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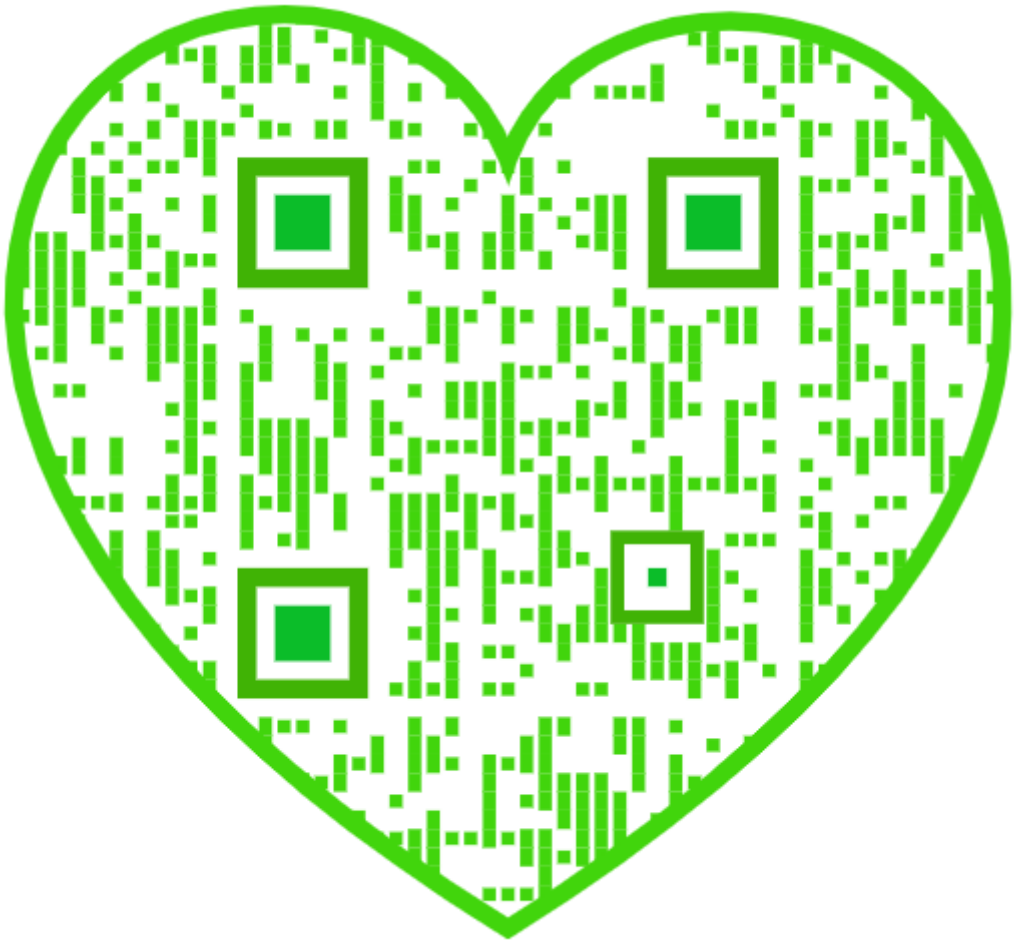

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CHARLES WALTER DUMONT

more than to any other man is due the existence of the Cyclopedia of Law and Procedure. His was the idea; his was the plan; and his has been the business ability and energetic management, as organizer and president of The American Law Book Company, which have made possible the successful publication of these volumes, which are therefore respectfully dedicated to him.

William Mack.

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I. DEFINITION.

Malicious prosecution, regarded as a remedy, is a distinctive action *ex delicto* for the recovery of damages to person, property, or reputation, shown to have proximately resulted from a previous civil or criminal proceeding,[1] which was commenced or continued without probable cause, but with malice, and which has terminated unsuccessfully.[2] Regarded as a specific tort, it is the wrong so committed.[3] The term is also sometimes used as the name of the original judicial proceeding.[4]

1. **Malicious prosecution is not limited to criminal suits.**— Hayes *v.* Union Mercantile Co., 27 Mont. 264, 276, 70 Pac. 975. See also *infra*, IV, D, 1. But see Bear *v.* Marx, 63 Tex. 298, 300, where it is said that the term "malicious prosecution," as used in Tex. Rev. St. art. 302, limiting the right of a party to bring an action for malicious prosecution, refers only to criminal proceeding, and not to a prosecution as involved in a civil action. And *compare* Ahern *v.* Collins, 39 Mo. 145, 150, where it is said: "Malicious arrest ought not to be confounded with malicious prosecution. It is true that the mode of proceeding for both, previous to the change of practice in this State, would have been by an action on the case, and it is likewise true that malice and want of probable cause are necessary ingredients of both; but the word 'arrest' more properly applies to the taking of a party into custody under civil process, and the action for malicious arrest was instituted only where the plaintiff had been maliciously and without probable cause taken into custody for debt, or where there was a malicious holding of a party to bail. The essential ground of an action for malicious prosecution, on the other hand, consisted in the fact that there had been a legal prosecution against the plaintiff without reasonable or probable cause."

2. Black L. Dict.

The gist of the action is that plaintiff has been improperly made the subject of legal process to his damage. Herbener *v.* Crossan, 4 Pennew. (Del.) 38, 55 Atl. 223.

3. See *infra*, III.

It consists in maliciously setting the law in motion. Pigott Torts 287.

Elements of the tort see *infra*, III.

Other torts distinguished.— There is a distinction between a malicious prosecution and a malicious abuse of process. Kline *v.* Hibbard, 80 Hun (N. Y.) 50, 29 N. Y. Suppl. 807. The authorities upon the question of what constitutes a cause of action for abuse of process are in a state of some confusion. Frequently this action seems to have been confounded with actions for malicious prosecution, although they are essentially different. The test is whether the process has been used to accomplish some unlawful end, or to compel defendant to do some collateral thing which he could not legally be compelled to do. Docter *v.* Riedel, 96 Wis. 158, 71 N. W. 119, 65 Am. St. Rep. 40, 37 L. R. A. 580. As stated in Hale Torts 361, "'malicious abuse of process' is distinguished from 'malicious prosecution' in at least two respects, first, in that want of probable cause is not an essential element; and, second, that it is not essential that the original proceeding shall have terminated." Paul *v.* Fargo, 84 N. Y. App. Div. 9, 15, 82 N. Y. Suppl. 369. An action for malicious prosecution, and not an action for assault and false imprisonment, is the proper remedy when an arrest is made by a duly qualified officer, under process fair on its face and issued from a court of competent jurisdiction. Lisabelle *v.* Hubert, 23 R. I. 456, 50 Atl. 837. See Lord Mansfield's distinction in Johnstone *v.* Sutton, 1 T. R. 510, 544 [*cited* in Johnson *v.* Girdwood, 7 Misc. (N. Y.) 651, 28 N. Y. Suppl. 151]. See also Rich *v.* McInerny, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32; Gelzenleuchter *v.* Niemeyer, 64 Wis. 316, 25 N. W. 442, 54 Am. Rep. 616. False imprisonment and abuse of process further distinguished see FALSE IMPRISONMENT, 19 Cyc. 321; PROCESS.

4. *Alabama.*— Rich *v.* McInerny, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32.

New York.— Kline *v.* Hibbard, 80 Hun 50, 29 N. Y. Suppl. 807.

Wisconsin.— Eggett *v.* Allen, 119 Wis. 625, 96 N. W. 803; Gelzenleuchter *v.* Niemeyer, 64 Wis. 316, 25 N. W. 442, 54 Am. Rep. 616.

United States.— Johnson *v.* Ebberts, 11 Fed. 129, 6 Sawy. 538.

Canada.— Grimes *v.* Miller, 23 Ont. App. 764.

Other definitions are: "A judicial proceeding instituted by one person against another, from wrongful or improper motives, and without probable cause to sustain it." Hicks *v.* Brantley, 102 Ga. 264, 268, 29 S. E. 459.

"A prosecution begun in malice, without probable cause to believe that it can succeed and which finally ends in failure." Burt *v.* Smith, 181 N. Y. 1, 5, 73 N. E. 495.

"A prosecution instituted wilfully and purposely, to gain some advantage to the prosecutor, or through mere wantonness or carelessness, if it be at the same time wrong and unlawful within the knowledge of the actor, and without probable cause." Eggett *v.* Allen, 119 Wis. 625, 630, 96 N. W. 803.

"A prosecution on some charge of crime which is wilful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or is bound to

II. NATURE OF RIGHT INFRINGED.

A. Public Policy. Public policy favors prosecutions for crimes and affords such protection to the citizen causing the prosecution of another in good faith and on reasonable grounds as is essential to public justice,[5] without the sacrifice of the right of the individual.[6] Free access to courts of civil justice is provided for the administration of the law of the land; and an action for malicious prosecution does not lie merely because they have been resorted to unsuccessfully.[7]

B. Secondary Character. The right infringed by malicious prosecution is not a primary, simple, or so called absolute right from the mere violation of which damage is presumed; but it is a right not to be harmed, the infringement of which is ordinarily actionable only when damages conforming to legal standard is shown to have followed.[8] The right is not violated at peril; but it involves the duty of abstaining from wilful harm.[9] Responsibility rests upon moral wrong or at least legal culpability.[10]

C. Objects of the Right. Through the development of the common-law forms of action,[11] the law substantive has come to a gradual recognition that the right is broader[12] than freedom of the person, for whose violation false imprisonment did not ordinarily lie,[13] and broader than the sanctity of property, for the invasion of which in this way possessory actions are unavailing,[14] and that it finally concerns the security of reputation from defamation through courts of

know are wrong and against the dictates of public policy." Fox *v.* Smith, 25 R. I. 255, 258, 55 Atl. 698.

"A wanton prosecution or arrest, by regular process in a civil or criminal proceeding, without probable cause." Webster Int. Dict. [*citing* Bouvier L. Dict.].

The term "malicious prosecution" imports a causeless as well as an ill-intended prosecution. Newell Malic. Pros. § 5 [*quoted* in Hicks *v.* Brantley, 102 Ga. 264, 268, 29 S. E. 459].

5. *Illinois.*— Richey *v.* McBean, 17 Ill. 63.

Louisiana.— Girot *v.* Graham, 41 La. Ann. 511, 605, 6 So. 815; Laville *v.* Biguenaud, 15 La. Ann. 605.

Massachusetts.— Stone *v.* Crocker, 24 Pick. 81.

Minnesota.— Cole *v.* Curtis, 16 Minn. 182. And see Shafer *v.* Hertzig, 92 Minn. 171, 99 N. W. 796.

New York.— Carl *v.* Ayers, 53 N. Y. 14; Sprague *v.* Gibson, 17 N. Y. Suppl. 685.

England.— Metropolitan Bank *v.* Pooley, 10 App. Cas. 210, 49 J. P. 756, 54 L. J. Q. B. 449, 53 L. T. Rep. N. S. 163, 33 Wkly. Rep. 709.

In criminal cases.— Actions for malicious prosecution in criminal cases have never been favored, and a clear case must be made out of a perversion of the forms of justice to the satisfaction of private malice, and the wilful oppression of the innocent, in order to sustain them. Russell *v.* Chamberlain, (Ida. 1906) 85 Pac. 926; Laville *v.* Biguenaud, 15 La. Ann. 605. *Contra,* Reynolds *v.* Dunlop, (Kan. 1906) 84 Pac. 720. The prosecutor should stand on the footing of the most favored class of prosecutors. Taylor *v.* Baltimore, etc., R. Co., 18 Ind. App. 692, 48 N. E. 1044.

6. Wade *v.* National Bank of Commerce, 114 Fed. 377.

7. See *infra,* p. 39, note 82; p. 41, note 98. "In the present day, according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution." Quartz Hill Consol. Gold Min. Co. *v.* Eyre, 11 Q. B. D. 674, 690, 52 L. J. Q. B. 488, 49 L. T. Rep. N. S. 249, 31 Wkly. Rep. 668, per Bowen, L. J.

8. Cotterell *v.* Jones, 11 C. B. 713, 16 Jur. 88, 21 L. J. C. P. 2, 73 E. C. L. 713; Shearwood Torts 34. In Kramer *v.* Stock, 10 Watts (Pa.) 115, it was held that to sustain an action on the case for malicious prosecution, it was necessary that the party should have committed an illegal act, from which positive or implied damage ensue, but that to bring an action, although there was no ground for it, such as suing for a debt previously tendered, was not such illegal act. And see Parker *v.* Langley, Gilb. Cas. 163.

9. See as sustaining the above view *infra,* VII.

10. See *infra,* VI.

11. See *infra,* IV, D, 1.

12. Where anything is done maliciously, besides commencing a malicious or vexatious prosecution, an action for malicious prosecution will lie for the damages sustained by such act. As the holding to excessive bail (Closson *v.* Staples, 42 Vt. 209, 1 Am. Rep. 316), although plaintiff has a well founded cause of action, or holding to bail, when plaintiff has no cause of action, if done for the purpose of vexation (Ray *v.* Law, 20 Fed. Cas. No. 11,592, Pet. C. C. 207).

13. See FALSE IMPRISONMENT, 19 Cyc. 321.

14. See DETINUE; EJECTMENT; REPLEVIN; TRESPASS; TROVER.

justice.[15] While this progress has directly affected the whole subject, it has not entirely repealed the rule as to damages, reversed the public policy, or changed the nature of the right.[16]

III. ELEMENTS OF THE TORT IN GENERAL.

An action for maliciously putting the law in motion lies in all cases where there is a concurrence of the following elements:[17] (1) The commencement or continuance of an original criminal or civil judicial proceeding;[18] (2) its legal causation by the present defendant against plaintiff who was defendant in the original proceeding;[19] (3) its *bona fide* termination in favor of the present plaintiff;[20] (4) the absence of probable cause for such proceeding;[21] (5) the presence of malice therein;[22] (6) damage conforming to legal standards resulting to plaintiff.[23]

IV. THE ORIGINAL PROCEEDING.

A. Judicial Character. The essential foundation of an action for malicious prosecution is an original proceeding, judicial in character.[24] If extrajudicial, trespass and not case, that is to say false imprisonment and not malicious prosecution, is ordinarily regarded as the appropriate remedy.[25]

15. Lawrence *v.* Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Gorton *v.* Brown, 27 Ill. 489, 81 Am. Dec. 245; Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 997, 56 L. R. A. 261; Wade *v.* National Bank of Commerce, 114 Fed. 377; Hunter *v.* Boyd, 3 Ont. L. Rep. 183.

An action for libel is upon all fours with an action for malicious prosecution. The latter is but an aggravated form of an action for libel, as indeed the libel is sworn to before the magistrate. The cases make no distinction between them. Briggs *v.* Garrett, 111 Pa. St. 412, 2 Atl. 513, 56 Am. Rep. 274 [*citing* Chapman *v.* Calder, 14 Pa. St. 365; Winebiddle *v.* Porterfield, 9 Pa. St. 137; Travis *v.* Smith, 1 Pa. St. 234, 44 Am. Dec. 125; Gray *v.* Pentland, 2 Serg. & R. (Pa.) 23], per Paxson, J. And see Severns *v.* Brainard, 61 Minn. 265, 63 N. W. 477. That an action of malicious prosecution may be joined with one in slander see Bible *v.* Palmer, 95 Tenn. 393, 32 S. W. 249; Shepherd *v.* Staten, 5 Heisk. (Tenn.) 79, 80. See also JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 399.

16. See *infra*, IX.

17. *Iowa.*— Pierce *v.* Doolittle, 130 Iowa 333, 106 N. W. 751; Holden *v.* Merritt, 92 Iowa 707, 61 N. W. 390.

Kansas.— Carbondale Inv. Co. *v.* Burdick, 67 Kan. 329, 72 Pac. 781.

New York.— Miller *v.* Milligan, 48 Barb. 30; Vanderbilt *v.* Mathis, 5 Duer 304.

North Dakota.— Merchant *v.* Pielke, 10 N. D. 48, 84 N. W. 574.

Rhode Island.— See Collins *v.* Campbell, 18 R. I. 738, 31 Atl. 832; Lauzon *v.* Charroux, 18 R. I. 467, 28 Atl. 975.

Tennessee.— See Swepson *v.* Davis, 109 Tenn. 99, 70 S. W. 65, 59 L. R. A. 501.

Texas.— Breneman *v.* West, 21 Tex. Civ. App. 19, 50 S. W. 471.

England.— Cox *v.* English, etc., Bank, [1905] A. C. 168, 74 L. J. P. C. 62, 92 L. T. Rep. N. S. 483; Abrath *v.* North Eastern R. Co., 11 App. Cas. 247, 50 J. P. 659, 55 L. J. Q. B. 457, 55 L. T. Rep. N. S. 63; Savile *v.* Roberts, 1 Ld. Raym. 374, 1 Salk. 13, 3 Salk. 16.

18. See *infra*, IV.

19. See *infra*, V.

20. See *infra*, VIII.

21. See *infra*, VI.

22. See *infra*, VII.

23. See *infra*, IX.

24. *Georgia.*— Swift *v.* Witchard, 103 Ga. 193, 29 S. E. 762; Satilla Mfg. Co. *v.* Cason, 98 Ga. 14, 25 S. E. 909, 58 Am. St. Rep. 287.

Indiana.— Turpin *v.* Remy, 3 Blackf. 210.

Massachusetts.—Bixby *v.* Brundige, 2 Gray 129, 61 Am. Dec. 443; Bodwell *v.* Osgood, 3 Pick. 379, 15 Am. Dec. 228.

New York.— Barry *v.* Third Ave. R. Co., 51 N. Y. App. Div. 385, 64 N, Y. Suppl. 615; Kneeland *v.* Spitzka, 42 N. Y. Super. Ct. 470; Newfield *v.* Copperman, 15 Abb. Pr. N. S. 360 [*affirmed* in 42 N. Y. Super. Ct. 302].

Pennsylvania.— Kramer *v.* Lott, 50 Pa. St. 495, 88 Am. Dec. 556.

South Carolina.— Whaley *v.* Lawton, 57 S. C. 256, 35 S. E. 558.

United States.— Cooper *v.* Armour, 42 Fed. 215, 8 L. R. A. 47, holding that if plaintiff was not apprehended and no process issued, he cannot maintain malicious prosecution.

25. Turpin *v.* Remy, 3 Blackf. (Ind.) 210; Baird *v.* Householder, 32 Pa. St. 168; Maher *v.* Ashmead, 30 Pa. St. 344, 72 Am. Dec. 708. *Compare* Stewart *v.* Thompson, 51 Pa. St. 158; Johnstone *v.* Sutton, 1 T. R. 510; Hunt *v.* McArthur, 24 U. C. Q. B. 254. See also FALSE IMPRISONMENT, 19 Cyc. 321.

Plaintiff must pursue some other remedy for the injury done him if for any reason the alleged prosecution had no existence. False imprisonment, malicious abuse of process, libel and slander, or other closely analogous actions to malicious prosecution may lie: but malicious prosecution will not lie. Cockfield *v.* Braveboy, 2 McMull. (S. C.) 270, 39 Am. Dec. 123.

B. Jurisdiction Whether Necessary. According to the prevailing[26] but not universal opinion,[27] it is not necessary in such an action that the court in which the proceeding was initiated should have had jurisdiction of the subject-matter of the original proceeding.

C. Criminal Prosecution — 1. NATURE OF. Any enforcement of the criminal law through courts of justice concerning a matter which will subject the accused to a prosecution,[28] without regard to the technical form in which the charge has been preferred,[29] and irrespective of the grade[30] of the criminal offense, is a sufficient proceeding upon which to base an action of malicious prosecution.

2. COMMENCEMENT OF. The decisions are not in accord as to what amounts to

26. Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650; Morris *v.* Scott, 21 Wend. (N. Y.) 281, 34 Am. Dec. 236. In Attwood *v.* Monger, Style 378, 379, Roll, C. J., said: "It is all one whether here were any jurisdiction or no, for the plaintiff is prejudiced by the vexation." *Compare* Gibbs *v.* Ames, 119 Mass. 60 [*distinguishing* Whiting *v.* Johnson, 6 Gray (Mass.) 246; Bixby *v.* Brundige, 2 Gray (Mass.) 129, 61 Am. Dec. 443].

The fact that the court had no jurisdiction does not relieve defendant from liability (Sutor *v.* Wood, 76 Tex. 403, 13 S. W. 321; Ward *v.* Sutor, 70 Tex. 343, 8 S. W. 51, 8 Am. St. Rep. 606), where the prosecution was productive of legal damage to the party proceeded against (Stone *v.* Stevens, 12 Conn. 219, 30 Am. Dec. 611). So also an action will lie for attacking property under a writ issued by a court without jurisdiction (Boon *v.* Maul, 3 N. J. L. 862), but not against a person who applies for an injunction against plaintiff in the full belief that the court had jurisdiction to grant it on the case made, if it appeared afterward that the court had not jurisdiction to grant an injunction. Mark *v.* Hyatt, 61 Hun (N. Y.) 325, 15 N. Y. Suppl. 885 [*affirmed* in 135 N. Y. 306, 31 N. E. 1099, 18 L. R. A. 275]. But there must have been a prosecution. Cooper *v.* Armour, 42 Fed. 215, 8 L. R. A. 47.

Trespass or case.— If the prosecution be before a court having no jurisdiction, the party may bring either trespass or case. Hays *v.* Younglove, 7 B. Mon. (Ky.) 545; Ailstock *v.* Moore Lime Co., 104 Va. 565, 52 S. E. 213, 2 L. R. A. N. S. 1100. See also Bodwell *v.* Osgood, 3 Pick. (Mass.) 379, 15 Am. Dec. 228; Morris *v.* Scott, 21 Wend. (N. Y.) 281, 34 Am. Dec. 236.

27. *Arkansas.*— Vinson *v.* Flynn, 64 Ark. 453, 43 S. W. 146, 46 S. W. 186, 39 L. R. A. 415.

Georgia.— Berger *v.* Saul, 113 Ga. 869, 39 S. E. 326.

Indiana.— See Turpin *v.* Remy, 3 Blackf. 210.

Massachusetts.—Bixby *v.* Brundige, 2 Gray 129, 61 Am. Dec. 443.

Nebraska.— Painter *v.* Ives, 4 Nebr. 122.

United States.— See Castro *v.* De Uriarte, 12 Fed. 250.

Canada.— Grimes *v.* Miller, 23 Ont. App. 764; Richardson *v.* Ransom, 10 Ont. 387; Pring *v.* Wyatt, 5 Ont. L. Rep. 505; Stephens *v.* Stephens, 24 U. C. C. P. 424 [*cited* in Anderson *v.* Wilson, 25 Ont. 91; Smith *v.* Evans, 13 U. C. C. P. 60]. *Compare* Macdonald *v.* Henwood, 32 U. C. C. P. 433.

28. See Sperier *v.* Ott, 116 La. 1087, 41 So. 323; and cases cited *infra*, this note.

Causing arrest in another state.— Johnson *v.* Corrington, 7 Ohio Dec. (Reprint) 572, 3 Cinc. L. Bul. 1139.

Contempt proceedings.— Kansas, etc., Coal Co. *v.* Galloway, 71 Ark. 351, 74 S. W. 521, 100 Am. St. Rep. 79.

Ne exeat.— Miller Bank *v.* Richmon, 68 Nebr. 731, 94 N. W. 998.

Perjury.— Sitton *v.* Farr, Rice (S. C.) 303.

Search warrant.— Maliciously and without probable cause instituting and carrying forward proceedings under a search warrant. Florence Oil, etc., Co. *v.* Huff, 14 Colo. App. 281, 59 Pac. 624; Anderson *v.* Cowles, 72 Conn. 335, 44 Atl. 477, 77 Am. St. Rep. 310; Whitson *v.* May, 71 Ind. 269; Carey *v.* Sheets, 67 Ind. 375; Olson *v.* Tvete, 46 Minn. 225, 48 N. W. 914; Miller *v.* Brown, 3 Mo. 127, 23 Am. Dec. 693; Sprangler *v.* Booze, 103 Va. 276, 49 S. E. 42; Elsee *v.* Smith, 2 Chit. 304, 18 E. C. L. 648, 1 D. & R. 97, 16 E. C. L. 19, 24 Rev. Rep. 639; Leigh *v.* Webb, 3 Esp. 164; Young *v.* Nichol, 9 Ont. 347.

Surety of the peace.— Fisher *v.* Hamilton, 49 Ind. 341.

Generally as to matters held insufficient to form the basis of an action see Akin *v.* Jones, 111 Ky. 199, 63 S. W. 441, 23 Ky. L. Rep. 607; Forrest *v.* McBee, 72 S. C. 189, 51 S. E. 675; Ambs *v.* Atchison, etc., R. Co., 114 Fed. 317.

Drunkenness.— Against a person having a drunken person arrested for disturbing the peace in his neighborhood the action has been held not to lie. Stertzback *v.* Quirk, 8 Rob. (La.) 111.

Procuring a criminal warrant to be issued for assisting the emigration of aliens under contract to perform labor, even though the statute is not criminal. Beuthner *v.* Ellinger, 90 Wis. 439, 63 N. W. 756.

29. Long *v.* Rogers, 17 Ala. 540.

It is enough if indictment shows a number of charges, one of which is malicious and without probable cause. Boaler *v.* Holder, 51 J. P. 277; Reed *v.* Taylor, 4 Taunt. 616, 13 Rev. Rep. 701. But see Delisser *v.* Towne, 1 Q. B. 333, 4 P. D. 644, 41 E. C. L. 565.

30. Long *v.* Rogers, 17 Ala. 540; Randall *v.* Henry, 5 Stew. & P. (Ala.) 367.

As between a principal and an accessary see Spear *v.* Hiles, 67 Wis. 361, 30 N. W. 511.

a commencement of a criminal prosecution which is sufficient as a foundation for such an action. It has been held that, if there was merely an arrest and discharge by a magistrate,[31] without the filing of a complaint,[32] or where a criminal complaint was made before a magistrate but not followed by the issuance of any process nor by an arrest,[33] no adequate basis has been made out.[34] It has also been held that an oral charge of a crime made before a magistrate,[35] the filing of an affidavit,[36] the issuance of a criminal warrant, although not placed in an officer's hands,[37] the arrest of an accused on a criminal complaint made before a magistrate,[38] or the holding and committing for the grand jury of the accused who has afterward been discharged because of failure of the grand jury to indict, or because of want of sufficient evidence,[39] make out the commencement of the judicial proceeding.

3. SUFFICIENCY OF PRELIMINARY STEPS. There is authority to the effect that, in order to serve as a basis for the action, the original criminal prosecution must have been upon a sufficient affidavit,[40] complaint,[41] information,[42] indictment,[43] or warrant;[44] and that the action cannot be maintained if the process under which plaintiff was arrested was absolutely void.[45] The weight of authority, however, is to the contrary,[46] and the general opinion is that if a person maliciously and

31. Krause *v.* Spiegel, 94 Cal. 370, 29 Pac. 707, 28 Am. St. Rep. 137, 15 L. R. A. 707; Collum *v.* Turner, 102 Ga. 534, 27 S. E. 680; Satilla Mfg. Co. *v.* Cason, 98 Ga. 14, 25 S. E. 909, 58 Am. St. Rep. 287; Lewin *v.* Uzuber, 65 Md. 341, 4 Atl. 285; Kramer *v.* Lott, 50 Pa. St. 495, 88 Am. Dec. 556; Baird *v.* Householder, 32 Pa. St. 168; Maher *v.* Ashmead, 30 Pa. St. 344, 72 Am. Dec. 708.

32. Barry *v.* Third Ave. R. Co., 51 N. Y. App. Div. 385, 64 N. Y. Suppl. 615.

An action is considered commenced at the issuance of warrant and not of arrest. Staunton *v.* Goshorn, 94 Fed. 52, 36 C. C. A. 75. And see Cameron *v.* Fergusson, 3 U. C. Q. B. O. S. 318, where it was held that the declaration and not the writ was held to be the commencement of the suit.

33. Swift *v.* Witchard, 103 Ga. 193, 29 S. E. 762 (under a statute requiring that the prosecution shall have been instituted and "carried on"); Bartlett *v.* Christhilf, 69 Md. 219, 14 Atl. 518; Cockfield *v.* Braveboy, 2 McMull. (S. C.) 270, 39 Am. Dec. 123; Heyward *v.* Cuthbert, 4 McCord (S. C.) 354; Cooper *v.* Armour, 42 Fed. 215, 8 L. R. A. 47.

34. See also FALSE IMPRISONMENT.

35. Clark *v.* Postan, 6 C. & P. 423, 25 E. C. L. 506; Dawson *v.* Vansandau, 11 Wkly. Rep. 516.

36. Coffey *v.* Myers, 84 Ind. 105; Britton *v.* Granger, 13 Ohio Cir. Ct. 281, 7 Ohio Cir. Dec. 182.

37. Holmes *v.* Johnson, 44 N. C. 44.

Placed in the hands of officer but never returned see Strehlow *v.* Petit, 96 Wis. 22, 71 N. W. 102. And see Oakley *v.* Tate, 118 N. C. 361, 24 S. E. 806.

38. Brown *v.* Randall, 36 Conn. 56, 4 Am. Rep. 35; Page *v.* Citizens' Banking Co., 111 Ga. 73, 78 Am. St. Rep. 144, 51 L. R. A. 463; Sayles *v.* Briggs, 4 Metc. (Mass.) 421; Venafra *v.* Johnston, 10 Bing. 301, 25 E. C. L. 145, 6 C. & P. 50, 25 E. C. L. 316, 3 L. J. C. P. 51, 3 Moore & S. 847.

39. Graves *v.* Dawson, 130 Mass. 78, 39 Am. Rep. 429; Apgar *v.* Woolston, 43 N. J. L. 57; Shock *v.* McChesney, 4 Yeates (Pa.) 507, 2 Am. Dec. 415 [*overruling* Shock *v.* McChesney, 2 Yeates (Pa.) 473]; Payn *v.* Porter, Cro. Jac. 490 (indictment returned ignoramus); Morgan *v.* Hughes, 2 T. R. 225; 1 Rolle Abr. Action sur case (P) 112 (bill preferred *coram non judice*).

40. Field *v.* Ireland, 21 Ala. 240; Collum *v.* Turner, 102 Ga. 534, 27 S. E. 680; Satilla Mfg. Co. *v.* Cason, 98 Ga. 14 25 S. E. 909, 58 Am. St. Rep. 287; McNeely *v.* Driskill, 2 Blackf. (Ind.) 259; Bailey *v.* Dodge, 28 Kan. 72, unnecessary statement in an affidavit for a search warrant.

41. Krause *v.* Spiegel, 94 Cal. 370, 29 Pac. 707, 28 Am. St. Rep. 137, 15 L. R. A. 707; Bartlett *v.* Brown, 6 R. I. 37, 75 Am. Dec. 675.

42. Leigh *v.* Webb, 3 Esp. 164, where the information contained no direct charge in terms of a crime, and the facts stated in it showed only a cause of action in trover.

43. Frierson *v.* Hewitt, 2 Hill (S. C.) 499.

44. Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650; Oakley *v.* Tate, 118 N. C. 361, 24 S. E. 806.

Mistake of a justice in issuing warrant for an offense on facts stated by a complainant not amounting to an offense will not render the complainant liable. Newman *v.* Davis, 58 Iowa 447, 10 N. W. 852.

45. Vinal *v.* Core, 18 W. Va. 1. See also Cockfield *v.* Braveboy, 2 McMull. (S. C.) 270, 39 Am. Dec. 123, where the prosecution never legally existed because of defects in warrant.

46. Jones *v.* Gwynn, 10 Mod. 148; Chambers *v.* Robinson, 2 Str. 691.

The malice of the prosecutor, and the vexation, disgrace, and expense of the prosecution are not measured by the sufficiency or insufficiency of the charge on which the prosecution is instituted. Stancliff *v.* Palmeter, 18 Ind. 321. In Pippet *v.* Hearn, 5 B. & Ald. 634, 1 D. & R. 266, 7 E. C. L. 346, the court said: "For in either case, whether the in-

without probable cause procures or instigates a criminal prosecution against another he cannot defeat an action for malicious prosecution by setting up technical inaccuracies in the affidavit,[47] complaint,[48] indictment or information,[49] or warrant.[50]

dictment be good or bad, the plaintiff is equally subjected to the disgrace of it, and put to the same expense in defending himself against it."

47. Where the affidavit failed to charge an offense known to the law (Mask *v.* Rawls, 57 Miss. 270), or did not charge a crime (Streight *v.* Bell, 37 Ind. 550), or the affidavit on which the prosecution was based improperly charged the offense (Schattgen *v.* Holnback, 149 Ill. 646, 36 N. E. 969 [*affirming* 52 Ill. App. 54]), or was defective in not charging the pretenses to have been made concerning an existing fact (Stocking *v.* Howard, 73 Mo. 25); or where there was error of a magistrate in ordering an arrest on an affidavit which charged no act or offense punishable by law (Barton *v.* Kavanaugh, 12 La. Ann. 332), the person is liable to an action for malicious prosecution, if his affidavit is false, malice and want of probable cause being found (Navarino *v.* Dudrap, 66 N. J. L. 620, 50 Atl. 353). And see Harlan *v.* Jones, 16 Ind. App. 398, 45 N. E. 481; Bell *v.* Keepers, 37 Kan. 64, 14 Pac. 542; Potter *v.* Gjertsen, 37 Minn. 386, 34 N. W. 746; Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101; Johnson *v.* Daws, 13 Fed. Cas. No. 7,382, 5 Cranch C. C. 283. But see Krause *v.* Spiegel, 94 Cal. 370, 29 Pac. 707, 28 Am. St. Rep. 137, 15 L. R. A. 707; Oakley *v.* Tate, 118 N. C. 361, 24 S. E. 806. And *compare* Sweeny *v.* Bienville Water Supply Co., 121 Ala. 454, 25 So. 575, holding that, although the affidavit before the justice of the peace was defective, defendant is not precluded from setting up the defense of probable cause in an action against him for malicious prosecution.

48. The original prosecution may be sufficient basis for malicious prosecution even though the complaint failed to charge a criminal offense (Stancliff *v.* Palmeter, 18 Ind. 321; Bell *v.* Keepers, 37 Kan. 64, 14 Pac. 542; Stocking *v.* Howard, 73 Mo. 25; Matlick *v.* Crump, 62 Mo. App. 21; Thurber *v.* Eastern Bldg., etc., Assoc., 118 N. C. 129, 24 S. E. 730; Strehlow *v.* Pettit, 96 Wis. 22, 71 N. W. 102), a crime or misdemeanor (Crawford *v.* Ryan, 5 Pa. Cas. 205, 7 Atl. 745), or was defective (Parli *v.* Reed, 30 Kan. 534, 2 Pac. 635), or technically inaccurate (Curnow *v.* Kessler, 110 Mich. 10, 67 N. W. 982).

It is no defense that the alleged facts did not constitute the crime charged nor any other criminal offense. Dennis *v.* Ryan, 65 N. Y. 385, 22 Am. Rep. 635. Defendant cannot urge the insufficiency of the complaint on which he caused plaintiff's arrest. Minneapolis Threshing Mach. Co. *v.* Regier, 51 Nebr. 402, 70 N. W. 934; Anderson *v.* Wilson, 25 Ont. 91. Nor is it a defense if it failed to state an offense and the warrant was void (Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101); that it did not legally set out any criminal offense, plaintiff having been regularly arrested and tried upon the warrant issued against him, and discharged because of the insufficiency of such complaint (Finn *v.* Frink, 84 Me. 261, 24 Atl. 851, 30 Am. St. Rep. 348; Reel *v.* Martin, 12 Pa. Super. Ct. 340), or that the specific facts stated in such complaint do not show the offense to have been committed (Potter *v.* Gjertsen, 37 Minn. 386, 34 N. W. 746), or that it was not signed by the complainant (Chapman *v.* Dodd, 10 Minn. 350).

On collateral attack, an informal and defective complaint is sufficient. Vennum *v.* Huston, 38 Nebr. 293, 56 N. W. 970; Malone *v.* Huston, 17 Nebr. 107, 22 N. W. 231.

Misnomer of the offense is not sufficient to sustain an action if there was probable cause for the prosecution, in the form in which it was made. Bartlett *v.* Brown, 6 R. I. 37, 75 Am. Dec. 675.

Trespass only would lie, not case, it has been held, where the complaint showed a trespass, not a crime. Kramer *v.* Lott, 50 Pa. St. 495, 88 Am. Dec. 556.

49. Shaul *v.* Brown, 28 Iowa 37, 4 Am. Rep. 151.

The action can be maintained on an indictment, although no acquittal can be had on it (Stancliff *v.* Palmeter, 18 Ind. 321), or although the name of defendant did not appear on the indictment (Kline *v.* Shuler, 30 N. C. 484, 49 Am. Dec. 402). Nor is it a defense to the action that the prosecution was based on an information upon the affidavit of a private person, which was therefore void. Best *v.* Hoeffner, 39 Mo. App. 682 [*following* Stocking *v.* Howard, 73 Mo. 25].

50. An action for malicious prosecution may be maintained against the informer, where the prosecution is commenced upon information given with malicious intent, although the warrant be technically inaccurate (Randall *v.* Henry, 5 Stew. & P. (Ala.) 367), as where the warrant does not describe the offense with which he was charged (Ewing *v.* Sanford, 19 Ala. 605), or technically incorrect (Cabiness *v.* Martin, 15 N. C. 106), or where there is a misrecital of name in mandatory part of warrant (Blair *v.* Horton, 51 N. C. 543), or a want of seal on warrant (Kline *v.* Shuler, 30 N. C. 484, 49 Am. Dec. 402), or where the warrant was issued by one justice returnable before another in another town in the same county (Messman *v.* Iglenfeldt, 89 Wis. 585, 62 N. W. 522).

That defendant's oath did not, in law, **authorize** the magistrate to grant the warrant if defendant availed himself of it is no defense. Johnson *v.* Daws, 13 Fed. Cas. No. 7,382, 5 Cranch C. C. 283.

4. NECESSITY OF ARREST.[51] There is a corresponding conflict of opinion as to whether actual interference with freedom of locomotion by arrest or imprisonment is essential to the maintenance of the action, based on a criminal prosecution. The doctrine of one group of cases is that there must be at least a technical arrest or imprisonment,[52] and that it is not sufficient that an accusation of a criminal offense has been preferred before a magistrate,[53] if the accused has not been apprehended[54] or process served.[55] The better and general opinion is in accordance with the general tendency to enlarge the scope of the action,[56] that it may be maintained, although there had been no arrest or imprisonment or holding to bail.[57]

D. Civil Proceeding — 1. A RECOGNIZED BASIS. Malicious prosecution is now in the United States under, if not in consequence of, the abolition of forms of action, a generic name applied conveniently alike whether the original proceeding complained of was criminal or civil,[58] and almost indifferently to the particular form of proceeding.[59] In England and Canada, however, it is based on criminal proceedings only,[60] although certain allied wrongs based on civil proceedings not actions are more or less clearly identified with it.[61]

2. NATURE AND FORM OF PROCEEDING — a. In General. Current actions like forcible entry and unlawful detainer proceedings,[62] replevin,[63] and perhaps ejectment,[64] and extraordinary remedies,[65] like injunction,[66] and auxiliary proceed-

A corporation cannot claim immunity on the ground that its superintendent merely stated the facts to the magistrate who issued the warrant, and that it is not bound by the magistrates' deduction therefrom, where the affidavit for the warrant states that plaintiff "did feloniously steal," etc., the property described in the affidavit. Humphreys *v.* Prudential Ins. Co., 16 N. Y. Suppl. 480.

51. Necessity of arrest in civil actions see *infra*, IV, D, 3.

52. Collins *v.* Fowler, 10 Ala. 858; Malone *v.* Huston, 17 Nebr. 107, 22 N. W. 231.

53. Lawyer *v.* Loomis, 3 Thomps. & C. (N. Y.) 393; Cooper *v.* Armour, 42 Fed. 215, 8 L. R. A. 47.

54. Cooper *v.* Armour, 42 Fed. 215, 8 L. R. A. 47.

55. Swift *v.* Witchard, 103 Ga. 193, 29 S. E. 762 (under Civ. Code, § 3843); Lawyer *v.* Loomis, 3 Thomps. & C. (N. Y.) 393; Cooper *v.* Armour, 42 Fed. 215, 8 L. R. A. 47.

56. See *infra*, IV, D, 3, b, (II).

57. Whipple *v.* Fuller, 11 Conn. 582, 29 Am. Dec. 330; Stapp *v.* Partlow, Dudley (Ga.) 176; Pangburn *v.* Bull, 1 Wend. (N. Y.) 345.

What constitutes an arrest see McIntosh *v.* Demeray, 5 U. C. Q. B. 343; Perrin *v.* Joyce, 6 U. C. Q. B. O. S. 300.

58. See *infra*, IV, D, 2.

59. Payne *v.* Donegan, 9 Ill. App. 566; Savage *v.* Brewer, 16 Pick. (Mass.) 453, 28 Am. Dec. 255; Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261.

Lis pendens.— Wrongfully, maliciously, and without probable cause filing a notice of *lis pendens*, whereby plaintiff was prevented from selling her property, may perhaps constitute a sufficient proceeding. See Smith *v.* Smith, 56 How. Pr. (N. Y.) 316 [*affirmed* in 20 Hun 555 (*reversed* on the facts in 26 Hun 573)].

60. Quartz Hill Consol. Gold Min. Co. *v.* Eyre, 11 Q. B. D. 674, 52 L. J. Q. B. 488, 49 L. T. Rep. N. S. 249, 31 Wkly. Rep. 668; Powell *v.* Hiltgen, 5 Terr. L. Rep. 16.

61. See *infra*, IV, D, 2, c.

62. Pope *v.* Pollock, 46 Ohio St. 367, 21 N. E. 356, 15 Am. St. Rep. 608, 4 L. R. A. 255; Nickelson *v.* Cameron Lumber Co., 39 Wash. 569, 81 Pac. 1059; Thompson *v.* Gatlin, 58 Fed. 534, 7 C. C. A. 351.

63. McPherson *v.* Runyon, 41 Minn. 524, 43 N. W. 392, 16 Am. St. Rep. 727; Brounstein *v.* Sahlein, 65 Hun (N. Y.) 365, 20 N. Y. Suppl. 213; Crawford *v.* McLaren, 9 U. C. C. P. 215.

64. Vexatious ejectment of a tenant, if any special damage is caused thereby (Slater *v.* Kimbro, 91 Ga. 217, 18 S. E. 296, 44 Am. St. Rep. 19), but not an ordinary ejectment suit in which plaintiff failed to recover (McNamee *v.* Minke, 49 Md. 122; Muldoon *v.* Rickey, 103 Pa. St. 110, 49 Am. Rep. 117).

65. Dibrell *v.* Robinson, 1 Tex. App. Civ. Cas. § 721.

66. *California.*—Robinson *v.* Kellum, 6 Cal. 399.

Georgia.— Mitchell *v.* Southwestern R. Co., 75 Ga. 398.

Illinois.— Crate *v.* Kohlsaat, 44 Ill. App. 460.

Iowa.— Beach *v.* Williams, (1899) 79 N. W. 393.

Kentucky.— Cox *v.* Taylor, 10 B. Mon. 17.

Mississippi.— See Manlove *v.* Vick, 55 Miss. 567.

Ohio.— Newark Coal Co. *v.* Upson, 40 Ohio St. 17.

Canada.— Montreal St. R. Co. *v.* Ritchie, 16 Can. Sup. Ct. 622.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 12.

Compare Williams *v.* Ainsworth, 121 Wis.

ings,[67] like garnishment[68] and attachment[69] are sufficient basis for the action when the other essentials are present.

b. Attachment. That the action may be maintained for maliciously and without probable cause[70] suing out an attachment and wrongfully seizing the goods[71] of the debtor is well established.[72] Execution of an attachment bond, as required by statute, does not affect the right to sue at common law for a malicious attachment.[73] Neither the insufficiency of the affidavit[74] nor a previous action on the attachment bond[75] precludes the right of recovery.

600, 99 N. W. 327, where in an injunction proceeding restraining defendant from selling certain potatoes, there was no evidence that defendant lost any profits, and it was held that the action would not lie.

Wrongful injunction generally see 22 Cyc. 1061 *et seq.*

67. Roberts *v.* Keeler, 111 Ga. 181, 36 S. E. 617 (maliciously and without probable cause suing out a money rule against a levying officer); Black *v.* Buckingham, 174 Mass. 102, 54 N. E. 494 (arrest on mesne process).

Execution.— Antcliff *v.* June, 81 Mich. 477, 45 N. W. 1019, 21 Am. St. Rep. 533, 10 L. R. A. 621; Hall *v.* Leaming, 31 N. J. L. 321, 86 Am. Dec. 213; Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574; Ault *v.* Armstrong, 12 U. C. Q. B. 385.

Wrongful execution generally see 17 Cyc. 1570 *et seq.*

68. Schumann *v.* Torbett, 86 Ga. 25, 12 S. E. 185; Nix *v.* Goodhill, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434; Cooper *v.* Scyoc, 104 Mo. App. 414, 79 S. W. 751. But see Noonan *v.* Orton, 30 Wis. 356.

Wrongful garnishment generally see 20 Cyc. 1152.

69. See *infra*, IV, D, 2, b.

70. Spengler *v.* Davy, 15 Gratt. (Va.) 381; Burkhart *v.* Jennings, 2 W. Va. 242.

71. Even though there was some indebtedness. Spaids *v.* Barrett, 57 Ill. 289, 11 Am. Rep. 10; Savage *v.* Brewer, 16 Pick. (Mass.) 453, 28 Am. Dec. 255; Pierce *v.* Thompson, 6 Pick. (Mass.) 193; Fortman *v.* Rottier, 8 Ohio St. 548, 70 Am. Dec. 606; Tomlinson *v.* Warner, 9 Ohio 103; Tamblyn *v.* Johnston, 126 Fed. 267, 62 C. C. A. 601.

72. *Alabama.*— Stewart *v.* Cole, 46 Ala. 646; McKellar *v.* Couch, 34 Ala. 336; Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59, 17 Ala. 689, 52 Am. Dec. 194.

Arkansas.— Harr *v.* Ward, 73 Ark. 437, 84 S. W. 496.

California.— Weaver *v.* Page, 6 Cal. 681.

Connecticut.— Whipple *v.* Fuller, 11 Conn. 582, 29 Am. Dec. 330.

Illinois.— Nelson *v.* Danielson, 82 Ill. 545; Spaids *v.* Barrett, 57 Ill. 289, 11 Am. Rep. 10; Lawrence *v.* Hagerman, 56 Ill. 68, 8 Am. Rep. 674.

Kentucky.— Fullenwider *v.* McWilliams, 7 Bush 389.

Massachusetts.— Lindsay *v.* Larned, 17 Mass. 190.

Missouri.— Holliday *v.* Sterling, 62 Mo. 321; Walser *v.* Thies, 56 Mo. 89; Talbott *v.* Great Western Plaster Co., 86 Mo. App. 558; Kelley *v.* Osborn, 86 Mo. App. 239.

New York.— Bump *v.* Betts, 19 Wend. 421.

Ohio.— Fortman *v.* Rottier, 8 Ohio St. 548, 70 Am. Dec. 606; Tomlinson *v.* Warner, 9 Ohio 103.

Pennsylvania.— McCullough *v.* Grishobber, 4 Watts & S. 201.

Virginia.— Spengler *v.* Davy, 15 Gratt. 381.

West Virginia.— Burkhart *v.* Jennings, 2 W. Va. 242.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 13.

Independently of statutory authorization, an action may be maintained for a malicious attachment. Fortman *v.* Rottier, 8 Ohio St. 548, 70 Am. Dec. 606; Tomlinson *v.* Warner, 9 Ohio 103.

The attachment must be fully executed as provided by the statute. Maskell *v.* Barker, 99 Cal. 642, 34 Pac. 340.

Wrongful attachment see 4 Cyc. 831 *et seq.*

The action does not lie, however, for seizing property lawfully subject to attachment, upon an attachment regularly sued out and founded on a just debt, even though attaching creditor acted maliciously. Batchelder *v.* Frank, 49 Vt. 90; Hood *v.* Cronkite, 29 U. C. Q. B. 98. Nor when founded on a just claim, although such claim was smaller than that for which the suit was brought, when the property attached was of no greater value than the amount of such claim. Grant *v.* Moore, 29 Cal. 644.

The action will not lie by a stock-holder in a corporation against a person for fraudulently and maliciously attaching his shares of stock. Eldred *v.* Ripley, 97 Ill. App. 503.

73. Spaids *v.* Barrett, 57 Ill. 289, 11 Am. Rep. 10; Lawrence *v.* Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Churchill *v.* Abraham, 22 Ill. 455; Pettit *v.* Mercer, 8 B. Mon. (Ky.) 51; Doll *v.* Cooper, 9 Lea (Tenn.) 576; Smith *v.* Story, 4 Humphr. (Tenn.) 169; Preston *v.* Cooper, 19 Fed. Cas. No. 11,395, 1 Dill. 589.

74. Forrest *v.* Collier, 20 Ala. 175, 56 Am. Dec. 190.

75. The injured party is not restricted to a suit on the attachment bond. Maskell *v.* Barker, 99 Cal. 642, 34 Pac. 340; Spaids *v.* Barrett, 57 Ill. 289, 11 Am. Rep. 10; Pierce *v.* Thompson, 6 Pick. (Mass.) 193; Brand *v.* Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362; Bruce *v.* Coleman, 1 Handy (Ohio) 515, 12 Ohio Dec. (Reprint) 265. See also Dyer *v.* Sharp, 2 Pa. Co. Ct. 216. *Contra*, Ault *v.* Everitt, 16 Ky. L. Rep. 93, the reason apparently being that in Ken-

c. Proceeding Other Than an Action. Civil proceedings other than actions which from their nature are likely to injure reputation or credit may be the basis of an action for malicious prosecution, subject to usual rules of practice, proceeding, and evidence,[76] although no particularized damage appears. This is true of the institution of bankruptcy proceedings,[77] or of proceedings for the winding up of a company,[78] or a partnership,[79] and inquisitions of lunacy.[80] Essentially the same principles apply to rules for contempt of court.[81]

3. Interference With Person or Property[82] — a. Presence of. Where there has been an arrest of the person,[83] or seizure of property[84] in or in connection with a civil action,[85] where the damage is exceptional, peculiar, or particularized and actual,[86] malicious prosecution lies, according to the prevailing American rule, if the other essentials of the wrong be made out.

b. Absence of — (1) *English Rule.* In harmony with the English view of

tucky only actual damages can be recovered in a suit on the bond.

Defendant has a remedy on common-law principles aside from the remedy on the attachment bond. Preston *v.* Cooper, 19 Fed. Cas. No. 11,395, 1 Dill. 589.

Conversely the recovery in an action for malicious attachment of general damages as injury to credit and reputation does not bar an action on the attachment bond for special damages thereby provided for. Hall *v.* Forman, 5 Ky. L. Rep. 140.

76. Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116; Farmer *v.* Darling, 4 Burr. 1971.

77. King *v.* Sullivan, (Tex. Civ. App. 1906) 92 S. W. 51; Wilkinson *v.* Goodfellow-Brooks Shoe Co., 141 Fed. 218; Sonneborn *v.* Stewart, 22 Fed. Cas. No. 13,176, 12 Woods 599 [*reversed* in 98 U. S. 187, 25 L. ed. 116, on the theory that probable cause was shown]; Metropolitan Bank *v.* Pooley, 10 App. Cas. 210, 49 J. P. 756, 54 L. J. Q. B. 449, 53 L. T. Rep. N. S. 163, 33 Wkly. Rep. 709 (but only when adjudication in bankruptcy proceeding has been set aside); Johnson *v.* Emerson, L. R. 6 Exch. 329, 40 L. J. Exch. 201, 25 L. T. Rep. N. S. 337; Whitworth *v.* Hall, 2 B. & Ad. 695, 9 L. J. K. B. O. S. 297, 22 E. C. L. 291; Cotton *v.* James, 1 B. & Ad. 128, 20 E. C. L. 424; Brown *v.* Chapman, 3 Burr. 1418, W. Bl. 427 (for maliciously and without probable cause instituting proceedings to have one declared a bankrupt); Farley *v.* Danks, 4 E. & B. 493, 1 Jur. N. S. 331, 24 L. J. Q. B. 244, 3 Wkly. Rep. 173, 82 E. C. L. 493; Chapman *v.* Pickersgill, 2 Wils. C. P. 145; Magill *v.* Samuel, 19 U. C. C. P. 443; Locke *v.* Wilson, 6 U. C. Q. B. 600. *Compare* Cincinnati Daily Tribune Co. *v.* Bruck, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433.

78. Quartz Hill Consol. Gold Min. Co. *v.* Eyre, 11 Q. B. D. 674, 52 L. J. Q. B. 488, 49 L. T. Rep. N. S. 249, 31 Wkly. Rep. 668.

79. Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261.

80. Griswold *v.* Griswold, 143 Cal. 617, 77 Pac. 672; Lockenour *v.* Sides, 57 Ind. 360, 26 Am. Rep. 58.

81. Tavenner *v.* Morehead, 41 W. Va. 116, 23 S. E. 673. See Montreal *v.* Hall, 12 Can. Sup. Ct. 74, as to action based on removal of arbitrator.

82. Necessity of arrest in criminal prosecution see *supra*, IV, C, 4.

83. *Illinois.*— Collins *v.* Hayte, 50 Ill. 353 (holding that an arrest in a civil suit will be governed by the rules of law applicable to actions for malicious prosecution for causing plaintiff's arrest on a criminal charge); Burnap *v.* Wight, 14 Ill. 301 (maliciously and without probable cause suing out a writ of ne exeat).

New York.— Brown *v.* McIntyre, 43 Barb. 344.

Rhode Island.— Lauzon *v.* Charroux, 18 R. I. 467, 28 Atl. 975.

United States.— Burnap *v.* Albert, 4 Fed. Cas. No. 2,170, Taney 244.

Canada.— Cameron *v.* Playter, 3 U. C. Q. B. 138; Dunn *v.* McDougall, 5 U. C. Q. B. O. S. 156.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 16.

Arrest and imprisonment generally see Pierce *v.* Thompson, 6 Pick. (Mass.) 193; Stone *v.* Swift, 4 Pick. (Mass.) 389, 16 Am. Dec. 349; Lindsay *v.* Larned, 17 Mass. 190; Hayden *v.* Shed, 11 Mass. 500; Watkins *v.* Baird, 6 Mass. 506, 4 Am. Dec. 170.

84. Woodley *v.* Coker, 119 Ga. 226, 46 S. E. 89; Juchter *v.* Boehm, 67 Ga. 534; Gundermann *v.* Buschner, 73 Ill. App. 180; Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261. See Gordon *v.* Rumble, 19 Ont. App. 440; Lyden *v.* McGee, 16 Ont. 105; Winning *v.* Gow, 32 U. C. Q. B. 528.

Even in England an action lay for maliciously and causelessly seizing ships. Redway *v.* McAndrew, L. R. 9 Q. B. 74, 79 L. T. Rep. N. S. 421, 22 Wkly. Rep. 60; Castrique *v.* Behrens, 3 E. & E. 709, 9 Jur. N. S. 1028, 30 L. J. Q. B. 163, 4 L. T. Rep. N. S. 52, 107 E. C. L. 709.

85. Black *v.* Buckingham, 174 Mass. 102, 54 N. E. 494; Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261.

86. *Alabama.*— Bennett *v.* Black, 1 Stew. 39.

Georgia.— Mitchell *v.* Southwestern R. Co., 75 Ga. 398.

Massachusetts.— Pierce *v.* Thompson, 6 Pick. 193; Lindsay *v.* Larned, 17 Mass. 190.

the remedy,[87] some American authorities hold that no action will lie for merely commencing a civil action, however unfounded the suit may be,[88] in the absence of interference with person or property or of special grievance differentiated from and superadded to the ordinary expenses of the suit. The usual reasoning is that the remedy of a person sued is to tax his costs, whereby he will not be stimulated to interminable litigation based upon constructive harm.[89]

(II) *AMERICAN RULE.* The general American opinion, however, is that costs in that country, unlike the English costs, awarded *per falsum clamorem*,[90] are

Michigan.— Antcliff *v.* June, 81 Mich. 477, 45 N. W. 1019, 21 Am. St. Rep. 533, 10 L. R. A. 621.

Minnesota.— O'Neill *v.* Johnson, 53 Minn. 439, 55 N. W. 601, 39 Am. St. Rep. 615.

New Jersey.— Brush *v.* Burt, 3 N. J. L. 979.

Pennsylvania.— Kramer *v.* Stock, 10 Watts 115.

Tennessee.— Lipscomb *v.* Shofner, 96 Tenn. 112, 33 S. W. 818.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 16.

87. Quartz Hill Consol. Gold Min. Co. *v.* Eyre, 11 Q. B. D. 674, 690, 52 L. J. Q. B. 488, 49 L. T. Rep. N. S. 249, 31 Wkly. Rep. 668, where it was said: "In the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution." See also Purton *v.* Honnor, 1 B. & P. 205; Cotterell *v.* Jones, 11 C. B. 713, 16 Jur. 88, 21 L. J. C. P. 2, 73 E. C. L. 713; Parker *v.* Langley, Gilb. Cas. 163; Beauchampe *v.* Croft, Keilw. 26; Savile *v.* Roberts, 1 Ld. Raym. 374, 1 Salk. 13, 3 Salk. 16; Anonymous, 6 Mod. 73; Goslin *v.* Wilcock, 2 Wils. C. P. 302; 1 Bacon Abr. 141; Fitzherbert Nat. Brev. 429; and *supra*, note 60.

88. *Georgia.*— Mitchell *v.* Southwestern R. Co., 75 Ga. 398.

Iowa.— Smith *v.* Hintrager, 67 Iowa 109, 24 N. W. 744; Wetmore *v.* Mellinger, 64 Iowa 741, 18 N. W. 870, 52 Am. Rep. 465.

Maryland.— McNamee *v.* Minke, 49 Md. 122.

Michigan.— Stimer *v.* Bryant, 84 Mich. 466, 47 N. W. 1099.

New Jersey.— Potts *v.* Imlay, 4 N. J. L. 382, 7 Am. Dec. 603; Parker *v.* Frambes, 2 N. J. L. 144; Woodmansie *v.* Logan, 2 N. J. L. 86.

New York.— Paul *v.* Fargo, 84 N. Y. App. Div. 9, 82 N. Y. Suppl. 369.

Pennsylvania.— Norcross *v.* Otis, 152 Pa. St. 481, 25 Atl. 575, 34 Am. St. Rep. 669; Muldoon *v.* Rickey, 103 Pa. St. 110, 49 Am. Rep. 117; Eberly *v.* Rupp, 90 Pa. St. 259; Mayer *v.* Walter, 64 Pa. St. 283; Beam *v.* Warfel, 9 Lanc. Bar 185.

Texas.— Smith *v.* Adams, 27 Tex. 28; Haldeman *v.* Chambers, 19 Tex. 1.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 16.

General American rule see *infra*, IV, D, 3, b, (II).

89. *Illinois.*— Bonney *v.* King, 201 Ill. 47, 66 N. E. 377; Smith *v.* Michigan Buggy Co., 175 Ill. 619, 51 N. E. 569, 67 Am. St. Rep. 242; Lawrence *v.* Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Gorton *v.* Brown, 27 Ill. 489, 81 Am. Dec. 245; Dooley *v.* Meisenbach, 83 Ill. App. 75; Payne *v.* Donegan, 9 Ill. App. 566.

Iowa.—Wetmore *v.* Mellinger, 64 Iowa 741, 18 N. W. 870, 52 Am. Rep. 465.

Maryland.— Supreme Lodge A. P. L. *v.* Unverzagt, 76 Md. 140, 24 Atl. 323.

Minnesota.— See Burton *v.* St. Paul, etc., R. Co., 33 Minn. 189, 22 N. W. 300.

New Jersey.— Bitz *v.* Meyer, 40 N. J. L. 252, 29 Am. Rep. 233; Potts *v.* Imlay, 4 N. J. L. 382, 7 Am. Dec. 603.

North Carolina.— Terry *v.* Davis, 114 N. C. 31, 18 S. E. 943.

Ohio.— Cincinnati Daily Tribune Co. *v.* Bruck, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433; Sax *v.* Laws, 7 Ohio Dec. (Reprint) 41, 1 Cinc. L. Bul. 78; Bartholomew *v.* Metropolitan L. Ins. Co., 1 Ohio S. & C. Pl. Dec. 267, 7 Ohio N. P. 209; Lucy *v.* Metropolitan L. Ins. Co., 31 Cinc. L. Bul. 22.

Pennsylvania.— Norcross *v.* Otis, 152 Pa. St. 481, 25 Atl. 575, 34 Am. St. Rep. 669; Muldoon *v.* Rickey, 103 Pa. St. 110, 49 Am. Rep. 117; Kramer *v.* Stock, 10 Watts 115.

Texas.— Johnson *v.* King, 64 Tex. 226; McCord-Collins Commerce Co. *v.* Levi, 21 Tex. Civ. App. 109, 50 S. W. 606; Gulf, etc., R. Co. *v.* Hewson, 3 Tex. App. Civ. Cas. § 248.

Washington.— Abbott *v.* Thorne, 34 Wash. 692, 76 Pac. 302, 101 Am. St. Rep. 1021, 65 L. R. A. 826.

Wisconsin.—Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 16.

90. St. 52 Hen. III gave costs to defendant *per falsum clamorem*; and only since the passage of that act was it that the action for maliciously bringing a civil suit did not lie. See Mitchell *v.* Southwestern R. Co., 75 Ga. 398; Pope *v.* Pollock, 46 Ohio St. 367, 21 N. E. 356, 15 Am. St. Rep. 608, 4 L. R. A. 255; Wade *v.* National Bank, 114 Fed. 377; Savile *v.* Roberts, 1 Ld. Raym. 374, 1 Salk. 13, 3 Salk. 16. See also De Medina *v.* Grove, 1 Q. B. 152, 10 Jur. 426, 15 L. J. Q. B. 284, 59 E. C. L. 152 [*affirmed* in 10 Q. B. 172, 11 Jur. 145, 17 L. J. Q. B. 321, 59 E. C. L. 172]; Dronefield *v.* Archer, 5 B. & Ald. 513, 7 E. C. L. 281; Austin *v.* Debnam, 3 B. & C. 139, 10 E. C. L. 72; Churchill *v.* Siggers, 2 C. L. R. 1509, 3 E. & B. 929, 18 Jur. 773, 23

not designed to and in fact do not amount to a remedy of compensation for the wrong so committed by the party who first put the law vexatiously in motion and who can be charged in malicious prosecution only after plaintiff in that action has faced the sufficient deterrent of the burden of proof as to the many elements of that tort. The prevailing rule is accordingly that the action may lie, although the original proceeding was begun by a civil summons only and the party seeking recovery was not arrested and his property was not seized,[91] and he suffered no peculiar injury,[92] but only when the want of probable cause is very palpable.[93]

V. DEFENDANT'S CONNECTION WITH ORIGINAL PROCEEDING.[94]

A. Commencement or Continuance by Defendant. It is not material to plaintiff's right of recovery whether defendant wrongfully commenced or tortiously continued[95] the original proceeding after want of probable cause had been shown therein,[96] upon the charge presented.[97]

L. J. Q. B. 308, 2 Wkly. Rep. 551, 77 E. C. L. 929, 26 Eng. L. & Eq. 200.

The history and effect of the English statutes and decisions will be found elaborately considered by Corliss, C. J., in Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

91. *California.*— Eastin *v.* Stockton Bank, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77.

Colorado.— Hoyt *v.* Macon, 2 Colo. 113.

Connecticut.—Whipple *v.* Fuller, 11 Conn. 582, 29 Am. Dec. 330.

Indiana.— McCardle *v.* McGinley, 86 Ind. 538, 44 Am. Rep. 343; Whitesell *v.* Study, (App. 1906) 76 N. E. 1010.

Kansas.— Marbourg *v.* Smith, 11 Kan. 554.

Kentucky.—Woods *v.* Finnell, 13 Bush 628; Cox *v.* Taylor, 10 B. Mon. 17.

Michigan.— Antcliffe *v.* June, 81 Mich. 477, 45 N. W. 1019, 21 Am. St. Rep. 533, 10 L. R. A. 621.

Minnesota.— Eickhoff *v.* Fidelity, etc., Co., 74 Minn. 139, 76 N. W. 1030; O'Neill *v.* Johnson, 53 Minn. 439, 55 N. W. 601, 39 Am. St. Rep. 615; McPherson *v.* Runyon, 41 Minn. 524, 43 N. W. 392, 16 Am. St. Rep. 727.

Missouri.— Smith *v.* Burrus, 106 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 15 L. R. A. 59; Brady *v.* Ervin, 48 Mo. 533.

Nebraska.— McCormick Harvesting Mach. Co. *v.* Willan, 63 Nebr. 391, 88 N. W. 497, 93 Am. St. Rep. 449, 56 L. R. A. 338. *Contra,* Rice *v.* Day, 34 Nebr. 100, 51 N. W. 747.

New Jersey.— Brush *v.* Burt, 3 N. J. L. 979.

New York.— Pangburn *v.* Bull, 1 Wend. 345.

North Dakota.— Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

Ohio.— Pope *v.* Pollock, 46 Ohio St. 367, 21 N. E. 356, 15 Am. St. Rep. 608, 4 L. R. A. 255.

Tennessee.— Lipscomb *v.* Shofner, 96 Tenn. 112, 33 S. W. 818.

Vermont.— Closson *v.* Staples, 42 Vt. 209, 1 Am. Rep. 316.

United States.— Wilkinson *v.* Goodfellow-Brooks Shoe Co., 141 Fed. 218.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 16.

"The reason for the rule . . . seems to me to be satisfactory and in accordance with right and justice. The common law declares that for every injury there is a remedy. Especially is this so where the injury is malicious. If a man is injured in his credit and reputation, and his business lessened or broken up, it can make no difference, in his right to recover for such injury, that his person or property has not been manually seized or disturbed." Brand *v.* Hinchman, 68 Mich. 590, 598, 36 N. W. 664, 13 Am. St. Rep. 362, per Morse, J.

The modern trend of authority in this country is well illustrated in the opinion of Corliss, C. J., in Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

92. The tendency is to enlarge the definition or to so indulge in presumptions of special damage as in Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261, or to so extend the meaning of interference with property, as in Cooper *v.* Scyoc, 104 Mo. App. 414, 79 S. W. 751, as to reach the same conclusion.

93. Eickhoff *v.* Fidelity, etc., Co., 74 Minn. 139, 76 N. W. 1030.

94. Persons responsible see *infra,* XI.

95. Wilmerton *v.* Sample, 42 Ill. App. 254; Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 758.

96. Wetmore *v.* Mellinger, (Iowa 1883) 14 N. W. 722; Wenger *v.* Phillips, 195 Pa. St. 214, 45 Atl. 927, 78 Am. St. Rep. 810; Blunk *v.* Atchison, etc., R. Co., 38 Fed. 311. Thus where an action is instituted by several persons, in the name of one, with probable cause, and afterward, and in the progress of the suit the person in whose name the action is commenced discovers there is no cause of action, and does not discharge plaintiff from custody, he alone is liable for his act or fault subsequent. Bicknell *v.* Dorion, 16 Pick. (Mass.) 478.

97. Babcock *v.* Merchants' Exchange, 159 Mo. 381, 60 S. W. 732.

Effect of change of charge by justice.— Where A caused B's arrest upon a warrant for larceny and the justice, of his own motion, changed the charge to one of disorderly conduct, imposed a fine and committed B in default of payment thereof, A was not liable

B. Instigation or Participation by Defendant. To sustain the action, it must affirmatively appear as a part of the case of the party demanding damages that the party sought to be charged was the proximate and efficient cause of maliciously putting the law in motion.[98] The action, however, does not lie for merely preferring an accusation,[99] for making to a magistrate a full and true statement of facts which the magistrate mistakenly [1] believes to have constituted a public offense and upon which he issues a warrant,[2] for a prosecution in good

for anything done after the charge had been changed. Frankfurter *v.* Bryan, 12 Ill. App. 549.

98. *Indiana.*— Wilkinson *v.* Arnold, 11 Ind. 45.

Kentucky.— Miller *v.* Metropolitan L. Ins. Co., 89 S. W. 183, 28 Ky. L. Rep. 223.

Missouri.—Walser *v.* Thies, 56 Mo. 89.

West Virginia.— Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

United States.— Cook *v.* Proskey, 138 Fed. 273, 77 C. C. A. 563.

England.— Fitzjohn *v.* Mackinder, 9 C. B. N. S. 505, 7 Jur. N. S. 1283, 30 L. J. C. P. 257, 4 L. T. Rep. N. S. 149, 9 Wkly. Rep. 477, 99 E. C. L. 505. To make an oral charge before a magistrate (Clarke *v.* Postan, 6 C. & P. 423, 25 E. C. L. 506; Dawson *v.* Vansandau, 11 Wkly. Rep. 516), to charge with felony in an information (Davis *v.* Noake, 6 M. & S. 29, 1 Stark. 377, 18 Rev. Rep. 290, 2 E. C. L. 146), or to hold oneself out as maker of charge (Clements *v.* Ohrly, 2 C. & K. 686, 61 E. C. L. 686) is sufficient.

Canada.—Hunt *v.* McArthur, 24 U. C. Q. B. 254; Cameron *v.* Playter, 3 U. C. Q. B. 138. And see Grimes *v.* Miller, 23 Ont. App. 764; Lyden *v.* McGee, 16 Ont. 105; McLarren *v.* Blacklock, 14 U. C. Q. B. 24. That the trial of the indictment was through counsel for the crown did not deprive plaintiff of the right of action against the real prosecutor. Carr *v.* Proudfoot, (East. T. 3 Vict.) R. & J. Dig. 2199. See also Poitras *v.* Le Beau, 14 Can. Sup. 742; Sinclair *v.* Haynes, 16 U. C. Q. B. 247.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 3. See also DAMAGES, 13 Cyc. 28 *et seq.*

99. *Illinois.*— Wilmerton *v.* Sample, 42 Ill. App. 254.

Missouri.—White *v.* Shradski, 36 Mo. App. 635.

New York.— Brown *v.* Chadsey, 39 Barb. 253.

Texas.— Burgess *v.* Singer Mfg. Co., (Civ. App. 1895) 30 S. W. 1110.

United States.—Wasserman *v.* Louisville, etc., R. Co., 28 Fed. 802.

England.— Cohen *v.* Morgan, 6 D. & R. 8, 28 Rev. Rep. 533, 16 E. C. L. 250.

Canada.— Sparks *v.* Joseph, 7 U. C. C. P. 69. And see Reid *v.* Maybee, 31 U. C. C. P. 384.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 3.

Nor is a person liable for unauthorized information furnished to a policeman by a clerk without such person's knowledge or authority. Hershey *v.* O'Neill, 36 Fed. 168.

The making of an affidavit on which a void search warrant is issued, without further action, does not create a liability for malicious prosecution. Wallace *v.* Williams, 14 N. Y. Suppl. 180.

A complaining witness is not responsible for the judgment of a magistrate in issuing a search warrant upon an insufficient affidavit. Wilmerton *v.* Sample, 42 Ill. App. 254.

Placing before an experienced attorney all facts relating to a theft, asking his advice as to whether such facts would justify an arrest, where the attorney discloses such facts to the prosecuting attorney, does not create a liability for malicious prosecution. Perry *v.* Sulier, 92 Mich. 72, 52 N. W. 801 [*following* Huntington *v.* Gault, 81 Mich. 144, 45 N. W. 970].

1. *Alabama.*— Chambliss *v.* Blau, 127 Ala. 86, 28 So. 602.

California.— Krause *v.* Spiegel, 94 Cal. 370, 29 Pac. 707, 28 Am. St. Rep. 137, 15 L. R. A. 707; Hahn *v.* Schmidt, 64 Cal. 284, 30 Pac. 818.

Indiana.— McNeely *v.* Driskill, 2 Blackf. 259.

Iowa.— Newman *v.* Davis, 58 Iowa 447, 10 N. W. 852. But see Holden *v.* Merritt, 92 Iowa 707, 61 N. W. 390, holding that where the party sought to be charged furnished an inspector with facts on which he filed an information against plaintiff charging a distinct offense, defendant cannot escape liability for malicious prosecution on the ground that the prosecution was instituted through mistaken judgment on the part of the inspector.

Massachusetts.— Gibbs *v.* Ames, 119 Mass. 60.

North Carolina.— Oakley *v.* Tate, 118 N. C. 361, 24 S. E. 806.

England.— Leigh *v.* Webb, 3 Esp. 164.

Canada.— Rogers *v.* Hassard, 2 Ont. App. 507; Pring *v.* Myatt, 5 Ont. L. Rep. 505; Sparks *v.* Joseph, 7 U. C. C. P. 69. But see McNellis *v.* Gartshore, 2 U. C. C. P. 464.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 3.

2. Cole *v.* Andrews, 74 Minn. 93, 76 N. W. 962.

Nor will an action for malicious prosecution lie where it does not appear that defendant made any effort to procure the indictment, but went before the grand jury on process of the state (Breneman *v.* West, 21 Tex. Civ. App. 19, 50 S. W. 471), or called a police inspector, in the belief that a crime had been committed and stated the material facts to him without concealment, but expected him to make further investigation (Burnham *v.*

faith, under a void ordinance,[3] or for the signing of a bond for an attachment.[4] The test is, Was defendant actively instrumental in putting the law in force?[5]

C. How Defendant's Liability Attaches[6] — **1. In General.** Liability in malicious prosecution may attach *inter alia*, (1) By personal commission, joint or several;[7] (2) by virtue of command before or after wrong done;[8] and (3) by virtue of relationship.[9]

2. Personal Commission. Recovery may be had against any ordinary person who personally instituted or caused the original wrongful proceeding.[10]

3. Command. Liability may also attach where the person sought to be charged directed or commanded another to institute the judicial proceedings complained of in the first instance,[11] or ratified the act.[12]

4. Relationship — a. Principal and Agent — (I) *In General.* The liability

Collateral Loan Co., 179 Mass. 268, 60 N. E. 617); nor for writing a letter to the superintendent of police stating that plaintiff had committed a murder (Harris *v.* Warre, 4 C. P. D. 125, 48 L. J. C. P. 310, 40 L. T. Rep. N. S. 429, 27 Wkly. Rep. 461).

The fact that defendant's name was indorsed on an indictment for perjury does not connect him with the prosecution, making him liable as for malicious prosecution, since he might have been summoned *in invitum*. Klug *v.* McPhee, (Colo. App. 1901) 63 Pac. 709.

3. James *v.* Sweet, 125 Mich. 132, 84 N. W. 61; Goodwin *v.* Guild, 94 Tenn. 486, 29 S. W. 721, 45 Am. St. Rep. 743, 27 L. R. A. 660.

4. Harr *v.* Ward, 73 Ark. 437, 84 S. W. 496.

5. Holden *v.* Merritt, 92 Iowa 707, 61 N. W. 390; Potter *v.* Gjertsen, 37 Minn. 386, 34 N. W. 746; Vennum *v.* Houston, 38 Nebr. 293, 56 N. W. 970; Danby *v.* Beardsley, 43 L. T. Rep. N. S. 603.

Silently acquiescing in the commencement of the prosecution is not sufficient. Shannon *v.* Sims, (Ala. 1906) 40 So. 574.

The present defendant need not have been a plaintiff to the original proceeding.— The action may lie, although the original proceeding was brought in the name of a third person on proof of actual damage. Bond *v.* Chapin, 8 Metc. (Mass.) 31; Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459; Cotterell *v.* Jones, 11 C. B. 713, 16 Jur. 88, 21 L. J. C. P. 2, 7 E. C. L. 713.

When plaintiff in the original action had no legal existence as to liability see Flatt *v.* Waddell, 18 Ont. 539.

6. **Persons responsible** see *infra*, XI.

7. See *infra*, V, C, 2.

8. See *infra*, V, C, 3.

9. See *infra*, V, C, 4.

10. *Delaware.*— Herbener *v.* Crossan, 4 Pennew. 38, 55 Atl. 223.

Illinois.— Hurd *v.* Shaw, 20 Ill. 354.

Louisiana.— Grant *v.* Deuel, 3 Rob. 17, 38 Am. Dec. 228.

New York.— McMorris *v.* Howell, 89 N. Y. App. Div. 272, 85 N. Y. Suppl. 1018.

Canada.— Thorne *v.* Mason, 8 U. C. Q. B. 236.

That the formal complaint was made by another is immaterial. Dann *v.* Wormser, 38 N. Y. App. Div. 460, 56 N. Y. Suppl. 474.

Liability of actor only among joint creditors see Cameron *v.* Playter, 3 U. C. Q. B. 138. See also Lyden *v.* McGee, 16 Ont. 105; McLaren *v.* Blacklock, 14 U. C. Q. B. 24.

One who both makes an arrest and originates the proceeding in which it is made may, although protected as to the arrest, be liable for malicious prosecution. Reisterer *v.* Lee Sum, 94 Fed. 343, 36 C. C. A. 285.

A person in whose name an action has been brought without his authority as the next friend of a minor is not responsible. Soule *v.* Winslow, 64 Me. 518.

Where the commonwealth's attorney acts on information of others and not by defendant's instigation he is not liable. Yocum *v.* Polly, 1 B. Mon. (Ky.) 358, 36 Am. Dec. 583.

11. Giving another a *carte blanche* to use his name as he sees fit in prosecuting suits is sufficient to create liability. Kinsey *v.* Wallace, 36 Cal. 462.

Generally advising and procuring a third person to institute is sufficient basis for liability. Goodrich *v.* Warner, 21 Conn. 432; Gilbert *v.* Emmons, 42 Ill. 143, 89 Am. Dec. 412; Perdu *v.* Connerly, Rice (S. C.) 48; Mowry *v.* Miller, 3 Leigh (Va.) 561, 24 Am. Dec. 680. But advising persons not to become sureties for one who had been arrested does not tend to show that those who give such advice have conspired with the person who caused the arrest. Labar *v.* Batt, 56 Mich. 589, 23 N. W. 325.

Liability may attach by consent.— Soule *v.* Winslow, 66 Me. 447.

12. Shannon *v.* Sims, (Ala. 1906) 40 So. 574; Central R. Co. *v.* Brewer, 78 Md. 394, 28 Atl. 615, 27 L. R. A. 63; Thompson *v.* Bell, 11 Tex. Civ. App. 1, 32 S. W. 142; Cameron *v.* Playter, 3 U. C. Q. B. 138.

One who authorizes or ratifies the act of another in making a void affidavit as the foundation of a criminal prosecution is liable in an action for malicious prosecution. Shannon *v.* Sims, (Ala. 1906) 40 So. 574.

What not ratification.— The fact that upon request of the prosecuting attorney defendant sent one of its agents as a witness for the prosecution did not constitute a ratification of the acts of agents who had instituted the prosecution without authority. Springfield Engine, etc., Co. *v.* Green, 25 Ill. App. 106.

of the principal for the conduct of his agent, or of a master for that of his servant, and the like, may rest upon command, as where the principal or master has directed the prosecution,[13] or the servant acts within the scope of his authority.[14] The employer may also by virtue of the relationship be held responsible for what his employee has done without express authority.[15]

(II) *TEST OF LIABILITY.* In such cases the courts, in harmony with the general tendency of the law,[16] plainly but with no great uniformity of principle or of *formulæ*, incline to test the employer's responsibility by a continually enlarging construction of implied power,[17] and of the course of employment.[18] Large numbers of decisions, however, lay down the restricted rule that when the employee acts without express authority,[19] beyond his authority,[20] or outside the scope of his employment[21] the principal is not liable, unless, with knowledge of the circumstances, he adopts and continues the same,[22] or participates in or ratifies the acts of his employee.[23] The employer is not responsible for his employee's independent prosecution.[24]

b. Attorney and Client. An action for malicious prosecution may be maintained against an agent or attorney for commencing an action, without authority of the party in whose name it is brought,[25] or for maliciously and illegally suing out process,[26] or procuring an arrest, where he knows there is no cause of action;[27] but he is not liable for innocently putting the law in motion in *bona fide* reliance

13. Krulevitz *v.* Eastern R. Co., 140 Mass. 573, 5 N. E. 500.

14. Thompson *v.* Nova Scotia Bank, 32 N. Brunsw. 335; Lyden *v.* McGee, 16 Ont. 105.

15. Cameron *v.* Pacific Express Co., 48 Mo. App. 99. See also *infra*, V, C, 4, a, (II).

16. See FALSE IMPRISONMENT; MASTER AND SERVANT; PRINCIPAL AND AGENT.

17. Dwyer *v.* St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303.

The wrong judgment of the agent will be imputed to the principal, but not his malice. Wallace *v.* Finberg, 46 Tex. 35.

18. A corporation may be liable for the wrongful act of an agent done in course of general authority, although in doing the particular act the agent may disobey instructions. Evansville, etc., R. Co. *v.* McKee, 99 Ind. 519, 50 Am. Rep. 102. And see American Express Co. *v.* Patterson, 73 Ind. 430; Indiana Bicycle Co. *v.* Willis, 18 Ind. App. 525, 48 N. E. 646; Lynch *v.* Metropolitan El. R. Co., 90 N. Y. 77, 34 Am. Rep. 141; Galveston, etc., R. Co. *v.* Donahoe, 56 Tex. 162. *Compare* Goff *v.* Great Northern R. Co., 3 E. & E. 672, 7 Jur. N. S. 286, 30 L. J. C. P. 148, 3 L. T. Rep. N. S. 850, 107 E. C. L. 672. See also Mundal *v.* Minneapolis, etc., R. Co., 92 Minn. 26, 99 N. W. 273, 100 N. W. 363; Cameron *v.* Pacific Express Co., 48 Mo. App. 99; Gulf, etc., R. Co. *v.* James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743; and 10 Cyc. 1216 *et seq.*

19. Murrey *v.* Kelso, 10 Wash. 47, 38 Pac. 879. In Central R. Co. *v.* Brewer, 78 Md. 394, 28 Atl. 615, 27 L. R. A. 63, it was held that a street car company was not liable for a malicious prosecution and false arrest of an individual by its president and superintendent on a charge of having passed counterfeit money, by dropping a "lead nickel" in the fare box, unless such officers have express authority for such action or it was ratified by the company.

20. Springfield Engine, etc., Co. *v.* Green, 25 Ill. App. 106.

Authority given to an agent to bring suit will not render the principal liable for his malicious acts in setting in motion the criminal procedure of the state. Cleveland Co-operative Stove Co. *v.* Koch, 37 Ill. App. 595.

21. Govaski *v.* Downey, 100 Mich. 429, 59 N. W. 167; Pownall *v.* Lancaster, etc., Turnpike Co., 16 Lanc. L. Rev. (Pa.) 411.

22. Dally *v.* Young, 3 Ill. App. 39.

23. Thompson *v.* Bell, 11 Tex. Civ. App. 1, 32 S. W. 142.

24. Boden *v.* St. Louis Transit Co., 108 Mo. App. 696, 84 S. W. 181; Tucker *v.* Erie R. Co., 69 N. J. L. 19, 54 Atl. 557; Smith *v.* Thompson, 6 U. C. Q. B. O. S. 325. *Compare* Davis *v.* Fortune, 6 U. C. Q. B. 281.

Liability of carrier of passengers for conduct of conductor see Dwyer *v.* St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303.

25. Bicknell *v.* Dorion, 16 Pick. (Mass.) 478.

26. Warfield *v.* Campbell, 35 Ala. 349.

Attachment.— An attorney who from malicious motives procures an unauthorized order of attachment which operates injuriously on the right of defendant is liable in an action of malicious prosecution as well as his client. Wood *v.* Weir, 5 B. Mon. (Ky.) 544.

27. Burnap *v.* Marsh, 13 Ill. 535. An attorney who advises, begins, and conducts a criminal prosecution upon an understanding with his client that the charge against the accused is untrue is liable for malicious prosecution. Staley *v.* Turner, 21 Mo. App. 244. And an attorney employed by his client to further a criminal prosecution is liable for an improper arrest, where he personally swears to the information on which the war-

on his client's information.[28] A client is not responsible for the malicious acts of his counsel, unless it appears that he aided, abetted, advised, consented to, adopted, or ratified such act, and such adoption or ratification must have been with full knowledge of all the facts.[29]

e. Partners.[30] A prosecution instituted by a partner for an alleged wrong relating to the property of the firm cannot impose any liability on another partner who did not assent to or have any knowledge of the prosecution at its commencement, and especially if he repudiates it as soon as known to him,[31] unless committed in the course of and for the purpose of transacting the partnership business.[32] Liability attaches if the original proceeding was with the express authority or knowledge.[33]

VI. WANT OF PROBABLE CAUSE.[34]

A. In General — 1. An Essential Element. Want of probable cause for the original proceeding is an essential element[35] of the case of the party seeking recovery in an action of malicious prosecution at every stage of that proceeding.[36] The very foundation of the action indeed is that the previous legal proceeding was resorted to or was pursued causelessly.[37] When it appears that there was

rant is issued. Whitney *v.* New York Casualty Ins. Assoc., 27 N. Y. App. Div. 320, 50 N. Y. Suppl. 227.

28. Liquid Carbonic Acid Mfg. Co. *v.* Convert, 82 Ill. App. 39 [*affirmed* in 186 Ill. 334, 57 N. E. 1129].

An attorney is not liable to an action for malicious prosecution unless, in conducting the litigation complained of, he knew that there was no cause of action; and knew also that his client was acting solely from illegal or malicious motives; and in forming his opinion upon these matters, he has a right to act upon such information as his client imparts, and is not bound to inform himself elsewhere. Peck *v.* Chouteau, 91 Mo. 138, 3 S. W. 577, 60 Am. Rep. 236; Seary *v.* Saxton, 28 Nova Scotia 278.

29. Oberne *v.* O'Donnell, 35 Ill. App. 180 (malicious suing out of an attachment); Burnap *v.* Albert, 4 Fed. Cas. No. 2,170, Taney 244 (ne exeat issued without probable cause by counsel and defendant imprisoned).

30. **Partners responsible as joint tort-feasors** with third persons see *infra*, XI, B.

31. Rosenkrans *v.* Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169; Gilbert *v.* Emmons, 42 Ill. 143, 89 Am. Dec. 412.

32. Noblett *v.* Bartsch, 31 Wash. 24, 71 Pac. 551, 96 Am. St. Rep. 886.

33. Lawrence *v.* Leathers, 31 Ind. App. 414, 68 N. E. 179.

But mere knowledge and acquiescence on the part of one partner as to the acts of another partner is not sufficient. Gilbert *v.* Emmons, 42 Ill. 143, 89 Am. Dec. 412.

34. **Want of probable cause:** Burden of proving see *infra*, XIV, A, 3, 4. Evidence see *infra*, XIV, C, 5. Pleading see *infra*, XIII, A, 4. Presumptions see *infra*, XIV, A, 3. Question for jury see *infra*, XV, B, 2. Instructions see *infra*, XIV, C, 4.

35. *California.*— Dwain *v.* Descalso, 66 Cal. 415, 5 Pac. 903.

Connecticut.— Frisbie *v.* Morris, 75 Conn. 637, 55 Atl. 9.

District of Columbia.— Staples *v.* Johnson, 25 App. Cas. 155.

Illinois.— Daily *v.* Donath, 100 Ill. App. 52; Clark *v.* Hill, 96 Ill. App. 383; Petry *v.* Schillo, 61 Ill. App. 236; Pomeroy *v.* Villavossa, 31 Ill. App. 590.

Indiana.— Cummings *v.* Parks, 2 Ind. 148; Whitesell *v.* Study, (App. 1906) 76 N. E. 1010; Lawrence *v.* Leathers, 31 Ind. App. 414, 68 N. E. 179.

Kentucky.— Garrard *v.* Willet, 4 J. J. Marsh. 628.

Louisiana.— Mosley *v.* Yearwood, 48 La. Ann. 334, 19 So. 274; Talbert *v.* Stone, 10 La. Ann. 537.

Massachusetts.— Shattuck *v.* Simonds, 191 Mass. 506, 78 N. E. 122.

Michigan.— Tefft *v.* Windsor, 17 Mich. 486.

New York.— Haupt *v.* Pohlmann, 16 Abb. Pr. 301; Murray *v.* Long, 1 Wend. 140; McCormick *v.* Sisson, 7 Cow. 715; Morris *v.* Corson, 7 Cow. 281.

Pennsylvania.— Scott *v.* Dewey, 23 Pa. Super. Ct. 396.

South Carolina.— Ford *v.* Kelsey, 4 Rich. 365.

Vermont.— Drew *v.* Potter, 39 Vt. 189.

Virginia.— Forbes *v.* Hagman, 75 Va. 168.

United States.— Wasserman *v.* Louisville, etc., R. Co., 28 Fed. 802.

England.—Abrath *v.* North Eastern R. Co., 11 Q. B. D. 440, 47 J. P. 692, 52 L. J. Q. B. 620, 49 L. T. Rep. N. S. 618, 32 Wkly. Rep. 50. See also Farmer *v.* Darling, 4 Burr. 1971; Anonymous, 6 Mod. 73.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 18.

36. See *infra*, XIII, A, 4; XIV, B, 3; XIV, C, 5.

Good faith and honest motives is no defense. Wilson *v.* Bowen, 64 Mich. 133, 31 N. W. 81.

37. Ulmer *v.* Leland, 1 Me. 135, 10 Am. Dec. 48; Ahern *v.* Collins, 39 Mo. 145; Christian *v.* Hanna, 58 Mo. App. 37.

probable cause to induce such original proceedings, the action will not lie,[38] and it is a full justification that defendant had good reason for the proceeding taken.[39]

2. RELATION TO MALICE.[40] To make out a cause of action in malicious prosecution, malice and want of probable cause must concur.[41] It is not sufficient to

That the person who at defendant's instigation made the complaint had probable cause for believing it to be well founded, if defendant acted without probable cause, is no defense. Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135.

38. Henderson *v.* Francis, 75 Ga. 178; Burlingame *v.* Burlingame, 8 Cow. (N. Y.) 141.

In Quebec.— The theory of probable cause pertaining to English law does not prevail in Quebec; it is necessary to apply the rule of the French law. Giguère *v.* Jacob, 10 Quebec Q. B. 501.

39. *Alabama.*— Whitehurst *v.* Ward, 12 Ala. 264.

Georgia.— Seamans *v.* Hoge, 105 Ga. 159, 31 S. E. 156.

Louisiana.— Enders *v.* Boisseau, 52 La. Ann. 1020, 27 So. 546.

Missouri.— Callahan *v.* Caffarata, 39 Mo. 136.

Nevada.— McNamee *v.* Nesbitt, 24 Nev. 400, 56 Pac. 37.

Texas.— Stansell *v.* Cleveland, 64 Tex. 660.

United States.— Ray *v.* Law, 20 Fed. Cas. No. 11,592, Pet. C. C. 207.

Canada.— Gunn *v.* McDonald, 6 U. C. Q. B. 596.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 18 *et seq.*

Probable cause must be addressed to final charge made.— Francis *v.* Tilyou, 26 N. Y. App. Div. 340, 49 N. Y. Suppl. 799.

That one of several defendants in an action for maliciously suing out an attachment had probable cause did not of itself protect the others. Schaper *v.* Sutter, 63 Ill. App. 257.

Actual guilt and probable cause need not concur to constitute a defense. Probable cause alone being a complete defense. Fadner *v.* Filer, 27 Ill. App. 506.

40. **Malice** generally see *infra*, VII.

41. *Alabama.*— Brown *v.* Master, 104 Ala. 451, 16 So. 443; McLeod *v.* McLeod, 73 Ala. 42; Benson *v.* McCoy, 36 Ala. 710; Ewing *v.* Sanford, 21 Ala. 157; Bennett *v.* Black, 1 Stew. 39.

Arkansas.— Foster *v.* Pitts, 63 Ark. 387, 38 S. W. 1114; Chrisman *v.* Carney, 33 Ark. 316.

California.— Anderson *v.* Coleman, 53 Cal. 188; Potter *v.* Seale, 8 Cal. 217.

Colorado.— Gurley *v.* Tompkins, 17 Colo. 437, 30 Pac. 344.

Connecticut.— Danchy *v.* Salisbury, 29 Conn. 124; Stone *v.* Stevens, 12 Conn. 219, 30 Am. Dec. 611.

District of Columbia.— Spitzer *v.* Friedlander, 14 App. Cas. 556; Porter *v.* White, 5 Mackey 180.

Florida.— Lewton *v.* Hower, 35 Fla. 58, 16 So. 616.

Georgia.— Hicks *v.* Brantley, 102 Ga. 264, 29 S. E. 459; Wilcox *v.* McKenzie, 75 Ga. 73; Rogers *v.* Tillman, 72 Ga. 479; Cook *v.* Walker, 30 Ga. 519; Sledge *v.* McLaren, 29 Ga. 64.

Hawaii.— Kerr *v.* Hyman, 6 Hawaii 300.

Illinois.— Anderson *v.* Friend, 85 Ill. 135; Israel *v.* Brooks, 23 Ill. 575; Wade *v.* Walden, 23 Ill. 425; Hurd *v.* Shaw, 20 Ill. 354; McBean *v.* Ritchie, 18 Ill. 114; Jacks *v.* Stimpson, 13 Ill. 701; Epstein *v.* Berkowsky, 64 Ill. App. 498; Smith *v.* Hall, 37 Ill. App. 28; Morrell *v.* Martin, 17 Ill. App. 336; Russell *v.* Deer, 7 Ill. App. 181; Cox *v.* McLean, 3 Ill. App. 45; Bishop *v.* Bell, 2 Ill. App. 551.

Indiana.— Smith *v.* Zent, 59 Ind. 362; Ammerman *v.* Crosby, 26 Ind. 451.

Iowa.— Ritchey *v.* Davis, 11 Iowa 124; Davis *v.* Cook, 3 Greene 539.

Kansas.— Wright *v.* Hayter, 5 Kan. App. 638, 47 Pac. 546.

Kentucky.— Nolle *v.* Thompson, 3 Metc. 121; Mitchell *v.* Mattingly, 1 Metc. 237; Pettit *v.* Mercer, 8 B. Mon. 51; Wood *v.* Weir, 5 B. Mon. 544; Yocum *v.* Polly, 1 B. Mon. 358, 36 Am. Dec. 583; Marshall *v.* Maddock, Litt. Sel. Cas. 106; Anderson *v.* Columbia Finance, etc., Co., 50 S. W. 40, 20 Ky. L. Rep. 1790; Abohosh *v.* Buck, 43 S. W. 425, 19 Ky. L. Rep. 1267.

Louisiana.— Barthe *v.* New Orleans, 42 La. Ann. 43, 7 So. 70; Crétin *v.* Levy, 37 La. Ann. 182; Dickinson *v.* Maynard, 20 La. Ann. 66, 96 Am. Dec. 379; Robertson *v.* Spring, 16 La. Ann. 252; Murphy *v.* Redler, 16 La. Ann. 1; Pellenz *v.* Bullerdieck, 13 La. Ann. 274; Accessory Transit Co. *v.* McCerren, 13 La. Ann. 214; Forbes *v.* Geddes, 6 La. Ann. 402; Sénécal *v.* Smith, 9 Rob. 418; Grant *v.* Deuel, 3 Rob. 17, 38 Am. Dec. 228.

Maine.— McLellan *v.* Cumberland Bank, 24 Me. 566.

Maryland.— Medcalfe *v.* Brooklyn L. Ins. Co., 45 Md. 198; Cecil *v.* Clarke, 17 Md. 508; Turner *v.* Walker, 3 Gill & J. 377, 22 Am. Dec. 329.

Massachusetts.— Stone *v.* Crocker, 24 Pick. 81; Wills *v.* Noyes, 12 Pick. 324.

Michigan.— Le Clear *v.* Perkins, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627; Brand *v.* Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362.

Mississippi.— Greenwade *v.* Mills, 31 Miss. 464.

Missouri.— Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650; Sharpe *v.* Johnston, 76 Mo. 660; Walser *v.* Thies, 56 Mo. 89; Moore *v.* Sanborin, 42 Mo. 490; Callahan *v.* Caffarata, 39 Mo. 136; Casperson *v.* Sproule, 39 Mo. 39; Talbott *v.* Great Western Plaster Co., 86 Mo. App. 558; Kelley *v.* Osborn, 86 Mo. App. 239; Matlick *v.* Crump, 62 Mo. App. 21; Freymark *v.* McKinney Bread Co., 55 Mo. App. 435; Witascheck *v.* Glass, 46 Mo.

show merely that the action was maliciously prosecuted,[42] it must also appear that it was commenced or continued without probable cause.[43] Want of probable

App. 209; Grant *v.* Reinhart, 33 Mo. App. 74; Cottrell *v.* Richmond, 5 Mo. App. 588.

Nebraska.— Vennum *v.* Huston, 38 Nebr. 293, 56 N. W. 970; Jones *v.* Fruin, 26 Nebr. 76, 42 N. W. 283; Parmer *v.* Keith, 16 Nebr. 91, 20 N. W. 103.

New Hampshire.— Friel *v.* Plumer, 69 N. H. 498, 43 Atl. 618, 76 Am. St. Rep. 190.

New York.— Shafer *v.* Loucks, 58 Barb. 426; Hall *v.* Suydam, 6 Barb. 83; Day *v.* Bach, 46 N. Y. Super. Ct. 460; Bulkeley *v.* Smith, 2 Duer 261; Foshay *v.* Ferguson, 2 Den. 617; Murray *v.* Long, 1 Wend. 140.

North Carolina.— Tucker *v.* Davis, 77 N. C. 330; Williams *v.* Hunter, 10 N. C. 545, 14 Am. Dec. 597.

Ohio.— Withan *v.* Hubbell, 4 Ohio Dec. (Reprint) 75, 1 Clev. L. Rep. 1; Zigler *v.* Russell, 2 Ohio Dec. (Reprint) 518, 3 West. L. Month. 424.

Oregon.— Mitchell *v.* Silver Lake Lodge No. 84, I. O. O. F., 29 Oreg. 294, 45 Pac. 798; Glaze *v.* Whitley, 5 Oreg. 164.

Pennsylvania.— Dietz *v.* Langfitt, 63 Pa. St. 234; Kirkpatrick *v.* Kirkpatrick, 39 Pa. St. 288; Scott *v.* Dewey, 23 Pa. Super. Ct. 396; Schondorf *v.* Griffith, 13 Pa. Super. Ct. 580; Lyon *v.* Fox, 2 Browne 67; Munns *v.* Dupont, 2 Browne 42.

Rhode Island.— King *v.* Colvin, 11 R. I. 582; Mowry *v.* Whipple, 8 R. I. 360.

South Carolina.— Campbell *v.* O'Bryan, 9 Rich. 204; Thomas *v.* De Graffenreid, 2 Nott & M. 143; O'Driscoll *v.* McBurney, 2 Nott & M. 54; Graham *v.* Bell, 1 Nott & M. 278, 9 Am. Dec. 687; Shackleford *v.* Smith, 1 Nott & M. 36.

Tennessee.— Smith *v.* Story, 4 Humphr. 169; Kelton *v.* Bevins, Cooke 90, 5 Am. Dec. 670.

Texas.— Culbertson *v.* Cabeen, 29 Tex. 247; McNeese *v.* Herring, 8 Tex. 151; Dempsey *v.* State, 27 Tex. App. 269, 11 S. W. 372, 11 Am. St. Rep. 193; Dreiss *v.* Faust, 1 Tex. App. Civ. Cas. § 33.

Vermont.— Carleton *v.* Taylor, 50 Vt. 220; Driggs *v.* Burton, 44 Vt. 124; Barron *v.* Mason, 31 Vt. 189; Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708.

Virginia.— Spengler *v.* Davy, 15 Gratt. 381; Young *v.* Gregory, 3 Call 446, 2 Am. Dec. 556.

West Virginia.— Burkhart *v.* Jennings, 2 W. Va. 242.

Wisconsin.— Collins *v.* Shannon, 67 Wis. 441, 30 N. W. 730; Ashland County *v.* Stahl, 48 Wis. 593, 4 N. W. 752.

United States.— Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116 [*reversing* on other grounds 22 Fed. Cas. No. 13,176, 2 Woods 599]; Frame *v.* Sewing-Mach. Co., 31 Fed. 704; Castro *v.* De Uriarti, 16 Fed. 93; Blunt *v.* Little, 3 Fed. Cas. No. 1,578, 3 Mason 102; Burnap *v.* Albert, 4 Fed. Cas. No. 2,170, Taney 244; Murray *v.* McLane, 17 Fed. Cas. No. 9,964, 1 Brunn. Col. Cas. 599; Wiggin *v.* Coffin, 29 Fed. Cas. No. 17,624, 3 Story 1.

Canada.— Giguère *v.* Jacob, 10 Quebec Q. B. 501.

42. *Iowa.*— Green *v.* Cochran, 43 Iowa 544.

Kentucky.— Burks *v.* Ferriell, 80 S. W. 809, 26 Ky. L. Rep. 36; Mesker *v.* McCourt, 44 S. W. 975, 19 Ky. L. Rep. 1897.

Louisiana.— Barton *v.* Kavanaugh, 12 La. Ann. 332.

New York.— Conner *v.* Wetmore, 110 N. Y. App. Div. 440, 96 N. Y. Suppl. 999.

Pennsylvania.— Lipowicz *v.* Jervis, 209 Pa. St. 315, 58 Atl. 619.

United States.— Staunton *v.* Goshorn, 94 Fed. 52, 36 C. C. A. 75.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 21.

Malice alone, however great, is insufficient. Gurley *v.* Tomkins, 17 Colo. 437, 30 Pac. 344; Tumalty *v.* Parker, 100 Ill. App. 382; Redman *v.* Stowers, 12 S. W. 270, 11 Ky. L. Rep. 429; Sénécal *v.* Smith, 9 Rob. (La.) 418; Sharpe *v.* Johnston, 59 Mo. 557; Grant *v.* Reinhart, 33 Mo. App. 74; Plummer *v.* Gheen, 10 N. C. 66, 14 Am. Dec. 572; Holt *v.* Follett, 65 Tex. 550; Collins *v.* Shannon, 67 Wis. 441, 30 N. W. 730; Ambs *v.* Atchison, etc., R. Co., 114 Fed. 317; Farmer *v.* Darling, 4 Burr. 1971.

43. *Alabama.*— Ewing *v.* Sanford, 21 Ala. 157.

Arkansas.— Lavender *v.* Hudgens, 32 Ark. 763.

California.— Lacey *v.* Porter, 103 Cal. 597, 37 Pac. 635.

Illinois.— Ames *v.* Snider, 69 Ill. 376; Ross *v.* Innis, 35 Ill. 487, 85 Am. Dec. 373; Leidig *v.* Rawson, 2 Ill. 272, 29 Am. Dec. 354; Smith *v.* Hall, 37 Ill. App. 28; Leyenberger *v.* Paul, 12 Ill. App. 635; Wagner *v.* Aultman, 2 Ill. App. 147.

Kentucky.— Wood *v.* Weir, 5 B. Mon. 544.

Louisiana.— Brown *v.* Vittur, 47 La. Ann. 607, 17 So. 193; Brelet *v.* Mullen, 44 La. Ann. 194, 10 So. 865; Johnson *v.* Meyer, 36 La. Ann. 333; Barton *v.* Kavanaugh, 12 La. Ann. 332; Penny *v.* Taylor, 5 La. Ann. 713; Grant *v.* Deuel, 3 Rob. 17, 38 Am. Dec. 228.

Maine.— Payson *v.* Caswell, 22 Me. 212.

Maryland.— Flickinger *v.* Wagner, 46 Md. 580.

Michigan.— Sweet *v.* Negus, 30 Mich. 406.

Missouri.— Meysenberg *v.* Engelke, 18 Mo. App. 346.

New York.— Besson *v.* Southard, 10 N. Y. 236; Hall *v.* Suydam, 6 Barb. 83; Wilson *v.* King, 39 N. Y. Super. Ct. 384; Foshay *v.* Ferguson, 2 Den. 617.

Tennessee.— Evans *v.* Thompson, 12 Heisk. 534; Hall *v.* Hawkins, 5 Humphr. 357; Dodge *v.* Brittain, Meigs 84.

Texas.— Ramsey *v.* Arrott, 64 Tex. 320; Hitson *v.* Forrest, 12 Tex. 320.

Wisconsin.— Murphy *v.* Martin, 58 Wis. 276, 16 N. W. 603.

United States.— Stacey *v.* Emery, 97 U. S. 642, 24 L. ed. 1035; Sanders *v.* Palmer, 55 Fed. 217, 5 C. C. A. 77; Breckenridge *v.*

cause cannot be inferred from malice,[44] but malice may be implied or inferred as a fact from want of probable cause.[45] There may be facts and circumstances which do not amount to probable cause, but which, being evidence of want of malice, may justify the discharge of defendant on the ground that there was an entire absence of malice.[46]

3. Whether State of Mind or State of Facts. Probable cause in the nature of things is sometimes a state of facts; uncontroverted testimony[47] or unimpeached records[48] may show such guilt[49] or conduct on the part of plaintiff as to make it out without any reference to, or despite, the mental attitude of defendant.[50] It sometimes involves a state of mind; when honesty of knowledge,[51] good

Auld, 4 Fed. Cas. No. 1,824, 4 Cranch C. C. 731; Munns *v.* De Nemours, 17 Fed. Cas. No. 9,926, 3 Wash. 31.

England.— Nicholson *v.* Coghill, 4 B. & C. 21, 10 E. C. L. 464; Willans *v.* Taylor, 6 Bing. 183, 7 L. J. C. P. O. S. 250, 3 M. & P. 350, 31 Rev. Rep. 379, 19 E. C. L. 90; Musgrave *v.* Newell, 2 Gale 91, 5 L. J. Exch. 227, 1 M. & W. 582, Tyrw. & G. 957; Morgan *v.* Hughes, 2 T. R. 225.

See 33 Cent Dig. tit. "Malicious Prosecution," § 21.

44. *Alabama.*— Steed *v.* Knowles, 79 Ala. 446.

California.— Grant *v.* Moore, 29 Cal. 644.

Delaware.—Herbener *v.* Crossan, 4 Pennew. 38, 55 Atl. 223.

District of Columbia.— Spitzer *v.* Friedlander, 14 App. Cas. 556.

Georgia.— Marable *v.* Mayer, 78 Ga. 710, 3 S. E. 429; Ventress *v.* Rosser, 73 Ga. 534.

Illinois.— Krug *v.* Ward, 77 Ill. 603; Ames *v.* Snider, 69 Ill. 376; Mitchinson *v.* Cross, 58 Ill. 366; Ross *v.* Innis, 35 Ill. 487, 85 Am. Dec. 373; Tumalty *v.* Parker, 100 Ill. App. 382; Splane *v.* Byrne, 9 Ill. App. 392; Roy *v.* Goings, 6 Ill. App. 140 [*affirmed* in 112 Ill. 656].

Indiana.— McCasland *v.* Kimberlin, 100 Ind. 121; Bitting *v.* Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505.

Iowa.— Center *v.* Spring, 2 Iowa 393.

Maine.— Ulmer *v.* Leland, 1 Me. 135, 10 Am. Dec. 48.

Minnesota.— Eickhoff *v.* Fidelity, etc., Co., 74 Minn. 139, 76 N. W. 1030.

Missouri.— Casperson *v.* Sproule, 39 Mo. 39; Williams *v.* Vanmeter, 8 Mo. 339, 41 Am. Dec. 644.

New York.— Hall *v.* Suydam, 6 Barb. 83; Pangburn *v.* Bull, 1 Wend. 345; Murray *v.* Long, 1 Wend. 140.

North Dakota.— Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

Pennsylvania.— Gyles *v.* Jefferis, 5 Pa. Dist. 129.

Rhode Island.— Fox *v.* Smith, 25 R. I. 255, 55 Atl. 698; King *v.* Colvin, 11 R. I. 582.

South Carolina.— Horn *v.* Boon, 3 Strobh. 307.

South Dakota.— Richardson *v.* Dybedahl, 14 S. D. 126, 84 N. W. 486.

Texas.— Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85.

Virginia.— Scott *v.* Shelor, 28 Gratt. 891; Spengler *v.* Davy, 15 Gratt. 381.

West Virginia.—Vinal *v.* Core, 18 W. Va. 1.

United States.— Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116 [*reversing* 22 Fed. Cas. No. 13,176, 2 Woods 599].

England.— Sutton *v.* Johnstone, 1 Bro. P. C. 76, 1 T. R. 493, 1 Rev. Rep. 269, 1 Eng. Reprint 427.

45. *Colorado.*— Murphy *v.* Hobbs, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366.

Illinois.—Roy *v.* Goings, 112 Ill. 656; Harpham *v.* Whitney, 77 Ill. 32; Ross *v.* Innis, 35 Ill. 487, 85 Am. Dec. 373.

Indiana.— Heap *v.* Parrish, 104 Ind. 36, 3 N. E. 549.

Kentucky.— Yocum *v.* Polly, 1 B. Mon. 358, 36 Am. Dec. 583; Jones *v.* Louisville, etc., R. Co., 96 S. W. 793, 29 Ky. L. Rep. 945; Anderson *v.* Columbia Finance, etc., Co., 50 S. W. 40, 20 Ky. L. Rep. 1790.

Louisiana.— Block *v.* Meyers, 33 La. Ann. 776; Decoux *v.* Lieux, 23 La. Ann. 392.

Maine.— Merriam *v.* Mitchell, 13 Me. 439, 29 Am. Dec. 514.

Maryland.— Turner *v.* Walker, 3 Gill & J. 377, 22 Am. Dec. 329.

Michigan.— Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. N. S. 928.

Minnesota.— Eickhoff *v.* Fidelity, etc., Co., 74 Minn. 139, 76 N. W. 1030.

Missouri.—Sharpe *v.* Johnston, 76 Mo. 660; Williams *v.* Vanmeter, 8 Mo. 339, 41 Am. Dec. 644; Jordan *v.* Chicago, etc., R. Co., 105 Mo. App. 446, 79 S. W. 1155; Talbott *v.* Great Western Plaster Co., 86 Mo. App. 558; Kelley *v.* Osborn, 86 Mo. App. 239; Grant *v.* Reinhart, 33 Mo. App. 74.

South Carolina.— Graham *v.* Bell, 1 Nott & M. 278, 9 Am. Dec. 687.

Texas.— Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85.

England.— Mitchell *v.* Jenkins, 5 B. & Ad. 588, 3 L. J. K. B. 35, 2 N. & M. 301, 27 E. C. L. 250.

See also *infra*, VII, C.

46. Long *v.* Rodgers, 19 Ala. 321. See *infra*, VII.

47. See *infra*, text and notes 51–57.

48. See *infra*, text and notes 51–57.

49. See *infra*, text and notes 51–57.

50. See *infra*, text and notes 51–57.

51. Herbener *v.* Crossan, 4 Pennew. (Del.) 38, 55 Atl. 223; Burt *v.* Smith, 181 N. Y. 1, 73 N. E. 495. And see Fry *v.* Kaessner, 43 Nebr. 133, 66 N. W. 1126; Rider *v.* Murphy, 47 Nebr. 857, 66 N. W. 837; Billingsley *v.* Maas, 93 Wis. 176, 67 N. W. 49.

faith of belief,[52] fairness of statement to counsel,[53] or the like [54] is in question, the *mens rea* may be the only matter in issue. Between these self-explanatory extremes, however, there is a middle zone of cases in which the authorities are in conflict as to whether probable cause has reference to facts known or to facts in existence at the time of the commencement of the proceedings.[55] Probable cause is a state of mind, in this, that the facts are regarded from the point of view of the prosecutor. The question is not what the actual facts were but what he had reason to believe they were.[56]

B. In Criminal Prosecutions — 1. In General — a. What Law Governs. The question of probable cause identical with that of the legal right to arrest is to be determined by the law in force at the time of the arrest, and not as afterward changed or interpreted.[57]

b. What Constitutes Probable Cause. In cases of criminal prosecutions, probable cause means reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious [58] man in the belief [59] that the accused is guilty of the offense with which he is charged.[60] It has also

52. Sandoz *v.* Veazie, 106 La. 202, 30 So. 767; Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615; Schondorf *v.* Griffith, 13 Pa. Super. Ct. 580.

An honest, although mistaken, belief in the truth of the charge made in a criminal complaint is evidence of probable cause in an action for malicious prosecution. Goldstein *v.* Foulkes, 19 R. I. 291, 36 Atl. 9. See also *infra*, VI, B, 2, b.

53. See *infra*, VI, B, 2, d.

54. Turner *v.* Ambler, 10 Q. B. 252, 6 Jur. 346, 16 L. J. Q. B. 158, 59 E. C. L. 252; Broad *v.* Ham, 5 Bing. N. Cas. 722, 8 L. J. C. P. 357, 8 Scott 40, 35 E. C. L. 385; Delegal *v.* Highley, 3 Bing. N. Cas. 950, 32 E. C. L. 435, 8 C. & P. 444, 34 E. C. L. 827, 3 Hodges 158, 6 L. J. C. P. 337, 5 Scott 154.

55. See *infra*, VI, B, 2, a, (IV).

56. *Iowa.*— Barber *v.* Scott, 92 Iowa 52, 60 N. W. 497.

Louisiana.— Barton *v.* Kavanaugh, 12 La. Ann. 332.

Michigan.— See Carter *v.* Sutherland, 52 Mich. 597, 18 N. W. 375.

New York.— Willard *v.* Holmes, 142 N. Y. 492, 37 N. E. 480, per Gray, J.

Pennsylvania.— Bryant *v.* Kuntz, 25 Pa. Super. Ct. 102; Humphreys *v.* Mead, 23 Pa. Super. Ct. 415.

West Virginia.— Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

Wisconsin.— Spear *v.* Hiles, 67 Wis. 361, 30 N. W. 511.

United States.— Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116.

Probable cause, unlike malice, is not determined by the standard of the particular defendant but of the ordinarily prudent and cautious man exercising conscience, impartiality, and reason without prejudice upon the facts. Heyne *v.* Blair, 62 N. Y. 19 [*reversing* on other grounds 3 Thomps. & C. 263]; Rawson *v.* Leggett, 97 N. Y. App. Div. 416, 90 N. Y. Suppl. 5. See also Bacon *v.* Towne, 4 Cush. (Mass.) 217.

"Some allowance will be made when the prosecutor is so injured by the offense that he could not likely draw his conclusions with the same impartiality and absence of prejudice that a person entirely disinterested would deliberately do. All that can be required of him is that he shall act as a reasonable and prudent man would be likely to do under like circumstances." Spear *v.* Hiles, 67 Wis. 361, 366, 30 N. W. 511.

57. Gould *v.* Gardner, 11 La. Ann. 289.

58. *Illinois.*— Ford *v.* Buckley, 68 Ill. App. 477.

Iowa.— Center *v.* Spring, 2 Iowa 393.

Kentucky.— Ahrens, etc., Mfg. Co. *v.* Hoeher, 21 Ky. 299, 51 S. W. 194, 21 Ky. L. Rep. 299.

Maine.— McGurn *v.* Brackett, 33 Me. 331.

Maryland.— Cooper *v.* Utterbach, 37 Md. 282.

New York.— Burt *v.* Smith, 181 N. Y. 1, 73 N. E. 495; Scanlan *v.* Cowley, 2 Hilt. 489.

Ohio.— Johnson *v.* McDaniel, 5 Ohio S. & C. Pl. Dec. 717.

South Carolina.— Cockfield *v.* Braveboy, 2 McMull. 270, 29 Am. Dec. 123. See also Sims *v.* McLendon, 3 Strobh. 557.

Tennessee.— Hall *v.* Hawkins, 5 Humphr. 357.

Utah.— Johnston *v.* Meaghr, 14 Utah 426, 47 Pac. 861.

Vermont.— Driggs *v.* Burton, 44 Vt. 124; Barron *v.* Mason, 31 Vt. 189.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 24 *et seq.*

59. Burt *v.* Smith, 181 N. Y. 1, 73 N. E. 495; Ambs *v.* Atchison, etc., R. Co., 114 Fed. 317.

Evidence need not be sufficient to insure a conviction. Widmeyer *v.* Felton, 95 Fed. 926. But it is necessary that the fact invoked by the accuser be such as if true would justify a criminal prosecution. Gowan *v.* Holland, 11 Quebec Super. Ct. 75.

To sustain a defense of probable cause it was not necessary for defendant to have ascertained in advance plaintiff's defense. Kansas, etc., Coal Co. *v.* Galloway, 71 Ark. 351, 74 S. W. 521, 100 Am. St. Rep. 79.

60. Other definitions are: "A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to

been defined as such conduct on the part of the accused as may induce the court to infer that a prosecution was undertaken from public motives.[61] However, no hard and fast rule can be laid down as to what facts and circumstances in any given case constitute probable cause; every case must be determined upon its facts in the light of its surrounding circumstances, in accordance with the rule first given herein.[62]

warrant a cautious man in the belief, that the person accused is guilty of the offense with which he is charged." Munns *v.* De Nemours, 17 Fed. Cas. No. 9,926, 3 Wash. 31, 37, per Washington, J. To the same effect see Lunsford *v.* Dietrich, 93 Ala. 565, 9 So. 308, 30 Am. St. Rep. 79, 86 Ala. 250, 5 So. 461, 11 Am. St. Rep. 37; Thompson *v.* Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554; Stone *v.* Stevens, 12 Conn. 219, 30 Am. Dec. 611; McDavid *v.* Blevins, 85 Ill. 238; Davie *v.* Wisher, 72 Ill. 262; Ames *v.* Snider, 69 Ill. 376; Ross *v.* Innis, 35 Ill. 487, 85 Am. Dec. 373; Richey *v.* McBean, 17 Ill. 63; Hess *v.* Webb, 53 Ill. App. 53; Splane *v.* Byrne, 9 Ill. App. 392; Paddock *v.* Watts, 116 Ind. 146, 18 N. E. 518, 9 Am. St. Rep. 832; Bitting *v.* Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505; Hays *v.* Blizzard, 30 Ind. 457; Shaul *v.* Brown, 28 Iowa 37, 4 Am. Rep. 151; Bacon *v.* Towne, 4 Cush. (Mass.) 217; Wilson *v.* Bowen, 64 Mich. 133, 31 N. W. 81; Casey *v.* Sevatson, 30 Minn. 516, 16 N. W. 407; Cole *v.* Curtis, 16 Minn. 182; Hazzard *v.* Flury, 120 N. Y. 223, 24 N. E. 194; Carl *v.* Ayers, 53 N. Y. 14; Shafer *v.* Loucks, 58 Barb. (N. Y.) 426; Hall *v.* Suydam, 6 Barb. (N. Y.) 83; Gordon *v.* Upham, 4 E. D. Smith (N. Y.) 9; Cabiness *v.* Martin, 14 N. C. 454; Ash *v.* Marlow, 20 Ohio 119; Shannon *v.* Jones, 76 Tex. 141, 13 S. W. 477; Glasgow *v.* Owen, 69 Tex. 167, 6 S. W. 527; Ramsey *v.* Arrott, 64 Tex. 320; Landa *v.* Obert, 45 Tex. 539; Dempsey *v.* State, 27 Tex. App. 269, 11 S. W. 372, 11 Am. St. Rep. 193; Scott *v.* Shelor, 28 Gratt. (Va.) 891; Vinal *v.* Core, 18 W. Va. 1; Wheeler *v.* Nesbitt, 24 How. (U. S.) 544, 16 L. ed. 765; Munns *v.* De Nemours, 17 Fed. Cas. No. 9,926, 3 Wash. 31; Wilmarth *v.* Mountford, 30 Fed. Cas. No. 17,774, 4 Wash. 79.

"A belief in the charge or facts alleged, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence in the same situation." Boeger *v.* Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322.

"A deceptive appearance of guilt arising from facts and circumstances misapprehended or misunderstood so far as to produce belief," and to depend not on facts, but on the belief of them. Seibert *v.* Price, 5 Watts & S. (Pa.) 438, 439, 40 Am. Dec. 525.

Similar definitions see Harpham *v.* Whitney, 77 Ill. 32; Tompson *v.* Mussey, 3 Me. 305; Ulmer *v.* Leland, 1 Me. 135, 10 Am. Dec. 48; Griffis *v.* Sellars, 19 N. C. 492, 31 Am. Dec. 422; Scott *v.* Dewey, 23 Pa. Super. Ct. 396; Ramsey *v.* Arrott, 64 Tex. 320.

The question does not turn upon the actual innocence or guilt of the accused, but upon the prosecutor's belief of it at the time, upon reasonable grounds. Burlingame *v.* Burlingame, 8 Cow. (N. Y.) 141; French *v.* Smith, 4 Vt. 363, 24 Am. Dec. 616.

"**However innocent** the plaintiff may have been . . . it is enough for the defendant to show, that he had reasonable grounds for believing him guilty at the time the charge was made." Foshay *v.* Ferguson, 2 Den. (N. Y.) 617, 619.

"**There must be a reasonable cause,**— such as would operate on the mind of a discreet man: there must also be a probable cause,— such as would operate on the mind of a reasonable man; at all events such as would operate on the mind of the party making the charge; otherwise there is no probable cause for him." Broad *v.* Ham, 5 Bing. N. Cas. 722, 725, 8 L. J. C. P. 357, 8 Scott 40, 35 E. C. L. 385, per Tindal, C. J.

61. Ulmer *v.* Leland, 1 Me. 135, 10 Am. Dec. 48; Cecil *v.* Clarke, 17 Md. 508.

62. See *supra*, text and note 58.

Probable cause was held to be sufficiently shown in the following cases:

District of Columbia.— Spitzer *v.* Friedlander, 14 App. Cas. 556 (embezzlement from employer); Coleman *v.* Heurich, 2 Mackey 189 (larceny).

Illinois.— Knickerbocker Ice Co. *v.* Scott, 76 Ill. App. 645, larceny.

Kentucky.— Faris *v.* Starke, 3 B. Mon. 4 (breaking into a store and stealing money); Albin Co. *v.* Mumford, 55 S. W. 913, 21 Ky. L. Rep. 1613 (embezzlement); Alexander *v.* Reid, 44 S. W. 211, 19 Ky. L. Rep. 1636 (false swearing).

Louisiana.— Grant *v.* Deuel, 3 Rob. 17, 38 Am. Dec. 228.

Maine.— Brainerd *v.* Brackett, 33 Me. 580.

Maryland.— Bowen *v.* Tascoe, 84 Md. 497, 36 Atl. 436, larceny.

Massachusetts.—Ellis *v.* Simonds, 168 Mass. 316, 47 N. E. 116.

Mississippi.— Greenwade *v.* Mills, 31 Miss. 464, stealing a slave.

Missouri.— Warren *v.* Flood, 72 Mo. App. 199, highway robbery.

New York.— Bankell *v.* Weinacht, 99 N. Y. App. Div. 316, 91 N. Y. Suppl. 107 (larceny); Vorce *v.* Oppenheim, 37 N. Y. App. Div. 69, 55 N. Y. Suppl. 596 (obtaining goods on credit with intent to defraud); Keating *v.* Fitts, 13 N. Y. App. Div. 1, 43 N. Y. Suppl. 124; Sheahan *v.* National Steamship Co., 66 Hun 48, 20 N. Y. Suppl. 740 [*affirmed* in 142 N. Y. 665, 37 N. E. 569]; Heyne *v.* Blair, 3 Thomps. & C. 263 [*reversed* on the facts in 62 N. Y. 19] (where defendant had discounted certain notes, where indorsements did not appear to be alike). *Compare* Rawson *v.* Leggett, 184

c. Guilt or Innocence of Accused. An action of malicious prosecution will not lie at the instance of a guilty party;[63] upon proof of actual guilt the existence of probable cause is conclusively presumed as a matter of law.[64] In many instances, however, the right of recovery does not depend upon the guilt or innocence of the party accused,[65] but upon such entire innocence of plaintiff that there was no just or reasonable ground to suspect his guilt,[66] or upon the prosecutor's justifiable belief in his guilt at the time of the prosecution.[67] Plaintiff may have been entirely innocent and yet have no cause of action,[68] if there was

N. Y. 504, 77 N. E. 662 [*reversing* 97 N. Y. App. Div. 416, 90 N. Y. Suppl. 5].

Pennsylvania.— Prough *v.* Entriken, 11 Pa. St. 81; Ritter *v.* Ewing, 4 Pa. Dist. 203, 16 Pa. Co. Ct. 295, keeping a vicious dog.

United States.— Berger *v.* Wild, 130 Fed. 882, 66 C. C. A. 79; Staunton *v.* Goshorn, 94 Fed. 52, 36 C. C. A. 75; Taylor *v.* Rice, 27 Fed. 264.

England.— Smith *v.* Macdonald, 3 Esp. 7.

See 33 Cent. Dig. tit. "Malicious Prosecution," §§ 24, 29–38.

Want of probable causes was held to be sufficiently shown in the following cases:

Illinois.— Ross *v.* Innis, 35 Ill. 487, 85 Am. Dec. 373, embezzlement.

Iowa.— Kletzing *v.* Armstrong, 119 Iowa 505, 93 N. W. 500 (selling mortgaged property); Necker *v.* Bates, 118 Iowa 545, 92 N. W. 667 (theft of a harness).

Kentucky.— Holburn *v.* Neal, 4 Dana 120.

Maine.— Page *v.* Cushing, 38 Me. 523.

Massachusetts.— Call *v.* Hayes, 169 Mass. 586, 48 N. E. 777 (embezzlement); Cheever *v.* Sweet, 151 Mass. 186, 23 N. E. 831 (robbery).

Missouri.— Ruth *v.* St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055, disturbing the peace.

Nebraska.— Jonasen *v.* Kennedy, 39 Nebr. 313, 58 N. W. 122 (larceny); Wertheim *v.* Altschuler, 12 Nebr. 591, 12 N. W. 107 (forgery).

Nevada.— McNamee *v.* Nesbitt, 24 Nev. 400, 56 Pac. 37, attempting to suborn a witness.

New York.— Thaule *v.* Krekeler, 81 N. Y. 428; Fetzer *v.* Burlew, 114 N. Y. App. Div. 650, 99 N. Y. Suppl. 1100.

North Carolina.—Thurber *v.* Eastern Bldg., etc., Assoc., 116 N. C. 75, 21 S. E. 193, forgery.

Pennsylvania.— Huckstein *v.* New York L. Ins. Co., 205 Pa. St. 27, 54 Atl. 461; Gaertner *v.* Heyl, 179 Pa. St. 391, 36 Atl. 146 (forgery); Campbell *v.* Sidwell, 20 Pa. Super. Ct. 183 (larceny); Huber *v.* Conway, 1 Phila. 121 (trying to poison defendant).

Texas.— Kleinsmith *v.* Hamlin, (Civ. App. 1901) 60 S. W. 994.

See 33 Cent. Dig. tit. "Malicious Prosecution," §§ 24, 29–38.

Arrest of wife with husband for act of husband no probable cause as to wife see Neys *v.* Taylor, 12 S. D. 488, 81 N. W. 901.

Civil liability, although existing to its fullest extent, is not probable cause for instituting a criminal proceeding. Schmidt *v.* Weidman, 63 Pa. St. 173.

63. *Alabama.*— Whitehurst *v.* Ward, 12 Ala. 264.

Indiana.— Adams *v.* Lisher, 3 Blackf. 241, 25 Am. Dec. 102.

Iowa.— Parkhurst *v.* Masteller, 57 Iowa 474, 10 N. W. 864.

Mississippi.—Threefoot *v.* Nuckols, 68 Miss. 116, 8 So. 335.

New Jersey.—McFadden *v.* Lane, 71 N. J. L. 624, 60 Atl. 365.

New York.— Barber *v.* Gould, 20 Hun 446.

North Carolina.— Johnson *v.* Chambers, 32 N. C. 287; Plummer *v.* Gheen, 10 N. C. 66, 14 Am. Dec. 572.

Pennsylvania.— Bruff *v.* Kendrick, 21 Pa. Super. Ct. 468.

Rhode Island.— Newton *v.* Weaver, 13 R. I. 616.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 25.

64. Lancaster *v.* McKay, 103 Ky. 616, 45 S. W. 887; Turner *v.* Dinnegar, 20 Hun (N. Y.) 465.

65. *Colorado.*— Florence Oil, etc., Co. *v.* Huff, 14 Colo. App. 281, 59 Pac. 624.

Illinois.— Jacks *v.* Stimpson, 13 Ill. 701; Bishop *v.* Bell, 2 Ill. App. 551.

Indiana.— Lytton *v.* Baird, 95 Ind. 349.

Kentucky.— Faris *v.* Starke, 3 B. Mon. 4.

New York.—Scanlan *v.* Cowley, 2 Hilt. 489.

Pennsylvania.— Le Maistre *v.* Hunter, Brightly 494.

See also *infra*, VI, B, 2, b; VII, C.

66. Bell *v.* Pearcy, 27 N. C. 83. Probable cause does not depend on the guilt or innocence of plaintiff, but on appearances deduced from facts known to defendant, and information received by him and properly investigated of a character to produce in the mind of a reasonably prudent and cautious person the honest belief that the crime charged had been committed. Bruff *v.* Kendrick, 21 Pa. Super. Ct. 468.

67. Knapp *v.* Chicago, etc., R. Co., 113 Iowa 532, 85 N. W. 769; King *v.* Colvin, 11 R. I. 582; Raulston *v.* Jackson, 1 Sneed (Tenn.) 128; Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446.

Disproving charge.— But it is competent for plaintiff, in an action for malicious prosecution, to disprove the charge preferred against him by defendant for the purpose of showing the want of probable cause. Lunsford *v.* Dietrich, 86 Ala. 250, 5 So. 461, 11 Am. St. Rep. 37; Long *v.* Rogers, 17 Ala. 540. See also cases cited *supra*, note 59; and cases cited *infra*, note 70.

68. Tumalty *v.* Parker, 100 Ill. App. 382;

probable cause for the prosecution.[69] *A fortiori* it is not essential to the protection of the prosecutor that plaintiff should have been convicted. Actual proof of innocence by plaintiff, however, is not necessary to support the action.[70]

d. Actual Commission of Crime. The existence of probable cause does not necessarily depend upon the actual commission of the original wrong charged.[71] If the case shows sufficient ground for believing it to have been committed, the justification may be made out.[72]

2. Conduct or Knowledge of Prosecutor — a. Knowledge — (i) *Basis of Knowledge.* The facts relied upon to constitute probable cause may be those which are within the personal knowledge of the prosecutor,[73] or those of which he learns from proper information derived from statements made by others,[74] or both.[75] Such information must relate to the question of guilt,[76] and must ordinarily[77] come from sources entitled to credit.[78] The test of the sufficiency of

Campbell *v.* Baltimore, etc., R. Co., 97 Md. 341, 55 Atl. 532; Van *v.* Pacific Coast Co., 120 Fed. 699.

The right to recover in an action for malicious prosecution is not based on innocence of plaintiff as to the charge for which he was prosecuted (Davie *v.* Wisher, 72 Ill. 262; Wilson *v.* King, 39 N. Y. Super. Ct. 384; Scanlan *v.* Cowley, 2 Hilt. (N. Y.) 489); nor is it decisive of the want of probable cause (Hall *v.* Suydam, 6 Barb. (N. Y.) 83); if the circumstances be such as to induce the prosecutor to suppose the party prosecuted to be guilty (Whitehurst *v.* Ward, 12 Ala. 264; Chrisman *v.* Carney, 33 Ark. 316). He must show affirmatively that the prosecutor had no probable cause for commencing the prosecution. Angelo *v.* Faul, 85 Ill. 106; Lang *v.* De Luca, 108 La. 304, 32 So. 329; Threefoot *v.* Nuckols, 68 Miss. 116, 8 So. 335; Bulkeley *v.* Smith, 2 Duer (N. Y.) 261.

69. Whitehurst *v.* Ward, 12 Ala. 264; Raulston *v.* Jackson, 1 Sneed (Tenn.) 128; Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446.

70. Moore *v.* Sanborin, 42 Mo. 490.

Where one prosecutes another for perjury, in swearing to what could not amount to perjury, it being immaterial, he cannot be protected, in a subsequent suit against him for a malicious prosecution, by proving the truth of his charge. Smith *v.* Deaver, 49 N. C. 513.

71. Ross *v.* Innis, 26 Ill. 259; Scanlan *v.* Cowley, 2 Hilt. (N. Y.) 489. But see Hawley *v.* Butler, 54 Barb. (N. Y.) 490, where it was held that if no felony was committed by any one such arrest was illegal.

72. Richardson *v.* Dybedahl, 14 S. D. 126, 84 N. W. 486; Raulston *v.* Jackson, 1 Sneed (Tenn.) 128; Ellis *v.* Abrahams, 8 Q. B. 709, 10 Jur. 593, 15 L. J. Q. B. 221, 55 E. C. L. 709; Reed *v.* Taylor, 4 Taunt. 616, 13 Rev. Rep. 701. In an action for malicious prosecution of plaintiff for murder, where plaintiff's own testimony shows that he may have been guilty of manslaughter, there appears probable cause for the prosecution. Ruffner *v.* Hooks, 2 Pa. Super. Ct. 278, 38 Wkly. Notes Cas. 516. But where defendant in an action for malicious prosecution had no evidence that plaintiff had forged a note, the fact that defendant had received a letter from the maker, stating that the note was a forgery, and that he believed such statement, did not constitute a reasonable cause for instituting criminal proceedings against plaintiff. Hutchinson *v.* Wenzel, 155 Ind. 49, 56 N. E. 845.

73. O'Dell *v.* Hatfield, 40 Misc. (N. Y.) 13, 81 N. Y. Suppl. 158; Vinal *v.* Core, 18 W. Va. 1; Wheeler *v.* Nesbitt, 24 How. (U. S.) 544, 16 L. ed. 765.

74. *Kentucky.*— Moore *v.* Large, 46 S. W. 508, 20 Ky. L. Rep. 409, confession.

Minnesota.— Shafer *v.* Hertzig, 92 Minn. 171, 99 N. W. 796; Smith *v.* Munch, 65 Minn. 256, 68 N. W. 19.

Montana.— Weaver *v.* Montana Cent. R. Co., 20 Mont. 163, 50 Pac. 414, confession of confederate to defendant's agent implicating plaintiff.

New York.— Francis *v.* Tilyou, 26 N. Y. App. Div. 340, 49 N. Y. Suppl. 799.

Vermont.— French *v.* Smith, 4 Vt. 363, 24 Am. Dec. 616.

West Virginia.—Vinal *v.* Core, 18 W. Va. 1.

United States.— Blunk *v.* Atchison, etc., R. Co., 38 Fed. 311.

Canada.— Oswald *v.* Mewburn, 6 U. C. Q. B. O. S. 471.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 33.

75. Harpham *v.* Whitney, 77 Ill. 32; McManus *v.* Wallis, 52 Tex. 534.

76. French *v.* Smith, 4 Vt. 363, 24 Am. Dec. 616.

77. See Jordan *v.* Alabama Great Southern R. Co., 81 Ala. 220, 8 So. 191, holding that want of probable cause cannot be presumed, by inference of law, from the fact that the charge was made on the information of witnesses who were in fact unworthy of belief.

78. Hays *v.* Blizzard, 30 Ind. 457; French *v.* Smith, 4 Vt. 363, 24 Am. Dec. 616.

Representations of detectives and counsel may suffice. Smith *v.* Ege, 52 Pa. St. 419.

Statements of child.— A prosecution instituted upon the apparently truthful statements of a child eleven years old, who claimed to have seen plaintiff commit the offense with which he was subsequently charged, is not without probable cause. Dwain *v.* Descalso, 66 Cal. 415, 5 Pac. 903.

the resulting knowledge is whether it would have justified a prudent, honest, and strong suspicion of the guilt of the accused.[79]

(II) *Character of Information.* The prosecutor is not bound to verify the correctness of each item of information;[80] it is sufficient that he acted with such caution,[81] impartiality,[82] and diligence as a reasonably prudent man would have used under the circumstances to ascertain the truth of his suspicions.[83] When facts or circumstances put him upon inquiry[84] he will be charged with knowledge of such facts as he would have learned[85] if he or his agent authorized to investigate[86] had made a proper[87] investigation[88] into the circumstances of the case, including the character[89] and identity of the accused.[90]

(III) *Effect of Insufficient Information.* Where the charge is made on insufficient information derived from others, which is not supported by evidence,[91]

79. *California.*— Lamb *v.* Galland, 44 Cal. 609.

Colorado.— Brown *v.* Willoughby, 5 Colo. 1.

Illinois.— Anderson *v.* Friend, 71 Ill. 475; Cox *v.* McLean, 3 Ill. App. 45.

Indiana.— Hays *v.* Blizzard, 30 Ind. 457.

Kentucky.— Meyer *v.* Louisville, etc., R. Co., 98 Ky. 365, 33 S. W. 98, 17 Ky. L. Rep. 945.

Louisiana.— Dearmond *v.* St. Amant, 40 La. Ann. 374, 4 So. 72; Plassan *v.* Louisiana Lottery Co., 34 La. Ann. 246.

Michigan.— Chapman *v.* Dunn, 56 Mich. 31, 22 N. W. 101.

New York.— Connelly *v.* McDermott, 3 Lans. 63; Richard *v.* Boland, 5 Misc. 552, 26 N. Y. Suppl. 57.

Tennessee.— Raulston *v.* Jackson, 1 Sneed 128.

Virginia.— Scott *v.* Schelor, 28 Gratt. 891.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 33.

False test.— An instruction that the information which will justify the making of a criminal complaint against another must be of such character and obtained from such a source that business men generally of ordinary care, prudence, and discretion would feel authorized in acting thereon, is erroneous as not stating the proper test, for it confines the jury to a certain class of men of ordinary care and prudence. Clark *v.* Hill, 96 Ill. App. 383; Jensen *v.* Halstead, 61 Nebr. 249, 85 N. W. 78. But see Gallaway *v.* Burr, 32 Mich. 332.

Representations of others that plaintiff was guilty of the offense charged, together with plaintiff's conduct in secreting himself, justified the prosecution. Mosley *v.* Yearwood, 48 La. Ann. 334, 19 So. 274. But representations of a third person as to matters not tending to establish the guilt of the accused do not amount, without further investigation or inquiry, to probable cause. Coyle *v.* Snellenburg, 30 Pa. Super. Ct. 246.

80. Bechel *v.* Pacific Express Co., 65 Nebr. 826, 91 N. W. 853; Miles *v.* Salisbury, 21 Ohio Cir. Ct. 333, 12 Ohio Cir. Dec. 7.

81. Maffioli *v.* Welch, 36 Ill. App. 284; Gardiner *v.* Mays, 24 Ill. App. 286.

82. Shafer *v.* Hertzig, (Minn. 1904) 99 N. W. 796.

83. Fisher *v.* Hamilton, 49 Ind. 341; McGurn *v.* Brackett, 33 Me. 331; Moore *v.* Statesville First Nat. Bank, 140 N. C. 293, 52 S. E. 944; Swaim *v.* Stafford, 26 N. C. 392.

84. Kansas, etc., Coal Co. *v.* Galloway, 71 Ark. 351, 74 S. W. 521, 100 Am. St. Rep. 79; Bechel *v.* Pacific Express Co., 65 Nebr. 826, 91 N. W. 853; Widmeyer *v.* Felton, 95 Fed. 926.

85. Boyd *v.* Mendenhall, 53 Minn. 274, 55 N. W. 45.

But it is not incumbent upon him to go to the house of the suspected person and inquire of him whether he remained at home on the night the crime was committed, and whether his two daughters would testify to that effect. Miller *v.* Chicago, etc., R. Co., 41 Fed. 898.

Nor is it necessary for one instituting a prosecution for surety of the peace to go to the person from whom he apprehends violence and inquire as to his intentions. Fisher *v.* Hamilton, 49 Ind. 341.

86. Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650.

87. Grinnell *v.* Stewart, 32 Barb. (N. Y.) 544.

88. Boyd *v.* Mendenhall, 53 Minn. 274, 55 N. W. 45; Grinnell *v.* Stewart, 32 Barb. (N. Y.) 544; Johnson *v.* McDaniel, 5 Ohio S. & C. Pl. Dec. 717.

89. The party causing the arrest should use reasonable diligence and efforts to learn the true character of the person accused. Hirsch *v.* Feeney, 83 Ill. 548, holding that if he does not such fact may be considered on trial for malicious prosecution growing out of the arrest. But see Christian *v.* Hanna, 58 Mo. App. 37, where it was held that the fact that the prosecutor in a former trial had, upon reliable authority that his goods had been stolen by plaintiff, instituted the prosecution without diligent inquiry as to the character of plaintiff, who was a stranger, and that it was not evidence of malice or lack of probable cause. But this does not apply as to a witness, upon whose information the prosecution was largely based, where such information was corroborated by independent circumstances, and as to part by other persons. Miller *v.* Chicago, etc., R. Co., 41 Fed. 898.

90. Lawrence *v.* Leathers, 31 Ind. App. 414, 68 N. E. 179; Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650.

91. Bornholdt *v.* Souillard, 36 La. Ann. 103; Norrel *v.* Vogel, 39 Minn. 107, 38 N. W. 705; Spencer *v.* Anness, 32 N. J. L. 100.

or which consists of mere suspicion,[92] or where the prosecutor knows of all the facts and of their inadequacy,[93] there is no justification for the prosecution.

(iv) *TIME OF ACQUIRING KNOWLEDGE.* On the one hand, it has been held that the defense of probable cause is determined only by the facts and circumstances which were known or ought to have been known[94] to the prosecutor at the time he instituted the original proceedings[95] and not by subsequently appearing facts.[96] On the other hand it has been held that subsequently acquired knowledge of facts affecting the question of plaintiff's guilt should not be excluded, and that the prosecutor may protect himself by proving any additional facts tending to show that the accused was guilty, although he may not have known of such facts when the prosecution was commenced,[97] and without reference to how or when they were discovered.[98] But when the issue concerns want of probable cause defendant is chargeable with actual or constructive knowledge with reference only to the time of causation of the original proceeding.[99]

b. Belief in Guilt of Accused — (i) *IN GENERAL.* Except where the existence of probable cause appears as a matter of law[1] one of the necessary elements of probable cause[2] is the actual and honest belief by the prosecutor that the accused

92. Flora *v.* Russell, 138 Ind. 153, 37 N. E. 593.

Where defendant had actual knowledge of the fact that plaintiff committed the act for which defendant prosecuted him no action lies. Hagelund *v.* Murphy, 54 Nebr. 545, 74 N. W. 956.

93. Barber *v.* Scott, 92 Iowa 52, 60 N. W. 497. Where defendant received a postal which could be construed as implying a threat, yet if he knew of facts sufficient to satisfy him that no threat was intended, there was no probable cause for the subsequent prosecution of plaintiff. Griffin *v.* Pembroke, 64 Mo. App. 263. Where it appeared that there were circumstances of a suspicious nature against defendant in the prosecution, which would amount to probable cause if unexplained, yet if these were denied and satisfactorily explained to the prosecutor before he commenced his prosecution he cannot avail himself of the defense of probable cause. Honeycut *v.* Freeman, 35 N. C. 320.

It is sufficient evidence of want of probable cause that the party making the complaint on a charge of feloniously taking property knew that the other party claimed and had at least a *prima facie* right to the property. Weaver *v.* Townsend, 14 Wend. (N. Y.) 192.

94. Boyd *v.* Mendenhall, 53 Minn. 274, 55 N. W. 45; Tabert *v.* Cooley, 46 Minn. 366, 49 N. W. 124, 13 L. R. A. 463; Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650.

95. *District of Columbia.*—Spitzer *v.* Friedlander, 14 App. Cas. 556.

Kansas.— Atchison, etc., R. Co. *v.* Watson, 37 Kan. 773, 15 Pac. 877.

Maryland.— Cecil *v.* Clarke, 17 Md. 508.

North Carolina.— Swain *v.* Stafford, 25 N. C. 289. *Contra*, Bell *v.* Pearcy, 27 N. C. 83.

Pennsylvania.— Bryant *v.* Kuntz, 25 Pa. Super. Ct. 102.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 34. See also *supra*, note 67.

96. Galloway *v.* Stewart, 49 Ind. 156, 19 Am. Rep. 677; Louisville, etc., R. Co. *v.* Hendricks, 13 Ind. App. 10, 40 N. E. 82, 41 N. E. 14; Macdonald *v.* Schroeder, 28 Pa. Super. Ct. 128; Scott *v.* Sheior, 28 Gratt. (Va.) 891; Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116.

Accordingly evidence coming to the prosecutor's knowledge after the commencement of the original proceeding should be excluded (Thompson *v.* Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554; Stratton *v.* Lockhart, 1 Ind. App. 380, 27 N. E. 715; McIntire *v.* Levering, 148 Mass. 546, 20 N. E. 191, 12 Am. St. Rep. 594, 2 L. R. A. 517; Christian *v.* Hanna, 58 Mo. App. 37; Maynard *v.* Sigman, 65 Nebr. 590, 91 N. W. 576; Nachtman *v.* Hammer, 155 Pa. St. 200, 26 Atl. 311); when offered in defense and not in mitigation (see Smith *v.* King, 62 Conn. 515, 26 Atl. 1059).

97. Lancaster *v.* McKay, 103 Ky. 610, 45 S. W. 887; Bacon *v.* Towne, 4 Cush. (Mass.) 217; Schroeder *v.* Blum, (Nebr. 1905) 103 N. W. 1073; Thurber *v.* Eastern Bldg., etc., Assoc., 118 N. C. 129, 24 S. E. 730; Johnson *v.* Chambers, 32 N. C. 287.

That plaintiff threatened to destroy the building for the burning of which he was prosecuted may be shown, although defendant does not show that such threat came to his knowledge before the commencement of the prosecution. Goggans *v.* Monroe, 31 Ga. 331.

98. Threefoot *v.* Nuckols, 68 Miss. 116, 8 So. 335. And see Pratt *v.* Hampe, 114 Iowa 237, 86 N. W. 292.

99. Alsop *v.* Lidden, 130 Ala. 548, 30 So. 401; Hitson *v.* Sims, 69 Ark. 439, 64 S. W. 219; Barge *v.* Weems, 109 Ga. 685, 35 S. E. 65; L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 121 Fed. 233, 57 C. C. A. 469. Knowledge of the innocence of a person charged with crime, acquired by the prosecutor after the institution of criminal proceedings, is insufficient to establish want of probable cause for the prosecution. Fox *v.* Smith, 25 R. I. 255, 55 Atl. 698.

1. See *infra*, VI, B, 4.

2. *Alabama.*— Steed *v.* Knowles, 79 Ala. 446; Chandler *v.* McPherson, 11 Ala. 916.

was guilty of the offense with which he was charged, induced and justified by such facts and circumstances as would have been sufficient to have aroused a reasonable suspicion of guilt in the mind of a cautious person.[3] Mere honest belief in guilt is not sufficient.[4] A real belief and reasonable grounds for it must concur.[5]

(II) *GOOD FAITH.* The prosecutor must have believed in plaintiff's guilt in good faith.[6] If it appears that he had knowledge of facts which would have explained suspicious appearances and have exonerated the accused he cannot justify the prosecution by assertion of the circumstances indicative of guilt.[7] If all the facts and circumstances under which he acted show that there was no probable cause for his conduct,[8] or that his belief was groundless,[9] or could not have been formed without gross ignorance or negligence,[10] his belief in guilt is no defense.

Arkansas.— Foster *v.* Pitts, 63 Ark. 387, 38 S. W. 1114.

California.— Harkrader *v.* Moore, 44 Cal. 144.

Illinois.—Angelo *v.* Faul, 85 Ill. 106.

Massachusetts.— Connery *v.* Manning, 163 Mass. 44, 39 N. E. 558.

Minnesota.— Smith *v.* Munch, 65 Minn. 256, 68 N. W. 19.

New Jersey.— O'Brien *v.* Frasier, 47 N. J. L. 349, 1 Atl. 465, 54 Am. Rep. 170.

New York.— Scanlan *v.* Cowley, 2 Hilt. 489.

Texas.— McManus *v.* Wallis, 52 Tex. 534.

Wisconsin.— Spear *v.* Hiles, 67 Wis. 350, 30 N. W. 506.

Canada.— Pring *v.* Wyatt, 5 Ont. L. Rep. 505.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 26 *et seq.*

3. *Arkansas.*— Hitson *v.* Sims, 69 Ark. 439, 64 S. W. 219.

Illinois.— Angelo *v.* Faul, 85 Ill. 106; Anderson *v.* Friend, 71 Ill. 475; Bourne *v.* Stout, 62 Ill. 261; Tumalty *v.* Parker, 100 Ill. App. 382; Gardiner *v.* Bunn, 24 Ill. App. 627.

Indiana.— Lacy *v.* Mitchell, 23 Ind. 67.

Kentucky.— Faris *v.* Starke, 3 B. Mon. 4.

Maine.— Humphries *v.* Parker, 52 Me. 502.

Massachusetts.— Bacon *v.* Towne, 4 Cush. 217.

Mississippi.— Planters' Ins. Co. *v.* Williams, 60 Miss. 916; Whitfield *v.* Westbrook, 40 Miss. 311.

Missouri.— Christian *v.* Hanna, 58 Mo. App. 37.

Nebraska.— Chicago, etc., R. Co. *v.* Kriski, 30 Nebr. 215, 46 N. W. 520.

New York.— Hall *v.* Suydam, 6 Barb. 83; Scanlan *v.* Cowley, 2 Hilt. 489; Moses *v.* Dickinson, 2 N. Y. City Ct. 184.

North Carolina.— Rice *v.* Ponder, 29 N. C. 390.

Pennsylvania.— McClafferty *v.* Philp, 151 Pa. St. 86, 24 Atl. 1042; Coyle *v.* Snellenburg, 30 Pa. Super. Ct. 246; Baker *v.* Moore, 29 Pa. Super. Ct. 301; Macdonald *v.* Schroeder, 28 Pa. Super. Ct. 128; Lear *v.* Watson, 16 Montg. Co. Rep. 150.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 26 *et seq.*

The test.— Conduct sufficient to excite a well grounded suspicion in men unskilled in technical rules of law is not the test, in an action for malicious prosecution, of probable cause; nor is allowance to be made for the prejudice, partiality, and excitement of a person instituting a prosecution, but the standard is what a reasonably prudent man would do. Reynolds *v.* Dunlap, (Kan. 1906) 84 Pac. 720.

4. *Alabama.*— Long *v.* Rodgers, 19 Ala. 321.

Georgia.— Joiner *v.* Ocean Steam Ship Co., 86 Ga. 238, 12 S. E. 361.

Indiana.— Graeter *v.* Williams, 55 Ind. 461; Lawrence *v.* Lanning, 4 Ind. 194.

Iowa.— Shaul *v.* Brown, 28 Iowa 37, 4 Am. Rep. 151.

Maine.— Humphries *v.* Parker, 52 Me. 502.

Maryland.— Johns *v.* Marsh, 52 Md. 323.

New York.— Thompson *v.* Lumley, 50 How. Pr. 105.

Pennsylvania.— Le Maistre *v.* Hunter, Brightly 494.

Texas.— Ramsey *v.* Arrott, 64 Tex. 320.

West Virginia.—Vinal *v.* Core, 18 W. Va. 1.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 26 *et seq.*

Where one, through his own error, mistake, or negligence causes the arrest and imprisonment of an innocent man, who has given no occasion for suspicion by his own misconduct, the assurance of the complainant, however strong it may be, that the accused was guilty of the crime imputed to him, is not sufficient evidence of probable cause for such arrest. Merriam *v.* Mitchell, 13 Me. 439, 29 Am. Dec. 514.

5. Vansickle *v.* Brown, 68 Mo. 627; Farnam *v.* Feeley, 56 N. Y. 451; Mowry *v.* Whipple, 8 R. I. 360 (not mere belief arising from some mental peculiarity and error of defendant himself); Eggett *v.* Allen, 119 Wis. 625, 96 N. W. 803.

6. Bourne *v.* Stout, 62 Ill. 261; Weil *v.* Israel, 42 La. Ann. 955, 8 So. 826; Ehrman *v.* Hoyt, 3 Ohio Dec. (Reprint) 308.

7. Fagnan *v.* Knox, 66 N. Y. 525.

8. Whitney *v.* New York Casualty Ins. Assoc., 27 N. Y. App. Div. 320, 50 N. Y. Suppl. 227.

9. Whitney *v.* New York Casualty Ins. Assoc., 27 N. Y. App. Div. 320, 50 N. Y. Suppl. 227.

10. Jacks *v.* Stimpson, 13 Ill. 701; Flam *v.* Lee, 116 Iowa 289, 90 N. W. 70, 93 Am. St. Rep. 242.

c. Acts and Admissions. While probable cause may be shown by proof of public motive[11] in defendant's conduct, its want may be caused to appear by the acts and admissions of the prosecutor[12] inconsistent with an honest belief in plaintiff's guilt,[13] and showing that the law was set in motion to serve his own personal purposes.[14]

d. Taking Advice of Counsel — (I) *How Far a Defense* — (A) *Full Defense.* It is the general rule that in an action for malicious prosecution defendant may make out the complete defense of probable cause[15] by showing that he submitted to proper counsel a statement conforming to legal requirements concerning the guilt of the accused; that in good faith he received advice justifying the prosecution and acted on that advice in instituting the proceedings complained of; and that if he showed these things he is entitled to immunity from damages,[16] although

In case of a mistake or error, not amounting to gross negligence, he will not be liable upon the ground of want of probable cause, where acting under an honest belief of the probable guilt of the accused. McGuire *v.* Goodman, 31 Ill. App. 420. But, if the belief was induced alone by the gross error, mistake, or negligence, it will not amount to probable cause. Le Maistre *v.* Hunter, Brightly (Pa.) 494.

11. See *supra*, VI, B, 1, b.

12. Cartwright *v.* Elliott, 45 Ill. App. 458; Casebeer *v.* Rice, 18 Nebr. 203, 24 N. W. 693.

13. Montross *v.* Bradsby, 68 Ill. 185 (procuring an indictment for perjury of an affidavit, knowing, or having good reason to believe, the affidavit to be true); Wanser *v.* Wyckoff, 9 Hun (N. Y.) 178 (the arrest for grand larceny when a mere trespass has been committed).

14. As where respectable citizens are wantonly and illegally arrested and incarcerated in jail on trumped-up charges of grave crime (Pace *v.* Aubrey, 43 La. Ann. 1052, 10 So. 381, where prosecutor confessed that his only purpose was to procure immunity for his brother for the same offenses, or where one is arrested on criminal process in which he was falsely charged with fraud for the purpose of coercing him to surrender to the prosecutor certain promissory notes, of which each of them was part-owner (Kimbal *v.* Bates, 50 Me. 308); or to obtain possession and ownership of personal property alleged to have been stolen (Schofield *v.* Ferrers, 47 Pa. St. 194, 86 Am. Dec. 532); or prosecution for larceny for taking up animals and posting as strays, under stray laws (Bauer *v.* Clay, 8 Kan. 580); or arrest and imprisonment for failure to return, on demand, a machine, title to which was to remain in defendant until paid for, after defendant had permitted plaintiff to transfer it (Davidoff *v.* Wheeler, etc., Mfg. Co., 14 Misc. (N. Y.) 456, 35 N. Y. Suppl. 1019 [*affirmed* in 16 Misc. 31, 37 N. Y. Suppl. 661].

15. *Kentucky.*— Miller *v.* Metropolitan L. Ins. Co., 89 S. W. 183, 28 Ky. L. Rep. 223.

Louisiana.—Sandoz *v.* Veazie, 106 La. 202, 30 So. 767.

Ohio.— Eihlert *v.* Gommoll, 23 Ohio Cir. Ct. 586.

Pennsylvania.— Fisher *v.* Forrester, 33 Pa. St. 501.

United States.— Widmeyer *v.* Felton, 95 Fed. 926.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 41 *et seq.*

16. *Alabama.*— Shannon *v.* Sims, (1906) 40 So. 574; O'Neal *v.* McKinna, 116 Ala. 606, 22 So. 905; Jordan *v.* Alabama Great Southern R. Co., 81 Ala. 220, 8 So. 191; Motes *v.* Bates, 80 Ala. 382; Leaird *v.* Davis, 17 Ala. 27.

California.— Sandell *v.* Sherman, 107 Cal. 391, 40 Pac. 493; Jones *v.* Jones, 71 Cal. 89, 11 Pac. 817; Levy *v.* Brannan, 39 Cal. 485.

Colorado.— Struby-Estabrook Mercantile Co. *v.* Kyes, 9 Colo. App. 190, 48 Pac. 663.

Illinois.— Neufeld *v.* Rodeminski, 144 Ill. 83, 32 N. E. 913; Anderson *v.* Friend, 71 Ill. 475; Wicker *v.* Hotchkiss, 62 Ill. 107, 14 Am. Rep. 75; Chicago Forge, etc., Co. *v.* Rose, 69 Ill. App. 123.

Indiana.— Terre Haute, etc., R. Co. *v.* Mason, 148 Ind. 578, 46 N. E. 332.

Kansas.— Atchison, etc., R. Co. *v.* Brown, 57 Kan. 785, 48 Pac. 31.

Kentucky.— Farmers', etc., Tobacco Warehouse Co. *v.* Gibbons, 107 Ky. 611, 55 S. W. 2, 21 Ky. L. Rep. 1348; Mesker *v.* McCourt, 44 S. W. 975, 19 Ky. L. Rep. 1897.

Maryland.— Cooper *v.* Utterbach, 37 Md. 282.

Massachusetts.— Donnelly *v.* Daggett, 145 Mass. 314, 14 N. E. 161; Stone *v.* Swift, 4 Pick. 389, 16 Am. Dec. 349.

Michigan.— Wakely *v.* Johnson, 115 Mich. 285, 73 N. W. 238; Tryon *v.* Pingree, 112 Mich. 338, 70 N. W. 905, 67 Am. St. Rep. 398, 37 L. R. A. 222; Fletcher *v.* Chicago, etc., R. Co., 109 Mich. 363, 67 N. W. 330; Poupard *v.* Dumas, 105 Mich. 326, 63 N. W. 301; Le Clear *v.* Perkins, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627.

Mississippi.— Whitfield *v.* Westbrook, 40 Miss. 311.

Missouri.— Sappington *v.* Watson, 50 Mo. 83; Hill *v.* Palm, 38 Mo. 13.

Montana.— Martin *v.* Corscadden, (1906) 86 Pac. 33.

New Hampshire.— Eastman *v.* Keasor, 44 N. H. 518.

New York.— Ferguson *v.* Arnow, 142 N. Y. 580, 37 N. E. 626.

Ohio.— Ash *v.* Marlow, 20 Ohio 119.

Pennsylvania.— Walter *v.* Sample, 25 Pa. St. 275; Myers *v.* Litts, 3 Lack. Leg. N. 363.

it may appear that the facts did not warrant the advice nor the prosecution,[17] or that the accused was innocent.[18]

(B) *Partial Defense.* Advice of counsel is entitled to at least consideration in determining probable cause,[19] but some decisions are to the effect that it is not of itself sufficient as a defense,[20] and is not conclusive of plaintiff's inability to prevail.[21]

(II) *ELEMENTS* — (A) *By Whom Given* — (1) PRIVATE COUNSEL. The advice to avail as a defense must have been given by a competent,[22] disinterested,[23] regularly admitted and practising attorney and counselor at law[24] in good standing[25] who is not the defendant himself[26] but another attorney, selected in good faith.[27]

Rhode Island.— Goldstein *v.* Foulkes, 19 R. I. 291, 36 Atl. 9; Bartlett *v.* Brown, 6 R. I. 37, 75 Am. Dec. 675.

South Dakota.— Wuest *v.* American Tobacco Co., 10 S. D. 394, 73 N. W. 903.

Texas.— Lenoir *v.* Marlin, 10 Tex. Civ. App. 376, 30 S. W. 566.

United States.— Staunton *v.* Goshorn, 94 Fed. 52, 36 C. C. A. 75; Coggswell *v.* Bohn, 43 Fed. 411; Blunk *v.* Atchison, etc., R. Co., 38 Fed. 311.

Canada.— Fellowes *v.* Hutchison, 12 U. C. Q. B. 633.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 41 *et seq.*

17. *Alabama.*— Steed *v.* Knowles, 79 Ala. 446.

California.— Potter *v.* Seale, 8 Cal. 217.

Iowa.— Center *v.* Spring, 2 Iowa 393.

Missouri.— Warren *v.* Flood, 72 Mo. App. 199.

New York.— Hall *v.* Suydam, 6 Barb. 83.

Ohio.— Johnson *v.* McDaniel, 5 Ohio S. & C. Pl. Dec. 717, 7 Ohio N. P. 467.

Pennsylvania.— Walter *v.* Sample, 25 Pa. St. 275.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 41 *et seq.*

The bona fide acts of a party on advice given by counsel after a full and fair statement of the facts are evidence of probable cause, however erroneous the opinion may be (Richardson *v.* Virtue, 2 Hun (N. Y.) 208; Hall *v.* Suydam, 6 Barb. (N. Y.) 83), even though the facts did not warrant the advice and prosecution (Poupard *v.* Dumas, 105 Mich. 326, 63 N. W. 301). See *infra*, VI, B, 2, d, (II), (D).

18. Hicks *v.* Brantley, 102 Ga. 264, 29 S. E. 459; Morrow *v.* Carnes, 108 Ill. App. 621.

19. Hall *v.* Kehoe, 5 Silv. Sup. (N. Y.) 129, 8 N. Y. Suppl. 176. In some jurisdictions it is held to afford strong evidence that there was probable cause (Murphy *v.* Larson, 77 Ill. 172; Skidmore *v.* Bricker, 77 Ill. 164), and that the prosecution was not malicious (Atkinson *v.* Van Cleave, 25 Ind. App. 508, 57 N. E. 731; Sparling *v.* Conway, 75 Mo. 510 [*affirming* 6 Mo. App. 283]). In others defendant will not be allowed to show, as evidence of probable cause, that he consulted an attorney and obtained legal advice before taking any steps in relation to the prosecution (Collard *v.* Gay, 1 Tex. 494), where a statement of the facts shows want of probable cause (Shannon *v.* Jones, 76 Tex. 141, 13 S. W. 477); for where probable cause is shown, that of itself is sufficient as a defense irrespective of whether he consulted, or what advice he received from, an attorney (Holt *v.* Follett, 65 Tex. 550).

20. Hall *v.* Kehoe, 5 Silv. Sup. (N. Y.) 129, 8 N. Y. Suppl. 176.

It is not a complete defense.— Johnson *v.* Miller, 69 Iowa 562, 29 N. W. 743, 58 Am. Rep. 231; Butcher *v.* Hoffman, 99 Mo. App. 239, 73 S. W. 266; Brown *v.* McBride, 24 Misc. (N. Y.) 235, 52 N. Y. Suppl. 620; Morgan *v.* Duffy, 94 Tenn. 686, 30 S. W. 735.

Where defendant acts from motives of private interest and without probable cause to support the prosecution, his action under the advice of counsel will not exempt him from liability. Freeman *v.* Wright, 113 Ill. App. 159; Grundy *v.* Crescent News, etc., Co., 38 La. Ann. 974; Glascock *v.* Bridges, 15 La. Ann. 672.

21. Lytton *v.* Baird, 95 Ind. 349; Gulf, etc., R. Co. *v.* James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743.

In some jurisdictions it has been held that evidence that an attorney upon a full and fair representation of facts advised the prosecution does not establish the existence of probable cause. Smith *v.* Eastern Bldg., etc., Assoc., 116 N. C. 73, 20 S. E. 963; Ramsey *v.* Arrott, 64 Tex. 320. But see Lenoir *v.* Marlin, 10 Tex. Civ. App. 376, 30 S. W. 566; Sebastian *v.* Cheney, (Tex. Civ. App. 1893) 24 S. W. 970 [*reversed* in 86 Tex. 497, 25 S. W. 691].

22. Murphy *v.* Larson, 77 Ill. 172; Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650.

23. Kansas, etc., Coal Co. *v.* Galloway, 71 Ark. 351, 74 S. W. 521, 100 Am. St. Rep. 79; White *v.* Carr, 71 Me. 555, 36 Am. Rep. 533. And see Watt *v.* Corey, 76 Me. 87; Adkin *v.* Pillen, 136 Mich. 682, 100 N. W. 176.

24. Murphy *v.* Larson, 77 Ill. 172; Burgett *v.* Burgett, 43 Ind. 78; Olmstead *v.* Partridge, 16 Gray (Mass.) 381; Stanton *v.* Hart, 27 Mich. 539.

That he was licensed is sufficient, without showing that he was learned in the law. Horne *v.* Sullivan, 83 Ill. 30.

25. Schattgen *v.* Holnback, 149 Ill. 646, 36 N. E. 969; Roy *v.* Goings, 112 Ill. 656; Murphy *v.* Larson, 77 Ill. 172; Young *v.* Lindstrom, 115 Ill. App. 239; Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650.

26. Epstein *v.* Berkowsky, 64 Ill. App. 498.

Although defendant was himself an able lawyer it may be shown that defendant acted on the advice of counsel. Terre Haute, etc., R. Co. *v.* Mason, 148 Ind. 578, 46 N. E. 332.

27. See *infra*, VI, B, 2, d, (II), (D), (I).

(2) PUBLIC COUNSEL. Counsel for the state, as the attorney-general,[28] or for a subdivision of the state, as the county, district, or prosecuting attorney,[29] are by virtue of their standing as practising lawyers,[30] and of their official capacity proper, and in fact the usual persons to give such advice.

(3) UNAUTHORIZED PERSONS. The advice of unprofessional persons,[31] not practising lawyers,[32] although they may be connected with the administration of the law indirectly,[33] and although they may be magistrates[34] who are not authorized

28. Gilbertson *v.* Fuller, 40 Minn. 413, 42 N. W. 203.

29. *Illinois.*—Albrecht *v.* Ward, 91 Ill. App. 38.

Indiana.— Terre Haute, etc., R. Co. *v.* Mason, 148 Ind. 578, 46 N. E. 332.

Michigan.— Fowles *v.* Hayden, 129 Mich. 586, 89 N. W. 339.

New Jersey.— Magowan *v.* Rickey, 64 N. J. L. 402, 45 Atl. 804.

Texas.— Rogers *v.* Mullins, 26 Tex. Civ. App. 250, 63 S. W. 897; Brady *v.* Georgia Home Ins. Co., 24 Tex. Civ. App. 464, 59 S. W. 914.

Wisconsin.— Brinsley *v.* Schulz, 124 Wis. 426, 102 N. W. 918.

United States.— Ambs *v.* Atchison, etc., R. Co., 114 Fed. 317.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 45.

Acting county attorney.—But when the evidence shows that defendant acted on the advice of the acting county attorney, as well as the advice of the city marshal, the action cannot be sustained. Russell *v.* Deer, 7 Ill. App. 181.

Attorney sent by prosecuting attorney.— Chicago, etc., R. Co. *v.* Pierce, 98 Ill. App. 368.

Prosecuting attorney and other counsel.— Evidence that defendant made a full and fair statement of all the facts known to him to the prosecuting attorney and his own attorney, and acted upon their advice in good faith, shows probable cause for commencing the prosecution. Workman *v.* Shelly, 79 Ind. 442; Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860; Genevey *v.* Edwards, 55 Minn. 88, 56 N. W. 578.

Omission to consult the district attorney previous to submitting the case to the grand jury does not affect the defense. Baldwin *v.* Weed, 17 Wend. (N. Y.) 224.

30. One who is intemperate is not necessarily in good standing because he is state's attorney. Roy *v.* Goings, 112 Ill. 656.

31. Sweeney *v.* Perney, 40 Kan. 102, 19 Pac. 328 (certain property-owners of the road district); Olmstead *v.* Partridge, 16 Gray (Mass.) 381 (one not an attorney); Griffin *v.* Pembroke, 64 Mo. App. 263 (other persons' erroneous advice that the statement of facts showed accused guilty of the crime alleged).

32. Murphy *v.* Larson, 77 Ill. 172 (a person whom defendant supposed was a licensed attorney and competent to advise, but who in fact was not licensed); Stanton *v.* Hart, 27 Mich. 539 (one not admitted to practise law, but who had merely done a little pettifogging before a justice of the peace); Grant *v.* Reinhart, 33 Mo. App. 74 (collecting agents, there being no showing that such agents were attorneys or persons learned in the law).

33. Coleman *v.* Heurich, 2 Mackey (D. C.) 189 (police officer); Truax *v.* Pennsylvania R. Co., 58 N. J. L. 218, 33 Atl. 278; Breitmesser *v.* Stier, 13 Phila. (Pa.) 80 (a detective).

34. *Alabama.*—Marks *v.* Hastings, 101 Ala. 165, 13 So. 297.

Colorado.— Florence Oil, etc., Co. *v.* Huff, 14 Colo. App. 281, 59 Pac. 624.

District of Columbia.—Coleman *v.* Heurich, 2 Mackey 189.

Illinois.— Murphy *v.* Larson, 77 Ill. 172.

Indiana.— Burgett *v.* Burgett, 43 Ind. 78.

Iowa.— Necker *v.* Bates, 118 Iowa 545, 92 N. W. 667. *Compare* Newman *v.* Davis, 58 Iowa 447, 10 N. W. 852.

Kansas.— Dolbe *v.* Norton, 22 Kan. 101.

Maine.— Finn *v.* Frink, 84 Me. 261, 24 Atl. 851, 30 Am. St. Rep. 348.

Massachusetts.— Olmstead *v.* Partridge, 16 Gray 381; Stone *v.* Swift, 4 Pick. 389, 16 Am. Dec. 349.

Michigan.— Holmes *v.* Horger, 96 Mich. 408, 56 N. W. 3; Cooney *v.* Chase, 81 Mich. 203, 45 N. W. 833.

Missouri.— Moore *v.* Sauborin, 42 Mo. 490; Williams *v.* Vanmeter, 8 Mo. 339, 41 Am. Dec. 644.

New York.— Parr *v.* Loder, 97 N. Y. App. Div. 218, 89 N. Y. Suppl. 823.

Oregon.— Gee *v.* Culver, 12 Oreg. 228, 6 Pac. 775.

Pennsylvania.— Mentel *v.* Hippely, 165 Pa. St. 558, 30 Atl. 1021; Beihofer *v.* Loeffert, 159 Pa. St. 365, 28 Atl. 217; Brobst *v.* Ruff, 100 Pa. St. 91, 45 Am. Rep. 358; Auer *v.* Mauser, 6 Pa. Super. Ct. 618, 42 Wkly. Notes Cas. 40. *Contra,* Thomas *v.* Painter, 10 Phila. 409; Rosenstein *v.* Feigel, 6 Phila. 532.

Tennessee.— Mauldin *v.* Ball, 104 Tenn. 597, 58 S. W. 248; Morgan *v.* Duffy, 94 Tenn. 686, 30 S. W. 735.

Wisconsin.— Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101; Sutton *v.* McConnell, 46 Wis. 269, 50 N. W. 414.

Contra.— Ball *v.* Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; Hahn *v.* Schmidt, 64 Cal. 284, 30 Pac. 818; Potter *v.* Seale, 8 Cal. 217; Sisk *v.* Hurst, 1 W. Va. 53; Carratt *v.* Morley, 1 Q. B. 18, 1 G. & D. 275, 6 Jur. 259, 10 L. J. Q. B. 259, 41 E. C. L. 417; Cohen *v.* Morgan, 6 D. & R. 8, 28 Rev. Rep. 533, 16 E. C. L. 250; Leigh *v.* Webb, 3 Esp. 164. However, defendant cannot claim protection even in California, where he has concealed facts from the magistrate which, if disclosed, would have prevented the issuance

to give advice to or to act as attorney at law for an interested party [35] is insufficient to show probable cause or excuse the want of it.

(B) *The Disclosure* — (1) FULL, FAIR, AND COMPLETE. To justify by advice of counsel defendant must show that he or his prosecuting agent [36] truly and correctly,[37] fully and fairly,[38] and in good faith [39] stated to such counsel all the facts bearing upon the guilt or innocence of the accused. The making of an exaggerated,[40] misrepresented,[41] incorrect statement,[42] or the withholding of any material fact,[43] is inconsistent with probable cause.[44] It must appear what information was in fact imparted so that the jury may determine whether it was a full, truthful statement of all the facts.[45]

(2) OF WHAT FACTS. All authorities agree that all facts of which defendant

of the warrant. Cochran *v.* Bones, 1 Cal. App. 729, 82 Pac. 970.

Committing magistrate.—Defendant cannot excuse himself by showing that he acted under the advice of the committing magistrate. Potter *v.* Casterline, 41 N. J. L. 22. And it is error to allow proof of it. Rigden *v.* Jordan, 81 Ga. 668, 7 S. E. 857.

Justice of district court.—Evidence that defendant in making the complaint acted on the advice of a justice of a district court is admissible as tending to show that defendant acted in good faith and with probable cause. Monaghan *v.* Cox, 155 Mass. 487, 30 N. E. 467, 31 Am. St. Rep. 555.

35. Although the magistrate was a practising attorney, the advice being given, not as an attorney, but as a magistrate (Marks *v.* Hastings, 101 Ala. 165, 13 So. 297); as legal advice in such cases, to be a justification, must be given by counsel learned in the law (Rigden *v.* Jordan, 81 Ga. 668, 7 S. E. 857; Sutton *v.* McConnell, 46 Wis. 269, 50 N. W. 414). But see Britton *v.* Granger, 13 Ohio Cir. Ct. 281, 7 Ohio Cir. Dec. 182, where it was held competent for defendant, a police officer, to show that after making the arrest he took the advice of an attorney at law, before making the affidavit upon which the prosecution was based.

36. Jeremy *v.* St. Paul Boom Co., 84 Minn. 516, 88 N. W. 13.

37. Whitehead *v.* Jessup, 2 Colo. App. 76, 29 Pac. 916; Harris *v.* Woodford, 98 Mich. 147, 57 N. W. 96; Webster *v.* Fowler, 89 Mich. 303, 50 N. W. 1074; Thompson *v.* Lumley, 50 How. Pr. (N. Y.) 105.

38. *Alabama.*— Steed *v.* Knowles, 79 Ala. 446.

California.—Dawson *v.* Schloss, 93 Cal. 194, 29 Pac. 31; Wild *v.* Odell, 56 Cal. 136.

Kansas.— Atchison, etc., R. Co. *v.* Brown, 57 Kan. 785, 48 Pac. 31.

Louisiana.— Sandoz *v.* Veazie, 106 La. 202, 30 So. 767.

Michigan.— Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. N. S. 928.

Minnesota.— Flikkie *v.* Oberson, 82 Minn. 82, 84 N. W. 651; Norrell *v.* Vogel, 39 Minn. 107, 38 N. W. 705.

Montana.— Martin *v.* Corscadden, (1906) 86 Pac. 33.

New York.— Howe *v.* Oldham, 69 Hun 57, 23 N. Y. Suppl. 703; Willard *v.* Holmes, 2 Misc. 303, 21 N. Y. Suppl. 998.

Ohio.— Broerman *v.* Ryan, 18 Ohio Cir. Ct. 877, 6 Ohio Cir. Dec. 15.

Pennsylvania.— Leahey *v.* March, 155 Pa. St. 458, 26 Atl. 701.

United States.— Cuthbert *v.* Galloway, 35 Fed. 466.

Canada.— Scougall *v.* Stapleton, 12 Ont. 206.

39. Bliss *v.* Wyman, 7 Cal. 257; Logan *v.* Maytag, 57 Iowa 107, 10 N. W. 311; Davidoff *v.* Wheeler, etc., Mfg. Co., 14 Misc. (N. Y.) 456, 35 N. Y. Suppl. 1019 [*affirmed* in 16 Misc. 31, 37 N. Y. Suppl. 661]; Marx *v.* Mann, 1 Pa. Co. Ct. 262.

To constitute a good defense it is necessary that defendant should in perfect good faith have obtained the advice of a competent and reliable attorney upon a full and accurate statement of facts (Davie *v.* Wisher, 72 Ill. 262), as he understood them, on the faith of which counsel acted in advising the prosecution (Weil *v.* Israel, 42 La. Ann. 955, 8 So. 826), and that he honestly followed advice given (Barhight *v.* Tammany, 158 Pa. St. 545, 28 Atl. 135, 38 Am. St. Rep. 853).

40. Flora *v.* Russell, 138 Ind. 153, 37 N. E. 593.

41. Cointement *v.* Cropper, 41 La. Ann. 303, 6 So. 127; Block *v.* Meyers, 33 La. Ann. 776; Decoux *v.* Lieux, 33 La. Ann. 392; Cole *v.* Curtis, 16 Minn. 182 (misrepresentation of the case); Miles *v.* Walker, 66 Nebr. 728, 92 N. W. 1014 (untrue statement).

42. Lawrence *v.* Leathers, 31 Ind. App. 414, 68 N. E. 179; Kendrick *v.* Cypert, 10 Humphr. (Tenn.) 291. See also cases cited *supra*, note 38.

43. *Maine.*—Stevens *v.* Fassett, 27 Me. 266.

Minnesota.— Norrel *v.* Vogel, 39 Minn. 107, 38 N. W. 705.

Nebraska.—Peterson *v.* Reisdorph, 49 Nebr. 529, 68 N. W. 943.

Pennsylvania.— Replogle *v.* Frothingham, 16 Pa. Super. Ct. 374.

Texas.— Rogers *v.* Mullins, 26 Tex. Civ. App. 250, 63 S. W. 897.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 42.

44. Le Maistre *v.* Hunter, Brightly (Pa.) 494.

45. Struby-Estahrook Mercantile Co. *v.* Kyes, 9 Colo. App. 190, 48 Pac. 663; Jonasen *v.* Kennedy, 39 Nebr. 313, 58 N. W. 122; Merchant *v.* Pielke, 10 N. D. 48, 84 N. W. 574. See also *infra*, XIV, C, 5, h.

had knowledge must be stated.[46] It has been held that these are the only ones he is required to disclose.[47] The general rule is, however, that he must also state to the counsel all facts he had reasonable grounds to believe existed at that time,[48] or all facts of which he could have ascertained by reasonable diligence,[49] or both classes of facts.[50]

(c) *The Advice Given.* Defendant must show what advice was given him by counsel,[51] if any was given,[52] and that on the statements made by him counsel advised the prosecution[53] or informed him that the indictment would lie.[54]

46. King *v.* Erskins, 116 La. 480, 40 So. 844; Pandjiris *v.* Hartman, 196 Mo. 539, 94 S. W. 270. See also cases cited *supra*, note 36 *et seq.*; and *infra*, note 48 *et seq.*

47. Scrivani *v.* Dondero, 128 Cal. 31, 60 Pac. 463; Holliday *v.* Holliday, 123 Cal. 26, 55 Pac. 703, 53 Pac. 42; Dunlap *v.* New Zealand F. & M. Ins. Co., 109 Cal. 365, 42 Pac. 29; Johnson *v.* Miller, 69 Iowa 562, 29 N. W. 743, 58 Am. Rep. 231; Hess *v.* Oregon German Baking Co., 31 Oreg. 503, 49 Pac. 803.

Extent of rule.—Advice of counsel, of a full and fair statement of the facts, does not cease to be a defense because the prosecutor could, by the exercise of reasonable diligence and prudence, have learned that those on whose information he acted were of bad character for truth and veracity, there being no known facts and circumstances calculated to arouse suspicion as to the truth of their statements. Jordan *v.* Alabama Great Southern R. Co., 81 Ala. 220, 8 So. 191.

All material facts.— It has been held that to constitute advice of counsel a defense, it is not necessary that the prosecutor should have made a full and fair disclosure of all the facts, but only of all facts known to him, or those which he could have ascertained by reasonable diligence. Motes *v.* Bates, 80 Ala. 382. Defendant is only required to state fully and fairly all the material facts which he knew or had reasonable ground to believe existed at the time. Johnson *v.* Miller, 69 Iowa 562, 29 N. W. 743, 58 Am. Rep. 231. See also McLeod *v.* McLeod, 73 Ala. 42; Roy *v.* Goings, 112 Ill. 656.

48. *Illinois.*— Anderson *v.* Friend, 85 Ill. 135.

Iowa.— Johnson *v.* Miller, 69 Iowa 562, 29 N. W. 743, 58 Am. Rep. 231, but not facts which he could have ascertained by reasonable diligence.

Kansas.— Schippel *v.* Norton, 38 Kan. 567, 16 Pac. 804.

Maryland.— Thelin *v.* Dorsey, 59 Md. 539.

Michigan.— Smith *v.* Austin, 49 Mich. 286, 13 N. W. 593.

Missouri.— Pipkin *v.* Haucke, 15 Mo. App. 373.

Nebraska.— Gillispie *v.* Stafford, 4 Nebr. (Unoff.) 873, 96 N. W. 1039.

Pennsylvania.— Reardon *v.* Pierce, 1 Chest. Co. Rep. 323.

Texas.—Lenoir *v.* Marlin, 10 Tex. Civ. App. 376, 30 S. W. 566.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 40 *et seq.*

49. *California.*— Holliday *v.* Holliday, 123 Cal. 26, 55 Pac. 703.

Illinois.— Anderson *v.* Friend, 71 Ill. 475; Wicker *v.* Hotchkiss, 62 Ill. 107, 14 Am. Rep. 75; Ross *v.* Innis, 35 Ill. 487, 85 Am. Dec. 373; Daily *v.* Donath, 100 Ill. App. 52.

Maryland.— Hyde *v.* Greuch, 62 Md. 577; Cooper *v.* Utterbach, 37 Md. 282.

Michigan.—Wakely *v.* Johnson, 115 Mich. 285, 73 N. W. 238; Pawlowski *v.* Jenks, 115 Mich. 275, 73 N. W. 238.

Missouri.—Sharpe *v.* Johnston, 59 Mo. 557; Sappington *v.* Watson, 50 Mo. 83; Hill *v.* Palm, 38 Mo. 13, even though he honestly supposed some one of these facts was not material.

Nebraska.— Jensen *v.* Halstead, 61 Nebr. 249, 85 N. W. 78.

North Dakota.— Merchant *v.* Pielke, 10 N. D. 48, 84 N. W. 574.

Ohio.— Ash *v.* Marlow, 20 Ohio 119.

South Dakota.—Wuest *v.* American Tobacco Co., 10 S. D. 394, 73 N. W. 903.

Tennessee.— Cooper *v.* Flemming, 114 Tenn. 40, 84 S. W. 801, 68 L. R. A. 849.

United States.— Blunk *v.* Atchison, etc., R. Co., 38 Fed. 311.

Canada.— St. Denis *v.* Shoultz, 25 Ont. App. 131.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 40 *et seq.*

50. Maynard *v.* Sigman, 65 Nebr. 590, 91 N. W. 576; Humphreys *v.* Mead, 23 Pa. Super. Ct. 415; Replogle *v.* Frothingham, 16 Pa. Super. Ct. 374.

The distinction between cases which require disclosure only with reference to reasonable grounds from those which are based on due diligence is not clear. The two *criteria* are commonly used interchangeably as equivalents. In Iowa, however, it has been held erroneous to charge that defendant must have submitted to counsel all facts which he could have ascertained by reasonable diligence, because he was only required to state all the material facts which he knew or had reasonable ground to believe existed at the time. Johnson *v.* Miller, 69 Iowa 562, 29 N. W. 743, 58 Am. Rep. 231.

51. Burris *v.* North, 64 Mo. 426; Turner *v.* Dinnegar, 20 Hun (N. Y.) 465; Beihofer *v.* Loeffert, 159 Pa. St. 365, 28 Atl. 217.

52. Holden *v.* Merritt, 92 Iowa 707, 61 N. W. 390, it appearing that the attorney from whom the advice was asked gave no advice, but referred defendant to the United States officers.

53. Beihofer *v.* Loeffert, 159 Pa. St. 365, 28 Atl. 217.

54. Chandler *v.* McPherson, 11 Ala. 916. See also *infra*, XIV, C, 5, h.

(D) *Good Faith* — (1) IN SEEKING ADVICE. The advice of counsel must have been honestly sought[55] and understandingly given;[56] but defendant has been held not to be bound in the first instance to prove good faith on his part.[57] Collusion between defendant and his counsel avoids the defense.[58] Advice resorted to in bad faith will not be allowed to operate as a cloak to hide malice.[59] But the bad faith of counsel himself and alone is not material[60] unless brought to defendant's knowledge.[61]

(2) IN ACTING UPON ADVICE. Defendant must show that he acted[62] upon the opinion of such counsel in good faith,[63] believing it to be true.[64] If after having received such advice, he learns of other facts exculpating the accused he is not justified in proceeding upon that advice.[65]

3. CONDUCT AND ADMISSIONS OF ACCUSED — a. In General. All that accused did or omitted to do pertaining to the offense charged under a liberal definition of relevancy[66] and subject to no definite rule is proper to be considered in connec

55. *Colorado.*— Clement *v.* Major, 8 Colo. App. 86, 44 Pac. 776.

Illinois.— Ames *v.* Snider, 69 Ill. 376.

Missouri.— Sharpe *v.* Johnston, 76 Mo. 660.

Tennessee.—Kendrick *v.* Cypert, 10 Humphr. 291.

Texas.— Kleinsmith *v.* Hamlin, (Civ. App. 1901) 66 S. W. 994.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 42.

56. Kendrick *v.* Cypert, 10 Humphr. (Tenn.) 291.

57. Pawlowski *v.* Jenks, 115 Mich. 275, 73 N. W. 238; Krause *v.* Bishop, 18 S. D. 298, 100 N. W. 434.

58. Hamilton *v.* Smith, 39 Mich. 222.

59. Neufeld *v.* Rodeminski, 144 Ill. 83, 32 N. E. 913; McCarthy *v.* Kitchen, 59 Ind. 500; Fisher *v.* Forrester, 33 Pa. St. 501.

But a prosecution for arson, resulting in an acquittal, if instituted on probable cause and under advice of the county attorney, to whom all the material facts were made known by the prosecutor, cannot be made the basis of an action, although the prosecutor's motive was to defeat a claim for insurance. Brady *v.* Georgia Home Ins. Co., 24 Tex. Civ. App. 464, 59 S. W. 914.

60. Seabridge *v.* McAdam, 119 Cal. 460, 51 Pac. 691; Sandell *v.* Sherman, 107 Cal. 391, 40 Pac. 493; Peterson *v.* Toner, 80 Mich. 350, 45 N. W. 346; Shea *v.* Cloquet Lumber Co., 92 Minn. 348, 100 N. W. 111.

61. Shea *v.* Cloquet Lumber Co., 92 Minn. 348, 100 N. W. 111.

62. *Alabama.*— Steed *v.* Knowles, 79 Ala. 446; Leaird *v.* Davis, 17 Ala. 27.

California.— Potter *v.* Seale, 8 Cal. 217.

Illinois.—Loewenthal *v.* Streng, 90 Ill. 74 Gruel *v.* Mengler, 74 Ill. App. 36.

Iowa.— Mesher *v.* Iddings, 72 Iowa 553, 34 N. W. 328; Center *v.* Spring, 2 Iowa 393.

Michigan.—Fletcher *v.* Chicago, etc., R. Co., 109 Mich. 363, 67 N. W. 330.

Missouri.—Williams *v.* Vanmeter, 8 Mo. 339, 41 Am. Dec. 644.

New Hampshire.— Eastman *v.* Keasor, 44 N. H. 518.

New York.— Hall *v.* Suydam, 6 Barb. 83; Ames *v.* Rathbun, 37 How. Pr. 289.

Pennsylvania.—Walter *v.* Sample, 25 Pa. St. 275.

Vermont.— St. Johnsbury, etc., R. Co. *v.* Hunt, 59 Vt. 294, 7 Atl. 277.

United States.— Staunton *v.* Goshorn, 94 Fed. 52, 36 C. C. A. 75, holding that the defense that defendants acted under the advice of attorneys may be sustained, although the advice was taken after the arrest but before the issuance of the warrant.

England.—Ravenga *v.* Mackintosh, 2 B. & C. 693, 9 E. C. L. 302, 1 C. & P. 204, 12 E. C. L. 125, 4 D. & R. 107.

63. *Alabama.*— O'Neal *v.* McKinna, 116 Ala. 606, 22 So. 905.

California.—Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380.

Indiana.— McCarthy *v.* Kitchen, 59 Ind. 500.

Iowa.— Center *v.* Spring, 2 Iowa 393.

Minnesota.— Cole *v.* Curtis, 16 Minn. 182.

Mississippi.— Kehl *v.* Hope Oil-Mill, etc., Co., 77 Miss. 762, 27 So. 641.

Nebraska.— Rosenblatt *v.* Rosenberg, 1 Nebr. (Unoff.) 656, 95 N. W. 686; Hiersche *v.* Scott, 1 Nebr. (Unoff.) 48, 95 N. W. 494.

North Dakota.— Merchant *v.* Pielke, 10 N. D. 48, 84 N. W. 574.

South Dakota.— Jackson *v.* Bell, 5 S. D. 257, 58 N. W. 671.

Wisconsin.— Sherburne *v.* Rodman, 51 Wis. 474, 8 N. W. 414.

See 33 Cent. Dig. tit. "Malicious Prosecution," §§ 42, 46.

Defendant may rebut plaintiff's evidence as to want of probable cause by showing that he acted in good faith, under the advice of counsel, after a full and fair statement of his counsel of the facts of the case. Levy *v.* Brannan, 39 Cal. 485.

64. Center *v.* Spring, 2 Iowa 393; Jackson *v.* Bell, 5 S. D. 257, 58 N. W. 671.

Insufficient if he does not himself believe the accused guilty of the crime charged see McCarthy *v.* Kitchen, 59 Ind. 500; Johnson *v.* Miller, 82 Iowa 693, 47 N. W. 903, 48 N. W. 1081, 31 Am. St. Rep. 514; Cole *v.* Curtis, 16 Minn. 182.

This same rule applies in causing an arrest on civil process. Gould *v.* Gardner, 8 La. Ann. 11.

65. Cole *v.* Curtis, 16 Minn. 182.

66. See *infra*, XIV, C, 5.

tion with all surrounding circumstances, to determine whether or not probable cause existed,[67] and whether or not malice and want of probable cause concurred.[68]

b. Possession of Stolen Property. That a person is found in possession of recently stolen property is evidence of probable cause for believing that such possessor is guilty of larceny,[69] unless he gives a reasonable explanation as to how it came into his possession.[70]

c. Settlement. A settlement[71] or an attempted settlement[72] of a debt with

67. Probable cause.—In the following cases the acts and conduct of plaintiff in the malicious prosecution suit were held to show probable cause for plaintiff's arrest.

California.— Lacey *v.* Porter, 103 Cal. 597, 37 Pac. 635.

Illinois.—Palmer *v.* Richardson, 70 Ill. 544.

Maine.—Varrell *v.* Holmes, 4 Me. 168.

Maryland.— Central R. Co. *v.* Brewer, 78 Md. 394, 28 Atl. 615, 27 L. R. A. 63; Boyd *v.* Cross, 35 Md. 194.

Massachusetts.— Cheever *v.* Sweet, 151 Mass. 186, 23 N. E. 831; Allen *v.* Codman, 139 Mass. 136, 29 N. E. 537.

Michigan.— Rankin *v.* Crane, 104 Mich. 6, 61 N. W. 1007.

Missouri.— Thomas *v.* Smith, 51 Mo. App. 605.

Nebraska.— Fry *v.* Kaessner, 48 Nebr. 133, 66 N. W. 1126; Rider *v.* Murphy, 47 Nebr. 857, 66 N. W. 837, selling liquor without a license, in violation of the liquor law.

New York.— Carl *v.* Ayers, 53 N. Y. 14 (attempted theft of diamond); Kline *v.* Hibbard, 80 Hun 50, 29 N. Y. Suppl. 807 (refusing to remove an obstruction in highway and resisting commissioners when they attempted to remove it); Haupt *v.* Pohlmann, 1 Rob. 121 (larceny); Witham *v.* Thomas, 21 N. Y. Suppl. 176 (cutting trees); Wrench *v.* Samenfeld, 19 N. Y. Suppl. 948 (arrest for wilful injury to real property); Foshay *v.* Ferguson, 2 Den. 617 (stealing cattle); Baldwin *v.* Weed, 17 Wend. 224 (obtaining goods under false pretenses).

Ohio.— Ehrman *v.* Hoyt, 3 Ohio Dec. (Reprint) 308, forcibly entering a residence by forcing a door.

Pennsylvania.— Mitchell *v.* Logan, 172 Pa. St. 349, 33 Atl. 554 (larceny of a satchel); Nachtman *v.* Hammer, 155 Pa. St. 200, 26 Atl. 311 (arson); Mahaffey *v.* Byers, 151 Pa. St. 92, 25 Atl. 93 (breaking safe); Cooper *v.* Hart, 147 Pa. St. 594, 23 Atl. 833 (fraudulently contracting a debt); Sloan *v.* Schomaker, 136 Pa. St. 382, 20 Atl. 525 (breach of the peace); Dietz *v.* Langfitt, 63 Pa. St. 234 (homicide).

See 33 Cent. Dig. tit. "Malicious Prosecution," § 29.

Want of probable cause.— In the following cases the acts and conduct of plaintiff in the malicious prosecution suit showed a want of probable cause for the arrest.

California.—Seabridge *v.* McAdam, 108 Cal. 345, 41 Pac. 409, wilfully tearing down a fence.

Colorado.— Brooks *v.* Bradford, 4 Colo. App. 410, 36 Pac. 303, embezzlement.

Georgia.— Rigden *v.* Jordan, 81 Ga. 668, 7 S. E. 857, swindling.

Illinois.— Chapman *v.* Cawrey, 50 Ill. 512, breaking into a storehouse.

Louisiana.— Osborn *v.* Moore, 12 La. Ann. 714.

New York.— Hazzard *v.* Flury, 120 N. Y. 233, 24 N. E. 194 (larceny of a rug); Anderson *v.* How, 116 N. Y. 336, 22 N. E. 695 (wilfully severing from the freehold of another, under Pen. Code, § 640, anything attached thereto); McCormack *v.* Perry, 47 Hun 71 (opening a sealed letter wilfully and without authority, in violation of Pen. Code, § 642); Bandell *v.* May, 15 N. Y. Suppl. 273 (grand larceny).

Wisconsin.— Morrow *v.* Wood, 35 Wis. 59, 17 Am. Rep. 471, assault and battery.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 29.

68. Smith *v.* Liverpool, etc., Ins. Co., 107 Cal. 432, 40 Pac. 540; Jones *v.* Jones, 71 Cal. 89, 11 Pac. 817; Moses *v.* Dickinson, 2 N. Y. City Ct. 184. And see Emerson *v.* Cochran, 111 Pa. St. 619, 4 Atl. 498.

Plaintiff cannot recover on proof of malice and his own acquittal, when such evidence, acts, and conduct show probable cause. Foshay *v.* Ferguson, 2 Den. (N. Y.) 617. See also *infra*, VII, A; *supra*, VI, A, 2.

69. Thompson *v.* Richardson, 96 Ala. 488, 11 So. 728; McDonald *v.* Atlantic, etc., R. Co., 3 Ariz. 96, 21 Pac. 338.

But the mere possession of goods supposed to be stolen by another would not afford a sufficient probable cause for a prosecution against the possessor as the receiver of stolen goods, when no inquiry was made of such person nor any opportunity given of explaining how such possession was acquired. Swaim *v.* Stafford, 26 N. C. 392.

70. Thompson *v.* Richardson, 96 Ala. 488, 11 So. 728.

71. Fagnan *v.* Knox, 66 N. Y. 525.

72. Rankin *v.* Crane, 104 Mich. 6, 61 N. W. 1007; Harris *v.* Woodford, 98 Mich. 147, 57 N. W. 96. And see Stoddard *v.* Roland, 31 S. C. 342, 9 S. E. 1027, where a mortgage was paid before a warrant was issued for arrest of plaintiff for violating Gen. St (1882) § 2515, providing that any person who disposes of personal property on which there is a mortgage, without the written consent of the mortgagee, and fails to pay the debt within ten days thereafter, or to deposit the amount thereof with the clerk of the court of common pleas of the county where the debtor resides, shall be guilty of a misdemeanor, cannot affect the question as to want of probable

the accused does not of itself show that the criminal proceedings were instituted without probable cause.[73]

d. Admissions. An actual admission of guilt on the part of the accused,[74] but, it has been held, only when made before and not after the arrest,[75] constitutes probable cause for his arrest. Probable cause may also be shown by implied admissions of the accused;[76] waiver of a preliminary examination by the accused has generally been regarded as such an admission,[77] and as *prima facie* evidence of probable cause.[78]

4. Inference From Result — a. Action of Magistrate — (i) *Preliminary Examination.* If the result of the preliminary examination is the discharge of the accused by the magistrate, this has been held to be *prima facie*,[79] but is not

cause for the prosecution, although it might bear on that of malice.

73. Eagleton *v.* Kabrich, 66 Mo. App. 231; Fagnan *v.* Knox, 66 N. Y. 525.

But the arrest of a person on a criminal charge for the purpose of compelling payment of an indebtedness, and an agreement not to prosecute further upon payment of the debt, is *prima facie* evidence of a want of probable cause, and is conclusive, in the absence of satisfactory evidence to the contrary. See Prough *v.* Entriken, 11 Pa. St. 81.

74. Cropley *v.* Given, 30 Leg. Int. (Pa.) 160.

75. Louisville, etc., R. Co. *v.* Hendricks, 13 Ind. App. 10, 40 N. E. 82, 41 N. E. 14.

76. But the fact that the accused moved to dismiss the complaint against him (Wheeler *v.* Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408), or, in an action of slander, admits the speaking of the words, but justifies on the ground that they were true (Sterling *v.* Adams, 3 Day (Conn.) 411), does not thereby impliedly admit probable cause.

77. *Iowa.*— Barber *v.* Scott, 92 Iowa 52, 60 N. W. 497.

Missouri.— Vansickle *v.* Brown, 68 Mo. 627.

North Carolina.—Jones *v.* Wilmington, etc., R. Co., 125 N. C. 227, 34 S. E. 398.

Oregon.— Hess *v.* Oregon German Baking Co., 31 Oreg. 503, 49 Pac. 803.

West Virginia.— Brady *v.* Stiltner, 40 W. Va. 289, 21 S. E. 729.

But where recitals in recognizance are inconsistent with the subsequent proceedings, it is insufficient to show probable cause. Van de Wiele *v.* Callanan, 7 Daly (N. Y.) 386.

78. Louisville, etc., R. Co. *v.* Hendricks, 13 Ind. App. 10, 40 N. E. 82, 41 N. E. 14; Jones *v.* Wilmington, etc., R. Co., 131 N. C. 133, 42 S. E. 559; Hess *v.* Oregon German Baking Co., 31 Oreg. 503, 49 Pac. 803; Brady *v.* Stiltner, 40 W. Va. 289, 21 S. E. 729. In Vansickle *v.* Brown, 68 Mo. 627, the court held the waiver of preliminary examination conclusive of probable cause, but this is contrary to the general rule.

79. *District of Columbia.*— Costello *v.* Knight, 4 Mackey 65.

Louisiana.— Brown *v.* Vittur, 47 La. Ann. 607, 17 So. 193; Bornholdt *v.* Souillard, 36 La. Ann. 103; Plassan *v.* Louisiana Lottery Co., 34 La. Ann. 246.

Maine.— Frost *v.* Holland, 75 Me. 108.

Maryland.— Straus *v.* Young, 36 Md. 246.

Minnesota.— Chapman *v.* Dodd, 10 Minn. 350.

Missouri.— Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650.

North Carolina.— Bostick *v.* Rutherford, 11 N. C. 83; Johnston *v.* Martin, 7 N. C. 248. It imports that the accusation was groundless Griffis *v.* Sellars, 19 N. C. 492, 31 Am. Dec. 422.

Pennsylvania.— Barhight *v.* Tammany, 158 Pa. St. 545, 28 Atl. 135, 38 Am. St. Rep. 853; Cooper *v.* Hart, 147 Pa. St. 594, 23 Atl. 833; Madison *v.* Pennsylvania R. Co., 147 Pa. St. 509, 23 Atl. 764, 30 Am. St. Rep. 756.

Virginia.— Jones *v.* Finch, 84 Va. 204, 4 S. E. 342.

Washington.—Noblett *v.* Bartsch, 31 Wash. 24, 71 Pac. 551.

West Virginia.—Vinal *v.* Core, 18 W. Va. 1.

Wisconsin.— Eggett *v.* Allen, 119 Wis. 625, 96 N. W. 803; Bigelow *v.* Sickles, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 54.

But the presumption may be rebutted by plaintiff's own evidence showing probable cause. Plassan *v.* Louisiana Lottery Co., 34 La. Ann. 246; Bernar *v.* Dunlap, 94 Pa. St. 329.

Soundness of doctrine.— The doctrine that the discharge by a magistrate is *prima facie* evidence of want of probable cause seems to be founded upon Nicholson *v.* Coghill, 4 B. & C. 21, 10 E. C. L. 464, and the *per curiam* opinion in Secor *v.* Babcock, 2 Johns. (N. Y.) 203, and upon Johnston *v.* Martin, 7 N. C. 248, and Bostick *v.* Rutherford, 11 N. C. 83. Its soundness is questioned in McRae *v.* Oneal, 13 N. C. 166, on the authority of Purcell *v.* McNamara, 1 Camph. 199, 9 East 361, 9 Rev. Rep. 578, and also by Israel *v.* Brooks, 23 Ill. 575.

Shifting of burden of proof.— Some authorities hold that if plaintiff proves that he was discharged by an examining magistrate, the burden of proof that there was probable cause is cast upon defendant. Whaling *v.* Wells, 50 La. Ann. 562 23 So. 447; Rosenkranz *v.* Hass, 1 Misc. (N. Y.) 220, 20 N. Y. Suppl. 880; Johnston *v.* Martin, 7 N. C. 248; Bernar *v.* Dunlap, 94 Pa. St. 329; Smith *v.* Ege, 52 Pa. St. 419; Williams *v.* Norwood, 2 Yerg. (Tenn.) 329. Burden of proof generally see *infra*, XIV, A, 3.

conclusive,[80] evidence of the want of probable cause; but the later and better opinion is that more than a mere dismissal by the magistrate must be proved,[81] and that standing alone it is no evidence of want of probable cause.[82] *Per contra*, if that result be unfavorable to the accused, and he be held or committed by the magistrate, this is *prima facie*[83] but not conclusive[84] evidence of probable cause.

(II) *FINAL JUDGMENT.* When the magistrate has jurisdiction to render final judgment in the examination of a criminal charge, and is not simply a committing magistrate, when the hearing is fair, without fraud, and results in a conviction of

Insufficiency of evidence as cause of discharge.— Other cases hold that in order to constitute *prima facie* evidence, such discharge must be for want of sufficient evidence to believe plaintiff guilty. Frost *v.* Holland, 75 Me. 108; Bostwick *v.* Rutherford, 11 N. C. 83.

Where witnesses for the defense, including defendant himself, may be examined on the hearing, the discharge of plaintiff by the examining magistrate is not *per se prima facie* evidence of want of probable cause. Cole *v.* Curtis, 16 Minn. 182.

Discharge because in the opinion of the recorder or prosecuting attorney the complaint did not set forth the offense with legal accuracy, then the discharge did not tend to prove that there was or was not probable cause. Cooney *v.* Chase, 81 Mich. 203, 45 N. W. 833.

80. Rankin *v.* Crane, 104 Mich. 6, 61 N. W. 1007; Perry *v.* Sulier, 92 Mich. 72, 52 N. W. 801; Hamilton *v.* Smith, 39 Mich. 222. And see Brelet *v.* Mullen, 44 La. Ann. 194, 10 So. 865; Pownall *v.* Lancaster, etc., Turnpike Co., 16 Lanc. L. Rev. (Pa.) 411.

Persuasive evidence of want of probable cause.— In Missouri it is held that if plaintiff is discharged by one exercising the powers of a committing magistrate, not on account of technicalities or informalities, but on an examination of the merits of the charge, such discharge would necessarily be considered persuasive evidence of want of probable cause. Sharpe *v.* Johnston, 59 Mo. 557, 76 Mo. 660; Sappington *v.* Watson, 50 Mo. 83; Brant *v.* Higgins, 10 Mo. 728; Christian *v.* Hanna, 58 Mo. App. 37; Thomas *v.* Smith, 51 Mo. App. 605.

81. *California.*— Harkrader *v.* Moore, 44 Cal. 144.

Illinois.— Anderson *v.* Friend, 85 Ill. 135; Thorpe *v.* Balliett, 25 Ill. 339; Israel *v.* Brooks, 23 Ill. 575.

Indiana.— Wright *v.* Fansler, 90 Ind. 492.

Maine.— Payson *v.* Caswell, 22 Me. 212.

Massachusetts.— Stone *v.* Crocker, 24 Pick. 81.

New York.— Vanderbilt *v.* Mathis, 5 Duer 304; Gorton *v.* De Angelis, 6 Wend. 418.

Pennsylvania.— Mann *v.* Cowan, 8 Pa. Super. Ct. 30.

Rhode Island.— Fox *v.* Smith, 26 R. I. 1, 57 Atl. 932.

Texas.— Heldt *v.* Webster, 60 Tex. 207.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 54.

82. Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. N. S. 928. See cases cited *infra*, note 98. See also cases cited *supra*, p. 7, note 7.

83. *Alabama.*— Ewing *v.* Sanford, 19 Ala. 605.

California.— Diemer *v.* Herber, 75 Cal. 287, 17 Pac. 205.

Indiana.— Louisville, etc., R. Co. *v.* Hendricks, 13 Ind. App. 10, 40 N. E. 82, 41 N. E. 14.

Iowa.— Arnold *v.* Moses, 48 Iowa 694; Ritchey *v.* Davis, 11 Iowa 124.

Kansas.— Ross *v.* Hixon, 46 Kan. 550, 26 Pac. 955, 26 Am. St. Rep. 123, 12 L. R. A. 760.

Massachusetts.— Bacon *v.* Towne, 4 Cush. 217.

Nebraska.— Bechel *v.* Pacific Express Co., 65 Nebr. 826, 91 N. W. 853.

Pennsylvania.— Cooper *v.* Hart, 147 Pa. St. 594, 23 Atl. 833.

Virginia.— Womack *v.* Circle, 29 Gratt. 192; Maddox *v.* Jackson, 4 Munf. 462.

West Virginia.— Hale *v.* Boylen, 22 W. Va. 234.

United States.— Aubs *v.* Atchison, etc., R. Co., 114 Fed. 317; Miller *v.* Chicago, etc., R. Co., 41 Fed. 898.

84. *Alabama.*— Ewing *v.* Sanford, 19 Ala. 605.

Arkansas.— Wells *v.* Parker, 76 Ark. 41, 88 S. W. 602.

Iowa.— Flackler *v.* Novak, 94 Iowa 634, 63 N. W. 348; Arnold *v.* Moses, 48 Iowa 694.

Kentucky.— Dean *v.* Noel, 70 S. W. 406, 24 Ky. L. Rep. 969.

Louisiana.— Whaling *v.* Wells, 50 La. Ann. 562, 23 So. 447.

Massachusetts.— Bacon *v.* Towne, 4 Cush. 217.

New York.— Haupt *v.* Pohlmann, 1 Rob. 121.

Ohio.— Ash *v.* Marlow, 20 Ohio 119.

Oregon.— Hess *v.* Oregon German Baking Co., 31 Oreg. 503, 49 Pac. 803.

Texas.— Raleigh *v.* Cook, 60 Tex. 438.

Virginia.— Maddox *v.* Jackson, 4 Munf. 462.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 54.

But see Holliday *v.* Holliday, (Cal. 1898) 53 Pac. 42, 55 Pac. 703, where it was held conclusive in absence of fraud.

Compare Darnell *v.* Sallee, 7 Ind. App. 581, 34 N. E. 1020 (insufficient evidence of probable cause); Kendrick *v.* Cypert, 10 Humphr. (Tenn.) 291 (not *prima facie* evidence of probable cause); Miller *v.* Chicago, etc., R. Co., 41 Fed. 898.

defendant, such conviction is generally,[85] but not universally,[86] regarded as conclusive upon the question of probable cause for the prosecution, although upon appeal plaintiff was acquitted.[87]

b. Action of Grand Jury. The finding of an indictment by the grand jury against an accused person charged with crime is *prima facie* evidence of probable cause in an action for malicious prosecution,[88] but it is not conclusive,[89] and may be rebutted by proof that the indictment was obtained by false or fraudulent testimony,[90] or other improper means.[91] Failure of the grand jury to indict has been variously regarded as being *prima facie*,[92] not *prima facie*,[93] persuasive,[94] and not even any[95] sufficient evidence of want of probable cause.[96] It does not, however, preclude defendant from proving that plaintiff was in fact guilty of the crime charged.[97]

c. Action of Court or Jury — (I) *ACQUITTAL.* An acquittal is merely one of the essentials of plaintiff's case, usually sheds no light on other facts and of itself,

85. *Illinois.*— Thomas *v.* Muehlmann, 92 Ill. App. 571.

Indiana.—Adams *v.* Bicknell, 126 Ind. 210, 25 N. E. 804, 22 Am. St. Rep. 576; Bitting *v.* Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505.

Massachusetts.— Whitney *v.* Peckham, 15 Mass. 243.

Missouri.— Boogher *v.* Hough, 99 Mo. 183, 12 S. W. 524.

New York.— See Burt *v.* Place, 4 Wend. 591.

North Carolina.— Griffis *v.* Sellars, 19 N. C. 492, 31 Am. Dec. 422.

Rhode Island.— Welch *v.* Boston, etc., R. Corp., 14 R. I. 609.

England.— Reynolds *v.* Kennedy, 1 Wils. C. P. 232.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 49 *et seq.*

Finding of insanity.— The presumption arising from the finding of commissioners of insanity, that plaintiff, brought before them, was insane, must be overcome by evidence sufficient to destroy its probative force. Figg *v.* Hanger, 4 Nebr. (Unoff.) 792, 96 N. W. 658.

86. *Alabama.*— Ewing *v.* Sanford, 19 Ala. 605.

California.—Diemer *v.* Herber, 75 Cal. 287, 17 Pac. 205; Ganea *v.* Southern Pac. R. Co., 51 Cal. 140.

Iowa.— Olson *v.* Neal, 63 Iowa 214, 18 N. W. 863.

Kansas.— Bauer *v.* Clay, 8 Kan. 580.

Massachusetts.— Bacon *v.* Towne, 4 Cush. 217.

Nevada.— Ricord *v.* Central Pac. R. Co., 15 Nev. 167.

West Virginia.— Hale *v.* Boylen, 22 W. Va. 234.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 49 *et seq.*

87. See cases cited *supra*, note 85. *Contra*, Richter *v.* Koster, 45 Ind. 440.

Discharge on habeas corpus after conviction by a justice of the peace, because the justice had no jurisdiction to try the offense, was held to be insufficient, in an action for malicious prosecution, to show want of probable cause. Pierce *v.* Doolittle, 130 Iowa 333, 106 N. W. 751.

88. Garrard *v.* Willet, 4 J. J. Marsh. (Ky.) 628; Jones *v.* Louisville, etc., R. Co., 96 S. W. 793, 29 Ky. L. Rep. 945; Sharpe *v.* Johnston, 76 Mo. 660; Firer *v.* Lowery, 59 Mo. App. 92; Ricord *v.* Central Pac. R. Co., 15 Nev. 167; Brown *v.* Griffin, Cheves (S. C.) 32. *Contra*, Motes *v.* Bates, 80 Ala. 382; Perkins *v.* Spaulding, 182 Mass. 218, 65 N. E. 72.

89. Flackler *v.* Novak, 94 Iowa 634, 63 N. W. 348; Raleigh *v.* Cook, 60 Tex. 438.

90. Jones *v.* Jenkins, 3 Wash. 17, 27 Pac. 1022.

91. Firer *v.* Lowery, 59 Mo. App. 92.

92. Potter *v.* Casterline, 41 N. J. L. 22; Harper *v.* Harper, 49 W. Va. 661, 39 S. E. 661; Vinal *v.* Core, 18 W. Va. 1; Ambs *v.* Atchison, etc., R. Co., 114 Fed. 317; McCreary *v.* Bettis, 14 U. C. C. P. 95, as being some evidence of want of probable cause.

93. Fulmer *v.* Harmon, 3 Strobh. (S. C.) 576.

94. Casperson *v.* Sproule, 39 Mo. 39.

95. Ritchey *v.* Davis, 11 Iowa 124; Taylor *v.* Dominick, 36 S. C. 368, 15 S. E. 591; Brady *v.* Stiltner, 40 W. Va. 289, 21 S. E. 729. In Ganea *v.* Southern Pac. R. Co., 51 Cal. 140, it was held that where proceedings before a grand jury are not, as formerly, a mere examination of the case of the prosecution, but are in fact a preliminary trial, and one in which the accused may appear by his witness, and make his defense, and may himself be sworn and testify in his own behalf, the fact that the grand jury dismissed the charge on which plaintiff in an action for malicious prosecution was arrested affords no evidence of want of probable cause for the complaint.

96. Magowan *v.* Rickey, 64 N. J. L. 402, 45 Atl. 804; Newall *v.* Jenkins, 1 Phila. (Pa.) 268. In Miller *v.* Chicago, etc., R. Co., 41 Fed. 898, it was held that when a magistrate, after a hearing, has committed an accused person, and the grand jury has then ignored the bill, these two facts, upon a suit for malicious prosecution, neutralize each other; and plaintiff, to sustain his case, must produce other evidence of malice, and of want of probable cause for instituting the prosecution.

97. Barber *v.* Gould, 20 Hun (N. Y.) 446.

does not show want of probable cause.[98] Nevertheless an acquittal has been variously regarded as no evidence,[99] as insufficient evidence,[1] as not being[2] and as being *prima facie* evidence of want of probable cause.[3]

(II) *CONVICTION*—(A) *In General.* Conviction of plaintiff in the original proceeding is not essential to proof of probable cause,[4] but when shown has been regarded sometimes as *prima facie*,[5] but more generally as conclusive,[6] evidence

98. *Illinois.*— Anderson *v.* Friend, 85 Ill. 135; Skidmore *v.* Bricker, 77 Ill. 164; Hurd *v.* Shaw, 20 Ill. 354; McBean *v.* Ritchie, 18 Ill. 114.

Indiana.—Bitting *v.* Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505; Adams *v.* Lister, 3 Blackf. 241, 25 Am. Dec. 102.

Kentucky.— Lancaster *v.* Langston, 36 S. W. 521, 18 Ky. L. Rep. 299.

Louisiana.— Grant *v.* Deuel, 3 Rob. 17, 38 Am. Dec. 228.

Missouri.— Boeger *v.* Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322; Christian *v.* Hanna, 58 Mo. App. 37.

New Jersey.— McFadden *v.* Lane, 71 N. J. L. 624, 60 Atl. 365.

New York.— Shipman *v.* Learn, 92 Hun 558, 36 N. Y. Suppl. 969; Vanderbilt *v.* Mathis, 5 Duer 304; Scott *v.* Simpson, 1 Sandf. 601.

North Carolina.— Bell *v.* Pearcy, 33 N. C. 233.

Oregon.— Glaze *v.* Whitley, 5 Oreg. 164.

Pennsylvania.—Steimling *v.* Bower, 156 Pa. St. 408, 27 Atl. 299.

Tennessee.—Pharis *v.* Lambert, 1 Sneed 228.

Texas.— Bekkeland *v.* Lyons, 96 Tex. 255, 72 S. W. 56, 64 L. R. A. 474; Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 50. See also cases cited *supra*, p. 7, note 7.

Contra.—Whitfield *v.* Westbrook, 40 Miss. 311.

Acquittal is not the act of defendant; moreover criminal proceeding being for the avowed purpose of ascertaining whether a person is guilty or not, necessarily implies a certain degree of uncertainty. Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. N. S. 928.

Acquittal, resulting from a compromise in a prosecution against plaintiff and another, is not conclusive of plaintiff's innocence or of want of probable cause. Carroll *v.* New Jersey Cent. R. Co., 134 Fed. 684. And see Hiersche *v.* Scott, 1 Nebr. (Unoff.) 48, 95 N. W. 494.

In connection with other circumstances an acquittal may make out probable cause. Jones *v.* Louisville, etc., R. Co., 96 S. W. 793, 29 Ky. L. Rep. 945.

Where plaintiff was guilty notwithstanding his acquittal, acquittal will not sustain an action. Parkhurst *v.* Masteller, 57 Iowa 474, 10 N. W. 864.

99. Thompson *v.* Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554; Comisky *v.* Breen, 7 Ill. App. 369; Philpot *v.* Lucas, 101 Iowa 478, 70 N. W. 625; Tandy *v.* Riley, 80 S. W. 776, 26 Ky. L. Rep. 98, 82 S. W. 1000, 26 Ky. L. Rep. 993; Laing *v.* Mitten, 185 Mass. 233, 70 N. E. 128; Shafer *v.* Hertzig, 92 Minn. 171, 99 N. W. 796; Tyler *v.* Smith, 25 R. I. 486, 56 Atl. 683; Cullen *v.* Hanisch, 114 Wis. 24, 89 N. W. 900.

1. Herbener *v.* Crossan, 4 Pennew. (Del.) 38, 55 Atl. 223; Sundmaker *v.* Gaudet, 113 La. 887, 37 So. 865; Britton *v.* Granger, 13 Ohio Cir. Ct. 281, 7 Ohio Cir. Dec. 182; Fry *v.* Wolf, 8 Pa. Super. Ct. 468, 43 Wkly. Notes Cas. 124; Berger *v.* Wild, 130 Fed. 882, 66 C. C. A. 79.

2. Philpot *v.* Lucas, 101 Iowa 478, 70 N. W. 625; Burks *v.* Ferriell, 80 S. W. 809, 26 Ky. L. Rep. 36; Eastman *v.* Monastes, 32 Oreg. 291, 51 Pac. 1095, 67 Am. St. Rep. 531; Raymond *v.* Biden, 24 Nova Scotia 363; Sherwood *v.* O'Reilly, 3 U. C. Q. B. 4; Lavigne *v.* Lefevre, 14 Quebec Super. Ct. 275.

3. Toth *v.* Greisen, (N. J. 1902) 51 Atl. 927; Auer *v.* Mauser, 6 Pa. Super. Ct. 618, 42 Wkly. Notes Cas. 40.

4. It is enough that there was reasonable ground to believe the party guilty as charged, and that the prosecutor acts with caution. Cox *v.* McLean, 3 Ill. App. 45.

5. Maynard *v.* Sigman, 65 Nebr. 590, 91 N. W. 576; Nicholson *v.* Sternberg, 61 N. Y. App. Div. 51, 70 N. Y. Suppl. 212 (conviction before a justice of the peace); Johnston *v.* Meaghr, 14 Utah 426, 47 Pac. 861.

The record of a conviction is *prima facie* evidence of probable cause and throws the burden of proof upon plaintiffs. Miller *v.* Davenport, (Iowa 1897) 73 N. W. 584. In Olson *v.* Neal, 63 Iowa 214, 18 N. W. 863, it was held that in a suit for malicious prosecution the record of a conviction before a justice of the peace does not conclusively establish probable cause, but is only *prima facie* evidence thereof. Skeffington *v.* Elyward, 97 Minn. 244, 105 N. W. 638.

The order adjudging the respondent guilty of contempt of court was not conclusive evidence of probable cause in a subsequent action against the relator for malicious prosecution of the contempt proceedings. Mesnier *v.* Denike, 82 N. Y. App. Div. 404, 81 N. Y. Suppl. 818.

6. *Iowa.*— Bowman *v.* Brown, 52 Iowa 437, 3 N. W. 609.

Maine.— Severance *v.* Judkins, 73 Me. 376.

Massachusetts.— Cloon *v.* Gerry, 13 Gray 201; Whitney *v.* Peckham, 15 Mass. 243.

Nebraska.— Murphy *v.* Ernst, 46 Nebr. 1, 64 N. W. 353.

New York.— Oppenheimer *v.* Manhattan R. Co., 18 N. Y. Suppl. 411; Miller *v.* Deere, 2 Abb. Pr. 1.

Texas.— Kruegel *v.* Stewart, (Civ. App. 1904) 81 S. W. 365.

of the existence of probable cause for that proceeding. An exception to the finality of such evidence where the conviction is shown to have been procured by defendant's fraud or wrong,[7] or where the good faith of the court rendering that judgment is adequately impeached,[8] has been generally, but not universally,[9] recognized.

(B) *Subsequent Acquittal or Discharge.* A conviction in the trial court, if not properly procured,[10] is according to the general opinion conclusive of probable cause, although it may be afterward set aside for newly discovered evidence[11] or reversed upon appeal to a superior tribunal.[12]

(III) *Cessation of Prosecution.* The discharge[13] of the accused by the magistrate, judge, or court without investigation into the merits, but for lack of

Wisconsin.— Lawrence *v.* Cleary, 88 Wis. 473, 60 N. W. 793.

United States.— Blackman *v.* West Jersey, etc., R. Co., 126 Fed. 252.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 52. See also cases cited *supra*, note 85; and cases cited *infra*, note 12.

7. Gilmore *v.* Mastin, 115 Ill. App. 46; Johnson *v.* Girdwood, 7 Misc. (N. Y.) 651, 28 N. Y. Suppl. 151 [*affirmed* in 143 N. Y. 660, 39 N. E. 21]; Miller *v.* Deere, 2 Abb. Pr. (N. Y.) 1; Root *v.* Rose, 6 N. D. 575, 72 N. W. 1022; Lawrence *v.* Cleary, 88 Wis. 473, 60 N. W. 793.

8. Murphy *v.* Ernst, 46 Nebr. 1, 64 N. W. 353.

9. Root *v.* Rose, 6 N. D. 575, 72 N. W. 1022, misconduct of the judge. In Williams *v.* Woodhouse, 14 N. C. 257, it was held that, where defendant in an indictment was convicted of the charge, he cannot in any form of action recover against the prosecutor, although he shows that the conviction was the result of conspiracy and perjury. In Severance, *v.* Judkins 73 Me. 376, it was held that, although the conviction of a minor son of an offense may be unjust and procured by fraud and perjury, and through a conspiracy to accomplish such a purpose, an action by the father for damages occasioned thereby is not maintainable while such conviction remains unreversed.

10. Adams *v.* Bicknell, 126 Ind. 210, 25 N. E. 804, 22 Am. St. Rep. 576; Payson *v.* Caswell, 22 Me. 212; Witham *v.* Gowen, 14 Me. 362; Phillips *v.* Kalamazoo, 53 Mich. 33, 18 N. W. 547; Womack *v.* Circle, 32 Gratt. (Va.) 324. *Contra*, Parker *v.* Huntington, 7 Gray (Mass.) 36, 66 Am. Dec. 455.

11. Parker *v.* Huntington, 7 Gray (Mass.) 36, 66 Am. Dec. 455; Parker *v.* Farley, 10 Cush. (Mass.) 279.

12. *Georgia.*— Hartshorn *v.* Smith, 104 Ga. 235, 30 S. E. 666.

Illinois.— Thomas *v.* Muehlmann, 92 Ill. App. 571.

Indiana.— Adams *v.* Bicknell, 126 Ind. 210, 25 N. E. 804, 22 Am. St. Rep. 576; Blucher *v.* Zonker, 19 Ind. App. 615, 49 N. E. 911.

Maine.— Payson *v.* Caswell, 22 Me. 212; Witham *v.* Gowen, 14 Me. 362.

Massachusetts.— Morrow *v.* Wheeler, etc., Mfg. Co., 165 Mass. 349, 43 N. E. 105; Parker *v.* Huntington, 7 Gray 36, 66 Am. Dec. 455; Parker *v.* Farley, 10 Cush. 279.

Michigan.— Thick *v.* Washer, 137 Mich. 155, 100 N. W. 394, 109 Am. St. Rep. 694; Phillips *v.* Kalamazoo, 53 Mich. 33, 18 N. W. 547.

North Carolina.— Price *v.* Stanley, 128 N. C. 38, 38 S. E. 33; Griffis *v.* Sellars, 20 N. C. 315; Griffis *v.* Sellars, 19 N. C. 492, 31 Am. Dec. 422.

North Dakota.— Root *v.* Rose, 6 N. D. 575, 72 N. W. 1022.

Pennsylvania.— Macdonald *v.* Schroeder, 28 Pa. Super. Ct. 128.

Virginia.— Womack *v.* Circle, 32 Gratt. 324.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 53.

But see Goodrich *v.* Warner, 21 Conn. 432. This was an action for malicious prosecution. Plaintiff was tried for the offense charged before a justice of the peace, and found guilty, whereupon he appealed to the county court, and was there tried and acquitted. It was held: (1) That, had there been no appeal from the first judgment, it would have been conclusive evidence of probable cause, and (2) that, as the result was, the conviction was not conclusive evidence of probable cause, but if the trial was fair and full, it was entitled to great consideration.

Abandonment of one charge and conviction on another.—In Labar *v.* Crane, 49 Mich. 561, 14 N. W. 495, in an action for maliciously prosecuting plaintiff for an assault with intent to kill, and, after the abandonment of such prosecution, instituting a second one, for assault and battery, in which plaintiff was found guilty, but subsequently acquitted on appeal, the conviction is not evidence of probable cause for the first prosecution.

New trial and subsequent nolle.—In Knight *v.* International, etc., R. Co., 61 Fed. 87, 9 C. C. A. 376, it was held that the conviction of plaintiff on the charge complained of was *prima facie* evidence of probable cause, although a new trial was granted, and a *nolle* subsequently entered by the state. But in Richter *v.* Koster, 45 Ind. 440, it was held that a finding of guilty against an accused, having been subsequently set aside, and the accused discharged upon the entry of a *nolle prosequi* after the granting of a new trial, is no evidence of probable cause in a subsequent action by him for malicious prosecution.

13. Thompson *v.* Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554; Thorpe *v.* Balliett, 25 Ill. 339; Staub *v.* Van Benthuysen, 36 La. Ann. 467; Heldt *v.* Webster, 60 Tex. 207.

jurisdiction [14] or want of prosecution,[15] is of itself ordinarily no evidence of want of probable cause;[16] although it might be *prima facie* evidence of his innocence.[17] Nor is the fact that defendant abandoned,[18] voluntarily discontinued,[19] or suffered a dismissal to be entered [20] sufficient to show want of probable cause.

(IV) *OTHER ACTION.* Proof of the disagreement of the jury has been held to constitute evidence of probable cause.[21] The decision of the jury that defendant shall pay costs of the prosecution is not conclusive.[22]

C. In Civil Proceedings — 1. IN GENERAL. Probable cause in civil proceedings is such reasons supported by such facts and circumstances as will warrant a cautious, reasonable, and prudent man in the honest belief that his action and the means taken in prosecution of it are just, legal, and proper.[23] *Mutatis mutandis,*

14. McClafferty *v.* Philp, 151 Pa. St. 86, 24 Atl. 1042.

15. Wakely *v.* Johnson, 115 Mich. 285, 73 N. W. 238; Chapman *v.* Dodd, 10 Minn. 350; Purcel *v.* McNamara, 1 Camph. 199, 9 East 361, 9 Rev. Rep. 578.

16. Nolen *v.* Kaufman, 70 Mo. App. 651; Tyler *v.* Smith, 25 R. I. 486, 56 Atl. 683.

A nonsuit is not sufficient to support a finding of want of probable cause. Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800.

Evil motive.—When plaintiff can prove circumstances attending the cessation of proceedings showing an evil motive on defendant's part in starting them, the want of probable prosecution may be *prima facie* evidence of want of probable cause. Nicholson *v.* Coghill, 4 B. & C. 21, 10 E. C. L. 464; Willans *v.* Taylor, 6 Bing. 183, 7 L. J. C. P. O. S. 250, 3 M. & P. 350, 31 Rev. Rep. 379, 19 E. C. L. 90 [*affirmed* in 2 B. & Ad. 845, 1 L. J. K. B. 17, 22 E. C. L. 355].

17. Wright *v.* Fansler, 90 Ind. 492.

18. Lancaster *v.* Langston, 36 S. W. 521, 18 Ky. L. Rep. 299; O'Dell *v.* Hatfield, 40 Misc. (N. Y.) 13, 81 N. Y. Suppl. 158; Le Maistre *v.* Hunter, Brightly (Pa.) 494; Frederick *v.* Halberstadt, 14 Rich. (S. C.) 41. But see Messman *v.* Ihlenfeldt, 89 Wis. 585, 62 N. W. 522.

19. Eagleton *v.* Kabrich, 66 Mo. App. 231; Funk *v.* Amor, 7 Ohio Cir. Ct. 419, 4 Ohio Cir. Dec. 662; Ford *v.* Kelsey, 4 Rich. (S. C.) 365. But see Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615, where it was held to be *prima facie* evidence of want of probable cause.

It is not sufficient for plaintiff to show the prosecution and its abandonment to go to the jury; he must show want of probable cause. Lapointe *v.* Stennett, (Trin. T. 1 & 2 Vict.) R. & J. Dig. 2196.

20. Boeger *v.* Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322; Dorendinger *v.* Tschechtelin, 12 Daly (N. Y.) 34; Gordon *v.* Upham, 4 E. D. Smith (N. Y.) 9; Dugan *v.* O'Neil, 5 Ohio Dec. (Reprint) 459, 6 Am. L. Rec. 58. *Compare* Cuthbert *v.* Gallowav, 35 Fed. 466. *Contra,* Williams *v.* Norwood, 2 Yerg. (Tenn.) 329.

21. Barber *v.* Scott, 92 Iowa 52, 60 N. W. 497; Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 758.

To rebut the presumption of probable cause from the disagreement of the jury, evidence that plaintiff was in great mental distress on the criminal trial, and could not recall material facts or give a complete history of the case to his attorney is admissible. Barber *v.* Scott, 92 Iowa 52, 60 N. W. 497.

22. Urich *v.* Neuer, 2 Grant (Pa.) 272.

23. Shell *v.* Moody, 103 Ga. 248, 29 S. E. 924; Spengler *v.* Davy, 15 Gratt. (Va.) 381; Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

Facts and circumstances which lead to the inference that a party instituting a suit was actuated by an honest and reasonable conviction of its justice are sufficient evidence of probable cause. Besson *v.* Southard, 10 N. Y. 236.

Probable cause.— The following cases illustrate statements of facts which have been held to constitute probable cause in civil proceedings: Woods *v.* Finnell, 13 Bush (Ky.) 628 (selection of forum); Plummer *v.* Noble, 6 Me. 285 (sale of judgment; ignorance of death of judgment creditor); Pierce *v.* Thompson, 6 Pick. (Mass.) 193 (several suits, some of which are groundless); Willard *v.* Holmes, 142 N. Y. 492, 37 N. E. 480 [*reversing* 2 Misc. 303, 21 N. Y. Suppl. 998] (misusing corporation name by its treasurer in loaning its credit); Richardson *v.* Virtue, 4 Thomps. & C. (N. Y.) 441 (plaintiff and defendant had unsettled mutual claims against each other which could not be set off; each brought suit and had each other arrested); Gorton *v.* De Angelis, 6 Wend. (N. Y.) 418 (two suits in a justice's court, after being himself sued by the party whom he prosecutes, and neglecting to appear at the return of the summonses); Mell *v.* Barner, 135 Pa. St. 151, 19 Atl. 940 (administrator suing out execution after being told by judgment debtor that judgment was paid, there being no other evidence of payment); Breckinridge *v.* Auld, 4 Fed. Cas. No. 1,824, 4 Cranch C. C. 731 (a capias ad satisfaciendum, although defendant has a good set-off).

Want of probable cause.— The following cases illustrate statements of facts which have been held not to constitute probable cause: Livingstone *v.* Hardie, 41 La. Ann. 311, 6 So. 129 (attacking sales to defendant as fraudulent); Butchers' Union Slaughterhouse, etc., Co. *v.* Crescent City Live Stock

the same principles determine questions of probable cause in civil proceedings as in criminal.[24]

2. ATTACHMENT PROCEEDING. Probable cause for suing out an attachment may exist, although the attachment was unauthorized.[25] It is sufficient that the conduct of the debtor was such as to render the suit a measure of reasonable precaution.[26] If it exists, there is no liability in an action for malicious prosecution.[27]

3. TAKING ADVICE OF COUNSEL. The rules as to who are proper counsel to give

Landing, etc., Co., 37 La. Ann. 874 (assumption that the judgment of the highest state court is not law); Ferguson *v.* Arnow, 142 N. Y. 580, 37 N. E. 626 [*reversing* 21 N. Y. Suppl. 308] (encroachment on highway); Pangburn *v.* Bull, 1 Wend. (N. Y.) 345 (voluntary overpayment and suit to recover back); Wengert *v.* Beashore, 1 Penr. & W. (Pa.) 232 (capias ad respondendum and holding to bail); Carleton *v.* Taylor, 50 Vt. 220 (fraudulently procuring arrest and adjudication of bankruptcy of plaintiff).

24. Stewart *v.* Sonneborn, 98 U. S. 187, 192, 25 L. ed. 116 [*citing* Burhans *v.* Sanford, 19 Wend. (N. Y.) 417; Cotton *v.* Huidekoper, 2 Penr. & W. (Pa.) 149; Nicholson *v.* Coghill, 4 B. & C. 21, 10 E. C. L. 464; Webb *v.* Hill, 3 C. & P. 485, 14 E. C. L. 676], where Strong, J., says: "Notwithstanding what has been said in some decisions of a distinction between actions for criminal prosecution and civil suits, both classes at the present day require substantially the same essentials. Certainly an action for instituting a civil suit requires not less for its maintenance than an action for a malicious prosecution of a criminal proceeding."

In criminal prosecutions see *supra*, VI, B.

25. Gimbel *v.* Gomprecht, (Tex. Civ. App. 1896) 36 S. W. 781.

26. McCullough *v.* Grishobber, 4 Watts & S. (Pa.) 201.

Probable cause is a belief by the attaching creditor in the existence of the facts essential to the prosecution of his attachment, founded upon such circumstances as, supposing him to be a man of ordinary caution, prudence, and judgment, were sufficient to induce this belief. Foster *v.* Pitts, 63 Ark. 387, 38 S. W. 1114; Kelley *v.* Osborn, 86 Mo. App. 239; Spengler *v.* Davy, 15 Gratt. (Va.) 381; Burkhart *v.* Jennings, 2 W. Va. 242. And to constitute it there must be an indebtedness and a ground for attachment; the absence of either is therefore absence of probable cause. Rice *v.* Day, 34 Nebr. 100, 51 N. W. 464.

Facts showing probable cause.— The admission by defendant in attachment to plaintiff of facts sufficient to authorize an attachment constitutes probable cause. Wise *v.* McNichols, 63 Mo. App. 141. So it has been held that if the agent of a non-resident creditor sent out with instructions to collect the debt is informed by a near relative of the debtor that she was about to leave the state, and by a commercial agency that she had failed in business and had sold out her stock of goods and mortgaged all her property except her residence, and was offering it for sale, these facts constitute probable cause. Baldwin *v.* Walker, 91 Ala. 428, 8 So. 364. Probable cause appears where the debtor gave a number of checks which were protested because he had no funds in bank to meet them, and soon after giving the checks he left the state with his family and household goods, leaving no property in the state subject to execution. Mark *v.* Christian, 59 S. W. 1092, 22 Ky. L. Rep. 1102. It is sufficient that the suspiciousness of attachment defendant's conduct made recourse to attachment a reasonable precaution. McCullough *v.* Grishobber, 4 Watts & S. (Pa.) 201.

When attachment has been sued out on two grounds, probable cause as to either will defeat the action for malicious attachment. Wise *v.* McNichols, 63 Mo. App. 141.

That the writ be executed by actual levy on the property is also essential. Maskell *v.* Barker, 99 Cal. 642, 34 Pac. 340. It is not necessary, however, that defendant should have participated in the execution of the attachment process; if he makes out the affidavit maliciously, vexatiously, and without probable cause, this will be sufficient to render him liable without proof of any further intervention on his part. Walser *v.* Thies, 56 Mo. 89.

That affidavit for attachment was insufficient to authorize the attachment cannot be a matter of justification or defense. Forrest *v.* Collier, 20 Ala. 175, 56 Am. Dec. 190.

27. Barrett *v.* Spaids, 70 Ill. 408 (facts held to be sufficient to constitute probable cause for attachment on ground of fraudulent conveyance of property); Grant *v.* Reinhart, 33 Mo. App. 74. In Leyser *v.* Field, 5 N. M. 356, 363, 23 Pac. 173, in an action against an attorney for maliciously issuing an attachment, it was held error to refuse to instruct the jury that defendant "had a right to act upon facts and circumstances brought to his knowledge through the usual and ordinary business channels, if he believed them to be true; and if such facts and circumstances were of such character, and came from such sources, that lawyers generally, of ordinary care, prudence, and discretion, would act upon them, under similar circumstances, believing them to be true, then such facts and circumstances, if believed by . . . [said defendant] to be true, would be probable cause."

In an action on an attachment bond the fact that the note sued on in the attachment was paid shows want of probable cause; such an inference is not necessarily drawn in an action for malicious prosecution. Dorr Cattle Co. *v.* Des Moines Nat. Bank, 127 Iowa 153, 98 N. W. 918.

advice,[28] what statement of facts must be made to such counsel,[29] in what spirit the advice must be asked[30] and given[31] and acted upon[32] are substantially identical in civil cases with those which are applicable in criminal cases.[33] If the testimony shows conformity with them, probable cause is made out and defendant is relieved from responsibility for the prosecution instituted by him,[34] and

28. When advice of counsel is relied upon as furnishing probable cause for a proceeding so as to relieve defendant from liability for malicious prosecution, it must appear that he presented to disinterested (White *v.* Carr, 71 Me. 555, 36 Am. Rep. 533) and reputable legal counsel (Davis *v.* Baker, 88 Ill. App. 251; Newton *v.* Weaver, 13 R. I. 616) a proper legal statement of the facts.

29. He must make a full, correct, and honest statement of all the material facts of the case within his knowledge (Sandell *v.* Sherman, 107 Cal. 391, 40 Pac. 493; Dorr Cattle Co. *v.* Des Moines Nat. Bank, 127 Iowa 153, 98 N. W. 918; Anderson *v.* Columbia Finance, etc., Co., 50 S. W. 40, 20 Ky. L. Rep. 1790; Stone *v.* Swift, 4 Pick. (Mass.) 389, 16 Am. Dec. 349; Wiesinger *v.* Benton Harbor First Nat. Bank, 106 Mich. 291, 64 N. W. 59; Le Clear *v.* Perkins, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627; Ames *v.* Rathbun, 55 Barb. (N. Y.) 194, 37 How. Pr. 280; Richardson *v.* Virtue, 4 Thomps. & C. (N. Y.) 441; Hull *v.* Smith, 1 Phila (Pa.) 19; Forbes *v.* Hagman, 75 Va. 168; Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116; Coggswell *v.* Bohn, 43 Fed. 411); but advice of counsel on a full and fair statement of the material facts and information within defendant's knowledge is no defense when it appears that he kept back important facts in presenting his case to counsel (Struby-Estabrook Mercantile Co. *v.* Kyes, 9 Colo. App. 190, 48 Pac. 663; Willard *v.* Holmes, 2 Misc. (N. Y.) 303, 21 N. Y. Suppl. 998 [*reversed* on other grounds in 142 N. Y. 492, 37 N. E. 480]; Cuthbert *v.* Galloway, 35 Fed. 466); or concealed the truth (Blunt *v.* Little, 3 Fed. Cas. No. 1,578, 3 Mason 102).

30. Eickhoff *v.* Fidelity, etc., Co., 74 Minn. 139, 76 N. W. 1030; Blunt *v.* Little, 3 Fed. Cas. No. 1,578, 3 Mason 102.

31. Such advice must be given by such counsel with full knowledge of all the material facts (Newton *v.* Weaver, 13 R. I. 616), in good faith (Phillips *v.* Bonham, 16 La. Ann. 387; Gould *v.* Gardner, 8 La. Ann. 11), before the commencement of the suit (Hull *v.* Smith, 1 Phila. (Pa.) 19; Blunt *v.* Little, 3 Fed. Cas. No. 1,578, 3 Mason 102).

32. *California.*— Sandell *v.* Sherman, 107 Cal. 391, 40 Pac. 493.

Louisiana.— Phillips *v.* Bonham, 16 La. Ann. 387; Gould *v.* Gardner, 8 La. Ann. 11.

Massachusetts.— Stone *v.* Swift, 4 Pick. 389, 16 Am. Dec. 349.

Michigan.— Le Clear *v.* Perkins, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627.

Missouri.— Alexander *v.* Harrison, 38 Mo. 258, 90 Am. Dec. 431.

New York.— Ames *v.* Rathbun, 55 Barb. 194, 37 How. Pr. 280; Richardson *v.* Virtue, 4 Thomps. & C. 441. But see Kingsbury *v.* Garden, 45 N. Y. Super. Ct. 224.

United States.— Coggswell *v.* Bohn, 43 Fed. 411.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 57.

But see Wetmore *v.* Mellinger, (Iowa 1883) 14 N. W. 722. And see Hogg *v.* Pinckney, 16 S. C. 387, where it is held that acting on advice of counsel is not in itself a defense, but is a circumstance to be considered by the jury.

That attachment plaintiff in good faith acted on the advice of counsel after a full and fair statement of all the material facts known to him constitutes a good defense to an action for malicious attachment. Some decisions consider that under these circumstances there is probable cause for suing out the writ of attachment (Farmers, etc., Tobacco Warehouse Co. *v.* Gibbons, 107 Ky. 611, 55 S. W. 2, 21 Ky. L. Rep. 1348; Anderson *v.* Columbia Finance, etc., Co., 50 S. W. 40, 20 Ky. L. Rep. 1790; Stone *v.* Swift, 4 Pick. (Mass.) 389, 16 Am. Dec. 349; Kompass *v.* Light, 122 Mich. 86, 80 N. W. 1008; Wiesinger *v.* Benton Harbor First Nat. Bank, 106 Mich. 291, 64 N. W. 59; Alexander *v.* Harrison, 38 Mo. 258, 90 Am. Dec. 431), others that absence of malice is established (Alexander *v.* Harrison, 38 Mo. 258, 90 Am. Dec. 431; Brewer *v.* Jacobs, 22 Fed. 217). But the mere fact that the suit was brought in good faith to recover what the attachment plaintiff believed he was entitled to under the law does not of itself constitute a valid defense. It must further be shown that attachment plaintiff believed in the existence of the facts alleged as grounds for an attachment. A party may believe that he is entitled to collect an honest debt, and yet the means employed may be wanton and malicious. Scovill *v.* Glasner, 79 Mo. 449. So, where the defense is based on the fact that plaintiff in attachment acted on advice of counsel, the jury may still see from all the facts that the suit was malicious, notwithstanding the advice of counsel. Brewer *v.* Jacobs, 22 Fed. 217.

33. See *supra*, VI, B, 2, d.

34. Harr *v.* Ward, 73 Ark. 437, 84 S. W. 496; St. Pierre *v.* Warner, 24 R. I. 295, 53 Atl. 41.

To an action for a tort committed on property, advice of counsel is no defense unless the advice was taken and followed in good faith; and not then except as to exemplary damages. Chambers *v.* Upton, 34 Fed. 473.

Where liability is doubtful or depends on a construction of law, advice of counsel may be taken into consideration as bearing on probable cause in suing out an attachment.

this, it has been held, is the case no matter how erroneous[35] or mistaken[36] the advice may be.

4. Inference From Result — a. Cessation of Proceeding. The voluntary dismissal[37] or the discontinuance[38] of the original action is *prima facie*, but not conclusive,[39] evidence of want of probable cause, according to the general, but not universal, opinion.[40] So also a settlement or compromise after commencement of the suit will preclude an action for malicious prosecution.[41]

b. Judgment or Findings. A finding or judgment for plaintiff in the original suit, according to the prevailing opinion, is conclusive[42] evidence of probable cause, or estops defendant therein from denying the existence of probable cause,[43] even though reversed in a higher court,[44] until impeached;[45] but it has also

Dorr Cattle Co. *v.* Des Moines Nat. Bank, (Iowa 1904) 98 N. W. 918 [*citing* McAllister *v.* Johnson, 108 Iowa 42, 43, 78 N. W. 790].

35. Richardson *v.* Virtue, 4 Thomps. & C. (N. Y.) 441.

36. Hull *v.* Smith, 1 Phila. (Pa.) 19. But see Brewer *v.* Jacobs, 22 Fed. 217, where it was held in a suit for malicious prosecution that if the court can see that, notwithstanding the advice of counsel, it was unreasonable to believe that a ground of attachment existed, that fact of itself does not constitute probable cause.

37. Wetmore *v.* Mellinger, (Iowa 1883) 14 N. W. 722; Emerson *v.* Cochran, 111 Pa. St. 619, 4 Atl. 498. *Contra*, Smith *v.* Burrus, 106 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 13 L. R. A. 59; Wise *v.* McNichols, 63 Mo. App. 141, dismissal of an action in attachment, where attachment was sued out upon grounds admitted by attachment defendant to attachment plaintiff to exist.

38. Burhans *v.* Sanford, 19 Wend. (N. Y.) 417; Webb *v.* Hall, 3 C. & P. 485, 14 E. C. L. 676; Nicholson *v.* Coghill, 4 B. & C. 21, 10 E. C. L. 464.

39. Burt *v.* Smith, 181 N. Y. 1, 73 N. E. 495; Bristow *v.* Haywood, 4 Campb. 213, 1 Stark. 48, 2 E. C. L. 29.

40. Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800, holding that the mere fact that plaintiffs in the actions for whose prosecution damages are sought took a nonsuit therein is not sufficient to support a finding of a want of probable cause.

The mere suffering judgment of non prosequitur is not sufficient evidence to sustain the action (Roberts *v.* Bayles, 1 Sandf. (N. Y.) 47; Gorton *v.* De Angelis, 6 Wend. (N. Y.) 418; Purton *v.* Honnor, 1 B. & P. 205; Sinclair *v.* Eldred, 4 Taunt. 7); but it may be aided by other evidence (Norrish *v.* Richards, 3 A. & E. 733, 1 Harr. & M. 437, 4 L. J. K. B. 254, 5 N. & M. 269, 30 E. C. L. 336).

Want of probable cause cannot be inferred from discontinuance of suit in consequence of plaintiff's failure to appear, as where two suits commenced before a justice of the peace have both gone down in consequence of the failure of plaintiff to appear on the adjourned day, and a new action is pending in a justice court for the same demand (Palmer *v.* Avery, 41 Barb. (N. Y.) 290 [*affirmed* in 41 N. Y. 619]); or after judgment for plaintiff in replevin, another suit against the same defendant, involving the same issues, was discontinued pursuant to an agreement that it should abide the event of the first. Such discontinuance is not *prima facie* evidence that the discontinued suit was without probable cause (Brounstein *v.* Sahlein, 65 Hun (N. Y.) 365, 20 N. Y. Suppl. 213).

41. Clark *v.* Everett, 2 Grant (Pa.) 416; Murson *v.* Austin, 2 Phila. (Pa.) 116.

42. *Alabama.*— Jones *v.* Kirksey, 10 Ala. 839.

Connecticut.— Frisbie *v.* Morris, 75 Conn. 637, 55 Atl. 9.

Georgia.— Short *v.* Spragins, 104 Ga. 628, 30 S. E. 810.

Kentucky.— Kaye *v.* Kean, 18 B. Mon. 839.

Maryland.— Clement *v.* Odorless Excavating Apparatus Co., 67 Md. 461, 605, 10 Atl. 442, 13 Atl. 632, 1 Am. St. Rep. 409.

Rhode Island.—Welch *v.* Boston, etc., R. Corp., 14 R. I. 609.

Vermont.— Hathaway *v.* Allen, Brayt. 152.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 58.

43. Herman *v.* Brookerhoff, 8 Watts (Pa.) 240; Rosenstein *v.* Brown, 7 Phila. (Pa.) 144.

44. *Kentucky.*— Kaye *v.* Kean, 18 B. Mon. 839.

Maryland.— Clements *v.* Odorless Excavating Apparatus Co., 67 Md. 461, 605, 10 Atl. 442, 13 Atl. 632, 1 Am. St. Rep. 409.

Michigan.—Stimer *v.* Bryant, 84 Mich. 466, 47 N. W. 1099.

New York.— Palmer *v.* Avery, 41 Barb. 290 [*affirmed* in 41 N. Y. 619].

Rhode Island.— Foster *v.* Denison, 19 R. I. 351, 36 Atl. 93; Welch *v.* Boston, etc., R. Corp., 14 R. I. 609.

Tennessee.— Memphis Gayoso Gas Co. *v.* Williamson, 9 Heisk. 314.

Wisconsin.— Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 58.

45. Jones *v.* Kirksey, 10 Ala. 839. Or a perpetual injunction issued thereon (Hathaway *v.* Allen, Brayt. (Vt.) 152); unless other matter be relied upon to impeach the judgment or decree and show that it was obtained by fraud or other undue means (Spring *v.* Besore, 12 B. Mon. (Ky.) 551; Palmer *v.* Avery, 41 Barb. (N. Y.) 290 [*affirmed* in 41

been held to be sufficient,[46] or only *prima facie*,[47] evidence of probable cause. That plaintiff in the suit complained of was defeated will not sustain an action without additional evidence of malice and want of probable cause in instituting it.[48]

VII. MALICE.[49]

A. An Essential Element.[50] A cause of action in malicious prosecution cannot be made out unless malice on the part of the responsible cause of the original proceeding, who is defendant in malicious prosecution, is affirmatively shown, by plaintiff in malicious prosecution.[51]

N. Y. 619]); or, if obtained without notice to defendant, as in case of an attachment of his property in his absence (Bump *v.* Betts, 19 Wend. (N. Y.) 421).

46. Stimer *v.* Bryant, 84 Mich. 466, 47 N. W. 1099; Palmer *v.* Avery, 41 Barb. (N. Y.) 290; Crescent City Live-Stock Landing, etc., Co. *v.* Butcher's Union Slaughter House, etc., Co., 120 U. S. 141, 7 S. Ct. 472, 30 L. ed. 614.

47. Figg *v.* Hanger, 4 Nebr. (Unoff.) 792, 96 N. W. 658; Memphis Gayoso Gas Co. *v.* Williams, 9 Heisk. (Tenn.) 314. And see Burt *v.* Smith, 84 N. Y. App. Div. 47, 82 N. Y. Suppl. 186.

It is not conclusive (Moffatt *v.* Fisher, 47 Iowa 473; Burt *v.* Place, 4 Wend. (N. Y.) 591); and may be rebutted by positive evidence (Burt *v.* Place, *supra*).

48. Campbell *v.* Threlkeld, 2 Dana (Ky.) 425; Leyser *v.* Field, 5 N. M. 356, 23 Pac. 173; Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116 [*reversing* 22 Fed. Cas. No. 13,176, 2 Woods 599]; Ray *v.* Law, 20 Fed. Cas. No. 11,592, Pet. C. C. 207.

Issuing a rule nisi against a constable, in whose hands an execution has been placed, is not an adjudication that there is probable cause for suing out the same, when the petition for the rule does not truly set forth the facts, and therefore is not a defense to an action for malicious prosecution in suing out such rule. Roberts *v.* Keeler, 111 Ga. 181, 36 S. E. 617.

49. Evidence of malice see *infra*, XIV, C, 6.

Instructions as to malice see *infra*, XV, C, 6.

Malice as question for jury see *infra*, XV, B, 3.

Pleading malice see *infra*, XIII, A, 5.

50. Malice an essential element in actions generally see ACTIONS, 1 Cyc. 671 *et seq.*

51. *Alabama.*— Long *v.* Rodgers, 19 Ala. 321.

California.— Harkrader *v.* Moore, 44 Cal. 144; Levy *v.* Brannan, 39 Cal. 485.

District of Columbia.— Staples *v.* Johnson, 25 App. Cas. 155.

Georgia.— Hamilton *v.* Du Pre, 111 Ga. 819, 35 S. E. 684.

Illinois.— Daily *v.* Donath, 100 Ill. App. 52; Clark *v.* Hill, 96 Ill. App. 383; Beckman *v.* Menge, 82 Ill. App. 228.

Indiana.— Carey *v.* Sheets, 67 Ind. 375; Whitesell *v.* Study, (App. 1906) 76 N. E. 1010; Lawrence *v.* Leathers, 31 Ind. App. 414, 68 N. E. 179.

Iowa.— Gabriel *v.* McMullin, 127 Iowa 426, 103 N. W. 355.

Kentucky.— Frowman *v.* Smith, Litt. Sel. Cas. 7, 12 Am. Dec. 265.

Louisiana.— Blass *v.* Gregor, 15 La. Ann. 421; McCormick *v.* Conway, 12 La. Ann. 53; Gould *v.* Gardner, 8 La. Ann. 11; Forbes *v.* Geddes, 6 La. Ann. 402.

Maine.— Humphries *v.* Perker, 52 Me. 502.

Maryland.— Cecil *v.* Clarke, 17 Md. 508.

Massachusetts.— Shattuck *v.* Simonds, 191 Mass. 506, 78 N. E. 122; Stone *v.* Swift, 4 Pick. 389, 16 Am. Dec. 349; White *v.* Dingley, 4 Mass. 433.

Missouri.— Moody *v.* Deutsch, 85 Mo. 237; Frissell *v.* Relfe, 9 Mo. 859; Riney *v.* Vanlandingham, 9 Mo. 816.

New Jerscy.— Brush *v.* Burt, 3 N. J. L. 979.

New York.—Von Latham *v.* Libby, 38 Barb. 339; Dillon *v.* American S. P. C. A., 2 N. Y. City Ct. 46; Vandnzor *v.* Linderman, 10 Johns. 106.

North Carolina.— Brooks *v.* Jones, 33 N. C. 260.

Oregon.— Gee *v.* Culver, 12 Oreg. 228, 6 Pac. 775.

Pennsylvania.— Emerson *v.* Cochran, 111 Pa. St. 619, 4 Atl. 498; Schofield *v.* Ferrers, 47 Pa. St. 194, 86 Am. Dec. 532.

Canada.— McIntosh *v.* Stephens, 9 U. C. Q. B. 235.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 59.

One is not liable for prosecuting a civil action if it is instituted in good faith, without malice, and with no other motive than the recovery of a debt honestly believed to be due (Gonzales *v.* Cobliner, 68 Cal. 151, 8 Pac. 697), although he fails in the suit (Kemp *v.* Brown, 43 Fed. 391). The action cannot be maintained, unless it be clear that defendant acted maliciously in commencing the suit. Stone *v.* Swift, 4 Pick. (Mass.) 389, 16 Am. Dec. 349.

Creditors who intervene in insolvency proceedings, and *bona fide* recommend the appointment of a provisional syndic, are not liable in damages without proof of malice. Louque *v.* Drez, 37 La. Ann. 84.

The purchase of a negotiable promissory note is a lawful act, and has in itself no tendency to prove a wrongful motive in procuring an unlawful arrest in an action afterward brought thereon. Underwood *v.* Brown, 106 Mass. 298.

Diligence in making inquiry.— In an action

B. Nature and Kinds — 1. What Constitutes. To constitute malice there must be *malus animus*, denoting that the party who instituted the original proceeding was actuated by wrong motives.[52] And it is held that no distinction exists in this respect between an action for instituting a civil suit and an action for instituting a criminal prosecution.[53] The rule is well settled that malice may consist of any personal hatred or ill-will,[54] any improper or sinister purpose,[55] or any reckless disregard of the rights of others,[56] which is inconsistent with good

for malicious prosecution, in causing the arrest of plaintiff for taking from defendant's possession grain which he had purchased at execution sale, but which he was stopped from threshing by an injunction suit, defendant cannot be charged with bad faith in not inquiring of plaintiff as to all the circumstances when he knew plaintiff was employed by his opponent in litigation. Turner *v.* O'Brien, 11 Nebr. 108, 7 N. W. 850.

52. *Illinois.*— Harpham *v.* Whitney, 77 Ill. 32; Splane *v.* Byrne, 9 Ill. App. 392.

Iowa.— Jenkins *v.* Gilligan, (1906) 108 N. W. 237, 238, where it is said that "to constitute malice there must have been (1) a motive or purpose, and (2) it must have been an improper one."

Missouri.—Christian *v.* Hanna, 58 Mo. App. 37.

New York.— Dennis *v.* Ryan, 63 Barb. 145 [*affirmed* in 65 N. Y. 385, 22 Am. Rep. 635].

Virginia.— Forbes *v.* Hagman, 75 Va. 168.

United States.— Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116 [*reversing* 22 Fed. Cas. No. 13,176, 2 Woods 599].

See 33 Cent. Dig. tit. "Malicious Prosecution," § 60.

Malice not an act.— An instruction that malice "in its legal sense" is "any wrongful act done intentionally, without legal justification or excuse" is erroneous, as malice is not an act, but the wrongful motive which prompts the act. Garvey *v.* Wayson, 42 Md. 178. An instruction defining malice as not the act, but the motive which prompts it, as consisting of a bad motive, or reckless disregard of the rights of others so as to show an evil intent, and as an action based on an improper motive not necessarily presupposing hatred, ill-will, or revenge, is proper. Miles *v.* Walker, 66 Nebr. 728, 92 N. W. 1014.

The fact that defendant is an upright and honest man, incapable of swearing falsely, is not inconsistent with malice. Decoux *v.* Lieux, 33 La. Ann. 392. But see Ahrens, etc., Mfg. Co. *v.* Hoeher, 106 Ky. 692, 51 S. W. 194, 21 Ky. L. Rep. 299.

Belief as to liability for money mentioned in forged paper.— It is not necessary that a person making an affidavit before a magistrate of facts supposed by affiant to constitute a forgery of his name must have believed at the time that he was responsible for the payment of the money mentioned in the forged paper, in order to relieve him from liability. Hahn *v.* Schmidt, 64 Cal. 284, 30 Pac. 818.

53. Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116. But see Hagg *v.* Pinckney, 16 S. C. 387.

An attachment made upon grounds which the attaching creditor knows to be false is malicious. Hurlbut *v.* Hardenbrook, 85 Iowa 606, 52 N. W. 510. Knowingly and grossly overstating the amount of claim in an affidavit for attachment indicates malice. Tamblyn *v.* Johnston, 126 Fed. 267, 62 C. C. A. 601. Where a landlord had a valid claim against his tenant for rent, the fact that the tenant had claims for other indebtedness against the landlord exceeding the amount of rent due did not justify the conclusion that the landlord was actuated by malice in suing out a landlord's attachment in his action for rent. Smeaton *v.* Cole, 120 Iowa 368, 94 N. W. 909.

54. *Louisiana.*— Kearney *v.* Holmes, 6 La. Ann. 373.

Minnesota.— Cole *v.* Andrews, 70 Minn. 230, 73 N. W. 3.

New York.— Langley *v.* East River Gas. Co., 41 N. Y. App. Div. 470, 58 N. Y. Suppl. 992.

South Dakota.—Wuest *v.* American Tobacco Co., 10 S. D. 394, 73 N. W. 903.

United States.— Blunk *v.* Atchison, etc., R. Co., 38 Fed. 311.

55. *Arkansas.*— Lemay *v.* Williams, 32 Ark. 166.

Iowa.— Jenkins *v.* Gilligan, (1906) 108 N. W. 237, 238, where it is said: "The books agree that the prosecution need not have been prompted by malevolence or any corrupt design, nor necessarily involve spite or hatred toward the person accused. It is enough if it be the result of any improper or sinister motive and in disregard of the rights of others."

Maine.— Page *v.* Cushing, 38 Me. 523.

Maryland.— Cooper *v.* Utterbach, 37 Md. 282.

Massachusetts.—Mitchell *v.* Hall, 111 Mass. 492.

Tennessee.—Kendrick *v.* Cypert, 10 Humphr. 291.

Vermont.— Barron *v.* Mason, 31 Vt. 189.

England.— Mitchell *v.* Jenkins, 5 B. & Ad. 588, 3 L. J. K. B. 35, 2 N. & M. 301, 27 E. C. L. 250; Stockley *v.* Hornidge, 8 C. & P. 11, 34 E. C. L. 580.

56. *Massachusetts.*— Wills *v.* Noyes, 12 Pick. 324.

Michigan.— Hamilton *v.* Smith, 39 Mich. 222.

Missouri.— Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650.

Ohio.—Johnson *v.* McDaniel, 5 Ohio S. & C. Pl. Dec. 717, 7 Ohio N. P. 467.

Texas.— Biering *v.* Galveston First Nat. Bank, 69 Tex. 599, 7 S. W. 90.

faith [57] or the mere purpose to further the ends of justice.[58] Indeed the broad rule, that whatever is done wilfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malicious, has been applied to actions for malicious prosecutions.[59] But an unlawful act is

United States.— Blunk *v.* Atchison, etc., R. Co., 38 Fed. 311; Brewer *v.* Jacobs, 22 Fed. 217.

Canada.— Laliberté *v.* Gingras, 21 Quebec Super. Ct. 466.

Want of due care not conclusive as to malice.— But it has been held that the want of due care, and a reckless design to accomplish an object, regardless of the rights of others, do not necessarily constitute malice. McGurn *v.* Brackett, 33 Me. 331. See also Harpham *v.* Whitney, 77 Ill. 32.

Failure to consult convenience of plaintiff. — It is no evidence of wrongful intent that a party commenced suit before the justice most convenient to him, even though his office was not so convenient for defendant as some other might have been. Carl Corper Brewing, etc., Co. *v.* Minwegen, etc., Mfg. Co., 77 Ill. App. 213.

57. Collins *v.* Hayte, 50 Ill. 353; Proctor Coal Co. *v.* Moses, 40 S. W. 681, 19 Ky. L. Rep. 419; Pawlowski *v.* Jenks, 115 Mich. 275, 73 N. W. 238.

58. *Colorado.*— Williams *v.* Kyes, 9 Colo. App. 220, 47 Pac. 839.

Kentucky.— Metropolitan L. Ins. Co. *v.* Miller, 114 Ky. 754, 71 S. W. 921, 24 Ky. L. Rep. 1561.

Missouri.— Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650.

New Jersey.— See McFadden *v.* Lane, 71 N. J. L. 624, 60 Atl. 365.

New York.— See Coleman *v.* Botsford, 89 N. Y. App. Div. 104, 85 N. Y. Suppl. 1.

Pennsylvania.— Wenger *v.* Phillips, 195 Pa. St. 214, 45 Atl. 927, 78 Am. St. Rep. 810; Kerr *v.* Workman, Add. 270.

Texas.— Shannon *v.* Jones, 76 Tex. 141, 13 S. W. 477.

Wisconsin.— Eggett *v.* Allen, 119 Wis. 625, 96 N. W. 803.

England.— Abrath *v.* North Eastern R. Co., 11 Q. B. D. 440, 47 J. P. 692, 52 L. J. Q. B. 620, 49 L. T. Rep. N. S. 618, 32 Wkly. Rep. 50 [*affirmed* in 11 App. Cas. 247, 50 J. P. 659, 55 L. J. Q. B. 457, 55 L. T. Rep. N. S. 63].

The prosecution of a person criminally, with any other motive than that of bringing a guilty party to justice, is malicious. Krug *v.* Ward, 77 Ill. 603; Kendrick *v.* Cypert, 10 Humphr. (Tenn.) 291; Gabel *v.* Weisensee, 49 Tex. 131; Porter *v.* Martyn, (Tex. Civ. App. 1895) 32 S. W. 731; Vinal *v.* Core, 18 W. Va. 1. *Contra*, Jordan *v.* Alabama Great Southern R. Co., 81 Ala. 220, 8 So. 191. The law will presume malice from the intentional use of criminal process for an unauthorized purpose, as for instance for the recovery of property. Rosenblatt *v.* Rosenberg, 1 Nebr. (Unoff.) 656, 95 N. W. 686. The use of criminal process to enforce payment of a debt constitutes malicious prosecution (Peterson *v.* Reisdorph, 49 Nebr. 529, 68 N. W. 943; Toomey *v.* Delaware, etc., R. Co., 4 Misc. (N. Y.) 392, 24 N. Y. Suppl. 108 [*affirmed* in 147 N. Y. 709, 42 N. E. 726]; Morgan *v.* Duffy, 94 Tenn. 686, 30 S. W. 735; Sebastian *v.* Cheney, (Tex. Civ. App. 1893) 24 S. W. 970 [*reversed* on other grounds in 86 Tex. 497, 25 S. W. 691]; Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101); especially if the claim is unfounded (Cannell *v.* Michel, 6 La. Ann. 577). Where defendant's own testimony showed that he had caused plaintiff's arrest for obtaining goods under false pretenses in order to coerce payment of a debt and not to vindicate public justice, the jury might properly infer malice. Ross *v.* Langworthy, 13 Nebr. 492, 14 N. W. 515. To the same effect see Reed *v.* Loosemore, 197 Pa. St. 261, 48 Atl. 20. And the same rule has been applied where the criminal law was invoked to establish rights under a contract. Whiteford *v.* Henthorn, 10 Ind. App. 97, 37 N. E. 419. Where a prosecution is instituted and defendant is arrested for the purpose of extorting money from him, in an action by him for malicious prosecution, he need not prove malice, as in such case the law will imply it. Prough *v.* Entriken, 11 Pa. St. 81. But proof that a criminal process has been made use of as a means for the collection of a debt is *prima facie* only and not conclusive in establishing malice. Wenger *v.* Phillips, 195 Pa. St. 214, 45 Atl. 927, 78 Am. St. Rep. 810; Morgan *v.* Duffy, 94 Tenn. 686, 30 S. W. 735; Strehlow *v.* Petit, 96 Wis. 22, 71 N. W. 102; Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101. No one has the right to cause the arrest of another as an experiment, and an arrest under such circumstances is malicious. Johnson *v.* Ebberts, 11 Fed. 129, 6 Sawy. 538. But it has been held that to prosecute for the sake of making an example is not indicative of malice. Coleman *v.* Allen, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449.

59. *Iowa.*— Noble *v.* White, 103 Iowa 352, 72 N. W. 556, holding that a definition of malice "as such a state of mind as leads to the intentional doing of some wrongful act, knowing it to be without just cause or legal excuse," is correct.

Kentucky.— Proctor Coal Co. *v.* Moses, 40 S. W. 681, 19 Ky. L. Rep. 419.

Maine.— Pullem *v.* Glidden, 66 Me. 202.

Massachusetts.— Wills *v.* Noyes, 12 Pick. 324.

Oregon.— Gee *v.* Culver, 13 Oreg. 598, 11 Pac. 302.

Texas.— Glasgow *v.* Owen, 69 Tex. 167, 6 S. W. 527; Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85.

Virginia.— Scott *v.* Shelor, 28 Gratt. 891.

West Virginia.— Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

United States.— Johnson *v.* Ebberts, 11

not necessarily a malicious act.[60] The mere existence of an ulterior purpose[61] or personal anger and hostility toward the person proceeded against[62] is not always inconsistent with good faith in bringing the proceedings and does not necessarily create liability therefor.[63]

2. KINDS. Malice necessary to sustain an action for malicious prosecution may be express, actual, or as it is frequently called, malice in fact, resulting in intentional wrong.[64] Indeed malice in fact, or actual or express malice, as distinguished from malice in law, such for instance as the law presumes in actions for libel or slander,[65] is essential to the maintenance of an action for malicious prosecution; it is a fact to be found by the jury and not a fact to be established by legal presumption.[66] However, the term "legal malice" is sometimes used with reference to actions for malicious prosecutions, not as being synonymous with malice in law as referred to above, but to distinguish malice in its enlarged legal sense from malice in its more restricted popular sense;[67] and in this sense it is said that legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive, and it is not essential that actual malevolence or corrupt design be shown.[68] This enlarged conception of malice is, however, classified by other authorities as malice in fact.[69] Moreover malice

Fed. 129, 6 Sawy. 538; Wiggin *v.* Coffin, 29 Fed. Cas. No. 17,624, 3 Story 1.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 60.

60. Lyon *v.* Hancock, 35 Cal. 372.

61. Jackson *v.* Linnington, 47 Kan. 396, 28 Pac. 173, 27 Am. St. Rep. 300.

62. Peck *v.* Chouteau, 91 Mo. 138, 3 S. W. 577, 60 Am. Rep. 236 (where it is said that "dislike or ill-will so long as it remains a feeling only, unaccompanied with any act, does not constitute malice"); Lalor *v.* Byrne, 51 Mo. App. 578 (holding that evidence of ill-will or dislike will not of itself suffice to prove malice in its legal sense; but, when there is other evidence tending to prove this issue, it is admissible); Sharp *v.* Johnston, 4 Mo. App. 576.

63. Macdonald *v.* Schroeder, 28 Pa. Super. Ct 128.

64. Herbener *v.* Crossan, 4 Pennew. (Del.) 38, 55 Atl. 223; Sandoz *v.* Veazie, 106 La. 202, 30 So. 767; Grant *v.* Deuel, 3 Rob. (La.) 17, 38 Am. Dec. 228; Dwyer *v.* St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303.

65. See LIBEL AND SLANDER, 25 Cyc. 225.

66. *California.*— Levy *v.* Brannan, 39 Cal. 485.

Maine.— Humphries *v.* Parker, 52 Me. 502.

New York.— Von Latham *v.* Libby, 38 Barb. 339; Vanderbilt *v.* Mathis, 5 Duer 304, holding that unless the evidence in relation to the circumstances under which the prosecution was ended, and that given to establish the want of probable cause, justify the inference of actual malice, such other evidence as will justify the jury in finding its existence must be given.

England.— Hicks *v.* Faulkner, 8 Q. B. D. 167, 175, 46 J. P. 420, 51 L. J. Q. B. 268, 46 L. T. Rep. N. S. 127, 30 Wkly. Rep. 545, where it is said: "The malice necessary to be established is not even malice in law such as may be assumed from the intentional doing of a wrongful act (see Bromage *v.* Prosser, 4 B. & C. 247, 255, 10 E. C. L. 563, 1 C. & P. 475, 12 E. C. L. 276, 6 D. & R. 296, 3 L. J. K. B. O. S. 203, 28 Rev. Rep. 241, per Bayley, J.), but malice in fact — *malus animus* — indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards any body"); Mitchell *v.* Jenkins, 5 B. & Ad. 588, 3 L. J. K. B. 35, 2 N. & M. 301, 27 E. C. L. 250.

Canada.— Grant *v.* Booth, 25 Nova Scotia 266. *Compare* Orr *v.* Spooner, 19 U. C. Q. B. 601.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 61. See also 12 Am. Dec. 268 note.

In South Carolina it is held that in actions for malicious prosecutions it is necessary to show express malice — that is, intent to injure plaintiff. Freeland *v.* Southern R. Co., 70 S. C. 427, 429, 50 S. E. 11 (where it is said: "The term express malice used in this connection means malice towards the particular person who was prosecuted, as distinguished from that malice which the law implies from an act done without legal excuse, which he who does it well knows will in all probability produce injury to some human being, though express ill-will to the person injured may be actually disproved"); Willis *v.* Knox, 5 S. C. 474; Frierson *v.* Hewitt, 2 Hill 499. But it is held that in an action for malicious arrest on civil process, neither express malice nor actual damages need be proved. Hogg *v.* Pinckney, 16 S. C. 387.

67. Humphries *v.* Parker, 52 Me. 502.

68. Peck *v.* Chouteau, 91 Mo. 138, 3 S. W. 577, 60 Am. Rep. 236 [*quoting* Cooley Torts 185]. See also Lemay *v.* Williams, 32 Ark. 166; Page *v.* Cushing, 38 Me. 523; Mitchell *v.* Wall, 111 Mass. 492; Forbes *v.* Hagman, 75 Va. 168.

69. Hicks *v.* Faulkner, 8 Q. B. D. 167, 46 J. P. 420, 51 L. J. Q. B. 268, 46 L. T. Rep. N. S. 127, 30 Wkly. Rep. 545; Grant *v.* Booth, 25 Nova Scotia 266.

may be implied in the sense that it may be inferred by the jury[70] like any other fact, from circumstances, and need not be proved by direct evidence.[71] Thus it may be proved by defendant's conduct which considered as a whole is inconsistent with proper motives.[72] So it is held that malice may be presumed not only from the total absence of probable cause,[73] but also from gross and culpable negligence in omitting to make suitable and reasonable inquiries.[74] On the other hand it is held that while to accuse and prosecute a person for crime without probable cause is matter of such serious consequences that malice may be inferred therefrom, but not necessarily so; the rule is otherwise with reference to an ordinary act of negligence, and unless the injury complained of was intentional, or so reckless or wanton as to indicate bad faith, malice is not to be inferred therefrom.[75]

C. Inference From Want of Probable Cause[76] **— 1. In General.** Malice and want of probable cause are both essential and distinct ingredients of a cause of action in malicious prosecution.[77] It has been held that, by proof of circumstances which establish want of probable cause, a *prima facie* case of malice is made out,[78] and that the burden of proof is on defendant to disprove

70. Baker *v.* Hornick, 57 S. C. 213, 35 S. E. 524; Grant *v.* Booth, 25 Nova Scotia 266. See also Brewer *v.* Jacobs, 22 Fed. 217.

71. Lemay *v.* Williams, 32 Ark. 166; Levy *v.* Brannan, 39 Cal. 485; Humphries *v.* Parker, 52 Me. 502. See also *infra*, XIV, C, 6.

72. *Arkansas.*— Sexton *v.* Brock, 15 Ark. 345.

Louisiana.— Deslonde *v.* O'Hern, 39 La. Ann. 14, 1 So. 286.

Massachusetts.— Pierce *v.* Thompson, 6 Pick. 193, holding that where there are mutual dealings, if one party has not an opportunity of knowing both sides of the account, he may, to effect an adjustment, sue on the debit side, without regard to credits; but in the case of a partner who may examine the books, such a proceeding, accompanied by an attachment of property, may be evidence that the suit was malicious.

Minnesota.— Severns *v.* Brainard, 61 Minn. 265, 63 N. W. 477, holding that where plaintiff dismisses his action without trial, and then begins another suit against the same defendant on the same grounds, the bringing of the latter suit is evidence of malice.

New Jersey.— Navarino *v.* Dudrap, 66 N. J. L. 620, 50 Atl. 353.

New York.— Laird *v.* Taylor, 66 Barb. 139; Fagnan *v.* Knox, 40 N. Y. Super. Ct. 41, where defendant deprived plaintiff of his means of exculpation, and then prosecuted him criminally.

United States.— Berger *v.* Wild, 130 Fed. 882, 66 C. C. A. 79; Tiblier *v.* Alford, 12 Fed. 262.

Canada.— Therrien *v.* La Ville de St. Paul, 23 Quebec Super. Ct. 248.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 64.

Malice cannot be inferred from the mere fact that defendant employed counsel to prosecute the charges complained of (Aldridge *v.* Churchill, 28 Ind. 62), or from his involuntary appearance before the grand jury, in obedience to a subpœna (Richter *v.* Koster, 45 Ind. 440), or his voluntary attendance upon the execution of a search warrant (Garvey *v.* Wayson, 42 Md. 178).

73. See *infra*, VII, C, 1.

74. Long *v.* Rodgers, 19 Ala. 321; Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650; Callahan *v.* Caffarata, 39 Mo. 136; Blunk *v.* Atchison, etc., R. Co., 38 Fed. 311; Wiggin *v.* Coffin, 29 Fed. Cas. No. 17,624, 3 Story 1.

75. Jenkins *v.* Gilligan, (Iowa 1906) 108 N. W. 237.

76. Inference of want of probable cause from malice see *supra*, VI, A, 2, text and note 44.

77. Judy *v.* Gifford, 33 Ind. App. 353, 71 N. E. 504; Montgomery *v.* Sutton, 58 Iowa 697, 12 N. W. 719; Girot *v.* Graham, 41 La. Ann. 511, 5 So. 815; Godfrey *v.* Soniat, 33 La. Ann. 915; Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. N. S. 928.

Without malice want of probable cause is wholly insufficient. Lunsford *v.* Dietrich, 93 Ala. 565, 9 So. 308, 30 Am. St. Rep. 79; Ball *v.* Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; Harkrader *v.* Moore, 44 Cal. 144; Stone *v.* Stevens, 12 Conn. 219, 30 Am. Dec. 611; Herbener *v.* Crossan, 4 Pennew. (Del.) 38, 55 Atl. 223; Coleman *v.* Allen, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449; Leidig *v.* Rawson, 2 Ill. 272, 29 Am. Dec. 354; Sandoz *v.* Veazie, 106 La. 202, 30 So. 767; Carson *v.* Edgeworth, 43 Mich. 241, 5 N. W. 282; Vanderbilt *v.* Mathis, 5 Duer (N. Y.) 304; Madison *v.* Pennsylvania R. Co., 147 Pa. St. 509, 23 Atl. 764, 30 Am. St. Rep. 756; Dietz *v.* Langfitt, 63 Pa. St. 234; Graham *v.* Bell, 1 Nott & M. (S. C.) 278, 9 Am. Dec. 687; Griffin *v.* Chubb, 7 Tex. 603; 58 Am. Dec. 85; Vinal *v.* Core, 18 W. Va. 1; Small *v.* McGovern, 117 Wis. 608, 94 N. W. 651; Abrath *v.* North Eastern R. Co., 11 Q. B. D. 440, 47 J. P. 692, 52 L. J. Q. B. 620, 49 L. T. Rep. N. S. 618, 32 Wkly. Rep. 50 [*affirmed* in 11 App. Cas. 247, 50 J. P. 659, 55 L. J. Q. B. 457, 55 L. T. Rep. N. S. 63].

78. Herbener *v.* Crossan, 4 Pennew. (Del.) 38, 55 Atl. 223; Toth *v.* Greisen, (N. J. Sup. 1902) 51 Atl. 927; Barron *v.* Mason, 31 Vt.

it.[79] But the more general opinion is that neither one is dependent on nor inferred from the other, as a matter of law;[80] and that from the circumstances establishing want of probable cause the jury[81] may[82] and as a matter of fact ordinarily

189; Collins *v.* Shannon, 67 Wis. 441, 30 N. W. 730.

79. Torsch *v.* Dell, 88 Md. 459, 41 Atl. 903; Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650; Butcher *v.* Hoffman, 99 Mo. App. 239, 73 S. W. 266; Mann *v.* Cowan, 8 Pa. Super. Ct. 30.

80. *Alabama.*— Jordan *v.* Alabama Great Southern R. Co., 81 Ala. 220, 8 So. 191; Ewing *v.* Sanford, 19 Ala. 605.

California.— Griswold *v.* Griswold, 143 Cal. 617, 77 Pac. 672; Harkrader *v.* Moore, 44 Cal. 144; Levy *v.* Brannan, 39 Cal. 485.

Illinois.— Tumalty *v.* Parker, 100 Ill. App. 382; Cartwright *v.* Elliott, 45 Ill. App. 458; Comisky *v.* Breen, 7 Ill. App. 369; Hirschi *v.* Mettelman, 7 Ill. App. 112; Bishop *v.* Bell, 2 Ill. App. 551.

Indiana.— Oliver *v.* Pate, 43 Ind. 132; Ammerman *v.* Crosby, 26 Ind. 451; Newell *v.* Downs, 8 Blackf. 523.

Iowa.— Pierce *v.* Doolittle, 130 Iowa 333, 106 N. W. 751; Parker *v.* Parker, 102 Iowa 500, 71 N. W. 421.

Kansas.— Malone *v.* Murphy, 2 Kan. 250.

New York.— McCarthy *v.* Weir, 113 N. Y. App. Div. 435, 99 N. Y. Suppl. 372; Vanderbilt *v.* Mathis, 5 Duer 304; Brown *v.* McBride, 24 Misc. 235, 52 N. Y. Suppl. 620.

North Carolina.— Kelly *v.* Durham Traction Co., 132 N. C. 368, 43 S. E. 923, 133 N. C. 418, 45 S. E. 826; Johnson *v.* Chambers, 32 N. C. 287; Bell *v.* Pearcy, 27 N. C. 83.

Tennessee.— Greer *v.* Whitfield, 4 Lea 85.

Texas.— Willis *v.* McNeill, 57 Tex. 465; Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85.

Canada.— Winfield *v.* Kean, 1 Ont. 193.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 67.

81. *Alabama.*— O'Neal *v.* McKinna, 116 Ala. 606, 22 So. 905.

Arkansas.— Bozeman *v.* Shaw, 37 Ark. 160.

Illinois.— Roy *v.* Goings, 112 Ill. 656; Krug *v.* Ward, 77 Ill. 603.

Iowa.— Pierce *v.* Doolittle, 130 Iowa 333, 106 N. W. 751.

Kentucky.— Wood *v.* Weir, 5 B. Mon. 544.

Maine.— Merriam *v.* Mitchell, 13 Me. 439, 29 Am. Dec. 514.

Maryland.— McWilliams *v.* Hoban, 42 Md. 56; Copper *v.* Utterbach, 37 Md. 282.

Minnesota.— Price *v.* Denison, 95 Minn. 106, 103 N. W. 728.

Nebraska.— Wertheim *v.* Altschuler, 12 Nebr. 591, 12 N. W. 107. *Compare* Rosenblatt *v.* Rosenberg, (1901) 95 N. W. 686.

New York.— McCarthy *v.* Weir, 113 N. Y. App. Div. 435, 99 N. Y. Suppl. 372; Grinnell *v.* Stewart, 32 Barb. 544; Vanderbilt *v.* Mathis, 5 Duer 304.

North Carolina.— McGowan *v.* McGowan, 122 N. C. 145, 29 S. E. 97.

Pennsylvania.— Prough *v.* Entriken, 11 Pa. St. 81.

Rhode Island.— Mowry *v.* Whipple, 8 R. I. 360.

Tennessee.— Hall *v.* Hawkins, 5 Humphr. 357.

Texas.— Gulf, etc., R. Co. *v.* James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743.

Virginia.— Evans *v.* Atlantic Coast Line R. Co., 105 Va. 72, 53 S. E. 3.

West Virginia.— Vinal *v.* Core, 18 W. Va. 1.

United States.— Burnap *v.* Albert, 4 Fed. Cas. No. 2,170, Taney 244.

England.— Mitchell *v.* Jenkins, 5 B. & Ad. 588, 3 L. J. K. B. 35, 2 N. & M. 301, 27 E. C. L. 250; Johnstone *v.* Sutton, 1 T. R. 510.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 67.

82. *Alabama.*— O'Neal *v.* McKinna, 116 Ala. 606, 22 So. 905; Long *v.* Rodgers, 19 Ala. 321; Bennett *v.* Black, 1 Stew. 39.

Arizona.— Cunningham *v.* Moreno, (1905) 80 Pac. 327.

California.— Grant *v.* Moore, 29 Cal. 644.

Colorado.— Murphy *v.* Hobbs, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366.

Connecticut.— Stone *v.* Stevens, 12 Conn. 219, 30 Am. Dec. 611.

Georgia.— Southwestern R. Co. *v.* Mitchell, 80 Ga. 438, 5 S. E. 490.

Illinois.— Hairpham *v.* Whitney, 77 Ill. 32; Ames *v.* Snider, 69 Ill. 376; McBean *v.* Ritchie, 18 Ill. 114; Daily *v.* Donath, 100 Ill. App. 52; Splane *v.* Byrne, 9 Ill. App. 392.

Indiana.— Heap *v.* Parrish, 104 Ind. 36, 3 N. E. 549; McCasland *v.* Kimberlin, 100 Ind. 121; Bitting *v.* Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505. *Compare* Strickler *v.* Greer, 95 Ind. 596.

Iowa.— Parker *v.* Parker, 102 Iowa 500, 71 N. W. 421; Center *v.* Spring, 2 Iowa 393.

Kansas.— Wright *v.* Hayter, 5 Kan. App. 638, 45 Pac. 546.

Kentucky.— Fullenwider *v.* McWilliams, 7 Bush 389; Wood *v.* Weir, 5 B. Mon. 544; Holburn *v.* Neal, 4 Dana 120.

Louisiana.— Brown *v.* Vittur, 47 La. Ann. 607, 17 So. 193; Decoux *v.* Lieux, 33 La. Ann. 392; Hayes *v.* Hayman, 20 La. Ann. 336; Blass *v.* Gregor, 15 La. Ann. 421; McCormick *v.* Conway, 12 La. Ann. 53; Cannell *v.* Michel, 6 La. Ann. 577; Senecal *v.* Smith, 9 Rob. 418; Grant *v.* Deuel, 3 Rob. 17, 38 Am. Dec. 228.

Maine.— Merriam *v.* Mitchell, 13 Me. 439, 29 Am. Dec. 514; Ulmer *v.* Leland, 1 Me. 135, 10 Am. Dec. 48.

Maryland.— Straus *v.* Young, 36 Md. 246; Turner *v.* Walker, 3 Gill & J. 377, 22 Am. Dec. 329.

Michigan.— Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. N. S. 928; Carson *v.* Edgeworth, 43 Mich. 241, 5 N. W. 282.

Minnesota.— Eickhoff *v.* Fidelity, etc., Co.,

does[83] infer malice, but is nevertheless not necessarily required to draw such inference.[84]

2. Rebuttal of Inference. The inference of malice from proof of want of probable cause may be rebutted by evidence showing a lawful and honest purpose,[85] or such facts as would be calculated to produce on the mind of a prudent and reasonable man a well grounded belief of the propriety of the proceedings instituted.[86]

D. Inference From Result of Proceeding. The law does not presume malice merely because plaintiff has been prosecuted, acquitted,[87] and discharged,[88] or because the order of arrest has been vacated,[89] or the prosecution *nolle pros'd*,[90] abandoned,[91] or voluntarily discontinued.[92] Nor does the mere termination of the

74 Minn. 139, 76 N. W. 1030; Cole v. Andrews, 70 Minn. 230, 73 N. W. 3; Chapman *v.* Dodd, 10 Minn. 350.

Nevada.— McNamee *v.* Nesbitt, 24 Nev. 400, 56 Pac. 37.

New York.— Brounstein *v.* Wile, 65 Hun 623, 20 N. Y. Suppl. 204; Wanser *v.* Wyckoff, 9 Hun 178; Hall *v.* Suydam, 6 Barb. 83; Lawyer *v.* Loomis, 3 Thomps & C. 393; Garrison *v.* Pearce, 3 E. D. Smith 255; Burhans *v.* Sanford, 19 Wend. 417; Murray *v.* Long, 1 Wend. 140. *Compare* Kingsbury *v.* Garden, 45 N. Y. Super. Ct. 224.

North Carolina.— Merrell *v.* Dudley, 139 N. C. 57, 51 S. E. 77; McGowan *v.* McGowan, 122 N. C. 145, 29 S. E. 97; Brooks *v.* Jones, 33 N. C. 260.

North Dakota.— Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

Pennsylvania.— Humphreys *v.* Mead, 23 Pa. Super. Ct. 415; Le Maistre *v.* Hunter, Brightly 494.

Rhode Island.— King *v.* Colvin, 11 R. I. 582; Mowry *v.* Whipple, 8 R. I. 360.

South Carolina.— Caldwell *v.* Bennett, 22 S. C. 1; Hogg *v.* Pinckney, 16 S. C. 387; Bell *v.* Graham, 1 Nott & M. 278, 9 Am. Dec. 687.

South Dakota.— Richardson *v.* Dybedahl, 14 S. D. 126, 84 N. W. 486; Wuest *v.* American Tobacco Co., 10 S. D. 394, 73 N. W. 903.

Tennessee.—Kendrick *v.* Cypert, 10 Humphr 291.

Virginia.— Scott *v.* Shelor, 28 Gratt. 891; Spengler *v.* Davy, 15 Gratt. 381.

Wisconsin.— Small *v.* McGovern, 117 Wis. 608, 94 N. W. 651; Lauterbach *v.* Netzo, 111 Wis. 322, 87 N. W. 230.

United States.— Ambs *v.* Atchison, etc., R. Co., 114 Fed. 317; Blunt *v.* Little, 3 Fed. Cas. No. 1,578, 3 Mason 102.

England.— Sutton *v.* Johnstone, 1 Bro. P. C. 76, 1 T. R. 493, 1 Rev. Rep. 269, 1 Eng. Reprint 427.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 67.

Compare Whitfield *v.* Westbrook, 40 Miss. 311.

In Missouri the rule is laid down that if want of probable cause is shown, the jury may infer malice from the facts which show the want of probable cause (Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650; Holliday *v.* Sterling, 62 Mo. 321; Moore *v.* Sauborin, 42 Mo. 490; Callahan *v.* Caffarata, 39 Mo. 136; Casperson *v.* Sproule, 39 Mo. 39; Butcher *v.* Hoffman, 99 Mo. App. 239, 73 S. W. 266; Talbott *v.* Great Western Plaster Co., 86 Mo. App. 558; Grant *v.* Reinhart, 33 Mo. App. 74. *Compare* Vansickle *v.* Brown, 68 Mo. 627; Christian *v.* Hanna, 58 Mo. App. 37); and the burden then falls on defendant to show that he acted without malice (Stubbs *v.* Mulholland, *supra*; Butcher *v.* Hoffman, *supra*). In Sharpe *v.* Johnson, 76 Mo. 660, it was held that malice cannot be inferred from want of probable cause, but it may be inferred from the same facts which go to establish want of probable cause, and the inference is one of law.

83. Sundmaker *v.* Gaudet, 113 La. 887, 37 So. 865; Baker *v.* Hornick, 57 S. C. 213, 35 S. E. 524. See also Gould *v.* Gregory, 133 Mich. 382, 95 N. W. 414.

84. Wright *v.* Hayter, 5 Kan. App. 638, 47 Pac. 546; Ton *v.* Stetson, (Wash. 1906) 86 Pac. 668.

Malice cannot be inferred from mere want of probable cause, when disproved by other circumstances. Emerson *v.* Cochran, 111 Pa. St. 619, 4 Atl. 498. See also Beach *v.* Wheeler, 24 Pa. St. 212. Malice will not be implied from the want of probable cause, where defendant is a man of high reputation, and humane disposition, and nothing induces the belief that he had any cause to prompt him to injure plaintiff. Digard *v.* Michaud, 9 Rob. (La.) 387.

85. Stone *v.* Stevens, 12 Conn. 219, 30 Am. Dec. 611; Wood *v.* Weir, 5 B. Mon. (Ky.) 544; Barron *v.* Mason, 31 Vt. 189.

86. Lunsford *v.* Dietrich, 86 Ala. 250, 5 So. 461, 11 Am. St. Rep. 37; Ewing *v.* Sandford, 21 Ala. 157.

87. McBean *v.* Ritchie, 18 Ill. 114.

The fact that there was a committal under the prosecution alleged to have been malicious does not negative the alleged malice of the prosecutor, but only the want of probable cause. Lewton *v.* Hower, 35 Fla. 58, 16 So. 616.

88. Staub *v.* Van Benthuysen, 36 La. Ann. 467. *Compare* Sappington *v.* Watson, 50 Mo. 83.

89. Sheahan *v.* National Steamship Co., 66 Hun (N. Y.) 48, 20 N. Y. Suppl. 740.

90. Yocum *v.* Polly, 1 B. Mon. (Ky.) 358, 36 Am. Dec. 583; McClafferty *v.* Philp, 151 Pa. St. 86, 24 Atl. 1042.

91. Le Maistre *v.* Hunter, Brightly (Pa.) 494.

92. Joiner *v.* Ocean Steamship Co., 86 Ga.

suit, complained of as malicious, in favor of plaintiff in the suit for malicious prosecution, raise such presumption.[93]

E. Effect of Advice of Counsel. Where probable cause is shown by sufficient proof of advice of counsel conforming to the requirements of the law, questions as to malice ordinarily become immaterial because in most jurisdictions a full defense to an action for malicious prosecution has thus been made out.[94] But where such advice falls short of showing probable cause[95] defendant, to negative and rebut implied but not express malice,[96] may prove that he had consulted counsel learned in the law[97] concerning a legal principle involved in the issues;[98] upon a full and fair statement of all the facts[99] within his knowledge or which with due diligence he might have known;[1] and that thereupon such attorney advised the prosecution;[2] and that defendant acted in such prosecution

238, 12 S. E. 361; Funk *v.* Amor, 7 Ohio Cir. Ct. 419, 4 Ohio Cir. Dec. 662.

93. Helwig *v.* Beckner, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788; Campbell *v.* Threlkeld, 2 Dana (Ky.) 425; Leyser *v.* Field, 5 N. M. 356, 23 Pac. 173.

94. See *supra*, VI, B, 2, d, (I), (A).

Advice of counsel as partial defense see *supra*, VI, B, 2, d, (I), (B).

95. Lipowicz *v.* Jervis, 209 Pa. St. 315, 58 Atl. 619; Barron *v.* Mason, 31 Vt. 189.

96. Wild *v.* Odell, 56 Cal. 136; Davenport *v.* Lynch, 51 N. C. 545; Baker *v.* Hornick, 57 S. C. 213, 35 S. E. 524. See also Barge *v.* Weems, 109 Ga. 685, 35 S. E. 65.

Evidence of advice of counsel as showing malice.— The fact that the city attorney advised that the ordinance under which plaintiff was arrested was void is not evidence of malice. James *v.* Sweet, 125 Mich. 132, 84 N. W. 61.

Declarations of attorney as evidence of malice.— Declarations of plaintiff's attorney in a trover suit, not made in plaintiff's presence, nor brought home to him in any way, are inadmissible to show malice in bringing such suit. Farrar *v.* Brackett, 86 Ga. 463, 12 S. E. 686.

97. See cases cited *infra*, this note.

Advice of person not attorney at law.—The fact that in commencing the prosecution defendant acted upon the advice of a person who was not a counselor or attorney at law is incompetent to disprove malice. McCullough *v.* Rice, 59 Ind. 580; Burgett *v.* Burgett, 43 Ind. 78 (advice of a justice of the peace, after fully and fairly stating the case to him); Straus *v.* Young, 36 Md. 246 (advice of a magistrate); Olmstead *v.* Partridge, 16 Gray. (Mass.) 381; Breitmesser *v.* Stier, 13 Phila. (Pa.) 80 (advice of detective at a police station, specially empowered by the mayor to inquire into such cases, a person too of experience in criminal matters, although not learned in the law). *Compare* Cook *v.* Proskey, 138 Fed. 273, 70 C. C. A. 563.

That defendant had consulted the family physician, who from the description of plaintiff's action was of the opinion that she was insane, has been held admissible to rebut the inference of malice in an action for malicious prosecution in causing the arrest and imprisonment of plaintiff upon a charge of insanity. Griswold *v.* Griswold, 143 Cal. 617, 77 Pac. 672.

Evidence in rebuttal.—That the person consulted had no sign displayed as an attorney is admissible in rebuttal. Atkinson *v.* Van Cleave, 25 Ind. App. 508, 57 N. E. 731.

The fact that two justices of the peace issued an order of attachment which was unjust, illegal, and offensive does not, in all cases, conduce to show that the party or his attorney might not have procured the order maliciously. Wood *v.* Weir, 5 B. Mon. (Ky.) 544.

Consultation of counsel with county attorney.— Evidence of a witness who had been consulted as counsel by defendant, with relation to his having submitted the matter to the county attorney, has been held to be properly excluded, as immaterial. Kletzing *v.* Armstrong, 119 Iowa 505, 93 N. W. 500.

98. Laird *v.* Taylor, 66 Barb. (N. Y.) 139.

99. *Colorado.*— Brooks *v.* Bradford, 4 Colo. App. 410, 36 Pac. 303.

Illinois.— Murphy *v.* Larson, 77 Ill. 172; Skidmore *v.* Bricker, 77 Ill. 164.

Indiana.— Flora *v.* Russell, 138 Ind. 153, 37 N. E. 593.

Nebraska.— Gillispie *v.* Stafford, 4 Nebr. (Unoff.) 873, 96 N. W. 1039.

North Carolina.— Beal *v.* Robeson, 30 N. C. 276.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 66.

Sufficiency of statement of facts a question for the jury.— Torsch *v.* Dell, 88 Md. 459, 41 Atl. 903.

1. Parker *v.* Parker, 102 Iowa 500, 71 N. W. 421; Cooper *v.* Utterbach, 37 Md. 282.

2. Eastman *v.* Keasor, 44 N. H. 518; Ramsey *v.* Arrott, 64 Tex. 320; R. F. Scott Grocer Co. *v.* Kelly, 14 Tex. Civ. App. 136, 36 S. W. 140.

Instructions by prosecuting attorney.— It is not malicious prosecution for one to prefer charges against a person to the prosecuting attorney, and follow his instructions in laying the matter before the grand jury. St. Louis, etc., R. Co. *v.* Wallin, 71 Ark. 422, 75 S. W. 477.

A letter of the prosecuting attorney, authorizing the commencement of the prosecu-

on such advice[3] in good faith.[4] Such evidence not amounting to proof of probable cause may operate strongly,[5] but is not conclusive to show that defendant acted without malice.[6]

VIII. FAVORABLE TERMINATION OF PROCEEDING.[7]

A. An Essential Element — 1. GENERAL RULE. Subject to the exception stated below no action lies, and no counter-claim[8] can be asserted for a malicious prosecution until the original proceeding, civil[9] or criminal,[10] complained of has

tion complained of, is admissible, where it tends to show motive, and probable cause to believe that an offense had been committed, and that the course usual in such cases was taken. Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860.

3. *Arkansas.*— Lemay *v.* Williams, 32 Ark. 166.

Colorado.— Brooks *v.* Bradford, 4 Colo. App. 410, 36 Pac. 303.

Indiana.— Smith *v.* Zent, 59 Ind. 362.

Iowa.— Myers *v.* Wright, 44 Iowa 38.

Louisiana.— Womack *v.* Fudikar, 47 La. Ann. 33, 16 So. 645.

Maine.— Hopkins *v.* McGillicuddy, 69 Me. 273; Soule *v.* Winslow, 66 Me. 447.

Maryland.— Turner *v.* Walker, 3 Gill & J. 377, 22 Am. Dec. 329.

Missouri.— Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650.

Texas.— Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446.

West Virginia.—Vinal *v.* Core, 18 W. Va. 1.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 66.

The consultation must be connected with the commencement of the prosecution. Olson *v.* Berg, 87 Minn. 277, 91 N. W. 1103.

4. *Colorado.*— Brooks *v.* Bradford, 4 Colo. App. 410, 36 Pac. 303.

Maryland.— Cooper *v.* Utterbach, 37 Md. 282.

Pennsylvania.— McClafferty *v.* Philp, 151 Pa. St. 86, 24 Atl. 1042; Emerson *v.* Cochran, 111 Pa. St. 619, 4 Atl. 498; Humphreys *v.* Mead, 23 Pa. Super. Ct. 415.

Texas.— Glasgow *v.* Owen, 69 Tex. 167, 6 S. W. 527.

Wisconsin.— Small *v.* McGovern, 117 Wis. 608, 94 N. W. 651.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 66.

5. Murphy *v.* Larson, 77 Ill. 172; Skidmore *v.* Bricker, 77 Ill. 164; Palmer *v.* Richardson, 70 Ill. 544.

6. Lemay *v.* Williams, 32 Ark. 166; Lytton *v.* Baird, 95 Ind. 349; Brewer *v.* Jacobs, 22 Fed. 217, holding that if the jury can see from all the facts that the suit was malicious, notwithstanding the advice of counsel, such advice affords no protection.

7. **Termination of proceeding:** Evidence see *infra*, XIV, C, 7. Pleading see *infra*, XIII, A, 6. Showing want of probable cause see *supra*, VI, B, 4; VI, C, 4.

8. Cawker City State Bank *v.* Jennings, 89 Iowa 230, 56 N. W. 494; Brooks *v.* Westover, 65 Iowa 369, 21 N. W. 682.

9. *Alabama.*— Jones *v.* Kirksey, 10 Ala. 839.

California.— Dowdell *v.* Carpy, 129 Cal. 168, 61 Pac. 948.

Connecticut.— See Frisbie *v.* Morris, 75 Conn. 637, 55 Atl. 9.

Kentucky.— Wood *v.* Laycock, 3 Metc. 192.

Maine.— Williams *v.* Ellis, 101 Me. 247, 63 Atl. 818.

Maryland.— Turner *v.* Walker, 3 Gill & J. 377, 22 Am. Dec. 329.

Massachusetts.— Shattuck *v.* Simonds, 191 Mass. 506, 78 N. E. 122; Wilson *v.* Hale, 178 Mass. 111, 59 N. E. 632; O'Brien *v.* Barry, 106 Mass. 300, 8 Am. Rep. 329.

New York.— Burt *v.* Place, 4 Wend. 591.

Wisconsin.— Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261.

England.— Metropolitan Bank *v.* Pooley, 10 App. Cas. 210, 49 J. P. 756, 54 L. J. Q. B. 449, 53 L. T. Rep. N. S. 163, 33 Wkly. Rep. 709.

Favorable termination when not necessary see *infra*, VIII, A, 2.

10. *California.*— Hurgren *v.* Union Mut. L. Ins. Co., 141 Cal. 595, 75 Pac. 168.

Connecticut.— Brown *v.* Randall, 36 Conn. 56, 4 Am. Rep. 35.

Illinois.— Bonney *v.* King, 201 Ill. 47, 66 N. E. 377; McBean *v.* Ritchie, 18 Ill. 114. But see Gilbert *v.* Emmons, 42 Ill. 143, 89 Am. Dec. 412, where it is held that an action for malicious prosecution will lie, although there has been no trial by jury or verdict of acquittal upon the charge.

Indiana.— West *v.* Hays, 104 Ind. 251, 3 N. E. 932.

Kansas.— Schippel *v.* Norton, 38 Kan. 567, 16 Pac. 804; Gillespie *v.* Hudson, 11 Kan. 163.

Massachusetts.—Wood *v.* Graves, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95; O'Brien *v.* Barry, 106 Mass. 300, 8 Am. Rep. 329; Bacon *v.* Waters, 2 Allen 400.

Missouri.— Sharpe *v.* Johnston, 76 Mo. 660.

New Jersey.— Lowe *v.* Wartman, 47 N. J. L. 413, 1 Atl. 489.

New York.— Hinds *v.* Parker, 11 N. Y. App. Div. 327, 42 N. Y. Suppl. 955.

North Carolina.— Hardin *v.* Borders, 23 N. C. 143.

Pennsylvania.— Mayer *v.* Walter, 64 Pa. St. 283; Stewart *v.* Thompson, 51 Pa. St. 158.

South Carolina.— O'Driscoll *v.* McBurney, 2 Nott & M. 54; Shackleford *v.* Smith, 1 Nott & M. 36.

been legally terminated in favor of defendant therein.[11] Until such original proceeding has been so finally ended, there is no remedy because there is no wrong,[12] and questions concerning want of probable cause and malice are immaterial.[13]

Wisconsin.— Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135; Pratt *v.* Page, 18 Wis. 337.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 70.

But see Johnson *v.* Corrington, 7 Ohio Dec. (Reprint) 572, 3 Cinc. L. Bul. 1139, where plaintiff was indicted and then arrested in another state on a requisition as a fugitive from justice, it was held that he might bring an action for malicious prosecution, although the indictment is still pending.

11. *California.*— Grant *v.* Moore, 29 Cal. 644.

Connecticut.— Monroe *v.* Maples, 1 Root 553.

Illinois.— Daily *v.* Donath, 100 Ill. App. 52.

Indiana.— Stark *v.* Bindley, 152 Ind. 182, 52 N. E. 804; Steel *v.* Williams, 18 Ind. 161.

Kentucky.— Wood *v.* Laycock, 3 Metc. 192.

Louisiana.— Davis *v.* Stuart, 47 La. Ann. 378, 16 So. 871.

New York.— Vanderbilt *v.* Mathis, 5 Duer 304.

Tennessee.— Swepson *v.* Davis, 109 Tenn. 99, 70 S. W. 65, 59 L. R. A. 501.

Texas.— Von Koehring *v.* Witte, 15 Tex. Civ. App. 646, 40 S. W. 63.

Vermont.— Driggs *v.* Burton, 44 Vt. 124.

West Virginia.—Vinal *v.* Core, 18 W. Va. 1.

Wisconsin.— Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261.

United States.— Crescent City Live-Stock, etc., Co. *v.* Butchers' Union Slaughter House, etc., Co., 120 U. S. 141, 7 S. Ct. 472, 30 L. ed. 614.

England.— Whitworth *v.* Hall, 2 B. & Ad. 695, 9 L. J. K. B. 297, 22 E. C. L. 291; Fisher *v.* Bristow, Dougl. (3d ed.) 215; Morgan *v.* Hughes, 2 T. R. 225; Arundel *v.* Tregono, Yelv. 116.

Canada.— Poitras *v.* Le Beau, 14 Can. Sup. Ct. 742; Erickson *v.* Brand, 14 Ont. App. 614; Cameron *v.* Fergusson, 3 U. C. Q. B. O. S. 318.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 70.

In a prosecution for perjury defendant has no ground of action for want of probable cause for the prosecution, no matter how malicious and unfounded it may have been, until such prosecution is ended by his acquittal or discharge. McBean *v.* Ritchie, 18 Ill. 114.

Attachment proceedings.— According to what is believed to be the weight of authority, an action will not lie for a malicious attachment until a termination of the attachment suit in favor of defendant therein. Rea *v.* Lewis, Minor (Ala.) 382; Wall *v.* Toomey, 52 Conn. 35; Feazle *v.* Simpson, 2 Ill. 30; Nolle *v.* Thompson, 3 Metc. (Ky.) 121; Spring *v.* Besore, 12 B. Mon. (Ky.) 551; Rossiter *v.* Minnesota Bradner-Smith Paper Co., 37 Minn. 996, 33 N. W. 855; Kelley *v.* Osborn, 86 Mo. App. 239; Freymark *v.* McKinney Bread Co., 55 Mo. App. 435; Bump *v.* Betts, 19 Wend. (N. Y.) 421; Donnegan v. Armour, 3 Ohio Cir. Ct. 432, 2 Ohio Cir. Dec. 244; Zigler *v.* Russell, 2 Ohio Dec. (Reprint) 518, 3 West. L. Month. 424; Sloan *v.* McCracken, 7 Lea (Tenn.) 626; McCracken *v.* Covington City Nat. Bank, 4 Fed. 602. In Michigan it is held that a motion to dissolve an attachment need not precede the bringing of the suit for malicious attachment; but that if the motion to dissolve is made, the attachment defendant will have to wait until the termination of that proceeding before bringing suit; and that a motion to dissolve afterward made does not affect the suit once instituted. Cadwell *v.* Corey, 91 Mich. 335, 51 N. W. 888 [*citing* Brand *v.* Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362]. Termination of suit by payment of plaintiff's demands and costs, it has been held, will not necessarily bar an action for malicious attachment, inasmuch as the interests of the party imperatively require that his property shall be released from the wrongful attachment without delay. Brand *v.* Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362; Fortman *v.* Rottier, 8 Ohio St. 548, 70 Am. Dec. 606. To the same effect see Spaids *v.* Barrett, 57 Ill. 289, 11 Am. Rep. 10, where it was held that an action for malicious attachment might be brought where defendant in attachment paid the amount claimed in the writ to save his property from total ruin. That attachment defendant entered special bail to dissolve the attachment and confessed judgment for a smaller amount than claimed is no defense to the action. Foster *v.* Sweeny, 14 Serg. & R. (Pa.) 386.

12. Liquid Carbonic Acid Mfg. Co. *v.* Convert, 82 Ill. App. 39 [*affirmed* in 186 Ill. 384, 57 N. E. 1129]; Fisher *v.* Bristow, Dougl. (3d ed.) 215. See also *infra*, XI, D; XIII, B, 2, h, (II).

The declaration must show that the suit complained of has been brought to an end the same as in a case of malicious prosecution of a criminal proceeding, and for the same reason, viz., that the party might recover in his action for malicious prosecution, and yet be guilty of and afterward convicted of the original charge. Bonney *v.* King, 103 Ill. App. 601 [*affirmed* in 201 Ill. 47, 66 N. E. 377].

13. Hergenrather *v.* Spielman, (Md. 1891) 22 Atl. 1106; Lowe *v.* Wartman, 47 N. J. L. 413, 1 Atl. 489; Williams *v.* Ainsworth, 121 Wis. 600, 99 N. W. 327.

2. Exception to Rule. An exception to the rule just stated [14] has been enforced where the proceedings complained of were *ex parte* [15] and plaintiff had no opportunity of being heard,[16] as in cases of malicious attachment.[17]

B. Mode of Termination — 1. In General. Any mode of termination is sufficient which constitutes a *bona fide* and final disposition on the merits [18] of the particular case by the proper judicial officer or body,[19] or which amounts to such a cessation of proceedings as to render them incapable of being revived.[20]

2. Judgment or Acquittal — a. In General. A verdict and judgment are not essential to the maintenance of the action.[21] A criminal prosecution has sufficiently terminated in this sense if plaintiff has been acquitted.[22]

b. Effect of Appeal. It has been decided that the rendition of a judgment [23]

14. See *supra*, VIII, A, 1. See also *supra*, VI, B, 4, c, (II), (A), text and note 8.

15. Steward *v.* Gromett, 7 C. B. N. S. 191, 6 Jur. N. S. 776, 29 L. J. C. P. 170, 97 E. C. L. 191.

16. See *supra*, p. 7, n. 7; and *infra*, note 17.

17. A number of cases hold that if a civil suit is maliciously prosecuted, especially the swearing out of a false attachment without probable cause, it is not necessary in order to maintain an action to recover therefor that the suit should have ended, or that the attachment must have been discharged or otherwise terminated in favor of defendant in the original suit (Alsop *v.* Lidden, 130 Ala. 548, 30 So. 401; Page *v.* Cushing, 38 Me. 523; Zinn *v.* Rice, 154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288; Caldwell *v.* Corey, 91 Mich. 335, 51 N. W. 888; Brand *v.* Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362; Rossiter *v.* Minnesota Bradner-Smith Paper Co., 37 Minn. 296, 33 N. W. 855; Fortman *v.* Rottier, 8 Ohio St. 548, 70 Am. Dec. 606; Grainger *v.* Hill, 4 Bing. N. Cas. 212, 7 L. J. C. P. 85, 5 Scott 561, 33 E. C. L. 675. But see Kelley *v.* Osborn, 86 Mo. App. 239), where the validity of the debt on which the attachment issued is not disputed (Zinn *v.* Rice, 154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288); or where defendant pays the sum claimed, involuntarily, under protest and for the sake of obtaining his liberty from duress (Morton *v.* Young, 55 Me. 24, 92 Am. Dec. 565). See also Freymark *v.* McKinney Bread Co., 55 Mo. App. 435; Bump *v.* Betts, 19 Wend. (N. Y.) 421; McCracken *v.* Covington City Nat. Bank, 4 Fed. 602.

18. *California.*— Hurgren *v.* Mutual L. Ins. Co., (1902) 69 Pac. 615.

Illinois.— Bonney *v.* King, 201 Ill. 47, 66 N. W. 377.

Indiana.— West *v.* Hayes, 104 Ind. 251, 3 N. E. 932.

Iowa.— Cawker City State Bank *v.* Jennings, 89 Iowa 230, 56 N. W. 494; Brooks *v.* Westover, 65 Iowa 360, 21 N. W. 682.

Kentucky.— Wood *v.* Laycock, 3 Metc. 192.

Louisiana.— Davis *v.* Stuart, 47 La. Ann. 378, 16 So. 871.

Massachusetts.— Hamilburgh *v.* Shepard, 119 Mass. 30; Cardival *v.* Smith, 109 Mass. 158, 12 Am. Rep. 682; O'Brien *v.* Barry, 106 Mass. 300, 8 Am. Rep. 329.

Missouri.— Kelley *v.* Osborn, 86 Mo. App. 239.

Nebraska.— Miller Bank *v.* Richmon, 64 Nebr. 111, 89 N. W. 627.

Tennessee.— Swepson *v.* Davis, 109 Tenn. 99, 70 S. W. 65, 59 L. R. A. 501.

Wisconsin.— Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261; Strehlow *v.* Pettit, 96 Wis. 22, 71 N. W. 102.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 71.

19. See *infra*, text and note 29.

20. Casebeer *v.* Drahoble, 13 Nebr. 465, 14 N. W. 397.

Termination by lapse of a year from declaration in a malicious arrest see Cameron *v.* Fergusson, 30 U. C. Q. B. O. S. 318.

That no formal order of discharge is necessary see Potter *v.* Casterline, 41 N. J. L. 22. *Compare* Rutherford *v.* Dyer, (Ala. 1906) 40 So. 974. In this case the prosecution having been instituted before a justice, a transcript of the proceedings before the justice showed that, the cause coming on for hearing, it was ordered and adjudged that the prosecution as to plaintiff be dismissed, on motion of counsel representing the state to dismiss on the ground that plaintiff was a minor and acted under instructions of her mother. It was held that an objection that the transcript did not show that the charge had been judicially investigated and the prosecution ended was without merit.

21. Bell *v.* Matthews, 37 Kan. 686, 16 Pac. 97; Kelley *v.* Sage, 12 Kan. 109. See *infra*, VIII, B, 3, 4, 5.

22. Thomason *v.* De Motte, 9 Abb. Pr. (N. Y.) 242, 18 How. Pr. 529; Secor *v.* Babcock, 2 Johns. (N. Y.) 203.

Unless there is an acquittal no action for malicious prosecution will lie. Whitesell *v.* Study, (Ind. App. 1906) 76 N. E. 1010; Leonard *v.* St. Louis Transit Co., 115 Mo. App. 349, 91 S. W. 452.

On the merits.— It must be shown that the prosecution has been tried on its merits, and a verdict rendered. Hurd *v.* Shaw, 20 Ill. 354.

An acquittal which will bar a second prosecution for the same offense need not be shown. Clark *v.* Cleveland, 6 Hill (N. Y.) 344.

23. Duckworth *v.* Boykin, 114 Ga. 969, 41 S. E. 62; Gerken *v.* Ruppert, 33 Misc. (N. Y.) 382, 67 N. Y. Suppl. 589; Swepson *v.* Davis, 109 Tenn. 99, 70 S. W. 65, 59 L. R. A. 501.

for plaintiff after appeal,[24] if not while the appeal is pending,[25] is sufficient basis for the action.

3. Dismissal or Discharge. It is a sufficient termination of the original proceeding to serve as a basis for an action of malicious prosecution that plaintiff was discharged, or the original proceeding was dismissed at a preliminary hearing,[26] or before trial,[27] as upon an abandonment of the proceedings;[28] that the grand

24. Burt *v.* Place, 4 Wend. (N. Y.) 591.

Dismissal by the county court of a case on appeal from a justice's judgment of conviction terminates the prosecution within the rule requiring a prosecution to end by an acquittal in order to entitle accused to maintain an action for malicious prosecution. Evans *v.* Atlantic Coast Line R. Co., 105 Va. 72, 53 S. E. 3.

25. An action for malicious prosecution cannot be maintained when the proceedings, under which the arrest complained of had been made, were not terminated, but an appeal was pending. Reynolds *v.* De Geer, 13 Ill. App. 113; Nebenzahl *v.* Townsend, 61 How. Pr. (N. Y.) 353. *Compare* Howell *v.* Edwards, 30 N. C. 516. But in Marks *v.* Townsend, 97 N. Y. 590, however, it was held that when a party has a final judgment on trial, the prosecution is so far terminated that he may sue for malicious prosecution. If an appeal from the judgment be pending when he brings his action, he simply takes the risk of an adverse decision on the appeal, which will defeat such action.

Although the right to petition for a new trial on statutory grounds continues for a year from the time of the entry of the judgment, the action will lie at any time after entry of final judgment in the court of last resort in the action claimed to have been malicious. Foster *v.* Denison, 19 R. I. 351, 36 Atl. 93.

Before mandate carried into effect.— Where a decree for complainant on a bill in chancery brought in the circuit court was reversed by the court of appeals, with a mandate directing the circuit court to dismiss the bill, it was held that this was not such a final adjudication and determination of the suit as would authorize defendant to bring an action for malicious prosecution before the mandate was carried into effect. Spring *v.* Besore, 12 B. Mon. (Ky.) 551. But otherwise where it has been judicially determined that the arrest was illegal and defendant entitled to his discharge, as the appeal does not change his status and the warrant cannot be revived.

Staying action for malicious prosecution.— It seems that the appeal from the judgment may furnish a reason for staying the trial of the action for malicious prosecution until the decision of the appeal. Marks *v.* Townsend, 97 N. Y. 590.

26. Costello *v.* Knight, 4 Mackey (D. C.) 65; Dreyfus *v.* Aul, 29 Nebr. 191, 45 N. W. 282; Rogers *v.* Mullins, 26 Tex. Civ. App. 250, 63 S. W. 897.

After hearing.— Rider *v.* Kite, 61 N. J. L. 8, 38 Atl. 754; Robbins *v.* Robbins, 133 N. Y. 597, 30 N. E. 977 [*affirming* 15 N. Y. Suppl. 215] (where plaintiff was discharged on her promise of good behavior); Mentel *v.* Hippely, 165 Pa. St. 558, 30 Atl. 1021. And see Douglas *v.* Allen, 56 Ohio St. 156, 46 N. E. 707; Foster *v.* Denison, 19 R. I. 351, 36 Atl. 93.

For want of prosecution.— Swensgaard *v.* Davis, 33 Minn. 368, 23 N. W. 543; Waldron *v.* Sperry, 53 W. Va. 116, 44 S. E. 283. But, although one arrested upon a criminal warrant be discharged by the magistrate, yet if the prosecutor, with due diligence, follows up the prosecution, and carries it on in a court having jurisdiction to try the case upon its merits, this is in effect a continuation of the original prosecution. Hartshorn *v.* Smith, 104 Ga. 235, 30 S. E. 666.

27. Kelley *v.* Sage, 12 Kan. 109.

Discharge by the county attorney.— Bell *v.* Matthews, 37 Kan. 686, 16 Pac. 97.

Discharge by a court having jurisdiction. — Moyle *v.* Drake, 141 Mass. 238, 6 N. E. 520.

Discharge by a justice (Porter *v.* Martyn, (Tex. Civ. App. 1895) 32 S. W. 731), with consent of the prosecutor (Welch *v.* Cheek, 115 N. C. 310, 20 S. E. 460), or for failure of the prosecutor to give security for costs (Casebeer *v.* Rice, 18 Nebr. 203, 24 N. W. 693).

Discharge from bail or imprisonment.— Ingram *v.* Root, 51 Hun (N. Y.) 238, 3 N. Y. Suppl. 858; Rice *v.* Ponder, 29 N. C. 390; Murray *v.* Lackey, 6 N. C. 368. In Bacon *v.* Townsend, 6 Barb. (N. Y.) 426, in an action for malicious prosecution in preferring a criminal complaint against plaintiff, evidence that a recognizance had been taken from the plaintiff, and that an indorsement had subsequently been made upon the affidavits taken by the police magistrate, in these words, "Bail discharged, April 20, 1843," and that an entry to the same effect was made in the book of minutes kept by the clerk of the criminal court, is not sufficient proof that there was an end of the criminal prosecution, before the commencement of the suit. But in Hyde *v.* Greuch, 62 Md. 577, in an action for malicious prosecution in procuring a peace warrant, it was held that the release of the party on giving surety to keep the peace, although not technically a termination of the proceeding, entitled him to sue.

28. Brown *v.* Randall, 36 Conn. 56, 4 Am. Rep. 35; Page *v.* Citizens' Banking Co., 111 Ga. 73, 36 S. E. 418, 78 Am. St. Rep. 144, 51 L. R. A. 463; Fay *v.* O'Neill, 36 N. Y. 11; Graves *v.* Scott, 104 Va. 372, 51 S. E. 821, 2 L. R. A. N. S. 927.

For want of prosecution allowed to go at liberty has the same effect. Leever *v.* Hamill, 57 Ind. 423. See cases cited *supra*, note 26.

jury failed to indict;[29] or that the indictment has been quashed.[30] When the original proceeding, however, has been terminated by the consent[31] or the procurement[32] of plaintiff, or the dismissal or discharge is merely technical,[33] or has been improperly obtained,[34] no foundation has been laid for the action on the case. So it is held that a dismissal of a suit on a stipulation signed by both parties providing that each party shall pay his own costs[35] or at plaintiff's costs[36]

29. *Arkansas.*— Wells *v.* Parker, 76 Ark. 41, 88 S. W. 602.

Florida.— Hower *v.* Lewton, 18 Fla. 328.

Georgia.— Woodruff *v.* Woodruff, 22 Ga. 237.

Indiana.— Darnell *v.* Sallee, 7 Ind. App. 581, 34 N. E. 1020.

Kentucky.— Proctor Coal Co. *v.* Moses, 40 S. W. 681, 19 Ky. L. Rep. 419.

Massachusetts.— Graves *v.* Dawson, 130 Mass. 78, 39 Am. Rep. 429.

New Jersey.— Apgar *v.* Woolston, 43 N. J. L. 57; Potter *v.* Casterline, 41 N. J. L. 22.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 71.

But see O'Driscoll *v.* McBurney, 2 Nott & M. (S. C.) 54, holding that the refusal of the grand jury to act upon a memorial presented to that body complaining of the conduct of plaintiff, who was a public officer, is not a sufficient termination of the case to support an action for malicious prosecution, for application may be made to another jury. And see Von Koehring *v.* Witte, 15 Tex. Civ. App. 646, 40 S. W. 63.

No information filed.— An order by a court in a criminal case that, the prosecuting attorney having filed "reasons therefor, he have leave not to file an information," is a final order and an end of the prosecution. Spalding *v.* Lowe, 56 Mich. 366, 23 N. W. 46.

30. Lytton *v.* Baird, 95 Ind. 349; Hays *v.* Blizzard, 30 Ind. 457; Cook *v.* Proskey, 138 Fed. 273, 70 C. C. A. 563.

Quashal as to one of two offenses charged. — Defendant filed an affidavit charging plaintiff and others with blackmailing with intent to extort money, and H was held to answer at the common pleas. Defendant appeared before the grand jury, which returned an indictment for the offense and also an indictment against plaintiff for assault. The indictment for blackmailing was quashed and plaintiff began an action against defendant for damages for malicious prosecution while the indictment for assault was still pending. It was held that the criminal prosecution was not legally terminated when the action for malicious prosecution was begun. Gaiser *v.* Hurleman, (Ohio 1906) 78 N. E. 372.

31. Welch *v.* Cheek, 125 N. C. 353, 34 S. E. 531. Or there has been a discharge because of settlement of the parties. McCormick *v.* Sisson, 7 Cow. (N. Y.) 715.

32. *California.*— Hurgren *v.* Union Mut. L. Ins. Co., 141 Cal. 585, 75 Pac. 168.

Delaware.— Craig *v.* Ginn, 3 Pennew. 117, 48 Atl. 192, 94 Am. St. Rep. 77, 53 L. R. A. 715.

Illinois.— Hibbard *v.* Ryan, 46 Ill. App. 313; Rosenberg *v.* Hart, 33 Ill. App. 262; Fadner *v.* Filer, 27 Ill. App. 506; Emery *v.* Ginnan, 24 Ill. App. 65.

Massachusetts.— Sartwell *v.* Parker, 141 Mass. 405, 5 N. E. 807. See also Hamilburgh *v.* Shepard, 119 Mass. 30, where after an action for malicious prosecution was brought, it was agreed to enter the prosecuting suit "Neither party" and the writ was never entered in court.

New York.— Gallagher *v.* Stoddard, 47 Hun 101; McCormick *v.* Sisson, 7 Cow. 715. See also Atwood *v.* Beirne, 73 Hun 547, 26 N. Y. Suppl. 149, where an agreement between the parties, their counsel, and the justice after three trials and being tired of the proceedings, that the parties should be absent from court on the day to which the proceedings were adjourned, and complaint thus fell for want of prosecution was insufficient.

Pennsylvania.— Murson *v.* Austin, 2 Phila. 116.

Rhode Island.— Russell *v.* Morgan, 24 R. I. 134, 52 Atl. 809.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 71.

33. Marks *v.* Townsend, 97 N. Y. 590.

There must be a legal termination to support the action. The mere fact that the accused was discharged from the recognizance entered into by him at the time of his arrest (Bacon *v.* Townsend, 2 Edm. Sel. Cas. (N. Y.) 120), or striking a cause from the docket, on motion of the states' attorney, with leave to reinstate the same (Blalock *v.* Randall, 76 Ill. 224), or an unauthorized discharge (Hill *v.* Egan, 160 Pa. St. 119, 28 Atl. 646), or discharging an injunction (Wood *v.* Laycock, 3 Metc. (Ky.) 192), or the dismissal of a prosecution in a justice's court for the purpose of commencing it in a district court (Schippel *v.* Norton, 38 Kan. 567, 16 Pac. 804. And see Lancaster *v.* McKay, 103 Ky. 610, 45 S. W. 887), is not such legal termination of the prosecution as will permit an action to lie for malicious prosecution. A discharge under an act for not bringing on the trial of an indictment at the term in which issue is joined, or at the term after, operates only as a discharge of the accused from imprisonment or from his recognizance and not from the indictment or the legal consequences of his crime. Apgar *v.* Woolston, 43 N. J. L. 57.

34. Leyenberger *v.* Paul, 40 Ill. App. 516. See also Sears *v.* Hathaway, 12 Cal. 277, holding that a party who has escaped because not technically, although morally, guilty cannot recover damages for the injury to his reputation by the unsuccessful prosecution.

35. Kinsey *v.* Wallace, 36 Cal. 462.

36. Marbourg *v.* Smith, 11 Kan. 554.

is a sufficient termination thereof in defendant's favor to enable him to maintain the action.

4. Nolle Prosequi. There are authorities holding that an action of malicious prosecution will not lie on the entry of a *nolle prosequi*.[37] The greater weight of authority, however, is that it is a sufficient termination of the prosecution to authorize defendant to sue for malicious prosecution,[38] when entered with the consent of the court,[39] for reasons other than an irregularity or informality in the indictment,[40] and when not entered at the instance or with the consent of defendant.[41]

5. Habeas Corpus. The discharge on habeas corpus of one who has been committed to await the action of the grand jury is not such a termination of the prosecution as will enable the accused to maintain an action for malicious prosecution.[42]

IX. DAMAGES.[43]

A. An Essential Element. The original theory as to malicious prosecution was in large measure determined by the law adjective;[44] the common-law remedy was the one appropriate to cases in which damages were indirect and consequential, and not direct or necessary, and in which they must almost invariably have been proved and were not presumed.[45] The early law substantive was that plaintiff could recover no damages unless he had clearly proved that he had sustained any.[46] Later extensions of the principles and changes in the form of the action[47] have

37. Garing *v.* Fraser, 76 Me. 37; Scott *v.* Shelor, 28 Gratt. (Va.) 891.

In Massachusetts.— "The entry of *nolle prosequi* by the district attorney of his own motion, followed by a discharge of the accused party by the court, may be such a termination of the prosecution as will enable the party to maintain an action for malicious prosecution. . . . But our cases uniformly hold that, where a *nolle prosequi* is entered by the procurement of the party prosecuted, or by his consent, or by way of compromise, such party cannot have an action for malicious prosecution." Langford *v.* Boston, etc., R. Co., 144 Mass. 431, 11 N. E. 697; Graves *v.* Dawson, 130 Mass. 78, 39 Am. Rep. 429; Coupal *v.* Ward, 106 Mass. 289; Parker *v.* Huntington, 2 Gray 124; Brown *v.* Lakeman, 12 Cush. 482; Parker *v.* Farley, 10 Cush. 279; Bacon *v.* Towne, 4 Cush. 217. In Graves *v.* Dawson, 130 Mass. 78, 39 Am. Rep. 429, it is held that whether a *nolle prosequi* is or is not such a termination of a criminal proceeding as is necessary to sustain an action for a malicious prosecution depends upon the other facts of the case.

38. *Indiana.*— Richter *v.* Koster, 45 Ind. 440; Chapman *v.* Woods, 6 Blackf. 504.

Kentucky.— Yocum *v.* Polly, 1 B. Mon. 358, 36 Am. Dec. 583.

Michigan.— Stanton *v.* Hart, 27 Mich. 539.

Missouri.— Kennedy *v.* Holladay, 25 Mo. App. 503.

New Hampshire.— Woodman *v.* Prescott, 66 N. H. 375, 22 Atl. 456.

New Jersey.— Apgar *v.* Woolston, 43 N. J. L. 57.

New York.— Moulton *v.* Beecher, 8 Hun 100, 1 Abb. N. Cas. 193.

North Carolina.— Marcus *v.* Bernstein, 117 N. C. 31, 23 S. E. 38; Hatch *v.* Cohen, 84 N. C. 602, 37 Am. Rep. 630.

Ohio.— Douglas *v.* Allen, 56 Ohio St. 156, 46 N. E. 707.

Pennsylvania.— Murphy *v.* Moore, 9 Pa. Cas 64, 11 Atl. 665.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 74.

So of a discharge by the prosecuting attorney.— Schoonover *v.* Myers, 28 Ill. 308; Rice *v.* Ponder, 29 N. C. 390, as where it appears on the state solicitor's docket that he does not think the evidence sufficient to convict.

39. Driggs *v.* Burton, 44 Vt. 124.

40. Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135.

41. Holliday *v.* Holliday, 123 Cal. 26, 55 Pac. 703; Lamprey *v.* Hood, 73 N. H. 384, 62 Atl. 380; Marcus *v.* Bernstein, 117 N. C. 31, 23 S. E. 38; Strehlow *v.* Pettit, 96 Wis. 22, 71 N. W. 102.

42. Holliday *v.* Holliday, (Cal. 1898) 53 Pac. 42; Walker *v.* Martin, 43 Ill. 508; Hinds *v.* Parker, 11 N. Y. App. Div. 327, 42 N. Y. Suppl. 955; Swartwout *v.* Dickelman, 12 Hun (N. Y.) 358; Merriman *v.* Morgan, 7 Oreg. 68. *Contra*, Zebley *v.* Storey, 117 Pa. St. 478, 12 Atl. 569; Charles *v.* Abell, Brightly (Pa.) 131.

43. **Damages** generally see Damages.

Mitigation of damages see *infra*, XIV, C, 8, b.

44. See *infra*, XII, A; and *supra*, II.

45. Herbener *v.* Crossan, 4 Pennew. (Del.) 38, 55 Atl. 223. See also *infra*, XII, B.

46. Savile *v.* Roberts, 1 Ld. Raym. 374, 1 Salk. 13, 3 Salk. 16; Byne *v.* Moore, 1 Marsh. 12, 5 Taunt. 187, 1 E. C. L. 103, per Mansfield, C. J. And see Jones *v.* Gwynn, 10 Mod. 148.

47. See *supra*, II, A–C; IV, D, 3.

left the substance of this original rule in force, although not without question[48] or exception;[49] that is to say, one of the ordinary essentials of plaintiff's case is complementary rather than special damages or particularized injury conforming to legal standards.[50]

B. Compensatory Damages — 1. ELEMENTS. The party injured is entitled to adequate compensation covering all the elements of the particular injury.[51]

48. There is grave doubt whether this rule survives; for example when the original proceeding constituted an imputation upon the character (Clerk & L. Torts 502), or upon the credit (Pollock Torts, *p. 266. And see Quartz Hill Consol. Gold Min. Co. *v.* Eyre, 11 Q. B. D. 674, 691, 52 L. J. Q. B. 488, 49 L. T. Rep. N. S. 249, 31 Wkly. Rep. 668, per Bowen, L. J.). And although damages are by no means always presumed in actions for liable and slander, it was held, by Marshall, J., in Wisconsin that in an action for malicious prosecution where damages are necessarily inferable from the facts alleged, a statement of such facts sufficiently states the damages. Luby *v.* Bennett, 111 Wis. 613, 627, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261. And in Enright *v.* Gibson, 119 Ill. App. 411 [*affirmed* in 219 Ill. 550, 76 N. E. 689], it was held that proof of false imprisonment and malicious prosecution for alleged larceny is proof of actual damage.

49. Malicious prosecution lies in some cases in which damages are naturally presumed; as in cases of arrest of person on some theory, as in cases of trespass *vi et armis*; and in cases of seizure of property, as in cases of trespass *de bonis asportatis*. So where an attachment writ is levied and sued out maliciously and without probable cause the law will presume some injury to have resulted, and award at least nominal damages. Dorr Cattle Co. *v.* Des Moines Nat. Bank, 127 Iowa 153, 98 N. W. 918. And so where plaintiff has been imprisoned, the law will presume damage. Garrison *v.* Pearce, 3 E. D. Smith (N. Y.) 255.

50. *Georgia.*— Mitchell *v.* South Western R. Co., 75 Ga. 398.

Kansas.— Marbourg *v.* Smith, 11 Kan. 554.

Minnesota.— McPherson *v.* Runyon, 41 Minn. 524, 43 N. W. 392, 16 Am. St. Rep. 727.

Ohio.— Springer *v.* Wise, 2 Disn. 391.

Texas.— Johnson *v.* King, 64 Tex. 226.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 154 *et seq.*

Arrest or special grievance.—Allgor *v.* Stillwell, 6 N. J. L. 166.

Where plaintiff has not been deprived of his property or his liberty, or his reputation attacked, he is entitled to damages only for the loss of time and reasonable expenses incurred in the defense of the action beyond reasonable costs. Closson *v.* Staples, 42 Vt. 309, 1 Am. Rep. 316. See also *infra*, text and note 53.

51. *Alabama.*— Marshall *v.* Betner, 17 Ala. 832.

Georgia.— Farrar *v.* Brackett, 86 Ga. 463, 12 S. E. 686, rent.

Illinois.— Lawrence *v.* Hagerman, 56 Ill. 68, 8 Am. Rep. 674.

Indiana.— Fisher *v.* Hamilton, 49 Ind. 341, holding that every circumstance of the act of arrest and prosecution, and also every act by which plaintiff was injuriously affected, not only in his person, but also in his individual happiness and peace of mind, may be considered by the jury in assessing damages, but not circumstances and acts not directly connected with the arrest.

Iowa.— Pratt *v.* Hampe, 114 Iowa 237, 86 N. W. 292; Moffatt *v.* Fisher, 47 Iowa 473, deprivation of use of property.

Kansas.— Bauer *v.* Clay, 8 Kan. 580, for all injuries resulting to plaintiff from his wrongful imprisonment.

Kentucky.—Woods *v.* Finnell, 13 Bush 628; Pettit *v.* Mercer, 8 B. Mon. 51.

Massachusetts.— Wheeler *v.* Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408, damages accruing after the date of the writ in a criminal case.

New York.— Brown *v.* McIntyre, 43 Barb. 344; Toomey *v.* Delaware, etc., R. Co., 4 Misc. 392, 24 N. Y. Suppl. 108 [*affirmed* in 147 N. Y. 709, 42 N. E. 726], substantial damages.

Ohio.—Newark Coal Co. *v.* Upson, 40 Ohio St. 17, deprivation of use of property, coal lands.

Texas.— Tynberg *v.* Cohen, (Civ. App. 1893) 24 S. W. 314.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 155 *et seq.*

Double damages.— Under the Pennsylvania act of 1705 see Campbell *v.* Finney, 3 Watts (Pa.) 84.

Probable cause for the proceeding is a good defense (Jarrett *v.* Higbee, 5 T. B. Mon. (Ky.) 546; Candler *v.* Petit, 2 Hall (N. Y.) 341), but would not be complete unless it shows probable cause for the whole charge (Boogher *v.* Bryant, 86 Mo. 42; Candler *v.* Petit, *supra*), and that defendant had a good cause of action to recover possession of personal property does not justify criminal proceedings and prevent recovery for their malicious prosecution. McCullough *v.* Rice, 59 Ind. 580.

Damages not recoverable.— Acts of an officer in serving a warrant in taking plaintiff out of bed at one o'clock at night, carrying him to a lock-up in a patrol wagon with intoxicated people, and placing him in a cell not sufficiently warmed, etc., were within his authority under the process, and hence no recovery could be had therefor against the prosecutor in an action for malicious prosecu-

Such elements[52] of damage include loss of time,[53] peril to life and liberty,[54] injury to fame, reputation,[55] character,[56] and health,[57] mental suffering,[58] general impair-

tion. Laing *v.* Mitten, 185 Mass. 233, 70 N. E. 128.

52. In Hamilton *v.* Smith, 39 Mich. 222, it is said that the elements of damage are the expenses plaintiff incurred about the prosecution complained of, his loss of time, his deprivation of liberty and the loss of the society of his family, the injury to his fame, personal mortification and the smart and injury of the malicious arts and acts and oppression of defendant. And see Wilson *v.* Bowen, 64 Mich. 133, 31 N. W. 81.

The elements of damage are classified by Holt, C. J., as: (1) Damages to a man's fame, as if the matter whereof he is accused be scandalous; (2) where a man is put in danger to lose his life or limb or property; (3) damage to a man's property, as where he is forced to expend money in necessary charges, to acquit himself of the crime; and (4) any special damage. Savile *v.* Roberts, 1 Ld. Raym. 374, 1 Salk. 13, 3 Salk. 16.

53. Ruth *v.* St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055; Johnson *v.* McDaniel, 5 Ohio S. & C. Pl. Dec. 717, 7 Ohio N. P. 467; Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574; Ambs *v.* Atchison, etc., R. Co., 114 Fed. 317. But not for loss of time after he was discharged by reason of his inability to find other employment. Cooper *v.* Scyoc, 104 Mo. App. 414, 79 S. W. 751.

Loss of time in preparing his defense and in attending court were not allowed to be considered in Osborn *v.* Moore, 12 La. Ann. 714, in the eye of the law, the expense of a suit which a party incurs as a general rule, being considered as covered by taxed costs. *Compare* cases cited *infra*, IX, B, 2, text and note 65.

54. Lavender *v.* Hudgens, 32 Ark. 763; Savile *v.* Roberts, 1 Ld. Raym. 374, 1 Salk. 13, 3 Salk. 16. *Contra*, Kansas, etc., Coal Co. *v.* Galloway, 71 Ark. 351, 74 S. W. 521, 100 Am. St. Rep. 79.

It is proper to take into consideration his arrest and imprisonment, the character of the accusation preferred, his arraignment and trial, and all circumstances of aggravation attending it (Anderson *v.* Callaway, 2 Houst. (Del.) 324), as well as the conditions surrounding the imprisonment (Spear *v.* Hiles, 67 Wis. 350, 30 N. W. 506, where plaintiff, who was arrested along with his wife, and confined in jail, was while in jail kept separate from her).

Damages for the imprisonment on the warrant may be recovered, although an action for false imprisonment would have been barred by the statute of limitation. Graves *v.* Dawson, 133 Mass. 419. But the jury ought not, in determining the amount of damages, to take into consideration facts establishing against some of defendants a case of false imprisonment, which constitute a distinct cause of action and for which they might be liable in another suit. Carpenter *v.* Shelden, 5 Sandf. (N. Y.) 77.

55. *Arkansas.*— Lavender *v.* Hudgens, 32 Ark. 763.

Delaware.— Herbener *v.* Crossan, 4 Pennew. 38, 55 Atl. 223.

Illinois.—Gundermann *v.* Buschner, 73 Ill. App. 180.

Massachusetts.— Wheeler *v.* Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408.

Michigan.— Hamilton *v.* Smith, 39 Mich. 222.

Nebraska.— Miles *v.* Walker, 66 Nebr. 728, 92 N. W. 1014.

New York.—Sheldon *v.* Carpenter, 4 N. Y. 579, 55 Am. Dec. 301; Fagnan *v.* Knox, 40 N. Y. Super. Ct. 41.

Ohio.— Johnson *v.* McDaniel, 5 Ohio S. & C. Pl. Dec. 717, 7 Ohio N. P. 467.

United States.— Ambs *v.* Atchison, etc., R. Co., 114 Fed. 317; Blunk *v.* Atchison, etc., R. Co. 38 Fed. 311.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 155.

56. Vinal *v.* Core, 18 W. Va. 1.

57. Fagnan *v.* Knox, 40 N. Y. Super. Ct. 41.

58. Herbener *v.* Crossan, 4 Pennew. (Del.) 38, 55 Atl. 223; Ruth *v.* St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055; Ambs *v.* Atchison, etc., R. Co., 114 Fed. 317.

Injury to feelings.— Mental suffering, although not arising directly from bodily suffering, is an element of damage. McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748. In an action for malicious prosecution it was not error to permit plaintiff to show that on his arrest at his home his mother fainted or was prostrated by the shock, and that plaintiff thereby suffered distress of mind. Flam *v.* Lee, 116 Iowa 289, 90 N. W. 70, 93 Am. St. Rep. 242; Parkhurst *v.* Masteller, 57 Iowa 474, 10 N. W. 864; Wheeler *v.* Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408; Harris *v.* Thomas, 140 Mich. 462, 103 N. W. 863; Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800; Fagnan *v.* Knox, 40 N. Y. Super. Ct. 41; Johnson *v.* McDaniel, 5 Ohio S. & C. Pl. Dec. 717, 7 Ohio N. P. 467; Vinal *v.* Core, 18 W. Va. 1.

Partnership.— But the injury to the private feelings of partners (in a partnership action) cannot be inquired into. Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

Indignity suffered.— Wheeler *v.* Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408.

Deprivation of the society of one's family.— Killebrew *v.* Carlisle, 97 Ala. 535, 12 So. 167.

Personal mortification and the smart and injury of the malicious arts and acts and oppression of defendant. Hamilton *v.* Smith, 39 Mich. 222.

Shame and humiliation.— Willard *v.* Holmes, 2 Misc. (N. Y.) 303, 21 N. Y. Suppl. 998 [*reversed* on other grounds in 142 N. Y. 492, 37 N. E. 480].

ment of social and mercantile standing,[59] actual loss and injury to property,[60] interest, and credit;[61] decrease in earning capacity;[62] and all losses sustained in business.[63] Such damages must be the direct, natural, and proximate result of the former suit.[64]

2. Expenses and Counsel Fees. Expenses incurred or paid about the original proceeding by plaintiff[65] and attorney's fees which have been incurred by him,[66]

59. Willard *v.* Holmes, 2 Misc. (N. Y.) 303, 21 N. Y. Suppl. 998 [*reversed* on other grounds in 142 N. Y. 492, 37 N. E. 480].

60. Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574. So where in an action for malicious prosecution of a trover suit by taking possession of a sawmill, plaintiff can plead and recover both the general damages caused by the taking and also the rent of the mill during the time he was deprived of its possession. Farrar *v.* Brackett, 86 Ga. 463, 12 S. E. 686.

Injuries to land, caused by a trespass thereon in taking possession of personalty, constitute a proper element of damages. Brown *v.* Master, 104 Ala. 451, 16 So. 443.

61. Goldsmith *v.* Picard, 27 Ala. 142; Wheeler *v.* Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408.

Injuries caused by information given to commercial agencies that the property had been attached, or publication of such fact in newspapers are not elements of damage, where it is not shown that plaintiff in attachment was connected with such publication or furnished the information to the commercial agencies. Maskell *v.* Barker, 99 Cal. 642, 34 Pac. 340.

62. Wheeler *v.* Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408.

63. Magmer *v.* Renk, 65 Wis. 364, 27 N. W. 26.

But a partnership can only recover injury to partnership trade or business. Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59, injury to the private feelings of the partners cannot be inquired into.

Profits in business, lost as the direct consequence of wrongful seizure and detention of property, as far as ascertainable, have been held recoverable on part of plaintiff as actual damages (British, etc., Steamship Nav. Co. *v.* Sibley, 27 La. Ann. 191; Goebel *v.* Hough, 26 Minn. 252, 2 N. W. 847), where such property was valuable for present use (Hough *v.* Dickinson, 58 Mich. 89, 24 N. W. 809; Elder *v.* Frevert, 18 Nev. 446, 5 Pac. 69), especially where defendant had notice that the levy would probably interrupt plaintiff's business (Wilson *v.* Manning, (Tex. Civ. App. 1896) 35 S. W. 1079). But the more general opinion is that such profits are not recoverable as an element of actual damage (see Roach *v.* Brannon, 57 Miss. 490; Kirbs *v.* Provine, 78 Tex. 353, 14 S. W. 849; and *infra*, note 72), being too remote, uncertain, speculative and too much a matter of conjecture to form the basis of a recovery (Lowenstein *v.* Monroe, 55 Iowa 82, 7 N. W. 406; Watts *v.* Shropshire, 12 La. Ann. 797; Casper *v.* Klippen, 61 Minn. 353, 63 N. W. 737, 52 Am. St. Rep. 604; Braunsdorf *v.* Fellner, 76 Wis. 1, 45 N. W. 97; Kennedy *v.* Meacham, 18 Fed. 312), as the field of inquiry thus opened is too broad (Zinn *v.* Rice, 161 Mass. 571, 37 N. E. 747), and evidence of such probable profits is not material on the question of actual damage (Sweeny *v.* Bienville Water Supply Co., 121 Ala. 454, 25 So. 575; Miller *v.* Jannett, 63 Tex. 82).

Loss of employment caused by an arrest may be shown as special damage. Stoecker *v.* Nathanson, 5 Nebr. (Unoff.) 435, 98 N. W. 1061, 70 L. R. A. 667.

64. O'Neill *v.* Johnson, 53 Minn. 439, 55 N. W. 601, 39 Am. St. Rep. 615.

Too remote.— That by reason of the finding of an indictment against plaintiff, it caused plaintiff's wife to become sick, nervous, insane, and utterly helpless is too remote. Hampton *v.* Jones, 58 Iowa 317, 12 N. W. 276. And see Fletcher *v.* Chicago, etc., R. Co., 109 Mich. 363, 67 N. W. 330.

Where a writ of ne exeat is sued out without just cause, defendant may recover only for direct primary loss sustained. Burnap *v.* Wight, 14 Ill. 301.

65. *Delaware.*— Anderson *v.* Callaway, 2 Houst. 324.

Georgia.— Slater *v.* Kimbro, 91 Ga. 217, 18 S. E. 296, 44 Am. St. Rep. 19.

Indiana.— Whitesell *v.* Study, (App. 1906) 76 N. E. 1010, damages sustained in the defense of the original suit, in excess of the taxable costs.

Kentucky.— Woods *v.* Finnell, 13 Bush 628.

Massachusetts.— Wheeler *v.* Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408.

New York.— Fagnan *v.* Knox, 40 N. Y. Super. Ct. 41.

Pennsylvania.— Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574.

West Virginia.—Vinal *v.* Core, 18 W. Va. 1.

United States.— Blunk *v.* Atchison, etc., R. Co., 38 Fed. 311.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 155.

66. Smith *v.* Bell, 91 Ky. 655, 25 S. W. 752; Bonesteel *v.* Bonesteel, 30 Wis. 511.

If plaintiff has become liable for such fees in defending such prosecution, but which has not been paid (Walker *v.* Pittman, 108 Ind 341, 9 N. E. 175; Ziegler *v.* Powell, 54 Ind. 173), or where it has been paid by another for plaintiff (Krug *v.* Ward, 77 Ill. 603) evidence thereof is competent.

By statute in some states attorney's fees are provided for in action for malicious prosecutions. Killebrew *v.* Carlisle, 97 Ala. 535, 12 So. 167; Farrar *v.* Brackett, 86 Ga. 463, 12 S. E. 686; Krug *v.* Ward, 77 Ill. 603; Ziegler *v.* Powell, 54 Ind. 173; Connelly *v.*

if reasonable and necessary,[67] so far as they are shown to have been an actual and proximate consequence of the act complained of,[68] are items of damage which may be awarded plaintiff[69] to the extent of their proved value.[70]

C. Exemplary Damages. In an action for malicious prosecution plaintiff is not limited to compensatory damages[71] but may also recover exemplary damages[72]

White, 122 Iowa 391, 98 N. W. 144; Drumm *v.* Cessnum, 61 Kan. 467, 59 Pac. 1078; Mitchell *v.* Davies, 51 Minn. 168, 53 N. W. 363; Ruth *v.* St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055; Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615; Hughes *v.* Brooks, 36 Tex. 379. *Contra,* Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116 [*reversing* 22 Fed. Cas. No. 13,176, 2 Woods 599].

But in an action for suing out an attachment maliciously, and without probable cause, plaintiff cannot recover attorney's fees and expenses in defending the attachment without proof of malice and want of probable cause. Abohosh *v.* Buck, 43 S. W. 425, 19 Ky. L. Rep. 1267.

67. Marshall *v.* Betner, 17 Ala. 832; Drumm *v.* Cessnum, 61 Kan. 467, 59 Pac. 1078.

But only so much of his expenditures, made in defense of the action held to be malicious, as were reasonably laid out and expended are recoverable. Eastin *v.* Stockton Bank, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77.

68. Landa *v.* Obert, 45 Tex. 539. And see Crétin *v* Levy, 37 La. Ann. 182, where it was held that the counsel fees allowable as damages for the wrongful issuance of conservative writs, in a suit for damages for malicious prosecution, are not those incurred for the defense of the suit, but only those rendered exclusively in relation to the writ.

69. Harr *v.* Ward, 73 Ark. 437, 84 S. W. 496. In Gregory *v.* Chambers, 78 Mo. 294 [*affirming* 8 Mo. App. 557], it was held that in an action for malicious prosecution the jury may, in their verdict for plaintiff, but are not bound to, allow plaintiff counsel fees expended in defending against the prosecution.

70. Hlubek *v.* Pinske, 84 Minn. 363, 87 N. W. 939; Mitchell *v.* Davies, 51 Minn. 168, 53 N. W. 363; Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615. And see Brown *v.* Master, 111 Ala. 397, 20 So. 344; Billingsley *v.* Maas, 93 Wis. 176, 67 N. W. 49.

71. Ziegler *v.* Powell, 54 Ind. 173; Hyde *v.* Greuch, 62 Md. 577.

Compensatory damages generally see *supra,* IX, B, 1.

Defendant, although free from actual malice, should pay all actual damages, but nothing more. Cartwright *v.* Elliott, 45 Ill. App. 458; Ivers *v.* Ryan, 42 La. Ann. 32, 7 So. 61.

If a creditor merely approves of an unlawful arrest of a debtor by one acting on his behalf, on learning of such arrest, he will only be liable for the actual injury sustained. Rosenkrans *v.* Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169. But *compare* Jacobs *v.* Crum, 62 Tex. 401.

72. *Georgia.*— Woodley *v.* Coker, 119 Ga. 226, 46 S. E. 89.

Indiana.— Lytton *v.* Baird, 95 Ind. 349.

Kansas.— Malone *v.* Murphy, 2 Kan. 250.

Louisiana.— See Sperier *v.* Ott, 116 La. 1087, 41 So. 323.

Maryland.— McWilliams *v.* Hoban, 42 Md. 56.

Montana.— Martin *v.* Corscadden, (1906) 86 Pac. 33.

North Carolina.— Kelly *v.* Durham Traction Co., 132 N. C. 368, 43 S. E. 923, 133 N. C. 418, 45 S. E. 826; Bradley *v.* Morris, 44 N. C. 395.

Tennessee.— Jones *v.* Turpin, 6 Heisk. 181.

Wisconsin.— Eggett *v.* Allen, 119 Wis. 625, 96 N. W. 803; Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 157.

Smart money.— The jury may add such further sum by way of smart money as will sufficiently punish defendant for the wrong and injury done to plaintiff. Callahan *v.* Caffarata, 39 Mo. 136.

Attachment proceedings.— In an action for the malicious suing out of a writ of attachment, exemplary damages may be recovered. Stewart *v.* Cole, 46 Ala. 646; Spaids *v.* Barrett, 57 Ill. 289, 11 Am. Rep. 10; Hurlbut *v.* Hardenbrook, 85 Iowa 600, 52 N. W. 510. One who by his conduct ratifies and confirms the act of his agent who sues out an attachment, knowing the grounds on which the writ is obtained are without foundation, is liable in exemplary damages. Jacobs *v.* Crum, 62 Tex. 401. But *compare* Rosenkranz *v.* Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169.

Injunction.— Exemplary damages cannot be recovered for the malicious suing out on an injunction. Galveston, etc., R. Co. *v.* Ware, 74 Tex. 47, 11 S. W. 918; Shackelford County *v.* Hounsfield, (Tex. Civ. App. 1893) 24 S. W. 358.

Loss of profits.—Where exemplary damages are sought plaintiff can show his loss of credit and prospective profits, although such loss cannot be properly recoverable as actual damages. Kirbs *v.* Provine, 78 Tex. 353, 14 S. W. 849; Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048. But plaintiff cannot prove what was the usual profit made by such establishments in the neighborhood of plaintiff in the same kind of business. O'Grady *v.* Julian, 34 Ala. 88. In an action for maliciously suing out summary process to dispossess a tenant who was using the premises as a boarding-house, the loss of boarders caused by suing out the process is recover-

where actual malice[73] and want of probable cause are shown.[74] To be effectual punitive damage may have relation to defendant's financial ability.[75] Where no actual damage has been suffered, no exemplary damages can be recovered.[76]

D. Amount Awarded. The jury are the proper judges of the amount of damages to be awarded.[77] And unless their determination appears to have been influenced by passion, prejudice, or some improper motive,[78] or unless the amount is outrageously disproportionate, either to the wrong received or to the situation and circumstances of either plaintiff or defendant,[79] the court will not disturb their verdict.[80] In case of an award of excessive damages the court may direct a

able. Slater *v.* Kimbro, 91 Ga. 217, 18 S. E. 296, 44 Am. St. Rep. 19. See *infra*, note 73 *et seq.*

73. *Alabama.*— Stewart *v.* Cole, 46 Ala. 646.

Illinois.—Hurlbut *v.* Hardenbrook, 85 Iowa 606, 52 N. W. 510.

Ohio.— Jonson *v.* McDaniels, 5 Ohio S. & C. Pl. Dec. 717, 7 Ohio N. P. 467.

Pennsylvania.— Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574.

Texas.— Jacobs *v.* Crum, 62 Tex. 401; Harris *v.* Finberg, 46 Tex. 79.

West Virginia.—Vinal *v.* Core, 18 W. Va. 1.

United States.— Sonneborn *v.* Stewart, 22 Fed. Cas. No. 13,176, 2 Woods 599 [*reversed* on other grounds in 98 U. S. 187, 25 L. ed. 116].

See 33 Cent. Dig. tit. "Malicious Prosecution," § 157.

Where the facts justify an inference of malice, damages in the nature of punitive damages are authorized. Deslonde *v.* O'Hern, 39 La. Ann. 14, 1 So. 286. See also Sperier *v.* Ott, 116 La. 1087, 41 So. 323.

74. Tucker *v.* Davis, 77 N. C. 330; Faroux *v.* Cornwell, (Tex. Civ. App. 1905) 90 S. W. 537.

If a want of probable cause appears, the jury in estimating damages may properly consider the degree of malignity displayed by the prosecutor. Murpry *v.* Hobbs, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366.

75. Spear *v.* Hiles, 67 Wis. 350, 30 N. W. 506.

76. Schippel *v.* Norton, 38 Kan. 567, 16 Pac. 804.

77. Montross *v.* Bradsby, 68 Ill. 185; Chapman *v.* Dodd, 10 Minn. 350; Hiatt *v.* Kinkaid, 28 Nebr. 721, 45 N. W. 236.

78. Loewenthal *v.* Streng, 90 Ill. 74; Walker *v.* Martin, 43 Ill. 508; Davis *v.* Seeley, 91 Iowa 583, 60 N. W. 183, 51 Am. St. Rep. 356; Bell *v.* Morse, 48 Kan. 601, 29 Pac. 1086; Chapman *v.* Dodd, 10 Minn. 350.

79. Ives *v.* Bartholomew, 9 Conn. 309; Walker *v.* Martin, 52 Ill. 347; Leith *v.* Pope, W. Bl. 1327.

Disproportionate to the wrong received.— In Phelps *v.* Cogswell, 70 Cal. 201, 11 Pac. 628, a verdict of four thousand dollars was reduced to one thousand dollars. Where the undisputed testimony shows actual damages sustained by plaintiff to the amount of fifty dollars or more, a verdict for plaintiff for only five dollars will not be sustained. Waufle *v.* McLellan, 51 Wis. 484, 8 N. W. 300. But in Farrar *v.* Brackett, 86 Ga. 463, 12 S. E. 686, twenty dollars attorney's fee was held to be proportionate to his success in the trover suit.

80. Weaver *v.* Page, 6 Cal. 681 (fifteen thousand dollars allowed to stand, where no misconduct was shown on the part of the jury); Evansville, etc., R. Co. *v.* Talbot, 131 Ind. 221, 29 N. E. 1134; Chapman *v.* Dodd, 10 Minn. 350; Vinal *v.* Core, 18 W. Va. 1. In Leith *v.* Pope, W. Bl. 1327, 1328, an action for malicious prosecution where the jury rendered a verdict for £10,000, De Grey, C. J., said: "That in cases of tort the Court will not interpose on account of the largeness of damages, unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury. That is, unless they are most outrageously disproportionate, either to the wrong received, or to the situation and circumstances of either the plaintiff or defendant."

Where the verdict is not so excessive as to indicate bias or prejudice, the granting of a new trial is unwarranted. Olmstead *v.* Williams, 89 Ga. 144, 15 S. E. 31.

Not excessive.— The verdicts in the following cases have been held not excessive under the foregoing rule. National Surety Co. *v.* Mabry, 139 Ala. 217, 35 So. 698 (seven thousand five hundred dollars); Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380 (one hundred and sixty-two dollars eighty cents); Ives *v.* Bartholomew, 9 Conn. 309 (two hundred dollars); Nelson *v.* Danielson, 82 Ill. 545 (seven hundred and fifty dollars); Montross *v.* Bradsby, 68 Ill. 185 (one thousand dollars); Mexican Cent. R. Co. *v.* Gehr, 66 Ill. App. 173 (forty thousand dollars); Evansville, etc., R. Co. *v.* Talbot, 131 Ind. 221, 29 N. E. 1134 (six thousand five hundred dollars); Rule *v.* McGregor, 115 Iowa 323, 88 N. W. 814 (one thousand five hundred dollars); Paukett *v.* Livermore, 5 Iowa 277 (five hundred dollars); Spencer *v.* Cramblett, 56 Kan. 794, 44 Pac. 985 (two thousand five hundred dollars); Maille *v.* Lacassagne, 35 La. Ann. 594 (four hundred and fifty dollars); Peterson *v.* Toner, 80 Mich. 350, 45 N. W. 346 (one hundred dollars); Shea *v.* Cloquet Lumber Co., 97 Minn. 41, 105 N. W. 552 (verdict reduced to one thousand two hundred dollars); Fiola *v.* McDonald, 85 Minn. 147, 88 N. W. 431 (seven hundred and fifty dollars); Martin *v.* Corscadden, (Mont. 1906) 86 Pac. 33 (five hundred and fifty dollars); Rawson *v.* Leggett, 97 N. Y. App. Div. 416, 90 N. Y.

release of part of such damages or award a new trial in case the release is not given.[81]

X. PERSONS ENTITLED TO SUE.

A. In General. Any person who is capable of holding property in his own right,[82] and of bringing other actions at law in his own name,[83] who was a party defendant to the original wrongful proceeding[84] and who suffered directly from the wrongful act,[85] is entitled to maintain an action for malicious prosecution. The right, however, is a personal one which does not survive to the personal rep-

Suppl. 5 (twenty-five thousand dollars); Scott *v.* Dennett Surpassing Coffee Co., 51 N. Y. App. Div. 321, 64 N. Y. Suppl. 1016 (two thousand five hundred dollars); Johnson *v.* Comstock, 14 Hun (N. Y.) 238 (one thousand dollars); Thorp *v.* Carvalho, 14 Misc. (N. Y.) 554, 36 N. Y. Suppl. (one thousand dollars); Scholl *v.* Schnebel, 8 N. Y. Suppl. 855 (one thousand dollars); Bump *v.* Betts, 23 Wend. (N. Y.) 85 (seven hundred and fifty dollars); Merchant *v.* Pielke, 10 N. D. 48, 84 N. W. 574 (eight hundred dollars); Coyle *v.* Snellenburg, 30 Pa. Super. Ct. 246 (one hundred and fifty dollars); Schondorf *v.* Griffith, 30 Pittsh. Leg. J. N. S. (Pa.) 292 [*affirmed* in 13 Pa. Super. Ct. 580] (eight hundred dollars); Neys *v.* Taylor, 12 S. D. 488, 81 N. W. 901 (one thousand dollars); Morgan *v.* Duffy, 94 Tenn. 686, 30 S. W. 735 (five hundred dollars); Gulf, etc., R. Co. *v.* James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743 (eight thousand dollars); Charlton *v.* Markland, 36 Wash. 40, 78 Pac. 132 (six hundred dollars); Eggett *v.* Allen, 119 Wis. 625, 96 N. W. 803 (one thousand dollars); Spear *v.* Hiles, 67 Wis. 350, 30 N. W. 506 (five thousand dollars); Plath *v.* Braunsdorff, 40 Wis. 107 (three thousand dollars); Leith *v.* Pope, W. Bl. 1327 (£10,000); Owens *v.* Purcell, 11 U. C. Q. B. 390 (£4, 5s.).

Excessive.— The verdicts in the following cases have been held excessive under the foregoing rule: Seabridge *v.* McAdam, 119 Cal. 460, 51 Pac. 691 (eight hundred dollars); Gray *v.* Fanning, 73 Conn. 115, 46 Atl. 831 (one thousand dollars); Loewenthal *v.* Streng, 90 Ill. 74 (ten thousand dollars and a remittitur of four thousand dollars did not remove the element of passion or prejudice and passion); Walker *v.* Martin, 52 Ill. 347 (twenty-five thousand dollars even after a remittitur was entered of five thousand dollars); Walker *v.* Martin, 43 Ill. 508 (twenty thousand dollars set aside, where the record disclosed that the evidence clearly established the fact that plaintiff was a man of very bad character); Wheeler, etc., Mfg. Co. *v.* Barrett, 70 Ill. App. 222 [*affirmed* in 172 Ill. 610, 50 N. E. 325] one thousand five hundred dollars); Davis *v.* Seeley, 91 Iowa 583, 60 N. W. 183, 51 Am. St. Rep. 356 (three thousand dollars); Bell *v.* Morse, 48 Kan. 601, 29 Pac. 1086 (one thousand dollars, although plaintiff remitted six hundred dollars judgment for four hundred dollars); Wright *v.* Hagerman, 42 S. W. 917, 19 Ky. L. Rep. 1032 (four thousand five hundred dollars); Cointement *v.* Cropper, 41 La. Ann. 303, 6 So. 127 (one thousand dollars); Driggs *v.* Morgan, 10 Rob. (La.) 119 (one thousand five hundred dollars); Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. N. S. 928 (four thousand dollars); Farrell *v.* St. Louis Transit Co., 103 Mo. App. 454, 78 S. W. 312 (one thousand five hundred dollars actual and one thousand dollars exemplary damages); Ruth *v.* St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055 (one thousand dollars actual and one thousand dollars punitive damages); Dann *v.* Wormser, 38 N. Y. App. Div. 460, 56 N. Y. Suppl. 474 (one thousand dollars); Billingsley *v.* Mass, 93 Wis. 176, 67 N. W. 49 (three thousand five hundred dollars); Tuckett *v.* Eaton, 6 Ont. 486 (one thousand five hundred dollars); Crawford *v.* McLaren, 9 U. C. C. P. 215 (£80).

81. Kinsey *v.* Wallace, 36 Cal. 462.

82. See cases cited *infra*, this and succeeding notes.

An escaped lunatic as plaintiff can sue. Dobbyn *v.* Decow, 25 U. C. C. P. 18.

Slave could not sue. Russell *v.* Cantwell, 5 S. C. 477.

83. **Infants** generally see INFANTS.

Insane persons generally see INSANE PERSONS.

Suit by husband for wife for malicious prosecution of the latter see HUSBAND AND WIFE, 21 Cyc. 1684 note 64.

Action by husband or wife see HUSBAND AND WIFE, 21 Cyc. 1530.

84. Duncan *v.* Citizens' Nat. Bank, 45 S. W. 774, 20 Ky. L. Rep. 237. But see St. Johnsbury, etc., R. Co. *v.* Hunt, 55 Vt. 570, 45 Am. Rep. 639, where it was held that a railroad company could maintain the action against one who maliciously caused the arrest of its engineer while running a train, with intent to delay the train and injure the company.

One against whom no attachment was sought, and whose name appeared in the copies of the writ by a mere clerical error, has no right of action for a malicious attachment. Farmers, etc., Warehouse Co. *v.* Gibbons, 107 Ky. 611, 55 S. W. 2, 21 Ky. L. Rep. 1348.

One who intervenes in an attachment suit to claim property attached cannot sue the attachment plaintiff for malicious prosecution. Breathwit *v.* Rogers, 63 Ark. 500, 39 S. W. 553.

85. St. Johnsbury, etc., R. Co. *v.* Hunt, 55 Vt. 570, 45 Am. Rep. 639.

resentatives[86] and is incapable of passing by deed of assignment for the benefit of creditors.[87]

B. Two or More Persons. The right of action for malicious prosecution ordinarily is several.[88] Two or more persons cannot sue jointly to recover damages for an alleged malicious or vexatious suit[89] unless they have a joint interest in the damages to be recovered.[90]

XI. PERSONS RESPONSIBLE.[91]

A. In General. All persons[92] who have legal capacity to be sued[93] and who are not by law exempted[94] from responsibility for torts may be held

86. Deming *v.* Taylor, 1 Day (Conn.) 285.
Abatement of action by death see 1 Cyc. 61 note 19, 80 note 95.

87. Francis *v.* Burnett, 84 Ky. 23, 7 Ky. L. Rep. 715; Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551; Noonan *v.* Orton, 34 Wis. 259, 17 Am. Rep. 441. *Compare* Hunt *v.* Conrad, 47 Minn. 557, 50 N. W. 614, 14 L. R. A. 512 (false imprisonment); Pulver *v.* Harris, 52 N. Y. 73 (assault and battery); Brooks *v.* Hanford, 15 Abb. Pr. (N. Y.) 342; People *v.* Tioga C. Pl., 19 Wend. (N. Y.) 73 (personal tort). But see *contra*, as to assignability of action for personal tort. Weire *v.* Davenport, 11 Iowa 49, 77 Am. Dec. 132; Rice *v.* Stone, 1 Allen (Mass.) 566; Jordan *v.* Gillen, 44 N. H. 424.
A suit for malicious attachment should properly be brought by defendant in attachment. Such a suit cannot be brought by his assignee in bankruptcy. Kerr *v.* Hyman, 6 Hawaii 300.

88. McLeod *v.* McLeod, 73 Ala. 42; Grimes *v.* Bowerman, 92 Mich. 258, 52 N. W. 751.

89. McLeod *v.* McLeod, 73 Ala. 42; Ainsworth *v.* Allen, Kirby (Conn.) 145; Rhoads *v.* Booth, 14 Iowa 575; Lawrence *v.* McKelvey, 80 N. Y. App. Div. 514, 81 N. Y. Suppl. 129.

90. Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59; Rhoads *v.* Booth, 14 Iowa 575; Cochrane *v.* Quackenbush, 29 Minn. 376, 13 N. W. 154. *Compare* Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141.
Several persons may sue jointly to recover expenses jointly incurred by them in defending a malicious prosecution brought against them all. Swales *v.* Grubbs, 6 Ind. App. 477, 33 N. E. 1124.

91. Defendant's connection with original proceeding see *supra*, V.

92. Louque *v.* Saloy's Succession, 45 La. Ann. 1386, 14 So. 255 (an administrator); Widmeyer *v.* Felton, 95 Fed. 926 (a receiver).
Acting as officer of corporation.— The fact that one who instituted a malicious prosecution acted in doing so as an officer of a corporation was no defense to an action against him. Murphy *v.* Eidlitz, 113 N. Y. App. Div. 659, 99 N. Y. Suppl. 950.
Liability of private corporations for malicious prosecution see CORPORATIONS, 10 Cyc. 1216.

93. See INFANTS; INSANE PERSONS.
A person of full age may be liable for a malicious suit contracted by him in his infancy. Sterling *v.* Adams, 3 Day (Conn.) 411.
Against justice of the peace sustained (Webb *v.* Spears, 15 Ont. Pr. 232); upon subsequent appearance of justice as prosecutor (Appleton *v.* Lepper, 20 U. C. C. P. 138). As to act to protect justices of the peace and others from vexatious actions see Kelly *v.* Barton, 26 Ont. 608 [*affirmed* in 22 Ont. App. 522].

94. The ordinary rules as to exemption from liability apply. Therefore a grand juror (Thornton *v.* Marshall, 92 Ga. 548, 17 S. E. 926; Sidener *v.* Russell, 34 Ill. App. 446; Floyd *v.* Barker, 6 Coke pt. xii, 23), a justice of the peace (Vennum *v.* Houston, 38 Nebr. 293, 56 N. W. 970), judge or justice (Girlington *v.* Pitfield, 1 Vent. 47), a magistrate exercising judicial discretion within jurisdiction (Orwitz *v.* McKay, 31 Nova Scotia 243; Gordon *v.* Denison, 22 Ont. App. 315. But see Webb *v.* Spears, 15 Ont. Pr. 232; Orr *v.* Spooner, 19 U. C. Q. B. 601), officers of a court who acted within the sphere of its jurisdiction (Driggs *v.* Morgan, 10 Rob. (La.) 119), a sheriff or bailiff in properly seizing property under execution (Beatty *v.* Rumble, 21 Ont. 184), are exempt.
Action is not maintainable against a mayor for refusal to execute a lease. Fair *v.* Moore, 3 U. C. C. P. 484. And see Brown *v.* Cape Girardeau, 90 Mo. 377, 2 S. W. 302, 57 Am. Rep. 28.
Liability of inferior judicial officers acting maliciously see Appleton *v.* Lepper, 20 U. C. C. P. 138; Garner *v.* Coleman, 19 U. C. C. P. 106.
Liability of officer serving warrant see Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101.
Liability of military or naval officers in service see Sutton *v.* Johnstone, 1 Bro. P. C. 76, 1 T. R. 493, 510, 1 Rev. Rep. 269, 1 Eng. Reprint 427; Barwis *v.* Keppel, 2 Wils. C. P. 314. And see Dawkins *v.* Paulet, L. R. 5 Q. B. 94, 9 B. & S. 768, 39 L. J. Q. B. 53, 21 L. T. Rep. N. S. 584, 18 Wkly. Rep. 336.
Liability of municipal corporation see Kelly *v* Barton, 26 Ont. 608 [*affirmed* in 22 Ont. App. 522].
That defendants must be treated as being charged as individuals, not as acting in their capacity of councilors, see East Nissouri Tp. *v.* Horseman, 16 U. C. Q. B. 556.
Where the person sought to be charged was merely the messenger or agent of the gov-

responsible for damages in malicious prosecution upon proof of all essentials of the wrong.[95]

B. Joint Tort-Feasors. The usual principles as to joint tort-feasors apply;[96] the liability is joint and several.[97] All persons who originate,[98] aid, or abet in,[99] or voluntarily participate in,[1] such original proceeding are liable as principals,[2] jointly or severally if they acted with malice and without probable cause.[3] Partners may be joint tort-feasors with third persons.[4]

XII. ACTIONS IN GENERAL.[5]

A. Form of Remedy. As respects the form of the remedy, it clearly appears that the common-law remedy developed from the old writ of conspiracy[6]

ernor of Arkansas and his only act was done by him as such agent, as prescribed by the act of congress, now U. S. Rev. St. § 5278 [U. S. Comp. St. (1901) p. 3597], even though maliciously, creates no liability. *In re* Titus, 23 Fed. Cas. No. 14,062, 8 Ben. 411.

95. McMorris *v.* Howell, 89 N. Y. App. Div. 272, 85 N. Y. Suppl. 1018. The fact that defendant in an action for malicious prosecution in prosecuting plaintiff for alleged destruction of a highway acted in making the complaint in his official capacity was a matter to be considered by the jury in determining the question of probable cause. Skeffington *v.* Eylward, 97 Minn. 244, 105 N. W. 638.

96. Liability of husband and wife for malicious prosecution see HUSBAND AND WIFE, 21 Cyc. 1545 note 45. See TORTS.

97. *Idaho.*— Russell *v.* Chamberlain, (1906) 85 Pac. 926.

Missouri.— Cooper *v.* Scyoc, 104 Mo. App. 414, 79 S. W. 751.

Pennsylvania.— Cotton *v.* Huidekoper, 2 Penr. & W. 149.

Texas.— Porter *v.* Martyn, (Civ. App. 1895) 32 S. W. 731.

West Virginia.—Vinal *v.* Core, 18 W. Va. 1.

United States.— A recovery may be had against one or more or all; plaintiff may separate actions, although he can have but a single satisfaction except as to costs. Albright *v.* McTighe, 49 Fed. 817.

Canada.— Gordon *v.* Rumble, 19 Ont. App. 440; Clissold *v.* Machell, 25 U. C. Q. B. 80 [*affirmed* in 26 U. C. Q. B. 422].

See 33 Cent. Dig. tit. "Malicious Prosecution," § 83 *et seq.*

98. *Alabama.*— Southern Express Co. *v.* Couch, 133 Ala. 285, 32 So. 167.

South Dakota.— Richardson *v.* Dybedahl, 14 S. D. 126, 84 N. W. 486.

West Virginia.—Vinal *v.* Core, 18 W. Va. 1.

Wisconsin.— Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101.

Canada.— Friel *v.* Ferguson, 15 U. C. C. P. 584, where one defendant procured the warrant and the other issued it.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 83 *et seq.*

99. Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 758; Mauldin *v.* Ball, 104 Tenn. 597, 58 S. W. 248; Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101.

1. *Idaho.*— Russell *v.* Chamberlain, (1906) 85 Pac. 926.

Maryland.— Stansbury *v.* Fogle, 37 Md. 369.

Nebraska.— Casebeer *v.* Rice, 18 Nebr. 203, 24 N. W. 693.

New York.— Brown *v.* Chadsey, 39 Barb. 253.

North Carolina.— Sneeden *v.* Harris, 109 N. C. 349, 13 S. E. 920, 14 L. R. A. 389.

Pennsylvania.— Cotton *v.* Huidekoper, 2 Penr. & W. 149.

West Virginia— Vinal *v.* Core, 18 W. Va. 1.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 83 *et seq.*

It is no defense that the person sought to be charged did not sign the complaint (Tangney *v.* Sullivan, 163 Mass. 166, 39 N. E. 799; Casebeer *v.* Rice, 18 Nebr. 203, 24 N. W. 693), or originate the proceeding (Stansbury *v.* Fogle, 37 Md. 369).

2. Porter *v.* Martyn, (Tex. Civ. App. 1895) 32 S. W. 731; Vinal *v.* Core, 18 W. Va. 1.

3. Russell *v.* Chamberlain, (Ida. 1906) 85 Pac. 926; Johnson *v.* Miller, 69 Iowa 562, 29 N. W. 743, 58 Am. Rep. 231; Vinal *v.* Core, 18 W. Va. 1; Friel *v.* Ferguson, 15 U. C. C. P. 584.

Two may join in charging a person with crime, although but one sign the complaint (Conroy *v.* Townsend, 69 Ill. App. 61); or swear to the complaint to obtain the warrant for plaintiff's arrest (Jones *v.* Jenkins, 3 Wash. 17, 27 Pac. 1022).

4. Page *v.* Citizens' Banking Co., 111 Ga. 73, 36 S. E. 418, 78 Am. St. Rep. 144, 51 L. R. A. 463.

5. Bail in such action see ARREST, 8 Cyc. 903 note 27.

6. Form of this writ is given in Fitzherbert Nat. Brev. 114 D.

The statute referred to in these writs was that of Edward III, called "De Conspiratoribus." See Pollock Torts, *p. 267.

Case and conspiracy compared and distinguished.— The old action of conspiracy could not be brought against one person only. Cox *v.* Wirrall, Cro. Jac. 193. This was one reason why the action on the case came to be used. Stephen Mal. Pros. *p. 85. When the wrong was committed by only one person there was an action on the case "in the nature of an action for conspiracy" (Mills *v.* Mills, Cro. Car. 239; Phillips *v.* Jansen, 2 Esp. 624: Savile *v.* Roberts, 1 Ld. Raym. 374, 1 Salk. 13, 3 Salk. 16; Price *v.* Crofts, T. Raym. 180; Saur Abr. p. 62, pl. 3); and

was case;[7] trespass *vi et armis* does not lie.[8] If, however, the proceeding complained of was extrajudicial, the remedy was trespass.[9] The substance of the distinction in large measure at least survives the current legislation designed to abolish forms of action.[10]

was early brought for malicious prosecution (Skinner *v.* Gunton, 1 Saund. 228; Daw *v.* Swaine, Sid. 424; Atwood *v.* Monger, Style 378). The distinction between the two actions is treated by Lord Chief Justice Holt, in Savile *v.* Roberts, 1 Ld. Raym. 374, 1 Salk. 13, 3 Salk. 16, which is considered the foundation of the modern action for malicious prosecution.

The historical aspect of the subject will be found in Bigelow Lead Cas. Torts 190, 196.

7. *Alabama.*— Randall *v.* Henry, 5 Stew. & P. 367; Seay *v.* Greenwood, 21 Ala. 491.

Arkansas.— Bach *v.* Cook, 21 Ark. 571.

Connecticut.— Whipple *v.* Fuller, 11 Conn. 582, 29 Am. Dec. 330; Luddington *v.* Peck, 2 Conn. 700.

Illinois.— Davis *v.* Baker, 88 Ill. App. 251.

Iowa.— Center *v.* Spring, 2 Iowa 393.

Ohio.— Tomlinson *v.* Warner, 9 Ohio 103; Anderson *v.* Buchanan, Wright 725.

Pennsylvania.— Stewart *v.* Thompson, 51 Pa. St. 158.

Rhode Island.— Hobbs *v.* Ray, 18 R. I. 84, 25 Atl. 694.

South Carolina.— Thomas *v.* Rouse, 2 Brev. 75.

Virginia.— Shaver *v.* White, 6 Munf. 110, 8 Am. Dec. 730.

Case is the proper remedy: For the malicious use of process regularly issued by a court of competent jurisdiction. Sheppard *v.* Furniss, 19 Ala. 760. For the malicious abuse of process in issuing an execution. Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574. For an illegal arrest made under a writ of attachment wrongfully sued out, but regularly issued by a court of competent jurisdiction. Plummer *v.* Dennett, 6 Me. 421, 20 Am. Dec. 316. For malicious arrest. Bassett *v.* Bratton, 86 Ill. 152; Turner *v.* Walker, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329; Hamilton *v.* Feemster, 4 Rich. (S. C.) 573; Doolan *v.* Martin, 6 Ont. Pr. 319; Dobbyn *v.* Decow, 25 U. C. C. P. 18; Thorne *v.* Mason, 8 U. C. Q. B. 236; Cameron *v.* Playter, 3 U. C. Q. B. 138; Dunn *v.* McDougall, 5 U. C. Q. B. O. S. 156. For maliciously procuring a capias ad satisfaciendum to be issued. Turner *v.* Walker, *supra.* For maliciously procuring a search warrant to be issued. Riley *v.* Johnston, 13 Ga. 260; Beaty *v.* Perkins, 6 Wend. (N. Y.) 382. For maliciously suing out an attachment and for injury to credit and business. State *v.* Thomas, 19 Mo. 613, 61 Am. Dec. 580. To recover damages incident to the taking and carrying away of property under a replevin process issued in furtherance of a conspiracy. Cannon *v.* Sipples, 39 Conn. 505. Where, in an action for malicious prosecution, or a malicious abuse of legal process, special loss to plaintiff's business resulting from the wrong is alleged to aggravate the damages, such allegation does not change the character of an action. It remains an action for a personal injury. Noonan *v.* Orton, 34 Wis. 259, 17 Am. Rep. 441.

Case, trespass, or trover.— In an action for malicious prosecution by attachment of plaintiff's property, plaintiff cannot recover as for a conversion of the goods attached. Burton *v.* St. Paul, etc., R. Co., 33 Minn. 189, 22 N. W. 300. Where the proceedings complained of are merely irregular (Sheppard *v.* Furniss, 19 Ala. 760); or where an arrest is made on a void warrant (Kramer *v.* Lott, 50 Pa. St. 495, 88 Am. Dec. 556; Baird *v.* Householder, 32 Pa. St. 168), the proper remedy is trespass; but where the warrant is void for want of jurisdiction, trespass, or trover is proper (Zachary *v.* Holden, 47 N. C. 453). When an injury is effected by regular process of a court of competent jurisdiction, case is the proper remedy, and trespass is not sustainable, although the process may have been maliciously adopted. Riley *v.* Johnston, 13 Ga. 260; Owens *v.* Starr, 2 Litt. (Ky.) 230; Warfield *v.* Walter, 11 Gill & J. (Md.) 80; Boyd *v.* Snyder, 207 Pa. St. 330, 56 Atl. 924; McHugh *v.* Pundt, 1 Bailey (S. C.) 441; Olinger *v.* McChesney, 7 Leigh (Va.) 660; Shaver *v.* White, 6 Munf. (Va.) 110, 8 Am. Dec. 730; Smith *v.* Miles, 22 Fed. Cas. No. 13,079*a*, 1 Hempst. 34.

Groundless proceeding.— In no case has he who instituted a groundless proceeding been held liable as a trespasser. Lovier *v.* Gilpin, 6 Dana (Ky.) 321; Cassier *v.* Fales, 139 Mass. 461, 1 N. E. 922; Barber *v.* Rollinson, 1 Cromp. & M. 330, 2 L. J. Exch. 101, 3 Tyrw. 267; Daniels *v.* Fielding, 4 D. & L. 329, 10 Jur. 1061, 16 L. J. Exch. 153, 16 M. & W. 200.

8. Ivy *v.* Barnhartt, 10 Mo. 151; Shaver *v.* White, 6 Munf. (Va.) 110, 8 Am. Dec. 730.

9. See *supra*, XII, A. See also Anderson *v.* Cowles, 72 Conn. 335, 44 Atl. 477, 77 Am. St. Rep. 310; Turpin *v.* Remy, 3 Blackf. (Ind.) 210; Johnstone *v.* Sutton, 1 T. R. 510; McGuiness *v.* Dafoe, 27 Ont. 117 [*affirmed* in 23 Ont. App. 704]; Hunt *v.* McArthur, 24 U. C. Q. B. 254.

10. For an instance of where the declaration was apparently in malicious prosecution but really in trespass see Whiting *v.* Johnson, 6 Gray (Mass.) 246.

On the same facts one may be liable both for false imprisonment and for malicious prosecution. Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101.

Tresspass lay for false imprisonment.— The two causes of action (false imprisonment and malicious prosecution) are different and inconsistent, but may be united in

B. Conditions Precedent.[11] Rules of court requiring that before the action may be maintained a certain order be had must be duly complied with.[12]

C. Jurisdiction and Venue.[13] Jurisdiction and venue in actions for malicious prosecution must substantially conform to the provisions of local statutes.[14] The action is transitory, and under the common law may be brought in any county in which defendant may be found.[15]

D. Defenses. In addition to showing the non-existence of an essential element of the alleged malicious original proceeding,[16] defendant may, when the facts or circumstances warrant or permit it, resort to any defense which may be interposed in civil actions generally.[17] For example he may plead the statute of limitations in bar of the action.[18]

the same complaint under different counts. Davis *v.* Pacific Tel., etc., Co., (Cal. 1899) 57 Pac. 746.

11. **Conditions precedent** generally see ACTIONS, 1 Cyc. 692 *et seq.*

12. See cases cited *infra*, this note.

Copy of indictment.— By rule of court in some states it is provided that a copy of the indictment, in cases of felony, shall be obtained by order of the judge before whom the cause was brought, before an action for malicious prosecution shall be commenced. Where such rule is in force the action for malicious prosecution cannot be maintained without first complying therewith in cases of felony. A. *v.* B., R. M. Charlt. (Ga.) 228. But where one person prefers a bill of indictment against another for a felony, and the bill is thrown out by the grand jury, the party prosecuted, who has brought an action for malicious prosecution, may give a copy of the indictment in evidence, although it had not been obtained by order of the judge. Taylor *v.* Cooper, 2 Mill (S. C.) 208. But the rule is otherwise where the action is predicated on a charge of misdemeanor. Cherry *v.* McCants, 7 S. C. 224; Mims *v.* Burts, 2 Mill (S. C.) 308.

Production of record.— When the prosecution alleged to have been malicious was for misdemeanor, and plaintiff was acquitted, he can prove his acquittal without producing a copy of the record, although if the crime of which he was acquitted was felony he must produce it. Morrison *v.* Kelly, W. Bl. 384.

Notice of action in Canada see McGuiness *v.* Dafoe, 27 Ont. 117 [*affirmed* in 23 Ont. App. 704]; Scott *v.* Reburn, 25 Ont. 450; McKay *v.* Cummings, 6 Ont. 400.

13. **Jurisdiction** generally see COURTS.

Venue generally see VENUE.

14. Feighner *v.* Delaney, 21 Ind. App. 36, 51 N. E. 379; Winn *v.* Carter Dry Goods Co., 102 Ky. 370, 43 S. W. 436, 19 Ky. L. Rep. 1418; Vennum *v.* Huston, 38 Nebr. 293, 56 N. W. 970 [*following* McNee *v.* Sewell, 14 Nebr. 532, 16 N. W. 827]; Hubbard *v.* Lord, 59 Tex. 384.

15. Hall *v.* Coe, 4 Cow. (N. Y.) 15; Vinal *v.* Core, 18 W. Va. 1. And see Santoro *v.* Trimble, 63 N. Y. App. Div. 413, 71 N. Y. Suppl. 785; Osborn *v.* Stephens, 74 Hun (N. Y.) 91, 26 N. Y. Suppl. 160.

It need not be brought in the county where the cause of action arose. Hull *v.* Vreeland, 18 Abb. Pr. (N. Y.) 182; Shaver *v.* White, 6 Munf. (Va.) 110, 8 Am. Dec. 730.

16. *Alabama.*—Alsop *v.* Lidden, 130 Ala. 548, 30 So. 401.

Illinois.— Ford *v.* Buckley, 68 Ill. App. 447.

Indiana.— Harlan *v.* Jones, 16 Ind. App. 398, 45 N. E. 481.

Maryland.— Gittinger *v.* McRae, 89 Md. 513, 45 Atl. 823.

Missouri.— Cooper *v.* Seyoc, 104 Mo. App. 414, 79 S. W. 751.

Nebraska.— Minneapolis Threshing Mach. Co. *v.* Regier, 51 Nebr. 402, 70 N. W. 934.

New York.— Francis *v.* Tilyou, 26 N. Y. App. Div. 340, 49 N. Y. Suppl. 799.

Wisconsin.— Strehlow *v.* Pettit, 96 Wis. 22, 71 N. W. 102.

Absence of malice see *supra*, VII.

Defendant's non-participation in the original proceeding see *supra*, V.

Existence of probable cause see *supra*, VI.

No damage or injury to plaintiff as a complete or as a partial defense see *supra*, IX.

Non-existence of a judicial proceeding see *supra*, IV, A.

No termination of original proceeding see *supra*, VIII.

17. See cases cited *infra*, this note.

Prematurely bringing suit.— Enright *v.* Gibson, 119 Ill. App. 411 [*affirmed* in 219 Ill. 550, 76 N. E. 689]; Johnson *v.* Shove, 6 Gray (Mass.) 498; Lieblang *v.* Cleveland City Electric R. Co., 26 Ohio Cir. Ct. 30; Von Keohring *v.* Witte, 15 Tex. Civ. App. 646, 40 S. W. 63; Williams *v.* Ainsworth, 121 Wis. 600, 99 N. W. 327. Necessity of termination of original proceeding see *supra*, VIII.

Estoppel of plaintiff as a defense see Tamblyn *v.* Johnston, 126 Fed. 267, 62 C. C. A. 601, where the facts were held not to operate as an estoppel.

Defendant may be estopped to make his defense; thus where he had made the affidavit on which the warrant was issued in the original proceeding, it was held that he could not be heard to question the sufficiency of either the warrant or the affidavit. Rutherford *v.* Dyer, (Ala. 1906) 40 So. 970.

18. *California.*— McCusker *v.* Walker, 77 Cal. 208, 109 Pac. 382; Taylor *v.* Bidwell, 65 Cal. 489, 4 Pac. 491; Anderson *v.* Coleman, 56 Cal. 124.

Georgia.— Printup *v.* Smith, 74 Ga. 157.

Illinois.— Burnap *v.* Marsh, 13 Ill. 535.

XIII. PLEADING.[19]

A. Complaint[20] — **1. General Requisites.** In accordance with the general theory of current pleading[21] the complaint or declaration in malicious prosecution should plainly state the specific facts constituting the cause of action,[22] not conclusions[23] nor evidence of facts[24] nor unnecessary repetitions thereof;[25] but so as to sufficiently allege all of the essential elements of the wrong.[26] It has been held

Louisiana.— King *v.* Erskins, 116 La. 480, 40 So. 844.

Pennsylvania.— Boyd *v.* Snyder, 207 Pa. St. 330, 56 Atl. 924.

Tennessee.—Morgan *v.* Duffy, 94 Tenn. 686, 30 S. W. 735.

West Virginia.— Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

When statute commences to run.— McCusker *v.* Walker, 77 Cal. 208, 19 Pac. 382 (from time of the wrongful act); Printup *v.* Smith, 74 Ga. 157 (from time of termination of litigation); King *v.* Erskins, 116 La. 480, 40 So. 844 (from date of arrest).

Civil proceedings as well as criminal prosecutions have been held to be embraced within the term "prosecution" as used in a statute relating to the limitation of actions for malicious prosecution. Burnap *v.* Marsh, 13 Ill. 535.

19. Pleading generally see PLEADING.

20. Complaint in action on the case in the nature of conspiracy for malicious prosecution see CONSPIRACY, 8 Cyc. 673 note 43.

21. See, generally, PLEADING.

For forms of complaint see Antcliff *v.* June, 81 Mich. 477, 45 N. W. 1019, 21 Am. St. Rep. 533, 10 L. R. A. 621; Hussey *v.* Norfolk Southern R. Co., 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312; Lauzon *v.* Charroux, 18 R. I. 467, 28 Atl. 975.

In Canada a declaration in the form prescribed by U. C. Consol. St. schedule B, No. 27, is sufficient. Eakins *v.* Christopher, 18 U. C. C. P. 532. See also McBride *v.* Howard, 12 Can. L. J. N. S. 280; Davis *v.* Fortune, 6 U. C. Q. B. 281.

22. Pangburn *v.* Bull, 1 Wend. (N. Y.) 345, holding that the rule that plaintiff in an action for malicious prosecution must set out the facts which constitute his ground of action is complied with where he sets out several suits brought by defendant and adjournments and other proceedings connected therewith.

Failure to state specific facts no ground for demurrer.— That a complaint is not sufficiently specific cannot be taken advantage of by demurrer. Cottrell *v.* Cottrell, 126 Ind. 181, 25 N. E. 905; McBean *v.* Campbell, 6 U. C. Q. B. O. S. 457; Thompson *v.* Garrison, 6 U. C. Q. B. O. S. 309.

Irrelevant matters will be stricken out. Haughie *v.* New York, etc., Tel. Co., 34 Misc. (N. Y.) 634, 70 N. Y. Suppl. 584.

23. Schofield *v.* Thackaberry, 115 Ill. App. 118.

24. Dreux *v.* Domec, 18 Cal. 83.

25. Hussey *v.* Norfolk Southern R. Co., 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312; Code, § 233.

26. See cases cited *infra*, this note.

For complaints that have been held sufficient in general see the following cases:

Arizona.— Sullivan *v.* Garland, 5 Ariz. 188, 50 Pac. 31.

Arkansas.— Haglin *v.* Apple, 65 Ark. 274, 45 S. W. 989; McIlroy *v.* Adams, 32 Ark. 315.

California.— Runk *v.* San Diego Flume Co., (1896) 43 Pac. 518.

Colorado.— Struby-Estabrook Mercantile Co. *v.* Kyes, 9 Colo. App. 190, 48 Pac. 663.

Connecticut.—Doane *v.* Cummins, 11 Conn. 152; Sterling *v.* Adams, 3 Day 411.

Georgia.— Woodley *v.* Coker, 119 Ga. 226, 46 S. E. 89; Melson *v.* Thornton, 113 Ga. 99, 38 S. E. 342.

Idaho.— Russell *v.* Chamberlain, (1906) 85 Pac. 926.

Illinois.— Robertson *v.* Marion, 97 Ill. App. 332.

Indiana.— Cottrell *v.* Cottrell, 126 Ind. 181, 25 N. E. 905; Schoonover *v.* Reed, 66 Ind. 598; York *v.* Webster, 66 Ind. 50; McCarthy *v.* Kitchen, 59 Ind. 500; Collins *v.* Love, 7 Blackf. 416.

Kentucky.— Carrico *v.* Meldrum, 1 A. K. Marsh. 224; Wickliffe *v.* Payne, 1 Bibb 413.

Louisiana.—Burkett *v.* Lanata, 15 La. Ann. 337.

Michigan.— Cadwell *v.* Corey, 91 Mich. 335, 51 N. W. 888; Antcliff *v.* June, 81 Mich. 477, 45 N. W. 1019, 21 Am. St. Rep. 533, 10 L. R. A. 621.

Missouri.— Hilbrant *v.* Donaldson, 69 Mo. App. 92; Eagleton *v.* Kabrich, 66 Mo. App. 231.

Nebraska.— Metcalf *v.* Bockoven, 62 Nebr. 877, 87 N. W. 1055.

North Carolina.— Pittsburg, etc., R. Co. *v.* Wakefield Hardware Co., 138 N. C. 174, 50 S. E. 571; Hussey *v.* Norfolk Southern R. Co., 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312.

Ohio.— Tilton *v.* Morgaridge, 12 Ohio St. 98.

Oklahoma.— Schrieber *v.* Clapp, 13 Okla. 215, 74 Pac. 316.

Rhode Island.— Lauzon *v.* Charroux, 18 R. I. 467, 28 Atl. 975.

Utah.— Johnston *v.* Meaghr, 14 Utah 426, 47 Pac. 861.

Canada.— Nagle *v.* Timmins, 31 U. C. C. P. 221; Dewar *v.* Carrique, 14 U. C. C. P. 137.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 91.

Complaints were held insufficient in Woodall *v.* McMillan, 38 Ala. 622 (a count claiming damages of defendant "for maliciously,

that a complaint in an action for malicious prosecution is not demurrable for misjoinder of distinct causes of action, because it seeks to recover: (1) For wrongfully causing the writ to be issued; (2) for wrongfully causing the same to be levied; (3) for excessive levy; and (4) for improper conduct in making the levy.[27]

2. ORIGINAL PROCEEDING.[28] It is essential that the complaint must contain a substantial, accurate, and complete description of the original proceeding,[29] and it must set forth facts showing that it was judicial in character;[30] in criminal

and without probable cause therefor, causing the plaintiff to be arrested and imprisoned on a charge of perjury;" and a second count claiming damages "for this — that the defendant . . . falsely imprisoned plaintiff, and then detained him in prison and custody, without any reasonable or probable cause . . . contrary to law, and against the will of plaintiff" are counts in trespass); Holly *v.* Carson, 39 Ala. 345 (complaint alleging that plaintiff claimed damages against defendant "for maliciously, and without probable cause therefor, causing the plaintiff to be arrested and imprisoned on a charge of felony"); Duckworth *v.* Boykin, 114 Ga. 969, 41 S. E. 62; Steel *v.* Williams, 18 Ind. 161 (complaint not showing that the prosecution against plaintiff had ended in his acquittal); Spring *v.* Besore, 12 B. Mon. (Ky.) 551 (not showing that suit terminated in plaintiff's favor and the manner of its termination); Bartlett *v.* Christhilf, 69 Md. 219, 14 Atl. 518; Lansing *v.* Oliver, 1 Nebr. (Unoff.) 602, 95 N. W. 782; Ford *v.* Kelsey, 4 Rich. (S. C.) 365 (where complaint failed to show writ was issued without probable cause); Miskimmons *v.* Moore, 10 Wyo. 41, 65 Pac. 1000.

In an action by a corporation for malicious prosecution the complaint averred that defendants wilfully, maliciously, and without probable caused filed a bill for plaintiff's dissolution, wherein they made false, malicious, and slanderous allegations against plaintiff, and widely circulated the same, to destroy public confidence in plaintiff, and that having taken no proof the suit was dismissed by order of court. It was held that the complaint stated no cause of action. Supreme Lodge A. P. L. *v.* Unverzagt, 76 Md. 104, 24 Atl. 323.

Under N. Y. Code Civ. Proc. § 499, providing that the objection that a complaint does not state facts sufficient to constitute a cause of action is not waived by an omission to demur, the objection that a complaint for malicious prosecution does not allege want of probable cause may be raised by motion to dismiss. Palmer *v.* Palmer, 8 N. Y. App. Div. 331, 40 N. Y. Suppl. 829.

Formal defects in the complaint in a justice's court will be overlooked, if no objection is made to them until evidence is offered. Holbrook *v.* Cooper, 44 Mich. 373, 6 N. W. 850. See also, generally, JUSTICES OF THE PEACE, 24 Cyc. 570.

Complaint which negatives existence of statutory ground for an attachment stated in the attachment affidavit and denies the existence of any and all statutory grounds for the issuance of the writ is sufficient as against a demurrer that such complaint "fails to negative or deny that any statutory ground existed for the issuance of the attachment." Brown *v.* Master, 104 Ala. 451, 16 So. 443.

27. All the matters thus specified are component parts of the malicious prosecution complained of. Brown *v.* Master, 104 Ala. 451, 16 So. 443.

Joinder of count for circulating slanderous charges.— In Cadwell *v.* Corey, 91 Mich. 335, 51 N. W. 888, it is held that counts for maliciously suing out a writ of attachment, on a false affirmation of dishonesty and fraud in the contraction of the debt sued for, may be joined with a count for circulating reports of the same general character and referring to the same dealings between the parties, and plaintiff cannot be compelled to an election of counts.

Joinder of actions for false imprisonment and malicious prosecution see 19 Cyc. 358.

28. **The original proceeding as an element of liability** see *supra*, IV.

29. Ammerman *v.* Crosby, 26 Ind. 451; Haskins *v.* Ralston, 69 Mich. 63, 37 N. W. 45, 13 Am. St. Rep. 376 (allegations held sufficient); Closson *v.* Staples, 42 Vt. 209, 1 Am. Rep. 316.

The declaration is good if it states that defendant maliciously caused plaintiff to be indicted, although he was tried and acquitted and there is no averment that defendant caused plaintiff to be tried. Graham *v.* Noble, 13 Serg. & R. (Pa.) 233.

Charge of illegal arrest.— Where a complaint is susceptible of no other interpretation than a charge of illegal arrest, detention, and restraint of liberty, the action is to be regarded as one of false imprisonment and not malicious prosecution. Burns *v.* Erben, 26 How. Pr. (N. Y.) 273.

The judgment need not be set out. McBride *v.* Howard, 12 Can. L. J. N. S. 280; Wilcox *v.* Burnside, 5 U. C. Q. B. O. S. 525; Crawford *v.* Stennett, (East. T. 2 Vict.) 3 K. & J. Dig. 2193.

The affidavit to arrest need not be set out. Beamer *v.* Darling, 4 U. C. Q. B. 211.

30. Drew *v.* Potter, 39 Vt. 189. See also Ragsdale *v.* Bowles, 16 Ala. 62, holding that an allegation that defendant caused plaintiff to be released and set at liberty, and abandoned the prosecution, does not show with any reasonable certainty that the charge was investigated judicially, that the prosecution was ended by the judgment of any judicial tribunal, or that defendant was discharged after judicial investigation.

Court's jurisdiction.— That the declaration must show that the court had jurisdiction of

cases the particular offense must be stated.[31] Process issued must be adequately described.[32]

3. PARTIES.[33] So it is necessary that the complaint should set forth such facts as are sufficient to show that plaintiff has the capacity to sue,[34] and that defendant is liable individually[35] as the proximate cause of the damage complained of.[36] In case there is more than one defendant it is not necessary,[37] and may be

the original action see Anderson *v.* Wilson, 25 Ont. 91; Stephens *v.* Stephens, 24 U. C. C. P. 424.

Magistrate's jurisdiction.—Where the original proceeding was before a magistrate, the complaint must set forth facts showing that the magistrate had jurisdiction. Stephens *v.* Stephens, 24 U. C. C. P. 424. See also Munroe *v.* Abbott, 39 U. C. Q. B. 78; Campbell *v.* McDonell, 27 U. C. Q. B. 343; Sinclair *v.* Haynes, 16 U. C. Q. B. 247.

Necessity of jurisdiction see *supra*, IV, B.

31. Cochran *v.* Bones, 1 Cal. App. 729, 82 Pac. 970.

Extent and limits of rule.— The doctrine seems to be well settled that the averment in the declaration must substantially charge the particular felony or misdemeanor charged in the affidavit. But it is not necessary to recite the affidavit in full. Hughes *v.* Ross, 1 Stew. & P. (Ala.) 258. The declaration should state the offense imputed to plaintiff by its technical name, or by its legal description. Bartlett *v.* Jennison, 6 Blackf. (Ind.) 295; Turpin *v.* Remy, 3 Blackf. (Ind.) 210. But it need not describe the offense by name for which the party was prosecuted, nor draw the legal conclusion from the acts of the prosecutor. Long *v.* Rogers, 17 Ala. 540. An allegation that defendant "falsely and maliciously, and without any reasonable or probable cause, charged the said plaintiff with having feloniously stolen a certain horse of the defendant's," is sufficient to show that the crime of larceny was imputed to plaintiff. Cox *v.* Kirkpatrick, 8 Blackf. (Ind.) 37. The petition should state the facts, and not the conclusion of the pleader upon the facts. Brown *v.* Cape Girardeau, 90 Mo. 377, 2 S. W. 302, 59 Am. Rep. 28. But when the offense imputed is stated by its technical name, it is sufficient, especially after verdict. Thomas *v.* Hunter, 44 Ind. 477. It is held not to be necessary that it should appear that the complaint under which plaintiff was arrested alleged a crime in terms sufficient, where it is shown that the complaint sought to charge an offense against the law. Kleinsmith *v.* Hamlin, (Tex. Civ. App. 1901) 60 S. W. 994. But see Whaley *v.* Lawton, 57 S. C. 256, 35 S. E. 558.

32. Sheppard *v.* Furniss, 19 Ala. 760, holding that a complaint or declaration in case, for malicious prosecution, must aver the issuance of process, properly describing it.

It is not essential that the writ should be described by its technical name (Ammerman *v.* Crosby, 26 Ind. 451); or that the writing be set out in full, in the malicious suit (Bernard *v.* Cafferty, 11 Gray (Mass.) 10; Closson *v.* Staples, 42 Vt. 209, 1 Am. Rep. 316). Nor is it necessary to aver that the affidavit was in writing. Forrest *v.* Collier, 20 Ala. 175, 56 Am. Dec. 190.

33. Persons entitled to sue see *supra*, X.

Persons liable see *supra*, XI.

34. See *supra*, X, A.

35. Describing a defendant in his fiduciary capacity is not merely surplusage, but erroneous, as he can be made liable only in his individual capacity. Wengert *v.* Beashore, I Penr. & W. (Pa.) 232, styling defendant as executor. And see Louque *v.* Saloy, 45 La. Ann. 1386, 14 So. 255; Lamorere *v.* Cox, 32 La. Ann. 246; Mell *v.* Barner, 135 Pa. St. 151, 19 Atl. 940.

36. Marshall *v.* Betner, 17 Ala. 832 (holding that in an action for malicious attachment defendant must be connected by averment with the execution of the process of attachment); Watters *v.* De la Matter, 109 Ill. App. 334; Gittinger *v.* McRae, 89 Md. 513, 43 Atl. 823. *Compare* Walser *v.* Thies, 56 Mo. 89, where it is held to be unnecessary either to plead or prove that defendant participated in the execution of the attachment process; that if he makes out the affidavit maliciously and without probable cause this is sufficient without further intervention on his part to render him liable in damages for any resulting injury. See also *supra*, V, B, text and note 98.

37. Dreux *v.* Domec, 18 Cal. 83; Russell *v.* Chamberlain, (Ida. 1906) 85 Pac. 926 (holding that it is not necessary, in an action for malicious prosecution, to allege that all defendants combined in instituting the proceedings, but if, after they were commenced, they without probable cause and with malice voluntarily participated in the prosecution, they may be joined in an action with the persons who instituted the action); Gilmore *v.* Mastin, 115 Ill. App. 46; Jenner *v.* Carson, 111 Ind. 522, 13 N. E. 44 (holding that where the action is against several defendants a complaint which charges that defendants wrongfully, maliciously, and without probable cause did the several things therein charged is sufficient); Hamilton *v.* Smith, 39 Mich. 222.

Name and authority of agent.— It is not necessary that the complaint should set forth the name and authority of the agent or employee through whom the prosecution was instituted. Indiana Bicycle Co. *v.* Willis, 18 Ind. App. 525, 48 N. E. 646.

Prosecution to finality without probable cause.— A declaration charging a conspiracy to sacrifice and destroy plaintiff's property and business by the malicious use of judicial proceedings must, it has been held, allege that such proceedings were instigated, instituted,

superfluous,[38] to allege a conspiracy. When, however, the action is brought against persons not parties to the record, a concise statement should be made of their relation to each other,[39] and of what they did in connection with the proceeding complained of.[40]

4. Want of Probable Cause.[41] Want of probable cause for the original proceeding being an essential element, it must be alleged in the declaration.[42] The specific allegation *in hæc verba* is proper as the allegation of an ultimate fact,[43] but is not essential or sacramental.[44] If the petition states not conclusions[45]

and prosecuted to a finality by defendants without probable cause. Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459. See also Conspiracy, 8 Cyc. 673 note 43. But in Dreux *v.* Domec, 18 Cal. 83, 88, it was said: "An action lies for a conspiracy unjustly to prosecute a defendant; but we apprehend that this action is somewhat different, in form at least, from an action on the case for a malicious prosecution. The gist of this action is the malicious prosecution; that of the other conspiracy — the combining of two or more to do an unlawful and injurious act. In the first case . . . an action is complete before an acquittal; in the other, the acquittal or termination of the prosecution is necessary."

38. Muriel *v.* Tracy, 6 Mod. 169; Skinner *v.* Gunton, 1 Saund. 228.

39. Page *v.* Citizens' Banking Co., 111 Ga. 73, 36 S. E. 418, 78 Am. St. Rep. 144, 51 L. R. A. 463; McLarren *v.* Blacklock, 14 U. C. Q. B. 24.

40. Sharp *v.* Miller, 54 Cal. 329; Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

41. Want of probable cause as element of liability see *supra*, VI, A, 1.

42. *Arkansas.*— Haglin *v.* Apple, 65 Ark. 274, 45 S. W. 989.

Hawaii.— Kerr *v.* Hyman, 6 Hawaii 300.

Indiana.— McCullough *v.* Rice, 59 Ind. 580.

Kentucky.— Duncan *v.* Griswold, 92 Ky. 546, 18 S. W. 354, 13 Ky. L. Rep. 765; Cox *v.* Taylor, 10 B. Mon. 17.

Louisiana.— Philips *v.* Lehman, 39 La. Ann. 630, 2 So. 409.

Maryland.— Lohrfink *v.* Still, 10 Md. 530.

Massachusetts.—Dennehey *v.* Woodsum, 100 Mass. 195; Wills *v.* Noyes, 12 Pick. 324.

Missouri.— Moody *v.* Deutsch, 85 Mo. 237; Kelley *v.* Osborn, 86 Mo. App. 239.

New York.— Cousins *v.* Swords, 14 N. Y. App. Div. 338, 43 N. Y. Suppl. 907; Palmer *v.* Palmer, 8 N. Y. App. Div. 331, 40 N. Y. Suppl. 829; Given *v.* Webb, 7 Rob. 65.

Ohio.— Withau *v.* Hubbell, 4 Ohio Dec. (Reprint) 75, 1 Clev. L. Rep. 1.

Pennsylvania.— Lipowicz *v.* Jervis, 209 Pa. St. 315, 58 Atl. 619.

South Carolina.— Hogg *v.* Pinckney, 16 S. C. 387.

Tennessee.— Turner *v.* Turner, 85 Tenn. 387, 3 S. W. 121.

Texas.— Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85.

Vermont.— Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708.

Virginia.—Spengler *v.* Davy, 15 Gratt. 381; Marshall *v.* Bussard, Gilm. 9; Young *v.* Gregory, 3 Call 446, 2 Am. Dec. 556.

West Virginia.— Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459; Burkhart *v.* Jennings, 2 W. Va. 242.

Wisconsin.— Collins *v.* Shannon, 67 Wis. 441, 30 N. W. 760.

United States.— Preston *v.* Cooper, 19 Fed. Cas. No. 11,395, 1 Dill. 589.

Canada.— Fisher *v.* Holden, 17 U. C. C. P. 395; Young *v.* Daniell, 21 U. C. Q. B. 443; Acland *v.* Adams, 7 U. C. Q. B. 139. See also Ventris *v.* Brown, 22 U. C. C. P. 345; Barber *v.* Daniell, 12 U. C. C. P. 68.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 94.

Want of such an allegation is a fatal defect in the declaration or complaint. Haglin *v.* Apple, 65 Ark. 274, 45 S. W. 989; King *v.* Montgomery, 50 Cal. 115; Marable *v.* Mayer, 78 Ga. 710, 3 S. E. 429; Chelf *v.* Penn, 2 Metc. (Ky.) 463; Witascheck *v.* Glass, 46 Mo. App. 209; Davis *v.* Terry, 114 N. C. 27, 18 S. E. 947; Ely *v.* Davis, 111 N. C. 24, 15 S. E. 878; Thompson *v.* Gatlin, 58 Fed. 534, 7 C. C. A. 351.

43. Struby-Estabrook Mercantile Co. *v.* Kyes, 9 Colo. App. 190, 48 Pac. 663; Blucher *v.* Zonker, 19 Ind. App. 615, 49 N. E. 911; Locke *v.* Wilson, 6 U. C. Q. B. 600.

Form of petition held sufficient see Nehr *v.* Dobbs, 47 Nebr. 863, 866, 66 N. W. 864. *Compare* Locke *v.* Wilson, 6 U. C. Q. B. 600, 601.

But where the declaration shows upon its face that plaintiff was convicted or indicted, but judgment was reversed on appeal, the averment of want of probable cause by itself is not a statement of fact, but only a conclusion of law, and presumption of probable cause must be rebutted by some additional averment showing fraud or undue means in procuring such conviction or binding over. Boogher *v.* Hough, 99 Mo. 183, 12 S. W. 524; Giusti *v.* Del Papa, 19 R. I. 338, 33 Atl. 525.

44. Benson *v.* Bacon, 99 Ind. 156; Burkett *v.* Lanata, 15 La. Ann. 337; Clossen *v.* Staples, 42 Vt. 209, 1 Am. Rep. 316. And see Griffith *v.* Hall, 26 U. C. Q. B. 94; Lyons *v.* Kelly, 6 U. C. Q. B. 278; McIntosh *v.* Demeray, 5 U. C. Q. B. 343; Denham *v.* Ridout, 6 U. C. Q. B. O. S. 193.

45. Scotten *v.* Longfellow, 40 Ind. 23; Maddox *v.* McGinnis, 7 T. B. Mon. (Ky.) 370; Given *v.* Webb, 7 Rob. (N. Y.) 65.

"Without perfect cause" has been held to be an insufficient allegation. Cox *v.* Taylor, 10 B. Mon. (Ky.) 17.

"Without good cause" is not sufficient. Mitchell *v.* Mattingly, 1 Metc. (Ky.) 237.

but facts from which the inference of want of probable cause naturally follows,[46] it is sufficient.

5. MALICE.[47] Malice as well as absence of probable cause must be alleged;[48] otherwise the declaration or complaint is bad on demurrer.[49] It is not sufficient

Want of "just" or "proper" cause is not a good averment of want of probable cause. De Wiele *v.* Callanan, 7 Daly (N. Y.) 386.

"Want of any just cause" is insufficient. Ellis *v.* Thilman, 3 Call (Va.) 3.

"Without any legal or justifiable cause" is insufficient. Young *v.* Gregory, 3 Call (Va.) 446, 2 Am. Dec. 556.

Falsity of charge.— It is not necessary to charge that the accusation complained of was false. McCarthy *v.* Kitchen, 59 Ind. 500; Ziegler *v.* Powell, 54 Ind. 173, holding that however false the charge might have been, if the person making it had probable cause for so doing, he would not be liable in a suit for malicious prosecution.

46. *Alabama.*— Brown *v.* Master, 104 Ala. 451, 16 So. 443.

California.— Clark *v.* Nordholt, 121 Cal. 26, 53 Pac. 400.

Connecticut.— Wall *v.* Toomey, 52 Conn. 35.

Illinois.— Spaids *v.* Barrett, 57 Ill. 289, 11 Am. Rep. 10.

Iowa.— Hampton *v.* Jones, 58 Iowa 317, 12 N. W. 276.

Louisiana.—Burkett *v.* Lanata, 15 La. Ann. 337.

Maryland.— Turner *v.* Walker, 3 Gill & J. 377, 22 Am. Dec. 329.

New Hampshire.— Davis *v.* Clough, 8 N. H. 157.

New York.— Bregman *v.* Kress, 83 N. Y. App. Div. 1, 81 N. Y. Suppl. 1072.

North Carolina.— Ely *v.* Davis, 111 N. C. 24, 15 S. E. 878.

Ohio.— Crane *v.* Buchman, 30 Cinc. L. Bul. 120.

Texas.— Sebastian *v.* Cheney, (Civ. App. 1893) 24 S. W. 970.

Vermont.— King *v.* Estabrooks, 77 Vt. 371, 60 Atl. 84; Closson *v.* Staples, 42 Vt. 209, 1 Am. Rep. 316.

Virginia.— Mowry *v.* Miller, 3 Leigh 561, 24 Am. Dec. 680.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 94 *et seq.*

Where an attachment was sued out by defendant as agent for a third person, and the declaration in an action for maliciously suing out such attachment alleges that he was not the agent of such third person, but acted wholly without authority from him, it is unnecessary to aver the want of probable cause. Forrest *v.* Collier, 20 Ala. 175, 56 Am. Dec. 190.

Insufficient statement of facts see Cousins *v.* Swords, 14 N. Y. App. Div. 338, 43 N. Y. Suppl. 907; McKenzie *v.* Royal Dairy, 35 Wash. 390, 77 Pac. 680; McBean *v.* Campbell, 6 U. C. Q. B. O. S. 457; Thompson *v.* Garrison, 6 U. C. Q. B. O. S. 309.

47. Malice as essential element of liability see *supra*, VII, A.

48. *Colorado.*— Graham *v.* Reno, 5 Colo. App. 330, 38 Pac. 835.

Connecticut.— Dauchy *v.* Salisbury, 29 Conn. 124.

Hawaii.— Kerr *v.* Hyman, 6 Hawaii 300, holding that an allegation that defendants intended to injure plaintiff is not equivalent to an allegation of malice.

Louisiana.—Philips *v.* Lehman, 39 La. Ann. 630, 2 So. 409.

Massachusetts.— Wills *v.* Noyes, 12 Pick. 324.

Missouri.— Mooney *v.* Kennett, 19 Mo. 551, 61 Am. Dec. 576; Kelley *v.* Osborn, 86 Mo. App. 239.

Ohio.— Withan *v.* Hubbell, 4 Ohio Dec. (Reprint) 75, 1 Clev. L. Rep. 1.

Oregon.— Mitchell *v.* Silver Lake Lodge No. 84, I. O. O. F., 29 Oreg. 294, 25 Pac. 798.

Pennsylvania.— Lipowicz *v.* Jervis, 209 Pa. St. 315, 58 Atl. 619.

Vermont.— Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708.

Virginia.— Spengler *v.* Davy, 15 Gratt. 381.

West Virginia.— Burkhart *v.* Jennings, 2 W. Va. 242.

Wisconsin.— Collins *v.* Shannon, 67 Wis. 441, 30 N. W. 730.

United States.— McCracken *v.* Covington City Nat. Bank, 4 Fed. 602; Preston *v.* Cooper, 19 Fed. Cas. No. 11,395, 1 Dill. 589.

Canada.— Vandervoort *v.* Youker, 13 Ont. 417; Acland *v.* Adams, 7 U. C. Q. B. 139. See also Powell *v.* Williamson, 1 U. C. Q. B. 154.

See 33 Cent. Dig. tit. "Malicious Prosecution," §§ 96, 97.

For forms of petitions held sufficient see Forrest *v.* Collier, 20 Ala. 175, 178, 56 Am. Dec. 190 (holding that in an action for wrongfully suing out an attachment, an allegation that the attachment was sued out wrongfully, fraudulently, and in order to oppress and injure plaintiff, is equivalent to an averment that it was sued out maliciously); Swindell *v.* Houck, 2 Ind. App. 519, 28 N. E. 736; Jones *v.* Fruin, 26 Nebr. 76, 77, 42 N. W. 283; Jones *v.* Jenkins, 3 Wash. 17, 19, 27 Pac. 1022.

Repetition of allegation.— Where the complaint in an action for malicious prosecution contains allegations of malice and want of probable cause, by defendant in filing an affidavit charging plaintiff with a criminal offense, such allegation need not be repeated in connection with the averments concerning the issue of the warrant, the arrest, and the imprisonment. Ruston *v.* Biddle, 43 Ind. 515.

49. Smith *v.* Smith, 26 Hun (N. Y.) 573.

to allege that the original proceedings were wrongfully procured.[50] It is held that the allegation that defendant acted "maliciously" is sufficient,[51] and that it is bad pleading to set forth the evidence to establish malice.[52] On the other hand it is held that the complaint or declaration must set forth the conduct of defendant alleged to have been malicious.[53]

6. Favorable Termination of Proceeding.[54] As a general rule plaintiff's pleading must consistently[55] allege the fact[56] of the final[57] termination of the previous

50. Preston *v.* Cooper, 19 Fed. Cas. No. 11,395, 1 Dill. 589.

51. O'Neill *v.* Johnson, 53 Minn. 439, 55 N. W. 601, 39 Am. St. Rep. 615 (malice is a fact, to be pleaded as such); Clark *v.* Folkers, 1 Nebr. (Unoff.) 96, 95 N. W. 328.

That defendant maliciously sued, etc., is sufficient. McIntosh *v.* Demeray, 5 U. C. Q. B. 343.

52. O'Neill *v.* Johnson, 53 Minn. 439, 55 N. W. 601, 39 Am. St. Rep. 615; Solis *v.* Manning, 37 How. Pr. (N. Y.) 13, holding that the evidence upon which a charge of malice is based cannot be pleaded and will be stricken on motion. *Compare* Brockleman *v.* Brandt, 10 Abb. Pr. (N. Y.) 141; Eddy *v.* Beach, 7 Abb. Pr. (N. Y.) 17 [*affirming* 37 How. 13]; Shaw *v.* Jayne, 4 How. Pr. (N. Y.) 119.

53. Jones *v.* Oliver, 3 N. J. L. 1033; Dispereaux *v.* Smock, 3 N. J. L. 744; Courter *v.* Wood, 3 N. J. L. 616; Elkinton *v.* Deacon, 2 N. J. L. 160; Pangburn *v.* Bull, 1 Wend. (N. Y.) 345, 351 (where it is said that "something more than a general allegation that a suit was commenced maliciously must be stated; the particular grievance must be alleged"); Tavenner *v.* Morehead, 41 W. Va. 116, 23 S. E. 673; McCracken *v.* Covington City Nat. Bank, 4 Fed. 602.

54. Favorable termination of proceeding as element of liability see *supra*, VIII, A.

55. Ashford *v.* Goheen, 7 U. C. Q. B. 547.

56. *Alabama.*— Southern Car, etc., Co. *v.* Adams, 131 Ala. 147, 32 So. 503.

Georgia.— McDaniel *v.* Nelms, 96 Ga. 366, 23 S. E. 407.

Illinois.— Rothschild *v.* Meyer, 18 Ill. App. 284.

Louisiana.— Lawler *v.* Levy, 33 La. Ann. 220.

Maryland.— Turner *v.* Walker, 3 Gill & J. 377, 22 Am. Dec. 329.

New York.— Thomason *v.* Demotte, 9 Abb. Pr. 242, 18 How. Pr. 529.

North Carolina.— Johnson *v.* Finch, 93 N. C. 205.

Rhode Island.— Tyler *v.* Smith, 25 R. I. 486, 56 Atl. 683.

South Carolina.— O'Driscoll *v.* McBurney, 2 Nott & M. 54 (holding that it is necessary to allege that the prosecution is at an end, and the allegation must be proved as laid); Shackleford *v.* Smith, 1 Nott & M. 36.

Virginia.— Sprangler *v.* Booze, 103 Va. 276, 49 S. E. 42.

Wisconsin.— Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261.

Canada.— Wilcox *v.* Burnside, 5 U. C. Q. B. O. S. 525.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 98 *et seq.*

This rule is not changed by the fact that the petition alleges, as the cause of action, the malicious issuing of an attachment, if the action in which it is issued and the attachment proceedings rest upon the same grounds, and must be determined together. McCracken *v.* Covington City Nat. Bank, 4 Fed. 602.

57. *California.*— Dowdell *v.* Carpy, 129 Cal. 168, 61 Pac. 948; Carpenter *v.* Nutter, 127 Cal. 61, 59 Pac. 301; Holliday *v.* Holliday, (1898) 55 Pac. 703; Holliday *v.* Holliday, (1898) 53 Pac. 42.

Georgia.— Fulton Grocery Co. *v.* Maddox, 111 Ga. 260, 36 S. E. 647.

South Carolina.— Whaley *v.* Lawton, 57 S. C. 256, 35 S. E. 558.

South Dakota.—Schaefer *v.* Cremer, (1905) 104 N. W. 468.

Virginia.— Ward *v.* Reasor, 98 Va. 399, 36 S. E. 470.

Canada.— Magill *v.* Samuel, 19 U. C. C. P. 443; Davis *v.* Barnett, 26 U. C. Q. B. 109; Griffith *v.* Ward, 20 U. C. Q. B. 31; Bishop *v.* Martin, 14 U. C. Q. B. 416.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 98 *et seq.*

Bad on demurrer.— A complaint which fails to show that the action complained of had been terminated is bad on general demurrer. Smith *v.* Smith, 26 Hun (N. Y.) 573; Hull *v.* Sprague, 23 R. I. 188, 49 Atl. 697; King *v.* Johnston, 81 Wis. 578, 51 N. W. 1011; Barrell *v.* Simonton, 17 Fed. Cas. No. 1,041, 2 Cranch C. C. 657. The failure of the complaint to show that the writ of arrest had been vacated or set aside by the court in the action in which it was issued (Forster *v.* Orr, 17 Oreg. 447, 21 Pac. 440), or to otherwise show that it has been avoided by competent authority (Searll *v.* McCracken, 16 How. Pr. (N. Y.) 262), renders it bad on demurrer.

No appeal taken.— A complaint which does not allege that no appeal has been taken is bad. The complaint in an action brought on the vacation of an order of arrest alleged to have been obtained on false and malicious affidavits, from which no appeal is taken, which does not allege that no appeal has been taken from the order vacating the order of arrest, is demurrable. Ingram *v.* Root, 51 Hun (N. Y.) 238, 3 N. Y. Suppl. 858.

Good for false imprisonment.— A complaint which does not contain an allegation as to the termination of the prosecution may state a good cause of action for false imprisonment,

proceeding complained of as wrongful favorably[58] to defendant; or it must contain averments obviating the force and effect of the absence of termination, or of an adverse determination.[59]

although not for malicious prosecution. Davis *v.* Johnson, 101 Fed. 952, 42 C. C. A. 111.

58. *Alabama.*— Rea *v.* Lewis, Minor 382.

Illinois.— Spaids *v.* Barrett, 57 Ill. 289, 11 Am. Rep. 10; Feazle *v.* Simpson, 2 Ill. 30.

Kentucky.— Chelf *v.* Penn, 2 Metc. 463; Spring *v.* Besore, 12 B. Mon. 551.

Maryland.—Clements *v.* McCracken, (1890) 20 Atl. 184.

Minnesota.— See Pixley *v.* Reed, 26 Minn. 80, 1 N. W. 800.

Missouri.— Kelley *v.* Osborn, 86 Mo. App. 239; Freymark *v.* McKinney Bread Co., 55 Mo. App. 435.

Ohio.— Zigler *v.* Russell, 2 Ohio Dec. (Reprint) 518, 3 West. L. Month. 424.

Rhode Island.—Collins *v.* Campbell, 18 R. I. 738, 31 Atl. 832.

South Carolina.— Tisdale *v.* Kingman, 34 S. C. 326, 13 S. E. 547.

Virginia.— Young *v.* Gregory, 3 Call 446, 2 Am. Dec. 556.

Wisconsin.— Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261.

United States.— McCracken *v.* Covington City Nat. Bank, 4 Fed. 602.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 99.

The declaration or complaint must show that the civil action (Wood *v.* Laycock, 3 Metc. (Ky.) 192; Murson *v.* Austin, 2 Phila. (Pa.) 116), or criminal prosecution claimed to have been malicious, has been legally terminated by judgment in his favor (Wood *v.* Laycock, *supra*; Murson *v.* Austin, *supra*), or that he was acquitted (Monroe *v.* Maples, 1 Root (Conn.) 553; Steel *v.* Williams, 18 Ind. 161; Mooney *v.* Kennett, 19 Mo. 551, 61 Am. Dec. 576; Scholl *v.* Schnebel, 8 N. Y. Suppl. 855), or discharged (Gorrell *v.* Snow, 31 Ind. 215; Hains *v.* Elwell, 3 N. J. L. 411), by order or judgment of the court (Teague *v.* Wilks, 3 McCord (S. C.) 461). And the averment of "discharged" is not always sufficient. Carpenter *v.* Nutter, 127 Cal. 61, 59 Pac. 301; Kirkpatrick *v.* Kirkpatrick, 39 Pa. St. 288; Tyler *v.* Smith, 25 R. I. 486, 56 Atl. 683.

Illustrations.— An averment in a declaration for malicious prosecution of an examination of plaintiff before a justice of the peace, touching the alleged offense, and a discharge by him therefrom (Long *v.* Rogers, 17 Ala. 540); that the grand jury had made a return of "no bill" on a bill of indictment, and "expressed in their finding that the prosecution was malicious" (Horn *v.* Sims, 92 Ga. 421, 17 S. E. 670); that "on the motion and request of the defendant made in person, said affidavit, prosecution and charges were dismissed, and plaintiff was not required to go to trial thereon" (Clegg *v.* Waterbury, 88 Ind. 21); or that plaintiff had been acquitted by the grand jury's finding "No bill" (Teague *v.* Wilks, 3 McCord (S. C.) 461), shows a sufficient termination of the prosecution. Where the wife of a plaintiff in an action for malicious prosecution was arrested and bound over on the charge of conspiring to poison the prosecutor, and, a true bill being found, was tried and convicted, but the judgment was arrested and she discharged, the averment of "discharged" was held not to be a sufficient averment and proof of the termination of the prosecution to sustain an action for malicious prosecution, as it did not countervail the effect of the record of the conviction. Nothing short of an acquittal will answer where the prosecution has progressed to a trial by a petit jury. Kirkpatrick *v.* Kirkpatrick, 39 Pa. St. 288. A complaint which alleges that judgment was rendered and entered in favor of defendant in the action in which the attachment issued is sufficient without further alleging that the judgment remains in full force. If the judgment is no longer in force, this fact should be alleged by defendant in his answer. Carter *v.* Paige, 80 Cal. 390, 22 Pac. 188. A declaration alleging that one R engaged defendant to pay a note made by said R to plaintiff, and bring him (R) said note; that defendant paid said note, but did not deliver it to said R, but maliciously, in the name of one P, and without his knowledge, procured a writ of attachment against plaintiff upon said note, etc., is not sufficient in that it does not allege what judgment was rendered in the attachment action. Parker *v.* Willard, Quincy (Mass.) 326.

59. Risser *v.* Liberman, 102 N. Y. App. Div. 482, 92 N. Y. Suppl. 942, holding that in the absence of allegations showing either the termination of the replevin suit, or any fact showing that plaintiff was deprived of her right to assert her defense in that suit, the complaint is demurrable.

An exception exists to the general rule requiring an averment of the termination of the original proceeding favorable to defendant under certain circumstances, as where the termination of the former suit can neither tend to establish nor invalidate plaintiff's cause of action, it is not necessary to aver such determination. Turner *v.* Walker, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329; Boogher *v.* Hough, 99 Mo. 183, 12 S. W. 524 (averment that conviction was obtained by fraud and undue means); Fortman *v.* Rottier, 8 Ohio St. 548, 70 Am. Dec. 606 (holding that where the facts are such that the trial or judgment in the main action does not involve the question of the existence of probable cause, it is not necessary to allege the termination of the former suit); Hogg *v.* Pinckney, 16 S. C. 387. In Grainger *v.* Hill, 4 Bing. N. Cas. 212, 7 L. J. C. P. 85,

7. Damages.[60] The complaint or declaration must contain a sufficient allegation of damage, conforming to legal standards.[61] Actual or compensatory damages may be shown under the general *ad damnum*,[62] but special[63] damages, and, it has been held, exemplary, must be particularly stated.[64]

5 Scott 561, 33 E. C. L. 675, where plaintiff complained of an abuse of the process of law for the purpose of extorting property, to which defendants had no claim; that the abuse having been perpetrated, and defendants having attained their end by it, it was held to be immaterial whether their suit was terminated or not. In Sneeden *v.* Harris, 109 N. C. 349, 13 S. E. 920, 14 L. R. A. 389, in an action for malicious prosecution, the complaint alleged that plaintiff was arrested and imprisoned in an action for slander of title wrongfully instituted for the sole purpose of getting immediate possession of land claimed and occupied by him, it was held that it was not necessary to allege that such action had been finally determined. So in Forrest *v.* Collier, 20 Ala. 175, 56 Am. Dec. 190, where an attachment was sued out by defendant as agent for a third person, and the declaration in the action for the malicious suing out of such attachment alleged that he was not the agent of such third persons but acted wholly without authority from them, it was held unnecessary to aver that the attachment suit was ended, as the false and fraudulent representation of agency resulted in the consequent damage and was the gist of the action. So the general rule does not apply to a case arising in obtaining a peace warrant (Hyde *v.* Greuch, 62 Md. 577); nor to an arrest under a judge's order (Eakins *v.* Christopher, 18 U. C. C. P. 532).

If defendant has had no opportunity to defend, it has been held that this fact should be alleged. Freymark *v.* McKinney Bread Co., 55 Mo. App. 435; Bump *v.* Betts, 19 Wend. (N. Y.) 421. See also Pixley *v.* Reed, 26 Minn. 80, 1 N. W. 800.

60. Damage as an element of liability see *supra*, IX, A.

61. See cases cited *infra*, this note.

In an action for malicious attachment plaintiff must allege that he was injured by the attachment (Springer *v.* Wise, 2 Disn. (Ohio) 391), and that the attachment was actually levied on the property of the attachment defendant (Maskell *v.* Barker, 99 Cal. 642, 34 Pac. 340).

Averment of special damages.— Where the complaint in an action for malicious prosecution of a civil suit fails to aver that plaintiff suffered any special loss, annoyance, or inconvenience, it is demurrable. Smith *v.* Hintrager, 67 Iowa 109, 24 N. W. 744. But a specific allegation as to damages, specifying the amount thereof, is not essential to plaintiff's cause of action to recover such damages as are necessarily inferable from the facts alleged. Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261.

Allegations of damage held sufficient see Ramsey *v.* Flowers, 72 Ark. 316, 80 S. W. 147 (holding that a complaint is not objectionable because alleging what would have been the consequence to plaintiff had the prosecution been successful); Sterling *v.* Adams, 3 Day (Conn.) 411; Jones *v.* Fruin, 26 Nebr. 76, 42 N. W. 283.

Matters which merely tend to aggravate the damages which necessarily result from the acts set out in the complaint need not be alleged. Jackson *v.* Bell, 5 S. D. 257, 58 N. W. 671.

62. French *v.* Guyot, 30 Colo. 222, 70 Pac. 683.

As mental pain and suffering is an element of actual or compensatory damages, evidence of the condition of plaintiff's family at the time of his arrest is admissible to show the character and extent of the mental anguish caused plaintiff by his arrest and prosecution, although it is not specially pleaded. Davis *v.* Seeley, 91 Iowa 583, 60 N. W. 183, 51 Am. St. Rep. 356.

63. Horne *v.* Sullivan, 83 Ill. 30 (loss of boarders); Fine *v.* Navarre, 104 Mich. 93, 62 N. W. 142 (impairment of credit).

Damages for an abuse of the process of the law by cruel and oppressive conduct are not recoverable unless a count charging such abuse is inserted in the declaration. Baldwin *v.* Weed, 17 Wend. (N. Y.) 224.

Expenses for costs and counsel fees in defending himself must be specifically alleged and proved by plaintiff as matters of special damage. Thompson *v.* Lumley, 7 Daly (N. Y.) 74.

Inability to perform contract.— Under a general allegation of damage evidence of damages resulting from plaintiff's inability, on account of sickness occasioned by such prosecution, to perform a certain contract of employment, is inadmissible. Oldfather *v.* Zent, 14 Ind. App. 89, 41 N. E. 555.

Allegations held sufficient see Ten Cate *v.* Fansler, 10 Okla. 7, 65 Pac. 375; Morrow *v.* Cheyne, 12 Ont. Pr. 487.

Allegations held insufficient see Evins *v.* Metropolitan St. R. Co., 55 N. Y. App. Div. 626, 67 N. Y. Suppl. 1132; Mitchell *v.* McMurrich, 22 Ont. 712.

64. Ten Cate *v.* Fansler, 10 Okla. 7, 65 Pac. 375; Moehring *v.* Hall, 66 Tex. 240, 1 S. W. 258. But see Davis *v.* Seeley, 91 Iowa 583, 60 N. W. 183, 51 Am. St. Rep. 356 (where it was held that exemplary damages may be recovered without being specially pleaded, as such damages arise from the existence of malice); Martin *v.* Corscadden, (Mont. 1906) 86 Pac. 33 (holding that under Mont. Civ. Code, § 4290, providing that in any action for breach of an obligation not arising from contract where defendant has been guilty of oppression, fraud, or malice, actual or presumed, punitive damages may be awarded, plaintiff in an action for malicious prosecu-

B. Answer or Plea — 1. In General. The plea must answer all it proposes to answer, otherwise it will be bad on demurrer, whether it be a plea in abatement,[65] or in bar.[66]

2. Defensive Matter — a. Specific. The action of malicious prosecution is peculiar in not being susceptible of specific defenses; the burden resting on plaintiff to show the concurrence of the many elements rendering the defense by justification ordinarily a negative one.[67] Usually every matter of fact which goes to defeat plaintiff's cause of action[68] may be shown without any special pleading.[69]

b. Conventional — (i) *In General.* A counter-claim,[70] want of capacity to sue,[71] or of liability to be sued,[72] estoppel of plaintiff by his own previous consent,[73] or by settlement or compromise,[74] or other conventional defenses may avail defendant[75] under elementary rules of pleading.[76]

tion may recover such damages, although they are not claimed *eo nomine* in the complaint).

Where loss of financial credit resulting from a wrongful arrest is considered exemplary damages, plaintiff in an action for malicious prosecution may properly introduce evidence as to such loss under a general count for exemplary damages. Curlee *v.* Rose, 27 Tex. Civ. App. 259, 65 S. W. 197.

65. Foster *v.* Napier, 73 Ala. 595.

66. Horton *v.* Smelser, 5 Blackf. (Ind.) 428.

67. See *infra*, XIV, A.

Error in name of plaintiff as a defense see Cochran *v.* Bones, 1 Cal. App. 729, 82 Pac. 970.

Plea of appeal pending sustained see Griffith *v.* Ward, 20 U. C. Q. B. 31.

Order setting aside arrest or discharging defendant on condition that no action be brought see Erickson *v.* Brand, 14 Ont. App. 614; Coffey *v.* Scane, 25 Ont. 22 [*affirmed* in 22 Ont. App. 269]; Hall *v.* Brown, 3 Ont. Pr. 293; Duross *v.* Duross, 19 U. C. Q. B. 77; Graham *v.* Thompson, 16 U. C. Q. B. 259.

Subsequent proceedings impairing effect of a judgment as a foundation for an action for malicious prosecution, if not disclosed by the complaint, can only be taken advantage of by defendant as defensive matter. Luby *v.* Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261.

68. Degenhart *v.* Schmidt, 7 Mo. App. 117.

69. Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 758, (1884) 19 N. W. 310 (holding that where on the trial of an action for the malicious prosecution of plaintiff for larceny, in which the material issue was whether plaintiff was guilty of the theft, defendant offered in evidence the record of an action in which the alleged owner of the property had established his title thereto by a recovery against the now plaintiff, and then offered evidence that the only question in that action was whether plaintiff therein was in fact the owner of the property; such evidence was properly admitted without the judgment in such action having been pleaded); Sutor *v.* Wood, 76 Tex. 403, 13 S. W. 321. *Compare* Fant *v.* McDaniel, 1 Brev. (S. C.) 173, 2 Am. Dec. 660 (where it was held that in order to entitle a defendant to show that he had probable cause for prosecuting plaintiff, he must state such cause in his plea, and disclose the grounds on which he means to rely in his defense); Spear *v.* Hiles, 67 Wis. 350, 30 N. W. 506 (where, in an action for malicious prosecution for arson, evidence that there was a general suspicion or rumor in the neighborhood that plaintiff and his wife had set the fire was not allowed in evidence, because not specially pleaded).

70. Farmer *v.* Norton, 129 Iowa 88, 105 N. W. 371; Savage *v.* Davis, 131 N. C. 159, 42 S. E. 571.

Counter-claim generally see Recoupment, Set-Off, and Counter-Claim.

71. See *supra*, X, A.

72. Thornton *v.* Marshall, 92 Ga. 548, 17 S. E. 926; Sidener *v.* Russell, 34 Ill. App. 446; Vennum *v.* Huston, 38 Nebr. 293, 56 N. W. 970. See also *supra*, XI, A.

But the real instigator cannot relieve himself from liability by showing that he was not the prosecutor of record. Baker *v.* Moore, 29 Pa. Super. Ct. 301.

73. Hibbard *v.* Ryan, 46 Ill. App. 313; McIntosh *v.* Demeray, 5 U. C. Q. B. 343. See also Morse *v.* Teetzel, 1 Ont. Pr. 369; Wilson *v.* Brecker, 11 U. C. C. P. 268. But see Tamblyn *v.* Johnston, 126 Fed. 267, 62 C. C. A. 601. See also *supra*, VIII, B, 3, text and note 31.

74. See *supra*, VIII, B, 3.

75. David *v.* Aaronson, 105 La. 347, 29 So. 895 (provocation); Black *v.* Buckingham, 174 Mass. 102, 54 N. E. 494 (plaintiff's own neglect); George *v.* Johnson, 25 N. Y. App. Div. 125, 49 N. Y. Suppl. 203 (truth of charge).

Former action pending pleadable as a defense see Beyersdorf *v.* Sump, 39 Minn. 495, 41 N. W. 101, 12 Am. St. Rep. 678.

However recovery of damages in a replevin (McPherson *v.* Runyon, 41 Minn. 524, 43 N. W. 392, 16 Am. St. Rep. 727); a technical defect in the complaint, such question not having been raised in the prosecution (Kerstetter *v.* Thomas, 36 Wash. 620, 79 Pac. 290); or the fact that the creditor had a legal right to the issuance of an execution on his judgment and that costs had been taxed against him on such execution (Cooper *v.* Scyoc, 104 Mo. App. 414, 79 S. W. 751) is no defense to the action. And see Griffith *v.* Hall, 26 U. C. Q. B. 94.

76. See, generally, Pleading.

(II) *STATUTE OF LIMITATIONS.*[77] The action must be brought within the time specified by the statute in force in the jurisdiction in which the action is brought;[78] otherwise it is barred[79] and this whether it is based on a civil or criminal proceeding.[80] As a general rule the statute begins to run against the right to maintain such an action from the time when the original proceeding complained of as malicious was terminated.[81]

3. GENERAL ISSUE.[82] The plea of the general issue or general denial puts in issue all essential elements of the wrongful act charged in the complaint,[83] which plaintiff must affirmatively show in the first instance as necessary parts of a *prima facie* case.[84] In many jurisdictions it is not only a proper, but the only proper,[85] plea to that end.[86]

4. SPECIAL PLEADING — a. Justification. Under statutes permitting contradictory defenses, defendant may plead both the general issue and justification.[87] It has been frequently held that the admitted sufficiency of the general denial

Striking out paragraphs of defense as embarrassing see Rogers *v.* Clark, 13 Manitoba 189.

77. Statute of limitation generally see LIMITATIONS OF ACTIONS, 25 Cyc. 963.

78. Boyd *v.* Snyder, 207 Pa. St. 330, 56 Atl. 924; Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459; Montreal *v.* Hall, 12 Can. Sup. Ct. 74.

79. Taylor *v.* Bidwell, 65 Cal. 489, 4 Pac. 491.

80. Burnap *v.* Marsh, 13 Ill. 535.

81. *California.*— Berson *v.* Ewing, 84 Cal. 89, 23 Pac. 1112 [*distinguishing* McCusker *v.* Walker, 77 Cal. 208, 19 Pac. 382]. But see McCusker *v.* Walker, *supra* (where it was held that the statute of limitation runs on a cause of action for maliciously suing out an attachment from the time of the wrongful act); Sharp *v.* Miller, 57 Cal. 431 (time of levy); Anderson *v.* Coleman, 56 Cal. 124.

Georgia.— Printup *v.* Smith, 74 Ga. 157.

Tennessee.— Morgan *v.* Duffy, 94 Tenn. 686, 30 S. W. 735.

Texas.— Von Koehring *v.* Witte, 15 Tex. Civ. App. 646, 40 S. W. 63.

Canada.— Montreal *v.* Hall, 12 Can. Sup. Ct. 74.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 89.

But see Ma-Ka-Ta-Wah-Qua-Twa *v.* Rebok, (1901) 111 Fed. 12, time of arrest.

82. Evidence admissible under general issue see *infra*, XIV, B.

83. An answer denying the allegations of the complaint is sufficient (Radde *v.* Ruckgaber, 3 Duer (N. Y.) 684; Rost *v.* Harris, 12 Abb. Pr. (N. Y.) 446); to enable defendant to put in evidence facts showing presence of probable cause and want of malice (Trogden *v.* Deckard, 45 Ind. 572; Crane *v.* Buchman, 30 Cinc. L. Bul. 120); as that he acted upon the advice of counsel learned in the law, and upon a full presentation of the facts (Smith *v.* Davis, 3 Mont. 109; Crane *v.* Buchman, *supra*). See also *infra*, XIV, B.

No other evidence is admissible, however, under a plea of the general issue, or not guilty, except such as disproves plaintiff's cause of action. Andrews *v.* Mitchell, 92 Ga. 629, 18 S. E. 1017.

A plea that defendant was not indebted, and did not undertake and promise, in manner and form as charged by plaintiff, is bad. Ventress *v.* Rosser, 73 Ga. 534.

A plea to an action for wrongfully and vexatiously suing out an attachment, which alleges that the attachment "was not sued out wrongfully, maliciously, or vexatiously, or without reasonable or probable cause," presents a substantial defense to the action and is not demurrable. Marshall *v.* Betner, 17 Ala. 832.

Striking out redundant matter.— The detail of actual facts which are relied on to constitute probable cause are but matters of evidence upon issue raised by a general denial, and not new matter, nor the denial of allegations of the complaint controverted, and may be stricken as redundant matter. Rost *v.* Harris, 12 Abb. Pr. (N. Y.) 446.

84. Brigham *v.* Aldrich, 105 Mass. 212.

85. See cases cited *infra*, this note. But see *infra*, XIII, B, 4, text and note 89.

Effect of joining other plea.— If the facts relied on to constitute probable cause be specially pleaded, and also the general issue, the special plea may be struck out on motion (Brown *v.* Collelly, 5 Blackf. (Ind.) 390; Simpson *v.* McArthur, 16 Abb. Pr. (N. Y.) 302 note); and the action of the court in striking out a paragraph setting up such facts, when a general denial is in, cannot be assigned as an available error (Trogden *v.* Deckard, 45 Ind. 572).

Where a special plea of probable cause is insufficiently pleaded, it may be stricken out (Smith *v.* Davis, 3 Mont. 109) or demurred to (Wilson *v.* Ferrari, 1 Disn. (Ohio) 579, 12 Ohio Dec. (Reprint) 807), for if the facts stated would not constitute probable cause they would be irrelevant.

Pleading facts in mitigation.— In a state where defendant may prove at the trial facts not amounting to a total defense but which may tend to mitigate plaintiff's damage if properly set forth in the answer, if the alleged facts could in any form of relation be material to be proved upon the trial, the court should not strike them out. Bradner *v.* Faulkner, 93 N. Y. 515.

86. Auburn Bank *v.* Weed, 19 Johns. (N. Y.) 300.

87. Rigden *v.* Jordan, 81 Ga. 668, 7 S. E. 857.

does not exclude the use of a special plea;[88] and in some instances a special plea has been held to be required.[89] Such special plea must set forth facts which are in law sufficient to justify[90] the whole charge.[91]

b. Mitigation. Matter not amounting to a total defense but tending to reduce the extent of plaintiff's recovery has been held proper to be asserted by way of a special plea in the answer.[92]

C. Reply. A reply is necessary only where new matter is pleaded in the

A plea of justification admits that the act complained of was done, but sets up that defendant was authorized by law to do the same. Andrews *v.* Mitchell, 92 Ga. 629, 18 S. E. 1017. A plea that admits the eviction and also sets out the facts which led to the suing out and execution of a warrant, and claims that defendant was authorized by law, under these facts, to have a warrant issued and executed, and that he did so in good faith, and without malice, and with probable cause, is a sufficient plea in justification. Andrews *v.* Mitchell, *supra.* An answer admitting that defendant procured the warrant and caused the arrest upon the charge mentioned, but denies that it was done maliciously, and without probable cause, and also that plaintiff was tried and acquitted, makes an issue of fact that involves a trial upon the merits of the case. Redman *v.* Stowers, 12 S. W. 270, 11 Ky. L. Rep. 429. But a plea that defendant, without any malice, consented to become prosecutor as a matter of friendship to another, and on the assurance of the solicitor-general that so doing was only a matter of form, is not a plea of justification. Horn *v.* Sims, 92 Ga. 421, 17 S. E. 670.

88. Crane *v.* Buchman, 30 Cinc. L. Bul. 120.

89. Andrews *v.* Mitchell, 92 Ga. 629, 18 S. E. 1017; Eihlert *v.* Gommoll, 23 Ohio Cir. Ct. 586, holding that the matter of advice of counsel, to be available, should be pleaded as an affirmative defense; but where no objection is made to the introduction of evidence on that ground, all being heard and considered and submitted to the jury, and the jury charged as to the law relating thereto, the absence of such defense in the pleading is immaterial.

90. *Alabama.*— Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

Delaware.—Herbener *v.* Crossan, 4 Pennew. 38, 55 Atl. 223.

Kentucky.— Legrand *v.* Page, 7 T. B. Mon. 401.

Missouri.— Babcock *v.* Merchants' Exch., 159 Mo. 381, 60 S. W. 732.

New Jersey.— Magowan *v.* Rickey, 64 N. J. L. 402, 45 Atl. 804; Spencer *v.* Anness, 32 N. J. L. 100.

New York.— Dunton *v.* Hagerman, 18 N. Y. App. Div. 146, 46 N. Y. Suppl. 758.

Ohio.— Wilson *v.* Ferrari, 1 Disn. 579, 12 Ohio Dec. (Reprint) 807, it being proper to state the facts so that the court may determine whether they would constitute probable cause or not.

Canada.— Jones *v.* Dunn, 1 U. C. C. P. 204. And see Griffith *v.* Hall, 26 U. C. Q. B. 94; Sanderson *v.* Downs, 11 U. C. Q. B. 99.

Sufficiency of plea.— A plea to an action for malicious prosecution stating in general terms that defendant had probable cause for the prosecution, without stating the facts, is insufficient. Brown *v.* Connelly, 5 Blackf. (Ind.) 390. But the plea need not state in so many words that defendant was justified in so doing. If from the matter set up justification must be plainly implied or inferred it is sufficient. Andrews *v.* Mitchell, 92 Ga. 629, 18 S. E. 1017. And see Rigden *v.* Jordan, 81 Ga. 668, 7 S. E. 857. In an action for malicious prosecution on a charge of arson, defendant pleaded that before the commencement of the prosecution his barn was burned; that plaintiff stated a short time before that that defendant would soon be as poor as plaintiff; that before the fire was extinguished, and while some people were looking at it, plaintiff passed by without stopping or appearing to notice the ruins; and that defendant stated the circumstances to an attorney, who was of the opinion that they amounted to arson, and advised defendant to commence the prosecution. It was held the facts stated do not show probable cause. Horton *v.* Smelser, 5 Blackf. (Ind.) 428.

91. Long *v.* Lee, 4 U. C. Q. B. 377.

92. See cases cited *infra,* this note; and the practice statutes of the several states.

In Iowa under Code, § 3593, in actions for damages to person, character, or property, no mitigating circumstances shall be proved unless specially pleaded. Flam *v.* Lee, 116 Iowa 289, 90 N. W. 70, 98 Am. St. Rep. 242.

In New York under Code Civ. Proc. § 536, it is provided that "the defendant may prove at the trial, facts, not amounting to a total defense, tending to mitigate or otherwise reduce the plaintiff's damages, if they are set forth in the answer." Bradner *v.* Faulkner, 93 N. Y. 515. Under this statute it is competent for defendant to plead specially, and give in evidence any facts which tend to rebut the existence of malicious motives on his part in causing the prosecution in question. Bradner *v.* Faulkner, *supra.*

In Texas in an action for damages, actual and exemplary, for wrongfully and maliciously attaching plaintiff's goods, defendants can plead, in mitigation of exemplary damages, that they had, since suit was brought, offered to redeliver the goods. Billingsley *v.* Hewett, (Civ. App. 1897) 39 S. W. 953.

In Canada see Pursley *v.* Bennett, 11 Ont. Pr. 64; Macdonald *v.* Henwood, 32 U. C. C. P. 433.

answer,[93] but when facts constituting probable cause have been pleaded as an affirmative justification in the answer, a reply has been held to be necessary.[94] If the allegation of an answer, however, really results in a particular denial of a charge which is already covered by a general denial, it is not new matter and needs no reply.[95]

D. Amendment and Supplemental Pleading. In accordance with the general trend of the law on this subject amendments to the pleadings in actions for malicious prosecutions are liberally allowed,[96] including cases in which the purpose is to conform the pleadings to the proof, upon such terms as may appear proper and just to the court.[97] But when the amendment is insufficient[98] or too indefinite[99] it should not be allowed. Nor has a party a right by a supplemental complaint to establish a cause of action where none existed at the time of the commencement of the suit.[1]

E. Bill of Particulars. Plaintiff cannot as a rule be required to furnish a bill of particulars in an action for malicious prosecution.[2]

F. Exhibits. The action for malicious prosecution is not founded upon the papers in the original proceedings; they need not be attached to the complaint as exhibits.[3]

G. Variance. Following the general rule as to variance, an essential or substantial[4] but not an immaterial[5] difference between the allegations of the declaration and the proof is fatal to plaintiff's case.

93. Babcock *v.* Merchants' Exch., 159 Mo. 381, 60 S. W. 732.

94. Tandy *v.* Riley, 80 S. W. 776, 26 Ky. L. Rep. 98, 82 S. W. 1000, 26 Ky. L. Rep. 993.

95. Dreux *v.* Domec, 18 Cal. 83; Olson *v.* Tvete, 46 Minn. 225, 48 N. W. 914, where an allegation in an answer that a statement of the facts was made to the county attorney, and that the procuring of the search warrant was advised by him, was held not to be new matter which required a reply.

96. Mocerf *v.* Stirman, 29 S. W. 324, 16 Ky. L. Rep. 587 (holding that where the petition states a cause of action on the attachment bond, and the circumstances show that plaintiff intended to sue for damages for malicious attachment, the petition may be amended so as to state a cause of action for malicious attachment); Krish *v.* Davis, 16 Ky. L. Rep. 32 (where the petition was amended to state that the attachment was sued out without probable cause); Beyersdorf *v.* Sump, 39 Minn. 495, 41 N. W. 101, 12 Am. St. Rep. 678; Levy *v.* Fargo, 1 Nev. 415; Hershey *v.* O'Neill, 36 Fed. 168. But see L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 121 Fed. 233, 57 C. C. A. 469.

If a declaration which is formally defective, that is, if the defect is such as, after verdict, would be cured by the statute of jeofails, the court should either disregard it, or should direct amendment to be made forthwith. Sutton *v.* Van Akin, 51 Mich. 463, 16 N. W. 814; Winn *v.* Peckham, 42 Wis. 493.

97. Spice *v.* Steinruck, 14 Ohio St. 213.

98. Hyfield *v.* Bass Furnace Co., 89 Ga. 827, 15 S. E. 752.

99. McDaniel *v.* Nelms, 96 Ga. 366, 23 S. E. 407.

1. Continental Constr., etc., Co. *v.* Vinal, 1 N. Y. Suppl. 200, 14 N. Y. Civ. Proc. 293.

2. Lane *v.* Williams, 37 Hun (N. Y.) 388; Roach *v.* Shediac, 38 Can. L. J. N. S. 767; Clark *v.* Nordholt, 121 Cal. 26, 53 Pac. 400.

Compare Dietz *v.* Leber, 33 N. Y. App. Div. 563, 53 N. Y. Suppl. 977, where it was held that defendant in an action for malicious prosecution is entitled to a bill of particulars as to the newspapers in which plaintiff alleges the fact of his prosecution was published through defendant's procurement, and the names of the persons claimed to have refused to do business with him because of such prosecution.

3. Ammerman *v.* Crosby, 26 Ind. 451.

Filing a copy of the original proceeding does not make such copy a part of the complaint. Fisher *v.* Hamilton, 49 Ind. 341.

4. *Alabama.*— Thompson *v.* Richardson, 96 Ala. 488, 11 So. 728; Bennett *v.* Black, 1 Stew. 494.

Delaware.— Craig *v.* Ginn, (1899) 45 Atl. 842 [*affirmed* in 3 Pennew. 117, 48 Atl. 192, 94 Am. St. Rep. 77, 53 L. R. A. 715].

Kentucky.— Cole *v.* Hanks, 3 T. B. Mon. 208.

Maryland.— Lewin *v.* Uzuber, 65 Md. 341, 4 Atl. 285; McNamee *v.* Minke, 49 Md. 122.

Massachusetts.— Stone *v.* Swift, 4 Pick. 389, 16 Am. Dec. 349.

Minnesota.— Chapman *v.* Dodd, 10 Minn. 350.

Missouri.— Engelke *v.* Chouteau, 98 Mo. 629, 12 S. W. 358.

Pennsylvania.— Lane *v.* Sayre Land Co., 211 Pa. St. 290, 60 Atl. 792.

South Carolina.— Law *v.* Franks, Cheves 9; Hester *v.* Hagood, 3 Hill 195; Thomas *v.* De Graffenreid, 2 Nott & M. 143.

Canada.— Colbert *v.* Hicks, 5 Ont. App. 571; Munroe *v.* Abbott, 39 U. C. Q. B. 78; Prentice *v.* Hamilton, 2 U. C. Q. B. O. S. 114; Carr *v.* Proudfoot, (East. T. 3 Vict.) 3 R. & J. Dig. 2199.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 107.

5. *Connecticut.*— Riley *v.* Gourley, 9 Conn. 154.

H. Aider by Verdict. If the issue joined be such as necessarily requires on trial proof of facts defectively pleaded, whether in substance or form, without which it is not to be presumed either that the judge would have directed the jury to give or that the jury would have given the verdict, such imperfection is cured by the verdict.[6] The general but not universal[7] rule is that the verdict will make good only imperfectly or insufficiently pleaded statements of facts,[8] and that if the pleading totally omits to state any essential or constituent element of the action a verdict will not cure the defect.[9]

XIV. EVIDENCE.[10]

A. Burden of Proof and Presumptions — 1. In General. The burden of proof in the first instance according to the general rule[11] rests upon plaintiff when

Kentucky.—Yocum *v.* Polly, 1 B. Mon. 358, 36 Am. Dec. 583.

Massachusetts.— Sayles *v.* Briggs, 4 Metc. 421.

Minnesota.— Cole *v.* Curtis, 16 Minn. 182.

New York.— Mills *v.* McCoy, 4 Cow. 406.

South Carolina.— Vandyke *v.* Dare, Bailey 65.

Tennessee.—Armstrong *v.* Grogan, 5 Sneed 108.

Virginia.— Mowry *v.* Miller, 3 Leigh 561, 24 Am. Dec. 680.

Canada.— Carr *v.* Proudfoot, (East. T. 3 Vict.) 3 R. & J. Dig. 2199, variance as to court trying indictment immaterial.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 107.

If the proof substantially shows what is alleged in the declaration, it is sufficient. Peterson *v.* Toner, 80 Mich. 350, 45 N. W. 346.

6. *Indiana.*— Clegg *v.* Waterbury, 88 Ind. 21.

Nevada.— Levey *v.* Fargo, 1 Nev. 415.

Pennsylvania.— Weinberger *v.* Shelly, 6 Watts & S. 336.

Wisconsin.— Robson *v.* Comstock, 8 Wis. 372.

Canada.—Fahey *v.* Kennedy, 28 U. C. Q. B. 301; Duross *v.* Duross, 19 U. C. Q. B. 77. *Compare* Manning *v.* Rossin, 3 U. C. C. P. 89, not cured by verdict.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 111.

This is especially true where the objection is not made until at the trial (Beyersdorf *v.* Sump, 39 Minn. 495, 41 N. W. 101, 12 Am. St. Rep. 678; Hershey *v.* O'Neill, 36 Fed. 168), or after verdict (Robson *v.* Comstock, 8 Wis. 372).

7. See cases cited *infra*, this note.

Want of an averment that the prosecution is at an end would be a fatal defect to the declaration on a demurrer (Forster *v.* Orr, 17 Oreg. 447, 21 Pac. 440), but cannot be taken advantage of after verdict (Weinberger *v.* Shelly, 6 Watts & S. (Pa.) 336).

An averment that defendant abandoned the charge, and that the prosecution is wholly ended, is good after verdict. Cotton *v.* Wilson, Minor (Ala.) 203.

An omission to aver the termination of the suit is cured by verdict. Rea *v.* Lewis, Minor (Ala.) 382; Wall *v.* Toomey, 52 Conn. 35; Spaids *v.* Barrett, 57 Ill. 289, 11 Am. Rep. 10; Olson *v.* Neal, 63 Iowa 214, 18 N. W. 863; Young *v.* Gregory, 3 Call (Va.) 446, 2 Am. Dec. 556. But in Missouri it is held that the failure to aver the termination of the former suit is an essential constituent element of the cause of action, and is not cured by verdict. Freymark *v.* McKinney Bread Co., 55 Mo. App. 435.

8. Grove *v.* Kansas City, 75 Mo. 672.

9. See cases cited *infra*, this note.

Failure to allege malice is held to be a fatal defect, which is not cured by verdict. Dauchy *v.* Salisbury, 29 Conn. 124; Mitchell *v.* Silver Lake Lodge No. 84, I. O. O. F., 29 Oreg. 294, 304, 45 Pac. 798, where Moore, J., said: "The absence of an allegation of malice in the complaint was a failure to state a cause of action, and not a defective statement which was cured by the verdict." *Compare* Spengler *v.* Davy, 15 Gratt. (Va.) 381.

Failure to allege want of probable cause.— So in Gibson *v.* Waterhouse, 4 Me. 226, it was held that the want of an allegation of probable cause was an omission which was not cured by verdict, nor was it supplied by an allegation that the prosecution was unjust. In Ellis *v.* Thilman, 3 Call (Va.) 3, the allegation was that the prosecution was malicious and without just cause. In Young *v.* Gregory, 3 Call (Va.) 446, 2 Am. Dec. 556, it was alleged that the proceedings were had maliciously and without any legal or justifiable cause. And in Kirtley *v.* Deck, 2 Munf. (Va.) 10, 5 Am. Dec. 445, the allegation was that defendant falsely and maliciously conspired, etc., to prefer a false and malicious prosecution, etc.; but there was no averment that the prosecution was without probable cause. In each of the foregoing Virginia cases it was held that the declaration was radically defective and was not cured by verdict. *Compare* Spengler *v.* Davy, 15 Gratt. (Va.) 381.

10. Evidence generally see EVIDENCE.

11. See *supra*, XIII, B, 3.

An exception to this rule has been recognized, in cases arising out of attachment proceedings. Plaintiff may allege in one count the wrongful attachment and the existence of malice, and, if he fails in establishing

the general issue is tendered[12] to prove every essential[13] element of this specific tort in order that he may make out a *prima facie* case.[14] He is entitled to the usual presumptions of law and fact in this as in other actions,[15] but to no other.[16]

malice, he may recover such actual damages caused him by the attachment as are secured by the attachment bond, if it was wrongful. Fry *v.* Estes, 52 Mo. App. 1. And see Kirksey *v.* Jones, 7 Ala. 622; McLaughlin *v.* Davis, 14 Kan. 168; Reed *v.* Samuels, 22 Tex. 114, 73 Am. Dec. 253. These cases seem to rest on the theory that the statute recognizes a liability in the bond for an attachment which is wrongful, even though not malicious, hence the party aggrieved may either sue in debt on the undertaking, or in case for the wrong.

12. Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85, holding that where a general denial is pleaded, in an action for malicious prosecution, plaintiff must prove that he has been prosecuted by defendant, either criminally or in a civil suit, and that the prosecution is at an end; that it was instituted maliciously, and without probable cause; and that he has sustained damages thereby.

13. As setting forth a search warrant, detention, indictment, etc., are mere matters of inducement, they need not be proved. Mills *v.* McCoy, 4 Cow. (N. Y.) 406.

14. *Arkansas.*— St. Louis, etc., R. Co. *v.* Wallin, 71 Ark. 422, 75 S. W. 477.

Delaware.—Herbener *v.* Crossan, 4 Pennew. 38, 55 Atl. 223; Rhodes *v.* Silvers, 1 Harr. 127.

Illinois.— Cudahy *v.* Powell, 35 Ill. App. 29.

Indiana.— Carey *v.* Sheets, 67 Ind. 375.

Iowa.— Pierce *v.* Doolittle, 130 Iowa 333, 106 N. W. 751.

Kentucky.— Lucas *v.* Hunt, 91 Ky. 279, 15 S. W. 781, 12 Ky. L. Rep. 871 [*overruling* Brown *v.* Morris, 3 Bush 81]; Ullman *v.* Abrams, 9 Bush 738.

Louisiana.— Laville *v.* Biguenaud, 15 La. Ann. 605; Blass *v.* Gregor, 15 La. Ann. 421.

Missouri.— Smith *v.* Burrus, 106 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 13 L. R. A. 59.

Nebraska.— Jones *v.* Fruin, 26 Nebr. 76, 42 N. W. 283.

New York.— Bulkeley *v.* Smith, 2 Duer 261.

North Carolina.— Johnston *v.* Lance, 29 N. C. 448.

Pennsylvania.— Beach *v.* Wheeler, 30 Pa. St. 69.

Texas.— Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446.

West Virginia.—Vinal *v.* Core, 18 W. Va. 1.

United States.— Preston *v.* Cooper, 19 Fed. Cas. No. 11,395, 1 Dill. 589.

England.— Cox *v.* English, etc., Bank, [1905] A. C. 168, 74 L. J. P. C. 62, 92 L. T. Rep. N. S. 483.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 112 *et seq.*

"Plaintiff has to prove, first, that he was innocent [query whether this is the rule] and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the judge inconsistent with the existence of reasonable and probable cause; and lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice." Abrath *v.* North Eastern R. Co., 11 Q. B. D. 440, 455, 47 J. P. 692, 52 L. J. Q. B. 620, 49 L. T. Rep. N. S. 618, 32 Wkly. Rep. 50, per Bowen, L. J.

15. *California.*— Weaver *v.* Page, 6 Cal. 681, facts raising presumption that payee received notice of payment of bill of exchange.

Massachusetts.— Wills *v.* Noyes, 12 Pick. 324, presumption that every man knows the law; that plaintiff in replevin knew that replevin would not lie in a particular case.

Missouri.— Kennedy *v.* Holladay, 25 Mo. App. 503, presumption that plaintiff's reputation was good.

New York.— Bulkeley *v.* Smith, 2 Duer 261, where the existence of facts constituting a probable cause is admitted or established, presumption that defendant entertained and acted upon the belief which such facts justified him in holding.

Vermont.— Carleton *v.* Taylor, 50 Vt. 220, issuance of a warrant of arrest by a court of general jurisdiction ground for presumption that probable cause was shown therefor.

Wisconsin.— Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135, where there is evidence that defendant knew plaintiff for several years, presumption that he knew his reputation.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 112 *et seq.*

Mo. Rev. St. (1879) § 2100, provides that, when the grand jury ignores a bill against a person committed by a magistrate, the costs shall be paid by the state if the grand jury shall certify that there was probable cause for the prosecution. Where the record only shows that the bill was ignored, and judgment was entered against the state for costs, it must be presumed, in a collateral proceeding for malicious prosecution, that such certificate was made. Miller *v.* Chicago, etc., R. Co., 41 Fed. 898.

16. Wood *v.* Tinnell, 17 Am. L. Reg. N. S. 689 (removal from one jurisdiction to another for the avowed purpose of bringing an action in the latter jurisdiction does not raise any presumption of a want of probable cause); Davidoff *v.* Wheeler, etc., Mfg. Co., 16 Misc. (N. Y.) 31, 37 N. Y. Suppl. 661 [*affirming* 14 Misc. 456, 35 N. Y. Suppl. 1019] (the fact that defendant, in an action for malicious prosecution, consulted counsel,

If he fails to sustain the burden of proof, defendant ordinarily has no occasion to offer evidence in his own defense.[17]

2. Original Proceeding. It is incumbent upon plaintiff to prove that original judicial proceedings had been caused by defendant[18] and had finally terminated[19] in plaintiff's favor.[20]

3. Want of Probable Cause. As a general rule the burden of proof rests upon plaintiff to show want of probable cause for such original proceeding;[21] but in

and subsequently instituted the prosecution on which the action is based, does not raise a presumption that the prosecution was advised by counsel).

17. Ullman *v.* Abrams, 9 Bush (Ky.) 738; Wheeler *v.* Nesbitt, 24 How. (U. S.) 544, 16 L. ed. 765.

18. Wheeler *v.* Nesbitt, 24 How. (U. S.) 544, 16 L. ed. 765.

The connection of defendant with the prosecution is a fact which must be established. Klug *v.* McPhee, 16 Colo. App. 39, 63 Pac. 709. Whether plaintiff was the person against whom the prosecution was directed is matter of evidence, whatever may be the name in the complaint and warrant. Conroy *v.* Townsend, 69 Ill. App. 61.

19. Hamilburgh *v.* Shepard, 119 Mass. 30; Shackleford *v.* Smith, 1 Nott & M. (S. C.) 36; Glasgow *v.* Owen, 69 Tex. 167, 6 S. W. 527.

20. Rhodes *v.* Silvers, 1 Harr. (Del.) 127; Lytton *v.* Baird, 95 Ind. 349; Hewit *v.* Wooten, 52 N. C. 182; Wheeler *v.* Nesbitt, 24 How. (U. S.) 544, 16 L. ed. 765.

For a malicious prosecution in procuring an indictment against plaintiff, to sustain an action it must appear that the proceedings under the indictment are legally at an end. Whether or not this rule applies to an indictment found in a foreign country, under our federal constitution and the laws of congress relating to fugitives from justice escaping from one state into another, and those relating to the authentication of records and judicial proceedings, it is applicable to an indictment found in a different state from that in which the action is brought. Pratt *v.* Page, 18 Wis. 337.

Limits of rule.— The rule that plaintiff must prove at the trial that the alleged malicious prosecution has resulted in his favor does not apply to a case arising in obtaining a peace warrant. Hyde *v.* Greuch, 62 Md. 577. Nor is plaintiff bound to prove that he was acquitted by the jury promptly, without hesitation, delay, or deliberation. Bacon *v.* Towne, 4 Cush. (Mass.) 217; Scott *v.* Shelor, 28 Gratt. (Va.) 891.

21. *Arizona.* — Cunningham *v.* Moreno, (1905) 80 Pac. 327.

California.— Levy *v.* Brannan, 39 Cal. 485; Grant *v.* Moore, 29 Cal. 644.

Georgia.— Joiner *v.* Ocean Steamship Co., 86 Ga. 238, 12 S. E. 361.

Illinois.—Davie *v.* Wisher, 72 Ill. 262; Ames *v.* Snider, 69 Ill. 376; Ross *v.* Innis, 35 Ill. 487, 85 Am. Dec. 373; Young *v.* Lindstrom, 115 Ill. App. 239; McFarland *v.* Washburn, 14 Ill. App. 369.

Louisiana.— Monroe *v.* H. Weston Lumber Co., 50 La. Ann. 142, 23 So. 247; Digard *v.* Michaud, 9 Rob. 387.

Massachusetts.— Good *v.* French, 115 Mass. 201.

Michigan.— Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. N. S. 928.

New Jersey.— Magowan *v.* Rickey, 64 N. J. L. 402, 45 Atl. 804.

New York.— Kutner *v.* Fargo, 34 N. Y. App. Div. 317, 54 N. Y. Suppl. 332.

North Carolina.— Welch *v.* Cheek, 115 N. C. 310, 20 S. E. 460.

West Virginia.— Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

Wisconsin.— Cullen *v.* Hanisch, 114 Wis. 24, 89 N. W. 900.

Canada.— Malcolm *v.* Perth Mnt. F. Ins. Co., 29 Ont. 717 [*affirming* 29 Ont. 406].

See 33 Cent. Dig. tit. "Malicious Prosecution," § 113.

Prima facie showing — Slight proof.— It is incumbent on plaintiff to make some proof that there was no reasonable ground for the charge, and that it was without probable cause to sustain it (Anderson *v.* Callaway, 2 Houst. (Del.) 324); the burden does not devolve on defendant; the fact must be shown *prima facie* by plaintiff before he can recover (Davis *v.* Cook, 3 Greene (Iowa) 539). Want of probable cause, although negative in its form and character, must be proved by plaintiff, when put in issue, by some affirmative evidence. Lavender *v.* Hudgens, 32 Ark. 763; Ventress *v.* Rosser, 73 Ga. 534; Bousch *v.* Fidelity, etc., Co., 100 Va. 735, 42 S. E. 877. But slight proof may be sufficient in view of the difficulty of establishing it. Vinal *v.* Core, 18 W. Va. 1; Barbour *v.* Gettings, 26 U. C. Q. B. 544.

A preponderance of evidence that defendant did not have probable cause to institute the prosecution is necessary (Palmer *v.* Richardson, 70 Ill. 544; Epstein *v.* Berkowsky, 64 Ill. App. 498; Skala *v.* Rus, 60 Ill. App. 479; Legallee *v.* Blaisdell, 134 Mass. 473); especially where there is evidence both for and against the truth of a plea of justification, the jury should find against the plea unless it is sustained by a preponderance of the evidence (Mitchell *v.* Andrews, 94 Ga. 611, 20 S. E. 130). However, it is not incumbent upon plaintiff, in proof of want of probable cause, to give in evidence all the testimony introduced before the magistrate, in order that the court may determine whether there was or was not probable cause. Bacon *v.* Towne, 4 Cush. (Mass.) 217.

Burden of proof shifts to defendant to show probable cause, where plaintiff has made out

some jurisdictions that onus is thrown on defendant[22] on a plea of probable cause,[23] or where it is shown that there has been a voluntary dismissal of a civil action,[24] or an arrest and dismissal,[25] or a discharge of a criminal proceeding[26] for want of sufficient proof[27] after full investigation.[28]

4. Want of Probable Cause and Malice. The burden of proving the concurrence of malice and want of probable cause is on plaintiff.[29]

a *prima facie* case of want of probable cause. Martin *v.* Corscadden, (Mont. 1906) 86 Pac. 33; MacDonald *v.* Schroeder, 214 Pa. St. 411, 63 Atl. 1024.

Until plaintiff has proved express malice, he cannot require defendant to prove a probable cause. Frowman *v.* Smith, Litt. Sel. Cas. (Pa.) 7, 12 Am. Dec. 265.

Malice may be inferred by the jury from an utter absence of probable cause, but in such case the absence of probable cause, to form the basis of a presumption of malice, should be shown affirmatively. McCormick *v.* Conway, 12 La. Ann. 53.

In an action for malicious prosecution for stealing, however, it is not necessary for plaintiff, in order to show a want of probable cause, to prove a good title to the property stolen, or that defendant actually knew it. Sexton *v.* Brock, 15 Ark. 345.

Plaintiff's unexplained neglect to testify may be considered by the jury on the question of want of probable cause. Pullen *v.* Glidden, 68 Me. 559.

22. Thus where plaintiff was arrested on a charge of an intention to depart from the country and remove his property in order to defraud creditors, and the arrest is made as he was stepping into the cars, although there was ample opportunity to have executed the process during the two preceding days, the burden of proving probable cause is on defendant. Widmaier *v.* Mellert, 6 Phila. (Pa.) 515.

If want of probable cause is shown by plaintiff, the burden of proof, in the absence of malice, is then thrown on defendant. Le Maistre *v.* Hunter, Brightly (Pa.) 494.

Where a prosecution is commenced for the purpose of extorting money the burden of proof is on defendant. Prough *v.* Entriken, 11 Pa. St. 81.

23. *California.*— Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380.

Kansas.— Wright *v.* Hayter, 5 Kan. App. 638, 47 Pac. 546.

Kentucky.— Brown *v.* Morris, 3 Bush 81.

New York.— Morris *v.* Corson, 7 Cow. 281, where defendant pleaded the truth of the facts involved in the prosecution, which was for felony, it was an assumption of the burden of proving the probable cause, and plaintiff need not in the first instance prove a want of it.

South Dakota.— Wuest *v.* American Tobacco Co., 10 S. D. 394, 73 N. W. 903.

Texas.— See Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85.

Virginia.— Evans *v.* Atlantic Coast Line R. Co., 105 Va. 72, 53 S. E. 3.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 113.

24. Wetmore *v.* Mellinger, (Iowa 1883) 14 N. W. 722, the voluntary dismissal of a civil action casts on defendant the burden of showing probable cause.

25. Johnston *v.* Martin, 7 N. C. 248.

26. Barhight *v.* Tammany, 158 Pa. St. 545, 28 Atl. 135, 38 Am. St. Rep. 853; Scott *v.* Dewey, 23 Pa. Super. Ct. 396. But see Pownall *v.* Lancaster, etc., Co., 16 Lanc. L. Rev. (Pa.) 411, where it was held that the fact that plaintiff was discharged after a hearing before the examining magistrate does not throw the burden of proving probable cause on defendant.

27. Smith *v.* Eastern Bldg., etc., Assoc., 116 N. C. 73, 20 S. E. 963.

28. Josselyn *v.* McAllister, 25 Mich. 45.

29. *Alabama.*— O'Grady *v.* Julian, 34 Ala. 88.

Arkansas.— Foster *v.* Pitts, 63 Ark. 387, 38 S. W. 1114.

California.— Griswold *v.* Griswold, 143 Cal. 617, 77 Pac. 672.

Delaware.— Rhodes *v.* Silvers, 1 Harr. 127.

District of Columbia.— Spitzer *v.* Friedlander, 14 App. Cas. 556.

Georgia.— Sledge *v.* McLaren, 29 Ga. 64.

Illinois.— Calef *v.* Thomas, 81 Ill. 478; Wade *v.* Walden, 23 Ill. 425; Tumalty *v.* Parker, 100 Ill. App. 382; Swenson *v.* Erickson, 90 Ill. App. 358; Epstein *v.* Berkowsky, 64 Ill. App. 498; Splane *v.* Byrne, 9 Ill. App. 392.

Iowa.— Richards *v.* Jewett, 118 Iowa 629, 92 N. W. 689; Barber *v.* Scott, 92 Iowa 52, 60 N. W. 497.

Kansas.— Wright *v.* Hayter, 5 Kan. App. 638, 47 Pac. 546.

Louisiana.— Sundmaker *v.* Gaudet, 113 La. 887, 37 So. 865; Womack *v.* Fudikar, 47 La. 33, 16 So. 645; Laville *v.* Giguenaud, 15 La. Ann. 605; Blass *v.* Gregor, 15 La. Ann. 421.

Michigan.— Le Clear *v.* Perkins, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627.

Missouri.— Alexander *v.* Harrison, 38 Mo. 258, 90 Am. Dec. 431; Grant *v.* Reinhart, 33 Mo. App. 74.

New York.— Richardson *v.* Virtue, 2 Hun 208; Vanderbilt *v.* Mathis, 5 Duer 304; Moses *v.* Dickinson, 2 N. Y. City Ct. 184.

Pennsylvania.— Sutton *v.* Anderson, 103 Pa. St. 151; Le Maistre *v.* Hunter, Brightly 494; Bryant *v.* Kuntz, 25 Pa. Super. Ct. 102; Scott *v.* Dewey, 23 Pa. Super. Ct. 396.

South Carolina.— Horn *v.* Boon, 3 Strobh. 307.

Texas.— Ramsey *v.* Arrott, 64 Tex. 320; Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec.

5. MALICE. Plaintiff must prove that the conduct of defendant was such as to lead to the inference that the proceedings were not undertaken from public or proper motives, but from malice.[30]

6. DAMAGES. Except where damages are presumed[31] the burden is on plaintiff to show that he suffered damage and what damage he in fact suffered.[32]

B. Admissibility Under Pleadings. Evidence is not admissible[33] unless it concerns a matter in issue by the pleadings,[34] except as to controversies litigated

85; Melvin *v.* Chancy, 8 Tex. Civ. App. 252, 28 S. W. 241; Schwartz *v.* Burton, 1 Tex. App. Civ. Cas. § 1216.

Vermont.— Driggs *v.* Burton, 44 Vt. 124.

Wisconsin.— Collins *v.* Shannon, 67 Wis. 441, 30 N. W. 730.

United States.— Wheeler *v.* Nesbitt, 24 How. 544, 16 L. ed. 765; Ambs *v.* Atchison, etc., R. Co., 114 Fed. 317.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 114.

An instruction that, "if you believe from the evidence that the defendant had probable cause, and instituted the proceedings against the plaintiff and caused said writ to be issued in good faith and without malice, then you must find defendant not guilty," is erroneous, as the burden is on plaintiff to show malice and want of probable cause. Emery *v.* Ginnan, 24 Ill. App. 65.

By a preponderance of evidence plaintiff must show that the prosecution was begun by defendant with malice and without probable cause. Barber *v.* Scott, 92 Iowa 52, 60 N. W. 497; Christian *v.* Hanna, 58 Mo. App. 37.

Clear proof, etc.— While other courts hold that it cannot be maintained without clear proof of malice and the absence of probable cause (Maloney *v.* Doane, 15 La. 278, 35 Am. Dec. 204); and that plaintiff was acquitted (Scott *v.* Shelor, 28 Gratt. (Va.) 891); or that the suit or proceeding was finally determined before action brought for the injury (Emery *v.* Ginnan, 24 Ill. App. 65).

Facts neutralizing each other.— Where a magistrate, after hearing, has committed an accused person, and the grand jury has ignored the bill, these two facts neutralize each other, and plaintiff to sustain his action must produce other evidence of malice, and want of probable cause for the institution of the prosecution. Miller *v.* Chicago, etc., R. Co., 41 Fed. 898.

30. *Indiana.*— Judy *v.* Gifford, 33 Ind. App. 353, 71 N. E. 504.

Kansas.— Wright *v.* Hayter, 5 Kan. App. 638, 47 Pac. 546.

Missouri.— Finley *v.* St. Louis Refrigerator, etc., Co., 99 Mo. 559, 13 S. W. 87, it being sufficient to show that defendant either commenced or continued the prosecution maliciously.

Pennsylvania.— Travis *v.* Smith, 1 Pa. St. 234, 44 Am. Dec. 125, holding that one who institutes criminal proceedings against another rashly, wantonly, or wickedly is responsible as he is conclusively presumed to have acted maliciously.

West Virginia.— Vinal *v.* Core, 18 W. Va. 1, holding that actual malice, a design to injure plaintiff, or fraud and oppression may be inferred where a prosecution for larceny was instituted to get possession of certain oil, defendant's claim to which was not well founded, and defendants instructed the constable not to serve the warrant if he could get the oil, although advice of counsel was sought.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 115.

31. See *supra*, IX, A, text and notes 48, 49.

32. Herbener *v.* Crossan, 4 Pennew. (Del.) 38, 55 Atl. 223. See also *supra*, IX, A.

33. Sutton *v.* Thayer, (Iowa 1900) 84 N. W. 680; Babcock *v.* Merchants' Exch., 159 Mo. 381, 60 S. W. 732.

Title to property cannot be tried in an action for malicious prosecution. McElroy *v.* Meredith, 9 Pa. Cas. 321, 12 Atl. 170.

34. Noble *v.* White, 103 Iowa 352, 72 N. W. 556; Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650; George *v.* Johnson, 25 N. Y. App. Div. 125, 49 N. Y. Suppl. 203; Kelly *v.* Durham Traction Co., 132 N. C. 368, 43 S. E. 923, 133 N. C. 418, 45 S. E. 826.

All evidence made pertinent and material to the issues by the pleadings is in general admissible. Lawrence *v.* Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Louisville, etc., R. Co. *v.* Hendricks, 13 Ind. App. 10, 40 N. E. 82, 41 N. E. 14; Hampton *v.* Jones, 58 Iowa 317, 12 N. W. 276; Cole *v.* Curtis, 16 Minn. 182.

Defendant's character for veracity is not a proper subject of inquiry, unless made so by the pleading. Rogers *v.* Lamb, 3 Blackf. (Ind.) 155; Baker *v.* Hopkins, 1 A. K. Marsh. (Ky.) 587.

Evidence respecting the character of defendant's wife and son for peace and quietness is inadmissible. Horne *v.* Sullivan, 83 Ill. 30.

Malice of defendant.— It is not competent for the purpose of showing malice to admit testimony showing that plaintiff had been arrested at the instance of defendants in Washington, D. C., one year before the pending trial, and four years after the suit was brought. Acts done so long after the original cause of action are not to be supposed in any sense a part of the original matter. Shipman *v.* Fletcher, 20 D. C. 245.

Under a plea of justification, advice of private counsel as well as of the solicitor-general upon the statement made by defendant to them, which was substantially the same as that sworn to by him on trial, is admissible. Ventress *v.* Rosser, 73 Ga. 534.

by consent.[35] Under the general denial, or general issue, facts showing the existence of probable cause,[36] and the non-existence of malice,[37] the guilt of plaintiff,[38] and all circumstances attending the transactions which tend to show defendant's motive[39] may be offered in evidence.[40]

C. Admissibility Under Usual Rules of Evidence — 1. In General. The reception of evidence, in actions of malicious prosecution, is governed by the usual general rules,[41] which apply to oral[42] and documentary[43] evidence with reference to materiality[44] or remoteness;[45] to competency,[46] including the requirement of

35. Eihlert *v.* Gommoll, 23 Ohio Cir. Ct. 586. And see Evins *v.* Metropolitan St. R. Co., 47 N. Y. App. Div. 511, 62 N. Y. Suppl. 495.

36. *Indiana.*— Trogden *v.* Deckard, 45 Ind. 572; Brown *v.* Connelly, 5 Blackf. 390; Harlan *v.* Jones, 16 Ind. App. 398, 45 N. E. 481.

Kentucky.— Garrard *v.* Willet, 4 J. J. Marsh. 628.

Massachusetts.— Folger *v.* Washburn, 137 Mass. 60.

Michigan.— Steadman *v.* Keets, 129 Mich. 669, 89 N. W. 555.

Washington.— Kellogg *v.* Schenerman, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237.

United States.— Sheehee *v.* Resler, 21 Fed. Cas. No. 12,739, 1 Cranch C. C. 42 [*affirmed* in 1 Cranch 110, 2 L. ed. 51].

See 33 Cent. Dig. tit. "Malicious Prosecution," § 110.

Contra.— Fant *v.* McDaniel, 1 Brev. (S. C.) 173, 2 Am. Dec. 660.

37. Harlan *v.* Jones, 16 Ind. App. 398, 45 N. E. 481; McAllister *v.* Johnson, 108 Iowa 42, 78 N. W. 790.

38. Bruley *v.* Rose, 57 Iowa 651, 11 N. W. 629.

39. Maynard *v.* Sigman, 65 Nebr. 590, 91 N. W. 576.

Advice of counsel.— Folger *v.* Washburn, 137 Mass. 60; Sparling *v.* Conway, 6 Mo. App. 283 [*affirmed* in 75 Mo. 510].

To rebut the evidence of malice it is competent for defendant to show that he acted under advice of counsel, obtained in good faith, upon information of the real facts of the case. Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85.

40. Hitchcock *v.* North, 5 Rob. (La.) 328, 39 Am. Dec. 540.

However the writ is not admitted upon the general issue, in an action for a malicious arrest. James *v.* Mills, 4 U. C. Q. B. 366.

41. See, generally, Evidence.

42. Comisky *v.* Breen, 7 Ill. App. 369. See, generally, Evidence, 17 Cyc. 567 *et seq.*

43. *Iowa.*— Pierce *v.* Doolittle, 130 Iowa 333, 106 N. W. 751.

Maryland.— Cecil *v.* Clarke, 17 Md. 508.

Michigan.— Fletcher *v.* Chicago, etc., R. Co., 109 Mich. 363, 67 N. W. 330.

Missouri.— Kennedy *v.* Holladay, 25 Mo. App. 503.

Nebraska.— Turner *v.* O'Brien, 11 Nebr. 108, 7 N. W. 850.

Vermont.— Driggs *v.* Burton, 44 Vt. 124.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 119.

See also, generally, Evidence, 17 Cyc. 296 *et seq.*

44. *Alabama.*— Brown *v.* Master, 111 Ala. 397, 20 So. 344.

Illinois.— Brown *v.* Smith, 83 Ill. 291.

Indiana.— Feighner *v.* Delaney, 21 Ind. App. 36, 51 N. E. 379.

Iowa.— Noble *v.* White, 103 Iowa 352, 72 N. W. 556.

Maine.— Finn *v.* Frink, 84 Me. 261, 24 Atl. 851, 30 Am. St. Rep. 348.

Massachusetts.— Burnham *v.* Collateral Loan Co., 179 Mass. 268, 60 N. E. 617.

Michigan.— McClay *v.* Hicks, 119 Mich. 65, 77 N. W. 636; Tryon *v.* Pingree, 112 Mich. 338, 70 N. W. 905, 67 Am. St. Rep. 398, 37 L. R. A. 222; Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860.

Missouri.— Merkle *v.* Otteusmeyer, 50 Mo. 49.

Nebraska.— Schroeder *v.* Blum, (1905) 103 N. W. 1073; Miller Bank *v.* Richmon, 68 Nebr. 731, 94 N. W. 998.

New York.— Grout *v.* Cottrell, 143 N. Y. 677, 38 N. E. 717.

Texas.— Sutor *v.* Wood, 76 Tex. 403, 13 S. W. 321.

Washington.— Kellogg *v.* Scheuerman, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 117 *et seq.*

45. Alexander *v.* Reid, 44 S. W. 211, 19 Ky. L. Rep. 1636; Laing *v.* Mitten, 185 Mass. 233, 70 N. E. 128; Stamper *v.* Raymond, 38 Oreg. 16, 62 Pac. 20.

46. *Alabama.*— Rutherford *v.* Dyer, (1906) 40 So. 974.

Illinois.— Davie *v.* Wisher, 72 Ill. 262.

Indiana.— Peden *v.* Mail, 118 Ind. 560, 20 N. E. 446; McCarthy *v.* Kitchen, 59 Ind. 500.

Iowa.— Barber *v.* Scott, 92 Iowa 52, 60 N. W. 497; Green *v.* Cochran, 43 Iowa 544.

Massachusetts.— Perkins *v.* Spaulding, 182 Mass. 218, 65 N. E. 72; Brigham *v.* Aldrich, 105 Mass. 212.

Michigan.— Lansky *v.* Prettyman, 140 Mich. 40, 103 N. W. 538.

Vermont.— Gifford *v.* Hassam, 50 Vt. 704.

Wisconsin.— Strehlow *v.* Pettit, 96 Wis. 22, 71 N. W. 102; Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 117.

Any facts pertaining to the res gestæ are admissible. Merrell *v.* Dudley, 139 N. C. 57, 51 S. E. 777; Spear *v.* Hiles, 67 Wis. 350, 30 N. W. 506.

the best evidence[47] and the exclusion of hearsay,[48] with some exceptions;[49] to relevancy,[50] including the explanation,[51] impeachment, contradiction, and rebuttal[52] of other testimony.

2. Character of Parties — a. Of Plaintiff. Unless character is in issue[53] evidence as to it is generally held to be inadmissible as involving a collateral fact.[54] Under the plea of probable cause and to disprove malice, however, there may be shown the bad reputation of plaintiff concerning matters naturally calculated to affect the probability of his having committed the crime with which he has been charged,[55] at least where such reputation was known to defendant when he insti-

Evidence of collateral issues to which defendant was a stranger are not admissible. Thompson *v.* Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554. And see Bays *v.* Herring, 51 Iowa 286, 1 N. W. 558; Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135.

47. See, generally, Evidence, 17 Cyc. 465 *et seq.*

Proceedings before magistrate.—The magistrate before whom the prosecution was instituted cannot testify as to the evidence given before him on the prosecution. Larrence *v.* Lanning, 2 Ind. 256. To same effect see Chapman *v.* Dodd, 10 Minn. 350; Richards *v.* Foulke, 3 Ohio 52; Cotton *v.* Huidekoper, 2 Penr. & W. (Pa.) 149. *Contra*, Bacon *v.* Towne, 4 Cush. (Mass.) 217.

Loss or destruction of a written instrument must be satisfactorily proven before parol evidence of their contents can be admitted. Whitehall *v.* Smith, 24 Ill. 166.

48. Hart *v.* McLaughlin, 51 N. Y. App. Div. 411, 64 N. Y. Suppl. 827; Armstrong *v.* Grogan, 5 Sneed (Tenn.) 108. See also Conner *v.* Wetmore, 110 N. Y. App. Div. 440, 96 N. Y. Suppl. 999.

49. See *infra*, XIV, B, 5, b.

50. *Alabama.*— Sweeny *v.* Bienville Water Supply Co., 121 Ala. 454, 25 So. 575; Lunsford *v.* Dietrich, 93 Ala. 565, 9 So. 308, 30 Am. St. Rep. 79.

Connecticut.— Smith *v.* King, 62 Conn. 515, 26 Atl. 1059.

Iowa.— McAllister *v.* Johnson, 108 Iowa 42, 78 N. W. 790.

Kansas.— Farwell *v.* Laird, 58 Kan. 402, 49 Pac. 518.

New York.— Wright *v.* Church, 110 N. Y. 463, 18 N. E. 258; Thaule *v.* Krekeler, 81 N. Y. 428; Scott *v.* Dennett Surpassing Coffee Co., 51 N. Y. App. Div. 321, 64 N. Y. Suppl. 1016.

Pennsylvania.— Reed *v.* Loosemore, 197 Pa. St. 261, 48 Atl. 20; Bruff *v.* Kendrick, 21 Pa. Super. Ct. 468; Schondorf *v.* Griffith, 13 Pa. Super. Ct. 580.

Tennessee.— Graham *v.* Fidelity Mut. Life Assoc., 98 Tenn. 48, 37 S. W. 995.

Texas.— Cooper *v.* Langway, 76 Tex. 121, 13 S. W. 179.

Virginia.— Womack *v.* Circle, 29 Gratt. 192. See also Singer Mfg. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320.

United States.— L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 121 Fed. 233, 57 C. C. A. 469.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 117.

51. Higlister *v.* French, 180 Mass. 299, 62 N. E. 264.

52. *Kentucky.*— O'Daniel *v.* Smith, 66 S. W. 284, 23 Ky. L. Rep. 1822.

Michigan.— Lansky *v.* Prettyman, 140 Mich. 40, 103 N. W. 538; Thurkettle *v.* Frost, 137 Mich. 649, 100 N. W. 283; Gould *v.* Gregory, 133 Mich. 382, 95 N. W. 414.

New York.— Parr *v.* Loder, 85 N. Y. App. Div. 96, 82 N. Y. Suppl. 1040.

South Carolina.— Freeland *v.* Southern R. Co., 70 S. C. 427, 50 S. E. 11.

Washington.— Kerstetter *v.* Thomas, 36 Wash. 620, 79 Pac. 290.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 117.

53. Noble *v.* White, 103 Iowa 352, 72 N. W. 556.

Evidence of defendant's bad character for peace and quietude is not admissible in chief, although it appears that the original prosecution grew out of a personal collision between the parties. Walker *v.* Pittman, 108 Ind. 341, 9 N. E. 175. But it has been held that if evidence touching the character of defendant in an action for malicious prosecution was given on the prosecution, it is also admissible on the trial of the action for the purpose of determining the degree of credit to be given him as a witness. Goodrich *v.* Warner, 21 Conn. 432.

Capacity to commit crime or to commit a tort may become a pertinent inquiry, and when in issue, evidence thereof is admissible. McLeod *v.* McLeod, 75 Ala. 483, whether very old person could commit the trespass.

Where the injury is doubtful, evidence of character has been admitted. Scott *v.* Fletcher, 1 Overt. (Tenn.) 488.

Statements by plaintiff as to the character of defendant's daughter, with whose attempted murder he was charged, as bearing on plaintiff's social standing, had no tendency to show that plaintiff was the person guilty of making the assault on defendant's daughter and are inadmissible. Flam *v.* Lee, 116 Iowa 289, 90 N. W. 70, 93 Am. St. Rep. 242.

54. Lockwood *v.* Beard, 4 Ind. App. 505, 30 N. E. 15.

55. *Alabama.*— Martin *v.* Hardesty, 27 Ala. 458, 62 Am. Dec. 773.

Connecticut.— Sherwood *v.* Reed, 35 Conn. 450, 95 Am. Dec. 284.

Illinois.— Rosenkrans *v.* Barker, 115 Ill.

tuted the prosecution.[56] The ill-repute of plaintiff may also be shown to mitigate damages.[57] It has also been held that plaintiff may correspondingly show his previous good character[58] and defendant's knowledge of it,[59] in chief; but there is also good authority for holding that this cannot be done until after his character has been first attacked.[60] If plaintiff founds his action in part on injury to his character[61] or reputation in his business, he thereby puts his character in

331, 3 N. E. 93, 56 Am. Rep. 169; Israel *v.* Brooks, 23 Ill. 575.

Massachusetts.— Bacon *v.* Towne, 4 Cush. 217.

Montana.— Martin *v.* Corscadden, (1906) 86 Pac. 33.

Ohio.— Britton *v.* Granger, 13 Ohio Cir. Ct. 281, 7 Ohio Cir. Dec. 182.

Oregon.— Gee *v.* Culver, 13 Oreg. 598, 11 Pac. 302.

West Virginia.—Vinal *v.* Core, 18 W. Va. 1.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 129.

Contra.— Oliver *v.* Pate, 43 Ind. 132. And *compare* Rodriguez *v.* Tadmire, 2 Esp. 721; Downing *v.* Butcher, 2 M. & Rob. 374; Cornwall *v.* Richardson, R. & M. 305, 27 Rev. Rep. 753, 21 E. C. L. 758.

Extent and limits of rule.— It is competent for defendant to show, for the purpose of proving probable cause, the notorious bad character of plaintiff for honesty (Miller *v.* Brown, 3 Mo. 127, 23 Am. Dec. 693); that his only occupation was that of horse-racing and gambling (Martin *v.* Hardesty, 27 Ala. 458, 62 Am. Dec. 773); the quarrelsome disposition of plaintiff, and that he had threatened defendant, and would be likely to carry such threats into execution (Sherwood *v.* Reed, 35 Conn. 450, 95 Am. Dec. 284); and that plaintiff was, at the time of the prosecution, generally reputed to be guilty of acts similar to the one for which he was prosecuted, upon the question of probable cause (Barron *v.* Mason, 31 Vt. 189), but not other facts not connected with the prosecution complained of (Gregory *v.* Thomas, 2 Bibb. (Ky.) 286, 5 Am. Dec. 608). But evidence of the bad reputation of plaintiff "among the men and parties in the same business with him in this community" is inadmissible. Eschbach *v.* Hurtt, 47 Md. 61. So also, where a mother and her thirteen-year-old son, having been arrested for larceny and acquitted, the bad character of the mother for honesty is not competent evidence for defendant in a suit by the son for malicious prosecution. Bruce *v.* Tyler, 127 Ind. 468, 26 N. E. 1081. Nor can defendant prove the bad character of another person arrested with plaintiff. Armstrong *v.* Grogan, 5 Sneed (Tenn.) 108.

56. Waters *v.* West Chicago St. R. Co., 101 Ill. App. 265; Hlubek *v.* Pinske, 84 Minn. 363, 87 N. W. 939; Miles *v.* Salisbury, 21 Ohio Cir. Ct. 333, 12 Ohio Cir. Dec. 7.

57. *Illinois.*— Rosenkrans *v.* Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169.

Maine.— Fitzgibbon *v.* Brown, 43 Me. 169.

Missouri.— Gregory *v.* Chambers, 78 Mo. 294 [*affirming* 8 Mo. App. 557].

New Jersey.—O'Brien *v.* Frasier, 47 N. J. L. 349, 1 Atl. 465, 54 Am. Rep. 170.

Oregon.— Gee *v.* Culver, 13 Oreg. 598, 11 Pac. 302.

58. *Indiana.*— Blizzard *v.* Hays, 46 Ind. 166, 15 Am. Rep. 291.

Massachusetts.— McIntire *v.* Levering, 148 Mass. 546, 20 N. E. 191, 12 Am. St. Rep. 594, 2 L. R. A. 517.

Michigan.— Thurkettle *v.* Frost, 137 Mich. 649, 100 N. W. 283.

Minnesota.— Shea *v.* Cloquet Lumber Co., 97 Minn. 41, 105 N. W. 552.

Nebraska.— Miller Bank *v.* Richmon, 64 Nebr. 111, 89 N. W. 627.

Ohio.— Miles *v.* Salisbury, 21 Ohio Cir. Ct. 333, 12 Ohio Cir. Dec. 7; Johnson *v.* McDaniel, 5 Ohio S. & C. Pl. Dec. 717, 7 Ohio N. P. 467.

Pennsylvania.— Glace *v.* Hummel, 10 Pa. Dist. 110, 24 Pa. Co. Ct. 550, 4 Dauph. Co. Rep. 1.

Wisconsin.— Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 129.

For the purpose of showing want of probable cause, plaintiff may, without his own character having been previously attacked by defendant, prove that his general reputation in respect to the crime charged against him was good at the time and defendant's knowledge thereof. Funk *v.* Amor, 7 Ohio Cir. Ct. 419, 4 Ohio Cir. Dec. 662. *Contra,* Kennedy *v.* Holladay, 25 Mo. App. 503.

Proof of good character for peace and quietness on plaintiff's part should not be allowed in an action for malicious prosecution, for having plaintiff arrested for a riot on a complaint made by defendant on his own knowledge, and not upon information and belief. Skidmore *v.* Bricker, 77 Ill. 164.

59. *District of Columbia.*— Coleman *v.* Heurich, 2 Mackey 189.

Illinois.— Israel *v.* Brooks, 23 Ill. 575.

Indiana.— Blizzard *v.* Hays, 46 Ind. 166, 15 Am. Rep. 291.

Massachusetts.— McIntire *v.* Levering, 148 Mass. 546, 20 N. E. 191, 12 Am. St. Rep. 594, 2 L. R. A. 517.

Ohio.— Funk *v.* Amor, 4 Ohio Cir. Ct. 271, 2 Ohio Cir. Dec. 541.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 129.

60. Skidmore *v.* Bricker, 77 Ill. 164; McIntire *v.* Levering, 148 Mass. 546, 20 N. E. 191, 12 Am. St. Rep. 594, 2 L. R. A. 517; San Antonio, etc., R. Co. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542; Carroll *v.* New Jersey Cent. R. Co., 134 Fed. 684.

61. O'Brien *v.* Frazier, 47 N. J. L. 349, 1

issue.[62] Specific acts or facts concerning reputation or character, unless specifically pleaded, are not proper matters of proof.[63]

b. Of Defendant. Evidence of defendant's character for truth, either at the time of the original proceeding or at the trial of the action of malicious prosecution, is not admissible until after he has testified thereto and then only for the purpose of determining his credibility.[64]

3. Financial Condition of Parties. In an action for malicious prosecution having for its foundation an alleged malicious attachment, plaintiff's financial condition is competent evidence on the question of probable cause.[65] It has been regarded as error[66] and as proper to show defendant's financial standing and ability to respond to judgment.[67]

4. Defendant's Connection With Original Proceeding. It is proper to show that the present defendant was the cause of the original prosecution[68] by circumstantial evidence,[69] by conduct of defendant or his servant,[70] although subsequent in time to the arrest,[71] or by the record;[72] and *per contra* to show that defendant was not such cause.[73]

5. Probable Cause or Want Thereof — a. In General. All competent evidence,[74]

Atl. 465, 54 Am. Rep. 170, holding that where the declaration charges injury to character, evidence on part of defendant, in mitigation of damages, tending to show the bad reputation of plaintiff is admissible.

62. Finley *v.* St. Louis Refrigerator, etc., Co., 99 Mo. 559, 13 S. W. 87, holding that where injury to plaintiff's good name and reputation in his business is alleged as an element of damage, there is no error in allowing proof that at the time of the prosecution plaintiff was not of good credit.

63. Hart *v.* McLaughlin, 51 N. Y. App. Div. 411, 64 N. Y. Suppl. 827. And see Barge *v.* Weems, 109 Ga. 685, 35 S. E. 65; Neys *v.* Taylor, 12 S. D. 488, 81 N. W. 901.

Plaintiff is not bound to prove his good character in order to recover in malicious prosecution. It is therefore new matter, and as such must be specially pleaded. Degenhart *v.* Schmidt, 7 Mo. App. 117.

64. Goodrich *v.* Warner, 21 Conn. 432.

65. Yarbrough *v.* Hudson, 19 Ala. 653; Coleman *v.* Allen, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449; Grimes *v.* Bowerman, 92 Mich. 258, 52 N. W. 751 (assets and credits); Tykeson *v.* Bowman, 60 Minn. 108, 61 N. W. 909 (that plaintiff owed no one but defendant); Reisan *v.* Mott, 42 Minn. 49, 43 N. W. 691, 18 Am. St. Rep. 489 (that plaintiff had a large amount of property).

66. Southern Car, etc., Co. *v.* Adams, 131 Ala. 147, 32 So. 503; Brown *v.* Smallwood, 86 N. Y. App. Div. 76, 83 N. Y. Suppl. 415, 13 N. Y. Annot. Cas. 308.

67. *Colorado.*— French *v.* Guyot, 30 Colo. 222, 70 Pac. 683.

Georgia.— Coleman *v.* Allen, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449.

Indiana.— Sexson *v.* Hoover, 1 Ind. App. 65, 27 N. E. 105.

Minnesota.— Peck *v.* Small, 35 Minn. 465, 29 N. W. 69.

Missouri.— Renfro *v.* Prior, 25 Mo. App. 402.

Wisconsin.— Winn *v.* Peckham, 42 Wis. 493.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 130.

68. Kelly *v.* Durham Traction Co., 132 N. C. 368, 43 S. E. 923, 133 N. C. 418, 45 S. E. 826.

Sufficient proof see Cook *v.* Proskey, 138 Fed. 273, 70 C. C. A. 563.

69. Kelly *v.* Durham Traction Co., 132 N. C. 368, 43 S. E. 923, 133 N. C. 418, 45 S. E. 826.

It is competent for plaintiff to prove by evidence *dehors* the record who in fact acted as the prosecutor in the alleged malicious prosecution (Knauer *v.* Morrow, 23 Kan. 360), and what the officer said at the time of the arrest as to the instructions from defendant may be shown by plaintiff (Reynolds *v.* Haywood, 77 Hun (N. Y.) 131, 28 N. Y. Suppl. 467. *Contra*, Womack *v.* Circle, 29 Gratt. (Va.) 192).

70. Kelly *v.* Durham Traction Co., 132 N. C. 368, 43 S. E. 923, 133 N. C. 418, 45 S. E. 826.

71. Southern Express Co. *v.* Couch, 133 Ala. 285, 32 So. 167; Nickelson *v.* Cameron Lumber Co., 39 Wash. 569, 81 Pac. 1059.

72. Thorne *v.* Mason, 8 U. C. Q. B. 236; Spafford *v.* Buchanan, 3 U. C. Q. B. O. S. 391.

In Canada it has been held that it is not necessary to produce the record or prove the writ in order to connect defendant with the act. Patterson *v.* Morrison, 17 U. C. Q. B. 130; McLarren *v.* Blacklock, 14 U. C. Q. B. 24.

But an order in the criminal prosecution designating defendant as the prosecutor and taxing him with costs is not admissible against him either to show malice or the want of probable cause, as it adjudges nothing as between the parties. Coble *v.* Huffines, 132 N. C. 399, 43 S. E. 909, 133 N. C. 422, 45 S. E. 760.

73. Southern Express Co. *v.* Couch, 133 Ala. 285, 32 So. 167.

74. McLaren *v.* Birdsong, 24 Ga. 265; Lawrence *v.* Hagerman, 56 Ill. 68, 8 Am. Rep. 674. See cases cited *infra*, note 75, *et seq.*

including statements of third persons,[75] but not mere rumors[76] and other proceedings,[77] which evidence naturally tends to establish probable cause,[78] or want of probable cause[79] at the time of the institution of the original proceeding,[80] and as it is sometimes held which is shown to have come to defendant's knowledge,[81] is admissible.

Evidence of: Character see *supra*, XIV, C, 2; Financial condition see *supra*, XIV, C, 3.

75. Where the question is, whether the party acted prudently, wisely, or in good faith, the statements of third persons on which he acted, whether true or false, is original evidence.

California.— Lamb *v.* Galland, 44 Cal. 609.

Illinois.— Anderson *v.* Friend, 71 Ill. 475.

Indiana.— Pennsylvania Co. *v.* Weddle, 100 Ind. 138; Ammerman *v.* Crosby, 26 Ind. 451.

Maryland.— Cecil *v.* Clarke, 17 Md. 508.

Massachusetts.— Bacon *v.* Towne, 4 Cush. 217.

New Hampshire.— Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800.

New York.— English *v.* Major, 59 Hun 317, 12 N. Y. Suppl. 935.

Vermont.— French *v.* Smith, 4 Vt. 363, 24 Am. Dec. 616.

Canada.— Bernard *v.* Coutellier, 45 U. C. Q. B. 453.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 128.

But see Gimbel *v.* Gomprecht, (Tex. Civ. App. 1896) 36 S. W. 781.

Declarations of person abducted.— Where the charge upon which the action for malicious prosecution was founded was that of unlawfully taking away and detaining defendant's daughter without her consent, the declarations of the daughter, made about the time of the alleged abduction, tending to show her willingness to go, are admissible. Long *v.* Rogers, 17 Ala. 540.

Declarations of the principal in a note made in the absence of the surety are not admissible to show probable cause for an attachment against the surety. Anderson *v.* Columbia Finance, etc., Co., 50 S. W. 40, 20 Ky. L. Rep. 1790.

76. Brown *v.* Smallwood, 86 N. Y. App. Div. 76, 83 N. Y. Suppl. 415, 13 N. Y. Annot. Cas. 308; Tucker *v.* Wilkins, 105 N. C. 272, 11 S. E. 575. But see Britton *v.* Granger, 13 Ohio Cir. Ct. 281, 7 Ohio Cir. Dec. 182, where it was held that evidence of common repute in the neighborhood that plaintiff was guilty of the particular offense for which he was prosecuted is competent.

77. Keesling *v.* Doyle, 8 Ind. App. 43, 35 N. E. 126.

78. *Alabama.*— Brown *v.* Master, 104 Ala. 451, 16 So. 443.

California.— Lyon *v.* Hancock, 35 Cal. 372.

Georgia.— McLaren *v.* Birdsong, 24 Ga. 265.

Illinois.— Harpham *v.* Whitney, 77 Ill. 32; Collins *v.* Hayte, 50 Ill. 337, 99 Am. Dec. 521.

Indiana.— Ammerman *v.* Crosby, 26 Ind. 451; Swindell *v.* Houck, 2 Ind. App. 519, 28 N. E. 736.

Iowa.— Walker *v.* Camp, 69 Iowa 741, 27 N. W. 800.

Michigan.— Peterson *v.* Toner, 80 Mich. 350, 45 N. W. 346.

Ohio.— Johnson *v.* Corrington, 7 Ohio Dec. (Reprint) 572, 3 Cinc. L. Bul. 1139.

South Dakota.— Richardson *v.* Dybedahl, 14 S. D. 126, 84 N. W. 486.

Wisconsin.— Murphy *v.* Martin, 58 Wis. 276, 16 N. W. 603.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 125.

Letter to plaintiff in attachment containing facts tending to strengthen the circumstances already known to her, according to her own testimony, going to show probable cause for believing there existed a ground for attachment, is admissible. Brown *v.* Master, 104 Ala. 451, 16 So. 443.

That most of the debt was due for usurious interest, when the judgment in the attachment suit is for the whole sum claimed, is inadmissible. Such judgment is conclusive of probable cause until reversed, set aside, or its validity impaired by the judgment of some competent tribunal. Jones *v.* Kirksey, 10 Ala. 839.

79. McLaren *v.* Birdsong, 24 Ga. 265; Talbert *v.* Cooley, 46 Minn. 366, 49 N. W. 124, 13 L. R. A. 463; Watt *v.* Clark, 18 Ont. 602.

The inquiry must be material and relevant to the issue. Wright *v.* Church, 110 N. Y. 463, 18 N. E. 258.

That plaintiff was a minor, under twenty-one years of age, is irrelevant. Motes *v.* Bates, 74 Ala. 374.

80. Marshall *v.* Betner, 17 Ala. 832; Flackler *v.* Novak, 94 Iowa 634, 63 N. W. 348. See Blumenfeldt *v.* Haisman, 30 Ill. App. 388, holding that evidence of what took place at the time of and during the disturbance caused by the arrest of plaintiff is admissible.

Occurrences after the criminal prosecution was begun are not available as evidence of want of probable cause on the part of the prosecutor. Singer Mfg. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320.

81. *California.*— Hurgren *v.* Union Mut. L. Ins. Co., 141 Cal. 585, 75 Pac. 168.

Connecticut.— Anderson *v.* Cowles, 72 Conn. 335, 44 Atl. 477, 77 Am. St. Rep. 310.

Illinois.— Waters *v.* West Chicago St. R. Co., 101 Ill. App. 265.

Indiana.— Lawrence *v.* Leathers, 31 Ind. App. 414, 68 N. E. 179.

Kentucky.— Ahrens, etc., Mfg. Co. *v.* Hoeher, 106 Ky. 692, 51 S. W. 194, 21 Ky. L. Rep. 299; Anderson *v.* Columbia Finance, etc., Co., 50 S. W. 40, 20 Ky. L. Rep. 1790.

Massachusetts.— Walkup *v.* Pickering, 176 Mass. 174, 57 N. E. 364.

b. Acts and Admissions of Parties. The conduct,[82] admissions,[83] and declarations[84] of the present plaintiff,[85] and of the present defendant,[86] or of an authorized agent,[87] are admissible in evidence for the consideration of the jury[88] where sufficiently connected with the former proceedings[89] and with the issues of the present action.[90]

Virginia.— Singer Mfg. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320.

Wisconsin.— Small *v.* McGovern, 117 Wis. 608, 94 N. W. 651.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 125.

82. *Alabama.*— Killebrew *v.* Carlisle, 97 Ala. 535, 12 So. 167.

Connecticut.— Ward *v.* Green, 11 Conn. 455.

New Hampshire.— Eastman *v.* Keasor, 44 N. H. 518.

New York.— Thaule *v.* Krekeler, 81 N. Y. 428; Costigan *v.* Metropolitan L. Ins. Co., 39 N. Y. App. Div. 644, 57 N. Y. Suppl. 177; George *v.* Johnson, 25 N. Y. App. Div. 125, 49 N. Y. Suppl. 203.

North Carolina.— McRae *v.* Oneal, 13 N. C. 166.

Texas.— Sebastian *v.* Cheney, 86 Tex. 497, 25 S. W. 691 [*affirming* (Civ. App. 1893) 24 S. W. 970]; Kleinsmith *v.* Kempner, (Civ. App. 1904) 83 S. W. 409.

Wisconsin.— Bigelow *v.* Sickles, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25.

See 33 Cent. Dig. tit. "Malicious Prosecution," §§ 126, 127.

That before the attachment the debtor had offered to compromise or arbitrate the claim is competent. Lewis *v.* Taylor, (Tex. Civ. App. 1893) 24 S. W. 92.

83. Israel *v.* Brooks, 23 Ill. 575.

84. Call *v.* Hayes, 169 Mass. 586, 48 N. E. 777; Leach *v.* Wilbur, 9 Allen (Mass.) 212; Barron *v.* Mason, 31 Vt. 189.

Details of a confidential interview between plaintiff and his counsel after the issuance of the warrant for embezzlement, showing plaintiff's theory of his defense to the criminal charge, and showing his self-serving declarations that he retained the moneys that he was charged with having embezzled on the ground that defendant owed him the money, are not explanatory of any fact in issue, or relevant to the issue as to probable cause. Singer Mfg. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320.

85. Israel *v.* Brooks, 23 Ill. 575; Leach *v.* Wilbur, 9 Allen (Mass.) 212; Barron *v.* Mason, 31 Vt. 189.

86. *Connecticut.*— Goodrich *v.* Warner, 21 Conn. 432.

Iowa.— McAllister *v.* Johnson, 108 Iowa 42, 78 N. W. 790.

Massachusetts.— Call *v.* Hayes, 169 Mass. 586, 48 N. E. 777; McIntire *v.* Levering, 148 Mass. 546, 20 N. E. 191, 12 Am. St. Rep. 594, 2 L. R. A. 517.

Michigan.— Loranger *v.* Loranger, 115 Mich. 681, 74 N. W. 228.

Missouri.— Diel *v.* Missouri Pac. R. Co., 37 Mo. App. 454.

New Hampshire.— Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800.

Utah.— Johnston *v.* Meaghr, 14 Utah 426, 47 Pac. 861.

Wisconsin.— Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 131.

Evidence is not admissible to show that plaintiff became convinced, and admitted that his testimony in the first action could not be true, in the absence of any showing that defendant had knowledge of the facts disclosed by it (Driggs *v.* Burton, 44 Vt. 124); to show a conversation between strangers to the action imputing an attempt on the part of defendant to procure testimony against plaintiff by means of bribery (Valliquette *v.* McMahon, 30 Ill. App. 181); to show conversations between defendant and third persons collateral to the issue (Holden *v.* Merritt, 92 Iowa 707, 61 N. W. 390); to show a statement by defendant's clerk not made in connection with the action claimed to have been malicious (Scovill *v.* Glasner, 79 Mo. 449); or to show declarations of a police captain after plaintiff's arrest that defendant had had plaintiff arrested, in the absence of proof that the captain was defendant's agent in making the arrest (Diel *v.* Missouri Pac. R. Co., 27 Mo. App. 454).

87. Southern Express Co. *v.* Couch, 133 Ala. 285, 32 So. 167; Southern Car, etc., Co. *v.* Adams, 131 Ala. 147, 32 So. 503; Eggett *v.* Allen, 119 Wis. 625, 96 N. W. 803. *Compare* McLarren *v.* Blacklock, 14 U. C. Q. B. 24. But see Mundal *v.* Minneapolis, etc., R. Co., 92 Minn. 26, 99 N. W. 273, 100 N. W. 363.

88. But such declarations must be relevant to the issue before the court. Sims *v.* McLendon, 3 Strobh. (S. C.) 557; Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446. And where the question at issue is that of probable cause, false representations made to a third person, without design that they should reach the prosecutor and influence his conduct, are not admissible. Chrisman *v.* Carney, 33 Ark. 316.

89. Bullock *v.* Lindsay, 9 Gray (Mass.) 30; Carpenter *v.* Halsey, 57 N. Y. 657. Thus where in an action for malicious prosecution of plaintiff for maliciously removing a fence between his land and land of defendant, the dividing line between which had been settled by arbitration, evidence of prior wrongful removals of the fence by plaintiff, before the submission to arbitration, is inadmissible to prove probable cause for the prosecution. Tillotson *v.* Warner, 3 Gray (Mass.) 574.

90. Riley *v.* Gourley, 9 Conn. 154; Leroy *v.* Claus-Lipsius Brewing Co., 33 N. Y. App.

e. Similar But Unconnected Acts. Evidence of other and similar offenses and transactions[91] unconnected with the one in issue is generally excluded;[92] but where it is shown that defendant had knowledge of such facts prior to the commencement of the prosecution and they have a natural and substantial tendency to affect the reasonableness of his belief, they have been received in evidence.[93]

d. Record of Original Proceeding. The records of the original proceeding,[94] the judgment,[95] the findings of a court[96] or the jury[97] favorable to plaintiff, his

Div. 571, 53 N. Y. Suppl. 925; Hamer *v.* Ogden First Nat. Bank, 9 Utah 215, 33 Pac. 941.

91. Fry *v.* Wolfe, 8 Pa. Super. Ct. 468, 43 Wkly. Notes. Cas. 124. And see Hess *v.* Oregon German Baking Co., 31 Oreg. 503, 49 Pac. 803. *Contra*, Britton *v.* Granger, 13 Ohio Cir. Ct. 281, 7 Ohio Cir. Dec. 182.

92. *California.*— Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380.

Connecticut.— Anderson *v.* Cowles, 72 Conn. 335, 44 Atl. 477, 77 Am. St. Rep. 310.

Kentucky.— Gregory *v.* Thomas, 2 Bibb 286, 5 Am. Dec. 608. *Compare* O'Daniel *v.* Smith, 66 S. W. 284, 23 Ky. L. Rep. 1822.

Maryland.— Clements *v.* Odorless Excavating Apparatus Co., 67 Md. 461, 10 Atl. 442, 13 Atl. 632, 1 Am. St. Rep. 409.

Massachusetts.—Bullock *v.* Lindsay, 9 Gray 30; Tillotson *v.* Warner, 3 Gray 574. *Compare* Higlister *v.* French, 180 Mass. 299, 62 N. E. 264.

Michigan.— Carson *v.* Edgeworth, 43 Mich. 241, 5 N. W. 282.

Missouri.— Peck *v.* Chouteau, 91 Mo. 138, 3 S. W. 577, 60 Am. Rep. 236; Hill *v.* Palm, 38 Mo. 13; Rosenfeld *v.* Stix, 67 Mo. App. 582.

Montana.— Martin *v.* Corscadden, (1906) 86 Pac. 33.

Nebraska.— Miles *v.* Walker, 66 Nebr. 728, 92 N. W. 1014.

New York.— Carpenter *v.* Halsey, 57 N. Y. 657; Stevens *v.* Metropolitan L. Ins. Co., 2 Misc. 584, 21 N. Y. Suppl. 1024 [*affirmed* in 142 N. Y. 627, 37 N. E. 565].

United States.— Ray *v.* Law, 20 Fed. Cas. No. 11,592, Pet. C. C. 207, records of other actions brought by defendant against plaintiff.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 132.

Evidence of indecent exposures by a man to a woman, and to her sister, are irrelevant where the issue was whether there was probable cause for a prosecution for slanderous words, imputing to a man adulterous intercourse with a woman. Mitchinson *v.* Cross, 58 Ill. 366.

93. Proctor Coal Co. *v.* Moses, 40 S. W. 681, 19 Ky. L. Rep. 419; Thelin *v.* Dorsey, 59 Md. 539; St. Johnsbury, etc., R. Co. *v.* Hunt, 59 Vt. 294, 7 Atl. 277; Barron *v.* Mason, 31 Vt. 189. But see Philpot *v.* Lucas, 101 Iowa 478, 70 N. W. 625; Perkins *v.* Spaulding, 182 Mass. 218, 65 N. E. 72.

Evidence that plaintiff was in the habit of carrying his gun with him when going about his farm, offered to rebut the presumption that defendant had probable cause to believe he intended a breach of the peace, was incompetent, where there was no evidence that defendant knew of such practice. Killebrew *v.* Carlisle, 97 Ala. 535, 12 So. 167.

94. See *supra*, IV.

Admissibility of other indictments see Provident Sav. L. Assur. Soc. *v.* Johnson, 72 S. W. 754, 24 Ky. L. Rep. 1902; Coble *v.* Huffines, 133 N. C. 422, 45 S. E. 760. Defendant caused plaintiff to be indicted twice, and the prosecuting attorney entered a *nolle prosequi* on the second indictment, after an acquittal on the first, on the ground that he had been acquitted of the offense charged; it was held that it might be shown that the two prosecutions were for distinct offenses, and therefore that there was probable cause for the latter. White *v.* Ray, 8 Pick. (Mass.) 467.

The affidavit made by defendant and the warrant issued thereon were competent evidence. Rutherford *v.* Dyer, (Ala. 1906) 40 So. 974.

95. McKenna *v.* Heinlen, 128 Cal. 97, 60 Pac. 668.

However the judgment awarding costs against a prosecutor for want of probable cause is not admissible against such person in an action for malicious prosecution. McAllister *v.* Johnson, 108 Iowa 42, 78 N. W. 790. Nor can defendant give in evidence a plea of justification to the action complained of, and a demurrer which was sustained. Stone *v.* Powell, 5 Mo. 435.

96. The reasons of the justice for discharging defendant, contained in the record, are immaterial in a subsequent action for malicious prosecution (Kansas, etc., Coal Co. *v.* Galloway, 71 Ark. 351, 74 S. E. 521, 100 Am. St. Rep. 79; Chapman *v.* Dodd, 10 Minn. 350; Martin *v.* Corscadden, (Mont. 1906) 86 Pac. 33; Hinson *v.* Powell, 109 N. C. 534, 14 S. E. 301, judgment must speak for itself; Daly *v.* Leamy, 5 U. C. C. P. 374); and not admissible in evidence (Anderson *v.* Keller, 67 Ga. 58; Dempsey *v.* State, 27 Tex. App. 269, 11 S. W. 372, 11 Am. St. Rep. 193).

But the docket of a justice of the peace, although it stated therein in effect that he found no evidence in the case sufficient to justify the conviction of plaintiff of the offense charged against him, where such was the conclusion the law required him to reach, is admissible. Price *v.* Denison, 95 Minn. 106, 103 N. W. 728; Miller Bank *v.* Richmon, 68 Nebr. 731, 94 N. W. 998. And see Harper *v.* Harper, 49 W. Va. 661, 39 S. E. 661. And *compare* Martin *v.* Corscadden, (Mont. 1906) 86 Pac. 33.

97. Obernalte *v.* Johnson, 36 Nebr. 772, 55

acquittal[98] or discharge,[99] and the discontinuance of the original proceeding[1] have been held on the one hand to be admissible to prove a final termination and nothing else;[2] and on the other hand to show also want of probable cause[3] subject to rebuttal, contradiction, or explanation.[4]

e. Original Proceeding and Evidence Given. Evidence concerning the former trial or proceeding may be admitted on the trial of the action for malicious prosecution when material and within the issue,[5] and competent.[6] All competent[7] evidence pertaining to the trial of the former proceeding,[8] including what evidence was there given,[9] so far as it is relevant and material to the issues of probable cause[10] in issue on malicious prosecution, is admissible. The testimony of defendant as to facts peculiarly within his own knowledge given upon that trial is admissible for[11] or against him for causing that proceeding,[12] even though such

N. W. 220, holding that a special finding of a jury, in a criminal proceeding, that the complaint was made without probable cause, is not admissible. Nor is the testimony of one who served as a juror (Scott *v.* Shelor, 28 Gratt. (Va.) 891) or as a grand juror, in such a prosecution (Scotten *v.* Longfellow, 40 Ind. 23) admissible to show that the jury deliberated on the question of guilt or innocence of the accused party.

98. Cleveland, etc., R. Co. *v.* Jenkins, 75 Ill. App. 17; Baechler *v.* Andrews, 15 Can. L. T. Occ. Notes 55; Hewitt *v.* Cane, 26 Ont. 133; O'Hara *v.* Dougherty, 25 Ont. 347; McCann *v.* Preneveau, 10 Ont. 573; Reg. *v.* Ivy, 24 U. C. C. P. 78; Lusty *v.* Magrath, 6 U. C. Q. B. O. S. 340.

99. Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. N. S. 928. See also *supra*, VI, B, 4, c, (I).

1. Tumalty *v.* Parker, 100 Ill. App. 382.

2. Sherwood *v.* O'Reilly, 3 U. C. Q. B. 4.

3. Miles *v.* Walker, 66 Nebr. 728, 92 N. W. 1014. See Thomas *v.* Smith, 51 Mo. App. 605, holding that where defendant has had plaintiff arrested for larceny of part of the money in dispute, and after plaintiff's discharge he has been cast in a civil suit for the money, the civil judgment is relevant to prove probable cause.

4. Defendant may show that it was the result of a compromise (Carroll *v.* New Jersey Cent. R. Co., 134 Fed. 684); or settlement (Loftus *v.* Meyer, 84 N. Y. Suppl. 861); or that plaintiff was guilty of the offense charged notwithstanding his acquittal (Mack *v.* Sharp, 138 Mich. 448, 101 N. W. 631). That the affidavit in attachment did not allege as facts the grounds on which the arrest was vindicated is admissible to show want of probable cause. Eagleton *v.* Kabrich, 66 Mo. App. 231.

Evidence explanatory of the voluntary dismissal of the action complained of is admissible on behalf of defendant. Swindell *v.* Houck, 2 Ind. App. 519, 28 N. E. 736.

That such proceedings were dismissed by the prosecuting attorney entitles defendant to show by the prosecuting attorney why he dismissed the proceedings. Anderson *v.* Friend, 71 Ill. 475.

5. York *v.* Webster, 66 Ind. 50, holding that unusual delay in commencing the prosecution complained of after the alleged commission of the crime, and in bringing such prosecution to a trial, after it was commenced, is admissible.

However in the absence of evidence that defendant induced the committing magistrate to require an excessive bail-bond, evidence that such bond was required is not admissible. Davis *v.* Seeley, 91 Iowa 583, 60 N. W. 183, 51 Am. St. Rep. 356. Nor is an explanation of the action of the grand jury. Owens *v.* Owens, 81 Md. 518, 32 Atl. 247.

Whether the jury gave credit to the evidence of plaintiff in the original action or to the other witnesses is not material. Rigden *v.* Jordan, 81 Ga. 668, 7 S. E. 857; Parkhurst *v.* Masteller, 57 Iowa 474, 10 N. W. 864.

6. Spears *v.* Cross, 7 Port. (Ala.) 437, holding that when the affidavit upon which a warrant was issued is not in writing, the magistrate who issued the warrant is a competent witness to prove that it was issued upon the oath of the prosecutor and the contents of the oath.

7. Cotton *v.* Huidekoper, 2 Penr. & W. (Pa.) 149.

8. See cases cited *infra*, note 9 *et seq.*

9. Gardner *v.* Randolph, 18 Ala. 685; Goodrich *v.* Warner, 21 Conn. 432; Buller N. P. 14.

But where plaintiff and another were both jointly charged with a crime, it is not competent in a suit for malicious prosecution to prove that evidence was given at the preliminary examination of threats made by plaintiff's co-defendant some time before the offense, and of an attempt by him to induce a witness to make false statements in his defense, the only evidence of concert between plaintiff and his co-defendant being the testimony of a witness that he saw them commit the offense. Jordan *v.* Alabama Great Southern R. Co., 81 Ala. 220, 8 So. 191.

10. Kellogg *v.* Schenerman, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237.

Inadmissible evidence.— Evidence to establish facts which are admitted by the pleading will not be allowed (Donnelly *v.* Burkett, 75 Iowa 613, 34 N. W. 330), nor evidence of third parties, given at the trial of another complaint against plaintiff for a different offense (Falvey *v.* Faxon, 143 Mass. 284, 9 N. E. 621).

11. Richey *v.* McBean, 17 Ill. 63.

12. *Indiana.*— Evansville, etc., R. Co. *v.*

evidence was given by himself alone.[13] The testimony of other witnesses must be proved by those witnesses themselves,[14] unless after a proper foundation for the admission of secondary evidence.[15]

f. Guilt or Innocence of Accused. The issue not being whether plaintiff was guilty or innocent, but whether defendant had or had not probable cause for the proceeding,[16] it has been held that evidence of plaintiff's guilt or innocence is irrelevant to the question of probable cause.[17] Plaintiff's guilt or innocence, however, is not necessarily impertinent and immaterial,[18] and it is now generally held that defendant, although not necessarily restricted to plaintiff's guilt,[19] may introduce evidence tending to show it in proof of probable cause,[20] and that plaintiff may, for the purpose of showing want of probable cause, introduce evidence tending to establish his innocence and to disprove the charge,[21] and to show defendant's knowledge of the facts.[22]

Talbot, 131 Ind. 221, 29 N. E. 1134; Shannon *v.* Spencer, 1 Blackf. 526.

Minnesota.— Chapman *v.* Dodd, 10 Minn. 350.

Missouri.— Riney *v.* Vanlandingham, 9 Mo. 816; Hays *v.* Waller, 2 Mo. 222.

North Carolina.— Watt *v.* Greenlee, 7 N. C. 246; Moody *v.* Pender, 3 N. C. 29.

Tennessee.— Jones *v.* Carnes, 2 Yerg. 70; Scott *v.* Wilson, Cooke 315.

England.— Newton *v.* Rowe, 1 C. & K. 616, 47 E. C. L. 616.

In Gardner *v.* Randolph, 18 Ala. 685, it was held that the testimony of defendant was admissible whether the fact sworn to was peculiarly within his own knowledge or not.

13. McMahan *v.* Armstrong, 2 Stew. & P. (Ala.) 151, 23 Am. Dec. 304. *Contra*, Paukett *v.* Livermore, 5 Iowa 277.

14. *Alabama.*— Thompson *v.* Richardson, 96 Ala. 488, 11 So. 728.

Indiana.— Larrence *v.* Lanning, 2 Ind. 256.

Minnesota.— Chapman *v.* Dodd, 10 Minn. 350.

New York.— Burt *v.* Place, 4 Wend. 591.

North Carolina.— Watt *v.* Greenlee, 9 N. C. 186.

Ohio.— John *v.* Bridgman, 27 Ohio St. 22; Richards *v.* Foulke, 3 Ohio 52.

Pennsylvania.— Huidekoper *v.* Cotton, 3 Watts 56; Cotton *v.* Huidekoper, 2 Penr. & W. 149.

Contra.— Goodrich *v.* Warner, 21 Conn. 432; Bacon *v.* Towne, 4 Cush. (Mass.) 217, where it was held that such facts might be proved by any competent witness who had heard such testimony.

But it is competent to prove by any competent witness who was present and heard the testimony that no evidence in support of the criminal charge was offered or given by defendant. John *v.* Bridgman, 27 Ohio St. 22.

Depositions taken in the former suit, tending to show that defendant could have ascertained facts exculpating plaintiff, should have been admitted. Wetmore *v.* Mellinger, (Iowa 1883) 14 N. W. 722.

The official stenographer was allowed to read from his notes evidence of a witness on the criminal prosecution who was beyond the jurisdiction of the court. Brown *v.* Willoughby, 5 Colo. 1.

15. Chapman *v.* Dodd, 10 Minn. 350.

16. See *supra*, VI, B, 1, c.

17. Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650; Casebeer *v.* Rice, 18 Nebr. 203, 24 N. W. 693; Turner *v.* O'Brien, 11 Nebr. 108, 7 N. W. 850; Fenstermaker *v.* Page, 20 Nev. 290, 21 Pac. 322; Fox *v.* Smith, 25 R. I. 255, 55 Atl. 698; King *v.* Colvin, 11 R. I. 582.

18. Patterson *v.* Garlock, 39 Mich. 447.

19. Durham *v.* Jones, 119 N. C. 262, 25 S. E. 873.

20. Bacon *v.* Towne, 4 Cush. (Mass.) 217; Mack *v.* Sharp, 138 Mich. 448, 101 N. W. 631; Bell *v.* Pearcy, 27 N. C. 83; Plummer *v.* Gheen, 10 N. C. 66, 14 Am. Dec. 572; Bigelow *v.* Sickles, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25.

21. *Alabama.*— Long *v.* Rogers, 17 Ala. 540.

Illinois.— Leidig *v.* Rawson, 2 Ill. 272, 29 Am. Dec. 354.

Indiana.— Winemiller *v.* Thrash, 125 Ind. 353, 25 N. E. 350.

Louisiana.— Behrnes *v.* Coxe, 2 La. Ann. 472.

Michigan.— Patterson *v.* Garlock, 39 Mich. 447.

Pennsylvania.— Katterman *v.* Stitzer, 7 Watts 189.

Washington.— Kerstetter *v.* Thomas, 36 Wash. 620, 79 Pac. 290.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 135.

That plaintiff was innocent is not conclusive of want of probable cause. Atchison, etc., R. Co. *v.* Smith, 60 Kan. 4, 55 Pac. 272.

Evidence of transactions to which defendants were strangers are not admissible. Thompson *v.* Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554.

22. *Louisiana.*— Behrnes *v.* Coxe, 2 La. Ann. 472.

Maryland.— Cecil *v.* Clarke, 17 Md. 508.

Nebraska.— Casebeer *v.* Rice, 18 Nebr. 203, 24 N. W. 693.

Nevada.— See Fenstermaker *v.* Page, 20 Nev. 290, 21 Pac. 322.

Pennsylvania.— Katterman *v.* Stitzer, 7 Watts 189.

Wisconsin.—Bigelow *v.* Sickles, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 135.

g. Belief in Guilt of Accused. Defendant in an action for malicious prosecution is competent to testify directly as to his belief in the guilt of plaintiff when the prosecution was commenced,[23] and may introduce testimony otherwise proper to show just grounds for his belief.[24]

h. Advice of Counsel. It is competent for defendant to show on the question of probable cause that before instituting the original proceeding he in good faith consulted with and acted under the advice of counsel.[25] He must state what facts he communicated.[26]

6. Malice or Absence Thereof — a. In General. Upon the issue[27] of malice, as distinguished from probable cause,[28] plaintiff may introduce competent[29] and relevant[30] evidence to prove malice[31] on the part of defendant[32] toward

23. *Michigan.*— Spalding *v.* Lowe, 56 Mich. 366, 23 N. W. 46.

Minnesota.— Garrett *v.* Mannheimer, 24 Minn. 193.

Missouri.— Sparling *v.* Conway, 75 Mo. 510 [*affirming* 6 Mo. App. 283].

Nebraska.— Perrenoud *v.* Helm, 65 Nebr. 77, 90 N. W. 980; Turner *v.* O'Brien, 5 Nebr. 542.

New York.— McKown *v.* Hunter, 30 N. Y. 625; Goodman *v.* Stroheim, 36 N. Y. Super. Ct. 216. See also Conner *v.* Wetmore, 110 N. Y. App. Div. 440, 96 N. Y. Suppl. 999.

Ohio.— White *v.* Tucker, 16 Ohio St. 468.

Tennessee.— Greer *v.* Whitfield, 4 Lea 85.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 136.

This is in accordance with the general rule that whenever the belief, motive, or intention of any person is a material fact to be proved it is competent to prove it by direct testimony of such person. 1 Wigmore Ev. § 581.

Direct evidence of malice see *infra*, IV, C, 6, c.

24. Griffin *v.* Keeney, 27 N. Y. App. Div. 492, 50 N. Y. Suppl. 721; Neys *v.* Taylor, 12 S. D. 488, 81 N. W. 901. *Compare* Conner *v.* Wetmore, 110 N. Y. App. Div. 440, 96 N. Y. Suppl. 999.

Evidence tending to show belief in insanity see Griswold *v.* Griswold, 143 Cal. 617, 77 Pac. 672, consultation with physician.

25. *Georgia.*— Fox *v.* Davis, 55 Ga. 298.

Illinois.— Collins *v.* Hayte, 50 Ill. 337, 99 Am. Dec. 521.

Indiana.— Paddock *v.* Watts, 116 Ind. 146, 18 N. E. 518, 9 Am. St. Rep. 832.

Kentucky.— O'Daniel *v.* Smith, 66 S. W. 284, 23 Ky. L. Rep. 1822; Mark *v.* Christian, 59 S. W. 1092, 22 Ky. L. Rep. 1102.

Michigan.— Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860.

Nebraska.— Schroeder *v.* Blum, (1905) 103 N. W. 1073.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 137.

Full and fair statement of all the facts must be shown to render such evidence admissible. McCarthy *v.* Kitchen, 59 Ind. 500; Donnelly *v.* Burkett, 75 Iowa 613, 34 N. W. 330; Center *v.* Spring, 2 Iowa 393; Sharpe *v.* Johnston, 59 Mo. 557; Davidoff *v.* Wheeler, etc., Mfg. Co., 16 Misc. (N. Y.) 31, 37 N. Y. Suppl. 661 [*affirming* 14 Misc. 456, 35 N. Y. Suppl. 1019].

What such advice given was.— Davidoff *v.* Wheeler, etc., Mfg. Co., 16 Misc. (N. Y.) 31, 37 N. Y. Suppl. 661 [*affirming* 14 Misc. 456, 35 N. Y. Suppl. 1019].

26. Lansky *v.* Prettyman, 140 Mich. 40, 103 N. W. 538; Perrenoud *v.* Helm, 65 Nebr. 77, 90 N. W. 980. In Whitfield *v.* Westbrook, 40 Miss. 311, it was held that to allow the witness to state simply that he "stated all the facts in his knowledge" instead of stating what facts he communicated would enable the witness to evade the real question upon which the matter of defense rested. But in Brinsley *v.* Schulz, 124 Wis. 426, 102 N. W. 918, it was held that such testimony in general terms was sufficient to show that all facts material to the matter known to defendants were stated to the officer.

An attorney who consulted with attachment plaintiff upon the case may testify as to the opinion given by him as such attorney. Alexander *v.* Harrison, 38 Mo. 258, 90 Am. Dec. 431.

27. Duffy *v.* Beirne, 30 N. Y. App. Div. 384, 51 N. Y. Suppl. 626; Scott *v.* Dewey, 23 Pa. Super. Ct. 396.

28. Proof may be competent to show malice which is not evidence of want of probable cause (McKenna *v.* Heinlen, 128 Cal. 97, 60 Pac. 668), although usually the same evidence is admissible to prove both (Griswold *v.* Griswold, 143 Cal. 617, 77 Pac. 672).

29. Coble *v.* Huffines, 132 N. C. 399, 43 S. E. 909.

30. Thurkettle *v.* Frost, 137 Mich. 649, 100 N. W. 283; Jeremy *v.* St. Paul Boom Co., 84 Minn. 516, 88 N. W. 13. It is competent for plaintiff to introduce evidence, on the question of malice, tending to disprove the charge against him. Long *v.* Rogers, 17 Ala. 540.

That plaintiff was a minor, under twenty-one years of age, is irrelevant. Motes *v.* Bates, 74 Ala. 374.

31. Where the action has been commenced by defendant, without authority, evidence of express malice on the part of defendant toward plaintiff, while not necessary, is properly admitted (Smith *v.* Hyndman, 10 Cush. (Mass.) 554; McCann *v.* Preneveau, 10 Ont. 573), and, where punitive damages are demanded on the ground of malice, may show any facts tending to prove malice (Lyon *v.* Hancock, 35 Cal. 372).

32. *California.*— Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380.

him.[33] Correspondingly defendant may introduce any evidence which reasonably tends to rebut the inference of malice.[34]

b. Hearsay. Defendant may introduce evidence designed to show what information he had received from reputable persons in whom he confided and on which he acted to rebut proof of malice;[35] but evidence which has no tendency to disprove malice should be excluded.[36]

c. Direct Evidence. For the purpose of disproving malice, defendant, or his agent prosecuting,[37] may testify directly as to his relevant knowledge,[38] purpose,[39] motive, or belief in instituting the original proceeding complained of as malicious.[40]

Connecticut.— Chatfield *v.* Bunnell, 69 Conn. 511, 37 Atl. 1074.

Iowa.— Olson *v.* Neal, 63 Iowa 214, 18 N. W. 863, the amount involved.

Michigan.— Tryon *v.* Pingree, 112 Mich. 338, 70 N. W. 905, 67 Am. St. Rep. 398, 37 L. R. A. 222.

North Carolina.—Watt *v.* Greenlee, 9 N. C. 186, that defendant was the only witness against him on the prosecution.

Oregon.— Stamper *v.* Raymond, 38 Oreg. 16, 62 Pac. 20.

Wisconsin.—Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135, the amount involved.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 138.

33. Evidence of malice toward other persons than the complaining parties is not admissible. Barton *v.* Kavanaugh, 12 La. Ann. 332. The jury ought not, on the question of malice, to take into consideration facts establishing against some of defendants a case of false imprisonment, which constitutes a distinct cause of action and for which they might be liable in another suit. Carpenter *v.* Shelden, 5 Sandf. (N. Y.) 77. *Contra*, Thomas *v.* Norris, 64 N. C. 780, where plaintiff and another were charged with stealing a blanket; plaintiff was allowed to show defendant's malice toward such other person as tending to show malice against himself.

34. *Alabama.*— Yarbrough *v.* Hudson, 19 Ala. 653; Marshall *v.* Betner, 17 Ala. 832.

California.— Lyon *v.* Hancock, 35 Cal. 372.

Indiana.— Peden *v.* Mail, 118 Ind. 560, 20 N. E. 446; Ammerman *v.* Crosby, 26 Ind. 451.

Iowa.— Mitchell *v.* Harcourt, 62 Iowa 349, 17 N. W. 581.

Kentucky.— Campbell *v.* Threlkeld, 2 Dana 425.

Louisiana.— Maloney *v.* Doane, 15 La. 278, 35 Am. Dec. 204.

Vermont.— Barron *v.* Mason, 31 Vt. 189.

Wisconsin.— Murphy *v.* Martin, 58 Wis. 276, 16 N. W. 603.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 138.

But the general bad reputation of plaintiff's mother, as a peaceable and orderly person, cannot be admitted to show that defendant acted in good faith in procuring a peace warrant against her son. Hyde *v.* Gruech, 62 Md. 577.

Commission of similar acts.— For the purpose of proving want of malice, it is competent for defendant to show that plaintiff was at the time of the prosecution generally reputed to be guilty of acts similar to the one for which he was prosecuted. Barron *v.* Mason, 31 Vt. 189.

35. Ammerman *v.* Crosby, 26 Ind. 451. See, generally, EVIDENCE, 16 Cyc. 1192 *et seq.*

To rebut malice defendant may prove that a certain person communicated to another, with a request that the latter would make it known to defendant, the fact that the former saw plaintiff do the criminal act of which he was accused, and that this information was communicated to defendant before the complaint against plaintiff was made. Bacon *v.* Towne, 4 Cush. (Mass.) 217.

Common report that plaintiff had committed the alleged crime is not of itself sufficient to show probable cause; it may, with other circumstances, tend to negative malice, and is admissible in defendant's behalf. Pullen *v.* Glidden, 68 Me. 559.

Evidence tending to explain the motive of the prosecutor in insisting on a continuance of the proceeding. Hall *v.* Kehoe, 5 Silv. Sup. (N. Y.) 129, 8 N. Y. Suppl. 176.

Evidence that defendant was informed by a clerk of plaintiff of his business and financial affairs, and of his efforts to borrow money and dispose of his property, is admissible. Le Clear *v.* Perkins, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627.

36. Wilson *v.* Bowen, 64 Mich. 133, 31 N. W. 81.

37. Schwarting *v.* Van Wie New York Grocery Co., 60 N. Y. App. Div. 475, 69 N. Y. Suppl. 978.

38. Auer *v.* Mauser, 6 Pa. Super. Ct. 618, 42 Wkly. Notes Cas. 40.

39. Parker *v.* Parker, 102 Iowa 500, 71 N. W. 421.

40. *District of Columbia.*—Coleman *v.* Heurich, 2 Mackey 189.

Indiana.— Heap *v.* Parrish, 104 Ind. 36, 3 N. E. 549.

Maryland.— Campbell *v.* Baltimore, etc., R. Co., 97 Md. 341, 55 Atl. 532.

Michigan.—Spalding *v.* Lowe, 56 Mich. 366, 23 N. W. 46.

Minnesota.— Garrett *v.* Mannheimer, 24 Minn. 193.

Missouri.—Vansickle *v.* Brown, 68 Mo. 627.

Nebraska.— Turner *v.* O'Brien, 5 Nebr. 542.

New York.— McCormack *v.* Perry, 47 Hun 71; Leake *v.* Carlisle, 75 N. Y. Suppl. 382. *Contra*, Lawyer *v.* Loomis, 3 Thomps. & C. 393.

Tennessee.— Greer *v.* Whitfield, 4 Lea 85.

It has been held, however, that plaintiff cannot be interrogated as to defendant's motive.[41]

d. Prior Transactions and Relations. Prior transactions occurring,[42] and the personal relations previously existing between the parties to the present action,[43] and feelings of hostility, enmity, and ill-will[44] formerly subsisting may be shown upon the question of malice.[45]

e. Acts and Admissions. Evidence of the conduct, admissions, and declarations of the parties, plaintiff[46] and defendant,[47] and of defendant's authorized agents,[48] alike, whether occurring before or after the time of the original proceed-

Wisconsin.— Sherburne *v.* Rodman, 51 Wis. 474, 8 N. W. 414.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 140.

Contra.— L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 121 Fed. 233, 57 C. C. A. 469.

Advice of counsel.— Defendant is competent to testify that he instituted the prosecution in accordance with the opinion of counsel first obtained. Turner *v.* O'Brien, 5 Nebr. 542.

On cross-examination.— Where the good faith of the district attorney in instituting the prosecution is not impugned, defendant is not entitled to ask him on cross-examination whether he acted in good faith. Spear *v.* Hiles, 67 Wis. 350, 30 N. W. 506.

41. Hamer *v.* Ogden First Nat. Bank, 9 Utah 215, 33 Pac. 941, holding that while a witness may be interrogated as to his own motives in the doing or not doing of a particular act or thing, it is difficult to observe by what principle of law he may be interrogated concerning the motive of another person, when such person has given no expression of his intention to him.

42. Clark *v.* Folkers, 1 Nebr. (Unoff.) 96, 95 N. W. 328; Bankell *v.* Weinacht, 99 N. Y. App. Div. 316, 91 N. Y. Suppl. 107.

But not as to persons not parties to the action. Shanks *v.* Robinson, 130 Ind. 479, 30 N. E. 516; Hamer *v.* Ogden First Nat. Bank, 9 Utah 215, 33 Pac. 941.

43. Long *v.* Rodgers, 19 Ala. 321.

But malice cannot be shown against one who swears out a warrant for arrest, but was not present at the time of the arrest, and gave no instructions as to how it should be made, or the manner in which the officer made the arrest. Jones *v.* Wilmington, etc., R. Co., 125 N. C. 227, 34 S. E. 398.

44. Merchant *v.* Pielke, 10 N. D. 48, 84 N. W. 574.

45. Lyon *v.* Hancock, 35 Cal. 372; Collins *v.* Fisher, 50 Ill. 359; Bruington *v.* Wingate, 55 Iowa 140, 7 N. W. 478; Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860; Patterson *v.* Garlock, 39 Mich. 447.

46. Flam *v.* Lee, 116 Iowa 289, 90 N. W. 70, 93 Am. St. Rep. 242.

Confession of other larcenies.— An offer by defendant to prove that plaintiff had confessed to witness about two years prior to his arrest in controversy that he had at one time boarded at a restaurant in another state, and had been in the habit of stealing articles of silverware from the restaurant and giving them to his relatives, all of which had been communicated to defendant prior to the commencement of the prosecution, as bearing on defendant's good faith and to rebut the allegation of malice, was properly refused for failure to show when the confessed larcenies were committed, or that defendant believed the confession to be true. Martin *v.* Corscadden, (Mont. 1906) 86 Pac. 33.

What defendant in attachment said upon leaving home, or immediately previous thereto, as to the point of his destination (the ground of attachment being his absence from the state) is admissible; but he cannot show by common reputation in the neighborhood that it was supposed that he had gone to an adjacent state on a visit of business or pleasure. Pitts *v.* Burroughs, 6 Ala. 733.

47. *California.*— McKenna *v.* Heinlen, 128 Cal. 97, 60 Pac. 668.

Illinois.— Waters *v.* West Chicago St. R. Co., 101 Ill. App. 265; Epstein *v.* Berkowsky, 64 Ill. App. 498.

Iowa.— Parker *v.* Parker, 102 Iowa 500, 71 N. W. 421.

Massachusetts.— Walkup *v.* Pickering, 176 Mass. 174, 57 N. E. 364.

Minnesota.— Skeffington *v.* Eylward, 97 Minn. 244, 105 N. W. 638.

New Hampshire.— Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800.

New York.— Scott *v.* Dennett Surpassing Coffee Co., 51 N. Y. App. Div. 32, 64 N. Y. Suppl. 1016; Manasha *v.* Royal Ben. Soc., 21 Misc. 474, 47 N. Y. Suppl. 628.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 142.

Forwardness and activity in exposing plaintiff by publication is admissible. Vanderbilt *v.* Mathis, 5 Duer (N. Y.) 304.

Threats and expressions of ill-will are admissible. Parker *v.* Parker, 102 Iowa 500, 71 N. W. 421; Hidy *v.* Murray, 101 Iowa 65, 69 N. W. 1138; Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860; Vanderbilt *v.* Mathis, 5 Duer (N. Y.) 304; Brooks *v.* Jones, 33 N. C. 260; Mylott *v.* Skinner, 12 Pa. Super. Ct. 137; Strehlow *v.* Pettit, 96 Wis. 22, 71 N. W. 102.

Zeal displayed by defendant in conducting the prosecution is properly admitted to prove malice. Straus *v.* Young, 36 Md. 246.

48. Stuckey *v.* Savannah, etc., R. Co., 102 Ga. 782, 29 S. E. 920; Kelly *v.* Durham Traction Co., 132 N. C. 368, 43 S. E. 923, 133 N. C. 418, 45 S. E. 826; Taylor *v.* Huff, 130 N. C. 595, 41 S. E. 873; Wuest *v.* American Tobacco Co., 10 S. D. 394, 73 N. W. 903.

ing,[49] connected with the transactions[50] and tending to prove intent, is admissible upon the issue of malice.[51]

f. Original Proceeding. Any proceedings taken or any testimony taken in the former action having a natural tendency to show malice may be proved;[52] but evidence having no bearing upon the question of malice is immaterial and should be excluded.[53]

g. Other Actions. Evidence of other judicial proceedings tending either to establish malice[54] or to rebut the inference of malice[55] is admissible.

h. Advice of Counsel. Defendant may repel the inference of malice by showing that he acted upon legal advice.[56]

49. Brown *v.* Riggs, 123 Mich. 208, 81 N. W. 1079; Auer *v.* Mauser, 6 Pa. Super. Ct. 618, 42 Wkly. Notes Cas. 40.

50. Ramsey *v.* Flowers, 72 Ark. 316, 80 S. W. 147; Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800.

51. *Alabama.*— Motes *v.* Bates, 74 Ala. 374.

Colorado.— Murphy *v.* Hobbs, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366.

Georgia.— Rigden *v.* Jordan, 81 Ga. 668, 7 S. E. 857.

Illinois.— Willard *v.* Petitt, 153 Ill. 663, 39 N. E. 991 [*affirming* 54 Ill. App. 257].

Iowa.— Parker *v.* Parker, 102 Iowa 500, 71 N. W. 421; Holden *v.* Merritt, 92 Iowa 707, 61 N. W. 390.

Maryland.— Turner *v.* Walker, 3 Gill & J. 377, 22 Am. Dec. 329.

Massachusetts.— Ripley *v.* McBarron, 125 Mass. 272.

Michigan.— Cooney *v.* Chase, 81 Mich. 203, 45 N. W. 833.

Minnesota.—Smith *v.* Maben, 42 Minn. 516, 44 N. W. 792; Chapman *v.* Dodd, 10 Minn. 350.

New Hampshire.— Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800.

North Carolina.— Tucker *v.* Wilkins, 105 N. C. 272, 11 S. E. 575.

Vermont.— Barron *v.* Mason, 31 Vt. 189.

Wisconsin.— Palmer *v.* Broder, 78 Wis. 483, 47 N. W. 744.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 142.

But see Christian *v.* Hanna, 58 Mo. App. 37, holding that a conversation, had between prosecutor and accused after the beginning of the trial which tended to show malice, but not lack of probable cause for the continuance of the trial, is not admissible.

52. Plaintiff may introduce the record (Dreux *v.* Domec, 18 Cal. 83; Olmstead *v.* Partridge, 16 Gray (Mass.) 381. *Contra*, Wilmerton *v.* Sample, 39 Ill. App. 60), as well as the testimony given upon the former trial (Logan *v.* Maytag, 57 Iowa 107, 10 N. W. 311), the conduct of the parties before the justice (Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860), the justice's opinion after a full and fair statement of the facts (White *v.* Tucker, 16 Ohio St. 468), telegrams tending to show zeal or persistency in the prosecution (Marks *v.* Hastings, 101 Ala. 165, 13 So. 297), or reluctancy of defendant to prosecute (Goodrich *v.* Warner, 21 Conn. 432), overstated value of articles stated (Olmstead *v.* Partridge, *supra*), an offer of compromise or arbitration by the debtor before the attachment was sued out (Lewis *v.* Taylor, (Tex. Civ. App. 1893) 24 S. W. 92), a proposition of settlement made after attachment had been issued, but before levy (McLaren *v.* Birdsong, 24 Ga. 265), that defendant, at a time prior to the commencement of the action, made a second attempt to indict plaintiff (Reynolds *v.* Haywood, 77 Hun (N. Y.) 131, 28 N. Y. Suppl. 467), and defendant's reasons for dismissal of former action (Collins *v.* Fisher, 50 Ill. 359), are admissible on the question of malice.

A judgment reciting finding of court that prosecution was frivolous and malicious and imposing costs on defendant is admissible to prove malice. Coble *v.* Huffines, 132 N. C. 399, 43 S. E. 909.

Evidence as to what occurred between defendant and the magistrate at the time the information on which plaintiff was arrested was sworn to was admissible on the question of malice, although it did not constitute a defense. Fetzer *v.* Burlew, 114 N. Y. App. Div. 650, 99 N. Y. Suppl. 1100.

Where defendant is disqualified to testify he may prove by the magistrate what he testified to before him (Guerrant *v.* Tinder, Gilm. (Va.) 36), but not rehearsals of testimony given by witnesses other than defendant (John *v.* Bridgman, 27 Ohio St. 22).

53. Donnelly *v.* Burkett, 75 Iowa 613, 34 N. W. 330; Scovill *v.* Glasner, 79 Mo. 449.

54. *Indiana.*— Peden *v.* Mail, 118 Ind. 560, 20 N. E. 446; Keesling *v.* Doyle, 8 Ind. App. 43, 35 N. E. 126.

Michigan.— Cooney *v.* Chase, 81 Mich. 203, 45 N. W. 833.

Minnesota.— Severns *v.* Brainard, 61 Minn. 265, 63 N. W. 477.

North Carolina.— Coble *v.* Huffines, 132 N. C. 399, 43 S. E. 909, 133 N. C. 422, 45 S. E. 760.

Wisconsin.— Magmer *v.* Renk, 65 Wis. 364, 27 N. W. 26, evidence of successive suits on the same unfounded claim.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 145.

55. Yarbrough *v.* Hudson, 19 Ala. 653; Fowles *v.* Hayden, 129 Mich. 586, 89 N. W. 339; Thomas *v.* Smith, 51 Mo. App. 605; Sheahan *v.* National Steamship Co., 66 Hun (N. Y.) 48, 20 N. Y. Suppl. 740 [*affirmed* in 142 N. Y. 655, 37 N. E. 569].

56. Brooks *v.* Bradford, 4 Colo. App. 410, 36 Pac. 303 (holding, however, that it is

7. Favorable Termination of Original Proceeding. The fact that an original judicial proceeding had been prosecuted to a final termination in favor of plaintiff, when within the issues,[57] may be proved [58] by conventionally appropriate and competent evidence,[59] viz., by the production of the original records,[60] or a certified or examined copy thereof,[61] or of secondary evidence when a proper foundation has been laid.[62] Specifically, the record of the quarter sessions,[63] or of the police court,[64] entries in the justice's docket,[65] the original warrant with the

necessary in such a case for defendant to show what facts he stated to his counsel when he obtained such advice); Sehon *v.* Whitt, 92 S. W. 280, 28 Ky. L. Rep. 1222, 92 S. W. 280, 29 Ky. L. Rep. 691; Cooper *v.* Utterbach, 37 Md. 282.

A letter of the prosecuting attorney authorizing the commencement of the prosecution complained of is admissible for such purpose. Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860.

Declarations of plaintiff's attorney in a trover suit, not made in plaintiff's presence nor brought home to him, are inadmissible to show malice in bringing such suit. Farrar *v.* Brackett, 86 Ga. 463, 12 S. E. 686.

57. If the allegation is made part of the description of the instrument referred to, it must be literally proved to admit it in evidence (Munns *v.* De Nemours, 17 Fed. Cas. No. 9,926, 3 Wash. 31; Purcell *v.* Macnamara, 9 East 157, 9 Rev. Rep. 578; Pope *v.* Foster, 4 T. R. 590), while if it be one of matter of substance only, it may be substantially proved (Usher *v.* Whitinger, 1 Blackf. (Ind.) 250; Richards *v.* Foulks, 3 Ohio 66). See Cooper *v.* Langway, 76 Tex. 121, 13 S. W. 179.

Matter not pertinent to issues.— When the transcript or record contains matter not pertinent to the issue on trial, the proper course is to apply to the court to prevent the reading in evidence of the improper matter or to instruct the jury to disregard it. Granger *v.* Warrington, 8 Ill. 299; Casey *v.* Sevatson, 30 Minn. 516, 16 N. W. 407.

58. Lautman *v.* Pepin, 26 Ind. App. 427, 59 N. E. 1073.

59. See cases cited *infra*, notes 60 *et seq.*

Declarations.— In Bennett *v.* Black, 1 Stew. (Ala.) 39, in an action for malicious prosecution, on a charge of robbery in taking a slave from defendant, the declaration of the person claiming title to the slave "that he had determined to abandon his claim to the slave," although made in the absence of plaintiff, was held admissible in evidence.

An affidavit alleging malicious prosecutions, that plaintiff was arrested and brought before an alderman for breach of the peace, that defendant neglected to prosecute the suit, and that it was ended and determined, was held insufficient, as it did not set forth what action was taken by the alderman. Walker *v.* Curran, 1 Phila. (Pa.) 113.

The decision of the court discharging plaintiff of the crime charged against him has no relevancy on the question of probable cause, but is only relevant to prove that the prosecution has ended. Singer Mfg. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320.

60. *Arkansas.*— Hooper *v.* Lee, 12 Ark. 779.

Georgia.— Anderson *v.* Keller, 67 Ga. 58.

Illinois.— Granger *v.* Warrington, 8 Ill. 299; Knecht *v.* Lehr, 81 Ill. App. 208.

Kansas.— Sweeney *v.* Perney, 40 Kan. 102, 19 Pac. 328.

Massachusetts.— Stone *v.* Crocker, 24 Pick. 81.

Nebraska.— Metcalf *v.* Bockoven, 62 Nebr. 877, 87 N. W. 1055; Casebeer *v.* Drahoble, 13 Nebr. 465, 14 N. W. 397.

New Hampshire.— Lamprey *v.* Hood, 73 N. H. 384, 62 Atl. 380.

Pennsylvania.— Katterman *v.* Stilzer, 7 Watts 189.

Rhode Island.— Fox *v.* Smith, 25 R. I. 255, 55 Atl. 698.

Texas.— Chubb *v.* Griffin, 13 Tex. 392.

Canada.— Hewitt *v.* Cane, 26 Ont. 133; O'Hara *v.* Dougherty, 25 Ont. 347. *Compare* Daly *v.* Leamy, 5 U. C. C. P. 374.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 146.

But the records can only be used to prove the fact that such judgment was rendered; when it is sought to use it as evidence of ulterior facts, that it is sought to bind a litigant to recitations in a record to which he was not a party, and about which determination he had no voice or direction, that portion should be excluded. Sweeney *v.* Perney, 40 Kan. 102, 19 Pac. 328; Casey *v.* Sevatson, 30 Minn. 516, 16 N. W. 407.

Admitted facts.— Where the facts intended to be proved by a transcript or record stand admitted, such record is properly excluded. Donnelly *v.* Burkett, 75 Iowa 613, 34 N. W. 330.

61. Enright *v.* Gibson, 119 Ill. App. 411 [*affirmed* in 219 Ill. 550, 76 N. E. 689]; Olmstead *v.* Partridge, 16 Gray (Mass.) 381; Sayles *v.* Briggs, 4 Metc. (Mass.) 421; Ward *v.* Suter, 70 Tex. 343, 8 S. W. 51, 8 Am. St. Rep. 606.

62. Hooper *v.* Lee, 12 Ark. 779. See Brown *v.* Randall, 36 Conn. 56, 4 Am. Rep. 35, the usual secondary evidence upon a showing that such records and judgment are lost or destroyed.

63. Zebley *v.* Storey, 117 Pa. St. 478, 12 Atl. 569.

64. Brainerd *v.* Brackett, 33 Me. 580.

65. *Illinois.*— Ames *v.* Snider, 69 Ill. 376; Wilmerton *v.* Sample, 39 Ill. App. 60; McGuire *v.* Goodman, 31 Ill. App. 420.

Michigan.— Fletcher *v.* Chicago, etc., R. Co., 109 Mich. 363, 67 N. W. 330.

Minnesota.— Price *v.* Denison, 95 Minn. 106, 103 N. W. 728.

acquittal duly indorsed thereon,[66] the affidavit,[67] the affidavit and warrant,[68] the grand jury docket,[69] the indictment[70] or the information,[71] the verdict[72] and judgment[73] of the court in which it was determined, and the record on appeal,[74] have all been held to be properly admissible for this purpose. But if the record of the former action proves that such action terminated after the action for malicious prosecution was commenced, it is inadmissible in evidence.[75]

8. Damages — a. In General. To show the extent of plaintiff's injury, any evidence reasonably tending to show the natural and probable consequence of defendant's act is admissible.[76] But evidence is not admissible to show injuries

Ohio.— John *v.* Bridgman, 27 Ohio St. 22.

West Virginia.— Harper *v.* Harper, 49 W. Va. 661, 39 S. E. 661.

Wisconsin.— Magmer *v.* Renk, 65 Wis. 364, 27 N. W. 26.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 146.

The record of a justice of the peace, showing plaintiff's arrest, hearing, and acquittal (Wright *v.* Fansler, 90 Ind. 492; Sweeney *v.* Perney, 40 Kan. 102, 19 Pac. 328), although the judgment was not entered of record for nearly two years after it was rendered (Wright *v.* Fansler, *supra*).

66. Dougherty *v.* Dorsey, 4 Bibb (Ky.) 207.

67. The affidavit on which the warrant for the arrest is issued is admissible in evidence for plaintiff, if it authorized the warrant (McCullough *v.* Rice, 59 Ind. 580; Collins *v.* Love, 7 Blackf. (Ind.) 416; Turpin *v.* Remy, 3 Blackf. (Ind.) 210), although technically defective (McCullough *v.* Rice, *supra*; Turpin *v.* Remy, *supra*).

68. Cooper *v.* Turrentine, 17 Ala. 13; Conduit *v.* Dicken, 3 Blackf. (Ind.) 216; Cooney *v.* Chase, 81 Mich. 203, 45 N. W. 833.

The oath of defendant is evidence for him. Johnson *v.* Chambers, 32 N. C. 287.

69. Shannon *v.* Sims, (Ala. 1906) 40 So. 574.

70. Watts *v.* Clegg, 48 Ala. 561; Fant *v.* McDaniel, 1 Brev. (S. C.) 173, 2 Am. Dec. 660.

Plaintiff may read in evidence the indictment, with the indorsements, which it was alleged defendant had procured against him. Winemiller *v.* Thrash, 125 Ind. 353, 25 N. E. 350.

71. Mass *v.* Meire, 37 Iowa 97; Beihofer *v.* Loeffert, 159 Pa. St. 365, 28 Atl. 217.

72. Sutor *v.* Wood, 76 Tex. 403, 13 S. W. 321.

73. Winn *v.* Peckham, 42 Wis. 493; Brewer *v.* Jacobs, 22 Fed. 217.

A memorandum made by a justice of the peace at the time of trial of the prosecution before him, showing the judgment which he rendered, is admissible. Long *v.* Rodgers, 19 Ala. 321.

Entry made nunc pro tunc, after the commencement of the action for malicious prosecution, does not affect the rule. Holmes *v.* Horger, 96 Mich. 408, 56 N. W. 3.

74. Conduit *v.* Dicken, 3 Blackf. (Ind.) 216, to show a reversal of the lower court.

75. Feazle *v.* Simpson, 2 Ill. 30; Reg. *v.* Ivy, 24 U. C. C. P. 78; Wilson *v.* Thorpe, 18 U. C. Q. B. 443.

76. *Alabama.*— O'Grady *v.* Julian, 34 Ala. 88.

Colorado.— French *v.* Guyot, 30 Colo. 222, 70 Pac. 683.

Indiana.— Oldfather *v.* Zent, 21 Ind. App. 307, 52 N. E. 236.

Iowa.—Flam *v.* Lee, 116 Iowa 289, 90 N. W. 70, 98 Am. St. Rep. 242; Pratt *v.* Hampe, 114 Iowa 237, 86 N. W. 292. See also Hooker *v.* Chittenden, 106 Iowa 321, 76 N. W. 706.

Kansas.— See Reynolds *v.* Dunlap, (1906) 84 Pac. 720.

Massachusetts.— Burnham *v.* Collateral Loan Co., 179 Mass. 268, 60 N. E. 617.

Michigan.— Gould *v.* Gregory, 133 Mich. 382, 95 N. W. 414.

Nebraska.— Minneapolis Threshing Mach. Co. *v.* Regier, 51 Nebr. 402, 70 N. W. 934.

United States.— Tamblyn *v.* Johnston, 126 Fed. 267, 62 C. C. A. 601.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 148.

Actual effects of defendant's acts up to the time of trial may be shown. Schmidt *v.* Hughes, 33 Ill. App. 65.

Defendant's peculiar situation and circumstances at the time suit was brought may be shown. Nichols *v.* Bronson, 2 Day (Conn.) 211.

Evidence of attachments immediately following defendant's attachment may be shown. Grimes *v.* Bowerman, 92 Mich. 258, 52 N. W. 751.

Condition of apartment in jail in which he was confined may be shown. Driggs *v.* Morgan, 10 Rob. (La. 119. But see Zebley *v.* Storey, 117 Pa. St. 478, 12 Atl. 569.

Duration of imprisonment may be shown. King *v.* Colvin, 11 R. I. 582.

Search for exiled plaintiff.— Where one of the injuries complained of was that defendants by threats and violence had maliciously driven plaintiff into exile and forced him to abandon his home, family, and business, it is competent to prove that search had been made for him. Pullen *v.* Lane, 4 Coldw. (Tenn.) 249.

Too remote.— In an action by partners for damages from the issue of an attachment against them maliciously, and without probable cause, evidence of the disposition subsequently of the partnership property, including the appointment of a receiver thereof, in a suit for dissolution of the partnership, and the loss and shrinkage in the assets on the

resulting from conditions over which defendant was not directly responsible, and over which it does not appear that he exercised control.[77]

b. Mitigation of Damages. Plaintiff's general bad character[78] or his reputation for insanity,[79] and any relevant evidence[80] explanatory of defendant's motives,[81] and, in cases in which exemplary damages might be awarded, advice of counsel may be proven in mitigation of damages.[82]

c. Aggravation of Damages. The action of malicious prosecution being one in which exemplary damages[83] are allowable, evidence of defendant's pecuniary

receiver's sale, is not admissible as such damages are too remote. Cochrane *v.* Quackenbush, 29 Minn. 376, 13 N. W. 154. So it is error to allow plaintiff to show the course of his business during the nine years before the attachment, during which time his connecting stores had come to have twenty-three departments, and to testify that there had been a steady increase in the business every year, but that the business for the part of the year after the attachment had decreased. Zinn *v.* Rice, 161 Mass. 571, 37 N. E. 747.

77. Marks *v.* Hastings, 101 Ala. 165, 13 So. 297 (evidence as to the number of persons present when the officer went to arrest plaintiff); Garvey *v.* Wayson, 42 Md. 178 (evidence that, pursuant to the regular custom of the detective police department, his name was entered on the detective police annals, and open to the inspection and use of the police force, as tending to show the publicity of the charge made against him and the consequent injury).

Insult.— Evidence that the officer making the arrest acted in an insulting manner toward plaintiff is not admissible, without offering to prove that such conduct was instigated by defendant. Vansickle *v.* Brown, 68 Mo. 627.

Plaintiff's surroundings and treatment while in prison cannot be shown, to enhance damages, where defendant had no control over the public officials. Zebley *v.* Storey, 117 Pa. St. 478, 12 Atl. 569.

78. *Connecticut.*— Chatfield *v.* Bunnell, 69 Conn. 511, 37 Atl. 1074.

Illinois.— Rosenkrans *v.* Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169.

Maine.— Fitzgibbon *v.* Brown, 43 Me. 169.

Massachusetts.— Bacon *v.* Towne, 4 Cush. 217.

Minnesota.— Hlubek *v.* Pinske, 84 Minn. 363, 87 N. W. 939.

New Jersey.—O'Brien *v.* Frasier, 47 N. J. L. 349, 1 Atl. 465, 54 Am. Rep. 170.

Oregon.— Gee *v.* Culver, 13 Oreg. 598, 11 Pac. 302.

West Virginia.—Vinal *v.* Core, 18 W. Va. 1.

Defendant may show, in mitigation of damages, that after the prosecution by him plaintiff's character was bad on subjects unconnected with the felony for which he was prosecuted. Bostick *v.* Rutherford, 11 N. C. 83.

79. Hiersche *v.* Scott, (Nebr. 1901) 95 N. W. 494.

80. Johnson *v.* McDaniel, 5 Ohio S. & C. Pl. Dec. 717, 7 Ohio N. P. 467. See also Shannon *v.* Sims, (Ala. 1906) 40 So. 574.

Irrelevant evidence.— Evidence that plaintiff had committed a different theft (Patterson *v.* Garlock, 39 Mich. 447); that the criminal prosecution was dismissed at the instance of defendant, without the knowledge of plaintiff (Owens *v.* Owens, 81 Md. 518, 32 Atl. 247); that plaintiff had instituted a similar complaint against him (Bliss *v.* Franklin, 13 Allen (Mass.) 244); and the record of an action of replevin for the same property, which was alleged to have been stolen to show former recovery (Schofield *v.* Ferrers, 47 Pa. St. 194, 86 Am. Dec. 532), is irrelevant, and is not admissible in mitigation of damages. And so, in an action for malicious prosecution on a charge that plaintiff had embezzled goods from defendant's store, which plaintiff had been authorized to sell, evidence that plaintiff had taken land at a price greatly above its real value, in exchange for the store, is not admissible in mitigation of damages. Wheeler *v.* Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408. Nor is the fact that plaintiff might, in the criminal proceeding, have shortened his imprisonment by availing himself of a preliminary examination, admissible in mitigation of damages, unless there is affirmative proof that his motive in waiving examination and exposing himself to continued imprisonment was to enhance damages. King *v.* Colvin, 11 R. I. 582.

81. Forrest *v.* Collier, 20 Ala. 175, 56 Am. Dec. 190; White *v.* Wyley, 17 Ala. 167.

In an action by a firm for wrongful attachment, evidence that such firm was insolvent at the date of the attachment is admissible. Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

82. *Georgia.*— Shores *v.* Brooks, 81 Ga. 468, 8 S. E. 429, 12 Am. St. Rep. 332.

Michigan.— Fletcher *v.* Chicago, etc., R. Co., 109 Mich. 363, 67 N. W. 330.

New York.— Brown *v.* McBride, 24 Misc. 235, 52 N. Y. Suppl. 620.

North Dakota.— Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

Ohio.—Johnson *v.* McDaniel, 5 Ohio S. & C. Pl. Dec. 717, 7 Ohio N. P. 467. In White *v.* Tucker, 16 Ohio St. 468, it was held that defendant might show, on the question of mitigation of damages, that he went before the magistrate, and after he had related to him all the facts and circumstances of the case, and before making the affidavit, the magistrate told him that, if the statement was true, the accused was guilty of the crime charged, and that it was upon this assurance that the affidavit was made and the prosecution instituted.

83. Ellis *v.* Hampton, 123 N. C. 194, 31 S. E. 473. See *supra*, IX, C.

circumstances may be received,[84] but not of his social position,[85] or of his influence in the community.[86] The condition of plaintiff's family is not to be shown for the purpose of affecting the amount of general damages.[87] Circumstances of personal insult, indignity, outrage, humiliation, or discomfort are properly shown to aggravate damage.[88]

XV. TRIAL.[89]

A. Conduct of Trial. The usual rules as to order of proof,[90] examination of witnesses,[91] notice to produce,[92] the necessity of taking exceptions,[93] and addresses of counsel to the jury[94] and the giving of instructions.[95]

B. Province of Court and Jury — 1. In General. It is the province and duty of the court to determine the preliminary question whether there is any evidence sufficient to justify the submission of the case to the jury.[96] When that question has been resolved for plaintiff the trial judge should properly instruct the jury,[97] in which case it is for the jury in accordance with such instructions to determine the credibility of witnesses,[98] the sufficiency of evidence,[99] the conflict in testimony,[1] and, if its finding be for plaintiff, the extent of his damages.[2] If the question be resolved for defendant, it is the duty of the judge to direct a verdict or otherwise render judgment for him.[3]

84. Sexson *v.* Hoover, 1 Ind. App. 65, 27 N. E. 105; Peck *v.* Small, 35 Minn. 465, 29 N. W. 69; Renfro *v.* Prior, 22 Mo. App. 403; Winn *v.* Peckham, 42 Wis. 493.

Under Ga. Code, § 2986, which provides that "recovery shall not be confined to actual damages . . . but shall be regulated by the circumstances of the case," evidence of pecuniary circumstances of defendant is admissible. Coleman *v.* Allen, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449.

85. Renfro *v.* Prior, 22 Mo. App. 403. But see Flam *v.* Lee, 116 Iowa 289, 90 N. W. 70, 93 Am. St. Rep. 242; Eihlert *v.* Gommoll, 23 Ohio Cir. Ct. 586.

86. Peck *v.* Small, 35 Minn. 465, 29 N. W. 69.

87. Reisan *v.* Mott, 42 Minn. 49, 43 N. W. 691, 18 Am. St. Rep. 489.

88. *Iowa.*— Flam *v.* Lee, 116 Iowa 289, 90 N. W. 70, 93 Am. St. Rep. 242.

Kansas.—Drumm *v.* Cessnum, 61 Kan. 467, 59 Pac. 1078.

Louisiana.—Driggs *v.* Morgan, 10 Rob. 119.

Nebraska.— Stoecker *v.* Nathanson, 5 Nebr. (Unoff.) 435, 98 N. W. 1061, 70 L. R. A. 667.

New York.— Nicholson *v.* Sternberg, 61 N. Y. App. Div. 51, 70 N. Y. Suppl. 212.

Ohio.—Johnson *v.* McDaniel, 5 Ohio S. & C. Pl. Dec. 717, 7 Ohio N. P. 467.

Contra.— Zebley *v.* Storey, 117 Pa. St. 478, 12 Atl. 569.

89. Trial generally see TRIAL.

90. Cunningham *v.* Moreno, (Ariz. 1905) 80 Pac. 327, holding that it was not error to permit plaintiff to show damages until she had shown some want of probable cause; the order of proof being within the discretion of the trial court.

91. Colter *v.* McPherson, 12 Ont. Pr. 630.

Plaintiff may proceed to examine witnesses without first producing the affidavits on which the warrant on which the arrest was made was issued by a magistrate; and the court is not bound to arrest the examination *in limine* until the production of the affidavits, without reference to the relevancy or competency of the testimony. Stevens *v.* Lacour, 10 Barb. (N. Y.) 62.

Papers sent with jury.— The information made by defendant upon which plaintiff was arrested may be sent out with the jury. Seibert *v.* Price, 5 Watts & S. (Pa.) 438, 40 Am. Dec. 525.

92. Wilson *v.* Gilmour, 5 U. C. Q. B. 212.

93. Jones *v.* Duff, 5 U. C. Q. B. 143.

94. Alexander *v.* Reid, 44 S. W. 211, 19 Ky. L. Rep. 1636, holding that it was error to permit the attorney in his statement to the jury to read the indictment as evidence.

Opening and closing.— The plea of probable cause imposes the burden of proof, in the first instance, on defendant, who thereby assumes the affirmative and his counsel has the right to conclude the argument to the jury. Brown *v.* Morris, 3 Bush (Ky.) 81.

95. See *infra*, XV, C.

96. Hurd *v.* Shaw, 20 Ill. 354; Coleman *v.* Hibernia Ins. Co., 36 La. Ann. 92; Barrett *v.* Chouteau, 94 Mo. 13, 6 S. W. 215; Porter *v.* Martyn, (Tex. Civ. App. 1895) 32 S. W. 731.

It must construe the record showing the prosecution and its termination. Steed *v.* Knowles, 79 Ala. 446; Archibald *v.* McLaren, 21 Can. Sup. Ct. 588.

97. See *infra*, XV, C.

98. See *infra*, p. 108 note 16.

99. Anderson *v.* Callaway, 2 Houst. (Del.) 324; Hall *v.* Kehoe, 5 Silv. Sup. (N. Y.) 129, 8 N. Y. Suppl. 176; Kline *v.* Shuler, 30 N. C. 484, 49 Am. Dec. 402.

1. Robbins *v.* Robbins, 133 N. Y. 597, 30 N. E. 977 [*affirming* 15 N. Y. Suppl. 215]; Collins *v.* Manning, 1 N. Y. St. 193.

2. Chapman *v.* Dodd, 10 Minn. 350.

3. See *infra*, XV, B, 5.

Where the evidence is of such a persuasive and conclusive character, on the one side, that it would be utterly unreasonable or unjust for the jury either from prejudice or passion, or from misconception of the case,

2. Probable Cause — a. In General. The question of probable cause is an anomalous one.[4] In nature or logic it is a question of fact;[5] at the common law it was determined by the court alone.[6] In England the conduct of the reasonable man appears to be, and according to the letter of the law must be left to the judge, but is in fact left to the jury.[7] In America it is universally regarded as a mixed question of law and fact.[8]

to render a verdict contrary to the whole law and the whole evidence in the case, the court ought to have the courage to perform its duty, and go where the law leads. Miller *v.* Chicago, etc., R. Co., 41 Fed. 898.

4. *California.*— Grant *v.* Moore, 29 Cal. 644.

Maine.— Speck *v.* Judson, 63 Me. 207.

Massachusetts.— Kidder *v.* Parkhurst, 3 Allen 393; Stone *v.* Crocker, 24 Pick. 81.

Minnesota.— Burton *v.* St. Paul, etc., R. Co., 33 Minn. 189, 22 N. W. 300; Cole *v.* Curtis, 16 Minn. 182.

New York.— Thaule *v.* Krekeler, 81 N. Y. 428.

Ohio.— Ash *v.* Marlow, 20 Ohio 119.

United States.— Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116.

England.— Hicks *v.* Faulkner, 8 Q. B. D. 167, 46 J. P. 420, 51 L. J. Q. B. 268, 46 L. T. Rep. N. S. 127, 30 Wkly. Rep. 545 (per Hawkins, J.); Panton *v.* Williams, 2 Q. B. 169, 1 G. & D. 504, 10 L. J. Exch. 545, 42 E. C. L. 622. See also Lister *v.* Perryman, L. R. 4 H. L. 521, 39 L. J. Exch. 177, 23 L. T. Rep. N. S. 269, 19 Wkly. Rep. 9.

Mr. Pollock presents this paradox: "That it is neither a question of law nor of fact." Pollock Torts *p. 192.

5. According to the Scotch law this question is for the jury. Lister *v.* Perryman L. R. 4 H. L. 521, 39 L. J. Exch. 177, 23 L. T. Rep. N. S. 269, 19 Wkly. Rep. 9.

6. Blachford *v.* Dod, 2 B. & Ad. 179, 9 L. J. K. B. O. S. 196, 22 E. C. L. 83; Williams *v.* Taylor, 6 Bing. 183, 7 L. J. C. P. O. S. 250, 3 M. & P. 350, 31 Rev. Rep. 379, 19 E. C. L. 90; Eagar *v.* De Yott, 5 C. & P. 4, 24 E. C. L. 424; Pain *v.* Rochester, Cro. Eliz. 871; Golding *v.* Crowle, Say. 1. But see Beckwith *v.* Philby, 6 B. & C. 635, 9 D. & R. 487, 5 L. J. M. C. O. S. 132, 13 E. C. L. 287; Davis *v.* Russell, 5 Bing. 354, 7 L. J. M. C. O. S. 52, 2 M. & P. 590, 30 Rev. Rep. 637, 15 E. C. L. 618.

7. Lister *v.* Perryman, L. R. 4 H. L. 521, 39 L. J. Exch. 177, 23 L. T. Rep. N. S. 269, 19 Wkly. Rep. 9; Abrath *v.* North Eastern R. Co., 11 Q. B. D. 79; Hicks *v.* Faulkner, 8 Q. B. D. 167, 46 J. P. 420, 51 L. J. Q. B. 268, 46 L. T. Rep. N. S. 127, 30 Wkly. Rep. 545; Haddrick *v.* Heslop, 12 Q. B. 267, 12 Jur. 600, 17 L. J. Q. B. 313, 64 E. C. L. 267; Turner *v.* Ambler, 10 Q. B. 252, 6 Jur. 346, 16 L. J. Q. B. 158, 59 E. C. L. 252; Douglas *v.* Corbett, 6 E. & B. 511, 2 Jur. N. S. 1247, 88 E. C. L. 511; Piggott Torts 278.

In the early stages of the English law, there can be no doubt that the question of reasonable cause was one of law, for the court. Mr. Stephen (Stephen Mal. Pros. (1888) *p. 57), after an exhaustive review of the English cases, concludes that this "acknowledged rule has been gradually affected by successive judicial decisions, until the practical burden of deciding whether or not the plaintiff has shown a want of reasonable cause has been, in effect, transferred to the jury." See also Panton *v.* Williams, 2 Q. B. 169, 1 G. & B. 504, 10 L. J. Exch. 545, 42 E. C. L. 622; McDonald *v.* Rooke, 2 Bing. N. Cas. 217, 1 Hodges 314, 5 L. J. C. P. 9, 2 Scott 359, 29 E. C. L. 508.

8. *Arkansas.*— Chrisman *v.* Carney, 33 Ark. 316.

California.— Potter *v.* Seale, 8 Cal. 217.

Delaware.— Wells *v.* Parsons, 3 Harr. 505.

District of Columbia.— Staples *v.* Johnson, 25 App. Cas. 155; Coleman *v.* Heurich, 2 Mackey 189.

Florida.— Lewton *v.* Hower, 35 Fla. 58, 16 So. 616.

Georgia.— Pomeroy *v.* Golly, Ga. Dec. 26.

Illinois.—Angelo *v.* Faul, 85 Ill. 106; Israel *v.* Brooks, 23 Ill. 575; Wade *v.* Walden, 23 Ill. 425.

Indiana.— Lytton *v.* Baird, 95 Ind. 349.

Iowa.— Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 758; Center *v.* Spring, 2 Iowa 393.

Kansas.— Atchison, etc., R. Co. *v.* Watson, 37 Kan. 773, 15 Pac. 877; Bell *v.* Matthews, 37 Kan. 686, 16 Pac. 97.

Louisiana.— Sandoz *v.* Veazie, 106 La. 202, 30 So. 767; Burkett *v.* Lanata, 15 La. Ann. 337.

Maine.— Ulmer *v.* Leland, 1 Me. 135, 10 Am. Dec. 48.

Maryland.— Thelin *v.* Dorsey, 59 Md. 539; Medcalfe *v.* Brooklyn L. Ins. Co., 45 Md. 198.

Massachusetts.— Stone *v.* Crocker, 24 Pick. 81.

Mississippi.— Whitfield *v.* Westbrook, 40 Miss. 311; Greenwade *v.* Mills, 31 Miss. 464.

Missouri.— Moody *v.* Deutsch, 85 Mo. 237; Hill *v.* Palm, 38 Mo. 13; Meysenberg *v.* Engelke, 18 Mo. App. 346.

New York.— Besson *v.* Southard, 10 N. Y. 236; Bulkeley *v.* Keteltas, 6 N. Y. 384; Hall *v.* Suydam, 6 Barb. 83; Waldheim *v.* Sichel, 1 Hilt. 45; Pangburn *v.* Bull, 1 Wend. 345.

North Carolina.— Beale *v.* Roberson, 29 N. C. 280; Plummer *v.* Gheen, 10 N. C. 66, 14 Am. Dec. 572; Legget *v.* Blount, 4 N. C. 560, 7 Am. Dec. 702.

Ohio.— Ash *v.* Marlow, 20 Ohio 119.

Pennsylvania.— Leahey *v.* March, 155 Pa. St. 458, 26 Atl. 701; Walbridge *v.* Pruden, 102 Pa. St. 1; Travis *v.* Smith, 1 Pa. St. 234, 44 Am. Dec. 125; Weinberger *v.* Shelly, 6

b. Where Facts Undisputed. Primarily[9] what constitutes probable cause is a question of judicial opinion.[10] What facts,[11] and whether all or sufficient[12] undis-

Watts & S. 336; Le Maistre *v.* Hunter, Brightly 494.

South Carolina.— Caldwell *v.* Bennett, 22 S. C. 1; Horn *v.* Boon, 3 Strobh. 307; Paris *v.* Waddell, 1 McMull. 353; Nash *v.* Orr, 3 Brev. 94, 5 Am. Dec. 547.

Tennessee.— Cooper *v.* Flemming, (1904) 84 S. W. 801; Dodge *v.* Brittain, Meigs 84; Williams *v.* Norwood, 2 Yerg. 329.

Texas.— Landa *v.* Obert, 45 Tex. 539. In Heldt *v.* Webster, 60 Tex. 207, it is held that the want of probable cause is a question of fact for the jury.

Vermont.— French *v.* Smith, 4 Vt. 363, 24 Am. Dec. 616.

West Virginia.—Moats *v.* Rymer, 18 W. Va. 642, 41 Am. Rep. 703; Vinal *v.* Core, 18 W. Va. 1.

United States.— Munns *v.* De Nemours, 17 Fed. Cas. No. 9,926, 3 Wash. 31; Murray *v.* McLane, 17 Fed. Cas. No. 9,964.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 161.

9. Emerson *v.* Skaggs, 52 Cal. 246; McNulty *v.* Walker, 64 Miss. 198, 1 So. 55; Bacon *v.* Townsend, 2 Edm. Sel. Cas. (N. Y.) 120.

It is error to leave to the jury to determine whether the facts proved do or do not establish the want of probable cause. Emerson *v.* Skaggs, 52 Cal. 246.

The legal effect of evidence offered to show probable cause is for the court, but the court cannot determine the question as a matter of law unless the facts, when taken as true, are insufficient to make out a case. Boogher *v.* Hough, 99 Mo. 183, 12 S. W. 524.

Where by plaintiff's own evidence probable cause has been shown, it is the duty of the court to decide that plaintiff cannot recover. Scott *v.* Dewey, 23 Pa. Super. Ct. 396.

10. *California.*— Lacey *v.* Porter, 103 Cal. 597, 37 Pac. 635; Ball *v.* Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; Grant *v.* Moore, 29 Cal. 644.

Illinois.— Jacks *v.* Stimpson, 13 Ill. 701.

Indiana.— Pennsylvania Co. *v.* Weddle, 100 Ind. 138.

Kansas.— Bell *v.* Keepers, 37 Kan. 64, 14 Pac. 542.

Kentucky.—Lancaster *v.* Langston, 36 S. W. 521, 18 Ky. L. Rep. 299.

Maine.— Page *v.* Cushing, 38 Me. 523.

Massachusetts.— Good *v.* French, 115 Mass. 201; Kidder *v.* Parkhurst, 3 Allen 393; Stone *v.* Crocker, 24 Pick. 81.

Minnesota.—Smith *v.* Munch, 65 Minn. 256, 68 N. W. 19; Burton *v.* St. Paul, etc., R. Co., 33 Minn. 189, 22 N. W. 300.

Mississippi.— McNulty *v.* Walker, 64 Miss. 198, 1 So. 55.

New York.— Von Latham *v.* Libby, 38 Barb. 339; Carpenter *v.* Shelden, 5 Sandf. 77; Masten *v.* Deyo, 2 Wend. 424.

North Carolina.— Bradley *v.* Morris, 44 N. C. 395; Vickers *v.* Logan, 44 N. C. 393.

Pennsylvania.— Scott *v.* Dewey, 23 Pa. Super. Ct. 396.

South Carolina.— Lipford *v.* McCollum, 1 Hill 82.

Texas.— Landa *v.* Obert, 45 Tex. 539.

Vermont.— Driggs *v.* Burton, 44 Vt. 124.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 161.

It is a question of law on the evidence.— Burkett *v.* Lanata, 15 La. Ann. 337; Kidder *v.* Parkhurst, 3 Allen (Mass.) 393; Fletcher *v.* Chicago, etc., R. Co., 109 Mich. 363, 67 N. W. 330; Turner *v.* O'Brien, 5 Nebr. 542 (mere conversion of property is not larceny); Farrell *v.* Friedlander, 63 Hun (N. Y.) 254, 18 N. Y. Suppl. 215; Tomlinson *v.* Warner, 9 Ohio 103.

Proof that the jury entertained doubts, or deliberated as to the guilt of the accused after the case was concluded, is proof of probable cause. Grant *v.* Deuel, 3 Rob. (La.) 17, 38 Am. Dec. 228.

11. *California.*— Ball *v.* Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174.

District of Columbia.— Spitzer *v.* Friedlander, 14 App. Cas. 556.

Illinois.— Cleveland, etc., R. Co. *v.* Jenkins, 75 Ill. App. 17.

Indiana.— Taylor *v.* Baltimore, etc., R. Co., 18 Ind. App. 692, 48 N. W. 1044.

Kansas.—Drumm *v.* Cessnum, 58 Kan. 331, 49 Pac. 78.

Kentucky.— Metropolitan L. Ins. Co. *v.* Miller, 114 Ky. 754, 71 S. W. 921, 24 Ky. L. Rep. 1561; Ahrens, etc., Mfg. Co. *v.* Hoeber, 106 Ky. 692, 51 S. W. 194, 21 Ky. L. Rep. 299; Lancaster *v.* McKay, 103 Ky. 616, 45 S. W. 887; Provident Sav. L. Assur. Soc. *v.* Johnson, 72 S. W. 754, 24 Ky. L. Rep. 1902; O'Daniel *v.* Smith, 66 S. W. 284, 23 Ky. L. Rep. 1822; Moore *v.* Large, 46 S. W. 508, 20 Ky. L. Rep. 409.

Michigan.— Rankin *v.* Crane, 104 Mich. 6, 61 N. W. 1007.

Minnesota.— Smith *v.* Munch, 65 Minn. 256, 68 N. W. 19.

Nebraska.— Clark *v.* Folkers, 1 Nebr. (Unoff.) 96, 95 N. W. 328.

North Carolina.—Jones *v.* Wilmington, etc., R. Co., 125 N. C. 227, 34 S. E. 398.

North Dakota.— Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

Oregon.— Hess *v.* Oregon German Baking Co., 31 Oreg. 503, 49 Pac. 803.

Pennsylvania.— Replogle *v.* Frothingham, 16 Pa. Super. Ct. 374.

United States.—Sanders *v.* Palmer, 55 Fed. 217, 5 C. C. A. 77.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 161.

12. Atchison, etc., R. Co. *v.* Smith, 60 Kan. 4, 55 Pac. 272; Turney *v.* Taylor, 8 Kan. App. 593, 56 Pac. 137; Boyd *v.* Mendenhall, 53 Minn. 274, 55 N. W. 45; Burton *v.* St. Paul, etc., R. Co., 33 Minn. 189, 22 N. W. 300; Figg *v.* Hanger, 4 Nebr. (Unoff.) 792, 96

puted facts,[13] constitute probable cause is therefore determined exclusively by the court.[14]

c. Where Facts Disputed. The general rule is that where there is a substantial[15] dispute as to what the facts are, it is for the jury to determine what the truth is and whether the circumstances relied on as a charge or justification are sufficiently

N. W. 658; Bryant *v.* Kuntz, 25 Pa. Super. Ct. 102.

13. *California.*— Seabridge *v.* McAdam, 108 Cal. 345, 41 Pac. 409.

District of Columbia.— Spitzer *v.* Friedlander, 14 App. Cas. 556.

Kansas.— Atchison, etc., R. Co. *v.* Smith, 60 Kan. 4, 55 Pac. 272; Turney *v.* Taylor, 8 Kan. App. 593, 56 Pac. 137.

Kentucky.— Lancaster *v.* McKay, 103 Ky. 616, 45 S. W. 887.

Massachusetts.— Kidder *v.* Parkhurst, 3 Allen 393; Stone *v.* Crocker, 24 Pick. 81.

Michigan.— Rogers *v.* Olds, 117 Mich. 368, 75 N. W. 933.

Nebraska.— Maynard *v.* Sigman, 65 Nebr. 590, 91 N. W. 576.

New Jersey.—Toth *v.* Greisen, (Sup. 1902) 51 Atl. 927; Stricker *v.* Pennsylvania R. Co., 60 N. J. L. 230, 37 Atl. 776; Bell *v.* Atlantic City R. Co., 58 N. J. L. 227, 33 Atl. 211.

New York.— Fetzer *v.* Burlew, 114 N. Y. App. Div. 650, 99 N. Y. Suppl. 1100; Francis *v.* Tilyou, 26 N. Y. App. Div. 340, 49 N. Y. Suppl. 799; Palmer *v.* Palmer, 8 N. Y. App. Div. 331, 40 N. Y. Suppl. 829; O'Dell *v.* Hatfield, 40 Misc. 13, 81 N. Y. Suppl. 158; Gorton *v.* De Angelis, 6 Wend. 418.

North Carolina.—Moore *v.* Statesville First Nat. Bank, 140 N. C. 293, 52 S. E. 944.

North Dakota.— Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

Pennsylvania.— Huckestein *v.* New York L. Ins. Co., 205 Pa. St. 27, 54 Atl. 461; Gyles *v.* Jefferis, 5 Pa. Dist. 129.

South Dakota.— Krause *v.* Bishop, 18 S. D. 298, 100 N. W. 434.

United States.— Staunton *v.* Goshorn, 94 Fed. 52, 36 C. C. A. 75.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 161.

14. *California.*— Davis *v.* Pacific Tel., etc., Co., (1899) 57 Pac. 764; Seabridge *v.* McAdam, 108 Cal. 345, 41 Pac. 409; Smith *v.* Liverpool, etc., Ins. Co., 107 Cal. 432, 40 Pac. 540; Fulton *v.* Onesti, 66 Cal. 575, 6 Pac. 491; Eastin *v.* Stockton Bank, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77; Harkrader *v.* Moore, 44 Cal. 144.

Colorado.— Clement *v.* Major, 8 Colo. App. 86, 44 Pac. 776.

District of Columbia.—Coleman *v.* Heurich, 2 Mackey 189.

Illinois.— Angelo *v.* Faul, 85 Ill. 106.

Iowa.— Knapp *v.* Chicago, etc., R. Co., 113 Iowa 532, 85 N. W. 769; Erb *v.* German-American Ins. Co., 112 Iowa 357, 83 N. W. 1053.

Kansas.— Parli *v.* Reed, 30 Kan. 534, 2 Pac. 635.

Maine.— Cooper *v.* Waldron, 50 Me. 80; Marks *v.* Gray, 42 Me. 86; Taylor *v.* Godfrey, 36 Me. 525; Stevens *v.* Fassett, 27 Me. 266; Varrell *v.* Holmes, 4 Me. 168.

Massachusetts.— Cloon *v.* Gerry, 13 Gray 201; Hemmenway *v.* Woods, 1 Pick. 524.

Minnesota.— Gilbertson *v.* Fuller, 40 Minn. 413, 42 N. W. 203; Moore *v.* Northern Pac. R. Co., 37 Minn. 147, 33 N. W. 334; Cole *v.* Curtis, 16 Minn. 182.

New York.— Besson *v.* Southard, 10 N. Y. 236; Waldheim *v.* Sichel, 1 Hilt. 45; Gordon *v.* Upham, 4 E. D. Smith 9; Robbins *v.* Robbins, 15 N. Y. Suppl. 215 [*affirmed* in 133 N. Y. 597, 30 N. E. 977]. *Compare* Heyne *v.* Blair, 3 Thomps. & C. 263 [*reversed* in 62 N. Y. 19]; Fagnan *v.* Knox, 40 N. Y. Super. Ct. 41 [*reversed* in 66 N. Y. 525].

Pennsylvania.—Gyles *v.* Jefferis, 5 Pa. Dist. 129; Cropley *v.* Givin, 30 Leg. Int. 160.

Canada.— Donnelly *v.* Bawden, 40 U. C. Q. B. 611.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 161.

If the evidence is such that a reasonable man would think a person guilty of a felony which has been proved to have been committed, probable cause is established. Molloy *v.* Long Island R. Co., 59 Hun (N. Y.) 424, 13 N. Y. Suppl. 382 [*affirmed* in 137 N. Y. 629, 33 N. E. 745].

When the facts are undisputed, or when they fail to show a want of probable cause, a question of law arises which comes within the province of the court to decide. Fagnan *v.* Knox, 40 N. Y. Super. Ct. 41.

A seeming exception to this rule may grow out of the nature of the evidence, as when defendant's belief of the facts which are relied on by plaintiff to prove want of probable cause is a question involved. What that belief was is always a question for the jury. Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116. See also Seibert *v.* Price, 5 Watts & S. (Pa.) 438, 40 Am. Dec. 525. And although, in an action for malicious prosecution, the burden is on plaintiff to prove a want of probable cause for the prosecution, and although the evidence be uncontradicted, yet if the facts proved are capable of different inferences, it is for a jury to determine what, under the circumstances, would be the belief and action of men of ordinary prudence. Heyne *v.* Blair, 62 N. Y. 19 [*reversing* 3 Thomps. & C. 263].

15. *Illinois.*— Lasher *v.* Littell, 202 Ill. 551, 67 N. E. 372; McBean *v.* Ritchie, 18 Ill. 114; Davis *v.* Baker, 88 Ill. App. 251.

Kansas.— Markley *v.* Kirby, 6 Kan. App. 494, 50 Pac. 953.

Maryland.— Torsch *v.* Dell, 88 Md. 459, 41 Atl. 903.

Minnesota.— Olson *v.* Tvete, 46 Minn. 225, 48 N. W. 914.

established,[16] and for the court to decide whether they amount to probable cause.[17]

Missouri.— Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650.

Rhode Island.— Fox *v.* Smith, 26 R. I. 1, 57 Atl. 932.

United States.— L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 121 Fed. 233, 57 C. C. A. 469.

Canada.— Smith *v.* Chep, 6 U. C. Q. B. O. S. 213.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 161.

But see Cheever *v.* Sweet, 151 Mass. 186, 23 N. E. 831, where palpably and clearly the testimony was entitled to no credit.

If there is room for difference of opinion among reasonable men as to the existence of the facts alleged as a cause for the prosecution, the question is for the jury. Johnston *v.* Meaghr, 14 Utah 426, 47 Pac. 861.

16. *Georgia.*— Anderson *v.* Keller, 67 Ga. 58.

Illinois.— Young *v.* Lindstrom, 115 Ill. App. 239.

Iowa.— Johnson *v.* Miller, 69 Iowa 562, 29 N. W. 743, 58 Am. Rep. 231.

Kansas.—Drumm *v.* Cessnum, 58 Kan. 331, 49 Pac. 78.

Kentucky.— Provident Sav. L. Assur. Soc. *v.* Johnson, 115 Ky. 84, 72 S. W. 754, 24 Ky. L. Rep. 1902; Lancaster *v.* Langston, 36 S. W. 521, 18 Ky. L. Rep. 299.

Maryland.— McWilliams *v.* Hoban, 42 Md. 56.

Massachusetts.— Hemmenway *v.* Woods, 1 Pick. 524. See also Shattuck *v.* Simonds, 191 Mass. 506, 78 N. E. 122.

Michigan.—McClay *v.* Hicks, 119 Mich. 65, 77 N. W. 636.

Minnesota.— Shafer *v.* Hertzig, 92 Minn. 171, 99 N. W. 796; Fiola *v.* McDonald, 85 Minn. 147, 88 N. W. 431; Burton *v.* St. Paul, etc., R. Co., 33 Minn. 189, 22 N. W. 300; Cole *v.* Curtis, 16 Minn. 182.

Mississippi.— Whitfield *v.* Westbrook, 40 Miss. 311.

Nebraska.— Turner *v.* O'Brien, 5 Nebr. 542.

New York.— Besson *v.* Southard, 10 N. Y. 236; Langley *v.* East River Gas Co., 41 N. Y. App. Div. 470, 58 N. Y. Suppl. 992; Hall *v.* Kehoe, 5 Silv. Sup. 129, 8 N. Y. Suppl. 176; Collins *v.* Manning, 10 N. Y. Suppl. 658.

North Dakota.— Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

Pennsylvania.— Bruff *v.* Kendrick, 21 Pa. Super. Ct. 468.

South Dakota.— Richardson *v.* Dybedahl, 14 S. D. 126, 84 N. W. 486; Jackson *v.* Bell, 5 S. D. 257, 58 N. W. 671.

Virginia.— Boush *v.* Maryland Fidelity, etc., Co., 100 Va. 735, 42 S. E. 877; Crabtree *v.* Horton, 4 Munf. 59.

Wisconsin.— Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135.

England.— Hinton *v.* Heather, 15 L. J. Exch. 39, 14 M. & W. 131.

Canada.— Erickson *v.* Brand, 14 Ont. App. 614. But see Young *v.* Nichol, 9 Ont. 347.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 161.

But it is error to instruct the jury that, "if the facts are disputed it is for you to determine whether or not there was probable cause." Beihofer *v.* Loeffert, 159 Pa. St. 365, 28 Atl. 217.

It is reversible error to submit to the jury, in an action against several defendants, a material question of fact as to probable cause, of which there is evidence as to one of the defendants only. Johnson *v.* Miller, 69 Iowa 562, 29 N. W. 743, 58 Am. Rep. 231.

When a question of fact is present (Weaver *v.* Page, 6 Cal. 681), as the good faith of defendant (Fine *v.* Navarre, 104 Mich. 93, 62 N. W. 142; Foote *v.* Milbier, 1 Thomps. & C. (N. Y.) 456, 46 How. Pr. 38; Plath *v.* Braunsdorff, 40 Wis. 107), or when there is conflicting evidence as to the matter insisted upon as constituting probable cause or the want of it, and the facts are in dispute (Cheever *v.* Sweet, 151 Mass. 186, 23 N. E. 831; Kidder *v.* Parkhurst, 3 Allen (Mass.) 393; Thompson *v.* Price, 100 Mich. 558, 59 N. W. 253; Turner *v.* O'Brien, 5 Nebr. 542; Rhodes *v.* Brandt, 21 Hun (N. Y.) 1; Lawyer *v.* Loomis, 3 Thomps. & C. (N. Y.) 393; Foote *v.* Milbier, 1 Thomps. & C. (N. Y.) 456, 46 How. Pr. 38; Fagnan *v.* Knox, 40 N. Y. Super. Ct. 41; Thorp *v.* Carvalho, 14 Misc. (N. Y.) 554, 36 N. Y. Suppl. 1; Grout *v.* Cottrell, 22 N. Y. Suppl. 336 [*reversed* on other grounds in 143 N. Y. 677, 38 N. E. 717]; Brounstein *v.* Wile, 20 N. Y. Suppl. 204; Robbins *v.* Robbins, 15 N. Y. Suppl. 215 [*affirmed* in 133 N. Y. 597, 30 N. E. 977]; Thurber *v.* Eastern Bldg., etc., Assoc., 118 N. C. 129, 24 S. E. 730; McDaniel *v.* Needham, 61 Tex. 269), then it is for the jury to determine what the facts are.

Weight of evidence and the credibility of witnesses are matters within the exclusive province of the jury. Turner *v.* O'Brien, 5 Nebr. 542.

17. *Alabama.*— Ewing *v.* Sanford, 19 Ala. 605.

California.— Ball *v.* Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; Harkrader *v.* Moore, 44 Cal. 144.

Iowa.— Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 758; Shaul *v.* Brown, 28 Iowa 37, 4 Am. Rep. 151.

Maryland.— Campbell *v.* Baltimore, etc., R. Co., 97 Md. 341, 55 Atl. 532.

Massachusetts.— Sartwell *v.* Parker, 141 Mass. 405, 5 N. E. 807.

Minnesota.— Burton *v.* St. Paul, etc., R. Co., 33 Minn. 189, 22 N. W. 300; Cole *v.* Curtis, 16 Minn. 182.

Missouri.— Christian *v.* Hanna, 58 Mo. App. 37.

Nebraska.— Turner *v.* O'Brien, 5 Nebr. 542.

New York.— Stevens *v.* Lacour, 10 Barb. 62; Haupt *v.* Pohlmann, 1 Rob. 121; Bulkeley *v.* Keteltas, 4 Sandf. 450 [*reversed* on the facts in 6 N. Y. 384]; Garrison *v.* Pearce, 3

According to the general, but not universal,[18] opinion, it is error to leave it to the jury not only to determine the facts but also whether they constitute probable cause;[19] the court, not the jury, should draw that inference.[20] The court may take a special verdict and determine the question or probable cause thereon as a matter of law,[21] or it may instruct the jury hypothetically within the range of facts which the evidence tends to establish as to what constitutes probable cause, and thus leave it to the jury to determine only the facts.[22]

3. Malice. In general, whether a prosecution was malicious is a question of

E. D. Smith 255; Robbins *v.* Robbins, 15 N. Y. Suppl. 215 [*affirmed* in 133 N. Y. 597, 30 N. E. 977].

North Carolina.— Swaim *v.* Stafford, 25 N. C. 289.

Texas.— Ramsey *v.* Arrott, 64 Tex. 320.

Vermont.— Driggs *v.* Burton, 44 Vt. 124.

United States.— Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 161.

Want of probable cause is in all cases a question of law, which the court alone is competent to determine, and in relation to which the judge who tries the case is bound to express a positive opinion; and if instead of so doing he leaves it to the jury to determine, not only whether the facts alleged by plaintiff are true, but also whether, if true, they prove want of probable cause, he commits a fatal error. Bulkeley *v.* Smith, 2 Duer (N. Y.) 261. But where the facts had not been found by the jury, it is erroneous to instruct the jury "that admitting all the testimony in favor of the plaintiff to be true, yet that the plaintiff had not shewn a want of probable cause." Furness *v.* Porter, Walk. (Miss.) 442.

18. New York rule.— If the facts are undisputed and admit of but one inference, probable cause is a question of law (Anderson *v.* How, 116 N. Y. 336, 22 N. E. 695; Francis *v.* Tilyou, 26 N. Y. App. Div. 340, 49 N. Y. Suppl. 799), but if the facts are in dispute or admit of opposing inferences, the question is for the jury (Long Island Bottlers' Union *v.* Seitz, 180 N. Y. 243, 73 N. E. 20; Wass *v.* Stephens, 128 N. Y. 123, 28 N. E. 21; Fagnan *v.* Knox, 66 N. Y. 525; Rawson *v.* Leggett, 97 N. Y. App. Div. 416, 90 N. Y. Suppl. 5; Ericson *v.* Edison Electric Illuminating Co., 59 N. Y. App. Div. 612, 68 N. Y. Suppl. 1044; Dann *v.* Wormser, 38 N. Y. App. Div. 460, 56 N. Y. Suppl. 474. And see Langley *v.* East River Gas Co., 41 N. Y. App. Div. 470, 58 N. Y. Suppl. 992; Owens *v.* New Rochelle Coal, etc., Co., 38 N. Y. App. Div. 53, 55 N. Y. Suppl. 913; Hamilton *v.* Davey, 28 N. Y. App. Div. 457, 51 N. Y. Suppl. 88; Brown *v.* McBride, 24 Misc. 235, 52 N. Y. Suppl. 620). But, although want of probable cause is a question of law, yet the question may properly be passed upon by the jury, in the absence of any request to the judge to instruct them as to the law. Haupt *v.* Poblmann, 16 Abb. Pr. 301.

In Alabama it has been laid down that whether an attachment has been sued out without probable cause is a question peculiarly for the determination of the jury. Alsop *v.* Lidden, 130 Ala. 548, 30 So. 401; Lunsford *v.* Dietrich, 93 Ala. 565, 9 So. 308, 30 Am. St. Rep. 79.

Where there is substantial evidence tending to show probable cause, it is held that the court is not warranted in withdrawing the case from the jury. McGarry *v.* Missouri Pac. R. Co., 36 Mo. App. 340; Neil *v.* Thorn, 17 Hun (N. Y.) 144 [*reversed* on the facts in 88 N. Y. 270]; Connelly *v.* McDermott, 3 Lans. (N. Y.) 63.

19. See *supra*, XV, B, 2, a.

20. *Illinois.*— Cleveland, etc., R. Co. *v.* Jenkins, 75 Ill. App. 17.

Indiana.— Atkinson *v.* Van Cleave, 25 Ind. App. 508, 57 N. E. 731.

Nebraska.— Miller's Bank *v.* Richmon, 64 Nebr. 111, 89 N. W. 627.

Ohio.— Britton *v.* Granger, 13 Ohio Cir. Ct. 281, 7 Ohio Cir. Dec. 182.

Pennsylvania.— Bruff *v.* Kendrick, 21 Pa. Super. Ct. 468.

England.— Cox *v.* English, etc., Bank, [1905] A. C. 168, 74 L. J. P. C. 62, 92 L. T. Rep. N. S. 483; Lister *v.* Perryman, L. R. 4 H. L. 521, 39 L. J. Exch. 177, 23 L. T. Rep. N. S. 269, 19 Wkly. Rep. 9.

Canada.— Archibald *v.* McLaren, 21 Can. Sup. Ct. 588.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 161.

But see Clark *v.* Thompson 160 Mo. 461, 61 S. W. 194.

21. Helwig *v.* Beckner, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788; Taylor *v.* Baltimore, etc., R. Co., 18 Ind. App. 692, 48 N. E. 1044; Indiana Bicycle Co. *v.* Willis, 18 Ind. App. 525, 48 N. E. 646; Abrath *v.* North Eastern R. Co., 11 Q. B. D. 79; Panton *v.* Williams, 2 Q. B. 169, 1 G. & D. 504, 10 L. J. Exch. 545, 42 E. C. L. 622; Manley *v.* Gillespie, 27 Nova Scotia 301; Martin *v.* Hutchinson, 21 Ont. 388.

22. *Indiana.*— Lawrence *v.* Leathers, 31 Ind. App. 414, 68 N. E. 179.

Iowa.— Erb *v.* German-American Ins. Co., 112 Iowa 357, 83 N. W. 1053.

Kansas.— Walker *v.* Culman, 9 Kan. App. 691, 59 Pac. 606.

Kentucky.— Ahrens, etc., Mfg. Co. *v.* Heoher, 106 Ky. 692, 51 S. W. 194, 21 Ky. L. Rep. 299.

North Carolina.— Jones *v.* Wilmington, etc., R. Co., 125 N. C. 227, 34 S. E. 398.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 161.

fact,[23] solely for the jury,[24] and although undisputed evidence, clearly showing that defendant has knowingly and wrongfully instituted a groundless proceeding in wilful violation of the rights of plaintiff, may establish a *prima facie* case of malice as a matter of law,[25] nevertheless when all men would not draw an inference of malice from the facts as proven against defendant,[26] and there is sufficient proof of want of probable cause,[27] and there are substantial circumstances in evidence tending to establish malice,[28] a question of fact arises which it is within the province of the jury to determine. *A fortiori* therefore when the facts are in dispute,[29] the question of good faith,[30] diligence,[31] the credibility of witnesses,[32] and the conflict of testimony[33] should be submitted to the jury for their

23. Gault *v.* Mitchell, 12 Leg. Int. (Pa.) 238; Wheeler *v.* Nesbitt, 24 How. (U. S.) 544, 16 L. ed. 765.

24. *California.*— Lacey *v.* Porter, 103 Cal. 597, 37 Pac. 635; Potter *v.* Seale, 8 Cal. 217.

District of Columbia.— Staples *v.* Johnson, 25 App. Cas. 155.

Georgia.— Anderson *v.* Keller, 67 Ga. 58.

Indiana.— Newell *v.* Downs, 8 Blackf. 523; Lawrence *v.* Leathers, 31 Ind. App. 414, 68 N. E. 179; Taylor *v.* Baltimore, etc., R. Co., 18 Ind. App. 692, 48 N. E. 1044; Indiana Bicycle Co. *v.* Willis, 18 Ind. App. 525, 48 N. E. 646.

Iowa.— Hidy *v.* Murray, 101 Iowa 65, 69 N. W. 1138; Ritchey *v.* Davis, 11 Iowa 124.

Kansas.— Wagstaff *v.* Schippel, 27 Kan. 450.

Maine.— Cooper *v.* Waldron, 50 Me. 80; Page *v.* Cushing, 38 Me. 523.

Maryland.— Boyd *v.* Cross, 35 Md. 194; Turner *v.* Walker, 3 Gill & J. 377, 22 Am. Dec. 329. *Compare* Garvey *v.* Wayson, 42 Md. 178.

Minnesota.— Bartlett *v.* Hawley, 38 Minn. 308, 37 N. W. 580.

New Hampshire.— Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800.

New York.— Fetzer *v.* Burlew, 114 N. Y. App. Div. 650, 99 N. Y. Suppl. 1100; Hamilton *v.* Davey, 28 N. Y. App. Div. 457, 51 N. Y. Suppl. 88; Von Latham *v.* Libby, 38 Barb. 339; Bulkeley *v.* Smith, 2 Duer 261.

North Carolina.— Bradley *v.* Morris, 44 N. C. 395.

Oregon.— Gee *v.* Culver, 12 Oreg. 228, 6 Pac. 775.

Pennsylvania.— Schofield *v.* Ferrers, 47 Pa. St. 194, 86 Am. Dec. 532.

Wisconsin.— Eggett *v.* Allen, 119 Wis. 625, 96 N. W. 803.

United States.— Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116; L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 121 Fed. 233, 57 C. C. A. 469; Munns *v.* De Nemours, 17 Fed. Cas. No. 9,926, 3 Wash. 31.

England.— Mitchell *v.* Jenkins, 5 B. & Ad. 588, 3 L. J. K. B. 35, 2 N. & M. 301, 27 E. C. L. 250.

Canada.— Palk *v.* Kenney, 11 U. C. Q. B. 350.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 163.

Rule applied.— The evidence of good faith being conflicting (Spear *v.* Hiles, 67 Wis. 350, 30 N. W. 506), or where want of probable cause is shown (Jones *v.* Fruin, 26 Nebr. 76, 42 N. W. 283), the question whether defendant was actuated by malice is still one of fact for the jury (Collins *v.* Manning, 1 N. Y. St. 193; Gault *v.* Mitchell, 12 Leg. Int. (Pa.) 238), to say whether they will infer malice from want of probable cause (Closson *v.* Staples, 42 Vt. 209, 1 Am. Rep. 316), and whether the inference of malice is a reasonable one from the facts assumed in the instruction (Wheeler *v.* Nesbitt, 24 How. (U. S.) 544, 16 L. ed. 765).

25. Clement *v.* Major, 8 Colo. App. 86, 44 Pac. 776; Bartlett *v.* Hawley, 38 Minn. 308, 37 N. W. 580.

Insufficient proof of malice see Chicago, etc., R. Co. *v.* Pierce, 98 Ill. App. 368; Richards *v.* Jewett, 118 Iowa 629, 92 N. W. 689.

26. Neil *v.* Thorn, 17 Hun (N. Y.) 144 [*reversed* on the facts in 88 N. Y. 270].

27. Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650; Grinnell *v.* Stewart, 32 Barb. (N. Y.) 544.

28. Torsch *v.* Dell, 88 Md. 459, 41 Atl. 903; Meyer *v.* Lally, 143 Mich. 578, 107 N. W. 109; Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650; Ruth *v.* St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055; Connelly *v.* McDermott, 3 Lans. (N. Y.) 63.

Express malice need not be shown. It may be inferred from want of probable cause. Holliday *v.* Sterling, 62 Mo. 321.

But when there is evidence of express malice, outside of the mere fact of want of probable cause, it should be submitted to the jury. McGarry *v.* Missouri Pac. R. Co., 36 Mo. App. 340; Rhodes *v.* Brandt, 21 Hun (N. Y.) 1.

29. Thorp *v.* Carvalho, 14 Misc. (N. Y.) 554, 36 N. Y. Suppl. 1.

30. Krulevitz *v.* Eastern R. Co., 140 Mass. 573, 5 N. E. 500; Shafer *v.* Hertzig, 92 Minn. 171, 99 N. W. 796; Bartlett *v.* Hawley, 38 Minn. 308, 37 N. W. 580; Tamblyn *v.* Johnston, 126 Fed. 267, 62 C. C. A. 601.

31. Ellis *v.* Simonds, 168 Mass. 316, 47 N. E. 116, holding that it is a question for the jury whether a failure of prosecuting witness to make such inquiries as a reasonably prudent person would have made before instituting the prosecution was or was not due to malice on his part.

32. Bartlett *v.* Hawley, 38 Minn. 308, 37 N. W. 580; Spear *v.* Hiles, 67 Wis. 350, 30 N. W. 506.

33. Fagnan *v.* Knox, 40 N. Y. Super. Ct. 41.

determination, under appropriate instructions, as to whether the proof is sufficient to establish malice.[34]

4. Advice of Counsel. It is a question of fact whether a party or his agent[35] has fairly communicated to his counsel all the facts which he knew[36] or ought to have known[37] and whether he acted in good faith upon the advice received,[38] where different conclusions might be drawn from the evidence.[39] When the facts of the case and those laid before the attorney are all in evidence, the jury must determine whether the statement was full and fair,[40] and whether under the peculiar circumstances of each case the advice of counsel is a complete defense.[41]

5. Nonsuit or Direction of Verdict. Where, in a suit for malicious prosecution, plaintiff is unsuccessful in his attempt to establish want of probable cause,[42]

34. Holliday *v.* Sterling, 62 Mo. 321; Lucy *v.* Smith, 8 U. C. Q. B. 518.

35. Mundal *v.* Minneapolis, etc., R. Co., 92 Minn. 26, 99 N. W. 273, 100 N. W. 363.

36. Anderson *v.* Friend, 71 Ill. 475; Johnson *v.* Miller, (Iowa 1884) 19 N. W. 310; Billingsley *v.* Maas, 93 Wis. 176, 67 N. W. 49.

37. Chicago Forge, etc., Co. *v.* Rose, 69 Ill. App. 123; Bell *v.* Atlantic City R. Co., 202 Pa. St. 178, 51 Atl. 600.

38. *Alabama.*— McLeod *v.* McLeod, 73 Ala. 42.

Arkansas.— Wells *v.* Parker, 76 Ark. 41, 88 S. W. 602; Harr *v.* Ward, 73 Ark. 437, 84 S. W. 496.

California.— Seabridge *v.* McAdam, 108 Cal. 345, 41 Pac. 409; Potter *v.* Seale, 8 Cal. 217.

Illinois.— Schattgen *v.* Holnback, 149 Ill. 646, 36 N. E. 969 [*affirming* 52 Ill. App. 54]; Anderson *v.* Friend, 71 Ill. 475.

Kentucky.—Lancaster *v.* Langston, 36 S. W. 521, 18 Ky. L. Rep. 299.

Massachusetts.— Connery *v.* Manning, 163 Mass. 44, 39 N. E. 558.

Michigan.— Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. N. S. 928; Thompson *v.* Price, 100 Mich. 558, 59 N. W. 253.

Minnesota.— Cole *v.* Andrews, 70 Minn. 230, 72 N. W. 3; Cole *v.* Curtis, 16 Minn. 182.

Missouri.— Lalor *v.* Byrne, 51 Mo. App. 573.

New York.— Laird *v.* Taylor, 66 Barb. 139; Hall *v.* Suydam, 6 Barb. 83.

Pennsylvania.— Smith *v.* Walter, 125 Pa. St. 453, 17 Atl. 466.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 165.

39. Billingsley *v.* Maas, 93 Wis. 176, 67 N. W. 49.

40. McLeod *v.* McLeod, 73 Ala. 42.

41. *Illinois.*— Fadner *v.* Filer, 27 Ill. App. 506.

Iowa.— Connelly *v.* White, 122 Iowa 391, 98 N. W. 144.

Kentucky.— Tandy *v.* Riley, 80 S. W. 776, 26 Ky. L. Rep. 98.

Mississippi.— Kehl *v.* Hope Oil-Mill, etc., Co., 77 Miss. 762, 27 So. 641.

Nevada.—McNamee *v.* Nesbitt, 24 Nev. 400, 56 Pac. 37.

United States.— L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 121 Fed. 233, 57 C. C. A. 469.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 165.

There are also some authorities to the effect that where the proceeding was instituted on advice of counsel, such advice is only evidence to go to the jury to rebut the presumption of malice. Thurber *v.* Eastern Bldg., etc., Assoc., 116 N. C. 75, 21 S. E. 193.

42. *California.*— Dwain *v.* Descalso, 66 Cal. 415, 5 Pac. 903.

Nevada.— Fenstermaker *v.* Page, 20 Nev. 290, 21 Pac. 322.

New York.— Miller *v.* Milligan, 48 Barb. 30; Nebenzahl *v.* Townsend, 61 How. Pr. 353.

North Carolina.—Moore *v.* Statesville First Nat. Bank, 140 N. C. 293, 52 S. E. 944.

Pennsylvania.— Scott *v.* Dewey, 23 Pa. Super. Ct. 396; Ritter *v.* Ewing, 4 Pa. Dist. 203, 16 Pa. Co. Ct. 295.

South Carolina.— Stoddard *v.* Roland, 31 S. C. 342, 9 S. E. 1027; Lipford *v.* McCullum, 1 Hill 82.

England.— Cox *v.* English, etc., Bank, [1905] A. C. 168, 74 L. J. P. C. 62, 92 L. T. Rep. N. S. 483.

Canada.— Lalande *v.* Campeau, 5 Rev. de Jur. 438, 16 Quebec Super. Ct. 204; Malcolm *v.* Perth Mut. F. Ins. Co., 29 Ont. 406 [*affirmed* in 29 Ont. 717]; Rice *v.* Saunders, 26 U. C. C. P. 27; Joint *v.* Thompson, 26 U. C. Q. B. 519; Wanless *v.* Matheson, 15 U. C. Q. B. 278; Wilson *v.* Lee, 11 U. C. Q. B. 91; Smith *v.* McKay, 10 U. C. Q. B. 412.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 166.

The presumption of probable cause arising from the finding of a "true bill" by the grand jury warrants the granting of a nonsuit in an action for malicious prosecution where plaintiff rests after proving defendant's information on oath, the issuing of a warrant, arrest, indictment, finding of a "true bill" good character of plaintiff, and malice of defendant. Brown *v.* Griffin, Cheves (S. C.) 32.

It was error to direct verdict for defendant, or rather it was held that plaintiff was entitled to go to the jury under the evidence, as to probable cause in Staples *v.* Johnson, 25 App. Cas. (D. C.) 155; Davis *v.* Cassidy, 64 S. W. 633, 23 Ky. L. Rep. 955; Thurkettle *v.* Frost, 137 Mich. 649, 100 N. W. 283; Cas-

malice,[43] favorable termination of previous proceeding,[44] or connection of defendant as cause,[45] and when there is no dispute as to the facts, nor any reasonable doubt concerning the inferences to be drawn from them in respect to probable cause and malice, it is the duty of the court to direct a nonsuit or a verdict for defendant.[46] Where, however, there is conflict of testimony,[47] or, as it has sometimes been held, where the evidence is uncontradicted but susceptible of different inferences,[48] or where the court would not be justified in holding, as a matter of law, that defendant had such reasonable ground of suspicion, supported by circumstances of such strength as to warrant a cautious man in believ-

sinelli *v.* Cassinelli, 24 Nev. 182, 51 Pac. 252; Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800; Scott *v.* Dennett Surpassing Coffee Co., 51 N. Y. App. Div. 321, 64 N. Y. Suppl. 1016; Sweet *v.* Smith, 42 N. Y. App. Div. 502, 59 N. Y. Suppl. 404; Costigan *v.* Metropolitan L. Ins. Co., 39 N. Y. App. Div. 644, 57 N. Y. Suppl. 177; Ericson *v.* Edison Electric Illuminating Co., 31 Misc. (N. Y.) 379, 64 N. Y. Suppl. 498; Coble *v.* Huffines, 133 N. C. 422, 45 S. E. 760; Bryant *v.* Kuntz, 25 Pa. Super. Ct. 102; Replogle *v.* Frothingham, 16 Pa. Super. Ct. 374; Charlton *v.* Markland, 36 Wash. 40, 78 Pac. 132; Richardson *v.* Spangle, 22 Wash. 14, 60 Pac. 64; L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 121 Fed. 233, 57 C. C. A. 469.

43. Dearmond *v.* St. Amant, 40 La. Ann. 374, 4 So. 72; Mell *v.* Barner, 135 Pa. St. 151, 19 Atl. 940; Hatjie *v.* Hare, 68 Vt. 247, 35 Atl. 54; Anderson *v.* Bell, 24 Nova Scotia 100; Lucy *v.* Smith, 8 U. C. Q. B. 518.

44. Nebenzahl *v.* Townsend, 61 How. Pr. (N. Y.) 353; Lieblang *v.* Cleveland City Electric R. Co., 26 Ohio Cir. Ct. 30; Sinclair *v.* Haynes, 16 U. C. Q. B. 247.

If there is no evidence that the prosecution has been legally terminated a nonsuit is properly granted. Hardin *v.* Borders, 23 N. C. 143.

45. *Georgia.*— Bryan *v.* Baird, 117 Ga. 177, 43 S. E. 419.

Michigan.— Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. N. S. 928.

Minnesota.— Cole *v.* Andrews, 70 Minn. 230, 73 N. W. 3.

New Hampshire.— Lamprey *v.* Hood, 73 N. H. 384, 62 Atl. 380.

New York.— Lehman *v.* Oschmann, 89 N. Y. App. Div. 620, 85 N. Y. Suppl. 864.

Canada.— Perrin *v.* Joyce, 6 U. C. Q. B. O. S. 300.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 166.

46. *District of Columbia.*— Spitzer *v.* Friedlander, 14 App. Cas. 556.

Iowa.— Knapp *v.* Chicago, etc., R. Co., 113 Iowa 532, 85 N. W. 769.

Maryland.— Campbell *v.* Baltimore, etc., R. Co., 97 Md. 341, 55 Atl. 532.

Michigan.— James *v.* Sweet, 125 Mich. 132, 84 N. W. 61.

Minnesota.— Mundal *v.* Minneapolis, etc., R. Co., 92 Minn. 26, 99 N. W. 273, 100 N. W. 363.

Missouri.—Clark *v.* Thompson, 160 Mo. 461, 61 S. W. 194.

Nebraska.— Bechel *v.* Pacific Express Co., 65 Nebr. 826, 91 N. W. 853; Figg *v.* Hanger, 4 Nebr. (Unoff.) 792, 96 N. W. 658; Sudborough *v.* Pacific Express Co., 4 Nebr. (Unoff.) 518, 95 N. W. 3.

New York.— Burt *v.* Smith, 181 N. Y. 1, 73 N. E. 495; Kutner *v.* Fargo, 34 N. Y. App. Div. 317, 54 N. Y. Suppl. 332.

Pennsylvania.— Madison *v.* Pennsylvania R. Co., 147 Pa. St. 509, 23 Atl. 764, 30 Am. St. Rep. 756; Bryant *v.* Kuntz, 25 Pa. Super. Ct. 102; Scott *v.* Dewey, 23 Pa. Super. Ct. 396.

Rhode Island.— Fox *v.* Smith, 25 R. I. 255, 55 Atl. 698.

United States.— Castro *v.* De Uriarte, 16 Fed. 93.

Canada.— Shaw *v.* McKenzie, 6 Can. Sup. Ct. 181; Baker *v.* Jones, 19 U. C. C. P. 365; Winning *v.* Gow, 32 U. C. Q. B. 528; Riddell *v.* Brown, 24 U. C. Q. B. 90.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 166.

47. *Colorado.*— Clement *v.* Major, 1 Colo. App. 297, 29 Pac. 19.

Massachusetts.— Connery *v.* Manning, 163 Mass. 44, 39 N. E. 558.

Michigan.— Wiesinger *v.* Benton Harbor First Nat. Bank, 106 Mich. 291, 64 N. W. 59; Govaski *v.* Downey, 100 Mich. 429, 59 N. W. 167.

New York.— Siefke *v.* Siefke, 6 N. Y. App. Div. 472, 39 N. Y. Suppl. 601; De Matteis *v.* La Maida, 74 Hun 432, 26 N. Y. Suppl. 471; Gierhon *v.* Ludlow, 2 Silv. Sup. 518, 6 N. Y. Suppl. 111; Young *v.* Lyall, 57 N. Y. Super. Ct. 39, 5 N. Y. Suppl. 11; Sprague *v.* Gibson, 17 N. Y. Suppl. 685.

Pennsylvania.— Ritter *v.* Ewing, 174 Pa. St. 341, 34 Atl. 584; Acker *v.* Gundy, 9 Pa. Cas. 452, 12 Atl. 595.

United States.— Sanders *v.* Palmer, 55 Fed. 217, 5 C. C. A. 77.

Canada.— Hamilton *v.* Cousineau, 19 Ont. App. 203.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 166.

48. Panton *v.* Williams, 2 Q. B. 169, 1 G. & D. 504, 10 L. J. Exch. 545, 42 E. C. L. 622. It is error for the court to withdraw the case from the jury and dismiss the action, although there was no contradiction of defendant's testimony, it being competent for the jury to disbelieve the same, although not contradicted (Nigh *v.* Keifer, 5 Ohio Cir. Ct. 1, 3 Ohio Cir. Dec. 1), or as where the truth or falsity of plaintiff's contention was within the actual knowledge of defendants (Sanders *v.* Palmer, 55 Fed. 217, 5 C. C. A. 77).

ing that plaintiff was guilty of the offense with which he was charged,[49] it is error for the court to withdraw the case from the jury. When probable cause or want of probable cause is conclusively shown, the court should so direct the jury and leave other appropriate matters to it for determination.[50]

C. Instructions[51]**— 1. In General.** The same general principles governing instructions to the jury in other cases are applicable to actions of malicious prosecutions.[52]

2. Form and Sufficency in General. When any instruction is necessary other than an instruction to find for either party,[53] it should be technically correct,[54] or sufficiently accurate,[55] complete,[56] and applicable to the facts under consideration to properly present the question to the jury,[57] without undue repetition[58] and without inconsistency.[59] The instructions must be taken as a whole, and, if so taken, they correctly express the law, they will be upheld.[60]

3. Requests For Instructions. It is the duty of the trial court, when requested, to give in his charge any requested instructions not covered by the general charge,[61] which is correct as a proposition of law, and is applicable to the issue.[62] But error cannot be predicated on the omission to charge upon a point to

49. Anderson *v.* Columbia Finance, etc., Co., 50 S. W. 40, 20 Ky. L. Rep. 1790; De Matteis *v.* La Maida, 74 Hun (N. Y.) 432, 26 N. Y. Suppl. 471; Seary *v.* Saxton, 28 Nova Scotia 278; Webber *v.* McLeod, 16 Ont. 609; Torrance *v.* Jarvis, 13 U. C. Q. B. 120; Thorne *v.* Mason, 8 U. C. Q. B. 236; Smith *v.* Chep, 6 U. C. Q. B. O. S. 213. See also Shannon *v.* Sims, (Ala. 1906) 40 So. 574.

50. Patterson *v.* Scott, 38 U. C. Q. B. 642; Smith *v.* McKay, 10 U. C. Q. B. 412.

Plaintiff may be entitled to substantial damages as a matter of law. Charlebois *v.* Surveyer, 27 Can. Sup. Ct. 556.

51. Province of court and jury see *supra*, XV, B.

52. See, generally, Trial. See also Seabridge *v.* McAdam, 119 Cal. 460, 51 Pac. 691 (error in instruction as to effect of pleading); Kueney *v.* Uhl, (Iowa 1904) 98 N. W. 602 (unwarranted charge under evidence).

53. See *infra*, XV, C, 3, text and note 61 *et seq.*

54. White *v.* Shradski, 36 Mo. App. 635. See also Collins *v.* Fowler, 10 Ala. 858 (where larceny was improperly defined); Low *v.* Greenwood, 30 Ill. App. 184 (where malicious prosecution was improperly defined).

55. Florence Oil, etc., Co. *v.* Huff, 14 Colo. App. 281, 59 Pac. 624; Parker *v.* Parker, 102 Iowa 500, 71 N. W. 421; Tryon *v.* Pingree, 112 Mich. 338, 70 N. W. 905, 67 Am. St. Rep. 398, 37 L. R. A. 222; Sherburne *v.* Rodman, 51 Wis. 474, 8 N. W. 414.

Liability of a corporation for act of its agent see Mundal *v.* Minneapolis, etc., R. Co., 92 Minn. 26, 99 N. W. 273, 100 N. W. 363 (proper charge); Southern Car, etc., Co. *v.* Adams, 131 Ala. 147, 32 So. 503 (misleading charge).

56. Wilmerton *v.* Sample, 39 Ill. App. 60; Emery *v.* Ginnan, 24 Ill. App. 65.

57. *Alabama.*— Lunsford *v.* Dietrich, 93 Ala. 505, 9 So. 308, 30 Am. St. Rep. 79.

Connecticut.— Thompson *v.* Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554.

Indiana.— Hutchinson *v.* Wenzel, 155 Ind. 49, 56 N. E. 845.

Iowa.— Pierce *v.* Doolittle, 130 Iowa 333, 106 N. W. 751.

Michigan.—Lansky *v.* Prettyman, 140 Mich. 40, 103 N. W. 538.

Pennsylvania.— Buel *v.* Bergman, 213 Pa. St. 355, 62 Atl. 927.

Virginia.— Boush *v.* Maryland Fidelity, etc., Co., 100 Va. 735, 42 S. E. 877; Jones *v.* Morris, 97 Va. 43, 33 S. E. 377.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 168.

The jury is properly instructed to take into consideration all the proof that has been given that may properly bear upon the conduct of the parties. Hall *v.* Kehoe, 5 Silv. Sup. (N. Y.) 129, 8 N. Y. Suppl. 176.

It is error to charge upon a fact hypothetically stated in the instruction, if there is no evidence before them tending to show its existence. Greenwade *v.* Mills, 31 Miss. 464.

58. Wilmerton *v.* Sample, 39 Ill. App. 60, holding that when correct propositions of law are repeated so often and in so many different ways by the court as to bear and assume the character of an argument from the court, then they are open to serious criticism and are obnoxious to any correct practice in instructing a jury.

59. Rulison *v.* Collins, 5 Indian Terr. 282, 82 S. W. 748; Cooper *v.* Utterbach, 37 Md. 282.

60. Scrivani *v.* Dondero, 128 Cal. 31, 60 Pac. 463; Lytton *v.* Baird, 95 Ind. 349; Carter *v.* Sutherland, 52 Mich. 597, 18 N. W. 375; Baker *v.* Hornick, 57 S. C. 213, 35 S. E. 524.

When the jury could not have been misled by the instruction it will be upheld. Copper *v.* Langway, 76 Tex. 121, 13 S. W. 179.

61. Dawson *v.* Schloss, 93 Cal. 194, 29 Pac. 31.

62. *Indian Territory.*— Rulison *v.* Collins, 5 Indian Terr. 282, 82 S. W. 748.

Iowa.— Erb *v.* German-American Ins. Co., 112 Iowa 357, 83 N. W. 1053.

Missouri.— Clark *v.* Thompson, 160 Mo. 461, 61 S. W. 194.

which the court's attention has not been called. It is the duty of counsel to request such instructions as he thinks necessary.[63]

4. PROBABLE CAUSE.[64] It may be the duty of the court to direct the jury concerning probable cause for plaintiff or for defendant, as a matter of law.[65] Where directions as to probable cause are proper, they must state the principles of law[66]

New York.— Griffin *v.* Keeney, 27 N. Y. App. Div. 492, 50 N. Y. Suppl. 721.

Oregon.—Stamper *v.* Raymond, 38 Oreg. 16, 62 Pac. 20.

Texas.— San Antonio, etc., R. Co. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 168.

A refusal to charge that an admission made by one of several defendants in the absence of his co-defendants as to the falsity of his testimony on plaintiff's trial could not be considered by the jury as against his co-defendant is reversible error. Roberts *v.* Kendall, 3 Ind. App. 339, 29 N. E. 487.

Requests to charge should be limited to material issues. Thompson *v.* Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554; Lytton *v.* Baird, 95 Ind. 349.

Substantial compliance with the request is sufficient. Toomey *v.* Delaware, etc., R. Co., 4 Misc. (N. Y.) 392, 24 N. Y. Suppl. 108 [*affirmed* in 147 N. Y. 709, 42 N. E. 726].

Requests properly refused.— An instruction correct in the abstract but misleading (Marks *v.* Hastings, 101 Ala. 165, 13 So. 297), or inapplicable to portions of the evidence, or which magnifies matters about which there is no dispute (Palmer *v.* Broder, 78 Wis. 483, 47 N. W. 744), or which undertakes to select from the mass of evidence in the cause isolated circumstances, and express to the jury an opinion as to its probative force, separated from every other fact proved in the case (Coleman *v.* Heurich, 2 Mackey (D. C.) 189), or at variance with general principles of evidence on the subject (Coleman *v.* Heurich, *supra*), or which can in no possible way illustrate or shed light upon the question at issue (Neufeld *v.* Rodeminski, 144 Ill. 83, 32 N. E. 913 [*affirming* 41 Ill. App. 144]; Sutor *v.* Wood, 76 Tex. 403, 13 S. W. 321), is properly refused. When the court is called upon to give an instruction asked without modification or refuse it, and the court views the instruction in its strict form, it is properly refused when it cannot be given literally. Paukett *v.* Livermore, 5 Iowa 277.

63. Peterson *v.* Toner, 80 Mich. 350, 45 N. W. 346.

When there is no error in the definition of the crime as given to the jury, and where defendant wishes the court to instruct that plaintiff was guilty of some different offense, under the circumstances in proof, he should request a particular charge to that effect. Collins *v.* Fowler, 10 Ala. 858.

64. **Want of probable cause as element of liability** see *supra*, VI, A, 1.

65. Davis *v.* McLaulin, 122 Mich. 393, 81 N. W. 257; Graff *v.* Barrett, 29 Pa. St. 477; Staunton *v.* Goshorn, 94 Fed. 52, 36 C. C. A. 75; Sanders *v.* Palmer, 55 Fed. 217, 5 C. C. A. 77. And see Medcalfe *v.* Brooklyn L. Ins. Co., 45 Md. 198; Greenwade *v.* Mills, 31 Miss. 464.

66. *Illinois.*— Low *v.* Greenwood, 30 Ill. App. 184.

Massachusetts.— Bacon *v.* Towne, 4 Cush. 217.

Michigan.— Cooney *v.* Chase, 81 Mich. 203, 45 N. W. 833; Wilson *v.* Bowen, 64 Mich. 133, 31 N. W. 81.

Minnesota.— Casey *v.* Sevatson, 30 Minn. 516, 16 N. W. 407 [*following* Cole *v.* Curtis, 16 Minn. 182].

New York.— Carpenter *v.* Shelden, 5 Sandf. 77; Candler *v.* Petit, 2 Hall 341.

South Carolina.— Hogg *v.* Pinckney, 16 S. C. 387; Sims *v.* McLendon, 3 Strobh. 557.

Texas.— Glasgow *v.* Owen, 69 Tex. 167, 6 S. W. 527.

Wisconsin.— Sutton *v.* McConnell, 46 Wis. 269, 50 N. W. 414.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 169.

Court should instruct what facts the jury are to consider (Sweeney *v.* Perney, 40 Kan. 102, 19 Pac. 328); and what facts (Dreyfus *v.* Aul, 29 Nebr. 191, 45 N. W. 282) would or would not constitute probable cause (Bacon *v.* Towne, 4 Cush. (Mass.) 217; Rankin *v.* Crane, 104 Mich. 6, 61 N. W. 1007; Meysenberg *v.* Engelke, 18 Mo. App. 346; Stevens *v.* Lacour, 10 Barb. (N. Y.) 62; Plummer *v.* Gheen, 10 N. C. 66, 14 Am. Dec. 572. But see Gulf, etc., R. Co. *v.* James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743, where the evidence was conflicting); and the law applicable thereto (Greenwade *v.* Mills, 31 Miss. 464; Fisher *v.* Forrester, 33 Pa. St. 501; Williams *v.* Norwood, 2 Yerg. (Tenn.) 329).

Failure to submit question of defendant's guilt as distinguished from reasonable and probable cause as error see Farmer *v.* Norton, 129 Iowa 88, 105 N. W. 371.

Illustrations.— *Probable cause generally.*— Instructions held not erroneous see Jenkins *v.* Gilligan, (Iowa 1906) 108 N. W. 237; Provident Sav. L. Assur. Soc. *v.* Johnson, 115 Ky. 84, 72 S. W. 754, 24 Ky. L. Rep. 1902 (case of libel); Martin *v.* Corscadden, (Mont. 1906) 86 Pac. 33; George *v.* Johnson, 25 N. Y. App. Div. 125, 49 N. Y. Suppl. 203 (not improper because of use of the word "strong" suspicion); Graham *v.* Fidelity Mut. Life Assoc., 98 Tenn. 48, 37 S. W. 995; Billingsley *v.* Maas, 93 Wis. 176, 67 N. W. 49. Instructions held erroneous see Lunsford *v.* Dietrich, 93 Ala. 565, 9 So. 308, 30 Am. St. Rep. 79; Ball *v.* Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; Low *v.* Greenwood,

relevant to the issues under consideration [67] intelligibly,[68] and with substantial, although not necessarily verbal,[69] or technical correctness,[70] and in such manner as to preserve to the court and to the jury their respective functions under the law of the particular jurisdiction.[71]

30 Ill. App. 184, 186 (where it was said: "'Malicious prosecution' is a phrase that has a well settled meaning. It denotes both malice and want of probable cause. To say that prosecuting a person criminally with any other motive than that of bringing the person so prosecuted to justice, is 'malicious prosecution,' in effect tells the jury there was no probable cause"); Atchison, etc., R. Co. *v.* Allen, 70 Kan. 743, 79 Pac. 648; Sehon *v.* Whitt, 92 S. W. 280, 29 Ky. L. Rep. 691; Cole *v.* Curtis, 16 Minn. 182; Woodman *v.* Prescott, 65 N. H. 224, 19 Atl. 999; Singer Mfg. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320. Requests properly refused see Lunsford *v.* Dietrich, 93 Ala. 565, 9 So. 308, 30 Am. St. Rep. 79 (instructions asked, as to probable cause, based upon unfounded assumptions); Coleman *v.* Heurich, 2 Mackey (D. C.) 189 (instruction based on isolated circumstances); Paukett *v.* Livermore, 5 Iowa 277; Hunter *v.* Randall, 69 Me. 183; Tucker *v.* Cannon, 28 Nebr. 196, 44 N. W. 440, 32 Nebr. 444, 49 N. W. 435; Davidoff *v.* Wheeler, etc., Mfg. Co., 16 Misc. (N. Y.) 31, 37 N. Y. Suppl. 661 [*affirming* 14 Misc. 456, 35 N. Y. Suppl. 1019]; Taylor *v.* Dominick, 36 S. C. 368, 15 S. E. 591 (in which five cases the requested instructions were not correct expositions of the law).

Defendant's knowledge or information.— Instructions held not erroneous see Price *v.* Denison, 95 Minn. 106, 103 N. W. 728; Markley *v.* Snow, 207 Pa. St. 447, 56 Atl. 999, 64 L. R. A. 685; Sisk *v.* Hurst, 1 W. Va. 53. Instructions held erroneous see Kansas, etc., Coal Co. *v.* Galloway, 71 Ark. 351, 74 S. W. 521, 100 Am. St. Rep. 79; Clark *v.* Hill, 96 Ill. App. 383; Pierce *v.* Doolittle, 130 Iowa 333, 106 N. W. 751; Schroeder *v.* Blum, (Nebr. 1905) 103 N. W. 1073; Jensen *v.* Halstead, 61 Nebr. 249, 85 N. W. 78; Staunton *v.* Goshorn, 94 Fed. 52, 36 C. C. A. 75.

Defendant's belief.— Instructions held not erroneous see Carter *v.* Sutherland, 52 Mich. 597, 18 N. W. 375; Jenner *v.* Carson, 111 Ind. 522, 13 N. E. 44 (with reference to joint tort-feasors); Cole *v.* Curtis, 16 Minn. 182 (with reference to joint tort-feasors). Instructions held erroneous see Ball *v.* Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; Dawson *v.* Schloss, 93 Cal. 194, 29 Pac. 31; Roberts *v.* Kendall, 12 Ind. App. 269, 38 N. E. 424.

Degree of caution required to ascertain the guilt of plaintiff see Flacker *v.* Novak, 94 Iowa 634, 63 N. W. 348 (erroneous instruction); Eggett *v.* Allen, 106 Wis. 633, 82 N. W. 556 (erroneous instruction).

Degree of proof.— Keep *v.* Griggs, 12 Ill. App. 511, erroneous instruction.

Nonsuit.— Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800, correct instruction.

Acquittal.— Hiersche *v.* Scott, 1 Nebr. (Unoff.) 48, 95 N. W. 494, correct instruction.

Acquittal and burden of proof.— Laing *v.* Mitten, 185 Mass. 233, 70 N. E. 128, correct instruction.

Discharge.— Philpot *v.* Lucas, 101 Iowa 478, 70 N. W. 625, correct instruction.

67. Fisher *v.* Forrester, 33 Pa. St. 501.

68. *California.*— Holliday *v.* Holliday, 123 Cal. 26, 55 Pac. 703.

Iowa.— Donnelly *v.* Burkett, 75 Iowa 613, 34 N. W. 330.

Kentucky.— Lancaster *v.* Langston, 36 S. W. 521, 18 Ky. L. Rep. 299.

Minnesota.— Smith *v.* Mahen, 42 Minn. 516, 44 N. W. 792; Chapman *v.* Dodd, 10 Minn. 350.

Texas.— Porter *v.* Martyn, (Civ. App. 1895) 32 S. W. 731.

Virginia.— Maddox *v.* Jackson, 4 Munf. 462.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 169.

69. Thompson *v.* Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554.

70. Walker *v.* Camp, 63 Iowa 627, 19 N. W. 802.

71. Sweeny *v.* Bienville Water Supply Co., 121 Ala. 454, 25 So. 575; McClay *v.* Hicks, 119 Mich. 65, 77 N. W. 636.

Province of court and jury see *supra*, XV, B, 2.

In some jurisdictions the court should charge hypothetically what facts, if found, would constitute probable cause (Dorr Cattle Co. *v.* Des Moines Nat. Bank, 127 Iowa 153, 98 N. W. 918; Metropolitan L. Ins. Co. *v.* Miller, 114 Ky. 754, 71 S. W. 921, 24 Ky. L. Rep. 1561), or to find the existence or nonexistence of probable cause as they believe one state of facts or another exist (Alexander *v.* Reid, 44 S. W. 211, 19 Ky. L. Rep. 1636. *Compare* Holliday *v.* Holliday, 123 Cal. 26, 55 Pac. 703), or to collate all (Florence Oil, etc., Co. *v.* Huff, 14 Colo. App. 281, 59 Pac. 624) relevant parts of evidence and instruct what facts, if found, constitute probable cause (Williams *v.* Kyes, 9 Colo. App. 220, 47 Pac. 839).

A mere definition should not be given (Scrivani *v.* Dondero, 128 Cal. 31, 60 Pac. 463) unless sufficiently supplemented by instructions telling the jury what facts if established in plaintiff's case would or would not constitute probable cause (Maynard *v.* Sigman, 65 Nebr. 590, 91 N. W. 576). And see Scrivani *v.* Dondero, *supra*.

The court may properly instruct the jury that if they find that there were no circumstances connected with the transaction which would warrant a reasonable, dispassionate man in believing plaintiff to have

5. Advice of Counsel.[72] Where there is evidence that defendant consulted counsel before commencing the proceeding, it is proper[73] and in appropriate cases necessary[74] for the court to give consistent[75] instructions in regard to the law pertaining to the advice of counsel,[76] including the character of counsel consulted,[77] defendant's belief,[78] the truthfulness and completeness of statement,[79] the advice given,[80] his good faith and reliance upon the advice given,[81] the degree of proof requisite,[82] and the extent to which such advice may be a defense.[83]

6. Malice.[84] When malice is in issue[85] the court should properly define it[86]

been guilty of the charge made against him, and in undertaking such prosecution from public motives, then there was no probable cause for the prosecution. McWilliams *v.* Hoban, 42 Md. 56.

72. Advice of counsel as showing probable cause see *supra*, VI, B, 2, d; VI, C, 3.

Advice of counsel as rebutting malice see *supra*, VII, E.

73. Black *v.* Buckingham, 174 Mass. 102, 54 N. E. 494.

A charge is correct which declared defendant guilty if he began the prosecution maliciously, and without reasonable cause, although no express reference is made to advice of counsel. O'Neal *v.* McKinna, 116 Ala. 606, 22 So. 905.

74. O'Neal *v.* McKinna, 116 Ala. 606, 22 So. 905; Black *v.* Buckingham, 174 Mass. 102, 54 N. E. 494.

75. Dunlap *v.* New Zealand F. & M. Ins. Co., 109 Cal. 365, 42 Pac. 29.

76. Hurlbut *v.* Hardenbrook, 85 Iowa 606, 52 N. W. 510; Walker *v.* Camp, 69 Iowa 741, 27 N. W. 800; Lancaster *v.* Langston, 36 S. W. 521, 18 Ky. L. Rep. 299; Fugate *v.* Millar, 109 Mo. 281, 19 S. W. 71; Laughlin *v.* Clawson, 27 Pa. St. 328.

Too broad an instruction as to elements of advice of counsel see Black *v.* Buckingham, 174 Mass. 102, 54 N. E. 494.

77. *California.*— Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380.

Colorado.— Clement *v.* Major, 8 Colo. App. 86, 44 Pac. 776.

Connecticut.— Smith *v.* King, 62 Conn. 515, 26 Atl. 1059.

Indiana.— Burgett *v.* Burgett, 43 Ind. 78.

Iowa.— Hurlbut *v.* Hardenbrook, 85 Iowa 606, 52 N. W. 510.

Nebraska.— Perrenoud *v.* Helm, 65 Nebr. 77, 90 N. W. 980.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 170.

78. Messman *v.* Ihlenfeldt, 89 Wis. 585, 62 N. W. 522.

79. Thurkettle *v.* Frost, 137 Mich. 649, 100 N. W. 283; Leahey *v.* March, 155 Pa. St. 458, 26 Atl. 701; Smith *v.* Walter, 125 Pa. St. 453, 17 Atl. 466; Palmer *v.* Broder, 78 Wis. 483, 47 N. W. 744; Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116 [*reversing* 22 Fed. Cas. No. 13,176, 2 Woods 599].

Where it is undisputed that defendant placed all the facts before the prosecuting attorney by himself and by disinterested witnesses, and acted on his opinion, the court should instruct that plaintiff has failed to show want of probable cause to make the complaint. Huntington *v.* Gault, 81 Mich. 144, 45 N. W. 970.

80. Mauldin *v.* Ball, 104 Tenn. 597, 58 S. W. 248.

81. Fox *v.* Davis, 55 Ga. 298; Adkin *v.* Pillen, 136 Mich. 682, 100 N. W. 176; Peterson *v.* Toner, 80 Mich. 350, 45 N. W. 346; Biddle *v.* Jenkins, 61 Nebr. 400, 85 N. W. 392; Palmer *v.* Broder, 78 Wis. 483, 47 N. W. 744.

82. Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380; Albrecht *v.* Ward, 91 Ill. App. 38; Laing *v.* Mitten, 185 Mass. 233, 70 N. E. 128.

83. *Arkansas.*— Kansas, etc., Coal Co. *v.* Galloway, 71 Ark. 351, 74 S. W. 521, 100 Am. St. Rep. 79.

District of Columbia.— Staples *v.* Johnson, 25 App. Cas. 155.

Oklahoma.— Ten Cate *v.* Fansler, 10 Okla. 7, 65 Pac. 375.

Pennsylvania.— Baker *v.* Moore, 29 Pa. Super. Ct. 301.

South Carolina.— Baker *v.* Hornick, 57 S. C. 213, 35 S. E. 524.

Tennessee.— Mauldin *v.* Ball, 104 Tenn. 597, 58 S. W. 248.

Wisconsin.— Strehlow *v.* Pettit, 96 Wis. 22, 71 N. W. 102.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 170.

84. Malice as essential element of liability see *supra*, VII, A.

85. Cecil *v.* Clarke, 17 Md. 508, holding that when the facts themselves are too inconclusive to justify any rational mind in finding malice on part of defendant, the court may instruct the jury, when called on to do so, that there is no sufficient evidence to sustain the action.

86. *Alabama.*— Sweeny *v.* Bienville Water Supply Co., 121 Ala. 454, 25 So. 575. See also Rutherford *v.* Dyer, (1906) 40 So. 974.

Connecticut.— Smith *v.* King, 62 Conn. 515, 26 Atl. 1059.

Iowa.— Paukett *v.* Livermore, 5 Iowa 277.

Missouri.— Fugate *v.* Millar, 109 Mo. 281, 19 S. W. 71.

North Carolina.— Savage *v.* Davis, 131 N. C. 159, 42 S. E. 571.

Texas.— McDaniel *v.* Needham, 61 Tex. 269.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 172.

Where the court has rejected a prayer defining malice because it was incorrect, it is

without contradiction,[87] and instruct with regard to the inferences[88] and presumptions arising from the circumstances proved,[89] and the further fact that all such inferences may be rebutted by other evidence in the case.[90]

7. Concurrence of Probable Cause and Malice. Inasmuch as both probable cause and malice must have existed in order to entitle plaintiff to recover,[91] the court should properly instruct the jury in that regard,[92] as to the burden of proof,[93] and the weight and sufficiency of the evidence.[94]

8. Damages.[95] The jury should be directed as to the elements of damages and the principles by which its discretion should be governed,[96] regarding actual,[97]

not bound *ex moro motu* to give any definition of it. Garvey *v.* Wayson, 42 Md. 178.

87. Whitfield *v.* Westbrook, 40 Miss. 311.

88. *Alabama.*—Rutherford *v.* Dyer, (1906) 40 So. 974; Lunsford *v.* Dietrich, 93 Ala. 565, 9 So. 308, 30 Am. St. Rep. 79.

Connecticut.— Thompson *v.* Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554.

Missouri.— Fugate *v.* Millar, 109 Mo. 281, 19 S. W. 71.

Ohio.— Funk *v.* Amor, 4 Ohio Cir. Ct. 271, 2 Ohio Cir. Dec. 541.

Texas.— Biering *v.* Galveston First Nat. Bank, 69 Tex. 599, 7 S. W. 90; Gimbel *v.* Gomprecht, (Civ. App. 1896) 36 S. W. 781.

Vermont.— Closson *v.* Staples, 42 Vt. 209, 1 Am. Rep. 316.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 172.

89. *Connecticut.*— Smith *v.* King, 62 Conn. 515, 26 Atl. 1059.

Indiana.— Smith *v.* McDaniel, 5 Ind. App. 581, 32 N. E. 798.

New York.—Langley *v.* East River Gas Co., 41 N. Y. App. Div. 470, 58 N. Y. Suppl. 992.

North Carolina.— Merrell *v.* Dudley, 139 N. C. 57, 51 S. E. 777.

Oregon.— Gee *v.* Culver, 12 Oreg. 228, 6 Pac. 775.

Pennsylvania.— Baker *v.* Moore, 29 Pa. Super. Ct. 301.

South Carolina.— Baker *v.* Hornick, 57 S. C. 213, 35 S. E. 524.

Tennessee.— Graham *v.* Fidelity Mut. Life Assoc., 98 Tenn. 48, 37 S. W. 995.

Texas.— San Antonio, etc., R. Co. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542.

United States.— Wheeler *v.* Nesbitt, 24 How. 544, 16 L. ed. 765.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 172.

An instruction was proper which charged that if defendant commenced the criminal prosecution to get possession of certain premises, and without the intention of punishing plaintiff for a violation of the law, it was an abuse of process which would be conclusive evidence of malice, as to which the advice of counsel would be no protection. Rulison *v.* Collins, 5 Indian Terr. 282, 82 S. W. 748.

Request properly refused.—Where a prayer groups together various facts and asks the court to instruct the jury that they may consider such facts if found by them, in determining whether or not defendant was actuated by malice, and several of the facts so enumerated, even if found by the jury, would not be evidence of malice, such prayer should be rejected. Garvey *v.* Wayson, 42 Md. 178.

90. Smith *v.* McDaniel, 5 Ind. App. 581, 32 N. E. 798; Hinson *v.* Powell, 109 N. C. 534, 14 S. E. 301; Wheeler *v.* Nesbitt, 24 How. (U. S.) 544, 16 L. ed. 765.

91. Dreyfus *v.* Aul, 29 Nebr. 191, 45 N. W. 282. See also *supra*, VI; VII.

92. *Georgia.*— Coleman *v.* Allen, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449.

Illinois.— Morrell *v.* Martin, 17 Ill. App. 336.

Kentucky.— Ahrens, etc., Mfg. Co. *v.* Hoeher, 106 Ky. 692, 51 S. W. 194, 21 Ky. L. Rep. 299.

Missouri.— Fugate *v.* Millar, 109 Mo. 281, 19 S. W. 71; Talbott *v.* Great Western Plaster Co., 86 Mo. App. 558; Hilbrant *v.* Donaldson, 69 Mo. App. 92.

New Hampshire.— Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800.

New York.— Vorce *v.* Oppenheim, 37 N. Y. App. Div. 69, 55 N. Y. Suppl. 596.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 171.

Requests properly refused.— It is not reversible error to refuse to give an instruction as to malice and want of probable cause where it is not sufficiently precise and definite (Stone *v.* Stevens, 12 Conn. 219, 30 Am. Dec. 611), or which is defective in not defining what is meant by malice (Johns *v.* Marsh, 52 Md. 323). But see Ahrens, etc., Mfg. Co. *v.* Hoeher, 106 Ky. 692, 51 S. W. 194, 21 Ky. L. Rep. 299.

93. Sandell *v.* Sherman, 107 Cal. 391, 40 Pac. 493; Stone *v.* Stevens, 12 Conn. 219, 30 Am. Dec. 611.

94. Stone *v.* Stevens, 12 Conn. 219, 30 Am. Dec. 611; Keesling *v.* Doyle, 8 Ind. App. 43, 35 N. E. 126; Jones *v.* Jenkins, 3 Wash. 17, 27 Pac. 1022.

95. Damages as element of liability see *supra*, IX, A.

96. Marks *v.* Hastings, 101 Ala. 165, 13 So. 297.

An instruction is sufficient which charges that if the jury found for plaintiff they should give him such a sum as would indemnify him for the injuries he had sustained by the wrongful acts of defendant, in the absence of any request for more specific instructions. Leach *v.* Wilbur, 9 Allen (Mass.) 212.

97. *Iowa.*— Parkhurst *v.* Masteller, 57 Iowa 474, 10 N. W. 864.

special,[98] punitive, and vindictive damages,[99] and, when proper, as to the pecuniary ability of defendant.[1]

D. Verdict[2] and Judgment. When it has a sufficient basis in the pleading,[3] a verdict if general and not inconsistent with special findings,[4] or if special and properly framed[5] and sufficiently answered[6] and the judgment entered thereon against the party[7] or parties[8] will be sustained and a new trial refused.

E. New Trial For Insufficient Evidence. As regards the sufficiency of evidence where the testimony is uncontradicted, the finding of the court,[9] and where the testimony is conflicting, the verdict of the jury,[10] if there is no substantial

Kentucky.— Abohosh *v.* Buck, 43 S. W. 425, 19 Ky. L. Rep. 1267.

Massachusetts.— Black *v.* Buckingham, 174 Mass. 102, 54 N. E. 494.

Missouri.— Dwyer *v.* St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303.

Nebraska.— Ellison *v.* Brown, 43 Nebr. 68, 61 N. W. 97.

North Dakota.— Merchant *v.* Pielke, 10 N. D. 48, 84 N. W. 574.

Pennsylvania.— Reel *v.* Martin, 12 Pa. Super. Ct. 340.

Texas.— Shannon *v.* Jones, 76 Tex. 141, 13 S. W. 477; Curlee *v.* Rose, 27 Tex. Civ. App. 259, 65 S. W. 197.

Washington.— Jones *v.* Jenkins, 3 Wash. 17, 27 Pac. 1022.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 173.

98. Coleman *v.* Allen, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449; Lytton *v.* Baird, 95 Ind. 349.

99. *Alabama.*— Brown *v.* Master, 111 Ala. 397, 20 So. 344.

Iowa.— Connelly *v.* White, 122 Iowa 391, 98 N. W. 144.

Missouri.— Cooper *v.* Scyoc, 104 Mo. App. 414, 79 S. W. 751; Ruth *v.* St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055.

Ohio.— Miles *v.* Salisbury, 21 Ohio Cir. Ct. 333, 12 Ohio Cir. Dec. 7.

Wisconsin.—Eggett *v.* Allen, 119 Wis. 625, 96 N. W. 803.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 173.

Jury may be instructed to be lenient because plaintiff has been vindicated. Marx *v.* Mann, 1 Pa. Co. Ct. 262.

1. Whitfield *v.* Westbrook, 40 Miss. 311. *Compare* Singer Mfg. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320.

2. Proper form of verdict is given in Rutherford *v.* Dyer, (Ala. 1906) 40 So. 974.

3. Riley *v.* Gourley, 9 Conn. 154; Rigden *v.* Jordan, 81 Ga. 668, 7 S. E. 857.

4. Acton *v.* Coffman, 74 Iowa 17, 36 N. W. 774.

5. Cullen *v.* Hanisch, 114 Wis. 24, 89 N. W. 900.

6. See cases cited *infra*, this note.

Such verdict need not find the evidence and all the surplusage contained in the complaint (Tucker *v.* Hyatt, 151 Ind. 332, 51 N. E. 469, 44 L. R. A. 129), or probable cause, that being for the court to infer (Tucker *v.* Hyatt, *supra*; Taylor *v.* Baltimore, etc., R. Co., 18 Ind. App. 692, 48 N. E. 1044, surplusage disregarded; Indiana Bicycle Co. *v.* Willis, 18 Ind. App. 525, 48 N. E. 646, acquittal a sufficient finding of innocence).

A special verdict finding want of probable cause will not support a judgment for plaintiff, as malice is not inferred from want of probable cause, but is a question of fact. Helwig *v.* Beckner, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788. *Compare* Cooper *v.* Utterbach, 37 Md. 282.

7. Smith *v.* Zent, 59 Ind. 362, holding that where the jury find generally for plaintiff and specially facts that show probable or good cause, defendant is entitled to judgment on the special finding.

8. Albright *v.* McTighe, 49 Fed. 817, holding that the judgment may be against one, more, or all joint tort-feasors.

If part of defendants fail to plead, judgment must go against them, notwithstanding a sufficient plea by the others. Legrand *v.* Page, 7 T. B. Mon. (Ky.) 401.

Severance of the damages in the verdict is a ground for a reversal and a new trial, in an action against two defendants for malicious prosecution. McCool *v.* Mahoney, 54 Cal. 491.

Ga. Code, § 3075, as to joint trespassers, does not apply to actions for malicious prosecution. McCalla *v.* Shaw, 72 Ga. 458.

9. Bernar *v.* Dunlap, 94 Pa. St. 329.

10. *California.*— Vann *v.* McCreary, 77 Cal. 434, 19 Pac. 826.

Georgia.— Horn *v.* Sims, 92 Ga. 421, 17 S. E. 670; Southwestern R. Co. *v.* Mitchell, 80 Ga. 438, 5 S. E. 490.

Indiana.— Paddock *v.* Watts, 116 Ind. 146, 18 N. E. 518, 9 Am. St. Rep. 832; Atkinson *v.* Van Cleave, 25 Ind. App. 508, 57 N. E. 731.

Iowa.— Holden *v.* Merritt, 92 Iowa 707, 61 N. W. 390; Gale *v.* Bohanan, 73 Iowa 501, 35 N. W. 599; Burtis *v.* Chambers, 51 Iowa 645, 2 N. W. 503.

Kansas.— Clark *v.* Baldwin, 25 Kan. 120.

Maine.— Speck *v.* Judson, 63 Me. 207.

Maryland.— Owens *v.* Owens, 81 Md. 518, 32 Atl. 247.

Massachusetts.— Donnelly *v.* Daggett, 145 Mass. 314, 14 N. E. 161; Krulevitz *v.* Eastern R. Co., 143 Mass. 228, 9 N. E. 613; Bobsin *v.* Kingsbury, 138 Mass. 538.

Nebraska.— Dreyfus *v.* Aul, 29 Nebr. 191, 45 N. W. 282; Tucker *v.* Cannon, 28 Nebr. 196, 44 N. W. 440.

New York.— Howe *v.* Oldham, 69 Hun 57, 23 N. Y. Suppl. 703; Waas *v.* Stephens, 2 Silv. Sup. 581, 6 N. Y. Suppl. 131 [*affirmed* in 128 N. Y. 123, 28 N. E. 21]; Humphreys *v.*

ground,[11] or such an absence of evidence as to justify interference,[12] will not be disturbed, especially where substantial justice has been done.[13] But where a verdict has no evidence to sustain it on a material point,[14] where the evidence is wholly insufficient,[15] or where it is apparent that justice has miscarried[16] a new trial should be granted.

XVI. APPEAL AND ERROR.[17]

A. Reversal Not Justified. Reversal on appeal will not be justified by an erroneous instruction, validated by construction of the charge as a whole,[18] induced by request of appellant,[19] or not affecting the result because otherwise justified[20] or harmless,[21] or not properly objected to;[22] nor by errors in rulings on evidence acquiesced in[23] or harmless;[24] nor by an objection to a verdict made for the first time on appeal.[25] Nor should there be a reversal for the better satisfaction by the

Prudential Ins. Co., 16 N. Y. Suppl. 480 [*affirmed* in 135 N. Y. 650, 32 N. E. 647]; Doane *v.* Anderson, 15 N. Y. Suppl. 459; Silkman *v.* Crosby, 14 N. Y. St. 563.

Pennsylvania.— Miller *v.* Hammer, 141 Pa. St. 196, 21 Atl. 767.

Texas.— Shannon *v.* Jones, 76 Tex. 141, 13 S. W. 477; Gulf, etc., R. Co. *v.* James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743.

Wisconsin.— Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101.

United States.—Hershey *v.* O'Neill, 36 Fed. 168.

Canada.— Pockett *v.* Pool, 11 Manitoba 275; Scougall *v.* Stapleton, 12 Ont. 206; Hagerty *v.* Great Western R. Co., 44 U. C. Q. B. 319; Hood *v.* Cronkite, 29 U. C. Q. B. 98.

Proof of probable cause sufficient to sustain verdict for plaintiff see Roberts *v.* Keeler, 111 Ga. 181, 36 S. E. 617; Barge *v.* Weems, 109 Ga. 685, 35 S. E. 65; Hutchinson *v.* Wenzel, 155 Ind. 49, 56 N. E. 845; Gould *v.* Gregory, 133 Mich. 382, 95 N. W. 414; Miller Bank *v.* Richmon, 68 Nebr. 731, 94 N. W. 998; Rosenblatt *v.* Rosenberg, 1 Nebr. (Unoff.) 656, 95 N. W. 686; McMorris *v.* Howell, 89 N. Y. App. Div. 272, 85 N. Y. Suppl. 1018; Jones *v.* Morris, 97 Va. 43, 33 S. E. 377.

11. Nelson *v.* Danielson, 82 Ill. 545; Blakely *v.* Patterson, 15 U. C. Q. B. 180; Owens *v.* Purcell, 11 U. C. Q. B. 390.

12. Bruington *v.* Wingate, 55 Iowa 140, 7 N. W. 478; Shea *v.* Cloquet Lumber Co., 97 Minn. 41, 105 N. W. 552; Shrosbery *v.* Osmaston, 37 L. T. Rep. N. S. 792 [*followed* in Baker *v.* Kilpatrick, 7 Brit. Col. 150].

13. Thompson *v.* Force, 65 Ill. 370.

14. *Georgia.*— Goggans *v.* Monroe, 31 Ga. 331.

Nebraska.— Hiatt *v.* Kinkaid, 28 Nebr. 721, 45 N. W. 236.

New Jersey.— Bell *v.* Atlantic City R. Co., 58 N. J. L. 227, 33 Atl. 211.

Utah.— Wright *v.* Ascheim, 5 Utah 480, 17 Pac. 125.

Washington.— Murrey *v.* Kelso, 10 Wash. 47, 38 Pac. 879.

15. Mohar *v.* Simmons, 3 N. Y. St. 293; Cox *v.* English, etc., Bank, [1905] A. C. 168, 74 L. J. P. C. 62, 92 L. T. Rep. N. S. 483.

16. Mohar *v.* Simmons, 3 N. Y. St. 293.

The English test is whether the evidence is such as to make unreasonable and almost perverse, that the jury, when instructed and assisted properly by the judge, should return such a verdict. Metropolitan R. Co. *v.* Wright, 11 App. Cas. 152, 55 L. J. Q. B. 401, 54 L. T. Rep. N. S. 658, 34 Wkly. Rep. 746; Lyons *v.* Kelly, 6 U. C. Q. B. 278; Tyler v. Babington, 4 U. C. Q. B. 202.

In Canada see Wilson *v.* Tennant, 25 Ont. 339; Nourse *v.* Calcutt, 6 U. C. C. P. 14; Ruttan *v.* Pringle, 1 U. C. C. P. 244; Lyons *v.* Kelly, 6 U. C. Q. B. 278; Tyler *v.* Babington, 4 U. C. Q. B. 202.

17. **Appeal and error** generally see APPEAL AND ERROR.

18. See *supra*, XV, C.

19. Dawson *v.* Schloss, 93 Cal. 194, 29 Pac. 31.

20. Coleman *v.* Heurich, 2 Mackey (D. C.) 189.

21. *Arkansas.*— Hearn *v.* Coy, (1890) 13 S. W. 596.

Colorado.— Brooks *v.* Bradford, 4 Colo. App. 410, 36 Pac. 303.

Connecticut.— Thompson *v.* Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554.

Iowa.— Parkhurst *v.* Masteller, 57 Iowa 474, 10 N. W. 864; Myers *v.* Wright, 44 Iowa 38.

Maine.— Smith *v.* Swett, 63 Me. 344.

Maryland.— Hegenrather *v.* Spielman, (1891) 22 Atl. 1106.

Missouri.— Sparling *v.* Conway, 75 Mo. 510; Lalor *v.* Byrne, 51 Mo. App. 578.

New York.— See Neil *v.* Thorn, 88 N. Y. 270.

Utah.— Hamer *v.* Ogden First Nat. Bank, 9 Utah 215, 33 Pac. 941.

See 33 Cent. Dig. tit. "Malicious Prosecution," § 178.

Failure to instruct upon subject of exemplary damages when no actual damages are recovered may be non-prejudicial. Myers *v.* Wright, 44 Iowa 38.

22. Labar *v.* Crane, 56 Mich. 589, 23 N. W. 325.

23. Louisville, etc., R. Co. *v.* Hendricks, 13 Ind. App. 10, 40 N. E. 82, 41 N. E. 14.

24. Wright *v.* Fansler, 90 Ind. 492; Flam *v.* Lee, 116 Iowa 289, 90 N. W. 70, 98 Am. St. Rep. 242.

25. Bays *v.* Herring, 51 Iowa 286, 1 N. W. 558.

appellate[26] court because the verdict should have been smaller; nor on any issue not fully presented by the case on appeal.[27]

B. Reversal Justified. In accordance with the rules governing the determination of appeals generally[28] a reversal will be justified by unexcused and material error in instructions substantially affecting the result,[29] or by error in submitting to the jury the question of probable cause.[30]

XVII. CRIMINAL RESPONSIBILITY.[31]

At common law there was no criminal responsibility for having caused a malicious prosecution.[32] It exists by virtue of statute only.[33]

MALICIOUS SHOOTING. See ASSAULT AND BATTERY; HOMICIDE.

MALICIOUS THREAT. See THREATS.

MALICIOUS TRESPASS. See TRESPASS.

MALICIOUS WRONG. An intentional action causing damage, when done without just cause or excuse.[1] (See MALICE; MALICIOUS.)

MALIGNANT PUSTULE. A disease caused by the infliction upon the body of putrid animal matter containing poisonous bacillus anthrax.[2] (See, generally, ACCIDENT INSURANCE.)

MALINGERING. A deception practised by anybody from which they try to make out that they are sick when they are not sick.[3]

MALITIA. An express evil design.[4] (See MALICE.)

MALITIA EST ACIDA, EST MALI ANIMI AFFECTUS. A maxim meaning "Malice is sour, it is the quality of a bad mind."[5]

MALITIA HOMINUM EST OBVIANDUM. A maxim meaning "The malice of men is to be averted."[6]

MALITIA SUPPLET ÆTATEM. A maxim meaning "Malice supplies (or makes up for) age; wickedness of design supplies the want of age."[7]

MALITIIS HOMINUM NON EST INDULGENDUM. A maxim meaning "No indulgence ought to be shown to the malicious desires of men."[8]

26. Sayles *v.* Hoetzel, 20 N. Y. Suppl. 553.

27. Dann *v.* Wormser, 38 N. Y. App. Div. 460, 56 N. Y. Suppl. 474; Lauterbach *v.* Netzo, 111 Wis. 322, 87 N. W. 230.

28. See APPEAL AND ERROR, 3 Cyc. 440 *et seq.*

29. Thompson *v.* Lumley, 7 Daly (N. Y.) 74.

30. Loui Soy Wing *v.* Chung Yick, 113 Cal. 310, 45 Pac. 470.

It was reversible error, where the facts were undisputed, to submit to the jury the question of the existence of probable cause. Bell *v.* Atlantic City R. Co., 58 N. J. L. 227, 33 Atl. 211. *Compare* Pangburn *v.* Bull, 1 Wend. (N. Y.) 345.

The question of probable cause will be reviewed on appeal as a legal conclusion, rather than as a mere question of fact. Eickhoff *v.* Fidelity, etc., Co., 74 Minn. 139, 76 N. W. 1030.

31. Criminal law generally see CRIMINAL LAW.

Indictment or information generally see INDICTMENTS AND INFORMATIONS.

32. Knight *v.* Sawin, 6 Me. 361, holding that a malicious prosecution is not an indictable offense, although it is good ground for recovering damages in a civil action.

33. See the statutes of the several states.

Want of probable cause and malice see Johnson *v.* State, 32 Tex. Cr. 58, 22 S. W. 43.

Prosecution and punishment see Dempsey *v.* State, 27 Tex. App. 269, 11 S. W. 372, 11 Am. St. Rep. 193; Reed *v.* State, 29 Tex. App. 449, 16 S. E. 99.

1. Continental Ins. Co. *v.* Pacific Fire Underwriters, 67 Fed. 310, 320.

2. Bacon *v.* U. S. Mutual Acc. Assoc., 123 N. Y. 304, 310, 25 N. E. 399, 20 Am. St. Rep. 748, 9 L. R. A. 617.

3. Brown *v.* Third Ave. R. Co., 19 Misc. (N. Y.) 504, 507, 43 N. Y. Suppl. 1094.

4. Burrill L. Dict. [*citing* 4 Blackstone Comm. 199].

Used in Hanson *v.* Globe Newspaper Co., 159 Mass. 293, 302, 34 N. E. 462, 20 L. R. A. 856; Jones *v.* Gwynn, 10 Mod. 214, 215.

5. Bouvier L. Dict. [*citing* Creswick *v.* Rooksby, 2 Bulstr. 47, 49].

6. Morgan Leg. Max.

7. Burrill L. Dict.

Applied in Spillane *v.* Missouri Pac. R. Co., 135 Mo. 414, 426, 37 S. W. 198, 58 Am. St. Rep. 580; Hawk *v.* Harman, 5 Binn. (Pa.) 43, 45.

8. Morgan Leg. Max.

MALLEABLE. Capable of being drawn out and extended by beating; capable of extension by hammering; reducible to laminated form by beating.[9]

MALPRACTICE. As applied to attorneys at law, evil practice in a professional capacity and a resort to methods and practices unsanctioned and prohibited by law;[10] misbehavior; evil practice; practice contrary to established rules;[11] improper or immoral conduct; objectionable practice;[12] evil practice; illegal or immoral conduct; practice contrary to established rules;[13] practice contrary to rules.[14] As applied to physicians and surgeons, negligent acts committed by a physician in treating his patient;[15] or the unskilful treatment by a physician or surgeon in consequence of which the patient is injured more or less seriously, perhaps permanently.[16] (Malpractice: Of Attorney, see ATTORNEY AND CLIENT. Of Physician — Generally, see PHYSICIANS AND SURGEONS; Resulting in Death, see HOMICIDE.)

MALT. Barley or other grain steeped in water and dried in a kiln, thus forcing germination, until the saccharine principle has been evolved.[17]

MALT LIQUOR. An alcoholic liquor, as beer, ale, or porter, prepared by fermenting an infusion of malt;[18] a general term for alcoholic beverages produced merely by the fermentation of malt as opposed to those obtained by distillation of malt or mash.[19] (See, generally, INTOXICATING LIQUORS.)

MALTREATMENT. Improper or unskilful treatment by a surgeon of his patient, which may result from ignorance, neglect or wilfulness, not necessarily

9. Farris *v.* Magone, 46 Fed. 845, 849.

10. Matter of Baum, 5 Silv. Sup. (N. Y.) 462, 463, 8 N. Y. Suppl. 771; Matter of Post, 4 Silv. Sup. (N. Y.) 248, 249, 7 N. Y. Suppl. 438.

11. Century Dict. [*quoted* in Matter of Silkman, 88 N. Y. App. Div. 102, 123, 84 N. Y. Suppl. 1025].

12. Standard Dict. [*quoted* in Matter of Silkman, 88 N. Y. App. Div. 102, 123, 84 N. Y. Suppl. 1025].

13. Webster Dict. [*quoted* in Matter of Silkman, 88 N. Y. App. Div. 102, 123, 84 N. Y. Suppl. 1025].

14. Worcester Dict. [*quoted* in Matter of Silkman, 88 N. Y. App. Div. 102, 123, 84 N. Y. Suppl. 1025].

The word is an appropriate term for a contempt committed by an attorney or solicitor in abusing the practice of the court. Matter of Silkman, 88 N. Y. App. Div. 102, 123, 84 N. Y. Suppl. 1025. Proof that an attorney appeared both for plaintiff and defendant in actions involving the same issue, or that he used a legal process in an abusive manner, warrants his disbarment for malpractice. *In re* O'Connell, 174 Mass. 253, 262, 53 N. E. 1001, 54 N. E. 558.

15. This may consist in: (1) Wilful acts on the part of the physician or surgeon toward any person under his care, by which such person suffers death or injury; and (2) acts forbidden by express statute, on the part of a physician or surgeon in treating a patient, by means of which such patient suffers death or unnecessary injuries. Tucker *v.* Gillette, 22 Ohio Cir. Ct. 664, 669, 12 Ohio Cir. Dec. 401.

16. Abbott *v.* Mayfield, 8 Kan. App. 387, 56 Pac. 327.

Charge of as libelous see LIBEL AND SLANDER.

17. Hollender *v.* Magone, 38 Fed. 912, 915; Webster Int. Dict. [*quoted* in U. S. *v.* Cohn, 2 Indian Terr. 474, 492, 52 S. W. 38].

It is used in brewing and the distillation of whisky. U. S. *v.* Cohn, 2 Indian Terr. 474, 492, 52 S W. 38. As sold in Kansas it is an imitation of lager beer, and is made from malted grain, hops, and water slightly fermented, and contains a very slight percentage of alcohol — a mere trace of spirits. Lincoln Center *v.* Linker, 7 Kan. App. 282, 53 Pac. 787, 788.

18. U. S. *v.* Ducournau, 54 Fed. 138, 139; Webster Int. Dict. [*quoted* in Adler *v.* State, 55 Ala. 16, 23; U. S. *v.* Cohn, 2 Indian Terr. 474, 492, 52 S. W. 38; State *v.* Stapp, 29 Iowa 551, 552; State *v.* Gill, 89 Minn. 502, 503, 95 N. W. 449].

19. Century Dict. [*quoted* in Sarlls *v.* U. S., 152 U. S. 570, 572, 14 S. Ct. 720, 38 L. ed. 556]. It has been characterized as a liquor having neither vinous nor spirituous liquors as an ingredient (Tinker *v.* State, 90 Ala. 647, 648, 8 So. 855), and includes both non-intoxicating and intoxicating malt liquors (U. S. *v.* Cohn, 2 Indian Terr. 474, 502, 52 S. W. 38; State *v.* Kauffman, 68 Ohio St. 635, 644, 67 N. E. 1062), is a broader term than "lager beer" and includes other beverages as ale and porter (Sampson *v.* State, 107 Ala. 76, 79, 18 So. 207), as well as lager beer itself (Watson *v.* State, 55 Ala. 158, 160; State *v.* Goyette, 11 R. I. 592), also a malt liquor sold under the name of "Rochester Tonic" (U. S. *v.* Cohn, 2 Indian Terr. 474, 498, 52 S. W. 38).

"Beer" when used without a prefix signifies malt liquor, and whenever malt liquor is not intended to be expressed by the use of this word some prefix is used, such as "root beer," "ginger beer," etc.; but when the word "beer" is used it means either common or bock beer. Locke *v.* Com., 74 S. W. 654, 655, 25 Ky. L. Rep. 76.

implying that the conduct of the surgeon in the treatment of the patient's wounds was either wilfully or grossly careless.[20] (Maltreatment: By Physician or Surgeon, see PHYSICIANS AND SURGEONS. Homicide Arising Therefrom, see HOMICIDE. Of Convict, see CONVICTS. Liability of Counties For, in Its Hospitals, Jails, Etc., see COUNTIES. See also MALPRACTICE.)

MALUM HOMINUM EST OBVIANDUM. A maxim meaning "The malicious plans of men must be avoided."[21]

MALUM IN SE. Literally "a wrong in itself." An act involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law.[22] (Malum In Se: Champerty as, see CHAMPERTY. Contracts of Corporations When, see CORPORATIONS. In Criminal Law, see CRIMINAL LAW. Validity of Contracts in Violation of Law, see CONTRACTS. See, generally, ACTIONS. See MALUM PROHIBITUM.)

MALUM NON HABET EFFICIENTEM, SED DEFICIENTUM, CAUSAM. A maxim meaning "Evil has not an efficient, but a deficient, cause."[23]

MALUM NON PRÆSUMITUR. A maxim meaning "Wickedness is not presumed."[24]

MALUM PROHIBITUM. An act made wrong by legislation — a forbidden evil.[25] (Malum Prohibitum: Considerations For Bonds When, see BONDS. Contracts of Municipal Corporation, When Not, see MUNICIPAL CORPORATIONS. In Criminal Law, see CRIMINAL LAW. Validity of Contracts in Violation of Law, see CONTRACTS. See, generally, ACTIONS. See also MALUM IN SE.)

MALUM QUO COMMUNIUS, EO PEJUS. A maxim meaning "The more common an evil is, the worse it is."[26]

MALUS USUS EST ABOLENDUS. A maxim meaning "An evil custom ought to be abolished."[27]

MAN. Any human being, whether male or female;[28] a human being; a person of the male sex; a male of the human species above the age of puberty;[29] a human being of the male sex who has arrived at the age of puberty;[30] a male adult of the human race, as distinguished from a woman or a boy; one who has attained manhood, or is regarded as of manly estate;[31] a married man; a husband.[32]

MANAGE. Ordinarily to control according to law;[33] to direct; control; govern; administer; oversee;[34] to conduct; carry on; to direct the concerns

20. Com. *v.* Hackett, 2 Allen (Mass.) 136, 142.

21. Bouvier L. Dict. [*citing* Stanhope *v.* Blith, 4 Coke 15*a*, 15*b*].

22. Black L. Dict.

Acts mala in se are felonies or breaches of public duties, injuries to person or property, outrages upon public decency or good morals, and breaches of official duty when done wilfully or corruptly (Com. *v.* Adams, 114 Mass. 323, 324, 19 Am. Rep. 362), but the offense of selling liquor without a license by an innkeeper is not *malum in se* (Lewin *v.* Johnson, 32 Hun (N. Y.) 408, 411).

23. Morgan Leg. Max.

24. Burrill L. Dict.

25. Anderson L. Dict. [*quoted* in Hatch *v.* Hanson, 46 Mo. App. 323, 339].

Acts forbidden by statute, but not otherwise wrong, are held to be *mala prohibita*. Com. *v.* Adams, 114 Mass. 323, 324, 19 Am. Rep. 362.

The supplying of water by a city has been held not *malum prohibitum*. McGonigale *v.* Defiance, 140 Fed. 621, 627.

26. Morgan Leg. Max.

27. Bouvier L. Dict. [*citing* Coke Litt. 141; Littleton, § 212].

Applied in Franklin Bank *v.* Byram, 39 Me. 489, 491, 63 Am. Dec. 643; Evans *v.* Waln, 71 Pa. St. 69, 75; Patterson *v.* Anderson, 1 Pa. Co. Ct. 86, 89; The Slave, Grace, 2 Hagg. Adm. 94, 128.

28. Anderson L. Dict. [*quoted* in State *v.* Seiler, 106 Wis. 346, 350, 82 N. W. 167].

29. Bouvier L. Dict. [*quoted* in Kenyon *v.* People, 26 N. Y. 203, 211, 84 Am. Dec. 177; State *v.* Seiler, 106 Wis. 346, 350, 82 N. W. 167].

30. Rapalje & L. L. Dict. [*quoted* in State *v.* Seiler, 106 Wis. 346, 350, 82 N. W. 167].

31. Century Dict. [*quoted* in Holliday *v.* State, 35 Tex. Cr. 133, 134, 32 S. W. 538].

32. Webster Dict. [*quoted* in Clancy *v.* Clancy, 66 Mich. 202, 209, 33 N. W. 889].

As used in a statute exempting certain property to the children of deceased man is a generic term and includes females as well as males. Turner *v.* Whitten, 40 Ala. 530, 532.

Held to include a corporation see Dayton Coal, etc., Co. *v.* Barton, 103 Tenn. 604, 611, 53 S. W. 970.

33. Cook County *v.* McCrea, 93 Ill. 236, 239 [*cited* and *approved* in Locke *v.* Davison, 111 Ill. 19, 25].

34. Anderson L. Dict. [*quoted* in Ure *v.* Ure, 185 Ill. 216, 218, 56 N. E. 1087]; Web-

of;[35] to have under control and direction; to conduct; to guide; to administer; to treat; to handle;[36] to direct; to govern; control; wield; order.[37] (See MANAGER.)

MANAGEMENT. Administration, control, synonymous with GOVERNMENT,[38] *q. v.*; the act or art of managing; the manner of directing, carrying on or using for a purpose; conduct; administration; guidance; control;[39] the act of managing, carrying on, directing, conducting, administering, superintending;[40] government; control; superintendence; physical or manual handling or guidance; the act of managing by direction or regulation; administration.[41] (See MANAGER.)

MANAGER. One who has the conduct or direction of anything;[42] the person who manages.[43] (Manager: Agent in General, see PRINCIPAL AND AGENT. Of Corporation, see CORPORATIONS. See, generally, MASTER AND SERVANT.)

MANAGING AGENT. An agent having a general supervision over the affairs of a corporation, or such an agent as has the power of general manager;[44] an agent invested with the general conduct and control at a particular place of the business of a corporation;[45] one having the entire charge of the business and subagents of the corporation over a large territory;[46] one having the management and control of the department of the business of a foreign corporation from which the cause of action arose;[47] one who has oversight of all work of a company at a certain point, and general charge of the employees of the company;[48] one whose agency extends to all the transactions of a corporation; one who has or is engaged in the

ster Dict. [*quoted* in Com. *v.* Johnson, 144 Pa. St. 377, 381, 22 Atl. 703].

"Control" and "manage" have been held to be synonymous. Ure *v.* Ure, 185 Ill. 216, 218, 56 N. E. 1087. "Manage" and "superintend" are synonymous. Youngworth *v.* Jewell, 15 Nev. 45, 48.

35. Webster Dict. [*quoted* in Palmer *v.* Cheseboro, 55 Conn. 114, 115, 10 Atl. 508].

36. Webster Dict. [*quoted* in Roberts *v.* State, 26 Fla. 360, 362, 7 So. 861].

37. Webster Dict. [*quoted* in Clinard *v.* White, 129 N. C. 250, 251, 39 S. E. 960].

When applied to money placed in the hands of another, it is a word of trust or confidence. Sinking Fund Com'rs *v.* Walker, 6 How. (Miss.) 143, 186, 38 Am. Dec. 433.

As used in a will it authorizes the executor to take charge of the estate and manage it to the best advantage for the benefit of creditors and includes the power to sell the property for the payment of debts. Carlton *v.* Goebler, 94 Tex. 93, 99, 58 S. W. 829.

38. Lewis *v.* Lewelling, 53 Kan. 201, 205, 36 Pac. 351, 23 L. R. A. 510; St. Louis *v.* Howard, 119 Mo. 41, 46, 24 S. W. 770, 41 Am. St. Rep. 630.

39. Webster Dict. [*quoted* in *In re* School Districts, 23 Colo. 499, 502, 48 Pac. 647].

40. Brace *v.* Solner, 1 Alaska 361, 367.

41. *In re* Sanders, 53 Kan. 191, 197, 36 Pac. 348, 23 L. R. A. 603, as the management of a family, or of the household, or of servants, or of great enterprises, or of great affairs.

42. Com. *v.* Johnson, 144 Pa. St. 377, 381, 22 Atl. 703.

43. *In re* Western Counties Steam Bakeries, etc., Co., [1897] 1 Ch. 617, 632, 66 L. J. Ch. 354, 76 L. T. Rep. N. S. 239, 45 Wkly. Rep. 418.

As used in an affidavit of publication of legal notice, it is equivalent to and synonymous with "publisher" or "foreman" (Waters *v.* Waters, 7 Misc. (N. Y.) 519, 522, 27 N. Y. Suppl. 1004); as used in the verification of a statement by one in behalf of another it denotes agency (Chicago Lumber Co. *v.* Osborn, 40 Kan. 168, 172, 19 Pac. 656); as applied to an officer of a corporation, it conveys the idea that to the one thus named has been committed the management of the affairs of the company, and one dealing with the person so held out may assume that his acts are authorized (Saunders *v.* U. S. Marble Co., 25 Wash. 475, 483, 65 Pac. 782; Carrigan *v.* Port Crescent Imp. Co., 6 Wash. 590, 591, 34 Pac. 148).

In maritime law it is an agency unknown, and the authority implied from such a position is in that law undefined. Davidson *v.* Baldwin, 79 Fed. 95, 100, 24 C. C. A. 453.

44. Wheeler, etc., Mfg. Co. *v.* Lawson, 57 Wis. 400, 401, 15 N. W. 398; Carr *v.* Racine Commercial Bank, 19 Wis. 272, 273; Upper Mississippi Transp. Co. *v.* Whittaker, 16 Wis. 220, 221.

45. Brown *v.* Chicago, etc., R. Co., 12 N. D. 61, 65, 95 N. W. 153, 102 Am. St. Rep. 564 [*citing* Porter *v.* Chicago, etc., R. Co., 1 Nebr. 14, 15; American Express Co. *v.* Johnson, 17 Ohio St. 641; Foster *v.* Charles Betcher Lumber Co., 5 S. D. 57, 68, 58 N. W. 9, 49 Am. St. Rep. 859, 23 L. R. A. 490].

46. Ives *v.* Metropolitan L. Ins. Co., 78 Hun (N. Y.) 32, 34, 28 N. Y. Suppl. 1030.

47. Hat-Sweat Mfg. Co. *v.* Davis Sewing Mach. Co., 31 Fed. 294, 296.

The term implies the carrying on of the corporate business or some substantial part thereof by means of an agent who maintains and conducts the same within the limits of the state on account of the foreign corporation. U. S. *v.* American Bell Tel. Co., 29 Fed. 17, 33.

48. Clinard *v.* White, 129 N. C. 250, 251, 39 S. E. 960.

management of a corporation, in distinction from the management of a particular branch or department of its business;[49] a person clothed with general power;[50] a person having independent discretionary control of the locality where his duties are performed;[51] a person vested by a corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity and under the direction and control of superior authority.[52] (See, generally, CORPORATIONS; PRINCIPAL AND AGENT; PROCESS.)

MANAGING OWNER. One of several coöwners, to whom the others, or those of them who join in the adventure, have delegated the management of the ship.[53] (See, generally, MARITIME LIENS; SHIPPING.)

MANBOTE. A compensation paid the relations of a murdered man by the murderer or his friends.[54]

49. Brewster *v.* Michigan Cent. R. Co., 5 How. Pr. (N. Y.) 183, 186.

50. Stubing *v.* Metropolitan L. Ins. Co., 78 Hun (N. Y.) 610, 28 N. Y. Suppl. 960.

51. Ruland *v.* Canfield Pub. Co., 10 N. Y. Suppl. 913, 914, 18 N. Y. Civ. Proc. 282.

52. Persons *v.* Buffalo City Mills, 29 N. Y. App. Div. 45, 48, 51 N. Y. Suppl. 645 [*citing* Taylor *v.* Granite State Provident Assoc., 136 N. Y. 343, 346, 32 N. E. 992, 32 Am. St. Rep. 749]; Reddington *v.* Mariposa Land, etc., Co., 19 Hun (N. Y.) 405, 408 [*cited* and *approved* in Great West Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 52, 20 Pac. 771, 13 Am. St. Rep. 204; Glines *v.* Supreme Sitting O. of I. H., 20 N. Y. Suppl. 275, 276, 22 N. Y. Civ. Proc. 437].

The term includes the agent of a railroad company described as "General Agent, Passenger Dept., 261 Broadway, N. Y." (Tuchband *v.* Chicago, etc., R. Co., 115 N. Y. 437, 438, 22 N. E. 360); a division superintendent of a railroad, located at a point remote from the general offices of the company (Brayton *v.* New York, etc., R. Co., 72 Hun (N. Y.) 602, 603, 25 N. Y. Suppl. 264); a general superintendent of a telegraph or telephone company (Barrett *v.* American Tel., etc., Co., 138 N. Y. 491, 493, 34 N. E. 289); a manager (Pacific Coast R. Co. *v.* San Luis Obispo County Sup. Ct., 79 Cal. 103, 105, 21 Pac. 609); a person who was in the habit of making the semiannual statements to the bank comptroller and the only person exercising a general supervision over the affairs of the bank (Carr *v.* Racine Commercial Bank, 19 Wis. 272, 273); a soliciting agent with power to contract (Palmer *v.* Chicago Herald Co., 70 Fed. 886, 888); and a superintendent of a mining company (Lake County *v.* Sulphur Bank Quicksilver Min. Co., 68 Cal. 14, 18, 8 Pac. 593).

The term does not include an agent in charge of a branch store belonging to a corporation, having a manager exercising the general control of the corporate business, including that transacted by such agent (Osborne *v.* Columbia County Farmers' Alliance Corp., 9 Wash. 666, 667, 38 Pac. 160); an attorney in fact, authorized by corporation to apply for a patent to mining lands claimed by it, and to execute such papers as might be necessary for that purpose (Mars *v.* Oro Fino Min. Co., 7 S. D. 605, 611, 65 N. W. 19); a baggage-master in the employ of a railroad company (Flynn *v.* Hudson River R. Co., 6 How. Pr. (N. Y.) 308, 309); a business manager of a corporation (Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370, 382); a captain of a steamboat belonging to a foreign corporation, but transacting business on the waters of this state (Upper Mississippi Transp. Co. *v.* Whittaker, 16 Wis. 220, 221); a clerk employed in a store belonging to a mining corporation, although he keeps the accounts and pays the miners (Blanc *v.* Paymaster Min. Co., 95 Cal. 524, 531, 30 Pac. 765, 29 Am. St. Rep. 149); a general manager (Meton *v.* Isham Wagon Co., 4 N. Y. Suppl. 215, 216, 15 N. Y. Civ. Proc. 259); an ordinary agent or employee, who acts in an inferior capacity and under the direction and control of superior authority (Glines *v.* Supreme Sitting O. of I. H., 20 N. Y. Suppl. 275, 276, 22 N. Y. Civ. Proc. 437); a superintendent of a street railway employed by the president of a steam railroad to superintend the running of horse-cars on a portion of the steam railroad's track not yet completed, without authority to make contracts, and having no control over or knowledge of the affairs of the railroad company or its books (Emerson *v.* Auburn, etc., R. Co., 13 Hun (N. Y.) 150, 152); and a telegraph operator in the employ of a telegraph company (Jepson *v.* Postal Tel. Cable Co., 20 N. Y. Suppl. 300, 301, 22 N. Y. Civ. Proc. 434).

Judicial notice will be taken that a superintendent is a managing agent, so that the making an affidavit in replevin signed by one so described is a sufficient compliance with a statute providing that the statement shall be verified by the affidavit of plaintiff, his agent, or attorney. South Missouri Land Co. *v.* Jeffries, 40 Mo. App. 360, 361.

In statutory provisions authorizing service of process upon a managing agent within the state, it means a person holding responsible and representative relation, such as the term would include. Coler *v.* Pittsburgh Bridge Co., 146 N. Y. 281, 283, 40 N. E. 779.

53. Frazer *v.* Cuthbertson, 6 Q. B. D. 93, 95, 50 L. J. Q. B. 277, 29 Wkly. Rep. 396. See also The Odorilla *v.* Baizley, 128 Pa. St. 283, 292, 18 Atl. 511; The Jennie B. Gilkey, 19 Fed. 127, 129.

54. Bouvier L. Dict.

MANDAMUS

By Arthur L. Sanborn
Judge of United States District Court for the Western District of Wisconsin

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CROSS-REFERENCES

For Matters Relating to:

Mandamus as an Adequate Remedy at Law Preventing:

Equitable Relief in General, see EQUITY.

Injunction, see INJUNCTIONS.

Perfection of Appeal in:

Civil Procedure, see APPEAL AND ERROR.

Criminal Procedure, see CRIMINAL LAW.

Removal of Cause to Federal Court, see REMOVAL OF CAUSES.

Securing Payment of Bounty, see BOUNTIES.

I. DEFINITION AND NATURE OF REMEDY.

A. Definition.[1] Mandamus is an action or judicial proceeding of a civil nature,[2] extraordinary in the sense that it can be maintained only when there is no other adequate remedy,[3] prerogative in its character to the extent that the issue of both the alternative and the peremptory or final command is discretionary,[4] to enforce only clear legal rights,[5] and to compel courts to take jurisdiction or proceed in the exercise of their jurisdiction,[6] or to compel corporations, public[7] and private,[8] and public boards, commissions, or officers,[9] to exercise their jurisdiction or discretion and to perform ministerial duties, which duties result from an office, trust, or station,[10] and are clearly and peremptorily enjoined by law as absolute and official.[11]

1. **Leading** cases on the definition and history of mandamus are McBride *v.* Grand Rapids, 32 Mich. 360; State *v.* Gibson, 187 Mo. 536, 86 S. W. 177; State *v.* Lewis, 76 Mo. 370; Chumasero *v.* Potts, 2 Mont. 242; State *v.* Marks, 6 Lea (Tenn.) 12; Morley *v.* Power, 5 Lea (Tenn.) 691; State *v.* Miller, 1 Lea (Tenn.) 596.

2. See *infra*, I, C.

3. See *infra*, II, D.

4. See *infra*, II, A.

Prerogative defined.— "Prerogative simply means a power or will which is discretionary and above and uncontrolled by any other will; the term is frequently used to express the uncontrolled will of the sovereign power in the state. It is applied not only to the king but also to the legislative and judicial branches of the government, as 'the royal prerogatives,' the 'prerogatives of parliament,' the 'prerogatives of the court.'" 1 Halleck Int. L. 125. "Specifically, a privilege inherent in one's office or position; an official right; an exclusive or sovereign privilege, in theory subject to no restriction or interference, but practically often limited by other similar rights or prerogatives." Century Dict. By the phrase "high prerogative writ" is meant, not that the proceeding is not a judicial one, but that it is not a writ of right, issuing only at the discretion of the court. Shortt Mand. & Proc. 223.

5. See *infra*, II, B.

6. See *infra*, IV.

7. See *infra*, VI.

8. See *infra*, VII.

9. See *infra*, VI.

10. See *infra*, II, C, 2, c.

11. See *infra*, II, C, 2, b.

Other definitions are: "A writ issued in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station." Cincinnati Volksblatt Co. *v.* Hoffmeister, 62 Ohio St. 189, 196, 56 N. E. 1033, 78 Am. St. Rep. 707, 48 L. R. A. 732; Fraternal Mystic Circle *v.* State, 61 Ohio St. 628, 631, 48 N. E. 940, 76 Am. St. Rep. 446; State *v.* Carpenter, 51 Ohio St. 83, 87, 37 N. E. 261, 46 Am. St. Rep. 556; Freon *v.* Carriage Co., 42 Ohio St. 30, 37, 51 Am. Rep. 794; Sears *v.* Kincaid, 33 Oreg. 215, 218, 53 Pac. 303; Morrow County *v.* Hendryx, 14 Oreg. 397, 398, 12 Pac. 806; Lobban *v.* State, 9 Wyo. 377, 384, 64 Pac. 82; State *v.* Burdick, 3 Wyo. 588, 591, 28 Pac. 146; Chicago, etc., R. Co. *v.* Crane, 113 U. S. 424, 432, 5 S. Ct. 578, 28 L. ed. 1064.

"A command issuing from a common law court of competent jurisdiction, in the name of the State or sovereign, directed to some corporation, officer or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from the operation of law." High Extr. Rem. § 1 [*quoted* in State *v.* St. Bernard Police Jury, 39 La. Ann. 759, 764, 2 So. 305; Arnold *v.* Kennebec County, 93 Me. 117, 132, 44 Atl. 364; State *v.* Lewis, 76 Mo. 370, 380].

"A command issuing from a superior court, to some inferior court of judicature, corporation, or public officer, requiring them to do some particular act, therein specified, which appertains to their office and duty." 1 Swift Dig. 563 [*quoted* in Ansonia *v.* Studley, 67 Conn. 170, 176].

"A command issuing from the Superior Court, directed to some person, corporation or inferior court, within the jurisdiction of the superior court, requiring them to do some particular thing therein specified which by law they are bound to do, and which a superior court has previously determined or at least supposes to be consonant to right and justice." Swift *v.* State, 7 Houst. (Del.) 338, 345, 6 Atl. 856, 32 Atl. 143, 40 Am. St. Rep. 127.

"[A writ which] issues by the command of the sovereign power, and in the name of the State, and is directed to some subordinate court, judicature or body within the jurisdiction of the court from which it issues, and it requires the performance by the body to whom it is directed of a specific act, as being the legal duty of the office, character, or situation." 2 Potter Corp. § 634 [*quoted* in Richardson *v.* Swift, 7 Houst. (Del.) 137, 153, 30 Atl. 781, 783].

"A process, issued from the judicial branch of the government, which seeks to compel the officer to go forward and to do that which is enjoined upon him by the position he holds." People *v.* Hallett, 1 Colo. 352, 354.

B. Historical Development. Mandamus was originally one of a large class of writs by which the sovereign directed the performance of any desired act on the part of a subject. They were non-judicial, being merely commands issued directly to the subject, without any action by the courts. Afterward the power passed to the king's bench, the court which was supposed to represent the king.[12] It is still issued, in England, only by that court, except in cases where acts of parliament have specially authorized its issue by other courts.[13]

C. Nature of Remedy. Mandamus is a civil proceeding[14] or remedy[15] hav-

"A writ commanding the performance of some act or duty, therein specified, in the performance of which the applicant for the writ is interested, or by the non-performance of which he is aggrieved or injured." Legg *v.* Annapolis, 42 Md. 203, 226.

"An order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act or omit to do an act, the performance or omission of which is enjoined by law." School Dist. No. 14 *v.* School Dist. No. 4, 64 Ark. 483, 487, 43 S. W. 501; Traynor *v.* Beckham, 116 Ky. 13, 23, 74 S. W. 1105, 76 S. W. 844, 25 Ky. L. Rep. 283; Young *v.* Beckham, 115 Ky. 246, 253, 72 S. W. 1092, 1094, 24 Ky. L. Rep. 2135; Furnish *v.* Satterwhite, 114 Ky. 905, 908, 72 S. W. 309, 24 Ky. L. Rep. 1723; Denny *v.* Bosworth, 113 Ky. 785, 792, 68 S. W. 1078, 24 Ky. L. Rep. 554; State *v.* San Antonio St. R. Co., 10 Tex. Civ. App. 12, 13, 30 S. W. 266.

"The prerogative writ of mandamus is the direct intervention of the State to compel a person, natural or artificial, on whom the law imposes a public duty, to perform that duty." Norwalk, etc., Electric Light Co. *v.* South Norwalk, 71 Conn. 381, 390, 42 Atl. 82; Fuller *v.* Plainfield Academic School, 6 Conn. 532, 543.

"Mandamus is a high prerogative and remedial writ, the appropriate functions of which are the enforcement of duties to the public, by officers and others, who either neglect or refuse to perform them." Com. *v.* Allegheny County Com'rs, 37 Pa. St. 277, 279.

As synonymous with command or order.— The word "mandamus," it has been held, may properly be used as a substitute for "order" in a petition to compel payment for support of a pauper. Rouse *v.* McKean County Poor Dist., 169 Pa. St. 116, 32 Atl. 541.

12. Kendall *v.* U. S., 12 Pet. (U. S.) 524, 9 L. ed. 1181; *Ex p.* Crane, 5 Pet. (U. S.) 190, 8 L. ed. 92, Baldwin, J., dissenting. See also Atlanta *v.* Wright, 119 Ga. 207, 45 S. E. 994; State *v.* Lewis, 76 Mo. 370.

The earliest form of mandamus issued by the court seems to have been the writ issued in cases of escheat. The usual writ in such cases was *Diem causit extremum*, a form of which is given in Fitzherbert's Natura Brevium. If this writ was not issued within a year from the ancestor's death only mandamus could issue. Powis' Case, 2 Dyer 170, 73 Eng. Reprint 372. And see 1 Pollock & M. Hist. Eng. L. 292.

Influence of Mansfield.— "Until the time of Lord Mansfield . . . this writ had been of comparatively little value. It had been called a writ of restitution, and had been confined exclusively to offices of a public nature. . . . But in several cases which came before him, Rex *v.* Blooer, 2 Burr. 1043, in 1759, and Rex *v.* Barker, 3 Burr. 1265, in 1762, he extended its operation, first to the case of a curate in the established church, next to that of a dissenting minister, and laid down the principle that 'where there is a right to execute an office, perform a service, or exercise a franchise, (more especially if it be in a matter of public concern, or attended with profit,) and a person is kept out of possession, or dispossessed of such right, and has no other specific and legal remedy, the court ought to assist by a mandamus, upon reasons of justice . . . and . . . public policy, to preserve peace, order and good government.'" People *v.* Steele, 2 Barb. (N. Y.) 397, 416, per Edmonds, J., holding that a minister may be placed in possession of his pulpit, although occupied by another, ejectment not adequate. See also Oneida Common Pleas *v.* People, 18 Wend. (N. Y.) 79.

13. See *infra*, IX, A, 1.

14. Leigh *v.* State, 69 Ala. 261; Moody *v.* Fleming, 4 Ga. 115, 48 Am. Dec. 210; Williamsport *v.* Com., 90 Pa. St. 498; State *v.* Cranney, 30 Wash. 594, 71 Pac. 50; State *v.* Pacific Brewing, etc., Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208.

15. *Colorado.*— Stoddard *v.* Benton, 6 Colo. 508.

Delaware.— State *v.* Wilmington Bridge Co., 3 Harr. 312.

Indiana.— Brower *v.* O'Brien, 2 Ind. 423. The remedy partakes of the qualities and attributes of a civil action, but is nevertheless regarded as of an extraordinary character, being the highest known to the law. Burnsville Turnpike Co. *v.* State, 119 Ind. 382, 20 N. E. 421, 3 L. R. A. 265. It is an extraordinary remedy, at law, but has lost its prerogative character, and is treated as in the nature of a civil action. Seymour Water Co. *v.* Seymour, 163 Ind. 120, 70 N. E. 514.

Montana.— Mandamus is not a case at common law, nor a civil action within the Civil Practice Act. Attempts to classify it are futile. It is *sui generis*. It may be called an extraordinary legal remedy, civil in its nature. The absolute right to a jury trial does not exist. Chumasero *v.* Potts, 2 Mont. 242. It is a developed remedy, adapted to modern needs and ideas, and should be issued readily, without regard to any mere lifeless distinctions of past history. State *v.* Great Falls, 19 Mont. 518, 49 Pac. 15. The application for the writ is an equitable proceeding. The

ing the nature and attributes of a civil suit or action,[16] legal and not equitable,[17] personal in its nature[18] and civil and not criminal,[19] although it is available in

maxim, that equity looks upon that as done which ought to have been done, applies. Territory *v.* Gilbert, 1 Mont. 371.

Nebraska.— Mandamus is not a prerogative writ, but an ordinary remedy, to which the ordinary rules of pleading apply. State *v.* Chicago, etc., R. Co., 19 Nebr. 476, 27 N. W. 434. It is an action at law, governed by the ordinary rules of practice. State *v.* Affholder, 44 Nebr. 497, 62 N. W. 871.

Nevada.—Mandamus is a civil remedy, having all the qualties and attributes of a civil action, and is applied solely for the protection of civil rights. State *v.* Gracey, 11 Nev. 223.

See 33 Cent. Dig. tit. "Mandamus," § 2.

16. *Connecticut.*— State *v.* New Haven, etc., R. Co., 41 Conn. 134 (holding that if not technically an action at law, it is such within a statute requiring findings in actions at law); Gilman *v.* Bassett, 33 Conn. 298.

Illinois.— Chicago *v.* People, 210 Ill. 84, 71 N. E. 816; Roodhouse *v.* Briggs, 194 Ill. 435, 62 N. E. 778; Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33; People *v.* Weber, 86 Ill. 283; McBane *v.* People, 50 Ill. 503; Hall *v.* Mann, 96 Ill. App. 659.

Iowa.— Dove *v.* Keokuk Independent School Dist., 41 Iowa 689; Brown *v.* Crego, 29 Iowa 321. Under the code of 1851, it was held that mandamus was a prerogative writ, and not one of right, and was a prosecution within the meaning of the constitution, and should be prosecuted in the name of the state. Chance *v.* Temple, 1 Iowa 179.

New Hampshire.— In modern practice mandamus is regarded as an action at law, and a writ of right, and is not now regarded as a prerogative writ in the historical sense. Atty.-Gen. *v.* Taggart, 66 N. H. 362, 29 Atl. 1027, 25 L. R. A. 613.

New Mexico.— Mandamus is within a statute authorizing injunctions in aid of suits at law, the words being used in their broadest sense. *In re* Sloan, 5 N. M. 590, 25 Pac. 930. It is an extraordinary proceeding; process issues only on leave of court. Territory *v.* Ashenfelter, 4 N. M. 85, 12 Pac. 879. It is a civil action and, with the exception of the pleadings, is tried and proceeded with in the same manner as other actions. Perez *v.* Barber, 7 N. M. 223, 34 Pac. 190.

New York.— Mandamus is an action under the code. People *v.* Lewis, 3 Abb. Dec. 537 [*affirming* 28 How. Pr. 159]; People *v.* Ovenshire, 41 How. Pr. 164; People *v.* Albright, 23 How. Pr. 306. But it is a special proceeding within the New York charter imposing limitations on time for reinstatement on police force. People *v.* Greene, 87 N. Y. App. Div. 346, 84 N. Y. Suppl. 565.

North Carolina.— Under the constitution providing that there shall be but one form of action, mandamus is in the nature of, and to be commenced as, a civil action. Belmont *v.* Reilly, 71 N. C. 260.

Oklahoma.— The action has lost, to a considerable extent, its prerogative character, and is not now considered in most of the states as anything more than a civil action. It is governed by the code, and a jury trial is a matter of right. *Ex p.* Epley, 10 Okla. 631, 64 Pac. 18 (the peremptory writ is a judgment reviewable like other judgments); Territory *v.* Chicago, etc., R. Co., 2 Okla. 108, 39 Pac. 389.

Tennessee.—Under the code mandamus is a civil action, and may be brought in a court of equity. Simmons *v.* Leonard, 89 Tenn. 622, 15 S. W. 444; Hawkins *v.* Kercheval, 10 Lea 535. And see State *v.* Sneed, 105 Tenn. 711, 58 S. W. 1070. The issuance of the writ is in some respects regulated by statute. State *v.* Marks, 6 Lea 12.

Texas.— Mandamus is now regarded as an action by the party on whose relation it is granted, although subject still to the restriction that it cannot be granted to a party where the law affords him any other adequate means of redress. General Land Office Com'rs *v.* Smith, 5 Tex. 471.

Utah.— Mandamus is a civil action, controlled by the Practice Act. Lyman *v.* Martin, 2 Utah 136; Chamberlain *v.* Warburton, 1 Utah 267.

Wisconsin.— After issue joined by return mandamus is a civil action governed by the code. State *v.* Giljohann, 111 Wis. 377, 87 N. W. 245; State *v.* Lincoln, 67 Wis. 274, 30 N. W. 360; State *v.* Jennings, 56 Wis. 113, 14 N. W. 28. It is not a civil action as respects the manner of beginning it, but is such in other respects, that is, as to costs. State *v.* Policemen's Pension Fund, 121 Wis. 44, 98 N. W. 954. In the supreme court, when brought to protect the franchises or sovereignty of the state, it is treated as a prerogative writ. State *v.* Doyle, 40 Wis. 175, 22 Am. Rep. 692.

United States.— Warner Valley Stock Co. *v.* Smith, 165 U. S. 32, 17 S. Ct. 225, 41 L. ed. 621; Rosenbaum *v.* Bauer, 120 U. S. 450, 7 S. Ct. 633, 30 L. ed. 743; Louis *v.* Brown Tp., 109 U. S. 162, 27 L. ed. 892; Hartman *v.* Greenhow, 102 U. S. 672, 26 L. ed. 271; U. S. *v.* Boutwell, 17 Wall. 604, 21 L. ed. 721; Kentucky *v.* Dennison, 24 How. 66, 16 L. ed. 717; Kendall *v.* Stokes, 3 How. 87, 789, 11 L. ed. 506, 833; Kendall *v.* U. S., 12 Pet. 524, 9 L. ed. 1181.

See 33 Cent. Dig. tit. "Mandamus," § 2.

As action or suit see also ACTIONS, 1 Cyc. 723.

17. Bright *v.* Farmers' Highline Canal, etc., Co., 3 Colo. App. 170, 32 Pac. 433.

18. U. S. *v.* Butterworth, 169 U. S. 600, 18 S. Ct. 441, 42 L. ed. 873; Warner Valley Stock Co. *v.* Smith, 165 U. S. 28, 17 S. Ct. 225, 41 L. ed. 621 [*citing* U. S. *v.* Boutwell, 17 Wall. (U. S.) 604, 21 L. ed. 721].

19. *Alabama.*— State *v.* Williams, 69 Ala. 311; Leigh *v.* State, 69 Ala. 261.

Connecticut.— State *v.* New Haven, etc., Co., 41 Conn. 134.

criminal cases.[20] Under the codes of some states mandamus is regarded as a special proceeding.[21] It has been held, however, that mandamus is not a suit of a civil nature within the federal removal statute.[22]

D. Distinction Between Mandamus and Other Remedies — 1. Certiorari. Compared with certiorari, mandamus issues to compel, and certiorari to review, official or judicial action.[23]

Delaware.—State *v.* Wilmington Bridge Co., 3 Harr. 312.

Georgia.— Moody *v.* Fleming, 4 Ga. 115, 48 Am. Dec. 210.

Illinois.—Roodhouse *v.* Briggs, 194 Ill. 435, 62 N. E. 778. But mandamus is not a "civil case," within a statute relating to the jurisdiction of an inferior court. Peoria *v.* People, 20 Ill. 525.

Indiana.— Brower *v.* O'Brien, 2 Ind. 423.

Iowa.— Brown *v.* Crego, 29 Iowa 321; State *v.* Bailey, 7 Iowa 390.

Kansas.— Judd *v.* Driver, 1 Kan. 455.

Maryland.— Legg *v.* Annapolis, 42 Md. 203.

Missouri.— State *v.* Lewis, 76 Mo. 370.

Nevada.— State *v.* Gracey, 11 Nev. 223.

New York.— People *v.* Lewis, 28 How. Pr. 159 [appeal *dismissed* in 3 Abb. Dec. 537]; People *v.* Albright, 23 How. Pr. 306; People *v.* Colborne, 20 How. Pr. 378; People *v.* Steele, 1 Edm. Sel. Cas. 505.

North Carolina.— Belmont *v.* Reilly, 71 N. C. 260.

Ohio.— Chinn *v.* Trustees, 32 Ohio St. 236.

Texas.— General Land Office Com'rs *v.* Smith, 5 Tex. 471.

Wisconsin.— State *v.* Jennings, 56 Wis. 113, 14 N. W. 28.

United States.— Kentucky *v.* Dennison, 24 How. 66, 16 L. ed. 717; Kendall *v.* U. S., 12 Pet. 524, 9 L. ed. 1181; Rosenbaum *v.* Board of Supervisors, 28 Fed. 223.

England.— See Rex *v.* Bristol Dock Co., 12 East 428, 11 Rev. Rep. 440.

See 33 Cent. Dig. tit. "Mandamus," § 3.

20. *Alabama.*— Benners *v.* State, 124 Ala. 97, 26 So. 942; *Ex p.* Mahone, 30 Ala. 49, 38 Am. Dec. 111.

Michigan.— Clute *v.* Ionia Cir. Judge, 139 Mich. 337, 102 N. W. 843; Louisell *v.* Benzie Cir. Judge, 139 Mich. 40, 102 N. W. 371; Luton *v.* Newaygo County Cir. Judge, 69 Mich. 610, 37 N. W. 701; People *v.* Swift, 59 Mich. 529, 26 N. W. 694.

Missouri.— State *v.* Snyder, 98 Mo. 555, 12 S. W. 369; State *v.* Laughlin, 75 Mo. 358.

New York.— Willis *v.* Sage, 11 N. Y. App. Div. 4, 42 N. Y. Suppl. 251; People *v.* Grady, 66 Hun 465, 21 N. Y. Suppl. 381 [*affirmed* in 144 N. Y. 685, 39 N. E. 858]; People *v.* Monroe County Ct. of Sess., 19 N. Y. Suppl. 508, 8 N. Y. Cr. 355.

Utah.—State *v.* Hart, 19 Utah 438, 57 Pac. 415.

England.— Reg. *v.* Brown, 7 E. & B. 757, 3 Jur. N. S. 745, 26 L. J. M. C. 183, 5 Wkly. Rep. 625, 90 E. C. L. 757; Reg. *v.* Mainwaring, E. B. & E. 474, 4 Jur. N. S. 928, 27 L. J. M. C. 278, 96 E. C. L. 474; Reg. *v.* Bristol, 28 Eng. L. & Eq. 160.

See 33 Cent. Dig. tit. "Mandamus," § 122 *et seq.*

To compel signing bill of exceptions see Criminal Law, 12 Cyc. 852.

21. See Actions, 1 Cyc. 724. And see Jones *v.* San Francisco, 141 Cal. 96, 74 Pac. 696; State *v.* Fraker, 166 Mo. 130, 65 S. W. 720; State *v.* Lewis, 76 Mo. 370; State *v.* Holladay, 65 Mo. 76 [*overruling* Osage Valley, etc., R. Co. *v.* Morgan County Ct., 53 Mo. 156]; State *v.* Pacific, 61 Mo. 155; State *v.* Burkhardt, 59 Mo. 75; Smith *v.* St. Francois County Ct., 19 Mo. 433; State *v.* Carey, 2 N. D. 36, 49 N. W. 164; Rosenbaum *v.* San Francisco, 28 Fed. 223 [*affirmed* in 120 U. S. 450, 7 S. Ct. 633, 30 L. ed. 743], construing the California code.

22. Western Union Tel. Co. *v.* State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. N. S. 153; Indiana *v.* Lake Erie, etc., R. Co., 85 Fed. 1.

Removal of mandamus proceedings from state to federal court see Removal of Causes.

23. *Alabama.*— Lamar *v.* Marshall County Com'rs Ct., 21 Ala. 772.

Idaho.— Heitman *v.* Morgan, 10 Ida. 562, 79 Pac. 225.

Illinois.— Hayes *v.* Morgan, 81 Ill. App. 665.

Massachusetts.— Gibbs *v.* Hampden County Com'rs, 19 Pick. 298. Both mandamus and certiorari cannot be maintained by the same petitioner as to the canvass of an election. Flanders *v.* Roberts, 182 Mass. 524, 65 N. E. 902.

Missouri.— State *v.* Patton, 108 Mo. App. 26, 82 S. W. 537.

New Jersey.— Jones *v.* Allen, 13 N. J. L. 97.

New York.— People *v.* Barnes, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739 [*affirming* 44 Hun 574]; People *v.* Hayes, 106 N. Y. App. Div. 563, 94 N. Y. Suppl. 754; People *v.* Saratoga County, 106 N. Y. App. Div. 381, 94 N. Y. Suppl. 1012; People *v.* Matthies, 92 N. Y. App. Div. 16, 87 N. Y. Suppl. 196 [*affirmed* in 179 N. Y. 242, 72 N. E. 103]; People *v.* Woodbury, 88 N. Y. App. Div. 593, 85 N. Y. Suppl. 161 [*affirmed* in 179 N. Y. 525, 71 N. E. 1137]; People *v.* Chapin, 39 Hun 230 [*affirmed* in 103 N. Y. 635, 8 N. E. 368]; People *v.* Gilon, 9 N. Y. Suppl. 563, 18 N. Y. Civ. Proc. 112, 24 Abb. N. Cas. 125 [*affirmed* in 9 N. Y. Suppl. 212 (*affirmed* in 12 N. Y. Suppl. 629)]; People *v.* Troy, 43 How. Pr. 385; *Ex p.* Sanders, 4 Cow. 544.

Utah.— Salt Lake City Civic Federation *v.* Salt Lake County, 22 Utah 6, 61 Pac. 222.

Vermont.— Moore *v.* Chester, 45 Vt. 503; Woodstock *v.* Gallup, 28 Vt. 587.

West Virginia.— State *v.* McAllister, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343.

Wisconsin.— State *v.* Elliott, 108 Wis. 163, 84 N. W. 149.

2. INJUNCTION. Compared with injunction, mandamus cannot be used as a preventive writ, or as a substitute for injunction.[24] A mandatory injunction, when used against public officers, is the counterpart in equity of mandamus.[25] But mandamus is sometimes employed to regulate or restrain a judge in the exercise of his jurisdiction.[26]

3. PROHIBITION. Prohibition[27] is the converse of mandamus[28] and is defined by statute in some jurisdictions as its counterpart.[29]

II. RIGHT TO MANDAMUS IN GENERAL.

A. Discretion as to Issuance of Writ — 1. GENERAL RULE. It is often said in modern opinions that the proceeding by mandamus has lost its prerogative character[30] and become an ordinary civil action to enforce legal rights,[31] from

24. *Arkansas.*— Crawford *v.* Carson, 35 Ark. 565.

Illinois.— Fletcher *v.* Tuttle, 151 Ill. 41, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143.

Indiana.— State *v.* Connersville Natural Gas Co., 163 Ind. 563, 71 N. E. 483.

Louisiana.— See Terry *v.* Stauffer, 17 La. Ann. 306.

Maryland.— Legg *v.* Annapolis, 42 Md. 203.

Michigan.— People *v.* State Prison Inspectors, 4 Mich. 187. And see Renaud *v.* State Ct. of Mediation, etc., 124 Mich. 648, 83 N. W. 620, 83 Am. St. Rep. 346, 51 L. R. A. 458.

Nevada.— Sherman *v.* Clark, 4 Nev. 138, 97 Am. Dec. 516.

New Jersey.— Jacquelin *v.* Erie R. Co., (Ch. 1905) 61 Atl. 18. See Atty.-Gen. *v.* New Jersey R., etc., Co., 3 N. J. Eq. 136.

New York.— People *v.* Neubrand, 32 N. Y. App. Div. 49, 52 N. Y. Suppl. 280; Brown *v.* Duane, 60 Hun 98, 14 N. Y. Suppl. 450; Matter of Rooney, 26 Misc. 73, 56 N. Y. Suppl. 483; People *v.* McDonald, 52 N. Y. Suppl. 898.

Texas.— Yellowstone Kit *v.* Wood, 18 Tex. Civ. App. 683, 43 S. W. 1068.

"Where the established distinctions between equity and common law jurisdiction are observed, injunction and mandamus are not correlative remedies, in the sense of being applicable to the same subject matter, the choice of the writ to be resorted to in a particular case to depend upon whether there is an excess of action to be restrained or a defect to be supplied. The two writs properly pertain to entirely different jurisdictions and to different classes of proceedings, injunction being the proper writ only in cases of equitable cognizance, and mandamus being a common law writ, and applicable only in cases coming within the appropriate jurisdiction of courts of common law." Fletcher *v.* Tuttle, 151 Ill. 41, 59, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143.

Joinder of mandamus and injunction see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 395.

25. Parsons *v.* Marye, 23 Fed. 113. See Williams *v.* Maysville Tel. Co., 119 Ky. 33, 82 S. W. 995, 26 Ky. L. Rep. 945, holding under the Kentucky statutes that a mandatory injunction and not mandamus should issue where defendant is a telephone company, not an executive or ministerial officer; as to compel installation of telephone at the same rate as others. *Compare* Wiemer *v.* Louisville Water Co., 130 Fed. 251.

Mandatory injunctions see INJUNCTIONS, 22 Cyc. 742.

Mandatory injunction as a premature mandamus.— In cases where mandamus would otherwise be proper, but the time for official action has not arrived, a mandatory injunction will lie. State *v.* Houser, 122 Wis. 534, 100 N. W. 964. Necessity that time for action shall have arrived before mandamus may issue see *infra*, II, G, 2.

26. See *infra*, IV.

27. See PROHIBITION.

28. State *v.* King County Super. Ct., 31 Wash. 96, 71 Pac. 722; State *v.* Yakima County Super. Ct., 4 Wash. 30, 29 Pac. 764; State *v.* Wood County Ct., 33 W. Va. 589, 11 S. E. 72; High Extr. Leg. Rem. (3d ed.) § 763.

29. See the statutes of the several states. And see Maurer *v.* Mitchell, 53 Cal. 289; Williams *v.* Lewis, 6 Ida. 184, 54 Pac. 619; State *v.* Ross, 39 Wash. 399, 81 Pac. 865; State *v.* King County Super. Ct., 31 Wash. 96, 71 Pac. 722.

30. *Colorado.*— People *v.* Rio Grande County, 7 Colo. App. 229, 42 Pac. 1032.

Delaware.— Swift *v.* State, 7 Houst. 338, 6 Atl 856, 32 Atl. 143, 40 Am. St. Rep. 127. And see Knight *v.* Ferris, 6 Houst. 283.

Oklahoma.— *Ex p.* Epley, 10 Okla. 631, 64 Pac. 18.

Washington.— State *v.* Cranney, 30 Wash. 594, 71 Pac. 50.

United States.— Rees *v.* Watertown, 19 Wall. 107, 22 L. ed. 72; U. S. *v.* Keokuk, 6 Wall. 518, 18 L. ed. 918; Kentucky *v.* Dennison, 24 How. 66, 16 L. ed. 717; Kendall *v.* U. S., 12 Pet. 524, 9 L. ed. 1181.

The prerogative writ is a direct intervention of the state to compel the performance of a public duty. Norwalk Electric Light Co. *v.* South Norwalk, 71 Conn. 381, 42 Atl. 82.

31. Delgado *v.* Chavez, 5 N. M. 646, 25 Pac. 948; State *v.* Cranney, 30 Wash. 594, 71 Pac. 50; State *v.* Wyoming County Ct., 47 W. Va. 672, 35 S. E. 959; Fisher *v.* Charleston, 17 W. Va. 595; Kentucky *v.* Dennison, 24 How. (U. S.) 66, 16 L. ed. 717.

which it is sometimes said to result that the writ issues as a matter of right.[32] It will be found, however, that there is little real or substantial conflict in the authorities. The writ is employed only in unusual cases where other remedies fail,[33] and it is hedged about by many conditions totally inapplicable to the ordinary suit at law. The applicant must in all cases substantially demonstrate the propriety and justice of his case.[34] Nor is the court bound to take the case as the applicant presents it. It may consider defendant's rights, the interest of third persons, the importance or unimportance of the case, and the applicant's conduct, in determining whether or not the writ shall go.[35] The issuing of the writ therefore is generally, almost universally, considered discretionary, and to this extent only is the proceeding a prerogative one.[36] The discretion to be exercised is a

32. *Missouri.*— Mandamus is treated as an ordinary writ of right, issuable of course on proper cause. State *v.* Gibson, 187 Mo. 536, 86 S. W. 177; State *v.* Fraker, 166 Mo. 130, 65 S. W. 720.

Montana.— State *v.* Great Falls, 19 Mont. 518, 49 Pac. 15.

North Carolina.— Haymore *v.* Yadkin, 85 N. C. 268.

Rhode Island.— It is a summary remedy issuing of right and not at discretion; admits of no pleadings, and the proof is taken by affidavit *ex parte*. Wilkinson *v.* Providence Bank, 3 R. I. 22.

Virginia.— English authorities as to the nature of the prerogative writ, and that it is a writ of right when sought to enforce obedience to statutes, are approved in Richardson *v.* Farrar, 88 Va. 760, 768, 15 S. E. 117; Dew *v.* Judges Sweet Spring Dist. Ct., 3 Hen. & M. 1, 3 Am. Dec. 639.

Washington.— The writ is one strictly of right. Tacoma *v.* Lillis, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372. Under the statute mandamus is a civil action, nothing more than a form of procedure to enforce right and redress wrong. It is in no sense prerogative or discretionary. The right to the writ, under the statute, depends wholly on the absence of a plain, speedy, and adequate remedy. State *v.* McQuade, 36 Wash. 579, 79 Pac. 207; State *v.* Cranney, 30 Wash. 594, 71 Pac. 50; State *v.* Pacific Brewing, etc., Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208.

33. See *infra*, II, D.

34. See *infra*, II, B.

35. See *infra*, II, A, 3.

36. *Alabama.*— State *v.* Wilson, 123 Ala. 259, 26 So. 482, 45 L. R. A. 772.

Arkansas.— *Ex p.* Whittington, 34 Ark. 394; Fitch *v.* McDiarmid, 26 Ark. 482; *Ex p.* Williamson, 8 Ark. 424; *Ex p.* Trapnall, 6 Ark. 9, 42 Am. Dec. 676; Webb *v.* Hanger, 1 Ark. 121; Taylor *v.* Governor, 1 Ark. 21; Goings *v.* Mills, 1 Ark. 11.

California.— Gay *v.* Torrance, 145 Cal. 144, 78 Pac. 540; San Diego Bd. of Education *v.* San Diego, 128 Cal. 369, 60 Pac. 976; Wiedwald *v.* Dodson, 95 Cal. 450, 30 Pac. 580.

Connecticut.— Chesebro *v.* Babcock, 59 Conn. 213, 22 Atl. 145.

Delaware.— McCoy *v.* State, 2 Marv. 543, 36 Atl. 81; Cannon *v.* Janvier, 3 Houst. 27.

District of Columbia.— Dancy *v.* Clark, 24 App. Cas. 487.

Georgia.— Moody *v.* Fleming, 4 Ga. 115, 48 Am. Dec. 210; Savannah *v.* State, 4 Ga. 26.

Hawaii.— Matter of Waterhouse, 2 Hawaii 241.

Illinois.— People *v.* Olsen, 215 Ill. 620, 74 N. E. 785; People *v.* Rock Island, 215 Ill. 488, 74 N. E. 437, 106 Am. St. Rep. 179; People *v.* Chicago Bd. of Trade, 193 Ill. 577, 62 N. E. 196; Illinois Cent. R. Co. *v.* People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119; People *v.* Weber, 86 Ill. 283; People *v.* Ketchum, 72 Ill. 212; People *v.* Hatch, 33 Ill. 9; Peoria Bd. of School Inspectors *v.* People, 20 Ill. 525; People *v.* Curyea, 16 Ill. 547; Cicero *v.* People, 105 Ill. App. 406; Harrison *v.* People, 101 Ill. App. 224.

Indiana.— State *v.* Clinton County, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984.

Indian Territory.— Liverpool, etc., Ins. Co. *v.* Kearney, 1 Indian Terr. 328, 37 S. W. 143.

Iowa.— Vincent *v.* Ellis, 116 Iowa 609, 88 N. W. 836.

Kansas.— Atchison, etc., R. Co. *v.* Jefferson County Com'rs, 12 Kan. 127; State *v.* Marston, 6 Kan. 524.

Louisiana.—State *v.* Acme Lumber Co., 115 La. 893, 40 So. 301; State *v.* Rightor, 38 La. Ann. 916.

Maine.— Knight *v.* Thomas, 93 Me. 494, 45 Atl. 499; Brunswick *v.* Bath, 90 Me. 479, 38 Atl. 532; Davis *v.* York County Com'rs, 63 Me. 396; Belcher *v.* Treat, 61 Me. 577; Dane *v.* Derby, 54 Me. 95, 89 Am. Dec. 722; Baker *v.* Johnson, 41 Me. 15; Woodbury *v.* Piscataquis County Com'rs, 40 Me. 304; Woodman *v.* Somerset County Com'rs, 24 Me. 151.

Maryland.— State *v.* Latrobe, 81 Md. 222, 31 Atl. 788; George's Creek Coal, etc., Co. *v.* Allegany County Com'rs, 59 Md. 255; Booze *v.* Humbird, 27 Md. 1; State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639; Runkel *v.* Winemiller, 4 Harr. & M. 429, 1 Am. Dec. 411.

Massachusetts.— McCarthy *v.* Boston St. Com'rs, 188 Mass. 338, 74 N. E. 659; Alger *v.* Seaver, 138 Mass. 331; Atty.-Gen. *v.* Bost, 123 Mass. 460.

Michigan.— Sherwood *v.* Rynearson, 141 Mich. 92, 104 N. W. 392; Clute *v.* Ionia Cir. Judge, 139 Mich. 337, 102 N. W. 843; Detroit F. & M. Ins. Co. *v.* Hartz, 132 Mich. 518, 94 N. W. 7; O'Brien *v.* Wayne Cir. Judge, 131 Mich. 67, 90 N. W. 680; MacKinnon *v.* Auditor-Gen., 130 Mich. 552, 90 N. W. 329; Van Akin *v.* Dunn, 117 Mich. 421, 75 N. W. 938; Elder *v.* Gayner, 97 Mich. 617, 55 N. W.

judicial one[37] to be exercised on equitable principles[38] and is governed by fixed rules.[39] In some cases it is held that, although a clear right to the writ is shown, it may be refused;[40] and, on the other hand, where the rights of plaintiff can be

460; Cheboygan County *v.* Mentor Tp., 94 Mich. 386, 54 N. W. 169; McCreery *v.* Cobb, 93 Mich. 463, 53 N. W. 613; Fruitport Tp. *v.* Muskegon County Cir. Judge, 90 Mich. 20, 51 N. W. 109; Tennant *v.* Croeker, 85 Mich. 328, 48 N. W. 577; Schmedding *v.* May, 85 Mich. 1, 48 N. W. 201, 24 Am. St. Rep. 74; Pistorius *v.* Stempel, 81 Mich. 133, 45 N. W. 968; Auditor-Gen. *v.* Van Tassel, 73 Mich. 28, 40 N. W. 847; Auditor-Gen. *v.* Saginaw County, 62 Mich. 579, 29 N. W. 492; Tawas, etc., R. Co. *v.* Iosco Cir. Judge, 44 Mich. 479, 7 N. W. 65; Mabley *v.* Judge Super. Ct., 41 Mich. 31, 1 N. W. 985; People *v.* East Saginaw, 33 Mich. 164; People *v.* State University, 4 Mich. 98.

Mississippi.— Hendricks *v.* Johnston, 45 Miss. 644; Swann *v.* Buck, 40 Miss. 268; Ross *v.* Lane, 3 Sm. & M. 695.

Montana.— State *v.* Barret, 30 Mont. 203, 81 Pac. 349.

Nebraska.— State *v.* Moores, (1904) 99 N. W. 842; Moores *v.* State, 71 Nebr. 522, 99 N. W. 249; Donahue *v.* State, 70 Nebr. 72, 96 N. W. 1038; State *v.* Holmes, 3 Nebr. (Unoff.) 183, 91 N. W. 175.

New Jersey.— Gleistman *v.* West New York, (Sup. 1906) 64 Atl. 1084.

New Mexico.— Territory *v.* Perea, 6 N. M. 531, 30 Pac. 928.

New York.— *In re* Dederick, 77 N. Y. 595; Bearns *v.* Gould, 77 N. Y. 455 [*affirming* 8 Daly 384]; People *v.* Ferris, 76 N. Y. 326; Sage *v.* Lake Shore, etc., R. Co., 70 N. Y. 220; People *v.* Way, 92 N. Y. App. Div. 82, 86 N. Y. Suppl. 892; People *v.* Lindenthal, 77 N. Y. App. Div. 515, 78 N. Y. Suppl. 997; People *v.* Listman, 40 Misc. 372, 82 N. Y. Suppl. 263.

Oklahoma.— The only features now possessed by a mandamus proceeding in common with those originally possessed are those which give the court a discretionary power to issue the alternative or peremptory writ, and to bring the parties into court. *Ex p.* Epley, 10 Okla. 631, 64 Pac. 18; *In re* Brown, 2 Okla. 590, 39 Pac. 469; Territory *v.* Chicago, etc., R. Co., 2 Okla. 108, 39 Pac. 389.

Oregon.— Ball *v.* Lappius, 3 Oreg. 55.

Pennsylvania.— *In re* Porter's Tp. Road, 1 Walk. 10; *In re* Conshocken Ave., 12 Pa. Super. Ct. 573; Tatham *v.* Philadelphia Wardens, 5 Am. L. Reg. 378; McManus *v.* School Controllers, 7 Phila. 23.

South Carolina.— Moore *v.* Napier, 64 S. C. 564, 42 S. E. 997.

Tennessee.— Memphis Appeal Pub. Co. *v.* Pike, 9 Heisk. 697; State *v.* Sinking Fund Com'rs, 1 Tenn. Cas. 490.

Vermont.— Bates *v.* Keith, 66 Vt. 163, 28 Atl. 865; State *v.* Meagher, 57 Vt. 398; Free Press Assoc. *v.* Nichols, 45 Vt. 7.

Wisconsin.— To some extent the court exercises a discretion as to granting the writ. State *v.* Jennings, 48 Wis. 549, 4 N. W. 641.

United States.— Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428; New York L., etc., Ins. Co. *v.* Wilson, 8 Pet. 291, 8 L. ed. 949.

England.— Mandamus is not grantable as of right, but by prerogative (discretion). Rex *v.* Bristol Dock Co., 12 East 428, 11 Rev. Rep. 440.

Canada.— Pettigrew *v.* Baillargé, 20 Quebec Super. Ct. 173.

See 33 Cent. Dig. tit. "Mandamus," § 5.

The court will see that its jurisdiction is not improperly invoked, although defendant does not object. State *v.* Tolle, 71 Mo. 645; Barnes *v.* Gottschalk, 3 Mo. App. 111.

37. State *v.* Richards, 50 Fla. 284, 39 So. 152; Funk *v.* State, (Ind. 1906) 77 N. E. 854; McCarthy *v.* Boston, 188 Mass. 338, 74 N. E. 659; American Railway-Frog Co. *v.* Haven, 101 Mass. 398, 3 Am. Rep. 377; Com. *v.* Hampton County, 2 Pick. (Mass.) 414; Shepard *v.* Oakley, 181 N. Y. 339, 74 N. E. 227 [*reversing* 102 N. Y. App. Div. 617, 92 N. Y. Suppl. 1145].

38. State *v.* U. S. Express Co., 95 Minn. 442, 104 N. W. 556; Free Press Assoc. *v.* Nichols, 45 Vt. 7.

39. State *v.* Holmes, 3 Nebr. (Unoff.) 183, 91 N. W. 175; People *v.* New York Police Bd., 107 N. Y. 235, 13 N. E. 920 [*affirming* 46 Hun 296, 27 N. Y. Wkly. Dig. 360]; People *v.* Syracuse, 78 N. Y. 56 [*reversing* 52 How. Pr. 346]; *In re* Dederick, 77 N. Y. 595; People *v.* Ferris, 76 N. Y. 326 [*affirming* 16 Hun 219]; Sage *v.* Lake Shore, etc., R. Co., 70 N. Y. 220; People *v.* Dowling, 55 Barb. (N. Y.) 197, 37 How. Pr. 394; People *v.* Croton Aqueduct Bd., 49 Barb. (N. Y.) 259; People *v.* Booth, 49 Barb. (N. Y.) 31, 32 How. Pr. 17; People *v.* Westchester County, 15 Barb. (N. Y.) 607; People *v.* State Canal Bd., 13 Barb. (N. Y.) 432; St. Stephen Church Cases, 10 N. Y. Suppl. 125, 11 N. Y. Suppl. 669, 675, 25 Abb. N. Cas. 230; People *v.* Richmond County, 22 How. Pr. (N. Y.) 275 [*affirming* 21 How. Pr. 335]; Van Rensselaer *v.* Albany County, 1 Cow. (N. Y.) 501; People *v.* Asten, 7 N. Y. Wkly. Dig. 411.

The court cannot direct what is not lawful, without its being subject to review. There arise matters of discretion which may induce the court to withhold it, matters connected with delay, or possibly with the conduct of the parties. If what is directed to be done be lawful, other courts will not question this exercise of discretion. But in regard to that which is not lawful, it is open to correction on appeal. Reg. *v.* All Saints, 1 App. Cas. 611, 622, 35 L. T. Rep. N. S. 381, 25 Wkly. Rep. 128; Reg. *v.* Peterborough, 44 L. J. Q. B. 85, 23 Wkly. Rep. 343.

40. People *v.* Rock Island, 215 Ill. 488, 74 N. E. 437, 106 Am. St. Rep. 179; People *v.* Rose, 211 Ill. 252, 71 N. E. 1124; People *v.* Board of Trade, 193 Ill. 577, 62 N. E. 196; People *v.* Adams County, 185 Ill. 288, 56 N. E. 1044; People *v.* Ketchum, 72 Ill. 212;

secured only through the writ, it has been held that it would be an abuse of discretion to refuse it.[41]

2. State Cases. Where the writ is applied for by the state, for the public benefit, it has been held that the court has no discretion to refuse it.[42] The question of whether a mandamus should issue to protect the interest of the public does not depend upon the state of facts existing when the petition is filed, if that state of facts has ceased to exist when the final judgment is rendered.[43]

3. Matters Leading to Refusal of Writ — a. Public Policy. Mandamus may be refused where the public interest would be injuriously affected,[44] and it will not issue to compel the performance of an act which will work a public and private mischief.[45]

b. Doubtful Cases. The writ of mandamus issues only in case of necessity to prevent injustice or great injury. If there is a doubt of its necessity or propriety it will not go.[46]

c. Introduction of Disorder and Confusion. Where the issue of the writ would disturb official action, or create disorder or confusion, it may be denied.[47]

Cicero *v.* People, 105 Ill. App. 406. See Wiedwald *v.* Dodson, 95 Cal. 450, 30 Pac. 580.

41. Moody *v.* Fleming, 4 Ga. 115, 48 Am. Dec. 210 (holding that where the right and duty are clear the court is imperatively required to grant the writ); Savannah *v.* State, 4 Ga. 26; Atchison, etc., R. Co. *v.* Jefferson County Com'rs, 12 Kan. 127. It is an abuse of judicial discretion to deny a writ of mandamus where the application is made to enforce a clear legal right; where the duty to be enforced is plain and positive; where substantial damage will follow its non-performance; or where there is no other adequate remedy, no laches chargeable to applicant, and no special reasons which render his resort to the remedy inequitable. Neu *v.* Voege, 96 Wis. 489, 71 N. W. 880. And see State *v.* Holmes, 3 Nebr. (Unoff.) 183, 91 N. W. 175. But *compare* People *v.* Dowling, 55 Barb. (N. Y.) 197, 37 How. Pr. 394, holding that the matter rests in the sound discretion of the court.

42. New Haven, etc., Co. *v.* State, 44 Conn. 376; State *v.* Doyle, 40 Wis. 220; Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425.

43. Northern Pac. R. Co. *v.* Washington Territory, 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092, where it was sought to compel the location of a railroad station.

44. Evans *v.* Thomas, 32 Kan. 469, 4 Pac. 833; Ware *v.* Branch Cir. Judge, 75 Mich. 488, 42 N. W. 997 (holding that mandamus will not lie to compel a circuit judge to try an information over what is claimed to have been a breach of the peace); Bogan *v.* Holder, 76 Miss. 597, 24 So. 695 (holding that a tax-collector could not have mandamus to compel payment of fund withheld by the creditor on account of a former overpayment); Effingham *v.* Hamilton, 68 Miss. 523, 10 So. 39 (change of text-books seriously disturbing public interest refused, although a clear right and clear duty existed); *In re* Waverly, 35 N. Y. App. Div. 38, 54 N. Y. Suppl. 368 [*affirmed* in 158 N. Y. 710, 53 N. E. 1133].

45. People *v.* Brooklyn Bd. of Assessors, 137 N. Y. 201, 33 N. E. 145.

46. *Alabama.*— State *v.* Wilson, 123 Ala. 259, 26 So. 482, 45 L. R. A. 772, holding that a writ would not issue to correct legislative journals.

Arkansas.—Basham *v.* Carroll, 44 Ark. 284.

Connecticut.— Chesebro *v.* Babcock, 59 Conn. 213, 22 Atl. 145.

Illinois.— Kenneally *v.* Chicago, 220 Ill. 485, 77 N. E. 155; Yates *v.* People, 207 Ill. 316, 69 N. E. 775; Knopf *v.* Corcoran, 112 Ill. App. 320; People *v.* Chicago, 106 Ill. App. 72; Davis *v.* Miller Signal Co., 105 Ill. App. 657.

New York:— People *v.* Richmond County, 22 How. Pr. 275; People *v.* Ewen, 17 How. Pr. 375.

Pennsylvania.— Boyer *v.* Mutual Sav. Fund Assoc., 1 Leg. Rec. 231.

United States.— New York L., etc., Ins. Co. *v.* Wilson, 8 Pet. 291, 8 L. ed. 949.

England.— Reg. *v.* Godolphin, 8 A. & E. 338, 35 E. C. L. 620; Rex *v.* Chester, 1 M. & S. 101.

The existence of the right of appeal from judgments in mandamus proceedings justifies a freer use of the proceedings than when such right does not exist. Reg. *v.* Bangor, 18 Q. B. D. 349, 51 J. P. 51, 56 L. J. Q. B. 326, 35 Wkly. Rep. 158.

47. *Alabama.*— Bibb *v.* Gaston, (1906) 40 So. 936.

California.— San Diego Bd. of Education *v.* San Diego, 128 Cal. 369, 60 Pac. 976.

Illinois.— People *v.* Olsen, 215 Ill. 620, 74 N. E. 785, denying mandamus to prevent extension of taxes, where seventy per cent of the work had been done, and new books would be required.

Indiana.—State *v.* Clinton County, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984.

New York.— People *v.* Newton, 58 N. Y. Super. Ct. 439, 11 N. Y. Suppl. 782, 19 N. Y. Civ. Proc. 416; People *v.* Ulster County, 16 Johns. 59.

United States.— U. S. *v.* New Orleans, 31 Fed. 537; Wisdom *v.* Memphis, 30 Fed. Cas. No. 17,903, 2 Flipp. 285.

England.— See Rex *v.* Palmer, 8 East 416.

Canada.— Matter of Risdale, 22 U. C. Q. B. 122.

d. Inequitable or Burdensome Operation. Mandamus should not be issued when it will operate inequitably, or as an excessive burden upon defendant,[48] although mere inconvenience will not prevent the issuance of the writ.[49]

e. Where Writ Would Be Nugatory or Unavailing. When the writ would be nugatory or unavailing it should be denied.[50] So mandamus will not issue where

48. *California.*— San Diego Bd. of Education *v.* San Diego, 128 Cal. 369, 60 Pac. 976, holding that writ would not issue where it would compel double taxation, and where it was doubtful which of two municipal bodies had the power to levy the tax sought to be compelled.

Connecticut.—Ansonia *v.* Studley, 67 Conn. 170, 34 Atl. 1030; Chesebro *v.* Babcock, 59 Conn. 213, 22 Atl. 145.

District of Columbia.— Dancy *v.* Clark, 24 App. Cas. 487.

Illinois.— People *v.* Blocki, 203 Ill. 363, 67 N. E. 809, holding that writ would be refused where respondent would be subject to an action for damages.

Louisiana.— State *v.* Policy Jury, 108 La. 311, 32 So. 363.

Michigan.— Fletcher *v.* Alpena Cir. Judge, 136 Mich. 511, 99 N. W. 748.

Missouri.— State *v.* Finley, 74 Mo. App. 213.

Montana.— State *v.* Marshall, 13 Mont. 136, 32 Pac. 648.

New Jersey.— Roll *v.* Perrine, 34 N. J. L. 254, where it would involve defendant in litigation.

New York.— People *v.* Brooklyn Bd. of Assessors, 137 N. Y. 201, 33 N. E. 145.

West Virginia.— State *v.* Buchanan, 24 W. Va. 362, holding that mandamus against an assessor to compel obedience to the orders of his superior, the two officers differing as to the constitutionality of a statute creating exemptions, would be refused where it would involve citizens in expensive litigation, it appearing to the court that the property was exempt.

United States.— Sibley *v.* Mobile, 22 Fed. Cas. No. 12,829, 3 Woods 535.

A creditor cannot obtain a preference by mandamus. State *v.* Burbank, 22 La. Ann. 298.

49. People *v.* Newton, 20 Abb. N. Cas. (N. Y.) 387 (holding that it is no defense to an application for mandamus to a public officer for the removal of a nuisance that there is a large number of nuisances, to remove which would be very expensive, and that the applicant has a remedy against the person maintaining the nuisance, unless it is shown that by reason of the number of applications defendant is without the necessary means to enforce the order of the court); Com. *v.* Pittsburg, 209 Pa. St. 333, 58 Atl. 669.

50. *California.*— Kerr *v.* Stanislaus County Super. Ct., 130 Cal. 183, 62 Pac. 479; San Diego Bd. of Education *v.* San Diego, 128 Cal. 369, 60 Pac. 976; Boyne *v.* Ryan, 100 Cal. 265, 34 Pac. 707 (holding that a district attorney will not be compelled to commence a suit against his judgment, especially in the absence of power to compel him to prosecute it); Clark *v.* Crane, 57 Cal. 629.

Colorado.— People *v.* Butler, 24 Colo. 401, 51 Pac. 510.

Florida.— Duval County *v.* Jacksonville, 36 Fla. 196, 18 So. 339, 29 L. R. A. 416; State *v.* Marion County Com'rs, 27 Fla. 438, 8 So. 749; Caro *v.* Maxwell, 20 Fla. 17; State *v.* Madison County Election Inspectors, 17 Fla. 26.

Georgia.— Gilliam *v.* Green, 122 Ga. 322, 50 S. E. 137; Harris *v.* Roan, 119 Ga. 379, 46 S. E. 433 (denying writ to settle bill presenting error without merit); Stacy *v.* Hammond, 96 Ga. 125, 23 S. E. 77.

Illinois.— People *v.* Rose, 219 Ill. 46, 76 N. E. 42 (refusing mandamus to secure use of corporate name which would be subject to injunction by another company); People *v.* Lieb, 85 Ill. 484; People *v.* Church, 103 Ill. App. 132 (refusing mandamus to perfect an appeal which could not be effective); Hayes *v.* Morgan, 81 Ill. App. 665.

Kansas.— Rice *v.* Coffey County Bd. of Canvassers, 50 Kan. 149, 32 Pac. 134.

Maryland.— Summerson *v.* Schilling, 94 Md. 582, 51 Atl. 610, refusing to compel registration of illiterate voter since his right might be lost, or he might have learned to read before succeeding election.

Michigan.— Young *v.* Van Buren Cir. Judge, (1906) 108 N. W. 506 (holding that writ to compel approval of bond would not issue after sureties withdrew); Lamoreaux *v.* Atty.-Gen., 89 Mich. 146, 50 N. W. 812.

Minnesota.— State *v.* Archibald, 43 Minn. 328, 45 N. W. 606.

Montana.— State *v.* Lewis County Dist. Ct. Dept. No. 1, 29 Mont. 265, 74 Pac. 498.

Nebraska.— State *v.* Cronin, (1906) 106 N. W. 986; State *v.* Moores, (1904) 99 N. W. 842; Moores *v.* State, 71 Nebr. 522, 99 N. W. 249.

Nevada.— State *v.* Beck, 25 Nev. 105, 57 Pac. 935; State *v.* Waterman, 5 Nev. 323.

New Jersey.— Clarke *v.* Trenton Bd. of Health, 49 N. J. L. 349, 8 Atl. 509.

New York.— People *v.* O'Keefe, 100 N. Y. 572, 3 N. E. 592; People *v.* Rupp, 90 Hun 145, 35 N. Y. Suppl. 349, 749; People *v.* Greene County, 12 Barb. 217; People *v.* Payne, 12 Abb. N. Cas. 103, 64 How. Pr. 357; Matter of Foley, 39 How. Pr. 356.

North Carolina.— O'Hara *v.* Powell, 80 N. C. 103.

Oregon.— State *v.* Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166.

Pennsylvania.— Com. *v.* Handley, 106 Pa. St. 245; Com. *v.* Anthony, 4 Watts & S. 511 (mandamus refused to place relator in an office from which he might be removed by quo warranto); Com. *v.* Philadelphia County Com'rs, 6 Whart. 476 (refusing to compel the

no benefit will result to the applicant or relator,[51] although it has been held that

filing of an affirmation of oath where too late to be of use).

Texas.— Testard *v.* Brooks, (Civ. App. 1902) 70 S. W. 240, holding that mandamus would not issue to perfect an appeal from an injunction which would expire before hearing.

Vermont.— State *v.* Chittenden Co. Ct., 1 Tyler 333, holding that mandamus to proceed with a criminal trial would not be granted where accused was a fugitive from justice.

Washington.— State *v.* Irwin, 40 Wash. 413, 82 Pac. 420, holding that mandamus to compel the fixing of the amount of a supersedeas bond, in injunction proceedings against the destruction of certain buildings, would be denied where the property was destroyed before the hearing.

Wisconsin.— State *v.* Sullivan, 83 Wis. 416, 53 N. W. 677.

United States.— U. S. *v.* Norfolk, etc., R. Co., 118 Fed. 554, 55 C. C. A. 320.

England.— Reg. *v.* Birmingham, 3 Wkly. Rep. 236.

Canada.— Giles *v.* Wellington, 30 Ont. 610; Regina *v.* Haldimand County, 20 U. C. Q. B. 574.

See 33 Cent. Dig. tit. "Mandamus," § 48.

Admission to school.— A mandamus compelling admission of a student to a school will not be regarded as vain for the reason that the court cannot compel the faculty to grant a diploma to plaintiff. Miller *v.* Dailey, 136 Cal. 212, 68 Pac. 1029.

51. *Alabama.*—*Ex p.* Goldthwaite, 120 Ala. 481, 24 So. 389 (refusing a mandamus to compel trial of case where defendants are non-residents and not served); *Ex p.* Tillman, 93 Ala. 101, 9 So. 527 (where relator's rights were settled in another suit); Hall *v.* Steele, 82 Ala. 562, 2 So. 650 (where a statute would become operative and nullify the writ); *Ex p.* Du Bose, 54 Ala. 278.

Arkansas.— Lamar *v.* Wilkins, 28 Ark. 34.

Colorado.— People *v.* Butler, 24 Colo. 401, 51 Pac. 510.

Delaware.— Lurtz *v.* Hardcastle, 1 Marv. 450, 41 Atl. 194.

District of Columbia.— Dancy *v.* Clark, 24 App. Cas. 487; U. S. *v.* Root, 18 App. Cas. 239.

Florida.— State *v.* McRae, 49 Fla. 389, 38 So. 605.

Illinois.— People *v.* Olsen, 215 Ill. 620, 74 N. E. 785; People *v.* Alton, 209 Ill. 461, 70 N. E. 640; Yates *v.* People, 207 Ill. 316, 69 N. E. 775 (holding that an extinct insurance company could not compel a license); People *v.* Kohlsaat, 168 Ill. 37, 48 N. E. 81 [*affirming* 66 Ill. App. 505] (denying mandamus to secure appeal where an affirmance would necessarily result); People *v.* Chicago, 99 Ill. App. 489 (refusing a restoration to office which would be ineffectual through a power of removal); Board of Education *v.* Bolton, 85 Ill. App. 92 (holding that mandamus would not issue to enforce an abstract right); Gunning *v.* Sheahan, 73 Ill. App. 118.

Louisiana.— State *v.* Sommerville, 111 La. 1015, 36 So. 104; State *v.* Land, 52 La. Ann. 309, 27 So. 434; Corporation *v.* Paulding, 4 Mart. N. S. 189.

Maryland.— Wells *v.* Munroe, 86 Md. 443, 38 Atl. 987 (name not placed on ballot where there was no vacancy); Allegany County School Com'rs *v.* Allegany County Com'rs, 20 Md. 449.

Michigan.— Hatch *v.* Wayne Cir. Judge, 138 Mich. 184, 101 N. W. 228, holding that trial would not be compelled in favor of a person who was bound to be unsuccessful.

New York.— People *v.* Tremain, 29 Barb. 96, 17 How. Pr. 142 [*reversing* 17 How. Pr. 10].

Ohio.— State *v.* McKinley, 11 Ohio Dec. (Reprint) 692, 28 Cinc. L. Bul. 337 (refusing a recanvass which would determine no rights); State *v.* Society for Support of Sick, etc., 6 Ohio Dec. (Reprint) 899, 8 Am. L. Rec. 627 (refusing restoration to membership in a society where relator could be at once expelled).

Oklahoma.—Weeden *v.* Arnold, 5 Okla. 578, 49 Pac. 915, refusing to compel issue of medical license where one had already issued.

Pennsylvania.— *In re* Cahill, 110 Pa. St. 167, 20 Atl. 414; Com. *v.* Colley Tp., 29 Pa. St. 121; Com. *v.* Roman Catholic Soc., 6 Serg. & R. 508 (refusing mandamus to prolong a church contest); Com. *v.* Lane, 3 Wkly. Notes Cas. 546 (refusing mandamus to discharge a mortgage which supported relator's title).

Texas.—Thaxton *v.* Terrell, (1906) 91 S. W. 559 (holding that where after mandamus had been begun to compel the state land commissioner to accept relators' applications to purchase certain sections of public school lands, without reservation of the minerals therein, the relators complied with the rulings of the commission under protest and agreed to accept the lands under their applications, without the minerals, a mandamus would be refused); Fuller *v.* Brown, 10 Tex. Civ. App. 64, 30 S. W. 506 (teacher not reinstated after school fund exhausted).

Vermont.— Kendall *v.* Aldrich, 68 Vt. 478, 35 Atl. 429.

Washington.— Frye *v.* Mt. Vernon, 42 Wash. 268, 84 Pac. 864 (holding that a municipality would not be compelled to make an assessment for a street improvement, an action to enforce which would be barred by limitations); State *v.* Irwin, 40 Wash. 413, 82 Pac. 420; State *v.* Reed, 36 Wash. 638, 79 Pac. 306; State *v.* Sunset Tel., etc., Co., 30 Wash. 676, 71 Pac. 198; Barnett *v.* Ashmore, 5 Wash. 163, 31 Pac. 466; State *v.* Hunter, 4 Wash. 651, 30 Pac. 642, 32 Pac. 294.

West Virginia.— Hall *v.* Staunton, 55 W. Va. 684, 47 S. E. 265, denying inspection of election records not affecting petitioner's rights.

Wisconsin.— State *v.* Larrabee, 3 Pinn. 166, holding that "without prejudice" would not be stricken from a decree of dismissal.

Canada.— Giles *v.* Wellington, 30 Ont. 610.

it must be clear that no benefit can possibly result;[52] and that in the case of a clear right the writ may issue in the discretion of the court, although it may be of no avail[53] or it is doubtful if there will be substantial benefit.[54] And it has been held also that a mandatory duty may be enforced, although the relator will not be benefited.[55] It follows that mandamus will be refused where the lapse of time has rendered the relief sought nugatory,[56] or where the time within which the act may be lawfully done has expired.[57]

f. Resulting Injury to Third Persons. Mandamus will not as a general rule issue, where the rights of third persons would be injuriously affected.[58] So when a contract which should have been awarded to one person has been given to another, and rights thereunder have attached, a writ to award it to the first may be refused.[59] But a writ will not be refused because third persons will be

See 33 Cent. Dig. tit. "Mandamus," § 48.

52. Reg. *v.* Bridgeman, 10 Jur. 159, 15 L. J. M. C. 44, 2 New Sess. Cas. 232.

53. U. S. *v.* Bowyer, 25 App. Cas. (D. C.) 121 (where registration to labor employment bureau was compelled); People *v.* Alton, 209 Ill. 461, 70 N. E. 640 (holding that colored children might be admitted to school, although it might not benefit them); Smith *v.* Lawrence, 2 S. D. 185, 49 N. W. 7.

54. State *v.* Boyden, 18 S. D. 388, 100 N. W. 763.

55. *Ex p.* Jordan, 94 U. S. 248, 24 L. ed. 123, holding that the allowance of an appeal prayed by one who had a right to demand it would be compelled without regard to what would be gained by an appeal.

56. *California.*— French *v.* State Senate, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, mandamus to senate after adjournment.

Florida.— State *v.* Marion County, 27 Fla. 438, 8 So. 749, where period for which liquor license was sought had expired.

Georgia.— Stacy *v.* Hammond, 96 Ga. 125, 23 S. E. 77; Roberts *v.* Smith, 63 Ga. 213.

Illinois.— People *v.* Jeffers, 186 Ill. 631, 58 N. E. 377; People *v.* Chicago, 106 Ill. App. 72; Board of Education *v.* Bolton, 85 Ill. App. 92; Gunning *v.* Sheahan, 73 Ill. App. 118; People *v.* Ruhy, 59 Ill. App. 653, where officers had lost jurisdiction.

Indiana.— Louisville, etc., R. Co. *v.* State, 25 Ind. 177, 87 Am. Dec. 358.

Maryland.— Duvall *v.* Swann, 94 Md. 608, 51 Atl. 617; Summerson *v.* Schilling, 94 Md. 591, 51 Atl. 612; Summerson *v.* Schilling, 94 Md. 582, 51 Atl. 610.

Missouri.— State *v.* Corley, 168 Mo. 126, 67 S. W. 571; State *v.* Fisher, (1893) 21 S. W. 446.

New York.— People *v.* Troy, 78 N. Y. 33, 34 Am. Rep. 500 [*reversing* 17 Hun 20], designation of official newspaper.

Ohio.— State *v.* Block, 7 Ohio Dec. (Reprint) 532, 3 Cinc. L. Bul. 792, 4 Ohio Dec. (Reprint) 314, 1 Clev. L. Rep. 285, approval of appeal-bond after time limited not compelled.

Tennessee.— State *v.* Frazier, 114 Tenn. 516, 86 S. W. 319, holding canvass unnecessary after relator in office.

Texas.— Lacoste *v.* Duffy, 49 Tex. 767, 30 Am. Rep. 122, denying mandamus to grant an appeal which would be too late.

See 33 Cent. Dig. tit. "Mandamus," § 48.

57. People *v.* Finley, 97 Ill. App. 214; Ellicott *v.* Levy Court, 1 Harr. & J. (Md.) 359; Goodman *v.* Sussex County, 66 N. J. L. 571, 49 Atl. 919 (financial statement of county collector not compelled after time expired); People *v.* Monroe, 20 Wend. (N. Y.) 108 (denying mandamus to court acting under special commission which has expired).

58. *Alabama.*— *Ex p.* Du Bose, 54 Ala. 278.

Colorado.— Farmers', etc., Reservoir Co. *v.* People, 8 Colo. App. 246, 45 Pac. 543; Farmers' Independent Ditch Co. *v.* Maxwell, 4 Colo. App. 477, 36 Pac. 556.

Florida.— State *v.* Internal Imp. Fund, 20 Fla. 402.

Illinois.— People *v.* Bloomington, 38 Ill. App. 125.

Louisiana.— State *v.* New Orleans Commercial Ct., 4 Roh. 227.

New Mexico.— Territory *v.* Perea, 6 N. M. 531, 30 Pac. 928.

New York.— *In re* Hart, 159 N. Y. 278, 54 N. E. 44.

North Carolina.— Capital Printing Co. *v.* Hoey, 124 N. C. 767, 33 S. E. 160.

Texas.— Tahor *v.* General Land Office Com'rs, 29 Tex. 508; General Land Office Com'rs *v.* Smith, 5 Tex. 471 (patent not compelled after one has been erroneously issued to another person); Glasscock *v.* General Land Office Com'rs, 3 Tex. 51.

Wisconsin.— State *v.* Madison, 15 Wis. 30.

United States.— In a case involving numerous questions of law and fact, and where many acts of parties connected with it may be valid or void, depending upon circumstances and facts attending them at the time, and which rest in parol proof, a mandamus is not the proper remedy to be applied, particularly while it is reasonable to assume that parties are interested who should have an opportunity to defend their rights. U. S. *v.* Edmunds, 5 Wall. 563, 18 L. ed. 692.

See 33 Cent. Dig. tit. "Mandamus," § 47.

Possession given pursuant to judgment will be restored upon reversal of the judgment, although third persons are in under independent title. Quan Wo Chung *v.* Laumeister, 83 Cal. 384, 23 Pac. 320, 17 Am. St. Rep. 261; Fremont *v.* Crippen, 10 Cal. 212, 70 Am. Dec. 711.

59. Talbot Paving Co. *v.* Detroit, 91 Mich. 262, 51 N. W. 933; Detroit Free Press Co. *v.*

benefited or because obedience to the writ may have the effect of perfecting the rights of many.[60]

g. Conduct of Applicant. The application must be in good faith, not to serve an ulterior purpose; the relator's hands must be clean; he must not have contributed to the condition complained of, and the proceedings must not be tainted with fraud or corruption.[61] Where, however, it appears that the right sought to be enforced is tainted with fraud, although the inference is not incontrovertible, the court may, in its discretion, award an alternative writ so as to afford an opportunity to bring the question before a proper tribunal.[62]

h. Illegal or Unauthorized Purpose. When it appears that the act sought to be coerced would be unauthorized by law, or the underlying proceedings are unauthorized or illegal, the writ will be denied.[63] It will never issue to accomplish

State Auditors, 47 Mich. 135, 10 N. W. 171; Deckman *v.* Oak Harbor, 10 Ohio Cir. Ct. 409, 6 Ohio Cir. Dec. 729. See also *infra*, **VI, N, 2.**

60. Com. *v.* Pittsburgh, 34 Pa. St. 496, holding that a mandate to compel a city to levy a tax to pay interest on part of a series of bonds issued by it will not be refused because other bond-holders will be benefited thereby.

61. *Connecticut.*— Ansonia *v.* Studley, 67 Conn. 170, 34 Atl. 1030.

Illinois.— Klokke *v.* Stanley, 109 Ill. 192.

Indiana.— Western Union Tel. Co. *v.* State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. N. S. 153, holding that quotations for a bucket-shop would not be compelled.

Kansas.— State *v.* Marston, 6 Kan. 524.

Michigan.— Indiana Road Mach. Co. *v.* Keeney, (1907) 110 N. W. 530 (holding that a writ would not issue to compel a town to pay for a machine, the purchase of which had been induced by fraud of relator); Sherwood *v.* Rynearson, 141 Mich. 92, 104 N. W. 392; Chatfield *v.* Lenawee Cir. Judge, 140 Mich. 636, 104 N. W. 45 (holding that mandamus to compel the dissolution of an injunction would not be granted, where the applicant had procured a postponement of the trial of the injunction suit); Mason *v.* Gladstone, 93 Mich. 232, 53 N. W. 16; Hale *v.* Risley, 69 Mich. 596, 37 N. W. 570.

Minnesota.— State *v.* U. S. Express Co., (1905) 104 N. W. 556.

Missouri.— State *v.* Seibert, 130 Mo. 202, 32 S. W. 670.

Nebraska.— Donahue *v.* State, 70 Nebr. 72, 96 N. W. 1038, refusing mandamus where a relator was actuated by spite. But see Moores *v.* State, 71 Nebr. 522, 99 N. W. 249, holding that a judgment granting a mandamus closing a pool-room would not be refused because one of the two relators admitted that his leading motive was a belief that a certain citizen was interested in the profits.

New Jersey.— Brown *v.* Mullica Tp., 48 N. J. L. 447, 4 Atl. 427; Matawan *v.* Horner, 48 N. J. L. 441, 5 Atl. 807.

New York.— See People *v.* Adams, 18 N. Y. Suppl. 896, holding that even under a statute giving the remedy for wrongful dismissal from office, the application will be refused where the object is to enable the relator to sue for a salary for services not rendered, and for which no claim was seasonably filed.

Ohio.— Hagerty *v.* State, 14 Ohio Cir. Ct. 95, 7 Ohio Cir. Dec. 88.

Pennsylvania.— Com. *v.* McCuen, 75 Pa. St. 215 (holding that a county would not be compelled to pay the costs in a criminal proceeding, where such proceeding had been used by relator to accomplish a private purpose); Com. *v.* Henry, 49 Pa. St. 530 (holding that a municipal lease secured by improper influence by the relators would not be compelled).

Texas.— Nevell *v.* Terrell, (1905) 89 S. W. 971, holding that a lessee of public land who had had the lease canceled could not compel an additional lease.

England.— Reg. *v.* Liverpool, etc., R., 16 Jur. 949; Reg. *v.* Liverpool, etc., Co., 21 L. J. Q. B. 284, denying a writ to compel transfer of stock where the applicant was not proceeding for the *bona fide* purpose of becoming a shareholder.

Canada.— Reg. *v.* Wimbledon Urban Dist. Council, 62 J. P. 84, 77 L. T. Rep. N. S. 599.

62. People *v.* McGuire, 31 Misc. (N. Y.) 324, 65 N. Y. Suppl. 463.

63. *Alabama.*— Hall *v.* Steele, 82 Ala. 562, 2 So. 650; State *v.* Judge Orphans' Ct., 15 Ala. 740.

California.— Perrin *v.* Honeycutt, 144 Cal. 87, 77 Pac. 776; Smith *v.* Kenfield, 57 Cal. 138; People *v.* San Francisco, 20 Cal. 591.

District of Columbia.— Dancy *v.* Clark, 24 App. Cas. 487.

Florida.— State *v.* Stewart, 49 Fla. 259, 38 So. 600; State *v.* Sumter County, 22 Fla. 1.

Georgia.— Park *v.* Candler, 113 Ga. 647, 39 S. E. 89, holding that, although an officer of the executive department of the state and the securities on his official bond will be protected from liability when he acts on the opinion of the attorney-general, such an officer will not be compelled by mandamus to do an act which would be a violation of the constitution, notwithstanding the attorney-general is of opinion that such an act would not be a violation of that instrument, and has so advised the officer on his own application.

Illinois.— People *v.* Reddick, 181 Ill. 334, 54 N. E. 963 [*affirming* 82 Ill. App. 85]; People *v.* Hyde Park, 117 Ill. 462, 6 N. E. 33; Chase *v.* De Wolf, 69 Ill. 47; Knopf *v.* Corcoran, 112 Ill. App. 320; Civil Service Com-

a wrong, nor where the act commanded would result in a violation of a constitutional provision.[64]

B. Rights Which Will Be Enforced — 1. Necessity of Clear Legal Right. The legal right of plaintiff or relator to the performance of the particular act, of which performance is sought to be compelled, must be clear and complete.[65]

mission *v.* Kenyon, 86 Ill. App. 547; People *v.* Ruby, 59 Ill. App. 653; Allen *v.* Conlon, 2 Ill. App. 166.

Kansas.— Topeka First Nat. Bank *v.* Heflebower, 58 Kan. 792, 51 Pac. 225; Rosenthal *v.* State Bd. Canvassers, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157.

Michigan.— Traverse City First Nat. Bank *v.* Union Tp., 141 Mich. 404, 104 N. W. 771; Daniels *v.* Long, 111 Mich. 562, 69 N. W. 1112; Tennant *v.* Crocker, 85 Mich. 328, 48 N. W. 577.

Minnesota.— State *v.* U. S. Express Co., 95 Minn. 442, 104 N. W. 556; State *v.* Hill, 32 Minn. 275, 20 N. W. 196; Clark *v.* Buchanan, 2 Minn. 346.

Mississippi.— Ross *v.* Lane, 3 Sm. & M. 695.

Nebraska.— State *v.* Sheldon, 53 Nebr. 365, 73 N. W. 694.

New Jersey.— Edward C. Jones Co. *v.* Guttenberg, 66 N. J. L. 58, 48 Atl. 537.

New York.— People *v.* Calder, 85 N. Y. App. Div. 31, 82 N. Y. Suppl. 822.

North Carolina.— Betts *v.* Raleigh, 142 N. C. 229, 55 S. E. 145; Godwin *v.* Carolina, etc., Tel. Co., 136 N. C. 258, 48 S. E. 636, 103 Am. St. Rep. 941, 67 L. R. A. 251.

Pennsylvania.— Com. *v.* Baker, 212 Pa. St. 230, 61 Atl. 910; Sterrett *v.* Electric Reporting Co., 3 Pa. Co. Ct. 553, 19 Phila. 386; Com. *v.* Ripple, 4 Kulp 59; *In re* Election, 3 Lanc. L. Rev. 225; Boyer *v.* Mutual Sav. Fund Assoc., 1 Leg. Rec. 231.

South Carolina.— Moore *v.* Napier, 64 S. C. 564, 42 S. E. 997.

Tennessee.— Johnson *v.* Lucas, 11 Humphr. 306; Gillespie *v.* Wood, 4 Humphr. 437.

West Virginia.— State *v.* Wyoming County Ct., 47 W. Va. 672, 35 S. E. 959.

England.— Mandamus is a writ *subsidium justiciæ*, and will not be used to violate the law, assist an illegal purpose, or give effect to illegality. Reg. *v.* Littledale, L. R. 10 Ir. 78.

Canada.— *In re* Langdon, 45 U. C. Q. B. 47.

See 33 Cent. Dig. tit. "Mandamus," § 42.

64. People *v.* State Bd. of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646.

65. *Alabama.*— Minchener *v.* Carroll, 135 Ala. 409, 33 So. 168; Wilson *v.* Duncan, 114 Ala. 659, 21 So. 1017; *Ex p.* McKissack, 107 Ala. 493, 18 So. 140; Sessions *v.* Boykin, 78 Ala. 328; *Ex p.* Huckabee, 71 Ala. 427; Leigh *v.* State, 69 Ala. 261; *Ex p.* South, etc., R. Co., 65 Ala. 599; *Ex p.* Schmidt, 62 Ala. 252; *Ex p.* Harris, 52 Ala. 87, 23 Am. Rep. 559; State *v.* Judge Ninth Judicial Cir., 13 Ala. 805; State *v.* Talladega Road Com'rs, 3 Port. 412.

Arkansas.— Underwood *v.* White, 27 Ark. 382; *Ex p.* Hays, 26 Ark. 510, 511; Fitch *v.* McDiarmid, 26 Ark. 482; *Ex p.* Cheatham, 6 Ark. 437; *Ex p.* Trapnall, 6 Ark. 9, 42 Am. Dec. 676; *Ex p.* Conway, 4 Ark. 302; Webb *v.* Hanger, 1 Ark. 121; Taylor *v.* Governor, 1 Ark. 21; Goings *v.* Mills, 1 Ark. 11.

California.— Burke *v.* Edgar, 67 Cal. 182, 7 Pac. 488.

Colorado.— People *v.* Butler, 24 Colo. 401, 51 Pac. 510; Collier, etc., Lith. Co. *v.* Henderson, 18 Colo. 259, 32 Pac. 417; Aspen *v.* Aspen Town, etc., Co., 10 Colo. 191, 15 Pac. 794, 16 Pac. 160; Daniels *v.* Miller, 8 Colo. 542, 9 Pac. 18; People *v.* Spruance, 8 Colo. 307, 6 Pac. 831; Gruner *v.* Moore, 6 Colo. 526; Farmers' High Line Canal, etc., Co. *v.* People, 8 Colo. App. 246, 45 Pac. 543.

Connecticut.— State *v.* New Haven, etc., Co., 45 Conn. 331.

Delaware.— McCoy *v.* State, 2 Marv. 543, 36 Atl. 81.

District of Columbia.— U. S. *v.* Root, 22 App. Cas. 419; U. S. *v.* Bayard, 5 Mackey 428.

Florida.— State *v.* Knott, 48 Fla. 188, 37 So. 307; Florida Cent., etc., R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419; State *v.* Craft, 17 Fla. 722.

Georgia.— Napier *v.* Poe, 12 Ga. 170, commissioners, under a corporate charter, to receive subscriptions for stock, cannot be compelled, on the ground that the first subscription for the whole stock was invalid, to receive a second subscription from other would-be subscribers. And see State *v.* Georgia Medical Soc., 38 Ga. 608, 95 Am. Dec. 408 (where it was held that an incorporator had a clear right to membership and to restoration on illegal expulsion); State *v.* Justices Richmond County Inferior Ct., Dudley 37.

Illinois.— People *v.* Rose, 211 Ill. 252, 71 N. E. 1124; McGann *v.* People, 194 Ill. 526, 62 N. E. 941; People *v.* Getzendaner, 137 Ill. 234, 34 N. E. 297; Mobile, etc., R. Co. *v.* People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556; Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824; People *v.* Johnson, 100 Ill. 537, 39 Am. Rep. 63; People *v.* Davis, 93 Ill. 133; People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278; Ottawa *v.* People, 48 Ill. 233; People *v.* Salomon, 46 Ill. 415; People *v.* Hatch, 33 Ill. 9; Peoria Bd. of School Inspectors *v.* People, 20 Ill. 525; Pike County Com'rs *v.* People, 11 Ill. 202; McGann *v.* Harris, 114 Ill. App. 308; Cicero *v.* People, 105 Ill. App. 406; People *v.* Perrin, 103 Ill. App. 410; Scanlon *v.* Schwab, 103 Ill. App. 93; Reddick *v.* People, 82 Ill. App. 85; Buckley *v.* Eisendrath, 58 Ill. App. 364. And see McNeill *v.* Chicago, 212 Ill. 481, 72 N. E. 450, *de facto* policeman cannot compel restoration unless he was an officer *de jure* when excluded.

Under this rule it is held that where the act, the doing of which is sought to be compelled by mandamus, is the final thing, and if done gives to the relator all that he seeks proximately or ultimately, then the question whether he is entitled to have that act done may be inquired into by the officer or person to whom the mandamus is sought, and is also to be considered by the tribunal which is moved to grant the mandamus; but that in a case where the act to be done is but a step toward the final result, and is but the means of setting in motion a tribunal which is to decide upon the final relief claimed, then the inferior officer or tribunal may not inquire whether there exists the right to that final relief, and can only ask

Indiana.—State *v.* Spinney, (1906) 76 N. E. 971; State *v.* Bonnell, 119 Ind. 494, 21 N. E. 1101; Burnsville Turnpike Co. *v.* State, 119 Ind. 382, 20 N. E. 421, 3 L. R. A. 265; State *v.* Grubb, 85 Ind. 213.

Kansas.— Kansas Nat. Bank *v.* Hovey, 48 Kan. 20, 28 Pac. 1090; Swartz *v.* Large, 47 Kan. 304, 27 Pac. 993; Hall *v.* Stewart, 23 Kan. 396.

Kentucky.— Lowe *v.* Phelps, 14 Bush 642.

Louisiana.— State *v.* Acme Lumber Co., 115 La. 893, 40 So. 301; Mossy *v.* Harris, 25 La. Ann. 623.

Michigan.— Fletcher *v.* Alpena Cir. Judge, 136 Mich. 511, 99 N. W. 748; Clarke *v.* Hill, 132 Mich. 434, 93 N. W. 1044.

Mississippi.— Beaman *v.* Leake County Bd. of Police, 42 Miss. 237.

Missouri.— State *v.* Lesueur, 136 Mo. 452, 38 S. W. 325; State *v.* Williams, 99 Mo. 291, 12 S. W. 905; Williams *v.* Judge Cooper Ct. C. Pl., 27 Mo. 225; State *v.* Flad, 26 Mo. App. 500.

Montana.— State *v.* Lewis County, etc., Dist. Ct. Dept. No. 1, 29 Mont. 265, 74 Pac. 498.

Nebraska.— State *v.* McGuire, (1905) 105 N. W. 471; State *v.* Weston, 67 Nebr. 175, 93 N. W. 182; State *v.* Wenzel, 55 Nebr. 210, 75 N. W. 579; State *v.* Bartley, 50 Nebr. 874, 70 N. W. 367; State *v.* Bowman, 45 Nebr. 752, 64 N. W. 223; State *v.* Merrell, 43 Nebr. 575, 61 N. W. 754; State *v.* Nelson, 21 Nebr. 572, 32 N. W. 589; State *v.* Omaha, 14 Nebr. 265, 15 N. W. 210, 45 Am. Rep. 108.

Nevada.— State *v.* Wright, 10 Nev. 167.

New Hampshire.— New York Fidelity, etc., Co. *v.* Linehan, 71 N. H. 622, 52 Atl. 1094.

New Jersey.— State *v.* Clark, (1903) 55 Atl. 690; Edward C. Jones Co. *v.* Guttenburg, 66 N. J. L. 659, 51 Atl. 274; Padavano *v.* Fagan, 66 N. J. L. 167, 48 Atl. 998.

New Mexico.—Agricultural College *v.* Vaughn, 12 N. M. 333, 78 Pac. 51.

New York.— People *v.* New York Bd. of Police, 107 N. Y. 235, 13 N. E. 920 [*affirming* 46 Hun 296]; *In re* Gardner, 68 N. Y. 467; People *v.* Hawkins, 46 N. Y. 9; People *v.* Chenango County, 11 N. Y. 563; People *v.* Greene, 95 N. Y. App. Div. 397, 88 N. Y. Suppl. 601; People *v.* Sullivan County Bd. of Canvassers, 88 N. Y. App. Div. 185, 84 N. Y. Suppl. 406; People *v.* Coler, 61 N. Y. App. Div. 223, 70 N. Y. Suppl. 482 [*affirmed* in (1901) 60 N. E. 1046]; Lefrois *v.* Monroe County, 24 N. Y. App. Div. 421, 48 N. Y. Suppl. 519 [*reversed* on other grounds in 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 200]; People *v.* Stupp, 49 Hun 544, 2 N. Y. Suppl. 537; People *v.* Tremain, 29 Barb. 96, 17 How. Pr. 142; People *v.* Seward Highway Com'rs, 27 Barb. 94; People *v.* Croton Aqueduct Bd., 26 Barb. 240; People *v.* Easton, 13 Abb. Pr. N. S. 159; People *v.* New York, 18 Abb. Pr. 8; People *v* Collins, 19 Wend. 56; People *v.* Brooklyn, 1 Wend. 318, 19 Am. Dec. 502.

Ohio.— State *v.* Smith, 70 Ohio St. 13, 72 N. E. 300.

Oklahoma.— Beadles *v.* Fry, 15 Okla. 428, 82 Pac. 1041, 2 L. R. A. N. S. 855; Territory *v.* Crum, 13 Okla. 9, 73 Pac. 297.

Oregon.— State *v.* Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166; Mackin *v.* Portland Gas Co., 38 Oreg. 120, 61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596.

Pennsylvania.— Com. *v.* James, 214 Pa. St. 319, 63 Atl. 743; Sweigard *v.* Consumers' Ice Mfg., etc., Co., 198 Pa. St. 253, 48 Atl. 495; Gibboney's Petition, 185 Pa. St. 572, 40 Atl. 92; Com. *v.* Fitler, 136 Pa. St. 129, 20 Atl. 424; Com. *v.* Philadelphia, 132 Pa. St. 288, 19 Atl. 136; Porter Tp. *v.* Jersey Shore, 82 Pa. St. 275; Keasy *v.* Bricker, 60 Pa. St. 9; Conley *v.* West Deer Tp. School Directors, 32 Pa. St. 194; Heffner *v.* Com., 28 Pa. St. 108; Miller *v.* Canal Com'rs, 21 Pa. St. 23; Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9; James *v.* Bucks County Com'rs, 13 Pa. St. 72; Com. *v.* Cochran, 1 Serg. & R. 473; Com. *v.* Risser, 3 Pa. Super. Ct. 196; Moyer *v.* Wren, 9 Pa. Co. Ct. 441, 6 Kulp 179; Stegmaier *v.* Luzerne County, 10 Kulp 496; Com. *v.* Buchanan, 6 Kulp 217; Com. *v.* Hawk, 7 Lack. Leg. N. 125; Com. *v.* Kirst, 3 Lack. Jur. 45; Will *v.* Eberly, 8 Lanc. Bar 105; Com. *v.* Finn, 12 Luz. Leg. Reg. 177; Com. *v.* Guardians of Poor, 16 Phila. 6, 13 Wkly. Notes Cas. 61; Thatcher *v.* York County Com'rs, 16 York Leg. Rec. 205.

Rhode Island.— Sweet *v.* Conely, 20 R. I. 381, 39 Atl. 326.

South Carolina.— Richland Drug Co. *v.* Moorman, 71 S. C. 236, 50 S. E. 792; State *v.* Burnside, 33 S. C. 276, 11 S. E. 787; State *v.* Fuller, 18 S. C. 246.

South Dakota.— Custer County Bank *v.* Custer County, 18 S. D. 274, 100 N. W. 424.

Tennessee.— Memphis App. Pub. Co. *v.* Pike, 9 Heisk. 697.

Texas.— Boozer *v.* Terrell, 96 Tex. 635, 75 S. W. 482; De Poyster *v.* Baker, 89 Tex. 155, 34 S. W. 106; Texas Mexican R. Co. *v.* Jarvis, 80 Tex. 456, 15 S. W. 1089; Houston Tap, etc., R. Co. *v.* Randolph, 24 Tex. 317; General Land Office Commissioner *v.* Smith, 5 Tex. 471; Watkins *v.* Huff, (Civ. App. 1901)

whether the relator shows a right to have the act done which is sought from him or it.[66]

2. Doubtful, Inchoate, or Conditional Rights. Hence mandamus will not issue to enforce a right which is in substantial dispute,[67] or which is inchoate[68] or prospective,[69] or as to which a substantial doubt exists,[70] although objections raising mere technical questions will be disregarded if the right is clear and the case

63 S. W. 922; Nocona Bank *v.* March, (Civ. App. 1899) 51 S. W. 266.

Vermont.— Bankers' L. Ins. Co. *v.* Howland, 73 Vt. 1, 48 Atl. 435, 57 L. R. A. 374; Cook *v.* Peacham, 50 Vt. 231.

Virginia.— Milliner *v.* Harrison, 32 Gratt. 482; Page *v.* Clopton, 30 Gratt. 415.

Washington.— State *v.* Ross, 39 Wash. 399, 81 Pac. 865. And see State *v.* Frater, 39 Wash. 594, 81 Pac. 1135.

West Virginia.— Hutton *v.* Holt, 52 W. Va. 672, 44 S. E. 164; State *v.* Wyoming County Ct., 47 W. Va. 672, 35 S. E. 959.

Wisconsin.— State *v.* Benzenberg, 108 Wis. 435, 84 N. W. 858; State *v.* Hastings, 10 Wis. 518; State *v.* Larrabee, 3 Pinn. 166, 3 Chandl. 179.

United States.— *Ex p.* Cutting, 94 U. S. 14, 24 L. ed. 49.

England.— Reg. *v.* Lewisham Union, [1897] 1 Q. B. 498, 61 J. P. 151, 66 L. J. Q. B. 403, 76 L. T. Rep. N. S. 324, 45 Wkly. Rep. 346; Reg. *v.* Lords Com'rs of Treasury, 16 Q. B. 357, 15 Jur. 767, 20 L. J. Q. B. 305, 71 E. C. L. 357; Reg. *v.* Abrahams, 4 Q. B. 157, 3 G. & D. 382, 7 Jur. 129, 12 L. J. Q. B. 118, 45 E. C. L. 157; Reg. *v.* Godolphin, 8 A. & E. 338, 35 E. C. L. 620; Rex *v.* Davie, 6 A. & E. 374, 33 E. C. L. 210, 6 L. J. K. B. 126, 1 N. & P. 328, 36 E. C. L. 678, W. W. & D. 177; Rex *v.* Derrbigshire, 14 East 285; Rex *v.* Bristol Dock Co., 12 East 428, 11 Rev. Rep. 440; Rex *v.* Canterbury, 8 East 213; Rex *v.* Liverpool, 2 M. & S. 223; Rex *v.* Heywood, 1 M. & S. 624; Rex *v.* Chester, 1 M. & S. 101.

See 33 Cent. Dig. tit. "Mandamus," § 37.

A mere claim to spiritual privilege devoid of legal right, such as a right to be installed as a minister, cannot be enforced. Africans' Union Church *v.* Sanders, 1 Houst. (Del.) 100, 63 Am. Dec. 187.

66. State *v.* Shannon, 133 Mo. 139, 33 S. W. 1137; People *v.* Canal Appraisers, 73 N. Y. 443. And see State *v.* Marshall County Judge, 7 Iowa 186.

67. *Alabama.*— *Ex p.* Harris, 52 Ala. 87, 23 Am. Rep. 559. And see Dawson *v.* Sayre, 80 Ala. 444, 2 So. 479.

California.— Williams *v.* Smith, 6 Cal. 91. See also People *v.* Hays, 5 Cal. 66.

Kansas.— Davis *v.* Jewett, 69 Kan. 651, 77 Pac. 704.

Michigan.— People *v.* Curtis, 41 Mich. 723, 49 N. W. 923.

New Jersey.— State *v.* Clark, (Sup. 1903) 55 Atl. 690.

New York.— People *v.* Sullivan County Bd. of Canvassers, 88 N. Y. App. Div. 185, 84 N. Y. Suppl. 406; People *v.* Coler, 61 N. Y. App. Div. 223, 70 N. Y. Suppl. 482 [*affirmed* in 168 N. Y. 6, 60 N. E. 1046]; People *v.* Stupp, 49 Hun 544, 2 N. Y. Suppl. 537; People *v.* New York Bd. of Apportionment, 3 Hun 11, 5 Thomps. & C. 382; People *v.* Fromme, 30 Misc. 323, 63 N. Y. Suppl. 583 [*affirmed* in 67 N. Y. App. Div. 618, 73 N. Y. Suppl. 1144].

Pennsylvania.— Com. *v.* Warwick, 185 Pa. St. 623, 40 Atl. 93 [*reversing* 6 Pa. Dist. 473]; Com. *v.* Anderson's Ferry, 7 Serg. & R. 6; Com. *v.* Buchanan, 6 Kulp 217.

Rhode Island.— Foster *v.* Angell, 19 R. I. 285, 33 Atl. 406.

South Dakota.— Custer County Bank *v.* Custer County, 18 S. D. 274, 100 N. W. 424; Bailey *v.* Lawrence County, 2 S. D. 533, 51 N. W. 331.

Texas.— Juencke *v.* Terrell, 98 Tex. 237, 82 S. W. 1025; Wooten *v.* Rogan, 96 Tex. 434, 73 S. W. 799; De Poyster *v.* Baker, 89 Tex. 155, 34 S. W. 106.

Utah.—Hoffman *v.* Lewis, (1906) 87 Pac. 167.

Wisconsin.—State *v.* Hastings, 10 Wis. 518.

England.— Rex *v.* Chester, 1 M. & S. 101, holding that mandamus will not be granted to enforce compliance with a doubtful provision in a charter against long-established custom, especially where another remedy is open. But see Rex *v.* Jotham, 3 T. R. 575, 577, 1 Rev. Rep. 775, where it is said by Butler, J., that "there is a great deal of difference between . . . [mandamus to admit] and a mandamus to restore. The former is granted merely to enable the party to try his right."

The false assumption of the existence of a statutory provision may be disposed of in a mandamus proceeding. Territory *v.* Socorro, 12 N. M. 177, 76 Pac. 283.

Determination of title to office see *infra*, VI, C, 7.

Where the right of the applicant is in litigation, as a general rule mandamus will not lie. Swartz *v.* Large, 47 Kan. 304, 27 Pac. 993; State *v.* Eshelby, 2 Ohio Cir. Ct. 468, 1 Ohio Cir. Dec. 592; Runkle *v.* Com., 97 Pa. St. 328; Com. *v.* Philadelphia, 15 Pittsb. Leg. J. (Pa.) 337. See also *infra*, II, H.

68. *Ex p.* Harris, 52 Ala. 87, 23 Am. Rep. 559; People *v.* Olds, 3 Cal. 167, 58 Am. Dec. 398; People *v.* Brooklyn, 1 Wend. (N. Y.) 318, 19 Am. Dec. 502.

69. U. S. *v.* Root, 22 App. Cas. (D. C.) 419.

70. *Alabama.*— Dawson *v.* Sayre, 80 Ala. 444, 2 So. 479; *Ex p.* Harris, 52 Ala. 87, 23 Am. Rep. 559.

Arkansas.— Fitch *v.* McDiarmid, 26 Ark. 482.

Illinois.— Mobile, etc., R. Co. *v.* People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556; People *v.* Johnson, 100 Ill. 537, 39 Am. Rep. 63; People *v.* Crotty, 93 Ill. 180; People *v.* Salomon, 46 Ill. 415; People *v.* Hatch, 33 Ill. 9; Davis *v.* Miller Signal Co., 105 Ill. App.

meritorious.[71] Likewise mandamus will not issue to enforce a right which is conditional or incomplete by reason of conditions precedent which are still to be performed by the petitioner or relator,[72] or which is contingent upon the further act

657; Cicero *v.* People, 105 Ill. App. 406; Scanlan *v.* Schwab, 103 Ill. App. 93; Reddick *v.* People, 82 Ill. App. 85; Buckley *v.* Eisendroth, 58 Ill. App. 364.

Indiana.—Burnsville Turnpike Co. *v.* State, 119 Ind. 382, 20 N. E. 421, 3 L. R. A. 265.

Iowa.— Cutcomp *v.* Utt, 60 Iowa 156, 14 N. W. 214.

Kansas.— Kansas Nat. Bank *v.* Hovey, 48 Kan. 20, 28 Pac. 1090; Swartz *v.* Large, 47 Kan. 304, 27 Pac. 993; Cassatt *v.* Barber County, 39 Kan. 505, 18 Pac. 517.

Louisiana.— State *v.* Acme Lumber Co., 115 La. 893, 40 So. 301; State *v.* New Orleans, 49 La. Ann. 1322, 22 So. 354.

Maryland.— Goldborough *v.* Lloyd, 86 Md. 374, 38 Atl. 773.

Michigan.— Loomis *v.* Rogers Tp., 53 Mich. 135, 18 N. W. 596.

Mississippi.— Beaman *v.* Leake County Bd. of Police, 42 Miss. 237.

Missouri.— State *v.* Williams, 99 Mo. 291, 12 S. W. 905; State *v.* Buhler, 90 Mo. 560, 3 S. W. 68; Hulse *v.* Marshall, 9 Mo. App. 148.

Montana.— State *v.* Lewis County, etc., Dist. Ct., Dept. No. 1, 29 Mont. 265, 74 Pac. 498.

Nebraska.— State *v.* Wenzel, 55 Nebr. 210, 75 N. W. 579.

New York.— People *v.* Brush, 146 N. Y. 60, 40 N. E. 502; People *v.* Coler, 58 N. Y. App. Div. 131, 68 N. Y. Suppl. 448; Matter of Finnigan, 91 Hun 176, 36 N. Y. Suppl. 331; People *v.* Stupp, 49 Hun 544, 2 N. Y. Suppl. 537; People *v.* West Troy, 25 Hun 179; People *v.* New York, etc., R. Co., 2 N. Y. Civ. Proc. 82; People *v.* Manhattan R. Co., 20 Abb. N. Cas. 393; People *v.* New York, 18 Abb. Pr. 8.

North Dakota.— State *v.* Albright, 11 N. D. 22, 88 N. W. 729.

Pennsylvania.— Com. *v.* Philadelphia, 2 Pars. Eq. Cas. 220.

Rhode Island.— Sweet *v.* Conley, 20 R. I. 381, 39 Atl. 326.

South Carolina.— State *v.* Burnside, 33 S. C. 276, 11 S. E. 787; State *v.* Fuller, 18 S. C. 246. See Richland Drug Co. *v.* Moorman, 71 S. C. 236, 50 S. E. 792.

Vermont.— Free Press Assoc. *v.* Nichols, 45 Vt. 7.

Virginia.— Milliner *v.* Harrison, 32 Gratt. 482; Page *v.* Clopton, 30 Gratt. 415.

Wisconsin.— State *v.* McCann, 107 Wis. 348, 83 N. W. 647; State *v.* Washington County, 2 Pinn. 552, 2 Chandl. 247.

Wyoming.— State *v.* Barber, 4 Wyo. 56, 32 Pac. 14.

United States.— *In re* Key, 189 U. S. 84, 23 S. Ct. 624, 47 L. ed. 720.

71. *California.*— Kennedy *v.* San Francisco Bd. of Education, 82 Cal. 483, 22 Pac. 1042.

Florida.— State *v.* Johnson, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357.

Indiana.— State *v.* Warrick County, 124 Ind. 554, 25 N. E. 10, 8 L. R. A. 607.

Maryland.— Cecil County Com'rs *v.* Banks, 80 Md. 321, 30 Atl. 919.

Michigan.— People *v.* Detroit Bd. of Education, 18 Mich. 400.

Missouri.— Beck *v.* Jackson, 43 Mo. 117.

New Jersey.— Stokes *v.* Camden County, 35 N. J. L. 217.

New York.— People *v.* Kearny, 44 N. Y. App. Div. 449, 61 N. Y. Suppl. 41, 30 N. Y. Civ. Proc. 11; People *v.* Metropolitan Police Dist., 35 Barb. 527.

Ohio.— State *v.* Darke County, 43 Ohio St. 311, 1 N. E. 209.

Oklahoma.—Christy *v.* Kingfisher, 13 Okla. 585, 76 Pac. 135.

Pennsylvania.— Com. *v.* Chittenden, 2 Pa. Dist. 804, 13 Pa. Co. Ct. 362.

Texas.— Schley *v.* Maddox, (Civ. App. 1893) 22 S. W. 998 [*distinguishing* Texas Mexican R. Co. *v.* Jarvis, 80 Tex. 456, 15 S. W. 1089].

Utah.— Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398.

72. *Arkansas.*— St. Louis, etc., R. Co. *v.* B'Shears, 59 Ark. 237, 27 S. W. 2; Alexander *v.* Sanders, 23 Ark. 630; Taylor *v.* Governor, 1 Ark. 21.

California.— O'Neill *v.* Reynolds, 116 Cal. 264, 48 Pac. 57.

District of Columbia.— Lochren *v.* Long, 6 App. Cas. 486, pensioner must exhaust appeal before seeking mandamus against commissioner.

Georgia.— Crawley *v.* Mershon, 61 Ga. 284.

Iowa.— Harwood, etc., R. Co. *v.* Case, 37 Iowa 692.

Kansas.—McChun *v.* Glasgow, 55 Kan. 182, 40 Pac. 329; Chicago, etc., R. Co. *v.* Marshall, 47 Kan. 614, 28 Pac. 701; Garden City *v.* Hall, 46 Kan. 531, 26 Pac. 1021; State *v.* Stevens, 23 Kan. 456; State *v.* Marston, 6 Kan. 524.

Louisiana.— State *v.* New Orleans, etc., R. Co., 44 La. Ann. 1026, 11 So. 709; State *v.* West, 26 La. Ann. 322.

Michigan.—Aitken *v.* Chippewa Cir. Judge, (1906) 109 N. W. 223; Blain *v.* Chippewa Cir. Judge, 145 Mich. 59, 108 N. W. 440; Cheboygan County *v.* Menton Tp., 94 Mich. 386, 54 N. W. 169.

Nebraska.— State *v.* Bartley, 50 Nebr. 874, 70 N. W. 367; State *v.* Phelps County School Dist. No. 2, 25 Nebr. 301, 41 N. W. 155.

New Jersey.— Stockton *v.* Burlington Bd. of Education, 72 N. J. L. 80, 59 Atl. 1061.

New York.— People *v.* Lyman, 67 N. Y. App. Div. 446, 73 N. Y. Suppl. 987; People *v.* Coler, 61 N. Y. App. Div. 223, 70 N. Y. Suppl. 482 [*affirmed* in 168 N. Y. 6, 60 N. E. 1046]; People *v.* Green, 66 Barb. 630; People *v.* Fitzgerald, 13 N. Y. Suppl. 663 [*affirmed* in 128 N. Y. 620, 28 N. E. 254]. Where supervisors were required by statute to raise money by taxation within a certain sum sufficient to pay claims the amount of which claims was to be ascertained judicially, it was held that such judgment was not a con-

of a third person,[73] or which is beyond the possibility of performance.[74] But an act may be compelled, although the actual legal rights conferred must be subject to subsequent judicial determination.[75]

3. Equitable Rights. Mandamus cannot be employed as a general rule for the enforcement of equitable rights.[76] It follows that a purely equitable defense cannot be set up.[77]

4. Technical Rights. The writ is employed to promote principles of justice. It should not issue to compel a technical compliance with the letter of the law, in violation of its clear intent or spirit, nor to wrest a statute from its true purpose.[78] Hence the writ will not issue in support of unjust claims, although they may be technically regular.[79]

dition precedent to the right to a mandamus to compel them to raise the money. People *v* New York, 3 Abb. Dec. 566, 2 Keyes 288, 34 How. Pr. 379.

Pennsylvania.— Com. *v.* Pittsburg, 209 Pa. St. 333, 59 Atl. 669; Gerhard *v.* Packer Tp., 9 Pa. Dist. 720; Rafferty *v.* Haddock, 6 Pa. Dist. 667; Matter of Jefferson Tp. School Directors, 1 Pearson 252; Com. *v.* Heebner, 3 Montg. Co. Rep. 199; Com. *v.* Corey, 2 Pittsb. 444.

England.— Rex *v.* Jotham, 3 T. R. 575, 1 Rev. Rep. 770.

Petition seeking two kinds of relief, one of which must be obtained before there can be a clear legal right to the other, will be dismissed so far as it demands the dependent relief. Chicago *v.* People, 210 Ill. 84, 71 N. E. 816.

A mandate conditional on performance of condition precedent will not be granted. O'Neill *v.* Reynolds, 116 Cal. 264, 48 Pac. 57. See *contra*, People *v.* Monroe, 41 Misc. (N. Y.) 198, 83 N. Y. Suppl. 995.

A purchaser at execution sale who refuses to pay the purchase-money on the ground that he is the oldest judgment creditor and entitled to the money is not entitled to mandamus to compel a deed to be made to him. Williams *v.* Smith, 6 Cal. 91. See also People *v.* Hays, 5 Cal. 66.

73. People *v.* Croton Aqueduct Bd., 26 Barb. (N. Y.) 240; State *v.* Benzenberg, 108 Wis. 435, 84 N. W. 858.

74. State *v.* Newman, 91 Mo. 445, 3 S. W. 849, holding that one who does not possess the necessary qualifications for office, such as a term of residence prior to election, cannot compel a certificate of his election to be issued.

75. State *v.* Barber, 4 Wyo. 409, 34 Pac. 1028, 27 L. R. A. 45, holding that mandamus would issue to compel the secretary of state to affix the state seal to, and countersign, a commission issued by the governor to a state officer.

76. *Alabama.*— State *v.* Ninth Judicial Cir. Judge, 13 Ala. 805.

California.—Scheerer *v.* Edgar, 76 Cal. 569, 18 Pac. 681, the assignee of a judgment against a city, where the auditor has only authority to draw a warrant in favor of the person to whom the supervisors have ordered payment, and they have ordered the judgment to be paid to plaintiff, cannot compel the auditor to make a warrant to him, the assignee. But see Tyler *v.* Houghton, 25 Cal. 26, holding that a writ lies under statute by one having equitable interest, to contest land purchase.

Colorado.— Burlington, etc., R. Co. *v.* People, 20 Colo. App. 181, 77 Pac. 1026, holding that a suit in equity, where all the rights and duties of the parties may be adjusted, and not mandamus, a purely legal remedy, is the proper remedy for compelling the bridging of the tracks of several railroad companies, where they cross streets; individual action by a single railroad being sufficient in the case of certain bridges, and joint action by all the railroads being necessary where a continuous viaduct crossing the tracks of all of them is required.

Illinois— People *v.* Salomon, 46 Ill. 415; Davis *v.* Miller Signal Co., 105 Ill. App. 657.

Indiana.—Burnsville Turnpike Co. *v.* State, 119 Ind. 382, 20 N. E. 421, 3 L. R. A. 265.

Maryland.— State *v.* Taylor, 59 Md. 338.

Mississippi.—See Foote *v.* Noxubee County, 67 Miss. 156, 6 So. 612.

Nebraska.— State *v.* Wenzel, 55 Nebr. 210, 75 N. W. 579; Moores *v.* State, 4 Nebr. (Unoff.) 235, 93 N. W. 986.

Washington.— State *v.* Pierce County Super. Ct., 21 Wash. 575, 59 Pac. 483, no writ by creditor of heir to cite executors to perform trust.

England.— Reg. *v.* Orton, 14 Q. B. 139, 13 Jur. 1049, 18 L. J. Q. R. 321, 68 E. C. L. 139; Reg. *v.* Balby, etc., Turnpike Road, 17 Jur. 734, 22 L. J. Q. B. 164, L. & M. 134, 1 Wkly. Rep. 150; Rex *v.* Stafford, 3 T. R. 646.

77. Davis *v.* Miller Signal Co., 105 Ill. App. 657.

78. Wiedwald *v.* Dodson, 95 Cal. 450, 30 Pac. 580; State *v.* U. S. Express Co., 95 Minn. 442, 104 N. W. 556; Star Pub. Co. *v.* Associated Press, 159 Mo. 410, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151; People *v.* Brooklyn Bd. of Assessors, 137 N. Y. 201, 33 N. E. 145.

79. *Kentucky.*— Hickman County Ct. *v.* Moore, 2 Bush 108.

Michigan.— Van Akin *v.* Dunn, 117 Mich. 421, 75 N. W. 938; McQueen *v.* Detroit, 116 Mich. 90, 74 N. W. 387; Noble *v.* Paris Tp., 56 Mich. 219, 22 N. W. 321.

Minnesota.— Allen *v.* Robinson, 17 Minn. 113.

New Jersey.— O'Hara *v.* Fagan, 56 N. J. L. 279, 27 Atl. 1089.

5. Abstract or Moot Questions. The matter involved must be substantial and of sufficient importance to justify the use of the remedy in cases where it would otherwise issue. Abstract or moot questions will not be determined, or petty controversies considered.[80] So where the right is, or will become, a mere abstract right, the enforcement of which, by reason of some change of circumstances, can be of no substantial or practical benefit to the petitioner, mandamus will be denied.[81] It has been held, however, that where the question is one of public interest, an appeal from an order refusing mandamus will be heard, although the question is no longer a practical one.[82]

6. Constitutional Questions. It is rarely, if ever, proper to award a mandamus in a case in which it can be done only by declaring an act of the legislature unconstitutional.[83] In cases where the duty to perform an act depends solely on the question whether a statute or ordinance is constitutional and valid, the question may sometimes be determined on a petition for mandamus.[84] But an officer who

New York.— Matter of Scofield, 102 N. Y. App. Div. 358, 92 N. Y. Suppl. 672; People *v.* Brennan, 1 Abb. Pr. N. S. 184 [*affirmed* in 45 Barb. 457, 30 How. Pr. 417].

Ohio.— State *v.* Cappeller, 6 Ohio Dec. (Reprint) 863, 8 Am. L. Rec. 488.

Rhode Island.— Simmons *v.* Davis, 18 R. I. 46, 25 Atl. 691.

80. *California.*— De la Beckwith *v.* Colusa County Super. Ct., 146 Cal. 496, 80 Pac. 717; San Diego Bd. of Education *v.* San Diego, 1 Cal. App. 311, 82 Pac. 89.

Connecticut.— Daly *v.* Dimock, 55 Conn. 579, 12 Atl. 405; Colt *v.* Roberts, 28 Conn. 330.

Illinois.— People *v.* Rose, 219 Ill. 46, 76 N. E. 42; People *v.* Rock Island, 215 Ill. 488, 74 N. E. 437, 106 Am. St. Rep. 179; North *v.* State University, 137 Ill. 296, 27 N. E. 54; Gormley *v.* Day, 114 Ill. 185, 28 N. E. 693; People *v.* Masonic Benev. Assoc., 98 Ill. 635; Cristman *v.* Peck, 90 Ill. 150; People *v.* Hatch, 33 Ill. 9; People *v.* St. Louis, etc., R. Co., 122 Ill. App. 422; Board of Education *v.* Bolton, 85 Ill. App. 92; People *v.* Rose, 81 Ill. App. 387; Aff *v.* Hopkins, 57 Ill. App. 529.

Louisiana.— See Willis *v.* Wasey, 41 La. Ann. 694, 6 So. 730.

Michigan.— Alderton *v.* Binder, 81 Mich. 133, 45 N. W. 968.

Missouri.— State *v.* Renick, 157 Mo. 292, 57 S. W. 713 (remission of penalty by governor trivial and unimportant); State *v.* Westport, 135 Mo. 120, 36 S. W. 663.

New York.— People *v.* Saratoga County, 106 N. Y. App. Div. 381, 94 N. Y. Suppl. 1012; People *v.* Listman, 84 N. Y. App. Div. 633, 82 N. Y. Suppl. 784.

Oklahoma.— Beadles *v.* Fry, 15 Okla. 428, 82 Pac. 1041, 2 L. R. A. N. S. 855.

Vermont.— Hall *v.* Crossman, 27 Vt. 297.

West Virginia.— Hall *v.* Staunton, 55 W. Va. 684, 47 S. E. 265, so holding where relator sought to examine the poll-books to determine whether he should bring error when the examination would not benefit him, and it did not appear that he contemplated any procedure as a result of the examination, which would be of any value to him.

England.— Rex *v.* London, 1 T. R. 423.

See 33 Cent. Dig. tit. "Mandamus," § 48.

But see Benners *v.* State, 124 Ala. 97, 26 So. 942, holding that a writ issued to speed the decision of an actual legal dispute is not offensive to the policy of the law, and will be sustained.

81. *Florida.*— Bishoff *v.* State, 43 Fla. 67, 30 So. 808.

Illinois.— Gormley *v.* Day, 114 Ill. 185, 28 N. E. 693.

Louisiana.— State *v.* Lewis, 111 La. 693, 35 So. 816 (grand juror not reinstated after jury discharged); State *v.* St. Paul, 104 La. 280, 29 So. 112 (injunction not compelled after act to be enjoined accomplished); State *v.* Otero, 52 La. Ann. 1, 26 So. 812.

Maine.— Mitchell *v.* Boardman, 79 Me. 469, 10 Atl. 452; Woodbury *v.* Piscataquis County Com'rs, 40 Me. 304.

New York.— See People *v.* Tremain, 29 Barb. 96, 17 How. Pr. 142, where mandamus was refused where acts it was sought to enforce, although they might become effectual thereafter, would be fruitless at the time.

Ohio.— State *v.* Berry, 14 Ohio St. 315.

Vermont.— Spiritual Atheneum Soc. *v.* Randolph, 58 Vt. 192, 2 Atl. 747.

Washington.— State *v.* Spokane County Super. Ct., 37 Wash. 30, 79 Pac. 483.

82. People *v.* Republican Party Gen. Committee, 25 N. Y. App. Div. 339, 49 N. Y. Suppl. 723, holding that where the rights of voters are involved, an appeal from an order affecting the right to a nomination might be decided after the election.

83. People *v.* San Francisco, 20 Cal. 591; Wright *v.* Kelley, 4 Ida. 624, 43 Pac. 565; People *v.* Stephens, 2 Abb. Pr. N. S. (N. Y.) 348. But *compare* State *v.* Robins, 71 Ohio St. 273, 73 N. E. 470, 69 L. R. A. 427.

84. *Florida.*— Franklin County *v.* State, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183; McConike *v.* State, 17 Fla. 238.

Louisiana.— State *v.* New Orleans Bd. of School Directors, 42 La. Ann. 92, 7 So. 674. See *contra*, State *v.* Heard, 47 La. Ann. 1679, 18 So. 746, 47 L. R. A. 512, holding that mere executive officers have no right to refuse performance of merely ministerial duties on the ground that the law is unconstitutional.

Massachusetts.— Welch *v.* Swasey, (1907) 79 N. E. 745; Larcom *v.* Olin, 160 Mass. 102,

is not himself subject to the provisions of a statute cannot question its constitutionality.[85]

7. TITLE TO PROPERTY. The title to property will not be tried in mandamus proceedings.[86]

8. TITLE TO OFFICE. As a general rule the title to an office cannot be determined in mandamus, the proper remedy usually being held to be mandamus or a specific statutory proceeding.[87]

9. COMPLICATED QUESTIONS. The writ will not issue when it is necessary to try or decide complicated or extended questions of fact,[88] such as the taking of a long account.[89]

10. EFFECT OF AGREEMENT OF PARTIES. The right to the issuance of a writ of mandamus cannot be extended or altered by stipulation or agreement of the parties,[90] and the writ will not issue upon the mere consent of the parties.[91]

11. WAIVER AND ESTOPPEL. Relator may waive[92] or may be estopped by his conduct from claiming the right to mandamus.[93]

C. Acts and Duties Which Will Be Enforced — 1. PURPOSE OF MANDAMUS. The purpose of a writ of mandamus is to enforce the performance of a duty,[94] and where a positive official duty is enjoined by law upon any court, board, or officer, and no discretion is given as to the mode or manner of performance, man-

35 N. E. 113; Atty.-Gen. *v.* Boston, 123 Mass. 460; Warren *v.* Charlestown, 2 Gray 84.

Michigan.— Maynard *v.* Kent County Bd. of Canvassers, 84 Mich. 228, 47 N. W. 756, 11 L. R. A. 332.

Nebraska.— Van Horn *v.* State, 46 Nebr. 62, 64 N. W. 365.

New York.— See People *v.* Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836 [*affirming* 65 Hun 236, 20 N. Y. Suppl. 293]; People *v.* Rice, 65 Hun 263, 20 N. Y. Suppl. 97 [*reversing* 19 N. Y. Suppl. 978].

Washington.— Hindman *v.* Boyd, 42 Wash. 17, 84 Pac. 609.

But *compare* Ames *v.* People, 26 Colo. 83, 56 Pac. 656; *Ex p.* Lynch, 16 S. C. 32; Maxwell *v.* Burton, 2 Utah 595.

85. State *v.* Sparling, (Wis. 1906) 107 N. W. 1040.

86. Gregory *v.* Blanchard, 98 Cal. 311, 33 Pac. 199; State *v.* Williams, 54 Nebr. 154, 74 N. W. 396; Com. *v.* Rosseter, 2 Binn. (Pa.) 360, 4 Am. Dec. 451, holding that title to a church pew would not be tried.

87. See *infra*, VI, C, 7.

88. U. S. *v.* General Land Office, 5 Wall. (U. S.) 563, 18 L. ed. 692.

89. Caldwell Bd. of Education *v.* Spencer, 52 Kan. 574, 35 Pac. 221.

90. Bright *v.* Farmers' Highline Canal, etc., Co., 3 Colo. App. 170, 32 Pac. 433; Reg. *v.* Lords Com'rs of Treasury, 16 Q. B. 357, 15 Jur. 767, 20 L. J. Q. B. 305, 71 E. C. L. 357. But see State *v.* Marks, 6 Lea (Tenn.) 12, where it was held that while mandamus would not lie to the governor, yet where the governor and secretary of state constituted an inspection board, and returned to the writ that they were willing to canvass certain votes, the court would act as upon an agreed case.

91. State *v.* Burbank, 22 La. Ann. 379; State *v.* Westport, 135 Mo. 120, 36 S. W. 663.

92. *Ex p.* Bolton, 136 Ala. 147, 34 So. 226 (refusing mandamus to restore a cause in court, where it appeared that relator had waived his right to relief by allowing the term to lapse without availing himself of a statutory remedy in replevin); Fishel *v.* Grand Traverse Cir. Judge, 97 Mich. 609, 57 N. W. 188 (holding that mandamus will not issue to compel a circuit judge to vacate an order in a chancery cause made by consent of both parties).

93. Fletcher *v.* Kalkaska Cir. Judge, 81 Mich. 186, 45 N. W. 641 (holding that the fact that petitioner's attorney was present at a hearing of a sheriff's motion for the allowance of extra compensation in an attachment proceeding, protesting against the authority of the court to entertain it, and directed the sheriff's attorney to draft an order covering the findings of the court granting such compensation, does not estop petitioner from vacating the order by mandamus); State *v.* Pierce County Super. Ct., 19 Wash. 114, 52 Pac. 522 (holding that where, on appeal from an order granting a new trial, plaintiff does not urge that the order affected only one defendant, thus entitling him to an entry of the judgment against the other defendant, he is estopped to raise the question on application for mandamus to compel such entry).

94. *Arkansas.*— Fitch *v.* McDiarmid, 26 Ark. 482.

Colorado.— Leadville Illuminating Gas Co. *v.* Leadville, 9 Colo. App. 400, 49 Pac. 268.

New York.— People *v.* Neuhrand, 32 N. Y. App. Div. 49, 50, 52 N. Y. Suppl. 280, where it is said: "Mandamus is always to do some act in execution of law and not to be in the nature of a writ de non molestando."

Texas.— Yellowstone Kit *v.* Wood, 18 Tex. Civ. App. 683, 43 S. W. 1068.

England.— Rex *v.* Llandilo Dist. Road Com'rs, 2 T. R. 232, 1 Rev. Rep. 466.

Mandamus as preventive writ see *supra*, I, D, 2.

damus is the proper remedy to compel its performance.[95] Or the general rule may be stated that a public officer will in all cases be compelled to proceed, either to perform a ministerial duty, or to exercise a discretionary one, when the duty is clearly prescribed as imperative.[96] Mandamus is ordinarily a remedy for official inaction,[97] and will not lie to undo what has been done.[98]

2. Nature of Duty — a. Ministerial or Discretionary — (i) *Control or Review of Discretion.* Mandamus will not lie to control or review the exercise of the discretion of any court, board, or officer, when the act complained of is either judicial or quasi-judicial.[99] And while mandamus may be invoked to

95. *District of Columbia.*— U. S. *v.* Bayard, 5 Mackey 428.

Hawaii.— Harris *v.* Goodale, 2 Hawaii 130.

Indiana.— Wood *v.* State, 155 Ind. 1, 55 N. E. 959; Enos *v.* State, 131 Ind. 560, 31 N. E. 357; Hamilton *v.* State, 3 Ind. 452.

Iowa.— Benjamin *v.* Malaka Dist. Tp., 50 Iowa 648.

Nebraska.— State *v.* Coufal, 1 Nebr. (Unoff.) 128, 95 N. W. 362.

New Jersey.— Warmolts *v.* Keegan, 69 N. J. L. 186, 54 Atl. 813.

New York.— People *v.* McGuire, 31 Misc. 324, 65 N. Y. Suppl. 463.

South Carolina.— State *v.* Whitesides, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777.

Tennessee.—Meadows *v.* Nesbit, 12 Lea 486.

Virginia.— U. S. Fidelity, etc., Co. *v.* Peebles, 100 Va. 585, 42 S. E. 310.

Washington.— State *v.* Callvert, 33 Wash. 380, 74 Pac. 573; Chapin *v.* Port Angeles, 31 Wash. 535, 72 Pac. 117.

Wisconsin.— Roberts *v.* Erickson, 117 Wis. 324, 94 N. W. 29.

United States.— Roberts *v.* U. S., 176 U. S. 221, 20 S. Ct. 376, 44 L. ed. 443; Butterworth *v.* U. S., 112 U. S. 50, 5 S. Ct. 25, 28 L. ed. 656; Decatur *v.* Paulding, 14 Pet. 497, 599, 10 L. ed. 559, 609; *Ex p.* Crane, 5 Pet. 190, 8 L. ed. 92; U. S. *v.* Kendall, 26 Fed. Cas. No. 15,517, 5 Cranch C. C. 163.

96. *California.*— People *v.* Lake County, 33 Cal. 487; People *v.* Scannell, 7 Cal. 432.

Colorado.— Orman *v.* People, 18 Colo. App. 302, 71 Pac. 430.

District of Columbia.—U. S. *v.* Ross, 5 App. Cas. 241.

Idaho.— Pyke *v.* Steunenberg, 5 Ida. 614, 51 Pac. 614.

Illinois.— People *v.* Van Cleave, 183 Ill. 330, 55 N. E. 698, 47 L. R. A. 795; Reddick *v.* People, 82 Ill. App. 85; Sanner *v.* Union Drainage Dist., 64 Ill. App. 62.

Kansas.— State *v.* Faulkner, 20 Kan. 541.

Louisiana.— State *v.* Lanier, 47 La. Ann. 110, 16 So. 647; Watts *v.* Carroll Police Jury, 11 La. Ann. 141.

Maryland.— Robey *v.* Prince George's County, 92 Md. 150, 48 Atl. 48.

Michigan.— Locke *v.* Speed, 62 Mich. 408, 28 N. W. 917; Hickey *v.* Oakland County, 62 Mich. 94, 28 N. W. 771.

Minnesota.— State *v.* Nelson, 41 Minn. 25, 42 N. W. 548, 4 L. R. A. 300.

Mississippi.— Madison County Ct. *v.* Alexander, Walk. 523.

Missouri.— Castello *v.* St. Louis Cir. Ct., 28 Mo. 259; State *v.* Smith, 15 Mo. App. 412.

Nebraska.— State *v.* Slocum, 34 Nebr. 368, 51 N. W. 969; State *v.* Furnas County, 10 Nebr. 361, 6 N. W. 434; Moores *v.* State, 4 Nebr. (Unoff.) 781, 96 N. W. 225.

New York.— Myer *v.* Adam, 169 N. Y. 605, 62 N. E. 1098; People *v.* Troy, 78 N. Y. 33, 34 Am. Rep. 500 [*reversing* 17 Hun 20]; Howland *v.* Eldredge, 43 N. Y. 457; Fay *v.* Partridge, 78 N. Y. App. Div. 204, 79 N. Y. Suppl. 722; People *v.* Scannell, 63 N. Y. App. Div. 243, 71 N. Y. Suppl. 383; People *v.* Clark, 40 N. Y. App. Div. 214, 58 N. Y. Suppl. 12; People *v.* Brennan, 39 Barb. 651; People *v.* Highland, 8 N. Y. St. 531; Matter of Hall, 66 How. Pr. 330; Hull *v.* Oneida County, 19 Johns. 259, 10 Am. Dec. 223.

Ohio.— Karb *v.* State, 54 Ohio St. 383, 43 N. E. 920; Muskingum County *v.* Board of Public Works, 39 Ohio St. 628; State *v.* Belmont County Com'rs, 31 Ohio St. 451; Weldy *v.* Hocking County, 8 Ohio Dec. (Reprint) 767, 9 Cinc. L. Bul. 313; State *v.* Norton, 7 Ohio S. & C. Pl. Dec. 354, 5 Ohio N. P. 183.

Pennsylvania.— Douglas *v.* McLean, 25 Pa. Super. Ct. 9; Moore *v.* McClelland, 1 Pa. Co. Ct. 555.

Texas.— Auditorial Bd. *v.* Arles, 15 Tex. 72; Campbell *v.* Blanchard, 2 Tex. Unrep. Cas. 321.

Vermont.— Woodstock *v.* Gallup, 28 Vt. 587.

West Virginia.— Poling *v.* Phillippi Dist. Bd. of Education, 50 W. Va. 374, 40 S. E. 357.

United States.—Kimberlin *v.* Five Civilized Tribes Commission, 104 Fed. 603, 44 C. C. A. 109; U. S. *v.* Kendall, 26 Fed. Cas. No. 15,517, 5 Cranch C. C. 163.

Canada.— Rex *v.* Harris, Taylor (U. C.) 10; *In re* Dickson, 10 U. C. Q. B. 395.

See 33 Cent. Dig. tit. "Mandamus," § 133.

Construction of statute as mandatory or permissive see Statutes.

97. Atlanta *v.* Wright, 119 Ga. 207, 45 S. E. 994; State *v.* Lewis, 76 Mo. 370; *Ex p.* Crane, 5 Pet. (U. S.) 190, 8 L. ed. 92; Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60; U. S. *v.* Kendall, 26 Fed. Cas. No. 15,517, 5 Cranch C. C. 163.

98. Sweet *v.* Conley, 20 R. I. 381, 39 Atl. 326; State *v.* Miller, 1 Lea (Tenn.) 596; Maxwell *v.* Burton, 2 Utah 595. And see Com. *v.* Stofer, 2 Pearson (Pa.) 224.

99. *Alabama.*— Harlan *v.* State, 136 Ala. 150, 33 So. 858; *Ex p.* McKissack, 107 Ala. 493, 18 So. 140; *Ex p.* Candee, 48 Ala. 386; *Ex p.* Montgomery, 24 Ala. 98; *Ex p.* Putnam, 20 Ala. 592.

compel the exercise of discretion, it cannot compel such discretion to be exercised

Arkansas.— *Ex p.* Hays, 26 Ark. 510; *Ex p.* Hutt, 14 Ark. 368; *Ex p.* Williamson, 8 Ark. 424.

California.— Sullivan *v.* Shanklin, 63 Cal. 247.

Connecticut.— State *v.* Asylum St. Bridge Commission, 63 Conn. 91, 26 Atl. 580; State *v.* Staub, 61 Conn. 553, 23 Atl. 924; American Casualty Ins., etc., Co. *v.* Fyler, 60 Conn. 448, 22 Atl. 494, 25 Am. St. Rep. 337; Seymour *v.* Ely, 37 Conn. 103.

District of Columbia.— U. S. *v.* Root, 22 App. Cas. 419; U. S. *v.* Hitchcock, 21 App. Cas. 252 [*affirmed* in 190 U. S. 316, 23 S. Ct. 698, 47 L. ed. 1074]; Lochren *v.* U. S., 6 App. Cas. 486; U. S. *v.* Whitney, 5 Mackey 370.

Florida.— Towle *v.* State, 3 Fla. 202.

Georgia.— Eve *v.* Simon, 78 Ga. 120; Bonner *v.* State, 7 Ga. 473.

Hawaii.— Spreckels *v.* Judge First Cir. Ct., 10 Hawaii 198; Colburn *v.* White, 8 Hawaii 317.

Illinois.—People *v.* Hyde Park, 117 Ill. 462, 6 N. E. 33; St. Clair County *v.* People, 85 Ill. 396; Kelly *v.* Chicago, 62 Ill. 279; McGann *v.* Harris, 114 Ill. App. 308; People *v.* Church, 103 Ill. App. 132.

Indiana.— State *v.* Martin County, 125 Ind. 247, 25 N. E. 286; State *v.* Miami County, 63 Ind. 497; Mitchell *v.* Wiles, 59 Ind. 364; Burnet *v.* Wabash, etc., Canal, 50 Ind. 251.

Iowa.— Preston *v.* Independent School Dist. Bd. of Education, 124 Iowa 355, 100 N. W. 54; Leonard *v.* Wakeman, 120 Iowa 140, 94 N. W. 281; Christy *v.* Whitmore, 67 Iowa 60, 24 N. W. 593; Scripture *v.* Burns, 59 Iowa 70, 12 N. W. 760; Clark *v.* Muscatine Bd. of Directors, 24 Iowa 266.

Kansas.— Dwelling-House Ins. Co. *v.* Wilder, 40 Kan. 561, 20 Pac. 265; State *v.* Robinson, 1 Kan. 188.

Kentucky.— Newport *v.* Berry, 80 Ky. 354.

Louisiana.— State *v.* Judge Dist. Ct., 38 La. Ann. 49; State *v.* Judge Eighth Dist. Ct., 23 La. Ann. 766.

Maine.— Davis *v.* York County Com'rs, 63 Me. 396.

Maryland.— Henkel *v.* Millard, 97 Md. 24, 54 Atl. 657; Duvall *v.* Swann, 94 Md. 608, 51 Atl. 617; Green *v.* Purnell, 12 Md. 329.

Massachusetts.— *In re* Morse, 18 Pick. 443; Gray *v.* Bridge, 11 Pick. 189; Chase *v.* Blackstone Canal Co., 10 Pick. 244.

Michigan.— Fletcher *v.* Alpena Cir. Judge, 136 Mich. 511, 99 N. W. 748; People *v.* Auditor-Gen., 38 Mich. 746; People *v.* Judge Monroe Cir., 36 Mich. 274; People *v.* Auditor-Gen., 36 Mich. 271.

Mississippi.— Beaman *v.* Leake County Bd. of Police, 42 Miss. 237.

Missouri.— State *v.* St. Louis, 158 Mo. 505, 59 S. W. 1101; State *v.* Cramer, 96 Mo. 75, 8 S. W. 788; State *v.* Wilson, 49 Mo. 146; State *v.* Albin, 44 Mo. 346.

Nebraska.— State *v.* Lincoln, 68 Nebr. 597, 94 N. W. 719; Laflin *v.* State, 49 Nebr. 614, 68 N. W. 1022; State *v.* Kendall, 15 Nebr. 262, 18 N. W. 85; State *v.* Johnson County Dist. Ct., 2 Nebr. (Unoff.) 385, 96 N. W. 121.

New York.— People *v.* Land Office Com'rs, 149 N. Y. 26, 43 N. E. 418 [*reversing* 90 Hun 525, 36 N. Y. Suppl. 29]; People *v.* Leonard, 74 N. Y. 443; People *v.* Oneida County, 24 Hun 413; People *v.* Westchester County, 15 Barb. 607; People *v.* Rosendale, 5 Misc. 378, 25 N. Y. Suppl. 769; People *v.* Fairman, 12 Abb. N. Cas. 268; People *v.* New York Super. Ct., 19 Wend. 68; People *v.* Brooklyn, 1 Wend. 318, 19 Am. Dec. 502.

Ohio.— State *v.* Crites, 48 Ohio St. 460, 28 N. E. 178.

Pennsylvania.— Com. *v.* Henry, 49 Pa. St. 530; Com. *v.* Hultz, 6 Pa. St. 469; Respublica *v.* Philadelphia Guardians of Poor, 1 Yeates 476, 2 Dall. 224; Boggs *v.* Monongahela City, 22 Pa. Co. Ct. 640; Matter of Jefferson Tp., 1 Pearson 252.

South Carolina.—State *v.* Burnside, 33 S. C. 276, 11 S. E. 787; State *v.* Verner, 30 S. C. 277, 9 S. E. 113.

Tennessee.— Harris *v.* State, 96 Tenn. 496, 34 S. W. 1017; Morley *v.* Power, 73 Tenn. 691.

Texas.—Aycock *v.* Clark, 94 Tex. 375, 60 S. W. 665; De Poyster *v.* Baker, 89 Tex. 155, 34 S. W. 106; Sansom *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505; Brown *v.* Reese, 67 Tex. 318, 3 S. W. 292; Bledsoe *v.* International R. Co., 40 Tex. 537; Roan *v.* Raymond, 15 Tex. 78; Arberry *v.* Beavers, 6 Tex. 457, 55 Am. Dec. 791; General Land Office Commissioner *v.* Smith, 5 Tex. 471; Cullem *v.* Latimer, 4 Tex. 329; Clarke *v.* San Jacinto County, 18 Tex. Civ. App. 204, 45 S. W. 315.

Virginia.— Wise *v.* Bigger, 79 Va. 269; Page *v.* Clopton, 30 Gratt. 415.

Washington.— State *v.* Graves, 13 Wash. 485, 43 Pac. 376.

West Virginia.—Roberts *v.* Paul, 50 W. Va. 528, 40 S. E. 470; Marcum *v.* Ballot Com'rs, 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296; Miller *v.* Tucker County Ct., 34 W. Va. 285, 12 S. E. 702; State *v.* Wood County Ct., 33 W. Va. 589, 11 S. E. 72.

Wisconsin.— State *v.* Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33; State *v.* Washington County, 2 Pinn. 552.

United States.— U. S. *v.* Hitchcock, 190 U. S. 316, 23 S. Ct. 698, 47 L. ed. 1074; Roberts *v.* U. S., 176 U. S. 221, 20 S. Ct. 376, 44 L. ed. 443; Carrick *v.* Lamar, 116 U. S. 423, 6 S. Ct. 424, 29 L. ed. 677; Holloway *v.* Whiteley, 4 Wall. 522, 18 L. ed. 335; Reeside *v.* Walker, 11 How. 272, 13 L. ed. 693; Decatur *v.* Paulding, 14 Pet. 497, 599, 10 L. ed. 559, 609; Marbury *v.* Madison, 1 Cranch 137, 2 L. ed. 60.

England.— Reg. *v.* Metropolitan Police Dist., 4 B. & S. 593, 33 L. J. Q. B. 52, 9 L. T. Rep. N. S. 375, 12 Wkly. Rep. 74, 116 E. C. L. 593.

Canada.— Dartmouth *v.* Reg., 9 Can. Sup. Ct. 509 [*affirming* Reg. *v.* Dartmouth, 13 Nova Scotia 402]; Baxter *v.* Hesson, 12 U. C. Q. B. 139.

in any particular way.[1] But in contradiction to these general rules, under the statutes in some jurisdictions, it is held that mandamus will issue to control discretionary as well as ministerial duties.[2] The fact that certain incidents and details of the duty are discretionary is, however, no objection to starting performance of the duty itself;[3] and when the duty is mandatory and no discretion is vested, its performance and manner of performance both may be compelled by mandamus.[4]

(II) *Distinction Between Ministerial and Discretionary Duties*— (A) *In General.* While there is some conflict of opinion as to what constitutes, strictly speaking, a ministerial duty as distinguished from a discretionary duty,[5] and while it is not always easy to determine where the line of demarcation lies between a ministerial act and an act involving the exercise of judgment,[6] the distinction between merely ministerial and judicial and other official acts seems to be that, where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial. But where the act to be done involves the exercise of discretion or judgment it is not to be deemed merely ministerial.[7] Discretion

See 33 Cent. Dig. tit. "Mandamus," §§ 64, 134.

1. *Alabama.*— State *v.* Hamil, 97 Ala. 107, 11 So. 892.

California.— Walker *v.* San Francisco Super. Ct., 139 Cal. 108, 72 Pac. 829.

Connecticut.— State *v.* Asylum St. Bridge Commission, 63 Conn. 91, 26 Atl. 580.

Florida.— Towle *v.* State, 3 Fla. 202.

Illinois.— People *v.* State Bd. of Dental Examiners, 110 Ill. 180; People *v.* McCormick, 106 Ill. 184; McGann *v.* Harris, 114 Ill. App. 308.

Indiana.— State *v.* Tippecanoe County, 131 Ind. 90, 30 N. E. 892; Holliday *v.* Henderson, 67 Ind. 103; State *v.* Tippecanoe County, 45 Ind. 501.

Iowa.— Scripture *v.* Burns, 59 Iowa 70, 12 N. W. 760; Bailey *v.* Ewart, 52 Iowa 111, 2 N. W. 1009; Meyer *v.* Dubuque County, 43 Iowa 592.

Kentucky.— Young *v.* Beckham, 115 Ky. 246, 72 S. W. 1092, 1094, 24 Ky. L. Rep. 2135.

Louisiana.— State *v.* Board of Com'rs, 115 La. 684, 39 So. 842.

Maine.— Bangor *v.* Penobscot County, 87 Me. 294, 32 Atl. 903.

Missouri.— State *v.* Jones, 155 Mo. 570, 56 S. W. 307.

Montana.— State *v.* Rotwitt, 15 Mont. 29, 37 Pac. 845.

Nevada.— Hoole *v.* Kinkead, 16 Nev. 217.

New York.— People *v.* Westchester County, 12 Barb. 446.

Pennsylvania.— Com. *v.* Pittsburgh, 34 Pa. St. 496.

Rhode Island.— Corbett *v.* Naylor, 25 R. I. 520, 57 Atl. 303.

South Carolina.— State *v.* McMillan, 52 S. C. 60, 29 S. E. 540.

Tennessee.— State *v.* Miller, 1 Lea 596; White's Creek Turnpike Co. *v.* Marshall, 2 Baxt. 104.

Texas.— Auditorial Bd. *v.* Hendrick, 20 Tex. 60; Arberry *v.* Beavers, 6 Tex. 457, 55 Am. Dec. 791.

Virginia.— Eubank *v.* Boughton, 98 Va. 499, 36 S. E. 529.

West Virginia.— Taylor County Ct. *v.* Holt, (1906) 56 S. E. 205; Dent *v.* Taylor County, 45 W. Va. 750, 32 S. E. 250; State *v.* Herrald, 36 W. Va. 721, 15 S. E. 974.

United States.— See Gaines *v.* Thompson, 7 Wall. 347, 19 L. ed. 62; Mississippi *v.* Johnson, 4 Wall. 475, 18 L. ed. 437; Enterprise Sav. Assoc. *v.* Zumstein, 64 Fed. 837.

See 33 Cent. Dig. tit. "Mandamus," §§ 64, 134.

2. State *v.* Clausen, (Wash. 1906) 87 Pac. 498.

3. *Arkansas.*—Maddox *v.* Neal, 45 Ark. 121, 55 Am. Rep. 540.

California.— People *v.* Bell, 4 Cal. 177.

Illinois.— St. Clair County *v.* People, 85 Ill. 396.

Indiana.— State *v.* Kamman, 151 Ind. 407, 51 N. E. 483.

New York.— People *v.* Otsego County, 51 N. Y. 401.

4. State *v.* Marshall County Judge, 7 Iowa 186; State *v.* Garesche, 65 Mo. 480; People *v.* Guggenheimer, 28 Misc. (N. Y.) 735, 59 N. Y. Suppl. 913; Mason County *v.* Minturn, 4 W. Va. 300.

5. Wailes *v.* Smith, 76 Md. 469, 25 Atl. 922. And see cases more specifically cited *infra*, IV; V; VI; VII; VIII.

6. Bledsoe *v.* International R. Co., 40 Tex. 537. And see Decatur *v.* Paulding, 14 Pet. (U. S.) 497, 518, 599, 10 L. ed. 559, 609, where it was said by Justice Catron: "Any sensible distinction applicable to all cases, it is impossible to lay down . . . such are the refinements, and mere verbal distinctions, as to leave an almost unlimited discretion to the court."

7. Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65; *Ex p.* Shaudies, 66 Ala. 134; Teat *v.* McGaughey, 85 Tex. 478, 22 S. W. 302 (where it is said that the act to be compelled must be one which he has no discretion to refuse to perform, and which does not call for the exercise of his judgment upon matters of fact); Bledsoe *v.* International R. Co.,

may be defined, when applied to public functionaries, as the power or right conferred upon them by law of acting officially under certain circumstances, according to the dictates of their own judgment and conscience, and not controlled by the judgment or conscience of others.[8]

(B) *Determination of Questions of Fact.* Where the duty is such as necessarily requires the examination of evidence and the decision of questions of law and fact, such a duty is not ministerial;[9] but an act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act,[10] and although in so doing he must to such extent construe a statute by which the duty is imposed.[11] The construction of a statute is in itself, however, a judicial act.[12]

(III) *ABUSE OF DISCRETION.* An exception to the general rule that discretionary acts will not be reviewed or controlled exists when the discretion has been abused,[13] for example mandamus may in a case be granted where the action has been

40 Tex. 537; Houston, etc., R. Co. *v.* Randolph, 24 Tex. 317; Arberry *v.* Beavers, 6 Tex. 457, 55 Am. Dec. 791; General Land Office Commissioner *v.* Smith, 5 Tex. 471; Walker *v.* Barnard, 8 Tex. Civ. App. 14, 28 S. W. 726; Cox *v.* U. S., 9 Wall. (U. S.) 298, 19 L. ed. 579. See also U. S. *v.* Seaman, 17 How. (U. S.) 225, 15 L. ed. 226.

"Ministerial" defined.— "A ministerial act, is one which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act done." *Ex p.* Batesville, etc., R. Co., 39 Ark. 82, 85; American Casualty Ins., etc., Co. *v.* Fyler, 60 Conn. 448, 22 Atl. 494, 25 Am. St. Rep. 337; Gray *v.* State, 72 Ind. 567 [*citing* Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468]; State *v.* Cook, 174 Mo. 100, 73 S. W. 489; State *v.* Meier, 143 Mo. 439, 45 S. W. 306; Marcum *v.* Lincoln County, etc., Ballot Com'rs, 42 W. Va. 263, 25 S. E. 281, 36 L. R. A. 296. "It is one as to which nothing is left to discretion. It is a simple, definite duty arising under conditions admitted or proved to exist and imposed by law." Sullivan *v.* Shanklin, 63 Cal. 247; State *v.* McGrath, 92 Mo. 355, 5 S. W. 29; People *v.* Rosendale, 5 Misc. (N. Y.) 378, 379, 25 N. Y. Suppl. 769 [*citing* Mississippi *v.* Johnson, 4 Wall. (U. S.) 475, 18 L. ed. 437]. "It is a precise act, accurately marked out, enjoined upon particular officers for a particular purpose." Bassett *v.* Atwater, 65 Conn. 355, 363, 32 Atl. 937, 32 L. R. A. 575. There is ministerial duty when an individual has such an interest in its performance that neglect is wrongful. Morton *v.* Comptroller-Gen., 4 S. C. 430.

Absolute and imperative duty.—By "ministerial" is meant an absolute and imperative duty, the discharge of which requires neither the exercise of official discretion nor judgment. Henkel *v.* Millard, 97 Md. 24, 54 Atl. 657; Duvall *v.* Swann, 94 Md. 608, 51 Atl. 617; Wailes *v.* Smith, 76 Md. 469, 25 Atl. 922.

8. Farrelly *v.* Cole, 60 Kan. 356, 56 Pac. 492, 44 L. R. A. 464; State *v.* Hultz, 106 Mo. 41, 16 S. W. 940; Oneida C. Pl. *v.* People, 18 Wend. (N. Y.) 79.

Other definitions are: "The power or right of acting officially, according to what appears best and appropriate under the circumstances." Rio Grande County *v.* Lewis, 28 Colo. 378, 65 Pac. 51.

9. *California.*— Stuart *v.* Haight, 39 Cal. 87.

Colorado.— Farmers Independent Ditch Co. *v.* Maxwell, 4 Colo. App. 477, 36 Pac. 556.

District of Columbia.— Allen *v.* U. S., 22 App. Cas. 271.

Illinois.— Cook County *v.* People, 78 Ill. App. 586.

Maryland.— Henkel *v.* Millard, 97 Md. 24, 54 Atl. 657; Duvall *v.* Swann, 94 Md. 608, 51 Atl. 617; Wailes *v.* Smith, 76 Md. 469, 25 Atl. 922.

Missouri.— State *v.* Cook, 174 Mo. 100, 73 S. W. 489.

New York.— Abrams *v.* Hempstead, 45 Hun 272. *Compare* People *v.* Orleans County Sup'rs, 16 Misc. 213, 38 N. Y. Suppl. 890; People *v.* Rosendale, 5 Misc. 378, 25 N. Y. Suppl. 769.

United States.— U. S. *v.* Edmunds, 5 Wall. 563, 18 L. ed. 692.

10. Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; State *v.* Lander County Com'rs, 22 Nev. 71, 35 Pac. 300 [*following* State *v.* Murphy, 19 Nev. 89, 6 Pac. 840]; Marcum *v.* Lincoln County, etc., Ballot Com'rs, 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296. The duty is ministerial when it is to be performed upon a certain state of facts, although the officer or tribunal or body must judge according to their best discretion whether the facts exist, and whether they should perform the act. Otherwise it is obvious no mandamus could ever lie in any case. Thompson *v.* Gibbs, 97 Tenn. 489, 37 S. W. 277, 34 L. R. A. 548; Morley *v.* Power, 5 Lea (Tenn.) 691.

11. Roberts *v.* U. S., 176 U. S. 221, 20 S. Ct. 376, 44 L. ed. 443.

12. American Casualty Ins., etc., Co. *v.* Fyler, 60 Conn. 448, 22 Atl. 494, 25 Am. St. Rep. 337.

13. *Florida.*— State *v.* Kirke, 12 Fla. 278, 95 Am. Dec. 314.

Georgia.— Atlanta *v.* Wright, 119 Ga. 207, 45 S. E. 994; Manor *v.* McCall, 5 Ga. 522.

Illinois.— People *v.* Van Cleave, 183 Ill.

arbitrary [14] or capricious [15] or from personal or selfish motives,[16] or where it amounts to an evasion of a positive duty,[17] or there has been a refusal to consider pertinent evidence, hear the parties when so required, or to entertain any proper question concerning the exercise of the discretion.[18] Likewise it has been held that mandamus may issue where discretion has been exercised on questions not properly within it,[19] or where the action is based upon reasons outside the discretion imposed.[20]

b. Necessity of Clear Legal Duty. The duties which will be enforced by mandamus must be such as are clearly and peremptorily enjoined by law.[21] Where for any reasons the duty to perform the act is doubtful, the obligation is not

330, 55 N. E. 698, 47 L. R. A. 795; People *v.* Cook County, 176 Ill. 576, 52 N. E. 334; Illinois State Bd. of Dental Examiners *v.* People, 123 Ill. 227, 13 N. E. 201; Glencoe *v.* People, 78 Ill. 382; Illinois State Bd. of Health *v.* People, 102 Ill. App. 614.

Kentucky.— Louisville *v.* Kean, 18 B. Mon. 9.

Missouri.— State *v.* St. Louis Public Schools, 134 Mo. 296, 35 S. W. 617, 56 Am. St. Rep. 503.

Montana.— State *v.* Second Judicial Dist. Ct., 30 Mont. 8, 75 Pac. 516.

South Carolina.— Lynah *v.* St. Paul's Parish Poor Com'rs, 2 McCord 170.

Texas.— Arberry *v.* Beavers, 6 Tex. 457, 55 Am. Dec. 791.

14. People *v.* Van Cleave, 183 Ill. 330, 55 N. E. 698, 47 L. R. A. 795; Illinois State Bd. of Dental Examiners *v.* People, 123 Ill. 227, 13 N. E. 201; Sanson *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505. *Contra*, Shotwell *v.* Covington, 69 Miss. 735, 12 So. 260.

15. Zanone *v.* Mound City, 103 Ill. 552.

16. State Bd. of Dental Examiners *v.* People, 123 Ill. 227, 13 N. E. 201. See also People *v.* Van Cleave, 183 Ill. 330, 55 N. E. 698, 47 L. R. A. 795.

17. People *v.* Cook County, 176 Ill. 576, 52 N. E. 334; Illinois State Bd. of Dental Examiners *v.* People, 123 Ill. 227, 13 N. E. 201; Illinois State Bd. of Health *v.* People, 102 Ill. App. 614.

18. *Illinois.*— People *v.* Cook County, 176 Ill. 576, 52 N. E. 334.

Missouri.— State *v.* St. Louis Public Schools, 134 Mo. 296, 35 S. W. 617, 56 Am. St. Rep. 503.

New York.— Baird *v.* Kings County, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81; People *v.* Fulton County, 53 Hun 254, 6 N. Y. Suppl. 591; *Ex p.* Jennings, 6 Cow. 518, 16 Am. Dec. 447; Hull *v.* Oneida Sup'rs, 19 Johns. 259, 10 Am. Dec. 223.

Ohio.— State *v.* Franklin County, 1 Ohio Cir. Ct. 194, 1 Ohio Cir. Dec. 106.

Texas.— Johnson *v.* Galveston, 11 Tex. Civ. App. 469, 33 S. W. 150.

19. State *v.* Barnes, 25 Fla. 298, 5 So. 722, 23 Am. St. Rep. 516; State *v.* Watertown, 9 Wis. 254.

20. State *v.* Barnes, 25 Fla. 298, 5 So. 722, 23 Am. St. Rep. 516; Harwood *v.* Quinby, 44 Iowa 385.

21. *Alabama.*— Minchener *v.* Carroll, 135 Ala. 409, 33 So. 168.

Arizona.— Territory *v.* Yavapai County, (1906) 84 Pac. 519.

Arkansas.— Chicot County *v.* Kruse, 47 Ark. 80, 14 S. W. 469; Maddox *v.* Neal, 45 Ark. 121, 55 Am. Rep. 540.

California.— Maxwell *v.* San Francisco, 139 Cal. 229, 72 Pac. 996; Williams *v.* Bagnelle, (1902) 70 Pac. 1058; Inebriates' Home *v.* Reis, 95 Cal. 142, 30 Pac. 205; Priet *v.* Reis, 93 Cal. 85, 28 Pac. 798; Peck *v.* Los Angeles County, 90 Cal. 384, 27 Pac. 301; Davis *v.* Porter, 66 Cal. 658, 6 Pac. 746; Napa *v.* Rainey, 59 Cal. 275; Napa Valley R. Co. *v.* Napa County, 30 Cal. 435.

Colorado.— People *v.* Butler, 24 Colo. 401, 51 Pac. 510; Collier, etc., Co. *v.* Henderson, 18 Colo. 259, 32 Pac. 417; Daniels *v.* Miller, 8 Colo. 542, 9 Pac. 18; Stratton *v.* People, 18 Colo. App. 85, 70 Pac. 157; Montrose *v.* Endner, 18 Colo. App. 65, 70 Pac. 152; Bright *v.* Farmers', etc., Reservoir Co., 3 Colo. App. 170, 32 Pac. 433.

Connecticut.— Colley *v.* Webster, 59 Conn. 361, 20 Atl. 334; State *v.* New Haven, etc., R. Co., 45 Conn. 331; Parrott *v.* Bridgeport, 44 Conn. 180, 26 Am. Rep. 439.

Georgia.— Atlanta *v.* Wright, 119 Ga. 207, 45 S. E. 994.

Illinois.— Case *v.* Sullivan, 222 Ill. 56, 78 N. E. 37; Yates *v.* People, 207 Ill. 316, 69 N. E. 775; Yorktown Highway Com'rs *v.* People, 66 Ill. 339; People *v.* Cline, 63 Ill. 394.

Kansas.— Davis *v.* Jewett, 69 Kan. 651, 77 Pac. 704; Caldwell Bd. of Education *v.* Spencer, 52 Kan. 574, 35 Pac. 221.

Kentucky.— German Security Bank *v.* Coulter, 112 Ky. 577, 66 S. W. 425, 23 Ky. L. Rep. 1888; Louisville City Nat. Bank *v.* Coulter, 66 S. W. 427, 23 Ky. L. Rep. 1883.

Louisiana.— State *v.* Smith, 104 La. 464, 29 So. 20; Mossy *v.* Harris, 25 La. Ann. 623; Vicksburg, etc., R. Co. *v.* Caddo Parish, 10 La. Ann. 587.

Maine.— Townes *v.* Nichols, 73 Me. 515.

Mississippi.—Swann *v.* Work, 24 Miss. 439; Attala County *v.* Grant, 9 Sm. & M. 77, 47 Am. Dec. 102.

Missouri.— State *v.* Brown, 172 Mo. 374, 72 S. W. 640; State *v.* Buhler, 90 Mo. 560, 3 S. W. 68.

Nebraska.—State *v.* Whipple, 60 Nebr. 650, 83 N. W. 921; State *v.* Ramsay, 8 Nebr. 286; State *v.* York County School Dist. No. 9, 8 Nebr. 92.

New Jersey.— Bacon *v.* Cumberland

regarded as imperative, and the applicant will be left to his other remedies.[22] So when the statute prescribing the duty does not clearly and directly create it, the writ will not lie.[23]

c. Necessity That Duty Result From Office, Trust or Station. The duties which mandamus will enforce must be such as result from an office, trust, or station,[24] such a provision frequently being embodied in statutes by which the nature

County, 69 N. J. L. 195, 54 Atl. 234; Vreeland *v.* Jacobus, 26 N. J. L. 135.

New York.— Chase *v.* Saratoga County, 33 Barb. 603; People *v.* Emigration Com'rs, 22 How. Pr. 291.

Oklahoma.— Territory *v* Crum, 13 Okl. 9, 73 Pac. 297.

Oregon.— State *v.* Malheur County, (1905) 81 Pac. 368; Morrow County *v.* Hendryx, 14 Oreg. 397, 12 Pac. 806.

Pennsylvania.— Com. *v.* McCandless, 129 Pa. St. 492, 8 Atl. 159; Com. *v.* Loomis, 128 Pa. St. 174, 18 Atl. 335; Erie County *v.* Com., 127 Pa. St. 197, 17 Atl. 905; Allegheny City *v.* Kennedy, 14 Pa. Co. Ct. 152; Office Specialty Mfg. Co. *v.* Monroe County, 3 North. Co. Rep. 224.

Rhode Island.— Sweet *v.* Conley, 20 R. I. 381, 39 Atl. 326.

South Carolina.— State *v.* Burnside, 33 S. C. 276, 11 S. E. 787; State *v.* Knight, 31 S. C. 81, 9 S. E. 692; State *v.* Hagood, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841; State *v.* Applehy, 25 S. C. 100; *Ex p.* Barnwell, 8 S. C. 264.

Tennessee.— State *v.* Wilbur, 101 Tenn. 211, 47 S. W. 411.

Texas.— English, etc., Mortg., etc., Co. *v.* Hardy, 93 Tex. 289, 55 S. W. 169; Tabor *v.* General Land Office Commissioner, 29 Tex. 508; Durrett *v.* Crosby, 28 Tex. 687; Puckett *v.* White, 22 Tex. 559; Marshall *v.* Clark, 22 Tex. 23; Nocona Bank *v.* March, (Civ. App. 1899) 51 S. W. 266.

Virginia.— Milliner *v.* Harrison, 32 Gratt. 482; Page *v.* Clopton, 30 Gratt. 415.

Wisconsin.— State *v.* Sauk Co., 62 Wis. 376, 22 N. W. 572; State *v.* Manitowoc, 52 Wis. 423, 9 N. W. 607; State *v.* Hastings, 10 Wis. 518; State *v.* Washington, 2 Pinn. 552, 2 Chandl. 247.

United States.— Missouri *v.* Murphy, 170 U. S. 78, 18 S. Ct. 505, 42 L. ed. 955; U. S. *v.* Union Pacific R. Co., 160 U. S. 1, 16 S. Ct. 190, 40 L. ed. 319; U. S. *v.* Lamont, 155 U. S. 303, 15 S. Ct. 97, 39 L. ed. 160; U. S. *v.* Blaine, 139 U. S. 306, 11 S. Ct. 607, 35 L. ed. 183; U. S. *v.* Windom, 137 U. S. 636, 11 S. Ct. 197, 34 L. ed. 811; Bayard *v.* U. S., 127 U. S. 246, 8 S. Ct. 1223, 32 L. ed. 116; *Ex p.* Rowland, 104 U. S. 604, 26 L. ed. 861; U. S. *v.* Macon County Ct., 99 U. S. 582, 25 L. ed. 331; *Ex p.* Cutting, 94 U. S. 14, 24 L. ed. 49; Supervisors *v.* U. S., 18 Wall. 71, 21 L. ed. 771; Knox County *v.* Aspinwall, 24 How. 376, 16 L. ed. 735; Reeside *v.* Walker, 11 How. 272, 13 L. ed. 693.

England.— Rex *v.* Greame, 2 A. & E. 615, 29 E. C. L. 287 The duty to be performed must be clearly established. Residence of aldermen within the city is not compelled if not clearly necessary to the performance of their duties. Rex *v.* Portsmouth, 3 B. & C. 152, 4 D. & R. 767, 10 E. C. L. 77. A duty conditional on the approval of another person or body will not be directed to be performed without such approval being shown. Rex *v.* St. Luke, 1 B & S. 903, 8 Jur. N. S. 308, 31 L. J. Q. B. 50, 10 Wkly. Rep. 293, 101 E. C. L. 903.

22. *California.*— Los Angeles *v.* Hance, 130 Cal. 278, 62 Pac. 484.

Illinois.— McGann *v.* People, 194 Ill. 526, 62 N. E. 941; People *v.* Pleasant Hill, 67 Ill. App. 415.

Louisiana.— State *v.* St. Charles Parish Police Jury, 29 La. Ann. 146.

Massachusetts.— Fowler *v.* Brooks, 188 Mass. 64, 74 N. E. 291.

New Jersey.—Bacon *v.* Cumberland County, 69 N. J. L. 195, 54 Atl. 234; Elizabeth *v.* Essex County Ct. of C. Pl., 49 N. J. L. 626, 9 Atl. 752.

New York.— People *v.* Parmerter, 158 N. Y. 385, 53 N. E. 40.

Ohio.— State *v.* Smith, 71 Ohio St. 13, 72 N. E. 300; Karh *v.* State, 54 Ohio St. 383, 43 N. E. 920.

Pennsylvania.— Com. *v.* Fitler, 136 Pa. St. 129, 20 Atl. 424.

Washington.— State *v.* Byrne, 32 Wash. 264, 73 Pac. 394; Morris *v.* Williams, 23 Wash. 459, 63 Pac. 236.

Wisconsin.— State *v.* McCann, 107 Wis. 348, 83 N. W. 647.

United States.— Weaver *v.* Ogden City, 111 Fed. 323.

Canada.— *Ex p.* Thomas, 10 N. Brunsw. 356; Wilson *v.* Wainfleet, 10 Ont. Pr. 147; Reg. *v.* Haldimand County, 38 U. C. Q. B. 396; *In re* Kinnear, 30 U. C. Q. B. 398; *In re* Gibson, 20 U. C. Q. B. 111.

23. *California.*— Birch *v.* Phelan, 127 Cal. 49, 59 Pac. 209; People *v.* San Francisco, 20 Cal. 591.

Illinois.— People *v.* Hendee, 108 Ill. App. 591.

Louisiana.—State *v.* St. Martin Parish Police Jury, 33 La. Ann. 1122.

New Jersey.— Shackelton *v.* Guttenberg, 39 N. J. L. 660; Cleveland *v.* Jersey City Bd. of Finance, etc., 39 N. J. L. 629.

New York.— People *v.* Knox, 45 N. Y. App. Div. 537, 61 N. Y. Suppl. 472.

Pennsylvania.— *In re* Election, 3 Lanc. L. Rev. 225.

South Carolina.— State *v.* Harper, 30 S. C. 586, 9 S. E. 664; State *v.* Whitesides, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777.

Wisconsin.— State *v.* Anderson, 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 239.

24. *Arizona.*—Territory *v.* Mohave County, 2 Ariz. 248, 12 Pac. 730.

and scope of mandamus proceedings are prescribed in the several states.[25] Hence mandamus will not lie to enforce a contract as such; the obligation to perform it must be commanded by statute. The writ only lies to compel the discharge of official duties expressly imposed by law, and not contract duties implied from the contract relation,[26] especially where a series of acts is necessary involving dis-

Arkansas.— School Dist. No. 14 *v.* School Dist. No. 4, 64 Ark. 483, 43 S. W. 501.

Colorado.— People *v.* Arapahoe County Dist. Ct., 18 Colo. 26, 31 Pac. 339.

Connecticut.— Ansonia *v.* Studley, 67 Conn. 170, 34 Atl. 1030; Pond *v.* Parrott, 42 Conn. 13.

Delaware.— Swift *v.* State, 7 Houst. 338, 6 Atl. 856, 32 Atl. 143, 40 Am. St. Rep. 127; Richardson *v.* Swift, 7 Houst. 137, 30 Atl. 781.

Georgia.— Holtzclaw *v.* Riley, 113 Ga. 1023, 39 S. E. 425.

Indiana.— Placard *v.* State, 148 Ind. 305, 47 N. E. 623.

Iowa.— State *v.* Napier, 7 Iowa 425.

Kentucky.— Traynor *v.* Beckham, 116 Ky. 13, 74 S. W. 1105, 76 S. W. 844, 25 Ky. L. Rep. 283; Young *v.* Beckham, 115 Ky. 246, 72 S. W. 1092, 1094, 24 Ky. L. Rep. 2135; Furnish *v.* Satterwhite, 114 Ky. 905, 72 S. W. 309, 24 Ky. L. Rep. 1723; Denny *v.* Bosworth, 113 Ky. 785, 68 S. W. 1078, 24 Ky. L. Rep. 554.

Louisiana.— State *v.* St. Bernard Parish Police Jury, 39 La. Ann. 759, 2 So. 305.

Maine.— Arnold *v.* Kennebec County, 93 Me. 117, 44 Atl. 364.

Maryland.— Legg *v.* Annapolis, 42 Md. 203.

Nebraska.— State *v.* Piper, 50 Nebr. 25, 39, 40, 69 N. W. 378, 1150, 383; Laflin *v.* State, 49 Nebr. 614, 68 N. W. 1022.

Ohio.— Cincinnati Volksblatt Co. *v.* Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 78 Am. St. Rep. 707, 48 L. R. A. 732; Fraternal Mystic Circle *v.* State, 61 Ohio St. 628, 48 N. E. 940, 76 Am. St. Rep. 446; State *v.* Carpenter, 51 Ohio St. 83, 37 N. E. 261, 46 Am. St. Rep. 556; Freon *v.* Carriage Co., 42 Ohio St. 30, 51 Am. Rep. 794.

Oregon.— Sears *v.* Kincaid, 33 Oreg. 215, 53 Pac. 303; Morrow Co. *v.* Hendryz, 14 Oreg. 397, 12 Pac. 806.

Pennsylvania.— Com. *v.* Walton, 3 Pa. Dist. 391 (holding that a coroner cannot be compelled by mandamus to pay to the administrator moneys found on the person of decedent since the obligation to repay is not official, but personal); Hoover *v.* Reap, 10 Kulp 59.

Texas.— State *v.* San Antonio R. Co., 10 Tex. Civ. App. 12, 30 S. W. 266.

Wisconsin.— State *v.* McArthur, 23 Wis. 427.

Wyoming.—Lobban *v.* State, 9 Wyo. 377, 64 Pac. 82; State *v.* Burdick, 3 Wyo. 588, 28 Pac. 146.

United States.— Chicago, etc., R. Co. *v.* Crane, 113 U. S. 424, 5 S. Ct. 578, 28 L. ed. 1064.

Individual rights.— Simple common-law rights between individuals will not be enforced. State *v.* Howard County Ct., 39 Mo. 375.

25. See the statutes of the several states.

26. *California.*— Barber *v.* Mulford, 117 Cal. 356, 49 Pac. 206, holding that interest upon school-district warrants cannot be recovered.

Colorado.—Farmers' High Line Canal, etc., Co. *v.* People, 8 Colo. App. 246, 45 Pac. 543 (holding that an irrigation contract would not be construed); Bright *v.* Farmers' High Line Canal, etc., Co., 3 Colo. App. 170, 32 Pac. 433.

Connecticut.— Parrott *v.* Bridgeport, 44 Conn. 180, 26 Am. Rep. 439.

Florida.— Florida, etc., R. Co. *v.* Tavares, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419, refusing to enforce a contract to establish a railroad station at a certain place.

Illinois.— People *v.* Dulaney, 96 Ill. 503.

Indiana.— Indiana, etc., R. Co. *v.* Rinehart, 14 Ind. App. 588, 43 N. E. 238.

Kansas.— State *v.* Republican River Bridge Co., 20 Kan. 404, holding that a company maintaining a bridge on a public highway, under a public act aided by a congressional land grant, cannot be compelled by mandamus on the part of the state to keep the bridge in repair.

Louisiana.— State *v.* Nicholls, 42 La. Ann. 209, 7 So. 738; State *v.* New Orleans, etc., R. Co., 37 La. Ann. 589.

Missouri.— State *v.* Howard County Ct., 39 Mo. 375.

Nebraska.— State *v.* Mortensen, 69 Nebr. 376, 95 N. W. 831, holding that ordinary municipal contracts would not be enforced.

New York.—People *v.* Worth, 16 Misc. 664, 37 N. Y. Suppl. 126; People *v.* Kingston, 8 N. Y. Wkly. Dig. 82; People *v.* Comptroller, 20 Wend. 595. See Matter of Finnigan, 91 Hun 176, 36 N. Y. Suppl. 331; Utica Water-Works Co. *v.* Utica, 31 Hun 426. The payment of money will not be enforced by mandamus when there is another adequate remedy, as in the case of a salary. People *v.* Thompson, 25 Barb. 73. But *compare* People *v.* French, 91 N. Y. 265 [*reversing* 24 Hun 263]. Nor by statute which gives a remedy. People *v.* Crennan, 141 N. Y. 239, 36 N. E. 187 [*affirming* 26 N. Y. Suppl. 167]. But a teacher may have his name placed on the pay rolls, as a step necessary to payment. Matter of Gleese, 50 N. Y. Super. Ct. 473.

Ohio.— Mt. Vernon *v.* State, 71 Ohio St. 428, 73 N. E. 515, 104 Am. St. Rep. 783.

Pennsylvania.— Com. *v.* Wilkes-Barre Gas Co., 2 Kulp 499.

South Carolina.—Lynah *v.* St. Paul's Parish Poor Com'rs, 2 McCord 170.

Vermont.— Bailey *v.* Oviatt, 46 Vt. 627,

cretion.[27] Mandamus may, however, issue to enforce payment of municipal obligations.[28] And the writ will issue in a proper case to enforce a contract between a public corporation and a municipality, and to compel the performance of public duties,[29] or by statute provision may be made for the enforcement of public contracts.[30]

d. Duty Consisting of Continuous Acts. While it has been stated that mandamus will not lie to compel a continuing course of action,[31] there are frequent precedents for the granting of writs of such nature,[32] and the weight of authority is that to some degree at least the order may require a continuous action[33] or enforce a continuing duty.[34]

e. Requisite Act or Coöperation of Third Person. Mandamus will not issue when the official act to be performed depends on the act, approval, or coöperation of a third person, not a party.[35]

3. Creation or Imposition of New Powers or Duties. One of the most well-established principles governing mandamus is that it can create or impose no powers,[36]

holding that mandamus will not issue to compel a stenographer hired by a legislative committee under implied power to furnish copies of evidence.

Wisconsin.— South Milwaukee Bd. of Education *v.* State, 100 Wis. 455, 76 N. W. 351.

England.— Norris *v.* Irish Land Co., 8 E. & B. 512, 4 Jur. N. S. 235, 27 L. J. Q. B. 115, 6 Wkly. Rep. 55, 92 E. C. L. 572; Benson *v.* Paull, 6 E. & B. 273, 2 Jur. N. S. 425, 25 L. J. Q. B. 274, 4 Wkly. Rep. 493, 88 E. C. L. 273.

Canada.— Page *v.* Longueuil, 3 Rev. de Jur. 366; Elliott *v.* Les Syndics, etc., 3 Quebec Q. B. 535.

27. People *v.* Dulaney, 96 Ill. 503; Kingston *v.* Kingston, etc., Electric R. Co., 25 Ont. App. 462 [*affirming* 28 Ont. 399]. See also *infra*, II, C, 2, d.

28. Ray *v.* Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773 (payment of county warrant); Reg. *v.* York, 6 N. Brunsw. 273 (contract for public work). See *infra*, VI, U.

29. Topeka *v.* Topeka Water Co., 58 Kan. 349, 49 Pac. 79. See also *infra*, VII, ——.

Where the contract is not deemed enforceable specifically, it has been held that mandamus will be refused. Kingston *v.* Kingston, etc., Electric R. Co., 25 Ont. App. 462 [*affirming* 28 Ont. 399].

30. State *v.* New Orleans, etc., R. Co., 44 La. Ann. 1026, 11 So. 709; State *v.* New Orleans, etc., R. Co., 42 La. Ann. 550, 7 So. 606, holding Acts (1888), No. 133, for the enforcement of certain improvement contracts by corporations with municipalities, valid. See, generally, *infra*, VI, N, 4.

31. State *v.* Associated Press, 159 Mo. 410, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151 (holding that mandamus cannot be granted to compel respondent to enter into a contract with relator to furnish news reports during a considerable length of time, since mandamus will not be granted to enter into a contract which would require the exercise of experience and discretion over a long period, the courts being unable to enforce performance); People *v.* Interurban St. R. Co., 177 N. Y. 296, 69 N. E. 596 (compelling issuance of transfers); State *v.* Brewer, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858 (to compel a sheriff and city marshal to enforce the laws and prosecute violations). See also Kingston *v.* Kingston, etc., Electric R. Co., 25 Ont. App. 462.

32. *Florida.*— State *v.* Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225; State *v.* Pensacola, etc., R. Co., 27 Fla. 403, 9 So. 89.

Illinois.— Rogers Park Water Co. *v.* Fergus, 178 Ill. 571, 53 N. E. 363, where a corporation was compelled to furnish water at reduced rates.

Massachusetts.— Atty.-Gen. *v.* Boston, 123 Mass. 460, where a city was compelled to continue to collect ferry tolls.

New York.— People *v.* Voorhis, 186 N. Y. 263, 78 N. E. 1001 (where the writ was granted to compel election officers to perform continuous duties extending until election day); People *v.* New York, etc., R. Co., 28 Hun 543 (where a railroad was compelled to exercise its duties as a carrier).

West Virginia.— Mason *v.* Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418, where railroad was ordered to maintain crossing.

See also *infra*, VII, A, 9.

33. Goodell *v.* Woodbury, 71 N. H. 378, 52 Atl. 855, holding on mandamus to the chief of police of a city to compel him to prosecute certain persons for violating Pub. St. c. 112, relative to the sale of liquor, a contention that mandamus is not a proper remedy, in that the petition calls for a continuous course of action, is of no merit.

34. State *v.* Atlantic Coast Line R. Co., 48 Fla. 114, 37 So. 652.

35. State *v.* Cavanac, 30 La. Ann. 237; Ball *v.* Lappius, 3 Oreg. 55.

36. *Florida.*—State *v.* Jacksonville, 22 Fla. 21.

Kansas.— Sharpless *v.* Buckles, 65 Kan. 838, 70 Pac. 886.

Kentucky.—Lowe *v.* Phelps, 14 Bush 642.

Nebraska.— State *v.* Royse, 3 Nebr. (Unoff.) 269, 97 N. W. 473, 3 Nebr. (Unoff.) 262, 91 N. W. 559.

United States.— Missouri *v.* Murphy, 170 U. S. 78, 18 S. Ct. 505, 42 L. ed. 955; U. S.

rights,[37] or duties,[38] however, and may be employed only to enforce such duties as already exist.[39] It follows that mandamus will not issue to command an officer to do that which he could not lawfully do without such mandate,[40] or to compel him to act under a void [41] or inoperative [42] statute, or to perform an act which he has no legal authority to perform,[43] or which is forbidden or not authorized by the law of the state.[44]

4. Effect of Impossibility of Performance — a. In General. When the duty belongs to some other officer, or for any reason defendant has no power to act,[45] or where the duty whose performance is sought to be compelled is impossible of

v. Blaine, 139 U. S. 306, 11 S. Ct. 607, 35 L. ed. 183; Brownsville Taxing Dist. v. Loague, 129 U. S. 493, 9 S. Ct. 327, 32 L. ed. 780; U. S. v. Clark County Ct., 95 U. S. 769, 24 L. ed. 545.

37. *Ex p.* Hays, 26 Ark. 510; Fitch v. McDiarmid, 26 Ark. 482; People v. Olds, 3 Cal. 167, 58 Am. Dec. 398; People v. Land Office Com'rs, 149 N. Y. 26, 43 N. E. 418 [*reversing* 90 Hun 525, 36 N. Y. Suppl. 29]; Milster v. Spartanburg, 68 S. C. 243, 47 S. E. 141.

38. *Alabama.*— State v. Wilson, 123 Ala. 259, 26 So. 482, 45 L. R. A. 772.

Arizona.— Territory v. Yavapai County, (1906) 84 Pac. 519

Kansas.— Sharpless v. Buckles, 65 Kan. 838, 70 Pac. 886.

Kentucky.— Lowe v. Phelps, 14 Bush 642.

Pennsylvania.— Davis v. Patterson, 12 Pa. Super. Ct. 479; Hoover v. Reap, 10 Kulp 59.

United States.— Supervisors v. U. S., 18 Wall. 71, 21 L. ed. 771.

39. Sapp v. De Lacy, (Ga. 1907) 56 S. E. 754; *Ex p.* Rowland, 104 U. S. 604, 26 L. ed. 861; York, etc., R. Co. v. Milner, 15 L. J. Q. B. 379.

40. *Alabama.*— Cook v. Candee, 52 Ala. 109; State v. Judge Macon Orphans' Ct., 15 Ala. 740.

Arkansas.— Graham v. Parham, 32 Ark. 670.

Colorado.— Gruner v. Moore, 6 Colo. 526.

Kansas.— Rosenthal v. State Bd. of Canvassers, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157.

Louisiana.—State v. Judge Second Judicial Dist. Ct., 13 La. Ann. 89.

Minnesota.— Clark v. Buchanan, 2 Minn. 346.

New Jersey.— Ocean County v. Vanarsdale, 42 N. J. L. 536; Roll v. Perrine, 34 N. J. L. 254.

Pennsylvania.— See Jackson v. Pittsburgh, 8 Pa. Dist. 150.

Texas.— Boozer v. Terrell, 96 Tex. 635, 75 S. W. 482.

Vermont.— Page v. McClure, (1906) 64 Atl. 451.

See 33 Cent. Dig. tit. "Mandamus," § 41.

41. People v. San Diego, 85 Cal. 369, 24 Pac. 727; State v. Jumel, 32 La. Ann. 60; State v. Comptroller Gen., 4 S. C. 185; State v. Tappan, 29 Wis. 664, 9 Am. Rep. 622.

42. Browne v. State, (Ala. 1906) 41 So. 407.

43. People v. San Francisco, 28 Cal. 429; McCoy v. State, 2 Marv. (Del.) 543, 36 Atl. 81; People v. Cook County, 176 Ill. 576, 52 N. E. 334.

44. Chicot County v. Kruse, 47 Ark. 80, 14 S. W. 469; People v. Hallett, 1 Colo. 352; Morgan v. Pickard, 86 Tenn. 208, 9 S. W. 690; Thomson v. Baker, 90 Tex. 163, 38 S. W. 21; Horton v. Pace, 9 Tex. 81; Watkins v. Huff, (Tex. Civ. App. 1901) 63 S. W. 922.

45. *California.*— Angus v. Browning, 130 Cal. 502, 62 Pac. 827; San Diego Bd. of Education v. San Diego, 128 Cal. 369, 60 Pac. 976; Davis v. Sacramento, 82 Cal. 562, 22 Pac. 1118; Bates v. Gerber, 82 Cal. 550, 22 Pac. 1115; Haumeister v. Porter, (1887) 16 Pac. 187; Bates v. Porter, 74 Cal. 224, 15 Pac. 732; Davis v. Porter, 66 Cal. 658, 6 Pac. 746; Napa v. Rainey, 59 Cal. 275; Hewell v. Lane, 53 Cal. 213; Dubordieu v. Butler, 49 Cal. 512; People v. San Francisco, 27 Cal. 655.

Florida.— State v. Madison County Election Inspectors, Precinct No. 4, 17 Fla. 26; Columbia County v. King, 13 Fla. 451.

Georgia.— Gilliam v. Green, 122 Ga. 322, 50 S. E. 137; Jennings v. Rudd, 40 Ga. 49.

Idaho.— Payne v. State Bd. of Wagon-Road Com'rs, 4 Ida. 384, 39 Pac. 548.

Illinois.— People v. Hyde Park, 117 Ill. 462, 6 N. E. 33; People v. Chicago, 51 Ill. 58; People v. Chicago, 51 Ill. 17, 2 Am. Rep. 278; Civil Service Commission v. Kenyon, 86 Ill. App. 547; North Henderson Highway Com'rs v. People, 2 Ill. App. 24.

Indiana.— State v. Knox County, 101 Ind. 393.

Iowa.— State v. Napier, 7 Iowa 425.

Kansas.— Sharpless v. Buckles, 65 Kan. 838, 70 Pac. 886; State v. Anderson County, 28 Kan. 67.

Louisiana.— State v. New Orleans, 36 La. Ann. 726; State v. Judges Orleans Parish Civ. Dist. Ct., 34 La. Ann. 1114; State v. New Orleans, 23 La. Ann. 358.

Maine.— Rose v. Knox County, 50 Me. 243.

Maryland.— Wells v. Hyattsville Com'rs, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89.

Massachusetts.—Gloucester v. Essex County, 44 Mass. 375.

Michigan.—Chipman v. Wayne County, 127 Mich. 490, 86 N. W. 1024; Aitcheson v. Huebner, 90 Mich. 643, 51 N. W. 634; Murphy v. Reeder Town Treasurer, 56 Mich. 505, 23 N. W. 197; People v. Presque Isle County, 36 Mich. 377; People v. Auditor-Gen., 36 Mich. 271.

Mississippi.— Ross v. Lane, 3 Sm. & M. 695.

performance, or defendant has no power to perform it, the writ will not issue.[46]

Missouri.— State *v.* Mantz, 62 Mo. 258; State *v.* Bates County, 57 Mo. 70.

Nebraska.— State *v.* Cass County, 69 Nebr. 100, 95 N. W. 6; State *v.* Russell, 34 Nebr. 116, 51 N. W. 465, 33 Am. St. Rep. 625, 15 L. R. A. 740; State *v.* Scott, 15 Nebr. 147, 17 N. W. 263; Lancaster County *v.* State, 13 Nebr. 523, 14 N. W. 517.

New Jersey.—Free Public Library *v.* Board of Finance, 53 N. J. L. 62, 20 Atl. 755; Board of Education *v.* Union, 52 N. J. L. 69, 18 Atl. 571; Camden Bd. of Health *v.* Camden County, 50 N. J. L. 396, 13 Atl. 173; Bayer *v.* Hoboken, 40 N. J. L. 152; Mingo Jack Case, 10 N. J. L. J. 114.

New York.— People *v.* Hempstead School Dist. No. 25, 126 N. Y. 528, 27 N. E. 968 [*affirming* 12 N. Y. Suppl. 165]; New York Dental Soc. *v.* Jacobs, 103 N. Y. App. Div. 86, 92 N. Y. Suppl. 590; *In re* Stebbins, 41 N. Y. App. Div. 269, 58 N. Y. Suppl. 468; People *v.* Reardon, 49 Hun 425, 3 N. Y. Suppl. 560; *In re* Nicoll, 44 Hun 340; People *v.* Busti, 32 Misc. 123, 66 N. Y. Suppl. 199; People *v.* York, 27 Misc. 658, 59 N. Y. Suppl. 418; Matter of Popoff, 10 Misc. 272, 31 N. Y. Suppl. 2; People *v.* Cortlandt, 61 N. Y. Suppl. 727; People *v.* New York, 10 Wend. 393.

Ohio.— Putnam County *v.* Allen County, 1 Ohio St. 322; State *v.* Brewster, 9 Ohio Dec. (Reprint) 357, 12 Cinc. L. Bul. 223; State *v.* Hamilton County, 7 Ohio Dec. (Reprint) 357, 2 Cinc. L. Bul. 156.

Oklahoma.— Huddleston *v.* Noble County, 8 Okla. 614, 58 Pac. 749.

Pennsylvania.— Com. *v.* Dickinson, 83 Pa. St. 458; Uniontown *v.* Com., 34 Pa. St. 293.

Rhode Island.— Portland Stone Ware Co. *v.* Taylor, 17 R. I. 33, 19 Atl. 1086.

South Carolina.— Same *v.* Harper, 30 S. C. 586, 9 S. E. 664; State *v.* Whitesides, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777.

Tennessee.— State *v.* Sneed, 9 Baxt. 472.

Virginia.— Richmond *v.* Epps, 98 Va. 233, 35 S. E. 723.

Washington.— State *v.* Ross, 39 Wash. 399, 81 Pac. 865; Elder *v.* Territory, 3 Wash. Terr. 438, 19 Pac. 29.

West Virginia.— Dempsey *v.* Hardee Dist. Bd. of Education, 40 W. Va. 99, 20 S. E. 811.

Wisconsin.—State *v.* Hunter, 111 Wis. 582, 87 N. W. 485; State *v.* Manitowoc County, 48 Wis. 112, 4 N. W. 121; State *v.* Beloit, 20 Wis. 79.

United States.— Missouri *v.* Murphy, 170 U. S. 78, 18 S. Ct. 505, 42 L. ed. 955; Brownsville Taxing Dist. *v.* Loague, 129 U. S. 493, 9 S. Ct. 327, 32 L. ed. 780; U. S. *v.* Macon County, 99 U. S. 582, 25 L. ed. 331; Cleveland *v.* U. S., 111 Fed. 341, 49 C. C. A. 383; U. S. *v.* New Orleans Bd. of Liquidation, 74 Fed. 489, 20 C. C. A. 622; Grand County *v.* King, 67 Fed. 202, 14 C. C. A. 421; U. S. *v.* Bd. of Liquidation, 60 Fed. 387, 9 C. C. A. 37; Deere *v.* Rio Grande County, 33 Fed. 823; U. S. *v.* New Orleans, 27 Fed. Cas. No. 15,871, 2 Woods 230 [*reversed* on other grounds in 98 U. S. 381, 25 L. ed. 225].

Canada.— *Ex p.* New Brunswick R. Co., 15 N. Brunsw. 78.

See 33 Cent. Dig. tit. "Mandamus," § 41.

46. *Alabama.*— Old Dominion Tel. Co. *v.* Powers, 140 Ala. 220, 37 So. 195; *Ex p.* Shaudies, 66 Ala. 134 (sheriff not compelled to deliver prisoner who has surrendered to the county); State *v.* Dunn, Minor 46, 12 Am. Dec. 25.

Arkansas.— Lamar *v.* Wilkins, 28 Ark. 34; Ackerman *v.* Desha County, 27 Ark. 457, tax pursuant to destroyed records not compelled.

California.— De la Beckwith *v.* Colusa County Super. Ct., 146 Cal. 496, 80 Pac. 717; McClatchy *v.* Matthews, 135 Cal. 274, 67 Pac. 134 (production of record not in defendant's custody denied); Wiedwald *v.* Dodson, 95 Cal. 450, 30 Pac. 580.

Colorado.— Colorado, etc., Iron Co. *v.* State Bd. of Land Com'rs, 14 Colo. App. 84, 60 Pac. 367; Northampton First Nat. Bank *v.* Arthur, 12 Colo. App. 90, 54 Pac. 1107.

Connecticut.— State *v.* Towers, 71 Conn. 657, 42 Atl. 1083.

Florida.— State *v.* Internal Imp. Fund, 20 Fla. 402, conveyance of land already conveyed to another not compelled.

Georgia.— Stacy *v.* Hammond, 96 Ga. 125, 23 S. E. 77.

Illinois.— People *v.* Cook County, 176 Ill. 576, 52 N. E. 334; People *v.* Chicago, 106 Ill. App. 72.

Missouri.— State *v.* Luhke, 15 Mo. App. 152, court having lost jurisdiction by appeal not compelled to act.

New Jersey.— Gouldey *v.* Atlantic City, 63 N. J. L. 537, 42 Atl. 852.

New York.— People *v.* Hayt, 66 N. Y. 606 [*reversing* 7 Hun 39]; *In re* Nicoll, 44 Hun 340, 8 N. Y. St. 819 (holding that where on an application to compel a board of education to receive children into the public schools, it appeared that defendants could not receive them for want of room, that the court would not determine as to the propriety of teaching higher branches, rotation among pupils or quota of pupils in each of the school buildings); Colonial L. Assur. Co. *v.* New York County, 24 Barb. 166, 4 Abb. Pr. 84, 13 How. Pr. 305; People *v.* Westchester, 15 Barb. 607; People *v.* Greene County, 12 Barb. 217; People *v.* Ft. Edward Plank Road Co., 11 How. Pr. 89. Where bank funds were turned over to receivers appointed in a suit by the attorney-general, mandamus to pay them to receivers in another suit was refused. Matter of Murray Hill Bank, 9 N. Y. App. Div. 554, 41 N. Y. Suppl. 920.

Pennsylvania.— Curran *v.* White, 22 Pa. Co. Ct. 201.

South Carolina.— State *v.* Lehre, 7 Rich. 234.

Virginia.— Mitchell *v.* Witt, 98 Va. 459, 36 S. E. 528.

Although in some cases it has been allowed where the impossibility resulted from respondent's wrongful act.[47]

b. Want of Funds. A public body will not be required to do an act when it is impossible through a want of funds and inability to raise them[48] and the same rule applies to a public officer.[49]

5. Effect of Performance or Willingness to Perform. If the duty sought to be enforced has been already done, or is being performed,[50] or if the respondent admits his willingness to perform it,[51] mandamus will be refused. A partial, imperfect, or illegal performance will not bar the writ.[52]

D. Existence of Other Adequate Remedy — 1. General Rule.[53] Mandamus will lie to prevent a failure of justice, upon reasons of public policy, to preserve peace, order, and good government, correct official inaction, and enforce official function, but only in cases of last necessity where the usual forms of procedure are powerless to afford relief; where there is no other clear, adequate, efficient and speedy remedy.[54] So in the absence of a statutory

West Virginia.—State *v.* Wyoming County Ct., 47 W. Va. 672, 35 S. E. 959.

Wisconsin.— State *v.* Beloit, 21 Wis. 280, 91 Am. Dec. 474.

England.— Reg. *v.* London, etc., R. Co., 6 R. & Can. Cas. 634.

See 33 Cent. Dig. tit. "Mandamus," § 41.

47. State *v.* Philips, 96 Mo. 570, 10 S. W. 182 (holding that the transfer of a cause from the court of appeals to the supreme court might be compelled after the expiration of the term, although the court could not then transfer the cause of its own motion); People *v.* Treanor, 15 N. Y. App. Div. 508, 44 N. Y. Suppl. 528. But see Rice *v.* Walker, 44 Iowa 458.

48. White County *v.* People, 222 Ill. 9, 78 N. E. 13; Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; Benton Harbor *v.* St. Joseph, etc., St. R. Co., 102 Mich. 386, 60 N. W. 758, 47 Am. St. Rep. 553, 26 L. R. A. 245; *Re* Bristol, etc., R. Co., 3 Q. B. D. 10, 47 L. J. Q. B. 48, 37 L. T. Rep. N. S. 527, 26 Wkly. Rep. 236. But see Savannah, etc., Canal Co. *v.* Shuman, 91 Ga. 400, 17 S. E. 937, 44 Am. St. Rep. 43, holding that while want of funds by a canal company may be a reason for not inflicting punishment for disobedience to the writ, it is no reason for not granting it, where its charter requires it to do the act, as to keep its canal navigable. See, generally, *infra*, VI, O, 1; VII, A, 9, c.

49. Com. *v.* Griest, 8 Pa. Dist. 468, 22 Pa. Co. Ct. 482. See also *infra*, VI, O, 1.

50. *Idaho.*— Chemung Min. Co. *v.* Morgan, 11 Ida. 232, 81 Pac. 384.

Iowa.— Mystic Milling Co. *v.* Chicago, etc., R. Co., (1906) 107 N. W. 943.

Michigan.—Hartwig *v.* Manistee, 134 Mich. 615, 96 N. W. 1067.

Missouri.—State *v.* Smith, (1891) 15 S. W. 614; State *v.* Schofield, 41 Mo. 38.

New York.— People *v.* Chapin, 104 N. Y. 96, 10 N. E. 141; Matter of Grady, 15 N. Y. App. Div. 504, 44 N. Y. Suppl. 578; People *v.* Hopey, 50 How. Pr. 380.

North Carolina.— Neuse River Nav. Co. *v.* Newbern, 52 N. C. 275.

Pennsylvania.— Bedford Borough School Directors *v.* Anderson, 45 Pa. St. 388; *In re* 34th Ward, 11 Pa. Dist. 135, 26 Pa. Co. Ct. 593; Hanover Borough *v.* York Com'rs, 1 York Leg. Rec. 25.

South Carolina.— State *v.* Port Royal R. Co., 31 S. C. 609, 10 S. E. 1104.

Virginia.— Jones *v.* Stafford Justices, 1 Leigh 584.

United States.— U. S. *v.* Kendall, 26 Fed. Cas. No. 15,518, 5 Cranch C. C. 385.

51. People *v.* Dulaney, 96 Ill. 503; State *v.* Sunset, etc., Tel. Co., 30 Wash. 676, 71 Pac. 198. And see *In re* White River Bank, 23 Vt. 478.

52. *California.*— Wood *v.* Strother, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249.

Kentucky.— Batman *v.* Megowan, 1 Metc. 533.

Missouri.— State *v.* Guinotte, 113 Mo. App. 399, 86 S. W. 884.

Nebraska.— State *v.* Howe, 28 Nebr. 618, 44 N. W. 874.

Wisconsin.— State *v.* Richter, 37 Wis. 275.

Mere colorable action is no bar to the issuance of the writ. State *v.* Bare, (W. Va. 1906) 56 S. E. 390.

A mandamus nisi may be granted where it appears defendant has taken some steps to perform. *In re* Toronto, 23 U. C. Q. B. 203.

53. Right to bring statutory action of mandamus as defeating right to prerogative writ see *infra*, IX, A, 1.

54. *Alabama.*— Scarbrough *v.* Watson, 140 Ala. 349, 37 So. 281; *Ex p.* Campbell, 130 Ala. 171, 30 So. 385; Bickley *v.* Bickley, 129 Ala. 403, 29 So. 854; *Ex p.* Woodruff, 123 Ala. 99, 26 So. 509; *Ex p.* Due, 116 Ala. 491, 23 So. 2; Wilson *v.* Duncan, 114 Ala. 659, 21 So. 1017; State *v.* Hamil, 97 Ala. 107, 11 So. 892; Reynolds *v.* Crook, 95 Ala. 570, 11 So. 412; Sessions *v.* Boykin, 78 Ala. 328; *Ex p.* South, etc., Alabama R. Co., 65 Ala. 599; State *v.* Brewer, 61 Ala. 318; Murphy *v.* State, 59 Ala. 639; Speed *v.* Cocke, 57 Ala. 209; *Ex p.* Clements, 50 Ala. 459; *Ex p.* Candee, 48 Ala. 386; Arrington *v.* Van Houton, 44 Ala. 284; Tarver *v.* Tallapoosa County, 17 Ala. 527; State *v.* Judge Macon Orphans' Ct., 15 Ala. 740; State *v.* Dunn, Minor 46, 12 Am. Dec. 25.

provision to the contrary it is a thoroughly well-established rule that in cases

Arkansas.— Basham *v.* Carroll, 44 Ark. 284; Fitch *v.* McDiarmid, 26 Ark. 482; *Ex p.* Williamson, 8 Ark. 424; Goings *v.* Mills, 1 Ark. 11.

California.— Williams *v.* Bagnelle, (1902) 70 Pac. 1058, 71 Pac. 445, 138 Cal. 699, 72 Pac. 408; Kings County *v.* Johnson, 104 Cal. 198, 37 Pac. 870; Eby *v.* Red Bank School Dist., 87 Cal. 166, 25 Pac. 240; People *v.* McLane, 62 Cal. 616; Babcock *v.* Goodrich, 47 Cal. 488; Kimball *v.* Union Water Co., 44 Cal. 173, 13 Am. Rep. 157; Crandall *v.* Amador County, 20 Cal. 72; Goodwin *v.* Glazer, 10 Cal. 333; Fremont *v.* Crippen, 10 Cal. 211, 70 Am. Dec. 711; Draper *v.* Noteware, 7 Cal. 276; People *v.* Olds, 3 Cal. 167, 58 Am. Dec. 398.

Colorado.— People *v.* Butler, 24 Colo. 401, 51 Pac. 510; People *v.* Clerk Arapahoe County Dist. Ct., 22 Colo. 280, 44 Pac. 506; People *v.* Arapahoe County Dist. Ct., 14 Colo. 396, 24 Pac. 260.

Connecticut.— Colley *v.* Webster, 59 Conn. 361, 20 Atl. 334; Atwood *v.* Partree, 56 Conn. 80, 14 Atl. 85; Tobey *v.* Hakes, 54 Conn. 274, 7 Atl. 551, 1 Am. St. Rep. 114; Elderkin's Appeal, 49 Conn. 69; State *v.* Fyler, 48 Conn. 145; Peck *v.* Booth, 42 Conn. 271; Treat *v.* Middletown, 8 Conn. 243; American Asylum, etc. *v.* Phœnix Bank, 4 Conn. 172, 10 Am. Dec. 112.

Dakota.— Territory *v.* Cavanaugh, 3 Dak. 325, 19 N. W. 413.

Florida.— State *v.* Richards, 50 Fla. 284, 39 So. 152.

Georgia.— Napier *v.* Poe, 12 Ga. 170; State *v.* Justices Richmond County Inferior Ct., Dudley 37.

Idaho.— Wright *v.* Kelley, 4 Ida. 624, 43 Pac. 565.

Illinois.— People *v.* Salomon, 46 Ill. 415; Peoria Bd. of School Inspectors *v.* People, 20 Ill. 525.

Indiana.— State *v.* Real Estate Bldg., etc., Assoc., 151 Ind. 502, 51 N. E. 1061; State *v.* Yant, 134 Ind. 121, 33 N. E. 896; State *v.* Tippecanoe County, 131 Ind. 90, 30 N. E. 892; Harrison School Tp. *v.* McGregor, 96 Ind. 185; Excelsior Mut. Aid Assoc. *v.* Riddle, 91 Ind. 84; Connersville *v.* Connersville Hydraulic Co., 86 Ind. 184; State *v.* Montgomery County, 25 Ind. 210; Franklin Tp. *v.* State, 11 Ind. 205; Johnson County *v.* Hicks, 2 Ind. 527; Marshall *v.* State, 1 Ind. 72.

Indian Territory.— Liverpool, etc., Ins. Co. *v.* Kearney, 1 Indian Terr. 328, 37 S. W. 143.

Iowa.— Sullivan *v.* Robbins, 109 Iowa 235, 80 N. W. 340 (mandamus will not lie where a plain, speedy, and adequate legal remedy is provided as by certiorari); Marshall *v.* Sloan, 35 Iowa 445; State *v.* Floyd County Judge, 5 Iowa 380.

Kansas.—Arends *v.* Kansas City, 57 Kan. 350, 46 Pac. 702; State *v.* Hannon, 38 Kan. 593, 17 Pac. 185; Smalley *v.* Yates, 36 Kan. 519, 13 Pac. 845; State *v.* Bridgman, 8 Kan. 458; State *v.* Stockwell, 7 Kan. 98; State *v.* McCrillus, 4 Kan. 250, 96 Am. Dec. 169.

Kentucky.— Goheen *v.* Myers, 18 B. Mon. 423.

Louisiana.—State *v.* Whitaker, 116 La. 947, 41 So. 218; State *v.* Acme Lumber Co., 115 La. 893, 40 So. 301; State *v.* Sommerville, 111 La. 1015, 36 So. 104; State *v.* New Orleans, etc., R. Co., 37 La. Ann. 589; State *v.* Herron, 29 La. Ann. 848.

Maine.— Baker *v.* Johnson, 41 Me. 15.

Maryland.—George's Creek Coal, etc., Co. *v.* Allegany County Com'rs, 59 Md. 255; Legg *v.* Annapolis, 42 Md. 203; Booze *v.* Humbird, 27 Md. 1; State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639.

Massachusetts.— McCarthy *v.* Boston St. Com'rs, 188 Mass. 338, 74 N. E. 659; Wheelock *v.* Suffolk County Auditor, 130 Mass. 486; Com. *v.* Justices Hampden County Ct. of Sess., 2 Pick. 414.

Michigan.— Wells *v.* Montcalm Cir. Judge, 139 Mich. 544, 102 N. W. 1001; Steel *v.* Clinton Cir. Judge, 133 Mich. 695, 95 N. W. 993; Clarke *v.* Hill, 132 Mich. 434, 93 N. W. 1044; Central Bitulithic Paving Co. *v.* Manistee Cir. Judge, 132 Mich. 126, 92 N. W. 938; Coffin *v.* Detroit Bd. of Education, 114 Mich. 342, 72 N. W. 156; Byles *v.* Golden Tp., 52 Mich. 612, 18 N. W. 383; People *v.* State Ins. Co., 19 Mich. 392; People *v.* Judges Branch Cir. Ct., 1 Dougl. 319.

Minnesota.— State *v.* U. S. Express Co., 95 Minn. 442, 104 N. W. 556; Baker *v.* Marshal, 15 Minn. 177.

Mississippi.—Attala County Bd. of Police *v.* Grant, 9 Sm. & M. 77, 47 Am. Dec. 102. And see Klein *v.* Smith County, 54 Miss. 254.

Missouri.— State *v.* Lewis, 76 Mo. 370; Township Bd. of Education *v.* Boyd, 58 Mo. 276; Mansfield *v.* Fuller, 50 Mo. 338; State *v.* Justices Bollinger County Ct., 48 Mo. 475; State *v.* Fletcher, 39 Mo. 388; Payne *v.* School Dist. No. 3-25-10, 87 Mo. App. 415; State *v.* McCracken, 60 Mo. App. 650.

Montana.— State *v.* District Ct., 27 Mont. 280, 70 Pac. 981.

Nebraska.— State *v.* McGuire, (1905) 105 N. W. 471; State *v.* Holmes, (1903) 97 N. W. 243; State *v.* Jessen, 66 Nebr. 515, 92 N. W. 584; State *v.* Graves, 66 Nebr. 17, 92 N. W. 144; Hopkins *v.* State, 64 Nebr. 10, 89 N. W. 401; State *v.* Houseworth, 63 Nebr. 658, 88 N. W. 858; Horton *v.* State, 60 Nebr. 701, 84 N. W. 87; State *v.* Osborn, 60 Nebr. 415, 83 N. W. 357; Nebraska Tel. Co. *v* State, 55 Nebr. 627, 76 N. W. 171, 45 L. R. A. 113; State *v.* Herrell, 43 Nebr. 575, 61 N. W. 754; Dutton *v.* State, 42 Nebr. 804, 60 N. W. 1042; State *v.* Laflin, 40 Nebr. 441, 58 N. W. 936; State *v.* Omaha, 14 Nebr. 265, 15 N. W. 210, 45 Am. Rep. 108; State *v.* Eberhardt, 14 Nebr. 201, 15 N. W. 320; State *v.* Stearns, 11 Nebr. 104, 7 N. W. 743; State *v.* Lincoln, 4 Nebr. 260; Moores *v.* State, 4 Nebr. (Unoff.) 235, 93 N. W. 986.

where relator may have relief in an ordinary civil action mandamus will not

Nevada.— State *v.* Storey County, 22 Nev. 263, 38 Pac. 668; State *v.* Wright, 10 Nev. 167.

New Hampshire.— Storer Post, No. 1, G. A. R. *v.* Page, 70 N. H. 280, 47 Atl. 264; State *v.* Manchester, etc., R. Co., 62 N. H. 29.

New Jersey.— Edward C. Jones Co. *v.* Guttenberg, 66 N. J. L. 659, 51 Atl. 274; Bamford *v.* Hollinshead, 47 N. J. L. 439, 2 Atl. 244; Elmendorf *v.* Jersey City Bd. of Finance, 41 N. J. L. 135; Little *v.* Union Tp. Committee, 37 N. J. L. 84; Nicolson Pavement Co. *v.* Newark, 35 N. J. L. 396; Morgan *v.* Monmouth Plank Road Co., 26 N. J. L. 99.

New York.— People *v.* New York Cent., etc., R. Co., 168 N. Y. 187, 61 N. E. 172 [*reversing* on other grounds 61 N. Y. App. Div. 494, 70 N. Y. Suppl. 684]; People *v.* Campbell, 72 N. Y. 496; Clark *v.* Miller, 54 N. Y. 528 [*affirming* 47 Barb. 38]; People *v.* Hawkins, 46 N. Y. 9; People *v.* Chenango County, 11 N. Y. 563; People *v.* New York Bd. of Education, 104 N. Y. App. Div. 162, 93 N. Y. Suppl. 300; Jones *v.* Fonda, 85 N. Y. App. Div. 265, 83 N. Y. Suppl. 1012; Cochrane *v.* Feitner, 44 N. Y. App. Div. 239, 60 N. Y. Suppl. 614; Lefrois *v.* Monroe County, 24 N. Y. App. Div. 421, 48 N. Y. Suppl. 519; People *v.* New York Bd. of Education, 60 Hun 486, 584, 15 N. Y. Suppl. 308; People *v.* Thompson, 32 Hun 93; People *v.* Coffin, 7 Hun 608; People *v.* Green, 1 Hun 1, 3 Thomps. & C. 90; People *v.* Martin, 62 Barb. 570; Clark *v.* Miller, 47 Barb. 38; People *v.* Brennan, 39 Barb. 522; People *v.* Haws, 37 Barb. 440, 24 How. Pr. 148, 15 Abb. Pr. 115 [*affirming* 13 Abb. Pr. 375 note, 23 How. Pr. 107]; People *v.* Wood, 35 Barb. 653 [*reversing* 13 Abb. Pr. 374, 22 How. Pr. 286]; People *v.* Thompson, 25 Barb. 73; Northrup *v.* Pittsfield, 2 Thomps. & C. 108; People *v.* York, 31 Misc. 549, 65 N. Y. Suppl. 559; People *v.* New York, etc., R. Co., 2 N. Y. Civ. Proc. 82; People *v.* Seventeenth Ward School Inspectors, 44 How. Pr. 322; People *v.* Dikeman, 7 How. Pr. 124; *Ex p.* Fireman's Ins. Co., 6 Hill 243; People *v.* Stevens, 5 Hill 616; *Ex p.* Lynch, 2 Hill 45; People *v.* New York, 25 Wend. 680; People *v.* Brooklyn, 1 Wend. 318, 19 Am. Dec. 502; Boyce *v.* Russell, 2 Cow. 444; Shipley *v.* Mechanics' Bank, 10 Johns. 484. "The rule that a mandamus will not be granted where the party has a remedy by action is one addressed to the sound discretion of the court, and is not of universal application." People *v.* Lindenthal, 77 N. Y. App. Div. 515, 78 N. Y. Suppl. 997; People *v.* Coler, 34 N. Y. App. Div. 167, 168, 54 N. Y. Suppl. 639; People *v.* Green, 2 Thomps. & C. 62; People *v.* Palmer, 14 Misc. 41, 35 N. Y. Suppl. 222; People *v.* Way, 86 N. Y. Suppl. 892.

North Carolina.— State *v.* Moore County Justices, 24 N. C. 430.

Ohio.— State *v.* Meiley, 22 Ohio St. 534; Cincinnati, etc., R. Co. *v.* Clinton County Com'rs, 1 Ohio St. 77; State *v.* Bowers, 26 Ohio Cir. Ct. 326 [*affirmed* without opinion in 70 Ohio St. 423, 72 N. E. 1155]; State *v.* Cleveland, 10 Ohio Dec. (Reprint) 571, 22 Cinc. L. Bul. 113; State *v.* Hamilton County, 5 Ohio S. & C. Pl. Dec. 545, 7 Ohio N. P. 562.

Oklahoma.— Territory *v.* Crum, 13 Okla. 9, 73 Pac. 297; Territory *v.* Hewitt, 5 Okla. 167, 49 Pac. 60; Steward *v.* Territory, 4 Okla. 707, 46 Pac. 487.

Oregon.— Habersham *v.* Sears, 11 Oreg. 431, 5 Pac. 208, 50 Am. Rep. 481.

Pennsylvania.— Com. *v.* Allegheny County Com'rs, 37 Pa. St. 277; Reading *v.* Com., 11 Pa. St. 196, 51 Am. Dec. 534; Com. *v.* Rosseter, 2 Binn. 360, 4 Am. Dec. 451; Douglas *v.* McLean, 25 Pa. Super. Ct. 9; Mercur *v.* Media Electric Light, etc., Co., 19 Pa. Super. Ct. 519; Com. *v.* Walton, 3 Pa. Dist. 391; Carlisle School Dist. *v.* Humrich, 18 Pa. Co. Ct. 322; Com. *v.* Philadelphia, 2 Pars. Eq. Cas. 220; Boyle *v.* Lloyd, 9 Kulp 389; Com. *v.* Ayre, 8 Kulp 243; Com. *v.* O'Day, 6 Kulp 177.

South Carolina.— State *v.* Turner, 32 S. C. 348, 11 S. E. 99.

Tennessee.— Whitesides *v.* Stuart, 91 Tenn. 710, 20 S. W. 245; State *v.* Marks, 6 Lea 12; State *v.* Miller, 1 Lea 596.

Texas.— Jackson *v.* Swayne, 92 Tex. 242, 47 S. W. 711; Hogne *v.* Baker, 92 Tex. 58, 45 S. W. 1004; Arkansas Bldg., etc., Assoc. *v.* Madden, 91 Tex. 461, 44 S. W. 823; Hume *v.* Schintz, 90 Tex. 72, 36 S. W. 429; Steele *v.* Goodrich, 87 Tex. 401, 28 S. W. 939; State *v.* Morris, 86 Tex. 226, 24 S. W. 393; Screwmen's Ben. Assoc. *v.* Benson, 76 Tex. 552, 13 S. W. 379; Ewing *v.* Cohen, 63 Tex. 482; Houston, etc., R. Co. *v.* Knechler, 36 Tex. 382; Jones *v.* McMahon, 30 Tex. 719; Arberry *v.* Beavers, 6 Tex. 457, 55 Am. Dec. 791; Cullem *v.* Latimer, 4 Tex. 329; Milam County *v.* Bell, Dall. 366; Callaghan *v.* Salliway, 5 Tex. Civ. App. 239, 23 S. W. 837.

Utah.— Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398.

Vermont.— Farr *v.* St. Johnsbury, 73 Vt. 42, 50 Atl. 548; Sabine *v.* Rounds, 50 Vt. 74; *In re* White River Bank, 23 Vt. 478.

Virginia.— Sinclair *v.* Young, 100 Va. 284, 40 S. E. 907; Nottoway County *v.* Powell, 95 Va. 635, 29 S. E. 682; Lewis *v.* Whittle, 77 Va. 415; Page *v.* Clopton, 30 Gratt. 415; *Ex p.* Goolsby, 2 Gratt. 575; King William Justices *v.* Munday, 2 Leigh 165, 21 Am. Dec. 604; Parker *v.* Anderson, 2 Patt. & H. 38.

West Virginia.— State *v.* McAllister, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343; Ratliffe *v.* Wayne County Ct., 36 W. Va. 202, 14 S. E. 1004; State *v.* Wood County Ct., 33 W. Va. 589, 11 S. E. 72; Lowther *v.* Davis, 33 W. Va. 132, 10 S. E. 20.

United States.— *In re* Key, 189 U. S. 84, 23 S. Ct. 624, 47 L. ed. 720; *Ex p.* Barksdale, 112 U. S. 177, 5 S. Ct. 421, 28 L. ed. 691; Reeside *v.* Walker, 11 How. 272, 13 L. ed. 693; Kendall *v.* Stokes, 3 How. 87, 11 L. ed. 506, 833; Kendall *v.* U. S., 12 Pet.

lie.[55] By statute it is in some jurisdictions provided that mandamus shall not be denied because petitioner has another specific legal remedy, when mandamus will afford a proper and sufficient remedy.[56]

2. Sufficiency of Other Remedy — a. In General. The remedy which will supersede mandamus may be described in general terms as one competent to afford relief upon the very subject-matter in question,[57] and which is equally convenient, beneficial, and effectual.[58] A remedy against a third person is not sufficient.[59] It has been held that mandamus will lie when other existing remedies are tedious,[60] are not sufficiently speedy,[61] or in case they have become

524, 9 L. ed. 1181; U. S. *v.* Alexandria Bank, 24 Fed. Cas. No 14,514, 1 Cranch C. C. 7.

Canada.— Elzevir *v.* Elzevir Corp., 12 U. C. C. P. 549.

See 33 Cent. Dig. tit. "Mandamus," § 8 *et seq.*

55. *District of Columbia.*— Evans *v.* U. S., 19 App. Cas. 207, action by attorney against pension commissioner adequate for money wrongfully exacted.

Indiana.— Harrison School Tp. *v.* McGregor, 96 Ind. 185.

Michigan.— Bay County *v.* Arenac County, 111 Mich. 105, 69 N. W. 146, holding assumpsit by county against county for taxes collected adequate.

New York.— *Ex p.* Lynch, 2 Hill 45.

Oklahoma.— Steward *v.* Territory, 4 Okla. 707, 46 Pac. 487, action by county against probate judge for fees is adequate.

Pennsylvania.— Kensington Electric Co. *v.* Philadelphia, 187 Pa. St. 446, 41 Atl. 309; Com. *v.* Huttel, 4 Pa. Super. Ct. 95, 40 Wkly. Notes Cas. 71.

See 33 Cent. Dig. tit. "Mandamus," § 8.

56. See the statutes of the several states. And see Brokaw *v.* Bloomington Tp., 130 Ill. 482, 22 N. E. 596, 6 L. R. A. 161; Ohio, etc., R. Co. *v.* People, 121 Ill. 483, 13 N. E. 236; People *v.* Crotty, 93 Ill. 180; East St. Louis *v.* Millard, 14 Ill. App. 483; Lower *v.* U. S., 91 U. S. 536, 23 L. ed. 420, construing Illinois statute.

In Illinois prior to the enactment of a statute to the effect stated in the text the general rule prevailed. People *v.* Huntoon, 71 Ill. 536; Rogers *v.* People, 68 Ill. 154; People *v.* Hatch, 33 Ill. 9; Peoria *v.* Grove, 20 Ill. 525.

57. *Alabama.*— State *v.* Wilson, 123 Ala. 259, 26 So. 482, 45 L. R. A. 772, holding that it must of itself enforce in some way the performance of the particular duty, and not be merely a remedy which saves the party unharmed by the non-performance of the duty.

California.— Babcock *v.* Goodrich, 47 Cal. 488; Fremont *v.* Crippen, 10 Cal. 211, 70 Am. Dec. 711.

Maryland.— Harwood *v.* Marshall, 9 Md. 83.

Michigan.— People *v.* State Treasurer, 24 Mich. 468.

Nevada.— State *v.* Wright, 10 Nev. 167.

Pennsylvania.— Com. *v.* Allegheny County Com'rs, 37 Pa. St. 277; Com. *v.* Pittsburgh, 34 Pa. St. 496; Com. *v.* Colley Tp., 29 Pa. St. 121; James *v.* Bucks County Com'rs, 13 Pa. St. 72; Reading *v.* Com., 11 Pa. St. 196, 51 Am. Dec. 534; Com. *v.* Walton, 3 Pa. Dist. 391; Com. *v.* Westfield, 11 Pa. Co. Ct. 369; Tatham *v.* Philadelphia, 5 Am. L. Reg. 378; Com. *v.* Phillips, 1 Del. Co. 13; Yuengling *v.* Schuylkill County Com'rs, 2 Leg. Chron. 350; Boyer *v.* Saving Fund, 1 Leg. Rec. 231; Hodges *v.* Board of Revision, 3 L. T. N. S. 77.

South Dakota.— State *v.* Menzie, 17 S. D. 535, 97 N. W. 745.

Tennessee.— Memphis Appeal Pub. Co. *v.* Pike, 9 Heisk. 697.

Virginia.— *Ex p.* Goolsby, 2 Gratt. 575; King William Justices *v.* Munday, 2 Leigh 165, 21 Am. Dec. 604; Parker *v.* Anderson, 2 Patt. & H. 38. An obsolete or inoperative remedy is not an adequate one. Page *v.* Clopton, 30 Gratt. 415. The remedy must be one which will enforce the right or the performance of the duty; must reach the act intended, and actually compel the performance of the duty; must be adequate to place the person injured as nearly as possible in the position occupied before the injury or omission. Sinclair *v.* Young, 100 Va. 284, 40 S. E. 907.

Washington.— State *v.* Daggett, 28 Wash. 1, 68 Pac. 340.

Wyoming.— Lobban *v.* State, 9 Wyo. 377, 64 Pac. 82.

58. *Alabama.*— State *v.* Wilson, 123 Ala. 259, 26 So. 482, 45 L. R. A. 772.

Arkansas.— Cummins *v.* Webb, 4 Ark. 229.

California.— Raisch *v.* San Francisco Bd. of Education, 81 Cal. 542, 22 Pac. 890; Fremont *v.* Crippen, 10 Cal. 211, 70 Am. Dec. 711.

Nebraska.— State *v.* Coufal, 1 Nebr. (Unoff.) 128, 95 N. W. 362. Where the warden of the penitentiary refused to allow the sheriff to serve a writ of replevin to recover personalty within the penitentiary, that under the statute such action could have been changed into one for conversion does not show such an adequate remedy at law as to bar an application for mandamus to compel the warden to permit service of the writ. Hopkins *v.* State, 64 Nebr. 10, 89 N. W. 401.

Pennsylvania.— Wetherill *v.* Delaware County, 2 Del. Co. 45.

59. Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398; American Bridge Co. *v.* Wheeler, 35 Wash. 40, 76 Pac. 534; State *v.* Daggett, 28 Wash. 1, 68 Pac. 340.

60. Bradley *v.* McGrabb, Dall. (Tex.) 504.

61. State *v.* Gardner, 32 Wash. 550, 73 Pac. 690, 98 Am. St. Rep. 858 (holding that replevin was not adequate where sheriff re-

obsolete,[62] or are circuitous.[63] The fact that an existing and specific legal remedy will be unproductive will not authorize the issuance of the writ.[64]

b. Equitable Remedies. An equitable remedy will not deprive a party of his legal remedy by mandamus,[65] unless given by express statute,[66] or unless the relator before asking the writ has gone into a court of equity and instituted proceedings under which the relief may be obtained that is sought by mandamus.[67] But the fact that an equitable remedy exists may influence the exercise of the court's discretion.[68]

c. Actions For Damages. In case adequate relief may be had by an action for damages, mandamus will not lie.[69] But in the case of corporations and ministerial officers, there is an exception to the general rule, and they may be compelled to exercise their functions according to law by mandamus, even though the party has another remedy against them by action for neglect of duty.[70] And as a develop-

fused to restore exempt property); State *v.* Daggett, 28 Wash. 1, 63 Pac. 340.

In Louisiana, under Code Pr. art. 831, a party may obtain the writ, whether he has other means of relief or not, if the slowness of ordinary legal forms be likely to produce great delay and defeat the ends of justice. Hatch *v.* New Orleans City Bank, 1 Rob. 470.

62. Page *v.* Clopton, 30 Gratt. (Va.) 415.

63. State *v.* Coufal, 1 Nebr. (Unoff.) 128, 95 N. W. 362.

64. Reg. *v.* Victoria Park Co., 1 Q. B. 288, 4 P. & D. 639, 41 E. C. L. 544; Hughes *v.* Newcastle Dist. Mut. F. Ins. Co., 13 U. C. Q. B. 153, refusing the writ against a mutual insurance company, to compel them to pay a claim, the ground of application being that they had no real or personal property which could be taken in execution. And *compare* *Ex p.* Rugby Charity, 9 D. & R. 214, 22 E. C. L. 589.

65. *California.*— Eby *v.* Red Bank School-Dist., 87 Cal. 166, 25 Pac. 240.

Indiana.— State *v.* Custer, 11 Ind. 210.

Kansas.— Simpson *v.* Kansas City, 52 Kan. 88, 34 Pac. 406.

Maryland.— Baltimore University *v.* Colton, 98 Md. 623, 57 Atl. 14, 64 L. R. A. 108; Hardcastle *v.* Maryland, etc., R. Co., 32 Md. 32.

Michigan.—Tawas, etc., R. Co. *v.* Iosco Cir. Judge, 44 Mich. 479, 7 N. W. 65; People *v.* State Treasurer, 24 Mich. 468. *Contra,* see Clarke *v.* Hill, 132 Mich. 434, 93 N. W. 1044, holding equitable remedy proper to compel transfer of stock.

Missouri.— State *v.* Lafayette County Ct., 41 Mo. 221.

New Jersey.— Wilson *v.* Longstreet, 38 N. J. L. 312.

New York.— People *v.* New York Cent., etc., R. Co., 168 N. Y. 187, 61 N. E. 172 [*reversing* on other grounds 61 N. Y. App. Div. 494, 70 N. Y. Suppl. 684]; People *v.* Brennan, 39 Barb. 522; People *v.* New York, 10 Wend. 393.

Pennsylvania.— Phœnix Iron Co. *v.* Com., 113 Pa. St. 563, 6 Atl. 75; Com. *v.* Pittsburgh, 34 Pa. St. 496; Com. *v.* Allegheny County, 32 Pa. St. 218; Com. *v.* Johnson, 2 Binn. 275; Douglas *v.* McLean, 25 Pa. Super. Ct. 9; Com. *v.* Coxe, 1 Leg. Chron. 89. *Compare* Lancaster County *v.* Lancaster, 160 Pa. St. 411, 28 Atl. 854; Com. *v.* Colley Tp., 29 Pa. St. 121.

Rhode Island.— Brennan *v.* Butler, 22 R. I. 228, 47 Atl. 320.

Tennessee.— State *v.* Sneed, 105 Tenn. 711, 58 S. W. 1070, enjoining collection of judgment improperly entered will not defeat mandamus to correct record.

Texas.— St. Louis, etc., R. Co. *v.* Smith, (Civ. App. 1907) 99 S. W. 171, holding that writ to judge to proceed lies, although there is a remedy by injunction, mandamus being more expeditious.

Wyoming.— Lobban *v.* State, 9 Wyo. 377, 64 Pac. 82, suit to quiet title will not defeat mandamus to compel tax receipt.

Canada.— See *In re* Stratford, etc., R. Co., 38 U. C. Q. B. 112.

See 33 Cent. Dig. tit. "Mandamus," § 8.

Contra.— See State *v.* Hartford St. R. Co., 76 Conn. 174, 56 Atl. 506 (holding equity to afford the proper remedy for a nuisance caused by a cross-over switch, under peculiar conditions); Dalton, etc., R. Co. *v.* McDaniel, 56 Ga. 191.

66. Selectmen *v.* Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340; State *v.* Manchester, etc., R. Co., 62 N. H. 29.

A remedy by mandatory injunction supersedes the right to mandamus. Williams *v.* Maysville Tel. Co., 119 Ky. 33, 82 S. W. 995, 26 Ky. L. Rep. 945.

67. Hardcastle *v.* Maryland, etc., R. Co., 32 Md. 32; Durfee *v.* Harper, 22 Mont. 354, 56 Pac. 582, injunction proper remedy to compel stock transfer.

68. People *v.* New York Cent., etc., R. Co., 168 N. Y. 187, 61 N. E. 172 [*reversing* on other grounds 61 N. Y. App. Div. 494, 70 N. Y. Suppl. 684].

69. People *v.* Campbell, 72 N. Y. 496; Birmingham F. Ins. Co. *v.* Com., 92 Pa. St. 72; Sweet *v.* Conley, 20 R. I. 381, 39 Atl. 326; Wilkinson *v.* Providence Bank, 3 R. I. 22. See Ware *v.* Cir. Judge, 75 Mich. 488, 42 N. W. 997.

Nuisance.— A right of action for damages will not prevent mandamus to abate a nuisance. Habersham *v.* Savannah, etc., Canal Co., 26 Ga. 665, such as the failure of a canal company to bridge its canal.

70. *California.*— Babcock *v.* Goodrich, 47 Cal. 488; People *v.* Loucks, 28 Cal. 69;

ment of this rule it is held by the weight of authority that mandamus will lie, although the party may have also a remedy upon the official bond of a ministerial officer.[71]

d. Criminal Remedies. A criminal remedy is not as a general rule considered an adequate one, so as to prevent the issue of mandamus.[72] But mandamus will not issue to compel a magistrate to continue the examination of a person on a criminal charge, where the relator has a remedy through the placing of an indictment before the grand jury.[73] Nor will mandamus lie to compel a court to take jurisdiction of offenses against a state law, which can also be prosecuted in other courts as violations of ordinances.[74]

e. Appeal and Error. Mandamus will not lie where there is an adequate remedy by appeal, or by writ of error.[75]

Fremont *v.* Crippen, 10 Cal. 211, 70 Am. Dec. 711.

Louisiana.— Cumberland, etc., Tel. Co. *v.* Morgan's, etc., R. Co., 51 La. Ann. 29, 24 So. 803, 72 Am. St. Rep. 442, railroad compelled to perform public duty.

Maryland.— Baltimore University *v.* Colton, 98 Md. 623, 57 Atl. 14, 64 L. R. A. 108, action not a remedy for expulsion from school.

New York.— People *v.* Mead, 24 N. Y. 114; Buck *v.* Lockport, 6 Lans. 251; People *v.* Taylor, 45 Barb. 129, 1 Abb. Pr. N. S. 200, 30 How. Pr. 78; People *v.* Guggenheimer, 28 Misc. 41, 35 N. Y. Suppl. 222; People *v.* Steele, 2 Barb. 397; People *v.* Palmer, 14 Misc. 41, 35 N. Y. Suppl. 222; People *v.* New York, 59 How. Pr. 277; People *v.* Starr, 55 How. Pr. 388 (holding that a county treasurer may be compelled to sue on a supervisor's bond, although the latter has given another bond to the town clerk on which recovery might be had); Adriance *v.* New York, 12 How. Pr. 224; McCullough *v.* Brooklyn, 23 Wend. 458; People *v.* New York, 10 Wend. 393. See also *Ex p.* Lynch, 2 Hill 45. But *compare* People *v.* Chenango County, 11 N. Y. 563. *Contra*, See People *v.* Brooklyn, 1 Wend. 318, 19 Am. Dec. 502.

Wisconsin.— State *v.* Wilson, 17 Wis. 687; State *v.* Smith, 11 Wis. 65.

71. *California.*— People *v.* Loucks, 28 Cal. 68.

Connecticut.— State *v.* Fyler, 48 Conn. 145.

Iowa.— Prescott *v.* Gonser, 34 Iowa 175.

Missouri.— State *v.* Dougherty, 45 Mo. 294.

Ohio.— State *v.* Staley, 38 Ohio St. 259. But see State *v.* Meiley, 22 Ohio St. 534, holding, when money had been paid into the probate court in condemnation proceedings and wrongfully retained by the probate judge from the party entitled thereto, that mandamus would not lie until the ordinary remedy by action against the judge for the money or on his bond had been exhausted.

Washington.— American Bridge Co. *v.* Wheeler, 35 Wash. 40, 76 Pac. 534.

Contra.— *Alabama.*— Speed *v.* Cocke, 57 Ala. 209; Arrington *v.* Van Houton, 44 Ala. 284.

Indiana.— State *v.* Montgomery County, 25 Ind. 210.

Kentucky.— Adair *v.* Hancock Deposit Bank, 107 Ky. 212, 53 S. W. 295, 21 Ky. L. Rep. 934. See also Elliott County *v.* Kitchen, 14 Bush 289.

Oklahoma.— Stewart *v.* Territory, 4 Okla. 707, 46 Pac. 487.

Oregon.— Habersham *v.* Sears, 11 Oreg. 431, 5 Pac. 208, 50 Am. Dec. 481.

Specific applications of this rule see *infra*, VI.

72. *California.*— Fremont *v.* Crippen, 10 Cal. 211, 70 Am. Dec. 711.

Nebraska.—Moores *v.* State, 63 Nebr. 345, 88 N. W. 514.

New Jersey.— *In re* Trenton Water Power Co., 20 N. J. L. 659.

New York.— People *v.* Brennan, 39 Barb. 522; People *v.* Troy, etc., R. Co., 37 How. Pr. 427; People *v.* New York, 10 Wend. 393. But the court may consider the fact that such a remedy exists, in exercising its discretion. People *v.* Listman, 84 N. Y. App. Div. 633, 82 N. Y. Suppl. 784.

Pennsylvania.—Baer *v.* Wilkesbarre School Directors, 4 Pa. Co. Ct. 43. But it is held that a clear statutory remedy by indictment must be resorted to in place of mandamus, as to compel the erection of a bridge. Garman *v.* Carroll, etc., Tp., 1 Pa. Dist. 530. See also Reading *v.* Com., 11 Pa. St. 196, 51 Am. Dec. 534, holding indictment the proper remedy to abate a nuisance. But see Com. *v.* Doylestown, 16 Pa. Co. Ct. 161, granting mandamus to keep a highway in repair, notwithstanding a remedy by indictment.

Washington.— State *v.* Brewer, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858.

Indictment as adequate remedy for obstructing highway see *infra*, VI, O, 4, h.

73. Reg. *v.* Duvaney, 12 N. Brunsw. 581.

74. Jackson *v.* Swayne, 92 Tex. 242, 47 S. W. 711.

75. *Alabama.*—Bickley *v.* Bickley, 129 Ala. 403, 29 So. 854; Baldwin *v.* Roman, 126 Ala. 266, 28 So. 40; *Ex p.* Woodruff, 123 Ala. 99, 26 So. 509; Anniston First Nat. Bank *v.* Cheney, 120 Ala. 117, 23 So. 733; *Ex p.* Carlisle, 118 Ala. 175, 24 So. 30; Wilson *v.* Duncan, 114 Ala. 659, 21 So. 1017; *Ex p.* Redd, 73 Ala. 548; *Ex p.* South, etc., Alabama R. Co., 65 Ala. 599; *Ex p.* Schmidt, 62 Ala. 252; *Ex p.* Grant, 53 Ala. 16; *Ex p.* Jones, 1 Ala. 15.

California. — Aldrich *v.* Alameda County Super. Ct., 135 Cal. 12, 66 Pac. 846; Donohue *v.* San Francisco Super. Ct., 93 Cal. 252,

f. Motions or Application to Court. If a substantial remedy can be obtained

28 Pac. 1043; People *v.* Thompson, 66 Cal. 398, 5 Pac. 686; Goytino *v.* McAleer, (App. 1906) 88 Pac. 991.

Colorado.—People *v.* Judge Boulder County Dist. Ct., 18 Colo. 500, 33 Pac. 162.

Florida.— State *v.* Call, 41 Fla. 450, 26 So. 1016.

Idaho.— State *v.* Whelan, 6 Ida. 78, 53 Pac. 2.

Indiana.—State *v.* Schmetzer, 156 Ind. 528, 60 N. E. 269; State *v.* Tippecanoe County, 131 Ind. 90, 30 N. E. 892; Knox County *v.* Montgomery, 106 Ind. 517, 6 N. E. 915; State *v.* Morris, 103 Ind. 161, 2 N. E. 355; State *v.* Tippecanoe County, 45 Ind. 501; Boone County *v.* State, 38 Ind. 193; Fogle *v.* Gregg, 26 Ind. 345; Johnson County *v.* Hicks, 2 Ind. 527; Marshall *v.* State, 1 Ind. 72; State *v.* Shelby County, 5 Ind. App. 220, 32 N. E. 92.

Iowa.— Preston *v.* Marion Independent School Dist. Bd. of Education, 124 Iowa 355, 100 N. W. 54; Barnett *v.* Earlham Independent Dist. Directors, 73 Iowa 134, 34 N. W. 780; Aananson *v.* Anderson, 70 Iowa 102, 30 N. W. 38; Marshall *v.* Sloan, 35 Iowa 445; State *v.* Floyd County Judge, 5 Iowa 380.

Kentucky.— Shine *v.* Kentucky Cent. R. Co., 85 Ky. 177, 3 S. W. 18, 8 Ky. L. Rep. 748.

Louisiana.— Hanson *v.* St. Mary Parish Police Jury, 116 La. 1080, 41 So. 321; State *v.* Judge Orleans Parish Civ. Dist. Ct., 107 La. 474, 31 So. 867; State *v.* Judge Twenty-First Judicial Dist., 36 La. Ann. 394; State *v.* Taylor, 32 La. Ann. 977; State *v.* Judge Sixth Dist. Ct., 12 La. Ann. 342; State *v.* Judge New Orleans Second Dist. Ct., 10 La. Ann. 420; State *v.* Judge Sixth Judicial Dist. Ct., 9 La. Ann. 250; State *v.* Judge New Orleans Fourth Dist. Ct., 8 La. Ann. 92; Macarty's Succession, 2 La. Ann. 979 [*followed* in *Ex p.* Bujol, 3 La. Ann. 716].

Maryland.— State *v.* Baltimore County Com'rs, 46 Md. 621.

Michigan.— Flint *v.* Genesee Cir. Judge, (1906) 109 N. W. 769; Travelers' Ins. Co. *v.* Kent Cir. Judge, 144 Mich. 687, 108 N. W. 363; Cosgrove *v.* Wayne Cir. Judge, 144 Mich. 682, 108 N. W. 361; Hitchcock *v.* Wayne Cir. Judge, 144 Mich. 362, 107 N. W. 1123; Sharp *v.* Montcalm Cir. Judge, 144 Mich. 328, 107 N. W. 874; Wells *v.* Montcalm Cir. Judge, 139 Mich. 544, 102 N. W. 1001; Valley City Desk Co. *v.* Kent Cir. Judge, 139 Mich. 194, 102 N. W. 651; Cattermole *v.* Ionia Cir. Judge, 136 Mich. 274, 99 N. W. 1; Michigan Mut. F. Ins. Co. *v.* Wayne Cir. Judge, 112 Mich. 270, 70 N. W. 582; Aldrich *v.* Wayne Cir. Judge, 111 Mich. 525, 69 N. W. 1108; Olson *v.* Muskegon Cir. Judge, 49 Mich. 85, 13 N. W. 369; People *v.* Judge Detroit Super. Ct., 32 Mich. 190.

Missouri.— State *v.* McKee, 150 Mo. 233, 51 S. W. 421; State *v.* Cape Girardeau County Ct., 109 Mo. 248, 19 S. W. 23; Sheridan *v.* Fleming, (1887) 2 S. W. 838; State *v.* Megown, 89 Mo. 156, 1 S. W. 208; State *v.* Lubke, 85 Mo. 338; State *v.* Platte County Ct., 83 Mo. 539; State *v.* Macon County Ct., 68 Mo. 29; Blecker *v.* St. Louis Law Commissioner, 30 Mo. 111; Williams *v.* Judge Cooper Ct. C. Pl., 27 Mo. 225; State *v.* Walker, 85 Mo. App. 247.

Montana.— State *v.* Bd. of Medical Examiners, 10 Mont. 162, 25 Pac. 440.

Nebraska.— State *v.* Jessen, 66 Nebr. 515, 92 N. W. 584; State *v.* Fawcett, 64 Nebr. 496, 90 N. W. 250; State *v.* Cornell, 54 Nebr. 158, 74 N. W. 398; State *v.* Merrell, 43 Nebr. 575, 61 N. W. 754; State *v.* Laflin, 40 Nebr. 441, 58 N. W. 936; State *v.* Cotton, 33 Nebr. 560, 50 N. W. 688; State *v.* Babcock, 22 Nebr. 38, 33 N. W. 711; State *v.* Westover, 2 Nebr. (Unoff.) 768, 89 N. W. 1002.

Nevada.— Mayberry *v.* Bowker, 14 Nev. 336.

New Jersey.— Stockton *v.* Burlington Bd. of Education, 72 N. J. L. 80, 59 Atl. 1061.

New York.— People *v.* Hamden Bd. of Auditors, 71 Hun 461, 24 N. Y. Suppl. 974; People *v.* Bolte, 35 Misc. 53, 71 N. Y. Suppl. 74; People *v.* Board of Education, 32 Misc. 63, 66 N. Y. Suppl. 149; People *v.* Roesch, 27 Misc. 44, 57 N. Y. Suppl. 295; People *v.* Oneida C. Pl., 21 Wend. 20; People *v.* New York Super. Ct., 18 Wend. 575; Livingston *v.* New York Super. Ct., 10 Wend. 545; *Ex p.* Nelson, 1 Cow. 417; Janesen *v.* Davison, 2 Johns. Cas. 72.

Ohio.— State *v.* Hamilton County, 26 Ohio St. 364; State *v.* Pike, 17 Ohio Cir. Ct. 624, 9 Ohio Cir. Dec. 299.

Pennsylvania.—Com. *v.* Philadelphia County Judges, 3 Binn. 273; Yuengling *v.* Schuylkill County Com'rs, 2 Leg. Chron. 350.

South Carolina.— State *v.* Hiers, 51 S. C. 388, 29 S. E. 89; *Ex p.* Mackey, 15 S. C. 322; State *v.* Mitchell, 2 Treadw. 703.

Texas.— Smith *v.* Conner, 98 Tex. 434, 84 S. W. 815; State *v.* Fisher, 94 Tex. 491, 62 S. W. 540; Aycock *v.* Clark, 94 Tex. 375, 60 S. W. 665; Steele *v.* Goodrich, 87 Tex. 401, 28 S. W. 939; State *v.* Morris, 86 Tex. 226, 24 S. W. 393; Kruegel *v.* Nash, 31 Tex. Civ. App. 15, 70 S. W. 983; Plummer *v.* Gholson, (Civ. App. 1898) 44 S. W. 1.

Utah.— State *v.* Booth, 21 Utah 88, 59 Pac. 553.

Washington.— State *v.* Tallman, 29 Wash. 317, 69 Pac. 1101; State *v.* Island County Super. Ct., 21 Wash. 631, 59 Pac. 505; State *v.* Hadley, 20 Wash. 520, 56 Pac. 29; State *v.* Hitt, 13 Wash. 547, 43 Pac. 638; State *v.* Allen, 8 Wash. 168, 35 Pac. 609. See also State *v.* Moore, 21 Wash. 629, 59 Pac. 505.

West Virginia.— Miller *v.* Tucker County Ct., 34 W. Va. 285, 12 S. E. 702.

Wisconsin.— State *v.* Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33; State *v.* Dick, 103 Wis. 407, 79 N. W. 421; State *v.* Sheboygan County, 29 Wis. 79; State *v.* Washburn, 22 Wis. 99 [*overruling* State *v.* McArthur, 13 Wis. 407].

United States.— Connecticut Mut. L. Ins.

by motion, or application to the court in an action, it is held that mandamus will not lie.[76]

g. Specific Statutory Remedies The existence of a specific statutory remedy will exclude mandamus,[77] but a statutory remedy to have such an effect must be

Co. *v.* Petitioner, 131 U. S. Appendix clxxx, 26 L. ed. 561; *Ex p.* Newman, 14 Wall. 152, 20 L. ed. 877.

See 33 Cent. Dig. tit. "Mandamus," § 9.

76. *Alabama.*— State *v.* Waller, 133 Ala. 199, 32 So. 163, sheriff compelled to release a levy by motion.

California.— State Bank *v.* Shaber, 55 Cal. 322, holding a motion to dismiss appeal improperly taken, operating as a stay, adequate, instead of mandamus to compel payment of a judgment against a city for injuries by a mob.

Nebraska.— State *v.* Houseworth, 63 Nebr. 658, 88 N. W. 858, motion to compel clerk to approve bond adequate.

New York.— People *v.* McGoldrick, 33 N. Y. Suppl. 441, 24 N. Y. Civ. Proc. 292, 1 N. Y. Annot. Cas. 401; People *v.* Wood, 2 Abb. Pr. 90, 11 How. Pr. 563.

Pennsylvania.— Lansdowne *v.* Upper Darby Tp., 9 Pa. Dist. 694, 7 Del. Co. 566, decree apportioning municipal debts on division enforced by motion.

Texas.— Nowlin *v.* Hall, 97 Tex. 441, 79 S. W. 806 [*affirming* (Civ. App. 1903) 77 S. W. 419] (lower court compelled to make findings by motion); Shrewsbury *v.* Ellis, 26 Tex. Civ. App. 406, 64 S. W. 700 (entry on probate fee book compelled by motion).

77. *Alabama.*— Scarbrough *v.* Watson, 140 Ala. 349, 37 So. 281 [*modifying* Marengo County *v.* Lyles, 101 Ala. 423, 12 So. 412], claim against county.

Arizona.— Dorrington *v.* Yuma County, (1902) 68 Pac. 541, claim for salary against a county.

California.— Williams *v.* Bagnelle, 138 Cal. 699, 72 Pac. 408, (1902) 70 Pac. 1058, teacher's salary.

Delaware.— Hastings *v.* Henry, 1 Marv. 287, 40 Atl. 1125.

Illinois.— People *v.* Cover, 50 Ill. 100.

Indiana.— State *v.* Kamman, 151 Ind. 407, 51 N. E. 483; State *v.* Yant, 134 Ind. 121, 33 N. E. 896; Louisville, etc., R. Co. *v.* State, 25 Ind. 177, 87 Am. Dec. 358.

Kansas.— State *v.* Stockwell, 7 Kan. 98.

Louisiana.— State *v.* New Orleans Bd. of Police, 113 La. 424, 37 So. 16; State *v.* New Orleans, McGloin 47.

Massachusetts.— Gardner *v.* Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340 (order for constructing railroad enforced by equitable remedy under a statute); Perry *v.* Hull, 180 Mass. 547, 62 N. E. 962 (remedy for decisions of political officers).

Michigan.— State Secretary *v.* Natural Salt Co., 126 Mich. 644, 86 N. W. 124; Johnston *v.* Mitchell, 120 Mich. 589, 79 N. W. 812; Sherman *v.* Sanilac County, 84 Mich. 108, 47 N. W. 513.

Missouri.— Tyler *v.* Lamar Tp. Bd., 75 Mo. App. 561.

Nebraska.— State *v.* Stearns, 11 Nebr. 104, 7 N. W. 743.

New Hampshire.— Goodell *v.* Woodbury, 71 N. H. 378, 52 Atl. 855 (petition to police commission adequate); Manchester *v.* Furnald, 71 N. H. 153, 51 Atl. 657 (statutory petition to abate taxes excludes mandamus); Sunapee School Dist. No. 8 *v.* Perkins, 49 N. H. 538.

New Jersey.— Stockton *v.* Burlington Bd. of Education, 72 N. J. L. 80, 59 Atl. 1061 (application to superintendent of instruction adequate where pupils were wrongfully transferred); Jefferson *v.* Atlantic City Bd. of Education, 64 N. J. L. 59, 45 Atl. 775; Harris *v.* Krause, 60 N. J. L. 72, 37 Atl. 439.

New York.— People *v.* Interurban St. R. Co., 177 N. Y. 296, 69 N. E. 596 [*affirming* 85 N. Y. App. Div. 407, 83 N. Y. Suppl. 622]; People *v.* Crennan, 141 N. Y. 239, 36 N. E. 187; Jones *v.* Fonda, 85 N. Y. App. Div. 265, 83 N. Y. Suppl. 1012; Matter of O'Hara, 63 N. Y. App. Div. 512, 71 N. Y. Suppl. 613; People *v.* Martin, 62 Barb. 570, 43 How. Pr. 52; People *v.* Busti Bd. of Canvassers, 32 Misc. 123, 66 N. Y. Suppl. 199; People *v.* Stevens, 5 Hill 616.

Ohio.— State *v.* Murphy, 3 Ohio Cir. Ct. 332, 2 Ohio Cir. Dec. 190.

Pennsylvania.— Com. *v.* Sellers, 7 Pa. Dist 665, 21 Pa. Co. Ct. 509; Com. *v.* Pease, 1 Dauph. Co. Rep. 47; Com. *v.* Miffintown, 2 Leg. Gaz. 75; Com. *v.* Clark, 6 Phila. 498. A statutory remedy giving a contest supersedes mandamus to admit a person elected. Com. *v.* Philadelphia, 2 Pars. Eq. Cas. 220. A like rule was applied to mandamus to compel the extension of a wharf, there being a special review. Com. *v.* Clark, *supra.* Mandamus to compel registry of a voter denied because of two statute remedies given. Com. *v.* Cuncannon, 3 Brewst. 344. Mandamus refused to reduce an assessment, for like reasons. Yuengling *v.* Schuylkill County Com'rs, 2 Leg. Chron. 350. Also mandamus, to compel a recorder to enter satisfaction of a mortgage. Com. *v.* Lane, 3 Wkly. Notes Cas. 546. A statutory remedy for the failure of an election officer to advertise an election takes the place of mandamus. Com. *v.* Sellers, 7 Pa. Dist. 665, 21 Pa. Co. Ct. 509. It was held in 1843 that a special remedy under the Statute of Westminster II, and not mandamus, was the proper method of procuring the settlement of a bill of exceptions. Drexel *v.* Man, 6 Watts & S. 386, 40 Am. Dec. 573. And in 1888 a peremptory mandamus was issued under such statute for the purpose. Reichenbach *v.* Ruddach, 121 Pa. St. 18, 15 Atl. 488. Where a statute as to removal of paupers does not give a remedy, but a punishment for non-performance, mandamus will issue. Porter Tp. *v.* Jersey Shore, 82 Pa. St. 275.

adequate[78] and its applicability must not be doubtful,[79] and it must not be obsolete.[80] A remedy available to a city, however, will not prevent mandamus by the state to enforce a judgment concerning a public matter.[81]

3. Statutory Duties Where No Remedy Is Provided. If the statute prescribing a duty provides no remedy mandamus will lie.[82]

4. Doubtful Cases. If the remedy is doubtful, the writ will issue.[83]

5. Effect of Election of Other Remedy. Where relator has sought other means of redress the writ should be denied,[84] unless, it would seem, in a case where such other relief would be unavailing.[85]

6. Waiver of Objections. An objection that mandamus is not the only plain and adequate remedy may be waived.[86] But defendant may insist that

Rhode Island.— Kenney *v.* State Bd. of Dentistry, 26 R. I. 538, 59 Atl. 932.

South Dakota.— Taubman *v.* Aurora County, 14 S. D. 206, 84 N. W. 784, special appeal as to official newspaper adequate.

Virginia.— Eubank *v.* Boughton, 98 Va. 499, 36 S. E. 529, appeal to county school superintendent adequate. A statutory action of debt excludes mandamus by contractor against a county. King William Justices *v.* Munday, 2 Leigh 165, 21 Am. Dec. 604.

Washington.— State *v.* Tallman, 25 Wash. 295, 65 Pac. 545.

West Virginia.— Welty *v.* Barbour County Ct., 46 W. Va. 460, 33 S. E. 269. A statutory remedy on the sheriff's bond excludes mandamus to compel the sheriff to pay claims against the county from a fund in his hand raised for the purpose. Ratliffe *v.* Wayne County Ct., 36 W. Va. 202, 14 S. E. 1004.

Wisconsin.— State *v.* Houser, 122 Wis. 534, 100 N. W. 964 (special statutory decision of political committee excludes mandatory injunction); State *v.* Oates, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912.

United States.— Moore *v.* Greenhow, 114 U. S. 338, 5 S. Ct. 1020, 29 L. ed. 240.

Mandatory injunction.— Under Civ. Code Pr. § 271, providing that a mandatory injunction may affirmatively direct the doing of the act required to be done, injunction and not mandamus is the proper remedy to compel a telephone company to install an instrument. Williams *v.* Maysville Tel. Co., 119 Ky. 33, 82 S. W. 995, 26 Ky. L. Rep. 945.

78. State *v.* Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225, statutory action for damages not adequate for refusal of terminal company to admit carrier to station. If a railroad company, required to erect fences on both sides of its road, builds a fence on the edge of its road-bed, and not at the margin of its right of way, an adjoining landowner may compel it to build on such margin. A remedy given the landowner to build and recover the expense is inapplicable, because the statute does not contemplate two fences, and the company had built one in the wrong place. Ohio, etc., R. Co. *v.* People, 121 Ill. 483, 13 N. E. 236. See also *supra*, note 77.

79. People *v.* Head, 25 Ill. 325 (doubtful remedy not adequate); Reg. *v.* St. George the Martyr, 56 J. P. 821, 61 L. J. Q. B. 398, 67 L. T. Rep. N. S. 412. See also *supra*, note 77.

80. Reg. *v.* St. George the Martyr, 56 J. P. 821, 61 L. J. Q. B. 398, 67 L. T. Rep. N. S. 412.

81. A provision in the charter of a city giving it the right to construct a bridge over railroad tracks, and to recoup the expenses from the railroad company, where the company, after an order duly passed, fails to construct such bridge, does not exclude other methods of enforcing the order; and the state, by mandamus, may compel an obedience where the order has been affirmed by a court on appeal. State *v.* New York, etc., R. Co., 71 Conn. 43, 40 Atl. 925.

82. Ottawa *v.* People, 48 Ill. 233; South St. Bridge Com'rs *v.* Philadelphia, 3 Brewst. (Pa.) 596; Simpson *v.* Scottish Union Ins. Co., 1 Hem. & M. 618, 9 Jur. N. S. 711, 32 L. J. Ch. 329, 8 L. T. Rep. N. S. 112, 1 New Rep. 537, 11 Wkly. Rep. 459.

83. *Alabama.*— Etheridge *v.* Hall, 7 Port. 47.

Nevada.— State *v.* Wright, 10 Nev. 167.

New York.— People *v.* Treanor, 15 N. Y. App. Div. 508, 44 N. Y. Suppl. 528; Clark *v.* Miller, 47 Barb. 38 [*affirmed* in 54 N. Y. 528]; *In re* Williamsburgh, 1 Barb. 34.

Pennsylvania.— Com. *v.* Mount Moriah Cemetery Assoc., 10 Phila. 385.

Utah.— Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398.

England.— Rex *v.* Nottingham Old Water Works Co., 6 A. & E. 355, 6 L. J. K. B. 89, 1 N. & P. 480, W. W. & D. 166, 33 E. C. L. 201.

Canada.— *Ex p.* Atty.-Gen., 17 N. Brunsw. 667.

84. *Illinois.*— Peoria Bd. of School Inspectors *v.* People, 20 Ill. 525.

Louisiana.— State *v.* Rightor, 38 La. Ann. 558.

Ohio.— State *v.* Lipa, 28 Ohio St. 665.

Washington.—Achey *v.* Creech, 21 Wash. 319, 58 Pac. 208.

United States.— Hitchcock *v.* Galveston, 48 Fed. 640.

Same question pending in a court of equity defeats writ. People *v.* Chicago, 53 Ill. 424.

85. Apgar *v.* Chester Tp. School Dist. No. 4, 34 N. J. L. 308; People *v.* White, 11 Abb. Pr. (N. Y.) 168.

86. Byington *v.* Hamilton, 37 Kan. 758, 16 Pac. 54.

there is another adequate remedy, although he has also interposed other defenses.[87]

E. Use of Mandamus For Review. Mandamus will not be granted for the purpose of review,[88] nor is it available as a substitute for an appeal or writ of

87. People *v.* Yonkers Bd. of Police Com'rs, 174 N. Y. 450, 67 N. E. 78, 95 Am. St. Rep. 596.

88. *Alabama.*— Southern R. Co. *v.* Walker, 132 Ala. 62, 31 So. 487; *Ex p.* McKissack, 107 Ala. 493, 18 So. 140; *Ex p.* Hayes, 92 Ala. 120, 9 So. 156; State *v.* Williams, 69 Ala. 311; *Ex p.* Garlington, 26 Ala. 170; *Ex p.* Rowland, 26 Ala. 133; *Ex p.* Small, 25 Ala. 74; *Ex p.* Elston, 25 Ala. 72; State *v.* Bowen, 6 Ala. 511, where it was held that the final judgment of a court of record in a matter over which it has exclusive jurisdiction is conclusive until reversed, and mandamus will not lie to overthrow it. And see *Ex p.* Mahone, 30 Ala. 49, 50, 68 Am. Dec. 111, where the court said *obiter*: "Neither is it our purpose to assert the doctrine, that by the writ of mandamus we can control the judgment of the primary court, on the evidence in the cause. We exhaust our power when we require the evidence to be heard and considered." But *compare* Wilson *v.* Duncan, 114 Ala. 659, 672, 20 So. 1017 (where the court said: "It is sometimes employed to correct the errors of inferior tribunals, and to prevent a failure of justice, or irreparable injury, when there is a clear legal right, and there is absence of any other adequate remedy); *Ex p.* Garland, 42 Ala. 559 (where the court said: "The mandamus has become, within its limited sphere of operation in this State, as much a means of reviewing the decision of a subordinate court as an appeal").

Arkansas.— *Ex p.* Hutt, 14 Ark. 368; *Ex p.* Williamson, 8 Ark. 424.

California.— Sankey *v.* Levy, 69 Cal. 244, 10 Pac. 336; People *v.* Pratt, 28 Cal. 166, 87 Am. Dec. 110.

Colorado.— People *v.* Clerk Arapahoe County Dist. Ct., 22 Colo. 280, 44 Pac. 506.

Indiana.— Gregg *v.* State, 151 Ind. 241, 51 N. E. 359.

Iowa.— Scripture *v.* Burns, 59 Iowa 70, 12 N. W. 760.

Louisiana.— State *v.* Judges Orleans Parish Ct. of App., 36 La. Ann. 481.

Maine.— Smyth *v.* Titcomb, 31 Me. 272.

Massachusetts.— Smith *v.* Boston, 1 Gray 72.

Michigan.— Detroit United R. Co. *v.* Oakland County Cir. Judge, (1906) 109 N. W. 846; Wells *v.* Montcalm Cir. Judge, 139 Mich. 544, 102 N. W. 1001, holding that mandamus will not be allowed to take the place of an appeal or a writ of prohibition, or any other writ to review the action of a lower court, even where two courts of coördinate jurisdiction are assuming control of the same parties and subject-matter.

Missouri.— State *v.* McKee, 150 Mo. 233, 51 S. W. 421; State *v.* Rombauer, 125 Mo. 632, 28 S. W. 968; Williams *v.* Cooper Ct. C. Pl. Judge, 27 Mo. 225; Dunklin County *v.* Dunklin County Dist. Ct., 23 Mo. 449; State *v.* Walker, 85 Mo. App. 247; State *v.* Judge St. Louis Cir. Ct., 1 Mo. App. 543.

Nebraska.— State *v.* Jessen, 66 Nebr. 515, 92 N. W. 584; Miles *v.* State, 53 Nebr. 305, 73 N. W. 678; State *v.* Piper, 50 Nebr. 25, 69 N. W. 378; State *v.* Laflin, 40 Nebr. 441, 58 N. W. 936; State *v.* Holmes, 38 Nebr. 355, 56 N. W. 979; McGee *v.* State, 32 Nebr. 149, 49 N. W. 220; State *v.* Kinkaid, 23 Nebr. 641, 37 N. W. 612; State *v.* Nelson, 21 Nebr. 572, 32 N. W. 589; State *v.* Powell, 10 Nebr. 48, 4 N. W. 317; State *v.* Nemaha County, 10 Nebr. 32, 4 N. W. 373.

Nevada.— Hoole *v.* Kinkead, 16 Nev. 217.

New York.— People *v.* Judges Columbia C. Pl., 3 How. Pr. 30; People *v.* Judges Dutchess C. Pl., 20 Wend. 658; Judges Oneida C. Pl. *v.* People, 18 Wend. 79. And see People *v.* Gale, 16 How. Pr. 199; *Ex p.* Koon, 1 Den. 644; *Ex p.* Gordon, 2 Hill 363. But *compare* People *v.* New York Super. Ct., 19 Wend. 68, where it is said that mandamus will lie to reverse an error in law.

North Carolina.— Perry *v.* Chatham County, 130 N. C. 558, 41 S. E. 787, holding that a party may elect between certiorari and mandamus when no appeal lies, since the former is "not imperative like an appeal."

Ohio.— State *v.* Waite, 70 Ohio St. 149, 71 N. E. 286.

South Carolina.— *Ex p.* Scarborough, 34 S. C. 13, 12 S. E. 666.

Texas.— Matlock *v.* Smith, 96 Tex. 211, 71 S. W. 956.

Utah.— Civic Federation *v.* Salt Lake County, 22 Utah 6, 61 Pac. 222.

Vermont.— Foster *v.* Redfield, 50 Vt. 285.

West Virginia.— Miller *v.* Tucker County Ct., 34 W. Va. 285, 12 S. E. 702; State *v.* Wood County Ct., 33 W. Va. 589, 11 S. E. 72.

Wisconsin.— State *v.* Johnson, 103 Wis. 591, 623, 79 N. W. 1081, 51 L. R. A. 33 [*quoted* in State *v.* Ludwig, 106 Wis. 226, 236, 82 N. W. 158] (where the court, after observing, in effect, that in cases where discretion has not been exercised at all, or the action taken by the inferior court is without semblance of legal cause and no other adequate remedy exists, mandamus will lie, said: "It is not meant by this, however, that mandamus will be used to perform the functions of appeal or writ of error, as seems to have been the tendency in the supreme courts of Alabama and Michigan. The duty of the court must be plain, the refusal to proceed within its jurisdiction to perform that duty must be clear, the results of such refusal prejudicial, the remedy, if any, by appeal or writ of error utterly inadequate, and the application for relief by mandamus speedy and prompt, in order to justify the issuance

error.[89] In some jurisdictions, however, these rules have been relaxed in particular cases and mandamus issued to avoid the consequences of errors where no remedy has been provided by way of review,[90] or so far as the error consists in an act or refusal which makes an adequate remedy by appeal impossible,[91] or

of the writ." State *v.* Judge Kenosha Cir. Ct., 3 Wis. 809.

Wyoming.— State *v.* Board of Live Stock Com'rs, 4 Wyo. 126, 32 Pac. 114.

United States.— *In re* Burdett, 127 U. S. 771, 8 S. Ct. 1394, 32 L. ed. 321; *Ex p.* Newman, 14 Wall. 152, 20 L. ed. 877; U. S. *v.* Judges U. S. Court of App., 85 Fed. 177, 29 C. C. A. 78.

Canada.— Meyers *v.* Baker, 26 U. C. Q. B. 16, holding that mandamus will not lie where an appeal is provided by law, although the relator has allowed the time for appeal to lapse.

See 33 Cent. Dig. tit. "Mandamus," § 62 *et seq.*, 134 *et seq.*

But *compare* State *v.* Teasdale, 21 Fla. 652, in which it was said that where there is no writ of error or appeal and mandamus is the only means of review, the court granting the writ will look into the whole cause including the testimony and ascertain whether or not justice has been done.

Control of discretionary acts see *supra*, II, C, 2.

89. *Alabama.*— *Ex p.* South, etc., Alabama R. Co., 65 Ala. 599.

Colorado.— People *v.* Arapahoe County Dist. Ct., 14 Colo. 396, 24 Pac. 260.

Michigan.— Michigan Mut. F. Ins. Co. *v.* Wayne Cir. Judge, 112 Mich. 270, 70 N. W. 582.

Missouri.— State *v.* Smith, 107 Mo. 527, 16 S. W. 401, 17 S. W. 901; State *v.* Megown, 89 Mo. 156, 1 S. W. 208.

Texas.— Smith *v.* Conner, 98 Tex. 434, 84 S. W. 815.

Washington.— State *v.* Spokane County Super. Ct., 21 Wash. 108, 57 Pac. 352 [*overruling* as far as in conflict State *v.* Hunter, 3 Wash. 92, 27 Pac. 1076].

West Virginia.—State *v.* Wood County Ct., 33 W. Va. 589, 595, 11 S. E. 72.

Wisconsin.—State *v.* Ludwig, 106 Wis. 226, 82 N. W. 158; State *v.* Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33; State *v.* Taylor, 19 Wis. 566.

United States.— American Constr. Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 13 S. Ct. 758, 37 L. ed. 486; *Ex p.* Schwab, 98 U. S. 240, 35 L. ed. 105; U. S. *v.* Judges U. S. Court of App., 85 Fed. 177, 29 C. C. A. 78.

See 33 Cent. Dig. tit. "Mandamus." § 9.

90. Brazel *v.* New South Coal Co., 131 Ala. 416, 30 So. 832; *Ex p.* Tower Mfg. Co., 103 Ala. 415, 15 So. 836; Chastain *v.* Armstrong, 85 Ala. 215, 3 So. 788; O'Neal *v.* Kelly, 72 Ala. 559; Heflin *v.* Rock Mills Mfg., etc., Co., 58 Ala. 613; *Ex p.* North, 49 Ala. 385; *Ex p.* Robbins, 29 Ala. 71; *Ex p.* Cole, 28 Ala. 50; Boraim *v.* Da Costa, 4 Ala. 393; State *v.* Lafayette County Ct., 41 Mo. 221; Perry *v.* Chatham County, 130 N. C. 558, 41 S. E. 787. But *compare* Wood *v.* Strother, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249; People *v.* Wayne County Bd. of Auditors, 10 Mich. 307; American Constr. Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 379, 13 S. Ct. 758, 37 L. ed. 486, where the court said: "But a writ of mandamus cannot be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court. . . . It does not, therefore, lie to review a final judgment or decree of the Circuit Court, sustaining a plea to the jurisdiction, even if no appeal or writ of error is given by law."

91. *Alabama.*— Anniston First Nat. Bank *v.* Chency, 120 Ala. 117, 23 So. 733; Wilson *v.* Duncan, 114 Ala. 659, 21 So. 1017; *Ex p.* Barnes, 84 Ala. 540, 4 So. 769; *Ex p.* Lawrence, 34 Ala. 446; *In re* State, 7 Ala. 459; *Ex p.* Jones, 1 Ala. 15.

California.— Gutierrez *v.* Hebberd, 106 Cal. 167, 39 Pac. 529. But *compare* Levy *v.* Yolo County Super. Ct., 66 Cal. 292, 5 Pac. 353, holding that, when an appeal is erroneously dismissed for a supposed insufficiency in the undertaking, mandamus will not lie to vacate the order dismissing it until such order has been annulled by certiorari.

Iowa.— See Case *v.* Blood, 71 Iowa 632, 33 N. W. 144.

Louisiana.— State *v.* Judges Orleans Parish Ct. of App., 105 La. 217, 29 So. 816; State *v.* Judge Catahoula Parish Seventh Dist. Ct., 38 La. Ann. 499; State *v.* Judges Orleans Parish Ct. of App., 37 La. Ann. 109; State *v.* Mayo, 33 La. Ann. 1070. See also State *v.* Judges Second Cir. Ct. of App., 33 La. Ann. 1096. But *compare* State *v.* Rightor, 36 La. Ann. 200, where mandamus was refused on the ground that another remedy (by writ of prohibition) was specially provided for cases where insufficient security is accepted by the judge.

Michigan.— Stock *v.* Wayne Cir. Judge, 143 Mich. 339, 106 N. W. 897.

New York.— People *v.* Bolte, 35 Misc. 53, 71 N. Y. Suppl. 74.

Wisconsin.— State *v.* McArthur, 13 Wis. 407 [*overruled* in State *v.* Washburn, 22 Wis. 99, on the ground that the error was appealable, a condition which was not considered by the court].

United States.— See *Ex p.* Newman, 14 Wall. 152, 165, 20 L. ed. 877, where it is said by Clifford, J.: "Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a court, having heard the cause, refuses to render judgment or enter a decree in the case, but the principles and usages of law do not warrant the use of the writ to re-examine a judgment

where the remedy provided by way of review is unavailable,[92] or inadequate;[93] but such inadequacy must be more than mere inconvenience.[94]

F. Against Whom Writ Lies — 1. In General. Mandamus will not issue to compel any one other than an officer to perform an official act,[95] and there must be someone in being having the power and whose duty it is to perform the act.[96]

or decree by a subordinate court in any case . . . nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal."

England.— Rex *v.* Stepney, [1902] 1 K. B. 317, 66 J. P. 183, 71 L. J. K. B. 238, 86 L. T. Rep. N. S. 21, 5 Wkly. Rep. 412, holding that where an inferior tribunal refuses to exercise jurisdiction so that no foundation is laid for appeal mandamus will lie to compel it to do so.

92. Reynolds *v.* Crook, 95 Ala. 570, 11 So. 412 (holding that when there is no party in existence who can prosecute an appeal mandamus will lie); *In re* State, 7 Ala. 259 (holding that an action erroneously abated by the court on the death of a party may be reinstated by mandamus); Johnson *v.* Glasscock, 2 Ala. 519 (holding that if the inferior court after reversal refuses to proceed according to the mandate of the appellate tribunal mandamus lies to compel its conformance). But *compare In re* Burdett, 127 U. S. 771, 8 S. Ct. 1394, 37 L. ed. 321, where the amount in controversy was too small to permit a writ of error, mandamus was denied.

93. *Alabama.*— *Ex p.* King, 27 Ala. 387 (where it was held that in a case of peculiar and pressing necessity mandamus should be granted in spite of the existence of another remedy); Boraim *v.* Da Costa, 4 Ala. 393.

Iowa.— Case *v.* Blood, 71 Iowa 632, 33 N. W. 144; Perkins *v.* West Des Moines Independent School Dist. Bd. of Directors, 56 Iowa 476, 9 N. W. 356; Benjamin *v.* Malake Dist. Tp., 50 Iowa 648, holding that an appeal to an authority which may have no power to enforce its decision is inadequate and does not bar mandamus.

Maryland.— Duer *v.* Dashiell, 91 Md. 660, 47 Atl. 1040.

Michigan.— Dillon *v.* Shiawassee Cir. Judge, 131 Mich. 574, 91 N. W. 1029, where mandamus issued on the ground that appeal would be too slow.

Missouri.— State *v.* Reynolds, (App. 1906) 97 S. W. 650 (where appeal was held too slow); State *v.* Osborne, 24 Mo. App. 309.

Ohio.— Noble County Com'rs *v.* Hunt, 33 Ohio St. 169.

South Dakota.— State *v.* Menzie, 17 S. D. 535, 97 N. W. 745; Huron *v.* Campbell, 3 S. D. 309, 53 N. W. 182, where the result of an injunction which the relator sought to vacate by mandamus might have deprived the city of services of counsel in time of need, pending an appeal, and it was held that appeal would not be an adequate remedy so as to bar mandamus.

Washington.— State *v.* Hatch, 36 Wash. 164, 78 Pac. 796.

Wisconsin.— State *v.* Johnson, 105 Wis. 164, 83 N. W. 320; State *v.* Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33, in both of which cases it was held that where the action of the inferior court is an absolute wrong, and will result in loss without remedy unless immediate relief is given, mandamus will lie for redress. These cases are distinguished as involving "a most extraordinary exigency" in State *v.* Ludwig, 106 Wis. 226, 237, 82 N. W. 158.

United States.— North Alabama Development Co. *v.* Orman, 71 Fed. 764, 18 C. C. A. 309, holding that mandamus is not improper where a writ of error is not fully adequate.

94. State *v.* Judge Twenty-First Judicial Dist., 36 La. 394; State *v.* Judge St. Louis Cir. Ct., 1 Mo. App. 543, 545 (where the court refusing mandamus said: "We are told that the relator would be annoyed, and that large costs would be incurred by the prolongation of this litigation beyond its necessary limits. This is, of course, an evil, but we cannot for that reason apply a remedy which the law will not sanction"); State *v.* Hadley, 20 Wash. 520, 56 Pac. 29 (where it was urged that the issue sought to be forced upon a court by mandamus was of great importance to the county; that it was desirable to obtain a construction of the law in question before the session of the legislature; and that appeal would be too slow, and it was held that the length of time involved in litigation was not a test of adequacy of remedy by appeal); State *v.* Johnson, 103 Wis. 591, 622, 79 N. W. 1081, 51 L. R. A. 33 (where the court said: "The remedy by appeal must be substantially adequate in order to prevent relief by mandamus. If it appears that an appeal will not be an adequate remedy, mandamus may still issue, in the discretion of the court").

95. Leach *v.* Aitken, 91 Cal. 484, 28 Pac. 777; Wright *v.* Kelley, 4 Ida. 624, 43 Pac. 565, holding that, where a writ is sought to compel commissioners of a county to perform an official act, respondents must be *de facto* officers of the county at the time the writ is to issue.

Definition of terms.— "An office is a public station or employment conferred by the appointment of the government. And any man is a public officer who is appointed by government, and has any duty to perform concerning the public; nor is he any the less a public officer because his authority or duty is confined to narrow limits." Polk *v.* James, 68 Ga. 128, 131.

Necessity that duty arise from office, trust, or station see *supra*, II, C, 2, c.

96. State *v.* Beloit, 21 Wis. 280, 91 Am. Dec. 474, holding that persons elected supervisors of a town, who refuse to qualify or serve, cannot be treated as supervisors *de facto* and commanded to levy a tax.

Extinct public corporation.—Mandamus will

De facto officers are, however, subject to the writ.[97] The writ will not lie against an officer after the expiration of his term,[98] or after he has resigned[99] or ceased to act as an officer,[1] or the office has become *functus officio*.[2] A continuing duty may be enforced against successors of the officer originally in default,[3] although a writ will not lie against such successors when not themselves in default, for the failure of their predecessors to perform the duty.[4] Where, however, an officer is charged *ex officio* with a duty in another capacity, he may be compelled to perform such duty, although the term of the office from which it arose has expired.[5] And it has been held that an officer may be compelled to perform a duty personal to himself and which does not devolve upon his successor even after his term has expired.[6] A new public corporation which has succeeded another, which has not lie against an extinct public corporation or the former members thereof. Barkley *v.* Madison Parish, etc., Bd. of Levee Com'rs, 93 U. S. 258, 22 L. ed. 893.

97. Wright *v.* Kelley, 4 Ida. 624, 43 Pac. 565; People *v.* Ingham County, 36 Mich. 416; Kelly *v.* Wimberly, 61 Miss. 548; People *v.* Schiellein, 95 N. Y. 124.

98. *Alabama.*— *Ex p.* Trice, 53 Ala. 546.

Arkansas.— Lamar *v.* Wilkins, 28 Ark. 34, where refusal to issue the writ was based on the ground that it would be ineffectual.

Iowa.— Eyerly *v.* Jaspar County, 81 Iowa 189, 46 N. W. 986.

Kentucky.— Terry *v.* Baker, 67 S. W. 258, 23 Ky. L. Rep. 2406.

Nevada.— State *v.* Kirman, 17 Nev. 380, 30 Pac. 1075.

New Jersey.— State *v.* Holliday, 8 N. J. L. 265.

Ohio.— State *v.* Lynch, 8 Ohio St. 347, holding that the fact that prior to the issue and service of an alternative writ of mandamus to compel a township treasurer to pay an order, the term of office of such treasurer had expired and all the funds in his hands had in good faith been paid over to his successor in office, is as to him a good defense.

West Virginia.— Holdermann *v.* Schane, 56 W. Va. 11, 48 S. E. 512; Dent *v.* Taylor County, 45 W. Va. 750, 32 S. E. 250.

See 33 Cent. Dig. tit. "Mandamus," § 59.

Abatement of proceedings on expiration of officer's term see *infra*, IX, D, 4.

Effect of termination of power to act in general see *supra*, II, C, 4, a.

Judges.— One who is no longer a judge cannot be compelled to exercise judicial functions. People *v.* Pearson, 4 Ill. 270; People *v.* Altgeld, 43 Ill. App. 460. Hence a judge before whom an action is tried cannot after his term of office has expired be compelled to settle a bill of exceptions, although he is authorized by statute to settle such a bill. Leach *v.* Aitken, 91 Cal. 484, 28 Pac. 777; State *v.* Allyn, 7 Wash. 285, 34 Pac. 914. But see State *v.* Barnes, 16 Nebr. 37, 19 N. W. 701. Nor will a judge whose term is about to expire be compelled to proceed to trial. Terry *v.* Baker, 67 S. W. 258, 23 Ky. L. Rep. 2406.

Justices of the peace.— Mandamus will not issue to a justice of the peace whose term has expired. Center First Nat. Bank *v.* Rowland, (Tex. Civ. App. 1907) 99 S. W. 1043.

Delivery of books and papers to successor see *infra*, VI, C, 7, b.

99. De Haas *v.* Newaygo Cir. Judge, 46 Mich. 12, 8 N. W. 587, holding that mandamus to settle a case for review will not issue to a judge who has resigned since filing his answer to the order to show cause, but that relief should be asked from his successor.

Simulated resignation.— It seems that a simulated resignation from office, or a resignation made for the purpose of evading the performance of official duties, does not bar mandamus to compel the officer to perform. Edwards *v.* U. S., 103 U. S. 471, 26 L. ed. 314.

1. State *v.* Bailey, 7 Iowa 390; Mason *v.* Brookfield School Dist. No. 14, 20 Vt. 487.

2. Sate *v.* Waterman, 5 Nev. 323; People *v.* Reardon, 49 Hun (N. Y.) 425, 3 N. Y. Suppl. 560; People *v.* Greene County, 12 Barb. (N. Y.) 217; People *v.* Busti Bd. of Town Canvassers, 32 Misc. (N. Y.) 123, 66 N. Y. Suppl. 199; Rumsey *v.* Lindsey, 207 Pa. St. 262, 56 Atl. 430.

Court.— Mandamus will not be granted to a court acting under a special permission which has expired by its own limitation. People *v.* Monroe Oyer & T., 20 Wend. (N. Y.) 108.

3. State *v.* Marshall County Judge, 7 Iowa 186; State *v.* Cornwall, 97 Wis. 565, 63 N. W. 63.

Bringing in or substituting successors as parties see *infra*, IX, C, 3, a.

Directing writ to successors see *infra*, IX, F, 3, e, (II); K, 6, b.

Succession of judges see *infra*, IV, B, 1, c, (IV).

Successors as parties to proceedings see *infra*, IX, C, 2.

Writ as binding successors see *infra*, IX, J, 4, b, (II).

4. People *v.* Burns, 106 N. Y. App. Div. 36, 94 N. Y. Suppl. 196; State *v.* Cincinnati, 7 Ohio Dec. (Reprint) 326, 2 Cinc. L. Bul. 114; Holdermann *v.* Schane, 56 W. Va. 11, 48 S. E. 512.

5. People *v.* Burns, 106 N. Y. App. Div. 36, 94 N. Y. Suppl. 196.

6. State *v.* Shearer, 29 Nebr. 477, 45 N. W. 784, holding that an ex-county clerk might be compelled to report the fees of his office and pay the excess over the amount to which he was entitled into the county treasury. And

thereupon become extinct, cannot be compelled to perform a duty of the old corporation.[7]

2. Corporation or Officer. If a public duty is imposed on a public or private corporation generally, and not on a particular officer thereof, a party seeking to have that duty performed may proceed against the corporation as such.[8] But if the duty is imposed on a particular officer of the corporation, the party seeking to have the duty performed must generally proceed against that officer; he cannot as a rule proceed against the corporation as such to compel it to perform the duty;[9] nor can he proceed against the corporation to compel it to require the officer to act.[10]

G. Conditions Precedent — 1. Demand. As a general rule relator must have demanded performance of the act or duty which he seeks to enforce.[11] Where, however, the duty is strictly public and enjoined by law and no person is charged by law with the duty to demand, no demand is necessary,[12] and this is

see Keokuk *v.* Merriam, 44 Iowa 432, holding that mandamus would be a proper remedy of a municipal corporation for the wrongful detention of its books by a public officer after resignation.

Compelling delivery of books and records see *infra*, VI, C, 7, b.

7. Barkley *v.* Levee Com'rs, 93 U. S. 258, 23 L. ed. 893.

8. See *infra*, IX, C, 2, b.

Mandamus against private corporations see *infra*, VII.

Mandamus against public corporations see *infra*, VI.

9. See *infra*, IX, C, 2, b.

Mandamus against municipal corporations and officers thereof see *infra*, VI.

Mandamus against private corporations and officers thereof see *infra*, VII.

10. Eyerly *v.* Jasper County, 72 Iowa 149, 33 N. W. 609. And see State *v.* Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166; Reg. *v.* Derby, 2 Salk. 436; Dagenais *v.* Trenton, 24 Ont. 343. *Contra*, Bay State Gas Co. *v.* State, 4 Pennew. (Del.) 497, 56 Atl. 1120.

11. *Alabama.*—Moseley *v.* Collins, 133 Ala. 326, 32 So. 131, demand to correct corporate record essential.

California.— Wilson *v.* Veterans' Home, 138 Cal. 67, 70 Pac. 1059 (readmission of soldier discharged from veterans' home); Shirley *v.* Cottonwood School Dist., (1892) 31 Pac. 365 (teacher's salary); Oroville, etc., R. Co. *v.* Plumas County, 37 Cal. 354 (enforcing railroad aid); Crandall *v.* Amador County, 20 Cal. 72; People *v.* Romero, 18 Cal. 89.

Connecticut.— Harrison *v.* Simonds, 44 Conn. 318.

Georgia.— Payne *v.* Perkerson, 56 Ga. 672; Leonard *v.* House, 15 Ga. 473.

Illinois.— People *v.* Mt. Morris, 145 Ill. 427, 34 N. E. 144; People *v.* Hyde Park, 117 Ill. 462, 6 N. E. 33; People *v.* Dulaney, 96 Ill. 503; People *v.* Gibbons, 91 Ill. App. 567, transfer of record on change of venue.

Indiana.— State *v.* Fisher, 157 Ind. 412, 61 N. E. 929; Lake Erie, etc., R. Co. *v.* State, 139 Ind. 158, 38 N. E. 596.

Kansas.— Dobbs *v.* Stauffer, 24 Kan. 127.

Michigan.— Presthus *v.* Gogebic Cir. Judge, 142 Mich. 204, 105 N. W. 154; People *v.* Quartermaster-Gen., 25 Mich. 340; People *v.* Walker, 9 Mich. 328.

Minnesota.— State *v.* Schaack, 28 Minn. 358, 10 N. W. 22; State *v.* Davis, 17 Minn. 429.

Nebraska.— Kemerer *v.* State, 7 Nebr. 130; State *v.* Holmes, 5 Nebr. (Unoff.) 66, 97 N. W. 243.

Nevada.— State *v.* Adams, 19 Nev. 370, 12 Pac. 488.

New Jersey.— Sheridan *v.* Van Winkle, 43 N. J. L. 579; Gledhill *v.* Governor, 25 N. J. L. 331.

New York.— People *v.* New York County Democratic Gen. Committee, 175 N. Y. 415, 67 N. E. 898; People *v.* Welde, 61 N. Y. App. Div. 580, 70 N. Y. Suppl. 869; People *v.* Syracuse, 26 Misc. 522, 57 N. Y. Suppl. 617; People *v.* McDonald, 52 N. Y. Suppl. 898.

North Carolina.— Horne *v.* Cumberland County, 122 N. C. 466, 29 S. E. 581; Alexander *v.* McDowell County, 67 N. C. 330.

Pennsylvania.— Dunn's Case, 9 Pa. Co. Ct. 417; Jefferson Tp. Case, 1 Pearson 252.

South Carolina.— State *v.* Lehre, 7 Rich. 234.

Wisconsin.— State *v.* Milwaukee, 20 Wis. 87.

United States.— Edinburg Coal Co. *v.* Humphreys, 134 Fed. 839, 67 C. C. A. 435; U. S. *v.* Indian Grave Drainage Dist., 85 Fed. 928, 29 C. C. A. 578.

Canada.— *Re* Peck, 34 U. C. Q. B. 129; *In re* Union School, 17 U. C. Q. B. 275; Reg. *v.* Bruce, 11 U. C. C. P. 575.

See 33 Cent. Dig. tit. "Mandamus," § 44.

Second application for writ where first has failed see *infra*, IX, J, 4, c.

Offer of fees must accompany demand on ministerial officer. *In re* Euphrasin Tp. Clerk, 12 U. C. Q. B. 622.

12. *Colorado.*— Rizer *v.* People, 18 Colo. App. 40, 69 Pac. 315, calling election.

Florida.— State *v.* Jacksonville, 22 Fla. 21.

Illinois.— People *v.* Edgar County, 223 Ill. 187, 79 N. E. 123; State Bd. of Equalization *v.* People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513; People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; Goshen *v.* Jackson, 165 Ill. 17, 45 N. E. 1000; People *v.* Crabb, 156 Ill. 155, 40 N. E. 319; People

also true where the duty is imperatively required by law of ministerial officers,[13] particularly where respondent has done an act which he calls a performance.[14] But where the duty is of a private nature affecting only the right of the relator there must have been a demand.[15] Where it appears that a demand would be unavailing it need not be made,[16] as where the course and conduct of officers is such as to show a settled purpose not to perform the imposed duty.[17] The demand must be unambiguous.[18] A demand upon an officer is good as against his successor.[19]

2. Refusal and Default. Conversely to the rule requiring a demand there

v. Williams, 145 Ill. 573, 33 N. E. 849, 36 Am. St. Rep. 514, 24 L. R. A. 492 (holding that public officer may be compelled to act as such without request); People *v.* Mt. Morris, 137 Ill. 576, 27 N. E. 757; People *v.* Upper Alton School Dist. Bd. of Education, 127 Ill. 613, 21 N. E. 187; Highway Com'rs *v.* Jackson, 61 Ill. App. 381.

Iowa.— State *v.* Bailey, 7 Iowa 390; State *v.* Marshall County Judge, 7 Iowa 186.

Minnesota.— State *v.* Weld, 39 Minn. 426, 40 N. W. 561.

New Jersey.— Morris *v.* Wrightson, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548.

New York.— People *v.* Cruger, 12 N. Y. App. Div. 536, 42 N. Y. Suppl. 398.

South Carolina.— Milster *v.* Spartanburg, 68 S. C. 26, 46 S. E. 539.

Virginia.— Lewis *v.* Christian, 101 Va. 135, 43 S. E. 331.

Washington.— State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515; State *v.* Brown, 19 Wash. 383, 53 Pac. 548; Northern Pac. R. Co. *v.* Territory, 3 Wash. Terr. 303, 13 Pac. 604 [*reversed* on other grounds in 142 U. S. 492, 35 L. ed. 1092, 12 S. Ct. 283].

Wisconsin.— State *v.* Cornwall, 97 Wis. 565, 73 N. W. 63.

But see *In re* Moulton, 12 Ont. App. 503.

13. *Florida.*— Columbia County Com'rs *v.* King, 13 Fla. 451.

Maryland.— Mottu *v.* Primrose, 23 Md. 482, corporate by-law.

Oklahoma.— Swan *v.* Wilderson, 10 Okla. 547, 62 Pac. 422.

Pennsylvania.— Com. *v.* Allegheny County, 37 Pa. St. 237.

South Dakota.— Heintz *v.* Moulton, 7 S. D. 272, 64 N. W. 135.

Wisconsin.— State *v.* Racine, 22 Wis. 258.

United States.— Riverside County *v.* Thompson, 122 Fed. 860, 59 C. C. A. 70.

Civil service.— Under Greater New York Charter, providing that when an office is abolished the person holding it shall be deemed suspended without pay and shall be reinstated within one year thereafter if there is need for his services, where an employee is placed on the suspended list and a vacancy occurs entitling him to reinstatement it is not necessary for him to demand reinstatement before bringing mandamus. People *v.* Grout, 45 Misc. (N. Y.) 47, 90 N. Y. Suppl. 861.

14. State *v.* Marshall County Judge, 7 Iowa 186.

15. *Illinois.*— People *v.* Mt. Morris, 137 Ill. 576, 27 N. E. 757; People *v.* Upper Alton School-Dist. Bd. of Education, 127 Ill. 613, 21 N. E. 187; Women's Catholic O. of F. *v.* Condon, 84 Ill. App. 564.

Indiana.— Ingerman *v.* State, 128 Ind. 225, 27 N. E. 499.

Iowa.— Mystic Milling Co. *v.* Chicago, etc., R. Co., (1906) 107 N. W. 943.

Nebraska.— State *v.* Smith, 31 Nebr. 590, 48 N. W. 468; State *v.* Eberhart, 14 Nebr. 201, 15 N. W. 320.

Nevada.— State *v.* Wright, 10 Nev. 167.

Rhode Island.— Cavanaugh *v.* Pawtucket, 23 R. I. 102, 49 Atl. 494.

See 33 Cent. Dig. tit. "Mandamus," § 44.

Necessity of averring demand see *infra*, IX, E, 3, d, (III), (B).

16. *Kansas.*— Chicago, etc., R. Co. *v.* Chase County, 49 Kan. 399, 30 Pac. 456.

Nevada.— Gamble *v.* First Judicial Dist. Ct., 27 Nev. 233, 74 Pac. 530.

New Jersey.— State *v.* Wrightson, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548.

Pennsylvania.— Com. *v.* Pittsburgh, 34 Pa. St. 496.

Washington.— State *v.* Byrne, 32 Wash. 264, 73 Pac. 394; State *v.* Pacific Brewing, etc., Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208.

West Virginia.— Fisher *v.* Charleston, 17 W. Va. 595.

United States.— U. S. *v.* Saunders, 124 Fed. 124, 59 C. C. A. 394.

Canada.— *In re* Davidson, 24 U. C. Q. B. 66.

See 33 Cent. Dig. tit. "Mandamus," § 44.

17. *Kansas.*— Chicago, etc., R. Co. *v.* Chase County, 49 Kan. 399, 30 Pac. 456.

Kentucky.— Maddox *v.* Graham, 2 Metc. 56.

Massachusetts.— Atty.-Gen. *v.* Boston, 123 Mass. 460.

Michigan.— People *v.* Mahoney, 30 Mich. 100.

Nebraska.— State *v.* Baushausen, 49 Nebr. 558, 68 N. W. 950.

South Carolina.— Morton *v.* Comptroller-Gen., 4 S. C. 430.

Texas.— Austin *v.* Cahill, (1905) 88 S. W. 542.

United States.— U. S. *v.* Brooklyn Bd. of Auditors, 8 Fed. 473.

18. Com. *v.* Pittsburg, 209 Pa. St. 333, 58 Atl. 669; State *v.* Cheraw, etc., R. Co., 16 S. C. 524; State *v.* Reed, 36 Wash. 638, 79 Pac. 306.

19. Wood *v.* State, 155 Ind. 1, 55 N. E. 959.

must have been a refusal on the part of respondents,[20] and there must have been an actual default; mandamus will not be granted in anticipation of an omission of duty.[21] It has been held, however, that a refusal may be in advance of the time fixed for performance.[22] The refusal must be by the person empowered to act.[23]

20. *Alabama.*— Moseley *v.* Collins, 133 Ala. 326, 32 So. 131.

California.— Tilden *v.* Sacramento County, 41 Cal. 68; Crandall *v.* Amador County, 20 Cal. 72; People *v.* Romero, 18 Cal. 89.

Colorado.— Grand County *v.* People, 8 Colo. App. 43, 46 Pac. 107.

Connecticut.— Harrison *v.* Simonds, 44 Conn. 318; Douglas *v.* Chatham, 41 Conn. 211.

Florida.— State *v.* Jefferson County, 17 Fla. 707; State *v.* Gibbs, 13 Fla. 55, 7 Am. Rep. 233.

Georgia.— Park *v.* Candler, 113 Ga. 647, 39 S. E. 89; Leonard *v.* House, 15 Ga. 473.

Illinois.— State Bd. of Equalization *v.* People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513.

Indiana.— Lewis *v.* Henley, 2 Ind. 332.

Iowa.— Case *v.* Blood, 68 Iowa 486, 27 N. W. 470; Price *v.* Harned, 1 Iowa 473.

Kansas.— Bryson *v.* Spaulding, 20 Kan. 427; Garden City First Nat. Bank *v.* Morton County, 7 Kan. App. 739, 52 Pac. 580.

Michigan.— Sadler *v.* Sheahan, 92 Mich. 630, 52 N. W. 1030.

Minnesota.— State *v.* Olson, 55 Minn. 118, 56 N. W. 585.

Nevada.— State *v.* Gracey, 11 Nev. 223.

New York.— People *v.* Democratic Gen. Committee, 82 N. Y. App. Div. 173, 81 N. Y. Suppl. 784 [*reversing* 39 Misc. 724, 80 N. Y. Suppl. 953, and *affirmed* in 175 N. Y. 415, 67 N. E. 898].

Ohio.— State *v.* Board of Elections, 24 Ohio Cir. Ct. 654.

Texas.— Dunn *v.* St. Louis, Southwestern R. Co., (Civ. App. 1905) 88 S. W. 532; Altgelt *v.* Campbell, (Civ. App. 1904) 78 S. W. 967; Burrell *v.* Blanchard, (Civ. App. 1899) 51 S. W. 46.

Vermont.— Bates *v.* Keith, 66 Vt. 163, 28 Atl. 865.

Virginia.— Gleaves *v.* Terry, 93 Va. 491, 25 S. E. 552, 34 L. R. A. 144.

Wisconsin.— Baker *v.* State, 86 Wis. 474, 56 N. W. 1088.

See 33 Cent. Dig. tit. "Mandamus," § 46.

21. *Colorado.*— People *v.* Judge Boulder County Dist. Ct., 18 Colo. 500, 33 Pac. 162.

District of Columbia.— U. S. *v.* Bowen, 6 D. C. 196.

Florida.— State *v.* Volusia County, 28 Fla. 793, 10 So. 14; Lake County *v.* State, 24 Fla. 263, 4 So. 795. Intention not to act is not sufficient. *Ex p.* Ivey, 26 Fla. 537, 8 So. 427.

Georgia.— Lee *v.* Taylor, 107 Ga. 362, 33 S. E. 408.

Hawaii.— Castle *v.* Kapena, 5 Hawaii 27.

Illinois.— People *v.* Adams County, 185 Ill. 288, 56 N. E. 1044; Gormley *v.* Day, 114 Ill. 185, 28 N. E. 693.

Iowa.— Chicago, etc., R. Co. *v.* Olmstead, 46 Iowa 316.

Kansas.— State *v.* Carney, 3 Kan. 81, holding that no previous threat or predetermination not to perform can amount to a default.

Maryland.— Sterling *v.* McMaster, 82 Md. 164, 33 Atl. 461; Allegany County *v.* Allegany County Com'rs, 20 Md. 449.

Missouri.— State *v.* Associated Press, 159 Mo. 410, 60 S. W. 91, 81 Am. St. Rep. 151, 51 L. R. A. 151.

Montana.— State *v.* Weston, 31 Mont. 218, 78 Pac. 487; State *v.* Rotwitt, 15 Mont. 29, 37 Pac. 845.

Nebraska.— State *v.* Ramsey, 8 Nebr. 286; State *v.* York County School Dist. No. 9, 8 Nebr. 92.

Nevada.— Hardin *v.* Guthrie, 26 Nev. 246, 66 Pac. 744; State *v.* Gracey, 11 Nev. 223.

Ohio.— Zanesville *v.* Richards, 5 Ohio St. 589; State *v.* Hamilton County, 7 Ohio Dec. (Reprint) 357, 2 Cinc. L. Bul. 156.

Pennsylvania.—Westgate *v.* Spalding, 8 Pa. Dist. 490.

South Carolina.— State *v.* Bates, 38 S. C. 326, 17 S. E. 28; Morton *v.* Comptroller-Gen., 4 S. C. 430.

South Dakota.— State *v.* Metcalf, 18 S. D. 393, 100 N. W. 923, 67 L. R. A. 331.

Tennessee.— State *v.* Anderson County, 8 Baxt. 249.

Texas.— Thaxton *v.* Terrell, (1906) 91 S. W. 559, holding that prior to the accrual of relator's rights to demand patents to certain school lands they could not have mandamus to determine the land commissioner's right to reserve the minerals on such land.

Vermont.— Spiritual Atheneum Soc. *v.* Randolph, 58 Vt. 192, 2 Atl. 747.

Virginia.— Sights *v.* Yarnalls, 12 Gratt. 292.

Washington.—Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 32 Wash. 218, 73 Pac. 388.

Wisconsin.— State *v.* Hunter, 111 Wis. 582, 87 N. W. 485.

United States.— *Ex p.* Cutting, 94 U. S. 14, 24 L. ed. 49.

See 33 Cent. Dig. tit. "Mandamus," § 46.

Recount of votes.— Under a statute giving mandamus for a recount the fact that the board is still canvassing is not ground for delay. People *v.* Oneida County Bd. of Canvassers, 25 Misc. (N. Y.) 444, 55 N. Y. Suppl. 712.

22. State *v.* Rotwitt, 15 Mont. 29, 37 Pac. 845. But see State *v.* Houser, 122 Wis. 534, 100 N. W. 964, where it is said that ordinarily mandamus will not lie before the time of performance arrives, that the proper remedy is a mandatory injunction, and that it is only under special circumstances that mandamus can issue in such a case.

23. Grand County *v.* People, 16 Colo. App. 215, 64 Pac. 675.

It may be either express or implied,[24] and it is not necessary that the word "refuse" or any equivalent to it should be used, but there should be enough to show a distinct determination not to do what is required.[25] A refusal may be implied from a delay in acting,[26] unless the delay will still permit action within the time fixed by law.[27] A refusal which is broader than the demand will operate as excusing any further demand up to the scope of the refusal.[28] The imposition of illegal conditions to the payment of a claim may amount to a refusal.[29] A demand in the alternative to do one of two, three, or more things will, if the duty enjoined form one of them, and there should have been a general refusal to comply with such demand, be sufficient.[30]

H. Effect of Pendency of Other Actions or Proceedings — 1. In General. As a general rule the pendency of another suit involving the same question will prevent the issue of a mandamus,[31] unless it will be ineffective or the other court is without jurisdiction,[32] or will not result in a complete adjudication of the ques-

24. *Arkansas.*— Coit *v.* Elliott, 28 Ark. 294.
Illinois.— People *v.* Mt. Morris, 137 Ill. 576, 27 N. E. 757.
New Jersey.— Lindabury *v.* Ocean County. 47 N. J. L. 417, 1 Atl. 701.
New Mexico.— Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170.
England.— Reg. *v.* Bristol, etc., R. Co., 4 Q. B. 162, 3 G. & D. 384, 7 Jur. 233, 12 L. J. Q. B. 166, 3 R. & Can. Cas. 433, 45 E. C. L. 162.
Canada.— Goodwin *v.* Ottawa, etc., R. Co., 13 U. C. C. P. 254.
See 33 Cent. Dig. tit. "Mandamus," § 46.
Any evasion of a positive duty by an officer or legal tribunal amounting to a virtual refusal to perform the duty is sufficient. Loewenthal *v.* People, 192 Ill. 222, 61 N. E. 462; East St. Louis *v.* People, 6 Ill. App. 76.

25. Atty.-Gen. *v.* Boston, 123 Mass. 460; U. S. *v.* Elizabeth, 25 Fed. Cas. No. 15,041*a*; Reg. *v.* St. Margaret's Parish Vestry, 8 A. & E. 889, 1 P. & D. 116, 1 W. W. & H. 673, 35 E. C. L. 894; Reg. *v.* Brecknock, etc., Canal Nav. Co., 3 A. & E. 217, 1 Harr. & W. 279, 4 N. & M. 871, 30 E. C. L. 117; Goodwin *v.* Ottawa, etc., R. Co., 13 U. C. C. P. 254.

26. *Michigan.*— People *v.* Whittemore, 4 Mich. 27.
New Jersey.— Magie *v.* Union Tp., 42 N. J. L. 531 (holding delay of insufficient duration); Cleveland *v.* Jersey City Bd. of Finance, etc., 38 N. J. L. 259; Hanna *v.* Rahway, 33 N. J. L. 110.
New York.— People *v.* Richmond County, 20 N. Y. 252; People *v.* New York, 3 Abb. Dec. 566, 2 Keyes 288, 34 How. Pr. 379; People *v.* Meakin, 56 Hun 626, 10 N. Y. Suppl. 161, 24 Abb. N. Cas. 477; People *v.* Albany Hospital, 11 Abb. Pr. N. S. 4.
Rhode Island.— Cavanaugh *v.* Pawtucket, 23 R. I. 102, 49 Atl. 494, holding the delay insufficient.
Washington.— Esby Estate Co. *v.* Pacific County, 40 Wash. 67, 82 Pac. 129.

27. People *v.* Richmond, 5 Misc. (N. Y.) 26, 25 N. Y. Suppl. 144.

28. People *v.* Rio Grande County, 7 Colo. App. 329, 42 Pac. 1032, holding that refusal of payment of a judgment amounted also to refusal to levy a tax to meet the debt.

29. People *v.* Livingston County, 68 N. Y. 114; People *v.* Mole, 85 N. Y. App. Div. 33, 82 N. Y. Suppl. 747. *Compare* Reg. *v.* Fox, 2 Q. B. 246, 42 E. C. L. 658.

30. Reg. *v.* St. John, 12 N. Brunsw. 3.

31. *Illinois.*— People *v.* Knickerbocker, 114 Ill. 539, 2 N. E. 507, 55 Am. Rep. 879; People *v.* Chicago, 53 Ill. 424; People *v.* Wiant, 48 Ill. 263; People *v.* Warfield, 20 Ill. 159.
Maryland.— Hardcastle *v.* Maryland, etc., R. Co., 32 Md. 32.
Missouri.— See State *v.* Moss, 35 Mo. App. 441.
Nebraska.— State *v.* North Lincoln St. R. Co., 34 Nebr. 634, 52 N. W. 369; State *v.* Matley, 17 Nebr. 564, 24 N. W. 200; State *v.* Patterson, 11 Nebr. 266, 9 N. W. 82; State *v.* Otoe County, 10 Nebr. 384, 6 N. W. 464.
Pennsylvania.— See Com. *v.* Pittsburgh, 34 Pa. St. 496.
Vermont.— Bates *v.* Keith, 66 Vt. 163, 28 Atl. 865.
See 33 Cent. Dig. tit. "Mandamus," § 35.
Compare Oroville, etc., R. Co. *v.* Plumas County, 37 Cal. 354 (holding that in mandamus to compel a county to subscribe to corporate bonds, the pendency of quo warranto proceedings against the persons claiming to compose the corporation could not be urged by answer); Morley *v.* Power, 5 Lea (Tenn.) 691. *Contra,* Calaveras County *v.* Brockway, 30 Cal. 325.
Form and sufficiency of plea in abatement see *infra,* IX, E, 4, g.
Pendency of suit on officer's bond will not prevent mandamus to compel performance of duty. State *v.* Moss, 35 Mo. App. 441.
Quo warranto.— Mandamus to the mayor of a city to compel him to make a nomination to the board of aldermen for the office of chief of police, while a person is holding that office *de facto,* and no one but the incumbent is claiming it, and while an information, in the nature of a quo warranto, is pending to try his title may be refused. Atty.-Gen. *v.* New Bedford, 128 Mass. 312.

32. Livingston *v.* Widber, (Cal. 1896) 47 Pac. 247; State Bank *v.* Shaber, 55 Cal. 322; People *v.* Brooklyn, 22 Barb. (N. Y.) 404; State *v.* Black, 34 S. C. 194, 13 S. E. 361.

tions involved.[33] So where the act to be compelled is involved in a pending appeal,[34] or certiorari,[35] the writ will be refused. Likewise a court will not be compelled to proceed with a suit pending a motion for a new trial,[36] or to enter judgment upon a report of auditors pending a motion to set such report aside,[37] and mandamus to proceed in accordance with a decree will not be granted pending a motion to set such decree aside.[38] It has been held, however, that mandamus would lie if necessary to secure the right to sell upon execution land in the possession of a receiver, although a proceeding was pending to set the judgment aside, where otherwise the security of the judgment creditor would be destroyed.[39]

2. INJUNCTION. If the act of performance as sought to be compelled by mandamus has been restrained by injunction, the writ will not issue.[40] But this rule does not apply in United States courts so as to prevent mandamus to municipal officers to levy taxes to pay judgments rendered in such courts.[41] And the writ

33. People *v.* Salomon, 51 Ill. 37, where county commissioners sought mandamus to compel a clerk to receive and file an estimate by them, and to place the amount of such estimate in tax warrants, and it was held that mandamus would be awarded, although a suit was pending by which the county clerk and the commissioners were sought to be enjoined, at the instance of a property-owner interested, from doing the same act which it was sought by the writ of mandamus to have done.

34. *Alabama.*—*Ex p.* Montgomery, 114 Ala. 115, 14 So. 365.

California.— Smith *v.* Jones, 128 Cal. 14, 60 Pac. 466; Davis *v.* Wallace, (1895) 38 Pac. 1107. See Dunphy *v.* Belden, 57 Cal. 427. But *compare* Contra Costa Water Co. *v.* Breed, 139 Cal. 432, 73 Pac. 189.

Michigan.— People *v.* Muskegon County Cir. Judge, 40 Mich. 63.

Nebraska.— Lobeck *v.* State, (1904) 101 N. W. 247.

North Carolina.— Hannon *v.* Halifax, 89 N. C. 123.

North Dakota.— Territory *v.* Woodbury, 1 N. D. 85, 44 N. W. 1077.

Ohio.— State *v.* Waite, 70 Ohio St. 149, 71 N. E. 286.

Washington.— State *v.* Jefferson County Super. Ct., 20 Wash. 502, 55 Pac. 933; State *v.* Lichtenberg, 4 Wash. 653, 30 Pac. 1056.

United States.— *Ex p.* French, 100 U. S. 1, 25 L. ed. 529; Hitchcock *v.* Galveston, 48 Fed. 640.

But see Com. *v.* Anderson's Ferry, etc., Turnpike Road, 7 Serg. & R. (Pa.) 6, where a turnpike company was under the provisions of a peculiar statute compelled to grant a certificate for a judgment, although an appeal was pending.

A writ of error improperly awarded will not suspend the right to mandamus to a court to proceed. Richardson *v.* Farrar, 88 Va. 760, 15 S. E. 117.

35. Oswego Highway Com'rs *v.* People, 99 Ill. 587. And see State *v.* Black, 34 S. C. 194, 13 S. E. 361, holding that mandamus to enforce a judgment might issue, although certiorari was pending in a court without jurisdiction.

36. People *v.* Arapahoe County Dist. Ct., 14 Colo. 396, 24 Pac. 260.

37. Berry *v.* Callet, 6 N. J. L. 179.

38. State *v.* Bridges, 21 Wash. 591, 59 Pac. 487.

39. Petaluma Sav. Bank *v.* San Francisco Super. Ct., 111 Cal. 488, 44 Pac. 177.

40. *Alabama.*— State *v.* Judge Macon Orphans' Ct., 15 Ala. 740.

Georgia.— See Brunswick *v.* Dure, 59 Ga. 803, holding that an injunction against enforcing judgments against city property held for public purposes did not prevent mandamus to compel levy of a tax.

Illinois.— People *v.* Hake, 81 Ill. 540; People *v.* Gilmer, 10 Ill. 242.

Indiana.— State *v.* Clinton County, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984.

Kansas.— State *v.* Snelling, 71 Kan. 499, 80 Pac. 966; Livingston *v.* McCarthy, 41 Kan. 20, 20 Pac. 478.

Louisiana.— State *v.* Judge Twelfth Dist. Ct., 38 La. Ann. 31.

New York.— Rothschild *v.* Gould, 84 N. Y. App. Div. 196, 82 N. Y. Suppl. 558; People *v.* Ulster County, 30 Hun 146; St. Stephen Church Cases, 10 N. Y. Suppl. 125, 11 N. Y. Suppl. 669, 675, 25 Abb. N. Cas. 230; *Ex p.* Fleming, 4 Hill 581.

Ohio.— Ohio, etc., R. Co. *v.* Wyandot County, 7 Ohio St. 278.

South Dakota.— Wilmarth *v.* Ritschlag, 9 S. D. 172, 68 N. W. 312.

West Virginia.— State *v.* Wyoming County Ct., 47 W. Va. 672, 35 S. E. 959.

Wisconsin.— State *v.* Kispert, 21 Wis. 387. See 33 Cent. Dig. tit. "Mandamus," § 36.

An appeal from an order dissolving an injunction which does not reinstate the injunction will not prevent mandamus to enforce a tax. Brown *v.* Nehmer, 128 Mich. 690, 87 N. W. 1035.

Where the injunction is void for want of jurisdiction it has been held the rule will not apply. State *v.* Carlson, (Nebr. 1904) 101 N. W. 1004; *Ex p.* Fleming, 4 Hill (N. Y.) 581; Chapman *v.* Miller, 52 Ohio St. 166, 39 N. E. 24.

41. Davenport *v.* U. S., 9 Wall. (U. S.) 409, 19 L. ed. 704; U. S. *v.* Keokuk, 6 Wall. (U. S.) 514, 18 L. ed. 933; U. S. *v.* Johnson County, 6 Wall. (U. S.) 166, 18 L. ed. 768; Smith *v.* Tallapoosa County, 22 Fed. Cas. No. 13,114, 2 Woods 596; U. S. *v.* Lee County, 26 Fed. Cas. No. 15,589, 2 Biss. 77.

may issue when the rights of one not a party to the injunction cannot be otherwise secured.[42]

3. MANDAMUS. The pendency of one mandamus proceeding is a bar to another, in another court, for the same cause.[43] But a proceeding by an individual for a mandamus will not be abated by reason of the fact that another proceeding is pending upon his relation in the name of a public officer.[44] And likewise the pendency of a mandamus proceeding in the name of the state will not prevent the prosecution of mandamus by an individual for the same relief.[45] The writ lies to compel a reinstatement of an appeal in an intermediate appellate court from a judgment against a city, although mandamus to enforce the judgment is pending in the lower court.[46]

III. STATUTORY AND CONSTITUTIONAL PROVISIONS.[47]

The writ of mandamus was known to the common law and is of very ancient origin,[48] and as a general proposition the common-law rules prescribing the occasion on which the writ may issue and the mode of proceeding thereunder are to be applied, except in so far as they have been modified by statute.[49] In cases relating to municipal corporations and their officers[50] the rules of proceeding under the writ were essentially modified in England in 1710[51] by the statute known as the statute of Anne.[52] The statute of Anne did not, however, extend to the mass of the subjects of mandamus which remained to be disposed of according to the course of the common law;[53] but by a subsequent English statute[54] the provisions of the statute of Anne were extended to all cases of mandamus.[55] While the statute of Anne has furnished the rule of proceeding in some of the courts in this country,[56] in other jurisdictions the statute has been held never to have been adopted or in force.[57] But at present in many jurisdictions statutory or constitutional provisions exist regulating generally or in

42. State *v.* Hornaday, 62 Kan. 334, 62 Pac. 998; Atchison, etc., R. Co. *v.* Jefferson County, 12 Kan. 127.

43. Goytino *v.* McAleer, (Cal. App. 1906) 88 Pac. 991.

44. Foote *v.* Myers, 60 Misc. 790.

45. Shull *v.* Gray County, 54 Kan. 101, 37 Pac. 994, holding a candidate for office entitled to compel a canvass.

46. State *v.* Smith, 172 Mo. 618, 73 S. W. 134.

47. Conformity of federal courts to state practice acts in mandamus proceedings see COURTS, 11 Cyc. 885.

Power of legislature to regulate use of writ see CONSTITUTIONAL LAW, 8 Cyc. 821.

State laws as rules of decision in federal courts see COURTS, 11 Cyc. 910.

48. Kimball *v.* Union Water Co., 44 Cal. 173, 13 Am. Rep. 157; New Haven, etc., Co. *v.* State, 44 Conn. 376; Strong's Case, Kirby (Conn.) 345; Clay *v.* Ballard, 87 Va. 787, 13 S. E. 262. See also *supra*, I, B.

49. *Ex p.* Davis, 41 Me. 38; Swann *v.* Buck, 40 Miss. 268; Universal Church *v.* Columbia Tp. Section Twenty-Nine, 6 Ohio 445, 27 Am. Dec. 267; *In re* Turner, 5 Ohio 542; Douglass *v.* Loomis, 5 W. Va. 542.

Procedure in mandamus see *infra*, IX.

50. Dane *v.* Derby, 54 Me. 95, 89 Am. Dec. 722; Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146.

51. New Haven, etc., Co. *v.* State, 44 Conn. 376, 388, where it was said: "The effect of that statute was to assimilate the proceedings in cases by mandamus to ordinary actions at law, the prosecutor setting forth his right or cause of action in certain formal modes, to which the defendant set up his defence by way of return, the prosecutor being then at liberty to plead to or traverse the return."

52. St. 9 Anne, c. 20.

53. Dane *v.* Derby, 54 Me. 95, 89 Am. Dec. 722.

54. St. 1 Wm. IV, c. 21.

55. Fitzhugh *v.* Custer, 4 Tex. 391, 51 Am. Dec. 728; Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146.

56. New Haven, etc., Co. *v.* State, 44 Conn. 376; Strong's Case, Kirby (Conn.) 345; State *v.* Sheridan, 43 N. J. L. 82, 84 (where it was said: "The statute of 9 Anne, c. 20, has been adopted in our state (Rev. p. 630), and its effect is to assimilate the proceedings for mandamus in cases falling within its provisions, to actions at law"); Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146 (holding that since the statute of 9 Anne is applicable to the local situation and circumstances of the state of Vermont and is not repugnant to its constitution or laws, it must be considered as a part of the common law respecting pleadings and proceedings in actions of mandamus in cases falling within its provisions).

57. Dane *v.* Derby, 54 Me. 95, 89 Am. Dec. 722; Lunt *v.* Davison, 104 Mass. 498; Howard *v.* Gage, 6 Mass. 462; Fitzhugh *v.* Custer, 4 Tex. 391, 51 Am. Dec. 728.

designated particulars the writ and the proceedings thereunder,[58] although in some jurisdictions it is held that the office, object, and effect of the writ is the same as

58. *Arkansas.*—Crawford *v.* Carson, 35 Ark. 565.

California.— Maxwell *v.* San Francisco, 139 Cal. 229, 72 Pac. 996; Kimball *v.* Union Water Co., 44 Cal. 173, 13 Am. Rep. 157; Tilden *v.* Sacramento County, 41 Cal. 68, holding that a statute providing that no action lies against a public board, but that mandamus lies against it, does not operate to change the essential nature of the writ itself.

Connecticut.— New Haven, etc., Co. *v.* State, 44 Conn. 376; Cook *v.* Tannar, 40 Conn. 378.

Illinois.— Chicago Great Western R. Co. *v.* People, 179 Ill. 441, 53 N. E. 986; People *v.* Crabb, 156 Ill. 155, 40 N. E. 319 (holding that a mandamus proceeding is an action at law and it is therefore governed by the same rules of pleading that are applicable to other actions at law); People *v.* Williams, 145 Ill. 573, 33 N. E. 849, 36 Am. St. Rep. 514, 24 L. R. A. 492; People *v.* Glann, 70 Ill. 232; Silver *v.* People, 45 Ill. 224; McDonald *v.* Judson, 97 Ill. App. 414; Highway Com'rs *v.* Gibson, 7 Ill. App. 231.

Massachusetts.— Boston, etc., R. Co. *v.* Hampden County Com'rs, 116 Mass. 73; Lunt *v.* Davison, 104 Mass. 498.

Mississippi.— Chatters *v.* Coahoma County, 73 Miss. 351, 19 So. 107.

Missouri.— State *v.* Lewis, 76 Mo. 370; Hubbell *v.* Maryville, 85 Mo. App. 165; State *v.* Lockett, 54 Mo. App. 202.

New Jersey.— Neptune Tp. School Dist. *v.* Mannion, (1907) 65 Atl. 440; Mercer County *v.* Pennsylvania R. Co., 42 N. J. L. 490.

New York.— See People *v.* Best, 187 N. Y. 1, 79 N. E. 890; People *v.* Morton, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231. *Compare* People *v.* Ulster County, 32 Barb. 473, 477 [*reversed* on other grounds in 34 N. Y. 268], where it was said: "The proceedings by mandamus are not affected by the code, but must be regulated by the rules of pleading and practice prevailing antecedent thereto. (Code, § 471)."

North Dakota.— State *v.* Carey, 2 N. D. 36, 49 N. W. 164, holding that the proceeding is assimilated by the statute to a civil action, although a special proceeding.

Ohio.— State *v.* Crites, 48 Ohio St. 142, 26 N. E. 1052 (holding that by the express terms of statute, the pleadings in mandamus shall have the same effect, and must be construed, and may be amended, as in civil actions); State *v.* Union Tp., 9 Ohio St. 599; State *v.* Perry County Com'rs, 5 Ohio St. 497.

Pennsylvania.— Com. *v.* Philadelphia, 176 Pa. St. 588, 35 Atl. 195 [*reversing* 5 Pa. Dist. 222, 18 Pa. Co. Ct. 83] (holding that the act of 1893 was not designed to substitute mandamus for the ordinary remedy at law); Phœnix Iron Co. *v.* Com., 113 Pa. St. 563, 6 Atl. 75; Kell *v.* Rudy, 1 Pa. Super. Ct. 507 [*reversing* 15 Pa. Co. Ct. 309].

Tennessee.—Hawkins *v.* Kercheval, 10 Lea 535; State *v.* Marks, 6 Lea 12.

Texas.— Thomson *v.* Baker, 90 Tex. 163, 38 S. W. 21; McKenzie *v.* Baker, 88 Tex. 669, 32 S. W. 1038; Pickle *v.* McCall, 86 Tex. 212, 24 S. W. 265.

Utah.— Lyman *v.* Martin, 2 Utah 136; Chamberlain *v.* Warburton, 1 Utah 267, holding that the rules for determining the sufficiency of pleadings in civil actions generally under the Practice Act refer to pleadings in cases of mandamus.

Vermont.— Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146, holding that the statute of Anne was in effect extended to all cases of mandamus by No. 74, Acts of 1876, and that the complaint, answers, and subsequent pleadings are to be governed by the rules of the common law and must contain in substance the essentials of good pleading in an ordinary action at law.

Virginia.— Clay *v.* Ballard, 87 Va. 787, 13 S. E. 262.

Washington.— Clark County *v.* Brazee, 1 Wash. Terr. 199, holding that the difficult learning of the old writ of mandamus is rendered mainly obsolete by the Practice Act.

West Virginia.—Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 595.

Wisconsin.— State *v.* Kellogg, 95 Wis. 672, 70 N. W. 300; State *v.* Jennings, 56 Wis. 113, 121, 14 N. W. 28, where it is said: "A proceeding by mandamus is essentially a suit, and that when issue is joined by the return it becomes, in effect, a civil action within the meaning of the statutes, and as to forms and sufficiency of the several pleadings must be governed and controlled by the same rules which prevail in other civil actions."

England.— Norris *v.* Irish Land Co., 8 E. & B. 512, 4 Jur. N. S. 235, 27 L. J. Q. B. 115, 6 Wkly. Rep. 55, 92 E. C. L. 512 [*distinguishing* Benson *v.* Paull, 6 E. & B. 273, 2 Jur. N. S. 425, 25 L. J. Q. B. 274, 4 Wkly. Rep. 493, 88 E. C. L. 273], holding that the remedy by mandamus given by section 68 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125) is not confined to cases in which the prerogative writ of mandamus might have been granted.

In Louisiana it has been held that under the articles of the code practice the courts have more extensive powers than those of the common law in issuing the writ. State *v.* Strong, 32 La. Ann. 579; Hatch *v.* New Orleans City Bank, 1 Rob. 470.

In North Carolina it was at one time said: "There is no provision in the C. C. P., regulating the proceedings in writs of mandamus, and in such cases 'the practice heretofore in use, may be adopted so far as may be necessary to prevent a failure of justice.' C. C. P., sec. 392. The writ of mandamus is an extraordinary remedy and can only be used by the express order of a court of superior jurisdiction, and is not governed by the rules pre-

at common law.[59] As a general rule when a statute gives in general terms the power to issue a writ of mandamus, the common law determines when and under what circumstances such writ should be issued.[60] It has been held, however, that the introduction of the writ of mandamus by name does not necessarily bring with it all the rules of practice regulating the issue of the writ at common law; these rules may be modified not only by the statutes of the state but by the structure and organization of the courts and the principles lying at the foundation of its system of procedure.[61]

IV. MANDAMUS TO COURTS AND JUDICIAL OFFICERS.

A. General Rules — 1. Review of Discretion. While a writ of mandamus will not as a general rule issue to review an exercise of judicial discretion,[62] it

scribed for the prosecution of ordinary legal remedies. State *v.* Jones, 23 N. C. 129. It is not embraced in the rule established in Tate *v.* Powe, 64 N. C. 644, which defines the distinction between civil actions and special proceedings." Lutterloh *v.* Cumberland County, 65 N. C. 403, 405. But by subsequent legislation, the mode of procedure in some particulars has been expressly prescribed. Rev. (1905) §§ 822–824.

59. People *v.* Best, 187 N. Y. 1, 79 N. E. 890. See also Pallady *v.* Beatty, 15 Okla. 626, 83 Pac. 428; Beadles *v.* Fry, 15 Okla. 428, 82 Pac. 1041, 2 L. R. A. N. S. 855; Cameron *v.* Parker, 2 Okla. 277, 38 Pac. 14; Durham *v.* Monumental Silver Min. Co., 9 Oreg. 41; Clay *v.* Ballard, 87 Va. 787, 13 S. E. 262.

60. See Common Law, 8 Cyc. 382, 383, text and note 7.

61. Fitzhugh *v.* Custer, 4 Tex. 391, 51 Am. Dec. 728; Bradley *v.* McCrabb, Dall. (Tex.) 504. See also Watkins *v.* Kirchain, 10 Tex. 375.

62. *Alabama.*— *Ex p.* Woodruff, 123 Ala. 99, 26 So. 509; *Ex p.* Scudder-Gale Grocery Co., 120 Ala. 434, 25 So. 44; *Ex p.* Hurn, 92 Ala. 102, 9 So. 515, 25 Am. St. Rep. 23, 13 L. R. A. 120; State *v.* Williams, 69 Ala. 311; *Ex p.* Schmidt, 62 Ala. 252; *Ex p.* Brown, 58 Ala. 536; Davidson *v.* Washburn, 56 Ala. 596; *Ex p.* Hendree, 49 Ala. 360; *Ex p.* South, etc., Alabama R. Co., 44 Ala. 654; Appling *v.* Bailey, 44 Ala. 333.

Arkansas.— McCreary *v.* Rogers, 35 Ark. 298; *Ex p.* Whittington, 34 Ark. 394; Union County Ct. *v.* Robinson, 27 Ark. 116; *Ex p.* Johnson, 25 Ark. 614; *Ex p.* Hutt, 14 Ark. 368.

California.— Rhodes *v.* Spencer, 62 Cal. 43; People *v.* Hubbard, 22 Cal. 34.

Delaware.— Houston *v.* Sussex County Levy Ct., 5 Harr. 108.

Hawaii.— Matter of Schmidt, 13 Hawaii 332.

Illinois.— Hemphill *v.* Collins, 117 Ill. 396, 7 N. E. 496.

Indian Territory.— See Glenn-Tucker *v.* Clayton, 4 Indian Terr. 511, 70 S. W. 8.

Kansas.— St. Louis, etc., R. Co. *v.* Shinn, 60 Kan. 111, 55 Pac. 346.

Kentucky.— Cassidy *v.* Young, 92 Ky. 227, 17 S. W. 485, 13 Ky. L. Rep. 512; Goheen *v.* Myers, 18 B. Mon. 423.

Louisiana.— State *v.* St. Paul, 110 La. 995, 35 So. 261; State *v.* Judge Second Dist. Ct., 32 La. Ann. 1306; State *v.* Rightor, 32 La. Ann. 1305; State *v.* Judge New Orleans Third Dist. Ct., 17 La. Ann. 328; State *v.* Judge Second Dist. Ct., 13 La. Ann. 484.

Maryland.— McCrea *v.* Roberts, 89 Md. 238, 43 Atl. 39, 44 L. R. A. 485.

Michigan.— Roberts *v.* Lenawee Cir. Judge, 140 Mich. 115, 103 N. W. 512; Felcher *v.* Wayne Cir. Judge, 97 Mich. 633, 57 N. W. 191.

Missouri.— State *v.* Megown, 89 Mo. 156, 1 S. W. 208; Strahan *v.* Audrain County Ct., 65 Mo. 644; Bell *v.* Pike County Ct., 61 Mo. App. 173.

Montana.— State *v.* Second Judicial Dist. Ct., 26 Mont. 275, 67 Pac. 943.

Nebraska.— State *v.* Laflin, 40 Nebr. 441, 58 N. W. 936; State *v.* Johnson County Dist. Ct., 2 Nebr. (Unoff.) 385, 96 N. W. 121.

New Jersey.— Wells *v.* Stackhouse, 17 N. J. L. 355; Hankins *v.* Bennet, 12 N. J. L. 179.

New York.— *Ex p.* Ostrander, 1 Den. 679; *Ex p.* Koon, 1 Den. 644; *Ex p.* Baily, 2 Cow. 479; *Ex p.* Bassett, 2 Cow. 458; *Ex p.* Nelson, 1 Cow. 417.

Pennsylvania.— *In re* Sixth St. Bridge, 15 Pa. Dist. 689, 32 Pa. Co. Ct. 499.

Texas.— State *v.* Morris, 86 Tex. 226, 24 S. W. 393.

Utah.— Taylor *v.* Salt Lake County Ct., 2 Utah 405.

Vermont.— Foster *v.* Redfield, 50 Vt. 285.

Virginia.— *Ex p.* Richardson, 3 Leigh 343; Jones *v.* Stafford Justices, 1 Leigh 584. But see Dew *v.* Judges Sweet Spring Dist. Ct., 3 Hen. & M. 1, 3 Am. Dec. 639.

United States.— *In re* Blake, 175 U. S. 114, 20 S. Ct. 42, 44 L. ed. 94; Hudson *v.* Parker, 156 U. S. 277, 15 S. Ct. 450, 39 L. ed. 424; *In re* Parsons, 150 U. S. 150, 14 S. Ct. 50, 37 L. ed. 1034; *Ex p.* Burtis, 103 U. S. 238, 26 L. ed. 392; *Ex p.* Perry, 102 U. S. 183, 26 L. ed. 43; *Ex p.* Denver, etc., R. Co., 101 U. S. 711, 25 L. ed. 872; *Ex p.* Loring, 94 U. S. 418, 24 L. ed. 165; *Ex p.* Flippin, 94 U. S. 348, 24 L. ed. 194 [*overruling* so far as in conflict McCargo *v.* Chapman, 20 How. 555, 15 L. ed. 1021]; U. S. *v.* Addison, 22 How. 174, 16 L. ed. 304; *Ex p.* Taylor, 14 How. 3, 14 L. ed. 302; *Ex p.* Hoyt, 13 Pet.

may be employed to compel an inferior tribunal to act or to exercise its discretion, although the particular method of acting or the manner in which the discretion shall be exercised will not be controlled.[63] But as a general rule it will not issue for this purpose where there is a remedy by appeal or other method of review.[64] In some cases, however, mandamus may be employed to correct the

279, 10 L. ed. 161; Ladd *v.* Tudor, 14 Fed. Cas. No. 7,975, 3 Woodb. & M. 325.

England.— Rex *v.* Leicestershire, 1 M. & S. 442, 14 Rev. Rep. 494.

Canada.— Reg. *v.* Duvaney, 12 N. Brunsw. 581; Woods *v.* Bennett, 12 U. C. Q. B. 167.

See 33 Cent Dig. tit. "Mandamus," § 64.

Control of discretion in general see *supra*, II, C, 2, a.

The commission of the Five Civilized Tribes, created by the act of congress, is a special tribunal, vested with judicial power to hear and determine the claims of all applicants to it for citizenship in the Five Nations in accordance with the provisions of the acts of congress; and the courts have no jurisdiction, by the use of the writ of mandamus, to correct its errors, control its decisions, review or reverse its judgments, or to compel it to make different decisions upon these questions. Kimberlin *v.* Five Civilized Tribes Commissiou, 104 Fed. 653, 44 C. C. A. 109 [*affirming* 3 Indian Terr. 16, 53 S. W. 467].

63. *Alabama.*— *Ex p.* Colley, 140 Ala. 193, 37 So. 232; *Ex p.* Campbell, 130 Ala. 196, 30 So. 521; *Ex p.* Hayes, 92 Ala. 120, 9 So. 156; *Ex p.* Redd, 73 Ala. 548; *Ex p.* Shaudies, 66 Ala. 134; Lamar *v.* Marshall County Com'rs' Ct., 21 Ala. 772.

Arkansas.— McCreary *v.* Rogers, 35 Ark. 298; Brem *v.* Arkansas County Ct., 9 Ark. 240; *Ex p.* Trapnall, 6 Ark. 9, 42 Am. Dec. 676; Gunn *v.* Pulaski County, 3 Ark. 427.

California.— Kerr *v.* Stanislaus County Super. Ct., 130 Cal. 183, 62 Pac. 479; Jacobs *v.* San Francisco, 100 Cal. 121, 34 Pac. 630; Beguhl *v.* Swan, 39 Cal. 411; Lewis *v.* Barclay, 35 Cal. 213.

Colorado.— People *v.* Graham, 16 Colo. 347, 26 Pac. 936; People *v.* Arapahoe County Dist. Ct., 14 Colo. 396, 24 Pac. 260.

Florida.— State *v.* Hocker, 36 Fla. 358, 18 So. 767; State *v.* King, 32 Fla. 416, 13 So. 891; *Ex p.* Henderson, 6 Fla. 279. And see State *v.* Walker, 25 Fla. 561, 6 So. 169.

Georgia.— Moody *v.* Fleming, 4 Ga. 115, 48 Am. Dec. 210; State *v.* Justices Richmond County Inferior Ct., Dudley 37.

Illinois.— People *v.* McConnell, 146 Ill. 532, 34 N. E. 945; Commercial Union Assur. Co. *v.* Scammon, 133 Ill. 627, 23 N. E. 406, 144 Ill. 506, 32 N. E. 916.

Indiana.— State *v.* Tippecanoe County, 45 Ind. 501.

Kentucky.— Com. *v.* Newell, 114 Ky. 419, 71 S. W. 4, 24 Ky. L. Rep. 1197; Shoemaker *v.* Hodge, 111 Ky. 436, 63 S. W. 979, 23 Ky. L. Rep. 736; Shine *v.* Kentucky Cent. R. Co., 85 Ky. 177, 3 S. W. 18, 8 Ky. L. Rep. 748; Com. *v.* Boone County Ct., 82 Ky. 632, 6 Ky. L. Rep. 755; Blair *v.* McCann, 64 S. W. 984, 23 Ky. L. Rep. 1226.

Louisiana.— State *v.* Judge of First Judicial Dist., 50 La. Ann. 552, 23 So. 478; Citizens' Bank *v.* Webre, 44 La. Ann. 1081, 11 So. 706; State *v.* Judge, 43 La. Ann. 826, 9 So. 640; State *v.* Lazarus, 37 La. Ann. 610; State *v.* Judge Civ. Dist. Ct., 34 La. Ann. 74; State *v.* Judge Third Dist. Ct., 32 La. Ann. 296; State *v.* Bermudez, 14 La. 478.

Michigan.— Brown *v.* Kalamazoo Cir. Judge, 75 Mich. 274, 42 N. W. 827, 13 Am. St. Rep. 438, 5 L. R. A. 226; People *v.* Judges Wayne County Ct., 1 Mich. 359.

Mississippi.— Attala County Bd. of Police *v.* Grant, 9 Sm. & M. 77, 47 Am. Dec. 102; Madison County Ct. *v.* Alexander, Walk. 523.

Missouri.— State *v.* Smith, 172 Mo. 446, 72 S. W. 692; State *v.* St. Louis Ct. of Appeals, 87 Mo. 374; Miltenberger *v.* St. Louis County Ct., 50 Mo. 172; State *v.* Lafayette County Ct., 41 Mo. 221; State *v.* Walker, 85 Mo. App. 247.

Nebraska.— State *v.* Churchill, 37 Nebr. 702, 56 N. W. 484.

New Jersey.— Sinnickson *v.* Corwine, 26 N. J. L. 311; Roberts *v.* Holsworth, 10 N. J. L. 57; Squier *v.* Gale, 6 N. J. L. 157.

New York.— People *v.* Steele, 2 Barb. 397.

Ohio.— *In re* Turner, 5 Ohio 542.

Pennsylvania.— Com. *v.* McLaughlin, 120 Pa. St. 518, 14 Atl. 377; Com. *v.* Judges Philadelphia County C. Pl., 3 Binn. 273.

Texas.— Gouhenour *v.* Anderson, 35 Tex. Civ. App. 569, 81 S. W. 104; Cox *v.* Hightower, 19 Tex. Civ. App. 536, 47 S. W. 1048.

Vermont.— Richards *v.* Wheeler, 2 Aik. 369.

Virginia.— Cowan *v.* Fulton, 23 Gratt. 579.

Washington.— State *v.* King County Super. Ct., 14 Wash. 686, 45 Pac. 670.

West Virginia.— State *v.* Wood County Ct., 33 W. Va. 589, 11 S. E. 72.

Wisconsin.— State *v.* Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33.

United States.— Hudson *v.* Parker, 156 U. S. 277, 15 S. Ct. 450, 39 L. ed. 424; *In re* Parsons, 150 U. S. 150, 14 S. Ct. 50, 37 L. ed. 1034; *Ex p.* Brown, 116 U. S. 401, 6 S. Ct. 387, 29 L. ed. 676.

England.— Reg. *v.* Adamson, 1 Q. B. D. 201, 45 L. J. M. C. 46, 33 L. T. Rep. N. S. 840, 24 Wkly. Rep. 250; Reg. *v.* Justices, 1 New Sess. Cas. 247.

Canada.— Dean *v.* Chamberlain, 8 Ont. Pr. 303.

See 33 Cent. Dig. tit. "Mandamus," § 64.

64. *Arkansas.*— *Ex p.* Williamson, 8 Ark. 424.

California.— People *v.* Moors, 29 Cal. 427.

Montana.— State *v.* District Ct., 27 Mont. 280, 70 Pac. 981; State *v.* Second Judicial Dist. Ct., 26 Mont. 274, 67 Pac. 625; State

errors of inferior tribunals and to prevent a failure of justice or irreparable injury where there is a clear right, and there is an absence of any other adequate remedy;[65] and it may also be employed to prevent an abuse of discretion,[66] or an act outside of the exercise of discretion,[67] or to correct an arbitrary action which does not amount to the exercise of discretion.[68]

2. Compelling Action — a. Correcting Mistake of Law in General. Where a court declines jurisdiction by mistake of law, erroneously deciding as a matter of law and not as a decision upon the facts that it has no jurisdiction, and either declines to proceed or disposes of the case, the general rule is that a mandamus to proceed will lie from any higher court having supervisory jurisdiction,[69] unless

v. Second Judicial Dist. Ct., 25 Mont. 31, 63 Pac. 686, writ of supervisory control.

Pennsylvania.— Com. *v.* Thomas, 163 Pa. St. 446, 30 Atl. 206 [*reversing* 8 Pa. Co. Ct. 568, 5 Kulp 547].

Wisconsin.— State *v.* Ludwig, 106 Wis. 226, 82 N. W. 158.

See 33 Cent. Dig. tit. "Mandamus," § 9. See also *supra*, II, D, 2, e.

But see People *v.* Van Tassel, 13 Utah 9, 43 Pac. 625.

65. *Alabama.*— Wilson *v.* Duncan, 114 Ala. 659, 21 So. 1017 (failure to take bond or taking of insufficient bond in election contest); *Ex p.* Tower Mfg. Co., 103 Ala. 415, 15 So. 836. And see *Ex p.* Dowe, 54 Ala. 258, holding that a chancellor would be required to take steps to secure payment of a claim against an inebriate's estate.

California.— Rhodes *v.* Craig, 21 Cal. 419.

Illinois.— People *v.* Pearson, 2 Ill. 473; People *v.* Pearson, 2 Ill. 458.

Louisiana.— State *v.* Judge Civil Dist. Ct. Div. B., 52 La. Ann. 1275, 27 So. 697, 51 L. R. A. 71.

Michigan.— Hester *v.* Chambers, 84 Mich. 562, 48 N. W. 152; Tawas, etc., R. Co. *v.* Iosco Cir. Judge, 44 Mich. 479, 7 N. W. 65.

South Dakota.— Vine *v.* Jones, 13 S. D. 54, 82 N. W. 82.

Tennessee.— State *v.* Sneed, 105 Tenn. 711, 58 S. W. 1070.

Canada.— Meyers *v.* Baker, 26 U. C. Q. B. 16.

Mandamus to correct error in general see *supra*, II, E.

A writ of supervision will not issue so long as the court keeps within its jurisdiction. It is seldom issued, only when other remedy fails to correct arbitrary, wrongful, and tyrannical action. State *v.* Second Judicial Dist. Ct., 32 Mont. 579, 81 Pac. 345.

66. *California.*— Petaluma Sav. Bank *v.* San Francisco Super. Ct., 111 Cal. 488, 44 Pac. 177.

Colorado.— Union Colony *v.* Elliott, 5 Colo. 371.

Georgia.— Moody *v.* Fleming, 4 Ga. 115, 48 Am. Dec. 210; *Ex p.* Simpson, R. M. Charlt. 111.

Michigan.— Fletcher *v.* Alpena Cir. Judge, 136 Mich. 511, 99 N. W. 748; Lansing Lumber Co. *v.* Ingham Cir. Judge, 108 Mich. 305, 66 N. W. 41; Detroit *v.* Wayne County Cir. Judge, 79 Mich. 384, 44 N. W. 622.

Montana.— State *v.* Eighth Judicial Dist. Ct., 32 Mont. 34, 79 Pac. 401.

United States.— *Ex p.* Virginia, 100 U. S. 313, 25 L. ed. 667.

Review of abuse of discretion in general see *supra*, II, C, 2, *a*, (III).

67. *Ex p.* Virginia, 100 U. S. 313, 329, 25 L. ed. 667, where it is said: "It is well settled that the writ of mandamus will issue to correct the action of subordinate or inferior courts or judicial officers, where they have exceeded their jurisdiction, and there is no other adequate remedy."

68. Gouhenour *v.* Anderson, 35 Tex. Civ. App. 569, 81 S. W. 104.

69. *California.*— De la Beckwith *v.* Colusa County Super. Ct., 146 Cal. 496, 80 Pac. 717; Cahill *v.* San Francisco Super. Ct., 145 Cal. 42, 78 Pac. 467; Temple *v.* Los Angeles Super. Ct., 70 Cal. 211, 11 Pac. 699; People *v.* De la Guerra, 43 Cal. 225; Beguhl *v.* Swan, 39 Cal. 411.

Dakota.— Territory *v.* Judge Dist. Ct., 5 Dak. 275, 38 N. W. 439.

Florida.— State *v.* Wills, (1905) 38 So. 289; State *v.* Reeves, 44 Fla. 179, 32 So. 814; State *v.* Hocker, 36 Fla. 358, 18 So. 767; State *v.* King, 32 Fla. 416, 13 So. 891; State *v.* Young, 31 Fla. 594, 12 So. 673, 34 Am. St. Rep. 41, 19 L. R. A. 636 [*overruling* State *v.* Van Ness, 15 Fla. 317]; Anderson *v.* Brown, 6 Fla. 299; *Ex p.* Henderson, 6 Fla. 279.

Idaho.— Hill *v.* Morgan, 9 Ida. 718, 76 Pac. 323.

Kansas.— State *v.* Webb, 34 Kan. 710, 9 Pac. 770. The writ lies to compel a district judge to hear a petition for change of municipal boundaries. Emporia *v.* Randolph, 56 Kan. 117, 42 Pac. 376.

Louisiana.— State *v.* Judges Fifth Cir. Ct. of App., 48 La. Ann. 672, 19 So. 617; State *v.* Judges Orleans Parish Ct. of App., 42 La. Ann. 1087, 8 So. 267.

Michigan.— Taylor *v.* Montcalm Cir. Judge, 122 Mich. 692, 81 N. W. 965.

Missouri.— State *v.* Smith, 172 Mo. 446, 72 S. W. 692; State *v.* Philips, 97 Mo. 331, 10 S. W. 855, 3 L. R. A. 476.

Montana.— State *v.* Loud, 24 Mont. 428, 62 Pac. 497; Raleigh *v.* First Judicial Dist. Ct., 24 Mont. 306, 61 Pac. 991, 81 Am. St. Rep. 431; State *v.* Eddy, 10 Mont. 311, 25 Pac. 1032.

Nevada.— Floral Springs Water Co. *v.* Rives, 14 Nev. 431.

there is a specific and adequate remedy by appeal or writ of error.[70] Mandamus will not, however, issue to review the decision of a lower court which has refused jurisdiction after determination of a question of fact.[71] In many cases a distinction is made between a refusal to take jurisdiction *ab initio* and a determination that there is no jurisdiction, it being held that where the court has acted and judicially determined that it has no jurisdiction its determination cannot be reviewed,[72]

New York.— Kelsey *v.* Church, 112 N. Y. App. Div. 408, 98 N. Y. Suppl. 535; People *v.* Foster, 40 Misc. 19, 81 N. Y. Suppl. 212, 12 N. Y. Annot. Cas. 375; People *v.* Judges Dutchess C. Pl., 1 How. Pr. 111.

Ohio.— State *v.* Smith, 69 Ohio St. 196, 68 N. E. 1044; State *v.* McCarty, 52 Ohio St. 363, 39 N. E. 1041, 27 L. R. A. 534; *In re* Turner, 5 Ohio 542.

Texas.— Cox *v.* Hightower, 19 Tex. Civ. App. 536, 47 S. W. 1048.

Utah.— Nichols *v.* Cherry, 22 Utah 1, 60 Pac. 1103; State *v.* Hart, 19 Utah 438, 57 Pac. 415.

Vermont.— Woodstock *v.* Gallup, 28 Vt. 587.

Virginia.— Valley Turnpike Co. *v.* Moore, 100 Va. 702, 42 S. E. 675; Richardson *v.* Farrar, 88 Va. 760, 15 S. E. 117; Cowan *v.* Fulton, 23 Gratt. 579.

Washington.— State *v.* Steiner, (1906) 87 Pac. 66; State *v.* King County Super. Ct., 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177; State *v.* McClinton, 17 Wash. 45, 48 Pac. 740; State *v.* Parker, 12 Wash. 685, 42 Pac. 113 [*following* State *v.* Hunter, 3 Wash. 92, 27 Pac. 1076]; State *v.* Lichtenberg, 4 Wash. 553, 30 Pac. 659.

West Virginia.— Wheeling Bridge, etc., R. Co. *v.* Paull, 39 W. Va. 142, 19 S. E. 551.

United States.— *Ex p.* Connaway, 178 U. S. 421, 20 S. Ct. 951, 44 L. ed. 1134; *In re* Grossmayer, 177 U. S. 48, 20 S. Ct. 535, 44 L. ed. 665; *In re* Hohorst, 150 U. S. 653, 14 S. Ct. 221, 37 L. ed. 1211; *Ex p.* Pennsylvania Co., 137 U. S. 451, 11 S. Ct. 141, 34 L. ed. 738; *Ex p.* Parker, 120 U. S. 737, 7 S. Ct. 767, 30 L. ed. 818; *Ex p.* Brown, 116 U. S. 401, 6 S. Ct. 387, 29 L. ed. 676; Chicago Knickerbocker Ins. Co. *v.* Comstock, 16 Wall. 258, 21 L. ed. 493; Finn *v.* Hoyt, 52 Fed. 83; Schollenberger *v.* Forty-Five Foreign Ins. Cos., 21 Fed. Cas. No. 12,475*a*, 5 Wkly. Notes Cas. (Pa.) 405. See also Crawford *v.* Haller, 111 U. S. 796, 4 S. Ct. 697, 28 L. ed. 602.

England.— Reg. *v.* Goodrich, 15 Q. B. 671, 14 Jur. 914, 19 L. J. Q. B. 413, 69 E. C. L. 671; Matter of Brighton Intercepting, etc., Sewers Act, 9 Q. B. D. 723; Reg. *v.* Bingham, 4 Q. B. 877, 3 R. & Can. Cas. 390, 45 E. C. L. 877; Rex *v.* Wiltshire Justices, 1 East 683; Reg. *v.* London, 16 Cox C. C. 77, 50 J. P. 711, 54 L. T. Rep. N. S. 646; Reg. *v.* Richards, 20 L. J. Q. B. 351, 2 L. M. & P. 263; Reg. *v.* Judge Southampton County Ct., 65 L. T. Rep. N. S. 320.

See 33 Cent. Dig. tit. "Mandamus," §§ 74, 75.

70. State *v.* Fourth Judicial Dist. Ct., 13 N. D. 211, 100 N. W. 248; State *v.* King County Super. Ct., 24 Wash. 438, 64 Pac. 727; State *v.* Moore, 21 Wash. 629, 59 Pac. 505; State *v.* Spokane County Super. Ct., 21 Wash. 108, 57 Pac. 352; State *v.* Hadley, 20 Wash. 520, 56 Pac. 29; State *v.* Jefferson County Super. Ct., 20 Wash. 502, 55 Pac. 933; U. S. *v.* Swan, 65 Fed. 647, 13 C. C. A. 77. See, generally, *supra*, II, D, 2, e.

71. Cahill *v.* San Francisco Super. Ct., 145 Cal. 42, 78 Pac. 467; *Ex p.* Lewis, 21 Q. B. D. 191, 52 J. P. 773, 57 L. J. M. C. 108, 59 L. T. Rep. N. S. 338, 37 Wkly. Rep. 13; Reg. *v.* Percy, L. R. 9 Q. B. 64, 43 L. J. M. C. 45, 22 Wkly. Rep. 72; Reg. *v.* Goodrich, 15 Q. B. 671, 14 Jur. 914, 19 L. J. Q. B. 413, 69 E. C. L. 671; Reg. *v.* Blanshard, 13 Q. B. 318, 18 L. J. M. C. 110, 66 E. C. L. 318; Reg. *v.* Kesteren Justices, 3 Q. B. 810, Dav. & M. 113, 13 L. J. M. C. 78, 1 New Sess. Cas. 151, 43 E. C. L. 985; Reg. *v.* London, 16 Cox C. C. 77, 50 J. P. 711, 54 L. T. Rep. N. S. 646; Reg. *v.* Fawcett, 11 Cox C. C. 305; Reg. *v.* Sheil, 49 J. P. 68, 50 L. T. Rep. N. S. 590; *Ex p.* MacMahon, 48 J. P. 70; *Ex p.* Milner, 15 Jur. 1037; Reg. *v.* Flintshire Justices, 11 Jur. 185, 16 L. J. M. C. 55, 2 New Sess. Cas. 572, 1 Saund. & C. 331; Reg. *v.* Yorkshire Justices, 53 L. T. Rep. N. S. 728, 34 Wkly. Rep. 108.

72. *Illinois.*— People *v.* Garnett, 130 Ill. 340, 23 N. E. 331, holding that mandamus would not lie to compel reinstatement of an appeal dismissed on the ground of unconstitutionality of the statute under which it was taken.

Louisiana.— State *v.* Judges Orleans Parish Ct. of App., 105 La. 217, 29 So. 816; State *v.* Judges First Cir. Ct. of App., 47 La. Ann. 1516, 18 So. 510; State *v.* Hudspeth, 38 La. Ann. 97; State *v.* Morgan, 12 La. 1181.

Missouri.— State *v.* Smith, 105 Mo. 6, 16 S. W. 1052; State *v.* Mosman, 112 Mo. App. 540, 87 S. W. 75.

Nevada.— Nevada Cent. R. Co. *v.* Lander County Dist. Ct., 21 Nev. 409, 32 Pac. 673; State *v.* Wright, 4 Nev. 119.

New York.— Matter of McBride, 72 Hun 394, 25 N. Y. Suppl. 431.

Pennsylvania.— Com. *v.* Judges Philadelphia County C. Pl., 3 Binn. 273.

United States.— *In re* Key, 189 U. S. 84, 23 S. Ct. 624, 47 L. ed. 720; *In re* Morrison, 147 U. S. 14, 13 S. Ct. 246, 37 L. ed. 60; *Ex p.* Baltimore, etc., R. Co., 108 U. S. 566, 2 S. Ct. 876, 27 L. ed. 812; *Ex p.* Des Moines, etc., R. Co., 103 U. S. 794, 26 L. ed. 461.

appeal or writ of error being in such case the proper remedy,[73] although in some cases it is said that mandamus will be granted even in such an instance if there is no other remedy.[74] As a general rule also mandamus will lie when an inferior court has refused to entertain jurisdiction upon what may be termed a preliminary objection based upon a matter of law.[75] Where the lower court has properly decided that it has no jurisdiction it will not be compelled to assume it.[76]

b. In Cases of Assumed Disqualification. When a judge declines jurisdiction on the ground that he is disqualified when he is not, his decision is not final, and mandamus lies to direct him to assume jurisdiction.[77]

3. Enforcing Ministerial Duties. Where a duty is reposed upon a judge or tribunal, and no discretion as to its performance given, performance may be compelled by mandamus.[78] And where any tribunal in which discretionary power is

Canada.— See Williamson *v.* Bryans, 12 U. C. C. P. 275.

73. *Ex p.* Hurn, 92 Ala. 102, 9 So. 515, 25 Am. St. Rep. 23, 13 L. R. A. 120; Aldrich *v.* Alameda County Super. Ct., 135 Cal. 12, 66 Pac. 846; State *v.* Fourth Judicial Dist. Ct., (N. D. 1904) 100 N. W. 248.

74. Reynolds *v.* Carroll, 114 La. 610, 38 So. 470; State *v.* Judges Orleans Parish Ct. of App., 37 La. Ann. 109; State *v.* Judges Second Cir. Ct. of App., 33 La. Ann. 1096; State *v.* Mayo, 33 La. Ann. 1070; State *v.* Judges Ct. of App., 33 La. Ann. 180; Maxwell *v.* Speed, 60 Mich. 36, 26 N. W. 824, holding that where an objection to the jurisdiction has been presented in such a manner as not to be open to review the court may be compelled by mandamus to set aside its ruling on such objection.

75. *Louisiana.*— State *v.* Foster, 106 La. 425, 31 So. 57; State *v.* Ellis, 41 La. Ann. 41, 6 So. 55; State *v.* Judge Twenty-Sixth Dist. Ct., 34 La. Ann. 1177.

Michigan.— Brown *v.* Mesnard Min. Co., 105 Mich. 653, 63 N. W. 1000; People *v.* Swift, 59 Mich. 529, 26 N. W. 694.

Missouri.— Castillo *v.* St. Louis Cir. Ct., 28 Mo. 259.

Montana.— Raleigh *v.* First Judicial Dist. Ct., 24 Mont. 306, 61 Pac. 991, 81 Am. St. Rep. 431.

Nevada.— State *v.* Murphy, 19 Nev. 89, 6 Pac. 840.

England.— Reg. *v.* Kesteven Justices, 3 Q. B. 810, Dav. & M. 113, 13 L. J. M. C. 78, 1 New Sess. Cas. 151, 43 E. C. L. 985; Rex *v.* Wilt County Justices, 8 B. & C. 380, 6 L. J. M. C. O. S. 97, 2 M. & R. 401, 15 E. C. L. 191; Reg. *v.* Carnarvonshire Justices, 1 G. & D. 423; Reg. *v.* Flintshire Justices, 11 Jur. 185, 16 L. J. M. C. 55, 2 New Sess. Cas. 572, 1 Saund. & C. 331; Reg. *v.* Richards, 20 L. J. Q. B. 351, 2 L. M. & P. 263. But see Reg. *v.* Monmouthshire Justices, 4 B. & C. 844, 7 D. & R. 334, 28 Rev. Rep. 478, 10 E. C. L. 825.

On ground of defect of parties.— Where an inferior judge refuses to try a cause at issue between the parties, on the ground that others unknown may be interested and should be made parties, a mandamus will be granted to compel him to proceed. If those who are interested and informed of the proceedings do not appear to protect their rights, they must bear the consequences; and those who are neither parties nor privies to the proceedings cannot be affected by the judgment. State *v.* Judge Commercial Ct., 4 Rob. (La.) 227.

76. State *v.* Judges Ct. of App., 45 La. Ann. 1319, 14 So. 118.

77. State *v.* Pitts, 139 Ala. 152, 36 So. 20; Medlin *v.* Taylor, 101 Ala. 239, 13 So. 310; *Ex p.* Alabama State Bar Assoc., 92 Ala. 113, 8 So. 768, 12 L. R. A. 134; State *v.* Young, 31 Fla. 594, 12 So. 673, 34 Am. St. Rep. 41, 19 L. R. A. 636 [*overruling* State *v.* Van Ness, 15 Fla. 317]. But see *In re* Judge Elgin County Ct., 20 U. C. Q. B. 588.

78. *Arkansas.*— McCreary *v.* Rogers, 35 Ark. 298, allowance of appeal.

Georgia.— Manor *v.* McCall, 5 Ga. 522.

Iowa.— State *v.* Marshall County Judge, 7 Iowa 186, holding that a county judge might be compelled to call to his assistance two justices of the peace and canvass returns of a county-seat election.

Maryland.— Bostock *v.* Sams, 95 Md. 400, 52 Atl. 665, 93 Am. St. Rep. 394, 59 L. R. A. 282, holding that the duty to issue a permit for building is ministerial where it appears that the proposed building is fully within the rules prescribed.

Massachusetts.— Com. *v.* Justices Hampden County Ct. of Sess., 2 Pick. 414, duty of court of sessions is peremptory to provide house of correction.

Missouri.— State *v.* Reynolds, (1906) 97 S. W. 650, holding that where minors over fourteen years of age were entitled to mandamus to compel the allowance of an appeal from an order refusing to set aside the appointment by the probate court of the public administrator as curator of their estate, in derogation of their right of selection, which right was supported in the probate court by substantial evidence and without any evidence against it, and these facts were admitted in the record, the acts of the probate court were ministerial, and not judicial; and hence mandamus would issue to that court directly to compel the setting aside of the order appointing the public administrator curator and the acceptance of the selection of the minors.

lodged has exercised its discretion so far as the exercise is necessary in a particular case, and has given its conclusions upon the facts before it, what remains to be done to make its conclusion effective is purely ministerial, and mandamus will lie to compel its performance.[79]

4. NECESSITY OF CLEAR CASE. Mandamus being an extraordinary writ, with prerogative features, and not a writ of right, a strong case must be presented to coerce action by a judge, the presumption being that he has done his duty.[80]

5. PRIOR DEMAND AND REFUSAL. There must always be a previous request to act, and a definite, unqualified refusal, before the writ will issue.[81]

New York.— People *v.* Shea, 7 Hun 303, assigning justices for general and special terms.

North Carolina.— Lander *v.* McMillan, 53 N. C. 174, where the justices of the county court were compelled to appoint commissioners to lay off the site of a county-seat, and holding also that it was no defense that the commissioners by whom the county-seat was located had been prompted by improper motives.

Pennsylvania.— Com. *v.* Bunn, 71 Pa. St. 405, holding duty of register to appoint a register's court ministerial.

Tennessee.— Newman *v.* Scott County Justices, 5 Sneed 695 [*overruling* in effect Cannon County Justices *v.* Hoodenpyle, 7 Humphr. 144], levy of tax.

Virginia.— U. S. Fidelity, etc., Co. *v.* Peebles, 100 Va. 585, 42 S. E. 310.

West Virginia.— Summers County *v.* Monroe County, 43 W. Va. 207, 27 S. E. 307 (duty of circuit court to appoint commissioners to settle boundaries between counties); Doolittle *v.* Cabell County Ct., 28 W. Va. 158 (filing petition for relocation of county-seat).

Canada.— McKenna *v.* Powell, 20 U. C. C. P. 394; Rex *v.* Bathurst Justices, 4 U. C. Q. B. O. S. 340.

See also cases more specifically cited *infra*, IV, B.

79. *Colorado.*— Rhodes *v.* Denver Bd. of Public Works, 10 Colo. App. 99, 49 Pac. 430.

Louisiana.— State *v.* Judge Fourth Dist. Ct., 28 La. Ann. 451.

Minnesota.— State *v.* Cox, 26 Minn. 214, 2 N. W. 494.

New Jersey.— Cortleyou *v.* Ten Eyck, 22 N. J. L. 45.

Tennessee.—Williams *v.* Saunders, 5 Coldw. 60.

Texas.— Lloyd *v.* Brinck, 35 Tex. 1.

United States.—New York L., etc., Ins. Co. *v.* Wilson, 8 Pet. 291.

See also cases more specifically cited *infra*, IV, B.

80. *California.*— Peralta *v.* Adams, 2 Cal. 594.

Connecticut.—Ansonia *v.* Studley, 67 Conn. 170, 34 Atl. 1030.

Illinois.— Hawes *v.* People, 124 Ill. 560, 17 N. E. 13.

Kentucky.— Warren County Ct. *v.* Daniel, 2 Bibb 573.

Maine.— Hoxie *v.* Somerset County Com'rs, 25 Me. 333.

Massachusetts.— Gray *v.* Bridge, 11 Pick. 189.

New Jersey.— Squier *v.* Gale, 6 N. J. L. 157. See also Tichenor *v.* Hewson, 14 N. J. L. 26.

New York.— *Ex p.* Koon, 1 Den. 644; People *v.* Justices Super. Ct., 20 Wend. 663.

Ohio.— State *v.* Tool, 4 Ohio St. 553.

Tennessee.— Vanvabry *v.* Staton, 88 Tenn. 334, 12 S. W. 786.

West Virginia.— Cummings *v.* Armstrong, 34 W. Va. 1, 11 S. E. 742.

United States.— *Ex p.* Taylor, 14 How. 3, 14 L. ed. 302.

England.— *Ex p.* Milner, 15 Jur. 1037, 6 Eng. L. & Eq. 371.

Canada.— Trainor *v.* Holcombe, 7 U. C. Q. B. 548.

81. *Alabama.*— *Ex p.* Scudder-Gale Grocery Co., 120 Ala. 434, 25 So. 44.

Arkansas.— Coit *v.* Elliott, 28 Ark. 294.

California.— Purcell *v.* McKune, 14 Cal. 230, holding that mandamus will not issue where the court requires a statement of evidence to be made by the attorney, without his objection before he furnishes it.

District of Columbia.— U. S. *v.* Cox, 14 App. Cas. 368, holding, where a trial court, which has refused to approve an appeal-bond because doubt has been raised as to the genuineness of the signatures thereon, refuses to allow the appellant to prove the signature, but the demand for rehearing is not made until after the lapse of time within which the bond could be filed, that mandamus will not lie to compel the court to approve the bond *nunc pro tunc*, as the demand for such hearing must be made within the time allowed for the filing of the bond.

Florida.— State *v.* Cooper, 20 Fla. 547, holding that an oral request to allow an appeal is insufficient.

Illinois.— People *v.* Gibbons, 91 Ill. App. 567.

Kentucky.— Muhlenburg County *v.* Morehead, 46 S. W. 484, 20 Ky. L. Rep. 376 (holding that where a county judge has refused to act with reference to the matter in connection with the county court a separate demand need not be made on him); Com. *v.* Harbeson, 13 Ky. L. Rep. 877 (holding that the refusal to hear all evidence offered is not a refusal to hear the case).

Louisiana.— State *v.* Judge of Second Dist. Ct., 15 La. Ann. 113.

Michigan.— Swarthout *v.* McKnight, 99 Mich. 347, 58 N. W. 315; Hitchcock *v.*

6. Power to Act. Where an action is no longer pending[82] or after the court has lost jurisdiction, it cannot be compelled by mandamus to proceed.[83] Nor will a judge be compelled to proceed where a writ of prohibition has been granted.[84]

7. Persons Who May Bring Mandamus. Mandamus will not lie to courts or judges at the instance of strangers to the proceedings. Relator must be either a formal or substantial party.[85] One who has absconded from the state for the purpose of evading the jurisdiction and orders of its courts cannot maintain mandamus proceedings.[86] Nor is a petitioner who is in contempt for disobedience to an injunction entitled to mandamus to a court to proceed.[87]

8. Conflicting and Concurrent Jurisdictions.[88] It seems that neither federal nor state courts will issue mandamus to the courts or judicial officers of each other.[89] Appellate courts will as a general rule compel litigants in the first instance to apply for the writ to the inferior court of general jurisdiction, except

Wayne County Cir. Judge, 97 Mich. 614, 57 N. W. 189.

Minnesota.— State *v.* Macdonald, 30 Minn. 98, 14 N. W. 459.

Montana.— State *v.* First Judicial Dist. Ct., 16 Mont. 274, 40 Pac. 600.

Nebraska.— State *v.* Moores, 29 Nebr. 122, 45 N. W. 278.

New York.— People *v.* Woodbury, 70 N. Y. App. Div. 416, 75 N. Y. Suppl. 236, holding that where a surrogate did not unqualifiedly refuse to issue execution on a judgment of his court, but advised that the adverse party be given notice of the application, and the applicant apparently acquiesced in the suggestion, mandamus would not lie to compel the issuing of such execution, as the writ implies an improper refusal.

Texas.— Dunn *v.* St. Louis, etc., R. Co., (Civ. App. 1905) 88 S. W. 532; Magee *v.* Penn, (Civ. App. 1902) 67 S. W. 1077.

Washington.— State *v.* Spokane County Super. Ct., 13 Wash. 514, 43 Pac. 636; State *v.* Hunter, 4 Wash. 651, 30 Pac. 642, 32 Pac. 294.

United States.— Edinburg Coal Co. *v.* Humphreys, 134 Fed. 839, 67 C. C. A. 435.

England.— Kernot *v.* Bailey, 4 Wkly. Rep. 608.

Necessity of demand and refusal generally see *supra*, II, G.

82. Eby's Case, 9 Watts & S. (Pa.) 145.

83. State *v.* Livsey, 27 Nebr. 55, 42 N. W. 762, holding that a justice of the peace would not be required to make an order in a case after the cause had been removed to the district court by proceedings in error, and the judgment of the justice had been reversed and the cause retained for trial.

After removal of cause to federal court see Removal of Causes.

84. State *v.* Judge of Nineteenth Judicial Dist., 39 La. Ann. 97, 1 So. 281, so holding, although the writ issued from a court without jurisdiction.

85. Garrison *v.* Webb, 107 Ala. 499, 18 So. 297; State *v.* Thompson, 106 La. 362, 30 So. 895 (no writ to tax costs by non-party); *Ex p.* Humes, 149 U. S. 192, 13 S. Ct. 836, 37 L. ed. 698 (no writ to review act of lower court by surety); *Ex p.* Cutting, 94 U. S. 14, 24 L. ed. 49 (no writ to allow appeal).

Motion to restore.— Where property is seized under the process of a court, as the property of defendant, and a stranger, alleging that the property is his, applies by motion to have it restored to him, which motion the court refuses to hear, mandamus will not lie to such court to hear the motion. Price *v.* Shelby Cir. Ct., 3 Hard. (Ky.) 254.

An intervener may compel the granting of an appeal. State *v.* Rightor, 35 La. Ann. 515. And see *Ex p.* Cutting, 94 U. S. 14, 24 L. ed. 49.

86. People *v.* Genet, 59 N. Y. 80, 17 Am. Rep. 315 (holding that an escaped prisoner who remains out of the jurisdiction of the court cannot have mandamus to secure a review of his conviction); Foster *v.* Redfield, 50 Vt. 285 (holding that one who had absconded to avoid obedience to an order for temporary alimony could not compel the court to proceed to final judgment in divorce).

87. Campbell *v.* Justices Super. Ct., 187 Mass. 509, 73 N. E. 659, 69 L. R. A. 311.

88. Effect of other pending proceedings see *supra*, II, H.

89. *Ex p.* Union Steamboat Co., 178 U. S. 317, 20 S. Ct. 904, 44 L. ed. 1084; *In re* Blake, 175 U. S. 114, 20 S. Ct. 42, 44 L. ed. 94; *In re* Atlantic City R. Co., 164 U. S. 633, 17 S. Ct. 208, 41 L. ed. 579; *In re* Sanford Fork, etc., Co., 160 U. S. 247, 16 S. Ct. 291, 40 L. ed. 414; *In re* Green, 141 U. S. 325, 12 S. Ct. 11, 35 L. ed. 765; *Ex p.* Pennsylvania Co., 137 U. S. 451, 11 S. Ct. 141, 34 L. ed. 738; Bath County *v.* Amy, 13 Wall. (U. S.) 244, 20 L. ed. 539; McClung *v.* Silliman, 6 Wheat. (U. S.) 598, 5 L. ed. 340; The Celestine, 5 Fed. Cas. No. 2,541, 1 Biss. 1. But see Spraggins *v.* Humphries County Ct., 22 Fed. Cas. No. 13,246, Brunn. Col. Cas. 218, Cooke (Tenn.) 160.

Concurrent and conflicting jurisdiction of state and federal courts see Courts, 11 Cyc. 996 *et seq.*

Jurisdiction as to process or judgment of other courts see Courts, 11 Cyc. 1014 *et seq.*

Writ of error, not mandamus, is the remedy for the failure of a state court to give effect to the mandate of the supreme court of the United States. McClung *v.* Embreeville Freehold, etc., Co., 103 Tenn. 399, 52 S. W. 1001; *In re* Blake, 175 U. S. 114, 20 S. Ct. 42, 44 L. ed. 94.

in cases affecting the public or of unusual importance.[90] Mandamus cannot be employed by one court to seize and carry away the records and papers in the custody of another.[91]

B. Subjects and Purposes Affected by Mandamus — 1. Particular Courts and Judicial Officers — a. Probate, Surrogate, or Orphans' Courts. Inferior courts of probate jurisdiction will be compelled to establish wills and grant letters when all the facts exist to make the duty purely ministerial,[92] and they will also be compelled to proceed in the exercise of their jurisdiction,[93] to approve bonds[94] or to transmit a case to another court;[95] but the writ will not issue to control discretion,[96]

90. *Alabama.*— Ramagnano *v.* Crook, 88 Ala. 450, 7 So. 247, holding that in mandamus to a probate judge the application must first be made to the circuit court, and refused.

California.— Johnson *v.* Reichert, 77 Cal. 34, 18 Pac. 858; Sankey *v.* California Pioneers Soc., (1886) 9 Pac. 424; Smith *v.* Dunn, (1885) 6 Pac. 848; Snow *v.* Stanislaus County Sup'rs, (1885) 6 Pac. 90 (holding that the application must be first made to the superior court); Cowell *v.* Buckelew, 14 Cal. 640. And see Gregory *v.* Blanchard, 98 Cal. 311, 33 Pac. 199, holding that the superior court was not authorized to issue a writ of mandate in aid of the execution of the judgment rendered in the justice's court.

Idaho.— Wright *v.* Kelley, 4 Ida. 624, 43 Pac. 565, holding that it was no ground for failing to first apply for the writ in the district court that the judge of such court had announced that the writ would not be granted if applied for.

Iowa.— Westbrook *v.* Wicks, 36 Iowa 382; U. S. *v.* Dubuque County, Morr. 31.

Kansas.— State *v.* Breese, 15 Kan. 123, holding that while the power of the supreme court to issue mandamus to an officer of the court of general jurisdiction is unquestioned, the application must usually be first made to that court.

Missouri.— State *v.* Lesueur, 126 Mo. 413, 29 S. W. 278; State *v.* Cooper County Ct., 64 Mo. 170, holding that mandamus will issue from the supreme court only in cases of far more than ordinary magnitude or importance.

Nebraska.— Mandamus to a county should be first brought in the district court. State *v.* Fillmore County, 32 Nebr. 870, 49 N. W. 769. In case of private rights, when there is an accumulation of work in the supreme court, the application should be first made to the district court. State *v.* Merrell, 38 Nebr. 510, 56 N. W. 1082; State *v.* Chase County School Dist. No. 24, 38 Nebr. 237, 56 N. W. 791; State *v.* Lincoln Gas Co., 38 Nebr. 33, 56 N. W. 789.

91. Walker *v.* Howard, 10 Tex. Civ. App. 602, 30 S. W. 1091.

92. *Alabama.*— Brennan *v.* Harris, 20 Ala. 185.

Illinois.— See People *v.* Knickerbocker, 114 Ill. 539, 2 N. E. 507, 55 Am. Rep. 879, holding, where a petition prayed for a command to the probate judge to proceed with the probating of a certain will and render final order thereon, that under former statutes the probate of a will was a ministerial act, but since the statute of 1849 it has been a judicial act.

Missouri.— State *v.* Reynolds, (App. 1906) 97 S. W. 650 (holding that the writ lies to compel a judge to set aside the appointment of an administrator and approve a lawful selection of the heirs); State *v.* Guinotte, 113 Mo. App. 399, 86 S. W. 884 (holding that persons clearly entitled to administration may compel the court to grant it to them and the probate court cannot, by mere denial of relator's right to administer on the estate, convert the proceeding into a judicial inquiry. There must be some foundation for such denial, as the same, by itself, does not raise the issue, unsupported by facts).

South Carolina.—State *v.* Watson, 2 Speers 97.

Tennessee.—Williams *v.* Saunders, 5 Coldw. 60.

Canada.— Dickson *v.* Monteith, 14 Ont. 719, where will had been established in highest court. The appointment of a creditor as administrator is not as of right, but rests in the discretion of the judge, who appoints, and that cannot be interfered with by any peremptory writ. Ont. Rev. St. (1877) c. 46, §§ 32, 36, do not better the claim of a creditor. *Re* O'Brien, 3 Ont. 326.

See 33 Cent. Dig. tit. "Mandamus," § 71.

93. *Ex p.* Dickson, 64 Ala. 188; Leslie *v.* Tucker, 57 Ala. 483; Shadden *v.* Sterling, 23 Ala. 518; Hensley *v.* Sacramento County Super. Ct., 111 Cal. 541, 44 Pac. 232 (holding, under Code Civ. Proc. § 1492, providing that, when the notice to creditors to file claims has been duly made, an order showing that due notice has been given, and directing it to be entered and recorded, must be made by the court, that mandamus will lie to compel the court to make such order); *Ex p.* Carnochan, T. U. P. Charlt. (Ga.) 216; State *v.* Bermudez, 14 La. 478. See *Ex p.* Jones, 1 Ala. 15.

94. *Ex p.* Candee, 48 Ala. 386; Fleming *v.* Ottawa Probate Judge, 137 Mich. 139, 100 N. W. 272.

95. Com. *v.* Clark, 10 Phila. (Pa.) 419, 1 Wkly. Notes Cas. 330.

96. *California.*— Mandamus will not lie to compel a court to sign an order stating that due proof of publication of notice to creditors of an estate has been made, where the court has recognized a publication made as such notice. Johnston *v.* Napa County Super. Ct., 105 Cal. 666, 39 Pac. 36.

Kansas.— Entertaining a second proceeding to declare a person insane is discretion-

nor in case of the existence of another adequate remedy, as by appeal or writ of error.[97]

b. Justices of the Peace. Mandamus lies to compel a justice to perform ministerial duties.[98] Such officers may also be compelled to take jurisdiction and proceed to trial,[99] as in the case of other courts,[1] to issue process,[2] to change the place of trial,[3] transfer a cause upon a showing ousting them of their jurisdic-

ary, he having been adjudged incompetent in the first. State *v.* Norton, 20 Kan. 506.

Michigan.— Mandamus will not lie to compel a probate judge to vacate an order admitting a will to probate. Corby *v.* Durfee, 96 Mich. 11, 55 N. W. 386. Or to compel him to extend the time allowed for creditors to present their claims. People *v.* Monroe County Probate Judge, 16 Mich. 204. Or to review a refusal to grant letters of administration on the estate. People *v.* St. Joseph County Probate Judge, 36 Mich. 500. Where an application was made for administration of the estate of a deceased contestant of a will, which the proponent of the will opposed by a motion to dismiss on the grounds that the right to contest a will does not survive, that the contestant had not diligently prosecuted his appeal, that the contestant had failed to obey an order of the supreme court adjudging costs against him, and that the estate ought to be speedily settled, the motion was in effect a motion to dismiss for want of jurisdiction, and an order overruling the motion was not reviewable by mandamus. Roberts *v.* Lenawee Cir. Judge, 140 Mich. 115, 103 N. W. 512.

Missouri.— Mandamus from the circuit court will not lie to compel the county court to approve an administrator's sale. Trainer *v.* Porter, 45 Mo. 336.

South Carolina.— A mandamus will not lie to an ordinary who has granted administration to one not entitled to it. State *v.* Mitchell, 2 Treadw. 703.

See 33 Cent. Dig. tit. "Mandamus," § 71.

97. *Alabama.*— Appling *v.* Bailey, 44 Ala. 333, refusal to bring in a party.

Georgia.— Barksdale *v.* Cobb, 16 Ga. 13, refusal to grant letters.

Kentucky.— Preston *v.* Fidelity Trust, etc., Co., 94 Ky. 295, 22 S. W. 318, 15 Ky. L. Rep. 130, refusal to probate.

Louisiana.— State *v.* Voorhies, 43 La. Ann. 553, 9 So. 489, preventing holding of family meeting.

Michigan.— John Hancock Mut. L. Ins. Co. *v.* Wayne Probate Judge, 97 Mich. 613, 57 N. W. 189 (allowance of contingent claim); Pulling *v.* Wayne Probate Judge, 97 Mich. 605, 57 N. W. 187 (controlling appointment of dower commissioners).

Ohio.— State *v.* Meiley, 22 Ohio St. 534, paying money out of court.

Oklahoma.— Steward *v.* Territory, 4 Okla. 707, 46 Pac. 487, paying money to the county.

South Carolina.— Where a person claiming the right to administer upon an estate had, without default, lost the right to appeal from an order of the ordinary appointing as executor, a mandamus from the law court was held to be the proper remedy. Watson *v.* Mayrant, 1 Rich. Eq. 449. Where appeal lies mandamus will not. State *v.* Mitchell, 3 Brev. 520.

Washington.— State *v.* Tallman, 25 Wash. 295, 65 Pac. 545, vacation of probate not compelled.

See 33 Cent. Dig. tit. "Mandamus," § 10.

Existence of other adequate remedy generally see *supra*, II, D.

98. Sullivan *v.* Yazoo, etc., R. Co., 85 Miss. 649, 38 So. 33; Bennett *v.* McCaffery, 28 Mo. App. 220; People *v.* Murray, 2 Misc. (N. Y.) 152, 23 N. Y. Suppl. 160, 23 N. Y. Civ. Proc. 71 [*affirmed* in 138 N. Y. 635, 33 N. E. 1084].

99. Whaley *v.* King, 92 Cal. 431, 28 Pac. 579; People *v.* Barnes, 66 Cal. 594, 6 Pac. 698; Larue *v.* Gaskins, 5 Cal. 507; State *v.* Smith, 69 Ohio St. 196, 68 N. E. 1044; Reg. *v.* Cotton, 15 Q. B. 569, 14 Jur. 788, 19 L. J. M. C. 233, 4 New Sess. Cas. 291, 69 E. C. L. 569; Reg. *v.* Biron, 14 Q. B. D. 474, 49 J. P. 68, 54 L. J. M. C. 77, 51 L. T. Rep. N. S. 429; Reg. *v.* Arnould, 8 E. & B. 550, 9 Jur. N. S. 162, 27 L. J. M. C. 92, 6 Wkly. Rep. 61, 92 E. C. L. 550; Reg. *v.* Surrey Justices, 21 L. J. M. C. 195; Rex *v.* Meehan, 3 Ont. L. Rep. 567; *In re* Conklin, 31 U. C. Q. B. 160.

After expiration of term of office.— A writ will not issue to compel a justice to proceed where judicial notice may be taken that his term of office has expired. Center First Nat. Bank *v.* Rowland, (Tex. Civ. App. 1907) 99 S. W. 1043.

1. See *supra*, IV, A, 2, a.

2. Benners *v.* State, 124 Ala. 97, 26 So. 942; Hempstead County *v.* Grave, 44 Ark. 317 (warrant of arrest); Com. *v.* Smith, 3 Wkly. Notes Cas. (Pa.) 95; Reg. *v.* Cheek, 9 Q. B. 942, 11 Jur. 86, 16 L. J. M. C. 65, 58 E. C. L. 942 (for levying poor rate); Reg. *v.* Middlesex County Justices, 2 Dowl. P. C. N. S. 385; Reg. *v.* Ellis, 2 Dowl. P. C. N. S. 361, 7 Jur. 108, 12 L. J. M. C. 20; Rex *v.* Hall, 1 Harr. & W. 83 (illegality of warrant and absence of remedy must clearly appear); Reg. *v.* Marsham, 48 J. P. 308, 50 L. T. Rep. N. S. 142, 32 Wkly. Rep. 157; Reg. *v.* Middlesex Magistrates Justices, 7 Jur. 259, 12 L. J. M. C. 36.

The right to process must be clear.— Richland Drug Co. *v.* Moorman, 71 S. C. 236, 50 S. E. 792. See, generally, *supra*, II, B.

3. State *v.* McCracken, 60 Mo. App. 650; People *v.* Bolte, 35 Misc. (N. Y.) 53, 71 N. Y. Suppl. 74. But see Galbraith *v.* Williams, 106 Ky. 431, 50 S. W. 686, 21 Ky. L. Rep. 79 (holding the decision of the justice as to the sufficiency of an affidavit for a change not reviewable by mandamus); State *v.* Cotton, 33 Nebr. 560, 50 N. W. 688 (holding that there was an adequate remedy on error to the district court). See also *infra*, IV, B, 2, e.

tion,[4] hear evidence,[5] enter judgment,[6] tax costs,[7] allow or transmit appeals,[8] or deliver their dockets and records to their successor.[9] But mandamus will not issue to control the discretion of a justice of the peace,[10] nor will mandamus lie where

When unavailing.— Gen. St. (1897) c. 103, § 42, requiring justices of the peace to grant changes of venue on proper application, is mandatory; but a justice does not lose jurisdiction of the case on the making of the demand, and hence, if the demand is refused and judgment subsequently rendered and satisfied by forced sale of property, mandamus will not thereafter issue to compel the granting of the change. Ellis *v.* Whitaker, 62 Kan. 582, 64 Pac. 62.

4. State *v.* Brumley, 53 Mo. App. 126; State *v.* Clayton, 34 Mo. App. 563; Bennett *v.* McCaffery, 28 Mo. App. 220. But see Clark *v.* Minnis, 50 Cal. 509 (holding that a justice cannot be compelled to remove a case to a superior court for trial on the ground that it involves title to land, where an appeal lies from his action); People *v.* Bolte, 71 N. Y. Suppl. 73 (holding that mandamus will not lie to compel a justice to remove a cause from the municipal court to the city court, since relator has an adequate remedy by appeal).

5. State *v.* Eddy, 10 Mont. 311, 25 Pac. 1032 (examine garnishee); Reg. *v.* Connolly, 22 Ont. 220; *Re* Holland, 37 U. C. Q. B. 214.

On preliminary examination in criminal case see *infra*, IV, B, 3, a.

6. *Colorado.*— Corthell *v.* Mead, 19 Colo. 386, 35 Pac. 741.

Connecticut.— To record judgment and furnish a copy. Smith *v.* Moore, 38 Conn. 105.

Georgia.— See Singer Mfg. Co. *v.* McNeil Paint, etc., Co., 117 Ga. 1005, 44 S. E. 801 [*overruling* in effect Starnes *v.* Tanner, 73 Ga. 144, which held that if a justice refused a motion to enter up judgment against a garnishee who was in default, the method of correcting such error was by certiorari and not mandamus], holding that certiorari will not lie until after judgment.

Indiana.— State *v.* Engle, 127 Ind. 457, 26 N. E. 1077, 22 Am. St. Rep. 655.

Michigan.— Cagney *v.* Wattles, 121 Mich. 469, 80 N. W. 245. Where, on the non-appearance of plaintiff in replevin before a justice, he orally announced his determination to enter a judgment of nonsuit and for a return of the property, as required by Comp. Laws, § 10,679, or of facts equivalent to such judgment, on the justice's subsequent refusal to enter such judgment mandamus was maintainable to compel the same, notwithstanding defendant was not present when the justice made such determination. Barlow *v.* Riker, 138 Mich. 607, 101 N. W. 820.

New Hampshire.— Dorr *v.* Hill, 62 N. H. 506.

Texas.— See Winstead *v.* Evans, (Civ. App. 1896) 33 S. W. 580.

Canada.— Lacerte *v.* Pepin, 10 Quebec Super. Ct. 542.

Default judgment will not be compelled before the time to answer expires. Hall *v.* Kerrigan, 135 Cal. 4, 66 Pac. 868.

Alteration of entry.— The circuit court cannot compel a justice to alter the entry of a judgment in his docket. Garnett *v.* Stacy, 17 Mo. 601.

7. State *v.* Walker, 85 Mo. App. 247. See Allen *v.* Conlon, 2 Ill. App. 166, holding that mandamus will not lie to tax illegal costs.

8. *Alabama.*— Perryman *v.* Burgster, 6 Port. 99.

Arkansas.— *Ex p.* Martin, 5 Ark. 371.

California.— People *v.* Harris, 9 Cal. 571.

District of Columbia.— Church *v.* U. S., 13 App. Cas. 264.

Indiana.— Boyd *v.* Weaver, 134 Ind. 266, 33 N. E. 1027; Coats *v.* State, 133 Ind. 36, 32 N. E. 737 (approve bond); State *v.* Cressinger, 88 Ind. 499.

Kansas.— Cox *v.* Rich, 24 Kan. 20.

Kentucky.— McDonald *v.* Jenkins, 93 Ky. 249, 19 S. W. 594, 14 Ky. L. Rep. 157, not compelled to approve bond involving discretion.

Nebraska.— State *v.* Kloke, (1907) 110 N. W. 687.

Pennsylvania.— Lehigh Valley Coal Co. *v.* Saunders, 9 Kulp 171.

Texas.— Trapp *v.* Frizzell, (Civ. App. 1906) 98 S. W. 947.

Vermont.— Orange *v.* Bill, 29 Vt. 442.

Virginia.— See Norfolk, etc., R. Co. *v.* Clark, 92 Va. 118, 22 S. E. 867.

But see Chicago, etc., R. Co. *v.* Franks, 55 Mo. 325; State *v.* McAuliffe, 48 Mo. 112, both holding that mandamus will not lie to compel a justice to allow a meritorious appeal out of time; the law (Wagner St. p. 849, § 10) giving therefor the remedy of rule and attachment in the circuit court.

9. *In re* Baker, 44 Pa. St. 440; Com. *v.* Brackenridge, 4 Pa. Dist. 598, 16 Pa. Co. Ct. 400; Com. *v.* Wallace, 24 Pa. Co. Ct. 9, 10 Kulp 30; Wadsworth *v.* Reel, 15 Pa. Co. Ct. 440.

10. *Indiana.*— Gregg *v.* State, 151 Ind. 241, 51 N. E. 359, refusal to allow an exemption from garnishment.

Nebraska.— State *v.* Powell, 10 Nebr. 48, 4 N. W. 317, error of a justice in setting aside a verdict and judgment on the ground of partiality and undue means cannot be reviewed.

New Jersey.— Anonymous, 3 N. J. L. 576.

New York.— McBride *v.* Murray, 72 Hun 394, 25 N. Y. Suppl. 431, determination of a justice that he has no jurisdiction.

Pennsylvania.— Palmer *v.* Reynolds, 5 Pa. Dist. 578, granting a refusal of an order of relief to an indigent person.

England.— Reg. *v.* Middlesex County Justices, 9 A. & E. 540, 8 L. J. M. C. 85, 1 P. & D. 402, 2 W. W. & H. 100, 36 E. C. L. 291; *Ex p.* Becke, 3 B. & Ad. 704, 23 E. C. L. 310 (continuance); Rex *v.* Carnarvon County

there is an adequate remedy by appeal or certiorari,[11] or where the act sought to be compelled is not within the powers of the justice.[12] A justice cannot be compelled by mandamus to remove his official residence.[13]

c. Judges — (I) *In General.* A judge will not be compelled to act as such in a matter exclusively for the court,[14] or after he has ceased to be a judge,[15] or otherwise than in his official capacity.[16]

(II) *Chamber Duties.* Judicial duties at chambers will not be controlled by mandamus.[17]

(III) *Special Judges.* An attorney acting as judge in place of the regularly qualified judge cannot be compelled by mandamus to act as such.[18]

(IV) *Disqualified Judges.* Mandamus lies to compel a judge who is actually disqualified, but decides that he is not, to decline to sit, to call in another judge, or to remove the case.[19]

(V) *In Case of Change of Judges.* Mandamus will issue to compel a judge to act with relation to proceedings had before his predecessor, but not to proceed in any particular way.[20] A court may be compelled to correct an error

Justices, 4 B. & Ald. 86, 22 Rev. Rep. 636, 6 E. C. L. 401; Rex *v.* Devon County Justices, 1 Chit. 34, 22 Rev. Rep. 789, 18 E. C. L. 33; Rex *v.* Cambridgeshire Justices, 1 D. & R. 325, 16 E. C. L. 41 (admission of evidence); Rex *v.* Leicestershire Justices, 1 M. & S. 442, 14 Rev. Rep. 494.

A decision on the merits will not be controlled by mandamus. Reg. *v.* Middlesex Justices, 2 Q. B. D. 516, 46 L. J. M. C. 225, 36 L. T. Rep. N. S. 402, 25 Wkly. Rep. 610; Rex *v.* Kent County Justices, 11 East 229, 10 Rev. Rep. 484.

11. Davidson *v.* Washburn, 56 Ala. 596 (vacation of peremptorily rendered judgment); Hyde *v.* Chadwick, (Mich. 1902) 90 N. W. 333 (dismissal of suit against corporation, garnishee, defendant); State *v.* Holmes, 38 Nebr. 355, 56 N. W. 979 (order setting aside a verdict and granting a new trial); State *v.* Cotton, 33 Nebr. 560, 50 N. W. 688 (transfer of case on change of venue); People *v.* Bolte, 71 N. Y. Suppl. 73. See, generally, *supra*, II, D, 2, e.

12. O'Brien *v.* Tallman, 36 Mich. 13, holding that a justice has no power to set aside a judgment after rendition and render a different one, and that his doing so, although in obedience to a mandamus, is a nullity.

13. Chapman *v.* People, 9 Colo. App. 268, 48 Pac. 153, holding that mandamus will not lie at the relation of a citizen to compel a justice of the peace to remove his official residence to the precinct in which, under the law, he should have such office.

14. Gruner *v.* Moore, 6 Colo. 526.

15. People *v.* McConnell, 155 Ill. 192, 40 N. E. 608, where he had resigned pending proceedings.

16. *Ex p.* Hayes, 92 Ala. 120, 9 So. 156; State *v.* Powers, 14 Ga. 388 (holding that in altering a completed bill of exceptions a judge acts as an individual, and mandamus will not lie to compel him to expunge the alterations); State *v.* McArthur, 23 Wis. 427 (holding that a stipulation of the parties to an action that the report of referees appointed by the court to determine certain disputed facts shall be the finding of the court, and shall be signed by the judge, does not render it his official duty to sign such report; and mandamus will not lie to compel him to do so).

17. *Ex p.* Brown, 5 Cow. (N. Y.) 31, holding that the supreme court will not interfere by mandamus to control the mere chamber duties of the common pleas.

18. State *v.* Earhart, 35 La. Ann. 603 (holding that pending a suspensive appeal from a district judge's recusation, mandamus does not lie to compel an attorney, appointed judge *ad hoc*, to try the cause); State *v.* Chargois, 30 La. Ann. 1102 (holding that an attorney acting as judge *pro hac vice* in a particular case cannot be compelled to proceed).

19. *Alabama.*—State *v.* Pitts, 139 Ala. 152, 36 So. 20; Crook *v.* Newborg, 124 Ala. 479, 27 So. 432, 82 Am. St. Rep. 190; State *v.* Castleberry, 23 Ala. 85.

Arkansas.— Walker *v.* Sneed, 7 Ark. 233, where a judge was compelled to certify his disqualification.

Illinois.— Graham *v.* Rutledge, 111 Ill. 253, holding that mandamus lies to compel a judge to enter an order reciting his disqualification, and certifying the case to another court.

Louisiana.— State *v.* Judge Ninth Judicial Dist., 21 La. Ann. 51.

North Dakota.— Gunn *v.* Lauder, 10 N. D. 389, 87 N. W. 999.

Ohio.— State *v.* Shaw, 43 Ohio St. 324, 1 N. E. 753; State *v.* Wolfe, 2 Ohio S. & C. Pl. Dec. 245.

Pennsylvania.— See Com. *v.* Clark, 10 Phila. 419, 1 Wkly. Notes Cas. 330, where a removal on account of "disputable or difficult matter" arising on probate of will was compelled by mandamus.

Canada.— *Ex p.* Leonard, 6 N. Brunsw. 269.

See 33 Cent. Dig. tit. "Mandamus," § 90.

20. Walker *v.* San Francisco Super. Ct., 139 Cal. 108, 72 Pac. 829; People *v.* McConnell, 146 Ill. 532, 34 N. E. 945 (holding that before a writ would issue to compel a judge to decide upon a motion for a new trial it

as to its jurisdiction, although composed of different members than at the time when the error was committed.[21] Where, after reversal upon appeal, the cause has been reinstated in another court, the judge of the original trial court cannot be compelled to decide a motion therein.[22]

d. Masters in Chancery. A summary order to act, and not mandamus, is the usual method to compel a master to perform his duty.[23]

e. Clerks of Court.[24] The duties of clerks of courts are mainly ministerial and mandamus will lie to compel their performance.[25] But mandamus will not lie where there is a remedy by an application to the court for an order directing the clerk to act,[26] although an appeal is not in all cases an adequate remedy.[27]

must clearly appear that there had been a demand and a refusal under circumstances making it the legal duty of respondent to act); New York L., etc., Ins. Co. *v.* Wilson, 8 Pet. (U. S.) 291, 8 L. ed. 949 (holding that a judge may be compelled to sign a judgment rendered by his predecessor in office).

Bill of exceptions.— Where a judge has refused to sign a proper bill of exceptions presented in apt time, his successor may be compelled to sign such a bill, although the time limited for its presentation has expired. State *v.* Slick, 86 Ind. 501. And likewise where a party is entitled to a bill of exceptions and has prepared and served it within a proper time, a judge cannot refuse to settle the bill because his predecessor in office who tried the case has refused to settle it after his term has expired. Leach *v.* Pierce, 93 Cal. 614, 29 Pac. 235. But in some jurisdictions, where it is the practice of the person before whom the case is tried to settle a bill of exceptions, although his term as judge has expired, a succeeding judge cannot be compelled to settle and sign a bill of exceptions in a case tried before his predecessor in office. Fellows *v.* Tait, 14 Wis. 156.

A clear case must be presented.— See State *v.* Lubke, 14 Mo. App. 587, where mandamus was refused to compel the successor of a judge whose term had expired to make a *nunc pro tunc* entry where the minute entry had been canceled by direction of the judge a few days after it was made.

21. *Ex p.* Parker, 131 U. S. 221, 9 S. Ct. 767, 30 L. ed. 818.

22. People *v.* Gibbons, 161 Ill. 510, 44 N. E. 282.

23. People *v.* Bowman, 181 Ill. 421, 55 N. E. 148, 72 Am. St. Rep. 265, holding that mandamus is not the proper remedy to compel the execution of a deed by the master under a certificate of sale.

24. Mandamus to restore clerk to office see CLERKS OF COURTS, 7 Cyc. 200, note 30.

25. See cases cited *infra*, this note.

Depositions.— A clerk may be compelled to file an interrogatory and issue a commission to take depositions. Roney *v.* Simmons, 97 Ala. 88, 11 So. 740. *Contra*, McDuffie *v.* Cook, 65 Ala. 430.

Approval of bond.— In approving a bond a clerk acts in a quasi-judicial capacity, and his action will not be controlled or reviewed by mandamus; but if he refuses to act at all or decides not to approve for an insufficient reason, mandamus will lie to compel him to pass upon the sufficiency of the bond. Mobile Mut. Ins. Co. *v.* Cleveland, 76 Ala. 321. A clerk may be compelled by mandamus to approve and file an appeal-bond (Daniels *v.* Miller, 8 Colo. 542, 9 Pac. 18), or to accept a duly recognized surety company as a surety on a garnishment bond (Santee River Co. *v.* Webster, 23 R. I. 599, 51 Atl. 218).

Filing papers.— On proper allowance and tender of fees a clerk may be compelled to file papers properly delivered to him. Kozminsky *v.* Williams, 126 Cal. 26, 58 Pac. 310.

Certified copies.— A clerk of court may be compelled to furnish copies of lists of applicants for liquor licenses, the same being public records. Com. *v.* Bair, 5 Pa. Dist. 488.

Return upon appeal may be compelled. State *v.* Wallace, 41 Ind. 445.

Payment of fees to the state may be compelled. State *v.* Stanton, 14 Utah 180, 46 Pac. 1109.

Transcript of appeal.— Where a clerk of the district court fails to prepare a bill of costs in anticipation of a demand for a delivery of a transcript of appeal, and does not have it approved by the judge, and refuses to deliver the record, the appellant may apply to the district, or to the supreme court for mandamus. State *v.* Wells, 111 La. 463, 35 So. 641.

Certificates of jurors and witnesses.—In the absence of a statute imposing such a duty, a county clerk, *ex officio* clerk of the superior court, will not be compelled to issue a certificate to a juror, stating his attendance and the amount to which he is entitled therefor. Hilton *v.* Curry, 124 Cal. 84, 56 Pac. 784. The clerk cannot be compelled to issue a certificate of attendance as a witness to a person whose right thereto is not clear. State *v.* Greene, 91 Wis. 500, 65 N. W. 181.

26. State *v.* Moores, 29 Nebr. 122, 45 N. W. 278 (holding that mandamus will not lie to compel a clerk of the district court to issue an order of sale upon a decree of foreclosure of mortgage, where no application has been made to the district court to direct the clerk to issue such order); People *v.* McGoldrick, 33 N. Y. Suppl. 441, 24 N. Y. Civ. Proc. 292, 1 N. Y. Annot Cas. 401 (holding that mandamus will not be granted to compel the clerk of the New York city court to deliver papers in his possession to relator).

27. State *v.* Renick, 157 Mo. 292, 57 S. W. 713, holding that a writ of mandamus may

f. Sheriffs. A sheriff may be compelled by mandamus to execute writs,[28] such as writs of attachment[29] or execution.[30] He may likewise be compelled to execute deeds upon judicial sales.[31] Mandamus will, however, be refused where there is another adequate remedy,[32] or when an antagonistic application is pending elsewhere.[33]

g. District and Prosecuting Attorneys. Mandamus will lie to restore a district or prosecuting attorney to his office where he has been wrongfully removed,[34] or to secure his lawful and clear right of audience or appearance.[35] But a district attorney is not a ministerial officer, and mandamus will not as a general rule issue to compel him to act,[36] in any event not unless all lawful conditions are first performed.[37] Nor will it lie to approve his accounts where the duty is not clear.[38]

h. Attorneys at Law — (i) *In General.* In a case where the right is clear,

be awarded against a clerk of court to require him to issue an execution on a judgment, although the relator has a remedy by suit on the clerk's bond, where such remedy is far more dilatory, and less adequate.

28. Fremont *v.* Crippen, 10 Cal. 211, 70 Am. Dec. 711, where execution of a writ of restitution was compelled.

29. See *infra*, IV, B, 4, d.

30. See *infra*, IV, B, 2, u, (VI).

31. San Jose Water Co. *v.* Lyndon, 124 Cal. 518, 57 Pac. 481; Grimm *v.* O'Connell, 54 Cal. 522; People *v.* Doane, 17 Cal. 476; McMillan *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655. See also *infra*, IV, B, 2, u, (VI), (VII).

A deed contradictory of the sheriff's return of a tax-sale will not be compelled. Hewell *v.* Lane, 53 Cal. 213.

Where tax-sale is upon invalid assessment deed will not be compelled. Bosworth *v.* Webster, 64 Cal. 1, 27 Pac. 786.

32. State *v.* Holliday, 35 Nebr. 327, 53 N. W. 142 (holding, where a sheriff was acting under orders of the district court and was answerable to it for abuse of its powers, application for relief should be made to that court); State *v.* Chambers, 26 Ohio Cir. Ct. 404.

33. Evans *v.* Thomas, 32 Kan. 469, 4 Pac. 833, where a writ sought by a justice to compel a sheriff to return a prisoner for trial before him was refused in discretion by reason of a like prosecution in another justice's court. See also *supra*, II, H.

34. *Ex p.* Lusk, 82 Ala. 519, 2 So. 140; People *v.* Hallett, 1 Colo. 352 (where, however, the writ was refused, it appearing that relator was not admitted to practice at the time he was elected district attorney); Howard *v.* Burns, 14 S. D. 383, 85 N. W. 920 (holding that a mandamus to compel county commissioners to issue a warrant for the county attorney's salary would not be denied for the reason that the order refusing to issue such a warrant was appealable). But see State *v.* Read, 49 La. Ann. 1533, 22 So. 798, holding that the supreme court, pending a suit in the district court against officers of a parish in which attorneys specially employed by them have been recognized by the district judge who has charge of the case, will not on application of the district attorney compel such judge to recognize him as the representative of the parish and entitled to direct the defense.

Restoration to office in general see *infra*, VI, C, 7, c.

35. State *v.* Brown, 106 La. 437, 31 So. 50; Terrell *v.* Greene, 88 Tex. 539, 31 S. W. 631, holding that a district judge might be compelled to permit a district attorney to appear for the county in an action which it was his right and duty to prosecute, although the order denying permission to prosecute was appealable, and although the district attorney might recover the commission which would accrue upon his prosecuting the suit, on refusal by the county of his services.

Prosecution under municipal ordinance.— The fact that an ordinance under which offenses likewise punishable by statute are being prosecuted in a city court is invalid is not a ground for mandamus to compel the court to permit the county attorney to take charge of the prosecution, nor is the fact that the legislature had no authority to create a city court. Jackson *v.* Swayne, 92 Tex. 242, 47 S. W. 711 [*reversing* (Civ. App. 1898) 45 S. W. 619].

The fact that there is another adequate remedy by filing a complaint in a justice's or a county court will prevent the issuance of a mandamus to a city court to allow a county attorney to take charge of a prosecution for an offense punishable alike by ordinance and by statute. Jackson *v.* Swayne, 92 Tex. 242, 47 S. W. 711 [*reversing* (Civ. App. 1898) 45 S. W. 619].

36. Boyne *v.* Ryan, 100 Col. 265, 34 Pac. 707; State *v.* Talty, 166 Mo. 529, 66 S. W. 361 (holding the filing of an information in the nature of quo warranto discretionary); Everding *v.* McGinn, 23 Oreg. 15, 35 Pac. 178.

37. Buggeln *v.* Doe, (Ariz. 1904) 76 Pac. 458.

38. Goldsborough *v.* Lloyd, 86 Md. 374, 38 Atl. 773, holding that mandamus will not be granted by two of the judges of a judicial circuit to compel a third judge of such circuit to approve the accounts of the district attorney of such circuit, such judge entertaining an opinion variant from that of the other judges as to the amount of fees payable.

and there is no other adequate remedy, a person duly qualified may have mandamus to secure an examination for admission as an attorney;[39] the power of admitting an attorney to practice, however, is judicial and will not be controlled by mandamus,[40] although it has been held that where an attorney has been authorized to practice in a higher court entitling him to practice in inferior courts, his admission into the inferior courts may be compelled,[41] and he may likewise enforce the right of audience in the proper court or tribunal.[42] Attorneys appointed to defend prisoners may have mandamus to compel a court to fix their compensation.[43] And the duty of substitution of attorneys may be thus enforced,[44] as well as the right of an attorney to prosecute *pro se* a claim lawfully assigned to him.[45] Discharged attorneys cannot compel the court to refuse to recognize their substitutes until the fees of relators are paid, since they have an adequate remedy at law.[46] Nor can an attorney compel an officer to repay a fee illegally exacted, there being an adequate remedy by action.[47]

(II) *DISBARMENT AND RESTORATION.* In case of a clear duty to proceed a court or public committee may be compelled to hear a disbarment proceeding.[48] When an attorney has been disbarred for a cause over which the court has no jurisdiction;[49] where the act of the court in excluding him was wrongful,[50] or the proceedings are taken without notice and opportunity to be heard;[51] or where the

39. State *v.* Baker, 25 Fla. 598, 6 So. 445.

40. Splane's Petition, 123 Pa. St. 527, 16 Atl. 481; Com. *v.* Judges Cumberland County Ct. C. Pl., 1 Serg. & R. (Pa.) 187.

41. Reg. *v.* London, 13 Q. B. 1, 66 E. C. L. 1; Rex *v.* York, 3 B. & Ad. 770, 1 L. J. K. B. 211, 24 E. C. L. 338; Hastings' Case, 1 Mod. 23.

Applicant must have legal right.— Rex *v.* Canterbury, 8 East 213, where mandamus to admit an advocate in an ecclesiastical court was refused on the ground that the applicant had been admitted into deacon's orders.

42. Withers *v.* State, 36 Ala. 252; Reg. *v.* Greenwich County Ct. Registrar, 15 Q. B. D. 54, 54 L. J. Q. B. 392, 53 L. T. Rep. N. S. 902, 2 Morr. Bankr. Cas. 175, 33 Wkly. Rep. 671.

Where a state court-martial wrongfully precludes an attorney from appearing before it in his official capacity, the attorney has no "plain, speedy, and adequate remedy in the ordinary course of law" (Gen. St. § 3470), and accordingly he is entitled to mandamus. State *v.* Crosby, 24 Nev. 115, 50 Pac. 127, 77 Am. St. Rep. 786.

43. People *v.* Foster, 40 Misc. (N. Y.) 19, 81 N. Y. Suppl. 212, 12 N. Y. Annot. Cas. 375, where refusal was solely because of lack of power. But see State *v.* Franklin County Com'rs, 5 Ohio S. & C. Pl. Dec. 579, 7 Ohio N. P. 563, holding that where county commissioners refuse to allow a fee for assisting in a criminal prosecution, the proper proceeding is to take the case up on error, and not by mandamus.

44. State *v.* Second Judicial Dist. Ct., 30 Mont. 8, 75 Pac. 516, so holding where, from the facts stated, it was the plain legal duty of the court to grant the application, and it was without his proper discretion to refuse it.

45. Philbrook *v.* San Francisco Super. Ct., 111 Cal. 31, 43 Pac. 402.

46. Kelly *v.* Horsly, (Ala. 1906) 41 So. 902.

47. Evans *v.* U. S., 19 App. Cas. (D. C.) 207.

48. *Ex p.* Alabama State Bar Assoc., 92 Ala. 113, 8 So. 768, 12 L. R. A. 134, where judge had refused on ground of disqualification by interest. See Reg. *v.* Incorporated Law Soc., [1895] 2 Q. B. 456, 64 L. J. Q. B. 797, 73 L. T. Rep. N. S. 187, 15 Reports 597, 43 Wkly. Rep. 687, holding that the application must present a proper case.

49. *Arkansas.*— Beene *v.* State, 22 Ark. 149.

California.— Fletcher *v.* Daingerfield, 20 Cal. 427.

Colorado.— Butler *v.* People, 2 Colo. 295.

Iowa.— State *v.* Start, 7 Iowa 499.

Massachusetts.— See *In re* Randall, 11 Allen 473, where mandamus was refused on ground of failure to show right.

Mississippi.— *Ex p.* Heyfron, 7 How. 127.

New York.— People *v.* Dowling, 55 Barb. 197, 37 How. Pr. 394. Mandamus lies to the common pleas to restore an attorney removed by them. People *v.* Justices Delaware C. Pl., 1 Johns. Cas. 181; *In re* Gephard, 1 Johns. Cas. 134.

United States.— *Ex p.* Robinson, 19 Wall. 505, 22 L. ed. 205; Bradley *v.* Fisher, 13 Wall. 335, 20 L. ed. 646; *Ex p.* Bradley, 7 Wall. 364, 19 L. ed. 214; *Ex p.* Garland, 4 Wall. 333, 18 L. ed. 366; *Ex p.* Burr, 9 Wheat. 529, 6 L. ed. 152.

50. State *v.* Finley, 30 Fla. 302, 11 So. 500; State *v.* Maxwell, 19 Fla. 31; State *v.* Kirke, 12 Fla. 278, 95 Am. Dec. 314 (erroneous decision on the testimony); Ingersoll *v.* Howard, 1 Heisk. (Tenn.) 247 (where the judge improperly excluded an attorney from practice, and refused to enter the order on record or allow an appeal); White's Case, 6 Mod. 18. But see Underwood *v.* Newaygo Cir. Judge, 97 Mich. 626, 57 N. W. 190.

51. People *v.* Turner, 1 Cal. 143, 52 Am. Dec. 295; Walls *v.* Palmer, 64 Ind. 493. And see *In re* Randall, 11 Allen (Mass.) 473,

exclusion was an abuse of judicial power, or made for an ulterior purpose, or through prejudice or passion,[52] mandamus lies to compel restoration or reinstatement. An action for damages is not an adequate remedy.[53] Mandamus will not lie, however, from a court which has no supervisory jurisdiction.[54] Restoration by the state court cannot be compelled by the United States supreme court.[55]

2. Matters Relating to Civil Procedure — a. Interlocutory Proceedings in General. The rule is almost universal that mandamus will not lie to correct or review interlocutory proceedings, even though no immediate appeal is given; such proceedings being reviewable on appeal or error from final judgment or decree. A very great proportion of such proceedings involve judgment and discretion, and could not in any event be corrected by mandamus; and the delay, vexation, and expense attending interference with trial courts in interlocutory matters would be burdensome.[56]

b. Rules of Practice. Courts of general jurisdiction act judicially in making rules of practice, and so long as their acts are in good faith and within the limits of their powers they are not subject to review by mandamus.[57] But where an inferior court has adopted rules of practice the discretion is departed with so

where it was held that applicant was not injured, he having appeared and been heard.

52. State *v.* Kirke, 12 Fla. 278, 95 Am. Dec. 314.

53. People *v.* Turner, 1 Cal. 143, 52 Am. Dec. 295; People *v.* Fletcher, 3 Ill. 482.

54. Walls *v.* Palmer, 64 Ind. 493.

55. *In re* Green, 141 U. S. 325, 12 S. Ct. 11, 35 L. ed. 765, holding that the supreme court has no power to compel a state supreme court to restore an attorney disbarred for the use of vituperation and denunciation.

56. *Alabama.*— Baldwin *v.* Roman, 126 Ala. 266, 28 So. 40; *Ex p.* Jones, 1 Ala. 15. But see *Ex p.* Jones, 133 Ala. 212, 32 So. 643, holding that mandamus lies from vacation of an order dismissing a bill, there being no appeal.

Arkansas.— *Ex p.* Hutt, 14 Ark. 368.

California.— Gay *v.* Torrance, 143 Cal. 169, 76 Pac. 973 (holding that the writ will not lie to correct an order striking out affidavits on motion for new trial, an appeal being given); Aldrich *v.* Alameda County Super. Ct., 135 Cal. 12, 66 Pac. 846 (order dismissing application for adjudication of sanity).

Colorado.— People *v.* Arapahoe County Dist. Ct., 32 Colo. 166, 75 Pac. 390, erroneous order amending pleadings.

Georgia.— Jones *v.* Dougherty, 11 Ga. 305.

Idaho.— State *v.* Whelan, 6 Ida. 78, 53 Pac. 2, denial of order to show cause for sale of decedent's estate.

Illinois.— People *v.* McRoberts, 100 Ill. 458.

Iowa.— Preston *v.* Marion Independent School Dist. Bd. of Education, 124 Iowa 355, 100 N. W. 54, order of board excluding a scholar.

Louisiana.—State *v.* Judge Orleans Parish Civ. Dist. Ct., 107 La. 474, 31 So. 867; State *v.* Rightor, 36 La. Ann. 112, holding that mandamus does not lie to compel a district judge either to overrule or to sustain certain exceptions, he having referred them to the trial on the merits.

Maryland.—Bembe *v.* Anne Arundel County, 94 Md. 330, 51 Atl. 183, order refusing to repair a bridge.

Michigan.— Polasky *v.* Kalamazoo Cir. Judge, (1907) 110 N. W. 521; Hopper *v.* Livingston Probate Judge, 137 Mich. 124, 100 N. W. 266; Cattermole *v.* Ionia Cir. Judge, 136 Mich. 274, 99 N. W. 1; Steel *v.* Clinton Cir. Judge, 133 Mich. 695, 95 N. W. 993; Freud *v.* Saginaw Cir. Judge, 125 Mich. 670, 85 N. W. 193; Mardian *v.* Daboll, 118 Mich. 353, 76 N. W. 497; Michigan Mut. F. Ins. Co. *v.* Donovan, 112 Mich. 270, 70 N. W. 582; Walsh *v.* St. Clair Cir. Judge, 107 Mich. 26, 84 N. W. 1045; Sherwood *v.* Ionia Cir. Judge, 105 Mich. 540, 63 N. W. 509. Where the circuit court dismissed an appeal under its own rule, a judgment might have been entered on application of either party, and this could have been reviewed by writ of error; so that, even if no judgment were in fact entered, mandamus to compel the vacation of the order dismissing the appeal was not the proper remedy. Detroit, etc., R. Co. *v.* Eaton Cir. Judge, 128 Mich. 495, 87 N. W. 641.

Montana.— State *v.* Second Judicial Dist. Ct., 27 Mont. 349, 71 Pac. 159 (refusal of postponement); State *v.* Second Judicial Dist. Ct., 26 Mont. 372, 68 Pac. 465 (order striking out scandalous affidavits).

Nebraska.— State *v.* Westover, 2 Nebr. (Unoff.) 768, 89 N. W. 1002.

Texas.— State *v.* Fisher, 94 Tex. 491, 62 S. W. 540, certification of judge's dissent reviewable on error.

Washington.— State *v.* Tallman, 29 Wash. 317, 69 Pac. 1101.

Wisconsin.— State *v.* Taylor, 19 Wis. 566.

United States.—*In re* Huguley Mfg. Co., 184 U. S. 297, 22 S. Ct. 455, 46 L. ed. 549; *In re* Atlantic City R. Co., 164 U. S. 633, 17 S. Ct. 208, 41 L. ed. 579, refusal to dismiss for want of jurisdiction.

57. Union Colony *v.* Elliott, 5 Colo. 371, where mandamus was refused to compel a district judge to make rules other than those which he might decide appropriate in irrigation cases.

long as the rules are retained, and rights conferred thereby may be enforced by mandamus.[58]

c. Abatement and Revival. In case of abatement by death or otherwise a clear right of revival will be enforced by mandamus.[59]

d. Consolidation of Actions. The consolidation of actions is usually regarded as discretionary, and will not be controlled by mandamus.[60]

e. Change of Venue. Where there is a clear ministerial duty to award a change of venue, such change may be compelled by mandamus.[61] But where the granting or refusal of a motion for change of venue is within the discretion of the court, the ruling thereon cannot be reviewed by mandamus,[62] although the court may be compelled by mandamus to exercise its discretion.[63] In accordance with the general rule,[64] mandamus will not lie to compel a change of venue where there is an adequate remedy by appeal or error,[65] or where the order is regarded

58. Berthelot *v.* Hotard, 117 La. 524, 42 So. 90; People *v.* New York Super. Ct., 5 Wend. (N. Y.) 114. But see Martine *v.* Lowenstein, 68 N. Y. 456, holding that the court of appeals will not interfere in case a rule of the supreme court is disregarded.

59. Reynolds *v.* Crook, 95 Ala. 570, 11 So. 412; Lee *v.* Harper, 90 Ala. 548, 8 So. 685; *Ex p.* Robinson, 72 Ala. 389; *Ex p.* South, etc., Alabama R. Co., 65 Ala. 599; *Ex p.* Ware, 48 Ala. 223; *Ex p.* Swan, 23 Ala. 192; State *v.* Nabor, 7 Ala. 459. But see Elliott *v.* Paterson, 65 Cal. 109, 3 Pac. 493, holding that, where a judgment of nonsuit was entered after the death of plaintiff, mandamus is not the proper remedy to obtain the substitution of an administrator and retrial of the action. Such a judgment is not void on its face, and the administrator should procure the judgment to be set aside before making the application for mandamus.

60. Halliburton *v.* Martin, 28 Tex. Civ. App. 127, 66 S. W. 675.

61. State *v.* Meeker County Dist. Ct., 77 Minn. 302, 79 N. W. 960; State *v.* Dick, 103 Wis. 407, 79 N. W. 421; State *v.* McArthur, 13 Wis. 407.

Premature application.— Mandamus will not lie in advance of the time for the judge to act. State *v.* Goodland, 128 Wis. 57, 107 N. W. 29, holding, where the application was on the ground of prejudice of the judge, that the judge had had until the last day of the term to make the order.

Necessity of motion.— It has been held that a formal motion is unnecessary where it is apparent that if made it would not be granted. Gamble *v.* First Judicial Dist. Ct., 27 Nev. 233, 74 Pac. 530.

Where the filing of an affidavit operates to disqualify the judge, mandamus lies to compel the proper officer to enter an order of removal. Cook *v.* Baxter, 27 Ark. 480.

Motion before justice of the peace see *supra*, IV, B, 1, b.

In criminal cases.— A change of venue to which there is a clear statutory right may be enforced by mandamus. *Ex p.* Reeves, 51 Ala. 55; *Ex p.* Chase, 43 Ala. 303; State *v.* Castleberry, 23 Ala. 85; State *v.* Williams, 127 Wis. 236, 106 N. W. 286, where a second change of venue, after remand for new trial on reversal of conviction, was compelled. But see *Ex p.* Banks, 28 Ala. 28 (holding the duty discretionary); People *v.* Judge Twelfth Dist., 17 Cal. 547 (holding that mandamus is not a proper remedy to compel the transfer of a case pursuant to an act directing it).

Certification of incompetency.— Mandamus is the proper remedy to compel a judge to certify his incompetency to the proper officer and to make the appointment of a special judge. Crook *v.* Newborg, 124 Ala. 479, 27 So. 432, 82 Am. St. Rep. 190. See also State *v.* Castleberry, 23 Ala. 85.

62. *California.—* People *v.* Hubbard, 22 Cal. 34.

Illinois.— People *v.* Church, 103 Ill. App. 132.

*Kentucky.—*Galbraith *v.* Williams, 106 Ky. 431, 50 S. W. 686, 21 Ky. L. Rep. 79.

Missouri.— State *v.* McKee, 150 Mo. 233, 51 S. W. 421.

Ohio.— State *v.* Wilson, 12 Ohio Cir. Ct. 636, 7 Ohio Cir. Dec. 17.

Pennsylvania.— Newlin's Petition, 123 Pa. St. 541, 16 Atl. 737.

Virginia.— Danville *v.* Blackwell, 80 Va. 38.

See 33 Cent. Dig. tit. "Mandamus," § 90.

63. Hennessy *v.* Nicol, 105 Cal. 138, 38 Pac. 649; State *v.* Durflinger, 73 Ohio St. 154, 76 N. E. 291. See, generally, *supra*, IV, a, 1.

64. See *supra*, II, D, 2, c.

65. *California.—* San Joaquin County *v.* San Joaquin County Super. Ct., 98 Cal. 602, 33 Pac. 482; People *v.* Sexton, 24 Cal. 78.

Colorado.— People *v.* Arapahoe County Dist. Ct., 22 Colo. 280, 44 Pac. 506.

Illinois.— People *v.* Gibbons, 91 Ill. App. 567.

Missouri.— State *v.* McKee, 150 Mo. 233, 51 S. W. 421; State *v.* O'Bryan, 102 Mo. 254, 14 S. W. 933.

Montana.— State *v.* Smith, 23 Mont. 329, 58 Pac. 867.

New York.— People *v.* Bolte, 35 Misc. 53, 71 N. Y. Suppl. 74; People *v.* Roesch, 27 Misc. 44, 57 N. Y. Suppl. 295.

Wisconsin.— State *v.* Washburn, 22 Wis. 99.

See 33 Cent. Dig. tit. "Mandamus," § 13.

as interlocutory.[66] So likewise certiorari and not mandamus has been held the proper remedy to vacate an order granting a change.[67] Where a change of venue has been granted without authority, mandamus to proceed may issue.[68] Where a change of venue has been granted, mandamus lies to compel a transmission of the record.[69] Where the change has been by consent, a dismissal in the court to which the change has been taken because of irregularities in the change cannot be compelled.[70]

f. Transfer of Cause. Mandamus lies to enforce an absolute right of removal.[71] Where a cause has been regularly removed, and the court from which it has been transferred assumes to treat it as still within its jurisdiction, and vacates the order of removal, mandamus lies to compel it to vacate the latter order.[72]

g. Parties. Where the court has erroneously declined to make a person a party, upon the ground that it has no jurisdiction to do so, it has been held that mandamus will lie,[73] although rulings as to the substitution or bringing in of new parties,[74] or the granting or refusal of a motion to intervene,[75] are usually regarded as matters of judicial discretion which will not be controlled.

h. Process. Mandamus lies to compel the issue of process,[76] and in some jurisdictions it may issue to set aside service,[77] or to compel the allowance of an amended return to process, as well as to control the action of the court in permitting such an amendment.[78] Where service has been improperly quashed it has been held that mandamus will issue.[79]

i. Arrest. A decision of a question of fact in relation to an order of arrest cannot be reviewed on mandamus.[80]

j. Pleadings. Mandamus will not lie to correct or strike out pleadings,[81] or to

66. People *v.* McRoberts, 100 Ill. 458. See also *supra*, IV, B, 2, a.

67. State *v.* Elliott, 108 Wis. 163, 84 N. W. 149.

68. *Ex p.* Cox, 10 Mo. 742 (so holding where the change was granted after verdict); State *v.* Spokane County Super. Ct., 40 Wash. 443, 82 Pac. 875, 111 Am. St. Rep. 915, 2 L. R. A. N. S. 568 (holding that where a court has exclusive jurisdiction to hear a cause, without power or discretion to award a change of venue, mandamus lies to compel it to proceed).

69. Robinson *v.* Stone, 13 Ark. 290; State *v.* Chapman, 67 Ohio St. 1, 65 N. E. 154, holding that the clerk cannot set up the invalidity of the order as a defense.

70. *Ex p.* Rice, 102 Ala. 671, 15 So. 450; *Ex p.* Reeves, 52 Ala. 394, holding, where after the trial court had ordered a change to one county the supreme court issued a mandamus to compel a change to another county, and relator there made a motion to dismiss on the ground that the second order was void, that such dismissal would not be compelled.

71. Danville *v.* Blackwell, 80 Va. 38.

Removal to federal court see REMOVAL OF CAUSES.

Transfer by justice of the peace see *supra*, IV, B, 2, b.

72. People *v.* Wayne Cir. Judge, 39 Mich. 115.

73. *Ex p.* Connaway, 178 U. S. 421, 20 S. Ct. 951, 44 L. ed. 1134.

74. See, generally, PARTIES. And see Coffin *v.* Ontonagon Cir. Judge, 139 Mich. 420, 103 N. W. 835. But *compare* Wood *v.* Lenawee Cir. Judge, 84 Mich. 521, 47 N. W. 1103, holding that where it appears that the right of action on an insurance certificate would be lost for want of a substitution of certain debtors as parties, which is denied by the court, mandamus will issue to compel a circuit judge to make an order therefor.

75. People *v.* Sexton, 37 Cal. 532; Moon *v.* Wellford, 84 Va. 34, 4 S. E. 572; White *v.* U. S., 1 Black (U. S.) 501, 17 L. ed. 227. But *compare Ex p.* Breedlove, 118 Ala. 172, 24 So. 363; Reynolds *v.* Crook, 95 Ala. 570, 11 So. 412, both holding that mandamus will lie to compel the chancellor to allow a third person to intervene so as to claim a share in a fund in court.

76. People *v.* Leask, 1 Abb. N. Cas. (N. Y.) 299; State *v.* Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166.

By justice of the peace see *supra*, IV, B, 1, b.

77. Mitchell *v.* Huron Cir. Judge, 53 Mich. 541, 19 N. W. 176; Baldwin *v.* Branch Cir. Judge, 48 Mich. 525, 12 N. W. 686. See *contra*, State *v.* Call, 41 Fla. 450, 26 So. 1016, where mandamus to set aside an order of publication for service of process was refused.

78. Casky *v.* Haviland, 13 Ala. 314; Kemp *v.* Porter, 6 Ala. 172.

79. Schollenberger *v.* Forty-Five Foreign Ins. Cos., 21 Fed. Cas. No. 12,475*a*, 5 Wkly. Notes Cas. (Pa.) 405.

80. Krekler *v.* Kent Cir. Judge, 135 Mich. 94, 97 N. W. 152; Gilbert *v.* Judges Niagara County Ct. C. Pl., 3 Cow. (N. Y.) 59.

81. People *v.* Judge Jackson County Cir.

review decisions as to their sufficiency.[82] The power to grant or refuse amendments to pleadings is largely discretionary as well as interlocutory in its character, and mandamus will not as a general rule be issued to control or review such discretion.[83] The same rule applies to a refusal of extended time to answer.[84]

k. Set-Off. The allowance of a set-off by motion is usually discretionary and mandamus will not lie.[85]

l. Stipulations. A disputed stipulation to settle a case cannot be enforced by mandamus to the court.[86] An order setting aside a stipulation between the attorneys in a suit being judicial will not be reviewed by mandamus.[87]

m. Evidence, Depositions, and Witnesses. The admissibility of evidence is peculiarly within the discretion of the court, and mandamus will not be issued to review or control it.[88] There being no adequate remedy by writ of error, an order for production of books and papers may in some jurisdictions be reviewed on mandamus to set aside.[89] The writ will issue to compel the issuance of a commission to take a deposition,[90] unless the act is discretionary;[91] to compel the allowance of proper interrogatories;[92] or to compel the examiner to complete the deposition, and punish a witness refusing to testify by contempt proceedings, if necessary;[93] but the act of a court suppressing or refusing to suppress a deposition being judicial will not be controlled.[94] An order for the attachment of a witness cannot be vacated by mandamus where other remedies exist,[95] although it has been said such attachment may be compelled.[96] A state court, however, cannot be compelled by mandamus to issue a subpœna for witnesses in a proceeding before a federal officer where the federal government has made no provision for compelling the attendance of witnesses.[97] Discretion in disallowing witness' fees

Ct., 41 Mich. 5, 2 N. W. 181. And see Columbia Bank *v.* Sweeny, 1 Pet. (U. S.) 567, 7 L. ed. 265, holding that mandamus will not lie to direct a court to withdraw an issue before it, and direct a different issue to be made up, as the case may be brought up on error.

82. State *v.* Second Judicial Dist. Ct., 27 Mont. 280, 70 Pac. 981, holding that a decision of a trial court that a complaint in a suit does not state a cause of action, being a determination of an issue of law arising in the case, will not be corrected by mandamus. And see *Ex p.* Mercantile Trust, etc., Co., 107 Ala. 621, 18 So. 235, holding that mandamus will not lie to settle whether a pleading should be filed as an original bill or as a cross bill.

83. Skutt *v.* Kent Cir. Judge, 136 Mich. 477, 99 N. W. 405; Blackburn *v.* Alpena Cir. Judge, 136 Mich. 48, 98 N. W. 754; Detroit *v.* Wayne Cir. Judge, 125 Mich. 634, 85 N. W. 1; St. Clair Tunnel Co. *v.* St. Clair Cir. Judge, 114 Mich. 417, 72 N. W. 249; Flint, etc., R. Co. *v.* Wayne Cir. Judge, 108 Mich. 80, 65 N. W. 583; *Ex p.* Bradstreet, 7 Pet. (U. S.) 634, 8 L. ed. 810; White *v.* Galbraith, 12 Ont. Pr. 513. See *contra*, *Ex p.* Sullivan, 106 Ala. 80, 17 So. 387; *Ex p.* Lawrence, 34 Ala. 446, where the lower court was compelled to disallow an amendment contrary to an agreement of the parties.

84. Gravier *v.* Caraby, 8 La. 202.

85. People *v.* St. Joseph County Cir. Judge, 39 Mich. 21.

86. Leavitt *v.* Judge Detroit Super. Ct., 52 Mich. 595, 18 N. W. 374, so holding, although a party retained money paid three weeks. But see *Ex p.* Lawrence, 34 Ala. 446, where a nonsuit was ordered pursuant to an agreement.

87. *Ex p.* Hayes, 92 Ala. 120, 9 So. 156. And see *Ex p.* Rowland, 26 Ala. 133.

88. *Ex p.* Bell, 48 Ala. 285; Scott *v.* Yolo County Super. Ct., 75 Cal. 114, 16 Pac. 547; Rex *v.* Cambridgeshire Justices, 1 D. & R. 325, 16 E. C. L. 41.

89. Church *v.* Anti-Kalsomine Co., 119 Mich. 437, 78 N. W. 478; Eddy *v.* Bay Cir. Judge, 114 Mich. 668, 72 N. W. 890; Petrie *v.* Muskegon County Cir. Judge, 90 Mich. 265, 51 N. W. 278; People *v.* Judge Kent County Cir. Ct., 38 Mich. 351.

90. Giboney *v.* Rogers, 32 Ark. 462; State *v.* McRae, 49 Fla. 389, 38 So. 605.

91. Muskegon Booming Co. *v.* Muskego Cir. Judge, 97 Mich. 622, 57 N. W. 190.

92. Mallory *v.* Matlock, 10 Ala. 595, holding that where a party in a cause pending at law proposes interrogatories to his adversary, pursuant to the statute, and they are improperly rejected by the court, his appropriate remedy is a mandamus to compel their allowance. And *compare* Uline *v.* New York Cent., etc., R. Co., 79 N. Y. 175.

93. Crocker *v.* Conrey, 140 Cal. 213, 73 Pac. 1006.

94. *Ex p.* Elston, 25 Ala. 72; Chandler *v.* Antrim Cir. Judge, 97 Mich. 621, 57 N. W. 189.

95. *Ex p.* Branch, 105 Ala. 231, 16 So. 926.

96. Locket *v.* Child, 11 Ala. 640; Hogan *v.* Alston, 9 Ala. 627.

97. Boom *v.* De Haven, 72 Cal. 280, 13 Pac. 694, where writ was refused to seenre witnesses before register of land-office.

will not be controlled the rule being the same as is applicable to other discretionary acts.[98]

n. Dismissal and Nonsuit. As a general rule the action of the court with regard to dismissing an action is judicial and not ministerial, and will not be reviewed by mandamus,[99] particularly where there is an adequate remedy by appeal,[1] or otherwise;[2] but in case the statute peremptorily requires a dismissal on certain conditions the writ will go to compel it.[3] Where there is no remedy by appeal or writ of error, an order erroneously striking a case from the docket may be corrected by mandamus.[4]

o. Reinstatement of Case. The reinstatement of a cause dismissed or disposed of is usually discretionary, not to be controlled by mandamus.[5]

p. Continuance or Postponement. As a general rule the discretion of a court

98. Murray *v.* Gillaspie, 96 Tex. 285, 72 S. W. 160.

99. *Ex p.* Johnson, 25 Ark. 614; Tomkin *v.* Harris, 90 Cal. 201, 27 Pac. 202 (motion by *amicus curiæ*); Cariaga *v.* Dryden, 29 Cal. 307; People *v.* Pratt, 28 Cal. 166, 87 Am. Dec. 110; State *v.* McCutchan, 119 Mo. App. 69, 96 S. W. 251; Rex *v.* Suffolk Justices, 6 M. & S. 57.

Although the parties agreed to a dismissal, mandamus does not lie to compel it. *Ex p.* Rowland, 26 Ala. 133.

Rights of third persons.— In case of an improper dismissal the remedy of a third person whose rights are affected thereby is by mandamus, if any remedy whatever exists. Jennings *v.* Pearce, 99 Ala. 303, 13 So. 605; Brazier *v.* Tarver, 4 Ala. 569.

Cross bill.— Mandamus will not lie to restore a cross bill erroneously dismissed. *Ex p.* Woodruff, 123 Ala. 99, 26 So. 509 [*overruling Ex p.* Thornton, 46 Ala. 384].

The dismissal of an appeal may be discretionary. Taylor County Ct. *v.* Holt, (W. Va. 1906) 56 S. E. 205.

Where party is in contempt dismissal has been held discretionary. *Ex p.* Colley, 140 Ala. 193, 37 So. 232.

Where jurisdiction is declined by error of law see *supra*, IV, A, 2.

1. *Ex p.* Merritt, 142 Ala. 115, 38 So. 183; Kendall *v.* Lassiter, 68 Ala. 181; *Ex p.* Hendree, 49 Ala. 360; *Ex p.* Bottoms, 46 Ala. 312; *Ex p.* Garlington, 26 Ala. 170; Lemon *v.* Oakland Cir. Judge, 140 Mich. 504, 103 N. W. 843; Recor *v.* St. Clair Cir. Judge, 139 Mich. 156, 102 N. W. 643 (order quashing garnishment reviewable on error); Steele *v.* Goodrich, 87 Tex. 401, 28 S. W. 939; *In re* Key, 189 U. S. 84, 23 S. Ct. 624, 47 L. ed. 725.

Where appeal is not adequate.— The dismissal of a suit may be compelled by mandamus because of the failure of a non-resident plaintiff to give security for costs. Anniston First Nat. Bank *v.* Cheney, 120 Ala. 117, 23 So. 733.

2. Theilman *v.* Alameda County Super. Ct., 95 Cal. 224, 30 Pac. 193, holding, where plaintiff's attorneys resisted a dismissal on the ground that fees were due, that plaintiff if desiring to dismiss had an adequate remedy in a substitution of attorneys.

3. State *v.* Johnson, 105 Wis. 90, 80 N. W. 1104, holding that a trial court's refusal to dismiss may be controlled where it can be reviewed on appeal only after a burdensome and expensive trial.

4. *Ex p.* State, 115 Ala. 123, 22 So. 556 (criminal case); *Ex p.* State, 51 Ala. 69; *Ex p.* Ahrams, 48 Ala. 151; *Ex p.* Lowe, 20 Ala. 330; Stephenson *v.* Mansony, 4 Ala. 317.

5. Southern R. Co. *v.* Walker, 132 Ala. 62, 31 So. 487; Hempstead County *v.* Grave, 44 Ark. 317; State *v.* Sommerville, 110 La. 953, 34 So. 953; State *v.* Judges First Cir. Ct. App., 49 La. Ann. 1084, 22 So. 193; Davis *v.* York County Com'rs, 63 Me. 396. But see *Ex p.* State, 115 Ala. 123, 22 So. 115 (holding that mandamus will lie to compel the judge of a city court to reinstate a criminal case which he has discontinued for reasons insufficient in law); Lindsay *v.* Wayne Cir. Judges, 63 Mich. 735, 30 N. W. 590 (holding that mandamus would issue to compel the taking off of a nonsuit, where the party against whom it was ordered was prevented by a misapprehension from being in court when the case was filed, and where his motion for reinstatement was overruled on technical grounds, and because the prosecution of the case was an expense to the county).

Remanded case.— After a cause is transferred and remanded for want of jurisdiction mandamus lies to compel the reinstatement of the case. *Ex p.* State, 115 Ala. 133, 22 So. 556; *Ex p.* State, 71 Ala. 363; *Ex p.* Remson, 31 Ala. 270. But see State *v.* Eighth Judicial Dist. Ct., 32 Mont. 37, 79 Pac. 546. Where a change of venue has been duly taken, and a transcript of the record filed in the office of the clerk of the circuit court of the county to which the case has been transferred, so that the court has complete jurisdiction thereof, but the court dismisses the cause on its own motion for alleged want of jurisdiction, the supreme court will, by mandamus, require the circuit court to reinstate the case, and to proceed with the trial thereof, but it has not the power to control the judgment and discretion of the circuit court in any particular direction, under Mo. Const. art. 6, § 3, giving the supreme court "a general superintending control" over the circuit courts of the state. State *v.* Neville, 157 Mo. 386, 57 S. W. 1012, 80 Am. St. Rep. 638, 51 L. R. A. 95.

in granting or refusing a continuance or postponement will not be controlled by mandamus.[6] But in a clear case of a continuance without right,[7] or where no showing has been made authorizing the exercise of discretion,[8] the court may be compelled to proceed; and likewise a clear duty of the court to postpone will be enforced.[9]

q. Stay of Proceedings. Where the grounds urged confer no power or discretion upon a court to grant a stay of proceedings it may be compelled by mandamus to proceed,[10] in case the order is not appealable.[11] But where the facts confer a discretion upon the trial court mandamus will not lie unless the discretion is abused in granting or refusing the order.[12]

r. Trial — (i) *In General.* Mandamus will not lie to compel a transfer of a cause from the law to the equity docket;[13] or to review the decision of a court as to the right to a jury trial where it is judicial.[14] The writ will, however, issue to enforce a peremptory statutory right to such a trial.[15] Mandamus will not in any event enforce a jury trial where such trial has not been duly demanded in accord with a mandatory statute.[16] Severance of a civil trial has been held discretionary.[17] That the trial was irregular is no ground for mandamus, when there is another remedy.[18]

6. *Alabama.*— *Ex p.* Scudder-Gale Grocery Co., 120 Ala. 434, 25 So. 44; *Ex p.* Jones, 66 Ala. 202; *Ex p.* Opdyke, 62 Ala. 68; *Ex p.* South, etc., Alabama R. Co., 44 Ala. 654.

California.— Whaley *v.* King, 92 Cal. 431, 28 Pac. 579; Stone *v.* McCann, 79 Cal. 460, 21 Pac. 863; Rose *v.* Nevada County Super. Ct., 65 Cal. 570, 4 Pac. 577.

Idaho.— Shoshone County Bd. Com'rs *v.* Mayhew, 5 Ida. 572, 51 Pac. 411.

Louisiana.— State *v.* Buckner, 45 La. Ann. 247, 12 So. 11; State *v.* Judge New Orleans Parish Ct., 15 La. 521; Corporation *v.* Paulding, 4 Mart. N. S. 189; State *v.* Esnault, 12 Mart. 488, holding that where it is objected that, one of defendants being the sheriff, the suit cannot be tried without the coroner, and, there being none, the judge refuses to order the jury to be called either by the sheriff or some other fit person, and continues the cause, he cannot be compelled to proceed with it.

Michigan.— Thompson *v.* Bay Cir. Judge, 138 Mich. 81, 101 N. W. 61, holding that mandamus will not lie to compel the vacation of an order striking a stipulation of discontinuance from the files; plaintiff under such circumstances being required merely to proceed with the cause or pay costs.

New Mexico.—Territory *v.* Ortiz, 1 N. M. 5.

Vermont.— Foster *v.* Redfield, 50 Vt. 285, holding that a writ of procedendo will not lie to compel a court to proceed to judgment upon a petition for divorce and alimony in a case continued, after hearing, by the court's own motion, in hope of a reconciliation, for the welfare of the children, etc.

Virginia.— *Ex p.* Richardson, 3 Leigh 343.

Washington.— State *v.* Steiner, (1906) 87 Pac. 66.

7. People *v.* Pearson, 2 Ill. 473; People *v.* Pearson, 2 Ill. 458.

8. Dixon *v.* Field, 10 Ark. 243; State *v.* Posey, 17 La. Ann. 252, 87 Am. Dec. 525.

9. Wattles *v.* Lillibridge, 119 Mich. 356, 78 N. W. 123.

10. Dunphy *v.* Belden, 57 Cal. 427; Avery *v.* Contra Costa County Super. Ct., 57 Cal. 247; Rhodes *v.* Craig, 21 Cal. 419; State *v.* King County Super. Ct., 14 Wash. 686, 45 Pac. 670.

11. *Ex p.* Tower Mfg. Co., 103 Ala. 415, 15 So. 836; Davis *v.* Wallace, (Cal. 1895) 38 Pac. 1107; Barber Asphalt Paving Co. *v.* Morris, 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761.

12. *California.*— Smith *v.* Jones, 128 Cal. 14, 60 Pac. 466.

Kentucky.— Rohmeiser *v.* Toney, 26 S. W. 721, 16 Ky. L. Rep. 260.

Michigan.— Gunzberg *v.* Kent Cir. Judge, 42 Mich. 591, 4 N. W. 308.

Wisconsin.— State *v.* Taylor, 19 Wis. 566.

Canada.— *In re* Judge Elgin County Ct., 13 U. C. C. P. 73.

13. Horton *v.* Gill, 5 Indian Terr. 193, 82 S. W. 718.

14. Donohue *v.* San Francisco Super. Ct., 93 Cal. 252, 28 Pac. 1043 (mandamus will not lie to compel a judge of a superior court to award a jury trial in an action to quiet title); State *v.* Twenty-Second Judicial Dist. Ct. Judge, 44 La. Ann. 1085, 11 So. 684.

Feigned issue.— Where a feigned issue is awarded by the court of common pleas to try the validity of a senior judgment, the supreme court will not interfere by mandamus to direct the award to be vacated. People *v.* Ulster C. Pl., 18 Wend. (N. Y.) 628.

15. State *v.* Hart, 26 Utah 229, 72 Pac. 938; Nichols *v.* Cherry, 22 Utah 1, 60 Pac. 1103.

The right must be clear.— People *v.* Judges Jackson Cir. Ct., 1 Dougl. (Mich.) 302.

Must be an actual default.— Mandamus will not issue merely because cause has been set down for trial without jury. State *v.* Rising, 15 Nev. 164.

16. *Ex p.* Ansley, 107 Ala. 613, 18 So. 242.

17. State *v.* St. Paul, 110 La. 722, 34 So. 750.

18. Marshall *v.* State, 1 Ind. 72, holding a writ of error the proper remedy where a trial was had in the absence of a party.

(II) *Calendar.* The control of the trial calendar is purely discretionary, and mandamus will not lie.[19]

(III) *Arguments to Jury.* Mandamus will not issue to control the discretion of the court in limiting arguments to the jury unless the discretion is abused.[20]

(IV) *Stenographic Reports.* Mandamus lies to compel the official reporter to furnish a transcript of his notes.[21] But mandamus will not lie to review the discretion of the trial judge in refusing an order to the stenographer.[22] An official stenographer may compel payment for his statutory services by mandamus to the proper officers.[23]

s. **Verdict and Findings.** The court may be compelled by mandamus to receive a verdict which is in proper form and responsive to the issues.[24] A ministerial duty to make findings of fact may be enforced by mandamus,[25] but the writ will not lie to correct insufficient or erroneous conclusions.[26]

t. **New Trial and Rehearings.** While the court may be compelled to hear and dispose of an application for a new trial,[27] the ruling upon such a motion is

19. Allen *v.* Calhoun, 6 Cow. (N. Y.) 32. And see Carpenter *v.* Jones, 121 Cal. 362, 53 Pac. 842, holding that the court would not be compelled to place a cause on the trial calendar where necessary jury fees are not paid.

If a circuit court improperly remands a cause to the rules, a mandamus will lie to compel it to reinstate the cause on the issue docket and proceed to trial. Sanders *v.* Nelson Cir. Ct., Hard. (Ky.) 17.

20. *In re* Carle, 60 N. J. L. 83, 37 Atl. 608.

21. Williams *v.* Cooley, (Ga. 1906) 55 S. E. 917 (criminal case); Lyle *v.* Sherman, (Mich. 1907) 110 N. W. 932 (application should be to circuit and not supreme court); State *v.* Ledwidge, 27 Mont. 197, 70 Pac. 511 (holding that the appropriate remedy to compel a stenographer to furnish such transcript is a writ of mandate rather than an order to the stenographer by the trial court); State *v.* Supple, 22 Mont. 184, 56 Pac. 20.

22. State *v.* St. Paul, 113 La. 1066, 37 So. 972.

23. Lamb *v.* Toomer, 91 Ga. 621, 17 S. E. 966; Gilbert *v.* Moody, 2 Ida. 747, 25 Pac. 1092. And see Pipher *v.* California Super. Ct., (Cal. App. 1906) 86 Pac. 904; Bartling *v.* People, 92 Ill. App. 410.

24. Munkers *v.* Watson, 9 Kan. 668; Com. *v.* Justices Middlesex County Sess., 9 Mass. 388; Com. *v.* Justices Norfolk County Ct. of Sess., 5 Mass. 435; State *v.* Knight, 46 Mo. 83; State *v.* Beall, 48 Nebr. 817, 67 N. W. 868. See Lloyd *v.* Brinck, 35 Tex. 1.

Necessity of special findings.— Mandamus will not lie to compel a court to receive a special verdict of a jury until they have found on all the special issues submitted to them, under the Judiciary Act, c. 23, § 7, providing for the submission of such special issues. Rose *v.* Harvey, 18 R. I. 527, 30 Atl. 459.

Directed verdict.— Where an instruction has been given in the nature of a demurrer to the evidence the judge is alone responsible for the verdict. Mandamus will not lie to compel him to receive a verdict offered against his direction. State *v.* Thayer, 5 Mo. App. 420.

Where jury has altered verdict.— The writ will not lie to compel the reception of a first verdict where the jury, before discharge, change it and render another. State *v.* Clementson, 69 Wis. 628, 35 N. W. 56.

25. Moore *v.* Waco Bldg. Assoc., 92 Tex. 265, 47 S. W. 716. And see MaGee *v.* Penn, (Tex. Civ. App. 1902) 67 S. W. 1077, holding that mandamus will not lie to compel a judge to file conclusions of fact and law in a case where there is no failure of duty upon his part, he having understood that a request therefor was withdrawn, counsel having acquiesced in his statement that there was no reason or necessity for findings. But *compare* Sankey *v.* Levy, 69 Cal. 244, 10 Pac. 336, holding that mandamus does not lie to correct the error of a superior court in rendering the judgment in a case on appeal from a justice's court, without filing findings of fact.

26. Ansonia *v.* Studley, 67 Conn. 170, 34 Atl. 1030 (holding that the decision of a trial court on the facts that counsel for a litigant has by laches waived the right to a finding in the cause cannot be reversed by another court by mandamus); Delhi School-Dist. *v.* Ingham, 49 Mich. 432, 13 N. W. 806; Moore *v.* Waco Bldg. Assoc., 92 Tex. 265, 47 S. W. 716.

27. *Alabama.*— Bridges *v.* Miller, 3 Ala. 746.

Kansas.— Bleakley *v.* Smart, (1906) 87 Pac. 76.

Missouri.— State *v.* Stratton, 110 Mo. 426, 19 S. W. 803.

Montana.— Sweeney *v.* Great Falls, etc., R. Co., 11 Mont. 34, 27 Pac. 347, holding that appeal is not an adequate remedy.

Nevada.— Crosby *v.* North Bonanza Silver Min. Co., 23 Nev. 70, 42 Pac. 583; Thomas *v.* Sullivan, 11 Nev. 280.

See 33 Cent. Dig. tit. "Mandamus," § 97.

Where the motion has been decided without hearing mandamus will lie. De Gaze *v.* Lynch, 42 Cal. 362; Morris *v.* De Cellis, 41 Cal. 331.

generally regarded as discretionary and will not be disturbed,[28] unless the discretion has been abused,[29] or the action has been beyond the power of the court,[30] although in some cases where under the practice an order granting a new trial is not appealable it has been held subject to review by mandamus.[31] Like new trial, the granting or denying of a rehearing in equity is discretionary.[32] Where a tribunal in excess of its proper powers revokes an order for a new trial which it had legally granted, mandamus will compel it to proceed with the new trial.[33]

Where motion is not pending.— Where, on the day named for hearing defendant's motion for a new trial, there was no appearance for plaintiff, and the hearing was continued to another day, at which neither party appeared, and nothing was thereafter done with reference to the motion, mandamus will not lie to direct the judge to decide the motion, it not having been submitted and not being pending. State *v.* Judge Stutsman County Dist. Ct., 3 N. D. 43, 53 N. W. 433.

Showing on motion.— Mandamus will not lie to compel a judge to pass upon a motion for a new trial in a cause tried before another judge, who has since died, where no competent evidence of the testimony introduced at the trial is offered upon the motion for new trial, since without such evidence the motion could not properly be decided. People *v.* McConnell, 146 Ill. 532, 34 N. E. 945.

Where there is a failure to furnish a statement of the evidence as required of a party under rule of court, the judge will not be compelled to proceed. Purcell *v.* McKune, 14 Cal. 230.

28. *Georgia.*— Echos *v.* Candler, 108 Ga. 785, 33 S. E. 811, holding that the supreme court has no jurisdiction to grant a writ of mandamus to compel a judge of the superior court to approve the grounds of a motion for a new trial.

Louisiana.— State *v.* Monroe, 47 La. Ann. 1482, 17 So. 940; State *v.* Monroe, 39 La. Ann. 664, 2 So. 215; State *v.* Watts, 8 La. 76.

Massachusetts.— Gray *v.* Bridge, 11 Pick. 189.

Michigan.— Detroit Tug, etc., Co. *v.* Gartner, 75 Mich. 360, 42 N. W. 968; People *v.* Detroit Super. Ct. Judge, 41 Mich. 31, 1 N. W. 985; People *v.* Branch County Cir. Judge, 17 Mich. 67.

New Jersey.— Squier *v.* Gale, 6 N. J. L. 157.

New York.— *Ex p.* Baily, 2 Cow. 479.

See 33 Cent. Dig. tit. "Mandamus," § 97.

29. Heflin *v.* Rock Mills Mfg., etc., Co., 58 Ala. 613; Brnce *v.* Williamson, 50 Ala. 313; *Ex p.* North, 49 Ala. 385; Hester *v.* Chambers, 84 Mich. 562, 48 N. W. 152; People *v.* New York Super. Ct., 5 Wend. (N. Y.) 114; Schintz *v.* Morris, 13 Tex. Civ. App. 580, 35 S. W. 516, 825, 36 S. W. 292, holding that under Const. art. 5. § 6, giving the court of civil appeals such original and appellate jurisdiction as may be prescribed by law; and Acts (1892), organizing such court, and authorizing it (section 9), by mandamus, to compel a judge of the district court to proceed to trial and judgment in a cause agreeably to the principles and usages of law, where a separate verdict was entered on each branch of a suit on two causes of action, one for and the other against defendants, and the trial court entered judgment, only on the verdict against them, and then granted defendants a new trial, but refused a new trial as to the verdict against plaintiff, mandamus will issue to compel it to vacate its order denying plaintiff a new trial, and on retrial, to try anew both causes of action.

Where the maker and indorser of a note were jointly sued, as authorized by Acts (1839), p. 489, and Acts (1835), p. 248, and a general verdict was found for defendants, but the court, on a motion for a new trial, being of the opinion that the verdict was wrong as to the maker, granted a new trial as to both, the supreme court will issue mandamus directing the court to vacate the order as to the indorser, and enter judgment in his favor on the verdict, and allow a new trial against the maker. People *v.* New York C. Pl., 19 Wend. (N. Y.) 118.

Laches.— A peremptory mandamus will be granted to set aside a rule for a new trial granted by an inferior court, on the ground of cumulative evidence newly discovered, where the party was guilty of laches. People *v.* New York Super. Ct., 10 Wend. (N. Y.) 285.

30. People *v.* Justices Chenango Connty Sess., 1 Johns. Cas. (N. Y.) 179. See also Chastain *v.* Armstrong, 85 Ala. 215, 3 So. 788.

An application granted in vacation will be vacated by mandamus. See *Ex p.* Farquhar, 99 Ala. 375, 11 So. 913; Seymour *v.* Farquhar, 95 Ala. 527, 10 So. 650.

31. O'Neal *v.* Kelly, 72 Ala. 559; *Ex p.* North, 49 Ala. 385; Hatchett *v.* Milner, 44 Ala. 224; Broyles *v.* Maddox, 43 Ala. 357. See Boyce *v.* Smith, 16 Mo. 317, holding that if a second new trial has been improperly granted, the matter can only be corrected by a mandamus from the supreme court.

An order in vacation refusing a rehearing has also been held within this rule. Chastain *v.* Armstrong, 85 Ala. 215, 3 So. 788.

32. *Ex p.* Gresham, 82 Ala. 359, 2 So. 486. And see Marshall *v.* State, Smith (Ind.) 17, holding that the refusal of a judge in probate to vacate a decree and rehear the case, if erroneous, is not ground for a writ of mandamus. The remedy is by appeal or writ of error.

33. State *v.* New Orleans Police Bd., 51 La. Ann. 747, 25 So. 637.

Mandamus will also lie to procure a statement, certificate of evidence, or bill, for the purpose of presenting a motion for a new trial.[34]

u. Judgment and Enforcement Thereof — (i) *Entry and Rendition.* When the parties have an absolute right that the court proceed to enter judgment, mandamus will lie;[35] but mandamus to enter a judgment will not issue where its effect would be to review or control the judicial discretion of the inferior court,[36] and when an appeal lies and is adequate mandamus will not go.[37] In order that the

34. Careaga *v.* Fernald, 66 Cal. 351, 5 Pac. 615; State *v.* Murphy, 19 Nev. 89, 6 Pac. 840; Whitmore *v.* Harris, 10 Utah 259, 37 Pac. 464, holding that where the time for serving amendments to a proposed statement on motion for a new trial has expired, and no amendments have been proposed, on refusal of a referee to sign the statement a writ of mandamus will issue. But see Conwell *v.* McWhorter, 93 Ga. 254, 19 S. E. 50, holding that mandamus does not lie to compel a judge of the superior court to approve a brief of evidence presented to him in connection with a motion for a new trial pending in that court, nor to require him to show cause why he should not approve a brief of evidence of a case tried by one who was not a judge of the circuit of the county in which the case was tried, and who has, since the trial, resigned his office.

35. *Alabama.*— *Ex p.* Lawrence, 34 Ala. 446.

California.— Claudius *v.* Melvin, 146 Cal. 257, 79 Pac. 897; Russell *v.* Elliott, 2 Cal. 245.

Colorado.— People *v.* Thirteenth Judicial Dist. Ct., 33 Colo. 77, 79 Pac. 1014; People *v.* Graham, 16 Colo. 347, 26 Pac. 936.

Idaho.— Havens *v.* Stewart, 7 Ida. 298, 62 Pac. 682.

Louisiana.— State *v.* Judge Fifth Dist. Ct., 35 La. Ann. 873; State *v.* Judge Cir. Dist. Ct., 35 La. Ann. 218; State *v.* Judge Second Judicial Dist., 30 La. Ann. 155; State *v.* Judge Orleans Parish Fourth Dist. Ct., 28 La. Ann. 451; State *v.* Judge Seventh Judicial Dist., 12 La. Ann. 48.

Missouri.— State *v.* Klein, 140 Mo. 502, 41 S. W. 895; State *v.* Adams, 76 Mo. 605 [*affirming* 12 Mo. App. 436]; State *v.* Cape Girardeau Ct. of C. Pl., 73 Mo. 560; Vernon *v.* Boggs, 1 Mo. 117; Kerr *v.* Rector, 1 Mo. 117; State *v.* Horner, 10 Mo. App. 307.

New Jersey.— Cortleyou *v.* Ten Eyck, 22 N. J. L. 45; Foreman *v.* Murphy, 3 N. J. L. 1024.

New Mexico.— Branford *v.* Erant, 1 N. M. 579.

New York.— People *v.* Murray, 2 Misc. 152, 23 N. Y. Suppl. 160 [*affirmed* in 138 N. Y. 635, 33 N. E. 1084]; People *v.* New York C. Pl., 19 Wend. 118; *Ex p.* Bostwick, 1 Cow. 143; Haight *v.* Turner, 2 Johns. 371.

Texas.— Texas Tram, etc., Co. *v.* Hightower, (1906) 96 S. W. 1071; Lloyd *v.* Brinck, 35 Tex. 1.

West Virginia.— Hutton *v.* Holt, 52 W. Va. 672, 44 S. E. 164; Marstiller *v.* Ward, 52 W. Va. 74, 43 S. E. 178.

United States.— *In re* Grossmayer, 177 U. S. 48, 20 S. Ct. 535, 44 L. ed. 665; Smith *v.* Jackson, 22 Fed. Cas. No. 13,064, 1 Paine 453.

England.— *Ex p.* Ness, 5 C. B. 155, 2 D. & L. 339, 17 L. J. C. P. 15, 57 E. C. L. 155.

Canada.— Oliver *v.* Fryer, 7 Ont. Pr. 325.

See 33 Cent. Dig. tit. "Mandamus," §§ 98, 100.

Entry by justice of the peace see *supra*, IV, B, 1, b.

Waiver of right.— Where a party submits to a new trial in the common pleas, and is nonsuited, he cannot obtain a mandamus directing the common pleas to enter judgment on the first verdict. Weavel *v.* Lasher, 1 Johns. Cas. (N. Y.) 241.

36. *Alabama.*— *Ex p.* Pearce, 80 Ala. 195; *Ex p.* Henry, 24 Ala. 638.

California.— Elder *v.* Grunsky, 127 Cal. 67, 59 Pac. 300; People *v.* San Francisco Super. Ct., 114 Cal. 466, 46 Pac. 383; Broder *v.* Mono County Super. Ct., 103 Cal. 121, 37 Pac. 143; Tibbetts *v.* Campbell, (1891) 27 Pac. 531; People *v.* Sexton, 37 Cal. 532, where leave to intervene had been granted after decision and before formal judgment.

Louisiana.— State *v.* Monroe, 47 La. Ann. 1482, 17 So. 940; Seddan *v.* Templeton, 7 La. Ann. 126; State *v.* Watts, 8 La. 76.

Michigan.— Fisher *v.* Wayne Cir. Judge, 128 Mich. 543, 87 N. W. 792.

Canada.— Ledden *v.* Russell, 2 N. Brunsw. 217.

See 33 Cent. Dig. tit. "Mandamus," §§ 98, 100.

Entry of judgment by default.— State *v.* Judge First City Ct., 46 La. Ann. 365, 14 So. 906; Hutton *v.* Holt, 52 W. Va. 672, 44 S. E. 164; Marstiller *v.* Ward, 52 W. Va. 74, 43 S. E. 178.

37. *Alabama.*— *Ex p.* Schmidt, 62 Ala. 252; *Ex p.* Morris, 44 Ala. 361.

California.— Ludlum *v.* Fourth Dist. Ct., 9 Cal. 7; Peralta *v.* Adams, 2 Cal. 594.

Colorado.— People *v.* Judge Boulder County Dist. Ct., 18 Colo. 500, 33 Pac. 162.

Montana.— State *v.* Eighth Judicial Dist. Ct., 32 Mont. 37, 79 Pac. 546.

Nebraska.— State *v.* Kinkaid, 23 Nebr. 641, 37 N. W. 612.

New York.— People *v.* Lott, 42 Hun 408. *Ex p.* Bostwick, 1 Cow. 143.

Texas.— Aycock *v.* Clark, 94 Tex. 375, 60 S. W. 665.

United States.— *In re* Westervelt, 98 Fed. 912, 39 C. C. A. 350.

See 33 Cent. Dig. tit. "Mandamus," §§ 15, 98.

Entry of appealable judgment.—Mandamus

writ may issue, relators must establish a clear right to the relief.[38] There must have been a demand made of the trial court,[39] and there must have been a refusal upon the part of the trial court to act.[40]

(II) *CORRECTION OR AMENDMENT.* The correction or amendment of a judgment is usually regarded as discretionary, and will not be controlled by mandamus.[41]

(III) *VACATION.* Mandamus will not as a general rule issue to compel the vacation of a judgment, this being discretionary, and appeal or error an adequate remedy.[42] But where the right of appeal is cut off by the unauthorized entry of a final judgment which the trial judge had no jurisdiction or power to order, mandamus may issue to annul and set aside the void entry.[43] It has also been

will lie to compel the court to enter a final judgment which is necessary to secure the relator a right of appeal. Havens *v.* Stewart, 7 Ida. 298, 62 Pac. 682.

38. Elder *v.* Grunsky, 127 Cal. 67, 59 Pac. 300 (holding that a clerk will not be compelled to enter a default judgment where service of process has been set aside); Rugg *v.* Davis, 68 Vt. 600, 35 Atl. 491; Fairbanks *v.* Amoskeag Nat. Bank, 32 Fed. 572 (holding that a clerk cannot be compelled by mandamus to enter judgment until there has been a determination of the cause).

Illustrations.— Mandamus will not issue to compel a judge to render a personal judgment against defendants on a finding which is not responsive to the pleadings, and which is, at plaintiff's instance, declared to be advisory only. State *v.* Dickinson, 59 Nebr. 753, 82 N. W. 16. The supreme court will not grant a mandamus to compel the common pleas to enter judgment on a report of auditors, while a rule is pending in that court to show cause why the report should not be set aside. Berry *v.* Callet, 6 N. J. L. 179.

39. State *v.* Hunter, 4 Wash. 651, 30 Pac. 642, 32 Pac. 294.

The proper judgment must have been demanded.— Orsland *v.* Wayne Cir. Judge, 138 Mich. 395, 101 N. W. 552.

40. State *v.* Hunter, 4 Wash. 651, 30 Pac. 642, 32 Pac. 294, refusing mandamus where it appeared that the court would probably take the desired action at its next session.

Pending a motion for new trial, mandamus to enter a judgment will not be granted where there has been no unreasonable delay in acting upon such motion. *Ex p.* Bradstreet, 8 Pet. (U. S.) 588, 8 L. ed. 1054.

41. *Alabama.*— *Ex p.* Woodruff, 123 Ala. 99, 26 So. 509.

Michigan.— Hiawatha Tp. *v.* Schoolcraft County Cir. Judge, 90 Mich. 270, 51 N. W. 282, holding that where a decree orally announced as dismissing a bill without prejudice is drawn, signed, and enrolled, omitting the words "without prejudice," an application for mandamus to vacate a subsequent order of the court amending the decree so as to conform to the oral announcement will be denied. But see Frederick *v.* Mecosta County Cir. Judge, 52 Mich. 529, 18 N. W. 343, holding that mandamus would issue where rights of third persons had not intervened to compel the entry of a proper judgment in replevin.

New York.— People *v.* Callahan, 7 Daly 434.

Texas.— Little *v.* Morris, 10 Tex. 263.

United States.— *Ex p.* Morgan, 114 U. S. 174, 5 S. Ct. 825, 29 L. ed. 135.

See 33 Cent. Dig. tit. "Mandamus," § 101.

42. *Alabama.*— *Ex p.* Campbell, 130 Ala. 171, 30 So. 385; *Ex p.* Carlisle, 118 Ala. 175, 24 So. 30; Bridgeport Electric, etc., Co. *v.* Bridgeport Land, etc., Co., 104 Ala. 276, 16 So. 93; Cochran *v.* Miller, 74 Ala. 50; *Ex p.* Creswell, 60 Ala. 378; *Ex p.* Bell, 48 Ala. 285; *Ex p.* Morris, 44 Ala. 361; State *v.* Bowen, 6 Ala. 511.

California.— O'Neill *v.* Reynolds, 116 Cal. 264, 48 Pac. 57.

Georgia.— Haskens *v.* State, 114 Ga. 837, 40 S. E. 997.

Louisiana.— State *v.* Judge Orleans Parish Ct. of App., 37 La. Ann. 111.

Michigan.— Gorman *v.* Calhoun Cir. Judge, 140 Mich. 230, 103 N. W. 567; Reed *v.* St. Clair Cir. Judge, 122 Mich. 153, 80 N. W. 985; Beals *v.* Clinton County Acting Cir. Judge, 91 Mich. 146, 51 N. W. 885 (holding that in an action on a joint and several note, where judgment was entered against one defendant on a cognovit, and afterward, on a trial, judgment was entered in favor of the other defendant because of the bar of the former judgment against the co-defendant, mandamus does not, as a matter of right, lie to the trial court to set aside both judgments, although the entry of the second judgment was error); Granger *v.* Judge Detroit Super. Ct., 44 Mich. 384, 6 N. W. 848; Chicago, etc., R. Co. *v.* Genesee Cir. Judge, 40 Mich. 168.

New York.— Elkins *v.* Athearn, 2 Den. 191; *Ex p.* Koon, 1 Den. 644; People *v.* New York C. Pl., 19 Wend. 118; *Ex p.* Bacon, 6 Cow. 392.

Virginia.— *Ex p.* Goolsby, 2 Gratt. 575.

United States.— *Ex p.* Roberts, 6 Pet. 216, 8 L. ed. 375.

See 33 Cent. Dig. tit. "Mandamus," § 102.

43. State *v.* Sneed, 105 Tenn. 711, 58 S. W. 1070, holding that mandamus would not be denied for the reason that relator had an adequate remedy by enjoining the collection of the judgment, since he was entitled to an adequate remedy at law, and holding also that the contention that such order was be-

held that where a chancery decree has been erroneously set aside on mere motion its restoration may be compelled.[44] Where a judgment is set aside, not as an act of judicial discretion but wholly upon a stipulation between the parties, it may be reinstated by mandamus in case the stipulation does not justify the act of the court.[45]

(IV) *OPENING DEFAULT.* The discretion of the trial court as to opening a default will not be interfered with unless such discretion be abused.[46] But in the absence of any other remedy a void judgment by default may be vacated.[47]

(V) *SATISFACTION.* Where relator has another remedy mandamus will not issue to vacate a satisfaction of a judgment.[48]

(VI) *EXECUTIONS.* The issue of execution upon a judgment or decree is a ministerial duty, and the writ lies to compel its performance.[49] But mandamus

yond the jurisdiction of the supreme court, as canceling a judgment after the expiration of the term was without merit, since it presupposed that a judgment entered without authority was valid.

Motion for new trial.— Where a judgment was entered after the adjournment of court *nunc pro tunc* as of the last day of the term, it was not necessary to file a motion for a new trial before bringing proceedings by mandamus to compel the trial court to expunge such judgment from the record, since, as the judgment was entered after the term, the relator had no opportunity to file such a motion. State *v.* Sneed, 105 Tenn. 711, 58 S. W. 1070.

44. York *v.* Ingham Cir. Judge, 57 Mich. 421, 24 **N. W. 157.**

45. People *v.* Judge Branch Cir. Ct., 26 Mich. 370.

46. Hallwood Cash Register Co. *v.* Wayne Cir. Judge, 139 Mich. 198, 102 N. W. 625 (holding that where the court has acted on a motion to set aside a default, and permitted the filing of an amended plea by granting the motion on condition that defendant appear and plead to the merits, mandamus will not lie to compel it to vacate the conditions, as the court's exercise of discretion will not be interfered with, and any error in the decision may be reviewed by allowing the case to go to judgment and raising the question by writ of error or case-made); *Ex p.* Benson, 7 Cow. (N. Y.) 363.

A void order, *ultra vires* the court, opening a default may be set aside by mandamus. *Ex p.* Payne, 130 Ala. 189, 29 So. 622.

47. Reid *v.* Benzie Cir. Judge, 115 Mich. 418, 73 N. W. 391 (holding that where plaintiff is prematurely defaulted for not filing a declaration, mandamus will issue to compel the order to be set aside); Campbell *v.* Donovan, 111 Mich. 247, 69 N. W. 514; People *v.* Bacon, 18 Mich. 247.

48. People *v.* Tioga C. Pl., 19 Wend. (N. Y.) 73, holding that where a right of action was assigned, and action brought by the assignee in the owner's name, and the nominal plaintiff acknowledged satisfaction of the judgment secured; mandamus would not issue to compel the court to vacate the satisfaction; the assignee's remedy being an action against the nominal plaintiff.

49. *Alabama.*— *Ex p.* Sibert, 67 Ala. 349.

California.— Holtum *v.* Greif, 144 Cal. 521, 78 Pac. 11; Hayward *v.* Pimental, 107 Cal. 386, 40 Pac. 545; Garoutte *v.* Haley, 104 Cal. 497, 38 Pac. 194; Hamilton *v.* Tutt, 65 Cal. 57, 2 Pac. 878; People *v.* Loucks, 28 Cal. 68. But see Fulton *v.* Hanna, 40 Cal. 278; Goodwin *v.* Glazer, 10 Cal. 333, both holding that the remedy by motion to compel the clerk to act was an adequate remedy.

Georgia.— Scott *v.* Bedell, 108 Ga. 205, 33 S. E. 903.

Illinois.— People *v.* Cloud, 3 Ill. 362.

Kansas.— Whitmore *v.* Stewart, 61 Kan. 254, 59 Pac. 261 (holding that, where an order releasing a judgment is void, mandamus will lie to compel the clerk of the court to issue an execution on the judgment, where he refuses to do so); Mendenhall *v.* Burnette, 58 Kan. 355, 49 Pac. 93 (holding that the clerk of the district court, having custody of the record of a judgment revived against the executors of defendant after his death, may be compelled by mandamus to issue execution thereon, where it appears that an application to the judge of the district court of the county for an order for such execution would be fruitless).

Louisiana.— Cox *v.* Thomas, 11 La. 366. But see State *v.* Judge New Orleans Fourth Dist. Ct., 19 La. Ann. 4, holding that where the district judge renders judgment on a rule to show cause why execution should not issue, dismissing a rule, a mandamus will not lie to compel him to order an execution. The decision on the rule is a judgment of the court, which can only be inquired into on appeal.

Missouri.— State *v.* Renick, 157 Mo. 292, 57 S. W. 713 (holding that the court rendering judgment need not have ordered an execution to issue); State *v.* Vogel, 6 Mo. App. 526.

New Jersey.— Laird *v.* Abrahams, 15 N. J. L. 22; Terhune *v.* Barcalow, 11 N. J. L. 38.

New York.— People *v.* Woodbury, 70 N. Y. App. Div. 416, 75 N. Y. Suppl. 236 (holding that a surrogate acts judicially in requiring that an adverse party be given notice of an application for execution, and the action of the surrogate cannot be reviewed by mandamus); People *v.* Gale, 22 Barb. 502 [*affirmed* in 3 Abb. Dec. 491].

Texas.— Jones *v.* McMahan, 30 Tex. 719.

Washington.— State *v.* Hatch, 36 Wash.

will not go to compel issuance of an execution on a void judgment[50] or to collect illegal fees.[51] The writ will issue to compel the sheriff to execute an execution by levy and sale,[52] unless the title to the property levied on is in dispute,[53] to execute and deliver a deed,[54] to appraise exempt property[55] or to surrender such property,[56] or to accept a sufficient affidavit of illegality.[57] But it has been held that another adequate remedy will defeat the right to compel execution to issue,[58] to compel levy[59] or the return of the property taken upon the levy to a

164, 78 Pac. 796, holding that under Ballinger Annot. Codes & St. § 5755, authorizing the issuance of a writ of mandate to compel the performance of an act which the law especially enjoins as a duty, mandate will lie to compel a judge of the supreme court to issue an execution where he has refused to do so, and has quashed an execution issued by the clerk, after execution has been ordered by the supreme court on appeal; the duty of issuing the execution not being so far solely a ministerial one, within the province of the clerk, as to preclude the direction of the writ of mandamus to the judge.

United States.— Stafford *v.* Union Bank, 17 How. 275, 15 L. ed. 101.

Canada.— Linden *v.* Buchanan, 29 U. C. Q. B. 1, holding that the writ properly issued to the clerk and not to the judge.

See 33 Cent. Dig. tit. "Mandamus," § 109 *et seq.*

A justice of the peace may be compelled by mandamus to issue execution. Hamilton *v.* Tutt, 65 Cal. 57, 2 Pac. 878.

50. Cramer *v.* McDowell, 6 Colo. 369.

51. Shase *v.* De Wolf, 69 Ill. 47.

52. Cummins *v.* Webb, 4 Ark. 229; North Pac. Coast R. Co. *v.* Gardner, 79 Cal. 213, 21 Pac. 735.

53. State *v.* Craft, 17 Fla. 722 (holding that mandamus would not issue to compel the sheriff to levy on property held in the name of the wife of the execution debtor); Matthews *v.* Nance, 49 S. C. 389, 27 S. E. 408 (holding that mandamus should not issue to compel a sheriff to sell land under execution where it is claimed that the land is a homestead, and that the lien of the judgment on which the execution is issued was divested by sale on another execution after entry of such judgment, but in such case the parties should be left to determine their rights by action).

Mandamus to compel jury trial of right to property.— Under Gen. St. p. 1420, § 33, providing that, if plaintiff in execution shall indemnify the sheriff against the demand of a claimant, the sheriff shall suspend proceedings for the trial of the right of property, the remedy for a person whose property is wrongfully taken is by replevin, trespass, or trover, and mandamus will not lie to compel the court to try such right before a jury. Harris *v.* Krause, 60 N. J. L. 72, 37 Atl. 439.

54. *Arkansas.*— Fowler *v.* Pearce, 7 Ark. 28, 44 Am. Dec. 526. And see State *v.* Lawson, 14 Ark. 114, holding that a clear legal duty and a refusal must be shown.

California.— People *v.* Irwin, 14 Cal. 428.

Florida.— See State *v.* Bradshaw, 39 Fla. 137, 22 So. 296, holding mandamus to lie to enforce execution of deeds upon tax certificates.

Georgia.— Burckhalter *v.* O'Connor, 100 Ga. 366, 28 S. E. 154.

New York.— People *v.* Fleming, 2 N. Y. 484.

See 33 Cent. Dig. tit. "Mandamus," § 112.

Where sale has been made by mistake at the wrong time, execution of deed will not be compelled. State *v.* Byrd, 42 Ga. 629.

Where purchase-money has not been paid.— Mandamus will not lie to compel a sheriff to make a deed to one claiming as the prior creditor who refuses to pay the purchase-money, there being an unsettled contest as to his priority. Williams *v.* Smith, 6 Cal. 91.

55. Chambers *v.* Perry, 47 Ark. 400, 1 S. W. 700; Rice *v.* Nolan, 33 Kan. 28, 5 Pac. 437; State *v.* Carson, 27 Nebr. 501, 43 N. W. 361, 20 Am. St. Rep. 681, 9 L. R. A. 523; Hamilton *v.* Fleming, 26 Nebr. 240, 41 N. W. 1002; Mann *v.* Welton, 21 Nebr. 541, 32 N. W. 599; State *v.* Cunningham, 6 Nebr. 90; People *v.* McClay, 2 Nebr. 7; Butt *v.* Green, 29 Ohio St. 667. But see Com. *v.* Huttel, 4 Pa. Super. Ct. 95, 40 Wkly. Notes Cas. 71, holding that a mandamus will not lie to compel a constable, charged with the execution of a landlord's warrant, to have an appraisement made of goods elected to be retained by the tenant under the three-hundred-dollar exemption law.

56. Mitchell *v.* Hay, 37 Ga. 581; State *v.* Gardner, 32 Wash. 550, 73 Pac. 690, 98 Am. St. Rep. 858, holding a remedy by replevin not sufficiently speedy and adequate.

57. Williams *v.* McArthur, 111 Ga. 28, 36 S. E. 301.

58. Holtum *v.* Greif, 144 Cal. 521, 78 Pac. 11 (holding that the remedy by appeal from an order overruling plaintiff's motion for execution is not such a plain, speedy, and adequate remedy in the ordinary court of law, within Code Civ. Proc. § 1086, as will prevent the issuance of a writ of mandamus against the judge of the court to compel the issuance of execution, where the result of a reversal of the order would merely confirm the petitioner's already complete right to execution); Fulton *v.* Hanna, 40 Cal. 278; Goodwin *v.* Glazer, 10 Cal. 333; Pickell *v.* Owen, 66 Iowa 485, 24 N. W. 8; State *v.* Frank, 52 Nebr. 553, 72 N. W. 857; State *v.* Pike, 17 Ohio Cir. Ct. 624, 9 Ohio Cir. Dec. 299.

59. State *v.* Chambers, 26 Ohio Cir. Ct. 404. See Armstrong *v.* Stansel, 47 Fla. 127, 36 So. 762 (holding that previous to the going into effect of Laws (1901), p. 48,

claimant,[60] or sale,[61] or to confirm a sale,[62] or to correct or set aside an antedated execution.[63] The pendency of an appeal or writ of error from the judgment will prevent mandamus,[64] as will a stay of execution.[65] It has been held that the refusal of a court to quash a void execution may be controlled by mandamus.[66]

(VII) *JUDICIAL SALES.* As a general rule the sheriff or other officer, in making a judicial sale, acts under the direction of the court out of which the order of sale issues, and his acts will not be controlled by mandamus from another court, at least in the absence of an application to the trial court for an order affording the relief sought.[67] An order affirming a judicial sale being discretionary cannot be compelled by mandamus,[68] but it has been held that mandamus may issue to compel a postponement of sale.[69]

(VIII) *IMPRISONMENT FOR DEBT.* Certiorari, not mandamus, is the proper remedy to review an order to discharge an imprisoned debtor.[70] But the duty to administer an oath of insolvency and discharge a debtor has been held ministerial and enforceable by mandamus.[71]

(IX) *SEQUESTRATION.* Mandamus will not lie to control the refusal of a judge to allow sequestered property to be bonded.[72]

c. 4914, authorizing an officer to be compelled by mandamus to execute a levy, mandamus did not lie to compel a sheriff to execute a writ of fieri facias; plaintiff having other adequate remedies); Jones *v.* McMahan, 30 Tex. 719 (holding that an action against the clerk for refusal to issue an execution is not an adequate remedy, so as to exclude mandamus, when the amount of the execution exceeds that of the clerk's bond).

60. State *v.* Gillespie, 9 Nebr. 505, 4 N. W. 239.

61. Armstrong *v.* Stansel, 47 Fla. 127, 36 So. 762; State *v.* Cone, 40 Fla. 409, 25 So. 279, 74 Am. St. Rep. 150; Wright *v.* Bond, 127 N. C. 39, 37 S. E. 65, 80 Am. St. Rep. 781, holding that mandamus will not lie to compel a sheriff to sell land liable to execution and sale, and apply the proceeds in satisfaction of a judgment, where the sheriff is solvent or his bond is valid, since the judgment creditor has thereby an adequate remedy at law.

62. State *v.* Island County Super. Ct., 21 Wash. 631, 59 Pac. 505.

63. Jennings *v.* Kalamazoo Cir. Judge, 44 Mich. 99, 6 N. W. 203.

64. People *v.* Adams, 13 Colo. 550, 22 Pac. 826, holding that mandamus will not lie to compel the issue of an execution on the ground that an appeal has not been properly perfected, where the appeal from the judgment has been allowed, and the appeal-bond approved by order of the trial court, as the jurisdiction of the supreme court has thereby attached, and a defect in the appeal can be reached by a motion to strike from the docket and files.

Pendency of appeal as preventing mandamus in general see *supra*, II, H, 1.

Where a writ of error is informal the remedy is by motion to vacate the writ and not by mandamus to have the judgment carried into execution. *Ex p.* French, 100 U. S. 1, 25 L. ed. 529.

65. Spradin *v.* Bratton, 6 Lea (Tenn.) 685. But see Avery *v.* Contra Costa County Super. Ct., 57 Cal. 247, holding that where the issue of execution is prevented by an unauthorized stay of proceedings, and there is no appeal, mandamus lies to the court to compel its issue.

66. Moore *v.* Bell, 13 Ala. 469, where the execution issued in the name of a deceased plaintiff. But see State *v.* Waller, 133 Ala. 199, 32 So. 163, holding that the purchaser of a decree in the chancery court of Montgomery county was not entitled to mandamus from the city court of the city of Montgomery to compel the sheriff to release a levy of execution issued on the decree and to return the execution, the remedy, if the purchaser was entitled to any, being by an application to the chancery court for an order on the sheriff to release the levy, etc.

67. People *v.* Bowman, 181 Ill. 421, 55 N. E. 148, 72 Am. St. Rep. 265; State *v.* Wright, 26 Mont. 540, 69 Pac. 101; State *v.* Holliday, 35 Nebr. 327, 53 N. W. 142.

The execution of a deed to a prior lienor, on redemption from a mortgage foreclosure, may be compelled. San Jose Water Co. *v.* Lyndon, 124 Cal. 518, 57 Pac. 481.

68. Tabor *v.* Lorance, 53 Ala. 543.

69. Roberts *v.* Kalamazoo Cir. Judge, 122 Mich. 560, 81 N. W. 355, holding that where it is apparent that property cannot be sold under foreclosure, to advantage, until certain pending suits are disposed of, a postponement may be compelled.

70. Ricardo *v.* Passaic Ct. of C. Pl., 38 N. J. L. 182.

71. Harrison *v.* Emmerson, 2 Leigh (Va.) 764.

72. State *v.* Judge New Orleans Fourth Dist. Ct., 17 La. Ann. 282.

After discontinuance.— Mandamus to a district judge, directing him to fix the amount of a release bond, and to grant an order for the release of certain property sequestered in a suit, will not be granted at the instance of defendant in a suit where the suit has been duly and legally discontinued, and the effect of the discontinuance is to put defendant in possession of the property sequestered. State *v.* Farrar, 20 La. Ann. 99.

(x) *WRIT OF ASSISTANCE.* Where there is no other remedy provided for putting a party to the suit or a purchaser under a decree in possession mandamus will issue to compel a writ of assistance.[73]

(xi) *RESTITUTION.* Mandamus lies to compel restitution of property pursuant to judgment or decree,[74] also to restore moneys paid under a reversed judgment or decree,[75] as well as the possession of land,[76] and a sheriff may be compelled to execute the writ.[77] But mandamus will not go when there is another adequate remedy.[78]

v. Record. Where it is merely a ministerial duty mandamus will issue to enforce the making of a court record,[79] or its correction;[80] but a judge cannot be compelled to alter his record where the alteration involves a judicial act.[81]

w. Review — (i) *APPEAL AND ERROR.* The use of the writ of mandamus as incidental to proceedings to secure the review of civil actions has been elsewhere

73. People *v.* Loucks, 28 Cal. 68; Fogarty *v.* Sparks, 22 Cal. 142; Fremont *v.* Crippen, 10 Cal. 211, 70 Am. Dec. 711; Chumasero *v.* Potts, 2 Mont. 242. But see Gregory *v.* Blanchard, 98 Cal. 311, 33 Pac. 199, holding that the purchaser at an execution sale in justice's court is not entitled to mandamus from the superior court to compel the delivery of the property by the debtor.

Where there is a remedy by appeal mandamus will be refused. Aldrich *v.* Wayne Cir. Judge, 111 Mich. 525, 69 N. W. 1108; State *v.* Burnell, 104 Wis. 246, 80 N. W. 460.

74. Kirk *v.* Cole, 3 MacArthur (D. C.) 71 (where undertaking for appeal was not filed in time); State *v.* Fields, 62 Nebr. 520, 87 N. W. 318 (holding that where a defendant in an action of forcible entry had attempted to appeal from an adverse judgment therein and no appeal lay, the district court may be required to enter judgment for plaintiff, although previously refusing on the ground that the appeal lay and superseded his jurisdiction).

Where an order suspending restitution has been granted it is reviewable only by appeal. U. S. *v.* Marshall, 122 Fed. 428, 58 C. C. A. 410.

75. *Ex p.* Walter, 89 Ala. 237, 7 So. 400, 18 Am. St. Rep. 103.

76. Fremont *v.* Crippen, 10 Cal. 211, 70 Am. Dec. 711.

77. North Pac. Coast R. Co. *v.* Gardner, 79 Cal. 213, 21 Pac. 735 (holding that the superior court may issue a writ of mandate to a sheriff, requiring him to execute a writ of restitution issued by a justice of the peace, upon his refusal to do so); Fremont *v.* Crippen, 10 Cal. 211, 70 Am. Dec. 711 (holding that, although petitioner has a civil action against a sheriff, or a criminal prosecution against him, if he refuses to execute a writ of restitution, yet neither of these can compel the sheriff to execute the writ, and therefore mandamus will be awarded.

Where the occupant is not a party or has not acquired possession under a party or after *lis pendens* filed the writ will not issue. Fogarty *v.* Sparks, 22 Cal. 142.

78. *Ex p.* Williamson, 8 Ark. 424 (where error would lie); Gutierrez *v.* Hebberd, 106 Cal. 167, 39 Pac. 529 (holding that mandamus will not lie pending an appeal from a decree awarding certain lands to plaintiff in partition, to compel the setting aside of a writ of possession issued under the court's order, and to restore petitioners to the possession of the lands, the remedy being by appeal, if the court erred).

79. People *v.* Thirteenth Judicial Dist. Ct., 33 Colo. 77, 79 Pac. 1014; Warren County *v.* State, 15 Ind. 250; New Home Sewing Mach. Co. *v.* Thornburg, 56 Nebr. 636, 77 N. W. 86.

80. Taylor *v.* Gillette, 52 Conn. 216 (so holding where a probate judge stated in the return on appeal that appellants took the appeal as sisters instead of heirs); State *v.* Whittet, 61 Wis. 351, 21 N. W. 245 (holding that an entry by a justice of the peace in his docket of an adjournment being only a ministerial duty, mandamus will lie to compel him to correct the same to conform to the facts, but only after notice to the parties whose rights are to be affected by the correction); Reg. *v.* West Riding of Yorkshire, 3 G. & D. 170, 12 L. J. M. C. 148. But see State *v.* Van Ells, 69 Wis. 19, 32 N. W. 32, holding that a peremptory writ of mandamus will not lie to compel a justice of the peace to enter in his docket an adjournment which the entry of a judgment in his docket and his own statement tend to show that he never made.

81. *Missouri.*— Dixon *v.* Second Judicial Cir. Judge, 4 Mo. 286.

New Jersey.— Mooney *v.* Edwards, 51 N. J. L. 479, 17 Atl. 973, holding that a writ of mandamus will not issue to compel a justice of the peace who has presided at a trial in the court for the trial of small causes to alter the entry made in his docket of the date at which an appeal-bond was filed and approved by him.

Pennsylvania.— Com. *v.* Hultz, 6 Pa. St. 469.

United States.— *Ex p.* Morgan, 114 U. S. 174, 5 S. Ct. 825, 29 L. ed. 135, amendment of judgment to conform to finding.

England.— *Ex p.* Ackworth, 3 Q. B. 397, 1 D. & L. 718, 8 Jur. 291, 13 L. J. M. C. 38, 1 New Sess. Cas. 64, 43 E. C. L. 790; Rex *v.* Hughes, 1 Harr. & W. 313, 5 L. J. M. C. 34, 5 N. & M. 139, 36 E. C. L. 605.

See 33 Cent. Dig. tit. "Mandamus," § 72.

fully treated.[82] An appellate court may be compelled by mandamus to certify a cause to a higher appellate court where there is a specific statutory duty to do so.[83] The superior court may be compelled by mandamus to proceed with a trial *de novo* on appeal from the judgment of a justice.[84]

(II) *CERTIORARI.* An order quashing[85] or refusing to quash[86] a writ of certiorari cannot be reviewed by mandamus.

(III) *SUPERSEDEAS.* Where not otherwise reviewable a wrongful supersedeas may be corrected by mandamus;[87] but where the order is discretionary it cannot as a general rule be reviewed.[88] Where there is a clear right to supersedeas on appeal, mandamus will lie to compel the trial court to fix the amount of the bond;[89] but the right must be absolute; the discretion of the court will not be controlled.[90]

x. Payments Out of Court. A writ of mandamus will not issue to authorize the payment of money from the custody of the court, where the relator's right is not clearly established.[91] It has been held, however, that a wholly unlawful payment out of court may be controlled by mandamus.[92]

y. Bonds and Undertakings. Where the duty is ministerial a court may be compelled by mandamus to approve or reject a bond,[93] or to fix the amount of an

82. See, generally, APPEAL AND ERROR.

Mandamus to compel: Allowance of appeal see APPEAL AND ERROR, 2 Cyc. 816. Certification of case see APPEAL AND ERROR, 2 Cyc. 745. Certification of evidence see APPEAL AND ERROR, 3 Cyc. 76 note 56. Enforcement of mandate see APPEAL AND ERROR, 3 Cyc. 490. Execution on failure to give security see APPEAL AND ERROR, 2 Cyc. 896 note 8. Extension of time to prepare bill of exceptions see APPEAL AND ERROR, 3 Cyc. 43. Preparation of transcript see APPEAL AND ERROR, 3 Cyc. 94 note 37. Settlement of bill of exceptions see APPEAL AND ERROR, 3 Cyc. 47. Settlement of case or statement of facts see APPEAL AND ERROR, 3 Cyc. 73 note 39. Transmission of transcript of record see APPEAL AND ERROR, 3 Cyc. 115 note 29.

83. State *v.* Philips, 96 Mo. 570, 10 S. W. 182 (holding that if it had been the duty of a court during a term to transfer a cause, and it had failed, mandamus would lie to compel the transfer, after the term expired, although the court could not then transfer the cause of its own motion); Texas, etc., R. Co. *v.* Conner, (Tex. 1907) 100 S. W. 367 (holding that mandamus would be refused where there was no conflict of decision); Herf *v.* James, 86 Tex. 230, 24 S. W. 396. See also Addison Tinsley Tobacco Co. *v.* Rombauer, 113 Mo. 435, 20 S. W. 1075.

84. Acker *v.* San Francisco Super. Ct., 68 Cal. 245, 9 Pac. 109, 10 Pac. 416.

But when there is an adequate remedy by certiorari, mandamus will not issue, as in a case where an appeal is erroneously dismissed from supposed want of jurisdiction. Levy *v.* Yolo County Super. Ct., 66 Cal. 292, 5 Pac. 353.

85. People *v.* Judges Rensselaer County C. Pl., 2 How. Pr. (N. Y.) 189.

86. Gibson *v.* Lenawee Cir. Judge, 97 Mich. 620, 57 N. W. 189.

87. *Ex p.* Walker, 54 Ala. 577. And see *Ex p.* Farquhar, 99 Ala. 375, 11 So. 913.

88. Savannah, etc., R. Co. *v.* Postal Tel. Cable Co., 113 Ga. 916, 39 S. E. 399, holding that the supreme court cannot by mandamus compel the judge of the superior court to grant a protective order in the nature of a supersedeas, where he refuses an injunction, and declines to grant such order.

89. *Alabama.*— *Ex p.* Elyton Land Co., 104 Ala. 88, 15 So. 939; *Ex p.* Planters', etc., Mut. Ins. Co., 50 Ala. 390.

California.— Green *v.* Hebbard, 95 Cal. 39, 30 Pac. 202, holding that the merits of the act appealed from cannot be considered.

Louisiana.— See State *v.* Judge Louisiana Second Judicial Dist., 21 La. Ann. 64.

Nebraska.— State *v.* Fawcett, 60 Nebr. 393, 83 N. W. 176; State *v.* Holmes, 60 Nebr. 39, 82 N. W. 109, 59 Nebr. 503, 81 N. W. 512; McBride *v.* Whitaker, 5 Nebr. (Unoff.) 399, 98 N. W. 847.

South Dakota.— See *In re* Taber, 13 S. D. 62, 82 N. W. 398.

Washington.— State *v.* King County Super. Ct., 28 Wash. 590, 68 Pac. 1051; State *v.* Sachs, 3 Wash. 96, 27 Pac. 1075.

Wisconsin.— Northwestern Mut. L. Ins. Co. *v.* Park Hotel Co., 37 Wis. 125.

See 33 Cent. Dig. tit. "Mandamus," § 116.

90. State *v.* Scott, 60 Nebr. 98, 82 N. W. 320; State *v.* Fawcett, 58 Nebr. 371, 78 N. W. 636; State *v.* Chehalis County Super. Ct., (Wash. 1906) 86 Pac. 632. And see Meyer *v.* Carolan, 9 Tex. 250.

91. *Ex p.* Hughes, 114 U. S. 147, 5 S. Ct. 823, 29 L. ed. 134.

92. Sheahan *v.* Wayne Cir. Judge, 42 Mich. 69, 3 N. W. 259, holding that where the court ordered that money paid into court belonging to infants be paid over to the general guardians, or their solicitors, without a showing in regard to security therefor, and without provision for the guardian *ad litem* or his solicitor, mandamus would be granted to require an order for its return. But see *In re* Crookshank, 9 U. C. Q. B. 677, where a mandamus to compel an order on the clerk of court to restore money wrongfully paid to execution creditors was refused.

93. Mobile Mut. Ins. Co. *v.* Cleveland, 76 Ala. 321; Bosely *v.* Woodruff County Ct.,

appeal-bond.[94] But where the act is judicial it will not be revised.[95] Mandamus will not in any event lie to control a rightful decision of an inferior court with regard to the approval of a bond or the requirement of a new one.[96]

z. Costs. The allowance or disallowance of costs is generally discretionary, excluding mandamus;[97] but where a mandatory duty exists under a statute, mandamus will issue[98] in case there is a clear right.[99] In case there is a remedy by appeal or writ of error the allowance or disallowance of costs will not be controlled.[1] Mandamus may lie to enforce a clear statutory right to security for costs,[2] or to enforce such right indirectly, as by compelling a dismissal where proper security has not been given,[3] and an appeal is not regarded as an adequate remedy.[4] But in case the requirement is discretionary, mandamus will not lie.[5] Where an appeal will not lie from an order staying execution pending an appeal, without the requirement of security for costs, mandamus will lie.[6] Mandamus will also lie to compel an inferior court to try a statutory issue as to the payment of, or giving security for, costs[7] as well as retaxation on appeal from the taxing officer,[8] or where jurisdiction to award costs has been declined by mistake of law.[9]

28 Ark. 306; State *v.* Lafayette County Ct., 41 Mo. 221; State *v.* Kloke, (Nebr. 1907) 110 N. W. 687. And see *Ex p.* Haralson, 75 Ala. 543; U. S. Fidelity, etc., Co. *v.* Peebles, 100 Va. 585, 42 S. E. 310.

94. See *supra*, IV, B, 2, w, (III).

95. *Ex p.* Harris, 52 Ala. 87, 23 Am. Rep. 559 [*overruling Ex p.* Candee, 48 Ala. 386; State *v.* Ely, 43 Ala. 568]. See Cook *v.* Candee, 52 Ala. 109.

96. *Ex p.* Damon, 103 Ala. 477, 15 So. 862; State *v.* Bowen, 6 Ala. 511.

97. *Alabama.*— Buford *v.* Christian, (1907) 42 So. 997, holding that the action of a trial judge in refusing to certify that plaintiff was entitled to greater damages than awarded, thus entitling him to costs, could not be revised.

Massachusetts.— *In re* Morse, 18 Pick. 443 (holding that there had not been a disregard of a plain duty by the commissioners in eminent domain proceedings); Chase *v.* Blackstone Canal Co., 10 Pick. 244 (costs in eminent domain proceedings).

Michigan.— O'Brien *v.* Wayne Cir. Judge, 131 Mich. 67, 90 N. W. 680, holding that the fact that the court did not follow the usual course as to costs is no ground for granting the writ.

Missouri.— See State *v.* Oliver, 116 Mo. 188, 22 S. W. 637.

New York.— Judges Oneida C. Pl. *v.* People, 18 Wend. 79; *Ex p.* Nelson, 1 Cow. 417 (costs on *nolle prosequi*); Jansen *v.* Davison, 2 Johns. Cas. 72. But see People *v.* Judges Rensselaer County C. Pl., 1 How. Pr. 109.

Washington.— State *v.* Graves, 13 Wash. 485, 43 Pac. 376, holding that the approval of a cost bill in a criminal case was judicial.

West Virginia.— Fleshman *v.* McWhorter, 54 W. Va. 161, 46 S. E. 116; Roberts *v.* Paul, 50 W. Va. 528, 40 S. E. 470, so holding, although no writ of error would lie.

Wisconsin.— State *v.* Judge Kenosha Cir. Ct., 3 Wis. 809.

United States.— *Ex p.* Many, 14 How. 24, 14 L. ed. 311.

Canada.— *Ex p.* Griffith, 7 N. Brunsw. 93; Coolican *v.* Hunter, 7 Ont. Pr. 237.

See 33 Cent. Dig. tit. "Mandamus," § 69.

98. State *v.* Engle, 127 Ind. 457, 26 N. E. 1077, 22 Am. St. Rep. 655; Koenigshof *v.* Spaulding, 59 Mich. 245, 26 N. W. 484.

99. *Ex p.* Lawson, 11 Ark. 323 (holding that a mandamus would not issue to a clerk to issue a fee bill with a fieri facias clause in favor of an officer of the court, where the statute only authorized the clerk to issue a fee bill, although he directed the sheriff to collect it by levy on property); Colley *v.* Webster, 59 Conn. 361, 20 Atl. 334 (where mandamus was refused against the clerk of a police court on the ground that the city, and not the clerk, was liable); State *v.* Oliver, 50 Mo. App. 217.

Alteration of final decree.— Where a chancellor after having exercised his discretion as to the imposition of costs attempts to modify the decree at a subsequent term, mandamus will lie to vacate the modification. *Ex p.* Robinson, 72 Ala. 389.

1. Peralta *v.* Adams, 2 Cal. 594; Haney *v.* Muskegon County Cir. Judge, 101 Mich. 392, 59 N. W. 662; *Ex p.* Nelson, 1 Cow. (N. Y.) 417; People *v.* Judges Ulster County C. Pl., Col. Cas. (N. Y.) 118; State *v.* Judge Kenosha Cir. Ct., 3 Wis. 809.

2. *Ex p.* Louisville, etc., R. Co., 124 Ala. 547, 27 So. 239.

3. Anniston First Nat. Bank *v.* Cheney, 120 Ala. 117, 23 So. 733; *Ex p.* Morgan, 30 Ala. 51 (holding that mandamus would lie where security was erroneously held sufficient); *Ex p.* Robbins, 29 Ala. 71; *Ex p.* Cole, 28 Ala. 50.

4. Anniston First Nat. Bank *v.* Cheney, 120 Ala. 117, 23 So. 733.

5. Anniston First Nat. Bank *v.* Cheney, 120 Ala. 117, 23 So. 733. And see *In re* Judge Elgin County Ct., 13 U. C. C. P. 73.

6. *Ex p.* Tower Mfg. Co., 103 Ala. 415, 15 So. 836.

7. Cox *v.* Hightower, 19 Tex. Civ. App. 536, 47 S. W. 1048.

8. Schmidt *v.* Wayne Cir. Judge, 136 Mich. 658, 99 N. W. 877.

9. People *v.* Judges Dutchess C. Pl., 1 How. Pr. (N. Y.) 111.

3. MATTERS RELATING TO CRIMINAL PROCEDURE — a. In General.[10] Mandamus lies in criminal as well as civil proceedings,[11] where there is a clear legal right to be enforced,[12] as well as a clear duty,[13] and where there is no other remedy;[14] but the issue of the writ is discretionary.[15] And the writ will not issue to control judicial discretion,[16] or to compel the rendition of a particular judgment.[17] The writ will be refused where the court has no power to execute it,[18] or where it will be useless.[19] Subject to these considerations mandamus may issue where an inferior court is proceeding out of its jurisdiction,[20] or to compel the court to

10. Change of venue see *supra*, IV, B, 2, e. Costs see *supra*, IV, B, 2, z.

11. See *supra*, I, C.

12. *Michigan.*— Clute *v.* Ionia Cir. Judge, 139 Mich. 337, 102 N. W. 843, where a writ to set aside an order quashing an information was denied where the information was quashed after the jury on the trial had disagreed, and it did not appear that a different result would be reached on another trial.

New York.— People *v.* Grady, 66 Hun 465, 21 N. Y. Suppl. 381, holding that mandamus will issue to compel a police justice to allow private counsel to appear for relator in the prosecution of a complaint.

Pennsylvania.— Brown *v.* McCroskey, 10 Pa. Dist. 583.

Utah.— State *v.* Hart, 19 Utah 438, 57 Pac. 415, where mandamus issued to compel the court to call a jury of twelve.

Canada.— Reg. *v.* Hicks, 7 Can. L. T. Occ. Notes 143, 19 Nova Scotia 89; Reg. *v.* Duvaney, 12 N. Brunsw. 581.

See 33 Cent. Dig. tit. "Mandamus," § 122.

13. Youngberg *v.* Smart, 70 Kan. 299, 78 Pac. 422 (where mandamus to compel a stay of execution was denied where the record on appeal had not been properly filed); Evans *v.* Thomas, 32 Kan. 469, 4 Pac. 833 (where a writ sought by a justice of the peace to compel a sheriff to return a prisoner for trial before him was refused where there was a later prosecution in another justice's court); Sadler *v.* Sheahan, 92 Mich. 630, 52 N. W. 1030; People *v.* Fuller, 68 N. Y. Suppl. 742 (where, in an application for mandamus to compel a person, as clerk of a magistrate, to exhibit a criminal complaint to defendant's attorney, it appears by the affidavit of the magistrate that respondent was not his clerk, and that he had possession of the complaint only for the purpose of placing it in a vault at the magistrate's request, the application will be denied); Reg. *v.* Ballard, 28 Ont. 489; Reg. *v.* Ray, 44 U. C. Q. B. 17 (where the court refused a mandamus to the mayor of a municipality to issue a distress warrant on a conviction made by him under the Temperance Act of 1864, where the by-law and conviction were open to grave objections, which had been taken on the trial before him); Reg. *v.* McConnell, 6 U. C. Q. B. O. S. 629.

14. *Ex p.* Clements, 50 Ala. 459 (holding that mandamus will not lie to compel the discharge of a prisoner once acquitted, the remedy being by plea); Com. *v.* Berry, 92 S. W. 936, 29 Ky. L. Rep. 234; Maynard *v.* Ingham Cir. Judge, 124 Mich. 465, 83 N. W. 102; Jones *v.* State, 43 Tex. Cr. 419, 66 S. W. 559 (holding that mandamus will not issue to compel the clerk of a lower court to enter a sentence on the record).

15. Jones *v.* State, 81 Ala. 79, 1 So. 32; Clute *v.* Ionia Cir. Judge, 139 Mich. 337, 102 N. W. 843.

Commission of lunacy.— An application to compel a court to issue a commission to inquire into the sanity of a convict, alleged to have been pronounced insane by nine physicians, since his conviction, was refused. Com. *v.* Wireback, 192 Pa. St. 150, 44 Atl. 1102.

16. *Alabama.*— Kerr *v.* Stanislaus County Super. Ct., 130 Cal. 183, 62 Pac. 479 (where mandamus to compel citation of officer for official neglect was refused); Strong *v.* Grant, 99 Cal. 100, 33 Pac. 733 (where mandamus to compel a dismissal was refused).

Kentucky.— Monroe *v.* Berry, 94 S. W. 38, 29 Ky. L. Rep. 602, where it was held that the transfer of a person accused, from one jail to another within the county and within the jurisdiction of the court, was not reviewable.

Montana.— State *v.* Silver Bow County Second Judicial Dist. Ct., 26 Mont. 275, 67 Pac. 943, holding that the discretion of the court in granting leave to file an information, without a preliminary examination, would not be refused.

New York.— People *v.* Tracy, 1 Den. 617, whether a warrant should issue for intrusion on Indian lands.

England.— Reg. *v.* Middlesex, 2 Q. B. D. 516, 46 L. J. M. C. 225, 36 L. T. Rep. N. S. 402, 25 Wkly. Rep. 610.

Canada.— Delaney *v.* Macnabb, 21 U. C. C. P. 563; Thompson *v.* Desnoyers, 16 Quebec Super. Ct. 253.

17. *Ex p.* Cage, 45 Cal. 248.

18. Cribb *v.* Parker, 119 Ga. 298, 46 S. E. 110, holding that mandamus would not issue to compel a trial judge to suspend sentence in a criminal case, where at the time the judge signs the bill of exceptions he has no jurisdiction over the sentence sought to be suspended.

19. Meacham *v.* Austin, 5 Day (Conn.) Rep. 234, holding that mandamus will lie on behalf of defendant, in a *qui tam* prosecution for theft, to compel the court to record an irregular verdict.

20. Com. *v.* Berry, 92 S. W. 936, 29 Ky. L. Rep. 234, holding that mandamus will lie to set aside an erroneous order directing a stenographer to take evidence before the grand jury.

proceed,[21] to allow an appeal,[22] to compel dismissal of a certiorari granted after the time allowed by law,[23] or to compel the court to restore to prisoners property taken from them by officers.[24]

b. Bail. The discretion of the trial court in granting or refusing an application for bail will not be controlled,[25] but an officer or judge may be compelled to hear and determine an application.[26] A reduction of bail will not be compelled where application therefor has not previously been made to the trial court.[27]

4. Particular Proceedings — a. Admiralty. In admiralty, as in other proceedings, mandamus cannot be employed as a writ of error,[28] or to control the discretion of a lower court,[29] or where the relator has a remedy by appeal.[30] The supreme court cannot compel a circuit court to take jurisdiction in a matter of such a character that a final judgment therein cannot be directly reviewed in the supreme court of the United States.[31]

21. *California.*— People *v.* Barnes, 66 Cal. 594, 6 Pac. 698.

Idaho.— Hays *v.* Stewart, 7 Ida. 193, 61 Pac. 591.

Louisiana.— State *v.* Brunot, 104 La. 237, 28 So. 996, preliminary examination.

Michigan.— Crane *v.* Saginaw Cir. Judge, 111 Mich. 496, 64 N. W. 721 (where an information was quashed on the ground that the statute upon which it was based was repealed); Grand Rapids *v.* Braudy, 105 Mich. 670, 64 N. W. 29, 55 Am. St. Rep. 472, 32 L. R. A. 116 (where court refused to proceed to trial and quashed the proceedings because it held an ordinance invalid); Luton *v.* Newaygo County Cir. Judge, 69 Mich. 610, 37 N. W. 701 (where an indictment was quashed upon the merits); People *v.* Swift, 59 Mich. 529, 26 N. W. 694 (where an indictment was quashed on the ground that the offense should have been prosecuted in another court).

Washington.— State *v.* Yakey, (1906) 85 Pac. 990, holding, however, that a judge could not be compelled to leave his own county and go to another for the sole purpose of hearing an application for a warrant.

Entry of judgment.— Mandamus to record a verdict and to proceed to final judgment will not issue when the proceedings are irregular (Meacham *v.* Austin, 5 Day (Conn.) 233), or where the verdict is an absolute nullity (Moore *v.* State, 72 Ind. 358).

Rehearing of an appeal cannot be compelled.— Wilson *v.* San Francisco Super. Ct., (Cal. 1901) 65 Pac. 1027; Reg. *v.* Grainger, 46 U. C. Q. B. 382.

Where the facts charged do not constitute an offense, mandamus will not lie to compel the trial of an information. Ware *v.* Branch Cir. Judge, 75 Mich. 488, 42 N. W. 997.

Waiver.— Where a petitioner has acquiesced in the action of a judge in quashing an information, he cannot compel the order to be vacated by mandamus. Louisell *v.* Benzie Cir. Judge, 139 Mich. 40, 102 N. W. 371.

22. *Ex p.* Morris, 11 Gratt. (Va.) 292.

Signing bill of exceptions see Criminal Law, 12 Cyc. 852.

23. Jacobs *v.* Wayne Cir. Judge, 132 Mich. 55, 92 N. W. 783.

24. *Ex p.* Hurn, 92 Ala. 102, 9 So. 515, 25 Am. St. Rep. 23, 13 L. R. A. 120.

25. *Ex p.* Campbell, 20 Ala. 89; U. S. *v.* Judges U. S. Ct. of App., 85 Fed. 177, 29 C. C. A. 78, holding that a circuit court of appeals has no jurisdiction to require by mandamus a territorial supreme court to admit to bail one convicted of crime, pending an appeal to such supreme court, after the question of his right to bail has been determined adversely to him by such supreme court on habeas corpus.

Mandamus to sheriff will not issue to compel him to bring accused before a certain circuit court commissioner for admission to bail where he has good reason to believe such commissioner disqualified and no issue is made to try the questions and there are other authorities having cognizance of the application. Elder *v.* Garner, 97 Mich. 617, 55 N. W. 460.

Supersedeas and mandamus.— Although an order from a justice of the supreme court to the court below allows a "writ of error to operate as a supersedeas" but directs the admission to bail, it is not a mere supersedeas but a command to admit to bail, and the supreme court may compel compliance with such order by mandamus, although the judge below is of opinion that said order is unauthorized by law and that the bond would be void. Hudson *v.* Parker, 156 U. S. 277, 15 S. Ct. 450, 39 L. ed. 424.

26. *Ex p.* Rhear, 77 Ala. 92; *Ex p.* Good, 19 Ark. 410.

Mandamus to order exoneration on a bail piece see Bail, 5 Cyc. 36 note 97.

27. Monroe *v.* Berry, 94 S. W. 38, 29 Ky. L. Rep. 602.

28. Morrison *v.* U. S. District Ct., 147 U. S. 14, 13 S. Ct. 246, 37 L. ed. 60. See, generally, *supra*, II, E.

29. Morrison *v.* U. S. District Ct., 147 U. S. 14, 13 S. Ct. 246, 37 L. ed. 60, holding, where a libel was dismissed as improperly filed, that the supreme court would not by mandamus direct the district court to vacate the order of dismissal, to reinstate the cause and to proceed.

30. Morrison *v.* U. S. District Ct., 147 U. S. 14, 13 S. Ct. 246, 37 L. ed. 60.

31. *In re* Glazier, 198 U. S. 171, 25 S. Ct. 653, 49 L. ed. 1000.

Jurisdiction of supreme court to issue mandamus in general see Courts, 11 Cyc. 913.

b. Arbitration and Award. Where the statute requires a controversy or question to be submitted to arbitration by a public officer or body, mandamus lies to compel such submission.[32] And the arbitrators will be compelled to proceed in the exercise of their power, to sign their award, assess costs, and file or lodge it as provided by the statute.[33]

c. Assignments For Benefit of Creditors. The administration by courts of assignments for creditors is in execution of the trusts declared in the instrument of assignment, mainly involving judicial discretion, not to be interfered with unless the discretion be abused.[34]

d. Attachment and Garnishment. Mandamus will not issue to control a judicial discretion in attachment proceedings;[35] but acts which are purely ministerial may be compelled,[36] or a clear statutory right may be enforced.[37]

32. Cleveland *v.* Jersey City Bd. of Finance, etc., 38 N. J. L. 259; Norton *v.* Counties Conservative Permanent Ben. Bldg. Soc., [1895] 1 Q. B. 246, 59 J. P. 149, 64 L. J. Q. B. 214, 71 L. T. Rep. N. S. 790, 14 Reports 59, 43 Wkly. Rep. 178; *In re* McNairn, 3 U. C. Q. B. 153.

Judgment on award.— The writ will issue to compel a court to enter judgment upon a statutory, but not upon a common-law, award. *Ex p.* Bell, 80 Ala. 372; Dudley *v.* Farris, 79 Ala. 187.

Enforcement.— The writ will not lie to enforce an award against a city where the statute under which the arbitration was made is not clear. Cleveland *v.* Jersey City Bd. of Finance, etc., 39 N. J. L. 629. See also People *v.* Haws, 37 Barb. (N. Y.) 440, 15 Abb. Pr. 115, 24 How. Pr. 148.

33. Chapman *v.* Ewing, 78 Ala. 403 (holding that mandamus lies to compel an arbitrator to restore or return an award withdrawn from the files, so that judgment can be entered thereon); Reg. *v.* Biram, 17 Q. B. 969, 16 Jur. 640, 79 E. C. L. 969 (holding that arbitrators will be compelled by mandamus to assess the costs of the proceedings).

Private matter.— Mandamus will not issue to compel arbitrators to act in a purely private matter. People *v.* Nash, 47 Hun (N. Y.) 542.

34. O'Neill *v.* Reynolds, 116 Cal. 264, 48 Pac. 57 (holding that mandamus will not issue to set aside an improper appointment of assignee); State *v.* Millard, 15 Ohio Cir. Ct. 460, 8 Ohio Cir. Dec. 672 (holding that mandamus will not lie to compel the probate court to open an order vacating an assignment for the benefit of creditors and discharging the assignee, for the purpose of allowing an additional account for expenses, the order having been made at the assignee's request, and not having been set aside or appealed from); State *v.* Johnson, 105 Wis. 164, 83 N. W. 320. See State *v.* Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33. But see *Ex p.* Green, 109 Ala. 660, 20 So. 56, holding that where a bill is filed by an assignee to have the court take jurisdiction of the settlement of his trust under the general assignment, and to cause property in the hands of a constable, under attachments issued subsequent to the assignment, to be restored to the assignee, mandamus will lie to compel the vacation of so much of the order issued in such proceeding as requires the constable, who was not a party thereto, to surrender the property in his possession to the assignee.

35. *Ex p.* Putnam, 20 Ala. 592 (holding that mandamus would not lie to vacate an amendment allowed to an original attachment); People *v.* Judges Calhoun Cir. Ct., 1 Dougl. (Mich.) 417 (holding that a sale of the attached property would not be ordered to be set aside).

A motion to quash or dismiss is usually regarded as directed to the discretion of the court and will not be controlled by mandamus (*Ex p.* McKissack, 107 Ala. 493, 18 So. 140; *Ex p.* Bottoms, 46 Ala. 312; *Ex p.* Putnam, 20 Ala. 592; S. K. Martin Lumber Co. *v.* Menominee Cir. Judge, 116 Mich. 354, 74 N. W. 649; Nederlander *v.* Wayne Cir. Judge, 55 Mich. 411, 21 N. W. 912; Carr *v.* Coopwood, 24 Miss. 256. See also Wright County *v.* Frazer, 109 Mich. 139, 66 N. W. 954; Lansing Lumber Co. *v.* Ingham Cir. Judge, 108 Mich. 305, 66 N. W. 41; Flint, etc., R. Co. *v.* Donovan, 108 Mich. 80, 65 N. W. 583. But *compare* Gee *v.* Alabama L. Ins., etc., Co., 13 Ala. 579. And see *contra*, Boraim *v.* Da Costa, 4 Ala. 393), although it has been held that an interlocutory order quashing an attachment may be vacated (People *v.* Judge Seventh Cir. Ct., 41 Mich. 326, 2 N. W. 26).

36. See, generally, *supra*, IV, A, 3.

Compliance with conditions precedent.— Mandamus will not issue to compel a clerk to issue an attachment until statutory conditions, such as a prior order of a justice of the peace, and prepayment of fees, have been complied with. Kozminsky *v.* Williams, 126 Cal. 26, 58 Pac. 310.

37. *Ex p.* Nicrosi, 103 Ala. 104, 15 So. 507.

Restoration of property.— Where property has been taken by a claimant under a redelivery bond, in an action of replevin, the sheriff will, in case he seizes the property under a second attachment against the same defendant before the right to possession is determined, be compelled to return possession to the claimant. Coos Bay R., etc., Co. *v.* Wieder, 26 Oreg. 453, 38 Pac. 338. But mandamus cannot be made to answer the office of the plea to a pending suit, nor of an action at law to recover specific property,

Mandamus will not lie, however, in case there is another adequate remedy.[38] It has been held that the duty of a levying officer to set off exemptions is ministerial and that it may be enforced by mandamus,[39] although, on the other hand, it has been held that the allowance of exemptions is an act requiring the exercise of judicial discretion;[40] and in any event mandamus will not issue where it would be nugatory.[41] Where upon an invalid claim of exemption the proceeds of attached goods have been awarded to the attachment defendant, it has been held that the order may be vacated by mandamus.[42] Under the same rules as apply to attachment discretionary orders in garnishment will not be reviewed,[43] nor will the writ issue when there is another remedy.[44]

e. Contempt of Court. As a general rule the question of whether a contempt of court shall be punished, and how it shall be punished, is one resting within the discretion of the court, which will not be controlled by mandamus,[45] although in some cases it has been intimated that in case of a clear right, and in the absence of any other remedy, mandamus will lie.[46] Mandamus will, however, lie to compel the court to take jurisdiction and proceed in contempt proceedings,[47] unless no interest will be subserved by its so doing.[48] In case there is another adequate

nor for the abuse of process, and the writ will not lie to compel the return of goods seized under attachment, on the ground that the statute authorizing the attachment is unconstitutional, or if for other reasons the goods are lawfully withheld. Murphy *v.* State, 59 Ala. 639.

38. *Ex p.* McKissack, 107 Ala. 493, 18 So. 140; Murphy *v.* State, 59 Ala. 639; *Ex p.* Bottoms, 46 Ala. 312; People *v.* Judges Branch Cir. Ct., 1 Dougl. (Mich.) 319.

Existence of other remedy as bar to mandamus in general see *supra*, II, D.

39. State *v.* Wilson, 31 Nebr. 462, 48 N. W. 147; Hamilton *v.* Fleming, 26 Nebr. 240, 41 N. W. 1002 [*overruling* State *v.* Krumpos, 13 Nebr. 321, 14 N. W. 409; State *v.* Sanford, 12 Nebr. 425, 11 N. W. 868]; State *v.* Cunningham, 6 Nebr. 90.

40. Blair *v.* McCann, 64 S. W. 984, 23 Ky. L. Rep. 1226; Oliver *v.* Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784.

41. State *v.* Bowden, 18 Fla. 17, holding that mandamus would not lie to compel sheriff to set off attached property as exempt after he had sold it.

42. *Ex p.* Barnes, 84 Ala. 540, 4 So. 769.

43. State *v.* Rightor, 49 La. Ann. 696, 22 So. 245 (holding that an order requiring the garnishee to appear and answer in open court would not be compelled); Burt *v.* Wayne Cir. Judge, 82 Mich. 251, 26 N. W. 380 (holding that where a defendant was garnished in a suit against plaintiff, an order requiring plaintiff to give a bond for the protection of defendant as garnishee will not be set aside by mandamus). And see Jackson *v.* Harrison County Justices, 1 Va. Cas. 314, holding that the superior court will not grant a mandamus to compel a county court to issue a pluries attachment against the body of a garnishee, who has been taken on the alias, and discharged by a judge of the general court under a habeas corpus.

44. *Ex p.* Hurn, 92 Ala. 102, 9 So. 515, 25 Am. St. Rep. 23, 13 L. R. A. 120; *Ex p.* South, etc., R. Co., 44 Ala. 654; Recor *v.* St. Clair Cir. Judge, 139 Mich. 156, 102 N. W. 643; People *v.* Cass Cir. Judge, 39 Mich. 407; U. S. *v.* Swan, 65 Fed. 647, 13 C. C. A. 77.

45. *Alabama.*—*Ex p.* Branch, 105 Ala. 231, 16 So. 926.

California.— Spencer *v.* Lawler, 79 Cal. 215, 21 Pac. 742; Heilbron *v.* Tulare County Super. Ct., 72 Cal. 96, 13 Pac. 160.

Louisiana.— Xavier Realty *v.* Louisiana R., etc., Co., 114 La. 967, 38 So. 695; *Ex p.* Powers, 4 La. Ann. 105.

Missouri.— State *v.* Horner, 16 Mo. App. 191.

South Dakota.—Farnham *v.* Colman, (1905) 103 N. W. 161.

United States.— Minnesota Moline Plow Co. *v.* Dowagiac Mfg. Co., 126 Fed. 746, 61 C. C. A. 352.

In **Montana** a writ of supervisory control may issue to determine the question of whether there is evidence to support a judgment for contempt. State *v.* Second Judicial Dist. Ct., 27 Mont. 128, 69 Pac. 988.

46. *Alabama.*— Hogan *v.* Alston, 9 Ala. 627.

District of Columbia.— Lamon *v.* McKee, 7 Mackey 446.

Massachusetts.—Kimball *v.* Morris, 2 Metc. 573, holding that, in an application for mandamus to compel the probate judge to arrest a debtor for disobedience of an order of court, the facts upon which the writ is sought must be shown to be true.

Michigan.— Montgomery *v.* Palmer, 100 Mich. 436, 59 N. W. 148; Schwartz *v.* Barry, 90 Mich. 267, 51 N. W. 279.

New York.— *Ex p.* Chamberlain, 4 Cow. 49.

47. Crocker *v.* Conrey, 140 Cal. 213, 73 Pac. 1006; Temple *v.* Los Angeles County Super. Ct., 70 Cal. 211, 11 Pac. 699; Ortman *v.* Dixon, 9 Cal. 23; Merced Min. Co. *v.* Fremont, 7 Cal. 130; State *v.* Judge First Judicial Dist., 50 La. Ann. 552, 23 So. 478; State *v.* Loud, 24 Mont. 428, 62 Pac. 497.

48. Old Dominion Tel. Co. *v.* Powers, 140 Ala. 220, 37 So. 195.

remedy by appeal, certiorari, or otherwise, mandamus will not issue with reference to contempt proceedings.[49]

f. Distress For Rates. In England mandamus lies to compel the issue of distress warrants to collect poor rates.[50]

g. Divorce. The general rules governing mandamus apply in actions for divorce,[51] including orders with reference to alimony.[52]

h. Ejectment. Mandamus, it has been held, will lie to correct an erroneous ruling that an action of ejectment is not triable as a summary action.[53]

i. Eminent Domain. Where in condemnation proceedings the court has a discretion as to whether it will proceed or not, mandamus will not be awarded to compel it to act.[54] The court will not upon mandamus review the merits of an interlocutory decree before a final decree has been entered.[55] As in other cases mandamus will not issue where there is an adequate remedy by appeal,[56] or where it will avail nothing.[57] In case the duty is ministerial, mandamus will lie to compel the appointment of commissioners or appraisers,[58] but the rule is otherwise

49. *Ex p.* Branch, 105 Ala. 231, 16 So. 926; *Ex p.* Stickney, 40 Ala. 160; Love *v.* St. Clair Cir. Judge, 97 Mich. 625, 57 N. W. 190; Kruegel *v.* Nash, 31 Tex. Civ. App. 15, 70 S. W. 983; State *v.* Jefferson County Super. Ct., 20 Wash. 502, 55 Pac. 933.

Interlocutory questions of pleading and practice will not be reviewed. Poupard *v.* Frazer, 129 Mich. 662, 89 N. W. 577. See, generally, *supra*, IV, B, 2, a.

50. Reg. *v.* Barclay, 8 Q. B. D. 306, 46 J. P. 167, 51 L. J. M. C. 27, 46 L. T. Rep. N. S. 102, 30 Wkly. Rep. 472; Reg. *v.* Collins, 17 Q. B. 816, 16 Jur. 422, 21 L. J. M. C. 73, 79 E. C. L. 816; Reg. *v.* Marriot, 12 A. & E. 779, 4 P. & D. 440, 40 E. C. L. 386; Rex *v.* Dyer, 2 A. & E. 606, 29 E. C. L. 283; Reg. *v.* Ellis, 2 Dowl. P. C. N. S. 361, 7 Jur. 108, 12 L. J. M. C. 20 (holding that mandamus may be directed to a justice who is interested in the property taxed, if he has acted as a justice in refusing the warrant); Reg. *v.* Marsham, 48 J. P. 308, 50 L. T. Rep. N. S. 142, 32 Wkly. Rep. 157; Reg. *v.* Middlesex, 7 Jur. 259, 12 L. J. M. C. 36.

One writ may direct two distress warrants against the same person. Reg. *v.* Handsley, 7 Q. B. D. 398.

Appeal.— Mandamus lies to a special court created to hear rating cases to compel it to dispose of an appeal. Reg. *v.* Walsall Tp., 3 Q. B. D. 457, 38 L. T. Rep. N. S. 665, 26 Wkly. Rep. 705.

51. *Ex p.* King, 27 Ala. 387 (holding that mandamus would issue to compel the chancellor to make an order awarding support and counsel fees to the wife, pending suit); Claudius *v.* Melvin, 146 Cal. 257, 79 Pac. 897 (holding that entry of final decree would be compelled); Ayres *v.* Gartner, 90 Mich. 380, 51 N. W. 461 (holding that where a complaint is not properly verified mandamus may issue to stay proceedings); State *v.* Spokane County Super. Ct., (Wash. 1906) 87 Pac. 1120 (holding that a writ to proceed on service by publication was proper, but would not be issued where no request or refusal was made to enter judgment).

If there is another remedy the writ will be refused.— *Ex p.* King, 27 Ala. 387; Ambos *v.* Ingham Cir. Judge, 123 Mich. 618, 82 N. W. 267, holding a remedy by appeal from a decree dismissing the bill sufficient.

52. *Ex p.* King, 27 Ala. 387 (holding that award of temporary alimony would be compelled); Compton *v.* Airial, 9 La. Ann. 496 (holding that the clerk of court in issuing a fieri facias for arrears of alimony acts as a ministerial officer, and would not be compelled by mandamus to issue it).

53. State *v.* Judge of Seventh Judicial Ct., 38 La. Ann. 499.

54. Wright *v.* Baker, 94 Ky. 343, 22 S. W. 335, 15 Ky. L. Rep. 109 (holding that a determination that land is not subject to condemnation is discretionary); Shine *v.* Kentucky Cent. R. Co., 85 Ky. 177, 3 S. W. 18, 8 Ky. L. Rep. 748 (holding that the court will not be compelled to proceed with a railroad condemnation where another court has appointed a receiver for the road); State *v.* Curler, 26 Nev. 347, 67 Pac. 1075 (holding that the determination of a judge as to the necessity of appointment of appraisers of property acquired by a county was a judicial act, and where he had refused to make such appointment mandamus would not issue to compel him to do so).

In Mississippi a justice of the peace acts ministerially only in presiding in an eminent domain proceeding, and his actions thereon may be controlled by mandamus. Sullivan *v.* Yazoo, etc., R. Co., 85 Miss. 649, 38 So. 33.

55. Chesebro *v.* Kent Cir. Judge, 70 Mich. 650, 38 N. W. 658. See, generally, *supra*, IV, B, 2, a.

56. State *v.* Neville, 110 Mo. 345, 19 S. W. 491 (where appointment of commissioners had been refused); State *v.* Field, 107 Mo. 445, 17 S. W. 896.

57. People *v.* Ruby, 59 Ill. App. 653, holding that where supervisors, in proceedings to lay out a highway, have lost jurisdiction, or their action would be quashed on certiorari, mandamus will not lie to compel a justice to proceed to have damages assessed.

58. *California.*— Lake Merced Water Co. *v.* Cowles, 31 Cal. 214; *In re* Spring Valley Waterworks, 17 Cal. 132.

where the act is judicial.[59] And likewise mandamus will issue to compel a report from the appraisers,[60] although an appraiser will not be compelled to sign a particular report,[61] to compel the trial court to hear evidence on exceptions to the report,[62] or to compel the allowance of an appeal.[63] But pending an appeal a deposit or payment of the sum awarded will not be compelled,[64] nor will a writ of assistance issue.[65] A conditional payment of the award into court is no defense to mandamus to compel its payment.[66]

j. Forcible Entry and Unlawful Detainer. The execution of a judgment of restitution may be compelled by mandamus.[67] Mandamus will not issue, however, to compel a judgment for treble damages where there is an adequate remedy by appeal,[68] nor to compel a justice to entertain an application for summary proceedings when his duties do not permit it;[69] nor will a writ issue to aid an injustice.[70]

k. Habeas Corpus. The issuance of a writ of habeas corpus being discretionary will not be controlled by mandamus,[71] nor for the same reason will mandamus lie to vacate an order of discharge on habeas corpus;[72] but after the issuance of a writ of habeas corpus the court will be compelled to proceed.[73] The writ

Delaware.— *In re* Front, etc., St. R. Co., 1 Pennew. 370, 41 Atl. 200.

Illinois.— Chicago, etc., R. Co. *v.* Wilson, 17 Ill. 123; Illinois Cent. R. Co. *v.* Rucker, 14 Ill. 353.

Wisconsin.—Western Union R. Co. *v.* Dickson, 30 Wis. 389.

England.— Wycombe R. Co. *v.* Donnington Hospital, L. R. 1 Ch. 268, 12 Jur. N. S. 347, 14 L. T. Rep. N. S. 179, 14 Wkly. Rep. 359; Fotherby *v.* Metropolitan R. Co., L. R. 2 C. P. 188, 12 Jur. N. S. 1005, 36 L. J. C. P. 88, 15 L. T. Rep. N. S. 243, 15 Wkly. Rep. 112; Rex *v.* Hungerford Market Co., 4 B. & Ad. 327, 1 N. & M. 112, 24 E. C. L. 148.

59. Wright *v.* Baker, 94 Ky. 343, 22 S. W. 335, 19 Ky. L. Rep. 109; Bell *v.* Pike County Ct., 61 Mo. App. 173.

Clear right must be shown.— Mandamus will not issue to compel the court to appoint commissioners, where it does not appear from the record that the land is subject to condemnation. Detroit, etc., R. Co. *v.* Judge Wayne County Cir., 95 Mich. 318, 54 N. W. 946. A clear legal right to a jury trial may be enforced. Carpenter *v.* Bristol County Com'rs, 21 Pick. (Mass.) 258.

60. *In re* Williamsburgh Trustees, 1 Barb. (N. Y.) 34.

61. People *v.* Morrison, 54 N. Y. App. Div. 262, 66 N. Y. Suppl. 519 [*affirmed* in 165 N. Y. 644, 59 N. E. 1128].

62. State *v.* Dearing, 173 Mo. 492, 73 S. W. 485.

63. State *v.* Sommerville, 104 La. 74, 28 So. 977.

64. State *v.* Waite, 70 Ohio St. 149, 71 N. E. 286.

65. State *v.* Burnell, 104 Wis. 246, 80 N. W. 460.

66. State *v.* Fairley, (Wash. 1906) 87 Pac. 1052.

67. Fremont *v.* Crippen, 10 Cal. 211, 70 Am. Dec. 711 (holding that neither for neglect of duty nor a criminal prosecution is mandamus an adequate remedy); Kirk *v.* Cole, 3 MacArthur (D. C.) 71 (holding that a justice may be compelled to issue a writ of restitution where the undertaking on appeal is not filed in time); State *v.* Fields, 62 Nebr. 520, 87 N. W. 318 (holding that mandamus will lie, although there is pending an attempted appeal which is void); State *v.* Black, 34 S. C. 194, 13 S. E. 361 (holding that a sheriff will be compelled to execute a warrant of dispossession, although certiorari proceedings are pending before the judge of another circuit, when such certiorari proceedings are void for lack of jurisdiction).

Where statutory proceedings to retain possession have been taken by a tenant, mandamus will not lie to compel the execution of a writ of dispossession. Kaiser *v.* Berrie, 85 Ga. 856, 11 S. E. 602.

Where error will lie to an order overruling a motion for a judgment of restitution, mandamus will not be granted. *Ex p.* Williamson, 8 Ark. 424.

68. Early *v.* Mannix, 15 Cal. 149.

69. People *v.* McAdam, 28 Hun (N. Y.) 284, 64 How. Pr. 238.

70. Stuart *v.* Corlette, 129 Mich. 611, 89 N. W. 342, holding that mandamus would not lie to compel a court commissioner to make return to an appeal from a judgment of not guilty in a forcible entry and detainer case, which he was withholding for payment of defendant's costs taxed two days after the appeal was taken. See, generally, *supra*, II, A, 3, d.

71. *Ex p.* Jones, 94 Ala. 33, 10 So. 429; *Ex p.* Chaney, 8 Ala. 424; Giboney *v.* Rogers, 32 Ark. 462; People *v.* Russell, 46 Barb. (N. Y.) 27.

72. Atty.-Gen. *v.* Jackson County Cir. Judge, 90 Mich. 272, 51 N. W. 280. But *compare* Fruitport Tp. *v.* Muskegon County Cir. Judge, 90 Mich. 20, 51 N. W. 109.

73. *Ex p.* Charleston, 107 Ala. 688, 18 So. 224; *Ex p.* Dunklin, 72 Ala. 241; *Ex p.* Shaudies, 66 Ala. 134; *Ex p.* Champion, 52 Ala. 311; *Ex p.* Mahone, 30 Ala. 49, 68 Am. Dec. 111; Wade *v.* Judge, 5 Ala. 130; *Ex p.* Good, 19 Ark. 410; *Ex p.* Allis, 12 Ark. 101; Wright *v.* Johnson, 5 Ark. 687.

may be enforced by the court issuing it and mandamus will not lie from a higher court.[74]

l. **Injunction.** The granting or refusing, modifying or vacating, of an injunction is usually regarded as being of such a discretionary nature that mandamus will not lie to control or interfere with the action of the court,[75] unless the discretion has been abused,[76] although in some jurisdictions the writ of mandamus has been used with quite a degree of freedom in order to prevent apparent injustice or irreparable injury from orders granting or dissolving injunctions.[77]

74. People *v.* Edwards, 66 Ill. 59.

75. *Alabama.*— *Ex p.* Montgomery, 24 Ala. 98.

Arkansas.— *Ex p.* Batesville, etc., R. Co., 39 Ark. 82; McMillen *v.* Smith, 26 Ark. 613; *Ex p.* Martin, 13 Ark. 198, 58 Am. Dec. 321. But *compare Ex p.* Pile, 9 Ark. 336; *Ex p.* Conway, 4 Ark. 302 [*criticized* in State *v.* Wilson, 49 Mo. 146].

California.— People *v.* Sexton, 37 Cal. 532.

Colorado.—People *v.* Butler, 24 Colo. 401, 51 Pac. 510, holding that the ruling of a court in denying a temporary injunction will not be reviewed where it is based on a conclusion of law which is jurisdictional, which arises in the case, goes to the merits of the application, and is correctly decided.

Louisiana.— Hauson *v.* St. Mary Parish Police Jury, 116 La. 1080, 41 So. 321; Lewis *v.* D'Albor, 116 La. 679, 41 So. 31; State *v.* Sommerville, 104 La. 639, 29 So. 280; Guion *v.* St. Paul, 104 La. 110, 28 So. 836; State *v.* Guion, 50 La. Ann. 492, 23 So. 614; Citizens' Bank *v.* Webre, 44 La. Ann. 1081, 11 So. 706; State *v.* Judge Civ. Dist. Ct., 41 La. Ann. 951, 6 So. 721; State *v.* Rightor, 40 La. Ann. 852, 5 So. 416; State *v.* Judge, 39 La. Ann. 99, 1 So. 300, 303; State *v.* Judge Civ. Dist. Ct., 37 La. Ann. 842; State *v.* Lazarus, 36 La. Ann. 578; State *v.* Judge Sixth Dist. Ct., 32 La. Ann. 549; State *v.* St. Bernard Parish Judge, 31 La. Ann. 794; State *v.* Judge Orleans Parish Sixth Dist. Ct., 28 La. Ann. 905, 26 Am. Rep. 115; State *v.* Judge Eighth Dist. Ct., 23 La. Ann. 766; State *v.* Judge Sixth Judicial Dist., 9 La. Ann. 350.

Michigan.—River Rouge *v.* Hosmer, (1907) 110 N. W. 622; Chatfield *v.* Lenawee Cir. Judge, 140 Mich. 636, 104 N. W. 45; Emery *v.* Ionia Cir. Judge, 138 Mich. 542, 101 N. W. 801; Fletcher *v.* Alpena Cir. Judge, 136 Mich. 511, 99 N. W. 748; Stenglein *v.* Saginaw Cir. Judge, 128 Mich. 440, 87 N. W. 449; Kelsey *v.* Wayne Cir. Judge, 120 Mich. 457, 79 N. W. 694; Doud *v.* Mackinac Cir. Judge, 118 Mich. 86, 76 N. W. 155; Chiera *v.* Wayne Cir. Judge, 97 Mich. 638, 57 N. W. 193.

Missouri.— State *v.* Engelmann, 86 Mo. 551; State *v.* Byers, 67 Mo. 706; State *v.* Wilson, 49 Mo. 146.

Montana.— State *v.* Second Judicial Dist. Ct., 25 Mont. 202, 64 Pac. 352; State *v.* Second Judicial Dist. Ct., 23 Mont. 564, 59 Pac. 917.

Nebraska.— State *v.* Jessen, 66 Nebr. 515, 92 N. W. 584.

Pennsylvania.—Whiteman *v.* Fayette Fuel-Gas Co., 139 Pa. St. 492, 20 Atl. 1062.

Texas.— Aycock *v.* Clark, 94 Tex. 375, 60 S. W. 665; State *v.* Morris, 86 Tex. 226, 24 S. W. 393.

United States.— *Ex p.* Schwab, 98 U. S. 240, 25 L. ed. 105.

See 33 Cent. Dig. tit. "Mandamus," § 81.

76. *Ex p.* Campbell, 130 Ala. 196, 30 So. 521; *Ex p.* Pile, 9 Ark. 336 (holding that a mandamus may be awarded to compel the circuit court to grant an injunction, where that court has refused to grant the same upon a sufficient bill, verified by affidavit); Dodge *v.* Van Buren Cir. Judge, 118 Mich. 189, 76 N. W. 315 (holding that mandamus will lie to compel a judge to grant an injunction where he, in refusing it, did not exercise his discretion, but said that, if the opinions of the supreme court, which he considered erroneous, were to be followed, the injunction should be granted); Detroit *v.* Cir. Judge Wayne County, 79 Mich. 384, 44 N. W. 622 (holding that when the granting of an injunction is an abuse of judicial discretion that cannot be justified on legal principles, and the case is urgent, a mandamus will be awarded to dissolve the injunction, although the order which granted it is reviewable on appeal); State *v.* Graves, 66 Nebr. 17, 92 N. W. 144 (holding that a judge of the district court may by mandamus be compelled to vacate an injunction granted by him without jurisdiction or authority).

Where the case may be heard upon merits.— An abuse of discretion in granting and maintaining a preliminary injunction will not be reviewed on mandamus where, without injury to the rights of defendant, the case can be heard upon its merits. Central Bitulithic Paving Co. *v.* Manistee Cir. Judge, 132 Mich. 126, 92 N. W. 938.

77. See State *v.* Judge Div. B Civ. Dist. Ct., 52 La. Ann. 1275, 27 So. 697, 51 L. R. A. 71 (holding that mandamus will lie to compel the court to dissolve an injunction upon bond, where it is apparent that no injury will result to plaintiff in injunction and that irreparable injury may result to defendant, and also that a remedy by appeal will be unavailing and the relator is otherwise without remedy); State *v.* Monroe, 50 La. Ann. 266, 23 So. 839 (holding that where, by an order of court, an injunction has been permitted to be bonded by defendant, and plaintiff has been refused a suspensive appeal from such order, plaintiff may test the correctness of the court's ruling on the character and results of the act enjoined by application to the supreme court for a man-

Mandamus will not issue to interfere with an injunction when it would be useless or unnecessary,[78] nor in any event while there is another adequate remedy,[79] nor

damus to compel the judge to grant the appeal asked for); State *v.* Judge Civ. Dist. Ct., 37 La. Ann. 400 (holding that mandamus will not lie to compel the granting of an injunction where it might conflict with an injunction already granted by another court in the same matter and between the same parties); Mactavish *v.* Kent Cir. Judge, 122 Mich. 242, 80 N. W. 1086 (holding that instances are rare where appellate courts will compel lower courts to issue injunctions, and they will seldom compel a dissolution unless injunction has been issued or dissolution refused in contravention of law); Barnum Wire, etc., Works *v.* Speed, 59 Mich. 272, 26 N. W. 802, 805 (holding that a court cannot interfere by injunction to restrain proceedings commenced and pending in another court of coördinate jurisdiction; and, where a court does assume so to act, a writ of mandamus will be granted by the supreme court to compel such court to vacate and set aside its orders and decrees in the matter); Van Norman *v.* Jackson Cir. Judge, 45 Mich. 204, 7 N. W. 796 (holding that mandamus would lie to dissolve an injunction where the bill upon which it was founded was devoid of substance and insufficient).

Where the question in dispute is one of law merely, it has been held that mandamus will lie. Central Bitulithic Paving Co. *v.* Manistee Cir. Judge, 132 Mich. 126, 92 N. W. 938; Bogert *v.* Jackson Cir. Judge, 118 Mich. 457, 76 N. W. 983; Ionia, etc., Farmers' Mut. F. Ins. Co. *v.* Ionia Cir. Judge, 100 Mich. 606, 59 N. W. 250, 32 L. R. A. 481 (refusal to dissolve a preliminary injunction).

In case of a clear right it has been held that mandamus may issue to compel the trial judge to grant an injunction. State *v.* King, 49 La. Ann. 881, 21 So. 585 (holding that mandamus would be granted to compel an injunction against the enforcement of foreclosure proceedings based upon an unconstitutional statute); State *v.* Judge Eleventh Dist. Ct., 40 La. Ann. 206, 3 So. 561; State *v.* Young, 38 La. Ann. 923 (holding that mandamus will lie to compel the granting of an injunction against the collection of a tax until the constitutionality of the statute upon which the tax is based may be determined); State *v.* Lazarus, 36 La. Ann. 578.

Where no right of appeal is given from orders granting or dissolving injunctions, mandamus lies to control the action of the court. *Ex p.* Fechheimer, 103 Ala. 154, 15 So. 647 (holding that mandamus lies to vacate an order improperly dissolving an injunction); *Ex p.* Sayre, 95 Ala. 288, 11 So. 378.

78. People *v.* Butler, 24 Colo. 401, 51 Pac. 510 (holding that a writ will not lie to compel the trial court to proceed with the hearing on a motion for a temporary injunction, where certain facts, already manifest to him, which the complainant refuses to rebut by evidence, are sufficient to have warranted a denial of the motion if a full hearing was had); State *v.* St. Paul, 104 La. 280, 29 So. 112 (holding that mandamus will not lie to compel a court of the first instance to grant a special order of injunction without bond after the sale sought to be enjoined has been made and the deed recorded, as mandamus cannot issue to compel an officer to do an act after the matter has become an accomplished fact); State *v.* Land, 52 La. Ann. 309, 27 So. 434; Mills *v.* Wayne Cir. Judge, 77 Mich. 210, 47 N. W. 128 (holding that mandamus will not issue to a judge to compel the dissolution of a preliminary injunction which, whether right or wrong, has spent its principal force; but defendant in the injunction proceeding will be left to his appeal from the action of the judge on the final hearing, when the entire merits will come before the supreme court).

79. State *v.* Allen, 51 La. Ann. 1889, 26 So. 610 (holding that mandamus will not lie to compel the granting of an injunction to restrain the release of a seizure under sequestration proceedings, on the ground that the appeal-bond for costs was sufficient as a suspensive appeal, since the remedy was a direct proceeding to have the order of appeal modified); Mactavish *v.* Kent Cir. Judge, 122 Mich. 242, 80 N. W. 1086 (holding that mandamus to compel the dissolution of an injunction upon the ground that the court had no jurisdiction of the bill because it failed to allege that complainant had not an adequate remedy at law would not lie, since the objection should have been taken by demurrer to the bill); Detroit etc., R. Co. *v.* Newton, 61 Mich. 33, 27 N. W. 876 (holding that mandamus would not issue to compel dissolution of an injunction to prevent a railroad company from interfering with a crossing, since the company had its legal remedy in case the complainants had no right to the injunction and judicial proceedings will be interfered with only when prompt action is necessary to prevent mischief); State *v.* Fillmore County, 32 Nebr. 870, 49 N. W. 769 (holding that where relator had obtained a decree enjoining a county and county board from discharging surface water upon his land, peremptory mandamus would not issue to enforce the duty imposed upon the county and county board where it did not appear that the duty could not be enforced by the district court in due course of law).

The remedy must be adequate.— Where there is danger that the administration of justice may suffer by delay, mandamus may issue to compel the district judge to grant an injunction *in limine*, although the party had other but slower means of relief. State *v.* Lazarus, 36 La. Ann. 578.

In case there is a remedy by appeal mandamus will not lie. Fremont *v.* Merced Min. Co., 9 Cal. 18 (modification of an original

where application for relief has not first been made to the court to which the writ is sought,[80] or to compel the granting of an injunction where the application for the injunction does not show a *prima facie* right.[81]

m. Insolvency and Bankruptcy. Matters of judgment and discretion in insolvency and bankruptcy proceedings will not be controlled by mandamus.[82]

n. Prohibition. Mandamus has been issued to set aside writs of prohibition.[83]

o. Receivers. As a general rule the action of a court with respect to a receiver will not be controlled by mandamus,[84] although it has been held that where, after appointment of a receiver, the court improperly refuses to allow the lien-holders to enforce their liens in other courts, the granting of such leave may be compelled by mandamus.[85]

p. Reference. The appointment of referees to take evidence or to hear and determine is discretionary and will not be controlled by mandamus,[86] nor will the action of the court in setting aside a reference,[87] or on the report be reviewed.[88] A referee may be compelled to proceed.[89] But a stipulation of the parties that the referee's report shall be signed by the judge does not render the duty to sign such report an official one which may be coerced by mandamus.[90]

injunction without notice to plaintiff); Rohmeiser *v.* Bannon, 22 S. W. 27, 15 Ky. L. Rep. 114 (holding that mandamus will not be granted to control the manner in which a court will enforce a judgment enjoining the construction of a public alley); State *v.* Judge Dist. Ct., 38 La. Ann. 49 (dissolution of an injunction on bond); State *v.* Judge Twenty-First Judicial Dist., 36 La. Ann. 394 (holding that a judge will not be compelled to bond an injunction after he has refused to dissolve it).

80. State *v.* Holmes, 5 Nebr. (Unoff.) 66, 97 N. W. 243, where application had not been made to the judge of the court to vacate an injunction granted at chambers.

81. Beasley *v.* Robson, 117 La. 584, 42 So. 147; Caire *v.* Judge Twenty-Third Dist. Ct., 43 La. Ann. 1133, 10 So. 178.

82. State *v.* Ellis, 40 La. Ann. 818, 5 So. 530 (holding that a district judge would not be compelled to annul the appointment of a provisional syndic); *In re* Blanchard, 15 N. J. L. 478 (holding that the refusal of a court of common pleas to discharge an insolvent debtor because of the omission of a word in the advertisement was a final judgment and not revisable by mandamus); Respublica *v.* Clarkson, 1 Yeates (Pa.) 46 (holding that it is discretionary with commissioners in bankruptcy whether they will make a certificate of conformity to the bankrupt act, as authorized by the act).

Mandamus to compel allowance of appeal in bankruptcy proceedings see BANKRUPTCY, 5 Cyc. 261 note 18.

83. *Ex p.* Boothe, 64 Ala. 312; *Ex p.* Keeling, 50 Ala. 474; Armistead *v.* Confederate States, 38 Ala. 458.

84. *Alabama.*— *Ex p.* Tillman, 93 Ala. 101, 9 So. 527, holding that a receiver's possession will not be displaced.

California.— People *v.* McLane, 62 Cal. 616, holding that a receiver will not be compelled to operate a railroad.

Michigan.— Moran *v.* Wayne Cir. Judge, 125 Mich. 6, 83 N. W. 1004; William Wright Co. *v.* Wayne Cir. Judge, 109 Mich. 139, 66 N. W. 954; Thomas *v.* Wayne Cir. Judge, 97 Mich. 608, 57 N. W. 188; Scott *v.* Wayne Cir. Judges, 58 Mich. 311, 25 N. W. 200.

Pennsylvania.— *In re* Chester County Judges, 193 Pa. St. 251, 45 Atl. 1069, holding that judges will not be compelled to distribute a fund in the hands of a receiver, on the ground that it should be distributed by them as chancellors instead of distribution being referred.

Texas.— Matlock *v.* Smith, 96 Tex. 211, 71 S. W. 956.

United States.— *In re* Rice, 155 U. S. 396, 15 S. Ct. 149, 39 L. ed. 198; Edinburg Coal Co. *v.* Humphreys, 134 Fed. 839, 67 C. C. A. 435.

See 33 Cent. Dig. tit. "Mandamus," § 83.

85. Petaluma Sav. Bank *v.* San Francisco Super. Ct., 111 Cal. 488, 44 Pac. 177, so holding where a court appointed a receiver of the husband's property in a divorce proceeding, and afterward refused the holder of liens on the husband's lands lying in other counties leave to enforce them in other courts. But *compare* Bridgeport Electric, etc., Co. *v.* Bridgeport Land, etc., Co., 104 Ala. 276, 16 So. 93, holding that mandamus lies to compel the vacation of orders allowing creditors to proceed against the debtor after the appointment of a receiver which interfered with the custody of the court.

86. People *v.* Williams, 55 Ill. 178; Anti-Kalsomine Co. *v.* Perkins, 123 Mich. 658, 82 N. W. 520; Ferris *v.* Munn, 22 N. J. L. 161; Com. *v.* Archbald, 195 Pa. St. 317, 46 Atl. 5; *In re* Chester County Judges, 193 Pa. St. 251, 45 Atl. 1069.

87. People *v.* Judge Osceola Cir. Ct., 30 Mich. 99.

88. *In re* Farwell, 2 N. H. 123; People *v.* Oneida C. Pl., 21 Wend. (N. Y.) 20; People *v.* New York Super. Ct., 19 Wend. (N. Y.) 68; People *v.* New York Super. Ct., 18 Wend. (N. Y.) 575; *Ex p.* Bassett, 2 Cow. (N. Y.) 458; Richards *v.* Wheeler, 2 Aik. (Vt.) 369.

89. Cumberland *v.* North Yarmouth, 4 Me. 459; People *v.* Randall, 37 Mich. 473.

90. State *v.* McArthur, 23 Wis. 427.

q. Replevin. The existence of a remedy by appeal will prevent mandamus to compel the vacation of an order quashing replevin.[91] It has been held that mandamus will lie to compel a levying officer to receive a claim and bond for the trial of the right of property.[92] After dismissal of a replevin suit it has been held that mandamus will lie to compel an assessment of damages.[93]

V. MANDAMUS AGAINST STATE OR GOVERNMENT OR EXECUTIVE OR LEGISLATIVE OFFICERS.

A. In General. In the absence of statute mandamus does not issue to the state or government itself.[94] And the rule that the state or government cannot be sued without its consent prevents the issue of mandamus against an executive officer, the effect of which would be to enforce a contract against the state or government without its consent,[95] or to compel him to perform acts unauthorized or forbidden by law.[96] As a general rule, however, the writ may be issued against an executive officer of the state or government to compel him to perform

91. Dages *v.* Beach, 122 Mich. 490, 81 N. W. 355; *Ex p.* Baltimore, etc., R. Co., 108 U. S. 566, 2 S. Ct. 876, 27 L. ed. 812.

92. Cordaman *v.* Malone, 63 Ala. 556.

93. Johnson *v.* Dick, 69 Mich. 108, 36 N. W. 738; Frederick *v.* Mecosta County Cir. Judge, 52 Mich. 529, 18 N. W. 343; People *v.* Osborn, 38 Mich. 313; People *v.* Judge Washtenaw Cir. Ct., 23 Mich. 497; People *v.* Tripp, 15 Mich. 518; People *v.* Judges Jackson Cir. Ct., 1 Dougl. (Mich.) 302.

94. People *v.* Best, 187 N. Y. 1, 79 N. E. 890 [*reversing* 112 N. Y. App. Div. 912, 98 N. Y. Suppl. 1112]; Reg. *v.* Secretary of State, [1891] 2 Q. B. 326, 56 J. P. 105, 60 L. J. Q. B. 457, 64 L. T. Rep. N. S. 764, 40 Wkly. Rep. 5; McQueen *v.* Reg., 16 Can. Sup. Ct. 1.

95. *Illinois.*— People *v.* Dulaney, 96 Ill. 503, holding that the constitutional provision that the state "shall never be made a defendant in any court of law or equity" prohibits the enforcement of the performance of a contract made by the penitentiary commissioners for convict labor by mandamus, as its effect would be to give an action against the state.

Iowa.— Wilson *v.* Louisiana Purchase Exposition Commission, (1907) 110 N. W. 1045; Mills Pub. Co. *v.* Larrabee, 78 Iowa 97, 42 N. W. 593.

Louisiana.—State *v.* Jumel, 38 La. Ann. 337.

New York.— People *v.* State Canal Bd., 13 Barb. 432, 441, where it was said: "If no action can be commenced and maintained against the state to compel the performance of a contract without a previous statute authorizing such action, it would seem to follow that no action can be maintained against an officer of the state to compel him to make or complete a contract on behalf of the state."

Tennessee.— State *v.* Sneed, 9 Baxt. 472.

Texas.— Thomson *v.* Baker, 90 Tex. 163, 38 S. W. 21; Marshall *v.* Clark, 22 Tex. 23; Hosner *v.* De Young, 1 Tex. 764.

Virginia.—Board of Public Works *v.* Gannt, 76 Va. 455.

West Virginia.— Miller *v.* State Bd. of Agriculture, 46 W. Va. 192, 32 S. E. 1007, 76 Am. St. Rep. 811.

United States.— Fitts *v.* McGhee, 172 U. S. 516, 19 S. Ct. 269, 43 L. ed. 535; *Ex p.* Ayers, 123 U. S. 443, 8 S. Ct. 164, 31 L. ed. 216; Hagood *v.* Southern, 117 U. S. 52, 6 S. Ct. 608, 29 L. ed. 805.

96. *Alabama.*— Dawson *v.* Matthews, 105 Ala. 485, 17 So. 19; Dawson *v.* Sayre, 80 Ala. 444, 2 So. 479.

Illinois.— People *v.* Wells, 12 Ill. 102.

Minnesota.— State *v.* Reed, 27 Minn. 458, 8 N. W. 768, holding that the writ does not lie to compel the warden and prison board to lease the prison shops and grounds to the relator who was the highest bidder where relator refuses to allow a provision in the lease against subletting.

Montana.— State *v.* Rickards, 17 Mont. 440, 43 Pac. 504, holding that a board of examiners could not be compelled to transmit claims for bounties on animals when there was no fund upon which the board could direct the auditor to draw his warrant.

Texas.— League *v.* De Young, 2 Tex. 497, holding that a suit, the object of which is to test the constitutionality of certain statutes supposed to affect individual rights, and which is brought against a public officer in the form of an application for a mandamus to compel him to perform official acts which the legislature has forbidden, is in effect a suit against the state, and is an attempted evasion of the well-established principle that the sovereign authority cannot be sued in its own courts without its express assent. And see Menard *v.* Shaw, 5 Tex. 334.

West Virginia.— Powell *v.* Dawson, 45 W. Va. 780, 32 S. E. 214.

United States.— U. S. *v.* Seldon, 27 Fed. Cas. No. 16,249*a*, 2 Hayw. & H. 332, holding that the marshal of the District of Columbia could not be compelled by mandamus to pay a witness' fee where the judge of the criminal court had decided that the petitioner was not entitled thereto.

England.— Reg. *v.* Secretary of State, [1891] 2 Q. B. 326, 56 J. P. 105, 60 L. J. Q. B. 457, 64 L. T. Rep. N. S. 764, 40 Wkly. Rep. 5 (holding that mandamus will not issue against the war secretary for pay and retirement allowances of officers and soldiers, as no legal duty exists either by common law or statute); Matter of Lords Com'rs, 1 B. & S.

a purely ministerial duty imposed by law.[97] But while the writ of mandamus will lie to control the action of executive officers of the government, when, having exhausted their judicial discretion, they have denied without legal cause the just legal rights of private persons,[98] it cannot be used to serve the purpose of an appeal or writ of error, or to control the exercise of judicial discretion.[99] Nor

81, 7 Jur. N. S. 1010, 4 L. T. Rep. N. S. 242, 9 Wkly. Rep. 599, 101 E. C. L. 81.

97. *Alabama.*— Trapp *v.* State, 120 Ala. 397, 24 So. 1001.

Florida.— State *v.* Crawford, 28 Fla. 441, 473, 10 So. 118, 14 L. R. A. 253; State *v.* Barnes, 25 Fla. 298, 5 So. 722, 23 Am. St. Rep. 516; State *v.* Drew, 17 Fla. 67; State *v.* Board of State Canvassers, 17 Fla. 29; State *v.* McLin, 16 Fla. 17; State *v.* Gamble, 13 Fla. 9; Towle *v.* State, 3 Fla. 202.

Louisiana.— See Oliver *v.* Board of Liquidation, 40 La. Ann. 321, 4 So. 166.

Nebraska.— State *v.* Savage, 64 Nebr. 684, 90 N. W. 898, 91 N. W. 557.

New York.— People *v.* Canal Appraisers, 73 N. Y. 443 [*affirming* 13 Hun 64]; *Ex p.* Rogers, 7 Cow. 526; *Ex p.* Jennings, 6 Cow. 518, 16 Am. Dec. 447, appraisers refusing to appraise damages from erection of canal.

South Carolina.— State *v.* Hayne, 8 S. C. 367.

United States.— Louisiana Bd. of Liquidation *v.* McComb, 92 U. S. 531, 23 L. ed. 623.

England.— Rex *v.* Lords Com'rs, 4 A. & E. 286, 1 Harr. & W. 533, 5 L. J. K. B. 20, 5 N. & M. 589, 31 E. C. L. 139, holding that mandamus lies against the lords of the treasury into whose hands money had been paid under an act of parliament for the use of an individual.

Canada.— *Re* Massey Mfg. Co., 11 Ont. 444 [*affirmed* in 13 Ont. App. 446].

And see CONSTITUTIONAL LAW, 8 Cyc. 855.

This rule has been applied to ministerial duties of a board of equalization in assessing franchises (State Bd. of Equalization *v.* People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513, holding that the duty to assess franchises is mandatory under statute and will be ordered by the writ, and if the board has adjourned they may be ordered to reconvene and assess the property omitted); a funding board (State *v.* Funding Bd., 34 La. Ann. 197); the warden of a state prison in drawing a warrant for fuel purchased for the prison by his predecessor (Patton *v.* State, 117 Ind. 585, 19 N. E. 303), or in permitting the sheriff to enter the penitentiary and execute a writ of replevin (Hopkins *v.* State, 64 Nebr. 10, 89 N. W. 401); collector of a port in granting a clearance (Gilchrist *v.* Charleston, 10 Fed. Cas. No. 5,420, Brunn. Col. Cas. 249, 5 Hughes 1); cabinet ministers (Hackfeld *v.* King, 11 Hawaii 5; Grieve *v.* Gulick, 5 Hawaii 73; Castle *v.* Kapena, 5 Hawaii 27); a superintendent of public works in issuing a building permit to one clearly entitled thereto (Matter of Akwai, 13 Hawaii 239); canal commissioners neglecting or refusing to pay an award ordered by the legislature (Johnson *v.* Kelly, Wright (Ohio) 353), or refusing to let a contract to the lowest bidder (People *v.* Contracting Bd., 46 Barb. (N. Y.) 254); the auditor-general of canals in drawing warrants (People *v.* Schoonmaker, 13 N. Y. 238), or officers of a state hospital for the insane in receiving patients from the district in which it is stuated (People *v.* Manhattan State Hospital, 5 N. Y. App. Div. 249, 39 N. Y. Suppl. 158).

In Louisiana the rule is laid down that whenever by the constitution and laws of the state officers of the executive branch of the government are vested with discretionary functions in the performance of civil duties, or political powers and responsibilities are devolved upon them, they are not answerable to the process of mandamus, but their acts are only examinable politically. State *v.* Board of Liquidation, 42 La. Ann. 647, 7 So. 706, 8 So. 577. But it is held that mandamus will go to state officers for the performance of purely ministerial functions. State *v.* Funding Bd., 34 La. Ann. 197; State *v.* Clinton, 27 La. Ann. 429.

In Minnesota it is held that where a duty is imposed upon an executive officer of the state as such officer, and not upon him as a private person, the judicial department will not interfere to compel the performance of such duty. Secombe *v.* Kittelson, 29 Minn. 555, 12 N. W. 519; State *v.* Dike, 20 Minn. 363; Rice *v.* Austin, 19 Minn. 103, 18 Am. Rep. 330.

In Pennsylvania it has been held that the courts have no jurisdiction to issue mandamus to state officers. Com. *v.* Wickersham, 90 Pa. St. 311; Com. *v.* Wickersham, 66 Pa. St. 134. *Compare* Com. *v.* Jones, 192 Pa. St. 472, 43 Atl. 1089; Com. *v.* Stenger, 1 Dauph. Co. Rep. (Pa.) 160.

In Texas it was at one time held that mandamus did not lie to any member of the executive department, save in the exceptional case of the land commissioner. Bledsoe *v.* International R. Co., 40 Tex. 537; Houston Tap, etc., Co. *v.* Randolph, 24 Tex. 317. But under statute mandamus may issue against any officer of the state government except the governor. Turner *v.* Cotton, 93 Tex. 559, 57 S. W. 35; Thomson *v.* Baker, 90 Tex. 163, 38 S. W. 21.

98. Illinois State Bd. of Examiners *v.* People, 93 Ill. App. 436; U. S. *v.* Hitchcock, 21 App. Cas. (D. C.) 252 [*affirmed* in 190 U. S. 316, 23 S. Ct. 698, 47 L. ed. 1074]; People *v.* Preston, 62 Hun (N. Y.) 185, 16 N. Y. Suppl. 488 [*affirmed* in 131 N. Y. 644, 30 N. E. 866].

99. *District of Columbia.*— Payne *v.* U. S., 20 App. Cas. 581.

Louisiana.— State *v.* Board of Liquidation, 33 La. Ann. 124 (payment of bonds sustained by supreme court not compelled when payment not ministerial); State *v.* Board of Liquidators, 29 La. Ann. 690; State *v.* Johnson, 28 La.

can the writ be awarded to compel the performance of an act that would be useless or nugatory.[1]

B. Executive Officers of State — 1. Governor — a. In General. While it is generally agreed that the courts have no right or power to interfere by mandamus with the governor upon questions involving his judgment and discretion,[2] yet they differ widely as to the power to interfere with his ministerial action.[3] In some jurisdictions it is held that mandamus will lie to compel the governor to perform a purely ministerial duty, such as might have been imposed upon any other officer.[4] On the other hand in many jurisdictions it is held that mandamus

Ann. 932; State *v.* State Floating Debt, 23 La. Ann. 388; State *v.* Warmoth, 23 La. Ann. 76.

Michigan.— People *v.* State Prison, 4 Mich. 187.

Virginia.—Simons *v.* State Military Bd., 99 Va. 390, 39 S. E. 125, payment of court-martial pay-roll by "Military Board."

United States.— U. S. *v.* Hitchcock, 190 U. S. 316, 23 S. Ct. 698, 47 L. ed. 1074 [*affirming* 21 App. Cas. (D. C.) 252]; U. S. *v.* Lamont, 155 U. S. 303, 15 S. Ct. 97, 39 L. ed. 160; U. S. *v.* Blaine, 139 U. S. 306, 11 S. Ct. 607, 35 L. ed. 183; U. S. *v.* Windon, 137 U. S. 636, 11 S. Ct. 197, 34 L. ed. 811; U. S. *v.* Seaman, 17 How. 225, 15 L. ed. 226. See also Constitutional Law, 8 Cyc. 854.

Control of discretion by mandamus in general see *supra*, II, C, 2, a.

This rule has been applied to the discretionary duties of a state surveyor-general (Sullivan *v.* Shanklin, 63 Cal. 247. See also San Bernardino County *v.* Reichert, 87 Cal. 287, 25 Pac. 692); a board of examiners in auditing claims (Krontinger *v.* Board of Examiners, 8 Ida. 463, 69 Pac. 279; Pyke *v.* Steunenberg, 5 Ida. 614, 51 Pac. 614; Payne *v.* State Bd. of Wagon-Road Com'rs, 4 Ida. 384, 39 Pac. 548); a state board of architects on an application for a license (Illinois State Bd. of Examiners *v.* People, 93 Ill. App.436); live-stock commissioners in paying to owners the proceeds of the sale of estrays (State *v.* Board of Live Stock Com'rs, 4 Wyo. 126, 32 Pac. 114); a live-stock sanitary commission in appraising cattle destroyed because affected with disease (Shipman *v.* State Live-Stock Sanitary Commission, 115 Mich. 488, 73 N. W. 817); a capitol building board in awarding contracts for the capitol (State *v.* Kensall, 15 Nebr. 262, 18 N. W. 85); a banking superintendent (People *v.* Preston, 62 Hun (N. Y.) 185, 16 N. Y. Suppl. 488 [*affirmed* in 131 N. Y. 644, 30 N. E. 866]); a canal board in approving contracts (People *v.* State Canal Bd., 13 Barb. (N. Y.) 432); or in allowing claims for costs expended by a canal engineer in a suit prosecuted against him for negligence (Hutchinson *v.* Canal Fund, 25 Wend. (N. Y.) 692); the officers of state lunatic asylum in discharging inmates (State *v.* Burgoyne, 7 Ohio St. 153); an inspector in determining whether an oyster bed is a natural bed (Lewis *v.* Christian, 101 Va. 135, 43 S. E. 331; Rowe *v.* Drisgell, 100 Va. 137, 40 S. E. 609; Thurston *v.* Hudgins, 93 Va. 780, 20 S. E. 966); a health board in granting doctors' certificates provided their discretionary power is not abused (State *v.* Lutz, 136 Mo. 633, 38 S. W. 323; State *v.* Gregory, 83 Mo. 123, 53 Am. Rep. 565); irrigation officers in apportioning water (Farmers' Independent Ditch Co. *v.* Maxwell, 4 Colo. App. 477, 36 Pac. 556); or a state board in approving or disapproving applications for pensions (State *v.* Verner, 30 S. C. 277, 9 S. E. 113).

1. People *v.* State Canal Bd., 13 Barb. (N. Y.) 432. See, generally, *supra*, II, A, 3, c.

2. *Alabama.*— State *v.* Jelks, 138 Ala. 115, 35 So. 60, application for a writ to compel governor to restore relator to command in the national guard.

California.— Berryman *v.* Perkins, 55 Cal. 483, approval of appraisal under act for water-supply.

Iowa.—See State *v.* Kirkwood, 14 Iowa 162.

Kansas.— Householder *v.* Morrill, 55 Kan. 317, 40 Pac. 664; Martin *v.* Ingham, 38 Kan. 641, 17 Pac. 162, holding that the duties imposed on the governor relating to the organization of new counties are partially ministerial and partially not, and mandamus will not lie.

Maryland.— Miles *v.* Bradford, 22 Md. 170, 85 Am. Dec. 643.

Nebraska.— State *v.* Boyd, 36 Nebr. 60, 53 N. W. 1116, holding that the governor is vested with a discretion in the use of the contingent fund appropriated by the legislature, and he will not be required by mandamus to approve a warrant drawn against it on account of books and stationery needed by the state and ordered by him.

Pennsylvania.— Mitchcson *v.* Harlan, 7 Am. L. Reg. 468, holding as the duty of the governor in the matter of granting letters patent to a corporation under the General Railroad Law of 1849, on the certificate of the commissioners named in the special act of incorporation that the provisions of the general law have been complied with, is of a discretionary, and not of a ministerial, nature, mandamus will not issue to control his action.

See 33 Cent. Dig. tit. "Mandamus," § 129.

3. See People *v.* Morton, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231.

4. *Alabama.*— Tennessee, etc., R. Co. *v.* Moore, 36 Ala. 371. *Compare* State *v.* Jelks, 138 Ala. 115, 35 So. 60.

California.— Elliott *v.* Pardee, (1906) 86 Pac. 1087; Harpending *v.* Haight, 39 Cal. 189, 2 Am. Rep. 432; Stuart *v.* Haight, 39 Cal. 87 (issuance of land certificate on register's warrant); Middleton *v.* Low, 30 Cal. 596; People *v.* Brooks, 16 Cal. 11.

will never issue against the governor to compel his performance of a duty imposed by his office,[5] it being considered to be against public policy and political necessity in view of the independence of the executive and judicial departments, and to be immaterial that other persons might lawfully have performed the same duty

Colorado.— Greenwood Cemetery Land Co. *v.* Routt, 17 Colo. 156, 28 Pac. 1125, 31 Am. St. Rep. 284, 15 L. R. A. 369.

Kansas.— Martin *v.* Ingham, 38 Kan. 641, 17 Pac. 162.

Kentucky.— Traynor *v.* Beckham, 116 Ky. 13, 74 S. W. 1105, 76 S. W. 844, 25 Ky. L. Rep. 283, 981.

Maryland.—Magruder *v.* Swann, 25 Md. 173.

Montana.— State *v.* Smith, 23 Mont. 44, 57 Pac. 449 (holding that Const. art. 4, § 1, prohibiting any one department of the state government from exercising any of the powers belonging to the other, does not prevent the courts from controlling by mandamus the exercise by the state executive of a purely ministerial duty); Territory *v.* Potts, 3 Mont. 364; Chumasero *v.* Potts, 2 Mont. 242.

Nebraska.— State *v.* Savage, 64 Nebr. 684, 90 N. W. 898, 91 N. W. 557; State *v.* Thayer, 31 Nebr. 82, 47 N. W. 704.

Nevada.— State *v.* Blasdel, 4 Nev. 241.

North Carolina.— Cotten *v.* Ellis, 52 N. C. 545.

Ohio.— State *v.* Nash, 66 Ohio St. 612, 64 N. E. 558; State *v.* Moffitt, 5 Ohio 358.

Wyoming.— State *v.* Brooks, 14 Wyo. 393, 84 Pac. 488, 6 L. R. A. N. S. 750.

See 33 Cent. Dig. tit. "Mandamus," § 129.

This rule has been applied with respect to the issuance of a commission to one elected or appointed to public office (Traynor *v.* Beckham, 116 Ky. 13, 74 S. W. 1105, 76 S. W. 844, 25 Ky. L. Rep. 283, 981, police judge; Groome *v.* Gwinn, 43 Md. 572, attorney-general; Magruder *v.* Swann, 25 Md. 173, circuit judge certified to have received a majority of votes); but not to the issuance of a commission after one has been issued to another for the same office (Brown *v.* Bragunier, 79 Md. 234, 29 Atl. 7, holding that there was an adequate remedy at law by contest). So the writ has been awarded to compel the signing of a patent to public lands (Middleton *v.* Low, 30 Cal. 596; Greenwood Cemetery Land Co. *v.* Routt, 17 Colo. 156, 28 Pac. 1125, 31 Am. St. Rep. 284, 15 L. R. A. 369; State *v.* Blasdel, 4 Nev. 241); the appointment of commissioners to hold an election to organize a municipality (Elliott *v.* Pardee, (Cal. 1906) 86 Pac. 1087); the filling of a vacancy in the office of lieutenant-governor (State *v.* Nash, 66 Ohio St. 612, 64 N. E. 558); the issuance of a proclamation, on the application for the charter of a banking company (State *v.* Chase, 5 Ohio St. 528); or the issuance of a warrant for a public loan in aid of a railroad (Tennessee, etc., R. Co. *v.* Moore 36 Ala. 371).

The right must be clear and the duty imperative. State *v.* Humphrey, 47 Kan. 561, 28 Pac. 722 (writ held not to lie to compel governor to execute contract for compensation of state agent in absence of specific appropriation); *In re* Cunningham, 14 Kan. 416 (holding that where no "receipt of the state treasurer for full payment" for land sold under the act of 1866 has been presented to the governor, nor even issued, a writ of mandamus will not be issued against the governor to compel him to issue a patent to land sold under the act); Wilson *v.* Bradley, 105 Ky. 52, 48 S. W. 166, 1088, 20 Ky. L. Rep. 1118 (holding that the fact that the claim for mileage of the agent of the state for the extradition of a fugitive embraces an illegal charge is sufficient reason for refusing a writ of mandamus to compel the governor to approve the claim, even if mandamus would otherwise lie).

5. *Arizona.*— Territorial Insane Asylum *v.* Wolfley, (1889) 22 Pac. 383, holding that mandamus will not lie to the governor of a territory to compel him to sign a warrant on the treasurer for funds for a territorial asylum at the instance of the directors of the asylum.

Arkansas.— Hawkins *v.* Governor, 1 Ark. 570, 33 Am. Dec. 346.

Florida.— State *v.* Drew, 17 Fla. 67, holding that the writ will not issue to compel the governor to sign a certificate of election, although a mere ministerial duty.

Georgia.— See State *v.* Towns, 8 Ga. 360 [*distinguishing* Bonner *v.* State, 7 Ga. 473], holding that where the relator applying for a mandamus *nisi* against the governor to issue to him a commission as clerk of the county court of ordinary had failed to establish his title to the office by the judgment of a court of competent jurisdiction, the court had no jurisdiction to award the mandamus.

Illinois.— People *v.* Cullom, 100 Ill. 472 (holding that the supreme court cannot compel the governor to call an election); People *v.* Yates, 40 Ill. 126; People *v.* Hatch, 33 Ill. 9; People *v.* Bissell, 19 Ill. 229, 68 Am. Dec. 591.

Indiana.— Hovey *v.* State, 127 Ind. 588, 27 N. E. 175, 22 Am. St. Rep. 663, 11 L. R. A. 763 [*distinguishing* Gray *v.* State, 72 Ind. 567; Baker *v.* Kirk, 33 Ind. 517; Governor *v.* Nelson, 6 Ind. 496], holding that the governor of a state will not be compelled by mandamus to issue a commission to a duly elected auditor of a county, where it appears that prior to the election an affidavit was filed with the governor, stating that theretofore the person so elected had been treasurer of said county, and had failed to account for money that came into his hands.

Louisiana.— See State *v.* Bd. of Liquidation, 42 La. Ann. 647, 7 So. 760; State *v.* Warmoth, 24 La. Ann. 351, 13 Am. Rep. 126; State *v.* Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712; Borgstede *v.* Clarke, 5 La. Ann. 291.

Maine.— *In re* Dennett, 32 Me. 508, 54 Am. Dec. 602.

Michigan.— People *v.* State, 29 Mich. 320, 18 Am. Rep. 89, holding that the courts have

if performance had been by law intrusted to them.[6] And this rule is held to extend to action by the governor as an *ex-officio* member of a board of public officers.[7] Moreover, it has been held that the courts will not assume jurisdiction in such case, although the governor voluntarily submits himself thereto.[8]

b. Compelling Exercise of Powers of Governor by Substitute. On the principle that when an executive officer refuses to act in a case at all mandamus will lie to compel him to do so, it is held that the writ will lie to determine whether there is a vacancy in the office of governor during which it is the duty of the president of the senate to exercise the powers of governor.[9]

2. Secretary of State. The secretary of state is very generally held not to be entitled to the immunity conceded by some of the cases to the governor,[10] and

no jurisdiction to compel the governor to comply with the acts of congress requiring him to certify that a certain ship canal had been constructed according to the acts of congress, when he is satisfied that such is the fact.

Minnesota.— State *v.* Dike, 20 Minn. 363; Rice *v.* Austin, 19 Minn. 103, 18 Am. Rep. 330 (holding that the writ will not lie to compel the governor to deed certain swamp lands to commissioners as provided by statute); Chamberlain *v.* Sibley, 4 Minn. 309 (holding that mandamus does not lie to compel the governor to deliver state railroad bonds to the assignee of the railroad company). See also Western R. Co. *v.* De Graff, 27 Minn. 1, 6 N. W. 341.

Mississippi.— State *v.* Dinkins, 77 Miss. 874, 27 So. 832; Vicksburg, etc., R. Co. *v.* Lowry, 61 Miss. 102, 48 Am. Rep. 76.

Missouri.— Robb *v.* Stone, 120 Mo. 428, 25 S. W. 376, 41 Am. St. Rep. 705, 23 L. R. A. 194. See also State *v.* Fletcher, 39 Mo. 388. *Compare* Pacific R. Co. *v.* Governor, 23 Mo. 353, 66 Am. Dec. 673.

New Jersey.— Gledhill *v.* State, 25 N. J. L. 331.

New York.— People *v.* Morton, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231 [*reversing* 24 N. Y. App. Div. 563, 49 N. Y. Suppl. 760].

Rhode Island.— Mauran *v.* Smith, 8 R. I. 192, 5 Am. Rep. 564.

South Dakota.— See Woods *v.* Sheldon, 9 S. D. 392, 69 N. W. 602.

Tennessee.— State *v.* Frazier, 114 Tenn. 516, 86 S. W. 319; Jonesboro, etc., Turnpike Co. *v.* Brown, 8 Baxt. 490, 35 Am. Rep. 713, holding that the governor of the state cannot be compelled by mandamus to issue certain state bonds which the legislature has directed to be issued. See also Bates *v.* Taylor, 87 Tenn. 319, 11 S. W. 266, 3 L. R. A. 316.

Wisconsin.— State *v.* Rusk, 55 Wis. 465, 13 N. W. 452; State *v.* Harvey, 11 Wis. 33; State *v.* Farwell, 3 Pinn. 393, 4 Chandl. 100.

United States.— Kentucky *v.* Dennison, 24 How. 66, 16 L. ed. 717, holding that mandamus does not lie from a federal court to the governor of a state to compel him to deliver a fugitive from justice demanded by the governor of another state, although the act of congress provides that "it shall be the duty" of the executive to do so.

See 33 Cent. Dig. tit. "Mandamus," § 129.

6. *In re* Dennett, 32 Me. 508, 54 Am. Dec. 602; People *v.* State, 29 Mich. 320, 18 Am. Rep. 89; Rice *v.* Austin, 19 Minn. 103, 18 Am. Rep. 330; People *v.* Morton, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231 [*reversing* 24 N. Y. App. Div. 563, 49 N. Y. Suppl. 760].

7. People *v.* Morton, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231; State *v.* Frazier, 114 Tenn. 516, 86 S. W. 319, holding that where a statute creates a board of inspectors of election consisting of the governor, secretary of state, and attorney-general, and makes no provision that a majority of the board may act, no action can be taken without the participation of the entire board; and the inability of the courts to coerce the governor by mandamus to act in connection with the boards precludes the issuance of a mandamus to compel the other members of the board to act. But see Gray *v.* State, 72 Ind. 567.

In Louisiana the rule is laid down that whenever by the constitution and laws of the state, officers of the executive branch of the government are vested with discretionary functions in the performance of civil duties, or political powers and responsibilities are devolved upon them, they are not answerable to judicial process but their acts are only examinable politically, and that when such duties and powers devolve upon the executive branch or department of the state government as a whole the members of the board thus constituted are likewise exempt from their judicial control, and this notwithstanding that some of the officers respectively are subject to judicial control and can be coerced by mandamus to act and to perform their ordinary official duties. State *v.* Board of Liquidation, 42 La. Ann. 647, 7 So. 706, 8 So. 577, where the governor, lieutenant-governor, auditor, treasurer, secretary of the state, and the speaker of the house of representatives composed the board of liquidation.

8. State *v.* Stone, 120 Mo. 428, 25 S. W. 376, 41 Am. St. Rep. 705, 23 L. R. A. 194 [*disapproving* Pacific R. Co. *v.* State, 23 Mo. 353, 66 Am. Dec. 673]. *Compare* State *v.* Marks, 6 Lea (Tenn.) 12, holding that where a board composed of the governor and secretary make no objection, the writ may go as upon an agreed case.

9. Atty.-Gen. *v.* Taggart, 66 N. H. 362, 29 Atl. 1027, 25 L. R. A. 613.

10. See State *v.* Marks, 6 Lea (Tenn.) 12.

may be coerced to perform purely ministerial acts.[11] This rule has been applied to such duties as filing papers,[12] proceedings to audit claims,[13] publishing notices of elections,[14] entering or filing,[15] or certifying nominations and questions upon which to vote,[16] canvassing votes and issuing election certificates,[17] or compiling and promulgating the election returns and tally lists forwarded to him by returning officers, as prescribed by law,[18] affixing the great seal to the commission issued by the governor to United States senators,[19] signing the commission of a person appointed as sheriff,[20] sealing and attesting a pardon,[21] making publication of a proposed constitutional amendment,[22] publishing the official journal of the legislature,[23] giving out public printing in pursuance of a contract of award,[24] furnishing copies of laws to one having the state contract to print them,[25] issuing warrants for goods received, under state contracts,[26] delivering judicial reports to the supreme court library,[27] or filing certificates or articles of incorporation.[28] But the writ will not be awarded unless the right of the relator is clear and undeni-

11. State *v.* State Secretary, 33 Mo. 293 (holding that the writ will lie to compel the secretary of state to verify the correctness of an account where his duties are purely ministerial); State *v.* Rotwitt, 15 Mont. 29, 37 Pac. 845; State *v.* Babcock, 19 Nebr. 230, 27 N. W. 98; State *v.* Jenkins, 20 Wash. 78, 54 Pac. 765.

12. Com. *v.* Atlantic, etc., R. Co., 53 Pa. St. 9.

13. Croasman *v.* Kincaid, 31 Oreg. 495, 49 Pac. 764; Irvin-Hodson Co. *v.* Kincaid, 31 Oreg. 478, 49 Pac. 765; Shattuck *v.* Kincaid, 31 Oreg. 379, 49 Pac. 758; State *v.* Warner, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255.

14. State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

15. Williams *v.* Lewis, 6 Ida. 184, 54 Pac. 619; Rose *v.* Bennett, 25 R. I. 405, 56 Atl. 185.

Where a controversy existed as to the expiration of the term of office of a district judge, and the secretary of state, under the advice of the attorney-general that it did not expire until January, 1905, made no proclamation for the election of a judge to fill his office at the election held in November, 1902, and no candidates were nominated by the various political parties for that office, it was held that, under such circumstances, mandamus would not be granted to compel the secretary of state to accept the certificate of an independent nominee for that office at such election. State *v.* Chatterton, 11 Wyo. 1, 70 Pac. 466.

16. People *v.* McGaffey, 23 Colo. 156, 46 Pac. 930; People *v.* District Ct., 18 Colo. 26, 31 Pac. 339; Williams *v.* Lewis, 6 Ida. 184, 54 Pac. 619; State *v.* Falley, 9 N. D. 450, 84 N. W. 860 (holding that under statute the secretary has no judicial power to inquire into the legality of nominations and mandamus lies to compel him to certify to the county officers the names of all persons whose nominations have been filed with him); State *v.* Falley, 8 N. D. 90, 76 N. W. 996; State *v.* Dahl, 6 N. D. 81, 68 N. W. 418, 34 L. R. A. 97. *Compare* People *v.* Rose, 211 Ill. 252, 71 N. E. 1124, holding that the writ will not issue to compel the secretary of state to certify relator's name as the nominee of a certain convention where the petition fails to show the convention was a legal one.

17. Pacheco *v.* Beck, 52 Cal. 3; State *v.* Lawrence, 3 Kan. 95; State *v.* Hayne, 8 S. C. 367.

18. State *v.* Strong, 32 La. Ann. 579.

19. State *v.* Crawford, 28 Fla. 441, 10 So. 118, 14 L. R. A. 253.

20. State *v.* Wrotnowski, 17 La. Ann. 156.

21. State *v.* Jenkins, 20 Wash. 78, 54 Pac. 765.

22. Com. *v.* Griest, 196 Pa. St. 396, 46 Atl. 505, 50 L. R. A. 568.

23. State *v.* Secretary of State, 43 La. Ann. 590, 9 So. 776.

24. People *v.* Palmer, 14 Misc. (N. Y.) 41, 35 N. Y. Suppl. 222.

25. State *v.* Barker, 4 Kan. 379, 96 Am. Dec. 175.

26. People *v.* Secretary of State, 58 Ill. 90, holding that the issuance of the warrants may be compelled whether there is money on hand or not.

27. *Ex p.* Barber, 12 Ark. 155.

28. People *v.* Rice, 138 N. Y. 151, 33 N. E. 846; State *v.* Taylor, 55 Ohio St. 61, 44 N. E. 513.

Filing amended certificate see People *v.* Rice, 138 N. Y. 151, 33 N. E. 846.

Filing certificate of increase of corporate capital.— State *v.* Rotwitt, 17 Mont. 537, 43 Pac. 922.

A discretionary power in the issuance of certificates will not be controlled. State *v.* McGrath, 92 Mo. 355, 5 S. W. 29, holding that the secretary of state must exercise his discretion in determining whether a company asking of him a certificate of incorporation has adopted a name that is the same as, or an imitation of, that of an existing corporation.

Registry of alteration of rules of building society.— Mandamus lies to compel the proper officer, registrar of building societies, to file or register alterations of rules made by a building society. Reg. *v.* Brabrook, 58 J. P. 117, 69 L. T. Rep. N. S. 718, 10 Reports 1.

Filing of charter, etc., or issue of license to foreign corporation see FOREIGN CORPORATIONS, 19 Cyc. 1287.

Filing the certificate of a foreign insurance company fully complying with the law may be compelled by mandamus. State *v.* Rotwitt, 18 Mont. 92, 44 Pac. 407.

able,[29] or where the effect of its issuance would be to control the exercise of judgment and discretion,[30] or to compel the performance of an act not authorized by law, or not falling within defendant's official power and duty.[31] Nor will it be granted, where if issued it would prove useless or unavailing,[32] or where the relator

Issuing a certificate to private bankers complying with the law may be compelled by the writ. State *v.* Cook, 174 Mo. 100, 74 S. W. 489.

Revocation of the license of a foreign insurance company forfeited by a violation of its conditions may be compelled by mandamus. State *v.* Doyle, 40 Wis. 175, 22 Am. Rep. 692.

29. People *v.* Hatch, 33 Ill. 9.

30. State *v.* McGrath, 92 Mo. 355, 5 S. W. 29.

31. *Colorado.*— Miller *v.* Edwards, 8 Colo. 528, 9 Pac. 632.

Louisiana.— State *v.* Deslonde, 27 La. Ann. 71, holding that the courts cannot compel the secretary of state to promulgate a law alleged to have been passed by the legislature, the remedy being with the legislative or the executive department.

Michigan.— Crane *v.* Secretary of State, 51 Mich. 195, 16 N. W. 376, holding that the secretary of state will not be compelled to issue a land patent, he not being authorized, but accustomed to do so.

Missouri.— See State *v.* Brown, 141 Mo. 21, 41 S. W. 911.

New York.— People *v.* Rice, 129 N. Y. 391, 29 N. E. 355, holding that, although a resolution of the board of county canvassers, transmitted by it to the secretary of state, with a protest against an election, and affidavits and other papers in relation thereto, cannot be properly considered by the state board of canvassers in canvassing the returns as sent up by the county board, mandamus will not lie to compel the secretary of state to cancel the same or return it, and to abstain from permitting it to go before the state board.

Texas.— Miller *v.* Tod, 95 Tex. 404, 67 S. W. 483; English, etc., Mortg., etc., Co. *v.* Hardy, 93 Tex. 289, 55 S. W. 169, holding that the writ will not be issued to compel the secretary of state to file corporate articles or issue corporation certificates, unless the necessary conditions are complied with.

Washington.— State *v.* Nichols, 38 Wash. 309, 80 Pac. 462; State *v.* Jenkins, 21 Wash. 364, 58 Pac. 217 (holding that a writ of mandate will not issue to compel the secretary of state to fill out and present to the governor, for his signature, a commission to a person entitled to be commissioned a notary public, as there is no provision, either in the constitution or statute, making this the duty of the secretary); State *v.* Young, 18 Wash. 21, 50 Pac. 786.

West Virginia.— Powell *v.* Dawson, 45 W. Va. 780, 32 S. E. 214, issuance of charter to corporation in violation of constitution.

Wisconsin.— State *v.* Harvey, 11 Wis. 33, holding that the secretary of state has no authority to issue patents for school lands, and therefore mandamus does not lie to compel him to do it.

Certifying bill.— The secretary of state will not be compelled by mandamus to certify a bill, or an enrolled act, to be a law, which is not among the archives of his office and legally placed there as a law. People *v.* Hatch, 33 Ill. 9.

Furnishing copy of void constitutional provision.— Mandamus will not lie to compel the secretary of state to furnish a certified copy of an amendment to the state constitution, as such, where the supreme court has adjudged that such amendment was not legally adopted, although Code (1873), § 3706, provides that every public officer having the custody of a public record shall give any person, on demand, a certified copy thereof, on payment of the fees. Harvey *v.* McFarland, 89 Iowa 703, 57 N. W. 410.

Alteration of legislative records.—The writ will not issue to expunge matters from legislative records for the reason that this would be an interference with legislative powers. State *v.* Wilson, 123 Ala. 259, 26 So. 482, 45 L. R. A. 772. Mandamus will not lie to compel the production and correction in accordance with allegations of the petition, of documents filed with the secretary of a territory, purporting to be a record of the proceedings of a session of the territorial legislature, in a case not involving private rights. Clough *v.* Curtis, 134 U. S. 361, 10 S. Ct. 573, 33 L. ed. 945 [*affirming* 2 Ida. (Hasb.) 523, 22 Pac. 8].

32. People *v.* Hatch, 33 Ill. 9; Harvey *v.* McFarland, 89 Iowa 703, 57 N. W. 410.

License of corporation under name used by another.— The writ will not issue to compel the secretary to license a corporation under a name the use of which by the corporation may be enjoined by an existing concern. People *v.* Rose, 219 Ill. 46, 76 N. E. 42.

Change of corporate name.— Where the secretary of state has refused to receive and file a certificate of a vote of the stockholders of a corporation, changing its name, for the reason that the proposed name has been previously assumed by another corporation, mandamus will not lie to compel him to file such certificate. Illinois Watch Case Co. *v.* Pearson, 140 Ill. 423, 31 N. E. 400, 16 L. R. A. 429.

Recount of election.— The secretary of state cannot be compelled to recount or recanvass an election, after the governor's certificate has been issued. Myers *v.* Chalmers, 60 Miss. 772; State *v.* Rodman, 43 Mo. 256, holding that mandamus will not issue to compel the secretary of state to count up votes, where the office in question is already filled by a person holding by color of right by virtue of a commission issued to him under the election.

may resort to another adequate legal remedy for the enforcement or protection of his right.[33]

3. STATE TREASURER. The state treasurer may be compelled to perform a ministerial duty,[34] as for instance to pay state warrants,[35] or to indorse a warrant "not paid for want of funds," in accordance with the fact;[36] to transfer money from one fund to another;[37] to redeem state bank-bills when so required by law;[38] to redeliver to a municipality railroad aid bonds deposited with him under a statute held unconstitutional;[39] or to surrender in pursuance of statute a fund deposited with him by a life insurance company.[40] But this rule extends to ministerial duties only and the writ cannot be invoked to enable a creditor of the state to exercise a supervisory control over the state treasurer in matters in which he is vested with discretion.[41] Moreover the writ will not lie in a case where the treasurer is under no unquestioned and legally defined duty,[42] or where it would

Filing articles of incorporation under abrogated statute.— Mandamus will not issue to compel the secretary of state to file corporate articles where the right has been taken away by statute. Preferred Tontine Mercantile Co. *v.* Secretary of State, 133 Mich. 395, 95 N. W. 417.

33. Arkansas Bldg., etc., Assoc. *v.* Madden, 91 Tex. 461, 44 S. W. 823.

Other adequate remedy preventing mandamus see, generally, *supra*, II, D.

34. State *v.* Burke, 33 La. Ann. 969; State *v.* Stephens, 136 Mo. 537, 37 S. W. 506; Wilson *v.* Swain, 60 N. J. L. 115, 36 Atl. 778 (holding that mandamus will lie to compel the state treasurer to pay over to a railroad company, upon completion of its road, a deposit made by it under the act, March 4, 1879, the duty of making such payment being ministerial); State *v.* Bates, 38 S. C. 326, 17 S. E. 28.

Furnishing evidence.— Mandamus lies to compel the state treasurer to deliver out, upon good security, a mortgage of land to the state, to be used as evidence on a trial between two citizens, concerning the same land, which one claims under a sale made by virtue of such mortgage in behalf of the state. De Oyley's Case, 1 Brev. (S. C.) 238.

35. Mulnix *v.* Mutual Ben. L. Ins. Co., 23 Colo. 81, 46 Pac. 127 (holding that it is proper to grant a peremptory writ to the treasurer to pay a state warrant regular and valid on its face; there being nothing before the court, by way of proof or admissions in the pleadings, to overcome the presumption that the warrant was lawfully issued for a valid indebtedness of the state); Raleigh, etc., Co. *v.* Jenkins, 68 N. C. 499; Bayne *v.* Jenkins, 66 N. C. 356; Com. *v.* Butler, 99 Pa. St. 535 (warrants for salaries of members of house of representatives); State *v.* Hastings, 15 Wis. 75; State *v.* Hastings, 10 Wis. 518. See also Hommerich *v.* Hunter, 14 La. Ann. 225. *Compare* Houston Tap, etc., R. Co. *v.* Randolph, 24 Tex. 317.

Effect of laches.— Where one, having a claim against the state entitled to be paid out of a special fund, neglected to present it or demand payment until after such fund had been lawfully exhausted, he could not compel the issuance of a warrant against such fund for his claim. Parks *v.* Hays, 11 Colo. App. 415, 53 Pac. 893.

36. State *v.* Young, 21 Wash. 391, 58 Pac. 220.

37. State *v.* Davidson, 114 Wis. 563, 88 N. W. 596, 90 N. W. 1067, 58 L. R. A. 739.

38. People *v.* Holmes, 3 Mich. 544.

39. People *v.* State Treasurer, 24 Mich. 468; People *v.* State Treasurer, 23 Mich. 499.

40. Prewitt *v.* Illinois L. Ins. Co., 93 S. W. 633, 29 Ky. L. Rep. 447, holding that the writ in such case is not an action against the state.

41. State *v.* Dubuclet, 24 La. Ann. 16; Lord *v.* Bates, 48 S. C. 93, 26 S. E. 213.

42. *California.*— Camron *v.* Weil, 57 Cal. 547 (holding that money received by the state treasurer, although collected and specially appropriated under an invalid act, should not be paid into the general fund, and therefore that mandamus should not issue to compel the state treasurer to pay into the general fund money collected under the Drainage Act); Smith *v.* Kenfield, 57 Cal. 138 (holding that the writ will not issue to compel allowance to plaintiff of a greater sum as salary than the amount fixed by the constitution).

Florida.— State *v.* Knott, 48 Fla. 188, 37 So. 307, where a writ to compel the treasurer to pay a requisition not bearing the governor's signature was denied.

Georgia.— Fletcher *v.* Renfroe, 56 Ga. 674, holding that mandamus does not lie to compel the treasurer to pay a warrant perfectly valid and outstanding in the face of a joint resolution of the houses of the legislature approved by the governor directing him not to do so.

Kansas.— Topeka First Nat. Bank *v.* Heflebower, 58 Kan. 792, 51 Pac. 225, holding that the state treasurer will not be compelled by mandamus to register and pay orders drawn on the permanent school fund by the state school fund commissioners to pay for bonds purchased by them when it appears that the price agreed to be paid is more than the actual market price, even though the excess above the market price be so small that the purchase cannot be declared an improvident one, the statute providing that the commissioners should not pay more than the actual market price.

in effect amount to a suit against the state without its consent.[43] Thus it is held that mandamus does not lie to compel a state treasurer to pay a debt due by a state, unless it appears that a legal appropriation for the purpose has been made and that there are moneys in the treasury applicable to the claim.[44]

4. Auditor. The auditor may be compelled to perform a ministerial duty imposed upon him by law.[45] Thus it has been held that the writ may be awarded to coerce the auditor to issue warrants for salaries of officers,[46] for an excess of

Louisiana.— State *v.* State Treasurer, 32 La. Ann, 177 (holding that where there is a sum to the credit of the general fund which is inadequate to pay the warrants presented to, or on file with, the state treasurer for payment, the treasurer cannot by mandamus be ordered to pay the whole fund to one creditor, to the exclusion of the others); State *v.* Dubuclet, 28 La. Ann. 85; State *v.* Dubuclet, 26 La. Ann. 127; State *v.* Dubuclet, 24 La. Ann. 16 (holding that mandamus cannot be invoked by a creditor of the state to compel the state treasurer to make a certain distribution of funds, not yet in his hands, as they may be received by him).

Michigan.— Bresler *v.* Butler, 60 Mich. 40, 26 N. W. 825, holding that where a person makes application for a mandamus to compel the state treasurer to pay a balance claimed to be due on the bills of the government stock bank without an adjudication determining that the amount claimed is owing from the state, such application will be refused.

Missouri.— State *v.* Bishop, 42 Mo. 504, holding that mandamus will not lie to compel the state treasurer to pay over the principal and interest of state bonds, without a special act of legislature authorizing and commanding him to pay.

North Carolina.— Garner *v.* Worth, 122 N. C. 250, 29 S. E. 364, holding that mandamus will not lie to compel the state treasurer to pay a warrant issued by the auditor, where the treasurer claims that the amount of indebtedness is incorrect, and that the claim was not duly audited by such auditor, the question raised by such claims being for the legislature and not for the courts to determine.

South Carolina.— Lord *v.* Bates, 48 S. C. 95, 26 S. E. 213; *Ex p.* Barnwell, 8 S. C. 264.

43. Weston *v.* Dane, 51 Me. 461.

44. State *v.* Barret, 30 Mont. 203, 81 Pac. 349 (holding that the attorney-general seeking to enforce by mandamus the payment of his stenographer's salary cannot occupy any stronger position than the stenographer would occupy, nor enforce any rights which the stenographer could not enforce); Hayne *v.* Hood, 1 S. C. 16. See also State *v.* Johnson, 28 La. Ann. 932.

45. Brewer *v.* Watson, 61 Ala. 310 (holding that the public interests are not endangered, by allowing a tax-collector or his attorney to inspect the collector's account with the state, as kept in books in the auditor's office, and if such inspection is requested and the auditor denies it, mandamus lies against him); Bryan *v.* Cattell, 15 Iowa 538; Peters *v.* Auditor, 33 Gratt. (Va.) 368 (holding that the state auditor may be compelled to furnish the local revenue commissioner with proper books); State *v.* Burdick, 3 Wyo. 588, 28 Pac. 146. See also State *v.* Babcock, 19 Nebr. 230, 27 N. W. 98.

In Michigan the supreme court has no jurisdiction by mandamus to coerce or direct the action of the board of state auditors in respect to their constitutional duties as they are made an independent tribunal by the constitution of the state. People *v.* State Auditors, 32 Mich. 191. One who is engaged in publishing law books and is ready to give security to bid for the publication of the state reports is a proper relator in mandamus proceedings to compel the board of state auditors to advertise for proposals under the statutes. The board as to duties imposed on it by the legislature outside of its constitutional duties is subject to mandamus. People *v.* State Auditors, 42 Mich. 422, 4 N. W. 274. The auditor-general may be compelled to perform a ministerial duty, as for instance to issue a proper warrant. Lachance *v.* Auditor-Gen., 77 Mich. 563, 43 N. W. 1005.

46. *Alabama.*— Purifoy *v.* Andrews, 101 Ala. 643, 16 So. 541; Reynolds *v.* Taylor, 43 Ala. 420.

Idaho.— Gilbert *v.* Moody, 3 Ida. 3, 25 Pac. 1092, stenographer's fees authorized by statute.

Iowa.— Bryan *v.* Cattell, 15 Iowa 538.

Kentucky.— Lindsey *v.* State Auditor, 3 Bush 231; Page *v.* Hardin, 8 B. Mon. 648.

Louisiana.— State *v.* Jumel, 30 La. Ann. 861.

Mississippi.— Swann *v.* Buck, 40 Miss. 268, holding that the right of a public officer to receive a warrant for the salary attached by law to his office may be enforced by mandamus, when it is made by statute the duty of the auditor "to grant to every claimant authorized to receive the same, a warrant on the State treasury."

Montana.— State *v.* Kenney, 10 Mont. 533, 26 Pac. 999, salary of the reporter of the supreme court reports.

North Carolina.— White *v.* Ayer, 126 N. C. 570, 36 S. E. 132.

Utah.— State *v.* Richards, 15 Utah 477, 49 Pac. 532; Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398.

Appropriation for salary.— Mandamus lies to compel an auditor to draw a warrant for an officer's pay, where there is an appropriation for it. Black *v.* State Auditor, 26 Ark. 237; Byrd *v.* Conway, 5 Ark. 436; *Ex p.* Tully, 4 Ark. 220, 38 Am. Dec. 33. But it is held that the writ will not lie where no appropriation has been made (State *v.* Johnson, 28 La. Ann. 932); or where the appropriation for the purpose has been ex-

taxes paid by mistake,[47] or for just claims generally against the state for the payment of which provision is made by law,[48] to execute and deliver tax deeds,[49] to allow inspection of records,[50] to issue notes to a bank,[51] or to transfer bonds as required by statute.[52] Where there is a specific appropriation by the legislature of a sum certain to be paid in satisfaction of a claim,[53] where the claim has been duly

hausted (Hager *v.* Shuck, 87 S. W. 300, 27 Ky. L. Rep. 957). *Compare* Bryan *v.* Cattell, 15 Iowa 538. On the other hand in Reynolds *v.* Taylor, 43 Ala. 420, it was held that if the salary of a public officer is fixed, and the times of payment prescribed by law, no special annual appropriation is necessary to authorize the auditor to issue his warrant for its payment. On an application for mandamus to compel the issuance of a warrant for the salary of a member of the code commission, which had been refused for want of an appropriation, it was held that the designation in the act authorizing the appointment of the commission of a designated sum as compensation for the commissioners constituted an appropriation. State *v.* Kenney, 10 Mont. 485, 26 Pac. 197.

Where title to office is in dispute.— It has been held that the auditor of public accounts cannot be required by mandamus to issue a warrant to the relator for the salary of an office while another person holds the commission; that it is no part of the duty of the auditor to determine the right to the office, and it cannot be determined as a collateral matter in such a proceeding. Winston *v.* Moseley, 35 Mo. 146. On the other hand it has been held that mandamus is maintainable to compel a state auditor to issue a warrant on the treasurer for relator's salary as superintendent of a water division, after relator's alleged improper removal from such office and the appointment of his successor, although relator's title to the office was incidentally involved in such proceeding to which relator's successor was not a party. State *v.* Grant, 14 Wyo. 41, 81 Pac. 795, 82 Pac. 2, 1 L. R. A. N. S. 588. On an application by a member of the legislature for a writ of mandate to compel the state auditor to audit and settle his account for mileage and attendance, it has been held that an allegation merely that a controversy has arisen as to his election is immaterial. State *v.* Kenney, 9 Mont. 223, 23 Pac. 733.

Inquest claims of justice of the peace see Lachance *v.* Auditor-Gen., 77 Mich. 563, 43 N. W. 1005, mandamus against auditor-general.

Mandamus to enforce sheriff's fees or charges see State *v.* Brewer, 62 Ala. 215; Reynolds *v.* McWilliams, 49 Ala. 552; McKinney *v.* Reynolds, 44 Ala. 660; Johnson *v.* Reynolds, 44 Ala. 586.

47. German Security Bank *v.* Coulter, 112 Ky. 577, 66 S. W. 425, 23 Ky. L. Rep. 1888 (holding that the state auditor may be required by mandamus to draw his warrant on the treasury in favor of a bank for an excess of taxes paid by it into the treasury by reason of a mistake as to the rate of taxation upon the amount assessed, but not for an excess of taxes paid by reason of an erroneous assessment, the auditor having no power to correct erroneous assessments); Bank of Commerce *v.* Stone, 108 Ky. 427, 56 S. W. 683, 22 Ky. L. Rep. 70; Louisville City Nat. Bank *v.* Coulter, 66 S. W. 427, 23 Ky. L. Rep. 1883; Farmers' Nat. Bank *v.* Stone, 58 S. W. 983, 22 Ky. L. Rep. 831.

Where taxes on township school lands, the title of which is held under a certificate of purchase from the county auditor, have been wrongfully assessed and paid, and the purchaser has presented to the auditor a properly authenticated certificate of the board of county commissioners of the county wherein such land is situated that he has been illegally assessed, and has illegally paid taxes on the land, for state, school, and sinking fund purposes, to a certain amount, which has been duly paid to the treasurer of the state and received into the state treasury, and has requested the auditor to audit such claim, and issue a warrant to the treasurer of state for the payment thereof, and the auditor has refused to comply with such request, he may be required to do so, by a writ of mandate. Henderson *v.* State, 53 Ind. 60.

Certificate of error in tax cases see Hubbard *v.* Auditor-Gen., 120 Mich. 505, 79 N. W. 979, mandamus against auditor-general.

48. State *v.* Brewer, 62 Ala. 215.

49. Purifoy *v.* Lamar, 112 Ala. 123, 20 So. 975; McCulloch *v.* Stone, 64 Miss. 378, 8 So. 236, holding that it is not within the province of the auditor to determine upon the validity of a tax title acquired by the state.

50. Brewer *v.* Watson, 61 Ala. 310; Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146.

51. Citizens' Bank *v.* Wright, 6 Ohio St. 318.

52. Robinson *v.* Rogers, 24 Gratt. (Va.) 319.

53. Rice *v.* State, 95 Ind. 33 (holding that mandamus will lie to compel the state auditor to draw a warrant for a claim for which money has been appropriated and is in the treasury); State *v.* Steele, 37 La. Ann. 353; Buffington *v.* Clinton, 28 La. Ann. 132; State *v.* Clinton, 28 La. Ann. 72; State *v.* Bordelon, 6 La. Ann. 68; People *v.* Schuyler, 79 N. Y. 189 (reimbursement of person for advancing money for public improvement).

Warrant for sum appropriated for lunatic asylum.— State *v.* State Auditor, 46 Mo. 326.

In Nebraska it has been held that the constitutional provision requiring claims upon the state treasurer to be examined and adjusted by the auditor applied to all claims, whether there had been a specific appropriation by the purpose of paying the claims or not, for that mandamus will not lie to compel the auditing of a claim in favor of the relator where an appropriation has been made therefor. State *v.* Babcock, 22 Nebr. 38, 33 N. W. 711. But in a later case it was held

allowed by the legislature,[54] or where, although not fixed by statute, the amount of the claim has been determined by a duly authorized official or is not in dispute,[55] or where the claim has been litigated and its validity determined by a court of competent jurisdiction,[56] the writ will lie. Where a state auditor in the discharge of his duties has a discretion to exercise,[57] as for instance in the allowance or rejection of a claim against the state, his decision cannot be controlled by mandamus,[58] especially after the auditor has already acted upon the matter.[59] Nor will his discretion as to the amount of the claim to be allowed be interfered with by mandamus.[60] But if he refuses to act upon a claim properly presented to him, the court will compel him to do so.[61] Where there is another adequate remedy,[62] as for instance, where the right of appeal is given to a claimant whose claim has been disallowed in whole or in part by the auditor,[63] the writ will not

that this rule should be restricted to such claims and demands as the state is under a legal obligation to pay, and not extended to appropriations of specific sums of money made by the legislature, as a donation, gift, reward, or charity. Sayre *v.* Moore, 40 Nebr. 854, 59 N. W. 755, claim for reimbursement of county for expenses of murder trial.

Necessity for appropriation.— In order to compel the state auditor by mandamus to issue his warrant for an appropriation it has been held that it must clearly appear either that there were, at the date of the appropriation, funds in the treasury, not otherwise appropriated, sufficient to pay the same, or that the general assembly making such appropriation did, within constitutional limits, provide for levying a sufficient tax to pay such appropriation within the proper fiscal years. Henderson *v.* People, 17 Colo. 587, 31 Pac. 334. So in State *v.* Porter, 89 Ind. 260, it was held that the auditor cannot be compelled by mandamus to issue his warrant in payment of a claim unless there be money actually in the treasury specifically appropriated by law to the purpose for which such warrant is drawn. See also Dodd *v.* Miller, 14 Ind. 433, holding that under statute claims for work done for the commissioners of swamp lands are only payable out of the swamp land fund, and an answer by the state auditor to an alternative writ of mandamus to compel him to issue a warrant for the payment of such a claim that there is no money in the fund on which the warrant is to be drawn is sufficient. So it is held that the writ will not be awarded to compel the auditor-general to issue a warrant for a bounty when the fund has been exhausted. Smith *v.* Auditor-Gen., 80 Mich. 205, 45 N. W. 136. On the other hand it has been held that the auditor may be compelled to draw warrants under state contracts, although there is no money in the treasury to pay them. People *v.* Lippincott, 72 Ill. 578.

54. Fordyce *v.* Godman, 20 Ohio St. 1, 13.

55. Fisk *v.* Cuthbert, 2 Mont. 593, holding that under Cod. St. c. 64, authorizing the general recorder to have published at the public expense a list of certain brands and marks, mandamus will lie to compel the territorial auditor to issue a warrant in payment of the services of one who published such list under a contract with the general recorder, although the law does not fix a certain compensation for such services, and the auditor defends on the grounds that he has no power to fix the same.

56. State *v.* Weston, 69 Nebr. 695, 96 N. W. 668, 5 Nebr. (Unoff.) 576, 99 N. W. 520.

Where an inquest of damages from the construction of a levee on plaintiff's land has been had, the auditor cannot be heard to deny that plaintiff is the owner of the land on which the levee was located, in proceedings to compel him to issue his warrant for the payment of the damages, since it will be presumed that this fact was properly found by the jury. Auditor *v.* Crise, 20 Ark. 540; Crise *v.* Auditor, 17 Ark. 572.

57. Holliday *v.* Henderson, 67 Ind. 103, holding that the auditor's discretion in the selection of a newspaper in which a publication is to be made cannot be controlled by mandamus.

58. *Arkansas.*—Danley *v.* Whiteley, 14 Ark. 687.

Colorado.— People *v.* Colorado Terr. Auditor, 2 Colo. 97.

Louisiana.— State *v.* Jumel, McGloin 144.

Missouri.— State *v.* Thompson, 41 Mo. 13, holding that mandamus will not lie to compel the state auditor to audit and settle a bill of costs, duly certified by the judge and the circuit attorney, as required by law.

South Dakota.— Sawyer *v.* Mayhew, 10 S. D. 18, 71 N. W. 141.

Washington.—State *v.* Cheetham, 20 Wash. 64, 54 Pac. 772.

59. Osborn *v.* Clark, 1 Ariz. 397, 25 Pac. 797.

60. Burton *v.* Furman, 115 N. C. 166, 20 S. E. 443.

61. People *v.* State, 2 Colo. 97; State *v.* Cornell, 56 Nebr. 143, 76 N. W. 459, holding that if the state auditor refuses to examine or pass upon a claim against the state, the supreme court will not examine into the merits of the claim as a means of determining whether action would be available to the claimant, but will compel action, and leave the merits to be examined in the manner approved by him.

62. State *v.* Cheetham, 20 Wash. 64, 54 Pac. 772.

63. State *v.* Babcock, 22 Nebr. 38, 33 N. W. 711.

lie. Where it is not shown to be within the authority and duty of the auditor to perform the act in question,[64] or where the proceeding is in effect a suit against the state without its consent,[65] the writ will not be awarded.

5. CONTROLLER. Mandamus lies against a state controller to enforce duties wholly ministerial,[66] and has been awarded to compel him to draw warrants for

64. *Alabama.*— State *v.* Brewer, 62 Ala. 215, where the writ was denied to compel the payment of a sheriff's fees on the ground that he was a defaulter.

Illinois.— Swigert *v.* Hamilton County, 130 Ill. 538, 22 N. E. 609, issuance of a warrant for an unliquidated amount.

Louisiana.— State *v.* Graham, 24 La. Ann. 429, holding that where a statute authorizing a public improvement specified that the contractor who did the work was to be paid in bonds, issued in instalments, on the certificate of the commissioners in charge of the improvement that a section had been completed, mandamus will not lie to the state auditor to compel him to issue certificates of indebtedness to the contractor, the certificate of the commissioners not having been issued.

Michigan.— People *v.* Auditor-Gen., 36 Mich. 271 (receiving returns of delinquent lands made after the prescribed time); People *v.* Auditor-Gen., 17 Mich. 161 (where it was not satisfactorily shown that all conditions as to the location of a school of medicine at a place other than Ann Arbor had been complied with).

Missouri.— State *v.* Allen, 180 Mo. 27, 79 S. W. 164, holding that since the statute authorizes the governor to ascertain the fees to be allowed a messenger for bringing back a fugitive from justice the auditor cannot be made to pay those fees until the governor has determined how much shall be allowed.

Nebraska.— State *v.* Moore, 48 Nebr. 870, 67 N. W. 876, holding that a company which has exceeded its authority by accepting a note in payment of membership fees required to be paid in advance, although it did so in good faith in reliance on the opinion of the attorney-general, cannot maintain mandamus against the auditor to compel the issuance of a license to it.

Ohio.— Fordyce *v.* Godman, 20 Ohio St. 1, where a claim had not been duly authorized by the legislature.

Issuance of certificate in opposition to injunction.— In Livingston *v.* McCarthy, 41 Kan. 20, 20 Pac. 478, it was held that mandamus will not issue against the auditor to compel him to issue a certificate for loss sustained by the burning of a town by guerrillas, where it is shown that another person claims an interest in the certificate adverse to plaintiff, and in an action brought against defendant and plaintiff by the third person the delivery of such certificate to plaintiff has been enjoined.

Failure of approval within proper time as ground for refusal of warrant.— When the state auditor refused to issue a warrant for payment of a claim, on the ground that the time had expired in which it should have been approved, mandamus will lie to compel him to issue the warrant, where the claim had been presented in time, but the auditor and secretary of state had postponed the approval thereof until after the expiration of the time required by law in which the approval should have been made, as the duty to approve the claim was a continuing one. State *v.* Cornell, 60 Nebr. 694, 84 N. W. 87.

Payment of greater compensation than fixed by law.— Where the compensation for services of officers, employees, etc., of the general assembly is fixed by law, the auditor cannot be compelled by mandamus to audit and pay any increased compensation attempted to be given by separate resolutions of each house, or by the general appropriation bill providing therefor in pursuance of such resolutions. People *v.* Spruance, 8 Colo. 307, 6 Pac. 831.

Writ to compel pursuance of particular methods.— A mere creditor of the state, who has the auditor's warrants for his claim, cannot maintain mandamus against that officer to compel him to pursue certain methods in the settlement of accounts with the tax-collectors, so that relator may get his money sooner. State *v.* Dubuclet, 28 La. Ann. 85.

65. State *v.* Jumel, McGloin (La.) 144 (holding that mandamus will not lie to compel the state auditor in violation of an express provision of law making a different disposition of the funds in the public treasury to draw his warrant on the treasurer for the payment of vouchers issued to the relator by the committee on contingent expenses of the house of representatives, as the proceeding, while nominally against the auditor, is in reality against the state, which, as a sovereign, is beyond judicial control); Ottawa County *v.* Alpin, 69 Mich. 1, 36 N. W. 702 (holding that an application by a board of county supervisors for mandamus to compel the auditor-general to pay over certain taxes received to the county treasurer is in effect a suit against the state and cannot be maintained without its consent); Sanilac County *v.* Aplin, 68 Mich. 659, 36 N. W. 794; People *v.* Auditor-Gen., 38 Mich. 746 (holding that where money has gone into the state treasury, as part of the general balance rightfully received, and not as a separate and independent item wrongfully received, mandamus will not lie to require its repayment, nor can any suit be maintained for it unless voluntarily allowed within the authority of some proper officer).

66. *California.*— People *v.* Bell, 4 Cal. 177.

Connecticut.— State *v.* Staub, 61 Conn. 553, 23 Atl. 924, holding that mandamus will lie to compel the state controller to distribute the money which the general assembly has

salaries of public officers,[67] or for money due on a state contract,[68] to direct the levy of a state tax to pay the public debt,[69] or to allow the district attorney to inspect records in his office.[70] But the writ will not lie where its effect would be to interfere with the controller in matters requiring the exercise of judgment and discretion on his part.[71] Thus it is held that a state controller cannot be compelled to audit claims against the state in any particular way or for any particular amount.[72] In the same way where the duty of the controller to perform the act in question is not clear,[73] or where there is another adequate remedy at law,[74] the writ will not lie.

6. Attorney-General. The general rule that mandamus cannot be resorted to

granted to the several towns of the state in aid of common schools, and which Gen. St. § 2228, orders him to distribute.

Nevada.— State *v.* Hobart, 12 Nev. 408.

New Jersey.— Compton *v.* Comptroller, 52 N. J. L. 150, 18 Atl. 584 (holding that when the facts upon which an appropriation of money by a state falls due are conceded, and the controller refuses to issue his warrant for the payment merely because he has taken a different view of the law from that entertained by the court, a mandamus will lie to compel him to issue the warrant); Angle *v.* Runyon, 38 N. J. L. 403 (holding that where an act of the legislature directed the treasurer of the state to pay a certain sum of money to A for alleged military services, and an application was made for mandamus to compel the controller to certify the claim for payment, a return showing facts recited in the preamble to the act as grounds on which the gift was made to be untrue, and that the legislature was imposed upon in passing the act, was insufficient as an answer to the writ and should be stricken out).

Texas.— Hart *v.* Stephens, (1907) 100 S. W. 135.

67. Nichols *v.* Comptroller, 4 Stew. & P. (Ala.) 154; People *v.* Whitman, 6 Cal. 659; Fowler *v.* Peirce, 2 Cal. 165; State *v.* Gamble, 13 Fla. 9; Pickle *v.* McCall, 86 Tex. 212, 24 S. W. 265.

Absence of statute fixing salary or making appropriation.—Where there is no permanent, continuing statute, or constitutional provision fixing the salary of a circuit judge, and no appropriation has been made therefor, mandamus will not issue to compel the controller-general to issue a warrant for a salary, and the state treasurer to pay it, since the proceeding would be against the state, in which case the court would have no jurisdiction. State *v.* Jennings, 68 S. C. 411, 47 S. E. 683.

68. People *v.* Brooks, 16 Cal. 11, warrant for money due lessee of convict labor from state.

69. Morton *v.* Comptroller-Gen., 4 S. C. 430.

70. State *v.* Hobart, 12 Nev. 408.

71. State *v.* Barnes, 25 Fla. 298, 5 So. 722, 23 Am. St. Rep. 516 (approval of sheriff's bond); Towle *v.* State, 3 Fla. 202 (where the controller was vested with a discretion in auditing the accounts of a sheriff and in deciding upon the legality of his claims for fees); Wailes *v.* Smith, 76 Md. 469, 25 Atl. 922; Lewright *v.* Love, 95 Tex. 157, 65 S. W. 1089 (holding that under Rev. St. art. 5049, subd. 42, providing that the operators of railroads within the state shall pay a tax on the gross receipts from passenger travel, which receipts shall be returned under oath to the controller, and the tax be collected by him under such regulations as may be prescribed, the controller cannot be compelled by mandamus to institute such suit, although it were his duty to do so.

72. People *v.* Roberts, 163 N. Y. 70, 57 N. E. 98 [*reversing* 45 N. Y. App. Div. 145, 61 N. Y. Suppl. 148].

73. *California.*— Patty *v.* Colgan, 97 Cal. 251, 31 Pac. 1133, 18 L. R. A. 744, where the act creating the duty was on its face unconstitutional.

Maryland.— Green *v.* Purnell, 12 Md. 329.

Nevada.— State *v.* Hallock, 20 Nev. 326, 22 Pac. 123, holding that mandamus will not lie against the state controller to compel him to issue a warrant in any greater amount than audited and allowed by the board of examiners.

New Jersey.— Rutgers College *v.* Morgan, 71 N. J. L. 663, 60 Atl. 205 [*affirming* 70 N. J. L. 460, 57 Atl. 250], where by statute the state controller was authorized to withhold his warrant on the state treasurer for a sum appropriated to a college, until a certain act had been judicially determined to be constitutional.

Tennessee.— State *v.* Nolan, 8 Lea 663, holding that the state controller will not be compelled by mandamus to issue his warrant for the payment of a judgment against the state for costs, where it is apparent that the judgment was irregular and not authorized by law.

Necessity for appropriation for claims sought to be enforced.— It has been held that it is a conclusive answer to an application for a peremptory mandamus to compel the controller to draw his warrant upon the treasurer for the payment of a claim upon the treasury that no appropriation has ever been made by law for the payment of the claim, as required by the constitution. People *v.* Burrows, 27 Barb. (N. Y.) 89, 16 How. Pr. 27 [*affirmed* in 17 N. Y. 235]. See also State *v.* La Grave, 23 Nev. 25, 41 Pac. 1075, 62 Am. St. Rep. 764; Nichols *v.* Comptroller, 4 Stew. & P. (Ala.) 154.

74. Chisholm *v.* McGehee, 41 Ala. 192.

to control the exercise of official discretion has been applied where it was sought to compel the state attorney-general to institute quo warranto proceedings,[75] or to issue a corporation certificate,[76] or to approve a contract for legal services rendered to a receiver.[77] With respect to discretionary duties it is only where it clearly appears that the attorney-general is not in the discharge of his duty in refusing to exercise his discretion at all, or is acting in utter disregard of the legal right of others, that the writ will lie.[78] But mandamus will lie to compel the attorney-general to perform a ministerial duty,[79] as, for instance, to compel the payment into the treasury of moneys paid to him under stipulations and judgments in actions by the state for taxes.[80]

7. Insurance Commissioner. Mandamus lies to compel a state commissioner or superintendent of insurance to perform a ministerial duty,[81] but not to compel the performance of an act not falling within his duties[82] or an act involving the exer-

75. *Michigan.*— People *v.* Atty.-Gen., 41 Mich. 728, 3 N. W. 205, quo warranto to determine right of corporation to exercise franchise. *Compare* Lamoreaux *v.* Atty.-Gen., 89 Mich. 146, 50 N. W. 812, where it was intimated that, if the prosecuting attorney of the county declines to act, an elector and taxpayer may apply to the attorney-general, and, on his refusal, may institute proceedings in the supreme court to compel him to file an information in the nature of a quo warranto to determine the right of a person to the office of sheriff.

Missouri.— State *v.* Talty, 166 Mo. 529, 66 S. W. 361, quo warranto to determine right of person to office.

New York.— People *v.* Fairchild, 67 N. Y. 334 [*affirming* 8 Hun 334]; People *v.* Atty.-Gen., 22 Barb. 114; People *v.* Atty.-Gen., 2 Abb. Pr. 131.

Ohio.— Thompson *v.* Watson, 48 Ohio St. 552, 31 N. E. 742, quo warranto to test constitutionality of election law.

Texas.— Lewright *v.* Bell, 94 Tex. 556, 63 S. W. 623, quo warranto to forfeit corporate charter.

76. People *v.* Rosendale, 76 Hun (N. Y.) 103, 27 N. Y. Suppl. 837 [*affirmed* in 142 N. Y. 126, 36 N. E. 806, and *reversing* 5 Misc. 378, 25 N. Y. Suppl. 769].

77. Candee *v.* Cunneen, 92 N. Y. App. Div. 71, 86 N. Y. Suppl. 723.

78. State *v.* Talty, 166 Mo. 529, 66 S. W. 361.

79. People *v.* Rosendale, 76 Hun (N. Y.) 112, 27 N. Y. Suppl. 825 [*affirmed* in 142 N. Y. 670, 37 N. E. 571].

Certifying costs.— In New York under Code Civ. Proc. § 3241, providing that costs awarded against the people shall be paid on the production of an exemplified copy of the judgment, and a certificate of the attorney-general that the action was brought pursuant to law, the granting of such certificate is merely ministerial, and may be enforced by mandamus. People *v.* Rosendale, 76 Hun (N. Y.) 112, 27 N. Y. Suppl. 825 [*affirmed* in 142 N. Y. 670, 37 N. E. 571]. Where an alternative mandamus was directed to the attorney-general to compel him to certify that certain suits for penalties under the metropolitan police law were duly instituted, in which suits costs were adjudged against the people of the state, and the attorney-general in his return stated that no appropriation had been made by the legislature for the payment of these costs, and this allegation was admitted by the demurrer, a peremptory mandamus was refused. People *v.* Tremain, 29 Barb. (N. Y.) 96, 17 How. Pr. 142 [*reversing* 17 How. Pr. 10].

80. San Mateo County *v.* Oullalian, 69 Cal. 647, 11 Pac. 386.

81. State *v.* Vorys, 69 Ohio St. 56, 68 N. E. 580.

Issuance of certificates to mutual benefit associations.— In New York the issuing of certificates of authority to mutual benefit associations has been held to be discretionary. People *v.* Fairman, 92 N. Y. 656; Schmidt *v.* Maxwell, 57 Hun (N. Y.) 590, 10 N. Y. Suppl. 583; *In re* Hartford L., etc., Ins. Co., 63 How. Pr. (N. Y.) 54. But under Ins. Law, art. 7, § 231 (Laws (1892), c. 690), giving to any mutual benefit fraternity incorporated under the laws of the state the right to reincorporate by filing with the superintendent of insurance a declaration and sworn statement, as required by law, the filing of the declaration and statement is a ministerial duty of the superintendent, and may be compelled by mandamus. People *v.* Payn, 28 Misc. (N. Y.) 275, 59 N. Y. Suppl. 851 [*affirmed* in 60 N. Y. Suppl. 1146 (*affirmed* in 161 N. Y. 229, 65 N. E. 849)]; People *v.* Payn, 26 N. Y. App. Div. 584, 50 N. Y. Suppl. 334. Where the superintendent of insurance refuses to file the declaration and statement on reincorporation on the ground that the name of the petitioner is similar to that of an association already recognized by the insurance department, he may be compelled so to do by mandamus. People *v.* Payn, 28 Misc. (N. Y.) 275, 59 N. Y. Suppl. 851 [*affirmed* in 60 N. Y. Suppl. 1146 (*affirmed* in 161 N. Y. 229, 55 N. E. 849)].

82. People *v.* Kelsey, 114 N. Y. App. Div. 888, 100 N. Y. Suppl. 391 (holding that a writ of mandamus cannot be awarded to compel the superintendent of insurance to change the record of nominations of officers of an insurance company in the absence of statute authorizing him to do so); People *v.* Payn, 26 N. Y. App. Div. 584, 50 N. Y. Suppl. 334.

cise of judgment and discretion.[83] The state insurance commissioner may be compelled by mandamus to issue a license to a foreign insurance company to do business within the state upon its compliance with all conditions precedent, where his duty in the premises is ministerial merely.[84] But in a number of jurisdictions it is held that the determination of the commissioner or superintendent of insurance in granting or refusing[85] or revoking[86] licenses authorizing foreign insurance companies to transact business within the state involves the exercise of official judgment and discretion on his part which cannot be controlled or directed by mandamus. Where the relator company has not fully complied with all the legal requirements it will not be entitled to the writ against the superintendent or commissioner.[87] Mandamus is held not to be the proper proceeding by which to test the question of the amount of taxes to be paid to the superintendent of insurance

83. State *v.* Upson, 79 Conn. 154, 64 Atl. 2 (holding that the insurance commissioner cannot be compelled to determine what sum is to be refunded to insurance companies for illegal taxes paid, under a legislative resolution so directing); Provident Sav. L. Assur. Soc. *v.* Cutting, 181 Mass. 261, 63 N. E. 433, 92 Am. St. Rep. 415 (discretion in the valuation of the policies or assets of a life insurance company).

84. Phœnix Carpet Co. *v.* State, 118 Ala. 143, 22 So. 627, 72 Am. St. Rep. 143; People *v.* Van Cleave, 183 Ill. 330, 55 N. E. 698, 47 L. R. A. 795, holding that the commissioner could not refuse a license on the ground that the name of the foreign company was similar to an existing company.

In Kansas it was at one time held that mandamus did not lie to compel the issue of licenses to foreign insurance companies. Dwelling-House Ins. Co. *v.* Wilder, 40 Kan. 561, 20 Pac. 265. It has been held otherwise, however, under a statute taking away the discretion of the commissioner. Kansas Home Ins. Co. *v.* Wilder, 43 Kan. 731, 23 Pac. 1061.

In Ohio it has been held that under the various acts making it the duty of the superintendent of insurance "to see to the execution and enforcement of all laws relating to insurance," and to revoke the license of any foreign company when it satisfactorily appears to him to be in an "unsound condition," he has such discretion as to originally issuing a license that mandamus for his refusal will not lie. State *v.* Moore, 42 Ohio St. 103. But a different rule has been laid down with respect to foreign fraternal beneficiary associations. State *v.* Vorys, 69 Ohio St. 56, 68 N. E. 580.

Issuing license, filing certificates, etc., of foreign corporation generally see FOREIGN CORPORATIONS.

85. *Connecticut.*— American Casualty Ins., etc., Co. *v.* Fyler, 60 Conn. 448, 22 Atl. 494, 25 Am. St. Rep. 337.

Nebraska.— State *v.* Benton, 25 Nebr. 834, 41 N. W. 793, holding that where the commissioner must decide whether the company applying for admission is solvent, his action cannot be controlled by mandamus in the absence of wilful disregard of duty.

New York.— People *v.* Fairman, 12 Abb. N. Cas. 268.

North Dakota.— State *v.* Carey, 2 N. D. 36, 49 N. W. 164 [*approved* in Sawyer *v.* Mayhew, 10 S. D. 23, 71 N. W. 141].

Wisconsin.— State *v.* Giljohann, 111 Wis. 377, 87 N. W. 245.

See 33 Cent. Dig. tit. "Mandamus," § 193.

86. Insurance Co. *v.* Wilder, 40 Kan. 561, 20 Pac. 265; State *v.* Carey, 2 N. D. 36, 49 N. W. 164.

In Illinois it is held that mandamus to compel the revocation of the license of a foreign company because of the removal of a cause of action against it to the federal court may be made on behalf of one not a citizen of the state. People *v.* Pavey, 151 Ill. 101, 37 N. E. 691.

In Michigan it is held that the revocation of a license of a foreign company is a ministerial duty and that mandamus does not lie to vacate an order revoking the license where the company had not conformed to the law. Hartford F. Ins. Co. *v.* Raymond, 70 Mich. 485, 38 N. W. 474.

87. Employers' Liability Assur. Co. *v.* Insurance Com'rs, 64 Mich. 614, 31 N. W. 542; Mutual F. Ins. Co. *v.* House, 89 Tenn. 438, 14 S. W. 927; State *v.* Fricke, 102 Wis. 107, 77 N. W. 732, 78 N. W. 455, holding that mandamus will not issue to compel the issue of a license to a company which has failed to pay taxes, although the statute of limitations would bar the recovery thereof.

Licensing foreign unincorporated insurance association.— Under statute in Alabama it has been held that mandamus does not lie to compel the issuance of a license to a foreign unincorporated insurance association. Hoadley *v.* Purifoy, 107 Ala. 276, 18 So. 220, 30 L. R. A. 351.

Licensing agents of foreign corporations.— It has been held that a non-resident cannot by mandamus compel the issuance of a license to transact insurance business in Vermont as the agent of a foreign insurance company. Cook *v.* Howland, 74 Vt. 393, 52 Atl. 973, 93 Am. St. Rep. 912; Bankers' L. Ins. Co. *v.* Howland, 73 Vt. 1, 48 Atl. 435, 57 L. R. A. 374. But it has been held in Kansas that the license of an authorized resident insurance agent cannot be revoked by the superintendent of insurance for the reason that he divided commissions with a non-resident agent who placed with the Kansas agent in-

by a foreign insurance company, and to prevent the superintendent of insurance from revoking the license of such company, injunction being the proper remedy.[88]

8. Medical, Dental, or Pharmacy Boards. Where a state medical[89] or dental board[90] is vested with discretion in granting or issuing licenses or certificates to applicants for leave to practice medicine or dentistry, mandamus will not lie to compel the exercise of such discretion unless the applicant has passed the prescribed examination, and is clearly entitled to a certificate.[91] Nor will the writ be granted against such examiners where another adequate remedy is provided by law.[92] But it is held that where a pharmacy board has no discretion in entering registered pharmacists, as where it is required by law to enter a "graduate in pharmacy," mandamus will lie to compel the board to perform its duty.[93] And under a statute requiring an examination of railroad employees engaged in certain capacities and a certificate showing fitness in certain respects, and imposing the payment of the necessary fees upon the railroad company, the examining officer cannot impose, as a condition to his performance of his duties, the payment of the fees by the applicant.[94]

9. Boards of Public Printing. Where a state board of public printing or other executive board authorized to let state printing contracts is vested with discretion in letting bids, the writ does not lie to compel them to contract with a particular party.[95] Nor will the writ be granted where the effect of its issuance would be

surance on property in that state and mandamus lies to compel the revocation of an order by the superintendent of insurance denying the right of the resident agent to represent the insurance company. Maxwell *v.* Church, 62 Kan. 487, 63 Pac. 738.

88. State *v.* Hahn, 50 Ohio St. 714, 35 N. E. 1052.

89. State *v.* State Medical Examining Bd., 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; State *v.* State Bd. of Health, 103 Mo. 22, 15 S. W. 322; State *v.* Gregory, 83 Mo. 123, 53 Am. Rep. 565; Hart *v.* Folsom, 70 N. H. 213, 47 Atl. 603; State *v.* Coleman, 64 Ohio St. 377, 60 N. E. 568, 55 L. R. A. 105; State *v.* Prendergast, 8 Ohio Cir. Ct. 401, 6 Ohio Cir. Dec. 807; Barmore *v.* State Bd. of Medical Examiners, 21 Oreg. 301, 28 Pac. 8.

Rule applied to state board of health.— State *v.* State Bd. of Health, 103 Mo. 22, 15 S. W. 322; State *v.* Gregory, 83 Mo. 123, 53 Am. Rep. 565.

90. Ewbank *v.* Turner, 134 N. C. 77, 46 S. E. 508; Kenney *v.* State Bd. of Dentistry, 26 R. I. 538, 59 Atl. 932; Williams *v.* State Bd. of Dental Examiners, 93 Tenn. 619, 27 S. W. 1019; State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587; State *v.* Chittenden, 107 Wis. 354, 83 N. W. 635.

In Illinois under statute providing that the board of dental examiners shall at all times issue a license to any regular graduate of any reputable dental college, it has been held that it is in the discretion of the court to decide when a college is reputable and that mandamus will not lie to control this discretion. Illinois State Bd. of Dental Examiners *v.* People, 123 Ill. 227, 13 N. E. 201; People *v.* Illinois State Bd. of Dental Examiners, 110 Ill. 180. But if this discretion is abused from personal or selfish motives to bar the graduates of a particular college from practice, mandamus will lie to compel the issuance of a license. Illinois State Bd. of Dental Examiners *v.* People, *supra*. Where the board has prescribed a rule that "it will recognize as reputable only such colleges as require" a certain requisite for graduation, it has exercised its judicial power, and so long as the rule is in force only the ministerial act of licensing the graduates of such colleges as comply with that rule remains to be done and the performance of such ministerial act can be enforced by mandamus. Illinois State Bd. of Dental Examiners *v.* People, 20 Ill. App. 457 [*affirmed* in 123 Ill. 227, 13 N. E. 201].

91. Dean *v.* Campbell, (Tex. Civ. App. 1900) 59 S. W. 294.

92. State *v.* Board of Medical Examiners, 10 Mont. 162, 25 Pac. 440; Kenney *v.* State Bd. of Dentistry, 26 R. I. 538, 59 Atl. 932.

93. State Bd. of Pharmacy *v.* White, 84 Ky. 626, 2 S. W. 225, 8 Ky. L. Rep. 678.

94. Baldwin *v.* Kouns, 81 Ala. 272, 2 So. 638, where the examiner was held to have refused to perform his official duty by stating that he would not issue the necessary certificate unless the petitioner should pay the fees, and mandamus was held to lie.

95. *Iowa.*— Mills Pub. Co. *v.* Larrabee, 78 Iowa 97, 42 N. W. 593.

Kansas.— State *v.* Robinson, 1 Kan. 188.

Missouri.— State *v.* McGrath, 91 Mo. 386, 3 S. W. 846, where the board was authorized to let contracts to the lowest responsible bidders.

Montana.— State *v.* Rickards, 16 Mont. 145, 40 Pac. 210, 50 Am. St. Rep. 476, 28 L. R. A. 298, where the state furnishing board was authorized to let contracts to the lowest responsible bidders.

New York.— Weed *v.* Beach, 56 How. Pr. 470.

See 33 Cent. Dig. tit. "Mandamus," § 181.

But *compare* Marsh *v.* State, 2 Nebr. (Un-

to annul a contract already made with another which was not so illegal or defective as to be utterly void.[96]

10. Election Canvassing Boards.[97] The view has been advanced that a state board of canvassers, composed of state executive officers, in the exercise of its power in canvassing election returns discharges duties purely political and governmental in their character, and hence its action cannot be controlled or enforced by mandamus.[98] In other jurisdictions mandamus has been held to lie to compel a state board of canvassers, as well as a county board, to perform its ministerial duties,[99] but not to control the exercise of their discretionary powers.[1] The writ does not lie until there has been an actual default in the performance of the duties of the board.[2]

11. Commissioners to Organize Corporations.[3] Mandamus lies to compel commissioners appointed by law to organize a corporation to proceed to perform their duties.[4]

12. Public Land Officials.[5] Mandamus has been held to lie against a state land commissioner or other proper official to compel the issuance of a land patent, or certificate, or to perform other ministerial duties, where all of the conditions precedent have been performed by the applicant,[6] to receive and receipt for money tendered under an order of the proper tribunal adjudicating the right to

off.) 372, 96 N. W. 520; State *v.* Cornell, 52 Nebr. 25, 71 N. W. 961.

The duty of approving a state printing contract is judicial, involving consideration of the pecuniary responsibility, judgment, skill, capacity, and integrity of the bidder, and mandamus will not lie. State *v.* Smith, 23 Mont. 44, 57 Pac. 449.

Enforcing claim for public printing.— The Pennsylvania act of May 1, 1876, § 20 (Pamphl. Laws 68), provides that no printing shall be done by the public printer, who is a mere contractor, except on the written order of the superintendent of public printing, or on a written order signed by the executive or the head of the department for which it is done. The legislature passed an act permitting certain pamphlets to be published by the state veterinarian and the economic zoölogist of the agricultural department. The authors sent an order to the public printer, which he refused to obey, and sent to the superintendent of printing. The latter, without authority from the secretary of agriculture, issued an order to the public printer in the regular form, directing him to publish the pamphlets. It was held that these facts raised no imputation of knowledge by the public printer of the irregularity, and he was entitled to a writ of mandamus to compel the payment of the cost of printing by the superintendent of printing. Com. *v.* Jones, 192 Pa. St. 472, 43 Atl. 1089.

96. Detroit Free Press Co. *v.* State Auditors, 47 Mich. 135, 10 N. W. 171.

97. Mandamus in connection with election proceedings generally see *infra*, VI, D.

98. Orman *v.* People, 18 Colo. App. 302, 71 Pac. 430; State *v.* Frazier, 114 Tenn. 516, 86 S. W. 319. See also *In re* Dennett, 32 Me. 508, 54 Am. Dec. 602. *Compare* State *v.* Marks, 6 Lea (Tenn.) 12.

99. *Florida.*— State *v.* McLin, 16 Fla. 17; State *v.* Gibbs, 13 Fla. 55, 7 Am. Rep. 233, writ lies after incomplete canvass.

Kansas.— See Rosenthal *v.* State Bd. of Canvassers, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157.

Michigan.—Belknap *v.* Board of State Canvassers, 95 Mich. 155, 54 N. W. 696.

New York.— People *v.* Rice, 129 N. Y. 449, 29 N. E. 355, 14 L. R. A. 643, where the state board of canvassers was compelled by mandamus to reject returns sent up by the county canvassers, where, although the returns were valid on their face, they were the result of illegal action on the part of the county canvassers.

South Carolina.— *Ex p.* Elliott, 33 S. C. 602, 12 S. E. 423.

Wyoming.— State *v.* Barber, 4 Wyo. 56, 32 Pac. 14.

See 33 Cent. Dig. tit. "Mandamus," § 154.

1. *Ex p.* Scarborough, 34 S. C. 13, 12 S. E. 666.

2. *Ex p.* Ivey, 26 Fla. 537, 8 So. 427; State *v.* Gibbs, 13 Fla. 55, 7 Am. Rep. 233.

3. Filing articles of incorporation by secretary of state see *supra*, V, B, 2.

Issuance of licenses to insurance corporations by commissioner see *supra*, V, B, 7.

4. Walker *v.* Devereaux, 4 Paige (N. Y.) 229; *In re* White River Bank, 23 Vt. 478.

5. Public land generally see Public Lands.

6. Robertson *v.* State Land-Office, 44 Mich. 274, 6 N. W. 659; People *v.* State Land Office, 23 Mich. 270; People *v.* Pritchard, 17 Mich. 338 (holding that where lands subject to entry are applied for and a payment tendered, the commissioner has no discretionary power to retain them from market for the accommodation of parties who had made application previously, but who were not ready to pay the money); Com. *v.* Cochran, 1 Serg. & R. (Pa.) 473 (mandamus to secretary of land-office); Kueckler *v.* Wright, 40 Tex. 600; Houston, etc., R. Co. *v.* Kuechler, 36 Tex. 382; State *v.* Forrest, 8 Wash. 610, 36 Pac. 686, 1120. See also State *v.*

purchase school lands, as a step in the process of acquiring title to such land,[7] to compel the reinstatement of relator as purchaser of school lands,[8] and where the right of a party to a lease of state lands has been fixed and nothing is left to be done but to perform the ministerial duty of executing the lease theretofore agreed on, mandamus will lie to compel the performance of that duty.[9] On the other hand the writ has been denied against land-office officials on the ground that they are executive officers of the state not subject to the control or interference of the judiciary in the performance of their duties,[10] that the particular duty was judicial and discretionary,[11] or that the act sought to be compelled was not authorized or

Nicholls, 42 La. Ann. 209, 7 So. 738; Thaxton *v.* Terrell, (Tex. 1906) 91 S. W. 559. *Compare* Com. *v.* Cochran, 6 Binn. (Pa.) 456, holding that the writ does not lie to compel the board of property to issue patents for donation lands.

The duty of the swamp land agent of Arkansas is ministerial, and his judgment may be controlled by mandamus. Hempstead *v.* Underhill, 20 Ark. 337.

Right to have field-notes filed.— The right of a claimant of a homestead donation to have his field-notes filed in the general land office may be enforced by mandamus. Hogue *v.* Baker, 92 Tex. 58, 45 S. W. 1004. So where under a statute providing that a county surveyor shall keep his field-notes, etc., in a fire-proof vault, to be designated by the board of supervisors, except when they are in use in the field by the surveyor in making surveys, and that the field-notes shall be accessible to the public at any time, subject to the regulations provided by the board of supervisors, etc., an order is made by the board of supervisors consistently with the statute designating a place of deposit for such field-notes, mandamus will lie to compel obedience to such order. Grand Traverse County *v.* Allyn, 144 Mich. 300, 107 N. W. 1062.

Repayment of purchase-price on failure of title.— In People *v.* Land Office, 149 N. Y. 26, 43 N. E. 418 [*reversing* 90 Hun 525, 36 N. Y. Suppl. 29], it is held that under the statute providing that when the title to land granted by the state shall fail and a legal claim for compensation on account of such failure shall be proved by any person entitled thereto, it shall be the duty of the land commissioners to direct repayment of the original purchase-money paid to the state, etc., the action of the commissioners is judicial and the performance of the duty in any particular manner will not be enforced by mandamus. So in Sullivan *v.* Shanklin, 63 Cal. 247, it was held that under an act providing for a certificate from the register showing the amount paid and the class of land on which the payment was made in exchange for the certificate of purchase or patent where the land sold was not the property of the state, upon which registers certified the amount specified should be paid out of the swamp and overflow land fund, etc., where the validity of the patent under which title passed through the medium of the state from the United States has never been determined mandamus would not lie to compel the issue of the register's certificate

The right must be clear and not in doubt. Milliner *v.* Harrison, 32 Gratt. (Va.) 482. And it is held that the writ will not lie to compel a sale to one who has been adjudged to have the preference right of purchase, where there is pending before another court a motion to vacate the judgment upon which the application for the writ is based. State *v.* Bridges, 21 Wash. 591, 59 Pac. 487.

Preliminary conditions.— Deeds under the town-site acts will not be compelled to be issued unless all preliminary conditions have been performed, and nothing remains but the issue and delivery of the deed. Territory *v.* Nowlin, 3 Dak. 349, 20 N. W. 430; McDaid *v.* Territory, 1 Okla. 92, 30 Pac. 438.

7. True *v.* Brandt, 72 Kan. 502, 83 Pac. 826; Scott *v.* Schwab, 70 Kan. 306, 78 Pac. 443; Wilkie *v.* Howe, 27 Kan. 518.

To compel acceptance of entry by an entry taker, the writ lies. Rainey *v.* Aydelette, 4 Heisk. (Tenn.) 122.

8. Hazelwood *v.* Rogan, 95 Tex. 295, 67 S. W. 80.

9. Colorado Fuel, etc., Co. *v.* State Bd. of Land Com'rs, 14 Colo. App. 84, 60 Pac. 367. But see Com. *v.* Henry, 49 Pa. St. 530, where the duty of the particular officer to execute the lease was not absolutely mandatory and the writ was refused on the facts.

Reinstatement of lessee.— So the writ will lie to compel the land commissioner to reinstate relator where the former in contravention of his authority is treating the latter's lease as void. McDowell *v.* Terrell, (Tex. 1905) 87 S. W. 668; State *v.* Ross, 42 Wash. 439, 85 Pac. 29; State *v.* Callvert, 33 Wash. 380, 74 Pac. 573.

10. State *v.* Braden, 40 Minn. 174, 41 N. W. 817 (auditor acting as *ex-officio* state land commissioner not compelled to issue logging permit); State *v.* Whitcomb, 28 Minn. 50, 8 N. W. 902; Galveston, etc., Narrow-Gauge R. Co. *v.* Gross, 47 Tex. 428.

11. *Michigan.*— Beebe *v.* State Land Office Com'r, 137 Mich. 48, 100 N. W. 128, as to issue of certificate showing homestead entry.

Nebraska.— State *v.* Eaton, (1907) 110 N. W. 709; State *v.* Scott, 18 Nebr. 597, 26 N. W. 386; State *v.* Scott, 17 Nebr. 686, 24 N. W. 337, holding that the public land board cannot be compelled to accept the highest bid for the leasing of school lands except for abuse of discretion.

New York.— People *v.* Land Office, 149 N. Y. 26, 43 N. E. 418 [*reversing* 90 Hun 525, 36 N. Y. Suppl. 29]; New York *v.* Land Office, 25 Misc. 202, 55 N. Y. Suppl. 101.

enjoined by law.[12] Mandamus has been refused to compel the issuance of a patent where one for the same lands had already issued to another person,[13] to compel a sale where there is a dispute as between the state and another party as to the title,[14] or to compel a survey of lands located as vacant where it appears that part of the land included in the location has been confirmed to others, since the peremptory writ will not issue unless the party seeking it is entitled to all the relief sought.[15]

13. NOTARY PUBLIC. Where a notary fails to set forth in a certificate of acknowledgment the facts necessary to constitute a good certificate, it has been asserted that he may be compelled by mandamus to do so, if the facts exist to warrant such action.[16]

C. Executive Officers of United States — 1. SECRETARY OF STATE. Mandamus may issue to compel the secretary of state to perform a mere ministerial duty,[17] as to issue a commission to which a person is lawfully entitled;[18] but not to direct or control the secretary in the discharge of an executive duty involving the exercise of judgment or discretion.[19]

2. SECRETARY OF WAR. Mandamus will only lie against the secretary of war to enforce a ministerial duty as contradistinguished from a duty which is discretionary.[20] Moreover the duty must be peremptory and plainly defined.[21]

3. SECRETARY OF THE TREASURY. Mandamus lies to the secretary of the treasury to compel the performance of a purely ministerial duty, such as the delivery of a draft which has been issued in payment of a claim,[22] the payment

Pennsylvania.— Com. *v.* Cochran, 5 Binn. 87.

Texas.— Clark *v.* Terrell, 98 Tex. 15, 81 S. W. 4; Anderson *v.* Rogan, 93 Tex. 182, 54 S. W. 242 (writ not available to compel consent of commissioner to examination of papers, etc., on file in the land office); De Poyster *v.* Baker, 89 Tex. 155, 34 S. W. 106; Teat *v.* McGaughey, 85 Tex. 478, 22 S. W. 302; Cullem *v.* Latimer, 4 Tex. 329.

Utah.— Miles *v.* Wells, 22 Utah 55, 61 Pac. 534.

Washington.— State *v.* Ross, 39 Wash. 399, 81 Pac. 865.

Wyoming.— State *v.* State Bd. of Land Com'rs, 7 Wyo. 478, 53 Pac. 292, lease of state lands discretionary.

12. State *v.* Lanier, 47 La. Ann. 110, 16 So. 647; Thomson *v.* Baker, 90 Tex. 163, 38 S. W. 21; De Poyster *v.* Baker, 89 Tex. 155, 34 S. W. 106; Taylor *v.* Hall, 71 Tex. 206, 9 S. W. 148; Durrett *v.* Crosby, 28 Tex. 687; Puckett *v.* White, 22 Tex. 559; General Land Office *v.* Smith, 5 Tex. 471; Cullem *v.* Latimer, 4 Tex. 320; Bracken *v.* Wells, 3 Tex. 88; Glasscock *v.* General Land Office, 3 Tex. 51; Campbell *v.* Blanchard, 2 Tex. Unrep. Cas. 321. See also Hempstead *v.* Underhill, 20 Ark. 337.

13. Smithee *v.* Mosely, 31 Ark. 425. See also People *v.* Auditor of Public Accounts, 3 Ill. 567; Teat *v.* McGaughey, 85 Tex. 478, 22 S. W. 302; Tabor *v.* General Land Office, 29 Tex. 508.

14. Juencke *v.* Terrill, 98 Tex. 237, 82 S. W. 1025.

15. Roberts *v.* Davidson, 83 Ky. 279; Texas Mexican R. Co. *v.* Jarvis, 80 Tex. 456, 15 S. W. 1089. See also Winder *v.* Williams, 23 Tex. 601; Watkins *v.* Kirchain, 10 Tex. 375. But this is construed in the light of the fact that persons who owned part of the land were not parties, and it is held that if all such persons are before the court the writ will lie to compel a survey of less than that claimed. Schley *v.* Maddox, (Tex. Civ. App. 1893) 22 S. W. 998.

16. Wannall *v.* Kem, 51 Mo. 150.

Curing defective certificate by judicial proceeding generally see ACKNOWLEDGMENTS, 1 Cyc. 607 *et seq.*

17. U. S. *v.* Bayard, 5 Mackey (D. C.) 428, holding that when money is in the custody of the department of state to which the petitioner has a clear legal right, and by an act of congress the secretary is directed to pay it over to him, mandamus will lie to compel its payment.

18. Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60.

19. U. S. *v.* Hay, 20 App. Cas. (D. C.) 576 (holding that the judiciary has no power by mandamus or otherwise to compel the secretary of state or the president through the secretary of state to present and urge a claim of a citizen of this country against a foreign government to redress a wrong committed against him in such foreign country; the duty of righting such a wrong being a political one, appertaining to the executive and legislative departments of the government); U. S. *v.* Bayard, 4 Mackey (D. C.) 310; U. S. *v.* Blaine, 139 U. S. 306, 11 S. Ct. 607, 35 L. ed. 183.

20. U. S. *v.* Root, 22 App. Cas. (D. C.) 419; U. S. *v.* Lamont, 155 U. S. 303, 15 S. Ct. 97, 39 L. ed. 160; *Ex p.* Schaumburg, 21 Fed. Cas. No. 12,441, 1 Hayw. & H. 249. See also U. S. *v.* Root, 18 App. Cas. (D. C.) 239.

21. U. S. *v.* Lamont, 155 U. S. 303, 15 S. Ct. 97, 39 L. ed. 160, signing contract for performance of work by person already under contract to perform same work at lower price.

22. U. S. *v.* Windom, 19 D. C. 54.

of interest on audit certificates,[23] or the payment of claims audited by the court of claims and for which an appropriation has been made,[24] but not to control the exercise of his judicial discretion.[25] So the writ will not lie where the law does not both authorize[26] and require him to do what he is asked in the petition to be made to do[27] or where the writ would in effect amount to a suit against the government.[28]

4. Postmaster-General. The postmaster-general may be compelled by mandamus to perform a ministerial duty, as to credit an award made by the solicitor of the treasury,[29] or admit matter to the mails in clear cases,[30] or to reëstablish a post-office discontinued without lawful authority;[31] but not an executive act requiring the exercise of judgment.[32]

5. Secretary of the Navy. The discretion of the secretary of the navy in matters committed to his care in the ordinary discharge of his official duties cannot be controlled by mandamus.[33]

6. Secretary of the Interior and Subordinate Officials. Mandamus will not lie to control the official discretion or judicial acts of the secretary of the interior or his subordinate officials,[34] as for instance the discretion of the secretary of the interior or the commissioner of the land department in the issuance of a

23. Roberts *v.* U. S., 176 U. S. 221, 20 S. Ct. 376, 44 L. ed. 443 [*affirming* 13 App. Cas. (D. C.) 38].

24. Roberts *v.* Consaul, 24 App. Cas. (D. C.) 551.

25. U. S. *v.* Boutwell, 7 D. C. 64 [*affirmed* in 17 Wall. (U. S.) 604, 21 L. ed. 721] (payment of a salary increase, the treasurer having power to determine who may be entitled thereto); U. S. *v.* Guthrie, 17 How. (U. S.) 284, 15 L. ed. 102 (payment of territorial judge).

26. U. S. *v.* Boutwell, 3 MacArthur (D. C.) 172 (holding that without a specific appropriation, and congressional direction to pay, the writ will not lie); Kentucky *v.* Boutwell, 13 Wall. (U. S.) 526, 20 L. ed. 631 (writ to compel issuance of warrant after the time limited in the appropriation act for the appropriation to take effect had expired).

27. Reeside *v.* Walker, 11 How. (U. S.) 272, 13 L. ed. 693, holding that where, in a suit brought by the United States against a receiver of public money, a verdict and judgment is rendered for defendant on a set-off, a mandamus does not lie to compel the secretary of the treasury to credit defendant upon the books of the department with the amount of the verdict and to pay the same.

28. Mississippi *v.* Durham, 4 Mackey (D. C.) 235, holding that mandamus will not lie against an officer of the treasury department who refuses to allow and pay a claim against the United States for, however obviously without legal justification his refusal may be, a mandamus against him to compel such allowance and payment is none the less in effect a suit against the United States.

29. Kendall *v.* U. S., 12 Pet. (U. S.) 524, 9 L. ed. 1181.

30. Payne *v.* U. S., 20 App. Cas. (D. C.) 581, holding that the writ of mandamus is properly issued to compel the postmaster-general to admit to the mails as second-class mail matter a railway guide periodically published, where he has excluded it from the mail as second-class matter exclusively on the ground of its failure to comply with the requirement of a postal regulation that it must "consist of current news"; that characteristic of second-class matter not being required by Act Cong., March 3, 1879, c. 180 (20 U. S. St. at L. 355 [U. S. Comp. St. (1901) p. 354]), classifying mail matter.

31. U. S. *v.* Cortelyou, 26 App. Cas. (D. C.) 298.

32. U. S. *v.* Key, 3 MacArthur (D. C.) 337; Kendall *v.* Stokes, 3 How. (U. S.) 87, 789, 11 L. ed. 506, 833 (where an amount had been awarded in favor of a claimant, and the postmaster-general declined to credit the amount awarded, on the ground that he had no power to settle the claim, and no money to pay it with); *In re* Coleman, 131 Fed. 151 (holding that when a receiver in bankruptcy was authorized to carry on the business of publishing a newspaper with a view to preserving its good-will as an asset of the bankrupt's estate, but pending such publication the postmaster by direction of the postmaster-general prohibited the circulation of the paper through the mails as unmailable matter, mandamus would not be granted to reverse such determination, although the question whether the publication was objectionable might be the subject of a difference of opinion).

33. U. S. *v.* Chandler, 2 Mackey (D. C.) 527 (holding that mandamus will not issue to compel the secretary of the navy to expend a congressional appropriation to establish a coaling station at Chiriqui, on the Isthmus of Panama; his predecessor also having refused to authorize the expenditure, and such expenditure being discretionary with him); Brashear *v.* Mason, 6 How. (U. S.) 92, 12 L. ed. 357 (holding that mandamus will not lie against the secretary of the navy, at the instance of an officer in the navy to enforce payment of his pay); Decatur *v.* Paulding, 14 Pet. (U. S.) 497, 599, 10 L. ed. 559, 609.

34. Hitchcock *v.* U. S., 22 App. Cas. (D. C.) 275 (where mandamus was denied against

land patent to the relator,[35] in approving the selection and taking of land by the relator as an adopted Indian,[36] or in causing a survey to be made,[37] and cannot be used to review the acts of the secretary of the interior and thus draw into the jurisdiction of the courts matters which are within the exclusive cognizance of the land department.[38] But after a patent has been regularly made out and recorded its delivery may be compelled.[39] Moreover, it is held that when all the proper prerequisites have been complied with, and all the preliminary steps have been taken whereby a party has in law become entitled to a patent, and nothing remains to be done but to issue the patent, it cannot arbitrarily and without just cause be withheld and its execution and delivery may be enforced by mandamus.[40] It is held that the writ will not lie to review the decision of the commissioner of pensions, where he adopts an interpretation of the law adverse to the relator and his decision is confirmed by the secretary of the interior,[41] or where the law has not been construed by the secretary, but is left open to the commissioner to construe.[42] But the rule is otherwise where the decision of the commissioner is overruled by the secretary of the interior, and the commissioner of pensions refuses to carry out the decision of the secretary.[43] Mandamus lies to compel the commissioner of patents to perform his ministerial duties.[44] Thus the commissioner of patents, after determining that a patent shall issue, acts ministerially in preparing the patent for the signature of the secretary of the interior, and in countersigning it and mandamus lies to compel the performance of these acts.[45] So mandamus lies to compel the commissioner of patents to furnish a certified copy of an abandoned or rejected application for a patent whenever a reasonable suggestion of its necessity for the purpose of evidence is made by the person requesting it.[46] But the action of a commissioner of patents in the exercise of his discretionary powers,[47] as for instance, in awarding or refusing a patent for an invention to an applicant, cannot be controlled by mandamus.[48] Nor will the writ be granted where the applicant has not complied with the conditions prerequisite to the

the secretary of the interior and the commissioner of Indian affairs to compel the payment to an Indian of money realized from the sale of timber on land assigned to him in severalty); New Orleans *v.* Paine, 147 U. S. 261, 13 S. Ct. 303, 37 L. ed. 162; Gaines *v.* Thompson, 7 Wall. (U. S.) 347, 19 L. ed. 62; Castro *v.* Hendricks, 23 How. (U. S.) 438, 16 L. ed. 576.

35. U. S. *v.* Hitchcock, 21 App. Cas. (D. C.) 252 [*affirmed* in 190 U. S. 316, 23 S. Ct. 698, 47 L. ed. 1074] (where the secretary of the interior had decided that an applicant failed to show by proper averments that the land was open for settlement); Cox *v.* U. S., 9 Wall. (U. S.) 298, 19 L. ed. 579; U. S. *v.* Edmunds, 5 Wall. (U. S.) 563, 18 L. ed. 692.

Public land generally see PUBLIC LANDS.

36. U. S. *v.* Hitchcock, 19 App. Cas. (D. C.) 347; U. S. *v.* Hitchcock, 205 U. S. 80, 27 S. Ct. 423 [*affirming* 26 App. Cas. (D. C.) 290].

37. U. S. *v.* Lamar, 116 U. S. 423, 6 S. Ct. 424, 29 L. ed. 677.

38. *In re* Emblen, 161 U. S. 52, 16 S. Ct. 487, 40 L. ed. 613.

39. U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167.

40. U. S. *v.* Hitchcock, 19 App. Cas. (D. C.) 333.

41. U. S. *v.* Hitchcock, 19 App. Cas. (D. C.) 237, 503.

42. U. S. *v.* Raum, 135 U. S. 200, 10 S. Ct. 820, 34 L. ed. 105 [*affirming* 7 Mackey (D. C.) 556]. See also Lochren *v.* U. S., 6 App. Cas. (D. C.) 486.

43. U. S. *v.* Black, 128 U. S. 40, 9 S. Ct. 12, 32 L. ed. 354.

44. See cases cited *infra*, this note.

Forwarding appeal to board of examiners from primary examiner.— Mandamus is the proper remedy where the commissioner of patents has refused to require the primary examiner to forward an appeal to the board of examiners in chief to review the ruling of the primary examiner requiring the petitioner to cancel certain of the claims in his application. *Ex p.* Frasch, 192 U. S. 566, 24 S. Ct. 424, 48 L. ed. 564; U. S. *v.* Allen, 192 U. S. 543, 24 S. Ct. 416, 48 L. ed. 555.

45. Butterworth *v.* U. S., 112 U. S. 50, 5 S. Ct. 25, 28 L. ed. 656 [*affirming* 3 Mackey (D. C.) 229].

46. U. S. *v.* Hall, 7 Mackey (D. C.) 14, 1 L. R. A. 738.

47. Holloway *v.* Whiteley, 4 Wall. (U. S.) 522, 18 L. ed. 335, reissue of patent to assignee.

Trade-marks.— The duty of the commissioner of patents to register trade-marks is judicial, and mandamus will not lie to control it. Seymour *v.* U. S., 2 App. Cas. (D. C.) 240.

Registry of labels.— Allen *v.* U. S., 22 App. Cas. (D. C.) 271.

48. Butterworth *v.* U. S., 112 U. S. 50, 5 S. Ct. 25, 28 L. ed. 656.

issuance of a patent,[49] or where the relator is in possession of another adequate remedy.[50]

D. State Legislatures or Legislative Officers. The courts will not interfere by mandamus proceedings with the legislative department of the government in the legitimate exercise of its powers,[51] except to enforce mere ministerial acts required by law to be performed by some officer thereof.[52] The writ will not be employed against a legislative officer in respect to a matter arising in the regular course of legislation and requiring the exercise of judgment and discretion.[53] Since the writ of mandamus does not confer authority upon the officer to whom it is directed, it will not lie to compel a legislative officer whose duties are purely clerical to perform a duty imposed upon the legislative body.[54] In the same way the writ will not lie to compel a legislative officer to perform a duty required to be performed under the supervision and control of the legislative body.[55] The courts by means of writs of mandamus operating upon the officers of legislative bodies may not supervise the making up of the records of the proceedings of those bodies or cause alterations to be made in such records as prepared by the officer whose duty it was to prepare them;[56] nor may they, in a case not involving the private interests of parties, determine whether a particular body of persons

49. U. S. *v.* Marble, 2 Mackey (D. C.) 12.

50. Seymour *v.* U. S., 10 App. Cas. (D. C.) 567.

51. *Ex p.* Echols, 39 Ala. 698, 88 Am. Dec. 749; State *v.* Bolte, 151 Mo. 362, 52 S. W. 262, 74 Am. St. Rep. 537.

Expulsion of member of legislature.— The courts cannot interfere by mandamus with the exercise by the legislature of its power to expel members. French *v.* State Senate, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556; State *v.* Bersch, 83 Mo. App. 657.

Determining title to office of governor.— When neither the speaker of the house of delegates, nor the joint assembly of both houses of the legislature, convened under section 3, article 7, of the constitution for the purpose of opening and publishing the returns of the election for the office of governor, does in fact open and publish the returns in respect to said office, or declare any person elected to that office, it has been held that the supreme court cannot by mandamus adjudge the person who appears from the returns certified to the speaker of the house to have received the highest number of votes for that office to be the governor, and compel the person who was the governor, during the preceding term, to deliver the office and its insignia to him. Goff *v.* Wilson, 32 W. Va. 393, 9 S. E. 26, 3 L. R. A. 58.

52. *Ex p.* Pickett, 24 Ala. 91 (holding that mandamus may be awarded against the speaker of the state house of representatives to compel him to certify to the controller of public accounts the amount to which the petitioner is entitled as a member of the house for mileage or per diem compensation); State *v.* Elder, 31 Nebr. 169, 47 N. W. 710, 10 L. R. A. 796 (writ to enforce ministerial duty of speaker to open and publish returns of the general election); State *v.* Moffitt, 5 Ohio 358 (mandamus held to lie to the speaker of the house to compel him to certify the election and appointment of officers); Wolfe *v.* McCaull, 76 Va. 876 (writ to compel the keeper of the rolls of the house of delegates to print and publish a bill passed by the legislature, and upon request to furnish a copy thereof properly certified). See also People *v.* Morton, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231 [*reversing* 24 N. Y. App. Div. 563, 49 N. Y. Suppl. 760], where it was intimated that mandamus will lie against the lieutenant-governor and speaker of the assembly as a member of an appointing board, during the legislative recess, while their exemption from arrest does not exist.

Mandamus will not lie to compel a stenographer to furnish a transcript of the report of a legislative investigation before a legislative committee, he being a mere clerk or servant, and not an officer. Bailey *v.* Oviatt, 46 Vt. 627.

53. *Ex p.* Echols, 39 Ala. 698, 88 Am. Dec. 749 (holding that mandamus will not be awarded to compel the speaker of the house of representatives to send to the senate a bill alleged to have passed the house); State *v.* Bolte, 151 Mo. 362, 52 S. W. 262, 74 Am. St. Rep. 537 (holding that the writ will not lie to the presiding officer to treat a bill as passed which he has declared lost).

54. Turnbull *v.* Giddings, 95 Mich. 314, 54 N. W. 887, 19 L. R. A. 853, holding that no writ will lie to the president and the clerk of the senate to compel them to insert a certain protest in the journal.

55. Scarborough *v.* Robinson, 81 N. C. 409, holding that no writ will lie to compel the speaker of the house and president of the senate to sign a bill left unsigned upon final adjournment.

The rule is otherwise where the ministerial duty of the officer is not subject to the control of the legislative body, although the duty was to be performed in the presence of such body. State *v.* Elder, 31 Nebr. 169, 47 N. W. 710, 10 L. R. A. 796.

56. Clough *v.* Curtis, 134 U. S. 361, 10 S. Ct. 573, 33 L. ed. 945 [*affirming* 2 Ida. (Hash.) 523, 22 Pac. 8]. See also Wise *v.* Bigger, 79 Va. 269.

assuming to exercise legislative functions constitutes in fact a lawful legislative assembly.[57]

VI. MANDAMUS TO MUNICIPAL AND OTHER PUBLIC CORPORATIONS AND OFFICERS.

A. Establishment of Corporation in General — 1. Boundaries. Duties with relation to a change of municipal boundaries may be enforced by mandamus where no discretion is vested in the body or officers charged with their performance.[58] But mandamus will not issue to compel the appointment of an agent to settle the boundaries between districts, where the duty is not mandatory.[59] A commission appointed to settle the boundary may be compelled to make a return, the duty being ministerial.[60]

2. Location of County-Seat. The proceedings by which the location or relocation of a county-seat are to be effected are usually fully prescribed by statute;[61] and where the provisions of such statutes have been complied with, the duty of the proper officer or officers to act is generally regarded as ministerial and may be enforced by mandamus.[62] Where, however, a discretion is vested in such officers, mandamus will not issue to control their actions,[63] unless they have refused to exercise their discretion,[64] or have abused it.[65] In any event there must be no other adequate remedy.[66] There must have been an actual default[67] or refusal[68] and all conditions precedent must have been complied with.[69] Persons who have

57. Clough *v.* Curtis, 134 U. S. 361, 10 S. Ct. 573, 33 L. ed. 945 [*affirming* 2 Ida. (Hasb.) 523, 22 Pac. 8].

58. People *v.* San Diego, 85 Cal. 369, 24 Pac. 727; Young *v.* Carey, 184 Ill. 613, 56 N. E. 960 [*reversing* 80 Ill. App. 601]; Roberts *v.* People, 93 Ill. App. 645; Lebanon *v.* Creel, 109 Ky. 363, 59 S. W. 16, 22 Ky. L. Rep. 865; Steele *v.* Willis, 64 S. W. 417, 23 Ky. L. Rep. 826 (mayor and council must exclude territory on proper petition).

Adjustment of indebtedness and payment of claims see *infra*, VI, U, 1, g.

59. *In re* Boundary Line Eastern, etc., Dist., (M. T. 6 Vict.) 3 R. & J. 2215.

60. Delong *v.* Striker, (E. T. 3 Vict.) 1 R. & J. Dig. 618.

61. See the statutes of the several states. And see also Counties.

62. Territory *v.* Mohave County, 2 Ariz. 248, 12 Pac. 730 (holding that mandamus will issue to compel the canvass of votes cast at an election upon the location of a county-seat); U. S. *v.* Dubuque County, Morr. (Iowa) 31 (holding that a board of county commissioners might be compelled to enter upon its minutes the result of the election).

Calling election.— A plain statutory duty to call an election for the relocation of a county-seat may be compelled by mandamus. Barry *v.* State, 57 Nebr. 464, 77 N. W. 1096; State *v.* Crabtree, 35 Nebr. 106, 52 N. W. 842, where a petition, after deducting the names of all unqualified signers, contained a sufficient number of signatures.

63. Territory *v.* Mohave County, 2 Ariz. 248, 12 Pac. 730; State *v.* Nelson, 21 Nebr. 572, 32 N. W. 589 (determination of a board of county commissioners as to the signing by a sufficient number of qualified electors of a petition for an election for relocation); State *v.* Nemaha County, 10 Nebr. 32, 4 N. W. 373 (error, if any, in rejecting names from a petition for an election to relocate); State *v.* Bonner, 44 N. C. 257 (holding that the discretion of commissioners appointed to determine the site for the county-seat will not be interfered with, although they may be compelled to proceed). But see State *v.* Marshall County Judge, 7 Iowa 186, holding that where the canvassers reject returns that should be counted, mandamus in a proper legal sense is a command not to recanvass, but to canvass the returns of the election.

64. State *v.* Bonner, 44 N. C. 257.

65. State *v.* Geib, 66 Minn. 266, 68 N. W. 1081 (holding that mandamus will issue to correct an error of law committed by a board of county supervisors in illegally striking the names of electors from a petition for the removal of a county-seat); State *v.* Polk County, 88 Wis. 355, 60 N. W. 266 (where a county board was compelled to compare signatures upon a petition with the poll lists, and also to act upon a second petition).

66. State *v.* Stockwell, 7 Kan. 98; State *v.* Stewart, 8 Ohio Dec. (Reprint) 171, 6 Cinc. L. Bul. 188, holding that mandamus would lie to compel a clerk of court to count a voting precinct which the canvassing board threw out.

Other adequate remedy as preventing mandamus in general see *supra*, II, D.

67. State *v.* Ramsey, 8 Nebr. 286, holding that a board of supervisors would not be compelled to reject certain votes cast at an election, and call a new election, where it was not their duty to canvass the vote.

68. Double *v.* McQueen, 96 Mich. 39, 55 N. W. 564, holding that mandamus to compel the canvass of the votes would not lie where there had been no refusal.

69. Condit *v.* Newton County, 25 Ind. 422 (so holding where a bond to convey a site

been guilty of fraud with regard to a county-seat election are not entitled to mandamus to enforce its result.[70] The application for mandamus to compel the submission of the question of removal is of such local interest that it will not ordinarily permit an appellate court to take original jurisdiction.[71]

3. Plats and Additions. Where the provisions of existing statutes and ordinances with relation thereto have been fully complied with in surveying and platting an addition to a municipality, the duty of the council or other officer with power to act under the circumstances to approve the plat becomes ministerial and may be enforced by mandamus.[72]

4. Changes in Grade of Municipality. A legal duty to reorganize a city of a certain grade, as a city of a higher grade, may be enforced by mandamus.[73]

B. Governing Bodies — 1. Councils or Other City Legislative Bodies. Where a clear and imperative duty is imposed by law upon a municipal council, mandamus will lie to compel its performance.[74] Under this rule a city council may be compelled by mandamus to organize,[75] or to meet,[76] or two branches of a council may be compelled to meet together for the purpose of joint action;[77] and also it has been held the passage of ordinances may be compelled.[78] But mandamus is not a proper remedy to control the act of a municipal body when acting within the scope of its legal powers.[79]

2. Boards of Supervisors. Mandamus will issue to compel a board of county commissioners or supervisors to perform a plain duty prescribed by law,[80] but matters as to which they are vested with discretion will not be controlled.[81] Where a board of supervisors have neglected to perform any duty required of them at their annual meeting they may be compelled by mandamus to meet again and perform it.[82] Or they may be compelled to reconvene and correct an

was made a condition precedent, and although a deed to the land was brought into court); Kaufer *v.* Ford, (Minn. 1907) 110 N. W. 364 (holding that mandamus will not issue to compel a county board of supervisors to convene and decide upon removal, without notice to the voters as required by statute); State *v.* Scott County, 42 Minn. 284, 44 N. W. 64 (holding that the court cannot be compelled to act upon a petition for a change of the county-seat where notice had not been given).

70. State *v.* Marston, 6 Kan. 524, holding that relators who have participated in the fraud cannot enforce the removal of the county officers.

71. State *v.* Juneau County Sup'rs, 38 Wis. 554, where also the relator had been guilty of laches.

Original jurisdiction of appellate court see *supra*, IV, A, 8.

72. People *v.* Mounds, 122 Ill. App. 449; Owen *v.* Moreland, 132 Mich. 477, 93 N. W. 1068; Van Husan *v.* Heames, 91 Mich. 519, 52 N. W. 18; Campau *v.* Detroit Bd. of Public Works, 86 Mich. 372, 49 N. W. 39; State *v.* Chase, 42 Mo. App. 343.

A surveyor's duty to record a plat complying with the law is ministerial. U. S. *v.* Forsyth, 5 Mackey (D. C.) 483.

73. State *v.* Faulkner, 20 Kan. 541, holding, however, that the mayor and council would not be compelled to organize a city of the third class as a city of the second class, until a legal census had been taken.

74. People *v.* New York, 45 Barb. (N. Y.) 473 (holding that the common council might be compelled to issue stock for the erection of a public market); Caven *v.* Coleman, (Tex. Civ. App. 1906) 96 S. W. 774 (appointment of examining board of plumbers).

75. Com. *v.* Ayre, 5 Pa. Dist. 575, 8 Kulp 243.

76. Com. *v.* Olyphant Borough, 2 Lack. Leg. N. (Pa.) 234.

Individual members cannot be compelled to attend. People *v.* Whipple, 41 Mich. 548, 49 N. W. 922.

77. Littlefield *v.* Newell, 85 Me. 246, 27 Atl. 110; Atty.-Gen. *v.* Lawrence, 111 Mass. 90; Lamb *v.* Lynd, 44 Pa. St. 336.

78. Huey *v.* Waldrop, 141 Ala. 318, 37 So. 380, holding that council must pass ordinance preventing animals running at large.

79. State *v.* McAllister, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343.

Eminent domain.— Mandamus will not lie to revise judgment of mayor and aldermen as to damages sustained by construction of railroad. Smith *v.* Boston, 1 Gray (Mass.) 72.

80. State *v.* Tippecanoe County, 131 Ind. 90, 30 N. E. 892; Perry *v.* Chatham County, 130 N. C. 558, 41 S. E. 787, holding that county commissioners will be compelled to enforce a statute for the fencing in of lands used for the pasturing of stock.

Consideration of a petition for the purpose of increasing the number of county commissioners may be compelled. State *v.* Menzie, 17 S. D. 535, 97 N. W. 745.

81. People *v.* McCormick, 106 Ill. 184 (holding that a county board would not be compelled to collect moneys from a former treasurer); State *v.* Tippecanoe County, 131 Ind. 90, 30 N. E. 892; People *v.* Livingston County, 26 Barb. (N. Y.) 118, 12 How. Pr. 204.

82. People *v.* Chenango. 8 N. Y. 317, where

error.[83] A board of county commissioners may be compelled to make an award in eminent domain proceedings.[84]

3. Record of Proceedings. A public board or city council may be compelled to make a record of its proceedings,[85] or to correct such records;[86] and likewise an officer charged with the duty of keeping such records may be compelled to make and amend them;[87] but mandamus will not go against an officer who does not have control of the record,[88] or where there is another adequate remedy.[89]

C. Title, Possession, and Incidents of Public Office[90]**—1. Appointment—a. In General.** Where the proper officer refuses to make an appointment, he may be compelled by mandamus to perform his duty by appointing some person,[91] although the writ will not lie to compel the appointment of a particular person, where the appointing power, as is usually the case, is vested with discretion in this regard,[92] unless such discretion is abused or exercised with manifest injus-

a board was required to meet and issue warrants for military commutation.

83. People *v.* Brinkerhoff, 68 N. Y. 259, where a board was compelled to reconvene and pass a resolution which had in fact been passed, although erroneously declared lost.

84. Dodge *v.* Essex County Com'rs, 3 Metc. (Mass.) 380.

Mandamus with relation to eminent domain proceedings in general see *supra*, IV, B, 4, i.

85. Milburn *v.* Glynn County, 112 Ga. 160, 37 S. E. 178 (holding that the entry of a contract upon the records of a board of highway commissioners could be compelled); Warren County *v.* State, 15 Ind. 250 (county board).

86. Columbus Water-Works Co. *v.* Columbus, 46 Kan. 666, 26 Pac. 1046; State *v.* Boyden, 18 S. D. 388, 100 N. W. 763.

87. Hill *v.* Goodwin, 56 N. H. 441, holding that a town-clerk might be compelled to record or correct the record of the proceedings of a town-meeting. And see Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590; *In re* Calne, Str. 948, where affidavit being made that the steward who kept the public books had refused to produce them at the corporate meeting to enter the elections of their members, a mandamus was granted to him to attend with the books at the next corporate assembly.

88. Wigginton *v.* Markley, 52 Cal. 411.

89. White *v.* Burkett, 119 Ind. 431, 21 N. E. 1087.

90. Mandamus in connection with elections and proceedings relating thereto see *infra*, VI, D.

Mandamus to compel county to furnish county official with office see Counties, 11 Cyc. 490 note 46.

Public officer generally see Public Officers.

91. *Alabama.*— Taylor *v.* Kolb, 100 Ala. 603, 13 So. 779.

Michigan.— Dingwall *v.* Detroit, 82 Mich. 568, 46 N. W. 938.

Missouri.— State *v.* Gasconade County Ct., 25 Mo. App. 446.

New York.— Kelly *v.* Van Wyck, 35 Misc. 210, 71 N. Y. Suppl. 814.

Pennsylvania.— Com. *v.* James, 214 Pa. St. 319, 63 Atl. 743; Lamb *v.* Lynd, 44 Pa. St. 336.

England.— Reg. *v.* Leicester Guardians, [1899] 2 Q. B. 632, 68 L. J. Q. B. 945, 81 L. T. Rep. N. S. 559.

See 35 Cent. Dig. tit. "Mandamus," § 158.

Where the statute conferring the power of appointment is directory merely, as where other provision is made by statute in case of the failure of the appointing power to make the appointment, the writ will not lie to compel an appointment. Davisson *v.* Solano County, 70 Cal. 612, 11 Pac. 680. See also Johnston *v.* Mitchell, 120 Mich. 589, 79 N. W. 812.

Mandamus to compel the filling of a vacancy will not lie, where the cause relied upon as creating a vacancy, as for instance the failure of a person elected to take the oath of office, furnishes a cause of forfeiture merely, and a vacancy can be created only by a direct proceeding for that purpose. People *v.* Mt. Vernon, 59 Hun (N. Y.) 204, 13 N. Y. Suppl. 447.

Nomination to office.— No exception lies to a refusal to grant a writ of mandamus to the mayor of a city to compel him to make a nomination to the board of aldermen for the office of chief of police, while a person is holding that office *de facto*, and no one but the incumbent is claiming it; and while an information, in the nature of a quo warranto, is pending to try his title to the office. Atty.-Gen. *v.* New Bedford, 128 Mass. 312.

92. Taylor *v.* Kolb, 100 Ala. 603, 13 So. 779; Davisson *v.* Solano County, 70 Cal. 612, 11 Pac. 680; People *v.* Casey, 66 N. Y. App. Div. 211, 72 N. Y. Suppl. 945 (holding that the determination of the question of the physical qualifications of an applicant for membership in the police force is one involving the exercise of discretion); People *v.* Alms House Com'rs, 65 Hun (N. Y.) 169, 20 N. Y. Suppl. 21; People *v.* Wendell, 57 Hun (N. Y.) 362, 10 N. Y. Suppl. 587; People *v.* Little Falls, 4 Silv. Sup. (N. Y.) 538, 8 N. Y. Suppl. 512; Matter of Rensselaer, 31 Misc. (N. Y.) 512, 64 N. Y. Suppl. 704; People *v.* Ballston Spa, 19 Misc. (N. Y.) 671, 44 N. Y. Suppl. 471; People *v.* Cohocton, 17 Misc. (N. Y.) 652, 41 N. Y. Suppl. 449; People *v.* Summers, 9 N. Y. Suppl. 700; Com. *v.* James, 214 Pa. St. 319, 63 Atl. 743; Com. *v.* Perkins, 7 Pa. St. 42; Respublica *v.* Philadelphia, 1 Yeates (Pa.) 476; Boggs *v.* Monongahela City, 22 Pa. Co. Ct. 640. See

tice.[93] But a contrary rule obtains where the duty of appointment is ministerial merely, as for instance where the power of selection is vested in another officer.[94]

b. Issuance of Commission. Where the issuance of a commission to an applicant for office is a mere ministerial duty, mandamus lies to compel it.[95]

2. Administering Oath of Office. Mandamus is the proper remedy to compel the proper official to administer the oath of office to[96] or to qualify the person entitled to the office.[97] But the writ has been refused for this purpose where the effect of its issuance would be to control the discretion vested in defendant;[98] where it appeared on the petition of the applicant that he was constitutionally ineligible to the office to which he had been elected;[99] where in consequence of the failure of the applicant to take the oath or affirmation within the time required by law, defendants had appointed another person to fill the office;[1] or where a judgment of ouster had been entered against relator in proceedings in the nature of quo warranto.[2]

3. Approval of Official Bonds. The approval of official bonds is said by some of the authorities to be a judicial duty,[3] and by others to be a ministerial duty,[4] or partly judicial and partly ministerial.[5] The exercise of the discretion of the proper authorities in determining the sufficiency of a bond and the sureties thereon will not be interfered with by mandamus proceedings[6] in the absence of proof of an abuse of discretion.[7] But the proper authorities may be compelled to consider a bond presented to them and to accept or reject it as it may or may not

also Com. v. Philadelphia, 2 Pars. Eq. Cas. (Pa.) 220.

Approval of appointment not compelled by mandamus.—Wintz v. Charleston Dist. Bd. of Education, 28 W. Va. 227.

93. Dingwall v. Detroit, 82 Mich. 568, 46 N. W. 938; State v. St. Louis Public Schools, 134 Mo. 296, 35 S. W. 617, 56 Am. St. Rep. 503.

94. Fort v. Howell, 5 N. J. L. 541, 34 Atl. 751.

95. Hubert v. Auvray, 6 La. 595; Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60. See also State v. Wrotnowski, 17 La. Ann. 156.

Certifying promotion as captain of police on pay-roll.—People v. Ogden, 41 Misc. (N. Y.) 246, 84 N. Y. Suppl. 73.

96. Huey v. Jones, 140 Ala. 479, 37 So. 193; Blake v. Ada County, 5 Ida. 163, 47 Pac. 734; People v. Straight, 128 N. Y. 545, 28 N. E. 762; *Ex p.* Richards, 13 N. Brunsw. 131.

97. Day v. Fleming County Ct., 3 B. Mon. (Ky.) 198; Applegate v. Applegate, 4 Metc. (Ky.) 236; People v. Straight, 128 N. Y. 545, 28 N. E. 762; *Ex p.* Heath, 3 Hill (N. Y.) 42.

98. Day v. Fleming County Ct., 3 B. Mon. (Ky.) 198.

99. Atchison v. Lucas, 83 Ky. 451.

1. Com. v. Philadelphia County Com'rs, 6 Whart. (Pa.) 476.

2. King v. Serle, 8 Mod. 332.

3. *Ex p.* Thompson, 52 Ala. 98; *Ex p.* Harris, 52 Ala. 87, 23 Am. Rep. 559 [*overruling* Beebe v. Robinson, 52 Ala. 66; *Ex p.* Candee, 48 Ala. 386; State v. Ely, 43 Ala. 568]; State v. Teal, 72 Minn. 37, 74 N. W. 1024; Shotwell v. Covington, 69 Miss. 735, 12 So. 260; Swan v. Gray, 44 Miss. 393; Smith v. Holland, 6 Del. Co. (Pa.) 210.

4. Bosely v. Woodruff County Ct., 28 Ark. 306; Speed v. Detroit, 97 Mich. 198, 56 N. W. 570.

5. State v. Lafayette County Ct., 41 Mo. 545; State v. Howard County Ct., 41 Mo. 247; State v. Lafayette County Ct., 41 Mo. 221.

6. *Alabama.*— *Ex p.* Thompson, 52 Ala. 98; Beebe v. Robinson, 52 Ala. 66.

Colorado.—Arapahoe County v. Crotty, 9 Colo. 318, 12 Pac. 151.

Illinois.— People v. School Trustees, 42 Ill. App. 60.

Massachusetts.— Keough v. Holyoke, 156 Mass. 403, 31 N. E. 387.

Minnesota.— State v. Teal, 72 Minn. 37, 74 N. W. 1024.

Mississippi.— Shotwell v. Covington, 69 Miss. 735, 12 So. 260; Swan v. Gray, 44 Miss. 393.

New Jersey.— Conger v. Middlesex County, 55 N. J. L. 112, 25 Atl. 275.

New York.— Matter of Reddish, 45 N. Y. App. Div. 37, 60 N. Y. Suppl. 1111.

See 33 Cent. Dig. tit. "Mandamus," § 147.

7. The writ may issue to compel the proper authorities to proceed according to a sound and just discretion and to prevent the exercise of it in an unjust and arbitrary manner. Cate v. Ross, 2 Duv. (Ky.) 243; State v. Lafayette County Ct., 41 Mo. 545; State v. Howard County Ct., 41 Mo. 247; State v. Lafayette County Ct., 41 Mo. 221; Sikes v. Bladen County Com'rs, 72 N. C. 34; State v. Franklin County, 1 Ohio Cir. Ct. 194, 1 Ohio Cir. Dec. 106. See also Houseman v. Com., 100 Pa. St. 122; Nelson v. Edwards, 55 Tex. 389. *Compare* Shotwell v. Covington, 69 Miss. 735, 12 So. 260.

Arbitrary requirement of approval of other official.— Where the proper official in accordance with a rule of his office adopted without authority refuses to approve the bond because the form of the bond had not been

be satisfactory to them and in the form required by law.[8] Moreover it is held that mandamus will lie to compel approval, where the sufficiency of the bond and its sureties is not in dispute and there is *prima facie* evidence of the relator's title to office, it being held that in such case all inquiry as to relator's title is barred and that a refusal to approve based on relator's lack of title will be no defense.[9]

4. Enforcement of Civil Service Laws[10] — a. In General. Under civil service laws it has been held that mandamus lies to compel civil service commissioners to entertain and consider the application of the relator for a position in the service,[11] to submit to the appointing officer the proper certificates as to the eligibility of candidates,[12] or to replace on the eligible list a name which they have unlawfully

approved by the city counselor, mandamus lies to compel approval. State *v.* Shannon, 133 Mo. 139, 33 S. W. 1137. See also Com. *v.* Chittenden, 2 Pa. Dist. 804, 13 Pa. Co. Ct. 362.

8. *Arkansas.*— Bosely *v.* Woodruff County Ct., 28 Ark. 306.

Massachusetts.— Keough *v.* Holyoke, 156 Mass. 403, 31 N. E. 387.

Missouri.— State *v.* Lafayette County, 41 Mo. 545.

New York.— See People *v.* Green, 50 How. Pr. 500 [*affirmed* in 64 N. Y. 656].

North Carolina.—Bennett *v.* Swain County, 125 N. C. 468, 34 S. E. 632.

Ohio.— State *v.* Belmont County Com'rs, 31 Ohio St. 451, holding that the proper authorities may be compelled to act with reasonable promptness.

See 33 Cent. Dig. tit. "Mandamus," §§ 147, 148.

Cancellation of bonds.— In State *v.* Judge Orleans Parish Civ. Dist. Ct., 34 La. Ann. 74, it was held that mandamus lies to compel the district judge to proceed with the trial of oppositions to applications made to the governor for the cancellation of bonds of public officials.

Discretion of tribunal as to time for assembling.— The commissioners' court, after it has canvassed the returns and declared the election of a county officer, and the county judge has issued to him a certificate of his election, cannot be compelled by mandamus to act at the same term on his bond, instead of at a subsequent day which it has fixed upon for assembling and considering the bonds of all the county officers, although there may be no reason for the delay, since the statute fixes no time in which the bonds shall be approved, and the court has a discretion as to when it shall meet and perform its duties. Luckey *v.* Short, 1 Tex. Civ. App. 5, 20 S. W. 723.

9. *Indiana.*— Copeland *v.* State, 126 Ind. 51, 25 N. E. 866; State *v.* Warwick County, 124 Ind. 554, 25 N. E. 10, 8 L. R. A. 607 (no defense that relator elected by corrupt means); Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 49. *Compare* Knox County *v.* Johnson, 124 Ind. 145, 24 N. E. 148, 19 Am. St. Rep. 88, 7 L. R. A. 684 [*distinguishing* Boone County *v.* State, 61 Ind. 379].

Massachusetts.— See Keough *v.* Holyoke, 156 Mass. 403, 31 N. E. 387.

Michigan.— Atty.-Gen. *v.* Corliss, 98 Mich. 372, 57 N. W. 410; Speed *v.* Detroit, 97 Mich. 198, 56 N. W. 570.

Missouri.— State *v.* Shannon, 133 Mo. 139, 33 S. W. 1137; Beck *v.* Jackson, 43 Mo. 117; State *v.* Wear, 37 Mo. App. 325.

New Jersey.— Stokes *v.* Camden County, 35 N. J. L. 217. *Compare In re* Prickett, 20 N. J. L. 134.

New York.— People *v.* Stout, 11 Abb. Pr. 17. See also People *v.* Green, 50 How. Pr. 500 [*affirmed* in 64 N. Y. 656].

Pennsylvania.— Com. *v.* Philadelphia, 15 Pittsb. Leg. J. 337, no defense that contest over election pending.

Utah.— Brown *v.* Atkin, 1 Utah 277.

See 33 Cent. Dig. tit. "Mandamus," §§ 147, 148.

Compare State *v.* New Orleans, 49 La. Ann. 1322, 22 So. 354.

Where in contest proceedings a sheriff has been found not to have been elected, it was held that the writ would not lie to compel the approval of his bond. Lewis *v.* Marion County Com'rs, 14 Ohio St. 515.

Failure to file bond within required time.— In some of the decisions it is held that mandamus will not lie to compel the proper authorities to approve a bond where the ground of their refusal is that the bond was not filed within the time provided by statute and therefore that the office is vacant. *Ex p.* Harris, 52 Ala. 87, 23 Am. Rep. 559; Knox County *v.* Johnson, 124 Ind. 145, 24 N. E. 148, 19 Am. St. Rep. 88, 7 L. R. A. 684 [*distinguishing* Boone County *v.* State, 61 Ind. 379]; Lowe *v.* Phelps, 14 Bush (Ky.) 642. But a different rule has been declared in other jurisdictions. Bosely *v.* Woodruff County Ct., 28 Ark. 306; State *v.* Lafayette County Ct., 41 Mo. 545.

10. **Restoration of officer or employee discharged in violation of civil service laws** see *infra*, VI, C, 7, c.

11. People *v.* Wheeler, 2 N. Y. St. 656.

12. People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; People *v.* Knauber, 43 N. Y. App. Div. 342, 60 N. Y. Suppl. 298, holding, however, that the duty of the commissioners is performed when they certify that the relator is qualified by both merit and fitness to be placed upon the eligible list, and that they cannot be compelled to certify that the relator is entitled to be appointed to the position for which he was examined.

removed therefrom.[13] So it has been held that the writ will lie to compel the proper official to notify the commissioners of any vacancies in the service,[14] or to call for a list of names eligible for appointment.[15]

b. Classifications by Civil Service Commissioners. The authorities are not harmonious on the question whether mandamus will lie to review the decisions of civil service commissioners in making classifications in the service, although the tendency of the later decisions is to the effect that the action of civil service commissioners in making classifications is subject to at least a limited and qualified control to be exercised by mandamus.[16]

c. Enforcement of Preference Rights. Mandamus has been held not to be the proper remedy to enforce a preference required by statute to be given to honorably discharged soldiers, sailors, etc., in appointments to public office or employment in the public service.[17]

5. Accepting Office and Assuming Duties. Mandamus will lie to compel the acceptance of a municipal office by one who, possessing the requisite qualifica-

Certification from list illegally made up.— In People *v.* Syracuse, 26 Misc. (N. Y.) 522, 57 N. Y. Suppl. 617, it was held that mandamus would not lie to compel a certification where the list from which the relator seeks to have his name certified for appointment was improperly and illegally made up by the civil service board.

13. People *v.* Cobb, 13 N. Y. App. Div. 56, 43 N. Y. Suppl. 120.

14. People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775.

15. People *v.* Syracuse, 26 Misc. (N. Y.) 522, 57 N. Y. Suppl. 617, where, however, the writ was denied on the ground that there had been no prior demand for such action.

16. See cases cited *infra*, this note.

In Illinois the rule has been broadly stated that a writ of mandamus will lie to compel civil service commissioners to make a classification which may be judicially determined to be correct. People *v.* Kraus, 171 Ill. 130, 48 N. E. 1052.

In New York there are several decisions to the effect that the decisions of civil service commissioners in making classifications in the civil service involve the exercise of judgment and discretion and cannot be controlled by mandamus. People *v.* Collier, 175 N. Y. 196, 67 N. E. 309 [*reversing* 78 N. Y. App. Div. 620, 79 N. Y. Suppl. 671, and *distinguishing* Chittendon *v.* Wurster, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809]; Dill *v.* Wheeler, 100 N. Y. App. Div. 155, 91 N. Y. Suppl. 686; People *v.* Hamilton, 98 N. Y. App. Div. 59, 90 N. Y. Suppl. 547 [*affirming* 44 Misc. 577, 90 N. Y. Suppl. 97]. Thus it has been held that the authority of the state civil service commission to change with the approval of the governor a position in the service from the competitive to the non-competitive class or *vice versa* cannot be reviewed collaterally by mandamus. People *v.* Collier, *supra* [*distinguishing* Chittendon *v.* Wurster, *supra*]; People *v.* Hamilton, *supra*. But in the later case of People *v.* McWilliams, 185 N. Y. 92, 99, 77 N. Y. Suppl. 785, where it was held that the action of the civil service commissioners was not a subject to review by certiorari, the court said: "It does not at all follow that the action of the civil service commission is not in any case subject to judicial control; but that such control is a limited and qualified one to be exercised by mandamus. If the position is clearly one properly subject to competitive examination, the commissioners may be compelled to so classify it. On the other hand, if the position be by statute or from its nature exempt from examination and the action of the commission be palpably illegal, the commission may be compelled to strike the position from the competitive or examination class, though in such case redress by mandamus would often be unnecessary, as a valid appointment could be made notwithstanding the classification. But where the position is one, as to the proper mode of filling which there is fair and reasonable ground for difference of opinion among intelligent and conscientious officials, the action of the commission should stand, even though the courts may differ from the commission as to the wisdom of the classification."

17. State *v.* Copeland, 74 Minn. 371, 77 N. W. 221; State *v.* Wayne County, 57 Ohio St. 86, 48 N. E. 136.

In New York by express statutory provision for a refusal to allow the preference provided for by statute an honorably discharged soldier, etc., of the United States in the late Civil war has a remedy by mandamus for righting the wrong. People *v.* Scannell, 63 N. Y. App. Div. 243, 71 N. Y. Suppl. 383. But the applicant must affirmatively show that the position he seeks is not one of those excepted from the preference to be given to veterans. Matter of Ostrander, 12 Misc. 476, 34 N. Y. Suppl. 295 [*affirmed* in 146 N. Y. 404, 42 N. E. 543]. See also Brown *v.* Duane, 60 Hun 98, 14 N. Y. Suppl. 450. It is held that the writ will be denied to compel the appointment of a veteran, where on the application for a peremptory writ the answering affidavits state that respondents consider relator incompetent to discharge the duties of the office thereby presenting a question of fact which is not within the purpose of a proceeding by mandamus (People *v.* Keating, 49 N. Y. App. Div. 123, 63 N. Y. Suppl. 71; People *v.* Ballston Spa, 19 Misc. 671, 44 N. Y. Suppl.

tions, has been duly appointed or elected to the same.[18] So it has been held that where the office of governor is vacant and the president of the state senate refuses to assume the duties of the office as required by law, mandamus will lie to compel him to do so.[19]

6. Removal From Office. Mandamus lies to compel the proper authorities to take action on a complaint or charge made against a public officer,[20] but not to control their judgment or discretion as to the sufficiency of the complaint as a ground for removal.[21] Mandamus has been held to lie to officials exercising an appointing power to compel the removal of an officer appointed without legal authority,[22] or with manifest abuse of discretion.[23] On the other hand it has been held that mandamus is not the proper remedy to compel the appointing power to remove an officer on the ground of his ineligibility to office.[24]

7. Title to and Possession of Office or Employment — a. In General. Although there are authorities to the contrary,[25] it is the general rule that title to

471; People *v.* Cohocton, 17 Misc. 652, 41 N. Y. Suppl. 449), or where the effect of granting the writ would be to control the discretion vested in defendants as to the relator's qualifications (People *v.* Scannell, 63 N. Y. App. Div. 243, 71 N. Y. Suppl. 383; People *v.* Newburgh Alms-House Com'rs, 65 Hun 169, 20 N. Y. Suppl. 21; People *v.* Wendell, 57 Hun 362, 10 N. Y. Suppl. 587; People *v.* Saratoga Springs, 54 Hun 16, 7 N. Y. Suppl. 125; People *v.* Little Falls, 4 Silv. Sup. 538, 8 N. Y. Suppl. 512; People *v.* Ballston Spa, 19 Misc. 671, 44 N. Y. Suppl. 471; People *v.* Summers, 9 N. Y. Suppl. 700). Nor will an alternative writ of mandamus be granted where the office is already filled by an actual incumbent *de facto*, exercising its functions under color of right. People *v.* Sheffield, 24 N. Y. App. Div. 214, 48 N. Y. Suppl. 796; People *v.* Palmer, 9 N. Y. App. Div. 252, 41 N. Y. Suppl. 494; People *v.* Rupp, 90 Hun 145, 35 N. Y. Suppl. 349, 749; People *v.* Cohocton, 17 Misc. 652, 41 N. Y. Suppl. 449 [*distinguishing* People *v.* Brooklyn, 149 N. Y. 215, 43 N. E. 554]. *Compare* People *v.* Scannell, 63 N. Y. App. Div. 243, 246, 71 N. Y. Suppl. 383, where it is said: "Where a veteran is deprived of any right to preference in appointment or promotion the statute now gives him a remedy by mandamus, and it is no longer an answer to show that his position has been filled by the appointment of another." Where an eligible person claims, upon a motion for a peremptory writ of mandamus, that he should have been certified in May as eligible to and entitled to fill a vacancy, and it appears that there was a sufficient number of other veterans entitled to a preference over him to prevent his having been so certified in May, he cannot change his position and claim that some of these other veterans had not passed the civil service examination, or had been appointed to other positions, so that he would have been certified upon a subsequent requisition made in June, had the board adopted the proper rule. People *v.* New York City Civil Service Bd., 13 N. Y. App. Div. 309, 43 N. Y. Suppl. 191. It was at one time held that the provisions of the civil service laws relating to the preferences of veterans applied only to original appointments and not to promotions. Brown *v.* Duane, 60 Hun 98, 14 N. Y. Suppl. 450; Matter of McGuire, 50 Hun 203, 2 N. Y. Suppl. 760. But under subsequent legislation a preference right to promotion may be enforced by mandamus. People *v.* Scannell, 63 N. Y. App. Div. 243, 71 N. Y. Suppl. 383.

18. People *v.* Williams, 145 Ill. 573, 33 N. E. 849, 36 Am. St. Rep. 514, 24 L. R. A. 492; Rex *v.* Bower, 1 B. & C. 585, 2 D. & R. 842, 1 L. J. K. B. O. S. 110, 8 E. C. L. 247. See also Reg. *v.* Hungerford, 11 Mod. 142. And see Elections, 15 Cyc. 393.

19. Atty.-Gen. *v.* Taggart, 66 N. H. 362, 29 Atl. 1072, 25 L. R. A. 613.

20. State *v.* Saline County, 18 Nebr. 422, 25 N. W. 587.

21. State *v.* Saline County, 18 Nebr. 422, 25 N. W. 587.

22. Dingwall *v.* Detroit, 82 Mich. 568, 46 N. W. 938; Detroit Parks, etc., Com'rs *v.* Detroit, 80 Mich. 663, 45 N. W. 508.

23. State *v.* St. Louis Public Schools, 134 Mo. 296, 35 S. W. 617, 56 Am. St. Rep. 503. *Compare* McLaughlin *v.* Burroughs, 90 Mich. 311, 51 N. W. 283.

24. Maverick Oil Co. *v.* Hanson, 67 N. H. 203, 29 Atl. 461.

25. Harwood *v.* Marshall, 9 Md. 83; Lindsey *v.* Luckett, 20 Tex. 516. See also Dew *v.* Judges Sweet Spring Dist. Ct., 3 Hen. & M. (Va.) 1, 3 Am. Dec. 639; Kline *v.* McKelvey, 57 W. Va. 29, 49 S. E. 896.

In Massachusetts it is held that while the use of mandamus to try the title to office is unusual, it may be so used where it affords the speediest and best method of settling the dispute of two rival claimants of a municipal office. Keough *v.* Holyoke, 156 Mass. 403, 31 N. E. 387; Luce *v.* Dukes County, 153 Mass. 108, 26 N. E. 419; Putnam *v.* Langley, 133 Mass. 204; Conlin *v.* Aldrich, 98 Mass. 557; Ellis *v.* Bristol, 2 Gray 370; *In re* Strong, 20 Pick. 484. But where the question was not which of two persons was rightfully entitled to a public office, but upon which of several public officers rests the duty of performing a certain public function, the rule acted upon in this commonwealth in cases where the sole question is which of two men is lawfully entitled to an office has not been applied. Fowler *v.* Brooks, 188 Mass.

a public office cannot be adjudicated on an application for mandamus.[26] Accordingly it may be stated as a general rule that where an office is already filled by an actual incumbent, exercising its functions, even though he is an officer *de facto* under color of right only, mandamus is not available to compel the admission of another claimant of the office, at least where the latter has never been an

64, 65, 74 N. E. 291, where the court said: "In view of the fact that the principle involved in our practice in such cases is opposed to the great weight of authority, we are not inclined to extend it beyond the limits to which it already has been carried."

Effect of prior conclusive determination of dispute.— In Shober *v.* Cochrane, 53 Md. 544, it was held that mandamus would not lie to compel defendant not to interfere with or prevent the petitioner from discharging the duties of an office and to yield up the office to the petitioner on the ground that the decision of the state board of education in the matter was final and conclusive.

26. *Alabama.*— Goodwyn *v.* Sherer, 145 Ala. 501, 40 So. 279; *Ex p.* Harris, 52 Ala. 87, 23 Am. Rep. 559.

Arkansas.— Underwood *v.* White, 27 Ark. 382; Fitch *v.* McDiarmid, 26 Ark. 482.

California.— Kelly *v.* Edwards, 69 Cal. 460, 11 Pac. 1; Meredith *v.* Sacramento County, 50 Cal. 433; Turner *v.* Melony, 13 Cal. 621; People *v.* Olds, 3 Cal. 167, 58 Am. Dec. 398.

Colorado.— Cripple Creek *v.* People, 19 Colo. App. 399, 75 Pac. 603.

Connecticut.— Harrison *v.* Simonds, 44 Conn. 318; Duane *v.* McDonald, 41 Conn. 517.

Delaware.— McCoy *v.* State, 2 Marv. 543, 36 Atl. 81.

Florida.— State *v.* Johnson, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357; State *v.* Saxon, 25 Fla. 792, 6 So. 858.

Georgia.— Bonner *v.* State, 7 Ga. 473.

Illinois.— People *v.* Cover, 50 Ill. 100; People *v.* Head, 25 Ill. 325; People *v.* Matteson, 17 Ill. 167; People *v.* Forquer, 1 Ill. 104; People *v.* School Trustees, 42 Ill. 60; Hildreth *v.* Heath, 1 Ill. App. 82.

Kansas.— Swartz *v.* Large, 47 Kan. 304, 27 Pac. 993; Hussey *v.* Hamilton, 5 Kan. 462. See also Eastman *v.* Householder, 54 Kan. 63, 37 Pac. 989.

Louisiana.— State *v.* Johnson, 29 La. Ann. 399.

Maine.— French *v.* Cowan, 79 Me. 426, 10 Atl. 335.

Michigan.— Frey *v.* Michie, 68 Mich. 323, 36 N. W. 184; People *v.* Detroit, 18 Mich. 338. *Compare* Lawrence *v.* Hanley, 84 Mich. 399, 47 N. W. 753.

Minnesota.— State *v.* Churchill, 15 Minn. 455; State *v.* Sherwood, 15 Minn. 221, 2 Am. Rep. 116.

Missouri.— State *v.* John, 81 Mo. 13; State *v.* Thompson, 36 Mo. 70; St. Louis County Ct. *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355; State *v.* Kansas City Police Com'rs, 80 Mo. App. 206; State *v.* Taaffe, 25 Mo. App. 567; State *v.* Gasconade County Ct., 25 Mo. App. 446.

Nebraska.— Maurer *v.* State, 71 Nebr. 24, 98 N. W. 426; State *v.* Haverly, 62 Nebr. 767, 87 N. W. 959; Kokes *v.* State, 55 Nebr. 691, 76 N. W. 467; Cruse *v.* State, 52 Nebr. 831, 73 N. W. 212; State *v.* Smith, 49 Nebr. 755, 69 N. W. 114; Anderson *v.* Colson, 1 Nebr. 172.

Nevada.— Denver *v.* Hobart, 10 Nev. 28.

New Hampshire.— Maverick Oil Co. *v.* Hauson, 67 N. H. 203, 29 Atl. 461.

New Jersey.— Searing *v.* Clark, 69 N. J. L. 609, 55 Atl. 690 (holding that mandamus will not lie to compel the surrender of a public office where relator's right to the office presents a debatable question of law); Casey *v.* Chase, 64 N. J. L. 207, 44 Atl. 872; State *v.* Steen, 43 N. J. L. 542.

New Mexico.— Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170.

New York.— People *v.* Yonkers, 174 N. Y. 450, 67 N. E. 78, 95 Am. St. Rep. 596; *In re* Hart, 159 N. Y. 278, 54 N. E. 44; People *v.* Brush, 146 N. Y. 60, 30 N. E. 502; People *v.* Goetting, 133 N. Y. 569, 30 N. E. 968; *In re* Gardner, 68 N. Y. 467; People *v.* Rickerson, 56 N. Y. App. Div. 588, 67 N. Y. Suppl. 248; People *v.* Kearny, 44 N. Y. App. Div. 449, 61 N. Y. Suppl. 41; People *v.* Kings County, 89 Hun 38, 34 N. Y. Suppl. 1128; People *v.* Mt. Vernon, 59 Hun 204, 13 N. Y. Suppl. 447; People *v.* Ferris, 16 Hun 219 [*affirmed* in 76 N. Y. 326]; People *v.* Hinsdale, 43 Misc. 182, 88 N. Y. Suppl. 206; People *v.* New York Casualty Co., 34 Misc. 326, 69 N. Y. Suppl. 775; People *v.* Scannel, 22 Misc. 298, 49 N. Y. Suppl. 1096; Matter of Hardy, 17 Misc. 667, 41 N. Y. Suppl. 469; Matter of Torney, 7 Misc. 260, 27 N. Y. Suppl. 913, 23 N. Y. Civ. Proc. 333 [*affirmed* in 11 Misc. 291]; People *v.* Dikeman, 7 How. Pr. 124 (no writ when title is substantially disputed); People *v.* Stevens, 5 Hill 616; People *v.* New York, 3 Johns. Cas. 79.

North Carolina.— Cozart *v.* Fleming, 123 N. C. 547, 31 S. E. 822; Swain *v.* McRae, 80 N. C. 111.

Oklahoma.— Cameron *v.* Parker, 2 Okla. 277, 38 Pac. 14; Ewing *v.* Turner, 2 Okla. 94, 35 Pac. 951.

Oregon.— Biggs *v.* McBride, 17 Oreg. 640, 21 Pac. 878, 5 L. R. A. 115; Warner *v.* Myers, 4 Oreg. 72.

Pennsylvania.— Carlisle School Dist. *v.* Humrich, 18 Pa. Co. Ct. 322.

Rhode Island.— Butler *v.* Pawtucket, 22 R. I. 249, 47 Atl. 364.

Washington.— Kimball *v.* Olmstead, 20 Wash. 629, 59 Pac. 377; Lynde *v.* Dibble, 19 Wash. 328, 53 Pac. 370.

Canada.— *In re* Brockville, 3 U. C. Q. B. O. S. 173.

See 33 Cent. Dig. tit. "Mandamus," § 161.

The trial of an election contest is not the proper function of a writ of mandamus. Territory *v.* Mohave County, 2 Ariz. 248, 12 Pac. 730; Lauritsen *v.* Seward, 99 Minn. 313, 109 N. W. 404.

actual incumbent,[27] except, it has been intimated, in cases where the office has been filled by proceedings palpably without legal warrant,[28] quo warranto[29] or the statutory contests provided by law in many of the states[30] being the proper remedies in such cases. But it is held that the mere fact that the application for the writ incidentally involves the inquiry as to which of two claimants is entitled to enjoy the office for the time being will not necessarily prevent the allowance of the writ.[31] Where there is no adverse claimant or officer in possession mandamus lies to compel the admission of one having an undisputed or a clear legal *prima facie* title to the possession of the office and to the performance of its duties.[32] And the same rule applies when the relator's title has been adjudicated upon and

A public officer may be compelled to receive money from a settler on school lands. This does not involve the question of title. Wilkie *v.* Howe, 27 Kan. 518.

27. *Alabama.*— *Ex p.* Harris, 52 Ala. 87, 23 Am. Rep. 559; State *v.* Dunn, Minor 46, 12 Am. Dec. 25.

Arkansas.— Underwood *v.* White, 27 Ark. 382.

California.— Kelly *v.* Edwards, 69 Cal. 460, 11 Pac. 1; Meredith *v.* Sacramento County, 50 Cal. 433; Turner *v.* Melony, 13 Cal. 621; People *v.* Olds, 3 Cal. 167, 58 Am. Dec. 398.

Colorado.— Cripple Creek *v.* People, 19 Colo. App. 399, 75 Pac. 603.

Kansas.— Swartz *v.* Large, 47 Kan. 304, 27 Pac. 993. See also Eastman *v.* Householder, 54 Kan. 63, 37 Pac. 989.

Missouri.— State *v.* Thompson, 36 Mo. 70; State *v.* Finley, 74 Mo. App. 213.

New Jersey.— Fort *v.* Howell, 58 N. J. L. 541, 34 Atl. 751; Henry *v.* Camden, 42 N. J. L. 335.

New York.— *In re* Gardner, 68 N. Y. 467; People *v.* Palmer, 9 N. Y. App. Div. 252, 41 N. Y. Suppl. 494; People *v.* Kings County, 89 Hun 38, 34 N. Y. Suppl. 1128; People *v.* Scrugham, 20 Barb. 302 [*reversed* on other grounds in 25 Barb. 302]; People *v.* Ballston Spa, 19 Misc. 671, 44 N. Y. Suppl. 471; Matter of Hardy, 17 Misc. 667, 41 N. Y. Suppl. 469; People *v.* Cohocton, 17 Misc. 652, 41 N. Y. Suppl. 449; Matter of Foley, 39 How. Pr. 356.

Oklahoma.— Ewing *v.* Turner, 2 Okla. 94, 35 Pac. 951.

Pennsylvania.— Com. *v.* James, 214 Pa. St. 319, 63 Atl. 743; Com. *v.* Gibbons, 196 Pa. St. 97, 46 Atl. 313; Com. *v.* Primrose, 2 Watts & S. 407; Com. *v.* Philadelphia County Com'rs, 5 Rawle 75; Carlisle School Dist. *v.* Humrich, 18 Pa. Co. Ct. 322; Com. *v.* Connell, 5 Lack. Leg. N. 332; Com. *v.* Smith, 2 Wkly. Notes Cas. 558.

England.— Rex *v.* Winchester, 7 A. & E. 215, 1 Jur. 738, 6 L. J. K. B. 213, 2 N. & P. 274, W. W. & D. 525, 34 E. C. L. 131; Rex *v.* Oxford, 6 A. & E. 349, 6 L. J. K. B. 103, 1 N. & P. 474, 33 E. C. L. 198; Frost *v.* Mayor, 5 E. & B. 531, 2 Jur. N. S. 114, 25 L. J. Q. B. 61, 4 Wkly. Rep. 14, 85 E. C. L. 531; Rex *v.* York, 4 T. R. 699; Rex *v.* Colchester, 2 T. R. 259, 1 Rev. Rep. 480.

Canada.— *In re* Brenan, 6 U. C. Q. B. O. S. 330.

See 33 Cent. Dig. tit. "Mandamus," § 161.

Mandamus to admit one to membership in a public body will not be ordered if the effect will be to oust incumbents whose claim to title is not frivolous. Casey *v.* Chase, 64 N. J. L. 207, 44 Atl. 872.

Restoration to office filled by another see *infra*, VI, C, 7, c, 2.

28. Leeds *v.* Atlantic City, 52 N. J. L. 332, 19 Atl. 780, 8 L. R. A. 697; Rex *v.* Bankes, 3 Burr. 1452, W. Bl. 45.

Where the writ would be fruitless as an aid to obtain an office to which one was legally elected, but which was without authority filled by another, or where the granting of the writ can have no other effect than to encourage the petitioner in future petty litigation for the fees and emoluments of the office, the writ will be refused. State *v.* Finley, 74 Mo. App. 213.

29. See QUO WARRANTO.

30. See ELECTIONS, 15 Cyc. 344 *et seq.*

A statutory bill in equity and not mandamus has been held to be the proper remedy to compel recognition of a person as member of a political committee. Brennan *v.* Butler, 22 R. I. 238, 47 Atl. 320.

31. Morton *v.* Broderick, 118 Cal. 474, 50 Pac. 644 (where on an application for mandamus to the auditor to compel the entry of one of two levies made by conflicting boards of supervisors it was held that where the writ is invoked to enforce a specific duty, and remedies at law are not adequate aid will not be refused merely because occupancy or incumbency or title is incidentally involved); People *v.* Head, 25 Ill. 325; O'Donnel *v.* Dusman, 39 N. J. L. 677.

Compelling clerk to recognize de facto board.— It has been held that the writ lies in favor of a *de facto* board of commissioners to compel a clerk of that board to recognize them and discharge his duties as clerk to the acting board, and the mere fact that other persons are contesting their rights as commissioners is no defense. Delgado *v.* Chavez, 140 U. S. 586, 11 S. Ct. 874, 35 L. ed. 578 [*affirming* 5 N. M. 646, 25 Pac. 948]. See also Putnam *v.* Langley, 133 Mass. 204.

32. *Indiana.*— Mannix *v.* State, 115 Ind. 245, 17 N. E. 565.

Michigan.— Smith *v.* Eaton County, 56 Mich. 217, 22 N. W. 267; People *v.* Ingham County, 36 Mich. 416.

New Hampshire.— Eaton *v.* Burke, 66 N. H. 306, 22 Atl. 452.

New Jersey.— Fort *v.* Howell, 58 N. J. L. 541, 34 Atl. 751; Clarke *v.* Trenton, 49 N. J. L. 349, 8 Atl. 509; McDermott *v.* Kenny, 45

finally established by a competent tribunal.[33] Thus after a judgment in quo warranto ousting an incumbent it has been held that mandamus will lie against the proper authorities to compel them to admit or recognize the person entitled to the office.[34] On the other hand it is held that the applicant for a writ of mandamus to compel the proper officials to admit or recognize him as an officer must establish a clear, specific right to the office, and hence that the writ will be denied if it appears that the election or appointment relied upon to establish his claim was invalid,[35] or where it appears on the face of the pleadings that he is disqualified from holding office.[36] So the writ will not issue when it appears that the term for which the petitioner was elected has already expired.[37]

b. Recovery of Books, Records, Appurtenances, Etc. The use of the writ of mandamus for the compulsory transfer of the books, records, and appurtenances of an office to the person showing a title to it is of early origin,[38] and the rule is well established that while mandamus will not lie to compel the respondent to turn over to the relator the books, papers, etc., pertaining to an office where the relator does not show a *prima facie* title or where the proceeding would necessarily involve the trying of the title of the parties to the office,[39] yet the writ will lie in favor of the holder of the *prima facie* title to an office after making the proper demand to recover the possession of the property, and insignia of the office, including the books, records, papers, rooms, buildings, and funds belonging to the office, against one holding over after the expiration of his term or lawfully removed or suspended or one intruding into office or otherwise detaining such property under a pretended official claim although without color of right.[40] While

N. J. L. 251; Kelly *v.* Paterson, 35 N. J. L. 196.

New York.— People *v.* Greene, 95 N. Y. App. Div. 397, 88 N. Y. Suppl. 601; People *v.* York, 33 N. Y. App. Div. 573, 53 N. Y. Suppl. 947; Matter of Howard, 26 Misc. 233, 56 N. Y. Suppl. 318.

North Dakota.— State *v.* Callahan, 4 N. D. 481, 61 N. W. 1025.

West Virginia.— Kline *v.* McKelvey, 57 W. Va. 29, 49 S. E. 896.

England.— See Reg. *v.* Leeds, 7 A. & E. 963, 2 Jur. 545, 7 L. J. Q. B. 80, 3 N. & P. 145, 1 W. W. & H. 23, 34 E. C. L. 497.

See 33 Cent. Dig. tit. "Mandamus," § 163.

Compelling board to recognize member.— Smith *v.* Eaton County, 56 Mich. 217, 22 N. W. 267; Kelly *v.* Paterson, 35 N. J. L. 196; Com. *v.* Fleming, 23 Pa. Super. Ct. 404; Com. *v.* Philadelphia, 23 Pa. Co. Ct. 631; Com. *v.* Smith, 2 Wkly. Notes Cas. (Pa.) 611.

33. Mannix *v.* State, 115 Ind. 245, 17 N. E. 565, where a judgment in favor of relator had been entered by agreement in contest proceedings.

34. People *v.* Rupp, 90 Hun (N. Y.) 145, 35 N. Y. Suppl. 349, 749; People *v.* Cohocton, 17 Misc. (N. Y.) 652, 41 N. Y. Suppl. 449; Com. *v.* Philadelphia Com'rs, 2 Pars. Eq. Cas. (Pa.) 220; Reg. *v.* McLellan, 1 C. L. Chamb. (U. C.) 125.

35. Com. *v.* James, 214 Pa. St. 319, 63 Atl. 743; Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 17 Am. St. Rep. 870, 6 L. R. A. 308; Lewis *v.* Whittle, 77 Va. 415; Bunting *v.* Willis, 27 Gratt. (Va.) 144, 21 Am. Rep. 338; State *v.* Kersten, 118 Wis. 287, 95 N. W. 1090.

36. People *v.* Sheffield, 47 Hun (N. Y.) 481.

37. People *v.* Chicago, 106 Ill. App. 72.

Issuance of writ where it will be useless in general see *supra*, II, A, 3, e.

38. O'Donnel *v.* Dusman, 39 N. J. L. 677 [*citing* Rex *v.* Owen, 4 Mod. 293; Rex *v.* Clapham, 1 Wils. C. P. 305].

39. People *v.* Head, 25 Ill. 325; Pipper *v.* Carpenter, 122 Mich. 688, 81 N. W. 962; Ashwell *v.* Bullock, 122 Mich. 620, 81 N. W. 577 [*distinguishing* Ketcham *v.* Wagner, 90 Mich. 271, 51 N. W. 281; Lawrence *v.* Hanley, 84 Mich. 399, 47 N. W. 753]; Keeler *v.* Deo, 117 Mich. 1, 75 N. W. 145; State *v.* Williams, 25 Minn. 340; Ewing *v.* Turner, 2 Okla. 94, 35 Pac. 951.

Where the official bond of relator had not been properly approved, the writ has been denied. Marshall *v.* Harwood, 7 Md. 466.

40. *Connecticut.*—Burr *v.* Norton, 25 Conn. 103.

Dakota.— Territory *v.* Shearer, 2 Dak. 332, 8 N. W. 135.

Florida.— State *v.* Givens, (1904) 37 So. 308; State *v.* Johnson, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357; State *v.* Johnson, 30 Fla. 433, 11 So. 845, 18 L. R. A. 410.

Illinois.— People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769.

Indiana.— Mannix *v.* State, 115 Ind. 245, 17 N. E. 565; Frisbie *v.* Fogg, 78 Ind. 269, delivery of books and papers and payment of money required to be applied to certain town purposes.

Iowa.— See Keokuk *v.* Merriam, 44 Iowa 432.

Kansas.— Metsker *v.* Neally, 41 Kan. 122, 21 Pac. 206, 13 Am. St. Rep. 269; Huffman *v.* Mills, 39 Kan. 577, 18 Pac. 516.

Louisiana.— State *v.* Bryan, 21 La. Ann. 186.

the title to public office cannot be adjudicated on an application for mandamus, sufficient investigation may be made in such proceeding to ascertain whether

Maryland.— Cecil County Com'rs *v.* Banks, 80 Md. 321, 30 Atl. 919; Dyer *v.* Bayne, 54 Md. 87; Harwood *v.* Marshall, 9 Md. 83.

Michigan.— See Lawrence *v.* Hanley, 84 Mich. 399, 47 N. W. 753.

Minnesota.— State *v.* Churchill, 15 Minn. 455; State *v.* Sherwood, 15 Minn. 221, 2 Am. Rep. 116; Crowell *v.* Lambert, 10 Minn. 369, holding that mandamus is a proper remedy, although an election contest is pending.

Missouri.— State *v.* May, 106 Mo. 488, 509, 17 S. W. 660, where it is said: "It is, however, also well settled that where the relator holds an uncontested title to a public office, or his title has been adjudicated and finally established by a competent tribunal, and he is in possession of the office, that mandamus will lie to compel the delivery to him of the books and papers belonging to his office by his predecessor in office, who has refused his demand therefor." See also State *v.* Trent, 58 Mo. 571.

Nebraska.— State *v.* Hyland, (1906) 107 N. W. 113; Cruse *v.* State, 52 Nebr. 831, 73 N. W. 212; State *v.* Meeker, 19 Nebr. 444, 27 N. W. 427.

New Hampshire.— Kimball *v.* Lamprey, 19 N. H. 215, holding that the writ lies against a usurper.

New Jersey.— Meinzer *v.* Disbrow, 42 N. J. L. 141 (holding that a township collector may be compelled by mandamus to pay over to his successor the balance of school funds remaining in his hands); O'Donnel *v.* Dusman, 39 N. J. L. 677; Pangborn *v.* Young, 32 N. J. L. 29; State *v.* Layton, 28 N. J. L. 244.

New Mexico.— Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170.

New York.— People *v.* Erie County, 42 N. Y. App. Div. 510, 59 N. Y. Suppl. 476; People *v.* Dikeman, 7 How. Pr. 124.

North Dakota.— State *v.* Archibald, 5 N. D. 359, 66 N. W. 234; State *v.* Callahan, 4 N. D. 481, 61 N. W. 1025.

Oklahoma.— Christy *v.* Kingfisher, 13 Okla. 585, 76 Pac. 135. See also Cameron *v.* Parker, 2 Okla. 277, 38 Pac. 14; Ewing *v.* Turner, 2 Okla. 94, 35 Pac. 951.

Oregon.— Stevens *v.* Carter, 27 Oreg. 553, 40 Pac. 1074, 31 L. R. A. 342; Warner *v.* Myers, 4 Oreg. 72.

Pennsylvania.— Plymouth Tp. Com'rs *v.* Sweeney, 10 Pa. Dist. 617, 10 Kulp 293; Com. *v.* Brackenridge, 4 Pa. Dist. 598, 16 Pa. Co. Ct. 400; Wadsworth *v.* Reel, 15 Pa. Co. Ct. 440.

South Carolina.— Runion *v.* Latimer, 6 S. C. 126.

South Dakota.— State *v.* Kipp, 10 S. D. 495, 74 N. W. 440; Driscoll *v.* Jones, 1 S. D. 8, 44 N. W. 726.

Tennessee.— Flets *v.* Memphis, 2 Head 650.

Texas.— Lindsey *v.* Luckett, 20 Tex. 516; Banton *v.* Nilson, 4 Tex. 400.

Vermont.— Stone *v.* Small, 54 Vt. 498; Walter *v.* Belding, 24 Vt. 658.

Virginia.— Sinclair *v.* Young, 100 Va. 284, 40 S. E. 907. See also Fitzpatrick *v.* Kirby, 81 Va. 467; Lewis *v.* Whittle, 77 Va. 415.

West Virginia.— Kline *v.* McKelvey, 57 W. Va. 29, 49 S. E. 896.

Wisconsin.— State *v.* Oates, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912, where a statutory remedy was held not adequate.

England.— Rex *v.* Buller, 8 East 389; *In re* Nottingham, Sid. 31.

Canada.— Reg. *v.* Dubord, 3 Manitoba 15; *In re* McLay, 24 U. C. Q. B. 54; *In re* Asphodel Tp., 17 U. C. Q. B. 593; Reg. *v.* Smith, 4 U. C. Q. B. 322 (holding that the writ lies, although relator was ineligible); *In re* Lacroix, 4 U. C. Q. B. O. S. 339.

See 33 Cent. Dig. tit. "Mandamus," § 165.

Rule applied where relator's title has been established by final judgment in election contest.— Mannix *v.* State, 115 Ind. 245, 17 N. E. 565.

Existence of statutory remedy as ground for denying writ see People *v.* Stevens, 5 Hill (N. Y.) 616.

Where books have been delivered to another holding office under color of title.— In People *v.* Lieb, 85 Ill. 484, it was held that mandamus will not issue to compel a county clerk who has delivered the assessor's books to one appointed to the office of assessor, and clothed with the proper evidence of his appointment, to deliver those books to another claiming the same office by election.

Recovery from de facto incumbent.—Where relator has been illegally removed or suspended from office and a successor has been appointed it has been held that mandamus being the proper remedy to restore the relator to office it may also issue to compel the restoration of the records and insignia of office. Metsker *v.* Neally, 41 Kan. 122, 21 Pac. 206, 13 Am. St. Rep. 269. *Compare* Ewing *v.* Turner, 2 Okla. 94, 35 Pac. 951.

Restoration of control of jail.— If jail built by authority of law is placed in the possession and under the control of another than the sheriff, by the county court, or the mayor and aldermen of a town or city and the sheriff of the county is virtually refused all legal authority and control over it, he may be restored to his right by a writ of mandamus. Felts *v.* Memphis, 2 Head (Tenn. 650. Mandamus lies to restore a jailer his control of the county jail which is withheld by defendant, a former deputy jailer who had been removed from office by the applicant. Burr *v.* Norton, 25 Conn. 103. So it has been held that mandamus will lie to compel a person who has been made jailer by the county board of chosen freeholders under an illegal contract to surrender the possession of the jail to the chosen freeholders. State *v.* Layton, 28 N. J. L. 244.

Where accounts of predecessor are unsettled.— The writ will not lie to compel an officer holding over to turn over to his successor in office the books and papers of the

relator has a *prima facie* title to the office or not;[41] and it is held that a person holding a certificate of election or a commission from an officer or tribunal authorized to issue the same, and who qualifies and properly demands possession, has the *prima facie* right of possession as against a recalcitrating incumbent, who holds over after his term expires;[42] and such *prima facie* title cannot be defeated in mandamus by an incumbent who is merely holding over after the expiration of his term, by alleging facts which do not tend to defeat the *prima facie* rights of the relator, but do tend to show that the relator's title will be ultimately defeated if the state at its election shall institute a proper proceeding to oust the relator,[43] the incumbent of the office under such circumstances not being a *de facto* officer holding under color of right.[44] A formal demand for possession is unnecessary where facts appear amounting substantially to a refusal,[45] or when it can be conclusively implied from the conduct of him against whom the writ is sought that there would be a refusal to comply.[46] Mandamus will not lie against a mere private person, not acting in any official capacity, to deliver books, records, etc., to the officer entitled to them.[47]

c. Restoration to Office or Employment — (i) *In General.* Mandamus is a proper remedy to restore a party to the possession of an office from which he has been illegally removed or suspended, as where he has been dismissed without sufficient cause or without the proper notice, hearing, and investigation, or in some other arbitrary manner.[48] So mandamus lies to reinstate an officer or

office where the accounts of the old incumbent have not been settled and there has been no unreasonable delay on his part or to compel him to turn over moneys in his possession where a suit therefor is pending in which he has been summoned as trustee. Bates *v.* Keith, 66 Vt. 163, 28 Atl. 865.

41. Cruse *v.* State, 52 Nebr. 831, 73 N. W. 212; McMillin *v.* Richards, 45 Nebr. 786, 64 N. W. 242; State *v.* Plambeck, 36 Nebr. 401, 54 N. W. 667; State *v.* Kipp, 10 S. D. 495, 74 N. W. 440.

42. *Illinois.*— People *v.* Head, 25 Ill. 325; People *v.* Matteson, 17 Ill. 167; People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769; People *v.* School Trustees, 42 Ill. App. 60.

Kansas.— Huffman *v.* Mills, 39 Kan. 577, 18 Pac. 516.

Minnesota.— State *v.* Sherwood, 15 Minn. 221, 2 Am. Rep. 116; Crowell *v.* Lambert, 10 Minn. 369.

Nebraska.— State *v.* Jaynes, 19 Nebr. 697, 28 N. W. 295.

New Jersey.— State *v.* Hudson County, 35 N. J. L. 269.

North Dakota.— State *v.* Callahan, 4 N. D. 481, 61 N. W. 1025.

Oregon.— Stevens *v.* Carter, 27 Oreg. 553, 40 Pac. 511, 50 Am. St. Rep. 726, woman holding certificate of election as county superintendent of school.

South Dakota.— State *v.* Kipp, 10 S. D. 495, 74 N. W. 440.

Wisconsin.— State *v.* Oates, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912; La Pointe *v.* O'Malley, 46 Wis. 35, 50 N. W. 521.

See 33 Cent. Dig. tit. "Mandamus," § 165.

43. *Florida.*— State *v.* Johnson, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357, holding that the illegality of the election is no defense.

Illinois.— People *v.* Head, 25 Ill. 325; People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769.

Minnesota.— State *v.* Sherwood, 15 Minn. 221, 2 Am. Rep. 116; Crowell *v.* Lambert, 10 Minn. 369.

Nebraska.— State *v.* Jaynes, 19 Nebr. 697, 28 N. W. 295.

New Jersey.— State *v.* Hudson County, 35 N. J. L. 269. *Compare* Clarke *v.* Trenton, 49 N. J. L. 349, 8 Atl. 509.

North Dakota.— State *v.* Callahan, 4 N. D. 481, 61 N. W. 1025.

Wisconsin.— State *v.* Oates, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912.

See 33 Cent. Dig. tit. "Mandamus," § 165.

44. State *v.* Callahan, 4 N. D. 481, 61 N. W. 1025; State *v.* Oates, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912.

45. State *v.* Hudson County, 35 N. J. L. 269.

46. Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170.

47. See *infra*, VIII.

48. *Alabama.*— *Ex p.* Lusk, 82 Ala. 519, 2 So. 140; *Ex p.* Wiley, 54 Ala. 226; *Ex p.* Diggs, 52 Ala. 381.

Colorado.— Gillett *v.* People, 13 Colo. App. 553, 59 Pac. 72, holding that on proceedings in mandamus to contest the right of removal of a mayor by the board of trustees, it is incumbent on the board of trustees as respondent to show that charges of something constituting a legal cause of amotion were preferred, and that they were sustained by legal evidence.

Florida.— State *v.* Teasdale, 21 Fla. 652, holding that the writ lies to restore an officer where the testimony entirely fails to support the charges.

Georgia.— Akerman *v.* Cartersville, 118 Ga. 334, 45 S. E. 312.

Illinois.— Delahanty *v.* Warner, 75 Ill. 185, 20 Am. Rep. 237; Street *v.* Gallatin County Com'rs, 1 Ill. 50.

Kansas.— Eastman *v.* Householder, 54 Kan. 63, 37 Pac. 989 (superintendent of state

employee who has been discharged in violation of the civil service laws.[49] Where a power to remove "for due cause" is given, the words "for due cause" operate as a limitation upon the power, and when a charge which is not "due cause" for removal is adjudged by an inferior tribunal to justify removal, mandamus will

asylum); Metsker *v.* Neally, 41 Kan. 122, 21 Pac. 206, 13 Am. St. Rep. 269.

Louisiana.— State *v.* New Orleans, 107 La. 632, 32 So. 22 (writ lies when the charges are insufficient, or not sustained by evidence); State *v.* Shakspeare, 43 La. Ann. 92, 8 So. 893; Prieur *v.* Commercial Bank, 7 La. 509. *Compare* State *v.* Dunlap, 5 Mart. 271.

Maryland.— Miles *v.* Stevenson, 80 Md. 358, 30 Atl. 646.

Massachusetts.— Hill *v.* Fitzgerald, (1907) 79 N. E. 825; Ransom *v.* Boston, (1907) 79 N. E. 823; Conlin *v.* Aldrich, 98 Mass. 557; Howard *v.* Gage, 6 Mass. 462.

Michigan.— Lawrence *v.* Hanley, 84 Mich. 399, 47 N. W. 753.

Missouri.— State *v.* Kansas City Police Com'rs, 80 Mo. App. 206. See also St. Louis County Ct. *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355.

New Jersey.— Welch *v.* Passaic Hospital Assoc., 59 N. J. L. 142, 36 Atl. 702; State *v.* Jersey City, 25 N. J. L. 536.

New York.— Sugden *v.* Partridge, 174 N. Y. 87, 66 N. E. 655 [*reversing* 78 N. Y. App. Div. 644, 80 N. Y. Suppl. 1149], reduction of rank and salary of detective sergeant.

North Carolina.— Lyon *v.* Granville County, 120 N. C. 237, 26 S. E. 929; Ellison *v.* Raleigh, 89 N. C. 125.

Pennsylvania.— Com. *v.* Stokley, 4 Pa. Co. Ct. 334, 20 Wkly. Notes Cas. 315, dismissal of policeman.

South Carolina.— State *v.* Courtenay, 23 S. C. 180; State *v.* Beaufort Pilotage Com'rs, 23 S. C. 175 (removal of pilot); Singleton *v.* Charleston Tobacco Inspection Com'rs, 2 Bay 105 (removal of inspector of tobacco).

South Dakota.— Gray *v.* Beadle County, (1906) 110 N. W. 36, holding that mandamus was a proper remedy, although the relator might have appealed from the decision of the board declaring his office vacant.

Tennessee.— Felts *v.* Memphis, 2 Head 650.

Texas.— Johnson *v.* Galveston, 11 Tex. Civ. App. 469, 33 S. W. 150.

Wisconsin.— State *v.* Watertown, 9 Wis. 254.

See 33 Cent. Dig. tit. "Mandamus," § 167.

Removal of military officer approved by governor.— In People *v.* Roe, 51 N. Y. App. Div. 494, 64 N. Y. Suppl. 642, it was held that a writ of mandamus requiring the commanding officer of the national guard of the state of New York to restore to duty an officer whom he has relieved from duty therein will not be issued, where the governor has approved the order relieving the officer from duty and has denied his application for reinstatement,

Removal by persons acting without authority.— The rule of the text has been applied where the petitioner was removed from a board of which he was a member, where the board had no authority in the premises. Akerman *v.* Cartersville, 118 Ga. 334, 45 S. E. 312, where the writ was allowed to compel the board of school commissioners to give recognition to the rights of a member thereof whom his associates had without legal authority attempted to remove from office. See also State *v.* Jersey City, 25 N. J. L. 536. And the same rule has been applied where it was attempted to oust the relator by the appointment of a city treasurer, made by the board of aldermen not having a majority of its members present as required by law. State *v.* Paterson, 35 N. J. L. 190. On the other hand it has been held that the writ will not lie against an officer who has no power of removal or reinstatement, although his unauthorized act of removal will be treated as null and void. People *v.* Dalton, 158 N. Y. 204, 52 N. E. 1119 [*affirming* 34 N. Y. App. Div. 6, 53 N. Y. Suppl. 1060].

Refusal of representation by counsel.— In State *v.* Courtenay, 23 S. C. 180, it was held that in investigating a charge against a pilot for negligence in grounding a steamship the fact that the privilege of being represented by counsel was refused him will not entitle him to the writ of mandamus to compel his restoration to office from which he was removed on account of such negligence.

Reinstatement on condition of waiver of claim for back salary.— In People *v.* Ahearn, 100 N. Y. Suppl. 716, it was held that where in mandamus to compel the reinstatement of relator in a municipal office his petition entitled him to an alternative writ, the court did not have power to attach a condition that he should waive all claims for back salary in case of ultimate success.

Mandamus to compel common council to proceed with hearing of charges.— In Goodfellow *v.* Detroit, 102 Mich. 343, 60 N. W. 760, where mandamus was applied for to compel the common council to proceed with the hearing of charges preferred against a member of the board of fire commissioners it was held that while the relator was entitled to a hearing upon the charges made at the time fixed or to have a time fixed when such hearing should be had, the indefinite action of the common council was equivalent to a dismissal of the charges pending and that the issuance of the writ was unnecessary.

49. Thompson *v.* Troup, 74 Conn. 121, 49 Atl. 907 (where a clerk in the department of public works was discharged without any opportunity being afforded him for a hearing as to the sufficiency of the cause); Hill *v.* Fitzgerald, (Mass. 1907) 79 N. E. 825; Ransom *v.* Boston, (Mass. 1907) 79 N. E. 823 (holding that the writ may be awarded in favor of a veteran in the public employment, although not a public officer, where he has been dismissed in violation of a statute requiring that he shall have the opportunity of a full hearing and that a veteran employed in the

lie to compel the restoration to office of the person removed.[50] But when the power of removal rests by law in the discretion of any person or depends upon the exercise of personal judgment as to whether the cause for removal be sufficiently good, mandamus will not lie to control such judgment or discretion.[51] So where the office or employment is held at the pleasure or will of the appointing

labor service of a city pursuant to the civil service statutes and rules of the civil service commission, who was wrongfully discharged from his employment, does not lose his right to mandamus to compel his reinstatement by the fact that he had previously brought an action for wages lost while excluded from his employment); Lewis *v.* Jersey City, 51 N. J. L. 240, 17 Atl. 112 (where the act relating to the dismissal from office or position of honorably discharged soldiers or sailors was held to refer to positions analogous to offices as distinguished from mere employment); People *v.* Scannell, 172 N. Y. 316, 65 N. E. 165 [*affirming* 69 N. Y. App. Div. 400, 75 N. Y. Suppl. 122]; People *v.* Kearny, 161 N. Y. 684, 57 N. E. 1121 [*affirming* 44 N. Y. App. Div. 449, 61 N. Y. Suppl. 41]; People *v.* Hayes, 106 N. Y. App. Div. 563, 94 N. Y. Suppl. 754; People *v.* Cram, 29 Misc. (N. Y.) 359, 61 N. Y. Suppl. 858 [*affirmed* in 50 N. Y. App. Div. 380, 64 N. Y. Suppl. 158].

In New York by express statute a veteran improperly removed may have "a remedy by mandamus for righting the wrong." People *v.* Dalton, 158 N. Y. 204, 52 N. E. 1119 [*affirming* 34 N. Y. App. Div. 6, 53 N. Y. Suppl. 1060, and *distinguishing* People *v.* Goetting, 133 N. Y. 569, 30 N. E. 968]; Matter of Sullivan, 5 Hun 285, 8 N. Y. Suppl. 401; People *v.* Ballston Spa, 19 Misc. 671, 44 N. Y. Suppl. 471. See also People *v.* Bardin, 7 N. Y. Suppl. 123. Mandamus will not lie under the veterans' act commanding the reinstatement of the applicant, where no duty in the premises rests upon defendants in the first instance, they being required to act only after the initiative has been taken by another officer. Matter of Broderick, 25 Misc. (N. Y.) 534, 56 N. Y. Suppl. 99.

Abolition of office or position.— In People *v.* Chicago, 104 Ill. App. 250, it was held that where a municipal office filled by a civil service employee is in good faith abolished, such employee may be discharged without a hearing and cannot complain of any arrangement made by the city for the performance by others already in the classified service of the duties of such abolished office. So in People *v.* Bermel, 51 Misc. (N. Y.) 75, 100 N. Y. Suppl. 728, it was held that on an application for a peremptory writ of mandamus to restore the relator to a position in the board of highways in a borough which he had formerly held and from which he had been suspended, the writ must be denied where the answer shows a *bona fide* abolition of the office.

Certifying for reinstatement by civil service commissioners.— Mandamus will not lie to compel municipal civil service commissioners to certify to the appointing power for reinstatement to a corresponding position an officer whose office has been abolished, where it is only when there is need for the services of a suspended officer that he is entitled to reinstatement, and the request by the appointing power to the commissioners for the name of a person to be appointed has not been made as required by law. Morrison *v.* Cantor, 75 N. Y. App. Div. 480, 78 N. Y. Suppl. 385 [*affirmed in* 173 N. Y. 646, 66 N. E. 1112]. So the determination of the commission as to whether or not newly created positions are similar to those which have been abolished involves the exercise of discretion which is not reviewable in a mandamus proceeding to compel relator's name to be certified. Donovan *v.* Cantor, 89 N. Y. App. Div. 50, 85 N. Y. Suppl. 406. In Civil Service Commission *v.* Kenyon, 86 Ill. App. 547, it was held that where a person in the employ of the city of Chicago as an assistant engineer of the waterworks was discharged, mandamus would not lie against the civil service commission to compel the commission "forthwith to place petitioner in the position of the fifth grade mechanical engineer of the Chicago avenue water works . . . and to certify petitioner to such position," since the civil service commission was not authorized to direct that a person named shall be employed in any particular place designated by the commission.

Transfer of veteran on abolition of position.— *In re* Breckenridge, 160 N. Y. 103, 54 N. E. 670, it was held that the provision of the act of 1898 that in cities of the first class if a position held by a veteran shall become unnecessary or be abolished for reasons of economy, he shall not be discharged, but shall be "transferred to any branch of the public service for duty in such position as he may be fitted to fill, receiving the same compensation therefor," contemplates for its operation the existence of a vacancy in such a position and not that a vacancy be created for the veteran, and in the absence of such vacancy mandamus will not lie to enforce a transfer. See also People *v.* Keating, 49 N. Y. App. Div. 123, 63 N. Y. Suppl. 71.

50. State *v.* Watertown, 9 Wis. 254.

51. *Louisiana.*— State *v.* New Orleans Police Bd., 51 La. Ann. 941, 25 So. 935.

Maryland.— State *v.* Register, 59 Md. 283.

Massachusetts.— Lunt *v.* Davison, 104 Mass. 498, suspension of pilot for misconduct.

New York.— People *v.* Woodbury, 179 N. Y. 525, 71 N. E. 1137 [*affirming* 88 N. Y. App. Div. 593, 85 N. Y. Suppl. 161]; Porter *v.* Howland, 24 Misc. 434, 54 N. Y. Suppl. 683; People *v.* Troy, 12 Abb. Pr. N. S. 181; People *v.* Troy Police Com'rs, 43 How. Pr. 385.

Ohio.— State *v.* Cleveland Fire Com'rs, 26 Ohio St. 24.

power,[52] where the relator is dismissed from membership in a body having the final and conclusive power to determine the election and qualifications of its members,[53] where there is a legal cause for the removal or suspension,[54] or where an officer voluntarily abandons the office[55] the writ does not lie to compel restoration. Where a plaintiff in mandamus seeks to be restored to his seat, it is not sufficient to show that he is an officer *de facto* merely; he must show a legal right to that which he demands and upon his failure to do so an award of the writ will be erroneous.[56] So the writ will not be awarded where defendant has no duty or authority in the premises,[57] where the relator has not previously made a proper demand for restoration[58] or has not exhausted his legal remedies, as by

Pennsylvania.— Com. *v.* Perkins, 7 Pa. St. 42; Respublica *v.* Philadelphia, 1 Yeates 476.

United States.— *Ex p.* Schaumburg, 21 Fed. Cas. No. 12,441, 1 Hayw. & H. 249.

See 33 Cent. Dig. tit. "Mandamus," § 167.

Removal of police officer.— This rule has been applied to the dismissal or acceptance of the resignation of a police officer. Gleistman *v.* West New York, (N. J. Sup. 1906) 64 Atl. 1084; People *v.* McAdoo, 110 N. Y. App. Div. 894, 96 N. Y. Suppl. 1069; People *v.* MacLean, 62 Hun (N. Y.) 42, 16 N. Y. Suppl. 401; Matter of Pritchard, 51 Misc. (N. Y.) 483, 101 N. Y. Suppl. 711; People *v.* Troy Police Com'rs, 12 Abb. Pr. (N. Y.) 181.

52. *Massachusetts.*— Sims *v.* O'Meara, (1907) 79 N. E. 824, holding that a janitor at a police station is not an officer or member of the police department, within the meaning of a statute providing that such officers or members can only be removed for cause after notice and opportunity to be heard.

Michigan.— Trainor *v.* Wayne County Bd. of Auditors, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95; Portman *v.* State Bd. of Fish Com'rs, 50 Mich. 258, 15 N. W. 106.

New York.— Lahey *v.* Partridge, 78 N. Y. App. Div. 199, 79 N. Y. Suppl. 724; Porter *v.* Howland, 24 Misc. 434, 53 N. Y. Suppl. 683, holding that where the position to which petitioner is appointed is in no sense a permanent one, he being employed from day to day, it is liable to be terminated at any time where no funds have been provided for the payment of petitioner's services, his dismissal in such case being equivalent to an abrogation of the position, and mandamus will not lie to compel his reinstatement.

South Carolina.— State *v.* Champlin, 2 Bailey 220.

England.— *Ex p.* Sandys, 4 B. & Ad. 863, 1 N. & M. 591, 24 E. C. L. 375.

Canada.— *Ex p.* Langen, 8 N. Brunsw. 135, office of pilot.

See 33 Cent. Dig. tit. "Mandamus," § 167.

53. People *v.* Fitz Gerald, 41 Mich. 2, 2 N. W. 179 (holding that where the action of a tribunal in dismissing an officer is by statute final and conclusive the writ of mandamus will not lie to compel the reinstatement of the officer, although he was dismissed without a proper hearing); Com. *v.* Loughlin, 20 Leg. Int. (Pa.) 100.

Decision of body upon its own membership generally see *infra*, VI, C, 7, e.

54. *Ex p.* Wiley, 54 Ala. 226; State *v.* Cleveland Bd. of Fire Com'rs, 26 Ohio St. 24; Riggins *v.* Richards, (Tex. Civ. App. 1904) 79 S. W. 84 [*affirmed* in 97 Tex. 526, 80 S. W. 524].

55. See Eastman *v.* Householder, 54 Kan. 63, 37 Pac. 989, holding, however, that there is no necessity for a forcible collision between plaintiff and defendant over the office or possession of the office room, books, etc., before the writ can be awarded.

56. Swartz *v.* Large, 47 Kan. 304, 27 Pac. 993 (holding that mandamus will not lie to compel one of the members of a board of county commissioners and the county clerk to recognize a person as county commissioner who has had a judgment rendered against him in a contest proceeding instituted by another claimant, an appeal from which was pending, and who has also been ousted from office by a judgment of the district court in proceedings in quo warranto, it appearing also that both claimants had received certificates of election, and had duly qualified); Jefferson County *v.* Clark, 1 T. B. Mon. (Ky.) 82; Allen *v.* Robinson, 17 Minn. 113 (holding that where a person against whom judgment has been rendered in an election contest is wrongfully in possession of the office pending an appeal, and yields possession thereof to his opponent, in obedience to a writ issued on the judgment, the fact that such writ was irregular will not entitle him to reinstatement by mandamus); People *v.* Metropolitan Police Dist. Bd. of Police, 91 N. Y. 265 [*reversing* 35 Barb. 644, 14 Abb. Pr. 151]; Bunting *v.* Willis, 27 Gratt. (Va.) 144, 21 Am. Rep. 338. See also St. Louis County Ct. *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355; Clarke *v.* Trenton, 49 N. J. L. 349, 8 Atl. 509; People *v.* Cram, 32 N. Y. App. Div. 414, 53 N. Y. Suppl. 110 [*affirmed* in 158 N. Y. 666, 52 N. E. 1125]; People *v.* Metropolitan Police Dist. Bd. of Police, 35 Barb. (N. Y.) 544. *Compare* People *v.* Metropolitan Police Dist. Bd. of Police, 35 Barb. (N. Y.) 527 [*reversed* in 24 How. Pr. 611].

57. People *v.* Dalton, 158 N. Y. 204, 52 N. E. 1119 [*affirming* 34 N. Y. App. Div. 6, 53 N. Y. Suppl. 1060]; Matter of Broderick, 25 Misc. (N. Y.) 534, 56 N. Y. Suppl. 99; Porter *v.* Howland, 24 Misc. (N. Y.) 434, 53 N. Y. Suppl. 683.

58. People *v.* Welde, 61 N. Y. App. Div. 580, 70 N. Y. Suppl. 869, holding that where the relator had begun no action to enforce his reinstatement until after the death of the removing officer, mandamus would not lie

applying for a new trial to defendant board,[59] or where the relator's term of office has expired or will expire before the writ can become effective.[60] The granting of the writ to reinstate an officer being discretionary, the remedy is barred if the petitioner has unreasonably neglected to enforce his right.[61] No precise definition can be formulated as to what is sufficient to constitute such want of diligence, but at law upon a petition for mandamus, as well as upon an appeal for equitable relief, this question must depend upon the circumstances of each particular case.[62]

(11) *Where Office Is Subsequently Filled by Another.* According to the prevailing rule the doctrine allowing the writ of mandamus to compel the restoration of an officer illegally removed applies, although the office is subsequently filled by another, where the office has been filled by proceedings palpably without legal warrant or where the facts before the court or within its judicial knowledge show clearly that the relator who was removed was in office *de jure et de facto*, and that defendant while claiming to be in *de facto* can make no claim to be in *de jure*,[63] and especially where it is *res judicata* that the relator's

until a demand had been made upon his successor.

59. State *v.* New Orleans Bd. of Police, 113 La. 424, 37 So. 16.

60. *Iowa.*— Potts *v.* Tuttle, 79 Iowa 253, 44 N. W. 374.

Maine.— Woodbury *v.* Piscataquis County Com'rs, 40 Me. 304.

Maryland.— See Harwood *v.* Marshall, 10 Md. 451.

Missouri.— State *v.* Kansas City Police Com'rs, 80 Mo. App. 206.

New York.— See Croker *v.* Sturgis, 175 N. Y. 158, 67 N. E. 307.

North Carolina.— Colvard *v.* Graham County, 95 N. C. 515.

Texas.— Riggins *v.* Richards, 97 Tex. 526, 80 S. W. 524 [*affirming* (Civ. App. 1904) 79 S. W. 84].

West Virginia.— Holdermann *v.* Schane, 56 W. Va. 11, 48 S. E. 512.

Where office has been abolished pending the proceedings.— People *v.* Ennis, 18 N. Y. App. Div. 412, 46 N. Y. Suppl. 444.

61. Eastman *v.* Householder, 54 Kan. 63, 37 Pac. 989; Hill *v.* Fitzgerald, (Mass. 1907) 79 N. E. 825; Streeter *v.* Worcester, 177 Mass. 29, 58 N. E. 277; People *v.* Sturgis, 82 N. Y. App. Div. 580, 81 N. Y. Suppl. 816 [*reversing* 79 N. Y. App. Div. 82, 79 N. Y. Suppl. 710]; People *v.* Keating, 49 N. Y. App. Div. 123, 63 N. Y. Suppl. 71; People *v.* Palmer, 3 N. Y. App. Div. 389, 38 N. Y. Suppl. 651.

62. Hill *v.* Fitzgerald, (Mass. 1907) 79 N. E. 825; Matter of McDonald, 34 N. Y. App. Div. 512, 54 N. Y. Suppl. 525.

Laches amounting to bar.— Bostwick *v.* Detroit Fire Dep't, 49 Mich. 513, 14 N. W. 501; People *v.* Keating, 49 N. Y. App. Div. 123, 63 N. Y. Suppl. 71; Matter of McDonald, 34 N. Y. App. Div. 512, 54 N. Y. Suppl. 525; People *v.* Bryant, 28 N. Y. App. Div. 480, 51 N. Y. Suppl. 119; People *v.* McCartney, 28 N. Y. App. Div. 138, 50 N. Y. Suppl. 919; People *v.* Collis, 6 N. Y. App. Div. 467, 39 N. Y. Suppl. 698; Vanderhoof *v.* Palmer, 3 N. Y. App. Div. 389, 38 N. Y. Suppl. 651; Matter of Gaffney, 84 Hun (N. Y.) 503, 32 N. Y. Suppl. 873; Miller *v.* Justices Ct. of Gen. Sess., 78 Hun (N. Y.) 334, 29 N. Y. Suppl. 157; McDowell *v.* Dalton, 33 Misc. (N. Y.) 359, 68 N. Y. Suppl. 419; People *v.* Welde, 28 Misc. (N. Y.) 582, 59 N. Y. Suppl. 1030; Matter of Vanderhoof, 15 Misc. (N. Y.) 434, 36 N. Y. Suppl. 833 [*affirmed* in 3 N. Y. App. Div. 389, 38 N. Y. Suppl. 651]; People *v.* Adams, 18 N. Y. Suppl. 896.

Delay not amounting to laches.— People *v.* Brady, 49 N. Y. App. Div. 238, 63 N. Y. Suppl. 145; People *v.* Lantry, 48 N. Y. App. Div. 131, 62 N. Y. Suppl. 630 [*reversing* 27 Misc. 160, 57 N. Y. Suppl. 770]; Matter of McDonald, 34 N. Y. App. Div. 512, 54 N. Y. Suppl. 525 (where the delay was satisfactorily explained); People *v.* Scannell, 27 Misc. (N. Y.) 662, 59 N. Y. Suppl. 679.

Relator has the burden of showing facts excusing the delay. People *v.* Welde, 28 Misc. (N. Y.) 582, 59 N. Y. Suppl. 1030; People *v.* Scannell, 28 Misc. (N. Y.) 401, 59 N. Y. Suppl. 950.

Laches and stale demands generally see Equity, 16 Cyc. 150.

63. *Kansas.*— Eastman *v.* Householder, 54 Kan. 63, 37 Pac. 989 (mandamus to restore trustees of charitable institution); Metsker *v.* Neally, 41 Kan. 122, 21 Pac. 206, 13 Am. St. Rep. 269.

New Jersey.— Leeds *v.* Atlantic City, 52 N. J. L. 332, 19 Atl. 780, 8 L. R. A. 697; Lewis *v.* Jersey City, 51 N. J. L. 240, 17 Atl. 112; Mason *v.* Paterson, 35 N. J. L. 190, where a city office had been filled by an election held at meeting of aldermen at which less than the legal number of aldermen were present.

Pennsylvania.— Com. *v.* Gibbons, 196 Pa. St. 97, 46 Atl. 313.

South Dakota.— Gray *v.* Beadle County, (1906) 110 N. W. 36.

Utah.— Pratt *v.* Salt Lake City Bd. of Police, etc., Com'rs, 15 Utah 1, 49 Pac. 747.

Virginia.— Dew *v.* Judges Sweet Spring Dist. Ct., 3 Hen. & M. 1, 3 Am. Dec. 639.

West Virginia.— Kline *v.* McKelvey, 57 W. Va. 29, 49 S. E. 896; Schmulbach *v.* Speidel, 50 W. Va. 553, 40 S. E. 424, 55 L. R. A. 922.

See 33 Cent. Dig. tit. "Mandamus," § 167.

Compare St. Louis County Ct. *v.* Sparks, 10

removal from office was illegal.[64] On the other hand it has been held that mandamus is not the proper remedy to restore an officer to his office which has already been filled under color of law, when the question of title turns upon a construction of statutory provisions which are not entirely clear or unambiguous.[65]

d. Effect of Pendency of Appeal In Quo Warranto or Contest Proceedings. Mandamus has been held not to lie to induct one into office, during the pendency of an appeal in quo warranto or contest proceedings between the relator and the incumbent of the office whether the judgment from which the appeal was taken was rendered against the relator[66] or in his favor.[67]

e. Decision of Body Upon Its Own Membership. Where by statute a municipal body is made the final judge of the election and qualification of its members its decision upon such question cannot be reviewed by mandamus.[68] If, however, a municipal body refuses to exercise its duty in this regard, mandamus will lie to compel it to act.[69]

Mo. 117, 45 Am. Dec. 355; Ewing *v.* Turner, 2 Okla. 94, 35 Pac. 951 (holding that where an incumbent of office is removed by the governor and a successor is thereupon appointed and commissioned and duly qualified as required by law, mandamus will not issue in aid of the original incumbent by going behind the certificate or commission of defendant to inquire into the question whether the governor had exercised the power of removal without authority of law); South Milwaukee Bd. of Education *v.* State, 100 Wis. 455, 76 N. W. 351.

In New York the rule has been laid down that mandamus is not the proper remedy to restore an officer to an office which has already been filled under color of law when the question of title turns upon a construction of statutory provisions which are not entirely clear or unambiguous. People *v.* Goetting, 133 N. Y. 569, 30 N. E. 968; Matter of Hardy, 17 Misc. 667, 41 N. Y. Suppl. 469. See also People *v.* Brush, 146 N. Y. 60, 40 N. E. 502; People *v.* Lane, 55 N. Y. 217; People *v.* Rupp, 90 Hun (N. Y.) 145, 35 N. Y. Suppl. 349, 749. And in a later case the rule has been more broadly stated that the writ of mandamus does not lie to restore a person to an office from which he has been illegally dismissed where another person is in the actual possession of the office under color of right, and this, although there is no serious question as to the title of the office. People *v.* Yonkers Bd. of Police Com'rs, 174 N. Y. 450, 67 N. E. 78, 95 Am. St. Rep. 596. But it has been held that the rule that courts will not at the instance of a person out of the possession of an office try the title thereto by mandamus, but will leave the party to his remedy by writ of quo warranto, has reference to public offices created by law and is not applicable to clerks or employees unlawfully removed from their positions by superior authority. People *v.* Kearny, 161 N. Y. 648, 57 N. E. 1121 [*affirming* 44 N. Y. App. Div. 449, 61 N. Y. Suppl. 41]; People *v.* Hayes, 106 N. Y. App. Div. 563, 94 N. Y. Suppl. 754; People *v.* McAdoo, 98 N. Y. App. Div. 312, 90 N. Y. Suppl. 689; People *v.* Hamilton, 98 N. Y. App. Div. 59, 90 N. Y. Suppl. 547 [*affirming* 44 Misc. 577, 90 N. Y. Suppl. 97]; People *v.* Sutton, 88 Hun (N. Y.) 173, 34 N. Y. Suppl. 487. Moreover, it has been intimated that under an express statute an honorably discharged soldier or sailor of the United States in the late Civil war who has been improperly removed from office may have a remedy by mandamus for his restoration, although the office has been subsequently filled. People *v.* Dalton, 158 N. Y. 204, 52 N. E. 1119 [*affirming* 34 N. Y. App. Div. 6, 53 N. Y. Suppl. 1060, and *distinguishing* People *v.* Goetting, 133 N. Y. 569, 30 N. E. 968]. But it has been held that this remedy by mandamus for wrongful removal has not been extended to exempt firemen. People *v.* Tracy, 35 N. Y. App. Div. 265, 54 N. Y. Suppl. 1070; Matter of Torney, 11 Misc. (N. Y.) 291, 32 N. Y. Suppl. 277 [*affirming* 7 Misc. 260, 27 N. Y. Suppl. 913, 23 N. Y. Civ. Proc. 333].

Trying title to office generally see *supra*, VI, C, 7, a.

64. Leeds *v.* Atlantic City, 52 N. J. L. 332, 19 Atl. 780, 8 L. R. A. 697.

65. Kimball *v.* Olmsted, 20 Wash. 629, 56 Pac. 377. See also Ewing *v.* Turner, 2 Okla. 94, 35 Pac. 951.

66. Swartz *v.* Large, 47 Kan. 304, 27 Pac. 993 (where judgment had been rendered against the relator both in contest and quo warranto proceedings); Allen *v.* Robinson, 17 Minn. 113 (holding that the fact that the relator had delivered possession to defendant in obedience to an irregular writ issued on a judgment in contest proceedings was immaterial).

67. Hannon *v.* Halifax, 89 N. C. 123.

68. *Massachusetts.* — Peabody *v.* Boston School Committee, 115 Mass. 383.

Michigan. — People *v.* Fitz Gerald, 41 Mich. 2, 2 N. W. 179.

Mississippi. — Vicksburg *v.* Rainwater, 47 Miss. 547.

New York. — Brennan *v.* Beck, 13 N. Y. Suppl. 216; Halloran *v.* Carter, 13 N. Y. Suppl. 214.

Pennsylvania. — Shimp's Case, 3 Lanc. Bar Jan. 20, 1872; Com. *v.* Loughlin, 20 Leg. Int. 100.

See 33 Cent. Dig. tit. "Mandamus," § 163.

69. Henry *v.* Camden, 42 N. J. L. 335.

8. Restraining Person From Exercising Functions of Office. It is not the proper office of a writ of mandamus to restrain a party claiming to be a public officer from exercising his office, or to enjoin one claiming to have been elected or appointed to an office from qualifying.[70]

9. Preventing Removal or Interference With Discharge of Official Duties. On the principle that the office of a mandamus is not to redress an anticipated evil or wrong, but can be invoked to remedy a wrong which has been suffered, it has been intimated that where no official action has been taken with respect to the abolition of an office or the removal of an incumbent, mandamus will not lie at the instance of the holder of the office to prevent a threatened removal from office.[71] In the same way where a petitioner is in office exercising all the duties and functions thereof, the writ will not lie to prevent an apprehended interference on the part of defendants with the exercise of his official duties, it appearing that there has been no such interference at the time of the issuance of the writ.[72]

10. Salaries and Claims[73] — a. In General. Mandamus lies to compel the proper authorities to perform their ministerial duties in paying salaries or claims for official services or issuing or signing warrants or orders therefor where the right is clear[74] and no other adequate remedy is provided by law.[75] Mandamus

70. Maverick Oil Co. *v.* Hanson, 67 N. H. 203, 29 Atl. 461; People *v.* Ferris, 76 N. Y. 326; People *v.* Neubrand, 32 N. Y. App. Div. 49, 52 N. Y. Suppl. 280.

71. Brown *v.* Duane, 60 Hun (N. Y.) 98, 14 N. Y. Suppl. 450, holding that the writ will not lie to compel the appointment of an officer to another office in anticipation of the abolition of his office.

72. Legg *v.* Annapolis, 42 Md. 203.

73. Payment of claims generally see *infra*, VI, U.

74. Reynolds *v.* Taylor, 43 Ala. 420; Chicago *v.* O'Hara, 60 Ill. 413; Bryan *v.* Cattell, 15 Iowa 538; People *v.* Buffalo, 18 Misc. (N. Y.) 533, 42 N. Y. Suppl. 545; *In re* Fergus, 18 U. C. Q. B. 341, writ to compel payment of fees lies when no funds in the treasurer's hands at the time of refusal if payment was not refused on that ground.

Right held not to be clear.— In the following cases the right was held not to be clear:

California.— Burke *v.* Edgar, 67 Cal. 182, 7 Pac. 488; Smith *v.* Kenfield, 57 Cal. 138, where the writ was to compel the drawing of a warrant for a salary larger than allowed by the constitution.

Nebraska.—Moores *v.* State, 4 Nebr. (Unoff.) 235, 93 N. W. 986, where there was not sufficient evidence of relator's title to office.

New Jersey.— O'Hara *v.* Fagan, 56 N. J. L. 279, 27 Atl. 1089; Salmon *v.* Haynes, 50 N. J. L. 97, 11 Atl. 151.

New York.— People *v.* New York City Bd. of Education, 104 N. Y. App. Div. 162, 93 N. Y. Suppl. 300; People *v.* Coler, 33 N. Y. App. Div. 617, 53 N. Y. Suppl. 1090 [*affirmed* in 158 N. Y. 667, 52 N. E. 1125, and *reversing* 24 Misc. 11, 53 N. Y. Suppl. 200] (where relator's office was abolished); People *v.* Green, 1 Hun 86, 3 Thomps. & C. 108. See also People *v.* Knox, 45 N. Y. App. Div. 537, 61 N. Y. Suppl. 472.

North Dakota.— State *v.* Albright, 11 N. D. 22, 88 N. W. 729, holding that mandamus will not lie to compel a county auditor to issue a warrant for the salary of a county superintendent of schools where the facts create a well-founded doubt as to the validity of the demand for the salary.

Pennsylvania.— Com. *v.* Lancaster, 5 Watts 152.

Canada.— Rex *v.* Justices Niagara Dist., Taylor (U. C.) 394.

Issuing separate certificate to employee.— In People *v.* Hopey, 50 How. Pr. (N. Y.) 380, it was held that the keeper of the state capitol cannot be compelled by mandamus to give a separate certificate to an employee for services in cleaning a portion of the capitol where he has given a general certificate to all the employees, the applicant included, to the state treasurer.

Payment out of specific fund.— Where the statute creates, the conditions occurring, a specific right of an officer to be paid out of a specific fund set apart for the purpose, mandamus lies for the purpose of compelling such payment. Sessions *v.* Boykin, 78 Ala. 328; Pulaski County *v.* De Lacy, 114 Ga. 583, 40 S. E. 741.

Where suit is pending before a competent court to determine the amount of salary due to relator, mandamus will not lie to compel the payment of the salary until the sum to be allowed has been adjudicated. Adams *v.* Hampden County Com'rs, 16 Gray (Mass.) 41.

Where defendant has no authority to draw warrants, the writ will not lie to compel action on his part. Respublica *v.* Philadelphia County Com'rs, 4 Yeates (Pa.) 181.

Certifying performance of work.— Mandamus lies to compel the secretary of state to perform his ministerial duties in certifying that certain work has been performed by the register of lands for the purpose of determining his compensation. State *v.* Secretary of State, 33 Mo. 293.

75. Reynolds *v.* Taylor, 43 Ala. 420.

is the proper remedy to compel payment[76] or the issuance of a salary warrant[77] where the salary is fixed by law and the officer charged with the performance of such duties refuses to perform the same. So upon the presentation of a conclusive certificate, warrant, or order, of the proper authority,[78] or a copy of a resolution equivalent to a warrant,[79] mandamus lies to compel payment. So where an officer's claim has been allowed and certified by the proper authorities the ministerial duty of issuing or signing a warrant therefor may be enforced by mandamus.[80] An officer or board whose duty it is to audit and allow claims may be

Suit to recover salary as adequate remedy see People *v.* New York City Bd. of Education, 104 N. Y. App. Div. 162, 93 N. Y. Suppl. 300; People *v.* Green, 1 Hun (N. Y.) 1, 3 Thomps. & C. 90.

Motion in county court to compel entry by county clerk of fees on fee book as adequate remedy see Shrewsbury *v.* Ellis, 26 Tex. Civ. App. 406, 64 S. W. 700.

76. Speed *v.* Detroit, 100 Mich. 92, 58 N. W. 638; McBride *v.* Grand Rapids, 47 Mich. 236, 10 N. W. 353; People *v.* Wayne County, 13 Mich. 233.

Fixed compensation increased subsequent to performance of services.— Where the compensation to the sheriff for boarding vagrants has been fixed by law, that is, by the order of the court of quarter sessions, and boarding has been furnished under the order the court cannot make a subsequent order increasing the compensation so as to cover the boarding furnished during the continuance of the previous order and a mandamus will not lie to compel the payment of the increased compensation. Strock *v.* Cumberland County, 176 Pa. St. 59, 34 Atl. 352.

77. *Alabama.*— Reynolds *v.* Taylor, 43 Ala. 420; Nichols *v.* Comptroller, 4 Stew. & P. 154.

Nebraska.— Von Forel *v.* State, 4 Nebr. (Unoff.) 843, 96 N. W. 648.

New York.— People *v.* New York Bd. of Police, 75 N. Y. 38 [*reversing* 12 Hun 653].

Ohio.— State *v.* Cleveland, 10 Ohio Dec. (Reprint) 571, 22 Cinc. L. Bul. 113, holding that where a city auditor refuses to draw his warrant to pay a monthly instalment of salary mandamus is the appropriate remedy, for the claimant has not an adequate remedy at law if he must be driven to monthly actions and their incident delays.

Texas.— Pickle *v.* McCall, 86 Tex. 212, 24 S. W. 265.

Utah.— Kendall *v.* Raybould, 13 Utah 226, 44 Pac. 1034; Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398.

Washington.— State *v.* Daggett, 28 Wash. 1, 68 Pac. 340, holding that mandamus is the proper remedy to compel the certification of the proper pay-roll and the issuance of the proper salary warrants where the salary is fixed by law and the officer charged with the performance of such duties refuses to perform the same.

78. Stevens *v.* Truman, 127 Cal. 155, 59 Pac. 397; Baker *v.* Johnson, 41 Me. 15; Robb *v.* Carter, 65 Md. 321, 4 Atl. 282 (sheriff's fees taxed by the court may be compelled to be paid by mandamus); Knight *v.* Ocean County, 48 N. J. L. 70, 3 Atl. 344; Lindabury *v.* Ocean County, 47 N. J. L. 417, 1 Atl. 701.

Where the certificate of the circuit judge is not conclusive upon the county court as to the amount of compensation to be allowed where the fees for services rendered are not fixed by law, mandamus will not lie to compel judgment in accordance with the certificate. Chicot County *v.* Kruse, 47 Ark. 80, 14 S. W. 469.

In the case of an invalid order or certificate a contrary rule to that of the text has been laid down. Crawley *v.* Mershon, 61 Ga. 284 (where the order was made by persons disqualified to act); State *v.* Livingston County Ct. Justices, 51 Mo. 557 (where the claim was one which the officer auditing and certifying its allowance was unauthorized to allow). See also St. Louis County Ct. *v.* Ruland, 5 Mo. 268.

An allowance by county commissioners to a county officer for services is not a judgment within the County Reform Law (Acts (1899), p. 352), § 28, providing that the county council may be compelled by mandamus to provide for a judgment against the county. State *v.* Kerr, 158 Ind. 155, 63 N. E. 24.

79. People *v.* Edmonds, 15 Barb. (N. Y.) 529.

80. *Arkansas.*— Black *v.* State Auditor, 26 Ark. 237.

California.— Quigg *v.* Evans, 121 Cal. 546, 53 Pac. 1093.

Minnesota.— State *v.* Vasaly, 98 Minn. 46, 107 N. W. 818, where it appeared that the amount had been raised by taxation.

Mississippi.— Chatters *v.* Coahoma County, 73 Miss. 351, 19 So. 107.

Missouri.—State *v.* Heege, 40 Mo. App. 650, 652, where it is said: "When a bill of costs is properly certified by the judge of the circuit court and the prosecuting attorney, the duty of the county court in reference to its payment is purely ministerial, and, if the county court for any cause declines to act, the circuit court of the county has authority to compel the performance of the duty by mmandamus."

Oklahoma.— Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841.

Wisconsin.— Roberts *v.* Erickson, 117 Wis. 324, 94 N. W. 29.

Where a special appropriation of money for the services of an officer has been duly made the ministerial duty of countersigning a warrant for the sum appropriated may be compelled by mandamus. Salmon *v.* Haynes, 50 N. J. L. 97, 11 Atl. 151.

compelled by mandamus to take some action in the premises.[81] But where an officer or board is vested with discretionary powers or final authority in fixing salaries or in auditing or allowing fees or claims for official services or expenses, mandamus will not lie to control the exercise thereof;[82] and this rule has been applied not only with respect to the determination of the amounts to be allowed on claims but to the rejection of claims or particular items thereof on the ground of the illegality of the charges,[83] unless the claims or items were made by statute or some rule of law legal charges, which the auditing power was bound to allow in whole or part.[84] The writ has been denied for the purpose of compelling the auditing and allowance of an officer's claim where there was another plain, speedy, adequate, or exclusive remedy furnished by law,[85] or where the auditing power was expressly prohibited from allowing any greater sum than was actually due and the issuance of the mandamus would have the effect of compelling the doing of an unauthorized or forbidden act,[86] or where the respondent had no

Issuance of voucher in absence of order.— Mandamus does not lie to compel the issuance of a salary voucher, which has not been authorized or ordered to be issued by the county board as provided by statute. Knopf v. Corcoran, 112 Ill. App. 320.

81. *Colorado.*— Merwin v. Boulder County, 29 Colo. 169, 67 Pac. 285; Howell v. Cooper, 2 Colo. App. 530, 31 Pac. 523.

Maryland.— Robey v. Prince George's County, 92 Md. 150, 48 Atl. 48.

Michigan.— Boyd v. Detroit Bd. of Health, 140 Mich. 306, 103 N. W. 605; Fournier v. West Bay City, 94 Mich. 463, 54 N. W. 277; Sherman v. Sanilac County, 84 Mich. 108, 47 N. W. 513.

New York.— People v. Buffalo, 16 Abb. N. Cas. 96. See also People v. New York, 32 N. Y. 473; People v. Dutchess County, 1 How. Pr. 163.

North Carolina.— Koonce v. Jones County, 106 N. C. 192, 10 S. E. 1038, holding that the writ lies to compel examination of relator's claim for compensation and determine the amount to which he is entitled.

South Carolina.— State v. Morris, 67 S. C. 153, 45 S. E. 178.

Mandamus to compel board to permit bill for services to be amended see People v. Wayne County, 9 N. Y. St. 437.

82. *Arizona.*—Dorrington v. Yuma County, (1902) 68 Pac. 541.

Arkansas.— Chicot County v. Kruse, 47 Ark. 80, 14 S. W. 469.

Colorado.— Merwin v. Boulder County, 29 Colo. 169, 67 Pac. 285; Howell v. Cooper, 2 Colo. App. 530, 31 Pac. 523.

Illinois.— Kane County v. Pierce, 60 Ill. 481.

Indiana.—State v. Noblesville, 156 Ind. 590, 60 N. E. 453. *Compare* State v. Warren County, 136 Ind. 207, 35 N. E. 1100.

Maryland.— Robey v. Prince George's County, 92 Md. 150, 48 Atl. 48.

Michigan.— Peck v. Kent County, 47 Mich. 477, 11 N. W. 279, where the board of supervisors was held to be vested with final authority in adjusting claims against the county. See also Sherman v. Sanilac County, 84 Mich. 108, 47 N. W. 513.

Nebraska.— Moores v. State, 4 Nebr. (Unoff.) 235, 93 N. W. 986.

New Jersey.— Shumar v. Applegate, 51 N. J. L. 117, 16 Atl. 59.

New York.— People v. Oneida County, 24 Hun 413; People v. French, 24 Hun 263 [*reversed* on other grounds in 91 N. Y. 265]; People v. Livingston County, 26 Barb. 118; People v. Case, 19 N. Y. Suppl. 625; People v. Warren County, 1 How. Pr. 116; *Ex p.* Farrington, 2 Cow. 407; People v. Albany County, 12 Johns. 414.

South Carolina.— State v. Morris, 67 S. C. 153, 45 S. E. 178.

Texas.— Orr v. Davis, 9 Tex. Civ. App. 628, 30 S. W. 249, fixing salary.

Virginia.— Simons v. State Military Bd., 99 Va. 390, 39 S. E. 125.

West Virginia.— Miller v. County Ct., 34 W. Va. 285, 12 S. E. 702.

Canada.— *In re* Dartnell, 26 U. C. Q. B. 430.

Compare State v. Armstrong, 19 Ohio 116.

Voluntary services as detective.— This rule has been applied in the case of services of an individual voluntarily assuming to act as a public detective in the discovery and apprehension of a criminal. Abels v. Ingham County, 42 Mich. 526, 4 N. W. 206.

Where the compensation for official services is fixed by law, the duty of auditing and allowing the account for such services is ministerial and may be enforced by mandamus. Dorrington v. Yuma County, (Ariz. 1902) 68 Pac. 541; Shumar v. Applegate, 51 N. J. L. 117, 16 Atl. 59; State v. Starling, 13 S. C. 262.

83. People v. Barnes, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739.

84. People v. Elmira, 82 N. Y. 80; People v. Columbia County, 67 N. Y. 330 (holding that the writ will lie to compel the allowance of an officer's claim, where there is no question as to its correctness and it has been illegally rejected as being a town and not a county charge); People v. Delaware County, 45 N. Y. 196; People v. New York, 32 N. Y. 473; Ramsdale v. Orleans County, 8 N. Y. App. Div. 550, 40 N. Y. Suppl. 840.

85. Dorrington v. Yuma County, (Ariz. 1902) 68 Pac. 541; Johnson County v. Hicks, 2 Ind. 527; Shumar v. Applegate, 51 N. J. L. 117, 16 Atl. 59.

86. Chicot County v. Kruse, 47 Ark. 80, 14

authority or duty imposed on him by law to perform the act which it was sought to compel.[87]

b. Effect of Prior Payment to De Facto Incumbent. The rule is laid down that mandamus will not lie to compel the payment of a salary to relator, where payment has already been made to another exercising the functions of the office as a *de facto* incumbent.[88] But a different rule has been applied where the appropriation has been exhausted by payment to a person claiming the office *de facto* but out of possession at the time.[89]

c. Necessity For Appropriation. It has been held that mandamus will not lie to compel the payment of the salary or claim of an officer where no appropriation has been made therefor.[90] On the other hand it has been held that where there is a general law fixing the amount of a salary and prescribing its payment at particular periods, it is not necessary that there should be a special annual appropriation.[91]

d. Where Title to Office Is in Question. The right to an office cannot be determined in a proceeding by mandamus to compel the payment of salary to a person claiming such office,[92] and hence the writ will not issue to compel the payment of an officer's salary, where at the time the office in question is filled by a *de facto* incumbent holding under color of right.[93] So it is held that until the title of a removed officer has been legally tried and determined, he cannot compel by mandamus the payment of the salary attached to the office,[94] at least where the office is occupied by a *de facto* incumbent.[95] So it is held that to entitle the relator to the writ he must establish his title by proof of an appointment or election as required by law, and the mere fact that he is exercising the functions of the office is not sufficient.[96] On the other hand the proposition has been laid down

S. W. 469; Sherman *v.* Sanilac County, 84 Mich. 108, 47 N. W. 513.

87. Shumar *v.* Applegate, 51 N. J. L. 117, 16 Atl. 59.

88. Chicago *v.* People, 210 Ill. 84, 71 N. E. 816; McDonald *v.* Newark, 58 N. J. L. 12, 32 Atl. 384 (damages for unlawful discharge of municipal employee); Matter of Grady, 15 N. Y. App. Div. 504, 44 N. Y. Suppl. 578; People *v.* Brennan, 45 Barb. (N. Y.) 457, 30 How. Pr. 417 [*affirming* 1 Abb. Pr. N. S. 457]; State *v.* Eshelby, 1 Ohio Cir. Dec. 592, 2 Ohio Cir. Ct. 468.

89. Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398.

90. Fitzsimmon *v.* O'Neill, 214 Ill. 494, 73 N. E. 797; Chicago *v.* People, 210 Ill. 84, 71 N. E. 816. See also Black *v.* State Auditor, 26 Ark. 237.

Rule applied to auditing of salary.— State *v.* Brown, 141 Mo. 21, 41 S. W. 911.

91. Reynolds *v.* Taylor, 43 Ala. 420 (issuance of warrant by state auditor); Nichols *v.* Comptroller, 4 Stew. & P. (Ala.) 154 (issuance of warrant by state controller).

92. State *v.* John, 81 Mo. 13; State *v.* Draper, 48 Mo. 213.

93. State *v.* John, 81 Mo. 13; State *v.* Draper, 48 Mo. 213.

94. Chicago *v.* People, 210 Ill. 84, 71 N. E. 816, where the writ was sought to compel restoration to office and payment of salary. See also Moores *v.* State, (Nebr. 1903) 93 N. W. 986. *Compare* People *v.* Dalton, 27 Misc. (N. Y.) 667, 59 N. Y. Suppl. 666.

Where office has been abolished.— Fuller *v.* Coler, 33 N. Y. App. Div. 617, 53 N. Y. Suppl. 1090 [*affirmed* in 158 N. Y. 667, 52 N. E. 1125].

95. State *v.* Kansas City Police Com'rs, 80 Mo. App. 206; U. S. *v.* Guthrie, 17 How. (U. S.) 284, 15 L. ed. 102.

In Michigan it has been held that where a street commissioner was removed from office by a common council having the power to do so, the courts will not review the regularity of the proceedings on application for mandamus to compel the city to pay his salary, and that on such application the court will not presume that there was not some person performing the duties of the office against whom quo warranto proceedings might have been instituted. Hartwig *v.* Manistee, 134 Mich. 615, 96 N. W. 1067.

Salary of employee illegally discharged.— The writ of mandamus cannot be used to compel a municipality to pay damages for its illegal discharge of an employee, especially where during the interval of his discharge the salary was paid to a *de facto* incumbent of the office. McDonald *v.* Newark, 58 N. J. L. 12, 32 Atl. 384.

Where one's unfitness for an official position from which he has been summarily removed is conceded, he cannot invoke the aid of the discretionary writ of mandamus to exact payment of salary for a period succeeding his discharge, even though his removal may have been illegal because without opportunity for hearing and defense. McQueen *v.* Detroit, 116 Mich. 90, 74 N. W. 387.

96. Burke *v.* Edgar, 67 Cal. 182, 7 Pac. 488.

that the rule that quo warranto is the proper remedy to try title to an office will not prevent resort to a proceeding by mandamus to compel payment of an officer's salary in which his right to the office is incidentally involved, where there is no other claimant or occupant of the office whom it is necessary to oust.[97]

11. Pensions. Where a pension board or other proper tribunal which hears and determines applications for pensions for municipal officers, such as policemen or firemen, performs not merely a ministerial but a quasi-judicial duty, or where its decision on such applications is final and conclusive, mandamus lies to compel it to take some action upon an application;[98] but not to control the exercise of its discretionary powers,[99] and in no case will the writ be granted where it is not shown that the relator was clearly entitled to the pension.[1]

12. Place of Holding Office. Mandamus is the proper remedy to compel a public officer to maintain his office at the place prescribed by law.[2] Upon a change in the location of a county-seat, it would seem that the removal of the officers to the new county-seat may be compelled by mandamus.[3] In answer to mandamus to compel the removal of his office, a county officer may assert that there has not been a legal removal of the county-seat.[4]

D. Elections and Proceedings Relating Thereto[5]**— 1. In General.** Officers charged with the conduct of elections and with the ascertainment and promulgation of the results thereof may be compelled by mandamus proceedings to perform specific ministerial duties imposed upon them by law.[6] The same rule has been applied for the purpose of compelling the proper officials of nominating

97. State *v.* Daggett, 28 Wash. 1, 68 Pac. 340, where the claim for salary included a period during which the petitioner held over after the expiration of his term of office and before the appointment of a successor. See also Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398.

In California it has been held under statute that a person holding a certificate of election or commission of office and discharging the duties of the office is entitled to mandamus to compel payment of his salary, although a contest for the office is pending. Wilson *v.* Fisher, 140 Cal. 188, 73 Pac. 850.

98. Fay *v.* Partridge, 78 N. Y. App. Div. 204, 79 N. Y. Suppl. 722; Karb *v.* State, 54 Ohio St. 383, 43 N. E. 920.

99. State *v.* Fireman's Pension, etc., Fund, 117 La. 1071, 42 So. 506 (pension for fireman's widow); People *v.* Martin, 131 N. Y. 196, 30 N. E. 60 [*affirming* 57 Hun 587, 11 N. Y. Suppl. 123] (pension to policeman's widow); Friel *v.* McAdoo, 101 N. Y. App. Div. 155, 91 N. Y. Suppl. 454 [*affirmed* in 181 N. Y. 558, 74 N. E. 1117] (retiring pension of policeman).

Fixing amount of compensation.— In Ramsay *v.* Hayes, 187 N. Y. 367, 80 N. E. 193, it was intimated that mandamus will lie to compel a fire commissioner, who has erred in the first instance in making a determination as to the amount of compensation to which a retired fireman was entitled, to make a right determination.

1. Burke *v.* San Francisco Police Relief, etc., Fund, (Cal. App. 1906) 87 Pac. 421 (holding that where prior to the institution of mandamus proceedings to compel payment of a portion of a police pension fund to petitioner, defendant had audited and allowed a demand in favor of petitioner for an amount greater than she was entitled to, and it did not appear that petitioner had demanded such money or shown any reason why she had not received the same, mandamus was properly denied); Fay *v.* Partridge, 78 N. Y. App. Div. 204, 79 N. Y. Suppl. 722; Karb *v.* State, 54 Ohio St. 383, 45 N. E. 920.

2. *California.*— Calaveras County *v.* Brockway, 30 Cal. 325.

Michigan.— Rice *v.* Shay, 43 Mich. 380, 5 N. W. 435.

Minnesota.— State *v.* Weld, 39 Minn. 426, 40 N. W. 561.

North Dakota.— State *v.* Langlie, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723, where officers were compelled to hold their offices at county-seat as relocated.

South Carolina.— State *v.* Walker, 5 S. C. 263.

Wisconsin.— State *v.* Saxton, 11 Wis. 27.

See 33 Cent. Dig. tit. "Mandamus," § 136.

A previous demand is not necessary. State *v.* Weld, 39 Minn. 426, 40 N. W. 561.

3. Territory *v.* Mohave County, 2 Ariz. 248, 12 Pac. 730.

A clear right to remove must be shown. State *v.* Marston, 6 Kan. 524.

4. State *v.* Saxton, 11 Wis. 27.

Invalidity of county-seat election.— Fraud in the election will defeat mandamus to compel the holding of an office at the county-seat. State *v.* Burton, 47 Kan. 44, 27 Pac. 141; State *v.* Marston, 6 Kan. 524. And a writ to hold office at the county-seat is not defeated by a void election for change.

5. Aid to corporations see *infra*, VI, P.

Elections in general see Elections, 15 Cyc. 268.

Removal of county-seat see *supra*, VI, A, 2.

6. *Alabama.*— Taylor *v.* Kolb 100 Ala. 603, 13 So. 779; State *v.* Hamil, 97 Ala. 107, 11 So. 892.

conventions,[7] or committees of regularly organized political parties to perform the duties imposed on them by statute.[8] But the writ will not lie to control the exercise of discretionary powers on the part of election officials.[9]

2. Apportionment or Division of Election Districts. Where the proper authorities have made an apportionment or division of assembly or election districts, requiring the exercise of judgment and discretion, they cannot be required by mandamus to make another apportionment or division,[10] unless the apportionment or division as made so far disregards the law as prescribed by constitutional or statutory provisions as to warrant the court in saying that it is no apportionment and should be treated as a nullity.[11]

3. Registration of Voters. There is some conflict of authority on the question whether mandamus will lie to compel registration officers to place the names of qualified voters on the election lists, it being held in some jurisdictions that the writ will be awarded where it is clear that the petitioners were duly qualified and all the formalities prescribed for a proper application have been complied with,[12] while in other jurisdictions the writ has been denied on the ground that its issuance would interfere with the discretion and judgment vested in the registration officers.[13] The writ will not be granted where there has been no default on the part of the proper officer, as where there has been no prior application and refusal,[14] where the application for the writ is made by an individual not in his

Delaware.— Hastings *v.* Henry, 1 Marv. 287, 40 Atl. 1125.

Iowa.— State *v.* Bailey, 7 Iowa 390.

Kentucky.— Booe *v.* Kenner, 105 Ky. 517, 49 S. W. 330, 20 Ky. L. Rep. 1343.

Louisiana.— State *v.* Judge Twenty-Second Judicial Dist. Ct., 48 La. Ann. 847, 19 So. 946; State *v.* Livaudais, 48 La. Ann. 827, 19 So. 750; State *v.* Houston, 40 La. Ann. 393, 4 So. 50, 8 Am. St. Rep. 532.

Maryland.— Duvall *v.* Swann, 94 Md. 608, 51 Atl. 617; Sterling *v.* Jones, 87 Md. 141, 39 Atl. 424.

Michigan.— Detroit *v.* Rush, 82 Mich. 532, 46 N. W. 951, 10 L. R. A. 171.

Montana.— State *v.* Choteau County, 13 Mont. 23, 31 Pac. 879.

New York.— People *v.* Hanes, 44 Misc. 475, 90 N. Y. Suppl. 61.

See 33 Cent. Dig. tit. "Mandamus," § 150.

Mandamus to compel the purchase of a voting machine was denied, when such machine would not be needed for some time, and no funds had been provided for its purchase. State *v.* Board of Elections, 24 Ohio Cir. Ct. 654.

7. State *v.* Jones, 74 Ohio St. 418, 78 N. E. 505.

8. Young *v.* Beckham, 115 Ky. 246, 72 S. W. 1092, 1094, 24 Ky. L. Rep. 2135; Longenecker *v.* Barron, 10 Pa. Dist. 429; *In re* Shoemaker, 6 Pa. Dist. 670.

9. *Alabama.*— Harmon *v.* Hamil, 97 Ala. 107, 11 So. 892.

Florida.— State *v.* Deane, 23 Fla. 121, 1 So. 698, 11 Am. St. Rep. 343.

Louisiana.— State *v.* Strong, 32 La. Ann. 173.

Rhode Island.— Cannon *v.* Providence, 24 R. I. 473, 53 Atl. 637; State *v.* Pawtucket, 18 R. I. 350, 27 Atl. 449; Weeden *v.* Richmond, 9 R. I. 128, 98 Am. Dec. 373.

South Carolina.— *Ex p.* Scarborough, 34 S. C. 13, 12 S. E. 666.

Texas.— Arberry *v.* Beavers, 6 Tex. 457, 55 Am. Dec. 791.

See 33 Cent. Dig. tit. "Mandamus," § 150.

In West Virginia under statute the action of election officers may be controlled by mandamus to the same extent as on certiorari. Goff *v.* Roane County, 56 W. Va. 675, 49 S. E. 588; Stanton *v.* Wolmesdorff, 55 W. Va. 601, 47 S. E. 245; Marcum *v.* Ballot Com'rs Lincoln County, etc., 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296.

10. State *v.* Campbell, 48 Ohio St. 435, 27 N. E. 884.

Premature application for writ.— Mandamus will not lie to compel the city council to redistrict the wards of a city in advance of the expiration of the time for action. People *v.* Richmond, 5 Misc. (N. Y.) 26, 25 N. Y. Suppl. 144.

11. People *v.* Adams County, 185 Ill. 288, 56 N. E. 1044; Baird *v.* Kings County, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81; Matter of Timmerman, 51 Misc. (N. Y.) 192, 100 N. Y. Suppl. 57.

12. See Elections, 15 Cyc. 306, text and note 7.

Transmission of statement to judge in case of appeal.— In Virginia it has been held that where under statute a voter appeals from the refusal of a registrar to register him, the answer of the registrar that the voter did not offer to qualify as to his right to vote, and that he is not entitled to vote, is no defense to an application for mandamus to compel the registrar to transmit to the court the ground relied upon by appellant and the reason for the registrar's refusal. Coleman *v.* Sands, 87 Va. 689, 13 S. E. 148.

Compelling registrars to deposit books with county clerks see McDiarmid *v.* Fitch, 27 Ark. 106.

13. See Elections, 15 Cyc. 306, text and note 72.

14. State *v.* Jefferson County, 17 Fla. 707.

own behalf but in behalf of third persons,[15] or where the registrars no longer have possession of the books and have no authority to make entries therein.[16]

4. Correction of Voting Lists. The writ of mandamus has been awarded to compel the proper officer to proceed to hear and dispose of objections taken to the right of a person to remain on the voters' lists.[17] But the writ will not be issued where its issuance would interfere with the exercise of discretionary powers[18] or would be nugatory and unavailing.[19] So it will not issue after the time allowed by statute within which the registrars may correct errors[20] or after the election has taken place and the registrar is *functus officio*.[21]

5. Calling Elections. Where an officer or board is under a clear legal ministerial duty to give notice of and order an election mandamus is an appropriate remedy to compel the performance of that duty,[22] and this, it is held, although the time designated by law for such election has passed.[23] But the writ has been refused where all of the conditions required by law for the calling of an election did not exist,[24] or where the question was one which was not required by law to

15. State *v.* Jefferson County, 17 Fla. 707.

16. Summerson *v.* Schilling, 94 Md. 582, 51 Atl. 610; U. S. *v.* McCormick, 26 Fed. Cas. No. 15,663, 1 Cranch C. C. 593.

17. *Re* Lilley, 21 Ont. 424 [*affirmed* in 19 Ont. App. 101]. See also *Re* Simmons, 12 Ont. 505.

18. Arrison *v.* Cook, 6 D. C. 335.

19. Arrison *v.* Cook, 6 D. C. 335.

20. State *v.* Willett, (Tenn. 1906) 97 S. W. 299.

21. State *v.* Waterman, 5 Nev. 323.

22. *Colorado.*— Rizer *v.* People, 18 Colo. App. 40, 69 Pac. 315.

Florida.— McConihe *v.* State, 17 Fla. 238.

Illinois.— People *v.* Knopf, 198 Ill. 340, 64 N. E. 842, 1127 (holding that the writ lies to compel the proper candidates to be included in the election notice); Glencoe *v.* People, 78 Ill. 382; People *v.* Fairbury, 51 Ill. 149.

Louisiana.— State *v.* New Orleans, 52 La. Ann. 1604, 28 So. 116.

Missouri.— State *v.* St. Louis School Bd., 131 Mo. 505, 33 S. W. 3.

Nebraska.— State *v.* Crabtree, 35 Nebr. 106, 52 N. W. 842; State *v.* Holden, 19 Nebr. 249, 27 N. W. 120.

New Jersey.— Morris *v.* Wrightson, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548; Hanna *v.* Rahway, 33 N. J. L. 110.

New York.— People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659; People *v.* Whitestone, 71 Hun 188, 24 N. Y. Suppl. 532.

South Dakota.— State *v.* Young, 6 S. D. 406, 61 N. W. 165.

Texas.— Kimberly *v.* Morris, 87 Tex. 637, 31 S. W. 808; Sansom *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505.

Vermont.— Jenney *v.* Alden, (1906) 64 Atl. 609.

Wisconsin.— See State *v.* Hinkel, (1907) 111 N. W. 217.

England.— Rex *v.* Liverpool, 1 Barn. 82; Rex *v.* Cambridge, 4 Burr. 2008, 2 T. R. 456; Rex *v.* Thetford, 8 East 270; Rex *v.* Abingdon, 1 Ld. Raym. 559; Rex *v.* Tregony, 8 Mod. 111; *In re* Scarborough, Str. 1180; Rex *v.* St. Martin-in-the-Fields, 1 T. R. 146.

See 33 Cent. Dig. tit. "Mandamus," § 151.

Calling a special election to fill a vacancy may, it has been held, be compelled by mandamus. Hanna *v.* Rahway, 33 N. J. L. 110; People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659; People *v.* Whitestone, 71 Hun (N. Y.) 188, 24 N. Y. Suppl. 532. *Compare* People *v.* Santa Barbara County, 14 Cal. 102.

A writ for a new election lies when the person who has been chosen at the original election is ineligible (Reg. *v.* Pembroke, 8 Dowl. P. C. 302, 4 Jur. 317; Rex *v.* Bedford, 1 East 79), or where the original election was merely colorable and clearly void (Rex *v.* Salford, Burr. S. Cas. 516). But where a *de facto* incumbent is in possession of the office under an election which is not clearly void, the writ will not lie to compel the calling of a new election, until a vacancy is first established by quo warranto. Rex *v.* Bankes, 3 Burr. 1452, W. Bl. 445; Reg. *v.* Cornwall, 25 U. C. Q. B. 293.

Compelling restoration of names to petition.— Where a board of county commissioners illegally strikes from the petition for the removal of a county-seat the names of electors, so that the number remaining is reduced below the minimum required for a valid petition, mandamus will lie to compel a restoration of the names to the petition. State *v.* Geib, 66 Minn. 266, 68 N. W. 1081. *Compare* State *v.* Nemaha County, 10 Nebr. 32, 4 N. W. 373.

The fixing of the time for holding an election requires the exercise of discretion and is therefore an act not reviewable by the court on a petition for mandamus, unless there has been an abuse of discretion. State *v.* Pawtucket, 18 R. I. 350, 27 Atl. 449.

Calling primary election.— Where election commissioners are vested with discretion as to calling a primary election at the request of a political committee, their discretion will not be controlled unless it has been wilfully abused. State *v.* Higgins, 76 Mo. App. 319.

23. McConihe *v.* State, 17 Fla. 238; State *v.* Young, 6 S. D. 406, 61 N. W. 165, where the designation of a day by statute was held to be directory.

24. State *v.* Anderson County, 28 Kan. 67; State *v.* Gang, 10 N. D. 331, 87 N. W. 5.

be submitted to electors.[25] Indeed mandamus has been awarded to compel municipal authorities to refrain from submitting a question to electors in pursuance of an unconstitutional statute.[26]

6. Announcement of Candidacy. A chairman of a county committee of a regularly organized political party has been held to be an officer so that mandamus may lie directing him to perform the ministerial duty of announcing the name of a candidate for nomination for office.[27]

7. Certifying Nominations. While the issuance of a certificate of nomination by a canvassing board is a ministerial act when the fact of nomination has been ascertained yet the ascertainment of the fact of nomination is an exercise of judicial duty which will not be controlled by mandamus.[28] Where the chairman and secretary of a nominating convention are the proper officers to execute certificates of nomination, such execution may be compelled by mandamus.[29]

8. Filing Tickets and Making Up Ballots. Mandamus will lie to compel the proper officer to perform the clear ministerial duty of filing a ticket regularly nominated by an organized party,[30] or placing upon the official ballot the names of persons regularly nominated,[31] evidenced by a certificate of nomination in due form.[32] So the writ will lie to compel the arrangement of the party names on the ballot in accordance with the requirements of law,[33] unless a discretion in this respect is conferred by law upon the officer charged with the preparation of the

25. State *v.* Napier, 7 Iowa 425, where the question was whether a county judge should make a contract for the erection of county buildings.

26. Elliott *v.* Detroit, 121 Mich. 611, 84 N. W. 820.

27. Longenecker *v.* Barron, 10 Pa. Dist. 429.

28. Cannon *v.* Providence Bd. of Canvassers, 24 R. I. 473, 53 Atl. 637, certificate refused on the ground of fraud.

29. State *v.* Jones, 74 Ohio St. 514, 78 N. E. 505 (holding that a person who acts as secretary of two rival conventions may be compelled to execute certificates of nominations made by each convention); State *v.* Moore, 23 Wash. 115, 62 Pac. 441.

Review of action.— Where under the statute the certification of nominations by the chairman of a nominating convention is conclusive he cannot be compelled by mandamus to change it. Mays *v.* Cobb, (Tex. 1906) 96 S. W. 1079.

30. Addle *v.* Davenport, 7 Ida. 282, 62 Pac. 681; State *v.* Larson, 13 N. D. 420, 101 N. W. 315; State *v.* Liudahl, 11 N. D. 320, 91 N. W. 950; State *v.* Metcalf, 18 S. D. 393, 100 N. W. 923, 67 L. R. A. 331. See also People *v.* McGaffey, 23 Colo. 156, 46 Pac. 930; State *v.* Falley, 8 N. D. 90, 76 N. W. 996.

Filing certificate of nomination.— State *v.* Lavik, 9 N. D. 461, 83 N. W. 914, holding that where a county auditor is required to receive and file certificates of nominations for county offices, mandamus will lie to compel the performance of the duty.

31. *Idaho.*— Addler *v.* Davenport, 7 Ida. 282, 62 Pac. 681.

Indiana.— Gibson County Bd. of Election Com'rs *v.* State, 148 Ind. 675, 48 N. E. 226.

Kansas.— Sims *v.* Daniels, 57 Kan. 552, 46 Pac. 952, 35 L. R. A. 146.

Kentucky.— Robinson *v.* McCandless, 96 S. W. 877, 29 Ky. L. Rep. 1088.

Montana.— State *v.* Weston, 27 Mont. 185, 70 Pac. 519, 1134.

Nebraska.— State *v.* Haverly, 62 Nebr. 767, 87 N. W. 959; State *v.* Smith, 57 Nebr. 41, 77 N. W. 384; State *v.* Clark, 56 Nebr. 584, 77 N. W. 87.

Pennsylvania.— Gintel *v.* Scott, 8 Pa. Dist. 536.

Wisconsin.— State *v.* Goff, 129 Wis. 668, 109 N. W. 628.

See also Elections, 15 Cyc. 348, text and note 39 *et seq.*

In West Virginia it has been held upon an application for mandamus to compel the ballot commissioners to place the petitioner on the ballot, thus reversing the action of the commissioners, that section 89, chapter 3 of the code, as reënacted in chapter 25, acts of 1893, in cases involving duties of ballot commissioners, gives the writ of mandamus more scope than at common law, rendering it a process to control them as to all actions ministerial or judicial. Marcum *v.* Lincoln County, etc., Ballot Com'rs, 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296. See also Harmison *v.* Ballot Com'rs, 45 W. Va. 179, 31 S. E. 394, 41 L. R. A. 591.

32. Sterling *v.* Jones, 87 Md. 141, 39 Atl. 424; State *v.* Goff, 129 Wis. 668, 109 N. W. 628.

In passing upon the sufficiency of a certificate of nomination it is held that the board of supervisors does not exercise a clear ministerial function but makes inquiry into and passes judgment upon questions of law and fact, and this discretion cannot be controlled by mandamus. Duvall *v.* Swann, 94 Md. 608, 51 Atl. 617.

33. Baker *v.* Wayne County Bd. of Election Com'rs, 110 Mich. 635, 68 N. W. 752, holding, however, that in order that the writ may lie to assign a certain position on the ballot

official ballot.[34] So the writ has been granted to compel the omission of the names of certain candidates in preparing ballots.[35] But where the petitioner is not clearly entitled to have his name placed upon the ballot,[36] or where, as for instance after the election has taken place, the writ would be fruitless and nugatory,[37] the writ will not be awarded.

9. Appointment of Election Officers.[38] Mandamus will lie to compel the proper officials to meet and appoint election officers in accordance with the requirements of law.[39] But when the duty of appointing election officers involves the exercise of judgment and discretion, mandamus will not lie to control this discretion,[40] unless such discretion has been abused.[41]

10. Counting Ballots and Making Returns. Mandamus lies to compel inspectors or judges of election to convene and perform their duties in counting ballots[42] and making returns[43] in accordance with statute. On the other hand it has been held that after the ballots have been counted, sealed up, and delivered to the proper custodian and the election inspectors or judges have thus become *functus officio*, they cannot be compelled by mandamus to reassemble and count ballots rejected by them.[44] So where in counting ballots the inspectors are vested with

to a party ticket, it must clearly appear that the party ticket is entitled to this position.

34. Woods *v.* State, 44 Nebr. 430, 63 N. W. 23.

35. State *v.* Smith, 57 Nebr. 41, 77 N. W. 384; Matter of Noble, 34 N. Y. App. Div. 55, 54 N. Y. Suppl. 42. See also State *v.* Metcalf, 18 S. D. 393, 100 N. W. 923, 67 L. R. A. 331.

36. Jennings *v.* Delta County Board of Election Com'rs, 137 Mich. 720, 100 N. W. 995 (holding that in the absence of fraud the determination of a political convention as to who are its nominees is final and mandamus will not be granted to compel the printing on the official ballot of a name not certified); Nelson *v.* King, (S. D. 1906) 109 N. W. 649.

Placing twice on an official ballot the name of a candidate who has been nominated by two parties will not be compelled by mandamus, merely because such double printing is not prohibited by statute. State *v.* Anderson, 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 239.

37. Duvall *v.* Swann, 94 Md. 608, 51 Atl. 617.

38. Mandamus to compel appointment of officers generally see *supra*, VI, C, 1.

39. Dingwall *v.* Detroit, 82 Mich. 568, 46 N. W. 938.

40. Taylor *v.* Kolb, 100 Ala. 603, 13 So. 779; State *v.* Houston, 40 La. Ann. 393, 4 So. 50, 8 Am. St. Rep. 532; State *v.* Higgins, 76 Mo. App. 319.

41. State *v.* St. Louis Public Schools, 134 Mo. 296, 35 S. W. 617, 56 Am. St. Rep. 503.

42. People *v.* Armstrong, 116 N. Y. App. Div. 103, 101 N. Y. Suppl. 712 [*distinguishing* Hearst *v.* Woelper, 183 N. Y. 274, 76 N. E. 28; People *v.* Way, 179 N. Y. 174, 71 N. E. 756]. See also People *v.* Payne, 12 Abb. N. Cas. (N. Y.) 103, 64 How. Pr. 357.

43. See Elections, 15 Cyc. 379.

44. State *v.* Russell, 34 Nebr. 116, 51 N. W. 465, 33 Am. St. Rep. 625, 15 L. R. A. 740; Corbett *v.* Naylor, 25 R. I. 520, 57 Atl. 303.

In New York by section 114 of the Election Law provision is made for a judicial investigation by mandamus proceedings of ballots which according to the statements of the inspectors were objected to as marked for identification or which were rejected by the inspectors as void. Hearst *v.* Woelper, 183 N. Y. 274, 76 N. E. 28. But it has been held that section 114 of the Election Law has reference only to an investigation of the ballots which have not been placed in sealed boxes, and that section 84 to the effect that in canvassing the vote on election day the sum of the votes appearing on the tally sheet must equal the number of ballots shown by the ballots subsequently returned; "and if it does not there has been a mistake in the count and the ballots must be recounted for said office," neither expressly nor impliedly authorizes the court, subsequent to an election, to compel by mandamus the opening of the boxes and a recount of the votes. Hearst *v.* Woelper, 183 N. Y. 274, 284, 76 N. E. 28 [*reversing* 110 N. Y. App. Div. 346, 96 N. Y. Suppl. 341, *distinguishing* Matter of Stewart, 155 N. Y. 545, 50 N. E. 51, and *overruling* Matter of Stiles, 69 N. Y. App. Div. 589, 75 N. Y. Suppl. 278] (where it was said: "Some finality of action on the part of the election board was intended and the power to review appears to be confined to the decision upon ballots rejected as void, or as marked for identification, (sec. 114), leaving any further examination of the ballots, which have been counted without objection and sealed up, to be made in the proceeding instituted by a defeated candidate to try the title of his successful opponent to the office"); People *v.* Way, 179 N. Y. 174, 71 N. E. 756. See also People *v.* Reardon, 49 Hun (N. Y.) 425, 3 N. Y. Suppl. 560. *Compare* People *v.* Parmelee, 22 Misc. (N. Y.) 380, 50 N. Y. Suppl. 451. Where there has been a failure of a town-clerk to post and publish notice that the local option question would be submitted to the electors as required by statute, mandamus will not issue requiring the board of inspectors to reconvene and reject all ballots received

a discretion mandamus will not lie to control this discretion by compelling them to correct an alleged miscount.[45]

11. Deciding Tie by Lot. Mandamus lies to compel the proper election officers to determine a tie vote by casting lots when this duty is imposed upon them by statute.[46]

12. Canvass of Returns. Mandamus will lie to compel the board of canvassers or other proper officials to discharge their ministerial duties in canvassing votes or returns.[47] And it has been held that the canvassers cannot set up as a defense irregularities or frauds in the conduct of the election however gross or monstrous in their character.[48] On the other hand it is held that the writ will not lie where

by them for or against the question. Matter of O'Hara, 63 N. Y. App. Div. 512, 71 N. Y. Suppl. 613. It has been held that mandamus will not lie under this statute to compel the board of inspectors of a town meeting to reassemble and recount ballots cast for supervisors at a town-meeting in the manner prescribed by the General Election Law, since the General Election Law is not applicable to town meeting unless specially made so by the town law. *In re* Larkin, 163 N. Y. 201, 57 N. E. 404 [*reversing* 46 N. Y. App. Div. 366, 61 N. Y. Suppl. 597].

Where a person declared by the inspectors to have been elected to an office has qualified and entered upon its duties, mandamus will not lie to compel the inspectors to reassemble and declare another person elected on the ground that the inspectors had wrongfully counted the votes. State *v.* Sullivan, 83 Wis. 416, 53 N. W. 677.

45. State *v.* Deane, 23 Fla. 121, 1 So. 698, 11 Am. St. Rep. 343 (rejecting "scratched ballot"); People *v.* Reardon, 49 Hun (N. Y.) 425, 3 N. Y. Suppl. 560; Corbett *v.* Naylor, 25 R. I. 520, 57 Atl. 303.

46. People *v.* Crabb 156 Ill. 155, 40 N. E. 319; Johnston *v.* State, 128 Ind. 16, 27 N. E. 422, 25 Am. St. Rep. 412, 12 L. R. A. 235; *In re* Cassel, 14 Montg. Co. Rep. (Pa.) 101; State *v.* Grace, 83 Wis. 295, 53 N. W. 444.

47. *Alabama.*— Hudmon *v.* Slaughter, 70 Ala. 546.

Arkansas.— Willeford *v.* State, 43 Ark. 62.

Colorado.— People *v.* Grand County, 6 Colo. 202.

Florida.— Franklin County *v.* State, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183; State *v.* Alachua County, 17 Fla. 9; State *v.* McLin, 16 Fla. 17.

Illinois.— People *v.* Hilliard, 29 Ill. 413.

Iowa.— State *v.* Marshall County Judge, 7 Iowa 186.

Kansas.— Rosenthal *v.* State, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157; Morgan *v.* Pratt County, 24 Kan. 71; State *v.* Hodgeman County, 23 Kan. 264; Hagerty *v.* Arnold, 13 Kan. 367.

Kentucky.— Cox *v.* Kash, 1 Bush 201.

Nebraska.— State *v.* Elder, 31 Nebr. 169, 47 N. W. 710, 10 L. R. A. 796; State *v.* Stearns, 11 Nebr. 104, 7 N. W. 743; State *v.* Hill, 10 Nebr. 58, 4 N. W. 514; State *v.* Dinsmore, 5 Nebr. 145.

New York.— People *v.* Rice, 129 N. Y. 449, 29 N. E. 355, 14 L. R. A. 643; People *v.* Schiellein, 95 N. Y. 124 (holding that where a board of canvassers met at the time and place as required by law, but entirely neglected to canvass the votes for the office of justice of the peace, they may be required to return and complete the duty with which they are charged, there being no limit of time mentioned in the statute within which the duty must be performed); People *v.* Buffalo, 65 Hun 300, 20 N. Y. Suppl. 1; *In re* Board of Canvassers, 12 N. Y. Suppl. 174; People *v.* Greene County, 2 N. Y. Civ. Proc. 452, 12 Abb. N. Cas. 95, 64 How. Pr. 201.

Oregon.— Simon *v.* Durham, 10 Oreg. 52.

Pennsylvania.— *In re* Contested Elections, 1 Brewst. 67.

See 33 Cent. Dig. tit. "Mandamus," § 154. See also Elections, 15 Cyc. 384, text and note 94 *et seq.*

Indorsing reasons for rejection of ballot.— Mandamus will lie to compel canvassers to indorse as directed by statute their reasons on ballots rejected as void, to place these ballots in a sealed package and file the same with the original statement of the canvassers. People *v.* Ward, 62 N. Y. App. Div. 531, 71 N. Y. Suppl. 76.

Compelling correction of returns to canvassers see People *v.* Nordheim, 99 Ill. 553 (holding that where canvassers had refused to allow the judges and clerks of election to amend their returns by signing their names, the canvassers could be compelled to correct the returns by mandamus); People *v.* Onondaga County, 129 N. Y. 469, 29 N. E. 361 (holding that where the sample ballots attached to a return of inspectors of election to the board of county canvassers show that the candidate was correctly named in the ballots, but through mistake or clerical error they are returned in a name differing slightly in the spelling or in some other particular, upon refusal of the said board to send back the return for correction, the candidate is entitled to a mandamus requiring it so to do before canvassing the vote). See also People *v.* Syracuse, 88 Hun (N. Y.) 203, 34 N. Y. Suppl. 661.

48. *Alabama.*— Hudman *v.* Slaughter, 70 Ala. 546.

Delaware.— McCoy *v.* State, 2 Marv. 543, 36 Atl. 81.

Iowa.— State *v.* Bailey, 7 Iowa 390; State *v.* Marshall County Judge, 7 Iowa 186.

Kansas.— See Garden City *v.* Hall, 46 Kan. 531, 26 Pac. 1021. *Compare* State *v.* Stevens, 23 Kan. 456.

the right of the relator sought to be enforced is not clear, or the duty of defendant in the premises is not plainly enjoined by law,[49] as for instance where the returns to be canvassed are not properly authenticated or certified or are otherwise defective and not in substantial compliance with statute.[50] Moreover it is held that, although the duties of the canvassers may be ministerial and they have no right to consider the question of vacancy in the office, the courts will consider it and deny the writ to compel the counting or abstracting of votes, where it is determined that no vacancy exists.[51] Where canvassing officers are vested with discretion in any particular, the writ will not lie to control such discretion.[52] Nor

Michigan.— Atty.-Gen. *v.* Iron County, 64 Mich. 607, 37 N. W. 539.

Ohio.— Dalton *v.* State, 43 Ohio St. 652, 3 N. E. 685.

Washington.— State *v.* Mason, (1907) 88 Pac. 126, holding that the writ lies to canvass returns even where the election was irregular, when such irregularity resulted from the failure of municipal officers to perform their duty, by which a committee of citizens were compelled to provide for the election.

Compare Rose *v.* Knox County Com'rs, 50 Me. 243 (no writ where election illegal); State *v.* Drake, 83 Wis. 257, 53 N. W. 496; State *v.* Barber, 4 Wyo. 56, 32 Pac. 14.

Unconstitutionality of election law no defense to writ to compel board to receive returns see Franklin County *v.* State, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183.

49. *California.*— People *v.* Pond, 89 Cal. 141, 26 Pac. 648.

Kansas.— Peters *v.* State Canvassers, 17 Kan. 365.

New York.— People *v.* State Bd. of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646; People *v.* Randolph, 32 Misc. 131, 66 N. Y. Suppl. 197.

Ohio.— State *v.* McKinley, 11 Ohio Dec. (Reprint) 692, 28 Cinc. L. Bul. 337.

Pennsylvania.— *In re* Election, 3 Lanc. L. Rev. 225.

Wisconsin.— State *v.* Oates, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912.

Wyoming.— State *v.* Barber, 4 Wyo. 56, 32 Pac. 14.

Compelling count for same person of votes slightly variant as to designation of candidate.— In State *v.* Williams 95 Mo. 159, 8 S. W. 415 [*distinguishing* State *v.* Garesche, 65 Mo. 480], it was held that mandamus will not lie to compel a board of election canvassers to count votes returned for Matthew Ryan, Mattias Ryan, and M. Ryan, as being cast for different persons, it not being alleged that they were different persons, or that the votes were cast for different persons. To the same effect see State *v.* Foster, 38 Ohio St. 599.

A board having no power to canvass, although assuming to do so, cannot be compelled to canvass votes. Page *v.* McClure, (Vt. 1906) 64 Atl. 451.

50. Luce *v.* Dukes County, 153 Mass. 108, 26 N. E. 419; Clark *v.* Hampden County, 126 Mass. 282; People *v.* Onondaga County, 129 N. Y. 469, 29 N. E. 361; State *v.* Randall, 35 Ohio St. 64. *Compare* Long *v.* State, 17 Nebr. 60, 22 N. W. 120.

Compelling rejection of defective or illegal returns.— In People *v.* Rice, 129 N. Y. 449, 29 N. E. 355, 14 L. R. A. 643, it was held that the writ of mandamus lies to compel the state board of canvassers to reject returns sent up from the county canvassers which, although valid on their face, were the result of illegal action on the part of the county board, the board having acted in excess of its jurisdiction. On the other hand it has been held that mandamus will not lie to prohibit the board of county canvassers from canvassing and certifying the returns because of mere informalities, when there is only one return made, and there is no authority given by statute to make any other. People *v.* Rensselaer County, 54 Hun (N. Y.) 595, 8 N. Y. Suppl. 259.

Failure to canvass on day required by law for making.— While mandamus will not lie to compel the performance of a legal duty, to which the party applying for the writ is not legally entitled, or where the time has expired within which the officer is authorized to act, yet where a board of canvassers are required to meet a particular day, although there is no limit of time mentioned within which their duties must be performed, and they have met at the time and place as required by statute but have entirely neglected to canvass the votes for an office, they may be required to return and complete the duty with which they are charged. People *v.* Schiellein, 95 N. Y. 124.

51. State *v.* McGregor, 44 Ohio St. 628, 10 N. E. 66; Com. *v.* Handley, 106 Pa. St. 245. See also Peters *v.* Board of State Canvassers, 17 Kan. 365.

52. *Alabama.*— Hudmon *v.* Slaughter, 70 Ala. 546.

California.— Magee *v.* Calaveras County, 10 Cal. 376.

Colorado.— Orman *v.* People, 18 Colo. App. 302, 71 Pac. 430.

Florida.— State *v.* Deane, 23 Fla. 121, 1 So. 698, 11 Am. St. Rep. 343.

Iowa.— State *v.* Bailey, 7 Iowa 390.

Kentucky.— Booe *v.* Kenner, 105 Ky. 517, 49 S. W. 330, 20 Ky. L. Rep. 1343; Anderson *v.* Likens, 104 Ky. 699, 47 S. W. 867, 20 Ky. L. Rep. 1001.

Louisiana.— State *v.* Strong, 32 La. Ann. 173.

New York.— People *v.* Hanes, 44 Misc. 475, 90 N. Y. Suppl. 61.

Ohio.— Dalton *v.* State, 43 Ohio St. 652, 3 N. E. 685.

See 33 Cent. Dig. tit. "Mandamus," § 154.

will the writ be granted where its issuance would be useless and the position of the petitioner would not be affected thereby.[53]

13. Recanvass. Although there is authority to the contrary[54] the prevailing rule seems to be that after canvassers have made one canvass, declared the result, and adjourned, they may be compelled by mandamus to reassemble and make a correct canvass of the returns where it appears that upon the first canvass they neglected or refused fully to perform their duty[55] But the writ will not issue in a case where its effect would be to control the exercise of discretion vested in the board,[56] or to compel the performance of an act not authorized and enjoined by law;[57] where quo warranto[58] or a statutory writ of contest or other proceeding at law affords a specific adequate remedy;[59] or where the result would not be changed by the recount and the writ would be ineffectual to give petitioner any relief,[60] or the term of office to which the petitioner claims election has expired;[61] or, it has been held, where a commission has been issued to the person declared elected[62] or he has qualified and entered upon the duties of his office.[63] So the writ has

53. Baker *v.* Board of State Canvassers, 111 Mich. 378, 69 N. W. 656 (holding that mandamus will not issue to compel a board of canvassers to credit candidates with votes which were rejected as irregular so that the party to which the candidate belongs may take its proper position on the next official ballot where neither the election of any of the candidates nor the position to which the party would be entitled on the ballot would be affected by the votes being counted); State *v.* Frazier, 114 Tenn. 516, 86 S. W. 319. See also People *v.* Board of Town Canvassers, 32 Misc. (N. Y.) 131, 66 N. Y. Suppl. 197; State *v.* McKinley, 11 Ohio Dec. (Reprint) 692, 28 Cinc. L. Bul. 337.

54. See Elections, 15 Cyc. 383, text and note 90.

55. See Elections, 15 Cyc. 384, text and note 91.

Intervention of citizens to cancel writ to compel recanvass see State *v.* Matley, 17 Nebr. 564, 24 N. W. 200.

Delivery of ballots for purpose of recanvass.— It is not error to refuse to grant a mandamus to require the clerk of the superior court to deliver certain ballots and voters' lists to the election superintendents for the purpose of reconsolidating the votes when it affirmatively appears that the ballots and lists are not in his possession. Gilliam *v.* Green, 122 Ga. 322, 50 S. E. 137.

56. State *v.* Hamil, 97 Ala. 107, 11 So. 892; *Ex p.* Scarborough, 34 S. C. 13, 12 S. E. 666; Arberry *v.* Beavers, 6 Tex. 457, 55 Am. Dec. 791.

In West Virginia upon a mandamus, the action of election canvassers may be controlled to the same extent as upon the statutory writ of certiorari. Goff *v.* Roane County, 56 W. Va. 675, 49 S. E. 588; Stanton *v.* Wolmesdorff, 55 W. Va. 601, 47 S. E. 245.

57. Sharpless *v.* Buckles, 65 Kan. 838, 70 Pac. 886 (holding that mandamus will not lie to compel a canvassing board to recanvass the returns and exclude certain votes cast under a law claimed to be unconstitutional); People *v.* Mein, 66 N. Y. App. Div. 615, 72 N. Y. Suppl. 479 (no writ to recanvass and reject votes on local option on ground of want of statutory notice).

58. State *v.* Hamil, 97 Ala. 107, 11 So. 892.

59. *Alabama.*— State *v.* Hamil, 97 Ala. 107, 11 So. 892.

Kentucky.— Houston *v.* Steele, (1894) 28 S. W. 662; Bach *v.* Spencer, 68 S. W. 442, 24 Ky. L. Rep. 354, contest exclusive remedy.

Michigan.— Belknap *v.* Ionia County, 94 Mich. 516, 54 N. W. 376.

Missouri.— State *v.* Smith, 104 Mo. 661, 16 S. W. 503.

New York.— People *v.* Mein, 66 N. Y. App. Div. 615, 72 N. Y. Suppl. 479.

Ohio.— State *v.* Stewart, 26 Ohio St. 216; State *v.* Berry, 14 Ohio St. 315; State *v.* Stewart, 8 Ohio Dec. (Reprint) 171, 6 Cinc. L. Bul. 188.

Pennsylvania.— Com. *v.* Philadelphia Com'rs, 2 Pars. Eq. Cas. 220, contest adequate.

South Carolina.— See *Ex p.* Mackey, 15 S. C. 322.

Contest held inadequate see State *v.* Peacock, 15 Nebr. 442, 19 N. W. 685.

The power of congress to judge of the election return of its members has been held not to constitute another remedy within the meaning of the rule. *Ex p.* Mackey, 15 S. C. 322.

60. Gilliam *v.* Green, 122 Ga. 322, 50 S. E. 137; Rice *v.* Coffey County, 50 Kan. 149, 32 Pac. 134.

61. Potts *v.* Tuttle, 79 Iowa 253, 44 N. W. 374.

62. Myers *v.* Chalmers, 60 Miss. 772; O'Hara *v.* Powell, 80 N. C. 103.

Where recanvass amounts to election contest.— It has been held that mandamus will not lie to compel the recanvass of election returns where the result would be to permit the court to go behind the election certificate and contest the election. Territory *v.* Mohave County, 2 Ariz. 248, 12 Pac. 730, where the result of a county-seat election had been declared and the county officers had acted upon it.

63. State *v.* Sullivan, 83 Wis. 416, 53 N. W. 677.

been denied where the canvassers have not refused to canvass the votes but propose to make a canvass on a day to which they have adjourned,[64] or where the object of the application for the writ was to compel a second canvass on the ground that the original canvass was not made by the officers authorized by law.[65]

14. Declaring Results and Certifying Election. It is very generally held that certifying or declaring the results of an election is a ministerial duty which may be compelled by mandamus,[66] and this, it has been held, although the refusal to act was on the grounds of fraudulent voting.[67] As a general rule mandamus will lie to compel canvassing boards or other proper authorities to perform the ministerial duty of issuing certificates of election to persons having the greatest number of votes as shown by the returns;[68] and in a number of cases where the certificate was arbitrarily withheld on account of alleged facts which the canvassers had no jurisdiction to investigate, the courts have compelled the certifying officer or officers to issue a certificate to an individual by name;[69] and it has been held to be no defense that a certificate has already been issued to another

64. Double *v.* McQueen, 96 Mich. 39, 55 N. W. 564.

65. Matter of Scofield, 102 N. Y. App. Div. 358, 92 N. Y. Suppl. 672.

66. *Alabama.*— Leigh *v.* State, 69 Ala. 261; State *v.* Ninth Judicial Cir. Judge, 13 Ala. 805.

Arkansas.— Willeford *v.* State, 43 Ark. 62; Howard *v.* McDiarmid, 26 Ark. 100.

California.— Pacheco *v.* Beck, 52 Cal. 3.

Georgia.— State *v.* Thrasher, 77 Ga. 671; Steward *v.* Peyton, 77 Ga. 668.

Illinois.— Holt *v.* People, 102 Ill. App. 276.

Indiana.— Enos *v.* State, 131 Ind. 560, 31 N. E. 357; Brower *v.* O'Brien, 2 Ind. 423.

Iowa.— Bradfield *v.* Watt, 36 Iowa 291; U. S. *v.* Dubuque County, Morr. 31, holding that the writ lies to compel the proper authorities to make a minute of the vote on their records.

Kansas.— Sumner County High School *v.* Sumner County, 61 Kan. 796, 60 Pac. 1057.

Kentucky.— Clark *v.* McKenzie, 7 Bush 523.

Louisiana.— State *v.* Monroe, 46 La. Ann. 1276, 15 So. 625, holding that defendants had no authority to question the result of the election on the ground of fraudulent voting. See also State *v.* Secretary of State, 32 La. Ann. 579.

Mississippi.— Bourgeois *v.* Fairchild, 81 Miss. 708, 33 So. 495.

Missouri.— Barnes *v.* Gottschalk, 3 Mo. App. 111.

Nebraska.— See State *v.* Elder, 31 Nebr. 169, 47 N. W. 710, 10 L. R. A. 796, opening and publishing returns of election for officers of executive department by speaker of house of representatives.

New York.— People *v.* Syracuse, 88 Hun 203, 34 N. Y. Suppl. 661; *In re* Bd. of Canvassers, 12 N. Y. Suppl. 174. See also Howland *v.* Eldredge, 43 N. Y. 457.

South Carolina.— *Ex p.* Elliott, 33 S. C. 602, 12 S. E. 423; State *v.* Chairman County Canvassers, 4 S. C. 485.

West Virginia.— Morgan *v.* Wetzel County Ct., 53 W. Va. 372, 44 S. E. 182.

See 33 Cent. Dig. tit. "Mandamus," § 155.

Validity of election as condition precedent. — In State *v.* Malheur County Ct., 46 Oreg. 519, 81 Pac. 368, it was held that mandamus would not be awarded to compel the county court to declare the result of a local option election where proper preliminary proceedings sufficient to constitute a valid election were not shown.

Preventing record of vote.— In Gayle *v.* Owen County Ct., 83 Ky. 61, it was held that mandamus is the proper remedy to prevent the clerk and judge of the county court from recording the vote upon a "local option" law, if the law is unconstitutional.

Mandamus will not lie to compel a canvasser to assent to and certify the result of a recount of ballots as found by another canvasser, although both were present at it, if they disagree as to such result, and the unwilling one says it is not an adequate, correct, true recount. Dent *v.* Taylor County, 45 W. Va. 750, 32 S. E. 250.

67. State *v.* Monroe, 46 La. Ann. 1276, 15 So. 625. See also Hudmon *v.* Slaughter, 70 Ala. 546; People *v.* Bell, 54 Hun (N. Y.) 567, 8 N. Y. Suppl. 254 [*affirmed* in 119 N. Y. 175, 23 N. E. 533]. *Compare* Cannon *v.* Providence, 24 R. I. 473, 53 Atl. 637.

Prohibition of declaration of result.— In State *v.* Coahoma County, (Miss. 1887) 3 So. 143, upon an application for a writ of prohibition and mandamus to prohibit a board of supervisors from declaring the result of an election for the removal of a county-seat, because of alleged frauds and irregularities and that the board might be commanded to order a legal election on the subject, it was held that it was not allowable in such proceeding to inquire into the qualification of electors and the legality of the election, as affected by matters not apparent on the face of the returns.

68. See Elections, 15 Cyc. 386, text and note 13.

Where two men are returned as elected, to county commissioners, and they are required to select one of them, mandamus will not lie to direct who shall be selected and receive the precept, if it is doubtful who is elected. Com. *v.* Philadelphia Com'rs, 2 Pars. Eq. Cas. (Pa.) 220.

69. See Elections, 15 Cyc. 387, text and note 15.

person,[70] although the latter proposition has been denied.[71] On the other hand it is held that the writ will not be granted upon the application of an individual ineligible to hold office,[72] or claiming to be elected under an unconstitutional law,[73] or where the election to fill the office was without authority of law,[74] although the board of canvassers act ministerially and have no power to institute an inquiry as to the eligibility of candidates or the validity of the election. So the writ will not lie to compel the issuance of a certificate of election unless it appears that the applicant received the highest number of votes.[75] Nor will the writ lie against an officer not required by law to issue a certificate of election,[76] or where defendant is vested with a discretion in the premises.[77] It has been held that the writ will not be granted without a previous application to the canvassers,[78] unless the court is convinced that such application would not be availing.[79]

15. Election Contests. Mandamus lies to compel municipal officers to proceed with the trial of a municipal election contest and to perform the ministerial duties devolving upon them in such contest.[80] Persons selected to take evidence in an election contest may be compelled by mandamus to proceed.[81]

16. Inspection of Election Records. Mandamus lies to compel the inspection of the lists of registered voters and other public election records,[82] unless it appears that the granting of the writ will be fruitless, nugatory, and serve no useful legal purpose.[83] But so much of the records as relate to the preparation and printing of the official ballots prescribed by law, the certification of the same, and their distribution to the judges of election has been held not to be a public record open to the inspection of the ordinary citizen or voter and hence its inspection cannot be compelled by mandamus.[84]

E. Duties of Particular Officers — 1. In General. Mandamus will not ordinarily be used to interfere with the details of municipal administration,[85] or

70. See Elections, 15 Cyc. 387, text and note 16.

71. People *v.* Cover, 50 Ill. 100; Sherburne *v.* Horn, 45 Mich. 160, 7 N. W. 730. See also State *v.* Smith, (Mo. 1891) 15 S. W. 614 (where it also appeared that the governor had delivered a commission to relator's opponent after which the relator had instituted a statutory contest for the office which was then pending); State *v.* Sullivan, 83 Wis. 416, 53 N. W. 677 (where it appeared that relator's opponent had been declared duly elected by the inspectors of election and had qualified and entered upon the duties of the office).

72. People *v.* State Bd. of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646; People *v.* Cortlandt, 61 N. Y. Suppl. 727. See also State *v.* Newman, 91 Mo. 445, 3 S. W. 849.

73. Maynard *v.* Kent County First Representative Dist., 84 Mich. 228, 47 N. W. 756, 11 L. R. A. 332.

74. Kokes *v.* State, 55 Nebr. 691, 76 N. W. 467; State *v.* Whittemore, 11 Nebr. 175, 9 N. W. 93; State *v.* Stauffer, 11 Nebr. 173, 8 N. W. 432; State *v.* McGregor, 44 Ohio St. 628, 10 N. E. 66.

75. Howes *v.* Walker, 92 Ky. 258, 17 S. W. 576, 13 Ky. L. Rep. 530; Atwood *v.* Sault Ste. Marie, 141 Mich. 295, 104 N. W. 649 [*distinguishing* Christopherson *v.* Manistee, 117 Mich. 125, 75 N. W. 445], holding that mandamus will not lie to compel a board of canvassers to issue a certificate of election to one not entitled according to the return of a recount committee, where the canvassers are required by law to accept the return as correct.

76. Boggs *v.* Monongahela City, 22 Pa. Co. Ct. 640.

77. State *v.* Baton Rouge, 25 La. Ann. 310; *Ex p.* Scarborough, 34 S. C. 13, 12 S. E. 666. See also State *v.* Bossier Parish Police Jury, 43 L. Ann. 1009, 10 So. 359; Grier *v.* Shackleford, 3 Brev. (S. C.) 491; State *v.* Bruce, 3 Brev. (S. C.) 264, 6 Am. Dec. 576.

78. State *v.* Smith, 31 Nebr. 590, 48 N. W. 468.

79. Hilton *v.* Grand Rapids, 112 Mich. 500, 70 N. W. 1043.

80. Carney *v.* Neeley, 60 Kan. 672, 57 Pac. 527 (holding that writ lies to compel the presiding officer of a special contest court to administer oaths and submit motions made by members to the decision of the court); *In re* Denham, 3 U. C. Q. B. O. S. 605.

81. State *v.* Peniston, 11 Nebr. 100, 7 N. W. 753.

82. See Elections, 15 Cyc. 307, text and note 81.

83. Hall *v.* Staunton, 55 W. Va. 684, 47 S. E. 265.

84. Gleaves *v.* Terry, 93 Va. 491, 25 S. E. 552, 34 L. R. A. 144.

85. People *v.* Listman, 84 N. Y. App. Div. 633, 82 N. Y. Suppl. 784, holding that where the executive head of a municipal police department has sent an officer to attend a Sunday theatrical performance, who reports to

to conduct or operate as a general supervision over municipal officers.[86] As has already been noted it will lie only to enforce a duty which results from an office, trust, or station,[87] and is prescribed by law,[88] and it will not lie against an individual,[89] nor, in general, against an officer who has ceased to be such.[90] Nor will it issue where it would be to no purpose.[91]

2. MAYOR OR OTHER CHIEF EXECUTIVE OFFICER. A ministerial duty of the mayor or other chief executive officer of a municipal corporation may be enforced by mandamus.[92] Thus where he has no discretion or veto power he may be compelled to sign an ordinance.[93] Where a discretion is reposed in the mayor of a municipality, the manner in which it shall be exercised cannot be controlled by mandamus;[94] and the council cannot by its action make mandatory a duty which, under the statute imposing it, is discretionary.[95]

3. OFFICERS OF COMMON COUNCILS. Performance of ministerial duties by the officers of a common council may be enforced by mandamus.[96] So the president of a city council may be compelled to sign an ordinance where such duty is mandatory.[97] But mandamus will not issue to compel a village clerk to attend meetings of the village council.[98] An official stenographer may be compelled to furnish a transcript of the evidence had at a hearing before a council.[99]

4. POLICE OFFICERS. Mandamus will not issue to compel performance of a duty by police officers when there is another adequate remedy,[1] as by removal of the officer.[2] Where, however, there is no other adequate remedy mandamus will

the police magistrate, who in return refuses to issue a warrant, and where both the Sunday violator may be proceeded against criminally and the head of the department ousted from office for official dereliction, the court, in the exercise of its discretion, will refuse mandamus to compel such officer to enforce the Sunday laws; neither the wrong complained of being of so grave a character, nor the public interests involved of so much importance, as to warrant extraordinary interference with the details of municipal administration.

86. Cady *v.* Ihnken, 129 Mich. 466, 89 N. W. 72; People *v.* Whipple, 41 Mich. 548, 49 N. W. 922.

87. See *supra*, II, C, 2, c.

88. State *v.* Dunn, (Nebr. 1906) 107 N. W. 236 (holding that no writ would issue to president *pro tem.* of council to appoint committees, when no statute creates the duty); People *v.* York, 27 Misc. (N. Y.) 658, 59 N. Y. Suppl. 418 (holding police commissioners would not be compelled to remove a picture from the rogues' gallery).

89. See *infra*, VIII.

90. See *supra*, II, F, 1.

91. Tennant *v.* Crocker, 85 Mich. 328, 48 N. W. 577, holding that mayor would not be compelled to declare not carried a resolution void on face.

92. State *v.* Fisher, (Del. 1903) 64 Atl. 68 (signing and affixing seal to contract); People *v.* McGuire, 31 Misc. (N. Y.) 324, 65 N. Y. Suppl. 463 (signing contract).

93. Dreyfus *v.* Lonergan, 73 Mo. App. 336; Com. *v.* Highley, 5 Del. Co. (Pa.) 284, 9 Montg. Co. Rep. 102; *In re* South Chester, 5 Del. Co. (Pa.) 281; Com. *v.* Bullock, 2 Montg. Co. Rep. (Pa.) 5; Com. *v.* Kepner, 10 Phila. (Pa.) 510; State *v.* Taylor, 36 Wash. 607, 79 Pac. 286.

Technical grounds.— The mayor of a city will not be compelled to certify an ordinance which was not passed over his veto on the technical ground that he by mistake returned the ordinance with the veto to the wrong chamber. Com. *v.* Fitler, 136 Pa. St. 129, 20 Atl. 424.

94. People *v.* Maher, 141 N. Y. 330, 36 N. E. 396 [*reversing* 19 N. Y. Suppl. 758, 46 N. Y. St. 205]; Com. *v.* Henry, 49 Pa. St. 530; Com. *v.* Lebanon City, 7 Pa. Dist. 163.

An ordinance authorizing the mayor to execute a lease invests him with discretion. Com. *v.* Henry, 49 Pa. St. 530.

95. People *v.* Maher, 141 N. Y. 330, 36 N. E. 396 [*reversing* 19 N. Y. Suppl. 758].

96. Warmolts *v.* Keegan, (N. J. 1903) 54 Atl. 813 (clerk of council must strike name from roll of members and place another thereon); People *v.* McGuire, 31 Misc. (N. Y.) 324, 65 N. Y. Suppl. 463 (clerk must sign contract).

97. State *v.* Meier, 143 Mo. 439, 45 S. W. 306 [*distinguishing* State *v.* Stone, 120 Mo. 428, 25 S. W. 376, 41 Am. St. Rep. 705, 23 L. R. A. 194].

98. Cady *v.* Ihnken, 129 Mich. 466, 89 N. W. 72.

99. Mockett *v.* State, 70 Nebr. 518, 97 N. W. 588, holding that a person acting as such a stenographer could not set up a private contract in defense to such duty.

1. People *v.* Listman, 40 Misc. (N. Y.) 372, 82 N. Y. Suppl. 263 [*affirmed* in 84 N. Y. App. Div. 633, 82 N. Y. Suppl. 784]; State *v.* Brewer, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858, holding that writ would not issue to compel a sheriff to prosecute violations of statutes, there being an adequate remedy against him by criminal prosecution.

2. Alger *v.* Seaver, 138 Mass. 331 (holding that a writ would not issue to compel a city marshal to station a police officer as provided

issue to compel a police officer to enforce criminal or police regulations and prosecute violators thereof,[3] unless the refusal to prosecute is within the reasonable exercise of his discretion.[4]

5. Boards of Health. The performance of a ministerial act by a board of health may be compelled by mandamus.[5]

F. Establishment, Maintenance, and Management of Schools[6] **— 1. In General.** Superintendents of schools, school trustees, or directors or other school officials may be compelled by mandamus to perform their ministerial duties,[7] but not to exercise their discretionary powers in any particular manner.[8] Nor will the writ lie where there is another adequate remedy.[9]

2. Erection of Buildings or Furnishing School Facilities. Mandamus lies to compel school authorities to perform their ministerial duties in building school-houses[10] and furnishing the proper school facilities.[11] But where discretionary powers as to the erection[12] or the location of school buildings[13] are vested in the

by an order of the council); State *v.* Murphy, 3 Ohio Cir. Ct. 332, 2 Ohio Cir. Dec. 190 (holding that writ to enforce liquor laws would not issue). But see Goodell *v.* Woodbury, 71 N. H. 378, 52 Atl. 855, holding that a remedy by removal of the officer would not prevent mandamus to compel a chief of police to prosecute violations of law.

3. Moores *v.* State, 71 Nebr. 522, 99 N. W. 249 (holding that city officers may be compelled to suppress a pool-room); State *v.* Cummings, 17 Nebr. 311, 22 N. W. 545; Goodell *v.* Woodbury, 71 N. H. 378, 52 Atl. 855 (unlawful sale of liquor); State *v.* Columbus Police Bd., 10 Ohio Dec. (Reprint) 256, 19 Cinc. L. Bul. 341 (holding writ to lie to compel police board to enforce liquor law); State *v.* Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166.

Arrest without warrant will not be commanded where such arrest would be unlawful. State *v.* Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166.

4. People *v.* Leonard, 74 N. Y. 443, holding that no writ would issue to compel prosecution of innkeepers for failure to maintain signs. And see State *v.* Francis, 95 Mo. 44, 8 S. W. 1, holding that while mandamus would issue to vacate an order of a police board directing the chief of police not to interfere with the sale of wine and beer on Sunday, it would not issue to compel the board to prosecute violations of the excise law.

5. Safford *v.* Detroit Bd. of Health, 110 Mich. 81, 67 N. W. 1094, 64 Am. St. Rep. 332, 33 L. R. A. 300 (action upon claim for payment for property destroyed to prevent spread of disease); Reynolds *v.* Schultz, 34 How. Pr. (N. Y.) 147 (writ lies to compel health board to fix time of hearing to abate nuisance).

6. Schools generally see Schools and School-Districts.

7. People *v.* Van Horn, 20 Colo. App. 215, 77 Pac. 978 (duty of superintendent to record description of boundaries of school-district, and preparation of map of same); Young *v.* State, 138 Ind. 206, 37 N. E. 984 (making enumeration by school trustee of children who are of school age in his township the basis of his report to the state superintendent); Philadelphia *v.* Johnson, 47 Pa. St. 382 (duty of school controllers to adopt scale of teachers' salaries); Baer *v.* School Directors, 4 Pa. Co. Ct. 43 (holding that the writ lies at the suggestion of one of the city auditors to compel school-directors to furnish statement of their accounts); Harkness *v.* Hutcherson, 90 Tex. 383, 38 S. W. 1120 (school trustees are "bodies politic and corporate in law," subject to mandamus).

8. State *v.* Jones, 155 Mo. 570, 56 S. W. 307; Patterson *v.* Cecil Tp. School Directors, 24 Pa. Co. Ct. 574.

9. Fogle *v.* Gregg, 26 Ind. 345, holding that an appeal lies to the county examiner from the decision of the township trustees upon the application of an inhabitant to be transferred for school purposes to another township.

10. State *v.* Custer, 11 Ind. 210 (holding that the writ lies to compel trustees to erect a school according to the decision of the superintendent); Benjamin *v.* Malaka Dist. Tp., 50 Iowa 648 (holding that the writ lies to build a school-house voted for by the electors); State *v.* Cartwright, (Mo. App. 1907) 99 S. W. 48; Krull *v.* State, 59 Nebr. 97, 80 N. W. 272 (holding that the writ lies to compel the building of a school-house in accordance with the direction of the proper authorities).

Erection of public buildings generally see *infra*, VI, O, 6.

11. Maddox *v.* Neal, 45 Ark. 121, 55 Am. Rep. 540; Hancock *v.* Perry Dist. Tp., 78 Iowa 550, 43 N. W. 527 (holding that mandamus lies to compel school directors to recognize territory as part of the district and provide school facilities therefor); Swenchart *v.* Strathman, 12 S. D. 313, 81 N. W. 505.

12. State *v.* Jones, 155 Mo. 570, 56 S. W. 307; *Ex p.* Manheim School Directors, 5 Pa. L. J. Rep. 400.

Renting room.—Where the question whether school directors shall rent a room and employ a teacher for the accommodation of any five scholars in pursuance of statute is discretionary, it cannot be compelled by mandamus. Aananson *v.* Anderson, 70 Iowa 102, 30 N. W. 38.

13. Douhet *v.* Clearfield Independent Dist.,

school authorities, the writ will not lie to control the exercise thereof. Moreover, in the absence of any showing of right on the part of township school authorities to build a school-house on land not belonging to the township, the writ will not be granted to compel its location on such land notwithstanding that the county examiner on appeal had rendered a decision to that effect.[14] The writ will not lie to compel a township trustee to furnish school facilities at a particular place where there is an adequate remedy by appeal to the county superintendent of schools.[15]

3. REMOVAL OF SCHOOL BUILDINGS. Mandamus will not lie to compel school authorities to remove a school to another location where the effect of the issuance of the writ would be to control the exercise of their discretionary powers;[16] but the duty of school authorities to remove a school building[17] or to restore it to its original location after removal,[18] in obedience to the decision of the superintendent of public instruction, may be enforced by mandamus.

4. CHANGE OF BOUNDARIES. Mandamus lies to compel the proper authorities to perform not only purely ministerial duties in respect to changing the boundaries of school-districts;[19] but in accordance with the general rules to compel them to

(Iowa 1907) 111 N. W. 326; Heintz *v.* Moulton, 7 S. D. 272, 64 N. W. 135.

Centralization of schools. — In State *v.* Chester Tp., 25 Ohio Cir. Ct. 424, it was held that where a board of education has proceeded in good faith to centralize schools of the township, its discretion with respect to the manner of doing it cannot be controlled by mandamus, although its judgment may be faulty. In State *v.* Colebrook Tp. Bd. of Education, 24 Ohio Cir. Ct. 383, it was held that a writ of mandamus will not be issued to compel the board of education to proceed to centralize schools, when it is not shown that there are sufficient funds in the treasury to provide the necessary building or buildings to accommodate the centralized schools.

14. Koontz *v.* State, 44 Ind. 323, where it also appeared that the township school authorities had the right to change the location of school-houses after it had been established by the school examiner.

15. State *v.* Schmetzer, 156 Ind. 528, 60 N. E. 269. See also Aananson *v.* Anderson, 70 Iowa 102, 30 N. W. 38.

16. Peters *v.* Warner, 81 Iowa 335, 46 N. W. 1001 (where there was no showing of abuse of discretion); Heintz *v.* Moulton, 7 S. D. 272, 64 N. W. 135.

17. Newby *v.* Free, 72 Iowa 379, 34 N. W. 168.

18. Atkinson *v.* Hutchinson, 68 Iowa 161, 26 N. W. 54.

Temporary removal of school. — Where a school-district voted to have a school kept all the ensuing season in a room furnished for the purpose half a mile from the school-house which would accommodate a large portion of the children and the district had the school so kept, although the required majority did not vote in favor of the proposition, it was held that a writ of mandamus would be denied to compel the school to be kept at the original school-house, where it did not appear there was an attempt to make a permanent change from the place of keeping the school and it was not shown how many of the petitioners had children to send to the school or that those who were taxpayers were in danger of having their taxes increased, and where at the time of the application for the writ the term of the school had half expired and had nearly expired at the time of the hearing. Colt *v.* Roberts, 28 Conn. 330.

Effect of ordering election on question of removal pending proceedings. — Where the school property and equipment of a school was removed three years prior to the commencement of an action to compel the trustees by mandamus to restore the school to the original district school-house, and the judge continued the case and ordered an election which resulted in approval of the action of the trustees in removing the school, it was held that mandamus should be denied, although the judge had no authority to order such election and the same was irregular; it being held that in this way the same result is reached as if the court had by mandamus required the trustees to move the school back to the same place and then an election had been held and it had been decided to move to a new site. State *v.* Marshall, 13 Mont. 136, 32 Pac. 648.

Renting school-house.—Where school directors are vested with discretion in causing a school to be taught in a rented house instead of a public school building, their action in so doing cannot be reviewed by mandamus. Scripture *v.* Burns, 59 Iowa 70, 12 N. W. 760.

19. Albin *v.* West Branch Independent Dist., 58 Iowa 77, 12 N. W. 134.

Filing resolution accepting provision of act for separate school-district. — In Com. *v.* James, 135 Pa. St. 480, 19 Atl. 950, it was held that the writ lies to a clerk of court to compel the filing of resolutions of boards of school directors accepting the provisions of an act constituting certain cities separate school-districts.

The recording of the description of the boundaries of a school-district as defined by the election in a book kept by the county superintendent of schools is held to be a ministerial duty, which may be enforced by mandamus. People *v.* Vanhorn, (Colo. App. 1904) 77 Pac. 978.

exercise,[20] although not to control,[21] their discretion in the premises. The writ will not lie for this purpose where there is an adequate remedy in the ordinary course of law.[22]

5. Examination of Teachers and Issuance of Certificates. While mandamus will lie to compel school superintendents or proper authorities to examine teachers and to act upon an application for a teacher's certificate,[23] it will not lie to control the discretionary powers of such officers in granting or withholding certificates,[24] unless they act arbitrarily and in abuse of their discretion.[25] Nor will the writ lie where another adequate remedy is provided by law.[26] Where, after grading a teacher, a board of examiners have no further discretion, it may be compelled by mandamus to issue a certificate of the grade to which the petitioner is entitled, although they could not by mandamus have been compelled to give the teacher any particular grade.[27]

6. Appointment of Teachers. The discretion vested by law in school authorities as to the persons whom they shall employ as teachers cannot be controlled by mandamus.[28] And where a discretion is vested in school authorities to approve or disapprove the appointment of a teacher to a position in a public school, it cannot be controlled by mandamus.[29] But where the duty of approving and filing the contract is purely ministerial, it is enforceable by mandamus.[30] So where the right of a person under a contract to teach in the public schools has been determined on appeal by the state superintendent of instruction, mandamus lies to compel an inferior school-board to recognize the contract.[31]

7. Reinstatement of Teachers. The rule has been laid down by several authorities that mandamus lies to restore a teacher to a position in a public school from which he had been unlawfully removed;[32] and since the position of teacher

20. Hightower *v.* Oberhaulser, 65 Iowa 347, 21 N. W. 671.

21. School Trustees *v.* Kay, 8 Ill. App. 30.

22. Marshall *v.* Sloan, 35 Iowa 445.

23. Bailey *v.* Ewart, 52 Iowa 111, 2 N. W. 1009; Stroup's Petition, 10 Pa. Dist. 301, 25 Pa. Co. Ct. 1, holding that the county superintendent of schools has no power to refuse to examine a teacher on the ground that he held examinations at a particular period in the year and that the teacher did not appear at such examination.

Making out lists of holders of certificates entitled to promotion.— Where a city board of school superintendents were required to make out and file a list of holders of teachers' certificates eligible to promotion the making of such list is a ministerial duty and enforceable by mandamus. Brooklyn Teachers' Assoc. *v.* New York Bd. of Education, 176 N. Y. 564, 68 N. E. 1114 [*affirming* 85 N. Y. App. Div. 47, 83 N. Y. Suppl. 1, and *distinguishing* Matter of Stebbins, 41 N. Y. App. Div. 269, 58 N. Y. Suppl. 468]. But mandamus will not lie to compel the placing of relator's name on a list of those eligible for appointment as high school teachers in New York city, where no such list is required by law. Matter of Stebbins, 41 N. Y. App. Div. 269, 58 N. Y. Suppl. 468.

24. Bailey *v.* Ewart, 52 Iowa 111, 2 N. W. 1009; Kell *v.* Rudy, 1 Pa. Super. Ct. 507, 38 Wkly. Notes Cas. 166 [*reversing* 15 Pa. Co. Ct. 309], where the certificate was refused on the ground that the applicant was in the habit of using intoxicating liquors.

The certification of a teacher as supervising principal has been held to be discretionary within the rule of the text. Com. *v.* Jenks, 154 Pa. St. 368, 26 Atl. 371. See also Com. *v.* Board of Public Education, 187 Pa. St. 70, 40 Atl. 806, 41 L. R. A. 498 [*affirming* 5 Pa. Dist. 341].

The countersigning of a certificate by a county superintendent has been held to be a ministerial act which may be compelled by mandamus. Donaldson *v.* York County School Superintendent, 8 Pa. Dist. 185.

25. McManus *v.* School Controllers, 7 Phila. (Pa.) 23.

26. Greenville College *v.* Greenville County Bd. of Education, (S. C. 1906) 55 S. E. 132; State *v.* Hitt, 13 Wash. 547, 43 Pac. 638.

27. Northington *v.* Sublette, 114 Ky. 72, 69 S. W. 1076, 24 Ky. L. Rep. 835.

28. State *v.* Smith, 49 Nebr. 755, 69 N. W. 114.

29. State *v.* Wilson Tp. Bd. of Education, 19 Ohio Cir. Ct. 574, 10 Ohio Cir. Dec. 678; State *v.* Wilson Tp. Bd. of Education, 8 Ohio S. & C. Pl. Dec. 196, 5 Ohio N. P. 446; Singleton *v.* Austin, 27 Tex. Civ. App. 88, 65 S. W. 686; Wintz *v.* Charleston Dist. Bd. of Education, 28 W. Va. 227.

30. Eden Independent Dist. No. 2 *v.* Rhodes, 88 Iowa 570, 55 N. W. 524; Brown *v.* Owen, 75 Miss. 319, 23 So. 35.

31. Pearsall *v.* Woolls, (Tex. Civ. App. 1899) 50 S. W. 959.

32. Kennedy *v.* San Francisco Bd. of Education, 82 Cal. 483, 22 Pac. 1042; Gilman *v.* Bassett, 33 Conn. 298 (holding that where a teacher without the action of the district was discharged by the committee, and the district at a special meeting called for that purpose directed the committee to reinstate her and

is not an office it has been held that the right to a writ of mandamus is not affected by the fact that another person has been placed in the position;[33] but the writ will be denied where the right of the relator is not clear,[34] where there is another adequate remedy at law,[35] or where the dismissal of the teacher was the result of a trial which may not be reviewed upon mandamus.[36]

8. Admission and Reinstatement of Pupils.[37] The writ of mandamus will lie to compel the admission to school of duly qualified pupils,[38] or to reinstate them in case of illegal expulsion.[39] But the writ will be denied where the right to admission is not clearly established,[40] where expulsion or refusal of admission was made in the exercise of discretionary powers vested in the school authorities and not arbitrarily,[41] where the issuance of the writ would be useless and of no substantial benefit to the petitioner,[42] or where there is an adequate remedy by appeal.[43]

9. Purchase and Use of Text-Books. As a general rule mandamus lies to compel the use in the public schools of text-books adopted in pursuance of statute.[44]

the committee refused to comply with the direction or to resign, mandamus will lie to compel obedience); People *v.* Van Siclen, 43 Hun (N. Y.) 537; Morley *v.* Power, 5 Lea (Tenn.) 691. *Compare* Jordan *v.* Board of Education, 14 Misc. (N. Y.) 119, 35 N. Y. Suppl. 247, 25 N. Y. Civ. Proc. 89, 2 N. Y. Annot. Cas. 244.

33. Kennedy *v.* San Francisco Bd. of Education, 82 Cal. 483, 22 Pac. 1042. *Compare* Jordan *v.* Board of Education, 14 Misc. (N. Y.) 119, 35 N. Y. Suppl. 247, 25 N. Y. Civ. Proc. 89, 2 N. Y. Annot. Cas. 244; South Milwaukee Bd. of Education *v.* State, 100 Wis. 455, 76 N. W. 351.

34. Jordan *v.* Board of Education, 14 Misc. (N. Y.) 119, 35 N. Y. Suppl. 247, 25 N. Y. Civ. Proc. 89, 2 N. Y. Annot. Cas. 244.

35. Jordan *v.* Board of Education, 14 Misc. (N. Y.) 119, 35 N. Y. Suppl. 247, 25 N. Y. Civ. Proc. 89, 2 N. Y. Annot. Cas. 244; South Milwaukee Bd. of Education *v.* State, 100 Wis. 455, 76 N. W. 351.

36. Jordan *v.* Board of Education, 14 Misc. (N. Y.) 119, 35 N. Y. Suppl. 247, 25 N. Y. Civ. Proc. 89, 2 N. Y. Annot. Cas. 244.

37. Mandamus to compel admission of person excluded on account of race or color see Civil Rights, 7 Cyc. 175.

38. State *v.* Penter, 96 Mo. App. 416, 70 S. W. 375; Kaine *v.* Com., 101 Pa. St. 490; Com. *v.* Williamson, 10 Phila. (Pa.) 490; Com. *v.* Davis, 10 Wkly. Notes Cas. (Pa.) 156.

Pupil not complying with illegal regulation.—Where a school-board, acting without authority, orders a change in text-books, mandamus will lie to compel the granting of school privileges to a child not complying with such regulation. Harley *v.* Lindemann, 129 Wis. 514, 109 N. W. 570. See also Board of Public Education *v.* Felder, 116 Ga. 788, 43 S. E. 56.

39. Perkins *v.* West Des Moines Independent School Dist., 56 Iowa 476, 9 N. W. 356 (where a pupil had been expelled under a rule which was void for want of power in the school-board to adopt it); *In re* Rebenack, 62 Mo. App. 8; State *v.* Osborne, 24 Mo. App. 309 (where it appeared that the remedy by appeal was not adequate); Jackson *v.* State, 57 Nebr. 183, 77 N. W. 662, 42 L. R. A. 792; State *v.* Dixon County School Dist. No. 1, 31 Nebr. 552, 48 N. W. 393.

Writ denied in absence of facts showing expulsion.—State *v.* Eau Claire Bd. of Education, 96 Wis. 95, 71 N. W. 123; *In re* Minister of Education, 11 Ont. 439.

40. Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 405, holding that where the principal of a graded school refused to receive a child into the school for a reason which was not good in law, viz., that the applicant was a person of color, would not upon an application for the writ of mandamus preclude him from relying upon another and valid reason, as that the applicant did not hold the requisite qualifications for admission.

Writ denied in case of want of accommodations see *In re* Nicoll, 44 Hun (N. Y.) 340; Dunn *v.* Windsor Bd. of Education, 6 Ont. 125.

Admission of non-residents not compelled.—State *v.* Arcadia Joint School Dist. No. 1, 65 Wis. 631, 27 N. W. 829, 56 Am. Rep. 653.

Admission of pupils not vaccinated not compelled see Field *v.* Robinson, 198 Pa. St. 638, 48 Atl. 873.

41. Clark *v.* Muscatine Independent School Dist., 24 Iowa 266; *In re* Nicoll, 44 Hun (N. Y.) 340; Miller *v.* Clement, 205 Pa. St. 484, 55 Atl. 32; Patterson *v.* Cecil Tp. School Directors, 24 Pa. Co. Ct. 574; State *v.* Burton, 45 Wis. 150, 30 Am. Rep. 706.

Mandamus against teacher.—In State *v.* Burton, 45 Wis. 150, 30 Am. Rep. 706, it was intimated that mandamus cannot in any case issue to a teacher in charge of a public school to compel him to reinstate a suspended pupil.

42. Cristman *v.* Peck, 90 Ill. 150 (where the school term had expired); Board of Education *v.* Bolton, 85 Ill. App. 92 (where since the commencement of the suit the pupil had been admitted).

43. Preston *v.* Marion Independent School Dist., 124 Iowa 355, 100 N. W. 54.

Prior exhaustion of remedy by appeal for decision transferring pupil from one school to another see Stockton *v.* Burlington Bd. of Education, 72 N. J. L. 80, 59 Atl. 1061.

44. State *v.* Blue, 122 Ind. 600, 23 N. E. 963; State *v.* Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240; State *v.* Springfield

But where the board of education is authorized by law to "establish the text-books to be used" in the schools, its action in that behalf cannot be controlled by mandamus.[45]

10. Prohibiting Sectarian Instruction. The writ of mandamus has been awarded to compel the proper school authorities to prohibit the giving of sectarian instruction in the public schools in violation of the constitution.[46] On the other hand, the writ has been denied on the ground that its issuance would be ineffectual,[47] or that it did not appear that the petitioner had demanded of the authorities the performance of a duty sought to be enforced.[48]

11. Fiscal Matters Relating to Schools — a. Appropriation, Apportionment, and Distribution of Funds. Mandamus lies to compel the proper authorities to perform their ministerial duties in distributing and paying over the moneys apportioned or belonging to a school-district, township, or county for school purposes,[49] unless there is another adequate remedy;[50] or in certifying to the proper authority the amount of funds belonging to a school-district erected out of an old district;[51] or, it has been held, in restoring misapplied school funds.[52] But where school authorities are vested with exclusive discretionary powers in the disbursement and distribution of school funds,[53] in appropriating money for particular school purposes,[54] or in prescribing rules for ascertaining the average school attendance according to which the school fund is to be apportioned[55] man-

School Directors, 74 Mo. 21; State *v.* Columbus Bd. of Education, 35 Ohio St. 368.

Prior demand for adoption of publications held necessary.— A teacher is not a public officer, but an employee, and cannot be compelled on the petition of a publisher to use a publisher's books in teaching, although their use is prescribed by statute. Heath *v.* Johnson, 36 W. Va. 782, 15 S. E. 980.

Making record of books adopted.—In American Book Co. *v.* McElroy, 76 S. W. 850, 25 Ky. L. Rep. 960, it was held that the writ lies to the superintendent to make a record of the books adopted for school use.

Purchasing text-books for use of pupils.— Mandamus will not lie to compel the school-board to purchase text-books for the use of pupils, when there are not sufficient funds in the treasury of the school-district to pay the regular running expenses of the school, and also to furnish books. Farris *v.* State, 46 Nebr. 867, 65 N. W. 890.

45. State *v.* Wilson, 121 Wis. 523, 99 N. W. 336.

46. State *v.* Edgerton School-Dist. No. 8, 76 Wis. 177, 44 N. W. 967, 20 Am. St. Rep. 41, 7 L. R. A. 330, where the writ was granted to compel the school authorities to prohibit the use of the Bible as a text-book.

47. Curran *v.* White, 22 Pa. Co. Ct. 201.

48. Scripture *v.* Burns, 59 Iowa 70, 12 N. W. 760.

49. *Indiana.*— Hon *v.* State, 89 Ind. 249.

Nebraska.— Guthrie *v.* State, 47 Nebr. 819, 66 N. W. 853, writ lies to village treasurer to compel transfer of license moneys to school fund.

New Hampshire.— Hall *v.* Somersworth Selectmen, 39 N. H. 511.

New Jersey.— Plainfield Bd. of Education *v.* Sheridan, 45 N. J. L. 276; Elizabeth Bd. of Education *v.* Sheridan, 42 N. J. L. 64.

Texas.— Lawhon *v.* Haas, (Civ. App. 1901) 65 S. W. 48.

Wyoming.— Brown *v.* Nash, 1 Wyo. 85. See 33 Cent. Dig. tit. "Mandamus," § 170.

Meeting of directors of old and new districts to agree upon division of assets.— In Case *v.* Blood, 68 Iowa 486, 27 N. W. 470, it was held that mandamus will not lie to compel the directors of an old school-district and a new one carved out of it to meet together to effect a division of funds, when the evidence shows that they had met repeatedly as required by statute, but were unable to agree. But mandamus will lie to compel the appointment of arbitrators in such case. Case *v.* Blood, 71 Iowa 632, 33 N. W. 144.

Where a school-district organization was legally dissolved by the acts of the voters in pursuance of statute, such fact may be alleged in the return to a writ of mandamus as a defense or bar to the claim of right, on the part of the pretended or *de facto* school-district treasurer of such district to draw school money from the county treasury. State *v.* Cooley, 58 Minn. 514, 60 N. W. 338.

50. Jefferson School Tp. *v.* Worthington School Town, 5 Ind. App. 586, 32 N. E. 807; State *v.* Shelby County, 5 Ind. App. 220, 32 N. E. 92, appeal adequate on claim against county for school moneys.

51. Ramsey *v.* Everett Tp. Clerk, 52 Mich 344, 17 N. W. 939.

52. State *v.* Union, 52 N. J. L. 69, 18 Atl. 571. *Compare* Elder *v.* Territory, 3 Wash. Terr. 438, 19 Pac. 29.

In the absence of any duty on the part of defendant in respect to the funds, mandamus will not lie against him for their restoration. State *v.* Union, 52 N. J. L. 69, 18 Atl. 571.

53 Newark *v.* Newark Bd. of Education, 30 N. J. L. 374.

54. State *v.* Board of Education, 11 Ohio S. & C. Pl. Dec. 422, 8 Ohio N. P. 186, no writ to apportion tuition fees under directory statute.

55. State *v.* Rice, 32 S. C. 97, 10 S. E. 833.

damus does not lie to control this discretion. Where it does not appear that the conditions precedent for the making of a legal apportionment have been performed, as for instance that defendant has received the statistical report as to the number of children of school age residing in the school-districts,[56] or where there is another adequate remedy at law,[57] the writ will not lie to compel an apportionment. So the writ will not lie to compel an appropriation for school purposes unless the authorities having the power to make requisition therefor do so in the proper manner and at the proper time.[58] Nor will the writ lie to compel the setting aside by an officer of any moneys for school purposes until he has collected them.[59]

b. Allowance and Payment of Claims — (i) *In General.* Where the school authorities vested with discretion in the allowance of claims refuse to consider or act upon a claim either by allowing or disallowing it, mandamus lies to compel them to act upon the claim,[60] but not to compel an allowance of the claim or the issuance of an order therefor or otherwise to control their discretion in the premises,[61] unless the action of the school authorities in refusing is arbitrary and capricious.[62] So the writ will not lie where there is another adequate remedy at law.[63] Nor will it be awarded to compel the payment of a claim where its amount has not been determined by the proper officer as required by law.[64]

(ii) *Payment of Teachers' Salaries.* The proposition has been laid down that mandamus is the proper remedy by which a public school-teacher to whom compensation for his services is due may obtain payment thereof out of the funds provided by law for that purpose.[65] The writ has been allowed to compel the payment of a teacher's salary in obedience to an order drawn by the proper officials directing its payment,[66] or where the claim has been submitted to and recognized as valid by a tribunal lawfully authorized to pass upon it.[67] So it has been held that the ministerial duty of issuing or countersigning a warrant for a

56. Ortega *v.* Padilla, 10 N. M. 40, 60 Pac. 70; Multnomah County School Dist. No. 2 *v.* Lambert, 28 Oreg. 209, 42 Pac. 221.

57. Township Bd. of Education *v.* Boyd, 58 Mo. 276.

58. Com. *v.* Pittsburg, 209 Pa. St. 333, 58 Atl. 669.

59. State *v.* Hunter, 111 Wis. 582, 87 N. W. 485.

60. Poling *v.* Philippi Dist. Bd. of Education, 50 W. Va. 374, 40 S. E. 357.

61. Poling *v.* Philippi Dist. Bd. of Education, 50 W. Va. 374, 40 S. E. 357.

62. Raisch *v.* San Francisco Bd. of Education, 81 Cal. 542, 22 Pac. 890, where the refusal of a board of education to draw a warrant in pursuance of their contract for supplies was held to be capricious.

Where a judgment against a school-district did not provide for interest, interest could not be awarded on a writ of mandate issued to compel the trustees of the district to perform the judgment. Howe *v.* Southrey, 144 Cal. 767, 78 Pac. 259.

63. Franklin Tp. *v.* State, 11 Ind. 205; State *v.* Hiers, 51 S. C. 388, 29 S. E. 89; Poling *v.* Philippi Dist. Bd. of Education, 50 W. Va. 374, 40 S. E. 357.

Other relief held inadequate.— Raisch *v.* San Francisco Bd. of Education, 81 Cal. 542, 22 Pac. 890.

64. Hicks *v.* Wayne County Bd. of Auditors, 97 Mich. 611, 57 N. W. 188, payment of assistant visitor of schools for services rendered.

65. Thompson *v.* Elmer Bd. of Education, 57 N. J. L. 628, 31 Atl. 168; Apgar *v.* Chester Tp. School Dist. No. 4, 34 N. J. L. 308.

In Illinois it is held that the proper remedy of a school-teacher to recover his wages is an action against the school directors of the district, and, upon a recovery, to take out the special execution provided, and enforce it by attachment or mandamus. Mandamus against the township treasurer is not the proper remedy. Rogers *v.* People, 68 Ill. 154.

Application of tuition fees.— In State *v.* Cooprider, 96 Ind. 279, it was held that the duty of the trustee of a school township to apply the tuition funds of the township, when received, to the payment of its indebtedness for tuition may be enforced by the writ of mandate.

Compelling collection of money to pay salary.— In State *v.* Davis, 17 Minn. 429, it was held that mandamus will not lie in favor of a teacher to compel the treasurer of a school-district to demand and receive from the county treasurer the moneys in his hands due the district, when the only demand upon such treasurer of the school-district was to pay an order by the trustees on such treasurer.

66. Case *v.* Wresler, 4 Ohio St. 561.

67. Thompson *v.* Elmer Bd. of Education, 57 N. J. L. 628, 31 Atl. 168 (where the controverted questions as to the relator's right to salary had been successfully litigated before the state superintendent); State *v.* Cincinnati Bd. of Police Com'rs, 7 Ohio Dec. (Reprint) 326, 2 Cinc. L. Bul. 114 (where a

teacher's salary,[68] or issuing a requisition upon a warrant,[69] may be compelled by the writ. On the other hand, in several cases the writ has been denied to compel the payment of the salaries of teachers on the ground that there was another adequate remedy provided by law,[70] that the duty was discretionary,[71] that there was no duty on the part of defendant in the premises,[72] or that there was no demand made upon the school authorities for the salary prior to the application for the writ.[73]

c. Assessment and Levy of School Taxes. Where a discretion is vested in a board of education on the question of levying or determining and certifying the amount to be levied this discretion cannot be controlled by mandamus.[74] So where the school authorities are authorized merely to give notice of the amount required for school purposes to the proper authorities who are vested with a discretion in determining what amount of taxes is necessary to be levied, the writ will not lie to compel the making of a levy sufficient to raise the amount reported by the school authorities.[75] But where the municipal or other proper authorities are required to raise by taxation for school purposes such sums as shall be deemed needful by the board of education, the duty of the levying body is ministerial and may be compelled by mandamus.[76] The writ will not lie where its issuance would work injustice or introduce confusion and disorder,[77] where the time for making a levy has passed and the writ would be unavailing,[78] where the school

judgment in a court of law had been obtained against the township board of education, but a levy upon school property was forbidden by statute); Harkness *v.* Hutcherson, 90 Tex. 383, 38 S. W. 1120 (mandamus to enforce collection of judgment).

68. State *v.* Hubbard, 22 Ohio Cir. Ct. 252, 12 Ohio Cir. Dec. 87; Com. Lyndall, 2 Brewst. (Pa.) 425, 7 Phila. 29; Morley *v.* Power, 5 Lea (Tenn.) 691; State *v.* McQuade, 36 Wash. 579, 79 Pac. 207.

69. Williams *v.* Bagnelle, 138 Cal. 699, 72 Pac. 408.

Approval of vouchers. — In Singleton *v.* Austin, 27 Tex. Civ. App. 44, 65 S. W. 686, it was held that where a school-teacher was employed under a statute authorizing school trustees to employ teachers, an action to compel the approval of vouchers issued in payment, brought on the theory that the teacher was prevented from teaching by the action of the trustees themselves could be maintained against the county superintendent of schools without alleging that the teacher appealed to the trustees from the action of the superintendent in refusing to permit the petitioner to teach. But in Plummer *v.* Gholson, (Tex. Civ. App. 1898) 44 S. W. 1, it was held that a writ of mandamus should not issue to compel a county superintendent of schools to approve a voucher for the salary of a teacher who has not first exhausted all remedies provided by the school law by appealing to the state superintendent.

70. Rogers *v.* People, 68 Ill. 154; Davis *v.* Jewett, 69 Kan. 651, 77 Pac. 704; Coffin *v.* Detroit Bd. of Education, 114 Mich. 342, 72 N. W. 156; People *v.* New York Bd. of Education, 60 Hun (N. Y.) 486, 15 N. Y. Suppl. 308 [*affirmed* in 148 N. Y. 766, 43 N. E. 989]; People *v.* New York Common School Inspectors, 44 How. Pr. (N. Y.) 322. See also Payne *v.* School Dist. No. 3–25–10, 87 Mo. App. 415.

71. Com. *v.* Philadelphia County Com'rs, 5 Binn. (Pa.) 536, where an act of the legislature directed the county commissioners to draw an order for the amount of a schoolmaster's bill if they approved thereof.

72. Davis *v.* Jewett, 69 Kan. 651, 77 Pac. 704.

Compelling ministerial officer to perform judicial act.—Where the effect of the issuance of the writ would be to compel a mere ministerial officer to perform a judicial act which by law he was not required to perform, it will not be awarded. State *v.* Gentry, 112 Mo. App. 589, 87 S. W. 68, where the issue was raised as to whether the office of school director legally existed, the school warrants having been issued by the school directors.

73. Shirley *v.* Cottonwood School Dist., (Cal. 1892) 31 Pac. 365.

74. State *v.* Colebrook Tp. Bd. of Education, 24 Ohio Cir. Ct. 383; Com. *v.* Shaw, 96 Pa. St. 268. See also *infra*, VI, V, 1, j.

Exoneration of taxpayer.— Mandamus will not lie to compel school directors to exonerate and discharge a property-owner from a school tax assessed by them against him. Bedford School Directors *v.* Anderson, 45 Pa. St. 388.

75. State *v.* Omaha, 39 Nebr. 745, 58 N. W. 442 [*distinguishing* State *v.* Paddock, 36 Nebr. 263, 54 N. W. 515].

76. Orford School Dist. No. 6 *v.* Carr, 63 N. H. 201 (writ lies to selectmen to levy tax irrespective of legality of vote of a school-district authorizing it); People *v.* Bennett, 54 Barb. (N. Y.) 480; State *v.* Smith, 11 Wis. 65; Dartmouth *v.* Reg., 9 Can. Sup. Ct. 509.

77. San Diego Bd. of Education *v.* San Diego, 128 Cal. 369, 60 Pac. 976, holding that the writ will not issue where a sufficient tax had already been levied, although on other instrumentality.

78. San Diego Bd. of Education *v.* San Diego, 128 Cal. 369, 60 Pac. 976.

for which the levy of the tax is sought has no legal existence,[79] or where the purpose of the tax is contrary to law.[80]

G. Public Records — 1. **Recording Instruments and Amending Records.** A ministerial duty to admit a deed or instrument to record may be enforced by mandamus,[81] as may a duty to discharge an encumbrance of record.[82]

2. **Inspection and Use of Records.** A clear legal right to the examination of public records may be enforced by mandamus,[83] even where it is for the purpose of making abstracts of title for the private gain of the abstracter.[84] Where the officer has a discretion as to the allowance of such examination and has exercised it the writ will not issue.[85] Mandamus will also lie to compel an officer to make a search and certify as to the existence of judgments.[86] A municipal officer may

79. State *v.* Cass County, 69 Nebr. 100, 95 N. W. 6.

80. Dempsey *v.* Hardee Dist. Bd. of Education, 40 W. Va. 99, 20 S. E. 811.

81. Strong's Case, Kirby (Conn.) 345; Manns *v.* Givens, 7 Leigh (Va.) 689; Dawson *v.* Thruston, 2 Hen. & M. (Va.) 132. And see *In re* Thompson, 25 U. C. Q. B. 237. But see Dancy *v.* Clark, 24 App. Cas. (D. C.) 487, holding that writ would not issue where a paper formally perfect was legally invalid on its face in substance.

Satisfaction-piece. — People *v.* Miner, 37 Barb. (N. Y.) 466, 23 How. Pr. 223 [*reversing* 32 Barb. 612]; People *v.* Sigel, 46 How. Pr. (N. Y.) 151.

The paper must be entitled to record. — Callahan *v.* Young, 90 Va. 574, 19 S. E. 163.

A single certificate discharging several mortgages cannot be compelled to be recorded. *In re* Smith, 31 U. C. Q. B. 305.

Where recorder did not receive a deed officially but as a private person to hold it in escrow record was not compelled. People *v.* Curtis, 41 Mich. 723, 49 N. W. 923.

82. State *v.* Planters Consol. Assoc., 43 La. Ann. 840, 9 So. 565; State *v.* Planters Consol. Assoc., 43 La. Ann. 838, 9 So. 564; Savage *v.* Holmes, 15 La. Ann. 334; People *v.* Miner, 37 Barb. (N. Y.) 466, 23 How. Pr. 223; People *v.* Sigel, 46 How. Pr. (N. Y.) 151; Water, etc., Co. *v.* Jenkyn, 20 Pa. Co. Ct. 102.

There must be a clear right. — Raymond *v.* Villeré, 42 La. Ann. 488, 7 So. 900; Willis *v.* Wasey, 41 La. Ann. 694, 6 So. 730; Waters *v.* Mercier, 4 La. 14.

Removal of cloud from title. — Mandamus cannot be employed as a means of avoiding the effect of a contract affecting relator's title. Willis *v.* Wasey, 41 La. Ann. 694, 6 So. 730.

83. *Indiana.* — State *v.* King, 154 Ind. 621, 57 N. E. 535.

Kansas. — Boylan *v.* Warren, 39 Kan. 301, 18 Pac. 174, 7 Am. St. Rep. 551.

Michigan. — Aitchison *v.* Huebner, 90 Mich. 643, 51 N. W. 634 (dealer in tax title may inspect state land book); Brown *v.* Washtenaw County Treasurer, 54 Mich. 132, 19 N. W. 778, 52 Am. Rep. 800.

Minnesota. — Ramsey County *v.* Heenan, 2 Minn. 330, where mandamus issued to compel a register of deeds to deliver to the board of supervisors certain books and papers relating to county taxes.

New Jersey. — Higgins *v.* Lockwood, (Sup. 1906) 64 Atl. 184, holding that a voter could enforce the right to inspect and copy registry lists.

Pennsylvania. — Com. *v.* Weaver, 17 York Leg. Rec. 201.

Tennessee. — State *v.* Williams, 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418.

See 33 Cent. Dig. tit. "Mandamus," § 179.

Right to examine records see Records.

An examination for the purpose of preparing an index under authority of the board of county commissioners may be secured. Hawes *v.* White, 66 Me. 305.

The application to inspect must be made in good faith. — Reg. *v.* Wimbledon Urban Dist. Council, 62 J. P. 84, 77 L. T. Rep. N. S. 599.

Upon the annexation of territory to a county the recorder or other proper officer is entitled to mandamus to enforce his right to inspect and copy such portions of the records of the county to which such territory formerly belonged as affect the real estate as annexed. State *v.* Meadows, 1 Kan. 90.

Commissioners to designate an elevated railroad route cannot be compelled to exhibit minutes, documents, maps, and writings, where they are not required to maintain an office, to keep minutes, or to file or record maps or documents. People *v.* Pierce, 38 Misc. (N. Y.) 332, 77 N. Y. Suppl. 910.

84. Stocknan *v.* Brooks, 17 Colo. 248, 29 Pac. 746; State *v.* McMillan, 49 Fla. 243, 38 So. 666; Day *v.* Button, 96 Mich. 600, 56 N. W. 3; Burton *v.* Tuite, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73; State *v.* Rachac, 37 Minn. 372, 35 N. W. 7 See also Boylan *v.* Warren, 39 Kan. 301, 19 Pac. 174, 7 Am. St. Rep. 551.

Where the existence of the right is denied mandamus will not issue. Bean *v.* People, 7 Colo. 200, 2 Pac. 909; Cormack *v.* Wolcott, 37 Kan. 391, 15 Pac. 245; Burton *v.* Reynolds, 110 Mich. 354, 68 N. W. 217; Webber *v.* Townley, 43 Mich. 534, 5 N. W. 971, 38 Am. Rep. 213. See also State *v.* McCubrey, 84 Minn. 439, 87 N. W. 1126; People *v.* Richards, 99 N. Y. 620, 1 N. E. 258.

85. State *v.* McCubrey, 84 Minn. 439, 87 N. W. 1126; People *v.* Richards, 99 N. Y. 620, 1 N. E. 258; Anderson *v.* Rogan, 93 Tex. 182, 54 S. W. 242.

86. State *v.* Scow, 93 Minn. 11, 100 N. W. 382, so holding, although the information was desired by an abstracter for use in his business.

be compelled by mandamus to submit his books of account to the officer authorized to inspect them.[87]

H. Official Newspapers. An official may be compelled to exercise his discretion with regard to the selection of an official newspaper[88] or to perform ministerial duties with reference to such selection;[89] but the exercise of a discretion intrusted to him cannot be controlled.[90] Mandamus will not lie to compel an officer to publish his official advertisements in a particular paper unless he is so required by law;[91] but where such a duty is imposed by law it may be so enforced,[92] and an official newspaper may compel the proper officer to publish an advertisement as required by law,[93] and may also enforce payment therefor.[94]

I. Franchises. A corporation having a clear legal right to a franchise may, it seems, enforce such right by mandamus;[95] but where a lawful discretion is vested in a municipal council to grant or to withhold a franchise, such discretion cannot be directly or indirectly destroyed or limited by a writ of mandamus.[96]

J. Licenses — 1. In General. The issuance of licenses for the conduct of particular kinds of business or for particular occupations[97] is usually regarded as discretionary and when so regarded cannot be compelled by mandamus.[98] But a

87. Keokuk *v.* Merriam, 44 Iowa 432.

88. Holliday *v.* Henderson, 67 Ind. 103; People *v.* Brennan, 39 Barb. (N. Y.) 651; People *v.* Greene County, 13 Abb. N. Cas. (N. Y.) 421; Matter of Hall, 66 How. Pr. (N. Y.) 330.

Where the requisite papers do not exist designation cannot be compelled. Bayer *v.* Hoboken, 40 N. J. L. 152.

89. Matter of Troy Press Co., 94 N. Y. App. Div. 514, 88 N. Y. Suppl. 115 [*affirmed* in 179 N. Y. 529, 71 N. E. 1141], county clerk must certify newspaper for publication of laws.

90. Holliday *v.* Henderson, 67 Ind. 103; People *v.* Troy, 78 N. Y. 33, 34 Am. Rep. 500 [*reversing* 17 Hun 20]; People *v.* Cattaraugus County, 19 Hun (N. Y.) 11; People *v.* Brennan, 39 Barb. (N. Y.) 651; People *v.* Riggs, 19 Misc. (N. Y.) 693, 45 N. Y. Suppl. 53.

91. Tillman *v.* Thrasher, 61 Ga. 15.

92. Braddy *v.* Whiteley, 113 Ga. 746, 39 S. E. 317; Coffee *v.* Raysdale, 112 Ga. 705, 37 S. E. 968.

93. Register Newspaper Co. *v.* Yeiser, 117 Ky. 1013, 80 S. W. 478, 25 Ky. L. Rep. 2186. *Compare* Milwaukee *v.* State, 97 Wis. 437, 73 N. W. 23.

Where the proper time has expired publication of a financial statement of a county will not be compelled. Goodman *v.* Sussex County, 66 N. J. L. 571, 49 Atl. 919.

94. People *v.* Green, 44 How. Pr. (N. Y.) 201.

95. Pereria *v.* Wallace, 129 Cal. 397, 62 Pac. 61.

Enforcing right to construct electric conduits see *infra*, VI, O, 4, g, (III).

Power of municipal corporations to grant franchises see MUNICIPAL CORPORATIONS.

Right to erect poles and wires for electric purposes see *infra*, VI, O, 4, g, (II).

96. State *v.* Henderson, 38 Ohio St. 644, holding that where a preliminary ordinance for the establishment of a street railroad directed a city clerk to advertise for proposals for the construction of such road, a citizen and owner of land abutting on the street through which the road would pass if constructed could not maintain mandamus to compel the clerk to make the required advertisement.

97. See, generally, LICENSES.

Sale of intoxicating liquors see INTOXICATING LIQUORS, 23 Cyc. 105 *et seq.*

98. *Alabama.*— State *v.* Langan, (1907) 43 So. 187, license for theater and sale of liquor.

California.— See People *v.* San Francisco, 20 Cal. 591.

District of Columbia.— U. S. *v.* Ross, 5 App. Cas. 241.

Illinois.— Harrison *v.* People, 121 Ill. App. 189 (holding that the issuance of a license to a pawnbroker would not be compelled where a former license had been revoked for good cause); Harrison *v.* People, 101 Ill. App. 224 (bowling alley).

Louisiana.— State *v.* St. Bernard Police Jury, 39 La. Ann. 759, 2 So. 305, slaughterhouse.

Missouri.— State *v.* Cramer, 96 Mo. 75, 8 S. W. 788, ferry.

New York.— Armstrong *v.* Murphy, 65 N. Y. App. Div. 123, 72 N. Y. Suppl. 473 (theatrical license); People *v.* Wurster, 14 N. Y. App. Div. 556, 43 N. Y. Suppl. 1088 (athletic club); People *v.* Grant, 58 Hun 455, 12 N. Y. Suppl. 879 (amusement); People *v.* Thacher, 42 Hun 349 (amusement); People *v.* Scully, 23 Misc. 732, 53 N. Y. Suppl. 125 (auctioneer); People *v.* New York, 7 How. Pr. 81 (stage driver).

Pennsylvania.— Schlaudecker *v.* Marshall, 72 Pa. St. 200 (eating-house); Com. *v.* Baldwin, 14 Phila. 93 (omnibus).

South Carolina.— State *v.* Hagood, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841.

See 33 Cent. Dig. tit. "Mandamus," § 192.

Mandamus to compel issue of liquor license see INTOXICATING LIQUORS, 23 Cyc. 137.

Approval of druggist's bond by township board in respect to sufficiency of sureties is discretionary. Bailey *v.* Van Buren Cir. Judge, 128 Mich. 627, 87 N. W. 890.

discretion vested in the municipal authorities must not be arbitrarily exercised,[99] nor may such officers impose conditions not imposed by law.[1] In case they refuse to exercise their discretion they may be compelled by mandamus.[2] The duty of officers to grant licenses under some statutes, however, has been held merely ministerial and enforceable by mandamus when the relator has shown a clear right.[3] In mandamus to procure the issuance of a license, where the relator has paid the fee demanded and taken the license, he is not entitled to a writ to the officer to whom payment is made for the return of such portion of the fee as is in excess of the legal amount, although the payment was made under an order of court, there being no legal authority for such an order.[4]

2. MARRIAGE LICENSES. The issue of a marriage license cannot be compelled unless all statutory conditions are complied with.[5]

3. REVOCATION OF LICENSE. A revocation of a license will not be compelled by mandamus except in a case of clear duty.[6]

K. Building Permits. While it has been held that the duty of the proper officer to issue a building permit, where the requirements of the statutes or municipal ordinances have been complied with, is ministerial and that mandamus will issue to enforce it,[7] it would seem that where the officer must determine the propriety of the issuance of such a permit, his duty is rather to be regarded as discretionary, and hence will not be controlled;[8] and in any event the writ will not issue unless the relator establishes a clear legal right,[9] or in a case where his right depends upon the decision of controverted facts demanding the exercise of a judicial discretion.[10]

L. Fisheries. The general rules governing mandamus control the issuance of the writ to enforce duties with regard to fisheries.[11] So a discretion vested in particular officers as to the licensing[12] or location[13] of oyster-beds cannot be controlled, but the performance of ministerial acts with relation thereto may be compelled.[14]

M. Paupers and Poor Relief. A discretion reposed in municipal authorities

The consent of a director of public works to the subletting of a market stall cannot be enforced by mandamus. Com. *v.* McIlvaine, 34 Pittsb. Leg. J. N. S. (Pa.) 317.

99. Harrison *v.* People, 101 Ill. App. 224; St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045 (writ lies for license to remove garbage); St. Louis *v.* Meyrose Lamp Mfg. Co., 139 Mo. 560, 41 S. W. 244, 61 Am. St. Rep. 474 (writ lies for license to operate engine).

1. See Phœnix Carpet Co. *v.* State, (Ala. 1897) 22 So. 627.

2. U. S. *v.* Ross, 5 App. Cas. (D. C.) 241.

3. State *v.* Ashbrook, 154 Mo. 375, 55 S. W. 327, 77 Am. St. Rep. 765, 48 L. R. A. 265 (merchant's license); People *v.* Perry, 13 Barb. (N. Y.) 206; Com. *v.* Stokley, 12 Phila. (Pa.) 316. See Matter of O'Rourke, 9 Misc. (N. Y.) 564, 30 N. Y. Suppl. 375.

4. Davis *v.* Patterson, 12 Pa. Super. Ct. 479.

5. Moore *v.* McClelland, 1 Pa. Co. Ct. 555.

6. New York Dental Soc. *v.* Jacobs, 103 N. Y. App. Div. 86, 92 N. Y. Suppl. 590 (holding that, in the absence of a statutory authority in a county clerk to expunge from the register the name of a person who registered as a duly licensed dentist, mandamus will not lie to require a clerk to cancel a registration made by his predecessor in office, on the ground that it was procured on an insufficient license and affidavit, under N. Y. Laws (1895), p. 418, c. 626); Reg. *v.* Burnside, 8 U. C. Q. B. 263.

Revocation of liquor license see INTOXICATING LIQUORS, 23 Cyc. 157.

7. Macfarland *v.* U. S., 18 App. Cas. (D. C.) 554; Bostock *v.* Sams, 95 Md. 400, 52 Atl. 665.

8. Greene *v.* Damrell, 175 Mass. 394, 56 N. E. 707; Hartman *v.* Collins, 106 N. Y. App. Div. 11, 94 N. Y. Suppl. 63; Hester *v.* Thomson, 35 Wash. 119, 76 Pac. 734.

9. State *v.* Hurley, 73 Conn. 536, 48 Atl. 215; People *v.* Calder, 85 N. Y. App. Div. 31, 82 N. Y. Suppl. 822; People *v.* D'Oench, 44 Hun (N. Y.) 33.

10. State *v.* Hurley, 73 Conn. 536, 48 Atl. 215.

11. See cases cited in the following notes.

Duties of fish and game officers generally see FISH AND GAME.

Enforcing construction of fishway see *infra*, VII, A, 9, j, (XI).

12. Abrams *v.* Hempstead, 10 N. Y. St. 378.

13. Rowe *v.* Drisgell, 100 Va. 190, 40 S. E. 609 (determination of whether or not grounds are natural oyster-beds is judicial); Thurston *v.* Hudgins, 93 Va. 780, 20 S. E. 966.

14. Lewis *v.* Christian, 101 Va. 135, 43 S. E. 331, writ lies to compel removal of stakes of artificial bed set by inspector's direction.

as to the relief of a pauper cannot be controlled by mandamus,[15] nor will the writ issue to interfere with a discretion reposed in commissioners of the poor unless such discretion has been abused,[16] although such officers may be compelled to perform ministerial duties.[17] Mandamus may be properly employed to compel overseers of the poor to obey an order of relief [18] or to enforce an order of removal.[19] Where an officer has expended money without authority of law he cannot compel reimbursement.[20]

N. Public Contracts — **1. In General.** A purely ministerial duty imposed upon public officers with regard to municipal contracts may be enforced by mandamus;[21] but where a discretion is vested, the execution of an agreement or the taking of steps toward the consummation thereof will not be compelled,[22] and where a discretion with regard to a public contract has been exercised it will not be reviewed.[23] So a contractor cannot by mandamus compel the execution of a contract which a city has declined to proceed with.[24] In any event mandamus will not lie to compel the making of a public contract in the absence of a clear duty;[25] and where there is no duty on the part of an officer to enter into a contract he cannot be compelled to execute evidence of such contract.[26] Where a street improvement contract has been repudiated by the city the contractor has no right to enforce the performance by the municipal officers of acts preliminary to the execution of the contract.[27]

2. Letting to Lowest Bidder. The duty of public officers who are required to

15. Matter of McDougall, 21 U. C. Q. B. 80, holding that a person who had furnished relief to a pauper could not compel repayment by a town.

The granting or refusal of an order of relief by justices of the peace is discretionary and cannot be reviewed by mandamus. Palmer *v.* Reynolds, 5 Pa. Dist. 578.

16. Lynah *v.* St. Paul's Parish Poor Com'rs, 2 McCord (S. C.) 170. See also Matter of McDougall, 21 U. C. Q. B. 80.

17. Lynah *v.* St. Paul's Parish Poor Com'rs, 2 McCord (S. C.) 170.

18. Armstrong *v.* Berwick Borough, 10 Pa. Co. Ct. 337.

19. Porter Tp. *v.* Jersey Shore Overseers, 82 Pa. St. 275; Com. *v.* Bohan, 5 Kulp (Pa.) 190.

20. People *v.* Emigration Com'rs, 27 Barb. (N. Y.) 562 [*reversing* 15 How. Pr. 177], holding that no writ would issue to reimburse an officer for the relief of an immigrant.

21. Milburn *v.* Glynn County Com'rs, 112 Ga. 160, 37 S. E. 178 (holding that mandamus will lie to compel entry of contract on minutes); Home Constr. Co. *v.* Duncan, 68 S. W. 15, 24 Ky. L. Rep. 94 (holding that mandamus lies to compel city officers to execute a contract in accordance with an ordinance which has been adjudged valid); Com. *v.* George, 148 Pa. St. 463, 24 Atl. 59, 61 (duty of controller to certify contract).

22. Detroit Free Press Co. *v.* State Auditors, 47 Mich. 135, 10 N. W. 171; State *v.* McGrath, 91 Mo. 386, 3 S. W. 846; Carpenter *v.* Yeadon Borough, 207 Pa. St. 396, 57 Atl. 837 (holding that the courts will not by mandamus compel a borough to publish an ordinance containing a contract by the borough with an individual so as to complete the contract); Dickerson *v.* Peters, 71 Pa. St. 53.

23. Fairchild *v.* Wall, 93 Cal. 401, 29 Pac. 60 (holding that where a street commissioner has exercised his discretion as to whether the owners of three fourths of a street frontage have elected to do work ordered on the street and has entered into a contract with such persons, his act cannot be controlled by mandamus); State *v.* Allen, 8 Wash. 168, 35 Pac. 609 (holding that an act of a county board within its jurisdiction rescinding the award of a contract and awarding it to another cannot be reviewed by mandamus).

24. People *v.* Campbell, 72 N. Y. 496; People *v.* Aldridge, 83 Hun (N. Y.) 279, 31 N. Y. Suppl. 920, holding an action for damages adequate.

25. *California.*— Maxwell *v.* Los Angeles County Sup'rs, (1893) 32 Pac. 443, holding that mandamus will not lie to compel an advertisement for bids where no duty exists.

Louisiana.— State *v.* Fitzpatrick, 45 La. Ann. 269, 12 So. 353, holding that where a contract does not conform to the requirements of law the mayor of a city cannot be compelled to sign it.

Missouri.— State *v.* St. Louis, 161 Mo. 371, 61 S. W. 658, holding that a board of public officers will not be compelled to enter into a contract where the ordinance authorizing it is silent as to important details.

Ohio.—American Clock Co. *v.* Licking County Com'rs, 31 Ohio St. 415, holding that writ would not lie where notice had not been given in conformity with the statute.

Wisconsin.— Milwaukee *v.* State, 97 Wis. 437, 73 N. W. 23, holding that mandamus to compel action on bids would not lie.

United States.— U. S. *v.* Lamont, 155 U. S. 303, 15 S. Ct. 97, 39 L. ed. 160.

See 33 Cent. Dig. tit. "Mandamus," § 181.

26. U. S. *v.* Lamont, 155 U. S. 303, 15 S. Ct. 97, 39 L. ed. 160.

27. State *v.* West, 26 La. Ann. 322.

let a contract to the lowest bidder is usually regarded as to such degree discretionary as not to be subject to control by mandamus,[28] particularly where the officer or board intrusted with the duty is given the right to reject any and all bids,[29] or to reject all bids in case the public interest will be subserved,[30] or is required to let to the lowest reliable or responsible bidder,[31] unless there is clear proof of fraud or bad faith.[32] Where an award has been made and remains unrevoked, mandamus cannot be issued to compel an award to another,[33] especially where there has been work done.[34] Mandamus in behalf of the lowest bidder has

28. *Iowa.*— Vincent *v.* Ellis, 116 Iowa 609, 88 N. W. 836.

Kentucky.—See Trapp *v.* Newport, 115 Ky. 840, 74 S. W. 1109, 25 Ky. L. Rep. 224, mandatory injunction.

Michigan.— Grant *v.* Detroit, 91 Mich. 274, 51 N. W. 997, holding that in the absence of any fraud or any violation of the law, the common council has the right to reject a contract and to refuse to go on with the work.

Nebraska.— State *v.* Lincoln, 68 Nebr. 597, 94 N. W. 719; State *v.* Kendall, 15 Nebr. 262, 18 N. W. 85. But *compare* State *v.* Cornell, 52 Nebr. 25, 71 N. W. 961; Marsh *v.* State, 2 Nebr. (Unoff.) 372, 96 N. W. 520.

New York.— People *v.* Contracting Bd., 33 N. Y. 382 [*affirming* 33 Barb. 510 (*reversing* 20 How. Pr. 206)]; People *v.* Croton Aqueduct Bd., 26 Barb. 240; People *v.* New York Bd. of Education, 5 N. Y. Suppl. 392; People *v.* Smith, 12 Abb. Pr. 133; People *v.* New York Aldermen, 11 Abb. Pr. 289. But *compare* People *v.* Contracting Bd., 46 Barb. 254 [*distinguishing* People *v.* Contracting Bd., 33 N. Y. 382; People *v.* Contracting Bd., 27 N. Y. 378].

Pennsylvania.— See Senior *v.* Douglass, 14 Wkly. Notes Cas. 454.

Texas.— Brown *v.* Houston, (Civ. App. 1898) 48 S. W. 760.

Washington.— Times Pub. Co. *v.* Everett, 9 Wash. 518, 37 Pac. 695, 43 Am. St. Rep. 865.

In **Ohio** it has been held that the act is ministerial only and may be enforced by mandamus (State *v.* Delaware County Bd. of Education, 42 Ohio St. 374; State *v.* Crawford County, 17 Ohio Cir. Ct. 370, 9 Ohio Cir. Dec. 715. But see State *v.* Printing Com'rs, 18 Ohio St. 386, holding that a writ would not issue where there was unreasonable delay, the difference in the bids did not appear, and the successful bidder had already incurred expense. And *compare* Ohio cases cited in notes following), even after an award to another bidder who has proceeded to the performance of the work (Boren *v.* Darke County Com'rs, 21 Ohio St. 311. See *contra,* Deckman *v.* Oak Harbor, 10 Ohio Cir. Ct. 409, 6 Ohio Cir. Dec. 729, holding that writ would not issue where the contract had been let and performed and a large part of the contract price paid). A clear legal right must be shown. State *v.* Hamilton County, 20 Ohio St. 425. The second lowest bidder is not entitled to the writ on the rejection of the lowest. Strack *v.* Ratterman, 18 Ohio Cir. Ct. 36, 9 Ohio Cir. Dec. 862. Where the bids are not competitive there is a discretion. State *v.* Toledo Bd. of Education, 14 Ohio Cir. Ct. 15, 7 Ohio Cir. Dec. 338.

29. Akron *v.* France, 24 Ohio Cir. Ct. 63; State *v.* Board of Education, 13 Ohio Cir. Ct. 603, 5 Ohio Cir. Dec. 379. See also State *v.* Cincinnati, 3 Ohio Cir. Ct. 542, 2 Ohio Cir. Dec. 312.

30. Stanley-Taylor Co. *v.* San Francisco, 135 Cal. 486, 67 Pac. 783 (holding that it was immaterial that the decision was erroneous or the reasons bad); Douglass *v.* Com., 108 Pa. St. 559 [*reversing* 14 Wkly. Notes Cas. 453] (holding that county commissioners may reject a printing bid on the ground that the bidder once defrauded the county).

31. *Illinois.*—Kelly *v.* Chicago, 62 Ill. 279; Cook County *v.* People, 78 Ill. App. 586 [*affirmed* in 180 Ill. 160, 54 N. E. 164].

Iowa.— Hanlin *v.* Charles City Independent Dist., 66 Iowa 69, 23 N. W. 268.

Missouri.— State *v.* McGrath, 91 Mo. 386, 3 S. W. 846.

Montana.— State *v.* Rickards, 16 Mont. 145, 40 Pac. 210, 50 Am. St. Rep. 476, 28 L. R. A. 298.

Ohio.— State *v.* Columbus, 9 Ohio S. & C. Pl. Dec. 336, 6 Ohio N. P. 347.

Pennsylvania.— Findley *v.* Pittsburgh, 82 Pa. St. 351; Com. *v.* Mitchell, 82 Pa. St. 343; Powden *v.* Eschelman, 15 Lanc. L. Rev. 249; Office Specialty Mfg. Co. *v.* Monroe County, 3 North. Co. Rep. 224.

South Dakota.— *In re* McCain, 9 S. D. 57, 68 N. W. 163.

32. Findley *v.* Pittsburgh, 82 Pa. St. 351; Com. *v.* Mitchell, 82 Pa. St. 343; Com. *v.* Philadelphia Guardians of Poor, 16 Phila. (Pa.) 6, 13 Wkly. Notes Cas. 61, so holding where the advertisement reserved the right to reject any and all bids.

33. People *v.* Contracting Bd., 27 N. Y. 378; Matter of Hilton Bridge Constr. Co., 13 N. Y. App. Div. 24, 43 N. Y. Suppl. 99; Weed *v.* Beach, 56 How. Pr. (N. Y.) 470; Capital Printing Co. *v.* Hoey, 124 N. C. 767, 33 S. E. 160 (no writ to make contract with one when contract made with another); State *v.* Fond du Lac Bd. of Education, 24 Wis. 683.

34. State *v.* Police Jury, 108 La. 311, 32 So. 363 (holding that the remedy of the lowest bidder for a ferry franchise is by direct action, not mandamus, especially when the contract was let to another who has for two months been engaged in running the ferry); Talbot Paving Co. *v.* Detroit, 91 Mich. 262, 51 N. W. 933; Deckman *v.* Oak Harbor, 10 Ohio Cir. Ct. 409, 6 Ohio Cir. Dec. 729. But

also been refused on the ground that he has no clear legal right,[35] and because of another adequate remedy by an action for damages[36] or by an appeal.[37]

3. Bonds, Deposits, and Other Conditions Precedent. A bidder cannot compel the letting of a contract to him where he has not complied with conditions precedent[38] or where conditions precedent to the valid letting of the contract have not been performed.[39] Where an unlawful condition has been required in a contractor's bond he may by mandamus compel the acceptance of a bond omitting such condition.[40] Where a contractor has made a deposit as security for the performance of a contract he cannot by mandamus compel a return of such deposit in case the result would be to control the discretion of an officer as to the fact of satisfactory performance.[41]

4. Enforcement — a. In General. Mandamus is not a proper remedy to compel municipal or public corporations to perform specifically their ordinary business contracts,[42] or to enforce an illegal contract.[43]

b. Payment of Contract Price.[44] Where a municipal corporation has legally contracted for certain work to be done, and to be paid for in a certain specified way, the corporation may, on the completion of the work, be compelled by mandamus to carry out the stipulations as to payment contained in the contract.[45] Mandamus for this purpose will not issue, however, where there is another adequate remedy;[46] a clear legal right must exist,[47] and the contractor must have complied with the contract.[48] Under these rules, where an officer refuses to perform a ministerial duty essential to the compensation of a contractor, he may be com-

compare Boren *v.* Darke County Com'rs, 21 Ohio St. 311.

35. People *v.* Croton Aqueduct Bd., 26 Barb. (N. Y.) 240; Tribune Printing, etc., Co. *v.* Barnes, 7 N. D. 591, 75 N. W. 904 (where writ to compel consideration of printing bid of non-resident of state was denied); Com. *v.* Philadelphia Guardians of Poor, 16 Phila. (Pa.) 6, 13 Wkly. Notes Cas. 61.

36. People *v.* New York Bd. of Education, 5 N. Y. Suppl. 392.

37. State *v.* Allen, 8 Wash. 168, 35 Pac. 609.

38. State *v.* Bartley, 50 Nebr. 874, 70 N. W. 367, where mandamus was refused where requisite bond had not been given.

39. State *v.* Benzenberg, 108 Wis. 435, 84 N. W. 858, so holding where no plea or profile of the work had been filed as required by statute.

40. People *v.* Edgcomb, 112 N. Y. App. Div. 604, 98 N. Y. Suppl. 965, holding acceptance of bond for public printing not requiring use of union label could be compelled.

41. Com. *v.* Philadelphia, 211 Pa. St. 85, 60 Atl. 549.

42. Parrott *v.* Bridgeport, 44 Conn. 180, 26 Am. Rep. 439; People *v.* Dulaney, 96 Ill. 503; Ingerman *v.* Conroy, 128 Ind. 225, 27 N. E. 499; State *v.* Mortensen, 69 Nebr. 376, 95 N. W. 831. See also State *v.* Howard County, 39 Mo. 375; State *v.* Zanesville, etc., Turnpike Road Co., 16 Ohio St. 308.

43. Mahon *v.* Halsted, 39 N. J. L. 640.

Where a contract has been illegally awarded to a person other than the lowest bidder it has been held that the contractor cannot compel the mayor by mandamus to draw a warrant for an amount audited by the common council. People *v.* Gleason, 121 N. Y. 631, 25 N. E. 4 [*reversing* 8 N. Y. Suppl. 728, and *distinguishing* East River Gaslight Co. *v.* Donnelly, 93 N. Y. 557].

44. Payment of claims by municipality in general see *infra*, VI, U.

45. State *v.* New Orleans, 29 La. Ann. 863.

After completion of a contract for the erection of a system of public waterworks, mandamus will lie to compel the commissioner and council of a city to test the works according to the terms of the contract, and in case they are found to comply therewith to accept them. State *v.* Crete, 32 Nebr. 568, 49 N. W. 272, holding that mandamus might be granted upon the relation of a creditor of a contractor who was the equitable owner of the property.

46. Elmendorf *v.* Jersey City, 41 N. J. L. 135, holding that the writ would not lie to enforce payment of an award by a referee. See, generally, *supra*, II, D.

47. People *v.* Coler, 61 N. Y. App. Div. 223, 70 N. Y. Suppl. 482 [*affirmed* in 168 N. Y. 6, 60 N. E. 1046], where contractor had not complied with eight-hour law. See, generally, *supra*, II, B, 1.

48. Dameron *v.* Cleveland County, 46 N. C. 484.

Violation of an unconstitutional labor law with which, under his contract, the contractor is bound to comply, will not prevent mandamus to compel payment. People *v.* Grout, 179 N. Y. 417, 72 N. E. 464 [*reversing* 96 N. Y. App. Div. 607, 89 N. Y. Suppl. 1113] (holding that a contractor might compel payment, although he had violated the eight-hour law); People *v.* Coler, 166 N. Y. 144, 59 N. E. 776 [*affirming* 56 N. Y. App. Div. 459, 68 N. Y. Suppl. 767]; People *v.* Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814 [*affirming* 56 N. Y. App. Div. 98, 67 N. Y. Suppl. 701].

pelled by mandamus.[49] So the levy and collection of a special assessment,[50] the issuance of bonds,[51] the execution of a certificate by an engineer upon his finding that the work has been completed,[52] or the making of measurements and estimates upon which payment is conditioned [53] may be compelled; and where a ministerial officer has a special fund in his hands for the payment of sums due upon a contract, payment therefrom may be enforced by mandamus;[54] but an officer cannot be compelled to certify to the existence of funds available to payment where such funds do not exist at the time of the certificate.[55] Discretionary acts cannot, however, be controlled.[56] So the judicial act of a board in determining the correctness of an estimate upon a public work,[57] or its action upon a particular claim for work and material,[58] cannot be reviewed by mandamus. The issuance of a warrant to pay the contract price cannot be compelled in the absence of a proper certificate of approval,[59] nor will the payment of a warrant be compelled, pending an appeal from the order allowing it.[60]

O. Public Works and Improvements — 1. In General. Ministerial duties with reference to the making and maintenance of public works and improvements may be enforced by mandamus,[61] under the general rules which have already been considered.[62] The incurring of indebtedness for this purpose, however, is usually within the discretion of the municipal authorities, and where such is the case it cannot be coerced.[63] Where an administrative board is charged

49. John H. Parker Co. *v.* New York, 110 N. Y. App. Div. 360, 97 N. Y. Suppl. 200.

50. See *infra*, VI, V, 10.

51. See *infra*, VI, S.

52. Conn *v.* Cass County, 151 Ind. 517, 51 N. E. 1062. See also State *v.* Bever, 143 Ind. 488, 41 N. E. 802.

53. Wren *v.* Indianapolis, 96 Ind. 206; People *v.* Buffalo State Asylum, 8 N. Y. Suppl. 395, holding that the fact that the appropriation made by the state to pay for the buildings has been exhausted is no answer to a proceeding to compel defendant to ascertain and certify the amount due plaintiff for work on the buildings, as it is to be presumed that the state will make provision for payment on the production of the requisite evidence of the claim.

54. Fitzhugh *v.* Ashworth, 119 Cal. 393, 51 Pac. 635 (holding that money advanced to the superintendent of streets by the contractor to cover the compensation of the city engineer as part of the "incidental expenses" required by law to be so advanced to the superintendent of streets is held by the superintendent of streets in his official capacity, and it is a duty enjoined upon him by law to pay the sum to the party entitled thereto; and mandamus is a proper proceeding to enforce the rights of such party); Ingerman *v.* State, 128 Ind. 225, 27 N. E. 499; Jackson County *v.* Branaman, (Ind. App. 1907) 79 N. E. 923; People *v.* Syracuse, 144 N. Y. 63, 38 N. E. 1006 [*affirming* 65 Hun 321, 20 N. Y. Suppl. 236]; Portland Stone Ware Co. *v.* Taylore, 17 R. I. 33, 19 Atl. 1086.

In case of void assessment.— Mandamus to compel payment to a contractor from a special assessment will not lie where the assessment had been adjudged invalid in a suit brought by a taxpayer to recover back what he had paid. People *v.* East Saginaw, 40 Mich. 336.

55. People *v.* Coler, 41 N. Y. App. Div. 463, 58 N. Y. Suppl. 988, holding that the Greater New York Charter, § 149, providing for the certificate of the city controller that means are provided for payments under a contract with the city, does not entitle a contractor to a peremptory writ of mandamus to compel the controller to issue such certificate where there are no funds to apply on the contract, although there had previously been funds that should have been kept for such purpose.

56. Seymour *v.* Ely, 37 Conn. 103, holding that a contractor cannot compel a superintendent of streets to certify that the streets have been kept in repair in accordance with the contract. See, generally, *supra*, II, C, 2, a.

57. Indianapolis *v.* Patterson, 33 Ind. 157.

58. State *v.* Flad, 108 Mo. 614, 18 S. W. 1128.

59. Schwanbeck *v.* People, 15 Colo. 64, 24 Pac. 575.

Issuance of warrants in general see *infra*, VI, U, 5.

60. Lobeck *v.* State, (Nebr. 1904) 101 N. W. 247.

Payment of warrants in general see *infra*, VI, U, 6.

61. See cases cited *infra*, this section.

Special assessments see *infra*, VI, V, 10.

Taxation for public improvements see *infra*, VI, V, 1, i.

62. See *supra*, II.

63. *Illinois.*— People *v.* Hyde Park, 117 Ill. 462, 6 N. E. 33.

Indiana.— Harrison Tp. Advisory Bd. *v.* State, (1906) 76 N. E. 986, writ to compel building of school-house must show funds on hand.

Michigan.— People *v.* Post, 30 Mich. 353, holding that a bridge would not be compelled when cost would be in excess of sum available.

with the duty of performing several acts involving expenditures, and there are no funds available sufficient to permit the performance of all, courts will not ordinarily by mandamus direct the board which act to perform and which to leave unperformed.[64]

2. Bridges.[65] Where the authorities having supervision and control of public bridges are vested with a discretion as to the erection of such bridges, the exercise of their discretion will not be controlled by mandamus.[66] Mandamus will, however, lie to enforce a specific duty with regard to the erection of a bridge, where it is imposed by law and no discretion is vested.[67] In a similar case a tax to raise a sum necessary to pay for a bridge may be enforced,[68] or a writ will lie to compel compliance with a statute requiring a municipality to acquire a toll-bridge and make it free,[69] or to compel a county to contribute to the expenses incurred by a town in building a bridge,[70] or conversely to compel a city to contribute to a county.[71] A county cannot, however, be compelled to build a bridge

New Jersey.— Justice *v.* Logan Tp., 71 N. J. L. 107, 58 Atl. 74, holding that a board would not be compelled to make a contract for the care of roads in excess of the available appropriation.

New York.— Matter of Lloyd Town Bd., 7 N. Y. Suppl. 165, where town board was not required to borrow money to build a road.

Ohio.— State *v.* Colebrook Tp. Bd. of Education, 24 Ohio Cir. Ct. 383, centralization of schools not compelled where there were no funds to provide buildings. See also State *v.* Board of Elections, 24 Ohio Cir. Ct. 654, where the purchase of a voting machine was not compelled where there were no funds.

Pennsylvania.— Com. *v.* McFadden, 14 Phila. 161, 8 Wkly. Notes Cas. 454, holding that a mandamus to lay pipe would not issue where no appropriation had been made to enable the engineer to contract for and proceed with the work.

West Virginia.—State *v.* Wyoming County Ct., 47 W. Va. 672, 35 S. E. 959, holding that erection of a court-house would not be compelled where debt would be imposed in excess of that which could be obtained by taxation within legal limit.

64. Farris *v.* State, 46 Nebr. 857, 65 N. W. 890.

65. Mandamus to compel repair or rebuilding see Bridges, 5 Cyc. 1087 *et seq.*

66. *Georgia.*— Patterson *v.* Taylor, 98 Ga. 646, 25 S. E. 771, holding that the discretion of the ordinary of a county would not be controlled, although two successive grand juries had recommended that the bridge be built at the particular place.

Illinois.— People *v.* Highway Com'rs, 118 Ill. 239, 8 N. E. 684; St. Clair County *v.* People, 85 Ill. 396; People *v.* Highway Com'rs, 32 Ill. App. 164.

Indiana.— Daviess County *v.* State, 141 Ind. 187, 40 N. E. 686.

Minnesota.— State *v.* Somerset, 44 Minn. 549, 47 N. W. 163.

Missouri.— State *v.* Thomas, 183 Mo. 220, 82 S. W. 106.

New Jersey.— State *v.* Essex County, 23 N. J. L. 214.

Ohio.— State *v.* Henry Connty, 31 Ohio St. 211.

Tennessee.— State *v.* Wayne County, 108 Tenn. 259, 67 S. W. 72.

West Virginia.—State *v.* Wood County Ct., 33 W. Va. 589, 11 S. E. 72.

Wisconsin.— State *v.* Mt. Pleasant, 16 Wis. 613.

Canada.— Brooks *v.* Haldimand Corp., 3 Ont. App. 73 [*reversing* 41 U. C. Q. B. 381] (holding discretion of council as to erection of bridge would not be interfered with); *Re* Wescott, 33 U. C. Q. B. 280. And see *Re* Kinnear, 30 U. C. Q. B. 398, holding that where the right was doubtful the parties should be left to their remedy by indictment and that the place of erection was discretionary.

67. People *v.* Dover, etc., Highway Com'rs, 158 Ill. 197, 41 N. E. 1105; Ottawa *v.* People, 48 Ill. 233; People *v.* Macon County, 19 Ill. App. 264 [*affirmed* in 121 Ill. 616, 13 N. E. 220]; York County Com'rs *v.* Com., 72 Pa. St. 24 (holding that where a county bridge was authorized in 1859 and nothing was done toward erection till 1871, mandamus would then lie to compel the commissioners to erect it); Billman *v.* Carroll Tp., 1 Pa. Co. Ct. 129; Brander *v.* Chesterfield Justices, 5 Call (Va.) 548, 2 Am. Dec. 606; Com. *v.* Kanawha County Justices, 2 Va. Cas. 499; Com. *v.* Fairfax County Justices, 2 Va. Cas. 9.

The duty must be clear.— Com. *v.* Westfield Borough, 11 Pa. Co. Ct. 369, where bridge approaches were not compelled to be built.

Consideration of the plans of a proposed bridge may be compelled. Muskingum County *v.* Board of Public Works, 39 Ohio St. 628.

68. See *infra*, VI, V, 1, i.

69. State *v.* Bangor, 98 Me. 114, 56 Atl. 589.

70. White County *v.* People, 222 Ill. 9, 78 N. E. 13; Will County *v.* People, 110 Ill. 511. And see Madison County *v.* People, 16 Ill. App. 305, holding that the county need not contribute to a bridge until the town pays its share.

Contribution to bridge funds in general see Bridges, 5 Cyc. 1060.

71. U. S. *v.* Washington, 28 Fed. Cas. No. 16,646, 2 Cranch C. C. 174.

where to do so it would be required to incur a debt beyond its legal limit.[72] Mandamus will not issue where there is a probability that the proper authorities will soon act.[73]

3. Drainage and Irrigation. Mandatory duties with regard to the construction and maintenance of public drainage systems may be enforced by mandamus.[74] For example drainage commissioners may be compelled to provide sufficient outlets for the system,[75] or to bridge a ditch,[76] or to keep a ditch in repair.[77] A drainage district may be compelled by mandamus to pay a judgment.[78] But payment of a claim by a sanitary district will not be ordered where a receipt in full is not tendered as required by the order authorizing payment.[79] A ditch commissioner who has money in his hands from an assessment for a special purpose may be compelled to distribute the fund as directed by law.[80] The duty of officers of an irrigation district to assume the management of the entire district may be enforced by mandamus.[81] The president of a reclamation district, which is a public corporation, cannot be compelled by mandamus to perform acts which do not pertain to his official duties.[82]

4. Highways and Streets — a. Establishment of Highways. A discretion vested in a board of county or highway commissioners or other body, with regard to the establishment of highways, cannot be controlled by mandamus.[83] In case, however, the duty is one which may be regarded as purely ministerial, it may be enforced.[84] In accord with the general rules governing mandamus the right must

72. White County *v.* People, 222 Ill. 9, 78 N. E. 13. See also *supra*, VI, O, 1.

73. Oxby *v.* Kalkaska, etc., County, 124 Mich. 463, 83 N. W. 132, where mandamus to compel the building of a bridge by adjoining counties was refused.

74. See cases cited in the following notes.

Contribution.— A probate judge may be compelled to appoint freeholders in a proceeding to secure the payment by the upper county to the lower county of the cost of outlet ditches. Cuff *v.* State, 52 Ohio St. 361, 43 N. E. 1039.

75. Peotone, etc., Drainage Dist. No. 1 *v.* Adams, 163 Ill. 428, 45 N. E. 266.

76. Union Drainage Dist. No. 1 *v.* O'Reilly, 34 Ill. App. 298 [*affirmed* in 132 Ill. 631, 24 N. E. 426], so holding whether the ditch was within or without the district.

77. Stephens *v.* Moore Tp., 25 Ont. App. 42; White *v.* Gosfield Tp., 2 Ont. 287.

78. Lewis *v.* Union Drainage Dist. No. 1, 111 Ill. App. 222, where the judgment had adjudicated that the commissioners either had money on hand or had levied a tax more than sufficient to pay the same.

Mandamus to compel payment of judgments in general see *infra*, VI, U, 1, d.

79. People *v.* Reddick, 181 Ill. 334, 54 N. E. 963.

80. Ingerman *v.* State, 128 Ind. 225, 27 N. E. 499.

81. Harris *v.* Tarbet, 19 Utah 328, 57 Pac. 33.

82. Angus *v.* Browning, 130 Cal. 502, 62 Pac. 827, holding that he could not be compelled to apportion and pay the proceeds of an assessment to the counties entitled thereto.

83. *California.*— People *v.* Lake County Com'rs, 33 Cal. 487, holding that supervisors could be compelled to act on a report but not to open road.

Indiana.— State *v.* Tippecanoe County Com'rs, 131 Ind. 90, 30 N. E. 892, purchase of gravel road.

Iowa.— Perry *v.* Clarke County, (1907) 110 N. W. 591.

Kentucky.— Highbaugh *v.* Hardin County Ct., 99 Ky. 16, 34 S. W. 706, 17 Ky. L. Rep. 1313, appropriation by fiscal court for road improvement.

Louisiana.— State *v.* Jefferson Police Jury, 22 La. Ann. 611.

Missouri.— Strahan *v.* Audrain County Ct., 65 Mo. 644; Bell *v.* Pike County Ct., 61 Mo. App. 173.

New York.— People *v.* Hulse, 38 Hun 388.

Texas.— Howe *v.* Rose, 35 Tex. Civ. App. 328, 80 S. W. 1019.

Canada.— Wilson *v.* Wainfleet, 10 Ont. Pr. 147. And see *In re* Augusta Tp., 12 U. C. Q. B. 522.

84. People *v.* Collins, 19 Wend. (N. Y.) 56. See Monroe County Sup'rs *v.* State, 63 Miss. 135 (holding that a writ lies to compel county to furnish overseers with proper tools); *In re* Thurston, 25 U. C. C. P. 593.

Illustrations.— The impaneling of a jury to determine the location of a highway (Mendon *v.* Worcester County, 10 Pick. (Mass.) 235, holding that a writ for new jury would issue when a first jury not acted), or the appointment of surveyors to vacate a road (State *v.* Salem Pleas Judges, 9 N. J. L. 246), may be enforced. Commissioners appointed for the purpose may be compelled to view the highway. State *v.* Bailey, 6 Wis. 291. The commissioners of two towns may be compelled to meet together and make an allotment of a town-line road for repair. Commissioners *v.* Commissioners, 74 Ill. App. 185. A town-clerk may be compelled to record a survey for a road. People *v.* Collins, 7 Johns. (N. Y.) 549. A commissioner of

be clear,[85] and in the case of a substantial defect therein the writ will not lie.[86] Nor will the writ issue where there is another adequate remedy.[87]

b. Opening Highways. Where the construction of a highway has been determined upon, ministerial duties thereafter relating thereto may be enforced by mandamus.[88] So where a highway has been legally established, mandamus will lie to compel the proper authorities to open it,[89] although not where the location is indefinite,[90] or there is a question as to its legality,[91] or the highway has been discontinued,[92] or the officers would be subjected to an action of damages,[93] or the officer has no means with which to act.[94] Where the commissioners are given a discretion they may be compelled to exercise it, although their discretion will not be controlled.[95] The judgment of the commissioners as to the sufficiency of the construction of the road cannot be reviewed by mandamus.[96] Where a second road has been laid out between the same termini by the construction of which the public convenience and necessity will be fully satisfied, mandamus will not issue to compel the construction of a road previously laid out.[97] A specific statutory duty to make alterations in a highway may be enforced by mandamus.[98]

c. Construction and Improvement of Streets — (i) *In General.* Mandamus will lie to compel a city to proceed with the construction of a street within a

highways may be compelled to certify the abandonment of a road. People *v.* Marlette, 94 N. Y. App. Div. 592, 88 N. Y. Suppl. 379.

85. People *v.* Curyea, 16 Ill. 547; People *v.* Davis, 39 Ill. App. 162 (holding that a hearing as to locating a road would not be compelled where the real purpose was to locate a private boundary); North Henderson Highway Com'rs *v.* People, 2 Ill. App. 24; Elizabeth *v.* Essex Common Pleas, 49 N. J. L. 626, 9 Atl. 752 (writ to compel record of proceedings to lay out a road after a few years' delay, not clear); People *v.* East Fishkill Highway Com'rs, 42 Hun (N. Y.) 463 (mandamus will not issue to compel laying out of road benefitting relator only).

Unauthorized change of location.— Mandamus will not issue to compel calling jury for an unauthorized change of location. Gloucester *v.* Essex County Com'rs, 3 Metc. (Mass.) 375.

86. State *v.* Latrobe, 81 Md. 222, 31 Atl. 788; People *v.* Zilwaukee Tp. Bd., 10 Mich. 274; Com. *v.* Westfield Borough, 11 Pa. Co. Ct. 369; State *v.* Exeter Sup'rs, 9 Wis. 554.

87. State *v.* Tippecanoe County Com'rs, 131 Ind. 90, 30 N. E. 892 (holding that writ would not issue to compel buying of toll-road after favorable popular vote, since an appeal was adequate); Sullivan *v.* Robbins, 109 Iowa 235, 80 N. W. 340 (holding that mandamus will not lie for illegality in the vacation of a highway by a county board of supervisors; the code, section 4344, providing that mandamus shall not issue where there is a plain, speedy, and adequate legal remedy, and section 4154, providing that the remedy where an inferior board acts illegally is by certiorari).

88. People *v.* Jefferds, 4 Thomps. & C. (N. Y.) 398, writ lies to complete laying out by signing and filing final order.

89. *Illinois.*— Sheaff *v.* People, 87 Ill. 189, 29 Am. Rep. 49; Hall *v.* People, 57 Ill. 307; Swan Tp. Highway Com'rs *v.* People, 31 Ill. 97. See Lyons Highway Com'rs *v.* People, 40 Ill. 453.

Indiana.— Welch *v.* State, 164 Ind. 104, 72 N. E. 1043.

Iowa.— Moon *v.* Cort, 43 Iowa 503, holding that relator must show special interest.

Massachusetts.—Richards *v.* Bristol County Com'rs, 120 Mass. 401.

New Jersey.— State *v.* Holliday, 8 N. J. L. 205.

New York.— People *v.* Collins, 19 Wend. 56; People *v.* Champion, 16 Johns. 61. And see *Ex p.* Sanders, 4 Cow. 544, holding that where three judges of the common pleas laid out a road, and, on a petition to discontinue it, discontinued a part of it only, a certiorari issued to revise the order to discontinue did not suspend proceedings as to that part of the road which was not discontinued, and that, notwithstanding the certiorari, a mandamus to compel the commissioners to open that part may be granted. But see Hamiltonban Tp. Sup'rs, 11 Pa. Co. Ct. 368, holding the only remedy to be by indictment.

90. Lyons Highway Com'rs *v.* People, 40 Ill. 453.

91. People *v.* Curyea, 16 Ill. 547.

92. People *v.* Reading Highway Com'rs, 1 Thomps. & C. (N. Y.) 193. But see People *v.* Mills, 109 N. Y. 69, 15 N. E. 886.

93. People *v.* Seward Highway Com'rs, 27 Barb. (N. Y.) 94, no writ when proceedings show no jurisdiction.

94. Warner *v.* Reading, 46 N. J. L. 519; Springfield *v.* Hampden County Highway Com'rs, 4 Pick. (Mass.) 68.

95. Hill *v.* Worcester County Com'rs, 4 Gray (Mass.) 414; Throckmorton *v.* State, 20 Nebr. 647, 31 N. W. 232. And see Com. *v.* Holland, 153 Pa. St. 233, 25 Atl. 1123.

96. Rice *v.* Middlesex Highway Com'rs, 13 Pick. (Mass.) 225.

97. Hitchcock *v.* Hampden County Com'rs, 131 Mass. 519.

98. State *v.* Ousatonic Water Co., 51 Conn. 137.

reasonable time after it is laid out.[99] A mandatory duty to grade[1] or widen[2] a street imposed by statute may be enforced by mandamus. But as a general rule the improvement[3] or the grade[4] of the street is a matter resting within the discretion of the municipal authorities, and the courts cannot by mandamus compel them to exercise that discretion in any particular direction. A relator whose land has been taken in street opening proceedings may compel the city to acquire the rights necessary to the opening of the entire street.[5] The fact that the city council has failed to provide funds for the purpose is, it has been held, no defense to mandamus to compel obedience to a judgment abolishing a grade crossing.[6]

(II) *Sidewalks.* A discretion vested in local authorities as to permitting the construction of sidewalks by abutting property-owners cannot be controlled by mandamus.[7] Where an officer has granted a permit to take up a sidewalk but has imposed an illegal condition, a mandamus ordering the permit to issue without such condition does not review the officer's discretion as to granting it.[8]

d. Determination of Damages. Mandamus will lie to compel the proper authorities to proceed to determine the damages occasioned by the laying out of a highway,[9] or the opening of a street,[10] or a change of grade;[11] but it will not lie

99. Webster *v.* Chicago, 83 Ill. 458; O'Brian *v.* Baltimore County Com'rs, 51 Md. 15; Aspinwall *v.* Boston, 191 Mass. 441, 78 N. E. 103; McCarthy *v.* Boston St. Com'rs, 188 Mass. 338, 74 N. E. 659.

1. People *v.* San Francisco, 36 Cal. 595, holding that if an act commands a municipal body to proceed and grade a certain street, prescribing the way and manner of doing the same, and the grade to be adopted, and leaves nothing to the discretion of the municipal body except certain incidents to the main work, courts will not construe the act as not mandatory because these incidents are left to the discretion of the body.

2. People *v.* Brooklyn, 22 Barb. (N. Y.) 404.

3. Parrott *v.* Bridgeport, 44 Conn. 180, 26 Am. Rep. 439 (holding that a writ of mandamus is not a proper remedy to compel a city to construct a public street in a certain special manner not required by law, but which it was averred had been agreed to by the city, and taken into consideration in the assessment of the petitioner's damages and benefits); Michigan City *v.* Roberts, 34 Ind. 471 (holding that the courts cannot, upon a proceeding by mandate, review the decision of the common council of a city incorporated under the general law of 1867 for the incorporation of cities, refusing to cause an improvement of a street to be made and paid for out of the general funds in the treasury of the city, and compel the council to cause the improvement to be made and so paid for against their judgment as to its expediency).

4. Metcalf *v.* Boston, 158 Mass. 284, 33 N. E. 586 (holding that where a city street is laid out by the mayor and common council acting concurrently with the street commissioners, under authority of a statute, and the order is silent as to the manner of construction, except that the grade is given, the fixing of a grade is not equivalent to a statement that the street is to be graded to its full width, and mandamus will not lie to compel the grade to be so made); People *v.* Clark, 40 N. Y. App. Div. 214, 58 N. Y. Suppl. 12.

5. Barnert *v.* Patterson, 69 N. J. L. 122, 54 Atl. 227.

6. Williams *v.* New Haven, 68 Conn. 263, 36 Atl. 61.

7. State *v.* St. Louis, 158 Mo. 505, 59 S. W. 1101.

8. People *v.* Collis, 17 N. Y. App. Div. 448, 45 N. Y. Suppl. 282.

9. Carpenter *v.* Bristol County Com'rs, 21 Pick. (Mass.) 258.

Pendency of certiorari. — Mandamus will not lie to compel commissioners to levy and certify a tax for the amount of damages assessed in opening a road, where the validity of the proceedings is involved in a pending certiorari. Oswego Highway Com'rs *v.* People, 99 Ill. 587.

10. People *v.* Syracuse, 20 How. Pr. (N. Y.) 491; Shoolbred *v.* Charleston Corp., 2 Bay (S. C.) 63. See also State *v.* Ryan, 2 Mo. App. 303.

11. People *v.* Green, 3 Hun (N. Y.) 755, 6 Thomps. & C. 129 [*affirmed* in 62 N. Y. 624]; People *v.* New York, 53 How. Pr. (N. Y.) 280; Gibson *v.* Greenville, 64 S. C. 455, 42 S. E. 206.

Laches. — Mandamus will not lie to compel city authorities to assess the damages to relator's property from a change of grade in the street in front thereof, where the charter requires such assessment to be made before the grade is changed, and relator, with full knowledge of what was being done, waited until several months after the work was completed before beginning action. State *v.* Superior, 108 Wis. 16, 83 N. W. 1100.

Grade crossing commissioners may be compelled by mandamus to hear evidence as to damages bearing on the right to the appointment of commissioners to assess such damages. Myer *v.* Adam, 63 N. Y. App. Div. 540, 71 N. Y. Suppl. 707 [*affirmed* in 169 N. Y. 605, 62 N. E. 1098].

Speculative and incidental damages. — Mandamus was refused when brought to compel

to compel the acceptance of a report as to such damages where the action upon such report is judicial.[12]

e. Payment of Damages. In the absence of other adequate remedy mandamus lies to compel the payment of awards for property taken for highways,[13] or in street opening proceedings,[14] or upon alteration of a grade;[15] but other special funds cannot be diverted to that purpose,[16] nor can a general fund where provision is made for payment from special assessments.[17]

f. Regulation and Care. Mandamus will not lie to compel a city to make a particular regulation as to the use of streets by carriages and hackmen,[18] or to continue a street cleaning department, the funds not being sufficient.[19]

g. Use by Public Service Corporations — (I) *In General.* A public service corporation cannot by mandamus enforce a right to make a particular use of city streets unless such right is clear and legal;[20] but where such right is clear it may be enforced.[21]

(II) *Erection of Electric Wires and Poles.* An imperative duty imposed by law upon municipal authorities to grant permission for the erection of poles

officers to consider a claim of a railroad company for the destruction of its station in building an elevated crossing over a street, on the ground that such damage was not the direct result of carrying out the plan, but incidental only. State *v.* Bridge Commission, 63 Conn. 91, 26 Atl. 580.

12. *In re* Kennehunk Toll Bridge, 11 Me. 263, holding that a writ will not lie to compel county commissioners to accept the report of a committee appointed by said commissioners pursuant to the state laws.

13. Treat *v.* Middletown, 8 Conn. 243; Minhinnah *v.* Haines, 29 N. J. L. 388; Miller *v.* Bridgewater Tp. Comm., 24 N. J. L. 54; Williamson County *v.* Jefferson, 1 Coldw. (Tenn.) 419; State *v.* Wilson, 17 Wis. 687. And see Rand *v.* Townshend, 26 Vt. 670.

In case there is a remedy by appeal mandamus will not lie. Boone County *v.* State, 38 Ind. 193.

On discontinuance of the highway.—Where the county commissioners laid out a highway and passed the usual orders for making it, and the owner of land over which it was laid out obtained a verdict for his damages, which was accepted by the court of common pleas and certified to the commissioners; but, before the proper time arrived for granting an order on the county treasury for the payment of such damages, measures were taken to discontinue the highway, and soon afterward an order was passed to discontinue it, and the land was never entered upon, and the commissioners refused to give the owner an order for the payment of his damages as found by the verdict, it was held that he had a vested right to such damages, and that he was entitled to a writ of mandamus to the commissioners to compel them to draw an order for the payment thereof. Harrington *v.* Berkshire County Com'rs, 22 Pick. (Mass.) 263, 33 Am. Dec. 741.

14. Duncan *v.* Louisville, 8 Bush (Ky.) 98 (holding that the mayor might be compelled to sell bonds for such purpose as directed by ordinance); People *v.* Buffalo Common Council, 140 N. Y. 300, 35 N. E. 485, 37 Am. St. Rep. 563 [*affirming* 2 Misc. 7, 21 N. Y. Suppl. 601]; People *v.* Syracuse, 78 N. Y. 56 [*reversing* 52 How. Pr. 346]; Ryan *v.* Hoffman, 26 Ohio St. 109; Boyer's Petition, 15 Pa. Co. Ct. 531.

15. People *v.* Fitch, 147 N. Y. 355, 41 N. E. 695.

16. Priet *v.* Reis, 93 Cal. 85, 28 Pac. 798. See, generally, *infra*, VI, U, 6, e.

17. People *v.* Hyde Park, 117 Ill. 462, 6 N. E. 33.

18. People *v.* Brookfield, 6 N. Y. App. Div. 398, 39 N. Y. Suppl. 673.

19. People *v.* Woodbury, 88 N. Y. App. Div. 443, 85 N. Y. Suppl. 174.

20. McGann *v.* People, 194 Ill. 526, 62 N. E. 941 [*reversing* 97 Ill. App. 587] (holding that mandamus to compel the issuance of a permit to lay a switch track in a street would be refused); State *v.* Latrobe, 81 Md. 222, 31 Atl. 788 (holding that a street railroad could not compel permit to dig up streets for tracks).

21. Wilmington *v.* Addicks, (Del. 1900) 47 Atl. 366 (holding a writ to lie to compel a permit to a gas company to lay pipes); State *v.* Bell, 49 La. Ann. 676, 21 So. 724 (holding that a city engineer would be compelled to furnish lines and levels to enable a street railroad to construct its road according to its franchise); Philadelphia Steam Supply Co. *v.* Philadelphia, 17 Phila. (Pa.) 110 (holding that a commissioner of highways may be compelled by mandamus to perform a statutory duty to refer to the board of highway supervisors an application to excavate the streets of the city for the purpose of laying pipes); Com. *v.* Smedley, 17 Phila. (Pa.) 18, 14 Wkly. Notes Cas. 402 (where it was held that a railroad was not bound to accept a plan by which it should use the tracks of another road).

Approval of bond.—Where permission to use streets for the purpose of laying pipes is conditioned on a satisfactory bond to be given to the city and approved by the municipal officers, such officers may be compelled by mandamus to act with regard to the approval of the bond. State *v.* Boyce, 43 Ohio St. 46, 1 N. E. 217.

and wires for the conveyance of electricity in the public streets may be enforced by mandamus;[22] but a discretion vested in the municipal authorities with regard to the use of streets for such purposes cannot be controlled,[23] although such authorities may be compelled to exercise their discretion and either grant or refuse such permission.[24] Where without authority of law a municipal corporation entirely prohibits the erection of overhead wires, a clear legal right to erect such wires may be enforced by mandamus.[25]

(III) *Subways and Conduits.* A corporation having a clear legal right to construct and maintain conduits in the streets of a city for the conveyance of telegraph, telephone, or other electric wires may enforce such right in the absence of any other adequate remedy by mandamus;[26] but before a permit to excavate the streets may be compelled, a necessary approval of the proper authorities to the plan of construction must be obtained.[27] A writ will not issue in behalf of a particular company while the city is considering a general plan to ground all wires,[28] nor where there has been a subway contracted for by the proper municipal authorities, which subway is to be used by all companies authorized to lay wires under ground, where it is not shown that relator cannot obtain space in such subway for the use of any electrical conductor that it may desire to use.[29] Mandamus will not be granted a railroad company for the purpose of conferring upon it the right to excavate the streets and construct a subway, where the right of the relator is doubtful and if enforced will threaten serious disturbance and inconvenience with results of doubtful advantage.[30]

h. Obstructions. Mandamus is a proper remedy to enforce a ministerial duty to remove obstructions from a street or highway,[31] but it will not lie where the duty is discretionary;[32] nor will it issue where there are other adequate

22. Pereria *v.* Wallace, 129 Cal. 397, 62 Pac. 61. See also Com. *v.* Warwick, 185 Pa. St. 623, 40 Atl. 93, holding that, before mandamus to compel the issuance of a permit to a telephone company to erect terminal poles would be granted, an issue of fact raised by a denial that terminal poles were a necessary part of telephone wires must be disposed of.

23. U. S. *v.* Wight, 15 App. Cas. (D. C.) 463; Suburban Light, etc., Co. *v.* Boston, 153 Mass. 200, 26 N. E. 447, 10 L. R. A. 497; People *v.* Monticello, 35 Misc. (N. Y.) 675, 72 N. Y. Suppl. 350.

24. People *v.* Monticello, 35 Misc. (N. Y.) 675, 72 N. Y. Suppl. 350, holding that a peremptory writ of mandamus requiring the issuance of a permit would be refused, although it appeared that a village board of trustees had sought either to prohibit entirely or to embarrass the telephone company in its right to the use of the streets and had delayed passing any regulations for the purpose, but leave was granted, however, to renew the application for mandamus in case the passage of an ordinance with regard to such regulations was unduly delayed.

25. State *v.* Red Lodge, (Mont. 1904) 76 Pac. 758.

26. State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113, holding that a telephone company might compel the board of public improvements of a city to act upon plans submitted by the company for service and supply pipes connecting manholes in the subway with certain buildings, and to grant a permit to do the work contemplated.

27. People *v.* Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893 [*affirming* 14 Daly 154]; People *v.* Ellison, 115 N. Y. App. Div. 254, 101 N. Y. Suppl. 55 [*affirming* 51 Misc. 413, 101 N. Y. Suppl. 444]; Missouri *v.* Murphy, 170 U. S. 78, 18 S. Ct. 505, 42 L. ed. 955, holding that a street commissioner cannot be compelled to issue a permit in the absence of an assent obtained from the board of public improvements.

28. State *v.* Towers, 71 Conn. 657, 42 Atl. 1083.

29. People *v.* Ellison, 115 N. Y. App. Div. 254, 101 N. Y. Suppl. 55.

30. People *v.* Newton, 58 N. Y. Super. Ct. 439, 11 N. Y. Suppl. 782, 19 N. Y. Civ. Proc. 416.

31. People *v.* Marlett, 41 Misc. (N. Y.) 151, 83 N. Y. Suppl. 962; People *v.* Newton, 20 Abb. N. Cas. (N. Y.) 387; People *v.* New York, 18 Abb. N. Cas. (N. Y.) 123; Pettigrew *v.* Baillargé, 20 Quebec Super. Ct. 173. See Chicago Cold Storage Warehouse Co. *v.* People, 224 Ill. 287, 79 N. E. 692, holding that upon mandamus to remove a platform from the sidewalk in front of a building a judgment ordering the sidewalk restored to its former level was proper.

32. People *v.* McMurray, 27 Colo. 277, 61 Pac. 226; People *v.* Maher, 141 N. Y. 330, 36 N. E. 396, holding that under the Albany city charter requiring the city engineer to take summary proceedings to remove a building constituting an obstruction to the street, where he has been given written directions by the mayor, the duty of the mayor to give such directions was discretionary and he

remedies,[33] where the legal existence of the highway or street is disputed,[34] or where the officer in obeying the writ would subject himself to an action for damages.[35]

i. Repair. The duty of municipal and highway officers to place and keep the streets and highways under their supervision in repair is usually regarded as ministerial and as such may be enforced by mandamus,[36] although the plan and manner of the repairs and the material used may rest in their discretion,[37] and collection of a fine or penalty from the officers is not an adequate remedy.[38] There must be a clear legal duty.[39] The commissioners cannot be ordered to repair in a particular manner,[40] and where there are no funds the writ will not issue.[41]

5. Parks. A discretionary duty as to the improvement of a public park cannot be enforced by mandamus,[42] and the discretion of park commissioners will not be controlled.[43]

6. Public Buildings. Municipal officers will be compelled by mandamus to exercise their discretion as to the erection of public buildings, and to build particular structures where the statute is mandatory.[44] But where the erection of

could not be compelled by mandamus to give them.

33. *Indiana.*— State *v.* Yant, 134 Ind. 121, 33 N. E. 896, holding that a road supervisor would not be compelled to bring an action for forfeiture against the person obstructing the highway, there being another remedy against the supervisor.

Louisiana.— State *v.* New Orleans, McGloin 47.

Michigan.— French *v.* South Haven, 85 Mich. 135, 48 N. W. 174.

Nebraska.— State *v.* Omaha, 14 Nebr. 265, 15 N. W. 210, 45 Am. Rep. 108.

New York.— People *v.* Thompson, 32 Hun 93.

Pennsylvania.— Reading *v.* Com., 11 Pa. St. 196, 51 Am. Dec. 534 (holding a remedy by indictment sufficient); Com. *v.* West Chester, 9 Pa. Co. Ct. 542.

34. People *v.* Pleasant Hill, 67 Ill. App. 415; People *v.* Bloomington, 38 Ill. App. 125; State *v.* Yant, 134 Ind. 121, 33 N. E. 896; French *v.* South Haven, 85 Mich. 135, 48 N. W. 174; State *v.* McCann, 107 Wis. 348, 83 N. W. 647.

35. People *v.* Blocki, 203 Ill. 363, 67 N. E. 809. See also cases cited *supra*, note 34.

36. *Florida.*— State *v.* Putnam County, 23 Fla. 632, 3 So. 164.

Illinois.— People *v.* Bloomington, 63 Ill. 207.

Indiana.— State *v.* Kamman, 151 Ind. 407, 51 N. E. 483.

Kentucky.— Catlettsburg *v.* Kinner, 13 Bush 334; Hammar *v.* Covington, 3 Metc. 494.

Pennsylvania.— Uniontown *v.* Com., 34 Pa. St. 293; Com. *v.* Doylestown Sup'rs, 16 Pa. Co. Ct. 161.

Wisconsin.— State *v.* Wood County Sup'rs, 41 Wis. 28.

Canada.— *In re* Moulton Tp., 12 Ont. App. 503, holding that a writ lies to repair a road, an indictment not being adequate.

Mandatory duty to issue bonds for road improvements may be enforced. People *v.* San Luis Obispo County, 50 Cal. 561.

37. State *v.* Kamman, 151 Ind. 407, 51 N. E. 483.

38. State *v.* Kamman, 151 Ind. 407, 51 N. E. 483, repair compelled, fine of officers not adequate.

39. Bacon *v.* Cumberland County, 69 N. J. L. 195, 54 Atl. 234.

40. St. Clair County *v.* People, 85 Ill. 396; Klein *v.* People, 31 Ill. App. 302.

41. Justice *v.* Logan Tp., 71 N. J. L. 107, 58 Atl. 74.

42. Com. *v.* Park, 10 Phila. (Pa.) 445, holding that under the act of 1868, providing that the city of Philadelphia shall be authorized and required to raise, by loans, from time to time, such sums of money as shall be necessary to make compensation for all grounds taken for Fairmount park, the city council alone might determine when loans were to be issued for the permanent improvement of the park, as the act conveyed discretion on them, and mandamus would not lie to compel a performance.

43. People *v.* South Park Com'rs, 221 Ill. 522, 77 N. E. 925, holding that no writ would lie to permit a railroad to build an additional track necessary to safety the permit being refused unless the company would elevate, although elevation would cost two million dollars.

44. *Florida.*— State *v.* Baker County Com'rs, 22 Fla. 29.

Georgia.— Polk *v.* James, 68 Ga. 128.

Illinois.— People *v.* La Salle County, 84 Ill. 303, 25 Am. Rep. 461.

Louisiana.— Watts *v.* Carroll Police Jury, 11 La. Ann. 141, holding that, although the police jury have discretion as to the mode of assessment, they have none to omit altogether the duty enjoined by law to appropriate money to build a court-house, and mandamus lies to compel them to discharge their duty.

Massachusetts.— Com. *v.* Justices Hampden County Ct. of Sess., 2 Pick. 414, where provision for the erection of a house of correction apart from the common jail was compelled to be made.

Pennsylvania.— See Com. *v.* Marshall, 3

such buildings is discretionary the decision of the proper authorities will not be controlled;[45] nor will their discretion as to the character and style thereof,[46] and mandamus to build a county building will not lie pending proceedings to relocate the county-seat.[47] A writ to compel submission of the question of the erection of a county building to a vote will be denied where no statute directs such submission;[48] but mandamus will issue to compel the proper authorities to comply with and make effectual the result of an election sanctioning the purchase of property for the erection of a public building.[49]

7. Sewers. Mandamus will issue to enforce the right of a property-owner to connect with a public sewer.[50] Where there is another adequate remedy mandamus will not issue to compel a local authority to repair and maintain a sewer.[51]

8. Waterworks. Mandamus is the proper remedy to compel the proper municipal authorities to furnish water to a private consumer.[52] A discretion vested in the municipal authorities as to the regulation of water-rates cannot be controlled by mandamus.[53] The issuance of bonds[54] or a certificate of indebtedness[55] for the purpose of the construction of waterworks cannot be enforced by mandamus where the action is vested in the discretion of the municipal authorities. Mandamus will issue in a proper case to compel the assessment of damages occasioned by the construction of a public water-supply system.[56]

9. Wharves. It would seem that mandamus will lie to compel a municipal corporation to provide adequate wharf facilities.[57] The fixing of dock-lines by

Wkly. Notes Cas. 182, where a county was compelled to build a court-house after it was recommended by two successive grand juries.

Virginia.— Broaddus *v.* Essex County, 99 Va. 370, 38 S. E. 177.

See 33 Cent. Dig. tit. "Mandamus," § 140.

Conditions precedent must be complied with. Camden Bd. of Health *v.* Camden County, 50 N. J. L. 396, 13 Atl. 173, holding that tax to improve jail would not be compelled before health board had taken action.

Where the statute is indefinite as to the duty imposed the writ will not issue. State *v.* Washington County, 2 Pinn. (Wis.) 552, 2 Chandl. 247, so holding where a statute directed a court-house contract upon the plan generally adopted by the different counties of the state.

Public market.— The legislature having authorized and directed the mayor, aldermen, and commonalty of the city of New York to create a public fund or stock, for the erection of a public market, a mandamus will lie to compel the common council to issue the stock; the common council constituting the only agency or instrument by which the behest of the legislature can be obeyed; and a mandamus being the only possible method by which that body can be compelled to act. People *v.* New York, 45 Barb. (N. Y.) 473.

45. Andrews *v.* Knox County, 70 Ill. 65; State *v.* Howell County Ct. Justices, 58 Mo. 583; *Ex p.* Black, 1 Ohio St. 30; Justices Huron Dist. *v.* Huron Dist. Council, 5 U. C. Q. B. 574. See also Reg. *v.* Bruce, 11 U. C. C. P. 574.

46. State *v.* Baker County Com'rs, 22 Fla. 29; People *v.* La Salle County, 84 Ill. 303, 25 Am. Rep. 461; Broaddus *v.* Essex County, 99 Va. 370, 38 S. E. 177, holding that the question of whether a building is fireproof is a matter resting within the judgment of supervisors.

47. State *v.* Wyoming County Ct., 47 W. Va. 672, 35 S. E. 959.

48. State *v.* Napier, 7 Iowa 425.

49. Weston *v.* Newburgh, 67 Hun (N. Y.) 127, 22 N. Y. Suppl. 22.

50. Springmyer *v.* State, 1 Ohio Cir. Ct. 501, 1 Ohio Cir. Dec. 279 (holding that a citizen might enforce a right to tap a public sewer, although it had been built by private donations to which he had not contributed); Meyler *v.* Meadville, 23 Pa. Co. Ct. 119 (holding that the city cannot compel the payment of a void assessment as a condition precedent to allowing a connection). But see State *v.* Board of Public Works, 6 Ohio Dec. (Reprint) 769, 8 Am. L. Rec. 24, holding that where the granting of permission to tap a sewer was within the discretion of the board of public works, such discretion could not be controlled.

51. Reg. *v.* St. Giles, 61 J. P. 217, 66 L. J. Q. B. 337, 35 Wkly. Rep. 335.

52. People *v.* Monroe, 41 Misc. (N. Y.) 198, 83 N. Y. Suppl. 995, holding that where the consumer's supply was cut off for nonpayment of rates, mandamus would not be granted to compel the water commissioner to continue the supply without payment of a penalty demanded as to the cost of cutting off the supply, except upon the consumer's making a deposit covering the amount charged as security to the commissioner, and also covering the probable cost of litigation to determine the validity of the charge.

53. Jacobs *v.* San Francisco, 100 Cal. 121, 34 Pac. 630.

54. Ackerman *v.* Buchman, 109 Pa. St. 254.

55. *Ex p.* Coster, 8 N. Brunsw. 349.

56. Furbish *v.* Kennebec County, 93 Me. 117, 44 Atl. 364; Reg. *v.* St. Johns Sewerage, etc., Com'rs, 12 N. Brunsw. 3.

57. Prescott *v.* Duquesne, 48 Pa. St. 118.

municipal corporations may be compelled, under statutes authorizing them to regulate the line of deep water.[58] But the writ was refused to compel a city to regulate the manner of erecting private wharves, under a directory statute;[59] and it has been held that mandamus will not lie to compel the issuance of a license to extend a wharf where there is another adequate remedy,[60] nor to control the discretion of an officer as to wharf regulations.[61]

P. Aid to Railroads and Other Corporations. Counties[62] and other municipal corporations[63] are frequently empowered by statute to aid the construction of railroads or other works of internal improvement, by appropriations, donations, or subscriptions to stock;[64] and a corporation having a clear right to aid under such a statute may enforce it by mandamus.[65] For example mandamus will issue to enforce a clear right to a stock subscription[66] or to the issue[67] or delivery[68] of aid bonds, or to the levy of a tax for the payment of such bonds or interest thereon, or for the payment of a donation.[69] Mandamus will not lie, however, to control a discretion vested in public officers,[70] and will issue to enforce only duties which are specifically imposed by statute.[71] There must have been a previous demand and refusal;[72] and there must have been a compliance with all conditions precedent, both with regard to the proceedings for the authorization of the aid[73]

58. Wool *v.* Edenton, 115 N. C. 10, 20 S. E. 165; Wool *v.* Edenton, 113 N. C. 33, 18 S. E. 76; Tatham *v.* Philadelphia Wardens, 2 Phila. (Pa.) 246.

Demand.— A petition by a riparian owner to the council-men of an incorporated town, in which he asks that they relocate the line of entry formerly fixed by them and that they make a general line on the deep water in front of the high land of the town, so designated that each of the owners of the high land may know the line so established, is a sufficient demand, and it is not essential that he should notify the board of his purpose to proceed immediately to erect a wharf. Wool *v.* Edenton, 115 N. C. 10, 20 S. E. 165.

59. Kennedy *v.* Washington, 14 Fed. Cas. No. 7,708, 3 Cranch C. C. 595.

60. Com. *v.* Clark, 6 Phila. (Pa.) 498, where a specific remedy was provided by statute.

61. State *v.* Fitzpatrick, 47 La. Ann. 1329, 17 So. 828, where writ to commissioner to order goods removed within forty-eight hours was refused.

62. See COUNTIES, 11 Cyc. 518 *et seq.*

63. See MUNICIPAL CORPORATIONS; TOWNS.

64. Public aid to railroad in general see RAILROADS.

65. See cases cited *infra*, this section.

66. *Ex p.* Selma, etc., R. Co., 46 Ala. 230; *Ex p.* Selma, etc., R. Co., 45 Ala. 696, 6 Am. Rep. 722; Napa Valley R. Co. *v.* Napa County, 30 Cal. 435; Piatt *v.* People, 29 Ill. 54; State *v.* Delaware County, 92 Ind. 499.

Action upon a taxpayer's petition asking a board of county commissioners to take stock to the amount of money collected upon a tax for that purpose may be compelled by mandamus. Pfister *v.* State, 82 Ind. 382.

67. People *v.* Harp, 67 Ill. 62; Piatt *v.* People, 29 Ill. 54; Atchison, etc., R. Co. *v.* Jefferson County Com'rs, 12 Kan. 106; People *v.* Mitchell, 35 N. Y. 551; Cincinnati, etc., R. Co. *v.* Clinton County Com'rs, 1 Ohio St. 77.

Necessity of previous stock subscription.— Mandamus may be awarded to compel the issue of bonds, although no formal stock subscription has been made. Illinois Midland R. Co. *v.* Barnett, 85 Ill. 313.

68. Santa Cruz R. Co. *v.* Santa Cruz County, 62 Cal. 239; California Northern R. Co. *v.* Butler County, 18 Cal. 671; Shelby County Ct. *v.* Cumberland, etc., R. Co., 8 Bush (Ky.) 209; State *v.* Jennings, 48 Wis. 549, 4 N. W. 641.

69. See *infra*, VI, V, 1, i.

70. Howland *v.* Eldredge, 43 N. Y. 457; Satterlee *v.* Strider, 31 W. Va. 781, 8 S. E. 552 (holding, where the issuance of bonds is dependent on the discretion of an officer in his decision that the proper amount of work has been done, mandamus will not issue to control such discretion); Matter of North Simcoe R. Co., 36 U. C. Q. B. 101.

71. State *v.* Knox County, 101 Ind. 398; Chicago, etc., R. Co. *v.* Olmstead, 46 Iowa 316; *Ex p.* New Brunswick R. Co., 15 N. Brunsw. 78, holding that a municipality authorized by the legislature to take stock in a company incorporated for the construction of a line of railway particularly defined by the act is not bound to issue debentures to a company not incorporated to construct that specific line, a subscription to their stock list by the warden being *ultra vires* and a nullity.

72. Oroville, etc., R. Co. *v.* Plumas County, 37 Cal. 354; Douglas *v.* Chatham, 41 Conn. 211 (where the duty was to guarantee the corporation's bonds); People *v.* Mt. Morris, 137 Ill. 576, 27 N. E. 757 (to compel audit and allowance of bonds); Chicago, etc., R. Co. *v.* Olmstead, 46 Iowa 316 (holding that a county treasurer could not be compelled to collect a tax until the tax lists have been placed in his hands and he shall have then refused or neglected to collect it).

Tender of stock certificates is excused by a refusal to issue bonds. Illinois Midland R. Co. *v.* Barnett, 85 Ill. 313.

73. Springfield, etc., R. Co. *v.* Wayne

and upon the part of the corporation to perfect its right to such aid.[74] In case the underlying proceedings are illegal the writ will not issue,[75] as for example, where the election has been invalid,[76] and there must be no other adequate remedy.[77] Mandamus will not issue to compel the payment of a stock subscription when the municipality has been unable to sell the bonds, from the proceeds of which payment is to be made,[78] nor will it issue to compel submission of the question of aid to a corporation by a township, pending proceedings to divide the township.[79] It will not lie against an officer to compel him to pay over a fund, unless the fund is actually or presumptively in his hands.[80] Where a subscription has been voted it has been held that the corporation must compel the completion of such subscription before it performs the work to aid which the subscription is authorized.[81]

Q. Appropriation and Apportionment of Funds. A municipal corporation may be compelled by mandamus to perform a specific statutory duty to appropriate and raise a fund for a specific purpose,[82] but the immediate performance of such a duty will not be compelled where no existing law gives the power or provides the means appropriate.[83] So a specific statutory duty imposed upon county commissioners to set apart funds for a specific purpose may be enforced,[84] or a specific duty of a fiscal officer to transfer funds from one account to another;[85] but where a discretion is vested in officers as to the apportionment of municipal funds between various departments it will not be controlled,[86] and an alteration in an apportionment will not be compelled where there is no statutory duty or power to act.[87] An officer may be compelled to transfer funds in his hands to the proper custodian,[88] but there must be a clear statutory duty.[89]

R. Deposit of Funds. Mandamus will lie to compel the deposit of public funds in accordance with law.[90] A bank cannot, however, compel a board of county commissioners to approve its bond as a county depository where the right is not clear.[91]

S. Issue of Bonds. A purely ministerial duty to execute and deliver municipal bonds may be enforced by mandamus;[92] but the writ will issue only

County Clerk, 74 Ill. 27; Lamoile Valley R. Co. *v.* Fairfield, 51 Vt. 257, where there had been a failure to record the instrument of assent, although it was filed in the proper office.

74. People *v.* Holden, 91 Ill. 446; Harwood, etc., R. Co. *v.* Case, 37 Iowa 692. See also State *v.* Lake City, 25 Minn. 404.

75. State *v.* Harper, 30 S. C. 586, 9 S. E. 664; State *v.* Whitesides, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777; *In re* Langdon, 45 U. C. Q. B. 47, holding that where a by-law granting a bonus to a railway company has been carried by the electors, a municipal council may refuse finally to pass the same because the passage of the by-law has been procured by bribery, and may set up such bribery in answer to an application for a mandamus.

76. *Ex p.* Selma, etc., R. Co., 46 Ala. 230. And see State *v.* Lake City, 25 Minn. 404.

77. State *v.* McCrillus, 4 Kan. 250, 96 Am. Dec. 169, holding an action against the treasurer on his bond sufficient to prevent mandamus to pay amount due on railroad aid bond.

78. Neuse River Nav. Co. *v.* Newbern, 52 N. C. 275.

79. State *v.* Anderson County, 28 Kan. 67.

80. Minneapolis, etc., R. Co. *v.* Becket, 75 Iowa 183, 39 N. W. 260; State *v.* Neely, 30 S. C. 587, 9 S. E. 664, 3 L. R. A. 672.

81. State *v.* Bates County Ct., 57 Mo. 70.

82. State *v.* Jersey City Bd. of Finance, 53 N. J. L. 62, 20 Atl. 755.

83. State *v.* Jersey City Bd. of Finance, 53 N. J. L. 62, 20 Atl. 755.

84. Humboldt County *v.* Churchill County Com'rs, 6 Nev. 30.

85. State *v.* Stone, 69 Ala. 206.

86. Hover *v.* People, 17 Colo. App. 375, 68 Pac. 679; State *v.* New Orleans, 32 La. Ann. 268; U. S. *v.* New Orleans, 31 Fed. 537.

87. People *v.* Hempstead, 126 N. Y. 528, 27 N. E. 968 [*affirming* 12 N. Y. Suppl. 165].

88. People *v.* Mahoney, 30 Mich. 100, holding that a town treasurer must transfer township library money to the treasurer of the township board of school inspectors.

89. State Agricultural College *v.* Vaughn, 12 N. M. 333, 78 Pac. 51.

90. People *v.* Gibler, 78 Ill. App. 193; State *v.* Cronin, (Nebr. 1904) 101 N. W. 325; State *v.* Bowers, 26 Ohio Cir. Ct. 326 [*affirmed* without opinion in 70 Ohio St. 423, 72 N. E. 1155]. *Compare* Port Huron First Nat. Bank *v.* Runnells, (Mich. 1885) 21 N. W. 911.

91. State *v.* Owen, 41 Nebr. 651, 59 N. W. 886.

92. *California.*— Turlock Irr. Dist. *v.* Williams, 76 Cal. 360, 18 Pac. 379, signing of irrigation bonds.

Kansas.— Smalley *v.* Yates, 36 Kan. 519,

where a clear legal duty exists,[93] and where all conditions precedent have been fulfilled.[94] In case a discretion is reposed in the officers sought to be compelled their action will not be coerced.[95] A contractor entitled to bonds in payment of a claim cannot, it has been held, enforce such right after he has obtained a judgment on his claim.[96]

T. Funding Indebtedness. A mandatory duty to issue bonds or take other steps toward the funding of municipal indebtedness may be enforced by mandamus,[97] but the writ will not issue unless the duty is clearly imposed by law.[98]

U. Enforcement and Payment of Claims — 1. Claims Which May Be Enforced — a. In General.[99] Claims which may be enforced or the enforcement of which may be aided by mandamus must be based upon a clear and specific legal right,[1] and they must in accordance with the rules governing the use of the

13 Pac. 845, delivery of bonds in completion of an agreement of purchase.

New Jersey.— Edward C. Jones Co. *v.* Guttenburg, 66 N. J. L. 659, 51 Atl. 274.

New York.— People *v.* Syracuse, 144 N. Y. 63, 38 N. E. 1006 [*affirming* 65 Hun 321, 20 N. Y. Suppl. 236]; People *v.* Guggenheimer, 47 N. Y. App. Div. 9, 62 N. Y. Suppl. 11 (bonds for water-supply); People *v.* Fitch, 78 Hun 321, 29 N. Y. Suppl. 163 (controller's duty to issue bonds peremptory); Matter of Atty.-Gen., 58 Hun 218, 12 N. Y. Suppl. 754 (holding that it was the duty of a city controller to issue bonds for the full amount of a state tax as required by statute); People *v.* Brennan, 39 Barb. 522 (bonds for purchase of land coerced, although title already in city); People *v.* Oneida County, 36 Misc. 597, 73 N. Y. Suppl. 1098 [*affirmed* in 68 N. Y. App. Div. 650, 74 N. Y. Suppl. 1142] (writ lies for county board to issue bonds); Sheehan *v.* Long Island City, 11 Misc. 487, 33 N. Y. Suppl. 428 (contractor may have writ where contract provides for payment by issue of bonds); People *v.* New York, 53 How. Pr. 280 (issue of assessment bonds by controller in payment for damages for change of grade).

Ohio.— Noble County Com'rs *v.* Hunt, 33 Ohio St. 169.

See 33 Cent. Dig. tit. "Mandamus," § 220.

93. People *v.* Chicago, 51 Ill. 53 (park bonds not authorized by city not compelled); People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278 (holding that city would not be compelled to issue bonds for park purposes under a statute illegally giving authority to a board of park commissioners to impose indebtedness upon a city without its consent); Halsey *v.* Nowrey, 71 N. J. L. 481, 59 Atl. 449 (mayor must sign bonds when so required by charter); People *v.* Parmerter, 158 N. Y. 385, 53 N. E. 40 [*reversing* 19 N. Y. App. Div. 632, 46 N. Y. Suppl. 1098] (attesting and registry not compelled when duty not clear); People *v.* White, 54 Barb. (N. Y.) 622 (village president must sign bonds lawfully issued); Morris *v.* Williams, 23 Wash. 459, 63 Pac. 236 (where a contract to sell bonds by county was not enforced by mandamus since there was no public duty).

Issue in excess of debt limit will not be compelled. Edward C. Jones Co. *v.* Guttenburg, 66 N. J. L. 58, 48 Atl. 537; Chalk *v.* White, 4 Wash. 156, 29 Pac. 979.

94. Los Angeles *v.* Hance, 130 Cal. 278, 62 Pac. 484 (issue on defective vote not coerced); People *v.* San Francisco, 27 Cal. 655 (holding that the clerk of the city and county of San Francisco is not in default for not countersigning the bonds required to be issued by the act of 1863, authorizing said city to subscribe to the capital stock of the Central Pacific Railroad of California, until the board of supervisors direct him to countersign the same or afford him an opportuity to do so in their presence, and he refuses); Daniels *v.* Long, 111 Mich. 562, 69 N. W. 1112 (denying writ to issue when properly certified election was illegal); Ackerman *v.* Buchman, (Pa. 1885) 6 Atl. 218 (estimate by water commissioners essential to issue of bonds to construct waterworks).

95. Morris *v.* Williams, 23 Wash. 459, 63 Pac. 236. See Farmers' Nat. Bank *v.* Jones, 105 Fed. 459, where a bill in equity to compel issue of bonds was treated as a mandamus and refused because the duty was discretionary.

96. State *v.* New Orleans, 36 La. Ann. 726.

97. Summit County *v.* People, 10 Colo. 14, 14 Pac. 47 (writ issued for funding bonds); Trach *v.* McCauley, 6 North. Co. Rep. (Pa.) 193 (city must exchange bonds, on refunding).

98. Bravin *v.* Tombstone, 6 Ariz. 212, 56 Pac. 719; U. S. *v.* New Orleans, 74 Fed. 489, 20 C. C. A. 622; U. S. *v.* New Orleans, 60 Fed. 387, 9 C. C. A. 37.

99. Claims against school-district see *supra*, VI, F, 10, b.

Compensation of teachers see *supra*, VI, F, 11, b, (II).

Mandamus to recover bounty see Bounties, 5 Cyc. 990.

Salaries and compensation of officers see *supra*, VI, C, 10.

1. *Illinois.*— Cottonwood *v.* People, 38 Ill. App. 239.

Louisiana.—State *v.* Judges Orleans Parish Civ. Dist. Ct., 34 La. Ann. 1114.

Michigan.— Portsmouth Tp. *v.* Bay City, 57 Mich. 420, 24 N. W. 127.

Montana.— State *v.* Lewis, etc., County, (1906) 86 Pac. 419.

writ in other cases be free from substantial doubt,[2] just,[3] and untainted by fraud or collusion.[4]

b. Unliquidated Claims. Mandamus will not lie to compel payment of an unliquidated claim[5] until the validity of the claim and the amount due shall have been definitely ascertained by some competent officer or tribunal, whose decision, while unappealed from or unreversed, is final and conclusive.[6] If the officer

Nebraska.— Moores *v.* State, 4 Nebr. (Unoff.) 235, 93 N. W. 986.

New Jersey.— McDonald *v.* Newark, 58 N. J. L. 12, 32 Atl. 384.

New York.— People *v.* Haws, 12 Abb. Pr. 192, 21 How. Pr. 117.

North Carolina.— Bear *v.* Brunswick County, 124 N. C. 204, 32 S. E. 558, 70 Am. St. Rep. 586.

Ohio.— State *v.* Ratterman, 3 Ohio Cir. Ct. 626, 2 Ohio Cir. Dec. 364.

Oklahoma.— Huddleston *v.* Noble County, 8 Okla. 614, 58 Pac. 749.

Virginia.— Richmond *v.* Epps, 98 Va. 233, 35 S. E. 723.

Canada.— Jennett *v.* Sinclair, 10 Nova Scotia 392.

See 33 Cent. Dig. tit. "Mandamus," § 223.

Debts contracted under an unconstitutional statute cannot be enforced by mandamus. Nougues *v.* Douglass, 7 Cal. 65.

2. *Illinois.*— People *v.* Johnson, 100 Ill. 537, 39 Am. Rep. 63; Cottonwood *v.* People, 38 Ill. App. 239.

Indiana.— Watkins *v.* State, 151 Ind. 123, 49 N. E. 169, 51 N. E. 79, holding auditor justified in refusing to issue warrant to assignee of a claim before notice of the assignment.

Kansas.— Kansas Nat. Bank *v.* Hovey, 48 Kan. 20, 28 Pac. 1090, bounty claim of receiver.

Kentucky.— Judge Hickman County Ct. *v.* Moore, 2 Bush 108, guarding insecure jail.

Louisiana.— Badger *v.* New Orleans, 49 La. Ann. 804, 21 So. 870, 37 L. R. A. 540, disputed contract claim.

Michigan.— Brownell *v.* Gratiot Sup'rs, 49 Mich. 414, 13 N. W. 798.

Missouri.— State *v.* Seibert, 130 Mo. 202, 32 S. W. 670, disqualified assignee.

New York.— People *v.* Coler, 58 N. Y. App. Div. 131, 68 N. Y. Suppl. 448 (doubt as to sum due and whether contract performed); Matter of Finnigan, 91 Hun 176 36 N. Y. Suppl. 331 (doubtful claim on contract); People *v.* New York, 3 Hun 11, 5 Thomps. & C. 382; People *v.* Orleans County Sup'rs, 16 Misc. 213, 38 N. Y. Suppl. 890 (justice's fees not clearly proved).

North Dakota.— State *v.* Albright, 11 N. D. 22, 88 N. W. 729.

Ohio.— State *v.* Cappeller, 6 Ohio Dec. (Reprint) 863, 8 Am. L. Rec. 487, liens filed against amount due.

Rhode Island.— Simmons *v.* Davis, 18 R. I. 46, 25 Atl. 691.

Washington.— Chambers *v.* Territory, 3 Wash. Terr. 280, 13 Pac. 336, holding that mandamus will not lie against the mayor and clerk of a city to pay an attorney's lien which has been filed on a judgment obtained for a client against the city, which the client had assigned, and satisfaction of which had been entered of record, where no judicial proceedings have been had to determine the amount or validity of the lien, as against the attorney, the assignee, or the city, or to set the assignment or satisfaction aside.

See 33 Cent. Dig. tit. "Mandamus," § 223 *et seq.*

Claims in litigation.— The pendency of an appeal or injunction will prevent the issuing of a mandamus. Livingston *v.* Widber, (Cal. 1896) 47 Pac. 247; Wilmarth *v.* Ritschlag, 9 S. D. 172, 68 N. W. 312. An unauthorized appeal will not have such effect, however. California Bank *v.* Shaber, 55 Cal. 322. See, generally, *supra*, II, H.

3. Van Akin *v.* Dunn, 117 Mich. 421, 75 N. W. 938; McQueen *v.* Detroit, 116 Mich. 90, 74 N. W. 387; O'Hara *v.* Fagen, 56 N. J. L. 279, 27 Atl. 1089; People *v.* Green, 66 Barb. (N. Y.) 630.

4. Noble *v.* Paris Tp., 56 Mich. 219, 22 N. W. 321.

5. *Georgia.*— Cox *v.* Whitfield County, 65 Ga. 741.

Kentucky.— Garrard County Ct. *v.* McKee, 11 Bush 234; King *v.* Mason County Common School Dist. No. 23, 32 S. W. 752, 17 Ky. L. Rep. 803.

Michigan.— Midland School Dist. No. 9 *v.* Midland School Dist. No. 5, 40 Mich. 551; People *v.* Detroit, 34 Mich. 201, *quantum meruit*.

New Jersey.— See Allen *v.* Williams, 33 N. J. Eq. 584.

New York.— People *v.* Metz, 100 N. Y. Suppl. 913.

See 33 Cent. Dig. tit. "Mandamus," § 235.

But see Ward *v.* Lowndes, 5 Jur. N. S. 1124, 21 L. J. Q. B. 265, 7 Wkly. Rep. 489, holding that where a debt is of such a nature that a mandamus will be granted to enforce the payment, it is not necessary that the amount of the debt should have been previously ascertained; but such amount may be ascertained by the verdict of the jury in the action in which the writ of mandamus is claimed.

Damages.— Mandamus will not lie to compel payment of unliquidated damages. Governor *v.* Justices Clark County Inferior Ct., 19 Ga. 97.

6. Watts *v.* McLean, 28 Ill. App. 537; State *v.* Wayne County Council, 157 Ind. 356, 61 N. E. 715; State *v.* Jamison, 142 Ind. 679, 42 N. E. 350; Trant *v.* State, 140 Ind. 414, 39 N. E. 513; State *v.* Snodgrass, 98 Ind. 546; Poling *v.* Philippi Dist. Bd. of Education, 50 W. Va. 374, 40 S. E. 357.

Action and judgment necessary.— School Dist. No. 3 *v.* Bodenhamer, 43 Ark. 140

whose duty it is to make the payment, must himself, at his own risk, inquire into the validity and the amount of the claim, he cannot be compelled by mandamus to make payment.[7] A judgment by a court of competent jurisdiction that a certain sum is due from a municipal corporation is usually regarded as an auditing of the claim within the meaning of statutes requiring claims to be audited.[8]

c. Bonds. Where the validity of municipal bonds is not disputed mandamus will lie to compel the proper authorities to make an appropriation for their payment,[9] or to compel them to perform any duties specifically imposed by law with reference thereto,[10] and a judgment on the bonds need not have first been obtained,[11] nor need they have been presented for allowance.[12] So when funds are in the hands of the proper officer payment may be compelled.[13] But when the validity of bonds or the liability of the municipality is contested, payment will not be compelled until the right has been determined.[14] A contractor cannot enforce bonds issued in payment for an improvement where through his fraud or wrong the work was not done according to contract,[15] and where the bonds are non-negotiable a purchaser has no better right.[16]

d. Judgments. Mandamus is usually regarded as a proper remedy to enforce a judgment against a municipal or public corporation[17] in case there is no other

(services as teacher); Cox *v.* Whitfield County, 65 Ga. 741; Hugg *v.* Ivins, 59 N. J. L. 139, 36 Atl. 685; *In re* Morris, etc., Dredging Co., 101 N. Y. Suppl. 726 (holding the certificate of an engineer as to work done under a contract not conclusive so as to permit mandamus); Com. *v.* Thompson, 86 Pa. St. 442; Hester's Case, 2 Watts & S. (Pa.) 416; Com. *v.* Allegheny County, 16 Serg. & R. (Pa.) 317; Com. *v.* Philadelphia, 5 Pa. Dist. 222; Shell *v.* Dauphin County, 1 Pearson (Pa.) 89; Com. *v.* School Directors, 4 L. T. N. S. (Pa.) 6.

Allowance by proper authority necessary. — Dubordieu *v.* Butler, 49 Cal. 522; State *v.* Snodgrass, 98 Ind. 546; People *v.* New York, 52 N. Y. 224; People *v.* Flagg, 17 N. Y. 584; People *v.* New York Bd. of Apportionment, 3 Hun (N. Y.) 11, 5 Thomps. & C. 382 [*affirmed* in 64 N. Y. 627]; People *v.* Green, 2 Thomps. & C. (N. Y.) 18 [*affirmed* in 56 N. Y. 476]; People *v.* Brennan, 18 Abb. Pr. (N. Y.) 100; State *v.* McConnell, 28 Ohio St. 589; Putnam County Com'rs *v.* Allen County, 1 Ohio St. 322; Burnet *v.* Portage County, 12 Ohio 54; Foster *v.* Angell, 19 R. I. 285, 33 Atl. 406; State *v.* Fuller, 18 S. C. 246; Thomas *v.* Mason, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727 (holding that where the amount of the claim has been determined and an order issued by the proper authority, judgment need not be obtained on the order); State *v.* Doyle, 38 Wis. 92.

7. State *v.* Snodgrass, 98 Ind. 546.

8. State *v.* Lander County, 22 Nev. 71, 35 Pac. 300.

9. State *v.* Perrysburg Tp. Bd. of Education, 27 Ohio St. 96, where the bonds were in the hands of innocent holders.

Appropriation for payment of claims in general see *infra*, VI, U, 6.

10. Dayton Tp. *v.* Rounds, 27 Mich. 82.

Payment of interest see *infra*, VI, U, 1, e.

Taxation for payment of bonds or interest see *infra*, VI, V, 1, h.

11. People *v.* Getzendaner, 137 Ill. 234, 34 N. E. 297.

12. Limestone Co. *v.* Rather, 48 Ala. 433; State *v.* McCrillus, 4 Kan. 250, 96 Am. Dec. 169, holding that bonds of a county are ascertained claims and the county board has no power to audit or allow them, or to disallow them.

Where officer is directed not to pay. — An order of a county board directing the treasurer not to pay certain bonds issued by the county, and for which money is in his hands, and which it is his duty to pay, is a nullity, and would be no defense to an action against the treasurer for the payment of such money. State *v.* McCrillus, 4 Kan. 250, 96 Am. Dec. 169.

13. Gunnison County *v.* Sims, 31 Colo. 483, 74 Pac. 457. See Ward *v.* Piper, 69 Kan. 773, 77 Pac. 699, holding that ordinary expense funds would not be compelled to be paid for bonds where it was not shown that the bonded indebtedness arose from ordinary expenses or that the funds were more than sufficient for current expenses.

Payment of claims in general see *infra*, VI, U, 6.

Other adequate remedy. — The fact that suit may be brought on the official bond of an officer is not an adequate remedy and will not prevent mandamus to pay. Elliott County *v.* Kitchen, 14 Bush (Ky.) 289.

14. Loomis *v.* Rogers Tp., 53 Mich. 135, 18 N. W. 596; Beaman *v.* Leake County, 42 Miss. 237; Bailey *v.* Lawrence County, 2 S. D. 533, 51 N. W. 331.

15. Northern Trust Co. *v.* Wilmette, 220 Ill. 417, 77 N. E. 169.

16. Northern Trust Co. *v.* Wilmette, 220 Ill. 417, 77 N. E. 169.

17. *Illinois.* — Dix *v.* Big Four Drainage Dist., 207 Ill. 17, 69 N. E. 576 (holding that writ lies against a town to pay a drainage assessment on judgment confirming it); Lewis *v.* Jonathan Creek, etc., Drainage Com'rs, 111 Ill. App. 222 (holding that a drainage district must pay a judgment when

adequate remedy.[18] So the allowance of a judgment as a claim may be com-

the fund was on hand or levied); Chicago *v.* People, 98 Ill. App. 517.

Iowa.— Brown *v.* Crego, 32 Iowa 498.

Kansas.— Pherson *v.* Young, 69 Kan. 655, 77 Pac. 693.

Missouri.—State *v.* Butler County, 164 Mo. 214, 64 S. W. 176, holding that it was no defense that the judgment was not certified to the county court.

New Jersey.— Lyon *v.* Elizabeth, 43 N. J. L. 158.

New York.— People *v.* Fulton County Com'rs, 70 Hun 560, 24 N. Y. Suppl. 397 [*affirmed* in 139 N. Y. 656, 35 N. E. 208]; People *v.* Abbott, 45 Hun 293, 13 N. Y. Civ. Proc. 101 [*reversed* on other grounds in 107 N. Y. 225, 13 N. E. 779]; Brinckerhoff *v.* Board of Education, 37 How. Pr. 499 (holding writ to pay out of appropriate fund, or to levy tax, would lie).

North Carolina.— Bear *v.* Brunswick County, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711; Fry *v.* Montgomery County Com'rs, 82 N. C. 304; Webb *v.* Beaufort, 70 N. C. 307 (so holding, although judgment was dormant); Lutterloh *v.* Cumberland County, 65 N. C. 403.

Ohio.— State *v.* Symmes Tp. Bd. of Education, 7 Ohio Dec. (Reprint) 326, 2 Cinc. L. Bul. 114, holding a writ to pay proper where statute forbids a levy.

Pennsylvania.— Miller *v.* Bradford, 19 Pa. Super. Ct. 297.

South Dakota.— Evans *v.* Bradley, 4 S. D. 83, 55 N. W. 721, holding payment of judgment mandatory when not impeached or appealed from.

West Virginia.— Poling *v.* Philippi Bd. of Education, 50 W. Va. 374, 40 S. E. 357.

United States.— Rose *v.* McKie, 145 Fed. 584, 76 C. C. A. 274 [*affirming* 140 Fed. 145] (holding that it was no defense to a writ to a town to provide for payment that the legal duty of the town did not include all acts necessary to full discharge of the judgment); Thompson *v.* Perris Irr. Dist., 116 Fed. 769 (holding writ to pay would lie against irrigation district); Helena *v.* U. S., 104 Fed. 113, 43 C. C. A. 429 (holding that city must apply special fund collected to pay judgment); Evans *v.* Pittsburg, 8 Fed. Cas. No. 4,567 (holding that a statute providing for the enforcement of a judgment against townships and counties included cities).

Canada.— *Re* Darby, 19 Ont. 51, holding that writ would lie against health board.

See 33 Cent. Dig. tit. "Mandamus," § 231.

In the federal courts.— A writ of mandamus in the federal circuit courts is never an independent suit, but is only a proceeding ancillary to the judgment which gives the jurisdiction, and, when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the same as provided in the contract. In the circuit court of the United States there must be a judgment for the recovery of money before there can be a mandamus to levy any tax to pay it, and mandamus is only a form of executing the judgment. Labette County *v.* U. S., 112 U. S. 217, 5 S. Ct. 108, 28 L. ed. 698; Bath County *v.* Amy, 13 Wall. (U. S.) 244, 20 L. ed. 539; Lafayette County *v.* Wonderly, 92 Fed. 313, 34 C. C. A. 360; Fuller *v.* Aylesworth, 75 Fed. 694, 21 C. C. A. 505; Osborne *v.* Adams County, 7 Fed. 441, 2 McCrary 97. And see *Ex p.* Holman, 28 Iowa 88, 4 Am. Rep. 159.

Under the statute in Pennsylvania municipal creditors are given mandamus to compel the payment of judgments. The process is called mandamus-execution, and restrains misappropriation as well as compels payment. It is not the prerogative writ, but in reality an execution. Pollock *v.* Lawrence County, 19 Fed. Cas. No. 11,255, 2 Pittsb. (Pa.) 137. The same considerations apply to the statutory mandamus provided for against school-districts. O'Donnell *v.* Cass Tp. School-Dist., 133 Pa. St. 162, 19 Atl. 358. It is not proper to proceed in the first instance by mandamus to collect a judgment against boroughs, townships, or counties. The proper proceeding is by an execution, obedience to which may be enforced by attachment; and where after such an execution there are no moneys unappropriated out of which the execution can be paid, and the revenues are not any more than is required to defray the current expenses, and the proper municipal officers fail or refuse to assess and collect sufficient taxes for the purpose, mandamus, first in the alternative and then in the peremptory form, may issue to compel them to perform their duty in the premises. Allen *v.* Dubois Borough, 5 Pa. Dist. 585. See also *In re* Marcy Tp., 8 Del. Co. (Pa.) 31, 10 Kulp 43, where an order to a creditor to enter satisfaction of a judgment in proceedings to ascertain the indebtedness of a township before issuing mandamus to levy a tax was refused.

Mandamus in action on debt.— In North Carolina it is held that a person may sue to recover a debt from a county and in the same action demand a mandamus for its payment. Fry *v.* Montgomery County Com'rs, 82 N. C. 304; McLendon *v.* Anson County Com'rs, 71 N. C. 38.

Dormant judgment.—Where a debt against a municipal corporation has been reduced to judgment in a court of competent jurisdiction, a peremptory mandamus may be properly asked for, although such judgment is dormant. Webb *v.* Beaufort, 70 N. C. 307.

Conclusiveness of judgment in proceedings by mandamus thereon see JUDGMENTS, 23 Cyc. 1294, text and note 68.

18. People *v.* Wood, 2 Abb. Pr. (N. Y.) 90 (holding that writ would not issue to compel a mayor to sign a warrant, after order by a court to pay a judgment, an order being an adequate remedy); Com. *v.* Pease, 1 Dauph. Co. Rep. (Pa.) 47 (holding a statutory remedy for collecting a judgment against a school-district exclusive). And see

pelled,[19] or the appropriation to its payment of any available funds,[20] or the setting aside of surplus revenues.[21] The writ also lies to compel the record of a judgment against a city.[22] It would seem that mandamus will not lie to enforce a part of a judgment which has been assigned.[23]

e. Interest. Mandamus will not lie to compel the payment of interest unless the law clearly makes it payable;[24] but where there is a clear duty mandamus will lie to compel provision for the payment of interest upon municipal bonds,[25] or to compel payment thereof,[26] when the validity of the bonds is not disputed.[27] Where the amount of interest coupons is definitely fixed by statute their allowance as

U. S. *v.* King, 74 Fed. 493, holding that the power to seek a writ to compel tax to pay judgment was no defense to a writ to compel payment from the proper fund. See also *infra*, VI, U, 2.

19. Johnson *v.* Sacramento County, 65 Cal. 481, 4 Pac. 463; State *v.* Lander County, 22 Nev. 71, 35 Pac. 300; Lower *v.* U. S., 91 U. S. 536, 23 L. ed. 420.

20. State *v.* Kansas City, 58 Mo. App. 124.

21. Mandamus will lie to compel the mayor and city council to set aside any revenues in excess of necessary current expenditures to payment of a judgment against the city, in preference to claims of simple-contract creditors; the writ being in the nature of an execution, without which the fund cannot be reached. Anniston *v.* Hurt, 140 Ala. 394, 37 So. 220, 103 Am. St. Rep. 45; White *v.* Decatur, 119 Ala. 476, 23 So. 999. See also Cleveland *v.* U. S., 111 Fed. 341, 49 C. C. A. 383. The fact that surplus revenues might be less than a judgment against a city is no reason for not granting mandamus to compel city officers to set revenues apart to the extent of the surplus to satisfy the judgment. White *v.* Decatur, 119 Ala. 476, 23 So. 999.

22. State *v.* Brown, 28 La. Ann. 103.

23. Schuck *v.* Pittsburgh, (Pa. 1887) 11 Atl. 651.

24. *California.*— Barber *v.* Mulford, 117 Cal. 356, 49 Pac. 206; Davis *v.* Sacramento, 82 Cal. 562, 22 Pac. 1118; Bates *v.* Gerber, 82 Cal. 550, 22 Pac. 1115; Davis *v.* Porter, 66 Cal. 658, 6 Pac. 746.

Florida.— Columbia County Com'rs *v.* King, 13 Fla. 451, where interest on coupons was not compelled to be paid.

Michigan.— Talbot *v.* Bay City, 71 Mich. 118, 38 N. W. 890, holding that no writ would issue for interest not contracted for.

Mississippi.— State *v.* Cole, 81 Miss. 174, 32 So. 314, holding that no writ would issue for interest on trust funds under constitutional provision which was not self-executing.

Missouri.— Veal *v.* Chariton County Ct., 15 Mo. 412, where writ for full rate of interest was issued where the rate had been illegally reduced.

Nebraska.— State *v.* Scott, 15 Nebr. 147, 17 N. W. 263, where writ for interest was limited to legal rate.

Pennsylvania.— Com. *v.* Philadelphia County Com'rs, 4 Serg. & R. 125 (where mandamus to pay interest on a county order was refused, the custom being not to pay interest); *In re* Plains Tp., 7 Kulp 234 (holding that no writ would issue for interest after decree on the debt).

Compound interest.— Mandamus will not issue to compel payment of interest upon interest where it is not provided for by statute. Davis *v.* Sacramento, 82 Cal. 562, 22 Pac. 1118; Bates *v.* Gerber, 82 Cal. 550, 22 Pac. 1115.

25. State *v.* New Orleans, 34 La. Ann. 477 (holding that council would be compelled to make an appropriation); Com. *v.* Pittsburgh, 34 Pa. St. 496; Com. *v.* Allegheny County, 32 Pa. St. 218; Com. *v.* Ayre, 5 Pa. Dist. 575, 8 Kulp 243.

Levy of tax to pay interest see *infra*, VI, V, 1, h.

26. *California.*— Haysmeister *v.* Porter, (1884) 3 Pac. 123; Roeding *v.* Porter, (1884) 2 Pac. 888; Meyer *v.* Porter, 65 Cal. 67, 2 Pac. 884.

New Jersey.— Rahway Sav. Inst. *v.* Rahway, 49 N. J. L. 384, 8 Atl. 106.

New York.— People *v.* Mead, 24 N. Y. 114.

Pennsylvania.— Williamsport *v.* Com., 90 Pa. St. 498, interest payment out of fund appropriated to other uses, withdrawn, but not needed for ordinary city expenses, compelled.

West Virginia.— State *v.* Wirt County Ct., 37 W. Va. 808, 17 S. E. 379.

Part of coupons not due.— The fact that at the time the fiat for the writ is obtained a part of the coupons are not due does not afford ground for denying relief where they are actually due when the petition is filed. State *v.* Anderson County, 8 Baxt. (Tenn.) 249.

In case the funds available have been blended and it is impossible to determine what sum is available the writ will be denied. Austin *v.* Cahill, (Tex. Civ. App. 1905) 88 S. W. 536.

27. Riley *v.* Garfield Tp., 54 Kan. 463, 38 Pac. 560; People *v.* Mead, 36 N. Y. 224 (payment of interest on bonds void because resident taxpayers did not consent refused); Bailey *v.* Lawrence County, 2 S. D. 533, 51 N. W. 331. But *compare* State *v.* Craig, 69 Mo. 565, where payment was compelled, although bonds were in litigation.

Where the county is estopped to deny the validity of bonds mandamus may issue to enforce payment of interest. State *v.* Wilkinson, 20 Nebr. 610, 31 N. W. 376; State *v.* Anderson County, 8 Baxt. (Tenn.) 249.

claims is usually held to be unnecessary.[28] Mandamus to compel payment of interest will not lie unless the duty of the officer is ministerial.[29]

f. Claims in Judicial Proceedings. Mandamus lies to compel the payment of jurors, witnesses, and officers' fees when clearly prescribed by statute, and when the right is clear.[30]

g. Claims Between Municipalities. Mandamus lies to compel the allowance and payment of claims arising on division or change of boundary, or otherwise between municipal corporations, where the amount is liquidated and the duty clear;[31] but unless the claims are clearly due, and payment imperative, resort must be had to an ordinary action.[32] Mandamus will not issue to compel a board of

28. Shinbone *v.* Randolph County, 56 Ala. 183.

In the absence of a specific fund.— A county treasurer is not justified in paying interest coupons out of any other than specific funds raised for that purpose, and in his hands, until the board of commissioners of the county have issued an order upon him to do so. Bailey *v.* Lawrence County, 2 S. D. 533, 51 N. W. 331.

29. People *v.* Fogg, 11 Cal. 351, holding the duty of an auditor to pay interest without warrant not clear.

30. *Alabama.*— Gray *v.* Abbott, 130 Ala. 322, 30 So. 346, writ lies to audit fees of state witnesses.

Arizona.— *In re* Woffenden, 1 Ariz. 237, 25 Pac. 647, writ lies to compel allowance of jury fees.

California.— Birch *v.* Phelan, 127 Cal. 49, 59 Pac. 209 (writ refused when statute not clear); Hilton *v.* Curry, 124 Cal. 84, 56 Pac. 784 (no writ for jury fees in absence of statute).

Connecticut.— Colley *v.* Webster, 59 Conn. 361, 20 Atl. 334, holding that payment of fees by clerk could not be compelled where the statute was merely permissive and there was another remedy.

Florida.— De Soto County Com'rs *v.* Howell, 51 Fla. 160, 40 So. 192, holding that county board must audit judgment for costs to defendant's witnesses after his acquittal.

Missouri.— State *v.* Fraker, 166 Mo. 130, 65 S. W. 720, holding a warrant for taxed costs imperative.

New York.— People *v.* Delaware County Sup'rs, 9 Abb. Pr. N. S. 408, holding that writ would lie for attorney's fees for calling witnesses.

Ohio.— State *v.* Cappeller, 8 Ohio Dec. (Reprint) 59, 5 Cinc. L. Bul. 363 (holding that a juror's fee would not be paid on informal certificate); State *v.* Moore, 1 Ohio Dec. (Reprint) 506, 10 West. L. J. 220 (holding writ would lie for attorney's pay for prosecution which had been duly allowed).

Vermont.— Peck *v.* Powell, 62 Vt. 296, 19 Atl. 227, holding writ would lie to compel payment of fees of city judge in prosecution.

Canada.— *In re* Harbottle, 30 U. C. Q. B. 314, where payment of witness' fees before coroner was not compelled where he was not properly called.

31. *Arkansas.*— Hempstead County *v.* Grove, 44 Ark. 317; Crow *v.* Dallas County, 13 Ark. 625.

California.— Riverside County *v.* San Bernardino County, 134 Cal. 517, 66 Pac. 788 (holding that writ would not issue to readjust accounts after board had acted); Kings County *v.* Johnson, 104 Cal. 198, 37 Pac. 870.

Florida.—Escambia County *v.* Pilot Com'rs, (1906) 42 So. 697.

Idaho.— Blaine County *v.* Smith, 5 Ida. 255, 48 Pac. 286, writ lies to compel apportionment of county debts among counties liable.

Indiana.— State *v.* Spinney, 166 Ind. 282, 76 N. E. 971, holding that a county treasurer might be compelled to pay town funds actually on hand to town treasurer.

Michigan.— Portsmouth Tp. *v.* Bay City, 57 Mich. 420, 24 N. W. 127 (holding mandamus would be refused where proceedings were not clear); Roscommon Tp. *v.* Midland County Sup'rs, 49 Mich. 454, 13 N. W. 814.

New York.— People *v.* Schieren, 89 Hun 220, 35 N. Y. Suppl. 64, where audit of a claim for taxes collected by a city for a town was compelled.

North Dakota.— See Coler *v.* Coppin, 10 N. D. 86, 85 N. W. 988, holding that when a judgment is obtained against a township on an indebtedness of a school-district, and subsequent to the entry of such judgment the township is divided into two school-districts, the judgment creditor may proceed to enforce such judgment against such districts, and each will be required by mandamus to levy a tax sufficient to pay its *pro rata* share of indebtedness, based upon the amount of its taxable property.

Pennsylvania.— *In re* Porter Tp. Road, 1 Walk. 10, payment to township of road taxes collected by county.

Apportionment and division of taxes see *infra*, VI, V, 4.

32. Midland School Dist. No. 9 *v.* Midland School Dist. No. 5, 40 Mich. 551 (holding that mandamus for the payment of money can issue at the instance of one municipal corporation against another only when there are statutory or legal relations between them to authorize it, and the obligation to pay has been legally liquidated); State *v.* Durant, 71 S. C. 311, 51 S. E. 146 (holding that payment of debt between counties would not be compelled before apportionment); State *v.* McMillan, 52 S. C. 60, 29 S. E. 540; State *v.* Johnson, 105 Wis. 111, 80 N. W. 1105 (holding that the repayment of money er-

commissioners appointed to adjust indebtedness upon a division of a county to act in a particular way.[33]

h. Claims Between Municipality and Officers. A writ of mandamus may be issued after the expiration of the term of a public officer to compel him to make report of the public money coming into his hands during his incumbency and incidentally to pay into the treasury sums so ascertained to be unlawfully retained by him;[34] but mandamus is not a proper remedy to litigate a claim of right by which an officer claims to retain money in his hands,[35] nor will it lie where another specific remedy is provided by statute.[36] A receiving or collecting officer may be compelled to pay over funds collected by him to the authorities entitled to receive them,[37] or to make proper entries and records and reports of receipts and disbursements;[38] but the duty must be clearly enjoined by law.[39]

2. Effect of Other Adequate Remedies — a. In General. Mandamus will not lie to enforce payment of a claim where there is another adequate remedy.[40] So

roneously collected was not mandatory). See also People *v.* Zilwaukee Tp. Bd., 10 Mich. 274.

33. Riverside County *v.* San Bernardino County, 134 Cal. 517, 66 Pac. 788.

34. Maurer *v.* State, 71 Nebr. 24, 98 N. W. 426; State *v.* Russell, 51 Nebr. 774, 71 N. W. 785; State *v.* Boyd, 49 Nebr. 303, 68 N. W. 510; State *v.* Kelley, 30 Nebr. 574, 46 N. W. 714 (account of fees by county clerk mandatory); State *v.* Shearer, 29 Nebr. 477, 45 N. W. 784; Finley *v.* Territory, 12 Okla. 621, 73 Pac. 273.

35. Maurer *v.* State, 71 Nebr. 24, 98 N. W. 426; Territory *v.* Crum, 13 Okl. 9, 73 Pac. 297.

36. Territory *v.* Cavanagh, 3 Dak. 325, 19 N. W. 413.

37. *Alaska.*— Nome *v.* Reed, 1 Alaska 395, holding that an officer receiving costs must pay them over to a town.

Indiana.— Manor *v.* State, 149 Ind. 310, 49 N. E. 160. See Jefferson School Tp. *v.* Worthington, 5 Ind. App. 586, 32 N. E. 807, holding, however, that the proper remedy for a school town to recover taxes apportioned to it, but paid by the county treasurer to the trustee of a school township, and converted by such township, is by action against the township, and not by mandamus against either the county treasurer or trustee.

North Carolina.— Bearden *v.* Fullam, 129 N. C. 477, 40 S. E. 204.

Ohio.— State *v.* Staley, 38 Ohio St. 259, holding that mandamus would lie to compel a county treasurer to transfer to the state treasury the state's proportion of taxes collected by such county treasurer.

Canada.— Reg. *v.* Niagara Bd. of Police, 4 U. C. Q. B. 141, where license-fees were compelled to be paid by a police board to government officers.

Payment over of taxes by collectors see *infra*, VI, V, 5.

38. State *v.* Hazlet, 41 Nebr. 257, 59 N. W. 891 (account of fees by county clerk mandatory); State *v.* Allen, 23 Nebr. 451, 36 N. W. 756 (duty of treasurer to enter fee items in book mandatory). See also Aaron *v.* German, 114 Ga. 587, 40 S. E. 713 (holding that writ lies to compel ordinary to make statement of warrants drawn); State *v.* Holm, 70 Nebr. 606, 97 N. W. 821 (where a writ to record and account for fees belonging to defendant was refused).

39. Kings County *v.* Johnson, 104 Cal. 198, 37 Pac. 870 (holding where the tax-collector of one county unlawfully collected taxes upon property in another county that he could not be compelled to pay such taxes to the collector of the proper county); Home for Inebriates *v.* Reis, 95 Cal. 142, 30 Pac. 205; Lee *v.* Taylor, 107 Ga. 362, 33 S. E. 408 (tax-collector's duty to pay local treasurer).

40. *California.*— Crandall *v.* Amador County, 20 Cal. 72.

Iowa.— State *v.* Floyd County, 5 Iowa 380.

New Hampshire.— Storer Post No. 1 G. A. R. *v.* Page, 70 N. H. 280, 47 Atl. 264, holding suit for appropriation for decorating soldiers' graves adequate.

New Jersey.— Little *v.* Union Tp., 37 N. J. L. 84, holding a suit for work adequate.

New York.— People *v.* O'Keefe, 100 N. Y. 572, 3 N. E. 592; People *v.* Haws, 37 Barb. 440, 15 Abb. Pr. 115, 24 How. Pr. 148 [*affirming* 13 Abb. Pr. 375 note, 23 How. Pr. 107] (action on award adequate; writ to pay will not lie); People *v.* Wood, 35 Barb. 653. See Utica Water-works Co. *v.* Utica, 31 Hun 426.

Ohio.— State *v.* Hamilton County, 5 Ohio S. & C. Pl. Dec. 545, 7 Ohio N. P. 562.

Pennsylvania.— Kensington Electric Co. *v.* Philadelphia, 187 Pa. St. 446, 41 Atl. 309 (suit for labor adequate); Boyle *v.* Lloyd, 9 Kulp 389 (suit proper on disputed demand).

South Carolina.— St. Paul's Parish Poor Com'rs *v.* Lynah, 2 McCord 170, holding that a poor commissioner's contract must be sued on.

Tennessee.— Whitesides *v.* Stewart, 91 Tenn. 710, 20 S. W. 245, suit on rejected claim necessary.

Vermont.— Farr *v.* St. Johnsbury, 73 Vt. 42, 50 Atl. 548, suit only remedy for damage to watercourse.

Virginia.— King William Justices *v.* Munday, 2 Leigh 165, 21 Am. Dec. 604, holding a statutory suit exclusive for price of bridge.

Washington.— State *v.* Snohomish County, 18 Wash. 160, 51 Pac. 368.

mandamus is not the proper remedy to enforce a claim which has been presented to the proper officers and disallowed by them where there is an adequate remedy by action,[41] or where relator has a remedy by appeal from the order of disallowance[42] or by certiorari.[43]

b. Action on Officer's Bond. Where an officer refuses to pay a claim which has been properly allowed and which he has funds to pay and is bound to pay, it is in some cases held that he cannot be compelled by mandamus, there being an adequate remedy upon his bond;[44] but the better rule would appear to be to the contrary.[45] An action on the bond of the officer in default will not prevent

Canada.— Hamilton *v.* Harris, 1 U. C. Q. B. 513, holding an indictment adequate for failure to pay sheriff's account.

See 33 Cent. Dig. tit. "Mandamus," § 30 *et seq.*

Existence of other remedy as bar to mandamus in general see *supra*, II, D.

Creditors of the city of New Orleans are required to conduct proceedings for the recovery of money by an ordinary form of action against the corporation, and not against any department, branch, or officer thereof, by the provision of act No. 5 of 1870, which divests the courts of the state of authority to allow any summary process or mandamus against the officers of the city of New Orleans to compel the issue and delivery of any order or warrant for the payment of money, or to enforce the payment of money claimed to be due from it to any person or corporation. As to the validity and operation of this statute see State *v.* New Orleans, 40 La. Ann. 299, 3 So. 584; State *v.* Judge Orleans Parish Civ. Dist. Ct., 38 La. Ann. 43, 58 Am. Rep. 158; State *v.* New Orleans, 37 La. Ann. 13; State *v.* New Orleans, 36 La. Ann. 726; State *v.* New Orleans, 36 La. Ann. 687; State *v.* New Orleans, 35 La. Ann. 781; State *v.* New Orleans, 34 La. Ann. 1149; State *v.* Shreveport, 33 La. Ann. 1179; Saloy *v.* New Orleans, 33 La. Ann. 79; State *v.* Pilsbury, 30 La. Ann. 705; State *v.* Mayor, 30 La. Ann. 129; Houston *v.* New Orleans, 30 La. Ann. 82; State *v.* Brown, 30 La. Ann. 78; State *v.* Shaw, 23 La. Ann. 790; Wolff *v.* New Orleans, 103 U. S. 358, 26 L. ed. 395; Louisiana *v.* New Orleans, 102 U. S. 203, 26 L. ed. 132.

41. *Alabama.*— Scarborough *v.* Watson, 140 Ala. 349, 37 So. 281 [*explaining* and *qualifying* Marengo County *v.* Lyles, 101 Ala. 423, 12 So. 412].

California.— Crandall *v.* Amador County, 20 Cal. 72.

Indiana.— Shelby Tp. *v.* Randles, 57 Ind. 390; Johnson County Com'rs *v.* Hicks, 2 Ind. 527.

Massachusetts.—Wheelock *v.* Suffolk County Auditor, 130 Mass. 486, holding a suit for officer's extra services adequate.

Missouri.— Mansfield *v.* Fuller, 50 Mo. 338, holding a suit adequate for unusual expense of sheriff's posse.

Nebraska.— State *v.* Lincoln, 4 Nebr. 260. And see Moores *v.* State, 4 Nebr. (Unoff.) 225, 93 N. W. 986.

Nevada.— State *v.* Storey County Com'rs, 22 Nev. 263, 38 Pac. 668, suit for costs of criminal appeal adequate.

New York.— People *v.* Green, 1 Hun 1, 3 Thomps. & C. 90 (holding that, although demands against corporate officers or corporations themselves may under certain circumstances be enforced by mandamus, where an action for damages may also be maintained in favor of the claimants, it cannot be done where an action can be maintained for the recovery of money claimed to be due and owing); People *v.* New York, 25 Wend. 680; *Ex p.* Lynch, 2 Hill 45. But see People *v.* Coler, 34 N. Y. App. Div. 167, 54 N. Y. Suppl. 639.

See 33 Cent. Dig. tit. "Mandamus," § 30 *et seq.*

But *compare* State *v.* Philipsburg, 23 Mont. 16, 57 Pac. 405 [*following* State *v.* Great Falls, 19 Mont. 518, 49 Pac. 15], holding that mandamus to enforce payment for water rentals would lie, although the city was suable.

42. *Indiana.*— Knox County *v.* Montgomery, 106 Ind. 517, 6 N. E. 915; State *v.* Morris, 103 Ind. 161, 2 N. E. 355; Johnson County *v.* Hicks, 2 Ind. 527.

Mississippi.—Portwood *v.* Montgomery Co., 52 Miss. 523.

Missouri.—State *v.* Cape Girardeau County Ct., 109 Mo. 248, 19 S. W. 23; State *v.* Platte County Ct., 83 Mo. 539; State *v.* Marshall, 82 Mo. 484; State *v.* Macon County Ct., 68 Mo. 29; Ward *v.* Cole County, 50 Mo. 401.

Nebraska.— State *v.* Cornell, 54 Nebr. 158, 74 N. W. 398; State *v.* Merrell, 43 Nebr. 575, 61 N. W. 754; State *v.* Babcock, 22 Nebr. 38, 33 N. W. 711.

Ohio.— State *v.* Hamilton County Com'rs, 26 Ohio St. 364.

Wisconsin.— State *v.* Sheboygan County Sup'rs, 29 Wis. 79.

See 33 Cent. Dig. tit. "Mandamus," § 30 *et seq.*

But *compare* People *v.* Hamden, 71 Hun (N. Y.) 461, 24 N. Y. Suppl. 974.

43. People *v.* Saratoga County, 106 N. Y. App. Div. 381, 94 N. Y. Suppl. 1012; People *v.* Matthies, 92 N. Y. App. Div. 16, 87 N. Y. Suppl. 196 [*affirmed* in 179 N. Y. 242, 72 N. E. 103].

44. Byington *v.* Hamilton, 37 Kan. 758, 16 Pac. 54; State *v.* Bridgman, 8 Kan. 458; Territory *v.* Hewitt, 5 Okla. 167, 49 Pac. 60. And *compare* Ratliffe *v.* Wayne County Ct., 36 W. Va. 202, 14 S. E. 1004, holding a suit on sheriff's bond for allowed claims exclusive.

45. Wyker *v.* Francis, 120 Ala. 509, 24 So. 895 [*overruling* so far as in conflict Ses-

mandamus to his successor to compel him to affix the seal of the county to a warrant for an allowed claim.[46]

3. Auditing and Allowance. Mandamus is the proper remedy to compel an auditing officer or board to proceed with its duty and audit and consider a claim.[47] But whether they will allow it, or in what amount, is as a general rule regarded as a judicial matter, and will not be coerced or reviewed,[48] nor will the reëxami-

sions *v.* Boykin, 78 Ala. 328, and in effect *overruling* Speed *v.* Cocke, 57 Ala. 209; Arrington *v.* Van Houton, 44 Ala. 284 (county treasurer)]; Babcock *v.* Goodrich, 47 Cal. 488; State *v.* Dougherty, 45 Mo. 294, holding that the fact that the treasurer of a board of public schools has a remedy on the official bond of a county treasurer for nonpayment of money will not prevent his proceeding against him by mandamus. See also *supra*, II, D, 2, c.

46. Prescott *v.* Gonser, 34 Iowa 175.

47. *Alabama.*— Chilton County Com'rs Ct. *v.* State, (1906) 41 So. 465; Marengo County *v.* Lyles, 101 Ala. 423, 12 So. 412.

Arkansas.— Shaver *v.* Lawrence, 44 Ark. 225; Files *v.* State, 42 Ark. 233; Brem *v.* Arkansas County Ct., 9 Ark. 240; *Ex p.* Taylor, 5 Ark. 49; Gunn *v.* Pulaski County, 3 Ark. 427.

California.— Smith *v.* San Bernardino County, 99 Cal. 262, 33 Pac. 1094; San Francisco Gas Light Co. *v.* Dunn, 62 Cal. 580; Tilden *v.* Sacramento County Sup'rs, 41 Cal. 68; People *v.* San Francisco Sup'rs, 28 Cal. 429.

Colorado.— Howell *v.* Cooper, 2 Colo. App. 530, 31 Pac. 523. But see Keefe Mfg., etc., Co. *v.* Arapahoe County School Dist. No. 1, 33 Colo. 513, 81 Pac. 257, holding that a writ would not issue where a claim was to be audited according to the judgment of the board.

Georgia.— Cheney *v.* Newton, 67 Ga. 477.

Idaho.— Pyke *v.* Steunenberg, 5 Ida. 614, 51 Pac. 614.

Illinois.— Illinois State Insane Hospital *v.* Higgins, 15 Ill. 185.

Maryland.— Robey *v.* Prince George's County Com'rs, 92 Md. 150, 48 Atl. 48.

Michigan.— Chipman *v.* Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024; Locke *v.* Speed, 62 Mich. 408, 28 N. W. 917; Hickey *v.* Oakland County Sup'rs, 62 Mich. 94, 28 N. W. 771; People *v.* Wayne County Auditors, 10 Mich. 307; People *v.* Macomb County Sup'rs, 3 Mich. 475.

Minnesota.— State *v.* McCardy, 62 Minn. 509, 64 N. W. 1133.

Mississippi.— Madison County Ct. *v.* Alexander, Walk. 523.

Missouri.— Castello *v.* St. Louis Cir. Ct., 28 Mo. 259; State *v.* Smith, 15 Mo. App. 412.

Nebraska.— Barry *v.* State, 40 Nebr. 171, 58 N. W. 717; State *v.* Slocum, 34 Nebr. 368, 51 N. W. 969; State *v.* Furnas County, 10 Nebr. 361, 6 N. W. 434; State *v.* Coufal, 1 Nebr. (Unoff.) 128, 95 N. W. 362.

New York.— People *v.* Matthies, 179 N. Y. 242, 72 N. E. 103 [*affirming* 92 N. Y. App. Div. 16, 87 N. Y. Suppl. 196]; People *v.* Hamilton County, 127 N. Y. 654, 27 N. E. 857 [*affirming* 56 Hun 459, 10 N. Y. Suppl. 88]; People *v.* Elmira, 82 N. Y. 80; People *v.* Coler, 48 N. Y. App. Div. 492, 62 N. Y. Suppl. 964; People *v.* Schieren, 89 Hun 220, 35 N. Y. Suppl. 64; People *v.* Smith, 83 Hun 432, 31 N. Y. Suppl. 749; People *v.* Gilroy, 82 Hun 500, 31 N. Y. Suppl. 776 [*affirmed* in 145 N. Y. 596, 40 N. E. 164]; People *v.* Fulton County, 53 Hun 254, 6 N. Y. Suppl. 591; People *v.* Westford, 53 Barb. 555; Matter of Ryan, 6 Misc. 478, 27 N. Y. Suppl. 169; People *v.* New York, 3 Misc. 131, 23 N. Y. Suppl. 1060; People *v.* Highland, 8 N. Y. St. 531; People *v.* Cortland County, 24 How. Pr. 119; People *v.* New York County, 21 How. Pr. 322 [*affirmed* in 22 How. Pr. 71]; Hull *v.* Oneida County Sup'rs, 19 Johns. 259, 10 Am. Dec. 223. See also Chase *v.* Saratoga County, 33 Barb. 603.

North Carolina.— Koonce *v.* Jones County, 106 N. C. 192, 10 S. E. 1038.

Ohio.— State *v.* Hamilton County, 26 Ohio St. 364; Weldy *v.* Hocking County, 8 Ohio Dec. (Reprint) 767, 9 Cinc. L. Bul. 313.

Oregon.— Irwin-Hodson Co. *v.* Kincaid, 31 Oreg. 478, 49 Pac. 765.

South Carolina.— State *v.* Morris, 67 S. C. 153, 45 S. E. 178.

Texas.— Auditorial Bd. *v.* Arles, 15 Tex. 72.

West Virginia.— Poling *v.* Philippi Dist. Bd. of Education, 50 W. Va. 374, 40 S. E. 357.

Wisconsin.— Kraft *v.* Madison, 98 Wis. 252, 73 N. W. 775, holding that writ lies where there is unreasonable delay to act on a claim.

Canada.— *In re* Dartnell, 26 U. C. Q. B. 430.

See 33 Cent. Dig. tit. "Mandamus," § 211 *et seq.*

Where there are no funds.— County commissioners will not be compelled by mandamus to act upon (audit) claims, where no estimates have been made for taxes to be levied to pay the same, unless there are funds in the treasury for the payment of such claims. Lancaster County *v.* State, 13 Nebr. 523, 14 N. W. 517.

48. *Arkansas.*— Brem *v.* Arkansas County Ct., 9 Ark. 240.

California.— Tilden *v.* Sacramento County, 41 Cal. 68.

Connecticut.— State *v.* Asylum St. Bridge Commission, 63 Conn. 91, 26 Atl. 580.

Michigan.— People *v.* Wayne County, 10 Mich. 307.

Missouri.— State *v.* Macon County Ct., 68 Mo. 29.

Nebraska.— State *v.* Churchill, 37 Nebr. 702, 56 N. W. 484.

nation and reauditing of claims once acted on be compelled,[49] unless the auditing board has not passed upon the claim as the statute directs.[50] In some cases, however, it has been held that a clear legal right to have a claim allowed, the circumstances being such as to leave no discretion in the officers in charge, may be enforced by mandamus.[51] So where an item of a claim has been rejected on an illegal ground mandamus will lie to compel its audit and allowance.[52] And where there is no remedy by appeal mandamus will lie where a board refuses to hear a claim or makes such an allowance as indicates dishonesty and an abuse of their discretion.[53] A board of auditors may be compelled to make a certificate of their action upon a claim as required by statute.[54] They may also be compelled to

New York.— People *v.* Matthies, 179 N. Y. 242, 72 N. E. 103 [*affirming* 92 N. Y. App. Div. 16, 87 N. Y. Suppl. 196]; People *v.* Clarke, 174 N. Y. 259, 66 N. E. 819; *In re* Freel, 148 N. Y. 165, 42 N. E. 586 [*affirming* 89 Hun 79, 35 N. Y. Suppl. 59]; People *v.* Livingston County, 68 N. Y. 114; People *v.* New York, 52 N. Y. 224; People *v.* Schieren, 89 Hun 220, 35 N. Y. Suppl. 64; People *v.* Livingston County, 26 Barb. 118; People *v.* St. Lawrence County, 30 How. Pr. 173; People *v.* New York, 1 Hill 362.

Oregon.— Irwin-Hodson Co. *v.* Kincaid, 31 Oreg. 478, 49 Pac. 765.

Pennsylvania.— Runkle *v.* Com., 97 Pa. St. 328; Boyle *v.* Lloyd, 9 Kulp 389.

Canada.— Staunton *v.* Justices Home Dist., (East. T. 3 Vict.) 3 R. & J. Dig. 2215.

See 33 Cent. Dig. tit. "Mandamus," § 211 *et seq.*

Preliminary questions.— Whether there is a judgment to be heard as a claim is a preliminary question, and mandamus lies. The rule that the writ will not control the judgment of the officer does not apply to such questions. State *v.* Lander County, 22 Nev. 71, 35 Pac. 300 [*following* State *v.* Murphy, 19 Nev. 89, 6 Pac. 840].

49. *California.*—Sullivan *v.* Gage, 145 Cal. 759, 79 Pac. 537; Tilden *v.* Sacramento County, 41 Cal. 68.

Idaho.—Kroutinger *v.* Board of Examiners, 8 Ida. 463, 69 Pac. 279; Payne *v.* State Bd. of Wagon Road Com'rs, 4 Ida. 384, 39 Pac. 548.

Indiana.— Franklin Tp. *v.* State, 11 Ind. 205.

Maine.— Bangor *v.* Penobscot County Com'rs, 87 Me. 294, 32 Atl. 903.

New York.— People *v.* Matthies, 179 N. Y. 242, 72 N. E. 103 (claim rejected as illegal); People *v.* Barnes, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; People *v.* Salina, 27 N. Y. App. Div. 476, 50 N. Y. Suppl. 533; People *v.* Livingston County, 26 Barb. 118; People *v.* St. Lawrence County, 30 How. Pr. 173.

South Carolina.—State *v.* Richland County Com'rs, 28 S. C. 258, 5 S. E. 622; State *v.* Kirby, 17 S. C. 563.

See 33 Cent. Dig. tit. "Mandamus," § 211 *et seq.*

50. People *v.* Cattaraugus County, 43 N. Y. App. Div. 22, 59 N. Y. Suppl. 615. See also People *v.* Westchester County, 73 N. Y. 173.

51. *California.*— Hunt *v.* Broderick, 104 Cal. 313, 37 Pac. 1040 (holding that where the board of supervisors have not exceeded their power in allowing a demand and the latter is a valid and legal claim against the county, it is the duty of the auditor to audit it and mandamus will lie to compel him to do so); McConoughey *v.* Jackson, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; Wood *v.* Strother, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249; Enkle *v.* Edgar, 63 Cal. 188; San Francisco Gas Light Co. *v.* Dunn, 62 Cal. 580; Sweeny *v.* Maynard, 52 Cal. 468; Stockton, etc., R. Co. *v.* Stockton, 51 Cal. 328; Babcock *v.* Goodrich, 47 Cal. 488.

Indiana.— State *v.* Warren County Com'rs, 136 Ind. 207, 35 N. E. 1100, holding that mandamus will lie to compel county commissioners to approve a report of a township trustee containing a proper claim for services, since in settlements by county commissioners with township officers, declared by Rev. St. (1881) § 5811, not to be final, they do not act judicially, but in their administrative capacity, so that no appeal lies from their decision.

Michigan.—McKillop *v.* Cheboygan County, 116 Mich. 614, 74 N. W. 1050; Safford *v.* Detroit Bd. of Health, 110 Mich. 81, 67 N. W. 1094, 64 Am. St. Rep. 332, 33 L. R. A. 300; People *v.* Macomb County, 3 Mich. 475.

Nebraska.— State *v.* Coufal, 1 Nebr. (Unoff.) 128, 95 N. W. 362.

New York.— People *v.* Highland, 8 N. Y. St. 531.

South Carolina.— Padgett *v.* McAlhany, 53 S. C. 139, 31 S. E. 58.

Utah.— Thoreson *v.* State Bd. of Examiners, 19 Utah 18, 57 Pac. 175; Taylor *v.* Salt Lake County Ct., 2 Utah 405.

United States.— Lower *v.* U. S., 91 U. S. 536, 23 L. ed. 420.

Where a previous refusal to audit has been overruled.— When an auditor has rejected a claim and it is afterward allowed by the governing body, auditing by him is ministerial. Contra Costa Water Co. *v.* Breed, 139 Cal. 432, 73 Pac. 189.

52. People *v.* Washington County, 66 N. Y. App. Div. 66, 72 N. Y. Suppl. 568; Ramsdale *v.* Orleans County, 8 N. Y. App. Div. 550, 40 N. Y. Suppl. 840.

53. People *v.* Wayne County, 10 Mich. 307; Marathon Tp. *v.* Oregon Tp., 8 Mich. 372; People *v.* McComb County Sup'rs, 3 Mich. 475.

54. People *v.* Page, 105 N. Y. App. Div. 212, 94 N. Y. Suppl. 660; People *v.* Manning, 37 N. Y. App. Div. 141, 55 N. Y. Suppl.

permit a claim to be amended.[55] Mandamus to audit will not lie against an officer who is not charged with the duty.[56]

4. Certification and Countersigning of Claim or Warrant. If an officer is authorized or required to examine and approve a claim, if in his judgment it is just and proper, his power is judicial and mandamus will not lie to compel approval;[57] but if his duty simply consists in certifying or signing an allowed claim, it is ministerial, especially where there is no other remedy.[58] So where an officer has refused to countersign a warrant upon reasons outside of his discretion,[59] or where he claims a discretion as to the certification of the claim where no discretion exists,[60] he may be compelled by mandamus to act; but there must be a specific legal right.[61] An officer may be compelled to number and record a claim as required by statute.[62]

5. Issuance of Warrant or Order — a. In General. The issuance of a warrant or order upon a claim which has been properly audited and allowed is usually regarded as a merely ministerial duty which may be enforced by mandamus.[63]

781; People *v.* Lewis, 27 Misc. 469, 59 N. Y. Suppl. 248.

55. People *v.* Wayne County, 45 Hun (N. Y.) 62, 9 N. Y. St. 437.

56. Burnet *v.* Portage County, 12 Ohio 54, holding that a writ would not issue against an auditor who refused to audit an appraiser's account that had not been finally acted upon by the county commissioners.

57. Dechert *v.* Com., 113 Pa. St. 229, 6 Atl. 229; Runkle *v.* Com., 97 Pa. St. 328; Edison Electric Illuminating Co. *v.* Jacobs, 8 Kulp (Pa.) 120 (no writ to controller to certify illegal contract); Com. *v.* Hancock, 9 Phila. (Pa.) 535.

58. *California.*—Wood *v.* Strother, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249.

Illinois.— People *v.* Hastings, 5 Ill. App. 436, holding that mayor must sign allowed warrant.

Michigan.— Clapp *v.* Titus, 138 Mich. 41, 100 N. W. 1005 (holding that president of council must sign orders properly allowed); People *v.* Bender, 36 Mich. 195.

Nebraska.— Montgomery *v.* State, 35 Nebr. 655, 53 N. W. 568, signing properly drawn order imperative.

New York.— People *v.* Coffey, 62 Hun 86, 16 N. Y. Suppl. 501 [*affirmed* in 131 N. Y. 569, 30 N. E. 64]; People *v.* Havemeyer, 3 Hun 97; People *v.* Opdyke, 40 Barb. 306 (signing warrant for construction of courthouse peremptory); People *v.* Havemeyer, 16 Abb. Pr. N. S. 219.

Pennsylvania.— Com. *v.* George, 148 Pa. St. 463, 24 Atl. 59, 61; Com. *v.* Lyndall, 2 Brewst. 425, signing teacher's warrant imperative.

Washington.— State *v.* Daggett, 28 Wash. 1, 68 Pac. 340, certifying city attorney on pay-roll mandatory.

Claim for services rendered to board of health.— Under a statute providing that payment of expenses incurred with regard to persons infected with contagious diseases shall be made upon presentation of an itemized statement to the board of supervisors, the board of health may be compelled to furnish an itemized statement or certify to a properly itemized statement. Sawyer *v.* Manton, 145 Mich. 272, 108 N. W. 644.

59. Com. *v.* Philadelphia, 176 Pa. St. 588, 35 Atl. 195.

60. People *v.* Northrop, 15 How. Pr. (N. Y.) 152.

61. Runkle *v.* Com., 97 Pa. St. 328; Jeanett *v.* Sinclair, 10 Nova Scotia 392, holding that the mayor of a city could not be compelled to sign debentures for the purpose of a city hall until plaintiff had performed conditions precedent. See also People *v.* Booth, 49 Barb. (N. Y.) 31, when signing of a warrant was not compelled where another had sued the city upon the same claim.

62. Kelso *v.* Teale, 106 Cal. 477, 39 Pac. 948.

63. *Alabama.*—Smith *v.* McCutchen, (1906) 41 So. 619; Jeffersonian Pub. Co. *v.* Hilliard, 105 Ala. 576, 17 So. 112; Jack *v.* Moore, 66 Ala. 184; Parker *v.* Hubbard, 64 Ala. 203; Cuthbert *v.* Lewis, 6 Ala. 262.

California.— Lamberson *v.* Jefferds, 118 Cal. 363, 50 Pac. 403; Barber *v.* Mulford, 117 Cal. 356, 49 Pac. 206; Babcock *v.* Goodrich, 47 Cal. 488. See also Santa Barbara *v.* Davis, 142 Cal. 669, 76 Pac. 495.

Indiana.— Patton *v.* State, 117 Ind. 585, 19 N. E. 303; State *v.* Buckles, 39 Ind. 272.

Louisiana.— Shaw *v.* Howell, 18 La. Ann. 195.

Minnesota.— State *v.* Ames, 31 Minn. 440, 18 N. W. 277.

Missouri.— Boone County *v.* Todd, 3 Mo. 140; State *v.* Brown, 72 Mo. App. 651.

Nebraska.— State *v.* Cass County, 53 Nebr. 767, 74 N. W. 254.

New Jersey.— Ahrens *v.* Fiedler, 43 N. J. L. 400. See also Beatty *v.* Titus, 47 N. J. L. 89.

New York.— People *v.* Clarke, 174 N. Y. 259, 66 N. E. 819 [*reversing* 79 N. Y. App. Div. 78, 79 N. Y. Suppl. 1111]; *In re* Freel, 148 N. Y. 165, 42 N. E. 586 [*affirming* 89 Hun 79, 35 N. Y. Suppl. 59]; People *v.* Anderson, 69 N. Y. App. Div. 619, 75 N. Y. Suppl. 240; People *v.* Green, 2 Thomps. & C. 18 [*affirmed* in 56 N. Y. 476]; People *v.* Earle, 47 How. Pr. 368.

Ohio.— State *v.* Darke County, 43 Ohio St. 311, 1 N. E. 209.

Pennsylvania.— Wetherill *v.* Delaware County Com'rs, 2 Del. Co. 45; Sisson *v.*

Mandamus will lie, however, only in a case where there is a clear right[64] and after compliance with conditions precedent.[65] So before the issuance of a warrant the claim must have been allowed as required by law.[66] Or in case the statute requires a specific direction to be given to the officer such direction must have issued.[67] There must also have been a proper demand[68] and a refusal.[69] In case there is another adequate remedy mandamus will not issue.[70] The officer can draw his warrant only in favor of the person to whom payment has been ordered.[71] When a warrant has been issued and collected by a person not entitled to the proceeds a writ will not lie to compel a new warrant or the delivery of the old.[72]

b. In the Absence of Funds. When the creditor has no independent right to a warrant except as an incident to payment it has been held that the issuance of a warrant cannot be compelled where there are no funds applicable to its payment,[73]

Bailey, 1 Luz. Leg. Reg. 56; Wetherill *v.* Delaware County, 14 Wkly. Notes Cas. 42.

South Carolina.— McLaughlin *v.* Charleston County Com'rs, 7 S. C. 375.

Texas.— Harkness *v.* Hutcherson, 90 Tex. 383, 38 S. W. 1120; Brown *v.* Ruse, 69 Tex. 589, 7 S. W. 489; Denman *v.* Coffee, (Civ. App. 1906) 91 S. W. 800; Altgelt *v.* Campbell, (Civ. App. 1904) 78 S. W. 967; Callaghan *v.* Salliway, 5 Tex. Civ. App. 239, 23 S. W. 837.

Washington.— American Bridge Co. *v.* Wheeler, 35 Wash. 40, 76 Pac. 534; Chapin *v.* Port Angeles, 31 Wash. 535, 72 Pac. 117.

Wisconsin.— State *v.* Born, 97 Wis. 542, 73 N. W. 105 (writ lies for warrant for claim allowed over mayor's veto); State *v.* Richter, 37 Wis. 275.

United States.— Little Rock *v.* U. S., 103 Fed. 418, 43 C. C. A. 261, holding a warrant for judgment convertible for tax receipt mandatory.

See 33 Cent. Dig. tit. "Mandamus," § 217.

Where the officer is bound to exercise his discretion as to whether a claim is legally due he cannot be compelled to draw a warrant. Rooney *v.* Snow, 131 Cal. 51, 63 Pac. 155, holding that a city auditor could not be compelled to draw a warrant for a claim which the city charter authorized him to reject or which the council had no authority to allow.

64. Scanlan *v.* Schwab, 103 Ill. App. 93, issue of interest-bearing warrant.

In case of fraud mandamus will not issue. Vosberg *v.* Wyoming County Com'rs, 7 Pa. Co. Ct. 646.

65. Schwanbeck *v.* People, 15 Colo. 64, 24 Pac. 575, warrant on contract not authorized where proper certificate of completion is not presented.

66. Dubordieu *v.* Butler, 49 Cal. 522; State *v.* Jamison, 142 Ind. 679, 42 N. E. 350; Trant *v.* State, 140 Ind. 414, 39 N. E. 513; Selby *v.* State, 63 Ohio St. 541, 59 N. E. 218; Putnam County Com'rs *v.* Allen County, 1 Ohio St. 322; Com. *v.* School Directors Abington, 4 L. T. N. S. (Pa.) 6.

Where the allowance is illegal and a nullity mandamus will not issue. Walton *v.* McPhetridge, 120 Cal. 440, 52 Pac. 731; Sawyer *v.* Colgan, 102 Cal. 283, 36 Pac. 580; Shaw *v.* Howell, 18 La. Ann. 195; People *v.* Schoonmaker, 13 N. Y. 238 [*reversing* 19 Barb. 657]; State *v.* Bardon, 103 Wis. 297, 79 N. W. 226, where claim was allowed after time limit expired. See also Com. *v.* Lancaster, 5 Watts (Pa.) 152.

67. State *v.* Manitowoc County Clerk, 48 Wis. 112, 4 N. W. 121.

68. Ruperich *v.* Baehr, 142 Cal. 190, 75 Pac. 782, holding that a writ would not issue to pay a balance of salary exceeding that applied on a judgment against an officer, without demand.

Necessity of demand and refusal in general see *supra*, II, G.

69. Altgelt *v.* Campbell, (Tex. Civ. App. 1904) 78 S. W. 967, where mandamus was refused when it was shown that a warrant would be drawn in the regular order.

70. See *supra*, VI, U, 2.

71. Scheerer *v.* Edgar, (Cal. 1888) 18 Pac. 681, holding that under the act of California of April 23, 1858 (Worley Comp. p. 42), authorizing the auditor of San Francisco to audit any and all sums that may be allowed and ordered paid by the board of supervisors, by authority of the act, and giving the board power to order judgments against the city and county to be paid, where the board has ordered payment of a judgment to be made to the judgment creditor, the auditor has no authority to draw the warrant in favor of an assignee of the judgment, although he had notice of the assignment.

72. State *v.* Lewis, 6 Ohio S. & C. Pl. Dec. 221, 4 Ohio N. P. 176; State *v.* Hamilton County, 5 Ohio S. & C. Pl. Dec. 545, 7 Ohio N. P. 562. But see Robertson *v.* Alameda Free Public Library, etc., 136 Cal. 403, 69 Pac. 88, holding that mandamus to compel the issuance of new warrants was the only adequate remedy where a library board had drawn warrants in payment for books and other supplies, and intrusted them to the librarian for delivery to plaintiff and his assignors, and the librarian had cashed the warrants and then absconded; and plaintiff was not required to bring an action at law against the board.

73. *Arkansas.*— Ft. Smith Bd. of Improvement *v.* McManus, 54 Ark. 446, 15 S. W. 897.

California.— Cramer *v.* Sacramento, 18 Cal. 384. But *compare* Robertson *v.* Alameda Free Public Library, etc., 136 Cal. 403, 69 Pac. 88.

or where no appropriation has been made against which the warrant properly may be drawn.[74]

6. PAYMENT — a. In General. Mandamus is a proper remedy to compel payment of a claim against a municipal or public corporation where there are funds generally applicable to its payment,[75] or to compel payment of a claim against a special fund which is in existence and in the hands of the proper officer.[76] It will likewise lie to compel provision to be made for the payment of claims,[77] or to compel the application of funds to warrants in the order of their registration.[78] An equitable right to secure payment for a particular fund cannot, however, be enforced by mandamus.[79] Payment of a warrant will not be compelled where

New York.— People *v.* Tremain, 17 How. Pr. 142.

Pennsylvania.—Com. *v.* Philadelphia County Com'rs, 1 Whart. 1; Com. *v.* Lancaster County Com'rs, 6 Binn. 5; Board of Health *v.* Harrisburg, 2 Pearson 242; Com. *v.* Allegheny County, 2 Pittsb. 417.

South Carolina.— McCaslan *v.* Major, 64 S. C. 188, 41 S. E. 893; State *v.* Daniel, 52 S. C. 201, 29 S. E. 633; State *v.* Hiers, 51 S. C. 388, 29 S. E. 89; State *v.* Starling, 13 S. C. 262.

Texas.— See Harkness *v.* Hutcherson, 90 Tex. 383, 38 S. W. 1120.

Contra.—State *v.* Hoffman, 35 Ohio St. 435.

74. Files *v.* State, 42 Ark. 233. But *compare* State *v.* Mason, 153 Mo. 23, 54 S. W. 524.

75. *Alabama.*— Anniston *v.* Hurt, 140 Ala. 394, 37 So. 220, 103 Am. St. Rep. 45; Wyker *v.* Francis, 120 Ala. 509, 24 So. 895; *Ex p.* Selma, etc., R. Co., 46 Ala. 423.

California.— Ward *v.* Forkner, (1897) 50 Pac. 713; State Bank *v.* Shaber, 55 Cal. 322.

Florida.— Escambia County *v.* Pensacola Pilot Com'rs, (1906) 42 So. 697; Ray *v.* Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773.

Illinois.— Illinois State Hospital *v.* Higgins, 15 Ill. 185.

Indiana.— Ingerman *v.* State, 128 Ind. 225, 27 N. E. 499; Shelby Tp. *v.* Randles, 57 Ind. 390; State *v.* Wabash, etc., Canal, 4 Ind. 495.

Maryland.— Robb *v.* Carter, 65 Md. 321, 4 Atl. 282; Thomas *v.* Owens, 4 Md. 189.

Mississippi.— Kelly *v.* Wimberly, 61 Miss. 548.

Missouri.— State *v.* Adams, 161 Mo. 349, 61 S. W. 894; State *v.* Craig, 69 Mo. 565; State *v.* Callaway County Treasurer, 43 Mo. 228.

Nebraska.— State *v.* Scotts Bluff County, 64 Nebr. 419, 89 N. W. 1063; Maher *v.* State, 32 Nebr. 354, 49 N. W. 436, 441; State *v.* Gandy, 12 Nebr. 232, 11 N. W. 296.

New Jersey.— State *v.* Philbrick, 49 N. J. L. 374, 8 Atl. 122; Clarke *v.* Earle, 42 N. J. L. 94; Pangborn *v.* Young, 32 N. J. L. 29.

New York.— People *v.* Edmonds, 19 Barb. 468.

North Carolina.— Wright *v.* Kinney, 123 N. C. 618, 31 S. E. 874.

Ohio.— Case *v.* Wresler, 4 Ohio St. 561.

Pennsylvania.— Jefferson County *v.* Shannon, 51 Pa. St. 221; Com. *v.* Johnson, 2 Binn. 275; Com. *v.* Diamond Nat. Bank, 9 Pa. Super. Ct. 118, 43 Wkly. Notes Cas. 378; Scraper Co. *v.* Pine Tp., 4 Pa. Dist. 501; Com. *v.* Floyd, 2 Pittsb. 422.

Rhode Island.— Times Pub. Co. *v.* White, 23 R. I. 334, 50 Atl. 383.

South Carolina.— Hunter *v.* Mobley, 26 S. C. 192, 1 S. E. 670.

Texas.— Elser *v.* Ft. Worth, (Civ. App. 1894) 27 S. W. 739.

Washington.— Cloud *v.* Sumas, 9 Wash. 399, 37 Pac. 305; Abernethy *v.* Medical Lake, 9 Wash. 112, 37 Pac. 306.

See 33 Cent. Dig. tit. "Mandamus," § 223 *et seq.*

76. *California.*— Day *v.* Callow, 39 Cal. 593.

Colorado.— Nance *v.* People, 25 Colo. 252, 54 Pac. 631; Nance *v.* Stuart, 12 Colo. App. 125, 54 Pac. 867; Northampton First Nat. Bank *v.* Arthur, 10 Colo. App. 283, 50 Pac. 738; Beeney *v.* Irwin, 6 Colo. App. 66, 39 Pac. 900; Hockaday *v.* Chaffee County, 1 Colo. App. 362, 29 Pac. 287.

Indiana.— Wood *v.* State, 155 Ind. 1, 55 N. E. 959; Potts *v.* State, 75 Ind. 336.

Iowa.— Ireland *v.* Hunnel, 90 Iowa 98, 57 N. W. 715; Hillis *v.* Ryan, 4 Greene 78.

Missouri.— State *v.* Adams, 161 Mo. 349, 61 S. W. 894; State *v.* Bollinger County Ct. Justices, 48 Mo. 475.

New York.— People *v.* Haws, 36 Barb. 59, payment of void debt validated by legislature compelled.

Oregon.— Bush *v.* Geisy, 16 Oreg. 355, 19 Pac. 123.

Rhode Island.— Portland Stone Ware Co. *v.* Taylor, 17 R. I. 33, 19 Atl. 1086.

Texas.— Johnson *v.* Campbell, 39 Tex. 83.

See 33 Cent. Dig. tit. "Mandamus," § 223 *et seq.*

77. Lindabury *v.* Ocean County, 47 N. J. L. 417, 1 Atl. 701; People *v.* Norton, 12 Abb. Pr. N. S. (N. Y.) 47; Thomas *v.* Mason, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727. See People *v.* Hempstead, 4 Hun (N. Y.) 94.

Taxation for payment of claims see *infra*, VI, V, 1, h.

A discretion vested in a board as to the receipt of funds from a particular source and placing them in availability for the payment of debts cannot be controlled. State *v.* Burbank, 22 La. Ann. 318.

78. Northampton First Nat. Bank *v.* Arthur, 10 Colo. App. 283, 50 Pac. 738.

79. U. S. *v.* Indian Grave Drainage Dist., 85 Fed. 928, 29 C. C. A. 578, holding that

any fact remains to be ascertained.[80] The relator must come into court with clean hands,[81] and where his right is based upon warrants or orders, his ownership thereof must be either admitted or proved.[82] Mandamus will lie to enforce a mandatory duty imposed upon a board of county commissioners to accept the lowest bid for the surrender of a county indebtedness to be paid out of a specific fund.[83]

b. Discretion of Officers. A discretion to pay a judgment by levy of a tax or by warrant upon funds in the treasury does not prevent mandamus to compel provision for the judgment in the one of such ways which will be effectual.[84] A determination by a board of the question of whether a valid judgment exists has been held to be preliminary, and after its determination in favor of the claim the duty to approve it becomes ministerial.[85]

c. Conditions Precedent. Mandamus will not as a general rule lie to compel payment of a claim until it has been properly audited and allowed.[86] By statute it is frequently provided that a warrant shall be essential to payment,[87] and in such case mandamus will not lie until a warrant shall have issued as required by the statute.[88]

d. Right of Officer to Contest Claim. As a general rule a disbursing officer cannot pass upon the legality of a claim where it has been allowed by a board or another officer having authority to act in the premises,[89] except in the case of fraud or mistake.[90] Where the board or officer had no authority to allow the claim the disbursing officer may refuse payment.[91] So mandamus will not issue

mandamus would not issue to enforce the claim of the holder of a judgment recovered on bonds and coupons against a drainage district to money in the hands of the district treasurer based upon the ground that in previous years the treasurer had received coupons from other bondholders in payment of assessments, thereby rendering plaintiff entitled to the whole of the assessment of subsequent years until he had received payments proportional to those of the other bondholders.

80. Clayton *v.* McWilliams, 49 Miss. 311, where difference in value between Confederate and lawful currency was to be calculated.

81. Funk *v.* State, (Ind. 1906) 77 N. E. 854, holding that no writ would issue to a warrant holder to compel payment of a warrant where he owes delinquent taxes.

82. Brownell *v.* Gratiot County, 49 Mich. 414, 13 N. W. 798, payment of order to one not clear owner not compelled.

83. A. Mau, etc., Co. *v.* Liddle, 15 Nev. 271.

84. People *v.* San Francisco, 21 Cal. 668; People *v.* Rio Grande County, 7 Colo. App. 229, 42 Pac. 1032.

85. State *v.* Lander County, 22 Nev. 71, 35 Pac. 300.

86. See *supra*, VI, U, 1, b.

87. See the statutes of the several states.

88. *Alabama.*— White *v.* Wolffe, 54 Ala. 110.

California.— People *v.* Fogg, 11 Cal. 351.

Louisiana.— State *v.* Mount, 21 La. Ann. 352.

Mississippi.— Honea *v.* Monroe County, 63 Miss. 171.

Nebraska.— State *v.* Thorne, 9 Nebr. 458, 4 N. W. 63.

North Carolina.— Bayne *v.* Jenkins, 66 N. C. 356.

See 33 Cent. Dig. tit. "Mandamus," § 237.

89. *California.*— El Dorado County *v.* Elstner, 18 Cal. 144.

Colorado.— Beeney *v.* Irwin, 6 Colo. App. 66, 39 Pac. 900.

Georgia.—Shannon *v.* Reynolds, 78 Ga. 760, 3 S. E. 653.

Iowa.— Ireland *v.* Hunnel, 90 Iowa 98, 57 N. W. 715.

Oklahoma.— See Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841, holding that where the legislature provides that the court shall determine the compensation due referees for adjudging claims against a city, and shall order a warrant drawn by the city for the payment of such compensation, if the city does not, at the time the compensation is directed, make objection before the court to the amount awarded, it cannot afterward question the correctness of the amount or the value of the services rendered, and mandamus will lie to compel payment if it is refused.

But see McNutt *v.* Lemhi County, (Ida. 1906) 84 Pac. 1054 (holding that the county itself, through its board of commissioners, may resist the payment of a warrant which has been wrongfully and unlawfully issued, although no appeal was ever taken by any one from the order directing its issuance); Bacon *v.* Tacoma, 19 Wash. 674, 54 Pac. 609 [*overruling* so far as in conflict Bardsley *v.* Sternburg, 17 Wash. 243, 49 Pac. 499] (holding that under a statute permitting trial of disputed questions of fact in mandamus, payment of warrants may be compelled, although the liability of the city is disputed on the ground of payment and forgery).

90. Shannon *v.* Reynolds, 78 Ga. 760, 3 S. E. 653. See also People *v.* Wendell, 71 N. Y. 171.

91. Connor *v.* Morris, 23 Cal. 447; Keller *v.* Hyde, 20 Cal. 593; Worcester County *v.*

to compel a payment where it appears that the contract is illegal upon which payment is sought, or there is grave reason to question its legality.[92]

e. Necessity of Existence of Funds. Mandamus will not issue to compel the payment of a claim against a municipality where no appropriation has been made for such payment,[93] or where there are no funds on hand applicable to the payment of the claim,[94] and funds for one purpose will not be compelled to be devoted to another.[95] Where the funds are not on hand mandamus to pay when the funds shall be received cannot issue.[96] The rule that mandamus will not issue

Goldsborough, 90 Md. 193, 44 Atl. 1055 (no writ to pay draft issued by board illegally constituted); State *v.* Ratterman, 3 Ohio Cir. Ct. 626, 2 Ohio Cir. Dec. 364.

After determination of legality.— Where an officer has refused to pay on the ground that the auditing board was illegally constituted, mandamus will issue where it is decided that the board is legal. Carolina Grocery Co. *v.* Burnet, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687.

92. People *v.* Grout, 111 N. Y. App. Div. 924, 98 N. Y. Suppl. 185.

93. *Arkansas.*—Files *v.* State, 42 Ark. 233; *Ex p.* Tully, 4 Ark. 220, 38 Am. Dec. 33.

Illinois.— Fitzsimmons *v.* O'Neill, 214 Ill. 494, 73 N. E. 797; Chicago *v.* People, 210 Ill. 84, 71 N. E. 816.

Indiana.— State *v.* Wayne County Council, 157 Ind. 356, 61 N. E. 715.

Louisiana.— State *v.* New Orleans, 49 La. Ann. 946, 22 So. 370; State *v.* Calhoun, 27 La. Ann. 167.

Maine.— Weston *v.* Dane, 51 Me. 461.

Missouri.— St. Louis, etc., R. Co. *v.* Clark, 53 Mo. 214; State *v.* Hays, 50 Mo. 34, 11 Am. Rep. 402.

Nebraska.— Patterson *v.* State, 2 Nebr. (Unoff.) 765, 89 N. W. 989.

New York.— People *v.* York, 66 N. Y. App. Div. 453, 73 N. Y. Suppl. 331 [*affirmed* in 171 N. Y. 627, 63 N. E. 1120]; People *v.* Tremain, 29 Barb. 96, 17 How. Pr. 142; People *v.* Connolly, 2 Abb. Pr. N. S. 315; People *v.* Earle, 46 How. Pr. 267.

Ohio.— State *v.* Hoffman, 25 Ohio St. 328.

Pennsylvania.— Com. *v.* Foster, 215 Pa. St. 177, 181, 64 Atl. 367, 368; Board of Health *v.* Harrisburg, 2 Pearson 242; Lancaster Firemen's Relief Assoc. *v.* Rathfon, 18 Lanc. L. Rev. 273.

Tennessee.— State *v.* Craig, (Ch. App. 1901) 64 S. W. 326.

See 33 Cent. Dig. tit. "Mandamus," § 234.

94. *California.*— Priet *v.* Reis, 93 Cal. 85, 28 Pac. 798; People *v.* Reis, 76 Cal. 269, 18 Pac. 309; People *v.* Cook, 39 Cal. 658.

Colorado.— Nance *v.* Stuart, 7 Colo. App. 510, 44 Pac. 779.

Illinois.— Chicago *v.* People, 210 Ill. 84, 71 N. E. 816; People *v.* Hyde Park, 117 Ill. 462, 6 N. E. 33.

Louisiana.— State *v.* New Orleans, 49 La. Ann. 946, 22 So. 370; State *v.* New Orleans, 35 La. Ann. 221; State *v.* New Orleans, 34 La. Ann. 469; State *v.* Burbank, 22 La. Ann. 318.

Michigan.— People *v.* Frink, 32 Mich. 96.

Minnesota.—State *v.* Minneapolis, 87 Minn. 156, 91 N. W. 298.

Ohio.— State *v.* Massillon, 24 Ohio Cir. Ct. 249; Saunders *v.* State, 2 Ohio Cir. Ct. 475, 1 Ohio Cir. Dec. 596.

Pennsylvania.— Jefferson County *v.* Shannon, 51 Pa. St. 221; Com. *v.* Philadelphia County Com'rs, 1 Whart. 1.

United States.— Clay County *v.* U. S., 115 U. S. 616, 6 S. Ct. 199, 29 L. ed. 482. See also New Orleans *v.* U. S., 49 Fed. 40, 1 C. C. A. 148.

Canada.— Cornwall *v.* Baby, (Hil. T. 5 Vict.) 3 R. & J. Dig. 2219.

See 33 Cent. Dig. tit. "Mandamus," § 234.

95. Goldsmith *v.* San Francisco, 115 Cal. 36, 46 Pac. 816 (holding that where the general fund for the fiscal year in which supplies were furnished by contract with the city and county of San Francisco to prisoners in the jails of the municipality was totally exhausted, the reduction of the original claim therefor to a judgment against the city and county did not increase the dignity of the claim so as to authorize the claimant to demand payment of it from any fund not subject to the primary demand, and mandamus would not lie to compel the supervisors to order such judgment paid); Ward *v.* Piper, 69 Kan. 773, 77 Pac. 699; Shawnee County *v.* State, 42 Kan. 327, 22 Pac. 326; Austin *v.* Cahill, (Tex. Civ. App. 1905) 88 S. W. 536. But see Jackson *v.* Baehr, 138 Cal. 266, 71 Pac. 167, holding that where by statute juror's fees were to be paid from the general fund the fact that a special fund which had been set apart by the supervisors for the purpose was exhausted was no defense to mandamus.

Judgment for tort.—A mandamus will not issue to compel payment of a judgment for tort from the general fund when it would result in the diversion of such fund from its proper application to current expenses leaving them to such extent unpaid. Sherman *v.* Smith, 12 Tex. Civ. App. 580, 35 S. W. 294; Denison *v.* Foster, (Tex. Civ. App. 1896) 37 S. W. 167.

96. Smith *v.* Broderick, 107 Cal. 644, 40 Pac. 1033, 48 Am. St. Rep. 167; Day *v.* Callow, 39 Cal. 593; State *v.* New Orleans, 116 La. 851, 41 So. 115 (holding that where the taxing power of the city has been exhausted, and its estimated revenues for the year are not more than sufficient to meet the necessary and usual charges fixed in the budget, mandamus will not lie to compel the appropriation of money to pay a judgment out of the unascertained and uncollected surplus of the taxes of the year or of previous years); State *v.* New Orleans, 45 La. Ann. 1389, 14 So. 291. See also Johnson *v.* Sacramento County,

to compel an officer to perform an act which it is beyond his power to perform[97] has been applied to prevent the issuance of a mandamus to compel the payment of a claim from a fund properly applicable to the indebtedness where such fund has been wrongfully dissipated or diverted.[98]

f. Effect of Stoppage of Payment. Where, after the allowance of a claim, payment thereof has been ordered stopped, a ministerial officer cannot be compelled by mandamus to make such payment,[99] nor where he has made payment may he be compelled to restore the funds paid out.[1]

g. Medium of Payment. Mandamus will not lie to compel payment in funds other than as provided by statute.[2]

V. Taxation[3] — **1. Levy and Assessment — a. In General.** It is well settled that where a specific ministerial duty is imposed by law upon an officer, board, or tribunal, with respect to the levy and assessment of taxes, mandamus will lie to compel its performance,[4] unless some other adequate remedy is pro-

65 Cal. 481, 4 Pac. 463. *Compare* New Orleans *v.* U. S., 49 Fed. 40, 1 C. C. A. 148.

Compelling application of surplus to judgment see *supra*, VI, U, 1, d, text and note 21.

One creditor cannot gain a preference over another by applying for a writ of mandamus to compel an officer to pay a sum of money out of funds to be thereafter received by him. State *v.* Burbank, 22 La. Ann. 298.

97. See *supra*, II, C, 4.

98. Bates *v.* Porter, 74 Cal. 224, 15 Pac. 732; Duval County *v.* Jacksonville, 36 Fla. 196, 18 So. 339, 29 L. R. A. 416; Rice *v.* Walker, 44 Iowa 458; State *v.* Craig, 69 Mo. 565. But *compare* Somerville *v.* Wood, 115 Ala. 534, 22 So. 476; Township Bd. of Education *v.* Boyd, 58 Mo. 276; Universal Church *v.* Columbia Tp., 6 Ohio 445, 27 Am. Dec. 267; Quaker City Nat. Bank *v.* Tacoma, 27 Wash. 259, 67 Pac. 710. *Contra*, Northampton First Nat. Bank *v.* Arthur, 12 Colo. App. 90, 54 Pac. 1107; People *v.* New York, 77 N. Y. 45; People *v.* Treanor, 15 N. Y. App. Div. 508, 44 N. Y. Suppl. 528; People *v.* Stout, 23 Barb. (N. Y.) 338.

Where trust funds have been diverted.— Where a specific fund given to a county by the legislature, to be held in trust for certain purposes, is diverted from that purpose and mixed with the general funds of the county, the court may award a mandamus, to compel such fund to be paid over to the person entitled to it, and to direct an order to be drawn upon the general funds of the county in the treasury. Pike County Com'rs *v.* People, 11 Ill. 202.

99. Murphy *v.* Reeder Town Treasurer, 56 Mich. 505, 23 N. W. 197; State *v.* Cook, 43 Nebr. 318, 61 N. W. 693.

1. State *v.* Bowman, 66 S. C. 140, 44 S. E. 569.

2. State *v.* Hays, 50 Mo. 34, 11 Am. Rep. 402.

3. Mandamus to private corporations or their officers with respect to taxation see *infra*, VII, A, 9, i.

4. *Alabama.*—Tarver *v.* Tallapoosa County, 17 Ala. 527.

Arkansas.— Crow *v.* Dallas County, 13 Ark. 625.

California.— Hyatt *v.* Allen, 54 Cal. 353; People *v.* Ashbury, 46 Cal. 523.

Colorado.— Denver *v.* Adams County, 33 Colo. 1, 77 Pac. 858.

Florida.— Columbia County *v.* King, 13 Fla. 451.

Georgia.— Wilkinson *v.* Cheatham, 43 Ga. 258; Manor *v.* McCall, 5 Ga. 522.

Illinois.— People *v.* Upham, 221 Ill. 555, 77 N. E. 931; State Bd. of Equalization *v.* People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513; People *v.* Salomon, 54 Ill. 39.

Indiana.— State *v.* Stout, 61 Ind. 143; Hamilton *v.* State, 3 Ind. 452.

Iowa.— State *v.* Johnson County Judge, 12 Iowa 237.

Kentucky.— Lexington *v.* Lexington Bd. of Education, 65 S. W. 827, 23 Ky. L. Rep. 1663.

Louisiana.— State *v.* New Orleans, 37 La. Ann. 13.

Maryland.— Maxwell *v.* Baldwin, 40 Md. 273.

Michigan.— People *v.* St. Clair County, 30 Mich. 388.

Mississippi.— Warren County *v.* Klein, 51 Miss. 807.

Missouri.— State *v.* Riley, 85 Mo. 156; State *v.* Patton, 108 Mo. App. 26, 82 S. W. 537.

Nebraska.— State *v.* Buffalo County, 6 Nebr. 454.

New Jersey.— Cooper *v.* Cape May Point Borough, 72 N. J. L. 164, 60 Atl. 516; State *v.* Jersey City Bd. of Finance, 53 N. J. L. 62, 20 Atl. 755.

New York.— People *v.* Molloy, 35 N. Y. App. Div. 136, 54 N. Y. Suppl. 1084 [*affirmed* in 161 N. Y. 621, 55 N. E. 1099]; People *v.* Bennett, 54 Barb. 480; People *v.* Schenectady County, 35 Barb. 408; People *v.* Barton, 29 How. Pr. 371.

North Carolina.— Jackson *v.* North Carolina Corp. Commission, 130 N. C. 385, 42 S. E. 123; Pegram *v.* Cleaveland County, 64 N. C. 557.

Ohio.— State *v.* Franklin County, 35 Ohio St. 458; State *v.* Harris, 17 Ohio St. 608.

Pennsylvania.— Perkins *v.* Slack, 86 Pa. St. 270; Com. *v.* Allegheny County, 32 Pa. St. 218.

South Carolina.— Mister *v.* Spartanburg,

vided.[5] Thus the writ will lie in a proper case to compel the levy of a special tax;[6] assessment and valuation of property subject to taxation in the manner required by law;[7] correction of an erroneous assessment;[8] assessment by the board of review of property omitted by local assessors;[9] examination, revision, and correction of an assessment list and duplicate;[10] hearing and determination by the county board or other proper officer or board of complaints with respect to the assessment or valuation of property;[11] striking an improper assessment and tax from the

68 S. C. 26, 46 S. E. 539; State *v.* Cromer, 35 S. C. 213, 14 S. E. 493.

Tennessee.— State *v.* Whitworth, 8 Lea 594.

Washington.— State *v.* Headlee, 22 Wash. 126, 60 Pac. 126.

West Virginia.— State *v.* Bare, (1906) 56 S. E. 390; State *v.* Herrald, 36 W. Va. 721, 15 S. E. 974; State *v.* Buchanan, 24 W. Va. 362.

Wisconsin.— Neu *v.* Voege, 96 Wis. 489, 71 N. W. 880; State *v.* McNutt, 87 Wis. 277, 58 N. W. 389; Waupaca County *v.* Matteson, 79 Wis. 67, 48 N. W. 213; State *v.* Smith, 11 Wis. 65.

United States.— East St. Louis *v.* U. S., 120 U. S. 600, 7 S. Ct. 739, 30 L. ed. 798; *Ex p.* Rowland, 104 U. S. 604, 26 L. ed. 861; Heine *v.* Levee Com'rs, 11 Fed. Cas. No. 6,325, 1 Woods 246 [*affirmed* in 19 Wall. 655, 22 L. ed. 223].

See 33 Cent. Dig. tit. "Mandamus," §§ 238 *et seq.*, 249.

Statutory prohibition of interference by courts.— S. C. Gen. St. § 171, declaring that "the collection of taxes shall not be stayed or prevented by any injunction, writ, or order issued by any court or judge thereof," and section 269, providing that "no writ, order, or process of any kind whatsoever staying or preventing any officer of the state charged with a duty in the collection of any tax, whether such tax is legally due or not, shall in any case be granted by any court or the judge of any court," do not prohibit the courts from exercising proper control over officers charged with the listing and assessment of property for the purpose of taxation, where they proceed contrary to law. State *v.* Cromer, 35 S. C. 213, 14 S. E. 493. And see State *v.* Boyd, 35 S. C. 233, 14 S. E. 496.

5. See *infra*, VI, V, 1, b.

6. *Alabama.*—Tarver *v.* Tallapoosa County, 17 Ala. 527.

Florida.— Columbia County *v.* King, 13 Fla. 451.

Georgia.— Manor *v.* McCall, 5 Ga. 522.

Illinois.— People *v.* Saloman, 51 Ill. 37.

Iowa.— State *v.* Johnson County Judge, 12 Iowa 237.

Kentucky.— Lexington *v.* Lexington Bd. of Education, 65 S. W. 827, 23 Ky. L. Rep. 1663.

Missouri.— State *v.* Riley, 85 Mo. 156.

Ohio.— State *v.* Franklin County, 35 Ohio St. 458; State *v.* Harris, 17 Ohio St. 608.

Pennsylvania.— Perkins *v.* Slack, 86 Pa. St. 270.

United States.— East St. Louis *v.* U. S., 120 U. S. 600, 7 S. Ct. 739, 30 L. ed. 798; *Ex p.* Rowland, 104 U. S. 604, 26 L. ed. 861.

See 33 Cent. Dig. tit. "Mandamus," § 238 *et seq.*

Levy to pay: Bonds, judgments, debts, etc., see *infra*, VI, V, 1, h. For public improvements, etc., see *infra*, VI, V, 1, i. For school purposes see *infra*, VI, V, 1, j. To cover loss by default of county treasurer see *infra*, VI, V, 1, k.

Relevies and additional levies see *infra*, VI, V, 1.

7. *California.*—Hyatt *v.* Allen, 54 Cal. 353; People *v.* Shearer, 30 Cal. 645.

Illinois.— People *v.* Upham, 221 Ill. 555, 77 N. E. 931; State Bd. of Equalization *v.* People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513, assessment of franchises and capital stock of corporation by state board of equalization acting as an original assessor and not as a board of review.

Maryland.— Maxwell *v.* Baldwin, 40 Md. 273.

New York.— People *v.* Wells, 110 N. Y. App. Div. 336, 97 N. Y. Suppl. 333; People *v.* Ontario County, 50 Misc. 63, 100 N. Y. Suppl. 330.

South Carolina.— Milster *v.* Spartanburg, 68 S. C. 26, 46 S. E. 539, to compel a city to assess and collect unpaid taxes against a corporation for past years where it has statutory authority to do so, but not otherwise.

Tennessee.— State *v.* Whitworth, 8 Lea 594.

West Virginia.— State *v.* Bare, (1906) 56 S. E. 390; State *v.* Graybeal, (1906) 55 S. E. 398 (mandamus on the relation of the state tax commissioner to compel an assessor to assess a bank in conformity with the requirements of the law); State *v.* Herrald, 36 W. Va. 721, 15 S. E. 974 (to compel assessment of land as town lots and not as farming lands); State *v.* Buchanan, 24 W. Va. 362.

Wisconsin.— Neu *v.* Voege, 96 Wis. 489, 71 N. W. 880, to compel assessor to assess lots separately.

Property not subject to taxation see *infra*, VI, V, 1, e.

8. People *v.* Wells, 110 N. Y. App. Div. 336, 97 N. Y. Suppl. 333; and other cases cited in the preceding note.

9. People *v.* Upham, 221 Ill. 555, 77 N. E. 931, assessment as real estate of rights of certain corporations to maintain tunnels in the streets of a city.

10. Cooper *v.* Cape May Point Borough, 72 N. J. L. 164, 60 Atl. 516.

11. People *v.* Cook County, 176 Ill. 576, 52 N. E. 334; Kinley Mfg. Co. *v.* Kochersperger, 174 Ill. 379, 51 N. E. 648; Kochersperger *v.* Larned, 172 Ill. 86, 49 N. E. 988; Beidler *v.* Kochersperger, 171 Ill. 563, 49 N. E. 716.

assessment rolls;[12] inclusion by a city tax board of estimate in its return of an amount erroneously omitted;[13] entry of an assessment by the county auditor as fixed by the boards of assessors and equalization;[14] entry on the assessment book of the delinquent taxes for the preceding year;[15] entry of a special tax on the tax-roll;[16] extension of taxes on the collector's books by the county clerk according to the increased valuation fixed by the state board of equalization;[17] extension of taxes by the county auditor at a corrected and reduced rate fixed by the county commissioners;[18] placing of assessments on the tax duplicate for collection;[19] issue of tax duplicates by the county auditor without adding an illegal assessment by the state board of equalization;[20] or return by the state railroad commission of the property of railroads for assessment and taxation.[21]

b. General Grounds For Refusal of Writ. The writ will not lie where some other adequate remedy is provided;[22] and of course it must be refused where, under the law, there is no duty on the part of the officer or board to do the act sought to be compelled,[23] or a want of power,[24] or if the existence of the duty or

12. See *infra*, VI, V, 1, e, (II).

13. People *v.* Molloy, 35 N. Y. App. Div. 136, 54 N. Y. Suppl. 1084 [*affirmed* in 161 N. Y. 621, 55 N. E. 1099].

14. State *v.* Covington, 35 S. C. 245, 14 S. E. 499; State *v.* Boyd, 35 S. C. 233, 14 S. E. 496; State *v.* Cromer, 35 S. C. 213, 14 S. E. 493.

15. People *v.* Ashbury, 46 Cal. 523.

16. State *v.* Lamont, 86 Wis. 563, 57 N. W. 369; Waupaca County *v.* Matteson, 79 Wis. 67, 48 N. W. 213.

17. People *v.* Salomon, 54 Ill. 39.

18. State *v.* Headlee, 22 Wash. 126, 60 Pac. 126.

19. State *v.* Stout, 61 Ind. 143.

20. Hamilton *v.* State, 3 Ind. 452.

21. Jackson *v.* North Carolina Corp. Commission, 130 N. C. 385, 42 S. E. 123.

22. State *v.* St. Charles Parish Police Jury, 29 La. Ann. 146; State *v.* Drexel, (Nebr. 1906) 107 N. W. 110; Yuengling *v.* Schnylkill County Com'rs, 2 Leg. Chron. (Pa.) 350; State *v.* Cromer, 35 S. C. 213, 14 S. E. 493; State *v.* Gaillard, 11 S. C. 309. See *supra*, II, D.

Remedy by appeal.— Mandamus will not lie to correct errors of the county board of equalization as to the liability of property to taxation, where a statute provides a plain and adequate remedy by appeal. State *v.* Drexel, (Nebr. 1906) 107 N. W. 110.

Certiorari.— Mandamus will not lie to correct an assessment where the law provides an adequate remedy by certiorari to review the assessment. People *v.* Wells, 110 N. Y. App. Div. 336, 97 N. Y. Suppl. 333.

Inadequate remedy.— Mandamus by a taxpayer to compel the county auditor to enter the assessment as fixed by the boards of assessors and equalization, without regard to an unauthorized increase by the controller-general, is not barred by the fact that there are statutory provisions under which the taxpayer may pay the tax under protest and sue to recover the amount illegally collected, since this remedy, if applicable, is not adequate. State *v.* Cromer, 35 S. C. 213, 14 S. E. 493. And see State *v.* Boyd, 35 S. C. 233, 14 S. E. 496.

Remedy in equity.— The existence of a remedy in equity is generally held not to be sufficient ground for refusing a writ of mandamus. Com. *v.* Allegheny County Com'rs, 32 Pa. St. 218. See *supra*, II, D, 2, b.

Mandamus to compel levy of special taxes see *infra*, VI, V, 1, h–k.

Striking of illegal assessment from rolls see *infra*, VI, V, 1, e, (II).

23. *Illinois.*— People *v.* Hendee, 108 Ill. App. 591, providing duplicate assessment books for the listing and assessment of personal property.

Louisiana.— State *v.* Board of Assessors, 113 La. 925, 37 So. 878 (refusing mandamus to compel assessment of land as belonging to the relator and as having certain dimensions and a certain boundary, because he failed to show title to any such property); State *v.* St. Charles Parish Police Jury, 29 La. Ann. 146.

Maryland.—Allegany County Public Schools *v.* Allegany County Com'rs, 20 Md. 449.

Nebraska.— Lancaster County *v.* State, 13 Nebr. 523, 14 N. W. 517.

United States.—Bass *v.* Taft, 137 U. S. 458, 11 S. Ct. 154, 34 L. ed. 752.

24. *Alabama.*—Speed *v.* Cocke, 57 Ala. 209.

Arkansas.— Graham *v.* Parham, 32 Ark. 676.

Illinois.— People *v.* Cook County, 176 Ill. 576, 52 N. E. 334; People *v.* Hyde Park, 117 Ill. 462, 6 N. E. 33.

Maryland.— Wells *v.* Hyattsville, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89; Allegany County Public Schools *v.* Allegany County Com'rs, 20 Md. 449.

Minnesota.— State *v.* Archibald, 43 Minn. 328, 45 N. W. 606, holding that a writ was improperly granted to compel an assessor to assess certain property, where pending the litigation his power had ceased and the books had been returned to the auditor.

Mississippi.— Warren County *v.* Klein, 51 Miss. 807.

Nebraska.— State *v.* Wahoo, 62 Nebr. 40, 86 N. W. 923.

New Jersey.— State *v.* Jersey City Bd. of Finance, 53 N. J. L. 62, 20 Atl. 755.

New York.— Matter of Popoff, 10 Misc. 272, 31 N. Y. Suppl. 2, want of power to correct errors in assessments.

power is doubtful.[25] Nor will the writ be granted where, if issued, it would be unavailing, or where there is no necessity for the relief sought.[26] The writ cannot be granted in anticipation of a breach of duty.[27]

c. Demand and Refusal. Although the general rule is that a demand and a refusal or its equivalent are necessary before applying for mandamus,[28] there is an exception in cases where the duty sought to be enforced is of a public nature and there is no one especially empowered to demand its performance,[29] and applications for mandamus with respect to the levy and assessment of taxes generally fall within this exception, so that specific demand and refusal are not necessary.[30] In any event, neglect or other conduct that is equivalent to a refusal to act renders further demand and refusal unnecessary.[31]

d. Discretion of Officer or Board and Judicial Powers. The writ will not lie to control a discretion vested in an officer or board with respect to the assessment and valuation of property or otherwise,[32] or to control or review the exer-

Ohio.— State *v.* Brewster, 9 Ohio Dec. (Reprint) 357, 12 Cinc. L. Bul. 223.

South Carolina.— Milster *v.* Spartanburg, 68 S. C. 26, 46 S. E. 539.

Washington.— Portland Sav. Bank *v.* Montesano, 14 Wash. 570, 45 Pac. 158.

United States.— Bass *v.* Taft, 137 U. S. 458, 11 S. Ct. 154, 34 L. ed. 752; Cleveland *v.* U. S., 111 Fed. 341, 49 C. C. A. 383; U. S. *v.* New Orleans, 27 Fed. Cas. No. 15,871, 2 Woods 230 [*reversed* on other grounds in 98 U. S. 381, 25 L. ed. 225].

Immediate performance of a duty imposed by statute to levy and collect a special tax will not be required where no existing law gives power or provides machinery appropriate to such immediate performance. State *v.* Jersey City Bd. of Finance, 53 N. J. L. 62, 20 Atl. 755.

Time and mode of levy.— A statute directing money to be levied by a particular day gives a special authority; and if the time has elapsed, it would be improper to order a mandamus, as there would be no authority under the law, to make the levy. Allegany County Public Schools *v.* Allegany County Com'rs, 20 Md. 449; Ellicott *v.* Levy Ct., 1 Harr. & J. (Md.) 359. An order cannot lawfully be made requiring the board of supervisors of a county to levy taxes at any other time or in any other mode than the time and mode prescribed by law. Warren County *v.* Klein, 51 Miss. 807.

Levy of special tax to pay: Bonds, judgments, debts, etc., see *infra*, VI, V, 1, h. For public improvements, etc., see *infra*, VI, V, 1, i.

25. Shackelton *v.* Guttenberg, 39 N. J. L. 660; *In re* Gibson, 20 U. C. Q. B. 111.

26. Wells *v.* Hyattsville, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89; Allegany County Public Schools *v.* Allegany County Com'rs, 20 Md. 449; State *v.* Archibald, 43 Minn. 328, 45 N. W. 606; State *v.* Comptroller-Gen., 4 S. C. 185; Giles *v.* Wellington, 30 Ont. 610. See *supra*, II, A, 3, e.

Expiration of period for assessment and levy.— Mandamus to have an assessment corrected will not be granted where both the period for making it and the period for levying the tax have passed, but in such case the remedy is by injunction. Wells *v.* Hyattsville, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89.

Adjournment of annual session of board.— But where mandamus proceedings were instituted to compel the Illinois state board of equalization to assess property, it was held that the fact that the board had adjourned its annual session prior to the hearing was not ground for denying the writ, on the theory that its issuance would be barren of practical results, since, under Hurd Rev. St. Ill. (1899) p. 1441, §§ 276, 277, providing that if property be not assessed for any year the amount of the omitted tax may be charged against such property in the assessment for any subsequent year, the successors of the present board might be required to obey the writ. State Bd. of Equalization *v.* People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513.

27. Allegany County Public Schools *v.* Allegany County Com'rs, 20 Md. 449. See *supra*, II, G.

28. See *supra*, II, G; *infra*, VI, V, 1, h, (III).

29. See *supra*, II, G, 1.

30. State Bd. of Equalization *v.* People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513; Milster *v.* Spartanburg, 68 S. C. 26, 46 S. E. 539, holding that where a city ought to have enforced the collection of taxes against a corporation, mandamus would lie to compel such enforcement without a previous demand.

Levy to pay judgments, etc., see *infra*, VI, V, 1, h, (III).

31. State Bd. of Equalization *v.* People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513; People *v.* New York, 3 Abb. Dec. (N. Y.) 566, 2 Keyes 288, 34 How Pr. 379 [*affirming* 11 Abb. Pr. 114].

32. *Georgia.*— Manor *v.* McCall, 5 Ga. 522.

Illinois.— People *v.* Cook County, 176 Ill. 576, 52 N. E. 334.

Louisiana.— State *v.* St. Charles Parish Police Jury, 29 La. Ann. 146.

Nebraska.— State *v.* Sheldon, 53 Nebr. 365, 73 N. W. 694; Young *v.* Lane, 43 Nebr. 812, 62 N. W. 202.

Ohio.— State *v.* Crites, 48 Ohio St. 460, 28 N. E. 178; State *v.* Harris, 17 Ohio St. 608.

West Virginia.— State *v.* Bare, (1906) 56 S. E. 390; State *v.* Herrald, 36 W. Va. 721, 15 S. E. 974; State *v.* Buchanan, 24 W. Va. 362.

cise of judicial as distinguished from ministerial powers;[33] but it will lie to compel the exercise of discretion or judicial powers without interfering with such exercise;[34] and if there is so gross an abuse of discretion or evasion of duty as to amount to a virtual refusal to perform the act enjoined, or to act at all in contemplation of law, mandamus will afford a remedy.[35] An assessor has no right to decide against instructions of the highest executive power of the state as to what kind of property is liable to taxation. After ascertaining the taxable property under such instructions and the value and ownership thereof, his discretion ceases, and it then becomes his clear duty, enforceable by mandamus, to enter the same on his tax book.[36] A ministerial tax officer has no discretion to refuse to obey an act of the legislature on the ground that it is unconstitutional.[37]

e. Property Not Subject to Taxation — (i) *Compelling Assessment.* As mandamus is a discretionary writ,[38] if it manifestly appears that the property of which it is sought to compel assessment is under the law exempt from taxation, the writ will not be granted,[39] even though the executive power of the state has instructed assessors to assess such property on the ground that the statute exempting the same is unconstitutional;[40] but this is because the court will not involve the citizens in expensive litigation growing out of a clearly illegal tax, and not because an assessor has any right to set up the defense as an excuse for his refusal to obey such instructions, and if the property is not manifestly exempt, the court will grant the writ and leave the constitutionality of the statute to be decided in a proper case on appeal by the taxpayer.[41]

(ii) *Striking From Assessment Rolls.* Mandamus will lie to compel assessors to strike an illegal assessment and tax of exempt property from the assessment rolls, unless some other adequate remedy is provided.[42]

United States.— Grand County *v.* King, 67 Fed. 202, 14 C. C. A. 421.

33. Younger *v.* Santa Cruz County, 68 Cal. 241, 9 Pac. 103; People *v.* Adam, 3 Mich. 427; People *v.* Chapin, 104 N. Y. 96, 10 N. E. 141; *In re* Dickson, 10 U. C. Q. B. 395.

34. People *v.* Cook County, 176 Ill. 576, 52 N. E. 334; Beidler *v.* Kochersperger, 171 Ill. 563, 49 N. E. 716; Cooper *v.* Cape May Point, 72 N. J. L. 164, 60 Atl. 516; State *v.* Springer, (N. J. Sup. 1902) 52 Atl. 996; State *v.* Crites, 48 Ohio St. 460, 28 N. E. 178; State *v.* Harris, 17 Ohio St. 608; State *v.* Herrald, 36 W. Va. 721, 15 S. E. 974; State *v.* Buchanan, 24 W. Va. 362.

While a superior court will not control the discretion of an inferior court, yet, where the law imposes upon an inferior court a specific duty to levy a tax, performance of the duty may be compelled by mandamus. Manor *v.* McCall, 5 Ga. 522.

35. Thus where a person's lands were assessed three hundred per cent higher than lands in the same neighborhood, and the board of commissioners on appeal overruled his objection without consideration and without giving counsel an opportunity to be heard, it was held that there was such an abuse of discretion that mandamus would be awarded to compel a proper review if the board had authority to review assessments. People *v.* Cook County, 176 Ill. 576, 52 N. E. 334.

Fraudulent assessments.— An assessment by the state board of equalization may be impeached on mandamus and declared void and equivalent to no assessment at all, where it is so low as to clearly show that it is fraudulent. State Bd. of Equalization *v.* People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513. Where such board disregarded all known rules for the valuation of the capital stock and franchises of corporations, and refused to consider the assessor's statements as to their value, and assessed such capital stock at a grossly inadequate sum under erroneous rules of valuation passed for the occasion, it was held that the assessment should be treated as void. State Bd. of Equalization *v.* People, *supra.*

Mere colorable action of an officer or board clothed with discretionary power, plainly arbitrary or capricious and evincing a purpose to evade due and faithful performance of duty, constitutes no bar to an application for a writ of mandamus to compel action in good faith; but mandamus will not be awarded for such purpose unless it appears that the officer or board has clearly and wilfully disregarded his or its duty, or that the action was extremely wrong or flagrantly improper and unjust, so that the decision can only be explained as the result of caprice, passion, partiality, or corruption. State *v.* Bare, (W. Va. 1906) 56 S. E. 390, where the evidence was held insufficient to prove lack of good faith on the part of an assessor for purposes of taxation.

36. State *v.* Buchanan, 24 W. Va. 262.

37. People *v.* Salomon, 54 Ill. 39.

38. See *supra*, II, A.

39. State *v.* Buchanan, 24 W. Va. 362. See also Maxwell *v.* State, 40 Md. 273; State *v.* Whitworth, 8 Lea (Tenn.) 594.

40. State *v.* Buchanan, 24 W. Va. 362.

41. State *v.* Buchanan, 24 W. Va. 362.

42. People *v.* Barton, 29 How. Pr. (N. Y.)

f. Fraudulent Taxes. Since mandamus is a discretionary writ and those who invoke its aid must come into court with clean hands, it will not be issued to accomplish an illegal purpose, as to enforce a fraudulent tax, even though the officer against whom it is invoked is charged with an express duty under the statute.[43]

g. Returns and Reports. Mandamus will lie to compel an officer to make a return or report of taxes voted, as required by statute.[44]

h. Levy to Pay Judgments, Bonds, or Other Indebtedness — (i) *In General.* Where a statute imposes upon a city, county, levee district, or other municipality, or upon a particular officer, board, or tribunal, a clear legal duty to levy a special tax to pay judgments, bonds, warrants, or other allowed or fixed indebtedness, or interest thereon, or to provide a sinking fund for payment at a future day, mandamus will lie on the relation of a person interested to compel performance of such duty.[45] It is well settled however that the writ will not lie in any case

371, holding that the writ would lie to strike off an improper assessment and tax on bonds or other securities of the United States, the remedy by action for damages not being adequate.

43. Cheboygan County *v.* Mentor Tp., 94 Mich. 386, 54 N. W. 169, holding that where a majority of the board of supervisors of a county wilfully voted money for a fraudulent purpose, and included the amount so voted in the county taxes apportioned among the various townships, mandamus would not lie at the instance of the majority of the board to compel the supervisors who opposed the fraud to spread on their respective assessment rolls their proportion of such fraudulent tax, since, although each supervisor was charged by statute with the express duty of spreading his proportion of the taxes on the assessment rolls, he would not be commanded by a court to do so when the effect would be to aid a fraud.

44. State *v.* Studheit, 11 Nebr. 359, 9 N. W. 559.

45. *Alabama.*— Graham *v.* Tuscumbia, (1906) 42 So. 400; Eufaula *v.* Hickman, 57 Ala. 338; State *v.* Covington County, 57 Ala. 240; Shinbone *v.* Randolph County, 56 Ala. 183; Covington County *v.* Dunklin, 52 Ala. 28; Miller *v.* McWilliams, 50 Ala. 427, 20 Am. Rep. 297; Limestone County *v.* Rather, 48 Ala. 433; Tarver *v.* Tallapoosa County, 17 Ala. 527.

California.— Meyer *v.* Brown, 65 Cal. 583, 26 Pac. 281; Robinson *v.* Butte County, 43 Cal. 353; Stockton, etc., R. Co. *v.* Stockton, 41 Cal. 147; English *v.* Sacramento County, 19 Cal. 172.

Colorado.— Gunnison County *v.* Sims, 31 Colo. 483, 74 Pac. 457; Grand County *v.* People, 16 Colo. App. 215, 64 Pac. 675; Grand County *v.* People, 8 Colo. App. 43, 46 Pac. 107; People *v.* Rio Grande County, 7 Colo. App. 229, 42 Pac. 1032.

Florida.— State *v.* Jacksonville, 22 Fla. 21; State *v.* Jackson County Com'rs, 19 Fla. 17; Columbia County *v.* King, 13 Fla. 451.

Georgia.— Dearing *v.* Shepherd, 78 Ga. 28; Wilkinson *v.* Cheatham, 43 Ga. 258.

Illinois.— Com. *v.* Big Four Drainage Dist., 207 Ill. 17, 69 N. E. 576; People *v.* Getzendaner, 137 Ill. 234, 34 N. E. 297; Cairo *v.* Campbell, 116 Ill. 305, 5 N. E. 114, 8 N. E. 688; Cairo *v.* Everett, 107 Ill. 75; McLean County *v.* Bloomington, 106 Ill. 209; Lyons *v.* Cooledge, 89 Ill. 529; Higgins *v.* Chicago, 18 Ill. 276; East St. Louis *v.* People, 6 Ill. App. 130; East St. Louis *v.* People, 6 Ill. App. 76.

Indiana.— State *v.* Clinton County, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984; Knox County *v.* Montgomery, 106 Ind. 517, 6 N. E. 915; State *v.* Madison County, 92 Ind. 133; Gardner *v.* Haney, 86 Ind. 17.

Iowa.— Palmer *v.* Stacy, 44 Iowa 340; Stevenson *v.* Summit Dist. Tp., 35 Iowa 462; Boynton *v.* Newton Tp., 34 Iowa 510; State *v.* Davenport, 12 Iowa 335; State *v.* Johnson County Judge, 12 Iowa 237.

Kansas.— Phelps *v.* Lodge, 60 Kan. 122, 55 Pac. 840; Riley *v.* Garfield Tp., 54 Kan. 463, 38 Pac. 560; Cassatt *v.* Barber County, 39 Kan. 505, 18 Pac. 517; Garden City First Nat. Bank *v.* Morton County, 7 Kan App. 739, 52 Pac. 580; Stevens *v.* Miller, 3 Kan. App. 192, 43 Pac. 439.

Kentucky.— Fleming *v.* Dyer, 47 S. W. 444, 20 Ky. L. Rep. 689; Elliott County *v.* Kitchen, 14 Bush 289; Rodman *v.* Larue County Justices, 3 Bush 144; Maddox *v.* Graham, 2 Metc. 56.

Louisiana.— State *v.* New Orleans, 45 La. Ann. 1389, 14 So. 291; State *v.* New Orleans, 37 La. Ann. 528; State *v.* New Orleans, 37 La. Ann. 13; State *v.* New Orleans, 36 La. Ann. 687; State *v.* New Orleans, 34 La. Ann. 1149; State *v.* New Orleans, 34 La. Ann. 477; State *v.* New Orleans, 32 La. Ann. 763; Moore *v.* New Orleans, 32 La. Ann. 726; State *v.* New Orleans, 30 La. Ann. 129.

Maryland.— Worcester County *v.* Melvin, 89 Md. 37, 42 Atl. 910; Darling *v.* Baltimore, 51 Md. 1, where levy of a tax to pay judgment rendered by a justice of the peace was compelled.

Michigan.— Loomis *v.* Rogers Tp., 53 Mich. 135, 18 N. W. 596; McArthur *v.* Duncan Tp., 34 Mich. 27.

Minnesota.— State *v.* Gunn, 92 Minn. 436, 100 N. W. 97.

Mississippi.— Klein *v.* Smith County, 54 Miss. 254; Warren County *v.* Klein, 51 Miss. 807; Jefferson County *v.* Arrghi, 51 Miss. 667; Musgrove *v.* Vicksburg, etc., R. Co., 50

for such purpose unless the relator's right to have the levy made is clearly

Miss. 677; Carroll *v.* Tishamingo County, 28 Miss. 38.

Missouri.— State *v.* Holt County Ct., 135 Mo. 533, 37 S. W. 521; Sheridan *v.* Fleming, 93 Mo. 321, 5 S. W. 813; State *v.* Slavens, 75 Mo. 508; State *v.* Rainey, 74 Mo. 229; Barrett *v.* Schuyler County Ct., 44 Mo. 197; State *v.* Hug, 44 Mo. 116; Flagg *v.* Palmyra, 33 Mo. 440.

Montana.— State *v.* Great Falls, 19 Mont. 518, 49 Pac. 15, water rents.

Nebraska.— State *v.* Weir, 33 Nebr. 35, 49 N. W. 785; State *v.* Cather, 22 Nebr. 792, 36 N. W. 157; State *v.* Buffalo County, 6 Nebr. 454; State *v.* Knievel, 5 Nebr. (Unoff.) 219, 97 N. W. 798.

Nevada.— Davis *v.* Simpson, 25 Nev. 123, 58 Pac. 146, 83 Am. St. Rep. 570.

New Jersey.— Sea Isle City Imp. Co. *v.* Sea Isle City, 61 N. J. L. 476, 39 Atl. 1063; Rahway Sav. Inst. *v.* Rahway, 49 N. J. L. 384, 8 Atl. 106; Munday *v.* Rahway, 43 N. J. L. 338; Lyon *v.* Elizabeth, 43 N. J. L. 158; State *v.* Guttenberg, 39 N. J. L. 660.

New Mexico.— Territory *v.* Santa Fe County, (1907) 89 Pac. 253; Territory *v.* Socorro, 12 N. M. 177, 76 Pac. 283.

New York.— People *v.* Delaware County, 173 N. Y. 297, 66 N. E. 7 [*reversing* 75 N. Y. App. Div. 184, 77 N. Y. Suppl. 676]; People *v.* New York, 3 Abb. Dec. 566, 2 Keyes 288, 34 How. Pr. 379 [*affirming* 11 Abb. Pr. 114]; People *v.* Marsh, 21 N. Y. App. Div. 88, 47 N. Y. Suppl. 395; Boyce *v.* Cayuga County, 20 Barb. 294; People *v.* Queens County, 10 N. Y. St. 286 (for water rent); People *v.* Otsego County, 36 How. Pr. 1.

North Carolina.— Leach *v.* Fayetteville, 84 N. C. 829; Fry *v.* Montgomery County, 82 N. C. 304; McLendon *v.* Anson County, 71 N. C. 38; Gooch *v.* Gregory, 65 N. C. 142; Pegram *v.* Cleaveland County Com'rs, 64 N. C. 557.

Ohio.— State *v.* Perrysburg Tp. Bd. of Education, 27 Ohio St. 96; State *v.* Harris, 17 Ohio St. 608 (county debt); State *v.* Hancock County, 11 Ohio St. 183; State *v.* Clinton County, 6 Ohio St. 280.

Pennsylvania.— Lehigh Coal, etc., Co.'s Appeal, 112 Pa. St. 360, 5 Atl. 231; Com. *v.* Pittsburgh, 88 Pa. St. 66; Williamsport *v.* Com., 84 Pa. St. 487, 24 Am. Rep. 208, 90 Pa. St. 498; Morgan *v.* Verbeke, 55 Pa. St. 456; Com. *v.* Perkins, 43 Pa. St. 400; Com. *v.* Pittsburgh, 41 Pa. St. 278; Com. *v.* Allegheny County Com'rs, 37 Pa. St. 277; Com. *v.* Taylor, 36 Pa. St. 263; Com. *v.* Pittsburgh, 34 Pa. St. 496; Com. *v.* Allegheny County Com'rs, 32 Pa. St. 218; *In re* Marcy Tp., 8 Del. Co. 31, 10 Kulp 43.

Tennessee.— State *v.* Anderson County, 8 Baxt. 249; Memphis *v.* Bethel, 3 Tenn. Cas. 205.

Texas.—Austin *v.* Cahill, (1905) 88 S. W. 542; Sherman *v.* Langham, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258; Houston *v.* Voorhies, 70 Tex. 356, 8 S. W. 109; Voorhies *v.* Houston, 70 Tex. 331, 7 S. W. 679; Wright *v.* San Antonio, (Civ. App. 1899) 50 S. W. 406; Sandmeyer *v.* Harris, 7 Tex. App. 515, 27 S. W. 284.

Virginia.— Cumberland County *v.* Randolph, 89 Va. 614, 16 S. E. 722.

Washington.— State *v.* Lewis County, (1907) 88 Pac. 760; State *v.* Seattle, 42 Wash. 370, 85 Pac. 11; Waldron *v.* Snohomish, 41 Wash. 566, 83 Pac. 1106; State *v.* Byrne, 32 Wash. 264, 73 Pac. 394; State Sav. Bank *v.* Davis, 22 Wash. 406, 61 Pac. 43; State *v.* Brown, 19 Wash. 383, 53 Pac. 548.

West Virginia.— Thomas *v.* Mason, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727; Fisher *v.* Charleston, 17 W. Va. 628; Fisher *v.* Charleston, 17 W. Va. 595.

Wisconsin.— Gutta Percha, etc., Mfg. Co. *v.* Ashland, 100 Wis. 232, 75 N. W. 1007; State *v.* McNutt, 87 Wis. 277, 58 N. W. 389; Waupaca County *v.* Matteson, 79 Wis. 67, 48 N. W. 213; State *v.* Manitowoc County, 52 Wis. 423, 9 N. W. 607; State *v.* Milwaukee, 25 Wis. 122; State *v.* Gates, 22 Wis. 210; State *v.* Milwaukee, 20 Wis. 87; State *v.* Beloit, 20 Wis. 79; State *v.* Madison, 15 Wis. 30.

United States.— East St. Louis *v.* U. S. 120 U. S. 600, 7 S. Ct. 739, 30 L. ed. 798; Thompson *v.* Perris Irr. Dist., 116 Fed. 769; Louisiana *v.* St. Martin's Parish Police Jury, 111 U. S. 716, 4 S. Ct. 648, 28 L. ed. 574; Cherokee County *v.* Wilson, 109 U. S. 621, 3 S. Ct. 352, 27 L. ed. 1053; *Ex p.* Rowland, 104 U. S. 604, 26 L. ed. 861; U. S. *v.* New Orleans, 103 U. S. 358, 26 L. ed. 395; Louisiana City *v.* U. S., 103 U. S. 289, 26 L. ed. 358; U. S. *v.* New Orleans, 98 U. S. 381, 25 L. ed. 225 [*reversing* 27 Fed. Cas. No. 15,871, 2 Woods 230]; Lower *v.* U. S., 91 U. S. 536, 23 L. ed. 420; Galena *v.* U. S., 5 Wall. 705, 18 L. ed. 560; Knox County *v.* Aspinwall, 24 How. 376, 16 L. ed. 735 [*affirming* 2 Fed. Cas. No. 593]; Rose *v.* McKie, 145 Fed. 584, 76 C. C. A. 274 [*affirming* 140 Fed. 145]; Cleveland *v.* U. S., 111 Fed. 341, 49 C. C. A. 383; U. S. *v.* Kent, 107 Fed. 190 [*affirmed* in 113 Fed. 232, 51 C. C. A. 189]; Padgett *v.* Post, 106 Fed. 600, 45 C. C. A. 488; Duel County *v.* First Nat. Bank, 86 Fed. 264; Fleming *v.* Trowsdale, 85 Fed. 189, 29 C. C. A. 106; Ceredo First Nat. Bank *v.* Savings Soc., 80 Fed. 581, 25 C. C. A. 466; U. S. *v.* Key West, 78 Fed. 88, 23 C. C. A. 663; Marion County *v.* Coler, 75 Fed. 352, 21 C. C. A. 392; Grand County *v.* King, 67 Fed. 202, 14 C. C. A. 421; *In re* Copenhaver, 54 Fed. 660; Aylesworth *v.* Gratiot County, 43 Fed. 350; Deere *v.* Rio Grande County, 33 Fed. 823; U. S. *v.* Judges Scotland County, 32 Fed. 714 [*affirmed* in 140 U. S. 41, 11 S. Ct. 697, 35 L. ed. 351]; U. S. *v.* New Orleans, 31 Fed. 537; Shelley *v.* St. Charles County, 30 Fed. 603; Devereaux *v.* Brownsville, 29 Fed. 742; U. S. *v.* Monona Independent School Dist., 20 Fed. 294; U. S. *v.* New Orleans, 17 Fed. 483; U. S. *v.* Cape Girardeau County, 16 Fed. 836, 5 McCrary 280 [*affirmed* in 118 U. S. 68, 6 S. Ct. 951, 30 L. ed. 73]; Boro *v.* Phillips

established,[46] and the power and duty to levy the tax is expressly or impliedly given and imposed by statute and is clear,[47] or to levy a special tax where the

County, 3 Fed. Cas. No. 1,663, 4 Dill. 216; Heine *v.* Madison Parish, etc., Levee Com'rs, 11 Fed. Cas. No. 6,325, 1 Woods 246 [*affirmed* in 19 Wall. 655, 22 L. ed. 223]; Maenhaut *v.* New Orleans, 16 Fed. Cas. No. 8,940, 3 Woods 1; *Ex p.* Parsons, 18 Fed. Cas. No. 10,774, 1 Hughes 282; Sibley *v.* Mobile, 22 Fed. Cas. No. 12,829, 3 Woods 535; U. S. *v.* Buchanan County, 24 Fed. Cas. No. 14,679, 5 Dill. 285; U. S. *v.* Vernon County Ct., 25 Fed. Cas. No. 14,877, 3 Dill. 281, 1 N. Y. Wkly. Dig. 378; U. S. *v.* Jefferson County, 26 Fed. Cas. No. 15,472, 5 Dill. 310, 1 McCrary 356; U. S. *v.* Justices Lincoln County Ct., 26 Fed. Cas. No. 15,503, 5 Dill. 184; U. S. *v.* Lee County, 26 Fed. Cas. No. 15,589, 2 Biss. 77; U. S. *v.* Miller County, 26 Fed. Cas. No. 15,776, 4 Dill. 233; U. S. *v.* Sterling, 27 Fed. Cas. No. 16,388, 2 Biss. 408; Wisdom *v.* Memphis, 30 Fed. Cas. No. 17,903, 2 Flipp. 285.

Canada.—*Ex p.* Devoe, 17 N. Brunsw. 513; Quaintance *v.* Howard Tp., 18 Ont. 95; Clarke *v.* Palmerston, 6 Ont. 616.

See 33 Cent. Dig. tit. "Mandamus," § 238 *et seq.*

Judgment against municipality and individuals jointly.— Where a judgment is obtained against a town and individuals jointly the fact that the individual defendants have property subject to execution will not prevent mandamus to compel the town to levy a tax for the payment of the judgment. Palmer *v.* Stacy, 44 Iowa 340.

Writ to successor of city.—Meyer *v.* Brown, 65 Cal. 583, 26 Pac. 281; Devereaux *v.* Brownsville, 29 Fed. 742. And see, generally, MUNICIPAL CORPORATIONS.

Extent of relief.— When a plaintiff has shown himself entitled to a mandamus to compel the levy and collection of taxes by a county to pay a judgment against it, he is entitled to one which will set in motion all the necessary machinery, including the action of an assessor and collector, required to be taken after the levy of the tax by the county court, although no demand has been made on such officers to perform the acts so required. Marion County *v.* Coler, 75 Fed. 352, 21 C. C. A. 392.

Revision and correction of assessment.— Mandamus will lie to compel a borough council to examine, revise, and correct an assessment list and duplicate of taxes levied to pay a judgment recovered by the relator against the borough. Cooper *v.* Cape May Point, 72 N. J. L. 164, 60 Atl. 516. See also State *v.* Springer, (N. J. Sup. 1902) 52 Atl. 996.

Discretion of court.— The court has some measure of discretion in awarding writs of mandamus, and in requiring levies of taxes they will not be so employed as to impose an unnecessarily oppressive burden at one time. In providing for the payment of a large judgment the whole amount may be apportioned and collected part at a time by successive levies. Phelps *v.* Lodge, 60 Kan. 122, 55 Pac. 840.

After completion of tax-rolls and partial collection.— It cannot be objected to the issuance of a writ of mandamus requiring a tax levy that the tax-rolls are already completed and partly collected, and that it will be an inconvenience to levy and collect the amount wrongfully omitted from the rolls in the first instance. State *v.* Byrne, 32 Wash. 264, 78 Pac. 394.

46. *Arkansas.*— Cope *v.* Collins, 37 Ark. 649.

Illinois.—Springfield, etc., R. Co. *v.* Wayne County, 74 Ill. 27.

Kansas.— Cassatt *v.* Barber County, 39 Kan. 505, 18 Pac. 517.

Louisiana.— State *v.* St. Charles Parish Police Jury, 29 La. Ann. 146.

Michigan.— Mason *v.* Gladstone, 93 Mich. 232, 53 N. W. 16, no writ to pay order at suit of one equitably estopped to claim fund.

West Virginia.— Fayette County Sup'rs *v.* Rule, 5 W. Va. 276.

Void judgment.— No tax can be compelled to pay a void judgment for costs against a city or town. Pollard *v.* Atwood, 79 Mo. App. 193.

No writ to pay dormant judgment.— State *v.* Phelps County School-Dist. No. 25, 25 Nebr. 301, 41 N. W. 155.

No writ to pay void bonds.— Brownsville Taxing-Dist. *v.* Loague, 129 U. S. 493, 9 S. Ct. 327, 32 L. ed. 780.

No writ to pay unconstitutional claim.— State *v.* Comptroller-Gen., 4 S. C. 185.

47. *Arkansas.*—Graham *v.* Parham, 32 Ark. 676.

Colorado.— Vincent *v.* Hinsdale County, 12 Colo. App. 40, 54 Pac. 393.

Florida.— Columbia County *v.* King, 13 Fla. 451.

Illinois.— Springfield, etc., R. Co. *v.* Wayne County, 74 Ill. 27, holding that the writ will not issue to compel extension of a tax to pay a donation to a railroad, where the result of the election is not certified by the proper officer.

Indiana.— State *v.* Knox County Com'rs, 101 Ind. 398.

Iowa.— Chicago, etc., R. Co. *v.* Olmstead, 46 Iowa 316.

Kansas.— Cassatt *v.* Barber County, 39 Kan. 505, 18 Pac. 517; State *v.* Wyandotte, 4 Kan. 430.

Louisiana.— State *v.* New Orleans, 49 La. Ann. 946, 22 So. 370; State *v.* Shreveport, 33 La. Ann. 1179; State *v.* St. Martin Parish Police Jury, 33 La. Ann. 1122.

Maryland.— Wells *v.* Hyattsville, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89, expiration of time fixed for levy.

Nebraska.— Lancaster County *v.* State, 13 Nebr. 523, 14 N. W. 517.

New Jersey.— State *v.* Guttenberg, 39 N. J. L. 660.

municipality has already reached, in taxing for current expenses or otherwise, the limit of its taxing power as fixed by law,[48] or to make the levy before the time fixed by statute therefor,[49] or to interfere with or control the discretion

New York.— People *v.* Ulster County, 16 Johns. 59.

North Carolina.—Bear *v.* Brunswick County, 124 N. C. 204, 32 S. E. 558, 70 Am. St. Rep. 586, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711.

Ohio.— State *v.* Hamilton County, 7 Ohio Dec. (Reprint) 357, 2 Cinc. L. Bul. 156.

Texas.— Sherman *v.* Smith, 12 Tex. Civ. App. 580, 35 S. W. 294.

United States.— Bass *v.* Taft, 137 U. S. 458, 11 S. Ct. 154, 34 L. ed. 752; Carroll County *v.* U. S., 18 Wall. 71, 21 L. ed. 771; Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. ed. 403; Cleveland *v.* U. S., 111 Fed. 341, 49 C. C. A. 383; Weaver *v.* Ogden City, 111 Fed. 323; Grand County *v.* King, 67 Fed. 202, 14 C. C. A. 421 (holding that it is not within the power of a court to compel, by mandamus, the levy of a tax to pay a judgment against a county, where no statute expressly makes it obligatory on such county to levy a tax for the purpose, and it does not appear that the judgment was based on a bond or other security, issued under a statute making it obligatory to levy a tax to pay it); Stewart *v.* Justices St. Clair County Ct., 47 Fed. 482; U. S. *v.* New Orleans, 27 Fed. Cas. No. 15,871, 2 Woods 230 [*reversed* on other grounds in 98 U. S. 381, 25 L. ed. 225].

See 33 Cent. Dig. tit. "Mandamus," §§ 238 *et seq.*, 245; and, generally, MUNICIPAL CORPORATIONS. See also *infra*, VI, V, 1, h, (II).

Authority doubtful.— If the authority of a municipality to levy a tax to pay judgments is doubtful, mandamus to compel a levy will not be granted. State *v.* Guttenberg, 39 N. J. L. 660. See also Springfield, etc., R. Co. *v.* Wayne County, 74 Ill. 27.

Estimate necessary when required by statute see Lancaster County *v.* State, 13 Nebr. 523, 14 N. W. 517.

Omitted taxes for past years.— The neglect of a city to perform its contractual obligation to levy taxes at the time directed by law, in order to meet the interest on bonds, does not enable the city to escape that duty, but it may be forced to perform the same by mandamus relating back to the time when the levy should have been made. Austin *v.* Cahill, (Tex. 1905) 88 S. W. 542.

48. *Alabama.*—Speed *v.* Cocke, 57 Ala. 209.

Arkansas.— Cope *v.* Collins, 37 Ark. 649; Graham *v.* Parham, 32 Ark. 676.

Colorado.— Grand County *v.* People, 16 Colo. App. 215, 64 Pac. 675; Vincent *v.* Hinsdale County, 12 Colo. App. 40, 54 Pac. 393.

Illinois.— East St. Louis *v.* Board of Trustees, 6 Ill. App. 130; East St. Louis *v.* People, 6 Ill. App. 76.

Kansas.—Phelps *v.* Lodge, 60 Kan. 122, 55 Pac. 840.

Louisiana.— State *v.* New Orleans, 49 La. Ann. 946, 22 So. 370; State *v.* New Orleans, 34 La. Ann. 477; State *v.* Shreveport, 33 La. Ann. 1179; State *v.* New Orleans, 23 La. Ann. 358, notwithstanding special act directing levy.

Michigan.— People *v.* Presque Isle County Sup'rs, 36 Mich. 377.

Mississippi.— Warren County *v.* Klein, 51 Miss. 807.

Nebraska.— State *v.* Wahoo, 62 Nebr. 40, 86 N. W. 923; State *v.* Sheldon, 53 Nebr. 365, 73 N. W. 694; State *v.* Royse, 3 Nebr. (Unoff.) 269, 97 N. W. 473, 71 Nebr. 1, 98 N. W. 459; State *v.* Royse, 3 Nebr. (Unoff.) 262, 91 N. W. 559.

North Carolina.— Cromartie *v.* Bladen, 85 N. C. 211.

Ohio.— State *v.* Brewster, 9 Ohio Dec. (Reprint) 357, 12 Cinc. L. Bul. 223.

Texas.— Sherman *v.* Smith, 12 Tex. Civ. App. 580, 35 S. W. 294.

Washington.— Portland Sav. Bank *v.* Montesano, 14 Wash. 570, 45 Pac. 158.

United States.— Clay County *v.* U. S., 115 U. S. 616, 6 S. Ct. 199, 29 L. ed. 482; East St. Louis *v.* U. S., 110 U. S. 321, 4 S. Ct. 21, 28 L. ed. 162; U. S. *v.* Macon County Ct., 99 U. S. 582, 25 L. ed. 331; Carroll County *v.* U. S., 18 Wall. 71, 21 L. ed. 771; Cleveland *v.* U. S., 111 Fed. 341, 49 C. C. A. 383; U. S. *v.* Cicero, 50 Fed. 147, 1 C. C. A. 499; U. S. *v.* New Orleans, 31 Fed. 537; U. S. *v.* Knox County Ct., 15 Fed. 704, 5 McCrary 76; U. S. *v.* Burlington, 24 Fed. Cas. No. 14,687; U. S. *v.* Elizabeth, 25 Fed. Cas. No. 15,041*a*; U. S. *v.* Miller County, 26 Fed. Cas. No. 15,776, 4 Dill. 233.

See 33 Cent. Dig. tit. "Mandamus," §§ 245, 246; and *infra*, VI, V, 1, h, (II). See also MUNICIPAL CORPORATIONS.

Limit not reached.— It is no defense, in an application for a writ of mandamus to compel the levy of a tax by a town to pay a judgment against it, that the authority of the town to tax is limited, unless it is shown that such limited authority has been exhausted. The authority is not exhausted by an issue of bonds. Rose *v.* McKie, 145 Fed. 584, 76 C. C. A. 274 [*affirming* 140 Fed. 145].

Acts impairing contracts.— Mandamus lies to compel the exercise of the taxing power to pay debts as it existed when the debt was contracted, notwithstanding the subsequent adoption of a statute or constitutional provision limiting or reducing the power of taxation. Graham *v.* Tuscumbia, (Ala. 1906) 42 So. 400; State *v.* New Orleans, 36 La. Ann. 687; State *v.* New Orleans, 34 La. Ann. 477; Memphis *v.* Bethel, 3 Tenn. Cas. 205; U. S. *v.* New Orleans, 103 U. S. 358, 26 L. ed. 395; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Deere *v.* Rio Grande County, 33 Fed. 823. See also *infra*, VI, V, 1, h, (II), note 56; and CONSTITUTIONAL LAW, 8 Cyc. 951.

49. State *v.* Wyandotte, 4 Kan. 430. *Compare* Wisdom *v.* Memphis, 30 Fed. Cas. No. 17,903, 2 Flipp. 285.

of the municipal authorities as to the amount of taxes necessary to provide for current expenses[50] or otherwise.[51] Nor will the writ lie where some other adequate legal remedy is provided,[52] or where there has been no unreasonable delay in making the levy.[53]

(II) *FEDERAL COURTS.* The federal courts have no jurisdiction to issue mandamus to state, county, or municipal officers except as an incident to the exercise of the jurisdiction conferred upon them by law;[54] but where a federal court acquires jurisdiction and renders a judgment against a county or other municipal corporation on a bond, warrant, or other indebtedness, it has, as an incident to such jurisdiction, power by mandamus to compel the levy of a special tax to pay the judgment, when such tax is authorized or required by the laws of the state.[55] It has no power, however, to compel the levy of a tax not authorized by the constitution and laws of the state, or to exceed the limitation upon the taxing power created by such laws.[56]

Future taxes.— The writ of mandamus, being based on default of duty, cannot direct the levy of future taxes, the time for the levy of which has not yet arrived, but may direct the levy during a series of future years of taxes which should have been, but were not, levied in past years. Austin *v.* Cahill, (Tex. 1905) 88 S. W. 542.

50. State *v.* Sheldon, 53 Nebr. 365, 73 N. W. 694 (holding that where the county authorities have levied taxes to provide for the current expenses of a certain year to the constitutional limit courts cannot control their discretion); Young *v.* Lane, 43 Nebr. 812, 62 N. W. 202; Sherman *v.* Langham, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961 (holding that the writ will not lie to control in advance the discretion of a council in determining the amount that will be necessary to meet current expenses, which are a first charge against the fund so derived); Cleveland *v.* U. S., 111 Fed. 341, 49 C. C. A. 383. But when, as under Nebr. Code (1875), art. 9, § 5, the county authorities are prohibited from levying a tax in excess of a certain amount, for all purposes, and the estimate of expenses is sufficient to exhaust the revenue, where such expenses can be reduced by judicious management, and a portion of the revenues applied to the payment of judgment creditors, that course ought to be pursued, and the court may, by mandamus, require that it shall be pursued. Deuel County *v.* Buchanan County First Nat. Bank, 86 Fed. 264, 30 C. C. A. 30.

51. State *v.* St. Charles Parish Police Jury, 29 La. Ann. 146; Cleveland *v.* U. S., 111 Fed. 341, 49 C. C. A. 383; Grand County *v.* King, 67 Fed. 202, 14 C. C. A. 421. See *supra*, II, C, 2.

Claim not established.— A police jury cannot be compelled by a mandamus to levy a tax for the payment of a claim which they deny, and which has not been passed on judicially. State *v.* St. Charles Parish Police Jury, 29 La. Ann. 146.

52. State *v.* St. Charles Parish Police Jury, 29 La. Ann. 146; Com. *v.* Mifflintown, 2 Leg. Gaz. (Pa.) 75. See *supra*, II, D.

53. Tillson *v.* Putnam County Com'rs, 19 Ohio 415.

Pending appeal.— Since mandamus is a discretionary writ, an application for mandamus to compel the levy of a tax to pay a judgment recovered against a county was denied pending an appeal by the county from the judgment to the supreme court of the United States, although no stay of execution had been obtained. Territory *v.* Woodbury, 1 N. D. 85, 44 N. W. 1077. The failure of a city to levy a tax for the payment of a judgment at the first opportunity after its rendition does not necessarily give occasion for the issuance of a peremptory writ of mandamus to compel such levy, where proceedings in error to review the judgment have been brought in good faith and without unnecessary delay, although no stay bond has been given. Pherson *v.* Young, 69 Kan. 655, 77 Pac. 693.

54. Bath County *v.* Amy, 13 Wall. (U. S.) 244, 20 L. ed. 539. See COURTS, 11 Cyc. 848.

55. Graham *v.* Parham, 32 Ark. 676; Riggs *v.* Johnson County, 6 Wall. (U. S.) 166, 18 L. ed. 768; Knox County *v.* Aspinwall, 24 How. (U. S.) 376, 16 L. ed. 735 [*affirming* 2 Fed. Cas. No. 593]; Padgett *v.* Post, 106 Fed. 600, 45 C. C. A. 488; *In re* Copenhaver, 54 Fed. 660; U. S. *v.* Buchanan County, 24 Fed. Cas. No. 14,679, 5 Dill. 285; U. S. *v.* Jefferson County, 26 Fed. Cas. No. 15,472, 5 Dill. 310, 1 McCrary 356; U. S. *v.* Sterling, 27 Fed. Cas. No. 16,388, 2 Biss. 408; and other federal cases cited *supra*, VI, V, 1, h, (I), note 45. See also COURTS, 11 Cyc. 848.

Appointment of commissioner to levy and collect tax not authorized.— Rusch *v.* Des Moines County, 21 Fed. Cas. No. 12,142, Woodw. 313.

56. Graham *v.* Parham, 32 Ark. 676; *Ex p.* Rowland, 104 U. S. 604, 26 L. ed. 861; Carroll County *v.* U. S., 18 Wall. (U. S.) 71, 21 L. ed. 771; Cleveland *v.* U. S., 111 Fed. 341, 49 C. C. A. 383; Grand County *v.* King, 67 Fed. 202, 14 C. C. A. 421; Stewart *v.* Justices St. Clair County Ct., 47 Fed. 482; U. S. *v.* Knox County Ct., 15 Fed. 704, 5 McCrary 76; U. S. *v.* Miller County, 26 Fed. Cas. No. 15,776, 4 Dill. 233; and other federal cases cited *supra*, VI, V, 1, h, (I), notes 47, 48.

Impairing obligation of contract.— But after a municipality has issued bonds or

(III) *Demand and Refusal.* Ordinarily, before applying for a writ to compel the levy of a tax to pay judgments, bonds, warrants, or other indebtedness, there must be a demand and refusal;[57] but this is not necessary where the conduct of the officer or board charged with the duty to levy the tax is equivalent to a refusal, or if it otherwise appears that a demand would be useless.[58] Any definite or positive request or demand to levy a tax for the payment of a judgment is sufficient.[59] A demand of payment of a judgment is sufficient to include any particular thing which is necessary to be done in order to enable the city council to make payment.[60] Under certain statutes providing for mandamus to compel the levy of a special tax by a city to pay an execution, a demand has been held unnecessary.[61]

i. Levy For Public Buildings, Works, and Other Improvements. Mandamus will also lie to compel the levy of taxes, where the duty to levy the same is imposed by law for the construction of public buildings,[62] waterworks,[63] bridges,[64] etc.; for establishing and maintaining public parks,[65] libraries,[66] etc.; or for the opening, constructing, altering, or repairing of streets or highways.[67] In all cases, however, the tax must be clearly authorized by law and the relator's right must be clearly established.[68] Special assessments upon the property within a district

other evidences of indebtedness and provided for the levy of taxes to pay the same, it cannot constitutionally impair the obligation of such contracts by withdrawing or limiting the taxing power; and the federal courts therefore having rendered judgment on such contracts, may, by mandamus, compel the levy of a tax as authorized when the contracts were entered into. State *v.* St. Martin's Parish Police Jury, 111 U. S. 716, 4 S. Ct. 648, 28 L. ed. 574; U. S. *v.* New Orleans, 103 U. S. 358, 26 L. ed. 395; U. S. *v.* Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Padgett *v.* Post, 106 Fed. 600, 45 C. C. A. 488; U. S. *v.* Jefferson County, 26 Fed. Cas. No. 15,472, 5 Dill. 310, 1 McCrary 356. See also *supra*, VI, V, 1, h, (I), note 48; and CONSTITUTIONAL LAW, 8 Cyc. 951.

57. Grand County *v.* People, 16 Colo. App. 215, 64 Pac. 675; Grand County *v.* People, 8 Colo. App. 43, 46 Pac. 107; State *v.* Jacksonville, 22 Fla. 21; Garden City First Nat. Bank *v.* Morton County, 7 Kan. App. 739, 52 Pac. 580. See *supra*, II, G.

Contra after execution returned nulla bona. — State *v.* Slavens, 75 Mo. 508; Fisher *v.* Charleston, 17 W. Va. 595.

58. Columbia County *v.* King, 13 Fla. 451; Austin *v.* Cahill, (Tex. 1905) 88 S. W. 542; State *v.* Byrne, 32 Wash. 264, 73 Pac. 394. See *supra*, II, G.

59. State *v.* Jacksonville, 22 Fla. 21.

Sufficiency of demand. — Fleming *v.* Trowsdale, 85 Fed. 189, 29 C. C. A. 106.

Filing of a certificate of judgment according to statute is a sufficient demand of payment. Helena *v.* U. S., 104 Fed. 113, 43 C. C. A. 429.

60. Cairo *v.* Campbell, 116 Ill. 305, 5 N. E. 114, 8 N. E. 688 (sufficient to include levy of tax); Cairo *v.* Everett, 107 Ill. 75; Lewis *v.* Union Drainage Dist. No. 1, Drainage Com'rs, 111 Ill. App. 222; U. S. *v.* Saunders, 124 Fed. 124, 59 C. C. A. 394.

61. State *v.* Slavens, 75 Mo. 508.

62. Tarver *v.* Tallapoosa County, 17 Ala. 527; Manor *v.* McCall, 5 Ga. 522; Watts *v.* Carroll Police Jury, 11 La. Ann. 141; Perkins *v.* Slack, 86 Pa. St. 270.

63. Holroyd *v.* Indian Lake, 180 N. Y. 318, 73 N. E. 36 [*affirming* 85 N. Y. App. Div. 246, 83 N. Y. Suppl. 533].

64. Anderson County Ct. *v.* Stone, 18 B. Mon. (Ky.) 848; Waupaca County *v.* Matteson, 79 Wis. 67, 48 N. W. 213.

65. People *v.* Salomon, 51 Ill. 37.

66. State *v.* Jersey City Bd. of Finance, 53 N. J. L. 62, 20 Atl. 755.

67. *California.* — Himmelmann *v.* Cofran, 36 Cal. 411.

Indiana. — State *v.* Stout, 61 Ind. 143, for construction of gravel road.

New York. — People *v.* St. Lawrence, 5 Cow. 292.

Ohio. — State *v.* Franklin County Com'rs, 35 Ohio St. 458.

South Carolina. — Shoolbred *v.* Charleston, 2 Bay 63.

Wisconsin. — State *v.* Hobe, 106 Wis. 411, 82 N. W. 336.

Canada. — *Ex p.* Jones, 10 N. Brunsw. 183.

68. Anderson County Ct. *v.* Stone, 18 B. Mon. (Ky.) 484; People *v.* Presque Isle County, 36 Mich. 377.

Defective bridge. — In mandamus to compel the levy of a tax to pay for a bridge the writ will not be granted if the work has not been done according to the contract and has not been accepted. Anderson County Ct. *v.* Stone, 18 B. Mon. (Ky.) 848.

Premature application. — Where the law does not provide that a tax shall be levied in the first instance but that the costs shall be paid from the bridge or other funds in the county treasury, mandamus to compel levy of a tax will be denied. State *v.* Hamilton County Com'rs, 7 Ohio Dec. (Reprint) 357, 2 Cinc. L. Bul. 156.

Exhaustion of special assessment. — Where payment of a judgment against a city for the damages for taking land for a street has been provided for, as required by statute, by the levy of a special assessment, upon the property specially benefited, the landowner

particularly benefited by the improvement to defray the cost thereof either wholly or in part are elsewhere treated.[69]

j. Levy For School Purposes. Mandamus will lie to compel the proper authorities to raise by taxation the necessary and proper amount for school purposes as determined by the board of education, where the determination of the board is binding,[70] or to otherwise perform specific duties imposed by law with respect to the levy and assessment of taxes for such purposes;[71] but of course the writ will not lie to compel taxation not authorized by law or in excess of the limit prescribed by law,[72] or to control a discretion vested in an officer or board.[73]

k. Levy to Cover Loss by Default of Treasurer. Mandamus will lie to compel the proper county officers to levy a tax, as required by statute, to cover a loss to the state by reason of a default of the county treasurer;[74] but not, it has been held, until the remedy on his bond has been exhausted or a showing is made that a suit on the bond would be unavailing.[75]

is not entitled to compel by mandamus the levy of a tax for that purpose upon all the taxable property of the city until the special assessment has proved inadequate. State *v.* Superior, 81 Wis. 649, 51 N. W. 1014.

69. See *infra*, VI, V, 10.

70. People *v.* Bennett, 54 Barh. (N. Y.) 480; State *v.* Smith, 11 Wis. 65. See also *supra*, VI, F, 11, c.

Determination of board of education not binding.— Where it is the duty of the city council to determine what portion of the amount required for school purposes, as reported by the board of education, is to be raised by taxation instead of from other sources, as under Nebr. Comp. St. c. 79, § 25, subd. 17, mandamus does not lie to compel the council to levy a tax for the amount required by the board. State *v.* Omaha, 39 Nebr. 745, 58 N. W. 442 [*distinguishing* State *v.* Paddock, 36 Nebr. 263, 54 N. W. 515]; State *v.* Omaha, 7 Nebr. 267.

71. *Kentucky.*— Lexington *v.* Lexington Bd. of Education, 65 S. W. 827, 23 Ky. L. Rep. 1663.

Missouri.— State *v.* Riley, 85 Mo. 156 (holding that mandamus would lie to compel the county clerk to assess the school taxes of a district on the taxable property therein according to its legal limits and in disregard of an illegal change of boundary); State *v.* Patton, 108 Mo. App. 26, 82 S. W. 537 (holding that mandamus is the proper remedy to compel a county clerk to extend levies and make an assessment for a school-district on his refusal so to do).

Nebraska.— State *v.* Studheit, 11 Nebr. 359, 9 N. W. 559, holding that the writ would lie to compel a school-district officer to make, as required by statute, a return or report to the county clerk of the lawful taxes voted by the district at the annual meeting.

New Hampshire.— Orford School Dist. No. 6 *v.* Carr, 63 N. H. 201, holding that it is not the duty or right of selectmen to inquire into the legality of the vote of a school-district to raise money; but when such vote is certified to them by the district clerk, they should assess the tax, and a mandamus lies to enforce performance of that duty.

Wisconsin.— State *v.* Lamont, 86 Wis. 563, 57 N. W. 369 (holding that the board of a free high school-district may institute a proceeding by mandamus to compel the levy and collection of a tax for the support of the school); State *v.* Smith, 11 Wis. 65.

School-bonds.— Where the school directors annually certify the amount necessary to pay interest upon school-bonds, and the county commissioners neglect and refuse to make the required levy, mandamus will issue, on the application of the holder of part of the bonds, requiring the levy to be made. State *v.* Byrne, 32 Wash. 264, 73 Pac. 394. See *supra*, VI, V, 1, h, (I).

Judgments.— Where the trustees of a school-district refused to pay a judgment had against them in their corporate capacity, and did not assess their district to satisfy the judgment, a writ of mandamus was granted to compel the assessment. *Ex p.* Devoe, 17 N. Brunsw. 513. See *supra*, VI, V, 1, h, (I).

Additional levies see *infra*, VI, V, 1, l, note 76.

Other remedy.—The existence of the remedy by certiorari is insufficient to bar the right of a school-district to mandamus against the county clerk to compel him to extend levies and make an assessment for the district in case of his refusal so to do. State *v.* Patton, 108 Mo. App. 26, 82 S. W. 537.

72. Allegheny County Public Schools *v.* Allegheny County Com'rs, 20 Md. 449; State *v.* Brewster, 9 Ohio Dec. (Reprint) 357, 12 Cinc. L. Bul. 223, holding that where the levy certified to the county auditor by the board of education, under Ohio Rev. St. § 3960, and the levy certified by the common council of Cincinnati, under section 2691, in the aggregate exceeded the limit of taxation fixed by law in the city, mandamus would not lie against the auditor to put the levy of the board of education on the tax duplicate, since, the aggregate being in excess, he could not be compelled to put on one part more than the other. See also *supra*, VI, V, 1, h, h, 1.

73. State *v.* Omaha, 39 Nebr. 745, 58 N. W. 442, referred to *supra*, this section, note 70. And see *supra*, VI, V, 1, d.

74. People *v.* St. Clair County, 30 Mich. 388.

75. State *v.* Montgomery County, 25 Ind.

1. Relevies and Additional Levies. Whenever there is a right to compel by mandamus the levy of a tax to raise a certain sum within the taxing limit, the court can compel a relevy or an additional levy of such a rate as will raise the sum necessary to satisfy the requirement, even to the maximum rate authorized by law.[76] But as a rule where a tax has once been levied by a municipal corporation for the payment of a judgment, bond, or other indebtedness, and is still uncollected in whole or in part, or unaccounted for, another levy or a relevy will not be compelled.[77]

2. PAYMENT. Mandamus will lie to compel acceptance of the proper sum due for taxes,[78] or to compel the receipt of state bank-bills,[79] coupons from state bonds,[80] or other authorized medium of payment,[81] unless the remedy is excluded by

210; People *v.* Livingston County, 17 N. Y. 486. *Compare*, however, People *v.* St. Clair County, 30 Mich. 388.

76. Lexington *v.* Lexington Bd. of Education, 65 S. W. 827, 23 Ky. L. Rep. 1663. A city council cannot, after the service of an alternative writ of mandamus ordering it to levy a tax for a certain purpose, by making the annual tax and omitting therefrom the levy which it was ordered to make, defeat the mandamus proceeding; and, where it attempts to do so, it is competent for the court to compel it to reconvene and correct the levy, or to add an additional levy sufficient to pay the claim. Denver *v.* Adams County, 33 Colo. 1, 77 Pac. 858. Where a judgment directed county supervisors to collect a tax and place the proceeds in the hands of the county treasurer as a sinking fund for plaintiff town, and the supervisors collected the tax and paid the same over to the treasurer without any directions, and he used it for county purposes, it was held that the town was entitled to a peremptory mandamus to compel the board of supervisors to again levy and collect the sum and pay it over to the county treasurer for the benefit of the town. People *v.* Delaware County, 173 N. Y. 297, 66 N. E. 7 [*reversing* 75 N. Y. App. Div. 184, 77 N. Y. Suppl. 676].

School purposes.— Where an insufficient levy for school purposes has been made by a city at the time fixed by law, the city may be compelled by mandamus, at any time before the tax books go into the hands of the collector, to make an additional levy. Lexington *v.* Lexington Bd. of Education, 65 S. W. 827, 23 Ky. L. Rep. 1663.

77. Huey *v.* Jackson Parish Police Jury, 33 La. Ann. 1091; Duperier *v.* Iberia Parish Police Jury, 31 La. Ann. 709; Bass *v.* Taft, 137 U. S. 458, 11 S. Ct. 154, 34 L. ed. 752. Where coupon bonds had been issued by a district in a county to assist in the construction of a railroad, and the coupons falling due in a certain year on said bonds had been levied for by the county court, it was held that the holder of such coupons must look to the sheriff of the county for payment, and was not entitled by mandamus to compel a second levy upon the people and property of said district to pay the interest represented by such coupons. Welty *v.* Barbour County Ct., 46 W. Va. 460, 33 S. E. 269. So, where bonds, maturing in different years, were issued for the improvement of certain lands upon which they were made a lien until paid, and the law required the county court to levy enough taxes upon such lands each year to pay the annual interest on such bonds, and all bonds maturing the following year, allowing at least twenty-five per cent for delinquent taxes, and the county court only levied enough, if all collected, to pay the interest and bonds, and allowed nothing for delinquencies, and delinquent suits were instituted, and certain tracts sold under judgments recovered, and some of the purchasers were *bona fide*, it was held that the court could not attempt, in mandamus proceedings, to apportion or determine the equities which existed, and would not issue a mandamus to compel a second levy upon lands sold for the payment of bonds due before such sales were made. Shelley *v.* St. Charles County, 30 Fed. 603.

Sheriff's bond.— One to whom the fiscal court has allowed claims against the county, payable out of the county levy, is not entitled to a mandamus to compel the court to make a second levy to pay his claims until he has exhausted his remedy upon the sheriff's general bond executed under Ky. St. § 4133, it not being sufficient that he has exhausted his remedy upon the sheriff's county levy bond. Adair *v.* Hancock Deposit Bank, 107 Ky. 212, 53 S. W. 295, 21 Ky. L. Rep. 934.

78. Metropolitan L. Ins. Co. *v.* Darenkamp, 66 S. W. 1125, 23 Ky. L. Rep. 2249 (license-tax); People *v.* O'Keefe, 90 N. Y. 419; People *v.* Cady, 50 N. Y. Super. Ct. 399; McNary *v.* Wrightman, 32 Oreg. 573, 52 Pac. 510; Com. *v.* Peltz, 1 Brewst. (Pa.) 159, 6 Phila. 330 (where writ issued to compel a tax-receiver to receive a poll tax separate from the general tax).

Before time for payment.— The writ will not lie to compel the receipt of a license-tax before the time fixed by statute for payment. State *v.* McMonies, (Nebr. 1906) 106 N. W. 454.

79. State *v.* Gaillard, 11 S. C. 309. But the writ would not lie where their receipt was prohibited by statute. State *v.* Sneed, 9 Baxt. (Tenn.) 472.

80. Lee *v.* Harlow, 75 Va. 22; Williamson *v.* Massey, 33 Gratt. (Va.) 237; Hartman *v.* Greenhow, 102 U. S. 672, 26 L. ed. 271.

81. Perry *v.* Washburn, 20 Cal. 318.

statute or some other adequate remedy is provided.[82] The writ will also lie to compel the issue of a receipt on payment of taxes.[83]

3. Collection — a. In General. Mandamus will lie in a proper case to compel the collection of taxes,[84] including a tax levied by a county, city, or other municipality to pay judgments, bonds, or other indebtedness,[85] and to compel the preliminary acts necessary to collection, such as the issue of a warrant of distress or other process for collection,[86] or delivery of the tax duplicates, tax-books, lists, etc., by the county commissioners or other proper officers to the collector of taxes.[87] Of course the writ cannot be granted to compel the collection of taxes or other acts in connection therewith where there is no duty or power to do the act sought to be enjoined.[88]

82. State *v.* Gaillard, 11 S. C. 309 (remedy by mandamus taken away by statute); Wilcox *v.* Hunter, (Va. 1896) 25 S. E. 1000 (no writ to compel receipt of coupons from bonds for license-fees when special statutory remedy given); Moore *v.* Greenhow, 114 U. S. 338, 5 S. Ct. 1020, 29 L. ed. 240; Antoni *v.* Greenhow, 107 U. S. 769, 2 S. Ct. 91, 27 L. ed. 468.

83. Perry *v.* Washburn, 20 Cal. 318; Metropolitan L. Ins. Co. *v.* Darenkamp, 66 S. W. 1125, 23 Ky. L. Rep. 2249 (license-tax); McNary *v.* Wrightman, 32 Oreg. 573, 52 Pac. 510; Lobban *v.* State, 9 Wyo. 377, 64 Pac. 82.

Illegal taxes unpaid.— Mandamus will not lie to compel a county treasurer to certify that all taxes are paid when taxes remain unpaid, although the same are illegal. State *v.* Nelson, 41 Minn. 25, 42 N. W. 548, 4 L. R. A. 300.

84. *Alabama.*—Tarver *v.* Tallapoosa County, 17 Ala. 527.

Connecticut.— State *v.* Fyler, 48 Conn. 145.

Iowa.— State *v.* Johnson County Judge, 12 Iowa 237.

Louisiana.— State *v.* O'Kelly, 48 La. Ann. 28, 18 So. 757.

Tennessee.— State *v.* Whitworth, 8 Lea 594.

England.— Rex *v.* Benn, 6 T. R. 198.

Other remedy.— It has been held that the remedy by mandamus is not excluded by the fact that an action may be brought on the collector's bond, as this remedy is not adequate (State *v.* Fyler, 48 Conn. 145); but in Virginia there is a decision to the contrary (Nottoway County *v.* Powell, 95 Va. 635, 29 S. E. 682). The fact that an indictment will lie does not exclude mandamus. State *v.* Whitworth, 8 Lea (Tenn.) 594. See *supra*, II, D, 2, d.

85. State *v.* Clinton County, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984; Houston *v.* Voorhies, 70 Tex. 356, 8 S. W. 109, where it is said that the mere levy and assessment of the tax and placing the tax-roll in the tax-collector's hands is not a full compliance by a city with its duty to creditors.

86. Tremont School Dist. *v.* Clark, 33 Me. 482; Waldron *v.* Lee, 5 Pick. (Mass.) 323; Brown *v.* Mullica Tp., 48 N. J. L. 447, 4 Atl. 427; People *v.* Halsey, 53 Barb. (N. Y.) 547, 36 How. Pr. 487 [*affirmed* in 37 N. Y. 344]; People *v.* Scheneetady County, 35 Barb. (N. Y.) 408, to attach collector's warrant to the tax books.

Estoppel.— A collector of taxes cannot by mandamus compel the delivery to him of warrants for the sale of lands for taxes, when he has stood by and allowed the lands to be sold for taxes by other officials, who acted under a mistaken view of the law in supposing that they were the ones to make the sales. Brown *v.* Mullica Tp., 48 N. J. L. 447, 4 Atl. 427.

87. *California.*— Kings County *v.* Johnson, 104 Cal. 198, 37 Pac. 870; People *v.* Ashbury, 44 Cal. 616.

Indiana.— Hamilton *v.* State, 3 Ind. 452, to compel the county auditor to issue his duplicate for a tax on real property without adding thereto an illegal assessment by the state board of equalization.

New York.— People *v.* Hardenburgh, 90 N. Y. 411.

Pennsylvania.— Com. *v.* Lyter, 162 Pa. St. 50, 29 Atl. 352.

South Carolina.— Runion *v.* Latimer, 6 S. C. 126, writ lies by treasurer *de facto* against usurping treasurer to deliver tax duplicate.

88. State *v.* New Castle, 2 Pennew. (Del.) 466, 47 Atl. 374 (no writ to collect after one year from date of warrant); Vicksburg, etc., R. Co. *v.* Caddo Parish, 10 La. Ann. 587 (no writ to sheriff having no power to collect); State *v.* Smith, 71 Ohio St. 13, 72 N. E. 300 (no writ to correct return as to certain taxes not required to be returned). A statute imposing upon county commissioners the duty to levy and assess a special tax to pay a judgment or other debt and to require the tax-collector to collect the same, gives the commissioners no authority to collect the same and therefore mandamus will not lie against them "to cause the tax to be collected." *Ex p.* Rowland, 104 U. S. 604, 26 L. ed. 861.

When collection has been enjoined.— Mandamus will not lie to compel a board of county commissioners to order the collection of a railroad aid tax which it has been enjoined from enforcing, especially where the *personnel* of the board has changed since the injunction decree was rendered on default. State *v.* Clinton County Com'rs, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984. Nor will it lie to compel the county treasurer to collect such tax until the tax lists shall have been placed in his hands and he shall have then refused or neglected to collect it. Chicago, etc., R. Co. *v.* Olmstead, 46 Iowa 316.

b. Inspection of Collector's Books. Mandamus will lie in a proper case to compel a collector of taxes to submit his books for inspection by an officer or board required or authorized to examine them.[89]

c. Appointment or Election of Collectors. Mandamus will lie to compel the county commissioners or others to appoint tax-collectors as required by statute,[90] or to compel the issue of an election certificate,[91] but not to control or interfere with a board's discretion as to the appointment of any particular person,[92] nor to determine the right to the office as between opposing claimants.[93]

4. Division or Apportionment of Taxes Collected Between Municipalities or Proper Officers. Upon the collection of taxes mandamus will lie to compel a proper apportionment or division thereof among the municipalities and officers lawfully entitled thereto.[94] But in accordance with the general rules governing mandamus the writ will not lie where there is another adequate remedy,[95]

Errors in tax-books.— The collector is not responsible for the tax-books, but he is responsible for the taxes as they appear upon the tax-books, and they cannot be changed by him in any manner, except specifically in pursuance to statute, and therefore mandamus will not lie to compel him to accept a certain sum in payment of taxes and to pay the money so paid into a school-district different from that in which his tax-book shows the taxpayer was listed. State *v.* Brown, 172 Mo. 374, 72 S. W. 640.

Delinquent tax returns.— Where a statute (Mich. Comp. Laws (1871), § 1034) requires all returns by the county treasurers of lands on which the taxes are delinquent to be delivered into the auditor-general's office on or before the last day of March in the year following their assessment, and the auditor-general is required by another section of the statute (section 1044) to make out the lists for publication on the first day of July, mandamus will not be granted to compel that officer to receive and accept returns which are forwarded after the first day of July and upon the basis thereof to credit the county with the amount of delinquent taxes so returned. People *v.* Auditor-Gen., 36 Mich. 271.

Review of decree for delinquent taxes.— Where an appeal is authorized by law from a decree for delinquent taxes, mandamus will not lie to compel the circuit judge to review such a decree and allow the landowner to answer, he alleging in his petition that the tax is illegal, and that he was not served with subpœna, but not that the petition and tax list were not published. Wiley *v.* Tuscola County Cir. Judge, 86 Mich. 381, 49 N. W. 35.

Contract for collection.— The adjudicatee of a contract for the collection of delinquent taxes and licenses of the city of New Orleans, for a specified year, is required to obtain and have prepared by the city notary a notarial contract therefor, conformably to the specifications of an ordinance adopted by the city council in pursuance of a state law; and where he fails to obtain such a contract for presentation to the mayor for signature he is without legal right to compel him, by mandamus, to sign any other. State *v.* Fitzpatrick, 45 La. Ann. 269, 270, 12 So. 353.

89. Scott *v.* Richland Police Jury, 46 La. Ann. 278, 14 So. 521.

90. Com. *v.* Philadelphia, 2 Pars. Eq. Cas. (Pa.) 220.

91. *In re* Election, 3 Lanc. L. Rev. (Pa.) 225.

92. Com. *v.* Perkins, 7 Pa. St. 42; Com. *v.* Philadelphia Com'rs, 2 Pars. Eq. Cas. (Pa.) 220.

93. Com. *v.* Philadelphia Com'rs, 2 Pars. Eq. Cas. (Pa.) 220.

94. *California.*— People *v.* Reis, 76 Cal. 269, 18 Pac. 309, holding that the county treasurer might be compelled to pay over interest collected for the state upon delinquent taxes.

Indiana.— Manor *v.* State, 149 Ind. 310, 49 N. E. 160.

Louisiana.— State *v.* Geier, 35 La. Ann. 1148, writ lies to treasurer to pay school moneys irregularly paid to him.

Maryland.— Anne Arundel County *v.* Gantt, 73 Md. 521, 21 Atl. 548.

Michigan.— Webster *v.* Wheeler, 119 Mich. 601, 78 N. W. 657 (writ lies by city treasurer to recover from county treasurer city taxes paid by mistake); East Saginaw *v.* Saginaw County, 44 Mich. 273, 6 N. W. 684.

Mississippi.— Brandt *v.* Murphy, 68 Miss. 84, 8 So. 296.

Nebraska.— State *v.* White, 29 Nebr. 288, 45 N. W. 631; State *v.* Roderick, 23 Nebr. 505, 37 N. W. 77.

New Jersey.— Trewin *v.* Shurts, (1907) 65 Atl. 984; Shields *v.* Grear, 55 N. J. L. 503, 27 Atl. 807; Shields *v.* Paterson, 55 N. J. L. 495, 27 Atl. 803; State *v.* Bernards Tp., 42 N. J. L. 338.

North Carolina.— Jones *v.* Stokes County, (1906) 55 S. E. 427.

Pennsylvania.— *In re* Porter Tp. Road, 1 Walk. 10.

Washington.— State *v.* Mish, 13 Wash. 302, 43 Pac. 40.

See 33 Cent. Dig. tit. "Mandamus," § 255.

Claims between municipalities in general see *supra*, VI, U, 1, g.

95. Bay County Sup'rs *v.* Arenac County, 111 Mich. 105, 69 N. W. 146 (holding mandamus will not lie to compel a county organized from the territory of another county to refund the amount of state taxes paid by the latter to the use of the former in

or in the absence of legal right,[96] or where an apportionment of the funds essential to fix the right thereto has not been made.[97]

5. Payment Over of Taxes by Collectors.[98] Mandamus will issue to compel a tax-collector to pay over taxes collected by him to the proper officer.[99] The writ will not lie, however, to compel township supervisors to pay over to the township treasurer moneys collected, where the effect would be to control their discretion as to the sufficiency of the treasurer's bond.[1] But if they refuse to act at all, mandamus will lie to compel them.[2] The writ will not lie when there is a special statutory remedy.[3]

6. Refund of Taxes Paid. Mandamus will lie to compel an officer or board to refund taxes illegally or improperly collected, where there is no judicial discretion in the matter but the facts are undisputed and the duty to refund is imperative;[4] but not where there is an issue involved which should go to a jury,[5] nor where the powers conferred upon the officer or board in this respect are judicial and not ministerial,[6] although it will lie in such case to compel the officer or board to act and exercise their discretion.[7] The writ will lie at the suit of a corporation to compel the county auditor, on his discovering that taxes have been erroneously collected, to call the attention of the county commissioners thereto, so that they may order a refund of the taxes so paid.[8]

7. Tax-Sales, Certificates, Conveyances, Etc. Mandamus will lie to compel the issue of warrants for the sale of lands for the payment of taxes;[9] or to compel the proper officers to make sales, issue certificates and deeds, assign certificates, and perform other duties in relation to tax-sales;[10] but in all cases the right

consequence of an erroneous apportionment); State *v.* Nelson, 105 Wis. 111, 80 N. W. 1105 (no writ by school-district for taxes paid by town treasurer to county treasurer by mistake).

96. Ross *v.* Lane, 3 Sm. & M. (Miss.) 695; Libby *v.* State, 59 Nebr. 264, 80 N. W. 817, holding that a writ would not lie in behalf of a city against a county to pay over a road tax when the former had already received its share.

97. Oregon City *v.* Moore, 30 Oreg. 215, 46 Pac. 1017, 47 Pac. 851.

98. **Claims between municipality and officer in general** see *supra*, VI, U, 1, h.

99. Trenton Public Schools *v.* Hammell, 31 N. J. L. 446; People *v.* Brown, 55 N. Y. 180, holding that payment to unauthorized officers was no defense.

1. Com. *v.* Norton, 3 Kulp (Pa.) 231.

2. Com. *v.* Norton, 3 Kulp (Pa.) 231.

3. Sunapee School Dist. No. 8 *v.* Perkins, 49 N. H. 538. And *compare* State *v.* Boullt, 26 La. Ann. 259.

4. Henderson *v.* State, 53 Ind. 60; Eyerly *v.* Jasper County, 72 Iowa 149, 33 N. W. 609; People *v.* Ulster County, 65 N. Y. 300 (writ lies to compel county supervisors to obey an order of court to refund); People *v.* Otsego County, 51 N. Y. 401. N. Y. Laws (1897), c. 284, providing that the state controller "shall," by order, direct the county treasurer to refund transfer taxes which have been illegally paid, is mandatory, so that mandamus will lie for a failure to comply therewith. Matter of Coogan, 27 Misc. (N. Y.) 563, 59 N. Y. Suppl. 111.

Remedy by action.— In some of the cases it has been held that the remedy by action to recover taxes paid is adequate and that mandamus will not lie. George's Creek Coal, etc., Co. *v.* Allegheny County Com'rs, 59 Md. 255; People *v.* Chenango County, 11 N. Y. 563.

5. Byles *v.* Golden Tp., 52 Mich. 612, 18 N. W. 383.

6. Younger *v.* Santa Cruz County, 68 Cal. 241, 9 Pac. 103 (holding that under a statute providing that any taxes erroneously or illegally collected might, by order of the board of county supervisors, be refunded by the county treasurer, the power to refund conferred upon the board was judicial, and not ministerial, and therefore mandamus would not lie to compel it to refund); State *v.* Upson, 79 Conn. 154, 64 Atl. 2 (holding that mandamus would not lie to compel the insurance commissioner to determine what amount should be refunded to insurance companies under a statute directing him to so determine, since it was a matter of judgment how much should be repaid); State *v.* Brewster, 6 Ohio Dec. (Reprint) 1210, 12 Am. L. Rec. 544.

7. People *v.* Otsego County, 51 N. Y. 401.

8. Hagerty *v.* State, 14 Ohio Cir. Ct. 95, 7 Ohio Cir. Dec. 88.

9. Brown *v.* Mullica Tp., 48 N. J. L. 447, 4 Atl. 427, where, however, the writ was refused on the merits.

10. *Georgia.*— Mitchell *v.* Hay, 37 Ga. 581, to compel release of property seized for tax when properly bonded.

Iowa.— McCready *v.* Sexton, 29 Iowa 356, 4 Am. Dec. 214, writ lies for corrected deed.

Kansas.— State *v.* Magill, 4 Kan. 415, to compel assignment of certificate of sale.

Louisiana.— State *v.* Register of Conveyances, 113 La. 93, 36 So. 900, to redeem.

Michigan.— Hudson *v.* Whitney, 53 Mich.

of the relator to the relief asked and the duty of the officer to perform the act must be established;[11] and where an officer is vested with judicial powers with respect to tax-sales and conveyances, mandamus will not lie to compel him to decide in any particular way or to set aside an erroneous decision.[12]

8. ISSUE OF CERTIFICATE OF TAXES DUE. Where the duty is imposed by statute mandamus will lie to compel a tax assessor or other officer to issue to a party applying therefor a certified statement over his hand and official seal of all taxes and assessments due and unpaid on certain real estate.[13]

9. COMPENSATION OF ASSESSORS. Where, in his settlement with a tax assessor,

158, 18 N. W. 626, to compel sale for delinquent taxes.

Minnesota.— State *v.* Halden, 62 Minn. 246, 64 N. W. 568, to permit redemption when notice of expiration of redemption is defective.

Nebraska.— State *v.* Farney, 36 Nebr. 537, 54 N. W. 862, one offering to bid may compel treasurer to offer for sale.

New Jersey.— Hugg *v.* Camden, 39 N. J. L. 620, sale imperative under directory statute.

New York.— People *v.* Brooklyn, 114 N. Y. 19, 20 N. E. 611 (to compel receipt of taxes offered upon invalid sale); People *v.* Lewis, 102 N. Y. App. Div. 408, 92 N. Y. Suppl. 642; Lester *v.* Macdaniel, 5 Misc. 190, 25 N. Y. Suppl. 815 (to enforce redemption); People *v.* Jackson, 1 N. Y. St. 491 (to cancel sales of eight years' standing under special act).

Virginia.— Randolph *v.* Stalnaker, 13 Gratt. 523, to record report of tax-sales.

Washington.— State *v.* Reed, 29 Wash. 383, 69 Pac. 1096, for redemption of undivided interests.

West Virginia.— King *v.* Mason, 60 W. Va. 607, 56 S. E. 377, to compel officer to receive and decide application for redemption.

Wisconsin.— State *v.* Winn, 19 Wis. 304, 88 Am. Dec. 689, writ lies for deed and former void deed no defense.

Wyoming.— Lobhan *v.* State, 9 Wyo. 377, 64 Pac. 82, to compel treasurer to give a receipt for taxes paid by mortgagee on mortgaged land.

See 33 Cent. Dig. tit. "Mandamus," §§ 252–255.

11. *California.*— Bosworth *v.* Webster, 64 Cal. 1, 27 Pac. 786 (no writ at the suit of one not showing a preliminary requisite, such as levy and non-payment); Hewell *v.* Lane, 53 Cal. 213 (deed with unauthorized recitals not compelled).

Colorado.— Statton *v.* People, 18 Colo. App. 85, 70 Pac. 157, no writ to receive part of redemption money.

Georgia.— Jennings *v.* Rudd, 40 Ga. 49, no writ lies to city marshal to put purchaser in possession, when statute does not so authorize.

Illinois.— Klokke *v.* Stanley, 109 Ill. 192, no writ to issue second deed.

Kansas.— Bryson *v.* Spaulding, 20 Kan. 427, no deed until demand.

Louisiana.— State *v.* Herron, 29 La. Ann. 848, no writ to compel recorder to discharge liens prior in time, action being adequate. See also Raymond *v.* Villeré, 42 La. Ann. 488, 7 So. 900; State *v.* Batt, 40 La. Ann. 582, 4 So. 495.

Michigan.— Aitcheson *v.* Huebner, 90 Mich. 643, 51 N. W. 634, no deed when money paid back to relator.

Missouri.— State *v.* Mantz, 62 Mo. 258, no writ for particular form of deed.

Nebraska.— State *v.* Gayhart, 34 Nebr. 192, 51 N. W. 746 (no writ for deed by holder not giving required notice to redeem); State *v.* Patterson, 11 Nebr. 266, 9 N. W. 82 (no writ to issue tax deeds when relator's right is in litigation).

New Jersey.— Bierman *v.* Seymour, 66 N. J. L. 122, 48 Atl. 1005, no writ for reimbursement of tax buyer for moneys paid out for abstract until approved by mayor.

New York.— People *v.* New York, 10 Wend. 393, no writ to city to make lease on tax-sale by it, unless proper notice given.

Canada.— *In re* Newcastle, Draper (U. C.) 503, no deed compelled after redemption.

See 33 Cent. Dig. tit. "Mandamus," §§ 252–255.

12. People *v.* Adam, 3 Mich. 427; People *v.* Chapin, 104 N. Y. 96, 10 N. E. 141; People *v.* Chapin, 103 N. Y. 635, 8 N. E. 368 [*affirming* 39 Hun 235].

Illustration.— This rule has been applied to mandamus to compel a conveyance after a tax-sale (People *v.* Adams, 3 Mich. 427, holding that mandamus will not lie at the suit of the holder of a tax-sale certificate to compel the state auditor to give him a conveyance, where a statute authorizes the auditor to forbear to sell lands for taxes or to withhold a conveyance after sale if for any cause the lands might not be sold or conveyed, as the power so conferred is judicial); to compel refunding of the purchase-money paid on an invalid tax-sale (People *v.* Chapin, 104 N. Y. 96, 10 N. E. 141, holding that where a state officer is vested with judicial power to determine the right to a refund of the purchase-money paid upon an invalid sale of land for taxes, mandamus will not lie to compel him to decide in any particular way or to set aside an erroneous decision); or to compel vacation of a tax-sale and conveyance (People *v.* Chapin, 103 N. Y. 635, 8 N. E. 368, holding that where the state controller has acted upon an application to vacate a tax-sale and conveyance under it because of alleged irregularity, and has denied the same, he cannot be required by mandamus to reach a different conclusion).

13. U. S. *v.* Trimble, 14 App. Cas. (D. C.) 414.

the auditor has withheld an amount erroneously overpaid him for his services for making the assessment the previous year, the assessor cannot by mandamus compel him to issue his warrant for the amount so withheld.[14]

10. Special Assessments. Mandamus will lie to compel officers or boards to perform a specific ministerial duty imposed on them by law with respect to the making of special assessments for public improvements.[15] So the levy and collection of such an assessment may be compelled;[16] but the levy will not be compelled where the right is not clear,[17] where action upon the part of the authorities is discretionary,[18] or where there is another adequate remedy,[19] or relator has been guilty of laches,[20] or respondents have no power to act.[21] And while assessors may be compelled to act, they cannot be compelled to act in any particular way.[22] A mandatory duty to levy and collect such a special assessment may be enforced

14. Bogan *v.* Holder, 76 Miss. 597, 24 So. 695.

15. People *v.* Green, 6 Thomps. & C. (N. Y.) 129 [*affirmed* in 62 N. Y. 624]. And see cases cited *infra*, this note and notes 16–24.

Exclusion of property.— Mandamus will lie to compel the officers charged with the duty of making a special assessment to exclude land included within the assessment district by mistake. People *v.* Wilson, 119 N. Y. 515, 23 N. E. 1064.

16. Himmelmann *v.* Cofran, 36 Cal. 411; State *v.* Keokuk, 9 Iowa 438; Chapin *v.* Osborn, 29 Ind. 99; *Ex p.* Jones, 10 N. Brunsw. 183.

Drainage assessments.— A special assessment to pay drainage warrants may be compelled. State *v.* Lewis County, (Wash. 1907) 88 Pac. 760, holding, where the drain had not been completed, that the commissioners could be ordered to levy the assessment, or could be required to proceed immediately and acquire by condemnation or otherwise the property necessary to the completion of the ditch, and then levy the assessment.

Reassessment.— Where a first assessment has been set aside the writ lies to compel a reassessment. People *v.* Pontiac, 185 Ill. 437, 56 N. E. 1114.

Confirmation of assessment.— Mandamus lies to compel a board of revision to meet and confirm an assessment by the board of assessors. People *v.* Green, 6 Thomps. & C. (N. Y.) 129 [*affirmed* in 62 N. Y. 624].

17. Sherwood *v.* Rynearson, 141 Mich. 92, 104 N. W. 392 (where writ to compel certification of a special drain assessment was not issued where the drain was incomplete); People *v.* Zilwaukie Tp. Bd., 10 Mich. 274. And *compare* People *v.* Hyde Park, 117 Ill. 462, 6 N. E. 33, holding that the propriety of the levy of a special assessment by municipal authorities is a matter exclusively within the legislative discretion of such authorities, and such discretion cannot be controlled by the courts.

Where the statute providing for the improvement is radically defective and irreconcilable in its different provisions, no mandamus can issue to compel the performance of the duties which were intended to be, but were not, defined by it. Morse *v.* Williamson, 35 Barb. (N. Y.) 472.

Where levy would be unlawful.— A writ of mandamus will not be issued to compel a new special assessment after the lapse of more than five years from the dismissal of a former special assessment for the same improvement. People *v.* Hyde Park, 117 Ill. 462, 6 N. E. 33.

Under provision for payment of judgment. — A statute providing for the issue of mandamus against municipal corporations requiring them to levy special taxes for the payment of judgments where an execution has been unavailing does not authorize mandamus to compel a tax to pay an award of damages by a jury in street opening proceedings. State *v.* Hug, 44 Mo. 116.

Demand and refusal.— A mandamus will not be granted to compel municipal authorities to proceed to levy a special assessment to obtain funds for the payment of judgments rendered in condemnation suits in the course of opening a street, or erecting other public work, until after a demand has been made upon such municipal authorities, by the party entitled to payment under such condemnation, for the payment thereof, and also the further demand has been made for the levying of a special assessment to obtain funds for that purpose, and such demands have been refused. People *v.* Hyde Park, 117 Ill. 462, 6 N. E. 33.

18. Gorman *v.* State, 157 Ind. 205, 60 N. E. 1083; Rollersville, etc., Free Turnpike Road Com'rs *v.* Sandusky County, 1 Ohio St. 149.

19. Frick *v.* Morford, 87 Cal. 576, 25 Pac. 764 (no writ to assess for street improvement when appeal lies); Simpson *v.* Kansas City, 52 Kan. 88, 34 Pac. 406 (holding that mandamus would not lie to reapportion the costs of grading, but that injunction was adequate to prevent the collection of a void assessment); State *v.* Baltimore County Com'rs, 46 Md. 621.

20. Simpson *v.* Kansas City, 52 Kan. 88, 34 Pac. 406.

21. Wilson *v.* Longstreet, 38 N. J. L. 312, holding that mandamus to compel commissioners to assess omitted property would not lie after they had reported, where they had no power to amend their report.

22. People *v.* Gilon, 9 N. Y. Suppl. 563, 18 N. Y. Civ. Proc. 112, 24 Abb. N. Cas. 125 [*affirmed* in 9 N. Y. Suppl. 212, which is *affirmed* on rehearing in 12 N. Y. Suppl. 629].

by a contractor;[23] and one who is entitled to the proceeds of the assessment may compel the proper officer to pay them over to him.[24]

VII. MANDAMUS TO PRIVATE CORPORATIONS AND THEIR OFFICERS AND TO UNINCORPORATED ASSOCIATIONS.

A. Domestic Corporations — 1. In General. The state has visitorial power over all corporations created by it, whether quasi-public or purely private, and it is a well-settled doctrine that this power may be exercised through the courts by writ of mandamus to compel domestic corporations or their officers[1] to perform a specific legal duty imposed upon them by their charters, by statute or ordinance, or by the common law;[2] and the writ may issue, not only on the

23. People *v.* Syracuse, 144 N. Y. 63, 38 N. E. 1006 [*affirming* 65 Hun 321, 20 N. Y. Suppl. 236]; Harrison *v.* New Brighton, 110 N. Y. App. Div. 267, 97 N. Y. Suppl. 246; State *v.* Seattle, 42 Wash. 370, 85 Pac. 11.

24. State *v.* Hobe, 106 Wis. 411, 82 N. W. 336.

1. To whom writ may or must issue see *infra*, IX, C, 2.

Corporation in hands of receiver see *infra*, VII, A, 9, k.

2. *Alabama.*— Montgomery *v.* Capital City Water Co., 92 Ala. 361, 9 So. 339; Foster *v.* White, 86 Ala. 467, 6 So. 88; Medical, etc., Soc. *v.* Weatherly, 75 Ala. 248.

California.— Von Arx *v.* San Francisco Gruetli Verein, 113 Cal. 377, 45 Pac. 685; Fresno County *v.* Fowler Switch Canal Co., 68 Cal. 359, 9 Pac. 309; Price *v.* Riverside Land, etc., Co., 56 Cal. 431.

Colorado.— Townsend *v.* Fulton Irr. Ditch Co., 17 Colo. 142, 29 Pac. 453; Golden Canal Co. *v.* Bright, 8 Colo. 144, 6 Pac. 142.

Connecticut.— Bassett *v.* Atwater, 65 Conn. 355, 32 Atl. 937, 33 L. R. A. 575; State *v.* Ousatonic Water Co., 51 Conn. 137; State *v.* New Haven, etc., Co., 37 Conn. 153.

Delaware.— Swift *v.* State, 7 Houst. 338, 6 Atl. 856, 32 Atl. 143, 40 Am. St. Rep. 127 [*affirming* 7 Houst. 137, 30 Atl. 781]; State *v.* Wilmington Bridge Co., 3 Harr. 312.

Florida.— State *v.* Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590.

Georgia.— Savannah, etc., Canal Co. *v.* Shuman, 91 Ga. 400, 17 S. E. 937, 44 Am. St. Rep. 43; State *v.* Georgia Medical Soc., 38 Ga. 608, 95 Am. Dec. 408; State *v.* Savannah, etc., Canal Co., 26 Ga. 665.

Illinois.— People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Ohio, etc., R. Co. *v.* People, 121 Ill. 483, 13 N. E. 236; Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; People *v.* Chicago, etc., R. Co., 67 Ill. 118.

Indiana.— Cummins *v.* Evansville, etc., R. Co., 115 Ind. 417, 18 N. E. 6; Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489.

Iowa.— Boggs *v.* Chicago, etc., R. Co., 54 Iowa 435, 6 N. W. 744.

Kansas.— Potwin Place *v.* Topeka R. Co., 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312; State *v.* Missouri Pac. R. Co., 33 Kan. 176, 5 Pac. 772.

Louisiana.— State *v.* New Orleans Gaslight Co., 108 La. 67, 32 So. 179; State *v.* Orleans R. Co., 38 La. Ann. 312; Prieur *v.* Commercial Bank, 7 La. 509.

Maine.— Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208; State *v.* Gorham, 37 Me. 451.

Maryland.— Firemen's Ins. Co. *v.* Baltimore, 23 Md. 296; Runkel *v.* Winemiller, 4 Harr. & M. 429, 1 Am. Dec. 411.

Michigan.— Lansing *v.* Lansing City Electric R. Co., 109 Mich. 123, 66 N. W. 949; People *v.* Mechanics' Aid Soc., 22 Mich. 86; People *v.* State Ins. Co., 19 Mich. 392.

Minnesota.— State *v.* Southern Minnesota R. Co., 18 Minn. 40.

Missouri.— State *v.* Joplin Water Works, 52 Mo. App. 312.

Nebraska.— Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481; State *v.* Chicago, etc., R. Co., 29 Nebr. 412, 45 N. W. 469; State *v.* Republican Valley R. Co., 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424.

Nevada.— State *v.* Wright, 10 Nev. 167; State *v.* Lady Bryan Min. Co., 4 Nev. 400.

New Jersey.— Wilbur *v.* Trenton Passenger R. Co., 57 N. J. L. 212, 31 Atl. 238; Atwater *v.* Delaware, etc., R. Co., 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543; Sibley *v.* Carteret Club, 40 N. J. L. 295; *In re* Trenton Water Power Co., 20 N. J. L. 659.

New York.— People *v.* Cummings, 72 N. Y. 433; People *v.* Erie County Medical Soc., 32 N. Y. 187; People *v.* New York Cent., etc., R. Co., 28 Hun 543; People *v.* Albany Hospital, 61 Barb. 397; Matter of Guess, 16 Misc. 306, 38 N. Y. Suppl. 91.

North Carolina.— Delacy *v.* Neuse River Nav. Co., 8 N. C. 274, 9 Am. Dec. 636.

Ohio.— State *v.* Fraternal Mystic Circle, 9 Ohio Cir. Ct. 364, 6 Ohio Cir. Dec. 385.

Oregon.— Slemmons *v.* Thompson, 23 Oreg. 215, 31 Pac. 514; Haugen *v.* Albina Light, etc., Co., 21 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424.

Pennsylvania.— Mount Moriah Cemetery Assoc. *v.* Com., 81 Pa. St. 235, 22 Am. Rep. 743; Com. *v.* Perkins, 43 Pa. St. 400; Com. *v.* Delaware, etc., Canal Co., 43 Pa. St. 295; Black and White Smiths' Soc. *v.* Vandyke, 2 Whart. 309, 30 Am. Dec. 263; Mercur *v.* Media Electric Light, etc., Co., 7 Del. Co. 586.

South Carolina.— State *v.* McIver, 2 S. C. 25; State *v.* North Eastern R. Co., 9 Rich. 247, 67 Am. Dec. 551.

relation of the attorney-general in the case of a duty to the public generally,[3] or, in a proper case, on the relation of a municipality[4] or of some particular public officer or board;[5] but also on the relation of a member of a corporation or other private individual whose rights are violated.[6] A corporation having been created, invested with certain powers, and charged with certain duties to be performed

Tennessee.— Memphis Appeal Pub. Co. *v.* Pike, 9 Heisk. 697; Mobile, etc., R. Co. *v.* Wisdom, 5 Heisk. 125; McCann *v.* South Nashville St. R. Co., 2 Tenn. Ch. 773.

Texas.— San Antonio St. R. Co. *v.* State, 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 622.

Virginia.— Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775.

Washington.— State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515.

West Virginia.— Cross *v.* West Virginia Cent., etc., R. Co, 35 W. Va. 174, 12 S. E. 1071.

Wisconsin.— State *v.* Chicago, etc., R. Co., 79 Wis. 259, 48 N. W. 243, 12 L. R. A. 180; State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 3 N. W. 760.

United States.— Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428 [*affirming* 11 Fed. Cas. No. 5,950, 3 Dill. 515]; State *v.* Bell Tel. Co., 23 Fed. 539.

England.— Reg. *v.* Bristol Dock Co., 2 Q. B. 64, 1 G. & D. 286, 6 Jur. 216, 2 R. & Can. Cas. 599, 42 E. C. L. 573; Rex *v.* Severn, etc., R. Co., 2 B. & Ald. 646, 21 Rev. Rep. 433; Prohurst's Case, Carth. 168; Bagg's Case, 11 Coke 93*b*.

Canada.— *Ex p.* Atty.-Gen., 17 N. Brunsw. 667; Reg. *v.* Ontario College of Physicians and Surgeons, 44 U. C. Q. B. 146.

See 33 Cent. Dig. tit. "Mandamus," §§ 34, 256 *et seq.*

"The visitorial or superintending power of the state over corporations created by the legislature will always be exercised, in proper cases, through the medium of the courts of the state, to keep those corporations within the limits of their lawful powers, and to correct and punish abuses of their franchises. To this end the courts will issue writs of quo warranto, mandamus or injunction, as the exigencies of the particular case may require." State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 679, 3 N. W. 760.

Duty imposed by the common law see People *v.* Chicago, etc., R. Co., 67 Ill. 118; and *infra*, VII, A, 9, b, text and note 28.

The directors of a railroad company or other corporation are officers of a corporation within the meaning of a statute authorizing mandamus. People *v.* Rochester, etc., R. Co., 76 N. Y. 294.

In Kentucky, where a statute restricts the application of the writ of mandamus by providing that the writ is an order commanding "an executive or ministerial officer" to perform or omit to do an act, the performance or omission of which is enjoined by law, and is granted on the motion of the party aggrieved, or of the commonwealth when the public interest is affected, it is held that mandamus is confined in its application to the classes of persons specified and cannot be extended by the courts to other persons, and therefore that the writ will not lie against a private corporation, or the officers thereof, intrusted with the performance of no governmental function, and having no right to exercise any power which is of a public nature. Cook *v.* College of Physicians and Surgeons, 9 Bush 541. See also Schmidt *v.* Abraham Lincoln Lodge, 84 Ky. 490, 2 S. W. 156, 8 Ky. L. Rep. 653.

3. State *v.* New Haven, etc., Co., 37 Conn. 153; State *v.* Hartford, etc., R. Co., 29 Conn. 538; Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; People *v.* New York Cent., etc., R. Co., 28 Hun (N. Y.) 543. See *infra*, IX, C, 1, d, (I), (B).

4. People *v.* Chicago, etc., R. Co., 67 Ill. 118; Firemen's Ins. Co. *v.* Baltimore, 23 Md. 296; Lansing *v.* Lansing City Electric R. Co., 109 Mich. 123, 66 N. W. 949; Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 554, 41 L. R. A. 481. See *infra*, IX, C, 1, c.

5. Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208. See *infra*, IX, C, 1, d.

6. *Alabama.*—Foster *v.* White, 86 Ala. 467, 6 So. 88.

Colorado.— Townsend *v.* Fulton Irr. Ditch Co., 17 Colo. 142, 29 Pac. 453.

Georgia.— State *v.* Georgia Medical Soc., 38 Ga. 608, 95 Am. Dec. 408; State *v.* Savannah, etc., Canal Co., 26 Ga. 665.

Illinois.— People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650.

Iowa.— Boggs *v.* Chicago, etc., R. Co., 54 Iowa 435, 6 N. W. 744.

Nebraska.— State *v.* Republican Valley R. Co., 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424.

New Jersey.— Atwater *v.* Delaware, etc., R. Co., 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543.

Oregon.— Haugen *v.* Albina Light, etc., Co., 21 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424.

Pennsylvania.— Mercur *v.* Media Electric Light, etc., Co., 7 Del. Co. 586.

Tennessee.— Mobile, etc., R. Co. *v.* Wisdom, 5 Heisk. 125.

Virginia.— Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775.

Washington.— State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515.

United States.— Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428 [*affirming* 11 Fed. Cas. No. 5,950, 3 Dill. 515].

See *infra*, IX, C, 1, e.

for the benefit of the public is not a private individual, within the meaning of a statute providing that mandamus shall not lie against private individuals.[7]

2. Application of General Rules. Applications for mandamus to private corporations or their officers are governed by the general rules already treated. Thus there must in all cases be a clear[8] and specific legal duty,[9] express or implied,[10] and clear proof of a breach of that duty.[11] The writ will not lie to compel a corporation to do an act as to which it has a mere privilege or option, or to control its discretion.[12] And as a rule the writ will not be issued if the relator has another adequate legal remedy,[13] as by an action at law for dam-

7. State v. Georgia Medical Soc., 38 Ga. 608, 95 Am. Dec. 408.

8. *New Jersey.*— *In re* Trenton Water Power Co., 20 N. J. L. 659.

New York.— People v. New York, etc., R. Co., 2 N. Y. Civ. Proc. 82.

Oregon.— Mackin v. Portland Gas Co., 38 Oreg. 120, 61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596.

Pennsylvania.— Birmingham F. Ins. Co. v. Com., 92 Pa. St. 72; Boyer v. Saving Fund, 1 Leg. Rec. 231.

United States.— U. S. v. Alexandria Bank, 24 Fed. Cas. No. 14,514, 1 Cranch C. C. 7.

See *supra*, II, B, 1.

9. *Alabama.*— State v. Mobile, etc., R. Co., 59 Ala. 321.

Delaware.— Africans Union Church v. Sanders, 1 Houst. 100, 63 Am. Dec. 187.

Illinois.— Ohio, etc., R. Co. v. People, 120 Ill. 200, 11 N. E. 347.

Nebraska.— Laflin v. State, 49 Nebr. 614, 68 N. W. 1022.

New York.— People v. New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484.

Texas.— San Antonio St. R. Co. v. State, 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662.

Washington.— Northwestern Warehouse Co. v. Oregon R., etc., Co., 32 Wash. 218, 73 Pac. 388.

United States.— Northern Pac. R. Co. v. Washington Terr., 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092 [*reversing* 3 Wash. Terr. 303, 13 Pac. 604].

England.— York, etc., R. Co. v. Reg., 1 C. L. R. 119, 1 E. & B. 858, 17 Jur. 630, 22 L. J. Q. B. 225, 7 R. & Can. Cas. 459, 1 Wkly. Rep. 358, 72 E. C. L. 858; Reg. v. Great Western R. Co., 62 L. J. Q. B. 572, 69 L. T. Rep. N. S. 572, 9 Reports 127.

See 33 Cent. Dig. tit. "Mandamus," § 256 *et seq.* See also *supra*, II, B.

10. San Antonio St. R. Co. v. State, 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662.

11. Northern Pac. R. Co. v. Washington Terr., 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092 [*reversing* 3 Wash. Terr. 303, 13 Pac. 604]. See also Northwestern Warehouse Co. v. Oregon R., etc., Co., 32 Wash. 218, 73 Pac. 388; Reg. v. Bristol, etc., R. Co., 4 Q. B. 162, 3 G. & D. 384, 7 Jur. 233, 12 L. J. Q. B. 106, 3 R. & Can. Cas. 433, 45 E. C. L. 161; Rex v. Brecknock, etc., Canal Nav. Co., 3 A. & E. 217, 1 Harr. & W. 279, 4 N. & M. 871, 30 E. C. L. 117.

Demand and refusal see *infra*, VII, A, 3.

12. *Florida.*— Florida, etc., R. Co. v. State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419.

Illinois.— North v. State University, 137 Ill. 296, 27 N. E. 54; Ohio, etc., R. Co. v. People, 120 Ill 200, 11 N. E. 347.

Kentucky.— Haly v. Frankfort Bldg., etc., Assoc., 4 Ky. L. Rep. 362.

Louisiana.— State v. Canal, etc., St. R. Co., 23 La. Ann. 333.

Nebraska.— Laflin v. State, 49 Nebr. 614, 68 N. W. 1022.

New York.— People v. Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202]; People v. New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484.

Texas.— San Antonio St. R. Co. v. State, 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662.

England.— York, etc., R. Co. v. Reg., 1 C. L. R. 119, 1 E. & B. 858, 17 Jur. 630, 22 L. J. Q. B. 225, 7 R. & Can. Cas. 459, 1 Wkly. Rep. 358, 72 E. C. L. 858; Reg. v. Great Western R. Co., 62 L. J. Q. B. 572, 69 L. T. Rep. N. S. 572, 9 Reports 127.

Canada.— Matter of McDonald, 6 Ont. Pr. 309.

See *supra*, II, C, 2, a; *infra*, VII, A, 9, b, (II), j, (I), (B).

There may be such a breach of discretion as to amount to a breach of duty. State v. Lady Bryan Min. Co., 4 Nev. 400.

13. *Alabama.*— State v. Mobile, etc., R. Co., 59 Ala. 321.

Connecticut.— Tobey v. Hakes, 54 Conn. 274, 7 Atl. 551, 1 Am. St. Rep. 114.

Massachusetts.— Murray v. Stevens, 110 Mass. 95.

Nebraska.— Horton v. State, 60 Nebr. 701, 84 N. W. 87.

New Hampshire.—State v. Manchester, etc., R. Co., 62 N. H. 29.

New Jersey.— State v. Paterson, etc., R. Co., 43 N. J. L. 505 [*affirmed* in 45 N. J. L. 186]; Bradbury v. Mutual Reserve Fund Life Assoc., 53 N. J. Eq. 306, 31 Atl. 775.

New York.— People v. Miller, 39 Hun 557 [*affirmed* in 114 N. Y. 636, 21 N. E. 1120]; Shipley v. Mechanics' Bank, 10 Johns. 484.

Pennsylvania.— Com. v. Rosseter, 2 Binn. 360, 4 Am. Dec. 451.

Rhode Island.— Wilkinson v. Providence Bank, 3 R. I. 22.

England.— Reg. v. Hull, etc., R. Co., 6 Q. B. 70, 8 Jur. 491, 13 L. J. Q. B. 257, 3 R. & Can. Cas. 705, 51 E. C. L. 70; Reg. v.

ages,[14] or if some other exclusive and not merely cumulative remedy is prescribed by statute.[15] It has been held that the fact that there is a remedy by suit in equity will not exclude the remedy by mandamus,[16] but there are many cases to the contrary.[17] The remedy by mandamus is not excluded by the fact that an

Victoria Park Co., 1 Q. B. 288, 4 P. & D. 639, 41 E. C. L. 544.

Canada.— Hughes *v.* New Castle Dist. Mut. F. Ins. Co., 13 U. C. Q. B. 153.

See 33 Cent. Dig. tit. "Mandamus," § 34; and other cases cited in the notes following. See also *supra*, II, D.

Quo warranto see People *v.* New York Infant Asylum, 122 N. Y. 190, 25 N. E. 241, 10 L. R. A. 381; Anonymous, 2 Ld. Raym. 989.

14. *California.*— Kimball *v.* Union Water Co., 44 Cal. 173, 13 Am. Rep. 157.

Connecticut.— Tobey *v.* Hakes, 54 Conn. 274, 7 Atl. 551, 1 Am. St. Rep. 114.

Massachusetts.— Murray *v.* Stevens, 110 Mass. 95.

Michigan.— Lamphere *v.* Grand Lodge A. O. U. W., 47 Mich. 429, 11 N. W. 268.

Minnesota.— Baker *v.* Marshal, 15 Minn. 177.

Missouri.— State *v.* Rombauer, 46 Mo. 155.

Nevada.— State *v.* Guerrero, 12 Nev. 105.

New Jersey.— Morton *v.* Timken, 48 N. J. L. 87, 2 Atl. 783; Galbraith *v.* People's Bldg., etc., Assoc., 43 N. J. L. 389.

New York.— People *v.* German United Evangelical St. Stephen's Church, 53 N. Y. 103; People *v.* Miller, 39 Hun 557 [*affirmed* in 114 N. Y. 636, 21 N. E. 1120]; People *v.* New York, etc., R. Co., 22 Hun 533; People *v.* New York, etc., R. Co., 2 N. Y. Civ. Proc. 82; People *v.* Parker Vein Coal Co., 10 How. Pr. 543; Shipley *v.* Mechanics' Bank, 10 Johns. 484.

Ohio.— State *v.* Enterprise Carriage Co., 9 Ohio Dec. (Reprint) 152, 11 Cinc. L. Bul. 103.

Oregon.— Durham *v.* Monumental Silver Min. Co., 9 Oreg. 41.

Pennsylvania.— Birmingham F. Ins. Co. *v.* Com., 92 Pa. St. 72; Com. *v.* Rosseter, 2 Binn. 360, 4 Am. Dec. 451.

Rhode Island.— Wilkinson *v.* Providence Bank, 3 R. I. 22.

Wisconsin.— State *v.* Milwaukee Medical College, 128 Wis. 7, 106 N. W. 116.

United States.— U. S. *v.* Alexandria Bank, 24 Fed. Cas. No. 14,514, 1 Cranch C. C. 7.

See 33 Cent. Dig. tit. "Mandamus," § 34; and *supra*, II, D, 2, c.

Action for damages not always adequate.—An action at law for damages is not always an adequate remedy, and where this is the case mandamus will lie notwithstanding such an action might be maintained. Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775. See also State *v.* Savannah, etc., Canal Co., 26 Ga. 665; State *v.* Joplin Water Works, 52 Mo. App. 312; People *v.* New York Cent., etc., R. Co., 61 N. Y. App. Div. 494, 70 N. Y. Suppl. 684; Slemmons *v.* Thompson, 23 Oreg. 215, 31 Pac. 514; Com. *v.* Mt. Moriah Cemetery Assoc., 10 Phila. (Pa.) 385 (mandamus to enforce right to interment in a cemetery lot); State *v.* McIver, 2 S. C. 25; Memphis Appeal Pub. Co. *v.* Pike, 9 Heisk. (Tenn.) 697; *Ex p.* Atty.-Gen., 17 N. Brunsw. 667.

15. *Alabama.*— State *v.* Mobile, etc., R. Co., 59 Ala. 321.

Kansas.— State *v.* Republican River Bridge Co., 20 Kan. 404.

Louisiana.— State *v.* New Orleans, etc., R. Co., 37 La. Ann. 589.

Michigan.— Eyke *v.* Lange, 90 Mich. 592, 51 N. W. 680, 104 Mich. 26, 63 N. W. 535.

Nebraska.— Nebraska Tel. Co. *v.* State, 55 Nebr. 627, 76 N. W. 171, 45 L. R. A. 113.

New Hampshire.— State *v.* Manchester, etc., R. Co., 62 N. H. 29.

New Jersey.— Mt. Pleasant Cemetery Co. *v.* Paterson, etc., R. Co., 43 N. J. L. 505; State *v.* Monmouth Plank Road Co., 26 N. J. L. 99.

New York.— People *v.* Central New York Tel., etc., Co., 41 N. Y. App. Div. 17, 58 N. Y. Suppl. 221; Matter of Waverly, 35 N. Y. App. Div. 38, 54 N. Y. Suppl. 368 [*affirmed* in 158 N. Y. 710, 53 N. E. 1133].

See 33 Cent. Dig. tit. "Mandamus," § 34; and *supra*, II, D, 2, g.

Statutory remedy merely cumulative see State *v.* McGann, 64 Mo. App. 225; State *v.* Chicago, etc., R. Co., 29 Nebr. 412, 45 N. W. 469.

Action for penalty.—An action for a penalty prescribed by statute as a remedy for failure of a corporation to perform a duty, if such remedy is adequate, or if it is upon a reasonable construction of the statute exclusive, will bar the remedy by mandamus. State *v.* Mobile, etc., R. Co., 59 Ala. 321. See also People *v.* New York, etc., R. Co., 11 Hun (N. Y.) 297. But if the remedy by recovery of the penalty is inadequate and merely cumulative, mandamus will not lie. Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721; State *v.* Chicago, etc., R. Co., 79 Wis. 259, 48 N. W. 243, 12 L. R. A. 180.

Remedy on bond.—Mandamus will not lie to compel a corporation to perform a duty imposed by statute, where the statute provides an adequate remedy for breach of the duty by requiring it to give bond and expressly or impliedly allowing an action thereon. State *v.* Republican River Bridge Co., 20 Kan. 404; State *v.* New Orleans, etc., R. Co., 37 La. Ann. 589; Mt. Pleasant Cemetery Co. *v.* Paterson, etc., R. Co., 43 N. J. L. 505.

16. Bassett *v.* Atwater, 65 Conn. 355, 364, 32 Atl. 937, 32 L. R. A. 575; Hardcastle *v.* Maryland, etc., R. Co., 32 Md. 32. And see *supra*, II, D, 2, b.

17. Clarke *v.* Hill, 132 Mich. 434, 93 N. W. 1044; Durfee *v.* Harper, 22 Mont. 354, 56

indictment will lie.[18] The writ will not be granted where it will prove unavailing or nugatory,[19] or where it is not necessary.[20]

3. DEMAND AND REFUSAL. Before application for the writ there must generally be an express and specific demand or request upon defendant to perform the act sought to be compelled and a refusal thereof;[21] but a demand is not necessary if it would be useless, or if the duty is plain and defendant has expressed or shown a determination not to perform it,[22] or if the duty is strictly public and enjoined by law, and no person is charged by law with the duty to make demand.[23]

4. TO ENFORCE RIGHTS AS TO STOCK OR MEMBERSHIP — a. In General. By the great weight of authority, the power of the courts to issue writs of mandamus to corporations and their officers is not limited to cases in which it is sought to enforce duties to the public, but the writ will also lie in proper cases to enforce private rights, and particularly those of members or stock-holders. If a corporation refuses to perform a specific legal duty[24] which it owes to a stock-holder or member, or one entitled to membership, and his right is clear,[25] he may enforce the same by mandamus,[26] subject to the principle generally applicable to proceed-

Pac. 582; Mt. Pleasant Cemetery Co. *v.* Paterson, etc., R. Co., 43 N. J. L. 505 (where a writ of mandamus to compel a railroad company to construct a wall, under its contract with a cemetery company, entered into as required by its charter, was denied on the ground that the remedy was by action on the contract or bill for specific performance); Ham *v.* Toledo, etc., R. Co., 29 Ohio St. 174; State *v.* Enterprise Carriage Co., 9 Ohio Dec. (Reprint) 152, 11 Cinc. L. Bul. 103.

Suit in equity already commenced.—Where, however, the party asking for the writ has already gone into a court of equity, and there instituted proceedings under which all the relief may be obtained that is asked for in the petition, the writ will be denied. Hardcastle *v.* Maryland, etc., R. Co., 32 Md. 32.

If a statute prescribes a remedy in equity, mandamus will not generally lie. State *v.* Manchester, etc., R. Co., 62 N. H. 29, statutory remedy by injunction.

18. See *supra*, II, D, 2, d; *infra*, VII, A, 9, a.

19. Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; Benton Harbor *v.* St. Joseph, etc., St. R. Co., 102 Mich. 386, 60 N. W. 758, 47 Am. St. Rep. 553, 26 L. R. A. 245; and *supra*, II, A, 3, e.

20. Harrison *v.* Simonds, 44 Conn. 318; *In re* White River Bank, 23 Vt. 478. Thus if a majority of the officers of a corporation have the power and are willing to do the act sought to be compelled the writ will not be granted because one or more refuse to act. See *In re* White River Bank, *supra*.

21. *Alabama.*—Moseley *v.* Collins, 133 Ala. 326, 32 So. 131.

California.— Price *v.* Riverside Land, etc., Co., 56 Cal. 431. And see Wilson *v.* Veterans' Home, 138 Cal. 67, 70 Pac. 1059.

Connecticut.— Harrison *v.* Simonds, 44 Conn. 318.

Illinois.— Women's Catholic O. of F. *v.* Condon, 84 Ill. App. 564.

Indiana.— Lake Erie, etc., R. Co. *v.* State, 139 Ind. 158, 38 N. E. 596.

Iowa.— Mystic Milling Co. *v.* Chicago, etc., R. Co., (1906) 107 N. W. 943.

Michigan.— People *v.* Walker, 9 Mich. 328.

Missouri.— State *v.* Associated Press, 159 Mo. 410, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151.

Nevada.— State *v.* Wright, 10 Nev. 167.

South Carolina.— State *v.* Cheraw, etc., R. Co., 16 S. C. 524.

Washington.—Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 32 Wash. 218, 73 Pac. 388.

England.— Reg. *v.* Bristol, etc., R. Co., 4 Q. B. 162, 3 G. & D. 384, 7 Jur. 233, 12 L. J. Q. B. 106, 3 R. & Can. Cas. 433, 45 E. C. L. 161; Rex *v.* Brecknock, etc., Canal Nav. Co., 3 A. & E. 217, 1 Harr. & W. 279, 4 N. & M. 871, 30 E. C. L. 117.

Canada.— Matter of Guillot, etc., Gravel Road Co., 26 U. C. Q. B. 246.

See 33 Cent. Dig. tit. "Mandamus," §§ 44–46. And see *supra*, II, G.

22. Mottu *v.* Primrose, 23 Md. 482; People *v.* Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129 [*affirming* 47 Hun 273]; People *v.* Albany Hospital, 11 Abb. Pr. N. S. (N. Y.) 4; State *v.* Pacific Brewing, etc., Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208. And see *supra*, II, G.

23. State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515; Northern Pac. R. Co. *v.* Territory, 3 Wash. Terr. 303, 13 Pac. 604 [*reversed* on other grounds in 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092]. See also *supra*, II, G; *infra*, VII, A, 9, b, (III).

24. See *supra*, II, C; VII, A, 2, text and note 9.

25. Boyer *v.* Saving Fund, 1 Leg. Rec. (Pa.) 231. See *supra*, II, B; II, C; VII, A, 2, text and note 9.

26. State *v.* Georgia Medical Soc., 38 Ga. 608, 95 Am. Dec. 408; People *v.* Mechanics' Aid Soc., 22 Mich. 86; Smith *v.* Steele, 8 Nebr. 115; State *v.* Wright, 10 Nev. 167; and other cases hereinafter more specifically cited.

Contra.— Schmidt *v.* Abraham Lincoln Lodge, 84 Ky. 490, 2 S. W. 156, 8 Ky. L.

ings of this nature, that he must be without another adequate legal remedy for the protection thereof.[27]

b. Showing as to Status. The writ will not issue on the relation of one seeking to enforce alleged rights as a stock-holder or member of a corporation, unless his status as such is properly established;[28] but he should not be compelled to contest his rights as against third persons claiming ownership of the stock.[29]

c. Reinstatement After Wrongful Expulsion or Exclusion. By the weight of authority mandamus will lie to compel a corporation to reinstate a member who has been illegally expelled, suspended, or otherwise excluded, and to restore him to all the rights and privileges of membership, whether the expulsion was illegal because of want of power on the part of the corporation or want of jurisdiction on the part of the particular board or tribunal, or because of want of notice or other irregularity.[30] But it is necessary, however, that the relator's right must be

Rep. 655; Cook *v.* Physicians, etc., College, 9 Bush (Ky.) 541 (more specifically referred to *supra*, VII, A, 1, note 2); Fraternal Mystic Circle *v.* State, 61 Ohio St. 628, 48 N. E. 940, 76 Am. St. Rep. 446 [*reversing* 9 Ohio Cir. Ct. 364, 6 Ohio Cir. Dec. 385] (more specifically referred to *infra*, VII, A, 4, c, note 30).

In an old English case it was held that a mandamus would not lie to compel a trading company to give one of the members a recommendatory mark or proof-mark, without which he was not able to carry on his trade with effect, but the grounds of the decision are not clear. Anonymous, 2 Ld. Raym. 989.

27. Lamphere *v.* Grand Lodge A. O. U. W., 47 Mich. 429, 11 N. W. 268; State *v.* People's Bldg., etc., Assoc., 43 N. J. L. 389; People *v.* Miller, 39 Hun (N. Y.) 557 [*affirmed* in 114 N. Y. 636, 21 N. E. 1120]. See *supra*, II, D; VII, A, 2, text and note 13; *infra*, VII, A, 9, a.

Other remedy must be adequate.— "The mere fact that an action or proceeding will lie, does not necessarily supersede the remedy by mandamus. The relator must not only have a specific, adequate and legal remedy, but it must be one competent to afford relief upon the very subject-matter of his application; and if it be doubtful whether such action or proceeding will afford him a complete remedy, the writ should issue." State *v.* Wright, 10 Nev. 167, 175.

28. State *v.* Wright, 10 Nev. 167; Matter of Reiss, 30 Misc. (N. Y.) 234, 62 N. Y. Suppl. 145; Boyer *v.* Saving Fund, 1 Leg. Rec. (Pa.) 231. And see *infra*, VII, A, 4, h, text and note 61.

Sufficiency of showing.—Where relator asks that an annual election of trustees be held as provided by law, and comes into court the apparent owner of the stock in his possession, and respondents admit that he paid the assessment thereon as levied by them and that at his request they issued to him the identical stock presented in court, he has shown such an interest in the stock against respondents as entitles him to the writ of mandamus. State *v.* Wright, 10 Nev. 167.

Registration on stock-book.— An application by one claiming to be a stock-holder of a corporation for a writ of mandamus to compel the corporation to allow him to examine its books must be denied, where the stock-book does not show him to be a stock-holder and a statute requires every stock corporation to keep a stock-book containing the names of all its stock-holders and provides that no transfer of stock shall be valid "for any purpose" until entered therein. Matter of Reiss, 30 Misc. (N. Y.) 234, 62 N. Y. Suppl. 145.

29. State *v.* Wright, 10 Nev. 167.

30. *Alabama.*— Montgomery County Medical, etc., Soc. *v.* Weatherly, 75 Ala. 248.

California.— Von Arx *v.* San Francisco Gruetli Verein, 113 Cal. 377, 45 Pac. 685; Rorke *v.* San Francisco Stock, etc., Bd., 99 Cal. 196, 33 Pac. 881; Otto *v.* Journeymen Tailors' Protective, etc., Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156.

Connecticut.— Fuller *v.* Plainfield Academic School, 6 Conn. 532.

Georgia.— United Bros. *v.* Williams, 126 Ga. 19, 54 S. E. 907; Savannah Cotton Exch. *v.* State, 54 Ga. 668; State *v.* Georgia Medical Soc., 38 Ga. 608, 95 Am. Dec. 408.

Illinois.— Sturges *v.* Chicago Bd. of Trade, 86 Ill. 441; Women's Catholic O. of F. *v.* Condon, 84 Ill. App. 564; Beesley *v.* Chicago Journeymen Plumbers' Protective, etc., Assoc., 44 Ill. App. 278.

Louisiana.— State *v.* Stevedores', etc., Benev. Assoc., 43 La. Ann. 1098, 10 So. 169; State *v.* Lusitanian Portuguese Soc., 15 La. Ann. 73.

Massachusetts.— Barrows *v.* Massachusetts Medical Soc., 12 Cush. 402. And see Spilman *v.* Supreme Council H. C., 157 Mass. 128, 31 N. E. 776; Crocker *v.* Old South Soc., 106 Mass. 489.

Michigan.— Meurer *v.* Detroit Musicians' Benev., etc., Assoc., 95 Mich. 451, 54 N. W. 954; Erd *v.* Bavarian Nat. Aid, etc., Assoc., 67 Mich. 233, 34 N. W. 555; Allnutt *v.* Subsidiary High Ct. U. S. A. O. of F., 62 Mich. 110, 28 N. W. 802; People *v.* Detroit Fire Dept., 31 Mich. 458; People *v.* Mechanics' Aid Soc., 22 Mich. 86. *Compare* Hargnell *v.* Lafayette Benev. Soc., 47 Mich. 648; Lamphere *v.* Grand Lodge A. O. U. W., 47 Mich. 429, 11 N. W. 268.

Missouri.— Lysaght *v.* St. Louis Operative Stonemasons' Assoc., 55 Mo. App. 538;

clear;[31] and if the corporation acted within its powers and the board or tribunal

Albers *v.* Merchants' Exch., 39 Mo. App. 583; State *v.* Union Merchants' Exch., 2 Mo. App. 96.

New Hampshire.— Egan *v.* Division No. 1 A. O. H., 62 N. H. 701.

New Jersey.— Venezia *v.* Italian Mut. Benev. Soc., (Ch. 1907) 65 Atl. 898; Jennings *v.* Supreme Lodge O. of S. of B., 67 N. J. L. 126, 50 Atl. 581; Sibley *v.* Carteret Club, 40 N. J. L. 295; *In re* Baker, 61 N. J. Eq. 592, 47 Atl. 1046.

New York.— Brown *v.* Supreme Ct. I. O. F., 176 N. Y. 132, 68 N. E. 145 [*affirming* 66 N. Y. App. Div. 259, 72 N. Y. Suppl. 806 (*affirming* 34 Misc. 556, 70 N. Y. Suppl. 397)]; People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84 [*reversing* 8 Misc. 552, 29 N. Y. Suppl. 307]; People *v.* Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129; People *v.* Erie County Medical Soc., 32 N. Y. 187 [*affirming* 25 How. Pr. 333]; *In re* Lurman, 90 Hun 303, 35 N. Y. Suppl. 956 [*affirmed* in 149 N. Y. 588, 44 N. E. 1125]; People *v.* Musical Mut. Protective Union, 47 Hun 273; People *v.* New York Benev. Soc. of O. M., 3 Hun 361; People *v.* Erie County Medical Soc., 24 Barb. 570; People *v.* Independent Order B. A. of U. S. A., 101 N. Y. Suppl. 866; People *v.* Supreme Council C. B. L., 10 N. Y. Suppl. 248, 23 Abb. N. Cas. 323; Fritz *v.* Muck, 62 How. Pr. 69; People *v.* St. Franciscus Benev. Soc., 24 How. Pr. 216; O'Reilly *v.* New York Mut. L. Ins. Co., 2 Abb. Pr. N. S. 167; People *v.* Throop, 12 Wend. 183.

North Carolina.— Delacy *v.* Neusé River Nav. Co., 8 N. C. 274, 9 Am. Dec. 636.

Pennsylvania.— Weise *v.* Musical Mut. Protective Union, 189 Pa. St. 446, 42 Atl. 118, 69 Am. St. Rep. 820; Hibernia Fire Engine Co. *v.* Com., 93 Pa. St. 264; Diligent Fire Co. *v.* Com., 75 Pa. St. 291; Evans *v.* Philadelphia Club, 50 Pa. St. 107; Marion Ben. Soc. *v.* Com., 31 Pa. St. 82; Washington Ben. Soc. *v.* Bacher, 20 Pa. St. 425; Com. *v.* German Mut. Support, etc., Soc., 15 Pa. St. 251; Franklin Ben. Assoc. *v.* Com., 10 Pa. St. 357; Black and White Smiths' Soc. *v.* Vandyke, 2 Whart. 309, 30 Am. Dec. 263; Com. *v.* Pennsylvania Ben. Inst., 2 Serg. & R. 141; Green *v.* African M. E. Soc., 1 Serg. & R. 254; Com. *v.* St. Patrick's Benev. Soc., 2 Binn. 441, 4 Am. Dec. 453; Riddell *v.* Harmony Fire Co., 1 Leg. Gaz. 316. *Contra*, Wolf *v.* United Daughters of America, 1 Phila. 374.

Rhode Island.— Lavalle *v.* Société St. Jean Baptiste, 17 R. I. 680, 24 Atl. 467, 16 L. R. A. 392; Sleeper *v.* Franklin Lyceum, 7 R. I. 523.

Texas.— Screwmen's Ben. Assoc. *v.* Benson, 76 Tex. 552, 13 S. W. 379; Manning Club *v.* San Antonio Club, 63 Tex. 166, 51 Am. Rep. 639.

Wisconsin.— State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 3 N. W. 760; State *v.* Milwaukee Chamber of Commerce, 20 Wis. 63.

England.— Prohurst's Case, Carth. 168; Baggs Case, 11 Coke 93*b*; Rex *v.* Doncaster, 2 Ld. Raym. 1564; Rex *v.* Cambridge University, 2 Ld. Raym. 1334, 8 Mod. 148, Str. 557; Rex *v.* Faversham Free Fishermen, etc., Co., 8 T. R. 352, 4 Rev. Rep. 691.

Canada.— Reg. *v.* Ontario College of Physicians and Surgeons, 44 U. C. Q. B. 146; Lapierre *v.* L'Union St. Joseph de Montreal, 21 L. C. Jur. 332. To register a practitioner registered in England see Reg. *v.* Ontario College of Physicians and Surgeons, etc., 44 U. C. Q. B. 564.

See 33 Cent. Dig. tit. "Mandamus," § 259.

Contra.— Fraternal Mystic Circle *v.* State, 61 Ohio St. 628, 48 N. E. 940, 76 Am. St. Rep. 446 [*reversing* 9 Ohio Cir. Ct. 364, 6 Ohio Cir. Dec. 385], holding that a member of a private corporation organized for the mutual protection and relief of its members, although unlawfully expelled and excluded from participation in its benefits, was not entitled to a writ of mandamus to compel it to restore him to membership, because such restoration was not an act specially enjoined by law, and because he had a plain and adequate remedy in the ordinary course of the law. In Kentucky, as has been seen, the remedy by mandamus is so restricted by statute that it will not lie against a private corporation or the officers thereof, intrusted with the performance of no governmental function and having no right to exercise any power of a public nature (see *supra*, VII, A, 1, note 2), and therefore the writ will not lie to compel reinstatement of a member of a corporation illegally expelled or excluded. Cook *v.* College of Physicians and Surgeons, 9 Bush (Ky.) 541. See also Schmidt *v.* Abraham Lincoln Lodge, 84 Ky. 490, 2 S. W. 156, 8 Ky. L. Rep. 655.

Property or valuable civil right not involved.— Some of the courts have held that mandamus will not lie where the nature of the corporation is such that the expulsion does not affect any property interest or other valuable civil right. Sale *v.* First Regular Baptist Church, 62 Iowa 26, 17 N. W. 143, 49 Am. Rep. 136. See also Grand Lodge K. of P. *v.* People, 60 Ill. App. 550 [*affirmed* in 166 Ill. 71, 46 N. E. 768]; People *v.* German United Evangelical St. Stephen's Church, 53 N. Y. 103; Rigby *v.* Connal, 14 Ch. D. 482, 49 L. J. Ch. 328, 42 L. T. Rep. N. S. 139, 28 Wkly. Rep. 650. And see *infra*, VII, A, 2.

Mere restriction in exercise of rights.— It has been held that the exclusion of a member of a corporation from speaking or voting at four successive meetings of the corporation, without its appearing that his ordinary corporate rights were thus restricted otherwise than in the administration of the internal discipline of the corporation under the by-laws or rules of its own government, is not sufficient cause for a mandamus to the corporation to restore him to a full enjoyment of those rights. Crocker *v.* Old South Soc., 106 Mass. 489.

31. State *v.* Lusitanian Portuguese Soc., 15

had jurisdiction, and the proceedings were had after notice and an opportunity to be heard and in accordance with the by-laws, the courts cannot interfere or pass upon the merits of the expulsion, or upon the reasonableness of the by-laws authorizing it if it was within the power of the corporation to enact them.[32] As a rule the writ will not be granted until the relator has exhausted the means of relief and remedies by objection, defense, appeal, and otherwise, afforded him by the by-laws and rules of the corporation,[33] unless such remedies are inappli-

La. Ann. 73; Vannatta *v.* Smith, 61 N. J. L. 188, 38 Atl. 811; Crow *v.* Capital City Council, 26 Pa. Super. Ct. 411. See *supra*, II, B, 1; II, C, 2, b.

Expulsion justified but irregular.—Although the relator's expulsion may have been irregular because of a want of notice or for other reasons, a writ of mandamus will not be granted to restore him to membership, if it appears that there are sufficient grounds for his expulsion. State *v.* Lusitanian Portuguese Soc., 15 La. Ann. 73; Meister *v.* Bay City Anshei Chesed Hebrew Cong., 37 Mich. 542; State *v.* Temperance Benev. Assoc., 42 Mo. App. 485 (holding that mandamus will not be granted to reinstate a member expelled without notice and opportunity to be heard, where he admits his guilt of the offense for which he was expelled, and the offense is sufficient ground for expulsion); State *v.* Algemeiner Verein, 7 Ohio Dec. (Reprint) 449, 3 Cinc. L. Bul. 295; State *v.* Society for Support of Sick, etc., 6 Ohio Dec. (Reprint) 899, 8 Am. L. Rec. 628.

Demand for restoration to membership and refusal thereof is generally necessary before applying for a writ of mandamus (Moseley *v.* Collins, 133 Ala. 326, 32 So. 131; Women's Catholic O. of F. *v.* Condon, 84 Ill. App. 564; and *supra*, VII, A, 3); but no demand is necessary if it will be useless, or the corporation has expressed or shown a determination not to restore the relator (People *v.* Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129 [*affirming* 47 Hun 273]; and *supra*, VII, A, 3).

32. *Alabama.*—Medical, etc., Soc. *v.* Weatherly, 75 Ala. 248.

California.—Josich *v.* Austrian Benev. Soc., 119 Cal. 74, 51 Pac. 18; Otto *v.* Journeymen Tailors' Protective, etc., Union, 75 Cal. 308, 314, 17 Pac. 217, 7 Am. St. Rep. 156, where it is said: "In the matter of expulsion, the society acts in a quasi-judicial character, and so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws, such laws not being in violation of the laws of the land or any inalienable right of the member, its sentence is conclusive, like that of a judicial tribunal."

Illinois.— Chicago Bd. of Trade *v.* Nelson, 162 Ill. 431, 44 N. E. 743, 53 Am. St. Rep. 312 [*reversing* 62 Ill. App. 541]; People *v.* Women's Catholic O. of F., 162 Ill. 78, 44 N. E. 401 [*affirming* 59 Ill. App. 390]; People *v.* Chicago Bd. of Trade, 80 Ill. 134; People *v.* Chicago Bd. of Trade, 45 Ill. 112; Beesley *v.* Chicago Journeymen Plumbers' Protective, etc., Assoc., 44 Ill. App. 278.

Louisiana.— State *v.* Stevedores', etc., Benev. Assoc., 43 La. Ann. 1098, 10 So. 169.

Massachusetts.— Spilman *v.* Supreme Council H. C., 157 Mass. 128, 31 N. E. 776; Barrows *v.* Massachusetts Medical Soc., 12 Cush. 402.

Michigan.— People *v.* St. George's Soc., 28 Mich. 261. See also Hargnell *v.* Lafayette Benev. Soc., 47 Mich. 648; Burt *v.* Grand Lodge F. & A. M., 44 Mich. 208.

Missouri.— State *v.* Grand Lodge I. O. O. F., 8 Mo. App. 148.

New Jersey.— Zeliff *v.* Grand Lodge K. of P., 53 N. J. L. 536, 22 Atl. 63.

New York.— People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84 [*reversing* 8 Misc. 552, 29 N. Y. Suppl. 307]; People *v.* Manhattan Chess Club, 23 Misc. 500, 52 N. Y. Suppl. 726 [*affirmed* in 34 N. Y. App. Div. 631, 55 N. Y. Suppl. 1145]. See also *Ex p.* Paine, 1 Hill 665.

Ohio.— State *v.* Algemeiner Verein, 7 Ohio Dec. (Reprint) 449, 3 Cinc. L. Bul. 295; State *v.* Aurora Relief Soc., 7 Ohio Dec. (Reprint) 334, 2 Cinc. L. Bul. 125.

Pennsylvania.— Com. *v.* Philadelphia Union League, 135 Pa. St. 301, 19 Atl. 1030, 20 Am. St. Rep. 870, 8 L. R. A. 195; Hibernia Fire Engine Co. *v.* Com., 93 Pa. St. 264; Society for Visitation of Sick, etc. *v.* Com., 52 Pa. St. 125, 91 Am. Dec. 139; Com. *v.* German Soc. for Mut. Support, etc., 15 Pa. St. 251; Black and White Smiths' Soc. *v.* Vandyke, 2 Whart. 309, 30 Am. Dec. 263; Com. *v.* Pike Ben. Soc., 8 Watts & S. 247; Com. *v.* Kensington German Ben. Soc., 17 Phila. 277.

Texas.— Screwmen's Benev. Assoc. *v.* Benson, 76 Tex. 552, 13 S. W. 379; Manning *v.* San Antonio Club, 63 Tex. 166, 51 Am. Rep. 639.

Validity of expulsion and remedies in the case of particular corporations see CLUBS, 7 Cyc. 262; EXCHANGES, 17 Cyc. 860; LABOR UNIONS, 24 Cyc. 826; MUTUAL BENEFIT INSURANCE; PHYSICIANS AND SURGEONS; RELIGIOUS SOCIETIES; and other like special titles.

33. *Alabama.*—Moseley *v.* Collins, 133 Ala. 326, 32 So. 131.

California.— Levy *v.* Magnolia Lodge No. 29 I. O. O. F., 110 Cal. 297, 42 Pac. 887.

Illinois.— People *v.* Grand Lodge K. of P., 166 Ill. 71, 46 N. E. 768 [*affirming* 60 Ill. App. 550]; People *v.* Women's Catholic O. of F., 162 Ill. 78, 44 N. E. 401 [*affirming* 59 Ill. App. 390].

Michigan.— People *v.* St. George's Soc., 28 Mich. 261.

New Jersey.— Zeliff *v.* Grand Lodge K. of P., 53 N. J. L. 536, 22 Atl. 63.

cable[34] or unreasonable and inadequate,[35] or would prove vain and useless.[36] Mandamus will not lie after the relator has brought an action to recover damages for the illegal expulsion.[37]

d. Admission to Membership. Where the law prescribes the qualifications of members of the corporation and gives an absolute right to membership, and the corporation refuses to admit a person who is duly qualified, mandamus will lie to compel his admission;[38] but the right to admission must be clear.[39] The writ will not be granted where it clearly appears that the relator, if admitted, would be immediately liable to expulsion;[40] where the admission fees prescribed by the by-laws are not paid;[41] or where, under its charter, the corporation is the sole judge of the qualifications of members and the right to membership.[42]

New York.— People *v.* Manhattan Chess Club, 23 Misc. 500, 52 N. Y. Suppl. 726.

Ohio.— State *v.* Knights of Golden Rule, 9 Ohio Dec. (Reprint) 1, 10 Cinc. L. Bul. 2.

Pennsylvania.— German Reformed Church *v.* Com., 3 Pa. St. 282; Crow *v.* Capital City Council, 26 Pa. Super. Ct. 411.

Texas.— Screwmen's Benev. Assoc. *v.* Benson, 76 Tex. 552, 13 S. W. 379; Benson *v.* Screwmen's Benev. Assoc., 2 Tex. Civ. App. 66, 21 S. W. 562.

England.— Prohurst's Case, Carth. 168, mandamus not granted to restore a fellow of a college without appealing to a visitor.

Mandamus to compel hearing of appeal.— Where the constitution and by-laws of an association provide that a member thereof who has been expelled may appeal from the action of a subordinate lodge expelling him to a certain officer, mandamus will lie to compel such officer to entertain jurisdiction of such appeal and determine it, if on proper application he refuses to do so. State *v.* Knights of Golden Rule, 9 Ohio Dec. (Reprint) 1, 10 Cinc. L. Bul. 2.

34. People *v.* Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129 [*affirming* 47 Hun 273], holding that where the by-laws of a corporation authorized it to reinstate an expelled member by a vote of a two-thirds majority of all members present, after his having paid all dues and fines standing against him and an extra fine of fifty dollars, and provided that applicants for reinstatement must pass an examination as in the case of applications for original membership, a person unlawfully expelled was not required to exhaust the means so provided for reinstatement before resorting to mandamus, as these provisions related to cases of expulsion supported by proceedings lawfully conducted, and where the appeal was to the discretionary power of the society.

35. Brown *v.* Supreme Ct. I. O. F., 176 N. Y. 132, 68 N. E. 145 [*affirming* 66 N. Y. App. Div. 259, 72 N. Y. Suppl. 806 (*affirming* 34 Misc. 556, 70 N. Y. Suppl. 397)]; Weiss *v.* Musical Mut. Protective Union, 189 Pa. St. 446, 42 Atl. 118, 69 Am. St. Rep. 820, holding that where no appeal was authorized by the by-laws of a mutual protective union, a resolution instructing the directors to investigate charges against certain members and, if found guilty, expel them, and providing for an appeal to the union from the decision of the directors, did not require members so expelled to appeal to the union before resorting to mandamus, where the resolution required, as a condition precedent, a compliance with the findings of the directors and the payment of all expenses.

Foreign corporations.—It has been held that the fact that the body within the organization to which the appeal must be taken is a corporation of another state does not change the rule, since it is to be presumed that such appellate body will do justice betwen the parties. Zeliff *v.* Grand Lodge K. of P., 53 N. J. L. 536, 22 Atl. 63.

36. State *v.* Grand Lodge, A. O. U. W., 70 Mo. App. 456; Brown *v.* Supreme Ct. I. O. F., 176 N. Y. 132, 68 N. E. 145 [*affirming* 66 N. Y. App. Div. 259, 72 N. Y. Suppl. 806 (*affirming* 34 Misc. 556, 70 N. Y. Suppl. 397)], holding that the fact that if a suspended member was denied reinstatement, the constitution and by-laws provided that he might appeal to various courts or tribunals within the association, and that no member should be entitled to bring any civil action or legal proceeding until he should exhaust all the remedies by such appeals, did not debar him from relief in the courts where the obstacles to the prosecution of an appeal amounted to almost a denial of justice, and where, if prosecuted, no relief would result therefrom.

37. State *v.* Lipa, 28 Ohio St. 665.

38. People *v.* Erie County Medical Soc., 32 N. Y. 187 [*affirming* 25 How. Pr. 333] (to medical society); Rex *v.* Askew, 4 Burr. 2186 (to college of physicians); Rex *v.* Turkey Co., 2 Burr. 943, 999 (to company of merchants); Reg. *v.* Pharmaceutical Soc., 1 Jur. N. S. 470 (to pharmaceutical society); Rex *v.* Hostmen Fraternity, Str. 1223; Dacosta *v.* Russia Co., Str. 783; Taverner's Case, T. Raym. 446 (to company of vintners).

39. Boyer *v.* Saving Fund, 1 Leg. Rec. (Pa.) 231.

40. *Ex p.* Paine, 1 Hill (N. Y.) 665.

41. Taverner's Case, T. Raym. 446.

42. State *v.* Louisiana Bar Assoc., 111 La. 967, 36 So. 50, 241 (holding that mandamus would not lie to compel admission to a bar association, as the association was the sole judge of the right to membership); People *v.* Holstein-Friesian Assoc., 41 Hun (N. Y.) 439 (holding that mandamus would not lie to compel a cattle-breeding association to

e. Right to Subscribe For Shares. It has been held that mandamus will not lie to compel a corporation to allow a subscription for shares of its capital stock, as the remedy by action for damages for denial of the right is adequate.[43]

f. Issue of Certificates of Stock. As a general rule mandamus will not lie to compel a corporation or its officers to issue a certificate of stock to one entitled thereto, since he has an adequate remedy at law by action against the corporation for the value of the stock claimed.[44] There are some cases, however, in which it has been held that the writ will lie if the right to the certificate is clear.[45]

g. Transfer of Shares. By the weight of authority, mandamus will not lie in ordinary cases to compel a corporation or its officers to transfer stock on its books and issue new certificates to the transferee, since the right is a purely private one, and there is generally an adequate remedy by an action against the corporation for damages[46] or by a suit in equity to secure a decree ordering the

admit the relator as a member and register his cattle, as the association was a purely private corporation with the right to admit such members as it saw fit).

Inns of court, etc.— In England it was held that mandamus would not lie to compel the admission of an attorney to an inn of court (Rex *v.* Barnard's Inn, 5 A. & E. 17, 2 Harr. & W. 62, 31 E. C. L. 505; Rex *v.* Allen, 5 B. & Ad. 984, 3 N. & M. 184, 27 E. C. L. 413; Rex *v.* Lincoln's Inn, 4 B. & C. 855, 7 D. & R. 351, 28 Rev. Rep. 482, 10 E. C. L. 830), or to compel an archbishop to admit a doctor of the civil law as an advocate of the court of arches (Rex *v.* Canterbury, 8 East 213).

43. U. S. *v.* Alexandria Bank, 24 Fed. Cas. No. 14,514, 1 Cranch C. C. 7. See also American Asylum for Education, etc. *v.* Phœnix Bank, 4 Conn. 172, 10 Am. Dec. 112.

44. *Connecticut.*— American Asylum for Education, etc. *v.* Phœnix Bank, 4 Conn. 172, 10 Am. Dec. 112.

Maine.— Townes *v.* Nichols, 73 Me. 515.

Minnesota.— Baker *v.* Marshal, 15 Minn. 177, holding that where there were two claimants to certain shares of stock and the certificates were issued to the wrongful claimant, the other had an adequate remedy by action, and mandamus would not lie to compel the issue of certificates to him.

Missouri.— State *v.* St. Louis Paint Mfg. Co., 21 Mo. App. 526.

Nevada.— State *v.* Guerrero, 12 Nev. 105.

New Jersey.— Morton *v.* Timken, 48 N. J. L. 87, 2 Atl. 783.

New York.— People *v.* Miller, 39 Hun 557 [*affirmed* in 114 N. Y. 636, 21 N. E. 1120].

Ohio.— State *v.* Carpenter, 51 Ohio St. 83, 37 N. E. 261, 46 Am. St. Rep. 556, holding that the remedy is by action for damages or a suit in equity to compel the issue and the delivery of the certificate, as the Ohio statute provides that the writ of mandamus shall not issue where there is a plain and adequate remedy in the ordinary course of the law.

See 33 Cent. Dig. tit. "Mandamus," § 261.

Issue of new certificate on transfer of stock see *infra*, VII, A, 4, *g*.

45. State *v.* New Orleans Gaslight Co., 25 La. Ann. 413 (where the writ was issued to compel a corporation to issue new certificates in the place of certificates which had been lost); Rice *v.* Pacific R. Co., 55 Mo. 146; State *v.* Cheraw, etc., R. Co., 16 S. C. 524.

Issue to county or other municipality see *infra*, VII, A, 9, j, (I), (K).

The right must be clear.—State *v.* St. Louis Paint Mfg. Co., 21 Mo. App. 526. If the claim is a doubtful one, involving the necessity of litigation to settle it, the remedy by mandamus must be denied. Townes *v.* Nichols, 73 Me. 515.

Excess of authorized amount of capital stock.— Mandamus will not lie to compel a corporation to issue stock in excess of the amount authorized by its charter. Boyer *v.* Saving Fund, 1 Leg. Rec. (Pa.) 231. See also Smith *v.* North American Min. Co., 1 Nev. 423; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599.

46. *California.*— Kimball *v.* Union Water Co., 44 Cal. 173, 13 Am. Rep. 157 [*overruling* in effect People *v.* Crockett, 9 Cal. 112]. *Compare* Herbert Kraft Co. Bank *v.* Orland Bank, 133 Cal. 64, 65 Pac. 143.

Connecticut.— Tobey *v.* Hakes, 54 Conn. 274, 7 Atl. 551, 1 Am. St. Rep. 114. See also American Asylum for Education, etc. *v.* Phœnix Bank, 4 Conn. 172, 10 Am. Dec. 112.

Georgia.— Terrell *v.* Georgia R., etc., Co., 115 Ga. 104, 41 S. E. 262; State Bank *v.* Harrison, 66 Ga. 696.

Massachusetts.— Stackpole *v.* Seymour, 127 Mass. 104; Murray *v.* Stevens, 110 Mass. 95.

Michigan.— Clarke *v.* Hill, 132 Mich. 434, 93 N. W. 1044.

Minnesota.— See Baker *v.* Marshal, 15 Minn. 177.

Missouri.— State *v.* Rombauer, 46 Mo. 155. See also State *v.* St. Louis Paint Mfg. Co., 21 Mo. App. 526.

Montana.— Durfee *v.* Harper, 22 Mont. 354, 56 Pac. 582.

New Jersey.— Galbraith *v.* People's Bldg., etc., Assoc., 43 N. J. L. 389.

New York.— People *v.* Miller, 39 Hun 557 [*affirmed* in 114 N. Y. 636, 21 N. E. 1120]; People *v.* Parker Vein Coal Co., 1 Abb. Pr. 128, 10 How. Pr. 543; *Ex p.* Fireman's Ins. Co., 6 Hill 243; Shipley *v.* Mechanics' Bank, 10 Johns. 484.

transfer.[47] Some courts, however, have held that mandamus will lie,[48] as the remedy by action for refusal to permit a transfer is too doubtful and uncertain in its character to supersede the specific and speedier remedy by mandamus.[49] The writ will lie if it is authorized by statute or, it seems, if the duty to register transfers is expressly imposed by statute,[50] or if there are special circumstances in any case rendering the remedy by action for damages inadequate.[51] Mandamus will lie, where the right is clear, to compel a transfer of stock to the purchaser of the same at a judicial sale, as required by statute.[52] In no case will the

Ohio.— Freon *v.* Carriage Co., 42 Ohio St. 30, 51 Am. Rep. 794; State *v.* Enterprise Carriage Co., 9 Ohio Dec. (Reprint) 152, 11 Cinc. L. Bul. 103.

Oregon.— Slemmons *v.* Thompson, 23 Oreg. 215, 31 Pac. 514; Durham *v.* Monumental Silver Min. Co., 9 Oreg. 41.

Pennsylvania.— Birmingham F. Ins. Co. *v.* Com., 92 Pa. St. 72.

Rhode Island.— Wilkinson *v.* Providence Bank, 3 R. I. 22.

England.— Rex *v.* London Assur. Co., 5 B. & Ald. 899, 1 D. & R. 510, 7 E. C. L. 489; Rex *v.* Bank of England, Dougl. (3d ed.) 524.

Canada.— *Ex p.* Watson, 16 N. Brunsw. 600.

See 33 Cent. Dig. tit. "Mandamus," §§ 34, 261.

47. Clarke *v.* Hill, 132 Mich. 434, 93 N. W. 1044; Durfee *v.* Harper, 22 Mont. 354, 56 Pac. 582; State *v.* Enterprise Carriage Co., 9 Ohio Dec. (Reprint) 152, 11 Cinc. L. Bul. 103.

48. *Indiana.*— Burnsville Turnpike Co. *v.* State, 119 Ind. 382, 20 N. E. 421, 3 L. R. A. 265; Green Mount, etc., Turnpike Co. *v.* Bulla, 45 Ind. 1. And see Helm *v.* Swiggett, 12 Ind. 194.

Louisiana.— State *v.* Orleans R. Co., 38 La. Ann. 312.

South Carolina.— State *v.* McIver, 2 S. C. 25.

Tennessee.— Memphis Appeal Pub. Co. *v.* Pike, 9 Heisk. 697.

Wisconsin.— *In re* Klaus, 67 Wis. 401, 29 N. W. 582.

Compare Camphell *v.* Morgan, 4 Ill. App. 100.

49. State *v.* McIver, 2 S. C. 25; Memphis Appeal Pub. Co. *v.* Pike, 9 Heisk. (Tenn.) 697.

50. Reg. *v.* Shropshire Union R., etc., Co., L. R. 8 Q. B. 420, 42 L. J. Q. B. 193, 21 Wkly. Rep. 953 [*reversed* on other grounds in L. R. 7 H. L. 496, 45 L. J. Q. B. 31, 32 L. T. Rep. N. S. 283, 23 Wkly. Rep. 709]; Reg. *v.* Carnatic R. Co., L. R. 8 Q. B. 299, 42 L. J. Q. B. 169, 28 L. T. Rep. N. S. 413, 21 Wkly. Rep. 621; Norris *v.* Irish Land Co., 8 E. & B. 512, 4 Jur. N. S. 235, 27 L. J. Q. B. 115, 6 Wkly. Rep. 55, 92 E. C. L. 512; Crawford *v.* Provincial Ins. Co., 8 U. C. C. P. 263.

51. Murray *v.* Stevens, 110 Mass. 95; Slemmons *v.* Thompson, 23 Oreg. 215, 31 Pac. 514, holding that mandamus would lie to compel a transfer where the breach of duty alleged was the refusal of the corporation to transfer the stock and enroll plaintiff on its books as a stock-holder, and the fraudulent acts of its agents in disposing of its property under a secret trust for private advantage in fraud of the rights of plaintiff, and which rendered the corporation apparently insolvent. In Ohio, however, it has been held that the fact that the business of the corporation is very profitable, that its shares of stock have no known market value, or are greatly enhanced by the good-will of a growing business, does not vary the rule, where the actual value is ascertainable in an action to recover damages. Freon *v.* Carriage Co., 42 Ohio St. 30, 51 Am. Rep. 794. It has also been held that mandamus will not lie to compel a transfer of stock on the books of the corporation, even though the stock has peculiar elements of value, by reason of which its value is incapable of compensation in damages, since in such case the transferee has a remedy in equity for a decree transferring the same. State *v.* Enterprise Carriage Co., 9 Ohio Dec. (Reprint) 152, 11 Cinc. L. Bul. 103. See also Clarke *v.* Hill, 132 Mich. 434, 93 N. W. 1044; Durfee *v.* Harper, 22 Mont. 354, 56 Pac. 582.

52. *Georgia.*— State Bank *v.* Harrison, 66 Ga. 696; Bailey *v.* Strohecker, 38 Ga. 259, 95 Am. Dec. 88, on the ground that in such case the officer of the corporation becomes *pro hac vice* a public officer. But it has been held that an order granted by a judge, appointing a trustee for a designated person and authorizing such trustee to sell described stock in a railroad company in which that person has an interest, does not bring the case within this exception, so as to afford a proper basis for a writ of mandamus against the company compelling it to transfer the stock in question to the trustee, in order that he may make a sale of the same under and by virtue of such order of the court. Terrell *v.* Georgia R., etc., Co., 115 Ga. 104, 41 S. E. 262.

Illinois.— People *v.* Goss, etc., Mfg. Co., 99 Ill. 355.

Indiana.— State *v.* Jeffersonville First Nat. Bank, 89 Ind. 302.

Iowa.— See Croft *v.* Colfax Electric Light, etc., Co., 113 Iowa 455, 85 N. W. 761.

North Carolina.— Cooper *v.* Dismal Swamp Canal Co., 6 N. C. 195.

Oregon.— Slemmons *v.* Thompson, 23 Oreg. 215, 31 Pac. 514 [*explaining* Durham *v.* Monumental Silver Min. Co., 9 Oreg. 41].

Tennessee.— Memphis Appeal Pub. Co. *v.* Pike, 9 Heisk. 697.

United States.— Hair *v.* Burnell, 106 Fed. 280.

Canada.— Goodwin *v.* Ottawa, etc., R. Co.,

writ be granted if the title to the stock is disputed and the right to the relief asked for is not clear,[53] or where the relator's claim rests on a mere equitable right,[54] or equitable issues are involved.[55]

h. Inspection of Books, Papers, and Records.[56] When a stock-holder or member of a corporation has a right, either under a statute or at common law, to an inspection of the books, papers, or records of the corporation, by himself or by his agent or attorney,[57] including the right to make extracts or copies,[58] and the corporation or its officers or agents wrongfully deny him such right, he may enforce the same by mandamus,[59] unless such remedy is excluded by stat-

13 U. C. C. P. 254; Matter of Guillot, 26 U. C. Q. B. 246 (where, however, the writ was refused because there had been no proper demand and refusal); Goodwin *v.* Ottawa, etc., R. Co., 22 U. C. Q. B. 186 (where the writ was refused on the merits).

53. *Indiana.*— Burnsville Turnpike Co. *v.* State, 119 Ind. 382, 20 N. E. 421, 3 L. R. A. 265.

New Jersey.— State *v.* Warren Foundry, etc., Co., 32 N. J. L. 439.

New York.— People *v.* Parker Vein Coal Co., 10 How. Pr. 186 [*affirmed* in 1 Abb. Pr. 128, 10 How. Pr. 543].

Oregon.— Slemmons *v.* Thompson, 23 Oreg. 215, 31 Pac. 514; Durham *v.* Monumental Silver Min. Co., 9 Oreg. 41.

Pennsylvania.— Birmingham F. Ins. Co. *v.* Com., 92 Pa. St. 72.

England.— Law Guarantee, etc., Soc. *v.* Bank of England, 24 Q. B. D. 406, 54 J. P. 582, 62 L. T. Rep. N. S. 496, 38 Wkly. Rep. 493; Reg. *v.* Londonderry, etc., Co., 13 Q. B. 998, 13 Jur. 939, 18 L. J. Q. B. 343, 6 R. & Can. Cas. 1, 66 E. C. L. 998; Reg. *v.* Liverpool, etc., R. Co., 16 Jur. 949, 21 L. J. Q. B. 284.

Canada.— Goodwin *v.* Ottawa, etc., R. Co., 22 U. C. Q. B. 186.

Assignment, power of attorney, and proof of title.— A corporation cannot be compelled by mandamus to do that which it would have no authority to do voluntarily; and therefore as a turnpike company had no power to transfer upon its books one person's stock to another without the production of a written assignment, power of attorney, or other proof of title, it was held that mandamus would not lie to compel it to do so. Burnsville Turnpike Co. *v.* State, 119 Ind. 382, 20 N. E. 421, 3 L. R. A. 265.

Discretion.— Where it is within the discretion of the directors to allow a transfer, the writ will not lie. Matter of McDonald, 6 Ont. Pr. 309. See *supra*, VII, A, 2, text and note 12.

Bad faith as ground for denying writ see Reg. *v.* Liverpool, etc., R. Co., 21 L. J. Q. B. 284.

54. Burnsville Turnpike Co. *v.* State, 119 Ind. 382, 20 N. E. 421, 3 L. R. A. 265. See *supra*, II, B, 3.

55. Croft *v.* Colfax Electric Light, etc., Co., 113 Iowa 455, 85 N. W. 761, where a petition for mandamus by a purchaser of stock at an execution sale to compel a transfer by the company was transferred to the equity docket because the execution debtor set up payment of the debt, and equitable issues were thus raised.

56. Inspection: By creditor of corporation see *infra*, VII, A, 7, d. By director or other officer see *infra*, VII, A, 6, c. By public officer see *infra*, VII, A, 9, e. Of books, papers, and records of foreign corporation see *infra*, VII, B.

57. Foster *v.* White, 86 Ala. 467, 6 So. 88; State *v.* Bienville Oil Works, 28 La. Ann. 204; State *v.* Sportsman's Park, etc., Assoc., 29 Mo. App. 326; Mitchell *v.* Rubber Reclaiming Co., (N. J. Ch. 1892) 24 Atl. 407. See CORPORATIONS, 10 Cyc. 958.

58. Swift *v.* State, 7 Houst. (Del.) 338, 6 Atl. 856, 32 Atl. 143, 40 Am. St. Rep. 127 [*affirming* 7 Houst. 137, 30 Atl. 781]; Varney *v.* Baker, (Mass. 1907) 80 N. E. 524; Tuttle *v.* Iron Nat. Bank, 170 N. Y. 9, 62 N. E. 761 [*affirming* 67 N. Y. App. Div. 627, 73 N. Y. Suppl. 1150]; Rex *v.* Merchant Tailors' Co., 2 B. & Ad. 115, 9 L. J. K. B. O. S. 146, 22 E. C. L. 57. And see CORPORATIONS, 10 Cyc. 958.

59. *Alabama.*— Cobb *v.* Lagarde, 129 Ala. 488, 30 So. 326; Winter *v.* Baldwin, 89 Ala. 483, 7 So. 734; Foster *v.* White, 86 Ala. 467, 6 So. 88.

California.— Johnson *v.* Langdon, 135 Cal. 624, 67 Pac. 1050, 87 Am. St. Rep. 156; Gavin *v.* Pacific Coast Mar. Firemen's Union, 2 Cal. App. 638, 84 Pac. 270.

Delaware.— State *v.* Pan-American Co., (1904) 61 Atl. 398; Swift *v.* State, 7 Houst. 338, 6 Atl. 856, 32 Atl. 143, 40 Am. St. Rep. 127 [*affirming* 7 Houst. 137, 30 Atl. 781].

Illinois.— Stone *v.* Kellogg, 165 Ill. 192, 46 N. E. 222, 56 Am. St. Rep. 240 [*affirming* 62 Ill. App. 444]; Meysenburg *v.* People, 88 Ill. App. 328; Mathews *v.* McClaughry, 83 Ill. App. 224; Crown Coal, etc., Co. *v.* Thomas, 60 Ill. App. 234.

Louisiana.—State *v.* North American Land, etc., Co., 105 La. 379, 29 So. 910; State *v.* New Orleans Gaslight Co., 49 La. Ann. 1556, 22 So. 815; State *v.* Accommodation Bank, 28 La. Ann. 874; State *v.* Bienville Oil Works Co., 28 La. Ann. 204; Cockburn *v.* Union Bank, 13 La. Ann. 289 (inspection of discount book of bank); Hatch *v.* New Orleans City Bank, 1 Rob. 470.

Maryland.— Weihenmayer *v.* Bitner, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446.

Massachusetts.— Varney *v.* Baker, (1907) 80 N. E. 524.

Michigan.— People *v.* Walker, 9 Mich. 328.

Missouri.— State *v.* Laughlin, 53 Mo. App. 542; State *v.* Sportsman's Park, etc., Assoc.,

ute;[60] but to entitle him to the writ his status as a stock-holder or member must be sufficiently established,[61] his right of inspection must be clear,[62] and he must have exhausted any remedies within the corporation that may be prescribed by statute.[63] Except in so far as the rule has been changed by statute, the writ will only be granted to protect the relator's interest as stock-holder or member, and only where it is sought in good faith and for a necessary or proper purpose;[64] and as a rule there must have been a proper demand upon and refusal by the corpo-

29 Mo. App. 326; State *v.* St. Louis, etc., R. Co., 29 Mo. App. 301.

New Jersey.— Garcin *v.* Trenton Rubber Mfg. Co., (Ch. 1905) 60 Atl. 1098; Fuller *v.* Hollander, 61 N. J. Eq. 648, 47 Atl. 646; Trimble *v.* American Sugar Refining Co., 61 N. J. Eq. 340, 48 Atl. 912; Stettauer *v.* New York, etc., Constr. Co., 42 N. J. Eq. 46, 6 Atl. 303; Huylar *v.* Cragin Cattle Co., 40 N. J. Eq. 392, 2 Atl. 274; Mitchell *v.* Rubber Reclaiming Co., (Ch. 1892) 24 Atl. 407.

New York.— Tuttle *v.* Iron Nat. Bank, 170 N. Y. 9, 62 N. E. 761 [*affirming* 67 N. Y. App. Div. 627, 73 N. Y. Suppl. 1150]; *In re* Steinway, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461 [*affirming* 31 N. Y. App. Div. 70, 52 N. Y. Suppl. 343]; Sage *v.* Lake Shore, etc., R. Co., 70 N. Y. 220; Matter of Coats, 75 N. Y. App. Div. 567, 78 N. Y. Suppl. 429; People *v.* Nassau Ferry Co., 86 Hun 128, 33 N. Y. Suppl. 244; People *v.* Crawford, 68 Hun 547, 22 N. Y. Suppl. 1025; People *v.* Eadie, 63 Hun 320, 18 N. Y. Suppl. 53 [*affirmed* in 133 N. Y. 573, 30 N. E. 1147]; People *v.* Lake Shore, etc., R. Co., 11 Hun 1; People *v.* Pacific Mail Steamship Co., 50 Barb. 280; Matter of Reiss, 30 Misc. 234, 62 N. Y. Suppl. 145; People *v.* Throop, 12 Wend. 183.

Pennsylvania.— Neubert *v.* Armstrong Water Co., 211 Pa. St. 582, 61 Atl. 123; McClintock *v.* Young Republicans, 210 Pa. St. 115, 59 Atl. 691, 105 Am. St. Rep. 784, 68 L. R. A. 459 (inspection of membership roll of incorporated political club); Phœnix Iron Co. *v.* Com., 113 Pa. St. 563, 6 Atl. 75; Com. *v.* Phœnix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184; Com. *v.* Philadelphia, etc., R. Co., 3 Pa. Dist. 115.

Rhode Island.— Lyon *v.* American Screw Co., 16 R. I. 472, 17 Atl. 61.

Washington.— State *v.* Pacific Brewing, etc., Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208.

Wisconsin.— State *v.* Bergenthal, 72 Wis. 314, 39 N. W. 566.

Wyoming.— Wyoming Coal Min. Co. *v.* State, (1906) 87 Pac. 337, 984.

United States.— Guthrie *v.* Harkness, 199 U. S. 148, 26 S. Ct. 4, 50 L. ed. 130, national banks.

England.— Rex *v.* Merchant Tailors' Co., 2 B. & Ad. 115, 9 L. J. K. B. O. S. 146, 22 E. C. L. 57; *In re* Burton, 31 L. J. Q. B. 62, 10 Wkly. Rep. 87; Reg. *v.* Wilts, etc., Canal Nav. Co., 29 L. T. Rep. N. S. 922; Rex *v.* Hostmen Fraternity, Str. 1223; Southampton *v.* Graves, 8 T. R. 590, 5 Rev. Rep. 480.

Canada.— Hibbard *v.* Barsalou, 1 L. C. L. J. 98; Murphy *v.* La Compagnie des Remorqueurs, etc., 16 L. C. Rep. 300. *Compare* Upper Canada Bank *v.* Baldwin, Draper (U. C.) 55.

See 33 Cent. Dig. tit. "Mandamus," § 264.

Right of inspection see CORPORATIONS, 10 Cyc. 954 *et seq.*

Keeping or bringing books, etc., into the state.— A stock-holder may by mandamus compel the corporation to comply with a statute requiring it to keep at its principal office in the state correct books of account, and to permit every stock-holder to examine such books at all reasonable times. Crown Coal, etc., Co. *v.* Thomas, 60 Ill. App. 234. *Compare,* however, Pratt *v.* Meriden Cutlery Co., 35 Conn. 36. In New Jersey by express statutory provision, where the books of a corporation are kept beyond the limits of the state, mandamus will lie to compel the corporation to bring them into the state for examination by a stock-holder. Trimble *v.* American Sugar Refining Co., 61 N. J. Eq. 340, 48 Atl. 912; Huylar *v.* Cragin Cattle Co., 40 N. J. Eq. 392, 2 Atl. 274; Mitchell *v.* Rubber Reclaiming Co., (Ch. 1892) 24 Atl. 407. This statute does not extend to all papers and memoranda of the company, however. Huylar *v.* Cragin Cattle Co., 42 N. J. Eq. 139, 7 Atl. 521.

60. Mandamus will not lie to enforce the right of inspection in Kentucky (Cook *v.* College of Physicians and Surgeons, 9 Bush (Ky.) 541; *supra,* VII, A, 1, note 2) or Ohio (Cincinnati Volksblatt Co. *v.* Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 78 Am. St. Rep. 707, 48 L. R. A. 732; *supra,* VII, A, 4, c, note 30).

61. State *v.* Whited, 104 La. 125, 28 So. 922; Matter of Reiss, 30 Misc. (N. Y.) 234, 62 N. Y. Suppl. 145. See *supra,* VII, A, 4, b.

Sale of stock.— If the relator has sold his stock he has no standing to demand an inspection, although the price has not been fully paid and the stock has been placed in the hands of a third person in escrow until payment shall be made. State *v.* Whited, 104 La. 125, 28 So. 922. A stock-holder has no standing after he sells his stock to prosecute an appeal from a judgment denying a writ to enforce the right of inspection. State *v.* New Orleans Maritime, etc., Exch., 112 La. 868, 36 So. 760.

62. People *v.* Walker, 9 Mich. 328; People *v.* Lake Shore, etc., R. Co., 11 Hun (N. Y.) 1; People *v.* American Union L. Ins. Co., 31 Misc. (N. Y.) 617, 64 N. Y. Suppl. 916.

Right of inspection generally see CORPORATIONS, 10 Cyc. 854 *et seq.*

63. People *v.* Nassau Ferry Co., 86 Hun (N. Y.) 128, 33 N. Y. Suppl. 244.

64. *Delaware.*—State *v.* Pan-American Co., (1904) 61 Atl. 398.

ration or its officers.[65] The right has been denied where it was sought merely for the purpose of securing the names of stock-holders, so that the relator might confer with them as to the business of the corporation,[66] where considerable loss would have resulted to the corporation,[67] and where the relator had been defeated in a suit involving the same questions.[68]

i. Redemption of Preferred Stock. Mandamus will not lie to compel redemp-

Louisiana.— State *v.* New Orleans Gaslight Co., 49 La. Ann. 1556, 22 So. 815; Hatch *v.* New Orleans City Bank, 1 Rob. 470, not granted except for some just and useful purpose.

Maryland.— Weihenmayer *v.* Bitner, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446.

Michigan.— People *v.* Walker, 9 Mich. 328, not granted to enable a corporator to gratify idle curiosity.

New Jersey.— Bruning *v.* Hoboken Printing, etc., Co., 67 N. J. L. 119, 50 Atl. 906; Rosenfeld *v.* Einstein, 46 N. J. L. 479.

New York.— Colwell *v.* Colwell Lead Co., 76 N. Y. App. Div. 615, 78 N. Y. Suppl. 607; Matter of Kennedy, 75 N. Y. App. Div. 188, 77 N. Y. Suppl. 714; Matter of Coats, 73 N. Y. App. Div. 178, 76 N. Y. Suppl. 730; Matter of Pierson, 44 N. Y. App. Div. 215, 60 N. Y. Suppl. 671 (holding that mandamus to compel a corporation to allow a stock-holder to examine its books to see if it was not selling gas at a loss was properly denied where it was shown that it had cut the price of gas to meet competition and thus retain its customers, and there was no advantage to the stock-holders or the company in an application to the attorney-general or for a receiver, which petitioner proposed to make if he should find that such sale was being made at a loss); People *v.* American Union L. Ins. Co., 31 Misc. 617, 64 N. Y. Suppl. 916; *In re* Taylor, 101 N. Y. Suppl. 1039 (holding that since mandamus to require a corporation to exhibit its books and papers to a stock-holder would only lie to protect his stock interest, it would not lie to aid him in a suit against directors based upon their false report, by which he was induced to become a stock-holder and sustained loss).

Pennsylvania.— Com. *v.* Empire Pass. R. Co., 134 Pa. St. 237, 19 Atl. 629.

Rhode Island.— Lyon *v.* American Screw Co., 16 R. I. 472, 17 Atl. 61.

England.— Reg. *v.* Bank of England, [1891] 1 Q. B. 785, 55 J. P. 695, 60 L. J. Q. B. 497, 64 L. T. Rep. N. S. 468, 39 Wkly. Rep. 558; Rex *v.* Merchant Tailors' Co., 2 B. & Ad. 115, 9 L. J. K. B. O. S. 146, 22 E. C. L. 57.

Canada.— Upper Canada Bank *v.* Baldwin, Draper (U. C.) 55.

See, generally, CORPORATIONS, 10 Cyc. 954 *et seq.*

Speculative or litigious purpose.— The writ will not be issued to aid a speculative or litigious purpose. State *v.* Pan-American Co., (Del. 1904) 61 Atl. 398; People *v.* Walker, 9 Mich 328; Com. *v.* Empire Pass. R. Co., 134 Pa. St. 237, 19 Atl. 629, holding that mandamus would not lie to compel a corporation to allow a stock-holder to make a list of the other stock-holders in order that they might be induced to join him in a suit he proposed to institute against the corporation and to share with him the expenses of such suit.

The statute or constitution in some states is construed as giving a clear and absolute right of inspection, which cannot be defeated by inquiring into the relator's or petitioner's motives and showing a hostile or improper purpose. Johnson *v.* Langdon, 135 Cal. 624, 67 Pac. 1050, 87 Am. St. Rep. 156. *Compare*, however, Stone *v.* Kellogg, 165 Ill. 192, 46 N. E. 222, 56 Am. St. Rep. 240 [*affirming* 62 Ill. App. 444]; State *v.* New Orleans Gaslight Co., 49 La. Ann. 1556, 22 So. 815. And see CORPORATIONS, 10 Cyc. 956.

65. Matthews *v.* McClaughry, 83 Ill. App. 224; People *v.* Walker, 9 Mich. 328; People *v.* Nassau Ferry Co., 86 Hun (N. Y.) 128, 33 N. Y. Suppl. 244; Rex *v.* Wilts, etc., Canal Nav., 3 A. & E. 477, 30 E. C. L. 228. See *supra*, VII, A, 3. But where the refusal to permit a stock-holder to inspect the books and accounts of the corporation was based on the ground that he had no right of inspection at any time or for any purpose, it was held unnecessary for the petition for mandamus to affirmatively show that the demand for inspection was made during office hours or at the place of business of the corporation, or that the person making the demand was the agent of the respondent or had any lawful right to represent her in the transaction. State *v.* Pacific Brewing, etc., Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208. A demand for certain information contained in the corporate books is not a sufficient demand to be permitted to inspect the books. Com. *v.* Pennsylvania R. Co., 6 Pa. Dist. 266.

An indefinite delay in according the right after a proper demand is equivalent to a denial of it. Cobb *v.* Lagarde, 129 Ala. 488, 30 So. 326.

Mailing of demand.—Where minority stock-holders addressed a written demand for opportunity to inspect the books of the corporation and deposited it in the post-office with postage prepaid, it was held that the demand would be presumed to have reached its destination. Neubert *v.* Armstrong Water Co., 211 Pa. St. 582, 61 Atl. 123.

66. Latimer *v.* Herzog Teleseme Co., 75 N. Y. App. Div. 522, 78 N. Y. Suppl. 314; Lyon *v.* American Screw Co., 16 R. I. 472, 17 Atl. 61.

67. Colwell *v.* Colwell Lead Co., 76 N. Y. App. Div. 615, 78 N. Y. Suppl. 607.

68. People *v.* American Union L. Ins. Co., 31 Misc. (N. Y.) 617, 64 N. Y. Suppl. 916.

tion of preferred stock of a corporation issued in disregard of the provisions of its organic law, even though all persons interested acquiesced in the unauthorized issue.[69]

j. Dividends, Etc. Mandamus will not lie to control or interfere with the discretion of the directors of a corporation in declaring dividends or to compel payment of dividends after they have been declared;[70] but it seems that it will lie to compel the ministerial act of delivering checks already drawn for dividends,[71] and that when the stock in a building and loan association is matured, the holder is entitled to mandamus to compel the corporation to make an application and division of profits and to declare the stock matured.[72]

k. Arbitration. Mandamus lies to compel a corporation, such as a building and loan society, to submit a dispute with a member to arbitration, as required by statute and the rules of the society.[73]

l. Publication of Statements or Reports. Where stock-holders may incur liability to creditors by reason of a failure of the officers to publish the annual statement or report required by statute, mandamus will lie on the relation of a stock-holder to compel performance of such duty.[74]

m. Collection of Unpaid Subscriptions to Stock. Perhaps in a proper case a stock-holder may by mandamus compel the proper officer of the corporation to make calls and collect unpaid subscriptions to the capital stock,[75] but the writ will not lie to control a discretion in the collection of subscriptions vested in the directors by the charter.[76]

5. Corporate Meetings and Elections. The legal right of a stock-holder or member of a corporation to have an election of directors, trustees, or other officers, or meetings of stock-holders or members for other purposes, as required by charter, statute, or by-laws, or to have a new election in the case of illegality, may be enforced by mandamus to compel the existing directors or other proper officer to call and hold a meeting for such purpose;[77] but the court will not interfere with the internal management of the corporation or a discretion vested in the

69. Smith *v.* Ferracute Mach. Co., 68 N. J. L. 237, 52 Atl. 231.

70. People *v.* Central Car, etc., Co., 41 Mich. 166, 49 N. W. 925; Rex *v.* Bank of England, 2 B. & Ald. 620. See also American Asylum for Education, etc., of Deaf, etc. *v.* Phœnix Bank, 4 Conn. 172, 10 Am. Dec. 112.

71. Le Roy *v.* Globe Ins. Co., 2 Edw. (N. Y.) 657, 671, where it was said that where a dividend has not only been declared, but the money to pay the same has been set apart and checks drawn therefor and placed in the hands of the secretary for each stock-holder, mandamus will lie for delivery of the checks.

72. Tyrrell Loan, etc., Assoc. *v.* Haley, 139 Pa. St. 476, 20 Atl. 1063, 23 Am. St. Rep. 199.

73. Norton *v.* Counties Conservative Permanent Ben.-Bldg. Soc., [1895] 1 Q. B. 246, 59 J. P. 149, 64 L. J. Q. B. 214, 71 L. T. Rep. N. S. 790, 14 Reports 59, 43 Wkly. Rep. 178.

74. Smith *v.* Steele, 8 Nebr. 115.

75. See Hays *v.* Lycoming F. Ins. Co., 98 Pa. St. 184.

Right of creditor of corporation to mandamus see *infra*, VII, A, 7, b.

76. State *v.* Canal, etc., St. R. Co., 23 La. Ann. 333.

77. *Connecticut.*— Bassett *v.* Atwater, 65 Conn. 355, 32 Atl. 937, 32 L. R. A. 575; Bethany Cong. Soc. *v.* Sperry, 10 Conn. 200, 208. *Compare* Harrison *v.* Simonds, 44 Conn. 318, holding that an office is not vacant when there is a *de facto* incumbent; that such incumbent must be ousted upon an information in the nature of quo warranto before the court will grant a mandamus to compel proceedings for filling the office; and that the writ will not be granted where it appears that the object sought can be accomplished without serious difficulty without the aid of the court.

Illinois.— See People *v.* Fairbury, 51 Ill. 149.

Maryland.— Mottu *v.* Primrose, 23 Md. 482.

Nevada.— State *v.* Wright, 10 Nev. 167; State *v.* Lady Bryan Min. Co., 4 Nev. 400.

New Jersey.— McNeely *v.* Woodruff, 13 N. J. L. 352.

New York.— People *v.* Cummings, 72 N. Y. 433; People *v.* Albany Hospital, 61 Barb. 397, 11 Abb. Pr. N. S. 4; St. Stephen's Church Cases, 10 N. Y. Suppl. 230, 11 N. Y. Suppl. 669-675, 25 Abb. N. Cas. 230.

Pennsylvania.— Com. *v.* Keim, 15 Phila. 1.

United States.— Gunton *v.* Ingle, 11 Fed. Cas. No. 5,870, 4 Cranch C. C. 438.

England.— *In re* Paris Skating Rink Co., 9 Ch. D. 731, 46 L. J. Ch. 831, 25 Wkly. Rep. 767; Rex *v.* Birmingham, 7 A. & E. 254, 1 Jur. 754, 34 E. C. L. 150; Rex *v.* Cambridge, 4 Burr. 2008, 2 T. R. 456; Thames-Haven Dock, etc., Co. *v.* Rose, 2 Dowl. P. C. N. S. 104, 12 L. J. C. P. 90, 4 M. & G. 552, 556, 3 R. & Can. Cas. 177, 5 Scott N. R. 524, 43

directors or others as to the calling of meetings.[78] The writ will also lie to compel the inspectors or tellers to canvass the votes at a corporate election and issue certificates;[79] but it will not lie to compel a recanvass by officers whose powers have ceased, or to determine the title to office.[80] Mandamus will not lie to compel the officers of a beneficial association to declare the adoption of an amendment to its constitution involving no pecuniary rights of the members, the question being whether the amendment was duly adopted.[81]

6. Corporate Offices and Officers[82] — a. Right to Office. It was formerly held that mandamus would not lie to admit or restore one to an office in a purely private corporation,[83] but the modern rule is otherwise.[84] Quo warranto and not mandamus is the proper remedy to try the disputed title to a corporate office;[85]

E. C. L. 287; Reg. *v.* Aldham, 15 Jur. 1035; Reg. *v.* Goole Parish, 4 L. T. Rep. N. S. 322; Rex *v.* Gregory, 8 Mod. 111.

Canada.— See Moore *v.* Port Bruce Harbour Co., 14 U. C. Q. B. 365.

See 33 Cent. Dig. tit. "Mandamus," § 262.

Religious societies see *infra*, VII, A, 12.

Call of election since service of papers.— It is no answer to the application for mandamus in such case that since the papers were served defendants have ordered an election, where it appears that they have attempted, by altering the by-laws, to change the mode of publishing the notice of election, to change the test of the right to vote at such election, and to give persons a right to vote who had not that right previously. People *v.* Albany Hospital, 61 Barb. (N. Y.) 397, 11 Abb. Pr. N. S. 4.

Existence of other remedy.— It has been held that the fact that a proceeding may be brought by a stock-holder to remove the existing directors or trustees from office and relieve them of their duties on their refusal to call a meeting for an election of directors or trustees is not such an adequate remedy as to bar mandamus to compel them to call such meeting. State *v.* Wright, 10 Nev. 167.

By statute.— In some states by statute mandamus will lie to compel the holding of a corporate election or a new election in case of illegality. See People *v.* Simonson, 18 N. Y. Suppl. 37, 27 Abb. N. Cas. 422.

The status of the relator as stock-holder or member must be established. State *v.* Wright, 10 Nev. 167. See *supra*, VII, A, 4, b.

A proper demand for the calling and holding of a corporate election must generally be made upon the proper officers. Harrison *v.* Simonds, 44 Conn. 318; State *v.* Wright, 10 Nev. 167; Com. *v.* Keim, 15 Phila. (Pa.) 1. See *supra*, VII, A, 3. But continuous neglect may render a demand unnecessary. People *v.* Albany Hospital, 61 Barb. (N. Y.) 397, 11 Abb. Pr. N. S. 4.

After acquiescence in an illegal election of officers for eight months mandamus for a new election was refused. Moore *v.* Port Bruce Harbour Co., 14 U. C. Q. B. 365.

Election not void.— If an election is not void, as where the only objection is because of the rejection of votes which would not have changed the result, mandamus will not be granted. *Ex p.* Mawby, 2 E. & B. 718, 18 Jur. 906, 23 L. J. M. C. 153, 2 Wkly. Rep. 473, 77 E. C. L. 718.

78. Com. *v.* Keim, 15 Phila. (Pa.) 1; MacDougall *v.* Gardiner, L. R. 10 Ch. 606, 33 L. T. Rep. N. S. 521, 23 Wkly. Rep. 846.

79. State *v.* McGann, 64 Mo. App. 225; People *v.* White, 11 Abb. Pr. (N. Y.) 168 (holding also that a suit by claimants of office in a corporation for an injunction to prevent adverse claimants from acting as officers is no bar to mandamus to obtain certificate of election); Com. *v.* Cox, 1 Leg. Chron. (Pa.) 78 (holding that mandamus is the proper remedy to compel inspectors appointed to hold an election for directors to receive and count the votes by proxy which have been rejected without sufficient reason). See also Hayes *v.* Morgan, 81 Ill. App. 665.

Other remedy.— In Missouri mandamus was held to lie to compel the inspectors to canvass the votes, although the statute provided a remedy by application to a court by any person aggrieved by a corporate election, as the statutory remedy was considered merely cumulative. State *v.* McGann, 64 Mo. App. 225. The contrary, however, was held in New York. People *v.* Simonson, 61 Hun (N. Y.) 338, 16 N. Y. Suppl. 118.

80. Hayes *v.* Morgan, 81 Ill. App. 665, holding that mandamus will not lie against the tellers of an election of directors after their temporary functions cease, to compel them to recanvass the vote cast, nor against the chairman and secretary to compel them to record the result of the recanvass and cause the petitioners to be let into the office of directors. See *infra*, VII, A, 6, a.

81. People *v.* Masonic Benev. Assoc., 98 Ill. 635.

82. **Ecclesiastical offices** see *infra*, VII, A, 12.

In colleges and universities, etc., see *infra*, VII, A, 13.

In foreign corporations see *infra*, VII, B.

Religious societies see *infra*, VII, A, 12.

83. Parkinson's Case, Comb. 143; Anonymous, Comb. 133; Anonymous, Comb. 41; Rex *v.* Middleton, 1 Keb. 625; Hurst's Case, 1 Keb. 349; White's Case, 6 Mod. 18, 3 Salk. 232. See also American Railway-Frog Co. *v.* Haven, 101 Mass. 398, 405, 3 Am. Rep. 377.

84. See the cases cited in the notes following.

85. People *v.* New York Infant Asylum,

but where the title to a corporate office has been determined in quo warranto proceedings,[86] or where the title is undisputed or clear, mandamus will lie to deliver or restore the office to the person entitled thereto.[87] The writ will not lie, however, where the office or its tenure are not of a permanent character,[88] where it involves no temporal right,[89] or where exclusive jurisdiction is vested in some other than the common-law courts,[90] or in visitors or other persons, special boards, or tribunals.[91] Nor will it be granted where the relator's right to the office is not

122 N. Y. 190, 25 N. E. 241, 10 L. R. A. 381, holding that where a person had been deposed from an office under a corporation and another person had been elected to the vacancy after he was deposed, quo warranto, and not mandamus, was the proper proceeding to restore him to his position. See also Hayes *v.* Morgan, 81 Ill. App. 665; Atty.-Gen. *v.* Looker, 111 Mich. 498, 69 N. W. 929; *In re* Hehra Hased Va Emet, 7 Hun (N. Y.) 333; People *v.* New York Casualty Co., 34 Misc. (N. Y.) 326, 69 N. Y. Suppl. 775; People *v.* Dikeman, 7 How. Pr. (N. Y.) 124; United Fire Assoc. *v.* Benseman, 4 Wkly. Notes Cas. (Pa.) 1; State *v.* Lehre, 7 Rich. (S. C.) 234; Rex *v.* Winchester, 7 A. & E. 215, 1 Jur. 738, 6 L. J. K. B. 213, 2 N. & P. 274, W. W. & D. 525, 34 E. C. L. 131; and, generally, QUO WARRANTO.

86. Matter of Journal Pub. Club, 30 Misc. (N. Y.) 326, 63 N. Y. Suppl. 465; Com. *v.* Masonic Home, 6 Pa. Dist. 732, 20 Pa. Co. Ct. 465 [*reversed* on other grounds in 188 Pa. St. 21, 41 Atl. 343].

87. *Connecticut.*— Fuller *v.* Plainfield Academic School, 6 Conn. 532.

Louisiana.— Prieur *v.* Commercial Bank, 7 La. 509, holding that where certain directors of a bank were denied by the majority the right to exercise the rights in the board appertaining to their office as directors, mandamus would lie to restore them to the exercise of their rights.

Maryland.— Ward *v.* Sasscer, 98 Md. 281, 57 Atl. 208, to restore trustees of an incorporated academy. See also Triesler *v.* Wilson, 89 Md. 169, 42 Atl. 926; Supreme Lodge O. of G. C. *v.* Simering, 88 Md. 276, 291, 40 Atl. 723, 71 Am. St. Rep. 409, 41 L. R. A. 720; Tartar *v.* Gibbs, 24 Md. 323; Weber *v.* Zimmerman, 23 Md. 45; Clayton *v.* Carey, 4 Md. 26.

Massachusetts.— J. H. Wentworth Co. *v.* French, 176 Mass. 442, 57 N. E. 789; American Railway-Frog Co. *v.* Haven, 101 Mass. 398, 3 Am. Rep. 377.

Nevada.— State *v.* Cronan, 23 Nev. 437, 49 Pac. 41; State *v.* McCullough, 3 Nev. 202.

New Jersey.— Welch *v.* Passaic Hospital Assoc., 59 N. J. L. 142, 36 Atl. 702.

New York.— People *v.* New York Infant Asylum, 122 N. Y. 190, 25 N. E. 241, 10 L. R. A. 381; People *v.* Steele, 2 Barb. 397; Matter of Journal Pub. Club, 30 Misc. 326, 63 N. Y. Suppl. 465, to restore directors.

Virginia.— Booker *v.* Young, 12 Gratt. 303, to restore the president of a bank to his office.

West Virginia.— Cross *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 174, 12 S. E. 1071, to admit to office of director of a railroad company.

England.— Reg. *v.* Government Stock Inv. Co., 3 Q. B. D. 442, 47 L. J. Q. B. 478, 39 L. T. Rep. N. S. 230 (to admit to the office of director); Rex *v.* Barker, 3 Burr. 1265; Rex *v.* Blooer, 2 Burr. 1043; Stamp's Case, Comb. 348 (to restore to the office of clerk of the company of masons of London); Anonymous, Comb. 105; Rex *v.* Cambridge University, 2 Ld. Raym. 1334, 8 Mod. 148, Str. 557; White's Case, 2 Ld. Raym. 1004 (to restore to the office of clerk of the company of butchers of London); Reg. *v.* Raines, 3 Salk. 233; Anonymous, Str. 696 (to compel the swearing in of a director of an insurance company); Rex *v.* Ely, 2 T. R. 290.

See 33 Cent. Dig. tit. "Mandamus," § 263. See also CORPORATIONS, 10 Cyc. 747, 749.

88. Evans *v.* Hearts of Oak Ben. Soc., 12 Jur. N. S. 163 (holding that an officer of a mutual benefit society who had been dismissed by the directors could not compel reinstatement, because the office and its tenure were not of a permanent character); Rex *v.* Guardians of Poor, 4 M. & S. 324; Rex *v.* Guardian of Thame, Str. 115; Rex *v.* Croydon, 5 T. R. 713, 2 Rev. Rep. 688 (would not lie to admit a vestry clerk).

89. State *v.* Bibb St. Church, 84 Ala. 23, 4 So. 40; Africans Union Church *v.* Sanders, 1 Houst. (Del.) 100, 63 Am. Dec. 187; Lee's Case, Carth. 169, Holt K. B. 435, 3 Lev. 309, 3 Mod. 332, Show. 217, 251, 261, Skin. 290. Religious societies see *infra*, VII, A, 12.

90. Reg. *v.* York, 20 Q. B. D. 740, 52 J. P. 709, 57 L. J. Q. B. 396, 59 L. T. Rep. N. S. 443, 36 Wkly. Rep. 718; Lee's Case, Carth. 169, Holt K. B. 435, 3 Lev. 309, 3 Mod. 332, Show. 217, 251, 261, Skin. 290, holding that the writ would not lie to restore one of the proctors of doctor's commons, conusance of such matters being vested in the ecclesiastical and not in the temporal courts.

91. State *v.* Bibb St. Church, 84 Ala. 23, 4 So. 40; People *v.* New York Post-Graduate Medical School, etc., 29 N. Y. App. Div. 244, 51 N. Y. Suppl. 420 (removal of professor of medical school by directors); People *v.* College of Physicians and Surgeons, 7 How. Pr. (N. Y.) 290; Bracken *v.* William and Mary College, 3 Call (Va.) 573; Reg. *v.* Hertford College, 3 Q. B. D. 693, 47 L. J. Q. B. 649, 39 L. T. Rep. N. S. 18, 27 Wkly. Rep. 347 [*reversing* 2 Q. B. D. 590, 36 L. T. Rep. N. S. 768]; Reg. *v.* Dean and Chapter of Chester, 15 Q. B. 513, 15 Jur. 10, 19 L. J. Q. B. 485, 69 E. C. L. 513; Parkinson's Case, Comb. 143, 3 Mod. 265, Show. 74; *Ex p.* Buller, 1 Jur. N. S. 709, 3 Wkly. Rep. 447;

clear,[92] as, for example, where by reason of a personal disqualification he is incligible thereto.

b. Mere Service or Employment. Unless the remedy has been extended by statute,[93] mandamus will not lie to admit or restore one to a mere service or employment, as distinguished from an office, the remedy in such case, if any, being by ordinary action.[94]

c. Inspection and Custody of Books, Papers, and Records. Mandamus will lie on the relation of a director or other officer of a corporation to enforce his right to inspect the books, papers, and records of the corporation, where such inspection is necessary to enable him to discharge his duties.[95] The writ will also lie to compel a former officer of a corporation to deliver the books, papers, and

Appleford's Case, 1 Mod. 82; Rex *v.* Alsop, Show. 457; Rex *v.* Ely, 5 T. R. 475; Philips *v.* Bury, 2 T. R. 346; Rex *v.* Ely, 2 T. R. 290. See also *infra*, VII, A, 11–13.

Refusal of visitors, etc., to act.— If the visitors or other persons, boards, or tribunals refuse to act, mandamus will lie to compel them to do so. *Ex p.* Buller, 1 Jur. N. S. 709, 3 Wkly. Rep. 447; Usher's Case, 5 Mod. 452; Rex *v.* Blythe, 5 Mod. 404; Rex *v.* Worcester, 4 M. & S. 415, 16 Rev. Rep. 512; Rex *v.* Ely, 5 T. R. 475; Rex *v.* Lincoln, 2 T. R. 338 note. See also *infra*, VII, A, 11–13.

92. Weber *v.* Zimmerman, 23 Md. 45; People *v.* New York Infant Asylum, 122 N. Y. 190, 25 N. E. 241, 10 L. R. A. 381.

The writ must be denied or quashed if it appears that the relator was not duly elected or chosen (J. H. Wentworth Co. *v.* French, 176 Mass. 442, 57 N. E. 789, holding that the writ would not be granted to declare duly elected officers chosen by the vote of a pledgee of stock whose certificate was not legally issued; People *v.* New York Infant Asylum, 122 N. Y. 190, 25 N. E. 241, 10 L. R. A. 381; Rex *v.* Taunton St. James, Cowp. 413; Reg. *v.* Twitty, 7 Mod. 83); that he has resigned (Rex *v.* Rippon, 1 Ld. Raym. 563, 2 Salk. 433) or been regularly removed by proper authority (People *v.* New York Post-Graduate Medical School, etc., 29 N. Y. App. Div. 244, 51 N. Y. Suppl. 420; People *v.* Albany Medical College, 26 Hun (N. Y.) 348 [*reversing* 62 How. Pr. 220, and *affirmed* in 89 N. Y. 635]; Rex *v.* Taunton St. James, Cowp. 413; Rex *v.* Guardians of Thame, Str. 115); that he has been legally removed and defendant appointed since the filing of the original answer (State *v.* McCullough, 3 Nev. 202); that there is good ground for his removal, although he has been irregularly removed (Rex *v.* Griffiths, 5 B. & Ald. 731, 7 E. C. L. 398); or that he has become disqualified to hold the office (Weber *v.* Zimmerman, 23 Md. 45).

93. In Nevada, where the remedy by mandamus is extended by statute beyond its scope at common law, it is held that the writ will lie to put one into the position of superintendent of a mining company. State *v.* Cronan, 23 Nev. 437, 49 Pac. 41; State *v.* McCullough, 3 Nev. 202.

94. People *v.* New York Post-Graduate Medical School, etc., 29 N. Y. App. Div. 244, 51 N. Y. Suppl. 420 (professorship in a medical school); *Ex p.* Le Cren, 2 D. & L. 571, 9 Jur. 255, 14 L. J. Q. B. 34 (organist in a church); Rex *v.* Guardians of Poor, 4 M. & S. 324 (clerk and treasurer of guardians of the poor); Lee's Case, Carth. 169, Holt K. B. 435, 3 Lev. 309, 3 Mod. 332, Show. 217, 251, 261, Skin. 290 (proctor of doctor's commons); Reg. *v.* Raines, 3 Salk. 233 (where it is said that "where the place is of mere service, no mandamus will lie; as for an usher of a school); Rex *v.* Croydon, 5 T. R. 713, 2 Rev. Rep. 688 (vestry clerk); Ile's Case, 1 Vent. 143.

95. Hatch *v.* New Orleans City Bank, 1 Rob. (La.) 470 (where the other directors refused to allow the relator to examine the books on the ground that he was hostile to the corporation and would use the information obtained to its injury); People *v.* Columbia Paper Bag Co., 103 N. Y. App. Div. 208, 92 N. Y. Suppl. 1084; People *v.* Goldstein, 37 N. Y. App. Div. 550, 56 N. Y. Suppl. 306 (holding also that on application by the president of a corporation for mandamus to compel the secretary to allow him to inspect the stock-book, it was no defense that defendant permitted an inspection of the other books of the company, or that he furnished the relator with an accurate statement of the condition of the company, or that the relator had stopped the proper delivery of the company's mail, or that he had collected the company's money without turning it over to defendant, or that his motives were improper); People *v.* Mott, 1 How. Pr. (N. Y.) 247; People *v.* Throop, 12 Wend. (N. Y.) 183 (holding also that a board of directors cannot exclude one of their number from an inspection of the books of the company because they deem him hostile to its interests). *Compare* Rosenfeld *v.* Einstein, 46 N. J. L. 479, holding that if there is fair reason to believe that a party (in this case a director) asking for an inspection of corporate books intends to make an improper use of them, and on that ground his request is denied, the court will not aid him by mandamus. It was also held in this case that where a director prayed for a mandamus against his co-director, commanding the latter to permit the former to have at all times an equal share and control with him in the management and direction of all the affairs and business of the company; but no interference with the petitioner's right to participate in the board meetings was alleged,

records to his successor,[96] or to secure delivery of books held by a minority organization.[97]

7. Corporate Debts and Contracts — a. In General. As a general rule mandamus will not lie at the suit of a creditor of or contractor with a corporation to compel the payment of corporate debts or the performance of corporate contracts or obligations arising solely out of such contracts, but he will be left to pursue his ordinary legal and equitable remedies.[98] It is otherwise, however, if the

the writ must be refused on the grounds that the prayer was too general and too broad, and that the writ, if issued, would be practically unenforceable.

96. *Indiana.*— Fasnacht *v.* German Literary Assoc., 99 Ind. 133.

Louisiana.— State *v.* Riedy, 50 La. Ann. 258, 23 So. 327.

Maryland.— Ward *v.* Sasscer, 98 Md. 281, 57 Atl. 208.

Massachusetts.— American Railway-Frog Co. *v.* Haven, 101 Mass. 398, 3 Am. Rep. 377; St. Luke's Church *v.* Slack, 7 Cush. 226.

Missouri.— State *v.* Davis, 54 Mo. App. 447.

New Jersey.— State *v.* Goll, 32 N. J. L. 285.

New York.— Matter of Journal Pub. Club, 30 Misc. 326, 63 N. Y. Suppl. 465; People *v.* Dikeman, 7 How. Pr. 124.

England.— Anonymous, 1 Barn. 402; Rex *v.* Wildman, Str. 879.

See 33 Cent. Dig. tit. "Mandamus," § 264.

Defenses.— Where the secretary of a railroad company bought a set of books with his own funds, and entered in them the minutes of the proceedings of the corporators, and received in them the subscriptions of stock, it was held that his possession was the possession of the company, that in going out of office he had no right to take the books with him, that he had no lien on the books either for the purchase-money, for his services as secretary, or for the use and occupation of his premises by the company while he was secretary, and that the company was entitled to a peremptory mandamus. State *v.* Goll, 32 N. J. L. 285.

Effect of proceeding in equity.— Mandamus will lie to obtain possession of the corporate books and papers in a proper case, notwithstanding there may be a remedy in equity, but not when the relator has already brought a suit in equity under which full, complete, and specific relief may be afforded him. Hardcastle *v.* Maryland, etc., R. Co., 32 Md. 32.

97. American Railway-Frog Co. *v.* Haven, 101 Mass. 398, 3 Am. Rep. 377.

98. *Alabama.*— Michener *v.* Carroll, 135 Ala. 409, 33 So. 168, payment of judgment against insurance company.

Connecticut.— Bassett *v.* Atwater, 65 Conn. 355, 360, 363, 32 Atl. 937, 32 L. R. A. 575.

Florida.— Florida Cent., etc., R. Co. *v.* State, 31 Fla. 482, 508, 13 So. 103, 20 L. R. A. 419, where it is said that "there is no better settled elementary principle in the law of mandamus than that the writ will never lie to enforce the performance of private contracts."

Indiana.— State *v.* Salem Church, 114 Ind. 389, 16 N. E. 808 (holding that mandamus would not lie to compel a religious society to permit the use of its church building by other denominations as provided by the contract under which subscriptions were made to its building fund); Excelsior Mut. Aid Assoc. *v.* Riddle, 91 Ind. 84 (holding that mandamus would not lie to compel payment under a contract of life insurance); Indiana, etc., R. Co. *v.* Rinehart, 14 Ind. App. 588, 43 N. E. 238 (holding that a provision in an instrument filed by a railroad company for the appropriation of land for a right of way that it would put in such bridges and tile drains as might be needed to give proper drainage across the right of way, being merely contractual, was not enforceable by mandamus).

Kansas.— State *v.* Republican River Bridge Co., 20 Kan. 404, holding that mandamus would not lie to compel a bridge company to rebuild and maintain its bridge, where the company had given the state a bond to secure the maintenance thereof, the remedy, if any, being on the bond.

Louisiana.— State *v.* New Orleans, etc., R. Co., 37 La. Ann. 589, holding that mandamus would not lie on the relation of a city to compel a railroad company to repair a street through which the city had granted a right of way and which the company had bound itself to keep in repair, a bond having been given by the company for the faithful performance of its contract.

Michigan.— Burland *v.* Northwestern Mut. Ben. Assoc., 47 Mich. 424, 11 N. W. 269; Van Norman *v.* Central Car, etc., Co., 41 Mich. 166, 49 N. W. 925.

Nebraska.— Horton *v.* State, 60 Nebr. 701, 84 N. W. 87, holding that mandamus will not lie to compel the issue of a warrant by the auditor of a private corporation on its treasurer, in accordance with a resolution of the executive committee, for payment of a debt due from the corporation.

New Jersey.— Bradbury *v.* Mutual Reserve Fund Life Assoc., 53 N. J. Eq. 306, 41 Atl. 775 (holding that where a policy in a mutual life insurance company has been forfeited by failure to pay the premiums upon the day fixed and the holder has the right upon certain terms, which he is able and willing to fulfil, to be relieved from his default, his remedy against the company is not by mandamus, but in a court of equity for relief in the nature of specific performance); Rosenfeld *v.* Einstein, 46 N. J. L. 479; State *v.* Paterson, etc., R. Co., 43 N. J. L. 505 [*affirmed* in 45 N. J. L. 186] (holding that where a railroad company, whose charter re-

remedy by mandamus is expressly given by statute,[99] if a specific and imperative legal duty to make the payment sought to be compelled or perform the contract is imposed by statute,[1] or, it seems, if there is no other remedy, as in the case where by statute the corporation cannot be otherwise sued or its property taken on execution.[2]

b. Collection of Subscriptions to Stock or Other Assets. In England mandamus has been held to lie at the suit of a judgment creditor, where there is no other legal remedy, to compel a corporation or its officers to make calls on sub-

quired it before constructing its road along a cemetery, to enter into a contract with the cemetery association to construct a suitable stone wall of a designated height between the railroad and the cemetery grounds, gave the association a penal bond to construct such wall within three months, mandamus would not lie to compel it to do so, as there was an adequate remedy at law on its contract, or by bill for specific performance).

New York.— People *v.* Nash, 47 Hun 542 [*affirmed* on other grounds in 111 N. Y. 310, 18 N. E. 630, 7 Am. St. Rep. 747, 2 L. R. A. 180]. See also Cohen *v.* New York Mut. L. Ins. Co., 50 N. Y. 610, 10 Am. Rep. 522.

Ohio.— Gas-Light Co. *v.* Zanesville, 47 Ohio St. 35, 50, 23 N. E. 60 (furnishing gas under contract with city); Ham *v.* Toledo, etc., R. Co., 29 Ohio St. 174 (refusing mandamus to compel a corporation to issue its bonds to one of its creditors, in order that he might obtain the benefit of a mortgage security); State *v.* Zanesville, etc., Turnpike Road Co., 16 Ohio St. 308 (refusal of corporation to contribute to the expense of repairing a bridge as required by contract).

Pennsylvania.— Hays *v.* Lycoming F. Ins. Co., 98 Pa. St. 184 [*reversing* 10 Wkly. Notes Cas. 31]; Com. *v.* Wilkes-Barre Gas Co., 2 Kulp 499, contract to supply gas.

Virginia.—Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 33, 32 S. E. 775.

Wisconsin.— State *v.* Milwaukee Medical College, 128 Wis. 7, 106 N. W. 116.

England.— Reg. *v.* Hull, etc., R. Co., 6 Q. B. 70, 8 Jur. 491, 13 L. J. Q. B. 257, 3 R. & Can. Cas. 705, 51 E. C. L. 70; Reg. *v.* Victoria Park Co., 1 Q. B. 288, 4 P. & D. 639, 41 E. C. L. 544; Benson *v.* Paul, 6 E. & B. 273, 2 Jur. N. S. 425, 25 L. J. Q. B. 274, 4 Wkly. Rep. 493, 88 E. C. L. 273.

Canada.— Hughes *v.* Newcastle Dist. Mut. F. Ins. Co., 13 U. C. Q. B. 153.

See 33 Cent. Dig. tit. "Mandamus," §§ 34, 272; and *supra*, II, C, 2, c.

The duty of officers to call a corporate meeting as required by the by-laws does not arise out of mere contract obligation so as to exclude mandamus to compel them to perform such duty. Bassett *v.* Atwater, 65 Conn. 355, 363, 32 Atl. 937, 32 L. R. A. 575. See *supra*, VII, A, 5.

Duty imposed by municipal ordinance.— The fact that an ordinance granting a railroad, street railroad, or other company the use of streets and alleys upon certain conditions requires formal acceptance by the company does not render the grant a mere private contract, so as to preclude mandamus by a citizen of the municipality to enforce compliance with the conditions of the ordinance. People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775. See *infra*, VII, A, 9, b, (I), text and note 26; j, (I), (D), (II).

Contract by railroad company to establish or maintain station.— Florida Cent., etc., R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419.

99. State *v.* New Orleans, etc., R. Co., 52 La. Ann. 1570, 28 So. 111, remedy by mandamus given by statute to parishes and municipal corporations to enforce the obligation of any contract relating to the paving, reconstruction, repair, or care of streets, highways, bridges, etc.

1. State *v.* Wabash, etc., Canal, 4 Ind. 495.

Illustrations.— Thus mandamus has been recognized as a proper remedy to compel payment of certain interest on canal bonds as expressly required by statute (State *v.* Wabash, etc., Canal, 4 Ind. 495); to compel a turnpike road company to issue a certificate to one who has performed work on the road under a contract with it, as required by a statute, so as to enable him to obtain payment from the state treasurer out of money subscribed by the state in aid of the construction of the road (Com. *v.* Hanover, etc., Turnpike Road Co., 9 Serg. & R. (Pa.) 59; Com. *v.* Anderson's Ferry, etc., Turnpike Road, 7 Serg. & R. (Pa.) 6); and to compel an insurance company to apply the amount due under a fire policy, as required by a statute, to the rebuilding of the premises insured (Simpson *v.* Scottish Union Ins. Co., 1 Hem. & M. 618, 9 Jur. N. S. 711, 32 L. J. Ch. 329, 8 L. T. Rep. N. S. 112, 1 New Rep. 537, 11 Wkly. Rep. 459, 71 Eng. Reprint 270).

2. Rex *v.* St. Katharine Dock Co., 4 B. & Ad. 360, 1 N. & M. 121, 24 E. C. L. 162. See also Person *v.* Warren R. Co., 32 N. J. L. 441.

If an execution will lie against the property of the company mandamus will not lie to compel them to pay a judgment, for there is then a remedy by the ordinary course of the law, and it can make no difference that the circumstances are such that the execution may produce no fruits. Reg. *v.* Victoria Park Co., 1 Q. B. 288, 4 P. & D. 639, 41 E. C. L. 544. See also Hughes *v.* Newcastle Dist. Mut. F. Ins. Co., 13 U. C. Q. B. 153.

To compel payment of taxes see *infra*, VII, A, 9, i.

scriptions for stock to raise funds for payment of the judgment;[3] but the writ seems never to have been issued for this purpose in the United States, and perhaps it will not lie.[4] However this may be, the remedy in equity is more complete and appropriate and the creditor is not bound to resort to mandamus instead of or before proceeding in equity.[5]

c. **Compelling Assessments.** It has been held in some states that mandamus will lie after or in aid of a judgment recovered by a member or policy-holder against an assessment insurance or mutual benefit company to compel an assessment to pay the judgment,[6] although not before judgment;[7] but there are decisions to the contrary.[8] This question is elsewhere more fully treated.[9]

d. **Inspection of Books and Records by Creditors.** A judgment creditor of a corporation, in a proper case, as in the case where by statute he is entitled to issue execution against shareholders who have not paid up for their shares, may by mandamus enforce his right to an inspection of the register of shareholders or other like book of the corporation.[10]

8. Affixing of Corporate Seal. Mandamus will lie to compel a corporation or its officers to affix the corporate seal to an instrument.[11]

9. To Compel Performance of Public Duties[12] — a. In General. Although on some questions the authorities are conflicting, the general rule is that mandamus will lie on the relation of the attorney-general acting for and in the name of the state,[13] or in some cases on the relation of a municipality or a particular public

To fix compensation of officer. — In a Georgia case there is *dictum* to the effect that where the president and directors of a corporation decline to fix the compensation of an officer as required by a by-law, or unreasonably postpone action in the premises, mandamus will lie to compel them to perform their duty. Eagle, etc., Mfg. Co. *v.* Browne, 58 Ga. 240.

3. Reg. *v.* Victoria Park Co., 1 Q. B. 288, 4 P. & D. 639, 41 E. C. L. 544, where, however, the writ was denied because it appeared that calls sufficient to satisfy the judgment had been made, but not paid, and that the company no longer had the proper officers for making such calls. See also Reg. *v.* Ledgard, 1 Q. B. 616, 41 E. C. L. 697, where mandamus was granted to compel an incorporated borough to make a borough rate for the purpose of paying instalments on a bond.

4. State *v.* Canal, etc., St. R. Co., 23 La. Ann. 333; Hays *v.* Lycoming F. Ins. Co., 98 Pa. St. 184. However, there is *dictum* in some of the cases to the effect that it will lie. Patterson *v.* Lynde, 112 Ill. 196, 206; McCarthy *v.* Lavasche, 89 Ill. 270, 276, 31 Am. Rep. 83 (statutory double liability of stock-holders); Hatch *v.* Dana, 101 U. S. 205, 215, 25 L. ed. 885.

Discretion vested in the directors by the charter as to collection of unpaid subscriptions cannot be interfered with by mandamus. State *v.* Canal, etc., St. R. Co., 23 La. Ann. 333.

Where there are no directors mandamus will not lie. Hatch *v.* Dana, 101 U. S. 205, 215, 25 L. ed. 885.

5. Ward *v.* Griswoldville Mg. Co., 16 Conn. 593; Dalton, etc., R. Co. *v.* McDaniel, 56 Ga. 191; Thompson *v.* Reno Sav. Bank, 19 Nev. 242, 9 Pac. 121, 3 Am. St. Rep. 883; Hatch *v.* Dana, 101 U. S. 205, 215, 25 L. ed. 885. And see Corporations, 10 Cyc. 653 *et seq.*

6. Hare *v.* Pottawattamie County Mut. F. Ins. Co., 74 Iowa 39, 36 N. W. 880; People *v.* Masonic Guild, etc., Mut. Ben. Assoc., 58 Hun (N. Y.) 395, 12 N. Y. Suppl. 171 [*reversed* on other grounds in 126 N. Y. 615, 27 N. E. 1037].

7. Excelsior Mut. Aid Assoc. *v.* Riddle, 91 Ind. 84; Burland *v.* Northwestern Mut. Ben. Assoc., 47 Mich. 424, 11 N. W. 269; People *v.* Masonic Guild, etc., Mut. Ben. Assoc., 58 Hun (N. Y.) 395, 12 N. Y. Suppl. 171 [*reversed* on other grounds in 126 N. Y. 615, 27 N. E. 1037]. *Contra*, Rainsbarger *v.* Union Mut. Aid Assoc., 72 Iowa 191, 33 N. W. 626.

8. See Miner *v.* Michigan Mut. Ben. Assoc., 65 Mich. 84, 31 N. W. 763.

9. See Mutual Benefit Insurance.

10. Reg. *v.* Derbyshire, etc., Junction R. Co., 3 E. & B. 784, 18 Jur. 1054, 23 L. J. Q. B. 333, 2 Wkly. Rep. 489, 77 E. C. L. 784.

11. Reg. *v.* Kendall, 1 Q. B. 366, 10 L. J. Q. B. 137, 4 P. & D. 603, 41 E. C. L. 580 (to compel the master of a hospital to affix the seal to an instrument of presentation); Rex *v.* Cambridge, 3 Burr. 1647, W. Bl. 547 (to compel the keeper of the common seal of a university to affix it to an instrument of appointment of an officer); Rex *v.* Windham, Cowp. 377 (to compel the warden of a college to affix the common seal to an answer of the fellows, etc., in chancery contrary to his own separate answer); Rex *v.* Bland, 7 Mod. 355 (to compel the provost of a college to affix the college seal to a presentation by the college).

12. **Corporation in hands of receiver** see *infra*, VII, A, 9, k.

13. State *v.* Hartford, etc., R. Co., 29 Conn. 538; Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; People *v.* New York, etc., R. Co., 28 Hun (N. Y.) 543. See *infra*, IX, C, 1, d, (I), (B).

officer or board,[14] or of a private individual,[15] to compel a corporation to perform a specific legal duty which it owes to the public, or to the relator as one of the public,[16] unless some other adequate remedy is provided.[17] An application by the attorney-general on behalf of the state to compel a quasi-public corporation to perform its duties to the public cannot be defeated by showing that the state has not been injured and that the individuals injured have private remedies by action;[18] and where the application is by individuals specially injured, the remedy is not barred by the fact that they have a remedy by action at law, unless such remedy is equally as convenient, beneficial, and effective as the remedy by mandamus.[19]

14. People *v.* Chicago, etc., R. Co., 67 Ill. 118; Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208; Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481. See *infra*, IX, C, 1, d.

15. *Illinois.*— People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650.

Iowa.— Boggs *v.* Chicago, etc., R. Co., 54 Iowa 435, 6 N. W. 744.

Nebraska.— State *v.* Republican Valley R. Co., 17 Nebr. 647, 24 N. W. 329, 32 Am. Rep. 424.

New York.— People *v.* New York Cent., etc., R. Co., 61 N. Y. App. Div. 494, 70 N. Y. Suppl. 684.

Pennsylvania.— Mercur *v.* Media Electric Light, etc., Co., 7 Del. Co. 586.

Virginia.— Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775.

Washington.— State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515.

United States.— Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428.

See *infra*, IX, C, 1, e.

16. *Connecticut.*— State *v.* Hartford, etc., R. Co., 29 Conn. 538.

Illinois.— People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; People *v.* Chicago, etc., R. Co., 67 Ill. 118.

Indiana.— Cummins *v.* Evansville, etc., R. Co., 115 Ind. 417, 18 N. E. 6.

Iowa.— Boggs *v.* Chicago, etc., R. Co., 54 Iowa 435, 6 N. W. 744.

Kansas.— Potwin Place *v.* Topeka R. Co., 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312.

Louisiana.— State *v.* New Orleans Gaslight Co., 108 La. 67, 32 So. 179.

Maine.— Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208.

Michigan.— People *v.* State Ins. Co., 19 Mich. 392.

Nebraska.— Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481; State *v.* Republican Valley R. Co., 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424.

New Jersey.—State *v.* Bridgeton, etc., Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837; *In re* Trenton Water Power Co., 20 N. J. L. 659.

New York.— People *v.* Rochester, etc., R. Co., 76 N. Y. 294; People *v.* New York Cent., etc., R. Co., 61 N. Y. App. Div. 494, 70 N. Y. Suppl. 684; People *v.* New York Cent., etc., R. Co., 28 Hun 543.

Pennsylvania.— Mercur *v.* Media Electric Light, etc., Co., 7 Del. Co. 586.

South Carolina.— State *v.* North Eastern R. Co., 9 Rich. 247, 67 Am. Dec. 551.

Texas.— San Antonio St. R. Co. *v.* State, 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662.

Virginia.—Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775.

Washington.— State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515.

United States.— Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428.

England.— Reg. *v.* Bristol Dock Co., 2 Q. B. 64, 1 G. & D. 286, 6 Jur. 216, 2 R. & Can. Cas. 599, 42 E. C. L. 573; Rex *v.* Severn, etc., R. Co., 2 B. & Ald. 646, 21 Rev. Rep. 433.

Canada.— *Ex p.* Atty.-Gen., 17 N. Brunsw. 667.

See 33 Cent. Dig. tit. "Mandamus," § 265 *et seq.*

By express statutory provision see People *v.* Rochester, etc., R. Co., 76 N. Y. 294, holding that the directors of a railroad company are officers of a corporation within the meaning of a statute (2 N. Y. Rev. St. c. 587, § 60) authorizing mandamus to compel the performance of public acts, duties, etc., and may therefore be compelled by mandamus to perform specific acts required by law for the benefit of the public.

17. *Alabama.*— State *v.* Mobile, etc., R. Co., 59 Ala. 321.

Nebraska.— Nebraska Tel. Co. *v.* State, 55 Nebr. 627, 76 N. W. 171, 45 L. R. A. 113.

New Hampshire.— State *v.* Manchester, etc., R. Co., 62 N. H. 29.

New Jersey.— Morgan *v.* Monmouth Plank Road Co., 26 N. J. L. 99.

New York.— People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202]; People *v.* Central New York Tel., etc., Co., 41 N. Y. App. Div. 17, 58 N. Y. Suppl. 221; Matter of Waverly, 35 N. Y. App. Div. 38, 54 N. Y. Suppl. 368 [*affirmed* in 158 N. Y. 710, 53 N. E. 1133]; Matter of Baldwinsville Tel. Co., 24 Misc. (N. Y.) 221, 53 N. Y. Suppl. 574; People *v.* New York, etc., R. Co., 2 N. Y. Civ. Proc. 82.

See *supra*, II, D; VII, A, 2.

18. People *v.* New York Cent., etc., R. Co., 28 Hun (N. Y.) 543; *Ex p.* Atty.-Gen., 17 N. Brunsw. 667.

19. State *v.* Savannah, etc., Canal Co., 26

The remedy by mandamus is not precluded by the fact that the breach of the duty sought to be compelled renders the corporation or its officers liable to a penalty or to indictment, or that it is ground for quo warranto to forfeit its charter.[20]

b. The Legal Duty and Violation Thereof — (I) *In General.* The writ will issue only where there is a specific legal duty on the part of the corporation to do the act sought to be compelled and clear proof of a breach of that duty;[21] and the relator's right must be clearly established.[22] Some of the courts seem to hold that the duty must be clearly and expressly enjoined by charter or statute;[23] but by the weight of authority it may be either express or implied,[24] and it may be

Ga. 665; People *v.* New York Cent., etc., R. Co., 61 N. Y. App. Div. 494, 70 N. Y. Suppl. 684; Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775; *Ex p.* Atty.-Gen., 17 N. Brunsw. 667. *Compare*, however, Crane *v.* Chicago, etc., R. Co., 74 Iowa 330, 37 N. W. 397, 7 Am. St. Rep. 479.

The remedy by repeated actions at law to recover damages for a constantly recurring and continued violation of duty is not adequate. Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775; and other cases above cited.

20. *Delaware.*— State *v.* Wilmington Bridge Co., 3 Harr. 312.

Michigan.— People *v.* State Ins. Co., 19 Mich. 392.

New Jersey.— *In re* Trenton Water Power Co., 20 N. J. L. 659.

New York.— People *v.* Schaghticoke, 37 How. Pr. 427.

South Carolina.— State *v.* North Eastern R. Co., 9 Rich. 247, 67 Am. Dec. 551.

United States.—Indiana *v.* Lake Erie, etc., R. Co., 83 Fed. 284.

England.— Reg. *v.* Bristol Dock Co., 2 Q. B. 64, 1 G. & D. 286, 6 Jur. 216, 2 R. & Can. Cas. 599, 42 E. C. L. 573; Rex *v.* Severn, etc., R. Co., 2 B. & Ald. 646, 21 Rev. Rep. 433. But a writ of mandamus to compel the repair of a turnpike or toll-road has been refused on the ground that the remedy by indictment should be pursued. Reg. *v.* Oxford, etc., Turnpike Roads, 12 A. & E. 427, 6 Jur. 216 note, 4 P. & D. 154, 40 E. C. L. 215; Reg. *v.* Brown, 13 U. C. C. P. 356. See *infra*, VII, A, 9, j, (XIV).

See also *supra*, II, D, 2, d.

21. *Illinois.*— Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; People *v.* Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631.

Indiana.— Lake Erie, etc., R. Co. *v.* State, 139 Ind. 158, 38 N. E. 596.

Iowa.— Mystic Milling Co. *v.* Chicago, etc., R. Co., (1906) 107 N. W. 943; Milwaukee Malt Extract Co. *v.* Chicago, etc., R. Co., 73 Iowa 98, 34 S. W. 761.

Minnesota.— State *v.* Southern Minnesota R. Co., 18 Minn. 40.

New Jersey.— *In re* Trenton Water Power Co., 20 N. J. L. 659.

New York.— People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202]; People *v.* New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484.

Texas.— San Antonio St. R. Co. *v.* State, 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662.

Virginia.— Sherwood *v.* Atlantic, etc., R. Co., 94 Va. 291, 26 S. E. 943.

Washington.— Northwest Warehouse Co. *v.* Oregon R., etc., Co., 32 Wash. 218, 73 Pac. 388.

United States.— Northern Pac. R. Co. *v.* Washington Terr., 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092 [*reversing* 3 Wash. Terr. 303, 13 Pac. 604]; People *v.* Colorado Cent. R. Co., 42 Fed. 638; Kansas *v.* Southern Kansas R. Co., 24 Fed. 179.

England.— Rex *v.* Brecknock, etc., Canal Nav. Co., 3 A. & E. 217, 1 Harr. 279, 4 N. & M. 871, 30 E. C. L. 117; York, etc., R. Co. *v.* Reg., 1 C. L. R. 119, 1 E. & B. 858, 17 Jur. 630, 22 L. J. Q. B. 225, 7 R. & Can. Cas. 459, 1 Wkly. Rep. 358, 72 E. C. L. 858 [*reversing* 1 E. & B. 178, 72 E. C. L. 178]; Reg. *v.* Great Western R. Co., 62 L. J. Q. B. 572, 69 L. T. Rep. N. S. 572, 9 Reports 127.

See 33 Cent. Dig. tit. "Mandamus," § 265 *et seq.* And see *supra*, II, C, 2; VII, A, 2.

Anticipation of omission of duty.— The writ of mandamus will not issue in anticipation of a supposed omission of duty, but it must appear that there has been an actual default in the performance of a clear legal duty. Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 32 Wash. 218, 73 Pac. 388. See also Mystic Milling Co. *v.* Chicago, etc., R. Co., (Iowa 1906) 107 N. W. 943. As to the necessity for demand and refusal see *infra*, VII, A, 9, b, (III).

22. People *v.* Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631; Mackin *v.* Portland Gas Co., 38 Oreg. 120, 61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596.

23. See People *v.* New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484; Northern Pac. R. Co. *v.* Washington Terr., 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092 [*reversing* 3 Wash. Terr. 303, 13 Pac. 604].

24. *Illinois.*— People *v.* Chicago, etc., R. Co., 130 Ill. 175, 32 N. E. 857.

Maine.— Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208.

Michigan.— People *v.* State Ins. Co., 19 Mich. 392.

Nebraska.— State *v.* Republican Valley R. Co., 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424.

Texas.— San Antonio St. R. Co. *v.* State, 90 Tex. 520, 523, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662, where it is said: "The duty need not be express; it may be

imposed either by the charter of the corporation or other statute,[25] by a municipal ordinance or order of court made in pursuance of its charter or valid statutory authority,[26] by an order of commissioners under a valid statute,[27] or by the common law.[28] The writ will not lie to enforce mere contract obligations, as distinguished from duties imposed by law.[29]

(II) *Privilege or Option and Matters of Discretion.* The writ will not issue to compel the corporation to do an act as to which it has under its charter a mere privilege or option,[30] or to control its discretion.[31]

(III) *Demand and Refusal.* As a general rule there must be a demand and

implied. Clearly, when it appears by fair implication from the terms of its charter, it is as imperative as if the obligation were expressed."

25. *Connecticut.*— State *v.* Hartford, etc., R. Co., 29 Conn. 538.

Illinois.— Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; People *v.* Chicago, etc., R. Co., 67 Ill. 118.

Indiana.— Cummins *v.* Evansville, etc., R. Co., 115 Ind. 417, 18 N. E. 6.

Iowa.— Boggs *v.* Chicago, etc., R. Co., 54 Iowa 435, 6 N. W. 744.

Maine.— Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208.

Nebraska.— Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481; State *v.* Republican Valley R. Co., 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424.

New York.— People *v.* New York, etc., R. Co., 28 Hun 543.

Pennsylvania.— Mercur *v.* Media Electric Light, etc., Co., 7 Del. Co. 586.

South Carolina.— State *v.* North Eastern R. Co., 9 Rich. 247, 67 Am. Dec. 551.

Texas.— San Antonio St. R. Co. *v.* State, 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662.

Washington.— State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515.

United States.— Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428.

England.— Reg. *v.* Bristol Dock Co., 2 Q. B. 64, 1 G. & D. 286, 6 Jur. 216, 2 R. & Can. Cas. 599, 42 E. C. L. 573; Rex *v.* Severn, etc., R. Co., 2 B. & Ald. 646, 21 Rev. Rep. 433.

Canada.— *Ex p.* Atty.-Gen., 17 N. Brunsw. 667.

See 33 Cent. Dig. tit. "Mandamus," § 265 *et seq.*

26. People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Le Mars Independent School Dist. *v.* Le Mars City Water, etc., Co., (Iowa 1906) 107 N. W. 944; Potwin Place *v.* Topeka R. Co., 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312; Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481; Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775.

27. Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208. See *infra*, VII, A, 9, j, (I), (J).

28. *Illinois.*— People *v.* Chicago, etc., R. Co., 67 Ill. 118.

Minnesota.— State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

Missouri.— State *v.* Hannibal, etc., R. Co., 86 Mo. 13.

Nebraska.— State *v.* Republican Valley R. Co., 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424.

New Jersey.— *In re* Trenton Water Power Co., 20 N. J. Eq. 659.

Washington.— State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515.

29. See *supra*, VII, A, 7, a.

30. *Minnesota.*— State *v.* Southern Minnesota R. Co., 18 Minn. 40.

New York.— People *v.* New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484.

Texas.— San Antonio St. R. Co. *v.* State, 90 Tex. 520, 527, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662, where it is said that "when . . . a corporation, whether quasi-public or purely private, is granted the privilege of doing an act, and there are in its charter no express terms which make it obligatory to do the act, or other words from which by fair construction that intention can be gleaned, we do not see upon what sound principle the duty can be imposed."

Virginia.— Sherwood *v.* Atlantic, etc., R. Co., 94 Va. 291, 26 S. E. 943.

United States.— Northern Pac. R. Co. *v.* Washington Terr., 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092 [*reversing* 3 Wash. Terr. 303, 13 Pac. 604].

England.— York, etc., R. Co. *v.* Reg., 1 C. L. R. 119, 1 E. & B. 858, 17 Jur. 630, 22 L. J. Q. B. 225, 7 R. & Can. Cas. 459, 1 Wkly. Rep. 358, 72 E. C. L. 858 [*reversing* 1 E. & B. 178, 72 E. C. L. 178]; Great Western R. Co. *v.* Reg., 1 E. & B. 874, 1 Wkly. Rep. 358 note, 72 E. C. L. 874 [*reversing* 1 E. & B. 253, 72 E. C. L. 253]; Reg. *v.* Great Western R. Co., 62 L. J. Q. B. 572, 69 L. T. Rep. N. S. 572, 9 Reports 127.

31. *California.*— People *v.* Bell, 4 Cal. 177.

Florida.— Florida Cent., etc., R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419.

Illinois.— Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; People *v.* Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631.

Iowa.— Milwaukee Malt Extract Co. *v.* Chicago, etc., R. Co., 73 Iowa 98, 34 N. W. 761.

New York.— People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming*

refusal of performance or conduct on the part of the corporation which is equivalent to such refusal.[32]

c. Impossibility of Performance. Since a writ of mandamus will not be granted when it is clear that it will be unavailing, it will not issue if the act sought to be compelled is physically impossible, or if for any reason it is not within the power of defendant,[33] although its inability is due to want of necessary funds and of the means of raising them.[34] Whether a strike by the employees of a corporation or others presents a case of impossibility of performance of public duties, so as to be ground for refusing a writ of mandamus, depends upon the circumstances.[35]

d. Posting of Articles, By-Laws, Names of Officers, Statements of Capital Stock, Etc. Mandamus is the proper remedy to compel a corporation to comply with a statute requiring it, for the benefit of the public and for the special benefit of persons dealing with it, to post for public inspection a copy of its articles or

69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202]; People *v.* New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484.

United States.— Northern Pac. R. Co. *v.* Washington Terr., 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092 [*reversing* 3 Wash. Terr. 303, 13 Pac. 604].

See *supra*, II, C, 2, a; VII, A, 2.

32. Lake Erie, etc., R. Co. *v.* State, 139 Ind. 158, 38 N. E. 596 (holding that in a mandamus proceeding against a railroad company to compel the removal of an obstruction from a public ditch, the alternative writ is insufficient on demurrer where it does not show a demand that the obstruction be removed); Mystic Milling Co. *v.* Chicago, etc., R. Co., (Iowa 1906) 107 N. W. 943; State *v.* Associated Press, 159 Mo. 410, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151; Reg. *v.* Bristol, etc., R. Co., 4 Q. B. 162, 3 G. & D. 384, 7 Jur. 233, 12 L. J. Q. B. 106, 3 R. & Can. Cas. 433, 45 E. C. L. 161 (holding that where an act of parliament empowered a company to execute works, and prescribed the manner in which it should be done, a party wishing to enforce the proper execution by mandamus must, after the work was completed, specifically require the company to perform those things which, according to his view, the act enjoined); Rex *v.* Brecknock, etc., Canal Nav. Co., 3 A. & E. 217, 1 Harr. & W. 279, 4 N. & M. 871, 30 E. C. L. 117. Some courts, however, make a distinction between public and private rights and hold that a demand is necessary before instituting proceedings against a railroad company to establish a mere private right to a depot or other facilities; but that in a case involving a public right to such facilities, no demand is necessary before suit. Northern Pac. R. Co. *v.* Territory, 3 Wash. Terr. 303, 13 Pac. 604 [*reversed* on other grounds in 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092]. See also State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515. See *supra*, VII, A, 3.

33. Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; People *v.* Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631; *Re* Bristol, etc., R. Co., 3 Q. B. D. 10, 47 L. J. Q. B. 48, 37 L. T. Rep. N. S. 527, 26 Wkly. Rep. 236; Reg. *v.* York, etc., R. Co., 16 Q. B. 886, 20 L. J. Q. B. 503, 6 R. & Can. Cas. 648, 71 E. C. L. 886. See *supra*, II, A, 3, e; II, C, 4.

Impossibility to complete railroad see Reg. *v.* York, etc., R. Co., 16 Q. B. 886, 20 L. J. Q. B. 503, 6 R. & Can. Cas. 648, 71 E. C. L. 886, impossibility because of inability to raise funds or to acquire land not shown.

34. Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; State *v.* Dodge City, etc., R. Co., 53 Kan. 329, 36 Pac. 755, 24 L. R. A. 564; Benton Harbor *v.* St. Joseph, etc., St. R. Co., 102 Mich. 386, 60 N. W. 758, 47 Am. St. Rep. 553, 26 L. R. A. 245; *Re* Bristol, etc., R. Co., 3 Q. B. D. 10, 47 L. J. Q. B. 48, 37 L. T. Rep. N. S. 527, 26 Wkly. Rep. 236 (holding that where a railroad company had leased its road and was without funds or the means of raising them, an application for mandamus to compel it to make a bridge for the purpose of carrying a turnpike road over its line should be denied because of the impossibility of performance); Reg. *v.* York, etc., R. Co., 1 E. & B. 178, 72 E. C. L. 178 [*reversed* on other grounds in 1 C. L. R. 119, 1 E. & B. 858, 17 Jur. 630, 22 L. J. Q. B. 225, 7 R. & Can. Cas. 459, 1 Wkly. Rep. 358, 72 E. C. L. 858]. See *supra*, II, C, 4, b. But see Savannah, etc., Canal Co. *v.* Shuman, 91 Ga. 400, 17 S. E. 937, 44 Am. St. Rep. 43, referred to *infra*, VII, A, 9, j, (XII), note 68.

Quo warranto, and not mandamus, is the proper remedy in such a case. Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347.

35. On application for mandamus to compel a railroad company to resume and exercise its duties as a carrier of freight and passengers, it was held no defense to show that the company's skilled freight handlers, who had been working at the rate of seventeen cents an hour, refused to work unless they were paid twenty cents an hour, it not being shown that they committed any unlawful act or that there was any violence, riot, or unlawful interference with the other employees of the company; but it was said that it might be otherwise if it were shown that a strike of the company's skilled freight handlers had been caused or compelled by some illegal or organized body which controlled their actions and sought through them to enforce its will upon the company, and that the company in resisting such unlawful

by-laws, the names of its officers, the amount of its capital stock, the amount actually paid in, and the amount of its indebtedness, etc.[36]

e. Inspection of Books, Papers, and Records.[37] Where a statute expressly or impliedly makes it the duty of a corporation to submit its books and affairs to the inspection of public officers, mandamus will lie to compel performance of the duty.[38] A bank acting as agent for the transfer of state and city loans is a public official and performs such public duties that it may be compelled by mandamus to allow inspection of papers by parties interested.[39]

f. Prevention of Ultra Vires Acts. It has been said that mandamus lies to compel a corporation to keep within its powers and to oust it from the exercise of powers or franchises not granted;[40] but in most cases this is not true, for mandamus is not a preventive writ.[41] The proper remedy is by quo warranto or injunction.[42]

g. Eminent Domain.[43] Mandamus is not the proper remedy to acquire a right to occupy or use the property of another on paying compensation, but the remedy is by condemnation proceedings in accordance with the statute.[44] It has been held, however, that mandamus will lie to compel a railroad company or other corporation to pay or deposit the amount of an award in condemnation proceedings for land taken or damages sustained, as required by statute,[45] or to do various other

efforts had refused to obey unjust and illegal dictation, and had used all the means in its power to employ other men in sufficient numbers to do the work, and that the refusal or neglect complained of had grown out of such a state of facts. People *v.* New York Cent., etc., R. Co., 28 Hun (N. Y.) 543. See also State *v.* Great Northern R. Co., 14 Mont. 381, 36 Pac. 458; Matter of Loader, 14 Misc. (N. Y.) 208, 35 N. Y. Suppl. 996, 999; Chicago, etc., R. Co. *v.* Burlington, etc., R. Co., 34 Fed. 481. And see CARRIERS, 6 Cyc. 373, note 58, 446.

36. Boardman *v.* Marshalltown Grocery Co., 105 Iowa 445, 75 N. W. 343.

Personal interest of relator.— It has been held, however, that the writ will not issue for such purpose unless the relator shows a personal interest entitling him to the same. Boardman *v.* Marshalltown Grocery Co., 105 Iowa 445, 75 N. W. 343.

37. Inspection: By stock-holders or members see *supra*, VII, A, 4, h. By directors or other officers see *supra*, VII, A, 6, e. By creditors see *supra*, VII, A, 7, d. Of books and affairs of foreign corporation see *infra*, VII, B.

38. State *v.* Workingmen's Bldg., etc., Assoc., 152 Ind. 278, 53 N. E. 168; State *v.* Real Estate Bldg., etc., Assoc., 151 Ind. 502, 51 N. E. 1061; Satterwhite *v.* State, 142 Ind. 1, 40 N. E. 654, 1087; People *v.* State Ins. Co., 19 Mich. 392. The remedy by mandamus in such cases is not precluded by the fact that the company's failure or refusal to comply with the statute renders it liable to indictment or to quo warranto for forfeiture of its charter. People *v.* State Ins. Co., *supra*.

Furnishing list of stock-holders for purposes of taxation see *infra*, VII, A, 9, i.

Inspection for purposes of taxation see *infra*, VII, A, 9, i.

Insurance companies see *infra*, VII, A, 9, j, (XV).

39. Guarantee Trust, etc., Co.'s Petition, 3 Pa. Dist. 205, 34 Wkly. Notes Cas. 14, holding also that the fact that a previous inspection of the documents has been allowed will not defeat the right to a second inspection, where it does not appear that the exercise of the right is vexatious or improper.

40. Com. *v.* Delaware, etc., Canal Co., 43 Pa. St. 295.

41. See State *v.* Connersville Nat. Gas Co., 163 Ind. 563, 71 N. E. 483. And *supra*, I, D, 2.

42. See CORPORATIONS, 10 Cyc. 968, 1279; INJUNCTIONS, 22 Cyc. 873 *et seq.*; and, generally, QUO WARRANTO.

Remedy by injunction provided by statute. — Under a statute (N. H. Gen. Laws, c. 158, §§ 11, 12) prohibiting a railroad company from allowing its line to be operated by a competing road and providing that any citizen might apply for an injunction to restrain such operation, it was held that mandamus would not lie at the suit of a citizen to compel a railroad company which had violated the act to take the operation of the line under its own management, as the remedy by injunction given by the statute was adequate and exclusive. State *v.* Manchester, etc., R. Co., 62 N. H. 29.

43. See also EMINENT DOMAIN, 15 Cyc. 992.

44. Idaho Independent Tel. Co. *v.* Oregon Short Line R. Co., 8 Ida. 175, 67 Pac. 318.

Mandamus pending appeal. — Mandamus will not lie to compel a steam railway company to permit a street railway company to build a crossing pursuant to a judgment in condemnation, pending appeal from the judgment, there being no necessity for putting in the crossing before the appeal could be decided. State *v.* Burnell, 104 Wis. 246, 80 N. W. 460.

45. State *v.* Grand Island, etc., R. Co., 27 Nebr. 694, 43 N. W. 419, 31 Nebr. 209, 47 N. W. 857; Reg. *v.* Deptford Pier, etc., Co., 8 A. & E. 910, 1 P. & D. 128, 35 E. C. L.

and miscellaneous acts which may be necessary in connection with such proceedings.[46]

h. Arbitration. It seems that where there is a provision in the charter or governing statute of a quasi-public corporation, like a gas or water company, requiring it to sell out to the city after a certain time, if the latter shall elect to purchase, at a price to be fixed by arbitrators, mandamus will lie after the city's election to purchase to compel the company to join in the appointment of arbitrators as provided by the statute.[47]

i. Taxation. Mandamus is a proper remedy to compel a corporation or its officers to perform a specific legal duty imposed upon them by statute in connection with the assessment and collection of taxes against the corporation or its stock-holders,[48] unless some other adequate remedy is provided.[49]

905; Reg. *v.* Swansea Harbour, 8 A. & E. 439, 3 Jur. 85, 8 L. J. Q. B. 69, 1 P. & D. 512, 35 E. C. L. 670.

46. Thus it has been held that mandamus will lie to compel a corporation to institute proceedings, as required by statute, to settle the compensation to be paid for land taken or damage sustained (Reg. *v.* Eastern Counties R. Co., 2 Q. B. 347, 42 E. C. L. 706; Rex *v.* Nottingham Old Water Works, 6 A. & E. 355, 6 L. J. K. B. 89, 1 N. & P. 480, W. W. & D. 166, 33 E. C. L. 201; Demorest *v.* Midland R. Co. of Canada, 10 Ont. Pr. 73; Reg. *v.* Great Western R. Co., 14 U. C. C. P. 462); to take up an award of compensation and pay the fees of the umpire or arbitrator (Reg. *v.* Cambrian R. Co., L. R. 4 Q. B. 320, 10 B. & S. 315, 38 L. J. Q. B. 198, 20 L. T. Rep. N. S. 437, 17 Wkly. Rep. 667; Reg. *v.* South Devon R Co., 15 Q. B. 1043, 15 Jur. 464, 20 L. J. Q. B. 145, 69 E. C. L. 1043; Reg. *v.* West Midland R. Co., 10 Wkly. Rep. 583); or to send up the papers in an appeal by the landowner from an assessment of damages (Wabash, etc., Canal *v.* Johnson, 2 Ind. 219).

Mere contract obligations see *supra*, VII, A, 7, a.

47. St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69, 114.

48. Satterwhite *v.* State, 142 Ind. 1, 40 N. E. 654, 1087; Firemen's Ins. Co. *v.* Baltimore, 23 Md. 296; St. Albans *v.* National Car Co., 57 Vt. 68.

Furnishing list of stock-holders.— Mandamus will lie to compel a corporation or its officers to comply with a statute requiring it to furnish to the proper public officers, for purposes of taxation, a list of the stock-holders with their places of residence and the amount of stock held by them. Firemen's Ins. Co. *v.* Baltimore, 23 Md. 296.

Inspection of books, papers, etc.— Mandamus lies to compel a corporation or its officers to permit the proper public officer to inspect its books and papers for the purpose of listing its property for taxation or determining property subject to taxation. State *v.* Workingmen's Bldg., etc., Assoc., 152 Ind. 278, 53 N. E. 168 (inspection of books of building and loan association to ascertain and list property subject to taxation); State *v.* Real Estate Bldg., etc., Assoc., 151 Ind. 502, 51 N. E. 1061 (to the same effect); Satterwhite *v.* State, 142 Ind. 1, 40 N. E. 654, 1087 (examination of books of bank to determine property of depositors subject to taxation). See *supra*, VII, A, 9, e. But where a testator was a stock-holder in a corporation, it was held that the public treasurer under the tax law could subpœna its officers to determine the value of the stock for purposes of the transfer tax, and that an examination of its book by the executors was unnecessary for that purpose. Matter of Kennedy, 75 N. Y. App. Div. 188, 77 N. Y. Suppl. 714 [*reversing* 37 Misc. 317, 75 N. Y. Suppl. 457].

Compelling officer to testify.— The writ will also lie to compel the officers of a corporation to answer questions before the board of equalization on an examination for the purpose of determining whether property has been omitted from taxation. Satterwhite *v.* State, 142 Ind. 1, 40 N. E. 654, 1087, examination of officer of a bank to determine whether taxpayers had deposits therein not returned or assessed for taxation.

To compel payment of tax.— It has also been held that mandamus will lie, where there is no other adequate remedy, to compel the proper officer of a corporation to pay a tax assessed against it on its capital stock, or a tax on the shares of its capital stock under a statute requiring it to pay the same and allowing it to deduct the amount paid from the dividends due to the stock-holders. Barney *v.* State, 42 Md. 480; Emory *v.* State, 41 Md. 38; State *v.* Mayhew, 2 Gill (Md.) 487; St. Albans *v.* National Car Co., 57 Vt. 68. See also McVeagh *v.* Chicago, 49 Ill. 319, 330. Mandamus will lie to compel a railroad company to pay tax upon its capital stock, where its liability has been fully established and there is no other adequate remedy, as in the case where it has leased its road to a foreign corporation and owns no personal property of any material value. Person *v.* Warren R. Co., 32 N. J. L. 441. See also Belvidere *v.* Warren R. Co., 34 N. J. L. 193; Silverthorne *v.* Warren R. Co., 33 N. J. L. 372.

49. Eyke *v.* Lange, 90 Mich. 592, 51 N. W. 680, 104 Mich. 26, 63 N. W. 535; Person *v.* Warren R. Co., 32 N. J. L. 441.

Remedy provided by statute.— It was held that mandamus would not lie to compel the cashier of a bank to pay the tax on the stock of delinquent taxpayers under a statute making bank-stock assessable to the owners in the town where the bank was located, and pro-

j. Mandamus to Particular Corporations — (i) *Railroad Companies*[50] — (A) *In General.* It is well settled that where a specific legal duty is imposed by law upon a railroad company for the benefit of the public, and there is a clear violation of such duty, mandamus will lie to compel performance,[51] unless some other adequate remedy is provided,[52] or unless performance in for some reason impossible.[53]

(B) *Completion of Road.* Thus mandamus will lie to compel a railroad company to construct and complete its road, if a legal duty to do so, as distinguished from mere permission, is imposed upon it by its charter,[54] unless performance of the duty is impossible.[55]

(C) *Restoration, Equipment, and Operation of Road in General.* Man-

viding that for the purpose of collecting such tax the treasurer of such town should call on and demand payment from the cashier, whose duty it should be to pay the same and charge the amount paid against the shares so taxed, but authorizing the treasurer to seize the personal property of a delinquent taxpayer and sell it or sue him in the name of the town, as it was considered that the remedy for collection thus provided, by distress or by action against the bank, was sufficiently clear and specific. Eyke *v.* Lange, 90 Mich. 592, 51 N. W. 680, 104 Mich. 26, 63 N. W. 535.

50. See, generally, Railroads.

Corporation in hands of receiver see *infra*, VII, A, 9, k.

Eminent domain see *supra*, VII, A, 9, g.

51. *Connecticut.*— State *v.* Hartford, etc., R. Co., 29 Conn. 538.

Illinois.— Ohio, etc., R. Co. *v.* People, 121 Ill. 483, 13 N. E. 236.

Kansas.— Potwin Place *v.* Topeka R. Co., 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312.

Maine.— Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208.

Minnesota.—State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; State *v.* Southern Minnesota R. Co., 18 Minn. 40.

Missouri.— State *v.* Hannibal, etc., R. Co., 86 Mo. 13.

Nebraska.— State *v.* Chicago, etc., R. Co., 29 Nebr. 412, 45 N. W. 469.

New York.—People *v.* New York Cent., etc., R. Co., 61 N. Y. App. Div. 494, 70 N. Y. Suppl. 684; People *v.* New York Cent., etc., R. Co., 28 Hun 543.

South Carolina.— State *v.* North Eastern R. Co., 9 Rich. 247, 67 Am. Dec. 551.

Washington.— State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515.

Wisconsin.— State *v.* Wisconsin Cent. R. Co., 123 Wis. 551, 102 N. W. 16.

United States.— Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428 [*affirming* 11 Fed. Cas. No. 5,950, 3 Dill. 515].

England.— Rex *v.* Severn, etc., R. Co., 2 B. & Ald. 646, 21 Rev. Rep. 433.

Canada.— *Ex p.* Atty.-Gen., 17 N. Brunsw. 667.

See 33 Cent. Dig. tit. "Mandamus," § 265 *et seq.*; and cases more specifically cited in the following sections.

The directors of a railroad company are officers of a corporation within the meaning of a statute authorizing mandamus. People *v.* Rochester, etc., R. Co., 76 N. Y. 294.

52. State *v.* Manchester, etc., R. Co., 62 N. H. 29; People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202]. See also *supra*, VII, A, 9, a; and cases more specifically cited under the sections following.

53. See *supra*, VII, A, 9, c.

54. *Minnesota.*— State *v.* Southern Minnesota R. Co., 18 Minn. 40.

Nebraska.— State *v.* Sioux City, etc., R. Co., 7 Nebr. 357.

Virginia.— Sherwood *v.* Atlantic, etc., R. Co., 94 Va. 291, 26 S. E. 943.

United States.— State *v.* Southern Kansas R. Co., 24 Fed. 179.

England.— Reg. *v.* Ambergate, etc., R. Co., 17 Q. B. 362, 79 E. C. L. 362; Reg. *v.* York, etc., R. Co., 16 Q. B. 886, 20 L. J. Q. B. 503, 6 R. & Can. Cas. 648, 71 E. C. L. 886; Reg. *v.* Eastern Counties R. Co., 10 A. & E. 531, 8 L. J. Q. B. 340, 2 P. & D. 648, 1 R. & Can. Cas. 509, 37 E. C. L. 287; York, etc., R. Co. *v.* Reg., 1 C. L. R. 119, 1 E. & B. 858, 17 Jur. 630, 22 L. J. Q. B. 225, 7 R. & Can. Cas. 459, 1 Wkly. Rep. 358, 72 E. C. L. 858 [*reversing* 1 E. & B. 178, 72 E. C. L. 178]; Great Western R. Co. *v.* Reg., 1 E. & B. 874, 1 Wkly. Rep. 358 note, 72 E. C. L. 874 [*reversing* 1 E. & B. 253, 72 E. C. L. 253]; Reg. *v.* Lancashire, etc., R. Co., 1 E. & B. 228, 17 Jur. 62, 22 L. J. Q. B. 57, 7 R. & Can. Cas. 266, 1 Wkly. Rep. 35, 72 E. C. L. 228.

Legal duty to construct road.— As will be seen from the cases above cited, there has been some difference of opinion as to whether in particular cases a railroad company is under a legal duty to construct its road or whether it has mere permission to do so, in which case it cannot be compelled by mandamus. See State *v.* Southern Minnesota R. Co., 18 Minn. 40; York, etc., R. Co. *v.* Reg., 1 C. L. R. 119, 1 E. & B. 858, 17 Jur. 630, 22 L. J. Q. B. 225, 7 R. & Can. Cas. 459, 1 Wkly. Rep. 358, 72 E. C. L. 858 [*reversing* 1 E. & B. 178, 72 E. C. L. 178]. This question frequently arises in other than mandamus cases and will be fully treated elsewhere. See, generally, Railroads.

55. See *supra*, VII, A, 9, c.

damus will also lie to compel a railroad company to perform its legal duty with respect to the restoration and operation of its road,[56] unless some other adequate remedy is provided.[57] Thus it has been held that the writ will lie to compel restoration of a railroad or a part thereof constructed under a statute providing that the public should have the beneficial enjoyment of the same on the payment of certain rates;[58] to compel a railroad company to operate its whole road, including a bridge, as one connected and continuous line;[59] to restore and operate its line to the terminus fixed by its charter;[60] or to reinstate and operate an abandoned branch or line, where the company is under a legal duty to do so, and has not merely an option or discretion in the matter.[61] The writ will not lie to

56. *Connecticut.*— State *v.* Hartford, etc., R. Co., 29 Conn. 538.

Kansas.— Potwin Place *v.* Topeka R. Co., 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312.

Nebraska.— State *v.* Sioux City, etc., R. Co., 7 Nebr. 357.

New Jersey.— Bridgeton *v.* Bridgeton, etc., Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837.

New York.— People *v.* New York Cent., etc., R. Co., 28 Hun 543, where the pendency of a strike was asserted as a defense.

United States.— Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428 [*affirming* 11 Fed. Cas. No. 5,950, 3 Dill. 515]; Farmers' Loan, etc., Co. *v.* Henning, 8 Fed. Cas. No. 4,666.

England.— Rex *v.* Severn, etc., R. Co., 2 B. & Ald. 646, 21 Rev. Rep. 433.

Canada.— *Ex p.* Atty.-Gen., 17 N. Brunsw. 667.

See 33 Cent. Dig. tit. "Mandamus," § 266 *et seq.*

Duty as to operation of road see, generally, RAILROADS.

Impossibility of performance see *supra*, VII, A, 9, c.

57. See *supra*, VII, A, 9, j, (I), (A), text and note 52. Mandamus will not lie in the first instance to compel a railroad company to operate its road or to control it in the operation thereof, where a statute provides an adequate remedy by application to the railroad commissioners. People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202]. So, where a statute prohibited the operation of a railroad by a rival and competing line and provided that any citizen might apply for an injunction to prevent it, the court held that a citizen, as such, could not petition for a writ of mandamus to compel a railroad company, one of two rival and competing roads, to operate its own road. State *v.* Manchester, etc., R. Co., 62 N. H. 29.

58. Rex *v.* Severn, etc., R. Co., 2 B. & Ald. 646, 21 Rev. Rep. 433.

59. Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428 [*affirming* 11 Fed. Cas. No. 5,950, 3 Dill. 515].

60. State *v.* Hartford, etc., R. Co., 29 Conn. 538, holding that the writ would lie to compel a railroad company to run trains to the original terminus at tide-water, as required by its charter, so as to connect with a steamboat line, such terminus having been abandoned and the track diverted to a different point not at tide-water.

61. *Kansas.*— State *v.* Dodge City, etc., R. Co., 53 Kan. 329, 36 Pac. 755, 24 L. R. A. 564; Potwin Place *v.* Topeka R. Co., 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312.

Nebraska.— State *v.* Sioux City, etc., R. Co., 7 Nebr. 357.

New Jersey.— Bridgeton *v.* Bridgeton, etc., Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837.

New York.— People *v.* Rome, etc., R. Co., 103 N. Y. 95, 8 N. E. 369. See also People *v.* Albany, etc., R. Co., 24 N. Y. 261, 82 Am. Dec. 295.

Washington.— State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515.

United States.— People *v.* Colorado Cent. R. Co., 42 Fed. 638; Farmers' Loan, etc., Co. *v.* Henning, 8 Fed. Cas. No. 4,666.

Where no legal duty is imposed.— The writ will not lie to compel a railroad company to reinstate and operate a line where no duty to do so is imposed by its charter or by statute, but the same is merely permissive or enabling. San Antonio St. R. Co. *v.* State, 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662; Sherwood *v.* Atlantic, etc., R. Co., 94 Va. 291, 26 S. E. 943; Reg. *v.* Great Western R. Co., 62 L. J. Q. B. 572, 69 L. T. Rep. N. S. 572, 9 Reports 127. As to the existence of the duty see, generally, RAILROADS.

Discretion of court.— Even where there is a legal duty, the granting of the writ rests somewhat in the discretion of the court, and it may be denied where the circumstances are such that it would be useless or futile, and of no public benefit. State *v.* Dodge City, etc., R. Co., 53 Kan. 329, 36 Pac. 755, 24 L. R. A. 564, where the court refused on this ground to grant the writ to compel a railroad company to replace or repair its track, a part of which had been torn up, because the company was wholly insolvent and without equipment, funds, or property, and the road had been abandoned for several months and could not be operated by any one except at a great loss. See also People *v.* Rome, etc., R. Co., 103 N. Y. 95, 8 N. E. 369, holding that where a railroad company owning by consolidation two lines of road could substantially accommodate the people by operating one line only between the same points and abandon the other without any serious detriment to any considerable number

control the company's discretion as to the equipment and operation of its road.[62]

(D) *Construction and Maintenance of Bridges, Viaducts, Crossings, Fences, Etc.*[63] If a railroad company constructs its road, it is under a legal duty to construct and maintain the same in such manner and with such safeguards as may be prescribed by its charter, by statute, by valid municipal ordinance, or by the common law,[64] and performance of such duty will be compelled by mandamus,[65] unless some other adequate remedy is provided.[66] Thus the writ will lie to compel a railroad company to so construct its road as not to obstruct a navigable stream;[67] to remove an obstruction from a public ditch;[68] to build and maintain proper bridges, viaducts, and the like;[69] to construct and maintain proper street and highway crossings, including necessary bridges, viaducts, and approaches thereto, etc.[70] It is likewise held that the writ will lie to compel a railroad com-

of people, should not be compelled by mandamus to operate both lines at a great sacrifice of money. And see Crane *v.* Chicago, etc., R. Co., 74 Iowa 330, 37 N. W. 397, 7 Am. St. Rep. 479.

Illegal lease.— The lessee of a railroad under a lease which all parties admit to be illegal cannot be compelled by mandamus to operate the road. People *v.* Colorado Cent. R. Co., 42 Fed. 638.

62. Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347; People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202].

63. **Mere contract obligations** see *supra*, VII, A, 7, a.

64. See, generally, RAILROADS.

By common law see People *v.* Chicago, etc., R. Co., 67 Ill. 118; State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; State *v.* Hannibal, etc., R. Co., 86 Mo. 13; and *supra*, VII, A, 9, h, text and note 28.

65. See the cases cited in the notes following.

66. See *supra*, VII, A, 9, a, text and note 17; and cases more specifically cited in the notes following.

67. State *v.* North Eastern R. Co., 9 Rich. (S. C.) 247, 67 Am. Dec. 551; New Orleans, etc., R. Co. *v.* Mississippi, 112 U. S. 12, 5 S. Ct. 19, 28 L. ed. 619.

68. Lake Erie, etc., R. Co. *v.* State, 139 Ind. 158, 38 N. E. 596, but demand necessary.

69. People *v.* Troy, etc., R. Co., 37 How. Pr. (N. Y.) 427; State *v.* North Eastern R. Co., 9 Rich. (S. C.) 247, 67 Am. Dec. 551; New Orleans, etc., R. Co. *v.* Mississippi, 112 U. S. 12, 5 S. Ct. 19, 28 L. ed. 619, holding that mandamus will lie to compel a railroad company to remove a bridge constructed across a navigable stream without a draw, and in lieu thereof to construct and maintain a bridge with a draw for the passage of vessels, in compliance with the governing statute.

At street, highway, and private crossings see the cases in the following notes.

70. *Alabama.*— Mobile, etc., R. Co. *v.* Pike County, 97 Ala. 105, 11 So. 732.

Colorado.— Burlington, etc., R. Co. *v.* People, 20 Colo. App. 181, 77 Pac. 1026.

Connecticut.— State *v.* New York, etc., R. Co., 71 Conn. 43, 40 Atl. 925; Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17.

Illinois.— People *v.* Chicago, etc., R. Co., 67 Ill. 118; Chicago, etc., R. Co. *v.* People, 79 Ill. App. 529.

Indiana.— Vandalia R. Co. *v.* State, (1906) 76 N. E. 980; Chicago, etc., R. Co. *v.* State, 158 Ind. 189, 63 N. E. 224; Cummins *v.* Evansville, etc., R. Co., 115 Ind. 417, 18 N. E. 6; Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489.

Iowa.— Ft. Dodge *v.* Minneapolis, etc., R. Co., 87 Iowa 389, 54 N. W. 243.

Kansas.— State *v.* Missouri Pac. R. Co., 33 Kan. 176, 5 Pac. 772.

Maine.— State *v.* Gorham, 37 Me. 451.

Minnesota.— State *v.* Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153; State *v.* St. Paul, etc., R. Co., 38 Minn. 246, 36 N. W. 870; State *v.* St. Paul, etc., R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313.

Missouri.— State *v.* Hannibal, etc., R. Co., 86 Mo. 13.

Nebraska.— Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481 [*affirmed* in 170 U. S. 57, 18 S. Ct. 513, 42 L. ed. 948].

New York.— People *v.* Northern Cent. R. Co., 164 N. Y. 289, 58 N. E. 138 [*modifying* 35 N. Y. App. Div. 624, 54 N. Y. Suppl. 1112]; People *v.* Boston, etc., R. Co., 70 N. Y. 569; People *v.* Dutchess, etc., R. Co., 58 N. Y. 152; People *v.* Troy, etc., R. Co., 37 How. Pr. 427.

Texas.— Houston, etc., R. Co. *v.* Dallas, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850 [*reversing* on other grounds (Civ. App. 1904) 78 S. W. 525].

West Virginia.— Mason *v.* Ohio River R. Co., 51 W. Va. 183, 41 S E. 418; Moundsville *v.* Ohio R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

Wisconsin.— See Oshkosh *v.* Milwaukee, etc., R. Co., 74 Wis. 534, 43 N. W. 489, 17 Am. St. Rep. 175.

United States.— State *v.* Lake Erie, etc., R. Co., 83 Fed. 284.

England.— Reg. *v.* Wycombe, L. R. 2 Q. B. 310, 8 B. & S. 259, 36 L. J. Q. B. 121, 15

pany to construct and maintain farm and private road crossings,[71] cattle-guards,[72] right-of-way fences,[73] etc.

L. T. Rep. N. S. 610, 15 Wkly. Rep. 489; Reg. *v.* Bristol, etc., R. Co., 4 Q. B. 162, 3 G. & D. 384, 7 Jur. 233, 12 L. J. Q. B. 106, 3 R. & Can. Cas. 433, 45 E. C. L. 161. And see Reg. *v.* South-Eastern R. Co., 4 H. L. Cas. 471, 17 Jur. 901, 10 Eng. Reprint 545.

Canada.— See Reg. *v.* Great Western R. Co., 21 U. C. Q. B. 555.

See 33 Cent. Dig. tit. "Mandamus," § 267.

Legal duty of railroads in this respect see, generally, RAILROADS.

Demand necessary see Reg. *v.* Bristol, etc., R. Co., 4 Q. B. 162, 3 G. & D. 384, 7 Jur. 233, 12 L. J. Q. B. 106, 3 R. & Can. Cas. 433, 45 E. C. L. 161; and *supra*, VII, A, 9, b, (III).

Option.— Where by statute a railroad company has an option, when its line crosses a turnpike road or public highway, either to carry the road over the railway or the railway over the road, a writ of mandamus commanding the company to do one of these things, instead of allowing them the option, is bad unless it shows on its face circumstances which establish impossibility of the company exercising the option. Reg. *v.* South-Eastern R. Co., 4 H. L. Cas. 471, 17 Jur. 901, 10 Eng. Reprint 545.

Other remedy.— Mandamus will not lie if some other adequate remedy is provided. People *v.* New York Cent., etc., R. Co., 158 N. Y. 410, 53 N. E. 166 [*affirming* 31 N. Y. App. Div. 334, 52 N. Y. Suppl. 234]; Matter of Waverly, 35 N. Y. App. Div. 38, 54 N. Y. Suppl. 368 [*affirmed* in 158 N. Y. 710, 53 N. E. 1133], holding that mandamus was excluded by a statutory remedy by application to the railroad commissioners. See *supra*, VII, A, 2, 9, a. It has been held, however, that a statute providing that suit might be brought to compel a railroad company to construct crossings as required by the act was not exclusive of the remedy by mandamus (State *v.* Chicago, etc., R. Co., 29 Nebr. 412, 45 N. W. 469); and that mandamus to compel construction of proper street crossings will lie notwithstanding the city is given the right to construct the same on failure of the company to do so, and to bring suit against the company for the cost and for a penalty, such remedy not being adequate or exclusive (State *v.* New York, etc., R. Co., 71 Conn. 43, 40 Atl. 925; Vandalia R. Co. *v.* State, (Ind. 1906) 76 N. E. 980; Houston, etc., R. Co. *v.* Dallas, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850 [*reversing* on other grounds (Civ. App. 1904) 78 S. W. 525]; State *v.* Lake Erie, etc., R. Co., 83 Fed. 284). Liability of the company to indictment does not prevent mandamus. See *supra*, VII, A, 9, a, text and note 20.

Impossibility see *supra*, VII, A, 9, c.

Grade not yet changed by city.— Mandamus may be prosecuted to determine the mode in which the respondent shall be required to restore a street, and to compel it to perform its duty, although the city council has not yet changed the established grade of the street to conform to the level which the relator claims should be adopted. State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153.

Concurrent duty of another company.— The fact that it was necessary, to accomplish the purposes proposed, that another company should also bridge its tracks, was held not fatal to the proceeding against defendant company, the former company having been in fact required to construct the bridges over its tracks. State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153. But on the other hand it has been held that a suit in equity, where all the rights and duties of the parties may be adjusted, and not mandamus, is the proper remedy for compelling the bridging of the tracks of several railroad companies where they cross streets; individual action by a single railroad being sufficient in the case of certain bridges, and joint action by all the railroads being necessary where a continuous viaduct crossing the tracks of all of them is required. Burlington, etc., R. Co. *v.* People, 20 Colo. App. 181, 77 Pac. 1026.

71. *Illinois.*— Illinois Cent. R. Co. *v.* Willemborg, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862.

Iowa.— Boggs *v.* Chicago, etc., R. Co., 54 Iowa 435, 6 N. W. 744.

New York.— People *v.* New York Cent., etc., R. Co., 61 N. Y. App. Div. 494, 70 N. Y. Suppl. 684. See also Peckham *v.* Dutchess County R. Co., 145 N. Y. 385, 40 N. E. 15; Buffalo Stone, etc., Co. *v.* Delaware, etc., R. Co., 130 N. Y. 152, 29 N. E. 121; Jones *v.* Seligman, 81 N. Y. 190.

Wisconsin.— State *v.* Wisconsin Cent. R. Co., 123 Wis. 551, 102 N. W. 16; State *v.* Chicago, etc., R. Co., 79 Wis. 259, 48 N. W. 243, 12 L. R. A. 180.

Canada.— Reist *v.* Grand Trunk R. Co., 12 U. C. Q. B. 675. See also Burke *v.* Grand Trunk R. Co., 6 U. C. C. P. 484.

Other remedy.— The fact that a statute imposes a penalty on a railroad company for neglecting to make proper farm or private road crossings, to be recovered by the occupant of the farm, does not secure the construction of the crossings or afford an adequate remedy, so as to deprive the occupant of his remedy by mandamus. State *v.* Chicago, etc., R. Co., 79 Wis. 259, 48 N. W. 243, 12 L. R. A. 180. Nor is the remedy by action for damages such an adequate remedy as to exclude mandamus. People *v.* New York Cent., etc., R. Co., 61 N. Y. App. Div. 494, 70 N. Y. Suppl. 684.

72. People *v.* Rochester, etc., R. Co., 14 Hun (N. Y.) 371 [*affirmed* in 76 N. Y. 294].

73. Ohio, etc., R. Co. *v.* People, 121 Ill. 483, 13 N. E. 236 [*affirming* 21 Ill. App. 23]; People *v.* Rochester, etc., R. Co., 76 N. Y. 294 [*affirming* 14 Hun 371]. See also Jones *v.* Seligman, 81 N. Y. 190.

(E) *Restoration, Paving, and Repair of Streets, Highways, Etc.* Mandamus will also lie to compel a railroad company to comply with its duty to restore, pave, or repair a street or highway as required by a statute or valid municipal ordinance,[74] unless some other adequate remedy is provided;[75] or to compel it to repair a levee, where there is a legal duty to do so.[76]

(F) *Stations, Depots, Warehouses, Side-Tracks, Switches, Etc.*[77] Mandamus is a proper remedy to compel a railroad company to furnish and maintain suitable stations, depots, warehouses, side-tracks, switches, etc., at proper points on its line, and to stop trains thereat, for the receipt and discharge of passengers and freight, if a duty to do so is imposed upon it by law,[78] and no other adequate remedy is provided;[79] but not if no such duty is imposed by law,[80] as in the case where the

74. *Indiana.*— Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489.

Louisiana.— State *v.* New Orleans, etc., R. Co., 42 La. Ann. 11, 7 So. 84.

Minnesota.— State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153.

New York.— People *v.* Dutchess, etc., R. Co., 58 N. Y. 152.

Pennsylvania.— Com. *v.* New York, etc., R. Co., 138 Pa. St. 58, 20 Atl. 951; Pittsburgh, etc., R. Co. *v.* Com., 104 Pa. St. 583.

West Virginia.—Mason *v.* Ohio River R. Co. 51 W. Va. 183, 41 S. E. 418; Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

Wisconsin.— See Oshkosh *v.* Milwaukee, etc., R. Co., 74 Wis. 534, 43 N. W. 489, 17 Am. St. Rep. 175.

England.— Reg. *v.* Bristol, etc., R. Co., 4 Q. B. 162, 3 G. & D. 384, 7 Jur. 233, 12 L. J. Q. B. 106, 3 R. & Can. Cas. 433, 45 E. C. L. 161, restoration of turnpike road.

Restoration of street or highway at crossing see *supra*, VII, A, 9, j, (I), (D).

Street railroads see *infra*, VII, A, 9, j, (II).

Demand necessary see Reg. *v.* Bristol, etc., R. Co., 4 Q. B. 162, 3 G. & D. 384, 7 Jur. 233, 12 L. J. Q. B. 106, 3 R. & Can. Cas. 433, 45 E. C. L. 161. And *supra*, VII, A, 9, b, (III).

Mere contract obligation see *supra*, VII, A, 7, a.

75. State *v.* New Orleans, etc., R. Co., 37 La. Ann. 589. In this case a city granted to a railroad company a right of way through a street and the company bound itself to keep the street in repair, and for the faithful execution of its contract the company, by the terms of the act, was to give a bond; and the act further provided that, if the company should fail to fulfil its obligation after due notice, the city council "should have said violation rectified," and recover the cost before any court of competent jurisdiction. It was held that mandamus would not lie to compel the company to repair the street, as the other remedy provided must be resorted to.

76. State *v.* New Orleans, etc., R. Co., 42 La. Ann. 138, 7 So. 226, holding, however, that a statute which purported to provide a summary remedy by mandamus to enforce the obligations of corporations with reference to the paving, grading, repairing, reconstructing, or care of any street, highway, bridge, culvert, levee, canal, ditch or crossing, could not be construed as extending to an obligation to construct a new levee or embankment.

77. Running and stopping of trains see *infra*, VII, A, 9, j, (I), (O).

78. *Connecticut.*— State *v.* New Haven, etc., Co., 37 Conn. 153.

Illinois.— People *v.* Chicago, etc., R. Co., 130 Ill. 175, 22 N. E. 857; Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824 [*affirming* 27 Ill. App. 404].

Maine.— Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208.

Massachusetts.— See Com. *v.* Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555.

Nebraska.— State *v.* Republican Valley R. Co., 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424.

New Jersey.— Jacquelin *v.* Erie R. Co., (Ch. 1905) 61 Atl. 18.

New York.— People *v.* New York, etc., R. Co., 40 Hun 570 [*reversed* in 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484, on the ground that no legal duty was shown].

See 33 Cent. Dig. tit. "Mandamus," §§ 266, 268; and, generally, RAILROADS.

Side-tracks and switches.— A railroad company may be compelled to permit the building of side-tracks to warehouses and to make switch connection therewith, when such duty is imposed upon it by statute. Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824 [*affirming* 27 Ill. App. 404].

79. State *v.* Chicago, etc., R. Co., 19 Nebr. 476, 27 N. W. 434 (holding that mandamus will not lie to compel a railroad company to establish a station or build side-tracks, etc., where adequate relief may be had under the statute by application to the railroad commissioners); People *v.* New York, etc., R. Co., 11 Hun (N. Y.) 297 (holding that where the trustees of a village were authorized to pass resolutions and ordinances "to compel all persons or corporations landing passengers within the limits of said village, to construct such suitable and safe platforms and accommodations as are necessary for the safety of passengers," mandamus would not lie to compel obedience to a resolution directing a railroad company to construct a platform, but obedience might be enforced by passing an ordinance with a penalty for neglect, and bringing an action to recover the penalty).

80. *Florida.*— Florida, etc., R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419.

obligation rests solely on contract,[81] or the matter is properly within the discretion of the company.[82] The writ will not be issued to establish a station not required by statute unless the corporation has clearly abused its discretion, and there is a clear case of public necessity.[83] A railroad company may be compelled in a proper case to reëstablish an abandoned station [84] or side-track and switch.[85]

(G) *Running and Stopping of Trains.*[86] Where the duty is clearly imposed by law, mandamus will lie to compel a railroad company to stop its trains at a station in a county-seat or elsewhere;[87] to stop at least two of its trains each day at a particular station;[88] to run daily trains;[89] to restore and run trains wrongfully discontinued in violation of a writ of mandamus;[90] or to run separate trains for passengers and freight;[91] but it will not lie, in the absence of statutory requirement, to compel an increase of the number of trains or the running of a particular number,[92] or to otherwise interfere with the reasonable exercise of discretion on the part of the company as to the running or stopping of trains.[93]

Illinois.— Mobile, etc., R. Co. *v.* People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556; and cases in the notes following.

New York.— People *v.* New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484 [*reversing* 40 Hun 570].

Washington.—Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 32 Wash. 218, 73 Pac. 388.

United States.— Northern Pac. R. Co. *v.* Washington, 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092 [*reversing* 3 Wash. Terr. 303, 13 Pac. 604].

When such duty is imposed see, generally, RAILROADS.

81. Florida, etc., R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419. See *supra*, VII, A, 7, a.

82. Florida, etc., R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419; Chicago, etc., R. Co. *v.* People, 152 Ill. 230, 38 N. E. 562, 26 L. R. A. 224; People *v.* New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484 [*reversing* 40 Hun 570]; Northern Pac. R. Co. *v.* Washington, 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092 [*reversing* 3 Wash. Terr. 303, 13 Pac. 604]. See *supra*, VII, A, 9, b, (II).

83. Chicago, etc., R. Co. *v.* People, 222 Ill. 396, 78 N. E. 784; Chicago, etc., R. Co. *v.* People, 152 Ill. 230 38 N. E. 562, 26 L. R. A. 224; Mobile, etc., R. Co. *v.* People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556.

84. State *v.* New Haven, etc., R. Co., 41 Conn. 134; State *v.* New Haven, etc., R. Co., 37 Conn. 153; People *v.* Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657.

85. Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824 [*affirming* 27 Ill. App. 404], holding that where a railway company has permitted the owner of a coal mine to build a side-track connecting its main track with the mine, and continues for years to furnish cars to haul coal from the mine over its line, such side-track must be considered as a part of its line, and if it disconnects the same, it may by mandamus be compelled to restore the connection.

86. Duty as to running and stopping of trains see, generally, RAILROADS.

87. Illinois Cent. R. Co. *v.* People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119; People *v.* Chicago, etc., R. Co., 130 Ill. 175, 22 N. E. 857; People *v.* Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657; Com. *v.* Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555. See also State *v.* Gladson, 57 Minn. 385, 59 N. W. 487, 24 L. R. A. 502 [*affirmed* in 166 U. S. 427, 17 S. Ct. 627, 41 L. ed. 1064].

Failure of municipality to perform conditions.— Under Mansfield Dig. Ark. §§ 5501, 5502, which provide that before a town can compel the stoppage of trains within its corporate limits, as provided by section 5500, the authorities shall tender the company the reasonable expenses of grading a switch or side-track at such place, and that mandamus may issue at the suit of any citizen of the town to compel the company to stop its trains as provided by section 5500, such tender must be made before mandamus will lie, although the company has already constructed all the switches and side-tracks necessary for the stopping of trains. St. Louis, etc., R. Co. *v.* B'Shears, 59 Ark. 237, 27 S. W. 2.

88. See Com. *v.* Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555.

89. People *v.* St. Louis, etc., R. Co., (Ill. 1896) 45 N. E. 824; *Ex p.* Atty.-Gen., 17 N. Brunsw. 667, holding also that the remedy by mandamus is not excluded by the fact that individuals injured by the company's failure to perform the duty are given a right of action for damages.

The fact that it is unprofitable to run daily trains as required by statute does not justify or excuse failure to do so under a provision in the statute excusing such failure when due to the weather, accident "or some other unavoidable cause," etc. *Ex p.* Atty.-Gen., 17 N. Brunsw. 667.

90. State *v.* Missouri Pac. R. Co., 114 Mo. 283, 21 S. W. 813.

91. People *v.* St. Louis, etc., R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656; People *v.* St. Louis, etc., R. Co., (Ill. 1896) 45 N. E. 824. *Compare* State *v.* Missouri Pac. R. Co., 55 Kan. 708, 41 Pac. 964, 49 Am. St. Rep. 278, 29 L. R. A. 444.

92. Ohio, etc., R. Co. *v.* People, 120 Ill. 200, 11 N. E. 347.

93. Chicago, etc., R. Co. *v.* People, 222 Ill.

(H) *Use of Road by Another Company.* Mandamus will lie to compel a railroad company to permit the use of its road by another company, when it is required by statute to do so.[94]

(I) *Receipt, Transportation, and Delivery of Freight or Passengers, Etc.*—(1) IN GENERAL.[95] Mandamus will lie to compel a railroad company to perform its duties as a common carrier by the receipt, transportation, and delivery of freight and passengers or otherwise.[96] Thus it has been held that it will lie in a proper case to compel a railroad company to furnish cars for shipment of freight, and to transport and deliver the same, without unlawful discrimination;[97] to receive, transport, and discharge live stock offered for transportation

396, 78 N. E. 784; Chicago, etc., R. Co. *v.* People, 152 Ill. 230, 38 N. E. 562, 26 L. R. A. 224; People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202]; People *v.* Long Island R. Co., 31 Hun (N. Y.) 125.

94. Com. *v.* Corey, 2 Pittsb. (Pa.) 444.

95. See also CARRIERS, 6 Cyc. 372 *et seq.*

Express companies see *infra*, VII, A, 9, j, (VI).

96. People *v.* New York Cent., etc., R. Co., 28 Hun (N. Y.) 543 [*reversing* 63 How. Pr. 291], holding also that the application for mandamus by the attorney-general in the name of the people of the state cannot be defeated by showing that the state has not been injured by refusal of the company to act and that the individuals injured have their private remedies for recovery of damgase sustained. See also Larrabee Flour Mills Co. *v.* Missouri Pac. R. Co., (Kan. 1906) 88 Pac. 72; Cumberland Tel., etc., Co. *v.* Morgan's Louisiana, etc., R. Co., 51 La. Ann. 29, 24 So. 803, 72 Am. St. Rep. 442; State *v.* Republican Valley R. Co., 17 Nebr. 647, 24 N. W. 329, 52 Am. Rep. 424; Atwater *v.* Delaware, etc., R. Co., 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543 (carriage of passengers); Covington Stock-Yards Co. *v.* Keith, 139 U. S. 128, 11 S. Ct. 461, 35 L. ed. 73; and other cases cited in the notes following.

Beyond its own line.—A railroad company cannot be compelled, as a common carrier, to receive goods at stations along its line for transportation, on the requirement of the consignor that it shall itself deliver the goods at a point beyond or off its own line, or to deliver goods received by it for transportation at such point. The legal duty of the company in that regard is commensurate only with its franchise. It is confined to its own line of road, and cannot be made to extend beyond it. People *v.* Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631. Nor can a railroad company chartered with certain express powers and privileges, with certain termini within which they are to be exercised, be compelled to purchase for the accommodation of the public more extended privileges beyond the limits of its franchise, so that it may deliver goods at points not upon the line of its road, or within its established termini. People *v.* Chicago, etc., R. Co., *supra*.

Anticipation of violation of duty.—Mandamus will not lie in anticipation of a breach of duty, and therefore it will not lie to compel a railroad company to switch cars on a private track, where such switching has been resumed before the filing of the petition and continued ever since; a showing of actual default in performance of a duty at the time being necessary. Mystic Milling Co. *v.* Chicago, etc., R. Co., (Iowa 1906) 107 N. W. 943. So under a statute which provides that it shall be unlawful for any railroad company to discriminate in charges or facilities for transportation, that every company permitting any one to connect a track with its track for the accommodation of any warehouse or elevator, etc., shall accord the same right to every other person soliciting it, which may be enforced by mandamus at the suit of any person entitled to such right, the owner of a warehouse or elevator cannot compel a railroad company to extend a spur of its track away from its existing tracks and over land not belonging to the railroad company, when it has never done a like service to other shippers in the same line of business, but has confined its service to according them facilities for shipment by granting to them leases upon its right of way for the construction of elevators abutting upon its tracks, Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 32 Wash. 218, 73 Pac. 388. In a proceeding to enforce by mandamus a demand upon a railroad company for an extension of its track to plaintiff's warehouse, an alternative offer to accept from defendant a lease of a portion of its right of way, in accordance with its policy in dealing with other like shippers, cannot be enforced as a demand for a lease, when the offer to accept a lease was too indefinite in its terms to be made the basis for a writ of mandate. Northwestern Warehouse Co. *v.* Oregon, R., etc., Co., *supra*.

Impossibility of performance see *supra*, VII, A, 9, c.

97. State *v.* Atlantic Coast Line R. Co., (Fla. 1906) 40 So. 875; Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824; Cumberland Tel., etc., Co. *v.* Texas, etc., R. Co., 52 La. Ann. 1850, 28 So. 284 (mandamus at the suit of a telephone and telegraph company to compel a railroad company to furnish and haul special cars for the purpose of distributing poles, wires, and cross-arms between stations, to enable the telephone and telegraph company to construct its line along the railroad company's line, where it owned a right of way); Cumberland Tel., etc., Co. *v.* Morgan's Louisiana, etc., R. Co., 51 La. Ann. 29, 24 So. 803, 72 Am. St. Rep. 442; U. S. *v.* Norfolk, etc., R. Co., 143 Fed. 266, 74 C. C. A.

over its road and connections;[98] to switch freight;[99] to deliver to a particular elevator whatever grain may be consigned to it upon the line of defendant's road;[1] to receive shipments of coal from all coal mines on the line of its road;[2] to receive freight and passengers from connecting roads as required by statute;[3] or to receive tax receipts in payment of freight or passage when such duty is imposed by law.[4] But it has been held in New York that the writ will not lie at the suit of an individual for refusal of a railroad company to transport goods tendered, on the ground that the remedy in such case by action is adequate.[5] The writ will not lie to control a railroad company in the exercise of a discretion as to the receipt and transportation of freight.[6]

(2) Rates and Charges. Mandamus will lie to compel a railroad company to receive, transport, and discharge freight or passengers without exacting a discriminating or unlawful rate or charge,[7] or to compel the issue of a commutation ticket to the relator where it issues such tickets to others under like conditions;[8] but the writ does not lie to compel a railroad company to receive freight for transportation at less than rates charged on the ground that the rates charged are excessive, where an adequate remedy is provided by statute.[9]

(J) *Enforcing Orders of Railroad Commission or Other Like Board.* Mandamus will lie to enforce valid orders of the board of railroad commissioners or other like board, where by statute such orders are binding and the company is under a legal duty to obey them;[10] conversely, when such orders are not final

404 [*reversing* 138 Fed. 849] (compelling distribution of coal cars among coal mining companies so as to prevent unjust discrimination in violation of the Interstate Commerce Act); U. S. *v.* West Virginia, etc., R. Co., 125 Fed. 252 (to the same effect); U. S. *v.* Norfolk, etc., R. Co., 109 Fed. 831 (to the same effect). And see State *v.* Harrington, (Nebr. 1907) 110 N. W. 1016.

98. Covington Stock-Yards Co. *v.* Keith, 139 U. S. 128, 11 S. Ct. 461, 35 L. ed. 73. See also U. S. *v.* Delaware, etc., R. Co., 40 Fed. 101.

99. Larabee Flour Mills Co. *v.* Missouri Pac. R. Co., (Kan. 1906) 88 Pac. 72, holding also that the remedy by mandamus was not excluded by the remedy afforded by statute before the board of railroad commissioners.

1. Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690. But not to deliver beyond its own line. People *v.* Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631, referred to *supra*, this section, note 96.

2. Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824.

3. See Chicago, etc., R. Co. *v.* Burlington, etc., R. Co., 34 Fed. 481.

4. Mobile, etc., R. Co. *v.* Wisdom, 5 Heisk. (Tenn.) 125.

5. People *v.* New York, etc., R. Co., 22 Hun (N. Y.) 533. This, however, is contrary to cases in other states cited in the preceding notes unless it can be distinguished on the ground that in this case a single shipment only was involved. See particularly Cumberland Tel., etc., Co. *v.* Morgan's Louisiana, etc., R. Co., 51 La. Ann. 29, 24 So. 803, 72 Am. St. Rep. 442.

6. Milwaukee Malt Extract Co. *v.* Chicago, etc., R. Co., 73 Iowa 98, 34 N. W. 761, where the court refused to grant a mandamus to compel a railroad company to transport an article called "New Era Beer," because the statute law of that state prohibited common carriers from bringing into the state intoxicating liquors, including beer, and the article was *prima facie* within the prohibition, so that it was discretionary with the carrier to refuse to transport it, although in fact it was not an intoxicating liquor.

7. *Florida.*— State *v.* Atlantic Coast Line R. Co., (1906) 40 So. 875.

Illinois.— People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650.

Minnesota.— State *v.* Chicago, etc., R. Co., 38 Minn. 281, 37 N. W. 782.

Nebraska.— State *v.* Fremont, etc., R. Co., 22 Nebr. 313, 35 N. W. 118.

New Jersey.— Atwater *v.* Delaware, etc., R. Co., 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543.

United States.— Covington Stock-Yards Co. *v.* Keith, 139 U. S. 128, 11 S. Ct. 461, 35 L. ed. 73 (unlawful special charge, in addition to the customary and legitimate charge for transportation, for receiving and delivering live stock); Augusta Southern R. Co. *v.* Wrightsville, etc., R. Co., 74 Fed. 522. *Compare* U. S. *v.* Delaware, etc., R. Co., 40 Fed. 101, holding that a case of unjust discrimination in live stock transportation was not made out.

Rates established by railroad commission or other like board see *infra*, VII, A, 9, j, (I), (J).

8. Atwater *v.* Delaware, etc., R. Co., 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543.

9. State *v.* Mobile, etc., R. Co., 59 Ala. 321, holding that a statute giving shippers the right to recover from the company as a penalty double the amount of the overcharge, the penalty in no case to be less than twenty dollars, afforded such an adequate remedy as to exclude mandamus.

10. People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y.

and impose no specific duty of obedience upon the part of the company, the writ will not issue to enforce them.[11]

(K) *Municipal Aid.* Mandamus will lie to compel a railroad company to deliver certificates of stock to a county or other municipal corporation which has issued its bonds in aid of the road.[12]

(L) *Public Sale of Lands.* It has been held that a provision in the charter of a railroad company directing that all lands unsold at the expiration of a certain number of years from the completion of the road and its branches shall be offered at public sale is of such a vague character that the courts will not enforce such sale by mandamus without further legislation.[13]

(II) *Street Railroad Companies.*[14] Mandamus will lie as in other cases to compel a street railroad company to perform duties to the public clearly imposed upon it by law,[15] unless some other adequate remedy is provided;[16] but the duty to do the act sought to be compelled and the legal right of the relator to have it done must clearly appear.[17] The writ will not issue to control the company in matters as

App. Div. 549, 75 N. Y. Suppl. 202]; Railroad Com'rs *v.* Atlantic Coast Line R. Co., 71 S. C. 130, 50 S. E. 641; and other cases cited in this note.

Illustrations.— Thus it has been held that the writ will lie to compel a railroad company to comply with an order to put into effect and operation a prescribed tariff of rates for transportation of freight and passengers (State *v.* Atlantic Coast Line R. Co., (Fla. 1906) 40 So. 875; State *v.* Atlantic Coast Line R. Co., 48 Fla. 146, 37 So. 657 [*affirmed* in 203 U. S. 256, 27 S. Ct. 108]; State *v.* Seaboard Air Line R. Co., 48 Fla. 129, 37 So. 314 [*affirmed* in 203 U. S. 261, 27 S. Ct. 109]; State *v.* Atlantic Coast Line R. Co., 48 Fla. 114, 37 So. 652; State *v.* Chicago, etc., R. Co., 38 Minn. 281, 37 N. W. 782; State *v.* Tremont, etc., R. Co., 22 Nebr. 313, 35 N. W. 118); to post a copy of the schedule of rates as fixed by the commission (State *v.* Pensacola, etc., R. Co., 27 Fla. 403, 9 So. 89); to establish a station or depot at a particular place (Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208); to stop certain trains at a station in order that the community may be properly served (Railroad Com'rs *v.* Atlantic Coast Line R. Co., 71 S. C. 130, 50 S. E. 641); or to remove a grade crossing and carry tracks over a street (Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17).

Mandamus to terminal company see *infra*, VII, A, 9, j, (III).

11. State *v.* Missouri Pac. R. Co., 55 Kan. 708, 41 Pac. 964, 49 Am. St. Rep. 278, 29 L. R. A. 444 (holding that an order of the railroad commissioners directing a company to restore and operate a local passenger train as it was previously operated would not be enforced by mandamus, since under the statute it was not final and conclusive, but advisory only); State *v.* Kansas Cent. R. Co., 47 Kan. 497, 28 Pac. 208 (holding to the same effect with respect to an order of the board of railroad commissioners requiring a railroad company to repair its track); People *v.* New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484 (holding that a legal duty to establish a station-house for passengers awaiting transportation or a warehouse for freight was not imposed under the former New York statute by an order of the railroad commissioners, since they had power merely to hear and determine questions arising between the people and railroad companies, and no power was given to them or to any court to enforce their decisions).

12. State *v.* Cheraw, etc., R. Co., 16 S. C. 524. See also *supra*, VII, A, 4, f.

Sufficiency of demand.— A demand by a county upon a railroad company for certificates of "preferred stock," although the precise character of the certificate is not specified, is sufficiently definite to warrant a proceeding by mandamus to obtain a proper certificate, the one offered being objectionable as implying, by its terms, that the county is something other than a stock-holder. State *v.* Cheraw, etc., R. Co., 16 S. C. 524.

13. People *v.* Illinois Cent. R. Co., 62 Ill. 510.

14. **Duty of street railroads** see STREET RAILROADS.

Corporation in hands of receiver see *infra*, VII, A, 9, k.

15. See the cases cited in the notes following.

16. People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202]; State *v.* Cleveland Electric R. Co., 15 Ohio Cir. Ct. 200, 8 Ohio Cir. Dec. 474. See *supra*, VII, A, 9, a; and cases specifically cited in the notes following.

17. Mandamus does not lie to compel a railroad company to furnish certain passenger service where it does not appear that such company has the right to run its trains as prayed in the petition. People *v.* St. Louis, etc., R. Co., 122 Ill. App. 422. Mandamus will not lie on the petition of a private citizen merely to settle some doubtful question, but to entitle him to the writ he must clearly show that he has a legal right which has been denied and that the denial of such right affects his personal interests; the writ is never awarded to settle mere abstract rights unaccompanied with substan-

to which it has a mere option or privilege[18] or matters within its discretion,[19] or to require performance of an act which is not within its power.[20] In proper cases mandamus will lie to compel a street railroad company to comply with a statute or binding municipal ordinance as to the location and construction of its road,[21] to restore, pave, or repair streets and highways where they are occupied by its tracks as required by statute or binding ordinance,[22] or to change the location or construction of its line to permit a street improvement;[23] to compel a company operating by electricity to construct safe-guards, as required by ordinance, where its wires cross those of a telegraph or telephone company whose rights were previously acquired;[24] or to compel the company to give proper service or to resume the operation of an abandoned or discontinued line,[25] to comply with a valid ordi-

tial or practical benefits. People *v.* St. Louis, etc., R. Co., *supra*.

Want of franchise from municipality.— A street railway company which has occupied public highways for several years in the operation of its line without a grant or privilege or franchise from the municipality cannot urge that objection for the purpose of relief against its enforced continuance to operate its line thereon, when its use and occupation of such highways has been undisturbed. State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515.

18. San Antonio St. R. Co. *v.* State, 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662. See *supra*, VII, A, 9, b, (II).

19. People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202]. See *supra*, VII, A, 9, b, (II).

20. Benton Harbor *v.* St. Joseph, etc., St. R. Co., 102 Mich. 386, 60 N. W. 758, 47 Am. St. Rep. 553, 26 L. R. A. 245. See *supra*, VII, A, 9, c.

21. Detroit *v.* Ft. Wayne, etc., R. Co., 90 Mich. 646, 51 N. W. 688; State *v.* Trenton Pass. R. Co., 57 N. J. L. 212, 31 Atl. 238; Halifax *v.* City R. Co., Ritch. Eq. Cas. (Nova Scotia) 319.

Discretion of court.— But it was held not an abuse of discretion for the court to refuse to compel removal of a cross-over switch not conforming to plan, where it served the public interest and was located as directed by the city officials. Hartford *v.* Hartford St. R. Co., 74 Conn. 194, 50 Atl. 393.

Other remedy of landowner.— Where an owner of property abutting on a street claimed to suffer annoyance from the maintenance by a street railway company of a cross-over switch, which annoyance was not merely an ordinary incident to the use by the company of double tracks and a cross-over switch, but was peculiar and exceptional because of the physical or other conditions existing at the particular place, it was held that equity would give redress, and that he could not maintain mandamus to compel the removal of the cross-over switch to the place designated in the plan for the construction of the tracks. State *v.* Hartford St. R. Co., 76 Conn. 174, 56 Atl. 506.

22. State *v.* Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590; Lansing *v.* Lansing City Electric R. Co., 109 Mich. 123, 66 N. W. 949; State *v.* St. Paul, etc., R. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; Rutherford Borough *v.* Hudson River Traction Co., (N. J. Sup. 1906) 63 Atl. 84; Halifax *v.* City R. Co., Ritch. Eq. Cas. (Nova Scotia) 319. See also Harrisburg *v.* Harrisburg Pass. R. Co., 1 Pearson (Pa.) 298; Memphis R. Co. *v.* State, 87 Tenn. 746, 11 S. W. 946. *Compare* State *v.* New Orleans Traction Co., 48 La. Ann. 567, 19 So. 565; State *v.* New Orleans, etc., R. Co., 44 La. Ann. 1026, 11 So. 709. And see *supra*, VII, A, 9, j, (I), (D), (E).

Other remedy excluding mandamus see State *v.* New Orleans, etc., R. Co., 37 La. Ann. 589, referred to *supra*, VII, A, 9, j, (I), (E), note 75.

Want of necessary funds and of means of raising them ground for refusing writ see Benton Harbor *v.* St. Joseph, etc., St. R. Co., 102 Mich. 386, 60 N. W. 758, 47 Am. St. Rep. 553, 26 L. R. A. 245; and *supra*, VII, A, 9, c.

23. Detroit *v.* Ft. Wayne, etc., R. Co., 90 Mich. 646, 51 N. W. 688 (removal of projecting ends of ties to prevent injury to contemplated concrete paving of street); People *v.* Geneva, etc., Traction Co., 112 N. Y. App. Div. 581, 98 N. Y. Suppl. 719 [*affirmed* in 186 N. Y. 516, 78 N. E. 1109] (change of location to permit street improvement).

24. State *v.* Janesville St. R. Co., 87 Wis. 72, 57 N. W. 970, 41 Am. St. Rep. 23, 23 L. R. A. 759.

Other remedy.— The remedy by mandamus is not excluded by the fact that the ordinance prescribes a penalty to be recovered for failure to comply therewith in this respect. State *v.* Janesville St. R. Co., 87 Wis. 72, 57 N. W. 970, 41 Am. St. Rep. 23, 23 L. R. A. 759.

25. Potwin Place *v.* Topeka R. Co., 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312; State *v.* Bridgeton, etc., Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837; Matter of Loader, 14 Misc. (N. Y.) 208, 35 N. Y. Suppl. 996, 999; State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515. *Contra*, under the Ohio statute. State *v.* Cleveland Electric R. Co., 15 Ohio Cir. Ct. 200, 8 Ohio Cir. Dec. 474. And *compare* Kingston *v.* Kingston, etc., Electric R. Co., 28 Ont. 399 [*affirmed* in 25 Ont. App. 462].

Absence of duty.— Where there is no legal duty to operate a line, but a mere permis-

nance regulating the sale of tickets over its lines,[26] to give transfers as required by law,[27] or to comply with a condition as to the amount of fare agreed to by it in consideration of a grant by the city of the right to use its streets.[28]

(III) *Terminal Companies.* Mandamus will lie to compel a terminal company to comply with a binding order of the railroad commissioners to admit a railroad company to the privileges of its common passenger station or terminal.[29]

(IV) *Subway or Tunnel Companies.* Mandamus will also lie against a subway or tunnel company to compel it to accord space in its tunnel or subway to other companies in case of a clear right and plain legal duty.[30]

(V) *Steamboat, Etc., Companies.* Steamboat companies and other watercraft may be compelled by mandamus to furnish certified lists of the tons of freight and number of passengers passed through canal locks as required by statute, or to perform other duties clearly imposed by law.[31]

(VI) *Express Companies.* Mandamus will also lie to compel express companies to perform the duties imposed upon them by law as common carriers or otherwise,[32] such as the duty to receive and carry goods offered them for transportation;[33] but they will not be compelled to carry fragile goods, such as glassware, subject to all common-law liabilities of a common carrier.[34]

(VII) *Telephone and Telegraph Companies.*[35] Telephone companies are common carriers and mandamus will lie to compel them to furnish telephones with the necessary connections and service, without discrimination, where they are under a legal duty to do so;[36] but it will not lie at the instance of a telephone company to compel a telegraph company to permit a telephone to be placed in its

sion or privilege, mandamus will not lie to compel its operation. San Antonio St. R. Co. *v.* State, 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662.

A discretion vested in the company as to the operation of its road was held ground for denying the writ in People *v.* Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788 [*affirming* 69 N. Y. App. Div. 549, 75 N. Y. Suppl. 202].

Duty of street railroad company in this respect see Street Railroads.

Discretion of court to refuse writ see State *v.* Home St. R. Co., 43 Nebr. 830, 62 N. W. 225.

Prior demand held unnecessary.— State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515. *Compare supra*, VII, A, 9, b, (III).

26. Detroit *v.* Ft. Wayne, etc., R. Co., 95 Mich. 456, 54 N. W. 958, 35 Am. St. Rep. 580, 20 L. R. A. 79.

27. Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775. But see to the contrary, where the application was by a private citizen, People *v.* Interurban St. R. Co., 177 N. Y. 296, 69 N. E. 596 [*dismissing* appeal from 85 N. Y. App. Div. 407, 83 N. Y. Suppl. 622]. A writ of mandamus should not issue at the instance of a municipal corporation to compel a street railway company to give transfers when the obligations of the company to do so arises wholly from its assent to certain municipal ordinances which of themselves have no legislative force. Newark *v.* North Jersey St. R. Co., (N. J. Sup. 1906) 62 Atl. 1003.

Other remedy.— The remedy by repeated actions at law to recover damages for violation of the duty to give transfers is not such an adequate remedy as to exclude mandamus. Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775. And see *supra*, VII, A, 2, 9, a. *Contra*, People *v.* Interurban St. R. Co., 177 N. Y. 296, 69 N. E. 596.

28. People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650.

29. State *v.* Jacksonville Terminal Co., 41 Fla. 363, 27 So. 221, 41 Fla. 377, 27 So. 225.

30. Matter of Long Acre Electric Light, etc., Co., 51 Misc. (N. Y.) 407, 101 N. Y. Suppl. 460, to compel a telegraph and electrical subway company to give an electric light and power company space in its subway ducts for certain electrical conductors.

31. Canal, etc., Com'rs *v.* Willamette Transp., etc., Co., 6 Oreg. 219.

32. See the cases in the notes following.

Railroad companies see *supra*, VII, A, 9, j, (I), (I).

33. Southern Express Co. *v.* Rose Co., 124 Ga. 581, 53 S. E. 185, 5 L. R. A. N. S. 619; Atty.-Gen. *v.* American Express Co., 118 Mich. 682, 77 N. W. 317.

34. People *v.* Babcock, 16 Hun (N. Y.) 313.

35. Duties of telephone and telegraph companies see Telegraphs and Telephones.

36. *Indiana.*— Central Union Tel. Co. *v.* State, 123 Ind. 113, 24 N. E. 215; Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721.

Maryland.— Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167.

Michigan.— Mahan *v.* Michigan Tel. Co., 132 Mich. 242, 93 N. W. 629.

office, since it cannot be compelled to receive oral messages.[37] Where collecting and furnishing market quotations for tickers or otherwise is part of the corporate duty of a telegraph company, it will be compelled by mandamus to perform it;[38]

Missouri.— State *v.* Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684.

Nebraska.— State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404. See also Nebraska Tel. Co. *v.* State, 55 Nebr. 627, 76 N. W. 171, 45 L. R. A. 113.

New York.— People *v.* Hudson River Tel. Co., 19 Abb. N. Cas. 466. *Compare*, however, Matter of Baldwinsville Tel. Co., 24 Misc. 221, 53 N. Y. Suppl. 574, holding that the failure of a telephone company to perform its duty at the request of a single person is not such a suspension of the exercise of its franchises as will sustain a writ of mandamus.

Ohio.— State *v.* Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583.

Pennsylvania.— Central Dist., etc., Tel. Co. *v.* Com., 114 Pa. St. 592, 7 Atl. 926; Bell Tel. Co. *v.* Com., 17 Wkly. Notes Cas. 505.

South Carolina.— State *v.* Citizens' Tel. Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

Vermont.— Commercial Union Tel. Co. *v.* New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

United States.— Delaware, etc., Tel., etc., Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633]; State *v.* Bell Tel. Co., 23 Fed. 539.

See also TELEGRAPHS AND TELEPHONES.

Other remedy.— The fact that the statute imposes a penalty for failure of a telephone company to furnish a telephone to a person entitled thereto does not exclude the remedy by mandamus. Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114. *Contra*, People *v.* Central New York Tel., etc., Co., 41 N. Y. App. Div. 17, 58 N. Y. Suppl. 221. But mandamus will not lie to compel a telephone company to furnish a telephone and service at less than the amount charged by it on the ground that the charge is excessive, where the statute provides a remedy by application to the board of transportation. Nebraska Tel. Co. *v.* State, 55 Nebr. 627, 76 N. W. 171, 45 L. R. A. 113.

In favor of another telephone company.— Under the New York Transportation Corporations Law, § 103 (Gen. Laws, c. 40; Laws (1890), c. 566), requiring every such corporation to receive despatches from or for other telegraph or telephone lines, and, on payment of the usual charges, to transmit them with impartiality and good faith, and in the order received, and providing for a penalty for refusal to do so, one telephone company is not obliged to install an instrument in the offices of another company for the use of the latter's patrons. People *v.* Central New York Tel., etc., Co., 41 N. Y. App. Div. 17, 58 N. Y. Suppl. 221; Matter of Baldwinsville Tel. Co., 24 Misc. (N. Y.) 221, 53 N. Y. Suppl. 574.

A telegraph company may compel a telephone company to give the use of its service. Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; People *v.* Hudson River Tel. Co., 19 Abb. N. Cas. (N. Y.) 466; State *v.* Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583; Bell Tel. Co. *v.* Com., 17 Wkly. Notes Cas. (Pa.) 505; Commercial Union Tel. Co. *v.* New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161; Delaware, etc., Tel., etc., Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633]; Missouri *v.* Bell Tel. Co., 23 Fed. 539.

Effect of contracts with others.— By the weight of authority a telephone company cannot be exonerated from its duty to furnish telephones and service by any conditions or restrictions imposed by contract with the owner of the invention applied in the exercise of the employment. Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; State *v.* Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583; Commercial Union Tel. Co. *v.* New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161; Delaware, etc., Tel., etc., Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633]; Missouri *v.* Bell Tel. Co., 23 Fed. 539. *Contra*, American Rapid Tel. Co. *v.* Connecticut Tel. Co., 49 Conn. 352, 44 Am. Rep. 237. A telegraph company may compel a telephone company to give the use of its service, notwithstanding the latter has made an exclusive contract with another telegraph company. Bell Tel. Co. *v.* Com., 17 Wkly. Notes Cas. (Pa.) 505; Delaware, etc., Tel., etc., Co. *v.* Delaware, *supra*.

Breach of prior contract.— Mandamus will lie to compel a telephone company to furnish petitioner with telephone facilities, although petitioner has not complied with a previous contract with respondent, whereby he agreed to use respondent's telephone exclusively, the remedy of respondent being in an action for breach of the contract. State *v.* Citizens' Tel. Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

Impossibility of performance.— It is a sufficient return to a writ of mandamus to compel respondent to furnish telephone facilities to petitioner that it has not the means to at once comply with the demand. State *v.* Citizens' Tel. Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

37. People *v.* Western Union Tel. Co., 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637, holding also that this is true, even though the company has waived its rights in this respect as against another telephone company by permitting it to install a telephone.

38. Davis *v.* Electric Reporting Co., 19 Wkly. Notes Cas. (Pa.) 567. See also West-

but by the weight of authority telegraph companies cannot be compelled to furnish market quotations given to it by stock exchanges, boards of trade, and the like, to persons not members of the same, as such bodies are not bound to furnish information concerning their business to persons not members.[39]

(VIII) *BRIDGE COMPANIES.*[40] Mandamus will lie to compel a bridge company to repair or rebuild and maintain its bridge as required by its charter,[41] unless some other adequate remedy is provided[42] or the obligation is not imposed by law, but rests in contract only.[43]

(IX) *LIGHTING, HEATING, FUEL, AND POWER COMPANIES.*[44] A corporation which occupies streets or highways, with its mains, pipes, or wires, and is engaged in the business of furnishing gas or electricity for light, heat, fuel, or power, is under a legal duty to supply any person who applies therefor and complies with its reasonable regulations, and if it wrongfully refuses to do so mandamus will lie;[45] but the relator must establish a clear legal right,[46] and the writ will not lie

ern Union Tel. Co. *v.* State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. N. S. 153.

Bucket-shops.— An answer to an alternative writ of mandamus to compel a telegraph company to sell and deliver to relator the continuous market quotations of a board of trade, which alleges that relator was, at the institution of the suit, engaged in purloining such quotations and using them in conducting a bucket-shop, and that he desires the quotations for the purpose of conducting a bucket-shop, sufficiently alleges that the relator desires the quotations for gambling purposes, and is a good answer in bar. Western Union Tel. Co. *v.* State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. N. S. 153. Where a board of trade and a telegraph company have agreed that the company shall not deliver the market quotations of the board, unless the applicant therefor agrees not to use them for the purpose of conducting a bucket-shop, the court will not compel the company to deliver the quotations to an applicant who refuses to agree not to use them for an illegal purpose. Western Union Tel. Co. *v.* State, *supra.*

39. Matter of Renville, 46 N. Y. App. Div. 37, 61 N. Y. Suppl. 549. *Compare* Western Union Tel. Co. *v.* State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. N. S. 153. See also EXCHANGES, 17 Cyc. 869.

40. See also BRIDGES, 5 Cyc. 1049.

Construction and maintenance of bridges by: Canal company see *infra,* VII, A, 9, j, (XII). Railroad company see *supra,* VII, A, 9, j, (I), (D).

41. State *v.* Wilmington Bridge Co., 3 Harr. (Del.) 312; State *v.* Republican River Bridge Co., 20 Kan. 404. See also BRIDGES, 5 Cyc. 1083, 1087.

42. State *v.* Republican River Bridge Co., 20 Kan. 404.

The fact that an indictment will lie for the neglect of duty does not exclude the remedy by mandamus. State *v.* Wilmington Bridge Co., 3 Harr. (Del.) 312. See *supra,* VII, A, 9, a, text and note 20.

43. State *v.* Republican River Bridge Co., 20 Kan. 404. In this case a bridge company accepted the terms and conditions of an act of the legislature, built the bridge as provided by the act, and the same was accepted by the governor, and the company deposited with the governor a bond by which it became obligated to the state to maintain the bridge in good condition forever, and indemnified the state against any losses by reason of the guaranty given by the state to the United States, and thereupon the company received a patent for four thousand acres of land granted by the United States to the state to aid in the construction of the bridge. It was held that mandamus would not lie to compel the company to rebuild and maintain the bridge, as the remedy, if any existed, was on the bond.

Mere contract obligations see *supra,* VII, A, 7, a.

44. See also ELECTRICITY; GAS.

45. *Indiana.*— State *v.* Consumers' Gas Trust Co., 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245; Portland Natural Gas, etc., Co. *v.* State, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639.

Louisiana.— State *v.* New Orleans Gaslight Co., 108 La. 67, 32 So. 179.

Missouri.— State *v.* Sedalia Gas Light Co., 34 Mo. App. 501.

New Jersey.— Johnson *v.* Atlantic City Gas, etc., Co., 65 N. J. Eq. 129, 56 Atl. 550.

New York.— Richman *v.* Consolidated Gas Co., 114 N. Y. App. Div. 216, 100 N. Y. Suppl. 81 [*affirmed* in 186 N. Y. 209, 78 N. E. 871]; People *v.* Manhattan Gas Light Co., 45 Barb. 136, 1 Abb. Pr. N. S. 404, 30 How. Pr. 87; Matter of Rebbecchi, 51 Misc. 403, 100 N. Y. Suppl. 513.

Oregon.— Mackin *v.* Portland Gas Co., 38 Oreg. 120, 61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596.

Pennsylvania.— Mercur *v.* Media Electric Light, etc., Co., 10 Pa. Dist. 10, 7 Del. Co. 586 [*reversed* on other grounds in 19 Pa. Super. Ct. 519]; Com. *v.* Wilkes-Barre Gas Co., 2 Kulp 499.

Compare Matter of Commercial Bank, 20 U. C. Q. B. 233.

Natural gas companies are within the rule. State *v.* Consumers' Gas Trust Co., 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245; Portland Natural Gas, etc., Co. *v.* State, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639.

46. State *v.* Sedalia Gas Light Co., 34 Mo. App. 501; Mackin *v.* Portland Gas Co., 38

where the duty sought to be enforced is not imposed by law,[47] or where it is sought to enforce a mere contract obligation.[48] Mandamus will also lie to compel such a corporation to remove its poles for the purpose of permitting a street improvement,[49] or to compel it to join in the appointment of arbitrators under a statute to determine the price to be paid for its plant by a city on the exercise by the latter of an option to purchase the same.[50] But it has been held that the remedy to prevent the taking up of a pipe line furnishing a customer with gas is injunction, and not mandamus.[51]

(x) *Water and Irrigation Companies.*[52] A corporation occupying the streets of a city or village with its mains and having a franchise to furnish the city and its inhabitants with water may be compelled by mandamus to furnish water to a person entitled thereto,[53] or to the municipality;[54] and the same is true of a corporation having a franchise to furnish water for irrigation purposes and under a legal duty to do so;[55] but the writ will not lie to enforce an obliga-

Oreg. 120, 61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596; Mercur *v.* Media Electric Light, etc., Co., 19 Pa. Super. Ct. 519 [*reversing* 10 Pa. Dist. 10, 7 Del. Co. 586]; Matter of Commercial Bank, 20 U. C. Q. B. 233. The writ will not issue to compel a gas company to furnish a consumer with light or heat pending the settlement of a disputed bill for gas previously furnished, whatever may be the rule as to enjoining the company from turning off the gas under the same circumstances. Mackin *v.* Portland Gas Co., *supra.* See also Electricity, 15 Cyc. 470; Gas, 20 Cyc. 1160 *et seq.*

47. Com. *v.* Wilkes-Barre Gas Co., 2 Kulp (Pa.) 499; Matter of Commercial Bank, 20 U. C. Q. B. 233.

48. Com. *v.* Wilkes-Barre Gas Co., 2 Kulp (Pa.) 499.

Mere contract obligations see *supra,* VII, A, 7, a.

49. Monongahela City *v.* Monongahela Electric Light Co., 3 Pa. Dist. 63, 12 Pa. Co. Ct. 529.

50. St. Louis *v.* St. Louis Gas-light Co., 70 Mo. 69. See *supra,* VII, A, 9, h.

51. State *v.* Connersville Natural Gas Co., 163 Ind. 563, 71 N. E. 483.

52. See Waters.

53. *Alabama.*— Weatherly *v.* Capital City Water Co., 115 Ala. 156, 22 So. 140.

Illinois.— Rogers Park Water Co. *v.* Fergus, 178 Ill. 571, 53 N. E. 363.

Indiana.— Seymour Water Co. *v.* Seymour, 163 Ind. 120, 70 N. E. 514.

Iowa.— Le Mars Independent School Dist. *v.* Le Mars City Water, etc., Co., (1906) 107 N. W. 944.

Kansas.— Topeka *v.* Topeka Water Co., 58 Kan. 349, 49 Pac. 79.

Missouri.— State *v.* Joplin Water Works, 52 Mo. App. 312.

Nebraska.— American Water Works Co. *v.* State, 46 Nebr. 194, 64 N. W. 711, 50 Am. St. Rep. 610, 30 L. R. A. 447.

New York.— People *v.* New York Suburban Water Co., 38 N. Y. App. Div. 413, 56 N. Y. Suppl. 364 (mandamus the proper remedy to compel the furnishing of pure water at reasonable rates); People *v.* Green Island Water Co., 56 Hun 76, 9 N. Y. Suppl. 168.

Oregon.— Haugen *v.* Albina Light, etc., Co., 2 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424.

Pennsylvania.— Long *v.* Springfield Water Co., 8 Del. Co. 151. And see Easton *v.* Lehigh Water Co., 97 Pa. St. 554.

United States.— See Wiemer *v.* Louisville Water Co., 130 Fed. 251, a case, however, of mandatory injunction.

Duty of water companies see Waters.

54. Le Mars Independent School Dist. *v.* Le Mars City Water, etc., Co., (Iowa 1906) 107 N. W. 944; Easton *v.* Lehigh Water Co., 97 Pa. St. 554.

Furnishing free to school-district.— The writ will lie to compel the furnishing of water free to a school-district as required by an ordinance. Le Mars Independent School Dist. *v.* Le Mars City Water, etc., Co., (Iowa 1906) 107 N. W. 944.

55. Merrill *v.* Southside Irr. Co., 112 Cal. 426, 44 Pac. 720; McCrary *v.* Beaudry, 67 Cal. 120, 7 Pac. 264; Price *v.* Riverside Land, etc., Co., 56 Cal. 431; Cozzens *v.* North Fork Ditch Co., 2 Cal. App. 404, 84 Pac. 342; People *v.* Farmers' High Line Canal, etc., Co., 25 Colo. 202, 54 Pac. 626 [*reversing* 8 Colo. App. 246, 45 Pac. 543]; Combs *v.* Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966, 31 Am. St. Rep. 275; Townsend *v.* Fulton Irr. Ditch Co., 17 Colo. 142, 29 Pac. 453; South Boulder, etc., Ditch Co. *v.* Marfell, 15 Colo. 302, 25 Pac. 504; Wheeler *v.* Northern Colorado Irr. Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. Rep. 603; Golden Canal Co. *v.* Bright, 8 Colo. 144, 6 Pac. 142; Bright *v.* Farmers' Highline Canal, etc., Co., 3 Colo. App. 170, 32 Pac. 433; Bardsly *v.* Boise Irr. etc., Co., 8 Ida. 155, 67 Pac. 428; Wilterding *v.* Green, 4 Ida. 773, 45 Pac. 134; State *v.* Minnesota, etc., Imp. Co., 20 Mont. 198, 50 Pac. 420.

Duty of irrigation companies see Waters.

Other remedy.— An action for damages for a failure of crops is not an adequate remedy. Golden Canal Co. *v.* Bright, 8 Colo. 144, 6 Pac. 142.

Demand necessary.— Price *v.* Riverside Land, etc., Co., 56 Cal. 431. See *supra,* VII, A, 9, b, (III).

Perpetual right.— Mandamus will not lie to

tion arising from contract only and not imposed by law.[56] Mandamus will also lie to prevent unlawful discrimination,[57] to compel a water company to extend its mains, where it is under a legal duty to do so,[58] to erect fire plugs for the purpose of furnishing a sufficient quantity of water for extinguishing fires,[59] to lower its pipes in the streets so as not to obstruct the sewers,[60] to make necessary alterations in the bed of the stream or course of a highway in constructing a dam across a river,[61] or to compel an irrigation company to bridge its ditches.[62]

(xi) *Water-Power Companies.* Mandamus will lie to enforce the duty of a water-power company to restore streets or highways by erecting and maintaining bridges,[63] but it will not lie where bridges have been already built by the municipality and are in existence.[64] The writ will also lie to compel the construction and maintenance of fishways as required by statute.[65]

(xii) *Canal Companies.*[66] Where the duty is imposed by law mandamus will lie to compel a canal company to build, repair, and maintain bridges or viaducts,[67] and to make improvements and repairs necessary to keep the canal navigable.[68]

secure a perpetual right to the use of water for irrigation, but must be limited to compelling its delivery during a particular year, as an annually recurring right, depending on the annual tender of the price. Townsend *v.* Fulton Irr. Ditch Co., 17 Colo. 142, 29 Pac. 453. See also People *v.* Farmers' High Line Canal, etc., Co., 25 Colo. 202, 54 Pac. 626 [*reversing* 8 Colo. App. 246, 45 Pac. 543].

Quantity.— The company will only be required to furnish an adequate supply in the absence of a contract or prescriptive right to a certain quantity. Bright *v.* Farmers' Highline Canal, etc., Co., 3 Colo. App. 170, 32 Pac. 433.

Compelling cutting off from ditches not entitled.— Mandamus will not issue to compel the proper officer to cut off the water-supply to ditches not entitled thereto, until the right of the applicants and third persons have been judicially determined. The officer has a certain discretion in the matter, which will not be interfered with in the first instance. Farmers' Independent Ditch Co. *v.* Maxwell, 4 Colo. App. 477, 36 Pac. 556.

56. Perrine *v.* San Jacinto Valley Water Co., (Cal. App. 1906) 88 Pac. 293. See *supra*, VII, A, 7, a. *Compare*, however, People *v.* Farmers' Highline Canal, etc., Co., 25 Colo. 202, 54 Pac. 626 [*reversing* 8 Colo. App. 246, 45 Pac. 543].

57. Long *v.* Springfield Water Co., 8 Del. Co. (Pa.) 151. See also Wiemer *v.* Louisville Water Co., 130 Fed. 251.

58. Topeka *v.* Topeka Water Co., 58 Kan. 349, 49 Pac. 79.

59. Easton *v.* Lehigh Water Co., 97 Pa. St. 554.

60. Montgomery *v.* Capital City Water Co., 92 Ala. 361, 9 So. 339.

61. State *v.* Ousatonic Water Co., 51 Conn. 137.

62. Fresno County *v.* Fowler Switch Canal Co., 68 Cal. 359, 9 Pac. 309; State *v.* Lake Koen Nav., etc., Co., 63 Kan. 694, 65 Pac. 681.

63. *In re* Trenton Water Power Co., 20 N. J. L. 659.

The fact that an indictment will lie for failure to perform a duty does not exclude the remedy by mandamus. *In re* Trenton Water Power Co., 20 N. J. L. 659. And see *supra*, VII, A, 9, a, text and note 20.

64. State *v.* Cowgill, etc., Hill Milling Co., 156 Mo. 620, 57 S. W. 1008.

65. West Point Water Power, etc., Co. *v.* State, 49 Nebr. 218, 66 N. W. 6, holding that the duty enjoined upon the owner of mill-dams to construct and maintain fishways by Nebr. Cr. Code, § 87*a*, is designed to promote the public welfare and may be enforced by mandamus on the relation of the county attorneys of the several counties.

66. See Canals, 6 Cyc. 267.

Irrigation canal companies see *supra*, VII, A, 9, j, (x).

67. Fresno County *v.* Fowler Switch Canal Co., 68 Cal. 359, 9 Pac. 309; State *v.* Savannah, etc., Canal Co., 26 Ga. 665; State *v.* Lake Koen Nav., etc., Co., 63 Kan. 694, 65 Pac. 681; *In re* Trenton Water Power Co., 20 N. J. L. 659, holding that where a private corporation is authorized by its charter to construct a canal, or cut a sluice or raceway, and the company digs or cuts the same across a highway, so as to render a bridge necessary where none was required before, the company is bound to erect and maintain such bridge at its own expense, without any express provision in its charter to that effect, and the duty is so clear, that a mandamus may issue to compel its performance. See also Canals, 6 Cyc. 272.

Private road.— Mandamus will lie to compel a canal company to build a bridge over its canal at a private road which it has cut off. State *v.* Savannah, etc., Canal Co., 26 Ga. 665.

Remedy by action for damages.— The fact that a person whose right to use a public or private road is cut off by failure of a canal company to construct or maintain a bridge may maintain an action for damages does not exclude mandamus, as the remedy by action is not an adequate one. State *v.* Savannah, etc., Canal Co., 26 Ga. 665.

Indictment.— The fact that an indictment will lie for the neglect of duty does not exclude the remedy by mandamus. *In re* Trenton Water Power Co., 29 N. J. L. 659. See *supra*, VII, A, 9, a, text and note 20.

68. Savannah, etc., Canal Co. *v.* Shuman, 91 Ga. 400, 17 S. E. 937, 44 Am. St. Rep. 43.

The writ will also lie to compel a canal company to execute other works where a specific legal duty to do so is imposed by its charter or by statute.[69]

(XIII) *Dock Companies.* A corporation authorized to construct and maintain a dock on navigable waters may be compelled by mandamus to perform the duties imposed by its charter or by statute.[70]

(XIV) *Turnpike and Toll-Road Companies.*[71] Mandamus will lie to compel turnpike and toll-road companies to repair their roads or perform other duties imposed by law,[72] unless some other adequate remedy is provided,[73] but not to enforce obligations not imposed by law, but arising out of contract relations only.[74]

(XV) *Insurance Companies.* Mandamus lies to compel an insurance company to submit its books, papers, and records to a public officer for an examination into its affairs as required by statute;[75] and they may be compelled to report, but not to submit to an examination not provided for by law,[76] nor to send to policy-holders a different statement of nominations for offices than is required by statute,[77] and the superintendent of insurance cannot be compelled to change a nomination for office in a company, where such change is not authorized by statute.[78] Nor, as a general rule, will the writ lie to compel the company to pay a debt or perform a mere contract obligation.[79]

(XVI) *Cemetery Companies.*[80] Mandamus will lie against a cemetery association or its officers to enforce the right of the owner of a lot to bury a member of his family therein.[81]

(XVII) *Live-Stock Companies.* A cattle-breeding corporation formed for

Impossibility.— It has been held that as mandamus is a discretionary remedy, it is not *per se* an abuse of discretion to order the writ to issue, notwithstanding the answer of the corporation, taken as true on demurrer, that it "has no funds nor any means of obtaining such," and "if said canal were put in navigable condition, it would not be profitable to operate it," for so long as the corporation retains its franchise, the unprofitableness of the same is immaterial; and although want of means may avail as a reason for not inflicting punishment for disobedience of the writ, it affords no conclusive reason against ordering the writ to issue. Savannah, etc., Canal Co. *v.* Shuman, 91 Ga. 400, 17 S. E. 937, 44 Am. St. Rep. 43. *Compare*, however, *supra*, VII, A, 9, c.

69. Rex *v.* Brecknock, etc., Canal Co., 3 A. & E. 217, 1 Harr. & W. 279, 4 N. & M. 871, 30 E. C. L. 117, where, however, the writ was denied because there had been no demand and refusal.

70. Reg. *v.* Bristol Dock Co., 2 Q. B. 64, 1 G. & D. 286, 6 Jur. 216, 2 R. & Can. Cas. 599, 42 E. C. L. 573 (repair and maintenance of course or channel of river); Rex *v.* Bristol Dock Co., 6 B. & C. 181, 9 D. & R. 309, 5 L. J. M. C. O. S. 51, 30 Rev. Rep. 280, 13 E. C. L. 93 (making or altering sewers).

71. See also Toll-Roads.

72. Reg. *v.* Rochdale, etc., Turnpike Road, 12 Q. B. 448, 64 E. C. L. 448, where, however, the writ was refused on the facts in the discretion of the court.

73. Morgan *v.* Monmouth Plank Road Co., 26 N. J. L. 99, holding that mandamus would not lie to compel a turnpike or plank road company to repair its road where a statute provided that whenever, in the opinion of the board of freeholders of the county, the road should not be in the condition required by its charter, the company should cease to charge toll and permit all persons to pass thereon free until the road should be properly repaired and certified to by the directors of the board of freeholders.

Indictment.— Mandamus to compel repairs has been refused in England and Canada on the ground that the parties should be left to their remedy by indictment. Reg. *v.* Oxford, etc., Turnpike Roads, 12 A. & E. 427, 6 Jur. 216 note, 4 P. & D. 154, 40 E. C. L. 215; Reg. *v.* Brown, 13 U. C. C. P. 356. *Compare*, however, *supra*, VII, A, 9, a, text and note 20.

74. State *v.* Zanesville, etc., Turnpike Road Co., 16 Ohio St. 308, holding that mandamus would not lie to compel a turnpike company to keep its bridge in repair where the obligation to do so arose merely from a contract with the county.

75. People *v.* State Ins. Co., 19 Mich. 392. See *supra*, VII, A, 9, c.

76. State *v.* Commercial Ins. Co., 158 Ind. 680, 64 N. E. 466.

77. People *v.* Kelsey, 114 N. Y. App. Div. 888, 100 N. Y. Suppl. 391.

78. People *v.* Kelsey, 114 N. Y. App. Div. 888, 100 N. Y. Suppl. 391.

79. Mere contract obligations see *supra*, VII, A, 7, a.

Assessments see *supra*, VII, A, 7, c.

Misappropriation of funds.— The writ will not lie to compel the application of a fund to pay a judgment "unless it has been expended in a way not authorized by the charter," as mandamus is not a proper remedy for misappropriation. Minchener *v.* Carroll, 135 Ala. 409, 33 So. 168.

80. See also Cemeteries, 6 Cyc. 707.

81. Mt. Moriah Cemetery Assoc. *v.* Com., 81 Pa. St. 235, 22 Am. Rep. 743 [*affirming* 10 Phila. 385]. *Compare* People *v.* St. Pat-

improving breeds, being a purely private corporation, will not be compelled by mandamus to admit a member or to permit registry or inspection of the herd book by one not a member.[82]

(XVIII) *NEWS PUBLISHING COMPANIES.* It has been held that mandamus will not lie to compel the Associated Press, a corporation engaged in the business of gathering and transmitting news for publication, to furnish to the publisher of a newspaper the same news service extended to others, since the performance of a contract for such service necessarily involves and requires for a long time the exercise of judgment, continuous supervision, special experience, and business discretion, and the courts are unable to enforce such performance.[83]

k. Corporation in Hands of Receiver.[84] Where a court having jurisdiction has appointed a receiver for a railroad company, and he is in possession of the road, its property, and assets, and is proceeding in execution of the trust under the direction and orders of the court, mandamus will not lie from another court against the corporation or the receiver directing their conduct in operating the road,[85] the remedy being by motion or petition in the court which appointed the receiver;[86] but it has been held that the writ may be issued by the court appointing the receiver to compel him to comply with a statute or ordinance requiring the construction of an overhead crossing in a city.[87]

10. CHARITABLE TRUSTS. The writ of mandamus has been employed to admit beneficiaries of a charitable trust and for various other purposes in the enforcement of such trusts.[88] The remedy, however, is generally in equity.[89]

11. HOSPITALS AND ASYLUMS.[90] It has been held that mandamus will not lie to restore one to the position of surgeon in a hospital or asylum,[91] or to compel the directors to allow a physician to practice therein;[92] but it will lie to restore one to his office as a member of the board of governors or trustees,[93] or as superintendent[94] or treasurer;[95] and it will lie to restore an inmate wrongfully expelled or excluded,[96] or to compel the calling and holding of the election of governors or trustees required by statute.[97] It will not lie to interfere with the jurisdiction of visitors, although it will lie to compel visitors to act if they wrongfully refuse to do so.[98] The writ lies to compel the superintendent of a state hospital for the

rick's Cathedral, 21 Hun (N. Y.) 184 [*reversing* 58 How. Pr. 55].

82. People *v.* Holstein-Friesian Assoc., 41 Hun (N. Y.) 439.

83. State *v.* Associated Press, 159 Mo. 410, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151. *Compare*, however, Inter-Ocean Pub. Co. *v.* Associated Press, 184 Ill. 438, 56 N. E. 822, 75 Am. St. Rep. 184, 48 L. R. A. 568 [*reversing* 83 Ill. App. 377], where relief was granted in a suit for an injunction.

84. See, generally, RECEIVERS.

85. State *v.* Marietta, etc., R. Co., 35 Ohio St. 154, where an application against a railroad company and its receiver for mandamus to compel the repair and operation of a part of its road as originally located and constructed was refused. See also People *v.* McLane, 62 Cal. 616; Strasburg *v.* Winchester, etc., R. Co., 94 Va. 647, 27 S. E. 493.

86. See Peckham *v.* Dutchess County R. Co., 145 N. Y. 385, 40 N. E. 15; Covington Stock-yards Co. *v.* Keith, 139 U. S. 128, 11 S. Ct. 461, 35 L. ed. 73.

87. Ft. Dodge *v.* Minneapolis, etc., R. Co., 87 Iowa 389, 54 N. W. 243.

88. Reg. *v.* Abrahams, 4 Q. B. 157, 45 E. C. L. 157; Rex *v.* Barker, 3 Burr. 1265, W. Bl. 300. See also People *v.* Sailors' Snug Harbor, 54 Barb. (N. Y.) 532.

Particular charitable trusts see *infra*, VII, A, 11, 12, 13.

89. *Ex p.* Rugby Charity, 9 D. & R. 214, 22 E. C. L. 589. And see CHARITIES, 6 Cyc. 968 *et seq.*

90. See, generally, ASYLUMS, 4 Cyc. 362; HOSPITALS, 21 Cyc. 1105.

91. Anonymous, Comb. 41.

92. People *v.* Julia F. Burnham Hospital, 71 Ill. App. 246.

93. Welch *v.* Passaic Hospital Assoc., 59 N. J. L. 142, 36 Atl. 702.

94. Eastman *v.* Householder, 54 Kan. 63, 37 Pac. 989.

95. See State *v.* Kuehn, 34 Wis. 229.

96. People *v.* Sailors' Snug Harbor, 54 Barb. (N. Y.) 532.

Demand and refusal.— A soldier discharged from a veterans' home for violation of its rules is not entitled to mandamus to compel his readmission, unless he shows a previous demand for readmittance and a refusal thereof. Wilson *v.* Veterans' Home, 138 Cal. 67, 70 Pac. 1059. And see *supra*, VII, A, 3.

97. People *v.* Albany Hospital, 61 Barb. (N. Y.) 397, 11 Abb. Pr. N. S. 4. See *supra*, VII, A, 5.

98. Rex *v.* Wheeler, 3 Keb. 360; Rex *v.* Worcester, 4 M. & S. 415, 16 Rev. Rep. 512. See *supra*, VII, A, 6.

insane to certify to the state auditor a claim for insurance premiums on the policies taken out by the commissioners, it being their duty by law to insure the property.[99]

12. Religious or Ecclesiastical Corporations.[1] Mandamus will lie to restore a trustee of an incorporated church,[2] or to restore a minister, curate, or other ecclesiastical or spiritual officer to his office when he has been wrongfully removed or excluded, and when temporal rights, such as agreed salary, stipends, or emoluments are annexed to the office and belong to the incumbent;[3] but where no temporal rights are involved the courts will leave the parties to settle their disputes by the constitution and rules of their organization.[4] Mandamus will not lie to restore to membership in a church where no temporal rights are involved;[5] and even where temporal rights are involved the writ will not issue where there has been no demand upon and refusal by the society to reinstate,[6] where the expulsion was within the rules and regulations of the society,[7] where the relator, if restored, might be immediately legally expelled,[8] or where an action for damages will give full and adequate relief.[9] Nor will the courts interfere until the remedies within the organization provided by its rules and regulations have been exhausted,[10] or inter-

99. Furnish *v.* Satterwhite, 114 Ky. 905, 72 S. W. 309, 24 Ky. L. Rep. 1723.

1. See, generally, Religious Societies.

2. Clayton *v.* Carey, 4 Md. 26. See *supra*, VII, A, 6, a.

3. *Alabama.*— State *v.* Bibb St. Church, 84 Ala. 23, 4 So. 40.

Delaware.— Africans Union Church *v.* Sanders, 1 Houst. 100, 63 Am. Dec. 187.

Kansas.— Feizel *v.* Wyandotte City M. E. Church First German Soc., 9 Kan. 592.

Maryland.— Tartar *v.* Gibbs, 24 Md. 323; Weber *v.* Zimmerman, 22 Md. 156; Runkel *v.* Winemiller, 4 Harr. & M. 429, 1 Am. Dec. 411.

New York.— People *v.* Steele, 2 Barb. 397; People *v.* Connelly, 3 N. Y. St. 372.

England.— Rex *v.* Barker, 3 Burr. 1265, W. Bl. 300; Rex *v.* Blooer, 2 Burr. 1043. *Compare* Rex *v.* Jotham, 3 T. R. 575, 1 Rev. Rep. 770.

To admit church wardens who have been duly elected.— Rex *v.* Williams, 8 B. & C. 681, 3 M. & R. 402, 15 E. C. L. 335; Rex *v.* Harris, 3 Burr. 1420, W. Bl. 430; Rex *v.* Rees, Carth. 393; Anonymous, 2 Chit. 254, 18 E. C. L. 619; Rex *v.* Harwood, 2 Ld. Raym. 1405; Rex *v.* White, 2 Ld. Raym. 1379; Rex *v.* Rice, 1 Ld. Raym. 138, 5 Mod. 325; Reg. *v.* Twitty, 2 Salk. 433; Hubbard *v.* Penrice, Str. 1246; Rex *v.* Simpson, Str. 609.

To admit a chaplain.— Rex *v.* Chester, Str. 797.

To admit to endowed lectureship.— Rex *v.* Canterbury, 15 East 117. *Compare* Rex *v.* London, 13 East 419, 12 Rev. Rep. 393, 399.

To admit residentiary canon.— Webber's Case, Lofft 254.

To admit or restore parish clerk.— Anonymous, 2 Chit. 254, 18 E. C. L. 619.

To admit or restore sexton.—Reg. *v.* Raines, 3 Salk. 233; Ile's Case, 1 Vent. 153. *Compare* Rex *v.* Thame, Str. 115.

Not to admit an organist.— *Ex p.* Le Cren, 2 D. & L. 571, 9 Jur. 255, 14 L. J. Q. B. 34.

Not to admit a vestry clerk.— Rex *v.* Croydon, 5 T. R. 713, 2 Rev. Rep. 688.

Disqualification.— Where a petitioner for mandamus is disqualified under the charter of a religious corporation from holding the office after he has been ordered to be restored thereto, such disqualification is good cause for quashing the writ and for discharging parties under attachment for disobeying the same. Weber *v.* Zimmerman, 23 Md. 45.

4. State *v.* Bibbs St. Church, 84 Ala. 23, 4 So. 40; Africans Union Church *v.* Sanders, 1 Houst. (Del.) 100, 63 Am. Dec. 187.

5. Hundley *v.* Collins, 131 Ala. 234, 32 So. 575, 90 Am. St. Rep. 33; Sale *v.* First Regular Baptist Church, 62 Iowa 26, 17 N. W. 143, 49 Am. Rep. 136. In Ohio see State *v.* Zesch, 7 Ohio S. & C. Pl. Dec. 298, 5 Ohio N. P. 274.

Issue of certificate of membership in parish.— On application for mandamus to compel the clerk of a parish to give the petitioner a certificate of his having become a member of the parish, in order that he might file the same with the clerk of the religious society which he wished to leave, the writ was refused on the ground that he had a remedy by action and that a decision on this summary process might affect the rights of persons who had not been heard. Oakes *v.* Hill, 8 Pick. (Mass.) 47.

6. Moseley *v.* Collins, 133 Ala. 326, 32 So. 131. See *supra*, VII, A, 3.

7. State *v.* Hebrew Congregation, 31 La. Ann. 205, 33 Am. Rep. 217; People *v.* Anshei Chesed Hebrew Congregation, 37 Mich. 542; People *v.* German United Evangelical St. Stephen's Church, 53 N. Y. 103 [*reversing* 6 Lans. 172 (*reversing* 3 Lans. 434)].

8. People *v.* Anshei Chesed Hebrew Congregation, 37 Mich. 542.

9. People *v.* German United Evangelical St. Stephen's Church, 53 N. Y. 103 [*reversing* 6 Lans. 172 (*reversing* 3 Lans. 434)].

10. State *v.* Bibbs St. Church, 84 Ala. 23, 4 So. 40 (holding that where the organic law of the church, or of the ecclesiastical organization to which defendant belongs, has provided rules and regulations for the settlement of disputes between a minister and his

fere with the decision of visitors or ecclesiastical officers in matters properly within their jurisdiction,[11] although the writ will lie to compel them to act if they wrongfully refuse to do so.[12] Mandamus will lie in a proper case to compel the calling, attendance upon, and holding of church elections by the proper officers,[13] to compel the delivery of church books, records, and papers by an outgoing officer to his successor,[14] or to compel church trustees to deliver a key to the church-wardens;[15] but not to restore a rightful vestry to the possession of church property wrongfully withheld, there being an adequate remedy by action;[16] nor to compel the trustees in whom the corporate powers are vested to affix the corporate seal to charter amendments adopted by a majority of the members;[17] nor, on application of the rector, to compel the custodian of the corporate seal to affix the same to an agreement for consolidation with another church, where it does not appear that the rector has the requisite authority to maintain the proceedings;[18] nor to restore the relator to the possession of a pew to which he claims title;[19] nor to enforce mere contract obligations.[20]

13. Colleges and Universities.[21] It has been held that mandamus will lie to restore or admit to his office a trustee of a college or university;[22] to restore a professor illegally removed by the trustees,[23] but not if he is not an officer, but a mere employee under contract, or if his removal was authorized;[24] to admit or

congregation or the church trustees who have control of the building and property, the courts will not interfere by mandamus until there has been a final decision by the proper church authorities); German Reformed Church *v.* Com., 3 Pa. St. 282.

11. Reg. *v.* York, 20 Q. B. D. 740, 52 J. P. 709, 57 L. J. Q. B. 396, 59 L. T. Rep. N. S. 443, 36 Wkly. Rep. 718; Reg. *v.* Rochester, 17 Q. B. 1, 15 Jur. 920, 20 L. J. Q. B. 467, 79 E. C. L. 1; Reg. *v.* Chester, 15 Q. B. 513, 19 L. J. Q. B. 485, 69 E. C. L. 513; Parkinson's Case, Comb. 143, 3 Mod. 265, Show. 74; Rex *v.* St. Peters, 5 T. R. 364; Rex *v.* Ely, 2 T. R. 290, 345, W. Bl. 22, 1 Wils. C. P. 206. See also *supra*, VII, A, 6, a, text and note 91.

12. Whiston *v.* Cathedral Church, 7 Hare 532, 13 Jur. 694, 18 L. J. Ch. 473, 27 Eng. Ch. 532, 68 Eng. Reprint 220; Rex *v.* Worcester, 4 M. & S. 415, 16 Rev. Rep. 512; Rex *v.* Lincoln, 2 T. R. 338 note; Rex *v.* Ely, 2 T. R. 290, W. Bl. 22, 1 Wils. C. P. 206, See also *supra*, VII, A, 6, a, text and note 91.

Mandamus to churchwardens and overseers to set them in motion see Rex *v.* Wilson, 5 D. & R. 602, 16 E. C. L. 243; Rex *v.* St. Margaret, 4 M. & S. 250.

13. St. Stephen's Church Cases, 10 N. Y. Suppl. 125, 11 N. Y. Suppl. 669–675, 25 Abb. N. Cas. 230 [*affirmed* in 13 N. Y. Suppl. 903]; People *v.* Winans, 9 N. Y. Suppl. 249; Rex *v.* Birmingham, 7 A. & E. 254, 1 Jur. 754, 34 E. C. L. 150; *Ex p.* Mawby, 3 E. & B. 718, 18 Jur. 906, 23 L. J. M. C. 153, 2 Wkly. Rep. 473, 77 E. C. L. 718; Chichester *v.* Harward, 1 T. R. 650. See also *supra*, VII, A, 5.

New election.— But where, upon the election of a churchwarden, the chairman of the vestry meeting had rejected votes which were alleged to be admissible, but it did not appear that the rejection had caused any difference in the result, a mandamus ordering a new election was refused. *Ex p.* Mawby, 3 E. & B. 718, 18 Jur. 906, 23 L. J. M. C. 153, 2 Wkly. Rep. 473, 77 E. C. L. 718.

Organist.—In *Ex p.* Le Cren, 2 D. & L. 571, 9 Jur. 255, 14 L. J. Q. B. 34, it was held that mandamus would not lie to compel the vicar, churchwardens, and parishioners of a parish to meet for the purpose of electing an organist to the parish church, as there was no such office, although within the time of living memory there had always been an organist who had been paid a stipend out of the church rates.

14. State *v.* Riedy, 50 La. Ann. 258, 23 So. 327; St. Luke's Church *v.* Slack, 7 Cush. (Mass.) 226. See also *supra*, VII, A, 6, c.

15. Reg. *v.* Abrahams, 4 Q. B. 157, 45 E. C. L. 157.

16. Smith *v.* Erb, 4 Gill (Md.) 437.

17. Com. *v.* St. Mary's Church, 6 Serg. & R. (Pa.) 508.

18. St. Stephen's Church Cases, 10 N. Y. Suppl. 125, 11 N. Y. Suppl. 669–675, 25 Abb. N. Cas. 230 [*affirmed* in 13 N. Y. Suppl. 903].

19. Com. *v.* Rosseter, 2 Binn. (Pa.) 360, 4 Am. Dec. 451, holding that the remedy is by action against the person disturbing him.

20. State *v.* Salem Church, 114 Ind. 389, 16 N. E. 808. See *supra*, VII, A, 7, a.

21. See, generally, Colleges and Universities, 7 Cyc. 283.

22. Fuller *v.* Plainfield Academic School, 6 Conn. 532, holding that this was true, although no profit attached to the office. See also Ward *v.* Sasscer, 98 Md. 281, 57 Atl. 208; and *supra*, VII, A, 6, a.

23. People *v.* Albany Medical College, 10 Abb. N. Cas. (N. Y.) 122, 62 How. Pr. 220 [*reversed* on other grounds in 26 Hun 348 (*affirmed* in 89 N. Y. 635)]; *Re* Wilson, 18 Nova Scotia 180.

24. People *v.* New York Post-Graduate Medical School, etc., Hospital, 29 N. Y. App. Div. 244, 51 N. Y. Suppl. 420; Bracken *v.* William, etc., College, 3 Call (Va.) 573.

Visitors.— A writ of mandamus will not lie in the case of a private eleemosynary cor-

restore a member or fellow;[25] to compel the master to take the oaths of the fellows as prescribed by statute;[26] to admit or restore students,[27] provided their right to admission or restoration is clear;[28] to restore a person to an academical degree to which temporal advantages are annexed;[29] to compel a college to admit a student who has taken the course of study and complied with other conditions to take the final examination, and if he passes the same to give him his degree;[30] or to compel the affixing of a corporate seal;[31] but not to admit to the position of usher of a school, as this is a mere employment;[32] nor to compel the issue of a diploma under a private contract not connected with public duty;[33] nor to compel the issue of a diploma to one who has been found by the proper authorities not to be properly qualified[34] or has lost his right thereto by contumacious conduct between the final examination and the day of graduation.[35]

B. Foreign Corporations. Since courts will not interfere with the internal management of foreign corporations,[36] mandamus will not lie to compel the admission or reinstatement of stock-holders or members of a foreign corporation,[37]

poration to restore a professor removed by visitors having jurisdiction in the matter. Bracken *v.* William, etc., College, 3 Call (Va.) 573.

25. Rex *v.* St. John's College, Comb. 238; Rex *v.* St. John's College, 4 Mod. 260; Rex *v.* St. John's College, 4 Mod. 233.

Visitors.— But where there is a visitor who has acted or to whom appeal may be made, mandamus will not lie (Prohurst's Case, Carth. 168; Parkinson's Case, Comb. 143, 3 Mod. 265, Show. 74; *Ex p.* Buller, 1 Jur. N. S. 709, 3 Wkly. Rep. 447; Appleford's Case, 1 Mod. 82; Rex *v.* Alsop, Show. 457; Rex *v.* All-Souls College, T. Jones 174; Rex *v.* Cambridge University, 6 T. R. 89; Rex *v.* Ely, 5 T. R. 475; Rex *v.* St. Catherine's Hall, 4 T. R. 233, 2 Rev. Rep. 369; Widdrington's Case, T. Raym. 31); but if the visitor refuses to hear an appeal or otherwise act as required by law, the writ will lie to compel him to do so (*Ex p.* Lee, E. B. & E. 863, 5 Jur. N. S. 218, 28 L. J. Q. B. 114, 96 E. C. L. 863; *Ex p.* Buller, 1 Jur. N. S. 709, 3 Wkly. Rep. 447; Usher's Case, 5 Mod. 452; Rex *v.* Blythe, 5 Mod. 404; Rex *v.* Ely, 5 T. R. 475). Where a duly qualified person had been elected to a fellowship in a college, so that the office was full, it was held that another could not maintain mandamus to compel his examination and a new election, the remedy, if any, being by appeal to the visitor. Reg. *v.* Hertford College, 3 Q. B. D. 693, 47 L. J. Q. B. 649, 39 L. T. Rep. N. S. 18, 27 Wkly. Rep. 347 [*reversing* 2 Q. B. D. 590, 46 L. J. Q. B. 724, 36 L. T. Rep. N. S. 768, 26 Wkly. Rep. 15].

26. Rex *v.* St. John's College, 4 Mod. 233.

27. *California.*— Foltz *v.* Hoge, 54 Cal. 28, holding that an applicant for admission to a college of law could not be rejected on the sole ground that she was a woman.

Indiana.— State *v.* White, 82 Ind. 278, 42 Am. Rep. 496.

Maryland.— Baltimore University *v.* Colton, 98 Md. 623, 57 Atl. 14, 64 L. R. A. 108.

New York.— People *v.* Physicians, etc., College, 7 How. Pr. 290.

Pennsylvania.— Com. *v.* McCauley, 2 Pa. Co. Ct. 459, 3 Pa. Co. Ct. 77.

Wisconsin.— State *v.* State Regents, 54 Wis. 159, 11 N. W. 472.

28. North *v.* State University, 137 Ill. 296, 27 N. E. 54; People *v.* Wheaton College, 40 Ill. 186 (where the relator's expulsion was held to be within the powers of the college); Dunn's Case, 9 Pa. Co. Ct. 417 (where the writ was refused because the petition did not show that application for reinstatement had been made to the trustees). Mandamus will not lie to restore a student who has been expelled from the state university, where the petition merely states that five years after his expulsion he "applied for admission to classes in said university, and was refused because of said suspension," without alleging that he is desirous of again becoming a pupil, or that he will do so if the writ is granted, since the writ will not issue at the suit of a private person unless it affirmatively appears that he will otherwise be deprived of something of substantial value to him. North *v.* State University, *supra.*

29. Rex *v.* Cambridge University, 2 Ld. Raym. 1334, 8 Mod. 148, Str. 557.

30. People *v.* Bellevue Hospital Medical College, 60 Hun (N. Y.) 107, 14 N. Y. Suppl. 490 [*affirmed* in 128 N. Y. 621, 28 N. E. 253].

31. See *supra*, VII, A, 8.

32. Reg. *v.* Raines, 3 Salk. 233.

33. State *v.* Milwaukee Medical College, 128 Wis. 7, 106 N. W. 116. See *supra*, VII, A, 7, a.

34. Niles *v.* Orange Training School, 63 N. J. L. 528, 42 Atl. 846; People *v.* New York Homœpathic Medical College, etc., 20 N. Y. Suppl. 379.

35. People *v.* New York Law School, 68 Hun (N. Y.) 118, 22 N. Y. Suppl. 663, holding, however, that, notwithstanding the right of the school to refuse him his degree, he is entitled to a certificate of attendance and that he passed a satisfactory examination.

36. See FOREIGN CORPORATIONS, 19 Cyc. 1236.

37. North State Copper, etc., Min. Co. *v.* Field, 64 Md. 151, 20 Atl. 1039, holding that under a statute providing that any foreign corporation transacting business in the state

to determine the right to a corporate office therein,[38] or to compel the transfer of stock.[39] By the weight of authority, however, the court may, at the suit of either a resident or non-resident stock-holder, enforce his right to inspect the books, papers, and records of a foreign corporation, where it is doing business in the state and the books, etc., are in the custody of an officer or agent therein,[40] although the writ will not lie where the books, etc., are not kept within the state and there is no officer or agent therein having the custody and control of them,[41] even though failure to keep them in the state is in violation of a constitutional or statutory provision under which the corporation is doing business therein.[42] In New York, however, it has been held that in the absence of a statute mandamus cannot be maintained against a foreign corporation to enforce the right of one of its resident stock-holders to inspect its books and records, where he merely seeks to enforce his right of inspection as a member of the corporation, although the books, the office of the company, and the business thereof are in the state;[43] but a foreign corporation maintaining an office for doing business in the state may be compelled by mandamus to deposit and exhibit its stock-book at such office, as required by statute.[44] Mandamus will not lie to compel a foreign corporation to perform an act which is prerequisite to its right to do business in the state, since the proper remedy is quo warranto or the imposition of the penalty for doing business without complying with the law.[45]

C. Unincorporated Associations. Of course, in the absence of a statute, mandamus will not lie against an unincorporated association as a body, for it has no legal existence as such, but any action must be against the individuals.[46] As the privileges of membership in a voluntary unincorporated association are not conferred by the sovereign power, but are merely created by the organization

should be admitted to exercise franchises therein, and might be sued in any of its courts for any cause of action, the courts of the state have no visitorial power over foreign corporations, nor jurisdiction to regulate their internal affairs, and could not therefore entertain the application of a stock-holder of a foreign corporation doing business in the state for a writ of mandamus to compel the corporation to annul a forfeiture of his stock and reinstate him as stock-holder. *Compare*, however, Guilford *v.* Western Union Tel. Co., 59 Minn. 332, 61 N. W. 324, 50 Am. St. Rep. 407, holding that an action might be maintained by a stock-holder against a foreign corporation to compel it to issue to him a new or duplicate stock certificate in the place of one which had been lost or destroyed, on the ground that the action did not fall within the rule that courts will not exercise visitorial powers over foreign corporations or interfere with the management of their internal affairs.

38. Wason *v.* Buzzell, 181 Mass. 338, 63 N. E. 909, holding that the court would not assume jurisdiction to determine the validity of an election of directors of a foreign corporation, although it had a usual place of business in the state and was authorized to do business therein.

39. People *v.* Parker Vein Coal Co., 1 Abb. Pr. (N. Y.) 128, 10 How. Pr. 584 [*affirming* 10 How. Pr. 186].

40. Swift *v.* State, 7 Houst. (Del.) 338, 6 Atl. 856, 32 Atl. 143, 40 Am. St. Rep. 127 [*affirming* 7 Houst. 137, 30 Atl. 781]; State *v.* North American Land, etc., Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309; State *v.* Farmer, 7 Ohio Cir. Ct. 429, 4 Ohio Cir. Dec. 664; Merritt *v.* Copper Crown Min. Co., 34 Nova Scotia 416, 36 Nova Scotia 383. See FOREIGN CORPORATIONS, 19 Cyc. 1238.

41. State *v.* North American Land, etc., Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309.

42. State *v.* North American Land, etc., Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309.

43. Matter of Rappleye, 43 N. Y. App. Div. 84, 59 N. Y. Suppl. 338 [appeal *dismissed* in 161 N. Y. 615, 55 N. E. 1100]. See also Matter of Crosby, 43 N. Y. App. Div. 618, 59 N. Y. Suppl. 340 [*reversing* 28 Misc. 300, 59 N. Y. Suppl. 865]; People *v.* Northern Pac. R. Co., 50 N. Y. Super. Ct. 456; Mitchell *v.* Northern Security Oil, etc, Co., 44 Misc. (N. Y.) 514, 90 N. Y. Suppl. 60 [*affirmed* in 99 N. Y. App. Div. 624, 91 N. Y. Suppl. 1104].

44. People *v.* Crawford, 68 Hun (N. Y.) 547, 22 N. Y. Suppl. 1025; People *v.* Montreal, etc., Copper Co., 40 Misc. (N. Y.) 282, 81 N. Y. Suppl. 974; People *v.* Knickerbocker Trust Co., 38 Misc. (N. Y.) 446, 77 N. Y. Suppl. 1000, holding further that if there is no such book as is described in the statute to examine, the stock-holder may inspect any other books or papers officially in the possession of the secretary and treasurer of the corporation in its New York office containing the information required by the statute to be kept in such stock-book. See FOREIGN CORPORATIONS, 19 Cyc. 1285.

45. Secretary of State *v.* National Salt Co., 126 Mich. 644, 86 N. W. 124.

46. See ASSOCIATIONS, 4 Cyc. 301, 313.

itself, courts of law cannot by mandamus compel the admission of an applicant for membership or interfere to restore a member who has been expelled.[47]

VIII. MANDAMUS TO INDIVIDUALS.[48]

In the absence of statutory provision to the contrary, mandamus does not lie against a private citizen.[49] Moreover, in a jurisdiction where the right to issue mandamus is regulated by statute it has been held that the writ will not issue to individuals in their private relations, or to associations having no chartered powers.[50] So it is held that the writ will not lie to compel a mere private person occupying no official or quasi-official position to deliver up books or records of a public nature detained by him to a person claiming them in an official capacity.[51]

47. Burt *v.* Grand Lodge F. & A. Masons, 66 Mich. 85, 33 N. W. 13; Weidenfeld *v.* Keppler, 84 N. Y. App. Div. 235, 82 N. Y. Suppl. 634 [*affirmed* in 176 N. Y. 562, 68 N. E. 1125]; People *v.* New York Benev. Soc., etc., 3 Hun (N. Y.) 361; White *v.* Brownell, 2 Daly (N. Y.) 329, 4 Abb. Pr. N. S. 162 [*affirming* 3 Abb. Pr. N. S. 318]; Fritz *v.* Muck, 62 How. Pr. (N. Y.) 69; Wolf *v.* Com., 64 Pa. St. 252; Wolf *v.* United Daughters of America, 1 Phila. (Pa.) 374. *Contra*, Otto *v.* San Francisco Journeymen Tailors' Protective, etc., Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156. See also ASSOCIATIONS, 4 Cyc. 302.

The remedy, if any, is in equity.— Fritz *v.* Muck, 62 How. Pr. (N. Y.) 69; Dawkins *v.* Antrobus, 17 Ch. D. 615, 44 L. T. Rep. N. S. 557, 29 Wkly. Rep. 511; Labouchere *v.* Wharncliffe, 13 Ch. D. 346, 41 L. T. Rep. N. S. 638, 28 Wkly. Rep. 367; Fisher *v.* Keane, 11 Ch. D. 353, 49 L. J. Ch. 11, 41 L. T. Rep. N. S. 335; Hopkinson *v.* Exeter, L. R. 5 Eq. 63, 37 L. J. Ch. 173, 16 Wkly. Rep. 266; Lyttleton *v.* Blackburne, 45 L. J. Ch. 219, 33 L. T. Rep. N. S. 641. *Contra*, Otto *v.* San Francisco Journeymen Tailors' Protective, etc., Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156. See also ASSOCIATIONS, 4 Cyc. 301; CLUBS, 7 Cyc. 258.

Statutory authority.— N. Y. Code Civ. Proc. § 1919, providing that in certain instances actions may be brought against voluntary associations of seven or more persons, does not authorize the issuance of mandamus to compel a voluntary unincorporated association to restore an expelled member to his rights. Weidenfeld *v.* Keppler, 84 N. Y. App. Div. 235, 82 N. Y. Suppl. 634 [*affirmed* in 176 N. Y. 562, 68 N. E. 1125].

Presumption of incorporation.— Where a society is proceeded against by a name not inappropriate as a corporate designation, and the application is resisted by defendant in that name, and no denial of its corporate character is contained in the papers, it will be presumed that it is in fact a corporation. People *v.* New York Benev. Soc., etc., 3 Hun (N. Y.) 361.

48. **Interested persons as necessary parties respondent** see IX, C, 2, c.

49. *Connecticut.*— Pond *v.* Parrott, 42 Conn. 13, clerk of police commission.

Georgia.— State *v.* Powers, 14 Ga. 388.

Illinois.— People *v.* Mattinger, 212 Ill. 530, 531, 72 N. E. 906 (where it is said: "It is well recognized that a writ of mandamus will not issue against individuals as such, but must be against some person or persons clothed with authority to do the act sought to be compelled"); People *v.* Lewis, 178 Ill. 629, 53 N. E. 1134 (holding that mandamus will not lie to compel parties assuming to hold office in the alleged town of Oak Park to perform any official duty, as such town, being part of the territory disconnected from the town of Cicero in a proceeding under the void act of 1891, has no legal existence and its officers cannot perform official duties).

Kentucky.— Cook *v.* Physicians, etc., College, 9 Bush 541.

Missouri.— State *v.* Tolle, 71 Mo. 645, holding that mandamus will not lie to compel the publication by an executor of a notice of a sale of real estate ordered by the court.

New York.— People *v.* Nash, 47 Hun 542 [*affirmed* in 111 N. Y. 310, 18 N. E. 630, 7 Am. St. Rep. 747, 2 L. R. A. 180].

South Carolina.— State *v.* Hayne, 8 S. C. 367, holding that the speaker of an illegal or unconstitutional body claiming to be the house of representatives is a mere private citizen.

West Virginia.— Heath *v* Johnson, 36 W. Va. 782, 15 S. E. 980, teacher not compelled to use publisher's books.

Wisconsin.— See State *v.* Burton, 45 Wis. 150, 30 Am. Rep. 706, teacher in public school.

England.— Reg. *v.* Hopkins, 1 Q. B. 160, 10 L. J. Q. B. 63, 4 P. & D. 550, 41 E. C. L. 484. *Compare* Reg. *v.* Abrahams, 4 Q. B. 157, 45 E. C. L. 157, holding that mandamus will lie to compel the trustees of a charity to deliver up keys in pursuance of the trust deed.

See 33 Cent. Dig. tit. "Mandamus," § 275.

Compelling witness to prove execution of deed.— In Reg. *v.* O'Meara, 15 U. C. Q. B. 201, it was held, under a statute requiring a witness to prove the signing and sealing of a memorial of a deed and the execution of the deed or conveyance mentioned in such memorial, that mandamus will lie to compel a witness to comply with the statute.

50. Wolf *v.* Com., 64 Pa. St. 252; Wolf *v.* United Daughters of America, 1 Phila. (Pa.) 374.

51. Hussey *v.* Hamilton, 5 Kan. 462 (holding that the writ will not lie to compel the

The personal liability of a public officer in the nature of a penalty or for damages or his personal liability as a debtor or bailee cannot be enforced through the medium of a writ of mandamus.[52] So the writ will not lie to compel the specific performance of a personal contract of service,[53] or other merely personal contracts.[54] But the writ is an appropriate remedy to enforce the performance of a duty to the public by one who, although not a public officer, occupies a relation of a quasi-official character.[55] So it has been held that one who is holding and executing an office *de facto* cannot set up as a defense to a writ to compel him to perform the duties of the office that he is not an officer *de jure*.[56]

IX. JURISDICTION, PROCEEDINGS, AND RELIEF.

A. Jurisdiction[57] and Venue[58] — 1. In England and Canada. In England the power to issue writs of mandamus was originally confided to the king's bench as having the general supervising power over all inferior jurisdictions and officers,[59] and this jurisdiction was originally exclusive.[60] Recent acts of parliament, however, have invested all the superior courts of the kingdom and the court of

books, papers, and insignia of an office to be delivered to a relator claiming title thereto by one forcibly and feloniously taking them from relator, where it is not alleged and shown that the respondent pretended to have any right to the office or exercised any functions pertaining to it); State *v.* Trent, 58 Mo. 571 (holding that mandamus will not lie to compel a mere private person to deliver to the county clerk a book of surveys and plats of the county roads, although the same were made under order of the county court and paid for by the county); Reg. *v.* Hopkins, 1 Q. B. 160, 10 L. J. Q. B. 63, 4 P. & D. 550, 41 E. C. L. 484. *Compare* Sudbury First Parish *v.* Stearns, 21 Pick. (Mass.) 148; Rex *v.* Ingram, W. Bl. 50.

52. Hewel *v.* Hogin, (Cal. App. 1905) 84 Pac. 100 (holding that the writ does not lie to the treasurer of an irrigation district to enforce his personal liability for interest on the district bonds); State *v.* Hale, (Ind. 1906) 77 N. E. 802; Com. *v.* Walton, 3 Pa. Dist. 391 (holding that the writ will not lie to recover from an officer a sum of money or property, held by him, not in his official character, but as a private citizen, as for instance to compel a coroner to turn over money found on a deceased person to his administrator).

53. Bailey *v.* Oviatt, 46 Vt. 627, holding that a stenographer engaged in reporting a legislative investigation, conducted by a legislative committee, is a mere servant or clerk, and cannot be compelled by mandamus to furnish a transcript.

54. Norris *v.* Irish Land Co., 8 E. & B. 512, 4 Jur. N. S. 235, 27 L. J. Q. B. 115, 6 Wkly. Rep. 55, 92 E. C. L. 512, enforcement of execution of lease.

55. Haines *v.* People, 19 Ill. App. 354 (holding that mandamus will issue to compel the performance of the quasi-public duty of keeping in repair a bridge rendered necessary by a raceway maintained by defendant for his private profit); Nye *v.* Rose, 17 R. I. 733, 24 Atl. 777.

56. Kelly *v.* Wimberly, 61 Miss. 548, where the respondent set up the fact that he had not given bond. See also *supra*, II, F, 1.

57. **Concurrent and conflicting jurisdiction** see Courts, 11 Cyc. 982 *et seq.* And see *supra*, III, as to power of one court to issue writ to another court.

Jurisdiction as affected by amount involved see Courts, 11 Cyc. 766, 774 *et seq.*, 878 *et seq.*

Jurisdiction of justices of the peace see Justices of the Peace, 24 Cyc. 484.

Power of judge at chambers or in vacation see Judges, 23 Cyc. 551.

58. Venue generally see Venue.

59. Fitch *v.* McDiarmid, 26 Ark. 482, 485; State *v.* Wilmington Bridge Co., 3 Harr. (Del.) 312, 315; State *v.* Wilmington, 3 Harr. (Del.) 294, 308; Knox County *v.* Aspinwall, 24 How. (U. S.) 376, 384, 16 L. ed. 735; *Ex p.* Crane, 5 Pet. (U. S.) 190, 192, 8 L. ed. 92; Awdeley *v.* Joye, Poph. 176.

60. *Arkansas.*— Webb *v.* Hanger, 1 Ark. 121, 122.

Kentucky.— Simpson *v.* Land Office Register, Ky. Dec. 217, 218.

Mississippi.— Swann *v.* Buck, 40 Miss. 268, 288.

Montana.— Chumasero *v.* Potts, 2 Mont. 242, 268.

New Hampshire.—Atty.-Gen. *v.* Taggart, 66 N. H. 362, 29 Atl. 1027, 25 L. R. A. 613.

New York.— People *v.* Donovan, 135 N. Y. 76, 79, 31 N. E. 1000; People *v.* New York, 3 N. Y. St. 253.

Pennsylvania.— Com. *v.* Wickersham, 90 Pa. St. 311, 313; *In re* Sedgeley Ave., 88 Pa. St. 509, 514.

United States.— Kendall *v.* U. S., 12 Pet. 524, 620, 9 L. ed. 1181; State *v.* Lake Erie, etc., R. Co., 85 Fed. 1, 2.

It seems, however, that chancery had power to issue the writ in some cases. People *v.* Green, 58 N. Y. 295, 299; Sikes *v.* Ransom, 6 Johns. (N. Y.) 279 [*citing* Lawlor *v.* Murray, 1 Sch. & Lef. 75]; *Ex p.* Crane, 5 Pet. (U. S.) 190, 192, 8 L. ed. 92; Coventry's Case, 2 Salk. 429; Rioters' Case, 1 Vern. Ch. 175, 23 Eng. Reprint 396.

chancery with power to issue the writ as ancillary or incidental to a cause pending therein, and have created a similar ancillary remedy known as an action of mandamus which is cognizable in those courts.[61] In Ontario either of the superior courts of common law[62] or the chancery division of the high court of justice[63] may issue the writ. In Quebec a prothonotary, except in a case of urgent necessity, has no power to issue the writ even in the absence of the judge.[64]

2. IN THE UNITED STATES — a. At Law — (i) *FEDERAL COURTS.*[65] Jurisdiction to issue writs of mandamus in otherwise proper cases is vested, within prescribed limits, in the federal supreme court,[66] the circuit courts of appeals,[67] and the circuit[68] and district[69] courts; and also in the courts of the District of Columbia[70] and of the various territories.[71]

(ii) *STATE COURTS* — (A) *Appellate Courts.*[72] The jurisdiction of the several state courts of last resort and intermediate appellate courts with reference to issuing writs of mandamus varies in the states.[73] They are generally authorized to issue such writs in aid of their supervisory jurisdiction, and are not infrequently vested with original jurisdiction to issue the same.[74]

(B) *Other Courts.*[75] Courts of general original common-law jurisdiction have inherent power to issue writs of mandamus in proper cases;[76] and independently

61. People *v.* Green, 58 N. Y. 295, 299; People *v.* New York, 3 N. Y. St. 253; *In re* Paris Skating Rink Co., 6 Ch. D. 731, 46 L. J. Ch. 831, 25 Wkly. Rep. 767. And see Webb *v.* Herne Bay, L. R. 5 Q. B. 642, 39 L. J. Q. B. 221, 22 L. T. Rep. N. S. 745, 19 Wkly. Rep. 241; Worthington *v.* Hulton, L. R. 1 Q. B. 63, 6 B. & S. 943, 12 Jur. N. S. 73, 35 L. J. Q. B. 61, 13 L. T. Rep. N. S. 463; Ward *v.* Lowndes, 28 L. J. Q. B. 265.

The king's bench alone can issue the prerogative writ.— Other courts can issue the writ only as ancillary, in a pending cause or matter. Glossop *v.* Heston, etc., Local Board, 12 Ch. D. 102, 49 L. J. Ch. 89, 40 L. T. Rep. N. S. 736, 28 Wkly. Rep. 111 (holding that the mandamus which the other courts may issue is not the prerogative writ, issuing only where the duty could not be compelled by action, but only a mandamus granted in a case where an action lies, and as the result of such action); *In re* Paris Skating Rink Co., 6 Ch. D. 731, 46 L. J. Ch. 831, 25 Wkly. Rep. 767; Baxter *v.* London County Council, 55 J. P. 391, 63 L. T. Rep. N. S. 767.

Action of mandamus held not to lie, the proper remedy being an application for a prerogative writ of mandamus, see Smith *v.* Chorley Dist. Council, [1891] 1 Q. B. 532; Baxter *v.* London County Council, 55 J. P. 391, 63 L. T. Rep. N. S. 767.

The king's bench will not refuse to issue a prerogative writ in every case where an action of mandamus would lie. Reg. *v.* London, etc., R. Co., [1894] 2 Q. B. 512, 58 J. P. 719, 63 L. J. Q. B. 695, 10 Reports 359 [*limiting* Reg. *v.* Lambourn, etc., Co., 22 Q. B. D. 463, 53 J. P. 248, 58 L. J. Q. B. 136, 60 L. T. Rep. N. S. 54]; Reg. *v.* St. George, 58 J. P. 821, 61 L. J. Q. B. 398, 67 L. T. N. S. 412. See also Morgan *v.* Metropolitan R. Co., L. R. 4 C. P. 97, 38 L. J. C. P. 87, 19 L. T. Rep. N. S. 655, 17 Wkly. Rep. 261; Fotherby *v.* Metropolitan R. Co., L. R. 2 C. P. 188, 12 Jur. N. S. 1005, 36 L. J. C. P. 88, 15 L. T. Rep. N. S. 243, 15 Wkly. Rep. 112; Birch *v.* St. Marylebone Parish, 20 L. T. Rep. N. S. 697, 17 Wkly. Rep. 1014.

62. *In re* Stratford, etc., R. Co., 38 U. C. Q. B. 112.

The practice court cannot issue the writ. *In re* Williams, 26 U. C. Q. B. 340; Crysdale *v.* Moorman, 17 U. C. C. P. 218.

63. *Re* Napanee Bd. of Education, 29 Grant Ch. (U. C.) 395.

64. Auger *v.* Cote, 17 L. C. Rep. 29, holding that notwithstanding the issuance had since been ratified by a judge, the whole proceedings must be declared null.

65. Removal of cause to federal court see REMOVAL OF CAUSES.

66. See COURTS, 11 Cyc. 913.

67. See COURTS, 11 Cyc. 946.

68. See COURTS, 11 Cyc. 849, 885, 951.

69. See COURTS, 11 Cyc. 953.

70. See COURTS, 11 Cyc. 966.

71. See COURTS, 11 Cyc. 954.

72. Jurisdiction to review mandamus proceedings see *infra*, IX, M, 1.

73. See the constitutions and statutes of the different states.

74. See COURTS, 11 Cyc. 801–843. And see Atty.-Gen. *v.* Boston, 123 Mass. 460, 470; Atty.-Gen. *v.* Taggart, 66 N. H. 362, 29 Atl. 1027, 25 L. R. A. 613; Com. *v.* Allegheny County, 32 Pa. St. 218, 225; Kendall *v.* U. S., 12 Pet. (U. S.) 524, 620, 9 L. ed. 1181.

75. Courts of District of Columbia see COURTS, 11 Cyc. 961 *et seq.*

Territorial courts see COURTS, 11 Cyc. 954 *et seq.*

76. Mann *v.* People, 16 Colo. App. 475, 66 Pac. 452; Chumasero *v.* Potts, 2 Mont. 242; Nelson *v.* Carter County, 1 Coldw. (Tenn.) 207 [*citing* Newman *v.* Scott County, 5 Sneed (Tenn.) 695]. And see Johnson *v.* Reichert, 77 Cal. 34, 18 Pac. 858; State *v.* Breese, 15 Kan. 123; Madison County Ct. *v.* Alexander, Walk. (Miss.) 523; Matter of Brush, 69 N. Y. App. Div. 617, 75 N. Y. Suppl. 285; State *v.* Williams, 26 Ohio St. 170; Vine *v.*

of this, the constitutions or statutes of the different states commonly confer such power on them either in express terms[77] or by authorizing them to issue writs in general,[78] or otherwise by implication.[79] Courts of inferior or limited original jurisdiction, however, have no jurisdiction to issue writs of mandamus,[80] in the

Jones, 13 S. D. 54, 82 N. W. 82; State *v.* Moore, 23 Wash. 115, 62 Pac. 441.

Any court invested with all the power of the king's bench has jurisdiction to issue the writ of mandamus. State *v.* Knight, 6 Houst. (Del.) 146; State *v.* Wilmington Bridge Co., 3 Harr. (Del.) 312; State *v.* Wilmington, 3 Harr. (Del.) 294; Harwood *v.* Marshall, 9 Md. 83; Runkel *v.* Winemiller, 4 Harr. & M. (Md.) 429, 1 Am. Dec. 411.

77. *Alabama.*— State *v.* Crook, 123 Ala. 657, 27 So. 334; Ramagnano *v.* Crook, 88 Ala. 450, 7 So. 247; *Ex p.* Pearson, 76 Ala. 521, all referring to the circuit court.

Connecticut.—Ansonia *v.* Studley, 67 Conn. 170, 34 Atl. 1030, superior court.

Georgia.— Savannah *v.* State, 4 Ga. 26; State *v.* Justices Richmond County Inferior Ct., Dudley 37; *Ex p.* Carnochan, T. U. P. Charlt. 216, all referring to the superior court.

Illinois.— Peoria *v.* People, 20 Ill. 525, circuit court.

Mississippi.—Swann *v.* Buck, 40 Miss. 268, circuit court.

Montana.— Chumasero *v.* Potts, 2 Mont. 242, district court.

New York.— See People *v.* Donovan, 135 N. Y. 76, 31 N. E. 1009.

North Carolina.—State *v.* Haywood County, 122 N. C. 661, 29 S. E. 60; Lutterloh *v.* Cumberland County, 65 N. C. 403, both referring to the superior court.

Oklahoma.— Starkweather *v.* Kemp, (1907) 88 Pac. 1045; Allen *v.* Reed, 10 Okla. 105, 60 Pac. 782, 63 Pac. 867, both referring to the district court.

Pennsylvania.— Com. *v.* Barnett, 199 Pa. St. 161, 48 Atl. 976, 55 L. R. A. 882; Com. *v.* McCandless, 129 Pa. St. 492, 8 Atl. 159; Taylor *v.* Com., 103 Pa. St. 96; Com. *v.* Stucker, 18 Pa. Co. Ct. 587; Com. *v.* Wickersham, 2 Pearson 336; Adams *v.* Duffield, 4 Brewst. 9; *In re* Contested Elections, 1 Brewst. 67, 4 Phila. 362; *In re* Cassel, 14 Montg. Co. Rep. 101; Com. *v.* Keim, 15 Phila. 1, all referring to the common pleas.

South Carolina.— McIver *v.* State, 2 S. C. 1, common pleas.

Virginia.—Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775, circuit court.

Wisconsin.— State *v.* Shaughnessey, 86 Wis. 646, 57 N. W. 1105; Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425, both referring to the circuit court.

See 33 Cent. Dig. tit. "Mandamus," § 276.

Mich. Const. art. 6, § 8, which, after conferring on the circuit courts "original jurisdiction in all matters civil and criminal," not expressly excepted or prohibited by law, and "appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same," provides that "they shall also have power to issue writs of habeas corpus, mandamus . . . and other writs necessary to carry into effect their orders, judgments and decrees and give them a general control over inferior courts and tribunals within their respective jurisdictions," does not give those courts the power to issue the writ of mandamus generally or in all cases to which it is applicable, but only when "necessary to carry into effect their orders, judgments and decrees and give them a general control over inferior courts and tribunals." McBride *v.* Grand Rapids, 32 Mich. 360.

78. Etheridge *v.* Hall, 7 Port. (Ala.) 47 (circuit court); Webb *v.* Hanger, 1 Ark. 121 (circuit court); U. S. *v.* Dubuque County, Morr. (Iowa) 31 (district court).

79. People *v.* Chicago, 193 Ill. 507, 62 N. E. 179, 58 L. R. A. 833 (holding that under Ill. Const. art. 6, § 12, circuit courts have original jurisdiction in mandamus, such cases being included in the term "all cases at law"); St. Louis County Ct. *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355 [*citing* St. Louis County Ct. *v.* Ruland, 5 Mo. 268; Boone County *v.* Todd, 3 Mo. 140] (holding that the statute, although it does not in express terms authorize the circuit courts to award writs of mandamus, must have intended it, as its words are, "whenever any writ of mandamus shall issue out of any court of this state," etc.); Banton *v.* Wilson, 4 Tex. 400 (holding that the grant of jurisdiction to the district court in "all suits, complaints, and pleas whatever" included mandamus). And see Milliken *v.* Weatherford, 54 Tex. 388, 38 Am. Rep. 629; Luckey *v.* Short, 1 Tex. Civ. App. 5, 20 S. W. 723.

80. *California.*— People *v.* Kern County, 45 Cal. 679 [*overruling* by implication People *v.* Day, 15 Cal. 91], holding that writs of mandate are not "special cases" within Const. art. 6, § 1, conferring jurisdiction on the county court.

Illinois.— Peoria *v.* People, 20 Ill. 525, holding that mandamus is not a "civil case" within a grant of jurisdiction to the county courts.

New York.— People *v.* New York Excise Bd., 3 N. Y. St. 253, city court of the city of New York.

North Carolina.—State *v.* Haywood County, 122 N. C. 661, 29 S. E. 60, Acts (1897), c. 6, § 2, attempting to confer jurisdiction on judges of certain criminal circuit courts, being unconstitutional.

Oklahoma.— Starkweather *v.* Kemp, (1907) 88 Pac. 1045, probate court.

Pennsylvania.— *In re* Opening of Spring Street, 112 Pa. St. 258, 3 Atl. 581; *In re* Sedgeley Ave., 88 Pa. St. 509 (both holding, however, that the court of quarter sessions, although it has no power to issue the prerogative writ of mandamus, has a right to issue an order to enforce a judgment standing on its records); Collin's Case, 2 Grant 214; *In re* Cassel, 14 Montg. Co. Rep. 101

absence of some constitutional or statutory provision conferring such jurisdiction on them.[81]

b. In Equity. Courts of equity have no power to issue writs of mandamus,[82] in the absence of constitutional or statutory provisions to the contrary.[83]

3. Jurisdiction as Affected by Territorial Limits; [84] Venue.[85] The circuit or district and the particular county thereof in which mandamus proceedings may be instituted,[86] or the rule to show cause against the allowance thereof may be

(the last two cases referring to the quarter sessions).

South Carolina.— McIver *v.* State, 2 S. C. 1, general sessions.

See 33 Cent. Dig. tit. "Mandamus," § 276.

Jurisdiction of justices' courts see Justices of the Peace, 24 Cyc. 484.

81. *Alabama.*— State *v.* Williams, 69 Ala. 311, city court of Mobile.

Iowa.— Brown *v.* Crego, 29 Iowa 321, 32 Iowa 498, holding that mandamus is a "civil action at law" within a grant of power to the circuit court.

Louisiana.— State *v.* Judge Twenty-second Judicial Dist. Ct., 35 La. Ann. 637, district court.

New York.— People *v.* Green, 58 N. Y. 295, holding that a statute which gives to the court of common pleas for the city and county of New York and certain other city courts original jurisdiction in law and equity, concurrent and coextensive with the supreme court, in all civil actions and in all special proceedings of a civil nature, includes proceedings by mandamus.

Texas.— Under Const. art. 5, § 16, as amended, allowing the county court to issue "writs of injunction, mandamus, and all writs" necessary to enforce its jurisdiction, the county court may in certain cases issue writs of mandamus, although not necessary to enforce its jurisdiction. Dean *v.* State, 88 Tex. 290, 30 S. W. 1047, 31 S. W. 185. Formerly the county court could issue the writ only in aid of its own jurisdiction. Townsend *v.* Shepard, 3 Tex. App. Civ. Cas. § 349; Goree *v.* Dupree, 1 Tex. App. Civ. Cas. § 825.

See 33 Cent. Dig. tit. "Mandamus," § 276.

82. Gay *v.* Gilmore, 76 Ga. 725. And see Smith *v.* Bourbon County, 127 U. S. 105, 8 S. Ct. 1043, 32 L. ed. 73. See, however, State *v.* Goll, 32 N. J. L. 285, 290; People *v.* Green, 58 N. Y. 295, 299.

83. Hawkins *v.* Kercheval, 10 Lea (Tenn.) 535.

Statutory powers of English and Canadian courts of chancery see *supra*, IX, A, 1.

84. Jurisdiction over foreign corporations as to inspection of books see Foreign Corporations, 19 Cyc. 1238.

85. Venue generally see Venue.

86. The petition may be presented in any county in Massachusetts. Boston, etc., R. Co. *v.* Hampden County Com'rs, 116 Mass. 73.

Mandamus affecting title to land.— Where the object of the suit is to try the title to land, the suit must be instituted in the county where the land is situated. General Land Office Com'r *v.* Smith, 5 Tex. 471. However, the venue of a suit against a surveyor to compel the performance of an official duty is in the county of his residence; and the fact that others who are made parties defendant assert an adverse interest in the land does not constitute the proceeding such a suit involving title to land as to require or authorize its institution in the county where the land is situate. Texas Mexican R. Co. *v.* Locke, 63 Tex. 623. And a proceeding to compel the execution of a sheriff's deed to a redemptioner after sale of land on execution does not involve a determination of a right or interest in the land, and hence it may be instituted in the county where relator resides. McMillan *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655.

Mandamus based on judicial proceeding or record.— A proceeding by a passenger to compel a carrier to issue him a transfer may be instituted in the county where the refusal occurred, although the duty to issue transfers appears from the record of another county, the statute providing that jurisdiction of writs of mandamus shall be in the circuit court of the county wherein the record or proceeding is to which the writ relates having no application. Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775. So a proceeding by the receiver of an insolvent bank to compel the state treasurer to pay over, pursuant to a decree in equity, a fund deposited with him as security is properly instituted in the county of the receiver's residence, although the decree to pay over was obtained in another county. Danby Bank *v.* State Treasurer, 39 Vt. 92.

Mandamus to corporation.— Although a cemetery company has its cemetery in Baltimore county, yet where its charter declares that it shall be located and its principal business be transacted in Baltimore city, and the charter is acknowledged and recorded there, the superior court of that city has jurisdiction over a case of mandamus against the company. Mottu *v.* Primrose, 23 Md. 482. The United States circuit court for the district of Iowa, under the acts of congress relating to the Union Pacific Railroad Company, has jurisdiction to compel that company to operate its road as required by law, if any part of the road is in the district of Iowa. U. S. *v.* Union Pac. R. Co., 28 Fed. Cas. No. 16,600, 3 Dill. 524. The purpose of the Pennsylvania acts of June 8, 1893 (Pamphl. Laws 345), and March 19, 1903 (Pamphl. Laws 32), construed *in pari materia*, was to give the courts in the counties where the chief place of business of a corporation is located, or where the corporation transacts its business or has property in whole or in part, the right to proceed by

issued,[87] or the alternative writ may be granted,[88] is commonly governed by statute.[89] The order to show cause or the alternative writ may be made returnable outside of the county or division where issued, if before the same court.[90] The issues may be tried outside of the county in which the proceeding was instituted;[91] but a circuit judge, while in one circuit, has no jurisdiction to hear a proceeding

mandamus to compel the performance of any act which should be performed within such county; and where a corporation has its plant and transacts almost all its business in one county, although its principal office is in another and distant county, the common pleas of the first county has jurisdiction of proceedings to compel the corporation to give a stock-holder an opportunity to inspect its books and papers. Neubert *v.* Armstrong Water Co., 211 Pa. St. 582, 61 Atl. 123. Under the same statutes proceedings to compel a water company to supply water should be brought in the county where the supply is sought to be had, and not in the county where the principal office of the company is located (Euwer *v.* Water Co., 10 Del. Co. (Pa.) 70, 36 Pittsb. Leg. J. N. S. 323); and if a railroad company has constructed and operates its road wholly in one county, where its operating officers reside, but has its principal office in another county, mandamus proceedings may be instituted against it in either (Loraine *v.* Pittsburg, etc., R. Co., 205 Pa. St. 132, 54 Atl. 580, 61 L. R. A. 502). It has been held, however, that where a railroad company operates in several counties, and has its chief offices in but one of them, the proceeding must be instituted in that one. Com. *v.* Pennsylvania R. Co., 4 Pa. Dist. 362. And see Whitemarsh Tp. *v.* Philadelphia, etc., R. Co., 8 Watts & S. (Pa.) 365.

Mandamus to county.— A proceeding against a county must be brought therein. McBane *v.* People, 50 Ill. 503 (holding that a statute providing that "all suits" against a county must be there brought applies to mandamus); Woodman *v.* Somerset County Com'rs, 24 Me. 151 (where it was intimated that the proceeding should be instituted in the supreme court while sitting in the county sued); Alexander *v.* McDowell County Com'rs, 67 N. C. 330 (*semble*); Johnston *v.* Cleaveland County, 67 N. C. 101 (*semble*).

Mandamus to public officer.— A motion for a writ of mandamus against a public officer should be made in the district embracing the county wherein an issue of fact joined on an alternative writ is triable, which is the county where the material facts took place, unless the court directs otherwise. People *v.* Myers, 50 Hun (N. Y.) 479, 3 N. Y. Suppl. 365 [*affirmed* in 112 N. Y. 676, 20 N. E. 417]. It has been held that an application for mandamus is not in itself a suit or action within 2 N. Y. Rev. St. 353, § 14, which provides that every action against a public officer for or concerning any act done by virtue of his office shall be laid in the county where the fact complained of happened, but that it is to be regarded as a motion within Code Civ. Proc. § 401. Mason *v.* Willers, 7 Hun (N. Y.) 23; People *v.* Schuyler, 2 Abb. Pr. N. S. (N. Y.) 78.

Residence of parties.—A proceeding against the superintendent of an insane asylum to compel him to grant a certificate of discharge may be commenced in the county where the lunatic is staying and where all the parties reside, although the asylum is located elsewhere. Statham *v.* Blackford, 89 Va. 771, 17 S. E. 233. So a proceeding against the keeper of a penitentiary may be instituted in the county where he resides and has his principal office, and if others are aiding him in alleged illegal acts, they may be joined with him in the same action, although residents of a different county. Penitentiary Co. No. 2 *v.* Nelms, 67 Ga. 565.

87. **Issuance in county in which writ is not intended to operate.**— The rule to show cause may issue in a county other than that in which the writ is intended to operate. Taylor *v.* Henry, 2 Pick. (Mass.) 397; People *v.* Fulton County, 70 Hun (N. Y.) 560, 24 N. Y. Suppl. 397 [*affirmed* in 139 N. Y. 656, 35 N. E. 208]; Wayne Tp. *v.* Green Tp., Wright (Ohio) 292, *semble*.

88. **The supreme court, at a session in either of its districts,** may issue an alternative writ to any part of the state. Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9. And see Boston, etc., R. Co. *v.* Hampden County Com'rs, 116 Mass. 73; Com. *v.* Pittsburgh, 34 Pa. St. 496. *Contra*, People *v.* Vermilion County, 40 Ill. 125. And see Hotchkiss *v.* Grattan, 90 Va. 642, 19 S. E. 165.

89. See the statutes of the different states.

90. Territory *v.* Shearer, 2 Dak. 332, 8 N. W. 135; Boston, etc., R. Co. *v.* Hampden County Com'rs, 116 Mass. 73; Jones *v.* McMahan, 30 Tex. 719, except writs against the heads of departments, which are returnable at the seat of government. See, however, People *v.* Ouray, 4 Colo. 291, holding that a writ issued by a district judge in vacation may not be made returnable at his pleasure into any county of his district, but must be made returnable in the county where the parties defendant may be properly impleaded.

A rule or writ issuing out of one county to operate in another should be made returnable into the latter. Woodman *v.* Somerset County Com'rs, 24 Me. 151; Wayne Tp. *v.* Green Tp., Wright (Ohio) 292, *semble*. And see People *v.* Fulton County, 70 Hun (N. Y.) 560, 24 N. Y. Suppl. 397 [*affirmed* in 139 N. Y. 656, 35 N. E. 208]. This was formerly the law in Massachusetts (Taylor *v.* Henry, 2 Pick. 397); but is no longer (Boston, etc., R. Co. *v.* Hampden County Com'rs, 116 Mass. 73).

91. Territory *v.* Shearer, 2 Dak. 332, 8 N. W. 135; Taylor *v.* Henry, 2 Pick. (Mass.)

arising wholly in another circuit.[92] The trial is sometimes required by statute to be held in the county of respondent's residence,[93] or the county where the matters complained of occurred.[94] In some jurisdictions mandamus is regarded as a civil action, subject to change of venue as such.[95] Ordinarily a court may issue a peremptory writ to any county or district within the limits of its territorial jurisdiction.[96]

4. Jurisdiction as Affected by Consent or Waiver. Jurisdiction to issue a writ of mandamus cannot be conferred on the court solely by consent of the parties to the proceeding,[97] nor by waiver.[98]

B. Time For Instituting Proceeding — 1. Limitations.[99] In many states the statutes of limitation do not apply to mandamus proceedings,[1] although the courts may require such proceedings to be instituted within the time fixed by the statutes for the prosecution of analogous rights.[2] In other states they are regarded as

397; State *v.* Pierce County, 71 Wis. 321, 37 N. W. 231.

92. State *v.* Williams, 52 S. C. 416, 29 S. E. 814.

93. State *v.* Scarborough, 70 S. C. 288, 49 S. E. 860.

94. McMillan *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655, holding, however, that the statute which provides that actions against a public officer for acts done by him in virtue of his office shall be tried in the county where the cause arose applies only to affirmative acts of the officer by which in the execution of process or otherwise he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty.

N. Y. Code Civ. Proc. § 2068, provides that a mandamus can be granted by the supreme court only in the district embracing the county wherein an issue of fact joined on an alternative writ is triable, and section 2084 provides that such issue of fact is triable in the county where the material facts took place, unless the court directs otherwise. It was held that a motion for a writ commanding the city controller of New York to draw his warrant for payment of unpaid taxes into the state treasury was properly made in the district where the following acts were actually or constructively performed, viz.: The equalization of the valuations of the counties by the state board; the filing of the statement of such equalization; the notification of the proper officers in the respective counties of the valuation; and the failure to pay the tax into the state treasury. People *v.* Myers, 50 Hun 479, 3 N. Y. Suppl. 365 [*affirmed* in 112 N. Y. 676, 20 N. E. 417].

95. McBane *v.* People, 50 Ill. 503; Williamsport *v.* Com., 90 Pa. St. 498.

96. See cases cited *infra*, this note.

This is true in Delaware, where it is held that the superior court, while sitting in one county, may issue a peremptory writ to any other county (Hastings *v.* Henry, 1 Marv. (Del.) 287, 40 Atl. 1125 [*citing* Knight *v.* Ferris, 6 Houst. (Del.) 283 (*reversing* 6 Houst. 146)]; also, it seems, in Massachusetts with reference to the supreme judicial court (Boston, etc., R. Co. *v.* Hampden County Com'rs, 116 Mass. 73, 83; Taylor *v.* Henry, 2 Pick. 397); but not, it seems, in Ohio with reference to the old supreme court (Wayne Tp. *v.* Green Tp., Wright (Ohio) 292).

A circuit or district court may issue a peremptory writ to any part of the circuit or district (*Ex p.* Carnochan, T. U. P. Charlt. (Ga.) 216), but not to a place beyond those limits (Shields *v.* State, 86 Ala. 584, 6 So. 271; Dunbar *v.* Frazer, 78 Ala. 529; Welch *v.* People, 38 Ill. 20), in the absence of constitution or statute to the contrary (Kings County *v.* Johnson, 104 Cal. 198, 37 Pac. 870).

Courts of last resort.— In Pennsylvania the supreme court, at a session in either of its districts, may issue a peremptory writ to any part of state (Com. *v.* Pittsburgh, 34 Pa. St. 496. And see Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9); but the rule is otherwise as to the court of appeals of Virginia (Hotchkiss *v.* Grattan, 90 Va. 642, 19 S. E. 165), and also, it seems, as to the supreme court of Illinois (People *v.* Vermilion County, 40 Ill. 125).

97. Welch *v.* People, 38 Ill. 20, holding that the circuit court of one circuit cannot thus acquire jurisdiction to issue a writ of mandamus to operate within the limits of another circuit. And see, generally, Courts, 11 Cyc. 673 *et seq.* See, however, Statham *v.* Blackford, 89 Va. 771, 17 S. E. 233.

The rule that consent cannot give jurisdiction does not apply where the objection is merely a personal privilege or exemption which may be waived. Therefore the court of common pleas of any county in the state may have jurisdiction in mandamus proceedings against state officers if such officers waive their privilege of exemption and consent to the jurisdiction of the court. Com. *v.* Barnett, 199 Pa. St. 161, 162, 48 Atl. 976, 55 L. R. A. 882.

98. Rogers *v.* Jenkins, 98 N. C. 129, 3 S. E. 821; State *v.* Scarborough, 70 S. C. 288, 49 S. E. 860. And see Hotchkiss *v.* Grattan, 90 Va. 642, 19 S. E. 165; and, generally, Courts, 11 Cyc. 697 *et seq.*

99. See, generally, Limitations of Actions.

1. Taylor *v.* Gillette, 52 Conn. 216; People *v.* Westchester County, 12 Barb. (N. Y.) 446; State *v.* Appleby, 25 S. C. 100; State *v.* Kirby, 17 S. C. 563; State *v.* Meagher, 57 Vt. 398. And see *infra*, IX, B, 2.

2. See *infra*, IX, B, 2.

within the statutes as being actions at law or civil actions[3] or special proceedings,[4] or as actions or proceedings not otherwise provided for.[5]

2. LACHES.[6] The court may, in the exercise of its discretion,[7] deny an application for mandamus made after an unreasonable delay,[8] especially where the

3. Barnes *v.* Glide, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153; Harby *v.* San Francisco, 2 Cal. App. 418, 83 Pac. 1081; Meents *v.* Reynolds, 62 Ill. App. 17; State *v.* King, 34 Nebr. 196, 51 N. W. 754, 33 Am. St. Rep. 635; State *v.* Sherman County School Dist. No. 9, 30 Nebr. 520, 46 N. W. 613, 27 Am. St. Rep. 420; Boston Rubber Hose Co. *v.* Hagerty, 20 Ohio Cir. Ct. 711, 10 Ohio Cir. Dec. 821. And see Prescott *v.* Gonser, 34 Iowa 175. *Contra*, Chinn *v.* Trustees, 32 Ohio St. 236; State *v.* Lewis, 6 Ohio S. & C. Pl. Dec. 221, 4 Ohio N. P. 176; Duke *v.* Turner, 204 U. S. 623, 27 S. Ct. 316, construing Oklahoma statute.

4. Jones *v.* San Francisco, 141 Cal. 96, 74 Pac. 696; People *v.* Marsh, 82 N. Y. App. Div. 571, 81 N. Y. Suppl. 579 [*affirmed* in 178 N. Y. 618, 70 N. E. 1107]; People *v.* French, 31 Hun (N. Y.) 617, 13 Abb. N. Cas. 413.

5. See LIMITATIONS OF ACTIONS, 25 Cyc. 1061, 1062.

6. See, generally, EQUITY, 16 Cyc. 150 *et seq.*

7. State *v.* Holmes, 3 Nebr. (Unoff.) 183, 91 N. W. 175 (holding that, although delay in applying for a writ of mandamus is not an absolute bar, it may be sufficient ground, in the discretion of the court, for denying the writ); People *v.* Marsh, 82 N. Y. App. Div. 571, 81 N. Y. Suppl. 579 [*affirmed* in 178 N. Y. 618, 70 N. E. 1107].

8. *California.*— Jones *v.* San Francisco, 141 Cal. 96, 74 Pac. 696 (seven years); McConoughey *v.* Torrence, 124 Cal. 330, 57 Pac. 81; Coffey *v.* Young Men's Inst. Grand Council, 87 Cal. 367, 25 Pac. 547; Anderson *v.* Burkhart, (1885) 5 Pac. 612; Harby *v.* San Francisco, 2 Cal. App. 418, 83 Pac. 1081 (three years); Dodge *v.* San Francisco, 1 Cal. App. 608, 82 Pac. 699 (nine years).

Colorado.— See People *v.* Judge Dist. Ct., 18 Colo. 500, 33 Pac. 162, two years.

Georgia.— Savannah *v.* State, 4 Ga. 26.

Illinois.— Kenneally *v.* Chicago, 220 Ill. 485, 77 N. E. 155, six years.

Kansas.—Arends *v.* Kansas City, 57 Kan. 350, 46 Pac. 702 (two years); Simpson *v.* Kansas City, 52 Kan. 88, 34 Pac. 406 (three and a half years); Rice *v.* Coffey County, 50 Kan. 149, 32 Pac. 134 (three weeks).

Louisiana.— State *v.* New Orleans Police Bd., 107 La. 162, 31 So. 662, one year.

Maryland.— George's Creek Coal, etc., Co. *v.* Allegany County Com'rs, 59 Md. 255, three years.

Massachusetts.— Hill *v.* Fitzgerald, (1907) 79 N. E. 825.

Michigan.—Avery *v.* Krakow Tp. Bd., 73 Mich. 622, 41 N. W. 818 (six years); Walcott *v.* Jackson, 51 Mich. 249, 16 N. W. 393 (ten years); Eggleston *v.* Kent Cir. Judge, 50 Mich. 147, 15 N. W. 55 (two years); Bostwick *v.* Detroit Fire Dept., 49 Mich. 513, 14 N. W. 501 (nineteen years); People *v.* Manistee Cir. Judge, 31 Mich. 72.

Missouri.— State *v.* Gibson, 187 Mo. 536, 86 S. W. 177; State *v.* Finley, 74 Mo. App. 243.

Montana.— State *v.* Clarke County Dist. Ct., 29 Mont. 265, 74 Pac. 498; Territory *v.* Potts, 3 Mont. 364, four years.

New Hampshire.— Manchester *v.* Furnald, 71 N. H. 153, 51 Atl. 657; True *v.* Melvin, 43 N. H. 503, four years.

New Jersey.— Taylor *v.* Bayonne, 57 N. J. L. 376, 30 Atl. 431, two years.

New York.— People *v.* New York Bd. of Education, 158 N. Y. 125, 52 N. E. 722 [*affirming* 20 N. Y. App. Div. 452, 46 N. Y. Suppl. 782] (six years); People *v.* Chapin, 104 N. Y. 96, 10 N. E. 141 (*semble*); People *v.* New York Bd. of Education, 114 N. Y. App. Div. 1, 99 N. Y. Suppl. 737 (sixteen months); People *v.* Maxwell, 87 N. Y. App. Div. 391, 84 N. Y. Suppl. 947 (six years); People *v.* Greene, 87 N. Y. App. Div. 346, 84 N. Y. Suppl. 565 (six months); People *v.* Sturgis, 82 N. Y. App. Div. 580, 81 N. Y. Suppl. 816 (seventeen months); People *v.* Marsh, 82 N. Y. App. Div. 571, 81 N. Y. Suppl. 579 [*affirmed* in 178 N. Y. 618, 70 N. E. 1107]; Murphy *v.* Keller, 61 N. Y. App. Div. 145, 70 N. Y. Suppl. 405 (eighteen months); Matter of McDonald, 34 N. Y. App. Div. 512, 54 N. Y. Suppl. 525 (four months); People *v.* Bryant, 28 N. Y. App. Div. 480, 51 N. Y. Suppl. 119 (two years); People *v.* McCartney, 28 N. Y. App. Div. 138, 50 N. Y. Suppl. 919 (three years); People *v.* Collis, 6 N. Y. App. Div. 467, 39 N. Y. Suppl. 698 (four months); People *v.* Palmer, 3 N. Y. App. Div. 389, 38 N. Y. Suppl. 651 (ten months); Matter of Gaffney, 84 Hun 503, 32 N. Y. Suppl. 873 (eight months); People *v.* Justices Ct. Gen. Sessions, 78 Hun 334, 29 N. Y. Suppl. 157 (eight months); People *v.* Adams, 18 N. Y. Suppl. 896 (four years); People *v.* Westchester County, 12 Barb. 446; McDowell *v.* Dalton, 33 Misc. 359, 69 N. Y. Suppl. 419 (two years and four months); People *v.* Welde, 28 Misc. 582, 59 N. Y. Suppl. 1030 (four months); People *v.* Scannell, 28 Misc. 401, 59 N. Y. Suppl. 950 (ten months); Matter of Vanderhoff, 15 Misc. 434, 36 N. Y. Suppl. 833 [*affirmed* in 3 N. Y. App. Div. 389, 38 N. Y. Suppl. 651] (four months); People *v.* French, 12 Abb. N. Cas. 156 (six years); People *v.* Syracuse, 52 How. Pr. 346 (two years); People *v.* Seneca Common Pl., 2 Wend. 264 (one year).

North Carolina.— Cross *v.* Cross, 90 N. C. 15, two years.

Ohio.— Chinn *v.* Fayette Tp., 32 Ohio St. 236; State *v.* Cincinnati School Dist. Bd. of Education, 4 Ohio Cir. Ct. 97, 2 Ohio Cir. Dec. 441, twelve years.

Pennsylvania.— Haines *v.* Com., 99 Pa. St. 410, 100 Pa. St. 317; Com. *v.* Southwark

delay has resulted prejudicially to the rights of respondent or others interested.[9] The applicant may of course avoid the effect of this rule by showing good excuse for the delay.[10] In states wherein the statutes of limitations do not apply

Fire-Engine Co., 12 Phila. 177, twenty-six years.

South Carolina.— State *v.* Appleby, 25 S. C. 100 (eight years); State *v.* Kirby, 17 S. C. 563 (ten years).

Texas.— McCurdy *v.* Connor, 95 Tex. 246, 66 S. W. 664; Teat *v.* McGaughey, 85 Tex. 478, 22 S. W. 302, forty-five years.

Washington.— Eshy Estate Co. *v.* Pacific County, 40 Wash. 67, 82 Pac. 129 (six months); State *v.* Whatcom County Super. Ct., 15 Wash. 314, 46 Pac. 232 (four months).

Wisconsin.— State *v.* Juneau County Sup'rs, 38 Wis. 554, one year.

United States.— Duke *v.* Turner, 204 U. S. 623, 27 S. Ct. 316, 51 L. ed. ——.

England.— Rex *v.* Leeds, etc., Canal Nav. Co., 11 A. & E. 316, 3 P. & D. 174, 39 E. C. L. 185 (sixty-five years); Rex *v.* Stainforth, etc., Canal Co., 1 M. & S. 32, 14 Rev. Rep. 389 (fifteen years). And see Worthington *v.* Hulton, L. R. 1 Q. B. 63, 6 B. & S. 943, 12 Jur. N. S. 73, 35 L. J. Q. B. 61, 13 L. T. Rep. N. S. 463, 14 Wkly. Rep. 632, 118 E. C. L. 943.

See 33 Cent. Dig. tit. "Mandamus," § 285.

The delay must be unreasonable in order to constitute laches (Savannah *v.* State, 4 Ga. 26, and cases cited *infra*, this paragraph), and whether the delay was unreasonable depends on the facts of the particular case (State *v.* Gibson, 187 Mo. 536, 86 S. W. 177). Delay held not to be unreasonable see Careaga *v.* Fernald, 66 Cal. 351, 5 Pac. 615 (eleven months); Taylor *v.* Gillette, 52 Conn. 216 (two years); Wood *v.* State, 155 Ind. 1, 55 N. E. 959 (sixteen months); People *v.* Greene, 95 N. Y. App. Div. 397, 88 N. Y. Suppl. 601 (ten days); People *v.* Grant, 61 N. Y. App. Div. 238, 70 N. Y. Suppl. 504 (thirteen years); People *v.* Brady, 49 N. Y. App. Div. 238, 63 N. Y. Suppl. 145 (two months; fourteen months); People *v.* Feitner, 49 N. Y. App. Div. 101, 62 N. Y. Suppl. 969, 63 N. Y. Suppl. 209 [*affirming* 29 Misc. 702, 62 N. Y. Suppl. 969] (four months); People *v.* Lantry, 48 N. Y. App. Div. 131, 62 N. Y. Suppl. 630 [*reversing* 27 Misc. 160, 57 N. Y. Suppl. 770] (four months and eighteen days); Matter of McDonald, 34 N. Y. App. Div. 512, 54 N. Y. Suppl. 525 (four months); People *v.* Cady, 50 N. Y. Super. Ct. 399 (six years); State *v.* Jennings, 48 Wis. 549, 4 N. W. 641; U. S. *v.* Ottawa Auditors, 28 Fed. 407 (seven years). Excuse for delay see *infra*, this subsection.

To defeat the right to mandamus the laches must be gross.— Savannah *v.* State, 4 Ga. 26.

Right to assert laches.— A purchaser of shares of stock from the equitable owner thereof, whose ownership was not disputed by his associates in interest, in whose name the stock was held, is not precluded by laches from compelling the company to issue a certificate of such stock to him, since it is a matter of no concern to the officers of the company how the stock is held, it being their duty to make a transfer of stock whenever properly directed. Banker *v.* Montana Gold, etc., Min. Co., (Mont. 1907) 89 Pac. 66.

9. State *v.* New Orleans Police Bd., 107 La. 162, 31 So. 662; Coot *v.* Willett, 93 Mich. 304, 53 N. W. 395; Chinn *v.* Trustees, 32 Ohio St. 236; Duke *v.* Turner, 204 U. S. 623, 27 S. Ct. 316, 51 L. ed. —. And see cases cited *supra*, note 8.

If no one interested is prejudiced by the delay, mandamus will not as a rule be refused on the ground of laches. State *v.* Smith, 172 Mo. 618, 73 S. W. 134; Chinn *v.* Trustees, 32 Ohio St. 236; Duke *v.* Turner, 204 U. S. 623, 27 S. Ct. 316, 51 L. ed. —. And see Barker *v.* Montana Gold, etc., Min. Co., (Mont. 1907) 89 Pac. 66.

10. Kreiling *v.* Nortrup, 215 Ill. 195, 74 N. E. 123 [*affirming* 116 Ill. App. 448] (where defendant recognized relator's rights pending the delay, and endeavored to secure them to him); People *v.* Baker, 49 Misc. (N. Y.) 143, 97 N. Y. Suppl. 453 (holding that a year and a half's delay by a policeman is not a bar to a suit to change his rating, he having made continuous efforts in the meantime to have the correction made); Meyer *v.* Beaver, 9 S. D. 168, 68 N. W. 310.

Ignorance of his rights does not as a rule excuse a relator's delay. People *v.* Maxwell, 87 N. Y. App. Div. 391, 84 N. Y. Suppl. 947. See, however, Matter of McDonald, 34 N. Y. App. Div. 512, 54 N. Y. Suppl. 525. Consequently unsound advice of counsel is no excuse. People *v.* Keating, 49 N. Y. App. Div. 123, 63 N. Y. Suppl. 71; McDowell *v.* Dalton, 33 Misc. (N. Y.) 359, 68 N. Y. Suppl. 419. But the delay may be excused by the fact that the law is unsettled by reason of conflicting judicial decisions, and that litigation which will result in settling the law is pending by others. People *v.* Lantry, 48 N. Y. App. Div. 131, 62 N. Y. Suppl. 630 [*reversing* 27 Misc. 160, 57 N. Y. Suppl. 770]; People *v.* Scannell, 27 Misc. (N. Y.) 662, 59 N. Y. Suppl. 679.

The pendency of an appeal by a party to a suit may excuse his delay in applying for mandamus in regard to the subject-matter of the appeal. Cahill *v.* San Francisco Super. Ct., 145 Cal. 42, 78 Pac. 467; *In re* Hohorst, 150 U. S. 653, 654, 14 S. Ct. 221, 37 L. ed. 1211. And see People *v.* Dalton, 52 N. Y. App. Div. 371, 65 N. Y. Suppl. 342.

The prosecution of other proceedings to obtain his rights may excuse relator's delay in applying for mandamus. Duke *v.* Turner, 204 U. S. 623, 27 S. Ct. 316, 51 L. ed. ——. And see Hill *v.* Fitzgerald, (Mass. 1907) 79 N. E. 825; State *v.* Smith, 172 Mo. 618, 73 S. W. 134. See, however, State *v.* Gibson, 187 Mo. 536, 86 S. W. 177; People *v.* New York Bd. of Education, 20 N. Y. App. Div. 452, 46 N. Y. Suppl. 782 [*affirmed* in 158

directly to mandamus proceedings it is common to apply them by analogy; and while it is difficult to lay down any fixed rule as to the time when the writ will be barred, it may be said in a general way that it must be brought within the period fixed for that particular form of civil action or proceeding which may be brought to enforce the right which is the subject of the writ;[11] and on the other hand that mandamus may be instituted at any time within that period.[12]

C. Parties — 1. Applicants, Petitioners, or Relators — a. In General. One member of a public board may in an otherwise proper case institute proceedings against the other members to compel them to perform their duties.[13] Ordinarily one person cannot by mandamus enforce the private right of another,[14] unless he sues in a representative capacity;[15] and in this latter event the proceeding should be instituted in the name or on the relation of the real party in interest.[16] A

N. Y. 125, 52 N. E. 722], holding that the persistent prosecution of fruitless proceedings in defiance of decisions of the courts is no excuse for the delay.

Reasonableness of delay see *supra*, note 8.

11. *California.*— Bates *v.* Gregory, (1889) 22 Pac. 683, no writ for refunding bonds after original bonds barred.

Illinois.— People *v.* Oran, 121 Ill. 650, 13 N. E. 726 [*affirming* 19 Ill. App. 174]. And see People *v.* Finley, 97 Ill. App. 214.

Michigan.— Wilkinson *v.* Auditor-Gen., (1907) 110 N. W. 123; McRae *v.* Auditor-Gen. (1906) 109 N. W. 1122; Avery *v.* Krakow Tp. Bd., 73 Mich. 622, 41 N. W. 818.

Montana.— Territory *v.* Potts, 3 Mont. 364.

New York.— People *v.* Chapin, 104 N. Y. 96, 10 N. E. 141; People *v.* Preston, 62 Hun 185, 16 N. Y. Suppl. 488 [*affirmed* in 131 N. Y. 644, 30 N. E. 866] (demand necessary within time when analogous suit must be brought); People *v.* French, 12 Abb. N. Cas. 156. It has been held that the four months' limitation applicable to writs of certiorari will be applied. People *v.* Greene, 87 N. Y. App. Div. 346, 84 N. Y. Suppl. 565. And see People *v.* Lantry, 48 N. Y. App. Div. 131, 62 N. Y. Suppl. 630 [*reversing* 27 Misc. 160, 57 N. Y. Suppl. 770]. However, the four months' limitation prescribed by the Rev. Charter, § 302 (Laws (1901), c. 466) for proceedings for reinstatement on the police force, does not apply to mandamus instituted to secure a position as detective sergeant, to which a police officer claims to be entitled. People *v.* Greene, *supra*. And Laws (1903), c. 482, § 6, constituting part of the charter of a city, limiting the time for commencement of "all proceedings" to vacate or reduce assessments to one year has no application to mandamus proceedings to compel the proper officials to do the formal act of canceling on the books an assessment which has been adjudged void and vacated in a suit brought for that purpose. People *v.* Brush, 115 N. Y. App. Div. 688, 101 N. Y. Suppl. 312.

Ohio.— State *v.* Cincinnati School Dist. Bd. of Education, 4 Ohio Cir. Ct. 97, 2 Ohio Cir. Dec. 441.

Oklahoma.— Beadles *v.* Smyser, (1906) 87 Pac. 292; Beadles *v.* Fry, 15 Okla. 428, 82 Pac. 1041, 2 L. R. A. N. S. 855, both holding that no writ will issue to compel payment of a judgment after the right to issue execution or revive the judgment has expired.

South Carolina.— Milster *v.* Spartanburg, 68 S. C. 26, 46 S. E. 539.

United States.— McAleer *v.* Clay County, 42 Fed. 665; U. S. *v.* Oswego Tp., 28 Fed. 55, both holding that a writ will not issue to compel a tax to pay a judgment after the power to issue an execution has expired. In Amy *v.* Galena, 7 Fed. 163, 10 Biss. 263, however, the contrary is held.

England.— Rex *v.* Agarsdley, 5 Dowl. P. C. 19. See, however, Ward *v.* Lowndes, 5 Jur. N. S. 1124, 28 L. J. Q. B. 265, 7 Wkly. Rep. 489.

See 33 Cent. Dig. tit. "Mandamus," § 284.

12. Wilkinson *v.* Cheatham, 43 Ga. 258; Hanna *v.* Chalker, 136 Mich. 8, 98 N. W. 732 (holding that mandamus to compel the issuance of county orders on a claim allowed by the county board will not be refused on the ground of laches, the statute not having run against the claim); People *v.* Westchester County, 12 Barb. (N. Y.) 446. And see Harwood *v.* Brownell, 48 Iowa 657.

This is not always so.— Laches may exist although a less time than the statutory period has elapsed. See cases cited *supra*, note 8.

13. Cooper *v.* Nelson, 38 Iowa 440; Cooperrider *v.* State, 46 Nebr. 84, 64 N. W. 372.

14. People *v.* Morgan, 97 N. Y. App. Div. 267, 89 N. Y. Suppl. 832 (holding that a taxpayer cannot compel the payment of damages awarded others for laying out a highway); People *v.* New York, 20 Misc. (N. Y.) 189, 45 N. Y. Suppl. 900. And see U. S. *v.* Chandler, 2 Mackey (D. C.) 527.

Necessity of clear legal right in petitioner see *supra*, II, B, 1.

15. Tyler *v.* Houghton, 25 Cal. 26, holding that the trustee of an express trust may as such institute the proceeding.

Proceeding in behalf of infant.— A proceeding to compel the admission of a child to a public school may as a rule be instituted by the father (see *infra*, IX, C, 1, e, (II), note 50), without the appointment of a guardian *ad litem* (People *v.* Detroit Bd. of Education, 18 Mich. 400); but in some cases the proceeding is properly brought on the relation of the child by his next friend (Weir *v.* State, 161 Ind. 435, 68 N. E. 1023).

16. People *v.* Busti Town Canvassers, 32

proceeding in the name of a public or private corporation as relator cannot be maintained unless the corporation has authorized the proceeding.[17]

b. The State — (I) *As Interested Party.* An application in behalf of the state must be made in the name of the state;[18] and the same is true where the right or duty sought to be enforced affects the state in its sovereign capacity as distinguished from the public generally.[19]

(II) *As Formal Party.*[20] Although the state is not interested in its sovereign capacity, yet where the right or duty sought to be enforced is a public one, the weight of authority is to the effect that the proceeding should be instituted in its name,[21] on relation of the party applying for the writ.[22] Nevertheless in some jurisdictions the state need not be made a formal party in such a case.[23] Even where the right or duty in question is a private one, it is the common practice to institute the proceeding in the name of the state,[24] on relation of the

Misc. (N. Y.) 123, 66 N. Y. Suppl. 199 (holding that a stock-holder in a corporation who acts as agent for the corporation cannot apply for a writ in his individual name and without making the corporation a party); Com. *v.* Wilkes-Barre Gas Co., 6 Kulp (Pa.) 328 (holding that an agent cannot proceed in his own name). See, however, Tyler *v.* Houghton, 25 Cal. 26, holding that the trustee of an express trust may apply for the writ without joining the beneficiary.

Necessity of naming state as formal party see *infra*, IX, C, 1, b, (II).

17. People *v.* Blackhurst, 60 Hun (N. Y.) 63, 15 N. Y. Suppl. 114 (holding that a committee of a private corporation whose functions have expired cannot institute the proceeding on relation of the corporation); State *v.* Sauk Co., 70 Wis. 485, 36 N. W. 396 (holding that a writ issued on the relation of a town should be quashed unless it appears that the applicant was directed by the electors of the town to make the application). See, however, People *v.* Kingston, 101 N. Y. 82, 4 N. E. 348, holding that where a public board passed a resolution authorizing the employment of counsel named "in all matters in litigation" growing out of a certain matter, and authorizing him "to take all necessary and proper proceedings in the name of the board," and subsequently a committee of its members was appointed with full power to do all things necessary in the litigation, authority was conferred to institute mandamus in regard to such matters.

Implied authority.—Where township bonds voted in aid of a railway company have been contracted to be paid by the company to another in part payment for work done, such other person has implied authority to use the name of the company as relator in a proceeding against the town to compel the issuing of the bonds. People *v.* Barnett, 91 Ill. 422.

18. *Ex p.* State, 113 Ala. 85, 21 So. 210.

19. *Iowa.*— Chance *v.* Temple, 1 Iowa 179.

New York.— Demarest *v.* Wickham, 63 N. Y. 320 (*semble*); People *v.* Martin, 62 Barb. 570 (*semble*).

North Dakota.— State *v.* Carey, 2 N. D. 36, 49 N. W. 164, *semble*.

South Carolina.— Milster *v.* Spartanburg, 68 S. C. 26, 46 S. E. 539 (*semble*); Runion *v.* Latimer, 6 S. C. 126.

Texas.— Kimberly *v.* Morris, 87 Tex. 637, 31 S. W. 808, *semble*.

Virginia.—Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775, *semble*.

See 33 Cent. Dig. tit. "Mandamus," § 287.

20. Necessity of issuing writ in name of state: Alternative writ see *infra*, IX, F, 3, e, (I) Peremptory writ see *infra*, IX, K, 6, a.

21. *Arkansas.*— Moses *v.* Kearney, 31 Ark. 261; *Ex p.* Fuller, 25 Ark. 443.

Colorado.— Wheeler *v.* Northern Colorado Irr. Co., 9 Colo. 248, 11 Pac. 103.

Connecticut.—Peck *v.* Booth, 42 Conn. 271; Lyon *v.* Rice, 41 Conn. 245.

Iowa.— Price *v.* Harned, 1 Iowa 473.

Missouri.— State *v.* St. Louis Public Schools, 134 Mo. 296, 35 S. W. 617, 56 Am. St. Rep. 503; State *v.* Bronson, 115 Mo. 271, 21 S. W. 1125.

New York.— People *v.* Martin, 62 Barb. 570. And see People *v.* Northern Cent. R. Co., 164 N. Y. 289, 58 N. E. 138 [*modifying* 35 N. Y. App. Div. 624, 54 N. Y. Suppl. 1112].

North Dakota.— State *v.* Carey, 2 N. D. 36, 49 N. W. 164, *semble*.

Pennsylvania.— Com. *v.* Huttel, 4 Pa. Super. Ct. 95, 40 Wkly. Notes Cas. 71.

See 33 Cent. Dig. tit. "Mandamus," § 287.

22. State *v.* St. Louis Public Schools, 134 Mo. 296, 35 S. W. 617, 56 Am. St. Rep. 503; State *v.* Bronson, 115 Mo. 271, 21 S. W. 1125. And see State *v.* Fyler, 48 Conn. 145; People *v.* Northern Cent. R. Co., 164 N. Y. 289, 58 N. E. 138 [*modifying* 35 N. Y. App. Div. 624, 54 N. Y. Suppl. 1112].

23. Milster *v.* Spartanburg, 68 S. C. 26, 46 S. E. 539; Kimberly *v.* Morris, 87 Tex. 637, 31 S. W. 808; Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775.

24. *Connecticut.*— State *v.* Towers, 71 Conn. 657, 42 Atl. 1083.

District of Columbia.— Dancy *v.* Clark, 24 App. Cas. 487.

Illinois.— Higgins *v.* Galesburg, 96 Ill. App. 471.

Indiana.— Jessup *v.* Carey, 61 Ind. 584; Brower *v.* O'Brien, 2 Ind. 423.

Iowa.— Chance *v.* Temple, 1 Iowa 179. This rule has since been changed by statute. Eden Independent Dist. No. 2 *v.* Rhodes, 88 Iowa 570, 55 N. W. 524.

applicant.[25] However, in some jurisdictions it is neither necessary[26] nor proper[27] to institute a proceeding to enforce a private right or duty in the name of the state; and in some of these jurisdictions such a proceeding must be commenced, not in the name of the state on relation, but in the name of the real party in interest.[28] In those states where the state need not be made a formal party,[29] and

Louisiana.— Morris *v.* Womble, 30 La. Ann. 1312; Malain *v.* Judge Third Judicial Dist., 29 La. Ann. 793; Bishop *v.* Marks, 15 La. Ann. 147.

Montana.— Territory *v.* Potts, 3 Mont. 364.

Nebraska.— State *v.* Spicer, 36 Nebr. 469, 54 N. W. 849.

Nevada.— State *v.* Curler, 26 Nev. 347, 67 Pac. 1075. And see State *v.* McCullough, 3 Nev. 202.

New York.— People *v.* Harwick, 48 N. Y. App. Div. 559, 62 N. Y. Suppl. 897; People *v.* Martin, 62 Barb. 570.

North Dakota.— State *v.* Carey, 2 N. D. 36, 49 N. W. 164.

Ohio.— State *v.* Perry County, 5 Ohio St. 497.

Oklahoma.— Collett *v.* Allison, 1 Okla. 42, 25 Pac. 516. And see Rider *v.* Brown, 1 Okla. 244, 32 Pac. 341.

Tennessee.— Whitesides *v.* Stuart, 91 Tenn. 710, 20 S. W. 245.

Washington.— State *v.* Douglas County Super. Ct., 41 Wash. 439, 83 Pac. 1027; State *v.* Pacific Brewing, etc., Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208.

West Virginia.— State *v.* Wyoming County Ct., 47 W. Va. 672, 35 S. E. 959; State *v.* Long, 37 W. Va. 266, 16 S. E. 578.

See 33 Cent. Dig. tit. "Mandamus," § 287.

25. *Connecticut.*— State *v.* Towers, 71 Conn. 657, 42 Atl. 1083.

District of Columbia.— Dancy *v.* Clark, 24 App. Cas. 487.

Florida.— Florida Cent., etc., R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419.

Illinois.— Ottawa *v.* People, 48 Ill. 233; Pike County *v.* People, 11 Ill. 202.

Indiana.— Jessup *v.* Carey, 61 Ind. 584.

Iowa.— Chance *v.* Temple, 1 Iowa 179.

Montana.— Territory *v.* Potts, 3 Mont. 364.

Nebraska.— Van Horn *v.* State, 51 Nebr. 232, 70 N. W. 941; State *v.* Spicer, 36 Nebr. 469, 54 N. W. 849.

Nevada.— State *v.* Curler, 26 Nev. 347, 67 Pac. 1075.

New York.— People *v.* Harwick, 48 N. Y. App. Div. 559, 62 N. Y. Suppl. 897.

Ohio.— State *v.* Perry County, 5 Ohio St. 497.

Oklahoma.— Collett *v.* Allison, 1 Okla. 42, 25 Pac. 516. And see Rider *v.* Brown, 1 Okla. 244, 32 Pac. 341.

Tennessee.— Whitesides *v.* Stuart, 91 Tenn. 710, 20 S. W. 245.

Washington.— State *v.* Pacific Brewing, etc., Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208.

West Virginia.— State *v.* Wyoming County Ct., 47 W. Va. 672, 35 S. E. 959; State *v.* Long, 37 W. Va. 266, 16 S. E. 578.

See 33 Cent. Dig. tit. "Mandamus," § 287.

The fact that the proceeding is instituted in the name of the state alone without a relator is not fatal to the issuance of a writ in the name of the state on the applicant's relation. People *v.* Monticello, 35 Misc. (N. Y.) 675, 72 N. Y. Suppl. 350. See People *v.* Parmerter, 158 N. Y. 385, 53 N. E. 40 [*reversing* 19 N. Y. App. Div. 632, 46 N. Y. Suppl. 1098].

26. *District of Columbia.*—Bundy *v.* U. S., 25 App. Cas. 459; Dancy *v.* Clark, 24 App. Cas. 487.

Illinois.—Higgins *v.* Galesburg, 96 Ill. App. 471.

Iowa.— Eden Independent Dist. No. 2 *v.* Rhodes, 88 Iowa 570, 55 N. W. 524.

Louisiana.— State *v.* Cole, 33 La. Ann. 1356; Morris *v.* Womble, 30 La. Ann. 1312; Malain *v.* Judge Third Judicial Dist., 29 La. Ann. 793.

North Carolina.— Brown *v.* Turner, 70 N. C. 93.

South Carolina.— Lord *v.* Bates, 48 S. C. 95, 26 S. E. 213, 24 S. E. 755.

West Virginia.— State *v.* Wyoming County Ct., 47 W. Va. 672, 35 S. E. 959; State *v.* Long, 37 W. Va. 266, 16 S. E. 578.

See 33 Cent. Dig. tit. "Mandamus," § 287.

27. *Ex p.* Fuller, 25 Ark. 443; Myers *v.* State, 61 Miss. 138; Com. *v.* Huttel, 4 Pa. Super. Ct. 95, 40 Wkly. Notes Cas. 71; Portland Stone Ware Co. *v.* Taylor, 17 R. I. 33, 19 Atl. 1086.

28. *California.*— People *v.* Pacheco, 29 Cal. 210.

Colorado.— Wheeler *v.* Northern Colo. Irr. Co., 9 Colo. 248, 11 Pac. 103 (*semble*); Stoddard *v.* Benton, 6 Colo. 508.

Kansas.— State *v.* Nichols, (1903) 73 Pac. 50; Shull *v.* Gray County, 54 Kan. 101, 37 Pac. 994; Hagerty *v.* Arnold, 13 Kan. 367; State *v.* Jefferson County, 11 Kan. 66; State *v.* Marston, 6 Kan. 524.

Oklahoma.— See Rider *v.* Brown, 1 Okla. 244, 32 Pac. 341.

South Dakota.— Heintz *v.* Moulton, 7 S. D. 272, 64 N. W. 135; Howard *v.* Huron, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493; Smith *v.* Lawrence, 2 S. D. 185, 49 N. W. 7.

Texas.— Elser *v.* Ft. Worth, (Civ. App. 1894) 27 S. W. 739.

See 33 Cent. Dig. tit. "Mandamus," § 287.

Compare Ex p. Fuller, 25 Ark. 443; Eden Independent Dist. No. 2 *v.* Rhodes, 88 Iowa 570, 55 N. W. 524.

Contra.— State *v.* Carey, 2 N. D. 36, 49 N. W. 164. And see Chumasero *v.* Potts, 2 Mont. 242.

29. State *v.* Marston, 6 Kan. 524; Heintz *v.* Moulton, 7 S. D. 272, 64 N. W. 135; Howard *v.* Huron, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493; Smith *v.* Lawrence, 2 S. D. 185, 49 N. W. 7; State *v.* Long, 37 W. Va. 266, 16 S. E. 578.

in some states even where the state must be joined,[30] the applicant may be known as plaintiff.

c. Municipal Corporations.[31] A municipal corporation, whatsoever its nature, may institute mandamus proceedings to enforce its rights in a proper case.[32]

d. Public Officers — (I) *State Officers* — (A) *Generally.* State officers may bring mandamus to compel the performance of official duties falling under their supervision or the performance of which is necessary to enable them to perform their own duties.[33]

(B) *Attorney-General.* Where the question is one of public right affecting the jurisdiction, franchises, or prerogatives of the state at large, the interests of public justice, or the right of liberty of the people, the proceeding may be instituted by the attorney-general.[34]

30. State *v.* Carey, 2 N. D. 36, 49 N. W. 164. *Contra*, Territory *v.* Potts, 3 Mont. 364.

31. Right of particular municipal boards, commissions, and officers to institute proceeding see *infra*, IX, C, 1, d, (II), (III).

32. *California.*—People *v.* Alameda County, 26 Cal. 641, mandamus by one county to another to compel the levy of a tax for its benefit.

Illinois.— People *v.* Upham, 221 Ill. 555, 77 N. E. 931.

Kansas.— State *v.* Missouri Pac. R. Co., 33 Kan. 176, 5 Pac. 772, *semble*, mandamus to compel railroad company to build viaduct over tracks at street crossings.

Maine.— Brunswick *v.* Bath, 90 Me. 479, 38 Atl. 532, mandamus by town against city to compel it to repair a common bridge.

New Jersey.— Bridgeton *v.* Bridgeton, etc., Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837, mandamus by city to enforce street railroad duty.

New York.— People *v.* Northern Cent. R. Co., 164 N. Y. 289, 58 N. E. 138; People *v.* Rome, etc., R. Co., 103 N. Y. 95, 8 N. E. 369, *semble*, mandamus to compel railroad company to erect and maintain station.

Ohio.— State *v.* Craig, 21 Ohio Cir. Ct. 13, 11 Ohio Cir. Dec. 348, mandamus by village to compel the levy of a tax by county.

Texas.— Elser *v.* Ft. Worth, (Civ. App. 1894) 27 S. W. 739, mandamus to compel city treasurer to pay warrants issued to purchase bonds not to be delivered until the money is paid on the warrants.

Washington.— Northern Pac. R. Co. *v.* Territory, 3 Wash. Terr. 303, 13 Pac. 604 [*reversed* on other grounds in 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092].

If the municipality has no beneficial interest in the action sought to be enforced, the writ will not issue at its instance. Bangor *v.* Penobscot County Com'rs, 87 Me. 294, 32 Atl. 903, holding that a city cannot compel a county to pay fees due city officers.

The legality of the organization of a municipality cannot be attacked in a mandamus proceeding instituted by it (How *v.* State, 89 Ind. 249; School Dist. No. 115 *v.* School Dist. No. 54, 34 Oreg. 97, 55 Pac. 98) or against its officers (Alderton *v.* Binder, 81 Mich. 133, 45 N. W. 968). And see MUNICIPAL CORPORATIONS.

33. State *v.* Hamilton, 5 Ind. 310 (holding that the state auditor is a proper relator in proceedings to compel a railroad company to furnish a list of stock for taxation); State *v.* Holcomb, 46 Nebr. 612, 65 N. W. 873 (warden of penitentiary); Harris *v.* State, 96 Tenn. 496, 34 S. W. 1017 (state board of examiners of assessments of the distributable property of railroad); State *v.* Graybeal, (W. Va. 1906) 55 S. E. 398 (holding that the state tax commissioner may bring mandamus to compel an assessment of taxes).

The governor may bring mandamus to compel the sealing of the commission of a United States senator (State *v.* Crawford, 28 Fla. 441, 10 So. 118, 14 L. R. A. 253), and, when specially authorized, to compel performance of an official duty (Russell *v.* Ayer, 120 N. C. 180, 27 S. E. 133, 37 L. R. A. 246).

34. *Alabama.*— *Ex p.* State, 113 Ala. 85, 21 So. 210, mandamus to correct errors in criminal case.

California.— People *v.* Budd, (1897) 47 Pac. 594, *semble*.

Connecticut.— State *v.* Hartford, etc., R. Co., 29 Conn. 538, mandamus to compel a railroad to operate its road.

Delaware.— State *v.* Wilmington Bridge Co., 3 Harr. 312, mandamus to compel performance of any public duty.

Florida.— State *v.* Johnson, 30 Fla. 433, 11 So. 845, 18 L. R. A. 410, mandamus to compel suspended officer to deliver up office.

Kansas.— State *v.* Hamilton County Com'rs, 35 Kan. 640, 11 Pac. 902 (mandamus to compel county commissioners to hold their offices at the county-seat); State *v.* McLaughlin, 15 Kan. 228, 22 Am. Rep. 264; Bobbett *v.* State, 10 Kan. 9 (the last two cases involving a public duty).

Louisiana.— See State *v.* Dubuclet, 27 La. Ann. 29.

Maine.— Weeks *v.* Smith, 81 Me. 538, 18 Atl. 325, mandamus to enforce public right.

Massachusetts.— Atty.-Gen. *v.* Old Colony R. Co., 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112 (mandamus to compel railroad to redeem and accept its own tickets); Atty.-Gen. *v.* Boston, 123 Mass. 460.

Michigan.— People *v.* Green, 29 Mich. 121.

Nebraska.— West Point Water Power, etc., Co. *v.* State, 49 Nebr. 218, 66 N. W. 6, mandamus to remedy public wrong. See also State *v.* Fremont, etc., R. Co., 22 Nebr. 313, 35 N. W. 118.

(II) *County Officers* — (A) *Generally.* County officers may bring mandamus to compel the performance of duties over which they have supervision or the performance of which is necessary to the performance of their own duties.[35]

(B) *County Attorney.* The district or county attorney is the proper officer to bring mandamus to compel the performance of duties affecting the people of the county and the administration of justice therein.[36]

New York.— People *v.* State Bd. of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646.

North Dakota.— State *v.* Carey, 2 N. D. 36, 49 N. W. 164, holding that where the remedy concerns the state as such, the writ should be applied for by the attorney-general, or if not by him, the application should at least have his assent.

Ohio.— State *v.* Preble County, 6 Ohio S. & C. Pl. Dec. 268, 4 Ohio N. P. 177, mandamus to compel filing of financial reports by county commissioners.

See 33 Cent. Dig. tit. "Mandamus," § 288.

However, an application for a writ of mandate to compel the performance of some act in which a large number of individuals are interested, which is made in the name of the people and is not signed by the attorney-general but by an attorney of the relator, will not be dismissed because not made in the name of someone interested, if the attorney-general unites in the brief in support of the application. People *v.* San Francisco, 36 Cal. 595.

Mandamus proceedings in the supreme court should be instituted by the attorney-general or with his consent, or his refusal to act or to consent be shown. People *v.* Pacheco, 29 Cal. 210; Wheeler *v.* Northern Colorado Irr. Co., 9 Colo. 248, 11 Pac. 103. And see *Ex p.* State, 113 Ala. 85, 21 So. 210; People *v.* Green, 29 Mich. 121.

The attorney-general has no standing to institute mandamus to compel a criminal examination of a city police justice where the alleged crime does not affect the public interest but is one against individual property interests (People *v.* Police Justice, 41 Mich. 224, 2 N. W. 25); nor to compel municipal officers to repay moneys into the city treasury (Atty.-Gen. *v.* Detroit, 107 Mich. 92, 64 N. W. 1057); nor to compel a railroad company to erect and maintain a station in a town pursuant to a contract between the company and the town, since a writ applied for by the attorney-general in behalf of the people may be issued only to subserve a public interest and to protect a public right (People *v.* Rome, etc., R. Co., 103 N. Y. 95, 8 N. E. 369). And see Com. *v.* New York, etc., R. Co., 138 Pa. St. 58, 20 Atl. 951. Nor can the attorney-general institute proceedings to determine who are entitled to vote at elections for trustees or at other corporate meetings of the stock-holders of a private stock corporation. Atty.-Gen. *v.* Albion Academy, etc., 52 Wis. 469, 9 N. W. 391.

Special counsel for the state railroad commissioners may by statute in Florida institute the proceeding when so directed by the commissioners. State *v.* Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225.

35. *Florida.*— State *v.* Croom, 48 Fla. 176, 37 So. 303 (mandamus by circuit court clerk to state controller to compel payment of funds for witnesses and jurors); Holland *v.* State, 23 Fla. 123, 1 So. 521 (mandamus by county board to compel sheriff to furnish convict labor).

Georgia.— Polk *v.* James, 68 Ga. 128 (mandamus by county road officers to compel purchase of county site); Manor *v.* McCall, 5 Ga. 522 (mandamus by court-house commissioners to compel levy of tax).

Indiana.— Wolfe *v.* State, 90 Ind. 16, mandamus by county treasurer to compel payment of county funds by state.

New York.— People *v.* Kingston, 101 N. Y. 82, 4 N. E. 348, county supervisors.

Texas.— Jernigan *v.* Finley, 90 Tex. 205, 38 S. W. 24, mandamus by county treasurer to compel state controller to issue warrant for county funds.

Washington.— State *v.* Headlee, 22 Wash. 126, 60 Pac. 126, mandamus by county board to compel auditor to perform duty.

See 33 Cent. Dig. tit. "Mandamus," § 288.

Mandamus does not lie at the instance of a clerk of one of the district courts of the parish of Orleans to regulate the jurisdiction of the several courts of the parish (State *v.* Walton, 24 La. Ann. 115); at the instance of a justice of the peace to compel the admission of another justice to a town board, where he has no right to act thereon (Grondin *v.* Logan, 88 Mich. 247, 50 N. W. 130); at the instance of a health board against a county to compel payment to individuals of debts incurred by the board (People *v.* Monroe County, 18 Barb. (N. Y.) 567); at the instance of a county board to compel a turnpike company to repair its bridge (State *v.* Zanesville, etc., Turnpike Road Co., 16 Ohio St. 308); or at the instance of a justice of the peace to compel payment of town orders due to third persons (Cook *v.* Peacham, 50 Vt. 231).

36. *Alabama.*— Benners *v.* State, 124 Ala. 97, 26 So. 942, mandamus to compel justice to issue warrant of arrest.

Connecticut.— Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336; State *v.* Fyler, 48 Conn. 145; State *v.* Hartford, etc., R. Co., 29 Conn. 538.

Kansas.— State *v.* Missouri Pac. R. Co., 33 Kan. 176, 5 Pac. 772; State *v.* Faulkner, 20 Kan. 541 (mandamus to compel performance of duty by officer of city in county); Bobbett *v.* State, 10 Kan. 9.

Michigan.— People *v.* Swift, 59 Mich. 529, 26 N. W. 694, mandamus to compel inferior court to try a criminal case.

(III) *Other Municipal Officers.* The rules governing the right of state[37] and county[38] officers generally to institute mandamus proceedings are likewise applicable to municipal officers in general.[39]

New York.— People *v.* State Bd. of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646. And see People *v.* Tracy, 1 Den. 617.

North Carolina.— Mott *v.* Forsyth County, 126 N. C. 866, 36 S. E. 330, mandamus by solicitor of superior court to compel county commissioners to draw a grand jury.

Pennsylvania.— Com. *v.* Marshall, 3 Wkly. Notes Cas. 182, mandamus to compel erection of court-house.

Washington.— State *v.* Yakima County Super. Ct., 4 Wash. 30, 29 Pac. 764.

United States.— Northern Pac. R. Co. *v.* Washington Terr., 142 U. S. 492, 12 S. Ct. 283, 35 L. ed. 1092 [*reversing* 3 Wash. Terr. 303, 13 Pac. 604], mandamus to compel railroad to erect and maintain station.

See 33 Cent. Dig. tit. "Mandamus," § 288.

However, an application by the state to the supreme court for a mandamus to a trial court in the body of which the state is not named as a party and which is signed by the solicitor for the county in which the cause is tried is not properly made and will be dismissed. *Ex p.* State, 113 Ala. 85, 21 So. 210.

Whether a deputy solicitor of a county has authority to institute mandamus proceedings in the name of the state in a criminal case admits of grave doubt. Shields *v.* State, 86 Ala. 584, 6 So. 271.

37. See *supra*, IX, C, 1, d, (I), (A).

38. See *supra*, IX, C, 1, d, (II), (A).

39. See cases cited *infra*, this note.

City officers may institute mandamus proceedings. People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769 (mandamus by mayor to secure the books of his office); Webster *v.* Wheeler, 119 Mich. 601, 78 N. W. 657 (mandamus by city collector to secure return of tax moneys paid by him by mistake); People *v.* Kent County, 38 Mich. 421 (city attorney); Hugg *v.* Camden, 39 N. J. L. 620 (mandamus by city attorney to compel council to sell land for taxes); Monongahela *v.* Monongahela Electric Light Co., 3 Pa. Dist. 63, 12 Pa. Co. Ct. 529 (mandamus by street committee to compel change of light poles); South St. Bridge Com'rs *v.* Philadelphia, 3 Brewst. (Pa.) 596, 7 Phila. 298 (mandamus by bridge commissioners to enforce payment of expenses); Com. *v.* Olyphant, 2 Lack. Leg. N. (Pa.) 234 (mandamus by burgess to compel council to perform duty); Com. *v.* Bullock, 2 Montg. Co. Rep. (Pa.) 5 (mandamus by council against mayor to compel signing of ordinance). However, a mayor authorized to certify a vacancy in the office of dispenser cannot bring mandamus to compel the probate judge to call a meeting of the county commissioners to furnish names for a successor to the office (Rose *v.* Lampley, (Ala. 1906) 41 So. 521); and a city police justice has no authority to proceed against the county supervisors to compel them to audit and allow to the city the fees charged by the Police Act upon the county in cases tried before him (People *v.* Kent County, *supra*); nor can bridge commissioners sue to enforce payment of interest on bonds issued to build the bridge (South St. Com'rs *v.* Philadelphia, *supra*). And a metropolitan district board of works, as the local sanitary authority, have no specific legal interest entitling them to a mandamus directing the local board of guardians to enforce the provisions of the Vaccination Acts. Reg. *v.* Lewisham Union, [1897] 1 Q. B. 498, 61 J. P. 151, 66 L. J. Q. B. 403, 76 L. T. Rep. N. S. 324, 45 Wkly. Rep. 346. And see Com. *v.* Olyphant, 2 Lack. Leg. N. (Pa.) 234; Reg. *v.* Gore Dist. Council, 5 U. C. Q. B. 357.

School officers may sue out a writ of mandamus.— State *v.* White, 116 Ala. 202, 23 So. 31 (mandamus by school treasurer); How *v.* State, 89 Ind. 249 (mandamus by school trustees to compel payment of money apportioned to a school township); Hooper *v.* Farren, 85 Md. 587, 37 Atl. 430 (mandamus by one school-board against another for possession of apartments and books and papers); State *v.* Bronson, 115 Mo. 271, 21 S. W. 1125 (mandamus by president of school-book commission to secure use of text-books); State *v.* Wallichs, 13 Nebr. 278, 13 N. W. 627. However, mandamus will not lie by two members of a board of school directors against a third to compel him to sign warrants in payment of teachers' salaries, since they have no beneficial interest in the subject of litigation. State *v.* James, 14 Wash. 82, 44 Pac. 116.

Township officers may sue out the writ. Cole *v.* State, 131 Ind. 591, 31 N. E. 458 (mandamus by town trustee to compel auditor to assess school tax); Pearsons *v.* Ranlett, 110 Mass. 118 (mandamus by the board of water commissioners of a town to compel the town treasurer to deliver water bonds to the board); Com. *v.* New York, etc., R. Co., 138 Pa. St. 58, 20 Atl. 951 [*affirming* 7 Pa. Co. Ct. 407] (mandamus by road officers to compel railroad company to restore highway); Whitemarsh Tp. *v.* Philadelphia, etc., R. Co., 8 Watts & S. (Pa.) 365 (mandamus by town supervisors to compel railroad to build highway); Walter *v.* Belding, 24 Vt. 658 (mandamus by town-clerk to secure records). However, a committee appointed by a town to audit the accounts of the overseers of the poor, and to demand and receive from them town books of account held by the overseers in their official capacity have no such property in the books as will authorize them to apply in their own names for a mandamus to compel the surrender of the books. Bates *v.* Plymouth, 14 Gray (Mass.) 163. And selectmen cannot bring mandamus against the town treasurer to compel to pay an order drawn by them on him for a town debt. Lexington *v.* Mulliken, 7

e. Right of Private Individual or Corporation to Enforce Public Right or Duty — (i) *General Rules.* The authorities are not in harmony as to the right of an individual to enforce a public right or to compel the performance of a public duty by mandamus. In some jurisdictions the proceedings must be instituted by the proper public officer, and a private individual is not entitled to the writ unless he has a special and peculiar interest in the enforcement of the right or the performance of the duty apart from his interest as one of the general public.[40] In other jurisdictions, on the other hand, if the public right or duty affects the people at large or the people of a particular governmental district, or a particular class of the people, such as voters or taxpayers, any one of the people at large or of the district affected, or any member of the class in question, may enforce the right or compel performance of the duty regardless of any special or peculiar

Gray (Mass.) 280. Nor can a town council compel the town treasurer to pay orders issued by it in favor of one who has furnished material to the town. Portland Stone Ware Co. *v.* Taylor, 17 R. I. 33, 19 Atl. 1086. The fact that a proceeding in the name of a town is brought by the town agent instead of the town clerk is not a fatal irregularity. Walter *v.* Belding, *supra.*

40. *Connecticut.*— Atwood *v.* Partree, 56 Conn. 80, 14 Atl. 85; Peck *v.* Booth, 42 Conn. 271; Lyon *v.* Rice, 41 Conn. 245. See, however, State *v.* Fyler, 48 Conn. 145.

Iowa.— Moore *v.* Cort, 43 Iowa 503; Welch *v.* Mahaska County, 23 Iowa 199. And see Boardman *v.* Marshalltown Grocery Co., 105 Iowa 445, 75 N. W. 343; State *v.* Davis County Judge, 2 Iowa 280. See, however, Hancock *v.* Perry Dist. Tp., 78 Iowa 550, 43 N. W. 527; Hightower *v.* Overhaulser, 65 Iowa 347, 21 N. W. 671; State *v.* Bailey, 7 Iowa 390; State *v.* Marshall County Judge, 7 Iowa 186.

Kansas.—Adkins *v.* Doolen, 23 Kan. 659; Reedy *v.* Eagle, 23 Kan. 254; Turner *v.* Jefferson County, 10 Kan. 16; Bobbett *v.* State, 10 Kan. 9. See, however, Carey Salt Co. *v.* Hutchinson, 72 Kan. 99, 82 Pac. 721.

Louisiana.— State *v.* Walton, 24 La. Ann. 115. And see State *v.* Dubuclet, 28 La. Ann. 85. See, however, Watts *v.* Carroll Police Jury, 11 La. Ann. 141.

Maine.— Robbins *v.* Bangor R., etc., Co., 100 Me. 496, 62 Atl. 136, 1 L. R. A. N. S. 963; Weeks *v.* Smith, 81 Me. 538, 18 Atl. 325; Mitchell *v.* Boardman, 79 Me. 469, 10 Atl. 452; Sanger *v.* Kennebec County, 25 Me. 291.

Massachusetts.— Pearsons *v.* Ranlett, 110 Mass. 118; *In re* Wellington, 16 Pick. 87, 26 Am. Dec. 631.

New Jersey.— State *v.* Hollinshead, 47 N. J. L. 439, 2 Atl. 244. And see State *v.* Williams, 41 N. J. L. 332, 32 Am. Rep. 219. *Contra,* State *v.* Camden City Council, 39 N. J. L. 620.

Pennsylvania.— Stegmaier *v.* Jones, 203 Pa. St. 47, 52 Atl. 56 [*affirming* 10 Kulp 496]; Com. *v.* Mitchell, 82 Pa. St. 343; Heffner *v.* Com., 28 Pa. St. 108; Com. *v.* Westfield Borough, 11 Pa. Co. Ct. 369; *In re* Forty Fort, 6 Kulp 65; Com. *v.* Park, 9 Phila. 481; Com. *v.* McCallin, 33 Pittsb. Leg. J. 152. See, however, Cheatham *v.* McCormick, 178 Pa. St. 186, 35 Atl. 631 [*reversing* 38 Wkly. Notes Cas. 124]; Kaine *v.* Com., 101 Pa. St. 490; Com. *v.* Bair, 5 Pa. Dist. 488; Com. *v.* Doyleston, 16 Pa. Co. Ct. 161; Com. *v.* Dickinson, 3 Brewst. 561.

Rhode Island.— Williams *v.* Champlin, 26 R. I. 416, 59 Atl. 75 (*semble*); O'Brien *v.* Pawtucket, 18 R. I. 113, 25 Atl. 914. See, however, Portland Stone Ware Co. *v.* Taylor, 17 R. I. 33, 19 Atl. 1086.

South Carolina.— State *v.* Charleston Light, etc., Co., 68 S. C. 540, 47 S. E. 979. But see Garrison *v.* Laurens, 55 S. C. 551, 33 S. E. 577.

England.— Reg. *v.* Frost, 8 A. & E. 822, 2 Jur. 966, 1 P. & D. 79, 1 W. W. & H. 664, 35 E. C. L. 861.

Canada.— Hislop *v.* McGillivray Tp. Corp., 17 Can. Sup. Ct. 479 [*affirming* 15 Ont. App. 687 [*affirming* 15 Ont. App. 687 (*affirming* 12 Ont. 749)]; Reg. *v.* Gore District Council, 5 U. C. Q. B. 357. See also on this question Reg. *v.* Bruce Municipal Council, 11 U. C. C. P. 575.

See 33 Cent. Dig. tit. "Mandamus," §§ 54 *et seq.*, 289. And see cases cited *infra,* note 43.

Beneficial interest.— In several states it is provided by statute that the writ may issue at the instance of the person "beneficially interested" in having the right enforced or the duty performed. Fritts *v.* Charles, 145 Cal. 512, 75 Pac. 1057; Ellis *v.* Workman, 144 Cal. 113, 77 Pac. 822; People *v.* Budd, (Cal. 1897) 47 Pac. 594; Colnon *v.* Orr, 71 Cal. 43, 11 Pac. 814; Linden *v.* Alameda County, 45 Cal. 6; Clough *v.* Curtis, 134 U. S. 361, 10 S. Ct. 573, 33 L. ed. 945 (Idaho); Chumasero *v.* Potts, 2 Mont. 242; Van Horn *v.* State, 51 Nebr. 232, 70 N. W. 941; State *v.* Gracey, 11 Nev. 223; State *v.* Carey, 2 N. D. 36, 49 N. W. 164; Heintz *v.* Moulton, 7 S. D. 272, 64 N. W. 135; Howard *v.* Huron, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493; Smith *v.* Lawrence, 2 S. D. 185, 49 N. W. 7. This is so in Ohio in certain cases (State *v.* Murphy, 3 Ohio Cir. Ct. 332, 2 Ohio Cir. Dec. 190; State *v.* Preble County, 6 Ohio S. & C. Pl. Dec. 228, 4 Ohio N. P. 180); and it was formerly so in Dakota territory (Territory *v.* Cole, 3 Dak. 301, 19 N. W. 418), and in Iowa (State *v.* Bailey, 7 Iowa 390; State *v.* Davis County Judge, 2 Iowa 280).

What constitutes special and peculiar interest see *infra,* IX, C, 1, e, (II).

interest apart from that common to the general public.[41] The true distinction seems to be that where the right or duty in question affects the state in its sovereign capacity as distinguished from the people at large, the proceedings must be

41. *Arkansas.*— Moses *v.* Kearney, 31 Ark. 261. And see Maddox *v.* Neal, 45 Ark. 121, 55 Am. Rep. 540.

California.— See Frederick *v.* San Luis Obispo, 118 Cal. 391, 50 Pac. 661; Eby *v.* Red Bank School Dist., 87 Cal. 166, 25 Pac. 240; Hyatt *v.* Allen, 54 Cal. 353. In this state the writ may issue on application of the person "beneficially interested." See *supra*, note 40.

Colorado.— Rizer *v.* People, 18 Colo. App. 40, 69 Pac. 315. And see Chapman *v.* People, 9 Colo. App. 268, 48 Pac. 153.

Delaware.— See Hawkins *v.* Dougherty, 9 Houst. 156, 18 Atl. 951.

District of Columbia.— U. S. *v.* Cortelyou, 26 App. Cas. 298. And see U. S. *v.* Hall, 7 Mackey 14, 1 L. R. A. 738.

Florida.— Florida Cent., etc., R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419; McConihe *v.* State, 17 Fla. 238. See, however, State *v.* Jefferson County Com'rs, 17 Fla. 707.

Georgia.— See Ford *v.* Cartersville, 84 Ga. 213, 10 S. E. 732.

Indiana.— Wampler *v.* State, 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829; Clarke County *v.* State, 61 Ind. 75; State *v.* Hamilton, 5 Ind. 310; Hamilton *v.* State, 3 Ind. 452. And see State *v.* Clinton County, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984; Decatur County Com'rs *v.* State, 86 Ind. 8; Crawford County *v.* Louisville, etc., Air-Line R. Co., 39 Ind. 192.

Kentucky.— See Catlettsburg *v.* Kinner, 13 Bush 334.

Missouri.— State *v.* St. Louis Public Schools, 134 Mo. 296, 35 S. W. 617, 56 Am. St. Rep. 503; State *v.* St. Louis School, 131 Mo. 505, 33 S. W. 3; State *v.* Francis, 95 Mo. 44, 8 S. W. 1; State *v.* Hannibal, etc., R. Co., 86 Mo. 13; State *v.* Noonan, 59 Mo. App. 524.

Montana.— Chumasero *v.* Potts, 2 Mont. 242. In this state the writ may issue on the application of the person "beneficially interested." See *supra*, note 40.

Nebraska.— State *v.* Osborn, 60 Nebr. 415, 83 N. W. 357 (*semble*); Cooperrider *v.* State, 46 Nebr. 84, 64 N. W. 372; State *v.* Kearney, 25 Nebr. 262, 41 N. W. 175, 13 Am. St. Rep. 493; State *v.* Willard, 11 Nebr. 104, 7 N. W. 743; State *v.* Shropshire, 4 Nebr. 411; People *v.* Buffalo County, 4 Nebr. 150. See, however, Morse *v.* Hitchcock County, 19 Nebr. 566, 27 N. W. 637; State *v.* Sovereign, 17 Nebr. 173, 22 N. W. 353. In this state the writ may issue on the application of the person "beneficially interested." See *supra*, note 40.

Nevada.— See State *v.* Gracey, 11 Nev. 223. In this state the writ may issue on the application of the person "beneficially interested." See *supra*, note 40.

Ohio.— State *v.* Nash, 66 Ohio St. 612, 64 N. E. 558; State *v.* Tanzey, 49 Ohio St. 656, 32 N. E. 750; State *v.* Brown, 38 Ohio St. 344. And see State *v.* Columbus Bd. of Education, 35 Ohio St. 368; State *v.* Fayette County, 22 Ohio Cir. Ct. 433, 12 Ohio Cir. Dec. 316. It has been held, however, that under a statute which provides that the writ may issue on information of "the person beneficially interested," the writ will not issue to compel the performance of a purely public duty at the instance of a private citizen having no interest beyond that shared in common with other citizens. State *v.* Murphy, 3 Ohio Cir. Ct. 332, 2 Ohio Cir. Dec. 190; State *v.* Preble County Com'rs, 6 Ohio S. & C. Pl. Dec. 228, 4 Ohio N. P. 180.

Oregon.— State *v.* Grace, 20 Oreg. 154, 25 Pac. 382; State *v.* Ware, 13 Oreg. 380, 10 Pac. 885.

South Dakota.— State *v.* Menzie, 17 S. D. 535, 97 N. W. 745; State *v.* Lien, 9 S. D. 297, 68 N. W. 748. And see Heintz *v.* Moulton, 7 S. D. 272, 64 N. W. 135; Howard *v.* Huron, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493. In this state the writ may issue on the application of the person "beneficially interested." See *supra*, note 40.

Washington.— State *v.* Mason, (1907) 88 Pac. 126. And see State *v.* Yakey, (1906) 85 Pac. 990; State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515.

West Virginia.— Payne *v.* Staunton, 55 W. Va. 202, 46 S. E. 927 (*semble*); State *v.* Wyoming County Ct., 47 W. Va. 672, 35 S. E. 959.

Wisconsin.— State *v.* Cornwall, 97 Wis. 565, 73 N. W. 63.

See 33 Cent. Dig. tit. "Mandamus," §§ 54 *et seq.*, 289. And see cases cited *infra*, note 43.

Right as dependent on status as citizen, resident, or taxpayer.— One who is not a citizen cannot enforce a public right or compel the performance of a public duty, where he has no special and peculiar interest in the matter. State *v.* Osborn, 60 Nebr. 415, 83 N. W. 357; People *v.* Colorado Cent. R. Co., 42 Fed. 638. So a person who is not a resident in the territory to be embraced in a proposed new school-district cannot petition for mandamus to compel the formation of the district (Township 14 School Trustees *v.* People, 71 Ill. 559); and a taxpayer of a county is not beneficially interested in having a vote on county division recanvassed where he does not reside therein (Territory *v.* Cole, 3 Dak. 301, 19 N. W. 418). See, however, Brooks *v.* Singer, 162 Ind. 568, 70 N. E. 980, holding that a legal voter of the state at the time the last preceding enumeration of the male inhabitants for legislative purposes was taken may maintain suit to test the constitutionality of an act of the general assembly based thereon apportioning the number of senators and representatives of the state, although the wrong complained of does

instituted by the proper public officer;[42] but that if the general public as distinguished from the state in its sovereign capacity is affected, any member of the state may sue out the writ.[43] However this may be, it is unquestionably the law

not exist in his own senatorial or representative district. One who is not a taxpayer cannot compel the collection of a tax. Garrison *v.* Laurens, 55 S. C. 551, 33 S. E. 577.

The payment of awards for damages for laying out a highway is not a matter of public interest entitling a freeholder and taxpayer to maintain a proceeding to compel payment. People *v.* Morgan, 97 N. Y. App. Div. 267, 89 N. Y. Suppl. 832.

42. *Illinois.*— Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824 (*semble*); Hall *v.* Mann, 96 Ill. App. 659 (*semble*).

Maryland.— Pumphrey *v.* Baltimore, 47 Md. 145, 28 Am. Rep. 446, *semble*.

Michigan.— Berube *v.* Wheeler, 128 Mich. 32, 87 N. W. 50 (*semble*); Elliott *v.* Detroit, 121 Mich. 611, 84 N. W. 820 (*semble*). And see Thomas *v.* Hamilton, 101 Mich. 387, 59 N. W. 658; Smith *v.* Saginaw, 81 Mich. 123, 45 N. W. 964; People *v.* Green, 29 Mich. 121; People *v.* State Prison Inspectors, 4 Mich. 187; People *v.* State University, 4 Mich. 98.

Minnesota.— State *v.* Archibald, 43 Minn. 328, 45 N. W. 606 (*semble*); State *v.* Weld, 39 Minn. 426, 40 N. W. 561 (*semble*).

New York.— People *v.* State Bd. of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646.

North Dakota.— State *v.* Carey, 2 N. D. 36, 49 N. W. 164, *semble*.

Texas.— Lewright *v.* Love, 95 Tex. 157, 65 S. W. 1089.

Virginia.— Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775, *semble*.

United States.— Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. ed. 428 [*affirming* 11 Fed. Cas. No. 5,950, 3 Dill. 515], *semble*.

See 33 Cent. Dig. tit. "Mandamus," §§ 54 *et seq.*, 289. And see cases cited *supra*, note 40.

43. *Illinois.*— Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824; Hall *v.* Mann, 96 Ill. App. 659. And see People *v.* Harris, 203 Ill. 272, 67 N. E. 785, 96 Am. St. Rep. 304; People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Glencoe *v.* People, 78 Ill. 382; Hall *v.* People, 57 Ill. 307; Ottawa *v.* People, 48 Ill. 233; Higgins *v.* Chicago, 18 Ill. 276; Pike County Com'rs *v.* People, 11 Ill. 202. See, however, People *v.* Vermilion County, 47 Ill. 256.

Maryland.— Pumphrey *v.* Baltimore, 47 Md. 145, 28 Am. Rep. 446.

Michigan.— Berube *v.* Wheeler, 128 Mich. 32, 87 N. W. 50; Elliott *v.* Detroit, 121 Mich. 611, 84 N. W. 820. And see Brophy *v.* Schindler, 126 Mich. 341, 85 N. W. 1114; People *v.* Detroit Bd. of Education, 18 Mich. 400.

Minnesota.— State *v.* Archibald, 43 Minn. 328, 45 N. W. 606; State *v.* Weld, 39 Minn. 426, 40 N. W. 561.

New York.— People *v.* State Bd. of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646, *semble*. And see People *v.* Keating, 168 N. Y. 390, 61 N. E. 637 [*reversing* 62 N. Y. App. Div. 348, 71 N. Y. Suppl. 97]; People *v.* Northern Cent. R. Co., 164 N. Y. 289, 58 N. E. 138; People *v.* Rice, 144 N. Y. 249, 39 N. E. 88; People *v.* Queens County, 142 N. Y. 271, 36 N. E. 1062 [*reversing* 71 Hun 97, 24 N. Y. Suppl. 563]; Baird *v.* Kings County, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81; People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659; People *v.* Sullivan County, 56 N. Y. 249; People *v.* Halsey, 37 N. Y. 344, 4 Transcr. App. 261 [*affirming* 53 Barb. 547, 36 How. Pr. 487]; People *v.* Swanstrom, 79 N. Y. App. Div. 94, 79 N. Y. Suppl. 934; People *v.* Manning, 37 N. Y. App. Div. 141, 55 N. Y. Suppl. 781; People *v.* Meakin, 56 Hun 626, 10 N. Y. Suppl. 161 [*affirmed* in 123 N. Y. 660, 26 N. E. 749]; People *v.* Daley, 37 Hun 461; People *v.* Rochester, etc., R. Co., 14 Hun 371 [*affirmed* in 76 N. Y. 294]; People *v.* Westchester County, 11 Hun 306; People *v.* Guggenheimer, 28 Misc. 735, 59 N. Y. Suppl. 913; People *v.* Van Wyck, 27 Misc. 439, 59 N. Y. Suppl. 134; Matter of Loader, 14 Misc. 208, 35 N. Y. Suppl. 996, 999; People *v.* Richmond, 5 Misc. 26, 25 N. Y. Suppl. 144; *In re* Whitney, 3 N. Y. Suppl. 838; People *v.* Buffalo, 16 Abb. N. Cas. 96; People *v.* Collins, 19 Wend. 56. See, however, People *v.* Hayt, 66 N. Y. 606; People *v.* Interurban St. R. Co., 85 N. Y. App. Div. 407, 83 N. Y. Suppl. 622 (holding that a resident and citizen is not entitled to a writ of mandamus requiring a street railroad corporation operating connecting lines of railway in the city of New York to perform its statutory obligation to carry for a single fare any person desiring to make a continuous trip over connecting lines, where such citizen has never been denied the right which he seeks to enforce, and the proceeding is instituted in behalf of the public generally, and that under the Railroad Law the railroad commissioners and the attorney-general have ample power to protect the rights of the public in the event of the refusal of the railroad corporation to perform the duty); People *v.* Tracy, 1 Den. 617.

North Dakota.— State *v.* Carey, 2 N. D. 36, 49 N. W. 164. In this state the writ may issue on the application of the person "beneficially interested." See *supra*, note 40.

Texas.— Kimberly *v.* Morris, 87 Tex. 637, 31 S. W. 808; State *v.* San Antonio St. R. Co., 10 Tex. Civ. App. 12, 30 S. W. 266. And see Porter *v.* State, 78 Tex. 591, 14 S. W. 794; Sansom *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505.

Virginia.— Richmond, etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775. And see Clay *v.* Ballard, 87 Va. 787, 13 S. E. 262; Wise *v.* Bigger, 79 Va. 269.

United States.— Union Pac. R. Co. *v.* Hall,

that if a private individual has a special and peculiar interest in the enforcement of a public right or the performance of a public duty apart from the interest that he has as a member of the people at large, he is entitled to protect or enforce it by mandamus;[44] and even where no such interest exists, yet if the officer whose duty it is to institute the proceedings is absent[45] or declines to move,[46] the individual may do so. Although the right or duty sought to be enforced is a public one, yet if the public interest is not injuriously affected by a breach thereof, a private individual cannot enforce it solely in behalf of the public;[47] and if an individual sues, not in behalf of the public, but solely in his own behalf, he must have a special pecuniary interest in the matter, and a clear legal right to the relief asked, else the writ will not issue.[48] Where, however, jurisdiction of a writ upon the relation of a private person is assumed because the subject-matter affects the prerogatives of the state a settlement between the relator and the respondent is immaterial.[49]

(II) *Sufficiency of Interest.* No general rule can be laid down as to what constitutes an interest sufficient to entitle a private individual to institute mandamus proceedings to enforce a public right or compel the performance of a public duty. A great variety of public rights and duties are enforceable by mandamus, and the sufficiency of the interest of a private individual therein to entitle him to this remedy depends upon the nature of the right or duty sought to be enforced in the particular case; in the note below[50] will be found numerous

91 U. S. 343, 23 L. ed. 428 [*affirming* 11 Fed. Cas. No. 5,950, 3 Dill. 515].

See 33 Cent. Dig. tit. "Mandamus," §§ 54 *et seq.*, 289. And see cases cited *supra*, note 41.

44. *Iowa.*— Windsor *v.* Polk County, 115 Iowa 738, 87 N. W. 704.

Maine.— Robbins *v.* Bangor, etc., R. Co., 100 Me. 496, 62 Atl. 136, 1 L. R. A. N. S. 963; Weeks *v.* Smith, 81 Me. 538, 18 Atl. 325.

Maryland.— Pumphrey *v.* Baltimore, 47 Md. 145, 28 Am. Rep. 446.

Nebraska.— State *v.* Crete, 32 Nebr. 568, 49 N. W. 272.

United States.— Louisiana Bd. of Liquidation *v.* McComb, 92 U. S. 531, 23 L. ed. 623.

See 33 Cent. Dig. tit. "Mandamus," §§ 54 *et seq.*, 289.

The fact that a public officer is entitled to institute the proceeding does not defeat the right of a specially interested individual to bring it. State *v.* Bloom, 19 Nebr. 562, 27 N. W. 638.

What constitutes special and peculiar interest see *infra*, IX, C, 1, e, (II).

45. People *v.* State University, 4 Mich. 98.

46. *Michigan.*— Giddings *v.* Blacker, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402; People *v.* State Bd. of Auditors, 42 Mich. 422, 4 N. W. 274; People *v.* Green, 29 Mich. 121; People *v.* State University, 4 Mich. 98.

Nebraska.— State *v.* Sovereign, 17 Nebr. 173, 22 N. W. 353. And see Van Horn *v.* State, 51 Nebr. 232, 70 N. W. 941; Morse *v.* Hitchcock County, 19 Nebr. 566, 27 N. W. 637.

Rhode Island.— See Williams *v.* Champlin, 26 R. I. 416, 59 Atl. 75.

Washington.— State *v.* Yakey, (1906) 85 Pac. 990.

England.— See Reg. *v.* Frost, 8 A. & E. 822, 2 Jur. 966, 1 P. & D. 75, 1 W. W. & H. 664, 35 E. C. L. 861.

See 33 Cent. Dig. tit. "Mandamus," §§ 54 *et seq.*, 289.

47. Crane *v.* Chicago, etc., R. Co., 74 Iowa 330, 37 N. W. 397, 7 Am. St. Rep. 479. And see Payne *v.* Staunton, 55 W. Va. 202, 46 S. E. 927. *Compare* People *v.* Morgan, 97 N. Y. App. Div. 267, 89 N. Y. Suppl. 832; People *v.* New York, 20 Misc. (N. Y.) 189, 45 N. Y. Suppl. 900.

48. Van Horn *v.* State, 51 Nebr. 232, 70 N. W. 941; State *v.* Benton, 31 Nebr. 44, 47 N. W. 477; State *v.* Kearney, 25 Nebr. 262, 41 N. W. 175, 13 Am. St. Rep. 493; Payne *v.* Staunton, 55 W. Va. 202, 46 S. E. 927. *Compare* People *v.* Morgan, 97 N. Y. App. Div. 267, 89 N. Y. Suppl. 832; People *v.* New York, 20 Misc. (N. Y.) 189, 45 N. Y. Suppl. 900.

Clear legal right to relief see *supra*, II, B, 1.

Sufficiency of interest see *infra*, IX, C, 1, e, (II).

49. State *v.* Doyle, 40 Wis. 175, 22 Am. Rep. 692.

50. Sufficiency of interest — *In general.*— It has been held that any citizen (State *v.* Bailey, 7 Iowa 390; State *v.* Marshall County, 7 Iowa 186) or elector (Chumasero *v.* Potts, 2 Mont. 242) is "beneficially interested" in having a public duty performed, and hence may apply for mandamus; that a resident and elector of a city who owns property therein which is taxed annually for municipal purposes is "beneficially interested" in the question of the continuation of the city, and hence may petition for mandamus to compel the board of trustees to call an election on the question of disincorporating the city (Frederick *v.* San Luis Obispo, 118 Cal. 391, 50 Pac. 661); that a trustee of an express trust has such bene-

applications of the principle, as in the case of elections for public office, issuance

ficial interest in the trust estate as to enable him to compel the surveyor-general to allow him to contest the application of a third person for the purchase of the land held in trust (Tyler *v.* Houghton, 25 Cal. 26); that a lumberman has a special interest in having a canal upon which he transports lumber kept open for navigation by the canal company (Savannah, etc., Canal Co. *v.* Shuman, 91 Ga. 400, 17 S. E. 937, 44 Am. St. Rep. 43); that inhabitants of a parish who are put to inconvenience and injury in reaching the court-house have such an interest in the erection of a new one in a proper place as to authorize a mandamus to compel the construction of the new court-house (Watts *v.* Carroll Police Jury, 11 La. Ann. 141); that an individual has sufficient interest to compel a water company, a public service corporation, to supply water to him (Robbins *v.* Bangor R., etc., Co., 100 Me. 496, 62 Atl. 136, 1 L. R. A. 963); that one who has complied with the statute in making a plat of land and has made the streets thereon to correspond with the general plan of the city has sufficient interest to compel the board of public works to approve his plat (Campau *v.* Detroit Bd. of Public Works, 86 Mich. 372, 49 N. W. 39); that a chattel mortgagee has a special interest entitling him to compel the proper officer to file the mortgage (Pistorius *v.* Stempel, 81 Mich. 133, 45 N. W. 968); that a person in whose favor a judgment has been rendered by a justice of the peace has a right to have an appeal to the circuit court dismissed for failure of appellant to pay the justice his fee for making a return as a condition precedent to the perfection of the appeal, and hence is entitled to mandamus to review the action of the circuit judge in taking jurisdiction of the appeal (People *v.* Allegan Cir. Judge, 29 Mich. 487); that a person in possession of a vault under a sidewalk, and therefore charged with the duty of keeping it in repair, has a sufficient interest to entitle him to maintain mandamus against the commissioner of public works to permit him to make the repairs (People *v.* Collis, 17 N. Y. App. Div. 448, 45 N. Y. Suppl. 282); that a Union veteran having a right to a preference in employment in the civil service has a special interest entitling him to enforce that right (Matter of Sullivan, 55 Hun (N. Y.) 285, 8 N. Y. Suppl. 401); that the writ lies by resident landowners to enforce the act as to fencing and keeping stock (Perry *v.* Chatham County, 130 N. C. 558, 41 S. E. 787); and that the voters residing in territory which they wish to have excluded from city limits have sufficient interest to entitle them to compel an election on the question of exclusion (Sansom *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505). On the other hand it has been held that an elector of a county is not *ipso facto* "beneficially interested" in an election on the question of the removal of the county-seat (Linden *v.* Alameda County, 45 Cal. 6); that a stock-holder in various banks cannot maintain the writ to rescind an order of bank examiners fixing their compensation for examinations (State *v.* Benton, 31 Nebr. 44, 47 N. W. 477); and that a taxpayer has no special interest in having the county clerk pay the fees of his office to the county collector as required by law (State *v.* Hollinshead, 47 N. J. L. 439, 2 Atl. 244).

As to carriers.— A coal-land owner has sufficient interest to compel a railroad company to furnish cars (Loraine *v.* Pittsburg, etc., R. Co., 205 Pa. St. 132, 54 Atl. 580, 61 L. R. A. 502); and a merchant desiring to ship goods may compel an express company to receive and carry them (Southern Express Co. *v.* Rose Co., 124 Ga. 581, 53 S. E. 185, 5 L. R. A. N. S. 619). A citizen of a municipality may apply for a writ to compel a street railway company to comply with conditions as to rate of fares, etc. People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650. Railroads generally see *infra*, this note.

As to criminal proceedings.— It has been held that one who has filed a criminal complaint with a magistrate has sufficient interest to compel him to act thereon. State *v.* Yakey, (Wash. 1906) 85 Pac. 990. *Contra*, Fritts *v.* Charles, 145 Cal. 512, 78 Pac. 1057. And see Mitchell *v.* Boardman, 79 Me. 469, 10 Atl. 452. Inspection of record to obtain evidence see *infra*, this note.

As to elections for public office.— A candidate for office has a special interest entitling him to compel a canvass of the returns. Shull *v.* Gray County, 54 Kan. 101, 37 Pac. 994; *In re* Contested Elections, 1 Brewst. (Pa.) 67, 4 Phila. 362; Smith *v.* Lawrence, 2 S. D. 185, 49 N. W. 7. So petitioners nominating a candidate have such special interest in having his name appear on the official ballots as to entitle them to require the secretary of state to certify the fact of his nomination to the various county clerks. Simpson *v.* Osborn, 52 Kan. 328, 34 Pac. 747. It has been held, however, that candidates cannot, after elections which resulted in no choice, require the proper authority to order another election. O'Brien *v.* Pawtucket, 18 R. I. 113, 25 Atl. 914.

As to issuance and payment of bonds, orders, and warrants.— One who has sold lands to a municipal corporation may, with the corporation's consent, compel the proper officer to issue bonds to him for the price (People *v.* Brennan, 39 Barb. (N. Y.) 522); and a railroad company may compel a county to issue bonds in payment of a stock subscription (Smith *v.* Bourbon County, 127 U. S. 105, 8 S. Ct. 1043, 32 L. ed. 73). And municipal bondholders may compel the payment of interest on the bonds. South St. Bridge Com'rs *v.* Philadelphia, 3 Brewst. (Pa.) 596, 7 Phila. 298. A public school-teacher may compel the issuance of a warrant for his salary. State *v.* James, 14 Wash.

and payment of bonds, orders and warrants, management of schools, publications

82, 44 Pac. 116. And one who holds an order on a municipal treasurer may compel payment thereof. State *v.* Bloom, 19 Nebr. 562, 27 N. W. 638; Portland Stone Ware Co. *v.* Taylor, 17 R. I. 33, 19 Atl. 1086 (order for payment of price of material furnished); State *v.* Haben, 22 Wis. 660. See, however, Foote *v.* Noxubee County, 67 Miss. 156, 6 So. 612 (holding that, although the holder of an order on the supervisors for the issuance of a warrant for part of a debt due by the county for building a bridge is to that extent the equitable assignee of the debt, he cannot by mandamus compel the board to make an allowance and issue a warrant in his favor for the amount named in the order); Elser *v.* Ft. Worth, (Tex. Civ. App. 1894) 27 S. W. 739 (holding that one who has contracted to sell bonds to a city, which, however, are not to be delivered until payment of warrants issued for the price, cannot compel payment of the warrants, there having been no exchange of the bonds and warrants).

As to issuance of execution.— A judgment plaintiff is specially interested in having the proper officer issue execution according to law. Moore *v.* Muse, 47 Tex. 210. And see Pistorius *v.* Stempel, 81 Mich. 133, 45 N. W. 968.

As to liquor laws.— A retail liquor dealer is "beneficially interested" in having a license issued to him, and hence he may compel it (Territory *v.* McPherson, 6 Dak. 27, 50 N. W. 351); and a liquor licensee who is about to be subjected to an additional license-tax under a statute alleged by him to have been passed in an illegal manner and to cure which someone had without authority made false entries in the legislative journal has sufficient interest to entitle him to require the secretary of state to erase such entries (State *v.* Wilson, 123 Ala. 259, 26 So. 482, 45 L. R. A. 772). But a private citizen has no special interest in having a police judge issue on his complaint a warrant for search of premises for intoxicating liquors. Mitchell *v.* Boardman, 79 Me. 469, 10 Atl. 452. Inspection of records relating to intoxicating liquors see *infra*, this note.

As to payment of judgment against municipality.— It has been held that the assignee of a judgment against a municipality has an interest entitling him to compel payment thereof. Chicago *v.* Sansum, 87 Ill. 182. See, however, Schuck *v.* Pittsburgh, 7 Pa. Cas. 583, 11 Atl. 651.

As to public contracts.— A person who would be a competent bidder under a state law for letting a contract has sufficient interest to compel state officers to carry out the law (People *v.* Board of State Auditors, 42 Mich. 422, 4 N. W. 274); and the lowest bidder for a public contract may compel the letting of the contract to him (People *v.* Buffalo Co., 4 Nebr. 150), unless the matter rests in the discretion of the proper public officers (Com. *v.* Mitchell, 82 Pa. St. 343). So one who is employed to furnish evidence necessary to authorize the county auditor to subject to taxation property improperly omitted from the tax duplicate, and who is to receive for his services a percentage of the tax collected on the restored property, has an interest sufficient to entitle him to compel the auditor to act on the evidence so furnished. State *v.* Crites, 43 Ohio St. 142, 26 N. E. 1052. Paving contracts see *infra*, this note. Payment of price of property sold to municipality see *supra*, this note.

As to public records.— It has been held that any citizen, although having no special interest, may compel the custodian of a public record to allow him to inspect it and to furnish him copies thereof. Com. *v.* Bair, 5 Pa. Dist. 488; Clay *v.* Ballard, 87 Va. 787, 13 S. E. 262. See, however, Colnon *v.* Orr, 71 Cal. 43, 11 Pac. 814, holding that a citizen does not *ipso facto* have a beneficial interest in the inspection of a public record, so as to entitle him to petition for mandamus to obtain inspection. And see cases cited *infra*, this paragraph. In any event a citizen is entitled to the writ where he has an interest in the matter. Boylan *v.* Warren, 39 Kan. 301, 18 Pac. 174, 7 Am. St. Rep. 551; State *v.* Williams, 41 N. J. L. 332, 32 Am. Rep. 219. And see U. S. *v.* Hall, 7 Mackey (D. C.) 14, 1 L. R. A. 738, holding that an attorney who has requested, in behalf of a client, a certified copy of an abandoned or rejected application for a patent has such an interest as to entitle him to compel the commissioner of patents to furnish the copy. It has been held, however, that mandamus will not lie to allow the inspection of records by a private individual for the sole purpose of obtaining evidence for the institution of a criminal prosecution. Payne *v.* Staunton, 55 W. Va. 202, 46 S. E. 927. And see Thomas *v.* Hamilton, 101 Mich. 387, 59 N. W. 658, holding that mandamus will not lie at the instance of a private individual to compel a druggist to allow relator to examine his record of sales of liquor. But see State *v.* Williams, *supra*, holding that a citizen desiring to ascertain whether the provisions of the city charter in regard to licensing saloons have been observed, with a view of securing due obedience to the law, is entitled to an inspection of the letters of recommendation filed with the collector of taxes as the basis for the issuance of licenses.

As to publication of laws and official reports.— It has been held that the proprietor of a newspaper has no such interest in the publication of session laws as to entitle him to compel publication by mandamus. Welch *v.* Mahaska County, 23 Iowa 199. On the other hand it has been held that mandamus will lie to compel county commissioners to make the necessary report of their financial transactions on the application of publishers of newspapers having the necessary circulation to entitle them to publish the report.

of laws and official reports, payment of judgments against municipalities, assessment and collection of taxes, etc.

State *v.* Fayette County, 22 Ohio Cir. Ct. 433, 12 Ohio Cir. Dec. 316.

As to railroads.— An abutter has sufficient interest to compel a street railroad company to operate its line. State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515. And by statute in Pennsylvania "two reputable citizens resident in the region traversed by the line" of a street railway company have a standing to compel the attorney-general to institute proceedings against the company to compel it to perform its statutory duties. Cheetham *v.* McCormick, 178 Pa. St. 186, 35 Atl. 631 [*reversing* 38 Wkly. Notes Cas. 124]. Issuance of municipal bonds in payment of stock subscription see *supra*, this note. Railroad aid tax see *infra*, this note. Railroad as carrier see *supra*, this note.

As to schools.—Resident taxpayers and voters having children of scholastic age have sufficient interest to compel the appointment of school trustees or directors (Porter *v.* State, 78 Tex. 591, 14 S. W. 794), and to compel the trustees or directors to perform their duties (Hightower *v.* Overhaulser, 65 Iowa 347, 21 N. W. 671; State *v.* Columbus Bd. of Education, 35 Ohio St. 368. And see Hancock *v.* Perry Dist. Tp., 78 Iowa 550, 43 N. W. 527). See also Brophy *v.* Schindler, 126 Mich. 341, 85 N. W. 1114. Thus such persons may compel such officers to perform their duties with reference to the establishment of schools (Maddox *v.* Neal, 45 Ark. 121, 55 Am. Rep. 540), the location of school-houses (Eby *v.* Red Bank School Dist., 87 Cal. 166, 25 Pac. 240), and the removal of school-houses (Heintz *v.* Moulton, 7 S. D. 272, 64 N. W. 135); and a father may compel the admission of his child to a public school (Cartwright *v.* Coffeyville Bd. of Education, (Kan. 1906) 84 Pac. 382; People *v.* Detroit Bd. of Education, 18 Mich. 400; Kaine *v.* Com., 101 Pa. St. 490. And see Weir *v.* State, 161 Ind. 435, 68 N. E. 1023). Issuance of warrant in payment of teacher's salary see *supra*, this note.

As to streets, highways, and bridges.— Abutting owners have a special interest in having the road officers enter into a paving contract (Com. *v.* Dickinson, 3 Brewst. (Pa.) 561), and in having the improvement done in accordance with the petition therefor (Carey Salt Co. *v.* Hutchinson, 72 Kan. 99, 82 Pac. 721); and also in having the street or road kept in repair (Catlettsburg *v.* Kinner, 13 Bush (Ky.) 334; Hammar *v.* Covington, 3 Metc. (Ky.) 494; Com. *v.* Doylestown, 16 Pa. Co. Ct. 161). But petitioners for a road as such have no greater interest than the rest of the community in procuring its location (Sanger *v.* Kennebec County, 25 Me. 291. But see Throckmorton *v.* State, 20 Nebr. 647, 31 N. W. 232), and an individual cannot compel the opening of an established road merely because the public would thereby be relieved of the necessity of passing over his land (Moon *v.* Cort, 43 Iowa 503); and the writ will not lie to compel the removal of obstructions from an abandoned road, although it affords the only access to relator's farm, the injury being to him only as one of the public (Atwood *v.* Partree, 56 Conn. 80, 14 Atl. 85). Mandamus to compel the erection of approaches to a bridge will not be granted on the petition of a private relator where the substance of the injury is that customers are kept from relator's mill by want of such approaches (Com. *v.* Westfield Borough, 11 Pa. Co. Ct. 369); but the writ will lie to compel township officers to rebuild a bridge which has been maintained for forty years, where the river over which it was built divides the farms of some of the petitioners, and some of them live on the side of the river opposite to the school-house, so that their children must needs go a considerable distance out of their way to get to school (Brophy *v.* Schindler, 126 Mich. 341, 85 N. W. 1114). Street assessments see *infra*, this note.

As to taxation.— A taxpayer is sufficiently interested in having all the property of the district assessed to petition for mandamus to compel such assessment. Hyatt *v.* Allen, 54 Cal. 353; Ford *v.* Cartersville, 84 Ga. 213. With stronger reason a creditor of a city may compel the levy of a tax to pay its debts. Howard *v.* Huron, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493. So a taxpayer has sufficient interest to compel the collection of taxes. State *v.* Fyler, 48 Conn. 145; Hawkins *v.* Dougherty, 9 Houst. (Del.) 156, 18 Atl. 951; State *v.* Gracey, 11 Nev. 223. See, however, State *v.* Dubuclet, 28 La. Ann. 85; State *v.* Walton, 24 La. Ann. 115, holding that a taxpayer has no special interest entitling him to compel the administrator of finance to bring suit against delinquent taxpayers in the proper court instead of in another court in which the administrator proposes to sue, although a suit in the latter court will involve the city in debt. And the beneficiaries of a street assessment may likewise compel its collection. Higgins *v.* Chicago, 18 Ill. 276. A taxpayer has sufficient interest to compel the levy and collection of a railroad aid tax (State *v.* Clinton County, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984; Decatur County *v.* State, 86 Ind. 8; Crawford County *v.* Louisville, etc., R. Co., 39 Ind. 192), and holders of bonds issued by a municipality in payment of its subscription to railroad stock may compel the levy and collection of a tax to pay interest thereon (Maddox *v.* Graham, 2 Metc. (Ky.) 56); but the railroad company cannot compel the levy and collection of a tax to enable the municipality to take stock (Crawford County *v.* Louisville, etc., R. Co., *supra*. *Compare* Harwood, etc., R. Co. *v.* Case, 37 Iowa 692). One who in good faith attends an advertised sale of property for delinquent taxes at the time named in the advertisement and requests the

f. Joinder.[51] Persons having a joint or common interest in the issuance of a writ of mandamus may join in an application therefor,[52] and are generally required to do so.[53] Persons having several and distinct interests, on the other hand, cannot join in the application,[54] and accordingly any one may bring a separate

treasurer to offer the delinquent property for sale and demands the right to bid therefor has such an interest therein as will entitle him to compel the treasurer to offer the property for sale (State *v.* Farney, 36 Nebr. 537, 538, 54 N. W. 862); and a person complying with the statutory requirements has sufficient interest to compel the state auditor to convey to him such title as the state may have acquired to lands sold for taxes (McCulloch *v.* Stone, 64 Miss. 278, 8 So. 236). Public contract in relation to taxation see *supra*, this note.

Interest as affected by status as citizen, resident, taxpayer, or voter see cases cited *supra*, same note.

51. **Joinder of causes of action** see *infra*, IX, E, 3, e.

Joinder of respondents see *infra*, IX, C, 2, b.

52. *Florida.*— State *v.* Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225, holding that special counsel for the state railroad commissioners may be joined with the attorney-general in a proceeding to enforce regulations of the commissioners.

Iowa.— Eden Independent Dist. No. 2 *v.* Rhodes, 88 Iowa 570, 55 N. W. 524, holding that a school-district and a teacher may join in compelling the president of the school-board to approve and file a contract between the teacher and the district.

Louisiana.— State *v.* State Tax Collector, 39 La. Ann. 530, 2 So. 59, holding that several taxpayers having a common interest in the enforcement of an ordinance for the reduction of assessments may unite in seeking like relief from the same injury on the same grounds.

New York.— See People *v.* Ontario County Sup'rs, 85 N. Y. 323 [*reversing* 17 Hun 501].

South Carolina.— State *v.* Melver, 2 S. C. 25, holding that the seller of corporate stock may join with the buyer in a proceeding to compel the corporation to transfer the stock on its books.

West Virginia.— Payne *v.* Staunton, 55 W. Va. 202, 46 S. E. 927, holding that several persons who make common application to a clerk of court for inspection of public records and are refused it may unite in mandamus to compel the clerk to allow such inspection.

See 33 Cent. Dig. tit. "Mandamus," § 290.

Joinder of candidates or nominees.— Candidates for separate offices at the same election may join in a proceeding to compel a canvass of the returns. Lehman *v.* Pettingell, (Colo. 1907) 89 Pac. 48 (candidates for county treasurer and sheriff); State *v.* Kendall, (Wash. 1906) 87 Pac. 821 (candidates for city council). So nominees for one office may join in a proceeding to have their names placed on the official ballot. State *v.* Mount, 151 Ind. 679, 51 N. E. 417, (1898) 52 N. E. 407.

Joinder of officers who have been removed. — It has been held that the members of an official board or the majority of them, having been illegally removed from office by the same order, may collectively compel their reinstatement. State *v.* Shakspeare, 43 La. Ann. 92, 8 So. 893; Hooper *v.* Farnen, 85 Md. 587, 37 Atl. 430. *Contra*, U. S. *v.* McKelden, MacArthur & M. (D. C.) 162 (*semble*); Rex *v.* Andover, Holt K. B. 441, 12 Mod. 332, Salk. 433.

53. *Arkansas.*— Lee County *v.* State, 36 Ark. 276, in which case it was held that an application to compel a new county to provide for the payment of its proportion of the debts of two counties contributing territory to such new county should be made in behalf of both such contributing counties, unless a separate proceeding may be maintained by one county alone without prejudice to the other.

Connecticut.— Douglas *v.* Chatham, 41 Conn. 211.

District of Columbia.— See U. S. *v.* Chandler, 2 Mackey 527.

Illinois.— Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33, holding that in a proceeding to compel state officers to pay money on a contract with petitioners, it is necessary to join all the persons originally interested in the contract as partners, and that a portion of the partners cannot maintain the suit in the firm-name, omitting one of the partners, by alleging that he has sold his interest in the contract to another one of the firm.

Pennsylvania.— Com. *v.* Allegheny Valley R. Co., 6 Pa. Dist. 565, holding that one of three interested municipalities cannot bring mandamus to compel a railroad company to restore a road lying in all.

Texas.— Austin *v.* Cahill, (Civ. App. 1905) 88 S. W. 536.

See 33 Cent. Dig. tit. "Mandamus," § 290.

A majority of a municipal board may, without joining the others, sue an officer to enforce the rights of the board. Pearsons *v.* Ranlett, 110 Mass. 118. Proceeding by part of the members of a public board against the others see *supra*, IX, C, 1, a.

The provision of the General Practice Act requiring all parties in interest to be made plaintiffs or defendants does not apply to proceedings by mandamus. State *v.* Fraker, 166 Mo. 130, 65 S. W. 720; State *v.* Burkhardt, 59 Mo. 75.

Necessity of joining: Beneficiary in proceeding by trustee see *supra*, IX, C, 1, a. Principal in proceeding by agent see *supra*, IX, C, 1, a. Public officer in proceeding by individual to enforce public right or duty see *supra*, IX, C, 1, e, (1).

Relief in favor of person not joined see *infra*, IX, J, 2.

54. *Delaware.*— State *v.* Simmons, 3 Pennew. 291, 50 Atl. 213.

proceeding for relief without joining the others.[55] A person having no legal interest in the matter and to whom respondent owes no duty cannot be joined as a relator.[56]

2. Respondents or Defendants[57] — a. In General. The party against whom the proceeding is instituted is properly termed respondent;[58] but in some states he may be termed defendant.[59]

b. Persons Under Duty to Act[60] — (i) *Necessary and Proper Parties.* The person or body whose duty it is to perform the act sought to be enforced by mandamus is a necessary party respondent.[61] All persons or bodies on whom a

District of Columbia.— U. S. *v.* McKelden, MacArthur & M. 162.

Kansas.— Dobbs *v.* Stauffer, 24 Kan. 127. And see State *v.* Reno County, 38 Kan. 317, 16 Pac. 337.

Maryland.— Smith *v.* Erb, 4 Gill 437.

Mississippi.— See Haskins *v.* Scott County, 51 Miss. 406.

Montana.— Wright *v.* Gallatin County, 6 Mont. 29, 9 Pac. 543, holding that several persons whose separate bids for county printing have been rejected cannot join in compelling an award of the contract to them in common.

Pennsylvania.— Com. *v.* Huttel, 4 Pa. Super. Ct. 95, 40 Wkly. Notes Cas. 71, holding that husband and wife cannot join in compelling a constable charged with the execution of a landlord's warrant against the husband to appraise property part of which is claimed by the husband and part by the wife as exempt.

England.— Rex *v.* Andover, Holt K. B. 441, 12 Mod. 332, 2 Salk. 433; Rex *v.* Kingston-upon-Hull, 11 Mod. 382, 8 Mod. 209, Str. 578, holding that two persons cannot join in mandamus to a mayor to admit them to their freedom, as each has a distinct right.

See 33 Cent. Dig. tit. "Mandamus," § 290.

See, however, People *v.* Ontario County Sup'rs, 85 N. Y. 323 [*reversing* 17 Hun 501]. *Compare* State *v.* New Orleans, 52 La. Ann. 1639, 28 So. 163.

Citizens and persons having a special interest in the subject-matter cannot join in an application for mandamus. Dobbs *v.* Stauffer, 24 Kan. 127. And see Maddox *v.* Graham, 2 Metc. (Ky.) 56; Haskins *v.* Scott County, 51 Miss. 406; Com. *v.* Norristown, 17 Pa. Co. Ct. 187, 12 Montg. Co. Rep. 9.

The holders of separate claims against a state or municipality cannot join in a proceeding to compel or insure payment. Goodwyn *v.* Sherer, 145 Ala. 501, 40 So. 279; Heckart *v.* Roberts, 9 Md. 41; Ohlson *v.* Durfrey, 82 Miss. 213, 33 So. 973; State *v.* Fraker, 166 Mo. 130, 65 S. W. 720; Lengel *v.* Stump, 1 Woodw. (Pa.) 399. So several persons to whom damages for laying out a road have been separately awarded cannot join in a proceeding to compel payment of the awards. Hoxie *v.* Somerset County Com'rs, 25 Me. 333 (*semble*); People *v.* Morgan, 97 N. Y. App. Div. 267, 89 N. Y. Suppl. 832.

55. Maddox *v.* Graham, 2 Metc. (Ky.) 56, holding that in a proceeding by bondholders to compel the levy and collection of a tax to pay railroad aid bonds it is not necessary to join either the railroad company or the taxpayers. And see cases cited *infra*, this note, and *supra*, note 54.

Bond and coupon holders.— Any one of the holders of a series of municipal bonds or of the coupons for interest thereon may institute a proceeding to compel or issue payment without joining the others. Meyer *v.* Porter, 65 Cal. 67, 2 Pac. 884 (*semble*); Maddox *v.* Graham, 2 Metc. (Ky.) 56; Territory *v.* Socorro, 12 N. M. 177, 76 Pac. 283; Com. *v.* Pittsburgh, 34 Pa. St. 496; State *v.* Byrne, 32 Wash. 264, 73 Pac. 394; Thompson *v.* Perris Irr. Dist., 116 Fed. 769; U. S. *v.* Kent, 107 Fed. 190. See, however, Douglas *v.* Chatham, 41 Conn. 211. Nor need the proceeding be instituted in behalf of the holders not joined. Thompson *v.* Perris Irr. Dist., *supra*.

56. State *v.* Simmons, 3 Pennew. (Del.) 291, 50 Atl. 213, holding that one who has contracted with a gas company to build gas works and to whom the company guaranteed access to the streets to lay pipes cannot join with the company in an application to compel the city authorities to grant a permit to open the streets for the purpose of laying pipes. And see Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336.

57. Conclusiveness of judgment on persons not joined as parties see *infra*, IX, J, 4, h.

Determination of rights of persons not joined as parties see *infra*, IX, J, 2.

Relief against persons not joined as parties see *infra*, IX, J, 2.

58. See cases cited *passim*, this article.

59. State *v.* Carey, 2 N. D. 36, 49 N. W. 164; State *v.* Long, 37 W. Va. 266, 16 S. E. 578. *Contra*, Territory *v.* Potts, 3 Mont. 364.

60. Parties to whom writ should be directed: Alternative writ see *infra*, IX, F, 3, e, (II). Peremptory writ see *infra*, IX, K, 6, b.

61. Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336; Bailey *v.* Lawrence County, 2 S. D. 533, 51 N. W. 331.

Who should be named as respondent — *As between public bodies and officers thereof.*— If a municipal duty is imposed on a particular officer or board of officers, a proceeding to compel performance should be brought against such officer or board rather than against the municipality. State *v.* Towers, 71 Conn. 657, 42 Atl. 1083; Eyerly *v.* Jasper County, 72 Iowa 149, 33 N. W. 609 (holding that a proceeding to compel a return of taxes illegally collected should be brought, not against the county, but against its supervisors or treas-

common duty rests may be joined as respondents in a proceeding for the purpose of compelling the performance of that duty,[62] and are generally required to be

urer); People v. New York, 3 Abb. Dec. (N. Y.) 502, 3 Keyes 81 [*affirming* 45 Barb. 473, 30 How. Pr. 327] (holding that the common council, and not the city, should be proceeded against for the enactment of an ordinance); Reg. v. Hereford, 2 Salk. 701 (holding that a proceeding to compel the admission of a person to the town clerkship should be brought against the mayor, not against the town); Mercier v. Roy, 16 Quebec Super. Ct. 510 (holding that where the inspection of town books is desired, the proceeding should run against, not the town, but the custodian of the books). *Compare* Bearden v. Fullam, 129 N. C. 477, 40 S. E. 204; Fisher v. Charleston, 17 W. Va. 628. But see Rex v. Taylor, 3 Salk. 231, holding that a proceeding to compel the reinstatement of an alderman should run against the corporation, not against the council. However, the municipality may be proceeded against if there is no officer or board charged with the duty of performance. State v. Towers, *supra*. On the same principle a court cannot be proceeded against for the performance of a duty imposed on its clerk. Daniels v. Miller, 8 Colo. 542, 9 Pac. 18; People v. Gale, 22 Barb. (N. Y.) 502, 3 Abb. Pr. 57, 13 How. Pr. 5 [*affirmed* in 3 Abb. Dec. 491, 3 Abb. Pr. 309, 13 How. Pr. 260]; State v. Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166. If, however, a municipal board is charged with the duty in question, the proceedings should run against it, rather than against its subordinates. Holtzclaw v. Riley, 113 Ga. 1023, 39 S. E. 425 (cannot run against agent); Hooper v. Farnen, 85 Md. 587, 37 Atl. 430 (cannot run against secretary); Congregation v. Bordentown St., etc., Committee, 56 N. J. L. 48, 27 Atl. 799 (cannot run against committee appointed by city council); State v. Fond du Lac Bd. of Education, 63 Wis. 234, 23 N. W. 102, 53 Am. Rep. 282 (holding that where the superintendent of schools is elected by the board of education and is under its control, a proceeding to compel the reinstatement of a suspended pupil is properly brought against the board, rather than against the superintendent).

As between different public bodies or officers the proceeding should be brought against that one which is charged with the duty of performing the act sought to be enforced. People v. Municipal Civ. Service Commission, 30 Misc. (N. Y.) 519, 63 N. Y. Suppl. 833; Fisher v. Charleston, 17 W. Va. 628; Evans v. Pittsburgh, 8 Fed. Cas. No. 4,568, 2 Pittsb. (Pa.) 405. Thus in a proceeding to compel the levy of a tax to pay a judgment against the parish, the police jury (Fisk v. Jefferson Parish Police Jury, 38 La. Ann. 508); in a proceeding to compel the reinstatement of the janitor of a police station, the police board (Sims v. Boston, 191 Mass. 382, 77 N. E. 714); in a proceeding to compel a city to pay fines and penalties to the county board of education, the city or the board of aldermen (Bearden v. Fullam, 129 N. C. 477, 40 S. E. 204); and in a proceeding to compel an appropriation of moneys out of the county treasury, the justices of the county court (Connell v. Davidson, 2 Head (Tenn.) 188) are the necessary parties respondent.

As between corporations and officers thereof.— It has been held that a proceeding to compel the performance of a duty resting generally on the corporation as such should be brought against the corporation (State v. Chicago, etc., R. Co., 79 Wis. 259, 48 N. W. 243, 12 L. R. A. 180; Goodwin v. Ottawa, etc., R. Co., 13 U. C. C. P. 254; Upton v. Hutchison, 8 Quebec Q. B. 505 [*affirming* 15 Quebec Super. Ct. 396, 2 Quebec Pr. 300); but that where the duty rests on particular corporate officers, they are the necessary parties respondent (Winter v. Baldwin, 89 Ala. 483, 7 So. 734; State v. Wright, 10 Nev. 167; State v. Bergenthal, 72 Wis. 314, 39 N. W. 566. *Contra*, Demorest v. Midland R. Co., 10 Ont. Pr. 82). See further *infra*, note 69. Parties respondent in mandamus to enforce right of stock-holder to inspect books of corporation see CORPORATIONS, 10 Cyc. 962.

As between different corporations.— A company which has leased a railroad and is building an extension thereof is a necessary party to a proceeding against the lessor company to compel the highways crossed by the extension to be put in good condition. Mobile, etc., R. Co. v. Pike County Com'rs Ct., 97 Ala. 105, 11 So. 732.

If respondent is in the hands of a receiver, the receiver is a necessary party. Chicago City R. Co. v. People, 116 Ill. App. 633.

62. State v. Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153; People v. Schiellein, 95 N. Y. 124.

Joinder of public bodies and their officers.— In a proceeding against a town by a holder of its bonds to compel payment, the town officers whose duty it is to act may be joined as respondents (People v. Getzendaner, 137 Ill. 234, 34 N. E. 297); and the clerk of a court, although acting under the direction of the judge thereof, is properly impleaded with the latter in proceedings by the sheriff to compel the delivery to him of a venire facias for the summoning of jurors (Dickson v. Judge Detroit Recorder's Ct., 136 Mich. 479, 99 N. W. 405); and in proceedings to compel county commissioners to deliver to petitioner the books and papers of the office of county treasurer, their appointee, who is in possession of the office, may properly be joined as respondent (Cecil County Com'rs v. Banks, 80 Md. 321, 30 Atl. 919). A school-district may properly be joined as defendant in a proceeding against its officials to compel the performance of a duty (Barber v. Mulford, 117 Cal. 356, 49 Pac. 206); and a town board of supervisors may be joined in a proceeding against its chairman and clerk to compel them to convene the board, and declare a

joined;[63] and even where some of those on whom a common duty rests are will-

resolution carried, and record it (People *v.* Brinkerhoff, 68 N. Y. 259 [*affirming* 7 Hun 668]).

Joinder of officers of same public body.— Where the law divides the performance of a certain duty among several officers, each to perform but one act in a series, but all to coöperate in the attainment of a single result and by a continuous succession so as to preserve unity of performance of the entire duty, all may be joined as respondents in a proceeding to compel performance of the duty. State *v.* Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166. And see *infra*, IX, C, 2. Thus several officers concerned in the separate but coöperative steps for the levy and collection of a tax may be joined as respondents. Labette County Com'rs *v.* U. S., 112 U. S. 217, 5 S. Ct. 108, 28 L. ed. 698; McKie *v.* Rose, 140 Fed. 145 (so holding, although some of them may not have refused to act); Guthrie *v.* Sparks, 131 Fed. 443, 65 C. C. A. 427; Hicks *v.* Cleveland, 106 Fed. 459, 45 C. C. A. 429. So the treasurer and supervisors of a county may be joined in a proceeding by a taxpayer to compel the repayment of taxes illegally collected (Eyerly *v.* Jasper County, 72 Iowa 149, 33 N. W. 609); and in a proceeding to compel payment of a claim against a board of education, its president and clerk may be joined as respondents, where they have duties to perform in regard to payment of claims (People *v.* Neilson, 5 Thomps. & C. (N. Y.) 367). If, however, the acts of the several officers are not parts of one entire duty devolved on all collectively, all cannot be thus joined. State *v.* Cornell, 54 Nebr. 158, 74 N. W. 398. In a proceeding to compel a recanvass, all the canvassers may be joined as respondents (State *v.* Bailey, 7 Iowa 390); and in a proceeding against street improvement assessors to compel them to correct an error in assessing a lot outside of the assesment district, it is proper to join the collector, where he is proceeding to collect the assessment by levy on relator's property (People *v.* Wilson, 119 N. Y. 515, 23 N. E. 1064).

Joinder of officers of different public bodies.— The several officers of a city and county who have functions to perform with reference to assessing personal property, levying taxes, and entering assessments and tax levies on the proper books may be joined as parties in a proceeding to compel the performance of those duties. State *v.* Harbison, 64 Kan. 295, 67 Pac. 844.

Joinder of officer as such and individually.— In a proceeding to compel a school-board to recognize one claiming the right to teach under a contract, the trustees are properly joined both as trustees and as individuals, they being individually liable for costs, if plaintiff prevails. Pearsall *v.* Woolls, (Tex. Civ. App. 1899) 50 S. W. 959.

Joinder of private corporations and officers thereof.— Where the president of a corporation is in control of it, he may be joined as respondent in a proceeding against it to compel the performance of a corporate duty. West Virginia Northern R. Co. *v.* U. S., 134 Fed. 198, 67 C. C. A. 220.

Joinder of causes of action see *infra*, IX, E, 3, e.

63. Knight *v.* Ferris, 6 Houst. (Del.) 283; Chicago City R. Co. *v.* People, 116 Ill. App. 633.

Joinder of public officers generally.— The road overseer is a necessary party to a proceeding against county supervisors to compel the keeping of a road free from obstructions and in good repair. Peck *v.* Los Angeles County, 90 Cal. 384, 27 Pac. 301. Where the mayor and aldermen of a city rejected the vote of a ward at a local option election and ordered the city clerk not to record the return, they are necessary parties to a proceeding to compel the clerk to record the return. Taylor *v.* McPheters, 111 Mass. 351. Under a statute which requires the highway commissioner to submit the proposed expenditure for the construction of a bridge to, and obtain the approval of, the township board, where the commissioner has done so and the board has refused its approval, the board is a necessary party in a proceeding to compel the erection of the bridge. Berube *v.* Wheeler, 128 Mich. 32, 87 N. W. 50. The reclassification by a municipal civil service commission of a position which they have placed in the competitive class cannot be compelled in the absence of the mayor of the city and the state civil service commissioner, as the reclassification could not be made effective without their action. Dill *v.* Wheeler, 100 N. Y. App. Div. 155, 91 N. Y. Suppl. 686. In a proceeding against a board of inspectors of elections for a recount of ballots under the New York Election Law of 1896, section 84, the poll clerks are necessary parties respondent. Matter of Stiles, 69 N. Y. App. Div. 589, 75 N. Y. Suppl. 278. Where petitioner, a county commissioner, accepted another office, and the county judge appointed another in his place under the misapprehension that petitioner had vacated his office of commissioner, and petitioner sues to compel the judge and his appointee to permit petitioner to act as commissioner, the remaining county commissioners are necessary parties respondent. Gaal *v.* Townsend, 77 Tex. 464, 14 S. W. 365. See, however, as to joinder of officers, State *v.* Norvell, 80 Mo. App. 180; State *v.* Williams, 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418.

Joinder of members of public board or court.— All the members of a municipal board must be joined as respondents in a proceeding to compel the performance of a duty imposed on the board. Eufaula *v.* Hickman, 57 Ala. 338. See also People *v.* Metropolitan Police Com'rs, 5 Abb. Pr. (N. Y.) 241 [*reversed* in 24 How. Pr. 611]. It is not enough to join merely a quorum, although they have once met as such. Deen *v.* Tanner, 106 Ga. 394, 32 S. E. 368. And see Matter

ing to act in conjunction with the others, yet all must as a rule be made respondents.[64] As a limitation on the rule just announced, it should be observed that even though a common duty rests on several officers, yet where that duty requires them respectively to perform separate, although successive, acts independently of, although in coöperation with, others, those who have performed the particular acts required of them,[65] or who are willing to perform those acts,[66] or who have not refused such performance or expressed an intention not to perform when the time for performance arises,[67] need not be joined with the others in a proceeding to compel the latter to perform the particular acts which the law requires of them. Unless the granting of the writ would prejudicially affect their interests,[68] persons or bodies who are not invested with power to perform the act sought to be enforced, or who are not required by law to perform it, are not necessary parties respondent,[69] and

of Broderick, 25 Misc. (N. Y.) 534, 56 N. Y. Suppl. 99. So if it takes all the judges of a court to do the act desired, all are necessary parties. State *v.* King County Super. Ct., 4 Wash. 327, 30 Pac. 82. Where, however, by law a board is composed of only one permanent member, who calls to his aid two others as occasion may arise, it is sufficient to proceed against the permanent member alone. State *v.* Marshall County Judge, 7 Iowa 186.

Joinder of officer in different capacities.— In an application to compel a board of education to issue a teacher's certificate, the county superintendent of schools as such need not be joined; it is sufficient to join him as a member of the board. Keller *v.* Hewitt, 109 Cal. 146, 41 Pac. 871.

Joinder of public bodies and their officers. — In a proceeding by the holder of corporate bonds against the town issuing them to compel payment of the same, it is sufficient to file the petition against the town alone, without naming individuals, in order to obtain a peremptory mandamus to each of the agencies through which it must act to make payment of the claim. People *v.* Getzendaner, 137 Ill. 234, 34 N. E. 297; Chicago *v.* Sansum, 87 Ill. 182. And see Bay State Gas Co. *v.* State, 4 Pennew. (Del.) 497, 56 Atl. 1120. See, however, Eyerly *v.* Jasper County, 72 Iowa 149, 33 N. W. 609. So it is not necessary to join the city council in a proceeding against a city to compel it to disconnect certain territory from it by ordinance. Charleston *v.* Wiley, 94 Ill. App. 53; Charleston *v.* Moore, 94 Ill. App. 51.

64. See cases cited *infra*, this note.

All the members of a public board should be joined as respondents, although some are willing to act. Lyon *v.* Rice, 41 Conn. 245; Littlefield *v.* Newell, 85 Me. 246, 27 Atl. 110. And see Eufaula *v.* Hickman, 57 Ala. 338; Knight *v.* Ferris, 6 Houst. (Del.) 283; State *v.* Jones, 23 N. C. 129. However, part of the members of a public board proceeding against the others need not name themselves as respondents. Cooperrider *v.* State, 46 Nebr. 84, 64 N. W. 372; Heintz *v.* Moulton, 7 S. D. 272, 64 N. W. 135.

Coördinate governing bodies.— In a proceeding to compel the aldermen of a city to meet the common council in joint convention for the purpose of electing subordinate officers as required by law, the council, being willing to act, need not be joined. Littlefield *v.* Newell, 85 Me. 246, 27 Atl. 110.

Whether majority of public board may be sued by minority see *supra*, IX, C, 1, a.

65. People *v.* Municipal Civil Service Commission, 30 Misc. (N. Y.) 519, 63 N. Y. Suppl. 833; State *v.* Richter, 37 Wis. 275.

66. Goodell *v.* Woodbury, 71 N. H. 378, 52 Atl. 855.

67. *New Hampshire.*— Goodell *v.* Woodbury, 71 N. H. 378, 52 Atl. 855, holding that in a proceeding to compel a chief of police to institute certain prosecutions as required by law, the county solicitor, whose duty it is to prosecute offenses, is not a necessary party, where he has not refused to act.

New York.— People *v.* Gravesend, 154 N. Y. 381, 48 N. E. 813, holding that in a proceeding to compel a town supervisor to issue bonds, the town treasurer and clerk, who must join in executing the bonds, are not necessary parties respondent, since the court would assume that they would sign the bonds if the supervisors should be ordered to issue them.

North Carolina.— Boner *v.* Adams, 65 N. C. 639.

Oregon.— See McLeod *v.* Scott, 21 Oreg. 94, 26 Pac. 1061, 29 Pac. 1.

South Dakota.— Smith *v.* Lawrence, 2 S. D. 185, 49 N. W. 7, holding that in a proceeding against a board of canvassers to compel a recanvass, the county auditor as clerk of the board or as auditor is not a necessary party respondent, where he has not neglected or refused to perform any duty devolving on him.

Wisconsin.— State *v.* Richter, 37 Wis. 275. See 33 Cent. Dig. tit. "Mandamus," § 293.

Refusal in advance.— Where two successive acts toward a common end are required to be done by two officers respectively, and mandamus is brought against the one required to act first, the other also may be joined, if he has pledged himself not to perform the act required of him. Guthrie *v.* Sparks, 131 Fed. 443, 65 C. C. A. 427. See, however, State *v.* Richter, 37 Wis. 275.

68. See *infra*, IX, C, 2, c.

69. Farrell *v.* King, 41 Conn. 448; People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; Brooks *v.* State, 162 Ind. 568, 70 N. E. 980.

cannot be joined as such. The writ should run singly to the person whose duty it is to perform the act required.[70]

Who are unnecessary parties — *Public corporations.*— A county is not a necessary party to a proceeding by a scrip-holder to compel the county collector to receive the scrip in payment of taxes (Fry *v.* Reynolds, 33 Ark. 450); nor is a borough a necessary party to a proceeding to compel its officers to discharge their duty (Com. *v.* Westfield Borough Officers, 1 Pa. Dist. 495). A city is not a necessary party to a proceeding to compel the city auditor to draw his warrant for the salary roll of the police force (State *v.* Mason, 153 Mo. 23, 54 S. W. 524), or to a proceeding against the city controller to compel him to pay over taxes due the state (People *v.* Myers, 50 Hun (N. Y.) 479, 3 N. Y. Suppl. 365 [*affirmed* in 112 N. Y. 676, 20 N. E. 417]), or to a proceeding against the city treasurer to enforce payment of a warrant duly executed by the proper city officers (Savage *v.* Sternberg, 19 Wash. 679, 54 Pac. 611, 67 Am. St. Rep. 751); or to a proceeding to compel the clerk of the city council to amend his record so that it will show the appointment of petitioner by the council as policeman in the place of a third person (Farrell *v.* King, 41 Conn. 448). A school-board is not a necessary party in a proceeding to compel a teacher to admit a child to school, although the teacher excluded the child pursuant to a resolution of the board Tape *v.* Hurley, 66 Cal. 473, 6 Pac. 129.

Public officers.— A county collector seeking to compel a city treasurer to pay over the proceeds of a county tax collected by him need not join any other city officer as respondent (Shields *v.* Grear, 55 N. J. L. 503, 27 Atl. 807); nor need any other county officer be joined as respondent in a proceeding by the state auditor against a county auditor to compel him to observe his duties (State *v.* Yates, 21 Ohio Cir. Ct. 686, 12 Ohio Cir. Dec. 298); and the fact that municipal officers have conspired to license gaming in violation of law does not require the joining of any one but the chief of police as respondent in a proceeding to compel the chief to prosecute gamblers (State *v.* Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166). A proceeding to compel the making of estimates of work done by a street improvement contractor and the levying of assessments therefor may be brought against the city without joining the members of the city council or the city engineer (Wren *v.* Indianapolis, 96 Ind. 206); and although a tax-collector has discontinued the collection of a tax under instructions from the city council, the council need not, it seems, be joined as respondent in a proceeding to compel the collector to collect the tax (State *v.* O'Kelly, 48 La. Ann. 28, 18 So. 757). A tax-collector is not a necessary party respondent in a proceeding to compel an auditor to enter on an assessment roll the delinquent taxes of the preceding fiscal year (People *v.* Ashbury, 46 Cal. 523), or in a proceeding to compel a town treasurer to issue a warrant of distress against the collector on his neglect to perform his duties (Waldron *v.* Lee, 5 Pick. (Mass.) 323). A magistrate who has unlawfully committed a slave to jail is not a necessary party respondent to a proceeding against the sheriff to compel him to release the slave. Ney *v.* Richard, 15 La. Ann. 603. Where the chief of police of a city may institute prosecutions independently of the police commissioners, they are not necessary parties respondent in a proceeding to compel him to do so. Goodell *v.* Woodbury, 71 N. H. 378, 52 Atl. 855. A board of county supervisors is not a necessary party respondent, it seems, in a proceeding to compel the chairman and clerk to perform their duties (People *v.* Brinkerhoff, 68 N. Y. 259 [*affirming* 7 Hun 668]); and it is not necessary, in a proceeding to compel a county court to levy a tax to pay bonds or coupons owing by the county, that the county trustee should be made a party defendant (State *v.* Anderson County, 8 Baxt. (Tenn.) 249). The fact that the county clerk has paid money due the state to the county treasurer does not require that the treasurer should be made a party defendant to a proceeding by the state auditor against the clerk to compel payment of the money. State *v.* Stanton, 14 Utah 180, 46 Pac. 1109. Where it is the duty of the county commissioners to levy a tax for payment of bonds of a township in the county issued in payment of a subscription to railroad stock, the trustees of the township are not necessary parties respondent in a proceeding to compel the commissioners to levy the tax. Labette County Com'rs *v.* U. S., 112 U. S. 217, 5 S. Ct. 108, 28 L. ed. 698.

Private corporations.— The owner and lessor of a railroad is not a necessary party respondent to a proceeding to compel the lessee to restore a highway on which it has encroached in constructing a crossing (People *v.* Northern Cent. R. Co., 164 N. Y. 289, 58 N. E. 138. But see Mobile, etc., R. Co. *v.* Pike County Com'rs Ct., 97 Ala. 105, 11 So. 732); and it has been said in a proceeding against a corporation as licensee of a corporation owning a patent on a telephone to compel it to establish connections with a telegraph line, the licensor is not a necessary party respondent (State *v.* Bell Telephone Co., 23 Fed. 539).

Private officers.— In a proceeding to compel a corporation to cause its officers to make and file a certificate as to payments on capital stock as required of them by law, such officers need not be joined. Bay State Gas Co. *v.* State, 4 Pennew. (Del.) 497, 56 Atl. 1120. And see, generally, People *v.* Throop, 12 Wend. (N. Y.) 183.

Authority and duty to act as prerequisite to issuance of writ see *supra*, II, F.

70. Kansas, etc., R. Co. *v.* Fitzhugh, 61 Ark. 339, 33 S. W. 208; Farrell *v.* King, 41 Conn. 448.

(II) *Style of Designation.* In proceedings to compel the performance of a duty imposed on a municipal corporation the earlier rule was to name the municipality as respondent by its corporate name,[71] and this rule is still adhered to or recognized in some American jurisdictions;[72] but the modern rule is to name as respondent or respondents that member or those members of the municipal government whose duty it is to perform the acts required of the municipality.[73] It has been held that where a duty is imposed on a public board as such, a proceeding to compel performance may run either against the board by its legal name[74]

Who are improper parties — *Public corporations.*— A city cannot be joined as respondent in a proceeding to compel the clerk of the city council to amend his record of the council's proceedings with reference to petitioner's appointment to office. Farrell *v.* King, 41 Conn. 448.

Public officers.— The mayor and council cannot be joined in a proceeding to compel the chief of police to prosecute gamblers (State *v.* Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166); and where the board of education of a city is an organization separate from the city, and money required for its use is to be drawn from the city treasury by the draft of the president of the board, countersigned by its clerk, the city auditor and controller are not proper parties to a proceeding to compel payment of a claim against the board (People *v.* Neilson, 5 Thomps. & C. (N. Y.) 367). In a proceeding by the state auditor against a county auditor to compel him to observe his duties, no other county officials are proper parties (State *v.* Yates, 21 Ohio Cir. Ct. 686, 12 Ohio Cir. Dec. 298); nor can the superintendent of public instruction be joined as respondent in a proceeding to compel a teacher to admit a child to a public school (Tape *v.* Hurley, 66 Cal. 473, 6 Pac. 129). If one of several judges of a court has power to do the act sought to be enforced, the others cannot be joined as respondents. State *v.* Kings County Super. Ct., 4 Wash. 327, 30 Pac. 82. And see, generally, Boner *v.* Adams, 65 N. C. 639.

Private corporations, and agents and stockholders.— The corporation is not a proper party defendant in a proceeding to compel a corporate officer to perform his duties (Winter *v.* Baldwin, 89 Ala. 483, 7 So. 734. See, however, *supra*, note 61); nor are any of the other officers proper parties (People *v.* Lake Shore, etc., R. Co., 11 Hun (N. Y.) 1. See, however, *supra*, note 61); and stockholders merely as such are not proper parties respondent in a proceeding to compel the corporation to perform a corporate act (State *v.* Home St. R. Co., 43 Nebr. 830, 62 N. W. 225).

Joinder of several persons in the alternative in a motion for the writ is permitted in some jurisdictions. Brophy *v.* Shindler, 126 Mich. 341, 85 N. W. 1114; Demorest *v.* Midland R. Co., 10 Ont. Pr. 73.

Joinder of causes of action see *infra*, IX, E, 3, e.

71. Eufaula *v.* Hickman, 57 Ala. 338.

72. Louisville *v.* Kean, 18 B. Mon. (Ky.) 9; Ricker *v.* City, 1 Lanc. L. Rev. (Pa.) 92; Leavenworth County *v.* Sellew, 99 U. S. 624, 25 L. ed. 333. But *compare* Fuller *v.* Plainfield, 6 Conn. 532.

73. *Alabama.*— Eufaula *v.* Hickman, 57 Ala. 338.

Illinois.— People *v.* Bloomington, 63 Ill. 207.

Kentucky.— Louisville *v.* Kean, 18 B. Mon. 9.

Pennsylvania.— Ricker *v.* City, 1 Lanc. L. Rev. 92.

United States.—Davenport *v.* U. S., 9 Wall. 409, 19 L. ed. 704.

Where, however, there is no officer or board charged with the duty in question, the municipality may be proceeded against in its corporate name. Williams *v.* New Haven, 68 Conn. 263, 36 Atl. 61.

74. *Connecticut.*— Norwalk, etc., Electric Light Co. *v.* South Norwalk, 71 Conn. 381, 42 Atl. 82, holding that this is the better practice.

Illinois.— Sheaff *v.* People, 87 Ill. 189, 29 Am. Rep. 49.

Missouri.— St. Louis County Ct. *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355, *semble*.

New Jersey.— State *v.* Rahway, 53 N. J. L. 156, 20 Atl. 966.

New Mexico.— Territory *v.* Socorro, 12 N. M. 177, 76 Pac. 283.

New York.— People *v.* Champion, 16 Johns. 61.

Pennsylvania.— Com. *v.* Norristown, 17 Pa. Co. Ct. 187, 12 Montg. Co. Rep. 9.

Texas.— See Pearsall *v.* Woolls, (Civ. App. 1899) 50 S. W. 959.

Wisconsin.— State *v.* Milwaukee, 25 Wis. 122.

United States.— Leavenworth County *v.* Sellew, 99 U. S. 624, 25 L. ed. 333.

Sufficiency of designation.— Where the government of a village is vested in a council consisting of a president and councilmen, it is sufficient to direct the proceeding against "the council," rather than against "the president and councilmen." Glencoe *v.* People, 78 Ill. 382. And although a city is incorporated as "The Mayor, Aldermen, and Citizens of Pittsburgh," a proceeding may be maintained against the councils "of the City of Pittsburgh." Com. *v.* Pittsburg, 34 Pa. St. 496. To designate respondents as "the mayor, aldermen and common council" does not imply that the mayor and aldermen are no part of the council, and hence there is a sufficient designation of "the mayor, aldermen *et al. de communi concilio.*" Pees *v.* Leeds, Str. 640.

or against its individual members as such.[75] In some jurisdictions it is not only proper but necessary that the proceeding should run against the board as such,[76] while in other jurisdictions the proceeding must run against the individual members of the board.[77] If officers are not constituted a board by law, they cannot be sued as such.[78] Where the duty sought to be enforced rests on a public officer, it is the better practice to proceed against him in his official title without naming him individually.[79] If a duty is imposed on a private corporation as such, it should be proceeded against in its corporate name;[80] but if the duty rests on its board of trustees the proceeding should run against the board.[81]

c. Persons Interested in Subject-Matter. Individuals or corporations who have a special legal interest in the subject-matter of a mandamus proceeding and whose rights will be collaterally determined by a judgment awarding the writ may properly be joined as parties respondent,[82] and are generally required to be so joined.[83] Thus if a right, title, or interest in or to real property is directly

75. *Alabama.*— Eufaula *v.* Hickman, 57 Ala. 338.

Missouri.— St. Louis County Ct. *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355, *semble.*

Montana.— State *v.* Choteau County, 13 Mont. 23, 31 Pac. 879, where by law the board is composed of certain officers *ex officio*, and its members do not necessarily embrace the same officers but are subject to changes.

Nebraska.— Cooperrider *v.* State, 46 Nebr. 84, 64 N. W. 372.

Ohio.— Hollister *v.* Lucas County Dist. Ct. Judges, 8 Ohio St. 201, 70 Am. Dec. 100, holding that the proceeding should be brought against the judges of a court, rather than the court.

Pennsylvania.— Com. *v.* Sheehan, 81* Pa. St. 132.

Texas.— See Pearsall *v.* Woolls, (Civ. App. 1899) 50 S. W. 959.

Washington.— See State *v.* Byrne, 32 Wash. 264, 73 Pac. 394.

76. Thomas *v.* Carteret County Com'rs, 66 N. C. 522; Askew *v.* Pollock, 66 N. C. 49.

77. Montgomery County *v.* Menefee County Ct., 93 Ky. 33, 18 S. W. 1021, 13 Ky. L. Rep. 891; Bell *v.* Pike County Ct., 61 Mo. App. 173.

If the board is unincorporated the individual members should be designated. People *v.* Civil Service, etc., Bd., 17 Abb. N. Cas. (N. Y.) 64. And see Houston *v.* Sussex County Levy Ct., 5 Harr. (Del.) 15.

78. Randall *v.* State, 64 Ohio St. 57, 59 N. E. 742.

79. *Iowa.*— Chance *v.* Temple, 1 Iowa 179.

New Mexico.— Territory *v.* Socorro, 12 N. M. 177, 76 Pac. 283.

New York.— See People *v.* Westchester County, 4 Cow. 403.

Wisconsin.— State *v.* Milwaukee, 25 Wis. 122.

Canada.— Burdett *v.* Sawyer, 2 Ont. Pr. 398, holding, however, that it is permissible to name the officer individually as such.

Contra.— Eufaula *v.* Hickman, 57 Ala. 338.

80. State *v.* Chicago, etc., R. Co., 79 Wis. 259, 48 N. W. 248, 12 L. R. A. 180, and not in the name of its directors.

81. State *v.* Sears, 10 Nev. 167, holding, however, that a proceeding against the trustees individually is virtually the same as if against the board.

82. *Connecticut.*— State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465.

Minnesota.— State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153.

Nevada.— See State *v.* Mack, 26 Nev. 430, 69 Pac. 862.

Washington.—American Bridge Co. *v.* Wheeler, 35 Wash. 40, 76 Pac. 534.

United States.—West Virginia Northern R. Co. *v.* U. S., 134 Fed. 198, 67 C. C. A. 220.

The code provision which permits the rights of all persons in the subject-matter in controversy to be determined in one action applies to mandamus proceedings. State *v.* Cranney, 30 Wash. 594, 71 Pac. 50. *Contra*, People *v.* Croton Aqueduct Bd., 5 Abb. Pr. (N. Y.) 372, 16 How. Pr. 4. And see *infra*, note 97. But see *infra*, note 83.

83. *Illinois.*— Powell *v.* People, 214 Ill. 475, 73 N. E. 795, 105 Am. St. Rep. 117; Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33.

Kansas.— Livingston *v.* McCarthy, 41 Kan. 20, 20 Pac. 478.

New Jersey.— State *v.* Van Winkle, 43 N. J. L. 579, holding that a city is a necessary party to a proceeding to compel its treasurer to pay out of city funds a deficiency in the city's quota of state and county taxes.

Tennessee.— State *v.* Willett, (1906) 97 S. W. 299, holding that the persons whose right to register is involved are necessary parties to a proceeding to compel election officers to erase their names from the registration books.

Texas.— General Land Office Com'rs *v.* Smith, 5 Tex. 471; Cullem *v.* Latimer, 4 Tex. 329; Smith *v.* Power, 2 Tex. 57.

United States.— See State *v.* Bell Tel. Co., 23 Fed. 539.

Canada.— Dollery *v.* Whaley, 12 U. C. C. P. 552, holding that in a proceeding by plaintiff in an action to compel a judge to proceed with the trial thereof, defendant in the action is a necessary party respondent.

See 33 Cent. Dig. tit. "Mandamus," § 293.

See, however, State *v.* Doyle, 40 Wis. 220, holding that where a statute requires the license of a foreign insurance company to be revoked without notice to the company,

involved, all persons owning or claiming the same must as a rule be joined as respondents;[84] and if a right, title, or interest in or to a public office is directly involved it is generally necessary to join an adverse claimant thereof as a party.[85]

on violation of its conditions, a mandamus to compel revocation will be granted without requiring the company to be made a party respondent

The state is a necessary party respondent in a proceeding to enforce a contract with the state. State *v.* New York Guaranty, etc., Co., 38 La. Ann. 337; Louisiana *v.* Jumel, 107 U. S. 711, 2 S. Ct. 128, 27 L. ed. 448.

The provision of the General Practice Act requiring all parties in interest to be joined does not apply to mandamus proceedings. State *v.* Fraker, 166 Mo. 130, 65 S. W. 720; State *v.* Burkhardt, 59 Mo. 75. And see *infra*, note 96. But see *supra*, note 82; *infra*, note 97.

Joinder by representation.— A person or corporation may be virtually joined as a party respondent by representation. Calaveras County *v.* Brockway, 30 Cal. 325; People *v.* Myers, 50 Hun (N. Y.) 479, 3 N. Y. Suppl. 365 [*affirmed* in 112 N. Y. 676, 20 N. E. 417]. Thus the holders of municipal bonds have been held to be sufficiently joined by making the municipality a respondent. Austin *v.* Cahill, (Tex. 1905) 88 S. W. 542 [*reversing* in effect (Civ. App. 1905) 88 S. W. 536]. But a receiver of a corporation is not sufficiently joined by making the corporation a party respondent. Chicago City R. Co. *v.* People, 116 Ill. App. 633.

84. *California.*— Fogarty *v.* Sparks, 22 Cal. 142, holding that in a proceeding to compel a sheriff to remove an occupant from land under a writ of restitution, the occupant is a necessary party, unless he acquired his rights after *lis pendens* filed or under the parties to the suit.

Idaho.— Strethem *v.* Skinner, (1905) 82 Pac. 451, holding that in a proceeding against a water master to compel him to distribute waters in a certain way, all parties to be affected thereby should be joined.

Massachusetts.— Kent *v.* Essex County, 10 Pick. 521.

Michigan.— Campau *v.* Detroit, 86 Mich. 372, 49 N. W. 39, holding that in a proceeding to compel a board of public works to vacate a plat, the persons who made the plat and persons who have purchased lots according to the plat are necessary parties.

New York.— People *v.* Stewart, 77 N. Y. App. Div. 181, 78 N. Y. Suppl. 1054, holding that the owners of buildings which it will be necessary to destroy in the enforcement of municipal building regulations are necessary parties to a proceeding to compel the superintendent of buildings to enforce such regulations.

See 33 Cent. Dig. tit. "Mandamus," § 293.

Mandamus to compel cancellation of public lease or tax-sale.— Where the cancellation of a lease of public lands is sought, the lessee is a necessary party respondent. State *v.* Land Com'rs, 7 Wyo. 478, 53 Pac. 292. Where, however, the purchaser at a tax-sale has not received a conveyance, he is not a necessary party to a proceeding by the owner to compel cancellation of the sale. People *v.* Brooklyn Registrar, 114 N. Y. 19, 20 N. E. 611.

Mandamus to compel execution of tax deed or sheriff's deed.— In a proceeding by a purchaser at a tax-sale to compel the issuance of a tax deed persons who claim an interest in the land are proper parties respondent (State *v.* Cranney, 30 Wash. 594, 71 Pac. 50); but it is not necessary to join them (Roach *v.* State, (Ala. 1905) 39 So. 685; Jones *v.* Welsing, 52 Iowa 220, 2 N. W. 1106). And in a proceeding by a bidder at execution sale to compel the sheriff to accept the bid and execute a deed, the execution debtor and creditor are not necessary parties. State *v.* Scarborough, 56 S. C. 48, 33 S. E. 779.

Mandamus to compel lease or conveyance of public lands — *In general.*— In a proceeding to compel trustees of public lands to make a deed in pursuance of their agreement, one to whom they have conveyed the same lands notwithstanding the contract is a necessary party respondent. State *v.* Internal Imp. Fund, 20 Fla. 402. So one to whom public lands have been leased is a necessary party to a proceeding by another to compel a lease of the same lands to him. State *v.* Land Com'rs, 7 Wyo. 478, 53 Pac. 292.

Survey and issuance of patent.— In a proceeding to compel a survey of public lands and the issuance of a patent thereto, persons claiming an interest in the lands must be joined as respondents. Chappell *v.* Rogan, 94 Tex. 492, 62 S. W. 539; Texas Mexican R. Co. *v.* Jarvis, 80 Tex. 456, 15 S. W. 1089; Tabor *v.* General Land Office Com'rs, 29 Tex. 508; Cullem *v.* Latimer, 4 Tex. 329. And see Watkins *v.* Kirchain, 10 Tex. 375.

Mandamus to compel removal of obstructions from street.— Persons who have purchased land in the justifiable belief that it has not been dedicated as a street are necessary parties in a proceeding to compel the city to remove obstructions from the land as a street (People *v.* Bloomington, 38 Ill. App. 125); and persons who are occupying a street under contract with the city council are necessary parties to a like proceeding (Gibbs *v.* Ashford, 27 Tex. Civ. App. 629, 66 S. W. 858). See also People *v.* Blocki, 203 Ill. 363, 67 N. E. 809.

85. See cases cited *infra*, this note.

Mandamus to compel appointment.— In a proceeding to compel the appointment of petitioner to office, one who has already been appointed to the office must be joined. People *v.* Dobbs Ferry, 63 N. Y. App. Div. 276, 71 N. Y. Suppl. 578 (*semble*); People *v.* Scannell, 63 N. Y. App. Div. 243, 71 N. Y. Suppl. 383 (holding, however, that if the incumbent's appointment is only temporary, it is not necessary to make him a party);

However, an individual or corporation whose rights will not be affected by a judgment awarding the writ need not be joined as a respondent;[86] nor need one be joined whose interest is merely collateral, general, or incidental.[87]

People *v.* Wendell, 57 Hun (N. Y.) 362, 10 N. Y. Suppl. 587. And see Powell *v.* People, 214 Ill. 475, 73 N. E. 795, 105 Am. St. Rep. 117.

Mandamus to compel correction of record so as to show appointment.— In a proceeding to compel the correction of a municipal record so that it will show the appointment of petitioner to office instead of showing the appointment of another, that other is not a necessary (Denver *v.* People, 17 Colo. App. 190, 68 Pac. 114), or even a proper (Farrell *v.* King, 41 Conn. 448), party respondent.

Mandamus to compel admission to office.— The person in possession of an office is a necessary party respondent to a proceeding to compel petitioner's admission to the office. Kelly *v.* Edwards, 69 Cal. 460, 11 Pac. 1. And see *In re* Hart, 159 N. Y. 278, 54 N. E. 44.

Mandamus to compel removal.— If it is sought to remove a person from office, he must be joined as respondent. Powell *v.* People, 214 Ill. 475, 73 N. E. 795, 105 Am. St. Rep. 117; People *v.* Wendell, 57 Hun (N. Y.) 362, 10 N. Y. Suppl. 587.

Mandamus to compel reinstatement.— In a proceeding to compel the reinstatement of one who has been removed or ousted from office, the present incumbent is a proper party respondent (People *v.* Ahearn, 111 N. Y. App. Div. 741, 98 N. Y. Suppl. 492), and, it has been held, a necessary party (Dew *v.* Judges Sweet Spring Dist. Ct., 3 Hen. & M. (Va.) 1, 3 Am. Dec. 639. *Contra*, People *v.* Ahearn, *supra*). In mandamus to compel reinstatement to an office abolished in bad faith, the appointee of the new office created in the place of the one abolished is not a necessary party; but in mandamus to compel the transfer of petitioner to the newly created position the appointee is a necessary party. Jones *v.* Willcox, 80 N. Y. App. Div. 167, 80 N. Y. Suppl. 420. Where a disbursing clerk was placed on a suspended list under Greater New York Charter, § 1543 (Laws (1901), p. 636, c. 466), and two vacancies occurred in the position which he was qualified to fill, in mandamus to compel his reinstatement it was not necessary for him to make the survivor of two men illegally transferred to the position of disbursing clerk a party to the proceeding, where he was entitled to claim the position made vacant by the death of the other of two such men, together with the salary incident to that position which had accrued since the latter's death and which the city had not paid to any person. People *v.* Grout, 45 Misc. (N. Y.) 47, 90 N. Y. Suppl. 861.

Mandamus to compel payment of salary.— In a proceeding by an officer to compel an auditor to issue a warrant for salary, one to whom a warrant for such salary has already been issued as a *de facto* officer but who is no longer in possession of the office is not a necessary party respondent. Williams *v.* Clayton, 6 Utah 86, 21 Pac. 398. See also McGuire *v.* Hurst, 64 S. W. 435, 23 Ky. L. Rep. 846.

Whether title to office may be tried in mandamus proceedings, see *supra*, VI, C, 7.

86. Roach *v.* State, (Ala. 1905) 39 So. 685; Jones *v.* Welsing, 52 Iowa 220, 2 N. W. 1106; Sheldon Independent Dist. *v.* Sioux County, 51 Iowa 658, 2 N. W. 590 (holding that where two school-districts as organized embrace common territory claimed by each, the one is not a necessary party respondent to a proceeding by the other to compel the county supervisors to levy a tax in its favor); Harwood *v.* Quinby, 44 Iowa 385; State *v.* Wright, 10 Nev. 167; People *v.* Keating, 55 N. Y. App. Div. 528, 67 N. Y. Suppl. 418.

87. *Connecticut.*— State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465, holding that in a proceeding to compel the treasurer of one of several towns comprising a bridge district to pay orders drawn on him by the district commissioners, neither the district nor the other towns need be joined.

Indiana.— Ingerman *v.* State, 128 Ind. 225, 27 N. E. 499, holding that in a proceeding by a contractor against a ditch commissioner to compel the distribution of a fund collected by assessment for the construction of a ditch, the persons whose lands have been assessed need not be joined. And see Towle *v.* State, 110 Ind. 120, 10 N. E. 941.

Kentucky.— See Hewitt *v.* Craig, 86 Ky. 23, 5 S. W. 280, 9 Ky. L. Rep. 232.

Nebraska.— State *v.* Osborn, 60 Nebr. 415, 83 N. W. 357, holding that in a proceeding to compel an assessor to assess property for taxation at its fair value, it is unnecessary to join any taxpayer of the taxing district as a party.

Pennsylvania.— See Com. *v.* Martin, 170 Pa. St. 118, 32 Atl. 624; *In re* Porter Tp. Road, 1 Walk. 10.

South Carolina.— State *v.* Smith, 7 S. C. 275.

Texas.—Austin *v.* Cahill, (1905) 88 S. W. 542 [*reversing* in effect (Civ. App. 1905) 88 S. W. 536], holding that the fact that points of law may be determined in the course of litigation that will make a precedent harmful to the interests of certain persons in some future litigation is not a sufficient reason for making such persons parties.

Washington.—American Bridge Co. *v.* Wheeler, 35 Wash. 40, 76 Pac. 534, holding that county commissioners are not necessary parties to a proceeding against the county auditor to compel him to issue a warrant on a claim allowed by the commissioners against the county.

See 33 Cent. Dig. tit. "Mandamus," § 293.

If a person's interest has been barred by judgment in prior litigation, he is not a necessary party. General Land Office Com'rs

3. New Parties — a. In General. Persons who, by reason of being interested in the subject-matter of the proceeding, might or should have been joined as parties respondent[88] may be brought in as such *pendente lite*;[89] and it has been held that in a proper case an answer to an order to show cause may be treated as a petition against third persons, and an order to show cause be issued against them as respondents.[90] In case respondent's term of office expires *pendente lite* his successor must be brought in as a party respondent if judgment is desired against him;[91] but where, pending a proceeding against a public body, a new and different body is constituted in its place, the new body cannot be substituted as respondent.[92]

b. Intervention.[93] An individual or a corporation on whom no duty rests to perform the act sought to be enforced in mandamus proceedings,[94] and who has no substantial and peculiar interest in the subject-matter of the litigation,[95] cannot intervene therein as a party; and even where such an interest exists there can be no intervention at common law.[96] In some states, however, this rule has been abrogated either directly or indirectly by statute, so that any person or corporation who by reason of interest might have been joined as a necessary or proper party respondent in mandamus proceedings may intervene therein.[97]

v. Smith, 5 Tex. 471 (*semble*); State *v.* Brown, 19 Wash. 383, 53 Pac. 548 (holding that an irrigation district is not a necessary party to a proceeding to compel the county commissioners to levy a tax to pay interest on irrigation bonds, where the legality of the bonds has been determined in another action to which the district was a party).

88. See *supra*, IX, C, 2, c.

89. *Connecticut.*— State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465.

Illinois.— Chicago *v.* People, 98 Ill. App. 517.

Iowa.— Larkin *v.* Harris, 36 Iowa 93 (*semble*); State *v.* Johnson County Bd. of Equalization, 10 Iowa 157 (*semble*).

Massachusetts.— Kent *v.* Essex County, 10 Pick. 521.

Michigan.— Grand Rapids *v.* Burlingame, 102 Mich. 321, 60 N. W. 698.

Minnesota.— State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153.

Texas.— Watkins *v.* Kirchain, 10 Tex. 375; Smith *v.* Power, 2 Tex. 57, holding that if a third person's interest is disclosed pending suit, petitioner must bring him in as a respondent.

See 33 Cent. Dig. tit. "Mandamus," § 295.

See, however, McGuire *v.* Hurst, 64 S. W. 435, 23 Ky. L. Rep. 846; State *v.* Brown, 28 La. Ann. 103 (holding that an interested third person cannot be brought in to answer a call made upon respondent to perform a mere ministerial duty); State *v.* Smith, 7 S. C. 275.

90. Double *v.* McQueen, 96 Mich. 39, 55 N. W. 564.

91. Fox *v.* Trinidad Waterworks Co., 7 Colo. App. 401, 43 Pac. 1051; Gonhenour *v.* Anderson, 35 Tex. Civ. App. 569, 81 S. W. 104. *Contra*, Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794 [*citing* Orford School Dist. No. 6 *v.* Carr, 63 N. H. 201].

Abatement of proceeding on expiration of respondent's term of office see *infra*, IX, D, 4.

Directing writ to successor of respondent see *infra*, IX, K, 6, b.

Judgment against respondent as binding his successor see *infra*, IX, J, 4, b, (II).

92. Thomas *v.* Carteret County Com'rs, 66 N. C. 522; Carson *v.* Cleaveland County Com'rs, 64 N. C. 566.

Revival of proceeding against successor of respondent see *infra*, IX, D, 4, c.

93. **Right of interested persons not joined as parties to be heard in resistance of the application** see *infra*, IX, H, 7.

94. People *v.* Myers, 50 Hun (N. Y.) 479, 3 N. Y. Suppl. 365 [*affirmed* in 112 N. Y. 676, 20 N. E. 417].

95. Towle *v.* State, 110 Ind. 120, 10 N. E. 941; Com. *v.* Martin, 170 Pa. St. 118, 32 Atl. 624.

96. Winstanley *v.* People, 92 Ill. 402 (*semble*); Harwood *v.* Quinby, 44 Iowa 385 (*semble*); O'Bryan *v.* Owensboro, 113 Ky. 680, 68 S. W. 858, 69 S. W. 800, 24 Ky. L. Rep. 469, 645 (*semble*). See, however, People *v.* Austin, 46 Cal. 520; Com. *v.* Martin, 170 Pa. St. 118, 32 Atl. 624; Smith *v.* Power, 2 Tex. 57; State *v.* Gratiot, 17 Wis. 245, in all of which cases intervention as respondent was allowed. And see Wright *v.* Neathery, 14 Tex. 211, where intervention as petitioner was allowed.

The provisions of a general practice act authorizing all persons in interest to be made parties does not apply to mandamus proceedings. State *v.* Burkhardt, 59 Mo. 75 [*approved* in State *v.* Williams, 96 Mo. 13, 8 S. W. 771]; People *v.* Croton Aqueduct Bd., 5 Abb. Pr. (N. Y.) 372, 16 How. Pr. 4. And see State *v.* Wrotnowski, 17 La. Ann. 156; and *supra*, note 83. See, however, *supra*, note 82; *infra*, note 97.

Intervention is allowed in the court's discretion in New York. Bohnet *v.* New York, 150 N. Y. 279, 44 N. E. 949 [*dismissing* appeal from 8 N. Y. App. Div. 293, 40 N. Y. Suppl. 1140].

97. People *v.* Blocki, 203 Ill. 363, 67 N. E. 809 (where intervention as respondent is expressly authorized); Hower's Appeal, 127 Pa. St. 134, 17 Atl. 862; Lehigh Coal, etc., Co.'s Appeal, 112 Pa. St. 360, 5 Atl. 231 (where a

4. Objections — a. In General.[98] In those jurisdictions where a proceeding to enforce a private right should be brought in the name of the individual in whom the right is vested,[99] the unauthorized use of the name of the state is not ground for dismissing the application, but the state's name will be stricken out on motion.[1] In a proceeding instituted on relation of a railroad company against a town to compel it to issue its bonds to the company, it is no concern of the town for whose use the proceeding is prosecuted.[2] Where the omission of a necessary party respondent appears on the face of the petition no plea is necessary to bring the matter before the court; but the objection may be reached by demurrer or motion in arrest;[3] but if an interested person appears and defends, it is immaterial that he was not formally joined as a party respondent.[4] Where the removal of a municipal officer has been declared illegal in a proceeding between the officer and the city council, the court cannot, in a subsequent proceeding by the officer to compel them to restore him to office, object that one who was appointed by them to the office on relator's removal is not made a party respondent;[5] and in a proceeding to compel a justice of the peace to issue an execution on a judgment rendered by him, the refusal of the court to make the judgment-defendant a party is not available to respondent as error.[6] A party who himself brings in another person as respondent cannot object that such person should not have been made a party.[7] Even where the individual members of a

limited right to intervene is expressly authorized in certain cases).

The General Practice Act is construed to authorize intervention in mandamus proceedings in some states. State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; Towle *v.* State, 110 Ind. 120, 10 N. E. 941 (*semble*); State *v.* Pilsbury, 31 La. Ann. 1; Neligh First Nat. Bank *v.* Lancaster, 54 Nebr. 467, 74 N. W. 858; State *v.* Mack, 26 Nev. 430, 69 Pac. 862. And see State *v.* Matley, 17 Nebr. 564, 24 N. W. 200; State *v.* Patterson, 11 Nebr. 266, 9 N. W. 82; and *supra*, note 82. See, however, *supra*, notes 83, 96.

If a person's interest will not be affected by a judgment awarding the writ, he cannot intervene. Harwood *v.* Quinby, 44 Iowa 385; State *v.* Wright, 10 Nev. 167; People *v.* Keating, 55 N. Y. App. Div. 528, 67 N. Y. Suppl. 418. And see *supra*, IX, C, 2, c.

Intervention after award of peremptory writ.— There can be no intervention after judgment awarding a peremptory writ, especially where the act sought to be enforced has been performed. Owens *v.* Colgan, 97 Cal. 454, 32 Pac. 519.

Persons already represented in proceeding. — One who is already a virtual party by representation cannot intervene. Calaveras County *v.* Brockway, 30 Cal. 325; People *v.* Myers, 50 Hun (N. Y.) 479, 3 N. Y. Suppl. 365 [*affirmed* in 112 N. Y. 676, 20 N. E. 1417]. And see *supra*, IX, C, 2, c.

Purpose of intervention.— Even where the general right to intervene in mandamus proceedings is recognized, yet intervention will not be permitted for all purposes. Thus in a proceeding to compel the auditor to draw his warrant on the state treasury, the court will not permit a third person to come in and litigate his claim with petitioner on the ground that he has a lien on the debt which the state owes petitioner (Hewitt *v.* Craig, 86 Ky. 23, 5 S. W. 280, 9 Ky. L. Rep. 232); and in a proceeding by a town to compel the payment of moneys owing it by a county, a town creditor who claims the fund will not be allowed to intervene (*In re* Porter Tp. Road, 1 Walk. (Pa.) 10). A third person cannot intervene and excuse, by reason of something peculiar to himself, the omission of an official duty on the part of a public officer (Harwood *v.* Quinby, 44 Iowa 385); and a person who claims an interest in the subject-matter cannot intervene as plaintiff and ask affirmative relief (Winstanley *v.* People, 92 Ill. 402, holding that the statute allowing intervention in mandamus proceedings authorizes intervention only as a party respondent). And where judgment has been recovered in an action on municipal bonds in favor of the holders, taxpayers are not entitled to be made parties to a subsequent suit to enforce the judgment by mandamus for the purpose of having the judgment opened and relitigating the validity of the bonds. Kinney *v.* Eastern Trust, etc., Co., 123 Fed. 297, 59 C. C. A. 586.

Who are interested persons see *supra*, IX, C, 2, c.

98. **Abatement and revival** see *infra*, IX, D.
Amendment as to parties see *infra*, IX, E, 7.
Harmless error see *infra*, IX, M.

99. See *supra*, IX, C, 1, b, (II).

1. State *v.* Bates, (S. C. 1896) 24 S. E. 755.
2. People *v.* Barnett, 91 Ill. 422.
3. Powell *v.* People, 214 Ill. 475, 73 N. E. 795, 105 Am. St. Rep. 117.
4. Dew *v.* Judges Sweet Spring Dist. Ct., 3 Hen. & M. (Va.) 1, 3 Am. Dec. 639.
5. Leeds *v.* Atlantic City, 52 N. J. L. 332, 19 Atl. 780, 8 L. R. A. 697.
6. Adams *v.* Casey-Swasey Co., 15 Tex. Civ. App. 379, 39 S. W. 654, since respondent is not prejudiced.
7. Hoffman *v.* Silverthorn, 137 Mich. 60, 100 N. W. 183.

public body should not be named as respondents in a proceeding against it for mandamus,[8] the naming of the individual members is not a fatal error.[9]

b. Waiver. The omission, as a party respondent, of one who has a legal interest in the right or duty sought to be enforced and whose rights will be collaterally determined by the judgment if rendered as prayed for cannot be waived by the parties so as to authorize the court to determine the rights of the interested person in his absence;[10] but a party respondent may waive the right to object to a non-joinder so far as he himself is concerned.[11] If a defect of parties appears on the face of the petition respondent waives the objection by failure to demur.[12] Misjoinder of relators is waived by answering;[13] but one who is substituted as a party in place of respondent does not waive the error by answering pursuant to order of court.[14] Irregularity in instituting the proceeding in the name of an individual instead of in the name of the state is waived where respondent files an answer[15] or fails to object in the lower court;[16] and irregularity in instituting a proceeding on relation of a county instead of the county commissioners is likewise waived.[17] By filing an answer or return respondents waive any irregularity in proceeding against them instead of the body of which they are the members.[18]

D. Abatement and Revival[19] — **1. Death of Relator.** Generally mandamus proceedings are to be classed with those personal actions which die with the person;[20] but where a writ is prosecuted by a public officer for the public benefit, his death will not affect the proceeding.[21]

2. Death of Defendant. In the absence of the statutory provision to the contrary,[22] mandamus against a public officer abates on the death of defendant.[23]

3. Expiration of Term of Office of Relator.[24] When the proceedings are instituted for the public benefit, and to enforce a public duty, they do not abate by the termination of the official term of relator.[25]

8. See *supra*, IX, C, 2, b, (II).

9. Sheaff *v.* People, 87 Ill. 189, 29 Am. Rep. 49, holding that it may be regarded as surplusage.

10. Powell *v.* People, 214 Ill. 475, 73 N. E. 795, 105 Am. St. Rep. 117.

11. People *v.* Northern Cent. R. Co., 164 N. Y. 289, 58 N. E. 138.

12. People *v.* Northern Cent. R. Co., 164 N. Y. 289, 58 N. E. 138.

13. People *v.* Ontario County, 85 N. Y. 323 [*reversing* on another ground 17 Hun 501], holding that the objection is available only on motion to quash the alternative writ.

14. Thomas *v.* Carteret County Com'rs, 66 N. C. 522.

15. Jessup *v.* Carey, 61 Ind. 584.

16. Brower *v.* O'Brien, 2 Ind. 423; Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794; Hill *v.* Goodwin, 56 N. H. 441.

17. Holland *v.* State, 23 Fla. 123, 1 So. 521.

18. Fuller *v.* Plainfield Academic School, 6 Conn. 532; Sterling *v.* Jones, 87 Md. 141, 39 Atl. 424.

19. Abatement and revival generally see 1 Cyc. 10 *et seq.*

Effect of pendency of other proceeding see *supra*, II, H.

Plea in abatement of pendency of another suit see Abatement and Revival, 1 Cyc. 44.

20. See Abatement and Revival, 1 Cyc. 69.

A statute providing against abatement of an appeal or writ of error by the death of either party was held not to apply to mandamus. Booze *v.* Humbird, 27 Md. 1, holding that in such a case the personal representative of the relator could not continue the prosecution of the appeal.

Death of one copartner among the relators does not abate the writ. People *v.* Essex County, 70 N. Y. 228.

21. Felts *v.* Memphis, 2 Head (Tenn.) 650, holding that his successor in office may continue the prosecution of the proceeding.

22. See for example 2 Starr & C. Annot. St. Ill. § 2682.

23. U. S. *v.* Butterworth, 169 U. S. 600, 18 S. Ct. 441, 42 L. ed. 873 (holding that mandamus to such an officer cannot be revived against his successor in office even with the consent of the latter); U. S. *v.* Boutwell, 17 Wall. (U. S.) 604, 21 L. ed. 721. See also People *v.* Lautry, 88 N. Y. App. Div. 583, 85 N. Y. Suppl. 193.

Death of a represented person, such as an inebriate represented by a trustee, terminates a mandamus proceeding brought against the representative. *Ex p.* Dowe, 54 Ala. 258.

24. Bringing in successor as party defendant see *supra*, IX, C, 3, a.

Directing writ to successor in office see *infra*, IX, K, 6, b.

Expiration of office affecting right to writ see *supra*, II, F, 1.

Judgment against officer as binding his successor in office see *infra*, IX, J, 4, b, (II).

25. Columbia County Com'rs *v.* Bryson, 13 Fla. 281 (change of membership of relator, a board of commissioners); Felts *v.* Memphis, 2 Head (Tenn.) 650. See State *v.*

4. Expiration of Term of Office of Defendant — a. In General — (I) *No Uniform Rule.* It cannot be denied that there is a sharp conflict of authority on this question.[26] While one line of cases flatly asserst that, if pending the proceedings the term of defendant officer terminates, the proceedings abate,[27] another line of cases with equal emphasis denies that under such circumstances the proceedings abate.[28] Whichever view may be taken, it will be supported by decisions of respectable courts and sustained by many well-reasoned cases.[29] The real question in dispute seems to be whether the proceedings are against the individual or against the office,[30] and in answer to this question the rule supported by the great weight of authority[31] may be laid down as follows: If against the individual the proceedings will abate;[32] otherwise they will not abate.[33]

(II) *Rule That Proceedings Abate.* The federal courts,[34] as well as some of the state courts,[35] proceeding upon the theory that the proceedings are

Atchison, etc., R. Co., (Kan. 1899) 57 Pac. 106, where it was held that an application for mandamus against a railroad company will be dismissed where before it is heard the board has performed its functions and passed out of existence.

26. See State *v.* Board of State Canvassers, 32 Mont. 13, 15, 79 Pac. 402; State *v.* Guthrie, 17 Nebr. 113, 22 N. W. 77; Thompson *v.* U. S., 103 U. S. 480, 26 L. ed. 521; U. S. *v.* Boutwell, 17 Wall. (U. S.) 604, 21 L. ed. 721; Cox *v.* U. S., 9 Wall. (U. S.) 298, 19 L. ed. 579 [both cases *distinguished* in Thompson *v.* U. S., *supra*]; and cases cited *infra*, note 34 *et seq.* In State *v.* Board of State Canvassers, *supra* [*criticizing* Thompson *v.* U. S., *supra*], the court agreeing with Mr. Merrill (Merrill Mand. § 238, note 5) that it is difficult to reconcile the Thompson case with those of Boutwell and McGarrahan, said: "We confess that we cannot understand how they are distinguishable. We believe that what the court said in the Boutwell and McGarrahan Cases is correct and supported by law and reason."

27. See cases cited *infra*, notes 34–39.

28. See cases cited *infra*, note 42.

29. State *v.* Guthrie, 17 Nebr. 113, 22 N. W. 77; and *infra*, notes 34, 35, 42.

30. State *v.* Puckett, 7 Lea (Tenn.) 709.

31. See cases cited *infra*, notes 34, 35, 42.

32. State *v.* Puckett, 7 Lea (Tenn.) 709. See also *infra*, IV, D, 4, a, (II).

33. State *v.* Puckett, 7 Lea (Tenn.) 709. See also *infra*, IV, D, 4, a, (III).

34. In the federal courts the rule that a petition for a writ of mandamus to a public officer of the United States abates by his resignation of his office has been laid down by a series of uniform decisions, and has for years been considered so well settled that in some of the cases no opinion has been filed and no official reports published. Seymour *v.* Nelson, 11 App. Cas. (D. C.) 58; U. S. *v.* Butterworth, 169 U. S. 600, 18 S. Ct. 441, 42 L. ed. 873; Smith *v.* Raynolds, 166 U. S. 717, 17 S. Ct. 998, 41 L. ed. 1186; Warner Valley Stock Co. *v.* Smith, 165 U. S. 28, 17 S. Ct. 225, 41 L. ed. 621; U. S. *v.* Lochren, 164 U. S. 701, 17 S. Ct. 1001, 41 L. ed. 1181; U. S. *v.* Lamont, 155 U. S. 303, 15 S. Ct. 97, 39 L. ed. 160; U. S. *v.* Chandler, 122 U. S. 643; U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; U. S. *v.* Boutwell, 17 Wall. (U. S.) 604, 21 L. ed. 721; Cox *v.* U. S., 9 Wall. (U. S.) 298, 19 L. ed. 579.

This rule applies as well after judgment and pending appeal therefrom as before. Seymour *v.* Nelson, 11 App. Cas. (D. C.) 58; Warner Valley Stock Co. *v.* Smith, 165 U. S. 28, 17 S. Ct. 225, 41 L. ed. 621.

Judge Strong's reason for this rule.— In U. S. *v.* Boutwell, 17 Wall. (U. S.) 604, 607, 21 L. ed. 721 [*quoted* in Warner Valley Stock Co. *v.* Smith, 165 U. S. 28, 32, 17 S. Ct. 225, 41 L. ed. 621], it is said: "The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. . . . If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. . . . It necessarily follows from this, that on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary."

35. *Ex p.* Rowe, 7 Cal. 175 (holding that a suit to compel an officer to file an additional office bond abates on the resignation of the officer); Beachy *v.* Lamkin, 1 Ida. 50; State *v.* Board of State Canvassers, 32 Mont. 13, 15, 79 Pac. 402 [*following* U. S. *v.* Boutwell, 17 Wall. (U. S.) 604, 21 L. ed. 721; Cox *v.* U. S., 9 Wall. (U. S.) 298, 19 L. ed. 579] (where it is said: "We believe that reason and the weight of authority are in support of the position we take"); State *v.* Guthrie, 17 Nebr. 113, 22 N. W. 77 [*criticizing* State *v.* Warner, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255; State *v.* Gates, 22 Wis. 210, and *following* U. S. *v.* Boutwell, 17 Wall. (U. S.) 604, 21 L. ed. 721; Cox *v.* U. S., 9 Wall. (U. S.) 298, 19 L. ed. 579]; Rains *v.* Simpson, 50 Tex. 495, 32 Am. Rep. 609. But see State *v.* Cole, 25 Nebr. 342, 41 N. W. 245.

Where the delinquency charged is personal the mandamus proceedings abate upon the death, resignation, or termination of office of the officer charged unless otherwise pro-

directed not against the government, municipality, or corporation of which defendant is an officer, but against the officer himself, whose personal default warrants the impetration of the writ,[36] have decided that the proceedings abate upon the expiration of defendant's term of office[37] whether by his own resignation[38] or otherwise.[39]

(III) *Rule That Proceedings Do Not Abate.* On the other hand, proceeding upon the theory that the writ operates on the office rather than on the individual who occupies the office,[40] and that the proceedings are instituted to enforce the writ against the corporation, municipality, or government through its officer or agent,[41] the great majority of cases lay down the rule that the proceedings do not abate by the resignation, removal, or expiration of the term of defendant officer, and may be enforced against his successor or successors in office.[42]

vided by statute. People *v.* Morton, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231 [*approved* on this point in People *v.* Best, 187 N. Y. 1, 79 N. E. 890].

36. See *supra*, IX, D, 4, a, (I).

37. At common law an application for mandamus against a public official abates on his retirement from office. State *v.* Board of State Canvassers, 32 Mont. 13, 79 Pac. 402; People *v.* Lantry, 88 N. Y. App. Div. 583, 85 N. Y. Suppl. 193.

38. See cases cited *supra*, notes 34, 35.

Resignation for the purpose of evading the writ takes the case from the operation of the rule. State *v.* Guthrie, 17 Nebr. 113, 22 N. W. 77.

Under the Illinois township statute, it has been held that a supervisor, town-clerk, or justice of the peace continues in office when he is not relieved of his duties until his successor is appointed or chosen and qualified, although his resignation has been tendered to and accepted by the proper authority. Badger *v.* U. S., 93 U. S. 599, 23 L. ed. 991.

39. See cases cited *supra*, notes 34, 35.

40. See *supra*, IX, D, 4, a, (I).

41. See cases cited *infra*, note 42.

42. *Arizona.*— Utter *v.* Franklin, 7 Ariz. 300, 64 Pac. 427.

Colorado.— Nance *v.* People, 25 Colo. 252, 54 Pac. 631; Parks *v.* Hays, 11 Colo. App. 415, 53 Pac. 893. *Compare* Fox *v.* Trinidad Waterworks Co., 7 Colo. App. 401, 43 Pac. 1051.

Connecticut.— Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336.

Illinois.— State Bd. of Education *v.* People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513; People *v.* Barnett Tp., 100 Ill. 332, by statute. See Starr & C. Annot. St. § 2682.

Iowa.— See U. S. *v.* Dubuque County, Morr. 31, 36.

Kansas.— Shull *v.* Gray County, 54 Kan. 101, 107, 37 Pac. 994.

Kentucky.— Lindsey *v.* State Auditor, 3 Bush 231; Maddox *v.* Graham, 2 Metc. 56.

Louisiana.— State *v.* Jefferson Police Jury, 39 La. Ann. 979, 3 So. 88; Bassett *v.* Barbin, 11 La. Ann. 672.

Michigan.— People *v.* Wexford Tp., 37 Mich. 351.

Mississippi.— Hardee *v.* Gibbs, 50 Misc. 802, saying that such a rule is essential to the administration of justice.

Nebraska.— See State *v.* Cole, 25 Nebr. 342, 41 N. W. 245. In this case defendant was duly elected and qualified as a county officer; during his term of office application was made for a writ of mandamus to compel him to perform certain duties; he filed his answer controverting the principal allegation; subsequently he filed a supplementary answer alleging that since the filing of his original answer his term of office had expired; to this a general demurrer was interposed which was sustained on the ground that the facts therein stated did not constitute a defense. *Contra*, State *v.* Guthrie, 17 Nebr. 113, 22 N. W. 77.

New York.— People *v.* Best, 187 N. Y. 1, 79 N. E. 890 [*reversing* 112 N. Y. App. Div. 912, 98 N. Y. Suppl. 1112, and *explaining* People *v.* Morton, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231 (*reversing* 24 N. Y. App. Div. 563, 49 N. Y. Suppl. 760)]; People *v.* Chenango, 8 N. Y. 317; People *v.* Maher, 64 Hun 408, 19 N. Y. Suppl. 758 [*reversed* on other grounds in 141 N. Y. 330, 36 N. E. 396]; People *v.* Lantry, 40 Misc. 428, 82 N. Y. Suppl. 261; People *v.* Cram, 30 Misc. 561, 63 N. Y. Suppl. 1027; People *v.* Sage, 3 How. Pr. 56; People *v.* Collins, 19 Wend. 56; People *v.* Champion, 16 Johns. 61.

North Carolina.— Pegram *v.* Cleaveland County Com'rs, 65 N. C. 114.

Oklahoma.— Finley *v.* Territory, 12 Okla. 621, 73 Pac. 273.

Pennsylvania.— Com. *v.* Union Tp. Overseers of Poor, 4 Kulp 87; Lancaster Co. *v.* Lancaster, 12 Lanc. L. Rev. 201.

Tennessee.— State *v.* Puckett, 7 Lea 709.

Wisconsin.— State *v.* Warner, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255; State *v.* Gates, 22 Wis. 210; State *v.* Madison, 15 Wis. 30.

See 33 Cent. Dig. tit. "Mandamus," § 52.

Continuing duty theory.— These decisions, some of them in express terms, others by necessary implication, justify this doctrine upon the ground that the proceedings are against the office to compel the performance of a continuing duty, a duty devolving upon the office irrespective of the incumbent; that the responsibility results from the office and not from any individual responsibility of

b. Where Defendant Is a Board or Body. Where defendant is a court or a board consisting of more than one officer or person, the courts have been more uniform in applying the rule that no abatement takes place, where pending the mandamus proceedings there is a change in the *personnel* of the board, council, commission, or the like,[43] provided of course the board has not performed all of its functions and actually gone out of existence.[44] And the reason for this is plain; for, while the constituent members of the court or board may not be the same, the representative body remains identical;[45] the *personnel* of the judges or officers may change, but the court or board retains its identity and is in a sense the same.[46]

the person occupying it. Nance *v.* People, 25 Colo. 252, 54 Pac. 631; Hardee *v.* Gibbs, 50 Miss. 802; State *v.* Puckett, 7 Lea (Tenn.) 709; State *v.* Warner, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255; State *v.* Gates, 22 Wis. 210. And see cases cited *supra*, this note. This also appears to be the rule as followed in the supreme court of the United States whenever a proceeding is to enforce a continuing duty against a corporation or municipality. Thompson *v.* U. S., 103 U. S. 480, 484, 26 L. ed. 521 [*distinguishing* U. S. *v.* Boutwell, 17 Wall. (U. S.) 604, 21 L. ed. 721; Cox *v.* U. S., 9 Wall. (U. S.) 298, 19 L. ed. 579]; Leavenworth County *v.* Sellew, 99 U. S. 624, 25 L. ed. 333. See also *Ex p.* Parker, 131 U. S. 221, 9 S. Ct. 708, 33 L. ed. 123; Edwards *v.* U. S., 103 U. S. 471, 26 L. ed. 314. In Thompson *v.* U. S., *supra* [*quoted* in Warner Valley Stock Co. *v.* Smith, 165 U. S. 28, 17 S. Ct. 225, 41 L. ed. 621], it was said: "The cases in which it has been held by this court that an abatement takes place by the expiration of the term of office have been those of officers of the government, whose alleged delinquency was personal, and did not involve any charge against the government whose officers they were."

Mandamus proceedings against an official merely as such are not effected by change of incumbency in office. People *v.* Wexford Tp., 37 Mich. 351.

Pending appeal no writ can issue against successor in office. Ross *v.* Lane, 3 Sm. & M. (Miss.) 695.

43. *Connecticut.*— Norwalk, etc., Electric Light Co. *v.* South Norwalk, 71 Conn. 381, 42 Atl. 82; State Attorney *v.* Branford, 59 Conn. 402, 22 Atl. 336.

Florida.— State *v.* Canfield, 40 Fla. 36, 23 So. 591, 42 L. R. A. 72; Columbia County *v.* Bryson, 13 Fla. 281.

Illinois.— People *v.* Barnett Tp., 100 Ill. 332, by statute.

Kentucky.—Maddox *v.* Graham, 2 Metc. 56.

Louisiana.— State *v.* Jefferson Parish Police Jury, 39 La. Ann. 979, 3 So. 88; State *v.* New Orleans, 35 La. Ann. 68.

New York.— People *v.* Collins, 19 Wend. 56.

North Carolina.— Pegram *v.* Cleveland County, 65 N. C. 114.

Pennsylvania.— Lancaster County *v.* Lancaster City, 12 Lanc. L. Rev. 201.

Wisconsin.— State *v.* Madison, 15 Wis. 30.

United States.— Murphy *v.* Utter, 186 U. S. 95, 22 S. Ct. 776, 46 L. ed. 1070; Warner Valley Stock Co. *v.* Smith, 165 U. S. 28, 17 S. Ct. 225, 41 L. ed. 621; Leavenworth County *v.* Sellew, 99 U. S. 624, 25 L. ed. 333.

See 33 Cent. Dig. tit. "Mandamus," § 52; and cases cited *supra*, note 42.

Abatement as to retiring officers.— A writ of mandamus against the county court requiring that the tax-roll be delivered to the tax-collector is abated by the going out of office of the members of the court, as against such retiring officers. Rains *v.* Simpson, 50 Tex. 495, 32 Am. Rep. 609.

Consolidation of boards.— In Jefferson Police Jury *v.* U. S., 60 Fed. 249, 8 C. C. A. 607 [*following* State *v.* Jefferson Police Jury, 39 La. Ann. 979, 3 So. 88; U. S. *v.* Board of Mobile, 12 Fed. 768], it was held that a mandamus against the police jury of a division of a parish might be enforced, after a consolidation, against the police jury of the parish thus formed.

44. Carson *v.* Cleveland County, 64 N. C. 566, holding that the board of county commissioners, not being the representative of the former county court, even as regards matters of administration, a suit pending against the latter, at the time of its dissolution, cannot be revived against the former. *Compare* Com. *v.* Hampden County, 6 Pick. (Mass.) 501, where the statute creating defendant was repealed by another statute vesting all its powers in another body.

45. Maddox *v.* Graham, 2 Metc. (Ky.) 56.

46. Norwalk, etc., Co. *v.* South Norwalk, 71 Conn. 381, 42 Atl. 82; State *v.* Guthrie, 17 Nebr. 113, 115, 22 N. W. 77; Pegram *v.* Cleveland County, 65 N. C. 114; Warner Valley Stock Co. *v.* Smith, 165 U. S. 28, 32, 33, 17 S. Ct. 225, 41 L. ed. 621. In State *v.* Guthrie, *supra*, it is said: "I do not think, however, that those cases where the writ of mandamus has been directed to courts or boards consisting of more than one officer or person can be considered as exactly in point. In such cases, while the judges, members, or officers may change, the court or board retains its identity, and is, in a sense, the same. . . . This distinction has been often overlooked or denied by courts of the greatest respectability." And in Warner Valley Stock Co. *v.* Smith, *supra*, it is said: "The case of a public officer of the United States differs in this respect from that of a municipal board, which is a continuing corporation (although its individual members may be changed) and

c. Revival of Continuance — (i) *Under Rule That Proceedings Abate.* Mandamus being a legal and not an equitable proceeding,[47] it would seem that the effect of an abatement as to defendant would be to completely terminate the proceeding, and that it could not be revived or continued against the successor in office.[48] However, some cases,[49] it seems, impliedly applying the rule as to abatement in equity merely place the proceeding in a state of suspension from which it may be revived[50] in the proper manner.[51]

(ii) *Under Rule That Proceedings Do Not Abate.* In case the proceeding is a proper one to be continued by or against an official successor,[52] in the absence of statutory provision to the contrary,[53] the procedure may follow that employed for the revival and continuance of civil actions generally,[54] it being the common practice to enter a suggestion of the change of interest on the record, and a rule or order bringing in the new party or parties.[55] On the other hand some of the cases hold that no revival is necessary against the successor of the officer against whom the proceedings were instituted.[56]

to which in its corporate capacity a writ of mandamus may be directed."

47. See *supra*. I, C.

48. See Abatement and Revival, 1 Cyc. 20; Beachy *v.* Lamkin, 1 Ida. 50.

In the absence of statutory provision to the contrary, the successor in office cannot be brought in by way of amendment of the proceeding or on an order for the substitution of parties. U. S. *v.* Boutwell, 17 Wall. (U. S.) 604, 21 L. ed. 721. See also People *v.* Lantry, 88 N. Y. App. Div. 583, 85 N. Y. Suppl. 193 [*reversing* 40 Misc. 428, 82 N. Y. Suppl. 261], stating this to be the rule at common law.

49. See *Ex p.* Tinkum, 54 Cal. 201 (holding that the successor in office must be first brought in as a party to the proceedings); State *v.* Board of State Canvassers, 32 Mont. 13, 79 Pac. 402 (where the writ was dismissed when the successors in office were given no opportunity to perform and no demand was made upon them). *Compare* New Mexico *v.* Baker, 196 U. S. 432, 25 S. Ct. 375, 49 L. ed. 540, where in mandamus proceedings against a judge of a territorial court, who after the appeal ceased to be a judge and whose successor consented that the action be revived against him, the court, under the act of congress of Feb. 8, 1899, substituted the name of the successor in the place of the original appellee.

50. See Abatement and Revival, 1 Cyc. 21.

51. Manner of revival generally see Abatement and Revival, 1 Cyc. 10. In *Ex p.* Tinkum, 54 Cal. 201, it was said that the change in the incumbent should have been suggested on the records by proper orders, and the action continued against the successor.

52. See *supra*, IX, D, 4, a, (iii).

53. Alias peremptory writ may issue against successor in office under the Illinois statutes. People *v.* Barnett Tp., 100 Ill. 332. See Starr & C. Annot. St. Ill. § 2682.

54. See Abatement and Revival, 1 Cyc. 10. See Hardee *v.* Gibbs, 50 Miss. 802, where the proceeding may be revived against the successor in office by scire facias.

Appearing and filing answer.— The failure in mandamus proceedings brought against an officer and continued against his successor in office to bring in the latter by process is cured by the successor's appearing and filing an answer. Parks *v.* Hays, 11 Colo. App. 415, 53 Pac. 893.

55. Parks *v.* Hays, 11 Colo. App. 415, 53 Pac. 893; Fox *v.* Trinidad Waterworks Co., 7 Colo. App. 401, 43 Pac. 1051; Lindsey *v.* State Auditor, 3 Bush (Ky.) 231. See also Palmer *v.* Jones, 49 Iowa 405, 407.

56. Utter *v.* Franklin, 7 Ariz. 300, 64 Pac. 427, 428; Norwalk, etc., Electric Light Co. *v.* South Norwalk, 71 Conn. 381, 42 Atl. 82; State Attorney *v.* Branford, 59 Conn. 402, 22 Atl. 336; People *v.* Best, 187 N. Y. 1, 79 N. E. 890 [*reversing* 112 N. Y. App. Div. 912, 98 N. Y. Suppl. 1112, and *quoting* High Extr. Rem. § 38]; People *v.* Cram, 30 Misc. (N. Y.) 561, 63 N. Y. Suppl. 1027 (holding that under the code the new officer or successors in office need not have notice); State *v.* Puckett, 7 Lea (Tenn.) 709. But see People *v.* Morton, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231 [*reversing* 24 N. Y. App. Div. 563, 49 N. Y. Suppl. 760] (where it was held that the practice prescribed by Code Civ. Proc. § 1930, for the substitution of a successor in office for a party to an action or special proceeding against county, town, or municipal officers applied to state officers); People *v.* Lantry, 88 N. Y. App. Div. 583, 85 N. Y. Suppl. 193 [*reversing* 40 Misc. 428, 82 N. Y. Suppl. 261] (holding that the relator is not entitled under Code Civ. Proc. §§ 723, 755, 756, 1930, or 1997, to have the respondent's successor substituted in the respondent's place; that his remedy is to make a demand upon the successor and if such successor refuses to perform, then to institute a mandamus proceeding against him). In People *v.* Lantry, 40 Misc. (N. Y.) 428, 82 N. Y. Suppl. 261, McCall, J., at special term, said that the official successor need not be substituted as defendant, but that it is the better practice that he be so substituted. See also People *v.* Welde, 61 N. Y. App. Div. 580, 70 N. Y. Suppl. 869.

5. Receivership. The fact that defendant goes into the hands of a receiver during the pendency of the proceedings is not a ground for abating the same.[57]

6. Repeal of Statute. The repeal of the statute upon which the right or duty in mandamus depends will put an end to the proceedings.[58]

E. Pleading[59] **— 1. In General.** As appears in other connections, there are in many jurisdictions rules peculiarly applicable to mandamus proceedings with reference to the title of the proceedings, the form of the application, and the name by which it is known, the form and names of the subsequent pleadings, and various other matters. These rules exist either at common law or by force of statute, and they vary in the different states.[60] Subject to this statement it may be said that the common-law rules of pleading in civil actions as modified by the codes or otherwise are applicable in mandamus proceedings.[61] As in ordinary actions at law pleadings are essential and cannot be waived.[62]

2. Title of Proceedings. The application for a writ of mandamus should be addressed to the court before which it is laid;[63] but, in the absence of statutes modifying the common-law practice,[64] neither the application,[65] nor the affidavit upon which it is founded,[66] nor the answer to the application[67] should be entitled as in any cause, since in contemplation of law no cause is pending until the writ issues, the proceeding being *ex parte* up to that time.[68] If the application is

57. People *v.* Barnett, 91 Ill. 422, 431, so long at least as the receiver makes no objection to the suit going on to its termination.

58. *Florida.*— State *v.* Gibbs, 13 Fla. 55, 7 Am. Rep. 233.

Iowa.— Cutcomp *v.* Utt, 60 Iowa 156, 14 N. W. 214.

Massachusetts.— See Com. *v.* Hampden County, 6 Pick. 500.

Mississippi.— Cole *v.* Wineman, 80 Miss. 73, 31 So. 537.

Wisconsin.— State *v.* Harvey, 14 Wis. 151. Repeal of a municipal ordinance has the same effect. Cutcomp *v.* Utt, 60 Iowa 156.

59. See, generally, Pleading.

60. See *infra*, IX, E, 2 *et seq.*

61. *California.*— People *v.* San Francisco, 27 Cal. 655.

Colorado.— Nance *v.* People, 25 Colo. 252, 54 Pac. 631; People *v.* Lothrop, 3 Colo. 428; Gillett *v.* People, 13 Colo. App. 553, 59 Pac. 72.

Illinois.— Powell *v.* People, 214 Ill. 475, 73 N. E. 795, 105 Am. St. Rep. 117; Chicago, etc., R. Co. *v.* People, 179 Ill. 441, 53 N. E. 986; People *v.* Crabb, 156 Ill. 155, 40 N. E. 319; Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33; People *v.* Glann, 70 Ill. 232; Silver *v.* People, 45 Ill. 224; McDonald *v.* Judson, 97 Ill. App. 414; Hall *v.* Mann, 96 Ill. App. 659; Bolton *v.* People, 95 Ill. App. 285; Chicago Great Western R. Co. *v.* People, 79 Ill. App. 529.

Nebraska.— State *v.* Baushausen, 49 Nebr. 558, 68 N. W. 950; State *v.* Chicago, etc., R. Co., 19 Nebr. 476, 27 N. W. 434.

Nevada.— State *v.* Lady Bryan Min. Co., 4 Nev. 400. And see State *v.* Gracey, 11 Nev. 223.

Ohio.— State *v.* Crites, 48 Ohio St. 142, 26 N. E. 1052; State *v.* Ottinger, 43 Ohio St. 457, 3 N. E. 298; State *v.* Hawes, 43 Ohio St. 16, 1 N. E. 1; Fornoff *v.* Nash, 23 Ohio St. 335.

Tennessee.— State *v.* Williams, 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418.

Texas.— Sanson *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505.

Vermont.— Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146.

West Virginia.— Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 595.

Wisconsin.— State *v.* Kellogg, 95 Wis. 672, 70 N. W. 300; State *v.* Jennings, 56 Wis. 113, 14 N. W. 28.

62. Payne *v.* Perkerson, 56 Ga. 672. See also *infra*, IX, E, 8.

63. Landers *v.* Lawler, 84 Cal. 547, 24 Pac. 307; Chance *v.* Temple, 1 Iowa 179.

64. See the statutes of the different states.

65. State *v.* Johnson County, 10 Iowa 157, 74 Am. Dec. 381; Chance *v.* Temple, 1 Iowa 179; Chumasero *v.* Potts, 2 Mont. 242. And see McCrary *v.* Beaudry, 67 Cal. 120, 7 Pac. 264.

66. *Iowa.*— Chance *v.* Temple, 1 Iowa 179.

Montana.— Territory *v.* Potts, 3 Mont. 364; Chumasero *v.* Potts, 2 Mont. 242.

New York.—People *v.* Dikeman, 7 How. Pr. 124; People *v.* Tioga C. Pl., 1 Wend. 291; Haight *v.* Turner, 2 Johns. 371. See, however, People *v.* Oneida County, 25 Misc. 444, 55 N. Y. Suppl. 712.

England.— Rex *v.* Warwickshire, 5 Dowl. P. C. 382.

Canada.— Queen *v.* York, 6 N. Brunsw. 90; Toronto Public Library Bd. *v.* Toronto, 19 Ont. Pr. 329.

At any rate it is not necessary to entitle the affidavit. McCrary *v.* Beaudry, 67 Cal. 120, 7 Pac. 264.

However, an affidavit entitled "Sup. Court. In the matter of John La Farge against the judges," etc., is not so entitled as to prevent its being read (*Ex p.* La Farge, 6 Cow. (N. Y.) 61); nor is an affidavit entitled "In re Complaint of — *v.* —" (Augusta Tp. *v.* United Counties, etc., 1 Ont. Pr. 121).

67. Chumasero *v.* Potts, 2 Mont. 242.

68. Chance *v.* Temple, 1 Iowa 179; Chumasero *v.* Potts, 2 Mont. 242; People *v.* Tioga

granted, the writ issues in the name of the state,[69] and it is directed to the person or corporation upon whom the duty of acting rests;[70] and accordingly the subsequent pleadings and papers should be entitled as in a cause. In most jurisdictions the subsequent proceedings are entitled in the name of the state against the respondent in the writ, and the person or officer instituting the proceeding is commonly named as relator.[71]

3. APPLICATION — a. In General. The action of the court in mandamus proceedings is invoked by some form of application,[72] based on papers presenting the facts of the case.[73] Mandamus cannot be demanded by way of answer in an ordinary action at law,[74] but it has been held that in mandamus proceedings against one person he may in his answer demand that the writ issue against another.[75] The practice in regard to what constitutes the first pleading in the case is not uniform. At common law the alternative writ is not only a process,[76] but also a pleading, and it stands in place of the declaration in an ordinary action at law.[77] In many states, however, the application for mandamus is instituted by

C. Pl., 1 Wend. (N. Y.) 291; Haight *v.* Turner, 2 Johns. (N. Y.) 371; Rex *v.* Warwickshire, 5 Dowl. P. C. 382.

69. See *infra*, IX, F, 3, e, (I).

70. See *infra*, IX, F, 3, e, (II); IX, K, 6, b.

71. See *supra*, IX, C, 1, a.

72. Payne *v.* Perkerson, 56 Ga. 672 (holding that a formal application cannot be waived); *Ex p.* Davis, 41 Me. 38 (holding that a mere memorial to the court, stating the facts, is not a good application).

Application by complaint is the practice in some states. St. Albans *v.* National Car Co., 57 Vt. 68.

Application by motion is the practice in some states. *Ex p.* Garland, 42 Ala. 559; Potts *v.* State, 75 Ind. 336; Chance *v.* Temple, 1 Iowa 179; Swan *v.* Gray, 44 Miss. 393 (English practice); Territory *v.* Potts, 3 Mont. 364; Chumasero *v.* Potts, 2 Mont. 242 (both holding that the statutory application is nothing more than a motion); State *v.* Harrington, (Nebr. 1907) 110 N. W. 1016; State *v.* Lancaster County, 49 Nebr. 51, 68 N. W. 336; State *v.* Lincoln, 4 Nebr. 260; Collet *v.* Allison, 1 Okla. 42, 25 Pac. 516; State *v.* Fairchild, 22 Wis. 110.

Application by petition is the practice in some states. People *v.* Loomis, 94 Ill. 587; Highway Com'rs *v.* Gilson, 7 Ill. App. 231; Cumberland, etc., R. Co. *v.* Judge Washington County Ct., 10 Bush (Ky.) 564; Bishop *v.* Marks, 15 La. Ann. 147; Swan *v.* Gray, 44 Miss. 393; Swann *v.* Buck, 40 Miss. 268; Elliott *v.* Oliver, 22 Oreg. 44, 29 Pac. 1; Griffin *v.* Wakelee, 42 Tex. 513; Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 595.

73. See cases cited *infra*, this note.

Necessity of petition.— In Delaware the attorney-general need not file a petition, but may *ex officio* suggest the case of a violation of a public duty, and ask mandamus. State *v.* Wilmington Bridge Co., 3 Harr. (Del.) 312. In Alabama when an application is made to the supreme court for a writ of mandamus to an inferior court of record because of matters necessarily appearing on its records, a petition stating the facts on which the relief is asked, while more formal, is not necessary. *Ex p.* Tower Mfg. Co., 103 Ala. 415, 15 So. 836. In Illinois, however, there must be a petition filed in such a case (People *v.* Loomis, 94 Ill. 587); and a motion for leave to file a petition for mandamus in the supreme court must be accompanied by a copy of the petition proposed to be filed (People *v.* Seibert, 167 Ill. 639, 48 N. E. 687). In Missouri, where the statute authorizes mandamus to compel the levy of a tax to pay a judgment against a municipality after execution returned *nulla bona*, no formal petition is necessary; but it is sufficient to exhibit the judgment, execution, and return. State *v.* Slavens, 75 Mo. 508; State *v.* Norvell, 80 Mo. App. 180.

The facts are presented by information in some states. Chance *v.* Temple, 1 Iowa 179.

Failure to file new petition on substitution of respondents.— A petition having been amended by substituting respondents' successors in place of respondents, and a notice to the new parties having been issued as in a new case instituted by a new petition, the failure to file a new petition, while ground for dismissing the new case, did not relieve respondents from answering in the pending cause, where they appeared therein. Palmer *v.* Jones, 49 Iowa 405.

Right to supply lost petition.— Under the Tennessee code a lost petition cannot be supplied by filing another the same in substance where the original had not been filed so as to become part of the record. Baker *v.* McMinnville, 2 Heisk. (Tenn.) 117.

Supporting affidavits see *infra*, IX, E, 3, c.

74. Bishop *v.* Marks, 15 La. Ann. 147.

Defendant cannot by cross action have a writ to compel the performance of some act by plaintiff. Leavenworth *v.* Leavenworth City, etc., Water Co., 62 Kan. 643, 64 Pac. 66.

75. Double *v.* McQueen, 96 Mich. 39, 55 N. W. 564.

76. See *infra*, IX, F.

77. *Colorado.*— Nance *v.* People, 25 Colo. 252, 54 Pac. 631; Wheeler *v.* Northern Colorado Irr. Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. Rep. 603; Gillett *v.* People, 13 Colo. App. 553, 59 Pac. 72.

a petition or complaint which is regarded as the first pleading and to that extent takes the place of the alternative writ;[78] and in a few states the affidavit on which the writ issues may be regarded as the first pleading.[79] It has been held that the relation may be regarded as the complaint,[80] but that the information is not a pleading.[81] Whatsoever constitutes the first pleading, it is generally governed

Connecticut.— Williams *v.* New Haven, 68 Conn. 263, 36 Atl. 61; Brainard *v.* Staub, 61 Conn. 570, 24 Atl. 1040.

Florida.— State *v.* Richards, 50 Fla. 284, 39 So. 152; State *v.* Finley, 30 Fla. 302, 11 So. 500.

Illinois.— People *v.* Ohio Grove Tp., 51 Ill. 191; People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278; People *v.* Salomon, 46 Ill. 333; Silver *v.* People, 45 Ill. 224; People *v.* Hatch, 33 Ill. 9. This rule has been changed by statute. See *infra*, note 78.

Indiana.— Welch *v.* State, 164 Ind. 104, 72 N. E. 1043; State *v.* Burnsville Turnpike Co., 97 Ind. 416; Gill *v.* State, 72 Ind. 266; Smith *v.* Johnson, 69 Ind. 55; Johnson *v.* Smith, 64 Ind. 275; Boone County *v.* State, 61 Ind. 379; Clarke County *v.* State, 61 Ind. 75.

Kansas.— State *v.* Jefferson County, 11 Kan. 66.

Mississippi.— Haskins *v.* Scott County, 51 Miss. 406; Jones *v.* Gibbs, 51 Miss. 401. This rule has been changed by statute. See *infra*, note 78.

Missouri.— State *v.* State Bd. of Health, 103 Mo. 22, 15 S. W. 322; Hambleton *v.* Dexter, 89 Mo. 188, 1 S. W. 234; Bell *v.* Pike County Ct., 61 Mo. App. 173; State *v.* Beyers, 41 Mo. App. 503.

Nevada.— State *v.* Gracey, 11 Nev. 223, holding that this is the usual practice, although it is otherwise in Nevada. See *infra*, note 79.

New Jersey.— Hopper *v.* Bergen County, 52 N. J. L. 313; 19 Atl. 383; State *v.* Sheridan, 43 N. J. L. 82.

New York.— People *v.* Queens County, 142 N. Y. 271, 36 N. E. 1062; People *v.* Ransom, 2 N. Y. 490; People *v.* Order of American Star, 53 N. Y. Super. Ct. 66; People *v.* Hertle, 28 Misc. 37, 60 N. Y. Suppl. 23 [*affirmed* in 46 N. Y. App. Div. 505, 60 N. Y. Suppl. 23, 61 N. Y. Suppl. 965]; People *v.* Parmelee, 22 Misc. 380, 50 N. Y. Suppl. 451; People *v.* Columbia Club, 20 N. Y. Civ. Proc. 319; People *v.* Baker, 14 Abb. Pr. 19; People *v.* Ovenshire, 41 How. Pr. 164.

North Dakota.— State *v.* Carey, 2 N. D. 36, 49 N. W. 164.

Ohio.— Fornoff *v.* Nash, 23 Ohio St. 335; Johnes *v.* State Auditor, 4 Ohio St. 493. This rule has been changed by statute. See *infra*, note 78.

Oregon.— Shively *v.* Pennoyer, 27 Oreg. 33, 39 Pac. 396.

Pennsylvania.— See Keasy *v.* Bricker, 60 Pa. St. 9. But see Davis *v.* Patterson, 12 Pa. Super. Ct. 479.

Utah.— Lyman *v.* Martin, 2 Utah 136.

Washington.—See State *v.* Moore, 15 Wash. 432, 46 Pac. 647.

West Virginia.— Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 595.

United States.— U. S. *v.* Union Pac. R. Co., 28 Fed. Cas. No. 16,599, 2 Dill. 527.

However, the parties may stipulate that the petition shall be taken for the alternative writ instead of requiring an order for issue of an alternative writ. People *v.* Rio Grande County, 7 Colo. App. 229, 42 Pac. 1032. And if by consent or waiver no alternative writ issues, the petition or complaint may be taken as the first pleading. Welch *v.* State, 164 Ind. 104, 72 N. E. 1043; Wren *v.* Indianapolis, 96 Ind. 206; Pfister *v.* State, 82 Ind. 382. See also Kell *v.* Rudy, 1 Pa. Super. Ct. 507.

78. *Alabama.*— *Ex p.* Candee, 48 Ala. 386.

Illinois.— People *v.* Crabb, 156 Ill. 155, 40 N. E. 319; People *v.* Pavey, 151 Ill. 101, 37 N. E. 691; People *v.* Mt. Morris, 145 Ill. 427, 34 N. E. 144; People *v.* Thistlewood, 103 Ill. 139; People *v.* Davis, 93 Ill. 133; People *v.* Glann, 70 Ill. 232; Hall *v.* Mann, 96 Ill. App. 659; Murphy Mfg. Co. *v.* Ishester, 91 Ill. App. 7; Highway Com'rs *v.* Gibson, 7 Ill. App. 231. The rule was formerly otherwise. See *supra*, note 77.

Mississippi.— Chatters *v.* Coahoma County, 73 Miss. 351, 19 So. 107; Klein *v.* Smith County, 54 Miss. 254. But *compare* Beard *v.* Lee County, 51 Miss. 542. The rule was formerly otherwise. See *supra*, note 77.

Ohio.— State *v.* Dalton, 1 Ohio Cir. Ct. 119, 1 Ohio Cir. Dec. 71. The rule was formerly otherwise. See *supra*, note 77.

Tennessee.— State *v.* Marks, 6 Lea 12.

Vermont.— Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146.

If no alternative writ issues the petition or complaint may be taken as the first pleading. See *supra*, note 77.

Stipulation that petition be taken for alternative writ see *supra*, note 77.

79. *California.*— McCrary *v.* Beaudry, 67 Cal. 120, 7 Pac. 264, affidavit treated as complaint.

Indiana.— Welch *v.* State, 164 Ind. 104, 72 N. E. 1043; Wren *v.* Indianapolis, 96 Ind. 206; Pfister *v.* State, 82 Ind. 382, all holding that the affidavit may be treated as the complaint where no alternative writ issues.

Nebraska.— Long *v.* State, 17 Nebr. 60, 22 N. W. 120, affidavit treated as relation.

Nevada.— State *v.* Gracey, 11 Nev. 223; State *v.* McCullough, 3 Nev. 202, both holding that the affidavit is regarded as the complaint.

Wisconsin.— Schend *v.* St. George's German Aid Soc., 49 Wis. 237, 5 N. W. 355, affidavit treated as petition or relation.

80. State *v.* Jennings, 56 Wis. 113, 14 N. W. 28.

81. State *v.* Johnson County, 10 Iowa 157, 74 Am. Dec. 381.

and to be construed by the rules of pleading applicable in ordinary actions at law.[82]

b. Form and Character of Allegations — (i) *In General.* Generally speaking, the allegations in mandamus proceedings are to be made as in an ordinary action at law.[83]

(ii) *Allegations as Distinguished From Recitals.* In an application for mandamus the facts must appear by direct and positive allegation, a mere recital of the facts being insufficient;[84] but in the alternative writ the facts are properly stated by way of recital.[85]

(iii) *Allegations of Facts as Distinguished From Conclusions and Evidence.* The first pleading in mandamus proceedings, whatever its name or form, should positively state the facts on which petitioner bases his right to relief, and state them in issuable form.[86] Accordingly it has been held bad pleading on the one hand to allege a mere conclusion of law as distinguished from the facts giving rise to such conclusion,[87] and on the other hand it is considered improper

82. *Connecticut.*— Brainard *v.* Staub, 61 Conn. 570, 24 Atl. 1040.

Illinois.— Springfield, etc., R. Co. *v.* Wayne County Clerk, 74 Ill. 27; People *v.* Glann, 70 Ill. 232; People *v.* Soloman, 46 Ill. 333; Hall *v.* Mann, 96 Ill. App. 659.

New Jersey.— State *v.* Sheridan, 43 N. J. L. 82.

New York.— People *v.* Order of American Star, 53 N. Y. Super. Ct. 66.

Ohio.— Fornoff *v.* Nash, 23 Ohio St. 335.

West Virginia.— Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 595.

See 33 Cent. Dig. tit. "Mandamus," § 296.

Clerical errors will be disregarded where the intent is clear. People *v.* Oneida County, 25 Misc. (N. Y.) 444, 55 N. Y. Suppl. 712.

In those jurisdictions where the petition and rule constitute no part of the pleadings, the strict rules of pleading are not applied to them, it being in all cases sufficient for the petition to set forth a *prima facie* case. Fisher *v.* Charleston, 17 W. Va. 595.

The first pleading is strictly construed against the pleader. Leatherwood *v.* Hill, (Ariz. 1906) 85 Pac. 405; People *v.* Swigert, 107 Ill. 494. See, however, Townsend *v.* Fulton Irr. Ditch Co., 17 Colo. 142, 29 Pac. 453, holding that since proceedings to compel the delivery of water for irrigation are necessarily somewhat summary in their nature, and to be effective the relief must be immediate, the trial courts should be liberal in matters of pleading. Aider of pleading by inference and presumption see *infra*, IX, E, 3, d, (VI).

83. People *v.* Order of American Star, 53 N. Y. Super. Ct. 66.

84. Greenfield *v.* State, 113 Ind. 597, 15 N. E. 241. See, however, Babcock *v.* Goodrich, 47 Cal. 488.

85. State *v.* Board of Police Com'rs, 108 Mo. App. 98, 82 S. W. 960; Bell *v.* Pike County Ct., 61 Mo. App. 173; State *v.* Goll, 32 N. J. L. 285; Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 628; Fisher *v.* Charleston, 17 W. Va. 595.

86. People *v.* Westchester County, 15 Barb. (N. Y.) 607. And see *infra*, IX, E, 3, b, (V).

87. *California.*— San Luis Obispo County *v.* Gage, 139 Cal. 398, 73 Pac. 174, allegation that petitioner's claim was rejected "without right and against the facts."

Colorado.— Kephart *v.* People, 28 Colo. 73, 62 Pac. 946, allegation that there is money in the treasury applicable to the payment of petitioner's warrant, and that it is the duty of the treasurer to pay it.

Connecticut.— Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17.

Florida.— State *v.* Finley, 30 Fla. 302, 11 So. 500, allegation that the record, evidence, and proceedings in a proceeding to disbar relator are wholly insufficient to authorize his disbarment, and that the judgment of disbarment is totally void.

Illinois.— Stott *v.* Chicago, 205 Ill. 281, 68 N. E. 736 [*affirming* 98 Ill. App. 105] (allegation that petitioner "was duly appointed to the office" claimed by him, the office not being one created by statute of which the court is bound to take judicial notice); People *v.* Sellars, 179 Ill. 170, 53 N. E. 545 (allegation that property was liable to taxation); People *v.* Crotty, 93 Ill. 180 (allegation that a good bond was tendered as required by law).

Indiana.— Weir *v.* State, 161 Ind. 435, 68 N. E. 1023, allegation that an order of transfer "entitled relatrix to attend the schools of the school town" to which she was transferred.

Iowa.— Chance *v.* Temple, 1 Iowa 179.

Missouri.— State *v.* Hudson, 13 Mo. App. 61, general averment of compliance with the requirements of a statute.

Nebraska.— Woodward *v.* State, 58 Nebr. 598, 79 N. W. 164; State *v.* Thorne, 9 Nebr. 458, 4 N. W. 63 (allegation that bonds were issued "for works of internal improvement"); State *v.* Thatch, 5 Nebr. 94 (allegation that an election was carried by fraudulent means).

New York.— People *v.* Democratic Gen. Committee, 52 N. Y. App. Div. 170, 65 N. Y. Suppl. 57 [*reversing* 31 Misc. 350, 65 N. Y. Suppl. 418] (allegation of a member expelled from a general committee of a political party that the expulsion was illegal and void, and that the committee was without power or

to allege evidentiary facts as distinguished from the ultimate fact which they tend to prove.[88]

(iv) *Allegations on Information and Belief.* As a rule the allegations of the petition or other application must be positive, and be positively sworn to. Allegations on information and belief, or positive allegations verified on information and belief, are ordinarily insufficient to justify the granting of the writ.[89]

(v) *Certainty.*[90] An applicant for mandamus must plead his facts with the same certainty, neither more nor less, than is required in ordinary actions at law.[91] The facts must be set forth specifically and distinctly, and in such form that issue may be taken thereon.[92] The duty to perform the act sought to be enforced,

authority to expel him or to deprive him of his office); People *v.* German United Evangelical St. Stephen's Church, 3 Lans. 434 [*affirmed* in 53 N. Y. 103 (*reversing* 6 Lans. 172)] (general allegation of a right to vote for trustees of a religious corporation); People *v.* Westchester County, 15 Barb. 607 (allegation that injustice has been done relators in assessing their property, or that they have been unjustly assessed, and that defendant supervisors have refused to correct the erroneous assessments); People *v.* Parmelee, 22 Misc. 380, 50 N. Y. Suppl. 451 (holding that an alternative writ to compel a recount of rejected votes should state facts warranting the conclusion, and not merely state the legal conclusion, that the ballots should have been counted); People *v.* Columbia Club, 20 N. Y. Civ. Proc. 319 (allegation that relator had been expelled from defendant society unjustly and in violation of the law and of the constitution and by-laws of the society, and "that although entitled to be reinstated as a member of the society," it had "unjustly refused to reinstate" him as such member).

Oregon.— State *v.* Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166 (allegation of neglect to issue bench warrant "as required by law"); Shively *v.* Pennoyer, 27 Oreg. 33, 39 Pac. 396 (allegation that petitioner had made a written application for public lands "in the manner prescribed by law").

Texas.— Cochran *v.* Patillo, 16 Tex. Civ. App. 458, 41 S. W. 537 (allegation of wrongful suspension and dismissal of pupil); Houston *v.* Smith, 12 Tex. Civ. App. 120, 34 S. W. 194. And see Wilson *v.* Bristley, 13 Tex. Civ. App. 200, 35 S. W. 837.

Washington.— Parrish *v.* Reed, 2 Wash. 491, 27 Pac. 230, 28 Pac. 372.

Compare Withers *v.* State, 36 Ala. 252. See, however, State *v.* Ames, 31 Minn. 440, 18 N. W. 277; Kidder *v.* Morse, 26 Vt. 74; State *v.* Lean, 9 Wis. 279.

88. *Florida.*— State *v.* Atlantic Coast Line R. Co., 48 Fla. 114, 37 So. 652.

Illinois.— People *v.* Pavey, 151 Ill. 101, 37 N. E. 691.

Indiana.— Caffyn *v.* State, 91 Ind. 324.

Iowa.— Chance *v.* Temple, 1 Iowa 179.

Michigan.— See People *v.* State Land Office, 26 Mich. 146.

New York.— People *v.* Hertle, 28 Misc. 37, 60 N. Y. Suppl. 23 [*affirmed* in 46 N. Y. App. Div. 505, 61 N. Y. Suppl. 965].

See 33 Cent. Dig. tit. "Mandamus," § 297.

89. *Colorado.*—Kephart *v.* People, 28 Colo. 73, 62 Pac. 946.

Delaware.— See Bay State Gas Co. *v.* State, 4 Pennew. 497, 56 Atl. 1120.

Illinois.— Gunning *v.* Sheahan, 73 Ill. App. 118.

Nebraska.— Steidl *v.* State, 63 Nebr. 695, 88 N. W. 853; State *v.* Lancaster County, 49 Nebr. 51, 68 N. W. 336; State *v.* Clay County School-Dists., 8 Nebr. 98 (so holding where respondents do not appear); State *v.* Lincoln, 4 Nebr. 260.

New York.— People *v.* Grout, 107 N. Y. App. Div. 228, 94 N. Y. Suppl. 1101 (so holding, although the allegations are not denied); People *v.* Cruger, 12 N. Y. App. Div. 536, 42 N. Y. Suppl. 398; People *v.* Green, 1 Hun 1, 3 Thomps. & C. 90; People *v.* Oneida County, 25 Misc. 444, 55 N. Y. Suppl. 712; People *v.* Norton, 12 Abb. Pr. N. S. 47.

Oklahoma.— Collet *v.* Allison, 1 Okla. 42, 25 Pac. 516, so holding as to a verification by petitioner's attorney.

Vermont.— Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146.

In exceptional cases, it seems, the facts may be stated and verified on information and belief (Kephart *v.* People, 28 Colo. 73, 62 Pac. 946; State *v.* Lancaster County, 49 Nebr. 51, 68 N. W. 336), where the grounds or source of information and belief are stated (People *v.* Grout, 107 N. Y. App. Div. 228, 94 N. Y. Suppl. 1101; People *v.* Cruger, 12 N. Y. App. Div. 536, 42 N. Y. Suppl. 398; People *v.* Green, 1 Hun (N. Y.) 1, 3 Thomps. & C. 90; People *v.* Oneida County, 25 Misc. (N. Y.) 444, 55 N. Y. Suppl. 712).

90. Certainty of prayer for relief see *infra*, IX, E, 3, d, (x).

91. People *v.* Columbia Club, 20 N. Y. Civ. Proc. 319; Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 628; Fisher *v.* Charleston, 17 W. Va. 595.

It has been held, however, that greater certainty is required in a petition for mandamus than in ordinary cases. Arberry *v.* Beavers, 6 Tex. 457, 55 Am. Dec. 791; White *v.* Meyers, (Tex. Civ. App. 1898) 47 S. W. 476.

92. *Connecticut.*— American Casualty Ins., etc., Co. *v.* Fyler, 60 Conn. 448, 22 Atl. 494, 25 Am. St. Rep. 337.

Florida.— State *v.* Atlantic Coast Line R. Co., 48 Fla. 114, 37 So. 652.

and the right to demand performance thereof, must distinctly appear.[93] Accordingly the allegations must be sufficiently definite to inform respondent of what is required of him, and set forth facts sufficient to enable him to proceed and to enable the court to command performance of specific acts.[94] Consequently if the duty relates to particular property, real or personal, it may be necessary to describe it.[95] However, certainty to a common intent is all that is required; and

Illinois.— People *v.* Swigert, 107 Ill. 494; Lavalle *v.* Soucy, 96 Ill. 467; People *v.* Davis, 93 Ill. 133; People *v.* Glann, 70 Ill. 232; Illinois, etc., Canal *v.* People, 12 Ill. 248, 52 Am. Dec. 488; Women's Catholic O. of F. *v.* Condon, 84 Ill. App. 564.

Iowa.— Chance *v.* Temple, 1 Iowa 179.

Louisiana.— Hatch *v.* New Orleans City Bank, 1 Rob. 470, holding that the cause of action must be stated with sufficient certainty to prevent a repetition, when once investigated and decided.

Missouri.— Hambleton *v.* Dexter, 89 Mo. 188, 1 S. W. 234; State *v.* Everett, 52 Mo. 89; State *v.* Fletcher, 39 Mo. 388.

New York.— Commercial Bank *v.* New York Canal Com'rs, 10 Wend. 25.

Texas.— Honston Tap, etc., R. Co. *v.* Randolph, 24 Tex. 317; Cullem *v.* Latimer, 4 Tex. 329.

93. See *infra*, IX, E, 3, d, (II).

Certainty as to person bound.— Where two adjoining townships disputed as to which one should rebuild a bridge on the dividing highway, a petition in mandamus against the officers of each township, praying that either one or the other of the townships, or both, be compelled to build the bridge, was not defective as too indefinite. Brophy *v.* Schindler, 126 Mich. 341, 85 N. W. 1114.

Grounds of refusal as excusing technical exactness.— An allegation that respondent refused to perform the duty on certain grounds has been held to excuse technical exactness in stating why, on other grounds, relator is entitled to the relief sought. King *v.* State, 50 Nebr. 66, 69 N. W. 307. See, however, People *v.* State Land Office, 26 Mich. 146.

The statute imposing the duty must be set forth or referred to according to some cases. Smith *v.* Com., 41 Pa. St. 335. But this is generally unnecessary, since the courts take judicial notice of statutes. See *infra*, IX, E, 3, d, (VII). And where two statutes are identical so far as the rights and duties of the parties in the particular case are concerned, the petition need not specify upon which one it is based. People *v.* San Diego, 85 Cal. 369, 24 Pac. 727.

Description of relator.— A complaint in a mandamus proceeding on the relation of the township trustee is not defective because the trustee is described therein as the trustee of the civil township, although the word "civil" might have been omitted without detriment to the complaint. Baltimore, etc., R. Co. *v.* State, 159 Ind. 510, 65 N. E. 508.

94. *Delaware.*— Houston *v.* Sussex County Levy Ct., 5 Harr. 15.

Kentucky.— Covington Bd. of Education *v.* Covington, 103 Ky. 634, 45 S. W. 1045, 20 Ky. L. Rep. 289.

Louisiana.— State *v.* New Orleans, etc., R. Co., 44 La. Ann. 1026, 11 So. 709.

Mississippi.— Jarvis *v.* Warren County, 49 Miss. 603.

Texas.— Caldwell County *v.* Herbert, 68 Tex. 321, 4 S. W. 607. See, however, Houston, etc., R. Co. *v.* Dallas, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850.

See 33 Cent. Dig. tit. "Mandamus," § 303.

See, however, State *v.* Atlantic Coast Line R. Co., 48 Fla. 114, 37 So. 652; State *v.* Choteau County, 13 Mont. 23, 31 Pac. 879; Com. *v.* Pittsburgh, 34 Pa. St. 496, in all of which cases the pleading was held to be sufficient in this respect.

95. State *v.* Mobile, etc., R. Co., 59 Ala. 321 (holding that in a proceeding to compel a carrier to accept and transport cotton tendered by relator, the petition must state the number of bales tendered, so that the court, if it awards the writ, can command the carrier to do a specific thing); People *v.* Sellars, 179 Ill. 170, 53 N. E. 545 (holding that a petition to compel the county clerk to extend taxes, arrearages, and interest due on personal property omitted by the assessor in previous years should state the amount of such property, its nature and character, and by whom owned); People *v.* Tracy, 1 Den. (N. Y.) 617 (holding that a writ to remove an intruder from Indian lands must mention the tract). See, however, State *v.* Jeffersonville First Nat. Bank, 89 Ind. 302 (holding that "ten shares of the capital stock of said bank, then the property of" a person named, in a writ of mandate against a bank and its officers to compel them to permit a transfer of stock, is a sufficient description of the stock); State *v.* Leon, 66 Wis. 199, 28 N. W. 140.

Description of highway.—A petition or writ to compel the repair of a highway must describe that portion of it which is to be repaired. Com. *v.* Allegheny Valley R. Co., 6 Pa. Dist. 565. See, however, Jennings *v.* Scott, 87 Ill. App. 459; State *v.* Leon, 66 Wis. 199, 28 N. W. 140, in both of which cases the description was held to be sufficient.

Description of pecuniary claim.—A petition to compel a public officer to allow or to pay a claim held by relator, or to issue a warrant therefor, must describe the claim in such terms as to identify it and distinguish it from all other claims of a similar kind. State *v.* Cardozo, 5 S. C. 297. And see State *v.* Dubuque Dist. Tp., 11 Iowa 155. Hence the amount of the claim must be specified. San Luis Obispo County *v.* Gage, 139 Cal. 398, 73 Pac. 174; State *v.* Dubuque Dist. Tp., *supra*; McCoy *v.* Justices Harnett County,

if the facts are so stated that the ordinary mind, disregarding technicality of pleading, may easily comprehend them, it is sufficient.[96] If petitioner's pleading is uncertain, the court may on motion require it to be made more certain.[97]

c. Supporting Affidavit and Verification.[98] The application is in many jurisdictions required to be supported by affidavits presenting the facts;[99] and in those jurisdictions where the facts are presented by petition or complaint, this paper must be verified by oath.[1] If the complaint or petition is not verified the proper

50 N. C. 265. And see Parks *v.* Hays, 11 Colo. App. 415, 53 Pac. 893. See, however, Maynard *v.* Freeman, (Tex. Civ. App. 1900) 60 S. W. 334.

96. Central Dist., etc., Tel. Co. *v.* Com., 114 Pa. St. 592, 7 Atl. 926; Long *v.* Springfield Water Co., 8 Del. Co. (Pa.) 151; Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146. And see State *v.* Atlantic Coast Line R. Co., 48 Fla. 114, 37 So. 652; State *v.* Johnson, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357; Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33; Klein *v.* Smith County, 54 Miss. 254; State *v.* Lady Bryan Min. Co., 4 Nev. 400; State *v.* Crites, 48 Ohio St. 142, 26 N. E. 1052; State *v.* Leon, 66 Wis. 199, 28 N. W. 140.

97. Copeland *v.* State, 126 Ind. 51, 25 N. E. 866; Fornoff *v.* Nash, 23 Ohio St. 335; State *v.* Dalton, 1 Ohio Cir. Ct. 119, 1 Ohio Cir. Dec. 71. And see State *v.* Crites, 48 Ohio St. 142, 26 N. E. 1052.

98. Amendment as to affidavit or verification see *infra*, IX, E, 7.

Waiver of affidavit or verification see *infra*, IX, E, 8.

99. *Connecticut.*— Lyon *v.* Rice, 41 Conn. 245. In applications brought to enforce a public right, however, an affidavit is not necessary. Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336; Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17.

Indiana.— Potts *v.* State, 75 Ind. 336.

Mississippi.— Swan *v.* Gray, 44 Miss. 393, holding that the petition must be supported by affidavits of others where petitioner does not verify it.

Montana.— Territory *v.* Potts, 3 Mont. 364.

Nebraska.— State *v.* Lancaster County, 49 Nebr. 51, 68 N. W. 336; State *v.* Lincoln, 4 Nebr. 260. It seems, however, that a verified petition is sufficient. State *v.* Harrington, (1907) 110 N. W. 1016.

Oklahoma.— Collet *v.* Allison, 1 Okla. 42, 25 Pac. 516.

Washington.— Smith *v.* Ormsby, 20 Wash. 396, 55 Pac. 570, 72 Am. St. Rep. 110.

West Virginia.— Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 595, both holding that the petition should be supported by affidavit if filed by a private individual.

In England an affidavit was necessary in cases where respondent was guilty of a neglect of duty (Curser *v.* Smith, 1 Barn. 59; Reg. *v.* Cory, 3 Salk. 230), but not in a matter of right, as where relator demanded restoration to office (Reg. *v.* Cory, *supra*). See Swan *v.* Gray, 44 Miss. 393.

Who may make affidavit.— The affidavit may be made by petitioner or any person having knowledge of the facts. Cannon *v.* Janvier, 3 Houst. (Del.) 27. And see Swan *v.* Gray, 44 Miss. 393.

Application and affidavit as separate papers.— According to the English practice the application and the supporting affidavit were separate papers. People *v.* Chicago, 25 Ill. 483. But several American courts have held that this is not a necessary requirement. Golden Canal Co. *v.* Bright, 8 Colo. 144, 6 Pac. 142 (holding that a verified petition is equivalent to the statutory "petition and affidavit"); People *v.* Chicago, *supra*; State *v.* Johnson County, 10 Iowa 157, 74 Am. Dec. 381. And see State *v.* Harrington, (Nebr. 1907) 110 N. W. 1016.

Time of presenting affidavits.— The affidavits must be presented at the time of applying for the writ. People *v.* Shea, 73 N. Y. App. Div. 237, 76 N. Y. Suppl. 682; People *v.* St. Louis, etc., R. Co., 47 Hun (N. Y.) 543.

Title of affidavit see *supra*, IX, E, 2.

1. *Arkansas.*— Black *v.* State Auditor, 26 Ark. 237.

California.— Landers *v.* Lawler, 84 Cal. 547, 24 Pac. 307; People *v.* Reis, 76 Cal. 269, 18 Pac. 309.

Indiana.— Pudney *v.* Burkhart, 62 Ind. 179.

Iowa.— Chance *v.* Temple, 1 Iowa 179.

Louisiana.— State *v.* Jefferson Police Jury, 33 La. Ann. 29; Bishop *v.* Marks, 15 La. Ann. 147; Leland *v.* Rose, 10 La. Ann. 415.

Maine.— Woodman *v.* Somerset County Com'rs, 24 Me. 151.

Mississippi.— Hardee *v.* Gibbs, 50 Miss. 802; Swan *v.* Gray, 44 Miss. 393, holding that the petition must be verified by petitioner where it is not supported by the affidavits of others.

Nebraska.— State *v.* Harrington, (1907) 110 N. W. 1016, holding that the petition must be verified where no affidavits are filed.

Texas.— Shirley *v.* Conner, 98 Tex. 63, 80 S. W. 984, 81 S. W. 284; Brown *v.* Ruse, 69 Tex. 589, 7 S. W. 489; Bracken *v.* Wells, 3 Tex. 88, all holding that the petition should be verified, although the statute does not require it.

West Virginia.— See Mason County *v.* Minturn, 4 W. Va. 300.

United States.— Poultney *v.* La Fayette, 12 Pet. 472, 9 L. ed. 1161; Postmaster-Gen. *v.* Trigg, 11 Pet. 173, 9 L. ed. 676.

In Illinois a verification was formerly necessary (People *v.* Chicago, 25 Ill. 483), but it is doubtful whether this is the present rule (Hall *v.* Mann, 96 Ill. App. 659; Rowe *v.* People, 96 Ill. App. 438. But see P. H.

practice is to move to reject it. If the opposite party takes issue of law or fact thereon, the objection is waived.[2]

d. Contents — (1) *In General.* The application for a writ of mandamus, whatsoever its local name and form, should, like the declaration or complaint in an ordinary action at law, state facts which *prima facie* constitute a cause of action in favor of the applicant,[3] and in those jurisdictions where the alternative writ is regarded as the first pleading[4] this rule applies likewise to it.[5] If a *prima facie* case is shown the pleading is sufficient.[6] Specifically the first pleading should state facts which show that a plain legal duty rests on respondent to per-

Murphy Mfg. Co. *v.* Isbester, 91 Ill. App. 7).

The officers before whom the oath may be taken are prescribed by statute in Tennessee. Whitesides *v.* Stuart, 91 Tenn. 710, 20 S. W. 245.

The ordinary jurat is sufficient. State *v.* Wright, 10 Nev. 167. And see Pallady *v.* Beatty, 15 Okla. 626, 83 Pac. 428. *Compare* Landers *v.* Lawler, 84 Cal. 547, 24 Pac. 307.

Who may make verification.— Any competent person may make the verification. Landers *v.* Lawler, 84 Cal. 547, 24 Pac. 307 (*semble*); Baltimore, etc., R. Co. *v.* State, 159 Ind. 510, 65 N. E. 508 (holding accordingly that in case a public officer is the petitioner he may verify the petition in his individual capacity). Thus petitioner's attorney may make the verification where the facts are within his knowledge (Palladay *v.* Beatty, 15 Okla. 626, 83 Pac. 428), or where the real parties in interest are absentees, the only petitioner within the state being a nominal party (Arkansas Southern R. Co. *v.* Wilson, (La. 1907) 42 So. 976). If the interest of several persons who join in a petition is joint, it seems that one may verify the petition for all; but if their interest is several, all must verify the petition, and it is insufficient as to those who do not do so. Lengel *v.* Stump, 1 Woodw. (Pa.) 399.

Verification on information and belief see *supra*, IX, E, 3, b, (IV).

2. Pudney *v.* Burkhart, 62 Ind. 179.

3. *Illinois.*— People *v.* Mt. Morris, 145 Ill. 427, 34 N. E. 144; Lavalle *v.* Soucy, 96 Ill. 467; People *v.* Davis, 93 Ill. 133; Springfield, etc., R. Co. *v.* Wayne County Clerk, 74 Ill. 27; People *v.* Glann, 70 Ill. 232; People *v.* Worth Tp. Highway Com'rs, 52 Ill. 498; Bolton *v.* People, 95 Ill. App. 285; People *v.* Soucy, 26 Ill. App. 505.

Iowa.— Chance *v.* Temple, 1 Iowa 179.

Pennsylvania.— Boyle *v.* Lansford School Dist., 8 Pa. Dist. 436.

Texas.— Arberry *v.* Beavers, 6 Tex. 457, 55 Am. Dec. 791; Cullem *v.* Latimer, 4 Tex. 329.

Washington.—See Clarke County *v.* Brazee, 1 Wash. Terr. 199.

See 33 Cent. Dig. tit. "Mandamus," § 298.

In Vermont, however, it is not necessary that a petition for a mandamus should allege all the particular facts on which the writ is claimed so that the case may be tried on demurrer as is common and requisite in suits according to the course of the common law, but if the petition states the right and duty in general terms it is sufficient. Kidder *v.* Morse, 26 Vt. 74.

The petition must state a prima facie case even where the alternative writ is regarded as the first pleading. Schwanbeck *v.* People, 15 Colo. 64, 24 Pac. 575; Haskins *v.* Scott County, 51 Miss. 406; Hardee *v.* Gibbs, 50 Miss. 802; Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 595.

4. See *supra*, IX, E, 3, a.

5. *Colorado.*— Wheeler *v.* Northern Colorado Irr. Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. Rep. 603; Gillett *v.* People, 13 Colo. App. 553, 59 Pac. 72.

Florida.— State *v.* Richards, 50 Fla. 284, 39 So. 152; Scott *v.* State, 43 Fla. 396, 31 So. 244; Puckett *v.* State, 33 Fla. 385, 14 So. 834; State *v.* Finley, 30 Fla. 302, 11 So. 500.

Illinois.— People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278; People *v.* Hatch, 33 Ill. 9; Illinois, etc., Canal *v.* People, 12 Ill. 248, 52 Am. Dec. 488. The alternative writ is no longer regarded as the first pleading in this state. See *supra*, IX, E, 3, a.

Indiana.— Gill *v.* State, 72 Ind. 266.

Iowa.— Chance *v.* Temple, 1 Iowa 179.

Missouri.— State *v.* State Bd. of Health, 103 Mo. 22, 15 S. W. 322; State *v.* St. Louis Police Com'rs, 108 Mo. App. 98, 82 S. W. 960; Bell *v.* Pike County Ct., 61 Mo. App. 173.

Nebraska.— King *v.* State, 50 Nebr. 66, 69 N. W. 307; State *v.* York County School Dist. No. 9, 8 Nebr. 92.

New Jersey.— State *v.* Sheridan, 43 N. J. L. 82.

New York.— People *v.* Ransom, 2 N. Y. 490; People *v.* Bricklayers' Benevolent, etc., Union, 20 N. Y. App. Div. 8, 46 N. Y. Suppl. 648; People *v.* Ovenshire, 41 How. Pr. 164.

North Dakota.— State *v.* Carey, 2 N. D. 36, 49 N. W. 164.

Oregon.— Shively *v.* Pennoyer, 27 Oreg. 33, 39 Pac. 396; Elliott *v.* Oliver, 22 Oreg. 44, 29 Pac. 1; McLeod *v.* Scott, 21 Oreg. 94, 20 Pac. 1061, 29 Pac. 1.

See 33 Cent. Dig. tit. "Mandamus," § 298.

In Montana, however, it is held, under a code provision, that the alternative writ may state the facts generally. State *v.* Choteau County, 13 Mont. 23, 31 Pac. 879.

6. State *v.* Jacksonville, 22 Fla. 21; People *v.* Hertle, 28 Misc. (N. Y.) 37, 60 N. Y. Suppl. 23 [*affirmed* in 46 N. Y. App. Div. 505, 61 N. Y. Suppl. 965].

form the act sought to be enforced;[7] that the applicant is entitled to have that duty performed;[8] that respondent has refused or failed to perform the act in question;[9] that the applicant's rights have been infringed by respondent's default;[10] and that the applicant has no adequate ordinary remedy at law.[11] If these essentials appear the pleading is sufficient.[12]

(II) *ALLEGATIONS AS TO EXISTENCE OF DUTY, RIGHT OF PETITIONER, AND DUTY OF RESPONDENT*—(A) *In General.* The allegations of the petition or alternative writ must show the existence of an official duty to perform the act sought to be enforced;[13] that petitioner has a clear legal right to have that duty performed;[14] and that the duty of performance plainly rests on respond-

7. See *infra*, IX, E, 3, d, (II).
8. See *infra*, IX, E, 3, d, (II).
9. See *infra*, IX, E, 3, d, (III).
10. See *infra*, IX, E, 3, d, (IV).
11. See *infra*, IX, E, 3, d, (V).
12. *California.*— McConoughey *v.* Jackson, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53.

Colorado.— Denver Bd. of Public Works *v.* Hayden, 13 Colo. App. 36, 56 Pac. 201.

Delaware.— Bay State Gas Co. *v.* State, 4 Pennew. 238, 56 Atl. 1114.

Georgia.— Neal Loan, etc., Co. *v.* Chastain, 121 Ga. 500, 49 S. E. 618.

Indiana.— Pfau *v.* State, 148 Ind. 539, 47 N. E. 927.

Mississippi.— McNeill *v.* McElroy, (1894) 15 So. 786; Klein *v.* Smith County, 54 Miss. 254.

Virginia.— Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775.

Washington.— See Clarke County *v.* Brazee, 1 Wash. Terr. 199.

See 33 Cent. Dig. tit. "Mandamus," § 298.

For form of alternative writ see People *v.* Judges Westchester County Ct. of C. Pl., 4 Cow. (N. Y.) 73.

For form of information for writ see Chance *v.* Temple, 1 Iowa 179, 187.

For form of petition for writ see People *v.* Lothrop, 3 Colo. 428, 430.

13. Chance *v.* Temple, 1 Iowa 179; Kemerer *v.* State, 7 Nebr. 130. And see Reg. *v.* Hopkins, 1 Q. B. 161, 10 L. J. Q. B. 63, 4 P. & D. 550, 41 E. C. L. 484; and cases cited *passim*, IX, D, 3, e, (II).

14. *Alabama.*— State *v.* Talladega Road Com'rs, 3 Port. 412.

Arkansas.— Levy *v.* Inglish, 4 Ark. 65.

Colorado.— Nance *v.* People, 25 Colo. 252, 54 Pac. 631.

Connecticut.— American Casualty Ins. Co. *v.* Fyler, 60 Conn. 448, 22 Atl. 494, 25 Am. St. Rep. 337.

Delaware.— McCoy *v.* State, 2 Marv. 543, 36 Atl. 81.

District of Columbia.— U. S. *v.* Chandler, 2 Mackey 527.

Florida.— State *v.* Richards, (1905) 39 So. 152; Scott *v.* State, 43 Fla. 396, 31 So. 244; Puckett *v.* State, 33 Fla. 385, 14 So. 834; State *v.* Bowdon, 18 Fla. 17.

Illinois.— People *v.* Sellars, 179 Ill. 170, 53 N. E. 545; People *v.* Mt. Morris, 145 Ill. 427, 34 N. E. 144; Lavalle *v.* Soucy, 96 Ill. 467; People *v.* Davis, 93 Ill. 133; People *v.* Glann, 70 Ill. 232; People *v.* Chicago, 25 Ill. 483; Illinois, etc., Canal *v.* People, 12 Ill. 248, 52 Am. Dec. 488; People *v.* Perrin, 103 Ill. App. 410; Bolton *v.* People, 95 Ill. App. 285; Women's Catholic O. of F. *v.* Condon, 84 Ill. App. 564; People *v.* Soucy, 26 Ill. App. 505. The statute dispensing with the alternative writ does not relieve relator from the common-law requirement of showing a clear and indubitable right to the relief demanded. North *v.* State University, 137 Ill. 296, 27 N. E. 54; People *v.* Madison County, 125 Ill. 334, 17 N. E. 802.

Indiana.— State *v.* Fisher, 157 Ind. 412, 61 N. E. 929; State *v.* Overman, 157 Ind. 141, 60 N. E. 1017; Logansport, etc., R. Co. *v.* Groniger, 51 Ind. 383.

Maine.— Hoxie *v.* Somerset County Com'rs, 25 Me. 333.

Michigan.— People *v.* Judge Wayne County Cir. Ct., 19 Mich. 296.

Mississippi.— Hardee *v.* Gibbs, 50 Miss. 802.

Missouri.— State *v.* Fletcher, 39 Mo. 388.

Montana.— State *v.* Lewis County, etc., Dist. Ct. Dept. No. 1, 29 Mont. 265, 74 Pac. 498.

Nebraska.— State *v.* Weston, 67 Nebr. 175, 93 N. W. 182; State *v.* York County, 17 Nebr. 643, 24 N. W. 210; State *v.* Wallichs, 13 Nebr. 278, 13 N. W. 627; State *v.* Otoe County, 10 Nebr. 19, 4 N. W. 258.

Nevada.— State *v.* La Grave, 22 Nev. 417, 41 Pac. 115.

New York.—People *v.* Baker, 35 Barb. 105; People *v.* Palmer, 27 Misc. 569, 59 N. Y. Suppl. 62; Gardenier *v.* Columbia County, 2 N. Y. Suppl. 351; People *v.* Baker, 14 Abb. Pr. 19; People *v.* Rensselaer C. Pl., 41 How. Pr. 164; People *v.* Judges Columbia C. Pl., 3 How. Pr. 30.

North Carolina.— Lutterloh *v.* Cumberland County, 65 N. C. 403.

Ohio.— State *v.* Bickham, 4 Ohio Cir. Ct. 246, 2 Ohio Cir. Dec. 526.

Pennsylvania.—Boyle *v.* Lansford School Dist., 8 Pa. Dist. 436.

Rhode Island.— Gill *v.* Pawtucket, 18 R. I. 281, 27 Atl. 506.

Texas.— Houston Tap, etc., R. Co. *v.* Randolph, 24 Tex. 317.

Wisconsin.— State *v.* Hastings, 10 Wis. 518.

See 33 Cent. Dig. tit. "Mandamus," § 300.

Interest of petitioner.— Petitioner must allege facts showing that he has an interest in having the duty in question performed. Marini *v.* Graham, 67 Cal. 130, 7 Pac. 442;

ent.[15] Accordingly it must appear that respondent has authority and power to per-

North *v.* State University, 137 Ill. 296, 27 N. E. 54; Township 14 School Trustees *v.* People, 71 Ill. 559; Haskins *v.* Scott County, 51 Miss. 406; State *v.* Carey, 2 N. D. 36, 49 N. W. 164. However, a specific allegation of interest is unnecessary where the facts pleaded show that petitioner has such interest. Cole *v.* State, 131 Ind. 591, 31 N. E. 458. If petitioner's interest depends on a foreign statute, the statute must be pleaded. State *v.* Overman, 157 Ind. 141, 60 N. E. 1017.

Right as against stranger to proceeding.— In an application for mandamus to compel a sheriff to eject, under a writ of restitution, an occupant of land who is not a party to the action, it must be shown distinctly by the affidavits that his possession was acquired under the parties or subsequent to the filing of a *lis pendens*. Fogarty *v.* Sparks, 22 Cal. 142.

Right to pension.— Where a petition to compel the reinstatement of petitioner to the police pension roll avers that the board of trustees expressly found, originally, that petitioner's husband died from the immediate effects of an injury received by him in the discharge of his duty as a police officer, such finding is not impeached by an averment in the petition that he was stricken down and became physically ill because of physical efforts exerted by him in discharging his duty. Eddy *v.* People, 218 Ill. 611, 75 N. E. 1071.

Rights and powers of corporations.— If the privilege of borrowing public funds is conferred by statute on corporations of a certain class, the petition of a corporation seeking to compel a loan must show that it is one of the prescribed class (Houston Tap, etc., R. Co. *v.* Randolph, 24 Tex. 317); and where a corporation seeks to compel the payment of a legislative appropriation made to enable it to carry out a certain trust, its petition must show that it has power to perform the trust (Leatherwood *v.* Hill, (Ariz. 1906) 85 Pac. 405).

Appointment or election to office.— If petitioner claims rights of office he must allege his appointment (Burke *v.* Edgar, 67 Cal. 182, 7 Pac. 488; Kenneally *v.* Chicago, 220 Ill. 485, 77 N. E. 155; McNeill *v.* Chicago, 212 Ill. 481, 72 N. E. 450; Stott *v.* Chicago, 205 Ill. 281, 68 N. E. 736 [*affirming* 98 Ill. App. 105]) or election (State *v.* Johnson, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357, where, however, the allegations were held to be sufficient in this respect. *Compare* Boyle *v.* Lansford School Dist., 8 Pa. Dist. 436).

Eligibility to office.— Where one of several candidates who have received an equal number of votes for a municipal office petitions to compel the city council to provide a mode of drawing lots to determine the tie, he must, it seems, allege that he is eligible to the office, but he need not allege the eligibility of his opponents. People *v.* Crabb, 156 Ill. 155, 40 N. E. 319. So a petition to compel election supervisors to select as ballot clerk one of several persons whose names have been submitted to them for that purpose must allege the eligibility of such persons. Sudler *v.* Lankford, 82 Md. 142, 33 Atl. 455. However, a petition to compel a retiring officer to turn over to his successor the records and furniture pertaining to the office need not allege that the successor is eligible to the office. State *v.* Johnson, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357; McGee *v.* State, 103 Ind. 444, 3 N. E. 139; State *v.* Callahan, 4 N. D. 481, 61 N. W. 1025.

If petitioner claims the benefit of the Civil Service Act, he must allege that his position is in the classified service. Stott *v.* Chicago, 205 Ill. 281, 68 N. E. 736 [*affirming* 93 Ill. App. 105]; People *v.* Dalton, 159 N. Y. 235, 53 N. E. 1113 [*affirming* 34 N. Y. App. Div. 302, 54 N. Y. Suppl. 216].

Ownership of property involved in the controversy, if essential to petitioner's right, must be alleged in the petition. Winder *v.* Williams, 23 Tex. 601. Allegations held sufficient in this respect see Mattoon *v.* Mattoon Tile Co., 97 Ill. App. 56 (holding that a petition to compel the passage of an ordinance disconnecting lands from the territory of a city sufficiently shows, on general demurrer, that petitioners are the owners of more than half the area of such lands, where it alleges who owns the various tracts embraced in such area, and then sets up that petitioners "represent a majority of the area of the land in said territory"); Com. *v.* Pittsburgh, 34 Pa. St. 496 (holding that if a petition to compel a tax to pay municipal bonds alleges that petitioner purchased the bonds it need not allege how they were transferred or the consideration for the transfer).

Qualifications as a pupil of a public school must be alleged by one who seeks by mandamus to be admitted as a pupil. Weir *v.* State, 161 Ind. 435, 68 N. E. 1023; Draper *v.* Cambridge, 20 Ind. 268.

Residence and citizenship.—If the right and duty in question is one that may be enforced only by residents or citizens, petitioner must allege his residence or citizenship. Township 14 School Trustees *v.* People, 71 Ill. 559; Hall *v.* People, 57 Ill. 307 (where, however, the petition was held sufficient to show residence); Houston Tap, etc., R. Co. *v.* Randolph, 24 Tex. 317; People *v.* Colorado Cent. R. Co., 42 Fed. 638.

15. *California.*— Meyer *v.* San Francisco, (1907) 88 Pac. 722; San Luis Obispo County *v.* Gage, 139 Cal. 398, 73 Pac. 174; Marini *v.* Graham, 67 Cal. 130, 7 Pac. 442.

Colorado.— Stuart *v.* Nance, 28 Colo. 194, 63 Pac. 323 [*affirming* 12 Colo. App. 125, 54 Pac. 867]; Nance *v.* People, 25 Colo. 252, 54 Pac. 631.

Delaware.— McCoy *v.* State, 2 Marv. 543, 36 Atl. 81.

District of Columbia.— U. S. *v.* Chandler, 2 Mackey 527.

Florida.— State *v.* Richards, 50 Fla. 284, 39 So. 152; Scott *v.* State, 43 Fla. 396, 31 So. 244; Puckett *v.* State, 33 Fla. 385, 14 So. 834.

Georgia.— Payne *v.* Perkerson, 56 Ga. 672.

form the act sought to be enforced.[16] If the right or duty in question is based on an official order, the petition or alternative writ should show that the order is within the power and authority of the body by whom it was made;[17] but the facts justifying the order need not be set forth,[18] nor need the petition set forth in detail the proceedings on which the order is based.[19] And where the right or duty is based on an order or ordinance it is generally sufficient to set out the same in substance.[20]

(B) *Conditions Precedent to Right and Duty* — (1) IN GENERAL. To entitle petitioner to relief the petition or the alternative writ must allege the existence of all such facts as are essential elements of the right and duty sought to be enforced, and show that all things have been done which are required to be done in order to give rise to the right and duty. Accordingly if prerequisites or conditions precedent to the duty to act or to the right to demand action are imposed

Illinois.— People *v.* Sellars, 179 Ill. 170, 53 N. E. 545; People *v.* Mt. Morris, 145 Ill. 427, 34 N. E. 144; North *v.* State University, 137 Ill. 296, 27 N. E. 54; Swigert *v.* Hamilton County, 130 Ill. 538, 22 N. E. 609; People *v.* Madison County, 125 Ill. 334, 17 N. E. 802; People *v.* Elgin, 66 Ill. 507; People *v.* Helt, 116 Ill. App. 391; Scanlan *v.* Schwab, 103 Ill. App. 93; Bolton *v.* People, 95 Ill. App. 285; Women's Catholic O. of F. *v.* Condon, 84 Ill. App. 564.

Indiana.— State *v.* Fisher, 157 Ind. 412, 61 N. E. 929.

Iowa.— Chance *v.* Temple, 1 Iowa 179.

Kansas.— Rosenthal *v.* State Bd. of Canvassers, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157; State *v.* Carney, 3 Kan. 88.

Louisiana.— State *v.* St. Martin's Parish Police Jury, 32 La. Ann. 884; Hatch *v.* New Orleans City Bank, 1 Rob. 470.

Michigan.— People *v.* Saginaw County Sup'rs, 26 Mich. 21.

Mississippi.— Hardee *v.* Gibbs, 50 Miss. 802.

Nebraska.— State *v.* Wallichs, 13 Nebr. 278, 13 N. W. 627; Kemerer *v.* State, 7 Nebr. 130.

New Jersey.— Rader *v.* Union Tp. Committee, 43 N. J. L. 518.

Texas.— Houston Tap, etc., R. Co. *v.* Randolph, 24 Tex. 317; Burrell *v.* Blanchard, (Civ. App. 1899) 51 S. W. 46.

Virginia.— Dinwiddie Justices *v.* Chesterfield Justices, 5 Call 556.

See 33 Cent. Dig. tit. "Mandamus," § 303.

However, an express allegation of respondent's official capacity is not necessary, if it appears from the petition that he is being proceeded against as an officer. State *v.* Byrne, 32 Wash. 264, 73 Pac. 394; State *v.* Headlee, 18 Wash. 220, 51 Pac. 369.

Corporate duty.— A petition to compel a corporation to perform a duty not imposed on it by general law must show that the duty is imposed by its charter. People *v.* Colorado Cent. R. Co., 42 Fed. 638, holding that an allegation that defendant operated a certain railroad, and was a corporation of the state in which the suit is brought, without showing when or for what purpose it was chartered, or what railroad, if any, it built or was authorized to build, is not sufficient to show that defendant was under any legal obligation to operate said railroad. However, only such powers of the corporation as relate to the act sought to be enforced need be enumerated in the complaint. Merrill *v.* Southside Irr. Co., 112 Cal. 426, 44 Pac. 720.

Certainty of petition in regard to duty see *supra*, IX, E, 3, b, (v).

Judicial notice of law imposing duty see *infra*, IX, E, 3, d, (VII).

16. Hambleton *v.* Dexter, 89 Mo. 188, 1 S. W. 234. And see cases cited *supra*, note 15.

An express allegation of authority is not essential, it seems, if the authority sufficiently appears otherwise. State *v.* Headlee, 18 Wash. 220, 51 Pac. 369.

Authority to levy a tax to pay railroad aid bonds sufficiently appears from allegations of authority to subscribe to the company's stock and to borrow money to pay the subscription. Com. *v.* Pittsburgh, 34 Pa. St. 496.

17. State *v.* Atlantic Coast Line R. Co., (Fla. 1906) 40 So. 875, order of railroad commissioners.

18. *California.*— Babcock *v.* Goodrich, 47 Cal. 488, order allowing claim against county.

Florida.— State *v.* Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225, order of railroad commissioners.

Indiana.— State *v.* Beil, 157 Ind. 25, 60 N. E. 672, order of board of health.

North Carolina.— See McCless *v.* Meekins, 117 N. C. 34, 23 S. E. 99.

Wisconsin.— State *v.* Leon, 66 Wis. 199, 28 N. W. 140, order for public improvement.

Wyoming.—Appel *v.* State, 9 Wyo. 187, 61 Pac. 1015, order allowing claim against county.

19. State *v.* Ames, 31 Minn. 440, 18 N. W. 277; People *v.* Land Office Com'rs, 90 Hun (N. Y.) 525, 36 N. Y. Suppl. 29. And see Babcock *v.* Goodrich, 47 Cal. 488; Greenfield *v.* State, 113 Ind. 597, 15 N. E. 241; Wren *v.* Indianapolis, 96 Ind. 206; Arkansas Southern R. Co. *v.* Wilson, (La. 1907) 42 So. 976.

20. State *v.* Beil, 157 Ind. 25, 60 N. E. 672; Monongahela City *v.* Monongahela Electric Light Co., 3 Pa. Dist. 63, 12 Pa. Co. Ct. 529.

by statute or otherwise, it must appear that they have been fully complied with and performed, so that the court can determine that a present duty rests on respondent and that a present right to performance is vested in petitioner.[21] And some courts have gone so far as to hold that petitioner should by his

Judicial notice of ordinance see *infra*, IX, E, 3, d, (VII).

21. *Alabama.*— Withers *v.* State, 36 Ala. 252, holding that a petition to compel a court to allow petitioner to appear before it as an attorney must show the existence of facts entitling him to practise and compliance with the statutory requisites in regard thereto; that it is not sufficient to allege that he "is a practitioner of law in all the courts of [the] State."

California.— Cozzens *v.* North Fork Ditch Co., 2 Cal. App. 404, 84 Pac. 342.

Colorado.— Schwanbeck *v.* People, 15 Colo. 64, 24 Pac. 575.

Illinois.— People *v.* Glann, 70 Ill. 232, holding that petitioner must aver fulfilment of conditions precedent or show some excuse for non-performance.

Kansas.— Shawnee County Com'rs *v.* State, 42 Kan. 327, 22 Pac. 326, holding that where the performance of a duty by a county officer is coupled with the expenditure of the general fund of the county, the alternative writ ought to allege that there is sufficient money belonging to the particular fund which could legally be appropriated to the purpose.

Michigan.— People *v.* Wayne County Cir. Judge, 19 Mich. 296, holding that a purchaser at a guardian's sale is not entitled to the writ to enforce his rights as such without a clear showing that he has done at the proper time everything necessary to complete the purchase on his part.

Nebraska.— State *v.* Weston, 67 Nebr. 175, 93 N. W. 182, holding that a petition to compel the state auditor to register refunding bonds issued by a county, and certify thereon that they have been regularly and legally issued and registered in accordance with law, is defective where it does not appear therefrom that there have been filed in the auditor's office the necessary information and data relative to the issuance of the bonds, from which it may be inferred that they were issued by authority and in pursuance of a valid statute, and that the statutory requirements to entitle them to registration have been complied with.

New Jersey.— Rader *v.* Union Tp., 43 N. J. L. 518, holding that where a statute gives the right in question and establishes a special method of enforcing it not according to the course of the common law, the facts and circumstances whose existence is necessary to the aid of the statute must be specially set out.

Mode of pleading performance.— Where a right claimed is dependent on the performance of conditions precedent, it is not sufficient to state a performance in all things generally, but the pleader should allege specially that each condition has been performed and the manner of its performance. People *v.* Glann, 70 Ill. 232.

Mandamus affecting division of municipality and limits thereof.— A petition to compel the division of a municipal corporation must show that proper proceedings have been taken to that end. Trustees *v.* People, 71 Ill. 559, holding that a failure to show that the school-district sought to be divided has no bonded debt; that the boundary of the new district does not come nearer than one mile to a school-house; that the petition for division was signed by all the voters of the new district; and that the new district contains not less than five families, is fatal. See, however, Somonauk *v.* People, 178 Ill. 631, 53 N. E. 314, where a petition to compel the division of a town was held sufficient in its allegations of notice of the division proceedings. So an application to compel action dependent on a vote for the division of a county must show an election, and that a majority of the votes are in favor of the division. State *v.* Elwood, 11 Wis. 17. Petition to compel the passing of an ordinance disconnecting petitioner's lands from a city held sufficient, on general demurrer, to show that petitioners all signed the petition for disconnection see Mattoon *v.* Mattoon Tile Co., 97 Ill. App. 56. See also as to disconnecting town territory Wilson *v.* Bristley, 13 Tex. Civ. App. 200, 33 S. W. 837.

Mandamus to compel approval of bond.— A petition to compel the approval of an official bond must show that the bond was presented for approval within the time prescribed by statute (State *v.* Adams, 19 Nev. 370, 12 Pac. 488), and that it was executed by sufficient sureties (Woodward *v.* State, 58 Nebr. 598, 79 N. W. 164). Where, however, a complaint to compel the county auditor to approve the bond of a township trustee avers that relator tendered to the auditor a good and sufficient bond, it is not demurrable, although it does not allege that the bond was in a penalty double the amount of money likely to come into the trustee's hands in any one year during his office. Copeland *v.* State, 126 Ind. 51, 25 N. E. 866. A petition to compel the acceptance of a surety on an appeal-bond alleging, as to his qualification of residence, that he was a resident at the time the petition was filed, is insufficient. It must allege that he was a resident when the bond was presented for approval. State *v.* Spiegel, 20 Ohio Cir. Ct. 597, 11 Ohio Cir. Dec. 313.

Mandamus to compel delivery of official rooms, records, funds, etc.— An alternative writ to compel the prior incumbent of an office to surrender the office room, records, etc., need not allege in specific words that his term of office has expired. While the writ would be more exact and definite if the specific words were used, words fully equivalent, from which the expiration of the term follows as a necessary consequence, are suffi-

allegations anticipate objections to the issuance of the writ and negative their validity.[22]

cient. State *v.* Johnson, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357. But if such a petition fails to state that there are any official records, funds, etc., it is bad on demurrer. Lavalle *v.* Soucy, 96 Ill. 467.

Mandamus to compel public improvement. —A petition to compel the construction of a public improvement must show that the statutory proceedings therefor have been taken (State *v.* Graffam, 74 Wis. 643, 43 N. W. 727), and in some states must show an appropriation of the necessary funds to enable respondent to contract for and proceed with the work (Com. *v.* McFadden, 14 Phila. (Pa.) 161).

Mandamus to compel reinstatement to office see Fuller *v.* Plainfield Academic School, 6 Conn. 532 (holding that where plaintiff averred that a corporation was established by the name of the trustees, etc.; that he was one of the trustees, duly elected and enjoying the rights and privileges belonging to him as trustee; and that he continued to hold and exercise that office until he was removed therefrom, it sufficiently appeared that there was such an office as trustee and that there were rights, duties, and privileges appertaining thereto); Stott *v.* Chicago, 205 Ill. 281, 68 N. E. 736 [*affirming* 98 Ill. App. 105]; People *v.* Dalton, 159 N. Y. 235, 53 N. E. 1113 [*affirming* 34 N. Y. App. Div. 302, 54 N. Y. Suppl. 216] (the last two cases relating to public office).

22. *Arkansas.*— Pritchard *v.* Woodruff, 36 Ark. 196.

California.— Peck *v.* Los Angeles County, 90 Cal. 384, 27 Pac. 301; Schwartz *v.* Wilson, 75 Cal. 502, 17 Pac. 449 (holding that a petition to enforce payment of a claim must show that the debt limit will not be exceeded); Cozzens *v.* North Fork Ditch Co., 2 Cal. App. 404, 84 Pac. 342 (holding that in view of the terms of a contract for the supply of water for irrigation, it was necessary that a petition to compel the furnishing of a certain amount of water should allege that respondent had sufficient water to supply not only petitioner but all water takers). But see Miller *v.* Dailey, 136 Cal. 212, 68 Pac. 1029 (holding that a petition to compel the admission to a public school of a pupil who has been wrongfully expelled need not set forth the regulations governing the school and allege compliance therewith); Babcock *v.* Goodrich, 47 Cal. 488.

Illinois.— Blocki *v.* People, 220 Ill. 444, 77 N. E. 172 (holding that a street railway company seeking to compel the commissioner of public works to grant a permit to construct a track after the time limited in the ordinance for such construction has expired must allege that the delay was caused by circumstances recognized by the ordinance as excusing the delay); Stott *v.* Chicago, 205 Ill. 281, 68 N. E. 736 [*affirming* 98 Ill. App. 105] (holding that to bring within the Civil Service Act one petitioning for reinstatement on the pay-roll as police patrolman, the petition must show that the office of police patrolman is not within the provisions of a section of the act excluding certain officers from such service); People *v.* Highway Com'rs, 88 Ill. 141.

Indiana.— Weir *v.* State, 161 Ind. 435, 68 N. E. 1023; Logansport, etc., R. Co. *v.* Groniger, 51 Ind. 383; Draper *v.* Cambridge, 20 Ind. 268.

Kansas.— Martin *v.* Ingham, 38 Kan. 641, 17 Pac. 162.

Maine.— Hoxie *v.* Somerset County, 25 Me. 333, holding that the petition must not only contain the affirmative allegation of proceedings necessary to entitle petitioner to the process prayed for, but must also aver that other facts which would justify the omission complained of do not exist.

Montana.— State *v.* Lewis, etc., County Dist. Ct. Dept. No. 1, 29 Mont. 265, 74 Pac. 498.

Ohio.— State *v.* Bickham, 4 Ohio Cir. Ct. 246, 2 Ohio Cir. Dec. 526, holding that relator must show that facts which would justify the omission complained of do not exist.

Texas.— Ewing *v.* Dallas County, 83 Tex. 663, 19 S. W. 280 (holding, under a statute which provides that if a *de facto* corporation is declared void by any court of competent jurisdiction the commissioners' court shall provide for the sale of its property and the settlement of its debts, and for this purpose may levy and collect taxes from the inhabitants of the corporation, and that upon the reincorporation of the *de facto* corporation all property owned by it shall belong to the new corporation, which shall be liable for the debts of the old corporation, that a petition to compel the commissioners to levy a tax to pay the salaries of officers of a city whose incorporation has been declared void is fatally defective where it fails to allege that the city has not been reincorporated); Houston, etc., R. Co. *v.* Randolph, 24 Tex. 317; Arberry *v.* Beavers, 6 Tex. 457, 55 Am. Dec. 791; Cullen *v.* Latimer, 4 Tex. 329; Watkins *v.* Huff, (Civ. App. 1901) 63 S. W. 922 [writ of error *denied* in 94 Tex. 631, 64 S. W. 682] (holding, under a statute which provides that school trustees, in contracting with teachers, shall not create a deficiency debt against the district, that a petition to compel the approval of a teacher's contract must show that the funds of the district would not be rendered deficient by the approval); Wilson *v.* Bristley, 13 Tex. Civ. App. 200, 35 S. W. 837.

West Virginia.— Fisher *v.* Charleston, 17 W. Va. 595, holding that an alternative writ based on a claim against a municipality must show non-payment, but that the petition need not do so.

And see cases cited *supra*, note 21; *infra*, note 24 *et seq.*

This rule is not recognized apparently in some jurisdictions. Foster *v.* White, 86 Ala.

(2) ILLUSTRATIONS.[23] The general rule announced in the preceding section applies in pleading rights and duties regarding bridges and highways,[24] elections,[25]

467, 6 So. 88 (holding that a petition to enforce the right of a stock-holder to inspect corporate books need not negative impropriety of purpose in seeking inspection); People *v.* Rio Grande County, 7 Colo. App. 229, 42 Pac. 1032 (holding that a petition to have a tax levied to pay a judgment need not allege the nature of the claim on which the judgment was rendered, but that if its nature can affect the right to mandamus it should be shown by the return); State *v.* Mayor, 22 Fla. 21 (holding that exhaustion of power to levy taxes need not be negatived in a petition to compel a levy); McCless *v.* Meekins, 117 N. C. 34, 23 S. E. 99; Appel *v.* State, 9 Wyo. 187, 61 Pac. 1015; U. S. *v.* Brown, 41 Fed. 481 (holding, under a statute providing that county warrants which are not presented within five years, or which, being presented within that time and protested for want of funds, are not presented again within five years after funds have been set apart for payment thereof, shall be barred, that an information showing that warrants were duly issued and presented within five years and that they have not since been paid is good on demurrer, although more than five years have elapsed since their presentation, as the appropriation of money for their payment and non-presentation within five years thereafter should be shown by plea). See also Parks *v.* Soldiers, etc., Home, 22 Colo. 86, 43 Pac. 542; Nance *v.* Stuart, 7 Colo. App. 510, 44 Pac. 779.

Negativing grounds of refusal see *infra*, IX, E, 3, d, (III), (B).

23. **Other illustrations** see *supra*, note 21.

24. See cases cited *infra*, this note.

Petition to compel erection of bridge or aid therein.— A petition to compel the erection of a bridge must show that respondents have adequate funds for that purpose (State *v.* Somerset, 44 Minn. 549, 47 N. W. 163); and it is essential that a petition by a town against a county to compel it to furnish aid to build a bridge should allege that the town has raised one half of the necessary funds (Madison County *v.* People, 16 Ill. App. 305; Kendall County *v.* People, 12 Ill. App. 210).

Petition to compel opening or improvement of highway.— A petition to compel the opening of a highway previously laid out should aver that the damages assessed to the landowners on the route of the road have been either paid or released, or that there is money in the town treasury with which to tender or pay the same, or that the necessary funds are otherwise under the control of the commissioners. Hall *v.* People, 57 Ill. 307. So an alternative writ to compel the appointment of commissioners for a road improvement should allege the existence and sufficiency of a fund applicable to the improvement. Shawnee County *v.* State, 42 Kan. 327, 22 Pac. 326.

Petition to compel removal of obstructions from highway.— A petition to compel county supervisors to clear a road from obstructions and keep it in repair is fatally defective if it fails to show that the road has not been abandoned and discontinued by the supervisors (Peck *v.* Los Angeles County, 90 Cal. 384, 27 Pac. 301); and a complaint in an action to compel a city by mandamus to remove from an alley an obstruction placed therein by a railroad company with the consent of the city must, in order to be sufficient, make it affirmatively to appear that an unlawful use is made of the alley (State *v.* New Albany, 127 Ind. 221, 26 N. E. 791).

Petition to compel payment of damages from laying out highway see *infra*, note 28.

25. *Delaware.*—Hastings *v.* Henry, 1 Marv. 287, 4 Atl. 1125, holding that a petition to compel the registry of petitioner as a voter must show that he offered evidence of his necessary qualifications.

Indiana.— Enos *v.* State, 131 Ind. 560, 31 N. E. 357, holding that a petition to compel the making and filing of an election certificate by the inspector of elections need not allege that the election board made a certified return of the votes.

Maine.— Rose *v.* Knox County, 50 Me. 243, holding that a petition to compel respondents to declare petitioner elected to fill a vacancy in an office must allege that a vacancy existed.

New York.— People *v.* Parmelee, 22 Misc. 380, 50 N. Y. Suppl. 451.

Wyoming.— State *v.* Chatterton, 11 Wyo. 1, 70 Pac. 466, holding that a petition to require the filing of a nomination certificate is insufficient which fails to show that the certificate was offered at the proper office within the time prescribed by law.

Petition to compel canvass see Wilson *v.* Bristley, 3 Tex. Civ. App. 200, 35 S. W. 837; State *v.* Barber, 4 Wyo. 56, 32 Pac. 14. A petition to require a board of canvassers to canvass and make return of the votes alleged to have been cast for relator for a particular office should show that an election for that office was held, and sufficient facts should be alleged to show *prima facie* a valid election for the office; and it is insufficient if it fails to show that any returns were made of the votes cast for relator or for the office named. State *v.* Chatterton, 12 Wyo. 168, 73 Pac. 961.

Petition to compel placing of name on ballot.— A petition by a party nominee to compel the placing of his name on the official ballot must show that he was regularly nominated (Sieber *v.* McCaffery, 198 Mo. App. 49, 82 S. W. 1104, holding that he must allege publication of notice of the primary election and due election of the delegates); that petitioner has a nomination certificate containing the party device and title (State *v.* Marshall County, (Ind. 1906) 78 N. E. 1016); and that the office for which he was nominated is vacant (Patrick *v.* Hagins, 41 S. W. 31, 19 Ky. L. Rep. 482, holding that

judicial proceedings,[26] licenses and permits,[27] pecuniary claims against the public,[28]

an allegation that the incumbent of the office "resigned" on a certain prior date does not show that a vacancy then occurred, there being no allegation that the resignation was then accepted).

26. *Indiana.*— Logansport, etc., R. Co. *v.* Groniger, 51 Ind. 383, holding that an affidavit in support of a motion to compel a justice of the peace to issue a summons in a civil action must allege that the justice is not related by blood or marriage to either party.

Massachusetts.—Kimball *v.* Morris, 2 Metc. 573.

Michigan.— People *v.* Judge Wayne County Cir. Ct., 19 Mich. 296.

Montana.— State *v.* Lewis, etc., County Dist. Ct. Dept. No. 1, 29 Mont. 265, 74 Pac. 498, holding that a writ to compel the amendment of a statement on motion for a new trial must show that the motion has not been decided.

New York.— People *v.* Bacon, 25 Misc. 16, 54 N. Y. Suppl. 409.

Washington.— State *v.* Hunter, 4 Wash. 651, 30 Pac. 642, 32 Pac. 294, holding that an alternative writ to compel a judge to enter judgment will not be granted where the application shows that service was had on defendant by publication, and fails to show that such proofs were offered before the court as to authorize an entry of judgment.

Petition to compel preparation and transmission of transcript on appeal.— Where a justice of the peace has dismissed a cause for want of prosecution, a petition to compel him to make out a transcript on plaintiff's giving notice of an appeal to the county court must allege that that court has appellate jurisdiction of the cause. White *v.* Meyers, (Tex. Civ. App. 1898) 47 S. W. 476. Mandamus to compel a justice to send up a transcript on appeal will not be granted on a petition filed during the first term after the appeal was perfected, where the petition does not allege that it was practicable for the justice to have sent up the transcript when the petition was filed, as the statute provides that such transcript shall, "if practicable," be sent up on or before the first day of the term (Raley *v.* Jones, (Tex. Civ. App. 1894) 25 S. W. 144); but where an application alleges the refusal of a county clerk to prepare and transmit a transcript on appellant's filing a poverty affidavit in lieu of an appeal-bond as authorized by statute, applicant is entitled to mandamus to compel such preparation and transmission without alleging that it was practicable to have sent up such record at or before the time of filing the application (Newton *v.* Leal, (Tex. Civ. App. 1900) 56 S. W. 209). See APPEAL AND ERROR, 3 Cyc. 93, 94.

27. See cases cited *infra*, this note.

Petition to compel issuance of liquor license.— In mandamus to compel the issuance of a dram-shop license, the petition and the alternative writ must show a compliance with the municipal ordinance and with the statute (State *v.* Hudson, 13 Mo. App. 61), as that a sufficient bond has been tendered (People *v.* Crotty, 93 Ill. 180). However, in Missouri a writ to compel the clerk of the county court to issue a license duly granted by the court need only show the due making of an order for the license without reciting the facts giving jurisdiction. State *v.* Moss, 35 Mo. App. 441.

Petition to compel issuance of permit see Blocki *v.* People, 220 Ill. 444, 77 N. E. 172. A petition to compel the commissioner of public works to issue a permit to lay a track in a street must aver that the necessary petition signed by owners of property abutting on the street was obtained and filed with the common council before the ordinance granting petitioner the right to lay the track was passed. McGann *v.* People, 194 Ill. 526, 62 N. E. 941 [*reversing* 97 Ill. App. 587].

28. Pritchard *v.* Woodruff, 36 Ark. 196 (holding that a petition to compel the state treasurer to refund, out of the appropriation made for that purpose, money erroneously paid into the treasury, need not allege the appropriation, but must allege that the sum demanded will not more than exhaust the appropriation); People *v.* Highway Com'rs, 88 Ill. 141 (holding that a petition to compel highway commissioners to pay damages growing out of the laying out of a road must show that the commissioners have taken possession of the road or recognized it as a legally established highway, or that the order for the road has not been revoked); Fisher *v.* Charleston, 17 W. Va. 595.

Mandamus to compel audit and allowance of claims.— A petition to compel the audit and allowance of a claim against a public body must allege facts giving rise to legal demand (San Luis Obispo County *v.* Gage, 139 Cal. 398, 73 Pac. 174), and showing that the demand is of such a nature that respondent is liable thereon (People *v.* Woodhull Tp. Bd., 14 Mich. 28), and that money has been appropriated therefor (Montrose *v.* Endner, 18 Colo. App. 65, 70 Pac. 152), or that there are moneys in the treasury applicable thereto (State *v.* Warner, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255).

Mandamus to compel issuance of orders and warrants.— A petition or alternative writ to compel the issuance of a warrant for a claim against a public body must allege facts showing a compliance with statutory prerequisites and performance of conditions precedent to the issuance of the warrant. *Ex p.* Crise, 16 Ark. 193, 20 Ark. 540 (holding that a petition to compel the issuance of a warrant for damages caused by a levee must show not only an inquisition and award of damages, but also that the levee has been built, or is being constructed, or is under contract for construction); Chapin *v.* Port Angeles, 31 Wash. 535, 72 Pac. 117 (holding that an alternative writ to compel a municipal corporation to issue a warrant on a judgment is demurrable where it fails to allege that the judgment was satisfied by petitioner

and public lands.[29] So it applies in pleading rights and duties regarding schools and a certified copy thereof presented to the city, as required by statute). Thus it has been held that the petition or writ must allege facts showing the validity of the claim, even though it has been audited, allowed, or approved (State *v.* La Grave, 22 Nev. 417, 41 Pac. 115. *Contra*, State *v.* Fraker, 166 Mo. 130, 65 S. W. 720; Caldwell County *v.* Harbert, 68 Tex. 321, 4 S. W. 607; State *v.* Headlee, 17 Wash. 637, 50 Pac. 493. And see Haly *v.* Auditor, 4 Bush (Ky.) 490), and even though an appropriation has been made to pay it (Parks *v.* Hays, 11 Colo. App. 415, 53 Pac. 893). So the petition or writ must make it appear that there are funds on hand out of which the claim may lawfully be paid. Cramer *v.* Sacramento, 18 Cal. 384; Redding *v.* Bell, 4 Cal. 333; Montgomery Tp. Highway Com'rs *v.* Snyder, 15 Ill. App. 645; Amos *v.* Burrus, 11 Ill. App. 383; State *v.* Otoe County, 10 Nebr. 19, 4 N. W. 258. And see Chapin *v.* Port Angeles, 31 Wash. 535, 72 Pac. 117, holding that an alternative writ reciting that petitioner is entitled to a warrant on the current expense fund of defendant city in satisfaction of a judgment is insufficient where it contains no allegations showing under what kind of contract the obligation which was merged in the judgment arose, and against what fund it was a charge when the contract was made. *Contra*, Robertson *v.* Alameda Free Public Library, etc., 136 Cal. 403, 69 Pac. 88. And see Babcock *v.* Goodrich, 47 Cal. 488; Lowell *v.* Bonney, 14 Colo. App. 230, 60 Pac. 830 (holding that an application to compel the state auditor to issue a warrant for the payment of services of an officer of the senate need not allege that there is money in the treasury to pay the same, since the salaries of such officers are preferred claims on any funds in the treasury or in anticipation of the revennes); Appel *v.* State, 9 Wyo. 187, 61 Pac. 1015. On the other hand a petition which fails to state that there was no money in the treasury to pay a city warrant at the time it was issued is inadequate to entitle petitioner to a writ compelling the mayor to sign an interest-bearing warrant. Scanlan *v.* Schwab, 103 Ill. App. 93. Petition or writ held to be sufficient see Babcock *v.* Goodrich, *supra* (in regard to jurisdiction to allow claim in question); State *v.* Ames, 31 Minn. 440, 18 N. W. 277 (in regard to action of city council authorizing payment of claim in question); State *v.* Headlee, 18 Wash. 220, 51 Pac. 369 (in regard to power of respondent to draw warrant); Appel *v.* State, *supra* (in regard to regularity of allowance of claim in question).

Mandamus to compel payment of claims in general.— A petition or alternative writ to compel payment of a claim against a public body must allege, according to the nature of the case, that the money is due from respondent (Payne *v.* Perkerson, 56 Ga. 672); that the claim was itemized when presented for payment (Chatters *v.* Coahoma County, 73 Miss. 351, 19 So. 107. See, however, Appel *v.* State, 9 Wyo. 187, 61 Pac. 1015), and accompanied by estimates and certificates as required by contract, or account for their absence (McCoy *v.* Harnett County, 50 N. C. 265, where, however, the petition was held to be sufficient in this respect); that respondent has funds on hand with which it may pay the claim (Stevens *v.* Truman, 127 Cal. 155, 59 Pac. 397. And see Schwartz *v.* Wilson, 75 Cal. 502, 17 Pac. 449. *Contra*, Davis *v.* Connor, 52 S. W. 945, 21 Ky. L. Rep. 658); and, where respondent city and another city are jointly bound to pay the claim, that it has not been paid by the other city (People *v.* Elgin, 66 Ill. 507).

Mandamus to compel payment of bonds.— A petition to compel the payment of public bonds must allege facts showing the validity of the bonds (State *v.* Thorne, 9 Nebr. 458, 4 N. W. 63. *Contra*, McCless *v.* Meekins, 117 N. C. 34, 23 S. E. 99); that all statutory conditions precedent to payment have been complied with (People *v.* Pavey, 137 Ill. 585, 27 N. E. 697); and that respondent has funds on hand applicable to payment of the bonds (Meyer *v.* San Francisco, (Cal. 1907) 88 Pac. 722; People *v.* Pavey, *supra*).

Mandamus to compel payment of warrants. — If a petition to compel a county treasurer to pay a warrant issued by the county auditor alleges that the board of supervisors of the county audited and allowed the claim and ordered the auditor to draw a warrant for its amount, and that the auditor in pursuance of this order issued and delivered the warrant to claimant, it is sufficient, although it does not follow the exact words of the statute. Jones *v.* Morgan, 67 Cal. 308, 7 Pac. 734. So an information showing that relator holds valid warrants against the general funds of the county, and that the treasurer holds funds which appear to be applicable to their payment, is sufficient to require the treasurer to show cause why such funds should not be so applied. U. S. *v.* Brown, 41 Fed. 481. The petition need not allege facts showing that the warrant was properly issued (Connor *v.* Morris, 23 Cal. 447 [*followed* in Jones *v.* Morgan, 67 Cal. 308, 7 Pac. 734]; Neal Loan, etc., Co. *v.* Chastain, 121 Ga. 500, 49 S. E. 618); but it must show that respondent has funds on hand which may be applied in payment of the warrant (Kephart *v.* People, 28 Colo. 73, 62 Pac. 946), and by statute it may be necessary to show that the warrant recites the specific use to which the money to be drawn thereon is to be applied (State *v.* Dubuque Dist. Tp., 11 Iowa 155).

Allegations as to presentation of claim for allowance see *infra*, IX, E, 3, d, (III), (B).

Petition to compel tax or local assessment to pay claim see *infra*, this section.

29. Moore *v.* Rogan, 96 Tex. 375, 73 S. W. 1, holding that an applicant for mandamus against the commissioner of the general land-office to compel reinstatement in his purchase of land, which the commissioner had canceled because of conflict with an existing lease,

and school-districts,[30] and it has also been held applicable in respect of taxation and local assessments.[31]

must show compliance by applicant with the law authorizing his purchase, as well as the invalidity of the lease.

Petition to compel issuance of deed or patent.— An alternative writ to compel the board of land commissioners to execute a deed of state land to petitioner must show on its face that he has complied with the statutory requirements (Shively *v.* Pennoyer, 27 Oreg. 33, 39 Pac. 396); and if a relation to compel the issuing of a patent shows that the land has been sold to the state, it must show also that the statement of the sale has been recorded as required by statute (State *v.* Harvey, 11 Wis. 33).

Petition to compel survey.— A petition to compel a county surveyor to survey lands claimed under a head-right certificate must show relator's title to the certificate, and describe his entry, and the location of the land. Winder *v.* Williams, 23 Tex. 601. Petition to compel survey held sufficient see Texas, etc., R. Co. *v.* Locke, 63 Tex. 623.

30. Township 14 School Trustees *v.* People, 71 Ill. 559; People *v.* Helt, 116 Ill. App. 391 (holding that a petition to compel a township treasurer to credit a school-district with an amount of taxes collected should allege that the district has not received the full amount of such taxes to which it is entitled, and that at the time of his refusal to make such credit there were in the hands of the treasurer sufficient funds from the particular source from which such credit was to be made to enable him to make the same); Harrison Tp. Advisory Bd. *v.* State, (Ind. 1906) 76 N. E. 986 (holding that in mandamus to compel the advisory board of a township to make an appropriation to build a school-house, a complaint and alternative writ are demurrable which fail to show that there are any funds from which the appropriation may be made); Weir *v.* State, 161 Ind. 435, 68 N. E. 1023; Draper *v.* Cambridge, 20 Ind. 268; Boyle *v.* Lansford School Dist., 8 Pa. Dist. 436 (holding that a motion to quash an alternative writ of mandamus will be allowed where a school-teacher who seeks thereby to enforce his rights does not show an acceptance of the terms of his election, or a contract thereunder before his appointment is annulled); Watkins *v.* Huff, (Tex. Civ. App. 1901) 63 S. W. 922 [writ of error *denied* in 94 Tex. 631, 64 S. W. 682]. See, however, Miller *v.* Dailey, 136 Cal. 212, 68 Pac. 1029 (where a petition to compel the admission of a pupil was held to be sufficient); Cruse *v.* McQueen, (Tex. Civ. App. 1894) 25 S. W. 711 (where a petition to compel a county judge to issue a teacher's certificate was held to be sufficient).

31. Applegate *v.* State, 158 Ind. 119, 63 N. E. 16 (holding that a petition by a county assessor to compel a bank to permit him to examine its books for the purpose of obtaining information to enable him to discharge his duty must allege that some taxpayer who is a depositor in the bank has failed to make a return for taxation of all his money so on deposit, or that relator has just cause to believe that he has not done so); Ewing *v.* Dallas County Com'rs Ct., 83 Tex. 663, 19 S. W. 280.

Petition held to be sufficient see People *v.* Land Office Com'rs, 90 Hun (N. Y.) 525, 36 N. Y. Suppl. 29 (holding, in a proceeding to compel the land-office commissioners to direct repayment of the price paid at a tax-sale afterward canceled by the state controller, that a petition alleging that application was duly made to the controller to cancel the sale, and that his decision canceling it was duly made, sufficiently alleges a proper presentation of the application and the rendition of the controller's decision); State *v.* Crites, 48 Ohio St. 142, 26 N. E. 1052 (holding that a petition to compel a county auditor to tax omitted property sufficiently shows the duty to act, where it alleges that the auditor had evidence before him showing that a certain person had in certain years failed to return taxable property owned by him); Caldwell County *v.* Harbert, 68 Tex. 321, 4 S. W. 607.

Mandamus to compel levy and collection of railroad aid tax see Harwood, etc., R. Co. *v.* Case, 37 Iowa 692; Arkansas Southern R. Co. *v.* Wilson, (La. 1907) 42 So. 976, holding that a petition to enforce the levy of a tax that has been voted in aid of a railroad enterprise need not recite every detail of the proceedings by which the election was held. Where the petition to compel the collection of a railroad aid tax shows that the order placing the same on the tax duplicate was canceled, and that on appeal from the order of cancellation judgment was rendered that the board of commissioners should enter on its record an order requiring that the tax be immediately collected, the petition is bad for failing to allege that the commissioners entered the order as required. State *v.* Burgett, 151 Ind. 94, 51 N. E. 139, (1898) 49 N. E. 884.

Mandamus to compel levy of school-tax see Covington Bd. of Education *v.* Covington, 103 Ky. 634, 45 S. W. 1045, 20 Ky. L. Rep. 289; Jarvis *v.* Warren County, 49 Miss. 603; Caldwell County *v.* Harbert, 68 Tex. 321, 4 S. W. 607.

Mandamus to compel levy of tax to pay judgment.— It has been held that an alternative writ to compel the levy of a tax to pay a judgment against a municipality need not show that the taxing power has not been exhausted by reason of a statute limiting such power to a certain percentage of the value of the taxable property (State *v.* Jacksonville, 22 Fla. 21); and that a petition to compel a levy need not show the nature of the claim on which the judgment was rendered (People *v.* Ric Grande County, 7 Colo. App. 229, 42 Pac. 1032. See, however, State *v.* St. Martin Parish Police Jury, 32 La.

(III) *Allegations as to Default and Breach of Duty*—(A) *In General.* The petition or alternative writ must allege facts showing that respondent has been guilty of acts which constitute a breach of the duty enjoined upon him, or that he has failed to perform that duty.[32]

(B) *Demand and Refusal of Performance.* In order to show that respondent is in default in cases where a private right is sought to be enforced, the petition or alternative writ must as a rule allege that performance of the duty has been demanded of respondent and that he has refused or failed to perform it.[33]

Ann. 884, holding that a petition to compel a municipal corporation to levy a tax to pay a judgment notwithstanding a constitutional limitation, on the ground that the limitation impairs the obligation of petitioner's contract with the municipality, must allege that the judgment is founded on a contract). But if no execution has been issued on the judgment the alternative writ must show that the municipality has no money in its treasury and no property subject to execution (Hambleton *v.* Dexter, 89 Mo. 188, 1 S. W. 234); and a judgment creditor who demands an order of the supervisors directing the town-clerk to insert the amount of the judgment in the tax-roll for collection must allege that he notified the supervisors of the rendition of the judgment in the manner required by statute (State *v.* Elba Sup'rs, 34 Wis. 169). In Missouri an alternative writ which sets forth a judgment against a city, an execution with return of *nulla bona*, and that no levy has been made by the city council as authorized, and commands a levy within legal limits, is sufficient (Hartman *v.* Brunswick, 98 Mo. App. 674, 73 S. W. 726), and it need not allege that there is no money in the treasury applicable to the judgment (Hubbel *v.* Maryville, 85 Mo. App. 165). As to this last proposition the law is otherwise in West Virginia (Fisher *v.* Charleston, 17 W. Va. 628); and in that state, while the petition of a creditor on whose judgment execution has been returned *nulla bona* need not expressly allege that the judgment has not been paid (Fisher *v.* Charleston, 17 W. Va. 595), yet non-payment must be alleged in the alternative writ (Fisher *v.* Charleston, *supra*).

Mandamus to compel local assessment see State *v.* Leon, 66 Wis. 199, 28 N. W. 140. An alternative writ to compel an assessment by drainage commissioners must show that their report was adopted, and that they were directed to proceed, by the county judge. People *v.* Marsh, 21 N. Y. App. Div. 88, 47 N. Y. Suppl. 395. If an application by contractors to compel a new assessment for their work alleges that payment of the original assessment was refused because of excess of work, it must clearly set forth facts showing that the previous assessment was void. Frick *v.* Morford, 87 Cal. 576, 25 Pac. 764.

Mandamus to compel issuance of precept for local assessments see Chapin *v.* Osborn, 29 Ind. 99. A complaint by contractors to compel the issuance of a precept on an estimate of work done under a contract for a local improvement must allege that plaintiff filed the affidavit required by statute in such cases. Indianapolis *v.* Patterson, 33 Ind. 157.

32. *California.*— Kelly *v.* Edwards, 69 Cal. 460, 11 Pac. 1.

Florida.— Lake County *v.* State, 24 Fla. 263, 4 So. 795.

Illinois.— Swigert *v.* Hamilton County, 130 Ill. 538, 22 N. E. 609; P. H. Murphy Mfg. Co. *v.* Isbester, 91 Ill. App. 7.

Kansas.— Rosenthal *v.* State Bd. of Canvassers, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157; State *v.* Carney, 3 Kan. 88; Garden City First Nat. Bank *v.* Morton County, 7 Kan. App. 739, 52 Pac. 580, holding that a petition and alternative writ to compel a tax levy must aver that respondents have failed or will fail to make the levy.

New York.— People *v.* Bricklayers' Benev., etc., Union, 20 N. Y. App. Div. 8, 46 N. Y. Suppl. 648.

Ohio.— State *v.* Bickham, 4 Ohio Cir. Ct. 246, 2 Ohio Cir. Dec. 526.

South Dakota.—Thomas *v.* Beadle County, 1 S. D. 452, 47 N. W. 529.

Texas.— Clarke *v.* San Jacinto County, 18 Tex. Civ. App. 204, 45 S. W. 315.

See 33 Cent. Dig. tit. "Mandamus," § 308.

Allegation of specific instances of violation of duty.— Where the recitals and allegations of an alternative writ together charge a general violation of the duty of respondent railroad company to put into practical operation a system or schedule of rates for the transportation of phosphate prescribed by the railroad commissioners, the writ is not demurrable because it does not allege a specific instance of the violation of such schedule of rates. State *v.* Atlantic Coast Line R. Co., 48 Fla. 114, 37 So. 652.

In proceedings to restore an attorney who has been disbarred it must accordingly appear that the disbarment was irregular, erroneous, or without jurisdiction. State *v.* Finley, 30 Fla. 302, 11 So. 500; *In re* Gephard, 1 Johns. Cas. (N. Y.) 134.

The evidence on which respondent based his action must be brought before the court, where that action is complained of as a breach of duty. *Ex p.* Smith, 69 Ala. 528; Standard Import Co. *v.* New Orleans Import Co., 117 La. 633, 42 So. 192; State *v.* Forrest, 11 Wash. 158, 39 Pac. 450.

33. *Arkansas.*— Coit *v.* Elliott, 28 Ark. 294, holding that it must appear that there has been a refusal by respondent to perform the duty in question, either in direct terms or by circumstances distinctly showing an intention on his part not to do the act required.

California.—Meyer *v.* San Francisco, (1907) 88 Pac. 722; Peck *v.* Los Angeles County, 90

In cases where a public right is sought to be enforced, however, no demand need be alleged.[34]

(IV) *ALLEGATIONS AS TO INJURY FROM DEFAULT OR BREACH OF DUTY.* In case a private right is sought to be enforced, it must appear from the petition or alternative writ that petitioner has been injuriously affected by respondent's default or breach of duty, or that he will be injuriously affected if the duty is not performed.[35]

(V) *ALLEGATIONS AS TO INADEQUACY OF ORDINARY REMEDIES.* The petition or alternative writ must make it appear that a necessity exists for resort-

Cal. 384, 27 Pac. 301; Kelly *v.* Edwards, 69 Cal. 460, 11 Pac. 1.

Connecticut.— Harrison *v.* Simonds, 44 Conn. 318; Douglas *v.* Chatham, 41 Conn. 211.

District of Columbia.— U. S. *v.* Chandler, 2 Mackey 527.

Florida.— Scott *v.* State, 43 Fla. 396, 31 So. 244.

Georgia.— Payne *v.* Perkerson, 56 Ga. 672.

Illinois.— People *v.* Mt. Morris, 145 Ill. 427, 34 N. E. 144; People *v.* Mt. Morris, 137 Ill. 576, 27 N. E. 757; Women's Catholic O. of F. *v.* Condon, 84 Ill. App. 564. Allegations as to refusal held to be sufficient see Mattoon *v.* Mattoon Tile Co., 97 Ill. App. 56.

Indiana.— State *v.* Fisher, 157 Ind. 412, 61 N. E. 929; Lake Erie, etc., R. Co. *v.* State, 139 Ind. 158, 38 N. E. 596; Ingerman *v.* State, 128 Ind. 225, 27 N. E. 499; Lewis *v.* Henley, 2 Ind. 332.

Iowa.— Chance *v.* Temple, 1 Iowa 179. This is now required by statute. Windsor *v.* Polk County, 115 Iowa 738, 87 N. W. 704; Scripture *v.* Burns, 59 Iowa 70, 12 N. W. 760.

Kansas.— Dobbs *v.* Stauffer, 24 Kan. 127.

Kentucky.— Covington Bd. of Education *v.* Covington, 103 Ky. 634, 45 S. W. 1045, 20 Ky. L. Rep. 289.

Michigan.— People *v.* Saginaw County, 26 Mich. 22.

Mississippi.— Hardee *v.* Gibbs, 50 Miss. 802. And see Chatters *v.* Coahoma County, 73 Miss. 351, 19 So. 107.

Nebraska.— Kemerer *v.* State, 7 Nebr. 130.

North Carolina.— See Alexander *v.* McDowell County Com'rs, 67 N. C. 330, 332, holding that "the writ should show expressly, by the averment of a demand and refusal, or an equivalent, that the prosecutor, before his application to the Court, did all in his power to obtain redress."

Pennsylvania.— Boyle *v.* Lansford School Dist., 8 Pa. Dist. 436; Com. *v.* Pennsylvania R. Co., 6 Pa. Dist. 266.

Texas.— Burrell *v.* Blanchard, (Civ. App. 1899) 51 S. W. 46.

United States.— See *Ex p.* Virginia Sinking Fund Com'rs, 112 U. S. 177, 5 S. Ct. 421, 28 L. ed. 691.

See 33 Cent. Dig. tit. "Mandamus," § 308.

See, however, People *v.* Wilson, 119 N. Y. 515, 23 N. E. 1064.

An allegation of refusal dispenses with an allegation of demand.— Evansville, etc., R. Co. *v.* State, 149 Ind. 276, 49 N. E. 2; Com. *v.* Pittsburgh, 34 Pa. St. 496.

A demand is substantially averred by the general words "often requested and refused to be done," in the absence of a special demurrer. People *v.* Reis, 76 Cal. 269, 18 Pac. 309.

Grounds and circumstances of refusal.— The petition or alternative writ must set forth respondent's reason for refusing to act, if any was given (Goss *v.* Vermontville, 44 Mich. 319, 6 N. W. 684; Vespra, etc., Municipal Corp. *v.* Beatty, 17 U. C. Q. B. 540. But see Gillett *v.* People, 13 Colo. App. 553, 59 Pac. 72), and the circumstances of refusal (Goss *v.* Vermontville, *supra*); and the validity of respondent's reason for refusing to act must be negatived (Martin *v.* Ingham, 38 Kan. 641, 17 Pac. 162; Goss *v.* Vermontville, *supra*; State *v.* McKee, 150 Mo. 233, 51 S. W. 421. *Contra*, Chapin *v.* Osborn, 29 Ind. 99. See State *v.* Lean, 9 Wis. 279). Thus in case the duty in question involves an exercise of discretion, it must appear that the refusal is not justifiable on the ground of discretion. Buggeln *v.* Doe, (Ariz. 1904) 78 Pac. 367; U. S. *v.* Chandler, 2 Mackey (D. C.) 527; Scott *v.* State, 43 Fla. 396, 31 So. 244; State *v.* Somerset, 44 Minn. 549, 47 N. W. 163. And see Rader *v.* Union Tp., 43 N. J. L. 518, holding that if the method of performing the duty is discretionary and optional, a mandamus to compel defendant to do it in a particular manner is defective, unless it shows on its face the impossibility of defendant's exercising the option.

34. Women's Catholic O. of F. *v.* Condon, 84 Ill. App. 564; Ingerman *v.* State, 128 Ind. 225, 27 N. E. 499.

35. *Alabama.*— State *v.* Cobb, 108 Ala. 9, 18 So. 532.

Arkansas.— *Ex p.* Fuller, 25 Ark. 443.

Illinois.— North *v.* State University, 137 Ill. 296, 27 N. E. 54.

Louisiana.— Hatch *v.* New Orleans City Bank, 1 Rob. 470.

Mississippi.— Haskins *v.* Scott County, 51 Miss. 406.

New York.— People *v.* Palmer, 27 Misc. 569, 59 N. Y. Suppl. 62. See, however, *In re* Larkin, 46 N. Y. App. Div. 366, 61 N. Y. Suppl. 597 [*reversed* on other grounds in 163 N. Y. 201, 57 N. E. 404].

Ohio.— State *v.* Bickham, 4 Ohio Cir. Ct. 246, 2 Ohio Cir. Dec. 526.

United States.— People *v.* Colorado Cent. R. Co., 42 Fed. 638.

See, however, Stocknan *v.* Brooks, 17 Colo. 248, 29 Pac. 746.

Petition held to be sufficient in this respect

ing to the extraordinary writ of mandamus in that ordinary legal remedies are inadequate to afford petitioner relief.[36]

(vi) *Aider by Inference and Presumption.* While as a rule the facts should appear by direct averment and not by mere inference,[37] yet the pleading may be aided by inferences which must necessarily be drawn as a matter of law from unequivocal averments.[38] And while as a rule nothing essential to the right to mandamus is taken by intendment,[39] yet it is not necessary expressly to allege

see State *v.* Edgerton Dist. Bd., 76 Wis. 177, 44 N. W. 967, 20 Am. St. Rep. 41, 7 L. R. A. 330.

36. *District of Columbia.*— U. S. *v.* Chandler, 2 Mackey 527.

Iowa.— Chance *v.* Temple, 1 Iowa 179.

Michigan.—People *v.* Judge Wayne County Cir. Ct., 19 Mich. 296.

Missouri.— Hambleton *v.* Dexter, 89 Mo. 188, 1 S. W. 234; State *v.* Fletcher, 39 Mo. 388.

New Jersey.— State *v.* Union Tp., 43 N. J. L. 518.

New York.—Gardenier *v.* Columbia County, 2 N. Y. Suppl. 351.

North Carolina.— Lutterloh *v.* Cumberland County, 65 N. C. 403; State *v.* Jones, 23 N. C. 129.

Ohio.— State *v.* Bickham, 4 Ohio Cir. Ct. 246, 2 Ohio Cir. Dec. 526.

Pennsylvania.— Isaacs *v.* Ford, 8 Kulp 80.

Vermont.—Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146.

England.— King *v.* Margate Pier Co., 3 B. & Ald. 220, 5 E. C. L. 133, 2 Chit. 256, 18 E. C. L. 620, 22 Rev. Rep. 356; Rex *v.* Shepton Mallett, 5 Mod. 421.

See 33 Cent. Dig. tit. "Mandamus," § 307.

This was formerly the rule in Illinois (Peoria School Inspectors *v.* People, 20 Ill. 525), but it has been changed by statute (People *v.* Crotty, 93 Ill. 180 [*overruling* Ryan *v.* Duncan, 88 Ill. 144]).

The right of appeal must be negatived.— State *v.* Smith, 19 Wis. 531. See Com. *v.* McCauley, 2 Pa. Co. Ct. 459, 3 Pa. Co. Ct. 77, where the petition was apparently held to be sufficient in this respect.

Necessity of express allegation of absence or inadequacy of ordinary remedy.— An express allegation that there is no adequate ordinary remedy is not necessary where the facts alleged disclose that such is the case. People *v.* Hilliard, 29 Ill. 413; Hon *v.* State, 89 Ind. 249; Chumasero *v.* Potts, 2 Mont. 242; State *v.* Union Tp., 43 N. J. L. 518; State *v.* Goll, 32 N. J. L. 285; State *v.* Jones, 23 N. C. 129 (holding that such an allegation is not only unnecessary but improper); State *v.* San Antonio St. R. Co., 10 Tex. Civ. App. 12, 30 S. W. 266; Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146. *Contra*, by statute. Isaacs *v.* Ford, 8 Kulp (Pa.) 80.

Necessity of alleging facts showing absence or inadequacy of ordinary remedy.— Facts showing that there is no adequate ordinary remedy need not be alleged where there is an express allegation of absence or inadequacy of ordinary remedies. State *v.* Union Tp., 43 N. J. L. 518; Com. *v.* Pittsburgh, 34 Pa. St. 496; Monongahela City *v.* Monongahela Electric Light Co., 3 Pa. Dist. 63, 12 Pa. Co. Ct. 529. *Contra*, State *v.* Jones, 23 N. C. 129. And see Hon *v.* State, 89 Ind. 249; Chumasero *v.* Potts, 2 Mont. 242.

An allegation of absence or inadequacy of ordinary remedies is without force if the facts alleged show the contrary. Hon *v.* State, 89 Ind. 249; Chumasero *v.* Potts, 2 Mont. 242. And see State *v.* Jones, 23 N. C. 129.

Sufficiency of allegations as to absence or inadequacy of ordinary remedy see Monongahela City *v.* Monongahela Electric Light Co., 3 Pa. Dist. 63, 12 Pa. Co. Ct. 529. An alternative writ to compel a town to levy a tax to satisfy an execution against it need not allege that an execution has been issued and proved unavailing; it is sufficient to state that the town has no property whereon to levy an execution, and has no money in its treasury subject to the payment of the judgment (Hambleton *v.* Dexter, 89 Mo. 188, 1 S. W. 234); but an allegation that the treasurer has refused to pay the judgment is insufficient to show no adequate remedy (Hambleton *v.* Dexter, *supra*).

37. *Florida.*— State *v.* Atlantic Coast Line R. Co., 48 Fla. 114, 37 So. 652.

Illinois.— See Lavalle *v.* Soucy, 96 Ill. 467. But see Hall *v.* People, 57 Ill. 307.

Indiana.— State *v.* Fisher, 157 Ind. 412, 61 N. E. 929.

Nebraska.— State *v.* Home St. R. Co., 43 Nebr. 830, 62 N. W. 225.

New York.— People *v.* Bricklayers' Benevolent, etc., Union, 20 N. Y. App. Div. 8, 46 N. Y. Suppl. 648.

Ohio.— See State *v.* Hancock County, 11 Ohio St. 183.

Wisconsin.— State *v.* Elwood, 11 Wis. 17.

See, however, Babcock *v.* Goodrich, 47 Cal. 488.

Allegation by way of recital see *supra*, IX, E, 3, b, (II).

38. State *v.* Atlantic Coast Line R. Co., 48 Fla. 114, 37 So. 652. And see State *v.* Johnson, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357; People *v.* Bricklayers' Benevolent, etc., Union, 20 N. Y. App. Div. 8, 46 N. Y. Suppl. 648; Com. *v.* Pittsburgh, 34 Pa. St. 496.

39. *Arizona.*— Leatherwood *v.* Hill, (1906) 85 Pac. 405.

California.— Meyer *v.* San Francisco, (1907) 88 Pac. 722.

Illinois.— People *v.* Swigert, 107 Ill. 494, See, however, Macoupin County Ct. *v.* People, 58 Ill. 191.

matters of fact which the law presumes from other facts which are set forth in the pleading.[40]

(VII) *AIDER BY JUDICIAL NOTICE.* It is unnecessary to allege matters of which the courts take judicial notice.[41] Thus if respondent's authority, power, or duty rests on a general statute, it is not necessary to plead the statute;[42] but the rule is otherwise in the case of municipal ordinances, since of these the courts do not as a rule take cognizance.[43]

(VIII) *AIDER BY REFERENCE TO EXTRANEOUS PAPERS.* If documents are attached to an application for mandamus and are made a part thereof by proper averment they may generally be looked to in determining the sufficiency of the application;[44] but in the absence of this a petition for mandamus cannot be aided by the affidavits filed in its support.[45] So the sufficiency of the alternative writ

Nebraska.— State *v.* Weston, 67 Nebr. 175, 93 N. W. 182.

Wyoming.— State *v.* Chatterton, 11 Wyo. 1, 70 Pac. 466.

40. *California.*— Connor *v.* Morris, 23 Cal. 447 [*followed* in Jones *v.* Morgan, 67 Cal. 308, 7 Pac. 734].

Connecticut.— Fuller *v.* Plainfield Academic Schools, 6 Conn. 532.

Florida.— State *v.* Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225.

Georgia.— Neal Loan, etc., Co. *v.* Chastain, 121 Ga. 500, 49 S. E. 618.

Illinois.— Somonauk *v.* People, 178 Ill. 631, 53 N. E. 314. And see Macoupin County Ct. *v.* People, 58 Ill. 191.

Indiana.— State *v.* Beil, 157 Ind. 25, 60 N. E. 672; Enos *v.* State, 131 Ind. 560, 31 N. E. 357. And see Greenfield *v.* State, 113 Ind. 597, 15 N. E. 241; Wren *v.* Indianapolis, 96 Ind. 206.

Kentucky.— Haly *v.* Auditor, 4 Bush 490.

New York.— People *v.* Bacon, 25 Misc. 16, 54 N. Y. Suppl. 409, holding, however, that the presumption of the continuance of a fact once shown to exist is not applicable where a writ of alternative mandamus to compel a clerk of court to issue a transcript and execution on a judgment alleges that the judgment has not been satisfied, released, or appealed from, and is no longer stayed, but fails to allege further that the judgment continues in existence or is in full force and effect, since relator, by only partially rebutting the facts which might affect his record, invites the presumption that he may have suppressed the fact that the judgment has been set aside.

Vermont.— Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146.

Wyoming.— Appel *v.* State, 9 Wyo. 187, 61 Pac. 1015; State *v.* Barber, 4 Wyo. 56, 32 Pac. 14.

See 33 Cent. Dig. tit. "Mandamus," § 313.

41. Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146.

Incorporation of a town under the General Incorporation Law is not judicially noticed. The statute requires that certain proceedings shall be held in the county court to incorporate towns. The courts cannot take notice that these proceedings have been had, and the fact of incorporation must be averred and proved as any other fact. Hambleton *v.* Dexter, 89 Mo. 188, 1 S. W. 234 [*citing* Hopkins *v.* Kansas City, etc., R. Co., 79 Mo. 98].

42. *Arkansas.*— Pritchard *v.* Woodruff, 36 Ark. 196.

California.— People *v.* San Diego, 85 Cal. 369, 24 Pac. 727; Babcock *v.* Goodrich, 47 Cal. 488.

Illinois.—See Stott *v.* Chicago, 205 Ill. 281, 68 N. E. 736 [*affirming* 98 Ill. App. 105].

Indiana.— Copeland *v.* State, 126 Ind. 51, 25 N. E. 866.

Missouri.— Hambleton *v.* Dexter, 89 Mo. 188, 1 S. W. 234; Hubbel *v.* Maryville, 85 Mo. App. 165.

New Jersey.— Rader *v.* Union Tp. Committee, 43 N. J. L. 518.

Vermont.— Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146.

West Virginia.— Fisher *v.* Charleston, 17 W. Va. 595.

See, however, Smith *v.* Com., 41 Pa. St. 335.

43. Puckett *v.* State, 33 Fla. 385, 14 So. 834; Stott *v.* Chicago, 205 Ill. 281, 68 N. E. 736 [*affirming* 98 Ill. App. 105]; People *v.* Chicago, 27 Ill. App. 217; Hyde Park *v.* Thatcher, 13 Ill. App. 613; Smith *v.* Com., 41 Pa. St. 335.

44. Babcock *v.* Goodrich, 47 Cal. 488; Singleton *v.* Austin, 27 Tex. Civ. App. 88, 65 S. W. 686.

Failure to file papers referred to.— Where an affidavit for mandate to compel a township trustee to pay an indebtedness states that the debt is shown in detail by certain orders and vouchers filed with the affidavit, and no orders or vouchers are filed, it is insufficient. State *v.* Snodgrass, 98 Ind. 546.

In Indiana, however, papers filed with the petition as exhibits cannot be considered as part of it unless they constitute the foundation of the pleading. Greenfield *v.* State, 113 Ind. 597, 15 N. E. 241; Kokomo *v.* State, 57 Ind. 152.

In Iowa it is not necessary to attach or to set out in the petition a copy of a writing referred to unless the same constitutes the basis of the action. Harwood, etc., R. Co. *v.* Case, 37 Iowa 692. And see State *v.* Johnson County Bd. of Equalization, 10 Iowa 157, 74 Am. Dec. 381.

45. People *v.* Mt. Morris, 145 Ill. 427, 34 N. E. 144; School Trustees *v.* People, 121 Ill. 552, 13 N. E. 526.

depends in those jurisdictions where it is regarded as a pleading,[46] upon its own recitals, and it cannot be aided by the petition or affidavits,[47] even though it contains a reference thereto.[48] Defects in the writ may, it seems, be supplied by the return.[49]

(IX) *Redundant and Scandalous Matter.* Petitioner should not allege matters which are not pertinent to his right to relief,[50] and if he does so, such matters may be stricken out on motion[51] or be disregarded as surplusage.[52] So irrelevant matter reflecting on the official integrity of respondent may be stricken out by the court on its own motion as being scandalous.[53]

(X) *Prayer For Relief.*[54] The prayer for relief must be certain, and ask the performance of specific acts;[55] but a writ of mandamus need not be asked by that name.[56] It has been held that the fact that the petition prays for more relief

46. See *supra*, IX, E, 3, a.

47. *Florida.*— Puckett *v.* State, 33 Fla. 385, 14 So. 834.

Missouri.— Hambleton *v.* Dexter, 89 Mo. 188, 1 S. W. 234.

Nebraska.— King *v.* State, 50 Nebr. 66, 69 N. W. 307; State *v.* York County School Dist. No. 9, 8 Nebr. 92.

New York.— People *v.* Sullivan County, 56 N. Y. 249; People *v.* Baker, 35 Barb. 105; People *v.* Parmelee, 22 Misc. 380, 50 N. Y. Suppl. 451; People *v.* Columbia Club, 15 N. Y. Suppl. 821, 20 N. Y. Civ. Proc. 319.

Oregon.— Shively *v.* Pennoyer, 27 Oreg. 33, 39 Pac. 396; Elliott *v.* Oliver, 22 Oreg. 44, 29 Pac. 1; McLeod *v.* Scott, 21 Oreg. 94, 26 Pac. 1061, 29 Pac. 1.

This was the rule in Ohio (McKenzie *v.* Ruth, 22 Ohio St. 371; Johnes *v.* State Auditor, 4 Ohio St. 493), but now the writ is required by statute to contain a copy of the petition (Deckman *v.* Oak Harbor, 10 Ohio Cir. Ct. 409, 6 Ohio Cir. Dec. 729). See *infra*, this note.

A different rule prevails in some states.— Gill *v.* State, 72 Ind. 266. Thus in those states where the affidavit or petition is referred to in the alternative writ (State *v.* Moore, 15 Wash. 432, 46 Pac. 647; State *v.* Trimbell, 12 Wash. 440, 41 Pac. 183) and served therewith (State *v.* McCullough, 3 Nev. 202; McCoy *v.* Harnett County Justices, 49 N. C. 180; State *v.* Moore, *supra*; State *v.* Trimhell, *supra*), the writ may be aided by reference to the affidavit or petition, and this is especially true where it is the affidavit and not the writ which is required to be answered (State *v.* McCullough, *supra*). If, however, the affidavit or petition is not referred to in the writ and served therewith, it cannot be resorted to in order to aid the writ. Chapin *v.* Port Angeles, 31 Wash. 535, 72 Pac. 117; State *v.* Moore, *supra*; State *v.* Trimbell, *supra*.

48. Commercial Bank *v.* New York Canal Com'rs, 10 Wend. (N. Y.) 25 (holding that it is not enough to refer in the writ to the affidavits and other papers on file; that while such reference is allowable to show the amount of a sum of money claimed, it is not allowable to show the right of relator thereto); State *v.* Carey, 2 N. D. 36, 49 N. W. 164; Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *r.* Charleston, 17 W. Va. 595. See, however, *supra*, note 48.

49. Brainard *v.* Staub, 61 Conn. 570, 24 Atl. 1040; State *v.* Section 29, Tp. 5, Wright (Ohio) 559. But *compare* Reg. *v.* Hopkins, 1 Q. B. 161, 10 L. J. Q. B. 63, 4 P. & D. 550, 41 E. C. L. 484; Reg. *v.* South-Eastern R. Co., 25 Eng. L. & Eq. 13.

50. People *v.* Ovenshire, 41 How. Pr. (N. Y.) 164.

51. State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113, holding that allegations in a petition to compel municipal action on plans for a pipe tunnel that the space allotted to relator is occupied by other companies with the city's consent should be stricken out.

However, facts may be alleged which do not give a right to mandamus where they bear on the question of respondent's duty (State *v.* San Antonio St. R. Co., 10 Tex. Civ. App. 12, 30 S. W. 266), and inasmuch as the allowance of a writ of mandamus rests largely in the discretion of the court, and the writ will be refused where the proceeding is trivial or vexatious, averments showing a special interest in relator will not be stricken out as immaterial, even in a case where it is not necessary to show such interest (State *v.* Home St. R. Co., 43 Nebr. 830, 62 N. W. 225).

52. Bay State Gas Co. *v.* State, 4 Pennew. (Del.) 238, 56 Atl. 1114; Baltimore, etc., R. Co. *v.* State, 159 Ind. 510, 65 N. E. 508; People *v.* Board of Police, 9 Abb. Pr. (N. Y.) 257.

53. People *v.* Murray, 22 N. Y. Suppl. 1051, 23 N. Y. Civ. Proc. 53.

54. Command of alternative writ see *infra*, IX, F, 3, e, (III).

Conformity between prayer and judgment see *infra*, IX, J, 1, c.

55. People *v.* Dulaney, 96 Ill. 503; State *v.* Cavanac, 30 La. Ann. 237; Rosenfeld *v.* Einstein, 46 N. J. L. 479.

A motion for a rule to show cause why a mandamus should not issue to an inferior tribunal must specify the object. Houston *v.* Sussex County Levy Ct., 5 Harr. (Del.) 15.

A prayer in the alternative against two repondents, each of whom asserts that the other is the person liable, does not render the petition uncertain. Brophy *v.* Schindler, 126 Mich. 341, 85 N. W. 1114.

56. State *v.* Cole, 33 La. Ann. 1356, holding that a prayer for an "order commanding," etc., is good.

than it shows petitioner entitled to is not a fatal defect,[57] and that the court may in such case grant the relief to which the facts entitle him.[58]

e. Joinder of Causes of Action.[59] In the absence of statute to the contrary,[60] separate and distinct rights, whether of one person or of several persons respectively, cannot be joined for the purpose of enforcement in one mandamus proceeding, whether the different duties rest on one person or on several persons respectively.[61] The court may, however, in one proceeding, enforce the performance of separate but coöperative acts required by law to be done by different officers in the performance of an entire duty cast on all in common.[62]

4. Return, Plea, and Answer[63] **— a. In General.** By the provisions of the alternative writ respondent is required either to perform the duty or show cause why he has not done so.[64] Accordingly it has been held that unless respondent moves to quash the writ or demurs to it,[65] a return thereto may[66] and must be

57. Goshen Highway Com'rs *v.* Jackson, 165 Ill. 17, 45 N. E. 1000 [*affirming* 61 Ill. App. 381]. See, however, State *v.* Lovejoy, (Ala. 1905) 39 So. 126 (holding that a petition to compel county commissioners to order an election to repeal a stock law is bad, where it shows that the stock district is only part of a precinct, and the prayer is for an election in the entire precinct); People *v.* Saginaw County, 26 Mich. 22 (holding that since the petition must show a clear legal duty resting on respondent, it is bad if the request embraces anything which it would be illegal for respondent to do).

Whether demurrer will lie to petition praying relief to which petitioner is not entitled see *infra*, IX, E, 6, a, (I).

58. See *infra*, IX, J, 2.

59. **Joinder of parties:** Petitioners see *supra*, IX, C, 1, f. Respondents see *supra*, IX, C, 2, b, (I); IX, C, 2, c.

60. See the statutes of the different states. And see People *v.* Order of American Star, 53 N. Y. Super. Ct. 66.

61. *Delaware.*—State *v.* Simmons, 3 Pennew. 291, 50 Atl. 213, joinder of different claims of one person.

Florida.— State *v.* Jefferson County, 17 Fla. 707, joinder of different claims of different persons.

Kansas.— State *v.* Reno County, 38 Kan. 317, 16 Pac. 337, holding that county commissioners cannot be compelled, in one proceeding, to order separate elections in different townships on the question whether those townships respectively shall subscribe to railroad stock.

Maryland.— Smith *v.* Erb, 4 Gill 437.

Mississippi.— Haskins *v.* Scott County, 51 Miss. 406.

Nebraska.— State *v.* Cornell, 54 Nebr. 158, 74 N. W. 398, joinder of demands for performance of different duties of different respondents.

New Jersey.— State *v.* Chester, etc., Tps., 10 N. J. L. 292, holding that one writ cannot be directed to the township committees of two several townships to compel them respectively to proceed to do their duty in a matter of road.

North Carolina.— See Boner *v.* Adams, 65 N. C. 639.

However, there is no misjoinder where, in a proceeding to compel the reassessment of property, nearly all of which has escaped taxation for a number of years by means of concealment and the making of false returns by the owner, the petition states in separate causes of action the wrongs committed by the owner each year, and the amount and value of the property which by reason thereof he prevented from being listed for taxation, as well as the amounts of the respective levies for such year. State *v.* Harbison, 64 Kan. 295, 67 Pac. 844. So in a proceeding against a bank which acts as agent for the transfer of both state and city loans, petitioner may join a demand to inspect papers relating to city loans and a demand to inspect papers relating to state loans. Guarantee Trust, etc., Co.'s Petition, 3 Pa. Dist. 205. And it is proper to entertain a proceeding to revive former judgments between the same parties and at the same time to enforce payment through mandamus. Houston *v.* Emery, 76 Tex. 282, 13 S. W. 264.

Joinder of demands for injunction and mandamus see Joinder and Splitting of Actions, 23 Cyc. 395.

62. State *v.* Bailey, 7 Iowa 390; State *v.* Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166; Labette County *v.* U. S., 112 U. S. 217, 5 S. Ct. 108, 28 L. ed. 698; Hicks *v.* Cleveland, 106 Fed. 459, 45 C. C. A. 429. And see *supra*, IX, C, 2, b, (I).

63. **Answer treated as petition** see *supra*, IX, E, 3, a.

Conclusiveness of return see *supra*, IX, E, 5, a, b.

Place where returnable see *supra*, IX, A, 3.

Return after demurrer or motion to quash see *infra*, IX, E, 6, a, (I).

Return to peremptory writ see *infra* IX, K, 8.

To what court writ is returnable see *supra*, IX, A, 3.

64. See *infra*, IX, F.

65. See *infra*, IX, E, 6, c.

66. *Alabama.*— State *v.* Williams, 69 Ala. 311.

Indiana.— State *v.* Warren County, 136 Ind. 207, 35 N. E. 1100; Boone County *v.* State, 61 Ind. 379; Clarke County *v.* State, 61 Ind. 75.

Mississippi.— Hardee *v.* Gibbs, 50 Miss. 802.

made,[67] either showing performance of the duty in question,[68] or denying all or someone of the essential facts recited in the writ,[69] or setting up new matter constituting a valid excuse for non-performance.[70] If respondent fails to make a return, the court may compel him to do so,[71] although in some states the court does not compel a return, but issues a peremptory writ in case no return is made.[72] The return is made to the alternative writ,[73] or to such other pleading as is by statute substituted for the writ.[74] The return corresponds to the plea or answer in an action at law,[75] and in some states a plea or answer or other like pleading

Oregon.— Elliott *v.* Oliver, 22 Oreg. 44, 29 Pac. 1; McLeod *v.* Scott, 21 Oreg. 94, 26 Pac. 1061, 29 Pac. 1.

Pennsylvania.— Keasy *v.* Bricker, 60 Pa. St. 9.

Tennessee.— State *v.* Marks, 6 Lea 12.

Issuance of peremptory writ in first instance see *infra*, IX, K, 2.

Right to make further return see *infra*, IX, E, 4, i.

67. People *v.* Salomon, 54 Ill. 39; State *v.* Kelly, 41 S. C. 551, 22 S. E. 1007; Griffin *v.* Wakelee, 42 Tex. 513; U. S. *v.* Kendall, 26 Fed. Cas. No. 15,517, 5 Cranch C. C. 163 [*affirmed* in 12 Pet. 524, 9 L. ed. 1181]; U. S. *v.* Union Pac. R. Co., 28 Fed. Cas. No. 16,599, 2 Dill. 527. And see cases cited *infra*, note 71.

A demurrer to the alternative writ may be treated as a return where the parties so stipulate. Ensworth *v.* Albin, 46 Mo. 450. And see State *v.* Lafayette County Ct., 41 Mo. 545.

An answer to a rule to show cause may be treated as a return where issuance of an alternative writ is waived. Kelly *v.* Rudy, 1 Pa. Super. Ct. 507.

68. State *v.* Williams, 69 Ala. 311; Swan *v.* Gray, 44 Miss. 393.

69. See *infra*, IX, E, 4, f, (II).

70. See *infra*, IX, E, 4, f, (III).

71. State *v.* Pennsylvania R. Co., 41 N. J. L. 250; State *v.* Jennings, 56 Wis. 113, 14 N. W. 28 (where the statute provides that respondent shall make return to the writ, and for neglect to comply with this requirement shall be proceeded against as for contempt); State *v.* Baird, 11 Wis. 260; Coventry's Case, 2 Salk. 429.

It rests in the discretion of the court whether it will compel a return or at once issue a peremptory writ. People *v.* Ulster, 1 Johns. (N. Y.) 64; Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 628; Fisher *v.* Charleston, 17 W. Va. 595. See, however, State *v.* Baird, 11 Wis. 260.

Return to a rule to show cause why a writ of mandamus should not issue may likewise be compelled. People *v.* Kalamazoo Cir. Judge, 39 Mich. 301 (holding, however, that the fine provided by statute for not obeying a writ of mandamus cannot be imposed for mere failure to make a return to an order to show cause, but that such failure must be punished by the common-law remedies); Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 595 (holding, however, that the court may issue a peremptory writ instead). And see Grand Rapids *v.* Burlingame, 102 Mich. 321, 60 N. W. 698.

Compelling further return see *infra*, IX, E, 4, i.

Motion to make return more certain see *infra*, IX, E, 4, f, (VII).

72. People *v.* Pearson, 3 Ill. 189, 33 Am. Dec. 445. And see *infra*, IX, K, 3. *Contra*, State *v.* Baird, 11 Wis. 260, holding that relator is not entitled to a peremptory writ where he has not sought to enforce a return.

73. *Illinois.*— Illinois, etc., Canal *v.* People, 12 Ill. 248, 52 Am. Dec. 488, holding that the petition on which the alternative issues need not be answered.

Iowa.— State *v.* Johnson County, 10 Iowa 157, 74 Am. Dec. 381 (holding that matters of defense must be presented by a return to the alternative writ, not by demurrer to the information for the writ); State *v.* Bailey, 7 Iowa 390 (holding that the return should be to the alternative writ, not to the information).

Michigan.— People *v.* La Grange Tp., 2 Mich. 187.

Mississippi.— Jones *v.* Gibbs, 51 Miss. 401.

Nevada.— See State *v.* Gracey, 11 Nev. 223.

Pennsylvania.— Umsted *v.* Conner, 12 Pa. Co. Ct. 405, holding that the rule to show cause why an alternative writ should not issue is not to be answered. And see Com. *v.* Norton, 3 Kulp 231.

United States.— U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167.

And see *supra*, IX, E, 3, a.

74. *Ex p.* Candee, 48 Ala. 386; State *v.* McCullough, 3 Nev. 202. And see People *v.* La Grange Tp., 2 Mich. 187; State *v.* Gracey, 11 Nev. 223; and *supra*, IX, E, 3, a.

75. *Alabama.*— *Ex p.* Candee, 48 Ala. 386.

Colorado.— Vincent *v.* Hinsdale County, 12 Colo. App. 40, 54 Pac. 393.

Connecticut.— Williams *v.* New Haven, 68 Conn. 263, 36 Atl. 46; Brainard *v.* Staub, 61 Conn. 570, 24 Atl. 1040.

Illinois.— People *v.* Mt. Morris, 145 Ill. 427, 34 N. E. 144; Illinois Cent. R. Co. *v.* People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119; People *v.* Mercer County, 51 Ill. 191; Silver *v.* People, 45 Ill. 224.

Indiana.— Parscouta *v.* State, 165 Ind. 484, 75 N. W. 970; State *v.* Burnsville Turnpike Co., 97 Ind. 416; Clarke County *v.* State, 61 Ind. 75.

Kansas.— State *v.* Jefferson County, 11 Kan. 66.

Michigan.— People *v.* La Grange Tp., 2 Mich. 187.

Missouri.— State *v.* Beyers, 41 Mo. App. 503.

has been substituted for the return by statute.[76] Accordingly the return or answer is in general respects governed by the rules of pleading applicable to the plea or answer in an action at law.[77]

b. Who May Make.[78] The return should be made by the officer or body to whom the writ is directed.[79] If an official body is the respondent, the return must be made not by its individual members, but by the body in the aggregate in its official capacity.[80]

Nevada.— State *v.* Gracey, 11 Nev. 223.

New Jersey.— State *v.* Sheridan, 43 N. J. L. 82.

New York.— People *v.* Order of American Star, 53 N. Y. Super. Ct. 66.

Utah.— Lyman *v.* Martin, 2 Utah 136.

West Virginia.—Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 595.

Wisconsin.— State *v.* Jennings, 56 Wis. 113, 14 N. W. 28.

An answer to a rule to show cause why an alternative writ should not issue is not a return, especially where no alternative writ ever issues. Armstrong *v.* Miller, Wright (Ohio) 559; U. S. *v.* Schurz, 102 U. S. 378.

Return as demurrer.—If, however, respondent contends that the facts stated in the alternative writ are insufficient in law to entitle relator to the relief sought, the return may be in the nature of a demurrer. Vincent *v.* Hinsdale County, 12 Colo. App. 40, 54 Pac. 393; People *v.* Miner, 46 Ill. 384; People *v.* Salomon, 46 Ill. 333.

76. People *v.* Crabb, 156 Ill. 155, 40 N. E. 319; People *v.* Mt. Morris, 145 Ill. 427, 34 N. E. 144; Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824; Cristman *v.* Peck, 90 Ill. 150; Highway Com'rs *v.* Gibson, 7 Ill. App. 231; Sudler *v.* Lankford, 82 Md. 142, 33 Atl. 455; Legg *v.* Annapolis, 42 Md. 203; State *v.* Marks, 6 Lea (Tenn.) 12; Clement *v.* Canfield, 28 Vt. 302. And see *supra*, IX, E, 3, a.

The answer to an order to show cause, which in Michigan is substituted for the alternative writ, is made by affidavits. People *v.* La Grange Tp., 2 Mich. 187.

77. *Connecticut.*— Brainard *v.* Staub, 61 Conn. 570, 24 Atl. 1040.

Illinois.— People *v.* Crabb, 156 Ill. 155, 40 N. E. 319.

Nebraska.— State *v.* Baushausen, 49 Nebr. 358, 68 N. W. 950.

Nevada.— State *v.* Gracey, 11 Nev. 223; State *v.* McCullough, 3 Nev. 202.

New Jersey.— State *v.* Sheridan, 43 N. J. L. 82.

New Mexico.— Conklin *v.* Cunningham, 7 N. M. 445, 456, 38 Pac. 170.

New York.— People *v.* Baker, 35 Barb. 105, 14 Abb. Pr. 19.

Utah.— Lyman *v.* Martin, 2 Utah 136.

Wisconsin.— State *v.* Kellogg, 95 Wis. 672, 70 N. W. 300.

Presumptions.—Ordinarily the presumption is in favor of the return rather than against it. Springfield *v.* Hampden County, 10 Pick. (Mass.) 59; Atty.-Gen. *v.* Sanilac County, 42 Mich. 72, 3 N. W. 260. But every intendment is made against a return that fails to answer material allegations of the writ. Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824; People *v.* Mercer County, 51 Ill. 191; People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769; Board of Trade *v.* Nelson, 62 Ill. App. 541; People *v.* Horton, 46 Ill. App. 434; State *v.* Alexander, 115 Tenn. 156, 90 S. W. 20; Harris *v.* State, 96 Tenn. 496, 34 S. W. 1017.

78. Who may sign and verify see *infra*, IX, E, 4, d.

79. *California.*— People *v.* San Francisco, 27 Cal. 655.

Kentucky.— Mitchell *v.* Campbell, 94 Ky. 347, 22 S. W. 549, 15 Ky. L. Rep. 163, holding that a stranger to the proceeding cannot answer.

Missouri.— State *v.* Burkhardt, 59 Mo. 75, holding that a stranger to the proceeding cannot make a return.

New Jersey.— Mercer County *v.* Pennsylvania R. Co., 41 N. J. L. 250.

Wisconsin.— State *v.* Shea, 70 Wis. 104, 35 N. W. 319, holding that an answer filed by a stranger to the action cannot supply the want of an answer by respondent.

England.— Rex *v.* Bailey, 1 Keb. 33; Rex *v.* Abingdon, 12 Mod. 308, 2 Salk. 431.

See 33 Cent. Dig. tit. "Mandamus," § 356.

A return filed as in respondent's behalf by attorneys of the court is presumed to be respondent's return, and cannot be stricken out on the mere suggestion of relator that it is not respondent's return. State *v.* Wickham, 65 Mo. 634; State *v.* Edwards, 11 Mo. App. 152. And see People *v.* San Francisco, 27 Cal. 655. If, however, an answer purports to have been drafted by attorneys and not to have been submitted to respondent for approval, it will not be considered. Douglass *v.* Manistee Cir. Judge, 42 Mich. 495, 4 N. W. 225.

80. *California.*— People *v.* San Francisco, 27 Cal. 655.

Indiana.— Clarke County *v.* State, 61 Ind. 75.

North Carolina.— Lander *v.* McMillan, 53 N. C. 174; McCoy *v.* Harnett County, 49 N. C. 180.

Ohio.— State *v.* Brown County Ct. of C. Pl., 1 Ohio Dec. (Reprint) 20, 1 West. L. J. 163, holding that if a court is the respondent, the judges thereof must answer collectively as a court.

England.— Rex *v.* Baily, 1 Keb. 33 (holding that if the writ is directed to the aldermen, bailiffs, and commonalty of a municipality, the bailiffs and capital burgesses, without the commonalty, cannot make a return); Rex *v.* Abingdon, 12 Mod. 308, 2 Salk. 431 (holding that the mayor of a respondent

c. Time For Making. The time for filing a return to an alternative writ or for answering the pleading that has in some states been substituted for the alternative writ is generally fixed by the court in its discretion,[81] although in some jurisdictions the matter is regulated by statute.[82] The time for filing a return or answer as originally fixed may be extended by the court in a proper case.[83]

municipality cannot answer for it unless the majority of the members of the body consent).

See 33 Cent. Dig. tit. "Mandamus," § 356.

Answers of the individual members will be stricken from the files on motion. People *v.* San Francisco, 27 Cal. 655; Clarke County Com'rs *v.* State, 61 Ind. 75; Lander *v.* McMillan, 53 N. C. 174; McCoy *v.* Harnett County, 49 N. C. 180.

If two answers are filed, each in form the answer of the respondent body, the court will ascertain which is the true answer. People *v.* San Francisco, 27 Cal. 655. See, however, Rex *v.* Abingdon, 12 Mod. 308, 2 Salk. 431.

If respondent board is equally divided as to what shall be the return, the court may permit a return to be filed by individual members in addition to the return purporting to be that of the board. People *v.* New York Bd. of Police, 107 N. Y. 235, 13 N. E. 920 [*affirming* 46 Hun 296].

If the writ is directed to the individual members of a board as well as to the board itself, the members may make individual returns in addition to that made by the board. People *v.* Board of Police, 46 Hun (N. Y.) 296 [*affirmed* in 107 N. Y. 235, 13 N. E. 920].

If respondents do not constitute a corporate body they may answer separately, although the duty sought to be enforced devolves on them jointly. People *v.* Holden, 91 Ill. 446.

The majority of the members of the respondent body may answer for the body (People *v.* San Francisco, 27 Cal. 655; Lander *v.* McMillan, 53 N. C. 174; McCoy *v.* Harnett County Justices, 49 N. C. 180; State *v.* Section 2d, Wright (Ohio) 559. And see Rex *v.* Abingdon, 12 Mod. 308, 2 Salk. 431), and it is their answer that will govern in case other answers are filed in respondent's behalf (People *v.* San Francisco, *supra*. And see Lander *v.* McMillan, *supra*).

The answer need not aver that the body formally adopted it as their answer, where it is such in form. People *v.* San Francisco, 27 Cal. 655.

The fact that one member of the body verifies the answer does not of itself show it to be his individual answer. People *v.* San Francisco, 27 Cal. 655.

81. *Illinois.*— People *v.* Brooks, 57 Ill. 142, holding that such time for return is fixed by the court as may be reasonable and just.

North Carolina.— Lutterloh *v.* Cumberland County, 65 N. C. 403; State *v.* Jones, 23 N. C. 129.

Oklahoma.— *In re* Brown, 2 Okla. 590, 39 Pac. 469, holding that a defendant in a disbarment proceeding is not entitled to twenty days' time, the time allowed to answer the ordinary summons under the code, but may be cited to appear and answer within any time that gives him a reasonable opportunity to be heard.

Pennsylvania.— Childs *v.* Com., 3 Brewst. 194, holding that respondent must be allowed a sufficient time after issuance of the alternative writ.

West Virginia.— Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 595.

United States.— Wisdom *v.* Memphis, 30 Fed. Cas. No. 17,903, 2 Flipp. 285.

See 33 Cent. Dig. tit. "Mandamus," § 357.

It rests in the discretion of the court whether respondent will be allowed to file a return after the return-day or whether a peremptory writ will at once issue. People *v.* Judges Ulster County, 1 Johns. (N. Y.) 64; Fisher *v.* Charleston, 17 W. Va. 628.

To what term of court writ may be made returnable.— In Illinois if an original proceeding in the supreme court concerns the public interest the writ is made returnable to the term at which the application is made; but if the proceeding be of a merely private nature the writ is made returnable at the succeeding term. People *v.* Thistlewood, 103 Ill. 139. In Maryland the court may entertain the case on the first day of the term, and, if the exigency of the case requires it, provide for the return of the writ at an early day in the same term, the time for return being in the sound discretion of the court. Harwood *v.* Marshall, 10 Md. 451. In Tennessee, where the application is made in vacation, the writ is returnable to the next term of court, and where the application is made in term-time the writ is returnable to the same term, and this is the rule followed by the federal courts sitting in that district. Wisdom *v.* Memphis, 30 Fed. Cas. No. 17,903, 2 Flipp. 285. In Texas the writ may be made returnable to the same term at which it was granted (Fitzhugh *v.* Custer, 4 Tex. 391, 51 Am. Dec. 728; Bradley *v.* McCrabb, Dall. (Tex.) 504), and this rule is followed by the federal courts sitting in that state (Hitchcock *v.* Galveston, 48 Fed. 640).

Whether the writ may be made returnable in vacation of court see JUDGES, 23 Cyc. 551.

English practice see Rex *v.* St. Andrew, 7 A. & E. 281, 34 E. C. L. 163; Anonymous, 2 Salk. 434 [*cited* in Johnson *v.* State, 1 Ga. 271]; Rex *v.* Dover, Str. 407. And see Fitzhugh *v.* Custer, 4 Tex. 391, 51 Am. Dec. 728; Bradley *v.* McCrabb, Dall. (Tex.) 504.

Notice to respondent see *infra*, IX, F, 3, f.

82. See the statutes of the different states. And see Brunswick *v.* Dure, 59 Ga. 803; People *v.* Brotherhood of Stationary Engineers, 12 N. Y. Suppl. 362, 19 N. Y. Civ. Proc. 175.

83. State *v.* Rahway Tax Assessors, 51

d. Signature and Verification. At common law the return need not be signed.[84] It has been held that if respondent is a municipality the return need not bear its common seal,[85] but that the return of a respondent court should be made under its seal.[86] The return need not be verified[87] in the absence of statute[88] or rule of court to the contrary.[89] The remedy for failure to verify the return where verification is required is a motion to strike the pleading from the files.[90]

e. Service. In some states it is the practice to serve a copy of the return on relator.[91]

f. Form and Contents — (i) *In General.* Unless the return shows performance of the act sought to be enforced,[92] it must show valid reasons for respondent's failure or refusal to perform the act.[93] Respondent may plead by way of traverse[94] or by way of confession and avoidance;[95] and in the absence of

N. J. L. 279, 17 Atl. 122; People *v.* Blackhurst, 60 Hun (N. Y.) 63, 15 N. Y. Suppl. 114 (*semble*); People *v.* Judges Westchester County Ct. of C. Pl., 4 Cow. (N. Y.) 73. And see McLeod *v.* Scott, 21 Oreg. 94, 26 Pac. 1061, 29 Pac. 1.

Allowance of time for further return see *infra*, IX, E, 4, i.

Compelling further return see *infra*, IX, E, 4, i.

Compelling return where none is filed see *supra*, IX, E, 4, a.

Time for filing amended return see *infra*, IX, E, 4, i.

84. Lydston *v.* Exeter, 12 Mod. 126; Thetford's Cases, 1 Salk. 192.

If signing is necessary the return may be signed by counsel for respondent. People *v.* San Francisco, 27 Cal. 655. And see *supra*, note 79.

85. Lydston *v.* Exeter, 12 Mod. 126; Thetford's Cases, 1 Salk. 192.

86. State *v.* Brown County Ct. of C. Pl., 1 Ohio Dec. (Reprint) 20, 1 West. L. J. 163.

87. *Alabama.*— Tallapoosa Com'rs' Ct. *v.* Tarver, 21 Ala. 661.

Arkansas.— See Parsel *v.* Barnes, 25 Ark. 261.

Indiana.— State *v.* Morris, 103 Ind. 161, 2 N. E. 355.

Missouri.— State *v.* Wickham, 65 Mo. 634; State *v.* Edwards, 11 Mo. App. 152.

New York.— People *v.* Order of American Star, 53 N. Y. Super. Ct. 66, *semble*.

United States.— *Ex p.* Bradstreet, 4 Pet. 102, 7 L. ed. 796, holding that a judge need not swear to a return of his reasons why he refused to sign a bill of exceptions.

See 33 Cent. Dig. tit. "Mandamus," § 346.

See, however, Watkins *v.* Kirchain, 10 Tex. 375.

An answer consisting of matter of record need not be sworn to. Watkins *v.* Kirchain, 10 Tex. 375.

Any member of a respondent board may verify the return if verification is necessary. People *v.* San Francisco, 27 Cal. 655, *semble*. And see *supra*, note 80.

88. See the statutes of the different states. And see People *v.* Thirteenth Judicial Dist. Ct., 33 Colo. 77, 79 Pac. 1014; State *v.* Marks, 6 Lea (Tenn.) 12.

89. State *v.* Sumter County Com'rs, 22 Fla. 1.

90. State *v.* Maxwell, 19 Fla. 31. And see Parsel *v.* Barnes, 25 Ark. 261.

91. See the statutes of the different states.

In South Carolina it is the practice in the supreme court to let relator have a copy of the return some time before the hearing. State *v.* Kelly, 41 S. C. 551, 22 S. E. 1007.

92. See *supra*, IX, E, 4, a.

Performance of the duty is sufficiently set forth by averring with certainty and clearness that respondent has complied with the mandate of the writ, substantially following the mandatory clause of the writ. State *v.* Williams, 69 Ala. 311.

93. People *v.* Chenango, 8 N. Y. 317 (holding that where an objection to the validity of a law arises from the failure of the legislature to comply with constitutional provisions, and this is not apparent from the act itself, it can be taken advantage of only by alleging it distinctly in the return); People *v.* Ulster County, 32 Barb. (N. Y.) 473; Com. *v.* Pittsburgh, 34 Pa. St. 496; State *v.* Lean, 9 Wis. 279.

The return must show a complete legal right in respondent to refuse obedience to the command of the alternative writ. Williams *v.* New Haven, 68 Conn. 263, 36 Atl. 61; Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17. It must show not merely what would be a *prima facie* right in respondent in the absence of any allegation to the contrary, but must show a right to refuse obedience in view of the allegations of the writ. Williams *v.* New Haven, *supra*; State *v.* Beyers, 41 Mo. App. 503.

If the return is manifestly false, frivolous, or calculated to embarrass or delay the remedy sought, it will be quashed on motion and a peremptory writ will be awarded. State *v.* Jersey City Bd. of Public Works, 45 N. J. L. 465. Return held not to be frivolous see Johnston *v.* Cleaveland County, 67 N. C. 101.

The return is sufficient if it contains a full and certain answer to all the allegations expressly made in the petition for it, and discloses a fair legal reason why the mandamus should not be obeyed. Springfield *v.* Hampden County Com'rs, 10 Pick. (Mass.) 59; Kell *v.* Rudy, 1 Pa. Super. Ct. 507. And see Welchans *v.* Shirk, 98 Pa. St. 17 [*reversing* 12 Lanc. Bar 135].

94. See *infra*, IX, E, 4, f, (II).

95. See *infra*, IX, E, 4, f, (III).

a demurrer or motion to quash[96] he must plead in one way or the other else no defense is presented.[97] The sufficiency of the return depends on its substance rather than its form,[98] although in a few states certain formal requirements must be observed.[99]

(II) *TRAVERSES OR DENIALS.*[1] Respondent may answer by way of traverse or denial of the matters set forth in the petition or writ.[2] Denials must be single;[3] and at common law a general denial in the return is a nullity,[4] although the rule is otherwise in some states.[5] Respondent need not traverse any fact or answer for any breach of duty not set out or assigned in the writ.[6]

(III) *CONFESSION AND AVOIDANCE.* Instead of traversing the matters set forth in the alternative writ or petition, respondent may plead by way of confession and avoidance,[7] and if he relies on new matter excusing non-performance of the commands of the writ, this must be set up in the return.[8] Great

96. See *infra*, IX, E, 6.

97. *Alabama.*— *Ex p.* Candee, 48 Ala. 386.
Arkansas.— Levy *v.* Inglish, 4 Ark. 65.
Colorado.—People *v.* Grand County, 6 Colo. 202.
Florida.— Canova *v.* State, 18 Fla. 512.
Illinois.— People *v.* Cook County, 180 Ill. 160, 54 N. E. 164; Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824; Chicago Bd. of Trade *v.* Nelson, 62 Ill. App. 541.
Indiana.— Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489.
Mississippi.— Swan *v.* Gray, 44 Miss. 393.
New York.— Albany Commercial Bank *v.* New York Canal Com'rs, 10 Wend. 25.
Pennsylvania.— Com. *v.* Allegheny County Com'rs, 37 Pa. St. 277.
Wisconsin.— State *v.* Eaton, 11 Wis. 29.

98. For forms of answer or return see People *v.* Lothrop, 3 Colo. 428; Incker *v.* Iredell County, 46 N. C. 451.
Demurrer treated as answer see *supra*, IX, E, 4, a.

99. *Ex p.* Geter, 141 Ala. 323, 37 So. 341 (holding that a return on typewriter paper instead of transcript paper, in violation of a rule of the supreme court, will not be considered); State *v.* Judge New Orleans Probate Ct., 2 Rob. (La.) 418 (holding that the answer to a rule to show cause issuing out of the supreme court to the judge of an inferior court must be in writing).

1. Negative pregnant see *infra*, IX, E, 4, f, (VII).
Traverse of return see *infra*, IX, E, 5.

2. *Illinois.*— People *v.* Salomon, 46 Ill. 333; Ohio, etc., R. Co. *v.* People, 32 Ill. App. 69.
Indiana.— Boone County *v.* State, 61 Ind. 379; Clark County *v.* State, 61 Ind. 75.
Iowa.— Chance *v.* Temple, 1 Iowa 179.
Mississippi.—Beard *v.* Lee County, 51 Miss. 542; Swan *v.* Gray, 44 Miss. 393.
New York.— People *v.* Ft. Edward Highway Com'rs, 11 How. Pr. 89.
Pennsylvania.— Keasy *v.* Bricker, 60 Pa. St. 9.
Tennessee.— State *v.* Williams, 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418.
Texas.— Houston, etc., R. Co. *v.* Dallas, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850.
United States.— *Ex p.* Newman, 14 Wall. 152, 20 L. ed. 877.

3. U. S. *v.* Bayard, 5 Mackey (D. C.) 428; Harwood *v.* Marshall, 10 Md. 451.
A denial in the conjunctive is bad. People *v.* Goldstein, 37 N. Y. App. Div. 550, 56 N. Y. Suppl. 306.

4. May *v.* Finley, 91 Tex. 352, 43 S. W. 257; Sansom *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505; Burrell *v.* Blanchard, (Tex. Civ. App. 1899) 51 S. W. 46; Pearsall *v.* Wooles, (Tex. Civ. App. 1899) 50 S. W. 959.

5. Wood *v.* State, 155 Ind. 1, 55 N. E. 959 (*semble*); Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489 (*semble*); Taylor *v.* Chickasaw County, 74 Miss. 23, 19 So. 834 (*semble*); State *v.* Moss, 35 Mo. App. 441.
In South Dakota it was held that an answer which denies "each and all the allegations in the affidavit contained, except such as are hereinafter admitted or qualified," although not a form of pleading to be encouraged, has grown into such frequent use that it would be unwise and unfair to litigants and attorneys for the court to hold, without premonition, that such an answer, unassailed by motion or otherwise, constitutes no denial. Hardy *v.* Purington, 6 S. D. 382, 61 N. W. 158.

6. Springfield *v.* Hampden County, 10 Pick. (Mass.) 59; Buffalo, etc., R. Co. *v.* Com., 120 Pa. St. 537, 14 Atl. 443.

7. *Illinois.*— People *v.* Salomon, 46 Ill. 333.
Indiana.— Boone County *v.* State, 61 Ind. 379; Clarke County *v.* State, 61 Ind. 75.
Mississippi.— Beard *v.* Lee County, 51 Miss. 542; Swan *v.* Gray, 44 Miss. 393.
New York.— People *v.* Ft. Edward Highway Com'rs, 11 How. Pr. 89.
Pennsylvania.— Keasy *v.* Bricker, 60 Pa. St. 9.
United States.— *Ex p.* Newman, 14 Wall. 152, 20 L. ed. 877.

8. Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17 (holding that where the facts taken by themselves will produce a certain legal result, but by reason of some extraneous incidents affecting them they do not produce that result, those incidents are not put in issue by a mere denial of the facts; and where a legal right to refuse obedience to the writ can be shown in no other way than by setting forth such incidental

strictness of pleading is required in returns which set up matter of confession and avoidance.[9]

(IV) *ADMISSIONS*— (A) *In General.* Relator is entitled to the benefit of all admissions made by respondent in the return.[10]

(B) *Admissions From Failure to Deny.* All such allegations of the petition and recitals of the alternative writ are as material and well pleaded are taken to be true unless respondent denies them;[11] and the same occurs where attempted

matter, a return which fails to specifically plead it is bad); People *v.* Roverts, 45 N. Y. App. Div. 145, 61 N. Y. Suppl. 148 (holding that a defense that petitioning contractors have an adequate remedy in the right to a determination of the claim payment of which is sought to be enforced by mandamus should be set up in the return); Matter of Rebbecchi, 51 Misc. (N. Y.) 403, 100 N. Y. Suppl. 513 (holding that an answer to a petition to compel a gas company to furnish gas at the statutory rate, alleging that such rate would give the company very little above the average cost of the service and would not serve in yielding an adequate return, so that the company would be deprived of its property without just compensation and without due process of law, is insufficient in failing to allege the facts from which the court might determine the question of adequacy).

Proceedings for restoration to membership. — Where one who has been expelled from a corporation or society seeks restoration by mandamus, the return should set out all the facts necessary to show that relator was removed for a legal cause and in a legal manner. State *v.* Hiram Grand Lodge F. & A. M., 2 Pennew. (Del.) 21, 43 Atl. 520; Society for Visitation, etc. *v.* Com., 52 Pa. St. 125, 91 Am. Dec. 139; Com. *v.* German Soc. for Mut. Support, etc., 15 Pa. St. 251; Green *v.* African M. E. Soc., 1 Serg. & R. (Pa.) 254.

Proceedings relating to municipal claims.— A city excusing non-payment of a claim admitted to be just on the ground that the revenues it can lawfully raise are inadequate must set out in detail all the items of its receipts and expenditures, so that the court can see that it is not the fault of the city that the debt is not paid and that the city is doing all it can to pay it. Chicago *v.* People, 215 Ill. 235, 74 N. E. 137. So an answer in a proceeding to compel a county auditor to issue his warrant for an allowance made by the county board to a contractor for constructing a gravel road, alleging that before demand for the warrant a resident taxpayer gave notice of his intention to appeal, and within proper time filed his affidavit and bond for appeal, which bond the auditor had approved, is insufficient in not showing that the affidavit was such as the statute requires. Matter *v.* Stout, 93 Ind. 19. And if the failure to levy a tax is excused on the ground that the case is within a constitutional limitation of municipal powers, but the section containing the limitation also contains an exception, the return must not only show that the case is within the limitation, but also that it is not within the exception. State *v.* Beyers, 41 Mo. App. 503. However, it is a sufficient return to a mandate to an officer intrusted with the drawing of warrants or payment of claims upon the public treasury for services rendered for him to state that there is no money in the treasury belonging to the fund on which the warrant is drawn or out of which payment is to be made, it not being necessary to state why such a state of things exists. Cavanaugh *v.* Cass School Dist., 6 Pa. Co. Ct. 35.

9. State *v.* Jacksonville, 22 Fla. 21.

However, the return to an alternative writ to compel a railroad company to put into operation a schedule of tariffs prescribed by the railroad commissioners which alleges positively and unequivocally that the tariffs so prescribed are unreasonable and that they do not give the company compensation for the services required to be performed by it is sufficient to tender an issue as to the reasonableness of the rates without setting up all the facts bearing on the question of reasonableness. State *v.* Seaboard Air Line R. Co., (Fla. 1904) 37 So. 314.

10. People *v.* Pritchard, 19 Mich. 470; State *v.* Marks, 6 Lea (Tenn.) 12 (so holding where defendant makes a return by answer under oath); State *v.* Fetter, 12 Wis. 566.

11. *Illinois.*— Chicago *v.* People, 215 Ill. 235, 74 N. E. 137; Cleary *v.* Hoobler, 207 Ill. 97, 69 N. E. 967; People *v.* Cook County, 180 Ill. 160, 54 N. E. 164; Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824.

Indiana.—Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489.

Michigan.— Berube *v.* Wheeler, 128 Mich. 32, 87 N. W. 50. And see Grand Rapids *v.* Burlingame, 102 Mich. 321, 60 N. W. 698; Jones *v.* Detroit Bd. of Education, 88 Mich. 371, 50 N. W. 309.

Nebraska.— State *v.* Banshausen, 49 Nebr. 558, 68 N. W. 950; Linch *v.* State, 30 Nebr. 740, 47 N. W. 88.

Nevada.— State *v.* Murphy, (1906) 85 Pac. 1004.

New York.— People *v.* Wells, 89 N. Y. App. Div. 89, 85 N. Y. Suppl. 438; Stutzbach *v.* Coler, 62 N. Y. App. Div. 219, 70 N. Y. Suppl. 901 [*affirmed* in 168 N. Y. 416, 61 N. E. 697]; People *v.* Dalton, 23 Misc. 294, 50 N. Y. Suppl. 1028 [*affirmed* in 31 N. Y. App. Div. 630, 54 N. Y. Suppl. 1112].

Ohio.— State *v.* Hawes, 43 Ohio St. 16, 1 N. E. 1.

Oklahoma.— Pitzer *v.* Territory, 4 Okla. 86, 44 Pac. 216.

Tennessee.— State *v.* Alexander, 115 Tenn. 156, 90 S. W. 20; Harris *v.* State, 96 Tenn. 496, 34 S. W. 1017.

denials in the return are insufficient in law; as for instance where they are lacking in distinctness and certainty.[12]

(v) *Allegation of Facts as Distinguished From Conclusions and Evidence.* The return or answer must set out the facts relied on as an excuse for non-performance so that relator may traverse them.[13] Accordingly it is insufficient if it states conclusions of law without alleging the facts on which they are based.[14] Similarly it must deny facts; a denial of a conclusion of law unaccom-

Wisconsin.— State *v.* Kellogg, 95 Wis. 672, 70 N. W. 300; State *v.* Avery, 14 Wis. 122.

See 33 Cent. Dig. tit. "Mandamus," § 349.

If an answer neither admits nor denies the allegations of the petition, those allegations will not be taken as true. Hooper *v.* Creager, 84 Md. 195, 35 Atl. 967, 1103, 36 Atl. 359, 35 L. R. A. 202. *Contra,* People *v.* Crabb, 156 Ill. 155, 40 N. E. 319.

12. U. S. *v.* Bayard, 5 Mackey (D. C.) 428; State *v.* Adams, 161 Mo. 349, 61 S. W. 894; State *v.* McCullough, 3 Nev. 202; May *v.* Finley, 91 Tex. 352, 43 S. W. 257; Burrell *v.* Blanchard, (Tex. Civ. App. 1899) 51 S. W. 46.

13. People *v.* Ohio Grove Tp., 51 Ill. 191.

14. *California.*— People *v.* San Francisco, 27 Cal. 655, allegation in general terms that an ordinance is illegal and void.

Connecticut.— Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17.

Delaware.— State *v.* Hiram Grand Lodge, 2 Pennew. 21, 43 Atl. 520.

District of Columbia.— U. S. *v.* Bayard, 5 Mackey 428.

Florida.— Ray *v.* Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773, holding that a return that the warrants whose payment is sought are spurious, illegal, and void is insufficient as being a mere conclusion of law, as is a return, that the warrants were issued and are held without valuable consideration, such statement being made, not as a positive averment of such fact, but as an inference or argument based on allegations which do not support the inference or argument.

Illinois.— Chicago *v.* People, 215 Ill. 235, 74 N. E. 137; People *v.* Ohio Grove Tp., 51 Ill. 191.

Indiana.—Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489, 501, holding that an allegation of a conclusion, deduction, or opinion is bad.

Maryland.— Harwood *v.* Marshall, 10 Md. 451, allegation that petitioner did not take and subscribe the oaths "before the Governor of the State, in manner and form as directed by the constitution and laws."

Missouri.— State *v.* Adams, 161 Mo. 349, 61 S. W. 894, allegation that a contract had been "canceled for the reason that the relator had failed to comply" therewith.

Nebraska.— Woodward *v.* State, 58 Nebr. 598, 79 N. W. 164.

Nevada.— State *v.* McCullough, 3 Nev. 202.

New Mexico.— Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170.

New York.— People *v.* Lyman, 69 N. Y. App. Div. 399, 74 N. Y. Suppl. 1106 (holding that a denial in the return to an application to compel the state commissioner of excise to prepare orders for the payment of a rebate on a liquor tax certificate that the licensee was duly tried for a violation of the liquor tax law and discharged is insufficient, being a mere legal conclusion that the discharge was not in accordance with law); People *v.* Sullivan County, 56 N. Y. 249, allegation that two newspapers were "duly designated" and that the papers so designated "fairly represent the two principal political parties in said county"); People *v.* Goldstein, 37 N. Y. App. Div. 550, 56 N. Y. Suppl. 306 (allegations that at no time were the books in question kept away from relator, and that they were open for his inspection); People *v.* Flagg, 16 Barb. 503 [*reversed* on other grounds in 17 N. Y. 584] (holding that a return in a proceeding to compel a city treasurer to draw a warrant for the payment of the moneys due under a contract between the city and relator alleging in general terms that relator had not performed the contract in manner and form as alleged in the petition is bad); Matter of Guess, 16 Misc. 306, 38 N. Y. Suppl. 91 (allegation that petitioner did not possess the qualifications required by law, as well as by the regulations and usages of the republican party); People *v.* Argyle, etc., Plank Road Co., 11 How. Pr. 89 (allegation that the law under which relief is claimed is unconstitutional and void). And see *In re* Freel, 38 N. Y. Suppl. 143.

Oklahoma.— Territory *v.* Caffrey, 8 Okla. 193, 57 Pac. 204.

Pennsylvania.— Prospect Brewing Co.'s Petition, 127 Pa. St. 523, 17 Atl. 1090 (holding that a return to a writ to compel the granting of the petition of a corporation for a brewers' wholesale license, setting forth that the averment of the petition for the license was incomplete, inaccurate, and misleading, but not showing in what respect; that the company had conducted its business in violation of law, but not showing what law; that the company was not a fit person to receive the license, but not showing a cause of disqualification within the law; and that the company did not possess a good moral character, but not averring that the officers and directors thereof were men of bad moral character, is insufficient); Com. *v.* Pittsburgh, 34 Pa. St. 496 (allegation that bonds were not transferred in accordance with the acts of assembly); Com. *v.* Pennsylvania R. Co., 6 Pa. Dist. 266. And see Com. *v.* Chittenden, 2 Pa. Dist. 804, 13 Pa. Co. Ct. 362.

Utah.— Lyman *v.* Martin, 2 Utah 136.

A return of fraud which does not set out the facts on which the allegation of fraud is based is insufficient. Hendricks *v.* Johnson, 45 Miss. 644; People *v.* Earle, 47 How. Pr. (N. Y.) 370. And see Com. *v.* Allegheny

panied by a denial of the facts on which such conclusion is based is insufficient to raise an issue.[15] Matters of evidence should not be alleged in the return. It is the ultimate facts on which the defense is based, and not the evidentiary facts tending to establish them, that should be alleged.[16]

(VI) *ALLEGATIONS AND DENIALS ON INFORMATION AND BELIEF.* The cases are not in accord as to whether the allegations and denials in the return or answer may be made on information and belief. In some states this may be done;[17] but in other states the allegations and denials must be made positively,[18] save under exceptional circumstances.[19]

County Com'rs, 37 Pa. St. 237; Cousins *v.* Warren Borough School Dist., 28 Pa. Co. Ct. 381.

15. McConoughey *v.* Jackson, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53 (holding that in a proceeding to compel the drawing of a warrant for an indebtedness to petitioner for expenses incurred by him at respondent's instance, a denial of indebtedness to petitioner without a denial of the facts in regard to the expenses incurred by him is a denial of a conclusion of law and insufficient); People *v.* San Francisco, 27 Cal. 655 (holding that if the complaint avers the rendition of a judgment against defendant by a court of competent jurisdiction, and states the character of the judgment, an answer denying that defendant became or was lawfully bound by the judgment is only a denial of a conclusion of law); Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17; State *v.* McCullough, 3 Nev. 202.

16. Cook *v.* Tannar, 40 Conn. 378; People *v.* Ransom, 2 N. Y. 490; People *v.* Baker, 14 Abb. Pr. (N. Y.) 19; People *v.* Metropolitan Bd. of Police, 9 Abb. Pr. (N. Y.) 257; Commercial Bank *v.* New York Canal Com'rs, 10 Wend. (N. Y.) 25.

17. People *v.* Alameda County, 45 Cal. 395 (holding that the answer to a petition presented to the supreme court may deny the allegations of the petition on information and belief); State *v.* Cooley, 58 Minn. 514, 60 N. W. 338 (holding that denials on information and belief and affirmative allegations in the same form are sufficient); State *v.* Sherwood, 15 Minn. 221, 2 Am. Rep. 116 (holding that a denial of any knowledge or information sufficient to form a belief as to the truth of the matter alleged in the writ will not be stricken out as sham).

A disclaimer of knowledge of the facts alleged in the petition is sufficient to raise an issue (People *v.* Ryan, 17 Mich. 159, holding that respondent cannot be compelled under oath to admit or deny what he has no means of knowing with certainty), when accompanied by a denial for the purposes of the suit (Buffalo, etc., R. Co. *v.* Com., 120 Pa. St. 537, 14 Atl. 443).

In New York respondent may in the return to the alternative writ deny any knowledge or information sufficient to form a belief as to the matters recited in the writ (People *v.* Bricklayers' Benev., etc., Union, 20 N. Y. App. Div. 8, 46 N. Y. Suppl. 648); but affidavits filed in opposition to a motion for a writ are insufficient which contain allegations or denials on information and belief (People *v.* New York Cent., etc., R. Co., 168 N. Y. 187, 61 N. E. 172 [*reversing* 61 N. Y. App. Div. 494, 70 N. Y. Suppl. 684]; People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659; People *v.* York, 31 N. Y. App. Div. 527, 52 N. Y. Suppl. 401, 1060; People *v.* Fulton County, 53 Hun 254, 6 N. Y. Suppl. 591; People *v.* Sturgis, 38 Misc. 433, 77 N. Y. Suppl. 1008; Matter of Reiss, 30 Misc. 234, 62 N. Y. Suppl. 145; People *v.* Guggenheimer, 28 Misc. 735, 59 N. Y. Suppl. 913; Matter of Guess, 16 Misc. 306, 38 N. Y. Suppl. 91; People *v.* Paton, 20 Abb. N. Cas. 195; People *v.* Schuyler, 51 How. Pr. 461; *In re* Freel, 38 N. Y. Suppl. 143; People *v.* McGuire, 8 N. Y. Suppl. 852 [*reversed* on other grounds in 126 N. Y. 419, 27 N. E. 967]).

Form of denial.—A statement in the return to a writ to compel a city to levy a tax to pay a judgment that respondent has no knowledge of the judgment sufficient to form a belief and therefore denies the same is not sufficient, but the denial should be of any knowledge or information sufficient to form a belief. State *v.* Madison, 15 Wis. 30.

18. Ray *v.* Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773; State *v.* Sumter County Com'rs, 22 Fla. 1; Cleary *v.* Hoobler, 207 Ill. 97, 69 N. E. 967; People *v.* Crabb, 156 Ill. 155, 40 N. E. 319; State *v.* Trammel, 106 Mo. 510, 17 S. W. 502; State *v.* Williams, 96 Mo. 13, 8 S. W. 771.

Presumptive knowledge.— If respondent as an officer has presumptive knowledge of the facts he cannot allege ignorance thereof. McConoughey *v.* Jackson, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; People *v.* Lake County, 12 Colo. 89, 19 Pac. 892; Creager *v.* Hooper, 83 Md. 490, 35 Atl. 159. And see Cousins *v.* Warren Borough School Dist., 28 Pa. Co. Ct. 381.

19. State *v.* Sumter County Com'rs, 22 Fla. 1 (holding that the rule requiring pleas to be sworn to does not restrict a defendant to pleading matters of defense which are within his personal knowledge); People *v.* York, 31 N. Y. App. Div. 527, 52 N. Y. Suppl. 1060.

The sources of information and grounds of belief must be given, else an allegation or denial on information and belief is insufficient. People *v.* Coler, 48 N. Y. App. Div. 492, 62 N. Y. Suppl. 964; People *v.* York, 31 N. Y. App. Div. 527, 52 N. Y. Suppl. 1060; Douglas *v.* McLean, 25 Pa. Super. Ct. 9; Cousins *v.* Warren Borough School Dist.,

(VII) *CERTAINTY.* The return or answer to the writ must be certain and specific.[20] This rule applies both to its affirmative allegations[21] and to its

28 Pa. Co. Ct. 381; Miller *v.* Hawk, 7 Lack. Leg. N. (Pa.) 125.

20. State *v.* Jones, 10 Iowa 65; Bailey *v.* Behrant, 3 Okla. 219, 41 Pac. 575; Miller *v.* Hawk, 7 Lack. Leg. N. (Pa.) 125; Com. *v.* Pittsburgh, 33 Pittsb. Leg. J. N. S. (Pa.) 316.

The affidavits used in opposition to a motion for mandamus must likewise be specific and definite. Matter of Guess, 16 Misc. (N. Y.) 306, 38 N. Y. Suppl. 91.

Where the answer takes the place of the return it is not required to be more certain or specific than was required in the return. Legg *v.* Annapolis, 42 Md. 203.

Illustrations.— In proceedings to compel a judge to sign a certificate of evidence, it is insufficient to answer that the certificate presented did not contain all the evidence, but the evidence omitted should be pointed out with reasonable certainty in order that the court may shape its order to meet the emergency. People *v.* Horton, 46 Ill. App. 434. So a return to a writ commanding a bill of exceptions to be sealed which avers that the bill is not a true bill of exceptions and does not state the exceptions in manner and form as they were taken in the case is bad for uncertainty in not stating in what respect the exceptions are deficient. Reichenbach *v.* Ruddach, 121 Pa. St. 18, 15 Atl. 448. A return in proceedings to restore a member which states in general terms that he was expelled for violation of duty without specifying the charges on which he was convicted is bad. Com. *v.* Philadelphia, 6 Serg. & R. (Pa.) 469. So a return in proceedings to compel the restoration of a person as minister of a church should set forth with precision and certainty the rules of the church excusing compliance with the writ. Brosius *v.* Reuter, 1 Harr. & J. (Md.) 551, 2 Am. Dec. 534. And a return to a mandamus to restore common councilmen that they were chosen yearly and that before the coming of the writ they were chosen and continued for a year and at the end of the year were duly removed from their offices by the election of others is bad for uncertainty in failing to show the time they were elected, so that it might appear that they were not removed before the year expired. Rex *v.* Chester, 5 Mod. 10. In proceedings against the city controller to compel him to sign a warrant for money due under a municipal contract, an answer denying that any contract had been entered into between the city and relator as required by a certain statute should state specifically the defense relied on, if its meaning is that the contract as entered into in fact was not in accordance with the requirements of the statute. Com. *v.* Philadelphia, 176 Pa. St. 588, 35 Atl. 195. And in a proceeding to compel a corporation to levy a tax to pay a judgment a vague allegation in the return that it has property subject to levy is of no force where the writ sets out a return *nulla bona.* Cole *v.* East Greenwich Fire Engine Co., 12 R. I. 202. Where, in proceedings to compel a county superintendent to countersign a school-board's certificate of fitness of a candidate for a state teacher's certificate, the answer avers petitioner's disability without specifying in what respect he is deficient, sets forth that his marks on the annual examination did not entitle him to a professional certificate, and that his success and zeal as a teacher were not such as to warrant the granting of a certificate, it was deficient in particularity and certainty. Donaldson *v.* York County School Superintendent, 8 Pa. Dist. 185.

Return held to be sufficiently certain see Hempstead *v.* Underhill, 20 Ark. 337; Demment *v.* Rokker, 126 Ill. 174, 19 N. E. 33; State *v.* Elwood, 12 Wis. 551. Under the discretionary power vested in commissioners to grant or refuse a license to keep a bar-room it is not necessary in a mandamus proceeding against them for an alleged failure to perform their duty in that respect that the return should state with certainty anything more than the fact that they have made an examination, and that on such examination they believe that a license should not be granted to the petitioners, either because they are not fit persons or because a bar-room should not, as a matter of public interest, be licensed in the place proposed by the relator. If, however, the facts upon which their decision is based are stated, the rule as to certainty does not apply to them. U. S. *v.* Douglass, 19 D. C. 99. In a proceeding to compel the county authorities to issue bonds to a railroad company in pursuance of a vote of the people of the county, a return setting up that the majority cast at the election in favor of subscription was more than made up of illegal votes; that a majority of the legal votes was against the subscription and that the apparent majority was entirely composed of illegal and fraudulent votes cast by persons who were not entitled to vote; and that the railroad company before entering into liabilities on the faith of such vote had notice that a majority of the legal votes was against the subscription, is sufficient without going into detail and stating the reasons why the votes were illegal and fraudulent. People *v.* Logan County, 63 Ill. 374.

21. Chicago *v.* People, 215 Ill. 235, 74 N. E. 137 (holding that general statements are insufficient); Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824; Chicago Bd. of Trade *v.* Nelson, 62 Ill. App. 541; People *v.* Horton, 46 Ill. App. 434 (holding that a return should not be in general terms without alleging specifically the facts relied on); State *v.* Allison, 155 Mo. 325, 56 S. W. 467; Matter of Reiss, 30 Misc. (N. Y.) 234, 62 N. Y. Suppl. 145; Reg. *v.* St. Andrew, 10 A. & E. 736, 37 E. C. L. 388; Reg. *v.* Southampton, 1 B. & S. 5, 101 E. C. L. 5 (holding that the return must be very minute in showing why respondent did not do what

denials.[22] At common law the highest degree of certainty is required ;[23] but this rule has been relaxed in most states, and now the same certainty, neither more nor less, is generally required as is necessary in ordinary actions at law.[24] General allegations in an answer are sufficient where they are not more so than the allegations of the petition to which they are a reply.[25] An argumentative return is bad.[26] The facts must be stated directly and not inferentially or argumentatively,[27] and denials must be made in the same way.[28] As a rule the mode of objecting to a return which is bad for uncertainty is by motion to make it more definite.[29]

he was commanded). And see cases cited *passim*, IX, E, 4, f, (VII).

22. U. S. *v.* Bayard, 5 Mackey (D. C.) 428; Harwood *v.* Marshall, 10 Md. 451. And see cases cited *passim*, IX, E, 4, f, (VII).

23. Com. *v.* Chittenden, 2 Pa. Dist. 804, 13 Pa. Co. Ct. 362; Rex *v.* Abingdon, 12 Mod. 401. And see Cullem *v.* Latimer, 4 Tex. 329.

Certainty to every intent is necessary.— U. S. *v.* Bayard, 5 Mackey (D. C.) 428; Harwood *v.* Marshall, 10 Md. 451; Prospect Brewing Co.'s Petition, 127 Pa. St. 523, 17 Atl. 1090; Rex *v.* Norwich, 2 Salk. 432.

Greater certainty is required than in an ordinary plea in bar.— People *v.* Ohio Grove Tp., 51 Ill. 191; People *v.* Horton, 46 Ill. App. 434. And see State *v.* Beyers, 41 Mo. App. 503.

24. State *v.* Hiram Grand Lodge of F. & A. M., 2 Pennew. (Del.) 21, 43 Atl. 520; Brosius *v.* Reuter, 1 Harr. & J. (Md.) 551, 2 Am. Dec. 534; Fisher *v.* Charleston, 17 W. Va. 595.

Certainty to a common intent is requisite and sufficient. People *v.* Baker, 35 Barb. (N. Y.) 105, 14 Abb. Pr. 19; Central Dist., etc., Tel. Co. *v.* Com., 114 Pa. St. 592, 7 Atl. 926; Com. *v.* Allegheny County, 32 Pa. St. 218; Kell *v.* Rudy, 1 Pa. Super. Ct. 507; Com. *v.* School Directors, 4 Pa. Dist. 314; Carlisle School Dist. *v.* Humrich, 18 Pa. Co. Ct. 322. And see Douglas *v.* McLean, 25 Pa. Super. Ct. 9.

The facts must be pleaded with such a degree of certainty as to enable the court to determine whether they are sufficient in law to justify respondent in failing to do the act sought to be enforced. *Ex p.* Candee, 48 Ala. 386; Tallapoosa Com'rs Ct. *v.* Tarver, 21 Ala. 661; Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17; State *v.* Bloxham, 33 Fla. 482, 15 So. 227; Ray *v.* Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773; Polk County *v.* Johnson, 21 Fla. 577; State *v.* Jones, 10 Iowa 65.

25. Houston, etc., R. Co. *v.* Dallas, (Tex. 1905) 84 S. W. 648. And see Miller *v.* Canal Com'rs, 21 Pa. St. 23.

26. *Delaware.*— State *v.* Hiram Grand Lodge F. & A. M., 2 Pennew. 21, 43 Atl. 520.

Illinois.— People *v.* Holden, 91 Ill. 446; People *v.* Horton, 46 Ill. App. 434.

Maryland.— Creager *v.* Hooper, 83 Md. 490, 35 Atl. 159.

Nevada.— State *v.* McCullough, 3 Nev. 202.

Pennsylvania.— Com. *v.* Pennsylvania R. Co., 6 Pa. Dist. 266.

England.— Reg. *v.* Hereford, 6 Mod. 309, 2 Salk. 701.

27. *Florida.*— Ray *v.* Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773.

Indiana.— Copeland *v.* State, 126 Ind. 51, 25 N. E. 866.

Maryland.— Brosius *v.* Reuter, 1 Harr. & J. 551, 2 Am. Dec. 534.

New Mexico.— Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170.

New York.— People *v.* Board of Sup'rs, 10 Abb. Pr. 233; People *v.* New York, 18 How. Pr. 152 [*affirmed* in 21 How. Pr. 288]; Commercial Bank *v.* New York Canal Com'rs, 10 Wend. 25.

Pennsylvania.— Kaine *v.* Com., 101 Pa. St. 490; Society for Visitation, etc. *v.* Com., 52 Pa. St. 125, 91 Am. Dec. 139; Com. *v.* Allegheny County Com'rs, 37 Pa. St. 237; Com. *v.* Allegheny County, 32 Pa. St. 218; Douglas *v.* McLean, 25 Pa. Super. Ct. 9; Com. *v.* Chittenden, 2 Pa. Dist. 804, 13 Pa. Co. Ct. 362; Cousins *v.* Warren Borough School Dist., 28 Pa. Co. Ct. 381; Miller *v.* Hawk, 7 Lack. Leg. N. 125.

However, presumptions may be indulged from facts alleged in the return. State *v.* Douglas County, 148 Mo. 37, 49 S. W. 862.

28. *Delaware.*—State *v.* Pan American Co., (1904) 61 Atl. 399.

District of Columbia.— U. S. *v.* Bayard, 5 Mackey 428.

Illinois.— Stone *v.* Kellogg, 165 Ill. 192, 46 N. E. 222, 56 Am. St. Rep. 240 [*affirming* 62 Ill. App. 444].

Maryland.— Harwood *v.* Marshall, 10 Md. 451.

Missouri.— State *v.* Adams, 161 Mo. 349, 61 S. W. 894; State *v.* Allison, 155 Mo. 325, 56 S. W. 467. See, however, State *v.* State Bd. of Health, 103 Mo. 22, 15 S. W. 322.

Nebraska.— State *v.* Jaynes, 19 Nebr. 161, 26 N. W. 711.

New York.— People *v.* Board of Police, 46 Hun 296 [*affirmed* in 107 N. Y. 235, 13 N. E. 920].

Pennsylvania.— Kaine *v.* Com., 101 Pa. St. 490; Com. *v.* Allegheny County, 37 Pa. St. 277.

Virginia.— Com. *v.* Fairfax County Ct., 2 Va. Cas. 9.

See, however, Tallapoosa County Ct. *v.* Tarver, 29 Ala. 414; San Luis Obispo County *v.* Gage, 139 Cal. 398, 73 Pac. 174; Wood *v.* State, 155 Ind. 1, 55 N. E. 959; Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489.

A negative pregnant is bad. People *v.* Goldstein, 37 N. Y. App. Div. 550, 56 N. Y. Suppl. 306. And see Silverthorne *v.* Warren R. Co., 33 N. J. L. 372.

29. State *v.* Douglas County, 148 Mo. 37, 49 S. W. 862; Hardy *v.* Purington, 6 S. D.

(VIII) *IRRESPONSIVENESS AND EVASIVENESS.* If the return or answer is not responsive to the allegations of the writ or petition it is insufficient.[30] Accordingly it is bad if it is evasive in its denials or allegations.[31]

(IX) *REDUNDANCY AND IMMATERIALITY.* Immaterial or redundant matter in the return or answer will be struck out on motion.[32] Where the petition contains immaterial averments, the denial of such averments is not ground for refusing the writ, no material averments being denied.[33]

(X) *REFERENCE TO EXTRANEOUS PAPERS.* The return must as a rule be complete in itself without reference to other papers.[34]

g. Matters Occurring Pendente Lite. Matters arising after the institution of the proceeding may be pleaded by respondent in defense.[35]

382, 61 N. W. 158; Cleveland *v.* U. S., 111 Fed. 341, 49 C. C. A. 383.

30. People *v.* Goldstein, 37 N. Y. App. Div. 550, 56 N. Y. Suppl. 306; Matter of Rebecchi, 51 Misc. (N. Y.) 327, 100 N. Y. Suppl. 335; Gorgas *v.* Blackburn, 14 Ohio 252; Douglas *v.* McLean, 25 Pa. Super. Ct. 9; U. S. *v.* Iowa City, 7 Wall. (U. S.) 313, 19 L. ed. 79. And see Legg *v.* Annapolis, 42 Md. 203.

31. *Florida.*— State *v.* Rose, 26 Fla. 117, 7 So. 370; State *v.* Jacksonville, 22 Fla. 21.

Illinois.— People *v.* Holden, 91 Ill. 446; People *v.* Horton, 46 Ill. App. 434.

Maryland.— Harwood *v.* Marshall, 10 Md. 451.

Michigan.— Atty.-Gen. *v.* Sanilac Sup'rs, 42 Mich. 72, 3 N. W. 260, holding that if the allegations of the return are evasive respondent will be bound by them according to the interpretation evidently intended. *Compare* Potter *v.* Homer, 59 Mich. 8, 26 N. W. 208; People *v.* Kalamazoo Cir. Judge, 39 Mich. 301, holding that the only redress the supreme court can give for an evasive answer to an order to show cause is a peremptory mandamus and costs.

Mississippi.— Hendricks *v.* Johnson, 45 Miss. 644.

Missouri.— State *v.* Schofield, 41 Mo. 38.

Montana.— State *v.* Second Judicial Dist. Ct., 22 Mont. 438, 56 Pac. 865.

New York.— Pierce, etc., Mfg. Co. *v.* Bleckwenn, 62 Hun 265, 16 N. Y. Suppl. 768 [*affirmed* in 131 N. Y. 570, 30 N. E. 67]; *In re* Williamsburgh, 1 Barb. 34; Martin *v.* William J. Johnston Co., 12 N. Y. Suppl. 844, 25 Abb. N. Cas. 350 [*reversed* on other grounds in 128 N. Y. 605, 27 N. E. 1017], 62 Hun 557, 17 N. Y. Suppl. 133 [*affirmed* in 133 N. Y. 692, 31 N. E. 627]; People *v.* White, 11 Abb. Pr. 168.

Pennsylvania.— Kaine *v.* Com., 101 Pa. St. 490; Society for Visitation of Sick, etc., *v.* Com., 52 Pa. St. 125, 91 Am. Dec. 139; Com. *v.* Allegheny County Com'rs, 37 Pa. St. 277; Miller *v.* Hawk, 7 Lack. Leg. N. 125.

See 33 Cent. Dig. tit. "Mandamus," § 354.

A return is not evasive if its denials are as broad as the allegations of the petitions. Com. *v.* Dickinson, 83 Pa. St. 458. And where a petition to compel a circuit judge to make a further return on appeal alleges that petitioner took oral exceptions on the trial to the failure of the court to give certain instructions prayed for by him, a return is not evasive which states that the judge rejected the instructions, substituting his own general charge, "to which action of the court no exception was taken," and further that the bill of exceptions signed "fully and fairly states all the facts attending the trial, to the best of his knowledge, belief and remembrance." State *v.* Small, 47 Wis. 436, 2 N. W. 544.

32. Brainard *v.* Staub, 61 Conn. 570, 24 Atl. 1040; People *v.* Ft. Edward Highway Com'rs, 11 How. Pr. (N. Y.) 89; People *v.* Van Leuven, 8 How. Pr. (N. Y.) 358. See, however, Moon *v.* Wellford, 84 Va. 34, 4 S. E. 572.

33. Stutzbach *v.* Coler, 62 N. Y. App. Div. 219, 70 N. Y. Suppl. 901 [*affirmed* in 168 N. Y. 416, 61 N. E. 697]. And see Reg. *v.* Balkwell, 6 U. C. Q. B. O. S. 297.

34. See cases cited *infra*, this note.

Affidavits submitted with the return cannot be considered (State *v.* Pierce County Super. Ct., 14 Wash. 203, 44 Pac. 331); although attached to it (Potter *v.* Homer, 59 Mich. 8, 26 N. W. 208).

An exhibit which is not the foundation of the defense cannot be considered. Newton *v.* Askew, 53 Ark. 476, 14 S. W. 670; Western Union Tel. Co. *v.* State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. N. S. 153.

A city ordinance must be pleaded like any other fact, and its terms be specifically set out, since the courts do not take judicial notice thereof and a mere reference to it in pleading is insufficient to bring it before the court. Com. *v.* Chittenden, 2 Pa. Dist. 804, 13 Pa. Co. Ct. 362.

It is sufficient to plead in substance such papers as respondent relies on in his return. Copies need not be set out. People *v.* Ransom, 2 N. Y. 490.

Adoption of another's return.— Respondent may as part of his return adopt a return made in another cause pending in the same court by another officer proceeded against by the same petitioner for the same demand. Rogers *v.* Mandeville, 20 Ga. 627. So one respondent may adopt the return of another respondent in the same cause. People *v.* Holden, 91 Ill. 446.

35. *Missouri.*— State *v.* Weeks, 93 Mo. 499, 6 S. W. 266.

Nebraska.— See State *v.* Cole, 25 Nebr. 342, 41 N. W. 245.

Nevada.— State *v.* McCullough, 3 Nev. 202.

New York.— People *v.* Baker, 35 Barb. 105; People *v.* Reading Highway Com'rs, 1

h. Joinder of Defenses. Respondent may plead as many defenses as he has,[36] provided that they are not inconsistent.[37] However, he cannot demur and plead to the merits at the same time;[38] nor can he plead in abatement and in bar at the same time.[39] However, the right to interpose a plea in abatement is not waived by demurring to the relation and moving to quash, where the fact so pleaded does not appear on the face of the relation.[40]

i. Further Return.[41] The practice is not uniform as to making a further return where the return as made is insufficient. It has been held that in such a case the court may allow respondent to make a further return,[42] and that it may compel him to do so.[43] In other states the practice in such a case is at once to

Thomps. & C. 193; People *v.* Baker, 14 Abb. Pr. 19.

Wisconsin.— Hawley *v.* Polk County, 88 Wis. 355, 60 N. W. 266.

United States.— Thompson *v.* U. S., 103 U. S. 480, 26 L. ed. 521.

36. *Alabama.*— *Ex p.* Candee, 48 Ala. 386; *Ex p.* Selma, etc., R. Co., 46 Ala. 230; Tallapossa Com'rs' Ct. *v.* Tarver, 21 Ala. 661.

Illinois.— People *v.* Horton, 46 Ill. App. 434.

Kansas.— Evans *v.* Thomas, 32 Kan. 469, 4 Pac. 833.

Maine.— Dane *v.* Derby, 54 Me. 95, 89 Am. Dec. 722.

Missouri.— State *v.* Moss, 35 Mo. App. 441.

New Jersey.— State *v.* Jersey City Bd. of Public Works, 45 N. J. L. 465.

New York.— People *v.* Ulster County, 32 Barb. 473; People *v.* Order of American Star, 53 N. Y. Super. Ct. 66; People *v.* Baker, 14 Abb. Pr. 19.

United States.— *Ex p.* Newman, 14 Wall. 152, 20 L. ed. 877.

England.— Wright *v.* Fawcett, 4 Burr. 2041; Rex *v.* Cambridge, 4 Burr. 2008, 2 T. R. 456; Reg. *v.* Norwich, 2 Salk. 436.

See 33 Cent. Dig. tit. "Mandamus," § 351.

Traverse and confession and avoidance.— Respondent may for separate defenses both deny the allegations of the writ and confess and avoid them. School Dist. No. 4 *v.* People, 106 Ill. App. 620; Boone County *v.* State, 61 Ind. 379; Clarke County *v.* State, 61 Ind. 75. But a single paragraph of the return cannot both deny and confess and avoid. Vandalia R. Co. *v.* State, (Ind. 1906) 76 N. E. 980.

Separate statement and numbering.— For the purpose of the application, each complete statement of facts assigning a cause why the command of the writ ought not to be obeyed is regarded as a separate defense and must be separately stated and numbered. People *v.* Wells, 89 N. Y. App. Div. 89, 85 N. Y. Suppl. 438; People *v.* Order of American Star, 53 N. Y. Super. Ct. 66. And the matter of defense should be so presented as to admit of single and distinct issues. People *v.* Baker, 14 Abb. Pr. (N. Y.) 19.

37. *Alabama.*—*Ex p.* Candee, 48 Ala. 386.

Illinois.— People *v.* Horton, 46 Ill. App. 434.

Maine.— Dane *v.* Derby, 54 Me. 95, 89 Am. Dec. 722.

Missouri.— See State *v.* Moss, 35 Mo. App. 441.

New Jersey.— State *v.* Jersey City Bd. of Public Works, 45 N. J. L. 465.

New York.— People *v.* Baker, 14 Abb. Pr. 19; People *v.* Board of Police, 9 Abb. Pr. 257, holding that a plea that relator was duly removed from office is not consistent with the plea that he was never duly appointed.

England.— Wright *v.* Fawcett, 4 Burr. 2041; Rex *v.* Cambridge, 4 Burr. 2008, 2 T. R. 456; Reg. *v.* Pomfret, 10 Mod. 107; Reg. *v.* Norwich, 2 Salk. 436; Rex *v.* York, 5 T. R. 66.

See 33 Cent. Dig. tit. "Mandamus," § 351.

By statute in some states inconsistent defenses may be interposed. People *v.* Lothrop, 3 Colo. 428.

Defenses held not to be repugnant see Evans *v.* Thomas, 32 Kan. 469, 4 Pac. 833; Rex *v.* Taunton St. James, Cowp. 413.

38. Brainard *v.* Staub, 61 Conn. 570, 24 Atl. 1040, nor at different times where both are pending at the same time.

The rule is otherwise in Louisiana. Union Oil Co. *v.* Campbell, 48 La. Ann. 1350, 20 So. 1007; Shaw *v.* Howell, 18 La. Ann. 195.

39. Silver *v.* People, 45 Ill. 224; Com. *v.* Thompson, 2 Leg. Chron. (Pa.) 394, both holding that a plea in abatement is waived by pleading other matter in bar. *Contra*, State *v.* Smith, (Mo. 1891) 15 S. W. 614.

40. State *v.* Jennings, 56 Wis. 113, 14 N. W. 28.

41. Amendment of return see *infra*, IX, E, 7.

42. State *v.* Jones, 10 Iowa 65; U. S. *v.* Lafayette County Ct., 26 Fed. Cas. No. 15,449, 5 Dill. 288 note. *Compare* Kephart *v.* People, 28 Colo. 73, 62 Pac. 946 (holding that where a plea in bar to an alternative writ is overruled, ordinarily respondent should be given permission to answer, but that the appellate court will not hold a denial of such permission to be an abuse of discretion where it does not appear what the nature of the answer was, or that any showing was made by respondent that properly invoked such discretion); Brunswick *v.* Dure, 59 Ga. 803.

Leave to file further return denied see State *v.* Lafayette County Ct., 41 Mo. 545.

43. State *v.* Williams, 99 Mo. 291, 12 S. W. 905; Johnston *v.* Cleaveland County, 67 N. C. 101.

issue a peremptory writ.[44] Although the alternative writ is amended after return, yet respondent will not be allowed to make a further return if no new matter is presented by the amendment.[45] If the original return is sufficient, the filing of an additional one in the nature of a demurrer will not affect the sufficiency of the former.[46]

j. Set-Off and Counter-Claim. Set-offs and counter-claims are not allowed at common law,[47] but the practice seems to be otherwise in some states.[48]

5. Pleadings Subsequent to Return — a. At Common Law. At common law before the statute of Anne and in those states where that statute was not adopted or similar statutes were not enacted, the return to an alternative writ of mandamus was conclusive. No reply or traverse was permitted and relator's only remedy was an action for damages for a false return,[49] or a criminal information for a false return,[50] and then if the return was falsified plaintiff not only recovered damages equivalent to the injury sustained, but the court awarded the peremptory writ.[51]

b. By Statute. But by the statute of Anne the rule was changed in England,[52] and it was enacted that the prosecutor or relator might plead to or traverse all or any of the material facts averred in the return, defendant having liberty to reply, take issue, or demur, and it was directed that such further proceedings might be had as might have been had if the prosecutor had brought his action on the case for a false return. Thus mandamus became in effect a personal action against defendant.[53] In the United States in some jurisdictions this statute has

44. People *v.* Pearson, 3 Ill. 189, 33 Am. Dec. 445; People *v.* Ovenshire, 41 How. Pr. (N. Y.) 164 [*criticizing* and *limiting* People *v.* New York C. Pl., 9 Wend. 429]; Sanson *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505; Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 595. And see People *v.* Judges Columbia C. Pl., 3 How. Pr. (N. Y.) 30. *Contra*, Com. *v.* Allegheny County Com'rs, 32 Pa. St. 218.

45. Brainard *v.* Staub, 61 Conn. 570, 24 Atl. 1040. *Compare* People *v.* Marsh, 21 N. Y. App. Div. 88, 47 N. Y. Suppl. 395.

46. Dane *v.* Derby, 54 Me. 95, 89 Am. Dec. 722.

47. Anderson County Ct. *v.* Stone, 18 B. Mon. (Ky.) 848; People *v.* Order of American Star, 53 N. Y. Super. Ct. 66. And see Leavenworth *v.* Leavenworth, etc., Water Co., 62 Kan. 643, 64 Pac. 66; State *v.* Wedge, 28 Nev. 36, 78 Pac. 760.

48. *Arkansas.*— Lusk *v.* Perkins, 48 Ark. 238, 2 S. W. 847; Cope *v.* Collins, 37 Ark. 649.

Indiana.— Florer *v.* State, 133 Ind. 453, 32 N. E. 829.

Michigan.— Aplin *v.* Shiawasse County, 74 Mich. 536, 42 N. W. 143.

Nebraska.— Stenberg *v.* State, 48 Nebr. 299, 67 N. W. 190; State *v.* Slocum, 34 Nebr. 368, 51 N. W. 969.

Tennessee.— State *v.* Alexander, 115 Tenn. 156, 90 S. W. 20.

49. *Alabama.*— Tallapoosa Com'rs' Ct. *v.* Tarver, 21 Ala. 661.

Delaware.— McCoy *v.* State, 2 Marv. 543, 36 Atl. 81; State *v.* Wilmington Bridge Co., 3 Harr. 540.

Louisiana.—State *v.* Susitanian Portuguese Soc., 15 La. Ann. 73.

Maine.— Dane *v.* Derby, 54 Me. 95, 89 Am. Dec. 722.

Maryland.— Harwood *v.* Marshall, 10 Md. 451; Brosius *v.* Reuter, 1 Harr. & J. 551, 2 Am. Dec. 534.

Mississippi.— Swan *v.* Gray, 44 Miss. 393; Beaman *v.* Leake County Bd. of Police, 42 Miss. 237; Swann *v.* Work, 24 Miss. 439; Attala County Bd. of Police *v.* Grant, 9 Sm. & M. 77, 47 Am. Dec. 102.

North Carolina.— Tucker *v.* Iredell County, 46 N. C. 451; State *v.* King, 23 N. C. 22.

Vermont.— Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146.

See 34 Cent. Dig. tit. "Mandamus," § 355.

Facts relevant to the subject of inquiry are the only facts which are taken to be true. Carroll *v.* Tishamingo County Bd. of Police, 28 Miss. 38.

On a rule to show cause why the alternative writ should not issue the rule as to the conclusive character of a return has no application as the cause shown under the rule to show cause is not a return to a mandamus in legal contemplation. State *v.* Section 29, Wright (Ohio) 559. See also U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167. In the case first cited the writ was ordered and on the return thereto the rule as to the conclusiveness of the return was applied. See Universal Church *v.* Hamilton County, Section Twenty-nine, 6 Ohio 445, 27 Am. Dec. 267.

50. Dane *v.* Derby, 54 Me. 95, 89 Am. Dec. 722.

51. Tallapoosa Com'rs' Ct. *v.* Tarver, 21 Ala. 661; Dane *v.* Derby, 54 Me. 95, 89 Am. Dec. 722; Beard *v.* Lee County, 51 Miss. 542.

The peremptory writ is of right when the return is falsified and there is a verdict for plaintiff. Buckley *v.* Palmer, 2 Salk. 430.

52. St. 9 Anne, c. 20.

53. U. S. *v.* Boutwell, 17 Wall. (U. S.) 604, 21 L. ed. 721.

been adopted[54] as a part of the common law,[55] or practices have been established by similar statutes under which the proceeding is like an ordinary action wherein the return is not conclusive and issues are made by pleading to the return or the return is traversed by proof.[56] If no issue is made on the return, however, by

Damages are awarded and the writ issues as in an action for a false return. State *v.* King, 23 N. C. 22.

54. See U. S. *v.* Boutwell, 17 Wall. (U. S.) 604, 21 L. ed. 721, as to the practice in Maryland.

55. Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146. But in Fitzhugh *v.* Custer, 4 Tex. 391, 51 Am. Dec. 728, it was held that the statute of Anne had not been adopted in that state and that no other statute had been enacted containing similar provisions, but that notwithstanding this the practice of considering the return to a rule to show cause why a mandamus should not issue as conclusive and thereby remitting the relator to an action on the case or to an information for the false return was repugnant to the system prevailing in that state and that there was no good reason why in the absence of statute as well as by statutory sanction a relator should be driven to another action in order to falsify a return if it is proper in any event to do this.

56. *Alabama.*— Longshore *v.* State, 137 Ala. 636, 34 So. 684.

Colorado.— Gillett *v.* People, 13 Colo. App. 553, 59 Pac. 72.

Illinois.— The proceeding is begun by petition and service of summons and no alternative writ issues but the issues are made by the petition, plea, replication, etc., as in other actions at law. Mayor *v.* Briggs, 194 Ill. 435, 62 N. E. 778; People *v.* Cook County, 180 Ill. 160, 54 N. E. 164; Highway Com'rs *v.* Gibson, 7 Ill. App. 231.

Indiana.— Potts *v.* State, 75 Ind. 336.

Iowa.— State *v.* Jones, 10 Iowa 65; Chance *v.* Temple, 1 Iowa 179.

Kansas.— The present action of mandamus is not only the old common-law proceeding of mandamus, but it is also the old common-law action on the case for the false return. It is the two proceedings combined. State *v.* Jefferson County, 11 Kan. 66.

Louisiana.—State *v.* Lusitanian Portuguese Soc., 15 La. Ann. 73, issue raised by return without answer or reply.

Mississippi.— Beard *v.* Lee County, 51 Miss. 542 (under a statute providing that the proceedings in mandamus shall be in all respects "like those in an ordinary action for the recovery of damages"); Haskins *v.* Scott County, 51 Miss. 406.

Missouri.— State *v.* Lockett, 54 Mo. App. 202.

New York.— People *v.* Beebe, 1 Barb. 379; People *v.* Vail, 1 Wend. 38. In People *v.* Order of American Star, 53 N. Y. Super. Ct. 66, it is held that under the statute then prevailing there was a verdict as in an action by defendant for a false return.

North Carolina.— Tucker *v.* Iredell County, 46 N. C. 451; State *v.* King, 23 N. C. 22.

Ohio.—State *v.* Union Tp., 9 Ohio St. 599, return deemed controverted without answer or reply.

Pennsylvania.—Adams *v.* Duffield, 4 Brewst. 9; Com. *v.* Norton, 3 Kulp 231.

Tennessee.— State *v.* Williams, 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418; State *v.* Marks, 6 Lea 12.

Virginia.— Com. *v.* Fairfax County Ct., 2 Va. Cas. 9.

Washington.— State *v.* McQuade, 36 Wash. 579, 79 Pac. 207, return deemed traversed.

West Virginia.— State *v.* Wyoming County Ct., 47 W. Va. 672, 35 S. E. 959, reply to new matter.

Wisconsin.— State *v.* Pierce County, 71 Wis. 321, 37 N. W. 231; State *v.* Eaton, 11 Wis. 29.

See 33 Cent. Dig. tit. "Mandamus," §§ 355, 365.

Framing issues.— In Michigan the only pleadings contemplated are relator's petition and respondent's answer or return. If relator desires to controvert the facts stated in the answer, issues may be framed under the direction of the trial court, and while for the purpose of framing these issues a trial court may permit relator to file a replication (Lewis *v.* Detroit Bd. of Education, 139 Mich. 306, 102 N. W. 756; Wagner *v.* Gladwin Cir. Judge, 131 Mich. 129, 91 N. W. 155), the more common practice is to dispense with the replication altogether and to state such issues in the form of questions on the coming in of the answer). Lewis *v.* Detroit Bd. of Education, *supra*; Webster *v.* Wheeler, 119 Mich. 601, 78 N. W. 657, holding that the answer of respondent should not be contradicted by affidavits, but only upon issues settled as above indicated. See also Just *v.* Wise Tp., 47 Mich. 511, 11 N. W. 294); and the filing of a replication, under the rule, is not a matter of right, and it is improper without an issue framed by the court. it is not considered a regular pleading in the case (Wagner *v.* Gladwin Cir. Judge, *supra*).

But the return of a judge is held to be conclusive. People *v.* Judge Wayne Cir. Ct., 23 Mich. 536; Cummings *v.* Armstrong, 34 W. Va. 1, 11 S. E. 742; Douglass *v.* Loomis, 5 W. Va. 542.

After reply, plea, or answer to the respondent's answer or return, where the issue is reached according to general rules of pleading in actions at law, if a *similiter* is omitted and the case proceeds to trial it is to be treated as if formal issues had been joined. Chicago, etc., R. Co. *v.* People, 79 Ill. App. 529 [*affirmed* in 179 Ill. 441, 53 N. E. 986]. There is no rejoinder where the issues are framed on the petition and answer without a replication. Lewis *v.* Detroit Bd. of Education, 139 Mich. 306, 102 N. W. 756; Just

traversing it or replying to new matter and the peremptory writ is demanded on the alternative writ and return or answer, such return, writ, or answer is taken as true,[57] unless the issue is raised by the return and a reply or answer to the return is not necessary, which is true in some jurisdictions, the return being traversable nevertheless by proof.[58] It has been held that the relators cannot both demur and reply to the return.[59] The reply constitutes an admission that the return upon its face is a sufficient answer.[60]

c. Sufficiency of Reply. Where the proceeding under the statute is at law, the petitioner should reply to the answer as in other cases at law and the filing of the ordinary replication to an answer in chancery is irregular and if taken advantage of in apt time might in a proper case be good cause for reversal.[61] Issue must be taken only on material matters,[62] and a plea which does not transverse

v. Wise Tp., 47 Mich. 511, 11 N. W. 294. And whether a statute providing that the relator shall plead to or traverse material facts stated in the return and that the respondent shall reply, take issue, etc., applies, or the rules of common-law pleading govern, the relators are not entitled to judgment because defendant failed to plead to what is termed the answer of the relators unless their last pleading tendered a new and controlling issue of fact, and if it does not do this, then under either system of pleading the cause is at issue and no other pleading by way of traverse can be made. State *v.* Lockett, 54 Mo. App. 202.

57. *Alabama.*— Longshore *v.* State, 137 Ala. 636, 34 So. 684; *Ex p.* Scudder-Gale Grocer Co., 120 Ala. 434, 25 So. 44.

Illinois.— People *v.* Lindblom, 215 Ill. 58, 74 N. E. 73; Roodhouse *v.* Briggs, 194 Ill. 435, 62 N. E. 778; People *v.* Crabb, 156 Ill. 155, 40 N. E. 319. It is not necessary for respondent to submit any proof of such matters as are not denied by the reply. Chicago *v.* People, 114 Ill. App. 145.

Louisiana.— See State *v.* Burthe, 39 La. Ann. 328, 1 So. 652.

Mississippi.— Beard *v.* Lee County, 51 Miss. 542.

Nebraska.— State *v.* Cathers, 25 Nebr. 250, 41 N. W. 182, holding that if the answer or return is not sufficient the writ will issue.

North Carolina.— Tucker *v.* Iredell County, 46 N. C. 451, holding that where the return admits a material allegation of the petition but avers new matter, the issue should be taken on the new matter and not on the admitted facts, in order to avail petitioner in falsifying the return, otherwise the new matter will be taken as true.

West Virginia.— State *v.* Wyoming County Ct., 47 W. Va. 672, 35 S. E. 959, requiring a replication to new matter, as in the case last above.

See 33 Cent. Dig. tit. "Mandamus," § 355.

In Michigan if no issues are framed the proceeding is disposed of on the issue raised by the petition and answer, and in determining this issue it is assumed that all averments of fact in the answer and all material allegations of the petition not specifically answered by the respondent are true as alleged. Indiana Road Mach. Co. *v.* Keeney, (1907) 110 N. W. 530; Lewis *v.* Detroit Bd. of Education, 139 Mich. 306, 102 N. W. 756; Merrill *v.* Gladwin County, 61 Mich. 95, 27 N. W. 866; Loomis *v.* Rogers Tp., 53 Mich. 135, 18 N. W. 596; Fletcher *v.* Alpena Cir. Judge, 136 Mich. 511, 99 N. W. 748; Jackson, etc., Traction Co. *v.* Railroad Com'rs, 128 Mich. 164, 87 N. W. 133; Keeler *v.* Deo, 117 Mich. 1, 75 N. W. 145; People *v.* Ingham County, 36 Mich. 416.

58. *California.*— Fowler *v.* Pierce, 2 Cal. 165, no replication unless directed by the court.

Louisiana.—Borgstede *v.* Clarke, 5 La. Ann. 291, no traverse necessary.

Nebraska.— State *v.* Knieval, 5 Nebr. (Unoff.) 219, 97 N. W. 798.

New York.— People *v.* Order of American Star, 53 N. Y. Super. Ct. 66, no replication necessary.

Ohio.— State *v.* Union Tp., 9 Ohio St. 599, no replication permitted.

Virginia.— Com. *v.* Fairfax County Ct., 2 Va. Cas. 9.

Washington.— State *v.* McQuade, 36 Wash. 579, 79 Pac. 207.

Wisconsin.— State *v.* Pierce County, 71 Wis. 321, 37 N. W. 231, where the return is merely a denial of the material allegation.

See 33 Cent. Dig. tit. "Mandamus," § 365.

Submission without proof.— In any event if the matter is submitted on the petition or alternative writ and the return or answer to the alternative writ without proof, the return will be taken as true. Sherer *v.* Lassen County Super. Ct., 96 Cal. 653, 31 Pac. 565; People *v.* Lindblom, 215 Ill. 58, 74 N. E. 73; People *v.* Herser, 172 Ill. 271, 50 N. E. 230 (where all the material allegations of the petition are denied); People *v.* Danville, 147 Ill. 127, 35 N. E. 154.

59. People *v.* Vail, 1 Wend. (N. Y.) 38.

60. People *v.* Davis, 39 Ill. App. 162; People *v.* Metropolitan Police Bd., 26 N. Y. 316; People *v.* Finger, 24 Barb. (N. Y.) 341. But see Gillett *v.* People, 13 Colo. App. 553, 59 Pac. 72.

61. Roodhouse *v.* Briggs, 194 Ill. 435, 62 N. E. 778; Highway Com'rs *v.* Gibson, 7 Ill. App. 231.

62. Tucker *v.* Iredell County, 46 N. C. 451.

Matters arising pending the proceeding may be pleaded to the return. People *v.* Baker, 35 Barb. (N. Y.) 105.

or confess and avoid the material facts set up in the return or answer is bad on demurrer.[63]

6. Motions and Demurrers[64] **— a. Motion to Quash or Dismiss** — (i) *Alternative Writ.* After the issuance of an alternative writ it is proper in most jurisdictions to move to quash or dismiss the writ.[65] The motion is the nature of a demurrer.[66] It may be heard before the return of the writ,[67] or may be made after the return.[68] But when the motion is made after a return, defendant cannot rely upon the absence of an averment in the petition, the existence of which was admitted by the return, unless the return is withdrawn.[69] The writ cannot be quashed for any matter involving the merits,[70] nor because of a formal defect

The party cannot seek other relief in his reply to the answer to the original application. Grier *v.* David, 4 Quebec Pr. 373.

63. State *v.* Eaton, 11 Wis. 29.

The return being insufficient, a traverse to it is a vain thing, because the matter of the return ought not to have been put in issue, and therefore the traverse ought not to be received. Com. *v.* Fairfax County, 2 Va. Cas. 9.

64. **Motion for peremptory writ** see *infra*, IX, K, 4.

65. *California.*— Kahn *v.* San Francisco, (1886) 12 Pac. 478; Kahn *v.* Bauer, (1886) 12 Pac. 477; People *v.* Bartlett, 67 Cal. 156, 7 Pac. 417.

Indiana.—State *v.* Commercial Ins. Co., 158 Ind. 680, 64 N. E. 466.

Maine.— Dane *v.* Derby, 54 Me. 95, 89 Am. Dec. 722.

Maryland.— Harwood *v.* Marshall, 10 Md. 451.

Minnesota.— State *v.* Macdonald, 29 Minn. 440, 13 N. W. 671.

Mississippi.— Haskine *v.* Scott County, 51 Miss. 406.

Montana.— State *v.* Lewis County, etc., Dist. Ct. Dept. No. 1, 29 Mont. 265, 74 Pac. 498; State *v.* Ledwidge, 27 Mont. 197, 70 Pac. 511; State *v.* Hogan, 22 Mont. 384, 56 Pac. 818.

New Jersey.— Fairbank *v.* Sheridan, 43 N. J. L. 82.

New York.— People *v.* Hayes, 106 N. Y. App. Div. 563, 94 N. Y. Suppl. 754; People *v.* Oswego County, 50 Hun 105, 3 N. Y. Suppl. 751, 15 N. Y. Civ. Proc. 379; People *v.* Brotherhood of Stationary Engineers, 12 N. Y. Suppl. 362, 19 N. Y. Civ. Proc. 175; People *v.* Physicians, etc., College, 7 How. Pr. 290.

North Carolina.— McCoy *v.* Harnett County, 50 N. C. 265.

Pennsylvania.— Lengel *v.* Stump, 1 Woodw. 399. But see Copland *v.* Lancaster County Bank, 5 Lanc. Bar, Febr. 14, 1874.

West Virginia.— State *v.* Wood County Ct., 33 W. Va. 589, 11 S. E. 72; Doolittle *v.* Cabell County Ct., 28 W. Va. 158.

Wisconsin.— State *v.* Clifton, 113 Wis. 107, 88 N. W. 1019; State *v.* Bergenthal, 72 Wis. 314, 39 N. W. 566; State *v.* Sauk County Sup'rs, 70 Wis. 485, 36 N. W. 396; State *v.* Clough, 69 Wis. 369, 34 N. W. 399; State *v.* Milwaukee, 22 Wis. 397; State *v.* Slavin, 11 Wis. 153; State *v.* Hastings, 10 Wis. 518; State *v.* Lean, 9 Wis. 279.

Canada.— Reg. *v.* Dartmouth, 16 Nova Scotia 173.

See 33 Cent. Dig. tit. "Mandamus," § 338.

In Oklahoma, under the statute, no motion or demurrer is permissible. Beadles *v.* Fry, 15 Okla. 428, 82 Pac. 1041, 2 L. R. A. N. S. 855.

Second writ.— After the quashing of the writ a second writ may issue. State *v.* Trimbell, 12 Wash. 440, 41 Pac. 183.

A motion to quash the complaint, where it takes the place of an alternative writ, is proper where it is defective in matters of substance. But material defects therein cannot be taken advantage of by a mere motion to dismiss. Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146.

66. Brainard *v.* Staub, 61 Conn. 570, 24 Atl. 1040; State *v.* Stockwell, 7 Kan. 98; People *v.* Physicians, etc., College, 7 How. Pr. (N. Y.) 290; State *v.* Wood County Ct., 33 W. Va. 589, 11 S. E. 72. See also State *v.* Lean, 9 Wis. 279.

67. Harwood *v.* Marshall, 10 Md. 451; State *v.* Lean, 9 Wis. 279.

68. *Arkansas.*— Hawkins *v.* More, 3 Ark. 345.

Mississippi.— Haskins *v.* Scott County, 51 Miss. 406.

New York.—Commercial Bank *v.* New York Canal Com'rs, 10 Wend. 25.

Vermont.— Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146.

England.— Rex *v.* Chester, Holt K. B. 438. *Contra*, Rex *v.* York, 5 T. R. 66.

But see Fuller *v.* Plainfield Academic School, 6 Conn. 532; Reg. *v.* Dartmouth, 16 Nova Scotia 173.

69. Brainard *v.* Staub, 61 Conn. 570, 24 Atl. 1040.

70. People *v.* Oswego County, 50 Hun (N. Y.) 105, 3 N. Y. Suppl. 751, 15 N. Y. Civ. Proc. 379.

The statute of limitations cannot be urged by the motion but only by demurrer or return. People *v.* Bingham, 114 N. Y. App. Div. 170, 99 N. Y. Suppl. 593. But see State *v.* Lewis, etc., County Dist. Ct. Dept. No. 1, 29 Mont. 265, 74 Pac. 498.

The constitutionality of the statute under which the proceeding is instituted will not be inquired into on a motion to quash. Lengel *v.* Stump, 1 Woodw. (Pa.) 399.

A defect of parties cannot be considered. State *v.* Bergenthal, 72 Wis. 314, 39 N. W. 566.

capable of amendment.[71] The question whether mandamus is the proper remedy,[72] including whether the relator has another legal remedy,[73] cannot be raised on the motion. On the other hand it has been held that the sufficiency of the affidavit or petition[74] and the question of laches[75] may be considered. On overruling the motion leave to answer should be granted.[76]

(II) *Return or Answer.* In most jurisdictions a motion may be made to quash a return or answer.[77] Such a motion is proper where the answer or return contains no defense whatever,[78] or is false, frivolous, or calculated to delay the remedy.[79] In some jurisdictions, however, all formal objections to the writ must be taken by a motion to quash.[80] The motion does not reach back to defects in the writ.[81]

b. Motion to Strike Out Matter. In most jurisdictions where mandamus is regarded as an ordinary action at law, it seems that it is proper to move to strike out immaterial, impertinent, or scandalous matter in the writ[82] or complaint.[83] So where a part of an answer or return is immaterial or impertinent, it may properly be expunged on motion.[84]

c. Demurrers[85] — (I) *To Petition.* While a demurrer to the petition or complaint is recognized as proper practice in some jurisdictions,[86] it is held in some tsates that where the petition is for an alternative writ the writ takes the place of a complaint and a demurrer must be to the writ rather than the petition.[87] But

The writ will not be quashed because it is directed to more persons than necessary.— State *v.* Leon, 66 Wis. 199, 28 N. W. 140.

71. Doolittle *v.* Cabell County Ct., 28 W. Va. 158.

An irregular provision for a return in the writ may be amended on a motion to quash. People *v.* Brotherhood of Stationary Engineers, 12 N. Y. Suppl. 362, 19 N. Y. Civ. Proc. 175.

Facts not specifically stated.— The writ should not be quashed merely because the facts are not stated as specifically as they should be, the remedy being a motion requiring the facts to be more specifically stated. Fornoff *v.* Nash, 23 Ohio St. 335.

72. People *v.* Oswego County, 50 Hun (N. Y.) 105, 3 N. Y. Suppl. 751, 15 N. Y. Civ. Proc. 379.

73. People *v.* Oswego County, 50 Hun (N. Y.) 105, 3 N. Y. Suppl. 751, 15 N. Y. Civ. Proc. 379.

74. State *v.* Hogan, 22 Mont. 384, 56 Pac. 818; State *v.* Wood County Ct., 33 W. Va. 589, 11 S. E. 72.

75. State *v.* Lewis, etc., County Dist. Ct. Dept. No. 1, 29 Mont. 265, 74 Pac. 498.

76. State *v.* Lean, 9 Wis. 279.

77. Longshore *v.* State, 137 Ala. 636, 34 So. 684; Crans *v.* Francis, 24 Kan. 750; State *v.* Stockwell, 7 Kan. 98; Gallager *v.* Jersey City Bd. of Public Works, 45 N. J. L. 465; State *v.* Griscom, 8 N. J. L. 136, peremptory writ. But see Adams *v.* Duffield, 4 Brewst. (Pa.) 9. *Contra*, State *v.* Giljohann, 111 Wis. 377, 87 N. W. 245.

78. Crans *v.* Francis, 24 Kan. 750.

Where the answer sets up any sufficient reason for refusing the writ, although in other respects it is evasive and irresponsive, it should not be quashed as a whole. Legg *v.* Annapolis, 42 Md. 203.

79. Gallager *v.* Jersey City Bd. of Public Works, 45 N. J. L. 465.

80. American Casualty Ins., etc., Co. *v.* Fyler, 60 Conn. 448, 22 Atl. 494, 25 Am. St. Rep. 337; Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336.

81. State *v.* Hiram Grand Lodge F. & A. M., 2 Pennew. (Del.) 21, 43 Atl. 520.

82. Cheney *v.* State, 165 Ind. 121, 74 N. E. 892.

83. Copeland *v.* State, 126 Ind. 51, 25 N. E. 866.

84. Brainard *v.* Staub, 61 Conn. 570, 24 Atl. 1040; Erikson *v.* Alpena Cir. Judge, 138 Mich. 103, 101 N. W. 63.

85. General rules see PLEADING.

86. McCrary *v.* Beaudry, 67 Cal. 120, 7 Pac. 264; Neal Loan, etc., Co. *v.* Chastain, 121 Ga. 500, 49 S. E. 618; Mattoon *v.* Mattoon Tile Co., 97 Ill. App. 56; Sansom *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505; Singleton *v.* Austin, 27 Tex. Civ. App. 88, 65 S. W. 686; Nocona Bank *v.* March, (Tex. Civ. App. 1899) 51 S. W. 267; Benson *v.* Screwmen's Benev. Assoc., 2 Tex. Civ. App. 66, 21 S. W. 562.

Affidavits filed in support of the petition cannot be considered. School Trustees *v.* People, 121 Ill. 552, 13 N. E. 526; Rowe *v.* People, 96 Ill. App. 438.

A demurrer to an application stands as against an amended application.— Leatherwood *v.* Hill, (Ariz. 1906) 89 Pac. 521.

87. *Colorado.*— Nance *v.* People, 25 Colo. 252, 54 Pac. 631.

Indiana.— Johnson *v.* Smith, 64 Ind. 275.

Iowa.— State *v.* Johnson County Bd. of Equalization, 10 Iowa 157, 74 Am. Dec. 381. But see Harwood, etc., R. Co. *v.* Case, 37 Iowa 692.

Maine.— Dane *v.* Derby, 54 Me. 95, 89 Am. Dec. 722.

Nebraska.— State *v.* Home St. R. Co., 43 Nebr. 830, 62 N. W. 225. But see State *v.* Grand Island, etc., R. Co., 27 Nebr. 694, 43

such a demurrer has been held proper when the issuance of an alternative writ has been waived.[88] It has been held that a demurrer to the petition cannot be extended so as to include the writ.[89]

(II) *To Alternative Writ.* While it has been held in a few cases that a demurrer does not lie to an alternative writ,[90] yet in most jurisdictions, especially where the alternative writ is considered as a complaint, a demurrer lies as if the writ was a complaint in an ordinary action at law.[91] Where, by statute, the practice in mandamus proceedings is essentially the same as in ordinary actions at law, it would seem that a petition or writ is subject to demurrer upon the same grounds as is a complaint in an ordinary action at law.[92] The objection must of course appear upon the face of the writ.[93] It is not a ground of demurrer that relator has mistaken his remedy,[94] nor that the verification of the complaint is insuffi-

N. W. 419; State *v.* Chicago, etc., R. Co., 19 Nebr. 476, 27 N. W. 434.

Pennsylvania.— Plymouth Tp. Com'rs *v.* Sweeney, 10 Pa. Dist. 617, 10 Kulp 293.

See 33 Cent. Dig. tit. "Mandamus," § 341.

As mere informality.— A demurrer to the affidavit or complaint, instead of to the writ, is a mere informality, since the writ must recite the affidavit or verify the complaint. Johnson *v.* Smith, 64 Ind. 275.

88. Wren *v.* Indianapolis, 96 Ind. 206; Pfister *v.* State, 82 Ind. 382.

In Missouri while the regular course of procedure is to let the alternative writ issue and then raise questions arising on its face by a motion to quash, yet if defendant waives the issuance of the alternative writ and demurs to the petition and both parties prefer to present the issues in that form, the court will consider them. State *v.* Cook, 171 Mo. 348, 71 S. W. 829.

89. Gill *v.* Ripley County, 72 Ind. 266.

90. U. S. *v.* Hitchcock, 19 App. Cas. (D. C.) 333; People *v.* Harris, 6 Abb. Pr. (N. Y.) 30.

91. *Colorado.*— Nance *v.* People, 25 Colo. 252, 54 Pac. 631; Vincent *v.* Hinsdale County, 12 Colo. App. 40, 54 Pac. 393.

Florida.— State *v.* Jennings, 47 Fla. 302, 35 So. 986; State *v.* Board of State Canvassers, 17 Fla. 29.

Illinois.— People *v.* Salomon, 46 Ill. 333.

Indiana.— State *v.* Warren County, 136 Ind. 207; Potts *v.* State, 75 Ind. 336; Boone County *v.* State, 61 Ind. 379.

Iowa.— Meyer *v.* Dubuque County, 43 Iowa 592, holding that a demurrer and not a motion to dismiss is proper where there is an insufficient statement of facts.

New Jersey.— Fairbank *v.* Sheridan, 43 N. J. L. 82.

New York.— People *v.* Queens County, 142 N. Y. 271, 36 N. E. 1062.

Oregon.— Elliott *v.* Oliver, 22 Oreg. 44, 29 Pac. 1.

Pennsylvania.— Com. *v.* Allegheny County, 37 Pa. St. 277.

Washington.— State *v.* Brewer, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858.

Canada.— Reg. *v.* Dartmouth, 17 Nova Scotia 311.

See 33 Cent. Dig. tit. "Mandamus," § 341 *et seq.*

But see State *v.* Menzie, 17 S. D. 535, 97 N. W. 745.

Contra.— Dane *v.* Derby, 54 Me. 95, 89 Am. Dec. 722.

In Indiana it is common practice to demur both to the writ and the application. In such a case the facts alleged in the verified application upon which the alternative writ rests may be, when necessary, considered in order to supplement those embraced in the writ, and the application may be considered in connection with the alternative writ to which the demurrer may have been addressed. Wampler *v.* State, 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829. On a demurrer to the alternative writ, the question raised is not, as is the case in an ordinary action, whether the relator under the facts is entitled to some form of relief, but is as to whether he is entitled to the specific relief prayed for. State *v.* Indianapolis Union R. Co., 160 Ind. 45, 66 N. E. 163, 60 L. R. A. 831.

Certainty of allegation is requisite, but if the alternative writ states the facts on which the demand is based with sufficient precision to express the right of the relator and the duty of the respondent in such a manner that the ordinary mind may easily apprehend them, this is all the certainty required to defeat a demurrer. State *v.* Atlantic Coast Line R. Co., 48 Fla. 114, 37 So. 652.

A demurrer to the writ brings before the court the whole merits of the case as therein presented. People *v.* Chicago, 51 Ill. 17, 2 Am. Rep. 278.

A demurrer is practically equivalent to a motion to quash.— State *v.* Brewer, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858.

Withdrawal of demurrer.— Where the question of law involved in the case is fully raised by demurrer, and must necessarily be decided before entering upon the consideration of questions of fact, a motion for leave to withdraw a demurrer and file an answer is properly overruled. State *v.* Fremont, etc., R. Co., 22 Nebr. 313, 35 N. W. 118.

If the relator is entitled to any relief whatever, a demurrer to the writ does not lie. Meyer *v.* Beaver, 9 S. D. 168, 68 N. W. 310.

Demurrer treated as return see *supra,* IX, E, 4, a, note 67.

92. See PLEADING.

93. Territory *v.* McPherson, 6 Dak. 27, 50 N. W. 351.

94. Crawford *v.* Carson, 35 Ark. 565.

cient;[95] nor is the question of laches raised by a demurrer,[96] or the failure to issue the writ in the name of the state.[97]

(III) *To Return or Answer.* In a proper case, in most of the states, a demurrer lies to the return or answer.[98] It is not necessary to demur, however, where the return is a nullity or where it does not traverse any of the facts alleged in the writ.[99] It has been held, in at least one jurisdiction, that a special demurrer will not lie;[1] while in another jurisdiction it has been held that objections to form and the like cannot be urged by a general, but only by a special, demurrer.[2]

(IV) *To Reply.* The reply is generally subject to demurrer, and such demurrer reaches back to and searches the prior pleadings.[3]

(V) *General Rules.* The demurrer is governed by the general rules applicable to demurrers in actions at law in general,[4] such as that it must specifically state the grounds of demurrer,[5] and that it operates as an admission of all well-pleaded allegations of fact in the pleading demurred to,[6] but does not

95. Gill *v.* Ripley County, 72 Ind. 268.

96. People *v.* Marsh, 21 N. Y. App. Div. 88, 47 N. Y. Suppl. 395.

97. People *v.* Lewis, 27 Misc. (N. Y.) 469, 59 N. Y. Suppl. 248, holding that the objection must be taken by a special motion before a general term.

98. *Connecticut.*— Williams *v.* New Haven, 68 Conn. 263, 36 Atl. 61; Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17; New Haven, etc., Co. *v.* State, 44 Conn. 376.

Delaware.— See Knight *v.* Ferris, 6 Houst. 283.

Florida.— State *v.* Jennings, 47 Fla. 302, 35 So. 986; State *v.* Jacksonville, 22 Fla. 21; State *v.* Suwanee County, 21 Fla. 1.

Illinois.— Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33.

Indiana.— State *v.* Perry, 159 Ind. 508, 65 N. E. 528; Potts *v.* State, 75 Ind. 336; Boone County *v.* State, 61 Ind. 379.

Maryland.— Barney *v.* State, 42 Md. 480; Hardcastle *v.* Maryland, etc., R. Co., 32 Md. 32.

Massachusetts.— Lunt *v.* Davison, 104 Mass. 498.

Missouri.— State *v.* Moss, 35 Mo. App. 441.

Nebraska.— State *v.* Chicago, etc., R. Co., 19 Nebr. 476, 27 N. W. 434.

New Jersey.— Silverthorne *v.* Warren R. Co., 33 N. J. L. 173.

New York.— People *v.* Bricklayers' Benev., etc., Union, 20 N. Y. App. Div. 8, 46 N. Y. Suppl. 648; People *v.* Beebe, 1 Barb. 379; People *v.* Champion, 16 Johns. 61.

Oklahoma.— Finley *v.* Territory, 12 Okla. 621, 73 Pac. 273.

Pennsylvania.— Com. *v.* Allegheny County, 32 Pa. St. 218; German Reformed Church *v.* Com., 3 Pa. St. 282; Plymouth Tp. Com'rs *v.* Sweeney, 10 Pa. Dist. 617, 10 Kulp 293; Com. *v.* School Directors, 4 Pa. Dist. 314.

Canada.— Dartmouth *v.* Reg., Cass Dig. 515. *Contra,* Reg. *v.* Wells, 17 U. C. Q. B. 545.

See 33 Cent. Dig. tit. "Mandamus," § 360½.

The question whether the return must be sworn to cannot be raised by a demurrer. State *v.* Maxwell, 19 Fla. 31.

Prolixity in the return is not ground for a demurrer, although it may be grounds for a motion to strike out. People *v.* Baker, 35 Barb. (N. Y.) 105.

Where a portion of a return is alleged to be immaterial or argumentative, the remedy is not by demurrer, but by motion to strike out. People *v.* Ft. Edward Highway Com'rs, 11 How. Pr. (N. Y.) 89.

The demurrer may be interposed by the relator since he is the real party in interest. State *v.* Madison County, 92 Ind. 133.

Where distinct defenses are set up in a return to an alternative writ, one or more may be demurred to and issue taken on the others. State *v.* Suwannee County, 21 Fla. 1; State *v.* Chittenden, 107 Wis. 354, 83 N. W. 635.

99. People *v.* Miner, 46 Ill. 384; People *v.* Salomon, 46 Ill. 333; Sansom *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505.

1. People *v.* New York C. Pl., 9 Wend. (N. Y.) 429 [*criticized* and *limited* in People *v.* Ovenshire, 41 How. Pr. (N. Y.) 164]; Vail *v.* People, 1 Wend. (N. Y.) 38; People *v.* Champion, 16 Johns. (N. Y.) 61.

If any one of the defenses set up in the answer is sufficient, a general demurrer to the whole answer will be overruled. School Dist. No. 4 *v.* People, 106 Ill. App. 620.

2. People *v.* Chicago Bd. of Trade, 224 Ill. 370, 79 N. E. 611; People *v.* Holden, 91 Ill. 446. See also State *v.* Moss, 35 Mo. App. 44.

3. State *v.* Crites, 48 Ohio St. 142, 26 N. E. 1052; Morgenthaler *v.* Crites, 4 Ohio Cir. Ct. 485, 2 Ohio Cir. Dec. 663.

4. See Pleading.

5. Eden Dist. Tp. *v.* Templeton Independent Dist., 72 Iowa 687, 34 N. W. 472, holding that a demurrer on the ground that "the facts stated therein do not entitle the plaintiff to the relief demanded" is not sufficiently specific.

6. *Georgia.*— Justices Houston County Inferior Ct. *v.* Felder, 23 Ga. 212.

Illinois.— People *v.* Cook County, 176 Ill. 576, 52 N. E. 334; Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33; People *v.* Hatch, 33 Ill. 9.

Indiana.— Gill *v.* State, 72 Ind. 266.

Iowa.— Preston *v.* Marion Independent

admit conclusions of law.[7] A demurrer to the answer or reply will be carried back and sustained to the first defect in the pleading of either party.[8] Affidavits filed in support of the pleading demurred to will not be considered.[9] On sustaining or overruling a demurrer the practice is generally the same as in other actions at law,[10] and leave will ordinarily be given to plead over.[11] Answering over to the merits after a demurrer to the form of the petition is overruled is a waiver of the ground of demurrer.[12]

d. Waiver of Objections. The general rule is that objections which are merely

School Dist. Bd. of Education, 124 Iowa 355, 100 N. W. 54; Henry *v.* Taylor, 57 Iowa 72, 10 N. W. 308.

Missouri.— State *v.* Conrad, 147 Mo. 654, 49 S. W. 857.

Pennsylvania.— Com. *v.* Allegheny County Com'rs, 37 Pa. St. 277.

Wisconsin.— State *v.* Lean, 9 Wis. 279.

See 33 Cent. Dig. tit. "Mandamus," §§ 343, 363.

Contra.— Beasly *v.* Ridout, 94 Md. 641, 52 Atl. 61.

7. *Connecticut.*— Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17.

Nebraska.— State *v.* Jaynes, 19 Nebr. 161, 26 N. W. 711.

Oregon.— State *v.* Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166.

Vermont.— Page *v.* McClure, (1906) 64 Atl. 451.

Wisconsin.— State *v.* Edgerton School Dist. No. 8, 76 Wis. 177, 44 N. W. 967, 20 Am. St. Rep. 41, 7 L. R. A. 330.

See 33 Cent. Dig. tit. "Mandamus," §§ 343, 363.

Illustrations.— Under the rule that a demurrer admits probative facts only, and not conclusions at all, an alternative writ of mandamus to a municipal judge to issue bench warrants, reciting merely that he neglects to issue them "as required by law," does not, as is necessary, show that it is incumbent on such judge to issue bench warrants, but states merely a legal conclusion. State *v.* Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166. If any pleading misstates the effect of a statute, the adverse party in demurring does not admit the correctness of the construction claimed or that the statute imposes the obligation or confers the rights which the party alleges. Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17.

8. *Colorado.*— Hover *v.* People, 17 Colo. App. 375, 68 Pac. 679.

Connecticut.— Meriden Britannia Co. *v.* Whedon, 31 Conn. 118.

Florida.— State *v.* Finley, 30 Fla. 302, 11 So. 500.

Illinois.— People *v.* Chytraus, 183 Ill. 190, 55 N. E. 666; Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33; People *v.* McCormick, 106 Ill. 184.

Maryland.— Creager *v.* Hooper, 83 Md. 490, 35 Atl. 159.

Nebraska.— State *v.* Sams, 71 Nebr. 669, 99 N. W. 544.

New York.— People *v.* Ransom, 2 N. Y. 490; People *v.* Baker, 35 Barb. 105; People *v.* Welde, 28 Misc. 582, 59 N. Y. Suppl. 1030.

Ohio.— State *v.* Crites, 48 Ohio St. 142, 26 N. E. 1052; Morgenthaler *v.* Crites, 4 Ohio Cir. Ct. 485, 2 Ohio Cir. Dec. 663.

Pennsylvania.— Miller *v.* Canal Com'rs, 21 Pa. St. 23; Lansdowne Borough *v.* Upper Darby Tp., 9 Pa. Dist. 694; Com. *v.* Pennsylvania R. Co., 6 Pa. Dist. 266.

West Virginia.— Doolittle *v.* Cabell County Ct., 28 W. Va. 158.

Wisconsin.— State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 3 N. W. 760; State *v.* Elba Sup'rs, 34 Wis. 169.

See 33 Cent. Dig. tit. "Mandamus," §§ 364, 368.

The defect in a declaration to which a demurrer to a subsequent pleading will be carried back must be one for which the judgment should be arrested, and not otherwise. People *v.* Crabb, 156 Ill. 155, 40 N. E. 319.

9. State *v.* Wedgem, 27 Nev. 61, 72 Pac. 817.

10. See cases cited *infra*, this note.

When a demurrer is sustained to an alternative writ of mandamus because several causes of action are improperly united, plaintiff can proceed only by filing an amended complaint containing the cause of action which he elects to pursue. State *v.* Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166.

On overruling demurrer.— Since an alternative mandamus is treated as a declaration, the like effect will be given to the overruling of a demurrer to it, and relators will be deemed to have been conclusively adjudged to be entitled to the relief demanded. Hopper *v.* Bergen County, 52 N. J. L. 313, 314, 19 Atl. 383.

11. *Colorado.*— Denver *v.* Hayden, 13 Colo. App. 36, 56 Pac. 201.

Illinois.— People *v.* Illinois Cent. R. Co., 62 Ill. 510.

Iowa.— State *v.* Jones, 10 Iowa 65.

Louisiana.— Union Oil Co. *v.* Campbell, 48 La. Ann. 1350, 20 So. 1007.

Maryland.—Robey *v.* Prince George's County, 92 Md. 150, 48 Atl. 48, petition not dismissed after overruling demurrer to answer where questions remain to be decided. But see Hooper *v.* New, 85 Md. 565, 37 Atl. 424.

Nebraska.— Long *v.* State, 17 Nebr. 60, 22 N. W. 120.

New Jersey.— Hopper *v.* Bergen County, 52 N. J. L. 313, 19 Atl. 383.

North Carolina.—Perry *v.* Chatham County, 130 N. C. 558, 41 S. E. 787.

But see Com. *v.* Dickinson, 83 Pa. St. 458.

12. Illinois Cent. R. Co. *v.* People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119. See also Chicago Great Western R. Co. *v.* People, 179 Ill. 441, 53 N. E. 986.

formal or technical must be made at the first opportunity or they will be waived, but that objections to defects of substance may be taken at any time.[13] The failure to demur to the alternative writ does not waive the right to object on appeal that it states no facts warranting relief.[14]

7. Amendment. The general statutes of amendments are applied to mandamus proceedings as to other civil remedies or actions between the parties.[15] The relation,[16] petition, or other pleading,[17] or the application,[18] or affidavit upon which the writ is sought, is amendable,[19] and defects which might have been cured if objection had been made in apt time will be taken to have been cured by amend-

13. *Colorado.*— Gillett *v.* People, 13 Colo. App. 553, 59 Pac. 72, holding that a defective writ may be cured by answer.

Connecticut.—Fuller *v.* Plainfield Academic School, 6 Conn. 532.

Delaware.— Knight *v.* Ferris, 6 Houst. 283.

Illinois.— People *v.* Mt. Morris, 145 Ill. 427, 34 N. E. 144; People *v.* Davis, 93 Ill. 133; Illinois, etc., Canal *v.* People, 12 Ill. 248, 52 Am. Rep. 488.

Indiana.—Indiana Natural Gas, etc., Co. *v.* State, 162 Ind. 690, 71 N. E. 133.

Montana.— State *v.* Weston, 31 Mont. 218, 78 Pac. 487, holding that the objection that mandamus is prematurely sought may be waived by participating in the action.

New York.— People *v.* Fulton County, 14 Barb. 52; People *v.* Ft. Edward Highway Com'rs, 11 How. Pr. 89.

Formal defects in the answer are waived by failure to demur. People *v.* Lothrop, 3 Colo. 428.

14. Nance *v.* People, 25 Colo. 252, 54 Pac. 631; Denver *v.* Hayden, 13 Colo. App. 36, 56 Pac. 201. But see State *v.* Moss, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373, holding that the objection that no cause of action is stated was waived by a failure to demur and the filing of an answer.

15. State *v.* Bailey, 7 Iowa 390 (holding that, although the proceeding in Iowa was regarded as criminal in part, being so in form and name and also in some measure as it looks to a violation of official duty, in substance and real nature it was a civil remedy and the great reason which forbade the amendment of an indictment did not apply); State *v.* Baggot, 96 Mo. 63, 8 S. W. 737; People *v.* Marsh, 21 N. Y. App. Div. 88, 47 N. Y. Suppl. 395.

Amendments allowed: Misnomer in the names of the applicants. People *v.* New York Civ. Service Bd., 17 Abb. N. Cas. (N. Y.) 64; *In re* Stormont County, etc., High School Bd., 45 U. C. Q. B. 460. Entitling proceedings in the name of the government. Dancy *v.* Clark, 24 App. Cas. (D. C.) 487; Morris *v.* State, 94 Ind. 565; Brower *v.* O'Brien, 2 Ind. 423; Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794; Runion *v.* Latimer, 6 S. C. 126.

Amendment of pleadings generally see Pleading.

Amendment by joining additional parties respondent see *supra*, IX, C, 3, a.

16. State *v.* Elwood, 11 Wis. 17; State *v.* Hastings, 10 Wis. 518.

17. *Colorado.*— Denver School Dist. No. 1 *v.* Arapahoe County School Dist. No. 7, 33 Colo. 43, 78 Pac. 690.

Iowa.— State *v.* Bailey, 7 Iowa 390, as to amendment of information.

Missouri.— State *v.* Baggott, 96 Mo. 63, 8 S. W. 737, amendment of prayer.

New York.— People *v.* Marsh, 21 N. Y. App. Div. 88, 47 N. Y. Suppl. 395, amendments discretionary.

Pennsylvania.— Neubert *v.* Armstrong Water Co., 211 Pa. St. 582, 61 Atl. 123 (holding that where the several prayers of a petition for mandamus to enforce the right to inspect the books and papers of a corporation show that the purpose of a proceeding was to ascertain the value of the shares of stock owned by the petitioner, although this purpose was not specifically stated in the prayers, the court may permit the petition to be amended so as to include a specific prayer for that purpose); Com. *v.* Coxe, 1 Leg. Chron. 89; Com. *v.* McCauley, 4 Lanc. L. Rev. 50.

Tennessee.— Mobile, etc., R. Co. *v.* Wisdom, 5 Heisk. 125.

Wisconsin.— State *v.* Pierce County, 71 Wis. 321, 37 N. W. 231, amendment of petition at any time to correspond with the proofs.

See 33 Cent. Dig. tit. "Mandamus," § 315.

18. Houston *v.* Sussex County Levy Ct., 5 Harr. (Del.) 15 (motion for writ amendable); People *v.* Civil Service Bd., 17 Abb. N. Cas. (N. Y.) 64.

19. State *v.* Bailey, 7 Iowa 390; Rex *v.* Warwickshire, 5 Dowl. P. C. 382, in the latter case the court holding that the title of an affidavit, on which a rule has been obtained, may be amended, on payment of costs, the opposite party having leave to file affidavits in reply.

Verification of application.— Where an application for a writ of mandamus by a public corporation is defectively verified by one of the officers of the corporation on information and belief, an affidavit of another officer thereof, testifying positively to the essential facts alleged, may be treated as an amendment, within the meaning of the statute. Steidl *v.* State, 63 Nebr. 695, 88 N. W. 853. But in State *v.* Jefferson Police Jury, 33 La. Ann. 29, it was held that the oath to the petition being essential, a supplemental petition praying for leave to annex the oath which had been omitted could not deprive the respondent of the exception which he had taken to the original.

ment.[20] Likewise the alternative writ[21] and the return or answer thereto may be amended.[22]

8. Waiver of Objections. As in other civil proceedings,[23] objections to the pleadings in mandamus, which are not jurisdictional, may be waived by acts inconsistent with the intention to urge them, or by failure to urge them at the proper time.[24] The pleadings themselves, however, cannot be dispensed with by waiver,[25] although it has been held that a return may be waived by a stipulation that a demurrer to the petition may stand as a return,[26] and that where a *similiter* is omitted and the case proceeds to trial, it is to be treated as if formal issues had been joined and *similiters* filed or waived.[27] It seems that any defect in the substance of the alternative writ may be taken advantage of at any time before the peremptory mandamus is awarded,[28] but that after a return no advantage may be taken of defects in form.[29] Where a defendant in his return to a writ of mandamus sets forth matter in abatement, and also sets up facts in defense upon the

20. Mobile, etc., R. Co. *v.* Wisdom, 5 Heisk. (Tenn.) 125 (as to technical objections to defects of form); State *v.* Pierce County, 71 Wis. 321, 37 N. W. 231 (to conform to proof).

Objection that proceeding is not in name of state will be considered as obviated by amendment. Dancy *v.* Clark, 24 App. Cas. (D. C.) 487; Brower *v.* O'Brien, 2 Ind. 423; Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794.

21. *Indiana.*— Morris *v.* State, 94 Ind. 565, amendment of alternative writ to conform to amended complaint.

Iowa.— State *v.* Bailey, 7 Iowa 390.

Missouri.— State *v.* Baggott, 96 Mo. 63, 8 S. W. 737, amendment of alternative writ to conform to peremptory writ.

New York.— People *v.* Brotherhood of Stationary Engineers, 19 N. Y. Civ. Proc. 175, writ irregularly returnable amended on motion before the return-day to set it aside.

Ohio.— Fornoff *v.* Nash, 23 Ohio St. 335, where the writ is the only pleading and is amendable as other pleadings.

Wisconsin.— State *v.* Elwood, 11 Wis. 17, where upon sustaining a motion to quash an alternative writ for substantial objections to the alternative writ and relation, relator was given permission to amend his relation and alternative writ, being required to serve a copy of the amended writ within a fixed time, and the respondent being granted further time to answer it.

See 33 Cent. Dig. tit. "Mandamus," § 332.

22. *Florida.*— State *v.* Sumter County Com'rs, 19 Fla. 518.

Illinois.— Cristman *v.* Peck, 90 Ill. 150; Kendall County *v.* People, 12 Ill. App. 210.

Iowa.— State *v.* Keokuk, 18 Iowa 388.

Massachusetts.— Springfield *v.* Hampden County Com'rs, 10 Pick. 59.

Nevada.— State *v.* Wedge, 27 Nev. 61, 72 Pac. 817.

New York.— People *v.* Earle, 47 How. Pr. 370.

Pennsylvania.— Clyde Coal Co. *v.* Pittsburgh, etc., R. Co., 13 Pa. Dist. 131; Com. *v.* Pittsburgh, 33 Pittsb. Leg. J. N. S. 316. But where the application is to introduce an additional substantive defense, it should be made to the court below and will not be granted in the appellate court. Com. *v.* Philadelphia, 180 Pa. St. 12, 36 Atl. 404.

At whose instance.— *Ex p.* Harmon, 131 U. S. appendix lvxii, holding that the supreme court will not order circuit judges to amend their return at the instance of a third party, the judges themselves not asking for leave to add to or alter their return.

See 33 Cent. Dig. tit. "Mandamus," § 359.

23. See, generally, Pleading.

24. Gillett *v.* People, 13 Colo. App. 553, 59 Pac. 72 (holding that a defect in an alternative writ of mandamus may be cured by the allegations of the answer); Chicago, etc., R. Co. *v.* People, 79 Ill. App. 529.

Jurisdiction.— A return does not waive objections as to jurisdiction. Hotchkiss *v.* Grattan, 90 Va. 642, 19 S. E. 165.

The failure to verify a pleading is usually regarded as an irregularity, only, which may be waived. People *v.* Reis, 76 Cal. 269, 18 Pac. 309 (going to trial without objection is a waiver of unverified complaint); Pudney *v.* Burkhart, 62 Ind. 179 (demurrer operates as waiver); Brown *v.* Ruse, 69 Tex. 589, 7 S. W. 489; Mason County *v.* Minturn, 4 W. Va. 300 (objection on other ground a waiver).

Error in entitling the information and supporting affidavit, as in a cause, is formal, and is waived unless taken *in limine*, as on the reading. Chance *v.* Temple, 1 Iowa 179, *semble*.

25. Payne *v.* Perkerson, 56 Ga. 672.

26. Ensworth *v.* Albin, 46 Mo. 450.

27. Chicago, etc., R. Co. *v.* People, 79 Ill. App. 529.

28. People *v.* Davis, 93 Ill. 133; People *v.* Green, 58 N. Y. 295 (want of sufficient title in the relator to the relief sought); People *v.* Sullivan County, 56 N. Y. 249; Albany Commercial Bank *v.* New York Canal Com'rs, 10 Wend. (N. Y.) 25; Rex *v.* Margate Pier Co., 3 B. & Ald. 220, 5 E. C. L. 133, 2 Chit. 256, 18 E. C. L. 620, 22 Rev. Rep. 356.

29. People *v.* Ontario County, 17 Hun (N. Y.) 501; Albany Commercial Bank *v.* New York Canal Com'rs, 10 Wend. (N. Y.) 25; State *v.* Marks, 6 Lea (Tenn.) 12. See also People *v.* Wilson, 119 N. Y. 515, 23 N. E. 1064.

merits, and asks judgment upon the merits, he thereby waives the plea in abatement and elects to try the cause upon the merits.[30]

9. Issues, Proof, and Variance — a. Matters to Be Proved. The relator must prove every material allegation necessary to show himself entitled to the relief sought.[31] A specific traverse of the allegations of the alternative writ is sufficient to put them in issue under the rules of pleading applicable to proceedings in mandamus, and the relator must then produce evidence to prove such allegations.[32] If issue is not joined on the allegations of the alternative writ, the opposing return, affidavit, or other pleading stands admitted.[33] In a state where a court of equity has jurisdiction of mandamus, it has been held, under the rule obtaining in equity, that the allegations of the application must be proved, although they are not denied.[34] Where the relator takes no issue on the respondent's allegations, but proceeds to argument, the truth of such allegations is admitted.[35]

b. Variance. The proof in mandamus proceedings is confined to the issues as made,[36] and a material variance is fatal.[37]

F. Process and Alternative Writ — 1. Notice in General — a. Necessity. While notice must ordinarily be given before a peremptory writ will be granted,[38] the application for the order or rule to show cause, or the alternative writ in the first instance, is generally *ex parte*.[39]

b. Waiver. A general appearance is a waiver of the want, or the insufficiency, of notice of the application;[40] but a party cannot waive the necessity of giving notice to a co-party.[41]

2. Order or Rule to Show Cause — a. Propriety and Necessity. At common law a rule was always issued as the primary step to inaugurate mandamus proceedings after the filing of a petition.[42] Such practice is still proper in most

30. Silver *v.* People, 45 Ill. 224.

31. *Illinois.*— Ward *v.* Cook, 78 Ill. App. 111.

Louisiana.— State *v.* St. Martin Parish Police Jury, 32 La. Ann. 884.

Massachusetts.— Kimball *v.* Morris, 2 Metc. 573.

Missouri.— State *v.* Kansas City, 80 Mo. App. 206.

South Carolina.— State *v.* Smith, 8 S. C. 127, 9 S. C. 44.

Wisconsin.— State *v.* Warner, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255.

See 33 Cent. Dig. tit. "Mandamus," § 370.

To compel allowance of appeal.— On application for a writ of mandamus to compel the allowance of an appeal, the relator must show that he has a clear right to the appeal which has been refused. U. S. *v.* Allen, 22 App. Cas. (D. C.) 56; *Ex p.* Cutting, 94 U. S. 14, 24 L. ed. 49.

Facts of record need not be proved. Champaign County *v.* Condit, 120 Ill. 301, 11 N. E. 394.

On mandamus against a corporation, it is not necessary to prove the fact of its incorporation unless it is specially denied. State *v.* Ames, 31 Minn. 440, 18 N. W. 277.

32. *Florida.*— State *v.* Sumter County Com'rs, 22 Fla. 1.

Missouri.— State *v.* Cape Girardeau Water Works, etc., Co., 74 Mo. App. 273.

Nebraska.— State *v.* Sherman County, 31 Nebr. 465, 48 N. W. 146.

New York.— People *v.* York, 43 N. Y. App. Div. 444, 60 N. Y. Suppl. 208; People *v.* Delaware County, 12 How. Pr. 50.

Ohio.— State *v.* Staley, 18 Ohio Cir. Ct. 406.

See 33 Cent. Dig. tit. "Mandamus," § 370.

33. Lewis *v.* Detroit Bd. of Education, 139 Mich. 306, 102 N. W. 756; Barlow *v.* Riker, 138 Mich. 607, 101 N. W. 820; Clark *v.* Kent Cir. Judge, 125 Mich. 449, 84 N. W. 629; Reeves *v.* Ferguson, 31 N. J. L. 107.

34. State *v.* King, (Tenn. Ch. App. 1901) 62 S. W. 314.

35. People *v.* New York Bd. of Education, 104 N. Y. App. Div. 162, 93 N. Y. Suppl. 300.

36. Illinois Midland R. Co. *v.* Barnett, 85 Ill. 313; State *v.* Kansas City Police Com'rs, 80 Mo. App. 206; People *v.* Waring, 62 N. Y. Suppl. 966.

37. People *v.* New York Health Dept., 86 N. Y. App. Div. 521, 83 N. Y. Suppl. 800 [*affirmed* in 176 N. Y. 602, 68 N. E. 1123], holding that there is no variance between an allegation of removal for lack of funds, and a finding of removal on account of diminished and insufficient salary appropriation.

38. See *infra*, IX, K, 1.

39. Boraim *v.* Da Costa, 4 Ala. 393; Chumasero *v.* Potts, 2 Mont. 242.

40. People *v.* Cairo, 50 Ill. 154; Watson *v.* Mayrant, 1 Rich. Eq. (S. C.) 449; Edwards *v.* U. S., 103 U. S. 471, 26 L. ed. 314; Fairbanks *v.* Amoskeag Nat. Bank, 30 Fed. 602. But see Dugue *v.* Levy, 115 La. 83, 38 So. 902, holding that a general appearance is not a waiver of the failure to give notice of the application for the writ when an exception only is taken.

41. State *v.* Mills, 27 Wis. 403.

42. Grimes *v.* Harrison County, Wright

jurisdictions,[43] although it is generally unnecessary,[44] and in some states it is held improper,[45] on the ground that it is useless, since the rule or order is practically the same as the alternative writ.[46]

b. Refusal Where Application Defective. The court may dismiss the proceeding without granting a rule or order to show cause where the application is clearly defective.[47]

c. Form and Contents. The rule or order to show cause is not a pleading in the mandamus proceedings and hence is not governed by the strict rules applicable thereto.[48] It has been held that the order to show cause need not have a teste nor be under the seal of the court,[49] and that it need not comply with the statutory requirements relating to the alternative writ.[50] Only one writ can be asked for.[51]

d. Service. The order to show cause or other notice of the application must be served in such a manner as to substantially give notice to all the persons to be affected by the writ.[52] Service by publication is in some cases permissible.[53]

e. Return. The sufficiency of the return is governed in general by the rules relating to orders to show cause in civil actions in general.[54]

f. Hearing. The only question is whether a *prima facie* case has been made by the petition,[55] and not whether mandamus is the proper remedy.[56] An

(Ohio) 126; Dinwiddie Justices *v.* Chesterfield Justices, 5 Call (Va.) 556; State *v.* Long, 37 W. Va. 266, 16 S. E. 578; Fisher *v.* Charleston, 17 W. Va. 595. See also People *v.* La Grange Tp. Bd., 2 Mich. 187.

43. Kimball *v.* Marshall, 44 N. H. 465; Rider *v.* Brown, 1 Okla. 244, 32 Pac. 341; U. S. *v.* Kendall, 26 Fed. Cas. No. 15,517, 5 Cranch C. C. 163.

As substitute for alternative writ.— An order to show cause may be substituted for the alternative writ. People *v.* Fulton County, 70 Hun (N. Y.) 560, 24 N. Y. Suppl. 397 [*affirmed* in 139 N. Y. 656, 35 N. E. 208].

44. State *v.* Clermont County C. Pl. Judges, 1 Ohio Dec. (Reprint) 51, 1 West. L. J. 358; Monongahela City *v.* Monongahela Electric Light Co., 3 Pa. Dist. 63, 12 Pa. Co. Ct. 529; Com. *v.* Young Men's Hibernia Ben. Soc., 2 Brewst. (Pa.) 441; Sights *v.* Yarnalls, 12 Gratt. (Va.) 292; Hebb *v.* Cayton, 45 W. Va. 578, 32 S. E. 187; State *v.* Long, 37 W. Va. 266, 16 S. E. 578; Fisher *v.* Charleston, 17 W. Va. 628.

45. State *v.* Arcadia Joint School Dist. No. 1, 65 Wis. 631, 27 N. W. 829, 56 Am. Rep. 653; State *v.* Delafield, 64 Wis. 218, 24 N. W. 905; State *v.* Fairchild, 22 Wis. 110. *Compare* Schend *v.* St. George's German Aid Soc., 49 Wis. 237, 5 N. W. 355.

46. Lutterloh *v.* Cumberland County, 65 N. C. 403.

47. U. S. *v.* Hay, 20 App. Cas. (D. C.) 576; Moore *v.* Waco Bldg. Assoc., 92 Tex. 265, 47 S. W. 716; Hume *v.* Schintz, 90 Tex. 72, 36 S. W. 429; Herf *v.* James, 86 Tex. 230, 24 S. W. 396.

48. Fisher *v.* Charleston, 17 W. Va. 595.

49. Taylor *v.* Henry, 2 Pick. (Mass.) 397.

50. People *v.* Fulton County, 70 Hun (N. Y.) 560, 24 N. Y. Suppl. 397.

51. State *v.* Beloit, 20 Wis. 79.

52. Mobile, etc., R. Co. *v.* Pike County Com'rs Ct., 97 Ala. 105, 11 So. 732 (holding that the burden is on the relator to show that the persons served are agents of defendant corporation); Reg. *v.* Burke, 29 Nova Scotia 227.

Service on a board has been held sufficient where a majority of the board, including the chairman, was served (People *v.* Contracting Bd., 20 How. Pr. (N. Y.) 206), and even where the service was merely upon the chairman (State *v.* Wellman, 83 Me. 282, 22 Atl. 170).

A rule to admit to office must be served on the *de facto* incumbent. *In re* Strong, 20 Pick. (Mass.) 484.

On an application to compel a judge to vacate a decree service upon the parties who obtained the decree is unnecessary. Huron *v.* Campbell, 3 S. D. 309, 53 N. W. 182. But see State *v.* Mills, 27 Wis. 403.

Under some statutes service upon a majority of a common council is sufficient. State *v.* Kendall, (Wash. 1906) 87 Pac. 821.

A statute forbidding the service of process on election day has been held not to apply to the service on an election board of an order to show cause why the relator should not be permitted to vote. People *v.* Donovan, 63 Hun (N. Y.) 512, 18 N. Y. Suppl. 501 [*reversed* on other grounds in 135 N. Y. 76, 31 N. E. 1009].

53. Cross *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 174, 12 S. E. 1071.

54. See MOTIONS.

Fine for failure to make.— A fine provided for not obeying a mandamus cannot be imposed for failure to make return to the order to show cause. People *v.* Kalamazoo Cir. Judge, 39 Mich. 301.

The return must be made to the court and not to a judge.— Whitesides *v.* Stuart, 91 Tenn. 710, 20 S. W. 245.

55. Lee *v.* Kearny Tp., 4 N. J. L. J. 275, evidence not taken.

56. Reed *v.* Beach, 122 Mich. 153, 80 N. W. 985; Olson *v.* Muskegon Cir. Judge, 49 Mich. 85, 13 N. W. 369.

answer to the rule is, in some jurisdictions, improper,[57] and will not be considered in disposing of the rule;[58] but it may be treated as a return to an alternative writ and the rule itself be considered as such a writ.[59] A motion to discharge the rule is treated as a demurrer, confining the consideration of the question to the petition.[60]

g. Amendment. The rule or order is amendable in the interest of justice.[61]

3. Alternative Writ[62] — a. Nature of Writ. As already stated,[63] it is now the general practice to issue an alternative writ, *ex parte*, on the filing of the petition, without a prior order to show cause. In most jurisdictions the alternative writ is substantially the commencement of the proceeding so far as the defendant is concerned, although in some states he may appear at an earlier stage.[64] In some jurisdictions, however, there is no alternative writ.[65] The writ is both a process and a pleading,[66] and takes the place of a summons.[67]

b. When Granted. It is the usual practice to issue an alternative writ when the petition or affidavit makes a *prima facie* case therefor.[68] The writ will not be granted where it appears that a peremptory writ should not issue.[69]

c. Time and Place of Issuance. Whether an alternative writ may issue out of court and the particular term at which application must be made depends on the local practice in the different jurisdictions.[70]

57. Umstead *v.* Conner, 12 Pa. Co. Ct. 405.

58. Com. *v.* McCauley, 2 Pa. Co. Ct. 459.

59. Kell *v.* Rudy, 1 Pa. Super. Ct. 507, 38 Wkly. Notes Cas. 166.

60. State *v.* Sheboygan County, 20 Wis. 104.

61. Dew *v.* Sweet Spring Dist. Ct. Judges, 3 Hen. & M. (Va.) 1, 3 Am. Dec. 639.

62. Necessity of issuance before peremptory writ see *infra*, IX, K, 2.

63. See *supra*, IX, F, 2.

64. See Brainard *v.* Stauh, 61 Conn. 570, 24 Atl. 1040; Wampler *v.* State, 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829; State *v.* Warren County, 136 Ind. 207; Boone County *v.* State, 61 Ind. 379; Lyman *v.* Martin, 2 Utah 136.

The issuance of a new writ is not a new suit. Kas *v.* State, 63 Nebr. 581, 88 N. W. 776.

The petition and rule cannot be substituted for the alternative writ without consent. Fisher *v.* Charleston, 17 W. Va. 595.

65. Cumberland, etc., R. Co. *v.* Washington County Ct. Judge, 10 Bush (Ky.) 564. And see the statutes of the several states.

In Illinois by statute the petition takes the place of the alternative writ. Hall *v.* Mann, 96 Ill. App. 659.

In Montana the alternative writ is dispensed with when the application is granted upon notice. Chumasero *v.* Potts, 2 Mont. 242.

66. Potwin Place *v.* Topeka R. Co., 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312; State *v.* Jefferson County, 11 Kan. 66; Mason *v.* Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418.

67. Miami County *v.* Mowbray, 160 Ind. 10, 66 N. E. 46.

68. *Georgia.*— Gay *v.* Gilmore, 76 Ga. 725.

Illinois.— People *v.* Cloud, 3 Ill. 362.

Indiana.— *Ex p.* Loy, 59 Ind. 235.

Nebraska.— American Water Works Co. *v.* O'Connor, 31 Nebr. 445, 48 N. W. 64.

New Jersey.— Lock *v.* Repaupo Meadow Co., (Sup. 1904) 57 Atl. 423.

New York.— People *v.* Wendell, 71 N. Y. 171; Jones *v.* Willcox, 80 N. Y. App. Div. 167, 80 N. Y. Suppl. 420; Pratt *v.* Phelan, 67 N. Y. App. Div. 349, 73 N. Y. Suppl. 823; People *v.* Coler, 41 N. Y. App. Div. 463, 58 N. Y. Suppl. 988; People *v.* Clark, 40 N. Y. App. Div. 214, 58 N. Y. Suppl. 12; People *v.* Brennan, 39 Barb. 522; People *v.* Coler, 34 Misc. 119, 68 N. Y. Suppl. 738.

North Carolina.— Lutterloh *v.* Cumberland County, 65 N. C. 403.

Ohio.— State *v.* Board of Education, 6 Ohio S. & C. Pl. Dec. 235, 4 Ohio N. P. 44.

Pennsylvania.— Miller *v.* Clement, 205 Pa. St. 484, 55 Atl. 32; Keasy *v.* Bricker, 60 Pa. St. 9; Jefferson County *v.* Shannon, 51 Pa. St. 221; Com. *v.* Allegheny County, 37 Pa. St. 277; Com. *v.* Pittsburg, 34 Pa. St. 496; Kell *v.* Rudy, 1 Pa. Super. Ct. 507, 38 Wkly. Notes Cas. 166 [*reversing* 15 Pa. Co. Ct. 309]; Boyle *v.* Lansford School Dist., 7 Pa. Dist. 709, 7 Del. Co. 314; Com. *v.* Allegheny Valley R. Co., 6 Pa. Dist. 565; Com. *v.* Norristown, 17 Pa. Co. Ct. 187, 12 Montg. Co. Rep. 9; Com. *v.* McCauley, 2 Pa. Co. Ct. 459; Childs *v.* Com., 3 Brewst. 194; Com. *v.* Controller, 2 Brewst. 425, 7 Phila. 29; Com. *v.* Lloyd, 9 Kulp 25.

Texas.— Steele *v.* Goodrich, 87 Tex. 401, 28 S. W. 939; Burnett *v.* Powell, 86 Tex. 584, 24 S. W. 788, 25 S. W. 17.

Washington.— Parrish *v.* Reed, 2 Wash. 491, 27 Pac. 230, 28 Pac. 372.

See 33 Cent. Dig. tit. "Mandamus," § 325.

In England where an action has been commenced in which a mandamus is claimed, an interlocutory application therefor will not be granted, unless it can be shown that plaintiff will suffer some injury by waiting for the result of the action. Widnes Alkali Co. *v.* Sheffield, etc., R. Co., 37 L. T. Rep. N. S. 131.

69. Parrish *v.* Reed, 2 Wash. 491, 27 Pac. 230, 28 Pac. 372. *Contra*, see People *v.* Goff, 27 Misc. (N. Y.) 331. 57 N. Y. Suppl. 1106.

70. People *v.* Oswego County, 50 Hun (N. Y.) 105, 3 N. Y. Suppl. 751, 15 N. Y.

d. Mode of Allowance. A rule or order for the alternative writ may be entered but it is not essential.[71] The common practice is for the judge, by an indorsement on the writ or other writing thereon, to direct the clerk to issue it.[72]

e. Form and Contents — (i) *In Whose Name Writ Issues.* In England the writ issues in the name of the sovereign.[73] In this country it must be issued in the name of the state[74] or territory.[75]

(ii) *To Whom Directed.*[76] The alternative writ, like the peremptory writ,[77] should be directed to the individual or corporation on whom the duty rests of performing the act sought to be compelled,[78] and if a common duty rests upon several persons the writ should ordinarily be directed to all.[79] On the other hand, if no duty rests upon a person, the writ should not be directed to him.[80] These rules are corollary to those requiring that the person on whom the duty rests shall be made a party respondent, that all persons under a common duty shall be joined as respondents, and that persons not under duty should not ordinarily be joined; and illustrations of who are necessary or proper parties respondent in particular instances serve also for the most part to illustrate to whom in like instances the writ must or may be directed.[81] The style in which respondent shall be designated in the writ is governed likewise by the rules governing the style of designating the party respondent.[82]

Civ. Proc. 379; Howerton *v.* Tate, 66 N. C. 231; Com. *v.* Coxe, 1 Leg. Chron. (Pa.) 89.

Power of judge to grant writ in vacation time or at chambers see JUDGES, 23 Cyc. 551.

71. Klein *v.* Smith County, 54 Miss. 254; People *v.* Lumb, 6 N. Y. App. Div. 26, 39 N. Y. Suppl. 514; People *v.* Schoharie County, 15 N. Y. Suppl. 795; People *v.* Sage, 2 How. Pr. (N. Y.) 60; Com. *v.* Young Men's Hibernia Ben. Soc., 2 Brewst. (Pa.) 441.

72. State *v.* King, 29 Kan. 607 (holding that the writ should contain at the bottom an allowance signed officially by the judge and then attested and sealed by the clerk); Clark *v.* State, 24 Nebr. 263, 38 N. W. 752. See also Brown *v.* Atkin, 1 Utah 277; State *v.* Rice, 35 Wis. 178.

73. Brower *v.* O'Brien, 2 Ind. 423; People *v.* Martin, 62 Barb. (N. Y.) 570; Kendall *v.* U. S., 12 Pet. (U. S.) 524, 9 L. ed. 1181 [*affirming* 26 Fed. Cas. No. 15,517, 5 Cranch C. C. 163].

74. State *v.* Cole, 33 La. Ann. 1356; State *v.* McCullough, 3 Nev. 202; State *v.* Long, 37 W. Va. 266, 16 S. E. 578.

75. Rider *v.* Brown, 1 Okla. 244, 32 Pac. 341, holding that the better practice is to issue the writ in the name of the territory, although perhaps the writ may be issued in the name of the party interested under the code provision requiring the real party in interest to sue.

76. Necessary and proper parties respondent see *supra*, IX, C, 2, b, (I).

77. See *infra*, IX, K, 6, b.

78. *Iowa.*— State *v.* Bailey, 7 Iowa 390.

New York.— People *v.* Metropolitan Police Com'rs, 5 Abb. Pr. 241.

West Virginia.— Fisher *v.* Charleston, 17 W. Va. 628.

Wisconsin.— State *v.* Bergenthal, 72 Wis. 314, 39 N. W. 566.

Canada.— Mercier *v.* Roy, 16 Quebec Super. Ct. 510.

See 33 Cent. Dig. tit. "Mandamus," § 331.

If the duty commanded is incumbent upon a corporation, the writ should be directed either to the corporation or to the select body within the corporation, whose province and duty it is to perform the particular act, or put the necessary machinery in motion to secure its performance. Mercer County Bd. of Freeholders *v.* Pennsylvania R. Co., 41 N. J. L. 250.

79. Farnsworth *v.* Boston, 121 Mass. 173 (holding that where the order of a city council in taking land surrendered to the city in discharge of an assessment requires a description signed by the mayor to be filed in the registry of deeds, and the mayor relies on a vote of the council vacating the assessment as depriving the owner of his right to surrender, an alternative writ to compel the city to take the land should issue to the mayor as well as to the council); State *v.* Jones, 23 N. C. 129. And see State *v.* Bailey, 7 Iowa 390.

Effect of willingness to act see, generally, *supra*, IX, C, 2, b, (I).

80. *Iowa.* — State *v.* Marshall County Judge, 7 Iowa 186.

Massachusetts.— Waldron *v.* Lee, 5 Pick. 323.

Oregon.— State *v.* Williams, 45 Oreg. 314, 77 Pac. 965, 67 L. R. A. 166. And see McLeod *v.* Scott, 21 Oreg. 94, 26 Pac. 1061, 29 Pac. 1.

Pennsylvania.— Com. *v.* Westfield Borough Officers, 1 Pa. Dist. 495.

West Virginia.— Fisher *v.* Charleston, 17 W. Va. 628.

See 33 Cent. Dig. tit. "Mandamus," § 331.

The writ may be directed to several persons in the alternative in some jurisdictions, it seems. Demorest *v.* Midland R. Co., 10 Ont. Pr. 73.

81. See *supra*, IX, C, 2, a, b, (I).

82. See *supra*, IX, C, 2, a, b, (II).

(III) *Setting Out Cause of Action and Command.* While in some states, by statute, where the writ merely takes the place of a summons, defendant need not set out the cause of action,[83] in most jurisdictions it must contain a recital of the facts necessary to show the duty to act and a command either to perform the duty or show cause at a certain time and place why defendant should not perform.[84] In commanding the performance of the act, the particular act to be performed must be clearly and fully described in the writ.[85] So where the writ commands a compliance with an order of an officer or a board, the writ must show that the order was within the power of such officer or board.[86] If the writ demands more than the holder is entitled to have awarded to him, it must be set aside in its entirety.[87]

(IV) *Provisions For Return.* In most jurisdictions the writ must be made returnable to the court issuing it, and not to the judge or at chambers,[88] and in term-time rather than in vacation,[89] at such time as may be fixed by the writ.[90] In some jurisdictions the writ must be made returnable at the office of the clerk of the county designated therein.[91]

(V) *Variance Between Petition and Writ.* The writ must substantially agree with the relief prayed for in the petition.[92]

f. Service — (I) *In General.* The service of the alternative writ is in lieu of service of a petition and summons.[93] In some jurisdictions the general statutes relating to service of summons and citations are inapplicable,[94] and the manner of service is a matter within the discretion of the court.[95] The service of an insufficient writ is nugatory.[96]

83. Hall *v.* Mann, 96 Ill. App. 659.

84. Fisher *v.* Charleston, 17 W. Va. 628.

85. *Alabama.*— Longshore *v.* State, 137 Ala. 636, 34 So. 684.

Delaware.— State *v.* Simmons, 3 Pennew. 291, 50 Atl. 213.

Florida.— Florida Cent., etc., R. Co. *v.* State, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419, holding that it is insufficient to command the performance of work pursuant to ordinances not referred to in the petition or writ.

Iowa.— Chance *v.* Temple, 1 Iowa 179.

Maine.— Hartshorn *v.* Ellsworth, 60 Me. 276; Anonymous, 31 Me. 590.

New York.— See People *v.* Baker, 35 Barb. 105, 14 Abb. Pr. 19.

North Carolina.— McCoy *v.* Harnett County, 51 N. C. 488; McCoy *v.* Harnett County, 50 N. C. 265.

Oregon.— Sears *v.* Kincaid, 33 Oreg. 215, 53 Pac. 303.

Rhode Island.— Sleeper *v.* Franklin Lyceum, 7 R. I. 523.

West Virginia.— Fisher *v.* Charleston, 17 W. Va. 628.

Wisconsin.— State *v.* Milwaukee, 22 Wis. 397.

See 33 Cent. Dig. tit. "Mandamus," § 329.

86. State *v.* Atlantic Coast Line R. Co., (Fla. 1906) 40 So. 875.

87. U. S. *v.* Elizabeth, 42 Fed. 45.

88. **Taylor** *v.* Henry, 19 Mass. 397; Whitesides *v.* Stuart, 91 Tenn. 710, 20 S. W. 245. See also Judges, 23 Cyc. 551.

In North Carolina mandamus to compel a county superintendent of schools to sign a teacher's salary order is not an action on a money demand, and hence may be made returnable before a judge at chambers. Ducker *v.* Venable, 126 N. C. 447, 35 S. E. 818.

89. *Georgia.*— Hammond *v.* Poole, 58 Ga. 169; Johnson *v.* State, 1 Ga. 271.

Maryland.— Harwood *v.* Marshall, 10 Md. 451.

North Carolina.— Howerton *v.* Tate, 66 N. C. 231.

Texas.—Murphy *v.* Wentworth, 36 Tex. 147.

United States.— Hitchcock *v.* Galveston, 48 Fed. 640.

See 33 Cent. Dig. tit. "Mandamus," § 326.

90. *Georgia.*— Brunswick *v.* Dure, 59 Ga. 803.

Illinois.— People *v.* Brooks, 57 Ill. 142.

Nevada.— State *v.* McCullough, 3 Nev. 202.

North Carolina.— State *v.* Jones, 23 N. C. 129.

Wisconsin.— State *v.* Lean, 9 Wis. 279.

Canada.—Burdett *v.* Sawyer, 2 Ont. Pr. 398.

See 33 Cent. Dig. tit. "Mandamus," § 326.

91. People *v.* Brotherhood of Stationary Engineers, 12 N. Y. Suppl. 362, 19 N. Y. Civ. Proc. 175.

92. State *v.* Connersville Natural Gas Co., 163 Ind. 563, 71 N. E. 483; Laflin *v.* State, 49 Nebr. 614, 68 N. W. 1022; Com. *v.* Pennsylvania R. Co., 6 Pa. Dist. 266; Fisher *v.* Charleston, 17 W. Va. 595.

93. Elliott *v.* Oliver, 22 Oreg. 44, 29 Pac. 1; McLeod *v.* Scott, 21 Oreg. 94, 26 Pac. 1061, 29 Pac. 1.

94. Jones *v.* Doherty, (Tex. Civ. App. 1900) 56 S. W. 596; Smith *v.* Ormsby, 20 Wash. 396, 55 Pac. 570, 72 Am. St. Rep. 110.

95. Lutterloh *v.* Cumberland County, 65 N. C. 403.

96. Deckman *v.* Oak Harbor, 10 Ohio Cir. Ct. 409, 6 Ohio Cir. Dec. 729.

(II) *Necessity.* Except defendant has actual notice,[97] a peremptory writ will not issue where an alternative writ has been granted unless it has been served or there has been a return or other appearance pursuant to the alternative writ.[98]

(III) *Mode of Service.* Except where otherwise provided by statute,[99] the original writ must be delivered and not a copy.[1] The service of a copy is, however, a mere irregularity.[2] Personal service is necessary in order to form the basis for attachment proceedings in case the writ is disobeyed.[3]

(IV) *Persons to Be Served.* The writ must be served upon the individual or individuals who are required to perform the duty commanded.[4]

(V) *Time For Service.* The time when the service must be made before the return-day is wholly a matter of local practice.[5]

(VI) *Waiver.* A return or other appearance is a waiver of the want of, or irregularity in, the service.[6]

(VII) *Return of Service.* The return should show service by indorsement on a copy of the writ, the original being delivered to defendant for his return.[7] If erroneous, the officer may be compelled to correct his return.[8]

97. Bradley *v.* McCrahb, Dall. (Tex.) 504.

98. Wilson *v.* Hunt, (Cal. 1888) 16 Pac. 305; State *v.* Walker, 32 Fla. 431, 13 So. 928.

99. Com. *v.* Norristown, 17 Pa. Co. Ct. 187, 12 Montg. Co. Rep. 9.

1. Hempstead *v.* Underhill, 20 Ark. 337; Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336 (holding that other papers defining the duty need not be served); Miami County *v.* Mowbray, 160 Ind. 10, 66 N. E. 46; Potts *v.* State, 75 Ind. 336; Clarke County *v.* State, 61 Ind. 75. *Contra*, see St. Louis County Ct. *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355; People *v.* Judges Westchester County Ct. of C. Pl., 4 Cow. (N. Y.) 73; State *v.* Lincoln, 67 Wis. 274, 30 N. W. 360.

Reading writ.— A mere offer by the officer to read the writ without a delivery of it is insufficient. Ladue *v.* Spalding, 17 Mo. 159.

Service by leaving a copy at the dwelling-house may be sufficient in the discretion of the court, where there is no rule or statute governing the practice. State *v.* Jones, 23 N. C. 129.

2. Hempstead *v.* Underhill, 20 Ark. 337; State *v.* Pennsylvania R. Co., 41 N. J. L. 250. *Contra*, State *v.* King, 29 Kan. 607.

3. State *v.* Jones, 23 N. C. 129; holding, however, that the court, instead of proceeding by attachment for contempt for failure to show cause, may direct a peremptory mandamus to issue, although there has been no personal service of the alternative writ.

4. *Louisiana.*— State *v.* Shreveport, 29 La. Ann. 658.

Mississippi.— Jones *v.* Gibbs, 51 Miss. 401.

Nevada.— State *v.* Wright, 10 Nev. 167, holding service on the president of a board sufficient.

New Jersey.—State *v.* Pennsylvania R. Co., 41 N. J. L. 250, holding service on the superintendent of a railroad division insufficient.

United States.—Hitchcock *v.* Galveston, 48 Fed. 640; Downs *v.* Rock Island County, 8 Fed. Cas. No. 4,047, 4 Biss. 508, holding service on the clerk of a board insufficient.

See 33 Cent. Dig. tit. "Mandamus," § 336.

Where a writ is directed to a county, it is properly served upon the county clerk. This amounts to service upon defendant. Leavenworth County *v.* Sellew, 99 U. S. 624, 25 L. ed. 333.

Service on a domestic corporation may be made by serving an agent appointed by the company to accept service. Cross *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 174, 12 S. E. 1071. Where the thing enjoined by the writ was the building of a bridge, service upon a mere financial officer of the company was not sufficient. State *v.* Pennsylvania R. Co., 42 N. J. L. 490. Where an alternative writ of mandamus issues commanding a director of a railroad company to show cause why he should not vacate said office of director then held by him and surrender the same to the petitioner, it is necessary that said writ should be served upon said director either personally or by publication. Otherwise the court cannot pass upon or determine his right. Cross *v.* West Virginia, etc., R. Co., 34 W. Va. 742, 12 S. E. 765.

A mandamus directed to a foreign corporation engaged in business in this state, commanding the performance of some duty growing out of that business, may be legally served upon any officer of the company in this state, upon whom lawful service could have been made, according to the ancient common law, if the corporation were domestic. State *v.* Pennsylvania R. Co., 42 N. J. L. 490.

5. People *v.* Thistlewood, 103 Ill. 139; People *v.* Rickey, 19 Ill. 405.

Service in vacation has been held insufficient. People *v.* Judges Essex C. Pl., 1 How. Pr. (N. Y.) 114.

6. People *v.* Barnett, 91 Ill. 422; McBane *v.* State, 50 Ill. 503. See also State *v.* Newark, 19 Ohio Cir. Ct. 5, 10 Ohio Cir. Dec. 440.

7. Potts *v.* State, 75 Ind. 336; Clarke County *v.* State, 61 Ind. 75.

8. Ward *v.* Curtiss, 18 Conn. 290.

g. Amendments. The writ is amendable in like manner as any other process or pleading in furtherance of justice and in the discretion of the court.[9]

h. Objections and Waiver Thereof. Defects in the form of the writ, such as the name in which it issues,[10] or the individuals to whom it is directed,[11] are waived by the filing of an answer or other appearance without objection.

G. Evidence — 1. Presumptions. On an application for a mandamus, the general rules governing presumptions in evidence apply.[12] Thus it will be presumed that the decision of a court was on the merits,[13] and correct;[14] that the decision of a municipal board,[15] or a senate committee,[16] was regular; that the governor acted within his authority in removing an officer and appointing his successor;[17] that public officers have exercised their power to appoint deputies and that they are in charge;[18] and that a judgment debt against a corporation is one for the payment of which the corporation may levy a tax.[19] It will not be presumed that facts exist warranting a removal from office.[20]

2. Burden of Proof. On an application for a mandamus, the burden of proof is governed by the general rule that the party holding the affirmative of the issue must establish his allegations by a preponderance of the evidence.[21] The relator

9. *Connecticut.*— Brainard *v.* Staub, 61 Conn. 570, 24 Atl. 1040.

Florida.—State *v.* Gibbs, 13 Fla. 55, 7 Am. Rep. 233.

Illinois.— Lyons Highway Com'rs *v.* People, 38 Ill. 347.

Indiana.— Morris *v.* State, 94 Ind. 565.

Iowa.— State *v.* Bailey, 7 Iowa 390.

Kansas.— Stevens *v.* Miller, 3 Kan. App. 192, 43 Pac. 439.

Missouri.— Taylor *v.* Moss, 35 Mo. App. 470. But see State *v.* Howard County Ct., 41 Mo. 247.

Nebraska.— Kas *v.* State, 63 Nebr. 581, 88 N. W. 776.

New York.— People *v.* Clausen, 61 N. Y. App. Div. 184, 70 N. Y. Suppl. 417; People *v.* Clausen, 50 N. Y. App. Div. 286, 63 N. Y. Suppl. 993; People *v.* Marsh, 21 N. Y. App. Div. 88, 47 N. Y. Suppl. 395; People *v.* Earle, 47 How. Pr. 370. See People *v.* Metropolitan Police Com'rs, 5 Abb. Pr. 241 [*reversed* in 24 How. Pr. 611 note], holding that a fatal defect is not cured by a mandamus made after the return-day.

Ohio.— Fornoff *v.* Nash, 23 Ohio St. 335.

Oregon.— See State *v.* Richardson, (1906) 85 Pac. 225.

Pennsylvania.—Com. *v.* Pittsburgh, 34 Pa. St. 496; Com. *v.* Coxe, 1 Leg. Chron. 89; Com. *v.* Keim, 15 Phila. 1.

South Carolina.— State *v.* Charleston, 1 S. C. 30.

West Virginia.— Mason *v.* Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418.

United States.— Poweshiek County *v.* Durant, 76 U. S. 736, 19 L. ed. 813; West Virginia, etc., R. Co. *v.* U. S., 134 Fed. 198, 67 C. C. A. 220 [*affirming* 125 Fed. 252]; U. S. *v.* Union Pac. R. Co., 28 Fed. Cas. No. 16,601, 4 Dill. 479 [*affirmed* in 91 U. S. 343, 23 L. ed. 428].

See 33 Cent. Dig. tit. "Mandamus," § 332.

Where there is a misjoinder of petitioners, however, an amendment is not permissible, but a new writ is necessary. Com. *v.* Westfield Borough Officers, 1 Pa. Dist. 495; Lengel *v.* Stump, 1 Woodw. (Pa.) 399.

10. State *v.* McCullough, 3 Nev. 202.

11. Fuller *v.* Plainfield Academic School, 6 Conn. 532; Sterling *v.* Jones, 87 Md. 141, 39 Atl. 424.

12. See, generally, Evidence.

13. *In re* Wilson, 75 Cal. 580, 17 Pac. 698.

14. State *v.* McKee, 150 Mo. 233, 51 S. W. 421.

15. San Luis Obispo County *v.* Gage, 139 Cal. 398, 73 Pac. 174.

16. French *v.* State Senate, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556.

17. Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170.

18. People *v.* Dalton, 158 N. Y. 204, 52 N. E. 1119 [*affirming* 34 N. Y. App. Div. 6, 53 N. Y. Suppl. 1060].

19. Cole *v.* East Greenwich Fire Engine Co., 12 R. I. 202.

20. People *v.* Metropolitan Bd. of Police, 35 Barb. (N. Y.) 527; People *v.* Metropolitan Police Dist., 35 Barb. (N. Y.) 535.

21. *Florida.*— State *v.* Seaboard Air Line R. Co., (1904) 37 So. 658, on an application for a mandamus to enforce railroad rates prescribed by commission, the burden of proof is on the road to show unconstitutionality.

Louisiana.— State *v.* Jumel, 31 La. Ann. 142.

Montana.— State *v.* Second Judicial Dist. Ct., 26 Mont. 372, 68 Pac. 465, on mandamus to compel a trial judge to determine a motion for a new trial, the decision of which is alleged to be unnecessarily delayed, the relator has the burden of showing such unnecessary delay.

New Jersey.— Thompson *v.* Elmer Bd. of Education, 57 N. J. L. 628, 31 Atl. 168, on mandamus by a school-teacher to enforce a judgment for compensation, the only burden of the relator is to show the jurisdiction of the state superintendent over the matter.

New York.— People *v.* Knox, 78 N. Y. App. Div. 344, 79 N. Y. Suppl. 989 (the burden of proof is on the one claiming the right to have his name placed on the eligible list to explain an apparent forgery in his credentials); People *v.* Tieman, 8 Abb. Pr. 359

must prove himself entitled substantially to every claim and to all the redress which he seeks in his writ. If he fails to establish any substantial part of his claim, his application will be denied.[22]

3. ADMISSIBILITY. Any competent evidence tending to establish, or in any way affecting, the right of the relator, and within the allegations of the petition and writ, is admissible.[23] So also evidence affecting the duty, or bearing on the discretionary power, of defendant, is admissible.[24] Irrelevant and immaterial evidence is inadmissible.[25]

(where one exercising a public office seeks to compel payment of his salary by mandamus, he must show himself entitled to the office).

Pennsylvania.— Mercur *v.* Media Electric Light, etc., Co., 19 Pa. Super. Ct. 519.

South Carolina.— State *v.* Adams, 63 S. C. 189, 41 S. E. 82, a county treasurer, resisting payment of a warrant issued upon a claim audited and approved by the county commissioners, has the burden of proof.

United States.— Moran *v.* Elizabeth, 9 Fed. 72, on an application for a mandamus to compel the payment of money, the claimant must show a return *nulla bona* as required by statute.

Where the relator has made out a prima facie case, the burden of proof is on defendant to justify his action. McGowan *v.* Ford, 107 Cal. 177, 40 Pac. 231.

When the matter is peculiarly within the knowledge of one party, the burden is on him to show it. State *v.* Clinton County, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984.

To justify delay.— The burden of proof is on the relator to show that delay was justified so as not to amount to laches. People *v.* Welde, 28 Misc. (N. Y.) 582, 59 N. Y. Suppl. 1030; People *v.* Scannell, 28 Misc. (N. Y.) 401, 59 N. Y. Suppl. 950.

22. Trant *v.* State, 140 Ind. 414, 39 N. E. 513.

23. *Louisiana.*— State *v.* Rogillio, 30 La. Ann. 833, on an application for a mandamus to compel the recording of a mortgage, it may be shown that it is not recordable by reason of other liens.

New Jersey.—O'Donnel *v.* Dusman, 39 N. J. L. 677 (on a writ by a newly elected officer to compel books to be turned over to him, if there is no determination of the election board, legally proven, there may be other evidence of relator's title); *In re* Prickett, 20 N. J. L. 134 (on an application for a mandamus to compel a township committee to accept a bond and the oath of office from one claiming to have been elected a constable, the record of the township meeting, or a sworn copy thereof, is the only evidence of such election, and a certificate or even a sworn copy of the list, filed in the office of the county clerk, is inadmissible).

New York.— People *v.* Yonkers Bd. of Police Com'rs, 174 N. Y. 450, 67 N. E. 78, 95 Am. St. Rep. 596, on mandamus by one unlawfully removed from office to compel his reinstatement, evidence of acts of the relator, showing laches and acquiescence, is admissible.

Pennsylvania.— Com. *v.* McCauley, 3 Pa. Co. Ct. 77, on an application for a mandamus to reinstate a student expelled from college, his punishable acts unknown when expelled, are inadmissible.

Texas.— Crumley *v.* McKinney, (1888) 9 S. W. 157 (on application for a mandamus to compel a clerk to issue a writ of supersedeas, the judgment and appeal-bond are both admissible in order to determine whether the appeal-bond entitles the applicant to a supersedeas); Browne *v.* Reese, 67 Tex. 318, 3 S. W. 292 (on application for a mandamus to compel the payment of a school-teacher by a county commissioners' court, the best evidence of the judgment of that court is either the record or a certified copy thereof).

To show motive for application for writ.— On an application for a mandamus to allow the inspection of the books of a corporation, evidence as to the financial condition of the corporation is competent and admissible. Cobb *v.* Lagarde, 129 Ala. 488, 30 So. 326.

Right to introduce new facts first brought into the case on application for mandamus.— Where a circuit judge is sought to be compelled by mandamus to grant a motion which he denied upon the showing of facts made before him, the case must be heard on the facts disclosed on the hearing of such motion, and not upon the new facts first brought into the case on the application for mandamus. People *v.* Monroe Cir. Judge, 36 Mich. 274. But see Champaign County *v.* Condit, 120 Ill. 301, 11 N. E. 394 [*affirming* 24 Ill. App. 560]; Du Page County *v.* Martin, 39 Ill. App. 298.

24. State *v.* Greene County, 119 Ind. 444, 21 N. E. 1097 (on an application for a mandamus to compel the building or repairing of a bridge, evidence of its cost and the financial condition of the county is admissible); People *v.* Knauber, 163 N. Y. 23, 57 N. E. 161 (on mandamus to compel appointment to office, evidence that the appointing power sought to evade the provisions of the law is admissible).

25. *Illinois.*— Kreiling *v.* Nortrup, 215 Ill. 195, 74 N. E. 123, on mandamus proceedings to compel the widening and deepening of a ditch, evidence of the value of the land before and after the construction of the ditch is immaterial.

Iowa.— Windsor *v.* Polk County, 115 Iowa 738, 87 N. W. 704, on mandamus to compel the calling of an election, proof of conduct of the board, not preventing the call, is not material.

Texas.— Durrett *v.* Crosby, 28 Tex. 687, on an application for a mandamus to the

4. Weight and Sufficiency. The rules generally applicable to civil actions are applied to determine the weight and sufficiency of evidence in mandamus proceedings.[26]

H. Trial or Hearing — 1. In General. Inasmuch as mandamus is an action at law the trial is generally, as near as may be, the same as in an ordinary action to recover damages.[27]

2. Provisional Remedies. In some jurisdictions an injunction in aid of mandamus proceedings has been held permissible.[28]

commissioner of the general land-office, it is immaterial to inquire into the motives of the commissioner of claims in rejecting a land warrant, since the former officer has no authority to revise the action of the latter.

Washington.— State *v.* State Bd. of Dental Examiners, 38 Wash. 325, 80 Pac. 544, on application to compel a state board of dental examiners to issue a license to the relator, the questions and answers relating to the examination are inadmissible.

United States.— U. S. *v.* New Orleans Bd. of Liquidation, 60 Fed. 387, 9 C. C. A. 37, on mandamus to compel the issuance of bonds, proof of a special tax to pay the claim is inadmissible.

26. See, generally, Evidence.

The allowance of a claim *prima facie* shows its validity. State *v.* Fraker, 166 Mo. 130, 65 S. W. 720.

Forty-five days' delay by a judge to determine a motion for a new trial is not sufficient to show that the decision was unnecessarily delayed. State *v.* Second Judicial Dist. Ct., 26 Mont. 372, 68 Pac. 465.

Proof of power to create a fund is insufficient to sustain an application for a mandamus when no fund is on hand. People *v.* Green, 1 Hun (N. Y.) 1, 3 Thomps. & C. 90.

Election certificate conclusive.— On mandamus to compel the acceptance of the bond of one claiming to have been elected to an office, the official certificate of the canvassers is conclusive. Stokes *v.* Camden County, 35 N. J. L. 217; People *v.* Hamilton County, 75 N. Y. App. Div. 110, 77 N. Y. Suppl. 620. See also State *v.* Elwood, 12 Wis. 551.

On mandamus to compel the levying of a tax to pay a judgment, an affidavit showing that the judgment had been assigned by the judgment creditor to the relator is sufficient *prima facie* evidence of the ownership of the judgment by the relator. State *v.* Racine, 22 Wis. 258.

Evidence held insufficient to sustain verdict.— People *v.* Alton, 209 Ill. 461, 70 N. E. 640; People *v.* Clausen, 50 N. Y. App. Div. 286, 63 N. Y. Suppl. 993.

27. *Indiana.*— Wood *v.* State, 155 Ind. 1, 55 N. E. 959.

Iowa.— Dove *v.* Keokuk Independent School Dist., 41 Iowa 689.

Nebraska.— American Water Works Co. *v.* State, 31 Nebr. 445, 48 N. W. 64.

New York.— People *v.* Green, 1 Hun 1, 3 Thomps. & C. 90; People *v.* Westchester County, 15 Barb. 607; People *v.* Woodman, 15 Daly 20, 1 N. Y. Suppl. 335, 4 N. Y. Suppl. 554; People *v.* St. Stephen's Church Cases, 10 N. Y. Suppl. 125, 11 N. Y. Suppl. 669–675, 25 Abb. N. Cas. 230; People *v.* Delaware C. Pl., 2 Wend. 255.

Pennsylvania.— Phœnix Iron Co. *v.* Com., 113 Pa. St. 563, 6 Atl. 75; German Reformed Church *v.* Com., 3 Pa. St. 282.

Wisconsin.— State *v.* Wolski, 116 Wis. 71, 92 N. W. 360; State *v.* Delafield, 64 Wis. 218, 24 N. W. 905; Schend *v.* St. George's German Aid Soc., 49 Wis. 237, 5 N. W. 355.

Compare State *v.* Lusitanian Portuguese Soc., 15 La. Ann. 73.

See 33 Cent. Dig. tit. "Mandamus," § 376.

Who may be heard.— In mandamus cases the party interested is permitted to be heard in resisting the application. Beecher *v.* Anderson, 45 Mich. 543, 8 N. W. 539.

The right to open and close the argument belongs to the party showing cause. People *v.* Wayne County Treasurer, 8 Mich. 392.

Notice of trial is not necessary, the case not being a calendar cause. Berube *v.* Wheeler, 128 Mich. 32, 87 N. W. 50. But see People *v.* Fillmore Tp. Bd., 11 Mich. 197.

Admissions in the respondent's return may be relied on by the relator, but not any allegations in the affidavits or petition which are not admitted. People *v.* Pritchard, 19 Mich. 470.

Parol evidence may be received to show the reason for the refusal to issue the writ. Belcher *v.* Treat, 61 Me. 577.

All record evidence relied upon by either relator or respondent should be brought before the court as exhibits in the shape of certified copies, or authenticated in some way, rather than in bare recitals of its existence, with a mere reference thereto. Cronin *v.* Kalkaska Sup'rs, 58 Mich. 448, 25 N. W. 393.

Acquiescence of defendant.— Mandamus ought not to be awarded when there is a substantial defect in the proof of plaintiff's rights, notwithstanding the officer may manifest a willingness to obey the mandate; and especially ought it not to be done when the interests of a third person are involved. Glasscock *v.* General Land Office Com'rs, 3 Tex. 51.

Consolidation of mandamus proceedings to compel payment of judgments see Consolidations and Severance of Actions, 8 Cyc. 597 note 25.

28. Cynthiana *v.* Board of Education, 52 S. W. 969, 21 Ky. L. Rep. 731; Moore *v.* Jones, 76 N. C. 188; Alderson *v.* Kanawha County, 31 W. Va. 633, 8 S. E. 274. But see Andrews *v.* Rumsey, 75 Ill. 598.

3. Time and Place.[29] No hearing is permissible until the return is filed and all pleadings in the matter completed.[30] The trial of the issues of fact must be at a term of court,[31] in the home forum or place of litigation,[32] and not at chambers.[33]

4. Mode of Trial. In many jurisdictions issues of fact in a mandamus proceeding are triable by jury.[34] Likewise a reference of particular issues or to take proof has been held proper in some states,[35] but a case in a federal court cannot be sent to a master as a suit in equity.[36] If the application is made to an appellate court, it is common practice to send issues of fact to an inferior court for trial.[37]

5. Discontinuance. The relator has the right to discontinue the proceedings,[38] even where a counter-claim has been set up, the latter being unauthorized;[39] but a discontinuance as to a necessary party will not be allowed.[40] At common law in a suit where it is not permitted to take judgment against a part only of defendants, the taking of such judgment operates to discontinue the suit as to all other defendants.[41]

6. Dismissal. As in other civil actions, the proceeding may be dismissed in a proper case, as where the relator refuses to produce evidence,[42] where the proceeding is prosecuted without authority,[43] where the petition is substantially defective,[44] when the occasion for the writ has passed,[45] or when the alternative writ is quashed or a demurrer thereto sustained.[46] But a dismissal will not be granted because the proceedings are not in the name of the state where no sub-

29. Venue and change of venue see *supra*, IX, A, 3.

30. State *v.* Kelly, 41 S. C. 551, 22 S. E. 1007.

31. Mayer *v.* State, 52 Nebr. 764, 73 N. W. 214.

At the same term there may be granted a rule to show cause and the alternative and the peremptory writ, and all questions arising in the case may be decided in the same court. Fitzhugh *v.* Custer, 4 Tex. 391, 51 Am. Dec. 728.

32. Mayer *v.* State, 52 Nebr. 764, 73 N. W. 214.

33. See Judges, 23 Cyc. 551.

34. See Juries, 24 Cyc. 129.

Determination by the court is proper, provided both the relator and respondent agree. Upshur *v.* Baltimore, 94 Md. 743, 51 Atl. 953.

35. People *v.* St. Louis, etc., R. Co., 44 Hun (N. Y.) 552, 7 N. Y. St. 415; People *v.* Haws, 12 Abb. Pr. (N. Y.) 70; State *v.* Columbia, 22 S. C. 582.

36. Cleveland *v.* U. S., 127 Fed. 667, 62 C. C. A. 393.

37. *California.* — Calaveras County *v.* Brockway, 30 Cal. 325. But see Thornton *v.* Hoge, 84 Cal. 231, 23 Pac. 1112.

Michigan.— Haines *v.* Saginaw County, 87 Mich. 237, 49 N. W. 310.

New Jersey.— Edward C. Jones Co. *v.* Guttenberg, 66 N. J. L. 659, 51 Atl. 274.

Washington — State *v.* Ross, (1906) 87 Pac. 262.

Wisconsin.— State *v.* Pierce County, 71 Wis. 321, 37 N. W. 231; State *v.* Gratiot, 17 Wis. 245; State *v.* Saxton, 14 Wis. 123.

But see Territory *v.* Chicago, etc., R. Co., 2 Okla. 108, 39 Pac. 389, holding that where issues in mandamus are joined in which defendants have a right to a jury trial, but there is no means provided by statute by which the supreme court can secure a jury, the cause must come to an end.

Under a statute providing that the supreme court shall transmit a record in mandamus proceedings pending therein, in which an issue of fact is not finally determined, to the district court of the proper county, a town is a resident of the county in which it is situated. State *v.* Lake, 28 Minn. 362, 10 N. W. 17.

38. State *v.* New Orleans, 44 La. Ann. 354, 10 So. 766; State *v.* Wedge, 28 Nev. 36, 78 Pac. 760.

If the relator has embraced too many persons in his alternative writ, there is no error in permitting him before the trial to enter a discontinuance as to one or more and to proceed against the remainder. State *v.* Long, 37 W. Va. 266, 16 S. E. 578.

39. State *v.* Wedge, 28 Nev. 36, 78 Pac. 760.

40. Eufaula *v.* Hickman, 57 Ala. 338, holding that inasmuch as all the members of a municipal board must be joined in a proceeding to compel them to act as a board, plaintiff cannot discontinue the proceeding as to a member not served with notice.

41. McDonald *v.* Judson, 97 Ill. App. 414.

42. Vermillion *v.* State, (Nebr. 1907) 110 N. W. 736.

43. People *v.* Blackhurst, 60 Hun (N. Y.) 63, 15 N. Y. Suppl. 114.

44. Hume *v.* Schintz, 90 Tex. 72, 36 S. W. 429.

45. U. S. *v.* Norfolk, etc., R. Co., 118 Fed. 554, 55 C. C. A. 320.

46. State *v.* Sams, 711 Nebr. 669, 99 N. W. 544; Hester *v.* Thomson, 35 Wash. 119, 76 Pac. 734.

stantial right is affected.[47] A dismissal by a judge without jurisdiction at the time and place to hear the cause upon its merits is invalid.[48] A dismissal of the principal defendant requires a dismissal as to one against whom incidental relief is asked.[49] While the relator in mandamus cannot, as a strict matter of right, dismiss his case after final submission,[50] still the court will dismiss the proceeding where public interests are involved, and it is desirable that plaintiff's case be fully presented.[51]

7. Scope of Inquiry — a. In General. The question as to what matters will be considered by the court in determining the right to the writ is governed by no fixed rule applicable to all cases.[52]

47. People *v.* San Francisco, 36 Cal. 595. See also Eden Independent Dist. No. 2 *v.* Rhodes, 88 Iowa 570, 55 N. W. 524.

48. People *v.* Ouray, 4 Colo. 291.

49. Evans *v.* U. S., 19 App. Cas. (D. C.) 202.

50. State *v.* Rall, 51 Kan. 599, 33 Pac. 299; People *v.* Bingham, 101 N. Y. Suppl. 410, holding that the relator has the right of dismissal, but not without prejudice.

51. State *v.* Rall, 51 Kan. 599, 33 Pac. 299.

52. See cases cited *infra*, this note.

The question of the incorporation of the municipality cannot be considered in mandamus proceedings against its officers. People *v.* Board of School Trustees, 111 Ill. 171; Hon *v.* State, 89 Ind. 249; State *v.* Dixon County School Dist. No. 1, 31 Nebr. 552, 48 N. W. 393. Legality of the incorporation of a city will not be inquired into on an application to compel it to pay a judgment. Lee *v.* Thief River Falls, 82 Minn. 88, 84 N. W. 654.

Formal irregularities in the performance of official duties will not be considered. Cleveland *v.* Orange, 31 N. J. L. 131.

Matters occurring after suit was brought may be considered in determining whether the writ should be made peremptory. State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465.

Questions involved in the trial of a cause will not be reviewed on an application for a mandamus to compel the setting aside of an order granting a new trial. Chicago, etc., R. Co. *v.* Genesee County Cir. Judge, 89 Mich. 549, 50 N. W. 879. See also *Ex p.* Farquhar, 99 Ala. 375, 11 So. 913, holding that on an application for mandamus to show cause why a supersedeas granted by a judge of the circuit court should not be vacated, and a petition for rehearing dismissed, the court cannot consider the ruling on a demurrer to the petition and on the pleas and evidence in the case.

Validity of judicial proceedings.— In an application to compel continuance of proceedings which had been enjoined, the equity or propriety of the injunction will not be considered. State *v.* Judge Macon Orphans' Ct., 15 Ala. 740; People *v.* Gilmer, 10 Ill. 242.

Matters affecting the discretion of the court will often be considered. Grayson County Ct. *v.* Breckinridge County Ct., 8 Ky. L. Rep. 135; Osborne *v.* Lindow, 78 Mich. 606, 44 N. W. 414. But on an application for a writ to allow an appeal, the probability of the result will not be considered where the appeal is a matter of right. Ware *v.* McDonald, 62 Ala. 81.

Taking of appeal.— On an application by an assignee to compel a judge to allow an appeal, the question whether the assignor has appealed cannot be considered. State *v.* Judge St. Charles Parish Ct., 28 La. Ann. 900.

Genuineness of warrants.— In a mandamus proceeding to compel a public officer to receive warrants in payment of a debt, the issue of the genuineness of the warrants may be passed upon. State *v.* Pilsbury, 29 La. Ann. 787.

Motives of judge.— So long as the trial judge is permitted to sit in the case and is not required to vacate the bench in accordance with the statute, the court, on petition for mandamus to compel him to enter judgment in a cause, will not consider his private motives, nor his estimate of counsel in the case. Alexander *v.* Moss, 89 S. W. 118, 28 Ky. L. Rep. 171.

Ability to execute writ.— Whether the court has power to execute a writ of mandamus will not be considered in determining whether the applicant is entitled to the writ. People *v.* Morton, 24 N. Y. App. Div. 563, 49 N. Y. Suppl. 760.

Where relator has been removed from office, the question whether he was guilty of the charges on which he was removed will not be considered. State *v.* Barrett, 22 Ohio Cir. Ct. 104, 12 Ohio Cir. Dec. 231.

The validity of the original cause of action will not be considered in a mandamus proceeding to enforce a judgment. Sherman *v.* Langham, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961; Harkness *v.* Hutcherson, 90 Tex. 383, 38 S. W. 1120.

As determined by scope of record.— Generally the whole record in a mandamus proceeding will be examined and considered. Le Grange County *v.* Cutler, 7 Ind. 6. But omissions in the alternative writ cannot be supplied by the affidavit or application on which it was allowed. People *v.* Sullivan County, 56 N. Y. 249; McKenzie *v.* Ruth, 22 Ohio St. 371. The supreme court will look only at the petition and return and not at the record in the lower courts. Schollenberger *v.* Forty-Five Foreign Ins. Co's, 21 Fed. Cas. No. 12,475*a*, 5 Wkly. Notes Cas. 366. Where a judge or other officer has denied an application, the hearing must be on the same papers as those on which the application was denied.

b. Constitutionality or Validity of Statute. As a general rule the court will consider and determine the validity of a statute upon which depends the right of the relator or the duty of respondent.[53]

c. Right or Title to Office or Employment. Only the *prima facie* right to office will be investigated in mandamus proceedings and not the relator's title or eligibility.[54]

d. Regularity of Official Action. Generally the court will not investigate the facts upon which a certificate, return, report, allowance of claim, or like official action was made or resulted.[55]

e. Right or Title to Property. When the title to property is questioned only collaterally it will not be considered or tried.[56] However, it has been held that

People *v.* Monroe Cir. Judge, 36 Mich. 274; Matter of Woods, 5 Misc. (N. Y.) 575, 26 N. Y. Suppl. 169. Stipulations of the parties may be considered even on the question as to whether the writ lies. Byington *v.* Hamilton, 37 Kan. 758, 16 Pac. 54. Matters of defense stated in respondent's brief cannot be considered if not in the return. State *v.* Yakey, (Wash. 1906) 85 Pac. 990.

53. McConihe *v.* State, 17 Fla. 238; Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; McDermont *v.* Dinnie, 6 N. D. 278, 69 N. W. 294; State *v.* Saxton, 11 Wis. 27. But see Wright *v.* Kelley, 4 Ida. 624, 43 Pac. 565 (holding that the constitutionality of a statute cannot be questioned collaterally on an application for a writ of mandamus by a private party to enforce a private right); State *v.* Douglas County, 18 Nebr. 506, 26 N. W. 315 (holding that the validity of a statute could not be investigated by mandamus on the eve of election under the act questioned). See, generally, *supra*, II, B, 6.

54. *California.*— Turner *v.* Melony, 13 Cal. 621.

Florida.— State *v.* Johnson, 35 Fla. 2, 16 So. 786, 31 L. R. A. 357; State *v.* Gamble, 13 Fla. 9.

Illinois.— People *v.* Weber, 86 Ill. 283.

Louisiana.— State *v.* Pitot, 21 La. Ann. 336; State *v.* Wrotnowski, 17 La. Ann. 156.

Michigan.— Smith *v.* Wayne Cir. Judge, 84 Mich. 564, 47 N. W. 1092; People *v.* Ingham Co., 36 Mich. 416.

Minnesota.— State *v.* Churchill, 15 Minn. 455; State *v.* Sherwood, 15 Minn. 221, 2 Am. Rep. 116.

Missouri.— State *v.* Auditor, 34 Mo. 375.

Montana.— State *v.* Cook, 17 Mont. 529, 43 Pac. 928.

Nebraska.— State *v.* Plambeck, 36 Nebr. 401, 54 N. W. 667; State *v.* Dodson, 21 Nebr. 218, 31 N. W. 788.

New Jersey.— O'Donnel *v.* Dusman, 39 N. J. L. 677; Feurey *v.* Roe, 35 N. J. L. 123.

New York.— People *v.* Lane, 55 N. Y. 217.

North Dakota.—State *v.* Archibald, 5 N. D. 359, 66 N. W. 234.

Oregon.— Stevens *v.* Carter, 27 Oreg. 553, 40 Pac. 1074, 31 L. R. A. 342.

Pennsylvania.— Flick *v.* Harpham, 13 Pa. Co. Ct. 648.

South Dakota.— State *v.* Kipp, 10 S. D. 495, 74 N. W. 440; Fuller *v.* Roberts County, 9 S. D. 216, 220, 68 N. W. 308, 1103.

Tennessee.—See Pucket *v.* Bean, 11 Heisk. 600.

See 33 Cent. Dig. tit. "Mandamus," § 383. See also *supra*, VI, C, 7.

55. *District of Columbia.*—Arrison *v.* Cook, 6 D. C. 335, election returns conclusive.

Kansas.— State *v.* Lawrence, 3 Kan. 95, return of canvassers collaterally conclusive.

Michigan.— Fuller *v.* Atty.-Gen., 98 Mich. 96, 57 N. W. 33, bad faith of board in removing officers not triable.

Mississippi.— But see Warren County *v.* Klein, 51 Miss. 807, where the illegality of an allowed claim was tried.

Nebraska.— State *v.* Saline County, 18 Nebr. 422, 25 N. W. 587.

New York.— Jordan *v.* New York Bd. of Education, 14 Misc. 119, 35 N. Y. Suppl. 247, 25 N. Y. Civ. Proc. 89, 2 N. Y. Annot. Cas. 244. But see People *v.* Green, 47 How. Pr. 382, holding that whether a claim is a county charge may be inquired into upon issues raised on an alternative mandamus issued for the payment of the claim.

Pennsylvania.— Com. *v.* German Soc. for Mut. Support, etc., 15 Pa. St. 251 (merits of expulsion of member of society not tried); Monongahela City *v.* Monongahela Electric Light Co., 3 Pa. Dist. 63, 12 Pa. Co. Ct. 529 (action of city council in passing ordinance not reviewed).

South Carolina.— State *v.* Beaufort Pilotage Com'rs, 23 S. C. 175, report of commission of pilots not received.

West Virginia.—State *v.* Wood County Ct., 33 W. Va. 589, 11 S. E. 72.

See 33 Cent. Dig. tit. "Mandamus," § 381 *et seq.*

Right to penalties and waivers.— In mandamus proceedings to compel the secretary of the treasurer to deliver to the relator a draft in the possession of the secretary, and withheld by the latter until certain penalties incurred by relator were adjusted, whether the penalties were actually incurred, and whether they were waived, cannot be determined. U. S. *v.* Windom, 19 D. C. 54.

56. Volcano Cañon Road Co. *v.* Placer County, 88 Cal. 634, 26 Pac. 513; Weaverville, etc., Wagon Road Co. *v.* Trinity County, 64 Cal. 69, 28 Pac. 496; Babcock *v.* Goodrich, 47 Cal. 488; People *v.* Doane, 17 Cal. 476; Tennant *v.* Crocker, 85 Mich. 328, 48 N. W. 577. But see Eby *v.* Red Bank School-Dist., 87 Cal. 166, 25 Pac. 240. See also *supra*, II, B, 7.

if the title of third persons is disclosed by the relator's own showing the writ will be denied.[57]

f. Rights of Third Persons. The rights of third persons who are not parties to the proceeding will not be determined, but the court will limit its determination to the rights of the parties.[58]

8. Questions For Jury. Where issues are submitted to the jury they should be confined to material ones.[59] As in other actions, questions of law are for the court and questions of fact are for the jury,[60] and where the evidence is conflicting the question is one for the jury.[61] Where the return or answer puts in issue no material facts there is no question for the jury and the court may hear and determine the case on the questions of law alone.[62]

9. Verdict and Findings. Where the trial is by the court and a judgment is necessary it must, in some states, be supported by proper findings of fact and conclusions of law.[63] Where issues of fact are tried by a jury the judge presiding at the trial may direct a verdict,[64] but he cannot order a nonsuit.[65] Where a verdict is not directed the jury may render a general or a special verdict;[66] and a general verdict is proper, although several special issues are submitted to the jury.[67] A verdict of the jury upon any question of fact submitted to them is binding upon the court.[68]

10. Stay of Proceedings. The court has the power to stay proceedings *pendente lite* as in other cases,[69] but after the court has awarded a peremptory mandamus there is no power to stay the proceedings.[70]

I. New Trials and Rehearings. The rules in regard to new trials and rehearings in mandamus proceedings are practically the same as those applicable to ordinary actions at law.[71] A rehearing in an appellate court which has granted or denied the writ is governed by the practice relating to new trials in the lower court,[72]

57. Chance *v.* Temple, 1 Iowa 179.

58. *California.*— People *v.* Doane, 17 Cal. 476.

Colorado.— See Bright *v.* Farmers' Highline Canal, etc., Co., 3 Colo. App. 170, 32 Pac. 433.

Louisiana.— State *v.* Clinton, 27 La. Ann. 429.

Montana.— Wright *v.* Gallatin County, 6 Mont. 29, 9 Pac. 543.

Nevada.— State *v.* Wright, 10 Nev. 167.

Virginia.— Nottoway County *v.* Powell, 95 Va. 635, 29 S. E. 682.

See 33 Cent. Dig. tit. "Mandamus," § 385.

Conclusiveness of judgment against persons not parties see *infra*, IX, J, 4, b.

Interested persons as proper or necessary parties respondent see *supra*, IX, C, 2, c.

Interest of third persons as affecting discretion of court as to issuing writ see *supra*, II, 3, f.

Relief against persons not parties see *infra*, IX, J, 2.

59. People *v.* Waynesville, 88 Ill. 469.

60. Creager *v.* Hooper, 83 Md. 490, 35 Atl. 159 (holding that the question of the existence of a statute or ordinance is one for the court); People *v.* Dick, 84 N. Y. App. Div. 181, 82 N. Y. Suppl. 719; People *v.* Manhattan State Hospital, 5 N. Y. App. Div. 249, 39 N. Y. Suppl. 158 (holding that the question of the reasonableness of police regulations as to committing the insane is for the court); Smith *v.* Com., 41 Pa. St. 335.

61. Federal, etc., Co. *v.* Pittsburg, 16 York Leg. Rec. (Pa.) 195.

62. Howard *v.* Huron, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493, 6 S. D. 180, 60 N. W. 803.

63. State *v.* Young, 6 S. D. 406, 61 N. W. 165.

64. People *v.* Clausen, 74 N. Y. App. Div. 217, 77 N. Y. Suppl. 521; People *v.* Metropolitan Police Dist., 35 Barb. (N. Y.) 651, 14 Abb. Pr. 158.

65. People *v.* Clausen, 74 N. Y. App. Div. 217, 77 N. Y. Suppl. 521.

66. People *v.* Order American Star, 53 N. Y. Super. Ct. 66.

67. People *v.* Metropolitan Police Dist., 35 Barb. (N. Y.) 644, 651, 14 Abb. Pr. 151, 158.

68. People *v.* Kearny, 44 N. Y. App. Div. 449, 61 N. Y. Suppl. 41. See also People *v.* Woodman, 15 Daly (N. Y.) 20, 1 N. Y. Suppl. 335, 4 N. Y. Suppl. 554.

69. Uhler *v.* Boyd, 41 Cal. 60; State *v.* Avery, 15 Wis. 18.

70. People *v.* Steele, 2 Barb. (N. Y.) 554, 1 Code Rep. 88.

71. State *v.* Richardson, 37 La. Ann. 261; State *v.* Judge Sixth Dist. Ct., 32 La. Ann. 207; Com. *v.* Hampden County Highway Com'rs, 6 Pick. (Mass.) 501; People *v.* Knox, 78 N. Y. App. Div. 344, 79 N. Y. Suppl. 989; People *v.* Metropolitan Police Dist., 35 Barb. (N. Y.) 644, 14 Abb. Pr. 158; People *v.* Byrne, 9 N. Y. Annot. Cas. 127; State *v.* Hœflinger, 33 Wis. 594; State *v.* School Land Com'rs, 9 Wis. 200. See, generally, New Trial.

72. People *v.* Coon, 25 Cal. 635.

and in cases referred to the lower court by the appellate court a motion for a new trial must be made in the appellate court.[73]

J. Judgment — 1. In General — a. Distinguished From Final Writ. The judgment in mandamus proceedings is distinct from the final or peremptory writ which is issued in pursuance of the judgment for the relator. The writ recites the facts showing why it should issue, the judgment directing it, the command of the acts to be performed, and a provision for return. The judgment shows the determination of the court on the merits, directs or denies the writ, and awards the damages and costs, if any.[74]

b. Necessity — (i) *In General.* At common law the peremptory writ was regarded as the final determination of the rights of the parties, and no formal judgment seems to have been required upon which to base the writ.[75] This practice is held applicable in some states to peremptory writs issued by a judge as such;[76] but, when the proceedings are before the court, statutes generally have made a material change in the common-law practice, and before the peremptory writ can properly issue, a formal judgment must be entered as a basis therefor.[77]

(ii) *Necessity of Finding Facts.* In some states it is necessary, to support a judgment in mandamus, that the court should find the facts upon which the judgment is founded.[78] In other states a finding of facts is unnecessary.[79]

c. Form and Contents.[80] The order or judgment directing issuance of the writ should specifically state the act to be performed, but it seems that a failure to do so is not fatal when the prayer of the petition is clear and specific.[81] The methods to be employed in performing the required act may be stated in general terms.[82] A judgment directing a levy to raise money should state the amount, which should not be more than required.[83] If the act to be performed is one required by statute, the judgment should follow the language of the statute.[84] The proper order for a peremptory writ after an alternative is "let the writ be made peremptory," or "peremptory writ refused."[85] Any technical error in the final order may be modified so as to read correctly.[86]

d. Judgment by Default, Pro Confesso, and Nil Dicit. In some jurisdictions if defendant fails to answer, or the answer to the petition is quashed, the allegations of the petition are not authorized to be taken *pro confesso*; nor is the judge authorized to enter judgment as by default for want of answer, or by *nil dicit*. The case must be heard *ex parte*, and the mind of the judge satisfied as to the law and the facts, before the writ can be ordered.[87]

e. Judgment Non Obstante Veredicto. It has been held that a judgment *non*

73. People *v.* Holloway, 41 Cal. 409.

74. See cases cited *infra*, this section.

75. Com. *v.* Union Tp., 4 Kulp (Pa.) 87; State *v.* Young, 6 S. D. 406, 61 N. W. 165.

76. Territory *v.* Shearer, 2 Dak. 332, 8 N. W. 135, holding that in such case the writ must necessarily issue without a judgment on which to base the same, since a judge as such can render no judgment.

77. Travelers' Ins. Co. *v.* Mayer, 2 N. D. 234, 50 N. W. 706; Com. *v.* Union Tp., 4 Kulp (Pa.) 87; State *v.* Young, 6 S. D. 406, 61 N. W. 165.

78. State *v.* New Haven, etc., Co., 41 Conn. 134, holding that mandamus is an action at law within the meaning of the statute declaring that "whenever any action at law shall be tried by the Superior Court without a jury, said court shall find, upon the motion of either party, the facts upon which the judgment . . . is founded."

79. Weimer *v.* People, 72 Ill. App. 119; West Virginia Northern R. Co. *v.* U. S., 134 Fed. 198, 67 C. C. A. 220.

80. Form and requisites of peremptory writ see *infra*, IX, K.

81. Geneva *v.* People, 98 Ill. App. 315. See also Estill County *v.* Embry, 144 Fed. 913, 75 C. C. A. 654, holding that an order for a writ to tax to pay bonds, fixing the amount by reference to the judgment on the bonds, is good.

82. State Bd. of Equalization *v.* People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513.

83. Lexington *v.* Lexington Bd. of Education, 65 S. W. 827, 23 Ky. L. Rep. 1663.

84. Rizer *v.* People, 18 Colo. App. 40, 69 Pac. 315.

85. Chance *v.* Temple, 1 Iowa 179.

86. People *v.* Mole, 85 N. Y. App. Div. 33, 82 N. Y. Suppl. 747.

87. Sudler *v.* Lankford, 82 Md. 142, 33 Atl. 455; Legg *v.* Annapolis, 42 Md. 203. See also Hooper *v.* New, 85 Md. 565, 37 Atl. 424.

obstante veredicto cannot be properly entered in the course of a mandamus proceeding.[88]

f. Separate Judgments Against Different Parties. In accordance with the common-law rule two separate judgments cannot be had in mandamus proceedings,[89] and when there is a joinder of petitioners the judgment must be for all of them or for none of them.[90]

g. Rendition and Entry of Judgment. As a general rule a judgment in mandamus proceedings, like others, must be rendered in term-time, and by the court, not a judge.[91] Where a writ is issued without any order of court having been entered upon the journal record of the clerk, the entry of the order may be made *nunc pro tunc*.[92]

2. Scope and Extent of Relief.[93] The relief to be granted is measured and limited by the extent of the specific duties of respondent, and the command must not exceed such duties.[94] No relief can be granted as against the interests of any person who is not a party to the proceeding;[95] and as a rule relief will not be granted in favor of interested third persons.[96] Where the relator institutes the proceeding in a private capacity, and, although the state is a formal party, the public is in no way interested, no relief will be granted beyond that to which relator himself is entitled;[97] but where the public interests are concerned, relief to which relator is not entitled may be granted to the state as the real party in interest.[98]

3. Damages. By statute in many jurisdictions the relator is entitled to recover damages, where he is adjudged entitled to the relief sought, to be assessed upon equitable principles of compensation.[99] Such a statute does not contemplate an

88. People *v.* Metropolitan Police Bd., 26 N. Y. 316, holding that when a relator in a mandamus has pleaded to an amended return to an alternative writ, he cannot subsequently question its sufficiency in law; and, if the verdict is against him, judgment *non obstante veredicto* cannot be entered.

89. McDonald *v.* Judson, 97 Ill. App. 414.

90. Sedden *v.* McBride, 210 Pa. St. 429, 60 Atl. 12.

91. See, generally, Judgments.

Judgment rendered by judge in vacation.— A judge has no authority to make a peremptory writ granted by him returnable before him in vacation, and, upon its return in vacation, he has no authority to determine the cause and award or deny the relief sought. Therefore a judgment rendered by him in such a proceeding in vacation is unauthorized and void. State *v.* Crook, 123 Ala. 657, 27 So. 334.

92. Poweshiek County *v.* Durant, 9 Wall. (U. S.) 736, 19 L. ed. 813.

93. **Exercise of discretion** in granting relief see *supra*, II, A.

94. Texas Mexican R. Co. *v.* Jarvis, 80 Tex. 456, 15 S. W. 1089; Fisher *v.* Charleston, 17 W. Va. 595; U. S. *v.* Labette County, 7 Fed. 318, 2 McCrary 27 [*affirmed* in 112 U. S. 217, 5 S. Ct. 108, 28 L. ed. 698].

The court is not obliged to grant the prayer in its entirety, but only so much as the relator is shown to be entitled to. Goshen Highway Com'rs *v.* Jackson, 165 Ill. 17, 45 N. E. 1000; People *v.* State, 58 Ill. 90.

95. People *v.* Curtis, 41 Mich. 723, 49 N. W. 923.

Conclusiveness of judgment on persons not parties see *infra*, IX, J, 4, b.

Determination of rights of persons not parties see *supra*, H, 7, f.

Interested persons as proper or necessary parties respondent see *supra*, IX, C, 2, c.

96. New Orleans *v.* U. S., 49 Fed. 40, 1 C. C. A. 148, holding that in a proceeding by one of several judgment creditors of a city to compel payment of his claim, the city will not be commanded to pay all the judgments in their proper order.

However, in a proceeding instituted by the attorney-general, on the relation of a shipper to compel an express company to receive goods for transportation without requiring the consignor to pay the stamp duty, the relief should not be limited to the parties to the record, but may run against the express company for the protection of all shippers within the state, where it definitely appears that the requirement complained of is the uniform practice of the company. Atty.-Gen. *v.* American Express Co., 118 Mich. 682, 77 N. W. 317.

97. State *v.* Cleveland Electric R. Co., 15 Ohio Cir. Ct. 200, 8 Ohio Cir. Dec. 474.

98. State *v.* Cleveland Electric R. Co., 15 Ohio Cir. Ct. 200, 8 Ohio Cir. Dec. 474.

99. See the statutes of the several states. And see McClure *v.* Scates, 64 Kan. 282, 67 Pac. 856; Brown *v.* Worthen, 63 Kan. 883, 65 Pac. 255; People *v.* Musical Mut. Protective Union, 118 N. Y. 101, 23 N. E. 129; People *v.* Richmond County, 28 N. Y. 112.

Unless the main relief sought is obtained the relator is not entitled to damages. Brown *v.* Worthen, 63 Kan. 883, 65 Pac. 255; Tucker *v.* Iredell County, 46 N. C. 451.

If no issue of fact is raised upon the return, but the relator demurs thereto, and the

award of damages against the state, in whose name alone the writ of mandamus can be prosecuted;[1] nor against a court or judge,[2] in the absence of wilful disregard of duty.[3] When those to whom the writ must issue are not those against whom the right of action for damages exists, as in the case of successors in office, the relator cannot recover damages in the mandamus proceeding.[4]

4. Estoppel by Judgment — a. In General.[5] It is well settled that a final judgment rendered upon the merits of an application for a peremptory writ of mandamus comes within the principle of *res judicata*, and is a bar to another application for the same writ by the same party under the same circumstances,[6]

return is found insufficient in law, there can be no foundation for an action for a false return, and the relator is therefore not entitled to an assessment of damages. State *v.* Ryan, 2 Mo. App. 306.

New York — Where peremptory writ issued in first instance.—Code Civ. Proc. § 2088, providing for an award of the relator's damages in a mandamus proceeding, applies where a final order for a peremptory writ has been obtained in the first instance, without the issuance of an alternative writ, provided the relator elects at the time of entering such final order to have his damages awarded in the proceeding. People *v.* Wappingers Falls, 151 N. Y. 386, 45 N. E. 852 [*reversing* 91 Hun 517, 37 N. Y. Suppl. 1148 (*affirming* 13 Misc. 732, 35 N. Y. Suppl. 213)].

Where award of writ impracticable.— Where parties institute an action in mandamus against a city to compel the awarding of a contract to them, but during the time the case is delayed in the court the contract is awarded to other parties, and fully performed, and paid for before the case is decided in their favor, the issuing of the peremptory writ of mandamus having then become impracticable, such parties are entitled to have their damages for failure to have the contract awarded to them determined in such mandamus suit. State *v.* Newark, 19 Ohio Cir. Ct. 5, 10 Ohio Cir. Dec. 440 [*reversing* 8 Ohio S. & C. Pl. Dec. 121, 5 Ohio N. P. 283].

Counsel fees.— Damages do not include counsel fees or other trial expenses, being limited by statute to those recoverable in an action for a false return. People *v.* New York Cent., etc., R. Co., 102 N. Y. Suppl. 385.

A petitioner illegally removed from office is, on reinstatement by mandamus, entitled only to nominal damages, since, on restoration to the office, he becomes entitled to the accrued emoluments during the entire period of his attempted removal, if found to have been able and willing to perform its duties. Hill *v.* Fitzgerald, (Mass. 1907) 79 N. E. 825.

Submission of question to jury.—The court has the right to submit the question of damages to the jury. Hollister *v.* Donahoe, 16 S. D. 206, 92 N. W. 12.

1. State *v.* Ohio Bd. of Public Works, 36 Ohio St. 409.

2. Hill *v.* Morgan, 9 Ida. 777, 76 Pac. 765.

3. McClure *v.* Scates, 64 Kan. 282, 67 Pac. 856.

4. People *v.* Morton, 24 N. Y. App. Div. 563, 49 N. Y. Suppl. 760.

Under the New York statute it was held that in mandamus proceedings against supervisors commanding them to audit the damages assessed for taking the relator's land for a highway, if the return be adjudged insufficient, the proper judgment is, the award of a peremptory mandamus, with damages against defendants, personally, for interest on the relator's damages; the town being liable only for the damages actually assessed, with expenses, etc. People *v.* Richmond County, 28 N. Y. 112. In People *v.* Musical Mut. Protection Union, 118 N. Y. 101, 109, 23 N. E. 129 [*citing* Code Civ. Proc. § 2088], it is said: "It is contended that the court erred in awarding any damages to the relator and in the amount so awarded. The statute provides that where return has been made to an alternative writ issued upon the relation of a private person, the court, upon making a final order for a peremptory mandamus must, if the relator so elects, award to him, against the defendant, the same damages which the relator might recover in an action against the defendant for a false return."

5. See, generally, Judgments, 23 Cyc. 1106 *et seq.*, 1215 *et seq.*

6. Visher *v.* Smith, 92 Cal. 60, 28 Pac. 94; State *v.* Hartford St. R. Co., 76 Conn. 174, 56 Atl. 506; Sauls *v.* Freeman, 24 Fla. 209, 48 So. 525, 12 Am. St. Rep. 190; Hoffman *v.* Silverthorn, 137 Mich. 60, 100 N. W. 183.

Denial of writ conclusive.— When a mandamus is refused on grounds that are conclusive against the right of plaintiff to recover in any action whatever, the judgment is conclusive of that fact. State *v.* Hard, 25 Minn. 460; Louis *v.* Brown Tp., 109 U. S. 162, 3 S. Ct. 92, 27 L. ed. 892.

Judgment conclusive in supreme court except on appeal.— Where a superior court has adjudicated the merits of an application for mandamus, such an adjudication is as conclusive, except on appeal, upon the supreme court as it is upon another superior court. Santa Cruz Gap Turnpike Joint Stock Co. *v.* Santa Clara County, 62 Cal. 40.

A party having the right to plead and recover damages in mandamus proceedings cannot, after having prosecuted to final judgment an action for mandamus, institute a second action to recover damages. Achey *v.* Creech, 21 Wash. 319, 58 Pac. 208.

upon all issues which were litigated or which might have been litigated in the proceedings upon the application.[7]

b. Persons Concluded[8]—(I) *In General.* In accordance with the general rule a judgment in mandamus proceedings operates as an estoppel only as to parties to the action and their privies.[9] A judgment will sometimes, however, operate as an estoppel and a former adjudication against persons who were not named in the proceeding and who were not parties to the record by name, if they were represented in the action or entitled to be heard.[10]

(II) *Officers.* By the weight of authority a judgment in mandamus ordering a performance of an official duty against an officer may properly be directed to such officer and his successor in office, and will bind such successor,[11] although there are decisions to the contrary.[12]

(III) *State.* A state is not bound by a judgment in mandamus instituted on the relation of citizens to compel the county clerk to keep his office at the county-seat, where the state, in the exercise of its sovereign power, on the relation of the county attorney, attempts to compel obedience to its laws in reference to the same matter.[13]

c. Successive Writs and Proceedings. Subject to the rule above stated that the judgment in mandamus operates as an estoppel or adjudication,[14] a second proceeding in mandamus may be brought, when the writ is refused in the first proceeding, by a decision not made on the merits.[15] So also the rule of *res judicata* cannot be invoked in a second action unless the claim or demand,[16] and the parties,[17] are the same. Where an application for a mandamus fails, because there was no demand and refusal, it cannot as a general rule be renewed after a demand.[18]

Rule applicable to public officers.—The rule against making a second application on fresh materials, without new facts, after a first application has failed, applies to public officers as well as individuals. Reg. *v.* Pickles, 3 Q. B. 599, 43 E. C. L. 884.

7. Weed *v.* Mirick, 62 Mich. 414, 29 N. W. 78; Kaufer *v.* Ford, (Minn. 1907) 110 N. W. 364.

8. **Determination of rights of third persons** see *supra*, IX, H, 7, f.

Interested persons as proper or necessary parties see *supra*, IX, C, 2, c.

Relief against persons not joined as parties see *supra*, IX, J, 2.

9. People *v.* Smyth, 28 Cal. 21; People *v.* Croton Aqueduct Bd., 5 Abb. Pr. (N. Y.) 372, 16 How. Pr. 4.

Where a county appears by its attorney and demurs to a petition for mandamus to compel action by the county clerk, the county is bound by the proceedings, and the writ, if warranted, may be served on the individual members of the county board and its president, although they were not made parties individually to the petition. People *v.* Raymond, 186 Ill. 407, 57 N. E. 1066.

10. Ashton *v.* Rochester, 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619 [*affirming* 60 Hun 372, 14 N. Y. Suppl. 855], holding that where a judgment in mandamus is rendered against a municipality in its corporate name, or against a board of officers who represent the municipality, in the absence of fraud or collusion, it will bind the citizens and taxpayers. See Judgments, 23 Cyc. 1245.

11. Schrader *v.* State, 157 Ind. 341, 61 N. E. 721; Pegram *v.* Cleaveland County Com'rs, 65 N. C. 114; Hicks *v.* Cleveland, 106 Fed. 459, 45 C. C. A. 429.

12. Coxe *v.* U. S., 9 Wall. (U. S.) 298, 19 L. ed. 579.

Bringing in successor as party respondent see *supra*, IX, C, 3, a.

Directing writ to successor see *infra*, IX, K, 6, b.

Expiration of respondent's term of office as abating proceeding see *supra*, IX, D, 4.

13. State *v.* Burton, 47 Kan. 44, 27 Pac. 141; State *v.* Stock, 38 Kan. 154, 184, 16 Pac. 106, 799.

Mandamus as suit against state see *supra*, V, A.

14. See *supra*, IX, J, 4, a.

15. *Nebraska.*— State *v.* Baushausen, 49 Nebr. 558, 68 N. W. 950.

New York.— People *v.* Champlain Bd. of Auditors, 33 N. Y. App. Div. 277, 53 N. Y. Suppl. 739.

Oklahoma.— Allen *v.* Reed, 10 Okla. 105, 60 Pac. 782, 63 Pac. 867.

Texas.— Shirley *v.* Conner, 98 Tex. 63, 80 S. W. 984, 81 S. W. 284.

Wisconsin.— State *v.* Hinkel, (1907) 111 N. W. 217.

When no issues are made upon a petition for mandamus, and it is heard as upon demurrer, its refusal for want of sufficient facts will not bar another petition upon a different statement of facts. Pritchard *v.* Woodruff, 36 Ark. 196.

Where a writ is quashed on the motion of the respondent, it is no defense that the writ is the second of two writs upon the same facts. State *v.* Moss, 35 Mo. App. 441.

16. State *v.* Cooley, 58 Minn. 514, 60 N. W. 338.

17. State *v.* St. Louis, etc., R. Co., 29 Mo. App. 301.

18. *Ex p.* Thompson, 6 Q. B. 721, 14 L. J. Q. B. 176, 51 E. C. L. 721; Reg. *v.* St. John,

K. Peremptory Writ[19] — **1. Notice of Application.** Except where otherwise provided by statute or rule of court,[20] notice is necessary before a peremptory writ can be issued.[21]

2. Necessity For Alternative Writ. Except where the alternative writ is abolished by statute,[22] no peremptory writ of mandamus can ordinarily be granted before the issuance of an alternative writ.[23] Especially is this true where material facts alleged in the petition are controverted by the return or answer.[24] In other words the petition and order to show cause cannot be substituted in lieu of the alternative writ,[25] except by consent of the parties and of the court.[26] In many jurisdictions, however, a peremptory writ may be granted in the first instance after notice where there are no disputed questions of fact and a clear case is presented.[27]

12 N. Brunsw. 3, where it is said, however, that there may be circumstances warranting a departure from this rule.

19. Place of issuance see *supra*, IX, A, 3. **Issuance of peremptory writ where no return is made instead of compelling return** see *supra*, IX, E, 4, a.

20. Home Ins. Co. *v.* Scheffer, 12 Minn. 382; Harkins *v.* Sencerbox, 2 Minn. 344; Harkins *v.* Scott County, 2 Minn. 342.

In Nebraska it is only where there is no room for controversy as to the right of the applicant, and where from the nature of the facts set forth in the affidavit the court can take judicial notice that a valid excuse cannot be given, that a peremptory writ may issue without notice. State *v.* Harrington, (1907) 110 N. W. 1016; Horton *v.* State, 60 Nebr. 701, 84 N. W. 87.

21. *Alabama.*— Boraim *v.* Da Costa, 4 Ala. 393.

Arkansas.— Moody *v.* Rogers, 74 Ark. 132, 85 S. W. 84.

Kentucky.— Weaver *v.* Toney, 107 Ky. 419, 54 S. W. 732, 21 Ky. L. Rep. 1157, 50 L. R. A. 105.

Louisiana.— State *v.* Couvillon, 109 La. 267, 33 So. 309; Savage *v.* Holmes, 15 La. Ann. 334; Leverich *v.* Prieur, 8 Rob. 97; French *v.* Prieur, 6 Rob. 299.

Maine.— See Anonymous, 31 Me. 590.

Maryland.— Brosius *v.* Reuter, 1 Harr. & J. 480.

Minnesota.— State *v.* Scott County, 42 Minn. 284, 44 N. W. 64; Clark *v.* Buchanan, 2 Minn. 346.

New Mexico.— Armijo *v.* Territory, 1 N. M. 580.

New York.— People *v.* Dutchess County, 18 N. Y. Suppl. 302; People *v.* Judges Rensselaer County C. Pl., 3 How. Pr. 164; Albany Water Works Co. *v.* Albany Mayor's Ct., 12 Wend. 292.

North Carolina.— Lutterloh *v.* Cumberland County, 65 N. C. 403.

Pennsylvania.— *In re* Devereux St., 13 Phila. 103.

Texas.— Crumley *v.* McKinney, (1888) 9 S. W. 157.

Virginia.— Dinwiddie Justices *v.* Chesterfield Justices, 5 Call 556.

West Virginia.— Stanton *v.* Wolmesdorff, 55 W. Va. 601, 47 S. E. 245.

Wisconsin.— State *v.* Mills, 27 Wis. 403.

United States.— Fairbanks *v.* Amoskeag Nat. Bank, 30 Fed. 602.

Canada.— Kingston *v.* Kingston, etc., R. Co., 28 Ont. 399; *Re* Brookfield, 12 Ont. Pr. 485.

See 33 Cent. Dig. tit. "Mandamus," § 318.

22. Chatters *v.* Coahoma County, 73 Miss. 351, 19 So. 107. And see the statutes of the several states.

23. Boraim *v.* Da Costa, 4 Ala. 393; Johnson *v.* Glascock, 2 Ala. 519; Harwood *v.* Marshall, 9 Md. 83; Mullanphy *v.* St. Louis County Ct., 6 Mo. 563; Tillson *v.* Putnam County Com'rs, 19 Ohio 415.

24. *California.*—People *v.* Alameda County, 45 Cal. 395.

Georgia.— McIntosh County *v.* Aiken Canning Co., 123 Ga. 647, 51 S. E. 585.

Iowa.— Price *v.* Harned, 1 Iowa 473.

Nebraska.— American Water-Works Co. *v.* State, 31 Nebr. 445, 48 N. W. 64.

New York.— People *v.* Brown, 55 N. Y. 180; People *v.* Voorhis, 115 N. Y. App. Div. 218, 100 N. Y. Suppl. 927; People *v.* Coleman, 99 N. Y. App. Div. 88, 91 N. Y. Suppl. 432; People *v.* Palmer, 3 N. Y. App. Div. 389, 38 N. Y. Suppl. 651; People *v.* Green, 1 Hun 1, 3 Thomps. & C. 90; People *v.* Goff, 27 Misc. 331, 57 N. Y. Suppl. 1106; *In re* Loftus, 16 N. Y. Suppl. 327; *In re* Shay, 15 N. Y. Suppl. 488; People *v.* Becker, 3 N. Y. St. 202.

North Carolina.— Tucker *v.* Raleigh, 75 N. C. 267.

Texas.— Houston *v.* Smith, 12 Tex. Civ. App. 120, 34 S. W. 194.

Wisconsin.— State *v.* Shea, 70 Wis. 104, 35 N. W. 319; State *v.* Manitowoc, 52 Wis. 423, 9 N. W. 607.

See 33 Cent. Dig. tit. "Mandamus," § 405.

25. Fisher *v.* Charleston, 17 W. Va. 595.

26. Fisher *v.* Charleston, 17 W. Va. 595.

The parties may stipulate that the petition be taken for the alternative writ instead of requiring an order for issue of an alternative writ. People *v.* Rio Grande County, 7 Colo. App. 229, 42 Pac. 1032.

27. *California.*— People *v.* Turner, 1 Cal. 143, 52 Am. Dec. 295.

Illinois.— See People *v.* Cloud, 3 Ill. 362.

Iowa.— Chance *v.* Temple, 1 Iowa 179.

Kentucky.— Cumberland, etc., R. Co. *v.* Judge Washington County Ct., 10 Bush

3. ISSUANCE ON DEFAULT OR ON INSUFFICIENT PLEADING. While in some jurisdictions a peremptory writ cannot be issued by default or without proof,[28] yet in most states the writ may be granted on motion on the failure to answer or make a return, or where the answer or return is defective in substance,[29] or on the

564; Justices Clarke County Ct. *v.* Paris, etc., Turnpike Co., 11 B. Mon. 143.

Minnesota.— Home Ins. Co. *v.* Scheffer, 12 Minn. 382; Harkins *v.* Scott County, 2 Minn. 342.

Mississippi.— Attala County Police Bd. *v.* Grant, 9 Sm. & M. 77, 47 Am. Dec. 102.

Nebraska.— State *v.* Weston, 67 Nebr. 175, 93 N. W. 182; Horton *v.* State, 60 Nebr. 701, 84 N. W. 87; State *v.* Whipple, 60 Nebr. 650, 83 N. W. 921; Mayer *v.* State, 52 Nebr. 764, 73 N. W. 214; American Water-Works Co. *v.* State, 31 Nebr. 447, 48 N. W. 64.

New Jersey.—Hugg *v.* Camden, 39 N. J. L. 620; Kelly *v.* Paterson, 35 N. J. L. 196; State *v.* Elkinton, 30 N. J. L. 335.

New York.— People *v.* Cullinan, 173 N. Y. 604, 66 N. E. 1114; People *v.* Coler, 171 N. Y. 373, 64 N. E. 149; People *v.* New York Police Bd., 107 N. Y. 235, 13 N. E. 920; People *v.* Greene County, 64 N. Y. 600; People *v.* Cullinan, 95 N. Y. App. Div. 598, 88 N. Y. Suppl. 1022; People *v.* Democratic Gen. Committee, 82 N. Y. App. Div. 173, 81 N. Y. Suppl. 784 [*affirmed* in 175 N. Y. 415, 67 N. E. 898]; People *v.* Lindenthal, 79 N. Y. App. Div. 43, 79 N. Y. Suppl. 828; People *v.* Wells, 78 N. Y. App. Div. 373, 79 N. Y. Suppl. 728; People *v.* Moore, 78 N. Y. App. Div. 28, 79 N. Y. Suppl. 7; People *v.* Produce Exch. Trust Co., 53 N. Y. App. Div. 93, 65 N. Y. Suppl. 926; Matter of Kenny, 52 N. Y. App. Div. 385, 65 N. Y. Suppl. 204; People *v.* Harwick, 48 N. Y. App. Div. 559, 62 N. Y. Suppl. 897; People *v.* Morgan, 20 N. Y. App. Div. 48, 46 N. Y. Suppl. 898; People *v.* Palmer, 3 N. Y. App. Div. 389, 38 N. Y. Suppl. 651; People *v.* Sutton, 88 Hun 173, 34 N. Y. Suppl. 487; People *v.* Myers, 50 Hun 479, 3 N. Y. Suppl. 365 [*affirmed* in 112 N. Y. 676, 20 N. E. 417, 125 N. Y. 749, 27 N. E. 408]; People *v.* St. Louis, etc., R. Co., 47 Hun 543; People *v.* Miller, 42 Hun 462; People *v.* Brennan, 39 Barb. 522; Manhattan, etc., Electric Co. *v.* Fornes, 47 Misc. 209, 95 N. Y. Suppl. 851; Matter of Uvalde Asphalt Paving Co., 33 Misc. 699, 68 N. Y. Suppl. 1106; People *v.* McGuire, 31 Misc. 324, 65 N. Y. Suppl. 463; Matter of Journal Pub. Club, 30 Misc. 326, 63 N. Y. Suppl. 465; People *v.* Fromme, 30 Misc. 323, 63 N. Y. Suppl. 583; People *v.* Scannell, 25 Misc. 619, 56 N. Y. Suppl. 117; Forty-Second St., etc., R. Co. *v.* Collis, 24 Misc. 321, 53 N. Y. Suppl. 669; *In re* McDonald, 16 Misc. 304, 39 N. Y. Suppl. 367; Matter of Loader, 14 Misc. 208, 35 N. Y. Suppl. 996; People *v.* Tedcastle, 12 Misc. 468, 34 N. Y. Suppl. 257; People *v.* Brooklyn Bd. of Education, 16 N. Y. Suppl. 676; *In re* Loftus, 16 N. Y. Suppl. 327; *In re* Shay, 15 N. Y. Suppl. 488; People *v.* Becker, 3 N. Y. St. 202; People *v.* New York, 52 How. Pr. 140; *Ex p.* Rogers, 7 Cow. 526; *Ex p.* Goddell, 14 Johns. 325.

North Carolina.— Perry *v.* Chatham County, 130 N. C. 558, 41 S. E. 787; Lutterloh *v.* Cumberland County, 65 N. C. 403, holding that where a claim is based upon a judgment, the proper process is a peremptory mandamus.

North Dakota.— State *v.* Getchell, 3 N. D. 243, 55 N. W. 585.

Ohio.— Banks *v.* De Witt, 42 Ohio St. 263.

Pennsylvania.— Com. *v.* Knorr, 210 Pa. Dist. 535, 25 Pa. Co. Ct. 244; Com. *v.* Pittsburg, 33 Pittsb. Leg. J. 315; Com. *v.* Hyde Park, 15 Wkly. Notes Cas. 506. But see Jefferson County *v.* Shannon, 51 Pa. St. 221; Childs *v.* Com., 3 Brewst. 194.

Texas.— See Houston *v.* Smith, 12 Tex. Civ. App. 120, 34 S. W. 194.

West Virginia.— Stanton *v.* Wolmesdorff, 55 W. Va. 601, 47 S. E. 245.

Wisconsin.— State *v.* Shea, 70 Wis. 104, 34 N. W. 319.

United States.— Knox County *v.* Aspinwall, 24 How. 376, 16 L. ed. 735.

See 33 Cent. Dig. tit. "Mandamus," § 405.

Where defendants have had ample opportunity to set up all substantial defenses in a previous litigation, a peremptory, instead of an alternative, mandamus should be granted. Aspinwall *v.* Knox County Com'rs, 2 Fed. Cas. No. 593 [*affirmed* in 24 How. 376, 16 L. ed. 735].

Where the return is a denial upon information and belief and puts in issue only legal questions, a peremptory writ may issue in the first instance. *In re* Long Acre Electric Light, etc., Co., 102 N. Y. Suppl. 242 [*affirming* 51 Misc. 407, 101 N. Y. Suppl. 460].

28. Pereria *v.* Wallace, 129 Cal. 397, 62 Pac. 61; Hayward *v.* Pimental, 107 Cal. 386, 40 Pac. 545; People *v.* Central Pac. R. Co., 62 Cal. 506; Farmers' Independent Ditch Co. *v.* Maxwell, 4 Colo. App. 477, 36 Pac. 566; Sudler *v.* Lankford, 82 Md. 142, 33 Atl. 455; Legg *v.* Annapolis, 42 Md. 203; Runkel *v.* Winemiller, 4 Harr. & M. (Md.) 429, 1 Am. Dec. 411.

29. *Alabama.*— *Ex p.* Geter, 141 Ala. 323, 37 So. 341.

Illinois.— People *v.* Pearson, 4 Ill. 270.

Michigan.— Grand Rapids *v.* Burlingame, 102 Mich. 321, 60 N. W. 698; Murphy *v.* Reeder Tp., 57 Mich. 419, 24 N. W. 127.

Nebraska.— Wheeler *v.* State, 32 Nebr. 472, 49 N. W. 442; State *v.* Gandy, 12 Nebr. 232, 11 N. W. 296.

New York.— Matter of Freel, 89 Hun 79, 35 N. Y. Suppl. 59 [*affirmed* in 148 N. Y. 165, 42 N. E. 586]; People *v.* Ulster County, 1 Johns. 64.

Tennessee.— Memphis Appeal Pub. Co. *v.* Pike, 9 Heisk. 697, holding, however, that default may be opened in a proper case.

Washington.— State *v.* Reid, 17 Wash. 688, 49 Pac. 516.

overruling of a demurrer where no answer is afterward interposed.[30] But while failure to make a return admits the facts alleged in the petition, it does not admit their legal sufficiency.[31]

4. Issuance on the Pleadings. It is common practice for relator to move for a peremptory writ on the return, or on the papers equivalent to the return, instead of pleading or joining issue on the return, or going to trial. Such a motion operates as a demurrer to the return or other defensive matter, so as to admit the truth of all matters sufficiently pleaded therein.[32] But matter not well pleaded in the return or answer, such as conclusions of law, will not be taken as admitted.[33] Of course, undisputed allegations of fact in the petition, that are undisputed in the answer, will be taken as true, but not mere conclusions of law in the petition, although not disputed.[34] On the motion, an order to quash or strike out parts of the return may be made.[35] Affidavits and other proof not served upon defendants with the order to show cause cannot be read or considered.[36] The denial of a motion for a peremptory writ merely defers the question of its issuance until a trial on the merits.[37]

Wisconsin.— State *v.* Watertown, 9 Wis. 254.

See 33 Cent. Dig. tit. "Mandamus," § 406.

Under a statute authorizing a peremptory writ, where the answer is considered insufficient, the writ cannot be issued where no answer has been interposed. State *v.* Board of Com'rs, 115 La. 684, 39 So. 842.

30. State *v.* Sandilek, 37 Nebr. 580, 56 N. W. 207; People *v.* Hamilton County Com'rs, 3 Nebr. 244; Hopper *v.* Bergen County Freeholders, 52 N. J. L. 313, 19 Atl. 383; Brown *v.* Ruse, 69 Tex. 589, 7 S. W. 489; Sansom *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505; Hebb *v.* Cayton, 45 W. Va. 578, 32 S. E. 187. But see State *v.* Delafield, 69 Wis. 264, 34 N. W. 123.

31. Madison County *v.* Smith, 95 Ill. 328.

32. *California.*— Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 405.

Illinois.— People *v.* Danville, 147 Ill. 127, 35 N. E. 154.

Michigan.—Gallagher *v.* Cheboygan County, 119 Mich. 271, 77 N. W. 930; Tyler *v.* Oceana County, 93 Mich. 448, 53 N. W. 616; Grondin *v.* Logan, 88 Mich. 247, 50 N. W. 130; Post *v.* Sparta Tp., 63 Mich. 323, 29 N. W. 721; Hickey *v.* Oakland County, 62 Mich. 94, 28 N. W. 771; Merrill *v.* Gladwin County, 61 Mich. 95, 27 N. W. 866; Murphy *v.* Reeder, 56 Mich. 505, 23 N. W. 197; People *v.* Ingham County, 36 Mich. 416.

Mississippi.— Beard *v.* Lee County, 51 Miss. 542; Swann *v.* Work, 24 Miss. 439; Attala County Bd. of Police *v.* Grant, 9 Sm. & M. 77, 47 Am. Dec. 102.

Missouri.— State *v.* Adams, 161 Mo. 349, 61 S. W. 894; State *v.* Neville, 110 Mo. 345, 19 S. W. 491; State *v.* Smith, 104 Mo. 661, 16 S. W. 503.

New York.—*In re* Steinway, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461; People *v.* New York Cent., etc., R. Co., 156 N. Y. 570, 51 N. E. 312; Haebler *v.* New York Produce Exch., 149 N. Y. 414, 44 N. E. 87; People *v.* Brooklyn, 149 N. Y. 215, 43 N. E. 554; People *v.* Brush, 146 N. Y. 60, 40 N. E. 502; People *v.* Rome, etc., R. Co., 103 N. Y. 95, 8 N. E. 369; People *v.* Cromwell, 102 N. Y. 477, 7 N. E. 413; People *v.* Fairman, 91 N. Y. 385; People *v.* Westchester County, 73 N. Y. 173; People *v.* New York Bd. of Apportionment, 64 N. Y. 627; People *v.* New York Bd. of Education, 114 N. Y. App. Div. 1, 99 N. Y. Suppl. 737; People *v.* Hamilton, 98 N. Y. App. Div. 59, 90 N. Y. Suppl. 547; Matter of Coats, 73 N. Y. App. Div. 178, 76 N. Y. Suppl. 730; People *v.* Knox, 58 N. Y. App. Div. 541, 69 N. Y. Suppl. 602 [*affirmed* in 167 N. Y. 620, 60 N. E. 1118]; People *v.* Keating, 49 N. Y. App. Div. 123, 63 N. Y. Suppl. 71; People *v.* Dalton, 46 N. Y. App. Div. 264, 61 N. Y. Suppl. 263; People *v.* Gleason, 32 N. Y. App. Div. 357, 53 N. Y. Suppl. 7; People *v.* Salina, 27 N. Y. App. Div. 476, 50 N. Y. Suppl. 533; People *v.* Collis, 20 N. Y. App. Div. 341, 46 N. Y. Suppl. 727; People *v.* Wurster, 14 N. Y. App. Div. 556, 43 N. Y. Suppl. 1088; People *v.* New York Law School, 68 Hun 118, 22 N. Y. Suppl. 663; People *v.* McKenzie, 66 Hun 265, 21 N. Y. Suppl. 279; Matter of Nash, 36 Misc. 113, 72 N. Y. Suppl. 1057; People *v.* Goff, 27 Misc. 331, 57 N. Y. Suppl. 1106; People *v.* Scannel, 22 Misc. 298, 49 N. Y. Suppl. 1096; People *v.* Tedcastle, 12 Misc. 468, 34 N. Y. Suppl. 257; *In re* Schmitt, 10 N. Y. Suppl. 583; People *v.* Durston, 3 N. Y. Suppl. 522; People *v.* Becker, 3 N. Y. St. 202; People *v.* Hudson Highway Com'rs, 7 Wend. 474; People *v.* Hudson Highway Com'rs, 6 Wend. 559.

Tennessee.— State *v.* Alexander, 115 Tenn. 156, 90 S. W. 20; State *v.* Marks, 6 Lea 12.

England.— Reg. *v.* Deverell, 3 E. & B. 372, 18 Jur. 494, 23 L. J. M. C. 121, 2 Wkly. Rep. 231, 77 E. C. L. 372.

See 33 Cent. Dig. tit. "Mandamus," § 403.

33. State *v.* Adams, 161 Mo. 349, 61 S. W. 894.

34. People *v.* Brooklyn, 149 N. Y. 215, 43 N. E. 554.

35. People *v.* Board of Police, 9 Abb. Pr. (N. Y.) 257.

36. Matter of Uvalde Asphalt Paving Co., 33 Misc. (N. Y.) 699, 68 N. Y. Suppl. 1106.

37. Booth *v.* Strippleman, 61 Tex. 378.

5. Scope and Extent of Relief — a. In General. Only one writ can be granted on an order to show cause why a peremptory mandamus should not issue,[38] and the writ should not command the allowance of inconsistent remedies.[39] A peremptory writ must strictly conform to the order of the court upon which it issues.[40]

b. Conformity to Petition. Generally the relator will not be granted greater relief than that which is asked for in his petition,[41] but such relief as is fairly within the prayer will be granted, although not specifically prayed for.[42] So a demand for excessive relief does not preclude the granting of the relief to which the relator is entitled under the facts stated.[43] Ordinarily, however, the writ is properly refused where the petitioner fails to establish a right substantially as extensive as is claimed,[44] although in some cases a prayer for relief, in so far as it seeks unauthorized relief, has been treated as surplusage.[45]

c. Conformity to Alternative Writ. The earlier doctrine that the peremptory writ must strictly follow the alternative one is followed in many cases.[46] There are cases, however, holding that a substantial agreement is sufficient, especially as to matters of detail;[47] and in some jurisdictions the rule has been relaxed so as

38. State *v.* Beloit, 20 Wis. 79, holding, however, that the rule is otherwise where the relator proceeds by an alternative writ, and also that if a rule is entered against several parties against whom several writs would be required, the court may grant the writ as to one and deny it as to the others.

39. State *v.* Reynolds, (Mo. App. 1906) 97 S. W. 650.

40. Hawkins *v.* More, 3 Ark. 345.

41. Bangor *v.* Penobscot County Com'rs, 87 Me. 294, 32 Atl. 903; People *v.* Wexford Tp., 37 Mich. 351. But see Davis *v.* Patterson, 12 Pa. Super. Ct. 479.

42. Mobile Mut. Ins. Co. *v.* Cleveland, 76 Ala. 321.

43. *California.*— People *v.* San Francisco, 27 Cal. 655.

Illinois.—Goshen Highway Com'rs *v.* Jackson, 165 Ill. 17, 45 N. E. 1000 [*affirming* 61 Ill. App. 381].

Indiana.— Satterwhite *v.* State, 142 Ind. 1, 40 N. E. 654, 1087.

Iowa.— Ellsworth *v.* Dorwart, 95 Iowa 108, 63 N. W. 588, 58 Am. St. Rep. 427.

Mississippi.—Chatters *v.* Coahoma County, 73 Miss. 351, 19 So. 107.

Missouri.— Barton County School Dist. No. 1 *v.* Lamar Bd. of Education, 73 Mo. 627; Osage Valley, etc., R. Co. *v.* Morgan County Ct., 53 Mo. 156.

New York.— People *v.* Nostrand, 46 N. Y. 375; People *v.* Armstrong, 116 N. Y. App. Div. 103, 101 N. Y. Suppl. 712.

South Dakota.—Smith *v.* Lawrence, 2 S. D. 185, 49 N. W. 7.

West Virginia.— See Fisher *v.* Charleston, 17 W. Va. 628, holding that the writ may issue, although also prayed against an officer having no power or duty.

See 33 Cent. Dig. tit. "Mandamus," § 393.

44. Rosenfeld *v.* Einstein, 46 N. J. L. 479; Texas Mexican R. Co. *v.* Jarvis, 80 Tex. 456, 15 S. W. 1089.

45. Townsend *v.* Fulton Irr. Ditch Co., 17 Colo. 142, 29 Pac. 453.

46. *Connecticut.*— State *v.* Ousatonic Water Co., 51 Conn. 137; Douglas *v.* Chatham, 41 Conn. 211.

Florida.— State *v.* Call, 39 Fla. 165, 22 So. 266; State *v.* Gibbs, 13 Fla. 55, 7 Am. Rep. 233.

Indiana.— Trant *v.* State, 140 Ind. 414, 39 N. E. 513.

Iowa.— State *v.* Johnson County Judge, 12 Iowa 237; Price *v.* Harned, 1 Iowa 473; Chance *v.* Temple, 1 Iowa 179.

Missouri.— Jasper County School Dist. No. 11 *v.* Landerbaugh, 80 Mo. 190; State *v.* Kansas City, etc., R. Co., 77 Mo. 143 [*overruling* Barton County School Dist. No. 1 *v.* Lamar Bd. of Education, 73 Mo. 627, and Osage Valley, etc., R. Co. *v.* Morgan County Ct., 53 Mo. 156]; State *v.* Holladay, 65 Mo. 76; State *v.* Kansas City Police Com'rs, 80 Mo. App. 206; State *v.* Norvell, 80 Mo. App. 180; State *v.* Joplin Water Works, 52 Mo. App. 312; State *v.* Field, 37 Mo. App. 83; State *v.* Schmitz, 36 Mo. App. 550; State *v.* Clayton, 34 Mo. App. 563. See also State *v.* Associated Press, 159 Mo. 410, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151.

Nebraska.— State *v.* Haverley, 62 Nebr. 767, 87 N. W. 959.

New Jersey.— McDonald *v.* Newark, 58 N. J. L. 12, 32 Atl. 384; Rader *v.* Union Tp., 43 N. J. L. 518.

New York.— People *v.* Clausen, 50 N. Y. App. Div. 286, 63 N. Y. Suppl. 993; People *v.* Gilroy, 60 Hun 507, 15 N. Y. Suppl. 242; People *v.* Green, 64 Barb. 162; People *v.* New York County, 10 Abb. Pr. 233, 18 How. Pr. 152; People *v.* Dutchess County, 1 Hill 50.

Ohio.— Morgenthaler *v.* Crites, 4 Ohio Cir. Ct. 485, 2 Ohio Cir. Dec. 663.

South Carolina.— State *v.* Cheraw, etc., R. Co., 16 S. C. 524.

West Virginia.—Doolittle *v.* Cabell County Ct., 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 628.

Canada.— Reg. *v.* McLean, 5 U. C. Q. B. 473.

See 33 Cent. Dig. tit. "Mandamus," § 393.

47. State *v.* Weld, 39 Minn. 426, 40 N. W. 561; State *v.* Norvell, 80 Mo. App. 180; State *v.* Joplin Water-Works, 52 Mo. App. 312; People *v.* Dutchess, etc., R. Co., 58 N. Y. 152; People *v.* Scannell, 50 N. Y. App. Div. 625.

to allow the peremptory writ to be in any form consistent with the case made by the complaint and embraced within the issues,[48] and to permit the peremptory writ to command the performance of only part of the acts referred to in the alternative writ, where the acts are independent of each other.[49]

6. Form and Contents — a. In General. The writ must be issued under the seal of the court, tested in the name of the judge, signed by the clerk, and returnable at some future day.[50] It must not only show the obligation of defendant to perform the act but also his omission to perform.[51] But the writ need not recite a right existing independently thereof by statute and by virtue of the police powers of a municipality.[52] The duty required to be performed must be clearly, distinctly, and specifically stated in the mandatory clause of the writ,[53] and not be in the alternative.[54] The rights of defendant should be expressly guarded.[55]

b. To Whom Directed.[56] As in the case of the alternative writ,[57] the peremptory writ must be directed to the person or corporation on whom the duty rests of performing the act sought to be enforced,[58] and in case a common duty rests

63 N. Y. Suppl. 985; McClintock *v.* Philadelphia, 210 Pa. St. 115, 59 Atl. 691, 105 Am. St. Rep. 784, 68 L. R. A. 459, holding that the omission of the name of the president of defendant, it being shown in the alternative writ, is immaterial, where he was under no duty.

48. State *v.* Weld, 39 Minn. 426, 40 N. W. 561; People *v.* Queens County, 142 N. Y. 271, 36 N. E. 1062; People *v.* Morton, 24 N. Y. App. Div. 563, 49 N. Y. Suppl. 760; Gunn *v.* Lander, 10 N. D. 389, 87 N. W. 999; Dew *v.* Judges Sweet Spring Dist. Ct., 3 Hen. & M. (Va.) 1, 3 Am. Dec. 639. See also People *v.* Early, 106 N. Y. App. Div. 269, 94 N. Y. Suppl. 640; People *v.* Yonkers Bd. of Police, 79 N. Y. App. Div. 82, 79 N. Y. Suppl. 710.

49. State *v.* Crites, 48 Ohio St. 142, 26 N. E. 1052; Howard *v.* Huron, 6 S. D. 180, 60 N. W. 803, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493.

50. State *v.* Delafield, 64 Wis. 218, 24 N. W. 905.

51. Rosenthal *v.* State Bd. of Canvassers, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157.

52. Matter of Seaboard Tel., etc., Co., 68 N. Y. App. Div. 283, 74 N. Y. Suppl. 15. See also Presque Isle County *v.* Thompson, 61 Fed. 914, 10 C. C. A. 154.

53. *Connecticut.*— Douglas *v.* Chatham, 41 Conn. 211.

Illinois.— People *v.* Brooks, 57 Ill. 142.

Indiana.— Chicago, etc., R. Co. *v.* State, 158 Ind. 189, 63 N. E. 224.

Iowa.— Chance *v.* Temple, 1 Iowa 179.

Maine.— Hartshorn *v.* Ellsworth, 60 Me. 276.

Michigan.— Diamond Match Co. *v.* Powers, 51 Mich. 145, 16 N. W. 314.

Minnesota.— See State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, 39 N. W. 153.

West Virginia.— Cross *v.* West Virginia Cent., etc., R. Co., 34 W. Va. 742, 12 S. E. 765, holding that a writ to admit a director must designate the term during which he is to be admitted.

Wisconsin.— State *v.* Milwaukee, 22 Wis. 397.

See 33 Cent. Dig. tit. "Mandamus," § 411.

54. State *v.* Pacific, 61 Mo. 155.

55. Douglas *v.* Chatham, 41 Conn. 211; Matter of Coats, 73 N. Y. App. Div. 178, 76 N. Y. Suppl. 730.

56. Necessary and proper parties respondent see *supra*, IX, C, 2, b, (I).

57. See *supra*, IX, F, 3, e, (II).

58. *Alabama.*— Winter *v.* Baldwin, 89 Ala. 483, 7 So. 734.

Colorado.— Daniels *v.* Miller, 8 Colo. 542, 9 Pac. 18.

Connecticut.— State *v.* Towers, 71 Conn. 657, 42 Atl. 1083; State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336; Farrell *v.* King, 41 Conn. 448.

Delaware.— State *v.* Pan American Co., (1904) 61 Atl. 698.

Georgia.— Holtzclaw *v.* Riley, 113 Ga. 1023, 39 S. E. 425.

Illinois.— Chicago *v.* Sansum, 87 Ill. 182.

Louisiana.— State *v.* O'Kelly, 48 La. Ann. 28, 18 So. 757; State *v.* Shreveport, 29 La. Ann. 658.

Maryland.— Hooper *v.* Farnen, 85 Md. 587, 37 Atl. 430.

Missouri.— State *v.* Norvell, 80 Mo. App. 180.

New York.— People *v.* Brinckerhoff, 68 N. Y. 259 [*affirming* 7 Hun 668]; People *v.* New York, 3 Abb. Dec. 502, 3 Keyes 81 [*affirming* 45 Barb. 473, 30 How. Pr. 327]; People *v.* Throop, 12 Wend. 183.

South Dakota.—Bailey *v.* Lawrence County, 2 S. D. 533, 51 N. W. 331.

Tennessee.— State *v.* Williams, 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418.

England.— Rex *v.* Taylor, 3 Salk. 231; Reg. *v.* Hereford, 2 Salk. 701.

Canada.— Demorest *v.* Midland R. Co., 10 Ont. Pr. 82; Goodwin *v.* Ottawa, etc., R. Co., 13 U. C. C. P. 254; Upton *v.* Hutchison, 8 Quebec Q. B. 505 [*affirmed* in 15 Quebec Super. Ct. 396, 2 Quebec Pr. 300].

See 33 Cent. Dig. tit. "Mandamus," § 412.

Effect of improper joinder.— The joining of a person in mandamus proceedings who has not power to perform the duties demanded does not invalidate the writ. State *v.* Pan American Co., (Del. 1904) 61 Atl. 398.

on several, it should be directed to all.[59] On the other hand, the writ cannot be directed to one on whom the duty of performance does not rest.[60] These rules are corollary to those which determine who are necessary or proper parties respondent, and cases supporting and illustrating the one set of rules may, subject to some exceptions, serve to support and illustrate the other.[61] The style by which a person to whom a writ is directed should be designated in the writ is likewise governed by the rules as to the designation of respondents generally.[62] The peremptory writ must, as a rule, follow the alternative writ in regard to the persons to whom it is directed.[63] If the writ is to compel the performance of an act by an official, it should be directed to him as such official.[64] The cases are not in accord as to whether, in mandamus proceedings against an officer, the writ may be directed to his successors in office. It has been held that where respondent is still in office when the writ issues, it cannot be directed to his successors generally as well as to him.[65] The judgment is binding on the respondent's successors in office,[66] although it may be directed to one who succeeds the officer *pendente lite*.[67]

7. Service. In most jurisdictions it is necessary to deliver the original writ on

59. Cecil County Com'rs *v.* Banks, 80 Ind. 321, 30 Atl. 919; Matter of Broderick, 25 Misc. (N. Y.) 534, 56 N. Y. Suppl. 99; People *v.* Paton, 5 N. Y. St. 313, 20 Abb. N. Cas. 195; State *v.* Jones, 23 N. C. 129; Hicks *v.* Cleveland, 106 Fed. 459, 45 C. C. A. 429; Evans *v.* Pittsburgh, 8 Fed. Cas. No. 4,568, 2 Pittsb. 405. And see West Virginia Northern R. Co. *v.* U. S., 134 Fed. 198, 67 C. C. A. 220. But see People *v.* Brinkerhoff, 68 N. Y. 259 [*affirming* 7 Hun 668].

Effect of willingness to act.— The writ should be directed to all members of a public board, although some are willing to act. Eufaula *v.* Hickman, 57 Ala. 338; Knight *v.* Ferris, 6 Houst. (Del.) 283; State *v.* Jones, 23 N. C. 129, so holding, although those willing to act are the petitioners. But where those willing to act admit service of the alternative writ and declare their willingness, the peremptory writ need not be expressly directed to them. Knight *v.* Ferris, *supra*; State *v.* Jones, *supra*.

60. *Alabama.*— Winter *v.* Baldwin, 89 Ala. 483, 7 So. 734.

Colorado.— Daniels *v.* Miller, 8 Colo. 542, 9 Pac. 18.

Connecticut.— State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; Doolittle *v.* Branford, 59 Conn. 403, 22 Atl. 336; Farrell *v.* King, 41 Conn. 448.

Delaware.— State *v.* Pan American Co., (1904) 61 Atl. 398.

Georgia.— Gilliam *v.* Green, 122 Ga. 322, 50 S. E. 137; Holtzclaw *v.* Riley, 113 Ga. 1023, 39 S. E. 425.

Louisiana.— State *v.* O'Kelly, 48 La. Ann. 28, 18 So. 757; State *v.* Shreveport, 29 La. Ann. 658.

Maryland.— Hooper *v.* Farnen, 85 Md. 587, 37 Atl. 430.

New York.— People *v.* Throop, 12 Wend. 183.

United States.—Evans *v.* Pittsburgh, 8 Fed. Cas. No. 4,568, 2 Pittsb. 405.

England.— Rex *v.* Smith, 2 M. & S. 583; Rex *v.* Taylor, 3 Salk. 231; Reg. *v.* Hereford, 2 Salk. 701; Rex *v.* Norwic, Str. 55.

Canada.— Upton *v.* Hutchison, 8 Quebec Q. B. 505 [*affirmed* in 15 Quebec Super. Ct. 396, 2 Quebec Pr. 300].

See 33 Cent. Dig. tit. "Mandamus," § 412.

A writ to compel the admission of a person to office, it has been held, cannot run against a rival claimant in possession, since he has no power to act. State *v.* Dunn, Minor (Ala.) 46, 12 Am. Dec. 25. See, however, Cecil County Com'rs *v.* Banks, 80 Md. 321, 30 Atl. 919.

61. See *supra*, IX, C, 2, b, (I).

62. See *supra*, IX, C, 2, b, (I).

63. State *v.* Bergen County Freeholders, 52 N. J. L. 313, 19 Atl. 383, holding that where an alternative writ is directed to two persons and commands the performance of a joint duty, a peremptory writ cannot issue against one of them alone.

However, although an alternative writ was directed to certain persons as commissioners of highways, the peremptory writ may be directed to the commissioners *eo nomine*. People *v.* Champion, 16 Johns. (N. Y.) 61.

In Pennsylvania a peremptory writ may by statute issue against a private corporation and the officer whose duty it is to perform the act desired, although the alternative writ is directed against another officer also, who has no duty in the matter. McClintock *v.* Philadelphia Young Republicans, 210 Pa. St. 115, 59 Atl. 691, 105 Am. St Rep. 784, 68 L. R. A. 459 [*affirming* 13 Pa. Dist. 456].

64. State *v.* Elkinton, 30 N. J. L. 335.

65. Spiritual Atheneum Soc. *v.* Randolph Selectmen, 58 Vt. 192 (not only because the successors are not in existence, but also because they have not neglected any duty); U. S. *v.* Elizabeth, 42 Fed. 45. *Contra*, Hicks *v.* Cleveland, 106 Fed. 459.

66. See *supra*, IX, J, 4, b, (II).

67. Boody *v.* Watson, 64 N. H. 162, 173, 9 Atl. 794; Orford School Dist. No. 6 *v.* Carr, 63 N. H. 201, 206. And see State *v.* Milwaukee, 25 Wis. 122.

Abatement of proceedings by expiration of respondent's term of office see *supra*, IX, D, 4.

Bringing in respondent's successor as party respondent see *supra*, IX, C, 3, a.

which the return should be made.[68] If more than one person is to be served, the original writ should be delivered to one of defendants, and copies should be given to each of the others.[69] Service should generally be made on each person commanded to act,[70] in the absence of a statute to the contrary.[71] It has been held that the writ may be served by any person.[72] Defects in the mode of serving the writ are waived by an appearance and making a return.[73]

8. Return. Strictly speaking, there is no return to a peremptory writ.[74] It is to be obeyed and a certificate is made of what has been done.[75] However, a return, or a certificate in the nature thereof, must generally be made under penalty of an attachment.[76] The return differs from the return to an alternative writ in that it should contain merely a certificate of compliance, unless something impossible or unlawful is commanded, or such a change of conditions has taken place as to make compliance improper, in which case the facts should be stated.[77]

9. Quashing or Setting Aside. If the writ is defective in substance it may be quashed.[78] It may be quashed for any reason going to its validity, such as that it clearly changes or enlarges in a material matter the terms of the first writ,[79] or does not conform to the order of the court upon which it issued,[80] or because the relator is no longer entitled to the performance sought.[81] However, it will not be quashed when served after the duty is completed for the time being, but the time for the return will be extended.[82] Where defendant has had an opportunity to be heard upon the rule to show cause, or otherwise, the writ will not be quashed because of the failure to issue an alternative writ.[83]

10. Amendment. Under the modern rule as to the liberal allowance of amendments of legal proceedings, the writ may, in the discretion of the court, be amended either to conform to the alternative writ or to the facts proved.[84]

68. State *v.* King, 29 Kan. 607 (holding that the delivery of a copy is invalid); State *v.* Mineral Point, 22 Wis. 396. But see State *v.* Elkinton, 30 N. J. L. 335.

69. State *v.* Brady, 6 Phila. (Pa.) 121; Rex *v.* Worcester Corp., 68 J. P. 130, 2 Loc. Gov. 51.

70. Downs *v.* Rock Island County, 7 Fed. Cas. No. 4,047, 4 Biss. 508, holding that a writ against a board of supervisors should be served on the individual members, and that an acceptance by the clerk "by order of the board" was insufficient.

Service on common council.—A peremptory writ of mandamus to compel the city council of a village to perform a public duty must be served on the persons composing the council at the time of such service. People *v.* Barnett, 91 Ill. 422; Glencoe *v.* People, 78 Ill. 382.

71. People *v.* Guggenheimer, 44 N. Y. App. Div. 399, 60 N. Y. Suppl. 703, holding that the statutory provision that where a board consisting of more than three is created by law, with a president who is "appointed" pursuant to law, service of a peremptory mandamus to the board may be on such president, the word "appointed" is not technical, but includes those elected. And see the statutes of the several states.

72. People *v.* Pearson, 4 Ill. 270.

73. People *v.* Barnett, 91 Ill. 422.

74. State *v.* Smith, 9 Iowa 334.

75. State *v.* Smith, 9 Iowa 334.

76. State *v.* Pennsylvania R. Co., 41 N. J. L. 250.

77. *Florida.*— State *v.* Alachua County, 17 Fla. 9.

Illinois.— People *v.* Barnett, 91 Ill. 422.

Iowa.— State *v.* Smith, 9 Iowa 334.

Kansas.— State *v.* Sheldon, 2 Kan. 322.

Maryland.— Weber *v.* Zimmerman, 23 Md. 45.

See 33 Cent. Dig. tit. "Mandamus," § 415.

If a statute has been enacted, after such peremptory order, forbidding obedience and making obedience impossible, such new matter will constitute a sufficient return, provided the statute is constitutional. Sedberry *v.* Chatham County, 66 N. C. 486.

The omission of a date to the return is not a fatal defect. State *v.* Griscom, 8 N. J. L. 136.

The time for the return of the peremptory writ may be extended. State *v.* Rahway, 51 N. J. L. 279, 17 Atl. 122.

A protest in a certificate in response to a peremptory writ against the jurisdiction of the court will be stricken out. State *v.* McLin, 16 Fla. 17.

78. Hawkins *v.* More, 3 Ark. 345; People *v.* Judges Westchester County Ct. of C. Pl., 4 Cow. (N. Y.) 73; Rex *v.* Oxford, 7 East 345, 2 Smith K. B. 341, 8 Rev. Rep. 696.

79. Brown *v.* Rahway, 51 N. J. L. 279, 17 Atl. 122.

80. Hawkins *v.* More, 3 Ark. 345.

81. Weber *v.* Zimmerman, 23 Md. 45.

82. Brown *v.* Rahway, 51 N. J. L. 279, 17 Atl. 122.

83. State *v.* Elkinton, 30 N. J. L. 335; Knox County *v.* Aspinwall, 65 U. S. 376, 16 L. ed. 735.

84. Denver School Dist. No. 1 *v.* Arapahoe County School Dist. No. 35, 33 Colo. 43, 78 Pac. 690; State *v.* Johnson County Judge,

11. Alias Writ. When the writ is not obeyed, a second writ is sometimes issued instead of at once proceeding by attachment.[85]

12. Operation and Effect. The writ may of itself, where awarded against a court or judge, operate as a stay of the judicial proceedings.[86] When it is used to place a person in possession of an office, it confers no right, but merely gives him possession to enable him to assert his right, which in some cases he could not otherwise do.[87] A writ to compel payment of judgments is not void because the judgments are void.[88]

L. Enforcement, Performance, and Violation — 1. Necessity For Obedience. Implicit obedience to the command of the writ is required;[1] the judgment and writ being regular on their face and the relief granted being within the jurisdiction of the court, the respondent has no alternative but to obey, and his disobedience will be a contempt of court.[2]

2. Sufficiency of Performance and Effect of Violation — a. In General. Any disobedience of a command of the writ whether intentional or otherwise,[3] although if the respondent's conduct is not contumacious the fact may operate on the court upon the question of punishment,[4] will constitute a violation of the writ and put the respondent in contempt of court,[5] unless of course he has a legally

12 Iowa 237; Brown *v.* Rahway, 53 N. J. L. 156, 20 Atl. 966. See also Orr *v.* Atcheson, 66 Kan. 789, 71 Pac. 848; State *v.* Louisiana Accommodation Bank, 28 La. Ann. 874; State *v.* Giddings, 98 Minn. 102, 107 N. W. 1048. *Contra*, Columbia County *v.* King, 13 Fla. 451.

85. Cromartie *v.* Bladen, 87 N. C. 134; Fry *v.* Montgomery County Com'rs, 82 N. C. 304; Newman *v.* Scott County Justices, 1 Heisk. (Tenn.) 787; State *v.* Memphis, 2 Tenn. Cas. 185.

Where time of office expires.— Where an officer to whom a writ has been directed and on whom it has been served goes out of office without performing the act, an alias writ to the successor in office is permissible. People *v.* Barnett Tp., 100 Ill. 332. See also Bonner *v.* Foster Tp., 10 Pa. Co. Ct. 477.

86. Noel *v.* Smith, 2 Cal. App. 158, 83 Pac. 167.

87. Brower *v.* O'Brien, 2 Ind. 423.

88. Boasen *v.* State, 47 Nebr. 245, 66 N. W. 303.

1. State *v.* Memphis, 2 Tenn. Cas. 185.

2. *Indiana.*—Bowers *v.* State, 127 Ind. 272, 26 N. E. 798.

Iowa.— Smith *v.* State, 9 Iowa, 334.

Kentucky.— Cumberland, etc., R. Co. *v.* Washington County Ct., 10 Bush 564.

Minnesota.— State *v.* Giddings, 98 Minn. 102, 107 N. W. 1048.

Nebraska.— McAleese *v.* State, 42 Nebr. 886, 61 N. W. 88.

Pennsylvania.— Williamsport *v.* Com., 90 Pa. St. 498; Com. *v.* Sheehan, 81* Pa. St. 132; Com. *v.* Taylor, 36 Pa. St. 263; *In re* Contested Elections, 1 Brewst. 67.

United States.— Evans *v.* Pittsburgh, 8 Fed. Cas. No. 4,568, 2 Pittsb. (Pa.) 405.

See 33 Cent. Dig. tit. "Mandamus," § 419 *et seq.* See also *infra*, IX, L, 5, b.

After removal of cause to federal court.— A party cannot be attached for contempt in refusing to obey a writ of mandamus issued by the supreme court of the state, where the cause in which it issued has been removed by writ of error to the supreme court of the United States, until that court, by some action of its own, has returned the case to the state court. Frazee *v.* Cardozo, 6 S. C. 315. See also New York, etc., R. Co. *v.* Woodruff, 42 Fed. 468, holding that where the state court refuses to permit a removal to the federal court, on a writ of error from the supreme court of the United States, a federal circuit court will not enjoin the enforcement of the peremptory writ, the same questions being involved on the writ of error, and therefore the injunction is unnecessary.

Order modified on appeal.— Although pending an appeal the order cannot be enforced, and modifications are made in it by the appellate court, such modified order remains in force and obedience is not excluded, but the order to the extent of the affirmance has the added sanction of the appellate court. People *v.* Rice, 144 N. Y. 249, 39 N. E. 88 [*affirming* 80 Hun 437, 30 N. Y. Suppl. 457].

3. *In re* Smith, 2 Cal. App. 158, 83 Pac. 167.

4. *In re* Smith, 2 Cal. App. 158, 83 Pac. 167.

The failure to fully perform is not contumacious where the officers have acted in good faith and in the exercise of their best judgment in attempting to reach the result ordered by the writ. State *v.* Memphis, 2 Tenn. Cas. 185. And where the statute is changed under which the writ commanded a duty to be performed, and defendant in good faith and according to his best judgment as to the effect of the change ceased to comply with the writ, it was held that he could not be punished by attachment for contempt even if his judgment was wrong, but that a new application by mandamus was proper. State *v.* Memphis, 2 Tenn. Cas. 185; State *v.* Harvey, 14 Wis. 151.

5. *Illinois.*— People *v.* Salomon, 54 Ill. 39.

Louisiana.— State *v.* Tax Collector, 48 La. Ann. 28, 18 So. 757; State *v.* Orleans Parish Civ. Dist. Ct., 38 La. Ann. 43, 58 Am. Rep. 158.

valid excuse for his failure. Decisions relating to this phase of the question are considered in a subsequent section.[6]

b. Substantial Compliance. However, the respondent will not be punished for contempt if there has been a substantial compliance, and a literal obedience is not required where the respondent's conduct is not contumacious.[7] Of course if all that the writ orders has been done in obedience to it nothing more can be required;[8] and the general command to proceed to perform an official duty does not require action in excess of the duty which the law would otherwise impose on the respondent in respect to the particular subject-matter, nor does it preclude his acting with such discretion and judgment as it would otherwise have been his right or duty to employ.[9]

c. Continuing Duties and Cases Arising Upon New Facts. When the duties, the performance of which is commanded, are continuing, it is not a compliance with the writ to perform a part of such duties.[10] But after full compliance with

Minnesota.— State *v.* Giddings, 98 Minn. 102, 107 N. W. 1048.

Nebraska.— McAleese *v.* State, 42 Nebr. 886, 61 N. W. 88.

New York.— People *v.* Rice, 144 N. Y. 249, 39 N. E. 88 [*affirming* 80 Hun 437, 30 N. Y. Suppl. 457]; People *v.* Brice, 62 N. Y. App. Div. 593, 71 N. Y. Suppl. 196 [*modifying* 34 Misc. 491, 70 N. Y. Suppl. 346, as to the punishment].

Pennsylvania.— Williamsport *v.* Com., 90 Pa. St. 498.

United States.— Leavenworth County *v.* Sellew, 99 U. S. 624, 25 L. ed. 333; U. S. *v.* Muscatine County, 28 Fed. Cas. No. 16,538, 2 Abb. 53, 1 Dill. 522.

See 33 Cent. Dig. tit. "Mandamus," § 424 *et seq.* See also *infra*, IX, L, 5, b.

Inaction as well as an affirmative refusal to obey will bring the party within the rule. State *v.* Tax Collector, 48 La. Ann. 28, 18 So. 757.

6. See *infra*, IX, L, 3.

7. *California.*— People *v.* Turner, 1 Cal. 188, where it was held that an attachment should not issue against a judge for non-compliance with a writ directing him to vacate an order expelling a member of the bar unless it appeared from the papers on which the motion was founded that an application had first been made to the court vacating the order, and an order having been entered on the record of the court reciting that the relator had been restored by the supreme court was held to be a sufficient recognition of the power of the supreme court to restore and a substantial compliance with the mandate of that court.

New Jersey.— State *v.* Griscom, 8 N. J. L. 136, holding that where the writ commanded a committee "to assign to the overseers or some of them," etc., an assignment to one is a substantial compliance.

Tennessee.— State *v.* Memphis, 2 Tenn. Cas. 185.

West Virginia.— State *v.* Cunningham, 33 W. Va. 607, 11 S. E. 76.

United States.— U. S. *v.* Kendall, 26 Fed. Cas. No. 15,518, 5 Cranch C. C. 385.

See 33 Cent. Dig. tit. "Mandamus," §§ 419, 420.

A reasonable delay incident to the performance of the duty will not subject the party to punishment for contempt. State *v.* Cunningham, 33 W. Va. 607, 11 S. E. 76. A writ to levy a tax for a bridge, not fixing time, will be complied with by a levy at first meeting after writ served. State *v.* Pierce County Sup'rs, 71 Wis. 321, 73 N. W. 231, upon considering the sufficiency of the judgment for the peremptory writ. So in People *v.* Hempstead, 4 Hun (N. Y.) 95, it was held that where the order requiring a board of auditors to show cause why mandamus should not be granted to compel them to allow a claim was made after the adjournment of the board, such adjournment will prevent the enforcement of a peremptory writ, but the writ might issue to be enforced at the board's next lawful meeting.

8. Whiting *v.* West Point, 89 Va. 741, 17 S. E. 1, where the writ commanded a town council "to assess and collect taxes for corporation purposes on the property" of a certain corporation, and there being no specific prayer that the taxes for any particular year should be assessed but only that taxes be ordered to be assessed and collected, and there being no authority in the council to assess back taxes, an assessment of taxes for the current year was held to be all that could be required. See also *infra*, IX, L, 2, c.

9. Cromartie *v.* Bladen Com'rs, 87 N. C. 134, 85 N. C. 211; State *v.* Memphis, 2 Tenn. Cas. 185; Whiting *v.* West Point, 89 Va. 741, 17 S. E. 1; State *v.* Cunningham, 33 W. Va. 607, 11 S. E. 76; *Ex p.* Bradstreet, 8 Pet. (U. S.) 588, 8 L. ed. 1054, where on a motion against a judge for contempt in refusing to obey a writ directing him to reinstate certain suits which had been dismissed and to proceed to adjudicate them according to law, it appearing that the suits were reinstated and ordered for trial but that delays had taken place so that a verdict had been reached in one of them only, it was held that the judge must exercise his discretion in those intermediate proceedings which take place between the institution of the suit and trial, and that if he acts oppressively it is not to the supreme court that application should be made.

10. People *v.* Voorhis, 186 N. Y. 263, 78 N. E. 1001 [*reversing* 100 N. Y. Suppl. 717].

the commands of the writ a subsequent and similar act does not constitute a violation of the writ.[11]

3. Excuse or Justification For Disobedience — a. In General. Respondent cannot avoid punishment for refusing to obey the mandate of a writ of mandamus in the absence of a just excuse for his course.[12] An agreement between the parties by which the operation of the writ is arrested after its service constitutes a valid excuse for non-compliance.[13]

b. Conclusiveness of Judgment and Peremptory Writ. The rule of *res judicata* applies to the judgment for a peremptory writ of mandamus, and all questions raised or which could have been raised in opposition to granting the writ are concluded by the issue of the writ and cannot be raised again in resisting obedience or in justification of disobedience.[14]

c. Impediments to and Impossibility of Performance — (1) *In General.* Inability to perform, if respondent himself is not at fault and his own conduct has not caused the inability, may be a sufficient excuse.[15] But the officer should not be allowed to escape his duty or obligation because of a failure to do that precedent act which would have insured the ultimate performance of the whole duty, at the time provided by law,[16] and if the excuse set up is impossibility to perform, which, however, is merely a condition which the respondent has brought about by its own previous disobedience of the command of the legislature, it will not avail as he cannot thus take advantage of his own wrong.[17]

Effect of part performance on appeal see *infra*, M, 1.

11. People *v.* Turner, 1 Cal. 188; Bowers *v.* State, 127 Ind. 272, 26 N. E. 798, after writ to restore pupil obeyed, a second suspension for cause not a violation.

12. People *v.* Rochester, etc., R. Co., 76 N. Y. 294.

Advice of counsel.— Attachments for contempt have been discharged where the failure to perform was under advice of counsel, and without intending any contempt. Clapp *v.* Fisk, 1 Hun (N. Y.) 464; Senior *v.* Douglass, 14 Wkly. Notes Cas. (Pa.) 454. *Compare* Williamsport *v.* Com., 90 Pa. St. 498.

Disobedience after a void service of a writ by copy instead of by original has been held not to constitute contempt. State *v.* King, 29 Kan. 607.

But disobedience of order for the writ before the latter is issued or served has been held to be a contempt upon the part of defendant who had knowledge of the order and its contents. People *v.* Rice, 144 N. Y. 249, 39 N. E. 88 [*affirming* 80 Hun 437, 30 N. Y. Suppl. 457].

Failure to affix seal to the writ has been held to constitute an excuse for failure to obey the same. Clapp *v.* Fisk, 1 Hun (N. Y.) 464.

13. Rahway Sav. Inst. *v.* Rahway, 50 N. J. L. 350, 15 Atl. 27. In People *v.* Aitken, 19 Hun (N. Y.) 327, it was held that the members of the common council were not guilty of criminal contempt for adjourning without complying with the mandate of the supreme court to order a special election to fill a supposed vacancy, it appearing that the person whose seat was adjudged vacant had promised the council to refrain from acting pending its appeal to the court of appeals.

14. *Illinois.*— People *v.* Salomon, 54 Ill. 39.

Iowa.— State *v.* Smith, 9 Iowa 334.

Maryland.— Weber *v.* Zimmerman, 23 Md. 45.

New York.— People *v.* Rice, 144 N. Y. 249, 39 N. E. 88 [*affirming* 80 Hun 437, 30 N. Y. Suppl. 457]; People *v.* Rochester, etc., R. Co., 76 N. Y. 294; People *v.* Guggenheimer, 44 N. Y. App. Div. 399, 60 N. Y. Suppl. 703.

Pennsylvania.— *In re* Contested Elections, 1 Brewst. 67.

West Virginia.— State *v.* Cunningham, 33 W. Va. 607, 11 S. E. 76.

United States.— President *v.* Elizabeth, 40 Fed. 799 (holding that an objection that another course of procedure preliminary to the granting of the writ could have been pursued by relator, cannot be urged in justification of a disobedience of the writ); U. S. *v.* Silverman, 27 Fed. Cas. No. 16,288, 4 Dill. 224.

See 33 Cent. Dig. tit. "Mandamus," § 424.

Facts arising after the judgment are no defense in a contempt proceeding for violation of the writ of mandamus; the original judgment cannot be collaterally attacked in that way, but the remedy is by application to file a supplemental answer in the original proceeding to the end that the judgment therein may be modified. State *v.* Giddings, 98 Minn. 102, 107 N. W. 1048. *Contra*, Weber *v.* Zimmerman, 23 Md. 45, where the subsequent disqualification of one to hold the office to which it was ordered that he be restored was held good cause for quashing the writ and discharging parties from attachment for disobeying it.

15. U. S. *v.* Seaboard R. Co., 85 Fed. 955; U. S. *v.* Green, 53 Fed. 769.

Where duty devolves on more than one see *infra*, IX, L, 4, b.

16. Milburn *v.* Cedar Rapids, etc., R. Co., 12 Iowa 246.

17. People *v.* Salomon, 54 Ill. 39.

(II) *Injunction.* Courts will not ordinarily compel officers to put themselves in positive conflict with a writ or order of another court and will not interfere by mandamus with the obedience of an injunction issued by a court of competent jurisdiction,[18] and it has been held that obedience to such an injunction will be a sufficient protection if the directions of the subsequent writ of mandamus are not obeyed in violation of the injunction.[19] But an injunction restraining defendant from performing the command of a peremptory writ of mandamus will be no excuse for non-compliance with such writ;[20] and state courts have no power to interfere by injunction, either before or after the writ of mandamus issues, with the performance of the mandate of a writ of mandamus issuing out of a federal court for the enforcement of its judgment, and such injunction will afford no excuse for disobedience of the mandamus.[21]

(III) *Order Void For Want of Jurisdiction*— (A) *In General.* If the command of the writ is in whole or in part beyond the power of the court, the writ or so much thereof as is in excess of jurisdiction is void, and the court has no right in law to punish for any contempt of the unauthorized requirements.[22] But while jurisdiction of the subject-matter cannot be conferred by consent, a question relating to the authority of a branch of the court to make the particular order may be effectually raised,[23] and the question of the jurisdiction of the supreme court is necessarily determined in issuing a peremptory writ and cannot be raised thereafter in resisting performance.[24]

(B) *Acts Beyond Lawful Authority of Respondent.* If the impossibility to perform relates to inability to do the acts commanded because they are beyond the lawful authority of the respondent, the command is nugatory and the respondent cannot be attacked for disobeying the mandate.[25]

4. Who Must Obey and Persons Punishable For Disobedience — a. In General. Except as to the duty of performance which may devolve upon a successor in office,[26] only those to whom the writ is directed and on whom it is served can be punished for contempt in failing to obey its mandate.[27] And while the writ is directed to persons in an official capacity, or by official name, if the command is disobeyed the officers are individually liable to attachment or other process for contempt, which should be brought against them individually.[28]

18. See *supra*, II, H, 2.

19. People *v.* West Troy, 25 Hun (N. Y.) 179; State *v.* Kisbert, 21 Wis. 387. See also Cumberland, etc., R. Co. *v.* Judge Washington County Ct., 10 Bush (Ky.) 564.

20. Com. *v.* Sheehan, 81 Pa. St. 132.

21. U. S. *v.* Keokuk, 6 Wall. (U. S.) 514, 18 L. ed. 933; U. S. *v.* Johnson, 6 Wall. (U. S.) 166, 18 L. ed. 768 (in which cases it is held that a prior injunction by the state court will not be regarded as giving the latter prior jurisdiction, the writ of mandamus being necessary to the exercise of jurisdiction of the federal court in the matter in which the judgment was rendered); Holt County *v.* National L. Ins. Co., 80 Fed. 686, 25 C. C. A. 469; U. S. *v.* Lee County, 26 Fed. Cas. No. 15,589, 2 Biss. 77; U. S. *v.* Silverman, 27 Fed. Cas. No. 16,288, 12 Biss. 224; U. S. *v.* Muscatine County, 28 Fed. Cas. No. 16,538, 2 Abb. 53, 1 Dill. 522. In Hawley *v.* U. S., 108 U. S. 543, 2 S. Ct. 846, 27 L. ed. 820, it was held that the relator was not a party to the suit in which the injunction was obtained and, consequently, was not bound by it; and it was also held that having established her right to the tax by the judgment of the circuit court in a suit to which the town in its corporate capacity was a party, she may use the power of that court to command the assessment and collection of the tax as a means of carrying the judgment rendered in her favor into execution, notwithstanding what the taxpayers may have caused to be done in some proceeding to which the relator was not a party.

22. *In re* McCain, 9 S. D. 57, 68 N. W. 163; *Ex p.* Rowland, 104 U. S. 604, 26 L. ed. 861.

23. People *v.* Rice, 144 N. Y. 249, 39 N. E. 88 [*affirming* 80 Hun 437, 30 N. Y. Suppl. 457].

24. State *v.* Cunningham, 33 W. Va. 607, 11 S. E. 76.

25. *Ex p.* Rowland, 104 U. S. 604, 26 L. ed. 861; U. S. *v.* Seaboard R. Co., 85 Fed. 955; U. S. *v.* Green, 53 Fed. 769; U. S. *v.* Labette County, 7 Fed. 318, 2 McCrary 27. See also Evans *v.* Pittsburgh, 8 Fed. Cas. No. 4,568, 2 Pittsb. (Pa.) 405.

26. See *infra*, IX, L, 4, c. See also *supra*, IX, D, 4.

27. U. S. *v.* Labette County, 7 Fed. 318, 2 McCrary 27.

28. *Iowa.*— State *v.* Smith, 9 Iowa 334.
Kentucky.— Maddox *v.* Graham, 2 Metc. 56.

b. Where Duty Devolves on More Than One. Where the command of the writ requires the performance of acts by more than one, as in the case of boards and other municipal bodies, those who refuse to obey will be amenable to contempt process;[29] but there is no disobedience such as to bring into contempt the others who are willing to obey and whose hands are tied by the delinquency of their associates.[30]

c. After Expiration of Term or Change in Officers. When the *personnel* of a board or other municipal body changes, and such change works no abatement of the proceedings pending,[31] if the act required to be done is one pertaining to the body in its official capacity those succeeding must comply in the same manner as their predecessors.[32] And so where the writ is regarded as directed to the officer in his official capacity purely, it is held to bind the encumbent of the office whoever he may be.[33] When an officer resigns and ceases to have the power to do the acts commanded by the writ, he cannot by contempt process be compelled to do that which he is without power to do, but he may be punished for his refusal to do the act before he became divested of official character;[34] but where an officer continues, under the law, to hold his office until his successor is elected and qualified, his resignation is no excuse for his failure to perform before his successor is so elected and qualified.[35]

5. Proceedings For Enforcement and Punishment — a. In General. The court entertaining the proceeding for a mandamus has jurisdiction not only to command the performance of the duties, but to enforce the command by subsequent proceedings and orders to that end.[36] Thus it has been held that an alias writ of mandamus may issue when the first order has not been complied with,[37] and if the writ has been disobeyed contumaciously, further steps may be taken to compel obedience and in addition the delinquent parties may be punished for contempt.[38]

Missouri.— St. Louis County Ct. *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355.

New York.— People *v.* Brice, 34 Misc. 491, 70 N. Y. Suppl. 346 [*modified* in other respects in 62 N. Y. App. Div. 593, 71 N. Y. Suppl. 196]; People *v.* Delaware, 9 Abb. Pr. N. S. 408.

Ohio.— Hollister *v.* Judges Lucas County Dist. Ct., 8 Ohio St. 201, 70 Am. Dec. 100.

See 33 Cent. Dig. tit. "Mandamus," § 424.

29. State *v.* Judge Cir. Dist. Ct., 38 La. Ann. 43, 58 Am. Rep. 158; People *v.* Brice, 34 Misc. (N. Y.) 491, 70 N. Y. Suppl. 346 [*modified* in 62 N. Y. App. Div. 593, 71 N. Y. Suppl. 196]; Leavenworth County *v.* Sellew, 99 U. S. 624, 25 L. ed. 333; U. S. *v.* Buchanan County, 24 Fed. Cas. No. 14,679, 5 Dill. 285.

30. State *v.* Smith, 9 Iowa 334; U. S. *v.* Green, 33 Fed. 769.

31. See *supra*, IX, D, 4.

32. U. S. *v.* Dubuque County, Morr. (Iowa) 31; Maddox *v.* Graham, 2 Metc. (Ky.) 56; People *v.* Collins, 19 Wend. (N. Y.) 56; Pegram *v.* Cleaveland County Com'rs, 65 N. C. 114.

33. People *v.* Bacon, 18 Mich. 247, order to judge of inferior court.

34. People *v.* Pearson, 4 Ill. 270, contempt of court in refusing to obey a writ of mandamus requiring respondent to sign a bill of exceptions while he was judge. But see U. S. *v.* Justices Lauderdale County, 10 Fed. 460.

Where the writ is directed against a corporation, one who has ceased to be an officer of the corporation and who therefore has no power to perform cannot be attached for failure to obey the writ. U. S. *v.* Seaboard R. Co., 85 Fed. 955, where a writ of mandamus commanded a railway company to make out its annual report and was served on the secretary and treasurer, who shows that he has not possession of the books necessary to enable him to make out the report, and that he has resigned, and is no longer connected with the railroad.

35. U. S. *v.* Green, 53 Fed. 769; U. S. *v.* Justices Lauderdale County, 10 Fed. 460. See also Badger *v.* U. S., 93 U. S. 599, 23 L. ed. 991.

36. Palmer *v.* Jones, 49 Iowa 405.

37. Cromartie *v.* Bladen, 87 N. C. 134; Cavanaugh *v.* Cass School Dist., 6 Pa. Co. Ct. 35; State *v.* Memphis, 2 Tenn. Cas. 185.

38. State *v.* Memphis, 2 Tenn. Cas. 185.

Performance by officer of court.— The judgment is not, strictly speaking, capable of being executed by the sheriff. No writ of possession or of fieri facias can issue. If defendant does not choose to obey the order, he may be arrested and imprisoned; but if he chooses to remain in prison, the order will remain unexecuted. State *v.* Judge Orleans Parish Sixth Dist. Ct., 21 La. Ann. 741. See also State *v.* Judge Civ. Dist. Ct., 38 La. Ann. 43, 58 Am. Rep. 158, where it is said that distringas is not an appropriate remedy. But in Lee County *v.* U. S., 7 Wall. (U. S.) 175, 19 L. ed. 162, and U. S. *v.* Muscatine County, 28 Fed. Cas. No. 16,538, 2 Abb. 53, 1 Dill. 522, it was held that where writs of mandamus issued by the federal courts commanding the proper officers to levy and collect taxes to pay judgment against public

b. Contempt Proceedings to Punish or Coerce — (i) *In General.* Except as the practice may be modified by statute, the proceeding for the enforcement of the writ and punishment for its disobedience is by attachment for contempt,[39] as in other contempt cases, and governed by general rules applicable to such proceedings.[40] The proceeding and attachment should run against the officer in his individual name and not against the office.[41]

(ii) *Fine and Commitment.* The violation of or refusal to obey a peremptory writ of mandamus is a contempt of court, ordinarily punishable as such,[42] as in other contempt proceedings[43] by fine or imprisonment, or both,[44] and the court

corporations are evaded, disobeyed, or cannot be executed, such court has the power to appoint its marshal to execute the writs. These cases, however, are said to rest entirely upon the statute in Iowa permitting the practice. Ress *v.* Watertown, 19 Wall. (U. S.) 107, 22 L. ed. 72. See also Thompson *v.* Allen County, 115 U. S. 550, 6 S. Ct. 140, 29 L. ed. 472.

39. *Arkansas.*— Walker *v.* Fuller, 29 Ark. 448.

Illinois.— People *v.* Salomon, 54 Ill. 39; People *v.* Pearson, 4 Ill. 270.

Kentucky.— Maddox *v.* Graham, 2 Metc. 56.

Ohio.— State *v.* Crites, 48 Ohio St. 460, 28 N. E. 178.

Pennsylvania.— Williamsport *v.* Com., 90 Pa. St. 498; Com. *v.* Sheehan, 81* Pa. St. 132; Com. *v.* Taylor, 36 Pa. St. 263; Cavanaugh *v.* Cass School Dist., 6 Pa. Co. Ct. 35; Senior *v.* Douglass, 14 Wkly Notes Cas. 454.

United States.— *In re* Copenhaver, 54 Fed. 660; U. S. *v.* Green, 53 Fed. 769; Moran *v.* Elizabeth, 40 Fed. 799; U. S. *v.* Buchanan, 24 Fed. Cas. No. 14,679, 5 Dill. 285; U. S. *v.* Lee County, 26 Fed. Cas. No. 15,589, 2 Biss. 77.

See 33 Cent. Dig. tit. "Mandamus," § 424 *et seq.*

40. See CONTEMPT, 9 Cyc. 1 *et seq.*

Affidavit.— Proceeding for the punishment of a contempt in failing to obey the writ may be had on an affidavit sworn to before any officer authorized to administer an oath. McAleese *v.* State, 42 Nebr. 886, 61 N. W. 88.

Service of a rule to show cause why a party should not be attached for contempt in not obeying a writ of peremptory mandamus, must be proved to have been made upon the party before the rule will be made absolute. State *v.* Rahway, 53 N. J. L. 156, 20 Atl. 966.

A false return is not conclusive in such a proceeding to protect the respondent. State *v.* Crites, 48 Ohio St. 460, 28 N. E. 178.

Filing a sufficient answer, although it be false, will prevent the issue of an attachment for contempt. Gilberton School Dist. *v.* Mahanoy Tp. School Dist., 6 Pa. Co. Ct. 38; Cavanaugh *v.* Cass School Dist., 6 Pa. Co. Ct. 35.

Attachment for contempt is premature until the writ of mandamus is awarded and disobeyed. Gilberton School Dist. *v.* Mahanoy Tp. School Dist., 6 Pa. Co. Ct. 38. But it has been held that the issue and service of the writ is immaterial where defendant had knowledge of the order for the writ, but failed to obey the same. People *v.* Rice, 144 N. Y. 249, 39 N. E. 88 [*affirming* 80 Hun 437, 30 N. Y. Suppl. 457].

Hearing at chambers.— A judge at chambers cannot without express authority conferred by law punish for a contempt not committed in his presence, and statutes conferring such authority generally do not apply to mandamus directed to a public officer when a special statute covering the particular case provides that the punishment must be fixed by the court in lieu of and as a bar to any penalty that might have been incurred by the failure of the officer to perform the duty which the writ enjoins. *In re* Price, 40 Kan. 156, 19 Pac. 751 [*following* State *v.* Stevens, 40 Kan. 113, 19 Pac. 365], construing Civ. Code, § 699.

An appeal from an order attaching a party guilty of contempt does not bring up the validity of the order for the writ. People *v.* Rochester, etc., R. Co., 76 N. Y. 294. See also State *v.* Stevens, 40 Kan. 113, 19 Pac. 365. And where the explanation offered to relieve the respondent's conduct of its apparent contumaciousness is a question of fact the determination of the trial court will not be disturbed unless clearly wrong. McAleese *v.* State, 42 Nebr. 886, 61 N. W. 88.

41. See *supra,* IX, L, 4, a.

42. See *supra,* IX, L, 1.

Defenses see *supra,* IX, L, 3.

43. See CONTEMPT, 9 Cyc. 33 *et seq.*

Under a general statutory provision relating to proceedings as for contempts to enforce civil remedies and to protect the rights of the parties to civil actions, fixing a punishment as for a contempt for the disobedience of any lawful order of a court of record, the violation of a writ of mandamus is punishable. People *v.* Rochester, etc., R. Co., 76 N. Y. 294.

44. See the following cases:

Georgia.— Ball *v.* Wright, 115 Ga. 729, 42 S. E. 32, fine.

Illinois.— People *v.* Salomon, 54 Ill. 39, fine and imprisonment until fine is paid.

Indiana.— Satterwhite *v.* State, 142 Ind. 1, 40 N. E. 654, 1087, fine.

Louisiana.— State *v.* Judge Civ. Dist. Ct., 38 La. Ann. 43, 58 Am. Rep. 158, fine and imprisonment.

Minnesota.— State *v.* Giddings, 98 Minn. 102, 107 N. W. 1048, fine and imprisonment until payment.

New York.— People *v.* Rice, 144 N. Y. 249,

may by proceedings as for contempt coerce obedience to the mandate of the writ by imprisonment of the contumacious party until he shall comply.[45]

M. Review[46] — **1. Right of Review.** Under the early common law, proceedings in mandamus were not reviewable in a higher court,[47] but under the modern statutes and practice the granting or refusal of a writ of mandamus is subject to review.[48] The right to appeal from a judgment granting a peremptory writ of

39 N. E. 88 [*affirming* 80 Hun 437, 30 N. Y. Suppl. 457] (imposing a fine); People *v.* Rochester, etc., R. Co., 76 N. Y. 294 (amount of fine approved).

Pennsylvania.— Com. *v.* Sheehan, 81* Pa. St. 132, fine.

United States.— *In re* Copenhaver, 54 Fed. 660, upholding the power of the federal court to imprison state judges for disobedience of a mandate from the federal courts.

See 33 Cent. Dig. tit. "Mandamus," § 425. See also Contempt, 9 Cyc. 52 *et seq.*

Fine in lieu of other penalties.— Sometimes a fine is provided by statute, the payment of which is made a bar to any action for any penalty incurred by the officer by reason of his neglect or refusal to perform the duty required by the writ. *In re* Price, 40 Kan. 156, 19 Pac. 751; State *v.* Stevens, 40 Kan. 113, 19 Pac. 365.

45. State *v.* Judge, 37 La. Ann. 610; State *v.* Judge Sixth Dist. Ct., 21 La. Ann. 741; State *v.* Williams, 7 Rob. (La.) 252; Cromartie *v.* Bladen, 85 N. C. 211; U. S. *v.* Green, 53 Fed. 769. See also State *v.* Smith, 9 Iowa 334; *In re* Copenhaver, 54 Fed. 660.

Imprisonment after performance is held unauthorized, under a statute providing for imprisonment until the act is performed in the case of the omission to do an act which it is still in the power of the party to do, such omission being distinguished from affirmative acts of resistance for which a punishment is fixed by definite imprisonment and fine. People *v.* Brice, 62 N. Y. App. Div. 593, 71 N. Y. Suppl. 196 [*modifying* 34 Misc. 491, 70 N. Y. Suppl. 346].

And if the party is no longer the officer he may be punished for contempt, but not imprisoned to coerce performance. People *v.* Pearson, 4 Ill. 270.

Indefinite imprisonment as punishment cannot be imposed. Cromartie *v.* Bladen, 85 N. C. 211.

46. See, generally, Appeal and Error.

47. *Connecticut.*— New Haven, etc., Co. *v.* State, 44 Conn. 376.

Mississippi.— Hardee *v.* Gibbs, 50 Miss. 802.

New Jersey.— Layton *v.* State, 28 N. J. L. 575.

Texas.— Bradley *v.* McCrabb, Dall. 504.

England.— Dublin *v.* Rex, 1 Bro. P. C. 73, 1 Eng. Reprint 425.

See 33 Cent. Dig. tit. "Mandamus," § 427.

48. *Alabama.*— State *v.* Crook, 123 Ala. 657, 27 So. 334; Ware *v.* McDonald, 62 Ala. 81; Etheridge *v.* Hall, 7 Port. 47.

Colorado.— Bean *v.* People, 6 Colo. 98.

Connecticut.— New Haven, etc., Co. *v.* State, 44 Conn. 376.

Delaware.— Union Church *v.* Sanders, 1 Houst. 100, 63 Am. Dec. 187.

Iowa.— Chance *v.* Temple, 1 Iowa 179.

Kentucky.— Warren County Ct. *v.* Daniel, 2 Bibb 573.

Louisiana.— State *v.* Judge Sixth Judicial Dist. Ct., 20 La. Ann. 529.

Maryland.— Harwood *v.* Marshall, 9 Md. 83.

Michigan.— Graham *v.* Wayne Cir. Judge, 143 Mich. 360, 106 N. W. 1109.

Minnesota.— State *v.* Webber, 31 Minn. 211, 17 N. W. 339; State *v.* Churchill, 15 Minn. 455.

Mississippi.— Hardee *v.* Gibbs, 50 Miss. 802.

Missouri.— Lewis *v.* Price, 11 Mo. 398.

Nebraska.— State *v.* Affholder, 44 Nebr. 479, 62 N. W. 871.

New Jersey.— The refusal by the supreme court of a mandamus and its discharging a rule to show cause why mandamus should not issue is not reviewable on error (Neptune Tp. School Dist. *v.* Mannion, (N. J. 1907) 65 Atl. 440; Paterson *v.* Shields, 59 N. J. L. 426, 36 Atl. 891; American Transp., etc., Co. *v.* New York, etc., R. Co., 59 N. J. L. 156, 35 Atl. 1118; Layton *v.* State, 28 N. J. L. 575), except in cases covered by the statute (Neptune Tp. School Dist. *v.* Mannion, *supra*).

New York.— People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425; People *v.* Schoonmaker, 19 Barb. 657 [*reversed* on other grounds in 13 N. Y. 238].

Ohio.— State *v.* Philbrick, 69 Ohio St. 283, 69 N. E. 439; State *v.* Ottinger, 43 Ohio St. 457, 3 N. E. 298 [*distinguishing* State *v.* Cappeller, 37 Ohio St. 121]; Dutten *v.* Hanover, 42 Ohio St. 215; State *v.* Delaware County, 15 Ohio Cir. Ct. 40, 8 Ohio Cir. Dec. 244; State *v.* Bowersock, 1 Ohio Cir. Ct. 127, 1 Ohio Cir. Dec. 75. *Compare* State *v.* Smiley, 14 Ohio Cir. Ct. 660, 8 Ohio Cir. Dec. 117.

Oklahoma.— *Ex p.* Epley, 10 Okla. 631, 64 Pac. 18.

South Carolina.— Matthews *v.* Nance, 49 S. C. 322, 27 S. E. 100; *Ex p.* Mackey, 15 S. C. 322; State *v.* Chairman County Canvassers, 4 S. C. 485; Pinckney *v.* Henegan, 2 Strobh. 250, 49 Am. Dec. 592.

South Dakota.— Hardy *v.* Purington, 6 S. D. 382, 61 N. W. 158.

Tennessee.— Beasley *v.* Terriss, 1 Lea 461.

Texas.— Bradley *v.* McCrabb, Dall. 504.

Utah.— Eslinger *v.* Pratt, 14 Utah 107, 46 Pac. 763.

Virginia.— Price *v.* Smith, 93 Va. 14, 24 S. E. 474; *Ex p.* Morris, 11 Gratt. 292.

mandamus is not affected by the issuance of the writ before the appeal-bond is filed,[49] but after the commands of a writ of mandamus have been complied with the question whether the writ should have been granted will not be reviewed.[50] So also where the object sought to be reached by a writ of mandamus has been accomplished by another proceeding, the merits of an order denying the writ will not be reviewed on appeal.[51]

2. Mode of Review. Mandamus proceedings may be reviewed by writ of error,[52] and some courts hold this to be the only method of review, an appeal not being allowed;[53] but the weight of authority supports the view that appeal is a

Washington.— State *v.* Whatcom County Super. Ct., 2 Wash. 9, 25 Pac. 1007.

Wisconsin.— State *v.* Lincoln, 67 Wis. 274, 30 N. W. 360.

United States.— Hartman *v.* Greenhow, 102 U. S. 672, 26 L. ed. 271.

Canada.— Barrington *v.* Montreal, 25 Can. Sup. Ct. 202; Danjon *v.* Marquis, 3 Can. Sup. Ct. 251.

See 33 Cent. Dig. tit. "Mandamus," § 427.

Action reviewable, although application heard at chambers.— State *v.* Churchill, 15 Minn. 455. But *compare* Allen *v.* Reid, (Okla. 1900) 60 Pac. 782, holding that the supreme court cannot review the action of the chief justice or one of the associate justices of that court at chambers in refusing to grant a writ of mandamus.

Special leave to appeal from a judgment of the court of appeal for Ontario, under 60 & 61 Vict. c. 34, § 1, par. (e), will not be granted on the ground merely that there is error in such judgment, nor will such leave be granted when it is certain that a similar application to the court of appeal would be refused. Atty.-Gen. *v.* Scully, 33 Can. Sup. Ct. 16, holding further that where a person acquitted of a criminal charge requested of the attorney-general a fiat for a copy of the record, and on his refusal applied for a writ of mandamus, which the divisional court granted, and its judgment was affirmed by the court of appeal, the public interest did not require special leave to be given for an appeal from the judgment of the court of appeal, although it might have if the writ had been refused.

A judgment which is a nullity will not support an appeal.— State *v.* Crook, 123 Ala. 657, 27 So. 334, holding that an appeal from such a judgment must be dismissed, although all the parties to the cause on appeal consent for the appellate court to assume jurisdiction and pass on the questions presented, for consent cannot confer jurisdiction.

49. Wyker *v.* Francis, 120 Ala. 509, 24 So. 895.

50. *California.*— San Diego School Dist. *v.* San Diego County Sup'rs, 97 Cal. 438, 32 Pac. 517 [*followed* in Leet *v.* Kern County Sup'rs, (1897) 47 Pac. 595].

Iowa.— Stephens *v.* Querry, (1904) 97 N. W. 1115; Chamberlin *v.* MacVicar, (1898) 76 N. W. 839.

Montana.— State *v.* Napton, 10 Mont. 369, 25 Pac. 1045.

Nebraska.— Betts *v.* State, 67 Nebr. 202, 93 N. W. 167.

New York.— People *v.* Squire, 110 N. Y. 666, 18 N. E. 362 (holding that in such case the order granting the writ should be affirmed without considering the question whether relator was entitled to the writ); People *v.* Cohoes Bd. of Education, 57 Hun 594, 11 N. Y. Suppl. 296 (holding that in such case the appeal must be dismissed, as a decision thereon could have no practical effect).

Oregon.— Jacksonville School Dist. *v.* Crowell, 33 Oreg. 11, 52 Pac. 693.

See 33 Cent. Dig. tit. "Mandamus," § 427.

Contra.— Polk County *v.* Johnson, 21 Fla. 577.

Partial compliance with writ does not defeat appeal.— State *v.* Albright, 11 N. D. 22, 88 N. W. 729.

Where the duty imposed is continuous it is error to dismiss an appeal from a final order granting a writ of peremptory mandamus, although defendants have obeyed the writ in part by performing some of the acts which they were commanded to perform. People *v.* Voorhis, 186 N. Y. 263, 78 N. E. 1001 [*reversing* 115 N. Y. App. Div. 118, 100 N. Y. Suppl. 717].

51. People *v.* Cannedy, 55 N. Y. App. Div. 623, 66 N. Y. Suppl. 961. *Compare* Simon *v.* Durham, 10 Oreg. 52.

52. *Alabama.*— Etheridge *v.* Hall, 7 Port. 47.

Colorado.— Bean *v.* People, 6 Colo. 98.

Connecticut.— New Haven, etc., Co. *v.* State, 44 Conn. 376.

Delaware.— Union Church *v.* Sanders, 1 Houst. 100, 63 Am. Dec. 187.

Kentucky.— Warren County Ct. *v.* Daniel, 2 Bibb 573.

Nebraska.— State *v.* Lancaster County, 13 Nebr. 223, 13 N. W. 212 [*followed* in State *v.* Affholder, 44 Nebr. 497, 62 N. W. 871].

Ohio.— State *v.* Ottinger, 43 Ohio St. 457, 3 N. E. 298 [*distinguishing* State *v.* Capeller, 37 Ohio St. 121].

Virginia.— Price *v.* Smith, 93 Va. 14, 24 S. E. 474.

Washington.— State *v.* Whatcom County Super. Ct., 2 Wash. 9, 25 Pac. 1007.

United States.— *Ex p.* De Groot, 6 Wall. 497, 18 L. ed. 887; Kentucky *v.* Dennison, 24 How. 66, 16 L. ed. 717; Ward *v.* Gregory, 7 Pet. 633, 8 L. ed. 810; Muhlenberg County *v.* Dyer, 65 Fed. 634, 13 C. C. A. 64.

See 33 Cent. Dig. tit. "Mandamus," § 428.

53. Craddock *v.* Croghan, Ky. Dec. 100; State *v.* Lancaster County, 13 Nebr. 223, 13 N. W. 212 [*followed* in State *v.* Affholder, 44 Nebr. 497, 62 N. W. 871]; Kentucky *v.*

proper method of review.[54] It has also been held that mandamus proceedings may be reviewed on certiorari.[55] Mandamus from a higher court will not lie to review the action of a lower court in issuing or refusing to issue a mandamus,[56] but it has been held that the remedy for a refusal to issue a mandamus is by a direct application to the higher court, it having original jurisdiction in such matters, for a writ of mandamus, and not by a writ of error.[57]

3. Judgments and Orders Reviewable. The general rule that appeal or error will not lie until there has been a final judgment or order applies to mandamus proceedings as well as to ordinary civil actions.[58] Accordingly a judgment

Dennison, 24 How. (U. S.) 66, 16 L. ed. 717; Ward *v.* Gregory, 7 Pet. (U. S.) 633, 8 L. ed. 810; Jabine *v.* Oates, 115 Fed. 861; Muhlenberg County *v.* Dyer, 65 Fed. 634, 13 C. C. A. 64.

54. *Alabama.*— State *v.* Crook, 123 Ala. 657, 27 So. 334; Ware *v.* McDonald, 62 Ala. 81; Withers *v.* State, 36 Ala. 252 [*following* Tennessee, etc., R. Co. *v.* Moore, 36 Ala. 371; Riggs *v.* Pfister, 21 Ala. 469; Brooks *v.* Kirby, 19 Ala. 72; Falkner *v.* Randolph County, 19 Ala. 177; Tarver *v.* Tallapoosa County, 17 Ala. 527; Etheridge *v.* Hall, 7 Port. 47].

Iowa.— Chance *v.* Temple, 1 Iowa 179.

Louisiana.— State *v.* Sixth Judicial Dist. Ct., 20 La. Ann. 529.

Maryland.— Harwood *v.* Marshall, 9 Md. 83.

Minnesota.— State *v.* Teal, 72 Minn. 37, 74 N. W. 1024; State *v.* Webber, 31 Minn. 211, 17 N. W. 339; State *v.* Churchill, 15 Minn. 455 [*following* Yale *v.* Edgerton, 11 Minn. 271].

New York.— People *v.* Church, 20 N. Y. 529 [*distinguishing* Becker *v.* People, 18 N. Y. 487, as having been, prior to Laws (1859), c. 174, establishing the practice of reviewing mandamus proceedings by appeal]; People *v.* Spicer, 34 Hun 584; People *v.* Schoonmaker, 19 Barb. 657 [*reversed* on other grounds in 13 N. Y. 238].

Ohio.— Dutten *v.* Hanovre, 42 Ohio St. 215 [*followed* in State *v.* Bowersock, 1 Ohio Cir. Ct. 127, 1 Ohio Cir. Dec. 75]; State *v.* Delaware County, 15 Ohio Cir. Ct. 40, 8 Ohio Cir. Dec. 244.

South Carolina.— *Ex p.* Mackey, 15 S. C. 322; State *v.* Chairman County Canvassers, 4 S. C. 485; Pinckney *v.* Henegan, 2 Strobh. 250, 49 Am. Dec. 592.

South Dakota.— See Hardy *v.* Purington, 6 S. D. 382, 61 N. W. 158.

Tennessee.— Beasley *v.* Ferris, 1 Lea 461, holding that the respondent may appeal from a judgment awarding a peremptory mandamus and if the appeal be refused may sue out a writ of error.

Texas.— Bradley *v.* McCrabb, Dall. 504.

Utah.— Eslinger *v.* Pratt, 14 Utah 107, 46 Pac. 763.

Virginia.— Moon *v.* Wellford, 84 Va. 34, 4 S. E. 572.

Washington.— State *v.* Whatcom County Super. Ct., 2 Wash. 9, 25 Pac. 1007.

See 33 Cent. Dig. tit. "Mandamus," § 428.

Course of appeal.— The appeal to the supreme court of Canada in cases of mandamus under 38 Vict. c. 11, § 23, is restricted by the application of section 11 to decisions of "the highest court of final resort," in the province, and hence an appeal will not lie from any court in the province of Quebec but the court of queen's bench. Danjou *v.* Marquis, 3 Can. Sup. Ct. 251, holding that an appeal will not lie to the supreme court from the court of review. St. 54 & 55 Vict. c. 25, does not authorize an appeal to the supreme court of Canada from a decision of the court of review in a case where the judgment of the superior court is reversed and there is an appeal to the court of queen's bench. Barrington *v.* Montreal, 25 Can. Sup. Ct. 202.

55. Graham *v.* Wayne Cir. Judge, 143 Mich. 360, 106 N. W. 1109. See also Lauzon *v.* Chippewa County, 129 Mich. 269, 88 N. W. 628; Michigan Mut. L. Ins. Co. *v.* Hartz, 129 Mich. 104, 88 N. W. 405.

56. Graham *v.* Wayne Cir. Judge, 143 Mich. 360, 106 N. W. 1109; *Ex p.* De Grott, 6 Wall. (U. S.) 497, 18 L. ed. 887. See also Warren County Ct. *v.* Daniel, 2 Bibb (Ky.) 573.

57. State *v.* Cappeller, 37 Ohio St. 121; Martin *v.* Board of Education, 42 W. Va. 514, 26 S. E. 348.

58. State *v.* Higby, 60 Nebr. 765, 84 N. W. 261; People *v.* Haws, 34 Barb. (N. Y.) 69; Langevin *v.* Les Commissaires d'Ecole, etc., 18 Can. Sup. Ct. 599.

Illustrations.— An order for a mandamus to compel the sheriff to accept a bond for the trial of the right of property levied on under attachment is not such a judgment, sentence, or decree as will support a writ of error sued out by plaintiff in the attachment suit. Braley *v.* Clarke, 18 Ala. 436. Where an order quashing a return to a writ of alternative mandamus and directing a peremptory mandamus is reversed by a higher court with liberty to the relator to demur or to take issue on the allegations of the return, the order of the higher court is not appealable, as it is not a final order and does not affect a substantial right and is a matter of discretion. People *v.* Clyde, 69 N. Y. 603.

Overruling demurrer.— Even if it is competent to demur to a petition for mandamus, if a demurrer is made and overruled the cause is not reviewable on certiorari until a final order is made. Lauzon *v.* Chippewa County, 129 Mich. 269, 88 N. W. 628.

An order setting aside a referee's report upon an application for a mandamus is

awarding[59] or refusing[60] a peremptory mandamus is final and subject to review. But an order granting[61] or refusing[62] an alternative writ of mandamus is not reviewable, for it is not final,[63] an alternative mandamus being in the nature of an order to show cause, and not affecting a substantial right, because it determines nothing against the respondent or in favor of the relator.[64]

4. Persons Entitled to Demand Review. Any party to the proceeding who considers himself prejudiced by the judgment rendered may demand a review,[65] but a party cannot appeal from a ruling not injurious or prejudicial to him.[66] A public officer against whom a mandamus has been issued has the right of appeal, although he may have no personal interest in the performance or non-performance of the act commanded;[67] but after his term of office has expired he cannot appeal from a judgment directing the issuance of a writ of mandamus against him in his offi-

not appealable. Thomas *v.* Smith, 1 Mont. 21.

An order refusing to strike out a portion of the return to an alternative writ of mandamus as irrelevant, immaterial, and not responsive to the requirements of the writ is not appealable. State *v.* Jennings, 56 Wis. 113, 14 N. W. 28.

An order setting aside the service of an alternative writ of mandamus is appealable. State *v.* Lincoln, 67 Wis. 274, 30 N. W. 360.

59. *Minnesota.*—State *v.* Webber, 31 Minn. 211, 17 N. W. 339.

Missouri.— State *v.* Sutterfield, 54 Mo. 391 [*following* McVey *v.* McVey, 51 Mo. 406; Strouse *v.* Drennan, 41 Mo. 289, and *distinguishing* Tetherow *v.* Grundy County Ct., 9 Mo. 118]; Bastan *v.* Fireman's Fund, 88 Mo. App. 22; State *v.* Horner, 10 Mo. App. 307.

New York.— People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425.

South Carolina.— Matthews *v.* Nance, 49 S. C. 322, 27 S. E. 100.

Tennessee.— Beasley *v.* Ferriss, 1 Lea 461.

Wisconsin.— State *v.* Giljohann, 111 Wis. 377, 87 N. W. 245.

United States.— Davies *v.* Corbin, 112 U. S. 36, 5 S. Ct. 4, 28 L. ed. 627.

See 33 Cent. Dig. tit. "Mandamus," § 429.

60. Bastan *v.* Fireman's Fund, 88 Mo. App. 22; State *v.* Ottinger, 43 Ohio St. 457, 3 N. E. 298 [*distinguishing* State *v.* Cappeller, 37 Ohio St. 121].

An order made by a district judge in vacation denying a peremptory writ of mandamus is not such a final judgment by the district court as authorizes an appeal. Shepard *v.* Hubbard City, (Tex. Civ. App. 1897) 42 S. W. 862.

An order denying a motion that the peremptory writ issue in a mandamus case is not reviewable (State *v.* McKellar, 92 Minn. 242, 99 N. W. 807; People *v.* Brooklyn, 13 Wend. (N. Y.) 130), but an appeal lies for the relator only where judgment is pronounced after issue joined upon plea or demurrer, interposed upon the coming in of the return to the alternative mandamus (People *v.* Brooklyn, *supra*).

61. People *v.* Ransom, 2 N. Y. 490; People *v.* O'Donnel, 99 N. Y. App. Div. 253, 90 N. Y. Suppl. 961; Matter of Goodwin, 30 N. Y. App. Div. 418, 51 N. Y. Suppl. 355; Matter of Kreischer, 30 N. Y. App. Div. 313, 51 N. Y. Suppl. 802; People *v.* Lumb, 6 N. Y. App. Div. 26, 39 N. Y. Suppl. 514; People *v.* Syracuse, 88 Hun (N. Y.) 203, 34 N. Y. Suppl. 661; People *v.* Mitchell, 15 N. Y. Suppl. 305; McCall *v.* Anson, 44 N. C. 302; Saucon Tp. *v.* Broadhead, 5 Pa. Cas. 587, 9 Atl. 63.

The granting of an alternative writ is a matter of discretion in the court below which will not be reviewed on appeal; the remedy of any person aggrieved by the allowance of such writ being by appeal from the final order entered in the proceedings. People *v.* Mitchell, 15 N. Y. Suppl. 305.

Review for irregularities only.— An order directing an alternative writ to issue cannot be reviewed on the merits, but only for irregularities. People *v.* Devermann, 83 Hun (N. Y.) 181, 31 N. Y. Suppl. 593.

62. Bastan *v.* Fireman's Fund, 88 Mo. App. 22 [*following Ex p.* Skaggs, 19 Mo. 339; Shrever *v.* Livingston County, 9 Mo. 196; State *v.* Bowerman, 40 Mo. App. 576]; Com. *v.* Lackawanna County, 133 Pa. St. 180, 19 Atl. 351 [*following* Com. *v.* Davis, 109 Pa. St. 128].

63. Bastan *v.* Fireman's Fund, 88 Mo. App. 22 [*following Ex p.* Skaggs, 19 Mo. 339; Shrever *v.* Livingston County, 9 Mo. 196]; State *v.* Bowreman, 40 Mo. App. 576; Com. *v.* Lackawanna County, 133 Pa. St. 180, 19 Atl. 351 [*following* Com. *v.* Davis, 109 Pa. St. 128]; Saucon Tp. *v.* Broadhead, 5 Pa. Cas. 587, 9 Atl. 63.

64. People *v.* O'Donnel, 99 N. Y. App. Div. 253, 90 N. Y. Suppl. 833; People *v.* Lumb, 6 N. Y. App. Div. 26, 39 N. Y. Suppl. 514.

65. Horton *v.* State, 60 Nebr. 701, 84 N. W. 87; People *v.* Town, 1 N. Y. App. Div. 127, 37 N. Y. Suppl. 864 (holding that the receiver of taxes of a village, against whom a peremptory writ of mandamus has been awarded to compel the payment of a warrant is a "party aggrieved" and may appeal); Eslinger *v.* Pratt, 14 Utah 107, 46 Pac. 763.

66. See Phillips County School Dist. No. 15 *v.* Flanigan, 28 Colo. 431, 65 Pac. 24 (no matter how erroneous the proceedings may be as to other parties on the same side); People *v.* Unger, 85 N. Y. App. Div. 251, 83 N. Y. Suppl. 84.

67. Moore *v.* Muse, 47 Tex. 210.

cial capacity.[68] When a mandamus is issued against a court, board, or other body, the majority may appeal, although the minority refuse to join in the appeal;[69] and where two sets of the members, as individuals, have made returns of different import an appeal by one set is proper.[70] Where a writ of mandamus is directed against the members of a city council as such they cannot appeal or prosecute a writ of error as individuals, or as representatives of wards, but only as members of the council in its corporate capacity;[71] but where the order is for a mandamus against the individuals composing a city council, as well as against the council as a board, the members may appeal therefrom as individuals, for the order affects them personally.[72] Where a mandamus involves the interests of the state the attorney-general may take an appeal.[73] The question whether the original order for a peremptory mandamus was served on the respondent is immaterial to his right to appeal therefrom.[74] A person not a party to the mandamus proceedings cannot demand a review[75] or assign errors in the appellate court,[76] and where on certiorari to review the action of a lower court in granting a mandamus to strike out a personal property assessment, the record fails to show that the relator was possessed of any taxable personal property the higher court may properly refuse to consider the legal questions supposed to be involved.[77]

5. Time For Appeal. An appeal from a judgment in mandamus proceedings must be taken within the time limited by statute for taking appeals.[78]

6. Notice of Appeal. Where the abstract on an appeal from an order awarding mandamus failed to show service of the notice of appeal on the clerk of the district court as required by law, the supreme court acquired no jurisdiction of the appeal, notwithstanding the appearance and consent of the parties.[79]

7. Procedure For Review. An appeal cannot be taken from the writ of mandamus but must be taken from the order or judgment of the court,[80] and an appeal from an order granting a peremptory writ in the first instance is to be taken as from a final order made in a special proceeding.[81] It has been held that the correct procedure to bring before the supreme court for review the decision of the lower court in a mandamus case is to appeal from the judgment or an order denying a motion for a new trial, and that an appeal from an order directing a peremptory writ of mandamus to issue can only be sustained by considering such order as an irregular judgment, and an appeal from such order is irregular

68. Schrader *v.* State, 157 Ind. 341, 61 N. E. 721, holding further that where a public officer appeals from a judgment for a mandamus against him after the termination of his term of office and the qualification of his successor, such successor cannot be substituted as appellant after the expiration of the time allowed by statute for appealing.

69. Kelly *v.* Moore County, 24 N. C. 430.

70. McCoy *v.* Harnett County, 49 N. C. 180.

71. Osborne *v.* Kammer, 96 Va. 228, 31 S. E. 19.

72. People *v.* Guggenheimer, 29 Misc. (N. Y.) 553, 61 N. Y. Suppl. 961.

73. Com. *v.* Clark, 1 Bibb (Ky.) 531, mandamus to compel registry of money purporting to be made on a Virginia land-office warrant.

74. Matthews *v.* Nance, 49 S. C. 322, 27 S. E. 100.

75. Wilson *v.* Duncan, 114 Ala. 659, 21 So. 1017; People *v.* Board of Canvassers, 2 N. Y. Suppl. 561.

76. Wilson *v.* Duncan, 114 Ala. 659, 21 So. 1017; Hower's Appeal, 127 Pa. St. 134, 17 Atl. 862, holding that where in a proceeding by a creditor to enforce by mandamus the collection of a special tax sufficient to pay an alleged indebtedness, the petition of citizens and taxpayers for leave to intervene is refused, the petitioners have no standing to be heard upon the matter on appeal or certiorari.

77. Michigan Mut. L. Ins. Co. *v.* Hartz, 129 Mich. 104, 88 N. W. 405.

78. Gardner *v.* Ingram, 82 Ala. 339, 2 So. 879.

A right to office is not involved in a mandamus proceeding having for its object the revocation of an alleged illegal order for the removal of police commissioners, in which the mayor is made respondent, and an appeal taken from a judgment therein rendered is not returnable within ten days under the provisions of La. Act 45 of 1870 (special session), § 7. State *v.* Shakespeare, 43 La. Ann. 92, 3 So. 893.

79. Stephens *v.* Querry, (Iowa) 97 N. W. 1115.

80. State *v.* Delafield, 64 Wis. 218, 24 N. W. 905.

81. People *v.* Spicer, 34 Hun 584. See also People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425.

practice.[82] It has also been held that a motion for a new trial and a bill of exceptions are necessary to be filed in mandamus proceedings for the purpose of enabling the supreme court to review the decision or judgment on appeal, under the same circumstances and for the same purpose as in ordinary actions;[83] but other courts hold that a final judgment passed upon a pleading defective in substance may be reviewed without a motion for a new trial having been filed and ruled upon;[84] and that the refusal of a peremptory writ of mandamus on an alternative writ and answer may be reviewed, although there was no motion for a new trial or bill of exceptions.[85]

8. Presentation and Reservation in Lower Court of Grounds For Review. The general rule that questions not raised and exceptions not made in the lower court will not be considered on appeal or error applies in the review of mandamus proceedings.[86]

82. State *v.* McKellar, 92 Minn. 242, 99 N. W. 807 [*explaining* State *v.* Northern Pac. R. Co., 89 Minn. 363, 95 N. W. 297; State *v.* Butler, 89 Minn. 220, 94 N. W. 688; State *v.* Willmar, etc., R. Co., 88 Minn. 448, 93 N. W. 112; State *v.* Duluth St. R. Co., 88 Minn. 158, 92 N. W. 516; State *v.* Bazille, 87 Minn. 500, 92 N. W. 415, 94 Am. St. Rep. 718; State *v.* Minneapolis, etc., R. Co., 87 Minn. 195, 91 N. W. 465; State *v.* Minneapolis, 87 Minn. 156, 91 N. W. 298; State *v.* Rogers, 87 Minn. 130, 91 N. W. 430; State *v.* McCardy, 87 Minn. 38, 99 N. W. 263; State *v.* Ames, 87 Minn. 23, 91 N. W. 18; State *v.* Zimmerman, 86 Minn. 353, 90 N. W. 783, 91 Am. St. Rep. 351, 58 L. R. A. 78; State *v.* Schreiner, 86 Minn. 253, 90 N. W. 401; State *v.* Peltier, 86 Minn. 181, 90 N. W. 375; State *v.* Chicago, etc., R. Co., 85 Minn. 416, 89 N. W. 1; State *v.* McCubrey, 84 Minn. 439, 87 N. W. 1126; State *v.* Smith, 84 Minn. 295, 87 N. W. 295; State *v.* Ramsey County Prob. Ct., 84 Minn. 289, 87 N. W. 783; State *v.* Johnson, 83 Minn. 496, 86 N. W. 610; State *v.* Demann, 83 Minn. 331, 86 N. W. 352; State *v.* Stratte, 83 Minn. 194, 86 N. W. 20; State *v.* Renville County, 83 Minn. 65, 85 N. W. 830; State *v.* Nichols, 83 Minn. 3, 85 N. W. 717; State *v.* Schram, 82 Minn. 420, 85 N. W. 155; Lee *v.* Thief River Falls, 82 Minn. 88, 84 N. W. 654; State *v.* Hynes, 82 Minn. 34, 84 N. W. 636; State *v.* Bazille, 81 Minn. 370, 84 N. W. 120; State *v.* Butler, 81 Minn. 103, 83 N. W. 483; State *v.* U. S. Express Co., 81 Minn. 87, 83 N. W. 465; State *v.* Minneapolis R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514; State *v.* Minneapolis Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; State *v.* Minor, 79 Minn. 201, 81 N. W. 912; Drew *v.* Tifft, 79 Minn. 175, 81 N. W. 839, 79 Am. St. Rep. 446, 47 L. R. A. 525; State *v.* Johnson, 77 Minn. 453, 80 N. W. 620; State *v.* Minneapolis, etc., R. Co., 76 Minn. 469, 79 N. W. 510; State *v.* Halda, 75 Minn. 512, 78 N. W. 16; State *v.* St. Paul, etc., R. Co., 75 Minn. 473, 78 N. W. 87].

83. School Dist. No. 14 *v.* School Dist. No. 4, 64 Ark. 483, 43 S. W. 501.

84. Horton *v.* State, 60 Nebr. 701, 84 N. W. 87.

85. Territory *v.* Browne, 7 N. M. 568, 37 Pac. 1116.

86. *Colorado.*— Grand County *v.* People, 8 Colo. App. 43, 46 Pac. 107.

Connecticut.— Hartford *v.* Hartford St. R. Co., 73 Conn. 327, 47 Atl. 330.

Florida.— Ray *v.* Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773, delay in instituting proceedings.

Illinois.— Eddy *v.* People, 218 Ill. 611, 75 N. E. 1071; Chicago *v.* Sansum, 87 Ill. 182.

Indiana.— State *v.* Riggs, 92 Ind. 336 (objection to sufficiency of return); Gill *v.* State, 72 Ind. 266.

Iowa.— Corwith Independent Dist. *v.* Lu Verne Dist. Tp., 88 Iowa 713, 54 N. W. 221.

Kansas.— Stevens *v.* Miller, 3 Kan. App. 192, 43 Pac. 439.

Louisiana.—State *v.* Southern Mineral, etc., Imp. Co., 108 La. 24, 32 So. 174.

Michigan.— Monroe *v.* Monroe County, 137 Mich. 638, 100 N. W. 896, certiorari.

Missouri.— State *v.* Schmitz, 36 Mo. App. 550.

New York.— People *v.* Unger, 85 N. Y. App. Div. 249, 83 N. Y. Suppl. 83; People *v.* Grant, 61 N. Y. App. Div. 238, 70 N. Y. Suppl. 504 (objection that proceeding barred by limitations); People *v.* Lyman, 46 N. Y. App. Div. 312, 61 N. Y. Suppl. 655; People *v.* Contracting Bd., 46 Barb. 254. But *compare* People *v.* Payn, 26 N. Y. App. Div. 584, 50 N. Y. Suppl. 334, holding that, although a public officer waived in the court below the objection that there was no duty imposed by law upon him in regard to the subject-matter of the application, he could urge such objection on appeal.

Pennsylvania.— Easton *v.* Lehigh Water Co., 97 Pa. St. 554.

Texas.— Singleton *v.* Austin, 27 Tex. Civ. App. 88, 65 S. W. 686.

Washington.— Wilson *v.* Aberdeen, 25 Wash. 614, 46 Pac. 95.

Wisconsin.— State *v.* Smith, 11 Wis. 65 (objection that writ should have been applied for by the board of education instead of its clerk); State *v.* Exeter, 9 Wis. 554.

United States.— Presque Isle County *v.* Thompson, 61 Fed. 914, 10 C. C. A. 154.

See 33 Cent. Dig. tit. "Mandamus," § 432.

Waiver of objection.— A mandamus ordering a railroad company to stop all its regular passenger trains at a certain county-seat

9. Record and Assignments of Error. When an alternative writ of mandamus is issued it becomes and constitutes plaintiff's complaint or cause of action, and on appeal it should be set out in the record.[87] On appeal from a judgment awarding a peremptory writ of mandamus, there having been no alternative writ, the record in the appellate court is plaintiff's affidavit, defendant's answer, and the judgment of the court certified as required by statute for the certification of a judgment-roll.[88] The party seeking to reverse the judgment must except to the ruling of the court and assign the error in the appellate court.[89] Where an agreed statement of facts is not made part of the record by a bill of exceptions or order of court, it will not be considered on appeal, although it is referred to in the judgment.[90] On an appeal from an order directing the issuance of a peremptory writ of mandamus, an assignment that the court erred in overruling a demurrer to the "complaint" cannot be considered where the demurrer was addressed to the alternative writ and not to the complaint or petition, and the alternative writ is not in the transcript.[91]

10. Appeal-Bond. On appeal from a judgment in mandamus proceedings an appeal-bond must usually be given as required by statute,[92] although it has been held that a public officer against whom a writ of mandamus has been awarded may appeal without giving security for costs where he is acting only in his official capacity to protect the public interests and has no personal interest in the matter.[93]

11. Supersedeas. The execution of a judgment awarding a writ of mandamus may be stayed by supersedeas,[94] and an appeal, with a supersedeas bond, as provided by law, stays the proceedings as in other cases.[95] But the mere

where it is its duty to stop them cannot on appeal be objected to as too broad because the pleading and proof shows that the company has failed to stop only one of its trains there, where the petition was demurred to on the ground that the prayer was broader than the petition and the company, after its demurrer was overruled, answered the petition and had a trial on the merits. Illinois Cent. R. Co. *v.* People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119.

87. Smith *v.* Johnson, 69 Ind. 55.

Where the record does not contain a copy of the alternative writ it will be presumed that such writ was not issued; and in the absence thereof a motion to quash the summons should have been sustained. Hart *v.* State, 161 Ind. 189, 67 N. E. 996.

88. Hardy *v.* Purington, 6 S. D. 382, 61 N. W. 158.

89. Lamkin *v.* Sterling, 1 Ida. 120.

90. School Dist. No. 14 *v.* School Dist. No. 4, 64 Ark. 483, 43 S. W. 501.

91. Placard *v.* State, 148 Ind. 305, 47 N. E. 623.

92. Wyker *v.* Francis, 120 Ala. 509, 24 So. 895 (holding the bond sufficient); People *v.* Deerfield Highway Com'rs, 22 Wend. (N. Y.) 587.

93. Reynolds *v.* Blue, 47 Ala. 711; Atchison *v.* Lucas, 83 Ky. 451.

94. Atchison *v.* Lucas, 83 Ky. 451; State *v.* Whatcom County Super. Ct., 2 Wash. 9, 25 Pac. 1007, holding that it is error to deny defendant's motion for a supersedeas of the writ pending the appeal and to refuse to fix the amount of his bond therefor. But *compare* State *v.* Judges Douglas County Dist. Ct., 19 Nebr. 149, 26 N. W. 723.

Under N. Y. Code Civ. Proc. § 2089, providing for a stay of proceedings under a writ of mandamus, where a mandamus has been granted to hold an election to fill vacancies in the offices of vestry-men of an incorporated church, and the questions decided in granting the mandamus are important and fairly debatable, proceedings under the writ are properly stayed until an appeal from the mandamus order is decided by the appellate court. People *v.* Hart, 11 N. Y. Suppl. 674, 25 Abb. N. Cas. 230 [*affirmed* in 13 N. Y. Suppl. 903].

Discretion of court.— Where a peremptory writ of mandamus has been awarded, the allowance of a supersedeas rests within the judicial discretion of the trial court. Cooperrider *v.* State, 46 Nebr. 84, 64 N. W. 372.

Effect of supersedeas.— The supersedeas of a judgment awarding a peremptory writ of mandamus which has not been performed stays the execution of the writ, but if the commands of the writ have been performed the supersedeas does not undo such performance. Polk County *v.* Johnson, 21 Fla. 577, where it was held (contrary to the weight of authority see *supra*, IX, M, 1) that the performance of the requirements of the writ was not a bar to an appeal from the judgment awarding the writ. A devolutive appeal from a decree refusing a mandamus on the state controller to compel him to pay relator a certain sum of money will not restrain such sum in the controller's hands. New Orleans Republican Printing Co. *v.* Dubuclet, 29 La. Ann. 109.

95. *Iowa.*—State *v.* Marshall County Judge, 7 Iowa 186.

taking of an appeal[96] or writ of error[97] does not of itself operate as a supersedeas of execution in the case of a peremptory mandamus.

12. Scope and Extent of Review. On appeal or error in mandamus proceedings the appellate court cannot consider the weight of conflicting evidence,[98] or review the discretion of the court below in granting or refusing the writ,[99] where it appears to have been lawfully exercised[1] and no abuse is shown.[2] Where a peremptory writ of mandamus has been ordered by the trial court against a public officer in his official capacity, assignments of error which present merely

Kentucky.— Wyatt *v.* Ryan, 65 S. W. 129, 23 Ky. L. Rep. 1457.

Minnesota.— State *v.* Webber, 31 Minn. 211, 17 N. W. 339.

Missouri.— State *v.* Klein, 137 Mo. 673, 39 S. W. 272; State *v.* Lewis, 76 Mo. 370. But *compare* State *v.* Horner, 10 Mo. App. 307.

Texas.— Griffin *v.* Wakelee, 42 Tex. 513 [*followed* in Churchill *v.* Martin, 65 Tex. 367].

See 33 Cent. Dig. tit. "Mandamus," § 434.

An order allowing a supersedeas bond does not operate as a suspension of the judgment until the bond is filed and a writ of error is issued. Blackerby *v.* People, 10 Ill. 266. But *compare* Matter of Reddish, 47 N. Y. App. Div. 187, 62 N. Y. Suppl. 261, holding that where a supreme court justice stayed a peremptory mandamus to compel a town supervisor to approve and file the bond of a highway commissioner holding over from a previous year, after such supervisor had taken an appeal from the order granting the writ on the supervisor's application made five days after the service thereof, on condition that he should apply for a hearing of the appeal at the next term of the appellate division, and within ten days execute and file an approved bond to pay all of the costs on appeal adjudged against him, etc., and such undertaking was executed and read for approval, it was error for a supreme court justice sitting at special term to vacate such stay before the expiration of the ten days.

The amount of the bond to be required by a United States circuit court on granting a supersedeas is to be determined by it in its sound discretion under the laws and rules of the supreme court. U. S. *v.* New Orleans, 8 Fed. 112.

96. Pinckney *v.* Henegan, 2 Strohh. (S. C.) 250, 49 Am. Dec. 592.

97. Tyler *v.* Hamersley, 44 Conn. 393, 26 Am. Rep. 471 (especially where the errors assigned have already been brought before and passed upon by the court upon a reservation of the case for advice); People *v.* Steele, 1 Edm. Sel. Cas. (N. Y.) 505; Com. *v.* Coit, 15 Wkly. Notes Cas. (Pa.) 484. *Contra*, U. S. *v.* Columbian Ins. Co., 25 Fed. Cas. No. 14,840, 2 Cranch C. C. 266.

98. State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515.

99. *Connecticut.*— Chesebro *v.* Babcock, 59 Conn. 213, 22 Atl. 145.

New York.— People *v.* Interurban St. R. Co., 177 N. Y. 296, 69 N. E. 596; Tuttle *v.* Iron Nat. Bank, 170 N. Y. 9, 62 N. E. 761 [*affirming* 67 N. Y. App. Div. 627, 73 N. Y. Suppl. 1150]; Bohnet *v.* New York, 150 N. Y. 279, 44 N. E. 949; People *v.* Thompson, 99 N. Y. 641, 1 N. E. 542; *In re* Dederick, 77 N. Y. 595; People *v.* Ferris, 76 N. Y. 326; Sage *v.* Lake Shore, etc., R. Co., 70 N. Y. 220; People *v.* Lindenthal, 77 N. Y. App. Div. 515, 78 N. Y. Suppl. 997; People *v.* Mitchell, 15 N. Y. Suppl. 305.

North Carolina.— State *v.* Jones, 23 N. C. 129.

Pennsylvania.— On appeal from the exercise of the discretion of the court in granting or refusing a mandamus execution the appellate court will consider only the jurisdiction of the court below and the regularity of the proceedings as shown by the record. Achuff's Appeal, 12 Pa. Super. Ct. 573.

South Dakota.— Hollister *v.* Donahoe, 16 S. D. 206, 92 N. W. 12.

Canada.— See Dartmouth *v.* Reg., 9 Can. Sup. Ct. 509.

See 33 Cent. Dig. tit. "Mandamus," § 436.

Where ground of decision not stated.— Where an order refusing a writ of mandamus does not state the grounds of decision and the writ may have been refused as a matter of discretion, the order must stand on appeal. People *v.* Van Wyck, 157 N. Y. 495, 52 N. E. 559 [*affirming* 33 N. Y. App. Div. 318, 53 N. Y. Suppl. 914].

1. Tuttle *v.* Iron Nat. Bank, 170 N. Y. 9, 62 N. E. 761 [*affirming* 67 N. Y. App. Div. 627, 73 N. Y. Suppl. 1150].

It is presumed that the discretion of the court below was properly exercised where nothing to the contrary appears on the record. Achuff's Appeal, 12 Pa. Super. Ct. 573.

2. *In re* Dederick, 77 N. Y. 595; Hollister *v.* Donahoe, 16 S. D. 206, 92 N. W. 12.

Discretion of court below controlled only in case of abuse.— Moody *v.* Fleming, 4 Ga. 115, 48 Am. Dec. 210; Vincent *v.* Ellis, 116 Iowa 609, 88 N. W. 836; Little Rock *v.* U. S., 103 Fed. 418, 43 C. C. A. 261.

Circumstances not showing abuse of discretion.— When a local court familiar with the conditions of the county refuses a writ of mandamus to remove the county offices and nothing but the naked facts of the county-seat election appear in the application therefor, without explanation of the delay in proceeding for a mandamus, and a restraining order enjoining the commissioners of the county from canvassing the vote proclaiming the result, or removing the county offices remains undisturbed, it cannot be held on error that there was an abuse of discretion in refusing the writ. Golden *v.* Elliott, 13 Kan. 92.

causes of error on behalf of the appellant as an individual cannot be considered on appeal.[3] Where an alternative writ of mandamus was issued and a return filed thereto, a trial had on the issues framed by the writ and return before the court, and findings were made, the exceptions to such findings presented, on appeal from the final order therein made, not only questions of law, but also the facts for review.[4] The question whether an office has been abolished may be determined on appeal from an order sustaining a demurrer to an alternative writ of mandamus to compel the payment of the salary of the official, although the writ alleges that the officer is duly qualified, commissioned, and acting, as the court will take judicial notice of the statute.[5]

13. Determination and Disposition of Cause. The appellate court will determine upon the entire record whether a peremptory writ of mandamus should issue,[6] but where the court is unable from the lack of a proper record to consider an appeal upon its merits the appeal must be dismissed.[7] Errors arising in the course of the trial or proceeding may be reviewed upon appeal from the order directing a peremptory mandamus which is the final judgment in the proceeding.[8] Where the trial court has treated a verified petition for a writ of mandamus as a pleading, it will be so considered by the appellate court when the case is brought there for review.[9] Where an erroneous ruling is the ground for an appeal, an amendment cannot be allowed in the supreme court which would defeat the cause of appeal.[10] All proper presumptions will be indulged in favor of the correctness of the ruling in the court below,[11] and its findings will not be disturbed unless clearly and manifestly unsupported by the evidence.[12] It has been held that on review of a judgment awarding a mandamus the statements of the return or opposing affidavits are to be taken as true,[13] and that on certiorari to review a

3. Placard *v.* State, 148 Ind. 305, 47 N. E. 623.

4. People *v.* Wells, 85 N. Y. App. Div. 378, 83 N. Y. Suppl. 376.

5. Reed *v.* Dunbar, 41 Oreg. 500, 69 Pac. 451.

6. Edward C. Jones Co. *v.* Guttenberg, 66 N. J. L. 659, 51 Atl. 274 [*affirming* 66 N. J. L. 58, 48 Atl. 537].

7. People *v.* Unger, 85 N. Y. App. Div. 249, 83 N. Y. Suppl. 83.

8. People *v.* Hertle, 46 N. Y. App. Div. 505, 60 N. Y. Suppl. 23, 61 N. Y. Suppl. 965 [*modifying* and *affirming* 28 Misc. 37, 60 N. Y. Suppl. 23].

9. Horton *v.* State, 60 Nebr. 701, 84 N. W. 87.

10. Askew *v.* Pollock, 66 N. C. 49.

11. Miller *v.* Dailey, 136 Cal. 212, 68 Pac. 1029 (holding that the supreme court will assume that the findings of the court below are supported by the evidence where the bill of exceptions does not purport to set out all the evidence and there are no specifications of the insufficiency of the evidence to support them); Jackson School Dist. *v.* Culbert, 134 Cal. 508, 66 Pac. 741 (holding that the appellate court cannot reverse a judgment denying the writ unless it is made to appear that such a showing was made before the lower court as would require the issuance of the writ); Monroe *v.* Monroe County, 137 Mich. 638, 100 N. W. 896 (holding that on certiorari to review the granting of a mandamus the court cannot disregard the findings of the court below, although they are contrary to statements in respondent's return on which no issue was taken); People *v.* Brooklyn, 13 Wend. (N. Y.) 130 (holding that a judgment refusing a peremptory mandamus will not be reversed unless from the record it appears that the alternative mandamus was upon its face *prima facie* sufficient to entitle the relator to the relief sought); Wilson *v.* Aberdeen, 25 Wash. 614, 66 Pac. 95 (holding that a judgment denying a writ of mandamus upon proofs offered and submitted by the parties will be presumed to be warranted by the facts, where neither the evidence nor the findings of fact are in the records, although the affidavit of the writ may make out a *prima facie* case to which no complete defense either by demurrer or answer may have been interposed).

Where judgment entirely wrong.— Where on appeal from an order denying the writ of mandamus to compel the state land board to execute a lease of coal lands to appellant as it had agreed to do, on the usual conditions of mining leases, there is an absence of proof respecting such usual conditions, which might have been essential to justly express appellant's rights by the decree, this is not enough to warrant an affirmance of the judgment where it otherwise appears to be entirely wrong. Colorado Fuel, etc., Co. *v.* State Bd. of Land Com'rs, 14 Colo. App. 84, 60 Pac. 367.

12. Dove *v.* Keokuk Independent School Dist., 41 Iowa 689; West Virginia Northern R. Co. *v.* U. S., 134 Fed. 198, 67 C. C. A. 220.

13. U. S. *v.* Wright, 15 App. Cas. (D. C.) 463 [*following* U. S. *v.* Johnson, 12 App. Cas. (D. C.) 545]; Doyle *v.* Knox, 67 N. Y. App. Div. 231, 73 N. Y. Suppl. 650; People *v.* Lipshitz, 33 N. Y. App. Div. 629, 53 N. Y. Suppl.

refusal to issue a writ of mandamus, the application for which was heard on petition and answer, the answer will be taken as true for the purpose of the case.[14] Harmless error is not ground for reversal,[15] nor will the judgment be reversed on grounds on which a reversal is not sought.[16] Where pending the review events have occurred rendering a decision of the legal questions involved unnecessary the court will not pass upon them;[17] but if the relator is entitled to relief, although such events have rendered the precise relief sought unavailing, the court will give such relief as is proper.[18] Where a judgment awarding a writ of mandamus is reversed, other proceedings dependent upon the mandamus fall with it,[19] and conversely the reversal of a prior judgment on which a judgment of mandamus is based requires the reversal of the latter judgment.[20] On appeal from an order denying a motion for an attachment for contempt in disobeying a writ of mandamus, the court may direct a new peremptory writ to issue in such form as to meet the exigencies of the case.[21] The appellate court may dismiss the proceeding,[22] or remand it[23] with instructions to the lower court as to the judgment to be entered,[24] in which case the mandate of the appellate court must be complied

475 [*following* Haebler *v.* New York Produce Exch., 149 N. Y. 414, 44 N. E. 87].

14. Kenyon *v.* Ionia County, 138 Mich. 544, 101 N. W. 851.

Where issue was not joined on the question raised by the return and the writ of mandamus was denied, the return is conclusive on certiorari. Thornton *v.* Gratiot County, 131 Mich. 539, 91 N. W. 840.

15. O'Bryan *v.* Owensboro, 113 Ky. 680, 63 S. W. 858, 69 S. W. 800, 24 Ky. L. Rep. 469, 645; State *v.* Norvell, 80 Mo. App. 180.

16. State *v.* Mish, 13 Wash. 302, 43 Pac. 40.

17. Seymour *v.* Nelson, 11 App. Cas. (D. C.) 58 (holding that a writ of mandamus to a public officer abates by reason of his retirement from office pending an appeal therefrom, and in such case the rule is not to dismiss the appeal but to reverse the judgment and remand the cause to the court in which it originated with direction to dismiss for want of proper parties); Cutcomp *v.* Utt, 60 Iowa 156, 14 N. W. 214 (holding that a judgment refusing a mandamus will not be reversed where the right sought to be enforced has expired pending the appeal); State *v.* Multnomah County Grand Jury, 37 Oreg. 542, 62 Pac. 208 (holding that where a grand jury was discharged pending an appeal from an order dismissing a writ of mandamus to compel it to inquire into a criminal charge the appeal would be dismissed).

18. Canal Constr. Co. *v.* Schlickum, 139 Mich. 246, 102 N. W. 737 (holding that where, pending certiorari to review a mandamus directing a supervisor to spread a certain tax upon his assessment roll for a certain year, the time when the tax could be spread upon the roll for that year has expired, the supreme court, in sustaining the legality of the tax, will direct that the assessment be spread on the roll for the succeeding year); State *v.* Anderson, 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 239 (holding that where an election has taken place before a decision on appeal in a proceeding by mandamus to control the form of the official ballot to be used at such election but the lower court should have granted the relief sought, the relator is entitled to a reversal with costs of the order denying such relief and to recover his costs in the lower court with nominal damages).

19. Com. *v.* Buffalo, etc., R. Co., (Pa. 1888) 14 Atl. 449, writ of inquiry awarded to ascertain damages caused by defendant's breach of duty.

20. Com. *v.* Pennsylvania Masonic Home, 188 Pa. St. 21, 41 Atl. 343, holding that where a decree in mandamus directing a corporation to recognize a particular person as an officer is based solely upon a prior judgment of ouster against another claimant of the office and appeals are taken both from the judgment of ouster and the decree of mandamus, the supreme court in reversing the judgment of ouster and entering judgment in favor of defendant in that proceeding will reverse the decree of mandamus because there is nothing upon which the mandamus can operate after the judgment of ouster has been reversed.

21. People *v.* Delaware County, 9 Abb. Pr. N. S. (N. Y.) 408.

22. State *v.* Kansas City Police Com'rs, 184 Mo. 109, 71 S. W. 215, 88 S. W. 27 [*affirming* 80 Mo. App. 206], holding that where on review of a mandamus by an employee of a city for reinstatement the sole issue is as to the power to dismiss him, and that is determined adversely to the appellant, it is proper for the appellate court to dismiss the proceeding rather than remand it.

23. State *v.* North American Land, etc., Co., 105 La. 379, 29 So. 910 [*following* State *v.* Montegndo, 48 La. Ann. 1417, 20 So. 911], holding that where the judgment is reversed for illegality of the citation it is proper to remand rather than dismiss the case.

24. Denver School Dist. No. 1 *v.* Adams County School Dist. No. 98, 33 Colo. 52, 78 Pac. 693.

Where issues of fact undetermined.— In reversing a judgment dismissing a petition for a mandamus the appellate court will not direct the court below to award a peremptory mandamus where issues of fact joined upon

with.[25] Where a judgment of reversal is not necessarily final, a procedendo will be ordered whether plaintiff or defendant be the appellant.[26]

N. Costs — **1. In General.**[27] At common law no costs were allowed to the successful applicant for a writ of mandamus.[28] Later costs were in certain cases allowed by statute in England.[29] In the United States the award of costs in such proceedings is purely statutory.[30] In some jurisdictions mandamus is considered a special proceeding,[31] while in others it is considered an action to which the ordinary rules of costs apply.[32]

some of the pleas remain undetermined. Higgins *v.* Galesburg, 96 Ill. App. 471 [*followed* in Moshier *v.* Galesburg, 96 Ill. App. 502].

25. Hendricks *v.* State, 156 Ind. 185, 59 N. E. 382 (holding that where a judgment in mandamus which was erroneous because it directed the school-trustees of two districts to erect a joint school-house on certain land purchased by the trustee of one district without the knowledge or consent of the other was reversed with instructions to sustain a motion to correct and enter judgment so as to eliminate such objection, a judgment directing the issuance of a peremptory writ of mandamus, commanding the trustees of the two districts to erect a joint school-house at a certain town, of sufficient capacity to accommodate the school children of the districts, as prayed for in the petition of the patrons of the trustees, and approved by the county superintendent, and to proceed immediately with its construction, properly complied with the court's instructions and a motion for further modification was properly denied); People *v.* Saratoga County, 170 N. Y. 93, 62 N. E. 1069 [*modifying* 66 N. Y. App. Div. 117, 72 N. Y. Suppl. 782 (*reversing* 34 Misc. 740, 70 N. Y. Suppl. 1048)] (holding that where the appellate division has directed that a peremptory writ of mandamus should be granted, requiring a board of supervisors to allow claims for services rendered on a *quantum meruit* "at such sums as are proper," an order entered thereon requiring their allowance at a specified amount is erroneous and on appeal therefrom will be corrected so as to conform to the directions of the appellate court).

26. Harwood *v.* Marshall, 9 Md. 83.

27. Allowance and amount of costs generally see Costs.

28. Denslow *v.* Gunn, 68 Conn. 219, 35 Atl. 1125. See also to the same effect State *v.* King, 23 N. C. 22.

Crown costs.— The doctrine of the common law that the crown neither pays nor receives costs remains unaltered in relation to the prerogative writ of mandamus. Rex *v.* Canterbury, [1902] 2 K. B. 503, 66 J. P. 455, 71 L. J. K. B. 932, 86 L. T. Rep. N. S. 450, 50 Wkly. Rep. 476; Reg. *v.* York, 6 N. Brunsw. 90.

29. Denslow *v.* Gunn, 68 Conn. 219, 35 Atl. 1125; Reg. *v.* Saviour Parish, 7 A. & E. 925, 2 Jur. 565, 7 L. J. M. C. 59, 3 N. & P. 345, 1 W. W. & H. 234, 34 E. C. L. 478.

By 9 Anne, c. 20, it was provided that upon judgment on the return to an alternative writ of mandamus in favor of relator, he might recover damages and costs in such manner as he might have done in an action on the case for a false return; and on the other hand that if the judgment should be rendered for defendant making return to such writ, he should recover the costs of suit. State *v.* King, 23 N. C. 22. Under 1 N. C. Rev. St. c. 97, in force in 1840 and similar to the statute of Anne, it was held that defendant, although judgment was given for him, could not recover his costs against the relator where the public only was interested, inasmuch as the act, although general in its terms, should be confined to those cases only where the relator claimed some office or franchise and had therefore a personal interest in the suit. State *v.* King, *supra*.

Under 1 Wm. IV, c. 21, § 6, after quashing the return the court ordered that defendants should pay costs but that the members of the board should not be personally liable as such. Reg. *v.* St. Saviour Parish, 7 A. & E. 925, 2 Jur. 565, 7 L. J. M. C. 59, 3 N. & P. 345, 1 W. W. & H. 234, 34 E. C. L. 478.

30. *California.*— Power *v.* May, 123 Cal. 147, 55 Pac. 796.

Connecticut.— Denslow *v.* Gunn, 68 Conn. 219, 35 Atl. 1125.

Illinois.— Pike County Com'rs *v.* People, 11 Ill. 202.

Missouri.— State *v.* Hanley, 76 Mo. App. 631.

Nebraska.— See State *v.* Holm, 3 Nebr. (Unoff.) 768, 92 N. W. 1006.

New Jersey.— Hopper *v.* Bergen County, 52 N. J. L. 313, 19 Atl. 383.

New York.— People *v.* Onondaga Ct. C. Pl., 10 Wend. 598.

Oregon.— Burgtorf *v.* Bentley, 27 Oreg. 268, 41 Pac. 163; Bush *v.* Geisey, 16 Oreg. 355, 19 Pac. 123.

Tennessee.— Whitesides *v.* Stuart, 91 Tenn. 710, 20 S. W. 245.

Texas.— McMeans *v.* Finley, 88 Tex. 515, 32 S. W. 524.

Utah.— Page *v.* Utah Commission, 11 Utah 119, 39 Pac. 499.

31. Power *v.* May, 123 Cal. 147, 55 Pac. 796; Page *v.* Utah Commission, 11 Utah 119, 39 Pac. 499.

Additional allowance of costs.— Under the code of civil procedure of New York mandamus is not a special proceeding justifying an additional allowance of costs. People *v.* Coler, 58 N. Y. App. Div. 347, 68 N. Y. Suppl. 1101 [*reversing* 33 Misc. 351, 68 N. Y. Suppl. 446]; People *v.* Hertle, 46 N. Y. App. Div. 505, 60 N. Y. Suppl. 23, 61 N. Y. Suppl. 965.

32. State *v.* Policemen's Pension Fund, 121 Wis. 44, 98 N. W. 954. See also People *v.* Lewis, 28 How. Pr. (N. Y.) 470; People *v.*

2. Discretion of Court. The rule has been frequently laid down that costs in mandamus proceedings are discretionary ;[33] but the law so stated is too broad. While these proceedings are somewhat dependent upon the state of the pleadings,[34] and the rights of the parties,[35] the rule of discretion is not an arbitrary one,[36] and must be regulated by the statute in force at the time of its attempted exercise.[37]

3. Dependent Upon Success or Failure of Party.[38] In construing statutes, the courts have usually followed the general rule in civil actions and awarded costs to the prevailing party.[39] Accordingly, upon the dismissal of the petition costs

Colborne, 20 How. Pr. (N. Y.) 378; New York cases decided under the old statute.

Under the New York practice, where an alternative writ has been issued costs may be awarded as in an action (People *v.* Board of Water Com'rs, 58 N. Y. App. Div. 554, 69 N. Y. Suppl. 93; People *v.* Coler, 58 N. Y. App. Div. 347, 68 N. Y. Suppl. 1101; People *v.* New York Produce Exch., 64 How. Pr. 523. See People *v.* Lewis, 28 How. Pr. 470 [*affirming* 28 How. Pr. 159]), except that, upon making a final order for such writ, the costs are in the discretion of the court (People *v.* Queens County, 83 Hun 237, 31 N. Y. Suppl. 569 [*affirmed* in 145 N. Y. 597, 40 N. E. 164]; People *v.* New York Produce Exch., 64 How. Pr. 523). Under Code Civ. Proc. § 2086, where a peremptory writ is granted or denied without a previous alternative mandamus, costs not exceeding fifty dollars and disbursements may be awarded either party, as upon a motion. People *v.* New York Produce Exch., *supra.* But an unsuccessful party has been held not to be within the contemplation of this section of the statute. People *v.* Mt. Vernon, 95 N. Y. App. Div. 75, 88 N. Y. Suppl. 493.

33. People *v.* Auditor-Gen., 38 Mich. 746; Hopper *v.* Bergen County, 52 N. J. L. 313, 19 Atl. 383; People *v.* Densmore, 1 Barb. (N. Y.) 57; People *v.* New York C. Pl., 19 Wend. (N. Y.) 157 note; People *v.* Onondaga C. Pl. Ct., 10 Wend. (N. Y.) 598; People *v.* Columbia, 5 Cow. (N. Y.) 291; *Ex p.* Root, 4 Cow. (N. Y.) 548; *Re* Brookfield, 12 Ont. Pr. 485.

"Mr. Merrill in his work on Mandamus, section 310, says that costs are awarded, or divided, or refused, as under the circumstances seems proper to the court; and that it has been considered to be such a matter of course to grant costs to the party ultimately succeeding, that very strong grounds will be required to induce the court to depart from the general rule." Power *v.* May, 123 Cal. 147, 153, 55 Pac. 796.

Under 1 Wm. IV, c. 21, § 6, after argument and judgment on return to a mandamus the court will give costs to the party succeeding, unless very strong grounds of exemption be shown on the other side. Reg. *v.* Newbury, 1 Q. B. 751, 2 G. & D. 109, 6 Jur. 821, 11 L. J. Q. B. 149, 41 E. C. L. 760. In Reg. *v.* Harden, 18 Jur. 147, 148, 23 L. J. Q. B. 127, L. & M. 214, 2 Wkly. Rep. 164, Earle, J., said: "The late cases have generally given the costs of obtaining the writ to the successful party; and though it is a matter for the discretion of the Court, it is said that they ought to be given, unless there are strong grounds to the contrary. . . . Taking that to be the rule I have come to the conclusion that this defendant has shewn sufficiently strong grounds for holding him to be exempt."

34. State *v.* Schofield, 41 Mo. 38 (holding that defective statements in return will sometimes carry costs even where writ is refused); Hopper *v.* Bergen County, 52 N. J. L. 313, 19 Atl. 383 (holding that overruling demurrer will not as a rule carry costs); People *v.* Columbia, 5 Cow. (N. Y.) 291 (holding that the granting or overruling of a motion, without notice, will not carry costs).

35. See cases cited *infra,* this note.

Officer in interest of public.— Where proceedings are instituted by an officer in the interest of the public no costs should be allowed upon failure. Clute *v.* Ionia Cir. Judge, 131 Mich. 203, 91 N. W. 159. Where proceedings are initiated in good faith, and present a new and reasonable question for adjudication in which the relator has no greater personal interest than any other, the application for mandamus should be denied, without costs. People *v.* Greene County, 14 Abb. N. Cas. (N. Y.) 29. See *infra,* IX, N, 4.

36. Reg. *v.* Langridge, 1 C. L. R. 361, 1 Jur. N. S. 64, 24 L. J. Q. B. 73, 3 Wkly. Rep. 165.

37. See *supra,* IX, N, 1. See also Costs, 11 Cyc. 1.

38. **Prevailing party rule** generally see Costs, 11 Cyc. 27 *et seq.*

Unsuccessful party rule generally see Costs, 11 Cyc. 27 *et seq.*

39. *California.*— Power *v.* May, 123 Cal. 147, 55 Pac. 796 [*criticizing* McDougal *v.* Roman, 2 Cal. 80].

Illinois.— Pike County Com'rs *v.* People, 11 Ill. 202.

Missouri.— State *v.* Hanley, 76 Mo. App. 631.

Nebraska.— State *v.* Holm, 3 Nebr. (Unoff.) 768, 92 N. W. 1006.

Nevada.— State *v.* McCullough, 3 Nev. 202.

New Hampshire.— Sunapee School Dist. No. 8 *v.* Perkins, 49 N. H. 538; Fox *v.* Whitney, 32 N. H. 408; Ballou *v.* Smith, 31 N. H. 413.

New Jersey.— State *v.* Ferguson, 31 N. J. L. 283.

New York.— People *v.* Deerfield Highway Com'rs, 22 Wend. 587.

Oregon.— Bush *v.* Geisy, 16 Oreg. 355, 19 Pac. 123.

should be awarded against the relator;[40] but where he prevails in his action costs should be awarded in his favor, even though defendant may be a public servant.[41]

4. Officers Liable — a. Judicial Officers. Costs are not allowed against judicial officers, where they act in good faith and are not guilty of abuse of discretion, breach or evasion of duty, or unreasonable delay.[42] Where, however, mandamus issues against such officer upon failure or neglect in his official duties, costs should be awarded against him,[43] such acts being considered extrajudicial.[44] For a mere error of judgment a judicial officer is civilly liable to no one, but

Texas.— McMeans *v.* Finley, 88 Tex. 515, 32 S. W. 524.

Utah.— Page *v.* Utah Commission, 11 Utah 119, 39 Pac. 499.

Vermont.— Essex County R. Co. *v.* Lunenburgh, 50 Vt. 250.

Wisconsin.— State *v.* Policemen's Pension Fund, 121 Wis. 44, 98 N. W. 954.

United States.— U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 219; U. S. *v.* Boutwell, 17 Wall. 604, 21 L. ed. 721; Kendall *v.* U. S., 12 Pet. 524, 9 L. ed. 181.

England.— Reg. *v.* Langridge, 3 C. L. R. 361, 1 Jur. N. S. 64, 24 L. J. Q. B. 73, 3 Wkly. Rep. 165; Reg. *v.* Harden, 18 Jur. 147, 23 L. J. Q. B. 127, L. & M. 214, 2 Wkly. Rep. 164; Reg. *v.* Surrey, 14 Q. B. 684, 14 Jur. 457, 19 L. J. M. C. 171, 2 New Sess. Cas. 377, 68 E. C. L. 684.

See 33 Cent. Dig. tit. "Mandamus," § 438.

"In U. S. v. Schurz, 102 U. S. 407 [26 L. ed. 219], which was mandamus to compel defendant, as secretary of the interior, to issue a patent, he was charged with costs upon a motion specially directed to that question. See note to the case page 407, where Mr. Justice Miller delivered the opinion of the court, in which he said that a careful examination of the authorities 'leaves no option but to follow the rule that the prevailing party shall recover of the unsuccessful one the legal costs which he has expended in obtaining his rights.'" Power *v.* May, 123 Cal. 147, 153, 55 Pac. 796.

Costs have been denied where question is important and one of general interest. People *v.* Auditor-Gen., 38 Mich. 746.

Parties defending ruling of court are not liable for costs. Reg. *v.* Middlesex Sheriff, 5 Q. B. 365, 13 L. J. Q. B. 14, 3 R. & Can. Cas. 396, 48 E. C. L. 365.

Public officer entitled to double costs upon failure of proceedings against him see People *v.* Colborne, 20 How. Pr. (N. Y.) 378, construing Code Proc. § 471, and 2 N. Y. Rev. St. 617, § 4 (24).

Removal of relator from office pending proceeding.— When relator seeks by mandamus to compel members of a board to recognize him as a member thereof and after his petition is filed he is removed from office by the governor, a judgment cannot be given in his favor except for costs down to and including the answers filed setting up such removal. State *v.* Sutton, 6 Ohio Dec. (Reprint) 786, 6 Am. L. Rec. 135.

Right is not dependent upon the recovery of damages. Bush *v.* Geisy, 16 Oreg. 355, 19 Pac. 123.

40. *New Hampshire.*—Sunapee School Dist. No. 8 *v.* Perkins, 49 N. H. 538.

New York.— People *v.* New York C. Pl. Judges, 1 How. Pr. 222; *Ex p.* Root, 4 Cow. 548; People *v.* Oneida County, 4 Cow. 402.

North Carolina.— McCoy *v.* Harnett County, 50 N. C. 265.

South Carolina.— State *v.* Thomson, 19 S. C. 599.

Texas.— McMeans *v.* Finley, 88 Tex. 515, 32 S. W. 524; Kleiber *v.* McManus, 66 Tex. 48, 17 S. W. 249.

See 33 Cent. Dig. tit. "Mandamus," § 438.

Where relief demanded has been secured before his application relator must pay costs. State *v.* Sommerville, 105 La. 312, 29 So. 724.

Where relator applies in official capacity, the costs, upon failure, are properly charged to him in the capacity in which he sued. People *v.* Madison County, 125 Ill. 334, 17 N. E. 802.

41. See cases cited *supra*, IX, N, 3. See also *infra*, IX, N, 4, b.

42. *Connecticut.*— Denslow *v.* Gunn, 68 Conn. 219, 35 Atl. 1125.

Nevada.— State *v.* Bonnifield, 10 Nev. 401.

New York.— People *v.* New York C. Pl., 19 Wend. 157 note [*criticizing* People *v.* New York C. Pl., 18 Wend. 534].

Texas.— Kleiber *v.* McManus, 66 Tex. 48, 17 S. W. 249.

Washington.— State *v.* Reid, 17 Wash. 267, 49 Pac. 517.

See 33 Cent. Dig. tit. "Mandamus," § 439.

Where application to dissolve injunction is successfully resisted, and defendant obtains a writ of mandamus directing the trial judge to dissolve the injunction, plaintiff and not judge is liable for costs. Johnson *v.* New Orleans, 109 La. 696, 33 So. 735.

No costs against a referee where a party opposes writ in his own behalf see Whitmore *v.* Harris, 10 Utah 259, 37 Pac. 464.

43. *Alabama.*— Hudgins *v.* State, 145 Ala. 499, 39 So. 717.

New Hampshire.— Ballou *v.* Smith, 31 N. H. 413.

Oregon.— Burgtorf *v.* Bentley, (1899) 41 Pac. 163.

Tennessee.— State *v.* Sneed, 105 Tenn. 711, 58 S. W. 1070.

England.— Reg. *v.* Surrey, 14 Q. B. 684, 14 Jur. 457, 19 L. J. M. C. 171, 2 New Sess. Cas. 377, 68 E. C. L. 684.

See 33 Cent. Dig. tit. "Mandamus," § 439.

44. State *v.* Sneed, 105 Tenn. 711, 58 S. W. 1070.

where a party is forced into mandamus proceedings in order to obtain justice, there results an error that carries with it the right to costs.[45]

b. Public Officers. Public officers are liable in costs for any duty they are required to perform by law.[46] In this case, as in the case of judicial officers, it has been argued that it would entail a hardship where an officer refused to act in case of doubt; but in the absence of discretionary power in the statute the rule has always been enforced.[47] Where more than one public officer is involved, costs will be assessed only against those who failed to do their duty.[48] Resignation of a public officer will not save liability for costs.[49]

5. Security For Costs — a. In General. The matter of requiring security for costs is one of statutory regulation.[50]

b. On Appeal.[51] The usual rules of costs on appeal obtain both under the state[52] and federal[53] practice, save in those cases where a federal officer is acting in his official capacity, with no personal interest involved.[54]

6. Enforcement of Payment. Judgment for costs in mandamus cases can only be collected by execution in the same way as other judgments.[55]

MANDATA LICITA RECIPIUNT STRICTAM INTERPRETATIONEM, SED ILLICITA LATAM ET EXTENSAM. A maxim meaning "Lawful commands receive a strict interpretation, but unlawful commands a broad and extended one."[1]

MANDATARIUS TERMINOS SIBI POSITOS TRANSGREDI NON POTEST. A maxim meaning "A mandatary cannot exceed the bounds of his authority."[2]

MANDATARY or **MANDATORY.** As an adjective, containing a command;

45. State *v.* Hanley, 76 Mo. App. 635.

46. *California.*— Power *v.* May, 123 Cal. 147, 55 Pac. 796.

Illinois.— Dix Highway Com'rs *v.* Big Four Drainage Dist., 207 Ill. 17, 69 N. E. 576.

Nebraska.— State *v.* Holm, (1902) 92 N. W. 1006.

New Hampshire.— Butler *v.* Pelham, 19 N. H. 553.

Utah.— Page *v.* Utah Commission, 11 Utah 119, 39 Pac. 499.

Washington.— State *v.* Kendall, (1906) 87 Pac. 821.

United States.— U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; U. S. *v.* Boutwell, 17 Wall. 604, 21 L. ed. 721; Kendall *v.* Stokes, 12 Pet. 524, 9 L. ed. 1181.

Canada.— *In re* Hutchison, 31 U. C. Q. B. 274.

See 33 Cent. Dig. tit. "Mandamus," § 440.

Compare State *v.* Orangeburg County Treasurer, 10 S. C. 40.

Where proceedings are revived against a successor in office the cost of the first proceedings cannot be added to the second suit. State *v.* Ferguson, 31 N. J. L. 289.

47. Bush *v.* Geisy, 16 Oreg. 355, 19 Pac. 123.

Rule maintains even where officers are acting in obedience to avoid injunction order supposed by them to be valid. State *v.* Carlson, (Nebr. 1904) 101 N. W. 1004.

In Mississippi a state officer is personally liable but has a claim of reimbursement from the state. State *v.* Stone, 69 Miss. 383, 12 So. 559, 30 Am. St. Rep. 561.

48. Hagerty *v.* Arnold, 13 Kan. 367; State *v.* Berg, 76 Mo. 136; People *v.* Brinkerhoff, 68 N. Y. 259.

49. Gouhenour *v.* Anderson, 35 Tex. Civ. App. 569, 81 S. W. 104.

50. See Costs, 11 Cyc. 170.

Under Tennessee practice, a bond for costs must be given. Whitesides *v.* Stuart, 91 Tenn. 710, 20 S. W. 245.

Effect of giving other security.— Mandamus to a municipal corporation to levy a tax for the purpose of paying a judgment against such corporation is in the nature of an execution to enforce such judgment, and does not require a bond for costs where such has already been given in the original action. Stevens *v.* Miller, 3 Kan. App. 192, 43 Pac. 439.

Under English practice, no security was required where relator was a poor person put forward as a mere dummy, where it appeared he had some interest in the case. Reg. *v.* Malmesbury, 9 Dowl. P. C. 359, 5 Jur. 366, 10 L. J. Q. B. 129.

51. Increase of security required on appeal to house of lords see Reg. *v.* Southampton, 6 B. & S. 407, 34 L. J. Q. B. 164, 118 E. C. L. 407.

52. People *v.* Deerfield Highway Com'rs, 22 Wend. (N. Y.) 587.

52. U. S. *v.* New Orleans, 8 Fed. 112.

54. Reynolds *v.* Blue, 47 Ala. 711 [*following* Riggs *v.* Pfister, 21 Ala. 469].

55. State *v.* Jaynes, 19 Nebr. 697, 28 N. W. 295.

Not enforced by contempt proceedings.— A defendant failing to pay a judgment for costs in a mandamus proceeding is not in contempt of court and cannot be proceeded against therefor. State *v.* Jaynes, 19 Nebr. 697, 28 N. W. 295.

1. Burrill L. Dict.

2. Bouvier L. Dict.

perceptive; imperative; peremptory.[3] As a noun, one to whom a command or charge is given;[4] a person who has gratuitously undertaken to perform certain duties, and who is therefore bound to apply ordinary skill and diligence, but no more.[5] (See, generally, BAILMENTS; CONSTITUTIONAL LAW; INJUNCTION; MANDAMUS; STATUTES.)

MANDATE. A bailment of goods, without reward, to be carried from place to place, or to have some act performed about them;[6] a bailment of personal property in regard to which a bailee engages to do some act without reward;[7] a contract by which a lawful business is committed to the management of another and by him undertaken to be performed without reward;[8] a consensual and imperfect synallagmatic contract by which one binds himself, either gratuitously or for a remuneration (honoraire) to manage and direct a *licit* matter for which he is to account;[9] a consensual contract by which one of the parties confides the carrying on or execution of one or more matters of business to the other, who takes them in his charge;[10] a request or direction.[11] In its judicial sense, the official mode of communicating the judgment of the appellate court to the lower court;[12] a judicial command used by a court or magistrate directing the proper officer to enforce a judgment, decree, or sentence;[13] a writ, process, or other written direction issued pursuant to law out of a court, or made, pursuant to law, by a court or judge thereof, demanding a person to do, or to refrain from doing, an act therein specified;[14] an official or authoritative command; an order or injunction; a commission or judicial precept. As used in the canon law, a rescript of the Pope issued for certain purposes.[15] (Mandate: In Criminal Prosecution, see CRIMINAL LAW. In Proceeding — By Creditor's Suit, see CREDITORS' SUITS; To Establish Highway, see STREETS AND HIGHWAYS. In Prosecution For Homicide, see HOMICIDE. Of Court — Disobedience of as Contempt, see CONTEMPT;[16] On Appeal or Other Proceedings For Review, see APPEAL AND ERROR; To Circuit Court to Carry Out Decree, see COURTS;[17] To Judiciary Directing Construction of Statutes, see CONSTITUTIONAL LAW.[18] See, generally, BAILMENTS; MANDAMUS.)

3. Black L. Dict.

4. Webster Dict. [*quoted* in Kearney *v.* Oakes, 20 Nova Scotia 30, 38].

5. Briggs *v.* Spaulding, 141 U. S. 132, 148, 11 S. Ct. 924, 35 L. ed. 662.

In Scottish law it is equivalent to a general agent in our law, and is not an attorney or solicitor. Monroe *v.* Douglas, 4 Sandf. Ch. (N. Y.) 126, 200 [*citing* 2 Bell L. Dict. 208].

In the civil law, where he is employed to institute or conduct a suit, he is designated as a *procurator ad lites*. Monroe *v.* Douglas, 4 Sandf. Ch. (N. Y.) 126, 200 [*citing* 3 Burge Comm. 984].

6. Montgomery *v.* Evans, 8 Ga. 178, 180; Eddy *v.* Livingston, 35 Mo. 478, 492, 88 Am. Dec. 122; Thompson *v.* Woodruff, 7 Coldw. (Tenn.) 401, 407.

The term is used where someone undertakes without recompense to do some act for another in respect of a thing bailed. 2 Kent Comm. 569 [*quoted* in McCauley *v.* Davidson, 10 Minn. 418, 421; Eddy *v.* Livingston, 35 Mo. 487, 492, 88 Am. Dec. 122].

7. Bronnenburg *v.* Charman, 80 Ind. 475, 477.

8. Richardson *v.* Futrell, 42 Miss. 525, 543.

9. Gurley *v.* New Orleans, 41 La. Ann. 75, 79, 5 So. 659. See also Waterman *v.* Gibson, 5 La. Ann. 672, 673.

10. Williams *v.* Conger, 125 U. S. 397, 422, 8 S. Ct. 933, 31 L. ed. 778, where comparing this term with "procuration" it is said: "The word mandate is more general and comprehends every power given to another in whatsoever mode it be, whilst procuration supposes a power given by writing."

11. Thus a check is a mandate by the drawer to his banker to pay the amount to the transferee or holder of the check. Smith *v.* Union Bank, 1 Q. B. D. 31, 33, 45 L. J. Q. B. 149, 33 L. T. Rep. N. S. 557, 24 Wkly. Rep. 194.

12. Horton *v.* State, 63 Nebr. 34, 37, 88 N. W. 146.

13. Bouvier L. Dict. [*quoted* in State *v.* Boyd, 34 Nebr. 435, 439, 51 N. W. 964; Seaman *v.* Clarke, 60 N. Y. App. Div. 416, 421, 69 N. Y. Suppl. 1002].

14. McKelsey *v.* Lewis, 3 Abb. N. Cas. (N. Y.) 61, 63.

An injunction order is a mandate (Boon *v.* McGucken, 67 Hun (N. Y.) 251, 254, 22 N. Y. Suppl. 424), but a pleading is not (Fromme *v.* Gray, 14 Misc. (N. Y.) 592, 593, 36 N. Y. Suppl. 1107).

In a statute giving courts power to punish as for criminal contempt wilful disobedience of its lawful mandates, the word is evidently used in the sense of a command, order, or direction. People *v.* Oyer & T. Ct., 10 N. Y. App. Div. 25, 29, 41 N. Y. Suppl. 702.

15. Webster Dict. [*quoted* in People *v.* Oyer & T. Ct., 36 Hun (N. Y.) 277, 285, 3 N. Y. Cr. 208].

16. See 9 Cyc. 8.

17. See 11 Cyc. 918.

18. See 8 Cyc. 811.

MANDATUM. The contract of MANDATE,[19] *q. v.* (See MANDATE; and, generally, BAILMENTS.)

MANDATUM NISI GRATUITUM NULLUM EST. A maxim meaning "Unless a mandate is gratuitous, it is not a mandate."[20]

MANDATUM NON SUSCIPERE CUI LIBET LIBERUM ESE; SUSCEPTUM AUTEM CONSUMMANDUM EST, AUT QUIA PRIMUM RENUNCIANDUM EST, PER SEMET IPSUM AUT PER ALIUM EANDEM REM MANDATOR EXEQUATUR. A maxim meaning "Every person is at liberty to refuse a command; but being undertaken, it is to be performed, or first refused in person, that the principal may have an opportunity either to do the thing himself, or by the hands of another."[21]

MANEAT. To remain in.[22]

MANIA. That form of insanity where the mental derangement is accompanied with more or less excitement sometimes amounting to a fury;[23] a condition in which the perversion of the understanding embraces all kinds of objects, and is accompanied with general mental excitement.[24] (Mania: Affecting — Capacity to Contract, see CONTRACTS; Responsibility For Crime, see CRIMINAL LAW; HOMICIDE; Testamentary Capacity, see WILLS. See, generally, INSANE PERSONS.)

MANIA A POTU. Insanity resulting as a secondary effect produced by the excessive and protracted indulgence in intoxicating liquors.[25] (Mania a Potu: Affecting Responsibility For Crime, see CRIMINAL LAW. See DELIRIUM TREMENS. See also, generally, INSANE PERSONS.)

MANIA TRANSITORIA. The case of one in the possession of his ordinary reasoning faculties who allows his passions to convert him into a temporary maniac.[26] (See, generally, INSANE PERSONS.)

MANIFEST. As an adjective, obvious, apparent, plain;[27] needing no evidence to make it more clear; that which is open, palpable, uncontrovertible.[28] As a noun, in maritime law, a declaration of the entire cargo.[29] (Manifest: Admissibility in Evidence, see ADMIRALTY. Requirement of Custom Laws as to, see CUSTOMS DUTIES.)

MANIFESTA PROBATIONE NON INDIGENT. A maxim meaning "Manifest things require no proof."[30]

MANKATO FREIGHT. Freight marked or consigned to Mankato.[31] (See FREIGHT.)

MANKIND. The race or species of human beings, in law, females as well as males.[32] (See MAN.)

19. Black L. Dict.

It is a species of bailment in which the mandatory undertakes gratuitously to do some act about the thing bailed, and is only responsible for gross neglect or a breach of good faith. Com. *v.* Cait, 2 Pittsb. (Pa.) 495, 496.

20. Bouvier L. Dict.

Applied in Harris *v.* Sheffield, 10 Nova Scotia 1, 5.

21. Morgan Leg. Max.

22. Spinning *v.* Spinning, 43 N. J. Eq. 215, 245, 10 Atl. 270.

23. Hall *v.* Unger, 11 Fed. Cas. No. 5,949, 2 Abb. 507, 510, 4 Sawy. 672.

24. Matter of Gannon, 2 Misc. (N. Y.) 329, 333, 21 N. Y. Suppl. 960; People *v.* Lake, 2 Park. Cr. (N. Y.) 215, 218.

It is a general term and includes many phases of mental disorder. Smith *v.* Smith, 47 Miss. 211, 216.

It is distinguished from monomania, which is the perversion of the understanding in regard to a single object, or a small number of objects, with the predominance of mental excitement. Matter of Gannon, 2 Misc. (N. Y.) 329, 333, 21 N. Y. Suppl. 960.

25. State *v.* Hurley, Houst. Cr. Cas. (Del.) 28, 35.

26. New York Mut. L. Ins. Co. *v.* Terry, 15 Wall. (U. S.) 580, 583, 21 L. ed. 236.

27. Lapham *v.* Curtis, 5 Vt. 371, 377, 26 Am. Dec. 310.

28. Hermance *v.* Ulster County, 71 N. Y. 481, 485, synonymous with "evident," "visible," "plain," "obvious" to the understanding.

As used in a statute relating to marriages and providing that consent and consummation may be manifested in any form, and proved under the same general rules of evidence as facts in other cases, the term implies manifested for the purpose of proof whenever the fact may come in issue. Sharon *v.* Sharon, 75 Cal. 1, 15, 16 Pac. 345.

29. New York, etc., Mail Steamship Co. *v.* U. S., 125 Fed. 320, distinguishing from a bill of lading which is a declaration of a specific part of the cargo.

30. Bouvier L. Dict. [*citing* Bedell's Case, 7 Coke 40*a*, 40*b*].

31. Lawrence *v.* Winona, etc., R. Co., 15 Minn. 390, 395, 2 Am. Rep. 130.

32. Rex *v.* Wiseman, Fortesc. 91, 94.

MANNER.[33] Mode of action, way of performing or effecting anything, method, style;[34] the mode, the way, in which an act shall be done;[35] the way of managing;[36] the way of doing a thing, the method of procedure;[37] method or peculiar way;[38] general method.[39]

MANOR. A house, dwelling, seat, or residence.[40] (See, generally, GROUND-RENTS.)

MANSION or **MANSION-HOUSE.** A dwelling-house or place of residence.[41] (Mansion or Mansion-House. Breaking and Entering, see BURGLARY. Burning, see ARSON. Right of Widow to Occupy, see EXECUTORS AND ADMINISTRATORS.)

MANSLAUGHTER. See HOMICIDE.

MANSTEALING. A word sometimes used synonymously with kidnapping.[42] (See, generally, KIDNAPPING.)

MAN-TRAPS. Engines to catch trespassers, now unlawful unless set in a dwelling-house for defense between sunset and sunrise.[43] (Man-traps: Liability For Personal Negligence, see NEGLIGENCE. Responsibility For Homicide Committed by, see HOMICIDE.)

MANUAL LABOR. Labor performed by hand.[44] (See LABOR.)

MANUFACTORY. See MANUFACTURES.

33. **Literally the term means** the handling of the thing, and has a wider sense embracing both "method" and "mode." Webster Dict. [*quoted* in Pitcher *v.* Chicago Bd. of Trade, 20 Ill. App. 319, 325].

This is a word of large signification, but cannot exceed the subject to which it belongs. The incident cannot be extended beyond its principal. Wells *v.* Bain, 75 Pa. St. 39, 54, 15 Am. Rep. 563.

The element of time may be included in the term (Harris *v.* Doherty, 119 Mass. 142, 143; State *v.* McClure, 91 Wis. 313, 315, 64 N. W. 992), or it may not be involved therein (Bankers' L. Ins. Co. *v.* Robbins, 59 Nebr. 170, 174, 80 N. W. 484; State *v.* Eureka Consol. Min. Co., 8 Nev. 15, 29).

34. Littell *v.* State, 133 Ind. 577, 580, 33 N. E. 417.

The expression "manner and form" as used in a plea covers matters of both substance and form, and saves the necessity of repeating at length the allegations sought to be brought within the scope of the traverse. Bradley *v.* Barbour, 65 Ill. 431, 433.

35. State *v.* Kennon, 7 Ohio St. 546, 560.

36. Noyes *v.* Children's Aid Soc., 70 N. Y. 481, 483, 3 Abb. N. Cas. 36, 39.

37. Bankers' L. Ins. Co. *v.* Robbins, 59 Nebr. 170, 174, 80 N. W. 484.

38. Northrop *v.* Curtis, 5 Conn. 246, 253.

39. *In re* Thirty-Fourth St., 81 Pa. St. 27, 31.

When used with regard to holding elections it means the usual, ordinary, or necessary details required for the holding of the election. People *v.* English, 139 Ill. 622, 629, 29 N. E. 678, 15 L. R. A. 131.

40. Black L. Dict.

41. Devoe *v.* Com., 3 Metc. (Mass.) 316, 325; Thompson *v.* People, 3 Park. Cr. (N. Y.) 208, 214; Com. *v.* Pennock, 3 Serg. & R. (Pa.) 199; Armour *v.* State, 3 Humphr. (Tenn.) 379, 385.

It includes such houses as are appurtenant thereto, as kitchen, laundry, smokehouse, or dairy. Fletcher *v.* State, 10 Lea (Tenn.) 338, 339. Also the out-house, such as barns, stables, cow-houses, dairy-houses and the like, if they be parcel of the messuage, though they be not under the same roof, or joining contiguous to it. 2 East P. C. 492, 493 [*quoted* in State *v.* Brooks, 4 Conn. 446, 448]. A gearhouse separated from the main yard by a fence if there is a gate between it and the main yard, always left open at night, so as to constitute one yard under the protection of the yard dog. Bryant *v.* State, 60 Ga. 358, 359.

In an indictment for burglary the use of the word "mansion" instead of "dwelling-house" is sufficient. Thompson *v.* People, 3 Park. Cr. (N. Y.) 208, 214; Com. *v.* Pennock, 3 Serg. & R. (Pa.) 199. See BURGLARY.

42. 4 Blackstone Comm. 219 [*quoted* in Bouvier L. Dict.].

43. Bouvier L. Dict.

44. Morgan *v.* London Gen. Omnibus Co., L. R. 13 Q. B. 832, 48 J. P. 503, 53 L. J. Q. B. 352, 51 L. T. Rep. N. S. 213, 32 Wkly. Rep. 759, does not include the work of an omnibus conductor engaged at daily wages.

As used in a statute giving preferred claims for manual or mechanical labor the term applies only to persons working for wages or salary and not to contractors (Anderson Driving Park Assoc. *v.* Thompson, 18 Ind. App. 458, 48 N. E. 259, 261); and in a statute giving a lien for services in logging it includes the use of all implements or instrumentalities, such as axe, cant-hook, team, and the like actually used in and necessary to the performance of such labor by the lumbermen (Martin *v.* Wakefield, 42 Minn. 176, 177, 43 N. W. 966, 6 L. R. A. 362), and includes labor performed by a team and services under a contract for a gross price per month for both (Breault *v.* Archambault, 64 Minn. 420, 421, 67 N. W. 348, 58 Am. St. Rep. 545). See also Martin *v.* Wakefield, *supra*.

A Chinese person, member of a firm of dealers in fancy goods but occasionally, previous to his departure to China for a temporary visit, working as a household servant, was engaged in "manual labor." Lew Jin *v.* U. S., 66 Fed. 953, 954, 14 C. C. A. 281.

MANUFACTURES

By Francis Dana

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Water and Watercourses, see WATERS.

I. TERMINOLOGY.

A. In General. It will appear from the various decisions that the definitions of "manufacture" and kindred terms, as given by the lexicographers, do not afford a true test in law as to what may or may not be included within the meaning of those terms. The courts have cited those definitions generally, but have not adhered to them in particular cases.[1] When therefore the usual question arises — whether or not a given industry, or thing, is to be classed as manufacture, or a given person, natural or artificial, as a manufacturer,[2] it is not safe to rely

1. See *infra*, I, B *et seq.*
2. The most frequent subject of dispute relating to manufactures is the question whether or not a given article or industry may properly be classed as a manufacture, a given person or corporation, as a manufac-

upon the lexicographer; it is necessary to look to the decisions. With this caution the following definitions are given, some of which apply to the thing made; others to the process of making,[3] since the word "manufacture" may be descriptive, either of the making a thing by art, or of the thing when made.[4]

B. Manufacture — 1. Standard Definitions. As a noun, manufacture is defined as: (1) The process of making anything by art, or reducing materials into a form fit for use, by the hand or by machinery;[5] (2) anything made or manufactured by hand, or manual dexterity, or by machinery.[6] As a verb, the word

turer or manufacturing corporation, or as "wholly engaged in manufacturing," or as an "exclusively manufacturing corporation," within the meaning of those terms as employed in statutes relating to bankruptcy, corporations, customs, license, and taxation. See Bankruptcy, 5 Cyc. 283; Corporations, 10 Cyc. 162; Customs Duties, 12 Cyc. 1118 *et seq.*; Licenses, 25 Cyc. 593; Taxation; and cases cited *passim* this article.

3. See *infra*, I, B *et seq.*

4. Boulton *v.* Bull, 2 H. Bl. 463, 471, 3 Rev. Rep. 439. See also Morgan *v.* Seward, 1 Jur. 527, 6 L. J. Exch. 153, M. & H. 55, 2 M. & W. 544.

5. Worcester Dict. [*quoted* in Beggs *v.* Edison Electric Illuminating Co., 96 Ala. 295, 299, 11 So. 381, 38 Am. St. Rep. 94; Atty.-Gen. *v.* Lorman, 59 Mich. 157, 163, 26 N. W. 311, 60 Am. Rep. 287; Evening Journal Assoc. *v.* State Bd. of Assessors, 47 N. J. L. 36, 38, 54 Am. Rep. 114].

Other definitions are: "The operation of reducing raw materials of any kind into a form suitable for use, by hand, by art, or by machinery." Webster Dict. [*quoted* in Schriefer *v.* Wood, 21 Fed. Cas. No. 12,481, 5 Blatchf. 215, 217].

"The process of making a thing by art." Burrill L. Dict. [*quoted* in Lamborn *v.* Bell, 18 Colo. 346, 351, 32 Pac. 989, 20 L. R. A. 241; Carlin *v.* Western Assur. Co., 57 Md. 515, 526, 40 Am. Rep. 440; Benedict *v.* Davidson County, 110 Tenn. 183, 192, 67 S. W. 806].

"The production of articles for use from raw or prepared materials, by giving these materials new forms, qualities, properties or combinations, whether by hand-labor or by machinery." Century Dict. [*quoted* in Beggs *v.* Edison Electric Illuminating Co., 96 Ala. 295, 300, 11 So. 381, 38 Am. St. Rep. 94].

"The making of anything by hand or artifice." Beggs *v.* Edison Electric Illuminating Co., 96 Ala. 295, 299, 11 So. 381, 38 Am. St. Rep. 94.

"Mr. Brande defines 'manufacture' as a term employed to designate the changes or modifications made by art or industry in the form or substance of material articles in the view of rendering them capable of satisfying some want or desire of man; and manufacturing industry to consist in the application of art, science or labor to bring about certain changes or modifications of already existing materials. He includes under the term 'manufacture' all branches of industry with the exceptions of fishing, hunting, mining and such industries as have for their object to obtain possession of material products in the state in which they are fashioned by nature. He says that the term is generally applied only to those departments of industry in which the raw material is fashioned into desirable articles by art or labor without the aid of the soil, but that there is no real good reason for such limitation, and that it is obvious from the slightest consideration that agriculture is nothing but a manufacture, for the business of the agriculturist is so to dispose of the soil, seed, manure or other materials, that they may supply him with other and more desirable products." Evening Journal Assoc. *v.* State Bd. of Assessors, 47 N. J. L. 36, 38, 54 Am. Rep. 114; *In re* Tecopa Min., etc., Co., 110 Fed. 120, 121. See also Brande Encycl. tit. "Manufacture."

Distinguished from commerce.— In Kidd *v.* Pearson, 128 U. S. 1, 20, 9 S. Ct. 6, 32 L. ed. 346 [*quoted* in U. S. *v.* Knight Co., 156 U. S. 1, 14, 15 S. Ct. 249, 39 L. ed. 325], it was said: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation — the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitutes commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation." See also, generally, Commerce, 7 Cyc. 407.

Distinguished from traffic.— In People *v.* Collins, 3 Mich. 343, 385, it is said: "The manufacture of an article is one thing, and the traffic therein is another and a distinct thing. 'To manufacture is to make; the operation of making whatever is used by man; any thing made from raw materials by hand, by machinery or by art.' So says Dr. Webster. 'To traffic is to trade, either by barter or by buying or selling; to trade; to pass goods and commodities from one person to another, for an equivalent in goods or money,' etc. So says Dr. Webster."

6. Worcester Dict. [*quoted* in Atty.-Gen. *v.* Lorman, 59 Mich. 157, 164, 26 N. W. 311, 60 Am. St. Rep. 287].

Other definitions are: "Anything made from raw materials, by hand, or by machinery, or by art." Bouvier L. Dict.; Webster Dict. [*quoted* in People *v.* Wemple, 61 Hun (N. Y.) 53, 62, 57 N. Y. Suppl. 711 [*reversed* on other grounds in 129 N. Y.

is defined as meaning to form by manufacture, or workmanship, by the hand or machinery; to make by art and labor.[7]

2. Legal Definition — a. Stated. Manufacture is: (1) The application, to material,[8] of labor or skill,[9] whereby the original article is changed to a new, different, and useful article,[10] provided the process is of a kind popularly regarded as manufacture;[11] or (2) the product of such process.[12]

b. Its Elements Considered — (I) *Material Used.* While the courts in their decisions have often used the term "raw material," as has Webster in his definition,[13] to indicate the original material subjected to the process of manufacture, and although it was held in one reported case[14] and has apparently been intimated in others[15] that rawness of material was essential to manufacture, the general current of authority is in favor of the rule that the material need not be raw.[16]

664, 29 N. E. 812]; Schriefer *v.* Wood, 21 Fed. Cas. No. 12,481, 5 Blatchf. 215, 217].

"Whatever is made by human labor, either directly or through the instrumentality of machinery." Abbott L. Dict. [*quoted* in Lamborn *v.* Bell, 18 Colo. 346, 351, 32 Pac. 989, 20 L. R. A. 241; Carlin *v.* Western Assur. Co., 57 Md. 515, 526, 40 Am. Rep. 440; Benedict *v.* Davidson County, 110 Tenn. 183, 192, 67 S. W. 806].

7. Worcester Dict. [*quoted* in Atty.-Gen. *v.* Lorman, 59 Mich. 157, 164, 26 N. W. 311, 60 Am. Rep. 287]. See also *In re* Tecopa Min., etc., Co., 110 Fed. 120, 121.

Other definitions are: "To make or fabricate from raw materials by the hand, by art or machinery, and work into forms convenient for use." Webster Dict. [*quoted* in Carlin *v.* Western Assur. Co., 57 Md. 515, 526, 40 Am. Rep. 440; People *v.* Wemple, 61 Hun (N. Y.) 53, 62, 15 N. Y. Suppl. 711 [*reversed* on other grounds in 129 N. Y. 664, 29 N. E. 812]; Benedict *v.* Davidson County, 110 Tenn. 183, 192, 67 S. W. 806; *In re* Tecopa Min., etc., Co., 110 Fed. 120, 121; Schriefer *v.* Wood, 21 Fed. Cas. No. 12,481, 5 Blatchf. 215, 217]; Bouvier L. Dict.

"To work raw materials into suitable forms for use." Webster Dict. [*quoted* in Schriefer *v.* Wood, 21 Fed. Cas. No. 12,481, 5 Blatchf. 215, 217].

"To make any thing by hand or artificial device." Louisville, etc., R. Co. *v.* Fulgham, 91 Ala. 555, 558, 8 So. 803.

The word "manufacture" is a compound word of Latin origin, derived from the words "manu" (ablative), by hand, and "facere," to do, to make, to form; but the meaning is not confined to that which is done by hand alone, but by machinery as well. *In re* Tecopa Min., etc., Co., 110 Fed. 120, 121.

Furnishing new material not included in manufacture.— The force of the word "manufacture" is simply and no more than this: "To make up by hand [original definition] or by machinery [derivative definition] any raw material into a form fit for use." It does not include the idea that the manufacturer shall furnish the raw material. That is, strictly speaking, a mercantile sale, although in common parlance we speak of a man who furnishes the material and works it up as a manufacturer. In fact he is both a merchant and a manufacturer. Horowitz *v.* Weidner, (N. J. Ch. 1895) 31 Atl. 771, 773.

8. See *infra*, I, B, 2, b, (I).
9. See *supra*, I, B, 1.
10. See *infra*, I, B, 2, b, (II).
11. See *infra*, I, B, 2, c.
12. See *supra*, I, B, 1.
13. See *supra*, I, B, 1.
14. People *v.* Holdridge, 4 Lans. (N. Y.) 511, where it was held that an establishment where completed articles were made from melted pig iron and whole iron was not engaged in manufacture because the material was not "raw."
15. See cases cited *infra*, this note.

In Louisiana certain cases seem to have gone, to some extent, upon a like theory. Thus it has been held that those who import parts, already manufactured for the purpose of being made complete articles, and fit them together and finish the complete article, are not engaged in manufacture within the meaning of a constitutional exemption from assessment. Lake *v.* Guillotte, 48 La. Ann. 870, 19 So. 924. See also Chicksaw Cooperage Co. *v.* Police Jury, 48 La. Ann. 523, 19 So. 476; Brooklyn Cooperage Co. *v.* New Orleans, 47 La. Ann. 1314, 17 So. 804. But a cooper who made barrels out of shakes and rough logs was held a manufacturer in New Orleans *v.* Le Blanc, 34 La. Ann. 596.

16. People *v.* Morgan, 48 N. Y. App. Div. 395, 399, 63 N. Y. Suppl. 76 (where the court said: "Whoever creates a useful thing by mechanical labor is entitled usually to be called a manufacturer. The fact that he purchases some and makes some of the parts does not destroy that character. . . . No manufacturer of the finished product in this age works up the raw material. That is done by specialists all along the line. The practical manufacturer assembles the material he needs from all quarters in its most finished condition and does the rest himself"); Norris *v.* Com., 27 Pa. St. 494, 496 (where it is said: "Manufacturing . . . does not often mean the production of a new article out of materials entirely raw. It generally consists in giving new shapes, new qualities, or new combinations to matter which has already gone through some other

(II) *CHANGE EFFECTED* — (A) *In General.* The change effected must be such as to produce, instead of the original material, a new and different article.[17]

(B) *"Making" Distinguished From "Taking."* Certain industries are held not to be manufactures, although they involve the application of labor and skill to material to fit it for use; they do not result in the production of a different article, and so are held to amount to mere taking or distribution.[18] The mere appropriation of an article which is furnished by nature is not a manufacture.[19]

c. **Popular Usage Followed.** The courts have generally followed the popular usage,[20] which does not class as manufactures certain industries to which the

artificial process. . . . A shoemaker is none the less a manufacturer of shoes because he does not also tan the leather"); Tide-Water Oil Co. *v.* U. S., 171 U. S. 210, 217, 18 S. Ct. 837, 43 L. ed. 139 (where the court said: "It may be said generally, although not universally, that a complete manufacture is either the ultimate product of prior successive manufactures, such as a watch spring, or a pen-knife, or an intermediate product which may be used for different purposes, such for instance as pig iron, iron bars, lumber or cloth"). And see Dudley *v.* U. S., 74 Fed. 548; Baumgarten *v.* Magone, 50 Fed. 69; U. S. *v.* Semmer, 41 Fed. 324.

17. Ingram *v.* Cowles, 150 Mass. 155, 157, 23 N. E. 48 (where it is said: "We hesitate to say that sawing logs into boards is a 'branch of manufacture,' and think it doubtful whether something more of a transformation of the raw material is not necessary to bring the employment within the clause"); Hartranft *v.* Wiegmann, 121 U. S. 609, 615, 7 S. Ct. 1240, 30 L. ed. 1012 [*following* U. S. *v.* Wilson, 28 Fed. Cas. No. 16,736] (where it is said: "The application of labor to an article . . . does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool"). See also U. S. *v.* Potts, 5 Cranch (U. S.) 284, 3 L. ed. 102 (where round copper plates turned up and raised at the edges by labor for subsequent use in the manufacture of copper vessels was held not to be manufactured copper); U. S. *v.* Semmer, 41 Fed. 324; Foppes *v.* Magone, 40 Fed. 570; Frazee *v.* Moffitt, 18 Fed. 584, 20 Blatchf. 267 (where it was held that hay was not manufactured); U. S. *v.* Wilson, *supra* (where marble cut into blocks for transportation was held not to be manufactured marble).

A contract to ship goods in a "manufactured state" was held not broken by failure to rivet joints of certain pipes before shipping, as it appeared that the seller usually shipped his apparatus without riveting the pipes. Allington, etc., Mfg. Co. *v.* Detroit Reduction Co., 133 Mich. 427, 95 N. W. 562.

18. See cases cited *infra*, this note.

Digging coal.— The distinction is well marked between the digging of coal and the making of coke; the former is not, but the latter is, a manufacture. Com. *v.* Juniata Coke Co., 157 Pa. St. 507, 27 Atl. 373, 22 L. R. A. 232.

Mining, however elaborate, is not in itself manufacture. Byers *v.* Franklin Coal Co., 106 Mass. 131; Cowling *v.* Zenith Iron Co., 65 Minn. 263, 68 N. W. 46, 60 Am. St. Rep. 471, 33 L. R. A. 508; Com. *v.* Juniata Coke Co., 157 Pa. St. 507, 27 Atl. 373, 22 L. R. A. 232; *In re* Woodside Coal Co., 105 Fed. 56, 5 Am. Bankr. Rep. 186; *In re* Rollins Gold, etc., Min. Co., 102 Fed. 982, 4 Am. Bankr. Rep. 327; *In re* Elk Park Min., etc., Co., 101 Fed. 422, 4 Am. Bankr. Rep. 131. And see *infra*, I, D, note 45.

Distribution of water is not manufacture. Kentucky Lead, etc., Co. *v.* New Albany Water-Works, 62 Ind. 63; Dudley *v.* Jamaica Pond Aqueduct Corp., 100 Mass. 183.

Distribution of natural gas is not manufacture. Wilson *v.* Tennent, 32 Misc. (N. Y.) 273, 65 N. Y. Suppl. 852. See also Com. *v.* Northern Electric Light, etc., Co., 145 Pa. St. 105, 22 Atl. 839, 14 L. R. A. 107.

Ice as taken from natural sources and fitted for distribution and use is not generally regarded as a manufacture. Hittinger *v.* Westford, 135 Mass. 258, 262 (where it is said: "The cutting of ice produced by the agencies of nature, on the surface of a pond, into pieces of a size convenient for handling, and storing the pieces in a building, cannot . . . be called a manufacture. The material is in no way changed, or adapted to any new or different use; it still remains ice, to be used simply as ice. . . . It is like the harvesting of hay or grain"); People *v.* Knickerbocker Ice Co., 99 N. Y. 181, 1 N. E. 669 [*affirming* 32 Hun 475] (holding that a company engaged in storing and preserving ice and preparing it for sale is not a manufacturing corporation). But see Atty.-Gen. *v.* Lorman, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287, where it was held that the reduction of ice into a form fit to use both by hand and by the use of machinery was manufacture.

19. Com. *v.* Northern Electric Light, etc., Co., 145 Pa. St. 105, 22 Atl. 839, 14 L. R. A. 107.

20. State *v.* Johnson, 20 Mont. 367, 369, 370, 51 Pac. 820, where under a statutory construction law, requiring in substance that words, unless technical, should be construed according to the context and approved usage of the language, the court construing a statute imposing a license-tax interpreted the word "manufacture" in its popular sense, and said: "We therefore would include among manufacturers those who produce goods from a raw state by manual skill and labor, and

definitions strictly apply, such as cooking and the making of confectionery,[21] buildings,[22] and farming.[23]

d. Particular Industries[24] — (i) *Electricity.*[25] The production of electricity by artificial means in a condition fit for use is generally held to be manufacture, and the theory that it is merely the gathering and use of a gift of nature is disapproved.[26]

goods which are commonly turned out of factories, and we would exclude a merchant tailor, who merely cuts and fashions a suit of clothes as ordered by a customer, from cloth purchased elsewhere, and kept to be made up as suits are ordered from him — although a 'manufacturer' is one who makes or fabricates anything for use" and so would include "a tailor who works cloths into suits for wear;" "a seamstress . . for she makes handkerchiefs from linen;" "the carpenter who takes raw lumber and prepares it for building a house;" "a milliner, who makes and sells bonnets; a blacksmith, who makes horseshoes or forges iron; and a cook, who makes bread or other articles to be used as food. . . . We should never entertain the thought that included in the factories and among the manufacturers tailor shops or merchant tailors, not engaged in wholesale trade, or milliners, dress makers, furniture dealers, restaurants and the like." See also People *v.* Wemple, 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708 [*reversing* 15 N. Y. Suppl. 718]; *In re* Tecopa Min., etc., Co., 110 Fed. 120.

21. New Orleans *v.* Mannessier, 32 La. Ann. 1075, 1076, where a person engaged in making and selling ice-cream claimed exemption from taxation under a Louisiana statute, on the ground that he was a manufacturer, and the court held the contrary, saying: "We cannot assent to the proposition that a person making and selling ice-cream is a manufacturer in the sense of the law, or in any other sense of the word. The attempt to magnify a confectionery, which is defendant's business, into a manufacture, must fail. We are told that any one seeing the steam engine, complicated apparatus, and large force needed to produce defendant's goods, would at once conclude that he is a manufacturer. With as much force it might be said that any one visiting the mammoth kitchen of the Grand Union Hotel at Saratoga, together with their myriads of employees, and their colossal apparatus, would at once magnify the cooks and pastrymen into manufacturers." See also State *v.* Eckendorf, 46 La. Ann. 131, 14 So. 518; State *v.* Johnson, 20 Mont. 367, 51 Pac. 820.

22. People *v.* New York Floating Dry Dock Co., 63 How. Pr. (N. Y.) 451, 453, 11 Abb. N. Cas. 40 [*affirmed* in 92 N. Y. 487], where it was said: "Undoubtedly, using the words — manufacture, manufacturer — in their broadest sense, the builder and repairer of a vessel, or a house even, might be called a manufacturer. In either case such builder takes the raw material, and by the hand, or by machinery and tools, fashions it into form and shape for use. But this is not the ordinary and general meaning to be given to the words," and hence it was held that a corporation empowered "to construct one or more dry docks, or wet docks, or other conveniences and structures" for certain purposes, to use them for such purposes, and furnish them for use by others for such purposes, was not a manufacturing corporation. And see Jacobs *v.* Baker, 7 Wall. (U. S.) 295, 19 L. ed. 200; and *infra*, I, B, 2, d, (v).

23. See Evening Journal Assoc. *v.* State Bd. of Assessors, 47 N. J. L. 36, 54 Am. Rep. 114; *In re* Chandler, 5 Fed. Cas. No. 2,591, 1 Lowell 478.

24. **Disputed industries.** — There are industries which lie so close to the line between what is, and what is not, manufacture, that their claim to the name, although usually well settled in one way or the other, has given rise to much discussion. See *infra*, I, B, 2, d, (I)–(VII).

25. **Electricity** generally see ELECTRICITY, 15 Cyc. 466.

26. Beggs *v.* Edison Electric Illuminating Co., 96 Ala. 295, 300, 11 So. 381, 38 Am. St. Rep. 94 (where the court said: "According to the above definitions of the word manufacture, we are constrained to consider and declare an electric-light company a manufacturing corporation to all intents and purposes. It is no answer to this argument to say, that electricity exists in a state in nature, and that a corporation engaged in the electric-light business collects or gathers such electricity. This does not fully or exactly express the process by which such corporations are able to make, sell and deliver something useful and valuable. The electricity that exists in nature is of a very different quality from that produced by means of machinery. . . . But the electric currents that produce these results can not be said to be 'the free gift of nature, gathered from the air or the clouds.' It is the product of capital and labor, and in this respect can not be distinguished from ordinary manufacturing operations"): Burke *v.* Mead, 159 Ind. 252, 260, 64 N. E. 880; People *v.* Wemple, 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708 [*reversing* 15 N. Y. Suppl. 718]; Com. *v.* Keystone Electric Light, etc., Co., 193 Pa. St. 245, 44 Atl. 326 [*reversing* 2 Dauph. Co. Rep. 1, 4 Lack. Leg. N. 353, and *explaining* and *criticizing* Com. *v.* Edison Electric Light, etc., Co., 170 Pa. St. 231, 32 Atl. 419; Com. *v.* Northern Electric Light, etc., Co., 145 Pa. St. 105, 22 Atl. 839, 14 L. R. A. 107, in so far as they maintain that the production of electricity is not manufacture]. See also People *v.* Wemple, 129 N. Y. 664, 29 N. E. 812 [*reversing* 61 Hun 53, 15 N. Y. Suppl. 711]. *Compare* Frederick Electric Light, etc., Co. *v.*

(II) *GAS.*[27] The business of producing illuminating gas is a manufacture.[28] But the liberation of natural gas from the earth and its transportation to consumers is not manufacture.[29]

(III) *LUMBER.*[30] Lumber has given rise to much doubt as to whether its production, in early stages, is manufacture or not. The weight of authority seems to be that such production is in general manufacture,[31] but it can hardly be said with certainty that a court would so hold in any given case.[32]

(IV) *PRINTING.* As to printing it is generally held that it is manufacture when it consists in the mere production of printed matter such as books, blank books, bill heads, etc.;[33] but that it is not manufacture when auxiliary to the editing and publication of a newspaper.[34]

Frederick City, 84 Md. 599, 36 Atl. 362, 36 L. R. A. 130, the court declined to determine whether or not electricity could be said to be manufactured.

27. **Gas** generally see GAS, 20 Cyc. 11, 53.

28. Nassau Gaslight Co. *v.* Brooklyn, 89 N. Y. 409; Com. *v.* Northern Electric Light, etc., Co., 145 Pa. St. 105, 22 Atl. 839, 14 L. R. A. 107.

29. See *supra*, I, B, 2, b, (II), (B).

30. **Lumber defined** see LOGGING, 25 Cyc. 1541.

31. Bemis *v.* First Nat. Bank, 63 Ark. 625, 40 S. W. 127 (holding that where land of a sawmill and fixtures and appurtenances were subject to a vendor's lien, and a tax-book introduced as evidence to show what had been taxed as personalty, the phrase "materials and manufactured articles" meant, in reference to the sawmill business, logs, lumber, and articles made therefrom); Bogard *v.* Tyler, 55 S. W. 709, 21 Ky. L. Rep. 1452.

"One who works up lumber on a considerable scale is popularly called a manufacturer of that article, and such lumber is spoken of as manufactured in our tariff acts and treasury regulations, and in the lately repealed [reciprocity] treaty regulating commerce with Canada. If so, the fact that the manufacturer uses only lumber which he grows himself does not appear to be material. It is not like the case, put in argument, of a farmer making cider or cheese, for two reasons: These products when made by the farmer exclusively from his own farm, are not usually made on so large a scale as to be called a manufacture, as the word is now commonly used, and the making is one merely incidental to the cultivation of his land, like curing his hay, &c. But in the case of the lumber business, the land may be almost said to be incident to the lumber, which usually forms its chief value, and the manufacture itself is the main source of profit, independently of any cultivation or other use of the land." *In re* Chandler, 5 Fed. Cas. No. 2,591, 1 Lowell 478, 479, 4 Nat. Bankr. Rep. 213.

"The conversion of saw-logs into lumber of different kinds, is the changing, by machinery, of raw materials into new and useful forms, and is not a mere addition or mode of use of an article already manufactured." State *v.* Wilbert's Sons Lumber, etc., Co., 51 La. Ann. 1223, 1235, 26 So. 106.

32. See cases cited *infra*, this note.

"We hesitate to say that sawing logs into boards is a 'branch of manufactures,' and think it doubtful whether something more of a transformation of the raw material is not necessary to bring the employment within the 'clause' [of a tax statute]." Ingram *v.* Cowles, 150 Mass. 155, 157, 23 N. E. 48.

Firewood was held not to be a manufactured article within the meaning of the California code providing for a warranty implied by sale of manufactured articles under certain circumstances. Correio *v.* Lynch, 65 Cal. 273, 3 Pac. 889.

33. *In re* Capital Pub. Co., 3 MacArthur (D. C.) 405; Press Printing Co. *v.* Bd. of Assessors, 51 N. J. L. 75, 16 Atl. 173; Evening Journal Assoc. *v.* State Bd. of Assessors, 47 N. J. L. 36, 54 Am. Rep. 114; *In re* Kenyon, 1 Utah 47. But see Patterson *v.* New Orleans, 47 La. Ann. 275, 16 So. 815, holding that the printing on paper of bill heads, orders, blanks, and other forms to be used in commerce, and the folding and cutting of paper into shape required for letter or bill heads and commercial books, is not manufacture.

34. *In re* Capital Pub. Co., 3 MacArthur (D. C.) 405 [*criticizing dictum* in Matter of Kenyon, 1 Utah 47] (holding that the printing and publishing of a weekly paper was not a manufacture in common parlance and therefore not under the bankrupt law); Oswald *v.* St. Paul Globe Pub. Co., 60 Minn. 82, 85, 61 N. W. 902 (where it was said: "The business of publishing an ordinary daily or weekly newspaper is at most only partly a manufacturing business, and that part is merely incidental to the main or principal part of the business, which is collecting and selling news, preparing and selling literary work, and other editorial work"); Press Printing Co. *v.* State Bd. of Assessors, 51 N. J. L. 75, 16 Atl. 173; Evening Journal Assoc. *v.* State Bd. of Assessors, 47 N. J. L. 36, 41, 54 Am. Rep. 114 (where it was said: "Neither in the nature of things nor in the ordinary signification of language, would a newspaper be called a manufactured article or its publisher a manufacturer").

In Louisiana it was held that the printing and publication of a newspaper was manufacture within the constitutional exemption of license-tax in favor of manufacturers. The court did not regard the theory that the

(v) *Outdoor Structures.* The construction of large and permanent outdoor structures is generally held not manufacture,[35] unless where it is incidental to the business of manufacturing the component parts of such structure.[36]

(vi) *Meat.* Slaughtering and packing meat and processes pertaining thereto are subjects of some doubt, to be determined by the circumstances under which the business is carried on.[37]

(vii) *Clothing.* The production of clothing may or may not be manufacture according to the manner in which it is carried on.[38]

e. Miscellaneous Cases. There is of course a multitude of cases in which particular industries and products have been held respectively to be or not to be

newspaper is a product of mind labor rather than of hand labor and therefore is not an article of manufacture, as sound, saying: "Such a view would deny exemption to a book publisher or manufacturer of books; yet it seems very clear that he would be considered a manufacturer within the intendment of the Constitution." State *v.* Dupré, 42 La. Ann. 561, 563, 7 So. 727.

In New York where a corporation, the publisher of a newspaper, sought relief from the franchise tax, claiming to be a manufacturing corporation, the court said: "An interesting discussion has taken place on this question in the courts of sister states, resulting in a conflict of views," and declined to determine it, deciding the case on other grounds. People *v.* Roberts, 155 N. Y. 1, 3, 49 N. E. 248.

In Utah it was held that a firm which printed and published a daily paper and also conducted a book and job printing office was a manufacturer under the Bankrupt Act, of books, cards, bill heads, etc. Hawley, J., in stating an opinion of the court, added: "Though it is not necessary to decide that the printing and publishing of a daily newspaper is manufacturing in the strict sense of the law, yet my brother Judges have expressed the opinion it would be, and I am inclined to the same conviction. A newspaper publication is as much the result of manufacture as that of books or cards, or bill-heads." *In re* Kenyon, 1 Utah 47, 50.

35. Com. *v.* Marsh, 3 Pa. Dist. 489 (construction of a road-bed of a railway is not manufacturing); Jacobs *v.* Baker, 7 Wall. (U. S.) 295, 19 L. ed. 200 (the term "manufacture" does not include a jail, although made with hands, and that a jail cannot be patented as a manufacture).

36. People *v.* Morgan, 61 N. Y. App. Div. 373, 70 N. Y. Suppl. 516 (where the business of a corporation included melting and mixing, in their own plant, a preparation of asphalt, sand, and oil and paving streets with it, and it was held a manufacturing corporation); Com. *v.* Pittsburgh Bridge Co., 156 Pa. St. 507, 27 Atl. 4 [*following* Com. *v.* Keystone Bridge Co., 156 Pa. St. 500, 27 Atl. 1, where it was not held outright that the construction of a bridge by fitting together the parts so manufactured was "manufacture" but that, even if it was not, yet the fact that the corporation occasionally did build a bridge out of materials it had manufactured for that purpose did not change its character as a corporation organized exclusively for manufacturing purposes] (holding that the Pittsburg bridge company, which it appeared was engaged exclusively in making and selling iron and steel bridges, roofs, girders, and buildings, and which was in the habit of buying lumber, iron, steel, and other materials in the rough, and designing, shaping, framing, and finishing such materials and fitting them for use at its own shops, and selling the finished material, and sometimes putting it together and erecting it into bridges, roofs, or buildings, was a manufacturing corporation).

37. See cases cited *infra*, this note.

Slaughtering, separating, and dealing in the product, not manufacture.— Purchasing sheep and lambs, slaughtering, flaying, separating the hide and wool, selling both and making fertilizer of the offal, preserving the flesh by cold storage and shipping it to places of delivery is not "carrying on manufacture" as the phrase is used in a statute exempting corporations so engaged from taxation. People *v.* Roberts, 155 N. Y. 408, 50 N. E. 53, 41 L. R. A. 228 [*reversing* 20 N. Y. App. Div. 521, 47 N. Y. Suppl. 123].

Purchasing and slaughtering hogs, turning them into lard, bacon, etc., is manufacture. Engle *v.* Sohn, 41 Ohio St. 691, 52 Am. Rep. 103 [*criticizing* Jackson *v.* State, 15 Ohio 652, on the ground that the facts seemed "meagerly reported," and *distinguishing* that case on the ground that the pork packing business had changed since its date].

38. Landgraf *v.* Kuh, 188 Ill. 484, 59 N. E. 501 (holding that the making of wearing apparel by machines driven by electric power is "a manufacturing purpose" within the act providing for fire-escapes on buildings used for manufacturing purposes); State *v.* Johnson, 20 Mont. 367, 51 Pac. 820 (holding that a tailor is not included in a provision of the Montana constitution providing for license-fees from manufacturers, because he is not one of those who produce goods from a new state by manufacture, skilled labor, and goods which are "commonly turned out of factories"); Radebaugh *v.* Plain City, 11 Ohio Dec. (Reprint) 612, 28 Cinc. L. Bul. 107 (holding that a non-resident merchant tailor who in a village exhibits samples of clothing and takes orders for suits of clothing to be made by him at his place of business elsewhere is a manufacturer within the meaning of a village ordinance imposing license-fees).

manufacture, but it would be useless to cite these cases under the names of the industries or products there the subject of decision, since the principles of decision are alike in all; and since further, the fact that a given thing or industry has been held to be manufacture under one set of circumstances is no assurance that it will be so held under another.[39]

39. *Alabama.*— Beggs *v.* Edison Electric Illuminating Co., 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94; Louisville, etc., R. Co. *v.* Fulgham, 91 Ala. 555, 8 So. 803.

Arkansas.— Bemis *v.* First Nat. Bank, 63 Ark. 625, 40 S. W. 127.

California.— Correio *v.* Lynch, 65 Cal. 273, 3 Pac. 889.

Colorado.— Lamborn *v.* Bell, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241.

Connecticut.— William Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395; Meriden Britannia Co. *v.* Parker, 39 Conn. 450, 12 Am. Rep. 401.

District of Columbia.— *In re* Capital Pub. Co., 3 MacArthur 405.

Illinois.— Landgraf *v.* Kuh, 188 Ill. 484, 59 N. E. 501; Evanston Electric Illuminating Co. *v.* Kochersperger, 175 Ill. 26, 51 N. E. 719; Liebenstein *v.* Baltic F. Ins. Co., 45 Ill. 301.

Indiana.— Burke *v.* Mead, 159 Ind. 252, 64 N. E. 880; Kentucky Lead, etc., Co. *v.* New Albany Water-Works, 62 Ind. 63.

Kentucky.— Muir *v.* Samuels, 110 Ky. 605, 62 S. W. 481, 23 Ky. L. Rep. 14; Bogard *v.* Tyler, 55 S. W. 709, 21 Ky. L. Rep. 1452.

Louisiana.— State *v.* American Sugar Refining Co., 108 La. 603, 32 So. 965; State *v.* A. W. Wilbert's Sons Lumber, etc., Co., 51 La. Ann. 1223, 26 So. 106; Southern Chemical, etc., Co. *v.* Board of Assessors, 48 La. Ann. 1475, 21 So. 31; Lake *v.* Guillotte, 48 La. Ann. 870, 19 So. 924; Chickasaw Cooperage Co. *v.* Police Jury, 48 La. Ann. 523, 19 So. 476; Brooklyn Cooperage Co. *v.* New Orleans, 47 La. Ann. 1314, 17 So. 804; Patterson *v.* New Orleans, 47 La. Ann. 275, 16 So. 815; State *v.* Eckendorf, 46 La. Ann. 131, 14 So. 518; New Orleans *v.* New Orleans Coffee Co., 46 La. Ann. 86, 14 So. 502; Nicholson *v.* Tax Collector, 44 La. Ann. 76, 10 So. 403; State *v.* Dupré, 42 La. Ann. 561, 7 So. 727; Cohn *v.* Parker, 41 La. Ann. 894, 6 So. 718; State *v.* Board of State Assessors, 36 La. Ann. 347; Jones *v.* Raines, 35 La. Ann. 996; New Orleans *v.* Ernst, 35 La. Ann. 746; New Orleans *v.* Le Blanc, 34 La. Ann. 596; New Orleans *v.* Mannessier, 32 La. Ann. 1075.

Maryland.— Electric Light, etc., Co. *v.* Frederick City, 84 Md. 599, 36 Atl. 362, 36 L. R. A. 130; Carlin *v.* Toronto Western Assur. Co., 57 Md. 515, 40 Am. Rep. 440; Mayhew *v.* Hardesty, 8 Md. 479.

Massachusetts.— Stone *v.* Fireman's Ins. Co., 153 Mass. 475, 27 N. E. 6, 11 L. R. A. 771; Ingram *v.* Cowles, 150 Mass. 155, 23 N. E. 48; Hittinger *v.* Westford, 135 Mass. 258; Byers *v.* Franklin Coal Co., 106 Mass. 131; Dudley *v.* Jamaica Pond Aqueduct Corp., 100 Mass. 183.

Michigan.— Allington, etc., Mfg. Co. *v.* Detroit Reduction Co., 133 Mich. 427, 95 N. W. 562; Atty.-Gen. *v.* Lorman, 59 Mich. 157, 26 N. W. 311, 60 Am. St. Rep. 287; Merchants', etc., Bank *v.* Stone, 38 Mich. 779.

Minnesota.— Nicollet Nat. Bank *v.* Frisk-Turner Co., 71 Minn. 413, 74 N. W. 160, 70 Am. St. Rep. 334; Commercial Bank *v.* Azotine Mfg. Co., 66 Minn. 413, 69 N. W. 217; Holland *v.* Duluth Iron Min., etc., Co., 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480; Anderson *v.* Anderson Iron Co., 65 Minn. 281, 68 N. W. 49, 33 L. R. A. 510; Cowling *v.* Zenith Iron Co., 65 Minn. 263, 68 N. W. 48, 60 Am. St. Rep. 471, 33 L. R. A. 508; Hastings Malting Co. *v.* Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652; State *v.* Clarke, 64 Minn. 556, 67 N. W. 1144; St. Paul Barrel Co. *v.* Minneapolis Distilling Co., 62 Minn. 448, 64 N. W. 1143; Anchor Inv. Co. *v.* Columbia Electric Co., 61 Minn. 510, 63 N. W. 1109; Oswald *v.* St. Paul Globe Pub. Co., 60 Minn. 82, 61 N. W. 902; Winona First Nat. Bank *v.* Winona Plow Co., 58 Minn. 167, 59 N. W. 997.

Missouri.— Owen *v.* Brockschmidt, 54 Mo. 285.

Montana.— State *v.* Johnson, 20 Mont. 367, 51 Pac. 820.

Nebraska.—Bolton *v.* Nebraska Chicory Co., 69 Nebr. 681, 96 N. W. 148.

New Hampshire.— Franklin Needle Co. *v.* Franklin, 65 N. H. 177, 18 Atl. 318; Lovett *v.* Brown, 40 N. H. 511.

New Jersey.— Press Printing Co. *v.* Board of Assessors, 51 N. J. L. 75, 16 Atl. 173; Evening Journal Assoc. *v.* State Bd. of Assessors, 47 N. J. L. 36, 54 Am. Rep. 114; Rogers *v.* Danforth, 9 N. J. Eq. 289.

New York.— People *v.* Roberts, 158 N. Y. 168, 52 N. E. 1104; People *v.* Roberts, 155 N. Y. 408, 50 N. E. 53, 41 L. R. A. 228; People *v.* Roberts, 155 N. Y. 1, 49 N. E. 248; People *v.* Campbell, 148 N. Y. 759, 43 N. E. 177 [*reversing* 88 Hun 530, 34 N. Y. Suppl. 713]; People *v.* Campbell, 145 N. Y. 587, 40 N. E. 239; People *v.* Roberts, 145 N. Y. 375, 40 N. E. 7; People *v.* Campbell, 144 N. Y. 166, 38 N. E. 990; People *v.* Wemple, 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708 [*reversing* 15 N. Y. Suppl. 718]; Halpin *v.* Insurance Co. of North America, 120 N. Y. 73, 23 N. E. 989, 8 L. R. A. 79; People *v.* Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155; People *v.* Knickerbocker Ice Co., 99 N. Y. 181, 1 N. E. 669 [*affirming* 32 Hun 475]; People *v.* New York Floating Dry Dock Co., 92 N. Y. 487 [*affirming* 11 Abb. N. Cas. 40, 63 How. Pr. 451]; Nassau Gaslight Co. *v.* Brooklyn, 89 N. Y. 409 [*affirming* 25 Hun 567]; People *v.* Morgan, 61 N. Y. App. Div. 373, 70 N. Y. Suppl. 516; People *v.* Roberts, 51 N. Y. App. Div. 77, 64 N. Y. Suppl. 494; People *v.* Morgan, 48 N. Y. App. Div. 395, 63

C. Manufacturer.[40] A manufacturer is usually defined as "one who is

N. Y. Suppl. 76; People *v.* Roberts, 20 N. Y. App. Div. 514, 47 N. Y. Suppl. 122; Holden *v.* Clancy, 58 Barb. 590; Tone *v.* Doelger, 6 Rob. 251; Wilson *v.* Tennent, 32 Misc. 273, 65 N. Y. Suppl. 852 [*affirmed* in 61 N. Y. App. Div. 100, 70 N. Y. Suppl. 2].

Ohio.— Engle *v.* Sohn, 41 Ohio St. 691, 52 Am. Rep. 103; Radebaugh *v.* Plain City, 11 Ohio Dec. (Reprint) 612, 28 Cinc. L. Bul. 107.

Oregon.— Dalles Lumber, etc., Co. *v.* Wasco Woolen Mfg. Co., 3 Oreg. 527.

Pennsylvania.— Com. *v.* Keystone Laundry Co., 203 Pa. St. 289, 52 Atl. 326; Com. *v.* Keystone Electric Light, etc., Co., 193 Pa. St. 245, 44 Atl. 326; Com. *v.* Edison Electric Light, etc., Co., 170 Pa. St. 231, 32 Atl. 419 [*following* Com. *v.* Northern Electric Light, etc., Co., 145 Pa. St. 105, 22 Atl. 839, 14 L. R. A. 107]; Com. *v.* Juniata Coke Co., 157 Pa. St. 507, 27 Atl. 373, 22 L. R. A. 232; Com. *v.* Pottsville Iron, etc., Co., 157 Pa. St. 500, 27 Atl. 371, 22 L. R. A. 228; Com. *v.* Pittsburgh Bridge Co., 156 Pa. St. 507, 27 Atl. 4; Com. *v.* Keystone Bridge Co., 156 Pa. St. 500, 27 Atl. 1; Com. *v.* Chester Electric Light, etc., Co., 145 Pa. St. 131, 22 Atl. 846; Com. *v.* Edison Electric Light Co., 145 Pa. St. 131, 22 Atl. 841, 845, 27 Am. St. Rep. 683; Com. *v.* Arrott Mills Co., 145 Pa. St. 69, 22 Atl. 243; Madore's Appeal, 129 Pa. St. 15, 17 Atl. 804; Pardee's Appeal, 100 Pa. St. 408; Norris *v.* Com., 27 Pa. St. 494; Com. *v.* Marsh, 3 Pa. Dist. 489, 14 Pa. Co. Ct. 369.

Tennessee.— Benedict *v.* Davidson County, 110 Tenn. 183, 67 S. W. 806; Murray *v.* State, 11 Lea 218; Memphis Gaslight Co. *v.* State, 6 Coldw. 310, 98 Am. Dec. 452.

Utah.— *In re* Kenyon, 1 Utah 47.

Virginia.— Consumers' Brewing Co. *v.* Norfolk, 100 Va. 171, 43 S. E. 336; Langhorne *v.* Com., 76 Va. 1012.

Washington.— Robins *v.* Paulson, 30 Wash. 459, 70 Pac. 1113.

United States.— Allen *v.* Smith, 173 U. S. 389, 19 S. Ct. 446, 45 L. ed. 741; Tide-Water Oil Co. *v.* U. S., 171 U. S. 210, 18 S. Ct. 837, 43 L. ed. 139; U. S. *v.* Klumpp, 169 U. S. 209, 18 S. Ct. 311, 42 L. ed. 720 [*reversing* 72 Fed. 1008, 19 C. C. A. 343 (*affirming* 68 Fed. 908)]; The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. ed. 937; U. S. *v.* E. C. Knight Co., 156 U. S. 1, 15 S. Ct. 249, 39 L. ed. 325; Seeberger *v.* Cahn, 137 U. S. 95, 11 S. Ct. 28, 34 L. ed. 599; Robertson *v.* Rosenthal, 132 U. S. 460, 10 S. Ct. 120, 33 L. ed. 392; Arthur *v.* Butterfield, 125 U. S. 70, 8 S. Ct. 714, 31 L. ed. 643; Hartranft *v.* Wiegmann, 121 U. S. 609, 7 S. Ct. 1240, 30 L. ed. 1012; Pott *v.* Arthur, 104 U. S. 735, 26 L. ed. 909; Fisk *v.* Arthur, 103 U. S. 431, 26 L. ed. 520; Kohlsaat *v.* Murphy, 96 U. S. 153, 24 L. ed. 844; Arthur *v.* Rheims, 96 U. S. 143, 24 L. ed. 813; Arthur *v.* Herman, 96 U. S. 141, 24 L. ed. 812; Murphy *v.* Arnson, 96 U. S. 131, 24 L. ed. 773; Arthur *v.* Sussfield, 96 U. S. 128, 24 L. ed. 772; Merrill *v.* Yeomans, 94 U. S. 568, 24 L. ed. 235; Meyer *v.* Arthur, 91 U. S. 570, 23 L. ed. 455; Jacobs *v.* Baker, 7 Wall. 295, 19 L. ed. 200; Lawrence *v.* Allen, 7 How. 785, 12 L. ed. 914; Elliott *v.* Swartwout, 10 Pet. 137, 9 L. ed. 373; Meyer *v.* U. S., 124 Fed. 296; Veit *v.* U. S., 121 Fed. 205; Lyon *v.* U. S., 121 Fed. 204; Garrison *v.* U. S., 121 Fed. 149; *In re* White Star Laundry Co., 117 Fed. 570; Downing *v.* U. S., 116 Fed. 779; Veil *v.* U. S., 113 Fed. 856; White *v.* U. S., 113 Fed. 855; U. S. *v.* Ronss, 113 Fed. 816; Vandegrift *v.* U. S., 113 Fed. 816; *In re* Tecopa Min., etc., Co., 110 Fed. 120 [*criticizing In re* Rollins Gold, etc., Min. Co., 102 Fed. 982]; U. S. *v.* Churchill, 106 Fed. 672; *In re* Woodside Coal Co., 105 Fed. 56; *In re* Elk Park Min., etc., Co., 101 Fed. 422, 4 Am. Bankr. Rep. 131; U. S. *v.* Wolff, 69 Fed. 327; White *v.* U. S., 69 Fed. 93; U. S. *v.* Dunbar, 67 Fed. 783, 14 C. C. A. 639; Riley *v.* U. S., 66 Fed. 741; Oppenheimer *v.* U. S., 66 Fed. 740; *In re* Zeimer, 66 Fed. 740; Tiffany *v.* U. S., 66 Fed. 737; Tiffany *v.* U. S., 66 Fed. 736; *In re* Steiner, 66 Fed. 726; U. S. *v.* Curley, 66 Fed. 720; Oppenheimer *v.* U. S., 66 Fed. 52, 13 C. C. A. 327; White *v.* U. S., 65 Fed. 788; Bredt *v.* U. S., 65 Fed. 496; Lowenthal *v.* U. S., 65 Fed. 420; Durand *v.* Schulze, 61 Fed. 819, 10 C. C. A. 97; Goldberg *v.* U. S., 61 Fed. 91, 9 C. C. A. 380; Johnson *v.* Johnston, 60 Fed. 618; Durand *v.* Green, 60 Fed. 392; *In re* Mills, 56 Fed. 820; *In re* John Russell Cutlery Co., 56 Fed. 221; Baumgarten *v.* Magone, 50 Fed. 69; U. S. *v.* Patton, 46 Fed. 461; U. S. *v.* Semmer, 41 Fed. 324; Foppes *v.* Magone, 40 Fed. 570; United Nickel Co. *v.* Pendleton, 15 Fed. 739; May *v.* Simmons, 4 Fed. 499; U. S. *v.* Weedon, 3 Fed. 623, 4 Hughes 450; Pratt *v.* Rosenfeld, 3 Fed. 335, 18 Blatchf. 234; Adams *v.* Bancroft, 2 Fed. Cas. No. 44, 3 Sumn. 384; Baxter *v.* Maxwell, 2 Fed. Cas. No. 1,126, 4 Blatchf. 32; *In re* Chandler, 5 Fed. Cas. No. 2,591, 1 Lowell 478; Lennig *v.* Maxwell, 15 Fed. Cas. No. 8,243, 3 Blatchf. 125; Merrill *v.* Yeomans, 17 Fed. Cas. No. 9,472, 1 Ban. & A. 47, Holmes 331; Sill *v.* Lawrence, 22 Fed. Cas. No. 12,850, 1 Blatchf. 605; Thorp *v.* Lawrence, 23 Fed. Cas. No. 14,005, 1 Blatchf. 351; U. S. *v.* Sarchet, 27 Fed. Cas. No. 16,224, Gilp. 273.

England.— Merrill *v.* Wilson, [1901] 1 K. B. 35, 65 J. P. 53, 70 L. J. K. B. 97, 83 L. T. Rep. N. S. 490, 49 Wkly. Rep. 161; Rex *v.* Wheeler, 2 B. & Ald. 345, 20 Rev. Rep. 465; Whymper *v.* Harney, 18 C. B. N. S. 243, 11 Jur. N. S. 269, 34 L. J. M. C. 113, 11 L. T. Rep. N. S. 711, 13 Wkly. Rep. 440, 114 E. C. L. 243; Parker *v.* Great Western R. Co., 6 E. & B. 77, 2 Jur. N. S. 325, 25 L. J. Q. B. 209, 4 Wkly. Rep. 365, 88 E. C. L. 76; Boulton *v.* Bull, 2 H. Bl. 463, 3 Rev. Rep. 439; Morgan *v.* Seaward, 1 Jur. 527, 6 L. J. Exch. 153, M. & H. 55, 2 M. & W. 544.

See also CUSTOMS DUTIES, 12 Cyc. 1118–1126.

40. Liability of manufacturer to pay license-fee see LICENSES, 25 Cyc. p. 593 *et seq.*

engaged in working raw materials into wares suitable for use."[41] "Manufacturer" is distinguishable from "mechanic" or "tradesman,"[42] and has been held, under statute, to be identical with "producer."[43]

D. Manufacturing Corporation[44] — **1. In General.** The test of what is or is not a manufacturing corporation is, what is the business of the corporation; whether that business is a manufacture or not. What that business is the courts usually determine: (1) By consulting the charter of the company to ascertain its powers, and (2) by considering whether the manufacturing power, if any, is a business in itself or merely incidental to some other.[45] A corporation may be a

41. Consumers' Brewing Co. *v.* Norfolk, 101 Va. 171, 43 S. E. 336; Webster Dict. [*quoted* in People *v.* New York Floating Dry Dock Co., 11 Abb. N. Cas. (N. Y.) 40, 42, 63 How. Pr. 451].

"Manufacturer" is otherwise defined as one who is engaged in the business of working raw materials into wares suitable for use, who gives new shapes, new qualities, new combinations, to matter which has already gone through some artificial process. A manufacturer prepares the original substance for use in different forms. He makes to sell and stands between the original producer and the dealer and the first consumer, depending for his profit on the labor which he bestows on the raw materials. State *v.* Dupré, 42 La. Ann. 561, 7 So. 727 [*quoting* New Orleans *v.* Le Blanc, 34 La. Ann. 596]; New Orleans *v.* Ernst, 35 La. Ann. 746. See also State *v.* American Sugar Refining Co., 108 La. 603, 32 So. 965.

The test.— In determining whether or not a given person is a manufacturer, the courts first ascertain in what his business consists, then, whether or not that business is manufacture, and the cases as to what is manufacture are all applicable *pro tanto* to the question; but every person who manufactures is not a manufacturer; the manufacture may be merely incidental to another business. Thus, while a farmer who makes articles from his produce undoubtedly manufactures them, he is not a manufacturer for his business is to produce the raw material and the manufacture is not in his case a business by itself but only an incident to his farming. *In re* Chandler, 5 Fed. Cas. No. 2,591, 1 Lowell 478. And see *supra*, I, B, 2, d, (I)–(VII); I, B, 2, e.

The term "manufacturer" "applies both to him who actually makes . . . and to him who causes . . . to be made." Hancock *v.* State, 114 Ga. 439, 441, 40 S. E. 317.

A member of a firm engaged in manufacture is thereby a manufacturer himself. U. S. *v.* Weedon, 3 Fed. 623, 4 Hughes 450.

A corporation engaged in manufacturing is a manufacturer. State *v.* A. W. Wilber's Sons Lumber, etc., Co., 51 La. Ann. 1223, 26 So. 106.

Person not owning manufacturing plant.— One skilled in manufacture, who contributes his skill and labor to a manufacturing industry, designing the works and overseeing the labor, is a manufacturer within the meaning of the trade-mark law and as such entitled to a trade-mark, although he does not own the whole capital. William Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527, 9 Atl. 395; Meriden Britannia Co. *v.* Parker, 39 Conn. 450, 12 Am. Rep. 401. Under a Minnesota statute defining manufacturer as one who purchases and receives or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacture, refining, or by a combination of different materials, with a view of making gain or profit by so doing, it was held that one need not own nor operate the manufacturing plant in order to constitute him a manufacturer. State *v.* Clarke, 64 Minn. 556, 67 N. W. 1144.

42. Atwood *v.* De Forest, 19 Conn. 513, 518, where it was held that persons "carrying on the business of manufacturing for sale in the market, without reference to the supply of the community where their establishment is located, a particular article, as german-silver spectacles . . . are manufacturers, and not tradesmen;" so that their tools so used are not exempt from attachment, and where the court said: "If it be said, that the distinction between a mechanic and a manufacturer, is not as precise as is desirable; and that there is difficulty in determining to which class certain individuals belong; especially, in cases where men are engaged in both the business of a mechanic, as well as in that of a manufacturer; the answer is, the difficulty is not in the distinction itself; that seems to be precise enough; but it is in the application of the distinction to particular facts."

43. Hancock *v.* State, 114 Ga. 439, 441, 40 S. E. 317, where it was said: "We hold that the word 'producer,' as used in the special act [an act prohibiting the sale of intoxicating liquors with an exception in favor of the producer], is identical in meaning with 'manufacturer.

44. Corporations generally see CORPORATIONS, 10 Cyc. 1.

45. See cases cited *infra*, this note. And see CORPORATIONS, 10 Cyc. 162; and *supra*, 1, B, 2, d, (I)–(VII); I, B, 2, e.

"The character of the company depends upon the business which it actually does, and not simply upon the name which it bears," and the so-called steam power company, which is in fact a real estate corporation, and manufactures steam only to supply its own tenants, thus improving the leasing value of its realty, is not a manufacturing corpora-

manufacturing company as to one of its powers or industries and not as to another.[46]

2. "EXCLUSIVELY MANUFACTURING CORPORATION;" "WHOLLY ENGAGED IN MANUFACTURING." These terms as used in statutes do not altogether preclude the conduct, by a corporation, of operations which are not in themselves manufacture, provided manufacturing is the business of the company and such other operations are merely incidental thereto.[47]

tion. Com. *v.* Arrott Mills Co., 145 Pa. St. 69, 22 Atl. 243.

A laundry company is not a manufacturing corporation, within the Bankruptcy Act. (Muir *v.* Samuels, 110 Ky. 605, 62 S. W. 481, 23 Ky. L. Rep. 14; *In re* White Star Laundry Co., 117 Fed. 570), even if it manufactures soaps and dyes, necessary for its own use in the business of bleaching fabrics (Com. *v.* Keystone Laundry Co., 203 Pa. St. 289, 52 Atl. 326).

Mining and smelting companies.— A corporation which derives most of its profits from smelting ore, employing in the operation of its smelter twelve or fourteen men, was held to be a manufacturing corporation within the meaning of the Bankruptcy Act of 1898, although it mined the ore so smelted itself, employing two or three men only for that purpose, and incidentally conducted a store and boarding-house for its employees. *In re* Tecopa Min., etc., Co., 110 Fed. 120. See also *In re* White Star Laundry Co., 117 Fed. 570; *In re* Woodside Coal Co., 105 Fed. 56; *In re* Elk Park Min., etc., Co., 101 Fed. 422, 4 Am. Bankr. Rep. 131. *Compare In re* Rollins Gold, etc., Min. Co., 102 Fed. 982. But in People *v.* Horn Silver Min. Co., 105 N. Y. 76, 82, 11 N. E. 155, it appeared that a corporation was organized to conduct a business of mining in Utah and engaged also in reducing the ore which it mined to bullion in Utah, which bullion it then shipped to its refinery at Chicago and there refined, and afterward shipped to the United States assay office in New York, where the silver was further refined to standard bars at the expense of the company, this being the only manufacture, if any, carried on by it in New York. The court held that it was not a manufacturing corporation in New York, even if it could be regarded as such in Utah, saying: "According to common comprehension and the ordinary use of language, the process of refining this bullion at the assay office was not a manufacture, and the assay office was not a manufacturing establishment. But whether it was or not, the defendant which employed the assay office for a compensation to refine the bullion was not itself engaged in the manufacture. It was no more a manufacturer than a farmer is who takes his grain to the grist-mill to be ground into flour, for a part of the grain or a money compensation, or who takes his wool to a cloth manufacturer to be made into cloth for a compensation, and then to be returned to him. A railroad company may manufacture all its cars and engines, and yet it cannot be properly classified as a manufacturing company." A mining corporation is not a manufacturing corporation within the meaning of a constitutional provision exempting from double liability the stock-holders of manufacturing corporations. Cowling *v.* Zenith Iron Co., 65 Minn. 263, 68 N. W. 48, 60 Am. St. Rep. 471, 33 L. R. A. 508. See also Byers *v.* Franklin Coal Co., 106 Mass. 131; Com. *v.* Juniata Coal Co., 157 Pa. St. 507, 27 Atl. 373, 22 L. R. A. 232; Com. *v.* Pottsville Iron, etc., Co., 157 Pa. St. 500, 27 Atl. 371, 22 L. R. A. 228.

A waterworks company is not a manufacturing company. Kentucky Lead, etc., Co. *v.* New Albany Water-Works, 62 Ind. 63; Dudley *v.* Jamaica Pond Aqueduct Corp., 100 Mass. 183.

A company which publishes a newspaper, but does not own or operate any plant for that purpose, merely employing an agent to oversee the work done by a contractor, is not a manufacturing corporation. People *v.* Roberts, 155 N. Y. 1, 49 N. E. 248. But see Hendy *v.* Soule, 11 Fed. Cas. No. 6,359, 1 Deady 400.

A corporation whose principal business is to own patents and license other corporations to use them is not a manufacturing corporation, within the tax laws. People *v.* Campbell, 88 Hun (N. Y.) 530, 34 N. Y. Suppl. 713 [*reversed* on other grounds in 148 N. Y. 759, 43 N. E. 177, where, however, it was held that the finding of the controller, on the point above stated, was conclusive].

A corporation whose business is mixing tea, and roasting, grinding, and mixing coffee is not a manufacturing corporation, because it does not produce a new article different from the material on which it operates. People *v.* Roberts, 145 N. Y. 375, 40 N. E. 7.

46. Press Printing Co. *v.* State Bd. of Assessors, 51 N. J. L. 75, 16 Atl. 173; Winona First Nat. Bank *v.* Winona Plow Co., 58 Minn. 167, 59 N. W. 997; Com. *v.* Juniata Coke Co., 157 Pa. St. 507, 27 Atl. 373, 22 L. R. A. 232.

47. In determining whether or not these terms apply, the courts consider the purposes set forth in the charter of the company. Thus a corporation may be authorized to manufacture and sell certain products, in which case the sale, being an incident to the manufacture, does not exclude it from the class of "exclusively manufacturing corporations." On the other hand it may be authorized to manufacture, buy and sell, or to deal in and manufacture, in which case it is not an exclusively manufacturing corporation. Or it may be authorized to furnish, alone, and while that may include the power of manufacturing what it furnishes, yet,

E. Manufacturing Establishment. The term "manufacturing establishment" includes the whole plant.[48]

since manufacture is not stated in its charter as its purpose, it cannot be regarded as a corporation "organized exclusively for the purpose of manufacturing." In every such case it is necessary to consider the particular statute with reference to which the question arises. See the statutes of the several states; and cases cited *infra*, this note.

A corporation formed "to furnish light, heat and power for public and private uses" is not "organized for purely manufacturing purposes," for, although it manufactures electricity which it furnishes, the purpose of its organization is the test, and that must be gathered from the charter, which does not mention manufacturing but only furnishing. Evanston Electric Illuminating Co. *v.* Kochersperger, 175 Ill. 26, 51 N. E. 719.

A corporation authorized to manufacture and deal in azotine and other fertilizing materials, grease and stearin, is not organized for the purpose of carrying on a manufacturing business exclusively. Commercial Bank *v.* Azotine Mfg. Co., 66 Minn. 413, 69 N. W. 217.

A company authorized only to engage in the business of "manufacturing lager beer and other malt liquors, and selling the same, together with such other business as may be incidental thereto," is a manufacturing corporation, as disposing of its product is merely incidental to manufacturing. Hastings Malting Co. *v.* Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652 [*distinguishing* Winona First Nat. Bank *v.* Winona Plow Co., 58 Minn. 167, 59 N. W. 997, on the ground that the corporation there in question was authorized to purchase and sell as well as to manufacture].

A corporation authorized not only to distil and manufacture, but also to buy, sell, and deal in liquors, is not organized for the purpose of carrying on an exclusively manufacturing business. St. Paul Barrel Co. *v.* Minneapolis Distilling Co., 62 Minn. 448, 64 N. W. 1143.

A company authorized to manufacture and do other business is not "organized for the purpose of carrying on an exclusively manufacturing business" (Mohr *v.* Minnesota Elevator Co., 40 Minn. 343, 41 N. W. 1074; State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510), although it actually does nothing but manufacture (Winona First Nat. Bank *v.* Winona Plow Co., 58 Minn. 167, 59 N. W. 997; Densmore *v.* Shepard, 46 Minn. 54, 48 N. W. 528, 681; Arthur *v.* Willius, 44 Minn. 409, 46 N. W. 851).

Wholly engaged in manufacture.— Under N. Y. Laws (1890), c. 522, providing for a franchise tax upon corporations, and making exception in case of "companies wholly engaged in manufacture," it was held that a corporation engaged in manufacture and in other business as well was not protected by the exception, which is limited to corporations whose corporate business is exclusively that of manufacture, and that the capital employed in manufacture, as well as that employed in other business, is subject to the tax. People *v.* Roberts, 158 N. Y. 168, 52 N. E. 1104. A corporation engaged in manufacturing in New York and also purchasing and selling supplies of the kind in which it deals, but not manufactured by it, as authorized by its charter, is not "wholly engaged in carrying on manufacture within this state." People *v.* Campbell, 145 N. Y. 587, 40 N. E. 239. See also People *v.* Roberts, 158 N. Y. 162, 52 N. E. 1102. But where a New York corporation organized under the General Manufacturing Act was engaged to some extent in the *ultra vires* act of dealing in products not manufactured by itself, but necessary to completing its stock in trade, it was held that since it was strictly a manufacturing corporation, it was exempt from taxation as to the capital employed in its manufacturing business, but rightly taxed as to that part invested in other business. People *v.* Campbell, 144 N. Y. 166, 38 N. E. 990. See also People *v.* Roberts, 51 N. Y. App. Div. 77, 64 N. Y. Suppl. 494.

48. See Teaff *v.* Hewitt, 1 Ohio St. 511, 535, 59 Am. Dec. 634 (where it is said: "A manufacturing establishment including all its essential parts, may unite in the same pursuit and for producing the same result, portions of real estate with articles of personal property, retaining all the essential qualities of chattels"); Memphis Gaslight Co. *v.* State, 6 Coldw. (Tenn.) 310, 312, 98 Am. Dec. 452 (where it is said: "In order that a particular article or class of articles should constitute a part of a manufacturing establishment, it is not essential that they be actually employed in the process of manufacture. The establishment includes, also, all the usual and necessary appliances for storing, measuring, weighing, packing, and delivering the manufactured article, after the process of manufacture is completed").

The term has been held to include: A flour mill (Carlin *v.* Western Assur. Co., 57 Md. 515, 40 Am. Rep. 440. See also Lamborn *v.* Bell, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241), gas-pipes laid through streets and owned by a gas company, as part of the "establishment" (Memphis Gaslight Co. *v.* State, 6 Coldw. (Tenn.) 310, 98 Am. Dec. 452), and real estate bought and reasonably necessary for the erection and operation of such "establishment" (Franklin Needle Co. *v.* Franklin, 65 N. H. 177, 18 Atl. 318). In Bogard *v.* Tyler, 55 S. W. 709, 710, 21 Ky. L. Rep. 1452, it was held that where a statute providing for lien in favor of persons furnishing labor and materials to a "manufacturing establishment" is relied on, there must be a manufacturing establishment and, under the evidence in the case, as the sawmill was en-

F. Manufactory; Factory. "Manufactory" and "factory" are different forms of the same word.[49] "Manufactory" has been defined as "a house or place where anything is manufactured,"[50] and "factory," as "a building, or collection of buildings, appropriated to the manufacture of goods."[51] But a manufactory is something more than a building.[52] It includes not only the building but the machinery necessary to produce the particular goods manufactured and the engines or other power necessary to propel such machinery.[53] It seems, however, that mechanical power and machinery are not always essential to the existence of a factory.[54] A single factory may include several buildings.[55] Factory is not

gaged in manufacturing lumber for the market, there was such establishment.

Employment of children by manufacturing establishment see INFANTS, 22 Cyc. 526 note 29.

"Manufacturing purposes."— A covenant to use property for "manufacturing purposes" would imply the right to use it for all purposes incident to such object. Madore's Appeal, 129 Pa. St. 15, 17 Atl. 804.

49. Schott *v.* Harvey, 105 Pa. St. 222, 227, 51 Am. Rep. 201, where it is said: "The word factory is a contraction of manufactory."

50. Webster Dict. [*quoted* in Halpin *v.* Insurance Co. of North America, 120 N. Y. 73, 77, 23 N. E. 989, 8 L. R. A. 79].

51. Webster Dict. [*quoted* in Liebenstein *v.* Baltic F. Ins. Co., 45 Ill. 301, 303; Schott *v.* Harvey, 105 Pa. St. 222, 227, 51 Am. Rep. 201].

It is otherwise defined as "a building, the main or principal design or use of which is to be a place for producing articles as products of labor." Franklin F. Ins. Co. *v.* Brock, 57 Pa. St. 74, 82.

The manufacture of drugs in a laboratory by a wholesale drug company, not amounting to one-half per cent of the trade, has been regarded as merely incidental to the trade and not sufficient to show that the company was operating a factory within the meaning of an ordinance requiring fire-escapes. Hernischel *v.* Texas Drug Co., 26 Tex. Civ. App. 1, 61 S. W. 419.

52. Schott *v.* Harvey, 105 Pa. St. 222, 51 Am. Rep. 201.

53. Schott *v.* Harvey, 105 Pa. St. 222, 51 Am. Rep. 201. See Teaff *v.* Hewitt, 1 Ohio St. 511, 536, 59 Am. Dec. 634, where it is said: "It is true, that where a manufactory or a mill is conveyed or delivered, by any general name or description which embraces all its essential parts as such manufactory or mill, the machinery and all the necessary parts of the establishment pass, whether affixed to the freehold or not." And see FIRE INSURANCE, 19 Cyc. 666, text and note 65.

"A starch manufactory substantially includes the fixtures, etc., necessary to the processes of such manufacture." Peoria M. & F. Ins. Co. *v.* Lewis, 18 Ill. 553, 562.

It seems the term "flax factory" is broad enough to cover machinery for the manufacture of rope when a usual part of the business of the flax factory and the introduction of such machinery is not an increase of the hazard in insurance on a flax factory. Aurora F. Ins. Co. *v.* Eddy, 55 Ill. 213.

"The term 'factories' embraces the fixed machinery necessary to operate the factories, and the reason is, that without such necessary machinery, the buildings would not in fact be factories. A building is no more a factory without machinery, than machinery would be a factory without a building." Mayhew *v.* Hardesty, 8 Md. 479, 495. In this case it was so held, concerning the term as used in a covenant in a lease, to keep a factory insured.

54. See Hernischel *v.* Texas Drug Co., 26 Tex. Civ. App. 1, 4, 61 S. W. 419, where it is said: "In Black's L. Dict. the word factory is thus defined: 'In the English law the term includes all buildings or premises wherein, or within the close or curtilage of which, steam, water, or any mechanical power is used to move or work any machinery employed in preparing, manufacturing, or finishing cotton, wool, hair, silk, hemp, or tow. Later this definition was extended to other manufacturing places.' The American legal definition of the word is practically the same. We do not understand, however, that its meaning is confined to such enterprises as use machinery and mechanical power, especially in construing the ordinance in question. The rule should not extend beyond the reason for its application, but should extend at least that far. There are doubtless enterprises in this country using no machinery of any sort, and yet, in the strictest sense, coming within the proper definition of 'factory.' Such, for instance, are cigar factories, or factories where garments are made, and in each of which a large number of employes may be engaged in a single building or a small space."

55. Liebenstein *v.* Baltic F. Ins. Co., 45 Ill. 301, 303, where it is said: "The word 'factory' does not necessarily mean a single building or edifice, but may apply to several, where they are used in connection with each other, for a common purpose, and stand together in the same inclosure. This is popular usage, and also that of the lexicographers."

Where one of two buildings is specified by further description.— Where there were two buildings which might both have been included under the single term as one "manufactory," but an insurance policy specified one of them by further description, it was

synonymous with mill, the former being a general term, while the latter is a specific term,[56] and a factory may contain several mills.[57] Various establishments have been held to be factories or manufactories under certain statutes,[58] and the statutory meaning is sometimes wider than the common definition.[59] The deed of a "factory" passes the land on which it stands, and the water privilege, if any, therewith[60] and, it has been held, the machinery and other articles essential to the factory;[61] but the machinery in a factory is not always necessarily a part of it so as to pass by the term.[62] A deed of land "on which is a factory" does not include personalty, although essential to the factory.[63] Machinery alone does

held that the term "manufactory" did not, in that case, include both. Liebenstein *v.* Ætna Ins. Co., 45 Ill. 303.

56. Thomas *v.* Troxel, 26 Ind. App. 322, 59 N. E. 683.

Mills generally see MILLS.

57. Thomas *v.* Troxel, 26 Ind. App. 322, 59 N. E. 683.

58. See cases cited *infra*, this note.

A concern carrying on the business of manufacturing for sale in the market, without reference to the supply of the local community, of a particular article, "is a factory and not a mechanic's shop." Atwood *v.* De Forest, 19 Conn. 513.

"Factory" or "work shop" is defined in an act to regulate the manufacture of clothing, wearing apparel and other articles, and providing for an eight hour day of labor, etc., as "any place where goods or products are manufactured or repaired, cleaned or sorted, in whole or in part, for sale or for wages." Ritchie *v.* People, 155 Ill. 98, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L. R. A. 79.

Sawmills.— It has been intimated in one decision that sawmills are "manufactories." State *v.* A. W. Wilbert's Sons Lumber, etc., Co., 51 La. Ann. 1223, 26 So. 106 (holding that sawmill operators were manufacturers within a constitutional exemption from license-tax); Plaquemine Lumber, etc., Co. *v.* Browne, 45 La. Ann. 459, 12 So. 485. *Compare* Jones *v.* Raines, 35 La. Ann. 996 [*distinguished* in State *v.* A. W. Wilbert's Sons Lumber, etc., Co., 51 La. Ann. 1223, 26 So. 106], holding that sawmills are not exempt from taxation under a constitutional provision exempting from taxation "the capital, machinery, and other property employed in the manufacture of . . . furniture and other articles of wood."

An annexed building commonly called an "ashery" and used since its erection for the purpose of depositing ashes therein and converting the same into potash is a factory within the meaning of a statute providing against burglary. Blackford *v.* State, 11 Ohio St. 327.

A shoemaker's shop where boots and shoes are made for customers, and a small stock of ready-made goods and misfits carried incidentally, has been held to be a manufactory within the meaning of an act giving mechanics employed in manufactories a preference for wages for six months next preceding an assignment for creditors, no distinction being taken between a manufacturing principally for customers and manufacturing for sale generally. Allen's Estate, 2 Pa. Dist. 87.

Ice-house.— Interpreting a New York statute in which "factory" was defined as including also "a mill, workshop or other manufacturing or business establishment where one or more persons are employed at labor," the court said: "We think that a commercial ice house, which is extensively equipped with machinery, and in which numerous operatives are employed, is a factory, within the meaning of the statute. The purpose of the statute is to throw a safeguard around the workmen employed in business establishments where machinery is in use. . . . By the statutory definition, a factory includes, not only a manufacturing establishment, but a business establishment where one or more persons are employed at labor, and the particular enumeration preceding the term, 'or other manufacturing or business establishment,' is too meagre to restrict the meaning of the term by the application of the rule *ejusdem generis*." Rabe *v.* Consolidated Ice Co., 113 Fed. 905, 907, 51 C. C. A. 535.

"Manufactories," as used in English Lands Clauses Act, see EMINENT DOMAIN, 15 Cyc. 606.

"Factory" as used in mechanics' lien acts see MECHANICS' LIENS.

59. Ritchie *v.* People, 155 Ill. 98, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L. R. A. 79; Rabe *v.* Consolidated Ice Co., 113 Fed. 905, 51 C. C. A. 535.

60. See Allen *v.* Scott, 21 Pick. (Mass.) 25, 32 Am. Dec. 238 [*cited* in Indianapolis, etc., R. Co. *v.* Indianapolis First Nat. Bank, 134 Ind. 127, 33 N. E. 679], holding that where land was mortgaged with all the buildings thereon except the brick factory, the reservation excepted the land on which the factory stood, and the water privilege therewith. And see MILLS.

61. Delaware, etc., R. Co. *v.* Oxford Iron Co., 36 N. J. Eq. 452, holding that a mortgage of a factory *eo nomine* includes *ex vi termini* all the machinery and other articles essential to the factory. And see FIXTURES, 19 Cyc. 1060, text and note 19; 1063, text and note 39; MILLS.

62. See FIXTURES, 19 Cyc. 1063 note 39; MILLS.

63. Teaff *v.* Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634, holding that the words "on which is erected a woolen manufactory" added to the description of the mortgaged premises by the number of the lot, etc., is descriptive of the realty merely and does not include personal

not constitute a manufactory.[64] A "store" is not a factory,[65] nor is a "storehouse," although used to some extent for manufacture.[66] "Factory prices," in the absence of a different established technical meaning, mean the prices at which goods may be bought at the factories.[67]

II. ACTS AND POWERS INCIDENTAL TO MANUFACTURE.

A. In General. The question what acts and powers are incidental to manufacture so far as it concerns the business of manufacturing corporations may be answered broadly by the general rule that a corporation may acquire all such property and do all such acts as are reasonably necessary to enable it to carry on its proper business,[68] and that which is incidental to manufacturing as a corporate power is also incidental to it as carried on by a natural person.[69]

B. Purchase and Sale. The incidents of manufacture, as such, apart from those which attach to business generally, consist in the acquisition of material and the disposal of the product.[70]

property not made part of the realty, although essential to the purposes of the manufactory.

64. Halpin *v.* Insurance Co. of North America, 120 N. Y. 73, 23 N. E. 989, 8 L. R. A. 79, holding that where in a policy of insurance on "machinery and apparatus used in the business of manufacturing leather and morocco" there was the following clause: "If a building covered by this policy shall become vacant or unoccupied, or, if a mill or manufactory, shall stand idle or be run nights or overtime . . . this policy, if covering thereon, or on property therein, shall . . . cease and determine," the machinery did not constitute a "mill or manufactory," so that its standing idle did not work a forfeiture of the policy. And see Phenix Ins. Co. *v.* Holcombe, 57 Nebr. 622, 78 N. W. 300, 73 Am. St. Rep. 532, where machinery in a factory was held not to be the manufacturing establishment.

65. Thurston *v.* Union Ins. Co., 17 Fed. 127, 129, holding that "store fixtures" in an express exception from property insured under policies on a "building and additions, occupied for stores, and shoe factory," did not apply to the fixtures of the factory, the court saying: "Store is the American word for shop or warehouse, and is never applied to a factory."

66. Franklin F. Ins. Co. *v.* Brock, 57 Pa. St. 74, holding that a building described in a policy of insurance as a storehouse, and used as such, is not a manufactory within an exception contained in such policy, although some articles are customarily made there.

67. Whipple *v.* Levett, 29 Fed. Cas. No. 17,518, 2 Mason 89.

Where the wholesale factory price was argued by one party to mean the wholesale factory price designated by the tariff; and by the other to mean other wholesale prices of different grades of goods, according to a custom among cotton manufacturers in Connecticut and Rhode Island, it was held that the question was properly left to the jury. Avery *v.* Stewart, 2 Conn. 69, 7 Am. Dec. 240.

68. See CORPORATIONS, 10 Cyc. 1096 *et seq.*

Mining when conducted by a corporation chiefly engaged in smelting, which in that case was held to be manufacture, was regarded as an incident of the smelting and not as a separate business. *In re* Tecopa Min., etc., Co., 110 Fed. 120.

Where the main business of a corporation was the manufacture of a product of chicory it was held that the other charter powers, to plant, cultivate, harvest, store, purchase, market, sell, and deal in chicory, were all incidental to the manufacture. Bolton *v.* Nebraska Chicory Co., 69 Nebr. 681, 96 N. W. 148.

69. See *In re* Chandler, 5 Fed. Cas. No. 2,591, 1 Lowell 478, 479, where it was said that "in the case of the lumber business, the land may be almost said to be incident to the lumber, which usually forms its chief value, and the manufacture itself is the main source of profit, independently of any cultivation or other use of the land."

70. Hastings Malting Co. *v.* Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652.

But the purchase or sale of that which is not the product of manufacture, or does not become so, even though it be a like article and convenient as an accessory to the business of a manufacturer in dealing with his own product, is not an incident to his manufacturing business. St. Paul Commercial Bank *v.* Azotine Mfg. Co., 66 Minn. 413, 69 N. W. 217; St. Paul Barrel Co. *v.* Minneapolis Distilling Co., 62 Minn. 448, 64 N. W. 1143; Winona First Nat. Bank *v.* Winona Plow Co., 58 Minn. 167, 59 N. W. 997; People *v.* Roberts, 158 N. Y. 168, 52 N. E. 1104; People *v.* Roberts, 158 N. Y. 162, 52 N. E. 1102; People *v.* Campbell, 145 N. Y. 587, 40 N. E. 239; People *v.* Campbell, 144 N. Y. 166, 38 N. E. 990; People *v.* Roberts, 51 N. Y. App. Div. 77, 64 N. Y. Suppl. 494.

Ultra vires.— The purchase by a manufacturing company of a license to sell the product of a foreign corporation is held to be *ultra vires*, and the issue of stock for that purpose unlawful. Powell *v.* Murray, 3 N. Y. App. Div. 273, 38 N. Y. Suppl. 233 [*affirmed* in 157 N. Y. 717, 53 N. E. 1130]. An executory contract for the purchase of goods by a manufacturing corporation, for the purpose of resale, is held to be *ultra vires* and

C. Borrowing Money. A manufacturing corporation may, it has been held, borrow money for the prosecution of its legitimate business and secure its payment by mortgage independently of statute.[71]

III. MANUFACTURER'S LIEN.[72]

A. In General. The law is well settled that in general, where goods are delivered to be manufactured, the manufacturer has a lien on them for his labor and expenses bestowed on them.[73]

B. Nature of Lien. A manufacturer's lien is a simple personal right of retainer and cannot be assigned or attached as personal property or a chose in action.[74]

C. Possession Requisite. The lien attaches only to such goods as are in the possession of the manufacturer.[75]

D. Effect of Special Agreements. The fact that a fixed price has been agreed upon does not prevent the lien from attaching.[76] But an express agreement fixing a future time of payment would be inconsistent with and destroy the right of lien.[77]

E. Waiver or Discharge — 1. RELINQUISHMENT OF POSSESSION. A voluntary relinquishment of possession is a waiver on the lien.[78] But an involuntary relinquishment of the goods does not deprive the manufacturer of his lien.[79]

2. PARTIAL DELIVERY. Partial delivery does not constitute a waiver of the lien

cannot be enforced. Bosshardt, etc., Co. *v.* Crescent Oil Co., 171 Pa. St. 109, 32 Atl. 1120. But where a corporation was organized "for the purpose of manufacturing and selling all the varieties of glass" it was held that a contract for the purchase of goods intended to keep up the stock in trade, and that they might retain their old customers while the factory and machinery were under repair, was within the scope of the powers of the company, such purchase being auxiliary and incidental to the main purpose of its incorporation. Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315.

Powers of corporations generally relating to ownership and transfer of property see CORPORATIONS, 10 Cyc. 1122 *et seq.*

71. Burt *v.* Rattle, 31 Ohio St. 116.

Power to borrow money and mortgage realty.— A corporation organized under the General Manufacturing Act (N. Y. Laws (1848), c. 40, as amended by Laws (1864), c. 517), may, it has been held, upon filing the requisite assent of two thirds of its stockholders mortgage its real estate to secure the payment of its debts, but not to raise money to carry on its operations. Carpenter *v.* Black Hawk Gold Min. Co., 65 N. Y. 43.

Power of corporations generally to borrow money see CORPORATIONS, 10 Cyc. 1100.

72. **Lien** generally see LIENS.

Logging lien see LOGGING.

Mechanic's lien see, generally, MECHANICS' LIENS.

73. Townsend *v.* Newell, 14 Pick. (Mass.) 332. See H. Meyer Boot, etc., Mfg. Co. *v.* Ward, 68 Ill. App. 272; Morgan *v.* Congdon, 4 N. Y. 552; Solomon *v.* Bok, 49 Misc. (N. Y.) 493, 98 N. Y. Suppl. 838; Burdict *v.* Murray, 3 Vt. 302, 21 Am. Dec. 588; Chase *v.* Westmore, 5 M. & S. 180. And see BAILMENTS, 5 Cyc. 193 note 68.

74. Lovett *v.* Brown, 40 N. H. 511; Ruggles *v.* Walker, 34 Vt. 468, 472, where it is said: "The lien in such cases is a mere passive lien or right of retainer, and, although the retention of the property may be attended with expense, and may be of no benefit to either party, these considerations will not change the nature of the lien or the rights conferred by it. It is of the same nature as the lien of an attorney or solicitor on papers for his costs."

75. King *v.* Indian Orchard Canal Co., 11 Cush. (Mass.) 231 (holding that a manufacturer of brick made and burnt on land which the manufacturer does not own, and of which he has no lease, has not the possession of the brick requisite to entitle him to a lien); Ruggles *v.* Walker, 34 Vt. 468. See also, generally, BAILMENTS, 5 Cyc. 194, text and notes 72, 73.

76. Burdict *v.* Murray, 3 Vt. 302, 21 Am. Dec. 588; Chase *v.* Westmore, 5 M. & S. 180. See also Townsend *v.* Newell, 14 Pick. (Mass.) 332.

77. Morgan *v.* Congdon, 4 N. Y. 552; Burdict *v.* Murray, 3 Vt. 302, 21 Am. Dec. 588; Chase *v.* Westmore, 5 M. & S. 180.

78. King *v.* Indian Orchard Canal Co., 11 Cush. (Mass.) 231; Solomon *v.* Bok, 49 Misc. (N. Y.) 493, 98 N. Y. Suppl. 859; Blumenherg Press Co. *v.* Mutual Mercantile Agency, 77 N. Y. App. Div. 87, 78 N. Y. Suppl. 1085 [*reversed* on other grounds in 177 N. Y. 362, 69 N. E. 641]; Ruggles *v.* Walker, 34 Vt. 468.

79. Burdict *v.* Murray, 3 Vt. 302, 21 Am. Dec. 588, holding that where the owners of undressed hides left them with a manufacturer to he turned into morocco, and while in his possession the owners permitted them to he attached for their debt to another, the bailee might have detained them until the

upon the remainder of the goods, where all the goods are to be manufactured at one entire price. In such case any part of the goods in the manufacturer's possession is subject to lien for the whole price.[80]

3. Attachment of Goods. A lien is not discharged by attachment of the goods when the manufacturer receipts for them, asserting his lien, whether attached at the suit of another party or at his own.[81]

4. Tortious Conversion. Where the manufacturer wrongfully converts the goods to his own use he cannot claim a lien on them.[82]

MANUFACTURING COMPANY or CORPORATION. See Manufactures.

MANU FORTI. Literally "with a strong hand."[1]

MANUMISSION. The act of giving liberty to one who has been in just servitude with the power of acting except as restrained by law.[2] (See Emancipation.)

MANUMITTED PERSON. One who having been a slave has been made free.[3] (See Manumission.)

MANUMITTERE IDEM EST QUOD EXTRA MANUM VEL POTESTATEM PONERE. A maxim meaning "To manumit is to place beyond hand and power."[4]

MANURE. A term which includes all imported substances which subserve the purpose of enriching the soil and thus increasing the crops upon it; synonymous with Fertilizer,[5] *q. v.* (Manure: Personalty or Realty in General, see Fixtures. Rights of Tenant and Landlord, see Landlord and Tenant. Subject of Larceny, see Larceny.)

MANUSCRIPT.[6] Something written with the hand; a book or paper written with the hand, or a writing of any kind, in contradistinction to a printed docu-

price agreed upon for the manufacture was paid and could maintain trespass against the persons taking them.

80. Morgan *v.* Congdon, 4 N. Y. 552; Blumenberg Press *v.* Mutual Mercantile Agency, 77 N. Y. App. Div. 87, 78 N. Y. Suppl. 1085 [*reversed* on other grounds in 177 N. Y. 362, 69 N. E. 641]; Ruggles *v.* Walker, 34 Vt. 468; Blake *v.* Nicholson, 3 M. & S. 167.

81. Townsend *v.* Newell, 14 Pick. (Mass.) 332. See also Burdict *v.* Murray, 3 Vt. 302, 21 Am. Dec. 588.

82. Hotchkiss *v.* Hunt, 49 Me. 213, where manufacturers wrongfully pledged the goods for their own debt.

1. State *v.* Flowers, 6 N. C. 225, 226 [*approved* in State *v.* Ray, 32 N. C. 39, 40, where it is said: "'*Manu forti*' . . . implies greater force than is expressed by the words '*vi et armis.*'"].

2. Fenwick *v.* Chapman, 9 Pet. (U. S.) 461, 472, 9 L. ed. 193.

Modes of manumission of slave see the following cases:

Alabama.— Evans *v.* Kittrell, 33 Ala. 449; Hooper *v.* Hooper, 32 Ala. 669; Roberson *v.* Roberson, 21 Ala. 273; Welch *v.* Welch, 14 Ala. 76; Alston *v.* Coleman, 7 Ala. 795.

California.— Pearson *v.* Pearson, 51 Cal. 120.

Connecticut.— Geer *v.* Huntington, 2 Root 364; Arabas *v.* Ivers, 1 Root 92.

Kentucky.— Monohon *v.* Caroline, 2 Bush 410; Susan *v.* Ladd, 6 Dana 30; Anderson *v.* Crawford, 15 B. Mon. 328; Major *v.* Winn, 13 B. Mon. 250; Beall *v.* Joseph, Hard. 51; Fanny *v.* Dejarnet, 2 J. J. Marsh. 230; Cooke *v.* Cooke, 3 Litt. 238.

Louisiana.— State *v.* Baillio, 15 La. Ann. 555; Bazzi *v.* Rose, 8 Mart. 149; Beard *v.* Poydras, 4 Mart. 348.

Mississippi.— Weathersby *v.* Weathersby, 13 Sm. & M. 685.

Missouri.— Redmond *v.* Murray, 30 Mo. 570; Robert *v.* Melugen, 9 Mo. 170.

New Jersey.— Fox *v.* Lambson, 8 N. J. L. 275; State *v.* Emmons, 2 N. J. L. 6; State *v.* Frees, 1 N. J. L. 259.

New York.— Trongott *v.* Byers, 5 Cow. 480; Petry *v.* Christy, 19 Johns. 53; *In re* Mickel, 14 Johns. 324; Wells *v.* Lane, 9 Johns. 144.

South Carolina.— Lenoir *v.* Sylvester, 1 Bailey 632.

Tennessee.— Porter *v.* Blakemore, 2 Coldw. 556; McCloud *v.* Chiles, 1 Coldw. 248; Abram *v.* Johnson, 1 Head 120; James *v.* State, 9 Humphr. 308; Hinklin *v.* Hamilton, 3 Humphr. 569; Fishers' Negroes *v.* Dabbs, 6 Yerg. 119.

Virginia.— Fulton *v.* Gracey, 15 Gratt. 314; Phœbe *v.* Boggess, 1 Gratt. 129, 42 Am. Dec. 543.

United States.— Williams *v.* Ash, 1 How. 1, 11 L. ed. 25; McCutchen *v.* Marshall, 8 Pet. 220, 8 L. ed. 923; Fidelio *v.* Dermott, 8 Fed. Cas. No. 4,754, 1 Cranch C. C. 405.

3. Opinion of Judge Appleton in 44 Me. 521, 527.

4. Morgan Leg. Max.

5. Heller *v.* Magone, 38 Fed. 908, 911, construing 22 U. S. St. at L. 488.

6. Derived from Latin, *manus*, the hand, and *scribere*, *scriptum*, to write; and synonymous with *manuscriptum*. Webster Dict.

ment ;[7] books written with the hand.[8] (Manuscript: As Baggage, see CARRIERS.[9] Unpublished, Whether Subject to Execution, see EXECUTIONS.[10] See, generally, COPYRIGHT; LITERARY PROPERTY.)

MANY. Multitudinous; numerous;[11] but sometimes recognized as synonymous with the terms "divers," "several," "sundry," and "various,"[12] being of a certain number, large or small.[13] (See FEW; MAJORITY.)

MAP. A drawing upon a plain surface representing a part of the earth's surface and the relative position of objects thereon ;[14] a transcript of the region which it portrays, narrowed in compass, so as to facilitate an understanding of the original.[15] (Map: As Evidence — In General, see EVIDENCE; In Condemnation Proceeding, see EMINENT DOMAIN; In Criminal Prosecution, see CRIMINAL LAW; In Highway Proceeding, see STREETS AND HIGHWAYS; Of Boundary, see BOUNDARIES. As Literary Property, see LITERARY PROPERTY. As Used to Illustrate Evidence of Witnesses, see APPEAL AND ERROR.[16] Copyright and Infringement Thereof, see COPYRIGHT. Cost of Procuring Map as Evidence, see COSTS.[17] Dedication of Property to Public Use, see DEDICATION. Description of Property by Reference to Map — In Deed, see DEEDS; In Mortgage, see MORTGAGES; In Writing Required by Statute of Frauds, see FRAUDS, STATUTE OF. Easement Created by Sale of Land With Reference to Map, see EASEMENTS. Establishing and Fixing Boundary, see BOUNDARIES. Judicial Notice of Locality on Accepted Map, see EVIDENCE. Of City and Other Municipal Corporation, see MUNICIPAL CORPORATIONS. Of Public Land, see PUBLIC LANDS.)

MARAUDER. One who, while employed in the army as a soldier, commits larceny or robbery in the neighborhood of the camp, or while wandering away from the army.[18]

MARBLE. A term which may include so-called Mexican onyx.[19]

[*quoted* in Parton *v.* Prang, 18 Fed. Cas. No. 10,784, 3 Cliff. 537, 544].

7. Webster Dict. [*quoted* in Parton *v.* Prang, 18 Fed. Cas. No. 1,273, 3 Cliff. 537, 544].

8. Leon Loan, etc., Co. *v.* Leon Equalization Bd., 86 Iowa 127, 134, 53 N. W. 94, 41 Am. St. Rep. 486, 17 L. R. A. 199.

9. See 6 Cyc. 667.

10. See 17 Cyc. 944.

11. Hilton Bridge Constr. Co. *v.* Foster, 26 Misc. (N. Y.) 338, 340, 57 N. Y. Suppl. 140.

Many denotes multitude.— Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 719, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710.

12. Hilton Bridge Constr. Co. *v.* Foster, 26 Misc. (N. Y.) 338, 340, 57 N. Y. Suppl. 140. See also Farnam *v.* Barnum, 2 How. Pr. N. S. (N. Y.) 396, 404.

13. Century Dict. [*quoted* in Hilton Bridge Constr. Co. *v.* Foster, 26 Misc. (N. Y.) 338, 340, 57 N. Y. Suppl. 140].

Compared with "majority" and "few."— The term as used in reference to many well regulated railroads abstaining from the use of certain warning signals, as absolving from all duty to resort to them, means a mere excess above the adjective "few," and while it is not the synonym of the word "majority" its meaning is that if a relatively large number, as compared with the whole number, abstained from the use of the warning signals, then to omit them is not of itself negligence. Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 719, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710.

14. Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 27 Mont. 288, 324, 70 Pac. 1114.

15. Burke *v.* McCowen, 115 Cal. 481, 485, 47 Pac. 367; Banker *v.* Caldwell, 3 Minn. 94.

Map and survey, as used in reference to the location of a railroad, means not only a delineation on paper or other material, giving a general or approximate idea of the situation of the road, but also such full and accurate notes and data as are necessary to furnish complete means for identifying and ascertaining the precise position of every part of the line, with courses and distances throughout so that there can be no doubt where any portion of it is to be found. San Francisco, etc., R. Co. *v.* Gould, 122 Cal. 601, 603, 55 Pac. 411.

16. See 3 Cyc. 58 note 74.

17. See 11 Cyc. 113.

18. Bouvier L. Dict. [*quoted* in Curry *v.* Collins, 37 Mo. 324, 328].

But in the modern and metaphorical sense of the word, as now sometimes used in common speech, it seems to be applied to a class of persons who are not a part of any regular army, and are not answerable to any military discipline, but who are mere lawless banditti, engaged in plundering, robbery, murder, and all conceivable crimes. Curry *v.* Collins, 37 Mo. 324, 328.

19. Mexican Onyx, etc., Co. *v.* U. S., 66 Fed. 732. See also Rice *v.* Ferris, 2 Vt. 62, 64.

"Mexican onyx," so-called, is a mineral consisting chiefly of carbonate of lime and certain impurities, principally ferrous oxides, imparting to the material its beautiful and variegated colors, crystalline in structure, and

MARE. A female of the horse species;[20] the female of the horse, or equine genus of quadrupeds.[21] (See HORSE; and, generally, ANIMALS; LARCENY.)

MARGARINE. A fatty substance said to be a chemical compound consisting of a base which has been termed glycerine, and of margaric acid.[22]

MARGIN. A part of a page at the edge, left uncovered in writing or printing; an uncovered bordering space;[23] the line where the earth and water meet around a lake;[24] the border or side of a highway.[25] In the parlance of the stock market, a portion of the price of a commodity purchased which the purchaser pays to the commission man or broker as a security for the purchase of the property;[26] security against loss on the part of a broker which may arise from a fall in the market price of the shares of stock purchased for another;[27] additional collateral security against loss to a broker while he is carrying the stock for his employer on a declining market;[28] security.[29] (See, generally, BOUNDARIES; FACTORS AND BROKERS; GAMING. See also CORNER; CLOSED OUT; CLOSING OUT; DEALING IN FUTURES; DEALING IN GRAIN.)

MARINE. As an adjective, pertaining to the sea.[30] As a noun, a soldier that serves on board of a ship and fights in naval engagements; also the whole navy of a kingdom or state; the whole economy of naval affairs.[31] (Marine: Insurance, see MARINE INSURANCE. See, generally, ADMIRALTY, and Cross-References Thereunder. See also MARITIME.)

MARINE CORPS. A military body designed to perform military services, and while they are not necessarily performed on board ships, their active service in time of war is chiefly in the navy, or aiding naval expeditions.[32] (Marine Corps:

belonging scientifically to a group of calcites, recognized by the leading dictionaries and encyclopedias as belonging to the general class of "marble." Mexican Onyx, etc., Co. *v.* U. S., 66 Fed. 732.

20. Teal *v.* State, 119 Ga. 102, 104, 45 S. E. 964.

"**Filly**" as not included in the term see Lunsford *v.* State, 1 Tex. App. 448, 450, 28 Am. Rep. 414.

21. Webster Dict. [*quoted* in Cross *v.* State, 17 Tex. App. 476, 478].

"**Horse,**" which is a generic term, includes a mare. South, etc., Alabama R. Co. *v.* Bees, 82 Ala. 340, 342, 2 So. 752; State *v.* Gooch, 60 Ark. 218, 220, 29 S. W. 640; Troxler *v.* Buckney, 126 Cal. 288, 290, 58 Pac. 691; People *v.* Pico, 62 Cal. 50, 52; Baldwin *v.* People, 2 Ill. 304; State *v.* Dunnavant, 3 Brev. (S. C.) 9, 10, 5 Am. Dec. 530; Allison *v.* Brookshire, 38 Tex. 199, 201; Collins *v.* State, 16 Tex. App. 274, 281; People *v.* Butler, 2 Utah 504, 506; Reg. *v.* Aldridge, 4 Cox C. C. 143, 144.

22. Tilghman *v.* Proctor, 102 U. S. 707, 708, 26 L. ed. 279 [*quoted* in Tilghman *v.* Proctor, 125 U. S. 136, 139, 8 S. Ct. 894, 31 L. ed. 664]. But see definition in Webster Int. Dict.

23. Webster Dict. [*quoted* in Indiana Cent. Canal Co. *v.* State, 53 Ind. 575, 594].

24. Lembeck *v.* Andrews, 47 Ohio St. 336, 351, 24 N. E. 686, 8 L. R. A. 578, a meaning to be given to the term when used in a deed making the margin of a lake a boundary or corner of land conveyed. See also Indiana Cent. Canal Co. *v.* State, 53 Ind. 575, 594.

"**Margin**" or "**edge**" **distinguished** from "middle" see Fowler *v.* Vreeland, 44 N. J. Eq. 268, 270, 14 Atl. 116.

25. Clay *v.* Postal Tel. Cable Co., 70 Miss. 406, 411, 11 So. 658.

26. Fortenbury *v.* State, 47 Ark. 188, 193, 1 S. W. 58; Sheehy *v.* Shinn, 103 Cal. 325, 330, 37 Pac. 393; McClain *v.* Fleshman, 106 Fed. 880, 882, 46 C. C. A. 15. See also Lemonius *v.* Mayer, 71 Miss. 514, 518, 14 So. 33; Memphis Brokerage Assoc. *v.* Cullen, 11 Lea (Tenn.) 75, 77.

27. Markham *v.* Jaubon, 49 Barb. (N. Y.) 462, 465.

28. McNeil *v.* New York Tenth Nat. Bank, 55 Barb. (N. Y.) 59, 64.

29. *In re* Taylor, 192 Pa. St. 304, 306, 43 Atl. 973, 73 Am. St. Rep. 812; Hopkins *v.* O'Kane, 169 Pa. St. 478, 480, 32 Atl. 421.

30. Webster Dict. [*quoted* in Doughten *v.* Vandever, 5 Del. Ch. 51, 73].

Marine or maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian states. Louisiana *v.* Mississippi, 202 U. S. 1, 52, 26 S. Ct. 406, 50 L. ed. 913. See also The Alexander, 60 Fed. 914, 918.

"**Marine cause**" see Warn *v.* Easton, etc., Transit Co., 2 N. Y. Suppl. 620, 622.

31. Webster Dict. [*quoted* in Doughten *v.* Vandever, 5 Del. Ch. 51, 73].

In the plural, marines has been defined to be a body of troops trained to do military service on board ships (Webster Dict. [*quoted* in Doughten *v.* Vandever, 5 Del. Ch. 51, 73]); soldiers serving aboard ships (The Rita, 89 Fed. 763, 767). Although marines are not in one sense seamen, yet they are, while employed on board public vessels, persons in the naval service, persons subject to the orders of naval officers, persons under the governments of the naval code as to punishment, and persons amenable to the naval department. Wilkes *v.* Dinsman, 7 How. (U. S.) 89, 124, 12 L. ed. 618.

32. U. S. *v.* Dunn, 120 U. S. 249, 252, 7 S. Ct. 507, 30 L. ed. 667.

Service in, as Affecting Right to Naturalization, see ALIENS. See, generally, ARMY AND NAVY.)

MARINE COURT. A local court of record, which formerly existed in New York city, having original jurisdiction of civil causes, where the action was for personal injuries or defamation, and of other civil actions where the damages claimed did not exceed two thousand dollars. It was originally created as a tribunal for the settlement of causes between seamen.[33] (See, generally, COURTS.)

33. Black L. Dict. For a complete history of this court, the extent of its jurisdiction, and the practice therein see McAdam Marine Ct. Pr. (2d ed. 1872).

MARINE INSURANCE

By Alfred W. Varian

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CROSS-REFERENCES

For Matters Relating to:

Contract Generally, see CONTRACTS.

Insurance:

Generally, see INSURANCE, and Cross-References Thereunder.

Against Fire, see FIRE INSURANCE, and Cross-References Thereunder.

Agents and Brokers, see INSURANCE.

Companies, see INSURANCE.

I. DEFINITION.

Marine insurance is a contract whereby one party, for a stipulated sum, undertakes to indemnify the other against loss arising from marine perils.[1]

II. ORIGIN AND DEVELOPMENT.

The origin of contracts of marine insurance is clouded in obscurity and has been the occasion of much learned discussion by numerous and eminent writers on the subject. The conclusions reached can be hardly more than speculative, but the consensus of the best opinions is that insurance of marine risks was practised by the Greeks, the Rhodians, and the Romans during their respective periods of commercial supremacy. Whether it merely lay dormant after the fall of the Roman Empire or whether it continued to exist in another form is not satisfactorily explained. Its revival in modern times is traced to about the close of the twelfth or the beginning of the thirteenth century when it came into use in Italy and was subsequently introduced into England and the continental countries.[2]

III. INSURABLE INTEREST.

A. Necessity in General.[3] As in other contracts of insurance,[4] an insurable interest by the insured in the subject-matter of the insurance is essential to the validity of a contract of marine insurance.[5]

1. Williams *v.* New England Ins. Co., 29 Fed. Cas. No. 17,731, 3 Cliff. 244, 248. See also North America Ins. Co. *v.* Com., 87 Pa. St. 173, 183, 30 Am. Rep. 352.

By statute in some states marine insurance is defined as "an insurance against risks connected with navigation, to which a ship, cargo, freightage, profits, or other insurable interest in movable property, may be exposed during a certain voyage or a fixed period of time." Cal. Civ. Code (1906), § 2655; Mont. Civ. Code (1895), § 3540; N. D. Rev. Codes (1899), § 4537; S. D. Civ. Code (1903), § 1883.

Policy covering risk of fire only.— The business of issuing ordinary fire insurance on boats navigating the Great Lakes and the high seas is marine insurance business, within Minn. Laws (1895), p. 392, c. 175. Dwinnell *v.* Minneapolis Fire, etc., Co., 90 Minn. 383, 97 N. W. 110. A policy of insurance on a vessel engaged in navigation, although it insures her against fire risks alone, is a maritime contract because of its subject-matter, and an action *in personam* to enforce payment thereon is within the jurisdiction of a court of admiralty. North German F. Ins. Co. *v.* Adams, 142 Fed. 439, 73 C. C. A. 555. But where the hazard is fire alone, and the subject is an unfinished vessel, never afloat for a voyage, the contract to insure must be regarded as a fire risk, especially in the absence of an express agreement that it shall have the incidents of a marine policy. Eureka Ins. Co. *v.* Robinson, 56 Pa. St. 256, 94 Am. Dec. 65.

Inland insurance.— The rules and principles of marine insurance must be applied to the interpretation of policies of insurance effected upon vessels exclusively employed in inland navigation, where not inapplicable by reason of the particular subject-matter. Caldwell *v.* St. Louis Perpetual Ins. Co., 1 La. Ann. 85.

2. New England Mut. Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90; Sadlers Co. *v.* Badcock, 2 Atk. 554, 26 Eng. Reprint 733; 1 Duer Ins. Introd. Discourse.

3. **Wager policies** see *infra*, IV, A, 4, b, (II).

Right to return of premium paid see *infra*, V, F, 2.

4. See FIRE INSURANCE, 19 Cyc. 583; LIFE INSURANCE, 25 Cyc. 701, 702, and Other Insurance Titles.

5. *Louisiana.*— Katheman *v.* General Mut. Ins. Co., 12 La. Ann. 35; Alliance Mar. Assur. Co. *v.* Louisiana State Ins. Co., 8 La. 1, 28 Am. Dec. 117.

Maine.— Sawyer *v.* Mayhew, 51 Me. 398; Folsom *v.* Merchants' Mut. Mar. Ins. Co., 38 Me. 414.

Maryland.— Whiting *v.* Independent Mut. Ins. Co., 15 Md. 297.

Massachusetts.— Boston Ins. Co. *v.* New

B. General Requisites and Sufficiency.[6] As a general rule if the insured will sustain loss from the destruction of the subject-matter or derive benefit from its preservation, this is sufficient to constitute an insurable interest.[7]

York Ins. Co., 174 Mass. 229, 54 N. E. 543; Russell *v.* New England Mar. Ins. Co., 4 Mass. 82; Toppan *v.* Atkinson, 2 Mass. 365.

New York.— Phœnix Ins. Co. *v.* Parsons, 129 N. Y. 86, 29 N. E. 87; Riggs *v.* Commercial Mut. Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 21 Am. St. Rep. 716, 10 L. R. A. 684 [*affirming* 57 N. Y. Super. Ct. 78, 5 N. Y. Suppl. 183 [*reversing* on rehearing 51 N. Y. Super. Ct. 466)]; Murray *v.* Columbian Ins. Co., 11 Johns. 302; Riley *v.* Delafield, 7 Johns. 522; Buchanan *v.* Ocean Ins. Co., 6 Cow. Cr. 318.

Ohio.— London Mar. Ins. Co. *v.* Walsh-Upstill Coal Co., 68 Ohio St. 469, 68 N. E. 21.

Pennsylvania.— Warder *v.* Horton, 4 Binn. 529.

United States.— Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219; Merchants Mut. Ins. Co. *v.* Baring, 20 Wall. 159, 22 L. ed. 250; China Mut. Ins Co. *v.* Ward, 59 Fed. 712, 8 C. C. A. 229; Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132.

England.—Anderson *v.* Morice, 1 App. Cas. 713, 3 Aspin. 290, 46 L. J. Q. B. 11, 35 L. T. Rep. N. S. 566, 25 Wkly. Rep. 14; Moran *v.* Uzielli, [1905] 2 K. B. 555, 10 Com. Cas. 203, 74 L. J. Q. B. 494, 21 T. L. R. 378, 54 Wkly. Rep. 250; Seagrave *v.* Union Mar. Ins. Co., L. R. 1 C. P. 305, H. & R. 302, 12 Jur. N. S. 358, 35 L. J. C. P. 172, 14 L. T. Rep. N. S. 479, 14 Wkly. Rep. 690; Wilson *v.* Jones, L. R. 2 Exch. 139, 36 L. J. Exch. 78, 15 L. T. Rep. N. S. 669, 15 Wkly. Rep. 435; Clay *v.* Harrison, 10 B. & C. 99, 8 L. J. K. B. O. S. 90, 5 M. & R. 17, 21 E. C. L. 51; Lucena *v.* Crawford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623; Le Cras *v.* Hughes, 3 Dougl. 81, 26 E. C. L. 64; Stockdale *v.* Dunlop, 4 Jur. 681, 9 L. J. Exch. 83, 6 M. & W. 224; Camden *v.* Anderson, 5 T. R. 709; Goddart *v.* Garrett, 2 Vern. Ch. 269, 23 Eng. Reprint 774.

Canada.— Pugh *v.* Wylde, 11 Nova Scotia 177; Scatcherd *v.* Equitable F. Ins. Co., 8 U. C. C. P. 415; Orchard *v.* Ætna Ins. Co., 5 U. C. C. P. 445.

See 28 Cent. Dig. tit. "Insurance," § 137 *et seq.*

As to the statute of 19 Geo. II, c. 37, see *infra*, IV, A, 4, b, (II).

6. Reinsurance see *infra*, XI, B.

7. *Massachusetts.*— Putnam *v.* Mercantile Mar. Ins. Co., 5 Metc. 386; Wiggin *v.* Mercantile Ins. Co., 7 Pick. 271; Oliver *v.* Greene, 3 Mass. 133, 3 Am. Dec. 96.

New York.— Riggs *v.* Commercial Mut. Ins. Co., 125 N. Y. 7, 25 N. E. 7, 21 Am. St. Rep. 716, 10 L. R. A. 684 [*affirming* 57 N. Y. Super. Ct. 78, 5 N. Y. Suppl. 183 (*reversing* on rehearing 51 N. Y. Super. Ct. 466)]; Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 77 [*affirming* 38 N. Y. Super. Ct. 281]; Hitchcock *v.* Northwestern Ins. Co., 26 N. Y. 68.

Pennsylvania.— International Mar. Ins. Co. *v.* Winsmore, 124 Pa. St. 61, 16 Atl. 516.

United States.— Harrison *v.* Fortlage, 161 U. S. 57, 16 S. Ct. 488, 40 L. ed. 616; Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219; Seaman *v.* Enterprise F. & M. Ins. Co., 18 Fed. 250, 5 McCrary 558.

England.— Moran *v.* Uzielli, [1905] 2 K. B. 555, 10 Com. Cas. 203, 74 L. J. K. B. 494, 21 T. L. R. 378, 54 Wkly. Rep. 250; Lucena *v.* Crawford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623; Stirling *v.* Vaughan, 2 Camph. 225, 11 East 619; Barclay *v.* Cousins, 2 East 544, 6 Rev. Rep. 505.

Canada.— Moore *v.* Home Ins. Co., 14 L. C. Jur. 77.

See 28 Cent. Dig. tit. "Insurance," § 139 *et seq.*

Insurable interest of reinsurer see *infra*, XI, B.

Interest defined and described.— "A man is interested in a thing to whom advantage may arise, or prejudice happen, from the circumstances which may attend it. . . . Interest does not necessarily imply a right to the whole, or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks, or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing and the interest derivable from it may be very different. Of the first the price is generally the measure, but by interest in a thing every benefit and advantage arising out of or depending on such thing may be considered as being comprehended." Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 302, 6 Rev. Rep. 623.

A direct interest is essential. Minturn *v.* Warren Ins. Co., 2 Allen (Mass.) 86; Marine Ins. Co. *v.* Walsh-Upstill Coal Co., 23 Ohio Cir. Ct. 191.

"It is the duty of a Court always to lean in favour of an insurable interest, if possible, for it seems to me that after underwriters have received the premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection, and one which has no real merit, certainly not as between the assured and the insurer."

A vested[8] or proprietary[9] interest is not essential, but such interest may be merely possessory,[10] inchoate,[11] contingent,[12] defeasible,[13] equitable,[14] or expectant.[15] However, in regard to expectant interests there must be a subsisting right or title in the insured at the time of the loss with respect to the subject out of which the expectancy arises.[16] A person who, by reason of a contract or of his special

Stock *v.* Inglis, 12 Q. B. D. 564, 571, 53 L. J. Q. B. 356, 51 L. T. Rep. N. S. 449, Per Brett, M. R.

Statutory definition.— Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest. N. D. Rev. Codes (1899), § 4450; S. D. Civ. Code (1903), § 1802; Mont. Civ. Code (1895), § 3400; Cal. Civ. Code (1903), § 2546.

8. Putnam *v.* Mercantile Mar. Ins. Co., 5 Metc. (Mass.) 386; Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623; Le Cras *v.* Hughes, 3 Dougl. 81, 26 E. C. L. 64.

9. *Connecticut.*— Bulkley *v.* Derby Fishing Co., 1 Conn. 571.

Massachusetts.— Putnam *v.* Mercantile Mar. Ins. Co., 5 Metc. 386; Bartlet *v.* Walter, 13 Mass. 267, 7 Am. Dec. 143; Oliver *v.* Greene, 3 Mass. 133, 3 Am. Dec. 96.

New York.— Riggs *v.* Commercial Mut. Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 21 Am. St. Rep. 716, 10 L. R. A. 684 [*affirming* 57 N. Y. Super. Ct. 78, 5 N. Y. Suppl. 183 (*reversing* on rehearing 51 N. Y. Super. Ct. 466)]; Sturm *v.* Atlantic Mut. Ins. Co., 38 N. Y. Super. Ct. 281 [*affirmed* in 63 N. Y. 77].

Pennsylvania.— International Mar. Ins. Co. *v.* Winsmore, 124 Pa. St. 61, 16 Atl. 516.

United States.— Harrison *v.* Fortlage, 161 U. S. 57, 16 S. Ct. 488, 40 L. ed. 616; Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219; Buck *v.* Chesapeake Ins. Co., 1 Pet. 151, 7 L. ed. 90; The Gulnare, 42 Fed. 861; Seaman *v.* Enterprise F., etc., Ins. Co., 18 Fed. 250, 5 McCrary 558; Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132.

England.— Stirling *v.* Vaughan, 2 Campb. 225, 11 East 619.

See 28 Cent. Dig. tit. "Insurance," § 154 *et seq.*

10. Strum *v.* Atlantic Mut. Ins. Co., 63 N. Y. 77 [*affirming* 38 N. Y. Super. Ct. 281]; Marine Ins. Co. *v.* Walsh-Upstill Coal Co., 23 Ohio Cir. Ct. 191; The Gulnare, 42 Fed. 861; Simmes *v.* Marine Ins. Co., 22 Fed. Cas. No. 12,862, 2 Cranch. C. C. 618; Routh *v.* Thompson, 13 East 274, 11 East 428, 10 Rev. Rep. 539.

11. Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132; Barber *v.* Fleming, L. R. 5 Q. B. 59, 10 B. & S. 879, 39 L. J. Q. B. 25, 18 Wkly. Rep. 254; Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623.

12. Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219; Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132; Anderson *v.* Morice, 1 App. Cas. 713, 3 Aspin. 290, 46 L. J. Q. B. 11, 35 L. T. Rep. N. S. 566, 25 Wkly. Rep. 14; Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623; Le Cras *v.* Hughes, 3 Dougl. 81, 26 E. C. L. 64. And see Wells *v.* Philadelphia Ins. Co., 9 Serg. & R. (Pa.) 103.

13. Frierson *v.* Brenham, 5 La. Ann. 540, 52 Am. Dec. 603; French *v.* Hope Ins. Co., 16 Pick. (Mass.) 397; Russel *v.* Union Ins. Co., 4 Dall. (U. S.) 421, 1 L. ed. 892, 21 Fed. Cas. No. 12,146, 1 Wash. 409; Stirling *v.* Vaughan, 2 Campb. 225, 11 East 619.

Insurable interest in prize see *infra*, III, D, 15.

14. *Massachusetts.*— Amsinck *v.* American Ins. Co., 129 Mass. 185; Rider *v.* Ocean Ins. Co., 20 Pick. 259; Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. 249; Bartlet *v.* Walter, 13 Mass. 267, 7 Am. Dec. 143; Locke *v.* North American Ins. Co., 13 Mass. 61; Oliver *v.* Greene, 3 Mass. 133, 3 Am. Dec. 96.

New Hampshire.— Goodall *v.* New England Mut. F. Ins. Co., 25 N. H. 169.

New York.— Riggs *v.* Commercial Mut. Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 21 Am. St. Rep. 716, 10 L. R. A. 684 [*affirming* 57 N. Y. Super. Ct. 78, 5 N. Y. Suppl. 183 (*reversing* on rehearing 51 N. Y. Super. Ct. 466)]; Kenny *v.* Clarkson, 1 Johns. 385, 3 Am. Dec. 336.

South Carolina.— Hume *v.* Providence Washington Ins. Co., 23 S. C. 190.

United States.— Ohl *v.* Eagle Ins. Co., 18 Fed. Cas. No. 10,473, 4 Mason 390.

England.— *Ex p.* Houghton, 1 Rose 177, 17 Ves. Jr. 251, 11 Rev. Rep. 73, 34 Eng. Reprint 97.

Canada.— Clark *v.* Scottish Imperial Ins. Co., 4 Can. Sup. Ct. 192 [*reversing* 18 N. Brunsw. 240].

See 28 Cent. Dig. tit. "Insurance, "§ 154 *et seq.*

Cestui que trust see *infra*, III, D, 9.

15. International Mar. Ins. Co. *v.* Winsmore, 124 Pa. St. 61, 66, 16 Atl. 516 (where it is said that "as a general rule, whatever furnishes a reasonable expectation of pecuniary benefit from the continued existence of the subject of insurance is a valid insurable interest"); Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132; Barber *v.* Fleming, L. R. 5 Q. B. 59, 10 B. & S. 879, 39 L. J. Q. B. 25, 18 Wkly. Rep. 254; Barclay *v.* Cousins, 2 East 544, 6 Rev. Rep. 505; Nichol *v.* Goodall, 10 Ves. Jr. 157, 32 Eng. Reprint 803.

Insurable interest in profits or commissions see *infra*, III, D, 17.

16. Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 321, 6 Rev. Rep. 623, where

relation to the property, will incur a liability if a vessel or cargo is lost has an insurable interest.[17]

C. Time When Interest Must Exist. It was formerly the rule that the insured must be interested in the subject-matter at the time of effecting the policy and at the time of the loss;[18] but the modern rule does not require that there be an interest existing at the time the insurance is effected, it being sufficient that such interest subsists during the risk and at the time of the loss.[19] It is always necessary, however, that there shall be an insurable interest at the time of the loss,[20] except where the policy covers property "lost or not lost," in which case the insured is entitled to recover thereon, although he became interested in the subject-matter after a partial loss occurred, unless he purchased with knowledge of the damage.[21] Where the insured parts with his interest after loss, he may nevertheless recover on the policy in his own name for the benefit of the real party in interest.[22]

it was said by Lord Eldon: "In order to distinguish that intermediate thing between a strict right, or a right derived under a contract, and a mere expectation or hope, which has been termed an insurable interest, it has been said in many cases to be that which amounts to a moral certainty. I have in vain endeavoured, however, to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest, unless it be a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party."

"A mere hope or expectation" is not an insurable interest. Riggs *v.* Commercial Mut. Ins. Co., 125 N. Y. 712, 25 N. E. 1058, 21 Am. St. Rep. 716, 10 L. R. A. 684.

Mere practice to allow bounty.—In Devaux *v.* Steele, 6 Bing. N. Cas. 358, 8 Scott 637, 37 E. C. L. 663, it was held that the mere practice of the French government to allow a bounty to fishing vessels under circumstances which did not entitle them thereto under the law was a mere matter of expectation and did not constitute a vested interest which could be the subject of insurance.

17. *Kentucky.*—Fireman's Ins. Co. *v.* Powell, 13 B. Mon. 311, one who has given bond for delivery of attached vessel.

Massachusetts.— Bartlet *v.* Walter, 13 Mass. 267, 7 Am. Dec. 143 (hirer of vessel who has contracted to keep her insured); Oliver *v.* Greene, 3 Mass. 133, 3 Am. Dec. 96 (holding that an owner of a vessel who has chartered the remainder with a covenant to pay the value in case of a loss may insure the whole vessel as his property).

New York.— Sturm *v.* Atlantic Mut. Ins. Co., 38 N. Y. Super. Ct. 281 [*affirmed* in 63 N. Y. 77], consignee in possession for purpose of sale or return.

United States.— Russel *v.* Union Ins. Co., 4 Dall. 421, 1 L. ed. 892, 21 Fed. Cas. No. 12,146, 1 Wash. 409, owner who is surety for payment of value of cargo in case of condemnation.

England.— Reed *v.* Cole, 3 Burr. 1512, agreement by seller of ship to pay purchaser in case of loss.

Insurable interest of carriers and other bailees see *infra*, III, D, 5.

18. Sadlers Co. *v.* Badcock, 2 Atk. 554, 26 Eng. Reprint 733; Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623. See also Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132.

19. Boston Ins. Co. *v.* Globe F. Ins. Co., 174 Mass. 229, 54 N. E. 543, 75 Am. St. Rep. 303; Hagan *v.* Scottish Union, etc., Ins. Co., 186 U. S. 423, 22 S. Ct. 862, 46 L. ed. 1229; Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219; Mannheim Ins. Co. *v.* Hollander, 112 Fed. 549; Henshaw *v.* Mutual Safety Ins. Co., 11 Fed. Cas. No. 6,387, 2 Blatchf. 99; Lower Rhine, etc., Ins. Assoc. *v.* Sedgwick, [1898] 1 Q. B. 739, 8 Aspin. 380, 67 L. J. Q. B. 330, 78 L. T. Rep. N. S. 496, 46 Wkly. Rep. 380; Rhind *v.* Wilkinson, 2 Taunt. 237, 11 Rev. Rep. 551. And see Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542.

20. Lazarus *v.* Commonwealth Ins. Co., 5 Pick. (Mass.) 76; Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249; Carroll *v.* Boston Mar. Ins. Co., 8 Mass. 515; Anderson *v.* Morice, 1 App. Cas. 713, 3 Aspin. 290, 46 L. J. C. P. 11, 35 L. T. Rep. N. S. 566, 25 Wkly. Rep. 14; Clay *v.* Harrison, 10 B. & C. 99, 8 L. J. K. B. O. S. 90, 5 M. & R. 17, 21 E. C. L. 51; Powles *v.* Innes, 12 L. J. Exch. 163, 11 M. & W. 10. See also Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542.

21. Sutherland *v.* Pratt, 2 Dowl. P. C. N. S. 813, 7 Jur. 261, 12 L. J. Exch. 235, 11 M. & W. 296, 311, in which it was said: "Such a policy is clearly a contract of indemnity against all past, as well as all future losses, sustained by the assured, in respect to the interest insured. It operates just in the same way as if the plaintiff having purchased goods at sea, the defendant, for a premium, had agreed that if the goods had at the time of the purchase sustained any damage by perils of the sea, he would make it good." And see Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219. See *infra*, III, D, 19, a.

22. Sparkes *v.* Marshall, 2 Bing. N. Cas. 761, 2 Hodges 44, 5 L. J. C. P. 286, 3 Scott 172, 29 E. C. L. 750. See also *infra*, VI, C, 1; X, B, 1.

D. Persons Who May Insure and Subjects or Interests Insurable — 1. Owner. The owner of a vessel, cargo, or other property has in all cases an insurable interest in it to the full value;[23] and this is true even though he has made an executory contract for its sale,[24] or has sold the same conditionally, where the condition has not been performed,[25] or the legal title does not stand in his name,[26] or stands in his name as trustee only,[27] or is defeasible;[28] and where the subject of the insurance is a vessel, it may be insured by the owner, although it has been chartered and the charterer has stipulated to pay its value in case of loss during the voyage,[29] or it has been mortgaged, even to the full value,[30] or other

23. Martin *v.* Fishing Ins. Co., 20 Pick. (Mass.) 389, 32 Am. Dec. 220; Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 77 [*affirming* 38 N. Y. Super. Ct. 281]; Stuart *v.* Columbian Ins. Co., 23 Fed. Cas. No. 13,554, 2 Cranch C. C. 442; Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623.

Registration.— Where by statute one has no title, either legal or equitable, in a vessel, unless it is registered in his name as required by the statute, one in whose name a vessel is not registered has no insurable interest as owner. Marsh *v.* Robinson, Anstr. 479, 4 Esp. 98, 3 Rev. Rep. 617; Camden *v.* Anderson, 5 T. R. 709, where it was held that one of several owners of a vessel whose name did not appear as one of the registered owners had no insurable interest in freight, since he was neither a legal nor equitable owner and the right to freight depended on ownership. In Moore *v.* Home Ins. Co., 14 L. C. Jur. 77, it was held that the deposit by the insured of bills of sale, and documents requisite for showing ownership of a vessel, with the collector of customs for registration was sufficient to give an insurable interest, although the actual registration was not made until after the loss of the vessel. It was further held in this case that if this were not so, the insured could fall back upon any anterior title registered, from which he could deduce insurable interest.

Proof of ownership see *infra*, XII, F, 2, d.

24. Bell *v.* Western M. & F. Ins. Co., 3 Rob. (La.) 428; Bell *v.* Firemen's Ins. Co., 3 Rob. (La.) 423; Worthington *v.* Bearse, 12 Allen (Mass.) 382, 90 Am. Dec. 152; Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Miss.) 249; Williams *v.* Insurance Co. of North America, 1 Hilt. (N. Y.) 345; Stuart *v.* Columbian Ins. Co., 23 Fed. Cas. No. 13,554, 2 Cranch C. C. 442. See also Merchants' Mar. Ins. Co. *v.* Rumsey, 9 Can. Sup. Ct. 577.

25. Worthington *v.* Bearse, 12 Allen (Mass.) 382, 90 Am. Dec. 152 (holding that where the owner of a mortgaged vessel sold his remaining interest therein with a stipulation that he should pay off the mortgage, he continued to have an insurable interest in the vessel, notwithstanding the sale, so long as the stipulation had not been complied with, since until this part of his contract was complied with the vendee had a right to avoid the sale and rescind the whole bargain, and the delivery of a bill of sale passed the title only at the election of the vendee); Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249.

26. Slocovich *v.* Oriental Mut. Ins. Co., 13 Daly (N. Y.) 264 [*affirmed* in 108 N. Y. 56, 14 N. E. 802]; Kenny *v.* Clarkson, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336; Simmes *v.* Marine Ins. Co., 22 Fed. Cas. No. 12,862, 2 Cranch C. C. 618.

Insurable interest of: Assignor for benefit of creditors see *infra*, III, D, 14. *Cestui que trust* see *infra*, III, D, 9. Stock-holders see *infra*, III, D, 2, b.

27. See *infra*, III, D, 9.

Assignee for benefit of creditors see *infra*, III, D, 14.

28. Frierson *v.* Brenham, 5 La. Ann. 540, 52 Am. Dec. 603. See *supra*, III, B, text and note 13.

29. Hobbs *v.* Hannam, 3 Campb. 93, 13 Rev. Rep. 764.

30. *Massachusetts.*—Worthington *v.* Bearse, 12 Allen 382, 90 Am. Dec. 152; Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. 249; Higginson *v.* Dall, 13 Mass. 96; Locke *v.* North American Ins. Co., 13 Mass. 61.

New York.— Carr *v.* Security Ins. Co., 109 N. Y. 504, 17 N. E. 369; Wilkes *v.* People's F. Ins. Co., 19 N. Y. 184; Buffalo Steam Engine Works *v.* Sun Mut. Ins. Co., 17 N. Y. 401.

Ohio.— Williams *v.* Cincinnati Ins. Co., Wright 542.

England.— Provincial Ins. Co. *v.* Leduc, L. R. 6 P. C. 224, 2 Aspin. 338, 43 L. J. P. C. 49, 31 L. T. Rep. N. S. 142, 22 Wkly. Rep. 929; Hutchinson *v.* Wright, 25 Beav. 444, 4 Jur. N. S. 749, 27 L. J. Ch. 834, 6 Wkly. Rep. 475, 53 Eng. Reprint 706; Smith *v.* Lascelles, 2 T. R. 187.

Canada.— Anchor Mar. Ins. Co. *v.* Keith, 9 Can. Sup. Ct. 483; Perkins *v.* Equitable Ins. Co., 9 N. Brunsw. 562.

See 28 Cent. Dig. tit. "Insurance," § 154 *et seq.* And see Fire Insurance, 19 Cyc. 586.

Subsequent forfeiture of vessel.— It has been held that the mortagor of a vessel, with covenant for payment, and to insure for benefit of the mortgagee, had an insurable interest which was not destroyed by a subsequent forfeiture of the vessel by selling the same to an alien in violation of the act of congress of 1831. Wilkes *v.* People's F. Ins. Co., 19 N. Y. 184.

A mortgagor parting with the equity of redemption continues to have an insurable interest in the mortgaged property so long as he is liable for the mortgage debt. Buf-

wise transferred merely as security for a debt,[31] except that where the vessel is bottomed the owner has an insurable interest only in the excess of its value over the amount of the bottomry bond.[32] So also the indorsement and transfer of a bill of lading merely as security for a debt, even though the transfer is absolute in form, leaves an insurable interest in the indorser.[33] Of course if the owner of a vessel, cargo, or other property sells and transfers the same absolutely, reserving no lien or interest at all, he no longer has an insurable interest therein;[34] but he retains an insurable interest if he agrees with the purchaser to pay him if a loss shall happen,[35] or if he reserves a lien or takes back a mortgage for the purchase-money.[36]

2. Part Ownership or Interest — a. In General. One who is part-owner of a vessel, cargo, or other property may protect his own interest by insurance,[37] and the same is true of one who is otherwise interested with others in a marine adventure;[38] but a part-owner or person partly interested has no insurable interest in the shares of the other part-owners or persons interested.[39] This rule

falo Steam Engine Works *v.* Sun Mut. Ins. Co., 17 N. Y. 401.

31. A transfer by bill of sale absolute in form, but which is intended merely as security, leaves an insurable interest in the transferrer. Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249; Hutchinson *v.* Wright, 25 Beav. 444, 4 Jur. N. S. 749, 27 L. J. Ch. 834, 6 Wkly. Rep. 475, 53 Eng. Reprint 706; Alston *v.* Campbell, 4 Bro. P. C. 476, 2 Eng. Reprint 325; Ward *v.* Beck, 13 C. B. N. S. 668, 9 Jur. N. S. 912, 32 L. J. C. P. 113, 106 E. C. L. 668; Millidge *v.* Stymest, 11 N. Brunsw. 164.

32. Kenny *v.* Clarkson, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336; Smith *v.* Williams, 2 Cai. Cas. (N. Y.) 110; Harman *v.* Vanhatton, 1 Eq. Cas. Abr. 371, 21 Eng. Reprint 1110, 2 Vern. Ch. 716, 23 Eng. Reprint 1071; Glover *v.* Black, 1 W. Bl. 396. *Compare* Williams *v.* Smith, 2 Cai. (N. Y.) 13.

33. Hibbert *v.* Carter, 1 T. R. 745, 1 Rev. Rep. 388.

34. Folsom *v.* Merchants' Mut. Mar. Ins. Co., 38 Me. 414; Worthington *v.* Bearse, 12 Allen (Mass.) 382, 90 Am. Dec. 152; Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249; Murray *v.* Columbian Ins. Co., 11 Johns. (N. Y.) 302; Pugh *v.* Wylde, 11 Nova Scotia 177.

Effect of reconveyance.— It has been held, however, that where the owner of a vessel sells and conveys the same absolutely, but afterward is revested with the title by a reconveyance, his insurable interest in the vessel is merely suspended during the time the title is vested in the vendee and is revived again on the reconveyance, so that, under a policy of insurance issued to him before the sale for a period extending beyond the time of reconveyance, he is entitled to recover for loss of the vessel after the reconveyance. Worthington *v.* Bearse, 12 Allen (Mass.) 382, 90 Am. Dec. 152.

35. Reed *v.* Cole, 3 Burr. 1512.

36. Fernandez *v.* Great Western Ins. Co., 3 Rob. (N. Y.) 457 [*reversed* on other grounds in 48 N. Y. 571, 8 Am. Rep. 571] (holding also that the change of interest from that of owner to that of mortgagee was not such a change of interest as to avoid a policy previously taken out); Williams *v.* Cincinnati Ins. Co., Wright (Ohio) 542 (bill of sale reserving an interest as mortgagee). See Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542.

If the agreement does not create a lien, the seller does not retain an insurable interest. Folsom *v.* Merchants' Mut. Mar. Ins. Co., 38 Me. 414, holding that a merchant who sells to a fishing vessel unconditionally an outfit for a voyage, under an agreement that he shall have a lien on the same, has no insurable interest therein after parting with the possession.

Insurable interest of: Lienor see *infra*, III, D, 13. Mortgagee see *infra*, III, D, 11.

Change of interest as affecting policy see *infra*, VI, C, 1.

37. *Connecticut.*— Bulkley *v.* Derby Fishing Co., 1 Conn. 571, partners owning vessel and cargo.

Massachusetts.— Finney *v.* Warren Ins. Co., 1 Metc. 16, 35 Am. Dec. 343.

Pennsylvania.— International Mar. Ins. Co. *v.* Winsmore, 124 Pa. St. 61, 16 Atl. 516.

Wisconsin.— Walls *v.* Helfenstein, 28 Wis. 632.

England.— Inglis *v.* Stock, 10 App. Cas. 263, 5 Aspin. 422, 54 L. J. Q. B. 582, 52 L. T. Rep. N. S. 821, 33 Wkly. Rep. 877 [*affirming* 12 Q. B. D. 564, 2 Aspin. 294, 53 L. J. Q. B. 356, 51 L. T. Rep. N. S. 449 (*reversing* 9 Q. B. D. 708, 4 Aspin. 596, 52 L. J. Q. B. 30, 47 L. T. Rep. N. S. 416, 31 Wkly. Rep. 455)] (undivided interest in cargo); Page *v.* Fry, 2 B. & P. 240, 5 Rev. Rep. 583; Carruthers *v.* Sheddon, 1 Marsh. 416, 6 Taunt. 14, 1 E. C. L. 486 (partners).

Canada.— Moore *v.* Home Ins. Co., 14 L. C. Jur. 77, trustees.

38. Wilson *v.* Jones, L. R. 2 Exch. 139, 36 L. J. Exch. 78, 15 L. T. Rep. N. S. 669, 15 Wkly. Rep. 435, part interest in adventure of laying an Atlantic cable. See also Ebsworth *v.* Alliance Mar. Ins. Co., L. R. 8 C. P. 596, 2 Aspin. 125, 42 L. J. C. P. 305, 29 L. T. Rep. N. S. 749.

39. Sawyer *v.* Freeman, 35 Me. 542; Reed *v.* Pacific Ins. Co., 1 Metc. (Mass.) 166; Finney *v.* Warren Ins. Co., 1 Metc. (Mass.)

of course does not prevent one part-owner from insuring for the others if his act is authorized or ratified by them,[40] or from protecting by insurance on his own account any interest he may in fact have, by reason of advances or disbursements made or liability assumed, with respect to the other shares.[41]

b. Stock-Holders. A stock-holder in a corporation owning a ship, cargo, or other property, while he has neither a legal title to the corporate property nor any equitable title which he can convert into a legal title, has such equitable rights of a pecuniary nature growing out of his situation as stock-holder as to give him an insurable interest in the corporate property to the extent of his shares.[42]

3. Charterer.[43] The charterer of a vessel who is in possession,[44] who contracts to keep her insured,[45] who holds her as security for advancements or disbursements,[46] or who covenants to pay her value in case of loss,[47] has an insurable interest in the vessel.[48]

4. Master and Crew. The master of a vessel generally has no insurable interest either in the vessel or in the cargo,[49] and this is true, although his wife is a part-owner of the same;[50] but he may have such interest in the cargo where it is consigned to him.[51] The master may insure his wages,[52] commis-

16, 35 Am. Dec. 343; Murray *v.* Columbian Ins. Co., 11 Johns. (N. Y.) 302; Knight *v.* Eureka F. & M. Ins. Co., 26 Ohio St. 664, 20 Am. Rep. 778; Graves *v.* Boston Mar. Ins. Co., 2 Cranch (U. S.) 419, 2 L. ed. 324.

40. Gray *v.* Buck, 78 Me. 477, 7 Atl. 16; Provincial Ins. Co. *v.* Leduc, L. R. 6 P. C. 224, 2 Aspin. 338, 43 L. J. P. C. 49, 31 L. T. Rep. N. S. 142, 22 Wkly. Rep. 929. See *infra*, IV, A, 2.

When authorized to insure to secure advances.— Where a ship was purchased in the names of A and B, but the purchase-price was advanced by A alone, and B agreed to reimburse him and authorized him to insure the ship in his, A's, name, and in case of loss collect the whole insurance, this was held to give A an insurable interest in the whole ship. Provincial Ins. Co. *v.* Leduc, L. R. 6 P. C. 224, 2 Aspin. 338, 43 L. J. P. C. 49, 31 L. T. Rep. N. S. 142, 22 Wkly. Rep. 929. But in Murray *v.* Columbian Ins. Co., 11 Johns. (N. Y.) 302, where A purchased the whole of a cargo in which B was to have one-third interest and which was charged to him by A, and the invoices and bills of lading were made out in their joint names, and B subsequently directed his correspondent to place the proceeds to A's credit, it was held that A had no insurable interest in the one third of the cargo which belonged to B.

41. Oliver *v.* Greene, 3 Mass. 133, 3 Am. Dec. 96; International Mar. Ins. Co. *v.* Winsmore, 123 Pa. St. 61, 16 Atl. 516.

Insurable interest in: Advances and disbursements see *infra*, III, D, 18. Freight see *infra*, III, D, 16. Profits see *infra*, III, D, 17, a.

Covenant to pay value in case of loss.— A part-owner in possession who has covenanted to pay the value of the coöwner's interest in the vessel in case of loss has an insurable interest to the full value of the vessel. Oliver *v.* Greene, 3 Mass. 133, 3 Am. Dec. 96.

42. Riggs *v.* Commercial Mut. Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 21 Am. St. Rep. 716, 10 L. R. A. 684 [*affirming* 57 N. Y. Super. Ct. 78, 5 N. Y. Suppl. 183 (*reversing* on rehearing 51 N. Y. Super. Ct. 466)]; Mannheim Ins. Co. *v.* Hollander, 112 Fed. 549; Seaman *v.* Enterprise F. & M. Ins. Co., 18 Fed. 250, 5 McCrary 558, 21 Fed. 778. And see Wilson *v.* Jones, L. R. 2 Exch. 139, 36 L. J. Exch. 78, 15 L. T. Rep. N. S. 669, 15 Wkly. Rep. 435. See also Fire Insurance, 19 Cyc. 589.

43. Insurable interest in: Advances and disbursements see *infra*, III, D, 18. Freight see *infra*, III, D, 16. Profits see *infra*, III, D, 17, a.

44. Murdock *v.* Franklin Ins. Co., 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572; The Gulnare, 42 Fed. 861.

45. Bartlet *v.* Walter, 13 Mass. 267, 7 Am. Dec. 143.

46. Murdock *v.* Franklin Ins. Co., 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572.

47. Oliver *v.* Greene, 3 Mass. 133, 3 Am. Dec. 96.

48. General average charges see *infra*, III, D, 5, note 64.

49. Barker *v.* Marine Ins. Co., 2 Fed. Cas. No. 992, 2 Mason 369; Mercantile Ins. Co. *v.* The Orphan Boy, 17 Fed. Cas. No. 9,431.

Purchase by master.— The master of a ship who sells a cargo at public auction after an abandonment to the underwriters, and buys it in at the sale to prevent a loss, does not become owner of the property thereby, so as to acquire an insurable interest, for he cannot become the purchaser at a sale made by his authority as agent of the owners, and if he does so there is in effect no sale. Barker *v.* Marine Ins. Co., 2 Fed. Cas. No. 992, 2 Mason 369. The same principle applies in other cases in which the master becomes the purchaser when he is also the agent to sell or to authorize a sale. Copeland *v.* Mercantile Ins. Co., 6 Pick. (Mass.) 198.

50. Mercantile Ins. Co. *v.* The Orphan Boy, 17 Fed. Cas. No. 9,431.

51. Buck *v.* Chesapeake Ins. Co., 1 Pet. (U. S.) 151, 7 L. ed. 90.

Consignees see *infra*, III, D, 7.

52. King *v.* Glover, 2 B. & P. N. R. 206, 9 Rev. Rep. 638.

sions,[53] or primage on freight.[54] A seaman or officer lower than the master has no insurable interest in his wages or any property which he is to receive in lieu of wages, it being considered contrary to public policy to permit such insurances;[55] but where he is also freighter on board, he may insure in this capacity,[56] even though he is to pay for the transportation of the goods in services;[57] and a person having an interest in the nature of a lien on a seaman's wages may insure such interest.[58] The ship's husband or manager has no insurable interest in the ship.[59]

5. Carriers and Other Bailees. A carrier,[60] a warehouseman or wharfinger,[61] or any other bailee[62] having property in his custody or possession for which he is responsible,[63] or upon which he has a lien for advances, expenses, or disbursements,[64] has an insurable interest to the extent of the full value of the property.[65]

53. Holbrook *v.* Brown, 2 Mass. 280; Providence Washington Ins. Co. *v.* Bowring, 50 Fed. 613, 1 C. C. A. 583; King *v.* Glover, 2 B. & P. N. R. 206, 9 Rev. Rep. 638.

54. Pedrick *v.* Fisher, 19 Fed. Cas. No. 10,900, 1 Sprague 565.

55. Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132; Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623; The Lady Durham, 3 Hagg. Adm. 196; Webster *v.* De Tastet, 7 T. R. 157, 4 Rev. Rep. 402. See also Galloway *v.* Morris, 3 Yeates (Pa.) 445, 449; Hawkins *v.* Twizell, 5 E. & B. 883, 2 Jur. N. S. 302, 25 L. J. Q. B. 160, 4 Wkly. Rep. 242, 85 E. C. L. 883.

56. Stone *v.* National Ins. Co., 19 Pick. (Mass.) 34, holding that the mate, who was also freighter of goods on board and was thus acting in two capacities, could insure the goods against barratry of the master and mariners. See also Galloway *v.* Morris, 3 Yeates (Pa.) 445, 449.

57. Stone *v.* National Ins. Co., 19 Pick. (Mass.) 34.

58. Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132.

59. Reed *v.* Pacific Ins. Co., 1 Metc. (Mass.) 166; Finney *v.* Warren Ins. Co., 1 Metc. (Mass.) 16, 35 Am. Dec. 343; China Mut. Ins. Co. *v.* Ward, 59 Fed. 712, 8 C. C. A. 229.

60. Savage *v.* Corn Exch. F., etc., Ins. Co., 36 N. Y. 655, 3 Transcr. App. 112; Chase *v.* Washington Mut. Ins. Co., 12 Barb. (N. Y.) 595; Van Natta *v.* Mutual Security Ins. Co., 2 Sandf. (N. Y.) 490; Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 312, 6 S. Ct. 750, 29 L. ed. 873 [*affirming* an unreported judgment of the circuit court which *affirmed* 19 Fed. Cas. No. 11,112, 10 Biss. 181; Ursula Bright Steamship Co. *v.* Amsinck, 115 Fed. 242; The Sidney, 23 Fed. 88 [*reversed* on other grounds in 27 Fed. 119]; Cunard Steamship Co. *v.* Marten, [1902] 2 K. B. 624, 71 L. J. K. B. 968, 87 L. T. Rep. N. S. 400; Stephens *v.* Australasian Ins. Co., L. R. 8 C. P. 18, 1 Aspin. 458, 42 L. J. C. P. 12, 27 L. T. Rep. N. S. 585, 21 Wkly. Rep. 228; Crowley *v.* Cohen, 3 B. & Ad. 478, 1 L. J. K. B. 158, 23 E. C. L. 214. See also Carriers, 6 Cyc. 509, 510; Fire Insurance, 19 Cyc. 585.

Ownership of the vessel by a carrier is not essential to his insurable interest in the goods carried. Chase *v.* Washington Mut. Ins. Co., 12 Barb. (N. Y.) 595. An express company may insure. Wells *v.* Pacific Ins. Co., 44 Cal. 397.

Lightermen may insure. Joyce *v.* Kennard, L. R. 7 Q. B. 78, 1 Aspin. 194, 41 L. J. Q. B. 17, 25 L. T. Rep. N. S. 932, 20 Wkly. Rep. 233; Tate *v.* Hyslop, 15 Q. B. D. 368, 5 Aspin. 487, 54 L. J. Q. B. 592, 53 L. T. Rep. N. S. 581.

61. Waters *v.* Monarch F. & L. Assur. Co., 5 E. & B. 870, 2 Jur. N. S. 375, 25 L. J. Q. B. 102, 4 Wkly. Rep. 245, 85 E. C. L. 870. And see Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 312, 6 S. Ct. 750, 29 L. ed. 873. See also Fire Insurance, 19 Cyc. 585, 586.

62. Murdock *v.* Franklin Ins. Co., 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572; Russel *v.* Union Ins. Co., 4 Dall. (U. S.) 421, 1 L. ed. 892, 21 Fed. Cas. No. 12,146, 1 Wash. 409; Dixon *v.* Whitworth, 4 C. P. D. 371, 4 Aspin. 326, 48 L. J. C. P. 538, 40 L. T. Rep. N. S. 718, 28 Wkly. Rep. 184; Routh *v.* Thompson, 13 East 274, 11 East 428, 10 Rev. Rep. 539. See Merchants' Mar. Ins. Co. *v.* Rumsey, 9 Can. Sup. Ct. 577.

63. The Sidney, 23 Fed. 88; Stephens *v.* Australasian Ins. Co., L. R. 8 C. P. 18, 1 Aspin. 458, 42 L. J. C. P. 12, 27 L. T. Rep. N. S. 585, 21 Wkly. Rep. 228.

64. Savage *v.* Corn Exch. F., etc., Ins. Co., 36 N. Y. 655, 3 Transcr. App. 112; Russel *v.* Union Ins. Co., 4 Dall. (U. S.) 421, 1 L. ed. 892, 21 Fed. Cas. No. 12,146, 1 Wash. 409; Dixon *v.* Whitworth, 4 C. P. D. 371, 4 Aspin. 326, 48 L. J. C. P. 538, 40 L. T. Rep. N. S. 718, 28 Wkly. Rep. 184.

Advances and disbursements generally see *infra*, III, D, 18.

General average charges.— The charterer of a steamship, being primarily bound to secure or discharge general average contributions due upon the goods of the several cargo owners, and entitled to a lien thereon for his reimbursement, has an insurable interest in such goods, and under a policy insuring him against general average charges on the cargo may recover the amount of contributions so paid by him on cargo owned by others as well as by himself. Dodwell *v.* Munich Assur. Co., 123 Fed. 841.

65. Savage *v.* Corn Exch. F., etc., Ins. Co., 36 N. Y. 655, 3 Transcr. App. 112.

6. Agents.[66] Ordinarily an agent, who has no further interest than that usually arising from such relation, has no such insurable interest as will permit him to take out insurance on his own account,[67] but it is otherwise if the agent holds the legal title in trust,[68] or if he is also in the position of a bailee;[69] and if he is in possession of property upon which he has a lien for advances or disbursements he may insure for his own benefit.[70] So an agent may have an insurable interest by reason of expected commissions or profits.[71] An agent of course may insure on behalf of the owners or others interested, if he is authorized to do so or his act is ratified.[72]

7. Consignees.[73] A consignee who has no interest in the goods consigned cannot insure them on his own account;[74] but a consignee who has made advances,[75] or has accepted drafts or bills of exchange against shipments,[76] or has incurred liability toward[77] or is in possession of goods,[78] or who has power to sell,[79] has an insurable interest in them. And a consignee to whom goods are consigned for sale has an insurable interest in his expected commissions or profits.[80]

8. Purchasers. One who has made a valid contract for the purchase of a vessel, cargo, or other property sufficient to transfer to him the title has an insurable interest,[81] although the price has not been paid or even definitely agreed

66. Prize agents or commissioners see *infra*, III, D, 15.

67. Sawyer *v.* Mayhew, 51 Me. 398; China Mut. Ins. Co. *v.* Ward, 59 Fed. 712, 8 C. C. A. 229; Seagrave *v.* Union Mar. Ins. Co., L. R. 1 C. P. 305, H. & R. 302, 12 Jur. N. S. 358, 35 L. J. C. P. 172, 14 L. T. Rep. N. S. 479, 14 Wkly. Rep. 690. See also Warder *v.* Horton, 4 Binn. (Pa.) 529.

68. Page *v.* Western M. & F. Ins. Co., 19 La. 49. See *infra*, III, D, 9.

69. See *supra*, III, D, 5.

70. Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 77 [*affirming* 38 N. Y. Super. Ct. 281]; Russel *v.* Union Ins. Co., 4 Dall. (U. S.) 421, 1 L. ed. 892, 21 Fed. Cas. No. 12,146, 1 Wash. 409.

Lienors generally see *infra*, III, D, 13.

Agent's advances and disbursements generally see *infra*, III, D, 18.

71. See *infra*, III, D, 17.

72. See *infra*, IV, A, 2.

73. Purchasers see *infra*, III, D, 8.

Master as consignee see *supra*, III, D, 4.

74. Toppan *v.* Atkinson, 2 Mass. 365; Seagrave *v.* Union Mar. Ins. Co., L. R. 1 C. P. 305, H. & R. 302, 12 Jur. N. S. 358, 35 L. J. C. P. 172, 14 L. T. Rep. N. S. 479, 14 Wkly. Rep. 690.

75. Russel *v.* Union Ins. Co., 4 Dall. (U. S.) 421, 1 L. ed. 892, 21 Fed. Cas. No. 12,146, 1 Wash. 409; The Sidney, 23 Fed. 88 [*reversed* on other grounds in 27 Fed. 119]; Aldrich *v.* Equitable Safety Ins. Co., 1 Fed. Cas. No. 155, 1 Woodb. & M. 272; Ebsworth *v.* Alliance Mar. Ins. Co., L. R. 8 C. P. 596, 2 Aspin. 125, 42 L. J. C. P. 305, 29 L. T. Rep. N. S. 479; Hill *v.* Secretan, 1 B. & P. 315, 4 Rev. Rep. 806; Godin *v.* London Assur. Co., 1 Burr. 489, 1 Ld. Ken. 254, 1 W. Bl. 103; Conway *v.* Gray, 10 East 536; Carruthers *v.* Sheddon, 1 Marsh. 416, 6 Taunt. 14, 1 E. C. L. 486.

A creditor for whose benefit goods are consigned to a third person by his debtor has an insurable interest in the goods. Hill *v.* Secretan, 1 B. & P. 315, 4 Rev. Rep. 806. See also *supra*, III, B.

Advances and disbursements see *infra*, III, D, 18.

76. Williams *v.* Cresent Mut. Ins. Co., 15 La. Ann. 651; Ebsworth *v.* Alliance Mar. Ins. Co., L. R. 8 C. P. 596, 2 Aspin. 125, 42 L. J. C. P. 305, 29 L. T. Rep. N. S. 479; Wolff *v.* Horncastle, 1 B. & P. 316, 4 Rev. Rep. 808.

The indorsement and delivery of a bill of lading to a creditor *prima facie* conveys the whole property in the goods from the time of its delivery; but if the intention of the parties appears to have been only to bind the net proceeds in case of the arrival of the goods, then an insurance made on account of the indorser after such indorsement is good. Hibbert *v.* Carter, 1 T. R. 745, 1 Rev. Rep. 388.

77. Sturm *v.* Atlantic Mut. Ins. Co., 38 N. Y. Super. Ct. 281 [*affirmed* in 63 N. Y. 77].

78. Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 77 [*affirming* 38 N. Y. Super. Ct. 281]; Rolker *v.* Great Western Ins. Co., 4 Abb. Dec. (N. Y.) 76, 3 Keyes 17; Buck *v.* Chesapeake Ins. Co., 1 Pet. (U. S.) 151, 7 L. ed. 90; The Sidney, 23 Fed. 88 [*reversed* on other grounds in 27 Fed. 119].

79. Pouverin *v.* Louisiana State M. & F. Ins. Co., 4 Rob. (La.) 234.

80. See *infra*, III, D, 17.

81. Inglis *v.* Stock, 10 App. Cas. 263, 5 Aspin. 422, 54 L. J. Q. B. 582, 52 L. T. Rep. N. S. 821, 33 Wkly. Rep. 877 [*affirming* 12 Q. B. D. 564, 5 Aspin. 294, 53 L. J. Q. B. 356, 51 L. T. Rep. N. S. 449 (*reversing* 9 Q. B. D. 708, 4 Aspin. 596, 52 L. J. Q. B. 30, 47 L. T. Rep. N. S. 416, 31 Wkly. Rep. 455)]; Seagrave *v.* Union Mar. Ins. Co., L. R. 1 C. P. 305, H. & R. 302, 12 Jur. N. S. 358, 35 L. J. C. P. 172, 14 L. T. Rep. N. S. 479, 14 Wkly. Rep. 690; Sparkes *v.* Marshall, 2 Bing. N. Cas. 761, 2 Hodges 44, 5 L. J. C. P. 286, 3 Scott 172, 29 E. C. L. 750;

upon ;[82] and, in the case of goods, although the bill of lading taken in the seller's name remains unindorsed.[83] So it has been held that an insurable interest in the purchaser exists where specific property has been appropriated by the vendor to the contract[84] or the property placed at the risk of the vendee[85] or put in his possession.[86] In like manner one who has an equitable interest under an executory contract for the purchase of a vessel has an insurable interest, although the vendor retains the legal title to secure payment of the balance of the price.[87] On the other hand, if the contract has not been completed and the title, possession, and risk remain in the vendor, the vendee has no interest which is insurable.[88]

Joyce *v.* Swann, 17 C. B. N. S. 84, 112 E. C. L. 84; Browning *v.* Provincial Ins. Co., L. R. 5 P. C. 263, 2 Aspin. 35, 28 L. T. Rep. N. S. 853, 21 Wkly. Rep. 587.

After stoppage in transitu the vendee ceases to have an insurable interest. Clay *v.* Harrison, 10 B. & C. 99, 8 L. J. K. B. O. S. 90, 5 M. & R. 17, 21 E. C. L. 51. But see Arnould Mar. Ins. (7th ed.) § 286.

The form of contract and acts requisite to transfer title will be found fully treated elsewhere in this work. See SALES.

Necessity for writing under statute of frauds.— The fact that the contract is not in writing has in England been held to prevent an insurable interest accruing to the vendee (Stockdale *v.* Dunlop, 4 Jur. 681, 9 L. J. Exch. 83, 6 M. & W. 224), but a contrary view has been taken in Massachusetts (Amsinck *v.* American Ins. Co., 129 Mass. 185).

Registration.— Where by statute the purchaser or transferee of a vessel acquires no title, legal or equitable, unless the vessel is registered in his name, registration is necessary to give him an insurable interest in the vessel, or in freight, the right to which is dependent on ownership. Camden *v.* Anderson, 5 T. R. 709. See *supra*, III, D, 1, note 23.

82. Joyce *v.* Swann, 17 C. B. N. S. 84, 112 E. C. L. 84.

83. Joyce *v.* Swann, 17 C. B. N. S. 84, 112 E. C. L. 84. And see Seagrave *v.* Union Mar. Ins. Co., L. R. 1 C. P. 305, 315, H. & R. 302, 12 Jur. N. S. 358, 35 L. J. C. P. 172, 14 L. T. Rep. N. S. 479, 14 Wkly. Rep. 690.

84. Harrison *v.* Fortlage, 161 U. S. 57, 16 S. Ct. 488, 40 L. ed. 616; Colonial Ins. Co. *v.* Adelaide Mar. Ins. Co., 12 App. Cas. 128, 6 Aspin. 94, 56 L. J. P. C. 19, 56 L. T. Rep. N. S. 173, 35 Wkly. Rep. 636; Inglis *v.* Stock, 10 App. Cas. 263, 5 Aspin. 422, 54 L. J. Q. B. 582, 52 L. T. Rep. N. S. 821, 33 Wkly. Rep. 877 [*affirming* 12 Q. B. D. 564, 5 Aspin. 294, 53 L. J. Q. B. 356, 51 L. T. Rep. N. S. 449 (*reversing* 9 Q. B. D. 708, 4 Aspin. 596, 52 L. J. Q. B. 30, 47 L. T. Rep. N. S. 416, 31 Wkly. Rep. 455)]; Sparkes *v.* Marshall, 2 Bing. N. Cas. 761, 2 Hodges 44, 5 L. J. C. P. 286, 3 Scott 172, 29 E. C. L. 750.

"No arrival, no sale." — Persons who agree to purchase goods to be shipped by a certain vessel with a provision, "No arrival, no sale," have an insurable interest in the goods. Harrison *v.* Fortlage, 161 U. S. 57, 16 S. Ct. 488, 40 L. ed. 616. *Compare* Fragano *v.* Long, 4 B. & C. 219, 6 D. & R. 283, 3 L. J. K. B. O. S. 177, 10 E. C. L. 551.

Partial deliveries.— Where the charterers of a vessel were also the purchasers of a cargo of wheat to be shipped on board, and the master of the vessel from time to time received delivery from the vendors, it was held that such delivery from time to time was a delivery to the purchasers, that it vested in them a right of possession and property, and that consequently they had an insurable interest in such wheat as had been so delivered. Colonial Ins. Co. *v.* Adelaide Mar. Ins. Co., 12 App. Cas. 128, 6 Aspin. 94, 56 L. J. P. C. 19, 56 L. T. Rep. N. S. 173, 35 Wkly. Rep. 636. To the same effect see Inglis *v.* Stock, 10 App. Cas. 263, 5 Aspin. 422, 54 L. J. Q. B. 582, 52 L. T. Rep. N. S. 821, 33 Wkly. Rep. 877 [*affirming* 12 Q. B. D. 564, 5 Aspin. 294, 53 L. J. Q. B. 356, 51 L. T. Rep. N. S. 449 (*reversing* 9 Q. B. D. 708, 4 Aspin. 596, 52 L. J. Q. B. 30, 47 L. T. Rep. N. S. 416, 31 Wkly. Rep. 455)]. But in Anderson *v.* Morice, 1 App. Cas. 713, 3 Aspin. 290, 46 L. J. Q. B. 11, 35 L. T. Rep. N. S. 566, 25 Wkly. Rep. 14, where A. & Co. contracted with B. & Co. for the purchase of a cargo of crop Rangoon rice, per "Sunbeam," and B. & Co. chartered the "Sunbeam" to go to Rangoon and ship a cargo of rice, and A. & Co. effected a policy of insurance on rice from Rangoon, to port of discharge by the "Sunbeam," and the "Sunbeam" went to Rangoon, and after eight thousand eight hundred and seventy-eight bags of rice were on board sank, and the ship and the rice were totally lost, when four hundred more bags would have completed the loading, and the captain afterward signed bills of lading for the eight thousand eight hundred and seventy-eight bags, and B. & Co. drew bills for the price upon A. & Co., who accepted and paid them with knowledge of the loss, it was held that the title to the rice did not pass and that A. & Co. had no insurable interest.

85. Inglis *v.* Stock, 10 App. Cas. 263, 5 Aspin. 422, 54 L. J. Q. B. 582, 52 L. T. Rep. N. S. 821, 33 Wkly. Rep. 877; Anderson *v.* Morice, 1 App. Cas. 713, 3 Aspin. 290, 46 L. J. Q. B. 11, 35 L. T. Rep. N. S. 566, 25 Wkly. Rep. 14.

86. Kenny *v.* Clarkson, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336. See also Simmes *v.* Mar. Ins. Co., 22 Fed. Cas. No. 12,862, 2 Cranch C. C. 618.

87. Rider *v.* Ocean Ins. Co., 20 Pick. (Mass.) 259. See also Simmes *v.* Mar. Ins. Co., 22 Fed. Cas. No. 12,862, 2 Cranch C. C. 618.

88. Anderson *v.* Morice, 1 App. Cas. 713,

9. Trustees and Beneficiaries. One who holds property as trustee has an insurable interest,[89] as has also the beneficiary or *cestui que trust.*[90]

10. Sureties. There is an insurable interest in one who as surety in a forthcoming bond is bound for the delivery of an attached vessel,[91] or who is surety for payment of the value of a cargo in case of its condemnation by a foreign court and has possession of the same for his indemnity.[92]

11. Mortgagees.[93] A mortgagee has an insurable interest in the property covered by his mortgage to the extent of the mortgage debt,[94] and this notwithstanding that he has assigned the mortgage as collateral security for a debt,[95] or that a superior lien exists in favor of another, if anything remains to the insured,[96] or that the mortgage is not recorded and is for that reason ineffectual as against third persons, since it is good as between the parties.[97]

12. Lenders on Bottomry and Respondentia. One who lends money on bottomry has an insurable interest in the ship to the amount of the

3 Aspin. 290, 46 L. J. Q. B. 11, 35 L. T. Rep. N. S. 566, 25 Wkly. Rep. 14; Seagrave *v.* Union Mar. Ins. Co., L. R. 1 C. P. 305, H. & R. 302, 12 Jur. N. S. 358, 35 L. J. C. P. 172, 14 L. T. Rep. N. S. 479, 14 Wkly. Rep. 690; Fragano *v.* Long, 4 B. & C. 219, 6 D. & R. 283, 3 L. J. K. B. O. S. 177, 10 E. C. L. 551; and other cases cited in the preceding notes.

89. *Connecticut.*— Bulkley *v.* Derby Fishing Co., 1 Conn. 571.

Louisiana.— Page *v.* Western M. & F. Ins. Co., 19 La. 49.

Massachusetts.— Finney *v.* Warren Ins. Co., 1 Metc. 16, 35 Am. Dec. 343; Lazarus *v.* Commonwealth Ins. Co., 19 Pick. 81.

New York.— Hughes *v.* Mercantile Mut. Ins. Co., 44 How. Pr. 351 [*reversed* on other grounds in 55 N. Y. 265, 14 Am. Rep. 254].

United States.— Young *v.* Union Ins. Co., 24 Fed. 279.

England.— Ebsworth *v.* Alliance Mar. Ins. Co., L. R. 8 C. P. 596, 2 Aspin. 125, 42 L. J. C. P. 305, 29 L. T. Rep. N. S. 479; Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623; *Ex p.* Houghton, 1 Rose 177, 17 Ves. Jr. 251, 11 Rev. Rep. 73, 34 Eng. Reprint 97; Rhind *v.* Wilkinson, 2 Taunt. 237, 11 Rev. Rep. 551; *Ex p.* Yallop, 15 Ves. Jr. 60, 10 Rev. Rep. 24, 33 Eng. Reprint 677.

Canada.— Moore *v.* Home Ins. Co., 14 L. C. Jur. 77.

See 28 Cent. Dig. tit. "Insurance," § 154 *et seq.*

An administrator has an insurable interest in the property of the estate. Finney *v.* Warren Ins. Co., 1 Metc. (Mass.) 16, 35 Am. Dec. 343.

Assignee for benefit of creditors see *infra*, III, D, 14.

90. Bulkley *v.* Derby Fishing Co., 1 Conn. 571; Lazarus *v.* Commonwealth Ins. Co., 19 Pick. (Mass.) 81; Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249; Hill *v.* Secretan, 1 B. & P. 315, 4 Rev. Rep. 806; *Ex p.* Houghton, 1 Rose 177, 17 Ves. Jr. 251, 11 Rev. Rep. 73, 34 Eng. Reprint 97; *Ex p.* Yallop, 15 Ves. Jr. 60, 10 Rev. Rep. 24, 33 Eng. Reprint 677. And see *supra*, III, B.

Assignor for benefit of creditors see *infra*, III, D, 14.

Stock-holders in corporation see *supra*, III, D, 2, b.

91. Fireman's Ins. Co. *v.* Powell, 13 B. Mon. (Ky.) 311.

92. Russel *v.* Union Ins. Co., 4 Dall. (U. S.) 421, 1 L. ed. 892, 21 Fed. Cas. No. 12,146, 1 Wash. 409.

93. **Mortgagor** see *supra*, III, D, 1, text and note 30.

94. *Louisiana.*— Bell *v.* Western M. & F. Ins. Co., 5 Rob. 423, 39 Am. Dec. 542.

Massachusetts.— Mercantile Mar. Ins. Co. *v.* Clark, 118 Mass. 288; Clark *v.* Mercantile Mar. Ins. Co., 100 Mass. 509, bill of sale absolute in form, but intended as security only.

New York.— Buffalo Steam Engine Works *v.* Sun Mut. Ins. Co., 17 N. Y. 401; Fernandez *v.* Great Western Ins. Co., 3 Rob. 457 [*reversed* on other grounds in 48 N. Y. 571, 8 Am. Rep. 571]; Slocovich *v.* Oriental Mut. Ins. Co., 13 Daly 264 [*affirmed* in 108 N. Y. 56, 14 N. E. 802]; Roussel *v.* St. Nicholas Ins. Co., 52 How. Pr. 495.

Ohio.— Williams *v.* Cincinnati Ins. Co., Wright 542.

Pennsylvania.— See Wells *v.* Philadelphia Ins. Co., 9 Serg. & R. 103.

England.— Ebsworth *v.* Alliance Mar. Ins. Co., L. R. 8 C. P. 596, 2 Aspin. 125, 42 L. J. C. P. 305, 29 L. T. Rep. N. S. 479; Irving *v.* Richardson, 2 B. & Ad. 193, 9 L. J. K. B. O. S. 225, 1 M. & Rob. 153, 22 E. C. L. 88; Smith *v.* Lascelles, 2 T. R. 187; Glover *v.* Black, 1 W. Bl. 396.

Canada.— Crawford *v.* St. Lawrence Ins. Co., 8 U. C. Q. B. 135. And see Archbold *v.* Merchants' Mar. Ins. Co., 16 Nova Scotia 98.

Bill of sale reserving lien.— Where the owner of a vessel sells it on credit and gives a bill of sale reserving an interest as mortgagee, he has still an insurable interest. Williams *v.* Cincinnati Ins. Co., Wright (Ohio) 542.

95. Keith *v.* Anchor Mar. Ins. Co., 15 Nova Scotia 402 [*affirmed* in 9 Can. Sup. Ct. 483].

96. Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542.

97. Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542.

bond,[98] although a personal liability has accrued against the owner by reason of a deviation [99] or breach of a condition;[1] but the bond must be executed under such circumstances and be in such form as to create a valid maritime hypothecation of the ship.[2] The lender on respondentia has an insurable interest in the cargo and freight to the same extent as the lender on bottomry has in the ship.[3] Sums loaned on bottomry are also a separate and distinct subject of insurance.[4] The insurable interest of the borrower has been already considered.[5]

13. LIENORS.[6] Any person having a lien upon a vessel, cargo, or other property, or an interest in the nature of a lien,[7] whether it be a common-law lien dependent upon possession,[8] or a maritime lien,[9] has an insurable interest to the extent of his lien; and it can make no difference that the lienor has a right to pursue his debtor personally for the debt on account of which the lien exists,[10] or that there is a superior lien in favor of another, if anything may remain to the insured.[11]

98. Simonds *v.* Hodgson, 3 B. & Ad. 50, 1 L. J. K. B. 51, 23 E. C. L. 32; Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623; Boddington's Case, 2 Hagg. Adm. 422; Glover *v.* Black, 1 W. Bl. 396.

99. Harman *v.* Vanhatton, 1 Eq. Cas. Abr. 371, 21 Eng. Reprint 1110, 2 Vern. Ch. 716, 23 Eng. Reprint 1071.

1. Cassa Marittima *v.* Phœnix Ins. Co., 129 N. Y. 490, 29 N. E. 962.

2. Simonds *v.* Hodgson, 3 B. & Ad. 50, 1 L. J. K. B. 51, 23 E. C. L. 32; Stainbank *v.* Shepard, 13 C. B. 418, 1 C. L. R. 609, 17 Jur. 1032, 22 L. J. Exch. 341, 1 Wkly. Rep. 505, 76 E. C. L. 418; Stainbank *v.* Fenning, 11 C. B. 51, 15 Jur. 1082, 20 L. J. C. P. 226, 73 E. C. L. 51.

Sufficiency of bottomry or respondentia bond see Simonds *v.* Hodgson, 3 B. & Ad. 50, 1 L. J. K. B. 51, 23 E. C. L. 32; Stainbank *v.* Shepard, 13 C. B. 418, 1 C. L. R. 609, 17 Jur. 1032, 22 L. J. Exch. 341, 1 Wkly. Rep. 505, 76 E. C. L. 418; Stainbank *v.* Fenning, 11 C. B. 51, 15 Jur. 1082, 20 L. J. C. P. 226, 73 E. C. L. 51; and, generally, SHIPPING.

3. Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623.

4. Force *v.* Providence Washington Ins. Co., 35 Fed. 767.

5. See *supra*, III, D, 1, text and note 32.

6. **Insurable interest of:** Agent see *supra*, III, D, 6. Carriers and other bailees see *supra*, III, D, 5. Consignee see *supra*, III, D, 7. Lenders on bottomry or respondentia see *supra*, III, D, 12. Mortgagees see *supra*, III, D, 11. Person having lien on seamen's wages see *supra*, III, D, 4, text and note 58.

Advances and disbursements see *infra*, III, D, 18.

7. *Louisiana.*— Bell *v.* Western M. & F. Ins. Co., 5 Rob. 423, 39 Am. Dec. 542, vendor's lien.

Massachusetts.— Putnam *v.* Mercantile Mar. Ins. Co., 5 Metc. 386.

New York.— Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 77 [*affirming* 38 N. Y. Super. Ct. 281].

Ohio.— Williams *v.* Cincinnati Ins. Co., Wright 542, lien for purchase reserved in bill of sale for vessel.

Pennsylvania.— Wells *v.* Philadelphia Ins. Co., 9 Serg. & R. 103.

United States.— Merchants Mut. Ins. Co. *v.* Baring, 20 Wall. 159, 22 L. ed. 250; Russel *v.* Union Ins. Co., 4 Dall. 421, 1 L. ed. 892, 21 Fed. Cas. No. 12,146, 1 Wash. 409; The Gulnare, 42 Fed. 861; Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132; Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127.

England.— Moran *v.* Uzielli, [1905] 2 K. B. 555, 10 Com. Cas. 203, 74 L. J. K. B. 494, 21 T. L. R. 378, 54 Wkly. Rep. 250; Briggs *v.* Merchant Traders' Ship Loan, etc., Assoc., 13 Q. B. 167, 13 Jur. 787, 18 L. J. Q. B. 178, 66 E. C. L. 167; Dixon *v.* Whitworth, 4 C. P. D. 371, 4 Aspin. 326, 48 L. J. C. P. 538, 40 L. T. Rep. N. S. 718, 28 Wkly. Rep. 184; Wolff *v.* Horncastle, 1 B. & P. 316, 4 Rev. Rep. 808; Carruthers *v.* Sheddon, 1 Marsh. 416, 6 Taunt. 14, 1 E. C. L. 486.

See 28 Cent. Dig. tit. "Insurance," § 154 *et seq.*

8. Russel *v.* Union Ins. Co., 4 Dall. (U. S.) 421, 1 L. ed. 892, 21 Fed. Cas. No. 12,146, 1 Wash. 409; Dixon *v.* Whitworth, 4 C. P. D. 371, 4 Aspin. 326, 48 L. J. C. P. 538, 40 L. T. Rep. N. S. 718, 28 Wkly. Rep. 184.

An agreement for a lien without the retention of possession does not create an insurable interest. Folsom *v.* Merchants' Mut. Mar. Ins. Co., 38 Me. 414, holding that a merchant who sold to a fishing vessel unconditionally an outfit for a voyage, under an agreement that he should have a lien on the outfit and the voyage, had no insurable interest, as the agreement created no lien.

9. Dodwell *v.* Munich Assur. Co., 123 Fed. 841; Moran *v.* Uzielli, [1905] 2 K. B. 555, 10 Com. Cas. 203, 74 L. J. K. B. 494, 21 T. L. R. 378, 54 Wkly. Rep. 250.

Ship-owner who has paid salvage on cargo. — A ship-owner who has paid money in order to release the ship and cargo from a claim for salvage has a lien on the cargo for the proportion of those expenses payable to him by the owners of the goods, and an insurable interest in the cargo in respect of such lien. Briggs *v.* Merchant Traders' Ship Loan, etc., Assoc., 13 Q. B. 167, 13 Jur. 787, 18 L. J. Q. B. 178, 66 E. C. L. 167.

10. Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132.

11. Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542.

14. Assignors and Assignees For Benefit of Creditors. An assignee for the benefit of creditors has an insurable interest in the assigned property,[12] as has also the assignor, at least if the property assigned is of greater value than the amount of his debts.[13]

15. Captors, Prize Agents, Etc. The captors of a vessel or cargo, even before condemnation, have an insurable interest in the property captured,[14] although their right is liable to be defeated by an adjudication of the court of admiralty against them to restore the prize to the former owners.[15] The sovereign also has an insurable interest in a prize,[16] and the captors, who must be taken to represent him, may insure for his benefit as well as their own.[17] A prize agent appointed to act on behalf of all interested in the capture may effect the insurance on their behalf.[18] Commissioners appointed by the crown for the care, management, and sale of prizes have an insurable interest in ships captured by a British man-of-war on their way to England.[19]

16. Insurable Interest in Freight and Passage Money — a. In General. Freight has always been considered a proper subject for marine insurance.[20] The right to freight results from the right of ownership, and therefore the owner is generally the only person having an insurable interest,[21] and he has such interest, although the vessel sails under a charter-party,[22] or, although the freight has been prepaid, if there be no agreement that it is to be retained by the ship-owner in all events.[23] Neither the cargo owner[24] nor the charterer has such interest in the freight to be

12. Pike *v.* Merchants' Mut. Ins. Co., 26 La. Ann. 392; Wells *v.* Philadelphia Ins. Co., 9 Serg. & R. (Pa.) 103.

13. Lazarus *v.* Commonwealth Ins. Co., 19 Pick. (Mass.) 81.

14. Russel *v.* Union Ins. Co., 4 Dall. (U. S.) 421, 1 L. ed. 892, 21 Fed. Cas. No. 12,146, 1 Wash. 409; Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623; Stirling *v.* Vaughan, 2 Campb. 225, 11 East 619; Le Cras *v.* Hughes, 3 Dougl. 81, 26 E. C. L. 64; Robertson *v.* Hamilton, 14 East 522, 13 Rev. Rep. 303; Routh *v.* Thompson, 13 East 274, 11 East 428, 10 Rev. Rep. 539; Boehm *v.* Bell, 8 T. R. 154, 4 Rev. Rep. 620; Craufurd *v.* Hunter, 8 T. R. 13, 4 Rev. Rep. 576; Nichol *v.* Goodall, 10 Ves. Jr. 155, 32 Eng. Reprint 803.

15. Stirling *v.* Vaughan, 2 Campb. 225, 11 East 619; Boehm *v.* Bell, 8 T. R. 154, 4 Rev. Rep. 620; and other cases cited in the preceding note.

Defeasible interest generally see *supra*, III, B, text and note 13.

16. Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623; Stirling *v.* Vaughan, 2 Campb. 225, 11 East 619; Routh *v.* Thompson, 13 East 274, 11 East 428, 10 Rev. Rep. 539.

17. Stirling *v.* Vaughan, 2 Campb. 225, 11 East 619; Routh *v.* Thompson, 13 East 274, 11 East 428, 10 Rev. Rep. 539.

18. Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127; Stirling *v.* Vaughan, 2 Campb. 225, 11 East 619; Routh *v.* Thompson, 13 East 274, 11 East 428, 10 Rev. Rep. 539.

19. Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623; Craufurd *v.* Hunter, 8 T. R. 13, 4 Rev. Rep. 576.

20. Cole *v.* Louisiana Ins. Co., 2 Mart. N. S. (La.) 167; McGaw *v.* Ocean Ins. Co., 23 Pick. (Mass.) 405; Adams *v.* Warren Ins. Co., 22 Pick. (Mass.) 163; Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623.

Freight, as that term is used in marine insurance, signifies the earnings or profits derived by the ship-owner or the hirer of a ship from the use of it himself or by letting it to others, or by carrying goods for others. The Bedouin, [1894] P. 1, 7 Aspin. 391, 63 L. J. Adm. 30, 69 L. T. Rep. N. S. 782, 6 Reports 693, 42 Wkly. Rep. 292. And see Minturn *v.* Warren Ins. Co., 2 Allen (Mass.) 86; Lord *v.* Neptune Ins. Co., 10 Gray (Mass.) 109; Robinson *v.* Manufacturers' Ins. Co., 1 Metc. (Mass.) 143; Clark *v.* Ocean Ins. Co., 16 Pick. (Mass.) 289; Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429; Denoon *v.* Home, etc., Assur. Co., L. R. 7 C. P. 341, 1 Aspin. 309, 41 L. J. C. P. 162, 26 L. T. Rep. N. S. 628, 20 Wkly. Rep. 970.

21. Williams *v.* Insurance Co. of North America, 1 Hilt. (N. Y.) 345; Camden *v.* Anderson, 5 T. R. 709.

Partners of owners.— Where two partners purchased a ship under a bill of sale, and afterward took in two other partners, but there was no transfer of the ship to them jointly with the others, it was held that the four partners had no insurable interest in the freight of the ship. Camden *v.* Anderson, 5 T. R. 709.

An assignee of the freight has an insurable interest in it. Mestaer *v.* Gillespie, 11 Ves. Jr. 621, 8 Rev. Rep. 261, 32 Eng. Reprint 1230.

22. Hodgson *v.* Mississippi Ins. Co., 2 La. 341.

23. Ogden *v.* New York Mut. Ins. Co., 8 Bosw. (N. Y.) 248 [*affirmed* in 35 N. Y. 418]; Ellis *v.* Lafone, 8 Exch. 546, 17 Jur. 213, 22 L. J. Exch. 124, 1 Wkly. Rep. 200.

24. Minturn *v.* Warren Ins. Co., 2 Allen (Mass.) 86.

earned by the ship,[25] except when the charterer sets up the ship as a general freighter[26] or uses it for the carriage of his own goods,[27] in which case he has an insurable interest in the freight to be paid to him or benefit accruing to him.

b. When Interest Exists. Where there is no contract and no part of the goods expected to be carried are on board, there is no insurable interest in freight,[28] although there are goods ready for shipment[29] or the master is provided with funds for the purpose of purchasing a cargo.[30] But where a part of the goods has been loaded and the balance is ready, there is an insurable interest in the whole freight.[31] If the ship-owner has made a binding contract for freight with a third party,[32] or has goods to be shipped on his own account,[33] and the ship is in readiness to receive them,[34] or if he has done something with a view of enabling her to receive them,[35] such as commencing a voyage to the port of loading,[36] he has an insurable interest, and this notwithstanding the contract is not in writing.[37]

In advanced freight see *infra*, III, D, 16, c.

25. Huth *v.* New York Mut. Ins. Co., 8 Bosw. (N. Y.) 538; Mellen *v.* National Ins. Co., 1 Hall (N. Y.) 452; Robbins *v.* New York Ins. Co., 1 Hall (N. Y.) 325; Cheriot *v.* Barker, 2 Johns. (N. Y.) 346, 3 Am. Dec. 437.

26. Clark *v.* Ocean Ins. Co., 16 Pick. (Mass.) 289.

27. Huth *v.* New York Mut. Ins. Co., 8 Bosw. (N. Y.) 538. But see Mellen *v.* National Ins. Co., 1 Hall (N. Y.) 452.

28. Gordon *v.* American Ins. Co., 4 Den. (N. Y.) 360; Patrick *v.* Ludlow, 3 Johns. Cas. (N. Y.) 10, 2 Am. Dec. 130; Smith *v.* Williams, 2 Cai. Cas. (N. Y.) 110; Hart *v.* Delaware Ins. Co., 11 Fed. Cas. No. 6,150, 2 Wash. 346; Tonge *v.* Watts, 2 Str. 1251.

29. Adams *v.* Pennsylvania Ins. Co., 1 Rawle (Pa.) 97; Tonge *v.* Watts, 2 Str. 1251.

30. Adams *v.* Pennsylvania Ins. Co., 1 Rawle (Pa.) 97.

31. Robinson *v.* Manufacturers' Ins. Co., 1 Metc. (Mass.) 143; De Longuemere *v.* New York F. Ins. Co., 10 Johns. (N. Y.) 201; Hart *v.* Delaware Ins. Co., 11 Fed. Cas. No. 6,150, 2 Wash. 346; Parke *v.* Hebson [*cited* in Truscott *v.* Christie, 2 B. & B. 320, 326, 329, 23 Rev. Rep. 451, 453, 6 E. C. L. 164, 167, 168]; Montgomery *v.* Eggington, 3 T. R. 362, 1 Rev. Rep. 718.

32. Adams *v.* Warren Ins. Co., 22 Pick. (Mass.) 163; Gordon *v.* American Ins. Co., 4 Den. (N. Y.) 360; Brankelow Steamship Co. *v.* Canton Ins. Office, [1899] 2 Q. B. 178, 8 Aspin. 563, 68 L. J. Q. B. 811, 81 L. T. Rep. N. S. 6, 47 Wkly. Rep. 611; Barber *v.* Fleming, L. R. 5 Q. B. 59, 10 B. & S. 879, 39 L. J. Q. B. 25, 18 Wkly. Rep. 254; The Copernicus, [1896] P. 237, 8 Aspin. 166, 65 L. J. P. D. & Adm. 108, 74 L. T. Rep. N. S. 757; Flint *v.* Flemyng, 1 B. & Ad. 48, 8 L. J. K. B. O. S. 350, 20 E. C. L. 391.

Insurable under time policy.— Freight may be insured under a time policy, although it cannot be earned until after the time for which it is insured. Michael *v.* Gillespy, 2 C. B. N. S. 627, 3 Jur. N. S. 1219, 26 L. J. C. P. 306, 89 E. C. L. 627.

33. Gordon *v.* American Ins. Co., 4 Den. (N. Y.) 360.

34. Gordon *v.* American Ins. Co., 4 Den. (N. Y.) 360; Brankelow Steamship Co. *v.* Canton Ins. Office, [1899] 2 Q. B. 178, 8 Aspin. 563, 68 L. J. Q. B. 811, 81 L. T. Rep. N. S. 6, 47 Wkly. Rep. 563.

35. Melcher *v.* Ocean Ins. Co., 60 Me. 77; Foley *v.* United F. & M. Ins. Co., L. R. 5 C. P. 155, 39 L. J. C. P. 206, 22 L. T. Rep. N. S. 108, 18 Wkly. Rep. 437; Truscott *v.* Christie, 2 B. & B. 320, 5 Moore C. P. 33, 6 E. C. L. 164.

If something has been done under the contract whereby the freight is to be earned, it is not necessary that the vessel be in readiness to receive the cargo. Foley *v.* United F. & M. Ins. Co., L. R. 5 C. P. 155, 39 L. J. C. P. 206, 22 L. T. Rep. N. S. 108, 18 Wkly. Rep. 437.

36. Hodgson *v.* Mississippi Ins. Co., 2 La. 341; Robinson *v.* Manufacturers' Ins. Co., 1 Metc. (Mass.) 143; Adams *v.* Warren Ins. Co., 22 Pick. (Mass.) 163; Mercantile Steamship Co. *v.* Tyser, 7 Q. B. D. 73, 5 Aspin. 6 note, 29 Wkly. Rep. 790; Barber *v.* Fleming, L. R. 5 Q. B. 59, 10 B. & S. 879, 39 L. J. Q. B. 25, 18 Wkly. Rep. 254; Warre *v.* Miller, 4 B. & C. 538, 10 E. C. L. 693, 1 C. & P. 237, 12 E. C. L. 143, 7 D. & R. 1, 4 L. J. K. B. O. S. 8; Mackenzie *v.* Shedden, 2 Campb. 431, 11 Rev. Rep. 759; Thompson *v.* Taylor, 6 T. R. 478, 3 Rev. Rep. 233.

Illustration.— Plaintiff chartered his vessel to sail from New York to San Francisco, thence to Callao, thence to the Chincha Islands, and there to take on a cargo of guano for Hamburg or Rotterdam. Defendants thereupon caused plaintiff to be insured, "lost or not lost," several sums, respectively, on charter, primage, and property on board, "at and from New York to San Francisco." The vessel sailed in accordance with the charter, and was wrecked between New York and San Francisco, and condemned and sold. In an action on the policy it was held that plaintiff's interest in the guano charter commenced when his vessel left New York for San Francisco, and that defendants were liable. Melcher *v.* Ocean Ins. Co., 60 Me. 77.

37. Adams *v.* Pennsylvania Ins. Co., 1 Rawle (Pa.) 97; Warre *v.* Miller, 4 B. & C.

c. Advance Freight. One paying freight in advance under a contract expressly providing that it is not recoverable in any event may cause the same to be insured; but if the freight is merely prepaid without any such stipulation, so that it is recoverable back in case of non-performance of the contract of carriage, the cargo owner has no insurable interest in it.[38]

d. Passage Money. Passage money is insurable and is governed by the same rules as are applicable to freight.[39]

17. Insurable Interest in Profits or Commissions — a. In Profits. Profits expected to be realized from a marine adventure are a proper subject of marine insurance,[40] and may be insured by a valued policy[41] against any of the events by which the realization of profit might be defeated, viz., loss of the ship, or of the whole or a part of the goods, or delay of the voyage.[42] To have an insurable interest in profits the insured must have a legal interest in the goods or adventure out of which the profits are expected to be realized.[43]

538, 10 E. C. L. 693, 1 C. & P. 237, 12 E. C. L. 143, 7 D. & R. 1, 4 L. J. K. B. O. S. 8; Patrick *v.* Eames, 3 Campb. 441.

38. Katheman *v.* General Mut. Ins. Co., 12 La. Ann. 35; Lee *v.* Barreda, 16 Md. 190; Minturn *v.* Warren Ins. Co., 2 Allen (Mass.) 86; Mellen *v.* National Ins. Co., 1 Hall (N. Y.) 452; Robbins *v.* New York Ins. Co., 1 Hall (N. Y.) 325; Sansom *v.* Ball, 4 Dall. (Pa.) 459, 1 L. ed. 908; Allison *v.* Bristol Mar. Ins. Co., 1 App. Cas. 209, 3 Aspin. 178, 34 L. T. Rep. N. S. 809, 24 Wkly. Rep. 1039; Manfield *v.* Maitland, 4 B. & Ald. 582, 23 Rev. Rep. 402, 6 E. C. L. 610; Wilson *v.* Royal Exch. Assur. Co., 2 Campb. 623, 12 Rev. Rep. 760; Wilson *v.* Martin, 11 Exch. 684, 25 L. J. Exch. 217; De Silvale *v.* Kendall, 4 M. & S. 37, 16 Rev. Rep. 373.

A party, being a stranger to the property in both a vessel and her cargo, cannot create an insurable interest in the freight by spontaneously advancing the amount of such freight to the master or owner of the vessel. Orchard *v.* Ætna Ins. Co., 5 U. C. C. P. 445.

39. Ogden *v.* New York Mut. Ins. Co., 8 Bosw. (N. Y.) 248 [*affirmed* in 35 N. Y. 418]; Truscott *v.* Christie, 2 B. & B. 320, 5 Moore C. P. 33, 6 E. C. L. 164.

40. *Connecticut.*— Bulkley *v.* Derby Fishing Co., 1 Conn. 571; Fosdick *v.* Norwich Mar. Ins. Co., 3 Day 108.

Massachusetts. — Putnam *v.* Mercantile Mar. Ins. Co., 5 Metc. 386; French *v.* Hope Ins. Co., 16 Pick. 397.

New York.— Tom *v.* Smith, 3 Cai. 245; Abbott *v.* Sebor, 3 Johns. Cas. 39, 2 Am. Dec. 139.

United States.— Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222, 7 L. ed. 659; Providence Washington Ins. Co. *v.* Bowring, 50 Fed. 613, 1 C. C. A. 583.

England.— Wilson *v.* Jones, L. R. 2 Exch. 139, 36 L. J. Exch. 78, 15 L. T. Rep. N. S. 669, 15 Wkly. Rep. 435; Ionides *v.* Pender, 1 Aspin. 432, 27 L. T. Rep. N. S. 244; Grant *v.* Parkinson, 3 B. & P. 85 note, 3 Dougl. 16, 6 T. R. 483, 26 E. C. L. 22; Eyre *v.* Clover, 3 Campb. 276, 16 East 218, 13 Rev. Rep. 801; Henrickson *v.* Margetson, 2 East 549 note, 6 Rev. Rep. 509 note; Barclay *v.* Cousins, 2 East 544, 6 Rev. Rep. 505. See also Halhead *v.* Young, 6 E. & B. 312, 2 Jur. N. S. 970, 25 L. J. Q. B. 290, 4 Wkly. Rep. 530, 88 E. C. L. 312.

See 28 Cent. Dig. tit. "Insurance," § 154 *et seq.*

Adventure of laying cable.— The interest of a stock-holder in the adventure of laying an Atlantic cable; that is, the profits to be derived by him from the success of the adventure, are held an insurable interest. Wilson *v.* Jones, L. R. 2 Exch. 139, 36 L. J. Exch. 78, 15 L. T. Rep. N. S. 669, 15 Wkly. Rep. 435.

41. Mumford *v.* Hallett, 1 Johns. (N. Y.) 433; Wilson *v.* Jones, L. R. 2 Exch. 139, 36 L. J. Exch. 78, 15 L. T. Rep. N. S. 669, 15 Wkly. Rep. 435; Grant *v.* Parkinson, 3 B. & P. 85 note, 3 Dougl. 16, 6 T. R. 483, 26 E. C. L. 22; Eyre *v.* Glover, 3 Campb. 276, 16 East 218, 13 Rev. Rep. 801; Barclay *v.* Cousins, 2 East 544, 6 Rev. Rep. 505.

42. McSwiney *v.* Royal Exch. Assur. Co., 14 Q. B. 634, 14 Jur. 998, 19 L. J. Q. B. 222, 68 E. C. L. 634.

43. Fosdick *v.* Norwich Mar. Ins. Co., 3 Day (Conn.) 108; Abbott *v.* Sebor, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139; Grant *v.* Parkinson, 3 B. & P. 85 note, 3 Dougl. 16, 6 T. R. 483, 26 E. C. L. 22; Stockdale *v.* Dunlop, 4 Jur. 681, 9 L. J. Exch. 83, 6 M. & W. 224.

Joint owners of cargo.— Where two of several plaintiffs in an action on a policy of insurance were owners of the vessel insured, and all were in copartnership and joint owners of the cargo, it was held that a sufficient interest in plaintiffs was shown. Bulkley *v.* Derby Fishing Co., 1 Conn. 571.

Under agreement for share of profits.— In an action on a policy of insurance on profits valued at one thousand dollars, where it appeared that plaintiff had made a contract with a third person that, in consideration of one thousand dollars paid by him to such person, he should have a right to take one half of any palm leaf imported by such person, on paying one half of the costs and charges; that plaintiff agreed to take one half of a certain cargo, and advanced six hundred dollars on it before its arrival, but that such sum was repaid him on learning

b. In Commissions. The commissions to be paid to the master,[44] supercargo,[45] or consignee[46] for the disposal of goods are insurable interests. It must, however, appear that the goods were on board or were ready and had been contracted to be put on board at the time of the loss.[47] The assignee of commissions as security also has an insurable interest therein.[48] Commissions for procuring a charter-party are not insurable.[49]

18. Insurable Interest in Advances and Disbursements.[50] Persons making advances or disbursements for the benefit of a maritime adventure under circumstances and conditions which give them a lien on the ship, cargo, or freight have an insurable interest in the property against which their lien exists,[51] but if no lien

that the palm leaf had been discharged at Charleston in a damaged condition, and that there would have been a profit if the palm leaf had arrived safely at Boston, it was held that plaintiff had an insurable interest in the profits. French *v.* Hope Ins. Co., 16 Pick. (Mass.) 397.

44. Holbrook *v.* Brown, 2 Mass. 280; Providence Washington Ins. Co. *v.* Bowring, 50 Fed. 613, 1 C. C. A. 583; King *v.* Glover, 2 B. & P. N. R. 206, 9 Rev. Rep. 638. And see *supra*, III, D, 4.

45. New York Ins. Co. *v.* Robinson, 1 Johns. (N. Y.) 616; Wells *v.* Philadelphia Ins. Co., 9 Serg. & R. (Pa.) 103.

46. Putnam *v.* Mercantile Mar. Ins. Co., 5 Metc. (Mass.) 386; French *v.* Hope Ins. Co., 16 Pick. (Mass.) 397; Warder *v.* Horton, 4 Binn. (Pa.) 529; Knox *v.* Wood, 1 Campb. 543, 10 Rev. Rep. 746.

47. Knox *v.* Wood, 1 Campb. 543, 10 Rev. Rep. 746. In this case A, residing in Dublin, having agreed with B at Jamaica to send out two ships annually, for which they were to provide cargoes, to be consigned to him, chartered a ship which was to proceed from Bristol to St. Thomas where she was to deliver an outward cargo (the property of another person) and thence to Jamaica, where she was to take in a cargo from B for Dublin, and by the terms of the charter-party, A, in consideration of guaranteeing the homeward cargo, was to receive a commission on the homeward freight. The ship was captured on her passage from St. Thomas to Jamaica. It was held that A had not then an insurable interest either in the commission on the freight or in the commission on the sale of the homeward cargo.

48. Wells *v.* Philadelphia Ins. Co., 9 Serg. & R. (Pa.) 103.

49. Phœnix Ins. Co. *v.* Parsons, 129 N. Y. 86, 29 N. E. 87.

50. Advances or disbursements by: Agent see *supra*, III, D, 6. Bailee see *supra*, III, D, 5, text and note 64. Consignee see *supra*, III, D, 7.

Payments by charterer to discharge general average charges see *supra*, III, D, 5, note 64.

Advances on freight see *infra*, III, D, 16, c.

Advances to seamen see *supra*, III, D, 4, text and note 58.

Lienors generally see *supra*, III, D, 13.

51. *Maryland.*— Lee *v.* Barreda, 16 Md. 190.

New York.— Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 77 [*affirming* 38 N. Y. Super. Ct. 281]; Buchanan *v.* Ocean Ins. Co., 6 Cow. 318.

Pennsylvania.— International Mar. Ins. Co. *v.* Winsmore, 124 Pa. St. 61, 16 Atl. 516.

West Virginia.— Murdock *v.* Franklin Ins. Co., 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572.

United States.— Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219; Merchants Mut. Ins. Co. *v.* Baring, 20 Wall. 159, 22 L. ed. 250; Russel *v.* Union Ins. Co., 4 Dall. 421, 1 L. ed. 892, 21 Fed. Cas. No. 12,146, 1 Wash. 409; Dodwell Munich Assur. Co., 123 Fed. 841; China Mut. Ins. Co. *v.* Ward, 59 Fed. 712, 8 C. C. A. 229; Providence Washington Ins. Co. *v.* Bowring, 50 Fed. 613, 1 C. C. A. 583 [*affirming* 46 Fed. 119]; The Gulnare, 42 Fed. 861; The Sidney, 23 Fed. 88 [*reversed* on other grounds in 27 Fed. 119]; Aldrich *v.* Equitable Safety Ins. Co., 1 Fed. Cas. No. 155, 1 Woodb. & M. 272; Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127.

England.— Moran *v.* Uzielli, [1905] 2 K. B. 555, 10 Com. Cas. 203, 74 L. J. K. B. 494, 21 T. L. R. 378, 54 Wkly. Rep. 250; Briggs *v.* Merchant Traders' Ship Loan, etc., Assoc., 12 Q. B. 167, 13 Jur. 787, 18 L. J. Q. B. 178, 66 E. C. L. 167; Ebsworth *v.* Alliance Mar. Ins. Co., L. R. 8 C. P. 596, 2 Aspin. 125, 42 L. J. C. P. 305, 29 L. T. Rep. N. S. 479; Manfield *v.* Maitland, 4 B. & Ald. 582, 23 Rev. Rep. 402, 6 E. C. L. 610; Wolff *v.* Horncastle, 1 B. & P. 316, 4 Rev. Rep. 808; Steinbank *v.* Fenning, 11 C. B. 51, 15 Jur. 1082, 20 L. J. C. P. 226, 73 E. C. L. 51; Carruthers *v.* Sheddon, 1 Marsh. 416, 6 Taunt. 14, 1 E. C. L. 486.

See 28 Cent. Dig. tit. "Insurance," § 154 *et seq.*

Advances made by the charterer to the master at the port of loading, to be repaid by deductions out of freight, give the charterer an insurable interest in a policy on disbursements. Currie *v.* Bombay Native Ins. Co., L. R. 3 P. C. 72, 39 L. J. P. C. 1, 6 Moore P. C. N. S. 302, 22 L. T. Rep. N. S. 317, 18 Wkly. Rep. 296, 16 Eng. Reprint 740.

Advances to obtain crew, etc.— Where a part-owner of a schooner engaged in a joint trading venture with the other owners to the West Indies, at the request of such other owners of the vessel and cargo, made advancements necessary to provide the vessel with a crew, means of subsistence, etc., for the

is created there is no insurable interest.[52] The facts and circumstances essential to give a lien to persons making advances and disbursements will be treated elsewhere.[53]

19. Lost and Forfeitable Property — a. Lost Property. Property irrecoverably lost may be insured under a policy "lost or not lost,"[54] even though the insured's interest was acquired after an unknown partial loss.[55] If the insured have knowledge of the loss before the contract is concluded the contract is not enforceable,[56] but it is otherwise if the agreement to insure is concluded before, although the policy is not executed until after, the loss is known.[57]

b. Property Subject to Forfeiture. The fact that property is liable to forfeiture does not prevent the owner from effecting a valid insurance upon it,[58] although it is otherwise if there has been a forfeiture.[59]

IV. Contract in General.

A. Parties, Formation, and Validity — 1. Who May Underwrite. At common law any individual or association of individuals may be insurers of

out-bound and in-bound voyage, it was held that such part-owner had an insurable interest in the advances and disbursements to the extent thereof. International Mar. Ins. Co. *v.* Winsmore, 124 Pa. St. 61, 16 Atl. 516.

Advances to release from salvage claim.— The owner of a vessel has an insurable interest in the cargo for advances by him to release the cargo from a claim for salvage services. Briggs *v.* Merchant Traders' Ship Loan, etc., Assoc., 12 Q. B. 167, 13 Jur. 787, 18 L. J. Q. B. 178, 66 E. C. L. 167.

52. *Maryland.*— Lee *v.* Barreda, 16 Md. 190.

New York.— Buchanan *v.* Ocean Ins. Co., 6 Cow. 318.

United States.— Merchants Mut. Ins. Co. *v.* Baring, 20 Wall. 159, 22 L. ed. 250; China Mut. Ins. Co. *v.* Ward, 59 Fed. 712, 8 C. C. A. 229.

England.— Moran *v.* Uzielli, [1905] 2 K. B. 555, 10 Com. Cas. 203, 74 L. J. K. B. 494, 21 T. L. R. 378, 54 Wkly. Rep. 250; Currie *v.* Bombay Native Ins. Co., L. R. 3 P. C. 72, 39 L. J. P. C. 1, 22 L. T. Rep. N. S. 317, 6 Moore P. C. N. S. 302, 18 Wkly. Rep. 296, 16 Eng. Reprint, 740; Manfield *v.* Maitland, 4 B. & Ald. 582; Wolff *v.* Horncastle, 1 B. & P. 316, 4 Rev. Rep. 808; Wilson *v.* Royal Exch. Assur. Co., 2 Campb. 623, 12 Rev. Rep. 760 (illegal loan to captain payable out of freight); Stainbank *v.* Fenning, 11 C. B. 51, 15 Jur. 1082, 20 L. J. C. P. 226, 73 E. C. L. 51.

Canada.— Orchard *v.* Ætna Ins. Co., 5 U. C. C. P. 445, stranger to property in both vessel and cargo advancing amount of freight to master or owner.

Repairs.— The owner of a cargo has no insurable interest in a vessel by reason of expenditures for repairs during the voyage without request from or consent of the owner. Buchanan *v.* Ocean Ins. Co., 6 Cow. (N. Y.) 318.

Advances by general agent.— A ship's general agent, even though acting under a power of attorney authorizing him to sell, manage, direct, charter, and freight, has presumptively no maritime or equitable lien, or other insurable interest in the vessel, for advances made in the course of the agency. China Mut. Ins. Co. *v.* Ward, 59 Fed. 712, 8 C. C. A. 229.

A cargo owner has no insurable interest in the ship in which it is carried, although he has expended money in reclaiming the ship from capture. Kulem Kemp *v.* Vigne, 1 T. R. 304, 1 Rev. Rep. 205.

53. See Maritime Liens.

54. Arkansas Ins. Co. *v.* Bostick, 27 Ark. 539; Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219; Sutherland *v.* Pratt, 2 Dowl. P. C. N. S. 813, 7 Jur. 261, 12 L. J. Exch. 235, 11 M. & W. 296. See also *supra*, III, C.

55. Sunderland *v.* Pratt, 2 Dowl. P. C. N. S. 813, 7 Jur. 261, 12 L. J. Exch. 235, 11 M. & W. 296.

56. Gauntlett *v.* Sea Ins. Co., 127 Mich. 504, 86 N. W. 1047; Anderson *v.* Morice, 1 App. Cas. 713, 3 Aspin. 290, 46 L. J. Q. B. 11, 35 L. T. Rep. N. S. 566, 25 Wkly. Rep. 14.

57. Mead *v.* Davison, 3 A. & E. 303, 1 Harr. & W. 156, 4 L. J. K. B. 193, 4 N. & M. 701, 30 E. C. L. 153.

58. *Maine.*— Polleys *v.* Ocean Ins. Co., 14 Me. 141.

New York.— Wilkes *v.* People's F. Ins. Co., 19 N. Y. 184.

South Carolina.— Hume *v.* Providence Washington Ins. Co., 23 S. C. 190.

United States.— Ocean Ins. Co. *v.* Polleys, 13 Fed. 157, 10 L. ed. 105; Clark *v.* Protection Ins. Co., 5 Fed. Cas. No. 2,832, 1 Story 109.

England.— Visger *v.* Prescott, 5 Esp. 184, 8 Rev. Rep. 846.

Aliens.— The statutes of the United States forbidding an alien to own an American vessel under pain of forfeiture does not prevent aliens from recovering, in case of loss, on a policy of insurance on a vessel owned by them. Hume *v.* Providence Washington Ins. Co., 23 S. C. 190.

59. Fontaine *v.* Phœnix Ins. Co., 11 Johns. (N. Y.) 293. In this case a vessel was in-

marine risks.[60] However, the business of insuring marine risks is generally conducted by corporations. The powers conferred and restrictions imposed upon them are treated elsewhere in this work.[61] In some jurisdictions the business is by statute restricted to corporations or to particular corporations or associations.[62]

2. **Who May Effect Insurance.** A part-owner,[63] master,[64] ship's husband,[65] charterer,[66] or agent[67] has not by reason of such relationship any general authority to insure anything further than his own individual interest. But any of them may insure for the owners or other part-owners, if authorized by them or subject to their ratification.[68] The ratification may be made even after they have knowl-

sured at and from New York to St. Bartholomew, and at and from thence back to New York, with liberty to touch and trade at Martinique. The vessel discharged her cargo at Martinique and had taken in part of a return cargo when a loss happened. It was held that if the cargo she had taken in at Martinique was intended for the United States, it was a breach of the Non-Intercourse Law of the United States of March, 1809, which was then in operation, by which the vessel would be forfeited and the property immediately vested in the United States, so that the owners would have no insurable interest.

The property continues in the owner until actual seizure, and the seizure relates back to the time when the property became liable to forfeiture, thus preventing a recovery against the underwriter for the loss resulting from such previous liability. Clark *v.* Protection Ins. Co., 5 Fed. Cas. No. 2,832, 1 Story 109. See also Lockyer *v.* Offley, 1 T. R. 252, 1 Rev. Rep. 194.

60. Marine Mut. Ins. Assoc. *v.* Young, 4 Aspin. 357, 43 L. T. Rep. N. S. 441. See Insurance, 22 Cyc. 1386.

61. See Insurance, 22 Cyc. 1380.

62. See Insurance, 22 Cyc. 1386.

In England in the year 1719 an act was passed which restricted the marine insurance business and confined it to private underwriters and the Royal Exchange and London Assurance. Other corporations, partnerships, and associations were prohibited from making sea insurances. St. 6 Geo. I, c. 18; Mitchell *v.* Cockburne, 2 H. Bl. 379; Everth *v.* Blackburn, 6 M. & S. 152, 2 Stark. 66, 3 E. C. L. 319. This act, however, was repealed in 1824. St. 5 Geo. IV, c. 114.

63. *Maine.*— Sawyer *v.* Freeman, 35 Me. 542; Blanchard *v.* Waite, 28 Me. 51, 48 Am. Dec. 474.

Maryland.— Garrell *v.* Hanna, 5 Harr. & J. 412.

Massachusetts.— Finney *v.* Fairhaven Ins. Co., 5 Metc. 192, 38 Am. Dec. 397; Foster *v.* U. S. Insurance Co., 11 Pick. 85; Dumas *v.* Jones, 4 Mass. 647.

Ohio.— Knight *v.* Eureka F. & M. Ins. Co., 26 Ohio St. 664, 20 Am. Rep. 778.

England.— Hooper *v.* Lusby, 4 Campb. 66. See also Robinson *v.* Gleadow, 2 Bing. N. Cas. 156, 1 Hodges 245, 2 Scott 250, 29 E. C. L. 480.

64. Haynes *v.* Rowe, 40 Me. 181; Foster *v.* U. S. Insurance Co., 11 Pick. (Mass.) 85; Adams *v.* Plattsburgh Ins. Co., 95 Pa. St. 348, 40 Am. Rep. 662; Barker *v.* Marine Ins. Co., 2 Fed. Cas. No. 992, 2 Mason 369.

A custom may exist, so general and notorious as to authorize the captain of a steamboat to effect an insurance on it for the benefit of the owners without their express direction. Adams *v.* Pittsburgh Ins. Co., 95 Pa. St. 348, 40 Am. Rep. 662.

65. Finney *v.* Warren Ins. Co., 1 Metc. (Mass.) 16, 35 Am. Dec. 343; McCready *v.* Woodhull, 34 Barb. (N. Y.) 80; Turner *v.* Burrows, 8 Wend. (N. Y.) 144; French *v.* Backhouse, 5 Burr. 2727.

66. Sawyer *v.* Freeman, 35 Me. 542.

67. Barlow *v.* Leckie, 4 Moore C. P. 8, 16 E. C. L. 326. *Compare* Alliance Mar. Assur. Co. *v.* Louisiana State Ins. Co., 8 La. 1, 28 Am. Dec. 117.

68. *Maine.*— Gray *v.* Buck, 78 Me. 477, 7 Atl. 16; Blanchard *v.* Waite, 28 Me. 51, 48 Am. Dec. 474.

Massachusetts.— Hamilton *v.* Phœnix Ins. Co., 106 Mass. 395; Finney *v.* Fairhaven Ins. Co., 5 Metc. 192, 38 Am. Dec. 397; Lazarus *v.* Commonwealth Ins. Co., 19 Pick. 81; Davis *v.* Boardman, 12 Mass. 80.

New York.— Hughes *v.* Mercantile Mut. Ins. Co., 44 How. Pr. 351 [*reversed* on other grounds in 55 N. Y. 265, 14 Am. Rep. 254].

United States.— Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219.

England.— Provincial Ins. Co. *v.* Leduc, L. R. 6 P. C. 225, 2 Aspin. 338, 43 L. J. P. C. 49, 31 L. T. Rep. N. S. 142, 22 Wkly. Rep. 929; Williams *v* North China Ins. Co., 1 C. P. D. 757, 3 Aspin. 342, 35 L. T. Rep. N. S. 884; Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623; Barlow *v.* Leckie, 4 Moore C. P. 8, 16 E. C. L. 356; Braik *v.* Douglas, 4 Myl. & C. 320 note, 18 Eng. Ch. 320, 41 Eng. Reprint 125.

Canada.— Seaman *v.* West, 17 Nova Scotia 207.

Evidence warranting inference of authority. — Where the owner of more than one half of a ship, as ship's husband for five or six years, has kept her insured for himself and the other owners jointly, without their interference, by annual policies containing a clause for submitting to arbitration any disputed loss, it warrants an inference that they authorized him to procure such policies. Hamilton *v.* Phœnix Ins. Co., 106 Mass. 395. See also Lindsay *v.* Gibbs, 3 De G. & J. 690, 5 Jur. N. S. 376, 28 L. J. Ch. 692, 7 Wkly. Rep. 320, 60 Eng. Ch. 533, 44 Eng. Reprint 1435.

edge of a loss,[69] and it need be in no particular form, anything which clearly evinces a purpose to ratify being sufficient.[70] A general agent,[71] prize agent,[72] or partner[73] may effect valid insurances for their principals, as may also one partner for his copartners.[74]

3. Form and Formation of Contract — a. In the United States — (i) *In General.* The formation of a contract of marine insurance is governed by the same principles as the formation of other contracts,[75] and particularly of other contracts of insurance.[76] No precise form of words is required to constitute a contract of marine insurance.[77] The contract is usually contained in a policy, but the policy is merely the formal written instrument in which the contract is usually embodied.[78] Except as restricted by statute, the contract need not be in writing.[79] A contract of insurance is completed, when there is an assent to the terms of it by the parties upon a valuable consideration, and neither payment of the premium nor giving a premium note, nor the delivery of a policy to the insured, is a pre-

69. Finney *v.* Fairhaven Ins. Co., 5 Metc. (Mass.) 192, 38 Am. Dec. 397; Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219; Oliver *v.* Mutual Commercial Mar. Ins. Co., 18 Fed. Cas. No. 10,498, 2 Curt. 277; Williams *v.* North China Ins. Co., 1 C. P. D. 757, 3 Aspin. 342, 35 L. T. Rep. N. S. 884; Routh *v.* Thompson, 13 East 274, 11 East 428, 10 Rev. Rep. 539; Hagedorn *v.* Oliverson, 2 M. & S. 485, 15 Rev. Rep. 317.

70. Finney *v.* Fairhaven Ins. Co., 5 Metc. (Mass.) 192, 38 Am. Dec. 397; De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. (Pa.) 68, 33 Am. Dec. 38; Flemming *v.* Marine Ins. Co., 4 Whart. (Pa.) 59, 33 Am. Dec. 33; Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219.

Bringing action on policy a ratification see Finney *v.* Fairhaven Ins. Co., 5 Metc. (Mass.) 192, 38 Am. Dec. 397.

Letter in ignorance of insurance not a ratification see Bell *v.* Janson, 1 M. & S. 201.

71. Robertson *v.* Hamilton, 14 East 522, 13 Rev. Rep. 303.

72. See *supra*, III, D, 15.

Captors may insure for sovereign see *supra*, III, D, 15.

73. Voisin *v.* Commercial Mut. Ins. Co., 62 Hun (N. Y.) 4, 16 N. Y. Suppl. 410.

74. Hooper *v.* Lushy, 4 Campb. 66.

75. See Contracts, 9 Cyc. 245 *et seq.*

76. See Fire Insurance, 19 Cyc. 592 *et seq.*; Life Insurance, 25 Cyc. 712 *et seq.*; and Other Insurance Titles.

77. Scriba *v.* Insurance Co. of North America, 21 Fed. Cas. No. 12,560, 2 Wash. 107.

78. London Assur. Corp. *v.* Paterson, 106 Ga. 538, 32 S. E. 650.

Insurance made without issuing a policy is to be regarded as made upon the terms and subject to the conditions in the ordinary form of policy used by the company at that time. Eureka Ins. Co. *v.* Robinson, 56 Pa. St. 256, 94 Am. Dec. 65; State F. & M. Ins. Co. *v.* Porter, 3 Grant (Pa.) 123.

The policy when issued becomes the sole contract between the parties, and all proposals and negotiations which are not included in the policy or annexed thereto are considered waived. Higginson *v.* Dall, 13 Mass. 96. See also Kaines *v.* Knightly, Skin. 54; Robertson *v.* Lovett, 3 Nova Scotia Dec. 424; and, generally, Evidence, 17 Cyc. 567, 606.

79. *Alabama.*— Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 31 Ala. 711.

Maine.— Blanchard *v.* Waite, 28 Me. 51, 48 Am. Dec. 474.

Maryland.— Leftwich *v.* Royal Ins. Co., 91 Md. 596, 46 Atl. 1010.

Massachusetts.— Sanford *v.* Orient Ins. Co., 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358; Emery *v.* Boston Mar. Ins. Co., 138 Mass. 398.

New York.— Boice *v.* Thames, etc., Mar. Ins. Co., 38 Hun 246; Bunten *v.* Orient Mut. Ins. Co., 8 Bosw. 448.

Ohio.— Neville *v.* Merchants', etc., Mut. Ins. Co., 19 Ohio 452.

Pennsylvania.— Smith *v.* Odlin, 4 Yeates 468.

Wisconsin.— Northwestern Iron Co. *v.* Ætna Ins. Co., 26 Wis. 78. See also Ætna Ins. Co. *v.* Northwestern Iron Co., 21 Wis. 458.

United States.— Merchants' Mut. Ins. Co. *v.* Lyman, 15 Wall. 664, 21 L. ed. 246; Commercial Mut. Ins. Co. *v.* Union Mut. Ins. Co., 19 How. 318, 15 L. ed. 636 [*affirming* 24 Fed. Cas. No. 14,372, 2 Curt. 524]; Henning *v.* U. S. Insurance Co., 11 Fed. Cas. No. 6,366, 2 Dill. 26.

See 28 Cent. Dig. tit. "Insurance," § 204.

Continuance under former policy.— Where, after the expiration of a marine policy, insurance was continued under its terms by agreement covering another and more extensive voyage, it was held that the acceptance of the risk under such agreement constituted a new and distinct contract of insurance, although no new policy was issued. Leftwich *v.* Royal Ins. Co., 91 Md. 596, 46 Atl. 1010.

Agent's authority to make parol contract of insurance not presumed see Ætna Ins. Co. *v.* Northwestern Iron Co., 21 Wis. 458.

Statute of frauds.— A preliminary contract of insurance which may be performed within a year is not within the statute of frauds. Sanford *v.* Orient Ins. Co., 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358. See, generally, Frauds, Statute of.

requisite to its consummation.[80] There must, however, be a mutual consent to the terms[81] and mutual obligations assumed — the underwriter to pay the loss, if any, the insured to pay the premium.[82] The unconditional delivery and acceptance of a policy creates a contract binding on both parties,[83] but if a policy is duly executed, it is not necessary, to render it binding, that it shall be actually received into the possession of the insured.[84] The policy need not state the precise interest or kind of property intended to be insured,[85] nor specifically enumerate the risks insured against,[86] but the commencement and termination of the risk must be expressed.[87]

(11) *Binding Slips.* Memoranda or binding slips containing a description of the adventure and the subject-matter and amount of insurance are usually issued by the underwriters or their agent prior to the execution of the formal policy, being intended to protect the insured in the interim. These slips have been held to be valid contracts of insurance,[88] but they are superseded by the issuance of a

80. Blanchard *v.* Waite, 28 Me. 51, 48 Am. Dec. 474. See also Bunten *v.* Orient Mut. Ins. Co., 8 Bosw. (N. Y.) 448 [*affirmed* in 1 Abb. Dec. 257, 2 Keyes 667, 31 How. Pr. 640]; Commercial Mut. Ins. Co. *v.* Union Mut. Ins. Co., 19 How. (U. S.) 318, 15 L. ed. 636 [*affirming* 24 Fed. Cas. No. 14,372, 2 Curt. 524]; and other cases cited in the preceding note.

81. *Louisiana.*— Berthoud *v.* Atlantic M. & F. Ins. Co., 13 La. 539; Alliance Mar. Assur. Co. *v.* Louisiana State Ins. Co., 8 La. 1, 28 Am. Dec. 117.

Massachusetts.— Scammell *v.* China Mut. Ins. Co., 164 Mass. 341, 41 N. E. 649, 49 Am. St. Rep. 462.

Michigan.— Gauntlett *v.* Sea Ins. Co., 127 Mich. 504, 86 N. W. 1047.

New York.— Hughes *v.* Mercantile Mut. Ins. Co., 55 N. Y. 265, 14 Am. Rep. 254.

Ohio.— Neville *v.* Merchants', etc., Mut. Ins. Co., 19 Ohio 452.

A mere proposal or application for insurance cannot be converted into a contract by delay on the part of the company in accepting or rejecting the same. Heiman *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 153, 10 Am. Rep. 154.

A **"Lloyd's" policy,** being an insurance by individual members of an association, does not become operative except by special indorsement by the underwriters. Chadsey *v.* Guion, 97 N. Y. 333.

82. Neville *v.* Merchants', etc., Mut. Ins. Co., 19 Ohio 452.

83. Ætna Ins. Co. *v.* Webster, 6 Wall. (U. S.) 129, 18 L. ed. 888. See also Fire Insurance, 19 Cyc. 603 *et seq.*; Life Insurance, 25 Cyc. 717 *et seq.*

Subsequent memorandum requiring approval.— Where the agent of an insurance company was fully authorized to make insurance of vessels and had in fact on a previous occasion insured the same vessel for the same applicant, and in the instance under consideration actually delivered to him on receipt of the premium note a policy duly executed by the officers of the company, filled up and countersigned by himself under his general authority, and having every element of a perfect and valid contract, it was held that the fact that after the execution and delivery of the policy the insured signed a memorandum stating, "The insurance on this application to take effect when approved by E. P. Dorr, general agent," etc., did not make the previous transaction a nullity until approved; and therefore, although the general agent sent back the application, directing the agent who had delivered the policy to return the premium note and cancel the policy, the insured was entitled to recover for a loss, the agent having neither returned the note nor canceled the policy. Ætna Ins. Co. *v.* Webster, 6 Wall. (U. S.) 129, 18 L. ed. 888.

84. Xenos *v.* Wickham, L. R. 2 H. L. 296, 36 L. J. C. P. 313, 16 L. T. Rep. N. S. 800, 16 Wkly. Rep. 38.

85. Wiggin *v.* Mercantile Ins. Co., 7 Pick. (Mass.) 271; Riggs *v.* Commercial Mut. Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 21 Am. St. Rep. 716, 10 L. R. A. 684; Murray *v.* Columbian Ins. Co., 11 Johns. (N. Y.) 302. See also *infra*, IV, B, 3, a, 4.

86. Parkhurst *v.* Gloucester Mut. Fishing Ins. Co., 100 Mass. 301, 97 Am. Dec. 100, 1 Am. Rep. 105, holding "as prescribed in by-laws" a sufficient designation of the risks.

87. Manly *v.* United M. & F. Ins. Co., 9 Mass. 85, 6 Am. Dec. 40; Cleveland *v.* Union Ins. Co., 8 Mass. 308; Petrie *v.* Phenix Ins. Co., 132 N. Y. 137, 30 N. E. 380.

Place of delivery of cargo.— It is not necessary to the validity of a policy of marine insurance on a cargo that a definite place of delivery of the cargo should be specified. Petrie *v.* Phenix Ins. Co., 11 N. Y. Suppl. 188 [*affirmed* in 132 N. Y. 137, 30 N. E. 380].

88. *Maryland.*— Delaware State F. & M. Ins. Co. *v.* Shaw, 54 Md. 546.

Massachusetts.— Scammell *v.* China Mut. Ins. Co., 164 Mass. 341, 41 N. E. 649, 49 Am. St. Rep. 462.

New York.— See also Bunten *v.* Orient Mut. Ins. Co., 8 Bosw. 448 [*affirmed* in 1 Abb. Dec. 257, 2 Keyes 667, 31 How. Pr. 640].

Pennsylvania.— State F. & M. Ins. Co. *v.* Porter, 3 Grant 123.

policy, which then becomes, subject to correction in equity in case of mistake, the only evidence of the intention of the parties.[89]

b. In Canada. In Canada, as in the United States, there may be a valid preliminary contract to insure, or a contract evidenced by a binding slip or memorandum, prior to the execution and delivery of a policy;[90] but the issuance of the policy in accordance with the preliminary agreement will supersede the latter.[91]

c. In England. In England, by force of statutory provisions,[92] a contract of marine insurance to be binding must be embodied in a policy,[93] which must contain the names of the insurers,[94] the names of the insured or the person effecting the insurance,[95] the particular risk or adventure,[96] and the sum insured.[97] The interest of the insured need not be stated.[98] A revenue stamp is required by statute on every policy of marine insurance, in order that it may form the basis of an action or be used in evidence,[99] and although the parties do not desire to

United States.— Kerr *v.* Union Mar. Ins. Co., 124 Fed. 835.

89. Dow *v.* Whetten, 8 Wend. (N. Y.) 160.

90. Robertson *v.* Dudman, 10 Nova Scotia 50.

91. Robertson *v.* Lovett, 3 Nova Scotia Dec. 424.

If the policy varies from the preliminary agreement and is seasonably repudiated by the insured, he may recover for a loss under the preliminary agreement. Robertson *v.* Dudman, 10 Nova Scotia 50.

92. St. 28 Geo. III, c. 56; 54 & 55 Vict. c. 56.

93. Royal Exch. Assur. Corp. *v.* Sjoforsakrings Atkiebolaget Vega, [1901] 2 K. B. 567, 9 Aspin. 233, 6 Com. Cas. 189, 70 L. J. K. B. 874, 85 L. T. Rep. N. S. 241, 50 Wkly. Rep. 25 [*affirmed* in [1902] 2 K. B. 384, 9 Aspin. 329, 7 Com. Cas. 205, 71 L. J. K. B. 739, 87 L. T. Rep. N. S. 356, 50 Wkly. Rep. 694]; Home Mar. Ins. Co. *v.* Smith, [1898] 2 Q. B. 351, 8 Aspin. 408, 67 L. J. Q. B. 777, 78 L. T. Rep. N. S. 734, 46 Wkly. Rep. 661; Ionides *v.* Pacific F. & M. Ins. Co., L. R. 7 Q. B. 517, 2 Aspin. 454, 1 Aspin. 330, 41 L. J. Q. B. 190, 26 L. T. Rep. N. S. 738, 21 Wkly. Rep. 22.

Execution and delivery necessary.— The contract is not complete until the policy is executed, delivered, and accepted. Xenos *v.* Wickham, L. R. 2 H. L. 296, 36 L. J. C. P. 313, 16 L. T. Rep. N. S. 800, 16 Wkly. Rep. 38.

Binding slips, labels, and memoranda have therefore no force or effect as contracts of insurance. Mildred *v.* Maspons, 8 App. Cas. 874, 5 Aspin. 182, 53 L. J. Q. B. 33, 49 L. T. Rep. N. S. 685, 32 Wkly. Rep. 125; Xenos *v.* Wickham, L. R. 2 H. L. 296, 36 L. J. C. P. 313, 16 L. T. Rep. N. S. 800, 16 Wkly. Rep. 38; Home Mar. Ins. Co. *v.* Smith, [1898] 2 Q. B. 351, 8 Aspin. 408, 67 L. J. Q. B. 777, 78 L. T. Rep. N. S. 734, 46 Wkly. Rep. 661; Mackenzie *v.* Coulson, L. R. 8 Eq. 368; Rogers *v.* M'Carthy, 3 Esp. 106; Morocco Land, etc., Co. *v.* Fry, 11 Jur. N. S. 76, 11 L. T. Rep. N. S. 618, 13 Wkly. Rep. 310. *Compare* Cory *v.* Patton, L. R. 9 Q. B. 577, 2 Aspin. 302, 43 L. J. Q. B. 181, 30 L. T. Rep. N. S. 758, 23 Wkly. Rep. 46, L. R. 7 Q. B. 304, 1 Aspin. 225, 41 L. J. Q. B. 195 note, 26 L. T. Rep. N. S. 161, 20 Wkly. Rep. 364.

94. *In re* Arthur Average Assoc., 3 Ch. D. 522, 2 Aspin. 570, 45 L. J. Ch. 346, 34 L. T. Rep. N. S. 388, 24 Wkly. Rep. 514.

95. De Vignier *v.* Swanson, 1 B. & P. 346 note, 4 Rev. Rep. 825 note; Bell *v.* Gilson, 1 B. & P. 345, 4 Rev. Rep. 823; Wolff *v.* Horncastle, 1 B. & P. 316, 4 Rev. Rep. 808; Hilbert *v.* Martin, 1 Campb. 538; Mellish *v.* Bell, 15 East 4, 13 Rev. Rep. 344.

96. Edwards *v.* Aberayron Mut. Ship Ins. Soc., 1 Q. B. D. 563, 34 L. T. Rep. N. S. 457.

A time policy must contain a specific definition of the voyage and is not satisfied by describing a voyage as beginning anywhere and ending at no particular port at no particular time. Royal Exch. Assur. Corp. *v.* Sjoforsakrings Atkiebolaget Vega, [1902] 2 K. B. 384, 9 Aspin. 329, 7 Com. Cas. 205, 71 L. J. K. B. 739, 87 L. T. Rep. N. S. 356, 50 Wkly. Rep. 694.

Misnomer of vessel.— The misnomer of a vessel in a policy is of no consequence where the parties understood what vessel was intended. Ionides *v.* Pacific F. & M. Ins. Co., L. R. 7 Q. B. 517, 2 Aspin. 454, 1 Aspin. 330, 41 L. J. Q. B. 190, 26 L. T. Rep. N. S. 738, 21 Wkly. Rep. 22. See *infra*, IV, B, 4, d, (II).

97. Home Mar. Ins. Co. *v.* Smith, [1898] 2 Q. B. 351, 8 Aspin. 408, 67 L. J. Q. B. 777, 78 L. T. Rep. N. S. 734, 46 Wkly. Rep. 661.

98. Carruthers *v.* Sheddon, 1 Marsh. 416, 6 Taunt. 14, 1 E. C. L. 486. See *infra*, IV, B, 3, a.

99. St. 30 Vict. c. 23. See Royal Exch. Assur. Corp. *v.* Sjoforsakrings Atkiebolaget Vega, [1902] 2 K. B. 384, 9 Aspin. 329, 7 Com. Cas. 205, 71 L. J. K. B. 739, 87 L. T. Rep. N. S. 356, 50 Wkly. Rep. 694; Fisher *v.* Liverpool Mar. Ins. Co., L. R. 9 Q. B. 418, 2 Aspin. 454, 43 L. J. Q. B. 114, 30 L. T. Rep. N. S. 501, 22 Wkly. Rep. 951; Ionides *v.* Pacific F. & M. Ins. Co., L. R. 7 Q. B. 517, 2 Aspin. 454, 1 Aspin. 330, 41 L. J. Q. B. 190, 26 L. T. Rep. N. S. 738, 21 Wkly. Rep. 22; *In re* Teignmouth, etc., Shipping Assoc., L. R. 14 Eq. 148, 1 Aspin. 325, 41 L. J. Ch. 679, 26 L. T. Rep. N. S. 684; Morrison *v.*

avail themselves of the invalidity of the contract on that ground, the courts will refuse to take cognizance of a cause based upon an unstamped policy.[1]

4. Kinds of Policies and Their Peculiarities — a. In General. Marine policies may be classified into interest and wager policies, valued and open, time and voyage, and floating or running.

b. Interest and Wager Policies — (I) *Interest Policies.* An interest policy is one which shows by its form that the insured has a real substantial interest in the thing insured.[2]

(II) *Wager Policies*[3] — (A) *In England.* A wager policy is one in which the parties by express terms disclaim the intention of making a contract of indemnity.[4] Under the statute of George II,[5] the insurance of English ships or goods and effects laden on English ships "interest or no interest," "without farther proof of interest than the policy," or, "without benefit of salvage to the insurer," are declared to be illegal as wager policies; and all policies containing clauses of similar import have been held to be within the statute.[6] The statute extends to insurances on profits, commissions, and advances, and insurances against loss in respect to the non-arrival of a ship by a specified time.[7] Wager policies were good at common law,[8] but since the passage of the statute they will not be enforced even though the insurer disclaims taking advantage of the illegality.[9]

(B) *In the United States.* A policy is not considered a wager policy because it contains one or more of the clauses specified in the English statute, and it is only where the parties intend to game that the policies will be treated as a wager;[10] but such policies are deemed policies on interest and the insured is entitled to

Universal Mar. Ins. Co., 1 Aspin. 100, 25 L. T. Rep. N. S. 108.

1. Nixon *v.* Albion Mar. Ins. Co., L. R. 2 Exch. 338, 36 L. J. Exch. 180, 16 L. T. Rep. N. S. 568, 15 Wkly. Rep. 964. But where a member of a mutual insurance company, afterward converted into a limited company, has vessels on its books as insured, and pays calls, and otherwise acts as if he were a member of the company, he is in any action brought against him by the limited company for calls on losses, estopped from denying his liability, and from setting up either any irregularity in the transfer from the one company to the other, or that the losses were paid without any stamped policies being entered into in contravention of 30 Vict. c. 23, § 7. Barrow Mut. Ship Ins. Co. *v.* Ashburner, 5 Aspin. 527, 54 L. J. Q. B. 377, 54 L. T. Rep. N. S. 58.

2. Cousins *v.* Nantes, 3 Taunt. 512, 13 Rev. Rep. 696; Kulen Kemp *v.* Vigne, 1 T. R. 304, 1 Rev. Rep. 205.

Insurable interest see *supra*, III.

3. Right to return of premium see *infra*, V, F, 8.

4. Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623; Cousins *v.* Nantes, 3 Taunt. 512, 13 Rev. Rep. 696.

5. St. 19 Geo. II, c. 37.

6. Gedge *v.* Royal Exch. Assur. Corp., [1900] 2 Q. B. 214, 9 Aspin. 57, 5 Com. Cas. 229, 69 L. J. Q. B. 506, 82 L. T. Rep. N. S. 463; Berridge *v.* Man On Ins. Co., 18 Q. B. D. 346, 6 Aspin. 104, 56 L. J. Q. B. 223, 56 L. T. Rep. N. S. 375, 35 Wkly. Rep. 343; Keith *v.* Protection Mar. Ins. Co., L. R. 10 Ir. 365; Murphy *v.* Bell, 4 Bing. 567, 6 L. J. C. P. O. S. 118, 1 M. & P. 493, 29 Rev. Rep. 620, 13 E. C. L. 639; De Mattos *v.* North, L. R. 3 Exch. 185, 37 L. J. Exch. 116, 18 L. T. Rep. N. S. 797; Smith *v.* Reynolds, 1 H. & N. 221, 25 L. J. Exch. 337, 4 Wkly. Rep. 644; Mortimer *v.* Broadwood, 20 L. T. Rep. N. S. 398, 17 Wkly. Rep. 653.

On a foreign ship a wager policy was held valid. Nantes *v.* Thompson, 2 East 385, 6 Rev. Rep. 458.

7. Gedge *v.* Royal Exch. Assur. Corp., [1900] 2 Q. B. 214, 9 Aspin. 57, 5 Com. Cas. 229, 69 L. J. Q. B. 506, 82 L. T. Rep. N. S. 463; Berridge *v.* Man On Ins. Co., 18 Q. B. D. 346, 6 Aspin. 104, 56 L. J. Q. B. 223, 56 L. T. Rep. N. S. 375, 35 Wkly. Rep. 343; De Mattos *v.* North, L. R. 3 Exch. 185, 37 L. J. Exch. 116, 18 L. T. Rep. N. S. 797; Kent *v.* Bird, Cowp. 583; Smith *v.* Reynolds, 1 H. & N. 221, 25 L. J. Exch. 337, 4 Wkly. Rep. 644; Mortimer *v.* Broadwood, 20 L. T. Rep. N. S. 398, 17 Wkly. Rep. 653.

8. Keith *v.* Protection Mar. Ins. Co., L. R. 10 Ir. 365; Sadlers Co. *v.* Badcock, 2 Atk. 554, 26 Eng. Reprint 733; Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623; Assevedo *v.* Cambridge, 10 Mod. 77.

9. Gedge *v.* Royal Exch. Assur. Corp., [1900] 2 Q. B. 214, 9 Aspin. 57, 5 Com. Cas. 229, 69 L. J. Q. B. 506, 82 L. T. Rep. N. S. 463; Scott *v.* Brown, [1892] 2 Q. B. 724, 57 J. P. 213, 61 L. J. Q. B. 738, 67 L. T. Rep. N. S. 782, 4 Reports 42, 41 Wkly. Rep. 116; Holman *v.* Johnson, Cowp. 341.

10. Amory *v.* Gilman, 2 Mass. 1; Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451. See also Buchanan *v.* Ocean Ins. Co., 6 Cow. (N. Y.) 318; Clendining *v.* Church, 3 Cai. (N. Y.) 141.

indemnity only for his actual loss.[11] But a policy which is strictly a gaming policy, that is one in which the assured has no interest in the property insured, is interdicted on the ground of public policy.[12]

c. Valued and Open Policies — (I) *Valued Policies* — (A) *Definition and Nature.* Policies are further classified into valued and open policies. A valued policy is one in which the parties by express agreement in the policy agree upon the value of the subject-matter of the insurance.[13] The agreement upon a value does not make the policy a wager but is considered merely the valuation of the insured's interest.[14] The effect of the valuation as fixing the extent of liability of the underwriters for losses under valued policies is treated elsewhere.[15]

(B) *Valuation Applies to Insured's Interest.* The valuation in the policy is treated as a valuation of the insured's interest in the subject-matter and not as a valuation of the entire object or thing which is the subject of the insurance.[16]

(C) *On Freight; Applies to Each Voyage.* The valuation of freight in a policy covering distinct voyages is presumed to apply to the freight on each voyage,[17] but the presumption may be rebutted by circumstances.[18]

(D) *Short Shipments.* Where cargo is insured under a valued policy and but part of the goods intended to be shipped are actually put on board, if the value of the whole is a datum, the valuation will be proportionately applied to the amount of goods loaded;[19] but where the value of the whole intended cargo is not known

11. Hemmenway *v.* Eaton, 13 Mass. 108; Amory *v.* Gilman, 2 Mass. 1; Clendining *v.* Church, 3 Cai. (N. Y.) 141; Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451.

12. Amory *v.* Gilman, 2 Mass. 1; Craig *v.* Murgatroyd, 4 Yeates (Pa.) 161.

13. Howes *v.* Union Ins. Co., 16 La. Ann. 235; Williams *v.* Continental Ins. Co., 24 Fed. 767; Wilson *v.* Nelson, 5 B. & S. 354, 10 Jur. N. S. 1044, 33 L. J. Q. B. 220, 10 L. T. Rep. N. S. 523, 12 Wkly. Rep. 295, 117 E. C. L. 354; Aubert *v.* Jacobs, Wightw. 118.

Every policy on profits is necessarily a valued policy, the amount insured being the valuation of the expected profits. Mumford *v.* Hallett, 1 Johns. (N. Y.) 433.

Policies not valued.— Where in a policy of marine insurance the space "valued at $——" is left unfilled, and no valuation is named in the indorsement, but merely the sum insured, it is an open, and not a valued, policy. Snowden *v.* Guion, 101 N. Y. 458, 5 N. E. 322. See also Mellen *v.* National Ins. Co., 1 Hall (N. Y.) 500. Where the valuation clause is not filled up, but at the foot of the policy the amount of the insurance is inserted, such statement cannot be treated as the valuation, if without difficulty the value intended to be protected can be ascertained. Asfar *v.* Blundell, [1896] 1 Q. B. 123, 8 Aspin. 106, 65 L. J. Q. B. 138, 73 L. T. Rep. N. S. 648, 15 Reports 481, 44 Wkly. Rep. 130.

14. Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451; Grant *v.* Parkinson, 3 B. & P. 85 note , 3 Dougl. 16, 6 T. R. 483, 26 E. C. L. 22; Lewis *v.* Rucker, 2 Burr. 1167; Hodgson *v.* Glover, 6 East 316, 8 Rev. Rep. 495; Shaw *v.* Felton, 2 East 109.

15. See *infra*, IX, F.

16. Post *v.* Phœnix Ins. Co. 10 Johns. (N. Y.) 79; Watson *v.* Insurance Co. of North America, 29 Fed. Cas. No. 17,286, 3 Wash. 1; Allison *v.* Bristol Mar. Ins. Co., 1 App. Cas. 209, 3 Aspin. 178, 34 L. T. Rep. N. S. 809, 24 Wkly. Rep. 1039; Williams *v.* North China Ins. Co., 1 C. P. D. 757, 3 Aspin. 342, 35 L. T. Rep. N. S. 884.

Deduction of bottomry bond.— The amount of a bottomry bond executed by the master abroad a short time before the date of a policy, without the underwriters' knowledge, is to be deducted from the actual value of the property covered, and not from the value as estimated in the policy. Watson *v.* Insurance Co. of North America, 29 Fed. Cas. No. 17,286, 3 Wash. 1.

17. Thwing *v.* Washington Ins. Co., 10 Gray (Mass.) 443; Davy *v.* Hallett, 3 Cai. (N. Y.) 16, 2 Am. Dec. 241; Virginia Valley Ins. Co. *v.* Mordecai, 22 How. (U. S.) 111, 16 L. ed. 329; Hugg *v.* Augusta Ins., etc., Co., 7 How. (U. S.) 595, 12 L. ed. 834; Columbian Ins. Co. *v.* Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 664.

Distinct voyages.—An insurance, for a premium, for the voyage round, at and from B to C, with the privilege of one other port, in the same island with C, and at and from either of them back to B, on freight laden or to be laden, valued at the sum insured, is upon separate and distinct voyages, during the prosecution of which distinct freights were at risk, and to each of which, as they successively came into existence, the whole valuation in the policy ought to be applied, and a total loss on the homeward voyage paid for accordingly. Patapsco Ins. Co. *v.* Biscoe, 7 Gill & J. (Md.) 293, 28 Am. Dec. 319.

18. Thwing *v.* Washington Ins. Co., 10 Gray (Mass.) 443.

19. Mutual Mar. Ins. Co. *v.* Munro, 7 Gray (Mass.) 246; Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429; Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451;

or fixed the valuation is not to be considered in the estimation of the value of the partial shipment and the policy will be treated as open.[20] The same rules apply to a valuation on freight.[21]

(II) *Open Policies.* An open or unvalued policy is one in which the value of the subject-matter is not fixed by the policy.[22]

d. Floating or Running Policies — (I) *Definition and Classification.* A "floating" or "running" policy, more frequently referred to as an "open" policy, is a contract whereby the underwriter agrees to insure property of the insured, the particulars of which are to be subsequently determined in accordance with stipulations contained in the policy.[23] There have been adopted various forms of these policies, some providing that the insurance shall cover all shipments of a particular class; others leaving it solely to the caprice of the insured to subsequently declare what property he shall elect to have protected by the insurance; and a third class requiring both a declaration by the insured and an approval by the underwriter before the attaching of the policy.

(II) *Policies Covering All Risks of a Particular Character.* Under an open policy on goods covering all shipments of a particular character, and which the insured is bound to declare, the policy attaches to the goods as soon as,[24]

Forbes *v.* Cowie, 1 Campb. 520; Tobin *v.* Harford, 17 C. B. N. S. 528, 10 Jur. N. S. 850, 34 L. J. C. P. 37, 10 L. T. Rep. N. S. 817, 12 Wkly. Rep. 1062, 112 E. C. L. 528; Forbes *v.* Aspinall, 13 East 323, 12 Rev. Rep. 352.

20. Dinoon *v.* Home, etc., Assur. Co., L. R. 7 C. P. 341, 1 Aspin. 309, 41 L. J. C. P. 162, 26 L. T. Rep. N. S. 628, 20 Wkly. Rep. 970; Tobin *v.* Harford, 17 C. B. N. S. 528, 10 Jur. N. S. 850, 34 L. J. C. P. 37, 10 L. T. Rep. N. S. 817, 12 Wkly. Rep. 1062, 112 E. C. L. 528.

21. Thwing *v.* Washington Ins. Co., 10 Gray (Mass.) 443; Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429; Dinoon *v.* Home, etc., Assur. Co., L. R. 7 C. P. 341, 1 Aspin. 309, 41 L. J. C. P. 162, 26 L. T. Rep. N. S. 628, 20 Wkly. Rep. 970; Patrick *v.* Eames, 3 Camph. 441.

"Carried or not carried."— Insurance was made on freight valued at the sum insured, "carried or not carried." A part of the cargo was on board when the vessel was driven on shore and lost. It was held that the insured was entitled to recover the value in the policy. De Longuemere *v.* Phœnix Ins. Co., 10 Johns. (N. Y.) 127.

22. Howes *v.* Union Ins. Co., 16 La. Ann. 235; Williams *v.* Continental Ins. Co., 24 Fed. 767. Where the printed clause in a policy, "The said goods and merchandise are valued at," was followed immediately by the written words, "eighteen francs, valued at four dollars and forty-four cents," the policy was held an open one, these words merely ascertaining at what rate the value of the cargo paid for in francs was to be reduced into our money. Ogden *v* Columbia Ins. Co., 10 Johns. (N. Y.) 273. And where a policy was effected upon freight, to "be valued at as under," and in the margin, nearly opposite, but a little above these words, the sum of £1,300 was written in figures, it was held that this was not a valued policy. Wilson *v.* Nelson, 5 B. & S. 354, 10 Jur. N. S. 1044, 33 L. J. Q. B. 220, 10 L. T. Rep. N. S. 523, 12 Wkly. Rep. 795, 117 E. C. L. 354.

23. London Assur. Corp. *v.* Paterson, 106 Ga. 538, 32 S. E. 650; Oteri *v.* Home Mut. Ins. Co., McGloin (La.) 198; Orient Mut. Ins. Co. *v.* Wright, 23 How. (U. S.) 401, 16 L. ed. 524. See also Arkansas Ins. Co. *v.* Bostick, 27 Ark. 539.

English statutory definition.— The Marine Insurance Bill, 1899, defines a floating policy as one "which describes the insurance in general terms, and leaves either the name of the ship or ships or other particulars to be defined by subsequent declaration."

Also called open policies.— The appellation "open" policy is frequently given to policies of this kind. See Phillips Ins. § 1178 note.

24. Hartshorn *v.* Shoe, etc., Ins. Co., 15 Gray (Mass.) 240; E. Carver Co. *v.* Manufacturers' Ins. Co., 6 Gray (Mass.) 214; Arnold *v.* Pacific Mut. Ins. Co., 78 N. Y. 7; Imperial Mar. Ins. Co. *v.* Fire Ins. Corp., 4 C. P. D. 166, 4 Aspin. 71, 48 L. J. C. P. 424, 40 L. T. Rep. N. S. 166, 27 Wkly. Rep. 680; Stephens *v.* Australasian Ins. Co., L. R. 8 C. P. 18, 1 Aspin. 458, 42 L. J. C. P. 12, 27 L. T. Rep. N. S. 585, 21 Wkly. Rep. 228.

The object of the declaration is to earmark and identify the particular adventure to which the insured elects to apply the policy. Arnold *v.* Pacific Mut. Ins. Co., 78 N. Y. 7; Davies *v.* National F. & M. Ins. Co., [1891] A. C. 485, 60 L. J. P. C. 73, 65 L. T. Rep. N. S. 560; Ionides *v.* Pacific F. & M. Ins. Co., L. R. 6 Q. B. 674.

Goods not contemplated by policy.— The policy cannot be extended by the declaration so as to apply to things not contemplated by and described therein. Shearer *v.* Louisiana Mut. Ins. Co., 14 La. Ann. 797; Oteri *v.* Home Mut. Ins. Co., McGloin (La.) 198.

What interest covered; insurance by carrier.— A steamship company took out an open policy on merchandise to be shipped on its steamers, which the company might agree to insure prior to the sailing of its vessels;

and in the order in which, they are shipped.[25] The declaration should be in the order of shipment;[26] and in case of mistake, the insured may and is bound to rectify the declaration,[27] which may, in the absence of fraud, be made even after knowledge of a loss.[28]

(III) *Policies Giving Assured Right to Elect What Risks Shall Be Covered.* Where the policy leaves it to the election of the assured to determine what property shall be covered, a declaration of such property is absolutely indispensable to the attaching of the policy,[29] and the declaration must be at the time

any losses to be paid to it or order. Goods shipped by plaintiff were insured under such policy. The evidence showed that the bill of lading issued to plaintiff exempted the steamship company from liability for nearly all the losses covered by the policy; that the policy provided that it should not inure to the benefit of a carrier; that stipulation permitting cancellation exempted "pending risks"; that the carrier could insure third persons by entries and notices thereof to defendant; that losses on goods shipped by other owners, and insured under the same circumstances, had been paid without question; and that cancellation of the insurance on plaintiff's goods was sought to be effected only when it was learned that he had other insurance. It was held that the general ownership of plaintiff was insured, and the contention of the insurance company that only the steamship company's interest in goods was intended to be insured was unsubstantiated. Insurance Co. of North America *v.* Forcheimer, 86 Ala. 541, 5 So. 870.

Cargo policy will not cover ship.— Where the hull of a boat is insured under a certificate "subject to the conditions of open policy No. 2,273," and it appears that there is no clause in such policy which could cover the hull of a boat, it being a cargo policy, no recovery can be had in case of loss. Barry *v.* Boston Mar. Ins. Co., 62 Mich. 424, 29 N. W. 31.

Declaration of value.— Some policies provide for a declaration of value as well as of the subject-matter, and in such cases the declaration of value is essential for the purpose of making the policy a valued one as to that shipment, but is not a condition precedent to the attaching of the risk. Davies *v.* National F. & M. Ins. Co., [1891] A. C. 485, 60 L. J. P. C. 73, 65 L. T. Rep. N. S. 560; Harman *v.* Kingston, 3 Campb. 150, 13 Rev. Rep. 775.

25. Imperial Mar. Ins. Co. *v.* Fire Ins. Corp., 4 C. P. D. 166, 4 Aspin. 71, 48 L. J. C. P. 424, 40 L. T. Rep. N. S. 166, 27 Wkly. Rep. 680; Stephens *v.* Australasian Ins. Co., L. R. 8 C. P. 18, 1 Aspin. 458, 42 L. J. C. P. 12, 27 L. T. Rep. N. S. 585, 21 Wkly. Rep. 228. A marine insurance company issued an open policy for seven hundred and fifty thousand dollars to D and authorized D to issue certificates against it to that amount. D issued to A a certificate for a specified period of time for an indefinite amount covering all shipments made by A. Subsequently D issued certificates so as to exhaust the seven hundred and fifty thousand dollars. A sustained a loss on goods thereafter shipped, and it was held that his insurance, being prior in time to the exhausting of the policy, was good. Hartshorn *v.* Union Mut. Ins. Co., 5 Bosw. (N. Y.) 538 [*affirmed* in 36 N. Y. 172].

26. Stephens *v.* Australasian Ins. Co., L. R. 8 C. P. 18, 1 Aspin. 458, 42 L. J. C. P. 12, 27 L. T. Rep. N. S. 585, 21 Wkly. Rep. 228.

A fraudulent declaration as to value and extent of shipments, thereby concealing the extent to which certain policies had been exhausted, was held to be sufficient ground for canceling subsequent open policies written for the same parties. Rivaz *v.* Gerussi, 6 Q. B. D. 222, 4 Aspin. 377, 50 L. J. Q. B. 176, 44 L. T. Rep. N. S. 79.

27. Imperial Mar. Ins. Co. *v.* Fire Ins. Corp., 4 C. P. D. 166, 4 Aspin. 71, 48 L. J. C. P. 424, 40 L. T. Rep. N. S. 166, 27 Wkly. Rep. 680; Stephens *v.* Australasian Ins. Co., L. R. 8 C. P. 18, 1 Aspin. 458, 42 L. J. C. P. 12, 27 L. T. Rep. N. S. 585, 21 Wkly. Rep. 228.

28. *California.*— Wells *v.* Pacific Ins. Co., 44 Cal. 397.

Massachusetts.— Hartshorn *v.* Shoe, etc., Ins. Co., 15 Gray 240; E. Carver Co. *v.* Manufacturers' Ins. Co., 6 Gray 214.

New York.— Arnold *v.* Pacific Mut. Ins. Co., 78 N. Y. 7.

Texas.— Marine F. Ins. Co. *v.* Burnett 29 Tex. 433.

England.— Imperial Mar. Ins. Co. *v.* Fire Ins. Corp., 4 C. P. D. 166, 4 Aspin. 71, 48 L. J. C. P. 424, 40 L. T. Rep. N. S. 166, 27 Wkly. Rep. 680; Stephens *v.* Australasian Ins. Co., L. R. 8 C. P. 18, 1 Aspin. 458, 42 L. J. C. P. 12, 27 L. T. Rep. N. S. 585, 21 Wkly. Rep. 228.

Reasonable diligence in making the declaration is all that is requisite (E. Carver Co. *v.* Manufacturers' Ins. Co., 6 Gray (Mass.) 214. See also Wells *v.* Pacific Ins. Co., 44 Cal. 397), unless a particular time for making it is provided for in the policy (Shearer *v.* Louisiana Mut. Ins. Co., 14 La. Ann. 797).

29. Douville *v.* Sun Mut. Ins. Co., 12 La. Ann. 259; Schaefer *v.* Baltimore Mar. Ins. Co., 33 Md. 109; Orient Mut. Ins. Co. *v.* Wright, 23 How. (U. S.) 401, 16 L. ed. 524. The contract of insurance on an open or running policy does not become complete until a declaration of a desire to insure is made by the assured, and until this is done the contract is inchoate and incomplete, and if not made at all, the risk will be regarded as not having commenced. Arkansas Ins. Co. *v.* Bostick, 27 Ark. 539.

and in the manner provided for in the policy.[30] But a course of dealing contrary to the provisions of the policy as to the manner of making the declaration will be construed as a waiver of the requirements.[31] The assent of the underwriter is not necessary, as he has no option to reject the risk.[32]

(IV) *Policies Requiring Approval and Indorsement or Entry of Risk.* In policies requiring the underwriter's approval of the risk and his indorsement of such approval on the policy or entry thereof in a book furnished for that purpose, such approval and indorsement or entry are necessary before a risk can attach,[33] and they must be in the manner stipulated in the policy unless the contract is modified by a contrary course of dealing between the parties.[34] The

What shipments to be reported.— A provision in an open policy, "Shipments to be reported to the agents of said company," will not be construed to mean all shipments, so as to avoid the policy for failure to declare shipments, where it was well known to the insurer's agents that the insured did not insure all shipments, and previous policies contained an express agreement to report all shipments. Callaway *v.* Orient Ins. Co., 63 Fed. 830.

To whom declaration made.— The declaration must be made to the underwriters or someone on their behalf. Harman *v.* Kingston, 3 Campb. 150, 13 Rev. Rep. 775. And a course of dealing by the underwriter in accepting premiums and paying losses where the declaration has been made to an agent will estop the underwriter from relying upon a provision in the policy requiring notice to be sent to its home office. Insurance Co. of North America *v.* Bell, 25 Tex. Civ. App. 129, 60 S. W. 262. When an open policy is issued on property "as per indorsement hereon, accepted by the company," and the risk is agreed upon, the premium paid, and the indorsement made by the agent, the insurance is effected. Otherwise, where the risk is "to be accepted." Wass *v.* Maine Mut. Mar. Ins. Co., 61 Me. 537.

30. Douville *v.* Sun Mut. Ins. Co., 12 La. Ann. 259; Schaefer *v.* Baltimore Mar. Ins. Co., 33 Md. 109; Orient Mut. Ins. Co. *v.* Wright, 23 How. (U. S.) 401, 16 L. ed. 524; Davies *v.* National F. & M. Ins. Co., [1891] A. C. 485, 60 L. J. P. C. 73, 65 L. T. Rep. N. S. 560.

Mailing a letter, prepaid and properly addressed, to an insurance company, if done by general direction of their agent, satisfies a condition in a policy that the facts stated in the letter shall be "reported" to the company. Edwards *v.* Mississippi Valley Ins. Co., 1 Mo. App. 192.

31. Insurance Co. of North America *v.* Bell, 25 Tex. Civ. App. 129, 60 S. W. 262.

Acceptance of premium.— Where a warranty in an open marine policy stipulated that all risks should be reported to the insurer as soon as known to the assured, acceptance, after arrival of cargo, of premiums on risks not properly reported, was held not a waiver of the warranty, so as to estop the insurer to take advantage of his right to deny his liability on a loss because of previous failure to report risks promptly. Camors *v.* Union Mar. Ins. Co., 104 La. 349, 28 So. 926, 81 Am. St. Rep. 128. See also Palmer *v.* Factors', etc., Ins. Co., 33 La. Ann. 1336.

32. Rolker *v.* Great Western Ins. Co., 2 Sweeny (N. Y.) 275; Davies *v.* National F. & M. Ins. Co., [1891] A. C. 485, 60 L. J. P. C. 73, 65 L. T. Rep. N. S. 560; Ionides *v.* Pacific F. & M. Ins. Co., L. R. 7 Q. B. 517, 2 Aspin. 454, 1 Aspin. 330, 41 L. J. Q. B. 190, 26 L. T. Rep. N. S. 738, 21 Wkly. Rep. 22.

33. Hartshorn *v.* Shoe, etc., Ins. Co., 15 Gray (Mass.) 240; Platho *v.* Merchants', etc., Ins. Co., 38 Mo. 248; Edwards *v.* St. Louis Perpetual Ins. Co,. 7 Mo. 382; Delaware Ins. Co. *v.* S. S. White Dental Mfg. Co., 109 Fed. 334, 48 C. C. A. 382, 65 L. R. A. 387 [*reversing* 105 Fed. 642]. See also Wass *v.* Maine Mut. Mar. Ins. Co., 61 Me. 537.

Each indorsement separate insurance.— Where by the terms of the policy of insurance the party desiring to be insured upon any particular shipment of merchandise was bound to present to the insurance company an invoice of the goods, and pay or secure the premium to the company and have the risk indorsed, it was held that there must necessarily exist as many contracts of insurance as the indorsements upon the policy of separate shipments of goods. Douville *v.* Sun Mut. Ins. Co., 12 La. Ann. 259; Schaefer *v.* Baltimore Mar. Ins. Co., 33 Md. 109; Hartshorn *v.* Shoe, etc., Ins. Co., 15 Gray (Mass.) 240.

34. *California.*— Wells *v.* Pacific Ins. Co., 44 Cal. 397.

Maryland.— Phœnix Ins. Co. *v.* Ryland, 69 Md. 437, 16 Atl. 109, 1 L. R. A. 548.

Massachusetts.— Kennebec Co. *v.* Augusta Ins., etc., Co., 6 Gray 204.

Missouri.— See Edwards *v.* Mississippi Valley Ins. Co., 1 Mo. App. 192.

New York.— Petrie *v.* Phenix Ins. Co., 132 N. Y. 137, 30 N. E. 380; Heilner *v.* China Mut. Ins. Co., 60 N. Y. Super. Ct. 362, 18 N. Y. Suppl. 177.

United States.— Callaway *v.* Orient Ins. Co., 63 Fed. 830.

Restricted indorsement.— A printed policy insuring goods laden on boats or carriages, and providing that no shipment shall be considered as insured until approved and "indorsed" thereon by insurer, is subject to all restrictions and modifications in a written indorsement. Kaatzenstin *v.* Western Assur. Co., 1 N. Y. St. 712. See *infra*, IV, B, 1, b.

Oral acceptance.— A provision that no risk

indorsement may be made after a loss has occurred, if the fact of loss is unknown to the insured.[35]

e. Voyage and Time Policies[36] — (I) *VOYAGE POLICIES.* A voyage policy is one which limits the duration of the risk between designated termini.[37]

(II) *TIME POLICIES*[38] — (A) *Definition.* A time policy is one in which the duration of the risk is limited to a specified period of time.[39]

(B) *Application of Amount of Insurance.* The amount of the insurance stated in a time policy on goods is not exhausted when once goods to the value of the amount stated have been put at risk, but continues throughout the period of the contract to protect all goods coming within its terms at any one time up to the amount insured.[40]

(III) *MIXED POLICIES.*[41] A mixed policy is one which combines the characteristics of both a voyage and a time policy.[42]

5. ILLEGALITY[43] **— a. In General.** A contract of insurance upon any property or interest covering a voyage or adventure undertaken in contravention of either the law of nations or the laws of the country where it is effected or to be enforced is void.[44] And where there is any illegality avoiding the insurance as to

should be binding "until accepted by the company and indorsed herein" does not render invalid an oral acceptance of a new risk by the insurer, under an agreement to indorse it on the policy at a later date. Emery *v.* Boston Mar. Ins. Co., 138 Mass. 398. *Compare* Kaatzenstin *v.* Western Assur. Co., 1 N. Y. St. 712, where it was held that a written indorsement was necessary under a provision that no shipment should be considered insured until approved and indorsed on the policy.

35. Horter *v.* Merchants' Mut. Ins. Co., 28 La. Ann. 730. See also *supra*, III, D, 19, a.

36. Construction see *infra*, IV, B, 6, 7, b.

37. Leeds *v.* Mechanics' Ins. Co., 8 N. Y. 351; 1 Arnould Mar. Ins. (7th ed.) 11.

38. Construction see *infra*, IV, B, 7, a.

39. Leeds *v.* Mechanics' Ins. Co., 8 N. Y. 351; 1 Arnould Mar. Ins. (7th ed.) 11. A policy of insurance on a vessel for twelve months is a time policy, although the language of the printed part was appropriate to a voyage policy, terminating the risk on her arrival in port, and being there moored in safety. Leeds *v.* Mechanics' Ins. Co., *supra*. And see Dudgeon *v.* Pembroke, 2 App. Cas. 284, 3 Aspin. 393, 46 L. J. Q. B. 409, 36 L. T. Rep. N. S. 382, 25 Wkly. Rep. 499 [*reversing* 1 Q. B. D. 96, 34 L. T. Rep. N. S. 36, and *affirming* L. R. 9 Q. B. 581, 43 L. J. Q. B. 220, 31 L. T. Rep. N. S. 31, 22 Wkly. Rep. 914], where a policy was effected on a ship from Jan. 22, 1872, to Jan. 23, 1873, both inclusive, and these words were written on a printed form, which also contained in print the words "at and from," and "for this present voyage," and other similar words commonly found in the forms of a voyage policy, and which had not been erased or stricken through. It was held that the policy was really a time policy and its character was not affected by the printed words thus negligently left in the form. See *infra*, IV, B, 1, b.

In England a time policy for more than twelve months is made illegal by 54 & 55 Vict. c. 39, § 93. A policy for twelve months followed by a voyage policy covering ship until arrival at a final port is void under the act. Royal Exch. Assur. Corp. *v.* Sjoforsakrings Aktiebolaget Vega, [1901] 2 K. B. 567, 9 Aspin. 233, 6 Com. Cas. 189, 70 L. J. Q. B. 874, 85 L. T. Rep. N. S. 241, 50 Wkly. Rep. 25 [*affirmed* in [1902] 2 K. B. 384, 9 Aspin. 329, 7 Com. Cas. 205, 71 L. J. K. B. 739, 87 L. T. Rep. N. S. 356, 50 Wkly. Rep. 694].

40. Crowley *v.* Cohen, 3 B. & Ad. 478, 1 L. J. K. B. 158, 23 E. C. L. 214.

41. Construction see *infra*, IV, B, 6, 7.

42. Leeds *v.* Mechanics' Ins. Co., 8 N. Y. 351. "In a time policy, the risk insured is independent of the voyage; and in a policy which partakes of the nature both of a time policy and a voyage policy, the underwriter is not liable for a loss unless it occur within the time specified." Pitt *v.* Phenix Ins. Co., 10 Daly (N. Y.) 281, 283 [*citing* Arnould Mar. Ins. (4th ed.) 349–353].

Renewal.— Where a policy of marine insurance insured a vessel for a specified time for a particular voyage outward, and after making the voyage, but before expiration of the time specified, the same underwriter insured the vessel for the return voyage by a certificate of insurance which by its terms was made "under and subject to the conditions" of the existing policy, it was held that the underwriter was not liable for a loss occurring after the time specified in the original policy. Pitt *v.* Phenix Ins. Co., 10 Daly (N. Y.) 281.

43. Right to return of premium paid see *infra*, V, F, 8.

44. Warren *v.* Manufacturers' Ins. Co., 13 Pick. (Mass.) 518, 25 Am. Dec. 341; Russell *v.* De Grand, 15 Mass. 35; Breed *v.* Eaton, 10 Mass. 21; Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 4 Am. Dec. 92; Craig *v.* U. S. Insurance Co., 6 Fed. Cas. No. 3,340, Pet. C. C. 410; Gray *v.* Sims, 10 Fed. Cas. No. 5,729, 3 Wash. 276; Camden *v.* Anderson, 1 B. & P. 272, 6 T. R. 723; Redmond *v.*

part it will avoid it *in toto*.[45] But the illegality must exist during the course of the voyage insured;[46] and it seems that knowledge or a privity to the illegality must be brought home to the masters or owners.[47] A mere intention to do an illegal act will not avoid the insurance.[48]

b. Violation of Revenue and Trade Laws.[49] An insurance upon goods or upon a vessel engaged in transporting goods, which are intended to be taken into a country in violation of its revenue laws, is illegal and non-enforceable in that country,[50] and the same is true of adventures undertaken in violation of an embargo,[51] or of a law prohibiting trading in particular places,[52] or prohibiting the importation or exportation of particular articles of merchandise,[53] and other enactments relating to trade and navigation.[54] But the violation of the revenue

Smith, 2 D. & L. 280, 8 Jur. 711, 13 L. J. C. P. 159, 7 M. & G. 474, 8 Scott N. R. 250, 49 E. C. L. 457; Johnston *v.* Sutton, Dougl. (3d ed.) 254; Ingham *v.* Agnew, 15 East 516, 13 Rev. Rep. 516.

Policy on money loaned to captain payable out of the freight see Wilson *v.* Royal Exch. Assur. Co., 2 Campb. 623, 12 Rev. Rep. 760.

Insurance against damages caused by collision.— It has been held in Massachusetts that the owner of a vessel may insure against liability for damages caused by collision. Minturn *v.* Warren Ins. Co., 2 Allen (Mass.) 86. In England, however, this has been questioned. Delanoy *v.* Robson, 5 Taunt. 605, 1 E. C. L. 309. See, generally, CONTRACTS, 9 Cyc. 468.

A forcible retaking of the ship by the master and crew of a neutral vessel from a belligerent power is a breach of neutrality and avoids the insurance. Garrels *v.* Kensington, 8 T. R. 230, 4 Rev. Rep. 635.

Privateer plundering vessels.— A contract of marine insurance covering a privateer is not void, although it contemplates the plundering of enemies' vessels at sea, instead of their convoy to port as prizes. Ward *v.* Wood, 13 Mass. 539.

Wager policies see *supra*, IV, A, 4, b.

Statute making time policy for more than twelve months illegal see *supra*, IV, A, 4, e, (II), (A), note 39.

Property subject to forfeiture see *supra*, III, D, 19, b.

45. Clark *v.* Protection Ins. Co., 5 Fed. Cas. No. 2,832, 1 Story 109; Gray *v.* Sims, 10 Fed. Cas. No. 5,729, 3 Wash. 276; Marryat *v.* Wilson, 1 B. & P. 430, 8 T. R. 31; Parkin *v.* Dick, 2 Campb. 221, 11 East 502, 11 Rev. Rep. 258; Bird *v.* Pigon, 2 Selw. 966 note; Bird *v.* Appleton, 8 T. R. 562, 5 Rev. Rep. 468. See also Sewell *v.* Royal Exch. Assur. Co., 4 Taunt. 856.

46. Polleys *v.* Ocean Ins. Co., 14 Me. 141; Ocean Ins. Co. *v.* Polleys, 13 Pet. (U. S.) 157, 10 L. ed. 105; Clark *v.* Protection Ins. Co., 5 Fed. Cas. No. 2,832, 1 Story 109; Bird *v.* Appleton, 8 T. R. 562, 5 Rev. Rep. 468.

Deprivation of an insurable interest by committing an act rendering the subject-matter liable to forfeiture see *supra*, III, D, 19, b.

47. Walden *v.* Phœnix Ins. Co., 5 Johns. (N. Y.) 310, 4 Am. Dec. 359; Wilson *v.* Rankin, L. R. 1 Q. B. 162, 35 L. J. Q. B. 87, 13 L. T. Rep. N. S. 564, 14 Wkly. Rep. 198; Cunard *v.* Hyde, E. B. & E. 670, 6 Jur. N. S. 40, 27 L. J. Q. B. 408, 96 E. C. L. 670.

48. Pollock *v.* Babcock, 6 Mass. 234; Clark *v.* Protection Ins. Co., 5 Fed. Cas. No. 2,832, 1 Story 109.

49. **Right to return of premium** see *infra*, V, F, 8.

50. Russell *v.* De Grand, 15 Mass. 35; Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 4 Am. Dec. 92; Gray *v.* Sims, 10 Fed. Cas. No. 5,729, 3 Wash. 276. See also Clark *v.* Protection Ins. Co., 5 Fed. Cas. No. 2,832, 1 Story 109.

Property smuggled by one vessel and placed on board a second vessel does not so taint the latter vessel with the illegality as to avoid its insurance. Clark *v.* Protection Ins. Co., 5 Fed. Cas. No. 2,832, 1 Story 109.

51. Campbell *v.* Innes, 4 B. & Ald. 423, 23 Rev. Rep. 238, 6 E. C. L. 544; Johnston *v.* Sutton, Dougl. (3d ed.) 254; Dalmady *v.* Mottenx, 1 T. R. 89 note. See also Fontaine *v.* Phœnix Ins. Co., 11 Johns. (N. Y.) 293. But a policy of insurance may lawfully indemnify against loss which will result in case an embargo should be adopted. Odlin *v.* Pennsylvania Ins. Co., 18 Fed. Cas. No. 10,433, 2 Wash. 312.

52. Russell *v.* De Grand, 15 Mass. 35 (voyage to interdicted port); Dunlop *v.* Gill, 1 B. & Ald. 334. Trading within limits of the South Sea Company's or East India Company's charter by British subjects, in violation of the monopolies given to those companies, invalidated the adventure and any insurance upon it. Dunlop *v.* Gill, *supra*; Marryat *v.* Wilson, 1 B. & P. 430, 8 T. R. 31; Camden *v.* Anderson, 1 B. & P. 272, 6 T. R. 723; Toulmin *v.* Anderson, 1 Taunt. 227.

53. Camelo *v.* Britten, 4 B. & Ald. 184, 6 E. C. L. 442; Parkin *v.* Dick, 2 Campb. 221, 11 East 502, 11 Rev. Rep. 258. See Fracis *v.* Sea Ins. Co., 79 L. T. Rep. N. S. 28, 47 Wkly. Rep. 119.

54. **Omitting part of the cargo from the manifest** makes the voyage illegal. Freard *v.* Dawson, Marshall Ins. 171. See also Carruthers *v.* Gray, 3 Campb. 142, 15 East 35.

Sailing without convoy.— During the wars of Napoleon, England prohibited its merchant marine from sailing without convoy, and insurances upon voyages in contravention of such enactment were invalid. Cohen *v.*

or trade laws of a foreign country will not invalidate insurance upon property engaged in such adventures.[55]

c. Violation of Shipping Regulations. As a rule laws or regulations pertaining to the licensing, enrolment, or registration of a vessel,[56] its equipment, officers, or crew,[57] or the manner in which it shall carry its cargo[58] are but collateral to the voyage or trade, and a violation thereof does not invalidate the insurance. It has been held that failure to comply with a statute requiring that every vessel bound on a voyage across the Atlantic shall have on board, well secured under deck, a certain quantity of water, under the penalty of forfeiting a sum of money to the crew or passengers in case they shall be put on short allowance, does not render the voyage illegal, so as to invalidate a policy of insurance.[59] And so it was held where a false clearance was taken out in violation of a statute imposing a penalty therefor.[60]

d. Intercourse With Enemy. All insurances upon trading adventures which are carried on by the subjects of one belligerent country with the subjects of another are illegal and void, unless they are protected by a special license.[61] But neutral property may lawfully be carried on a neutral ship to an enemy's port and covered by insurance.[62] Sailing under an enemy's license[63] or convoy[64] invalidates the insurance. Carrying contraband goods to a belligerent port[65]

Hinckley, 2 Campb. 51, 1 Taunt. 249, 11 Rev. Rep. 660; Ingham *v.* Agnew, 15 East 517, 13 Rev. Rep. 516; Laing *v.* Glover, 5 Taunt. 49, 1 E. C. L. 38; Wake *v.* Atty, 4 Taunt. 494, 13 Rev. Rep. 660; Hinckley *v.* Walton, 3 Taunt. 131.

Without license.—Where a statute requires a vessel to obtain a special permission to trade or touch at particular ports or places the failure to obtain such permission invalidates the insurance. Darby *v.* Newton, 2 Marsh. 252, 6 Taunt. 544, 1 E. C. L. 746; Hagedorn *v.* Bazett, 2 M. & S. 100.

Carrying simulated papers is illegal and invalidates the insurance unless permission is granted by the underwriters. Horneyer *v.* Lushington, 3 Campb. 85, 15 East 46, 13 Rev. Rep. 759.

55. Parker *v.* Jones, 13 Mass. 173; Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 4 Am. Dec. 92; Gardiner *v.* Smith, 1 Johns. Cas. (N. Y.) 141; Andrews *v.* Essex F. & M. Ins. Co., 1 Fed. Cas. No. 374, 3 Mason 6; Planche *v.* Fletcher, Dougl. (3d ed.) 251; Lever *v.* Fletcher, 1 Park Ins. 506.

Facts must be known to the underwriters and the risk expressly assumed where the adventure is illegal by the laws of a foreign country. Parker *v.* Jones, 13 Mass. 173; Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 4 Am. Dec. 92.

56. Wilkes *v.* People's F. Ins. Co., 19 N. Y. 184; Ocean Ins. Co. *v.* Polleys, 13 Pet. (U. S.) 157, 10 L. ed. 105. See also Levy *v.* Merrill, 4 Me. 180. *Contra*, Benton *v.* Hope, 19 La. Ann. 463.

57. Warren *v.* Manufacturers' Ins. Co., 13 Pick. (Mass.) 518, 25 Am. Dec. 341; Flanigen *v.* Washington Ins. Co., 7 Pa. St. 306. See also Old Dominion Ins. Co. *v.* Frank, 7 Ohio Dec. (Reprint) 302, 2 Cinc. L. Bul. 93.

Non-compliance with a statute requiring a written agreement to be made with seamen does not render a policy on the vessel void. Redmond *v.* Smith, 2 D. & L. 280, 8 Jur. 711, 13 L. J. C. P. 159, 7 M. & G. 457, 8 Scott N. R. 250, 49 E. C. L. 457.

58. Sherlock *v.* Globe Ins. Co., 7 Ohio Dec. (Reprint) 17, 1 Cinc. L. Bul. 26. *Compare* Wilson *v.* Rankin, L. R. 1 Q. B. 162, 35 L. J. Q. B. 87, 13 L. T. Rep. N. S. 564, 14 Wkly. Rep. 198; Cunard *v.* Hyde, E. B. & E. 670, 5 Jur. N. S. 40, 27 L. J. Q. B. 408, 96 E. C. L. 670.

59. Warren *v.* Manufacturers' Ins. Co., 13 Pick. (Mass.) 518, 25 Am. Dec. 341.

60. Atkinson *v.* Abbott, 1 Campb. 535, 11 East 135.

61. Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 4 Am. Dec. 92; Muller *v.* Thompson, 2 Campb. 610, 12 Rev. Rep. 753; Wright *v.* Welbie, 1 Chit. 49, 22 Rev. Rep. 792, 18 E. C. L. 41; Esposito *v.* Bowden, 7 E. & B. 763, 3 Jur. N. S. 1209, 27 L. J. Q. B. 17, 5 Wkly. Rep. 732, 90 E. C. L. 763; Potts *v.* Bell, 8 T. R. 548, 5 Rev. Rep. 452 [*overruling* Bell *v.* Gilson, 1 B. & P. 345, 4 Rev. Rep. 828]. See, generally, WAR.

62. Gist *v.* Mason, 1 T. R. 88, 1 Rev. Rep. 154.

Domicile in a neutral state will give subjects of a belligerent state the privileges of neutrals. Marryat *v.* Wilson, 1 B. & P. 430, 8 T. R. 31; Bell *v.* Reid, 1 M. & S. 726, 14 Rev. Rep. 557.

63. Bulkley *v.* Derby Fishing Co., 1 Conn. 571; Colquhoun *v.* New York Firemen Ins. Co., 15 Johns. (N. Y.) 352; Craig *v.* U. S. Insurance Co., 6 Fed. Cas. No. 3,340, Pet. C. C. 410.

The acceptance of an enemy's license without any intention of using it is not illegal. Bulkley *v.* Derby Fishing Co., 1 Conn. 571; Hayward *v.* Blake, 12 Mass. 176. See also Perkins *v.* New England Mar. Ins. Co., 12 Mass. 214.

64. Lawrence *v.* Ocean Ins. Co., 11 Johns. (N. Y.) 241.

65. Ludlow *v.* Bowne, 1 Johns. (N. Y.) 1, 3 Am. Dec. 277; Gibson *v.* Service, 1 Marsh.

or violating a blockade[66] is a breach of the laws of nations and vitiates the insurance.

e. Insurance of Aliens — (I) *In General.* All persons having an insurable interest, whether aliens or natives, may be insured[67] with the exception of alien enemies.

(II) *Alien Enemies.* But the insurance of property belonging to any alien with whose sovereign the insured's sovereign is at war is illegal and void on the ground of public policy.[68] And such insurance, although effected prior to the commencement of hostilities, is not enforceable even after the restoration of peace,[69] unless the loss occurred before the commencement of hostilities, in which case the right to sue upon the policy is merely suspended during the continuance of hostilities.[70] But an alien enemy may be given a license to trade and the license validates the insurance and enables the licensee to sue on the policy even during the continuance of hostilities.[71]

B. Construction and Operation — 1. Rules of Construction — a. In General. The same rules of construction which apply to all other instruments apply equally to contracts of marine insurance.[72] The intent of the parties is to be

119, 5 Taunt. 433, 1 E. C. L. 226; Gibson *v.* Mair, 1 Marsh. 39, 15 Rev. Rep. 668, 4 E. C. L. 455.

By neutrals.— The carrying of contraband goods by neutrals to neutral ports is not illegal. Hobbs *v.* Henning, 17 C. B. N. S. 791, 11 Jur. N. S. 223, 23 L. J. C. P. 117, 12 L. T. Rep. N. S. 205, 13 Wkly. Rep. 431, 112 E. C. L. 791.

66. Ludlow *v.* Bowne, 1 Johns. (N. Y.) 1, 3 Am. Dec. 277; Dalgleish *v.* Hodgson, 7 Bing. 495, 7 L. J. C. P. O. S. 138, 5 M. & P. 407, 20 E. C. L. 223.

Sailing to a blockaded port is not itself illegal when not done for purpose of violating the blockade but to inquire whether it continues. Maryland Ins. Co. *v.* Woods, 6 Cranch (U. S.) 29, 3 L. ed. 143; Sperry *v.* Delaware Ins. Co., 22 Fed. Cas. No. 13,236, 2 Wash. 243; Naylor *v.* Taylor, 9 B. & C. 718, 17 E. C. L. 321, M. & M. 205, 22 E. C. L. 509, 4 M. & R. 526, 31 Rev. Rep. 731; Dalgleish *v.* Hodgson, 7 Bing. 495, 9 L. J. C. P. O. S. 138, 5 M. & P. 407, 20 E. C. L. 223.

What constitutes violation of a blockade see War.

67. Hume *v.* Providence Washington Ins. Co., 23 S. C. 190; Janson *v.* Driefontein Consol. Mines, [1902] A. C. 481, 7 Com. Cas. 268, 71 L. J. K. B. 857, 87 L. T. Rep. N. S. 372, 51 Wkly. Rep. 142; 1 Arnould Ins. 87.

The statutes of the United States forbidding an alien to own an American vessel under pain of forfeiture does not prevent alien owners from recovering, in case of loss, on a policy of insurance based upon a valuable consideration; and where aliens purchase a vessel and have the title made to a citizen, but really for their own benefit, they may lawfully take in their own names a policy of insurance upon such vessel, the policy not being designed to aid an illegal purchase. Hume *v.* Providence Washington Ins. Co., 23 S. C. 190.

68. Furtado *v.* Rodgers, 3 B. & P. 191, 6 Rev. Rep. 752; Brandon *v.* Curling, 4 East 410, 1 Smith K. B. 85, 7 Rev. Rep. 592; Gamba *v.* Le Mesurier, 4 East 407, 7 Rev. Rep. 590; Kellner *v.* Le Mesurier, 4 East 396, 1 Smith K. B. 72, 7 Rev. Rep. 581; Bristow *v.* Towers, 6 T. R. 35, 3 Rev. Rep. 113 note; Brandon *v.* Nesbitt, 6 T. R. 23, 3 Rev. Rep. 109. See, generally, War.

Who are alien enemies see Aliens; Domicile; War. See also Janson *v.* Briefontain Consol. Mines, [1902] A. C. 484, 7 Com. Cas. 268, 71 L. J. K. B. 857, 87 L. T. Rep. N. S. 372, 51 Wkly. Rep. 142.

69. Furtado *v.* Rodgers, 3 B. & P. 191, 6 Rev. Rep. 752; Brandon *v.* Curling, 4 East 410, 1 Smith K. B. 85, 7 Rev. Rep. 592; Gamba *v.* Le Mesurier, 4 East 407, 7 Rev. Rep. 590.

70. Janson *v.* Driefontein Consol. Mines, [1902] A. C. 484, 7 Com. Cas. 268, 71 L. J. K. B. 857, 87 L. T. Rep. N. S. 372, 51 Wkly. Rep. 142; Harman *v.* Kingston, 3 Campb. 150, 13 Rev. Rep. 775; Boulton *v.* Dobree, 2 Campb. 163; Flindt *v.* Waters, 15 East 260, 3 Rev. Rep. 457.

71. Usparicha *v.* Noble, 13 East 332, 12 Rev. Rep. 360; Conway *v.* Gray, 10 East 536; Kensington *v.* Inglis, 8 East 273, 9 Rev. Rep. 438; Wells *v.* Williams, 1 Salk. 46; De Tastet *v.* Taylor, 4 Taunt. 233, 13 Rev. Rep. 585.

72. *Alabama.*— Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 27 Ala. 78.

California.— Wells *v.* Pacific Ins. Co., 44 Cal. 397.

Louisiana.— Bell *v.* Western M. & F. Ins. Co., 5 Rob. 423, 39 Am. Dec. 542.

United States.—Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,299, 3 Cliff. 328; Hearn *v.* New England Mut. Mar. Ins. Co., 11 Fed. Cas. No. 6,301, 4 Cliff. 200.

England.— Carr *v.* Montefiore, 5 B. & S. 408, 10 Jur. N. S. 1069, 33 L. J. Q. B. 256, 11 L. T. Rep. N. S. 157, 12 Wkly. Rep. 870, 117 E. C. L. 408; Robertson *v.* French, 4 East 130, 4 Esp. 246, 7 Rev. Rep. 535; Cazalet *v.* St. Barbe, 1 T. R. 187, 1 Rev. Rep. 178.

See 28 Cent. Dig. tit. "Insurance," § 292 *et seq.*

ascertained[73] by construing the policy according to its sense and meaning as collected from the terms used in it,[74] due effect being given to every part;[75] and the terms are themselves to be understood in their plain, ordinary, and popular sense,[76] unless the context shows an intent to use them in some other special and peculiar sense.[77] The contract is to have a liberal construction in favor of the insured,[78] particularly as to limitations and exceptions,[79] and where there is doubt or

Inland navigation.— The rules and principles of marine insurance must be applied to the interpretation of policies of insurance effected upon vessels exclusively employed in inland navigation, when not inapplicable by reason of the particular subject-matter. Caldwell *v.* St. Louis Perpetual Ins. Co., 1 La. Ann. 85.

73. *California.*— Wells *v.* Pacific Ins. Co., 44 Cal. 397.

Louisiana.— Bell *v.* Western M. & F. Ins. Co., 5 Rob. 423, 39 Am. Dec. 542.

Michigan.— Jackson *v.* British America Assur. Co., 106 Mich. 47, 63 N. W. 899, 20 L. R. A. 636.

New York.— Wright *v.* Williams, 20 Hun 320; Woodruff *v.* Commecial Mut. Ins. Co., 2 Hilt. 122.

United States.— Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383, 6 L. ed. 664; Henshaw *v.* Mutual Safety Ins. Co., 11 Fed. Cas. No. 6,387, 2 Blatchf. 99; Palmer *v.* Warren Ins. Co., 18 Fed. Cas. No. 10,698, 1 Story 360.

England.— Sea Ins. Co. *v.* Blogg, [1898] 2 Q. B. 398, 8 Aspin. 412, 67 L. J. Q. B. 757, 78 L. T. Rep. N. S. 785, 47 Wkly. Rep. 71; Carr *v.* Montefiore, 5 B. & S. 408, 10 Jur. N. S. 1069, 33 L. J. Q. B. 256, 11 L. T. Rep. N. S. 157, 12 Wkly. Rep. 870, 117 E. C. L. 408; Kulen Kemp *v.* Vigne, 1 T. R. 304, 1 Rev. Rep. 205.

Proposal different from policy.— Where plaintiffs proposed to insure a wheat cargo "at and from" port, and defendants, "in accordance with your written request," granted an insurance "from" port, it was held that there was a complete contract to insure "at and from" port. Colonial Ins. Co. *v.* Adelaide Mar. Ins. Co., 12 App. Cas. 128, 6 Aspin. 94, 56 L. J. P. C. 19, 56 L. T. Rep. N. S. 173, 35 Wkly. Rep. 636.

74. Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 27 Ala. 77; Robertson *v.* French, 4 East 130, 4 Esp. 246, 7 Rev. Rep. 535; Carr *v.* Montefiore, 10 Jur. N. S. 1069, 5 B. & S. 408, 33 L. J. Q. B. 256, 11 L. T. Rep. N. S. 157, 12 Wkly. Rep. 870, 117 E. C. L. 408. See also Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542.

75. Hurry *v.* Royal Exch. Assur. Co., 2 B. & P. 430, 3 Esp. 289, 5 Rev. Rep. 639, 6 Rev. Rep. 804; Mercantile Mar. Ins. Co. *v.* Titherington, 5 B. & S. 765, 11 Jur. N. S. 62, 34 L. J. Q. B. 11, 11 L. T. Rep. N. S. 340, 13 Wkly. Rep. 141, 117 E. C. L. 765.

76. *Alabama.*— Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 27 Ala. 77.

New York.— Hills *v.* Rhenish Westfalian Lloyd Transport Ins. Co., 39 Hun 552; Dow *v.* Whetten, 8 Wend. 160.

Wisconsin.— Johnson *v.* Northwestern Nat. Ins. Co., 39 Wis. 87.

United States.— Red Wing Mills *v.* Mercantile Mut. Ins. Co., 19 Fed. 115.

England.—Crocker *v.* Sturge, [1897] 1 Q. B. 330, 8 Aspin. 208, 66 L. J. Q. B. 142, 75 L. T. Rep. N. S. 549, 45 Wkly. Rep. 271; West India Tel. Co. *v.* Home, etc., Mar. Ins. Co., 6 Q. B. D. 51, 4 Aspin. 341, 50 L. J. Q. B. 41, 43 L. T. Rep. N. S. 420, 29 Wkly. Rep. 192; Lang *v.* Anderson, 3 B. & C. 495, 10 E. C. L. 228, 1 C. & P. 171, 12 E. C. L. 108, 5 D. & R. 393, 3 L. J. K. B. O. S. 62, 27 Rev. Rep. 412; Robertson *v.* French, 4 East 130, 4 Esp. 246, 7 Rev. Rep. 535; Cazalet *v.* St. Barbe, 1 T. R. 191, 1 Rev. Rep. 178.

Words are to be construed in their commercial sense as understood by shippers, ship-owners, and underwriters. Providence Washington Ins. Co. *v.* Gerow, 17 Can. Sup. Ct. 387. And see CONTRACTS, 9 Cyc. 583; EVIDENCE, 17 Cyc. 685.

77. Dow *v.* Whetten, 8 Wend. (N. Y.) 160; Robertson *v.* French, 4 East 130, 4 Esp. 246, 7 Rev. Rep. 535.

78. *Alabama.*— Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 27 Ala. 77.

California.— Wells *v.* Pacific Ins. Co., 44 Cal. 397.

Massachusetts.— Macy *v.* Whaling Ins. Co., 9 Metc. 354.

New York.— Rolker *v.* Great Western Ins. Co., 4 Abb. Dec. 76, 3 Keyes 17; Hills *v.* Rhenish Westfalian Lloyd Transport Ins. Co., 39 Hun 552; Hennessey *v.* Manhattan F. Ins. Co., 28 Hun 98; Providence, etc., Steamship Co. *v.* Phœnix Ins. Co., 22 Hun 517; Wright *v.* Williams, 20 Hun 320; White *v.* Hudson River Ins. Co., 15 How. Pr. 288.

Pennsylvania.— Western Ins. Co. *v.* Cropper, 32 Pa. St. 351, 75 Am. Dec. 561.

United States.— Orient Mut. Ins. Co. *v.* Wright, 23 How. 456, 16 L. ed. 524; Teutonia *v.* Boylston Mut. Ins. Co., 20 Fed. 148; Hearn *v.* New England Mut. Mar. Ins. Co., 11 Fed. Cas. No. 6,301, 3 Cliff. 318 [*affirmed* in 20 Wall. 488, 22 L. ed. 395]; Henshaw *v.* Mutual Safety Ins. Co., 11 Fed. Cas. No. 6,387, 2 Blatchf. 99; Palmer *v.* Warren Ins. Co., 18 Fed. Cas. No. 10,698, 1 Story 360.

See 28 Cent. Dig. tit. "Insurance," § 295 *et seq.*

79. Schroeder *v.* Stock, etc., Ins. Co., 46 Mo. 174; Bearns *v.* Columbian Ins. Co., 48 Barb. (N. Y.) 445; Woodruff *v.* Commercial Mut. Ins. Co., 2 Hilt. (N. Y.) 122; Mosher *v.* Providence Washington Ins. Co., 12 Misc. (N. Y.) 104, 33 N. Y. Suppl. 85; Western Ins. Co. *v.* Cropper, 32 Pa. St. 351, 75 Am. Dec. 561; Palmer *v.* Warren Ins. Co., 18 Fed. Cas. No. 10,698, 1 Story 360.

ambiguity.[80] Where a policy contains words which have no application to the particular insurance they may be expunged.[81]

b. Written and Printed Portions and Marginal Clauses or Riders. The written and printed portions of the policy are to be construed, if possible, so that both can stand;[82] but if there is any inconsistency the written portion will prevail over the printed portion.[83] The same rules apply to marginal clauses and riders as to written portions of a policy.[84]

c. Effect of Usages. The contract must be construed with relation to the general and established usages and customs of the particular trade or business

80. Imperial Shale Brick Co. *v.* Jewett, 169 N. Y. 143, 62 N. E. 167; Allen *v.* St. Louis Ins. Co., 85 N. Y. 473; Ferguson *v.* Providence Washington Ins. Co., 125 Fed. 141; American Steamship Co. *v.* Indemnity Mut. Mar. Ins. Co., 108 Fed. 421; Canton Ins. Office *v.* Woodside, 90 Fed. 301, 33 C. C. A. 63; Teutonia Ins. Co. *v.* Boylston Mut. Ins. Co., 20 Fed. 148; Mowat *v.* Boston Mar. Ins. Co., 26 Can. Sup. Ct. 47.

81. Hydarnes Steamship Co. *v.* Indemnity Mut. Mar. Assur. Co., [1895] 1 Q. B. 500, 7 Aspin. 553, 64 L. J. Q. B. 353, 72 L. T. Rep. N. S. 103, 14 Reports 216.

82. *Alabama.*— Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 27 Ala. 77.

Louisiana.— Goss *v.* Citizens' Ins. Co., 18 La. Ann. 97.

New York.— Benedict *v.* Ocean Ins. Co., 31 N. Y. 389.

United States.— Merchants' Mut. Ins. Co. *v.* Allen, 121 U. S. 67, 7 S. Ct. 821, 30 L. ed. 858; The Orient, 16 Fed. 916, 4 Woods 235 [*affirmed* in 121 U. S. 67, 7 S. Ct. 821, 30 L. ed. 858]; Seton *v.* Delaware Ins. Co., 21 Fed. Cas. No. 12,675, 2 Wash. 175.

Canada.— Wilson *v.* Merchants' Mar. Ins. Co., 3 Nova Scotia Dec. 81.

83. *Alabama.*— Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 27 Ala. 77.

California.— Gulf of California Nav., etc., Co. *v.* State Inv., etc., Co., 70 Cal. 586, 12 Pac. 473.

Louisiana.— Goss *v.* Citizens' Ins. Co., 18 La. Ann. 97.

Maryland.— Commonwealth Ins. Co. *v.* Cropper, 21 Md. 311.

Massachusetts.— Parker *v.* China Mut. Ins. Co., 164 Mass. 237, 41 N. E. 267.

Missouri.— Schroeder *v.* Stock, etc., Ins. Co., 46 Mo. 174.

New York.— Chadsey *v.* Guion, 97 N. Y. 333; Nelson *v.* Sun Mut. Ins. Co., 71 N. Y. 453; Benedict *v.* Ocean Ins. Co., 31 N. Y. 389 [*affirming* 1 Daly 8]; Burt *v.* Brewers', etc., Ins. Co., 9 Hun 383 [*affirmed* in 78 N. Y. 400]; Huth *v.* New York Mut. Ins. Co., 8 Bosw. 538; Bargett *v.* Orient Mut. Ins. Co., 3 Bosw. 385; Woodruff *v.* Commercial Mut. Ins. Co., 2 Hilt. 122; Mosher *v.* Providence Washington Ins. Co., 12 Misc. 104, 33 N. Y. Suppl. 85.

United States.— Hagan *v.* Scottish Union, etc., Ins. Co., 186 U. S. 423, 22 S. Ct. 862, 46 L. ed. 1229; Seton *v.* Delaware Ins. Co., 21 Fed. Cas. No. 12,675, 2 Wash. 175.

England.— Dudgeon *v.* Pembroke, 2 App. Cas. 284, 3 Aspin. 393, 46 L. J. Q. B. 409, 36 L. T. Rep. N. S. 382, 25 Wkly. Rep. 499; Cunard Steamship Co. *v.* Marten, [1902] 2 K. B. 624, 71 L. J. K. B. 968, 87 L. T. Rep. N. S. 400; Hydarnes Steamship Co. *v.* Indemnity Mut. Mar. Assur. Co., [1895] 1 Q. B. 500, 7 Aspin. 553, 64 L. J. Q. B. 353, 72 L. T. Rep. N. S. 103, 14 Reports 216; Robertson *v.* French, 4 East 130, 4 Esp. 246, 7 Rev. Rep. 535.

Canada.— Meagher *v.* Home Ins. Co., 11 U. C. C. P. 328; Meagher *v.* Ætna Ins. Co., 20 U. C. Q. B. 607.

See 28 Cent. Dig. tit. "Insurance," § 301 *et seq.*

Illustrations.— Where a policy of insurance contained the usual covenants and conditions used in policies on voyages from port to port; but the names of the ports were left blank, and the risk was described as "port risk in the port of New York," it was held, in an action thereon, that these words controlled the printed part of the policy, and limited and defined the risk insured against. Nelson *v.* Sun Mut. Ins. Co., 71 N. Y. 453. And where the printed terms of an open marine policy were for perils of seas, rivers, fire, and overpowering thieves, and the insurance company, by its agent, indorsed thereon "$2,000 on cargo, canal-boat Ben. Franklin, at and from this port, per Miami and Wabash Canals, to Covington, Ind., and landed, at 3-8, $7.50," it was held that the policy, by the indorsement, covered the ordinary risks of canal navigation. Protection Ins. Co. *v.* Wilson, 6 Ohio St. 553. But where the policy contained a printed clause which prohibited the vessel from certain waters, including the Gulf of Campeachy, and had written into it the words "excluding the Gulf of Campeachy," it was held that the written words were not for the purpose of qualifying the printed clause, but for calling particular attention to the Gulf of Campeachy, near which the vessel was when insured. Parker *v.* China Mut. Ins. Co., 164 Mass. 237, 41 N. E. 267.

Time indorsement; voyage policy.— The written indorsement on a policy making the risk on time overrides the printed words which, if given effect, would make the policy a voyage policy. Dudgeon *v.* Pembroke, 2 App. Cas. 284, 3 Aspin. 393, 46 L. J. Q. B. 409, 36 L. T. Rep. N. S. 382, 25 Wkly. Rep. 499.

84. Swinnerton *v.* Columbian Ins. Co., 37 N. Y. 174, 93 Am. Dec. 560; Crew-Levick Co. *v.* British, etc., Mar. Ins. Co., 103 Fed. 48, 43 C. C. A. 107.

with reference to which the insurance has been effected,[85] which usages and customs the insurer is bound to know;[86] but a usage cannot be resorted to for the purpose of varying or contradicting the written agreement;[87] and the insured

85. *Alabama.*— Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 27 Ala. 77; Fulton Ins. Co. *v.* Milner, 23 Ala. 420.

Maine.— Cobb *v.* Lime Rock F. & M. Ins. Co., 58 Me. 326.

Maryland.— Allegre *v.* Maryland Ins. Co., 6 Harr. & J. 408, 14 Am. Dec. 289.

Massachusetts.— Macy *v.* Whaling Ins. Co., 9 Metc. 354.

New York.— Block *v.* Columbian Ins. Co., 3 Rob. 296 [*affirmed* in 42 N. Y. 393]; Child *v.* Sun Mut. Ins. Co., 3 Sandf. 26; Rankin *v.* American Ins. Co., 1 Hall 682; Coit *v.* Commercial Ins. Co., 7 Johns. 385, 5 Am. Dec. 282.

Pennsylvania.— State F. & M. Ins. Co. *v.* Porter, 3 Grant 123; Eyre *v.* Philadelphia Mar. Ins. Co., 5 Watts & S. 116.

South Carolina.— Union Bank *v.* Union Ins. Co., Dudley 171; Murden *v.* South Carolina Ins. Co., 1 Mill 200.

Texas.— Orient Mut. Ins. Co. *v.* Reymershoffer, 56 Tex. 234.

Wisconsin.— Johnson *v.* Northwestern Nat. Ins. Co., 39 Wis. 87.

United States.— Hazleton *v.* Manhattan Ins. Co., 12 Fed. 159, 11 Biss. 210; Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132; Hearn *v.* New England Mut. Mar. Ins. Co., 11 Fed. Cas. No. 6,301, 3 Cliff. 318 [*affirmed* in 20 Wall. 488, 22 L. ed. 395]; Rogers *v.* Mechanics' Ins. Co., 20 Fed. Cas. No. 12,016, 1 Story 603; Tidmarsh *v.* Washington F. & M. Ins. Co., 23 Fed. Cas. No. 14,024, 4 Mason 439; Winthrop *v.* Union Ins. Co., 30 Fed. Cas. No. 17,901, 2 Wash. 7.

England.— Salvador *v.* Hopkins, 3 Burr. 1707; Ougier *v.* Jennings, 1 Campb. 505 note, 10 Rev. Rep. 739; Miller *v.* Tetherington, 7 H. & N. 954, 8 Jur. N. S. 1039, 31 L. J. Exch. 363, 9 L. T. Rep. N. S. 231, 10 Wkly. Rep. 356.

See 28 Cent. Dig. tit. "Insurance," § 314; and, generally, CUSTOMS AND USAGES.

Illustrations.— Where a policy was on a voyage "at or from the port or ports of discharge and loading in India and the East India Islands," it was held that it might be shown that the Mauritius was considered in mercantile contracts as an East India island, although treated by geographers as an African island. Robertson *v.* Money, R. & M. 75, 27 Rev. Rep. 732, 21 E. C. L. 704. And where the policy was on a voyage, "to any port in the Baltic," it was held that it might be shown that the Gulf of Finland was considered in mercantile contracts as within the Baltic. Uhde *v.* Walters, 3 Campb. 16, 13 Rev. Rep. 737.

Applicable to reinsurance.— A usage between merchants and underwriters is binding upon reinsurers. Maritime Mar. Ins. Co. *v.* Fire Reinsurance Corp., 1 Aspin. 71, 40 L. T. Rep. N. S. 166.

Evidence see *infra*, XII, F, 2, b.

Question for jury see *infra*, XII, G, 2, b.

86. *Indiana.*— Toledo F. & M. Ins. Co. *v.* Speares, 16 Ind. 52; Grant *v.* Lexington F., etc., Ins. Co., 5 Ind. 23, 61 Am. Dec. 74.

New York.— Hartshorne *v.* Union Mut. Ins. Co., 36 N. Y. 172; St. Nicholas Ins. Co. *v.* Merchants' Mut. F. & M. Ins. Co., 11 Hun 108 [*reversed* on other grounds in 83 N. Y. 604]; Wadsworth *v.* Pacific Ins. Co., 4 Wend. 33.

Texas.— Orient Mut. Ins. Co. *v.* Reymershoffer, 56 Tex. 234.

United States.— Hearne *v.* New England Mut. Mar. Ins. Co., 20 Wall. 488, 22 L. ed. 395 [*affirming* 11 Fed. Cas. No. 6,301, 3 Cliff. 318]; Hazard *v.* New England Mar. Ins. Co., 8 Pet. 557, 8 L. ed. 1043; Ruger *v.* Fireman's Fund Ins. Co., 90 Fed. 310; Bulkley *v.* Protection Ins. Co., 4 Fed. Cas. No. 2,118, 2 Paine 82; Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192 [*affirmed* in 20 Wall. 494, 22 L. ed. 398]; Tidmarsh *v.* Washington F. & M. Ins. Co., 23 Fed. Cas. No. 14,024, 4 Mason 439.

England.— Winter *v.* Haldimand, 2 B. & Ad. 649, 22 E. C. L. 272; Stewart *v.* Bell, 5 B. & Ald. 238, 24 Rev. Rep. 342, 7 E. C. L. 136; Kingston *v.* Knibbs, 1 Campb. 508 note, 10 Rev. Rep. 742; Ougier *v.* Jennings, 1 Campb. 505 note, 10 Rev. Rep. 739; Noble *v.* Kennoway, Dougl. (3d ed.) 510; Grant *v.* Paxton, 1 Taunt. 463.

See 28 Cent. Dig. tit. "Insurance," § 314.

Compare Natchez Ins. Co. *v.* Stanton, 2 Sm. & M. (Miss.) 340, 41 Am. Dec. 592.

Form of charter-party.— When there is a settled form of charter in a particular trade, underwriters are bound to know the customary stipulations of a charter in that trade, and, when informed by an applicant for insurance that the vessel described in the application is chartered in such trade, the contract of insurance must be considered to be made with the understanding that the charter is framed in the usual way, unless the correspondence leads to a different conclusion. Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192 [*affirmed* in 20 Wall. 494, 22 L. ed. 398].

87. *Massachusetts.*— Hartshorn *v.* Shoe, etc., Dealers' Ins. Co., 15 Gray 240.

Missouri.— Wise *v.* St. Louis Ins. Co., 23 Mo. 80.

New York.— Bargett *v.* Orient Ins. Co., 3 Bosw. 385.

Pennsylvania.—State F. & M. Ins. Co. *v.* Porter, 3 Grant 123.

United States.— Hearne *v.* New England Mut. Mar. Ins. Co., 20 Wall. 488, 22 L. ed. 395 [*affirming* 11 Fed. Cas. No. 6,301, 3 Cliff. 318]; Orient Mut. Ins. Co. *v.* Wright, 1 Wall. 456, 17 L. ed. 505; Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,299, 3 Cliff. 328; Winthrop *v.* Union Ins. Co., 30 Fed. Cas. No. 17,901, 2 Wash. 7.

is not bound by the usages of underwriters of which he is not cognizant.[88] To be binding, a custom or usage must be general or universal, or at least not local to some other place than that in which the contract was made.[89]

d. By What Law Governed. The contract is to be construed according to the law and usages of the place where it is to be performed, or if a place of performance is not indicated, then according to the place where it is made, unless the parties otherwise stipulate.[90]

e. Construction by Parties. The general rule that the practical construction put upon a contract by the parties thereto will be binding upon them applies to contracts of marine insurance.[91]

2. Description of Persons Insured[92] **— a. In General.** Ordinarily a policy of

England.— Parkinson *v.* Collier, 1 Park. Ins. 47.

See also *infra*, XII, F, 2, b.

It is only when the law is unsettled that evidence of usage can be admitted to explain clauses in a policy of marine insurance. Winthrop *v.* Union Ins. Co., 30 Fed. Cas. No. 17,901, 2 Wash. 7. And see Bargett *v.* Orient Mut. Ins. Co., 3 Bosw. (N. Y.) 385, holding that it is not competent to show by parol evidence that words written in a policy of insurance, and which have received a judicial interpretation, have acquired by the usage of trade a peculiar commercial meaning varying from or in conflict with that which the courts have adjudged to be their true meaning.

88. Red Wing Mills *v.* Mercantile Mut. M. Ins. Co., 19 Fed. 115; Gahay *v.* Lloyd, 3 B. & C. 792, 5 D. & R. 641, 3 L. J. K. B. O. S. 116, 27 Rev. Rep. 486, 10 E. C. L. 359; Sweeting *v.* Pearce, 9 C. P. N. S. 534, 7 Jur. N. S. 800, 30 L. J. C. P. 109, 5 L. T. Rep. N. S. 79, 9 Wkly. Rep. 343, 99 E. C. L. 534.

89. *Maine.*— Cobb *v.* Lime Rock F. & M. Ins. Co., 58 Me. 326, holding that the usage or construction given in Boston to a condition prohibiting the vessel "from the river and Gulf of St. Lawrence between September first and May first" will not affect a policy of insurance upon a vessel made at Rockland, Me., containing the same words, unless the usage is shown to exist at the latter place.

Maryland.— Mason *v.* Franklin F. Ins. Co., 12 Gill & J. 468.

Massachusetts.— Parkhurst *v.* Gloucester Mut. Fishing Ins. Co., 100 Mass. 301, 97 Am. Dec. 109, 1 Am. Rep. 105.

Mississippi.— Natchez Ins. Co. *v.* Stanton, 2 Sm. & M. 340, 41 Am. Dec. 592.

New York.— Child *v.* Sun Mut. Ins. Co., 3 Sandf. 26.

United States.— Red Wing Mills *v.* Marcantile Mut. Ins. Co., 19 Fed. 115; Donnell *v.* Columbian Ins. Co., 7 Fed. Cas. No. 3,987, 2 Sumn. 366; Rogers *v.* Mechanics' Ins. Co., 20 Fed. Cas. No. 12,016, 1 Story 603.

See 28 Cent. Dig. tit. "Insurance," § 314; and, generally, Customs and Usages.

Need not extend to entire state.— To give validity to a custom affecting a contract of marine insurance, it is not necessary that it should extend to the whole of the state, but if the custom is generally known and acted upon in the port, city, or town where the policy is effected, it is sufficient. Fulton Ins. Co. *v.* Milner, 23 Ala. 420.

A policy referring to the usages of London as the standard by which its liabilities are to be fixed will be construed according to those usages only. Union Bank *v.* Union Ins. Co., Dudley (S. C.) 171.

90. *Louisiana.*— Shiff *v.* Louisiana State Ins. Co., 6 Mart. N. S. 629; Brooke *v.* Louisiana Ins. Co., 5 Mart. N. S. 530.

Massachusetts.— Heebner *v.* Eagle Ins. Co., 10 Gray 131, 69 Am. Dec. 308.

United States.— London Assur. *v.* Companhia de Moagens, 167 U. S. 149, 17 S. Ct. 785, 42 L. ed. 113; Canton Ins. Office *v.* Woodside, 90 Fed. 301, 33 C. C. A. 63; Wright *v.* Sun Mut. Ins. Co., 30 Fed. Cas. No. 18,095 [*reversed* on other grounds in 23 How. 412, 16 L. ed. 529].

England.— Royal Exch. Assur. Corp. *v.* Sjoforsakrings Aktiebolaget Vega, [1902] 2 K. B. 384, 9 Aspin. 329, 7 Com. Cas. 205, 71 L. J. K. B. 739, 87 L. T. Rep. N. S. 356, 50 Wkly. Rep. 694 [*affirming* [1901] 2 K. B. 567, 9 Aspin. 233, 6 Com. Cas. 189, 70 L. J. K. B. 874, 85 L. T. Rep. N. S. 241, 50 Wkly. Rep. 25]; Greer *v.* Poole, 5 Q. B. D. 272, 4 Aspin. 300, 49 L. J. Q. B. 463, 42 L. T. Rep. N. S. 687, 28 Wkly. Rep. 582; Power *v.* Whitmore, 4 M. & S. 141, 16 Rev. Rep. 416.

Canada.— Meagher *v.* Ætna Ins. Co., 20 U. C. Q. B. 607.

Place of payment.— A contract of marine insurance made by an English company in the United States upon a cargo to be exported to Portugal, which specially provides that in case of loss the amount of damages is to be paid at the office of the company in London, the adjustment to be made according to the usages of Lloyds, being a contract to be performed in England, is governed by the English law. London Assur. *v.* Companhia de Moagens, 167 U. S. 149, 17 S. Ct. 785, 42 L. ed. 113.

91. Insurance Co. of North America *v.* Forcheimer, 86 Ala. 541, 5 So. 870; Henning *v.* U. S. Insurance Co., 11 Fed. Cas. No. 6,366, 2 Dill. 26. See also Reed *v.* Merchants Mut. Ins. Co., 95 U. S. 23, 24 L. ed. 348, and, generally, Contracts, 9 Cyc. 588; Fire Insurance, 19 Cyc. 661; Life Insurance, 25 Cyc. 867.

92. **Contracts effected by agent** see *supra*, IV, A, 2.

Who may sue on contract see *infra*, XII, C, 1.

insurance insures only the interest of the person named therein as the assured.[93] Where the master, who is also part-owner, makes insurance on property on board for the owners of the vessel, part of which is joint and part separate property, the insurance will cover his own property, both joint and separate.[94] Insurance by a mortgagee for "account of himself" will not cover beyond the amount of the mortgage debt.[95] Where a policy is executed in blank as to the insured, it seems that, in the absence of a statute to the contrary, the holder has implied authority to fill in the name of the person intended.[96]

b. "Account of Whom It May Concern." Where the policy is "for account of whom it may concern" or other equivalent designation,[97] it covers all persons having an insurable interest[98] contemplated by the person effecting the

93. *Louisiana.*— Duncan *v.* Sun Mut. Ins. Co., 12 La. Ann. 486.

Maryland.— Newson *v.* Douglass, 7 Harr. & J. 417, 16 Am. Dec. 317.

Massachusetts.—Finney *v.* Warren Ins. Co., 1 Metc. 16, 35 Am. Dec. 343; Pearson *v.* Lord, 6 Mass. 81; Dumas *v.* Jones, 4 Mass. 647.

Missouri.— Wise *v.* St. Louis Mar. Ins. Co., 23 Mo. 80.

New York.— Turner *v.* Burrows, 8 Wend. 144 [*affirming* 5 Wend. 541].

Ohio.— Marine Ins. Co. *v.* Walsh-Upstill Coal Co., 68 Ohio St. 469, 68 N. E. 21.

United States.— Graves *v.* Boston Mar. Ins. Co., 2 Cranch 419, 2 L. ed. 324; The Sydney, 27 Fed. 119.

England.— Watson *v.* Swann, 11 C. B. N. S. 756, 31 L. J. C. P. 210, 103 E. C. L. 756.

See 28 Cent. Dig. tit. "Insurance," § 316 *et seq.*

A policy in the name of one part-owner "as property may appear," without any clause stating the insurance to be for the benefit of all concerned, does not cover the interest of another part-owner. Graves *v.* Boston Mar. Ins. Co., 2 Cranch (U. S.) 419, 2 L. ed. 324. See also Finney *v.* Warren Ins. Co., 1 Metc. (Mass.) 16, 35 Am. Dec. 343; Pearson *v.* Lord, 6 Mass. 81; Dumas *v.* Jones, 4 Mass. 647; Knight *v.* Eureka F. & M. Ins. Co., 26 Ohio St. 664, 20 Am. Rep. 778.

Interest of agent not covered.— A provision of an insurance policy that the term "insured," as used therein, shall include his legal representatives, does not include his agents. Boston Mar. Ins. Co. *v.* Scales, 101 Tenn. 628, 49 S. W. 743.

"As agent of B" will not cover the interest of C, although C is the only person interested in the property insured. Russell *v.* New England Mar. Ins. Co., 4 Mass. 82.

Insurance by trustee.— Where a trustee to whom shares in a vessel were conveyed as security for a debt took out insurance on the vessel and collected for a loss, it was held that the debtor's administratrix could not recover from him any part of the insurance so collected. Burlingame *v.* Goodspeed, 153 Mass. 24, 26 N. E. 232, 10 L. R. A. 495.

Wharfinger's policy, on goods, their "own, in trust, or on commission or for which they are responsible" only covers their liability for goods of others. North British, etc., Ins. Co. *v.* London, etc., Ins. Co., 5 Ch. D. 569, 46 L. J. Ch. 537, 36 L. T. Rep. N. S. 629.

Loss payable to another.— Where an open policy caused J to be insured, and afterward a risk was indorsed thereon, loss, if any, payable to the firm of G & B, it was held that G & B had a mere authority to receive payment in case of loss, and the policy covered only the interest which J had in the property. Graham *v.* Fireman's Ins. Co., 2 Disn. (Ohio) 255, 3 Wkly. L. Gaz. 170.

94. Foster *v.* U. S. Insurance Co., 11 Pick. (Mass.) 85.

95. Archbold *v.* Merchants' Mar. Ins. Co., 16 Nova Scotia 98.

96. Turner *v.* Burrows, 8 Wend. (N. Y.) 144 [*affirming* 5 Wend. 541].

97. **The technical or customary phrase is** not necessary to give the policy the effect of one "for whom it may concern." Duncan *v.* Sun Mut. Ins. Co., 12 La. Ann. 486. See also Duncan *v.* China Mut. Ins. Co., 129 N. Y. 237, 29 N. E. 76; Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219.

"Account of owner" is equivalent to "account of whom it may concern." Turner *v.* Burrows, 8 Wend. (N. Y.) 144; Catlett *v.* Pacific Ins. Co., 1 Wend. (N. Y.) 561 [*affirmed* in 4 Wend. 75]; Catlett *v.* Pacific Ins. Co., 5 Fed. Cas. No. 2,517, 1 Paine 594.

"For account of ——," with a blank for the name of the assured, is of the same effect. Burrows *v.* Turner, 8 Wend. (N. Y.) 144, 24 Wend. 276, 35 Am. Dec. 622; Cunard *v.* Nova Scotia Mar. Ins. Co., 29 Nova Scotia 409.

98. *Alabama.*— Insurance Co. of North America *v.* Forcheimer, 86 Ala. 541, 5 So. 870.

Louisiana.— Frierson *v.* Brenham, 5 La. Ann. 540, 52 Am. Dec. 603.

Maine.— Haynes *v.* Rowe, 40 Me. 181.

Maryland.— Newson *v.* Douglass, 7 Harr. & J. 417, 16 Am. Dec. 317.

Massachusetts.— Cobb *v.* New England Mut. Mar. Ins. Co., 6 Gray 192; Rider *v.* Ocean Ins. Co., 20 Pick. 259; Ward *v.* Wood, 13 Mass. 539.

New York.— Duncan *v.* China Mut. Ins. Co., 129 N. Y. 237, 29 N. E. 76; Pacific Mail Steamship Co. *v.* Great Western Ins. Co., 65 Barb. 334; Turner *v.* Burrows, 8 Wend. 144 [*affirming* 5 Wend. 541].

United States.— Hagan *v.* Scottish Union, etc., Ins. Co., 186 U. S. 423, 22 S. Ct. 862, 46 L. ed. 1229; Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219; Buck *v.* Chesapeake Ins.

insurance,[99] although no specific individuals were in mind[1] and the person or persons intended were unknown to the underwriter,[2] provided in all cases they either authorized the effecting of the insurance or have ratified and adopted it.[3] Such a policy will cover individual property, partnership property, and property held as agent;[4] and it may inure to the benefit of persons acquiring an interest after the insurance is effected.[5]

Co., 1 Pet. 151, 7 L. ed. 90; Dodwell *v.* Munich Assur. Co., 123 Fed. 841 [*affirmed* in 128 Fed. 410]; Mannheim Ins. Co. *v.* Hollander, 112 Fed. 549; Aldrich *v.* Equitable Safety Ins. Co., 1 Fed. Cas. No. 272, 1 Woodb. & M. 272; Henshaw *v.* Mutual Safety Ins. Co., 11 Fed. Cas. No. 6,387, 2 Blatchf. 99; Hurlbert *v.* Pacific Ins. Co., 12 Fed. Cas. No. 6,919, 2 Sumn. 471; Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127. See also The Clintonia, 104 Fed. 92.

England.— Hagedorn *v.* Oliverson, 2 M. & S. 485, 15 Rev. Rep. 317.

Canada.—Merchants Mar. Ins. Co. *v.* Barss, 15 Can. Sup. Ct. 185; Seaman *v.* West, 17 Nova Scotia 207.

See 28 Cent. Dig. tit. "Insurance," § 319.

Who may sue see *infra*, XII, C, 1, a.

99. *Louisiana.*— Frierson *v.* Brenham, 5 La. Ann. 540, 52 Am. Dec. 603.

Maine.— Haynes *v.* Rowe, 40 Me. 181.

Maryland.— Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Newson *v.* Douglass, 7 Harr. & J. 417, 16 Am. Dec. 317.

New York.— Duncan *v.* China Mut. Ins. Co., 129 N. Y. 237, 29 N. E. 76; Forgay *v.* Atlantic Mut. Ins. Co., 2 Rob. 79; Crosby *v.* New York Mut. Ins. Co., 5 Bosw. 369 [*affirmed* in 1 Abb. Dec. 562, 3 Keyes 394, 2 Transcr. App. 130, 5 Abb. Pr. N. S. 173].

Pennsylvania.— De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. 68, 33 Am. Dec. 38.

United States.— Hagan *v.* Scottish Union, etc., Ins. Co., 186 U. S. 423, 22 S. Ct. 862, 46 L. ed. 1229; Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219; The Sydney, 27 Fed. 119.

England.—Watson *v.* Swann, 11 C. B. N. S. 756, 31 L. J. C. P. 210, 103 E. C. L. 756; Routh *v.* Thompson, 13 East 274, 11 East 428, 10 Rev. Rep. 539.

Persons not intended are not covered (Pacific Ins. Co. *v.* Catlett, 4 Wend. (N. Y.) 75 [*affirming* 1 Wend. 561]; and other cases cited *supra*, this note), even though they be the parties who effect the insurance (Paradise *v.* Sun Mut Ins. Co., 6 La. Ann. 596).

No particular person contemplated.— When such a policy is obtained without intending to cover any particular cargo, but only to protect whatever cargo may be shipped in a certain vessel for a certain voyage, it will not inure to the benefit of a party who afterward ships his goods on the faith of it, and adopts the act of the person who obtained it, but does not take a valid assignment of it. Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348. A policy made at the instance of N on account of whom it might concern, the loss payable to H, for the sum of fifteen thousand dollars, is an agreement by the underwriters to insure all the interest to the extent of fifteen thousand dollars which shall be owned in the vessel at the time of her loss within the policy, and to pay the loss to H for the benefit of the actual owners. Henshaw *v.* Mutual Safety Ins. Co., 11 Fed. Cas. No. 6,387, 2 Blatchf. 99.

Presumption that individual interest was intended to be covered.— Where a purchaser of a steamboat had run her as his own property and on his own account, an insurance by him for the benefit of whom it may concern will be presumed to have been for his own benefit, and he will be entitled to recover the insurance, although there is a contest as to the validity of his title to the vessel. Frierson *v.* Brenham, 5 La. Ann. 540, 52 Am. Dec. 603.

1. Hagan *v.* Scottish Union, etc., Ins. Co., 186 U. S. 423, 22 S. Ct. 811, 46 L. ed. 1229; Routh *v.* Thompson, 13 East 274, 11 East 428, 10 Rev. Rep. 539.

2. The Sydney, 27 Fed. 119.

3. Frierson *v.* Brenham, 5 La. Ann. 540, 52 Am. Dec. 603; Newson *v.* Douglass, 7 Harr. & J. (Md.) 417, 16 Am. Dec. 317; De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. (Pa.) 68, 33 Am. Dec. 38; Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219; Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127.

Adoption or ratification.— Under such a clause a party interested, and for whose benefit the policy was effected, may ratify and adopt the same even after a loss, and thus become entitled to recover on the policy given equally as in the case of prior authorization. Newson *v.* Douglass, 7 Harr. & J. (Md.) 417, 16 Am. Dec. 317; De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. (Pa.) 68, 33 Am. Dec. 38; Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219; Williams *v.* North China Ins. Co., 1 C. P. D. 757, 3 Aspin. 342, 35 L. T. Rep. N. S. 884; Hagedorn *v.* Oliverson, 2 M. & S. 485, 15 Rev. Rep. 317; Seaman *v.* West, 17 Nova Scotia 207.

Authority of agent and ratification generally see *supra*, IV, A, 2.

4. Rolker *v.* Great Western Ins. Co., 4 Abb. Dec. (N. Y.) 76, 3 Keyes 17; Lawrence *v.* Sebor, 2 Cai. (N. Y.) 203; Dodwell *v.* Munich Assur. Co., 123 Fed. 841 [*affirmed* in 128 Fed. 410].

Vendee covered.— A policy "for whom it may concern," coupled with a provision that a change of interest shall not affect its validity, will cover the interest of an assignee of a vendee of the insured property. Duncan *v.* China Mut. Ins. Co., 129 N. Y. 237, 29 N. E. 76.

5. Duncan *v.* China Mut. Ins. Co., 129 N. Y. 237, 29 N. E. 76; Hagan *v.* Scottish Union, etc., Ins. Co., 186 U. S. 423, 22 S. Ct. 862, 46

3. DESCRIPTION OF INTEREST — a. In General. As a general rule the particular interest of the insured in the subject-matter of the insurance need not be specified.[6] Thus the interest of a mortgagee[7] or one having a lien for advances,[8] or of a carrier,[9] part-owner,[10] consignee,[11] administrator,[12] or reinsurer[13] need not be specified. But where the nature of the interest is such as to vary the nature of the risk then it should be stated.[14] If the interest of the insured is specified it must be stated correctly,[15] or there will be a variance in an action on the policy.[16]

b. "As Interest May Appear." Where the policy insures the person named therein "as interest may appear" the insurance covers each and every interest of the person named, whether that interest be in an individual or in a representative capacity;[17] but it will not cover the interest of any other person.[18]

4. SUBJECT-MATTER — a. In General. The subject-matter of marine insurance

L. ed. 1229; Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219; Mannheim Ins. Co. *v.* Hollander, 112 Fed. 549; Steamship Samana Co. *v.* Hall, 55 Fed. 663; Aldrich *v.* Equitable Safety Ins. Co., 1 Fed. Cas. No. 155, 1 Woodb. & M. 272; Henshaw *v.* Mutual Safety Ins. Co., 11 Fed. Cas. No. 6,387, 2 Blatchf. 99. See also *supra*, III, C.

6. Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542; Finney *v.* Warren Ins. Co., 1 Metc. (Mass.) 16, 35 Am. Dec. 343; Locke *v.* North American Ins. Co., 13 Mass. 61; Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127; Mackenzie *v.* Whitworth, 1 Ex. D. 36, 2 Aspin. 490, 45 L. J. Exch. 233, 33 L. T. Rep. N. S. 655, 24 Wkly. Rep. 287; Hall *v.* Janson, 3 C. L. R. 737, 4 E. & B. 500, 1 Jur. N. S. 571, 24 L. J. Q. B. 97, 3 Wkly. Rep. 213, 82 E. C. L. 500; Carruthers *v.* Sheddon, 1 Marsh. 416, 6 Taunt. 14, 1 E. C. L. 486.

Failure to state interest to insurer see *infra*, VII, B, 3, c.

7. Levy *v.* Merchant Mar. Ins. Co., 5 Aspin. 407, 1 Cab. & E. 474, 52 L. T. Rep. N. S. 263. And see Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542.

8. Carruthers *v.* Sheddon, 1 Marsh. 416, 6 Taunt. 14, 1 E. C. L. 486.

9. Crowley *v.* Cohen, 3 B. & Ad. 478, 1 L. J. K. B. 158, 23 E. C. L. 214. See also Chase *v.* Washington Mut. Ins. Co., 12 Barb. (N. Y.) 595; Van Natta *v.* Mutual Security Ins. Co., 2 Sandf. (N. Y.) 490.

10. Finney *v.* Warren Ins. Co., 1 Metc. (Mass.) 16, 35 Am. Dec. 343; Turner *v.* Burrows, 5 Wend. (N. Y.) 541 [*affirmed* in 8 Wend. 144]; Murray *v.* Columbian Ins. Co., 11 Johns. (N. Y.) 302; Carruthers *v.* Sheddon, 1 Marsh. 416, 6 Taunt. 14, 1 E. C. L. 486; Merchants Mar. Ins. Co. *v.* Barss, 15 Can. Sup. Ct. 185.

11. Carruthers *v.* Sheddon, 1 Marsh. 416, 6 Taunt. 14, 1 E. C. L. 486. *Compare*, however, Toppan *v.* Atkinson, 2 Mass. 365, referred to *infra*, note 14.

12. Finney *v.* Warren Ins. Co., 1 Metc. (Mass.) 16, 35 Am. Dec. 343.

13. Mackenzie *v.* Whitworth, 1 Ex. D. 36, 2 Aspin. 490, 45 L. J. Exch. 233, 33 L. T. Rep. N. S. 655, 24 Wkly. Rep. 287.

14. McSwiney *v.* Royal Exch. Assur. Co., 14 Q. B. 634, 18 L. J. Q. B. 193, 68 E. C. L. 634; Mackenzie *v.* Whitworth, 1 Ex. D. 36, 2 Aspin. 490, 45 L. J. Exch. 233, 33 L. T. Rep. N. S. 655, 24 Wkly. Rep. 287.

A special or equitable interest should be called to the attention of the underwriter. Ohl *v.* Eagle Ins. Co., 18 Fed. Cas. No. 10,473, 4 Mason 390. But see Palmer *v.* Pratt, 2 Bing. 185, 3 L. J. C. P. O. S. 250, 9 Moore C. P. 358, 27 Rev. Rep. 583, 9 E. C. L. 538. Thus a policy on goods to be shipped on the insured's own risk will not cover goods consigned to him, or his commissions on them. Toppan *v.* Atkinson, 2 Mass. 365. See also Riley *v.* Delafield, 7 Johns. (N. Y.) 522, holding that where A sold a vessel to B, in whose name she was registered, but it was agreed between them that A should have the whole benefit of the freight to arise from a voyage for which A had previously chartered the vessel, on which she was about to sail, and B insured the vessel as owner for the voyage, and A procured insurance to be made on the freight of goods on board for the same voyage, but the agreement between A and B or the peculiar nature of A's interest was not communicated to the insurer, A had not such an interest as could be insured under the name of freight, without disclosing and specifying its peculiar nature.

Interest of captors in prize.— Routh *v.* Thompson, 13 East 274, 11 East 428, 10 Rev. Rep. 539.

Bottomry or respondentia see *infra*, IV, B, 4, c.

15. Cohen *v.* Hannam, 5 Taunt. 101, 14 Rev. Rep. 702, 1 E. C. L. 62.

16. Variance see *infra*, XII, D, 4.

Joint owners of property insured for their joint use and on their joint account cannot recover upon a count on the policy averring the interest to be in one of them only. Bell *v.* Ansley, 16 East 141, 14 Rev. Rep. 322; Cohen *v.* Hannam, 5 Taunt. 101, 14 Rev. Rep. 702, 1 E. C. L. 62.

17. Finney *v.* Warren Ins. Co., 1 Metc. (Mass.) 16, 35 Am. Dec. 343; Crowley *v.* Cohen, 3 B. & Ad. 478, 1 L. J. K. B. 158, 23 E. C. L. 214.

18. Finney *v.* Warren Ins. Co., 1 Metc. (Mass.) 16, 35 Am. Dec. 343; Graves *v.* Boston Mar. Ins. Co., 2 Cranch (U. S.) 419, 2 L. ed. 324. And see *supra*, IV, B, 2, a.

must be set forth in the policy with sufficient certainty.[19] The use of the word "premises" in a policy covering property subject to marine risks refers to and is applicable to the subject-matter of the insurance whatever it may be.[20]

b. Profits and Commissions. Profits cannot be insured by a policy upon the thing out of which the profits are expected to accrue.[21] It has been held, however, that by an insurance on "property" on board a ship, effected in behalf of the master, whose only interest is his commission of a certain per cent on the cargo homeward, such commission is insured.[22]

c. Bottomry and Respondentia. Nor can bottomry or respondentia be insured by a policy on ship or cargo,[23] except where there is a usage in a particular trade to so insure them.[24]

d. Vessel — (i) *In General.* A policy on a ship[25] generally covers the hull, sails, rigging, tackle, and boats,[26] also furniture,[27] provisions,[28] outfits,[29] and appurtenances necessary, suitable, or usual for vessels engaged in the particular trade. Wages paid seamen, although under extraordinary circumstances, are not covered by a policy on ship.[30] Where a vessel insured by name is disintegrated with a view of disposing of its parts, or is reconstructed so as to amount to a substan-

19. Arnold *v.* Pacific Mut. Ins. Co., 78 N. Y. 7; Mackenzie *v.* Whitworth, 1 Ex. D. 36, 2 Aspin. 490, 45 L. J. Exch. 233, 33 L. T. Rep. N. S. 655, 24 Wkly. Rep. 287; Crowley *v.* Cohen, 3 B. & Ad. 478, 1 L. J. K. B. 158, 23 E. C. L. 214; Palmer *v.* Pratt, 2 Bing. 185, 3 L. J. C. P. O. S. 250, 9 Moore C. P. 358, 27 Rev. Rep. 583, 9 E. C. L. 538.

"Bills of exchange" is not a sufficiently specific designation to cover bills drawn by A upon B's foreign agent in favor of the captain of a vessel who had borrowed money from B and which bills the captain was to negotiate at a foreign port consigning goods to B's agent as security, the bills not being enforceable. Palmer *v.* Pratt, 2 Bing. 185, 3 L. J. C. P. O. S. 250, 9 Moore C. P. 358, 27 Rev. Rep. 583, 9 E. C. L. 538.

"Property of the assured . . . or sold but not delivered."—Evidence considered and held not to show a sale and delivery within the meaning of this clause see McFadden *v.* Union Assur. Soc., 112 Fed. 35.

20. Reid *v.* Lancaster F. Ins. Co., 19 Hun (N. Y.) 284; Haughton *v.* Ewbank, 4 Campb. 88; Beacon F., etc., Ins. Co. *v.* Gibb, 13 L. C. Rep. 81; Chapman *v.* Providence Washington Ins. Co., 23 N. Brunsw. 105; Beacon F. & L. Assur. Co. *v.* Gibb, 9 Jur. N. S. 105, 7 L. T. Rep. N. S. 574, 1 Moore P. C. N. S. 73, 1 New Rep. 110, 11 Wkly. Rep. 194, 15 Eng. Reprint 630.

21. Lucena *v.* Crauford, 3 B. & P. 75, 2 B. & P. N. R. 269, 315, 6 Rev. Rep. 623. But see Pritchet *v.* Insurance Co. of North America, 3 Yeates (Pa.) 458.

22. Holbrook *v.* Brown, 2 Mass. 280.

23. Robertson *v.* United Ins. Co., 2 Johns. Cas. (N. Y.) 250, 1 Am. Dec. 166; Jennings *v.* Pennsylvania Ins. Co., 4 Binn. (Pa.) 244, 5 Am. Dec. 404; Glover *v.* Black, 3 Burr. 1394; Goddart *v.* Garrett, 2 Vern. Ch. 269, 23 Eng. Reprint 774.

24. Gregory *v.* Christie, 3 Dougl. 419, 26 E. C. L. 274.

25. The usual form of policy on a ship is "upon the body, tackle, apparel, and furniture of the good ship or vessel called ——," etc.

26. Hall *v.* Ocean Ins. Co., 21 Pick. (Mass.) 472; Forbes *v.* Aspinall, 13 East 323, 12 Rev. Rep. 352; Brough *v.* Whitmore, 4 T. R. 206, 2 Rev. Rep. 361; Robertson *v.* Ewer, 1 T. R. 127, 1 Rev. Rep. 164. See also Roddick *v.* Indemnity Mut. Mar. Ins. Co., [1895] 2 Q. B. 380, 8 Aspin. 24, 64 L. J. Q. B. 733, 72 L. T. Rep. N. S. 860, 14 Reports 516, 44 Wkly. Rep. 27.

27. Robertson *v.* Ewer, 1 T. R. 127, 1 Rev. Rep. 164.

Fishing-tackle.— A policy upon a ship employed in the Greenland trade, on "ship, tackle, apparel, and furniture," does not, by the usage of trade, cover the fishing-tackle. Hoskins *v.* Pickersgill, 3 Dougl. 222, 26 E. C. L. 152.

28. Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132; French *v.* Patten, 1 Campb. 72, 8 East 373, 9 Rev. Rep. 469; Brough *v.* Whitmore, 4 T. R. 206, 2 Rev. Rep. 361. But the underwriters do not pay for provisions consumed, although consumed under extraordinary circumstances. Barney *v.* Maryland Ins. Co., 5 Harr. & J. (Md.) 139; Perry *v.* Ohio Ins. Co., 5 Ohio 305; Field Steamship Co. *v.* Burr, [1898] 1 Q. B. 821, 8 Aspin. 384, 67 L. J. Q. B. 528, 78 L. T. Rep. N. S. 293, 46 Wkly. Rep. 490 [*affirmed* in [1899] 1 Q. B. 579, 8 Aspin. 529, 68 L. J. Q. B. 426, 80 L. T. Rep. N. S. 445, 47 Wkly. Rep. 341]; Fletcher *v.* Poole, 1 Park. Ins. 115; Eden *v.* Poole, 1 T. R. 132 note; Robertson *v.* Ewer, 1 T. R. 127, 1 Rev. Rep. 164.

29. Macy *v.* Whaling Ins. Co., 9 Metc. (Mass.) 354; French *v.* Patten, 1 Campb. 72, 8 East 373, 9 Rev. Rep. 469; Forbes *v.* Aspinall, 13 East 323, 12 Rev. Rep. 352.

Outfits of a whaling voyage are not covered by a policy on a vessel. Taber *v.* China Mut. Ins. Co., 131 Mass. 239.

30. Field Steamship Co. *v.* Burr, [1898] 1 Q. B. 821, 8 Aspin. 384, 67 L. J. Q. B. 528, 78 L. T. Rep. N. S. 293, 46 Wkly. Rep. 490 [*af-*

tially different vessel, the insurance does not cover;[31] but if the repairs are not of such a character as to materially change the vessel the policy continues in force.[32]

(II) *Misnomer of Vessel.* Where there is a mistake in the name of the vessel insured or in which insured goods are to be carried, if the description in the policy designates the vessel intended with sufficient certainty or suggests the means of doing so, the policy is effective.[33] But if the parties have in contemplation different vessels there can be no contract.[34]

e. Furniture. "Furniture" includes all those fittings or things in the nature of fixtures which, although not actually affixed to the ship, are provided by the ship-owner for use on the ship and are reasonably necessary to carry properly the kind of cargo ordinarily carried by such a ship.[35]

f. Outfits. "Outfits" is a term of similar import to "furniture" and embraces all those objects necessary to the navigation of the ship and includes sails, rigging, boats, and provisions for the crew,[36] but will not cover property forming part of the ship's cargo.[37]

g. Cargo — (I) *In General.* Subject to the exception of property stowed on deck,[38] a policy on cargo covers all merchandise laden on board the vessel,[39] and includes money,[40] household furniture,[41] oil, and other products of a whaling voyage;[42] but it does not generally cover live stock[43] or their provender,[44] nor the outfit of a vessel,[45] nor a yacht in tow.[46]

(II) *Time Policy or Trading Voyage.* Under a time policy or on a trading voyage on cargo the risk assumed by the underwriter to the extent of his subscription covers subrogated or substituted cargo as often as a change takes place.[47]

firmed in [1899] 1 Q. B. 579, 8 Aspin. 529, 68 L. J. Q. B. 426, 80 L. T. Rep. N. S. 445, 47 Wkly. Rep. 341]; Fletcher *v.* Poole, 1 Park. Ins. 115; Eden *v.* Poole, 1 T. R. 132 note; Robertson *v.* Ewer, 1 T. R. 127, 1 Rev. Rep. 164.

31. Sherlock *v.* Globe Ins. Co., 7 Ohio Dec. (Reprint) 17, 1 Cinc. L. Bul. 26; Baker *v.* Central Ins. Co., 3 Ohio Dec. (Reprint) 478, 7 Am. L. Reg. 628.

32. Livie *v.* Janson, 12 East 648, 11 Rev. Rep. 513; Le Cheminant *v.* Pearson, 4 Taunt. 367, 13 Rev. Rep. 636.

33. Hughes *v.* Mercantile Mut. Ins. Co., 55 N. Y. 265, 14 Am. Rep. 254; Sea Ins. Co. *v.* Fowler, 21 Wend. (N. Y.) 600; Ionides *v.* Pacific F. & M. Ins. Co., L. R. 7 Q. B. 517, 2 Aspin. 454, 1 Aspin. 330, 41 L. J. Q. B. 190, 26 L. T. Rep. N. S. 738, 21 Wkly. Rep. 22; Le Mesurier *v.* Vaughan, 6 East 382, 2 Smith K. B. 492, 8 Rev. Rep. 500.

34. Hughes *v.* Mercantile Mut. Ins. Co., 55 N. Y. 265, 14 Am. Rep. 254.

35. Hogarth *v.* Walker, [1900] 2 Q. B. 283, 5 Com. Cas. 292, 69 L. J. Q. B. 634, 82 L. T. Rep. N. S. 744, 48 Wkly. Rep. 545 [*affirming* [1899] 2 Q. B. 401, 68 L. J. Q. B. 888, 48 Wkly. Rep. 47].

36. Macy *v.* Whaling Ins. Co., 9 Metc. (Mass.) 354.

Whaling voyages.— In a whaling voyage the term "outfit" has acquired a more enlarged signification and includes casks, staves, fishing gear, stores, and clothing necessary for the successful prosecution of such a voyage. Macy *v.* Whaling Ins. Co., 9 Metc. (Mass.) 354.

37. Folsom *v.* Merchants' Mut. Mar. Ins. Co., 38 Me. 414.

38. **As to deck cargo** see *infra*, IV, B, 4, m.

39. Macy *v.* Whaling Ins. Co., 9 Metc. (Mass.) 354; Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429; Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127.

40. Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429.

41. Vasse *v.* Ball, 2 Dall. (Pa.) 270, 1 L. ed. 377.

42. Paddock *v.* Franklin Ins. Co., 11 Pick. (Mass.) 227.

43. Allegre *v.* Maryland Ins. Co., 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429.

Live stock is covered by a policy on cargo, however, where live stock is the only article of exportation from the port from which the vessel is to sail. Allegre *v.* Maryland Ins. Co., 2 Gill & J. (Md.) 136, 20 Am. Dec. 424.

44. Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429.

45. French *v.* Patten, 1 Campb. 72, 8 East 373, 9 Rev. Rep. 469. See also Taber *v.* China Mut. Ins. Co., 131 Mass. 239.

46. Barry *v.* Boston Mar. Ins. Co., 62 Mich. 424, 29 N. W. 31. See also Oteri *v.* Home Mut. Ins. Co., McGloin (La.) 198.

47. American Ins. Co. *v.* Griswold, 14 Wend. (N. Y.) 399; Coggeshall *v.* American Ins. Co., 3 Wend. (N. Y.) 283; Columbian Ins. Co. *v.* Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 664.

Policy on outfit of whaling voyage.—An insurance on the outfit in a whaling voyage

h. Goods, Wares, and Merchandise. "Goods," "wares," and "merchandise" are comprehensive terms and cover a variety of subjects,[48] including coin[49] and bills of exchange.[50]

i. Property. A policy on "property on board" will cover money or bank-bills carried for the purchase of cargo or received from sale of cargo[51] and the insured's commissions upon cargo on board,[52] but will not cover freight.[53]

j. Proceeds. "Proceeds" of a cargo covers any property which by sale or barter is substituted for the original cargo and taken on board in lieu thereof,[54] but does not cover the original cargo which remains on board.[55]

k. Catchings. A policy covering "catchings" of a whaling voyage includes the "blubber" or pieces of whale flesh, cut and on deck,[56] the oils and casks,[57] and may also be shown, by usage, to include sea elephants.[58]

l. Freight. Insurance on "freight" embraces the compensation for the use of the ship or for the carriage of merchandise;[59] also the increment to the owner for carriage of his own goods;[60] but it does not cover goods or cargo,[61] or profits

does not terminate *pro tanto* with its consumption or distribution, but attaches to the proceeds of the adventure. Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132. See also Swift *v.* Mercantile Mut. Ins. Co., 113 Mass. 287.

48. A policy of insurance on goods, wares, and merchandise will cover a curricle. Duplanty *v.* Commercial Ins. Co., Anth. N. P. (N. Y.) 157.

"Goods, specie, and effects" belonging to a captain has been held to extend, by usage of trade, to money expended by him in the course of the voyage for the use of the ship, and for which he charges respondentia interest. Gregory *v.* Christie, 3 Dougl. 419, 26 E. C. L. 274.

"Lawful goods" includes all goods not prohibited by positive law of the country to which the vessel belongs and includes goods contraband of war. American Ins. Co. *v.* Dunham, 12 Wend. (N. Y.) 463 [*affirmed* in 15 Wend. 9]; Juhel *v.* Rhinelander, 2 Johns. Cas. (N. Y.) 120 [*affirmed* in 2 Johns. Cas. 487]; Skidmore *v.* Desdoity, 2 Johns. Cas. (N. Y.) 77; Seton *v.* Low, 1 Johns. Cas. (N. Y.) 1.

A sloop in tow is not goods and merchandise within the meaning of an open policy of marine insurance on goods and merchandise laden or to be laden. Oteri *v.* Home Mut. Ins. Co., McGloin (La.) 198. See also Barry *v.* Boston Mar. Ins. Co., 62 Mich. 424, 29 N. W. 31.

49. Coggeshall *v.* American Ins. Co., 3 Wend. (N. Y.) 283; Thomas *v.* Royal Exch. Assur. Co., 1 Price 195.

50. Thomas *v.* Royal Exch. Assur. Co., 1 Price 195.

51. Whiton *v.* Old Colony Ins. Co., 2 Metc. (Mass.) 1.

52. Holbrook *v.* Brown, 2 Mass. 280.

53. Freight cannot be insured as "property," but where a part of the cargo is to be taken in part payment of freight such part of the cargo may be insured as "property." Wiggin *v.* Mercantile Ins. Co., 7 Pick. (Mass.) 271.

54. Haven *v.* Gray, 12 Mass. 71; Dow *v.* Hope Ins. Co., 1 Hall (N. Y.) 166; Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132.

55. Dow *v.* Hope Ins. Co., 1 Hall (N. Y.) 166; Dow *v.* Whetten, 8 Wend. (N. Y.) 160.

But where the insurance is upon "goods and their proceeds" the original goods are covered so long as they remain subject to the rights in the policy. Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132.

56. Macy *v.* Whaling Ins. Co., 9 Metc. (Mass.) 354; Rogers *v.* Mechanics' Ins. Co., 20 Fed. Cas. No. 12,016, 1 Story 603.

57. Macy *v.* Whaling Ins. Co., 9 Metc. (Mass.) 354.

58. Child *v.* Sun Mut. Ins. Co., 3 Sandf. (N. Y.) 26.

59. *Louisiana.*— Hodgson *v.* Mississippi Ins. Co., 2 La. 341.

Massachusetts.— Minturn *v.* Warren Ins. Co., 2 Allen 86.

New York.— Riley *v.* Delafield, 7 Johns. 522.

England.— Flint *v.* Flemyng, 1 B. & Ad. 45, 8 L. J. K. B. O. S. 350, 20 E. C. L. 391.

Canada.— Driscoll *v.* Millville Mar. Ins. Co., 23 N. Brunsw. 160.

"Upon freight bill" is an insurance that the vessel shall earn freight. Field *v.* Citizens Ins. Co., 11 Mo. 50.

"One-third loss of freight as per charter party."— A policy covering "one-third loss of freight as per charter party," where the charter-party provides that insured shall receive but two thirds of the stipulated freight in case of sea damage, covers one third of the freight at risk by virtue of the clause in the charter-party and is not an insurance merely of one third of the freight. Griffiths *v.* Bramley-Moore, 4 Q. B. D. 70, 4 Aspin. 66, 48 L. J. Q. B. 201, 40 L. T. Rep. N. S. 149, 27 Wkly. Rep. 480.

60. Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429; Adams *v.* Pennsylvania Ins. Co., 1 Rawle (Pa.) 97; Devaux *v.* J'Anson, 2 Arn. 82, 5 Bing. N. Cas. 519, 3 Jur. 678, 8 L. J. C. P. 284, 7 Scott 507, 35 E. C. L. 280; Flint *v.* Flemyng, 1 B. & Ad. 45, 8 L. J. K. B. O. S. 350, 20 E. C. L. 391.

61. Minturn *v.* Warren Ins. Co., 2 Allen (Mass.) 86.

accruing to the cargo owner,[62] or compensation for carrying deck cargo unless such a mode of carrying the particular cargo is customary.[63] The charterer cannot insure the prepaid charter hire as freight *eo nomine*,[64] but he may insure advance freight or charter money by such designation where the same is in no event refundable,[65] and he may insure the compensation to be paid to him from carrying goods for others,[66] but not, it has been held, the benefit derived from the transportation of his own goods.[67] Where the freight on a trading voyage is insured the policy covers freight to be earned on substituted cargo.[68]

m. Effect of Stowage on Deck. Where property is insured under a general description such as cargo, goods, etc., it will only cover such property as is stowed under deck,[69] unless the policy specifies that it shall cover deck cargo[70] or there is a general usage to carry the particular kind of property on deck.[71]

n. Effect of Time and Place of Loading. Where a policy on cargo is "at and from" a named port, "from the loading thereof," or other equivalent expressions are used, the policy only attaches to such goods as are taken on board at the specified port.[72] Goods taken on board at a prior port are not covered, although they are on board in good safety at the port named,[73] unless a usage of trade

62. Minturn *v.* Warren Ins. Co., 2 Allen (Mass.) 86.

63. Adams *v.* Warren Ins. Co., 22 Pick. (Mass.) 163; Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429.

64. Huth *v.* New York Mut. Ins. Co., 8 Bosw. (N. Y.) 538; Mellen *v.* National Ins. Co., 1 Hall (N. Y.) 452; Robbins *v.* New York Ins. Co., 1 Hall (N. Y.) 325; Cheriot *v.* Barker, 2 Johns. (N. Y.) 346, 3 Am. Dec. 437; Hall *v.* Janson, 3 C. L. R. 737, 4 E. & B. 500, 1 Jur. N. S. 571, 24 L. J. Q. B. 97, 3 Wkly. Rep. 213, 82 E. C. L. 500.

65. Mellen *v.* National Ins. Co., 1 Hall (N. Y.) 452; Robbins *v.* New York Ins. Co., 1 Hall (N. Y.) 325; Hall *v.* Janson, 3 C. L. R. 737, 4 E. & B. 500, 1 Jur. N. S. 571, 24 L. J. Q. B. 97, 3 Wkly. Rep. 213, 82 E. C. L. 500.

66. Clark *v.* Ocean Ins. Co., 16 Pick. (Mass.) 289.

67. Mellen *v.* National Ins. Co., 1 Hall (N. Y.) 452. This case has been severely criticized by text writers. See 1 Phillips Ins. 200, 201.

68. Hugg *v.* Augusta Ins., etc., Co., 7 How. (U. S.) 595, 12 L. ed. 834.

69. *Indiana.*— Toledo F. & M. Ins. Co. *v.* Speares, 16 Ind. 52.

Louisiana.— Smith *v.* Mississippi M. & F. Ins. Co., 11 La. 142, 30 Am. Dec. 714.

Massachusetts.— Adams *v.* Warren Ins. Co., 22 Pick. 163; Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick. 108; Wolcott *v.* Eagle Ins. Co., 4 Pick. 429.

New York.— Allen *v.* St. Louis Ins. Co., 85 N. Y. 473; Atkinson *v.* Great Western Ins. Co., 4 Daly 1 [*reversed* on other grounds in 65 N. Y. 531]; Wadsworth *v.* Pacific Ins. Co., 4 Wend. 33; Lenox *v.* United Ins. Co., 3 Johns. Cas. 178.

Texas.— Orient Mut. Ins. Co. *v.* Reymershoffers, 56 Tex. 234.

England.—Apollinaris Co. *v.* Nord Deutsche Ins. Co., [1904] 1 K. B. 252, 9 Aspin. 526, 9 Com. Cas. 91, 73 L. J. Q. B. 62, 89 L. T. Rep. N. S. 670, 20 T. L. R. 79, 52 Wkly. Rep. 174; Backhouse *v.* Ripley, 1 Park. Ins. 24; Ross *v.* Thwaites, 1 Park. Ins. 24.

See 28 Cent. Dig. tit. "Insurance," § 332.

70. Boice *v.* Thames, etc., Mar. Ins. Co., 38 Hun (N. Y.) 246; Lenox *v.* United Ins. Co., 3 Johns. Cas. (N. Y.) 178.

71. *Indiana.*— Toledo F. & M. Ins. Co. *v.* Speares, 16 Ind. 52.

Massachusetts.— Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick. 108.

New York.— Allen *v.* St. Louis Ins. Co., 85 N. Y. 473; Wadsworth *v.* Pacific Ins. Co., 4 Wend. 33. See also Harris *v.* Moody, 30 N. Y. 266, 86 Am. Dec. 375.

Ohio.— Merchants', etc., Ins. Co. *v.* Shillito, 15 Ohio St. 559, 86 Am. Dec. 491.

Texas.— Orient Mut. Ins. Co. *v.* Reymershoffer, 56 Tex. 234.

United States.— Hazelton *v.* Manhattan Ins. Co., 12 Fed. 159, 11 Biss. 210.

England.—Apollinaris Co. *v.* Nord Deutsche Ins. Co., [1904] 1 K. B. 252, 9 Aspin. 526, 9 Com. Cas. 91, 73 L. J. K. B. 62, 89 L. T. Rep. N. S. 670, 20 T. L. R. 79, 52 Wkly. Rep. 174; Dacosta *v.* Edmunds, 4 Campb. 142, 2 Chit. 227, 16 Rev. Rep. 763, 18 E. C. L. 604.

See 28 Cent. Dig. tit. "Insurance," § 332.

72. Murray *v.* Columbian Ins. Co., 11 Johns. (N. Y.) 302; Richards *v.* Marine Ins. Co., 3 Johns. (N. Y.) 307; Rickman *v.* Carstairs, 5 B. & Ad. 651, 3 L. J. K. B. 28, 2 N. & M. 562, 27 E. C. L. 276; Constable *v.* Noble, 2 Taunt. 403, 11 Rev. Rep. 617; Spitta *v.* Woodman, 2 Taunt. 416, 11 Rev. Rep. 628; Grant *v.* Paxton, 1 Taunt. 463, 10 Rev. Rep. 583; Hodgson *v.* Richardson, W. Bl. 464. *Contra*, Wells *v.* Pacific Ins. Co., 44 Cal. 397. And see Stilwell *v.* Commercial Ins. Co., 2 Mo. App. 22.

"At and from" without more does not import that cargo is taken in at the port named. Silloway *v.* Neptune Ins. Co., 12 Gray (Mass.) 73.

73. Graves *v.* Marine Ins. Co., 2 Cai. (N. Y.) 339; Rickman *v.* Carstairs, 5 B. & Ad. 651, 3 L. J. K. B. 28, 2 N. & M. 562, 27 E. C. L. 276; Mellish *v.* Allnutt, 2 M. & S.

sanctions the taking of cargo at another port than that named[74] or the policy shows an intent to include property taken on board elsewhere,[75] as where the phrase "laden or to be laden" is inserted[76] or the insurance is upon a trading voyage.[77] Goods loaded at a prior port and discharged at the designated port and there reloaded are covered by the policy;[78] but if the goods are merely taken on deck at such port and restowed, such port is not to be considered their port of loading so as to bring them within the policy.[79] The fact that the underwriter knows that the goods intended to be insured were loaded at a prior port does not alter the rule.[80]

5. Conveyance of Cargo. Where the insurance is on cargo, if it be attempted to designate any vessel or class of vessels by which the cargo is to be transported, the cargo is only covered while on board the vessel designated or belonging to the class designated,[81] unless from necessity[82] or by custom[83] a transhipment is made.[84]

106, 14 Rev. Rep. 599; Langhorn *v.* Hardy, 4 Taunt. 628, 13 Rev. Rep. 708.

No designation of particular port.— In the absence of a distinct statement in the policy of the port whence the voyage is to be made, the risk will commence from a port where the vessel lay when the policy was made, and where the property insured was taken on board. Folsom *v.* Merchants' Mut. Mar. Ins. Co., 38 Me. 414.

Date of loading.— Where goods were insured "at and from all and every port, etc., on the coast of Brazil, and after the 17th of September, beginning the adventure upon the goods from the loading aboard the same ship at all and every port, etc., on the coast of Brazil, and from the 17th of September, 1800," it was held that the policy did not cover a cargo originally taken in before, and which continued on board after the 17th of September, while the ship was on the coast of Brazil, and after she left it on her return. Robertson *v.* French, 4 East 130, 4 Esp. 246, 7 Rev. Rep. 535.

Shipment "between" certain days.— A policy of insurance on goods to be shipped between two certain days does not cover goods shipped on either of those days. Atkins *v.* Boylston F. & M. Ins. Co., 5 Metc. (Mass.) 430, 39 Am. Dec. 692.

"Shipped from H after August 1st" will cover goods laden on board a vessel at H before August 1, where the vessel departs from H after that date. Sorbe *v.* Merchants' Ins. Co., 6 La. 185.

74. McCargo *v.* Merchants' Ins. Co., 10 Rob. (La.) 334; Moxon *v.* Atkins, 3 Campb. 200, 13 Rev. Rep. 789.

75. Wheresoever loaded.— Where the insurance is "from the loading thereof on board the ship wheresoever," etc., goods laden prior to arrival at port "at and from" which the risk commences are covered. Gladstone *v.* Clay, 1 M. & S. 418, 14 Rev. Rep. 479.

"Outward cargo to be considered homeward interest twenty-four hours after arrival at first port of discharge" was held to qualify the clause as to the place of loading and to make the policy cover the outward cargo. Joyce *v.* Realm Mar. Ins. Co., L. R. 7 Q. B. 580, 1 Aspin. 194, 41 L. J. Q. B. 356, 27 L. T. Rep. N. S. 144.

Continuation of former policy.— Where a policy was on goods at and from G to any port in the Baltic, beginning the adventure from the loading on board the ship, and the policy was declared to be in continuation of a former policy, which was a policy from V to her port of discharge in the United Kingdom, or any ports in the Baltic, with liberty to take in and discharge goods wheresoever, it was held to cover goods which were not loaded on board at G but at V. Bell *v.* Hobson, 3 Campb. 272, 16 East 240, 14 Rev. Rep. 337.

76. Hicks *v.* Home Ins. Co., 19 La. Ann. 527; Phœnix F. Ins. Co. *v.* Cochran, 51 Pa. St. 143.

77. Coggeshall *v.* American Ins. Co., 3 Wend. (N. Y.) 283; Vredenbergh *v.* Gracie, 4 Johns. (N. Y.) 444; Phœnix F. Ins. Co. *v.* Cochran, 51 Pa. St. 143; Columbian Ins. Co. *v.* Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 664; Gardner *v.* Columbian Ins. Co., 9 Fed. Cas. No. 5,224, 2 Cranch C. C. 473.

Freight.— The same rule applies to a policy on freight. Barclay *v.* Stirling, 5 M. & S. 6, 17 Rev. Rep. 245.

78. Carr *v.* Montefiore, 5 B. & S. 408, 10 Jur. N. S. 1069, 33 L. J. Q. B. 256, 11 L. T. Rep. N. S. 157, 12 Wkly. Rep. 870, 117 E. C. L. 408; Nounen *v.* Reid, 16 East 176.

79. Murray *v.* Columbian Ins. Co., 11 Johns. (N. Y.) 302.

80. Spitta *v.* Woodman, 2 Taunt. 416, 11 Rev. Rep. 628.

81. New Haven Steamboat Co. *v.* Providence Washington Ins. Co., 159 N. Y. 547, 54 N. E. 1093 [*reversing* 10 N. Y. App. Div. 278, 41 N. Y. Suppl. 1042]; Red Wing Mills *v.* Mercantile Mut. Ins. Co., 19 Fed. 115; Arnot *v.* Stewart, 5 Dow 274, 3 Eng. Reprint 1327.

82. Pierce *v.* Columbian Ins. Co., 14 Allen (Mass.) 320; Macy *v.* Mutual Mar. Ins. Co., 12 Gray (Mass.) 497; Plantamour *v.* Staples, 3 Dougl. 1, 1 T. R. 611 note, 26 E. C. L. 13.

83. Tierney *v.* Etherington, 1 Burr. 348.

84. Transhipping cargo as constituting a deviation see *infra*, VII, D, 5, a, text and note 95.

6. Voyage and Adventure — a. In General. In a voyage policy only the particular voyage described in the policy is covered by the insurance, and if the vessel sails on a different voyage, that is, is bound for a different terminus, the policy does not attach even though a part of the voyage lies over the same course.[85] Where the course is not designated in the policy there is an implied condition that the voyage shall be by the usual and regular course,[86] commenced within a reasonable time,[87] and performed with all reasonable expedition.[88] Only ports specified in the policy may be touched unless it is customary on voyages between the places named in the policy to touch at others *en route* for some purpose connected with the voyage.[89]

b. Port to Be Determined. Under a policy which gives the insured the right

85. *Louisiana.*— Lippincott *v.* Louisiana Ins. Co., 2 La. 399.

Massachusetts.— Friend *v.* Gloucester Mut. Fishing Ins. Co., 113 Mass. 326; Parsons *v.* Manufacturers' Ins. Co., 16 Gray 463.

New York.— Murray *v.* Columbian Ins. Co., 4 Johns. 443.

Pennsylvania.—Savage *v.* Pleasants, 5 Binn. 403, 6 Am. Dec. 424.

England.— Parkin *v.* Tunno, 2 Campb. 59, 11 East 22, 10 Rev. Rep. 422; Blackenhagen *v.* London Assur. Co., 1 Campb. 454, 10 Rev. Rep. 729.

The term "voyage" in a policy means the whole voyage, from its commencement to its termination. Paddock *v.* Franklin Ins. Co., 11 Pick. (Mass.) 227. It means the enterprise begun, and not the route taken. Friend *v.* Gloucester Mut. Fishing Ins. Co., 113 Mass. 326.

It is a new voyage where the original voyage is broken up and the cargo forwarded on another vessel, even though the vessel after making repairs returns to the original port of departure and takes a new cargo under the original charter. Parsons *v.* Manufacturers' Ins. Co., 16 Gray (Mass.) 463. Also where a vessel, being insured "at and from A. to B., with liberty to touch at C.," went to C, and commenced her voyage thence, not going to A at all. Murray *v.* Columbian Ins. Co., 4 Johns. (N. Y.) 443. If a vessel be insured to trade between New Orleans and any port in the West Indies, United States, or Gulf of Mexico, New Orleans is one of the termini, and the vessel is not protected on a voyage between the West Indies and Savannah. Lippincott *v.* Louisiana Ins. Co., 2 La. 399.

Distinction between change of voyage and deviation see *infra*, VII, D, 2.

Variation between voyage insured and charter-party.— The charter-party may be varied by subsequent instructions, and an insurance upon the new voyage, although different from that described in the charter-party, may be good. Hall *v.* Brown, 2 Dow 367, 3 Eng. Reprint 897.

Outward voyage frustrated.— An insurance effected upon an outward voyage will not cover a return voyage or a voyage to a new port of destination, although the vessel was prevented from visiting the original port of destination by an embargo. Savage *v.* Pleasants, 5 Binn. (Pa.) 403, 6 Am. Dec. 424; Blackenhagen *v.* London Assur. Co., 1 Campb. 454, 10 Rev. Rep. 729.

"Intended to navigate."— Where a policy described a steamboat as "now lying in Tait's Dock . . . and intended to navigate the St. Lawrence and lakes," it was held that the words implied no agreement to navigate the steamboat, and that consequently the insurers were liable, although the steamboat never left the dock. Grant *v.* Ætna Ins. Co., 8 Jur. N. S. 705, 6 L. T. Rep. N. S. 735, 15 Moore P. C. 516, 10 Wkly. Rep. 772, 15 Eng. Reprint 589.

Further voyage not covered.—A policy covering a specific voyage cannot be extended by implication to cover a further voyage, although circumstances (of war) make the further voyage necessary. Parkin *v.* Tunno, 2 Campb. 59, 11 East 22, 10 Rev. Rep. 422.

86. *Massachusetts.*— Stocker *v.* Merrimack M. & F. Ins. Co., 6 Mass. 220.

New York.— Reade *v.* Commercial Ins. Co., 3 Johns. 352, 3 Am. Dec. 495.

Ohio.— Jolly *v.* Ohio Ins. Co., Wright 539; Gazzam *v.* Ohio Ins. Co., Wright 202.

South Carolina.— Himely *v.* South Carolina Ins. Co., 1 Mill 154, 12 Am. Dec. 623.

England.— Middlewood *v.* Blakes, 7 T. R. 162, 4 Rev. Rep. 405.

87. Palmer *v.* Marshall, 8 Bing. 79, 317, 1 L. J. C. P. 19, 1 Moore & S. 161, 454, 21 E. C. L. 453, 559.

88. Himely *v.* South Carolina Ins. Co., 1 Mill (S. C.) 154, 12 Am. Dec. 623.

89. Grant *v.* Lexington Fire, etc., Ins. Co., 5 Ind. 23, 61 Am. Dec. 74; Kettell *v.* Wiggin, 13 Mass. 68; Ongier *v.* Jennings, 1 Campb. 505 note, 10 Rev. Rep. 739.

Intermediate ports.— The statement in a policy of marine insurance of the ultimate and intermediate termini of the voyage does not prohibit stopping at other intermediate ports, which by the course of navigation or the usage of trade are usually entered in making the insured voyage. In the absence of words excluding it, the course of navigation prescribed by usage may and indeed must be presumed. McCall *v.* Sun Mut. Ins. Co., 66 N. Y. 505. A voyage from one port to another, stopping at an intermediate port to unload and reship the cargo, in order to avoid confiscation, may be insured as a voyage from the first port to the last, without mentioning

to elect as to one or more ports of destination, the insured having made an election is bound by it and cannot substitute a different port.[90]

c. To Several Ports. A policy to B, C, and D covers a voyage to all or any of those ports. The vessel is not obliged to visit more than one.[91] But where the voyage is described as to B or C it is not permissible to visit more than one of them.[92] The ports named, if more than one of them be visited, should always be touched in the order in which they are named in the policy.[93]

d. To an Island. Where either of the named termini of the voyage is an island, or "port or ports" on an island, the vessel may go to any port on that island and from place to place thereon;[94] but if "to a port" on an island, only the port specified may be visited, and if none is named only one may be touched.[95]

e. "Port" — (i) *In General.* As used in policies of marine insurance the term "port" is not interpreted in its restricted sense as being limited to a harbor, but it embraces any place where it is customary to load or unload vessels, even though it be an open roadstead.[96] Where it is necessary to determine what is within the confines of a particular port, resort must generally be had to the

the intermediate port. Steinbach *v.* Columbian Ins. Co., 2 Cai. (N. Y.) 129.

90. New York Firemen Ins. Co. *v.* Lawrence, 14 Johns. (N. Y.) 46; Lawrence *v.* Ocean Ins. Co., 11 Johns. (N. Y.) 241 [*affirmed* in 14 Johns. 46]. See also Mallory *v.* Commercial Ins. Co., 9 Bosw. (N. Y.) 101.

Visiting port for information.— A voyage being insured to either or both of two ports, and the master having elected to go to the first mentioned port, and having been prevented from doing so by temporary causes insured against, it is permissible for him to put into a third port to gain information as to which of the two ports he had best go to. Clark *v.* United F. & M. Ins. Co., 7 Mass. 365, 5 Am. Dec. 50.

"To a port of call and discharge and loading" does not permit the vessel to discharge cargo at one port and then proceed to another to load. McGivern *v.* Provincial Ins. Co., 8 N. Brunsw. 311.

91. Hale *v.* Mercantile Mar. Ins. Co., 6 Pick. (Mass.) 172; Houston *v.* New England Ins. Co., 5 Pick. (Mass.) 89; Kane *v.* Columbian Ins. Co., 2 Johns. (N. Y.) 264; Marsden *v.* Reid, 3 East 572, 7 Rev. Rep. 516.

92. Bulkley *v.* Protection Ins. Co., 4 Fed. Cas. No. 2,118, 2 Paine 82. Under a policy giving liberty to use one port between T and G, and from thence to N, the vessel cannot use a port between T and G, and also go to G. Perkins *v.* Augusta Ins., etc., Co., 10 Gray (Mass.) 312, 71 Am. Dec. 654. The description of a voyage in a policy of marine insurance to a port on the north side of Cuba, "with the liberty of a second port thereon," means that the second port must also be on the north side. Nicholson *v.* Mercantile Mar. Ins. Co., 106 Mass. 399.

93. Akin *v.* Mississippi M. & F. Ins. Co., 4 Mart. N. S. (La.) 661; Deblois *v.* Ocean Ins. Co., 16 Pick. (Mass.) 303, 28 Am. Dec. 245; Kane *v.* Columbian Ins. Co., 2 Johns. (N. Y.) 264; Everth *v.* Tunno, 1 B. & Ald. 142, 1 Stark. 508, 2 E. C. L. 194; Andrews *v.* Mellish, 16 East 312, 2 M. & S. 27, 5 Taunt. 496, 1 E. C. L. 256; Gairdner *v.* Senhouse, 3 Taunt. 16, 12 Rev. Rep. 573; Beatson *v.* Haworth, 6 T. R. 531, 3 Rev. Rep. 258.

Failure to touch ports in proper order as a deviation see *infra*, VII, D, 5, a, text and note 88.

"And a market."— A vessel insured from B to S "and a market," "and at and from thence to a port of discharge," does not confine the vessel to taking ports in their geographical order. Deblois *v.* Ocean Ins. Co., 16 Pick. (Mass.) 303, 28 Am. Dec. 245.

"Liberty" of second port.— Insurance "at and from Norfolk to Curracoa, with liberty of going to any other island in the West Indies . . . and at and from thence to Richmond," must be understood as insurance on a voyage to Curacoa in the first place, and from that port to any other island, etc. Alexandria Mar. Ins. Co. *v.* Stras, 1 Munf. (Va.) 408. A policy at and from Martinique and all and every West India island warrants a course from Martinique to islands not in the homeward voyage. Bragg *v.* Anderson, 4 Taunt. 229, 13 Rev. Rep. 584. To the same effect see Metcalfe *v.* Parry, 4 Campb. 123, 15 Rev. Rep. 734. As to policies granting liberty see *infra*, VII, D, 10.

94. Thellusson *v.* Fergusson, Dougl. (3d. ed.) 361; Cruikshank *v.* Janson, 2 Taunt. 301, 11 Rev. Rep. 584.

95. Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,299, 3 Cliff. 328; Hearn *v.* New England Mut. Mar. Ins. Co., 11 Fed. Cas. No. 6,301, 3 Cliff. 318; Hearn *v.* New England Mut. Mar. Ins. Co., 11 Fed. Cas. No. 6,302, 4 Cliff. 200 [*affirmed* in 20 Wall. 488, 22 L. ed. 395].

96. Gookin *v.* Commercial Mut. Mar. Ins. Co., 12 Gray (Mass.) 501; Cole *v.* Union Mut. Ins. Co., 12 Gray (Mass.) 501, 74 Am. Dec. 609; De Longuemere *v.* Firemen Ins. Co., 10 Johns. (N. Y.) 126; De Longuemere *v.* New York F. Ins. Co., 10 Johns. (N. Y.) 120; Harrower *v.* Hutchinson, L. R. 5 Q. B. 584, 10 B. & S. 469, 39 L. J. Q. B. 229, 22 L. T. Rep. N. S. 684; Cockey *v.* Atkinson, 2 B. & Ald. 460, 21 Rev. Rep. 357; Sea Ins. Co. *v.* Gavin, 4 Bligh N. S. 578, 5 Eng. Reprint

customary understanding.[97] It has been held not necessarily to include every place within the custom port of that name;[98] and also that it may include places in different custom ports.[99] As used in clauses indicating the exact place of commencement or determination of the risk or the place where cargo shall be loaded or discharged, it is understood in a more restricted sense and means that spot where it is usual for vessels of the particular class to load or discharge their cargoes at the port named.[1]

(II) *Number Included.* Where the term "port" is used in describing the voyage or the termini of the risk, only one port is included;[2] but if the phrase "port or ports" is used in the policy, it gives liberty to use more than one port.[3]

f. "Port Risks," "Lying Up," "While Running," "Safely Moored," Etc. There are various expressions used for the purpose of indicating the voyage, course, or risk intended to be covered or excluded by the policy, such as "port risks,"[4] "lying up"[5] "while running,"[6] "safely moored,"[7] etc., and these are so diversified that it is not possible to classify them, but as many of them are frequently used their legal interpretation is given in the notes.[8]

206, 2 Dow & Cl. 129, 6 Eng. Reprint 676; Dalgleish *v.* Brooke, 15 East 295, 13 Rev. Rep. 476.

A neutral port is implied where the insurance is made to a port or ports within a district of which part is hostile and part neutral. Anonymous, 1 Chit. 53. *Compare* Graham *v.* Pennsylvania Ins. Co., 10 Fed. Cas. No. 5,674, 2 Wash. 113.

97. Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 27 Ala. 77; Grant *v.* Lexington F., etc., Ins. Co., 5 Ind. 23, 61 Am. Dec. 74; Gracie *v.* Baltimore Mar. Ins. Co., 8 Cranch (U. S.) 75, 3 L. ed. 492.

No port at place.— Where the policy was from a "port in Amelia Island" evidence was admitted to show that by usage it embraced adjacent islands, there being no port in Amelia Island. Moxon *v.* Atkins, 3 Campb. 200, 13 Rev. Rep. 789.

"While in port."— In a policy for a voyage and "while in port after arrival," it was held that "in port" as applied to Greenock did not include the fairway of the navigable channel of the Clyde five hundred feet off the harbor works. Hunter *v.* Northern Mar. Ins. Co., 13 App. Cas. 717; The Afton *v.* Northern Mar. Ins. Co., 14 Ct. of Sess. Cas. 544.

98. Brown *v.* Tayleur, 4 A. & E. 241, Hurl. & W. 578, 5 L. J. K. B. 57, 5 N. & M. 472, 31 E. C. L. 120; Dalgleish *v.* Brooke, 15 East 295, 13 Rev. Rep. 476; Payne *v.* Hutchinson, 2 Taunt. 405 note, 11 Rev. Rep. 620; Constable *v.* Noble, 2 Taunt. 403, 11 Rev. Rep. 617.

99. Sun Mut. Ins. Co. *v.* Mississippi Valley Transp. Co., 17 Fed. 919, 5 McCrary 477.

1. Meigs *v.* Mutual Mar. Ins. Co., 2 Cush. (Mass.) 439; Dickey *v.* United Ins. Co., 11 Johns. (N. Y.) 358; Meigs *v.* Sun Mut. Ins. Co., 16 Fed. Cas. No. 9,396; Simpson *v.* Pacific Mut. Ins. Co., 22 Fed. Cas. No. 12,886, Holmes 136; Samuel *v.* Royal Exch. Assur. Co., 8 B. & C. 119, 6 L. J. K. B. O. S. 315, 15 E. C. L. 66; Waples *v.* Eames, 2 Str. 1243.

2. Brown *v.* Tayleur, 4 A. & E. 241, Hurl. & W. 578, 5 L. J. K. B. 57, 5 N. & M. 472, 31 E. C. L. 120.

3. Lambert *v.* Liddard, 1 Marsh. 149, 5 Taunt. 480, 15 Rev. Rep. 557, 1 E. C. L. 249.

Ports of loading and of discharge.— Where the voyage covered by a policy was described as "at and from N. to any port or ports, place or places, in any order, on West Coast of South America, and for thirty days after arrival in final port," it was held that the policy covered risks at both ports of loading and ports of discharge on the west coast of South America, and was not limited to risks at the port of final discharge of the cargo from N, and thirty days after. Crocker *v.* Sturge, [1897] 1 Q. B. 330, 8 Aspin. 208, 66 L. J. Q. B. 142, 75 L. T. Rep. N. S. 549, 45 Wkly. Rep. 271.

4. **"Port risk."**— An insurance against "port risk in a port" does not designate the particular risks but rather the scope of the adventure, and covers the vessel only while lying in port and before the commencement of any voyage to points beyond the limit of the port. Nelson *v.* Sun Mut. Ins. Co., 71 N. Y. 453 [*affirming* 40 N. Y. Super. Ct. 417]. See also Slocovich *v.* Orient Mut. Ins. Co., 108 N. Y. 56, 14 N. E. 802.

5. **"Lying up."**— A policy on cargo on a vessel while "lying up" will cover, although the vessel is being towed in the harbor, there being a liberty for the vessel to be towed from place to place in the port. Dows *v.* Howard Ins. Co., 5 Rob. (N. Y.) 473. See also Pearson *v.* Commercial Union Assur. Co., 1 App. Cas. 498, 3 Aspin. 275, 45 L. J. C. P. 761, 35 L. T. Rep. N. S. 445, 24 Wkly. Rep. 951.

6. **"While running** on the Hudson and East Rivers" does not restrict the insurance to the time the vessel is in motion. St. Nicholas Ins. Co. *v.* Merchants' Mut. F. & M. Ins. Co., 11 Hun (N. Y.) 108 [*reversed* on other grounds in 83 N. Y. 604].

7. **"Safely moored."**— A change of moorings will not terminate a policy requiring the vessel to be safely moored. Anonymous *v.* Wetmore, 6 Esp. 109; Clarke *v.* Westmore [*cited* in Selw. 1003].

8. **"New York harbor"** has been held to include the whole of a voyage from Brooklyn

g. Waters To or From Which Vessel Is Confined or Excluded. The waters upon which the vessel is to navigate or is prohibited from navigating are written into the printed form and are varied according to the nature of the proposed adventure. The constructions placed by the courts upon some of these clauses are set forth in the note.[9]

7. Duration of Risk — a. Under Time Policy — (i) *In General.* As we before noted, a time policy is one that limits the duration of the insurance to a specified period of time. The loss must therefore occur during the time named.[10] If the policy is antedated it will cover the subject-matter from its date "lost or

to Tarrytown. Petrie *v.* Phenix Ins. Co., 132 N. Y. 137, 30 N. E. 380.

"While at wreck."— A policy on four pumps "at and from Ardrossan to the 'Alexandra' steamer ashore in the neighborhood of Drogheda, and while there engaged at the wreck and until again returned to Ardrossan by the 'Sea Mew' salvage steamer, beginning the risk from the loading on board the said ship and (or) wreck, including all risk of craft and for boats to and from the vessel and while at the wreck," was held not to include the risks while the pumps were on board the wreck on a voyage to Belfast, a port of safety. Wingate *v.* Foster, 3 Q. B. D. 582, 3 Aspin. 598, 47 L. J. Q. B. 525, 38 L. T. Rep. N. S. 737, 26 Wkly. Rep. 650. See also Difiori *v.* Adams, Cab. & E. 228.

"While at anchor" will not cover a vessel where it has been beached and her plugs taken out so as to permit the water to run in and out, and which, to prevent her moving, is fastened by iron rails to the bow and to one side of her stern and to her anchor on the other. Reid *v.* Lancaster F. Ins. Co., 19 Hun (N. Y.) 284 [*affirmed* in 90 N. Y. 382].

"Coasting trade."— A ship whilst on a voyage from Sunderland to Bordeaux is not employed in the "coasting trade." Harvey *v.* Beckwirth, 2 Hem. & M. 429, 10 Jur. N. S. 577, 10 L. T. Rep. N. S. 632, 4 New Rep. 255, 12 Wkly. Rep. 896.

9. Atlantic ocean and Atlantic coast.— Under a policy covering a tug while navigating "all inland and Atlantic coast waters of the United States," the tug is covered while off Charleston bay and one and a half miles from the nearest mainland. The vessel is not confined to inland waters under such clause. St. Paul F. & M. Ins. Co. *v.* Knickerbocker Steam Towage Co., 93 Fed. 931, 36 C. C. A. 19. "To navigate the Atlantic ocean" coupled with a warranty not to use ports in eastern Mexico, Texas, or Yucatan, will cover a vessel, whose home port is New Orleans, while in the Gulf of Mexico on a voyage from New Orleans to Liverpool. Merchants' Mut. Ins. Co. *v.* Allen, 121 U. S. 67, 7 S. Ct. 821, 30 L. ed. 858. But in New Haven Steam Saw-Mill Co. *v.* Security Ins. Co., 7 Fed. 847, the "Atlantic coast" was held to mean the coast of the Atlantic ocean and not the Gulf of Mexico. *Compare infra*, this note.

Inland waters are canals, lakes, streams, rivers, watercourses, inlets, bays, etc., and arms of the sea between projections of land. The Atlantic ocean beyond Sandy Hook is not within the inland waters of the United States. Cogswell *v.* Chubb, 1 N. Y. App. Div. 93, 36 N. Y. Suppl. 1076 [*affirmed* in 157 N. Y. 709, 53 N. E. 1124]. The waters of the Atlantic ocean off Coney Island are "inland waters." Fulton *v.* Insurance Co. of North America, 136 Fed. 182, 69 C. C. A. 198 [*reversing* 127 Fed. 413].

"No St. Lawrence" is a prohibition against the whole St. Lawrence navigation, both gulf and river. Birrell *v.* Dryer, 9 App. Cas. 345, 5 Aspin. 267, 51 L. T. Rep. N. S. 130.

The "North River" does not include tributaries of the Hudson river in the state of New York. Hastorf *v.* Greenwich Ins. Co., 132 Fed. 122.

The Gulf of Mexico is a part of the Atlantic ocean. The Orient, 16 Fed. 916, 4 Woods 255 [*affirmed* in 121 U. S. 67, 7 S. Ct. 821, 30 L. ed. 858]. *Compare supra*, this note.

"New Haven Harbor and adjacent inland waters" does not apply to Bridgeport harbor seventeen miles from New Haven harbor. Kirk *v.* Home Ins. Co., 92 N. Y. App. Div. 26, 86 N. Y. Suppl. 980.

"Off-shore."— A bridge pier is not "off-shore" within the meaning of a clause prohibiting the loading of cargo off-shore. Johnson *v.* Northwestern Nat. Ins. Co., 39 Wis. 87.

10. Melcher *v.* Ocean Ins. Co., 59 Me. 217; Pitt *v.* Phenix Ins. Co., 10 Daly (N. Y.) 281; Howell *v.* Protection Ins. Co., 7 Ohio 284; Howell *v.* Cincinnati Ins. Co., 7 Ohio 276.

Difference in time between place of contract and place of loss.— Where a vessel was lost on the day the policy expired, and the time of the place of loss and of the place of contract differed on account of the difference of their longitude, so that the loss occurred before noon by the time of the place where the contract was made, and after noon by the time of the place of the loss, it was held that the time must be reckoned according to the longitude of the place where the contract was made and to be performed. Walker *v.* Protection Ins. Co., 29 Me. 317.

Continuation of time policy by separate voyage policy.— Where a policy insured a vessel for a specified time for a particular voyage outward, and after the voyage was made, but before the time had expired, the same underwriter insured the vessel for the return voyage by a certificate made "under and subject to the conditions" of the exist-

not lost," although that clause is not inserted.[11] In the absence of any clause continuing the insurance it is immaterial where the vessel is at the termination of the period insured.[12]

(II) *Vessel "At Sea"; Continuance "to Port of Destination."* It is, however, frequently provided that if the vessel is "at sea" at the termination of the stated period, the risk shall continue until arrival at her "port of destination." The phrase "at sea" as here used means that period while the vessel is on her voyage and not lying in port.[13] If, however, she has quit her moorings in complete readiness for sea or has in any way commenced her voyage, although still within the confines of the port, she is considered "at sea."[14] It does not have the effect of continuing the insurance where the vessel is lying in a foreign port,[15] unless she is there involuntarily as from stress of weather, capture, or detention.[16] The "port of destination" as used in this connection does not mean the ultimate destination of the vessel, but the following destined port in the course of the voyage.[17]

b. Under Voyage Policy — (I) *On Ship* — (A) *"At and From."* In a voyage policy upon a vessel, the time at which the policy is to become operative is usually designated as "at and from" a specified port. The construction of this designation depends upon the situation of the parties at the time the policy is underwritten.[18] If the vessel, when the policy is underwritten, is not at the port designated the policy attaches from her first arrival there[19] in good physical

ing policy, it was held in an action on the policy that no liability accrued for a loss occurring after the time specified in the original policy, but before the commencement of the return voyage. Pitt *v.* Phenix Ins. Co., 10 Daly (N. Y.) 281.

Extension of time; transhipment of goods. — Where a policy is limited to forty days, the time consumed in making, with the written consent of the insurers, a transhipment of the insured goods from an unseaworthy craft, is not to be counted therein. Plant *v.* Eufaula Home Ins. Co., 41 Ga. 130.

Freight may be insured by a time policy, although for a period short of the time necessary to complete the voyage on which such freight is to be earned. Michael *v.* Gillespy, 2 C. B. N. S. 627, 3 Jur. N. S. 1219, 26 L. J. C. P. 306, 89 E. C. L. 627. But an insurance on freight for a specified period will not cover a loss resulting from the cancellation of a charter-party after such period because of injuries received to the vessel during the life of the policy. Hough *v.* Head, 5 Aspin. 505, 55 L. J. Q. B. 43, 53 L. T. Rep. N. S. 809, 34 Wkly. Rep. 160. See also Lincoln *v.* Boston Mar. Ins. Co., 159 Mass. 337, 34 N. E. 456.

11. Folsom *v.* Mercantile Mut. Ins. Co., 9 Fed. Cas. No. 4,902, 8 Blatchf. 170 [*affirmed* in 18 Wall. 237, 21 L. ed. 827].

12. Melcher *v.* Ocean Ins. Co., 59 Me. 217.

13. Bowen *v.* Hope Ins. Co., 20 Pick. (Mass.) 275, 32 Am. Dec. 213; American Ins. Co. *v.* Hutton, 24 Wend. (N. Y.) 330 [*affirmed* in 7 Hill 321].

14. Bowen *v.* Hope Ins. Co., 20 Pick. (Mass.) 275, 32 Am. Dec. 213; Union Ins. Co. *v.* Tysen, 3 Hill (N. Y.) 118.

15. See Washington Ins. Co. *v.* White, 103 Mass. 238, 4 Am. Rep. 543.

16. Wood *v.* New England Mar. Ins. Co., 14 Mass. 31, 7 Am. Dec. 182.

A detention for repairs at a loading port will not extend the policy under the above clause. Hutton *v.* American Ins. Co., 7 Hill (N. Y.) 321.

17. Wales *v.* China Mut. Ins. Co., 8 Allen (Mass.) 380; Cole *v.* Commercial Mut. Mar. Ins. Co., 12 Gray (Mass.) 519 note; Cole *v.* Union Mut. Ins. Co., 12 Gray (Mass.) 501, 74 Am. Dec. 609; Hutton *v.* American Ins. Co., 7 Hill (N. Y.) 321.

Where port of destination is specified. — An insurance for twelve months, with liberty of the globe, and, if at sea at the expiration of that time to continue until "arrival at port of destination in the United States," was held to terminate at the expiration of the twelve months unless the vessel was at sea and on a voyage to her port of destination in the United States. Eyre *v.* Marine Ins. Co., 6 Whart. (Pa.) 247. A vessel insured till her return to Boston, not exceeding two years, sailed from a foreign port for Boston, and, on arriving in the bay below the harbor within the two years, was ordered by the owner to put into Salem to be repaired, and she did so. It was held that the risk did not terminate on her arrival at Salem. Ellery *v.* New England Ins. Co., 8 Pick. (Mass.) 14.

18. Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127.

"At and from" an island. — A policy of insurance on a vessel "at and from" an island protects her in sailing from port to port of the island to take in her cargo. Dickey *v.* Baltimore Ins. Co., 7 Cranch (U. S.) 327, 3 L. ed. 360.

19. Patrick *v.* Ludlow, 3 Johns. Cas. (N. Y.) 10, 2 Am. Dec. 130; Garrigues *v.* Coxe, 1 Binn. (Pa.) 592, 2 Am. Dec. 493; Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127; Haughton *v.* Empire Mar. Ins. Co., L. R. 1 Exch. 206, 4 H. & C. 41, 12 Jur. N. S. 376, 35 L. J. Exch. 117, 15 L. T. Rep. N. S.

safety.[20] But where she is at the designated port at the time the contract of insurance is made the policy takes effect from its date,[21] except that when the vessel has been long lying in port without reference to any particular voyage it attaches from the time preparations for the voyage are begun,[22] and covers the vessel during its continuance in port preparing for the voyage.[23]

(B) *"From," From "Sailing," Etc.* Where the insurance is "from" a port, the risk attaches only from the time the vessel sails in complete readiness for the voyage and does not cover any risk "at" the designated port.[24] And where a policy is made with reference to the time of sailing, the vessel is considered as having sailed from the time she is unmoored and got under way in complete preparation for the voyage[25] with intent to proceed directly on her voyage.[26]

(C) *"To," "Arrives," Etc.* The risk on a vessel under a policy "to" a place, without any provision as to her safety there, continues until the vessel is safely moored at the designated port in the usual place and manner;[27] and where the policy is to cover until the vessel "gets into" or "arrives" at a specified port it is interpreted in the same way.[28]

80, 14 Wkly. Rep. 645; Chitty *v.* Selwyn, 2 Atk. 359, 26 Eng. Reprint 617; Motteux *v.* London Assur. Co., 1 Atk. 545, 26 Eng. Reprint 343; Hull *v.* Cooper, 14 East 479, 13 Rev. Rep. 287.

Risk attaches as soon as vessel is within natural boundaries of port.— Haughton *v.* Empire Mar. Ins. Co., L. R. 1 Exch. 206, 4 H. & C. 41, 12 Jur. N. S. 376, 35 L. J. Exch. 117, 15 L. T. Rep. N. S. 80, 14 Wkly. Rep. 645.

"Beginning from the loading."— Where a ship was insured at and from a port "beginning the adventure from the loading," and the vessel sailed without procuring a cargo at such port, the risk was held to have attached. Lambert *v.* Liddard, 1 Marsh. 149, 5 Taunt. 480, 15 Rev. Rep. 557, 1 E. C. L. 249.

"At and from" imports that the vessel is at the port named or will shortly arrive. De Wolf *v.* Archangel Maritime Bank, etc., Co., L. R. 9 Q. B. 451, 2 Aspin. 273, 43 L. J. Q. B. 147, 39 L. T. Rep. N. S. 605, 22 Wkly. Rep. 801; Hull *v.* Cooper, 14 East 479, 13 Rev. Rep. 287.

20. Snyder *v.* Atlantic Mut. Ins. Co., 95 N. Y. 196, 47 Am. Rep. 29; Haughton *v.* Empire Mar. Ins. Co., L. R. 1 Exch. 206, 4 H. & C. 41, 12 Jur. N. S. 376, 35 L. J. Exch. 117, 15 L. T. Rep. N. S. 80, 14 Wkly. Rep. 645; Bell *v.* Bell, 2 Campb. 475, 11 Rev. Rep. 769.

Danger of condemnation at the time of arrival does not prevent the policy from attaching. Bell *v.* Bell, 2 Campb. 475, 11 Rev. Rep. 769.

21. Hendricks *v.* Commercial Ins. Co., 8 Johns. (N. Y.) 1; Kemble *v.* Bowne, 1 Cai. (N. Y.) 75; Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127; Palmer *v.* Marshall, 8 Bing. 79, 317, 1 L. J. C. P. 19, 1 Moore & S. 161, 454, 21 E. C. L. 453, 559.

Change of ownership in port.— If the assured becomes owner while the vessel is lying in port the policy does not attach until his ownership commences. Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127.

22. Snyder *v.* Atlantic Mut. Ins. Co., 95 N. Y. 196, 47 Am. Rep. 29; Smith *v.* Steinbach, 2 Cai. Cas. (N. Y.) 158; Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127; Chitty *v.* Selwyn, 2 Atk. 359, 26 Eng. Reprint 617.

23. Snyder *v.* Atlantic Mut. Ins. Co., 95 N. Y. 196, 47 Am. Rep. 29; Warre *v.* Miller, 4 B. & C. 538, 10 E. C. L. 693, 1 C. & P. 237, 12 E. C. L. 143, 7 D. & R. 1, 4 L. J. K. B. O. S. 8; Rotch *v.* Edie, 6 T. R. 413, 3 Rev. Rep. 222.

24. Mosher *v.* Providence Washington Ins. Co., 12 Misc. (N. Y.) 104, 33 N. Y. Suppl. 85; Bell *v.* Marine Ins. Co., 8 Serg. & R. (Pa.) 98. See also Mey *v.* South Carolina Ins. Co., 3 Brev. (S. C.) 329.

25. Union Ins. Co. *v.* Tysen, 3 Hill (N. Y.) 118; Sea Ins. Co. *v.* Blogg, [1898] 2 Q. B. 398, 8 Aspin. 412, 67 L. J. Q. B. 757, 78 L. T. Rep. N. S. 785, 47 Wkly. Rep. 71 [*affirming* [1898] 1 Q. B. 27, 67 L. J. Q. B. 22]; Ridsdale *v.* Newnham, 4 Campb. 111, 3 M. & S. 456, 15 Rev. Rep. 327.

Departure imports an effectual leaving behind of the place. Union Ins. Co. *v.* Tysen, 3 Hill (N. Y.) 118.

26. Dennis *v.* Ludlow, 2 Cai. (N. Y.) 111; Sea Ins. Co. *v.* Blogg, [1898] 2 Q. B. 398, 8 Aspin. 412, 67 L. J. Q. B. 757, 78 L. T. Rep. N. S. 785, 47 Wkly. Rep. 71 [*affirming* [1898] 1 Q. B. 27, 67 L. J. Q. B. 22].

27. Zacharie *v.* Orleans Ins. Co., 5 Mart. N. S. (La.) 637; Stone *v.* Ocean Mar. Ins. Co., 1 Ex. D. 81, 3 Aspin. 152, 45 L. J. Exch. 361, 34 L. T. Rep. N. S. 490, 24 Wkly. Rep. 55; Anonymous, Skin. 243. See also Grant *v.* Lexington Fire, etc., Ins. Co., 5 Ind. 23, 61 Am. Dec. 74.

To a port "and a market" covers the vessel while going from port to port to dispose of her cargo. Maxwell *v.* Robinson, 1 Johns. (N. Y.) 333.

Until ship discharged.— A policy to run until the ship shall be discharged does not terminate until she is unloaded. Anonymous, Skin. 243.

28. Meigs *v.* Mutual Mar. Ins. Co., 2 Cush. (Mass.) 439; Coolidge *v.* Gray, 8 Mass. 527; Simpson *v.* Pacific Mut. Ins. Co., 22 Fed. Cas.

(D) "*Port of Discharge*," "*Final Port of Discharge*," *Etc.* It is the general rule that a policy to "a port of discharge" terminates at the first port at which cargo is discharged.[29] But where the *terminus ad quem* is described as "port or ports of discharge" the risk continues until arrival at the port where the cargo is substantially discharged.[30] And where the insurance is to the "last" or "final" port of discharge the underwriters are liable until the arrival at the port where the cargo is finally discharged.[31]

(E) "*Until Moored in Good Safety.*" It is usual to continue the risk until the vessel is "moored in good safety" for a specified period. The place of mooring, within the meaning of this clause, is that place where the vessel is to be discharged, and a mooring at any other place for any other purpose is not to be considered.[32] "Good safety" requires that the vessel be in good physical safety as distinguished from a vessel mooring in a sinking condition or as a mere wreck;[33] but the vessel may be in good safety, although she is damaged or has lost an anchor or is in hazard of loss.[34] The designated period mentioned in the policy as to the duration of the risk after the vessel is moored in good safety commences to run from the time of day the ship is safely moored and the number of days is to be taken as periods of twenty-four hours running from such time.[35]

No. 12,886, Holmes 136; Kellner *v.* Le Mesurier, 4 East 396, 1 Smith K. B. 72, 7 Rev. Rep. 581.

Arrival in possession of enemy is not an arrival. Aguilar *v.* Rodgers, 7 T. R. 421, 4 Rev. Rep. 478.

29. Bramhall *v.* Sun Mut. Ins. Co., 104 Mass. 510, 6 Am. Rep. 261; Fay *v.* Alliance Ins. Co., 16 Gray (Mass.) 455; Whitwell *v.* Harrison, 2 Exch. 127, 18 L. J. Exch. 465.

The port of arrival is not the port of discharge unless cargo is in fact there discharged. King *v.* Hartford Ins. Co., 1 Conn. 333; Lapham *v.* Atlas Ins. Co., 24 Pick. (Mass.) 1; Coolidge *v.* Gray, 8 Mass. 527.

The necessary discharge of part of the cargo at the port of arrival for the purpose of lightening the ship or saving cargo does not terminate the risk. Sage *v.* Middletown Ins. Co., 1 Conn. 239; King *v.* Middletown Ins. Co., 1 Conn. 184.

30. Bramhall *v.* Sun Mut. Ins. Co., 104 Mass. 510, 6 Am. Rep. 261; Upton *v.* Salem Commercial Ins. Co., 8 Metc. (Mass.) 605.

31. Moore *v.* Taylor, 1 A. & E. 25, 3 L. J. K. B. 132, 3 N. & M. 406, 28 E. C. L. 37; Moffat *v.* Ward [*cited* in Preston *v.* Greenwood, 4 Dougl. 28, 31, 26 E. C. L. 320]. A policy "at and from Newcastle N. S. W., to any port or ports place or places in any order on West Coast of South America and for thirty days after arrival in final port however employed," covers risks at both ports of loading and ports of discharge on the west coast of South America, and is not limited to risks at the port of final discharge of the cargo from N and thirty days after. Crocker *v.* Sturge, [1897] 1 Q. B. 330, 8 Aspin. 208, 66 L. J. Q. B. 142, 75 L. T. Rep. N. S. 549, 45 Wkly. Rep. 271.

Where the last intended port is inaccessible by reason of being in the hands of the enemy, the last preceding port is to be considered the final port. Brown *v.* Vigne, 12 East 283, 11 Rev. Rep. 375.

32. Dickey *v.* United Ins. Co., 11 Johns. (N. Y.) 358; Simpson *v.* Pacific Mut. Ins. Co., 22 Fed. Cas. No. 12,886, Holmes 136; Samuel *v.* Royal Exch. Assur. Co., 8 B. & C. 119, 6 L. J. K. B. O. S. 315, 15 E. C. L. 66; Waples *v.* Eames, 2 Str. 1243.

Intention to finish discharging at another place will not extend the life of the risk after the vessel has been moored for the designated period at the first place of discharge. Bramhall *v.* Sun Mut. Ins. Co., 104 Mass. 510, 6 Am. Rep. 261; Whitwell *v.* Harrison, 2 Exch. 127, 18 L. J. Exch. 465.

33. Lidgett *v.* Secretan, L. R. 5 C. P. 190, 39 L. J. C. P. 196, 22 L. T. Rep. N. S. 272, 18 Wkly. Rep. 692; Shawe *v.* Felton, 2 East 109.

A vessel taken under an embargo, although not actually reduced to physical possession of the captors, is not in safety. Minnett *v.* Anderson, Peake N. P. 211. See also Horneyer *v.* Lushington, 3 Campb. 85, 15 East 46, 13 Rev. Rep. 759.

34. Bill *v.* Mason, 6 Mass. 313; Murden *v.* South Carolina Ins. Co., 1 Mill (S. C.) 200; Lidgett *v.* Secretan, L. R. 5 C. P. 190, 39 L. J. C. P. 196, 22 L. T. Rep. N. S. 272, 18 Wkly. Rep. 692.

Liable to seizure.— Where barratry, although insured against and resulting in the vessel's condemnation, is committed by smuggling prohibited goods seized on her arrival, but not until more than twenty-four hours after mooring, the insurers are not liable, the loss being neither inchoate nor final by any proceeding touching the vessel prior to her being moored twenty-four hours. Mariatigui *v.* Louisiana Ins. Co., 8 La. 65, 28 Am. Dec. 129. See also Lockyer *v.* Offley, 1 T. R. 252, 1 Rev. Rep. 194.

35. Cornfoot *v.* Royal Exch. Assur. Corp., [1904] 1 K. B. 40, 9 Aspin. 489, 9 Com. Cas. 80, 73 L. J. K. B. 22, 89 L. T. Rep. N. S. 490, 20 T. L. R. 34, 52 Wkly. Rep. 49; Mercantile Mar. Ins. Co. *v.* Titherington, 5 B. & S. 765, 11 Jur. N. S. 62, 34 L. J. Q. B. 11, 11 L. T.

(F) *Termination by Closing of Navigation.* Policies on vessels navigating inland waters sometimes contain a provision that the risk shall cease if in consequence of ice or the closing of navigation the voyage cannot be finished the same season. Under this clause mere delay by ice will not amount to a stoppage of the voyage.[36]

(II) *On Cargo* — (A) "*At and From.*" A policy on goods "from" or "at and from," a particular port commences when the goods are placed on board the vessel,[37] and does not cover goods while in warehouse or while on the wharf waiting to be laden.[38] But if it is customary to carry the cargo in boats or lighters from the shore to the ship for loading, the policy will commence from the placing of the goods on board such craft.[39]

(B) "*Until Safely Landed.*" Usually the risk on goods is continued by the policy "until safely landed." Under this clause the risk terminates with the safe landing of the goods at the usual place of delivery,[40] covering while on craft upon which it is customary to tranship the goods from the ship to the shore.[41] A delivery to the consignee is not necessary.[42] The risk terminates upon each parcel as it is landed.[43] If the consignee receives the goods before they have been actually landed, as where he uses his own lighters to convey the goods from the

Rep. N. S. 340, 13 Wkly. Rep. 141, 117 E. C. L. 765.

36. Delahunt *v.* Ætna Ins. Co., 97 N. Y. 537 [*affirming* 26 Hun 668]; Sherwood *v.* Mercantile Mut. Ins. Co., 66 N. Y. 630. See also Brown *v.* St. Nicholas Ins. Co., 61 N. Y. 332.

37. *Alabama.*— Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 31 Ala. 711.

Maryland.— Maryland Ins. Co. *v.* Bossiere, 9 Gill & J. 121.

New York.— Patrick *v.* Ludlow, 3 Johns. Cas. 10, 2 Am. Dec. 130.

Ohio.— Hicks *v.* Merchants', etc., Ins. Co., 1 Ohio Dec. (Reprint) 374, 8 West. L. J. 416.

United States.— The Liscard, 56 Fed. 44 [*affirmed* in 68 Fed. 247, 15 C. C. A. 379 (*affirmed* in 167 U. S. 149, 17 S. Ct. 785, 42 L. ed. 113)].

The whole of the cargo insured need not be on board in order that the risk shall attach, but the risk will commence on such portion as is on board as soon as it is laden. Colonial Ins. Co. *v.* Adelaide Mar. Ins. Co., 12 App. Cas. 128, 6 Aspin. 94, 56 L. J. P. C. 19, 56 L. T. Rep. N. S. 173, 35 Wkly. Rep. 636.

38. Smith *v.* Mobile Nav., etc., Ins. Co., 30 Ala. 167; Cottam *v.* Mechanics', etc., Ins. Co., 40 La. Ann. 259, 4 So. 510; Australian Agricultural Co. *v.* Saunders, L. R. 10 C. P. 668, 3 Aspin. 63, 44 L. J. C. P. 391, 33 L. T. Rep. N. S. 447.

39. Parsons *v.* Massachusetts F. & M. Ins. Co., 6 Mass. 197, 4 Am. Dec. 115; Coggeshall *v.* American Ins. Co., 3 Wend. (N. Y.) 283.

40. Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 27 Ala. 77, 31 Ala. 711; Osacar *v.* Louisiana State Ins. Co., 5 Mart. N. S. (La.) 386; Gracie *v.* Marine Ins. Co., 8 Cranch (U. S.) 75, 3 L. ed. 492; Brown *v.* Carstairs, 3 Campb. 161; Harrison *v.* Ellis, 7 E. & B. 465, 3 Jur. N. S. 908, 26 L. J. Q. B. 239, 5 Wkly. Rep. 494, 90 E. C. L. 465.

Inland insurance; goods "in transit."— An insurance on oil in tank cars in transit, made upon the usual cargo form of marine insurance policy, terminates upon the cars being placed alongside the consignee's warehouse upon its private siding. Crew-Levick Co. *v.* British, etc., Mar. Ins. Co., 103 Fed. 48, 43 C. C. A. 107.

41. Parsons *v.* Massachusetts F. & M. Ins. Co., 6 Mass. 197, 4 Am. Dec. 115; Stewart *v.* Bell, 5 B. & Ald. 238, 24 Rev. Rep. 342, 7 E. C. L. 136.

Risk of craft till goods landed; transhipment from lighters into export vessel.— A policy of insurance on goods which includes "all risk of craft until the goods are discharged and safely landed" does not cover the risk to the goods while waiting on lighters at the port of delivery for transhipment into an export vessel. Houlder *v.* Merchants' Mar. Ins. Co., 17 Q. B. D. 354, 6 Aspin. 12, 55 L. J. Q. B. 420, 55 L. T. Rep. N. S. 244, 34 Wkly. Rep. 673.

42. Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 27 Ala. 77; Mansur *v.* New England Mut. Mar. Ins. Co., 12 Gray (Mass.) 520; Beddall *v.* British, etc., Mar. Ins. Co., 143 N. Y. 94, 37 N. E. 613; Brown *v.* Carstairs, 3 Campb. 161.

Landed and buried.— Dollars landed by the crew from a wrecked vessel and buried, but afterward stolen, are not landed in "good safety." Bridge *v.* Niagara Ins. Co., 1 Hall (N. Y.) 423.

43. Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 27 Ala. 77; Mansur *v.* New England Mut. Mar. Ins. Co., 12 Gray (Mass.) 520. But in Fletcher *v.* St. Louis Mar. Ins. Co., 18 Mo. 193, it was held that the underwriters were not exonerated from loss to goods where part only had been discharged unless they had been received or accepted by the consignee or a reasonable time had elapsed for the discharge of the remainder.

Time continuation.— A policy on goods to cover for twenty-four hours after they are landed continues for twenty-four hours after the whole are landed. Gardiner *v.* Smith, 1 Johns. Cas. (N. Y.) 141.

ship to the shore, the risk is terminated upon delivery to the consignee;[44] but it is otherwise where the consignee merely has the goods placed on public lighters for a like purpose.[45] A policy on goods "to" a specified port is construed similarly to goods insured as "until safely landed" and the risk terminates only upon landing of the goods or delivery to the consignee.[46]

(III) *On Freight*—(A) *Commencement.* A policy on freight, like a policy on any other subject-matter, cannot attach until there is an insurable interest in the assured in the subject-matter. We have already noted at some length when such interest exists.[47] However, it is not always when there is an insurable interest in freight that a policy on freight attaches, but, as in the case of other subject-matters, the question is governed by the particular provisions of the policy. If the policy is "at and from" a named port the risk commences from the arrival of the vessel at that port, there being then an insurable interest in the freight,[48] or if no insurable interest is then existing, from the time such interest accrues.[49] But if the policy is merely "from" a given port the risk commences upon sailing from that port;[50] and where the policy is "from the loading," no risk attaches until that time, and the freight on goods which are not actually loaded on board is not covered by the policy.[51]

(B) *Termination.* A policy on freight is not terminated by the arrival of a part of the cargo at its destination where the balance still remains subject to loss from the risks insured against.[52]

c. Injury Within Term and Loss After Expiration of Policy. Where the vessel during the course of the voyage or within the time insured becomes so injured that her destruction is inevitable she is considered then lost, although the actual destruction or loss does not occur until after the termination of the policy.[53] In

44. Rucker *v.* London Assur. Co., 2 B. & P. 432 note, 3 Asp. 290, 5 Rev. Rep. 639 note; Strong *v.* Natally, 1 B. & P. N. R. 16, 8 Rev. Rep. 741; Sparrow *v.* Caruthers, 2 Str. 1236.

45. Rucker *v.* London Assur. Co., 2 B. & P. 432 note, 3 Esp. 290, 5 Rev. Rep. 639 note; Hurry *v.* Royal Exch. Assur. Co., 2 B. & P. 430, 3 Esp. 289, 5 Rev. Rep. 639, 6 Rev. Rep. 804.

46. See Osacar *v.* Louisiana State Ins. Co., 5 Mart. N. S. (La.) 386; Leigh *v.* Mather, 1 Esp. 412, 5 Rev. Rep. 740.

47. See *supra*, III, D, 15, b. See also Gordon *v.* American Ins. Co., 4 Den. (N. Y.) 360; Hart *v.* Delaware Ins. Co., 11 Fed. Cas. No. 6,150, 2 Wash. 346.

48. Foley *v.* United F. & M. Ins. Co., L. R. 5 C. P. 155, 39 L. J. C. P. 206, 22 L. T. Rep. N. S. 108, 18 Wkly. Rep. 437; The Copernicus, [1896] P. 237, 8 Aspin. 166, 65 L. J. Adm. 108, 74 L. T. Rep. N. S. 757; Devaux *v.* J'Anson, 2 Arn. 82, 5 Bing. N. Cas. 519, 3 Jur. 678, 8 L. J. C. P. 284, 7 Scott 507, 35 E. C. L. 280; Williamson *v.* Innes, 8 Bing. 81, 1 M. & Rob. 88, 21 E. C. L. 454; Mackenzie *v.* Shedden, 2 Campb. 431, 11 Rev. Rep. 759; Horncastle *v.* Suart, 7 East 400, 8 Rev. Rep. 649.

49. Snyder *v.* Atlantic Mut. Ins. Co., 95 N. Y. 196, 47 Am. Rep. 29; Hart *v.* Delaware Ins. Co., 11 Fed. Cas. No. 6,150, 2 Wash. 346.

Cargo not loaded.—It is only freight on goods actually on board that is covered unless a full cargo is provided and ready for shipment. Patrick *v.* Eames, 3 Campb. 441.

50. Hart *v.* Delaware Ins. Co., 11 Fed. Cas. No. 6,150, 2 Wash. 346; Thompson *v.* Taylor, 6 T. R. 478, 3 Rev. Rep. 233.

51. Gordon *v.* American Ins. Co., 4 Den. (N. Y.) 360; Hopper *v.* Wear Mar. Ins. Co., 4 Aspin. 482, 46 L. T. Rep. N. S. 107; Beckett *v.* West of England Mar. Ins. Co., 1 Aspin. 185, 25 L. T. Rep. N. S. 739. See also Lord *v.* Grant, 1 Russ. & C. Eq. Cas. (Nova Scotia) 120. *Compare* Jones *v.* Neptune Mar. Ins. Co., L. R. 7 Q. B. 702, 1 Aspin. 416, 41 L. J. Q. B. 370, 27 L. T. Rep. N. S. 308. In Hydarnes Steamship Co. *v.* Indemnity Mut. Mar. Assur. Co., [1895] 1 Q. B. 500, 7 Aspin. 553, 64 L. J. Q. B. 353, 72 L. T. Rep. N. S. 103, 14 Reports 216, where the policy was on freight of a cargo of frozen meat against any loss from the "breaking down of machinery until final sailing of vessel" (quotation in writing), and the printed portion of the policy stated the risk was "from the loading," it was held that there was an inconsistency between the written and printed portions and the latter had no application to an insurance on freight and the risk attached while preparing to receive cargo.

A policy on profits containing a similar clause has been treated in the same manner. McSwiney *v.* Royal Exch. Assur. Co., 14 Q. B. 634, 14 Jur. 998, 19 L. J. Q. B. 222, 68 E. C. L. 634; Halhead *v.* Young, 6 E. & B. 312, 2 Jur. N. S. 970, 25 L. J. Q. B. 290, 4 Wkly. Rep. 530, 88 E. C. L. 312.

52. Willard *v.* Millers', etc., Ins. Co., 30 Mo. 35; Phillips *v.* Champion, 1 Marsh. 402, 6 Taunt. 3, 1 E. C. L. 480.

53. Duncan *v.* Great Western Ins. Co., 1 Abb. Dec. (N. Y.) 562, 3 Keyes 394, 2 Transcr. App. 130, 5 Abb. Pr. N. S. 173;

England, however, the underwriter is liable only for the average loss which has actually occurred during the life of the policy,[54] and under some of the earlier decisions he was held to be completely discharged where the actual total destruction of the vessel occurred after the stipulated time.[55]

d. Suspension of Risk. The policy continues effective for the whole period or voyage covered unless there is an express clause suspending it for a specified period or while within certain designated waters or places.[56] But where the policy is on time and the vessel limited to certain waters the risk is suspended during any departure from such waters.[57]

8. Double Insurance[58] **— a. Definition.** Double insurance is where the insured procures two or more insurances upon the same interest in the same property and for the same risk.[59] If the persons insured or the risks, interests, or property are different it is not a case of double insurance.[60]

b. Effect — (I) *In Absence of Stipulation.* In cases of double insurance, and in the absence of a contrary stipulation in the policy, the insured may recover the whole amount of any loss from any of the insurers,[61] up to the amount of the policy, and for any deficiency he can recover the balance from any of the other

Stagg *v.* United Ins. Co., 3 Johns. Cas. (N. Y.) 34; Coit *v.* Smith, 3 Johns. Cas. (N. Y.) 16; Peters *v.* Phœnix Ins. Co., 3 Serg. & R. (Pa.) 25.

54. Knight *v.* Faith, 15 Q. B. 649, 14 Jur. 1114, 19 L. J. Q. B. 509, 69 E. C. L. 649.

55. Lockyer *v.* Offley, 1 T. R. 252, 1 Rev. Rep. 194; Meretony *v.* Dunlope [*cited* in Lockyer *v.* Offley, *supra*].

56. Hyde *v.* Mississippi M. & F. Ins. Co., 10 La. 543, 29 Am. Dec. 465; Reed *v.* Merchants Mut. Ins. Co., 95 U. S. 23, 24 L. ed. 348; Palmer *v.* Warren Ins. Co., 18 Fed. Cas. No. 10,698, 1 Story 360.

An injury between time of seizure and restoration, where the seizure was for smuggling causing a forfeiture of the vessel, was held not to be covered by the policy. Pipon *v.* Cope, 1 Campb. 434, 10 Rev. Rep. 720.

57. Greenleaf *v.* St. Louis Ins. Co., 37 Mo. 25; Hennessey *v.* Manhattan F. Ins. Co., 28 Hun (N. Y.) 98; Wilkins *v.* Tobacco Ins. Co., 30 Ohio 317, 27 Am. Rep. 455.

Breach of warranty as to waters to be navigated avoids the policy. Day *v.* Orient Mut. Ins. Co., 1 Daly (N. Y.) 13. See also *infra*, VII, E, 5, i.

58. **Right to return of part of premium** see *infra*, V, F, 10.

Warranty against other insurance see *infra*, VII, E, 5, m.

59. *Massachusetts.*— Ryder *v.* Phœnix Ins. Co., 98 Mass. 185; Perkins *v.* New England Mar. Ins. Co., 12 Mass. 214.

New York.— Howard Ins. Co. *v.* Scribner, 5 Hill 298; American Ins. Co. *v.* Griswold, 14 Wend. 399.

Pennsylvania.— Wells *v.* Philadelphia Ins. Co., 9 Serg. & R. 103.

United States.— Gross *v.* New York, etc., Co., 107 Fed. 516; Thurston *v.* Koch, 23 Fed. Cas. No. 14,016, 4 Dall. (Pa.) 348, 1 L. ed. 862.

England.— Godin *v.* London Assur. Co., 1 Burr. 489, 1 Ld. Ken. 254, W. Bl. 103.

Canada.— Bank of British North America *v.* Western Assur. Co., 7 Ont. 166.

60. *Maine.*— Insurance Co. of North America *v.* Rogers, 78 Me. 191, 3 Atl. 283.

Massachusetts.— Perkins *v.* New-England Mar. Ins. Co., 12 Mass. 214.

New York.— Columbian Ins. Co. *v.* Lynch, 11 Johns. 233; American Ins. Co. *v.* Griswold, 14 Wend. 399.

Pennsylvania.— Wells *v.* Philadelphia Ins. Co., 9 Serg. & R. 103; Warder *v.* Horton, 4 Binn. 529.

United States.— Gross *v.* New York, etc., Steamship Co., 107 Fed. 516; The Fern Holme, 46 Fed. 119 [*affirmed* in 50 Fed. 613, 1 C. C. A. 583].

England.— North British, etc., Ins. Co. *v.* London, etc., Ins. Co., 5 Ch. D. 569, 46 L. J. Ch. 537, 36 L. T. Rep. N. S. 629.

61. *Massachusetts.*— Ryder *v.* Phœnix Ins. Co., 98 Mass. 185.

New York.— American Ins. Co. *v.* Griswold, 14 Wend. 399.

Pennsylvania.— Craig *v.* Murgatroyd, 4 Yeates 161.

United States.— McAllister *v.* Hoadley, 76 Fed. 1900; Thurston *v.* Koch, 23 Fed. Cas. No. 14,016, 4 Dall. (Pa.) 348, 1 L. ed. 862.

England.— Rogers *v.* Davis, 1 Park. Ins. 601; Newby *v.* Reed, W. Bl. 416. See also Henchman *v.* Offley, 3 Dougl. 135, 2 H. Bl. 345 note, 3 Rev. Rep. 408, 413, 26 E. C. L. 98.

Canada.— Bank of British North America *v.* Western Assur. Co., 7 Ont. 166.

By the continental law of Europe and by English law prior to the decision of Lord Mansfield in Newby *v.* Reed, 1 W. Bl. 416, the effect of double insurance was the same as is now held to result from the use of the American clause, which clause was adopted to restore the former rule. Carleton *v.* China Mut. Ins. Co., 174 Mass. 280, 54 N. E. 559, 46 L. R. A. 166; Ryder *v.* Phœnix Ins. Co., 98 Mass. 185; American Ins. Co. *v.* Griswold, 14 Wend. (N. Y.) 299. See *infra*, IV, B, 8, b, (IV).

Warranty against other insurance see *infra*, VII, E, 5, m.

insurers to the amount of their policies;[62] or he can recover proportionately from the several insurers.[63] He cannot, however, under any circumstances recover from all the underwriters more than the amount of his loss.[64]

(II) *On Valued Policies.* Where the policies are valued the insured cannot recover beyond the agreed valuation, and if the policies are differently valued he can recover up to, but not beyond, the agreed value in the policy sued on, less any sums received upon the other policies.[65]

(III) *Right of Underwriters to Contribution.* The insurers upon paying a loss have a right to call upon the other insurers for a ratable contribution.[66]

(IV) *American Clause.* To offset the effect of the foregoing rules there is now generally contained in policies of marine insurance what is commonly known as the "American" clause.[67] Under this clause the underwriters become liable according to the order of date of their policies, and the insured can recover from the second underwriter only where the amount of the first policy is insufficient to pay the loss,[68] and they are in such cases liable but for such proportion of the

62. Wiggin *v.* Suffolk Ins. Co., 18 Pick. (Mass.) 145, 29 Am. Dec. 576; American Ins. Co. *v.* Griswold, 14 Wend. (N. Y.) 399; Phœnix F. Ins. Co. *v.* Cochran, 51 Pa. St. 143; Murray *v.* Pennsylvania Ins. Co., 17 Fed. Cas. No. 9,961, 2 Wash. 186.

63. Wiggin *v.* Suffolk Ins. Co., 18 Pick. (Mass.) 145, 29 Am. Dec. 576.

64. *New York.*—American Ins. Co. *v.* Griswold, 14 Wend. 399.

Pennsylvania.— Craig *v.* Murgatroyd, 4 Yeates 161.

United States.— Insurance Co. of North America *v.* Canada Sugar-Refining Co., 87 Fed. 491, 31 C. C. A. 65; The Fern Holme, 46 Fed. 119 [*affirmed* in 50 Fed. 613].

England.— Godin *v.* London Assur. Co., 1 Burr. 489, 1 Ld. Ken. 254, W. Bl. 103.

Canada.— Kenny *v.* Union Mar. Ins. Co., 13 Nova Scotia 313.

65. The Fern Holme, 46 Fed. 119 [*affirmed* in 50 Fed. 613, 1 C. C. A. 583]; Murray *v.* Pennsylvania Ins. Co., 17 Fed. Cas. No. 9,961, 2 Wash. 186; Irving *v.* Richardson, 2 B. & Ad. 193, 9 L. J. K. B. O. S. 225, 1 M. & Rob. 153, 22 E. C. L. 88; Bruce *v.* Jones, 1 H. & C. 769, 9 Jur. N. S. 628, 32 L. J. Exch. 132, 7 L. T. Rep. N. S. 748, 11 Wkly. Rep. 371. See also Morgan *v.* Stockdale, 4 Exch. 615. *Contra,* Bousfield *v.* Barnes, 4 Campb. 228, where the insured was held entitled to recover up to the actual value of the property, although in excess of the agreed value.

Prior open policy; American clause.— Where the subsequent insurance is on cargo with the American clause, and is valued at so much per piece, parcel, or pound, it does not matter whether the prior insurance is valued or unvalued, as the liability on the subsequent insurance is, in either case, to be determined by deducting the amount to be paid by prior insurers, calculated at the value named in the subsequent policy. Minturn *v.* Columbia Ins. Co., 10 Johns. (N. Y.) 75; Kane *v.* Commercial Ins. Co., 8 Johns. (N. Y.) 229; McKim *v.* Phœnix Ins. Co., 16 Fed. Cas. No. 8,862, 2 Wash. 89.

The clause "answerable, in case of prior insurance on vessel, only for so much as the amount of such prior insurance may be deficient toward fully covering the risk," prevents plaintiffs from recovering the excess of the value of vessel, when lost, over the amount of the prior insurance, not exceeding the amount insured in said policy. Stephenson *v.* Piscataqua F. & M. Ins. Co., 54 Me. 55.

66. *Massachusetts.*— Ryder *v.* Phœnix Ins. Co., 98 Mass. 185; Wiggin *v.* Suffolk Ins. Co., 18 Pick. 145, 29 Am. Dec. 576.

New York.— American Ins. Co. *v.* Griswold, 14 Wend. 399.

United States.— McAllister *v.* Hoadley, 76 Fed. 1000; Thurston *v.* Koch, 23 Fed. Cas. No. 14,016, 4 Dall. (Pa.) 348, 1 L. ed. 862.

England.— Newby *v.* Reed, W. Bl. 116; Rogers *v.* Davis, 1 Park. Ins. 601.

Canada.— Bank of British North America *v.* Western Assur. Co., 7 Ont. 166.

67. The American clause is as follows: "If there be any prior insurance, these insurers shall be answerable only for so much of the amount as such prior insurance shall be deficient toward fully covering the premises hereby insured, and, in case of any insurance upon said premises subsequent in date to this policy, this company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent insurers," etc.

68. Gross *v.* New York, etc., Steamship Co., 107 Fed. 516; McAllister *v.* Hoadley, 76 Fed. 1000; Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127.

Part of risk covered by prior policy.— Where a prior policy covers a part of a voyage insured and a loss occurs during the voyage but after the termination of the prior policy, the underwriters on the second policy are liable for the entire loss. Kent *v.* Manufacturers' Ins. Co., 18 Pick. (Mass.) 19.

A judgment against the first insurers is not conclusive that they, and they alone, were liable for the whole loss. Whiting *v.* Independent Mut. Ins. Co., 15 Md. 297.

Effect of special memorandum.— Where at the time a policy containing the American clause was signed, a memorandum was made by the president of the company, stating that in case insurance on the property should be

loss as the amount they insure bears to the whole value.[69] And if the amount of property or interest at risk does not exceed the amount of insurance under the first policy, the second policy does not attach,[70] even though the prior underwriters have become insolvent.[71] The clause is limited in its operation solely to cases of double insurance,[72] and does not operate where the policies are concurrently executed.[73]

V. PREMIUM.

A. Necessity of. The premium, paid or promised, being the sole consideration for which the underwriter agrees to indemnify the assured against loss, it is requisite to the validity of the contract.[74]

B. Liability For — 1. In General. The party directing the insurance to be written, if he has any insurable interest, is liable for the premium.[75] Others interested in the subject-matter or adventure are not liable either directly or by

made in England, where it had been ordered, it should supersede so much of the insurance covered by the policy, and one per cent of the premium should be retained, and insurance on the same property was made in England eight days after the policy was underwritten by defendants, the court held that the terms of the memorandum did not alter the stipulations in the policy, and that the insurers were liable for the whole loss. Hogan *v.* Delaware Ins. Co., 12 Fed. Cas. No. 6,582, 1 Wash. 419.

69. Whiting *v.* Independent Mut. Ins. Co., 15 Md. 297.

70. Lewis *v.* Manufacturers' F. & M. Ins. Co., 131 Mass. 364; Ryder *v.* Phœnix Ins. Co., 98 Mass. 185; Amory *v.* Gilman, 2 Mass. 1; Providence Washington Ins. Co. *v.* Chapman, Cass. Dig. (Can.) 386.

71. Ryder *v.* Phœnix Ins. Co., 98 Mass. 185.

Suspension of prior policy.— Where the prior policy provided that in case the insured vessel left certain waters the policy should be suspended until its return to those waters, it was held that a subsequent policy, containing the American clause, took effect only on the suspension of the prior policy and was itself suspended when the vessel returned within the limits covered by the prior policy. St. Paul F. & M. Ins. Co. *v.* Knickerbocker Steam Towage Co., 93 Fed. 931, 36 C. C. A. 19.

The cancellation of the prior policy without the consent of the subsequent underwriters will not have the effect of rendering the latter liable for more than they would have been if the policy had not been canceled. Macy *v.* Whaling Ins. Co., 9 Mete. (Mass.) 354; Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127.

72. Whiting *v.* Independent Mut. Ins. Co., 15 Md. 297; Palmer *v.* Great Western Ins. Co., 10 Misc. (N. Y.) 167, 30 N. Y. Suppl. 1044 [*affirmed* in 153 N. Y. 660, 48 N. E. 1106]; International Nav. Co. *v.* British, etc., Ins. Co., 100 Fed. 304 [*affirmed* in 108 Fed. 987, 48 C. C. A. 181]; Chapman *v.* Providence Washington Ins. Co., 23 N. Brunsw. 105.

Merchants' and wharfingers' policies.— The underwriters on goods insured by the owners do not contribute with the underwriters of a wharfinger for a loss for which the wharfinger is responsible. North British, etc., Ins. Co. *v.* London, etc., Ins. Co., 5 Ch. D. 569, 46 L. J. Ch. 537, 36 L. T. Rep. N. S. 629.

73. Potter *v.* Marine Ins. Co., 19 Fed. Cas. No. 11,332, 2 Mason 475. See also American Ins. Co. *v.* Griswold, 14 Wend. (N. Y.) 399.

Policies becoming operative on the same date but previously executed on different days are not simultaneous, but the actual time of execution determines the rights of the respective underwriters. Carleton *v.* China Mut. Ins. Co., 174 Mass. 280, 54 N. E. 559, 46 L. R. A. 166; Gross *v.* New York, etc., Steamship Co., 107 Fed. 516. See also Deming *v.* Merchants' Cotton-Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

The actual time of execution may be shown where the policies bear the same date and the policy first executed bears the whole loss. Potter *v.* Marine Ins. Co., 19 Fed. Cas. No. 11,332, 2 Mason 475. But to offset the effect of the latter decision there has been adopted and inserted in most policies a clause to the effect that policies of the same date shall be deemed simultaneous. Carleton *v.* China Mut. Ins. Co., 174 Mass. 280, 54 N. E. 559, 46 L. R. A. 166; Deming *v.* Merchants' Cotton-Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

74. Hartshorn *v.* Shoe, etc., Dealers' Ins. Co., 15 Gray (Mass.) 240.

"An additional premium if by vessels lower than A 2" — "To be fixed at time of indorsement." — Under these clauses in an open policy, if the insured report a vessel lower than A 2, a premium must be fixed, and paid or secured, before the policy attaches. Orient Mut. Ins. Co. *v.* Wright, 23 How. (U. S.) 401, 16 L. ed. 524.

75. Mannheim Ins. Co. *v.* Hollander, 112 Fed. 549.

Continuing insurance.— One accepting a policy of marine insurance, providing for a continuance of the insurance at a *pro rata* premium after the term for which it was taken, if, at the end of the term, the vessel should be on a passage, is bound by the provision, and becomes liable, in the event stated, for the additional premium. Insurance Co. of North America *v.* Rogers, 78 Me. 191, 3 Atl. 283.

way of contribution for any part of the premium unless they authorized the party ordering the policy or have ratified his action.[76] In the United States the assured is liable directly to the underwriter for the premium.[77] In England, by the custom of Lloyd's, premiums of insurance are matters of account between the underwriter and the broker, and between the broker and the assured, without any privity between the assured and the underwriter. The broker has therefore a claim upon the assured for the amount of the premium, as the policy takes effect whether he has paid the underwriter or not, and whether the underwriter has, by the policy, confirmed the premium to be paid, or has taken the covenant of the broker to pay it.[78] And the underwriter cannot recover from the assured even though the policy contains an express promise by the assured to pay the premiums to the underwriter.[79]

2. POLICY NOT ATTACHING. If the policy issued does not conform with the contract as previously agreed upon,[80] or the adventure is illegal,[81] or for any other reason the policy fails to attach or the risk to run, there can be no recovery of premium from the assured.[82]

C. When Payable. In the absence of agreement to the contrary, the premium is payable upon the delivery of the policy,[83] and a delivery without receiving the premium is not a waiver of the obligation to pay on delivery.[84]

D. Amount. The amount of the premium is usually fixed in advance and stated in the policy. However, in open policies on goods and in other cases where the nature of the risk is not ascertainable at the time the policy is written, clauses are inserted stating a mode by which the amount of the premium is to be ascertained.[85] The mode stated in the policy is to be followed, and where the provision

76. McCready *v.* Woodhull, 34 Barb. (N. Y.) 80.

Part-owners.— One part-owner cannot, by ordering an insurance without authority from another, charge the other with any part of the premium, unless the other afterward assent to the insurance. Ogle *v.* Wrangham, Abbott Shipp. (13th ed.) 96. See also *supra*, IV, A, 2.

77. Mannheim Ins. Co. *v.* Hollander, 112 Fed. 549.

Payment to brokers.— But if the assured pay the premium to brokers who are the recognized agents of the underwriter, the payment is good and bars a further recovery thereof by the underwriter. Mannheim Ins. Co. *v.* Chipman, 124 Fed. 950.

78. Universo Ins. Co. *v.* Merchants Mar. Ins. Co., [1897] 2 Q. B. 93, 8 Aspin. 279, 66 L. J. Q. B. 564, 76 L. T. Rep. N. S. 748, 45 Wkly. Rep. 625; Power *v.* Butcher, 10 B. & C. 329, 8 L. J. K. B. O. S. 217, 5 M. & R. 327, 21 E. C. L. 144. See also Edgar *v.* Fowler, 3 East 222.

79. Universo Ins. Co. *v.* Merchants Mar. Ins. Co., [1897] 2 Q. B. 93, 8 Aspin. 279, 66 L. J. Q. B. 564, 76 L. T. Rep. N. S. 748, 45 Wkly. Rep. 625; Wilson *v.* Creighton, 3 Dougl. 132, 26 E. C. L. 96.

Fraud of assured.— Where by the fraud of the assured the underwriter is induced to give credit for the premiums to the broker, and the broker to give credit to the assured, the underwriter is entitled to receive the premiums from the assured. Foy *v.* Bell, 3 Taunt. 493, 12 Rev. Rep. 691.

80. Ocean Ins. Co. *v.* Carrington, 3 Conn. 357.

81. Jenkins *v.* Power, 6 M. & S. 282, 18 Rev. Rep. 375. See also Shiffner *v.* Gordon, 12 East 296.

Illegality see *supra*, IV, A, 5.

82. Commonwealth Ins. Co. *v.* Whitney, 1 Metc. (Mass.) 21; Taylor *v.* Sumner, 4 Mass. 56; Nye *v.* Ayres, 1 E. D. Smith (N. Y.) 532; Fairlie *v.* Christie, Holt N. P. 331, 3 E. C. L. 135, 1 Moore C. P. 114, 7 Taunt. 416, 2 E. C. L. 425, 18 Rev. Rep. 515.

A premium note cannot be enforced, if the vessel insured was unseaworthy when the risk commenced. Commonwealth Ins. Co. *v.* Whitney, 1 Metc. (Mass.) 21.

83. Babcock *v.* Baker, 37 N. Y. App. Div. 558, 56 N. Y. Suppl. 239.

84. Babcock *v.* Baker, 37 N. Y. App. Div. 558, 56 N. Y. Suppl. 239.

85. See Pollock *v.* Donaldson, 3 Dall. (U. S.) 510, 1 L. ed. 699, 19 Fed. Cas. No. 11,254.

Open cargo policy.— In a policy on cargo on a vessel for time, "as interest shall appear," the premium is to be augmented or diminished according to the actual cargo on board, from time to time, during the term insured. Pollock *v.* Donaldson, 3 Dall. (U. S.) 510, 1 L. ed. 699, 19 Fed. Cas. No. 11,254.

Vessel out of time.— Under an open policy providing that the premium is to be fixed at time of indorsement, when the character of the vessel and time of sailing are known, if the insured, on giving timely notice of a shipment, state all the facts, the circumstance that the vessel was out of time does not exonerate the insurers; but it is for them to object on that account, and require the proportionate premium. Rolker *v.* Great Western Ins. Co., 4 Abb. Dec. (N. Y.) 76, 3 Keyes 17.

is merely that the amount of the premium is to be "arranged" or "fixed," the amount is fixed at a reasonable sum commensurate with the risk undertaken.[86] If the amount cannot be agreed upon by the parties, it will be fixed by the court.[87]

E. Effect of Non-Payment. Payment of the premium is necessary before a policy of marine insurance will take effect, unless there is an agreement to the contrary or prepayment is waived by the insurer or its authorized agent.[88] In the absence of a custom or of a stipulation in the policy the insurance, where it has once attached, is not terminated by the failure of the insured to pay the premium or a premium note given therefor before the occurrence of a loss.[89] Promissory notes are frequently given for the premium at the time of effecting the policy, and where this is done the policy generally contains a clause declaring the effect

Rating of vessel.— Where a policy requires that a vessel shall not be below a certain "rate," this rate is not, in the absence of agreement to that effect, to be established solely by the rating register of the office making the insurance, certainly not unless the vessel was actually rated there; nor by a standard of rating anywhere in the port merely where that office is. If the vessel insured be not actually rated on the books of the office insuring, the rate may be established by any kind of evidence which shows what the vessel's condition really was. Orient Mut. Ins. Co. *v.* Wright, 1 Wall. (U. S.) 456, 17 L. ed. 505; Sun Mut. Ins. Co. *v.* Wright, 23 How. (U. S.) 412, 16 L. ed. 529; Orient Mut. Ins. Co. *v.* Wright, 23 How. (U. S.) 401, 16 L. ed. 524.

86. Greenock Steamship Co. *v.* Maritime Ins. Co., [1903] 1 K. B. 367, 9 Aspin. 364, 8 Com. Cas. 78, 72 L. J. K. B. 59, 88 L. T. Rep. N. S. 207, 51 Wkly. Rep. 447; Hyderabad Co. *v.* Willoughby, [1899] 2 Q. B. 530, 68 L. J. Q. B. 862. See also Scammell *v.* China Mut. Ins. Co., 164 Mass. 341, 41 N. E. 649, 49 Am. St. Rep. 462.

Insurance on cargo "as interest shall appear."— Where insurance is effected on the cargo of a vessel, in port and at sea, for a certain term, "as interest shall appear," the amount of the premium is to be regulated by the actual value of the cargo on board, from time to time, during the term of the insurance. Pollock *v.* Donaldson, 3 Dall. (U. S.) 510, 1 L. ed. 699, 19 Fed. Cas. No. 11,254.

Under an open policy reciting payment of premium at a specified rate, but providing that the premium on each risk is to be fixed at the time of indorsement, according to the rates of the company when the character of the vessel and time of sailing are known, if the insured, on giving timely notice of a shipment, states all the facts, the circumstance that the vessel was out of time does not exonerate the insurers; but it is for them to object on that account. Rolker *v.* Great Western Ins. Co., 4 Abb. Dec. (N. Y.) 76, 3 Keyes 17.

Expiration of contract on assured's failure to furnish particulars.— If a contract of insurance on the chartered freight of a vessel, in the form of a memorandum which purports on its face to contemplate the subsequent issuing of the policy, leaves the rate of premium "open for further particulars," and the particulars, of which the parties were then ignorant and which determine such rate, as shown by the charter-party, which is received by the assured ten days before the vessel sails on the voyage by which the freight is to be earned, he is bound to furnish the particulars to the insurer within a reasonable time, and, upon his failure to do so the contract expires by limitation. Scammell *v.* China Mut. Ins. Co., 164 Mass. 341, 41 N. E. 649, 49 Am. St. Rep. 462.

87. Greenock Steamship Co. *v.* Maritime Ins. Co., [1903] 1 K. B. 367, 9 Aspin. 364, 8 Com. Cas. 78, 72 L. J. K. B. 59, 88 L. T. Rep. N. S. 207, 51 Wkly. Rep. 447.

Vessel unseaworthy.— Where the policy provided that the property should be held covered in case of breach of warranty, "at a premium to be hereafter arranged," and the vessel failed to supply sufficient fuel for the voyage necessitating the burning of its fittings, it was held that the value of the fittings so burned was not an excessive premium. Greenock Steamship Co *v.* Maritime Ins. Co., [1903] 1 K. B. 367, 9 Aspin. 364, 8 Com. Cas. 78, 72 L. J. K. B. 59, 88 L. T. Rep. N. S. 207, 51 Wkly. Rep. 447.

88. Berthoud *v.* Atlantic M. & F. Ins. Co., 13 La. 539; Walker *v.* Provincial Ins. Co., 7 Grant Ch. (U. C.) 137 [*affirmed* in 8 Grant Ch. (U. C.) 217]. See also FIRE INSURANCE, 19 Cyc. 604; LIFE INSURANCE, 25 Cyc. 687.

Prepayment may be waived.—The Natchez, 42 Fed. 169; and cases in the notes following. See also FIRE INSURANCE, 19 Cyc. 605; LIFE INSURANCE, 25 Cyc. 687.

A contract to make insurance may be binding without payment of the premium or the giving of a premium note. A promise to give a premium note is a sufficient consideration for a promise to make a policy. Commercial Mut. Ins. Co. *v.* Union Mut. Ins. Co., 19 How. (U. S.) 318, 15 L. ed. 636.

Where the custom of an insurance company is to dispense with the signature of the assured to the premium note until after the policy is recorded, the omission to sign the note when the risk is taken does not render the contract void from want of consideration. Warren *v.* Ocean Ins. Co., 16 Me. 439, 33 Am. Dec. 674.

89. The Natchez, 42 Fed. 169.

of a failure to pay the note at maturity. These clauses are not uniform and there is some inconsistency among the cases construing them.[90]

F. Right to Return — 1. In General. It is the general rule that where the risk for which the premium has been paid has not been incurred or run, whether owing to the fault, pleasure, or will of the insured, or to any other cause,[91] or the policy, for any reason other than its illegality or fraud of the assured, becomes void, thereby preventing the risk from attaching, the premium shall be returned,

90. **Not void, but voidable.**— Under a provision that if the premium note should not be paid within fifteen days after maturity and demand, the policy would be void, it was held that the non-payment of such note did not *ipso facto* render the policy void, but only voidable at the underwriter's option; and that the underwriter could not wait until after the loss to exercise his option. Louisville Underwriters *v.* Pence, 93 Ky. 96, 19 S. W. 10, 14 Ky. L. Rep. 21, 40 Am. St. Rep. 176.

Return of pro rata premium.— Where the underwriter exercises its option of avoiding the policy it cannot recover the whole premium, but only a *pro rata* proportion thereof. Pennsylvania Ins. Co. *v.* Geraldin, 31 Mo. 30.

Set-off of contribution against loss.— By the rules of a marine insurance association the members insured each other's ships from noon of February 20 in any year, or from the date of entry of a vessel until noon of February 20 in the succeeding year; and the managers were empowered to levy contributions of one-fourth part of the estimated annual premium quarterly in each year, such premiums of insurance to form a fund for the payment of claims, and if any member should refuse to pay his contributions thereto, his ship should cease to be insured, and he should thenceforth forfeit all claims in respect of any loss. On April 5, 1881, a loss, incurred in the years 1880–1881 upon a ship belonging to plaintiff, and insured in the association, was fixed by an average adjuster at £180. A call of £41, 10*s.*, made on plaintiff on May 5, 1881, for the second quarter of 1881–1882, was by mutual consent set off against the loss. On May 13, 1881, the association paid plaintiff £100 on further account of the loss. On June 23, 1881, a call was made on plaintiff of £52, 16*s.*, 8*d.*, and on July 5, 1881, another call of £31, 4*s.* Plaintiff having tendered the balance due from him, the association refused to accept it, and during the pendency of an action to recover the full amount of the two calls one of plaintiff's ships insured in the association was wholly lost. It was held that plaintiff's ship did not cease to be insured, and that he had not forfeited his claim in respect of the loss. Williams *v.* British Mar. Mut. Ins. Assoc., 57 L. T. Rep. N. S. 27, 6 Aspin. 134.

A clause making the policy void for non-payment of a premium note will not bar a suit on the policy to recover for a loss because the note is not paid at the time the action is brought, there being a further provision in the policy that in case of loss the premium note should be deducted before payment of loss, and the note not being shown to be due at the time of the loss. Meagher *v.* Home Ins. Co., 10 U. C. C. P. 313; Meagher *v.* Ætna Ins. Co., 19 U. C. Q. B. 530.

Unless note "satisfactorily secured."— The failure of the underwriter to return a guarantee of a premium which he had demanded of the insured will be considered as fulfilling the requirement of satisfactorily securing the premium. Corbett *v.* Anchor Mar. Ins. Co., 14 Nova Scotia 375 [*affirmed* in 9 Can. Sup. Ct. 73].

Waiver.— A policy provided that, in case any note given for the premium should not be paid at maturity, such failure of payment should terminate the insurance, and said note should be considered the premium for the risk thus terminated. The boat was lost after maturity of the note given for the premium, and a voluntary payment of the note, with interest, was made after the loss, to the clerk of the insurer at his office, against the expressed wish of the clerk made at the time of the payment. It was held that such payment did not waive the forfeiture. Muhleman *v.* National Ins. Co., 6 W. Va. 508.

Premium considered earned.— Where the policy provides that it shall become void for non-payment of the premium note at its maturity and the full amount of the premium shall be considered earned, the policy becomes *ipso facto* void after the date of the maturity of the premium note, and its subsequent payment will not restore the policy. Wall *v.* Home Ins. Co., 36 N. Y. 157; Fry *v.* Franklin Ins. Co., 7 Ohio Dec. (Reprint) 442, 3 Cinc. L. Bul. 161; Cardwell *v.* Republic F. Ins. Co., 5 Fed. Cas. No. 2,396.

91. *Maine.*—Dodge *v.* Boston Mar. Ins. Co., 85 Me. 215, 27 Atl. 105.

Massachusetts.— Ryder *v.* Phœnix Ins. Co., 98 Mass. 185; Taylor *v.* Lowell, 3 Mass. 331, 3 Am. Dec. 141.

New York.— Mellen *v.* National Ins. Co., 1 Hall 500; Murray *v.* Columbian Ins. Co., 4 Johns. 443; Richards *v.* Marine Ins. Co., 3 Johns. 307; Forbes *v.* Church, 3 Johns. Cas. 159.

United States.— Scriba *v.* Insurance Co. of North America, 21 Fed. Cas. No. 12,560, 2 Wash. 107.

England.— Tyrie *v.* Fletcher, Cowp. 666; Loraine *v.* Tomlinson, 2 Dougl. (3d ed.) 585.

See 28 Cent. Dig. tit. "Insurance," § 457 *et seq.*

Prior insurance.— Where a policy contains the American clause and there is prior insurance sufficient to cover all the property at risk the insured is entitled to a return of the premium. Ryder *v.* Phœnix Ins. Co., 98 Mass. 185.

and an action may be maintained to recover the same.[92] But if the policy once attaches and any risk whatever is run the premium is considered earned and no part of it is required to be returned.[93]

2. ABSENCE OF INSURABLE INTEREST. If the assured has no insurable interest in the subject-matter no risk is assumed by the underwriter[94] and consequently he is not entitled to retain the premium.[95] But if the assured have any interest, even though the same be contingent,[96] the premium paid is not recoverable.[97] And although the assured has no interest, yet if he waits until the risk has been run and the adventure safely completed, he will not be permitted to obtain a return of the premium on the ground of his lack of insurable interest.[98]

3. MISTAKE. If from a mistake of fact a risk for which a premium has been paid is not run the underwriter is required to repay such premium.[99]

4. MISREPRESENTATION AND CONCEALMENT. In cases of misrepresentation[1] or concealment[2] which are not fraudulent but which are of such a nature as to avoid the policy and prevent it from attaching to the risk, the premium must be returned.

5. BREACH OF WARRANTY. Where there is any breach of either an express or implied warranty whereby the policy fails to attach the insured is entitled to a return of the premium.[3] But if the breach of warranty occur after the policy has attached there can be no return.[4] Thus a policy on a vessel "at and from"

92. Ryder *v.* Phœnix Ins. Co., 98 Mass. 185; Murray *v.* Columbian Ins. Co., 4 Johns. (N. Y.) 443; Richards *v.* Marine Ins. Co., 3 Johns. (N. Y.) 307; Penson *v.* Lee, 2 B. & P. 330, 5 Rev. Rep. 614; Oom *v.* Bruce, 12 East 225, 11 Rev. Rep. 367; and other cases cited in the preceding note.

93. Taylor *v.* Lowell, 3 Mass. 331, 3 Am. Dec. 141; Waters *v.* Allen, 5 Hill (N. Y.) 421; Hendricks *v.* Commercial Ins. Co., 8 Johns. (N. Y.) 1; Donath *v.* Insurance Co. of North America, 4 Dall. (Pa.) 463, 1 L. ed. 910; Moses *v.* Pratt, 4 Campb. 297, 16 Rev. Rep. 794; Tyrie *v.* Fletcher, Cowp. 666; Bermon *v.* Woodbridge, Dougl. (3d ed.) 781; Loraine *v.* Tomlinson, Dougl. (3d ed.) 585; Gladstone *v.* King, 1 M. & S. 35, 14 Rev. Rep. 392; Annen *v.* Woodman, 3 Taunt. 299, 12 Rev. Rep. 663.

94. See *supra*, III.

95. Mellen *v.* National Ins. Co., 1 Hall (N. Y.) 500; Routh *v.* Thompson, 13 East 274, 11 East 428, 10 Rev. Rep. 539; Martin *v.* Stilwell, Show. 100.

96. Contingent interest see *supra*, III, B, text and note 12.

97. Boehm *v.* Bell, 8 T. R. 154, 4 Rev. Rep. 620.

98. McCulloch *v.* Royal Exch. Assur. Co., 3 Campb. 406, 14 Rev. Rep. 765; Lowry *v.* Bourdieu, Dougl. (3d ed.) 468.

Where one insures the profits of a ship and the ship returns in ballast, he is not entitled to a return of the premium. Juhel *v.* Church, 2 Johns. Cas. (N. Y.) 333.

99. Oom *v.* Bruce, 12 East 225, 11 Rev. Rep. 367.

Premium for suppositious risk.— The premium is to be returned which is paid for insurance against a blockade erroneously supposed to exist. Taylor *v.* Sumner, 4 Mass. 56. But where the insurer, for an additional premium, agreed that a supposed deviation should not affect the insurance already obtained, it was held that the insured were not entitled to a return of the premium on the ground that the entire deviation had not been made, as was supposed at the time the agreement was entered into. Crowningshield *v.* New York Ins. Co., 3 Johns. Cas. (N. Y.) 142.

Lost or not lost.— A policy effected after the ship's arrival, both parties being ignorant of that fact, gives no right to a return of premium. Natusch *v.* Hendewerk [*cited* in Bradford *v.* Symondson, 7 Q. B. D. 456, 460]; Bradford *v.* Symondson, 7 Q. B. D. 456, 4 Aspin. 455, 20 L. J. Q. B. 582, 45 L. T. Rep. N. S. 364, 30 Wkly. Rep. 27.

1. Anderson *v.* Thornton, 8 Exch. 425; Feise *v.* Parkinson, 4 Taunt. 640, 13 Rev. Rep. 710.

2. Carter *v.* Boehm, 3 Burr. 1905, W. Bl. 593; Anderson *v.* Thornton, 8 Exch. 425; Tyler *v.* Horne, 1 Park. Ins. 455; De Costa *v.* Scandret, 2 P. Wms. 170, 24 Eng. Reprint 686.

3. *Maine.*— Dodge *v.* Boston Mar. Ins. Co., 85 Me. 215, 27 Atl. 105.

Massachusetts.— Taylor *v.* Lowell, 3 Mass. 331, 3 Am. Dec. 141; Porter *v.* Bussey, 1 Mass. 436.

New York.— Murray *v.* Columbian Ins. Co., 4 Johns. 443; Richards *v.* Marine Ins. Co., 3 Johns. 307; Duguet *v.* Rhinelander, 1 Johns. Cas. 360 [*reversed* on other grounds in 1 Cai. Cas. xxv].

United States.— Scriba *v.* Insurance Co. of North America, 21 Fed. Cas. No. 12,560, 2 Wash. 107.

England.— Penson *v.* Lee, 2 B. & P. 330, 5 Rev. Rep. 614; Colby *v.* Hunter, 3 C. & P. 7, M. & M. 81, 14 E. C. L. 422; Long *v.* Allan, 4 Dougl. 276, 26 E. C. L. 473; Anderson *v.* Pitcher, 3 Esp. 124, 1 Stark. 262, 5 Rev. Rep. 565, 2 E. C. L. 106.

See 28 Cent. Dig. tit. "Insurance," § 461.

4. Taylor *v.* Lowell, 3 Mass. 331, 3 Am. Dec. 141; Meyer *v.* Gregson, 3 Dougl. 402, 26 E. C. L. 264.

a port attaches while the vessel is in port and a subsequent breach of warranty as to time or manner of sailing or as to its seaworthiness on sailing gives no right to require any part of the premium to be delivered up.[5]

6. Deviation. Where a policy is avoided on the ground of a deviation no part of the premium need be returned, unless the risk is divisible, as the policy must first attach before it can be avoided for a deviation.[6]

7. Fraud. Although there are early cases to the contrary,[7] it is now the settled law that any actual fraud on the part of the assured in procuring a policy to be underwritten will deprive him of any right he might otherwise have to a return of the premium.[8] But fraud on the part of the underwriter in concealing or misrepresenting material facts will give the assured the right to recover back any premium paid.[9]

8. Illegality. Where a policy is void for illegality, as being a wager policy,[10] or as being designed to cover any unlawful trade or adventure,[11] or for other reasons,[12] the insured as a general rule cannot compel a return of the premium, as the courts will not assist either party in enforcing an illegal contract.[13] But it is otherwise if the illegality was not intended by the insured.[14]

9. Where Risk Is Divisible. Where the risk insured is from its nature or from the terms of the policy divisible and the policy is terminated before the whole of the risk is run, the premium is to be apportioned and the part covering the risk not run returned to the assured.[15] The risk is considered divisible where the policy covers distinct voyages,[16] but a policy "at and from" a port is not

5. Taylor *v.* Lowell, 3 Mass. 331, 3 Am. Dec. 141; Annen *v.* Woodman, 3 Taunt. 299, 12 Rev. Rep. 663.

6. Hearne *v.* New England Mut. Mar. Ins. Co., 20 Wall. (U. S.) 488, 22 L. ed. 395; Moses *v.* Pratt, 4 Campb. 297, 16 Rev. Rep. 794.

Express provision against return of premium in case of deviation see Alexandria Mar. Ins. Co. *v.* Stras, 1 Munf. (Va.) 408.

7. De Costa *v.* Scandret, 2 P. Wms. 170, 24 Eng. Reprint 686; Whittingham *v.* Thornburgh, 2 Vern. Ch. 206, 23 Eng. Reprint 734. See also Wilson *v.* Ducket, 3 Burr. 1361.

8. *Massachusetts.*— Hoyt *v.* Gilman, 8 Mass. 336.

New York.— Waters *v.* Allen, 5 Hill 421.

South Carolina.— Himely *v.* South Carolina Ins. Co., 1 Mill 154, 12 Am. Dec. 623.

United States.— Schwartz *v.* U. S. Insurance Co., 21 Fed. Cas. No. 12,505, 3 Wash. 170.

England.— Penson *v.* Lee, 2 B. & P. 330, 5 Rev. Rep. 614; Tyler *v.* Horne, 2 Marsh. Ins. 661; Chapman *v.* Fraser, 2 Marsh. Ins. 661. See also Anderson *v.* Thornton, 8 Exch. 425, 428.

9. Carter *v.* Boehm, 3 Burr. 1905, W. Bl. 593.

10. Jnhel *v.* Church, 2 Johns. Cas. (N. Y.) 333; Allkins *v.* Jupe, 2 C. P. D. 375, 46 L. J. C. P. 824, 36 L. T. Rep. N. S. 851; Lowry *v.* Bourdieu, Dougl. (3d ed.) 468. See *supra*, IV, A, 4, b, (II).

11. Russell *v.* De Grand, 15 Mass. 35; Morck *v.* Abel, 3 B. & P. 35; Horneyer *v.* Lushington, 3 Camph. 85, 15 East 46, 13 Rev. Rep. 759; Wilson *v.* Royal Exch. Assur. Co., 2 Campb. 623, 12 Rev. Rep. 760; Lubbock *v.* Potts, 7 East 449; Vandyck *v.* Hewitt, 1 East 96, 5 Rev. Rep. 516; Palyart *v.* Leckie, 6 M. & S. 290, 18 Rev. Rep. 381; Lowie *v.* Barber, 4 M. & S. 16, 16 Rev. Rep. 368. See *supra*, IV, A, 5, a, b.

12. Wilson *v.* Royal Exch. Assur. Co., 2 Campb. 623, 12 Rev. Rep. 760 (insurance on loan of money to captain, payable out of freight); Andree *v.* Fletcher, 3 T. R. 266, 2 T. R. 161, 1 Rev. Rep. 701 (reinsurance void under 19 Geo. II, c. 37).

13. See, generally, Contracts, 9 Cyc. 546 *et seq.*

14. Hentig *v.* Staniforth, 5 M. & S. 122, 17 Rev. Rep. 293.

Renunciation.— An insured, upon a policy effected in terms sufficiently large to comprehend an illegal adventure, and who intends thereby to cover an illegal adventure, cannot recover back the premium without some formal renunciation of the contract made known to the underwriter before the bringing of the action, although the adventure is never entered upon. Palyart *v.* Leckie, 6 M. & S. 290, 18 Rev. Rep. 381.

15. Lovering *v.* Mercantile Mar. Ins. Co., 12 Pick. (Mass.) 348; Waters *v.* Allen, 5 Hill (N. Y.) 421; Donath *v.* Insurance Co. of North America, 4 Dall. (Pa.) 463, 1 L. ed. 910; Stevenson *v.* Snow, 3 Burr. 1237, W. Bl. 315, 318.

Partial shipment under valued cargo policy. — Under a valued policy on cargo if the insured ships less than the agreed quantity or diverts a part of the original shipment he is entitled to a *pro rata* return of premium. Mutual Mar. Ins. Co. *v.* Munro, 7 Gray (Mass.) 246.

16. Rothwell *v.* Cooke, 1 B. & P. 172. In an insurance on a ship at and from Hull to Bilboa, warranted to depart from England with convoy, it was held that the voyages from Hull to Portsmouth, where she was to

divisible so as to apportion the premium between the parts of the risk "at" and "from" the port.[17] Nor where the whole risk is insured at one entire premium can there be any apportionment.[18] And where a policy is at a certain per cent a month for several months or a year it is considered one entire premium for the whole period.[19] The *quantum* of the return depends upon the circumstances of each case.[20]

10. Short Interest and Double Insurance.[21] If the property be insured to a larger amount than its real value a proportionate part of the premium is recoverable for the short interest.[22] But where the policy is a valued one no inquiry can be made as to the real extent of the interest unless it is fraudulent, and consequently there can be no surplus premium to recover.[23] In cases of double insurance the underwriters repay a part of the premium in proportion to their respective subscriptions.[24]

11. Stipulations For Return. It is sometimes stipulated in the policy that a part of the premium shall be returned under certain conditions or the happening of certain events.[25] The stipulation of this kind which has probably received the

meet the convoy, and thence to Bilboa, might be considered as distinct; and in case of a loss between the two latter places, an apportionment and a return of premium might be demanded. Rothwell *v.* Cooke, *supra*. Upon a policy at and from London to Halifax, warranted to depart with convoy from Portsmouth, the contract and risk are divisible at Portsmouth, as two independent contracts and risks. Tyrie *v.* Fletcher, Cowp. 666. A vessel was insured from Malta to St. Petersburg for a premium "at and after the rate of forty per cent., to return fifteen per cent. if the vessel passed the Gut of Gilbraltar on or before the twentieth of June last, and the risk ends without loss; or fifteen per cent. if the risk ends in safety at Gottenburgh." The vessel passed the Gut on the 9th of July, and while on her voyage in the English channel the supercargo received information which induced him to abandon the voyage to St. Petersburg, and go to London, where the vessel and cargo were seized. In an action for a return of the fifteen per cent last mentioned, it was held that the voyage was divisible, and that the underwriters, being discharged by the act of the insured from all risk from Gottenburgh to St. Petersburg, were bound to return the fifteen per cent. Ogden *v.* New York Firemen Ins. Co., 12 Johns. (N. Y.) 114.

17. Meyer *v.* Gregson, 3 Dougl. 402, 26 E. C. L. 264.

"At and from."—An insurance on a ship and goods at and from A to B, during her stay and trade there, at and from her port or ports of discharge in C, and at and from thence back to A, is an entire contract. Bermon *v.* Woodbridge, Dougl. (3d ed.) 781.

18. A custom to return part of the premium where the insurance is on a round voyage and the insured has no property on the return voyage is in conflict with a note given for the entire premium and cannot be set up as a defense to a suit on the note. Homer *v.* Dorr, 10 Mass. 26.

Where a policy was expressly apportioned on time and an abandonment was made for detention, it was held that the abandonment related back to the beginning of the detention and the risk was then terminated and a return of the unearned premium from that time should be made. Lovering *v.* Mercantile Mar. Ins. Co., 12 Pick. (Mass.) 348.

19. Loraine *v.* Tomlinson, Dougl. (3d ed.) 585.

20. Stevenson *v.* Snow, 3 Burr. 1237, W. Bl. 315, 318.

21. See *supra*, IV, B, 8.

22. Holmes *v.* United Ins. Co., 2 Johns. Cas. (N. Y.) 329; Fisk *v.* Masterman, 10 L. J. Exch. 306, 8 M. & W. 165. *Compare* Howland *v.* Commercial Ins. Co., Anth. N. P. (N. Y.) 42, holding that an action for return of premium, on account of short interest, will not lie, if plaintiff's interest, to the extent insured, was covered at any time during the voyage.

23. MacNair *v.* Coulter, 4 Bro. P. C. 450, 2 Eng. Reprint 305.

24. Fisk *v.* Masterman, 10 L. J. Exch. 306, 8 M. & W. 165.

Variation in risks covered.—If the risks covered by the two policies vary it is not a case of double insurance and the above rule has no application. Columbian Ins. Co. *v.* Lynch, 11 Johns. (N. Y.) 233. See also Insurance Co. of North America *v.* Rogers, 78 Me. 191, 3 Atl. 283; and *supra*, IV, B, 8, a.

25. If "employed in eastern trade during whole currency of policy."—Where a policy on plaintiff's ship from March 13, 1899, to March 13, 1900, provided for the return of a part of the premium, "should the vessel be employed in the Eastern trade during the whole currency of this policy," and the ship was employed in such trade from March 13, 1899, until July 23, 1899, when she was lost, it was held that the ship had been employed in the Eastern trade during the whole currency of the policy. Gorsedd Steamship Co. *v.* Forbes, 5 Com. Cas. 413.

Vessel laid up.—A stipulation in a time policy for a return of a part of the premium for every uncommenced month if sold or laid up, the term "laying up" means a laying up for the season without being further employed

most attention of the courts is the provision to return a part of the premium if the ship "sails with convoy and arrives." This has been held to mean a safe arrival,[26] but it is considered that there is a "safe arrival" notwithstanding there has been a general average loss[27] or the ship and cargo have been required to pay salvage.[28]

12. DEDUCTION OF ONE-HALF PER CENT. In England there was formerly a well established custom to allow one-half per cent to the underwriter where the premium was returned; but there is no trace of this custom ever having existed in the United States, and it appears to have become obsolete in England.[29]

VI. ALTERATION, CANCELLATION, ASSIGNMENT, AND REFORMATION OF POLICY, AND TRANSFER OF PROPERTY.

A. Alteration of Policy — 1. IN GENERAL. Any material alteration in the policy, after the same has been executed, if made without the consent of the underwriters, will vitiate the insurance.[30]

2. ALTERATION OR MODIFICATION BY CONSENT. A policy may be altered or modified by the consent of both parties,[31] and subject to the same exceptions as in the case of other contracts and restrictions, if any, imposed by statute, the alteration or modification may be by parol agreement.[32] Where several underwrite on the same policy the consent of part of them to an alteration will serve to keep the policy in force as to them but it will be void as to those who were ignorant of the making of the alteration.[33]

B. Cancellation of Policy — 1. BY PARTIES — a. In General. After the inception of the risk the underwriter cannot cancel the policy, unless there is a

during the current year. Hunter *v.* Wright, 10 B. & C. 714, 8 L. J. K. B. O. S. 259, 21 E. C. L. 301.

Premium not recoverable in addition to total loss.— Where a total loss is recovered, there cannot also be a return of premium for convoy, because the total loss includes the entire premium added to the invoice price. Langhorn *v.* Allnutt, 4 Taunt. 511, 13 Rev. Rep. 663.

26. May *v.* Christie, Holt N. P. 67, 17 Rev. Rep. 608, 3 E. C. L. 36; Leevin *v.* Cormac, 4 Taunt. 483, 13 Rev. Rep. 654.

Arrival under circumstances relieving the underwriters for loss gives the right to receive back the agreed portion of the premium. Dalgleish *v.* Brooke, 15 East 295, 13 Rev. Rep. 476.

Breaking up of the convoy does not terminate the right to a return of the premium where the vessel arrives. Audley *v.* Duff, 2 B. & P. 111, 5 Rev. Rep. 549.

27. Simond *v.* Boydell, Dougl. (3d ed.) 268.

28. Aguilar *v.* Rodgers, 7 T. R. 421, 4 Rev. Rep. 478.

29. Stevenson *v.* Snow, 3 Burr. 1237, W. Bl. 315, 318. See 2 Arnould Ins. (6th ed.) 1121.

30. French *v.* Patten, 1 Campb. 72, 1806, 9 East 351, 9 Rev. Rep. 571. See, generally, ALTERATION OF INSTRUMENTS.

Material alterations.— Inserting in the printed form of a policy any specific subject-matter after the policy has been executed will render it void. Langhorn *v.* Cologan, 4 Taunt. 330, 13 Rev. Rep. 613. The same is true of an alteration by changing the port of destination (Laird *v.* Robertson, 4 Bro. P. C. 488, 2 Eng. Reprint 333), giving a liberty to make an additional call (Forshaw *v.* Chabert, 3 B. & B. 158, 6 Moore C. P. 369, 23 Rev. Rep. 596, 7 E. C. L. 659), inserting an alternative port of destination (Campbell *v.* Christie, 2 Stark. 64, 3 E. C. L. 318), or enlarging the time within which the vessel is to sail (Fairlie *v.* Christie, Holt N. P. 331, 3 E. C. L. 135, 1 Moore C. P. 114, 7 Taunt. 416, 18 Rev. Rep. 515).

Immaterial alterations.— A policy "at and from A. and B." is not vitiated by inserting the words "both or either." Clapham *v.* Cologan, 3 Campb. 382. And inserting "and trade" in a policy "to Africa, and during her stay there and back with liberty to sell, barter, exchange, load, unload and reload cargo," is an immaterial alteration. Sanderson *v.* Symonds, 1 B. & B. 426, 4 Moore C. P. 42, 21 Rev. Rep. 675, 5 E. C. L. 721.

31. Ridsdale *v.* Shedden, 4 Campb. 107; Bates *v.* Grabham, Holt K. B. 469.

An agent generally has no authority to make an alteration in the policy. Bunten *v.* Orient Mut. Ins. Co., 4 Bosw. (N. Y.) 254 [*affirmed* in 1 Abb. Dec. 257, 2 Keyes 667, 31 How. Pr. 640].

32. See CONTRACTS, 9 Cyc. 596, 597; LIFE INSURANCE, 25 Cyc. 783.

33. Forshaw *v.* Chabert, 3 B. & B. 158, 6 Moore C. P. 369, 23 Rev. Rep. 596, 7 E. C. L. 659; Laird *v.* Robertson, 4 Bro. P. C. 488, 2 Eng. Reprint 333; Fairlie *v.* Christie, Holt N. P. 331, 3 E. C. L. 135, 1 Moore C. P. 114, 7 Taunt. 412, 2 E. C. L. 425, 18 Rev. Rep. 515; Campbell *v.* Christie, 2 Stark. 64, 3 E. C. L. 318; Langhorn *v.* Cologan, 4 Taunt. 330, 13 Rev. Rep. 613.

reservation to that effect in the contract, without the consent of the insured.[34] But the parties to the contract may mutually agree that the policy be canceled. There is nothing peculiar to marine insurance in regard to such agreements, but, as in other contracts, both parties must act upon any offer to cancel before any change has intervened in their relative situation.[35]

b. Ignoranee of Prior Loss. Where a policy has been canceled by consent of the parties in ignorance of an antecedent loss the underwriter is not discharged from liability for such loss, but only for losses occurring subsequent to the time of cancellation.[36] A cancellation under such circumstances will be rescinded in equity, although the mistake was of one party only.[37]

2. By Court. If a policy is liable to be completely avoided, as on the ground of fraud, misrepresentation, or concealment, a court of equity may direct its delivery up and cancellation.[38] But where the policy cannot be so avoided, a court of equity cannot direct its cancellation as to any claim on which there is a good legal defense or declare that there is no liability upon it.[39]

C. Assignment of Policy and Transfer of Property — 1. Transfer of Property Insured. A transfer of the property insured does not operate as a transfer of the insurance upon it, and where the transfer is absolute so that the insured ceases to have any insurable interest there can be no recovery upon the policy in case of loss.[40] But if the transfer is conditional the insured continues to

34. New York F. Mar. Ins. Co. *v.* Roberts, 4 Duer (N. Y.) 141.

35. Head *v.* Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. ed. 229.

An acceptance of an offer to cancel a policy after knowledge of a loss and after a prior refusal to cancel the same does not in law amount to an agreement to cancel. Head *v.* Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. ed. 229.

Offer to cancel must be accepted as an entirety.— Wilkins *v.* Tobacco Ins. Co., 30 Ohio St. 317, 27 Am. Rep. 455 [*affirming* 1 Cinc. Super. Ct. 349].

Authority of broker to cancel.— The authority given to a broker, when he is to effect a policy, does not extend to warrant him in canceling it. Xenos *v.* Wickham, L. R. 2 H. L. 296, 36 L. J. C. P. 313, 16 L. T. Rep. N. S. 800, 16 Wkly. Rep. 38.

Cancellation by corporation.— The cancellation must be made in the manner in which the underwriting company is enabled to act and if it is only authorized to act by writing the cancellation must be made in that manner. Head *v.* Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. ed. 229.

Notice of cancellation.—A policy of marine insurance dated April 5, 1880, for six months, provided: 'This policy to continue in force from the date of expiration until notice is given this company of its discontinuance, the assured to pay for such privilege *pro rata* for the time used." October 9 the insured wrote to the insurer, inclosing a check for one monthly premium from October 5 to November 5. On November 6 there was a loss by a peril of the sea. It was held that the sending of the check for one month's insurance was a monthly payment, and not the notice of discontinuance provided for in the policy. Greenwich Ins. Co. *v.* Providence, etc., Steamship Co., 119 U. S. 481, 7 S. Ct. 292, 30 L. ed. 473.

Where an insured became insolvent and the premium remained unpaid, and the underwriter notified the assignee that it would not be bound unless the premium was secured, to which the assignee paid no attention, it was held that the underwriter was justified in treating the agreement to insure as abandoned. Hubbell *v.* Pacific Mut. Ins. Co., 100 N. Y. 41, 2 N. E. 470.

36. Duncan *v.* New York Mut. Ins. Co., 61 N. Y. Super. Ct. 13, 18 N. Y. Suppl. 863 [*affirmed* in 138 N. Y. 88, 33 N. E. 730, 20 L. R. A. 386]; Steamship Samana Co. *v.* Hall, 55 Fed. 663; Reyner *v.* Hall, 4 Taunt. 725, 14 Rev. Rep. 650; Brown *v.* British America Assur. Co., 25 U. C. C. P. 514. *Contra*, Soper *v.* Atlantic Mut. F. & M. Ins. Co., 120 Mass. 267.

Pending salvage claim.— One who settles with the insurers for a partial loss, and surrenders his policy without notifying them of a claim pending for salvage, cannot, if the salvage be decreed, recover such further loss. It would be different if the notice were given. Batre *v.* Louisiana Ins. Co., 13 La. 577.

37. Duncan *v.* New York Mut. Ins. Co., 61 N. Y. Super. Ct. 13, 18 N. Y. Suppl. 863 [*affirmed* in 138 N. Y. 88, 33 N. E. 730, 20 L. R. A. 386].

38. Rivaz *v.* Gerussi, 6 Q. B. D. 222, 4 Aspin. 377, 50 L. J. Q. B. 176, 44 L. T. Rep. N. S. 79; Brooking *v.* Maudslay, 38 Ch. D. 636, 6 Aspin. 296, 57 L. J. Ch. 1001, 58 L. T. Rep. N. S. 852, 36 Wkly. Rep. 664; London, etc., Ins. Co. *v.* Seymour, L. R. 17 Eq. 85, 43 L. J. Ch. 120, 29 L. T. Rep. N. S. 641, 22 Wkly. Rep. 201; De Costa *v.* Scandret, 2 P. Wms. 170, 24 Eng. Reprint 686.

39. Brooking *v.* Maudslay, 38 Ch. D. 636, 6 Aspin. 296, 57 L. J. Ch. 1001, 58 L. T. Rep. N. S. 852, 36 Wkly. Rep. 664.

40. Lazarus *v.* Commonwealth Ins. Co., 5 Pick. (Mass.) 76; Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249; Car-

have an insurable interest and can recover.[41] A mere change of ownership or interest in the subject-matter of a marine insurance will not avoid the policy, provided there be an insurable interest at the time of loss, unless there is a provision to such effect in the policy.[42] A change in interest after a loss has happened clearly cannot be set up by the insurer to defeat a claim for the loss.[43]

2. ASSIGNMENT OF POLICY. In the absence of a prohibition as to the assignment of a policy, a transfer or assignment thereof is valid and the policy remains in force for the benefit of the assignee, although no notice of the assignment is given to the underwriters.[44]

3. EFFECT OF ASSIGNMENT. A valid assignment of a policy passes to the assignee all the rights of the insured,[45] and the assignee takes subject to the rights of the underwriter against the assignor.[46]

4. ASSIGNMENT AFTER LOSS. Where the interest of the insured ceases before loss a subsequent assignment of the policy is ineffectual to give the transferee a right to recover for the loss.[47] But if the interest of the insured continues until

roll *v.* Boston Mar. Ins. Co., 8 Mass. 515; North of England Pure Oil-Cake Co. *v.* Archangel Maritime Ins. Co., L. R. 10 Q. B. 249, 2 Aspin. 571, 44 L. J. Q. B. 121, 32 L. T. Rep. N. S. 561, 24 Wkly. Rep. 162.

41. Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249.

42. Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542 (holding that where a policy on a vessel obtained by the owner does not prohibit him from selling, he can do so without forfeiting it, if the insurers are not thereby put in a worse situation, and that, where he retains a mortgage or a privilege thereon as vendor, he will have an insurable interest entitling him to recover on the policy; it not being necessary that the interest at the time of the loss shall be the same as that existing when the policy was obtained); Worthington *v.* Bearse, 12 Allen (Mass.) 382, 90 Am. Dec. 152 (holding that where the owner of a vessel sold the same after having procured a policy of insurance thereon and afterward took a reconveyance, his rights under the policy were suspended during the time he had no title, but when he again acquired title by the reconveyance, his rights were revived, and he could recover on the policy in case of a loss after the reconveyance); Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249; Fernandez *v.* Great Western Ins. Co., 3 Rob. (N. Y.) 457 [*reversed* on other grounds in 48 N. Y. 571, 8 Am. Rep. 571] (holding that where the owner of a vessel sold the same after obtaining a policy thereon, and two days afterward, according to previous agreement, took back from the purchaser a mortgage to secure the payment of a part of the purchase-money, accompanied by a power of attorney placing the vessel under the entire control of the mortgagee, the transfer did not terminate the interest of the insured or release the insurer from liability to him); Sparkes *v.* Marshall, 2 Bing. N. Cas. 761, 2 Hodges 44, 5 L. J. C. P. 286, 3 Scott 172, 29 E. C. L. 750. And see the cases cited *infra*, VI, C, 5, notes 50–53.

Effect of clause prohibiting transfer see *infra*, VI, C, 5.

43. Duncan *v.* Great Western Ins. Co., 1 Abb. Dec. (N. Y.) 562, 3 Keyes 394, 2 Transcr. App. 130, 5 Abb. Pr. N. S. 173; Crosby *v.* New York Mut. Ins. Co., 5 Bosw. (N. Y.) 369; Sparkes *v.* Marshall, 2 Bing. N. Cas. 761, 776, 2 Hodges 44, 5 L. J. C. P. 286, 3 Scott 172, 29 E. C. L. 750.

44. Bell *v.* Firemen's Ins. Co., 5 Rob. (La.) 446; Hitchcock *v.* Northwestern Ins. Co., 26 N. Y. 68; Earl *v.* Shaw, 1 Johns. Cas. (N. Y.) 313, 1 Am. Dec. 117; Phœnix Ins. Co. *v.* Hagar, 11 Wkly. Notes Cas. (Pa.) 231.

45. Duncan *v.* China Mut. Ins. Co., 59 N. Y. Super. Ct. 396, 14 N. Y. Suppl. 301 [*affirmed* in 129 N. Y. 237, 29 N. E. 76].

Indorsement of certificates.— Where certificates of insurance are indorsed without assignment of the policy, and the policy contains a provision that it may be assigned, the assignment of the certificates may be considered to have been made for the purpose of enabling the assignee to claim the insurance, and not as an assignment of the policy, where the transaction is for collateral security for advances made on the cargo insured. Delahunt *v.* Ætna Ins. Co., 97 N. Y. 537.

Short indorsement.— A cargo of wheat, fully insured, having fallen in value, was sold, including the freight and the full insurance at a reduced price. The policies were transferred to the purchaser, but with an indorsement limiting the transfer to an amount sufficient only to cover the price at which the cargo was sold. It was held that the policy might have been indorsed short by express reservation but that the insured had here failed to do so and therefore could recover no part of the insurance after a total loss. Ralli *v.* Universal Mar. Ins. Co., 4 De G. F. & J. 1, 8 Jur. N. S. 495, 31 L. J. Ch. 313, 6 L. T. Rep. N. S. 34, 10 Wkly. Rep. 278, 65 Eng. Ch. 1, 45 Eng. Reprint 1082.

Partial assignment.— An assignment may be made to give the right to recover for an antecedent loss without conveying the right to recover for an unearned premium under the policy. Boddington *v.* Costelli, 1 C. L. R. 281, 1 E. & B. 879, 17 Jur. 781, 23 L. J. Q. B. 31, 1 Wkly. Rep. 359, 72 E. C. L. 879.

46. Waters *v.* Allen, 5 Hill (N. Y.) 421.

47. North of England Pure Oil-Cake Co. *v.* Archangel Maritime Ins. Co., L. R. 10 Q. B.

after a loss the policy may be assigned and the assignee may recover thereon in his own name.[48]

5. Clauses Prohibiting Transfer of Property or Assignment of Policy. Policies of marine insurance frequently contain clauses providing that the policy shall be void if the property be sold or transferred or the policy assigned without the consent of the underwriter.[49] These clauses are strictly construed and are interpreted as contemplating a complete change of ownership,[50] so that the policy is not affected if the insured gives a chattel mortgage on the property,[51] or if he sells the same and takes a mortgage thereon for the purchase-money, with control of the property,[52] or if the property is seized by a sheriff or marshal.[53]

D. Reformation of Policy. When the contract of insurance is agreed to, the underwriter is bound to insert in the policy whatever that contract by a just and reasonable interpretation includes, and if he omits to do so a court of equity will direct its reformation.[54] The mistake must be mutual.[55] It may be either one of law or of fact,[56] and be in regard to the names of the persons insured,[57] to the voyage,[58] or to the time of commencement of the risk.[59] The reformation may be made even after knowledge of a loss.[60] The power, however, should be exercised with great caution.[61]

VII. Avoidance and Forfeiture of Policy.

A. Misrepresentation[62] — **1. Definition.** A misrepresentation is a false statement or assertion made by one party to the other, before or at the time of

249, 2 Aspin. 571, 44 L. J. Q. B. 121, 32 L. T. Rep. N. S. 561, 24 Wkly. Rep. 162.

48. Lloyd *v.* Fleming, L. R. 7 Q. B. 299, 1 Aspin. 192, 41 L. J. Q. B. 93, 25 L. T. Rep. N. S. 824, 20 Wkly. Rep. 296.

49. **Notice of assignment.**— Where a policy of insurance contained the following clause: "It is agreed that, should the insured change master or owners, notice shall be given by him to the insurers without delay, when the insurers may end the adventure, if they so elect by returning a *pro rata* premium," it was held that the consent of the insurers, previously obtained for a change of the owners, did not do away with the necessity of a notice after the transfer. Eddy *v.* Tennessee M. & F. Ins. Co., 21 Mo. 587.

Assent of the underwriter may be shown by the signature of the secretary of the underwriting company, although the charter of the company requires all policies to be signed by its president. New England Mar. Ins. Co. *v.* De Wolf, 8 Pick. (Mass.) 56.

Only the underwriter can take advantage of an assignment of a policy in contravention of a prohibiting clause. An attaching creditor cannot do so. Pennsylvania Ins. Co. *v.* Trask, 8 Phila. (Pa.) 32.

50. Hitchcock *v.* Northwestern Ins. Co., 26 N. Y. 68.

51. Hennessey *v.* Manhattan F. Ins. Co., 28 Hun (N. Y.) 98; Pennsylvania Ins. Co. *v.* Phœnix Ins. Co., 71 Pa. St. 31; Pritchard *v.* Merchants Mar. Ins. Co., 26 N. Brunsw. 232.

A bill of sale absolute on its face, but intended merely as security for advances, is not within such a clause. Pritchard *v.* Merchants Mar. Ins. Co., 26 N. Brunsw. 232.

52. Hitchcock *v.* Northwestern Ins. Co., 26 N. Y. 68; Fernandez *v.* Great Western Ins. Co., 3 Rob. (N. Y.) 457 [*reversed* on other grounds in 48 N. Y. 571, 8 Am. Rep. 571].

53. Marigny *v.* Home Mut. Ins. Co., 13 La. Ann. 338, 71 Am. Dec. 511.

54. Fireman's Ins. Co. *v.* Powell, 13 B. Mon. (Ky.) 311; Bunten *v.* Orient Mut. Ins. Co., 8 Bosw. (N. Y.) 448 [*affirmed* in 1 Abb. Dec. 257, 2 Keyes 667, 31 How. Pr. 640]; Andrews *v.* Essex F. & M. Ins. Co., 1 Fed. Cas. No. 374, 3 Mason 6; Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192; Oliver *v.* Mutual Commercial Mar. Ins. Co., 18 Fed. Cas. No. 10,498, 2 Curt. 277; Motteux *v.* London Assur. Co., 1 Atk. 545, 26 Eng. Reprint 343; Wylde *v.* Union Mar. Ins. Co., Ritch. Eq. Cas. (Nova Scotia) 203 [*affirmed* in 10 Nova Scotia 205]. See, generally, Reformation of Instruments.

Must be mutual agreement.— The terms of the contract must have been previously agreed upon by both of the parties in order to entitle either to a reformation of the policy. Mackenzie *v.* Coulson, L. R. 8 Eq. 368.

55. Hearne *v.* New England Mut. Mar. Ins. Co., 20 Wall. (U. S.) 488, 22 L. ed. 395.

56. Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192.

57. Hill *v.* Millville Mut. M. & F. Ins. Co., 39 N. J. Eq. 66; Banks *v.* Wilson, Ritch. Eq. Cas. (Nova Scotia) 210.

58. National Traders' Bank *v.* Ocean Ins. Co., 62 Me. 519; Arnold *v.* Pacific Mut. Ins. Co., 78 N. Y. 7; Equitable Safety Ins. Co. *v.* Hearne, 20 Wall. (U. S.) 494, 22 L. ed. 398.

59. Wylde *v.* Union Mar. Ins. Co., Ritch. Eq. Cas. (Nova Scotia) 203 [*affirmed* in 10 Nova Scotia 205].

60. Arnold *v.* Pacific Mut. Ins. Co., 78 N. Y. 7.

61. Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192.

62. **Right to return of premium** see *supra*, V, F, 4.

entering into the contract, with respect to some matter or circumstance relating to it.[63]

2. Distinguished From Warranty. A representation is to be distinguished from a warranty in that it forms no part of the contract but is entirely collateral to it.[64] Also a warranty must be strictly complied with while a representation only requires a substantial compliance.[65]

3. Construction. A representation is to be taken in the ordinary meaning as of the place where made,[66] and in case of ambiguity it is to be construed most favorably to the insured, it being the duty of the underwriter in such cases to ask explanation.[67]

4. Continuation. A representation of an existing fact once made continues until altered or withdrawn.[68]

5. To Whom Representation Extends. A representation affects the contract only as to the person to whom it was made, and the fact that a misrepresentation was made to one underwriter will not affect the insurance made by a subsequent underwriter.[69]

6. Effect of Misrepresentations — a. As to Facts. A substantial misrepresentation of any material fact or circumstance relating to the insurance avoids the policy,[70] even though it may be made innocently and without any fraudulent

63. Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192; Behn *v.* Burness, 3 B. & S. 751, 9 Jur. N. S. 620, 32 L. J. Q. B. 204, 8 L. T. Rep. N. S. 207, 11 Wkly. Rep. 496, 113 E. C. L. 751.

64. *Massachusetts.*— Bryant *v.* Ocean Ins. Co., 22 Pick. 200.

New York.— Burritt *v.* Saratoga County Mut. F. Ins. Co., 5 Hill 188, 40 Am. Dec. 345.

Pennsylvania.— Mackie *v.* Pleasants, 2 Binn. 363.

United States.— Hazard *v.* New England Mar. Ins. Co., 8 Pet. 557, 8 L. ed. 1043 [*reversing* 11 Fed. Cas. No. 6,282, 1 Sumn. 218]; Hearn *v.* Equitable Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192.

England.— Behn *v.* Burness, 3 B. & S. 751, 9 Jur. N. S. 620, 32 L. J. Q. B. 204, 8 L. T. Rep. N. S. 207, 11 Wkly. Rep. 496, 113 E. C. L. 751.

65. *Maryland.*— Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348.

New York.— Irvin *v.* Sea Ins. Co., 22 Wend. 380; Suckley *v.* Delafield, 2 Cai. 222; Mackay *v.* Rhinelander, 1 Johns. Cas. 408.

United States.— Hazard *v.* New England Mar. Ins. Co., 8 Pet. 557, 8 L. ed. 1043 [*reversing* 11 Fed. Cas. No. 6,282, 1 Sumn. 218].

England.— Alexander *v.* Campbell, 1 Aspin. 373, 447, 41 L. J. Ch. 478, 27 L. T. Rep. N. S. 25; Pawson *v.* Watson, Cowp. 785, Dougl. (3d ed.) 11 note.

Canada.— Lyon *v.* Stadacona Ins. Co., 44 U. C. Q. B. 472.

And see *infra*, VII, A, 6; VII, E.

66. Hazard *v.* New England Mar. Ins. Co., 8 Pet. (U. S.) 557, 8 L. ed. 1043 [*reversing* 11 Fed. Cas. No. 6,282, 1 Sumn. 218].

67. Coulon *v.* Bowne, 1 Cai. (N. Y.) 288; Livingston *v.* Maryland Ins. Co., 7 Cranch (U. S.) 506, 3 L. ed. 421. See also Irvin *v.* Sea Ins. Co., 22 Wend. (N. Y.) 380.

As to amount of insurance.— In a proposal for the reinsurance of a ship in a company, it was stated that she was "insured only for four thousand pounds." This was the amount of the original insurance. The proposal also contained the amounts of insurances effected in other offices, but from this list an insurance effected without the assured's knowledge by a mortgagee was omitted. It was held that the words "insured only for four thousand pounds" must be construed as stating the amount of the original insurance, and not as a representation of the sum total insured in all offices whatever; the occasion on which, and the purpose for which, the words were used suggesting some limitation on their generality. Anderson *v.* Pacific F. & M. Ins. Co., 21 L. T. Rep. N. S. 408.

68. Kerr *v.* Union Mar. Ins. Co., 130 Fed. 415, 64 C. C. A. 617.

Promissory representation.— But where a promissory representation is *bona fide* intended to be complied with the happening of events preventing compliance will not discharge the underwriter. Driscol *v.* Passmore, 1 B. & P. 200, 4 Rev. Rep. 782.

69. Forrester *v.* Pigou, 3 Campb. 380, 1 M. & S. 9; Bell *v.* Carstairs, 2 Campb. 543, 14 East 374, 12 Rev. Rep. 557, 11 Rev. Rep. 593.

A contrary rule formerly prevailed. Barber *v.* Fletcher, Dougl. (3d ed.) 305; Marsden *v.* Reid, 3 East 572, 7 Rev. Rep. 516. See also Brine *v.* Featherstone, 4 Taunt. 869, 14 Rev. Rep. 689.

70. *Louisiana.*— Curell *v.* Mississippi M. & F. Ins. Co., 9 La. 163, 29 Am. Dec. 439.

Maryland.— Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348.

Massachusetts.— Lewis *v.* Eagle Ins. Co., 10 Gray 508; Sawyer *v.* Coasters' Mut. Ins. Co., 6 Gray 221.

New York.— Ely *v.* Hallett, 2 Cai. 57.

Ohio.— Howell *v.* Cincinnati Ins. Co., 7 Ohio 276.

South Carolina.— Price *v.* Depeau, 1 Brev. 452, 2 Am. Dec. 680.

intent.[71] But if the fact or circumstance misrepresented is not material to the risk it has no effect upon the insurance,[72] unless made with intent to deceive.[73]

b. Promissory Representations. A promissory representation must be substantially, but need not be literally, complied with.[74]

c. Intention, Expectancy, Opinion, and Belief. A mere representation as to intention, expectation, opinion, or belief, although not fulfilled, will not avoid the policy unless made with a fraudulent intent.[75]

United States.— Hazard *v.* New England Mar. Ins. Co., 8 Pet. 557, 8 L. ed. 1043 [*reversing* 11 Fed. Cas. No. 6,282, 1 Sumn. 218]; Livingston *v.* Maryland Ins. Co., 7 Cranch 506, 3 L. ed. 421; Higgie *v.* American Lloyds, 14 Fed. 143, 11 Biss. 395; Baxter *v.* New England Ins. Co., 2 Fed. Cas. No. 1,127, 3 Mason 96; Bulkley *v.* Protection Ins. Co., 4 Fed. Cas. No. 2,188, 2 Paine 82.

England.— Ionides *v.* Pacific F. & M. Ins. Co., L. R. 7 Q. B. 517, 2 Aspin. 454, 1 Aspin. 330, 41 L. J. Q. B. 190, 26 L. T. Rep. N. S. 738, 21 Wkly. Rep. 22; Anderson *v.* Pacific F. & M. Ins. Co., L. R. 7 C. P. 65, 1 Aspin. 220, 26 L. T. Rep. N. S. 130, 20 Wkly. Rep. 280; Behn *v.* Burness, 3 B. & S. 751, 9 Jur. N. S. 620, 32 L. J. Q. B. 204, 8 L. T. Rep. N. S. 207, 11 Wkly. Rep. 496, 113 E. C. L. 751; Pawson *v.* Watson, Cowp. 785, Dougl. (3d ed.) 11 note; Macdowall *v.* Fraser, Dougl. (3d ed.) 260; Mackintosh *v.* Marshall, 12 L. J. Exch. 337, 11 M. & W. 116.

See 28 Cent. Dig. tit. "Insurance," § 538 *et seq.*

Time of sailing substantially correct.— Representations that a vessel is about nine weeks out, when in fact she has been out ten weeks and four days, is not material, provided the latter period be within the usual time of voyage. Mackay *v.* Rhinelander, 1 Johns. Cas. (N. Y.) 408.

Nationality of cargo.— The representation of the insured that the cargo is American is not falsified by the vessel's carrying the baggage of French passengers. Vasse *v.* Ball, 2 Yeates (Pa.) 178. But a representation that a cargo is American is falsified if the cargo belongs to Spanish subjects notwithstanding it is furnished with American papers. Price *v.* Depeau, 1 Brev. (S. C.) 452, 2 Am. Dec. 680.

Last metaling of vessel.— A ship-owner stating that his ship had been last metaled in 1867, whereas only the bottom was then overhauled, and new metal put where required, does not make a material misstatement so as to vitiate the policy. Alexander *v.* Campbell, 1 Aspin. 373, 447, 41 L. J. Ch. 478, 27 L. T. Rep. N. S. 25.

71. See the cases cited in the preceding note, and *infra*, VII, A, 6, e.

72. Coulon *v.* Bowne, 1 Cai. (N. Y.) 288; Hodgson *v.* Alexandria Mar. Ins. Co., 5 Cranch (U. S.) 100, 3 L. ed. 48; Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451; Flinn *v.* Headlam, 9 B. & C. 693, 17 E. C. L. 310, M. & M. 367, 22 E. C. L. 546, 31 Rev. Rep. 739; Nova Scotia Mar. Ins. Co. *v.* Stevenson, 23 Can. Sup. Ct. 137.

Statutory provision.— Mass. St. (1887) c. 214, § 21, declaring immaterial misrepresentations by the assured or his agent, unless made with actual intent to deceive, or effective to increase the risk of loss, applies to marine insurance. Durkee *v.* India Mut. Ins. Co., 159 Mass. 514, 34 N. E. 1133; Ring *v.* Phœnix Assur. Co., 145 Mass. 426, 14 N. E. 525.

73. See *infra*, VII, A, 6, e.

74. *Massachusetts.*— Rice *v.* New England Mar. Ins. Co., 4 Pick. 439.

New York.— Irvin *v.* Sea Ins. Co., 22 Wend. 380; Suckley *v.* Delafield, 2 Cai. 222; Murray *v.* Alsop, 3 Johns. Cas. 47.

United States.— Lunt *v.* Boston Mar. Ins. Co., 6 Fed. 562, 19 Blatchf. 151 [*followed* in Lunt *v.* Boston Mar. Ins. Co., 17 Fed. 411].

England.— Denniston *v.* Lillie, 3 Bligh 202, 22 Rev. Rep. 13, 4 Eng. Reprint 579; Driscol *v.* Passmore, 1 B. & P. 200, 4 Rev. Rep. 782; Edwards *v.* Footner, 1 Campb. 530.

Canada.— Bailey *v.* Ocean Mut. Mar. Ins. Co., 19 Can. Sup. Ct. 153; McDonald *v.* Doull, 12 Nova Scotia 276.

Destination of vessel.— A representation as to the destination of a ship, if true at the time and not fraudulently made, does not avoid the policy, although the destination be afterward changed. Hubbard *v.* Coolidge, 12 Fed. Cas. No. 6,816, 2 Gall. 353.

A breach of a promissory condition not contained in the policy will not avoid it. Higginson *v.* Dall, 13 Mass. 96.

To "sail in ballast."— A representation in an insurance policy in time of peace that a vessel will sail in ballast is not violated by carrying ten barrels of powder taken on board without the knowledge of the owner. Suckley *v.* Delafield, 2 Cai. (N. Y.) 222.

Substantial compliance is excusable where subsequent events not happening through misconduct prevent compliance. Driscol *v.* Passmore, 1 B. & P. 200, 4 Rev. Rep. 782.

75. Fosdick *v.* Norwich Mar. Ins. Co., 3 Day (Conn.) 108; Bryant *v.* Ocean Ins. Co., 22 Pick. (Mass.) 200; Rice *v.* New England Mar. Ins. Co., 4 Pick. (Mass.) 439; Clason *v.* Smith, 5 Fed. Cas. No. 2,868, 3 Wash. 156; Anderson *v.* Pacific F. & M. Ins. Co., L. R. 7 C. P. 65, 1 Aspin. 220, 26 L. T. Rep. N. S. 130, 20 Wkly. Rep. 280 ("good and safe anchorage and well sheltered"); Hubbard *v.* Gloves, 3 Campb. 313; Brine *v.* Featherstone, 4 Taunt. 869, 14 Rev. Rep. 689.

Expected time of sailing.— Augusta Ins. Co. *v.* Abbott, 12 Md. 348; Allegre *v.* Maryland Ins. Co., 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; Barber *v.* Fletcher, Dougl. (3d ed.)

d. As to Information. A representation that the insured has information of a particular character relating to the risk does not make the insured chargeable with the truth of such information, but he is merely chargeable with the fact of having received it.[76]

e. Fraudulent Intent. Any misrepresentation, whether of a matter which is material or not, if it is wilfully made with a fraudulent intent, avoids the policy.[77] But where the misrepresentation is of a material fact the fact that it was made innocently and without any improper motives will not prevent a forfeiture of the insurance.[78]

7. Materiality of Misrepresentations — a. In General.[79] A matter is said to be material to the risk where it is of such a nature that it would influence a rational underwriter in determining whether to accept a risk or in fixing the amount of the premium.[80]

b. Particular Matters Material. A representation may be material, although it is of a matter which it is not necessary to disclose, and a misrepresentation as to the age,[81] equipment,[82] or particular condition[83] of a vessel is fatal to the insurance.[84] But if it does not appear that the underwriter was thereby induced to accept the risk, a misrepresentation as to the nature of the cargo is not material.[85] In a voyage policy a representation as to the situation of the vessel[86] or the time of sailing is immaterial;[87] but it is otherwise in a time policy.[88]

c. Replies to Inquiries. Inquiries made of the insured must be truthfully

305; Bowden *v.* Vaughan, 10 East 415, 10 Rev. Rep. 340.

76. Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Rice *v.* New England Mar. Ins. Co., 4 Pick. (Mass.) 439; Williams *v.* Delafield, 2 Cai. (N. Y.) 329; Tidmarsh *v.* Washington F. & M. Ins. Co., 23 Fed. Cas. No. 14,024, 4 Mason 439. Where a person at Sunderland effected a policy of insurance, and said no accounts had been received of the ship, and his counting-house was at Belfast, and at the time of saying this accounts had been received there, but this was unknown to him, it was held that his statement was not false or fraudulent. Greenwell *v.* Nicholson, 1 Jur. 285.

77. Nova Scotia Mar. Ins. Co. *v.* Stevenson, 23 Can. Sup. Ct. 137.

78. Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Lewis *v.* Eagle Ins. Co., 10 Gray (Mass.) 508; Sawyer *v.* Coasters' Mut. Ins. Co., 6 Gray (Mass.) 221; Hazard *v.* New England Mar. Ins. Co., 8 Pet. (U. S.) 557, 8 L. ed. 1043 [*reversing* 11 Fed. Cas. No. 6,282, 1 Sumn. 218]; Ionides *v.* Pacific F. & M. Ins. Co., L. R. 7 Q. B. 517, 2 Aspin. 454, 1 Aspin. 330, 41 L. J. Q. B. 190, 26 L. T. Rep. N. S. 738, 21 Wkly. Rep. 22; Anderson *v.* Pacific F. & M. Ins. Co., L. R. 7 C. P. 65, 1 Aspin. 220, 26 L. T. Rep. N. S. 130, 20 Wkly. Rep. 280; and other cases cited *supra*, VII, A, 6, a.

79. That a misrepresentation must be material to risk to have any effect see *supra*, VII, A, 6, a.

80. 1 Arnould Mar. Ins. (6th ed.) 530. And see Hazard *v.* New England Mar. Ins. Co., 8 Pet. (U. S.) 557, 8 L. ed. 1043 [*reversing* 11 Fed. Cas. No. 6,282, 1 Sumn. 218]; Hodgson *v.* Alexandria Mar. Ins. Co., 5 Cranch (U. S.) 100, 3 L. ed. 48 [*reversing* 12 Fed. Cas. No. 6,567, 1 Cranch C. C. 460]; Nova Scotia Mar. Ins. Co. *v.* Stevenson, 23 Can. Sup. Ct. 137; and other cases cited in the notes following. See also *infra*, VII, B, 3, a

81. Bulkley *v.* Protection Ins. Co., 4 Fed. Cas. No. 2,118, 2 Paine 82; Ionides *v.* Pacific Ins. Co., L. R. 7 Q. B. 517, 2 Aspin. 454, 1 Aspin. 330, 41 L. J. Q. B. 190, 26 L. T. Rep. N. S. 738, 21 Wkly. Rep. 22; Nova Scotia Mar. Ins. Co. *v.* Stevenson, 23 Can. Sup. Ct. 137. *Compare* Straas *v.* Marine Ins. Co., 23 Fed. Cas. No. 13,518, 3 Biss. 181.

82. Miller *v.* Russell, 1 Bay (S. C.) 309.

83. Higgie *v.* American Lloyds, 14 Fed. 143, 11 Biss. 395; Bulkley *v.* Protection Ins. Co., 4 Fed. Cas. No. 2,118, 2 Paine 82.

84. "A good old vessel" imports no more than that the vessel is seaworthy, and adds nothing to the implied warranty of seaworthiness. Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348.

85. Flinn *v.* Headlam, 9 B. & C. 693, 17 E. C. L. 310, M. & M. 367, 22 E. C. L. 546, 31 Rev. Rep. 739.

86. Callaghan *v.* Atlantic Ins. Co., 1 Edw. (N. Y.) 64; Kerr *v.* Union Mar. Ins. Co., 130 Fed. 415, 64 C. C. A. 617; Fillis *v.* Brutter, 1 Park. Ins. 414. In a representation that a ship was seen safe on such a day, and had performed two thirds of her voyage, if it turns out that she had got as far as was represented, but was lost two days before the day mentioned, the mistake is material, and makes the policy void. Macdowall *v.* Fraser, Dougl. (3d ed.) 260.

87. Curell *v.* Mississippi M. & F. Ins. Co., 9 La. 163, 29 Am. Dec. 439; Baxter *v.* New England Ins. Co., 19 Fed. Cas. No. 1,127, 3 Mason 96; Mackintosh *v.* Marshall, 12 L. J. Exch. 337, 11 M. & W. 116; Perry *v.* British America Fire, etc., Assur. Co., 4 U. C. Q. B. 330.

88. Vigoreaux *v.* Lime Rock Ins. Co., 59 Me. 457, 8 Am. Rep. 428; Harvey *v.* Seligman, 10 Ct. of Sess. Cas. 680.

answered, and the fact of making inquiries implies that the underwriter considers the matter material to the risk.[89]

B. Concealment[90] — **1. Obligation of Parties.** Contracts of marine insurance are *uberrimæ fidei* and there is an obligation to voluntarily disclose all facts and circumstances which are material to the risk and not within the knowledge of both parties.[91] This obligation is not limited to disclosures to be made by the insured but includes also the underwriter.[92]

2. Requisite Diligence of Agents and Brokers. The obligation to disclose material facts is not confined to facts which are within the personal knowledge of the insured,[93] but the law imposes upon his authorized agents the duty to exercise reasonable diligence in communicating such facts to the principal by the earliest and most expeditious usual route of mercantile communication.[94] The same degree of diligence is not required of all the insured's agents as is required of one having ordered or advised the insurance.[95] Where the insurance is effected

89. Kerr *v.* Union Mar. Ins. Co., 130 Fed. 415, 64 C. C. A. 617; Edwards *v.* Footner, 1 Campb. 530; Eisenhaur *v.* Providence Washington Ins. Co., 20 Nova Scotia 48.

90. Right to return of premium see *supra*, V, F, 4.

91. *California.*— Hart *v.* British, etc., Mar. Ins. Co., 80 Cal. 440, 22 Pac. 302.

Maryland.—Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Maryland Ins. Co. *v.* Bathurst, 5 Gill & J. 159.

Missouri.— Rosenheim *v.* American Ins. Co., 33 Mo. 230.

New York.— Burritt *v.* Saratoga County Mut. F. Ins. Co., 5 Hill 188, 40 Am. Dec. 345; Walden *v.* New York Firemen Ins. Co., 12 Johns. 128 [*reversed* on other grounds in 12 Johns. 513, 7 Am. Dec. 340]; Ely *v.* Hallett, 2 Cai. 57.

United States.— Hamblet *v.* City Ins. Co., 36 Fed. 118; Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451; Bulkley *v.* Protection Ins. Co., 4 Fed. Cas. No. 2,118, 2 Paine 82; Kohne *v.* Insurance Co. of North America, 14 Fed. Cas. No. 7,920, 1 Wash. 93; Moses *v.* Delaware Ins. Co., 17 Fed. Cas. No. 9,872, 1 Wash. 385.

England.— Blackburn *v.* Vigors, 12 App. Cas. 531, 6 Aspin. 216, 57 L. J. Q. B. 114, 57 L. T. Rep. N. S. 730, 36 Wkly. Rep. 449; Asfar *v.* Blundell, [1896] 1 Q. B. 123, 8 Aspin. 106, 65 L. J. Q. B. 138, 73 L. T. Rep. N. S. 648, 44 Wkly. Rep. 130; Ionides *v.* Pender, L. R. 9 Q. B. 531, 2 Aspin. 266, 43 L. J. Q. B. 227, 30 L. T. Rep. N. S. 547, 22 Wkly. Rep. 884; Bates *v.* Hewitt, L. R. 2 Q. B. 595, 56 L. J. Q. B. 282, 15 Wkly. Rep. 1172; Proudfoot *v.* Montefiore, L. R. 2 Q. B. 511, 8 B. & S. 510, 36 L. J. Q. B. 225, 16 L. T. Rep. N. S. 585, 15 Wkly. Rep. 920; Anderson *v.* Pacific F. & M. Ins. Co., L. R. 7 C. P. 65, 1 Aspin. 220, 26 L. T. Rep. N. S. 130, 20 Wkly. Rep. 280; Littledale *v.* Dixon, 1 B. & P. N. R. 151, 8 Rev. Rep. 774; Lynch *v.* Dunsford, 14 East 494, 13 Rev. Rep. 295; Lynch *v.* Hamilton, 3 Taunt. 37, 12 Rev. Rep. 591.

See 28 Cent. Dig. tit. "Insurance," § 550 *et seq.*

92. Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451; Carter *v.* Boehm, 3 Burr. 1905, W. Bl. 593.

93. Hamblet *v.* City Ins. Co., 36 Fed. 118; Blackburn *v.* Vigors, 12 App. Cas. 531, 6 Aspin. 216, 57 L. J. Q. B. 114, 57 L. T. Rep. N. S. 730, 36 Wkly. Rep. 449; Proudfoot *v.* Montefiore, L. R. 2 Q. B. 511, 8 B. & S. 510, 36 L. J. Q. B. 225, 16 L. T. Rep. N. S. 585, 15 Wkly. Rep. 920; Gladstone *v.* King, 1 M. & S. 35, 14 Rev. Rep. 392; Fitzherbert *v.* Mather, 1 T. R. 12, 1 Rev. Rep. 134.

94. Green *v.* Merchants' Ins. Co., 10 Pick. (Mass.) 402; Blackburn *v.* Vigors, 12 App. Cas. 531, 6 Aspin. 216, 57 L. J. Q. B. 114, 57 L. T. Rep. N. S. 730, 36 Wkly. Rep. 449; Proudfoot *v.* Montefiore, L. R. 2 Q. B. 511, 8 B. & S. 510, 36 L. J. Q. B. 225, 16 L. T. Rep. N. S. 585, 15 Wkly. Rep. 920; Stewart *v.* Dunlop, 4 Bro. P. C. 483, 2 Eng. Reprint 330; Gladstone *v.* King, 1 M. & S. 35, 14 Rev. Rep. 392; Fitzherbert *v.* Mather, 1 T. R. 12, 1 Rev. Rep. 134. *Contra*, Ruggles *v.* General Interest Ins. Co., 20 Fed. Cas. No. 12,119, 4 Mason 74 [*affirmed* in 12 Wheat. 408, 6 L. ed. 674].

Diligence required.—Where an agent directing insurance to be procured reported the vessel safe but the mail did not leave for several days and in the meantime the vessel was lost, it was held that the agent should have communicated by the same mail the loss of the ship. Fitzherbert *v.* Mather, 1 T. R. 12, 1 Rev. Rep. 134. See also Watson *v.* Delafield, 2 Johns. (N. Y.) 526.

An unusual or extraordinary mode of communication is not required. Green *v.* Merchants' Ins. Co., 10 Pick. (Mass.) 402; Snow *v.* Mercantile Mut. Ins. Co., 61 N. Y. 160.

Telegraph should be used where that mode of communication is in general use. Proudfoot *v.* Montefiore, L. R. 2 Q. B. 511, 8 B. & S. 510, 36 L. J. Q. B. 225, 16 L. T. Rep. N. S. 585, 15 Wkly. Rep. 920. But before that mode of communication became common it was not considered necessary. Folsom *v.* Mercantile Mut. Ins. Co., 9 Fed. Cas. No. 4,902, 8 Blatchf. 170 [*affirmed* in 18 Wall. 237, 21 L. ed. 827].

Cable communication was considered unusual a short time after the Atlantic cable was put into operation. Snow *v.* Mercantile Mut. Ins. Co., 61 N. Y. 160.

95. Blackburn *v.* Vigors, 12 App. Cas. 531, 6 Aspin. 216, 57 L. J. Q. B. 114, 57 L. T.

through an agent or a broker,[96] the agent or broker must communicate to the underwriter all the material facts within his knowledge and the insured must exercise diligence to inform such person of the facts of which he is possessed.[97] But if material facts are known to the insured or his agents, other than the one effecting the insurance, and through no lack of diligence they are not disclosed to the underwriter, it is not a concealment.[98]

3. Material Facts — a. In General. The law only requires that material facts be disclosed, by which is meant facts which are material to enable a rational underwriter, governing himself by the principles on which underwriters in practice act, to judge whether he shall accept the risk at all, or upon what terms.[99]

b. Sufficiency of Disclosure. The facts are not required to be set forth with unnecessary detail, but only sufficiently to call the attention of the underwriters thereto in such a manner that they can see that if they require further information they ought to ask for it.[1]

c. Nature and Extent of Interest. The nature of the particular interest or the extent of the interest of the insured in the subject-matter is not generally material. Thus, a part-owner, mortgagor, mortgagee, or insurer need not disclose his particular interest unless asked.[2] But if the interest be special, and such as is

Rep. N. S. 730, 36 Wkly. Rep. 449. See also Patton *v.* Janney, 18 Fed. Cas. No. 10,836, 2 Cranch C. C. 71.

Ordinary diligence only is required where the agent having the information did not direct the insurance to be obtained and has not been apprised of any intention to insure. Andrews *v.* Marine Ins. Co., 9 Johns. (N. Y.) 32.

96. Blackburn *v.* Vigors, 12 App. Cas. 531, 6 Aspin. 216, 57 L. J. Q. B. 114, 57 L. T. Rep. N. S. 730, 36 Wkly. Rep. 449; Thompson *v.* Buchanan, 4 Bro. P. C. 482, 2 Eng. Reprint 329; Vallance *v.* Dewar, 1 Campb. 503, 10 Rev. Rep. 738; Sawtell *v.* Loudon, 1 Marsh. 99, 5 Taunt. 359, 1 E. C. L. 189.

Concealment by intermediate broker.— Brokers who had knowledge of a loss were employed to effect insurance on an overdue vessel. Without disclosing their knowledge they telegraphed their agents at L, in the name of the owner, to effect insurance with underwriters there, which, after some negotiations between the owner and brokers at L, resulted in a policy being issued. It was held that the concealment by the original brokers avoided the insurance. Blackburn *v.* Haslam, 21 Q. B. D. 144, 6 Aspin. 326, 57 L. J. Q. B. 479, 59 L. T. Rep. N. S. 407, 36 Wkly. Rep. 855.

97. Watson *v.* Delafield, 2 Johns. (N. Y.) 526; McLanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98.

98. Wake *v.* Atty, 4 Taunt. 493, 13 Rev. Rep. 660. See also Biays *v.* Union Ins. Co., 22 Fed. Cas. No. 1,383, 1 Wash. 506.

99. Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Ely *v.* Hallett, 2 Cai. (N. Y.) 57; Ruggles *v.* General Interest Ins. Co., 20 Fed. Cas. No. 12,119, 4 Mason 74 [*affirmed* in 12 Wheat. 408, 6 L. ed. 674]; Ionides *v.* Pender, L. R. 9 Q. B. 531, 2 Aspin. 266, 43 L. J. Q. B. 227, 30 L. T. Rep. N. S. 547, 22 Wkly. Rep. 884; Tate *v.* Hyslop, 15 Q. B. D. 368, 5 Aspin. 487, 54 L. J. Q. B. 592, 53 L. T. Rep. N. S. 581; Rivaz *v.* Gerussi, 6 Q. B. D. 222, 4 Aspin. 377, 50 L. J. Q. B. 176, 44 L. T. Rep. N. S. 79; Elton *v.* Larkins, 8 Bing. 198, 21 E. C. L. 504, 5 C. & P. 86, 385, 24 E. C. L. 466, 617, 1 Moore & S. 323; Lynch *v.* Hamilton, 3 Taunt. 37, 12 Rev. Rep. 591. And see *supra*, VII, A, 7, a.

1. Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Allegre *v.* Maryland Ins. Co., 8 Gill & J. (Md.) 190, 29 Am. Dec. 536; Asfar *v.* Blundell, [1896] 1 Q. B. 123, 8 Aspin. 106, 65 L. J. Q. B. 138, 73 L. T. Rep. N. S. 648, 44 Wkly. Rep. 130; Weir *v.* Aberdeen, 2 B. & Ald. 320, 20 Rev. Rep. 450; Freeland *v.* Glover, 7 East 457, 6 Esp. 14, 3 Smith K. B. 426, 9 Rev. Rep. 803.

2. *Louisiana.*— Bell *v.* Firemen's Ins. Co., 5 Rob. 446; Bell *v.* Western M. & F. Ins. Co., 5 Rob. 423, 39 Am. Dec. 542.

Massachusetts.— Finney *v.* Warren Ins. Co., 1 Metc. 16, 35 Am. Dec. 343; Wiggin *v.* Mercantile Ins. Co., 7 Pick. 271; Bartlet *v.* Walter, 13 Mass. 267, 7 Am. Dec. 143; Locke *v.* North American Ins. Co., 13 Mass. 61; Oliver *v.* Greene, 3 Mass. 133, 3 Am. Dec. 96.

New York.—Van Natta *v.* Mutual Security Ins. Co., 2 Sandf. 490; Turner *v.* Burrows, 5 Wend. 541 [*affirmed* in 8 Wend. 144]; Lawrence *v.* Van Horne, 1 Cai. 276.

Pennsylvania.— Wells *v.* Philadelphia Ins. Co., 9 Serg. & R. 103; Pratt *v.* Phœnix Ins. Co., 1 Browne 267.

United States.— Russel *v.* Union Ins. Co., 1 Wash. 409, 4 Dall. 421, 1 L. ed. 892, 21 Fed. Cas. No. 12,146; Simmes *v.* Marine Ins. Co., 22 Fed. Cas. No. 12,862, 2 Cranch C. C. 618.

England.— Mackenzie *v.* Whitworth, 1 Ex. D. 36, 2 Aspin. 490, 45 L. J. Exch. 233, 33 L. T. Rep. N. S. 655, 24 Wkly. Rep. 287; Carruthers *v.* Sheddon, 1 Marsh. 416, 6 Taunt. 14, 1 E. C. L. 486.

Canada.— West *v.* Seaman, Cass. Dig. (Can.) 388; Perkins *v.* Equitable Ins. Co., 9 N. Brunsw. 562.

A designed concealment of the nature of the interest to be insured avoids the policy. Locke *v.* North American Ins. Co., 13 Mass.

not usually insured, its particular nature should be disclosed. In this category comes an equitable interest.[3]

d. National Character. Generally the national character of the vessel is not a material fact;[4] but if it is such as to expose it to belligerent risks or otherwise increase the risk it is material.[5]

e. Directions For Procuring Insurance. The directions for procuring insurance, where they tend to show that the vessel is out of time, should be disclosed.[6]

f. Loss, Injury, or Peril of Subject-Matter. The loss of the subject-matter of the insurance is of course material to the acceptance of the risk, and in a retroactive policy so is the fact that the vessel has sustained damage;[7] but the fact that the vessel has sustained damage is not necessarily material if the policy is not retroactive, as such damage forms an exception to the risk assumed.[8] Information to show the subject-matter to be in extraordinary peril should be disclosed.[9]

g. Time of Sailing or Being Spoken. The time of a ship's sailing is not generally material,[10] except in the case of a ship overdue or out of time.[11] In the

61. See also Finney *v.* Warren Ins. Co., 1 Metc. (Mass.) 16, 35 Am. Dec. 343; Lawrence *v.* Van Horne, 1 Cai. (N. Y.) 276; Merchants' Mar. Ins. Co. *v.* Barss, 15 Can. Sup. Ct. 185.

An overvaluation to such an extent as to make the risk speculative must be disclosed. Ionides *v.* Pender, L. R. 9 Q. B. 531, 2 Aspin. 266, 43 L. J. Q. B. 227, 30 L. T. Rep. N. S. 547, 22 Wkly. Rep. 884.

Undervaluation of shipments under open policy.— If the insured under an open policy making it requisite for him to declare all shipments systematically undervalues the shipments and conceals that fact from the underwriters in effecting new policies, the concealment will avoid the insurance. Rivaz *v.* Gerussi, 6 Q. B. D. 222, 4 Aspin. 377, 50 L. J. Q. B. 176, 44 L. T. Rep. N. S. 79.

3. Riley *v.* Delafield, 7 Johns. (N. Y.) 522; Russel *v.* Union Ins. Co., 4 Dall. (U. S.) 421, 20 L. ed. 632, 21 Fed. Cas. No. 12,146, 1 Wash. 409; Ohl *v.* Eagle Ins. Co., 18 Fed. Cas. No. 10,473, 4 Mason 390; Mackenzie *v.* Whitworth, 1 Ex. D. 36, 2 Aspin. 490, 45 L. J. Exch. 233, 33 L. T. Rep. N. S. 655, 24 Wkly. Rep. 287.

4. Clapham *v.* Cologan, 3 Campb. 382; West *v.* Seaman, Cass. Dig. (Can.) 388.

5. Maryland Ins. Co. *v.* Bathurst, 5 Gill & J. (Md.) 159; Elting *v.* Scott, 2 Johns. (N. Y.) 157; Stoney *v.* Union Ins. Co., Harp. (S. C.) 235; Livingston *v.* Maryland Ins. Co., 6 Cranch (U. S.) 274, 3 L. ed. 222; Marshall *v.* Union Ins. Co., 16 Fed. Cas. No. 9,134, 2 Wash. 411.

The insured is not bound to anticipate every possible ground of suspicion which may, against right, weigh with the belligerent cruisers and courts, and to communicate the circumstances, although if, against right, the belligerent courts are in the habit of condemning property under particular circumstances, he should disclose the circumstances, if they exist, that the underwriter may know how to estimate the risk. Marshall *v.* Union Ins. Co., 16 Fed. Cas. No. 9,133, 2 Wash. 357.

Change of nationality.— Where a ship was transferred by fictitious sale from the British to the Belgian flag, in order to escape board of trade inspection, the fact of her change of flag was held to be a material fact. Hutchinson *v.* Aberdeen Sea Ins. Co., 3 Ct. of Sess. Cas. 682.

6. Elton *v.* Larkins, 8 Bing. 198, 21 E. C. L. 504, 5 C. & P. 86, 385, 24 E. C. L. 466, 617, 1 Moore & S. 323; Willes *v.* Glover, 1 B. & P. N. R. 14, 8 Rev. Rep. 739; Shirley *v.* Wilkinson, 3 Dougl. 41, Dougl. (3d ed.) 306 note, 26 E. C. L. 39.

7. Poole *v.* Fitzgerald, Ambl. 145, 27 Eng. Reprint 93, 4 Bro. P. C. 439, 2 Eng. Reprint 297, Willes 641; Holland *v.* Russell, 4 B. & S. 14, 32 L. J. Q. B. 297, 9 L. T. Rep. N. S. 468, 11 Wkly. Rep. 757, 116 E. C. L. 14 [*affirming* 7 Jur. N. S. 842].

8. Stribley *v.* Imperial Mar. Ins. Co., 1 Q. B. D. 507, 3 Aspin. 134, 45 L. J. Q. B. 396, 34 L. T. Rep. N. S. 281, 24 Wkly. Rep. 701; Gladstone *v.* King, 1 M. & S. 35, 14 Rev. Rep. 392.

9. Stocker *v.* Merrimack M. & F. Ins. Co., 6 Mass. 220; Poole *v.* Fitzgerald, Ambl. 145, 27 Eng. Reprint 93, 4 Bro. P. C. 439, 2 Eng. Reprint 297, Willes 641; Seaman *v.* Fonereau, Str. 1183.

10. Fiske *v.* New England Mar. Ins. Co., 15 Pick. (Mass.) 310; McLanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98; Foley *v.* Moline, 1 Marsh. 117, 5 Taunt. 430, 15 Rev. Rep. 541, 1 E. C. L. 224; Fort *v.* Lee, 3 Taunt. 381, 12 Rev. Rep. 670; Perry *v.* British America F., etc., Assur. Co., 4 U. C. Q. B. 330.

11. Graham *v.* General Mut. Ins. Co., 6 La. Ann. 432; McLanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98; Johnson *v.* Phœnix Ins. Co., 13 Fed. Cas. No. 7,405, 1 Wash. 378; Elton *v.* Larkins, 8 Bing. 198, 21 E. C. L. 504, 5 C. & P. 86, 385, 24 E. C. L. 466, 617, 1 Moore & S. 323; Webster *v.* Foster, 1 Esp. 407; McAndrew *v.* Bell, 1 Esp. 373; Foley *v.* Moline, 1 Marsh. 117, 5 Taunt. 430, 15 Rev. Rep. 541, 1 E. C. L. 224; Bridges *v.* Hunter, 1 M. & S. 15, 14 Rev. Rep. 380;

latter case information as to when she was last spoken[12] and as to what special perils she fell in the track of is material.[13]

h. Voyage and Its Incidents. Ordinarily the name of the vessel is not material,[14] nor that of the master,[15] nor that the latter is sailing the vessel on shares,[16] nor the length of time she has already been in port.[17] That the vessel must remain in port for repairs beyond the time required for loading;[18] that she intends visiting a port for which she has been granted liberty to call,[19] or intends taking a course other than the usual one,[20] or has sailed from a second port in the course of her voyage;[21] or that she has made a false clearance,[22] or carries a general bill of lading,[23] are not facts which the insured is required to disclose in the absence of inquiry. But the true port of loading,[24] an intention to visit a port not in the regular course of the voyage,[25] the giving of special instructions to the master which violate the admiralty rules,[26] or the taking on board of papers increasing the risk of capture[27] are matters material to the risk and which require a voluntary disclosure.

i. Cargo. It is not necessary to disclose the particular nature of the cargo,[28] its condition[29] or ownership;[30] that it is contraband;[31] or that other cargo is to be carried on deck.[32]

j. Special Contracts. Where the insured has made any special contract in relation to the subject-matter, whereby others are relieved from their usual obligations, the terms of such contract are material to the risk.[33] It has been held, however, that failure to communicate the fact that the vessel is under charter-party is not such a concealment as will avoid the policy.[34]

k. Matters Covered by Warranty. There is no necessity of communicating any fact which is covered by either an express or an implied warranty.[35]

Ratcliffe *v.* Shoolbred, 1 Park. Ins. 413; Eisenhaur *v.* Providence Washington Ins. Co., 20 Nova Scotia 48.

A vessel is not to be considered missing because one or two other vessels which are more fleet have arrived. Littledale *v.* Dixon, 1 B. & P. N. R. 151, 8 Rev. Rep. 774.

12. Westbury *v.* Aberdein, 1 Jur. 201, 6 L. J. Exch. 83, M. & H. 49, 2 M. & W. 267.

13. Kirby *v.* Smith, 1 B. & Ald. 672, 19 Rev. Rep. 412; Westbury *v.* Aberdein, 1 Jur. 201, 6 L. J. Exch. 83, M. & H. 49, 2 M. & W. 267.

14. Knight *v.* Cotesworth, Cab. & E. 48.

15. Mercantile Mut. Ins. Co. *v.* Folsom, 18 Wall. (U. S.) 237, 21 L. ed. 827.

16. Russ *v.* Waldo Mut. Ins. Co., 52 Me. 187.

17. Kemble *v.* Bowne, 1 Cai. (N. Y.) 75.

18. Beckwith *v.* Sydebotham, 1 Campb. 116, 10 Rev. Rep. 652.

19. Hubbard *v.* Coolidge, 12 Fed. Cas. No. 6,816, 2 Gall. 353.

20. Middlewood *v.* Blakes, 7 T. R. 162, 4 Rev. Rep. 405.

21. Kohne *v.* Insurance Co. of North America, 14 Fed. Cas. No. 7,920, 1 Wash. 93.

22. Barnewall *v.* Church, 1 Cai. (N. Y.) 217, 2 Am. Dec. 180; McFee *v.* South Carolina Ins. Co., 2 McCord (S. C.) 503, 13 Am. Dec. 757.

23. Hurtin *v.* Phœnix Ins. Co., 12 Fed. Cas. No. 6,941, 1 Wash. 400.

24. Hodgson *v.* Richardson, W. Bl. 463.

25. Harrower *v.* Hutchinson, L. R. 5 Q. B. 584, 10 B. & S. 469, 39 L. J. Q. B. 229, 22 L. T. Rep. N. S. 684.

26. Sperry *v.* Delaware Ins. Co., 22 Fed. Cas. No. 13,236, 2 Wash. 243.

27. Livingston *v.* Maryland Ins. Co., 6 Cranch (U. S.) 274, 3 L. ed. 222.

28. Barret *v.* New Orleans Ins. Co., 8 La. Ann. 3; Lapene *v.* Sun Mut. Ins. Co., 8 La. Ann. 1, 58 Am. Dec. 668; Duplanty *v.* Commercial Ins. Co., Anth. N. P. (N. Y.) 156; Foley *v.* Tabor, 2 F. & F. 663.

29. Boyd *v.* Dubois, 3 Campb. 133; British, etc., Mar. Ins. Co. *v.* Sturge, 8 Aspin. 303, 77 L. T. Rep. N. S. 208.

30. Chase *v.* Washington Mut. Ins. Co., 12 Barb. (N. Y.) 595.

31. Howland *v.* Commonwealth Ins. Co., Anth. N. P. (N. Y.) 42.

32. Dacosta *v.* Edmunds, 4 Campb. 142, 2 Chit. 227, 16 Rev. Rep. 763, 18 E. C. L. 604; Clarkson *v.* Young, 22 L. T. Rep. N. S. 41.

33. Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 1 S. Ct. 582, 27 L. ed. 337; Tate *v.* Hyslop, 15 Q. B. D. 368, 5 Aspin. 487, 54 L. J. Q. B. 592, 53 L. T. Rep. N. S. 581; Mercantile Steamship Co. *v.* Tyser, 7 Q. B. D. 73, 5 Aspin. 6 note, 29 Wkly. Rep. 790. *Compare* The Bedouin, [1894] P. 1, 7 Aspin. 391, 63 L. J. Adm. 30, 69 L. T. Rep. N. S. 782, 6 Reports 693, 42 Wkly. Rep. 292.

34. Hodgson *v.* Mississippi Ins. Co., 2 La. 341, where the insurance was on freight.

35. Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Walden *v.* New York Firemen Ins. Co., 12 Johns. (N. Y.) 128 [*reversed* on other grounds in 12 Johns. 513, 7 Am. Dec. 340]; Bulkley *v.* Protection Ins. Co., 4 Fed. Cas. No. 2,118, 2 Paine 82; Haywood *v.*

l. Seaworthiness. Therefore as a rule, in a voyage policy whatever forms an ingredient of seaworthiness need not be disclosed unless particular inquiry is made therefor,[36] and although a general inquiry is made in regard thereto, all the particulars affecting the vessel's seaworthiness need not be stated.[37] But under the English law, if the policy is on time, a full disclosure of facts pertaining to the seaworthiness of the vessel is requisite, there being no implied warranty covering the premises.[38]

m. Other Applications For Insurance. The insured is not bound to disclose the fact that the risk has been declined by others or the estimate they put upon it, unless information on the subject is particularly called for.[39]

4. Fears or Apprehensions and Opinion or Expectation. Mere fears or apprehensions founded on peculiar facts need not be communicated.[40] Nor is there any duty to disclose mere opinion, speculation, or expectation.[41] But if the insured has reasonable ground to believe that facts material to the risk exist, the ground of such belief should be communicated.[42]

5. Rumors. There is no obligation to communicate loose rumors;[43] but if there is any material fact in connection with such rumor which is known to the insured he should disclose it,[44] and a failure to do so will avoid the policy even though the rumor prove false.[45]

6. Published Information. Published information as to matters of marine intelligence contained in papers received by and on file in the office of the insurer are generally presumed to be known to him;[46] but this presumption may be rebutted by proof that the person actually accepting the risk had no knowledge of such information.[47] If the insured have knowledge of any particular facts,

Rodgers, 4 East 590, 1 Smith K. B. 289, 7 Rev. Rep. 638.

Warranties see *infra*, VII, E.

36. Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Silloway *v.* Neptune Ins. Co., 12 Gray (Mass.) 73; Walden *v.* New York Firemen Ins. Co., 12 Johns. (N. Y.) 128, 513 [*reversed* on other grounds in 12 Johns. 513, 7 Am. Dec. 340]; Bulkley *v.* Protection Ins. Co., 4 Fed. Cas. No. 2,118, 2 Paine 82; Popleston *v.* Kitchen, 19 Fed. Cas. No. 11,278, 3 Wash. 138; Haywood *v.* Rodgers, 4 East 590, 1 Smith K. B. 289, 7 Rev. Rep. 638; Fawcus *v.* Sarsfield, 6 E. & B. 192, 2 Jur. N. S. 665, 25 L. J. Q. B. 249, 88 E. C. L. 192.

Damaged vessel.— But where a vessel is so damaged as not to be able to run at all and to require extensive repairs, these facts should be disclosed. Hamblet *v.* City Ins. Co., 36 Fed. 118.

37. Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348.

38. Fawcus *v.* Sarsfield, 6 E. & B. 192, 2 Jur. N. S. 665, 25 L. J. Q. B. 249, 88 E. C. L. 192; Russell *v.* Thornton, 6 H. & N. 140, 6 Jur. N. S. 1080, 30 L. J. Exch. 69, 2 L. T. Rep. N. S. 574, 8 Wkly. Rep. 615.

39. Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Ruggles *v.* General Interest Ins. Co., 20 Fed. Cas. No. 12,119, 4 Mason 74 [*affirmed* in 12 Wheat. 408, 6 L. ed. 674].

40. Ruggles *v.* General Interest Ins. Co., 20 Fed. Cas. No. 12,119, 4 Mason 74 [*affirmed* in 12 Wheat. 408, 6 L. ed. 674]; Bell *v.* Bell, 2 Camph. 475, 11 Rev. Rep. 769; Court *v.* Martineau, 3 Dougl. 161, 26 E. C. L. 114.

41. Folsom *v.* Mercantile Mut. Ins. Co., 9 Fed. Cas. No. 4,902, 8 Blatchf. 170. See also *supra*, VII, A, 6, c.

42. Graham *v.* General Mut. Ins. Co., 6 La. Ann. 432. And see Hart *v.* British, etc., Mar. Ins. Co., 80 Cal. 440, 22 Pac. 302.

43. Ruggles *v.* General Interest Ins. Co., 20 Fed. Cas. No. 12,119, 4 Mason 74 [*affirmed* in 12 Wheat. 408, 6 L. ed. 674]; Lynch *v.* Dunsford, 14 East 494, 13 Rev. Rep. 295; Durrell *v.* Bederley, Holt N. P. 283, 8 Rev. Rep. 739, 17 Rev. Rep. 639, 3 E. C. L. 118. *Compare* Lynch *v.* Hamilton, 3 Taunt. 37, 12 Rev. Rep. 591.

44. A rumor that the ship H fell in with the P "deep and leaky," necessitates the insured on goods *via* "ship or ships" to communicate to the underwriter that one of the "ship or ships" upon which the goods were to be forwarded was the "P." Lynch *v.* Dunsford, 14 East 494, 13 Rev. Rep. 295. See also Hart *v.* British, etc., Mar. Ins. Co., 80 Cal. 440, 22 Pac. 302; Leigh *v.* Adams, 1 Aspin. 147, 25 L. T. Rep. N. S. 566; Lynch *v.* Hamilton, 3 Taunt. 37, 12 Rev. Rep. 591.

45. Lynch *v.* Dunsford, 14 East 494, 13 Rev. Rep. 295.

46. Green *v.* Merchants' Ins. Co., 10 Pick. (Mass.) 402; Folsom *v.* Mercantile Mut. Ins. Co., 9 Fed. Cas. No. 4,902, 8 Blatchf. 170 [*affirmed* in 18 Wall. 237, 21 L. ed. 827]; Ruggles *v.* General Interest Ins. Co., 20 Fed. Cas. No. 12,119, 4 Mason 74 [*affirmed* in 12 Wheat. 408, 6 L. ed. 674]; Friere *v.* Woodhouse, Holt N. P. 572, 17 Rev. Rep. 639, 679, 3 E. C. L. 225.

47. Merchants' Ins. Co. *v.* Paige, 60 Ill. 448; Green *v.* Merchants' Ins. Co., 10 Pick. (Mass.) 402; Dickenson *v.* Commercial Ins. Co., Anth. N. P. (N. Y.) 126; Mackintosh *v.* Marshall, 12 L. J. Exch. 337, 11 M. & W.

which, coupled with such published information, tends to show that the latter is material to the particular risk, he is bound to communicate them to the underwriter.[48]

7. Private Advices. Private advices containing facts which if communicated would lead to an inquiry which would produce important information should be disclosed;[49] also advices tending to show that the subject-matter has been placed in proximity to a storm[50] or the enemy's cruisers should be communicated.[51]

8. Matters Known or Presumed to Be Known — a. In General. The insured is not required to disclose matters known to the underwriter,[52] or matters equally within his reach and which by fair inquiry and due diligence he may learn from ordinary sources.[53] Nor is he required to communicate matters which the law presumes to be within the underwriter's knowledge.[54]

b. What Underwriters Are Presumed to Know. The underwriters are presumed to be acquainted with all matters which are of common knowledge,[55] the usages and customs pertaining to the adventure insured,[56] the situation and topography of places within the insured voyage,[57] the political state of the world,[58] and the allegiance of particular countries.[59]

9. Effect of Concealment — a. In General. Any omission to communicate a

116. See also Mahoney *v.* Provincial Ins. Co., 12 N. Brunsw. 633.

Actual information to the particular agent of the underwriter effecting the insurance was held requisite in order to relieve the insured from the duty of making disclosure. Merchants' Ins. Co. *v.* Paige, 60 Ill. 448.

48. Ruggles *v.* General Interest Ins. Co., 20 Fed. Cas. No. 12,119, 4 Mason 74 [*affirmed* in 12 Wheat. 408, 6 L. ed. 674]; Lynch *v.* Dunsford, 14 East 494, 13 Rev. Rep. 295; Nicholson *v.* Power, 20 L. T. Rep. N. S. 580; Lynch *v.* Hamilton, 3 Taunt. 37, 12 Rev. Rep. 591.

49. Ely *v.* Hallett, 2 Cai. (N. Y.) 57; Rickards *v.* Murdock, 10 B. & C. 527, 8 L. J. K. B. O. S. 210, 21 E. C. L. 225; Elton *v.* Larkins, 8 Bing. 198, 21 E. C. L. 504, 5 C. & P. 86, 385, 24 E. C. L. 466, 617, 1 Moore & S. 323; Mahoney *v.* Provincial Ins. Co., 12 N. Brunsw. 633.

50. Moses *v.* Delaware Ins. Co., 17 Fed. Cas. No. 9,872, 1 Wash. 385; Kirby *v.* Smith, 1 B. & Ald. 672, 19 Rev. Rep. 412. See also Williams *v.* Delafield, 2 Cai. (N. Y.) 329.

51. Hoyt *v.* Gilman, 8 Mass. 336; Beckthwaite *v.* Nalgrove, Holt N. P. 288 note, 3 E. C. L. 120 note; Durrell *v.* Bederley, Holt N. P. 283, 8 Rev. Rep. 739, 17 Rev. Rep. 639, 3 E. C. L. 118.

52. *Maryland.*— Baltimore Ins. Co. *v.* McFadon, 4 Harr. & J. 31.

Massachusetts.— Green *v.* Merchants' Ins. Co., 10 Pick. 402.

South Carolina.— Money *v.* Union Ins. Co., 4 McCord 511.

United States.— Foisom *v.* Mercantile Mut. Ins. Co., 9 Fed. Cas. No. 4,902, 8 Blatchf. 170 [*affirmed* in 18 Wall. 237, 21 L. ed. 827].

England.— Bates *v.* Hewitt, L. R. 2 Q. B. 595, 36 L. J. Q. B. 282, 15 Wkly. Rep. 1172; Carter *v.* Boehm, 3 Burr. 1905, W. Bl. 593; Pimm *v.* Lewis, 2 F. & F. 778; Friere *v.* Woodhouse, Holt N. P. 572, 17 Rev. Rep. 639, 679, 3 E. C. L. 225.

Canada.— Royal Canadian Ins. Co. *v.* Smith, 17 Nova Scotia 322.

Matters formerly known.—A material fact, although it may have been known to the underwriter once, if not present to his mind at the time of effecting the insurance, should be communicated. Bates *v.* Hewitt, L. R. 2 Q. B. 595, 36 L. J. Q. B. 282, 15 Wkly. Rep. 1172.

53. Le Roy *v.* United Ins. Co., 7 Johns. (N. Y.) 343; Vasse *v.* Ball, 2 Dall. (Pa.) 270, 1 L. ed. 377; Friere *v.* Woodhouse, Holt N. P. 572, 17 Rev. Rep. 639, 679, 3 E. C. L. 225.

54. Nelson *v.* Louisiana Ins. Co., 5 Mart. N. S. (La.) 289; Gandy *v.* Adelaide Mar. Ins. Co., L. R. 6 Q. B. 746, 1 Aspin. 188, 40 L. J. Q. B. 239, 25 L. T. Rep. N. S. 742; Pimm *v.* Lewis, 2 F. & F. 778; Friere *v.* Woodhouse, Holt N. P. 572, 17 Rev. Rep. 639, 679, 3 E. C. L. 225.

55. Gandy *v.* Adelaide Mar. Ins. Co., L. R. 6 Q. B. 746, 1 Aspin. 188, 40 L. J. Q. B. 239, 25 L. T. Rep. N. S. 742.

56. Nelson *v.* Louisiana Ins. Co., 5 Mart. N. S. (La.) 289; Le Roy *v.* United Ins. Co., 7 Johns. (N. Y.) 343; Buck *v.* Chesapeake Ins. Co., 1 Pet. (U. S.) 151, 7 L. ed. 90; Calbreath *v.* Gracy, 4 Fed. Cas. No. 2,296, 1 Wash. 219; Fracis *v.* Sea Ins. Co., 8 Aspin. 418, 79 L. T. Rep. N. S. 28, 47 Wkly. Rep. 119; Dacosta *v.* Edmunds, 4 Camp. 142, 2 Chit. 227, 16 Rev. Rep. 763, 18 E. C. L. 604. See also *supra*, IV, B, 1, c.

Usage must be well known.— Tennant *v.* Henderson, 1 Dow 324, 3 Eng. Reprint 716.

57. De Longuemere *v.* New York F. Ins. Co., 10 Johns. (N. Y.) 120.

58. Buck *v.* Chesapeake Ins. Co., 1 Pet. (U. S.) 151, 7 L. ed. 90; Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451; Carter *v.* Boehm, 3 Burr. 1905, W. Bl. 593.

59. Buck *v.* Chesapeake Ins. Co., 1 Pet. (U. S.) 151, 7 L. ed. 90; Carter *v.* Boehm, 3 Burr. 1905, W. Bl. 593.

material fact which the insured is under an obligation to disclose will vitiate the policy,[60] whether such omission is intentional or results from mistake, accident, forgetfulness, or inadvertence,[61] and even though the insured may believe the facts to be immaterial.[62] Fraud is not necessary.[63]

b. False Information. If the insured has information material to the risk, the fact that such information turns out to be false does not counteract the effect of the concealment of such information.[64]

c. Information Acquired Pending Negotiations. If, pending negotiations for a policy of marine insurance and before the same have culminated in a contract between the parties, material facts come to the knowledge of the insured, he is under the same obligation to make disclosure of them to the underwriter as if he had such information before making the application.[65] The obligation terminates,

60. *California.*— Hart *v.* British, etc., Mar. Ins. Co., 80 Cal. 440, 22 Pac. 302.

Louisiana.— Graham *v.* General Mut. Ins. Co., 6 La. Ann. 432.

Maryland.— Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Maryland Ins. Co. *v.* Bathurst, 5 Gill & J. 159.

Massachusetts.— Fiske *v.* New England Mar. Ins. Co., 15 Pick. 310; Stocker *v.* Merrimack M. & F. Ins. Co., 6 Mass. 220; Oliver *v.* Greene, 3 Mass. 133, 3 Am. Dec. 96.

Missouri.— Rosenheim *v.* American Ins. Co., 33 Mo. 230.

New York.— Reliance Mar. Ins. Co. *v.* Herbert, 3 N. Y. App. Div. 593, 38 N. Y. Suppl. 373; Burritt *v.* Saratoga County Mut. F. Ins. Co., 5 Hill 188, 40 Am. Dec. 345; Walden *v.* New York Fireman Ins. Co., 12 Johns. 128 [*reversed* on other grounds in 12 Johns. 513, 7 Am. Dec. 340]; Ely *v.* Hallett, 2 Cai. 57.

Pennsylvania.— Kohne *v.* Insurance Co. of North America, 6 Binn. 219; Vasse *v.* Ball, 2 Yeates 178.

South Carolina.— Ingraham *v.* South Carolina Ins. Co., 3 Brev. 522; Price *v.* Depean, 1 Brev. 452, 2 Am. Dec. 680.

United States.— Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 1 S. Ct. 582, 27 L. ed. 337; Hamblet *v.* City Ins. Co., 36 Fed. 118; Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451; Bulkley *v.* Protection Ins. Co., 4 Fed. Cas. No. 2,118, 2 Paine 82; Kohne *v.* Insurance Co. of North America, 14 Fed. Cas. No. 7,920, 1 Wash. 93; Marshall *v.* Union Ins. Co., 16 Fed. Cas. No. 9,133, 2 Wash. 357; Moses *v.* Delaware Ins. Co., 17 Fed. Cas. No. 9,872, 1 Wash. 385.

England.— Blackburn *v.* Vigors, 12 App. Cas. 531, 6 Aspin. 216, 57 L. J. Q. B. 114, 57 L. T. Rep. N. S. 730, 36 Wkly. Rep. 449; Asfar *v.* Blundell, [1896] 1 Q. B. 123, 8 Aspin. 106, 65 L. J. Q. B. 138, 73 L. T. Rep. N. S. 648, 44 Wkly. Rep. 130; Tate *v.* Hyslop, 15 Q. B. D. 368, 5 Aspin. 487, 54 L. J. Q. B. 592, 53 L. T. Rep. N. S. 581; Rivaz *v.* Gerussi, 6 Q. B. D. 222, 4 Aspin. 377, 50 L. J. Q. B. 176, 44 L. T. Rep. N. S. 79; Ionides *v.* Pender, L. R. 9 Q. B. 531, 2 Aspin. 266, 43 L. J. Q. B. 227, 30 L. T. Rep. N. S. 547, 22 Wkly. Rep. 884; Harrower *v.* Hutchinson, L. R. 5 Q. B. 584, 10 B. & S. 469, 39 L. J. Q. B. 229, 22 L. T. Rep. N. S. 684; Bates *v.* Hewitt, L. R. 2 Q. B. 595, 36 L. J. Q. B. 282, 15 Wkly. Rep. 1172; Proudfoot *v.* Montefiore, L. R. 2 Q. B. 511, 8 B. & S. 510, 36 L. J. Q. B. 225, 16 L. T. Rep. N. S. 585, 15 Wkly. Rep. 920; Anderson *v.* Pacific F. & M. Ins. Co., L. R. 7 C. P. 65, 1 Aspin. 220, 26 L. T. Rep. N. S. 130, 20 Wkly. Rep. 280; Holland *v.* Russell, 4 B. & S. 14, 32 L. J. Q. B. 297, 8 L. T. Rep. N. S. 468, 11 Wkly. Rep. 757, 116 E. C. L. 14; Littledale *v.* Dixon, 1 B. & P. N. R. 151, 8 Rev. Rep. 774; Thompson *v.* Buchanan, 4 Bro. P. C. 482, 2 Eng. Reprint 329; Carter *v.* Boehm, 3 Burr. 1905. W. Bl. 593; Shirley *v.* Wilkinson, 3 Dougl. 41, Dougl. (3d ed.) 306 note, 26 E. C. L. 39; Reid *v.* Harvey, 4 Dow 97, 16 Rev. Rep. 38, 3 Eng. Reprint 1102; Lynch *v.* Dunsford, 14 East 494, 13 Rev. Rep. 295; Russell *v.* Thornton, 6 H. & N. 140, 6 Jur. N. S. 1080, 30 L. J. Exch. 69, 2 L. T. Rep. N. S. 574, 8 Wkly. Rep. 615; Nicholson *v.* Power, 20 L. T. Rep. N. S. 580; Bridges *v.* Hunter, 1 M. & S. 15, 14 Rev. Rep. 380; Ratcliffe *v.* Shoolbred, 1 Park. Ins. 413; Lynch *v.* Hamilton, 3 Taunt. 37, 12 Rev. Rep. 591; Fitzherbert *v.* Mather, 1 T. R. 12, 1 Rev. Rep. 134.

See 28 Cent. Dig. tit. "Insurance," § 550 *et seq.*

61. Burritt *v.* Saratoga County Mut. F. Ins. Co., 5 Hill (N. Y.) 188, 40 Am. Dec. 345; Carter *v.* Boehm, 3 Burr. 1905, W. Bl. 593; Fitzherbert *v.* Mather, 1 T. R. 12, 1 Rev. Rep. 134; and other cases cited in the preceding note.

62. Shirley *v.* Wilkinson, 3 Dougl. 41, Dougl. (3d ed.) 306 note, 26 E. C. L. 39; and other cases cited in the preceding notes.

63. Burritt *v.* Saratoga County Mut. F. Ins. Co., 5 Hill (N. Y.) 188, 40 Am. Dec. 345; Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 1 S. Ct. 582, 27 L. ed. 337; Hamblet *v.* City Ins. Co., 36 Fed. 118; Thompson *v.* Buchanan, 4 Bro. P. C. 482, 2 Eng. Reprint 329; Bridges *v.* Hunter, 1 M. & S. 15, 14 Rev. Rep. 380; and other cases cited in the preceding notes.

64. Hoyt *v.* Gilman, 8 Mass. 336; Willes *v.* Glover, 1 B. & P. N. R. 14, 8 Rev. Rep. 739; Lynch *v.* Dunsford, 14 East 494, 13 Rev. Rep. 295; Lynch *v.* Hamilton, 3 Taunt. 37, 12 Rev. Rep. 591.

65. Green *v.* Merchants' Ins. Co., 10 Pick. (Mass.) 402; Snow *v.* Mercantile Mut. Ins. Co., 61 N. Y. 160; Watson *v.* Delafield, 2 Cai. (N. Y.) 224; Merchants' Mut. Ins. Co.

however, upon the acceptance of the risk so as to create a binding contract, although no policy be then issued.[66]

10. Waiver. The underwriter may waive the right to avoid the contract because of concealment of a material fact by the insured or by his agent or broker, and it does so if, with knowledge of such concealment, it elects to treat the contract as valid or fails to rescind within a reasonable time to the prejudice of the insured.[67] Mere delay in rescinding, however, where there are no acts indicating an election or conduct inducing the insured to refrain from procuring other insurance or otherwise act to his prejudice, does not amount to a waiver.[68] And where the risk has been accepted and a binding slip issued before knowledge of the concealment, the issue of a policy after acquiring such knowledge, in accordance with the custom, without any protest or notice that the contract will be treated as void, does not amount to an election and waiver, unless it is so intended or the circumstances are such as to induce the insured to act to his prejudice in the belief that it is so intended.[69] If the underwriter pays a loss after knowledge that the insured concealed material facts, he cannot recover back the money so paid.[70] Acts on the part of the underwriter with knowledge of a disaster to the vessel, but without knowledge that it was known to and concealed by the insured, do not waive the right to avoid the policy because of such concealment.[71]

C. Fraud.[72] If through any fraud practised upon the underwriter he is

v. Lyman, 15 Wall. (U. S.) 664, 21 L. ed. 246; McLanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98; Proudfoot *v.* Montefiore, L. R. 2 Q. B. 511, 8 B. & S. 510, 36 L. J. Q. B. 225, 16 L. T. Rep. N. 585, 15 Wkly. Rep. 920; 1 Phillips Ins. § 561.

66. Cory *v.* Patton, L. R. 7 Q. B. 304, 1 Aspin. 225, 41 L. J. Q. B. 195 note, 26 L. T. Rep. N. S. 161, 20 Wkly. Rep. 364; Lishman *v.* Northern Mar. Ins. Co., L. R. 10 C. P. 179, 2 Aspin. 504, 44 L. J. C. P. 185, 32 L. T. Rep. N. S. 170, 23 Wkly. Rep. 733. *Compare* Merchants Mut. Ins. Co. *v.* Lyman, 15 Wall. (U. S.) 664, 21 L. ed. 246.

67. Morrison *v.* Universal Mar. Ins. Co., L. R. 8 Exch. 197, 1 Aspin. 503, 42 L. J. Exch. 115, 21 Wkly. Rep. 774 [*reversing* L. R. 8 Exch. 40, 42 L. J. Exch. 17, 27 L. T. Rep. N. S. 791, 21 Wkly. Rep. 196]; Royal Canadian Ins. Co. *v.* Smith, 17 Nova Scotia 322 [*reversed* on other grounds in Cass. Dig. (Can.) 386].

A question for the jury see Morrison *v.* Universal Mar. Ins. Co., L. R. 8 Exch. 197, 1 Aspin. 503, 42 L. J. Exch. 115, 21 Wkly. Rep. 774.

68. Morrison *v.* Universal Mar. Ins. Co., L. R. 8 Exch. 197, 1 Aspin. 503, 42 L. J. Exch. 115, 21 Wkly. Rep. 774 [*reversing* L. R. 8 Exch. 40, 42 L. J. Exch. 17, 27 L. T. Rep. N. S. 791, 21 Wkly. Rep. 196]. See also Russell *v.* Thornton, 6 H. & N. 140, 6 Jur. N. S. 1080, 30 L. J. Exch. 69, 2 L. T. Rep. N. S. 574, 8 Wkly. Rep. 615 [*affirming* 4 H. & N. 788].

A new contract operating as a waiver of concealment of the fact that the vessel had been aground and injured is not shown by a letter from the underwriter, after knowledge of the concealment, stating that he considered that his risk did not commence until the vessel should be surveyed and repaired, to which letter no reply was made by the insured. Russell *v.* Thornton, 6 H. & N. 140, 6 Jur. N. S. 1080, 30 L. J. Exch. 69, 2 L. T. Rep. N. S. 574, 8 Wkly. Rep. 615 [*affirming* 4 H. & N. 788]. It was also intimated in this case that the letter would not have created a new contract, even if it had been answered.

69. Morrison *v.* Universal Mar. Ins. Co., L. R. 8 Exch. 197, 1 Aspin. 503, 42 L. J. Exch. 115, 21 Wkly. Rep. 774 [*reversing* L. R. 8 Exch. 40, 42 L. J. Exch. 17, 27 L. T. Rep. N. S. 791, 21 Wkly. Rep. 196].

Intention to elect.—But where an underwriter who, after issuing a binding slip, has acquired knowledge of a concealment by the insured of a disaster to the ship, issues a policy, not because of any supposed obligation under the binding slip, but because he elects to take the risk notwithstanding the disaster and its concealment and cannot afterward avoid the policy. Royal Canadian Ins. Co. *v.* Smith, 17 Nova Scotia 322 [*reversed* on other grounds in Cass. Dig. (Can.) 386].

A question for the jury whether there was an election see Morrison *v.* Universal Mar. Ins. Co., L. R. 8 Exch. 197, 1 Aspin. 503, 42 L. J. Exch. 115, 21 Wkly. Rep. 774 [*reversing* L. R. 8 Exch. 40, 42 L. J. Exch. 17, 27 L. T. Rep. N. S. 791, 21 Wkly. Rep. 196].

Delivery of a policy accompanied by a protest or notice that any claim made under it will be resisted does not waive the right to avoid the policy because of the concealment, a preliminary contract having been made by binding slip before knowledge of the concealment. Nicholson *v.* Power, 20 L. T. Rep. N. S. 580.

70. Reliance Mar. Ins. Co. *v.* Herbert, 3 N. Y. App. Div. 593, 38 N. Y. Suppl. 373. *Compare infra*, X, B, 2.

71. Smith *v.* Royal Canadian Ins. Co., Cass. Dig. (Can.) 386 [*reversing* 17 Nova Scotia 322].

72. Right to return of premium see *supra*, V, F, 7.

induced to issue a policy or to insure upon more favorable terms than he otherwise would the policy is voidable at his election.[73]

D. Deviation and Change of Risk[74] — **1. Definition.** A deviation is a voluntary departure without necessity or reasonable cause from the prescribed or usual course of the voyage or of the manner of performing it.[75]

2. Distinguished From Change of Voyage. A deviation is to be distinguished from a change of voyage. Where there is any unreasonable delay in commencing the voyage, the voyage is different from the one insured and the policy does not attach.[76] Also where the master or authorized agent determines, prior to the commencement of the risk, not to sail upon the insured voyage or to abandon the original termini of the insured voyage, there is a non-inception of the risk,[77] and the policy does not attach, although part of the voyage lies over the same course.[78] But the determination to abandon the voyage should be made to appear by clear terms or unambiguous conduct.[79] If the ultimate termini of the intended voyage

73. Gardner *v.* Columbian Ins. Co., 9 Fed. Cas. No. 5,225, 2 Cranch C. C. 550; Rivaz *v.* Gerussi, 6 Q. B. D. 222, 4 Aspin. 377, 50 L. J. Q. B. 176, 44 L. T. Rep. N. S. 79; Pawson *v.* Watson, Cowp. 785, Dougl. (3d ed.) 11 note; Sibbald *v.* Hill, 2 Dow 263, 14 Rev. Rep. 160, 3 Eng. Reprint 859; Roberts *v.* Founereau, 1 Park. Ins. 405; Anonymous, Skin. 327.

First underwriter signing as decoy duck.— Where the first underwriter signs the policy as a decoy duck, under an agreement between himself and the assured that he shall not be called upon to pay in case of loss, the policy will be set aside for fraud. Wilson *v.* Ducket, 3 Burr. 1361.

Fraudulent misrepresentation see *supra*, VII, A, 6, e.

Fraudulent concealment see *supra*, VII, B.

74. **Right to return of premium** see *supra*, V, F, 6.

75. *Louisiana.*— Bell *v.* Firemen's Ins. Co., 5 Rob. 446; Bell *v.* Western M. & F. Ins. Co., 5 Rob. 423, 39 Am. Dec. 542.

Maryland.— Riggin *v.* Patapsco Ins. Co., 7 Harr. & J. 279, 16 Am. Dec. 302.

Massachusetts.— Amsinck *v.* American Ins. Co., 129 Mass. 185; Coffin *v.* Newburyport Mar. Ins. Co., 9 Mass. 436.

Missouri.— Settle *v.* St. Louis Perpetual Mar., etc., Ins. Co., 7 Mo. 379.

New York.— Audenreid *v.* Mercantile Mut. Ins. Co., 60 N. Y. 482, 19 Am. Rep. 204; Fernandez *v.* Great Western Ins. Co., 3 Rob. 457 [*reversed* on other grounds in 48 N. Y. 571, 8 Am. Rep. 571]; Child *v.* Sun Mut. Ins. Co., 3 Sandf. 26; New York Firemen Ins. Co. *v.* Lawrence, 14 Johns. 46, 57.

Pennsylvania.— Snowden *v.* Phœnix Ins. Co., 3 Binn. 457.

Virginia.— Alexandria Mar. Ins. Co. *v.* Stras, 1 Munf. 408.

United States.— Hostetter *v.* Park, 137 U. S. 30, 11 S. Ct. 1, 34 L. ed. 568. See also Bulkley *v.* Protection Ins. Co., 4 Fed. Cas. No. 2,118, 2 Paine 82.

England.— Pelly *v.* Royal Exch. Assur. Co., 1 Burr. 341; Hartley *v.* Buggin, 3 Dougl. 39, 26 E. C. L. 37.

Mistake in going from course is not a deviation. Brazier *v.* Clap, 5 Mass. 1.

Effect of ignorance of master see Tait *v.* Levi, 14 East 481, 13 Rev. Rep. 289.

Criminal or barratrous deviation by master see *infra*, VIII, E, 14, d.

76. Arnold *v.* Pacific Mut. Ins. Co., 78 N. Y. 7; Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127; Chitty *v.* Selwyn, 2 Atk. 359, 26 Eng. Reprint 617; Grant *v.* King, 4 Esp. 175, 6 Rev. Rep. 849.

When vessel must arrive.— There is an implied understanding that the ship shall be at port within such a time that the risk shall not be materially varied; and if there is delay beyond such time the policy does not attach. De Wolf *v.* Archangel Maritime Bank, etc., Co., L. R. 9 Q. B. 451, 2 Aspin. 273, 43 L. J. Q. B. 147, 39 L. T. Rep. N. S. 605, 22 Wkly. Rep. 801.

Premature sailing.— If a ship insured from a certain time sails before the time on a different voyage from that insured, the assured cannot recover, although she afterward gets into the course of the voyage described in the policy, and is lost after the day upon which the policy was to have attached. Way *v.* Modigliani, 2 T. R. 30, 1 Rev. Rep. 412.

77. Merrill *v.* Boyleston F. & M. Ins. Co., 3 Allen (Mass.) 247; New York Firemen Ins. Co. *v.* Lawrence, 14 Johns. (N. Y.) 46; Simon *v.* Sedgwick, [1893] 1 Q. B. 303, 7 Aspin. 245, 62 L. J. Q. B. 163, 67 L. T. Rep. N. S. 785, 4 Reports 128, 41 Wkly. Rep. 163; Hare *v.* Travis, 7 B. & C. 14, 9 D. & R. 748, 5 L. J. K. B. O. S. 348, 31 Rev. Rep. 139, 14 E. C. L. 17; Tasker *v.* Cunningham, 1 Bligh 87, 20 Rev. Rep. 33, 4 Eng. Reprint 32; Sellar *v.* McVicar, 1 B. & P. N. R. 23, 8 Rev. Rep. 744; Wooldridge *v.* Boydell, Dougl. (3d ed.) 16; Crowell *v.* Geddes, 5 Nova Scotia 184; Blackenhagen *v.* London Assur. Co., 1 Campb. 454, 10 Rev. Rep. 729.

78. Merrill *v.* Boylston F. & M. Ins. Co., 3 Allen (Mass.) 247; Wooldridge *v.* Boydell, Dougl. (3d ed.) 16; Way *v.* Modigliani, 2 T. R. 30, 1 Rev. Rep. 412; Crowell *v.* Geddes, 5 Nova Scotia 184.

79. Driscoll *v.* Bovil, 1 B. & P. 313. Where a vessel insured to A clears out for B, and after a loss the master states in his protest that the vessel was bound for B, if it be proved that she actually proceeded on her voyage to A, the insertion of B in the papers will not, when explained, make it a

are the same as the insured voyage, the policy attaches notwithstanding an intermediate voyage is contemplated.[80]

3. Effect. Where there has been any deviation or change of the risk without just cause, the underwriters become immediately absolved from further liability under the policy for losses occurring subsequent to the deviation.[81] They continue, however, liable for any loss occurring prior to the deviation.[82] The extent of the deviation is not material;[83] nor is the fact that the risk has not been increased or even that it has apparently been diminished.[84]

different voyage. Talcot *v.* Marine Ins. Co., 2 Johns. (N. Y.) 130.

80. Henshaw *v.* Marine Ins. Co., 2 Cai. (N. Y.) 274; Hare *v.* Travis, 7 B. & C. 14, 9 D. & R. 748, 5 L. J. K. B. O. S. 348, 31 Rev. Rep. 139, 14 E. C. L. 17.

81. *California.* — Schroeder *v.* Schweizer Lloyd Transport Versicherungs Gesellschaft, 60 Cal. 467, 44 Am. Rep. 61, 66 Cal. 294, 5 Pac. 478.

Louisiana.— Hermann *v.* Western M. & F. Ins. Co., 13 La. 516; Akin *v.* Mississippi M. & F. Ins. Co., 4 Mart. N. S. 661.

Maine.— Folsom *v.* Merchants' Mut. Mar. Ins. Co., 38 Me. 414.

Maryland.— Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Riggin *v.* Petapsco Ins. Co., 7 Harr. & J. 279, 16 Am. Dec. 302.

Massachusetts.— Amsinck *v.* American Ins. Co., 129 Mass. 185; Burgess *v.* Equitable Mar. Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Odiorne *v.* New England Mut. Mar. Ins. Co., 101 Mass. 551, 3 Am. Rep. 401; Seccomb *v.* Provincial Ins. Co., 10 Allen 305; Kettell *v.* Wiggin, 13 Mass. 68; Breed *v.* Eaton, 10 Mass. 21; Coffin *v.* Newburyport Mar. Ins. Co., 9 Mass. 436; Brazier *v.* Clap, 5 Mass. 1; Stetson *v.* Massachusetts Mut. F. Ins. Co., 4 Mass. 330, 3 Am. Dec. 217.

Mississippi.— Natchez Ins. Co. *v.* Stanton, 2 Sm. & M. 340, 41 Am. Dec. 592.

Missouri.— Walsh *v.* Homer, 10 Mo. 6, 45 Am. Dec. 342.

New York.— Snyder *v.* Atlantic Mut. Ins. Co., 95 N. Y. 196, 47 Am. Rep. 29; Audenreid *v.* Mercantile Mut. Ins. Co., 60 N. Y. 482, 19 Am. Rep. 204; Fernandez *v.* Great Western Ins. Co., 48 N. Y. 571, 8 Am. Rep. 571 [*reversing* 3 Rob. 457]; Stevens *v.* Commercial Mut. Ins. Co., 6 Duer 594 [*affirmed* in 26 N. Y. 397]; Foster *v.* Jackson Mar. Ins. Co., 1 Edm. Sel. Cas. 290; Vos *v.* Robinson, 9 Johns. 192.

Ohio.— Jolly *v.* Ohio Ins. Co., Wright 539; Gazzam *v.* Ohio Ins. Co., Wright 202.

Pennsylvania.— Merchants' Ins. Co. *v.* Algeo, 32 Pa. St. 330; Duerhagen *v.* U. S. Insurance Co., 2 Serg. & R. 309; Hood *v.* Nesbitt, 1 Yeates 114, 1 Am. Dec. 265; Kingston *v.* Girard, 4 Dall. 274, 1 L. ed. 831; Dallam *v.* Insurance Co., 6 Phila. 15.

South Carolina.— Himely *v.* South Carolina Ins. Co., 1 Mill 154, 12 Am. Dec. 623.

Virginia.— Alexandria Mar. Ins. Co. *v.* Stras, 1 Munf. 408.

United States.— Hearne *v.* New England Mut. Mar. Ins. Co., 20 Wall. 488, 22 L. ed. 395 [*affirming* 11 Fed. Cas. No. 6,302, 4 Cliff. 200]; Oliver *v.* Maryland Ins. Co., 7 Cranch 487, 3 L. ed. 414; Bulkley *v.* Protection Ins. Co., 4 Fed. Cas. No. 2,118, 2 Paine 82; Coles *v.* Marine Ins. Co., 6 Fed. Cas. No. 2,988, 3 Wash. 159; West *v.* Columbian Ins. Co., 29 Fed. Cas. No. 17,421, 5 Cranch C. C. 309.

England.— Mount *v.* Larkins, 8 Bing. 108, 1 L. J. C. P. 20, 1 Moore & S. 165, 21 E. C. L. 466; Davis *v.* Garrett, 6 Bing. 716, 8 L. J. C. P. O. S. 253, 4 M. & P. 540, 19 E. C. L. 321; Elliot *v.* Wilson, 4 Bro. P. C. 470, 2 Eng. Reprint 320; Redman *v.* London, 3 Camph. 503, 1 Marsh. 136, 5 Taunt. 462, 1 E. C. L. 240; Tait *v.* Levi, 14 East 481, 13 Rev. Rep. 289; Clason *v.* Simmonds, 6 T. R. 533 note, 3 Rev. Rep. 260.

Canada.— Spinney *v.* Ocean Mut. Mar. Ins. Co., 17 Can. Sup. Ct. 326; Reed *v.* Weldon, 12 N. Brunsw. 460; Fisher *v.* Western Assur. Co., 11 U. C. Q. B. 255.

See 28 Cent. Dig. tit. "Insurance," § 722.

Policy on goods.— A deviation equally avoids a policy on the cargo as on the vessel. Natchez Ins. Co. *v.* Stanton, 2 Sm. & M. (Miss.) 340, 41 Am. Dec. 592.

The owner need not be privy to the deviation to avoid the policy. Hood *v.* Nesbit, 2 Dall. (Pa.) 137, 1 L. ed. 321, 1 Am. Dec. 265; Elton *v.* Brogden, Str. 1264.

82. Henshaw *v.* Marine Ins. Co., 2 Cai. (N. Y.) 274; Green *v.* Young, 2 Salk. 444; Carter *v.* Royal Exch. Assur. Co. [*cited* in Foster *v.* Wilmer, Str. 1245].

83. Hermann *v.* Western M. & F. Ins. Co., 13 La. 516; Coffin *v.* Newburyport Mar. Ins. Co., 9 Mass. 436; Snyder *v.* Atlantic Mut. Ins. Co., 95 N. Y. 196, 47 Am. Rep. 29; Martin *v.* Delaware Ins. Co., 16 Fed. Cas. No. 9,161, 2 Wash. 254.

84. *Massachusetts.*— Amsinck *v.* American Ins. Co., 129 Mass. 185; Burgess *v.* Equitable Mar. Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Wiggin *v.* Amory, 13 Mass. 118, 124, where it was said: "It is not the increase, but the change, of the risk, that constitutes a deviation."

Mississippi.— Natchez Ins. Co. *v.* Stanton, 2 Sm. & M. 340, 41 Am. Dec. 592.

New York.— Child *v.* Sun Mut. Ins. Co., 3 Sandf. 26.

United States.— Maryland Ins. Co. *v.* LeRoy, 7 Cranch 26, 3 L. ed. 257.

England.— African Merchants Co. *v.* British, etc., Mar. Ins. Co., L. R. 8 Exch. 154, 158, 1 Aspin. 588, 42 L. J. Exch. 60, 28 L. T. Rep. N. S. 233, 21 Wkly. Rep. 484 (where it was said by Blackburn, J.: "The underwriter insures a particular risk, and the assured has no right to change it. Whether he increases

4. Intent to Deviate. It is only an actual deviation which terminates the insurance. The mere intention to deviate will not have that effect, but the policy will in such case continue to be a subsisting contract until the dividing point is reached and the vessel leaves the usual course of the insured voyage.[85]

5. Particular Acts Constituting a Deviation. Whether there is a deviation depends upon the nature of the voyage and the usages of trade.[86] It includes a simple departure from the prescribed or usual route,[87] calling at ports in their

or diminishes it is immaterial; if he varies it the underwriter is discharged. . . . But where there is a real change of risk by the employment or detention of the ship for some purpose wholly foreign, the underwriter has a right to say, 'I never undertook this risk. *Non haec in fœdera veni*'"); Mount *v.* Larkins, 8 Bing. 108, 1 L. J. C. P. 20, 1 Moore & S. 165, 21 E. C. L. 466; Hartley *v.* Buggin, 3 Dougl. 39, 26 E. C. L. 37.

Canada.— Spinney *v.* Ocean Mut. Mar. Ins. Co., 17 Can. Sup. Ct. 326 [*affirming* 21 Nova Scotia 244]; Reed *v.* Philps, 13 N. Brunsw. 171; Reed *v.* Weldon, 12 N. Brunsw. 460.

85. *Connecticut.*— Thompson *v.* Alsop, 1 Root 64.

Massachusetts.— Hobart *v.* Norton, 8 Pick. 159; Wiggin *v.* Amory, 13 Mass. 118; Coffin *v.* Newburyport Mar. Ins. Co., 9 Mass. 436; Lee *v.* Gray, 7 Mass. 349.

New York.— Arnold *v.* Pacific Mut. Ins. Co., 78 N. Y. 7; Snow *v.* Columbian Ins. Co., 48 N. Y. 624, 8 Am. Rep. 578 [*reversing* 48 Barb. 469]; Bearns *v.* Columbian Ins. Co., 48 Barb. 445; Wheeler *v.* New York Mut. Ins. Co., 35 N. Y. Super. Ct. 247; New York Firemen Ins. Co. *v.* Lawrence, 14 Johns. 46; Lawrence *v.* Ocean Ins. Co., 11 Johns. 241 [*affirmed* in 14 Johns. 46]; Henshaw *v.* Marine Ins. Co., 2 Cai. 274.

Pennsylvania.— Winter *v.* Delaware Mut. Safety Ins. Co., 30 Pa. St. 334; Snowden *v.* Phœnix Ins. Co., 3 Binn. 457.

United States.— Maryland Ins. Co. *v.* Woods, 6 Cranch 29, 3 L. ed. 143; Alexandria Mar. Ins. Co. *v.* Tucker, 3 Cranch 357, 2 L. ed. 466.

England.— Hare *v.* Travis, 7 B. & C. 14, 9 D. & R. 748, 5 L. J. K. B. O. S. 348, 31 Rev. Rep. 139, 14 E. C. L. 17; Thelluson *v.* Fergusson, Dougl. (3d ed.) 361; Wooldridge *v.* Boydell, Dougl. (3d ed.) 16; Marsden *v.* Reid, 3 East 572, 7 Rev. Rep. 516; Kewley *v.* Ryan, 2 H. Bl. 343, 3 Rev. Rep. 408; Heselton *v.* Allnutt, 1 M. & S. 46; Foster *v.* Wilmer, Str. 1249; Carter *v.* Royal Exch. Assur. Co. [*cited* in Foster *v.* Wilmer, *supra*]; Kingston *v.* Phelps [*cited* in Middlewood *v.* Blakes, 7 T. R. 162, 165].

Canada.— Reed *v.* Weldon, 12 N. Brunsw. 460.

See 28 Cent. Dig. tit. "Insurance," § 723.

Several courses.— A ship insured from A to B sailed with intent to touch at C, an intermediate point. To a certain point the voyage was the same, from that point there were three tracks to B, one by the way of C, the two others by different courses. There were advantages and disadvantages attending each, and the captain must elect according to circumstances. The ship took the track by C, with intent to put in there, but was taken before she actually came to the point where she must have turned out of the track to B, by the way of C, for the purpose of putting into the harbor of C. The underwriter was discharged, because he was entitled to the advantages of the captain's judgment in electing which of the three tracks it was best to pursue when he came to the first dividing point. Middlewood *v.* Blakes, 7 T. R. 162, 4 Rev. Rep. 405.

86. Lockett *v.* Merchants' Ins. Co., 10 Rob. (La.) 339; Parsons *v.* Manufacturers' Ins. Co., 16 Gray (Mass.) 463; Walsh *v.* Homer, 10 Mo. 6, 45 Am. Dec. 342; Bentaloe *v.* Pratt, 3 Fed. Cas. No. 1,330, Wall. Sr. 58.

The motives, end, and consequences of the act enter into the true criterion of judgment as to what constitutes a deviation. Foster *v.* Jackson Mar. Ins. Co., 1 Edm. Sel. Cas. (N. Y.) 290.

Placing tackle and furnishings on a sand bank according to custom, where this was necessary for the purpose of cleaning the vessel, was held not to avoid a policy of insurance upon such articles. Pelly *v.* Royal Exch. Assur. Co., 1 Burr. 341.

87. *Maryland.*— Riggin *v.* Patapsco Ins. Co., 7 Harr. & J. 279, 16 Am. Dec. 302.

Massachusetts.— Amsinck *v.* American Ins. Co., 129 Mass. 185; Burgess *v.* Equitable Mar. Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Nicholson *v.* Mercantile Mar. Ins. Co., 106 Mass. 399; Stocker *v.* Harris, 3 Mass. 409.

New York.— Day *v.* Orient Ins. Co., 1 Daly 13; Reade *v.* Commercial Ins. Co., 3 Johns. 352, 3 Am. Dec. 495.

Ohio.— Jolly *v.* Ohio Ins. Co., Wright 539; Gazzan *v.* Ohio Ins. Co., Wright 202.

Pennsylvania.— Duerhagen *v.* U. S. Insurance Co., 2 Serg. & R. 309.

South Carolina.— Himely *v.* South Carolina Ins. Co., 1 Mill 154, 12 Am. Dec. 623.

Virginia.— Alexandria Mar. Ins. Co. *v.* Stras, 1 Munf. 408.

United States.— Coles *v.* Marine Ins. Co., 6 Fed. Cas. No. 2,998, 3 Wash. 159.

England.— Middlewood *v.* Blakes, 7 T. R. 162, 4 Rev. Rep. 405.

See 28 Cent. Dig. tit. "Insurance," § 722.

To shorten course.— A master may not exercise his judgment and deviate, although to shorten the voyage insured. Kettell *v.* Wiggin, 13 Mass. 68.

River navigation.— It is not a deviation for a vessel engaged in river navigation to depart from the most frequented channel. Fireman's Ins. Co. *v.* Powell, 13 B. Mon.

improper order,[88] touching at unauthorized ports,[89] making collateral or intermediate voyages,[90] unnecessary delay in prosecuting the voyage,[91] towing vessels,[92] performing salvage services,[93] cruising,[94] transhipping cargo,[95] altering the character of the vessel[96] or doing anything else whereby the risk is substantially altered or varied.[97] Carrying a letter of marque without using or intending to use it is not a deviation.[98]

(Ky.) 311; Keeler *v.* Fireman's Ins. Co., 3 Hill (N. Y.) 250.

88. Akin *v.* Mississippi M. & F. Ins. Co., 4 Mart. N. S. (La.) 661; Deblois *v.* Ocean Ins. Co., 16 Pick. (Mass.) 303, 28 Am. Dec. 245; Kane *v.* Columbian Ins. Co., 2 Johns. (N. Y.) 264; Andrews *v.* Mellish, 16 East 312, 2 M. & S. 27, 5 Taunt. 496, 1 E. C. L. 256; Gairdner *v.* Senhouse, 3 Taunt. 16, 12 Rev. Rep. 573; Beatson *v.* Haworth, 6 T. R. 531, 3 Rev. Rep. 258.

89. Henshaw *v.* Marine Ins. Co., 2 Cai. (N. Y.) 274; Fox *v.* Black, 2 Park Ins. 620; Townson *v.* Guyon, 2 Park Ins. 620; Rodgers *v.* Jones, 16 Nova Scotia 96.

90. Seccomb *v.* Provincial Ins. Co., 10 Allen (Mass.) 305; Stocker *v.* Harris, 3 Mass. 409; Fernandez *v.* Great Western Ins. Co., 48 N. Y. 571, 8 Am. Rep. 571; Wingate *v.* Foster, 3 Q. B. D. 582, 3 Aspin. 598, 47 L. J. Q. B. 525, 38 L. T. Rep. N. S. 737, 26 Wkly. Rep. 650; Hamilton *v.* Sheddon, 7 L. J. Exch. 1, M. & H. 334, 3 M. & W. 49.

91. See *infra*, VII, D, 6.

92. Hermann *v.* Western M. & F. Ins. Co., 13 La. 516; Natchez Ins. Co. *v.* Stanton, 2 Sm. & M. (Miss.) 340, 41 Am. Dec. 592.

93. See *infra*, VII, D, 9, a, (VII).

94. See *infra*, VII, D, 7.

95. *California.* — Schroeder *v.* Schweizer Lloyd Transport Versicherungs Gesellschaft, 60 Cal. 467, 44 Am. Rep. 61, 66 Cal. 294, 5 Pac. 478.

Massachusetts.— Paddock *v.* Commercial Ins. Co., 2 Allen 93.

Missouri.— Salisbury *v.* Marine Ins. Co., 23 Mo. 553, 66 Am. Dec. 687; Malinckrodt *v.* Jefferson Mut. F. Ins. Co., 1 Mo. App. 205.

England.— Oliverson *v.* Brightman, 8 Q. B. 781, 55 E. C. L. 781, 1 C. & K. 360, 47 E. C. L. 360, 10 Jur. 875, 15 L. J. Q. B. 274.

Canada.— Fisher *v.* Western Assur. Co., 11 U. C. Q. B. 255.

Under liberty to "reship."—Under a policy of insurance which grants the privilege "to reship at all times and places," if the goods which were put on board one steamboat to be carried to a certain place were reshipped on the way, although unnecessarily, upon another boat bound to that place, in an action on the policy, such reshipment cannot be claimed as a deviation and avoidance of the policy, whatever might have been the result had defendants relied upon the delay or abandonment of the voyage. Fletcher *v.* St. Louis Mar. Ins. Co., 18 Mo. 193. See also Oliverson *v.* Brightman, 8 Q. B. 781, 55 E. C. L. 781, 1 C. & K. 360, 47 E. C. L. 360, 10 Jur. 875, 15 L. J. Q. B. 274. As to policies granting liberty see *infra*, VII, D, 10.

Open policy.— Where an insurance was made on shipments of gold to defendant by steamers generally, it was held that the insurance could not be limited to a line of steamers in which defendant was interested, although only such were contemplated by him in effecting the policy, and therefore the sale of his interests in such line did not terminate the contract. New York F. Mar. Ins. Co. *v.* Roberts, 4 Duer (N. Y.) 141.

96. Changing national character.— If a vessel be described in the policy to be a prize vessel, and afterward her national character is changed, so as to increase the risk, this discharges the underwriters. Seamans *v.* Loring, 21 Fed. Cas. No. 12,583, 1 Mason 127. The act of an American consul, in whose hands the vessel was placed by the crew after the death of all the officers at sea, in appointing a British master, which increases the risk, making the vessel a good prize if captured by a French cruiser, is not chargeable to the insured, and is no defense to the policy. Winthrop *v.* Union Ins. Co., 30 Fed. Cas. No. 17,901, 2 Wash. 7.

Taking alien enemies on board.— The taking of Spaniards on board a British vessel at a time when England and Spain were at war was held not to be a deviation. Toulmin *v.* Inglis, 1 Campb. 421, 10 Rev. Rep. 715.

Removing copper sheathing.— Where the copper is taken off an insured vessel, the alteration being rendered necessary by sea damage, there is no deviation. Waller *v.* Louisiana Ins. Co., 9 Mart. (La.) 276.

97. Employing the vessel as a receiving ship for slaves is a deviation. Hartley *v.* Buggin, 3 Dougl. 39, 26 E. C. L. 37.

Increasing risk of capture.— If the insured do any act which increases the risk of capture and detention according to the common practice of the belligerent, it may avoid the policy. Livingston *v.* Maryland Ins. Co., 7 Cranch (U. S.) 506, 3 L. ed. 421. See also *supra*, note 96.

Acts to avoid confiscation.— No acts done by the insured to avoid confiscation under the laws of a foreign power, if justified by the usage of trade, can avoid the policy. Livingston *v.* Maryland Ins. Co., 7 Cranch (U. S.) 506, 3 L. ed. 421.

A trial trip, after making repairs, to a port sixteen miles distant is a deviation from a policy "at and from" N to H. Fernandez *v.* Great Western Ins. Co., 48 N. Y. 571, 8 Am. Rep. 571. But a trial trip taken by a new vessel before beginning the voyage insured against is not a deviation. Thebaud *v.* Great Western Ins. Co., 84 Hun (N. Y.) 1, 31 N. Y. Suppl. 1084.

"Mating of vessels" not a deviation as a matter of law. Child *v.* Sun Mut. Ins. Co., 3 Sandf. (N. Y.) 26.

98. Wiggin *v.* Amory, 13 Mass. 118; Jarratt *v.* Ward, 1 Campb. 263, 10 Rev. Rep. 677; Raine *v.* Bell, 9 East 195, 9 Rev. Rep.

6. Delay. Unnecessary and unreasonable delay either in commencing or in prosecuting the voyage will constitute a deviation avoiding the policy.[99] The delay necessary to constitute a deviation must be an unreasonable delay,[1] or for a purpose not connected with the prosecution of the voyage.[2] Delays for the purposes of the voyage[3] and not for an unreasonable length of time are not deviations. What is to be deemed reasonable depends on the nature of the voyage and the custom of trade.[4]

533; Moss *v.* Byrom, 6 T. R. 379, 3 Rev. Rep. 208. But see Denison *v.* Modigliani, 5 T. R. 580.

99. *Maine.*— Folsom *v.* Merchants' Mut. Mar. Ins. Co., 38 Me. 414.

Maryland.— Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348.

Massachusetts.— Amsinck *v.* American Ins. Co., 129 Mass. 185; Burgess *v.* Equitable Mar. Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Coffin *v.* Newburyport Mar. Ins. Co., 9 Mass. 436.

New York.— Arnold *v.* Pacific Mut. Ins. Co., 78 N. Y. 7; Audenreid *v.* Mercantile Mut. Ins. Co., 60 N. Y. 482, 19 Am. Rep. 204; Thebaud *v.* Great Western Ins. Co., 84 Hun 1, 31 N. Y. Suppl. 1084; Foster *v.* Jackson Mar. Ins. Co., 1 Edm. Sel. Cas. 290; Gilfert *v.* Hallet, 2 Johns. Cas. 296.

Pennsylvania.— Kingston *v.* Girard, 4 Dall. 274, 1 L. ed. 831.

South Carolina.— Himely *v.* South Carolina Ins. Co., 1 Mill 154, 12 Am. Dec. 623.

United States.— Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383, 6 L. ed. 664; Oliver *v.* Maryland Ins. Co., 7 Cranch 487, 3 L. ed. 414.

England.— Maritime Ins. Co. *v.* Stearns, [1901] 2 K. B. 912, 6 Com. Cas. 182, 71 L. J. K. B. 86, 50 Wkly. Rep. 238; Hyderabad Co. *v.* Willoughby, [1899] 2 Q. B. 530, 68 L. J. Q. B. 862; African Merchants Co. *v.* British, etc., Mar. Ins. Co., L. R. 8 Exch. 154, 1 Aspin. 588, 42 L. J. Exch. 60, 28 L. T. Rep. N. S. 233, 21 Wkly. Rep. 484; Palmer *v.* Fenning, 9 Bing. 460, 2 Moore & S. 624, 23 E. C. L. 660; Mount *v.* Larkins, 8 Bing. 108, 1 L. J. C. P. 20, 1 Moore & S. 165, 21 E. C. L. 466; Palmer *v.* Marshall, 8 Bing. 79, 317, 1 L. J. C. P. 19, 1 Moore & S. 161, 454, 21 E. C. L. 453, 559; Williams *v.* Shee, 3 Campb. 469, 14 Rev. Rep. 811; Inglis *v.* Vaux, 3 Campb. 437; Hartley *v.* Buggin, 3 Dougl. 39, 26 E. C. L. 37; Phillips *v.* Irving, 13 L. J. C. P. 145, 7 M. & G. 325, 8 Scott N. R. 3, 49 E. C. L. 325.

Canada.— Spinney *v.* Ocean Mut. Mar. Ins. Co., 17 Can. Sup. Ct. 326 [*affirming* 21 Nova Scotia 244]; Reed *v.* Philps, 13 N. Brunsw. 171; Reed *v.* Weldon, 12 N. Brunsw. 460.

1. Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Thebaud *v.* Great Western Ins. Co., 84 Hun (N. Y.) 1, 31 N. Y. Suppl. 1084; Gilfert *v.* Hallet, 2 Johns. Cas. (N. Y.) 296; Earl *v.* Shaw, 1 Johns. Cas. (N. Y.) 313, 1 Am. Dec. 117; Palmer *v.* Fenning, 9 Bing. 460, 2 Moore & S. 624, 23 E. C. L. 660; Mount *v.* Larkins, 8 Bing. 108, 1 L. J. C. P. 20, 1 Moore & S. 165, 21 E. C. L. 466; Parkinson *v.* Collier, 1 Park Ins. 653; Spinney *v.* Ocean Mut. Mar. Ins. Co., 17 Can. Sup. Ct. 326 [*affirming* 21 Nova Scotia 244]; Reed *v.* Philps, 13 N. Brunsw. 171; Reed *v.* Weldon, 12 N. Brunsw. 460.

2. Arnold *v.* Pacific Mut. Ins. Co., 78 N. Y. 7; Bentaloe *v.* Pratt, 3 Fed. Cas. No. 1,330, Wall. Sr. 58; Solly *v.* Whitmore, 5 B. & Ald. 45, 24 Rev. Rep. 274, 7 E. C. L. 36.

3. Lockett *v.* Merchants' Ins. Co., 10 Rob. (La.) 339; Arnold *v.* Pacific Mut. Ins. Co., 78 N. Y. 7; Columbian Ins. Co. *v.* Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 664; Hyderabad Co. *v.* Willoughby, [1899] 2 Q. B. 530, 68 L. J. Q. B. 862; Lawrence *v.* Ocean Ins. Co., 11 Johns. 241; Phillips *v.* Irving, 13 L. J. C. P. 145, 7 M. & G. 325, 8 Scott N. R. 3, 49 E. C. L. 325.

4. Columbian Ins. Co. *v.* Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 664; Phillips *v.* Irving, 13 L. J. C. P. 145, 7 M. & G. 325, 8 Scott N. R. 3, 49 E. C. L. 325.

Waiting for permission to enter the port of destination, under a reasonable expectation of finally obtaining it, is not a deviation. Suydam *v.* Marine Ins. Co., 2 Johns. (N. Y.) 138. See also Schroder *v.* Thompson, 1 Moore C. P. 163, 7 Taunt. 462, 18 Rev. Rep. 540, 2 E. C. L. 448.

Coming to anchor off the port of destination where the vessel might have come directly in is a deviation. West *v.* Columbian Ins. Co., 29 Fed. Cas. No. 17,421, 5 Cranch C. C. 309.

Illustrations of unreasonable delays.— One hundred and thirteen days' delay in commencing the voyage of a pleasure yacht insured "at and from" a port is a deviation. Palmer *v.* Fenning, 9 Bing. 460, 2 Moore & S. 624, 23 E. C. L. 660. Delay of four months at a Cuban port on a trading voyage was not a deviation. Gilfert *v.* Hallet, 2 Johns. Cas. (N. Y.) 296. On a voyage from Dundee to St. John and thence to England, a detention of seventeen days at St. John was held a deviation. Reed *v.* Philps, 13 N. Brunsw. 171; Reed *v.* Weldon, 12 N. Brunsw. 460. Delay in sailing for thirty-three days was held a deviation. Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348. And fifteen months' delay was held unreasonable. Mount *v.* Larkins, 8 Bing. 108, 1 L. J. C. P. 20, 1 Moore & S. 165, 21 E. C. L. 466. Six months' delay, on the other hand, was held not necessarily unreasonable. Earl *v.* Shaw, 1 Johns. Cas. (N. Y.) 313, 1 Am. Dec. 117.

Visiting several ports when time allowed therefor is exhausted at first port.— Where a vessel is permitted, by usage of trade, to go from one port to another to collect her cargo, and she unnecessarily exhausts at one port

7. Cruising, Etc. Cruising, pursuing a vessel, or merely stopping to take possession of a prize, constitutes a deviation, unless authorized by the policy,[5] even though the insured vessel is, to the knowledge of the underwriter, armed and equipped and authorized to carry a letter of marque;[6] but the pursuit or capture of a hostile vessel in necessary self-defense is not a deviation.[7]

8. In Time Policy. Under a time policy the vessel may pursue any track within the limits of the policy, and it has not the effect of a deviation for the vessel to depart from those limits,[8] or to delay in the prosecution of a voyage.[9]

9. When Excusable or Justifiable — a. Force and Necessity — (i) *In General.* A deviation is said to be justifiable or excusable where it becomes necessary as the result of physical or moral force,[10] and whatever is necessary for the safety of the ship, provided it is not excluded by the terms of the policy, may be done by the master.[11] However, the delay or departure must be strictly commensurate with the necessity which justifies or excuses it,[12] and the necessity sufficient to justify or excuse the deviation must be real and imperious,[13] imminent and obvious.[14] What is such must be determined by the circumstances of each case.[15] A mere convenience is never sufficient to justify or excuse a deviation;[16] nor is

the whole time allowed by such usage, she cannot go to the other port without being guilty of such a deviation as will avoid the policy. Oliver *v.* Maryland Ins. Co., 7 Cranch (U. S.) 487, 3 L. ed. 414.

5. Wiggin *v.* Boardman, 14 Mass. 12; Wiggin *v.* Amory, 13 Mass. 118; Hood *v.* Nesbitt, 1 Yeates (Pa.) 114, 1 Am. Dec. 265; Haven *v.* Holland, 11 Fed. Cas. No. 6,229, 2 Mason 230; Jolly *v.* Walker, 2 Park Ins. 630.

Policy granting liberty to carry letters of marque see *infra*, VII, D, 10, c.

Merely taking a letter of marque is not a deviation see *supra*, VII, D, 5, text and note 98.

6. Wiggin *v.* Boardman, 14 Mass. 12.

7. See *infra*, VII, D, 9, a, (IV).

8. *Massachusetts.*— Ellery *v.* New England Ins. Co., 8 Pick. 14.

Missouri.— Greenleaf *v.* St. Louis Ins. Co., 37 Mo. 25.

New York.— Hennessey *v.* Manhattan F. Ins. Co., 28 Hun 98; Bearns *v.* Columbian Ins. Co., 48 Barb. 445; Keeler *v.* Fireman's Ins. Co., 3 Hill 250.

Ohio.— Wilkins *v.* Tobacco Ins. Co., 30 Ohio St. 317, 27 Am. Rep. 455.

South Carolina.— Hume *v.* Providence Washington Ins. Co., 23 S. C. 190.

United States.— Stuart *v.* Columbian Ins. Co., 23 Fed. Cas. No. 13,554, 2 Cranch C. C. 442.

See 28 Cent. Dig. tit. "Insurance." § 724.

Ports designated.— A policy on a vessel at and from A, B, and C, for the period of six calendar months from a certain day, is a policy on time and does not limit the vessel to voyages between these places. Grousset *v.* Sea Ins. Co., 24 Wend. (N. Y.) 209.

9. Cleveland *v.* Union Ins. Co., 8 Mass. 308; Hume *v.* Providence Washington Ins. Co., 23 S. C. 190.

10. Thompson *v.* Alsop, 1 Root (Conn.) 64; Scott *v.* Thompson, 1 B. & P. N. R. 181.

Master compelled to deviate.— If the master is forced by the crew to go out of his course, that is not deviation so as to avoid the policy. Elton *v.* Brogden, Str. 1264.

A previous intention to deviate followed by a compelling force making a deviation will not avoid the policy. Snowden *v.* Phœnix Ins. Co., 3 Binn. (Pa.) 457. See *supra*, VII, D, 4.

11. Turner *v.* Protection Ins. Co., 25 Me. 515, 43 Am. Dec. 294; Stocker *v.* Harris, 3 Mass. 409; Post *v.* Phœnix Ins. Co., 10 Johns. (N. Y.) 79; Scott *v.* Thompson, 1 B. & P. N. R. 181; D'Aguilar *v.* Tobin, Holt N. P. 185, 3 E. C. L. 80, 2 Marsh. 265, 4 E. C. L. 486.

A voyage superadded by necessity is subject to the same qualifications as the original voyage, and the new voyage must be pursued in the direct course and in the shortest time. Lavabre *v.* Wilson, Dougl. (3d ed.) 284.

12. King *v.* Delaware Ins. Co., 14 Fed. Cas. No. 7,788, 2 Wash. 300. See also Tenet *v.* Phœnix Ins. Co., 7 Johns. (N. Y.) 363.

13. Byrne *v.* Louisiana State Ins. Co., 7 Mart. N. S. (La.) 126; Burgess *v.* Equitable Mar. Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Kettell *v.* Wiggin, 13 Mass. 68; Brazier *v.* Clap, 5 Mass. 1; Stocker *v.* Harris, 3 Mass. 409; Robertson *v.* Columbian Ins. Co., 8 Johns. (N. Y.) 491; Oliver *v.* Maryland Ins. Co., 7 Cranch (U. S.) 487, 3 L. ed. 414; Phelps *v.* Auldjo, 2 Campb. 350, 11 Rev. Rep. 725.

Death of officers.— A deviation under the direction of the master and last remaining officer when dying, in order to place the vessel in charge of the American consul, is excusable, and the insurers are liable. Winthrop *v.* Union Ins. Co., 30 Fed. Cas. No. 17,991, 2 Wash. 7.

14. Riggin *v.* Patapsco Ins. Co., 7 Harr. & J. (Md.) 279, 16 Am. Dec. 302; Oliver *v.* Maryland Ins. Co., 7 Cranch (U. S.) 487, 3 L. ed. 414.

15. Reade *v.* Commercial Ins. Co., 3 Johns. (N. Y.) 252, 3 Am. Dec. 495.

16. Kettell *v.* Wiggin, 13 Mass. 68; Oliver *v.* Maryland Ins. Co., 7 Cranch (U. S.) 487, 3 L. ed. 414.

To expedite voyage.— A vessel being refused permission to enter or land any part of

a deviation excused by a mere apprehension of danger not founded upon reasonable evidence.[17]

(II) *Stress of Weather.* Where from stress of weather a vessel is compelled to alter her course, put into port, or otherwise delay her voyage, the deviation is excused.[18]

(III) *To Repair, Provision, and Outfit Vessel.* Where a vessel at the time of sailing is in all respects seaworthy, properly manned, equipped, and supplied, and a deficiency in any of these respects arises during the course of the voyage from an unforeseen cause, it is justifiable for the vessel to deviate to supply or correct the insufficiency of the vessel.[19] Thus the vessel may deviate to make repairs which have become necessary during the voyage,[20] or to supply or augment the crew where a part of the original crew have been lost or become incapacitated after sailing,[21] and where supplies have become exhausted or lost a deviation to replenish them is justifiable.[22] But if the necessity of such deviation results from any insufficiency in the ship, its equipment, men, or provisions, it is not excused.[23]

her cargo at the port of destination without performing a quarantine of forty days is not justified in proceeding to another port to enter and land its cargo. Robertson *v.* Columbian Ins. Co., 8 Johns. (N. Y.) 491.

17. Riggin *v.* Patapsco Ins. Co., 7 Harr. & J. (Md.) 279, 16 Am. Dec. 302; Neilson *v.* Columbian Ins. Co., 1 Johns. (N. Y.) 301.

18. Graham *v.* Commercial Ins. Co., 11 Johns. (N. Y.) 352; Kane *v.* Columbian Ins. Co., 2 Johns. (N. Y.) 264; American Ins. Co. *v.* Francia, 9 Pa. St. 390; Snowden *v.* Phœnix Ins. Co., 3 Binn. (Pa.) 457; Campbell *v.* Williamson, 2 Bay (S. C.) 237; Miller *v.* Russell, 1 Bay (S. C.) 309; Thomas *v.* Royal Exch. Assur. Co., 1 Price 195; Delany *v.* Stoddart, 1 T. R. 22, 1 Rev. Rep. 139. And see Leigh *v.* Mather, 1 Esp. 412, 5 Rev. Rep. 740.

Not bound to first jettison cargo.— The master is not bound to sacrifice his deck load before deviating, from stress of weather, to seek a port of refuge, unless the vessel was suffering from overlading. American Ins. Co. *v.* Francia, 9 Pa. St. 390.

Need not necessarily return to port from which driven.— If a ship is driven out of her loading port into another, and being there she does the best she can to get to her port of destination, she is not obliged to return to the port whence she was driven. Neither is it a deviation if she completes her lading at the port into which she was driven. Delany *v.* Stoddart, 1 T. R. 22, 1 Rev. Rep. 139.

Trying to dock.— A lighter insured for a voyage from Norwalk, Conn., to Jersey City is not guilty of a deviation because she makes fast to a Brooklyn dock, as a proper precaution to overcome the force of the wind and tide. New Jersey Lighterage Co. *v.* New York Mut. Ins. Co., 49 N. Y. Super. Ct. 165.

19. Akin *v.* Mississippi M. & F. Ins. Co., 4 Mart. N. S. (La.) 661; Turner *v.* Protection Ins. Co., 25 Me. 515, 43 Am. Dec. 294; Wiggin *v.* Amory, 13 Mass. 118; Motteux *r.* London Assur. Co., 1 Atk. 545, 26 Eng. Reprint 343; and other cases cited in the notes following.

20. *Louisiana.*— Akin *v.* Mississippi M. & F. Ins. Co., 4 Mart. N. S. 661.

Maine.— Turner *v.* Protection Ins. Co., 25 Me. 515, 43 Am. Dec. 294.

Massachusetts.— Silloway *v.* Neptune Ins. Co., 12 Gray 73; Hall *v.* Franklin Ins. Co., 9 Pick. 466; Wiggin *v.* Amory, 13 Mass. 118. See also Ellery *v.* New England Ins. Co., 8 Pick. 14.

New York.— Kane *v.* Columbian Ins. Co., 2 Johns. 264.

United States.— Coles *v.* Marine Ins. Co., 6 Fed. Cas. No. 2,988, 3 Wash. 159; Cruder *v.* Philadelphia Ins. Co., 6 Fed. Cas. No. 3,453, 2 Wash. 262.

England.— Motteux *r.* London Assur. Co., 1 Atk. 545, 26 Eng. Reprint 343; Smith *v.* Surridge, 4 Esp. 25, 6 Rev. Rep. 837.

A policy "at and from" a port will permit the vessel to go to the nearest port for repairs necessary to make her seaworthy for the voyage. Motteux *r.* London Assur. Co., 1 Atk. 545, 26 Eng. Reprint 343. Nor under such a policy will a delay during the time requisite for making necessary repairs be considered a deviation. Smith *v.* Surridge, 4 Esp. 25, 6 Rev. Rep. 837.

Nearest port.— The master is not bound to proceed to the nearest port geographically to make the repairs, but the matter rests in his discretion. Turner *v.* Protection Ins. Co., 25 Me. 515, 43 Am. Dec. 294. See also Silloway *v.* Neptune Ins. Co., 12 Gray (Mass.) 73.

If repairs can be more cheaply made at a port other than the one the vessel is at it is justifiable for the vessel to proceed to such other port. Hall *v.* Franklin Ins. Co., 9 Pick. (Mass.) 466.

21. Cruder *v.* Philadelphia Ins. Co., 6 Fed. Cas. No. 3,453, 2 Wash. 262.

Departure from course to take on a pilot, being necessary to the safety of the adventure, is justifiable. Pouverin *v.* Louisiana State M. & F. Ins. Co., 4 Rob. (La.) 234; Watson *v.* Marine Ins. Co., 7 Johns. (N. Y.) 57.

22. Lapene *r.* Sun Mut. Ins. Co., 8 La. Ann. 1, 58 Am. Dec. 668; Coles *v.* Marine Ins. Co., 6 Fed. Cas. No. 2,988, 3 Wash. 159; Wood *v.* Pleasants, 30 Fed. Cas. No. 17,961, 3 Wash. 201; Thomas *r.* Royal Exch. Assur. Co., 1 Price 195.

23. Folsom *v.* Mercantile Mut. Mar. Ins.

(IV) *To Avoid Capture, Etc.* When there is imminent danger of capture or seizure a vessel is justified in so altering her course as to avoid the same;[24] and pursuit or capture of a hostile vessel in necessary self-defense is not a deviation.[25]

(V) *To Join Convoy.* It is not a deviation for a ship to leave the regular track for the purpose of seeking convoy, when *bona fide* for the benefit of all concerned, unless expressly prohibited by the terms of the policy.[26]

(VI) *To Obtain Medical Assistance.* On humanitarian grounds a deviation to obtain necessary medical or surgical assistance for those lawfully on board the vessel is justifiable;[27] but not where the necessity arises from default on the part of the master or owner in failing to have such medicines and attendants as the nature of the voyage requires.[28]

(VII) *To Save Property or Human Life.* Stoppage on the high seas or a departure from the regular course for the purpose of saving property is a deviation;[29] but a stoppage or departure for the purpose of saving human lives is not a deviation.[30]

Co., 38 Me. 414; Burgess *v.* Equitable Mar. Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Audenreid *v.* Mercantile Mut. Ins. Co., 60 N. Y. 482, 19 Am. Rep. 204; Cruder *v.* Pennsylvania Ins. Co., 6 Fed. Cas. No. 3,453, 2 Wash. 262; Forshaw *v.* Chabert, 3 B. & B. 158, 6 Moore C. P. 369, 23 Rev. Rep. 596, 7 E. C. L. 659; Reed *v.* Philps, 13 N. Brunsw. 171.

As to what constitutes unseaworthiness see *infra*, VII, E, 6, a, (IV).

24. *Massachusetts.*— Whitney *v.* Haven, 13 Mass. 172.

New York.— Post *v.* Phœnix Ins. Co., 10 Johns. 79; Reade *v.* Commercial Ins. Co., 3 Johns. 352, 3 Am. Dec. 495; Suydam *v.* Marine Ins. Co., 2 Johns. 138.

Pennsylvania.— Savage *v.* Pleasants, 5 Binn. 403, 6 Am. Dec. 424.

South Carolina.— Miller *v.* Russell, 1 Bay 309.

United States.—Goyon *v.* Pleasants, 10 Fed. Cas. No. 5,647, 3 Wash. 241.

England.— Driscoll *v.* Bovil, 1 B. & P. 313.

Refusal of the crew to proceed for fear of capture justifies a deviation. Driscoll *v.* Bovil, 1 B. & P. 313.

Placing gold in a bank for a time while on its way from the mines to its ultimate destination, in order to avoid seizure, is not a deviation. Driefontein Consol. Gold Mines *v.* Janson, [1900] 2 Q. B. 339, 5 Com. Cas. 296, 69 L. J. Q. B. 771, 83 L. T. Rep. N. S. 79, 48 Wkly. Rep. 619 [*affirmed* in [1901] 2 Q. B. 419, 6 Com. Cas. 198, 70 L. J. K. B. 881, 85 L. T. Rep. N. S. 104, 49 Wkly. Rep. 660].

25. Haven *v.* Holland, 11 Fed. Cas. No. 6,229, 2 Mason 230. Every vessel, whether armed or not, has a right of self-defense against hostile attacks, and the master has a large discretion on this subject. He is not bound to attempt an escape in the first instance, and only to repel an attack when made. He is, on the other hand, at liberty to lie to or attack the enemy ship, or chase her, if he deems that the best means of self-defense, and not wait till a direct attack is made on his own vessel; for self-defense may be then fruitless by his being crippled. Haven *v.* Holland, *supra*.

Must be necessary or apparently so.— Wiggin *v.* Amory, 13 Mass. 118.

Cruising and pursuit or capture not in necessary self-defense as a deviation see *supra*, III, D, 7.

26. Patrick *v.* Ludlow, 3 Johns. Cas. (N. Y.) 10, 2 Am. Dec. 130; Bond *v.* Nutt, Cowp. 601, Dougl. (3d ed.) 367 note; Bond *v.* Gonsales, Holt K. B. 469, 2 Salk. 445; D'Aguilar *v.* Tobin, Holt N. P. 185, 3 E. C. L. 80, 2 Marsh. 265, 6 E. C. L. 486; Gordon *v.* Morley, Str. 1265.

27. Burgess *v.* Equitable Mar. Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Perkins *v.* Augusta Ins., etc., Co., 10 Gray (Mass.) 312, 71 Am. Dec. 654; The Iroquois, 118 Fed. 1003, 55 C. C. A. 497 [*affirmed* in 194 U. S. 240, 24 S. Ct. 640, 48 L. ed. 955]; Bond *v.* The Cora, 3 Fed. Cas. No. 1,621, 2 Pet. Adm. 373, 2 Wash. 80.

Captain's wife.— A vessel is justified in going out of her course to obtain necessary medical attendance for the captain's wife. Perkins *v.* Augusta Ins., etc., Co., 10 Gray (Mass.) 312, 71 Am. Dec. 654.

28. Woolf *v.* Claggett, 3 Esp. 257, 6 Rev. Rep. 830.

Absence of proper medical supplies as constituting unseaworthiness see *infra*, VII, E, 6, a, (IV), (D).

29. Burgess *v.* Equitable Mar. Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Settle *v.* St. Louis Perpetual Mar., etc., Ins. Co., 7 Mo. 379; Bond *v.* The Cora, 3 Fed. Cas. No. 1,621, 2 Pet. Adm. 373, 2 Wash. 80 [*affirming* 3 Fed. Cas. No. 1,620, 2 Pet. Adm. 361]; The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328; Crocker *v.* Jackson, 6 Fed. Cas. No. 3,398, 1 Sprague 141; The Henry Ewbank, 11 Fed. Cas. No. 6,376, 1 Sumn. 400.

30. Turner *v.* Protection Ins. Co., 25 Me. 515, 43 Am. Dec. 294; Burgess *v.* Equitable Mar. Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Bond *v.* The Cora, 3 Fed. Cas. No. 1,621, 2 Pet. Adm. 373, 2 Wash. 80 [*affirming* 3 Fed. Cas. No. 1,620, 2 Pet. Adm. 361]; The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328; Crocker *v.* Jackson, 6 Fed. Cas. No. 3,398, 1

b. To Avoid Perils Not Insured Against. A departure from the course of the voyage, if necessitated by overbearing force, although of a kind not insured against, excuses a deviation;[31] but a voluntary departure in order to avoid a peril not insured against is not justifiable so as to excuse the deviation.[32]

10. Policies Granting "Liberty" — a. In General. Where the policy contains a clause giving "liberty" to take some course or to do some act which, but for such clause, would be a deviation, the taking of such course or doing such act is covered by the policy;[33] as is also the doing of anything which under the circumstances is usual to accomplish the end in view.[34] There is, however, no obligation to do anything for which merely a "liberty" is given, as the liberty is nothing more than a permission.[35]

b. Limited to Purpose and Course of Voyage. Under a liberty "to touch," "to stay," "to call," etc., the vessel is only justified in putting into port for a purpose connected with and in furtherance of the main scope and object of the adventure;[36] and it is only ports within the course of the voyage to which the

Sprague 141; The Henry Ewbank, 11 Fed. Cas. No. 6,376, 1 Sumn. 400.

Incidentally saving property.— A departure by a vessel from her course to ascertain if those on board another vessel in apparent distress need relief and a delay to afford such relief, although the motive of saving property also influenced the master, will not be regarded as a deviation. Crocker *v.* Jackson, 6 Fed. Cas. No. 3,398, 1 Sprague 141.

When duty to proceed to nearest land.— Where the safety of life and property requires an instant and entire departure from the course of a contemplated voyage, it is the duty of the master to seek the nearest land he can hope to reach, if the peril be so great as to outweigh all other considerations; and he should proceed directly on his new course, without delay or deviation, unless prevented by some unforeseen obstacle. But it is not the master's duty to seek the nearest land he can hope to reach if the state of the weather be such that it would be more safe to attempt to seek another port. Turner *v.* Protection Ins. Co., 25 Me. 515, 43 Am. Dec. 294.

31. Robinson *v.* Marine Ins. Co., 2 Johns. (N. Y.) 89; Scott *v.* Thompson, 1 B. & P. N. R. 181; O'Reilly *v.* Gonne, 4 Campb. 249, 16 Rev. Rep. 788.

Ice preventing navigation to the port of destination will excuse a deviation. Graham *v.* Commercial Ins. Co., 11 Johns. (N. Y.) 352.

32. Akin *v.* Mississippi M. & F. Ins. Co., 4 Mart. N. S. (La.) 661; O'Reilly *v.* Royal Exch. Assur. Co., 4 Campb. 246, 16 Rev. Rep. 786.

33. Thorndike *v.* Bordman, 4 Pick. (Mass.) 471; Winthrop *v.* Union Ins. Co., 30 Fed. Cas. No. 17,901, 2 Wash. 7; Hunter *v.* Leathley, 10 B. & C. 858, 8 L. J. K. B. O. S. 274, 21 E. C. L. 359 [*affirmed* in 7 Bing. 517, 1 Cromp. & J. 423, 9 L. J. Exch. O. S. 118, 1 Tyrw. 355, 20 E. C. L. 232].

Duration of a liberty to "cruise six weeks" means "six weeks successively from the commencement of the cruise." Syers *v.* Bridge, Dougl. (3d. ed.) 509.

Liberty "to wait two months" has the effect of terminating the policy at the end of two months if the vessel continues to wait. Doyle *v.* Powell, 4 B. & Ad. 267, 1 N. & M. 678, 24 E. C. L. 123.

Liberty of second port see *supra*, IV, B, 6, c, note 93.

Alteration of policy by inserting clause giving liberty see *supra*, VI, A, 1, note 30.

Liberty to reship cargo see *supra*, VII, D, 5, note 95.

34. Pearson *v.* Commercial Union Assur. Co., 1 App. Cas. 498, 3 Aspin. 275, 45 L. J. C. P. 761, 35 L. T. Rep. N. S. 445, 24 Wkly. Rep. 951; Armet *v.* Innes, 4 Moore C. P. 150, 21 Rev. Rep. 737, 16 E. C. L. 366.

Liberty to trade.— Where a vessel has the right by the policy "to stop at all ports and places, for trade, refreshments, and recruits," the right to stop at islands and enter bays to take sea elephants is not forbidden, if the jury find it to be a part of a "whaling voyage." Child *v.* Sun Mut. Ins. Co., 3 Sandf. (N. Y.) 26.

35. Cross *v.* Shutliffe, 2 Bay (S. C.) 220, 1 Am. Dec. 645.

36. Burgess *v.* Equitable Mar. Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Seccomb *v.* Provincial Ins. Co., 10 Allen (Mass.) 305; U. S. *v.* The Paul Shearman, 27 Fed. Cas. No. 16,012, Pet. C. C. 98; Solly *v.* Whitmore, 5 B. & Ald. 45, 24 Rev. Rep. 274, 7 E. C. L. 36; Hammond *v.* Reid, 4 B. & Ald. 72, 22 Rev. Rep. 629, 6 E. C. L. 395; Bottomley *v.* Bovill, 5 B. & C. 210, 7 D. & R. 702, 4 L. J. K. B. O. S. 237, 29 Rev. Rep. 221, 11 E. C. L. 433; Williams *v.* Shee, 3 Campb. 469, 14 Rev. Rep. 811; Hartley *v.* Buggin, 3 Dougl. 39, 26 E. C. L. 37; Rucker *v.* Allnutt, 15 East 278, 13 Rev. Rep. 465; Langhorn *v.* Allnutt, 4 Taunt. 511, 13 Rev. Rep. 663, 12 Rev. Rep. 660; Violet *v.* Allnutt, 3 Taunt. 419, 13 Rev. Rep. 676; Urquhart *v.* Barnard, 1 Taunt. 450, 10 Rev. Rep. 574.

"Liberty to go into dry dock" will protect a vessel "in dock" while in the stream passing to a dry dock but not while it is in the stream for any other purpose. Pearson *v.* Commercial Union Assur. Co., 1 App. Cas. 498, 3 Aspin. 275, 45 L. J. C. P. 761, 35 L. T. Rep. N. S. 445, 24 Wkly. Rep. 951.

liberty applies.[37] These clauses give the right to a reasonable delay at the authorized port to accomplish the purposes for which the liberty was given.[38]

c. To Carry Letters of Marque, Etc. Where the vessel is granted liberty merely to carry a letter of marque it does not authorize direct cruising out of the course of the voyage.[39] Where the liberty is coupled with a liberty to capture, the vessel is permitted to convoy her prizes if the risk be not thereby increased;[40] but if convoying the prizes delays the progress of the insured vessel it is not permissible.[41] A liberty to chase, capture, and man prizes does not authorize the ship to lie in wait for them.[42]

11. Trading and Other Acts at Port of Call. Where a vessel enters a port within the scope of the insured voyage or under a liberty contained in the policy, or from necessity or justifiable cause, the vessel may load or discharge cargo, take on provisions and supplies, and do other things of a similar nature without the same amounting to a deviation,[43] unless the doing of such thing prolongs the delay at such port or otherwise varies the risk.[44]

12. Waiver. A deviation may be waived by the conduct of the underwriters in making the insured believe the policy continues to cover.[45] But it has been held that if the parties describe in the usual terms the voyage they insure, both knowing that the adventure has deviated from that description, they are nevertheless bound by the description they have chosen, and the previous deviation is fatal.[46]

E. Breach of Warranties[47] — 1. Definition of Warranty. A warranty is a stipulation forming part of the policy, either expressed or implied, as to some fact, condition, or circumstance relating to the risk.[48]

2. Condition Precedent. A warranty in a policy of marine insurance, whether express or implied, is a condition precedent to the attaching of the policy,[49] and

Staying to perform salvage services is not permissible under a liberty to "stay and trade." African Merchants Co. *v.* Britisb, etc., Mar. Ins. Co., L. R. 8 Exch. 154, 1 Aspin. 588, 42 L. J. Exch. 60, 28 L. T. Rep. N. S. 233, 21 Wkly. Rep. 484.

Waiting at an intermediate port for information as to what port the ship might safely proceed to is permissible under a liberty "to touch" and stay at any ports and places, for all purposes whatsoever. Langhorn *v.* Allnutt, 4 Taunt. 511, 13 Rev. Rep. 663, 12 Rev. Rep. 660.

37. Seccomb *v.* Provincial Ins. Co., 10 Allen (Mass.) 305; Bottomley *v.* Bovill, 5 B. & C. 210, 7 D. & R. 702, 4 L. J. K. B. O. S. 237, 29 Rev. Rep. 221, 11 E. C. L. 433; Ranken *v.* Reeve, 1 Park Ins. 627.

Intermediate voyages.— Liberty to touch and stay at any port by usage of the trade may cover intermediate voyages. Farquharson *v.* Hunter, 1 Park. Ins. 105.

38. Arnold *v.* Pacific Mut. Ins. Co., 78 N. Y. 7; Langhorn *v.* Allnutt, 4 Taunt. 511, 13 Rev. Rep. 663, 12 Rev. Rep. 660.

39. Parr *v.* Anderson, 6 East 202, 2 Smith K. B. 316, 8 Rev. Rep. 461.

40. Ward *v.* Wood, 13 Mass. 539.

41. Lawrence *v.* Sydebotham, 6 East 45, 2 Smith K. B. 214, 8 Rev. Rep. 385.

42. Hibbert *v.* Halliday, 2 Taunt. 428, 11 Rev. Rep. 633.

43. Perkins *v.* Augusta Ins., etc., Co., 10 Gray (Mass.) 312, 71 Am. Dec. 654; Lapham *v.* Atlas Ins. Co., 24 Pick. (Mass.) 1; Chase *v.* Eagle Ins. Co., 5 Pick. (Mass.) 51; Foster *v.* Jackson Mar. Ins. Co., 1 Edm. Sel. Cas. (N. Y.) 290; Kane *v.* Columbian Ins. Co., 2 Johns. (N. Y.) 264; Hughes *v.* Union Ins. Co., 3 Wheat. (U. S.) 159, 4 L. ed. 357; Laroche *v.* Oswin, 12 East 131, 11 Rev. Rep. 337; Cormack *v.* Gladstone, 11 East 347, 10 Rev. Rep. 518; Raine *v.* Bell, 9 East 195, 9 Rev. Rep. 533; Guibert *v.* Readhaw, 2 Park. Ins. 637; Thomas *v.* Royal Exch. Assur. Co., 1 Price 195.

Early cases contra see U. S. *v.* The Paul Shearman, 27 Fed. Cas. No. 16,012, Pet. C. C. 98; Sheriff *v.* Potts, 5 Esp. 96; Stitt *v.* Wardell, 2 Esp. 610.

44. Perkins *v.* Augusta Ins., etc., Co., 10 Gray (Mass.) 312, 71 Am. Dec. 654; Kingston *v.* Girard, 4 Dall. (Pa.) 274, 1 L. ed. 831; Inglis *v.* Vaux, 3 Campb. 437.

45. Silloway *v.* Neptune Ins. Co., 12 Gray (Mass.) 73.

46. Redman *v.* Loudon, 3 Campb. 503, 1 Marsh. 136, 5 Taunt. 462, 1 E. C. L. 240.

47. **Right to return of premium** see *supra*, V, F, 5.

48. Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192.

49. *Louisiana.* — McCargo *v.* Merchants' Ins. Co., 10 Rob. 334.

Massachusetts.— Odiorne *v.* New England Mut. Mar. Ins. Co., 101 Mass. 551, 3 Am. Rep. 401; McLoon *v.* Commercial Mut. Ins. Co., 100 Mass. 472, 97 Am. Dec. 116, 1 Am. Rep. 129; Capen *v.* Washington Ins. Co., 12 Cush. 517; Copeland *v.* New England Mar. Ins. Co., 2 Metc. 432; Paddock *v.* Franklin Ins. Co., 11 Pick. 227.

it must be strictly and fully complied with in every particular or no liability will be incurred.[50]

3. Effect of Breach.[51] If there be any breach of a warranty the policy is null and void,[52] and the underwriters are relieved from their liability notwithstanding the loss is not connected with the breach or that the breach is cured prior to the loss.[53] If, however, the policy covers two distinct subjects it is severable and a breach of warranty as to one will not avoid the policy on the other.[54] The same rules apply equally to a promissory warranty.[55]

4. Waiver of Breach and Estoppel — a. In General. The knowledge of the underwriter, at the time of effecting the insurance, of the falsity of a warranty has been held not to amount to a waiver or exception to the warranty.[56] It is a waiver of a breach of warranty if the underwriter with a knowledge of the breach voluntarily accepts notice of an abandonment for a constructive total loss.[57] But it is not a waiver for the underwriter not to state the breach as a ground of

New York.— Van Wickle *v.* Mechanics', etc., Ins. Co., 97 N. Y. 350.

United States.— Adderly *v.* American Mut. Ins. Co., 1 Fed. Cas. No. 75, Taney 126; Williams *v.* New England Ins. Co., 29 Fed. Cas. No. 17,731, 3 Cliff. 244.

England.— Lane *v.* Nixon, L. R. 1 C. P. 412, 12 Jur. N. S. 392, 35 L. J. C. P. 243, 14 Wkly. Rep. 641; Parmeter *v.* Cousins, 2 Campb. 235, 11 Rev. Rep. 702; Wedderburn *v.* Bell, 1 Campb. 1, 10 Rev. Rep. 615; Long *v.* Allan, 4 Dougl. 276, 26 E. C. L. 473; De Hahn *v.* Hartley, 1 T. R. 343 [*affirmed* in 2 T. R. 186, 1 Rev. Rep. 221].

Canada.— Lemelin *v.* Montreal Ins. Co., 1 Quebec 337; Leduc *v.* Western Assur. Co., 25 L. C. Jur. 55.

50. *Indiana.*— Grant *v.* Lexington F., etc., Ins. Co., 5 Ind. 23, 61 Am. Dec. 74.

Massachusetts.— Lovett *v.* China Mut. Ins. Co., 174 Mass. 108, 54 N. E. 338; Odiorne *v.* New England Mut. Mar. Ins. Co., 101 Mass. 551, 3 Am. Rep. 401; McLoon *v.* Commercial Mut. Ins. Co., 100 Mass. 472, 97 Am. Dec. 116, 1 Am. Rep. 129; Capen *v.* Washington Ins. Co., 12 Cush. 517.

New York.— Snow *v.* Columbian Ins. Co., 48 N. Y. 624, 8 Am. Rep. 578; Ryan *v.* Providence Washington Ins. Co., 79 N. Y. App. Div. 316, 79 N. Y. Suppl. 460.

Pennsylvania.— Mackie *v.* Pleasants, 2 Binn. 363; Ogden *v.* Ash, 1 Dall. 162, 1 L. ed. 82.

South Carolina.— Murden *v.* South Carolina Ins. Co., 1 Mill 200.

United States.— Lunt *v.* Boston Mar. Ins. Co., 6 Fed. 562, 19 Blatchf. 151.

England.— Pawson *v.* Watson, Cowp. 785, Dougl. (3d ed.) 11 note; Hore *v.* Whitmore, Cowp. 784; De Hahn *v.* Hartley, 1 T. R. 343 [*affirmed* in 2 T. R. 186, 1 Rev. Rep. 221].

51. Right to return of premium see *supra*, V, F, 5.

52. *Indiana.*— Grant *v.* Lexington F., etc., Ins. Co., 5 Ind. 23, 61 Am. Dec. 74.

Louisiana.— Caldwell *v.* Western Mar., etc., Ins. Co., 19 La. 42, 36 Am. Dec. 667.

Massachusetts.— Odiorne *v.* New England Mut. Mar. Ins. Co., 101 Mass. 551, 3 Am. Rep. 401.

New York.— Leitch *v.* Atlantic Mut. Ins. Co., 66 N. Y. 100; Buffalo Steam Engine Works *v.* Sun Mut. Ins. Co., 17 N. Y. 401; Patrick *v.* Hallett, 1 Johns. 241.

Pennsylvania.— Prescott *v.* Union Ins. Co., 1 Whart. 399, 30 Am. Dec. 207.

England.— Seymour *v.* London, etc., Mar. Ins. Co., 1 Aspin. 423, 41 L. J. C. P. 193, 27 L. T. Rep. N. S. 417; Hide *v.* Bruce, 3 Dougl. 213, 26 E. C. L. 146; Bean *v.* Stupart, Dougl. (3d ed.) 11.

53. Goicoechea *v.* Louisiana State Ins. Co., 6 Mart. N. S. (La.) 51, 17 Am. Dec. 175; Cogswell *v.* Chubb, 1 N. Y. App. Div. 93, 36 N. Y. Suppl. 1076 [*affirmed* in 157 N. Y. 709, 53 N. E. 1124]; Forshaw *v.* Chabert, 3 B. & B. 158, 6 Moore C. P. 369, 23 Rev. Rep. 596, 7 E. C. L. 659; Woolmer *v.* Muilman, 3 Burr. 1419, W. Bl. 427; Beacon F., etc., Ins. Co. *v.* Gibb, 13 L. C. Rep. 81.

"Not to carry grain."— A warranty "not allowed to carry grain in bulk across the Atlantic" is broken if the vessel, at the time when the policy takes effect, is just entering the harbor at the end of a voyage across the Atlantic with such a cargo. Sawyer *v.* Coasters' Mut. Ins. Co., 6 Gray (Mass.) 221.

54. Davis *v.* Boardman, 12 Mass. 80.

55. Grant *v.* Lexington F., etc., Ins. Co., 5 Ind. 23, 61 Am. Dec. 74.

Notice of change of masters.— Where a policy upon a steamboat provided that notice of a change of masters should be given to the insurers, it was held that the consent of the insurers to one change was not a complete performance of the requirement, and that notice of any subsequent change of masters must be given, or the policy would cease to be binding. Tennessee M. & F. Ins. Co. *v.* Scott, 14 Mo. 46.

56. Goicoechea *v.* Louisiana State Ins. Co., 6 Mart. N. S. (La.) 51, 17 Am. Dec. 175; Atherton *v.* Brown, 14 Mass. 152. But where a vessel was warranted not to use a port in Europe north of Antwerp, but was insured while lying at Rotterdam, which is north of Antwerp, it was held that the underwriter waived the warranty. Reck *v.* Phenix Ins. Co., 130 N. Y. 160, 29 N. E. 137.

57. Provincial Ins. Co. *v.* Leduc, L. R. 6 P. C. 224, 2 Aspin. 338, 42 L. J. P. C. 49, 31 L. T. Rep. N. S. 141, 22 Wkly. Rep. 929.

refusal to pay when proofs of loss are presented.[58] Nor will a failure to offer to return the premium estop the underwriter from relying on a breach of warranty,[59] unless the insured has thereby been induced to rely on the policy as in force.[60] Nor is a warranty waived or abrogated by indorsing upon the policy a permission to use one of several ports, the use of which is prohibited in the policy.[61]

b. Warranty of Seaworthiness. Knowledge that the vessel is not and cannot reasonably be made seaworthy for the intended voyage prevents the underwriter from relying on a breach of the warranty.[62] A general offer to insure goods loaded on designated vessels or an express approval of certain vessels will amount to a waiver;[63] and an agreement to consider a vessel seaworthy will estop the underwriter from relying upon a breach of the warranty to defeat a claim.[64] A clause in the policy providing for the insurance to cover in case of a breach of warranty, at a premium to be arranged, prevents the avoidance of the policy for breach of warranty of seaworthiness.[65] But a provision excepting liability for loss from particular conditions of unseaworthiness does not exclude the implied warranty.[66]

5. Express Warranties — a. Form. An express warranty must always be inserted in the policy,[67] and is thereby distinguishable from a representation which is but a collateral agreement.[68] The matters need not be inserted in any particular part of the policy and may be written on the margin;[69] but matters contained in a separate paper or a paper wafered to the policy[70] or referred to therein[71] are not warranties unless the policy expressly so stipulates.[72] The word "warrant" is

58. Devens *v.* Mechanics', etc., Ins. Co., 83 N. Y. 168.

59. Higgie *v.* American Lloyds, 14 Fed. 143, 11 Biss. 395. *Compare* Bidwell *v.* Northwestern Ins. Co., 24 N. Y. 302.

60. Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240.

61. Day *v.* Orient Mut. Ins. Co., 1 Daly (N. Y.) 13.

General warranty followed by limited warranty.— A clause prohibiting the use of the Gulf of St. Lawrence during certain months, followed by a clause prohibiting the use of certain ports in the gulf during a part of that period, was held to be an exception upon the first prohibition; but it was held that the vessel could only use the waters of the St. Lawrence in visiting the ports named during the period covered by the first prohibition and not included in the second. Owen *v.* Ocean Mut. Mar. Ins. Co., 18 Nova Scotia 495.

62. Thebaud *v.* Great Western Ins. Co., 84 Hun (N. Y.) 1, 31 N. Y. Suppl. 1084 [*affirmed* in 155 N. Y. 516, 50 N. E. 284]; Clapham *v.* Langton, 34 L. J. Q. B. 46, 10 L. T. Rep. N. S. 875, 12 Wkly. Rep. 1011; Burgess *v.* Wickham, 3 B. & S. 669, 33 L. J. Q. B. 17, 8 L. T. Rep. N. S. 47, 11 Wkly. Rep. 992, 113 E. C. L. 669. See also Paddock-Hawley Iron Co. *v.* Providence-Washington Ins. Co., (Mo. App. 1906) 93 S. W. 358. *Contra*, Myers *v.* Girard Ins. Co., 26 Pa. St. 192.

Examination by underwriter.— Measures taken by the insurer to satisfy himself as to the seaworthiness of a vessel, such as having a survey made thereof, will not of itself operate as a waiver or modification of the implied warranty of seaworthiness. Rogers *v.* Sun Mut. Ins. Co., 46 N. Y. Super. Ct. 65; Lemelin *v.* Montreal Ins. Co., 1 Quebec 337. *Compare*, however, Paddock-Hawley Iron Co. *v.* Providence-Washington Ins. Co., 118 Mo. App. 85, 93 S. W. 358.

63. Merchants' Ins. Co. *v.* Algeo, 31 Pa. St. 446; Marine F. Ins. Co. *v.* Burnett, 29 Tex. 433.

64. Parfitt *v.* Thompson, 14 L. J. Exch. 73, 13 M. & W. 392.

65. Greenock Steamship Co. *v.* Maritime Ins. Co., [1903] 1 K. B. 367, 9 Aspin. 364, 8 Com. Cas. 78, 72 L. J. K. B. 59, 88 L. T. Rep. N. S. 207, 51 Wkly. Rep. 447.

66. Quebec Mar. Ins. Co. *v.* Commercial Bank, L. R. 3 P. C. 234, 39 L. J. P. C. 53, 22 L. T. Rep. N. S. 559, 18 Wkly. Rep. 769.

67. Whitney *v.* Haven, 13 Mass. 172; Higginson *v.* Dall, 13 Mass. 96; Pawson *v.* Watson, Cowp. 785, Dougl. (3d ed.) 11 note.

All statements in the policy are *prima facie* warranties. Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192; Behn *v.* Burness, 3 B. & S. 751, 9 Jur. N. S. 620, 32 L. J. Q. B. 204, 8 L. T. Rep. N. S. 207, 11 Wkly. Rep. 496, 113 E. C. L. 751.

68. Burritt *v.* Saratoga County Mut. F. Ins. Co., 5 Hill (N. Y.) 188, 40 Am. Dec. 345; Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192. See also Walton *v.* Bethune, 2 Brev. (S. C.) 453, 4 Am. Dec. 597.

69. Kenyon *v.* Berthon, Dougl. (3d ed.) 12 note; Bean *v.* Stupart, Dougl. (3d ed.) 11.

70. Bize *v.* Fletcher, Dougl. (3d ed.) 12 note; Pawson *v.* Barnevelt, Dougl. (3d ed.) 12 note; Pawson *v.* Ewer, Dougl. (3d ed.) 12 note.

71. Burritt *v.* Saratoga County Mut. F. Ins. Co., 5 Hill (N. Y.) 188, 40 Am. Dec. 345.

72. Burritt *v.* Saratoga County Mut. F. Ins. Co., 5 Hill (N. Y.) 188, 40 Am. Dec. 345.

not necessary to make the statement a warranty, and the word "warranted" is often used where there is no warranty in fact, as in clauses wherein the subject-matter is "warranted free" from certain enumerated risks, which merely has the effect of excepting such risks from the perils insured against.[73]

b. Construction. A warranty is not to be construed so as to include anything which is not necessarily implied in it.[74] Thus a statement in a policy that a vessel is "intended" to navigate certain waters is not a warranty that she shall actually navigate them.[75] Nor is a warranty that a vessel shall have a certain number of guns a warranty that she shall have the necessary complement of men to work all of them.[76]

c. Nationality — (I) *What Amounts to Warranty.* A description of the subject-matter as "American" property, or other national designation, amounts to a warranty that the property is of the nationality designated.[77]

(II) *Meaning of Warranty.* A warranty of nationality does not mean that the vessel was built in such country,[78] but that the property belongs to a subject thereof,[79] and that it will so continue.[80] It requires that the vessel be conducted[81]

73. Johnson *v.* Ocean Ins. Co., 10 Rob. (La.) 334; Hagan *v.* Ocean Ins. Co., 10 Rob. (La.) 333; Lockett *v.* Firemen's Ins. Co., 10 Rob. (La.) 332; McCargo *v.* New Orleans Ins. Co., 10 Rob. (La.) 202, 43 Am. Dec. 180; Dickey *v.* United Ins. Co., 11 Johns. (N. Y.) 358. See *infra*, VIII, I.

74. Hide *v.* Bruce, 3 Dougl. 213, 26 E. C. L. 146.

License.— A warranty to have on board a license was construed as requiring a license in such form as to be a protection to the vessel and cargo for the voyage. Bulkley *v.* Derby Fishing Co., 1 Conn. 571.

Meaning of "the cargo."— An insurance declared to be on "the cargo," being one thousand and thirty-one hogsheads wine, does not amount to a warranty that the wine constitutes the whole cargo, and that no other goods will be taken on board. Muller *v.* Thompson, 2 Camph. 610, 12 Rev. Rep. 753.

An exception of liability for injury to a particular construction of vessel is not a warranty that the vessel is so constructed. Martin *v.* Fishing Ins. Co., 20 Pick. (Mass.) 389, 32 Am. Dec. 220.

Ports "in" substituted for ports "of."— A policy contained a condition not to use the ports of Big Glace bay, Schooner pond, Blockhouse mines, or Bridgeport. A loss occurred at a place known as "Port of Caledonia," about three quarters of a mile from the workings of Big Glace bay. The "port of Big Glace bay" had ceased to exist as a port for vessels, and the port of Caledonia, which was within the limits of the bay, had been substituted therefor. It was held that the loss was within the risk excepted, and that the policy might reasonably be construed as if the word "in" were substituted for the word "of." Campbell *v.* Canada Ins. Union, 12 Nova Scotia 21.

75. Grant *v.* Ætna Ins. Co., 6 L. C. Jur. 224, 12 L. C. Rep. 386.

76. Hide *v.* Bruce, 3 Dougl. 213, 26 E. C. L. 146.

77. Lewis *v.* Thatcher, 15 Mass. 431; Atherton *v.* Brown, 14 Mass. 152; Higgins *v.* Livermore, 14 Mass. 106; Coolidge *v.* New York Firemen Ins. Co., 14 Johns. (N. Y.) 308; Barker *v.* Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; Murray *v.* United Ins. Co., 2 Johns. Cas. (N. Y.) 168; Goix *v.* Low, 1 Johns. Cas. (N. Y.) 341.

Insuring by translated name.— Insuring a ship by an English name does not amount to a warranty or a representation that she is an English ship. Clapham *v.* Cologan, 3 Camph. 382.

78. Wilson *v.* Backhouse, Peake Add. Cas. 119.

79. De Wolf *v.* New York Firemen Ins. Co., 20 Johns. (N. Y.) 214 [*affirmed* in 2 Cow. 56]; Ludlow *v.* Bowne, 1 Johns. (N. Y.) 1, 3 Am. Dec. 277; Schwartz *v.* Insurance Co. of North America, 6 Binn. (Pa.) 378; Warder *v.* Horton, 4 Binn. (Pa.) 529; Phœnix Ins. Co. *v.* Pratt, 2 Binn. (Pa.) 308; Wilson *v.* Backhouse, Peake Add. Cas. 119.

Ownership by native born not conclusive of nationality.— Elbers *v.* United Ins. Co., 16 Johns. (N. Y.) 128; Tabbs *v.* Bendelack, 4 Esp. 108, 3 B. & P. 207 note.

A consul residing in a belligerent country and carrying on trade as a merchant will be considered as domiciled therein, so that it will amount to a breach of warranty of nationality in the case of property owned by him jointly with subjects of his home government. Arnold *v.* United Ins. Co., 1 Johns. Cas. (N. Y.) 363.

Scotch ownership of "British vessel."— The term "British vessel" in a policy is satisfied by the vessel's belonging to a Scotchman, who navigated her under a clearance and license from the British custom-house at New Providence. His habitual residence need not be proved. Mackie *v.* Pleasants, 2 Binn. (Pa.) 363.

A sale in futuro to an alien is not a breach of the warranty. Murgatroyd *v.* Crawford, 3 Dall. (Pa.) 491, 1 L. ed. 692.

80. Schwartz *v.* Insurance Co. of North America, 6 Binn. (Pa.) 378.

81. See Mayne *v.* Walter, 1 Park Ins. 730.

Under passport of belligerent.— Sailing under a passport granted by a belligerent

and documented[82] as of such nation, and a breach of the warranty in either particular will avoid the policy.

(III) *Property Included.* The warranty extends to all the property covered by the policy.[83]

d. Neutrality — (I) *What Included.* A warranty of neutrality imports that the property insured is neutral in fact, and shall be so in appearance and conduct;[84] that the property shall belong to neutrals;[85] that it shall be so documented as to prove its neutrality;[86] and that no act of the insured or his agent shall be done which can legally compromise its neutrality.[87]

(II) *Property and Interest Included.* The warranty extends to the insured's interest in all the property intended to be covered by the policy,[88] but not to the interest of a third party not covered by the policy.[89]

(III) *Time to Which It Relates.* The warranty is merely that the property is neutral at the time the risk commences and not that it shall continue neutral throughout the adventure.[90]

(IV) *What Amounts to Breach.* It is a breach of neutrality to sell or assign the whole or a part of the subject insured to a belligerent,[91] or one who has emigrated *flagrante bello*,[92] to cover property of belligerents,[93] to conceal

nation to protect against its own cruisers is not a sailing under the protection of the flag of that government, so as to constitute a breach of warranty of nationality. Jenks *v.* Hallet, 1 Cai. (N. Y.) 60.

82. Higgins *v.* Livermore, 14 Mass. 106; Barzillai *v.* Lewis, 3 Dougl. 126, 26 E. C. L. 92; Rich *v.* Parker, 7 T. R. 705, 4 Rev. Rep. 552.

Sailing without a register but with a sea letter and other necessary papers is not a breach of the warranty. Barker *v.* Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; Griffith *v.* Insurance Co. of North America, 5 Binn. (Pa.) 464.

A representation as to national character does not require that the vessel be so documented. Dawson *v.* Atty., 7 East 367.

83. Bayard *v.* Massachusetts F. & M. Ins. Co., 19 Fed. Cas. No. 1,133, 4 Mason 256.

84. Schwartz *v.* Insurance Co. of North America, 21 Fed. Cas. No. 12,504, 3 Wash. 117.

Where barratry is covered.— If a warranty of neutrality is contained in a policy, and there is a clause binding the insurers to answer for the barratry of the master, the warranty implies that the neutral character shall be forfeited only by such acts of the insured or their agent as amount to barratry. Wilcocks *v.* Union Ins. Co., 2 Binn. (Pa.) 574, 4 Am. Dec. 480.

Agreement to claim vessel as neutral.— The insured having agreed to claim the property insured as neutral in case of its capture, and refusing so to do when the vessel was captured on the ground that it would render him guilty of perjury, it was held that he could not recover of the insurer. Coolidge *v.* Blake, 15 Mass. 429.

85. Bauduy *v.* Union Ins. Co., 2 Fed. Cas. No. 1,112, 2 Wash. 391; Schwartz *v.* Insurance Co. of North America, 21 Fed. Cas. No. 12,504, 3 Wash. 117.

86. Cleveland *v.* Union Ins. Co., 8 Mass. 308; Blagge *v.* New York Ins. Co., 1 Cai. (N. Y.) 549; Ludlow *v.* Union Ins. Co., 2 Serg. & R. (Pa.) 119; Schwartz *v.* Insurance Co. of North America, 21 Fed. Cas. No. 12,504, 3 Wash. 117; Smith *v.* Delaware Ins. Co., 22 Fed. Cas. No. 13,035, 3 Wash. 127.

Documents required by municipal ordinances of foreign states need not be on board to satisfy the warranty. Nonnen *v.* Reid, 16 East 176.

87. Cleveland *v.* Union Ins. Co., 8 Mass. 308; Le Roy *v.* United Ins. Co., 7 Johns. (N. Y.) 343; Blagge *v.* New York Ins. Co., 1 Cai. (N. Y.) 549; Livingston *v.* Maryland Ins. Co., 6 Cranch (U. S.) 274, 3 L. ed. 222; Calbreath *v.* Gracy, 4 Fed. Cas. No. 2,296, 1 Wash. 219; Schwartz *v.* Insurance Co. of North America, 21 Fed. Cas. No. 12,504, 3 Wash. 117.

88. Bayard *v.* Massachusetts F. & M. Ins. Co., 2 Fed. Cas. No. 1,133, 4 Mason 256.

89. Livingston *v.* Maryland Ins. Co., 6 Cranch (U. S.) 274, 3 L. ed. 222.

90. Calbreath *v.* Gracy, 4 Fed. Cas. No. 2,296, 1 Wash. 219; Eden *v.* Parkison, Dougl. (3d ed.) 732; Garrels *v.* Kensington, 8 T. R. 230, 4 Rev. Rep. 635; Tyson *v.* Gurney, 3 T. R. 477.

91. Goold *v.* United Ins. Co., 2 Cai. (N. Y.) 73.

92. Jackson *v.* New York Ins. Co., 2 Johns. Cas. (N. Y.) 191; Duguet *v.* Rhinelander, 1 Johns. Cas. (N. Y.) 360 [*reversed* on other grounds in 1 Cai. Cas. xxv].

Effect of naturalization.— One who has emigrated *flagrante bello* to a neutral country and has become naturalized satisfies the warranty of neutrality. Duguet *v.* Rhinelander, 1 Johns. Cas. (N. Y.) 360 [*reversed* on other grounds in 1 Cai. Cas. xxv].

93. Schwartz *v.* Insurance Co. of North America, 6 Binn. (Pa.) 378; Pratt *v.* Phœnix Ins. Co., 1 Browne (Pa.) 152; Schwartz *v.* Insurance Co. of North America, 21 Fed. Cas. No. 12,504, 3 Wash. 117.

ship's papers,[94] to resist search,[95] or to attempt to enter a blockaded port.[96] But it is not a breach of neutrality to sail for a port believed to be blockaded,[97] or for a neutral ship to carry enemy's property from its own to the enemy's country.[98]

e. Safety and Navigation of Vessel.[99] A warranty that a vessel is "well" on a particular day is complied with if the ship was safe at any time of that day.[1] A warranty "to go out in tow" is not complied with by the vessel being towed from the loading berth to another part of the harbor.[2]

f. To Sail. A warranty "to sail" on a particular day requires that the vessel be got under way in complete readiness for the voyage with the purpose of proceeding thereon without further delay at the port of departure.[3] If it is intended or is necessary that the vessel stop for any purpose before proceeding to sea, she has not sailed within the meaning of the warranty.[4] But if after breaking ground in complete readiness and with intent to proceed, the vessel is detained by some unforeseen cause, the warranty is complied with.[5] An

94. Carrere *v.* Union Ins. Co., 3 Harr. & J. (Md.) 324, 5 Am. Dec. 437; Le Roy *v.* United Ins. Co., 7 Johns. (N. Y.) 343; Murray *v.* Alsop, 3 Johns. Cas. (N. Y.) 47; Livingston *v.* Maryland Ins. Co., 6 Cranch (U. S.) 274, 3 L. ed. 222, 7 Cranch (U. S.) 506, 3 L. ed. 421; Calbreath *v.* Gracy, 4 Fed. Cas. No. 2,296, 1 Wash. 219.

Letter of instructions.— The conduct of the master in not delivering a letter of instructions when captured, where it showed an innocent voyage, although imprudent, would not prevent a recovery by the insured. Sperry *v.* Delaware Ins. Co., 22 Fed. Cas. No. 13,236, 2 Wash. 243.

95. Garrels *v.* Kensington, 8 T. R. 230, 4 Rev. Rep. 635.

96. Fitzsimmons *v.* Newport Ins. Co., 4 Cranch (U. S.) 185, 2 L. ed. 591.

97. Vos *v.* United Ins. Co., 1 Cai. Cas. (N. Y.) vii [*affirmed* in 2 Johns. Cas. 469].

98. Barker *v.* Blakes, 9 East 283, 9 Rev. Rep. 558.

99. Manning and equipment see *infra*, VII, E, 5, j.

1. Blackhurst *v.* Cockell, 3 T. R. 360, 1 Rev. Rep. 717.

2. Provincial Ins. Co. *v.* Connolly, 5 Can. Sup. Ct. 258.

3. Sea Ins. Co. *v.* Blogg, [1898] 1 Q. B. 27, 67 L. J. Q. B. 22 [*affirmed* in [1898] 2 Q. B. 398, 67 L. J. Q. B. 757, 78 L. T. Rep. N. S. 785, 47 Wkly. Rep. 71]; Pittegrew *v.* Pringle, 3 B. & Ad. 514, 23 E. C. L. 229; Moir *v.* Royal Exch. Assur. Co., 4 Campb. 84, 1 Marsh. 570, 3 M. & S. 461, 6 Taunt. 241, 16 Rev. Rep. 330, 1 E. C. L. 596; Bouillon *v.* Lupton, 15 C. B. N. S. 113, 10 Jur. N. S. 422, 33 L. J. C. P. 37, 8 L. T. Rep. N. S. 575, 11 Wkly. Rep. 966, 109 E. C. L. 113.

Dropping down river.— A policy contained a warranty not to sail after the 15th of August. The vessel on the morning of the 15th of August was cleared at the custom-house and ready for sea. She was then lying in the custom-house dock, which opens into the river L, which forms part of D harbor. She was afterward, on the same day, hauled out of dock and warped down the river L about half a mile, toward the mouth of the harbor, which was some miles distant, for the purpose of proceeding on her voyage. At the time of so moving the vessel, the master and crew knew it to be impossible to get to sea that day. The next day she was warped a little farther down the river, and on the 17th, when the wind changed, she got to sea. The jury having found that the master and crew fully intended to sail on the 15th of August, if it had been possible, and did all they could, and used every means and exertion so to do, and that they intended by so doing to put themselves in a better situation for the prosecution of the voyage, and not merely and solely to fulfil the warranty, it was held that the vessel was in the prosecution of her voyage on the 15th of August, and that the warranty not to sail after that day had been complied with. Cockrane *v.* Fisher, 1 C. M. & R. 809, 1 L. J. Exch. 328, 5 Tyrw. 496.

"To sail in a few days."— Where a vessel warranted to sail in a few days was detained forty-five days after the date of the policy in making necessary repairs, testing the machinery, etc., it was held that the policy was not thereby avoided. Wallerstein *v.* Columbian Ins. Co., 3 Rob. (N. Y.) 528 [*reversed* on other grounds in 44 N. Y. 204, 4 Am. Rep. 664].

In the month of October.— The meaning of a statement that a ship insured would sail "in the month of October" from the West Indies was explained by evidence of merchants to mean after October 25. Chaurand *v.* Angerstein, 1 Peake N. P. 43.

4. Sea Ins. Co. *v.* Blogg, [1898] 2 Q. B. 398, 67 L. J. Q. B. 757, 78 L. T. Rep. N. S. 785, 47 Wkly. Rep. 71 [*affirming* [1898] 1 Q. B. 27, 67 L. J. Q. B. 22]; Pittegrew *v.* Pringle, 3 B. & Ad. 514, 23 E. C. L. 229.

Insufficient crew.— A warranty to sail on or before a particular day is not complied with by leaving the harbor on that day, without having a sufficient crew on board, although the remainder of the crew is engaged and ready to sail. Graham *v.* Barras, 5 B. & Ad. 1011, 3 N. & M. 125, 27 E. C. L. 424; Ridsdale *v.* Newnham, 4 Campb. 111, 3 M. & S. 456, 15 Rev. Rep. 327.

5. Union Ins. Co. *v.* Tysen, 3 Hill (N. Y.) 118; Lang *v.* Anderdon, 3 B. & C. 495, 10 E. C. L. 228, 1 C. & P. 171, 12 E. C. L. 108,

unforeseen cause preventing a vessel from commencing the voyage at the time named does not excuse the non-compliance with the warranty.[6] A delay in one stage of the voyage which must necessarily produce a breach of a warranty in regard to the sailing on a future stage does not terminate the policy before the arrival of the vessel at the port where the second stage commences.[7]

g. To Depart. A warranty "to depart" from a place on a specified date requires that there be an effectual leaving behind of that place on that day.[8]

h. To Sail With Convoy. A warranty "to sail with convoy" requires that the vessel join and depart with convoy[9] from the customary place where convoys are to be had[10] and to have sailing instructions on board.[11] She may sail unprotected from her loading port to the place of rendezvous for convoy;[12] and it is no breach of the warranty that she does not continue with the convoy during the whole course of the voyage,[13] but the convoy must be one intended for the whole voyage.[14] This does not mean that the same ship shall act as convoy for the entire voyage.[15] The warranty is not complied with by sailing under the protection of an armed ship not appointed by the government.[16]

i. Waters To or From Which Vessel Is Confined or Excluded. If a vessel is "prohibited from" or warranted "not to use" any designated place or waters it is a breach of warranty to enter[17] or touch[18] such places or waters. Clearing for

5 D. & R. 393, 3 L. J. K. B. O. S. 62, 27 Rev. Rep. 412; Thellusson *v.* Pigou, Dougl. (3d ed.) 366 note; Thellusson *v.* Staples, Dougl. (3d ed.) 366 note; Thellusson *v.* Fergusson, Dougl. (3d ed.) 361; Earle *v.* Harris, Dougl. (3d ed.) 357; Robertson *v.* Pugh, 15 Can. Sup. Ct. 706.

A delay for convoy after leaving the port of departure is not a breach of the warranty. Wright *v.* Shiffner, 2 Campb. 247, 11 East 515, 11 Rev. Rep. 263.

6. Hore *v.* Whitmore, Cowp. 784; Nelson *v.* Salvador, M. & M. 309, 31 Rev. Rep. 733, 22 E. C. L. 529; Robertson *v.* Pugh, 15 Can. Sup. Ct. 706.

7. On an assurance of a vessel at and from New York to Quebec, during her stay there, thence to the United Kingdom, the ship being warranted to sail from Quebec on or before Nov. 1, 1853, it was held that the insurer was liable for a loss occurring on her voyage to Quebec after Nov. 1, 1853. Baines *v.* Holland, 3 C. L. R. 593, 10 Exch. 802, 24 L. J. Exch. 204.

8. Moir *v.* Royal Exch. Assur. Co., 4 Campb. 84, 1 Marsh. 570, 3 M. & S. 461, 6 Taunt. 241, 16 Rev. Rep. 330, 1 E. C. L. 596; Robertson *v.* Pugh, 15 Can. Sup. Ct. 706. See also Union Ins. Co. *v.* Tysen, 3 Hill (N. Y.) 118.

9. Taylor *v.* Woodnen, 2 Park Ins. 707. *Compare* Magalhaens *v.* Busher, 4 Campb. 54.

10. Lethulier's Case, 2 Salk. 443.

11. Webb *v.* Thompson, 1 B. & P. 5, 4 Rev. Rep. 757; Hibbert *v.* Pigou, 3 Dougl. 224, 26 E. C. L. 153; Anderson *v.* Pitcher, 3 Esp. 124, 1 Stark. 262, 5 Rev. Rep. 565, 2 E. C. L. 106; Verdon *v.* Wilmot, 2 Park Ins. 696 note.

12. Warwick *v.* Scott, 4 Campb. 62.

13. Manning *v.* Gist, 3 Dougl. 74, 26 E. C. L. 59; Harrington *v.* Halkeld, 2 Park Ins. 639; Jeffery *v.* Legender, 3 Lev. 320, 4 Mod. 48, 2 Salk. 443, Show. 320. But she must keep with the convoy unless separated by necessity. Waltham *v.* Thompson, Marsh. Ins. 294.

14. Lilly *v.* Ewer, Dougl. (3d ed.) 72; Jeffery *v.* Legender, 3 Lev. 320, 4 Mod. 48, 2 Salk. 443, Show. 320.

15. Smith *v.* Readshaw, 2 Park Ins. 708; De Garray *v.* Clagget, 2 Park Ins. 708.

16. Hibbert *v.* Pigou, 3 Dougl. 224, 26 E. C. L. 153; D'Eguino *v.* Bewicke, 2 H. Bl. 551, 3 Rev. Rep. 503.

17. Cobb *v.* Lime Rock F. & M. Ins. Co., 58 Me. 326; Odiorne *v.* New England Mut. Mar. Ins. Co., 101 Mass. 551, 3 Am. Rep. 401; Day *v.* Orient Mut. Ins. Co., 1 Daly (N. Y.) 13.

"Not to enter or attempt to enter."— Evidence examined and held sufficient to go to the jury on the question whether the captain of a vessel was attempting to enter the Gulf of St. Lawrence within the meaning of a warranty "not to enter or attempt to enter" it. Taylor *v.* Moran, 11 Can. Sup. Ct. 347.

To enter St. Lawrence after certain date.— When a ship is insured on a time policy containing a stipulation "not allowed . . . to enter the Gulf of St. Lawrence before the 25th day of April, nor to be in the said Gulf after the 15th day of November. Nor to proceed to Newfoundland after the 1st day of December," the vessel is neither to be in the Gulf after November 15, nor to proceed to Newfoundland after December 1. Provincial Ins. Co. *v.* Leduc, L. R. 6 P. C. 224, 2 Aspin. 338, 43 L. J. P. C. 49, 31 L. T. Rep. N. S. 141, 22 Wkly. Rep. 929.

When prohibition from port includes waters about port.— A prohibition "from the River and Gulf of St. Lawrence, ports in Newfoundland, Northumberland Straits, Cape Breton," applies to the waters about Cape Breton, and not to the ports only of that island. Lovett *v.* China Mut. Ins. Co., 174 Mass. 108, 54 N. E. 338.

18. Stevens *v.* Commercial Mut. Ins. Co., 6 Duer (N. Y.) 594 [*affirmed* in 26 N. Y. 397].

and sailing toward a prohibited port has been held not to be a breach of the warranty,[19] but the decisions are not in harmony and the weight of authority seems to be to the contrary.[20] Where the vessel is "confined to" or is "to navigate only" designated waters, a departure therefrom is a breach of warranty.[21] The meaning of particular designations of bodies of water and watercourses contained in warranties have already been considered.[22]

j. Manning and Equipment.[23] Occasionally express warranties are inserted in policies relating to the condition, manning, and equipment of the vessel; these must be strictly complied with, and this notwithstanding the vessel is seaworthy.[24]

19. Snow *v.* Columbian Ins. Co., 48 N. Y. 624, 8 Am. Rep. 578; Wheeler *v.* New York Mut. Ins. Co., 35 N. Y. Super. Ct. 247.

To "use a port" means to go into a harbor or haven for shelter, for commerce, or for pleasure, and to derive a benefit or an advantage from its protection. Going near a harbor or port, sailing past, or going in the direction of it, is not a use of the port. Snow *v.* Columbian Ins. Co., 48 N. Y. 624, 8 Am. Rep. 578; Wheeler *v.* New York Mut. Ins. Co., 35 N. Y. Super. Ct. 247.

20. An intention to enter prohibited waters, manifested by unequivocal overt acts, has been held to be a breach of the warranty, although the vessel stranded before clearing the harbor at her port of departure. Robertson *v.* Stairs, 10 Nova Scotia 345. See also Colledge *v.* Harty, 6 Exch. 205, 20 L. J. Exch. 146. Where a vessel sails for a port and river which she is forbidden by the policy to use, and anchors at a buoy near the entrance of the river, whence she is driven ashore by a storm, this is a using of the place and a breach of the policy. Thames, etc., Mar. Ins. Co. *v.* O'Connell, 86 Fed. 150, 29 C. C. A. 624.

21. Kirk *v.* Home Ins. Co., 92 N. Y. App. Div. 26, 86 N. Y. Suppl. 980; Cogswell *v.* Chubb, 1 N. Y. App. Div. 93, 36 N. Y. Suppl. 1076 [*affirmed* in 157 N. Y. 709, 53 N. E. 1124]; Hastorf *v.* Greenwich Ins. Co., 132 Fed. 122; Providence Washington Ins. Co. *v.* Brummelkamp, 58 Fed. 918.

22. See *supra*, IV, B, 6, g.

23. **Safety of vessel** see *supra*, VII, E, 5, e.

Implied warranty see *infra*, VII, E, 6, a, (IV).

24. Grant *v.* Lexington F., etc., Ins. Co., 5 Ind. 23, 61 Am. Dec. 74; Eddy *v.* Tennessee M. & F. Ins. Co., 21 Mo. 587; St. Louis Ins. Co. *v.* Glasgow, 8 Mo. 713, 41 Am. Dec. 661; Ogden *v.* Ash, 1 Dall. (Pa.) 162, 1 L. ed. 82; Steward *v.* Wilson, 7 Jur. 1020, 13 L. J. Exch. 27, 12 M. & W. 11; De Hahn *v.* Hartley, 1 T. R. 343.

Officers and crew.— A warranty that the ship shall sail with a certain number of competent men must be literally complied with. De Hahn *v.* Hartley, 1 T. R. 343. See also Grant *v.* Lexington F., etc., Ins. Co., 5 Ind. 23, 61 Am. Dec. 74; St. Louis Ins. Co. *v.* Glasgow, 8 Mo. 713, 41 Am. Dec. 661. The breach of such a warranty avoids the policy whether the thing warranted is material or not. Grant *v.* Lexington F., etc., Ins. Co., *supra*. A warranty on the margin of a policy, "thirty seamen besides passengers," means thirty persons belonging to the ship's company, including cook, surgeon, boys, etc. Bean *v.* Stupart, Dougl. (3d ed.) 11. The cook is a competent hand, within the meaning of a requirement of a policy on flatboats that they shall be manned with not less than a specified number of competent hands. Grant *v.* Lexington F., etc., Ins. Co., 5 Ind. 23, 61 Am. Dec. 74.

A warranty that a ship has twenty guns is not broken where she has that number of guns, although she has not enough men to man them. Hide *v.* Bruce, 3 Dougl. 213, 26 E. C. L. 146.

Charge of watchman.— A warranty that a vessel shall be in charge of a watchman does not necessarily mean that the watchman shall be on board. Plyer *v.* German-American Ins. Co., 1 N. Y. Suppl. 395 [*reversed* on other grounds in 121 N. Y. 689, 24 N. E. 929].

Captain to hold certificate.—Where a policy of insurance on a ship contained a warranty "that the vessel be commanded by a captain holding a certificate from the American Shipmasters' Association," and where at the loss of the ship the captain had such certificate, of a certain date, which under the rules of the association required its presentation for examination before the date of loss, and, although not so presented, it was unrevoked, the warranty was complied with. McLoon *v.* Commercial Mut. Ins. Co., 100 Mass. 472, 97 Am. Dec. 116, 1 Am. Rep. 129.

Notice of change of masters.— Under a policy providing for notice to the insurers of a change of masters or owners, it is necessary for the owners or their assigns to give notice of every change of masters. Eddy *v.* Tennessee M. & F. Ins. Co., 21 Mo. 587; Tennessee M. & F. Ins. Co. *v.* Scott, 14 Mo. 46. The insurers are entitled to notice of a change of masters, notwithstanding the fact that they have assented to a previous change of both masters and owners. Eddy *v.* Tennessee M. & F. Ins. Co., *supra*.

Vessel under seizure.— Under a warranty that the vessel shall, during the continuance of the policy, be completely found with master, officers, and crew, the policy cannot be avoided because the vessel is not so found while she is laid up under seizure and in the custody of the sheriff. Marigny *v.* Home Mut. Ins. Co., 13 La. Ann. 338, 71 Am. Dec. 511.

Vessel in charge of workmen for repairs.— A stipulation in a policy on a boat that it shall be completely provided with "master, officers and crew" is not broken by placing the boat temporarily in charge of workmen

k. Loading and Carriage of Cargo — (i) *In General.* Warranties in a policy as to the loading and carrying of cargo must be strictly complied with, and a breach will avoid the policy whether they were material or not and whether or not the risk has been increased by the breach.[25]

(ii) *"Lawful" and "Contraband" Goods.* Policies frequently contain a warranty of "no contraband." What goods are contraband is considered elsewhere in this work.[26] Goods contraband of war are "lawful" goods within the meaning of a clause warranting the policy to be on "lawful" goods.[27]

(iii) *Explosive or Extrahazardous Articles.* A warranty not to carry or store explosive or extrahazardous articles does not prohibit the having on board a sufficient quantity of oil for the purpose of oiling the engine of the vessel;[28] but it prevents the carrying of articles which are of that description, although it is customary to carry them in the particular trade for which the vessel is insured.[29]

(iv) *Registered Tonnage.* Breach of a warranty not to load or carry in excess of the net registered tonnage of the vessel will avoid the policy.[30] "Ton-

for the purpose of repairs. St. Louis Ins. Co. *v.* Glasgow, 8 Mo. 713, 41 Am. Dec. 661.

A warranty that orders will be given that the ship shall not cruise must be complied with. Express orders to the captain not to cruise are necessary, and it is not sufficient that there is an implied direction not to cruise by reason of the fact that no orders are given to cruise, or that his orders do not empower him to cruise. Ogden *v.* Ash, 1 Dall. (Pa.) 162, 1 L. ed. 82.

Failure to comply with orders of underwriters.— The rules of an insurance association provided that the managing underwriters should survey each ship insured, in hull and materials, once a year, and order such stores and repairs as they might deem necessary, which stores must be got and repairs done on due notice being given, otherwise the ship should not be insured. The policies were all to be time policies for one year. The effect of not complying with an order of the managing underwriters was that the ship must be considered unseaworthy, and the policy which had before been effected on her void. Steward *v.* Wilson, 7 Jur. 1020, 13 L. J. Exch. 27, 12 M. & W. 11.

25. Sawyer *v.* Coasters' Mut. Ins. Co., 6 Gray (Mass.) 221; Great Western Ins. Co. *v.* Thwing, 13 Wall. (U. S.) 672, 20 L. ed. 607; Maryland Ins. Co. *v.* Leroy, 7 Cranch (U. S.) 26, 3 L. ed. 257; Hartt *v.* Standard Mar. Ins. Co., 22 Q. B. D. 499, 6 Aspin. 368, 58 L. J. Q. B. 284, 60 L. T. Rep. N. S. 649, 37 Wkly. Rep. 366.

A warranty not to carry grain in bulk across the Atlantic is broken if the vessel, at the time when the policy takes effect, is just entering the harbor at the end of a voyage across the Atlantic with such a cargo. Sawyer *v.* Coasters' Mut. Ins. Co., 6 Gray (Mass.) 221.

Taking additional cargo.— A policy will be avoided by breach of a warranty not to take cargo additional to that specified in the policy, whether or not the risk is thereby increased. See Maryland Ins. Co. *v.* Leroy, 7 Cranch (U. S.) 26, 3 L. ed. 257. But where an insurance was declared to be "on the cargo, being 1031 hhds. wine," it was held that this did not amount to a warranty that the wine should constitute the whole cargo and that no other goods should be taken on board. Muller *v.* Thompson, 2 Camph. 610, 12 Rev. Rep. 753.

Property on board.— Where a policy of insurance is "on property on board the boat," etc., and from certain points, this is not a warranty that the property insured is on board at the time of effecting the insurance. Whitney *v.* Haven, 13 Mass. 172.

The words "loading off shore prohibited" in a policy of marine insurance are capable of being construed by the court without the aid of extrinsic evidence, and in the absence of such evidence they are merely intended to prohibit loading while the vessel is lying at anchor away from the shore, and not to prohibit loading at the end of a bridge pier, fifteen hundred feet from shore; but parol evidence of experts is admissible to show that the words have acquired a certain definite and notorious meaning among nautical men, according to which they include loading at a bridge pier. Johnson *v.* Northwestern Nat. Ins. Co., 39 Wis. 87.

Construction of warranty against having negroes on board and not being permitted to enter in consequence thereof see Dickey *v.* United Ins. Co., 11 Johns. (N. Y.) 358.

26. See, generally, War. See also De Peyster *v.* Gardner, 1 Cai. (N. Y.) 492; Seymour *v.* London, etc., Mar. Ins. Co., 1 Aspin. 423, 41 L. J. C. P. 193, 27 L. T. Rep. N. S. 417.

27. Seton *v.* Low, 1 Johns. Cas. (N. Y.) 1.

28. Mitchell *v.* City of London Assur. Co., 15 Ont. App. 262.

29. St. Nicholas Ins. Co. *v.* Merchants' Mut. F. & M. Ins. Co., 83 N. Y. 604 [*reversing* 11 Hun 108].

30. Great Western Ins. Co. *v.* Thwing, 13 Wall. (U. S.) 672, 20 L. ed. 607; Hart *v.* Standard Mar. Ins. Co., 22 Q. B. D. 499, 6 Aspin. 368, 58 L. J. Q. B. 284, 60 L. T. Rep. N. S. 649, 37 Wkly. Rep. 366.

"Iron" and "steel."— A warranty in a marine policy against carrying "iron" in

nage," however, is the capacity of a vessel to carry cargo, and does not cover dunnage, ballast, stores, or equipment;[31] but it has been held that such a warranty is broken if the vessel carries more cargo in weight than such tonnage, even though the excess is used as dunnage.[32] A warranty that a vessel shall not load more than her registered tonnage refers to the vessel's carrying capacity as stated in the ship's papers under which she is sailing at the date of the policy.[33]

l. Against Encumbrances. A warranty against "all liens" is broken if the subject-matter is encumbered with a mortgage, although the policy is payable to the mortgagee.[34]

m. Against Other Insurance. A warranty of "no other insurance" means that there shall be no other insurance on the subject-matter during the continuance of the risk.[35] An insured who warrants that part of the ship's value shall remain uninsured commits no breach of his warranty by taking out further insurance to cover a portion of the original sum insured which he has notice is likely to become ineffective by reason of the insolvency of the underwriters.[36] A warranty against other insurance is not broken by taking out other insurance policies on different property or interests or against a different risk.[37] An overinsurance of the freight to be earned by a voyage or of the cargo is not a breach of warranty by the owner of the vessel not to insure his interest in the vessel, "or any other insurable interest in said interest, during the continuance of the policy," beyond a specified amount.[38] A warranty "not to insure more" refers only to subsequent policies.[39] A warranty against other insurance is not broken by taking out policies which are invalid.[40]

excess of the net registered tonnage was held to be broken by shipping a quantity of steel in excess of the net registered tonnage, as the term "iron" in the warranty included steel. Hart *v.* Standard Mar. Ins. Co., 22 Q. B. D. 499, 6 Aspin. 368, 58 L. J. Q. B. 284, 60 L. T. Rep. N. S. 649, 37 Wkly. Rep. 366.

31. Thwing *v.* Great Western Ins. Co., 103 Mass. 401, 4 Am. Rep. 567; Great Western Ins. Co. *v.* Thwing, 13 Wall. (U. S.) 672, 20 L. ed. 607.

32. Great Western Ins. Co. *v.* Thwing, 13 Wall. (U. S.) 672, 20 L. ed. 607. To the contrary, however, see Thwing *v.* Great Western Ins. Co., 103 Mass. 401, 4 Am. Rep. 567.

33. Reck *v.* Phenix Ins. Co., 130 N. Y. 160, 29 N. E. 137.

34. Bidwell *v.* Northwestern Ins. Co., 19 N. Y. 179, 24 N. Y. 302.

35. Butler *v.* Merchants' Mar. Ins. Co., Cass. Dig. (Can.) 221 [*affirming* 17 Nova Scotia 301].

Double insurance in absence of warranty see *supra*, IV, B, 8.

36. Trieste Gen. Ins. Co. *v.* Cory, [1897] 1 Q. B. 335, 66 L. J. Q. B. 313.

37. Davis *v.* Boardman, 12 Mass. 80 (holding that where insurance was effected for three thousand dollars on a ship and one thousand dollars on her cargo from the United States to Ireland, and at the foot of the policy was a memorandum that if the "vessel and cargo" should be insured in England, the policy should be canceled, the underwriter was liable as insurer of the cargo notwithstanding the fact that insurance was made in England on the vessel); Roddick *v.* Indemnity Mut. Mar. Ins. Co., [1895] 2 Q. B. 380, 8 Aspin. 24, 64 L. J. Q. B. 733, 72 L. T. Rep. N. S. 860, 14 Reports 516, 44 Wkly. Rep. 27 [*affirming* [1895] 1 Q. B. 836, 64 L. J. Q. B. 423] (holding that a warranty against other insurance in a time policy on the "hull and machinery" of a steamship was not broken by further insurances upon "disbursements," as the subject-matter of the insurances was different). And see *supra*, IV, B, 8, a.

Other insurance by different interest unknown to insured.— Where a consignor of a vessel effected an insurance on the freight, with the warranty, "no other insurance," and the consignee, who had accepted a draft against such freight, without instructions from the consignor, effected another insurance on the freight at the place of destination, it was held that this last insurance would not be considered a violation of the warranty contained in the former. Williams *v.* Crescent Mut. Ins. Co., 15 La. Ann. 651.

38. Merchants' Mut. Ins. Co. *v.* Allen, 122 U. S. 376, 7 S. Ct. 1248, 30 L. ed. 1209.

39. Where insurance was effected for eleven thousand dollars, with warranty not to insure more, on account of the owners of a schooner two of whom effected another insurance for ten thousand dollars with similar warranty, it was held that the warranties related to subsequent policies only, and, as a breach of warranty had made the former void, the last insurance was valid. Mussey *v.* Atlas Mut. Ins. Co., 14 N. Y. 79.

40. Knight *v.* Eureka F. & M. Ins. Co., 26 Ohio St. 664, 20 Am. Rep. 778, holding that a warranty against other insurance was not broken by further insurance taken out by an unauthorized agent, whose act had not been ratified.

Payment under invalid insurance.— The fact that the amount of an invalid policy of

n. To Report Risks Under Open Policy. A breach of a warranty in an open policy to report all risks as soon as known gives the underwriter the option of avoiding the policy as an entirety and not merely as to risks not reported.[41]

6. Implied Warranties — a. Seaworthiness — (i) *Voyage Policies* — (A) *In General.* In every voyage policy of marine insurance there is an implied warranty that the vessel is in all respects seaworthy.[42]

(B) *On Cargo, Freight, Etc.* This implied warranty of seaworthiness is not limited to cases of insurance upon vessels but applies equally to insurances on cargo, freight, and other subjects of marine insurance.[43] It has been held, how-

insurance is paid by the insurer does not make the taking out of such policy a breach of a warranty against other insurance. Knight *v.* Eureka F. & M. Ins. Co., 26 Ohio St. 664, 20 Am. Rep. 778.

"Honor" policies.— In Roddick *v.* Indemnity Mut. Mar. Ins. Co., [1895] 1 Q. B. 836, 64 L. J. Q. B. 423, it was said that honor policies were sufficient to constitute a breach of warranty against other insurance, although such policies were void at law under 19 Geo. II, c. 37, so that no recovery could be had thereon at law. In the same case on appeal a contrary opinion was expressed by Smith, L. J., although the point was not decided, a decision thereon being unnecessary. Roddick *v.* Indemnity Mut. Mar. Ins. Co., [1895] 2 Q. B. 380, 387, 64 L. J. Q. B. 733, 72 L. T. Rep. N. S. 860, 14 Reports 516, 44 Wkly. Rep. 27.

Other insurance canceled.— By the usual clause in policies as to prior insurances the underwriter is exonerated if prior insurances to the full value of the vessel and cargo have been actually made by the assured on the same voyage and are in full force at the time, although by a subsequent agreement between the assured and such prior underwriter, before the risk is commenced, the prior policies are canceled. Seamans *v.* Lowring, 21 Fed. Cas. No. 12,583, 1 Mason 127.

41. Camors *v.* Union Mar. Ins. Co., 104 La. 349, 28 So. 926, 81 Am. St. Rep. 128. See also *supra*, IV, A, 4, d, (III), (IV).

42. *Louisiana.*— Whitney *v.* Ocean Ins. Co., 14 La. 485, 33 Am. Dec. 595.

Massachusetts.— Copeland *v.* New England Mar. Ins. Co., 2 Metc. 432; Paddock *v.* Franklin Ins. Co., 11 Pick. 227; Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56; Taylor *v.* Lowell, 3 Mass. 331, 3 Am. Dec. 141.

New York.—Van Wickle *v.* Mechanics', etc., Ins. Co., 97 N. Y. 350; Draper *v.* Commercial Ins. Co., 21 N. Y. 378; Talcot *v.* Commercial Ins. Co., 2 Johns. 124, 3 Am. Dec. 406; Patrick *v.* Hallet, 1 Johns. 241; Barnewall *v.* Church, 1 Cai. 217, 2 Am. Dec. 180.

United States.— Long Dock Mills, etc., Co. *v.* Mannheim Ins. Co., 116 Fed. 886 [*affirmed* in 123 Fed. 861, 59 C. C. A. 668]; Guy *v.* Citizens' Mut. Ins. Co., 30 Fed. 695; Seaman *v.* Enterprise F. & M. Ins. Co., 21 Fed. 778; Higgie *v.* American Lloyds, 14 Fed. 143, 11 Biss. 395.

England.—Greenock Steamship Co. *v.* Maritime Ins. Co., [1903] 1 K. B. 367, 9 Aspin. 364, 8 Com. Cas. 78, 72 L. J. K. B. 59, 88 L. T. Rep. N. S. 207, 51 Wkly. Rep. 447 [*affirmed* in [1903] 2 K. B. 657, 9 Aspin. 463, 9 Com. Cas. 41, 72 L. J. K. B. 868, 89 L. T. Rep. N. S. 200, 52 Wkly. Rep. 186]; Turnbull *v.* Janson, 3 Aspin. 433, 36 L. T. Rep. N. S. 635; Burges *v.* Wickham, 3 B. & S. 669, 33 L. J. Q. B. 17, 8 L. T. Rep. N. S. 47, 11 Wkly. Rep. 992, 113 E. C. L. 669; Bouillon *v.* Lupton, 15 C. B. N. S. 113, 10 Jur. N. S. 422, 33 L. J. C. P. 37, 8 L. T. Rep. N. S. 575, 11 Wkly. Rep. 966, 109 E. C. L. 113; Dixon *v.* Sadler, 9 L. J. Exch. 48, 5 M. & W. 405 [*affirmed* in 11 L. J. Exch. 435, 8 M. & W. 895]; Clapham *v.* Langton, 34 L. J. Q. B. 46, 10 L. T. Rep. N. S. 875, 12 Wkly. Rep. 1011; Commercial Mar. Ins. Co. *v.* Namaqua Min. Co., 5 L. T. Rep. N. S. 504, 14 Moore P. C. 471, 10 Wkly. Rep. 136, 15 Eng. Reprint 383.

Canada.— Lemelin *v.* Montreal Assur. Co., 1 Quebec 337.

See 28 Cent. Dig. tit. "Insurance," § 583 *et seq.*

43. *Louisiana.*— Donnally *v.* Merchants' Mut. Ins. Co., 28 La. Ann. 939, 26 Am. Rep. 129; McCargo *v.* Merchants' Ins. Co., 10 Rob. 334; Dupeyre *v.* Western M. & F. Ins. Co., 2 Rob. 457, 38 Am. Dec. 218.

Maine.— Dodge *v.* Boston Mar. Ins. Co., 85 Me. 215, 27 Atl. 105.

Maryland.— Field *v.* Insurance Co. of North America, 3 Md. 244.

Massachusetts.— Starbuck *v.* New England Mar. Ins. Co., 19 Pick. 198; Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56; Porter *v.* Bussey, 1 Mass. 436.

New York.—Van Wickle *v.* Mechanics', etc., Ins. Co., 97 N. Y. 350 [*affirming* 48 N. Y. Super. Ct. 95]; Van Valkenburgh *v.* Astor Mut. Ins. Co., 1 Bosw. 61; Moses *v.* Sun Mut. Ins. Co., 1 Duer 159; Treadwell *v.* Union Ins. Co., 6 Cow. 270; Talcot *v.* Marine Ins. Co., 2 Johns. 130; Talcot *v.* Commercial Ins. Co., 2 Johns. 124, 3 Am. Dec. 406; Barnewall *v.* Church, 1 Cai. 217, 2 Am. Dec. 180; Warren *v.* United Ins. Co., 2 Johns. Cas. 231, 1 Am. Dec. 164.

South Carolina.— Ingraham *v.* South Carolina Ins. Co., 2 Treadw. 707; Hudson *v.* Williamson, 1 Treadw. 360, 3 Brev. 342.

England.— Knill *v.* Hooper, 2 H. & N. 277, 26 L. J. Exch. 377, 5 Wkly. Rep. 791; Oliver *v.* Cowley, 1 Park Ins. 470; Le Cheminant *v.* Pearson, 4 Taunt. 367, 13 Rev. Rep. 636.

See 28 Cent. Dig. tit. "Insurance," § 583 *et seq.*

Statutory provision.—Cal. Civ. Code, § 2681.

An insurance on a floating dock implies a warranty that the dock is seaworthy and fit

ever, that there is no implied warranty that the cargo is fit to encounter the ordinary vicissitudes of the voyage.[44]

(c) *Conveyances Used in Loading and Discharging.* Where the insurance is on goods "until safely landed" and the mode of landing is by lighters, there is no warranty that the lighters will be seaworthy for that purpose.[45]

(ii) *Time Policies* — (a) *In the United States.* In the United States there is some difference of opinion as to the exact extent of the warranty of seaworthiness in policies on time. The better doctrine seems to be that if the vessel is in port at the time of the commencement of the risk there is an implied warranty that the vessel is seaworthy for the port risk and before sailing will be made seaworthy for the voyage.[46] But if the vessel is at sea there is no implied warranty that she is then seaworthy.[47] Nor is there a warranty that the vessel will be seaworthy at the commencement of each stage.[48] In some jurisdictions the warranty extends to an implied undertaking on the part of the insured to use due diligence to maintain the vessel in a seaworthy state during the continuance of the policy.[49] In Illinois the courts do not recognize any implied warranty of seaworthiness in this class of policies.[50] By statute in California there is in every time policy an implied warranty that the ship is seaworthy at the commencement of each stage.[51]

(b) *In England and Canada.* In England there is no implied warranty of seaworthiness where the policy is on time, either at the commencement of the risk or at any subsequent period.[52] The same rule prevails in Canada.[53]

(iii) *Open or Running Policies.* An open or running cargo policy also contains an implied warranty that the vessel upon which the insured goods will be shipped is seaworthy.[54]

for the work for which it is designed. Marcy *v.* Sun Ins. Co., 11 La. Ann. 748.

A raft when insured must be fit to encounter the ordinary perils of the adventure. Moores *v.* Louisville Underwriters, 14 Fed. 226.

On salved property.—The implied warranty of seaworthiness extends to an insurance upon salved property. Knill *v.* Hooper, 2 H. & N. 277, 26 L. J. Exch. 377, 5 Wkly. Rep. 791.

It is the practice of underwriters to pay cargo losses to innocent shippers of cargo. Brooking *v.* Mandslay, 38 Ch. D. 636, 6 Aspin. 296, 57 L. J. Ch. 1001, 58 L. T. Rep. N. S. 852, 36 Wkly. Rep. 664.

44. Koebel *v.* Saunders, 17 C. B. N. S. 71, 10 Jur. N. S. 920, 33 L. J. C. P. 310, 10 L. T. Rep. N. S. 695, 12 Wkly. Rep. 1106, 112 E. C. L. 71.

45. Lane *v.* Nixon, L. R. 1 C. P. 412, 12 Jur. N. S. 392, 35 L. J. C. P. 243, 14 Wkly. Rep. 641. *Compare* Van Valkenburgh *v.* Astor Mut. Ins. Co., 1 Bosw. (N. Y.) 61.

46. *Connecticut.*— Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240.

Massachusetts.— Hoxie *v.* Pacific Mut. Ins. Co., 7 Allen 211.

New York.— American Ins. Co. *v.* Ogden, 20 Wend. 287.

Pennsylvania.— Dallam *v.* Insurance Co., 6 Phila. 15.

United States.— Rouse *v.* Insurance Co., 20 Fed. Cas. No. 12,089, 3 Wall. Jr. 367.

See 28 Cent. Dig. tit. "Insurance," § 583 *et seq.*

47. Macy *v.* Mutual Mar. Ins. Co., 12 Gray (Mass.) 497; Capen *v.* Washington Ins. Co., 12 Cush. (Mass.) 517; Hathaway *v.* Sun Mut. Ins. Co., 8 Bosw. (N. Y.) 33; Jones *v.* Insurance Co., 13 Fed. Cas. No. 7,470; Rouse *v.* Insurance Co., 20 Fed. Cas. No. 12,089, 3 Wall. Jr. 367.

48. Capen *v.* Washington Ins. Co., 12 Cush. (Mass.) 517; American Ins. Co. *v.* Ogden, 20 Wend. (N. Y.) 287; Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 497.

49. Cleveland *v.* Union Ins. Co., 8 Mass. 308; Berwind *v.* Greenwich Ins. Co., 114 N. Y. 231, 21 N. E. 151; Starbuck *v.* Phœnix Ins. Co., 34 N. Y. App. Div. 293, 54 N. Y. Suppl. 293; Starbuck *v.* Phenix Ins. Co., 10 N. Y. App. Div. 198, 41 N. Y. Suppl. 901.

50. Merchants' Ins. Co. *v.* Morrison, 62 Ill. 242, 14 Am. Rep. 93.

51. Cal. Civ. Code, § 2683; Pope *v.* Swiss Lloyd Ins. Co., 4 Fed. 153, 6 Sawy. 533.

52. Dudgeon *v.* Pembroke, 2 App. Cas. 284, 3 Aspin. 393, 46 L. J. Q. B. 409, 36 L. T. Rep. N. S. 382, 25 Wkly. Rep. 499; Barker *v.* Janson, L. R. 3 C. P. 303, 37 L. J. C. P. 105, 17 L. T. Rep. N. S. 473, 16 Wkly. Rep. 399; Turnbull *v.* Janson, 3 Aspin. 433, 36 L. T. Rep. N. S. 635; Michael *v.* Tredwin, 17 C. B. 551, 25 L. J. C. P. 83, 84 E. C. L. 551; Gibson *v.* Small, 1 C. L. R. 363, 4 H. L. Cas. 353, 17 Jur. 1131, 10 Eng. Reprint 499; Fawcus *v.* Sarsfield, 6 E. & B. 192, 2 Jur. N. S. 665, 25 L. J. Q. B. 249, 88 E. C. L. 192; Thompson *v.* Hopper, 6 E. & B. 172, 88 E. C. L. 172; Thompson *v.* Hopper, E. B. & E. 1038, 27 L. J. Q. B. 441, 6 Wkly. Rep. 857, 96 E. C. L. 1038.

53. Phœnix Ins. Co. *v.* Anchor Ins. Co., 4 Ont. 524.

54. Orient Mut. Ins. Co. *v.* Wright, 23 How. (U. S.) 401, 16 L. ed. 524.

(IV) *Requisites of Seaworthiness* — (A) *In General.* To comply with the implied warranty of seaworthiness the vessel must be in a fit state as to repair, equipment, crew, and in all other respects to perform the voyage insured and to encounter the ordinary perils.[55] A perfect vessel or one impervious to the assaults of the elements is not required.[56] The best and most skilful form of construction is not required but only sufficient for the kind of vessels insured and the service in which they are employed.[57]

(B) *Hull.* The hull must be sufficiently tight, staunch, and strong to resist the ordinary action of the winds and waves.[58]

(C) *Equipment and Appliances.* The vessel must have equipment and appliances commensurate and appropriate to the voyage and trade in which it is engaged;[59] and these must be in proper condition.[60] What are proper equipments and appliances must be determined according to the general custom of the port or country to which the vessel belongs.[61] The vessel must have sufficient ballast,[62] proper and sufficient dunnage,[63] cables, and anchors[64] for the voyage.

(D) *Fuel, Stores, and Provisions.* Sufficient fuel to last for the ordinary length of the voyage is requisite to the seaworthiness of the vessel;[65] and stores, provisions, and water for all persons lawfully on board must be on board at the commencement of the voyage.[66] Fodder reasonably sufficient to supply the live stock on board for the expected duration of the voyage is also requisite.[67]

(E) *Loading and Stowage.* The cargo must be properly loaded, stowed, dunnaged, and secured, so as not to imperil the navigation of the vessel or to cause

55. Whitney *v.* Ocean Ins. Co., 14 La. 485, 33 Am. Dec. 595; Capen *v.* Washington Ins. Co., 12 Cush. (Mass.) 517; Guy *v.* Citizens' Mut. Ins. Co., 30 Fed. 695; The Titania, 19 Fed. 101; The Orient, 16 Fed. 916, 4 Woods 255 [*affirmed* in 123 U. S. 67, 8 S. Ct. 68, 31 L. ed. 63]; Williams *v.* New England Ins. Co., 29 Fed. Cas. No. 17,731, 3 Cliff. 244; Daniels *v.* Harris, L. R. 10 C. P. 1, 2 Aspin. 413, 44 L. J. C. P. 1, 31 L. T. Rep. N. S. 408, 23 Wkly. Rep. 86; Bouillon *v.* Lupton, 15 C. B. N. S. 113, 10 Jur. N. S. 422, 33 L. J. C. P. 37, 8 L. T. Rep. N. S. 575, 11 Wkly. Rep. 966, 109 E. C. L. 113; Dixon *v.* Sadler, 9 L. J. Exch. 48, 5 M. & W. 405 [*affirmed* in 11 L. J. Exch. 435, 8 M. & W. 895]; Commercial Mar. Ins. Co. *v.* Namaqua Min. Co., 5 L. T. Rep. N. S. 504, 14 Moore P. C. 471, 10 Wkly. Rep. 136, 15 Eng. Reprint 383; and other cases cited *supra*, VII, E, 6, a, (I), (II), (A).

Secure from capture.— A vessel to be seaworthy must be rendered as secure as possible from capture. Wedderburn *v.* Bell, 1 Campb. 1, 10 Rev. Rep. 615.

56. Cleveland, etc., Transit Co. *v.* Insurance Co. of North America, 115 Fed. 431.

57. Moores *v.* Louisville Underwriters, 14 Fed. 226.

58. Marcy *v.* Sun Ins. Co., 11 La. Ann. 748; Bullard *v.* Roger Williams Ins. Co., 4 Fed. Cas. No. 2,122, 1 Curt. 148.

59. Myers *v.* Girard Ins. Co., 26 Pa. St. 192; Rouse *v.* Insurance Co., 20 Fed. Cas. No. 12,089, 3 Wall. Jr. 367.

Storm sails have been held requisite. Wedderburn *v.* Bell, 1 Campb. 1, 10 Rev. Rep. 615.

Carriage of live stock.— Ventilation for live stock must be provided, also a sufficient number of men to attend the cattle on board. Sleigh *v.* Tyser, [1900] 2 Q. B. 333, 9 Aspin. 97, 5 Com. Cas. 271, 69 L. J. Q. B. 626, 82 L. T. Rep. N. S. 804.

60. Marcy *v.* Sun Ins. Co., 11 La. Ann. 748; Flint, etc., Co. *v.* Marine Ins. Co., 71 Fed. 210; Wilkie *v.* Geddes, 3 Dow 57, 15 Rev. Rep. 17, 3 Eng. Reprint 988; Quebec Mar. Ins. Co. *v.* Commercial Bank, 7 Moore C. P. N. S. 1, 17 Eng. Reprint 1 [*reversing* 13 L. C. Jur. 267].

61. Tidmarsh *v.* Washington F. & M. Ins. Co., 23 Fed. Cas. No. 14,024, 4 Mason 439.

62. Merchants' Mut. Ins. Co. *v.* Sweet, 6 Wis. 670.

63. Hoggarth *v.* Walker, [1900] 2 Q. B. 283, 9 Aspin. 84, 5 Com. Cas. 292, 69 L. J. Q. B. 634, 82 L. T. Rep. N. S. 744, 48 Wkly. Rep. 545.

Dunnage mats are requisite for a vessel employed in the grain trade. Hoggarth *v.* Walker, [1900] 2 Q. B. 283, 9 Aspin. 84, 5 Com. Cas. 292, 69 L. J. Q. B. 634, 82 L. T. Rep. N. S. 744, 48 Wkly. Rep. 545.

64. Lawton *v.* Royal Canadian Ins. Co., 50 Wis. 163, 6 N. W. 505; Pope *v.* Swiss Lloyd Ins. Co., 4 Fed. 153, 6 Sawy. 533; Wilkie *v.* Geddes, 3 Dow 57, 15 Rev. Rep. 17, 3 Eng. Reprint 988.

65. Fontaine *v.* Phœnix Ins. Co., 10 Johns. (N. Y.) 58; Greenock Steamship Co. *v.* Maritime Ins. Co., [1903] 1 K. B. 367, 9 Aspin. 364, 8 Com. Cas. 78, 72 L. J. K. B. 59, 88 L. T. Rep. N. S. 207, 51 Wkly. Rep. 447 [*affirmed* in [1903] 2 K. & B. 657, 9 Aspin. 463, 9 Com. Cas. 41, 72 L. J. K. B. 868, 89 L. T. Rep. N. S. 200, 52 Wkly. Rep. 186.

66. Fontaine *v.* Phœnix Ins. Co., 10 Johns. (N. Y.) 58.

67. The Pomeranian, [1895] P. 349, 65 L. J. Adm. 39.

injury to the vessel or cargo.[68] Carrying a deck cargo does not necessarily render a vessel unseaworthy.[69]

(F) *Officers and Crew.*[70] To render the vessel seaworthy it is necessary that she shall have on board a sufficient number of competent men.[71] The master must be a man of skill, prudence, discretion, and integrity, with ability to navigate the vessel on the insured voyage,[72] and it seems that there should

68. Leitch *v.* Atlantic Mut. Ins. Co., 66 N. Y. 100; Anderson Lumber Co. *v.* Greenwich Ins. Co., 79 Fed. 125. But see Georgia Ins., etc., Co. *v.* Dawson, 2 Gill (Md.) 365, where a recovery was permitted by a cargo owner whose cargo had not been properly stowed or dunnaged.

According to usage.— Stowage according to custom and usage and the best judgment of experienced persons is sufficient to protect the ship from the charge of negligence as against insurers. Leitch *v.* Atlantic Mut. Ins. Co., 66 N. Y. 100; The Titania, 19 Fed. 101.

Depends on capacity of vessel whether overladen, not on depth of water.— If a steamboat or other vessel be overloaded or unduly laden, she is unseaworthy; but whether or not she is unduly laden depends upon the capacity of the boat or vessel, not upon the depth of water upon the shoals and bars in the river in which she is navigated. Reference is to be had to the capacity of the craft, and not to the capacity of the river, in deciding that question. Cincinnati Mut. Ins. Co. *v.* May, 20 Ohio 211.

Readily curable defect in loading.— A ship ought not to be treated as unseaworthy by reason of something objectionable, but easily curable by those on board. Hossen *v.* Union Mar. Ins. Co., [1901] A. C. 362, 9 Aspin. 167, 70 L. J. P. C. 34, 84 L. T. Rep. N. S. 366. See also Deblois *v.* Ocean Ins. Co., 16 Pick. (Mass.) 303, 28 Am. Dec. 245; Chase *v.* Eagle Ins. Co., 5 Pick. (Mass.) 51; Weir *v.* Aberdeen, 2 B. & Ald. 320, 20 Rev. Rep. 450.

69. Wilson *v.* Rankin, L. R. 1 Q. B. 162, 35 L. J. Q. B. 87, 13 L. T. Rep. N. S. 564, 14 Wkly. Rep. 198; Daniels *v.* Harris, L. R. 10 C. P. 1, 2 Aspin. 413, 44 L. J. C. P. 1, 31 L. T. Rep. N. S. 408, 23 Wkly. Rep. 86.

70. **Express warranty** see *supra*, VII, E, 5, j.

71. *Florida.*— Schultz *v.* Pacific Ins. Co., 14 Fla. 73.

Louisiana.— Caldwell *v.* Western M. & F. Ins. Co., 19 La. 42, 36 Am. Dec. 667.

Massachusetts.— Copeland *v.* New England Mar. Ins. Co., 2 Metc. 432.

New York.— Silva *v.* Low, 1 Johns. Cas. 184.

England.— Phillips *v.* Headlam, 2 B. & Ad. 380, 9 L. J. K. B. O. S. 238, 22 E. C. L. 163; Bush *v.* Royal Exch. Assur. Co., 2 B. & Ald. 73, 20 Rev. Rep. 350; Forshaw *v.* Chabert, 3 B. & B. 158, 6 Moore C. P. 369, 23 Rev. Rep. 596, 7 E. C. L. 659; Shore *v.* Bentall, 7 B. & C. 798 note, 1 M. & R. 111, 31 Rev. Rep. 302 note, 14 E. C. L. 357; Clifford *v.* Hunter, 3 C. & P. 16, M. & M. 103, 14 E. C. L. 427.

See 28 Cent. Dig. tit. "Insurance," § 587.

The occasional absence of the crew upon other duties during the voyage will not avoid a policy of insurance for unseaworthiness. Caldwell *v.* Western M. & F. Ins. Co., 19 La. 42, 36 Am. Dec. 667. Where the assured have once provided a sufficient crew, the negligent absence of all the crew at the time of the loss is no breach of the implied warranty that the ship should be properly manned. Busk *v.* Royal Exch. Assur. Co., 2 B. & Ald. 73, 20 Rev. Rep. 350.

Vessel laid up.— A policy on a vessel will not be forfeited by the fact that she had not a captain or crew on board when laid up. Bell *v.* Firemen's Ins. Co., 5 Rob. (La.) 446; Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542; Marigny *v.* Home Mut. Ins. Co., 13 La. Ann. 338, 71 Am. Dec. 511.

A night crew on a run to be made wholly by daylight is not necessary. Louisville Ins. Co. *v.* Monarch, 99 Ky. 578, 36 S. W. 563, 18 Ky. L. Rep. 444.

Insufficient crew.—A captain and one hand were held to be insufficient to undertake to sail a schooner of thirty-five tons burden and having three sails from New York to North Carolina. Dow *v.* Smith, 1 Cai. (N. Y.) 32.

An engineer ignorant of the management of boilers in salt water is not competent. Quebec Mar. Ins. Co. *v.* Commercial Bank, 7 Moore P. C. N. S. 1, 17 Eng. Reprint 1.

A ship's carpenter is not necessary to the proper manning of a vessel even on transatlantic voyages. Walsh *v.* Washington Mar. Ins. Co., 3 Rob. (N. Y.) 202 [*affirmed* in 32 N. Y. 427].

72. *Maryland.*— Riggin *v.* Patapsco Ins. Co., 7 Harr. & J. 279, 16 Am. Dec. 302.

Massachusetts.— Stocker *v.* Merrimack M. & F. Ins. Co., 6 Mass. 220.

New York.— Draper *v.* Commercial Ins. Co., 21 N. Y. 378.

United States.— McLanahan *v.* Universal Ins. Co., 1 Pet. 170, 7 L. ed. 98; Howland *v.* Marine Ins. Co., 12 Fed. Cas. No. 6,798, 2 Cranch C. C. 474.

England.— Phillips *v.* Headlam, 2 B. & Ad. 380, 9 L. J. K. B. O. S. 238, 22 E. C. L. 163; Clifford *v.* Hunter, 3 C. & P. 16, M. & M. 103, 14 E. C. L. 427; Tait *v.* Levi, 14 East 481, 13 Rev. Rep. 289.

That the registered master is incompetent does not render the vessel unseaworthy if she is actually under the direction of a competent person appointed by the owner to take charge of her. Drapsr *v.* Commercial Ins. Co., 21 N. Y. 378.

The master's becoming incompetent to command the vessel at a foreign port on a voyage out and home does render the vessel

also be on board a person who is competent to take the master's place in case of the latter's incapacity.[73]

(G) *Pilots.* Where the persons on board are not fully competent[74] to navigate the vessel in the harbors and inland channels which the vessel enters during the course of the voyage it is a breach of the warranty of seaworthiness if a competent pilot is not taken on board,[75] if by the exercise of reasonable diligence one can be obtained.[76] That the pilot is unlicensed does not render the vessel *prima facie* unseaworthy.[77]

(V) *Statutory Regulations.* The question whether a vessel is seaworthy is to be determined without reference to statutory regulations.[78]

(VI) *Relative Term*—(A) *In General.* Seaworthiness is a relative term depending on the nature of the ship, the voyage, and the trade in which it is engaged,[79] but not upon the amount of premium.[80]

(B) *Dependent on Voyage.* The same sufficiency is not required of a vessel while in port as on commencing a voyage, and it is enough that the state of the ship be commensurate with the risk at that time. The ship being sufficient to encounter the ordinary perils of the port, repairs, equipment, and crew necessary for the voyage may be added at any time prior to sailing.[81] But while a vessel is in port she must be in such a condition as to enable her to lie in reasonable security until she is properly repaired and equipped for the voyage.[82] A vessel, although not adequate for ocean traffic, may be entirely sufficient for inland or river navigation; but if a vessel sufficient only for river navigation sails upon a lake or ocean voyage there is a breach of warranty.[83]

(C) *Dependent on Cargo.* The seaworthiness of a vessel is also to be deter-

unseaworthy. Copeland *v.* New England Mar. Ins. Co., 2 Metc. (Mass.) 432.

73. Clifford *v.* Hunter, 3 C. & P. 16, M. & M. 103, 14 E. C. L. 427.

74. Flanigen *v.* Washington Ins. Co., 7 Pa. St. 306.

75. McDowell *v.* General Mut. Ins. Co., 7 La. Ann. 684, 56 Am. Dec. 619; Whitney *v.* Ocean Ins. Co., 14 La. 485, 33 Am. Dec. 595.

Loss outside of pilot ground.—Where a vessel entering Charleston harbor did not employ a pilot, and a loss happened, but at a point where the pilot is usually dismissed, it was held that the assured might recover. McMillan *v.* Union Ins. Co., Rice (S. C.) 248, 33 Am. Dec. 112. See also Cox *v.* Charleston F. & M. Ins. Co., 3 Rich. (S. C.) 331, 45 Am. Dec. 771.

76. McDowell *v.* General Mut. Ins. Co., 7 La. Ann. 684, 56 Am. Dec. 619; American Ins. Co. *v.* Ogden, 20 Wend. (N. Y.) 287; Peters *v.* Phœnix Ins. Co., 3 Serg. & R. (Pa.) 25; Phillips *v.* Headlam, 2 B. & Ad. 380, 9 L. J. K. B. O. S. 238, 22 E. C. L. 163.

77. Borland *v.* Mercantile Mut. Ins. Co., 46 N. Y. Super. Ct. 433; Keeler *v.* Fireman's Ins. Co., 3 Hill (N. Y.) 250; Hathaway *v.* St. Paul F. & M. Ins. Co., 1 Fed. 197, 1 McCrary 25.

78. Deshon *v.* Merchants' Ins. Co., 11 Metc. (Mass.) 199; Warren *v.* Manufacturers' Ins. Co., 13 Pick. (Mass.) 518, 25 Am. Dec. 341; Flanigen *v.* Washington Ins. Co., 7 Pa. St. 306; Wilson *v.* Rankin, L. R. 1 Q. B. 162, 35 L. J. Q. B. 87, 13 L. T. Rep. N. S. 564, 14 Wkly. Rep. 198.

79. Swift *v.* Union Mut. Mar. Ins. Co., 122 Mass. 573; Cobb *v.* New England Mut. Mar. Ins. Co., 6 Gray (Mass.) 192; Draper *v.* Commercial Ins. Co., 21 N. Y. 378; Daniels *v.* Harris, L. R. 10 C. P. 1, 2 Aspin. 413, 44 L. J. C. P. 1, 31 L. T. Rep. N. S. 408, 23 Wkly. Rep. 86; Burges *v.* Wickham, 3 B. & S. 669, 33 L. J. Q. B. 17, 8 L. T. Rep. N. S. 47, 11 Wkly. Rep. 992, 113 E. C. L. 669; Knill *v.* Hooper, 2 H. & N. 277, 26 L. J. Exch. 377, 5 Wkly. Rep. 791; Clapham *v.* Langton, 34 L. J. Q. B. 46, 10 L. T. Rep. N. S. 875, 12 Wkly. Rep. 1011.

80. Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240.

81. Cobb *v.* New England Mut. Mar. Ins. Co., 6 Gray (Mass.) 192; Taylor *v.* Lowell, 3 Mass. 331, 3 Am. Dec. 141; Hicks *v.* Merchant's, etc., Ins. Co., 2 Ohio Cir. Ct. 82, 1 Ohio Cir. Dec. 374; McLanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98; Cruder *v.* Pennsylvania Ins. Co., 6 Fed. Cas. No. 3,452, 2 Wash. 339; Williams *v.* New England Ins. Co., 39 Fed. Cas. No. 17,731, 3 Cliff. 244; Bouillon *v.* Lupton, 15 C. B. N. S. 113, 10 Jur. N. S. 422, 33 L. J. C. P. 37, 8 L. T. Rep. N. S. 575, 11 Wkly. Rep. 966, 109 E. C. L. 113; Commercial Mar. Ins. Co. *v.* Namaqua Min. Co., 5 L. T. Rep. N. S. 504, 14 Moore P. C. 471, 10 Wkly. Rep. 136, 15 Eng. Reprint 383; Forbes *v.* Wilson, 1 Park Ins. 472; Annen *v.* Woodman, 3 Taunt. 299, 12 Rev. Rep. 663.

82. Parmeter *v.* Cousins, 2 Campb. 235, 11 Rev. Rep. 702.

83. Thebaud *v.* Phœnix Ins. Co., 52 Hun (N. Y.) 495, 5 N. Y. Suppl. 619; Turnbull *v.* Janson, 3 Aspin. 433, 36 L. T. Rep. N. S. 635; Gillespie *v.* British America F., etc., Assur. Co., 7 U. C. Q. B. 108.

mined with regard to the nature of the cargo which she undertakes to transport, the requirement being that she is reasonably capable of safely conveying the cargo to its port of destination.[84]

(VII) *Duration of Warranty*—(A) *When Attaches.* The warranty of seaworthiness has application to the commencement of the risk and each stage thereof.[85] Unseaworthiness prior to the time of the attaching of the risk does not affect the insurance.[86] Where the policy is restrospective, seaworthiness at the time of making the insurance is not a necessary condition.[87]

(B) *Continuance.* There is no implied warranty that the vessel will remain in a seaworthy condition throughout the life of the policy.[88] It is, however, the duty of the master to use reasonable diligence to keep the vessel seaworthy,[89] although the underwriter is not relieved from liability under the policy because of the failure of the master to perform his duty in this respect unless the loss results therefrom.[90]

84. Schultz *v.* Pacific Ins. Co., 14 Fla. 73; Sleigh *v.* Tyser, [1900] 2 Q. B. 333, 9 Aspin. 97, 5 Com. Cas. 271, 69 L. J. Q. B. 626, 82 L. T. Rep. N. S. 804.

85. Garrigues *v.* Coxe, 1 Binn. (Pa.) 592, 2 Am. Dec. 493; Watson *v.* Clark, 1 Dow 336, 14 Rev. Rep. 73, 3 Eng. Reprint 720; Quebec Mar. Ins. Co. *v.* Commercial Bank, 7 Moore P. C. N. S. 1, 17 Eng. Reprint 1 [*reversing* 13 L. C. Jur. 267].

86. Under a policy "At and from North Carolina" it is sufficient if the vessel is seaworthy when she passes the boundary line of the state. Treadwell *v.* Union Ins. Co., 6 Cow. (N. Y.) 270.

87. Anchor Mar. Ins. Co. *v.* Keith, 9 Can. Sup. Ct. 483.

88. *Massachusetts.*—Copeland *v.* New England Mar. Ins. Co., 2 Metc. 432; Starbuck *v.* New England Mar. Ins. Co., 19 Pick. 198; Paddock *v.* Franklin Ins. Co., 11 Pick. 227.

Pennsylvania.— Peters *v.* Phœnix Ins. Co., 3 Serg. & R. 25; Garrigues *v.* Coxe, 1 Binn. 592, 2 Am. Dec. 493.

Texas.— Marine F. Ins. Co. *v.* Burnett, 29 Tex. 433.

United States.— Donnell *v.* Columbian Ins. Co., 9 Fed. Cas. No. 3,987, 2 Sumn. 366.

England.— Holdsworth *v.* Wise, 7 B. & C. 794, 6 L. J. K. B. O. S. 134, 1 M. & R. 673, 31 Rev. Rep. 299, 14 E. C. L. 355; Watson *v.* Clark, 1 Dow 336, 14 Rev. Rep. 73, 3 Eng. Reprint 720; Redman *v.* Wilson, 9 Jur. 714, 14 L. J. Exch. 333, 14 M. & W. 476; Dixon *v.* Sadler, 9 L. J. Exch. 48, 5 M. & W. 405 [*affirmed* in 11 L. J. Exch. 435, 8 M. & W. 895]; Commercial Mar. Ins. Co. *v.* Namaqua Min. Co., 5 L. T. Rep. N. S. 504, 14 Moore P. C. 471, 10 Wkly. Rep. 136, 15 Eng. Reprint 383.

Canada.— Leduc *v.* Western Assur. Co., 25 L. C. Jur. 280; Cross *v.* British America Ins. Co., 22 L. C. Jur. 10.

89. *Massachusetts.*—Copeland *v.* New England Mar. Ins. Co., 2 Metc. 432; Paddock *v.* Franklin Ins. Co., 11 Pick. 227.

Tennessee.— Stewart *v.* Tennessee M. & F. Ins. Co., 1 Humphr. 242.

Wisconsin.— Merchants' Mut. Ins. Co. *v.* Sweet, 6 Wis. 670.

United States.— Hazard *v.* New England Mar. Ins. Co., 8 Pet. 557, 8 L. ed. 1043 [*affirming* 11 Fed. Cas No. 6,282, 1 Sumn. 218]; Seaman *v.* Enterprise F. & M. Ins. Co., 21 Fed. 778, 5 McCrary 558.

England.— Dixon *v.* Sadler, 9 L. J. Exch. 48, 5 M. & W. 405 [*affirmed* in 11 L. J. Exch. 435, 8 M. & W. 895].

When master must put into port and repair.— The completion of the voyage without necessary delay is the primary purpose of the owner of a vessel and of the cargo, and of others interested. If the vessel suffers such injury that she cannot safely proceed to her port of discharge without repair, the master need not proceed to the nearest port geographically, for repairs. So long as she can be expected by an intelligent and faithful master to pursue her voyage in safety, she will be entitled so to do. Turner *v.* Protection Ins. Co., 25 Me. 515, 43 Am. Dec. 294. After a boat has been injured by one of the perils insured against, and partially repaired, so as merely to enable her to run, running her in this unseaworthy state, in good faith, until she is finally repaired, does not avoid the policy. Gazzam *v.* Cincinnati Ins. Co., 6 Ohio 71. But where a vessel which has been insured has a leak on the voyage insured for, if the leak be of such a character that a prudent and discreet master, of competent skill and judgment, would deem it necessary to examine and repair the leak before proceeding on the voyage, and in consequence of his failure to do so the vessel is lost, no recovery can be had on the policy of insurance. Adderly *v.* American Mut. Ins. Co., 1 Fed. Cas. No. 75, Taney 126. The master must have reasonable cause to believe that the vessel is unable to proceed safely home without having her repaired. Starbuck *v.* New England Mar. Ins. Co., 19 Pick. (Mass.) 198.

90. *Maryland.*— Merchants' Mut. Ins. Co. *v.* Butler, 20 Md. 41.

Massachusetts.— Starbuck *v.* New England Mar. Ins. Co., 19 Pick. 198; Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56; Taylor *v.* Lowell, 3 Mass. 331, 3 Am. Dec. 141.

Pennsylvania.— Peters *v.* Phœnix Ins. Co., 3 Serg. & R. 25.

Wisconsin.— Merchants' Mut. Ins. Co. *v.* Sweet, 6 Wis. 670.

United States.— Morse *v.* St. Paul F. &

(c) *Voyage in Stages.* Where the voyage is in stages the warranty of seaworthiness does not require that the vessel, at the commencement of the risk, be in sufficient state to complete the whole voyage, but it is sufficient if, at the commencement of each stage of the voyage, she be in all respects seaworthy for that particular stage.[91] If at the commencement of any stage she is not seaworthy for the stage of the voyage commenced there is a breach of the warranty.[92] The stages must be separate and distinct in order to have a different degree of seaworthiness for particular parts.[93] A vessel insured for a round voyage must at the inception of the risk be sufficiently seaworthy to complete the voyage without repairs in the absence of any damage from extraordinary perils.[94] Where the policy covers the risk in port as well as on the voyage, the warranty is complied with if the vessel at the time of attaching of the policy is seaworthy for the port risks and before leaving port is made seaworthy for the voyage.[95]

b. Neutrality. Where insurance is effected upon a vessel the insured impliedly warrants that she is neutral,[96] and that it will have on board the necessary papers to prove its neutrality.[97] But there is no warranty that the cargo is neutral,[98] or that the vessel will not change her national character.[99] It seems that the underwriter can only rely on the failure to have proper documents to defeat a claim under the policy, there being no express warranty, where the loss results from the want of such documents.[1]

VIII. RISKS AND CAUSES OF LOSS.

A. In General. The underwriters are only liable for such losses or damages as are occasioned by some one of the perils enumerated in the policy.[2] The loss

M. Ins. Co., 122 Fed. 748; Seaman *v.* Enterprise F. & M. Ins. Co., 21 Fed. 778.

England.— Commercial Mar. Ins. Co. *v.* Namaqua Min. Co., 5 L. T. Rep. N. S. 504, 14 Moore P. C. 471, 10 Wkly. Rep. 136, 15 Eng. Reprint 383.

Effect of bad faith.— A defect arising after the commencement of the risk and permitted to continue from bad faith discharges the insurer from liability for any loss which is the consequence of that bad faith, but does not affect the contract as to any other risk or loss covered by the policy and not caused or increased by such particular defect. Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 497.

91. Greenock Steamship Co. *v.* Maritime Ins. Co., [1903] 1 K. B. 367, 9 Aspin. 364, 8 Com. Cas. 78, 72 L. J. K. B. 59, 88 L. T. Rep. N. S. 207, 51 Wkly Rep. 447 [*affirmed* in [1903] 2 K. B. 657, 9 Aspin. 463, 9 Com. Cas. 41, 72 L. J. K. B. 868, 89 L. T. Rep. N. S. 200, 52 Wkly. Rep. 186]; Bouillon *v.* Lupton, 15 C. B. N. S. 113, 10 Jur. N. S. 422, 33 L. J. C. P. 37, 8 L. T. Rep. N. S. 575, 11 Wkly. Rep. 966, 109 E. C. L. 113; Dixon *v.* Sadler, 9 L. J. Exch. 48, 5 M. & W. 405 [*affirmed* in 11 L. J. Exch. 435, 8 M. & W. 895]; Commercial Mar. Ins. Co. *v.* Namaqua Min. Co., 5 L. T. Rep. N. S. 504, 14 Moore P. C. 471, 10 Wkly. Rep. 136, 15 Eng. Reprint 383.

92. Dupeyre *v.* Western M. & F. Ins. Co., 2 Rob. (La.) 457, 38 Am. Dec. 218.

93. Quebec Mar. Ins. Co. *v.* Commercial Bank, L. R. 3 P. C. 234, 39 L. J. P. C. 53, 22 L. T. Rep. N. S. 559, 18 Wkly. Rep. 769.

94. Reed *v.* Philps, 13 N. Brunsw. 171.

95. See *supra*, VII, E, 6, a, (VI), (B).

96. Stocker *v.* Merrimack M. & F. Ins. Co., 6 Mass. 220.

Circumstances which may become grounds for condemnation are not warranted not to exist. Marsh *v.* Muir, 1 Brev. (S. C.) 134, 2 Am. Dec. 648.

97. Stocker *v.* Merrimack M. & F. Ins. Co., 6 Mass. 220; Ohl *v.* Eagle Ins. Co., 18 Fed. Cas. No. 10,472, 4 Mason 172, 18 Fed. Cas. No. 10,473, 4 Mason 390; Steel *v.* Lacy, 3 Taunt. 285, 12 Rev. Rep. 658. See *supra*, VII, E, 5, c, d.

98. Baltimore Ins. Co. *v.* Taylor, 3 Harr. & J. (Md.) 198; Buck *v.* Chesapeake Ins. Co., 1 Pet. (U. S.) 151, 7 L. ed. 90; Hodgson *v.* Marine Ins. Co., 5 Cranch (U. S.) 100, 3 L. ed. 48.

99. Dent *v.* Smith, L. R. 4 Q. B. 414, 38 L. J. Q. B. 144, 20 L. T. Rep. N. S. 868, 17 Wkly. Rep. 646.

1. Polleys *v.* Ocean Ins. Co., 14 Me. 141.

2. *Alabama.*— Smith *v.* Mobile Nav., etc., Ins. Co., 30 Ala. 167.

Louisiana.— Marks *v.* Nashville M. & F. Ins. Co., 6 La. Ann. 126; Hermann *v.* Western M. & F. Ins. Co., 13 La. 516.

Maine.— Perry *v.* Cobb, 88 Me. 435, 34 Atl. 278, 49 L. R. A. 389.

Maryland.— American Towing Co. *v.* German F. Ins. Co., 74 Md. 25, 21 Atl. 553.

Massachusetts.— Parsons *v.* Massachusetts F. & M. Ins. Co., 6 Mass. 197, 4 Am. Dec. 115.

New York.— Moses *v.* Sun Mut. Ins. Co., 1 Duer 159; Richards *v.* Marine Ins. Co., 3 Johns. 307.

Pennsylvania.— Citizens' Ins. Co. *v.* Marsh,

must be of the subject-matter,[3] and must be actual and not merely imaginary.[4] Thus no recovery can be had for damage to the reputation of goods,[5] or for the mere fact that a vessel strained, where its value is not shown to have been thereby impaired.[6]

B. Must Be Extraordinary. It is only losses and damages of an extraordinary character that are covered,[7] and not consequences which in the ordinary course of events must occur or are to be expected.[8] But if the damage arise from a peril insured against, it matters not whether the force of that peril be great or small,[9] providing it is sufficient to damage a seaworthy vessel.[10] Damage due to the ordinary wear and tear upon the fabrics of a vessel is not insured against.[11]

C. Inherent Defects, Etc. Damages resulting from any inherent defect, vice, or infirmity of the subject-matter are not covered.[12]

D. Delay. The underwriters are not liable for losses due merely to the retardation or delay of the voyage, this not being a sea peril;[13] nor are they

41 Pa. St. 386; Savage *v.* Pleasants, 5 Binn. 403, 6 Am. Dec. 424.

South Carolina.— De Peau *v.* Russell, 1 Brev. 441, 2 Am. Dec. 696.

United States.— Hugg *v.* Augusta Ins., etc., Co., 7 How. 595, 12 L. ed. 834; Swan *v.* Union Ins. Co., 3 Wheat. 168, 4 L. ed. 361; Jordan *v.* Warren Ins. Co., 13 Fed. Cas. No. 7,524, 1 Story 342.

Canada.— O'Connor *v.* Merchants' Mar. Ins. Co., 20 Nova Scotia 514 [*affirmed* in 9 Can. L. T. Occ. Notes 209].

See 28 Cent. Dig. tit. "Insurance," § 1088 *et seq.*

3. Martin *v.* Salem Mar. Ins. Co., 2 Mass. 420; Chope *v.* Reynolds, 5 C. B. N. S. 642, 5 Jur. N. S. 822, 28 L. J. C. P. 194, 7 Wkly. Rep. 208, 94 E. C. L. 642.

On exchange.— An underwriter does not insure against any loss that may arise from the difference of exchange. Thellusson *v.* Bewick, 1 Esp. 77.

4. Giles *v.* Eagle Ins. Co., 2 Metc. (Mass.) 140.

5. Cater *v.* Great Western Ins. Co., L. R. 8 C. P. 552, 2 Aspin. 90, 42 L. J. C. P. 266, 29 L. T. Rep. N. S. 136, 21 Wkly. Rep. 850.

6. Giles *v.* Eagle Ins. Co., 2 Metc. (Mass.) 140; Peele *v.* Suffolk Ins. Co., 7 Pick. (Mass.) 254, 19 Am. Dec. 286.

7. *Louisiana.*— Dupeyre *v.* Western M. & F. Ins. Co., 2 Rob. 457, 38 Am. Dec. 218.

Massachusetts.— Cleveland *v.* Union Ins. Co., 8 Mass. 308.

New York.— Allison *v.* Corn Exch. Ins. Co., 57 N. Y. 87; Barnewall *v.* Church, 1 Cai. 217, 2 Am. Dec. 180.

United States.— Coles *v.* Marine Ins. Co., 6 Fed. Cas. No. 2,988, 3 Wash. 159.

England.— Harrison *v.* Universal Mar. Ins. Co., 3 F. & F. 190.

Compare Lockwood *v.* Sangamo Ins. Co., 46 Mo. 71.

8. Washington Mut. Ins. Co. *v.* Reed, 20 Ohio 199; Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455, 8 Aspin. 173, 65 L. J. Q. B. 616, 75 L. T. Rep. N. S. 95, 45 Wkly. Rep. 70; Paterson *v.* Harris, 1 B. & S. 336, 7 Jur. N. S. 1276, 30 L. J. Q. B. 354, 5 L. T. Rep. N. S. 53, 9 Wkly. Rep. 743, 101 E. C. L. 336. *Compare* Moore *v.* Perpetual Ins. Co., 16 Mo. 98.

Consumption and sale of cargo to procure necessary supplies and repairs is not covered. Moses *v.* Sun Mut. Ins. Co., 1 Duer (N. Y.) 159.

9. Washington Mut. Ins. Co. *v.* Reed, 20 Ohio 199.

Peril not located.— Because the peril cannot be located it does not follow that there was none. Moores *v.* Louisville Underwriters, 14 Fed. 226.

10. Fleming *v.* Insurance Co., 12 Pa. St. 391; Flemming *v.* Marine Ins. Co., 4 Whart. (Pa.) 59, 33 Am. Dec. 33.

11. Marcy *v.* Sun Mut. Ins. Co., 11 La. Ann. 748; Dupeyre *v.* Western M. & F. Ins. Co., 2 Rob. (La.) 457, 38 Am. Dec. 218; Hyde *v.* Louisiana State Ins. Co., 2 Mart. N. S. (La.) 410, 14 Am. Dec. 196; Washington Mut. Ins. Co. *v.* Reed, 20 Ohio 199; Coles *v.* Marine Ins. Co., 6 Fed. Cas. No. 2,988, 3 Wash. 159; Potter *v.* Suffolk Ins. Co., 19 Fed. Cas. No. 11,339, 2 Sumn. 197; Field Steamship Co. *v.* Burr, [1898] 1 Q. B. 821, 8 Aspin. 384, 67 L. J. Q. B. 528, 78 L. T. Rep. N. S. 293, 46 Wkly. Rep. 490 [*affirmed* in [1899] 1 Q. B. 579, 8 Aspin. 529, 68 L. J. Q. B. 426, 80 L. T. Rep. N. S. 445, 47 Wkly. Rep. 341].

12. Marcy *v.* Sun Mut. Ins. Co., 11 La. Ann. 748; Providence Washington Ins. Co. *v.* Adler, 65 Md. 162, 4 Atl. 121, 57 Am. Rep. 314; Boyd *v.* Dubois, 3 Campb. 133; Koebel *v.* Saunders, 17 C. B. 71, 10 Jur. N. S. 920, 33 L. J. C. P. 310, 10 L. T. Rep. N. S. 695, 12 Wkly. Rep. 1106, 112 E. C. L. 71.

13. *Maine.*— Perry *v.* Cobb, 88 Me. 435, 34 Atl. 278, 49 L. R. A. 389.

Maryland.— Barney *v.* Maryland Ins. Co., 5 Harr. & J. 139.

Massachusetts.— Lawton *v.* Sun Mut. Ins. Co., 2 Cush. 500.

Ohio.— Perry *v.* Ohio Ins. Co., 5 Ohio 305.

United States.— Jordan *v.* Warren Ins. Co., 13 Fed. Cas. No. 7,524, 1 Story 342.

England.— Shelbourne *v.* Law Inv., etc., Corp., [1898] 2 Q. B. 626, 8 Aspin. 445, 67 L. J. Q. B. 944, 79 L. T. Rep. N. S. 278; Taylor *v.* Dunbar, L. R. 4 C. P. 206, 38 L. J.

liable for the wages of the crew or provisions consumed by them during the delay, or for demurrage.[14]

E. Enumerated Perils — 1. Perils of the Sea — a. Definition. Perils of the sea embrace all kinds of marine casualties, such as shipwreck, foundering, stranding, collision, and every specie of damage done to the ship or goods at sea by the violent action of the winds or waves.[15] They do not embrace all losses happening on the seas.[16]

b. What Included. The term "perils of the sea" includes losses from stranding or grounding,[17] collision,[18] tempestuous weather,[19] action of the tides,[20] heavy cross seas,[21] dangers from taking a malposition in tidal harbors,[22] the entering of seawater through an open port, seam, or other opening in the vessel,[23] dangers from making landing,[24] injuries to live stock by kicking and bruising each other in consequence of storm,[25] or a vessel settling on a projection of a wharf.[26] But the term does not cover fire,[27] barratry,[28] jettison,[29] bursting of boilers,[30] accidental

C. P. 178, 17 Wkly. Rep. 382; The Leitrim, [1902] P. 256, 9 Aspin. 317, 8 Com. Cas. 6, 71 L. J. P. 108, 87 L. T. Rep. N. S. 240, 51 Wkly. Rep. 158; Bradford *v.* Levy, 2 C. & P. 137, R. & M. 331, 31 Rev. Rep. 657, 12 E. C. L. 492.

14. Barney *v.* Maryland Ins. Co., 5 Harr. & J. (Md.) 139; Perry *v.* Ohio Ins. Co., 5 Ohio 305; Shelbourne *v.* Law Inv., etc., Corp., [1898] 2 Q. B. 626, 8 Aspin. 445, 67 L. J. Q. B. 144, 79 L. T. Rep. N. S. 278; De Vaux *v.* Salvador, 4 A. & E. 420, 1 Harr. & W. 751, 5 L. J. K. B. 134, 6 N. & M. 713, 31 E. C. L. 195. *Compare* Fireman's Ins. Co. *v.* Fitzhugh, 4 B. Mon. (Ky.) 160.

15. Starbuck *v.* Phenix Ins. Co., 19 N. Y. App. Div. 139, 45 N. Y. Suppl. 995; Anthony *v.* Ætna Ins. Co., 1 Fed. Cas. No. 486, 1 Abb. 343; Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455, 8 Aspin. 173, 65 L. J. Q. B. 616, 75 L. T. Rep. N. S. 95, 45 Wkly. Rep. 70; Murray *v.* Nova Scotia Mar. Ins. Co., 10 Nova Scotia 24.

Cal. Civ. Code, § 2199, declares that perils of the sea "are from storms and waves; rocks, shoals, and rapids; other obstacles though of human origin; changes of climate; the confinement necessary at sea; animals peculiar to the sea; and, all other dangers peculiar to the sea."

16. Murray *v.* Nova Scotia Mar. Ins. Co., 10 Nova Scotia 24.

Mistaking a vessel for the enemy's ship and sinking her is not a peril of the sea. Cullen *v.* Butler, 4 Campb. 289, 5 M. & S. 461, 17 Rev. Rep. 400.

17. Hagar *v.* New England Mut. Mar. Ins. Co., 59 Me. 460; McNally *v.* Insurance Co. of North America, 31 Misc. (N. Y.) 61, 63 N. Y. Suppl. 125; Richelieu, etc., Nav. Co. *v.* Boston Mar. Ins. Co., 136 U. S. 408, 10 S. Ct. 934, 34 L. ed. 398; Pennsylvania R. Co. *v.* Manheim Ins. Co., 56 Fed. 301; Northwest Transp. Co. *v.* Boston Mar. Ins. Co., 41 Fed. 793; Potter *v.* Suffolk Ins. Co., 19 Fed. Cas. No. 11,339, 2 Sumn. 197; Fletcher *v.* Inglis, 2 B. & Ald. 315, 20 Rev. Rep. 448; Hahn *v.* Corbett, 2 Bing. 205, 3 L. J. C. P. O. S. 253, 9 Moore C. P. 390, 27 Rev. Rep. 590, 9 E. C. L. 546; Redman *v.* Wilson, 9 Jur. 714, 14 L. J. Exch. 333, 14 M. & W. 476.

18. Caldwell *v.* St. Louis Perpetual Ins. Co., 1 La. Ann. 85; Mathews *v.* Howard Ins. Co., 13 Barb. (N. Y.) 234 [*reversed* on other grounds in 11 N. Y. 9]; Richelieu, etc., Nav. Co. *v.* Boston Mar. Ins. Co., 136 U. S. 408, 10 S. Ct. 934, 34 L. ed. 398; Peters *v.* Warren Ins. Co., 14 Pet. (U. S.) 99, 10 L. ed. 371; Hale *v.* Washington Ins. Co., 11 Fed. Cas. No. 5,916, 2 Story 176; Davidson *v.* Burnand, L. R. 4 C. P. 117, 38 L. J. C. P. 73, 19 L. T. Rep. N. S. 782, 17 Wkly. Rep. 121; Smith *v.* Scott, 4 Taunt. 126, 13 Rev. Rep. 568.

19. Dudgeon *v.* Pembroke, 2 App. Cas. 284, 3 Aspin. 393, 46 L. J. Q. B. 409, 36 L. T. Rep. N. S. 382, 25 Wkly. Rep. 499.

20. Potter *v.* Suffolk Ins. Co., 19 Fed. Cas. No. 11,339, 2 Sumn. 197.

21. Bullard *v.* Roger William Ins. Co., 4 Fed. Cas. No. 2,122, 1 Curt. 148.

22. Hagar *v.* New England Mut. Mar. Ins. Co., 59 Me. 460; McNally *v.* Insurance Co. of North America, 31 Misc. (N. Y.) 61, 63 N. Y. Suppl. 125; Potter *v.* Suffolk Ins. Co., 19 Fed. Cas. No. 11,339, 2 Sumn. 197; Fletcher *v.* Inglis, 2 B. & Ald. 315, 20 Rev. Rep. 448. But this does not include the hogging or straining of a vessel in a tidal harbor which is not accompanied by any *casus fortuitus*. Magnus *v.* Buttemer, 11 C. B. 876, 16 Jur. 480, 21 L. J. C. P. 119, 73 E. C. L. 876.

23. Baker *v.* Manufacturers' Ins. Co., 12 Gray (Mass.) 603; Starbuck *v.* Phenix Ins. Co., 19 N. Y. App. Div. 139, 45 N. Y. Suppl. 995; Garrigues *v.* Coxe, 1 Binn. (Pa.) 592, 2 Am. Dec. 493; Davidson *v.* Burnand, L. R. 4 C. P. 117, 38 L. J. C. P. 73, 19 L. T. Rep. N. S. 782, 17 Wkly. Rep. 121.

24. Seaman *v.* Enterprise F. & M. Ins. Co., 21 Fed. 778.

25. Lawrence *v.* Aberdein, 5 B. & Ald. 107, 24 Rev. Rep. 299, 7 E. C. L. 69; Gabay *v.* Lloyd, 3 B. & C. 793, 5 D. & R. 641, 3 L. J. K. B. O. S. 116, 27 Rev. Rep. 486, 10 E. C. L. 359.

26. Wex *v.* Boatman's F. Ins. Co., 11 N. Y. St. 713.

27. Gilmore *v.* Carman, 1 Sm. & M. (Miss.) 279, 40 Am. Dec. 96.

28. O'Connor *v.* Merchants' Mar. Ins. Co., 16 Can. Sup. Ct. 331.

29. Gregson *v.* Gilbert, 1 Park Ins. 138.

30. Miller *v.* California Ins. Co., 76 Cal. 145, 18 Pac. 155, 9 Am. St. Rep. 184; West

breaking of machinery[31] from heavy seas which are not extraordinary,[32] damage by ordinary dampness,[33] the chemical action of sea-water upon a copper cable,[34] damage by worms[35] or rats,[36] or from detention by ice,[37] or damage to a vessel on land for repairs.[38]

2. PERILS OF RIVERS, ETC. Where the policy is to cover risks on inland waters, the phrase "perils of the rivers, lakes and canals" is generally substituted for "perils of the sea." The words include the same character of losses as are included within perils of the sea,[39] and in addition thereto those perils which are peculiar to inland waters, such as ice,[40] and swells.[41] This clause has also been held to cover damage from escape of steam[42] or bursting of boilers.[43]

3. PERILS OF NAVIGATION. "Perils of navigation" includes perils in making landings in river navigation;[44] and damage from rain in consequence of improper stowage, unless such improper stowage was occasioned or acquiesced in by the insured or his agent, is damage from the perils of navigation.[45]

4. IMPROPER NAVIGATION. Improper navigation embraces acts done in the management of a vessel as a vessel,[46] and does not include acts done in the loading, stowage, or care of the cargo.[47] It is not limited to acts done after the vessel

India, etc., Tel. Co. *v.* Home, etc., Mar. Ins. Co., 6 Q. B. D. 51, 4 Aspin. 341, 50 L. J. Q. B. 41, 43 L. T. Rep. N. S. 420, 29 Wkly. Rep. 92. *Contra*, Citizens Ins. Co. *v.* Glasgow, 9 Mo. 411; Perrin *v.* Protection Ins. Co., 11 Ohio 147, 38 Am. Dec. 728.

31. Thames, etc., Mar. Ins. Co. *v.* Hamilton, 12 App. Cas. 484, 6 Aspin. 200, 56 L. J. Q. B. 626, 57 L. T. Rep. N. S. 695, 36 Wkly. Rep. 337.

"Inchmaree" clause.—To meet the decision in the above case, in which the policy was on the steamship Inchmaree, and to extend the protection of the insurance to such cases, there was adopted what is generally known as the "Inchmaree" clause. Cleveland, etc., Transit Co. *v.* Insurance Co. of North America, 115 Fed. 431. The words "latent defect in machinery" used in this clause do not cover a weakness in design. Jackson *v.* Mumford, 8 Com. Cas. 61, 51 Wkly. Rep. 91.

32. The Gulnare, 42 Fed. 861.

33. Baker *v.* Manufacturers' Ins. Co., 12 Gray (Mass.) 603.

34. Paterson *v.* Harris, 1 B. & S. 336, 7 Jur. N. S. 1276, 30 L. J. Q. B. 354, 5 L. T. Rep. N. S. 53, 9 Wkly. Rep. 743, 101 E. C. L. 336. But insurers are liable for damages to zinc corroded by salt water from leakage during the voyage. Cogswell *v.* Ocean Ins. Co., 18 La. 84.

35. Hazard *v.* New England Mar. Ins. Co., 8 Pet. (U. S.) 557, 8 L. ed. 1043 [*affirming* 11 Fed. Cas. No. 6,282, 1 Sumn. 218]; Rohl *v.* Parr, 1 Esp. 445, 5 Rev. Rep. 741.

36. Hamilton *v.* Pandorf, 12 App. Cas. 518, 6 Aspin. 212, 52 J. P. 196, 57 L. J. Q. B. 24, 57 L. T. Rep. N. S. 726, 36 Wkly. Rep. 369.

37. Great Western Ins. Co. *v.* Jordan, 14 Can. Sup. Ct. 734.

38. Phillips *v.* Barber, 5 B. & Ald. 161, 24 Rev. Rep. 317, 7 E. C. L. 96; Thompson *v.* Whitmore, 3 Taunt. 227, 12 Rev. Rep. 642; Rowcroft *v.* Dunsmore [*cited* in Thompson *v.* Whitmore, *supra*]. But see Ellery *v.* New England Ins. Co., 8 Pick. (Mass.) 14.

39. Crescent Ins. Co. *v.* Vicksburg, etc., Packet Co., 69 Miss. 208, 13 So. 254, 30 Am. St. Rep. 537; Gilmore *v.* Carman, 1 Sm. & M. (Miss.) 279, 40 Am. Dec. 96; The Natchez, 42 Fed. 169.

Collision.—Where a policy of insurance upon a steamer employed in inland navigation, after enumerating certain risks to be borne by the insurer, recites that, besides those particularly mentioned, the insurer will be answerable for "all other perils, losses and misfortunes which shall come to the damage of the said boat, according to the general laws of insurance," a loss resulting from a collision produced by the negligence of the officers of another steamer, although not an enumerated risk, will be covered by the policy, being one of the perils of the river. Caldwell *v.* St. Louis Perpetual Ins. Co., 1 La. Ann. 85.

Grounding is a peril of river navigation. Fireman's Ins. Co. *v.* Powell, 13 B. Mon. (Ky.) 311.

40. Franklin Ins. Co. *v.* Humphrey, 65 Ind. 549, 32 Am. Rep. 78.

41. Washington Mut. Ins. Co. *v.* Reed, 20 Ohio 199.

42. Union Ins. Co. *v.* Groom, 4 Bush (Ky.) 289.

43. Citizens Ins. Co. *v.* Glasgow, 9 Mo. 411; Perrin *v.* Protection Ins. Co., 11 Ohio 147, 38 Am. Dec. 728.

44. Seaman *v.* Enterprise F. & M. Ins. Co., 21 Fed. 778.

45. Underwriters' Agency *v.* Sutherlin, 55 Ga. 266.

46. Carmichael *v.* Liverpool Sailing Ship Owners' Mut. Indemnity Assoc., 19 Q. B. D. 242, 6 Aspin. 184, 56 L. J. Q. B. 428, 57 L. T. Rep. N. S. 550, 35 Wkly. Rep. 793; Good *v.* London Steamship Owners' Mut. Protecting Assoc., L. R. 6 C. P. 563, 20 Wkly. Rep. 33.

47. Canada Shipping Co. *v.* British Shipowners' Mut. Protecting Assoc., 23 Q. B. D. 342, 6 Aspin. 422, 58 L. J. Q. B. 462, 61 L. T. Rep. N. S. 312, 38 Wkly. Rep. 87; Carmichael *v.* Liverpool Sailing Ship Owners' Mut. Indemnity Assoc., 19 Q. B. D. 242, 6 Aspin. 184, 56 L. J. Q. B. 428, 57 L. T. Rep. N. S. 550, 35

breaks ground, but includes negligence before commencement of the voyage, as by insufficiently closing a port, so that goods are damaged on the voyage.[48]

5. Stranding. A stranding implies a settling of the ship, some resting, or interruption of the voyage under extraordinary circumstances.[49] It is not confined to cases in which the vessel is upon the beach, but includes the striking and resting upon a rock,[50] grounding on piles in a river or settling upon a projection of a wharf.[51] It may result from stress of weather,[52] or the acts of those in charge of the navigation of the vessel *bona fide* performed to prevent other impending loss or injury.[53] A taking of the ground in a tidal harbor in the ordinary course of navigation is not a stranding.[54] The vessel must remain stationary for a time; if it strike and run there is no stranding.[55]

6. Collision — a. In General. Collision, in marine insurance, means the act of two ships or navigable objects striking together.[56] It does not include the striking against a submerged or sunken object,[57] against ice,[58] or against the bank or any projection of the land.[59] The object should be one which is navigable,[60] but it need not be in condition to be navigated at the time of the contact.[61] The vessel need not be in motion at the time of the impact.[62] It is not limited to the striking of any particular part of the vessel but includes the hull,[63] the upper works, and also the equipment.[64]

Wkly. Rep. 793; Good *v.* London Steamship Owners' Mut. Protecting Assoc., L. R. 6 C. P. 563, 20 Wkly. Rep. 33.

48. Carmichael *v.* Liverpool Sailing Ship Owners' Mut. Indemnity Assoc., 19 Q. B. D. 242, 6 Aspin. 184, 56 L. J. Q. B. 428, 57 L. T. Rep. N. S. 550, 35 Wkly. Rep. 793.

49. Potter *v.* Suffolk Ins. Co., 19 Fed. Cas. No. 11,339, 2 Sumn. 197; Letchford *v.* Oldham, 5 Q. B. D. 538, 49 L. J. Q. B. 458, 28 Wkly. Rep. 789; De Mattos *v.* Saunders, L. R. 7 C. P. 570, 1 Aspin. 377, 27 L. T. Rep. N. S. 120, 20 Wkly. Rep. 801; Wells *v.* Hopwood, 3 B. & Ad. 20, 23 E. C. L. 19; Bishop *v.* Pentland, 7 B. & C. 219, 6 L. J. K. B. O. S. 6, 1 M. & R. 49, 31 Rev. Rep. 177, 14 E. C. L. 104; McDougle *v.* Royal Exch. Assur. Co., 4 Campb. 283, 4 M. & S. 503, 16 Rev. Rep. 532; Corcoran *v.* Gurney, 1 E. & B. 456, 17 Jur. 1152, 22 L. J. Q. B. 113, 1 Wkly. Rep. 129, 72 E. C. L. 456.

Drawing off water in a canal whereby the vessel takes the ground is a stranding. Rayner *v.* Godmond, 5 B. & Ald. 225, 24 Rev. Rep. 335, 7 E. C. L. 129.

50. McDougle *v.* Royal Exch. Assur. Co., 4 Campb. 283, 4 M. & S. 503, 16 Rev. Rep. 532; Baker *v.* Towry, 1 Stark. 436, 18 Rev. Rep. 803, 2 E. C. L. 168.

51. Rayner *v.* Godmond, 5 B. & Ald. 225, 24 Rev. Rep. 335, 7 E. C. L. 129; Dobson *v.* Bolton, 1 Park Ins. 239.

52. Corcoran *v.* Gurney, 1 E. & B. 456, 17 Jur. 1152, 22 L. J. Q. B. 113, 1 Wkly. Rep. 129, 72 E. C. L. 456.

53. Letchford *v.* Oldham, 5 Q. B. D. 538, 49 L. J. Q. B. 458, 28 Wkly. Rep. 789; De Mattos *v.* Saunders, L. R. 7 C. P. 570, 1 Aspin. 377, 27 L. T. Rep. N. S. 120, 20 Wkly. Rep. 801; Barrow *v.* Bell, 4 B. & C. 736, 7 D. & R. 244, 4 L. J. K. B. O. S. 47, 28 Rev. Rep. 468, 10 E. C. L. 780.

54. Wells *v.* Hopwood, 3 B. & Ad. 20, 23 E. C. L. 19; Hearne *v.* Edmunds, 1 B. & B. 388, 4 Moore C. P. 15, 21 Rev. Rep. 660, 5 E. C. L. 699; Bishop *v.* Peutland, 7 B. & C. 219, 6 L. J. K. B. O. S. 6, 1 M. & R. 49, 31 Rev. Rep. 177, 14 E. C. L. 104; Kingsford *v.* Marshall, 8 Bing. 458, 1 L. J. C. P. 135, 1 Moore & S. 657, 21 E. C. L. 619; Magnus *v.* Buttemer, 11 C. B. 876, 16 Jur. 480, 21 L. J. C. P. 119, 73 E. C. L. 876.

55. Lake *v.* Columbian Ins. Co., 13 Ohio 48, 42 Am. Dec. 188; Harman *v.* Vaux, 3 Campb. 429, 14 Rev. Rep. 773. Remaining a minute and a half on a rock was held not to be stranding in McDougle *v.* Royal Exch. Assur. Co., 4 Campb. 283, 4 M. & S. 503, 16 Rev. Rep. 532.

56. Newtown Creek Towing Co. *v.* Ætna Ins. Co., 163 N. Y. 114, 57 N. E. 302; Cline *v.* Western Assur. Co., 101 Va. 496, 44 S. E. 700.

57. Cline *v.* Western Assur. Co., 101 Va. 496, 44 S. E. 700.

58. Newtown Creek Towing Co. *v.* Ætna Ins. Co., 163 N. Y. 114, 57 N. E. 302.

59. But collision with breakwater is covered by a policy insuring against collision with "wharves, piers, stages or similar structures." Union Mar. Ins. Co. *v.* Borwick, [1895] 2 Q. B. 279, 8 Aspin. 71, 64 L. J. Q. B. 679, 73 L. T. Rep. N. S. 156, 15 Reports 546.

60. Cline *v.* Western Assur. Co., 101 Va. 496, 44 S. E. 700; Chandler *v.* Blogg, [1898] 1 Q. B. 32, 8 Aspin. 349, 67 L. J. Q. B. 336, 77 L. T. Rep. N. S. 524.

61. Chandler *v.* Blogg, [1898] 1 Q. B. 32, 8 Aspin. 349, 67 L. J. Q. B. 336, 77 L. T. Rep. N. S. 524.

62. London Assur. *v.* Companhia de Moegans do Barreiro, 167 U. S. 149, 17 S. Ct. 785, 42 L. ed. 113.

63. Union Mar. Ins. Co. *v.* Borwick, [1895] 2 Q. B. 279, 8 Aspin. 71, 64 L. J. Q. B. 679, 73 L. T. Rep. N. S. 156, 15 Reports 546.

64. McCowan *v.* Baine, [1891] A. C. 401, 7 Aspin. 89, 65 L. T. Rep. N. S. 502; *In re* Margetts, [1901] 2 K. B. 792, 9 Aspin. 217,

b. Damage to Other Vessel. The general rule is that only the direct damage sustained by the insured vessel is recoverable, and damages sustained by the vessel or object with which the insured vessel collided, the whole or a part of which the insured vessel is obligated to pay, are not included.[65] A contrary rule, however, prevails in Massachusetts.[66]

c. "Running Down" Clause. The "running down" clause is a distinct contract under which the underwriters agree to pay a proportion of the damages sustained by the other vessel in collision.[67] The risk is confined to damage done and actually paid[68] to the owners of the vessel run down,[69] its cargo,[70] or passengers.[71] It does not include damage done to the assured's vessel, life salvage payable under statutory provision,[72] or the expense of removing the wreck of the other vessel.[73]

7. Tower's Liability. Under the usual form of "tower's liability" clause[74] there is covered the loss or damage to which the tug is subjected whether arising out of a towage or salvage service.[75] The liability must be determined by suit,[76] but the amount of the recovery against the tug is not conclusive as to amount unless the underwriters are parties to such suit.[77] It has been held that the

70 L. J. K. B. 762, 85 L. T. Rep. N. S. 94, 49 Wkly. Rep. 669.

65. *New York.*— Mathews *v.* Howard Ins. Co., 11 N. Y. 9.

Pennsylvania.— Goucher *v.* Providence Washington Ins. Co., 3 Pa. Super. Ct. 230.

South Carolina.— Street *v.* Augusta Ins., etc., Co., 12 Rich. 13, 75 Am. Dec. 714.

United States.— General Mut. Ins. Co. *v.* Sherwood, 14 How. 351, 14 L. ed. 452. But see Peters *v.* Warren Ins. Co., 14 Pet. 99, 10 L. ed. 371.

England.— De Vaux *v.* Salvador, 4 A. & E. 420, 1 Harr. & W. 751, 5 L. J. K. B. 134, 6 N. & M. 713, 31 E. C. L. 195; Taylor *v.* Dewar, 5 B. & S. 58, 10 Jur. N. S. 361, 33 L. J. Q. B. 141, 10 L. T. Rep. N. S. 267, 12 Wkly. Rep. 579, 117 E. C. L. 58.

66. Whorf *v.* Equitable Mar. Ins. Co., 144 Mass. 68, 10 N. E. 513; Blanchard *v.* Equitable Safety Ins. Co., 12 Allen (Mass.) 386; Walker *v.* Boston Ins. Co., 14 Gray (Mass.) 288; Nelson *v.* Suffolk Ins. Co., 8 Cush. (Mass.) 477, 54 Am. Dec. 770.

67. Xenos *v.* Fox, L. R. 4 C. P. 665, 38 L. J. C. P. 351, 17 Wkly. Rep. 893.

Usual form of clause.— "If the ship hereby insured shall come into collision with any other ship or vessel, and the assured in consequence thereof shall become liable to and shall pay any sum or sums, not exceeding the value of the said vessel hereby insured," the underwriters will pay a designated proportion of such amount so paid.

Vessel in tow in collision with tug.— Where the insured vessel was in tow and the tug came into collision with a third vessel under circumstances whereby the insured vessel was required to pay a part of the damage done to the third vessel such damage was held covered under this clause. McCowan *v.* Baine, [1891] A. C. 401, 7 Aspin. 89, 65 L. T. Rep. N. S. 502.

68. Goucher *v.* Providence Washington Ins. Co., 3 Pa. Super. Ct. 230; Thompson *v.* Reynolds, 7 E. & B. 172, 3 Jur. N. S. 464, 26 L. J. Q. B. 93, 90 E. C. L. 172.

69. Goucher *v.* Providence Washington Ins. Co., 3 Pa. Super. Ct. 230; London Steamship Owners' Ins. Co. *v.* Grampian Steamship Co., 24 Q. B. D. 663, 6 Aspin. 506, 59 L. J. Q. B. 549, 62 L. T. Rep. N. S. 784, 38 Wkly. Rep. 651; Taylor *v.* Dewar, 5 B. & S. 58, 10 Jur. N. S. 361, 33 L. J. Q. B. 141, 10 L. T. Rep. N. S. 267, 12 Wkly. Rep. 579, 117 E. C. L. 58.

70. Goucher *v.* Providence Washington Ins. Co., 3 Pa. Super. Ct. 230.

71. Coey *v.* Smith, 22 Ct. of Sess. Cas. 955. But see Taylor *v.* Dewar, 5 B. & S. 58, 10 Jur. N. S. 361, 33 L. J. Q. B. 141, 10 L. T. Rep. N. S. 267, 12 Wkly. Rep. 579, 117 E. C. L. 58.

72. London Steamship Owners' Ins. Co. *v.* Grampian Steamship Co., 24 Q. B. D. 663, 6 Aspin. 506, 59 L. J. Q. B. 549, 62 L. T. Rep. N. S. 784, 38 Wkly. Rep. 651.

73. Tatham *v.* Burr, [1898] A. C. 382, 8 Aspin. 401, 67 L. J. Adm. 61, 78 L. T. Rep. N. S. 473, 46 Wkly. Rep. 530; Burger *v.* Indemnity Mut. Mar. Assur. Co., [1900] 2 Q. B. 348, 9 Aspin. 85, 5 Com. Cas. 315, 69 L. J. Q. B. 838, 82 L. T. Rep. N. S. 831, 48 Wkly. Rep. 643; Nourse *v.* Liverpool Sailing Ship Owners' Mut. Protection, etc., Assoc., [1896] 2 Q. B. 16, 8 Aspin. 144, 65 L. J. Q. B. 507, 74 L. T. Rep. N. S. 543, 44 Wkly. Rep. 500; The North Britain, [1894] P. 77, 7 Aspin. 413, 63 L. J. Adm. 33, 70 L. T. Rep. N. S. 210, 42 Wkly. Rep. 243.

74. The usual form of this clause provides that the insurance is to "fully indemnify the assured for loss and damage arising from or growing out of any accident caused by collision or stranding resulting from any cause whatever to any other vessel or vessels . . . for which said steam-tug or its owners may be legally liable."

75. Ferguson *v.* Providence Washington Ins. Co., 125 Fed. 141.

76. McWilliams *v.* Home Ins. Co., 40 N. Y. App. Div. 400, 57 N. Y. Suppl. 1100; Rogers *v.* Ætna Ins. Co., 95 Fed. 103, 35 C. C. A. 396.

77. Rogers *v.* Ætna Ins. Co., 95 Fed. 103, 35 C. C. A. 396.

expenses of the suit, not including counsel fees, may be recovered,[78] but there are decisions to the contrary.[79]

8. Jettison. Jettison in a marine policy means any throwing overboard of any part of the cargo, equipment, provisions, etc., for just cause.[80] It does not include a jettison made for the purpose of enabling the vessel to perform life salvage services.[81]

9. Fire. "Fire" covers every loss whereby the property insured is directly damaged or consumed by fire from whatsoever cause the fire arose.[82] It does not cover damage to the interior of a boiler by the fires of the furnace on account of a failure to keep water in the boiler.[83]

10. Arrest, Restraint, Detention, Etc.— a. In General. "Arrest," "restraint," and "detention" import some violent interference with the ordinary course of the voyage.[84] They do not cover an interference by the operation of an ordinary municipal law or regulation,[85] nor a mere warning not to enter an enemy's port.[86] Actual physical force need not be applied,[87] nor need the acts be hostile.[88] An intention to keep the property is not an element.[89] Within these words fall an interference with the property by blockade,[90] embargo,[91] and a taking for alleged violation of revenue laws.[92]

b. Kings, Princes, and People. "Kings," "princes," and "people" refer to the governing power of the country,[93] including any of its officers, whether executive, military, or judicial.[94]

78. Egbert *v.* St. Paul F. & M. Ins. Co., 92 Fed. 517.

79. McWilliams *v.* Home Ins. Co., 40 N. Y. App. Div. 400, 57 N. Y. Suppl. 1100; Fernald *v.* Providence Washington Ins. Co., 27 N. Y. App. Div. 137, 50 N. Y. Suppl. 838.

80. Butler *v.* Wildman, 3 B. & Ald. 398, 22 Rev. Rep. 435, 5 E. C. L. 233.

81. Dabney *v.* New England Mut. Mar Ins. Co., 14 Allen (Mass.) 300.

82. Louisville Underwriters *v.* Durland, 123 Ind. 544, 24 N. E. 221, 7 L. R. A. 399; Germania Ins. Co. *v.* Sherlock, 25 Ohio St. 33; Howard F. Ins. Co. *v.* Norwich, etc., Transp. Co., 79 U. S. 194, 20 L. ed. 378; Gordon *v.* Rimmington, 1 Campb. 123.

83. American Towing Co. *v.* Germania F. Ins. Co., 74 Md. 25, 21 Atl. 553.

84. Miller *v.* Law Acc. Ins. Co., [1902] 2 K. B. 694, 7 Com. Cas. 151, 71 L. J. K. B. 551, 20 Wkly. Rep. 474 [*affirmed* in [1903] 1 K. B. 712, 9 Aspin. 386, 8 Com. Cas. 161, 72 L. J. K. B. 428, 88 L. T. Rep. N. S. 370, 51 Wkly. Rep. 420].

A suit against the captain of a vessel and not against the vessel is not covered, although it results in the delay of the voyage. Bradford *v.* Levy, 2 C. & P. 137, R. & M. 331, 31 Rev. Rep. 657, 12 E. C. L. 492.

Siege of city.— Where part of the transit was overland and the transit was interrupted by the besieging of the city wherein the property was located, it was held to be a restraint. Rodoconachi *v.* Elliott, L. R. 9 C. P. 518, 2 Aspin. 399, 43 L. J. C. P. 255, 31 L. T. Rep. N. S. 239.

85. Miller *v.* Law Acc. Ins. Co., [1902] 2 K. B. 694, 7 Com. Cas. 151, 71 L. J. K. B. 551, 50 Wkly. Rep. 474 [*affirmed* in [1903] 1 K. B. 712, 9 Aspin. 386, 8 Com. Cas. 161, 72 L. J. K. B. 428, 88 L. T. Rep. N. S. 370, 51 Wkly. Rep. 420].

86. Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 4 Am. Dec. 92; Corp *v.* United Ins. Co., 8 Johns. (N. Y.) 277; King *v.* Delaware Ins. Co., 14 Fed. Cas. No. 7,788, 2 Wash. 300 [*affirmed* in 6 Cranch 71, 3 L. ed. 155].

87. Saltus *v.* United Ins. Co., 15 Johns. (N. Y.) 523.

88. Robinson Gold Min. Co. *v.* Alliance Ins. Co., [1901] 2 K. B. 919, 6 Com. Cas. 244, 70 L. J. K. B. 892, 85 L. T. Rep. N. S. 419, 50 Wkly. Rep. 109 [*affirmed* in [1902] 2 K. B. 489, 7 Com. Cas. 219, 71 L. J. K. B. 942, 86 L. T. Rep. N. S. 858, 51 Wkly. Rep. 105].

89. Murray *v.* Harmony F. & M. Ins. Co., 58 Barb. (N. Y.) 9.

90. Vigers *v.* Ocean Ins. Co., 12 La. 362, 32 Am. Dec. 118; Wilson *v.* United Ins. Co., 14 Johns. (N. Y.) 227; Schmidt *v.* United Ins. Co., 1 Johns. (N. Y.) 249, 3 Am. Dec. 319; Thompson *v.* Read, 12 Serg. & R. (Pa.) 440; Olivera *v.* Union Ins. Co., 3 Wheat. (U. S.) 183, 4 L. ed. 365.

"Unlawful" restraints and detentions do not cover a detainment by a force lawfully blockading a port. McCall *v.* Marine Ins. Co., 8 Cranch (U. S.) 59, 3 L. ed. 487.

91. Delano *v.* Bedford Mar. Ins. Co., 10 Mass. 347, 6 Am. Dec. 132; Lorent *v.* South Carolina Ins. Co., 1 Nott & M. (S. C.) 505; Odlin *v.* Pennsylvania Ins. Co., 18 Fed. Cas. No. 10,433, 2 Wash. 312; Aubert *v.* Gray, 3 B. & S. 163, 169, 9 Jur. N. S. 714, 32 L. J. Q. B. 50, 7 L. T. Rep. N. S. 469, 11 Wkly. Rep. 27, 113 E. C. L. 163, 169; Rotch *v.* Edie, 6 T. R. 413, 3 Rev. Rep. 222.

92. Magoun *v.* New England Mar. Ins. Co., 16 Fed. Cas. No. 8,961, 1 Story 157.

93. Nesbitt *v.* Lushington, 4 T. R. 783, 2 Rev. Rep. 519.

94. The issuance of a writ of habeas corpus falls within this clause. Simpson *v.* Charleston F. & M. Ins. Co., Dudley (S. C.) 239.

11. Capture. Capture includes all hostile[95] takings made with intent to keep or obtain condemnation,[96] or made for the purpose of putting the property taken to a specific use for the benefit of the captor.[97] It is none the less a capture whether the taking be by friends or allies,[98] enemy or belligerent,[99] or by pirates.[1] A condemnation is not necessary to complete the capture or to render the underwriter liable.[2]

12. Seizure. "Seizure" is a broader term than "capture" and includes every forceable taking of possession,[3] whether by lawful authority[4] or overwhelming force,[5] legal, illegal,[6] or piratical.[7] It was formerly considered essential that the taking be hostile,[8] but this is not now the law.[9]

13. Pirates. An insurance against pirates includes seizure by mutinous passengers,[10] but not a wrongful seizure by a governmental official[11] or by a *de facto* government.[12]

14. Barratry — a. Definition. Barratry is an act committed by the master or

Arrest in a civil suit is not a restraint of princes, etc. Robinson Gold Min. Co. *v.* Alliance Ins. Co., [1901] 2 K. B. 919, 6 Com. Cas. 244, 70 L. J. K. B. 892, 85 L. T. Rep. N. S. 419, 50 Wkly. Rep. 109 [*affirmed* in [1902] 2 K. B. 489, 7 Com. Cas. 219, 71 L. J. K. B. 942, 86 L. T. Rep. N. S. 858, 51 Wkly. Rep. 105].

95. Lee *v.* Boardman, 3 Mass. 238, 3 Am. Dec. 134.

96. Dole *v.* New England Mut. Mar. Ins. Co., 6 Allen (Mass.) 373; Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 4 Am. Dec. 92; Murray *v.* Harmony F. & M. Ins. Co., 58 Barb. (N. Y.) 9; Johnston *v.* Hogg, 10 Q. B. D. 432, 5 Aspin. 51, 52 L. J. Q. B. 343, 48 L. T. Rep. N. S. 435, 31 Wkly. Rep. 768.

97. Murray *v.* Harmony F. & M. Ins. Co., 58 Barb. (N. Y.) 9.

98. Lee *v.* Boardman, 3 Mass. 238, 3 Am. Dec. 134; Murray *v.* United Ins. Co., 2 Johns. Cas. (N. Y.) 263.

99. Lee *v.* Boardman, 3 Mass. 238, 3 Am. Dec. 134; Murray *v.* United Ins. Co., 2 Johns. Cas. (N. Y.) 263; Robinson Gold Min. Co. *v.* Alliance Ins. Co., [1902] 2 K. B. 489, 7 Com. Cas. 219, 71 L. J. K. B. 942, 86 L. T. Rep. N. S. 858, 51 Wkly. Rep. 105.

1. Dole *v.* New England Mut. Mar. Ins. Co., 7 Fed. Cas. No. 3,966, 2 Cliff. 394.

2. Goss *v.* Withers, 2 Burr. 683, 2 Ld. Ken. 325.

3. Robinson Gold Min. Co. *v.* Alliance Ins. Co., [1902] 2 K. B. 489, 7 Com. Cas. 219, 71 L. J. K. B. 942, 86 L. T. Rep. N. S. 858, 51 Wkly. Rep. 105; Johnston *v.* Hogg, 10 Q. B. D. 432, 5 Aspin. 51, 52 L. J. Q. B. 343, 48 L. T. Rep. N. S. 435, 31 Wkly. Rep. 768.

4. Cory *v.* Burr, 8 App. Cas. 393, 5 Aspin. 109, 52 L. J. Q. B. 657, 49 L. T. Rep. N. S. 78, 31 Wkly. Rep. 894; Miller *v.* Law Acc. Ins. Soc., [1903] 1 K. B. 712, 9 Aspin. 386, 8 Com. Cas. 161, 72 L. J. K. B. 428, 88 L. T. Rep. N. S. 370, 51 Wkly. Rep. 420; Robinson Gold Min. Co. *v.* Alliance Ins. Co., [1902] 2 K. B. 489, 7 Com. Cas. 219, 71 L. J. K. B. 942, 86 L. T. Rep. N. S. 858, 51 Wkly. Rep. 105.

Taking by Confederate states included.— Dole *v.* Merchants' Mut. Mar. Ins. Co., 51 Me. 465; Dole *v.* New England Mut. Mar. Ins. Co., 6 Allen (Mass.) 373; Swinnerton *v.* Columbian Ins. Co., 37 N. Y. 174, 93 Am. Dec. 560 [*reversing* 9 Bosw. 361]; Fifield *v.* Pennsylvania Ins. Co., 47 Pa. St. 166, 86 Am. Dec. 523; Dole *v.* New England Mut. Mar. Ins. Co., 7 Fed. Cas. No. 3,966, 2 Cliff. 394.

5. Robinson Gold Min. Co. *v.* Alliance Ins. Co., [1902] 2 K. B. 489, 7 Com. Cas. 219, 71 L. J. K. B. 942, 86 L. T. Rep. N. S. 858, 51 Wkly. Rep. 105.

6. Mauran *v.* Alliance Ins. Co., 6 Wall. (U. S.) 1, 18 L. ed. 836; Powell *v.* Hyde, 5 E. & B. 607, 2 Jur. N. S. 87, 25 L. J. Q. B. 65, 4 Wkly. Rep. 51, 85 E. C. L. 607; Kleinwort *v.* Shepard, 1 E. & E. 447, 5 Jur. N. S. 863, 28 L. J. Q. B. 147, 7 Wkly. Rep. 227, 102 E. C. L. 447.

7. Johnston *v.* Hogg, 10 Q. B. D. 432, 5 Aspin. 51, 52 L. J. Q. B. 343, 48 L. T. Rep. N. S. 435, 31 Wkly. Rep. 768; Palmer *v.* Naylor, 2 C. L. R. 1202, 10 Exch. 382, 23 L. J. Exch. 323, 18 Jur. 961, 2 Wkly. Rep. 621; Kleinwort *v.* Shepard, 1 E. & E. 447, 5 Jur. N. S. 863, 28 L. J. Q. B. 147, 7 Wkly. Rep. 227, 102 E. C. L. 447. *Compare* Greene *v.* Pacific Mut. Ins. Co., 9 Allen (Mass.) 217.

8. Robinson Gold Min. Co. *v.* Alliance Ins. Co., [1901] 2 K. B. 919, 6 Com. Cas. 244, 70 L. J. K. B. 892, 85 L. T. Rep. N. S. 419, 50 Wkly. Rep. 109 [*affirmed* in [1902] 2 K. B. 489, 7 Com. Cas. 219, 71 L. J. K. B. 942, 86 L. T. Rep. N. S. 858, 51 Wkly. Rep. 105; Pipon *v.* Cope, 1 Campb. 434, 10 Rev. Rep. 720; Mellish *v.* Andrews, 15 East 13, 13 Rev. Rep. 351.

9. Miller *v.* Law Acc. Ins. Soc., [1903] 1 K. B. 712, 9 Aspin. 386, 8 Com. Cas. 161, 72 L. J. K. B. 428, 88 L. T. Rep. N. S. 370, 51 Wkly. Rep. 420.

10. Palmer *v.* Naylor, 3 C. L. R. 1202, 10 Exch. 382, 18 Jur. 961, 23 L. J. Exch. 323, 2 Wkly. Rep. 621; Kleinwort *v.* Shepard, 1 E. & E. 447, 5 Jur. N. S. 863, 28 L. J. Q. B. 147, 7 Wkly. Rep. 227, 102 E. C. L. 447.

11. Paddock *v.* Commercial Ins. Co., 2 Allen (Mass.) 93.

12. Mauran *v.* Alliance Ins. Co., 6 Wall. (U. S.) 1, 18 L. ed. 836. See also Dole *v.* Merchants' Mut. Mar. Ins. Co., 51 Me. 465.

mariners of a ship for some unlawful or fraudulent purpose, contrary to their duty to their owners, whereby the latter sustain injury.[13]

b. Essential Elements. It is necessary that the act be fraudulent[14] or criminal,[15] wilful,[16] and against the interests of the owner.[17] It need not be beneficial to the person committing the act.[18]

c. Acts of Owner. Acts done by a master, or other person who is also the legal or equitable owner of the vessel,[19] or the owner *pro hac vice*,[20] or acts done at his direction,[21] are not barratrous even as to innocent shippers of cargo. But

13. *Massachusetts.*— Stone *v.* National Ins. Co., 19 Pick. 34.

New York.— Walden *v.* New York Firemen Ins. Co., 12 Johns. 128 [*reversed* on other grounds in 12 Johns. 513, 7 Am. Dec. 340]; Cook *v.* Commercial Ins. Co., 11 Johns. 40, 6 Am. Dec. 353; Kendrick *v.* Delafield, 2 Cai. 67.

Pennsylvania.— Wilcocks *v.* Union Ins. Co., 2 Binn. 574, 4 Am. Dec. 480.

United States.— Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222, 7 L. ed. 659; Marcardier *v.* Chesapeake Ins. Co., 8 Cranch 39, 3 L. ed. 481; Dederer *v.* Delaware Ins. Co., 7 Fed. Cas. No. 3,733, 2 Wash. 61; Waters *v.* Merchants' Louisville Ins. Co., 29 Fed. Cas. No. 17,266, 1 McLean 275.

England.— Australasian Ins. Co. *v.* Jackson, 3 Aspin. 26, 33 L. T. Rep. N. S. 286; Earle *v.* Rowcroft, 8 East 126, 9 Rev. Rep. 385; Lindsay *v.* Leathley, 3 F. & F. 902, 11 L. T. Rep. N. S. 194; Boehm *v.* Combe, 2 M. & S. 172, 14 Rev. Rep. 611; Phyn *v.* Royal Exch. Assur. Co., 7 T. R. 505, 4 Rev. Rep. 508.

See 28 Cent. Dig. tit. "Insurance," §§ 1099, 1100.

Barratry of the mate who has assumed command upon death of the master is not within an exception of losses by barratry of the master. Tate *v.* Protection Ins. Co., 20 Conn. 481, 52 Am. Dec. 350.

14. *Kentucky.*— Louisville Underwriters *v.* Pence, 93 Ky. 96, 19 S. W. 10, 14 Ky. L. Rep. 21, 40 Am. St. Rep. 176.

Maine.— Hutchins *v.* Ford, 82 Me. 363, 19 Atl. 832.

Massachusetts.—Wiggin *v.* Amory, 14 Mass. 1, 7 Am. Dec. 175.

New York.— Walden *v.* New York Firemen Ins. Co., 12 Johns. 128 [*reversed* on other grounds in 12 Johns. 513, 7 Am. Dec. 340].

Ohio.— Germania Ins. Co. *v.* Sherlock, 25 Ohio St. 33.

Pennsylvania.— Hood *v.* Nesbit, 2 Dall. 137, 1 L. ed. 321, 1 Am. Dec. 265.

South Carolina.— Messonier *v.* Union Ins. Co., 1 Nott & M. 155.

Tennessee.—Stewart *v.* Tennessee Mar., etc., Ins. Co., 1 Humphr. 242.

United States.— Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222, 7 L. ed. 659; Dederer *v.* Delaware Ins. Co., 7 Fed. Cas. No. 3,733, 2 Wash. 61.

England.— Bradford *v.* Levy, 2 C. & P. 137, R. & M. 331, 31 Rev. Rep. 657, 12 E. C. L. 492; Todd *v.* Ritchie, 1 Stark. 240, 18 Rev. Rep. 768, 2 E. C. L. 97; Phyn *v.* Royal Exch. Assur. Co., 7 T. R. 505, 4 Rev. Rep. 508.

See 28 Cent. Dig. tit. "Insurance," § 1100.

15. Wiggin *v.* Amory, 14 Mass. 1, 7 Am. Dec. 175; Germania Ins. Co. *v.* Sherlock, 25 Ohio St. 33; Hood *v.* Nesbit, 2 Dall. (Pa.) 137, 1 L. ed. 321, 1 Am. Dec. 265.

16. Lawton *v.* Sun Mut. Ins. Co., 2 Cush. (Mass.) 500.

17. *Louisiana.*— Millaudon *v.* New Orleans Ins. Co., 11 Mart. 602, 13 Am. Dec. 358.

Massachusetts.— Ward *v.* Wood, 13 Mass. 539.

New York.— McIntyre *v.* Bowne, 1 Johns. 229.

Pennsylvania.— Citizens' Ins. Co. *v.* Marsh, 41 Pa. St. 386; Crousillat *v.* Ball, 4 Dall. 294, 1 L. ed. 840, 2 Am. Dec. 375.

England.— Hobbs *v.* Hannam, 3 Campb. 93, 13 Rev. Rep. 764; Stamma *v.* Brown, 2 Str. 1173; Nutt *v.* Bourdieu, 1 T. R. 323, 1 Rev. Rep. 211.

See 28 Cent. Dig. tit. "Insurance," §§ 1099, 1100.

18. Lawton *v.* Sun Mut. Ins. Co., 2 Cush. (Mass.) 500; Dederer *v.* Delaware Ins. Co., 7 Fed. Cas. No. 3,733, 2 Wash. 61. But see Crousillat *v.* Ball, 4 Dall. (Pa.) 294, 1 L. ed. 840, 2 Am. Dec. 375.

19. *Louisiana.*— Barry *v.* Louisiana Ins. Co., 11 Mart. 630.

New York.— Kendrick *v.* Delafield, 2 Cai. 67.

Pennsylvania.— Citizens' Ins. Co. *v.* Marsh, 41 Pa. St. 386.

South Carolina.— Frazier *v.* Charleston, etc., Ins. Co., Cheves 123.

United States.— Marcardier *v.* Chesapeake Ins. Co., 8 Cranch 39, 3 L. ed. 481.

England.— Nutt *v.* Bourdieu, 1 T. R. 323, 1 Rev. Rep. 211.

Cargo owned by mate.— The mate of a vessel can be a freighter of goods in her and recover a loss of the insurer on the ground of barratry of the mariners. Stone *v.* National Ins. Co., 19 Pick. (Mass.) 34.

Where the master is the general agent and consignee of the owner, his acts cannot constitute barratry. Crousillat *v.* Ball, 4 Dall. (Pa.) 294, 1 L. ed. 840, 2 Am. Dec. 375.

20. Taggard *v.* Loring, 16 Mass. 336, 8 Am. Dec. 140; Hallet *v.* Columbian Ins. Co., 8 Johns. (N. Y.) 272.

Who is an owner pro hac vice see SHIPPING.

21. Hallet *v.* Columbian Ins. Co., 8 Johns. (N. Y.) 272; Stamma *v.* Brown, 2 Str. 1173; Nutt *v.* Bourdieu, 1 T. R. 323, 1 Rev. Rep. 211. *Contra*, Meyer *v.* Great Western Ins. Co., 104 Cal. 381, 38 Pac. 82; Ionides *v.* Pender, 1 Aspin. 432, 27 L. T. Rep. N. S. 244.

the master of a ship who is also a part-owner of the same may commit barratry against his coöwners.[22]

d. Illustrations. Barratry includes any gross malversation by the master,[23] a fraudulent deviation[24] or delay[25] in the voyage, a fraudulent stranding[26] or wrecking[27] of the vessel, theft,[28] other than petty theft,[29] smuggling,[30] illicit trade,[31] resisting lawful search,[32] or knowingly doing any unlawful act without the authority of the owners.[33] But negligence,[34] unless so gross as to amount to evidence of fraud,[35] or a failure to make proper repairs[36] or to properly stow the cargo,[37] except where it is stowed contrary to the order or protest of the owner,[38] or an attempt to rescue from captors for the benefit of the owners,[39] is not included.

15. Thieves. An insurance against "thieves" includes any larceny, whether by persons on board the vessel[40] or from without.[41]

16. Enemies. An insurance against enemies means public enemies.[42]

17. Mortality. Unless a different intent clearly appears, an insurance against risk of mortality means death from natural causes.[43]

18. "All Other Perils." "All other perils" covers all perils which are of

22. Hutchins *v.* Ford, 82 Me. 363, 19 Atl. 832; Voisin *v.* Commercial Mut. Ins. Co., 62 Hun (N. Y.) 4, 16 N. Y. Suppl. 410; Small *v.* United Kingdom Mar. Mut. Ins. Assoc., [1897] 2 Q. B. 311, 8 Aspin. 293, 66 L. J. Q. B. 736, 76 L. T. Rep. N. S. 828, 46 Wkly. Rep. 24; Jones *v.* Nicholson, 2 C. L. R. 1236, 10 Exch. 28, 23 L. J. Exch. 330. But see Wilson *v.* General Mut. Ins. Co., 12 Cush. (Mass.) 360, 59 Am. Dec. 188.

23. Wilfully commencing a voyage when the winds were foul, contrary to the directions of the pilot, was held to be barratrous, although there was no fraud. Heyman *v.* Parish, 2 Campb. 149, 11 Rev. Rep. 688.

24. McIntyre *v.* Bowne, 1 Johns. (N. Y.) 229; Dixon *v.* Reed, 5 B. & Ald. 597, 1 D. & R. 207, 24 Rev. Rep. 481, 7 E. C. L. 327; Moss *v.* Byrom, 6 T. R. 379, 3 Rev. Rep. 208; Ross *v.* Hunter, 4 T. R. 33, 2 Rev. Rep. 319; Lockyer *v.* Offley, 1 T. R. 252, 1 Rev. Rep. 194.

25. American Ins. Co. *v.* Dunham, 12 Wend. (N. Y.) 463 [*affirmed* in 15 Wend. 9]; Roscow *v.* Corson, 8 Taunt. 684, 21 Rev. Rep. 507, 4 E. C. L. 335.

26. Pike *v.* Merchants' Mut. Ins. Co., 26 La. Ann. 392; Clark *v.* Washington Ins. Co., 100 Mass. 509, 1 Am. Rep. 135.

27. Voisin *v.* Commercial Mut. Ins. Co., 62 Hun (N. Y.) 4, 16 N. Y. Suppl. 410.

28. Lawton *v.* Sun Mut. Ins. Co., 2 Cush. (Mass.) 500; Stone *v.* National Ins. Co., 19 Pick. (Mass.) 34; America Ins. Co. *v.* Bryan, 1 Hill (N. Y.) 25 [*affirmed* in 26 Wend. 563, 37 Am. Dec. 278].

29. Stone *v.* National Ins. Co., 19 Pick. (Mass.) 34.

30. Havelock *v.* Hancill, 3 T. R. 277, 1 Rev. Rep. 703.

31. American Ins. Co. *v.* Dunham, 15 Wend. (N. Y.) 9.

32. Brown *v.* Union Ins. Co., 5 Day (Conn.) 1, 5 Am. Dec. 123.

33. Australasian Ins. Co. *v.* Jackson, 3 Aspin. 26, 33 L. T. Rep. N. S. 286; Earle *v.* Rowcroft, 8 East 126, 9 Rev. Rep. 385.

34. Louisville Underwriters *v.* Pence, 93 Ky. 96, 19 S. W. 10, 14 Ky. L. Rep. 21, 40 Am. St. Rep. 176; Fayerweather *v.* Phenix Ins. Co., 54 N. Y. Super. Ct. 545, 7 N. Y. St. 25; Waters *v.* Merchants' Louisville Ins. Co., 29 Fed. Cas. No. 17,266, 1 McLean 275.

35. Fayerweather *v.* Phenix Ins. Co., 54 N. Y. Super. Ct. 545, 7 N. Y. St. 25; Waters *v.* Merchants' Louisville Ins. Co., 29 Fed. Cas. No. 17,266, 1 McLean 275; Ionides *v.* Pender, 1 Aspin. 432, 27 L. T. Rep. N. S. 244.

36. Stewart *v.* Tennessee M. & F. Ins. Co., 1 Humphr. (Tenn.) 242.

37. Atkinson *v.* Great Western Ins. Co., 4 Daly (N. Y.) 1 [*reversed* on other grounds in 65 N. Y. 531].

38. Atkinson *v.* Great Western Ins. Co., 65 N. Y. 531.

39. Dederer *v.* Delaware Ins. Co., 7 Fed. Cas. No. 3,733, 2 Wash. 61.

40. America Ins. Co. *v.* Bryan, 1 Hill (N. Y.) 25 [*affirmed* in 26 Wend. 563, 37 Am. Dec. 278]; Atlantic Ins. Co. *v.* Storrow, 5 Paige (N. Y.) 285.

41. America Ins. Co. *v.* Bryan, 1 Hill (N. Y.) 25 [*affirmed* in 26 Wend. 563, 37 Am. Dec. 278]; Harford *v.* Maynard, 1 Park Ins. 36.

42. See Monongahela Ins. Co. *v.* Chester, 43 Pa. St. 491; Merchants' Ins. Co. *v.* Edmond, 17 Gratt. (Va.) 138.

43. Lawrence *v.* Aberdein, 5 B. & Ald. 107, 24 Rev. Rep. 299, 7 E. C. L. 69. See also Gabay *v.* Lloyd, 3 B. & C. 793, 5 D. & R. 641, 3 L. J. K. B. O. S. 116, 27 Rev. Rep. 486, 10 E. C. L. 359.

"Walking to be deemed safe arrival."—A policy of insurance on a dog contained the following clause: "This insurance is against all risks, including mortality from any cause, jettison, and washing overboard, but walking at Lahore, Punjab, to be deemed a safe arrival." The dog was injured during the transit, and on arrival at Lahore could only walk on three legs. It was held that the dog did not walk at Lahore, within the meaning of the policy. Jacob *v.* Gaviller, 7 Com. Cas. 116, 87 L. T. Rep. N. S. 26, 50 Wkly. Rep. 428.

like kind to any of the perils previously enumerated, and none other.[44] Where the perils of the sea are among the enumerated perils it will cover damage sustained in taking ground in a tidal harbor,[45] or from the winds while the vessel is in a graving-dock for repairs,[46] and damages sustained in getting out of dock[47] or being sunk by another vessel firing upon her in consequence of mistaking her for an enemy.[48] But the breaking of machinery is not included.[49] And where the insurance is upon live stock it covers the risk of their rushing overboard.[50] When coupled with insurance against enemies, a capture or seizure by the Confederate states was held included.[51] Fire being enumerated, loss sustained by putting into port and discharging and selling a part of the cargo, which consisted of coal and which had become overheated, was held to be covered.[52] And, where assailing thieves are insured against, loss from seizure by a mob is covered.[53] Barratry is not covered unless particularly enumerated.[54]

19. Usual Risks. Where insurance is made against the "usual risks" it covers barratry,[55] capture,[56] and mutiny where the insurance is upon slaves;[57] but not an extraordinary duty laid upon the insured goods,[58] or damage by worms,[59] rats,[60] or climate.[61]

F. Effect of Negligence, Fraud, and Misconduct — 1. Negligence in General. The general rule is that where the immediate cause of a loss is a peril insured against, the underwriters are liable notwithstanding such loss would not have occurred, except for the negligence of the insured,[62] or that of the master, crew, or other agents or servants.[63]

44. Swift *v.* Union Mut. Mar. Ins. Co., 122 Mass. 573; Moses *v.* Sun Mut. Ins. Co., 1 Duer (N. Y.) 159; Monongahela Ins. Co. *v.* Chester, 43 Pa. St. 491; Thames, etc., Mar. Ins. Co. *v.* Hamilton, 12 App. Cas. 484, 6 Aspin. 200, 56 L. J. Q. B. 626, 57 L. T. Rep. N. S. 695, 36 Wkly. Rep. 337; Miller *v.* Law Acc. Ins. Co., [1902] 2 K. B. 694, 7 Com. Cas. 151, 71 L. J. K. B. 551, 50 Wkly. Rep. 474; The Knight of St. Michael, [1898] P. 30, 8 Aspin. 360, 67 L. J. P. 19, 78 L. T. Rep. N. S. 90, 46 Wkly. Rep. 396; Phillips *v.* Barber, 5 B. & Ald. 161, 24 Rev. Rep. 317, 7 E. C. L. 96.

45. Petrie *v.* Phenix Ins. Co., 132 N. Y. 137, 30 N. E. 380 [*affirming* 11 N. Y. Suppl. 188].

46. Phillips *v.* Barber, 5 B. & Ald. 161, 24 Rev. Rep. 317, 7 E. C. L. 96.

47. Devaux *v.* J'Anson, 2 Arn. 82, 5 Bing. N. Cas. 519, 3 Jur. 678, 8 L. J. C. P. 281, 7 Scott 507, 35 E. C. L. 280.

48. Cullen *v.* Butler, 4 Campb. 289, 5 M. & S. 461, 17 Rev. Rep. 400.

49. Thames, etc., Mar. Ins. Co. *v.* Hamilton, 12 App. Cas. 484, 6 Aspin. 200, 56 L. J. Q. B. 626, 57 L. T. Rep. N. S. 695, 36 Wkly. Rep. 337 [*disapproving* West India, etc., Tel. Co. *v.* Home, etc., Mar. Ins. Co., 6 Q. B. D. 51, 4 Aspin. 341, 50 L. J. Q. B. 41, 43 L. T. Rep. N. S. 420, 29 Wkly. Rep. 92].

50. Anthony *v.* Ætna Ins. Co., 1 Fed. Cas. No. 486, 1 Abb. 343.

51. Monongahela Ins. Co. *v.* Chester, 43 Pa. St. 491.

52. The Knight of St. Michael, [1898] P. 30, 8 Aspin. 360, 67 L. J. Prob. 19, 78 L. T. Rep. N. S. 90, 46 Wkly. Rep. 396.

53. Babbitt *v.* Sun Mut. Ins. Co., 23 La. Ann. 314.

54. O'Connor *v.* Merchants' Mar. Ins. Co., 20 Nova Scotia 514 [*affirmed* in 9 Can. L. T. Occ. Notes 209].

55. Parkhurst *v.* Gloucester Mut. Fishing Ins. Co., 100 Mass. 301, 97 Am. Dec. 100, 1 Am. Rep. 105.

56. Levy *v.* Merrill, 4 Me. 180.

57. Johnson *v.* Ocean Ins. Co., 10 Rob. (La.) 334; Hagan *v.* Ocean Ins. Co., 10 Rob. (La.) 333; Lockett *v.* Firemen's Ins. Co., 10 Rob. (La.) 332; Andrews *v.* Ocean Ins. Co., 10 Rob. (La.) 332; McCargo *v.* New Orleans Ins. Co., 10 Rob. (La.) 202, 43 Am. Dec. 180.

58. De Peau *v.* Russel, 1 Brev. (S. C.) 441, 2 Am. Dec. 676.

59. Martin *v.* Salem Mar. Ins. Co., 2 Mass. 420.

60. Hunter *v.* Potts, 4 Campb. 203, 16 Rev. Rep. 776.

61. Martin *v.* Salem Mar. Ins. Co., 2 Mass. 420.

62. Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 77; Trinder *v.* North Queensland Ins. Co., 66 L. J. Q. B. 802, 77 L. T. Rep. N. S. 80.

63. *Florida.*— Shultz *v.* Pacific Ins. Co., 14 Fla. 73.

Georgia.— Underwriters' Agency *v.* Sutherlin, 55 Ga. 266.

Illinois.— National Ins. Co. *v.* Webster, 83 Ill. 470.

Kentucky.— Louisville Underwriters *v.* Pence, 93 Ky. 96, 19 S. W. 10, 14 Ky. L. Rep. 21, 14 Am. St. Rep. 176; Fireman's Ins. Co. *v.* Powell, 13 B. Mon. 311.

Maryland.— Merchants' Mut. Ins. Co. *v.* Butler, 20 Md. 41; Georgia Ins., etc., Co. *v.* Dawson, 2 Gill 365.

Massachusetts.— Nelson *v.* Suffolk Ins. Co., 8 Cush. 477, 54 Am. Dec. 770; Copeland *v.* New England Mar. Ins. Co., 2 Metc. 432. *Compare* Ellery *v.* New England Ins. Co., 8

2. Fraud. But where the proximate cause of a loss is the fraud of the insured or of those for whose conduct he is responsible, the loss is not covered by the policy except in those cases in which it falls within a loss by barratry.[64]

3. Wilful Misconduct and Gross Negligence. And for acts of the insured or his agents which amount to wilful misconduct or gross negligence the underwriters are not liable.[65]

Pick. 14; Cleveland *v.* Union Ins. Co., 8 Mass. 308.

Mississippi.— Crescent Ins. Co. *v.* Vicksburg, etc., Packet Co., 69 Miss. 208, 13 So. 254, 30 Am. St. Rep. 537.

Missouri.— Missouri Ins. Co. *v.* Glasgow, 8 Mo. 725; St. Louis Ins. Co. *v.* Glasgow, 8 Mo. 713, 41 Am. Dec. 661.

New York.— Slocovich *v.* Orient Mut. Ins. Co., 108 N. Y. 56, 14 N. E. 802; Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 77 [*affirming* 38 N. Y. Super. Ct. 281]; Mathews *v.* Howard Ins. Co., 11 N. Y. 9 [*reversing* 13 Barb. 234]; Savage *v.* Corn Exch. F., etc., Ins. Co., 4 Bosw. 1 [*affirmed* in 36 N. Y. 655]. *Compare* Fayerweather *v.* Phenix Ins. Co., 54 N. Y. Super. Ct. 545, 7 N. Y. St. 25.

Ohio.— Enterprise Ins. Co. *v.* Parisot, 35 Ohio St. 35, 35 Am. Rep. 589; Perrin *v.* Protection Ins. Co., 11 Ohio 147, 38 Am. Dec. 728; Howell *v.* Cincinnati Ins. Co., 7 Ohio 270; Fulton *v.* Lancaster Ins. Co., 7 Ohio, Pt. II, 5.

Pennsylvania.— Phœnix F. Ins. Co. *v.* Cochran, 51 Pa. St. 143; American Ins. Co. *v.* Insley, 7 Pa. St. 223, 47 Am. Dec. 509.

South Carolina.— Street *v.* Augusta Ins., etc., Co., 12 Rich. 13, 75 Am. Dec. 714. *Compare* Himely *v.* Stewart, 1 Brev. 209.

Tennessee.— Stewart *v.* Tennessee M. & F. Ins. Co., 1 Humphr. 242.

United States.— Richelieu etc., Nav. Co. *v.* Boston Mar. Ins. Co., 136 U. S. 408, 10 S. Ct. 934, 34 L. ed. 398; Orient Mut. Ins. Co. *v.* Adams, 123 U. S. 67, 8 S. Ct. 68, 31 L. ed. 63; General Mut. Ins. Co. *v.* Sherwood, 14 How. 351, 14 L. ed. 452; Waters *v.* Merchants' Louisville Ins. Co., 11 Pet. 213, 9 L. ed. 69; Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222, 7 L. ed. 659; Nome Beach Lighterage, etc., Co. *v.* Munich Assur. Co., 123 Fed. 820 [*affirmed* in 128 Fed. 410, 63 C. C. A. 152]; Earnmoor Steamship Co. *v.* Union Ins. Co., 44 Fed. 374; Northwest Transp. Co. *v.* Boston Mar. Ins. Co., 41 Fed. 793; Richelieu, etc., Nav. Co. *v.* Boston Mar. Ins. Co., 26 Fed. 596 [*affirmed* in 136 U. S. 408, 10 S. Ct. 934, 34 L. ed. 398]; Levi *v.* New Orleans Mut. Ins. Assoc., 15 Fed. Cas. No. 8,290, 2 Woods 63; Waters *v.* Merchants' Louisville Ins. Co., 29 Fed. Cas. No. 17,266, 1 McLean 275; Williams *v.* New England Ins. Co., 29 Fed. Cas. No. 17,731, 3 Cliff. 244; Williams *v.* Suffolk Ins. Co., 29 Fed. Cas. No. 17,738, 3 Sumn. 270. See also Andrews *v.* Essex F. & M. Ins. Co., 1 Fed. Cas. No. 374, 3 Mason 6. *Compare* The Titania, 19 Fed. 101; Howland *v.* Alexandria Mar. Ins. Co., 12 Fed. Cas. No. 6,798, 2 Cranch C. C. 474.

England.— Trinder *v.* Thames, etc., Mar. Ins. Co., [1898] 2 Q. B. 114, 8 Aspin. 373, 67 L. J. Q. B. 666, 78 L. T. Rep. N. S. 485, 46 Wkly. Rep. 561; West India, etc., Tel. Co. *v.* Home, etc., Mar. Ins. Co., 6 Q. B. D. 51, 4 Aspin. 341, 50 L. J. Q. B. 41, 43 L. T. Rep. N. S. 420, 29 Wkly. Rep. 92; Phillips *v.* Headlam, 2 B. & Ad. 380, 9 L. J. K. B. O. S. 238, 22 E. C. L. 163; Walker *v.* Maitland, 5 B. & Ald. 171, 24 Rev. Rep. 320, 7 E. C. L. 101; Busk *v.* Royal Exch. Assur. Co., 2 B. & Ald. 73, 20 Rev. Rep. 350; Shore *v.* Bentall, 7 B. & C. 798 note, 1 M. & R. 111, 31 Rev. Rep. 302 note, 14 E. C. L. 357; Bishop *v.* Pentland, 7 B. & C. 219, 6 L. J. K. B. O. S. 6, 1 M. & R. 49, 31 Rev. Rep. 177, 14 E. C. L. 104; Bishop *v.* Pentland, 7 B. & C. 214, 6 L. J. K. B. O. S. 6, 1 M. & R. 49, 31 Rev. Rep. 177, 14 E. C. L. 104; Redman *v.* Wilson, 9 Jur. 714, 14 L. J. Exch. 333, 14 M. & W. 476; Trinder *v.* North Queensland Ins. Co., 66 L. J. Q. B. 802, 77 L. T. Rep. N. S. 80; Dixon *v.* Sadler, 9 L. J. Exch. 48, 5 M. & W. 405 [*affirmed* in 11 L. J. Exch. 435, 8 M. & W. 895].

Canada.—Patterson *v.* Continental Ins. Co., 18 U. C. Q. B. 9.

See 28 Cent. Dig. tit. "Insurance," §§ 1112–1114.

Statutory provision to this effect see Cal. Civ. Code, § 2629.

The liability of the ship-owner to the shipper for the negligence of the master and crew cannot avail the insurer as a defense. Georgia Ins., etc., Co. *v.* Dawson, 2 Gill (Md.) 365.

Gross negligence see *infra*, VIII, F, 3.

64. Schultz *v.* Pacific Ins. Co., 14 Fla. 73; Field Steamship Co. *v.* Burr, [1898] 1 Q. B. 821, 8 Aspin. 384, 67 L. J. Q. B. 528, 78 L. T. Rep. N. S. 293, 46 Wkly. Rep. 490 [*affirmed* in [1899] 1 Q. B. 579, 8 Aspin. 529, 68 L. J. Q. B. 426, 80 L. T. Rep. N. S. 445, 47 Wkly. Rep. 341].

65. *Florida.*— Schultz *v.* Pacific Ins. Co., 14 Fla. 73.

Massachusetts.— Smith *v.* Touro, 14 Mass. 112.

New York.— Borland *v.* Mercantile Mut. Ins. Co., 46 N. Y. Super. Ct. 433.

Pennsylvania.— Citizens' Ins. Co. *v.* Marsh, 41 Pa. St. 386.

United States.— Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 499; Levi *v.* New Orleans Mut. Ins. Assoc., 15 Fed. Cas. No. 8,290, 2 Woods 63; Williams *v.* New England Ins. Co., 29 Fed. Cas. No. 17,731, 3 Cliff. 244.

England.— Dudgeon *v.* Pembroke, 2 App. Cas. 284, 3 Aspin. 393, 46 L. J. Q. B. 409, 36 L. T. Rep. N. S. 382, 25 Wkly. Rep. 499; Trinder *v.* Thames, etc., Mar. Ins. Co., [1898] 2 Q. B. 114, 8 Aspin. 373, 67 L. J. Q. B. 666, 78 L. T. Rep. N. S. 485, 46 Wkly. Rep. 561.

G. Proximate Cause of Loss — 1. In General. The underwriter is liable for only such losses as are proximately caused by the perils insured against.[66] The maxim "*causa proxima non remota spectatur*" is applicable to contracts of marine insurance.[67] The application of the maxim largely depends on the facts and circumstances in each case,[68] and should not be applied too literally.[69]

2. Sequential Causes. Where there are two or more causes contributing to the production of the loss the proximate cause is not necessarily the cause nearest in point of time to the loss,[70] but it is the efficient, predominating cause[71] of which the loss was the natural and almost inevitable result.[72] It need not be in active operation at the time of the loss.[73]

See 28 Cent. Dig. tit. "Insurance," § 1112 *et seq.*

Compare Franklin Ins. Co. *v.* Humphrey, 65 Ind. 549, 32 Am. Rep. 78.

Statutory provision see Cal. Civ. Code, § 2629.

Using turpentine to increase head of steam is misconduct. Citizens' Ins. Co. *v.* Marsh, 41 Pa. St. 386.

Driving a vessel through ice for the purpose of more quickly reaching the point of destination and with knowledge of the dangers to be encountered was held to be a wilful commission of a wrongful act. Standard Mar. Ins. Co. *v.* Nome Beach Lighterage, etc., Co., 133 Fed. 636, 67 C. C. A. 202.

Neglect to make the vessel seaworthy at an intermediate port where the vessel was in command of the owner and became unseaworthy during the voyage was held to relieve the underwriters from liability. Cudworth *v.* South Carolina Ins. Co., 4 Rich. (S. C.) 416, 55 Am. Dec. 692.

66. *Maine.*— Dyer *v.* Piscataqua F. & M. Ins. Co., 53 Me. 118.

Maryland.— Commonwealth Ins. Co. *v.* Cropper, 21 Md. 311.

Massachusetts.— New York, etc., Express Co. *v.* Traders', etc., Ins. Co., 132 Mass. 377, 42 Am. Rep. 440; Delano *v.* Bedford Mar. Ins. Co., 10 Mass. 347, 6 Am. Dec. 132.

Missouri.— Lockwood *v.* Sangamo Ins. Co., 46 Mo. 71.

New York.— Allison *v.* Corn Exch. Ins. Co., 57 N. Y. 87; Mathews *v.* Howard Ins. Co., 11 N. Y. 9.

South Carolina.— Teasdale *v.* Charleston Ins. Co., 2 Brev. 190, 3 Am. Dec. 705.

United States.—Waters *v.* Merchants Louisville Ins. Co., 11 Pet. 213, 9 L. ed. 69.

England.— Pink *v.* Fleming, 25 Q. B. D. 396, 6 Aspin. 554, 59 L. J. Q. B. 559, 63 L. T. Rep. N. S. 413; West India, etc., Tel. Co. *v.* Home, etc., Mar. Ins. Co., 6 Q. B. D. 51, 4 Aspin. 341, 50 L. J. Q. B. 41, 43 L. T. Rep. N. S. 420, 29 Wkly. Rep. 92; Sarquy *v.* Hobson, 2 B. & C. 7, 9 E. C. L. 13, 4 Bing. 131, 13 E. C. L. 434, 3 D. & R. 192, 1 L. J. K. B. O. S. 222, 12 Moore C. P. 174, 1 Y. & J. 347, 20 Rev. Rep. 794.

See 28 Cent. Dig. tit. "Insurance," § 1115 *et seq.*

"Any consequence resulting therefrom" means any immediate or proximate and not a remote consequence from the perils named. Orient Mut. Ins. Co. *v.* Adams, 123 U. S. 67, 8 S. Ct. 68, 31 L. ed. 63.

67. Nelson *v.* Suffolk Ins. Co., 8 Cush. (Mass.) 477, 54 Am. Dec. 770; Rice *v.* Homer, 12 Mass. 230; General Mut. Ins. Co. *v.* Sherwood, 14 How. (U. S.) 351, 14 L. ed. 452; Northwest Transp. Co. *v.* Boston Mar. Ins. Co., 41 Fed. 793; Dole *v.* New England Mut. Mar. Ins. Co., 7 Fed. Cas. No. 3,966, 2 Cliff. 394; Magoun *v.* New England Mar. Ins. Co., 16 Fed. Cas. No. 8,961, 1 Story 157; Inman Steamship Co. *v.* Bischoff, 7 App. Cas. 670, 5 Aspin. 6, 52 L. J. Q. B. 169, 47 L. T. Rep. N. S. 581, 31 Wkly. Rep. 141; Trinder *v.* Thames, etc., Mar. Ins. Co., [1898] 2 Q. B. 114, 8 Aspin. 373, 67 L. J. Q. B. 666, 78 L. T. Rep. N. S. 485, 46 Wkly. Rep. 56; Reischer *v.* Borwick, [1894] 2 Q. B. 548, 7 Aspin. 493, 63 L. J. Q. B. 753, 71 L. T. Rep. N. S. 238, 9 Reports 58; Livie *v.* Janson, 12 East 648, 11 Rev. Rep. 513; Redman *v.* Wilson, 9 Jur. 714, 14 L. J. Exch. 333, 14 M. & W. 476.

68. Northwest Transp. Co. *v.* Boston Mar. Ins. Co., 41 Fed. 793.

69. Inman Steamship Co. *v.* Bischoff, 7 App. Cas. 670, 5 Aspin. 6, 52 L. J. Q. B. 169, 47 L. T. Rep. N. S. 581, 31 Wkly. Rep. 141.

"In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril. But if the peril of the sea, which operated in a given case, was not of itself sufficient to occasion, and did not in and by itself occasion the loss claimed, if it depended upon the cause of that peril whether the loss claimed would follow it . . . then we must look beyond the peril to its cause, to ascertain the sufficient cause of the loss." General Mut. Ins. Co. *v.* Sherwood, 14 How. (U. S.) 351, 365, 14 L. ed. 452, per Curtis, J.

70. McCargo *v.* New Orleans Ins. Co., 10 Rob. (La.) 202, 43 Am. Dec. 180; Northwest Transp. Co. *v.* Boston Mar. Ins. Co., 41 Fed. 793; Dole *v.* New England Mut. Mar. Ins. Co., 7 Fed. Cas. No. 3,966, 2 Cliff. 394.

71. Dole *v.* New England Mut. Mar. Ins. Co., 7 Fed. Cas. No. 3,966, 2 Cliff. 394.

72. Northwest Transp. Co. *v.* Boston Mar. Ins. Co., 41 Fed. 793; Montoya *v.* London Assur. Co., 6 Exch. 451, 20 L. J. Exch. 254.

73. Dole *v.* New England Mut. Mar. Ins. Co., 7 Fed. Cas. No. 3,966, 2 Cliff. 394; Potter *v.* Ocean Ins. Co., 19 Fed. Cas. No. 11,335, 3 Sumn. 27.

3. Independent Causes. Where the causes are independent, the only peril which the law considers is that nearest in point of time,[74] and not a peril but for the occurrence of which the insured property might not have been brought within the reach or operation of the subsequent peril.[75]

4. Incidental Losses and Expenses. It also includes all incidental losses which are a legal or natural consequence of the direct injury or loss.[76] Thus up to the extent of the amount of the insurance the underwriters are liable for all expenses which are the direct and inevitable result of the perils insured against, such as repairs,[77] salvage,[78] amounts paid in good faith to captors for the redemption of captured property,[79] towage,[80] or other expenses which are neeessary for the protection and preservation of the insured property.[81] But consequential damages which the insured may suffer are not covered.[82]

5. General Average Losses and Expenses. All general average losses and

74. Howard F. Ins. Co. *v.* Norwich, etc., Transp. Co., 12 Wall. (U. S.) 194, 20 L. ed. 378; Northwest Transp. Co. *v.* Boston Mar. Ins. Co., 41 Fed. 793.

75. Howard F. Ins. Co. *v.* Norwich, etc., Transp. Co., 12 Wall. (U. S.) 194, 20 L. ed. 378; Lewis *v.* Ætna Ins. Co., 123 Fed. 157 [*affirmed* in 129 Fed. 1006, 64 C. C. A. 210].

76. McCargo *v.* New Orleans Ins. Co., 10 Rob. (La.) 202, 43 Am. Dec. 180; Lawton *v.* Sun Mut. Ins. Co., 2 Cush. (Mass.) 500; Perry *v.* Ohio Ins. Co., 5 Ohio 305; Hall *v.* Rising Sun Ins. Co., 1 Disn. (Ohio) 308, 12 Ohio Dec. (Reprint) 639; Peters *v.* Warren Ins. Co., 14 Pet. (U. S.) 99, 10 L. ed. 371; Peters *v.* Warren Ins. Co., 19 Fed. Cas. No. 11,035, 3 Sumn. 389.

77. Providence, etc., Steamship Co. *v.* Phœnix Ins. Co., 89 N. Y. 559.

78. Providence, etc., Steamship Co. *v.* Phœnix Ins. Co., 89 N. Y. 559; Muir *v.* United Ins. Co., 1 Cai. (N. Y.) 49; Hall *v.* Rising Sun Ins. Co., 1 Disn. (Ohio) 308, 12 Ohio Dec. (Reprint) 639; International Nav. Co. *v.* Atlantic Mut. Ins. Co., 100 Fed. 304 [*affirmed* in 108 Fed. 987, 48 C. C. A. 181]; Aitchison *v.* Lohre, 4 App. Cas. 755, 4 Aspin. 168, 49 L. J. Q. B. 123, 41 L. T. Rep. N. S. 323, 28 Wkly. Rep. 1; Berens *v.* Rucker, W. Bl. 313.

An amount which may be paid for life salvage under a statutory provision fixing a liability for such salvage is not recoverable as a loss from any of the perils in the ordinary policy. Nourse *v.* Liverpool Sailing Shipowners' Mut. Protection, etc., Assoc., [1896] 2 Q. B. 16, 8 Aspin. 144, 65 L. J. Q. B. 507, 74 L. T. Rep. N. S. 543, 44 Wkly. Rep. 500.

79. Waddell *v.* Columbian Ins. Co., 10 Johns. (N. Y.) 61; Fontaine *v.* Columbian Ins. Co., 9 Johns. (N. Y.) 29; Clarkson *v.* Phœnix Ins. Co., 9 Johns. (N. Y.) 1; Gracie *v.* New York Ins. Co., 8 Johns. (N. Y.) 237.

80. McColdin *v.* Greenwich Ins. Co., 10 N. Y. St. 390; Perry *v.* Ohio Ins. Co., 5 Ohio 305.

81. *Kentucky.*— Fireman's Ins. Co. *v.* Fitzhugh, 4 B. Mon. 160.

Massachusetts.— Nelson *v.* Suffolk Ins. Co., 8 Cush. 477, 54 Am. Dec. 770.

New York.— Providence, etc., Steamship Co. *v.* Phœnix Ins. Co., 89 N. Y. 559.

Ohio.— Hall *v.* Rising Sun Ins. Co., 1 Disn. 308, 12 Ohio Dec. (Reprint) 639.

United States.— Hale *v.* Washington Ins. Co., 11 Fed. Cas. No. 5,916, 2 Story 176.

**Expenses in defending a claim against the insured vessel for damage done to another vessel in a collision is a charge against underwriters where such damage is covered by the policy. Blanchard *v.* Equitable Safety Ins. Co., 12 Allen (Mass.) 386.

Expense of a survey properly made to ascertain the propriety of making repairs is chargeable against the underwriters. Potter *v.* Ocean Ins. Co., 19 Fed. Cas. No. 11,335, 3 Sumn. 27.

Marine interest.— To render the insurer liable for marine interest, it ought clearly to appear that there were no other means of raising money than by a bottomry bond. Reade *v.* Commercial Ins. Co., 3 Johns. (N. Y.) 352, 3 Am. Dec. 495.

Expenses incident to sale of cargo partially damaged.— The charges and expenses incurred in handling and disposing of the goods, in case of a partial loss, in order to be considered a part of the loss, must be reasonable and proper, for the purpose only of ascertaining the amount of the loss. Thus items for surveys, inspection, and sale at auction would be included, but not charges for storage, nor the amount paid by the consignee for insurance of the goods while in store at the place of delivery. Lamar Ins. Co. *v.* McGlashen, 54 Ill. 513, 5 Am. Rep. 162.

82. Expenses in discharging and disposing of worthless cargo, which has become so by a sea peril, is not a charge against the underwriters on the ship. Field Steamship Co. *v.* Burr, [1898] 1 Q. B. 821, 8 Aspin. 384, 67 L. J. Q. B. 528, 78 L. T. Rep. N. S. 293, 46 Wkly. Rep. 490 [*affirmed* in [1899] 1 Q. B. 579, 8 Aspin. 529, 68 L. J. Q. B. 426, 80 L. T. Rep. N. S. 445, 47 Wkly. Rep. 341].

Neglect of the insured to preserve his lien for freight after a loss of a part of the cargo by perils insured against is not a loss chargeable to the underwriters. Williams *v.* Canton Ins. Office, [1901] A. C. 462, 6 Com. Cas. 256, 70 L. J. K. B. 962, 85 L. T. Rep. N. S. 317; Brankclow Steamship Co. *v.* Canton Ins. Office, [1899] 2 Q. B. 178, 8 Aspin. 563, 68 L. J. Q. B. 811, 81 L. T. Rep. N. S. 6, 47 Wkly. Rep. 611.

contributions are considered the proximate result of the peril which occasioned the general average sacrifice.[83]

6. Acts Induced by Peril Insured Against. The underwriters are not liable for the acts of third persons directly producing loss or injury, although such acts may have been induced by the happening of some peril insured against.[84]

7. Sales to Satisfy Charges. A loss caused by the sale of property to satisfy a lien or charge which the insured was bound to pay and which lien arose from the failure to pay the charges and expenses incurred for repairs,[85] salvage,[86] or bottomry[87] is not the proximate result of the peril which necessitated such repairs, etc.

The erroneous payment of the insured's interest in the proceeds of a salvage suit to another party is not a claim against the underwriter. The Clintonia, 105 Fed. 256.

83. *Illinois.*— Union Ins. Co. *v.* Cole, 18 Ill. App. 413.

Louisiana.— Hunter *v.* General Mut. Ins. Co., 11 La. Ann. 139.

Maine.— Thornton *v.* U. S. Insurance Co., 12 Me. 150.

Massachusetts.— Greely *v.* Tremont Ins. Co., 9 Cush. 415; Giles *v.* Eagle Ins. Co., 2 Metc. 140; Brooks *v.* Oriental Ins. Co., 7 Pick. 259; Dorr *v.* Union Ins. Co., 8 Mass. 494.

New York.— Heyliger *v.* New York Firemen Ins. Co., 11 Johns. 85; Saltus *v.* Commercial Ins. Co., 10 Johns. 487; Barker *v.* Phœnix Ins. Co., 8 Johns. 307, 5 Am. Dec. 339; Henshaw *v.* Marine Ins. Co., 2 Cai. 274; Leavenworth *v.* Delafield, 1 Cai. 573, 2 Am. Dec. 201; Maggrath *v.* Church, 1 Cai. 196, 2 Am. Dec. 173.

Pennsylvania.— Delaware Ins. Co. *v.* Delaunie, 3 Binn. 295.

United States.— The Roanoke, 59 Fed. 161, 8 C. C. A. 67 [*affirming* 46 Fed. 297]; Northwestern Transp. Co. *v.* Continental Ins. Co., 24 Fed. 171; Mutual Safety Ins. Co. *v.* Cargo of The George, 17 Fed. Cas. No. 9,981, Olcott 89; Potter *v.* Ocean Ins. Co., 19 Fed. Cas. No. 11,335, 3 Sumn. 27.

England.— Montgomery *v.* Indemnity Mut. Mar. Ins. Co., [1901] 1 K. B. 147, 9 Aspin. 141, 6 Com. Cas. 19, 70 L. J. K. B. 45, 84 L. T. Rep. N. S. 57, 49 Wkly. Rep. 221 [*affirmed* in [1902] 1 K. B. 734, 9 Aspin. 289, 7 Com. Cas. 120, 71 L. J. K. B. 467, 86 L. T. Rep. N. S. 462, 50 Wkly. Rep. 440]; Oppenheim *v.* Fry, 3 B. & S. 873, 113 E. C. L. 873. But see Merchants', etc., Transp. Co. *v.* Associated Firemen's Ins. Co., 53 Md. 448, 36 Am. Rep. 428.

84. Inman Steamship Co. *v.* Bischoff, 7 App. Cas. 670, 5 Aspin. 6, 52 L. J. Q. B. 169, 47 L. T. Rep. N. S. 581, 31 Wkly. Rep. 141; Manchester Liners *v.* British, etc., Mar. Ins. Co., 9 Aspin. 266, 7 Com. Cas. 26, 86 L. T. Rep. N. S. 148.

Loss of voyage by the master remaining at a foreign port to prosecute suits for collision is not the proximate result of the collision. Ruger *v.* Fireman's Fund Ins. Co., 90 Fed. 310.

Loss produced by refusal of the purchaser of cargo to complete the contract because of damage to part of the cargo from a sea peril is not the proximate consequence of such peril. McSwiney *v.* Royal Exch. Assur. Corp., 14 Q. B. 634, 18 L. J. Q. B. 193, 68 E. C. L. 634.

Exercise of an option to cancel the charter induced by a peril insured against does not make the ensuing loss the proximate result of such peril. Inman Steamship Co. *v.* Bischoff, 7 App. Cas. 670, 5 Aspin. 6, 52 L. J. Q. B. 169, 47 L. T. Rep. N. S. 581, 31 Wkly. Rep. 141; Mercantile Steamship Co. *v.* Tyser, 7 Q. B. D. 73, 5 Aspin. 6 note, 29 Wkly. Rep. 790. Where, under authority given in the bill of lading, the master terminates the voyage and returns to the port of departure upon learning of the opening of hostilities between two foreign countries, such loss is not the proximate result of the hostilities. Nickels *v.* London, etc., Mar., etc., Ins. Co., 6 Com. Cas. 15, 70 L. J. K. B. 29.

Loss sustained by the operation of the cesser clause in a charter-party for payment of freight in case of break-down is the proximate result of the peril which caused the break-down. The Bedouin, [1894] P. 1, 7 Aspin. 391, 63 L. J. Adm. 30, 69 L. T. Rep. N. S. 782, 6 Reports 696, 4 Wkly. Rep. 292. See also The Alps, [1893] P. 109, 7 Aspin. 337, 62 L. J. Adm. 59, 68 L. T. Rep. N. S. 624, 1 Reports 587, 41 Wkly. Rep. 527. But where by perils insured against the vessel is so damaged as to defeat the voyage the termination of the charter is the result of such peril and not of the cesser clause. *In re* Jamieson, [1895] 2 Q. B. 90, 7 Aspin. 593, 64 L. J. Q. B. 560, 72 L. T. Rep. N. S. 648, 14 Reports 444, 43 Wkly. Rep. 530.

85. Dyer *v.* Piscataqua F. & M. Ins. Co., 53 Me. 118; Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer (N. Y.) 342; Bradlie *v.* Maryland Ins. Co., 12 Pet. (U. S.) 378, 9 L. ed. 1123; Humphreys *v.* Union Ins. Co., 12 Fed. Cas. No. 6,871, 3 Mason 429; Sarquy *v.* Hobson, 2 B. & C. 7, 9 E. C. L. 13, 4 Bing. 131, 13 E. C. L. 434, 3 D. & R. 192, 1 L. J. K. B. O. S. 222, 12 Moore C. P. 174, 1 Y. & J. 347, 30 Rev. Rep. 497.

86. De Mattos *v.* Saunders, L. R. 7 C. P. 570, 1 Aspin. 377, 27 L. T. Rep. N. S. 120, 20 Wkly. Rep. 801.

87. Bradlie *v.* Maryland Ins. Co., 12 Pet. (U. S.) 378, 9 L. ed. 1123; Humphreys *v.* Union Ins. Co., 12 Fed. Cas. No. 6,871, 3 Mason 429; Benson *v.* Chapman, 8 C. B. 950, 63 E. C. L. 950, 2 H. L. Cas. 696, 9 Eng. Reprint 1256, 13 Jur. 969.

8. Sacrifices to Avoid Peril. Where a vessel is voluntarily scuttled, stranded, burned, or otherwise injured to avoid an impending peril, such peril is the proximate cause of the loss.[88]

9. Illustrations of Proximate Cause — a. Perils of the Sea. The following losses have been held to be the proximate result of a peril of the sea: The plundering of a vessel after its wreck and while on shore;[89] or its burning,[90] capture,[91] or destruction in a gale[92] while in such situation; the going ashore of a vessel because of the impressing of members of the crew who had been sent ashore to cast off her ropes,[93] or because of absence of a coast light extinguished by a belligerent during hostilities;[94] the freezing of the cargo after sinking of the vessel;[95] or damage by injurious flavor imparted to goods from putrefaction of other goods caused by shipping sea-water.[96] But damage done to perishable goods in handling them in discharging and reshipping them at an intermediate port so that repairs, rendered necessary by perils of the sea, could be made to the ship, is not the proximate result of such perils;[97] nor is the jettison of cargo because of its becoming putrid owing to delay of the voyage caused by tempestuous weather,[98] or the death of slaves because of the failure of provisions produced by delay resulting from bad weather.[99]

b. Capture and Seizure. The proximate cause of a loss is held to be by capture where, after capture, the vessel is plundered, fired, wrecked, or otherwise destroyed;[1] and capture is also considered the proximate cause of a loss where the vessel has stranded or been driven by tempests into an enemy's port and there captured.[2] The expenses incurred in procuring the release of a vessel seized for smuggling are the proximate result of the seizure and not the barratrous act of the master in smuggling.[3]

c. Fire. Fire is the proximate cause of a loss where a vessel sinks because a fire produced by a collision prevents the use of the pumps to keep the vessel afloat;[4] where after a collision a fire burns her upper parts, thereby so lessening her floating capacity as to cause her to sink;[5] or where fire causes an explosion producing damage to the vessel.[6]

d. Barratry. Loss by fire or other peril occasioned by the direct act and

88. Singleton *v.* Phenix Ins. Co., 132 N. Y. 298, 30 N. E. 839; Northwest Transp. Co. *v.* Boston Mar. Ins. Co., 41 Fed. 793.

89. Bondrett *v.* Hentigg, Holt N. P. 149, 17 Rev. Rep. 625, 3 E. C. L. 66.

90. Patrick *v.* Commercial Ins. Co., 11 Johns. (N. Y.) 9.

91. Hahn *v.* Corbett, 2 Bing. 205, 3 L. J. C. P. O. S. 253, 9 Moore C. P. 390, 27 Rev. Rep. 591, 9 E. C. L. 546.

92. Cardwell *v.* Republic F. Ins. Co., 5 Fed. Cas. No. 2,396.

93. Hodgson *v.* Malcolm, 2 B. & P. N. R. 336, 9 Rev. Rep. 656.

94. Ionides *v.* Universal Mar. Ins. Co., 14 C. B. N. S. 259, 10 Jur. N. S. 18, 32 L. J. C. P. 170, 8 L. T. Rep. N. S. 705, 11 Wkly. Rep. 858, 108 E. C. L. 259.

95. Devitt *v.* Providence Washington Ins. Co., 61 N. Y. App. Div. 390, 70 N. Y. Suppl. 654.

96. Montoya *v.* London Assur. Co., 6 Exch. 451, 20 L. J. Exch. 254.

97. Pink *v.* Fleming, 25 Q. B. D. 396, 6 Aspin. 554, 59 L. J. Q. B. 559, 63 L. T. Rep. N. S. 413.

98. Taylor *v.* Dunbar, L. R. 4 C. P. 206, 38 L. J. C. P. 178, 17 Wkly. Rep. 382.

99. Tatham *v.* Hodgson, 6 T. R. 656.

1. Coolidge *v.* New York Firemen Ins. Co., 14 Johns. (N. Y.) 308; Schieffelin *v.* New York Ins. Co., 9 Johns. (N. Y.) 21; Dole *v.* New England Mut. Mar. Ins. Co., 7 Fed. Cas. No. 3,966, 2 Cliff. 394; Magoun *v.* New England Mar. Ins. Co., 16 Fed. Cas. No. 8,961, 1 Story 157. See also Hagedorn *v.* Whitmore, 1 Stark. 157, 2 E. C. L. 67.

2. Rice *v.* Homer, 12 Mass. 230; Livie *v.* Janson, 12 East 648, 11 Rev. Rep. 513; Green *v.* Elmslie, 1 Peake N. P. 278, 3 Rev. Rep. 693.

But where the vessel was first totally wrecked and the cargo was seized by the enemy, it was held that the proximate cause of the loss of the cargo was not the seizure but the loss of the ship. Hahn *v.* Corbett, 2 Bing. 205, 3 L. J. C. P. O. S. 253, 9 Moore C. P. 390, 27 Rev. Rep. 590, 9 E. C. L. 546.

3. Cory *v.* Burr, 8 App. Cas. 393, 5 Aspin. 109, 52 L. J. Q. B. 657, 49 L. T. Rep. N. S. 78, 31 Wkly. Rep. 894.

4. New York, etc., Despatch Express Co. *v.* Traders', etc., Ins. Co., 132 Mass. 377, 42 Am. Rep. 440.

5. Howard F. Ins. Co. *v.* Norwich, etc., Transp. Co., 12 Wall. (U. S.) 194, 20 L. ed. 378.

6. Waters *v.* Merchants Louisville Ins. Co., 11 Pet. (U. S.) 213, 9 L. ed. 69.

agency of the master and crew barratrously committed is the proximate result of such barratry.[7]

e. Bursting of Boilers. The destruction by fire occasioned directly by the bursting of the boiler is the proximate result of the bursting of the boiler.[8]

H. Discrimination of Damages From Concurrent Perils. Where there is a concurrence of two causes of loss, one insured against and the other not insured against, or where they are insured against by different underwriters, if the damage caused by each can be discriminated it is to be separately borne by the parties respectively chargeable therewith.[9] But if the damage done by each cannot be distinguished the maxim *proxima causa* is then applicable.[10]

I. Excepted Risks — 1. Form and Effect of Exception. A clause in a policy providing that the subject-matter is "warranted free" from a particular peril or loss means that for such peril or loss the underwriter exempts himself from liability.[11] It does not create a technical warranty so as to avoid the insurance if such peril or loss occur.[12] An exception in the policy has the same effect, and in either case there can be no recovery for losses from such perils.[13] Perils which are excepted by the underwriters are construed the same as when they appear in the body of the policy as risks which the underwriters assume.[14]

2. Application of Causa Proxima. The rules as to proximate cause of perils insured against apply equally in determining whether a loss falls within an excepted peril.[15]

7. Gazzam *v.* Ohio Ins. Co., Wright (Ohio) 202; Waters *v.* Merchants Louisville Ins. Co., 11 Pet. (U. S.) 213, 9 L. ed. 69. See also O'Connor *v.* Merchants' Mar. Ins. Co., 16 Can. Sup. Ct. 331.

8. Montgomery *v.* Firemen's Ins. Co., 16 B. Mon. (Ky.) 427. Where the bursting of a boiler while the boat was running drove out the adjacent boiler and tore away the stanchion supporting the upper deck, so that it fell down into the furnace and took fire, the bursting of the boiler was held to be the immediate and proximate cause of the loss. Roe *v.* Columbus Ins. Co., 17 Mo. 301.

Insurance against loss occurring "subsequent" to peril.— A policy which excepts loss by the bursting of boilers, but covers that "occurring subsequent to and in consequence of such bursting," does not cover a loss occasioned by an explosion so violent as to tear open the sides of the vessel to such an extent that the water admitted sinks her in five or ten minutes. Such a loss is immediate upon, not subsequent to, the explosion, within the meaning of the policy. Evans *v.* Columbian Ins. Co., 44 N. Y. 146, 4 Am. Rep. 650.

9. Sherlock *v.* Globe Ins. Co., 7 Ohio Dec. (Reprint) 17, 1 Cinc. L. Bul. 26; Western Massachusetts Ins. Co. *v.* Norwich, etc., Transp. Co., 12 Wall. (U. S.) 201, 20 L. ed. 380 [*affirming* 18 Fed. Cas. No. 10,363, 6 Blatchf. 241, 34 Conn. 561]; 1 Phillips Ins. § 1136. In Fuller *v.* Detroit F. & M. Ins. Co., 36 Fed. 469, 1 L. R. A. 801, a vessel stranded and subsequently a fire broke out which was the proximate result of the stranding. The vessel was insured to the amount of twelve thousand dollars by fire insurance companies; to the amount of ten thousand dollars in marine policies covering loss by fire; and five thousand dollars in a marine company not covering loss by fire. In an action to apportion the loss, which was total and amounted to eighteen thousand dollars, it was found that the loss due to the stranding was six thousand dollars. This latter sum was ordered to be paid solely by the marine underwriters; nine thousand dollars to be paid proportionately by all underwriters; and three thousand dollars by the fire underwriters alone.

10. Western Massachusetts Ins. Co. *v.* Norwich, etc., Transp. Co., 12 Wall. (U. S.) 201, 20 L. ed. 380 [*affirming* 18 Fed. Cas. No. 10,363, 6 Blatchf. 241, 34 Conn. 561]; 1 Phillips Ins. § 1137.

11. Swinnerton *v.* Columbia Ins. Co., 37 N. Y. 174, 93 Am. Dec. 560; Cory *v.* Burr, 8 App. Cas. 393, 5 Aspin. 109, 52 L. J. Q. B. 657, 49 L. T. Rep. N. S. 78, 31 Wkly. Rep. 894.

12. Johnson *v.* Ocean Ins. Co., 10 Rob. (La.) 334; Hagan *v.* Ocean Ins. Co., 10 Rob. (La.) 333; Lockett *v.* Firemen's Ins. Co., 10 Rob. (La.) 332; McCargo *v.* New Orleans Ins. Co., 10 Rob. (La.) 202, 43 Am. Dec. 180. See also Egbert *v.* St. Paul F. & M. Ins. Co., 71 Fed. 739. But see Dole *v.* New England Mut. Mar. Ins. Co., 6 Allen (Mass.) 373, holding that the underwriter was not liable for a loss by fire where the vessel had been previously captured and was in the policy warranted free from capture.

13. Dole *v.* New England Mut. Mar. Ins. Co., 7 Fed. Cas. No. 3,966, 2 Cliff. 394; Cory *v.* Burr, 8 App. Cas. 393, 5 Aspin. 109, 52 L. J. Q. B. 657, 49 L. T. Rep. N. S. 78, 31 Wkly. Rep. 894. See also other cases throughout this subdivision.

14. Powell *v.* Hyde, 5 E. & B. 607, 2 Jur. N. S. 87, 25 L. J. Q. B. 65, 4 Wkly. Rep. 51, 85 E. C. L. 607.

15. *Illinois.*— Greenwich Ins. Co. *v.* Raab, 11 Ill. App. 636.

Maryland.— Commonwealth Ins. Co. *v.* Cropper, 21 Md. 311.

3. Particular Exceptions — a. Leakage. An exception of liability for leakage applies to leakage from sea perils as well as ordinary leakage.[16] The exception usually provides that the underwriters shall not be liable unless the leakage is occasioned by stranding or collision.[17]

b. Damage From Dampness. The usual exception as to damage from dampness[18] exempts the underwriter from damage from vapor and moisture in the hold of the vessel,[19] and from vapor from other cargo which has come into contact with sea-water;[20] but where one part of a cargo of grain becomes wet with sea-water, damage to the other part from contact with the first is not within the exception.[21]

c. Capture in Port. "Free from capture in port" discharges the underwriters if the seizure takes place there.[22] It does not include a capture on the high seas,[23] but includes any place where it is customary to load or discharge vessels.[24]

d. Bursting of Boilers. The exception as to damage from bursting of boilers excludes liability for damage to the vessel on account of the bursting of the boiler,[25] and all damage, partial or total, notwithstanding the policy contains a memorandum clause.[26] Where the exception is limited to cases of external causes, it means causes which are external to the boat, not to the boiler.[27]

e. Negligence or "Want of Ordinary Care." An exception as to damages from negligence or from "want of ordinary care" relieves the underwriter where the damage was occasioned by running the vessel at excessive speed,[28] failure to properly station the lookouts,[29] overloading the vessel to a point where danger becomes apparent,[30] or any other negligent management or navigation.[31] But it does not relieve the underwriter where the negligence of those in charge of another vessel causes injury to the property insured.[32]

f. Illicit Trade. Illicit trade is trade which is in violation of some municipal

New York.— Neilson *v.* Commercial Mut. Ins. Co., 3 Duer 455. *Compare* Savage *v.* Corn Exch. F., etc., Co., 4 Bosw. 1 [*affirmed* in 36 N. Y. 655, 3 Transcr. App. 112].

United States.— Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 497; Orient Mut. Ins. Co. *v.* Adams, 123 U. S. 67, 8 S. Ct. 68, 31 L. ed. 63.

England.— Livie *v.* Janson, 12 East 648, 11 Rev. Rep. 513.

16. Borland *v.* Mercantile Mut. Ins. Co., 46 N. Y. Super. Ct. 433.

Evaporation.— Where bottles of wine were found to be partly empty at the end of the voyage, although they remained corked and unbroken, it was held that the loss could only have occurred by leakage which was excepted in the policy. Cory *v.* Boylston F. & M. Ins. Co., 107 Mass. 140, 9 Am. Rep. 14.

17. McLaughlin *v.* Atlantic Mut. Ins. Co., 57 Me. 170; De Farconnet *v.* Western Ins. Co., 110 Fed. 405 [*affirmed* in 122 Fed. 448, 58 C. C. A. 612].

18. **Form of clause.**— "Free from damage by dampness, except caused by actual contact of sea water with articles damaged, occasioned by sea perils."

19. Neidlinger *v.* North America Ins. Co., 11 Fed. 514, 18 Blatchf. 297. See also Cory *v.* Boylston F. & M. Ins. Co., 107 Mass. 140, 9 Am. Rep. 14.

20. Neidlinger *v.* North America Ins. Co., 17 Fed. Cas. No. 10,086, 10 Ben. 254 [*affirmed* in 11 Fed. 514, 18 Blatchf. 297].

21. Woodruff *v.* Commercial Mut. Ins. Co., 2 Hilt. (N. Y.) 122.

22. Black *v.* Marine Ins. Co., 11 Johns. (N. Y.) 287; Oom *v.* Taylor, 3 Campb. 204.

Meaning of word "port" see *supra*, IV, B, 6, e.

23. Duval *v.* Commercial Ins. Co., 10 Johns. (N. Y.) 278; Watson *v.* Marine Ins. Co., 7 Johns. (N. Y.) 57; Keyser *v.* Scott, 4 Taunt. 660, 13 Rev. Rep. 721; Mellish *v.* Staniforth, 3 Taunt. 499.

24. Patrick *v.* Commercial Ins. Co., 11 Johns. (N. Y.) 9; Maydhew *v.* Scott, 3 Campb. 205; Jarman *v.* Coape, 2 Campb. 613, 13 East 394, 12 Rev. Rep. 374; Dalgleish *v.* Brooke, 15 East 295, 13 Rev. Rep. 476.

25. Strong *v.* Sun Mut. Ins. Co., 31 N. Y. 103, 88 Am. Dec. 242. But see Western Ins. Co. *v.* Cropper, 32 Pa. St. 351, 75 Am. Dec. 561.

26. McAllister *v.* Tennessee M. & F. Ins. Co., 17 Mo. 306; Roe *v.* Columbus Ins. Co., 17 Mo. 301.

27. Citizens Ins. Co. *v.* Glasgow, 9 Mo. 411.

28. Richelieu, etc., Nav. Co. *v.* Boston Mar. Ins. Co., 136 U. S. 408, 10 S. Ct. 934, 34 L. ed. 398; Flint, etc., R. Co. *v.* Marine Ins. Co., 71 Fed. 210.

29. Richelieu, etc., Nav. Co. *v.* Boston Mar. Ins. Co., 136 U. S. 408, 10 S. Ct. 934, 34 L. ed. 398; Flint, etc., R. Co. *v.* Marine Ins. Co., 71 Fed. 210.

30. Empire Parish Packet Co. *v.* Union Ins. Co., 32 La. Ann. 1081.

31. Rogers *v.* Ætna Ins. Co., 95 Fed. 103, 35 C. C. A. 396; Flint, etc., R. Co. *v.* Marine Ins. Co., 71 Fed. 210; Gillespie *v.* British America F., etc., Assur. Co., 7 U. C. Q. B. 108.

32. Pride *v.* Providence-Washington Ins. Co., 6 Pa. Dist. 227.

law or ordinance of the country where the trade is carried on.[33] It may consist of carrying contraband.[34] Under this exception the underwriters are not liable for losses from illicit trade or from attempting to trade illicitly;[35] but for any illegal seizure,[36] or for a seizure not provided for by the laws of the country,[37] or for seizure on account of illicit trade barratrously carried on,[38] the underwriters are liable. A judicial condemnation is not necessary.[39] The seizure may be made where there is probable cause,[40] but a seizure not made in good faith but on a pretext of the trade being illicit is not excluded by the exception.[41] That the underwriter has knowledge that the trade is to be illegal does not alter the effect of the exception.[42]

g. Loss of Time. The clause, "Warranted free from any claim consequent on loss of time," in a marine insurance policy exempts the insurers on freight from loss from delay in repairing machinery which frustrates the object of the adventure.[43]

h. Miscellaneous Exceptions. Various other exceptions less frequently used have been the subject of construction by the courts, including exceptions of blockade,[44] denial of entry,[45] insurrection,[46] ice, except when lying between piers,[47] melting of ice,[48] towing,[49] collision of governments,[50] overloading,[51] and negligence of those in charge of boat.[52]

4. Implied Exceptions. There is in all policies an implied exception to damage existing prior to the taking effect of the policy, and the expenses incurred for

33. Thompson *v.* Mississippi M. & F. Ins. Co., 2 La. 228, 22 Am. Dec. 129; Fandel *v.* Phœnix Ins. Co., 4 Serg. & R. (Pa.) 29; Smith *v.* Delaware Ins. Co., 3 Serg. & R. (Pa.) 74; Smith *v.* Delaware Ins. Co., 22 Fed. Cas. No. 13,035, 3 Wash. 127.

34. Carrington *v.* Merchants Ins. Co., 8 Pet. (U. S.) 495, 8 L. ed. 1021.

35. Cucullu *v.* Louisiana Ins. Co., 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199; Decrow *v.* Waldo Mut. Ins. Co., 43 Me. 460; Church *v.* Hubbart, 2 Cranch (U. S.) 187, 2 L. ed. 249; Smith *v.* Delaware Ins. Co., 22 Fed. Cas. No. 13,035, 3 Wash. 127 [*reversed* on other grounds in 7 Cranch 434, 3 L. ed. 396].

Jettison of illicit cargo.— But the underwriters are liable for loss by jettison of illicit cargo. Kohn *v.* New Orleans Ins. Co., 12 La. 348; Graham *v.* Pennsylvania Ins. Co., 10 Fed. Cas. No. 5,674, 2 Wash. 113.

36. Cucullu *v.* Orleans Ins. Co., 6 Mart. N. S. (La.) 11; Mumford *v.* Phœnix Ins. Co., 7 Johns. (N. Y.) 449; Johnstown *v.* Ludlow, 1 Cai. Cas. (N. Y.) xxix, 2 Johns. Cas. 481; Carrington *v.* Merchants' Ins. Co., 8 Pet. (U. S.) 495, 8 L. ed. 1021.

37. Thompson *v.* Mississippi M. & F. Ins. Co., 2 La. 228, 22 Am. Dec. 129.

38. Dunham *v.* American Ins. Co., 2 Hall (N. Y.) 422; American Ins. Co. *v.* Dunham, 12 Wend. (N. Y.) 463 [*affirmed* in 15 Wend. 9]; Suckley *v.* Delafield, 2 Cai. (N. Y.) 222. But see Smith *v.* Delaware Ins. Co., 22 Fed. Cas. No. 13,035, 3 Wash. 127 [*reversed* on other grounds in 7 Cranch 434, 3 L. ed. 396].

39. Thompson *v.* Mississippi M. & F. Ins. Co., 2 La. 228, 22 Am. Dec. 129.

Irregular proceedings after seizure will not make the underwriters liable for such seizure. Carrington *v.* Merchants Ins. Co., 8 Pet. (U. S.) 495, 8 L. ed. 1021.

40. Bradstreet *v.* Neptune Ins. Co., 3 Fed. Cas. No. 1,793, 3 Sumn. 600; Magoun *v.* New England Mar. Ins. Co., 16 Fed. Cas. No. 8,961, 1 Story 157.

41. Francis *v.* Ocean Ins. Co., 6 Cow. (N. Y.) 404 [*affirmed* in 2 Wend. 64]; Johnson *v.* Ludlow, 1 Cai. Cas. (N. Y.) xxix, 2 Johns. Cas. (N. Y.) 481; Graham *v.* Pennsylvania Ins. Co., 10 Fed. Cas. No. 5,674, 2 Wash. 113.

42. Goicoechea *v.* Louisiana State Ins. Co., 6 Mart. N. S. (La.) 51, 17 Am. Dec. 175; Carrington *v.* Merchants Ins. Co., 8 Pet. (U. S.) 495, 8 L. ed. 1021.

43. Bensaude *v.* Thames, etc., Mar. Ins. Co., [1896] A. C. 609, 8 Aspin. 315, 66 L. J. Q. B. 666, 77 L. T. Rep. N. S. 282, 46 Wkly. Rep. 78; Turnbull *v.* Hull Underwriters' Assoc., [1900] 2 Q. B. 402, 9 Aspin. 93, 5 Com. Cas. 248, 69 L. J. Q. B. 588, 82 L. T. Rep. N. S. 818.

44. Radcliff *v.* United Ins. Co., 9 Johns. (N. Y.) 277 [*reversing* 7 Johns. 38].

45. Dickey *v.* U. S. Insurance Co., 11 Johns. (N. Y.) 358.

46. Johnson *v.* Ocean Ins. Co., 10 Rob. (La.) 334; Hagan *v.* Ocean Ins. Co., 10 Rob. (La.) 333; Lockett *v.* Firemen's Ins. Co., 10 Rob. (La.) 332; Andrews *v.* Ocean Ins. Co., 10 Rob. (La.) 332; McCargo *v.* New Orleans Ins. Co., 10 Rob. (La.) 202, 43 Am. Dec. 180.

47. Huntley *v.* Providence Washington Ins. Co., 77 N. Y. App. Div. 196, 79 N. Y. Suppl. 35.

48. Tudor *v.* New England Mut. Mar. Ins. Co., 12 Cush. (Mass.) 554.

49. Grant *v.* Lexington F., etc., Ins. Co., 5 Ind. 23, 61 Am. Dec. 74.

50. Marcy *v.* Merchants' Mut. Ins. Co., 19 La. Ann. 388.

51. McCarthy *v.* St. Paul, F., etc., Ins. Co., 19 Misc. (N. Y.) 274, 43 N. Y. Suppl. 343.

52. Levi *v.* New Orleans Mut. Ins. Assoc., 15 Fed. Cas. No. 8,290, 2 Woods 63.

repairing such damage, although occurring during the life of the policy, are not insured against.[53]

IX. EXTENT OF LOSS AND LIABILITY OF INSURER.

A. In General. The amount stated in the policy fixes the limit of the underwriter's liability for any one loss.[54]

B. Successive Losses. Where there are several successive losses to the subject-matter during the term of the policy, the underwriters are liable for all of them notwithstanding their aggregate amount exceeds the amount named in the policy.[55]

C. Merger of Losses — 1. In General. Where a partial loss occurs and is followed by a total loss during the term of the policy and before repair, the partial loss is considered merged in the total loss and the underwriters are only liable for the latter.[56] And although the prior partial loss was from a peril not insured against, the underwriters are liable for the subsequent total loss if from an insured peril, and the extent of the partial loss is immaterial.[57]

2. Repair of Prior Partial Loss. But where the partial loss has been repaired,[58]

53. Stribley *v.* Imperial Mar. Ins. Co., 1 Q. B. D. 507, 3 Aspin. 134, 45 L. J. Q. B. 396, 34 L. T. Rep. N. S. 281, 24 Wkly. Rep. 701; Fawcus *v.* Sarsfield, 6 E. & B. 192, 2 Jur. N. S. 665, 25 L. J. Q. B. 249, 88 E. C. L. 192; Gladstone *v.* King, 1 M. & S. 35, 14 Rev. Rep. 392.

Time of attaching of risk see *supra*, IV, B, 7.

54. American Ins. Co. *v.* Griswold, 14 Wend. (N. Y.) 399.

A clause providing for the reduction of the amount of insurance to the extent of any loss paid under the policy unless the amount is made good by additional insurance and an additional premium paid therefor reduces the liability of the underwriter as to subsequent losses where the additional premium is not paid after the payment of a prior loss. Ronan *v.* Indemnity Mut. Mar. Assur. Co., 127 Fed. 757; Aitchison *v.* Lohre, 4 App. Cas. 755, 4 Aspin. 168, 49 L. J. Q. B. 123, 41 L. T. Rep. N. S. 323, 28 Wkly. Rep. 1.

55. Christie *v.* Buckeye Ins. Co., 5 Fed. Cas. No. 2,700.

Limit of liability.— The liability of the underwriter is not restricted to the single amount of his subscription, but he may be subject to several average losses, or to an average loss and a total loss, or to money expended and labor bestowed about the defense, safeguard and recovery of the ship to a greater amount than the subscription. Le Cheminant *v.* Pearson, 4 Taunt. 367, 13 Rev. Rep. 636.

56. Matheson *v.* Equitable Mar. Ins. Co., 118 Mass. 209, 19 Am. Rep. 441; Chieffelin *v.* New York Ins. Co., 9 Johns. (N. Y.) 21; Pitman *v.* Universal Mar. Ins. Co., 9 Q. B. D. 192, 4 Aspin. 544, 51 L. J. Q. B. 561, 46 L. T. Rep. N. S. 863, 30 Wkly. Rep. 906.

If the first loss is in judgment of law total a subsequent total loss from another peril does not merge the prior loss. Schieffelin *v.* New York Ins. Co., 9 Johns. (N. Y.) 21.

Partial loss during life of one policy followed by total loss during life of another.— The owner of a vessel effected insurance on the outward voyage and with the same underwriter effected insurance upon the homeward voyage. A partial loss occurred on the outward voyage and after the termination of the first policy and while the second was in operation the vessel was totally destroyed. The damage from the prior loss had not been repaired. The policies were valued. The underwriter was held liable both for the partial loss and the total loss. Lidgett *v.* Secretan, L. R. 6 C. P. 616, 1 Aspin. 95, 40 L. J. C. P. 257, 24 L. T. Rep. N. S. 942, 19 Wkly. Rep. 1088.

Under a policy on time, the insured may recover for a partial loss, and subsequently for another distinct loss, partial or total. Wood *v.* Lincoln, etc., Ins. Co., 6 Mass. 479, 4 Am. Dec. 163.

57. See the cases *infra*, this note.

Constructive total loss merged in subsequent absolute total loss.— Woodside *v.* Globe Mar. Ins. Co., [1896] 1 Q. B. 105, 8 Aspin. 118, 65 L. J. Q. B. 117, 73 L. T. Rep. N. S. 626, 44 Wkly. Rep. 187.

The converse of the text proposition is also true; and where a vessel was damaged by perils of the sea to such an extent that the insured might have elected to treat the loss as total, and the vessel was subsequently captured, it was held that the insured could have no recovery under the policy, loss by capture not being covered. Rice *v.* Homer, 12 Mass. 230. See also Law *v.* Goddard, 12 Mass. 112; Schieffelin *v.* New York Ins. Co., 9 Johns. (N. Y.) 21; Livie *v.* Janson, 12 East 648, 11 Rev. Rep. 513.

58. Matheson *v.* Equitable Mar. Ins. Co., 118 Mass. 209, 19 Am. Rep. 441; Saltus *v.* Commercial Ins. Co., 10 Johns. (N. Y.) 487; Sherlock *v.* Globe Ins. Co., 7 Ohio Dec. (Reprint) 17, 1 Cinc. L. Bul. 26; Livie *v.* Janson, 12 East 648, 11 Rev. Rep. 573.

Ship pledged for cost of repairs.— Where under a time policy a ship has sustained damage by perils insured against, and has been repaired abroad under an arrangement

or where it consists of expenses or disbursements incurred,[59] the underwriters are liable for both such total and partial loss.

3. TOTAL LOSS AFTER TERMINATION OF POLICY. If the total loss takes place after the termination of the policy, it is a matter with which the underwriters have no concern, and they are liable for prior partial losses, although the same were never repaired.[60]

D. Particular Average Losses — 1. IN GENERAL. Particular average means a partial loss as distinguished from a total loss or a general average loss.[61]

2. TOTAL LOSS OF PART. A total loss of a part of the property covered by a policy of marine insurance is but a partial loss, except where the policy is to be construed as a separate insurance on each of the several things or subjects protected by it.[62]

3. ON FREIGHT. There is a partial loss on freight where the cargo is necessarily transhipped and the amount of such partial loss is the cost of forwarding the cargo from the point of transhipment.[63] If freight is actually earned[64] or the cargo, although damaged, arrived in specie[65] or can be transhipped so as to arrive in specie,[66] there is no loss on freight whatever. But a loss on a part of the cargo in specie is a *pro tanto* loss on freight.[67] If the ship-owner makes such delivery of the cargo to the consignee as he may be entitled to, the loss of such freight is not a charge against the underwriter.[68] If the cargo is delivered to the owner at an intermediate port under justifiable circumstances and is volun-

by which the ship is pledged for the cost of the repairs, but no personal liability is incurred by the ship-owners for those repairs, and the ship is subsequently lost on the voyage home, the underwriters are not liable to pay the cost of repairs in particular average, in addition to the total loss. The Dora Forster, [1900] P. 241, 69 L. J. P. 85, 49 Wkly. Rep. 271.

59. Saltus *v.* Commercial Ins. Co., 10 Johns. (N. Y.) 487; Barker *v.* Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; Livie *v.* Janson, 12 East 648, 11 Rev. Rep. 513.

60. Knight *v.* Faith, 15 Q. B. 649, 14 Jur. 1114, 19 L. J. Q. B. 509, 69 E. C. L. 649; Lidgett *v.* Secretan, L. R. 6 C. P. 616, 1 Aspin. 95, 40 L. J. C. P. 257, 24 L. T. Rep. N. S. 942, 19 Wkly. Rep. 1088.

61. Pierce *v.* Columbian Ins. Co., 14 Allen (Mass.) 320; Devitt *v.* Providence Washington Ins. Co., 61 N. Y. App. Div. 390, 70 N. Y. Suppl. 654 [*affirmed* in 173 N. Y. 17, 65 N. E. 777]; American Ins. Co. *v.* Griswold, 14 Wend. (N. Y.) 399; Globe Ins. Co. *v.* Sherlock, 25 Ohio St. 50; Coster *v.* Phœnix Ins. Co., 6 Fed. Cas. No. 3,264, 2 Wash. 51; Price *v.* Ships Small Damage Ins. Assoc., 22 Q. B. D. 580, 6 Aspin. 435, 58 L. J. Q. B. 269, 61 L. T. Rep. N. S. 278, 37 Wkly. Rep. 566; Great Indian Peninsular R. Co. *v.* Saunders, 2 B. & S. 266, 9 Jur. N. S. 198, 31 L. J. Q. B. 206, 6 L. T. Rep. N. S. 297, 10 Wkly. Rep. 520, 110 E. C. L. 266; Wilson *v.* Smith, 3 Burr. 1150, W. Bl. 507.

62. Guerlain *v.* Columbian Ins. Co., 7 Johns. (N. Y.) 527; Newlin *v.* Insurance Co. of North America, 20 Pa. St. 312; Waln *v.* Thompson, 9 Serg. & R. (Pa.) 115, 11 Am. Dec. 675; Pearse *v.* Quebec Steamship Co., 24 Fed. 285; Spence *v.* Union Mar. Ins. Co., L. R. 3 C. P. 427, 37 L. J. C. P. 169, 18 L. T. Rep. N. S. 632, 16 Wkly. Rep. 1010; Rosetto *v.* Gurney, 11 C. B. 176, 15 Jur. 1177, 20 L. J. C. P. 275, 73 E. C. L. 176; Janson *v.* Ralli, 6 E. & B. 422, 2 Jur. N. S. 566, 25 L. J. Q. B. 300, 4 Wkly. Rep. 568, 88 E. C. L. 422.

63. American Ins. Co. *v.* Center, 4 Wend. (N. Y.) 45.

Two vessels insured.— Where an insurance was against total loss of freight on boat or barge, and the barge was lost and her cargo transferred to the boat, and freight earned upon it, it did not prevent a recovery for loss of the freight which would have been earned but for the destruction of the barge. Stilwell *v.* Commercial Ins. Co., 2 Mo. App. 22.

64. Morgan *v.* Insurance Co. of North America, 4 Dall. (Pa.) 455, 1 L. ed. 907; Scottish Mar. Ins. Co. *v.* Turner, 17 Jur. 631, 1 Macq. H. L. 334, 1 Wkly. Rep. 537. *Compare* Troop *v.* Merchants' Mar. Ins. Co., 13 Can. Sup. Ct. 506.

65. McGaw *v.* Ocean Ins. Co., 23 Pick. (Mass.) 405; Fiedler *v.* New York Ins. Co., 6 Duer (N. Y.) 282.

66. Parsons *v.* Manufacturers' Ins. Co., 16 Gray (Mass.) 463; McGaw *v.* Ocean Ins. Co., 23 Pick. (Mass.) 405.

67. Boardman *v.* Boston Mar. Ins. Co., 146 Mass. 442, 16 N. E. 26; Parsons *v.* Manufacturers' Ins. Co., 16 Gray (Mass.) 463; McGaw *v.* Ocean Ins. Co., 23 Pick. (Mass.) 405.

A partial sale of cargo to avoid delay does not make a partial loss of freight for which the underwriters are liable. Moody *v.* Jones, 4 B. & C. 394, 10 E. C. L. 630.

68. Hubbell *v.* Great Western Ins. Co., 74 N. Y. 246 [*reversing* 10 Hun 167]; Marks *v.* Louisiana State M. & F. Ins. Co., 3 Rob. (La.) 454; Hugg *v.* Augusta Ins., etc., Co., 7 How. (U. S.) 595, 12 L. ed. 834.

If freight be not earned in consequence of events attributable to the shipper, any advance made on it must be returned, unless

tarily accepted by the owner, freight *pro rata itineris* is earned and the underwriters are liable for a partial loss of freight.[69]

4. On Profits. If any part of the cargo arrives at the port of destination, there is no loss of profits.[70]

5. On Advances. There is no partial loss on advances merely because the *res* for which the advances are made is damaged or partially destroyed, but it is only where the *res* as security for the advances is impaired that there can be a claim under the policy.[71]

6. On Bottomry. Upon an insurance upon bottomry there can be no recovery for a partial loss of the ship or for anything short of its absolute total loss.[72]

E. General Average Losses — 1. What Are. A general average loss in marine insurance is the amount lost to the owner of the ship, cargo, freight, or other interest for any voluntary sacrifice made or any extraordinary expense incurred by one interest for the benefit of all.[73] If the sacrifice, charge, or expense is not for the general benefit but for the benefit of a particular interest it is not a general average but a particular average charge against the interest for whose benefit it was made.[74] The principles governing general average and the rights and obligations of the various interests to and for contribution are fully considered elsewhere in this work.[75]

2. Conclusiveness of Adjustment. A general average contribution, although actually paid according to the adjustment, will not necessarily fix the amount of a recovery against the underwriter unless such average adjustment was correctly made according to the law of the place of adjustment.[76]

there be an agreement to the contrary, and cannot be deducted from the amount due on a policy of insurance. Hagedorn *v.* St. Louis Perpetual Ins. Co., 2 La. Ann. 1005.

69. Merchants' Mut. Ins. Co. *v.* Butler, 20 Md. 41; Whitney *v.* New York Firemen Ins. Co., 18 Johns. (N. Y.) 208; Robinson *v.* Marine Ins. Co., 2 Johns. (N. Y.) 323; Williams *v.* Smith, 2 Cai. (N. Y.) 13 [*reversed* on other grounds in 2 Cai. Cas. 110]; Hugg *v.* Augusta Ins., etc., Co., 7 How. (U. S.) 595, 12 L. ed. 834.

If cargo is not voluntarily accepted at an intermediate port no freight is payable and the underwriter must pay for a total loss. Callender *v.* Insurance Co. of North America, 5 Binn. (Pa.) 525.

70. Canada Sugar-Refining Co. *v.* Insurance Co. of North America, 175 U. S. 609, 20 S. Ct. 239, 44 L. ed. 292. See also Abbott *v.* Sebor, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139.

71. Germond *v.* Anthracite Ins. Co., 10 Fed. Cas. No. 5,365, 2 Wkly. Notes Cas. (Pa.) 399.

72. Broomfield *v.* Southern Ins. Co., L. R. 5 Exch. 192, 39 L. J. Exch. 186, 22 L. T. Rep. N. S. 371, 18 Wkly. Rep. 810; Thomson *v.* Royal Exch. Assur. Co., 1 M. & S. 30, 14 Rev. Rep. 388; Walpole *v.* Ewer, 2 Park Ins. 898. See also Force *v.* Providence Washington Ins. Co., 35 Fed. 767.

73. Padelford *v.* Boardman, 4 Mass. 548; May *v.* Delaware Ins. Co., 19 Pa. St. 312; Steamship Carisbrook Co. *v.* London, etc., Ins. Co., [1902] 2 K. B. 681, 9 Aspin. 332, 7 Com. Cas. 235, 71 L. J. K. B. 978, 87 L. T. Rep. N. S. 418, 50 Wkly. Rep. 691; Backhouse *v.* Ripley, 1 Park Ins. 24; Ross *v.* Thwaite, 1 Park Ins. 23; Price *v.* A1 Ships' Small Damage Ins. Assoc., 22 Q. B. D. 580, 6 Aspin. 435, 58 L. J. Q. B. 269, 61 L. T. Rep. N. S. 278, 37 Wkly. Rep. 566; Kemp *v.* Halliday, L. R. 1 Q. B. 520, 6 B. & S. 723, 12 Jur. N. S. 582, 35 L. J. Q. B. 156, 14 L. T. Rep. N. S. 762, 14 Wkly. Rep. 697, 118 E. C. L. 723; The Bona, [1895] P. 125, 7 Aspin. 557, 64 L. J. Adm. 62, 71 L. T. Rep. N. S. 870, 11 Reports 707, 43 Wkly. Rep. 290; The Brigella, [1893] P. 189, 7 Aspin. 337, 62 L. J. Adm. 81, 69 L. T. Rep. N. S. 834, 1 Reports 616.

Jettison of cargo to save lives of persons on another vessel is not general average. Dabney *v.* New England Mut. Mar. Ins. Co., 14 Allen (Mass.) 300.

The fact that one person owns the ship, cargo, and freight does not prevent a voluntary sacrifice of one for the benefit of all from being a general average loss and obliging the underwriters on each interest to pay their respective contributions. Potter *v.* Ocean Ins. Co., 19 Fed. Cas. No. 11,335, 3 Sumn. 27; Montgomery *v.* Indemnity Mut. Mar. Ins. Co., [1902] 1 K. B. 734, 9 Aspin. 289, 7 Com. Cas. 120, 71 L. J. K. B. 467, 86 L. T. Rep. N. S. 462, 50 Wkly. Rep. 440. *Contra*, The Brigella, [1893] P. 189, 7 Aspin. 337, 62 L. J. Adm. 81, 69 L. T. Rep. N. S. 834, 1 Reports 616.

74. Bridge *v.* Niagara Ins. Co., 1 Hall (N. Y.) 276.

75. See Shipping. See also Defarconnet *v.* Western Assur. Co., 110 Fed. 405 [*affirmed* in 122 Fed. 448, 58 C. C. A. 612]; International Nav. Co. *v.* Atlantic Mut. Ins. Co., 100 Fed. 304; Svendsen *v.* Wallace, 10 App. Cas. 404, 5 Aspin. 453, 54 L. J. Q. B. 497, 52 L. T. Rep. N. S. 901, 34 Wkly. Rep. 369.

76. *Louisiana.*— Shiff *v.* Louisiana State Ins. Co., 6 Mart. N. S. 629.

3. FOREIGN ADJUSTMENT. To pay general average "as per foreign statement" means to pay by foreign adjustment, if that adjustment is correctly made in accordance with the foreign law.[77]

4. OBLIGATION TO PAY BEFORE ADJUSTMENT OF AVERAGE. The obligation of the underwriter to pay a loss which is subject to general average contribution is not dependent upon an adjustment first taking place, but is payable directly upon proof of loss as in other cases, and the underwriter becomes subrogated to the rights of the insured to compel contribution.[78] But where the ship-owner is also owner of the cargo or freight, the amount due from the cargo or freight may be deducted from the loss on the ship.[79]

F. Calculation of Liability — 1. BASIC PRINCIPLE. It is a general rule peculiar to contracts of marine insurance that where the value of the insured's interest in the property insured exceeds the amount of the insurance, the insured is deemed a co-insurer as to such uninsured part and the underwriter is only liable for such proportion of the loss as the amount of the insurance bears to the value of the insured's interest.[80]

2. VALUATION OF SUBJECT-MATTER — a. Under Valued Policy — (I) *CONCLUSIVENESS OF VALUATION* — (A) *In General.* In the absence of fraud, accident,

Massachusetts.— Loring *v.* Neptune Ins. Co., 20 Pick. 411.

New York.— Depau *v.* Ocean Ins. Co., 5 Cow. 63, 15 Am. Dec. 431; Strong *v.* New York Firemen Ins. Co., 11 Johns. 323; Bordes *v.* Hallet, 1 Cai. 444; Lenox *v.* United Ins. Co., 3 Johns. Cas. 178.

United States.— Peters *v.* Warren Ins. Co., 19 Fed. Cas. No. 11,034, 1 Story 463, 19 Fed. Cas. No. 11,035, 3 Sumn. 389.

England.— Dent *v.* Smith, L. R. 4 Q. B. 414, 38 L. J. Q. B. 144, 20 L. T. Rep. N. S. 868, 17 Wkly. Rep. 646; The Mary Thomas, [1894] P. 108, 7 Aspin. 495, 63 L. J. Adm. 49, 71 L. T. Rep. N. S. 104, 6 Reports 792; Power *v.* Whitmore, 4 M. & S. 141, 16 Rev. Rep. 416; Newman *v.* Cazalet, 2 Park Ins. 900.

Canada.— McGivern *v.* Stymest, 10 N. Brunsw. 320; Avon Mar. Ins. Co. *v.* Barteaux, 2 Nova Scotia Dec. 195.

77. International Nav. Co. *v.* Sea Ins. Co., 124 Fed. 93; De Hart *v.* Compania Anonima de Seguros Aurora, [1903] 1 K. B. 109, 87 L. T. Rep. N. S. 716 [*affirmed* in [1903] 2 K. B. 503, 9 Aspin. 454, 8 Com. Cas. 314, 72 L. J. K. B. 818, 89 L. T. Rep. N. S. 154, 52 Wkly. Rep. 36]; Mavro *v.* Ocean Mar. Ins. Co., L. R. 10 C. P. 414, 2 Aspin. 590, 44 L. J. C. P. 229, 32 L. T. Rep. N. S. 743, 23 Wkly. Rep. 758; Hendricks *v.* Australasian Ins. Co., L. R. 9 C. P. 460, 2 Aspin. 44, 43 L. J. C. P. 188, 30 L. T. Rep. N. S. 419, 22 Wkly. Rep. 947; Harris *v.* Scaramanga, L. R. 7 C. P. 481, 1 Aspin. 339, 41 L. J. C. P. 170, 26 L. T. Rep. N. S. 797, 20 Wkly. Rep. 777; The Brigella, [1893] P. 189, 7 Aspin. 337, 62 L. J. Adm. 81, 69 L. T. Rep. N. S. 834, 1 Reports 616.

78. *Louisiana.*— Hanse *v.* New Orleans M. & F. Ins. Co., 10 La. 1, 29 Am. Dec. 456.

Massachusetts.— Lord *v.* Neptune Ins. Co., 10 Gray 109; Forbes *v.* Manufacturers' Ins. Co., 1 Gray 371.

New York.— Vandenheuvel *v.* United Ins. Co., 1 Johns. 406; Maggrath *v.* Church, 1 Cai. 196, 2 Am. Dec. 173.

South Carolina.— Faulkner *v.* Augusta Ins. Co., 2 McMull. 158, 39 Am. Dec. 119.

United States.— International Nav. Co. *v.* Atlantic Mut. Ins. Co., 100 Fed. 304; Potter *v.* Providence Washington Ins. Co., 19 Fed. Cas. No. 11,336, 4 Mason 298. See also Griswold *v.* Union Mut. Ins. Co., 11 Fed. Cas. No. 5,840, 3 Blatchf. 231.

England.— Dickenson *v.* Jardine, L. R. 3 C. P. 639, 37 L. J. C. P. 321, 18 L. T. Rep. N. S. 717, 16 Wkly. Rep. 1169.

Contra.— Lapsley *v.* Pleasants, 4 Binn. (Pa.) 502.

79. Jumel *v.* Mar. Ins. Co., 7 Johns. (N. Y.) 412, 5 Am. Dec. 283; Potter *v.* Providence Washington Ins. Co., 19 Fed. Cas. No. 11,336, 4 Mason 298; Williams *v.* London Assur. Co., 1 M. & S. 318, 14 Rev. Rep. 441.

80. *Illinois.*— Egan *v.* British, etc., Mar. Ins. Co., 193 Ill. 295, 61 N. E. 1081, 86 Am. St. Rep. 342.

Louisiana.— Natchez, etc., Packet, etc., Co. *v.* Louisville Underwriters, 44 La. Ann. 714, 11 So. 54; Phillips *v.* St. Louis Perpetual Ins. Co., 11 La. Ann. 459.

Maryland.— Whiting *v.* Independent Mut. Ins. Co., 15 Md. 297.

New York.— American Ins. Co. *v.* Griswold, 14 Wend. 399.

Ohio.— Webb *v.* Protection Ins. Co., 6 Ohio 456.

United States.— Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383, 6 L. ed. 664; Soelberg *v.* Western Assur. Co., 119 Fed. 23, 55 C. C. A. 601; International Nav. Co. *v.* British, etc., Mar. Ins. Co., 108 Fed. 987, 48 C. C. A. 181; Chicago Ins. Co. *v.* Graham, etc., Transp. Co., 108 Fed. 271, 47 C. C. A. 320; Western Assur. Co. *v.* Southwestern Transp. Co., 68 Fed. 923, 16 C. C. A. 65 [*affirmed* in 167 U. S. 149, 17 S. Ct. 785, 42 L. ed. 113]; Breed *v.* Providence Washington Ins. Co., 4 Fed. Cas. No. 1,826, 17 Blatchf. 287.

England.— Pitman *v.* Universal Mar. Ins. Co., 9 Q. B. D. 192, 4 Aspin. 544, 51 L. J. Q. B. 561, 46 L. T. Rep. N. S. 863, 30 Wkly. Rep. 906; Amery *v.* Rogers, 1 Esp. 207;

or mistake the valuation of the subject-matter of the insurance as agreed upon in the policy is generally considered conclusive,[81] and it will not be set aside for an overestimate of interest.[82] Nor is it material that the subject-matter had

Etches *v.* Aldan, 6 L. J. K. B. O. S. 65, 1 M. & R. 165, 31 Rev. Rep. 309.

See 28 Cent. Dig. tit. "Insurance," § 1243.

81. *Illinois.*—Lamar Ins. Co. *v.* McGlashen, 54 Ill. 513, 5 Am. Rep. 162.

Louisiana.— Howes *v.* Union Ins. Co., 16 La. Ann. 235; Akin *v.* Mississippi M. & F. Ins. Co., 4 Mart. N. S. 661.

Massachusetts.— Boardman *v.* Boston Mar. Ins. Co., 146 Mass. 442, 16 N. E. 26; Matheson *v.* Equitable Mar. Ins. Co., 118 Mass. 209, 19 Am. Rep. 441; Phœnix Ins. Co. *v.* McLoon, 100 Mass. 475; Hall *v.* Ocean Ins. Co., 21 Pick. 472; Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, 32 Am. Dec. 271; Deblois *v.* Ocean Ins. Co., 16 Pick. 303, 28 Am. Dec. 245; Clark *v.* Ocean Ins. Co., 16 Pick. 289; Winn *v.* Columbian Ins. Co., 12 Pick. 279; Clark *v.* United F. & M. Ins. Co., 7 Mass. 365, 5 Am. Dec. 50.

Missouri.— Lockwood *v.* Atlantic Mut. Ins. Co., 47 Mo. 50; Lockwood *v.* Sangamo Ins. Co., 46 Mo. 71.

New York.— Plyer *v.* German-American Ins. Co., 121 N. Y. 689, 24 N. E. 929; Providence, etc., Steamship Co. *v.* Phœnix Ins. Co., 89 N. Y. 559; Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 77; Voisin *v.* Providence Washington Ins. Co., 51 N. Y. App. Div. 553, 65 N. Y. Suppl. 1150; American Ins. Co. *v.* Ogden, 20 Wend. 287; American Ins. Co. *v.* Whitney, 5 Cow. 712 [*affirming* 3 Cow. 210].

Ohio.— Portsmouth Ins. Co. *v.* Brazee, 16 Ohio 81; Howell *v.* Protection Ins. Co., 7 Ohio 284.

United States.— Marine Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. ed. 200; Standard Mar. Ins. Co. *v.* Nome Beach Lighterage, etc., Co., 133 Fed. 636, 67 C. C. A. 602; The St. John, 101 Fed. 469; International Nav. Co. *v.* Atlantic Mut. Ins. Co., 100 Fed. 304; Williams *v.* Continental Ins. Co., 24 Fed. 767; Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451; Carson *v.* Marine Ins. Co., 5 Fed. Cas. No. 2,465, 2 Wash. 468; Gardner *v.* Columbian Ins. Co., 9 Fed. Cas. Nos. 5,224, 5,225, 2 Cranch C. C. 473, 550; Griswold *v.* Union Mut. Ins. Co., 11 Fed. Cas. No. 5,840, 3 Blatchf. 231; Mutual Safety Ins. Co. *v.* The George, 17 Fed. Cas. No. 9,981, Olcott 89; Straas *v.* Marine Ins. Co., 23 Fed. Cas. No. 13,518, 1 Cranch C. C. 343; Watson *v.* Insurance Co. of North America, 29 Fed. Cas. No. 17,286, 3 Wash. 1.

England.— Muirhead *v.* Forth, etc., Ins. Assoc., [1894] A. C. 72, 6 Reports 59; Woodside *v.* Globe Mar. Ins. Co., [1896] 1 Q. B. 105, 8 Aspin. 118, 65 L. J. Q. B. 117, 73 L. T. Rep. N. S. 626, 44 Wkly. Rep. 187; Thames, etc., Mar. Ins. Co. *v.* Pitts, [1893] 1 Q. B. 476, 7 Aspin. 302, 68 L. T. Rep. N. S. 524, 5 Reports 168, 41 Wkly. Rep. 346; Pitman *v.* Universal Mar. Ins. Co., 9 Q. B. D. 192, 4 Aspin. 544, 51 L. J. Q. B. 561, 46 L. T. Rep. N. S. 863, 30 Wkly. Rep. 906; North of England Iron Steamship Ins. Assoc. *v.* Armstrong, L. R. 5 Q. B. 244, 39 L. J. Q. B. 81, 21 L. T. Rep. N. S. 822, 18 Wkly. Rep. 520; Williams *v.* North China Ins. Co., 1 C. P. D. 757, 3 Aspin. 342, 35 L. T. Rep. N. S. 884; Lidgett *v.* Secretan, L. R. 6 C. P. 616, 1 Aspin. 95, 40 L. J. C. P. 257, 24 L. T. Rep. N. S. 942, 19 Wkly. Rep. 1088; Barker *v.* Janson, L. R. 3 C. P. 303, 37 L. J. C. P. 105, 17 L. T. Rep. N. S. 473, 16 Wkly. Rep. 399; The Main, [1894] P. 320, 7 Aspin. 424, 63 L. J. Adm. 69, 70 L. T. Rep. N. S. 247, 6 Reports 775; Allen *v.* Sugrue, 8 B. & C. 561, 7 L. J. K. B. O. S. 53, 3 M. & R. 9, 15 E. C. L. 279; MacNair *v.* Coulter, 4 Bro. P. C. 450, 2 Eng. Reprint 305; Da Costa *v.* Firth, 4 Burr. 1966; Forbes *v.* Cowie, 1 Campb. 520; Irving *v.* Manning, 6 C. B. 391, 60 E. C. L. 391, 1 H. L. Cas. 287, 9 Eng. Reprint 766; Forbes *v.* Aspinall, 13 East 323, 12 Rev. Rep. 352; Shawe *v.* Felton, 2 East 109; Feise *v.* Aguilar, 3 Taunt. 506, 12 Rev. Rep. 695; Aubert *v.* Jacobs, Wightw. 118.

See 28 Cent. Dig. tit. "Insurance," § 1239 *et seq.*

Where there is an open and a subsequent valued policy on the same goods the liability of the underwriter upon the valued policy is fixed by deducting the amount of the open policy calculated at the value named in the valued policy. Kane *v.* Commercial Ins. Co., 8 Johns. (N. Y.) 229; McKim *v.* Phœnix Ins. Co., 16 Fed. Cas. No. 8,862, 2 Wash. 89.

Sale by court for less than valuation.— Where a vessel insured under a valued policy containing the usual running down clause was sold to pay the damage done to another vessel and realized on such sale less than the sum at which she was valued in the policy, the underwriters were held liable only for their proportionate parts of the sum realized and paid to the owners of the injured ship. Thompson *v.* Reynolds, 7 E. & B. 172, 3 Jur. N. S. 464, 26 L. J. Q. B. 93, 90 E. C. L. 172.

Several policies with different valuations.— Where property is insured under several policies and the valuations therein are different, each policy is to be settled according to its own valuation and without regard to the other policies. Pleasants *v.* Maryland Ins. Co., 8 Cranch (U. S.) 55, 3 L. ed. 486.

Carrier's liability insurance.— Where the underwriter insures a carrier by a valued policy against liability for carrying goods on deck, and there is a total loss of the deck cargo, the underwriter must pay the stipulated value notwithstanding the carrier settled his liability for a less sum. Ursula Bright Steamship Co. *v.* Amsinck, 115 Fed. 242.

82. Clark *v.* Ocean Ins. Co., 16 Pick. (Mass.) 289; Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451; Gardner *v.* Columbian Ins. Co., 9 Fed. Cas. No. 5,225, 2 Cranch C. C. 550; Barker *v.* Janson, L. R.

become greatly impaired in value prior to the loss and from perils which were not insured against.[83]

(B) *Partial Losses.* Contrary to the general rule an exception is made in some jurisdictions as to claims for partial losses and the policy is treated as if open.[84]

(C) *Constructive Total Losses.* The conclusiveness of such valuation extends to determination of a constructive total loss.[85]

(D) *General Average and Salvage Losses.* The weight of authority in the United States is that for general average and salvage losses the valuation in the policy is conclusive;[86] but in England and in Massachusetts the valuation in the average adjustment or the value upon which the salvage award was made is the basis upon which the underwriter pays in such cases.[87]

(II) *Opening Valuation For Fraud, Etc.* Where the valuation is opened for fraud, accident, or mistake, it is to be disregarded and the underwriter held liable only according to the actual value of the insured's interest.[88] A gross overvaluation may create a presumption of fraud.[89]

3 C. P. 303, 37 L. J. C. P. 105, 17 L. T. Rep. N. S. 473, 16 Wkly. Rep. 399; McCuaig *v.* Unity F. Ins. Assoc., 9 U. C. C. P. 85.

Overvaluation merely evidence of fraud.— Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 77.

83. Mutual Mar. Ins. Co. *v.* Munro, 7 Gray (Mass.) 246; Woodside *v.* Globe Mar. Ins. Co., [1896] 1 Q. B. 105, 8 Aspin. 118, 65 L. J. Q. B. 117, 73 L. T. Rep. N. S. 626, 44 Wkly. Rep. 187; Lidgett *v.* Secretan, L. R. 6 C. P. 616, 1 Aspin. 95, 40 L. J. C. P. 257, 24 L. T. Rep. N. S. 942, 19 Wkly. Rep. 1088.

84. Fay *v.* Alliance Ins. Co., 16 Gray (Mass.) 455; Lord *v.* Neptune Ins. Co., 10 Gray (Mass.) 109; Forbes *v.* Manufacturers' Ins. Co., 1 Gray (Mass.) 371; Orrok *v.* Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Bedford Commercial Ins. Co. *v.* Parker, 2 Pick. (Mass.) 1, 13 Am. Dec. 388; Clark *v.* United F. & M. Ins. Co., 7 Mass. 365, 5 Am. Dec. 50. See also Brooks *v.* Oriental Ins. Co., 7 Pick. (Mass.) 259. The foregoing cases have been expressly disapproved in the following cases: Brooke *v.* Louisiana State Ins. Co., 4 Mart. N. S. (La.) 640; Natchez Ins. Co. *v.* Buckner, 4 How. (Miss.) 63; Ursula Bright Steamship Co. *v.* Amsinck, 115 Fed. 242; Watson *v.* Insurance Co. of North America, 29 Fed. Cas. No. 17,286, 3 Wash. 1; Irving *v.* Manning, 6 C. B. 391, 60 E. C. L. 391, 1 H. L. Cas. 287, 9 Eng. Reprint 766. In the United States courts it seems that the above rule is applied to partial losses on goods but not on vessel. See International Nav. Co. *v.* British, etc., Mar. Ins. Co., 108 Fed. 987, 48 C. C. A. 181 [*affirming* 100 Fed. 304].

Where goods are capable of separation into parts or parcels, the policy is to be taken as the standard price, and for a total loss of a part the underwriters are chargeable with a proportionate part of the value. Forbes *v.* Manufacturers' Ins. Co., 1 Gray (Mass.) 371. The provision contained in many policies for ascertaining the loss by a separation of damaged from undamaged articles applies only to partial losses and not to a total loss, where constructive or absolute. Delaware Ins. Co. *v.* Winter, 38 Pa. St. 176.

85. Allen *v.* Commercial Ins. Co., 1 Gray (Mass.) 154; Arrok *v.* Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Deblois *v.* Ocean Ins. Co., 16 Pick. (Mass.) 303, 28 Am. Dec. 245; Lovering *v.* Mercantile Mar. Ins. Co., 12 Pick. (Mass.) 348; Murray *v.* Great Western Ins. Co., 72 Hun (N. Y.) 282, 25 N. Y. Suppl. 414 [*affirmed* in 147 N. Y. 711, 42 N. E. 724]; American Ins. Co. *v.* Ogden, 20 Wend. (N. Y.) 287; Bullard *v.* Roger Williams Ins. Co., 4 Fed. Cas. No. 2,122, 1 Curt. 148; Peele *v.* Merchants' Ins. Co., 19 Fed. Cas. No. 10,905, 3 Mason 27; Burnand *v.* Rodocanachi, 7 App. Cas. 333, 4 Aspin. 576, 51 L. J. Q. B. 548, 47 L. T. Rep. N. S. 277, 31 Wkly. Rep. 65; Barker *v.* Janson, L. R. 3 C. P. 303, 37 L. J. C. P. 105, 17 L. T. Rep. N. S. 473, 16 Wkly. Rep. 399.

86. Providence, etc., Steamship Co. *v.* Phœnix Ins. Co., 22 Hun (N. Y.) 517 [*modified* in 89 N. Y. 559]; International Nav. Co. *v.* Atlantic Mut. Ins. Co., 100 Fed. 304 [*affirmed* in 108 Fed. 987, 48 C. C. A. 181]. *Compare* Hotchkiss *v.* Commercial Mut. Ins. Co., 1 Rob. (N. Y.) 489 [*reversed* in 48 N. Y. 656].

87. Brooks *v.* Oriental Ins. Co., 7 Pick. (Mass.) 259. See also Brewer *v.* American Ins. Co., 123 Mass. 78; Burnand *v.* Rodocanachi, 7 App. Cas. 333, 4 Aspin. 576, 51 L. J. Q. B. 548, 47 L. T. Rep. N. S. 277, 31 Wkly. Rep. 65; Steamship Balmoral Co. *v.* Martin, [1900] 2 Q. B. 748, 9 Aspin. 139, 5 Com. Cas. 416, 69 L. J. Q. B. 952, 83 L. T. Rep. N. S. 282, 49 Wkly. Rep. 137 [*affirmed* in [1901] 2 K. B. 896, 6 Com. Cas. 298, 70 L. J. K. B. 1018, 85 L. T. Rep. N. S. 389, 50 Wkly. Rep. 35].

88. Clark *v.* Ocean Ins. Co., 16 Pick. (Mass.) 289; Voisin *v.* Commercial Mut. Ins. Co., 62 Hun (N. Y.) 4, 16 N. Y. Suppl. 410; Haigh *v.* De la Cour, 3 Campb. 319, 13 Rev. Rep. 813.

Effect of fraud upon policy see *supra*, VII, C.

89. Wolcott *v.* Eagle Ins. Co., 4 Pick. (Mass.) 429; Ionides *v.* Pender, 1 Aspin. 432, 27 L. T. Rep. N. S. 244.

b. Under Open Policy — (I) *In General.* Where the policy is not valued, the basis upon which the underwriters are to pay is left open, and the real value must be proved by the insured in each case.[90]

(II) *On Ship.* In ascertaining the value of a ship under an open policy the value is to be taken as of the commencement of the risk.[91] Cost price does not necessarily represent actual value.[92]

(III) *On Cargo.* To ascertain the value of goods under an open policy the prime cost or invoice price of such goods is to be taken as the basis,[93] to which are to be added all expenses until put on board,[94] including the cost of insurance[95] and commissions,[96] but without deducting drawbacks.[97]

(IV) *On Freight.* Under an open policy on freight, the gross amount of freight contracted to be paid is the basis of an adjustment of either a total or a partial loss of freight.[98] And where the insured under a policy on freight ships his own goods in his own vessel, the reasonable rate of freight for the carriage of such goods is to be ascertained, and will form the basis of an adjustment thereon.[99]

3. Computation of Damage — a. Total Losses. Where the loss is total the damage is the value of the subject-matter and the underwriters pay the full amount of the insurance,[1] unless it exceeds the value of the insured property.[2]

90. Adams *v.* Warren Ins. Co., 22 Pick. (Mass.) 163; Snell *v.* Delaware Ins. Co., 4 Dall. (U. S.) 430, 1 L. ed. 896, 22 Fed. Cas. No. 13,137, 1 Wash. 509.

91. Carson *v.* Marine Ins. Co., 5 Fed. Cas. No. 2,465, 2 Wash. 468; Pitman *v.* Universal Mar. Ins. Co., 9 Q. B. D. 192, 4 Aspin. 544, 51 L. J. Q. B. 561, 46 L. T. Rep. N. S. 863, 30 Wkly. Rep. 906.

A custom to allow a month's pay advanced to captain and crew in estimating the value of a vessel was proved in Kemble *v.* Bowne, 1 Cai. (N. Y.) 75.

92. Snell *v.* Delaware Ins. Co., 4 Dall. (U. S.) 430, 1 L. ed. 896, 22 Fed. Cas. No. 13,137, 1 Wash. 509.

93. *Louisiana.*— Wolf *v.* National M. & F. Ins. Co., 20 La. Ann. 583; Leftwitch *v.* St. Louis Ins. Co., 5 La. Ann. 706.

Massachusetts.— Warren *v.* Franklin Ins. Co., 104 Mass. 518; Clark *v.* United F. & M. Ins. Co., 7 Mass. 365, 5 Am. Dec. 50.

New York.— American Ins. Co. *v.* Griswold, 14 Wend. 399; Minturn *v.* Columbian Ins. Co., 10 Johns. 75; Kane *v.* Commercial Ins. Co., 8 Johns. 229; Le Roy *v.* United Ins. Co., 7 Johns. 343; Suydam *v.* Marine Ins. Co., 2 Johns. 138.

South Carolina.— Budd *v.* Union Ins. Co., 4 McCord 1; Bailey *v.* South Carolina Ins. Co., 3 Brev. 354.

United States.— Snell *v.* Delaware Ins. Co., 4 Dall. 430, 1 L. ed. 896, 22 Fed. Cas. No. 13,137, 1 Wash. 509; Catlett *v.* Columbian Ins. Co., 5 Fed. Cas. No. 2,514, 3 Cranch C. C. 192. See Carson *v.* Marine Ins. Co., 5 Fed. Cas. No. 2,465, 2 Wash. 468.

England.— Usher *v.* Noble, 12 East 639, 11 Rev. Rep. 505; Dick *v.* Allen, 1 Park Ins. 226; Waldron *v.* Coombe, 3 Taunt. 162, 12 Rev. Rep. 629; Paterson *v.* Harris, 1 B. & S. 336, 7 Jur. N. S. 1276, 30 L. J. Q. B. 354, 9 Wkly. Rep. 743, 101 E. C. L. 336.

See 28 Cent. Dig. tit. "Insurance," § 1239 *et seq.*

The market price at the time of shipment and not the cost to the insured was held to be the rule of value in adjusting losses in Carson *v.* Marine Ins. Co., 5 Fed. Cas. No. 2,465, 2 Wash. 468.

94. Louisville M. & F. Ins. Co. *v.* Bland, 9 Dana (Ky.) 143; Minturn *v.* Columbian Ins. Co., 10 Johns. (N. Y.) 75; Carson *v.* Marine Ins. Co., 5 Fed. Cas. No. 2,465, 2 Wash. 468.

95. *Kentucky.*— Louisville M. & F. Ins. Co. *v.* Bland, 9 Dana 143.

Maryland.— Merchants' Mut. Ins. Co. *v.* Wilson, 2 Md. 217.

Massachusetts.— Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, 32 Am. Dec. 271.

New York.— American Ins. Co. *v.* Griswold, 14 Wend. 399; Ogden *v.* Columbian Ins. Co., 10 Johns. 273.

South Carolina.— Cox *v.* Charleston F. & M. Ins. Co., 3 Rich. 331, 45 Am. Dec. 771; Bailey *v.* South Carolina Ins. Co., 3 Brev. 354.

England.— Usher *v.* Noble, 12 East 639, 11 Rev. Rep. 505; Tuite *v.* Royal Exch. Assur. Co., 1 Park Ins. 224.

See 28 Cent. Dig. tit. "Insurance," § 1239 *et seq.*

96. Kemble *v.* Bowne, 1 Cai. (N. Y.) 75; Usher *v.* Noble, 12 East 639, 11 Rev. Rep. 505.

97. Minturn *v.* Columbian Ins. Co., 10 Johns. (N. Y.) 75.

98. Stevens *v.* Columbian Ins. Co., 3 Cai. (N. Y.) 43, 2 Am. Dec. 247; Palmer *v.* Blackburn, 1 Bing. 61, 1 L. J. C. P. O. S. 1, 7 Moore C. P. 339, 25 Rev. Rep. 599, 8 E. C. L. 403.

99. Paradise *v.* Sun Mut. Ins. Co., 6 La. Ann. 596.

1. Davy *v.* Hallett, 3 Cai. (N. Y.) 16, 2 Am. Dec. 241; Hancox *v.* Fishing Ins. Co., 11 Fed. Cas. No. 6,013, 3 Sumn. 132.

Partial discharge of cargo.— Where the value of the cargo exceeds the amount of the insurance, and after a partial discharge there is a total loss of the residue which exceeds the amount insured, the underwriter is liable for the full amount. American Ins. Co. *v.* Griswold, 14 Wend. (N. Y.) 399.

2. Amery *v.* Rogers, 1 Esp. 207. See *supra*, IX, F, 1.

b. Partial Losses — (1) *On Ship* — (A) *Repairs Not Made.* If repairs are not made, the extent of a partial loss of the ship must be determined by the estimate of surveyors,[3] and may be fixed by taking the value of the vessel sound and its value in its damaged condition.[4] Or the ship may be sold at public auction, in which case the liability of the underwriters will be the difference between the sale price and her original value.[5]

(B) *Repairs Made.* The damage done to a ship is ascertained where repairs have been made by the reasonable cost of such repairs[6] and the expenses of saving.[7] And upon this basis the underwriters may be liable for the full amount of the insurance as a particular average loss,[8] subject to the deductions hereinafter stated.[9]

(C) *Vessel Not Fully Restored.* Where the repairs made are not such as to restore the vessel to its original form of construction, but it is repaired so as to make it equally as useful and valuable, the insured can recover from the underwriters only the cost of the repairs actually made, and not the amount which it would have cost to restore the vessel to its original form.[10]

(D) *Temporary Repairs.* Where temporary repairs are made at a port of refuge, and the insured acting in good faith leaves the permanent repairs to be made at another port, the underwriters are liable for the cost of both the permanent and temporary repairs.[11]

(E) *Deduction New For Old* — (1) In General. After full repairs have been made the vessel is generally in a better condition than before damaged on account of old material being supplanted by new, and in order to avoid controversy as to the exact extent of this benefit a rule has been established in fixing the amount of the damage which deducts one third of the costs of repairs, including both the cost of labor and material, from the total expense of such repairs.[12] But the deduction does not apply to incidental expenses connected with the repairs

3. Pitman *v.* Universal Mar. Ins. Co., 9 Q. B. D. 192, 4 Aspin. 544, 51 L. J. Q. B. 561, 46 L. T. Rep. N. S. 863, 30 Wkly. Rep. 906.

4. Pitman *v.* Universal Mar. Ins. Co., 9 Q. B. D. 192, 4 Aspin. 544, 51 L. J. Q. B. 561, 46 L. T. Rep. N. S. 863, 30 Wkly. Rep. 906.

5. Williams *v.* Smith, 2 Cai. (N. Y.) 13 [*reversed* on other grounds in 2 Cai. Cas. 110]; Pitman *v.* Universal Mar. Ins. Co., 9 Q. B. D. 192, 4 Aspin. 544, 51 L. J. Q. B. 561, 46 L. T. Rep. N. S. 863, 30 Wkly. Rep. 906.

6. Sewall *v.* U. S. Insurance Co., 11 Pick. (Mass.) 90; International Nav. Co. *v.* Atlantic Mut. Ins. Co., 100 Fed. 304; Humphreys *v.* Union Ins. Co., 12 Fed. Cas. No. 6,871, 3 Mason 429; Aitchison *v.* Lohre, 4 App. Cas. 755, 4 Aspin. 168, 49 L. J. Q. B. 123, 41 L. T. Rep. N. S. 323, 28 Wkly. Rep. 1.

Repairs must be made bona fide and with reasonable discretion. Pitman *v.* Universal Mar. Ins. Co., 9 Q. B. D. 192, 4 Aspin. 544, 51 L. J. Q. B. 561, 46 L. T. Rep. N. S. 863, 30 Wkly. Rep. 906.

Actual outlay is strong evidence of reasonable cost of repairs. Aitchison *v.* Lohre, 4 App. Cas. 755, 4 Aspin. 168, 49 L. J. Q. B. 123, 41 L. T. Rep. N. S. 323, 28 Wkly. Rep 1.

7. Sewall *v.* U. S. Insurance Co., 11 Pick. (Mass.) 90.

An apportionment of docking expenses will be made where a ship is docked for repairs for which the underwriters are liable and while in dock the vessel is surveyed for the purpose of renewing her classification. Ruahon Steamship Co. *v.* London Assur. Co., [1897] 2 Q. B. 456, 66 L. J. Q. B. 841, 77 L. T. Rep. N. S. 402; Marine Ins. Co. *v.* China Transpacific Steamship Co., 11 App. Cas. 573, 6 Aspin. 68, 56 L. J. Q. B. 100, 55 L. T. Rep. N. S. 491, 35 Wkly. Rep. 169.

8. Aitchison *v.* Lohre, 4 App. Cas. 755, 4 Aspin. 168, 49 L. J. Q. B. 123, 41 L. T. Rep. N. S. 323, 28 Wkly. Rep. 1.

9. See *infra*, IX, F, 3, b, (I), (E).

10. Bristol Steam Nav. Co. *v.* Indemnity Mut. Mar. Ins. Co., 6 Aspin. 173, 57 L. T. Rep. N. S. 101; Stewart *v.* Steele, 5 Scott N. R. 927.

11. Paddock *v.* Commercial Ins. Co., 104 Mass. 521; Brooks *v.* Oriental Ins. Co., 7 Pick. (Mass.) 259.

12. *Louisiana.*— Fisk *v.* Commercial Ins. Co., 18 La. 77.

Maine.— Hagar *v.* New England Mut. Mar. Ins. Co., 59 Me. 460.

Massachusetts.— Paddock *v.* Commercial Ins. Co., 104 Mass. 521; Orrok *v.* Commonwealth Ins. Co., 21 Pick. 476, 32 Am. Dec. 271; Hall *v.* Ocean Ins. Co., 21 Pick. 472; Deblois *v.* Ocean Ins. Co., 16 Pick. 303, 28 Am. Dec. 245; Eager *v.* Atlas Ins. Co., 14 Pick. 141, 25 Am. Dec. 263; Sewall *v.* U. S. Insurance Co., 11 Pick. 90; Brooks *v.* Oriental Ins. Co., 7 Pick. 259; Nickels *v.* Maine F. & M. Ins. Co., 11 Mass. 253. *Com-*

which do not enhance the value of the vessel, such as towage, boat hire, etc.[13] The custom cannot be varied by showing that a greater benefit accrued to the ship by the replacing of the old with the new material.[14]

(2) Proceeds of Old Materials. The proceeds of old materials must be first deducted from the gross cost of the repairs before making the deduction of one third.[15]

(3) New Vessels. It is generally held that the deduction of one third does not apply in the case of a new vessel on her first voyage,[16] but this exception has not been uniformly adopted.[17] A voyage out and back is generally considered but one voyage unless very long.[18]

(II) *On Goods.* The rule for computing a particular average loss on goods is that the goods must be at once sold upon reaching their destination for the best possible price, and the ratio formed by the difference between the sound and damaged values at such port compared with the sound value then gives the per-

pare Eager *v.* Atlas Ins. Co., 14 Pick. 114, 25 Am. Dec. 363.

Missouri.— Kerr *v.* Quaker City Ins. Co., 33 Mo. 158.

New York.— Read *v.* Mutual Safety Ins. Co., 3 Sandf. 54; Byrnes *v.* National Ins. Co., 1 Cow. 265; Dunham *v.* Commercial Ins. Co., 11 Johns. 315, 6 Am. Dec. 374.

Ohio.— Perry *v.* Ohio Ins. Co., 5 Ohio 305; Wallace *v.* Ohio Ins. Co., 4 Ohio 234; Sherlock *v.* Globe Ins. Co., 7 Ohio Dec. (Reprint) 17, 1 Cinc. L. Bul. 26.

United States.— International Nav. Co. *v.* Atlantic Mut. Ins. Co., 100 Fed. 304; Humphreys *v.* Union Ins. Co., 12 Fed. Cas. No. 6,871, 3 Mason 429; New England Mut. Mar. Ins. Co. *v.* Dunham, 18 Fed. Cas. No. 10,155, 3 Cliff. 332, 371 [*affirming* 8 Fed. Cas. No. 4,152, 1 Lowell 253]; Potter *v.* Ocean Ins. Co., 19 Fed. Cas. No. 11,335, 3 Sumn. 27; Sanderson *v.* Columbian Ins. Co., 21 Fed. Cas. No. 12,298, 2 Cranch C. C. 218.

England.—Aitchison *v.* Lohre, 4 App. Cas. 755, 4 Aspin. 168, 49 L. J. Q. B. 123, 41 L. T. Rep. N. S. 323, 28 Wkly. Rep. 1; Pitman *v.* Universal Mar. Ins. Co., 9 Q. B. D. 192, 4 Aspin. 544, 51 L. J. Q. B. 561, 46 L. T. Rep. N. S. 863, 30 Wkly. Rep. 906; Pirie *v.* Steele, 8 C. & P. 200, 2 M. & R. 49, 34 E. C. L. 689; Poingdestre *v.* Royal Exch. Assur. Co., R. & M. 378, 27 Rev. Rep. 759, 21 E. C. L. 773.

See 28 Cent. Dig. tit. "Insurance," § 1252.

Deductions on both temporary and permanent repairs are to be made. Paddock *v.* Commercial Ins. Co., 104 Mass. 521.

Substantial restoration necessary.— A repair means where a boat can be restored substantially to what it was before the injury; but if it would become substantially a different boat, so that fire policies would not reattach for the unexpired time, it is not a repair, and the rule of one-third new for old will not apply. Sherlock *v.* Globe Ins. Co., 7 Ohio Dec. (Reprint) 17, 1 Cinc. L. Bul. 26.

Deduction not allowed where vessel is not put into free possession of owner.— Where a vessel was repaired by money obtained by giving a bottomry bond which the underwriters refused to discharge, whereupon the vessel was sold, no deduction was allowed on the cost of repairs. Da Costa *v.* Newnham, 2 T. R. 407.

Part damage recovered from vessel in suit for collision.— In a suit on an insurance policy, the amount recovered on a libel for collision is to be deducted from the gross amount of the damage, and not from the loss adjusted as a partial loss, with a deduction of one-third new for old. Dunham *v.* New England Mut. Ins. Co., 8 Fed. Cas. No. 4,152, 1 Lowell 253 [*affirmed* in 18 Fed. Cas. No. 10,155, 3 Cliff. 332, 371].

If the cost of repairs exceed one hundred per cent of the insured value the deductions new for old are not made. Pitman *v.* Universal Mar. Ins. Co., 9 Q. B. D. 192, 4 Aspin. 544, 51 L. J. Q. B. 561, 46 L. T. Rep. N. S. 863, 30 Wkly. Rep. 906.

13. Potter *v.* Ocean Ins. Co., 19 Fed. Cas. No. 11,335, 3 Sumn. 27.

14. Aitchison *v.* Lohre, 4 App. Cas. 755, 4 Aspin. 168, 49 L. J. Q. B. 123, 41 L. T. Rep. N. S. 323, 28 Wkly. Rep. 1.

15. Eager *v.* Atlas Ins. Co., 14 Pick. (Mass.) 141, 25 Am. Dec. 363; Brooks *v.* Oriental Ins. Co., 7 Pick. (Mass.) 259; American Ins. Co. *v.* Ogden, 20 Wend. (N. Y.) 287; Byrnes *v.* National Ins. Co., 1 Cow. (N. Y.) 265.

16. Pirie *v.* Steele, 8 C. & P. 200, 2 M. & Rob. 49, 34 E. C. L. 689; Fenwick *v.* Robinson, 3 C. & P. 323, 14 E. C. L. 590.

17. *Louisiana.*— Fisk *v.* Commercial Ins. Co., 18 La. 77.

Massachusetts.— Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, 32 Am. Dec. 271; Sewall *v.* U. S. Insurance Co., 11 Pick. 90; Nickels *v.* Maine F. & M. Ins. Co., 11 Mass. 253.

Missouri.— Kerr *v.* Quaker City Ins. Co., 33 Mo. 158.

New York.— Dunham *v.* Commercial Ins. Co., 11 Johns. 315, 6 Am. Dec. 374.

Ohio.— Perry *v.* Ohio Ins. Co., 5 Ohio 305; Wallace *v.* Ohio Ins. Co., 4 Ohio 234; Sherlock *v.* Globe Ins. Co., 7 Ohio Dec. (Reprint) 17, 1 Cinc. L. Bul. 26.

See 28 Cent. Dig. tit. "Insurance," § 1252.

18. Fenwick *v.* Robinson, 3 C. & P. 323, 14 E. C. L. 590.

Two years' voyage out and back considered

centage of loss which is to be applied to the policy value.[19] In ascertaining such proportion, the gross proceeds of the goods sound and damaged are to be used.[20]

4. Separate Parcels and Separate Insurances — a. Cargo in Bulk. Where the insurance is upon cargo in bulk it is upon the whole as an entirety, and the rules for adjusting losses and determining percentages of average losses are applied with reference to the entire cargo.[21]

b. Separate Packages, Etc. If, however, the insurance is on each package separately, or upon different subjects separately, it is treated as a separate insurance on each package or subject, and the losses are to be adjusted as if there had been separate policies issued for each package or subject.[22] But the mere fact that goods of the same specie are shipped in separate packages does not make the insurance a separate insurance on each package.[23] Nor does the fact that the cargo is valued at so much per bale, box, or package have such effect.[24]

c. Articles of Different Kind. If articles essentially different in nature and kind are insured each will bear its own average.[25]

but one voyage see Pirie *v.* Steele, 8 C. & P. 200, 2 M. & Rob. 49, 34 E. C. L. 689.

19. *Illinois.*—Lamar Ins. Co. *v.* McGlashen, 54 Ill. 513, 5 Am. Rep. 162.

Massachusetts.— Welles *v.* Gray, 10 Mass. 42; Clark *v.* United F. & M. Ins. Co., 7 Mass. 365, 5 Am. Dec. 50.

New York.— Savage *v.* Corn Exch. F., etc., Ins. Co., 36 N. Y. 655; Lawrence *v.* New York Ins. Co., 3 Johns. Cas. 217.

Rhode Island.— Evans *v.* Commercial Mut. Ins. Co., 6 R. I. 47.

United States.— London Assur. Co. *v.* Companhia De Moagens Do Barreiro, 167 U. S. 149, 17 S. Ct. 785, 42 L. ed. 113; Ursula Bright Steamship Co. *v.* Amsinck, 115 Fed. 242; International Nav. Co. *v.* Atlantic Mut. Ins. Co., 100 Fed. 304.

England.— Lewis *v.* Rucker, 2 Burr. 1167; Francis *v.* Boulton, 8 Aspin. 79, 65 L. J. Q. B. 153, 73 L. T. Rep. N. S. 578, 44 Wkly. Rep. 222; Usher *v.* Noble, 12 East 639, 11 Rev. Rep. 505; Johnson *v.* Sheddon, 2 East 581, 6 Rev. Rep. 516.

See 28 Cent. Dig. tit. "Insurance," § 1239 *et seq.*

Selling without renovation.— Cases of whisky in bottles became damaged and the straw in which they were packed was wet and discolored and some of the labels damaged. They were sold in their damaged condition. The underwriters were held liable for the loss upon the sale, the insured being under no obligation to repack or relabel the bottles before selling. Brown *v.* Fleming, 7 Com. Cas. 245.

20. Lawrence *v.* New York Ins. Co., 3 Johns. Cas. (N. Y.) 217; Evans *v.* Commercial Mut. Ins. Co., 6 R. I. 47; Hurry *v.* Royal Exch. Assur. Co., 3 B. & P. 308, 6 Rev. Rep. 804; Johnson *v.* Sheddon, 2 East 581, 6 Rev. Rep. 516.

21. Hills *v.* London Assur. Corp., 9 L. J. Exch. 25, 5 M. & W. 569. *Compare* Davy *v.* Milford, 15 East 559.

22. Kettell *v.* Alliance Ins. Co., 10 Gray (Mass.) 144; Vandenheuvel *v.* United Ins. Co., 1 Johns. (N. Y.) 406; Hills *v.* London Assur. Corp., 9 L. J. Exch. 25, 5 M. & W. 569.

"Each package subject to its own average" or equivalent expressions have the effect of making the losses adjustable under the policy as if the insurance was upon each article or subject separately. Chicago Ins. Co. *v.* Graham, etc., Transp. Co., 108 Fed. 271, 47 C. C. A. 320, 109 Fed. 352, 48 C. C. A. 397. This clause is not applicable to an insurance of a cargo of grain in bulk. Haenschen *v.* Franklin Ins. Co., 67 Mo. 156.

A separate valuation of hull and machinery followed by a clause "average payable on each valuation as if separately insured" is to be treated as a separate insurance of each. American Steamship Co. *v.* Indemnity Mut. Mar. Ins. Co., 108 Fed. 421 [*affirmed* in 118 Fed. 1014, 56 C. C. A. 56]; Oppenheim *v.* Fry, 5 B. & S. 348, 33 L. J. Q. B. 267, 10 L. T. Rep. N. S. 539, 12 Wkly. Rep. 831, 117 E. C. L. 348.

23. *Massachusetts.*— Pierce *v.* Columbian Ins. Co., 14 Allen 320.

New York.— Wadsworth *v.* Pacific Ins. Co., 4 Wend. 33.

United States.— Biays *v.* Chesapeake Ins. Co., 7 Cranch 415, 3 L. ed. 389.

England.— Ralli *v.* Janson, 6 E. & B. 422, 2 Jur. N. S. 566, 25 L. J. Q. B. 300, 4 Wkly. Rep. 568, 88 E. C. L. 422.

Canada.— Moore *v.* Provincial Ins. Co., 23 U. C. C. P. 383.

Where a cargo of oranges and lemons is insured it is not treated as a separate insurance on each specie of fruit. Humphreys *v.* Union Ins. Co., 13 Fed. Cas. No. 6,871, 3 Mason 429.

24. Newlin *v.* Insurance Co. of North America, 5 Pa. L. J. Rep. 116 [*affirmed* in 20 Pa. St. 312]; Hernandez *v.* New York Mut. Ins. Co., 12 Fed. Cas. No. 6,414, 6 Blatchf. 326; Entwisle *v.* Ellis, 2 H. & N. 549, 27 L. J. Exch. 105, 6 Wkly. Rep. 76. *Compare* Ralli *v.* Janson, 6 E. & B. 422, 2 Jur. N. S. 566, 25 L. J. Q. B. 300, 4 Wkly. Rep. 568, 88 E. C. L. 422.

25. Deidericks *v.* Commercial Ins. Co., 10 Johns. (N. Y.) 234; Wilkinson *v.* Hyde, 3 C. B. N. S. 30, 4 Jur. N. S. 482, 27 L. J. C. P. 116, 91 E. C. L. 30.

Coffee and wool being insured under one policy it was held that losses upon either should be separately adjusted. Wallerstein

d. By Two or More Vessels. If the cargo is sent forward in or transhipped to two or more ships the adjustment must be made as to the cargo in each ship, as if there had been a separate insurance upon the cargo in each.[26] But this rule does not apply where the cargo is placed on two or more lighters for the purpose of loading or discharging a vessel.[27]

e. After Partial Delivery. After a partial delivery of the cargo the percentage applies to the balance remaining at risk.[28]

G. Deduction and Calculation of Percentages — 1. What Losses Are Chargeable to Underwriters. Where the policy is "free of particular average under 5%" or other designated amount, the underwriters are not liable for particular average losses which are under the specified percentage;[29] but if the loss is equal to or above the percentage named the underwriters are liable for the entire loss.[30]

2. How Percentage Is Made Up. To make up the percentage all damage done or occasioned by any one particular casualty and all expenses and charges which are proximately caused thereby are to be added together.[31] But a general average loss cannot be added to a particular average loss to make up the percentage.[32] In the United States the general rule is that successive and distinct partial losses occurring on the same voyage cannot be added to make up the percentage,[33] but the contrary rule prevails in England.[34]

v. Columbian Ins. Co., 44 N. Y. 204, 4 Am. Rep. 664.

A policy on "master's effects" or "personal effects" is to be applied distributively to the various articles. Canton Ins. Office *v.* Woodside, 90 Fed. 301, 33 C. C. A. 63; Duff *v.* Mackenzie, 3 C. B. N. S. 16, 3 Jur. N. S. 1025, 26 L. J. C. P. 313, 91 E. C. L. 16.

26. Pierce *v.* Columbian Ins. Co., 14 Allen (Mass.) 320.

27. Pierce *v.* Columbian Ins. Co., 14 Allen (Mass.) 320.

28. Maryland Ins. Co. *v.* Bosley, 9 Gill & J. (Md.) 337.

29. *Louisiana.*— Riley *v.* Ocean Ins. Co., 11 Rob. 255.

Pennsylvania.— Newlin *v.* Insurance Co. of North America, 20 Pa. St. 312.

Rhode Island.— Evans *v.* Commercial Mut. Ins. Co., 6 R. I. 47.

United States.— Coster *v.* Phœnix Ins. Co., 6 Fed. Cas. No. 3,264, 2 Wash. 51.

England.— Price *v.* Al Ships' Small Damage Ins. Assoc., 22 Q. B. D. 580, 6 Aspin. 435, 58 L. J. Q. B. 269, 61 L. T. Rep. N. S. 278, 37 Wkly. Rep. 566. See also Paterson *v.* Harris, 1 B. & S. 336, 7 Jur. N. S. 1276, 30 L. J. Q. B. 354, 9 Wkly. Rep. 743, 101 E. C. L. 336.

30. Hagedorn *v.* Whitmore, 1 Stark. 157, 2 E. C. L. 67.

31. Snapp *v.* Merchants', etc., Ins. Co., 8 Ohio St. 458; Hall *v.* Rising Sun Ins. Co., 1 Disn. (Ohio) 308, 12 Ohio Dec. (Reprint) 639; Marine Ins. Co. *v.* China Transpacific Steamship Co., 11 App. Cas. 573, 6 Aspin. 68, 56 L. J. Q. B. 100, 55 L. T. Rep. N. S. 491, 35 Wkly. Rep. 169.

No more than proper proportion of salvage, general average, and agent's expenses can be included in fixing the percentage of the loss. Buzby *v.* Phœnix Ins. Co., 31 Fed. 422; Oppenheim *v.* Fry, 5 B. & S. 348, 33 L. J. Q. B. 267, 10 L. T. Rep. N. S. 539, 12 Wkly. Rep. 831, 117 E. C. L. 348.

Expense of survey made at home cannot be added to cost of repairs to make up the percentage. Giles *v.* Eagle Ins. Co., 2 Metc. (Mass.) 140; Brooks *v.* Oriental Ins. Co., 7 Pick. (Mass.) 259.

Damage done in one disaster or one continued gale or storm is to be considered by itself. Brooks *v.* Oriental Ins. Co., 7 Pick. (Mass.) 259.

Damage caused to other vessel.— In Massachusetts it has been held that the damage done to another vessel in collision and which the owners of the insured vessel have been obliged to make good may be included in making up the percentage. Whorf *v.* Equitable Mar. Ins. Co., 144 Mass. 68, 10 N. E. 513.

32. Price *v.* Al Ships' Small Damage Ins. Assoc., 22 Q. B. D. 580, 6 Aspin. 435, 58 L. J. Q. B. 269, 61 L. T. Rep. N. S. 278, 37 Wkly. Rep. 566.

33. Hagar *v.* England Mut. Mar. Ins. Co., 59 Me. 460; Paddock *v.* Commercial Ins. Co., 104 Mass. 521; Brooks *v.* Oriental Ins. Co., 7 Pick. (Mass.) 259; Donnell *v.* Columbian Ins. Co., 7 Fed. Cas. No. 3,987, 2 Sumn. 366; Luma *v.* Atlantic Mut. Ins. Co., 15 Fed. Cas. No. 8,605.

34. Stewart *v.* Merchants Mar. Ins. Co., 16 Q. B. D. 619, 5 Aspin. 506, 55 L. J. Q. B. 81, 53 L. T. Rep. N. S. 892, 34 Wkly. Rep. 208; Blackett *v.* Royal Exch. Assur. Co., 2 Cromp. & J. 244, 1 L. J. Exch. 101, 2 Tyrw. 266.

Time policy and separate voyages.— Even under the English rule where the policy is on time it is not permissible to add successive losses occurring on different voyages. Stewart *v.* Merchants Mar. Ins. Co., 16 Q. B. D. 619, 5 Aspin. 506, 55 L. J. Q. B. 81, 53 L. T. Rep. N. S. 892, 34 Wkly. Rep. 208.

3. How Damage Is Fixed. The amount of the damage is fixed as in other cases, including deductions of one third on repairs of vessel.[35]

H. Memorandum Clause — 1. In General. The memorandum clause[36] was adopted for the purpose of avoiding disputes over small losses in cases of articles of a perishable nature,[37] and not for the purpose of enlarging the perils.[38]

2. Articles Included. Within this clause it has been held that "corn" includes malt,[39] peas,[40] and beans,[41] but not rice;[42] that "fruit" includes oranges[43] and dried prunes;[44] that "vegetables" and "roots" include dried pinkroot which is not perishable,[45] but not sarsaparilla;[46] that "skins" and "hides" include furs[47] and deerskins;[48] that "salt" does not include saltpeter;[49] and that "dried fish" does not include pickled fish.[50] Under the general words as to perishable articles are included potatoes[51] and wheat,[52] but not fertilizer.[53]

3. Exemption For Partial Losses — a. In General. By this clause the underwriters exempt themselves from all partial losses to any of the memorandum articles.[54] It does not restrict their liability for total losses.[55]

b. Arrival in Specie — (i) *In General.* If the goods or any part of them

35. Sanderson *v.* Columbian Ins. Co., 21 Fed. Cas. No. 12,298, 2 Cranch C. C. 218. See *supra*, IX, F, 3.

36. Usual form of clause.— "It is also agreed, that bar, bundle, rod, hoop, and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, brooms, wickerware and willow (manufactured or otherwise), straw goods, salt, grain of all kinds, rice, tobacco, indian meal, fruits, (whether preserved or otherwise), cheese, dry-fish, hay . . . (specifying various other articles) and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general."

Rider.— Frequently marine policies merely have a rider or stamped indorsement, "Free of particular average," etc., without enumerating any particular article or articles to which it is to apply. This is treated as making the clause apply to all the articles included in the policy. Washburn, etc., Mfg. Co. *v.* Reliance Mar. Ins. Co., 106 Fed. 116 [*affirmed* in 179 U. S. 1, 21 S. Ct. 1, 45 L. ed. 49].

37. Price *v.* A1 Ships' Small Damage Ins. Assoc., 22 Q. B. D. 580, 6 Aspin. 435, 58 L. J. Q. B. 269, 61 L. T. Rep. N. S. 278, 37 Wkly. Rep. 566.

38. Potter *v.* Suffolk Ins. Co., 19 Fed. Cas. No. 11,399, 2 Sumn. 197.

39. Moody *v.* Surridge, 2 Esp. 633, 5 Rev. Rep. 575.

40. Mason *v.* Skurray, 1 Park Ins. 253.

41. Mason *v.* Skurray, 1 Park Ins. 253.

42. Scott *v.* Bourdillion, 2 B. & P. N. R. 213.

43. Humphreys *v.* Union Ins. Co., 12 Fed. Cas. No. 6,871, 3 Mason 429.

44. De Pau *v.* Jones, 1 Brev. (S. C.) 437.

45. Klett *v.* Delaware Ins. Co., 23 Pa. St. 262.

46. Coit *v.* Commercial Ins. Co., 7 Johns. (N. Y.) 385, 5 Am. Dec. 282.

47. Astor *v.* Union Ins. Co., 7 Cow. (N. Y.) 202.

48. Bakewell *v.* United Ins. Co., 2 Johns. Cas. (N. Y.) 246.

49. Journu *v.* Bourdien, 1 Park Ins. 245.

50. Baker *v.* Ludlow, 2 Johns. Cas. (N. Y.) 289.

51. Williams *v.* Cole, 16 Me. 207; Robinson *v.* Commonwealth Ins. Co., 20 Fed. Cas. No. 11,949, 3 Sumn. 220.

52. Lake *v.* Columbus Ins. Co., 13 Ohio 48, 42 Am. Dec. 188.

53. Mayo *v.* India Mut. Ins. Co., 152 Mass. 172, 25 N. E. 80, 23 Am. St. Rep. 814, 9 L. R. A. 831.

54. *Indiana.*— Indianapolis Ins. Co. *v.* Mason, 11 Ind. 171.

Kentucky.— Louisville M. & F. Ins. Co. *v.* Bland, 9 Dana 143.

Louisiana.— Aranzamendi *v.* Louisiana Ins. Co., 2 La. 432, 22 Am. Dec. 136; Brooke *v.* Louisiana Ins. Co., 5 Mart. N. S. 530; Brooke *v.* Louisiana State Ins. Co., 4 Mart. N. S. 640.

New York.— Devitt *v.* Providence Washington Ins. Co., 173 N. Y. 17, 65 N. E. 777; Wright *v.* Williams, 20 Hun 320; Wadsworth *v.* Pacific Ins. Co., 4 Wend. 33; Astor *v.* Union Ins. Co., 7 Cow. 202; Le Roy *v.* Gouverneur, 1 Johns. Cas. 226.

United States.— Morean *v.* U. S. Insurance Co., 1 Wheat. 219, 4 L. ed. 75.

England.— Wilson *v.* Smith, 3 Burr. 1550, W. Bl. 507; Hedburgh *v.* Pearson, 2 Marsh. 432, 7 Taunt. 154, 2 E. C. L. 303.

See 28 Cent. Dig. tit. "Insurance," § 1230 *et seq.*

Separate insurance.—Where there is a total loss of an entire package or parcel separately valued and insured it is a total loss of such part, even though the article is within the memorandum. Silloway *v.* Neptune Ins. Co., 12 Gray (Mass.) 73; Kettell *v.* Alliance Ins. Co., 10 Gray (Mass.) 144; Washburn, etc., Mfg. Co. *v.* Reliance Mar. Ins. Co., 179 U. S. 1, 21 S. Ct. 1, 45 L. ed. 49; Canton Ins. Office *v.* Woodside, 90 Fed. 301, 33 C. C. A. 63. See also Mowat *v.* Boston Mar. Ins. Co., 26 Can. Sup. Ct. 47.

What are separate insurances see *supra*, IX, F, 4.

55. Williams *v.* Cole, 16 Me. 207; Murray *v.* Hatch, 6 Mass. 465; Price *v.* A1 Ships' Small Damage Ins. Assoc., 22 Q. B. D. 580, 6 Aspin. 435, 58 L. J. Q. B. 269, 61 L. T. Rep. N. S. 278, 37 Wkly. Rep. 566; Wilson *v.* Smith, 3 Burr. 1550, W. Bl. 507.

What constitutes total loss see *infra*, IX, J.

arrive in specie at the port of destination, however extensively they may be damaged, it is generally considered that there is but a partial loss,[56] even though they be subject to charges which exceed their value.[57]

(II) *Exception to Cases of Constructive Total Loss.*[58] This rule is subject to exceptions in several jurisdictions. The principal exception is made to cases where there is a constructive total loss,[59] made complete by due abandonment.[60] The weight of authority in the United States, however, seems to be that there can be no claim upon the underwriters for a constructive total loss of memorandum articles.[61]

56. *Louisiana.*— Skinner *v.* Western M. & F. Ins. Co., 19 La. 273.

Maine.— Williams *v.* Kennebec Mut. Ins. Co., 31 Me. 455.

Massachusetts.— Mayo *v.* India Mut. Ins. Co., 152 Mass. 172, 25 N. E. 80, 23 Am. St. Rep. 814, 9 L. R. A. 831; Murray *v.* Hatch, 6 Mass. 465.

New York.— Depeyster *v.* Sun Mut. Ins. Co., 17 Barb. 306 [*affirmed* in 19 N. Y. 272, 75 Am. Dec. 331]; Chadsey *v.* Guion, 48 N. Y. Super. Ct. 267 [*affirmed* in 97 N. Y. 333]; Wadsworth *v.* Pacific Ins. Co., 4 Wend. 33; Saltus *v.* Ocean Ins. Co., 14 Johns. 138; Neilson *v.* Columbian Ins. Co., 3 Cai. 108.

United States.— Washburn, etc., Mfg. Co. *v.* Reliance Mar. Ins. Co., 179 U. S. 1, 21 S. Ct. 1, 45 L. ed. 49; Morean *v.* U. S. Insurance Co., 1 Wheat. 219, 4 L. ed. 75; Marcardier *v.* Chesapeake Ins. Co., 8 Cranch 39, 3 L. ed. 481; Biays *v.* Chesapeake Ins. Co., 7 Cranch 415, 3 L. ed. 389 [*affirming* 16 Fed. Cas. No. 9,064, 3 Wash. 256]; Robinson *v.* Commonwealth Ins. Co., 20 Fed. Cas. No. 11,949, 3 Sumn. 220.

England.— Navone *v.* Haddon, 9 C. B. 30, 19 L. J. C. P. 161, 67 E. C. L. 30; Cocking *v.* Fraser, 4 Dougl. 295, 26 E. C. L. 484; Mason *v.* Skurray, 1 Park Ins. 253; McAndrews *v.* Vaughan, 1 Park Ins. 253.

See 28 Cent. Dig. tit. "Insurance," § 1230 *et seq.*

Arrival of part of a chariot where the box, equal to two thirds the entire value, has been jettisoned is not an arrival in specie. Judah *v.* Randal, 2 Cai. Cas. (N. Y.) 324.

57. Marean *v.* U. S. Insurance Co., 16 Fed. Cas. No. 9,064, 3 Wash. 256; Glennie *v.* London Assur. Co., 2 M. & S. 371, 15 Rev. Rep. 275.

58. **Constructive total loss** see *infra*, IX, J, 4.

59. *Massachusetts.*— Mayo *v.* India Mut. Ins. Co., 152 Mass. 172, 25 N. E. 80, 23 Am. St. Rep. 814, 9 L. R. A. 831; Pierce *v.* Columbian Ins. Co., 14 Allen 320; Kettell *v.* Alliance Ins. Co., 10 Gray 144; Heebner *v.* Eagle Ins. Co., 10 Gray 131, 69 Am. Dec. 308.

New York.— Devitt *v.* Providence Washington Ins. Co., 173 N. Y. 17, 65 N. E. 777; Wright *v.* Williams, 20 Hun 320; Chadsey *v.* Guion, 46 N. Y. Super. Ct. 118 [*affirmed* in 97 N. Y. 333].

Pennsylvania.— Delaware Ins. Co. *v.* Winter, 38 Pa. St. 176.

England.— Adams *v.* Mackenzie, 13 C. B. N. S. 442, 9 Jur. N. S. 849, 32 L. J. C. P. 92, 7 L. T. Rep. N. S. 711, 11 Wkly. Rep. 342, 106 E. C. L. 442.

Canada.— O'Leary *v.* Stymest, 11 N. Brunsw. 289.

See 28 Cent. Dig. tit. "Insurance," § 1232.

Perishable goods.— It seems that in Massachusetts this exception does not apply where the goods are actually of a perishable nature. Mayo *v.* India Mut. Ins. Co., 152 Mass. 172, 25 N. E. 80, 23 Am. St. Rep. 814, 9 L. R. A. 831; Heebner *v.* Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308.

60. Heebner *v.* Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308; Wright *v.* Williams, 20 Hun (N. Y.) 320. See also Wallerstein *v.* Columbian Ins. Co., 44 N. Y. 204, 4 Am. Rep. 664.

Abandonment see *infra*, IX, K.

61. Skinner *v.* Western M. & F. Ins. Co., 19 La. 273; Nelson *v.* Louisiana Ins. Co., 5 Mart. N. S. (La.) 289; Waln *v.* Thompson, 9 Serg. & R. (Pa.) 115, 11 Am. Dec. 675; Hugg *v.* Augusta Ins., etc., Co., 7 How. (U. S.) 595, 12 L. ed. 834; Monroe *v.* British, etc., Mar. Ins. Co., 52 Fed. 777, 3 C. C. A. 280. See also Thompson *v.* Royal Exch. Assur. Co., 16 East 214.

Part memorandum articles.—Where a technical total loss is sought to be maintained upon the mere ground of the deterioration of the cargo at an intermediate port to a moiety of its value, all deterioration of memorandum articles must be excluded from the estimate. Therefore, in a cargo of a mixed character, no abandonment for mere deterioration in value during the voyage can be valid unless the damage on the non-memorandum articles exceeds a moiety of the value of the whole cargo, including the memorandum articles. Marcardier *v.* Chesapeake Ins. Co., 8 Cranch (U. S.) 39, 3 L. ed. 481.

If underwriters consent to an abandonment it seems that they may be liable for a constructive total loss of memorandum articles. Washburn, etc., Mfg. Co. *v.* Reliance Mar. Ins. Co., 82 Fed. 296, 27 C. C. A. 134 [*affirmed* in 179 U. S. 1, 45 L. ed. 49].

In New York the earlier cases generally held that a constructive total loss would not make a claim under the memorandum. Carr *v.* Providence Washington Ins. Co., 38 Hun 86 [*affirmed* in 109 N. Y. 504, 17 N. E. 369]; Burt *v.* Brewers', etc., Ins. Co., 9 Hun 383 [*affirmed* in 78 N. Y. 400]; Depeyster *v.* Sun Mut Ins. Co., 17 Barb. 306 [*affirmed* in 19 N. Y. 272, 75 Am. Dec. 331]; Merchants' Steamship Co. *v.* Commercial Mut. Ins. Co., 51 N. Y. Super. Ct. 444; Saltus *v.* Ocean

(III) *Total Loss of Value.* Some jurisdictions make a further exception upon the general rule and permit a recovery where, although the goods arrive in specie, they are of no value.[62]

(IV) *Delivery of Small Quantity by Extraordinary Efforts.* The underwriters cannot defeat a claim upon memorandum articles by delivering a small quantity of the goods in specie at the port of destination where the expense in so doing is not justified by their value.[63]

c. Termination of Adventure at Intermediate Port. The termination of the voyage or disposal of the cargo at an intermediate port cannot convert a partial loss into a total loss, under the memorandum clause, except where the circumstances are such that the goods are not capable of reaching the port of destination in specie,[64] or are capable of reaching it only at an expense exceeding their value at their destination.[65] An inability to forward them during the season is insufficient,[66] and the fact that a prudent uninsured owner would have sold them will not make their loss one within the policy.[67]

4. General Average Losses. The underwriters are not relieved under this clause from their obligation to pay general average losses, irrespective of amount, whether such losses arise directly from a general average sacrifice or as a contribution thereto.[68] But where the usual form of clause is modified, and "free from average" is substituted, the underwriter is relieved from paying general average losses to the same extent as he is relieved from paying particular average losses.[69]

5. Opening Memorandum — a. In General. If the vessel is stranded, sunk, burnt, or in collision, the memorandum is immediately opened and the underwriters become liable for all losses whether total or partial,[70] and this is so whether or not the damage result from such stranding, burning, etc.,[71] except in those cases wherein the usual form of the clause is altered so as to expressly require the loss

Ins. Co., 14 Johns. 138. But the above have been overruled by Devitt *v.* Providence Washington Ins. Co., 173 N. Y. 17, 65 N. E. 777.

62. Chadsey *v.* Guion, 46 N. Y. Super. Ct. 118 [*affirmed* in 97 N. Y. 333]; Almon *v.* British America Assur Co., 16 Nova Scotia 43. See also Depeyster *v.* Sun Mut. Ins. Co., 17 Barb. (N. Y.) 306 [*affirmed* in 19 N. Y. 272, 75 Am. Dec. 331].

63. Bryan *v.* New York Ins. Co., 25 Wend. (N. Y.) 617.

64. *Connecticut.*— Poole *v.* Protection Ins. Co., 14 Conn. 47.

Louisiana.— Aranzamendi *v.* Louisiana Ins. Co., 2 La. 432, 22 Am. Dec. 136.

Maine.— Williams *v.* Kennebec Mut. Ins. Co., 31 Me. 455.

Massachusetts.— Tudor *v.* New England Mut. Mar. Ins. Co., 12 Cush. 554.

New York.— Depeyster *v.* Sun Mut. Ins. Co., 17 Barb. 306 [*affirmed* in 19 N. Y. 272, 75 Am. Dec. 331].

Pennsylvania.— Delaware Ins. Co. *v.* Winter, 38 Pa. St. 176.

United States.— Hugg *v.* Augusta Ins., etc., Co., 7 How. 595, 12 L. ed. 834; Robinson *v.* Commonwealth Ins. Co., 20 Fed. Cas. No. 11,949, 3 Sumn. 220.

England.— Hadkinson *v.* Robinson, 3 B. & P. 388, 7 Rev. Rep. 786; Navone *v.* Haddon, 9 C. B. 30, 19 L. J. C. P. 161, 67 E. C. L. 30; Hunt *v.* Royal Exch. Assur. Co., 5 M. & S. 47, 17 Rev. Rep. 264.

Canada.— Fairbanks *v.* Union Mar. Ins. Co., 3 Nova Scotia 67.

See 28 Cent. Dig. tit. "Insurance," § 1230 *et seq.*

65. Reimer *v.* Ringrose, 6 Exch. 263, 20 L. J. Exch. 175.

66. Anderson *v.* Wallis, 3 Campb. 440, 2 M. & S. 240.

67. Reimer *v.* Ringrose, 6 Exch. 263, 20 L. J. Exch. 175.

68. Fireman's Ins. Co. *v.* Fitzhugh, 4 B. Mon. (Ky.) 160; Maggrath *v.* Church, 1 Cai. (N. Y.) 196, 2 Am. Dec. 173; Saltus *v.* Ocean Ins. Co., 14 Johns. (N. Y.) 138; Parker *v.* Towers, 2 Browne (Pa.) appendix 80; Wilson *v.* Smith, 3 Burr. 1550, W. Bl. 507; Nesbitt *v.* Lushington, 4 T. R. 783, 2 Rev. Rep. 519.

69. Bargett *v.* Orient Mut. Ins. Co., 3 Bosw. (N. Y.) 385.

70. London Assur. Co. *v.* Companhia de Moagens do Barreiro, 167 U. S. 149, 17 S. Ct. 785, 42 L. ed. 113; Cantillon *v.* London Assur. Co. [*cited* in Wilson *v.* Smith, 3 Burr. 1550, 1553]; Harman *v.* Vaux, 3 Campb. 429, 14 Rev. Rep. 773; Bowring *v.* Emslie [*cited* in Burnett *v.* Kensington, 7 T. R. 210, 215, 4 T. R. 783]; Rudolf *v.* British, etc., Mar. Ins. Co., 30 Nova Scotia 380 [*affirmed* in 28 Can. Sup. Ct. 607].

Losses occurring prior to stranding, etc.— As to whether the stranding of a vessel will operate to render the underwriters liable for partial losses sustained prior to the stranding see Roux *v.* Salvador, 3 Bing. N. Cas. 266, 2 Hodges 209, 7 L. J. Exch. 328, 4 Scott 1, 32 E. C. L. 130.

71. London Assur. Co. *v.* Companhia de Moagens do Barreiro, 167 U. S. 149, 17 S. Ct. 785, 42 L. ed. 113; Burnett *v.* Kensington, 1 Esp. 416, Peake Add. Cas. 71, 7 T. R. 210, 4

to result from the stranding, etc.[72] The happening of one of the events is a condition precedent to letting in claims for partial losses.[73]

b. What Is Stranding, Etc. To open the memorandum clause the vessel as a whole must be either stranded, sunk, or burnt, or in collision.[74] The extent of the damage done thereby is not material.[75] A vessel is not "burnt" merely because she has a fire on board.[76] As to what is a stranding and a collision has been already treated.[77]

c. Articles Must Be on Board. The stranding, or other event upon which the insured relies to open the memorandum, must occur while the insured goods are on board the ship.[78]

I. Sue and Labor Clause — 1. NATURE AND OBJECT OF CLAUSE. The sue and labor clause[79] is a distinct and independent contract having reference to charges not covered by the insurance,[80] adopted for the purpose of permitting the insured to take every means for the recovery of property without waiving his right to abandon[81] and to bind the underwriter to reimburse the insured for the reasonable amount of the expenses incurred.[82] The duty of the insured to use dili-

Rev. Rep. 424; Bowring *v.* Elmslie [*cited* in Burnett *v.* Kensington, *supra*].

72. Lake *v.* Columbus Ins. Co., 13 Ohio 48, 42 Am. Dec. 188; London Assur. Co. *v.* Companhia de Moagens do Barreiro, 167 U. S. 149, 17 S. Ct. 785, 42 L. ed. 113.

73. London Assur. Co. *v.* Campanhia de Moagens do Barreiro, 167 U. S. 149, 17 S. Ct. 785, 42 L. ed. 113; Harman *v.* Vaux, 3 Camph. 429, 14 Rev. Rep. 773.

"Free from average from jettison or leakage" permits a recovery for an average loss not arising from any jettison or leakage. Carr *v.* Royal Exch. Assur. Corp., 5 B. & S. 433, 10 Jur. N. S. 316, 33 L. J. Q. B. 63, 10 L. T. Rep. N. S. 265, 12 Wkly. Rep. 127, 117 E. C. L. 433.

74. The Glenlivet, [1894] P. 48, 7 Aspin. 395, 63 L. J. Adm. 45, 69 L. T. Rep. N. S. 706, 6 Reports 665, 42 Wkly. Rep. 97.

75. London Assur. Co. *v.* Companhia de Moagens do Barreiro, 167 U. S. 149, 17 S. Ct. 785, 42 L. ed. 113; Harman *v.* Vaux, 3 Camph. 429, 14 Rev. Rep. 773. *Compare* The Glenlivet, [1894] P. 48, 7 Aspin. 395, 63 L. J. Adm. 45, 69 L. T. Rep. N. S. 706, 6 Reports 665, 42 Wkly. Rep. 97.

76. The Glenlivet, [1894] P. 48, 7 Aspin. 395, 63 L. J. Adm. 45, 69 L. T. Rep. N. S. 706, 6 Reports 665, 42 Wkly. Rep. 97.

77. See *supra*, VIII, E, 5, 6. See also London Assur Co. *v.* Companhia de Moagens do Barreiro, 167 U. S. 149, 17 S. Ct. 785, 42 L. ed. 113.

78. Thames, etc., Mar. Ins. Co. *v.* Pitts, [1893] 1 Q. B. 476, 7 Aspin. 302, 68 L. T. Rep. N. S. 524, 5 Reports 168, 41 Wkly. Rep. 346; Roux *v.* Salvador, 3 Bing. N. Cas. 266, 2 Hodges 209, 7 L. J. Exch. 328, 4 Scott 1, 32 E. C. L. 130. See also London Assur. Co., *v.* Companhia de Moagens do Barreiro, 167 U. S. 149, 17 S. Ct. 785, 42 L. ed. 113.

Goods temporarily on shore.— The memorandum is not opened by the stranding of the vessel while the cargo is on shore at a port of refuge to permit repairs. The Alsace Lorraine, [1893] P. 209, 7 Aspin. 362, 62 L. J. Am. 107, 69 L. T. Rep. N. S. 261, 1 Reports 632, 42 Wkly. Rep. 112.

Stranding of a lighter while goods are being transferred from ship to land is not a stranding of the "ship" within the usual memorandum clause, and such stranding will not let in a partial loss, although the insurance was made "including risk of craft to and from ship." Hoffman *v.* Marshall, 2 Bing. N. Cas. 383, 1 Hodges 330, 5 L. J. C. P. 70, 2 Scott 559, 29 E. C. L. 582. "All risks of lighterage" inserted in a policy on fruit which also contained the memorandum clause was held to cover all losses partial or total, by lighterage, while the loss by the ship was limited, and free from partial losses. Hills *v.* Rhenish Westfalian Lloyd Transport Ins. Co., 39 Hun (N. Y.) 552.

79. Usual form of clause.— "And in case of any loss or misfortune it shall be lawful (and necessary) for the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises and ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured."

80. Alexandre *v.* Sun Mut. Ins. Co., 51 N. Y. 253; Johnston *v.* Salvage Assoc., 19 Q. B. D. 458, 6 Aspin. 167, 57 L. T. Rep. N. S. 218, 36 Wkly. Rep. 56; Dixon *v.* Whitworth, 4 C. P. D. 371, 4 Aspin. 326, 48 L. J. C. P. 538, 40 L. T. Rep. N. S. 718, 28 Wkly. Rep. 184.

Effect as to defenses.— A provision in a marine insurance policy, giving the insurer the right to recover and repair the vessel insured, on it believing that its interests demanded it at any time, does not defeat the right of the insurer to any defense that it may have to any claim for damage interposed by the insured. Searles *v.* Western Assur. Co., (Miss. 1906) 40 So. 866.

81. Alexandre *v.* Sun Mut. Ins. Co., 51 N. Y. 253.

82. Cory *v.* Boylston F. & M. Ins. Co., 107 Mass. 140, 9 Am. Rep. 14; Alexandre *v.* Sun Mut. Ins. Co., 51 N. Y. 253; Jumel *v.* Marine Ins. Co., 7 Johns. (N. Y.) 412, 5 Am. Dec. 283; Johnston *v.* Salvage Assoc., 19 Q. B. D.

gence to labor for the recovery of property imperiled is not increased by this clause.[83]

2. EXPENSES TO AVOID LOSSES COVERED BY POLICY. The sue and labor clause applies only to suing, etc., to prevent loss to property for which the underwriter would be liable under the other clauses of the policy.[84]

3. WHEN EXPENSES TO BE INCURRED. The expenses need not be incurred during the life of the policy if the policy was in force when the injury occurred.[85]

4. POLICY AGAINST "TOTAL LOSS ONLY." Where the policy is "free of particular average" or "against total loss only," no claim for expenses under the sue and labor clause can be made against the underwriters except such as are made in averting a total loss.[86]

5. LIMITATION OF RECOVERY. For expenses fairly incurred under this clause the liability of the underwriter is not limited to the amount of his subscription.[87] But if a loss occurs which exceeds the claim against the underwriter and the insured sue and labor to prevent further loss, there can be no recovery for the expense thereof.[88]

6. WHAT EXPENSES FALL WITHIN CLAUSE. Among the expenses which may be recovered under this clause are counsel fees,[89] marshal's fees,[90] costs of suit,[91] entering security for release of vessel,[92] expenses of travel[93] and attendance at trial,[94] cost of launching a stranded vessel which is in danger of total loss,[95] expense of recovery of captured property,[96] or of returning ship to port and unloading her to ascertain extent of damages,[97] wharfage,[98] selling insured property,[99] extra fod-

458, 6 Aspin. 167, 57 L. T. Rep. N. S. 218, 36 Wkly. Rep. 56; Lee *v.* Southern Ins. Co., L. R. 5 C. P. 397, 39 L. J. C. P. 218, 22 L. T. Rep. N. S. 443, 18 Wkly. Rep. 863.

Where there is no necessity to sue or labor, expenses incurred cannot be recovered, as where tugs are sent in search of scows reported to be adrift but which are in fact in a safe place. Barney Dumping-Boat Co. *v.* Niagara F. Ins. Co., 67 Fed. 341, 14 C. C. A. 408.

83. Cincinnati Mut. Ins. Co. *v.* May, 20 Ohio 211.

84. Jumel *v.* Marine Ins. Co., 7 Johns. (N. Y.) 412, 5 Am. Dec. 283; Pride *v.* Providence-Washington Ins. Co., 6 Pa. Dist. 227; Biays *r.* Chesapeake Ins. Co., 7 Cranch (U. S.) 415, 3 L. ed. 389; Johnston *v.* Salvage Assoc., 19 Q. B. D. 458, 6 Aspin. 167, 57 L. T. Rep. N. S. 218, 36 Wkly. Rep. 56.

"Running down" clause.— An insured under a policy containing a "running down" clause and the "sue and labor" clause cannot recover the expenses incurred in successfully defending a suit for collision. Xenos *r.* Fox, L. R. 4 C. P. 665, 38 L. J. C. P. 351, 17 Wkly. Rep. 893.

Carrier's liability policy.— The sue and labor clause is not applicable to a special contract "to cover shipowner's liability owing to omission of negligence clause from bill of lading," although written upon the ordinary form of marine policy containing the sue and labor clause. Cunard Steamship Co. *r.* Marten, [1903] 2 K. B. 511, 9 Aspin. 452, 9 Com. Cas. 9, 72 L. J. K. B. 754, 89 L. T. Rep. N. S. 152, 52 Wkly. Rep. 39.

85. Fireman's Ins. Co. *r.* Powell, 13 B. Mon. (Ky.) 311.

86. Crouan *v.* Stanier, [1904] 1 K. B. 87, 9 Com. Cas. 27, 73 L. J. K. B. 102, 52 Wkly. Rep. 75; Meyer *r.* Ralli, 1 C. P. D. 358, 3 Aspin. 324, 45 L. J. C. P. 741, 35 L. T. Rep. N. S. 838, 24 Wkly. Rep. 963. See also Kidston *r.* Empire Mar. Ins. Co., L. R. 2 C. P. 357, 12 Jur. N. S. 665, 36 L. J. C. P. 156, 16 L. T. Rep. N. S. 119, 15 Wkly. Rep. 769.

87. Alexandre *r.* Sun Mut. Ins. Co., 51 N. Y. 253; Barker *r.* Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; Jumel *r.* Marine Ins. Co., 7 Johns. (N. Y.) 412, 5 Am. Dec. 283; Watson *r.* Marine Ins. Co., 7 Johns. (N. Y.) 57; Lawrence *r.* Van Horne, 1 Cai. (N. Y.) 276; Dixon *r.* Whitworth, 4 C. P. D. 371, 4 Aspin. 326, 48 L. J. C. P. 538, 40 L. T. Rep. N. S. 718, 28 Wkly. Rep. 184.

88. Pride *v.* Providence-Washington Ins. Co., 6 Pa. Dist. 227.

89. Pride *r.* Providence-Washington Ins. Co., 6 Pa. Dist. 227.

90. Pride *r.* Providence-Washington Ins. Co., 6 Pa. Dist. 227.

91. Lawrence *v.* Van Horne, 1 Cai. (N. Y.) 276; Pride *r.* Providence-Washington Ins. Co., 6 Pa. Dist. 227.

92. Pride *v.* Providence-Washington Ins. Co., 6 Pa. Dist. 227.

93. Pride *r.* Providence-Washington Ins. Co., 6 Pa. Dist. 227.

94. Pride *r.* Providence-Washington Ins. Co., 6 Pa. Dist. 227.

95. Dix *v.* Union Ins. Co., 23 Mo. 57.

96. Watson *v.* Marine Ins. Co., 7 Johns. (N. Y.) 57; Bordes *r.* Hallet, 1 Cai. (N. Y.) 444; Lawrence *r.* Van Horne, 1 Cai. (N. Y.) 276.

97. Alexandre *r.* Sun Mut. Ins. Co., 51 N. Y. 253.

98. McBride *r.* Marine Ins. Co., 7 Johns. (N. Y.) 431.

99. McBride *r.* Marine Ins. Co., 7 Johns. (N. Y.) 431.

der to supply cattle insured against the risks of mortality,[1] and expense of conditioning the cargo.[2] But salvage[3] or general average[4] expenses, or cost of repairs to the vessel,[5] or warehousing cargo,[6] or extra freight paid in transhipping cargo,[7] are not covered by this clause.

J. Total Losses — 1. In General. There are two kinds of total losses — actual or absolute, and technical or constructive.[8] It is highly important that these be carefully differentiated, for upon them depend the whole doctrine of abandonment so important in the law of marine insurance. In cases of actual total loss no abandonment is necessary;[9] but if the loss is merely constructively total, an abandonment by the insured becomes necessary in order to recover as for a total loss.[10] An insurance against "total loss only" will cover any total loss, whether the same be active or constructive.[11] But where the insurance is against "absolute" total loss,[12] or "actual" total loss,[13] no recovery can be had for a technical total loss.

2. Extent of Underwriter's Liability. The settled rule is that where there is either an actual or a constructive total loss, the underwriter is liable for the whole amount of the sum insured,[14] but the rule is subject to the qualification

1. The Pomeranian, [1895] P. 349, 65 L. J. Adm. 39.

2. Francis *v.* Boulton, 8 Aspin. 79, 65 L. J. Q. B. 153, 73 L. T. Rep. N. S. 578, 44 Wkly. Rep. 222.

3. Aitchison *v.* Lohre, 4 App. Cas. 755, 4 Aspin. 168, 49 L. J. Q. B. 123, 41 L. T. Rep. N. S. 323, 28 Wkly. Rep. 1; Dixon *v.* Whitworth, 4 C. P. D. 371, 4 Aspin. 323, 48 L. J. C. P. 538, 40 L. T. Rep. N. S. 718, 28 Wkly. Rep. 184.

Memorandum articles.— It seems that salvage expenses which prevent an actual loss of a memorandum article might be a claim under this clause. Biays *v.* Chesapeake Ins. Co., 7 Cranch (U. S.) 415, 3 L. ed. 389.

4. Aitchison *v.* Lohre, 4 App. Cas. 755, 4 Aspin. 168, 49 L. J. Q. B. 123, 41 L. T. Rep. N. S. 323, 28 Wkly. Rep. 1.

5. Alexandre *v.* Sun Mut. Ins. Co., 51 N. Y. 253.

6. Booth *v.* Gair, 15 C. B. N. S. 291, 9 Jur. N. S. 1326, 33 L. J. C. P. 99, 9 L. T. Rep. N. S. 386, 12 Wkly. Rep. 106, 109 E. C. L. 291.

7. Great Indian Peninsula R. Co. *v.* Saunders, 2 B. & S. 266, 9 Jur. N. S. 198, 31 L. J. Q. B. 206, 6 L. T. Rep. N. S. 297, 10 Wkly. Rep. 520, 110 E. C. L. 266; Booth *v.* Gair, 15 C. B. N. S. 291, 9 Jur. N. S. 1326, 33 L. J. C. P. 99, 9 L. T. Rep. N. S. 386, 12 Wkly. Rep. 106, 109 E. C. L. 291. See also Shultz *v.* Ohio Ins. Co., 1 B. Mon. (Ky.) 336. *Compare* Indianapolis Ins. Co. *v.* Mason, 11 Ind. 171.

8. Devitt *v.* Providence Washington Ins. Co., 173 N. Y. 17, 65 N. E. 777; Kaltenbach *v.* Mackenzie, 3 C. P. D. 467, 4 Aspin. 39, 48 L. J. C. P. 9, 39 L. T. Rep. N. S. 215, 26 Wkly. Rep. 844; Mitchel *v.* Ede, 11 A. & E. 888, 9 L. J. Q. B. 187, 3 P. & D. 513, 1 T. R. 608, 1 Rev. Rep. 318, 39 E. C. L. 469.

9 *Maine.*— Prince *v.* Ocean Ins. Co., 40 Me. 481, 63 Am. Dec. 676.

New York.— Carr *v.* Providence Washington Ins. Co., 38 Hun 86 [*affirmed* in 109 N. Y. 504, 17 N. E. 369]; Burt *v.* Brewers', etc., Ins. Co., 9 Hun 383 [*affirmed* in 78 N. Y. 400]; Gordon *v.* Browne, 2 Johns. 150.

Ohio.— Portsmouth Ins. Co. *v.* Brazee, 16 Ohio 81.

United States.—Soelberg *v.* Western Assur. Co., 119 Fed. 23, 55 C. C. A. 601.

England.— Rankin *v.* Potter, L. R. 6 H. L. 83, 2 Aspin. 65, 42 L. J. C. P. 169, 29 L. T. Rep. N. S. 142, 22 Wkly. Rep. 1; Trinder *v.* Thames, etc., Mar. Ins. Co., [1898] 2 Q. B. 114, 8 Aspin. 373, 67 L. J. Q. B. 666, 78 L. T. Rep. N. S. 485, 46 Wkly. Rep. 561; Roux *v.* Salvador, 3 Bing. N. Cas. 266, 2 Hodges 209, 7 L. J. Exch. 328, 4 Scott 1, 32 E. C. L. 130.

10. See *infra*, IX, K, 2.

11. Pierce *v.* Columbian Ins. Co., 14 Allen (Mass.) 320; Heebner *v.* Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308; Insurance Co. of North America *v.* Canada Sugar-Refining Co., 87 Fed. 491, 31 C. C. A. 65; Marten *v.* Steamship Owners' Underwriting Assoc., 9 Aspin. 339, 7 Com. Cas. 195, 71 L. J. Q. B. 718, 87 L. T. Rep. N. S. 208, 50 Wkly. Rep. 587; Adams *v.* Mackenzie, 13 C. B. N. S. 442, 9 Jur. N. S. 849, 32 L. J. C. P. 92, 7 L. T. Rep. N. S. 711, 11 Wkly. Rep. 342, 106 E. C. L. 442; O'Leary *v.* Stymest, 11 N. Brunsw. 289. *Contra*, Buchanan *v.* Ocean Ins. Co., 6 Cow. (N. Y.) 318.

12. Carr *v.* Providence Washington Ins. Co., 109 N. Y. 504, 17 N. E. 369; Monroe *v.* British, etc., Mar. Ins. Co., 52 Fed. 777, 3 C. C. A. 280; Levy *v.* Merchant Mar. Ins. Co., 5 Aspin. 407, Cab. & E. 474, 52 L. T. Rep. N. S. 263.

13. Carr *v.* Providence Washington Ins. Co., 38 Hun (N. Y.) 86 [*affirmed* in 109 N. Y. 504, 17 N. E. 369]; Burt *v.* Brewers', etc., Ins. Co., 9 Hun (N. Y.) 383 [*affirmed* in 78 N. Y. 400].

14. Graves *v.* Washington Mar. Ins. Co., 12 Allen (Mass.) 391; Murray *v.* Great Western Ins. Co., 72 Hun (N. Y.) 282, 25 N. Y. Suppl. 414 [*affirmed* in 147 N. Y. 711, 42 N. E. 724].

No deduction of one third old for new is to be made in paying for a total loss. Dupuy *v.* United Ins. Co., 3 Johns. Cas. (N. Y.)

that there should be a deduction for the amount of any salvage coming into the hands of the insured.[15]

3. Actual Total Losses — a. Definition. An actual total loss is one where the subject-matter is wholly annihilated or ceases to remain in specie or where the subject-matter, although remaining in specie, is irretrievably lost to the insured and underwriter.[16] If there is no *spes recuperandi*,[17] nor anything of value to abandon,[18] it is an actual total loss.

b. Annihilation Not Necessary. The physical destruction of the property is not necessary to constitute an actual total loss, but such a loss may exist, although the property remains in specie.[19]

c. Deprivation of Property. There is an actual total loss if the insured is effectively deprived of the use and possession of the property, whether by a seizure or capture followed by condemnation,[20] by judicial sale by a court of competent jurisdiction,[21] or by theft[22] or jettison.[23]

d. Interception of Arrival. If from any of the perils insured against the property insured becomes placed in such a position that it is totally out of the power of the parties to procure its arrival at the port of destination the loss is total without abandonment.[24] But it is the well-settled rule that if any part of the

182; Soelberg *v.* Western Assur. Co., 119 Fed. 23, 55 C. C. A. 601.

15. Stephenson *v.* Piscataqua F. & M. Ins. Co., 54 Me. 55; Graves *v.* Washington Mar. Ins. Co., 12 Allen (Mass.) 391; McCall *v.* Sun Mut. Ins. Co., 66 N. Y. 505; Pringle *v.* Hartley, 3 Atk. 195, 26 Eng. Reprint 914.

16. Carr *v.* Providence Washington Ins. Co., 109 N. Y. 504, 17 N. E. 369; Murray *v.* Great Western Ins. Co., 72 Hun (N. Y.) 282, 25 N. Y. Suppl. 414 [*affirmed* in 147 N. Y. 711, 42 N. E. 724]; Burt *v.* Brewers', etc., Ins. Co., 9 Hun (N. Y.) 383 [*affirmed* in 78 N. Y. 400]; Soelberg *v.* Western Assur. Co., 119 Fed. 23, 55 C. C. A. 601.

17. Barney *v.* Maryland Ins. Co., 5 Harr. & J. (Md.) 139; Burt *v.* Brewers', etc., Ins. Co., 9 Hun (N. Y.) 383 [*affirmed* in 78 N. Y. 400].

18. Williams *v.* Cole, 16 Me. 207; Rankin *v.* Potter, L. R. 6 H. L. 83, 2 Aspin. 65, 42 L. J. C. P. 169, 29 L. T. Rep. N. S. 142, 22 Wkly. Rep. 1; Trinder *v.* Thames, etc., Mar. Ins. Co., [1898] 2 Q. B. 114, 8 Aspin. 373, 67 L. J. Q. B. 666, 78 L. T. Rep. N. S. 485, 46 Wkly. Rep. 561; Kaltenbach *v.* Mackenzie, 3 C. P. D. 467, 4 Aspin. 39, 48 L. J. C. P. 9, 39 L. T. Rep. N. S. 215, 26 Wkly. Rep. 844.

19. Carr *v.* Providence Washington Ins. Co., 109 N. Y. 504, 17 N. E. 369; McCall *v.* Sun Mut. Ins. Co., 66 N. Y. 505; Soelberg *v.* Western Assur. Co., 119 Fed. 23, 55 C. C. A. 601; Cossman *v.* West, 13 App. Cas. 160, 6 Aspin. 233, 57 L. J. P. C. 17, 58 L. T. Rep. N. S. 122; Roux *v.* Salvador, 3 Bing. N. Cas. 266, 2 Hodges 209, 7 L. J. Exch. 328, 4 Scott 1, 32 E. C. L. 130.

20. Condemnation is necessary.— The seizure and appropriation of an insured vessel by a foreign government, without the sentence of a court of competent jurisdiction, does not divest the owner of his right of property; and so long as the vessel exists, there is a *spes recuperandi*, and he cannot recover as for a total loss without abandoning. Barney *v.* Maryland Ins. Co., 5 Harr. & J. (Md.) 139; Watson *v.* Marine Ins. Co., 7 Johns. (N. Y.) 57.

A purchase of the vessel by the insured under a sentence of confiscation does not impair his right to recover for a total loss. Bourke *v.* Granberry, Gilm. (Va.) 16, 9 Am. Dec. 589; Stringer *v.* English, etc., Mar. Ins. Co., L. R. 5 Q. B. 599, 10 B. & S. 770, 39 L. J. Q. B. 214, 22 L. T. Rep. N. S. 802, 18 Wkly. Rep. 1201; Marshall *v.* Parker, 2 Campb. 69, 11 Rev. Rep. 665. *Compare* Story *v.* Strettell, 1 Dall. (Pa.) 10, 1 L. ed. 15; Wilson *v.* Forster, 1 Marsh. 425, 6 Taunt. 25, 16 Rev. Rep. 560, 1 E. C. L. 492.

21. Storer *v.* Gray, 2 Mass. 565; Cossman *v.* West, 13 App. Cas. 160, 6 Aspin. 233, 57 L. J. P. C. 17, 58 L. T. Rep. N. S. 122; Stringer *v.* English, etc., Mar. Ins. Co., L. R. 5 Q. B. 599, 10 B. & S. 770, 39 L. J. Q. B. 214, 22 L. T. Rep. N. S. 802, 18 Wkly. Rep. 1201. But see Thomas *v.* Rockland Ins. Co., 45 Me. 116.

22. A barratrous taking by the master of a vessel and her cargo and its subsequent sale by him is an actual total loss. Dixon *v.* Reed, 5 B. & Ald. 597, 1 D. & R. 207, 24 Rev. Rep. 481, 7 E. C. L. 327.

23. Dyson *v.* Rowcroft, 3 B. & P. 474, 7 Rev. Rep. 809; Cologan *v.* London Assur. Co., 5 M. & S. 447, 17 Rev. Rep. 390.

24. Williams *v.* Kennebec Mut. Ins. Co., 31 Me. 455; Crosby *v.* New York Mut. Ins. Co., 19 How. Pr. (N. Y.) 312 [*affirmed* in 1 Abb. Dec. 562, 3 Keyes 394, 2 Transcr. App. 130, 5 Abb. Pr. N. S. 173]; Robinson *v.* Commonwealth Ins. Co., 20 Fed. Cas. No. 11,949, 3 Sumn. 220; Stringer *v.* English, etc., Mar. Ins. Co., L. R. 5 Q. B. 599, 10 B. & S. 770, 39 L. J. Q. B. 214, 22 L. T. Rep. N. S. 802, 18 Wkly. Rep. 1201; Roux *v.* Salvador, 3 Bing. N. Cas. 266, 2 Hodges 209, 7 L. J. Exch. 328, 4 Scott 1, 32 E. C. L. 130; Fleming *v.* Smith, 1 H. L. Cas. 513, 9 Eng. Reprint 859.

A vessel so injured that she cannot be taken to a port at which the necessary repairs might be executed is an absolute total

insured property arrive at the port of destination in specie the loss is not a total one.[25]

e. Necessary Sale by Master. If the master of the vessel sells the insured property before its arrival at its port of destination, from an absolute necessity, there is an actual total loss.[26] The necessity must be such as to leave the master no alternative.[27] This necessity exists where the expense of repairs will be more than the value of the vessel when repaired,[28] or where its situation is such as to render it probable that it will greatly deteriorate in value before it can be taken to its destination.[29] If the necessity does not exist there is no actual total loss.[30]

f. Destruction in Specie. Where the subject-matter of the insurance ceases to exist in specie,[31] as where a vessel is wrecked and becomes a mere congeries of planks,[32] or where cargo by the progress of decomposition or other chemical

loss. Anchor Mar. Ins. Co. *v.* Keith, 9 Can. Sup. Ct. 483.

Procuring another vessel.— If a vessel becomes disabled, and another one could be procured in the port of distress or a contiguous port, the master should procure it and forward the cargo, or the underwriters on the cargo will not be liable; but where resort must be had to distant places to procure a vessel, and there are serious impediments in the way of putting the cargo on board, this rule will not be obligatory. Bryant *v.* Commonwealth Ins. Co., 6 Pick. (Mass.) 131; Treadwell *v.* Union Ins. Co., 6 Cow. (N. Y.) 270.

25. Young *v.* Mutual Ins. Co., 34 N. Y. Super. Ct. 321. See *supra*, IX, H, 3, b, (I); *infra*, IX, J, 4, i.

Salvage less than freight.— Where salvage falls short of the freight payable by the assured there is a total loss. Huth *v.* New York Mut. Ins. Co., 8 Bosw. (N. Y.) 538; Boyfield *v.* Brown, 2 Str. 1065.

26. *Louisiana.*— Peck *v.* Nashville M. & F. Ins. Co., 6 La. Ann. 148.

Maine.— Dunning *v.* Merchants' Mut. Mar. Ins. Co., 57 Me. 108; Stephenson *v.* Piscataqua F. & M. Ins. Co., 54 Me. 55; Prince *v.* Ocean Ins. Co., 40 Me. 481, 63 Am. Dec. 676; Williams *v.* Kennebec Mut. Ins. Co., 31 Me. 455.

Maryland.— Mutual Safety Ins. Co. *v.* Cohen, 3 Gill 459, 43 Am. Dec. 341.

Massachusetts.— Taber *v.* China Mut. Ins. Co., 131 Mass. 239; Graves *v.* Washington Mar. Ins. Co., 12 Allen 391; Bryant *v.* Commonwealth Ins. Co., 13 Pick. 543; Hall *v.* Franklin Ins. Co., 9 Pick. 466; Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. 249.

New York.— McCall *v.* Sun Mut. Ins. Co., 66 N. Y. 505; Wright *v.* Williams, 20 Hun 320.

England.— Farnworth *v.* Hyde, L. R. 2 C. P. 204, 36 L. J. C. P. 33, 15 L. T. Rep. N. S. 395, 15 Wkly. Rep. 340; Saunders *v.* Baring, 3 Aspin. 133, 34 L. T. Rep. N. S. 419; Roux *v.* Salvador, 3 Bing. N. Cas. 266, 2 Hodges 209, 7 L. J. Exch. 328, 4 Scott 1, 32 E. C. L. 130; Rosetto *v.* Gurney, 11 C. B. 176, 15 Jur. 1177, 20 L. J. C. P. 257, 73 E. C. L. 176; Fleming *v.* Smith, 1 H. L. Cas. 513, 9 Eng. Reprint 889. See also Cambridge *v.* Anderton, 2 B. & C. 691, 9 E. C. L. 301, 1 C. & P. 213, 12 E. C. L. 130, 4 D. & R. 203, 2 L. J. K. B. O. S. 141, R. & M. 60, 21 E. C. L. 702, 26 Rev. Rep. 517.

Canada.— Nova Scotia Mar. Ins. Co. *v.* Churchill, 26 Can. Sup. Ct. 65.

See 28 Cent. Dig. tit. "Insurance," § 1188 *et seq.*

27. Hall *v.* Franklin Ins. Co., 9 Pick. (Mass.) 466.

28. Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249; Robertson *v.* Caruthers, 2 Stark. 571, 20 Rev. Rep. 738, 3 E. C. L. 534. *Compare* Gallagher *v.* Taylor, 5 Can. Sup. Ct. 368.

29. Nova Scotia Mar. Ins. Co. *v.* Churchill, 26 Can. Sup. Ct. 65; Rumsey *v.* Providence Washington Ins. Co., 13 Nova Scotia 393.

30. Peck *v.* Nashville M. & F. Ins. Co., 6 La. Ann. 148; Taber *v.* China Mut. Ins. Co., 131 Mass. 239; Knight *v.* Faith, 15 Q. B. 649, 14 Jur. 1114, 19 L. J. Q. B. 509, 69 E. C. L. 649; Roux *v.* Salvador, 3 Bing. N. Cas. 266, 2 Hodges 209, 7 L. J. Exch. 328, 4 Scott 1, 32 E. C. L. 130; Kaltenbach *v.* Mackenzie, 3 C. P. D. 467, 4 Aspin. 39, 48 L. J. C. P. 9, 39 L. T. Rep. N. S. 215, 26 Wkly. Rep. 844.

Necessity of sale.— A vessel containing insured cargo went aground, and became hogged. The surveyors recommended her to be stripped with despatch and steps taken to save the cargo, but nothing was done for several days when the master, fearing bad weather, sold the ship and cargo. A large part of the cargo was saved by the purchaser. It was held that the loss could not be treated as total. Currie *v.* Bombay Native Ins. Co., L. R. 3 P. C. 72, 39 L. J. P. C. 1, 22 L. T. Rep. N. S. 317, 6 Moore P. C. N. S. 302, 18 Wkly. Rep. 296.

31. Saunders *v.* Baring, 3 Aspin. 133, 34 L. T. Rep. N. S. 419.

32. Walker *v.* Protection Ins. Co., 29 Me. 317; Burt *v.* Brewers', etc., Ins. Co., 9 Hun (N. Y.) 383 [*affirmed* in 78 N. Y. 400]; Merchants' Steamship Co. *v.* Commercial Mut. Ins. Co., 51 N. Y. Super. Ct. 444; Levy *v.* Merchant Mar. Co., 5 Aspin. 407, Cab. & E. 474, 52 L. T. Rep. N. S. 263; Cambridge *v.* Anderton, 2 B. & C. 691, 9 E. C. L. 301, 1 C. & P. 213, 12 E. C. L. 130, 4 D. & R. 203, 2 L. J. K. B. O. S. 141, R. & M. 60, 21 E. C. L. 702, 26 Rev. Rep. 517.

agency no longer remains the same kind of thing as before,[33] there is an actual total loss.

g. Submersion. Where the subject-matter goes to the bottom of the sea in such a place as to make its recovery improbable, there is an absolute total loss.[34] But if it is practicable to get her afloat and she is capable of being repaired at any expense there is no actual total loss.[35]

h. Freight. There exists an actual total loss of freight in all cases where the ship-owner is effectively prevented from earning any part of the freight for the insured voyage,[36] and this occurs where the cargo upon which the freight is expected to be earned is totally lost[37] or fails to reach the port of destination;[38] where the vessel is disabled and compelled to reship her cargo at the same rate contracted for;[39] or where the voyage is broken up and the cargo is necessarily sold at an intermediate port;[40] but an unnecessary sale of the cargo at an intermediate port cannot render the underwriters liable for a total loss on freight, even though the sale is *bona fide* and for the best interests of the parties except the insurers on freight.[41] If any part of the freight is actually earned, the loss is not total, irrespective of whether the owner has collected it.[42] A total loss of the ship after loading of the cargo is not necessarily a total loss of freight, as the ship-owner may be able to save and tranship the cargo to its destination at a cost less than the amount of freight contracted for.[43] But if the vessel, prior to the load-

33. Williams *v.* Cole, 16 Me. 207; Asfar *v.* Blumdell, [1896] 1 Q. B. 123, 8 Aspin. 106, 65 L. J. Q. B. 138, 73 L. T. Rep. N. S. 648, 44 Wkly. Rep. 130; Dyson *v.* Rowcroft, 3 B. & P. 474, 7 Rev. Rep. 809; Rosetto *v.* Gurney, 11 C. B. 176, 15 Jur. 1177, 73 E. C. L. 176.

34. Carr *v.* Providence Washington Ins. Co., 38 Hun (N. Y.) 86 [*affirmed* in 109 N. Y. 504, 17 N. E. 369].

35. See Carr *v.* Providence Washington Ins. Co., 109 N. Y. 504, 17 N. E. 369; Phœnix Ins. Co. *v.* McGhee, 18 Can. Sup. Ct. 61. *Compare* Cambridge *v.* Anderton, 2 B. & C. 691, 9 E. C. L. 301, 1 C. & P. 213, 12 E. C. L. 130, 4 D. & R. 203, 2 L. J. K. B. O. S. 141, R. & M. 60, 21 E. C. L. 702, 26 Rev. Rep. 517. *Contra*, Bullard *v.* Roger Williams Ins. Co., 4 Fed. Cas. No. 2,122, 1 Curt. 148.

36. Hubbell *v.* Great Western Ins. Co., 74 N. Y. 246; Robertson *v.* Atlantic Mut. Ins. Co., 68 N. Y. 192; Center *v.* American Ins. Co., 7 Cow. (N. Y.) 564 [*affirmed* in 4 Wend. 45]. An embargo preventing the discharge of cargo and thereby preventing the loading of return cargo makes a total loss on freight on the latter cargo. Puller *v.* Staniforth, 11 East 232, 10 Rev. Rep. 486.

37. Hubbell *v.* Great Western Ins. Co., 74 N. Y. 246; De Wolf *v.* State Mut. F. & M. Ins. Co., 6 Duer (N. Y.) 191; Asfar *v.* Blundell, [1896] 1 Q. B. 123, 8 Aspin. 106, 65 L. J. Q. B. 138, 73 L. T. Rep. N. S. 648, 44 Wkly. Rep. 130.

38. Lord *v.* Neptune Ins. Co., 10 Gray (Mass.) 109; Ogden *v.* New York Mut. Ins. Co., 35 N. Y. 418; Caze *v.* Baltimore Ins. Co., 7 Cranch (U. S.) 358, 3 L. ed. 370; Stillwell *v.* Home Ins. Co., 23 Fed. Cas. No. 13,450, 3 Dill. 80; Rankin *v.* Potter, L. R. 6 H. L. 83, 2 Aspin. 65, 42 L. J. C. P. 169, 29 L. T. Rep. N. S. 142, 22 Wkly. Rep. 1. If the expense of forwarding will exceed the value of the cargo on arrival there is no necessity of forwarding and the insured may recover for a total loss. Michael *v.* Gillespy, 2 C. B. N. S. 627, 3 Jur. N. S. 1219, 26 L. J. C. P. 306, 89 E. C. L. 627. See also Musgrave *v.* Mannheim Ins. Co., 32 Nova Scotia 405.

39. Blanks *v.* Hibernia Ins. Co., 36 La. Ann. 599; Willard *v.* Millers', etc., Ins. Co., 30 Mo. 35; Robertson *v.* Atlantic Mut. Ins. Co., 68 N. Y. 192.

40. Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer (N. Y.) 342; Whitney *v.* New York Firemen Ins. Co., 18 Johns. (N. Y.) 208; Hugg *v.* Augusta Ins., etc., Co., 12 Fed. Cas. No. 6,838, Taney 159; Hurtin *v.* Union Ins. Co., 12 Fed. Cas. No. 6,942, 1 Wash. 530; Kidston *v.* Empire Mar. Ins. Co., L. R. 2 C. P. 357, 12 Jur. N. S. 665, 36 L. J. C. P. 156, 16 L. T. Rep. N. S. 119, 15 Wkly. Rep. 769. See Griswold *v.* New York Ins. Co., 3 Johns. (N. Y.) 321, 3 Am. Dec. 490; Griswold *v.* New York Ins. Co., 1 Johns. (N. Y.) 205. But in Saltus *v.* Ocean Ins. Co., 14 Johns. (N. Y.) 138, it was held that there was no loss of freight, the cargo existing in specie, although it was sold at a port of refuge because it had so greatly deteriorated as not to be fit to reship.

41. Lord *v.* Neptune Ins. Co., 10 Gray (Mass.) 109; Rankin *v.* Potter, L. R. 6 H. L. 83, 2 Aspin. 65, 42 L. J. C. P. 169, 29 L. T. Rep. N. S. 142, 22 Wkly. Rep. 1; Anchor Mar. Ins. Co. *v.* Phœnix Ins. Co., 6 Ont. App. 567.

42. *Pro rata* freight paid according to the law of the port of refuge, although not payable under general rules of law applicable to payment on freight, prevents a claim against the underwriters for a total loss of freight. Price *v.* Maritime Ins. Co., [1901] 2 K. B. 412, 9 Aspin. 213, 6 Com. Cas. 168, 70 L. J. K. B. 780, 85 L. T. Rep. N. S. 101, 49 Wkly. Rep. 645.

43. Hubbell *v.* Great Western Ins. Co., 74

ing of the cargo, becomes a total loss or becomes so damaged as to justify an abandonment to the underwriters on the vessel, there is an actual total loss of freight.[44] If freight *pro rata itineris* has been earned the loss is not total.[45]

i. Profits. Where the cargo is a total loss, either actual or by force of an abandonment, there is a total loss of profits.[46]

4. Constructive Total Loss — a. Definition. A constructive total loss, or, as it is sometimes called, a technical total loss, is where the loss, although not actually total, is of such a character that the insured is entitled, if he thinks fit, to treat it as total by an abandonment.[47]

b. American Rule — (i) *In General.* It is the rule in the United States that the insured may treat the loss of ship or cargo as total where they are damaged during the course of the voyage more than fifty per cent of their value.[48]

N. Y. 246; Moss *v.* Smith, 9 C. B. 94, 14 Jur. 1003, 19 L. J. C. P. 225, 67 E. C. L. 94.

44. Rankin *v.* Potter, L. R. 6 H. L. 83, 2 Aspin. 65, 42 L. J. C. P. 169, 29 L. T. Rep. N. S. 142, 22 Wkly. Rep. 1; Trinder *v.* Thames, etc., Mar. Ins. Co., [1898] 2 Q. B. 114, 8 Aspin. 373, 67 L. J. Q. B. 666, 78 L. T. Rep. N. S. 485, 46 Wkly. Rep. 561; Troop *v.* Merchants Mar. Ins. Co., 13 Can. Sup. Ct. 506.

45. American Ins. Co. *v.* Center, 4 Wend. (N. Y.) 45; Davy *v.* Hallett, 3 Cai. (N. Y.) 16, 2 Am. Dec. 241.

46. Fosdick *v.* Norwich Mar. Ins. Co., 3 Day (Conn.) 108; Mumford *v.* Hallett, 1 Johns. (N. Y.) 433; Canada Sugar-Refining Co. *v.* Insurance Co. of North America, 175 U. S. 609, 20 S. Ct. 239, 44 L. ed. 292; Patapsco Ins. Co. *v.* Coulter, 3 Pet. (U. S.) 222, 7 L. ed. 659; Henrickson *v.* Margetson, 2 East 549 note, 6 Rev. Rep. 509 note; Barclay *v.* Cousins, 2 East 544, 6 Rev. Rep. 505. See also Abbott *v.* Sebor, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139.

47. Murray *v.* Great Western Ins. Co., 72 Hun (N. Y.) 282, 25 N. Y. Suppl. 414 [*affirmed* in 147 N. Y. 711, 42 N. E. 724]; Globe Ins. Co. *v.* Sherlock, 25 Ohio St. 50; Standard Mar. Ins. Co. *v.* Nome Beach Lighterage, etc., Co., 133 Fed. 636, 67 C. C. A. 602; Insurance Co. of North America *v.* Canada Sugar-Refining Co., 87 Fed. 491, 31 C. C. A. 65; Western Assur. Co. *v.* Poole, [1903] 1 K. B. 376, 6 Aspin. 390, 8 Com. Cas. 108, 72 L. J. K. B. 195, 88 L. T. Rep. N. S. 362; Mitchel *v.* Ede, 11 A. & E. 888, 9 L. J. Q. B. 187, 3 P. & D. 513, 1 T. R. 608, 1 Rev. Rep. 318, 39 E. C. L. 469.

On a P. P. I. wager policy there can be no recovery for a constructive total loss or anything less than an absolute total loss. Clendining *v.* Church, 3 Cai. (N. Y.) 141.

Abandonment see *infra*, IX, K.

Clauses restricting abandonment see *infra*, IX, K, 16.

48. *Illinois.*— Norton *v.* Lexington F., etc., Ins. Co., 16 Ill. 235.

Louisiana.— Riley *v.* Ocean Ins. Co., 11 Rob. 255; Brooke *v.* Louisiana Ins. Co., 5 Mart. N. S. 530; Brooke *v.* Louisiana State Ins. Co., 4 Mart. N. S. 640; Hyde *v.* Louisiana State Ins. Co., 2 Mart. N. S. 410, 14 Am. Dec. 196.

Massachusetts.— Taber *v.* China Mut. Ins. Co., 131 Mass. 239; Pierce *v.* Columbian Ins. Co., 14 Allen 320; Kettell *v.* Alliance Ins. Co., 10 Gray 144; Heebner *v.* Eagle Ins. Co., 10 Gray 131, 69 Am. Dec. 308; Lord *v.* Neptune Ins. Co., 10 Gray 109; Hall *v.* Ocean Ins. Co., 21 Pick. 472; Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, 32 Am. Dec. 271; Deblois *v.* Ocean Ins. Co., 16 Pick. 303, 28 Am. Dec. 245; Bryant *v.* Commonwealth Ins. Co., 13 Pick. 543; Hall *v.* Franklin Ins. Co., 9 Pick. 466; Peele *v.* Suffolk Ins. Co., 7 Pick. 254, 19 Am. Dec. 286; Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. 349; Wood *v.* Lincoln, etc., Ins. Co., 6 Mass. 479, 4 Am. Dec. 163.

Missouri.— Citizens Ins. Co. *v.* Glasgow, 9 Mo. 411.

New York.— Devitt *v.* Providence Washington Ins. Co., 173 N. Y. 17, 65 N. E. 777; Wallerstein *v.* Columbian Ins. Co., 44 N. Y. 204, 4 Am. Rep. 664; McConochie *v.* Sun Mut. Ins. Co., 26 N. Y. 477; Carr *v.* Providence Washington Ins. Co., 38 Hun 86 [*affirmed* in 109 N. Y. 504, 17 N. E. 369]; Wright *v.* Williams, 20 Hun 320; Burt *v.* Brewers', etc., Ins. Co., 9 Hun 383 [*affirmed* in 78 N. Y. 400]; McConochie *v.* Sun Mut. Ins. Co., 3 Bosw. 99 [*reversed* on other grounds in 26 N. Y. 477]; Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer 342; Suarez *v.* Sun Mut. Ins. Co., 2 Sandf. 482; American Ins. Co. *v.* Ogden, 20 Wend. 287; American Ins. Co. *v.* Center, 4 Wend. 45 [*affirming* 7 Cow. 564]; Dickey *v.* American Ins. Co., 3 Wend. 658, 20 Am. Dec. 763; Ludlow *v.* Columbian Ins. Co., 1 Johns. 335; Abbott *v.* Broome, 1 Cai. 292, 2 Am. Dec. 187; Dupuy *v.* United Ins. Co., 3 Johns. Cas. 182; Smith *v.* Bell, 2 Cai. Cas. 153 [*reversed* on other grounds in 3 Johns. Cas. 611].

Ohio.— Memphis, etc., Packet Co. *v.* Peabody Ins. Co., 7 Ohio Dec. (Reprint) 30, 1 Cinc. L. Bul. 42 [*affirmed* in 5 Ohio Dec. (Reprint) 417, 5 Am. L. Rec. 499].

Pennsylvania.— Jones *v.* Western Assur. Co., 198 Pa. St. 206, 47 Atl. 948; Delaware Ins. Co. *v.* Winter, 38 Pa. St. 176; Ralston *v.* Union Ins. Co., 4 Binn. 386.

South Carolina.— Hedley *v.* Nashville Ins., etc., Co., 6 Rich. 130; Cohen *v.* Charleston F. & M. Ins. Co., Dudley 147, 31 Am. Dec. 549.

United States.— Washburn, etc., Mfg. Co. *v.* Reliance Mar. Ins. Co., 179 U. S. 1, 21

A damage of fifty per cent only of the value is insufficient; it must be in excess of fifty per cent.[49]

(II) *Calculation of Extent of Loss.*[50] The extent of the injury to the vessel is to be considered with reference to its general market value immediately before the disaster,[51] even though the policy is valued.[52] In computing the amount of the damage to claim for a constructive total loss, the actual damage to the ship or cargo is to be ascertained as in other cases,[53] and it is not permissible to add thereto general average losses,[54] or the cost of survey.[55] Repairs should generally be estimated at the port of necessity;[56] but if full repairs cannot readily or as reasonably be made there, the rights of the parties are not to be sacrificed by following this rule,[57] and in such cases the insured cannot abandon if the vessel can be safely navigated to another port and repaired, and the entire expense is not equal to the requisite amount.[58] In regard to the vessel the right to abandon

S. Ct. 1, 45 L. ed. 49; Bradlie *v.* Maryland Ins. Co., 12 Pet. 378, 9 L. ed. 1123; Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604, 8 L. ed. 243; Marcardier *v.* Chesapeake Ins. Co., 8 Cranch 39, 3 L. ed. 481; Wallace *v.* Thames, etc., Ins. Co., 22 Fed. 66; Hart *v.* Delaware Ins. Co., 11 Fed. Cas. No. 6,150, 2 Wash. 346; Howell *v.* Philadelphia Mut. Ins. Co., 12 Fed. Cas. No. 6,781; Magoun *v.* New England Mar. Ins. Co., 16 Fed. Cas. No. 8,961, 1 Story 157; Seton *v.* Delaware Ins. Co., 21 Fed. Cas. No. 12,675, 2 Wash. 175.

See 28 Cent. Dig. tit. "Insurance," § 1192 *et seq.*

The American rule was adopted from that of the maritime countries of Europe in relation to losses of cargo. American Ins. Co. *v.* Ogden, 20 Wend. (N. Y.) 287.

Freight.— If the cost of forwarding exceeds a moiety of freight contracted for there is a constructive total loss of freight. Rogers *v.* Nashville M. & F. Ins. Co., 9 La. Ann. 537; American Ins. Co. *v.* Center, 4 Wend. (N. Y.) 45. If half of the cargo is lost in specie the freight may be abandoned. Boardman *v.* Boston Mar. Ins. Co., 146 Mass. 442, 16 N. E. 26.

Memorandum articles.—A constructive total loss is generally held inapplicable to memorandum articles. See *supra*, IX, H, 3, b, (II).

Clauses restricting abandonment see *infra*, IX, K, 16.

49. In the case of a vessel valued at sixteen thousand dollars damage to extent of eight thousand after making the usual allowance new for old permits of a recovery only for a partial loss. Fiedler *v.* New York Ins. Co., 6 Duer (N. Y.) 282.

50. Clause increasing percentage of loss necessary to abandonment see *infra*, IX, K, 16.

51. American Ins. Co *v.* Center, 4 Wend. (N. Y.) 45 [*affirming* 7 Cow. 564]; Wallace *v.* Thames, etc., Ins. Co., 22 Fed. 66.

Vessel of peculiar type.— The value of a vessel of an exceptional size and class should not be taken solely at her market value, but consideration should be given to the cost of constructing such a vessel for one desiring it for the particular purposes of his trade. Grainger *v.* Martin, 8 Jur. N. S. 995, 31 L. J. Q. B. 186 [*affirmed* in 4 B. & S. 9, 8 L. T. Rep. N. S. 796, 11 Wkly. Rep. 758, 116 E. C. L. 9].

52. Fulton Ins. Co. *v.* Goodman, 32 Ala. 108; Peabody Ins. Co. *v.* Memphis, etc., Packet Co., 5 Ohio Dec. (Reprint) 417, 5 Am. L. Rec. 499; Bradlie *v.* Maryland Ins. Co., 12 Pet. (U. S.) 378, 9 L. ed. 1123; Young *v.* Turing, 2 M. & G. 593, 2 Scott N. R. 752, 40 E. C. L. 759. See Vaughan *v.* Providence Washington Ins. Co., 28 N. Brunsw. 133. *Contra*, Harvey *v.* Detroit F. & M. Ins. Co., 120 Mich. 601, 79 N. W. 898; Copeland *v.* Phœnix Ins. Co., 6 Fed. Cas. No. 3,210, 1 Woolw. 278.

53. Budd *v.* Union Ins. Co., 4 McCord (S. C.) 1.

The percentage clause has no application to a claim for a constructive total loss. Taber *v.* China Mut. Ins. Co., 131 Mass. 239.

54. Ellicott *v.* Alliance Ins. Co., 14 Gray (Mass.) 318; Greely *v.* Tremont Ins. Co., 9 Cush. (Mass.) 415; Reynolds *v.* Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Hall *v.* Ocean Ins. Co., 21 Pick. (Mass.) 472; Orrok *v.* Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Padelford *v.* Boardman, 4 Mass. 548; Harvey *v.* Detroit F. & M. Ins. Co., 120 Mich. 601, 79 N. W. 898; Fiedler *v.* New York Ins. Co., 6 Duer (N. Y.) 282.

55. Fiedler *v.* New York Ins. Co., 6 Duer (N. Y.) 282.

56. Suarez *v.* Sun Mut. Ins. Co., 2 Sandf. (N. Y.) 482; American Ins. Co. *v.* Center, 4 Wend. (N. Y.) 45 [*affirming* 7 Cow. 564]; American Ins. Co. *v.* Francia, 9 Pa. St. 390.

In ascertaining the value of an abandoned ship, and whether she is injured to the amount of half her value, the true basis of the valuation is the value of the ship at the time of the disaster; and if, after the damage is or might be repaired, the ship is not or would not be worth, at the place of the repairs, double the cost of the repairs, it is to be treated as a technical total loss. Wallace *v.* Thames, etc., Ins. Co., 22 Fed. 66.

The cost to place the vessel in statu quo is the basis upon which the loss is to be estimated. Center *v.* American Ins. Co., 7 Cow. (N. Y.) 564 [*affirmed* in 4 Wend. 45]. See also Hyde *v.* Louisiana State Ins. Co., 2 Mart. N. S. (La.) 410, 14 Am. Dec. 196.

57. American Ins. Co. *v.* Center, 4 Wend. (N. Y.) 45.

58. Peck *v.* Nashville M. & F. Ins. Co., 6

depends upon the estimated cost of such repairs by experienced and practical men, and not upon what the actual cost is subsequently proved to be.[59] It is the cost of full repairs, such as the underwriter would be liable for in payment of a partial loss, that is to be considered.[60] The deduction of one-third new for old is not generally made in ascertaining the damage,[61] but there is a lack of uniformity as to this rule.[62]

c. English and Canadian Rule — (i) *In General.* In England and Canada to constitute a constructive total loss, the recovery of the insured property must be either impracticable[63] or such as would entail an expense which would exceed its value when recovered and put in order.[64]

La. Ann. 148; Lincoln *v.* Hope Ins. Co., 8 Gray (Mass.) 22; Orrok *v.* Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Hall *v.* Franklin Ins. Co., 9 Pick. (Mass.) 466; American Ins. Co. *v.* Center, 4 Wend. (N. Y.) 45; Ralston *v.* Union Ins. Co., 4 Binn. (Pa.) 386.

59. *Alabama.*— Fulton Ins. Co. *v.* Goodman, 32 Ala. 108.

Illinois.— Norton *v.* Lexington F., etc., Ins. Co., 16 Ill. 235.

Louisiana.— Graham *v.* Ledda, 17 La. Ann. 45.

Tennessee.— Hundhausen *v.* U. S. Fire & M. Ins. Co., 3 Tenn. Cas. 184.

United States.— Orient Mut. Ins. Co. *v.* Adams, 123 U. S. 67, 8 S. Ct. 68, 31 L. ed. 63; Bradlie *v.* Maryland Ins. Co., 12 Pet. 378, 9 L. ed. 1123; Wallace *v.* Thames, etc., Ins. Co., 22 Fed. 66; Peele *v.* Merchants' Ins. Co., 19 Fed. Cas. No. 10,905, 3 Mason 27.

See 28 Cent. Dig. tit. "Insurance," § 1192 *et seq.*

60. Prince *v.* Equitable Safety Ins. Co., 12 Gray (Mass.) 527; Lincoln *v.* Hope Ins. Co., 8 Gray (Mass.) 22; Sewall *v.* U. S. Insurance Co., 11 Pick. (Mass.) 90; Suarez *v.* Sun Mut. Ins. Co., 2 Sandf. (N. Y.) 482.

Estimated depreciation of the vessel between vessel as sound and as repaired cannot be added to the cost of repairs to make up the necessary fifty per cent. Sage *v.* Middletown Ins. Co., 1 Conn. 239; Orrok *v.* Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Peele *v.* Suffolk Ins. Co., 7 Pick. (Mass.) 254, 19 Am. Dec. 286.

A sum for damage from straining cannot be added to the cost of repairs in computing a constructive total loss. Peele *v.* Suffolk Ins. Co., 7 Pick. (Mass.) 254, 19 Am. Dec. 286.

Defects in a vessel existing prior to effecting the policy, if not such as to render her unseaworthy, are not to be taken into consideration in determining whether the expense of repairs is such as to constitute a constructive total loss. Depau *v.* Ocean Ins. Co., 5 Cow. (N. Y.) 63, 15 Am. Dec. 431; Phillips *v.* Nairne, 4 C. B. 343, 11 Jur. 455, 16 L. J. C. P. 194, 56 E. C. L. 343.

The amount of general average contributions is to be considered in determining the right to abandon, as they are to be considered payments on account of loss. Pezant *v.* National Ins. Co., 15 Wend. (N. Y.) 453.

Expense of raising the vessel and cargo and bringing her to port for repairs is to be computed in estimating a constructive total loss. Ellicott *v.* Alliance Ins. Co., 14 Gray (Mass.) 318; Lincoln *v.* Hope Ins. Co., 8 Gray (Mass.) 22; Young *v.* Union Ins. Co., 24 Fed. 279; Wallace *v.* Thames, etc., Ins. Co., 22 Fed. 66.

61. Phillips *v.* St. Louis Perpetual Ins. Co., 11 La. Ann. 459; Memphis, etc., Packing Co. *v.* Peabody Ins. Co., 7 Ohio Dec. (Reprint) 30, 1 Cinc. L. Bul. 42 [*affirmed* in 5 Ohio Dec. (Reprint) 417, 5 Am. L. Rec. 499]; Bradlie *v.* Maryland Ins. Co., 12 Pet. (U. S.) 378, 9 L. ed. 1123; Wallace *v.* Thames, etc., Ins. Co., 22 Fed. 66; Peele *v.* Merchants' Ins. Co., 19 Fed. Cas. No. 10,905, 3 Mason 27.

62. Heebner *v.* Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308; Allen *v.* Commercial Ins. Co., 1 Gray (Mass.) 154; Reynolds *v.* Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Hall *v.* Ocean Ins. Co., 21 Pick. (Mass.) 472; Orrok *v.* Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Winn *v.* Columbian Ins. Co., 12 Pick. (Mass.) 279; Sewall *v.* U. S. Insurance Co., 11 Pick. (Mass.) 90; Fiedler *v.* New York Ins. Co., 6 Duer (N. Y.) 282; American Ins. Co. *v.* Center, 4 Wend. (N. Y.) 45; American Ins. Co. *v.* Francia, 9 Pa. St. 390; Gerow *v.* British American Assur. Co., 16 Can. Sup. Ct. 524.

63. Moss *v.* Smith, 9 C. B. 94, 14 Jur. 1003, 19 L. J. C. P. 225, 67 E. C. L. 94; Rowland, etc., Steamship Co. *v.* Maritime Ins. Co., 6 Com. Cas. 160; Lindsay *v.* Leathley, 3 F. & F. 902, 11 L. T. Rep. N. S. 194.

64. Sailing Ship Blairmore Co. *v.* Macredie, [1898] A. C. 593, 8 Aspin. 429, 67 L. J. P. C. 429, 79 L. T. Rep. N. S. 217; Aitchison *v.* Lohre, 4 App. Cas. 755, 4 Aspin. 168, 49 L. J. Q. B. 123, 41 L. T. Rep. N. S. 323, 28 Wkly. Rep. 1; Farnworth *v.* Hyde, L. R. 2 C. P. 204, 36 L. J. C. P. 33, 15 L. T. Rep. N. S. 395, 15 Wkly. Rep. 340; Allen *v.* Sugrue, 8 B. & C. 561, 7 L. J. K. B. O. S. 53, 3 M. & R. 9, 15 E. C. L. 279; Rosetto *v.* Gurney, 11 C. B. 176, 15 Jur. 1177, 20 L. J. C. P. 257, 73 E. C. L. 176; Phillips *v.* Nairne, 4 C. B. 343, 11 Jur. 455, 16 L. J. C. P. 194, 56 E. C. L. 343; Kenneth *v.* Moore, 10 Ct. of Sess. Cas. 547.

Institute time clause.— This clause provides that "the insured value shall be taken as the required value in ascertaining whether the vessel is a constructive total loss." Its effect is that as the vessel becomes damaged the owner must show that the cost of repairing her will exceed the value named in the

(II) *TEST.* The test usually employed in determining whether the loss is such as to permit the insured to abandon is to ascertain whether, under all the circumstances attending the vessel, a prudent owner, if uninsured, would have declined to repair,[65] or, in the case of cargo, whether it can be sent on to its destination at a less expense than its value on arrival there.[66]

d. Wreck, Stranding, Etc. Whether the wreck, stranding, or submersion of a vessel will justify an abandonment of the property or interests at risk depends upon the circumstances attending each case, and the general rule applicable to such cases is that an abandonment is only permissible where the saving of the property is impracticable or where the cost of saving and restoring is so great as under the rules above stated amount to a constructive total loss.[67]

e. Capture, Seizure, Etc.[68] A capture, seizure, or detention of the ship or cargo

policy. Sailing Ship Blairmore Co. *v.* Macredie, [1898] A. C. 593, 8 Aspin. 429, 67 L. J. P. C. 96, 79 L. T. Rep. N. S. 217; Marten *v.* Steamship Owners' Underwriting Assoc., 9 Aspin. 339, 7 Com. Cas. 195, 71 L. J. K. B. 718, 87 L. T. Rep. N. S. 208, 50 Wkly. Rep. 587; Lindsay *v.* Leathley, 3 F. & F. 902, 11 L. T. Rep. N. S. 194; Patch *v.* Pitman, Cass. Dig. (Can.) 389 [*affirming* 7 Can. L. T. Occ. Notes 374].

Forty-eight per cent damage — Not worth repairing.— Where the jury found that the damage to an insured vessel from the perils insured against was forty-eight per cent of her value, and also found that the vessel was not worth repairing, it was held that there was no right to abandon as the vessel might not have been worth repairing without the injury. Cazalet *v.* St. Barbe, 1 T. R. 187, 1 Rev. Rep. 178; Nova Scotia Mar. Ins. Co. *v.* Churchill, 26 Can. Sup. Ct. 65; Troop *v.* Jones, 17 Nova Scotia 230; Harkley *v.* Provincial Ins. Co., 18 U. C. C. P. 335.

65. Sailing Ship Blairmore Co. *v.* Macredie, [1898] A. C. 593, 8 Aspin. 429, 67 L. J. P. C. 96, 79 L. T. Rep. N. S. 217; Shepherd *v.* Henderson, 7 App. Cas. 49, 9 Ct. of Sess. Cas. 1; Angel *v.* Merchants' Mar. Ins. Co., [1903] 1 K. B. 811, 9 Aspin. 406, 8 Com. Cas. 179, 72 L. J. K. B. 498, 88 L. T. Rep. N. S. 717, 51 Wkly. Rep. 530.

If the cost of repairs approximate repaired value and a substantial sum can be obtained for the vessel as she lies, the insured may abandon. Angel *v.* Merchants' Mar. Ins. Co., [1903] 1 K. B. 811, 9 Aspin. 406, 8 Com. Cas. 179, 72 L. J. K. B. 498, 88 L. T. Rep. N. S. 717, 51 Wkly. Rep. 530.

In considering a total loss on a ship which is sunk the owner is bound to take into consideration the fact that in raising the ship the cargo will be saved and will contribute in general average to expense. Sailing Ship Blairmore Co. *v.* Macredie, [1898] A. C. 593, 8 Aspin. 429, 67 L. J. P. C. 96, 79 L. T. Rep. N. S. 217; Kemp *v.* Holliday, L. R. 1 Q. B. 520, 6 B. & S. 723, 12 Jur. N. S. 582, 35 L. J. Q. B. 156, 14 L. T. Rep. N. S. 762, 14 Wkly. Rep. 697, 118 E. C. L. 723; Roux *v.* Salvador, 3 Bing. N. Cas. 266, 2 Hodges 209, 7 L. J. Exch. 328, 4 Scott 1, 32 E. C. L. 130; Moss *v.* Smith, 9 C. B. 94, 14 Jur. 1003, 19 L. J. C. P. 225, 67 E. C. L. 94; Irving *v.* Manning, 6 C. B. 391, 60 E. C. L. 391, 1 H. L. Cas. 287, 9 Eng. Reprint 766; Young *v.* Turing, 2 M. & G. 593, 2 Scott N. R. 752, 40 E. C. L. 759; Harkley *v.* Provincial Ins. Co., 18 U. C. C. P. 335; Meagher *v.* Home Ins. Co., 11 U. C. C. P. 328; King *v.* Western Assur. Co., 7 U. C. C. P. 300; Meagher *v.* Ætna Ins. Co., 20 U. C. Q. B. 607.

66. Watson *v.* Mercantile Mar. Ins. Co., 3 Nova Scotia Dec. 396.

67. *Connecticut.*— King *v.* Hartford Ins. Co., 1 Conn. 422.

Kentucky.— Louisville Ins. Co. *v.* Monarch, 99 Ky. 578, 36 S. W. 563, 18 Ky. L. Rep. 444.

Louisiana.— Graham *v.* Ledda, 17 La. Ann. 45; Thompson *v.* Mississippi M. & F. Ins. Co., 2 La. 228, 22 Am. Dec. 129.

Maryland.— Bosley *v.* Chesapeake Ins. Co., 3 Gill & J. 450, 22 Am. Dec. 337.

Massachusetts.— Marmaud *v.* Melledge, 123 Mass. 173; Wood *v.* Lincoln, etc., Ins. Co., 6 Mass. 479, 4 Am. Dec. 163; Sewall *v.* U. S. Insurance Co., 11 Pick. 90.

New York.— Murray *v.* Great Western Ins. Co., 72 Hun 282, 25 N. Y. Suppl. 414 [*affirmed* in 147 N. Y. 711, 42 N. E. 724]; Carr *v.* Providence Washington Ins. Co., 38 Hun 86 [*affirmed* in 109 N. Y. 504, 17 N. E. 369]; Burt *v.* Brewers', etc., Ins. Co., 9 Hun 383 [*affirmed* in 78 N. Y. 400]; Patrick *v.* Commercial Ins. Co., 11 Johns. 9.

South Carolina.— Mordecai *v.* Fireman's Ins. Co., 12 Rich. 512.

Tennessee.— Hundhausen *v.* U. S. Fire & M. Ins. Co., 3 Tenn. Cas. 184.

United States.— Orient Mut. Ins. Co. *v.* Adams, 123 U. S. 67, 8 S. Ct. 68, 31 L. ed. 63; Copeland *v.* Phœnix Ins. Co., 6 Fed. Cas. No. 3,210, 1 Woolw. 278; Howland *v.* Marine Ins. Co., 12 Fed. Cas. No. 6,798, 2 Cranch C. C. 474; Peele *v.* Merchants' Ins. Co., 19 Fed. Cas. No. 10,905, 3 Mason 27.

See 28 Cent. Dig. tit. "Insurance," § 1192 *et seq.*

Desertion by crew.— Where a ship was deserted at sea by the crew for the preservation of their lives and the assured on goods abandoned, and she was afterward towed into port, but the goods were so damaged as not to be worth sending to their place of destination, the assured recovered for a total loss. Parry *v.* Aberdeen, 9 B. & C. 411, 7 L. J. K. B. O. S. 260, 4 M. & R. 343, 17 E. C. L. 189.

68. Clause restricting right to abandon see *infra*, IX, K, 16.

gives the insured a right to abandon and recover for a total loss.[69] But a mere fear of capture gives no right to abandon.[70] The right to abandon continues so long as the insured is deprived of possession of his property,[71] but after it is restored or released or indemnity is recovered the right to abandon ceases.[72] A redelivery of the seized or captured property on bail does not defeat the right to abandon.[73]

69. *Louisiana.*— Vigers *v.* Ocean Ins. Co., 12 La. 362, 32 Am. Dec. 118.

Massachusetts.—McLellan *v.* Maine F. & M. Ins. Co., 12 Mass. 246; Dorr *v.* New England Ins. Co., 11 Mass. 1; Delano *v.* Bedford Mar. Ins. Co., 10 Mass. 347, 6 Am. Dec. 132; Dorr *v.* Union Ins. Co., 8 Mass. 494; Dorr *v.* New England Mar. Ins. Co., 4 Mass. 221; Munson *v.* New England Mar. Ins. Co., 4 Mass. 88; Lee *v.* Boardman, 3 Mass. 238, 3 Am. Dec. 134; Oliver *v.* Newburyport Ins. Co., 3 Mass. 37, 3 Am. Dec. 77; Livermore *v.* Newburyport Mar. Ins. Co., 1 Mass. 264; Lovering *v.* Mercantile Mar. Ins. Co., 12 Pick. 348.

New York.— Gardere *v.* Columbian Ins. Co., 7 Johns. 514; Murray *v.* United Ins. Co., 2 Johns. Cas. 263; Mumford *v.* Church, 1 Johns. Cas. 147; Smith *v.* Steinbach, 2 Cai. Cas. 158; Hallett *v.* Peyton, 1 Cai. Cas. 28; Church *v.* Bedient, 1 Cai. Cas. 21.

Pennsylvania.— Bohlen *v.* Delaware Ins. Co., 4 Binn. 430; Dutilh *v.* Gatliff, 4 Dall. 446, 1 L. ed. 903. See Savage *v.* Pleasants, 5 Binn. 403, 6 Am. Dec. 424.

South Carolina.— Lorent *v.* South Carolina Ins. Co., 1 Nott & M. 505; Mey *v.* Tunno, 2 Bay 307.

United States.— Rhinelander *v.* Pennsylvania Ins. Co., 4 Cranch 29, 2 L. ed. 540; Queen *v.* Union Ins. Co., 20 Fed. Cas. No. 11,505, 2 Wash. 331.

England.— Rodoconachi *v.* Elliott, L. R. 9 C. P. 518, 2 Aspin. 399, 43 L. J. C. P. 255, 31 L. T. Rep. N. S. 239; Hamilton *v.* Mendes, 2 Burr. 1198, W. Bl. 279; Goss *v.* Withers, 2 Burr. 683, 2 Ld. Ken. 325; Dean *v.* Hornby, 2 C. L. R. 1519, 3 E. & B. 180, 18 Jur. 623, 23 L. J. Q. B. 129, 2 Wkly. Rep. 156, 77 E. C. L. 180.

See 28 Cent. Dig. tit. "Insurance," § 1197 *et seq.*

A restraint by blockade or embargo will give a right to abandon, although there is no actual arrest or detention. Delano *v.* Bedford Mar. Ins. Co., 10 Mass. 347, 6 Am. Dec. 132; Ogden *v.* New York Ins. Co., 10 Johns. (N. Y.) 177 [*affirmed* in 12 Johns. 25]; Craig *v.* United Ins. Co., 6 Johns. (N. Y.) 226, 5 Am. Dec. 222; Walden *v.* Phœnix Ins. Co., 5 Johns. (N. Y.) 310, 4 Am. Dec. 359; McBride *v.* Marine Ins. Co., 5 Johns. (N. Y.) 299; Schmidt *v.* United Ins. Co., 1 Johns. (N. Y.) 249, 3 Am. Dec. 319; Suydam *v.* Marine Ins. Co., 1 Johns. (N. Y.) 181, 3 Am. Dec. 307; Odlin *v.* Pennsylvania Ins. Co., 18 Fed. Cas. No. 10,433, 2 Wash. 312. *Contra,* Lubbock *v.* Rowcroft, 5 Esp. 50, 8 Rev. Rep. 830; Rotch *v.* Edie, 6 T. R. 413, 3 Rev. Rep. 222.

Condemnation for rescuing captured property.— Where, before abandonment for capture, the vessel is illegally rescued by the master and retaken, and is afterward condemned for the rescue, the insured are not entitled to abandon. Robinson *v.* Jones, 8 Mass. 536, 5 Am. Dec. 114.

Capture without intent to condemn.— A vessel captured and detained, not with a view to condemnation, but until she shall give security that the cargo will not be carried to the port of destination, cannot be abandoned as a total loss. Hurtin *v.* Phœnix Ins. Co., 12 Fed. Cas. No. 6,941, 1 Wash. 400.

70. *Massachusetts.*— Tucker *v.* United M. & F. Ins. Co., 12 Mass. 288; Brewer *v.* Union Ins. Co., 12 Mass. 170, 7 Am. Dec. 53; Shapley *v.* Tappan, 9 Mass. 20; Lee *v.* Gray, 7 Mass. 349; Amory *v.* Jones, 6 Mass. 318; Cook *v.* Essex F. & M. Ins. Co., 6 Mass. 122; Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 4 Am. Dec. 92.

New York.— Corp *v.* United Ins. Co., 8 Johns. 277; Craig *v.* United Ins. Co., 6 Johns. 226, 5 Am. Dec. 222; Neilson *v.* Columbian Ins. Co., 1 Johns. 301.

Pennsylvania.— Savage *v.* Pleasants, 5 Binn. 403, 6 Am. Dec. 424.

South Carolina.— Messonier *v.* United Ins. Co., 1 Nott & M. 155.

United States.— Smith *v.* Universal Ins. Co., 6 Wheat. 176, 5 L. ed. 235; King *v.* Delaware Ins. Co., 6 Cranch 71, 3 L. ed. 155 [*affirming* 14 Fed. Cas. No. 7,788, 2 Wash. 300].

See 28 Cent. Dig. tit. "Insurance," § 1193.

71. Dorr *v.* New England Ins. Co., 11 Mass. 1; Dorr *v.* Union Ins. Co., 8 Mass. 494; Dean *v.* Hornby, 2 C. L. R. 1519, 3 E. & B. 180, 18 Jur. 623, 23 L. J. Q. B. 129, 2 Wkly. Rep. 156, 77 E. C. L. 180; Pond *v.* King, 1 Wils. C. P. 191.

72. Murray *v.* Harmony, etc., Mar. Ins. Co., 58 Barb. (N. Y.) 9; Dickey *v.* American Ins. Co., 3 Wend. (N. Y.) 658, 20 Am. Dec. 763; Muir *v.* United Ins. Co., 1 Cai. (N. Y.) 49; Adams *v.* Delaware Ins. Co., 3 Binn. (Pa.) 287; Donath *v.* Insurance Co. of North America, 4 Dall. (Pa.) 463, 1 L. ed. 910; De Peau *v.* Russel, 1 Brev. (S. C.) 441, 2 Am. Dec. 676; Alexander *v.* Baltimore Ins. Co., 4 Cranch (U. S.) 370, 2 L. ed. 650; Marine Ins. Co. *v.* Tucker, 3 Cranch (U. S.) 357, 2 L. ed. 466; Hamilton *v.* Mendes, 2 Burr. 1198, W. Bl. 279; Falkner *v.* Ritchie, 2 M. & S. 290, 15 Rev. Rep. 253.

A decree of restitution terminates the right of the assured to abandon notwithstanding the decree is not complied with when the offer of abandonment is given. Marshall *v.* Delaware Ins. Co., 4 Cranch (U. S.) 202, 2 L. ed. 596.

73. Lovering *v.* Mercantile Ins. Co., 12 Pick. (Mass.) 348; McIver *v.* Henderson, 4 M. & S. 576, 16 Rev. Rep. 550.

f. Inability to Raise Funds. A technical total loss cannot be created by the inability of the master to raise funds for repairs, where such inability results from laches of the owner;[74] and it is the duty of the owner to prevent loss by raising funds necessary to meet the exigencies of the adventure if the same is within his power.[75]

g. Sale by Master. If the master of a vessel at an intermediate port, in the exercise of a sound judgment, makes a *bona fide* sale of the insured property for the benefit of all concerned, there is a constructive total loss,[76] provided, in all cases, there was urgent necessity for making the sale[77] or the extent of the dam-

74. Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer (N. Y.) 342. See Barber *v.* Fleming, L. R. 5 Q. B. 59, 10 B. & S. 879, 39 L. J. Q. B. 25, 18 Wkly. Rep. 254.

75. Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer (N. Y.) 342; Thornely *v.* Hebson, 2 B. & Ald. 513, 21 Rev. Rep. 381.

76. Stephenson *v.* Pacific Mut. Ins. Co., 7 Allen (Mass.) 232, 83 Am. Dec. 681; Avery *v.* New York Mut. Ins. Co., 58 N. Y. Super. Ct. 226, 11 N. Y. Suppl. 49 [*affirmed* in 132 N. Y. 594, 30 N. E. 1151]; Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer (N. Y.) 342; Alexandria Mar. Ins. Co. *v.* Tucker, 3 Cranch (U. S.) 357, 2 L. ed. 466; Robinson *v.* Commonwealth Ins. Co., 20 Fed. Cas. No. 11,949, 3 Sumn. 220; The Sarah Ann, 21 Fed. Cas. No. 12,342, 2 Sumn. 206; Read *v.* Bonham, 3 B. & B. 147, 6 Moore C. P. 397, 23 Rev. Rep. 587, 7 E. C. L. 653; Idle *v.* Royal Exch. Assur. Co., 3 Moore C. P. 115, 8 Taunt. 755, 21 Rev. Rep. 538, 4 E. C. L. 368; Doyle *v.* Dallas, 1 M. & Rob. 48.

For a barratrous sale the underwriters are liable, barratry being insured against in the policy. New Orleans Ins. Co. *v.* Albro Co., 112 U. S. 506, 5 S. Ct. 289, 28 L. ed. 809.

77. *Maine.*— Stephenson *v.* Piscataqua F. & M. Ins. Co., 54 Me. 55; Fuller *v.* Kennebec Mut. Ins. Co., 31 Me. 325.

Massachusetts.— Bryant *v.* Commonwealth Ins. Co., 6 Pick. 131.

New York.— Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer 342.

Pennsylvania.— American Ins. Co. *v.* Francia, 9 Pa. St. 390.

United States.— Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604, 8 L. ed. 243; Monroe *v.* British, etc., Mar. Ins. Co., 52 Fed. 777, 3 C. C. A. 280; Cort *v.* Delaware Ins. Co., 6 Fed. Cas. No. 3,257, 2 Wash. 375; Jordan *v.* Warren Ins. Co., 13 Fed. Cas. No. 7,524, 1 Story 342; The Sarah Ann, 21 Fed. Cas. No. 12,342, 2 Sumn. 206.

England.— Cobequid Mar. Ins. Co. *v.* Barteaux, L. R. 6 P. C. 319, 2 Aspin. 536, 32 L. T. Rep. N. S. 510, 23 Wkly. Rep. 892; Australasian Steam Nav. Co. *v.* Morse, L. R. 4 P. C. 222, 27 L. T. Rep. N. S. 357, 8 Moore P. C. N. S. 482, 20 Wkly. Rep. 728, 17 Eng. Reprint 393; Cunningham *v.* Maritime Ins. Co., [1899] 2 Ir. 257; Hall *v.* Jupe, 4 Aspin. 328, 49 L. J. C. P. 721, 43 L. T. Rep. N. S. 411; Cannon *v.* Meaburn, 1 Bing. 243, 1 L. J. C. P. O. S. 84, 2 L. J. C. P. O. S. 60, 8 Moore C. P. 127, 8 E. C. L. 491; Furneaux *v.* Bradley, 1 Park Ins. 365; Campbell *v.* Thompson, 1 Stark. 490, 2 E. C. L. 187.

Canada.— Providence Washington Ins. Co. *v.* Corbett, 9 Can. Sup. Ct. 256; Gallagher *v.* Taylor, 5 Can. Sup. Ct. 368; Providence Washington Ins. Co. *v.* Almon, Cass. Dig. (Can.) 390; Patch *v.* Pitman, Cass. Dig. (Can.) 389 [*affirming* 7 Can. L. T. Occ. Notes 374]; Driscoll *v.* Millville Mar. Ins. Co., 23 N. Brunsw. 160; Baker *v.* Brown, 3 Nova Scotia Dec. 100; Morton *v.* Patillo, 3 Nova Scotia Dec. 17.

See 28 Cent. Dig. tit. "Insurance," § 1200.

If plaintiffs act upon the judgment of competent surveyors that the vessel is not worth repairing, and upon their own *bona fide* opinion, they are justified in the abandonment and sale of a vessel. Hayman *v.* Molton, 5 Esp. 54, 8 Rev. Rep. 837; Baker *v.* Brown, 3 Nova Scotia Dec. 100. But the report of surveyors as to the necessity of the sale of a damaged vessel is not conclusive as to that necessity, or as to the right of the assured to abandon. Peck *v.* Nashville M. & F. Ins. Co., 6 La. Ann. 148.

Master must make sale.— No constructive total loss can be claimed by reason of a sale of a vessel at a port of distress unless the sale is made by the master, if he is present and in charge of the vessel. Paddock *v.* Commercial Ins. Co., 2 Allen (Mass.) 93.

That the vessel was repaired immediately after the sale, at the port of disaster, does not show that the sale was unnecessary. Fuller *v.* Kennebec Mut. Ins. Co., 31 Me. 325. See also Hall *v.* Ocean Ins. Co., 37 Fed. 371.

Circumstances which permit sale.— The master of a vessel has no power to sell her so as to affect the insurers, except under circumstances of stringent necessity; such circumstances as, after sufficient examination of her condition, after every exertion in his power, within the means at his disposal, to extricate her from peril or to raise funds for the repair, leave him no alternative but to sell her as she is. Cobequid Mar. Ins. Co. *v.* Barteaux, L. R. 6 P. C. 319, 2 Aspin. 536, 32 L. T. Rep. N. S. 510, 23 Wkly. Rep. 892. Where a ship was so shattered in a storm that it was found on survey that the expenses of repairing her would far exceed her original value, and the captain sold her *bona fide* for the benefit of all concerned, and the purchaser shortly afterward broke her up, it was held that this was such an urgent necessity as justified the sale. Robertson *v.* Clarke, 1 Bing. 445, 2 L. J. C. P. O. S. 71, 8 Moore C. P. 622, 25 Rev. Rep. 676, 8 E. C. L. 587.

There is a justifiable sale of cargo where

age and other circumstances antecedent to the sale were such as to have authorized an abandonment.[78]

h. Loss and Retardation of Voyage. A retardation of the voyage does not give the insured, whether on ship, cargo, or freight, a right to abandon as for a total loss if the thing insured is capable of performing the voyage.[79] But if from the period insured against the voyage is absolutely lost or justifiably broken up the insured may abandon.[80] A reasonable time should be allowed to make neces-

the cargo is in such condition as not to be able to reach its destination in specie. Rugely *v.* Sun Mut. Ins. Co., 7 La. Ann. 279, 56 Am. Dec. 603. See also Vaughan *v.* Western M. & F. Ins. Co., 19 La. 54. The cargo may be sold by the master where the vessel cannot be repaired within a reasonable time to complete the voyage and no other vessel is procurable. Rugely *v.* Sun Mut. Ins. Co., 7 La. Ann. 279, 56 Am. Dec. 603; Robertson *v.* Western M. & F. Ins. Co., 19 La. 227, 36 Am. Dec. 673; Macy *v.* China Mut. Ins. Co., 135 Mass. 328; Taber *v.* China Mut. Ins. Co., 131 Mass. 239; Saltus *v.* Ocean Ins. Co., 12 Johns. (N. Y.) 107, 7 Am. Dec. 290; Schieffelin *v.* New York Ins. Co., 9 Johns. (N. Y.) 21; Hugg *v.* Augusta Ins., etc., Co., 7 How. (U. S.) 595, 12 L. ed. 834; Hurtin *v.* Phœnix Ins. Co., 12 Fed. Cas. No. 6,941, 1 Wash. 400; Joseph *v.* Knox, 3 Campb. 320; Manning *v.* Newnham, 2 Campb. 624 note, 3 Dougl. 130, 12 Rev. Rep. 761, 26 E. C. L. 94; Wilson *v.* Millar, 2 Stark. 1, 19 Rev. Rep. 670, 3 E. C. L. 291.

78. Greely *v.* Tremont Ins. Co., 9 Cush. (Mass.) 415; Howell *v.* Philadelphia Mut. Ins. Co., 12 Fed. Cas. No. 6,781. See also Domett *v.* Young, C. & M. 465, 41 E. C. L. 255; Somes *v.* Sugrue, 4 C. & P. 276, 19 E. C. L. 513; Fleming *v.* Smith, 1 H. L. Cas. 513, 9 Eng. Reprint 859; Doyle *v.* Dallas, 1 M. & Rob. 48.

Where a vessel was injured to more than half her value, and a sale being recommended on proper surveys, the master sold, it was held that this could not affect the insured's right to abandon. Center *v.* American Ins. Co., 7 Cow. (N. Y.) 564 [*affirmed* in 4 Wend. 45]. But if a vessel arrives at her port of destination damaged by perils insured against to an amount less than half her valuation in the policy, deducting from the requisite repairs one-third new for old, and is sold by the master, in the presence of the owners, because of the impossibility of obtaining the funds necessary to repair her, the owners are not entitled to abandon her to the underwriters and recover as for a total loss. Allen *v.* Commercial Ins. Co., 1 Gray (Mass.) 154. See also Hall *v.* Franklin Ins. Co., 9 Pick. (Mass.) 466.

The right to abandon is not divested by a bona fide sale by the master. Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer (N. Y.) 342; American Ins. Co. *v.* Center, 4 Wend. (N. Y.) 45; Mowry *v.* Charleston Ins., etc., Co., 6 Rich. (S. C.) 146, 60 Am. Dec. 122.

79. *Massachusetts.*— Taber *v.* China Ins. Co., 131 Mass. 239; Greene *v.* Pacific Mut. Ins. Co., 9 Allen 217.

New York.— Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer 342.

Pennsylvania.— Ritchie *v.* U. S. Insurance Co., 5 Serg. & R. 501.

United States.— Bradlie *v.* Maryland Ins. Co., 12 Pet. 378, 9 L. ed. 1123; Smith *v.* Universal Ins. Co., 6 Wheat. 176, 5 L. ed. 235; Alexander *v.* Baltimore Ins. Co., 4 Cranch 370, 2 L. ed. 650; Church *v.* Marine Ins. Co., 5 Fed. Cas. No. 2,711, 1 Mason 341; Murray *v.* Ætna Ins. Co., 17 Fed. Cas. No. 9,995, 4 Biss. 417; Queen *v.* Union Ins. Co., 20 Fed. Cas. No. 11,505, 2 Wash. 331.

England.— McSwiney *v.* Royal Exch. Assur. Corp., 14 Q. B. 634, 14 Jur. 998, 19 L. J. Q. B. 222, 68 E. C. L. 634; Naylor *v.* Taylor, 9 B. & C. 718, 4 M. & R. 526, 17 E. C. L. 321; Underwood *v.* Robertson, 4 Campb. 138, 16 Rev. Rep. 760; Anderson *v.* Wallis, 3 Campb. 440, 2 M. & S. 240; Brotherston *v.* Barber, 5 M. & S. 418, 17 Rev. Rep. 378; Hunt *v.* Royal Exch. Assur. Co., 5 M. & S. 47, 17 Rev. Rep. 264; Falkner *v.* Ritchie, 2 M. & S. 290, 15 Rev. Rep. 253; Everth *v.* Smith, 2 M. & S. 278, 15 Rev. Rep. 246.

80. *Louisiana.*— Rogers *v.* Nashville M. & F. Ins. Co., 9 La. Ann. 537; Akin *v.* Mississippi M. & F. Ins. Co., 4 Mart. N. S. 661.

Massachusetts.— See Murray *v.* Hatch, 6 Mass. 465.

New York.— Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer 342; Saltus *v.* United Ins. Co., 15 Johns. 523; Post *v.* Phœnix Ins. Co., 10 Johns. 79; Craig *v.* United Ins. Co., 6 Johns. 226, 5 Am. Dec. 222; Ludlow *v.* Columbian Ins. Co., 1 Johns. 335; Williams *v.* Smith, 2 Cai. 1, 2 Am. Dec. 209; Abbott *v.* Broome, 1 Cai. 292, 2 Am. Dec. 187.

United States.— Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383, 6 L. ed. 664; Simonds *v.* Union Ins. Co., 4 Dall. 417, 1 L. ed. 890, 22 Fed. Cas. No. 12,875, 1 Wash. 382; King *v.* Delaware Ins. Co., 14 Fed. Cas. No. 7,788, 2 Wash. 300; Queen *v.* Union Ins. Co., 20 Fed. Cas. No. 11,505, 2 Wash. 331; Williams *v.* Suffolk Ins. Co., 29 Fed. Cas. No. 17,739, 3 Sumn. 510.

England.— De Caudra *v.* Swann, 16 C. B. N. S. 772, 111 E. C. L. 772.

Canada.— Musgrave *v.* Mannheim Ins. Co., 32 Nova Scotia 405.

When a ship is obliged to put back, and the damage she has sustained is of such a nature that she cannot pursue her voyage, and other ships cannot be procured to take the cargo, it is a total loss of ship, cargo, and freight, however inconsiderable the damage sustained may be, for the voyage in contemplation is lost. Wilson *v.* Royal Exch. Assur. Co., 2 Campb. 623, 12 Rev. Rep. 760.

sary repairs before it can be held that there has been an actual loss of the voyage.[81]

i. Effect of Arrival in Specie. If the subject-matter of the insurance arrive in specie at its destination there can be no abandonment.[82]

j. Freight. Where there has been an actual total loss or a constructive total loss, followed by due abandonment, of cargo or of the ship, and if another ship cannot be procured, there is a constructive loss of freight.[83] If the ship is a total loss it is the duty of the master to earn freight by forwarding the cargo by another vessel if one can be procured, and thus avoid or reduce the loss,[84] or if the ship is merely damaged it is his duty to repair the same and carry the cargo[85] to its des-

81. Clark *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 104, 13 Am. Dec. 400; Goold *v.* Shaw, 1 Johns. Cas. (N. Y.) 293 [*affirmed* in 2 Johns. Cas. 442].

Where owner must repair.—Where a vessel is damaged, but not to such extent as to constitute a technical total loss, the ship-owner is bound to repair her and complete the voyage, if practicable, without unreasonable delay. Hubbell *v.* Great Western Ins. Co., 74 N. Y. 246 [*reversing* 10 Hun 167]. Where there is insurance on freight the owner of a boat would not be justified in detaining the cargo a month or six weeks in order to make necessary repairs and continue a voyage, where the ordinary length of trip is seven or eight days. Roe *v.* Crescent Mut. Ins. Co., 11 La. Ann. 408.

82. Merchants' Mut. Ins. Co. *v.* New Orleans Mut. Ins. Co., 24 La. Ann. 305; Pierce *v.* Columbian Ins. Co., 14 Allen (Mass.) 320; Silloway *v.* Neptune Ins. Co., 12 Gray (Mass.) 73; Forbes *v.* Manufacturers' Ins. Co., 1 Gray (Mass.) 371; Pezant *v.* National Ins. Co., 15 Wend. (N. Y.) 453; Parage *v.* Dale, 3 Johns. Cas. (N. Y.) 156; Seton *v.* Delaware Ins. Co., 21 Fed. Cas. No. 12,675, 2 Wash. 175. *Compare* Peters *v.* Phœnix Ins. Co., 3 Serg. & R. (Pa.) 25. See also *supra*, IX, J, 3, d.

If less than a moiety of the articles arrive in specie the insured may abandon. Moses *v.* Columbian Ins. Co., 6 Johns. (N. Y.) 219. *Compare* Seton *v.* Delaware Ins. Co., 21 Fed. Cas. No. 12,675, 2 Wash. 175.

83. *Maine.*—Williams *v.* Kennebec Mut. Ins. Co., 31 Me. 455.

Massachusetts.—Ibwing *v.* Washington Ins. Co., 10 Gray 443; McGaw *v.* Ocean Ins. Co., 23 Pick. 405; Coolidge *v.* Gloucester Mar. Ins. Co., 15 Mass. 341.

New York.—Robertson *v.* Atlantic Mut. Ins. Co., 68 N. Y. 192; American Ins. Co. *v.* Center, 4 Wend. 45; Whitney *v.* New York Firemen Ins. Co., 18 Johns. 208; Livingston *v.* Columbian Ins. Co., 3 Johns. 49; Davy *v.* Hallett, 3 Cai. 16, 2 Am. Dec. 241.

England.—Guthrie *v.* North China Ins. Co., 7 Com. Cas. 130.

Canada.—Troop *v.* Merchants' Mar. Ins. Co., 13 Can. Sup. Ct. 506.

See 28 Cent. Dig. tit. "Insurance," § 1202.

What freight insured.—Where freight is insured on a particular voyage by a particular vessel, and cargo has been put on board and the vessel sails on her voyage, it is the freight of that cargo, in that vessel, and on that voyage which is the subject of insurance. McGaw *v.* Ocean Ins. Co., 23 Pick. (Mass.) 405.

Freight earned after abandonment of ship.—Where, because of an embargo, a ship and its cargo are abandoned to the underwriters and accepted by them, and the embargo is taken off and the ship earns her freight, there is no total loss of freight. McCarthy *v.* Abel, 5 East 388, 1 Smith K. B. 524, 7 Rev. Rep. 711.

Round voyage insured and total loss of ship on outward passage.—Under a policy of insurance to the charterers of a vessel "for whom it concerns on freight on board," the charterers may recover the amount of the money payable under the charter-party at the termination of the round voyage, and which they have agreed to get insured, although the vessel is totally lost at the outward port. Silloway *v.* Neptune Ins. Co., 12 Gray (Mass.) 73.

84. Clark *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 104, 13 Am. Dec. 400; Hughes *v.* Sun Mut. Ins. Co., 100 N. Y. 58, 2 N. E. 901, 3 N. E. 71; Kinsman *v.* New York Mut. Ins. Co., 5 Bosw. (N. Y.) 460; Bradhurst *v.* Columbian Ins. Co., 9 Johns. (N. Y.) 17; Griswold *v.* New York Ins. Co., 3 Johns. (N. Y.) 321, 3 Am. Dec. 490; Griswold *v.* New York Ins. Co., 1 Johns. (N. Y.) 205; Hugg *v.* Augusta Ins., etc., Co., 7 How. (U. S.) 595, 12 L. ed. 834; Anchor Ins. Co. *v.* Phœnix Ins. Co., 30 U. C. C. P. 570.

85. *Massachusetts.*—McGaw *v.* Ocean Ins. Co., 23 Pick. 405.

New York.—Griswold *v.* New York Ins. Co., 3 Johns. 321, 3 Am. Dec. 490; Griswold *v.* New York Ins. Co., 1 Johns. 205; Herbert *v.* Hallett, 3 Johns. Cas. 93.

United States.—Hugg *v.* Augusta Ins., etc., Co., 7 How. 595, 12 L. ed. 834.

England.—Philpott *v.* Swann, 11 C. B. N. S. 270, 7 Jur. N. S. 1291, 30 L. J. C. P. 358, 5 L. T. Rep. N. S. 183, 103 E. C. L. 270.

Canada.—Wilson *v.* Merchants' Mar. Ins. Co., 3 Nova Scotia Dec. 81.

Not applicable to river craft.—The rule requiring vessels to repair, if possible, and prosecute the voyage without transferring the freight, does not apply to river craft. Blanks *v.* Hibernia Ins. Co., 36 La. Ann. 599.

Limit of master's authority.—Where, in case of damage to a ship, the master elects to repair it, the mere fact that the expenses of repair ultimately prove to be greater than the value of the ship will not be sufficient to show that he acted beyond the scope of his

tination if this can be done at a reasonable cost and within a reasonable time, but not otherwise.[86]

k. Profits. It seems to be the better opinion that there can be no constructive total loss or an average loss on a policy on profits.[87]

K. Abandonment[88] — **1. Definition.** Abandonment is the act of the insured in notifying the underwriter that he elects to avail himself of the right to treat a particular loss as total by surrendering to the underwriter his interest in the insured property.[89]

2. Necessity of Election and Notice. An election and notice of abandonment is a condition precedent to a claim for a constructive total loss.[90] There is no obligation upon the insured to abandon;[91] but it is a matter of his own election,

authority, or to entitle the owner, in an action on a policy of freight, to recover as for a total loss. Benson *v.* Chapman, 8 C. B. 950, 65 E. C. L. 950, 2 H. L. Cas. 696, 9 Eng. Reprint 1256, 13 Jur. 969.

If the cost of repair exceeds the freight to be earned there is a total loss of freight unless the cargo can be sent to its destination in another vessel at an expense less than the freight contracted for. Hugg *v.* Augusta Ins., etc., Co., 12 Fed. Cas. No. 6,838, Taney 159.

86. See the cases cited in the preceding notes.

87. Edgar Thompson Steel Co. *v.* Boylston Mut. Ins. Co., 12 Mo. App. 244; Canada Sugar-Refining Co. *v.* Insurance Co. of North America, 175 U. S. 609, 20 S. Ct. 239, 44 L. ed. 292 [*reversing* 87 Fed. 491, 31 C. C. A. 65]. See also *supra*, IX, J, 3, i. *Compare* Tom *v.* Smith, 3 Cai. (N. Y.) 245; Abbott *v.* Sebor, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139.

88. Right to abandon and claim total loss see *supra*, IX, J, 4.

89. United Ins. Co. *v.* Lennox, 1 Johns. Cas. (N. Y.) 377 [*affirming* 2 Johns. Cas. 443]; Merchants', etc., Ins. Co. *v.* Duffield, 2 Handy (Ohio) 122, 12 Ohio Dec. (Reprint) 361.

A mere notice of abandonment at a given time, without actual abandonment, amounts to nothing; and unless the facts of the case, under the laws of commerce, justify an abandonment, the parties are not bound by it. Delaware Ins. Co. *v.* Winter, 38 Pa. St. 176.

90. *Connecticut.*— Townsend *v.* Phillips, 2 Root 400.

Illinois.— Norton *v.* Lexington F. & M. Ins. Co., 16 Ill. 235.

Louisiana.— Gomila *v.* Hibernia Ins. Co., 40 La. Ann. 553, 4 So. 490.

Maine.— Thomas *v.* Rockland Ins. Co., 45 Me. 116. *Compare* Fuller *v.* Kennebec Mut. Ins. Co., 31 Me. 325, where it was held that if a sale by the master is necessary and warranted by the rules of law, it would, even without an abandonment, constitute a technical total loss.

Maryland.— Bosley *v.* Chesapeake Ins. Co., 3 Gill & J. 450, 22 Am. Dec. 337.

Massachusetts.— Macy *v.* Whaling Ins. Co., 9 Metc. 354; Smith *v.* Manufacturers' Ins. Co., 7 Metc. 448; Peirce *v.* Ocean Ins. Co., 18 Pick. 83, 29 Am. Dec. 567; Lovering *v.* Mercantile Mar. Ins. Co., 12 Pick. 348; Rice *v.* Homer, 12 Mass. 230; Livermore *v.* Newburyport Mar. Ins. Co., 1 Mass. 264.

New York.— Wright *v.* Williams, 20 Hun 320; Suydam *v.* Marine Ins. Co., 1 Johns. 181, 3 Am. Dec. 307.

Ohio.— Globe Ins. Co. *v.* Sherlock, 25 Ohio St. 50; Sherlock *v.* Globe Ins. Co., 7 Ohio Dec. (Reprint) 17, 1 Cinc. L. Bul. 26.

Pennsylvania.— Watson *v.* Insurance Co. of North America, 1 Binn. 47.

United States.— Insurance Co. of North America *v.* Canada Sugar-Refining Co., 87 Fed. 491, 31 C. C. A. 65.

England.— Western Assur. Co. *v.* Poole, [1903] 1 K. B. 376, 9 Aspin. 390, 8 Com. Cas. 108, 72 L. J. K. B. 195, 88 L. T. Rep. N. S. 362; Woodside *v.* Globe Mar. Ins. Co., [1896] 1 Q. B. 105, 8 Aspin. 118, 65 L. J. Q. B. 117, 73 L. T. Rep. N. S. 626, 44 Wkly. Rep. 187; Holdsworth *v.* Wise, 7 B. & C. 794, 6 L. J. K. B. O. S. 134, 1 M. & R. 673, 31 Rev. Rep. 299, 14 E. C. L. 355; Roux *v.* Salvador, 3 Bing. N. Cas. 266, 2 Hodges 209, 7 L. J. Exch. 328, 32 E. C. L. 130; Martin *v.* Crokatt, 14 East 465, 13 Rev. Rep. 281; Fleming *v.* Smith, 1 H. L. Cas. 513, 9 Eng. Reprint 859; Bell *v.* Nixon, Holt N. P. 423, 3 E. C. L. 169.

Canada.— Nova Scotia Mar. Ins. Co. *v.* Churchill, 26 Can. Sup. Ct. 65; Patch *v.* Pitman, Cass. Dig. (Can.) 389 [*affirming* 7 Can. L. T. Occ. Notes 374]; Wood *v.* Stymest, 10 N. Brunsw. 309; Morton *v.* Patillo, 3 Nova Scotia Dec. 17.

See 28 Cent. Dig. tit. "Insurance," §§ 1194, 1212 *et seq.*

Reinsurance.—Notice of abandonment need not be given to a reinsurer. Western Assur. Co. *v.* Poole, [1903] 1 K. B. 376, 9 Aspin. 390, 8 Com. Cas. 108, 72 L. J. K. B. 195, 88 L. T. Rep. N. S. 362.

"No abandonment except in case of absolute total loss" has been construed as permitting the insured to recover for a constructive total loss without notice of abandonment. McLain *v.* British, etc., Mar. Ins. Co., 16 Misc. (N. Y.) 336, 38 N. Y. Suppl. 77.

Clause defining total loss.— A clause in a marine policy provided that no claim for a total loss should be made, unless in case of loss of more than fifty per cent, and an actual or technical total loss of the vessel does not enable the insured to claim for a total loss without abandonment, if there is no actual loss. Hubbell *v.* Great Western Ins. Co., 74 N. Y. 246.

91. *Massachusetts.*— Peirce *v.* Ocean Ins.

and if he chooses to retain the insured property or fails to make a proper abandonment he can recover according to his actual loss.[92]

3. Form — a. In General. No particular form of abandonment is required.[93]

Co., 18 Pick. 83, 29 Am. Dec. 567; Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. 249; Livermore *v.* Newburyport Mar. Ins. Co., 1 Mass. 264.

New York.— Earl *v.* Shaw, 1 Johns. Cas. 313, 1 Am. Dec. 117.

Pennsylvania.— Watson *v.* Insurance Co. of North America, 1 Binn. 47.

United States.— Murray *v.* Pennsylvania Ins. Co., 17 Fed. Cas. No. 9,961, 2 Wash. 186.

England.— Aitchison *v.* Lohre, 4 App. Cas. 755, 4 Aspin. 168, 49 L. J. Q. B. 123, 41 L. T. Rep. N. S. 323, 28 Wkly. Rep. 1; Western Assur. Co. *v.* Poole, [1903] 1 K. B. 376, 9 Aspin. 390, 8 Com. Cas. 108, 72 L. J. K. B. 195, 88 L. T. Rep. N. S. 362; Pitman *v.* Universal Mar. Ins. Co., 9 Q. B. D. 192, 4 Aspin. 544, 51 L. J. Q. B. 561, 46 L. T. Rep. N. S. 863, 30 Wkly. Rep. 906; Mitchel *v.* Ede, 11 A. & E. 888, 9 L. J. Q. B. 187, 3 P. & D. 513, 1 T. R. 608, 1 Rev. Rep. 318, 39 E. C. L. 469; Mellish *v.* Andrews, 15 East 13, 13 Rev. Rep. 351.

92. Peirce *v.* Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; Gracie *v.* New York Ins. Co., 8 Johns. (N. Y.) 237; Suydam *v.* Marine Ins. Co., 2 Johns. (N. Y.) 138; Earl *v.* Shaw, 1 Johns. Cas. (N. Y.) 313, 1 Am. Dec. 117; Murray *v.* Pennsylvania Ins. Co., 17 Fed. Cas. No. 9,961, 2 Wash. 186; Aitchison *v.* Lohre, 4 App. Cas. 755, 4 Aspin. 168, 49 L. J. Q. B. 123, 41 L. T. Rep. N. S. 323, 28 Wkly. Rep. 1; Western Assur. Co. *v.* Poole, [1903] 1 K. B. 376, 9 Aspin. 390, 8 Com. Cas. 108, 72 L. J. K. B. 195, 88 L. T. Rep. N. S. 362; Pitman *v.* Universal Mar. Ins. Co., 9 Q. B. D. 192, 4 Aspin. 544, 51 L. J. Q. B. 561, 46 L. T. Rep. N. S. 863, 30 Wkly. Rep. 906; Mellish *v.* Andrews, 15 East 13, 13 Rev. Rep. 351; Barker *v.* Blakes, 9 East 283, 9 Rev. Rep. 558.

93. Heebner *v.* Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308; Macy *v.* Whaling Ins. Co., 9 Metc. (Mass.) 354; Peirce *v.* Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 569; McConochie *v.* Sun Mut. Ins. Co., 26 N. Y. 477; Suydam *v.* Marine Ins. Co., 1 Johns. (N. Y.) 181, 3 Am. Dec. 307; Bell *v.* Beveridge, 4 Dall. (Pa.) 272, 1 L. ed. 830; Patapsco Ins. Co. *v.* Southgate, 5 Pet. (U. S.) 604, 8 L. ed. 243; Insurance Co. of North America *v.* Johnson, 70 Fed. 794, 17 C. C. A. 416; Copeland *v.* Phœnix Ins. Co., 6 Fed. Cas. No. 3,210, 1 Woolw. 278.

Forms of notices held sufficient.— "The brig Gem being ashore and not probable that she will be got off, I hereby abandon said vessel to the office and claim a total loss, as insured by policy No. 16,677." Reynolds *v.* Ocean Ins. Co., 22 Pick. (Mass.) 191, 192, 33 Am. Dec. 727. The assured "having received information of the condemnation of" the ship "at Humboldt, California, hereby abandons all in said vessel insured by" their policy, "and claims as for a total loss." Heebner *v.* Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308. An abandonment which states that the vessel has been stranded at San Francisco, and is so much injured as to render it necessary to place her on shore, and that she cannot be repaired there, is sufficient. Lincoln *v.* Hope Ins. Co., 8 Gray (Mass.) 22. A letter of abandonment stating as the cause of loss that the boat "had been nearly destroyed by the late disaster," the cause of loss being matter of public notoriety. Citizens' Ins. Co. *v.* Glasgow, 9 Mo. 411. A letter of abandonment of a vessel upon the ground that, in consequence of sea perils, "being found irreparable on survey, she was condemned and sold," sufficiently states the cause of abandonment, if the vessel was so much damaged that the costs of repair would exceed half her value, deducting one-third new for old. Perkins *v.* Augusta Ins., etc., Co., 10 Gray (Mass.) 312, 71 Am. Dec. 654. Where the agent who issued the policy examined the wreck at the company's expense, and forwarded the owners' statement concerning the loss, and the owners afterward verified formal proofs of loss and executed an assignment to the company of their interest in the vessel, all of which were retained by the company, the abandonment and its acceptance were held to be complete. Singleton *v.* Phenix Ins. Co., 132 N. Y. 298, 30 N. E. 839.

Forms held insufficient.— "I observe by the Boston newspaper of the 29th January, that the ship General Smith, insured in your office . . . was driven ashore in a heavy gale of wind the 6th of December, and by a Charleston paper of the 26th of January, that on the 13th she was not got off. In so dangerous a situation as Helvoet roads, it is to be feared that a total loss has ensued. I therefore, as a measure of precaution for both your interest and my own, do hereby abandon to you, and claim a total loss." Bosley *v.* Chesapeake Ins. Co., 3 Gill & J. (Md.) 450, 454, 22 Am. Dec. 337. A notice of abandonment of an insured cargo stating that the vessel put into an immediate port in distress, with several feet of water in her hold, and the cargo was landed, and found very seriously damaged, and claiming a total loss is insufficient to charge the insurers with a total loss, as not showing that the cargo was damaged to more than half its value. McConochie *v.* Sun Mut. Ins. Co., 26 N. Y. 477. Giving notice of loss, neglecting to take care of the property, suffering the agents of the underwriters to take measures for its preservation, and their selling the property by the assent of the insured or his agent, pursuant to a stipulation in the policy which provides that in case of loss the damaged portion shall be separated from the sound, and the amount of damage ascertained by appraisal or sale at auction, the underwriters "being liable for the loss on the damaged portion only," do not amount to an abandonment and an acceptance thereof, making the underwriters

It may be by parol,[94] or communicated by telegraph.[95] The word "abandon" is not necessary.[96] It is sufficient if it gives the underwriter information of the nature of the loss[97] and of the election of the insured to abandon all his rights to the property.[98] But the exact fractional interest need not be stated.[99]

b. Must Be Unequivocal. The intention to presently abandon must be explicit and unconditional,[1] and it must be coupled with an actual abandonment or relinquishment of claim of ownership.[2]

c. Must Assign Grounds. The insured must assign the true causes for the abandonment,[3] and the cause of the loss,[4] and if he assign an insufficient cause,

liable for the sum insured as for a total loss. Savage *v.* Corn Exch. F., etc., Ins. Co., 4 Bosw. (N. Y.) 1 [*affirmed* in 36 N. Y. 655].

A demand of payment for a total loss has been held to amount to an abandonment. Cassedy *v.* Louisiana State Ins. Co., 6 Mart. N. S. (La.) 421. *Contra*, Parmeter *v.* Todhunter, 1 Camph. 541.

The collection of the full amount at which a vessel was valued in a policy from an insurance company, on account of injury by collision, does not import an abandonment of the vessel by the owners to the insurer, where she was undervalued in the policy, and the owners refused to abandon. The St. Johns, 101 Fed. 469.

Under a clause requiring a notice of abandonment to be in writing, and sufficient to vest title in the company, a telegram informing the company that the vessel was ashore at a given point, and that the insured abandoned it and claimed a total loss, is sufficient, as no deed of abandonment is necessary to vest the title in the insurer under marine law. Richelieu, etc., Nav. Co. *v.* Thames, etc., Mar. Ins. Co., 72 Mich. 571, 40 N. W. 758.

There is a waiver of the right to object to the form of the abandonment where it contains an offer to make any further conveyance and assurance of title, and is absolutely rejected. Insurance Co. of North America *v.* Johnson, 70 Fed. 794, 17 C. C. A. 416.

94. *Alabama.*—Fulton Ins. Co. *v.* Goodman, 32 Ala. 108.

Massachusetts.— Silloway *v.* Neptune Ins. Co., 12 Gray 73. See also Macy *v.* Whaling Ins. Co., 9 Metc. 354; Peirce *v.* Ocean Ins. Co., 18 Pick. 83, 29 Am. Dec. 567.

New York.— McConochie *v.* Sun Mut. Ins. Co., 26 N. Y. 477.

United States.—Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604, 8 L. ed. 243; Copeland *v.* Phœnix Ins. Co., 6 Fed. Cas. No. 3,210, 1 Woolw. 278 [*affirmed* in 9 Wall. 461, 19 L. ed. 739].

England.— Read *v.* Bonham, 6 B. & B. 147, 6 Moore C. P. 397, 23 Rev. Rep. 587, 7 E. C. L. 653.

See 28 Cent. Dig. tit. "Insurance," § 1213.

Parol abandonment must be express.— Parmeter *v.* Todhunter, 1 Camph. 541.

95. Richelieu, etc., Nav. Co. *v.* Thames, etc., Ins. Co., 72 Mich. 571, 40 N. W. 758.

The telegraph should be used in giving notice of abandonment, where it is in general use. Kaltenbach *v.* Mackenzie, 3 C. P. D. 467, 4 Aspin. 39, 48 L. J. C. P. 9, 39 L. T. Rep. N. S. 215, 26 Wkly. Rep. 844.

96. Parmeter *v.* Todhunter, 1 Campb. 541.

97. Heebner *v.* Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308; McConochie *v.* Sun Mut. Ins. Co., 26 N. Y. 477.

98. Heebner *v.* Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308; Macy *v.* Whaling Ins. Co., 9 Metc. (Mass.) 354; Barker *v.* Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; Insurance Co. of North America *v.* Johnson, 70 Fed. 794, 17 C. C. A. 416; Currie *v.* Bombay Native Ins. Co., L. R. 3 P. C. 72, 39 L. J. P. C. 1, 22 L. T. Rep. N. S. 317, 6 Moore P. C. N. S. 302, 18 Wkly. Rep. 296, 17 Eng. Reprint 740.

99. Insurance Co. of North America *v.* Johnson, 70 Fed. 794, 17 C. C. A. 416.

1. Thomas *v.* Rockland Ins. Co., 45 Me. 116; Peirce *v.* Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; Bidwell *v.* Northwestern Ins. Co., 19 N. Y. 179; Suydam *v.* Marine Ins. Co., 1 Johns. (N. Y.) 181, 3 Am. Dec. 307; Patapsco Ins. Co. *v.* Southgate, 5 Pet. (U. S.) 604, 8 L. ed. 243.

"Meant to abandon."— Where insured wrote to the underwriters in a marine policy a letter stating that "he meant to abandon" for a loss, it was held that he thereby sufficiently declared his election to do so. Bell *v.* Beveridge, 4 Dall. (Pa.) 272, 1 L. ed. 830.

2. Where the owner, after the stranding of the boat, gave defendant notice of his intention to abandon, but retained control thereof and had it repaired, and thereafter claimed and used the boat as his own, it was held that there was no abandonment, and the owner could not recover as for a total loss. Louisville Underwriters *v.* Pence, 93 Ky. 96, 19 S. W. 10, 14 Ky. L. Rep. 21, 40 Am. St. Rep. 176. See also Sherlock *v.* Globe Ins. Co., 7 Ohio Dec. (Reprint) 17, 1 Cinc. L. Bul. 26.

3. Macy *v.* Whaling Ins. Co., 9 Metc. (Mass.) 354; Peirce *v.* Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; McConochie *v.* Sun Mut. Ins. Co., 26 N. Y. 477; Dickey *v.* New York Ins. Co., 4 Cow. (N. Y.) 222 [*affirmed* in 3 Wend. 658, 20 Am. Dec. 763]; Suydam *v.* Marine Ins. Co., 1 Johns. (N. Y.) 181, 3 Am. Dec. 307.

Additional causes need not be communicated to the underwriters, although known to the insured. Dederer *v.* Delaware Ins. Co., 7 Fed. Cas. No. 3,733, 2 Wash. 61; King *v.* Delaware Ins. Co., 14 Fed. Cas. No. 7,788, 2 Wash. 300 [*affirmed* in 6 Cranch 71, 3 L. ed. 155].

4. Bullard *v.* Roger Williams Ins. Co., 3 Fed. Cas. No. 2,122, 1 Curt. 148. *Compare*

or causes which do not in fact exist, he cannot avail himself of the abandonment in suing for a total loss.[5] The grounds for the abandonment must be stated with such particularity as to enable the underwriter to determine whether he is bound to accept the offer or not.[6]

4. Right Dependent on Existing Facts. The general rule is that the right of the insured to abandon depends upon the actual state of fact at the time the notice of abandonment is given.[7] In New York it has been held that the insured may abandon if the state of his intelligence regarding the loss is such that he would have been entitled to abandon.[8]

5. Must Cover Whole Interest. The abandonment must be entire and cover the whole interest insured,[9] but if only a part of the insured's interest is covered he need only abandon that part.[10]

6. When Right Becomes Fixed — a. In the United States. The American rule is that the rights of the parties become fixed at the time of the abandonment, and the right of the insured to recover for a constructive total loss is not altered by any change in the nature or extent of the loss.[11]

Thwing *v.* Washington Ins. Co., 10 Gray (Mass.) 443.

5. Dickey *v.* New York Ins. Co., 3 Wend. (N. Y.) 658, 20 Am. Dec. 763 [*affirming* 4 Cow. 222]; Suydam *v.* Marine Ins. Co., 1 Johns. (N. Y.) 181, 3 Am. Dec. 307; King *v.* Delaware Ins. Co., 14 Fed. Cas. No. 7,788, 2 Wash. 300 [*affirmed* in 6 Cranch 71, 3 L. ed. 155].

6. Peirce *v.* Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; McConochie *v.* Sun Mut. Ins. Co., 26 N. Y. 477; Suydam *v.* Marine Ins. Co., 1 Johns. (N. Y.) 181, 3 Am. Dec. 307.

7. *Connecticut.*— King *v.* Middletown Ins. Co., 1 Conn. 184.

Illinois.— Norton *v.* Lexington F., etc., Ins. Co., 16 Ill. 235.

Louisiana.— Marks *v.* Nashville M. & F. Ins. Co., 6 La. Ann. 126.

Maine.— Fuller *v.* Kennebec Mut. Ins. Co., 31 Me. 325.

Massachusetts.— Snow *v.* Union Mut. Mar. Ins. Co., 119 Mass. 592, 20 Am. Rep. 349; Greene *v.* Pacific Mut. Ins. Co., 9 Allen 217; Hall *v.* Franklin Ins. Co., 9 Pick. 466; Robinson *v.* Jones, 8 Mass. 536, 5 Am. Dec. 114; Dorr *v.* Union Ins. Co., 8 Mass. 502; Lee *v.* Boardman, 3 Mass. 238, 3 Am. Dec. 134; Oliver *v.* Newburyport Ins. Co., 3 Mass. 37, 3 Am. Dec. 77. *Compare* Dorr *v.* New England Mar. Ins. Co., 4 Mass. 221.

New York.— Buffalo City Bank *v.* Northwestern Ins. Co., 30 N. Y. 251; Saurez *v.* Sun Mut. Ins. Co., 2 Sandf. 482; Pezant *v.* National Ins. Co., 15 Wend. 453; Dickey *v.* American Ins. Co., 3 Wend. 658, 20 Am. Dec. 763; Depau *v.* Ocean Ins. Co., 5 Cow. 63, 15 Am. Dec. 431; Dickey *v.* New York Ins. Co., 4 Cow. 222 [*affirmed* in 3 Wend. 658, 20 Am. Dec. 763]; Earl *v.* Shaw, 1 Johns. Cas. 313, 1 Am. Dec. 117; Hallett *v.* Peyton, 1 Cai. Cas. 28; Church *v.* Bedient, 1 Cai. Cas. 21; Radcliff *v.* Coster, Hoffm. 98.

Pennsylvania.—Adams *v.* Delaware Ins. Co., 3 Binn. 287; Parker *v.* Towers, 2 Browne 80.

United States.— Bradlie *v.* Maryland Ins. Co., 12 Pet. 378, 9 L. ed. 1123; Olivera *v.* Union Ins. Co., 3 Wheat. 183, 4 L. ed. 365; Alexander *v.* Baltimore Ins. Co., 4 Cranch 370, 2 L. ed. 650; Marshall *v.* Delaware Ins. Co., 4 Cranch 202, 2 L. ed. 596 [*affirming* 16 Fed. Cas. No. 9,127, 2 Wash. 54]; Rhinelander *v.* Pennsylvania Ins. Co., 4 Cranch 29, 2 L. ed. 540; Humphreys *v.* Union Ins. Co., 12 Fed. Cas. No. 6,871, 3 Mason 429; Peele *v.* Merchants' Ins. Co., 19 Fed. Cas. No. 10,905, 3 Mason 27; Queen *v.* Union Ins. Co., 20 Fed. Cas. No. 11,505, 2 Wash. 331.

England.— Naylor *v.* Taylor, 9 B. & C. 718, 17 E. C. L. 321, M. & M. 205, 22 E. C. L. 509, 4 M. & R. 526, 31 Rev. Rep. 731; Bainbridge *v.* Nielson, 1 Campb. 237, 10 East 329, 10 Rev. Rep. 316.

Canada.— King *v.* Western Assur. Co., 7 U. C. C. P. 300.

See 28 Cent. Dig. tit. "Insurance," § 1192 *et seq.*

8. Livingston *v.* Hastie, 3 Johns. Cas. (N. Y.) 293; Murray *v.* United Ins. Co., 2 Johns. Cas. (N. Y.) 263; Mumford *v.* Church, 1 Johns. Cas. (N. Y.) 147.

9. Bidwell *v.* Northwestern Ins. Co., 19 N. Y. 179; The Manitoba, 30 Fed. 129.

Provision in policy for assignment of interest.— Where a policy contained the following clause, "And in all cases of abandonment, the assured shall assign, transfer, and set over to said insurance company all their interest in and to the said steamboat, and every part thereof, free of all claims and charges whatsoever," and only three fourths of the agreed value of the steamboat was insured, it was held that this clause had no more extensive meaning than the technical term "abandonment," as settled by the courts, and that the owners still held an interest of one fourth in the boat. Cincinnati Ins. Co. *v.* Duffield, 6 Ohio St. 200, 67 Am. Dec. 339.

10. Coolidge *v.* Gloucester Mar. Ins. Co., 15 Mass. 341; Harvey *v.* Detroit F. & M. Ins. Co., 120 Mich. 601, 79 N. W. 898; Allegheny Ins. Co. *v.* Ransom, 69 Pa. St. 496; The Manitoba, 30 Fed. 129.

11. *Maine.*— Fuller *v.* Kennebec Mut. Ins. Co., 31 Me. 325.

Massachusetts.— Lovering *v.* Mercantile

b. In England and Canada. In England and Canada the loss must continue to be constructively total until the commencement of the action in order to entitle the insured to recover for a total loss.[12]

7. By Whom Made — a. In General. The abandonment need not necessarily be made by the insured but may be made by an authorized agent,[13] and an agent having authority to insure has *prima facie* an authority to abandon.[14] It is requisite that the person who assumes to make the abandonment has the power to make a legal transfer of the property abandoned.[15] An equitable owner[16] or pledgee[17] cannot abandon. An abandonment by one part-owner of his interest does not affect the interests of the other owners,[18] but one jointly interested in the property with others may abandon for all.[19]

b. Effect of Mortgage. If the insured has mortgaged his vessel, thereby depriving himself of the power of conveying absolute title, he cannot abandon without the consent of the mortgagee.[20] A mortgagee cannot give notice of abandonment where he is not the party insured, but if he insures his interest as mortgagee he can abandon.[21]

Mar. Ins. Co., 12 Pick. 348; Coolidge *v.* Gloucester Mar. Ins. Co., 15 Mass. 341; Wood *v.* Lincoln, etc., Ins. Co., 6 Mass. 479, 4 Am. Dec. 163; Munson *v.* New England Mar. Ins. Co., 4 Mass. 88; Lee *v.* Boardman, 3 Mass. 238, 3 Am. Dec. 134.

New York.— Buffalo City Bank *v.* Northwestern Ins. Co., 30 N. Y. 251; Jumel *v.* Marine Ins. Co., 7 Johns. 412, 5 Am. Dec. 283; Bordes *v.* Hallet, 1 Cai. 444; Slocum *v.* United Ins. Co., 1 Johns. Cas. 151.

Pennsylvania.— Delaware Ins. Co. *v.* Winter, 38 Pa. St. 176.

United States.— Orient Mut. Ins. Co. *v.* Adams, 123 U. S. 67, 8 S. Ct. 68, 31 L. ed. 63; Bradlie *v.* Maryland Ins. Co., 12 Pet. 378, 9 L. ed. 1123; Copeland *v.* Phœnix Ins. Co., 6 Fed. Cas. No. 3,210, 1 Woolw. 278.

See 28 Cent. Dig. tit. "Insurance," § 1192 *et seq.*

Foreclosure of mortgage not a waiver of abandonment.— Where the mortgagor of an insured vessel made a valid offer of abandonment on account of a constructive total loss, which was ratified and assented to by the mortgagee, and the vessel was afterward repaired by the underwriters, who gave notice to the assured that they would be no longer responsible for her, it was held that a subsequent sale of the boat by the mortgagee under his mortgage did not operate as a waiver of the abandonment so far as the mortgagor was concerned. Fulton Ins. Co. *v.* Goodman, 32 Ala. 108.

12. Ruys *v.* Royal Exch. Assur. Corp., [1897] 2 Q. B. 135, 8 Aspin. 294, 66 L. J. Q. B. 534, 77 L. T. Rep. N. S. 23; Dean *v.* Hornby, 2 C. L. R. 1519, 3 E. & B. 180, 18 Jur. 623, 23 L. J. Q. B. 129, 2 Wkly. Rep. 156, 77 E. C. L. 180; Blairmore Co. *v.* Macredie, 24 Ct. of Sess. Cas. 893; Patterson *v.* Ritchie, 4 M. & S. 393, 16 Rev. Rep. 498; Falkner *v.* Ritchie, 2 M. & S. 290, 15 Rev. Rep. 253; Providence Washington Ins. Co. *v.* Corbett, 9 Can. Sup. Ct. 256; O'Leary *v.* Pelican Ins. Co., 29 N. Brunsw. 510; Kenny *v.* Halifax Mar. Ins. Co., 3 Nova Scotia 141.

As to law of Scotland see Shepherd *v.* Henderson, 7 App. Cas. 49, 9 Ct. of Sess. Cas. 1.

13. Peirce *v.* Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; Parker *v.* Towers, 2 Browne (Pa.) 80.

14. Cassedy *v.* Louisiana State Ins. Co., 6 Mart. N. S. (La.) 421; Reynolds *v.* Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Chesapeake Ins. Co. *v.* Stark, 6 Cranch (U. S.) 268, 3 L. ed. 220; Merchants Mar. Ins. Co. *v.* Barss, 15 Can. Sup. Ct. 185 [*affirming* 26 N. Brunsw. 339].

15. Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249; Murray *v.* Great Western Ins. Co., 72 Hun (N. Y.) 282, 25 N. Y. Suppl. 414 [*affirmed* in 147 N. Y. 711, 42 N. E. 724]; Jardine *v.* Leathley, 3 B. & S. 700, 9 Jur. N. S. 1035, 32 L. J. Q. B. 132, 7 L. T. Rep. N. S. 783, 11 Wkly. Rep. 432, 113 E. C. L. 699.

16. Millidge *v.* Stymest, 11 N. Brunsw. 164.

17. Jardine *v.* Leathley, 3 B. & S. 700, 9 Jur. N. S. 1035, 32 L. J. Q. B. 132, 7 L. T. Rep. N. S. 783, 11 Wkly. Rep. 432, 113 E. C. L. 699.

18. Kirby *v.* Thames, etc., Ins. Co., 27 Fed. 221.

19. Hunt *v.* Royal Exch. Assur. Co., 5 M. & S. 47, 17 Rev. Rep. 364.

20. Fulton Ins. Co. *v.* Goodman, 32 Ala. 108; Bidwell *v.* Northwestern Ins. Co., 19 N. Y. 179. See also Murray *v.* Great Western Ins. Co., 72 Hun (N. Y.) 282, 25 N. Y. Suppl. 414 [*affirmed* in 147 N. Y. 711, 42 N. E. 724].

Mortgagee president of corporation owning vessel.— Where a stranded vessel owned by a corporation was abandoned to the underwriters by an instrument in writing, signed by the president of the corporation, who, at the same time, held a mortgage upon her in his individual capacity, it was held that, as he would be estopped to set up the mortgage against the underwriters, the abandonment conveyed to and vested in them an unencumbered and perfect title to the subject abandoned. Northwestern Transp. Co. *v.* Continental Ins. Co., 24 Fed. 171.

21. Anchor Mar. Ins. Co. *v.* Keith, 9 Can. Sup. Ct. 483.

8. **To Whom Made.** The abandonment may be made to an agent of the underwriter.[22]

9. **Time of Making.** The general rule is that the insured must abandon within a reasonable time after receiving information from which it is apparent that a loss has occurred which entitles him to abandon.[23] If from information first received the character of the loss is not made to clearly appear, the insured has a reasonable time to ascertain its real nature.[24] What is a reasonable time depends on the facts and circumstances in each case.[25] After the property passes beyond the control of the insured, as from an unjustifiable sale, an abandonment is too late.[26] Some cases have held that the right to abandon continues so long as the loss continues total,[27] or the delay is not prejudicial to the underwriter.[28] In

22. Fosdick *v.* Norwich Mar. Ins. Co., 3 Day (Conn.) 108.

23. *Louisiana.*— Mellon *v.* Louisiana State Ins. Co., 5 Mart. N. S. 563.

Massachusetts.— Taber *v.* China Mut. Ins. Co., 131 Mass. 239; Smith *v.* Newburyport Mar. Ins. Co., 4 Mass. 668; Dorr *v.* New England Mar. Ins. Co., 4 Mass. 221; Livermore *v.* Newburyport Mar. Ins. Co., 1 Mass. 264.

Michigan.— Harvey *v.* Detroit F. & M. Ins. Co., 120 Mich. 601, 79 N. W. 898.

New York.— Murray *v.* Great Western Ins. Co., 72 Hun 282, 25 N. Y. Suppl. 414 [*affirmed* in 147 N. Y. 711, 42 N. E. 724].

Pennsylvania.— Fuller *v.* McCall, 1 Yeates 464, 1 Am. Dec. 312, 2 Dall. 219, 1 L. ed. 356; Bell *v.* Beveridge, 4 Dall. 272, 1 L. ed. 830; Parker *v.* Towers, 2 Browne appendix 80.

South Carolina.— Teasdale *v.* Charleston Ins. Co., 2 Brev. 190, 3 Am. Dec. 705.

United States.— Livingston *v.* Maryland Ins. Co., 6 Cranch 274, 3 L. ed. 222; Chesapeake Ins. Co. *v.* Stark, 6 Cranch 268, 3 L. ed. 220; Hurtin *v.* Phœnix Ins. Co., 12 Fed. Cas. No. 6,941, 1 Wash. 400.

England.— Shepherd *v.* Henderson, 7 App. Cas. 49, 9 Ct. of Sess. Cas. 1; Currie *v.* Bombay Native Ins. Co., L. R. 3 P. C. 72, 39 L. J. P. C. 1, 22 L. T. Rep. N. S. 317, 6 Moore P. C. N. S. 302, 18 Wkly. Rep. 296, 17 Eng. Reprint 740; Mitchel *v.* Ede, 11 A. & E. 888, 9 L. J. Q. B. 187, 3 P. & D. 513, 1 T. R. 608, 1 Rev. Rep. 318, 39 E. C. L. 469; Roux *v.* Salvador, 3 Bing. N. Cas. 266, 2 Hodges 209, 7 L. J. Exch. 328, 32 E. C. L. 130; Kelly *v.* Walton, 2 Campb. 155; Anderson *v.* Royal Exch. Assur. Co., 7 East 38, 3 Smith K. B. 48, 8 Rev. Rep. 589; Abel *v.* Potts, 3 Esp. 242, 6 Rev. Rep. 826; Hunt *v.* Royal Exch. Assur. Co., 5 M. & S. 47, 17 Rev. Rep. 264.

See 28 Cent. Dig. tit. "Insurance," § 1212.

24. Reynolds *v.* Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Duncan *v.* Koch, 8 Fed. Cas. No. 4,136, Wall. Sr. 33; Browning *v.* Provincial Ins. Co., L. R. 5 P. C. 263, 2 Aspin. 35, 28 L. T. Rep. N. S. 853, 21 Wkly. Rep. 587; Kaltenbach *v.* Mackenzie, 3 C. P. D. 467, 4 Aspin. 39, 48 L. J. C. P. 9, 39 L. T. Rep. N. S. 215, 26 Wkly. Rep. 844; King *v.* Walker, 3 H. & C. 209, 11 Jur. N. S. 43, 33 L. J. Exch. 325, 13 Wkly. Rep. 232; Gernon *v.* Royal Exch. Assur. Co., Holt N. P. 49, 3 E. C. L. 29, 2 Marsh. 88, 1 E. C. L. 664, 6 Taunt. 383, 16 Rev. Rep. 630; Driscoll *v.* Millville Mar. Ins. Co., 23 N. Brunsw. 160.

When a loss is well authenticated or well known, abandonment should be at once tendered. If it is not certainly known, but from strong evidence is fully believed, and the assured suspends his option with a view to avail himself of some favorable contingency, this might turn the property on him at its full or supposed value. But such intent must be certainly and clearly proved, not inferred from slight circumstances, or from the probability that such would naturally be a motive with the assured for delaying an abandonment. Duncan *v.* Koch, 8 Fed. Cas. No. 4,136, Wall. Sr. 33.

25. Chesapeake Ins. Co. *v.* Stark, 6 Cranch (U. S.) 268, 3 L. ed. 220; Shepherd *v.* Henderson, 7 App. Cas. 49, 9 Ct. of Sess. Cas. 1; Currie *v.* Bombay Native Ins. Co., L. R. 3 P. C. 72, 39 L. J. P. C. 1, 22 L. T. Rep. N. S. 317, 6 Moore P. C. N. S. 302, 18 Wkly. Rep. 296, 17 Wkly. Rep. 740.

Abandonment held to be in time when made within the following periods after knowledge of loss: Seven days. Kemp *v.* Halliday, L. R. 1 Q. B. 520, 6 B. & S. 723, 12 Jur. N. S. 582, 35 L. J. Q. B. 156, 14 L. T. Rep. N. S. 762, 14 Wkly. Rep. 697, 118 E. C. L. 723. Ten days. Read *v.* Bonham, 3 B. & B. 147, 6 Moore C. P. 397, 23 Rev. Rep. 587, 7 E. C. L. 653. Three weeks. Murray *v.* Great Western Ins. Co., 72 Hun (N. Y.) 282, 25 N. Y. Suppl. 414 [*affirmed* in 147 N. Y. 711, 42 N. E. 724]; Gardner *v.* Columbian Ins. Co., 9 Fed. Cas. No. 5,225, 2 Cranch C. C. 550.

Abandonments held not to be in time when made within the following periods: Five days. Hunt *v.* Royal Exch. Assur. Co., 5 M. & S. 47, 17 Rev. Rep. 264. Twenty-two days. Aldridge *v.* Bell, 1 Stark. 498, 18 Rev. Rep. 814, 2 E. C. L. 190. Forty-five days. Smith *v.* Newburyport Mar. Ins. Co., 4 Mass. 668. Two months. Taber *v.* China Mut. Ins. Co., 131 Mass. 239; Martin *v.* Granger, 8 L. T. Rep. N. S. 796. Three months. Savage *v.* Pleasants, 5 Binn. (Pa.) 403, 6 Am. Dec. 424.

26. Standard Mar. Ins. Co. *v.* Nome Beach Lighterage, etc., Co., 133 Fed. 636, 67 C. C. A. 602.

27. Suydam *v.* Marine Ins. Co., 1 Johns. (N. Y.) 181, 3 Am. Dec. 307; Steinbach *v.* Columbian Ins. Co., 2 Cai. (N. Y.) 129 [*affirmed* in 2 Cai. Cas. 158]; Roget *v.* Thurston, 2 Johns. Cas. (N. Y.) 248. See also Earl *v.* Shaw, 1 Johns. Cas. (N. Y.) 313, 1 Am. Dec. 117.

28. Young *v.* Union Ins. Co., 24 Fed. 279.

other jurisdictions it seems that an abandonment is requisite immediately upon acquiring information of the loss.[29]

10. Relation Back. The abandonment when made relates back to the time of the loss,[30] and if effectual the title of the underwriters becomes vested as of that date and they are responsible for the reasonable expenses incurred by the master after that date in an attempt to save the vessel.[31] The captain or master continues the agent of the insured until abandonment,[32] but after abandonment the master and owner become the agents of the underwriters.[33]

11. Continuance. An abandonment duly made is considered as continuing, although the underwriter refuse to accept it.[34]

12. Nature of Insured's Information. The intelligence which authorizes the insured to abandon need not be direct or positive information.[35] The protest of the master,[36] a newspaper report,[37] the report of a pilot,[38] or a letter from an official or an agent[39] is sufficient. The information must be of such facts and circumstances as render it highly probable that a constructive total loss has occurred,[40] and facts sufficient to constitute a total loss must exist,[41] but the facts and the information need not be the same.[42]

13. Waiver. The underwriter may by his acts or conduct waive the requirement of an abandonment and become liable to pay a total loss without formal notice.[43]

Contra, Taber *v.* China Mut. Ins. Co., 131 Mass. 239.

29. Krumbhaar *v.* Marine Ins. Co., 1 Serg. & R. (Pa.) 281.

In case of capture the time for abandonment is enlarged. Brown *v.* Phœnix Ins. Co., 4 Binn. (Pa.) 445.

Pestilence excuses the insured from making an abandonment immediately after knowledge of the ship's loss. McCalmont *v.* Murgatroyd, 3 Yeates (Pa.) 27.

Some early English cases held immediate notice necessary but that is not the law in England now. Rankin *v.* Potter, L. R. 6 H. L. 83, 2 Aspin. 65, 42 L. J. C. P. 169, 29 L. T. Rep. N. S. 142, 22 Wkly. Rep. 1.

30. Graham *v.* Ledda, 17 La. Ann. 45; Clamageran *v.* Bank, 6 Mart. N. S. (La.) 551; Snow *v.* Union Mut. Mar. Ins. Co., 119 Mass. 592, 20 Am. Rep. 349; Sun Mut. Ins. Co. *v.* Hall, 104 Mass. 507; Smith *v.* Manufacturers' Ins. Co., 7 Metc. (Mass.) 448; Dickey *v.* American Ins. Co., 3 Wend. (N. Y.) 658, 20 Am. Dec. 763; Clarkson *v.* Phœnix Ins. Co., 9 Johns. (N. Y.) 1; Bradlie *v.* Maryland Ins. Co., 12 Pet. (U. S.) 378, 9 L. ed. 1123; Gilchrist *v.* Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43; The Manitoba, 30 Fed. 129; Dederer *v.* Delaware Ins. Co., 7 Fed. Cas. No. 3,733, 2 Wash. 61.

31. Gilchrist *v.* Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43.

The owners do not acquire a lien for salvage services rendered by them prior to abandonment in attempting to save the property. The Manitoba, 30 Fed. 129.

32. Dederer *v.* Delaware Ins. Co., 7 Fed. Cas. No. 3,733, 2 Wash. 61.

33. Lee *v.* Boardman, 3 Mass. 238, 3 Am. Dec. 134; Curcier *v.* Philadelphia Ins. Co., 5 Serg. & R. (Pa.) 113; Chesapeake Ins. Co. *v.* Stark, 6 Cranch (U. S.) 268, 3 L. ed. 220.

34. The Sarah Ann, 21 Fed. Cas. No. 12,342, 2 Sumn. 206.

A clause that "insured shall not abandon until 60 days after notice of his intention so to do" means that a notice of abandonment shall not, in point of law, be obligatory until expiration of sixty days. And a notice of abandonment constitutes a continuing notice and operates as an abandonment at end of sixty days. Columbian Ins. Co. *v.* Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 664.

35. Lovering *v.* Mercantile Mar. Ins. Co., 12 Pick. (Mass.) 348; McConochie *v.* Sun Mut. Ins. Co., 3 Bosw. (N. Y.) 99 [*reversed* on other grounds in 26 N. Y. 477]; Bainbridge *v.* Neilson, 1 Campb. 237, 10 East 329. 10 Rev. Rep. 316.

36. Lovering *v.* Mercantile Ins. Co., 12 Pick. (Mass.) 348.

37. Bosley *v.* Chesapeake Ins. Co., 3 Gill & J. (Md.) 450, 22 Am. Dec. 337.

38. Munson *v.* New England Mar. Ins. Co., 4 Mass. 88.

39. Lovering *v.* Mercantile Mar. Ins. Co., 12 Pick. (Mass.) 348.

40. McConochie *v.* Sun Mut. Ins. Co., 3 Bosw. (N. Y.) 99 [*reversed* on other grounds in 26 N. Y. 477]. See also Bosley *v.* Chesapeake Ins. Co., 3 Gill & J. (Md.) 450, 22 Am. Dec. 337.

41. Bosley *v.* Chesapeake Ins. Co., 3 Gill & J. (Md.) 450, 22 Am. Dec. 337; Child *v.* Sun Mut. Ins. Co., 2 Sandf. (N. Y.) 76; Radcliff *v.* Coster, Hoffm. (N. Y.) 98.

Proof of the facts constituting the grounds for abandonment need not be such as would be required to sustain an action, but only such as are usually produced to underwriters as preliminary proof of loss. Lovering *v.* Mercantile Mar. Ins. Co., 12 Pick. (Mass.) 348.

42. Radcliff *v.* Coster, Hoffm. (N. Y.) 98.

43. McLellan *v.* Maine F. & M. Ins. Co., 12 Mass. 246; Curcier *v.* Philadelphia Ins. Co., 5 Serg. & R. (Pa.) 113; Force *v.* Providence Washington Ins. Co., 35 Fed. 767.

14. Revocation — a. In General. There is a revocation of an abandonment where the insured retakes possession of the insured property and puts the same to his own use,[44] and it is immaterial whether he intends to revoke the abandonment by so doing.[45] There is no revocation where the insured or his agents continue in control of the property for the purpose of preserving it and acting for the best interests of all concerned.[46] Nor is a refusal to execute a conveyance of the property a revocation.[47]

b. Repurchase at Master's Sale. A repurchase by the original owner under a *bona fide* and justifiable sale by the master will revoke an abandonment made prior thereto.[48] And a purchase by the master at such sale accrues to the owner, provided he chooses to accept the benefit of such purchase, in which event it has the same effect as a direct purchase by him.[49]

15. Acceptance — a. In General. An acceptance of an abandonment estops the underwriter from relying upon any insufficiency in the form, time, or right of abandonment,[50] and is irrevocable without the assent of the insured.[51] It need not be in express words but may be shown by acts inconsistent with an intent not to accept.[52]

Waiver of delay.—Where the insured under a marine policy wrote the insurer, inquiring "whether we must make an abandonment by judicial act, or if our present letter, expressing an intent to abandon, will do?" it was held that the latter's answer, ignoring the informal tender, and denying any liability under the policy, excused a delay in making the formal tender. De Farconnet *v.* Western Ins. Co., 110 Fed. 405 [*affirmed* in 122 Fed. 448].

44. King *v.* Hartford Ins. Co., 1 Conn. 333; Smith *v.* Touro, 14 Mass. 112; Oliver *v.* Newburyport Ins. Co., 3 Mass. 37, 3 Am. Dec. 77; Sherlock *v.* Globe Ins. Co., 7 Ohio Dec. (Reprint) 17, 1 Cinc. L. Bul. 26; Columbian Ins. Co. *v.* Ashby, 4 Pet. (U. S.) 139, 7 L. ed. 809.

The redelivery of a captured vessel on bail to an agent appointed by the master is not a waiver of an abandonment. Lovering *v.* Mercantile Mar. Ins. Co., 12 Pick. (Mass.) 348.

An investment of a shipment of specie by the supercargo who is also part-owner does not affect an abandonment previously made by his coöwner who had only insured his individual interest. Catlett *v.* Pacific Ins. Co., 5 Fed. Cas. No. 2,517, 1 Paine 594.

An owner cannot abandon to a second underwriter after an abandonment to one covering the same interest and which has been accepted. Higginson *v.* Dall, 13 Mass. 96.

Acts of mortgagee.— An abandonment properly made cannot be subsequently forfeited by the acts of the mortgagee of the vessel without the assent of the assured. Fulton Ins. Co. *v.* Goodman, 32 Ala. 108.

45. Reynolds *v.* Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727.

46. King *v.* Hartford Ins. Co., 1 Conn. 333; Schmidt *v.* United Ins. Co., 1 Johns. (N. Y.) 249, 3 Am. Dec. 319; Abbott *v.* Broome, 1 Cai. (N. Y.) 292, 2 Am. Dec. 187; Driscoll *v.* Millville Mar. Ins. Co., 23 N. Brunsw. 160.

Sale by insured.— Where an insurer refused to accept an abandonment, and the insured sold the goods on account of the insurer, such sale was held to be no waiver of the abandonment. Fuller *v.* Kennebec Mut. Ins. Co., 31 Me. 325; Livingston *v.* Hastie, 3 Johns. Cas. (N. Y.) 293.

47. Hurtin *v.* Phœnix Ins. Co., 12 Fed. Cas. No. 6,941, 1 Wash. 400.

48. Robertson *v.* Western M. & F. Ins. Co., 19 La. 227, 36 Am. Dec. 673; Ogden *v.* New York F. Ins. Co., 10 Johns. (N. Y.) 177 [*affirmed* in 12 Johns. 25]; Robinson *v.* United Ins. Co., 1 Johns. (N. Y.) 592 [*affirming* 2 Cai. 280]. See also Vaughan *v.* Western M. & F. Ins. Co., 19 La. 276. *Contra*, King *v.* Middletown Ins. Co., 1 Conn. 184.

49. Sawyer *v.* Maine M. & F. Ins. Co., 12 Mass. 291; Jumel *v.* Marine Ins. Co., 7 Johns. (N. Y.) 412, 5 Am. Dec. 283; Church *v.* Marine Ins. Co., 5 Fed. Cas. No. 2,711, 1 Mason 341; McMasters *v.* Shoolbred, 1 Esp. 237, 5 Rev. Rep. 735.

50. *Illinois.*— Norton *v.* Lexington F., etc., Ins. Co., 16 Ill. 235.

Kentucky.— Cincinnati Ins. Co. *v.* Bakewell, 4 B. Mon. 541.

Michigan.— Richelieu, etc., Nav. Co. *v.* Thames, etc., Mar. Ins. Co., 72 Mich. 571, 40 N. W. 758.

New York.— Buffalo City Bank *v.* Northwestern Ins. Co., 30 N. Y. 251; Child *v.* Sun Mut. Ins. Co., 2 Sandf. 76.

United States.— Phœnix Ins. Co. *v.* Copelin, 9 Wall. 461, 19 L. ed. 739.

England.— Provincial Ins. Co. *v.* Leduc, L. R. 6 P. C. 224, 2 Aspin. 338, 43 L. J. P. C. 49, 31 L. T. Rep. N. S. 141, 22 Wkly. Rep. 929.

See 28 Cent. Dig. tit. "Insurance," § 1216.

Compare Kenny *v.* Halifax Mar. Ins. Co., 1 Nova Scotia 141.

51. Peele *v.* Merchants' Ins. Co., 19 Fed. Cas. No. 10,905, 3 Mason 27.

52. *Kentucky.*— Cincinnati Ins. Co. *v.* Bakewell, 4 B. Mon. 541.

Massachusetts.— Badger *v.* Ocean Ins. Co., 23 Pick. 347.

Michigan.— Northwestern Transp. Co. *v.* Thames, etc., Ins. Co., 59 Mich. 214, 26 N. W. 336.

United States.— Richelieu, etc., Nav. Co. *v.* Boston Mar. Ins. Co., 136 U. S. 408, 10 S. Ct.

b. Repair and Return of Vessel. The underwriter may, without accepting the abandonment, take the vessel and repair her and return her to the insured if the expense of such repairs is not sufficient to constitute a constructive total loss;[53] but if the expense exceeds such amount they cannot require the insured to retake the property.[54] The vessel, however, must be returned fully repaired[55] within a reasonable time,[56] in order to make it obligatory on the insured to accept its return. If, however, he does accept the return of the vessel and thereafter finds

934, 34 L. ed. 398; Soelberg *v.* Western Assur. Co., 119 Fed. 23, 55 C. C. A. 601; Northwestern Transp. Co. *v.* Continental Ins. Co., 24 Fed. 171.

England.— Provincial Ins. Co. *v.* Leduc, L. R. 6 P. C. 224, 2 Aspin. 338, 43 L. J. P. C. 49, 31 L. T. Rep. N. S. 141, 22 Wkly. Rep. 929; Smith *v.* Robertson, 2 Dow 474, 14 Rev. Rep. 174, 3 Eng. Reprint 936.

Canada.— O'Leary *v.* Pelican Ins. Co., 29 N. Brunsw. 510; Baker *v.* Brown, 3 Nova Scotia Dec. 100.

See 28 Cent. Dig. tit. "Insurance," § 1216.

A refusal to accept will not prevent the working of an acceptance where the underwriter's acts are inconsistent therewith. McLeod *v.* Insurance Co. of North America, 34 Nova Scotia 88.

Silence has been construed as an acceptance. Hudson *v.* Harrison, 3 B. & B. 97, 3 Moore C. P. 288, 23 Rev. Rep. 575, 7 E. C. L. 626. But see Provincial Ins. Co. *v.* Leduc, L. R. 6 P. C. 224, 2 Aspin. 338, 43 L. J. P. C. 49, 31 L. T. Rep. N. S. 141, 22 Wkly. Rep. 929.

Underwriters simply causing property to be preserved and removed from a place where there was no agent of the assured, no adequate means for its protection, and no market, to the place to which it was originally shipped, where there were conveniences for its protection and a good market, and there offering it to the representative of the assured, to whom it had been in the first instance consigned, do not thereby accept an abandonment, especially where the assured had no right to abandon. Washburn, etc., Mfg. Co. *v.* Reliance Mar. Ins. Co., 82 Fed. 296, 27 C. C. A. 134 [*affirmed* in 179 U. S. 1, 21 S. Ct. 1, 45 L. ed. 49].

Who can accept.— Where the act incorporating an insurance company provides that no losses shall be settled or paid without the approbation of at least four of the directors, with the president or assistants, or a plurality of them, the acceptance of an abandonment by the president and assistants alone will not be binding on the company. Beatty *v.* Marine Ins. Co., 2 Johns. (N. Y.) 109, 3 Am. Dec. 401.

53. Marmaud *v.* Melledge, 123 Mass. 173; Reynolds *v.* Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727, 1 Metc. 160; Commonwealth Ins. Co. *v.* Chase, 20 Pick. (Mass.) 142; Sewall *v.* U. S. Insurance Co., 11 Pick. (Mass.) 90; Hall *v.* Franklin Ins. Co., 9 Pick. (Mass.) 466; Peele *v.* Suffolk Ins. Co., 7 Pick. (Mass.) 254, 19 Am. Dec. 286; Wood *v.* Lincoln, etc., Ins. Co., 6 Mass. 479, 4 Am. Dec. 163; Griswold *v.* New York Ins. Co., 1 Johns. (N. Y.) 205, 3 Johns. 321, 3 Am. Dec. 490; Cincinnati Mut. Ins. Co. *v.* May, 20 Ohio 211; Northwestern Transp. Co. *v.* Continental Ins. Co., 24 Fed. 171.

The underwriters on freight are not liable for a constructive total loss where the vessel has been repaired and returned by the underwriters on the ship in time to earn the freight. Marmaud *v.* Melledge, 123 Mass. 173.

54. Jones *v.* Western Assur. Co., 198 Pa. St. 206, 47 Atl. 948.

Where the underwriter covenants to repair, although the loss exceeds one half the value of the vessel, and he does so repair, the assured cannot abandon. Ritchie *v.* U. S. Insurance Co., 5 Serg. & R. (Pa.) 501.

55. *Illinois.*— Norton *v.* Lexington F., etc., Ins. Co., 16 Ill. 235.

Massachusetts.— Marmaud *v.* Melledge, 123 Mass. 173; Reynolds *v.* Ocean Ins. Co., 22 Pick. 191, 33 Am. Dec. 727.

Missouri.— Copelin *v.* Phœnix Ins. Co., 46 Mo. 211, 2 Am. Rep. 504.

United States.— Copeland *v.* Phœnix Ins. Co., 6 Fed. Cas. No. 3,210, Woolw. 278 [*affirmed* in 9 Wall. 461, 19 L. ed. 739].

Canada.— McLeod *v.* Insurance Co. of North America, 30 Nova Scotia 480.

Insufficiency of repairs must be made basis of a refusal to accept.— If the insured at the time of the offer to restore makes no objection to the sufficiency of the repairs, he will be precluded from setting them up to invalidate the tender, but he may have an action therefor (Reynolds *v.* Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727), except where the deficiencies are obvious (Copeland *v.* Phœnix Ins. Co., 6 Fed. Cas. No. 3,210, Woolw. 278 [*affirmed* in 9 Wall. 461, 19 L. ed. 739]).

56. *Illinois.*— Norton *v.* Lexington F., etc., Ins. Co., 16 Ill. 235.

Massachusetts.— Marmaud *v.* Melledge, 123 Mass. 173; Reynolds *v.* Ocean Ins. Co., 22 Pick. 191, 33 Am. Dec. 727, 1 Metc. 160; Peele *v.* Suffolk Ins. Co., 7 Pick. 254, 12 Am. Dec. 286.

Missouri.— Copelin *v.* Phœnix Ins. Co., 46 Mo. 211, 2 Am. Rep. 504.

United States.— Phœnix Ins. Co. *v.* Copelin, 9 Wall. 461, 19 L. ed. 739; Young *v.* Union Ins. Co., 24 Fed. 279; Northwestern Transp. Co. *v.* Continental Ins. Co., 24 Fed. 171; Gloucester Ins. Co. *v.* Younger, 10 Fed. Cas. No. 5,487, 2 Curt. 322; Peele *v.* Merchants' Ins. Co., 19 Fed. Cas. No. 10,905, 3 Mason 27.

Canada.— McLeod *v.* Insurance Co. of North America, 30 Nova Scotia 480.

Nine months has been held an unreasonable time for making repairs. Young *v.* Union Ins. Co., 24 Fed. 279.

the repairs insufficient, he can recover from the underwriters the cost of additional repairs.[57]

16. Clauses Restricting Abandonment. A policy may contain clauses restricting or imposing conditions upon the right to abandon and claim a constructive total loss. Thus it may expressly stipulate that there shall be no abandonment as for a constructive total loss, unless the cost of repairs shall exceed the percentage of the agreed value required in the absence of such a stipulation,[58] or it may prohibit an abandonment until a certain time after the loss,[59] or, in the case of capture, require proof of condemnation or of continuance of the detention for a certain period,[60] or require official news in case of capture or embargo.[61]

17. Effect of Abandonment — a. In General. An abandonment of itself transfers to the underwriter the interests in the subject-matter covered by the policy,[62] subject to the rights and interests, if any, of third persons,[63] and no additional

57. Marmaud *v.* Melledge, 123 Mass. 173.

58. The words "constructive total loss," in a marine policy stipulating that there shall be no abandonment of the barge insured as for a constructive total loss unless the cost of the necessary repairs required by the disaster, exclusive of the cost of rescuing the barge and taking her to the dock, etc., be equivalent to seventy-five per cent of the agreed value, mean, when applied to damages by a storm, one of the perils insured against, to be such a loss as that the repairs made necessary thereby, exclusive of rescuing the vessel and taking her to the dock, will be equivalent to seventy-five per cent of her value. Searles *v.* Western Assur. Co., (Miss. 1906) 40 So. 866. Under such a clause, where to repair the damage caused solely by the storm would cost less than twenty-five per cent of the value of the vessel, the assured cannot abandon and recover for constructive total loss; and he cannot justify an abandonment of the vessel as for a constructive total loss by showing that there were no facilities at the place where the vessel was sunk for raising her and making the expense of bringing the vessel to a dock an element of damage, showing as to him that the vessel was worthless, so as to entitle him to abandon her and sue for a constructive total loss. Searles *v.* Western Assur. Co., *supra*. The assured is not compelled to make an effort to save the vessel before he can abandon and sue, but he must prove that the conditions warranting him in abandoning her existed. Searles *v.* Western Assur. Co., *supra*.

59. A clause restricting an abandonment until a certain period after a loss merely suspends the time when the right to abandon accrues. Clarkson *v.* Phœnix Ins. Co., 9 Johns. (N. Y.) 1.

60. For construction of clause restricting right to abandon for capture, etc., until proof is exhibited of condemnation, or of the continuance of the detention for a designated period see Barney *v.* Maryland Ins. Co., 5 Harr. & J. (Md.) 139; Reynolds *v.* Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Ogden *v.* Columbian Ins. Co., 10 Johns. (N. Y.) 273; Speyer *v.* New York Ins. Co., 3 Johns. (N. Y.) 88; De Peau *v.* Russel, 1 Brev. (S. C.) 441, 2 Am. Dec. 676.

61. "Official news." — An entry of the fact of an embargo in Lloyd's Loss Book is sufficient to satisfy the requirement that no abandonment should be made in case of capture or embargo until "official news" has been received. Fowler *v.* English, etc., Mar. Ins. Co., 18 C. B. N. S. 818, 11 Jur. N. S. 411, 34 L. J. C. P. 253, 12 L. T. Rep. N. S. 381, 13 Wkly. Rep. 658, 114 E. C. L. 818.

62. *Illinois.*— Norton *v.* Lexington F., etc., Ins. Co., 16 Ill. 235.

Kentucky.— Cincinnati Ins. Co. *v.* Bakewell, 4 B. Mon. 541.

Louisiana.— Graham *v.* Ledda, 17 La. Ann. 45; Hooper *v.* Whitney, 19 La. 267; Clamageran *v.* Banks, 6 Mart. N. S. 551; Mellon *v.* Bucks, 5 Mart. N. S. 371.

Maine.— Stephenson *v.* Piscataqua F. & M. Ins. Co., 54 Me. 55.

Massachusetts.— Badger *v.* Ocean Ins. Co., 23 Pick. 347; Peirce *v.* Ocean Ins. Co., 18 Pick. 83, 29 Am. Dec. 567.

Michigan.— Northwestern Transp. Co. *v.* Thames, etc., Ins. Co., 59 Mich. 214, 26 N. W. 336.

Missouri.— Gould *v.* Citizens' Ins. Co., 13 Mo. 524.

New York.— Union Ins. Co. *v.* Burrell, Anth. N. P. 176; Rogers *v.* Hosack, 18 Wend. 319; Robinson *v.* United Ins. Co., 1 Johns. 592; United Ins. Co. *v.* Lenox, 1 Johns. Cas. 377 [*affirmed* in 2 Johns. Cas. 443]; Atlantic Ins. Co. *v.* Storrow, 5 Paige 285; Atlantic Ins. Co. *v.* Storrow, 1 Edw. 621; Radcliff *v.* Coster, Hoffm. 98.

Ohio.— Evans *v.* Ingersol, 15 Ohio St. 292; Sherlock *v.* Globe Ins. Co., 7 Ohio Dec. (Reprint) 17, 1 Cinc. L. Bul. 26.

United States.— Chesapeake Ins. Co. *v.* Stark, 6 Cranch 268, 3 L. ed. 220; Gilchrist *v.* Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43; Murphy *v.* Dunham, 38 Fed. 503; Copeland *v.* Phœnix Ins. Co., 6 Fed. Cas. No. 3,210, 1 Woolw. 278; Hurtin *v.* Phœnix Ins. Co., 12 Fed. Cas. No. 6,941, 1 Wash. 400; The Mary E. Perew, 16 Fed. Cas. No. 9,207, 15 Blatchf. 58; Mutual Safety Ins. Co. *v.* The George, 17 Fed. Cas. No. 9,981, Olcott 89.

See 28 Cent. Dig. tit. "Insurance," § 1219 *et seq.*

63. United Ins. Co. *v.* Lenox, 1 Johns. Cas. (N. Y.) 377 [*affirmed* in 2 Johns. Cas. 443].

Effect of bottomry or respondentia bond.— The holder of a bottomry and respondentia

conveyance or transfer is required.[64] The underwriter acquires thereby the entire interest insured,[65] together with all its incidents,[66] including rights of action against third parties for the injury;[67] and the fact that the property was undervalued is immaterial.[68] Any interest of the owner which is not insured continues to remain his property and is not affected by the abandonment.[69]

b. Transfer of Agency and Liability For Expenses, Etc. From the moment of a valid abandonment the master of the vessel becomes the agent of the underwriters,[70] and the latter become responsible for all his acts in connection with the insured property[71] and liable for all expenses and charges incurred in regard thereto.[72]

c. Right of Underwriters to Freight. Freight earned or paid does not pass to the underwriter on a vessel under an abandonment;[73] but freight subsequently earned passes to such underwriter.[74] Freight pending is, under the American authorities, to be apportioned as of the time of the disaster causing the abandon-

bond, which was conditioned to be void should an utter loss from any of the enumerated perils occur, is, upon a wreck of the vessel during the specified voyage, not amounting to such loss, entitled to the proceeds of the cargo saved by his efforts, as against the insurers thereof, who accepted an abandonment by the owners as for a "total loss," and paid the amount of their policies, said proceeds being insufficient to satisfy the bond. Delaware Mut. Safety Ins. Co. *v.* Gassler, 96 U. S. 645, 24 L. ed. 863.

64. Rogers *v.* Hosack, 18 Wend. (N. Y.) 319; Radcliff *v.* Coster, Hoffm. (N. Y.) 98.

65. Phillips *v.* St. Louis Perpetual Ins. Co., 11 La. Ann. 459; Union Ins. Co. *v.* Burrell, Anth. N. P. (N. Y.) 176; Mason *v.* Marine Ins. Co., 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700; Stewart *v.* Greenock Mar. Ins. Co., 2 H. L. Cas. 159, 1 Macq. H. L. 382, 9 Eng. Reprint 1052.

66. Badger *v.* Ocean Ins. Co., 23 Pick. (Mass.) 347; Peirce *v.* Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; Mason *v.* Marine Ins. Co., 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700; Stewart *v.* Greenock Mar. Ins. Co., 2 H. L. Cas. 159, 1 Macq. H. L. 382, 9 Eng. Reprint 1052.

Recovery of property improperly sold by master.— Where a master of a vessel, acting in his capacity as master, and from an alleged necessity, sells a damaged ship, the owners may, against the vendee, show that there was no such necessity, and that therefore the property was not divested; and upon an abandonment the same right would pass to the insurers. Peirce *v.* Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567.

67. Mason *v.* Marine Ins. Co., 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700; White *v.* Dobinson, 14 Sim. 273, 37 Eng. Ch. 273, 60 Eng. Reprint 363.

68. Mason *v.* Marine Ins. Co., 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700.

69. *California.*— White *v.* The Mary Ann, 6 Cal. 462, 65 Am. Dec. 523.

Kentucky.— Cincinnati Ins. Co. *v.* Bakewell, 4 B. Mon. 541.

Massachusetts.—Rice *v.* Cobb, 9 Cush. 302.

Ohio.— Cincinnati Ins. Co. *v.* Duffield, 6 Ohio St. 200, 67 Am. Dec. 339; Merchants', etc., Ins. Co. *v.* Duffield, 2 Handy 122, 12 Ohio Dec. (Reprint) 361.

United States.— Gilchrist *v.* Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43.

See 28 Cent. Dig. tit. "Insurance," §§ 1219, 1221.

70. *Louisiana.*— Phillips *v.* St. Louis Perpetual Ins. Co., 11 La. Ann. 459.

Massachusetts.— Badger *v.* Ocean Ins. Co., 23 Pick. 347; Peirce *v.* Ocean Ins. Co., 18 Pick. 83, 29 Am. Dec. 567.

New York.— Gardere *v.* Columbian Ins. Co., 7 Johns. 514; Jumel *v.* Marine Ins. Co., 7 Johns. 412, 5 Am. Dec. 283.

South Carolina.— Mordecai *v.* Fireman's Ins. Co., 12 Rich. 512.

United States.— The Sarah Ann, 21 Fed. Cas. No. 12,342, 2 Sumn. 206 [*affirmed* in 13 Pet. 387, 10 L. ed. 213].

71. Hooper *v.* Whitney, 19 La. 267; Badger *v.* Ocean Ins. Co., 23 Pick. (Mass.) 347; Peirce *v.* Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; Smith *v.* Touro, 14 Mass. 112; May *v.* Delaware Ins. Co., 19 Pa. St. 312; The Natchez, 42 Fed. 169. *Compare* Teasdale *v.* Charleston Ins. Co., 2 Brev. (S. C.) 190, 3 Am. Dec. 705.

72. Frothingham *v.* Prince, 3 Mass. 563; Gilchrist *v.* Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43; Hammond *v.* Essex F. & M. Ins. Co., 11 Fed. Cas. No. 6,001, 4 Mason 196.

73. Buffalo City Bank *v.* Northwestern Ins. Co., 30 N. Y. 251; Marine Ins. Co. *v.* United Ins. Co., 9 Johns. (N. Y.) 186; Miller *v.* Woodfall, 8 E. & B. 493, 4 Jur. N. S. 302, 27 L. J. Q. B. 120, 92 E. C. L. 493; Barrs *v.* Merchants Mar. Ins. Co., 26 N. Brunsw. 339.

74. Buffalo City Bank *v.* Northwestern Ins. Co., 30 N. Y. 251; McBride *v.* Marine Ins. Co., 7 Johns. (N. Y.) 431; Hammond *v.* Essex F. & M. Ins. Co., 11 Fed. Cas. No. 6,001, 4 Mason 196; Hogan *v.* Manselly, 12 Fed. Cas. No. 6,584; The Red Sea, [1896] P. 20, 8 Aspin. 102, 65 L. J. Adm. 9, 73 L. T. Rep. N. S. 462, 44 Wkly. Rep. 306; Davidson *v.* Case, 2 B. & B. 379, 5 Moore C. P. 116, 8 Price 542, 17 Rev. Rep. 280, 6 E. C. L. 191 [*affirming* 5 M. & S. 79]; Miller *v.* Woodfall, 8 E. & B. 493, 4 Jur. N. S. 302, 27 L. J. Q. B. 120, 92 E. C. L. 493; Scottish Mar. Ins. Co. *v.* Turner, 17 Jur. 631, 1 Macq. H. L. 334, 1 Wkly. Rep. 537.

ment,[75] but under the English decisions all freight pending passes to the underwriters on the vessel.[76] An underwriter on freight becomes by an abandonment subrogated to the rights of the insured and takes such freight as has been earned,[77] but not freight thereafter earned by the vessel in the same or another voyage.[78]

X. NOTICE AND PROOFS OF LOSS, PAYMENT, ADJUSTMENT, AND SUBROGATION.

A. Preliminary Notice and Proofs of Loss — 1. FORM, ETC. Marine insurance policies usually provide that the loss thereunder shall be paid within a specified time "after proof thereof." This provision does not require that there shall be strict legal proof of a loss,[79] but only that there be the best evidence of the facts that the insured has at that time.[80] They should show the interest of the insured[81] and a loss from a peril insured against,[82] and these facts may be established by such evidence as the protest of the master,[83] the bill of lading,[84] the invoice,[85] the certificate of a ship carpenter,[86] or the register and affidavits.[87]

Where the master makes a special contract to receive a moiety of the freight in lieu of wages and procures insurance of his part of the freight, and abandons as for a total loss, and freight is subsequently earned, his abandonment does not operate as an assignment of the freight so subsequently earned, and he is entitled to recover his moiety of the same freight against the owners or abandoners who have received it. Hammond *v.* Essex F. & M. Ins. Co., 11 Fed. Cas. No. 6,001, 4 Mason 196.

75. Coolidge *v.* Gloucester Mar. Ins. Co., 15 Mass. 341; Hammond *v.* Essex F. & M. Ins. Co., 11 Fed. Cas. No. 6,001, 4 Mason 196.

76. Sea Ins. Co. *v.* Hadden, 13 Q. B. D. 706, 5 Aspin. 230, 53 L. J. Q. B. 252, 50 L. T. Rep. N. S. 657, 32 Wkly. Rep. 841; Case *v.* Davidson, 2 B. & B. 379, 5 Moore C. P. 116, 8 Price 542, 17 Rev. Rep. 280, 6 E. C. L. 191 [*affirming* 5 M. & S. 79]; Miller *v.* Woodfall, 8 E. & B. 493, 4 Jur. N. S. 302, 27 L. J. Q. B. 120, 92 E. C. L. 493; Stewart *v.* Greenock Mar. Ins. Co., 2 H. L. Cas. 159, 1 Macq. H. L. 382, 9 Eng. Reprint 1052; Hickie *v.* Rodocanachi, 4 H. & N. 455, 5 Jur. N. S. 550, 28 L. J. Exch. 273, 7 Wkly. Rep. 545.

77. Marine Ins. Co. *v.* United Ins. Co., 9 Johns. (N. Y.) 186; Hammond *v.* Essex F. & M. Ins. Co., 11 Fed. Cas. No. 6,001, 4 Mason 196.

78. Hammond *v.* Essex F. & M. Ins. Co., 11 Fed. Cas. No. 6,001, 4 Mason 196; Jordan *v.* Warren Ins. Co., 13 Fed. Cas. No. 7,524, 1 Story 342.

79. Savage *v.* Corn Exch. F., etc., Nav. Ins. Co., 4 Bosw. (N. Y.) 1 [*affirmed* in 36 N. Y. 655]; Child *v.* Sun Mut. Ins. Co., 3 Sandf. (N. Y.) 26; Barker *v.* Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; Talcot *v.* Marine Ins. Co., 2 Johns. (N. Y.) 130; Lenox *v.* United Ins. Co., 3 Johns. Cas. (N. Y.) 224.

Both of two owners need not join.— Where insurance is effected by one for the benefit of himself and the other owners, it is not a fatal objection to the sufficiency of the notice of loss that the other owners did not unite therein. Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427.

"Early notice of loss."— Notice of loss given three days after the docking of the vessel satisfies a requirement in the policy that "early notice of loss" be given. Rodee *v.* Detroit F. & M. Ins. Co., 74 Hun (N. Y.) 146, 26 N. Y. Suppl. 242.

80. Child *v.* Sun Mut. Ins. Co., 3 Sandf. (N. Y.) 26; Lawrence *v.* Ocean Ins. Co., 11 Johns. (N. Y.) 241 [*affirmed* in 14 Johns. 46]; Barker *v.* Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339.

81. See Talcot *v.* Marine Ins. Co., 2 Johns. (N. Y.) 130.

82. Lawrence *v.* Ocean Ins. Co., 11 Johns. (N. Y.) 241 [*affirmed* in 14 Johns. 46].

Where there is a claim against several companies for the same loss, it is not necessary for the claimants to apportion or attempt to apportion the loss among the different insurers in their preliminary proofs, although the policies require that the insured shall in case of loss furnish to the insurer a full and detailed statement of the loss and the amount claimed. Fuller *v.* Detroit F. & M. Ins. Co., 36 Fed. 469, 1 L. R. A. 801.

If policy contains "rotten" clause, production of survey is necessary.— Haff *v.* Marine Ins. Co., 4 Johns. (N. Y.) 132.

83. The proof to be exhibited in case of a partial loss is the protest, bill of lading, and invoice, or such equivalent proof as the nature of the loss admits of. Allegre *v.* Maryland Ins. Co., 6 Harr. & J. (Md.) 408, 14 Am. Dec. 289; Savage *v.* Corn Exch. F., etc., Nav. Ins. Co., 4 Bosw. (N. Y.) 1 [*affirmed* in 36 N. Y. 655]; Dimock *v.* New Brunswick Mar. Assur. Co., 6 N. Brunsw. 398.

84. Lenox *v.* United Ins. Co., 3 Johns. Cas. (N. Y.) 224.

85. Lenox *v.* United Ins. Co., 3 Johns. Cas. (N. Y.) 224.

86. Dimock *v.* New Brunswick Mar. Assur. Co., 6 N. Brunsw. 398.

87. Where the preliminary proofs under a policy on a whaling ship consisted of the ship's register, and an affidavit of one owner, who was also the managing agent in whose name it was insured, that it had sailed for home from the Sandwich Islands twenty months previous, and was last heard from

Under such provision the proofs of loss may be made by a managing agent or owner.[88]

2. CONDITION PRECEDENT AND WAIVER THEREOF. The submission of proofs of loss is a condition precedent to a recovery under the usual form of policy,[89] unless waived by the underwriter. There is a waiver of proofs of loss or any insufficiency in those given where the underwriter denies liability and refuses to pay without requesting additional proofs.[90]

B. Payment — 1. TO WHOM MADE. Payment should be made to the insured or his agent or representative,[91] but it may be made to a third party with the consent of the insured.[92] In England the underwriter may make payment to the broker effecting the policy and thereby become discharged, but there must be actual payment in cash and not merely an adjustment of credits.[93]

2. RECOVERY BACK. After payment the sum paid cannot be recovered back on the ground of mistake of law[94] or because of defenses to the policy then known by the underwriter.[95] But if the insured suppresses a material fact when the risk is taken the policy is void, and if the insurer pays the loss while still in ignorance of this fact he is entitled to recover the money paid.[96]

C. Adjustment — 1. AS CONDITION PRECEDENT. Clauses are sometimes inserted whereby it is provided that the loss shall become payable after adjustment, and under this clause an adjustment in the manner provided for in the policy is a condition precedent to an action to recover for such loss,[97] unless the underwriter by his conduct or otherwise waives such adjustment.[98]

2. BY WHOM MADE. An adjustment may be made by an authorized agent[99] of

fifteen months previous, when on her way, they were held sufficient. Child *v.* Sun Mut. Ins. Co., 3 Sandf. (N. Y.) 26.

88. Child *v.* Sun Mut. Ins. Co., 3 Sandf. (N. Y.) 26.

89. Driscoll *v.* Millville Mar. Ins. Co., 23 N. Brunsw. 160; Robertson *v.* New-Brunswick Mar. Ins. Co., 8 N. Brunsw. 333.

An action for a total and an average loss commenced before notice of average loss given will not permit of a recovery for the average loss. Bryant *v.* Commonwealth Ins. Co., 6 Pick. (Mass.) 131.

90. Martin *v.* Fishing Ins. Co., 20 Pick. (Mass.) 389, 32 Am. Dec. 220; Murray *v.* Great Western Ins. Co., 72 Hun (N. Y.) 282, 25 N. Y. Suppl. 414 [*affirmed* in 147 N. Y. 711, 42 N. E. 724]; Boice *v.* Thames, etc., Mar. Ins. Co., 38 Hun (N. Y.) 246; Palmer *v.* Great Western Ins. Co., 10 Misc. (N. Y.) 167, 30 N. Y. Suppl. 1044 [*affirmed* in 153 N. Y. 660, 48 N. E. 1106]; Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549; Vos *v.* Robinson, 9 Johns. (N. Y.) 192; Norwich, etc., Transp. Co. *v.* Western Massachusetts Ins. Co., 18 Fed. Cas. No. 10,363, 6 Blatchf. 241, 34 Conn. 561. See also Enterprise Ins. Co. *v.* Parisot, 35 Ohio St. 35, 35 Am. Rep. 589. *Compare* McManus *v.* Ætna Ins. Co., 11 N. Brunsw. 314.

91. Hermann *v.* Louisiana State Ins. Co., 7 La. 502.

A custom to pay at Lloyd's is not binding on one who had no knowledge of it. Ward *v.* Harris, L. R. 8 Ir. 365.

Property mortgaged.— A payment made to the insured is valid even though the property is mortgaged, where the insurance is not made expressly payable to the mortgagee. Sleeper *v.* Union Ins. Co., 65 Me. 385, 20 Am. Rep. 706.

92. Where money alleged to be payable under a policy is by consent of assurer and assured handed to a third person to hold as trustee for the person entitled, the person so entitled can recover from the stakeholder only and not from the original debtor. Ker *v.* Osborne, 9 East 378.

93. Hine *v.* Steamship Ins. Syndicate, 7 Aspin. 558, 72 L. T. Rep. N. S. 79, 11 Reports 777; Gibson *v.* Winter, 5 B. & Ad. 96, 2 N. & M. 737, 27 E. C. L. 50; Russell *v.* Bangley, 4 B. & Ald. 395, 6 E. C. L. 532; Macfarlane *v.* Giannacopulo, 3 H. & N. 860, 28 L. J. Exch. 72; Jell *v.* Pratt, 2 Stark. 67, 3 E. C. L. 319.

94. Bilbie *v.* Lumley, 2 East 469, 6 Rev. Rep. 479.

95. Reliance Mar. Ins. Co. *v.* Herbert, 3 N. Y. App. Div. 593, 38 N. Y. Suppl. 373.

96. Reliance Mar. Ins. Co. *v.* Herbert, 3 N. Y. App. Div. 593, 38 N. Y. Suppl. 373.

97. Tredwen *v.* Holman, 1 H. & C. 72, 8 Jur. N. S. 1080, 31 L. J. Exch. 398, 6 L. T. Rep. N. S. 127, 10 Wkly. Rep. 652; Gammon *v.* Beverley, 1 Moore C. P. 563. See also Wright *v.* Ward, 1 Aspin. 25, 24 L. T. Rep. N. S. 439, 20 Wkly. Rep. 21; Bank of British North America *v.* Western Assur. Co., 7 Ont. 166.

98. Columbian Ins. Co. *v.* Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 664; Strong *v.* Harvey, 3 Bing. 304, 4 L. J. C. P. O. S. 57, 11 Moore C. P. 72, 11 E. C. L. 153.

99. Lenox *v.* United Ins. Co., 3 Johns. Cas. (N. Y.) 224.

Delegation of authority to arbitrate.— Where a ship's husband, authorized to submit a disputed loss to arbitration, does so through his agent, the award cannot be set aside on the ground that he had no authority to delegate his authority, where he ratified the pro-

the underwriter, and an agent who has authority to sign a policy has authority to adjust a loss upon it.[1]

3. CONCLUSIVENESS. An adjustment of a loss once made cannot be opened except for fraud or mistake,[2] and the underwriters after making an adjustment cannot contest their liability under the policy[3] or for the amount at which the loss has been adjusted.[4]

D. Subrogation — 1. ON PAYMENT. By payment of a loss, total or partial,[5] the underwriter becomes, by operation of law and without an assignment or transfer,[6] subrogated to all the rights of the insured in regard to that loss,[7] and is entitled to the proceeds of the property insured[8] or any amount which may be paid on account of such loss,[9] including general average contributions[10] and amounts paid by sovereign states for injury to or confiscation of the property insured.[11] He becomes subrogated to all causes of action which the insured may have against any third person for producing such loss and may recover for injuries sustained in a collision.[12] But the underwriter stands in no better position than the insured and can have no recovery against third persons except such as could have been

ceedings by his conduct while the arbitrator had the case under consideration. Hamilton *v.* Phœnix Ins. Co., 106 Mass. 395.

1. Richardson *v.* Anderson, 1 Campb. 43 note, 10 Rev. Rep. 628 note. *Compare* Monroe *v.* British, etc., Ins. Co., 52 Fed. 777, 3 C. C. A. 280.

2. Dow *v.* Smith, 1 Cai. (N. Y.) 32; Christian *v.* Coombe, 2 Esp. 489; Rogers *v.* Maylor, Peake Add. Cas. 37.

3. Barlow *v.* Ocean Ins. Co., 4 Metc. (Mass.) 270; Reed *v.* McLaughlin, 13 N. Brunsw. 128. *Contra*, Shepherd *v.* Chewter, 1 Campb. 274, 10 Rev. Rep. 681; Herbert *v.* Champion, 1 Campb. 134, 10 Rev. Rep. 657.

Cannot contest interest.— Where, after a claim for total loss on a marine policy, all claims and demands under the policy were referred to an arbitrator, who awarded that the underwriters should pay claimant a total loss, the underwriters cannot show, in defense to an action on the award, that they did not by the agreement intend to admit for whose benefit the insurance was effected, or show that such question was not presented to the arbitrators. Richardson *v.* Suffolk Ins. Co., 3 Metc. (Mass.) 573.

4. Adams *v.* Saunders, 4 C. & P. 25, M. & M. 373, 19 E. C. L. 390; Hewett *v.* Flexney, Beaw. Lex Mer. 333.

5. The St. Johns, 101 Fed. 469; Pearse *v.* Quebec Steamship Co., 24 Fed. 285.

6. Phœnix Ins. Co. *v.* Erie, etc., Co., 117 U. S. 312, 6 S. Ct. 750, 29 L. ed. 873; The St. Johns, 101 Fed. 469; Grummond *v.* The Burlington, 73 Fed. 258.

7. Phœnix Ins. Co. *v.* Parsons, 129 N. Y. 86, 29 N. E. 87; Atlantic Ins. Co. *v.* Storrow, 5 Paige (N. Y.) 285 [*modifying* 1 Edw. 621]; The Sydney, 27 Fed. 119; The Liberty No. 4, 7 Fed. 226; Hogan *v.* Manselly, 12 Fed. Cas. No. 6,584; Kaltenbach *v.* Mackenzie, 3 C. P. D. 467, 4 Aspin. 39, 48 L. J. C. P. 9, 39 L. T. Rep. N. S. 215, 26 Wkly. Rep. 844; Houstman *v.* Thornton, Holt N. P. 242, 17 Rev. Rep. 632, 3 E. C. L. 102; Randal *v.* Cochran, 1 Ves. 98, 27 Eng. Reprint 916.

The fact that the underwriter might have successfully resisted payment under the policy does not affect his right to subrogation upon payment of the loss. Nord-Deutscher Lloyd *v.* Insurance Co. of North America, 110 Fed. 420, 49 C. C. A. 1.

8. Taylor *v.* Insurance Co. of North America, 6 Fed. 410.

9. Hardman *v.* Brett, 37 Fed. 803, 2 L. R. A. 173; New England Mut. Mar. Ins. Co. *v.* Dunham, 18 Fed. Cas. No. 10,155, 3 Cliff. 332, 371 [*affirming* 8 Fed. Cas. No. 4,152, 1 Lowell 253].

Partial insurance.— Where an owner who is but partially insured, after receiving full payment to the extent of the insurance from the underwriters, recovers from a third party for the damage done to the insured property he is liable to the underwriter for its proportionate share of the amount so recovered. Egan *v.* British, etc., Mar. Ins. Co., 88 Ill. App. 552 [*affirmed* in 193 Ill. 295, 61 N. E. 1081, 86 Am. St. Rep. 342].

10. International Nav. Co. *v.* Atlantic Mut. Ins. Co., 100 Fed. 304.

11. Rogers *v.* Hosack, 18 Wend. (N. Y.) 319; Radcliff *v.* Coster, Hoffm. (N. Y.) 98; Shaw *v.* U. S., 8 Ct. Cl. 488; King *v.* Victoria Ins. Co., [1896] A. C. 250, 65 L. J. P. C. 38, 74 L. T. Rep. N. S. 206, 44 Wkly. Rep. 592; Burnand *v.* Rodocanachi, 7 App. Cas. 333, 4 Aspin. 576, 51 L. J. Q. B. 548, 47 L. T. Rep. N. S. 277, 31 Wkly. Rep. 65; Blaauwpot *v.* Da Costa, 1 Eden 130, 28 Eng. Reprint 633.

12. Egan *v.* British, etc., Mar. Ins. Co., 193 Ill. 295, 61 N. E. 1081, 86 Am. St. Rep. 342 [*affirming* 88 Ill. App. 552]; Home Ins. Co. *v.* Western Transp. Co., 33 How. Pr. (N. Y.) 102 [*affirmed* in 51 N. Y. 93]; Atlantic Ins. Co. *v.* Storrow, 5 Paige (N. Y.) 285 [*modifying* 1 Edw. 621]; The St. Johns, 101 Fed. 469; The Queen, 78 Fed. 155; *In re* Harris, 57 Fed. 243, 6 C. C. A. 320; Pearse *v.* Quebec Steamship Co., 24 Fed. 285; The Frank G. Fowler, 8 Fed. 360; The Liberty No. 4, 7 Fed. 226.

The master of a vessel is liable to an insurer, who has paid a loss on the cargo, for his negligence in navigation by which the loss was occasioned. Union Ins. Co. *v.* Dexter, 52 Fed. 152.

had by the insured.[13] The underwriter is only entitled by subrogation to full indemnity for the amount paid to the insured, and should he recover against a third party a greater sum than that paid to the insured he is bound to reimburse the insured therefor.[14]

2. On Compromise. If the underwriter instead of making payment of the loss sustained compromises such loss with the insured he takes nothing by subrogation.[15]

XI. Reinsurance.[16]

A. Definition and Nature of Contract. Reinsurance is a contract whereby the insured procures from other underwriters a total or partial indemnity for loss or damage to the property which he has insured, and from one or more of the perils he has insured against.[17] The contract is totally distinct from and unconnected with the original insurance.[18]

B. Insurable Interest and Legality. Every insurer has an insurable interest in the property he has insured,[19] but such interest exists only during the period covered by the original insurance[20] and only as against the risks therein assumed.[21] Contracts of reinsurance are valid, although there was formerly in England a statutory provision against them.[22] They may be effected under an open policy.[23]

C. Construction — 1. In General. A contract for the reinsurance of marine risks is governed by the same rules of construction, law, and usages as apply to

A sum recovered by the mortgagee for conversion of the vessel passes by subrogation to the underwriters who have paid for a total loss. Mercantile Mar. Ins. Co. *v.* Clark, 118 Mass. 288.

13. The Livingstone, 104 Fed. 918; The Catskill, 95 Fed. 700; Simson *v.* Thomson, 3 App. Cas. 279, 3 Aspin. 567, 38 L. T. Rep. N. S. 1.

14. The Livingstone, 130 Fed. 746, 65 C. C. A. 610; The St. Johns, 101 Fed. 469. *Compare* Craig *v.* Murgatroyd, 4 Yeates (Pa.) 161. *Contra,* North of England Iron Steamship Ins. Assoc. *v.* Armstrong, L. R. 5 Q. B. 244, 39 L. J. Q. B. 81, 21 L. T. Rep. N. S. 822, 18 Wkly. Rep. 520.

15. New York Ins. Co. *v.* Roulet, 24 Wend. (N. Y.) 505 [*affirming* 7 Paige 560]; Blaauwpot *v.* Da Costa, 1 Eden 130, 28 Eng. Reprint 633; Brooks *v.* MacDonnell, 1 Y. & C. Exch. 502.

Partial payment on account.— Goods insured upon a valid policy having been seized, confiscated, and sold by order of the enemy's government on their own account, but the necessary documents to verify the loss not having arrived in England, the underwriters, on application to pay their subscriptions, agreed to adjust and pay immediately £50 per cent on account, but no abandonment was made by the assured, and in the meantime the foreign consignees of the goods, in consequence of remonstrances to the enemy's government, obtained a restoration of half the proceeds of the goods which had been so seized and sold, which half amounted to more than the whole sum at which they were valued in the policy, it was held that the underwriters were not entitled to recover back the £50 per cent they had paid on account; the assured having in fact sustained a loss of half his goods, for which he was no more than indemnified by the £50 per cent he had received; and there having been no abandonment to the underwriters; and the superior value of the proceeds arising from the benefit of the market, in which the underwriters had no concern. Tunno *v.* Edwards, 12 East 488, 11 Rev. Rep. 458.

16. See also Fire Insurance, 19 Cyc. 638; Life Insurance, 25 Cyc. 781.

17. Delver *v.* Barnes, 1 Taunt. 48, 9 Rev. Rep. 707.

18. Pennsylvania Ins. Co. *v.* Telfair, 45 N. Y. App. Div. 564, 61 N. Y. Suppl. 322; Hastie *v.* De Peyster, 3 Cai. (N. Y.) 190.

19. New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 359; Philadelphia Ins. Co. *v.* Washington Ins. Co., 23 Pa. St. 250; Delaware Ins. Co. *v.* Quaker City Ins. Co., 3 Grant (Pa.) 71.

Policy need not be expressed to be a reinsurance.— Mackenzie *v.* Whitworth, 1 Ex. D. 36, 2 Aspin. 490, 45 L. J. Exch. 233, 33 L. T. Rep. N. S. 655, 24 Wkly. Rep. 287.

20. Delver *v.* Barnes, 1 Taunt. 48, 9 Rev. Rep. 707.

21. Alliance Mar. Assur. Co. *v.* Louisiana State Ins. Co., 8 La. 1, 28 Am. Dec. 117; Philadelphia Ins. Co. *v.* Washington Ins. Co., 23 Pa. St. 250.

22. Merry *v.* Prince, 2 Mass. 176; New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 359; New York State Mar. Ins. Co. *v.* Protection Ins. Co., 18 Fed. Cas. No. 10,216, 1 Story 458; Delver *v.* Barnes, 1 Taunt. 48, 9 Rev. Rep. 707; Andree *v.* Fletcher, 2 T. R. 161, 3 T. R. 266, 1 Rev. Rep. 701. See 19 Geo. II, c. 37; 30 & 31 Vict. c. 23, § 3.

23. Boston Ins. Co. *v.* Globe F. Ins. Co., 174 Mass. 229, 54 N. E. 543, 75 Am. St. Rep. 303; Gledstanes *v.* Royal Exch. Ins. Corp.,

original marine insurance,[24] even though the reinsurance is against the risk of loss by fire only and is contained in an ordinary fire policy.[25]

2. "To Pay as May Be Paid Thereon." Marine insurance policies usually contain a clause providing that the insurer will "pay as may be paid thereon." The purpose of this clause is to place the reinsurers in the same position as the original insurer,[26] but it does not create any liability beyond that of the original

5 B. & S. 797, 11 Jur. N. S. 108, 34 L. J. Q. B. 30, 11 L. T. Rep. N. S. 305, 13 Wkly. Rep. 71, 117 E. C. L. 797.

An open reinsurance policy attaches *ex proprio vigore* to the risks as they are assumed by the reinsured. Boston Ins. Co. *v.* Globe F. Ins. Co., 174 Mass. 229, 54 N. E. 543, 75 Am. St. Rep. 303.

24. Boston Ins. Co. *v.* Globe F. Ins. Co., 174 Mass. 229, 54 N. E. 543, 75 Am. St. Rep. 303; New York State Mar. Ins. Co. *v.* Protection Ins. Co., 18 Fed. Cas. No. 10,216, 1 Story 458; Canada F. & M. Ins. Co. *v.* Western Assur. Co., 5 Ont. App. 244; General Mar. Ins. Co. *v.* Ocean Mar. Ins. Co., 16 Quebec Super. Ct. 170.

The duty of disclosing all material facts does not differ in cases of reinsurance from such duty in the case of an original insurance. Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 1 S. Ct. 582, 27 L. ed. 337; Mackenzie *v.* Whitworth, 1 Ex. D. 36, 2 Aspin. 490, 45 L. J. Exch. 233, 33 L. T. Rep. N. S. 655, 24 Wkly. Rep. 287.

Usage binding on reinsurers see *supra*, IV, B, 1, c, note 85.

Interest of reinsurer need not be specified see *supra*, IV, B, 3, a, text and note 13.

English Stamp Act.— Reinsurance of marine risks is marine insurance within the meaning of the English Stamp Act of 1891. Home Mar. Ins. Co. *v.* Smith, [1898] 2 Q. B. 351, 8 Aspin. 408, 67 L. J. Q. B. 777, 78 L. T. Rep. N. S. 734, 46 Wkly. Rep. 661; Charlesworth *v.* Faber, 5 Com. Cas. 408.

Reinsurance policy covers only risks under policies at the time the reinsurance is effected unless a different intent is clearly shown by the terms of the policy. Commonwealth Ins. Co. *v.* Globe Mut. Ins. Co., 35 Pa. St. 475; Lower Rhine, etc., Ins. Assoc. *v.* Sedgwick, [1899] 1 Q. B. 179, 8 Aspin. 466, 68 L. J. Q. B. 186, 80 L. T. Rep. N. S. 6, 47 Wkly. Rep. 261.

Partial reinsurance.— An indorsement on a policy of reinsurance provided that the reinsurance should be "to the extent of one-half the amount of each and every risk which equals or exceeds in value the sum of $15,000" on cargoes insured by the reassured under certain open policies, and "on cargoes of the value of $50,000 and upwards, this policy is to cover the excess of $25,000, not exceeding the sum of $50,000 on any one cargo." The open policies issued by the reassured provided that the assured should "enter for insurance all goods at the full value thereof." It was held that in fixing the liability of the reassurer the word "risk," as used in the indorsement, referred to the value of the property as indorsed on the open policies, rather than the value of the property as adjusted after a loss. Continental Ins. Co. *v.* Ætna Ins. Co., 138 N. Y. 16, 33 N. E. 724. Plaintiffs, having risks on the ship Great Republic, her cargo and freight, made written application to defendant, as follows: "Re-insurance is wanted by the Mercantile Mutual Insurance Company for $ —— on cargo, on board of the ship Great Republic, at and from New York to Liverpool, on the excess of insurance which plaintiffs may have over $50,000, not exceeding $15,000." Defendants agreed to make the insurance as applied for. It was held that the policy attached to any excess over fifty thousand dollars which plaintiffs had at risk on the cargo alone, and not on vessel, freight, and cargo, and, plaintiffs' risk on the cargo alone at no time amounting to said sum, judgment was for defendants. Mercantile Mut. Ins. Co. *v.* State Mut. F. & M. Ins. Co., 25 Barb. (N. Y.) 319.

Original risk covered by two policies.— By a policy a vessel was insured from Bombay to Calcutta, and for thirty days after she had been moored at the latter place. She had arrived there ten days before such policy was effected, and on receiving news of her arrival, her owners effected a second policy on her with the same insurers, by which she was insured at and from Calcutta to Bombay. The vessel was totally lost at Calcutta during the continuance of the risk under both policies, and the insurers having paid the owners as for a total loss upon the second policy sought to recover the full amount upon a policy of reinsurance which they had effected of the risk under the second policy, without deducting the money payable upon the first policy. The court was of opinion that the second policy was intended as a substitution for the first, and that the original insurers were liable only on the second policy, and were therefore entitled to recover the full amount on the policy of reinsurance. Union Mar. Ins. Co. *v.* Martin, 35 L. J. C. P. 181.

25. Boston Ins. Co. *v.* Globe F. Ins. Co., 174 Mass. 229, 54 N. E. 543, 75 Am. St. Rep. 303; Imperial Mar. Ins. Co. *v.* Fire Ins. Corp., 4 C. P. D. 166, 4 Aspin. 71, 48 L. J. C. P. 424, 40 L. T. Rep. N. S. 166, 27 Wkly. Rep. 680.

26. Commonwealth Ins. Co. *v.* Globe Mut. Ins. Co., 35 Pa. St. 475; *In re* Eddystone Mar. Ins. Co., [1892] 2 Ch. 423, 7 Aspin. 167, 61 L. J. Ch. 362, 66 L. T. Rep. N. S. 370, 40 Wkly. Rep. 441.

"Subject to the same clauses and conditions" as original policy incorporates into the reinsurance policy each and every clause of the original. Charlesworth *v.* Faber, 5 Com. Cas. 408.

insurers[27] or make payment on the original policy a condition precedent to a recovery from the reinsurers.[28]

D. Extent of Loss and Liability of Reinsurers — 1. In General. The reinsurer is liable to the same extent as the original insurer for all losses from perils which he has assumed.[29]

2. Abandonment and Total Loss. The law of abandonment in marine insurance does not apply to a contract of reinsurance as between the insurer and the reinsurer;[30] but under a reinsurance the first insurer cannot recover from the reinsurers as for a total loss for what might have been a constructive total loss had the insured duly abandoned to the original insurer.[31]

E. Subrogation. Reinsurers upon payment of a loss acquire the same rights by subrogation as are acquired in similar cases where the original insurer pays a loss.[32]

F. Actions — 1. In General. Actions upon contracts of reinsurance on marine risks are governed by the same rules that apply to actions on the original insurance.[33]

2. Defenses. The reinsured can avail himself of any defenses which were open to the original insurer, and although the original underwriter pays a loss which he could have successfully defended, whether because of lack of interest, fraud, concealment, deviation, or breach of warranty, the reinsurer is entitled to defend an action by the original insurer upon those grounds.[34]

3. Evidence. In actions upon policies of reinsurance the same proof is required from plaintiff as is required in actions upon an original contract of marine insurance.[35]

27. Marten *v.* Steamship Owners' Underwriting Assoc., 9 Aspin. 339, 7 Com. Cas. 195, 71 L. K. B. 718, 87 L. T. Rep. N. S. 208, 50 Wkly. Rep. 587; Chippendale *v.* Holt, 8 Aspin. 78, 65 L. J. Q. B. 104, 73 L. T. Rep. N. S. 472, 44 Wkly. Rep. 128.

28. *In re* Eddystone Mar. Ins. Co., [1892] 2 Ch. 423, 7 Aspin. 167, 61 L. J. Ch. 362, 66 L. T. Rep. N. S. 370, 40 Wkly. Rep. 441.

29. Ocean Steamship Co. *v.* Ætna Ins. Co., 121 Fed. 882; Western Assur. Co. *v.* Baden Mar. Assur. Co., 22 Quebec Super. Ct. 374.

Costs bona fide incurred in defending the suit by the original assured are chargeable against the reinsurer where he has been given notice of such suit and is liable for the loss which was the subject of the suit. Hastie *v.* De Peyster, 3 Cai. (N. Y.) 190. And see New York State Mar. Ins. Co. *v.* Protection Ins. Co., 18 Fed. Cas. No. 10,216, 1 Story 458.

Where the insurer pays for a total loss after an abandonment the reinsurer is not obliged to pay for a total loss where the loss was not in fact constructively total. Chippendale *v.* Holt, 8 Aspin. 78, 65 L. J. Q. B. 104, 73 L. T. Rep. N. S. 472, 44 Wkly. Rep. 128. See also Marten *v.* Steamship Owners' Underwriting Assoc., 9 Aspin. 339, 7 Com. Cas. 195, 71 L. J. K. B. 718, 87 L. T. Rep. N. S. 208, 50 Wkly. Rep. 587.

The sue and labor clause in the original policy operates to bind each successive underwriter, where there is a chain of reinsurance policies, to make good the expenses which may have been incurred for his benefit. Western Assur. Co. *v.* Poole, [1903] 1 K. B. 376, 9 Aspin. 390, 8 Com. Cas. 108, 72 L. J. K. B. 195, 88 L. T. Rep. N. S. 362.

30. Hastie *v.* De Peyster, 3 Cai. (N. Y.) 190; Western Assur. Co. *v.* Poole, [1903] 1 K. B. 376, 9 Aspin. 390, 8 Com. Cas. 108, 72 L. J. K. B. 195, 88 L. T. Rep. N. S. 362.

31. Western Assur. Co. *v.* Poole, [1903] 1 K. B. 376, 9 Aspin. 390, 8 Com. Cas. 108, 72 L. J. K. B. 195, 88 L. T. Rep. N. S. 362; Phœnix Ins. Co. *v.* Anchor Ins. Co., 4 Ont. 524.

32. The Ocean Wave, 18 Fed. Cas. No. 10,417, 5 Biss. 378. See Delaware Ins. Co. *v.* Quaker City Ins. Co., 3 Grant (Pa.) 71. And see *supra*, X, D.

33. See *infra*, XII.

34. *New York.*— Hastie *v.* De Peyster, 3 Cai. 190.

Pennsylvania. — Delaware Ins. Co. *v.* Quaker City Ins Co., 3 Grant 71.

United States.— New York State Mar. Ins. Co. *v.* Protection Ins. Co., 18 Fed. Cas. No. 10,216, 1 Story 458.

England.— Maritime Ins. Co. *v.* Stearns, [1901] 2 K. B. 912, 6 Com. Cas. 182, 71 L. J. K. B. 86, 50 Wkly. Rep. 283; China Traders' Ind. Co. *v.* Royal Exch. Assur. Corp., [1898] 2 Q. B. 187, 8 Aspin. 409, 67 L. J. Q. B. 736, 78 L. T. Rep. N. S. 783, 46 Wkly. Rep. 497; Marten *v.* Steamship Owners' Underwriting Assoc., 9 Aspin. 339, 7 Com. Cas. 195, 71 L. J. K. B. 718, 87 L. T. Rep. N. S. 208, 50 Wkly. Rep. 587.

Canada.— Phœnix Ins. Co. *v.* Anchor Ins. Co., 4 Ont. 524.

35. Pennsylvania Ins. Co. *v.* Telfair, 45 N. Y. App. Div. 564, 61 N. Y. Suppl. 322; Hastie *v.* De Peyster, 3 Cai. (N. Y.) 190. See *infra*, XII, F.

The reinsurer is entitled to require the reinsured to show that a loss of the kind

XII. ACTIONS.

A. Jurisdiction and Form of Action — **1. In Admiralty.** As a contract of marine insurance is a maritime contract, courts of admiralty have jurisdiction of actions thereon,[36] and of actions to recover premiums due thereunder.[37] But a court of admiralty has no jurisdiction to reform a policy of marine insurance,[38] or to enforce specific performance of an agreement to insure.[39] The remedy in admiralty on a policy of marine insurance is by a libel *in personam* and is governed by the general rules applicable to such remedy on other causes of action.[40]

2. At Law. Although a contract of marine insurance is within the jurisdiction of courts of admiralty, their jurisdiction is not exclusive, but the common-law courts have concurrent jurisdiction of actions thereon.[41] An action at law will lie on a contract of insurance created by the acceptance of an application and issue of a binding slip or the like, although a policy was to be subsequently issued,[42] or on a parol agreement to insure.[43] Assumpsit will lie if the contract is not under seal;[44] but it will not lie on a contract under seal, unless a new parol agreement and consideration are averred, or unless the common-law rule in this

reinsured has in fact happened; that the reinsured has taken all necessary steps to have it fairly and carefully ascertained. That is all. He can upset the settlement between the original insurer and the underwriter only on the ground that it is dishonest or has been arrived at carelessly. An honest mistake will not afford excuse for not paying. Western Assur. Co. *v.* Poole, [1903] 1 K. B. 376, 9 Aspin. 390, 8 Com. Cas. 108, 72 L. J. K. B. 195, 88 L. T. Rep. N. S. 362.

It will not be presumed that the reinsurance policy covers the same risks as the original policy. Pennsylvania Ins. Co. *v.* Telfair, 45 N. Y. App. Div. 564, 61 N. Y. Suppl. 322.

Proof of a judgment recovered against the insured company on its policy is sufficient proof of a loss in an action against the reinsurers. Ocean Ins. Co. *v.* Sun Mut. Ins. Co., 18 Fed. Cas. No. 10,408, 15 Blatchf. 249.

36. New England Mar. Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90; North German F. Ins. Co. *v.* Adams, 142 Fed. 439, 73 C. C. A. 555; Kerr *v.* Union Mar. Ins. Co., 124 Fed. 835 (holding that action lies on contract created by acceptance of application and issue of a binding slip); Andrews *v.* Essex F. & M. Ins. Co., 1 Fed. Cas. No. 374, 3 Mason 6; De Lovio *v.* Boit, 7 Fed. Cas. No. 3,776, 2 Gall. 398; Gloucester Ins. Co. *v.* Younger, 10 Fed. Cas. No. 5,487, 2 Curt. 322, 1 Sprague 236; Hale *v.* Washington Ins. Co., 11 Fed. Cas. No. 5,916, 2 Story 176. See, generally, Admiralty, 1 Cyc. 825 *et seq.*

Insurance against fire.— A policy of insurance on a vessel engaged in navigation, although it insures her against fire risks alone, is a maritime contract because of its subject-matter, and an action *in personam* to enforce payment thereof is within the jurisdiction of a court of admiralty. North German F. Ins. Co. *v.* Adams, 142 Fed. 439, 73 C. C. A. 555. *Compare supra*, I, note 1.

37. The Guiding Star, 9 Fed. 521 [*affirmed* in 18 Fed. 263].

38. Williams *v.* Providence Washington Ins. Co., 56 Fed. 159 (holding therefore that a suit brought upon a contract of marine insurance, where the loss accrued outside of the express limits of the policy and the libel was based upon alleged false and fraudulent negotiations leading up to the making of the policy, was not within the jurisdiction of a court of admiralty); Andrews *v.* Essex F. & M. Ins. Co., 1 Fed. Cas. No. 374, 3 Mason 6. See Admiralty, 1 Cyc. 824.

39. Andrews *v.* Essex F. & M. Ins. Co., 1 Fed. Cas. No. 374, 3 Mason 6. See Admiralty, 1 Cyc. 824.

A contract to procure insurance is not a maritime contract enforceable in admiralty. Marquardt *v.* French, 53 Fed. 603.

40. New England Mut. Mar. Ins. Co. *v.* Dunham, 18 Fed. Cas. No. 10,155, 3 Cliff. 332, 371; and other cases cited *supra*, note 36. See, generally, Admiralty, 1 Cyc. 846 *et seq.*

41. New England Mar. Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90; De Lovio *v.* Boit, 7 Fed. Cas. No. 3,776, 2 Gall. 398; New England Mut. Mar. Ins. Co. *v.* Dunham, 18 Fed. Cas. No. 10,155, 3 Cliff. 332, 371. And see Albany City Ins. Co. *v.* Whitney, 70 Pa. St. 248. See also Admiralty, 1 Cyc. 811.

The common-law remedies when applied to a policy of marine insurance were found to be so inadequate and clumsy that disputes arising out of the contract were generally left to arbitration until the year A. D. 1601 when the statute of 43 Elizabeth was passed creating a special court or commission for the hearing and determining of causes arising on policies of insurance. New England Mar. Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90.

42. Scammell *v.* China Mut. Ins. Co., 164 Mass. 341, 41 N. E. 649, 49 Am. St. Rep. 462; Kerr *v.* Union Mar. Ins. Co., 124 Fed. 835.

43. Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 31 Ala. 711.

44. Firemen's Ins. Co. *v.* Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398; Luciani *v.* American F. Ins. Co., 2 Whart. (Pa.) 167; Mead *v.* Davidson, 3 A. & E. 303, 1 Harr. & W. 156, 4 L. J. K. B. 193, 4 N. & M. 701,

respect has been changed by statute.[45] Where the contract is under seal, debt[46] or covenant[47] will lie in proper cases to recover the amount due for a loss; and debt will also lie in a proper case where the contract is not under seal.[48] If a policy has been executed and become binding, and the company refuses to deliver it after learning of a loss, trover may be maintained.[49]

3. In Equity. An action on a contract of marine insurance, other than in admiralty,[50] must be at law and not in equity, unless there are special grounds of equitable jurisdiction.[51] A court of equity, however, has jurisdiction to enforce specific performance of an oral agreement to make a policy of insurance,[52] and the court, having jurisdiction for this purpose, may also give a decree for the amount due after a loss.[53] A court of equity of course is the proper forum in which to sue for reformation of a policy of marine insurance.[54]

4. Action to Recover Premiums. A court of law will take jurisdiction of an action to recover premiums paid, notwithstanding plaintiff is only an equitable assignee.[55]

5. Contractual Provisions. Clauses providing for the arbitration of differences arising between the parties in regard to losses under the policy are generally held not to oust the courts of their jurisdiction,[56] and a provision in the policy restricting the maintenance of an action to a special foreign court has been held to be invalid.[57]

B. Time of Bringing Suit — 1. Statutory Limitations. The statutory limitations as to the time within which actions on contract must be instituted are in general applicable to contracts of marine insurance.[58]

30 E. C. L. 153. See, generally, Assumpsit, Action of, 4 Cyc. 317.

45. Alexandria Mar. Ins. Co. *v.* Young, 1 Cranch (U. S.) 331, 2 L. ed. 126. See also Firemen's Ins. Co. *v.* Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398; and, generally, Assumpsit, Action of, 4 Cyc. 323.

Where the corporate seal of the insurer is affixed, not for the purpose of making the policy a specialty, but merely as the mode of executing a corporate contract, it seems that the contract may be treated as a simple contract and assumpsit maintained thereon. See Roper *v.* English, etc., Mar. Ins. Co., 1 Arn. Ins. 157 note. *Compare*, however, Corporations, 10 Cyc. 1338.

46. See Franklin F. Ins. Co. *v.* Massey, 33 Pa. St. 221; and Debt, Action of, 13 Cyc. 409.

47. Alexandria Mar. Ins. Co. *v.* Young, 1 Cranch (U. S.) 331, 2 L. ed. 126; Pelly *v.* Royal-Exch. Assur. Co., 1 Burr. 341. See also Herron *v.* Peoria M. & F. Ins. Co., 28 Ill. 235, 81 Am. Dec. 272; and Covenant, Action of, 11 Cyc. 1022.

48. See People's Ins. Co. *v.* Spencer, 53 Pa. St. 353, 91 Am. Dec. 217 (policy renewed by parol indorsement); and Debt, Action of, 13 Cyc. 405, 409.

49. Kohne *v.* Insurance Co. of North America, 14 Fed. Cas. No. 7,920, 1 Wash. 93. And see Franklin F. Ins. Co. *v.* Colt, 20 Wall. (U. S.) 560, 22 L. ed. 423.

50. See *supra*, XII, A, 1.

51. Carter *v.* United Ins. Co., 1 Johns. Ch. (N. Y.) 463 (holding that a bill filed to recover the amount of a total loss on a policy of insurance, stating no other ground of equitable relief than that the policy had been assigned to plaintiffs by the insured, in whose name it had been effected, and that the insurers refused to pay was bad on demurrer, as plaintiffs had an adequate remedy at law); Motteux *v.* London Assur. Co., 1 Atk. 545, 26 Eng. Reprint 343; De Ghettoff *v.* London Assur. Co., 4 Bro. P. C. 436, 2 Eng. Reprint 295; Dhegetoft *v.* London Assur. Co., Moseley 83, 25 Eng. Reprint 285.

52. Carpenter *v.* Mutual Safety Ins. Co., 4 Sandf. Ch. (N. Y.) 408; Franklin F. Ins. Co. *v.* Colt, 20 Wall. (U. S.) 560, 22 L. ed. 423; Commercial Mut. Ins. Co. *v.* Union Mut. Ins. Co., 19 How. (U. S.) 318, 15 L. ed. 636.

53. Carpenter *v.* Mutual Safety Ins. Co., 4 Sandf. Ch. (N. Y.) 408; Franklin F. Ins. Co. *v.* Colt, 20 Wall. (U. S.) 560, 22 L. ed. 423.

54. National Traders' Bank *v.* Ocean Ins. Co., 62 Me. 519; Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192 [*affirmed* in 2 Wall. 494, 22 L. ed. 398]; Mackenzie *v.* Coulson, L. R. 8 Eq. 368; Motteux *v.* London Assur. Co., 1 Atk. 545, 26 Eng. Repriut 343. See *supra*, VI, D.

55. Hoskins *v.* Holland, 44 L. J. Ch. 273, 23 Wkly. Rep. 477.

56. Kill *v.* Hollister, 1 Wils. C. P. 129; Anchor Mar. Ins. Co. *v.* Allen, 13 Quebec 4.

A provision to arbitrate is waived where the underwriters, although refusing to accept an abandonment, have taken possession of and repaired the ship. Cobb *v.* New England Mut. Mar. Ins. Co., 6 Gray (Mass.) 192. See Contracts, 9 Cyc. 510, 511.

57. Slocum *v.* Western Assur. Co., 42 Fed. 235.

Agreements ousting courts of jurisdiction see Contracts, 9 Cyc. 510.

58. See, generally, Limitations of Actions.

2. CONTRACTUAL LIMITATIONS — a. Construction and Validity. Under the usual clauses limiting the time to institute suit, such time does not begin to run until the loss is payable under the terms of the policy.[59] These stipulations are generally considered valid and binding.[60]

b. Performance of Conditions. The preliminary conditions provided for in the policy as to time of payment should be performed prior to instituting suit, but if the underwriters prevent the insured from performing those conditions, they are thereby waived, and if suit is instituted without performing them it is not prematurely commenced.[61]

C. Parties — 1. PLAINTIFF — a. Insured, Payee, Etc. A policy taken by the assured in his own name can be sued upon only by him or his legal representatives;[62] but if the policy is taken by one person for account of another, or payable to another, or "for account of whom it may concern," the person effecting

59. When loss occurs.— When goods are insured for a voyage, the time of the loss occurring is not necessarily the time when the peril is encountered and the vessel driven ashore. Thus, where it is subsequently found necessary to sell the cargo at an intermediate port the loss only becomes total from that time. Browning *v.* Provincial Ins. Co., L. R. 5 P. C. 263, 2 Aspin. 35, 28 L. T. Rep. N. S. 853, 21 Wkly. Rep. 587. The loss does not occur when the vessel runs on a shoal; the question of loss not depending on the vessel going aground, but on the expense of getting her off and repaired, and losses being payable, by provision of the policy, after proof of loss or damage. Harvey *v* Detroit F. & M. Ins. Co., 120 Mich. 601, 79 N. W. 898.

Collision liability clause.— Where a policy insuring the owner of a tug against loss arising from any accident to any other vessel or its cargo for which insured or his tug might be liable stipulated that the insurer should not be liable unless the liability of insurance for such damage should be determined by a suit at law, or otherwise, as the insurer might elect; that all claims should be void unless prosecuted within twelve months of the loss; and that insured should defend any suits to subject him to any liability insured against, it was held that the loss from which the twelve months' limitation commenced to run did not occur until insured had paid the damage pursuant to a decree of a court of last resort adjudging him or his tug liable therefor. McWilliams *v.* Home Ins. Co., 40 N. Y. App. Div. 400, 57 N. Y. Suppl. 1100. Where the policy further provided that the losses should be payable sixty days after proofs of loss or damage and of the amount thereof, it was held that proofs of loss could not be made until after a judicial determination of the liability of the vessel, and the limitation commenced to run sixty days after such proofs were furnished, unless they were waived. Rogers *v.* Ætna Ins. Co., 95 Fed. 103, 35 C. C. A. 396 [*affirming* 76 Fed. 569]. But in Provincial Ins. Co. *v.* Ætna Ins. Co., 16 U. C. Q. B. 135, under similar clauses it was held that an action brought within twelve months after payment of a loss to another vessel, but more than twelve months after the collision occurred, was too late.

"Months" means calendar months when used in such a clause. Pomares *v.* Provincial Ins. Co., (Hil. T. 1873) Stevens N. Brunsw. Dig. 432.

The action is deemed commenced from the time the writ is issued and placed in the hands of the proper officer for service. Harvey *v.* Detroit F., etc., Ins. Co., 120 Mich. 601, 79 N. W. 898; O'Leary *v.* Pelican Ins. Co., 29 N. Brunsw. 510.

After claim of loss.— Where a clause required action to be brought within twelve months from the date of depositing claim for loss or damage at the office of the assurers, and a protest was deposited accompanied by a demand for the insurance, but the protest was defective and some months later an amended claim was deposited, it was held that an action begun more than twelve months after the original, but less than twelve months after the amended claim, was deposited was too late. Robertson *v.* Pugh, 15 Can. Sup. Ct. 706.

If the insured is under disability to sue within the period the provision becomes nugatory, and does not commence to run even after the disability has been removed. Semmes *v.* City F. Ins. Co., 13 Wall. (U. S.) 158, 20 L. ed. 490.

If the underwriter prolongs negotiations for settlement until the expiration of the time provided in the policy within which suit must be commenced his actions constitute a waiver of such limitation. De Farconnet *v.* Western Ins. Co., 110 Fed. 405 [*affirmed* in 122 Fed. 448, 58 C. C. A. 612].

60. Allen *v.* Merchants Mar. Ins. Co., 15 Can. Sup. Ct. 488; Pomares *v.* Provincial Ins. Co., (Hil. T. 1873) Stevens N. Brunsw. Dig. 432. See CONTRACTS, 9 Cyc. 511; LIMITATIONS OF ACTIONS, 25 Cyc. 1013, 1017.

61. Rogers *v.* Ætna Ins. Co., 76 Fed. 569 [*affirmed* in 95 Fed. 103, 35 C. C. A. 396]; Strong *v.* Harvey, 3 Bing. 304, 4 L. J. C. P. O. S. 57, 11 Moore C. P. 72, 11 E. C. L. 153; Scott *v.* Avery, 5 H. L. Cas. 811, 2 Jur. N. S. 815, 25 L. J. Exch. 308, 4 Wkly. Rep. 746, 10 Eng. Reprint 1121. *Compare* Lantalum *v.* Anchor Mar. Ins. Co., 22 N. Brunsw. 14; Dickie *v.* Western Assur. Co., 21 N. Brunsw. 544.

62. Carroll *v.* Boston Mar. Ins. Co., 8 Mass. 515.

the insurance or his legal representative may sue upon the policy in his own name,[63] even though it is made payable to a mortgagee[64] or other third person;[65] or it may be sued upon by any of the parties for whose benefit it was effected.[66] But coöwners of the insured property are not proper parties where the insurance has not been effected for their benefit.[67] The assured cannot sue after his interest in the property ceases.[68]

b. Assignee. An assignee of the policy before loss who has taken the same

63. *Maine.*— Sleeper *v.* Union Ins. Co., 65 Me. 385, 20 Am. Rep. 706.

Massachusetts.— Reed *v.* Pacific Ins. Co., 1 Metc. 166; Cobb *v.* New England Mut. Mar. Ins. Co., 6 Gray 192.

New York.— New Haven Steamboat Co. *v.* Providence-Washington Ins. Co., 159 N. Y. 547, 54 N. E. 1093 [*reversing* on opinion of Barrett, J., 10 N. Y. App. Div. 278, 41 N. Y. Suppl. 1042]; Delahunt *v.* Ætna Ins. Co., 97 N. Y. 537; Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427; Voisin *v.* Commercial Mut. Ins. Co., 62 Hun 4, 16 N. Y. Suppl. 410; McLaughlin *v.* Great Western Ins. Co., 20 N. Y. Suppl. 536; Hughes *v.* Mercantile Mut. Ins. Co., 44 How. Pr. 351.

Ohio.— Knight *v.* Eureka F. & M. Ins. Co., 26 Ohio St. 664, 20 Am. Rep. 778.

United States.— Dodwell *v.* Munich Assur. Co., 123 Fed. 841 [*affirmed* in 128 Fed. 410, 63 C. C. A. 152]; Howland *v.* Alexandria Mar. Ins. Co., 12 Fed. Cas. No. 6,798, 2 Cranch C. C. 474.

England.— Provincial Ins. Co. *v.* Leduc, L. R. 6 P. C. 224, 2 Aspin. 338, 43 L. J. P. C. 49, 31 L. T. Rep. N. S. 142, 22 Wkly. Rep. 929; Flindt *v.* Waters, 15 East 260, 3 Rev. Rep. 457; Roberts *v.* Ogilby, 9 Price 269, 23 Rev. Rep. 671.

See 28 Cent. Dig. tit. "Insurance," §§ 1558, 1559.

If agency is disavowed or discontinued the person effecting the policy cannot sue. Reed *v.* Pacific Ins. Co., 1 Metc. (Mass.) 166.

After sale.— A marine policy was taken on a steamship for account of whom it may concern, to be paid, in case of loss, to the steamship company. The title to the vessel was in the company, and it subsequently sold her, taking a mortgage which ran to D, who owned nearly all the stock, and agreeing to give the purchaser the benefit of the insurance until other insurance could be effected. Before other insurance was effected the vessel was lost. It was held that under the provisions that in case of loss payment should be made to the company, it could maintain a libel on the policy, not only for its own interest, but also for the interest of all others having rights under the policy. Steamship Samana Co. *v.* Hall, 55 Fed. 663.

64. Carr *v.* Providence Washington Ins. Co., 38 Hun (N. Y.) 86 [*affirmed* in 109 N. Y. 504, 17 N. E. 369].

The failure to make a mortgagee a party to an action on a policy is waived by failure to raise the question by answer or demurrer. Carr *v.* Security Ins. Co., 109 N. Y. 504, 17 N. E. 369.

65. Williams *v.* Ocean Ins. Co., 2 Metc. (Mass.) 303; Richelieu, etc., Nav. Co. *v.* Thames, etc., Ins. Co., 58 Mich. 132, 24 N. W. 547; Aldrich *v.* Equitable Safety Ins. Co., 1 Fed. Cas. No. 155, 1 Woodb. & M. 272.

66. Palmer *v.* Great Western Ins. Co., 10 Misc. (N. Y.) 167, 30 N. Y. Suppl. 1044 [*affirmed* in 153 N. Y. 660, 48 N. E. 1106]; Catlett *v.* Pacific Ins. Co., 1 Wend. (N. Y.) 561 [*affirmed* in 4 Wend. 75]; Earnmoor *v.* California Ins. Co., 40 Fed. 847; Aldrich *v.* Equitable Safety Ins. Co., 1 Fed. Cas. No. 155, 1 Woodb. & M. 272; Hagedorn *v.* Oliverson, 2 M. & S. 485, 15 Rev. Rep. 317.

Trustee of express trust.— A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust, within the meaning of the provision of N. Y. Code Civ. Proc. § 449, which authorizes the trustee of an express trust to sue in his own name without joining with him the party for whose benefit the action is prosecuted. Duncan *v.* China Mut. Ins. Co., 129 N. Y. 237, 29 N. E. 241.

A policy by an agent in his own name may be sued upon by the principal. Browning *v.* Provincial Ins. Co., L. R. 5 P. C. 263, 2 Aspin. 35, 28 L. T. Rep. N. S. 853, 21 Wkly. Rep. 587.

Carrier's open policy.— Where a steamship company took out an open policy on merchandise to be shipped on its steamers, which the company might agree to insure prior to the sailing of vessels, any losses to be paid to it or order, and goods shipped by plaintiff were shipped under such policy, it was held that plaintiff could maintain an action on such policy under Ala. Code, § 2594, providing that actions on contracts, express or implied, for the payment of money, may be prosecuted in the name of the real party in interest, whether he has the real title or not. Insurance Co. of North America *v.* Forcheimer, 86 Ala. 541, 5 So. 870.

67. Finney *v.* Bedford Commercial Ins. Co., 8 Metc. (Mass.) 348, 41 Am. Dec. 515; Wise *v.* St. Louis Mar. Ins. Co., 23 Mo. 80.

68. Carroll *v.* Boston Mar. Ins. Co., 8 Mass. 515; Powles *v.* Innes, 12 L. J. Exch. 163, 11 M. & W. 10. But see Castelli *v.* Boddington, 1 C. L. R. 281, 1 E. & B. 879, 17 Jur. 781, 23 L. J. Q. B. 31, 1 Wkly. Rep. 359, 72 E. C. L. 879.

Sale after injury.— Where a vessel under a marine policy receives a fatal injury while owned by the insured, he can recover to the extent of the injury, although he sells her subsequently and before the destruction is visibly complete. Crosby *v.* New York Mut. Ins. Co., 5 Bosw. (N. Y.) 369, 19 How. Pr. 312 [*affirmed* in 1 Abb. Dec. 562, 3 Keyes 394, 2 Transcr. App. 130, 2 Abb. Pr. N. S. 173].

without the consent of the underwriters cannot sue on the policy,[69] but an assignee after loss can sue in his own name.[70]

2. Joinder of Parties — a. Plaintiffs. All the parties for whose interest the policy is effected need not be joined as plaintiffs as one may sue for all,[71] but it is improper for each to institute a separate action.[72] A payee named in the policy who disclaims interest need not be joined,[73] nor need a part-owner of the property insured be joined in an action by the other part-owner to recover on a policy covering his separate interest.[74]

b. Defendants. If there are several underwriters upon one policy it is proper to join all of them in an action.[75] Underwriters on different policies cannot properly be joined,[76] but failure to object to such joinder constitutes a waiver.[77]

D. Pleadings — 1. Declaration, Complaint, Petition, or Libel — a. The Contract. The manner of setting out the contract in an action on a marine policy does not differ from that applicable to other forms of insurance.[78]

b. Insurable Interest. The true nature of the insured's interest in the subject-matter of the insurance should be correctly averred;[79] but it is not necessary to specify the extent of that interest,[80] or set forth in the declaration evidentiary facts concerning the nature of the interest.[81] Where the action is brought in the name of an agent, the declaration should aver who the real parties in interest were at the time of the execution of the policy [82] and at the time of the loss.[83]

69. Carroll *v.* Boston Mar. Ins. Co., 8 Mass. 515.

Where the policy contains a clause authorizing change of interest, the rule that an assignee before loss cannot sue does not apply. Duncan *v.* China Mut. Ins. Co., 129 N. Y. 237, 29 N. E. 76.

Pledgee of bill of lading.— Where a consignee of goods pledges the bill of lading with another person as a security for advances made by him, and upon an agreement that the consignee shall effect an insurance on the goods for the benefit of the pledgee, and deposit the policy with him, the pledgee may sue on the policy in his own name. Sutherland *v.* Pratt, 13 L. J. Exch. 246, 12 M. & W. 16.

70. Lloyd *v.* Fleming, L. R. 7 Q. B. 299, 1 Aspin. 192, 41 L. J. Q. B. 93, 25 L. T. Rep. N. S. 824, 20 Wkly. Rep. 296.

71. Catlett *v.* Pacific Ins. Co., 1 Wend. (N. Y.) 561 [*affirmed* in 4 Wend. 75]; Howland *v.* Alexandria Mar. Ins. Co., 12 Fed. Cas. No. 6,798, 2 Cranch C. C. 474. See *supra*, XII, C, 1, a.

Appropriation of policy to one part-owner. — Where an agent of several part-owners of a vessel takes out various policies in his own name for the benefit of whom it may concern, and afterward appropriates the policies to the benefit of the respective owners severally, one part-owner, to whom a policy covering an amount corresponding to his interest has been appropriated by the agent and transferred by the written consent of the insurance company, cannot maintain an action on the policy in his own name alone, against the objection of the company that other part-owners are still interested in the policy, not having assented to such appropriation, and that therefore they are necessary parties to a determination of the controversy. Fowler *v.* Atlantic Mut. Ins. Co., 8 Bosw. (N. Y.) 332.

72. Blanchard *v.* Dyer, 21 Me. 111, 38 Am. Dec. 253.

73. Lewis *v.* Ætna Ins. Co., 123 Fed. 157.

74. Gray *v.* Buck, 78 Me. 477, 7 Atl. 16.

75. The Steamship Thanemore *v.* Thompson, 5 Aspin. 398, 52 L. T. Rep. N. S. 552.

76. Rogers *v.* Ætna Ins. Co., 76 Fed. 569 [*affirmed* in 95 Fed. 109, 35 C. C. A. 402].

A reinsurer cannot be brought in as a third party. Nelson *v.* Empress Assur. Corp., [1905] 2 K. B. 281, 10 Aspin. 68, 10 Com. Cas. 237, 74 L. J. K. B. 699, 93 L. T. Rep. N. S. 62, 21 T. L. R. 555, 53 Wkly. Rep. 648.

77. Rogers *v.* Ætna Ins. Co., 76 Fed. 569 [*affirmed* in 95 Fed. 109, 35 C. C. A. 402].

78. See Fire Insurance, 19 Cyc. 917, 918.

Setting out regulations.— Where the regulations of an association of ship-owners, combined for the mutual assurance of each other's ships, were indorsed on the back, and were declared to form part of a policy, to which the ship-owners were subscribers, it was held that the declaration in an action for a loss under the policy ought to set out the regulations as well as the policy. Strong *v.* Rule, 3 Bing. 315, 4 L. J. C. P. O. S. 73, 11 Moore C. P. 86, 11 E. C. L. 158.

79. Rider *v.* Ocean Ins. Co., 20 Pick. (Mass.) 259; Henshaw *v.* Mutual Safety Ins. Co., 11 Fed. Cas. No. 6,387, 2 Blatchf. 99; Cohen *v.* Hannam, 5 Taunt. 101, 14 Rev. Rep. 702, 1 E. C. L. 62; Cousins *v.* Nantes, 3 Taunt. 513, 13 Rev. Rep. 696.

80. Henshaw *v.* Mutual Safety Ins. Co., 11 Fed. Cas. No. 6,387, 2 Blatchf. 99.

81. Peron *v.* Frone, 2 Barn. 304.

82. Rider *v.* Ocean Ins. Co., 20 Pick. (Mass.) 259.

83. Rider *v.* Ocean Ins. Co., 20 Pick. (Mass.) 259; Henshaw *v.* Mutual Safety Ins. Co., 11 Fed. Cas. No. 6,387, 2 Blatchf. 99; Cohen *v.* Hannam, 5 Taunt. 101, 14 Rev. Rep. 702, 1 E. C. L. 62.

c. Warranties, Conditions, and Exceptions. There should be an averment that the express warranties contained in the policy have been complied with;[84] but this averment may be in general terms, and it is not necessary to specifically allege a compliance with each of the conditions and warranties.[85] A waiver of any condition to be available must be pleaded.[86] In regard to the implied warranty of seaworthiness, there is a conflict of opinion as to whether it is necessary to aver its performance, but the weight of authority seems to require it to be alleged.[87] A general allegation, however, is always sufficient.[88] It is not necessary for the declaration to allege facts to show that the loss did not fall within an exception contained in the policy.[89]

d. Cause of Loss. The loss should be alleged to have resulted from one of the perils insured against,[90] and should properly specify that peril[91] or allege facts showing a loss by a peril which is stated to have been among those covered by the policy.[92]

e. Loss on Adventure Insured. It should also be averred that the loss or damage occurred during the continuance of the risk or upon the insured voyage,[93] and where the policy is limited to certain waters it should be alleged that the loss occurred within those waters.[94]

f. Extent of Loss. The exact extent of the loss need not be stated.[95] Thus a declaration for a total loss will permit a recovery for a constructive total loss,[96] a partial loss,[97] or a general average loss.[98] But if the insured desires to recover for both a total loss and a general average loss both must be pleaded.[99] Where

84. Hutchinson *v.* Read, 4 Exch. 761, 19 L. J. Exch. 222; Mittleberger *v.* British America F., etc., Ins. Co., 2 U. C. Q. B. 439.

85. Louisville Underwriters *v.* Durland, 123 Ind. 544, 24 N. E. 221, 7 L. R. A. 399.

86. Allen *v.* Merchants Mar. Ins. Co., 15 Can. Sup. Ct. 488.

87. Van Wickle *v.* Mechanics', etc., Ins. Co., 97 N. Y. 350; McLain *v.* British, etc., Mar. Ins. Co., 14 Misc. (N. Y.) 650, 35 N. Y. Suppl. 827 [*affirmed* in 16 Misc. 336, 38 N. Y. Suppl. 77]; Earnmoor *v.* California Ins. Co., 40 Fed. 847; Guy *v.* Citizens' Mut. Ins. Co., 30 Fed. 695. *Contra*, Ward *v.* China Mut. Ins. Co., 44 Fed. 43.

88. McLain *v.* British, etc., Mar. Ins. Co., 14 Misc. (N. Y.) 650, 35 N. Y. Suppl. 827 [*affirmed* in 16 Misc. 336, 38 N. Y. Suppl. 77].

89. Rucker *v.* Green, 15 East 288.

90. American Ins. Co. *v.* Insley, 7 Pa. St. 223, 47 Am. Dec. 509; Mittleberger *v.* British America F., etc., Ins. Co., 2 U. C. Q. B. 439.

91. Miller *v.* California Ins. Co., 76 Cal. 145, 18 Pac. 155, 9 Am. St. Rep. 184; Weltin *v.* Union Mar. Ins. Co., 13 N. Y. Suppl. 700; Hicks *v.* Fitzsimmons, 12 Fed. Cas. No. 6,460, 1 Wash. 279.

92. Puller *v.* Glover, 12 East 124.

Illustration.— Where, in an action on an insurance policy for the loss of a barge with her cargo, the petition alleged an insurance against all loss "in said voyage by reason of the adventures and perils of said rivers, and all other perils," etc., and then alleged that she sprung a leak and sunk at port, it was held that, although the loss as stated did not come within the perils of the voyage specifically insured against, it may have been caused by one of the "other perils," and the general allegation, following the special statement of loss, that the damage arose from "one of the perils insured against," was sufficient on demurrer. Gartside *v.* Orphans' Ben. Ins. Co., 62 Mo. 322.

93. Weltin *v.* Union Mar. Ins. Co., 13 N. Y. Suppl. 700; Reck *v.* Phœnix Ins. Co., 3 N. Y. Civ. Proc. 376; Lambert *v.* Liddard, 1 Marsh. 149, 5 Taunt. 480, 15 Rev. Rep. 557, 1 E. C. L. 249; Mittleberger *v.* British American F., etc., Ins. Co., 2 U. C. Q. B. 439.

94. Mittleberger *v.* British American F., etc., Ins. Co., 2 U. C. Q. B. 439.

95. Washburn, etc., Mfg. Co. *v.* Reliance Mar. Ins. Co., 66 Fed. 69; Sturge *v.* Hahn, 4 Exch. 646, 19 L. J. Exch. 119.

Alleging total loss by sale.— Where in an action on a marine policy the complaint substantially alleges that the vessel, while proceeding on the voyage, was so disabled by perils of the sea as to be obliged, for the safety of her crew and cargo, to put into a certain port, where she was found to be irreparable and unfit and unable to proceed on her voyage, and was duly condemned and sold, the total loss of the vessel is sufficiently set forth. Wright *v.* Williams, 20 Hun (N. Y.) 320.

96. Snow *v.* Union Mut. Mar. Ins. Co., 119 Mass. 592, 20 Am. Rep. 349.

97. Watson *v.* Insurance Co. of North America, 1 Binn. (Pa.) 47, 4 Dall. 283, 1 L. ed. 835; Nicholson *v.* Croft, 2 Burr. 1188; Benson *v.* Chapman, 8 C. B. 950, 65 E. C. L. 950, 2 H. L. Cas. 696, 9 Eng. Reprint 1256, 13 Jur. 969; Devaux *v.* Astell, 4 Jur. 1135; Phœnix Ins. Co. *v.* McGhee, 18 Can. Sup. Ct. 61; Dimock *v.* New Brunswick Mar. Assur. Co., 6 N. Brunsw. 398.

98. Hanse *v.* New Orleans M. & F. Ins. Co., 10 La. 1, 29 Am. Dec. 456.

99. Schmidt *v.* United Ins. Co., 1 Johns. (N. Y.) 249, 3 Am. Dec. 319.

the policy contains a clause relieving the underwriters for average losses under a specified percentage, it is not required of the assured to specifically aver that the loss sued for exceeded such percentage.[1] It is not necessary to aver an abandonment where the insured seeks to recover for a constructive total loss.[2]

2. PLEA OR ANSWER. The defendant is required to specifically set up all special matter of defense.[3] Thus if the underwriter wishes to rely upon want of interest,[4] illegality,[5] fraud,[6] misrepresentation,[7] deviation,[8] or wilful misconduct,[9] he must specifically plead the facts constituting the same. Under a general denial plaintiff is put to proof of his whole case,[10] and defendant is not permitted to rely on any special matter of defense.[11]

3. AMENDMENT OF PLEADINGS. The rules applicable to amendment of pleadings in civil actions generally apply to actions upon contracts of marine insurance.[12]

4. VARIANCE. The proof should conform to the pleadings, but a substantial conformity is all that is necessary, and a recovery may be had notwithstanding a

Claims for a general average and a total loss may be joined in one count. Bryant *v.* Commonwealth Ins. Co., 6 Pick. (Mass.) 131.

1. Dawson *v.* Wrench, 6 D. & L. 474, 3 Exch. 359, 18 L. J. Exch. 229.

2. Snow *v.* Union Mut. Mar. Ins. Co., 119 Mass. 592, 20 Am. Rep. 349; Columbian Ins. Co. *v.* Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 664; Hodgson *v.* Alexandria Mar. Ins. Co., 5 Cranch (U. S.) 100, 3 L. ed. 48.

3. Hinck *v.* Home Ins. Co., 19 La. Ann. 527; Rogers *v.* Niagara Ins. Co., 2 Hall (N. Y.) 86; Alexandria Mar. Ins. Co. *v.* Hodgson, 6 Cranch (U. S.) 206, 3 L. ed. 200.

That articles are perishable and fall within a memorandum clause may be shown without pleading it. Nelson *v.* Louisiana Ins. Co., 5 Mart. N. S. (La.) 289.

Where evidence of a breach of warranty is given without objection, it is available to defendant, although not pleaded. Ryan *v.* Providence Washington Ins. Co., 79 N. Y. App. Div. 316, 79 N. Y. Suppl. 460.

4. Mills *v.* Campbell, 2 Y. & C. Exch. 389.

5. Old Dominion Ins. Co. *v.* Frank, 7 Ohio Dec. (Reprint) 302, 2 Cinc. L. Bul. 93. *Contra*, Gedge *v.* Royal Exch. Assur. Corp., [1900] 2 Q. B. 214, 9 Aspin. 57, 5 Com. Cas. 229, 69 L. J. Q. B. 506, 82 L. T. Rep. N. S. 463; Scott *v.* Brown, [1892] 2 Q. B. 724, 57 J. P. 213, 61 L. J. Q. B. 738, 67 L. T. Rep. N. S. 782, 4 Reports 42, 41 Wkly. Rep. 116; Holman *v.* Johnson, Cowp. 341.

6. Alexandria Mar. Ins. Co. *v.* Hodgson, 6 Cranch (U. S.) 206, 3 L. ed. 200.

Must allege knowledge or connivance of insured.— In an action on a marine insurance policy, a plea alleging that part of the goods insured as the cargo of the vessel were fraudulently withheld is demurrable if it does not allege that they were withheld with the owner's knowledge or connivance. Phœnix Ins. Co. *v.* Moog, 78 Ala. 284, 56 Am. Rep. 31. Under defendant's averment that the goods to the amount mentioned therein were not lost, and that the insurer suspected and had reason to suspect that the pretended loss was altogether fraudulent, facts will be received to prove that plaintiff did not have the goods when the loss occurred, and that plaintiff was guilty of fraud. Brugnot *v.* Louisiana State M. & F. Ins. Co., 12 La. 326.

7. Alexandria Mar. Ins. Co. *v.* Hodgson, 6 Cranch (U. S.) 206, 3 L. ed. 200.

8. Alexandria Mar. Ins. Co. *v.* Hodgson, 6 Cranch (U. S.) 206, 3 L. ed. 200. *Compare* Amsinck *v.* American Ins. Co., 129 Mass. 185.

9. An allegation that plaintiff sailed the vessel "into said ice knowing full well that so to do endangered the safety of said vessel" is not an allegation that the loss of the vessel was "caused by the willful act of the insured," within the terms of Cal. Civ. Code, § 2629, which exonerates the insurer from liability for such loss, but an allegation of negligent navigation, which under said section, as well as under the general law, constitutes no defense to liability, where, as in such case, the loss arose from a peril of the sea, which was a peril insured against. Nome Beach Lighterage, etc., Co. *v.* Munich Assur. Co., 123 Fed. 820 [*affirmed* in 128 Fed. 410, 63 C. C. A. 152].

10. Greenwich Ins. Co. *v.* Raab, 11 Ill. App. 636; Amsinck *v.* American Ins. Co., 129 Mass. 185.

General issue.— The London Assurance and The Royal Exchange were empowered by 11 Geo. I, c. 30, § 43, in all actions of covenant, on any policy of assurance under their common seal, to plead generally that they had not broken the covenants of the policy. This right of pleading was not taken away by 5 & 6 Vict. c. 97, § 3, which repeals so much of any act, commonly called public, local and personal, or of any act of a local or personal nature, whereby a party is enabled to plead the general issue, and give any special matter in evidence. Carr *v.* Royal Exchange Assur. Co., 1 B. & S. 956, 8 Jur. N. S. 384, 31 L. J. Q. B. 93, 6 L. T. Rep. N. S. 105, 10 Wkly. Rep. 352, 101 E. C. L. 956.

11. Alexandria Mar. Ins. Co. *v.* Hodgson, 6 Cranch (U. S.) 206, 3 L. ed. 200.

12. See Louisville Underwriters *v.* Pence, 93 Ky. 96, 19 S. W. 10, 14 Ky. L. Rep. 21, 40 Am. St. Rep. 176; Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427; Swain *v.* Boylston Ins. Co., 37 Fed. 766; Rumsey *v.* Providence Washington Ins. Co., 13 Nova Scotia

variance between the pleadings and the proofs, provided the variance is not such as to have misled the opposite party.[13]

E. Set-Off and Counter-Claim. The underwriters have a right to set off premiums due from the insured against losses either on the same or other policies;[14] but if the policy is for account of another, a set-off of premiums due on other policies from the party effecting the insurance will not be allowed,

393; Phœnix Ins. Co. *v.* Anchor Ins. Co., 4 Ont. 524; and, generally, PLEADING.

13. See, generally, PLEADING.

Fatal variances.— The following have been held to be fatal: An averment of sole interest in plaintiff and proof of joint ownership with another. Catlett *v.* Pacific Ins. Co., 5 Fed. Cas. No. 2,517, 1 Paine 594; Bell *v.* Ansley, 16 East 141, 14 Rev. Rep. 322; Hiscox *v.* Barrett [*cited* in Bell *v.* Ansley, *supra*]. An averment of interest in plaintiff and proof of interest in partnership of which plaintiff is a member. Cohen *v.* Hannam, 5 Taunt. 101, 14 Rev. Rep. 702, 1 E. C. L. 62. An averment of a joint interest and proof of sole interest. Catlett *v.* Pacific Ins. Co., 5 Fed. Cas. No. 2,517, 1 Paine 594. An averment of interest in a company and proof of a special contract relating to the interest of an individual. Graves *v.* Boston Mar. Ins. Co., 2 Cranch (U. S.) 419, 2 L. ed. 324. Proof of a loss from a different peril than that alleged. Hicks *v.* Fitzsimmons, 12 Fed. Cas. No. 6,460, 1 Wash. 279. Proof of a capture and a loss subsequent to the restoration of the vessel under an averment of a loss by capture. Kulen Kemp *v.* Vigne, 1 T. R. 304, 1 Rev. Rep. 205. Averment of loss by capture and proof of collusive capture through barratry of the master. Arcangelo *v.* Thompson, 2 Campb. 620, 12 Rev. Rep. 758. See also Heyman *v.* Parish, 2 Campb. 149, 11 Rev. Rep. 688; Blyth *v.* Shepherd, 1 Dowl. P. C. N. S. 880, 6 Jur. 489, 11 L. J. Exch. 293, 9 M. & W. 763. Allegation of a wilful act and proof of negligence. Sturm *v.* Atlantic Mut. Ins. Co., 38 N. Y. Super. Ct. 281.

Immaterial variances.— The following variances have been held to be immaterial: Proof of signature of the policy by an authorized agent under an allegation of signature by defendant. Nicholson *v.* Croft, 2 Burr. 1188. Allegation of a loss by barratry and proof that it happened by the act of an enemy and by barratry conjointly. Toulmin *v.* Anderson, 1 Taunt. 227. The misnomer of the vessel is immaterial where it is not such as to mislead defendant. Hall *v.* Molineux, 6 East 385 note, 8 Rev. Rep. 503; Le Mesurier *v.* Vaughan, 6 East 382, 2 Smith K. B. 492, 8 Rev. Rep. 500. Where the averment was that after the making of the policy the ship sailed and the evidence was that she sailed before, it was held that the variance was immaterial, the contract not being dependent upon the time of sailing. Peppin *v.* Solomons, 5 T. R. 496. A plea of payment to an action by A, upon a policy effected by A as agent, is supported by an indorsement on the policy by A, purporting that the loss had been adjusted, and the balance due from the defendant to A paid, although the principal has not authorized such a settlement. Gibson *v.* Winter, 5 B. & Ad. 96, 2 N. & M. 737, 27 E. C. L. 50.

Variation as to extent of loss see *supra*, XII, D, 1, f.

14. Cleveland *v.* Clap, 5 Mass. 201.

English practice in such cases see Pellas *v.* Neptune Mar. Ins. Co., 5 C. P. D. 34, 4 Aspin. 213, 49 L. J. C. P. 153, 42 L. T. Rep. N. S. 35, 28 Wkly. Rep. 405; De Gaminde *v.* Pigou, 4 Taunt. 246.

That the insured has been enjoined from collecting the premium does not alter the rule. Hodgson *v.* Alexandria Mar. Ins. Co., 5 Cranch (U. S.) 100, 3 L. ed. 48.

A private insurance office keeper may deduct from his payment of a loss underwritten by A for B the premium due on another risk underwritten by C for B. Cleveland *v.* Clap, 5 Mass. 201.

Action by assignee of policy.— In an action by the assignee of a policy of marine insurance, the insurers are not entitled to set off a debt incurred with them by the assured for premiums on policies effected with them by the assured after the date of the assignment. Pellas *v.* Neptune Mar. Ins. Co., 5 C. P. D. 34, 4 Aspin. 213, 49 L. J. C. P. 153, 42 L. T. Rep. N. S. 35, 28 Wkly. Rep. 405. But where a policy, by the terms of which "all sums due" from the insured when the loss becomes due are to be deducted before payment was assigned with the assent of the insurer, reserving his rights expressed in the policy, the insurer could deduct premium notes given subsequently, in the ordinary course of business, and without any fraudulent intent to defeat the assignment. Wiggin *v.* Suffolk Ins. Co., 18 Pick. (Mass.) 145, 29 Am. Dec. 576.

Premiums due to executors of assured.— There is no right either at law or in equity to deduct a loss on a policy underwritten by a testator with a broker from the amount due to the executors for premiums from the same broker, although the circumstances are such as in case of bankruptcy would support a plea of mutual credit. Beckwith *v.* Bullen, 8 E. & B. 683, 4 Jur. N. S. 558, 27 L. J. Q. B. 162, 6 Wkly. Rep. 286, 92 E. C. L. 683.

Bankruptcy of insured.— The benefit of a policy of insurance, previous to the bankruptcy of the insured, upon a loss after it, passes and gives a right of action to the assignees, not capable of set-off against a debt from the bankrupt. De Mattos *v.* Saunders, L. R. 7 C. P. 570, 1 Aspin. 377, 27 L. T. Rep. N. S. 120, 20 Wkly. Rep. 801; *Ex p.* Blagden, 2 Rose 249, 19 Ves. 465, 34 Eng. Reprint 589.

A bill in equity will lie to compel set-off of premium against a judgment for loss under

unless both policies were effected for the benefit of the same persons.[15] In an action by an underwriter to recover premiums, the insured may set off a loss under other policies;[16] but it has been held that such losses must first be liquidated,[17] and it is held that an adjustment is not equivalent to a liquidation.[18] The underwriter may deduct an amount due on a premium note from an amount of a loss sustained under the policy;[19] but if the premium note is not presently due the amount thereof cannot be set off.[20] The salvage received by the insured is not a set-off but is a sum in his hands belonging to him which diminishes *pro tanto* the extent of recovery.[21]

F. Evidence — 1. Presumptions and Burden of Proof — a. The Contract. Where there is a contract of marine insurance but no policy has issued, it will be presumed to be in conformity to the ordinary form of policy used.[22]

b. Insurable Interest. The burden is upon plaintiff to show interest,[23] where the question of interest is distinctly put in issue,[24] even though the policy is valued;[25] also the extent and value of interest,[26] except that under valued policies it is only necessary to show that the insured had a substantial interest in the subject-matter.[27]

c. Legality. There is a presumption that the voyage was legal and that all requirements of the law were complied with.[28]

d. Concealment. The burden is on defendant to show concealment,[29] and that the facts concealed were material.[30]

e. Misrepresentation. An underwriter relying on misrepresentation of a material fact has the burden of establishing all the elemental facts by the evidence.[31]

another policy. Leeds *v.* Marine Ins. Co., 6 Wheat. (U. S.) 565, 5 L. ed. 332.

15. Williams *v.* Ocean Ins. Co., 2 Metc. (Mass.) 303; Pacific Mail Steamship Co. *v.* Great Western Ins. Co., 65 Barb. (N. Y.) 334; Hurlbert *v.* Pacific Ins. Co., 12 Fed. Cas. No. 6,919, 2 Sumn. 471.

16. Columbian Ins. Co. *v.* Black, 18 Johns. (N. Y.) 149; *In re* Progress Assur. Co., 39 L. J. Ch. 496, 18 Wkly. Rep. 722.

17. Gordon *v.* Bowne, 2 Johns. (N. Y.) 150; Thomson *v.* Redman, 2 Dowl. P. C. N. S. 1028, 12 L. J. Exch. 310, 11 M. & W. 487.

A total loss under a valued policy may be set off. Columbia Ins. Co. *v.* Black, 18 Johns. (N. Y.) 149.

18. Castelli *v.* Boddington, 1 E. & B. 66, 17 Jur. 457, 22 L. J. Q. B. 5, 1 Wkly. Rep. 20, 72 E. C. L. 66 [*affirmed* in 1 C. L. R. 281, 1 E. & B. 879, 17 Jur. 781, 23 L. J. Q. B. 31, 1 Wkly. Rep. 359, 72 E. C. L. 879].

19. Rider *v.* Ocean Ins. Co., 20 Pick. (Mass.) 259; Dodge *v.* Union Mar. Ins. Co., 17 Mass. 471; Livermore *v.* Newburyport Mar. Ins. Co., 2 Mass. 232; Murray *v.* Great Western Ins. Co., 72 Hun (N. Y.) 282, 25 N. Y. Suppl. 414 [*affirmed* in 147 N. Y. 711, 42 N. E. 724]; The Natchez, 42 Fed. 169.

20. Murray *v.* Great Western Ins. Co., 72 Hun (N. Y.) 282, 25 N. Y. Suppl. 414 [*affirmed* in 147 N. Y. 711, 42 N. E. 724].

Note maturing after action brought but before judgment.— Warren *v.* Franklin Ins. Co., 104 Mass. 518.

21. Smith *v.* Manufacturers' Ins. Co., 7 Metc. (Mass.) 448.

22. State F. & M. Ins. Co. *v.* Porter, 3 Grant (Pa.) 123.

23. Beale *v.* Pettit, 2 Fed. Cas. No. 1,158, 1 Wash. 241; Depaba *v.* Ludlow, Comyns 361.

24. Petrel Guano Co. *v.* Providence Washington Ins. Co., 52 N. Y. Super. Ct. 297; Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219.

25. Hodgson *v.* Glover, 6 East 316, 8 Rev. Rep. 495.

26. Billow *v.* Western M. & F. Ins. Co., 1 La. Ann. 57; Beale *v.* Pettit, 2 Fed. Cas. No. 1,158, 1 Wash. 241; Hicks *v.* Fitzsimmons, 12 Fed. Cas. No. 6,460, 1 Wash. 279; Watson *v.* Insurance Co. of North America, 30 Fed. Cas. No. 17,286, 3 Wash. 1. *Compare* Page *v.* Fry, 2 B. & P. 240, 5 Rev. Rep. 583.

27. Feise *v.* Aguilar, 3 Taunt. 506, 12 Rev. Rep. 695.

28. Thornton *v.* Lance, 4 Campb. 231.

29. Fiske *v.* New England Mar. Ins. Co., 15 Pick. (Mass.) 310; Clement *v.* Phœnix Ins. Co., 5 Fed. Cas. No. 2,881, 6 Blatchf. 481; Folsom *v.* Mercantile Mut. Ins. Co., 9 Fed. Cas. No. 4,902, 8 Blatchf. 170 [*affirmed* in 18 Wall. 237, 21 L. ed. 827]; Elkin *v.* Jansen, 9 Jur. 353, 14 L. J. Exch. 201, 13 M. & W. 655.

30. Fiske *v.* New England Mar. Ins. Co., 15 Pick. (Mass.) 310; Mercantile Mut. Ins. Co. *v.* Folsom, 18 Wall. (U. S.) 237, 21 L. ed. 827.

On proof that the facts were material, and known to the assured, slight evidence of non-communication to the underwriter will shift the burden of proof. Elkin *v.* Jansen, 9 Jur. 353, 14 L. J. Exch. 201, 13 M. & W. 655.

31. Silloway *v.* Neptune Ins. Co., 12 Gray (Mass.) 73; Fiske *v.* New England Mar. Ins. Co., 15 Pick. (Mass.) 310; Nova Scotia Mar. Ins. Co. *v.* Stevenson, 23 Can. Sup. Ct. 137.

f. Deviation. Deviation must be shown by defendant;[32] but the necessity of a deviation and that it did not arise through any fault of the master or the insured must be shown by plaintiff.[33]

g. Fraud. Fraud is not generally presumed against the insured;[34] but if he overvalues the property covered by the policy it creates such a presumption, strong in proportion to its excess.[35]

h. Warranties — (I) *In General.* A compliance with express warranties must be shown by plaintiff,[36] but general evidence is usually considered sufficient in the first instance.[37]

(II) *Seaworthiness.* It is generally held that the burden of proof is on defendant to show unseaworthiness, there being a presumption that the vessel is seaworthy;[38] and where this rule does not prevail only slight evidence of sea-

32. Tidmarsh *v.* Washington F. & M. Ins. Co., 23 Fed. Cas. No. 14,024, 4 Mason 439.

33. Woolf *v.* Claggett, 3 Esp. 257, 6 Rev. Rep. 830.

34. Fiske *v.* New England Mar. Ins. Co., 15 Pick. (Mass.) 310; Livingston *v.* Delafield, 3 Cai. (N. Y.) 49; Kendrick *v.* Delafield, 2 Cai. (N. Y.) 67.

35. Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 77; Livingston *v.* Delafield, 3 Cai. (N. Y.) 49.

Unintentional overinsurance.— An overinsurance of cargo, growing out of insurance by a banking firm to protect them as accepters of drafts drawn by the captain on them to meet disbursements in the purchase of timber, which composed the cargo, does not tend to establish that the loss of the vessel was fraudulent. Merchants' Mut. Ins. Co. *v.* Allen, 122 U. S. 376, 7 S. Ct. 1248, 30 L. ed. 1209.

36. McLoon *v.* Commercial Mut. Ins. Co., 100 Mass. 472, 97 Am. Dec. 116, 1 Am. Rep. 129.

Vessel confined to trade between particular ports.— A policy upon the freight of a vessel, which at the time the policy was issued was in the China sea, provided that the voyage should be "confined to the trade between Atlantic ports of the United States, or the ports of London, Liverpool and Havre, and the Pacific Ocean, China Seas, etc." The vessel was lost on a voyage from Liverpool to New York, made on her return from the China sea. It was held that the burden was on plaintiffs to show either that there was a single trade between the Pacific ocean and China sea, etc., as one terminus, and both the Atlantic ports of the United States and the specified European ports indiscriminately as the other terminus, or that the language of the policy by usage was understood to include a direct voyage between the Atlantic ports of the United States and the specified European ports. Mallory *v.* Commercial Ins. Co., 9 Bosw. (N. Y.) 101.

37. Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549; Ludlow *v.* Union Ins. Co., 2 Serg. & R. (Pa.) 119.

38. *Louisiana.*— Rugely *v.* Sun Mut. Ins. Co., 7 La. Ann. 279, 56 Am. Dec. 603; Snethen *v.* Memphis Ins. Co., 3 La. Ann. 474, 48 Am. Dec. 462; Dupeyre *v.* Western M. & F. Ins. Co., 2 Rob. 457, 38 Am. Dec. 218.

Maine.— Treat *v.* Union Ins. Co., 56 Me. 231, 96 Am. Dec. 447.

Maryland.— Field *v.* Insurance Co. of North America, 3 Md. 244.

Massachusetts.— Capen *v.* Washington Ins. Co., 12 Cush. 517; Deshon *v.* Merchants' Ins. Co., 11 Metc. 199; Paddock *v.* Franklin Ins. Co., 11 Pick. 227.

Missouri.— Paddock-Hawley Iron Co. *v.* Providence-Washington Ins. Co., 118 Mo. App. 85, 93 S. W. 358.

United States.— Nome Beach Lighterage, etc., Co. *v.* Munich Assur. Co., 123 Fed. 820 [*affirmed* in 128 Fed. 410, 63 C. C. A. 152]; Earnmoor *v.* California Ins. Co., 40 Fed. 847; Guy *v.* Citizens' Mut. Ins. Co., 30 Fed. 695; Batchelder *v.* Insurance Co. of North America, 30 Fed. 459; Higgie *v.* American Lloyds, 14 Fed. 143, 11 Biss. 395; Lunt *v.* Boston Marine Ins. Co., 6 Fed. 562, 19 Blatchf. 151; Adderly *v.* American Mut. Ins. Co., 1 Fed. Cas. No. 75, Taney 126; Tidmarsh *v.* Washington F. & M. Ins. Co., 23 Fed. Cas. No. 14,024, 4 Mason 439.

England.— Ajum Goolam Hossen *v.* Union Mar. Ins. Co., [1901] A. C. 362, 9 Aspin. 167, 70 L. J. P. C. 34, 84 L. T. Rep. N. S. 366; Weddĕrburn *v.* Bell, 1 Campb. 1, 10 Rev. Rep. 615; Parker *v.* Potts, 3 Dow 23, 15 Rev. Rep. 1, 3 Eng. Reprint 977; Munro *v.* Vandam, 1 Park Ins. 469.

See 28 Cent. Dig. tit. "Insurance," § 1652 *et seq.*

Contra.— Van Wickle *v.* Mechanics', etc., Ins. Co., 97 N. Y. 350; Rogers *v.* Sun Mut. Ins. Co., 46 N. Y. Super. Ct. 65; Moses *v.* Sun Mut. Ins. Co., 1 Duer (N. Y.) 159; Van Vliet *v.* Greenwich Ins. Co., 14 Daly (N. Y.) 496, 15 N. Y. St. 375; Brown *v.* Girard, 4 Yeates (Pa.) 115, 2 Am. Dec. 400.

Continuance of seaworthiness.— The presumption is that a vessel continues seaworthy if she was so at the inception of the risk. Martin *v.* Fishing Ins. Co., 20 Pick. (Mass.) 389, 32 Am. Dec. 220; Paddock-Hawley Iron Co. *v.* Providence-Washington Ins. Co., 118 Mo. App. 85, 93 S. W. 358.

Time policy.— The burden of proving unseaworthiness after the attaching of a policy on time is upon defendant. Berwind *v.* Greenwich Ins. Co., 114 N. Y. 231, 21 N. E. 151.

Vessel to be repaired.—Where a vessel was insured on an application containing a statement that she was to be repaired at a certain

worthiness is necessary to make a *prima facie* case.[39] If shortly after the voyage has commenced a vessel springs a leak or founders without apparent and adequate cause, there is a presumption of unseaworthiness, and it is incumbent upon plaintiff to rebut the presumption.[40]

i. Loss — (i) *Missing Vessel.* Where a vessel is not heard of for a reason-

port, the burden of proof of seaworthiness rests on the insured. Lunt *v.* Boston Mar. Ins. Co., 17 Fed. 411.

Where voyage completed in safety.—Meigs *v.* Sun Mut. Ins. Co., 16 Fed. Cas. No. 9,396.

Where the vessel was sound and seaworthy for two years previous to her loss, and was wrecked in a cyclone, the burden of proof is upon the insurers to establish satisfactorily the alleged unseaworthiness at the time of loss. The Orient, 16 Fed. 916, 4 Woods 255 [*affirmed* in 121 U. S. 67, 7 S. Ct. 821, 30 L. ed. 858].

Disregarding statutory regulation.— The stowing on deck of all the water on board a vessel contrary to the requisition of U. S. St. (1790) c. 56, § 9, does not of itself render the vessel unseaworthy, nor shift upon the assured the burden of proving her seaworthy. Deshon *v.* Merchants' Ins. Co., 11 Metc. (Mass.) 199.

39. Voisin *v.* Commercial Mut. Ins. Co., 67 Hun (N. Y.) 365, 22 N. Y. Suppl. 348; Moses *v.* Sun Mut. Ins. Co., 1 Duer (N. Y.) 159.

40. *Louisiana.*—Pointer *v.* Merchants' Mut. Ins. Co., 20 La. Ann. 100; Parker *v.* Union Ins. Co., 15 La. Ann. 688; Rugely *v.* Sun Mut. Ins. Co., 7 La. Ann. 279, 56 Am. Dec. 603; Snethen *v.* Memphis Ins. Co., 3 La. Ann. 474, 48 Am. Dec. 462; Rugely *v.* Sun Mut. Ins. Co., 2 La. Ann. 279, 56 Am. Dec. 603; Dupeyre *v.* Western M. & F. Ins. Co., 2 Rob. 457, 38 Am. Dec. 218.

Maine.— Treat *v.* Union Ins. Co., 56 Me. 231, 96 Am. Dec. 447.

Massachusetts.— Swift *v.* Union Mut. Mar. Ins. Co., 122 Mass. 573; Paddock *v.* Franklin Ins. Co., 11 Pick. 227.

Missouri.— Gartside *v.* Orphan's Ben. Ins. Co., 62 Mo. 322.

New York.— Berwind *v.* Greenwich Ins. Co., 114 N. Y. 231, 21 N. E. 151; Van Wickle *v.* Mechanics', etc., Ins. Co., 97 N. Y. 350; Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427; Starbuck *v.* Phenix Ins. Co., 47 N. Y. App. Div. 621, 62 N. Y. Suppl. 264 [*affirmed* in 166 N. Y. 593, 59 N. E. 1130]; Starbuck *v.* Phenix Ins. Co., 34 N. Y. App. Div. 293, 54 N. Y. Suppl. 293; Wright *v.* Orient Mut. Ins. Co., 6 Bosw. 269; McLain *v.* British, etc., Mar. Ins. Co., 16 Misc. 336, 38 N. Y. Suppl. 77; Wex *v.* Boatman's F. Ins. Co., 11 N. Y. St. 713; Talcot *v.* Marine Ins. Co., 2 Johns. 130; Talcot *v.* Commercial Ins. Co., 2 Johns. 124, 3 Am. Dec. 406; Patrick *v.* Hallett, 1 Johns. 241; Barnewall *v.* Church, 1 Cai. 217, 2 Am. Dec. 180.

Pennsylvania.— Myers *v.* Girard Ins. Co., 26 Pa. St. 192; Prescott *v.* Union Ins. Co., 1 Whart. 399, 30 Am. Dec. 207.

South Carolina.— Miller *v.* South Carolina Ins. Co., 2 McCord 336, 13 Am. Dec. 734; Wallace *v.* De Pau, 1 Brev. 252, 2 Am. Dec. 662; Wallace *v.* Depau, 2 Bay 503.

United States.— Long Dock Mills, etc., Co. *v.* Mannheim Ins. Co., 116 Fed. 886 [*affirmed* in 123 Fed. 861]; Anderson Lumber Co. *v.* Greenwich Ins. Co., 79 Fed. 125; The Gulnare, 42 Fed. 861; Batchelder *v.* Insurance Co. of North America, 30 Fed. 459; Moores *v.* Louisville Underwriters, 14 Fed. 226; Higgie *v.* American Lloyds, 14 Fed. 143, 11 Biss. 395; Cort *v.* Delaware Ins. Co., 6 Fed. Cas. No. 3,257, 2 Wash. 375.

England.— Ajum Goolam Hossen *v.* Union Mar. Ins. Co., [1901] A. C. 362, 9 Aspin. 167, 70 L. J. P. C. 34, 84 L. T. Rep. N. S. 366; Douglas *v.* Scougall, 4 Dow 269, 16 Rev. Rep. 69, 3 Eng. Reprint 1161; Parker *v.* Potts, 3 Dow 23, 15 Rev. Rep. 1, 3 Eng. Reprint 977; Watson *v.* Clark, 1 Dow 336, 14 Rev. Rep. 73, 3 Eng. Reprint 720.

Canada.— Ewart *v.* Merchants' Mar. Ins. Co., 13 Nova Scotia 168; Myles *v.* Montreal Ins. Co., 20 U. C. C. P. 283; Coons *v.* Ætna Ins. Co., 18 U. C. C. P. 305. *Compare* Morrison *v.* Nova Scotia Mar. Ins. Co., 28 Nova Scotia 346.

See 28 Cent. Dig. tit. "Insurance," § 1652.

No presumption that the foundering of a vessel at sea arose from some latent defect existing before it left port arises, where it appears affirmatively that it was seaworthy at that time, and that it encountered marine perils such as might disable a staunch ship. Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427.

The presumption of unseaworthiness is a mere presumption of fact which shifts the *onus probandi* and prevails only where it is unrepelled by countervailing proof. No presumption of unseaworthiness arises, except from facts which exclude the rational inference of a loss attributable to the perils of the sea. Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427.

A necessary jettison, shortly after sailing with a proper load, without encountering a peril insured against, is a fact tending to generate a presumption of unseaworthiness. Schultz *v.* Pacific Ins. Co., 14 Fla. 73.

Shifting of burden.— It was proved at the trial that the vessel put back from inability to proceed eleven days after she started on her voyage. The judge directed the jury that the time which elapsed between setting sail and putting back was sufficiently short to shift the onus of proof from the underwriters, and make it incumbent on the assured to prove that the unseaworthiness arose from causes occurring subsequently to setting sail. This was held a misdirection. Pickup *v.* Thames Mar. Ins. Co., 3 Q. B. D. 594, 4 Aspin. 43, 47 L. J. Q. B. 749, 39 L. T. Rep. N. S. 341, 26 Wkly. Rep. 689.

able time, it is presumed to have been lost from a peril of the sea[41] or other peril insured against.[42] There is no fixed rule in law with regard to the time after which a missing vessel will be presumed to be lost; but it depends upon the circumstances of each case.[43]

(II) *Cause and Time of Loss.* In an action on a policy it is incumbent upon plaintiffs to show the probable cause of the loss[44] by one of the perils insured

Where adequate cause of loss shown.— Where it was shown that a vessel insured under a marine policy was sound and seaworthy for two years prior to her loss, and that she was wrecked in a cyclone, the burden of proof is on the insurers to show that she was unseaworthy at the inception of the voyage insured. The Orient, 16 Fed. 916, 4 Woods 255. If the insured lays a rational ground for the disability of the vessel by proving severe gales during the voyage, and seaworthiness on a preceding voyage, the burden of the proof of want of seaworthiness at the inception of the voyage lies on the insurer; *aliter* when a disability happens from stress of weather, without any sufficient cause. Watson *v.* Insurance Co. of North America, 29 Fed. Cas. No. 17,285, 2 Wash. 480. Where an injury to cargo resulted from negligently leaving open a valve in a discharge pipe whereby water flowed into the vessel upon her being loaded to such an extent as to bring the pipe below the surface of the water, it was held that the loss being from a peril insured against the burden was on the defendant to show unseaworthiness. Davidson *v.* Burnand, L. R. 4 C. P. 117, 58 L. J. C. P. 73, 19 L. T. Rep. N. S. 782, 17 Wkly. Rep. 121.

The presumption is rebutted in the case of loss of a ship soon after leaving port, of which the insured cannot prove the cause, when the balance of evidence is that she was neither overloaded nor top-heavy when she left port, and that the loss was attributable rather to mistakes of management after she started than to unseaworthiness when she left port. Ajum Goolam Hossen *v* Union Mar. Ins. Co., [1901] A. C. 362, 9 Aspin. 167, 70 L. J. P. C. 34, 84 L. T. Rep. N. S. 366.

41. Green *v.* Brown, Str. 1199.

42. Paddock *v.* Franklin Ins. Co., 11 Pick. (Mass.) 227.

43. Gordon *v.* Bowne, 2 Johns. (N. Y.) 150; Brown *v.* Neilson, 1 Cai. (N. Y.) 525; Houstman *v.* Thornton, Holt N. P. 242, 17 Rev. Rep. 632, 3 E. C. L. 102; Green *v.* Brown, Str. 1199. Presumptions of loss have been held to arise after one year (Gordon *v.* Bowne, 2 Johns. (N. Y.) 150); and after nine months (Houstman *v.* Thornton, Holt. N. P. 242, 17 Rev. Rep. 632, 3 E. C. L. 102).

In judging whether a vessel has been lost in a voyage insured, the usual, and not the utmost, length of the voyage must be considered. Brown *v.* Neilson, 1 Cai. (N. Y.) 525.

Under time policies.— If a policy of insurance on a vessel expires while she is supposed to be on a voyage, and a second policy for a different sum is taken, after the expiration of the first, there is in this country no rule of law which requires payment of that policy under which the vessel sailed or was last heard from, in the absence of proof of the time of loss. Clifford *v.* Thomaston Mut. Ins. Co., 50 Me. 197, 79 Am. Dec. 606. Evidence that a vessel sailed in May, was seen the following October, and was never seen or heard of again is *prima facie* proof, in an action on an insurance policy expiring on December 29 following, that the ship was lost during the lifetime of the policy. Reck *v.* Phenix Ins. Co., 130 N. Y. 160, 29 N. E. 137.

44. Baker *v.* Manufacturers' Ins. Co., 12 Gray (Mass.) 603; Berwind *v.* Greenwich Ins. Co., 53 N. Y. Super. Ct. 102 [*affirmed* in 114 N. Y. 231, 21 N. E. 151]; Bullard *v.* Roger Williams Ins. Co., 4 Fed. Cas. No. 2,122, 1 Curt. 148.

It is not sufficient for the insured to prove that there were storms during the voyage, unless he can fairly trace the injury sustained to their influence. Coles *v.* Marine Ins. Co., 6 Fed. Cas. No. 2,988, 3 Wash. 159.

In case of a boat springing a dangerous leak without apparent cause the owners are not required, to entitle them to recover for the loss, to show the identical cause of her loss, but may show a probable cause. Western Ins. Co. *v.* Tobin, 32 Ohio St. 77.

Absence of evidence of how loss arose.—Although a disaster happens in fair weather, and without apparent peril to cause it, yet, if the assured shows that the vessel was in fact seaworthy at the beginning of the voyage, there then arises a presumption of loss by some peril of navigation covered by the policy, and it is for the insurer to show that it was otherwise caused. Moores *v.* Louisville Underwriters, 14 Fed. 226. See also Potter *v.* Suffolk Ins. Co., 19 Fed. Cas. No. 11,339, 2 Sumn. 197. Where, in an action on a policy insuring a barge, it appears that it was seaworthy at the commencement of the voyage, but that it sank from an unknown cause, it is to be presumed that the loss was occasioned by an unavoidable peril of the sea. Paddock-Hawley Iron Co. *v.* Providence-Washington Ins. Co., 118 Mo. App. 85, 93 S. W. 358. A ship began suddenly to leak, and sank at her anchors in port during fine weather. Evidence was given tending to show that the ship was seaworthy, viz., that she had not long before been put in good repair; that surveys had been made of her just previously, and that she had behaved well on previous voyages, and on her voyage to the port where she was lost. No evidence was given of any actual facts showing the cause of her loss, although possible explanations of it, by way of conjecture, were suggested by the witnesses. It was held that there was evidence of a loss by the perils insured

against,[45] and that it occurred upon the insured voyage.[46] The mere fact that after arrival cargo is found damaged by sea-water,[47] or a vessel has defects in her hull, does not create a presumption that such damage was caused by a sea peril.[48] Where there is a loss by a peril insured against, it raises a *prima facie* case of liability, and it devolves upon the underwriters to show that the loss arose from or was caused by an excepted peril.[49]

(III) *Extent of Loss*—(A) *In General.* The burden is upon plaintiff to show the extent of the loss;[50] and where it appears that the property has sus-

against. Anderson *v.* Morice, 1 App. Cas. 713, 3 Aspin. 290, 46 L. J. Q. B. 11, 35 L. T. Rep. N. S. 506, 25 Wkly. Rep. 14.

45. Swift *v.* Union Mut. Mar. Ins. Co., 122 Mass. 573; Cory *v.* Boylston F. & M. Ins. Co., 107 Mass. 140, 9 Am. Rep. 14; Copeland *v.* New England Mar. Ins. Co., 2 Metc. (Mass.) 432; Reilly *v.* Home Ins. Co., 81 N. Y. App. Div. 314, 81 N. Y. Suppl. 59; Van Vliet *v.* Greenwich Ins. Co., 14 Daly (N. Y.) 496, 15 N. Y. St. 375; McCarthy *v.* St. Paul F. & M. Ins. Co., 19 Misc. (N. Y.) 274, 43 N. Y. Suppl. 343; Soelberg *v.* Western Assur. Co., 119 Fed. 23, 55 C. C. A. 601; Long Dock Mills, etc., Co. *v.* Mannheim Ins. Co., 116 Fed. 886 [*affirmed* in 123 Fed. 861]; Ionides *v.* Pender, 1 Aspin. 432, 27 L. T. Rep. N. S. 244; Sun Mut. Ins. Co. *v.* Masson, 4 L. C. Jur. 23.

46. Amsinck *v.* American Ins. Co., 129 Mass. 185.

Discharge of vessel.—A vessel was insured at and from Salem to her port or ports of discharge in the river La Plata. All her cargo except a few bundles of shingles was discharged at Montevideo, where she took on board merchandise intended for another vessel of the owner, then lying at Buenos Ayres, and proceeded to that port, where she was lost. It was held that the burden of proof was on the underwriters to show that the cargo was substantially discharged at Montevideo, so as to preclude recovery. Upton *v.* Salem Com. Ins. Co., 8 Metc. (Mass.) 605.

Vessel not heard from.—Where a loss by the perils of the sea is to be inferred from the ship not being heard of after her sailing, the assured must prove that when she left the port of outfit she was bound upon the voyage insured. Cohen *v.* Hinckley, 2 Campb. 51, 1 Taunt. 249, 11 Rev. Rep. 660; Koster *v.* Innes, R. & M. 333, 27 Rev. Rep. 755, 21 E. C. L. 761.

47. Fleming *v.* Marine Ins. Co., 3 Watts & S. (Pa.) 144, 38 Am. Dec. 747.

Arrival in damaged condition.—Where one who has insured a cargo under a marine policy proves the sound and valuable condition of the property at the time of shipment and its subsequent bad condition, a presumption is raised that it was injured by the peril it had passed through, and it devolves upon the insurers to rebut the presumption by showing that the property was not injured by any of the perils or causes insured against. Young *v.* Pacific Mut. Ins. Co., 34 N. Y. Super. Ct. 321.

48. Bullard *v.* Roger Williams Ins. Co., 4 Fed. Cas. No. 2,122, 1 Curt. 148; Donnell *v.* Columbian Ins. Co., 7 Fed. Cas. No. 3,987, 2 Sumn. 366.

49. Russ *v.* Waldo Mut. Ins. Co., 52 Me. 187; Northwest Transp. Co. *v.* Boston Mar. Ins. Co., 41 Fed. 793. *Compare* Reilly *v.* Home Ins. Co., 81 N. Y. App. Div. 314, 81 N. Y. Suppl. 59.

Barratry.—If an act of barratry be once proved, the onus of establishing any fact that goes to excuse it lies on the insurer. Millaudon *v.* New Orleans Ins. Co., 11 Mart. (La.) 602, 13 Am. Dec. 358; Barry *v.* Louisiana Ins. Co., 11 Mart. (La.) 202; Steinbach *v.* Ogden, 3 Cai. (N. Y.) 1.

Negligent navigation.—Where, in defense to an action on a marine policy, negligence of the master of the vessel is averred, the burden of proof is on the underwriter. Schultz *v.* Pacific Ins. Co., 14 Fla. 73; Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 497; Tidmarsh *v.* Washington F. & M. Ins. Co., 24 Fed. Cas. No. 14,024, 4 Mason 439.

Presumption that master performed duty.—A master may be presumed, in ordering the sale of his ship, to have done his duty properly, if there are no proofs to the contrary. Robinson *v.* Commonwealth Ins. Co., 20 Fed. Cas. No. 11,949, 3 Sumn. 220.

50. Merchants' Mut. Ins. Co. *v.* Wilson, 2 Md. 217; Heebner *v.* Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308; Cory *v.* Boylstown F. & M. Ins. Co., 107 Mass. 140, 9 Am. Rep. 14; Young *v.* Pacific Mut. Ins. Co., 34 N. Y. Super. Ct. 321; Soelberg *v.* Western Assur. Co., 119 Fed. 23, 55 C. C. A. 601.

Nominal damages.—Where the proof shows some damage but is not sufficiently definite to show the amount the jury can allow nominal damages. Merchants' Mut. Ins. Co. *v.* Wilson, 2 Md. 217.

Successive losses.—Under a policy of insurance upon a ship which provides that the indorsers shall not be liable for a partial loss unless it shall amount to five per cent, the burden of proving a partial loss amounting to five per cent from one gale or storm is upon the assured. Hagar *v.* New England Mut. Mar. Ins. Co., 59 Me. 460; Paddock *v.* Commercial Ins. Co., 104 Mass. 521.

To show actual total loss of memorandum articles, part of which are taken to the destination and sold, plaintiff must show that the expenses incurred in saving exceeded the amount realized. Almon *v.* British America Assur. Co., 16 Nova Scotia 43.

On a policy on profits it need not be shown that profits would have been realized had

tained damage from perils insured against and from perils not insured against, it is incumbent upon the insured to distinguish the losses occasioned by the several perils.[51]

(B) *Constructive Total Loss and Abandonment.* The burden is on plaintiff claiming a constructive total loss to show the facts justifying an abandonment,[52] that an abandonment was made,[53] and the time notice was given.[54]

2. Admissibility, Weight, and Sufficiency — a. The Contract in General. The policy is the evidence of the contract[55] and of the receipt of the premium.[56] The binding slip or memoranda is admissible to explain the contract,[57] but the application will not be admitted where there is no ambiguity in the policy.[58]

b. Usages, Extrinsic Facts, and Antecedent Statements. Evidence of usage,[59] extrinsic facts,[60] or antecedent statements[61] are not admissible to vary the executed contract, but may be resorted to explain the policy where the intention is not apparent.[62]

the cargo arrived. Canada Sugar-Refining Co. *v.* Insurance Co. of North America, 175 U. S. 609, 20 S. Ct. 239, 44 L. ed. 292; Patapsco Ins. Co. *v.* Coulter, 3 Pet. (U. S.) 222, 7 L. ed. 659. *Compare* Hodgson *v.* Glover, 6 East 316, 8 Rev. Rep. 495.

51. Paddock *v.* Commercial Ins. Co., 104 Mass. 521; Heebner *v.* Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308; Woodruff *v.* Commercial Mut. Ins. Co., 2 Hilt. (N. Y.) 130; Soelberg *v.* Western Assur. Co., 119 Fed. 23, 55 C. C. A. 601.

When part of the damage was sustained prior to the placing of the insurance, and no notice of such damage was given to the insurers, the duty of ascertaining what part of the loss occurred before and what after the insurance devolves on the insured. Batchelder *v.* Insurance Co. of North America, 30 Fed. 459.

52. Bryant *v.* Commonwealth Ins. Co., 13 Pick. (Mass.) 543.

That no other vessel was procurable must be shown by plaintiff in order to recover for loss of freight on a cargo sold at an intermediate port because of damage to the vessel. Kinsman *v.* New York Mut. Ins. Co., 5 Bosw. (N. Y.) 460.

Cost of repairs.— Osborne *v.* New York Mut. Ins. Co., 2 Silv. Sup. (N. Y.) 568, 6 N. Y. Suppl. 103 [*affirmed* in 127 N. Y. 656, 28 N. E. 254].

53. Morton *v.* Patillo, 3 Nova Scotia Dec. 17.

54. Morton *v.* Patillo, 3 Nova Scotia Dec. 17.

55. Mellen *v.* National Ins. Co., 1 Hall (N. Y.) 452.

56. Dalzell *v.* Mair, 1 Campb. 532; Anderson *v.* Thornton, 8 Exch. 425.

57. Lower Rhine, etc., Ins. Assoc. *v.* Sedgwick, [1899] 1 Q. B. 179, 8 Aspin. 466, 68 L. J. Q. B. 186, 80 L. T. Rep. N. S. 6, 47 Wkly. Rep. 261.

58. Folsom *v.* Mercantile Mut. Ins. Co., 9 Fed. Cas. No. 4,903, 9 Blatchf. 201 [*affirmed* in 18 Wall. 237, 21 L. ed. 827].

59. *Alabama.*— Smith *v.* Mobile Nav., etc., Ins. Co., 30 Ala. 167.

Massachusetts.— Emery *v.* Boston Mar. Ins. Co., 138 Mass. 398; Odiorne *v.* New England Mar. Ins. Co., 101 Mass. 551, 3 Am. Rep. 401; Lapham *v.* Atlas Ins. Co., 24 Pick. 1.

Wisconsin.— Ætna Ins. Co. *v.* Northwestern Iron Co., 21 Wis. 458.

United States.— Hearne *v.* New England Mut. Mar. Ins. Co., 20 Wall. 488, 22 L. ed. 395.

England.— Provincial Ins. Co. *v.* Leduc, L. R. 6 P. C. 224, 2 Aspin. 338, 43 L. J. P. C. 49, 31 L. T. Rep. N. S. 142, 22 Wkly. Rep. 929; Blackett *v.* Royal Exch. Assur. Co., 2 Cromp. & J. 244, 1 L. J. Exch. 101, 2 Tyrw. 266.

See *supra*, IV, B, 1, c.

On an issue whether a scow is a "building," within the meaning of that term in the condition of an insurance policy relating to vacant buildings, evidence that similar scows were used as buildings is admissible. Enos *v.* Sun Ins. Co., 67 Cal. 621, 8 Pac. 379.

Evidence of usage is not admissible to control rules of law as to adjustment of losses. Taber *v.* China Ins. Co., 131 Mass. 239.

60 Minturn *v.* Warren Ins. Co., 2 Allen (Mass.) 86; Mellen *v.* National Ins. Co., 1 Hall (N. Y.) 452; Vandervoort *v.* Smith, 2 Cai. (N. Y.) 155; Jones *v.* Western Assur. Co., 198 Pa. St. 206, 47 Atl. 948; State F. & M. Ins. Co. *v.* Porter, 3 Grant (Pa.) 123; Eyre *v.* Philadelphia Mar. Ins. Co., 5 Watts & S. (Pa.) 116.

61. Odiorne *v.* New England Mut. Mar. Ins. Co., 101 Mass. 551, 3 Am. Rep. 401; Astor *v.* Union Ins. Co., 7 Cow. (N. Y.) 202; Weston *v.* Emes, 1 Taunt. 115.

62. *New York.*— Bidwell *v.* Northwestern Ins. Co., 24 N. Y. 302; Fabbri *v.* Mercantile Mut. Ins. Co., 64 Barb. 85; Mumford *v.* Hallett, 1 Johns. 433.

Pennsylvania.— Eyre *v.* Philadelphia Mar. Ins. Co., 5 Watts & S. 116.

Texas.— Orient Mut. Ins. Co. *v.* Reymershoffer, 56 Tex. 234.

Wisconsin.— Johnson *v.* Northwestern Nat. Ins. Co., 39 Wis. 87.

England.— Preston *v.* Greenwood, 4 Dougl. 28, 26 E. C. L. 320; Urquhart *v.* Barnard, 1 Taunt. 450, 10 Rev. Rep. 574.

To show beneficiary.— Where a shipmaster procured insurance on his interest in a vessel "on account of whom it may concern," loss

e. Authority to Execute Policy. The authority to sign policies is not sufficiently shown by proof that the person was accustomed to sign them,[63] but it may be shown by proof that defendant was in the habit of paying losses on policies so subscribed.[64]

d. Interest and Ownership. Interest in the subject-matter need not be proved by direct testimony as to ownership;[65] but may be proved by acts of ownership, or of control over property.[66] A bill of lading[67] with the insured's name as shipper or consignee is *prima facie* evidence of an insurable interest, but it is not conclusive.[68] A register or an enrolment is admissible to show interest of the insured,[69] but it seems that an invoice is not sufficient.[70] The underwriter may show that the insured had no interest even under a valued policy.[71]

e. Misrepresentation and Concealment. Representations may be proved by parol where the object is to falsify them.[72] The materiality of facts concealed or misrepresented may be testified to by insurance brokers.[73] And it is competent

payable to himself, and on loss of the vessel and death of the master, a creditor brought an action on the policy, claiming it was for his benefit, it was held that evidence of declarations of the deceased that if the creditor would make him a loan he would secure him by a policy on the vessel, and of subsequent declarations that the loan had been made and the policy secured for the creditor's benefit, was inadmissible, without proof that the deceased was acting as the creditor's agent in effecting the insurance. Sleeper *v.* Union Ins. Co., 61 Me. 267.

63. Courteen *v.* Touse, 1 Campb. 43, 10 Rev. Rep. 627; Neal *v.* Erving, 1 Esp. 61, 5 Rev. Rep. 720.

64. Haughton *v.* Ewbank, 4 Campb. 88.

65. Parol proof of register will prove interest. Peyton *v.* Hallett, 1 Cai. (N. Y.) 363.

One who sold the cargo and sees it loaded can prove the interest of the owner. Peyton *v.* Hallett, 1 Cai. (N. Y.) 363.

Letter of owner to insured creditor.— In an action upon a policy in the name of a creditor of the owner, a letter from an owner, directing plaintiff to obtain insurance on the vessel in his own name, and stating the interest of plaintiff in the vessel insured, is admissible in evidence for plaintiff to prove his insurable interest. Vairin *v.* Canal Ins. Co., 10 Ohio 223.

Declarations of a master and part-owner of a vessel are admissible to prove interest. Hall *v.* Insurance Co., 3 Phila. (Pa.) 331.

66. Marsh *v.* Robinson, Anstr. 479, 4 Esp. 98, 3 Rev. Rep. 617; Robertson *v.* French, 4 East, 130, 4 Esp. 246, 7 Rev. Rep. 535; Amery *v.* Rogers, 1 Esp. 207.

Parol proof of ownership is not disproved by showing prior register in the name of another and subsequent register in the name of the same person. Robertson *v.* French, 4 East 130, 4 Esp. 246, 7 Rev. Rep. 535.

Parol title to vessel.— If a policy of insurance is underwritten on a ship, the assured cannot set up a parol title to the whole of the ship, when the ship's papers on the voyage prove a joint ownership in himself and the master. In such case he can recover only for his own moiety in case of loss. Ohl *v.* Eagle Ins. Co., 18 Fed. Cas. No. 10,472, 10,473, 4 Mason 172, 390.

Paying for supplies for the vessel is proof of ownership. Thomas *v.* Foyle, 5 Esp. 88.

67. McAndrew *v.* Bell, 1 Esp. 373; Russel *v.* Boheme, Str. 1127. But see Paine *v.* Maine Mut. Mar. Ins. Co., 69 Me. 568; Dickson *v.* Lodge, 1 Stark. 226, 18 Rev. Rep. 764, 2 E. C. L. 92.

68. Seagrave *v.* Union Mar. Ins. Co., L. R. 1 C. P. 305, 1 Harr. & R. 302, 12 Jur. N. S. 358, 35 L. J. C. P. 172, 14 L. T. Rep. N. S. 479, 14 Wkly. Rep. 690.

The bill of lading of the outward cargo is no proof of the interest of plaintiff in the homeward cargo. Beale *v.* Pettit, 2 Fed. Cas. No. 1,158, 1 Wash. 241.

"Contents unknown."— If the master guards his acknowledgment by saying "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading alone is not evidence, either of the quantity of the goods or of property in the consignee. Haddow *v.* Parry, 3 Taunt. 303, 12 Rev. Rep. 666.

69. Polleys *v.* Ocean Ins. Co., 14 Me. 141; Hall *v.* Insurance Co., 3 Phila. (Pa.) 331.

Transfer of ship.— Where a bill of sale of a ship has been executed, it may be shown that the transfer, although absolute in its terms, was intended only as a security, and that the transferrer has an equity of redemption. Millidge *v.* Stymest, 11 N. Brunsw. 164.

70. Paine *v.* Maine Mut. Mar. Ins. Co., 69 Me. 568; Rolker *v.* Great Western Ins. Co., 4 Abb. Dec. (N. Y.) 76, 3 Keyes 17.

Invoice and bill of lading discredited by declaration of deceased master.— Blagg *v.* Phœnix Ins. Co., 3 Fed. Cas. No. 1,477, 3 Wash. 5.

71. Williams *v.* North China Ins. Co., 1 C. P. D. 757, 3 Aspin. 342, 35 L. T. Rep. N. S. 884; Lidgett *v.* Secretan, L. R. 6 C. P. 616, 1 Aspin. 95, 40 L. J. C. P. 257, 24 L. T. Rep. N. S. 942, 19 Wkly. Rep. 1088; Shaw *v.* Felton, 2 East 109.

72. Higginson *v.* Dall, 13 Mass. 96.

73. Rickards *v.* Murdock, 10 B. & C. 527, 8 L. J. K. B. O. S. 210, 21 E. C. L. 225; Chapman *v.* Walton, 10 Bing. 57, 2 L. J. C. P. 210, 3 Moore & S. 389, 25 E. C. L. 36; Elton *v.* Larkins, 8 Bing. 198, 21 E. C. L. 504, 5 C. & P. 86, 385, 24 E. C. L. 466, 617, 1

to show that the rate of premium would have been the same had the facts not been misrepresented for the purpose of showing that the misrepresentations were immaterial to the risk.[74]

f. Fraud. Where the defense is fraud defendant may show any fact from which an inference of fraud may arise.[75]

g. Seaworthiness. It is not admissible for one to testify that a vessel is or is not seaworthy. He can only testify as to facts regarding her condition.[76] But an experienced shipwright or other qualified expert in such matters may give his opinion as to the vessel's seaworthiness from the facts in evidence or from facts within his own knowledge.[77] The condition of the vessel subsequent to the loss is competent.[78] The age of the ship is of weight to show unseaworthiness,[79] and admissions of the insurer are competent evidence to show seaworthiness.[80] Evidence as to the general reputation of the officers and crew as to their competency and skilfulness is admissible to show such facts.[81]

h. Value, Kind, Quality, Etc. Where the master is alive the bill of lading is not admissible against the underwriters as to the kind or quality of the cargo,[82] nor as to the amount of freight due thereon;[83] but the bill of lading and invoice are admissible to prove value.[84]

Moore & S. 323; Littledale *v.* Dixon, 1 B. & P. N. R. 151, 8 Rev. Rep. 774; Haywood *v.* Rodgers, 4 East 590, 1 Smith K. B. 289, 7 Rev. Rep. 638; Chaurand *v.* Angerstein, 1 Peake N. P. 61; Berthon *v.* Loughman, 2 Stark. 258, 3 E. C. L. 400; Seaman *v.* Fonereau, Str. 1183. *Contra,* Carter *v.* Boehm, 3 Burr 1905, W. Bl. 593; Durrell *v.* Bederley, Holt N. P. 283, 8 Rev. Rep. 739, 17 Rev. Rep. 639, 3 E. C. L. 118.

74. Buck *v.* Chesapeake Ins. Co., 4 Fed. Cas. No. 2,078.

75. Livingston *v.* Delafield, 3 Cai. (N. Y.) 49.

Loss of other insured vessels.— Hoxie *v.* Home Ins. Co., 33 Conn. 471; Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240.

Contents of cargo saved.—Where an insurer contests his liability on the ground of fraud in procuring insurance on a fictitious and overvalued cargo, testimony as to the contents of any part of the cargo saved from the wreck is admissible. Phœnix Ins. Co. *v.* Moog, 78 Ala. 284, 56 Am. Rep. 31.

76. Voisin *v.* Commercial Mut. Ins. Co., 62 Hun (N. Y.) 4, 16 N. Y. Suppl. 410.

Sufficiency of crew.—But where the insured goods were lost by the sinking of the steamer which was to carry them, it was held competent for the captain of the boat to testify that the boat carried a sufficient number of officers and men to make the trip, although not the number required by the license of the vessel. Louisville Ins. Co. *v.* Monarch, 99 Ky. 578, 36 S. W. 563, 18 Ky. L. Rep. 444.

Water entering through open port-hole.— A finding that a vessel which was sunk by water getting in through an open port-hole was seaworthy when she left port is supported by evidence that all the port-holes were fastened before she sailed, and that no leak was noticed for more than twelve hours after she had sailed. Starbuck *v.* Phœnix Ins. Co., 10 N. Y. App. Div. 198, 41 N. Y. Suppl. 901.

77. McLain *v.* British, etc., Mar. Ins. Co., 16 Misc. (N. Y.) 336, 38 N. Y. Suppl. 77; Beckwith *v.* Sydebotham, 1 Camph. 116, 10 Rev. Rep. 652; Thornton *v.* Royal Exch. Co., Peake Add. Cas. 25. See *infra,* XII, F, 2, l, text and note 22.

The testimony of the captain that the boat was seaworthy and that of the owner that she had been thoroughly overhauled before the voyage was sufficient *prima facie* evidence of her seaworthiness at the commencement of the voyage. Heilner *v.* China Mut. Ins. Co., 60 N. Y. Super. Ct. 362, 18 N. Y. Suppl. 177.

78. Voisin *v.* Commercial Mut. Ins. Co., 67 Hun (N. Y.) 365, 22 N. Y. Suppl. 348.

79. Watson *v.* Clark, 1 Dow 336, 14 Rev. Rep. 73, 3 Eng. Reprint 720.

80. In an action on a policy insuring a barge, which made the seaworthiness of the barge at the time of the issuance of the policy a condition precedent to the attaching of the policy, evidence that insured was induced to purchase the barge and to take out the policy by a report made by the insurer, after an examination of the barge, to the effect that the same was seaworthy, was admissible as tending to show that the insurer had admitted the seaworthiness at the issuance of the policy. Paddock-Hawley Iron Co. *v.* Providence-Washington Ins. Co., 118 Mo. App. 85, 93 S. W. 358.

81. Louisville Ins. Co. *v.* Monarch, 99 Ky. 578, 36 S. W. 563, 18 Ky. L. Rep. 444; Hutchins *v.* Ford, 82 Me. 363, 19 Atl. 832.

Incompetency of the master is not established as a matter of defense against a claim of loss on a marine policy by proof of a single instance of more or less intoxication, where previous good character and competency are established. Rogers *v.* Ætna Ins. Co., 76 Fed. 569.

82. Palmer *v.* Great Western Ins. Co., 116 N. Y. 599, 23 N. E. 5.

83. Palmer *v.* Great Western Ins. Co., 116 N. Y. 599, 23 N. E. 5.

84. Graham *v.* Pennsylvania Ins. Co., 10 Fed. Cas. No. 5,674, 2 Wash. 113.

i. Loss — (i) *Fact of Loss.* Proof of the fact of loss may be and generally is given by the parol testimony of the master, officers, and crew,[85] but it may be proved by other legal evidence.[86] Neither the master's protest[87] nor a survey[88] is essential to show loss or damage. Nor is a sentence of condemnation essential to show a loss by capture or seizure.[89] But where it is sought to show a loss by capture or seizure followed by condemnation, the court proceedings cannot be proved by parol, but the judgment or decree of the court must be produced.[90]

(ii) *Cause of Loss.* A recovery may be had, although the cause of the accident is not specifically ascertained by the evidence.[91] But if it is left in doubt whether the loss was occasioned by a peril insured against or by one not insured against there can be no recovery.[92] Where, after the arrival of goods insured at a port of destination, a portion of the packages were destroyed by fire, evidence that the remainder of the packages appeared to have suffered sea damage does not show damage from such cause as to the property destroyed by fire.[93] It is incompetent to give in evidence specific cases of other vessels that have been lost while navigating the same waters occasioned by some unknown injury causing them to suddenly sink;[94] but evidence of damage to other merchandise of the same kind and similarly packed, shipped in other vessels, is admissible to prove that it arose in the making or packing of the merchandise.[95]

(iii) *Extent of Loss.* The amount of damage to cargo may be shown by appraisers,[96] or by the value of sound goods and the amount realized by a sale at auction of the damaged goods,[97] but it cannot be shown by an amount realized at an irregular sale.[98] To show the extent of damage to a vessel the cost of repairs made necessary by the perils insured against is competent evidence;[99] but evi-

85. 2 Arnould Ins. § 474.

86. **Adjustment prima facie evidence of loss.**— Hogg *v.* Gouldney, Beaw. Lex Mer. 310, 1 Park Ins. 266; Shepherd *v.* Chewter, 1 Camph. 274, 10 Rev. Rep. 681.

Reception of the insured goods by the consignee from the carrier, and payment of the freight and charges without complaint of damage, is not evidence, in a suit on the policy, that the damage did not occur in the course of the navigation. Underwriters' Agency *v.* Sutherlin, 55 Ga. 266.

Not essential to call crew.— Where it was proved that the insured vessel sailed on the voyage insured with the goods on board, and never arrived at her port of destination; and that, a few days after her departure, a report was heard at the place whence she sailed that the ship had foundered at sea but that the crew were saved, it was held that this was sufficient *prima facie* evidence of a loss by perils of the sea; and that the assured was not bound to call any of the crew or to show that he was unable to procure their attendance. Koster *v.* Reed, 6 B. & C. 19, 9 D. & R. 2, 30 Rev. Rep. 239, 13 E. C. L. 21.

Where vessel is missing.— In an action on a policy from an English to a foreign port, to found a presumption that a ship was lost on the voyage, it is enough to prove that she was not heard of in England after she sailed, without calling witnesses from her port of destination, to show that she never arrived there. Twemlow *v.* Oswin, 2 Camph. 85, 11 Rev. Rep. 670.

87. Ruan *v.* Gardner, 20 Fed. Cas. No. 12,100, 1 Wash. 145.

88. Mitchell *v.* New England Mar. Ins. Co., 6 Pick. (Mass.) 117; Bentaloe *v.* Pratt, 3 Fed. Cas. No. 1,330, Wall. Sr. 58.

89. Dorr *v.* Pope, 8 Pick. (Mass.) 232; Ruan *v.* Gardner, 20 Fed. Cas. No. 12,100, 1 Wash. 145; Carruthers *v.* Gray, 3 Campb. 142, 15 East 35.

90. Thellusson *v.* Shedden, 2 B. & P. N. R. 228.

Evidence of condemnation.—A notarial copy of the condemnation of a ship by ship carpenters as not being worth repairing is only evidence of the fact of her having been condemned, not of the particular defects on which the condemnation was grounded. Wright *v.* Barnard, 2 Esp. 700, 5 Rev. Rep. 767.

91. Marcy *v.* Sun Ins. Co., 14 La. Ann. 264; Snethen *v.* Memphis Ins. Co., 3 La. Ann. 474, 48 Am. Dec. 462; Swift *v.* Union Mut. Mar. Ins. Co., 122 Mass. 573.

92. Baker *v.* Manufacturers' Ins. Co., 12 Gray (Mass.) 603.

93. Levy *v.* Mercantile Mut. Ins. Co., 5 Pa L. J. Rep. 284.

94. Western Ins. Co. *v.* Tobin, 32 Ohio St. 77.

95. Bradford *v.* Boylston F. & M. Ins. Co., 11 Pick. (Mass.) 162.

96. Stewart *v.* Western M. & F. Ins. Co., 11 La. 53; Stanton *v.* Natchez Ins. Co., 5 How. (Miss.) 744.

97. Stanton *v.* Natchez Ins. Co., 5 How. (Miss.) 744.

98. Sun Mut. Ins. Co. *v.* Masson, 4 L. C. Jur. 23.

99. Norwich, etc., Transp. Co. *v.* Western Massachusetts Ins. Co., 18 Fed. Cas. No. 10,363. 6 Blatchf. 241, 34 Conn. 561 [*affirmed* in 12 Wall. 201, 20 L. ed. 380].

dence of what it would cost to put a ship in repair at the end of the voyage, without reference to the causes which made such repairs needful, is incompetent.[1] The value of the wreck or the opinion of the master as to the impracticability of saving the vessel is admissible to show ground for abandonment.[2] That a vessel was recovered and repaired a year after the loss is not the best evidence that it was practicable to recover and repair it at the time of the loss.[3]

j. Proof of Loss. Secondary evidence of proofs of loss may be admitted on defendant's failure to produce the proofs on notice.[4]

k. Documentary Evidence — (I) *Ship's Log.* A ship's log-book is admissible in evidence.[5]

(II) *Ship's Register.* The ship's register is *prima facie* proof of nationality[6] and evidence of ownership and interest.[7]

(III) *Survey.* A regular marine survey made in accordance with the usages of maritime states is generally considered admissible[8] and *prima facie* evidence,[9] but not conclusive,[10] of the facts which they recite. But a survey which is called *ex parte* by the owners or is otherwise irregular is not admissible against the underwriters.[11]

1. Paddock *v.* Commercial Ins. Co., 104 Mass. 521.

2. Walker *v.* Protection Ins. Co., 29 Me. 317; Beaver Line Associated Steamers *v.* London, etc., Ins. Co., 5 Com. Cas. 269.

Total loss.— Testimony of the captain that the vessel stranded and filled, that she lost her spars and boats, that her hawser parted, and that in five minutes she was a complete wreck, is not sufficient to establish a total loss, where it appears that she was afterward rescued and repaired, and for years thereafter was a sound and seaworthy vessel. McColl *v.* Sun Mut. Ins. Co., 34 N. Y. Super. Ct. 313.

3. Orient Mut. Ins. Co. *v.* Adams, 123 U. S. 67, 8 S. Ct. 68, 31 L. ed. 63.

4. Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 497.

5. Kellock *v.* Home, etc., Ins. Co., 12 Jur. N. S. 653.

Log-book of man-of-war convoying.— To prove the time of sailing of a ship under convoy, the log-book of the man-of-war which convoyed the fleet is evidence. D'Israeli *v.* Jowett, 1 Esp. 427.

6. **English statute.**— The Merchant Shipping Act (1854), § 107, makes the register *prima facie* proof of disputed nationality, but such inference may be overborne by circumstantial evidence to the contrary. The Princess Charlotte, Brown & L. 75.

7. Watson *v.* Summers, 4 N. Brunsw. 62. But in an action to recover back a premium of insurance on the ground that plaintiff had no interest in the vessel at the time the insurance was made, the register, which was in the names of other persons, is not even *prima facie* evidence to show that the plaintiff was not the owner of the vessel. Sharp *v.* United Ins. Co., 14 Johns. (N. Y.) 201.

Conclusive evidence.— Marsh *v.* Robinson, Anstr. 479, 4 Esp. 98, 3 Rev. Rep. 617.

8. Hathaway *v.* Sun Mut. Ins. Co., 8 Bosw. (N. Y.) 33; American Ins. Co. *v.* Francia, 9 Pa. St. 390; Brown *v.* Girard, 4 Yeates (Pa.) 115, 2 Am. Dec. 400. *Compare* Howard *v.* Orient Mut. Ins. Co., 2 Rob. (N. Y.) 539.

Proof of loss of survey.— In an action upon a policy of marine insurance, proof of the loss of the warrant of survey under which the vessel was sold in a foreign country must be made under a commission; and a certificate of the registrar of the vice-admiralty court in such country, which states that the warrant was lost, is not sufficient. Robinson *v.* Clifford, 20 Fed. Cas. No. 11,948, 2 Wash. 1.

9. Warren *v.* United Ins. Co., 2 Johns. Cas. (N. Y.) 231, 1 Am. Dec. 164; Batchelder *v.* Insurance Co. of North America, 30 Fed. 459.

Best evidence.— In an action upon a policy of marine insurance, the warrant of survey, and report made thereon, under which the vessel is sold, are the best evidence as to the condition of the vessel at the time; and testimony of the master is not admissible except to prove the facts contained in the report. Robinson *v.* Clifford, 20 Fed. Cas. No. 11,948, 2 Wash. 1.

10. Mitchell *v.* New England Mar. Ins. Co., 6 Pick. (Mass.) 117.

Where several surveys of the same vessel are introduced at the trial as evidence of the cause of loss, they are to be examined and considered together, and duly weighed in ascertaining the result, inclining to give the most weight to the survey which was last in date. Innes *v.* Alliance Mut. Ins. Co., 1 Sandf. (N. Y.) 310.

11. Hall *v.* Franklin Ins. Co., 9 Pick. (Mass.) 466; Saltus *v.* Commercial Ins. Co., 10 Johns. (N. Y.) 487; Abbott *v.* Sebor, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139. *Compare* American Ins. Co. *v.* Francia, 9 Pa. St. 390.

Unverified report of survey inadmissible.— Murray *v.* Great Western Ins. Co., 39 Hun (N. Y.) 581.

A survey, constituting part of the preliminary proofs of loss of an insured vessel made in a port of necessity by ship-masters appointed by the United States consul with the assent of the master of the vessel, will be deemed a regular survey. Innes *v.* Alliance Mut. Ins. Co., 1 Sandf. (N. Y.) 310.

(iv) *Protest.* The protest of the master is competent evidence on behalf of the underwriters,[12] but it is generally held incompetent as evidence for the insured.[13] In Pennsylvania the protest, if made at the first port where it is practicable and within twenty-four hours after the vessel is moored, is held to be competent evidence for the owner.[14]

(v) *Lloyd's Lists, Etc.* Lloyd's lists and books are admissible in evidence against the underwriters as to, and are *prima facie* evidence of, the facts which they purport to state.[15]

(vi) *Foreign Sentence or Decree.* A foreign sentence of condemnation is generally held to be conclusive of the facts they determine.[16] In some juris-

A survey ordered by an American consul, where the vessel insured put into a foreign port for want of repairs, and a report of the surveyors thereon, is not evidence to be laid before the jury in an action on the insurance policy, where there is no proof that there were no tribunals at the port from which an order for a survey could be obtained. Cort *v.* Delaware Ins. Co., 6 Fed. Cas. No. 3,257, 2 Wash. 375.

12. Smith *v.* Logan, 1 Speers (S. C.) 274; Miller *v.* South Carolina Ins. Co., 2 McCord (S. C.) 336, 13 Am. Dec. 734. *Compare* Christian *v.* Coombe, 2 Esp. 489.

13. *Maine.*— Paine *v.* Maine Mut. Mar. Ins. Co., 69 Me. 568.

Maryland.— Patterson *v.* Maryland Ins. Co., 3 Harr. & J. 71, 5 Am. Dec. 419.

New York.— Berwind *v.* Greenwich Ins. Co., 53 N. Y. Super. Ct. 102 [*affirmed* in 114 N. Y. 231, 21 N. E. 151].

South Carolina.— Cudworth *v.* South Carolina Ins. Co., 4 Rich. 416, 55 Am. Dec. 692. But see Campbell *v.* Williamson, 2 Bay 237.

Virginia.— Marine Ins. Co. *v.* Stras, 1 Munf. 408.

England.— Senat *v.* Porter, 7 T. R. 158, 4 Rev. Rep. 403. And see 2 Arnould Ins. § 474.

Where forming part of proofs of loss.— A certified copy of the protest of the vessel's master and crew, which has been served on the insurer, and is referred to by the insured in their proofs of loss, is admissible in evidence against the insured, since it is thus made part of the proofs. Richelieu, etc., Nav. Co. *v.* Boston Mar. Ins. Co., 136 U. S. 408, 10 S. Ct. 934, 34 L. ed. 398. *Compare* American Ins. Co. *v.* Francia, 9 Pa. St. 390; Thurston *v.* Murray, 3 Binn. (Pa.) 326; Senat *v.* Porter, 7 T. R. 158, 4 Rev. Rep. 403.

14. Fleming *v.* Marine Ins. Co., 3 Watts & S. (Pa.) 144, 38 Am. Dec. 747; Brown *v.* Girard, 4 Yeates (Pa.) 115, 2 Am. Dec. 400; Boyce *v.* Moore, 2 Dall. (Pa.) 196, 1 L. ed. 346, 1 Am. Dec. 277; Richette *v.* Stewart, 1 Dall. (Pa.) 317, 1 L. ed. 154.

Inland craft.— The protest of the captain and crew of an inland craft is not admissible in evidence. Gordon *v.* Little, 8 Serg. & R. (Pa.) 533, 11 Am. Dec. 632.

The protest is admissible as a part of the preliminary proof of the loss of a vessel insured, although not made within twenty-four hours after reaching a port of safety, but is not admissible as evidence for the jury. American Ins. Co. *v.* Francia, 9 Pa. St. 390.

15. Bain *v.* Case, 3 C. & P. 496, M. & M. 262, 14 E. C. L. 681; Abel *v.* Potts, 3 Esp. 242, 6 Rev. Rep. 826; Mackintosh *v.* Marshall, 12 L. J. Exch. 337, 11 M. & W. 116.

Lloyd's register of shipping is not admissible to show that a vessel is considered as copper fastened. Freeman *v.* Baker, 5 B. & Ad. 797, 27 E. C. L. 336, 5 C. & P. 475, 24 E. C. L. 663, 3 L. J. K. B. 17, 2 N. & M. 446.

Certificate of Lloyd's agent.— A certificate as to damage of goods insured made by a Lloyd's agent abroad is not admissible in evidence as proof of damage in an action by the assured against the underwriter, a member of Lloyd's. Drake *v.* Marryat, 1 B. & C. 473, 25 D. & R. 696, 1 L. J. K. B. 161, 25 Rev. Rep. 464, 8 E. C. L. 201.

16. Wilcocks *v.* Union Ins. Co., 2 Binn. (Pa.) 574, 4 Am. Dec. 480; Bradstreet *v.* Neptune Ins. Co., 3 Fed. Cas. No. 1,793, 3 Sumn. 600; Magoun *v.* New England Mar. Ins. Co., 16 Fed. Cas. No. 8,961, 1 Story 157; Lothian *v.* Henderson, 3 B. & P. 499, 7 Rev. Rep. 829; Baring *v.* Clagett, 3 B. & P. 201, 5 East 398, 4 Rev. Rep. 520, 6 Rev. Rep. 759, 7 Rev. Rep. 719; Stirling *v.* Vaughan, 2 Campb. 225, 11 East 619; Hobbs *v.* Henning, 17 C. B. N. S. 791, 11 Jur. N. S. 223, 34 L. J. C. P. 117, 12 L. T. Rep. N. S. 205, 13 Wkly. Rep. 431, 112 E. C. L. 791; Salucci *v.* Woodmass, 3 Dougl. 345, 26 E. C. L. 229; Barzillai *v.* Lewis, 3 Dougl. 126, 26 E. C. L. 92; Baring *v.* Royal Exch. Assur. Co., 5 East 99, 7 Rev. Rep. 657; Oddy *v.* Bovill, 2 East 473, 6 Rev. Rep. 482; Everth *v.* Hannam, 2 Marsh. 72, 6 Taunt. 375, 1 E. C. L. 660; Gibson *v.* Mair, 1 Marsh. 39, 15 Rev. Rep. 668, 4 E. C. L. 455; Le Cheminant *v.* Pearson, 4 Taunt. 367, 13 Rev. Rep. 636; Bolton *v.* Gladstone, 2 Taunt. 85, 11 Rev. Rep. 532; Geyer *v.* Aguilar, 7 T. R. 681, 4 Rev. Rep. 543.

In Massachusetts they are only conclusive where they distinctly and specifically state the causes of condemnation. Sawyer *v.* Maine F. & M. Ins. Co., 12 Mass. 291; Robinson *v.* Jones, 8 Mass. 536, 5 Am. Dec. 114; Baxter *v.* New England Mar. Ins. Co., 6 Mass. 277, 4 Am. Dec. 125.

Conclusive only as to particular ground of condemnation.— Saloucci *v.* Johnson, 4 Dougl. 224, 26 E. C. L. 440; Bernardi *v.* Motteux, Dougl. (3d ed.) 575.

dictions, however, they are considered only *prima facie* evidence of those facts,[17] and to even have that effect it must affirmatively appear that the court had jurisdiction.[18] To prove condemnation it is only necessary to prove libel and sentence.[19]

1. **Expert and Opinion Evidence.** Experts or persons skilled or experienced in maritime matters may testify as to customs affecting insurance or the particular trade in which a vessel is engaged.[20] They may also testify as to what is good seamanship,[21] the seaworthiness of vessels,[22] the effect of seas or swells from

Depositions and other evidence given in the foreign court may be given in evidence to show that grounds of condemnation stated in the sentence are not true. Straas *v.* Marine Ins. Co., 23 Fed. Cas. No. 13,518, 1 Cranch C. C. 343.

Facts not authorizing condemnation as a prize being the stated grounds of condemnation it is not conclusive of a breach of warranty of neutrality or nationality. Fitzsimmons *v.* Newport Ins. Co., 4 Cranch (U. S.) 185, 2 L. ed. 591.

A foreign sentence founded on fraud may be disproved and impeached by evidence *aliunde*. Bradstreet *v.* Neptune Ins. Co., 3 Fed. Cas. No. 1,793, 3 Sumn. 600. See, generally, JUDGMENTS, 23 Cyc. 1604.

"Proof to be required in United States only."— In an action upon a policy on property warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign court of admiralty is not conclusive evidence of a violation of the warranty. Maryland Ins. Co. *v.* Woods, 6 Cranch (U. S.) 29, 3 L. ed. 143. See also Calhoun *v.* Commonwealth Ins. Co., 1 Binn. (Pa.) 293.

Condemnation without proof of capture.— The sentence of condemnation of a foreign court of admiralty cannot be received without previous proof of the ship having been captured. Marshall *v.* Parker, 2 Campb. 69, 11 Rev. Rep. 665; Visger *v.* Prescott, 5 Esp. 184, 8 Rev. Rep. 846.

Decrees of enemy's courts are equally conclusive. Pollard *v.* Bell, 8 T. R. 434, 5 Rev. Rep. 404.

Judgment in rem in salvage action against ship.— A judgment *in rem* of the admiralty division in a salvage action is conclusive against all the world as to the status of the *res*, but is not conclusive as to the grounds of the decision except as between the parties to the action. A judgment *in rem* by a court of competent jurisdiction is conclusive against all the world as to the status of the *res*, but there is no distinction between a judgment *in rem* and a judgment *in personam* as to its being only conclusive as to the point adjudicated upon, except that in the case of a judgment *in rem* the point adjudicated upon, which is always as to the status of the *res*, is conclusive against all the world as to that status, whereas in the case of a judgment *in personam* the point adjudicated upon, not being as to the status of the *res*, is only conclusive as between parties or privies. Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455, 8 Aspin. 173, 65 L. J. Q. B. 616, 75 L. T. Rep. N. S. 95, 45 Wkly. Rep. 70. See also Williams *v.* Suffolk Ins. Co., 29 Fed. Cas. No. 17,738, 3 Sumn. 270; and JUDGMENTS, 23 Cyc. 1406.

A decree of condemnation not always conclusive evidence of breach of warranty of nationality or ownership.— Van Tungeln *v.* Dubois, 2 Campb. 151; Nonnen *v.* Reid, 16 East 176; Price *v.* Bell, 1 East 663; Bird *v.* Appleton, 8 T. R. 562, 5 Rev. Rep. 468; Pollard *v.* Bell, 8 T. R. 434, 5 Rev. Rep. 404; Calvert *v.* Bovill, 7 T. R. 523, 4 Rev. Rep. 517; Goldschmidt *v.* Whitmore, 3 Taunt. 508.

17. Decrow *v.* Waldo Mut. Ins. Co., 43 Me. 460; Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549 [*affirming* 6 Cow. 404]; New York Firemen Ins. Co. *v.* De Wolf, 2 Cow. (N. Y.) 56.

Condemnation as "lawful prize" creates no inference of enemy's property so as to show a breach of warranty of neutrality. Goix *v.* Low, 2 Johns. Cas. (N. Y.) 480.

18. Bradstreet *v.* Neptune Ins. Co., 3 Fed. Cas. No. 1,793, 3 Sumn. 600.

Sentence of belligerent admiralty court sitting in neutral country.— The sentence of an admiralty court sitting under a commission from a belligerent in a neutral country is not recognized. Donaldson *v.* Thompson, 1 Campb. 429, 10 Rev. Rep. 717.

19. Alexandria Mar. Ins. Co. *v.* Hodgson, 6 Cranch (U. S.) 206, 3 L. ed. 200.

A paper purporting to be a copy of a decree of a court of appeals in admiralty, and not certified under seal, cannot be read in evidence, although exhibited by the assured to the underwriter as one of the preliminary proofs of loss. Thurston *v.* Murray, 3 Binn. (Pa.) 326.

Manner of authentication of foreign decrees see Yeaton *v.* Fry, 5 Cranch (U. S.) 335, 3 L. ed. 117; Church *v.* Hubbart, 2 Cranch (U. S.) 187, 2 L. ed. 249.

20. See the cases cited *supra*, IV, B, 1, c; XII, F, 2, b. And see EVIDENCE, 17 Cyc. 80.

21. Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 497.

22. Rosenheim *v.* America Ins. Co., 33 Mo. 230; Baird *v.* Daly, 68 N. Y. 547; Beckwith *v.* Sydebotham, 1 Campb. 116, 10 Rev. Rep. 652; Thornton *v.* Royal Exch. Assur. Co., 1 Peake Add. Cas. 25.

As to seaworthiness generally see *supra*, XII, F, 2, g.

The ordinary witness, however, is not qualified to state that a floating dock is seaworthy. Marcy *v.* Sun Mut. Ins. Co., 11 La. Ann. 748. See *supra*, XII, F, 2, g.

another vessel upon vessels laden in a particular manner,[23] and other matters relating to marine insurance[24] and to mercantile[25] or nautical[26] affairs. But they are not permitted to testify as to the meaning, construction, or effect of the policy,[27] except as to the technical phrases used therein which have not received judicial construction.[28]

m. Effect of Payment Into Court. If the underwriter pays into court any part of the amount sued for he thereby admits the contract,[29] that the vessel was seaworthy,[30] and that he is liable to plaintiff to the amount so paid;[31] but it is not an admission that the loss was total.[32]

G. Consolidation Rule. In England the practice often resorted to is to enter a consolidation rule whereby all the underwriters will be bound by the result of an action against one.[33] Such a rule will not be entered without the consent of plaintiff.[34]

H Production of Ship's Papers. The underwriters under the English practice in actions upon marine policies may require a production of the ship's papers,[35] and obtain a stay of proceedings until they have been produced.[36] All

23. Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427 [*affirming* 3 Rob. 202]; Western Ins. Co. *v.* Tobin, 32 Ohio St. 77.

24. See EVIDENCE, 17 Cyc. 70, 191, 230.

Whether a fact is material to the risk.— Leitch *v.* Atlantic Mut. Ins. Co., 66 N. Y. 100; Hawes *v.* New England Mut. Mar. Ins. Co., 11 Fed. Cas. No. 6,241, 2 Curt. 229.

25. See EVIDENCE, 17 Cyc. 75, 206, 238.

26. Louisville Ins. Co. *v.* Monarch, 99 Ky. 578, 36 S. W. 563, 18 Ky. L. Rep. 444 (possibility of a boat striking an object without notice to persons on board); Walker *v.* Protection Ins. Co., 29 Me. 317 (proper way of abandoning a wreck, the probable expense of repairs and the course to be pursued in making them); Parsons *v.* Manufacturers' Ins. Co., 16 Gray (Mass.) 463 (cause of leakage); Lapham *v.* Atlas Ins. Co., 24 Pick. (Mass.) 1 (that the risk is not increased by carrying cotton on deck); Western Ins. Co. *v.* Tobin, 32 Ohio St. 77 (that a certain class of vessel leaks or may suddenly spring a leak). See also Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427 [*affirming* 3 Rob. 202]; and EVIDENCE, 17 Cyc. 76, 207, 239.

27. Slocovich *v.* Orient Mut. Ins. Co., 108 N. Y. 56 14 N. E. 802; Reid *v.* Lancaster F. Ins. Co., 90 N. Y. 382; Turner *v.* Burrows, 8 Wend. (N. Y.) 144; Crofts *v.* Marshall, 7 C. & P. 597, 32 E. C. L. 778; Chauraud *v.* Angerstein, Peake N. P. 61. See EVIDENCE, 17 Cyc. 191, 220, 221.

28. See EVIDENCE, 17 Cyc. 80. In Camden *v.* Cowley, W. Bl. 417, insurance brokers were permitted to testify as to the meaning of the policy as understood in the trade regarding the length of time the policy covered, although they knew of no particular occasion on which it was so applied.

29. Donnell *v.* Columbian Ins. Co., 7 Fed. Cas. No. 3,987, 2 Sumn. 366.

30. Harrison *v.* Douglas, 3 A. & E. 396, 1 Harr. & W. 380, 6 N. & M. 180, 30 E. C. L. 193.

31. Donnell *v.* Columbian Ins. Co., 7 Fed. Cas. No. 3,987, 2 Sumn. 366.

32. Rucker *v.* Palsgrave, 1 Campb. 557, 1 Taunt. 419.

33. Foster *v.* Alvez, 3 Bing. N. Cas. 896, 4 Scott 535, 32 E. C. L. 410; Sharp *v.* Lethbridge, 6 Jur. 399, 11 L. J. C. P. 189, 4 M. & G. 37, 4 Scott N. R. 722, 43 E. C. L. 29; Kynaston *v.* Liddell, 8 Moore C. P. 223, 17 E. C. L. 539; Read *v.* Isaacs, 6 Moore C. P. 437, 17 E. C. L. 488.

Effect of rule.— Where upwards of forty actions were brought against underwriters of the policies of insurance, one of which had been assigned by memorandum of transfer signed by some of them, before the bankruptcy of the assured, the court made an order for consolidation, the general principle laid down being that all actions should be stayed except such as might be really necessary to determine the liability of distinct defendants in each class of cases, the defendants to be bound by the result, but not the plaintiffs. Syers *v.* Pickersgill, 27 L. J. Exch. 5, 6 Wkly. Rep. 16.

Restraining second action.— Where actions against underwriters have been consolidated by rule, and defendant has obtained a verdict in one, the court will not restrain plaintiff from trying a second cause, included in the rule, until the costs of the first are paid. Doyle *v.* Douglas, 4 B. & Ad. 544, 24 E. C. L. 240.

34. Doyle *v.* Anderson, 1 A. & E. 635, 4 N. & M. 873, 28 E. C. L. 300; McGregor *v.* Horsfall, 6 Dowl. P. C. 338, 2 Jur. 257, 7 L. J. Exch. 71, 3 M. & W. 320. But see Hollingsworth *v.* Brodrick, 4 A. & E. 646, 1 Harr. & W. 691, 6 N. & M. 240, 31 E. C. L. 287.

35. Harding *v.* Bussell, [1905] 2 K. B. 83, 10 Aspin. 50, Com. Cas. 184, 74 L. J. K. B. 500, 92 L. T. Rep. N. S. 531, 21 T. L. R. 401; China Traders' Ins. Co. *v.* Royal Exch. Assur. Corp., [1898] 2 Q. B. 187, 8 Aspin. 409, 67 L. J. Q. B. 736, 78 L. T. Rep. N. S. 783, 46 Wkly. Rep. 497.

Practice applies to suits against reinsurers. —China Traders' Ins. Co. *v.* Royal Exch. Assur. Corp., [1898] 2 Q. B. 187, 8 Aspin. 409, 67 L. J. Q. B. 736, 78 L. T. Rep. N. S. 783, 46 Wkly. Rep. 497.

36. China Transpacific Steamship Co. *v.*

papers relative to the issue including letters between the insured and master may be required to be produced.[37] The fact that the transit is by land does not affect this right.[38]

I. Trial — 1. Course and Conduct — a. In General. The course and conduct of a trial in an action on a marine insurance policy are governed by the same rules as apply to civil actions generally,[39] although the mode of trial is frequently by consent of the parties to try the question of liability separately, reserving the evidence and all questions of law and fact in relation to the particular mode of adjustment to be arranged afterward; and for this purpose to render the verdict effectual it is usually agreed that the verdict be taken for a given sum to be enlarged or reduced by assessors or a referee subject to the order of the court, or assenting that a verdict be taken for a total or partial loss to be amended and entered afterward conformably to the report of the assessor or as otherwise agreed.[40]

b. Reception of Evidence. The reception of evidence in an action on a marine insurance policy is governed by the same rules as apply to civil actions generally.[41]

c. Reference. The rules applicable to references in civil actions in general usually apply to references in actions on policies of marine insurance.[42] And

Commercial Union Assur. Co., 8 Q. B. D. 142, 51 L. J. Q. B. 132, 45 L. T. Rep. N. S. 647, 30 Wkly. Rep. 224; London, etc., Mar., etc., Ins. Co. *v.* Chambers, 5 Com. Cas. 241.

Papers not within control of plaintiff.— An action having been brought on a policy of marine insurance by the mortgagees of 32-64ths of the ship, and it appearing that plaintiffs had no ship's papers, but that the ship had been sailed by the mortgagor, who was the managing owner, and who had since died, defendants applied for an order that not only plaintiffs, but the mortgagor or his representatives, and also all persons interested in the proceedings and in the insurance on the ship, should produce upon oath the ship's papers, and that in the meantime all the proceedings should be stayed. It was held that defendants were entitled to the order, which must remain in force until at all events plaintiffs had satisfied the court that they had applied to the mortgagor and done all in their power to produce the ship's papers. West of England, etc., Dist. Bank *v.* Canton Ins. Co., 2 Ex. D. 472. See also London, etc., Mar., etc., Ins. Co. *v.* Chambers, 5 Com. Cas. 241.

37. Harding *v.* Bussell, [1905] 2 K. B. 83, 10 Aspin. 50, 10 Com. Cas. 184, 74 L. J. K. B. 500, 92 L. T. Rep. N. S. 531, 21 T. L. R. 401; Rayner *v.* Ritson, 6 B. & S. 888, 35 L. J. Q. B. 59, 14 Wkly. Rep. 81, 118 E. C. L. 888.

38. Harding *v.* Bussell, [1905] 2 K. B. 83, 10 Aspin. 50, 10 Com. Cas. 184, 74 L. J. K. B. 500, 92 L. T. Rep. N. S. 531, 21 T. L. R. 401 [*overruling* Henderson *v.* Underwriting, etc., Assoc., [1891] 1 Q. B. 557, 60 L. J. Q. B. 406, 64 L. T. Rep. N. S. 774, 39 Wkly. Rep. 528; Village Main Reef Gold Min. Co. *v.* Stearns, 5 Com. Cas. 246].

39. See, generally, Admiralty; Trial. See also Insurance.

On motion for reargument in a libel on a marine insurance policy, new objections to an average adjustment will not be entertained. Such an adjustment, when made up under the supervision and approval of the insurer's agent, and received and not objected to by them, is *prima facie* evidence of the correctness of the items it contains. Earnmoor Steamship Co. *v.* Union Ins. Co., 44 Fed. 374.

40. Winn *v.* Columbian Ins. Co., 12 Pick. (Mass.) 279. See also Hudson *v.* Marjorihanks, 7 Moore C. P. 463, 17 E. C. L. 520.

When accounts complicated.— In an action on a policy for an average loss, if the account is so complicated that it cannot be adjusted in court, the jury, by consent of the parties, may find for a total loss, plaintiff entering into a rule to account upon oath for what part of the insured property he may recover. Barber *v.* French, 1 Dougl. (3d ed.) 294.

41. See, generally, Admiralty; Trial.

Purpose of question not shown.— In an action on a policy on a "port risk in the port of New York," the exclusion of evidence defining "port risk," in the absence of any explanation of the purpose of the question, is not error. Slocovich *v.* Orient Mut. Ins. Co., 108 N. Y. 56, 14 N. E. 802.

Other cases of loss.— In an action by the owners of a steamboat against an insurance company on a policy against perils in the navigation of specified privileged waters for the loss of the vessel occasioned by encountering an unknown cause of peril from which she suddenly sprang a leak and sank while navigating a privileged water, it is not competent, in chief, to give in evidence for any purpose specific cases of other steamboats that have been lost while navigating the same and other rivers, occasioned by some unknown injury, causing them to suddenly leak and sink. Western Ins. Co. *v.* Tobin, 32 Ohio St. 77.

42. See, generally, References.

Under the practice in New York where an action on a marine policy involves many expenditures and losses, a reference may be ordered. Ryan *v.* Atlantic Mut. Ins. Co., 50 How. Pr. 321 [*affirmed* in 66 N. Y. 628].

where any part of the proceedings are referred, the findings made by the referee, commissioner, or assessor will not be set aside unless clearly erroneous.[43]

2. QUESTIONS FOR COURT AND JURY — a. In General. In tribunals having a jury all questions of fact arising in an action upon a marine policy are to be submitted to it for determination,[44] and their verdict will not be set aside when there is evidence sufficient to sustain it.[45]

b. Matters Pertaining to Contract in General. Whether the risk had been accepted,[46] or a policy duly stamped had been issued,[47] or was entered into under mutual mistake as to a material fact,[48] or whether a contemporaneous agreement was intended to form part of the policy,[49] and what interest was intended to be covered by the policy,[50] are questions for the jury. The existence of customs,[51] and whether they are reasonable,[52] are also questions for the jury.

c. Facts Relating to Validity. Facts relating to the validity of the policy and the adventure are for the jury;[53] but where the facts are undisputed the validity of the contract is a question of law for the court.[54]

d. Insured Voyage. The voyage intended to be covered,[55] and whether the property insured was upon the insured voyage,[56] whether the voyage had commenced or terminated,[57] or had been broken up,[58] are matters which should be submitted to the jury. But whether a voyage was justifiably broken up is a question of law for the court.[59]

43. Paddock *v.* Commercial Ins. Co., 104 Mass. 521.

Report.— The finding of the assessor, in accordance with the opinion of competent experts testifying before him, upon a question of fact referred to him, is not invalidated by his stating in his report that "it is of course impossible to determine this question with anything like certainty." Paddock *v.* Commercial Ins. Co., 104 Mass. 521.

Hearing and application to court for directions.— In an action on a marine policy, where the adjustment of the loss is referred by stipulation to a referee, he is to be satisfied as to the character of charges for saving the shipwrecked property in such manner as he may think reasonable, and, in case of difficulty and uncertainty, the proper course is for him to apply to the court for directions. Bridge *v.* Niagara Ins. Co., 1 Hall (N. Y.) 423.

44. Greenwich Ins. Co. *v.* Raab, 11 Ill. App. 636.

45. Phœnix Ins. Co. *v.* McGhee, 18 Can. Sup. Ct. 61; Dimock *v.* New Brunswick Mar. Assur. Co., 6 N. Brunsw. 398.

A verdict finding a vessel seaworthy was set aside as being contrary to the evidence in Morse *v.* St. Paul F. & M. Ins. Co., 124 Fed. 451.

46. Petrie *v.* Phenix Ins. Co., 132 N. Y. 137, 30 N. E. 380.

47. Stowe *v.* Querner, L. R. 5 Exch. 155, 39 L. J. Exch. 60, 22 L. T. Rep. N. S. 29, 18 Wkly. Rep. 466.

48. Dodd *v.* Gloucester Mut. Fishing Ins. Co., 127 Mass. 151.

49. Heath *v.* Durant, 1 D. & L. 571, 8 Jur. 131, 13 L. J. Exch. 95, 12 M. & W. 438.

50. Irving *v.* Richardson, 2 B. & Ad. 193, 9 L. J. K. B. O. S. 225, 1 M. & Rob. 153, 22 E. C. L. 88.

51. McLanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98; Calbreath *v.* Gracy, 4 Fed. Cas. No. 2,296, 1 Wash. 219; Phillips *v.* Pennsylvania Ins. Co., 19 Fed. Cas. No. 11,102.

Whether particular articles fall within the terms of the memorandum clause is for the jury. Evans *v.* Commercial Mut. Ins. Co., 6 R. I. 47.

52. Macy *v.* Whaling Ins. Co., 9 Metc. (Mass.) 354.

53. Harratt *v.* Wise, 9 B. & C. 712, 7 L. J. K. B. O. S. 309, 4 M. & R. 521, 17 E. C. L. 318.

54. **Loading vessel contrary to congressional act.**— The question whether the wrongful act of the master in loading turpentine on a vessel contrary to the manner provided by act of congress was misconduct, so as to prevent a recovery on a marine policy, was a question of law for the court; the functions of the jury, in cases where the law itself forbids the act by which the loss occurs, being confined to determining whether the act has been done. Citizens' Ins. Co. *v.* Marsh, 41 Pa. St. 386.

55. Carruthers *v.* Sheddon, 1 Marsh. 416, 6 Taunt. 14, 1 E. C. L. 486.

56. Allegre *v.* Maryland Ins. Co., 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; Friend *v.* Gloucester Mut. Fishing Ins. Co., 113 Mass. 326; Palmer *v.* Great Western Ins. Co., 116 N. Y. 599, 23 N. E. 5; Voisin *v.* Commercial Mut. Ins. Co., 67 Hun (N. Y.) 365, 22 N. Y. Suppl. 348.

57. Zacharie *v.* New Orleans Ins. Co., 5 Mart. N. S. (La.) 637; Upton *v.* Salem Commercial Ins. Co., 8 Metc. (Mass.) 605; Fletcher *v.* St. Louis Mar. Ins. Co., 18 Mo. 193; Lindsay *v.* Janson, 4 H. & N. 699, 28 L. J. Exch. 315; Devin *v.* Newnham, 4 Taunt. 722, 14 Rev. Rep. 648.

58. King *v.* Delaware Ins. Co., 6 Cranch (U. S.) 71, 3 L. ed. 155.

59. King *v.* Delaware Ins. Co., 6 Cranch (U. S.) 71, 3 L. ed. 155.

e. Misrepresentation and Concealment. It is also for the jury to determine whether there has been a misrepresentation or a concealment,[60] whether the matters alleged to have been misrepresented or concealed were material to the risk,[61] and whether due diligence was exercised by the insured in ascertaining material facts, or, after having ascertained such facts, in communicating them to the underwriter or countermanding prior instructions to procure insurance.[62]

f. Warranties and Conditions. Whether the insured has complied with all warranties and conditions is for the jury.[63] All the facts bearing on the question of seaworthiness should be submitted to the jury,[64] who are also the judges whether the insured has used reasonable diligence to maintain the vessel in a seaworthy condition,[65] and whether the presumption of seaworthiness has been overcome.[66]

g. Deviation. All the elemental facts constituting a deviation,[67] and whether

60. Green *v.* Merchants' Ins. Co., 10 Pick. (Mass.) 402; New York Firemen Ins. Co. *v.* Walden, 12 Johns. (N. Y.) 513, 7 Am. Dec. 340.

61. New York Firemen Ins. Co. *v.* Walden, 12 Johns. (N. Y.) 513, 7 Am. Dec. 340 [*reversing* 12 Johns. 128]; Livingston *v.* Delafield, 1 Johns. (N. Y.) 522; Maryland Ins. Co. *v.* Ruden, 6 Cranch (U. S.) 338, 3 L. ed. 242; Livingston *v.* Maryland Ins. Co., 6 Cranch (U. S.) 274, 3 L. ed. 222; Russel *v.* Union Ins. Co., 4 Dall. (U. S.) 421, 1 L. ed. 892, 21 Fed. Cas. No. 12,146, 1 Wash. 409; Hurtin *v.* Phœnix Ins. Co., 12 Fed. Cas. No. 6,941, 1 Wash. 400; Strihley *v.* Imperial Mar. Ins. Co., 1 Q. B. D. 507, 3 Aspin. 134, 45 L. J. Q. B. 396, 34 L. T. Rep. N. S. 281, 24 Wkly. Rep. 701; Littledale *v.* Dixon, 1 B. & P. N. R. 151, 8 Rev. Rep. 774; Shirley *v.* Wilkinson, 3 Dougl. 41, Dougl. (3d ed.) 306 note, 26 E. C. L. 39; Durrell *v.* Bederley, Holt N. P. 283, 17 Rev. Rep. 639, 8 Rev. Rep. 739, 3 E. C. L. 118; Bridges *v.* Hunter, 1 M. & S. 15, 14 Rev. Rep. 380.

Time of ship's sailing.— Whether the time of a ship's sailing is material to the risk is a question for the jury. McLanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98.

62. McLanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98.

63. Plyer *v.* German-American Ins. Co., 1 N. Y. Suppl. 395.

64. *Louisiana.*— Trimble *v.* New Orleans Ins. Co., 3 Mart. 394.

Maryland.— Field *v.* Insurance Co. of North America, 3 Md. 244.

Massachusetts.— Chase *v.* Eagle Ins. Co., 5 Pick. 51.

Missouri.— Rosenheim *v.* America Ins. Co., 33 Mo. 230.

New York.— Starbuck *v.* Phenix Ins. Co., 166 N. Y. 593, 59 N. E. 1130 [*affirming* 62 N. Y. Suppl. 264]; Thebaud *v.* Great Western Ins. Co., 155 N. Y. 516, 50 N. E. 284; Palmer *v.* Great Western Ins. Co., 116 N. Y. 599, 28 N. E. 5; Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427; Voisin *v.* Providence Washington Ins. Co., 51 N. Y. App. Div. 553, 65 N. Y. Suppl. 333; Starbuck *v.* Phenix Ins. Co., 19 N. Y. App. Div. 139, 45 N. Y. Suppl. 995; Osborne *v.* New York Mut. Ins. Co., 2 Silv. Sup. 568, 6 N. Y. Suppl. 103 [*affirmed* in 127 N. Y. 656, 28 N. E. 254]; Sturm *v.* Atlantic Mut. Ins. Co., 38 N. Y. Super. Ct. 281; Treadwell *v.* Union Ins. Co., 6 Cow. 270; Patrick *v.* Hallett, 1 Johns. 241; Barnewall *v.* Church, 1 Cai. 217, 2 Am. Dec. 180.

Pennsylvania.— Myers *v.* Girard Ins. Co., 26 Pa. St. 192.

South Carolina.— Caldwell *v.* Union Ins. Co., Dudley 263; McFee *v.* South Carolina Ins. Co., 2 McCord 503, 13 Am. Dec. 757; Hudson *v.* Williamson, 1 Treadw. 360; Fuller *v.* Alexander, 1 Brev. 149.

United States.— McLanahan *v.* Universal Ins. Co., 1 Pet. 170, 7 L. ed. 98; Nome Beach Lighterage, etc., Co. *v.* Munich Assur. Co., 123 Fed. 820.

England.— Clifford *v.* Hunter, 3 C. & P. 16, M. & M. 103, 14 E. C. L. 427; Jardine *v.* Leathley, 3 F. & F. 80; Knill *v.* Hooper, 2 H. & N. 277, 26 L. J. Exch. 377, 5 Wkly. Rep. 791.

See 28 Cent. Dig. tit. "Insurance," § 1736.

No evidence of suitability of river craft for ocean voyage.— In an action on a marine policy insuring a river steamer for an ocean voyage, where the evidence merely shows that the vessel is staunch for smooth-water navigation, thereby showing a breach of the implied warranty of seaworthiness, there is no question for the jury, and a judgment for plaintiff must be reversed. Thebaud *v.* Phœnix Ins. Co., 52 Hun (N. Y.) 495, 1 Silv. Sup. 449, 5 N. Y. Suppl. 619; Thebaud *v.* Great Western Ins. Co., 1 Silv. Sup. (N. Y.) 458, 5 N. Y. Suppl. 623.

65. Seaman *v.* Enterprise F., etc., Ins. Co., 21 Fed. 778; Colbreath *v.* Gracy, 4 Fed. Cas. No. 2,296, 1 Wash. 219.

66. Field *v.* Insurance Co. of North America, 3 Md. 244.

67. Lapham *v.* Atlas Ins. Co., 24 Pick. (Mass.) 1; Child *v.* Sun Mut. Ins. Co., 3 Sandf. (N. Y.) 26; Foster *v.* Jackson Mar. Ins. Co., 1 Edm. Sel. Cas. (N. Y.) 290.

Delay.— Whether a delay in commencing or prosecuting the voyage is under the rules of law such as to constitute a deviation from the insured risk is a question of fact for the jury. Thebaud *v.* Great Western Ins. Co., 84 Hun (N. Y.) 1, 31 N. Y. Suppl. 1084; Murray *v.* Great Western Ins. Co., 72 Hun (N. Y.) 282, 25 N. Y. Suppl. 414 [*affirmed* in 147 N. Y. 711, 42 N. E. 724]; Foster *v.*

such facts exist which justify a deviation,[68] should be submitted to the jury. But where the testimony is not conflicting deviation becomes a question of law for the court.[69]

h. Loss — (i) *Time and Place of Occurrence.* The jury must determine whether a loss has in fact occurred and the time[70] and place[71] of its occurrence, where such facts are material to the issues.

(ii) *Cause of Loss.* The cause of the loss[72] and whether causes of loss were distinct[73] are questions for the jury.

(iii) *Extent of Loss.* The extent or amount of a loss under a marine policy,[74] and whether the same was of such a character as under the rules of law constituted a constructive total loss,[75] are for the jury, who as a rule are also to determine whether there has been an abandonment,[76] whether the abandonment was made within a reasonable time,[77] and whether it has been accepted.[78]

Jackson Mar. Ins. Co., 1 Edm. Sel. Cas. (N. Y.) 290; Lawrence *v.* Ocean Ins. Co., 11 Johns. (N. Y.) 241 [*affirmed* in 14 Johns. 46]; Hull *v.* Cooper, 14 East 479, 13 Rev. Rep. 287; Grant *v.* King, 4 Esp. 175, 6 Rev. Rep. 849; Hamilton *v.* Sheddon, 7 L. J. Exch. 1, M. & H. 334, 3 M. & W. 49; Langhorn *v.* Allnutt, 4 Taunt. 511, 12 Rev. Rep. 660.

68. Perkins *v.* Augusta Ins., etc., Co., 10 Gray (Mass.) 312, 71 Am. Dec. 654; Dimock *v.* New Brunswick Mar. Assur. Co., 6 N. Brunsw. 398.

Whether delay is justifiable is a question of law for the court, but whether reasonable or not is a question for the jury. Reed *v.* Weldon, 12 N. Brunsw. 460.

69. Child *v.* Sun Mut. Ins. Co., 3 Sandf. (N. Y.) 26.

70. Clifford *v.* Thomaston Mut. Ins. Co., 50 Me. 197, 79 Am. Dec. 606; Hare *v.* Travis, 7 B. & C. 14, 9 D. & R. 748, 5 L. J. K. B. O. S. 348, 31 Rev. Rep. 139, 14 E. C. L. 17.

71. Reyner *v.* Pearson, 4 Taunt. 662, 13 Rev. Rep. 723.

72. *Missouri.*—Paddock-Hawley Iron Co. *v.* Providence-Washington Ins. Co., 118 Mo. App. 85, 93 S. W. 358.

New York.— Singleton *v.* Phenix Ins. Co., 132 N. Y. 298, 30 N. E. 839; Atkinson *v.* Great Western Ins. Co., 65 N. Y. 531.

Pennsylvania.— Crousillat *v.* Ball, 4 Dall. 294, 1 L. ed. 840, 2 Am. Dec. 375.

United States.— Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 497; Howland *v.* Alexandria Mar. Ins. Co., 12 Fed. Cas. No. 6,798, 2 Cranch C. C. 474.

England.— Barber *v.* Fleming, L. R. 5 Q. B. 59, 10 B. & S. 879, 39 L. J. Q. B. 25, 18 Wkly. Rep. 254; Jardine *v.* Leathley, 3 F. & F. 80; Hucks *v.* Thornton, Holt N. P. 30, 17 Rev. Rep. 594, 3 E. C. L. 22.

Acts of war or of mob.— Whether certain acts were acts of war or merely the private and unauthorized transactions of a mob was considered within the province of the jury. Swinnerton *v.* Columbian Ins. Co., 37 N. Y. 174, 93 Am. Dec. 560.

73. Luma *v.* Atlantic Mut. Ins. Co., 15 Fed. Cas. No. 8,605.

74. Sherlock *v.* Globe Ins. Co., 7 Ohio Dec. (Reprint) 17, 1 Cinc. L. Bul. 26; Barber *v.* Fleming, L. R. 5 Q. B. 59, 10 B. & S. 879, 39 L. J. Q. B. 25, 18 Wkly. Rep. 254.

The jury cannot be permitted to pass on the question of actual total loss on a marine policy, when a large part of the goods reach their destination in specie, and a substantial part of them are wholly uninjured. Washburn, etc., Mfg. Co. *v.* Reliance Mar. Ins. Co., 179 U. S. 1, 21 S. Ct. 1, 45 L. ed. 49 [*affirming* 82 Fed. 296, 27 C. C. A. 134].

75. Delaware Ins. Co. *v.* Winter, 38 Pa. St. 176; King *v.* Delaware Ins. Co., 14 Fed. Cas. No. 7,788, 2 Wash. 300 [*affirmed* in 6 Cranch 71, 3 L. ed. 155]; Driscoll *v.* Millville Mar. Ins. Co., 23 N. Brunsw. 160.

The propriety of a sale by the master is for the jury. Delaware Ins. Co. *v.* Winter, 38 Pa. St. 176.

Necessity of sale a mixed question of law and fact.— Bryant *v.* Commonwealth Ins. Co., 13 Pick. (Mass.) 543.

76. Hughes *v.* Sun Mut. Ins. Co., 100 N. Y. 58, 2 N. E. 901, 3 N. E. 71.

77. Mellon *v.* Louisiana State Ins. Co., 6 Mart. N. S. (La.) 424; Mellon *v.* Louisiana State Ins. Co., 5 Mart. N. S. (La.) 563; Bell *v.* Beveridge, 4 Dall. (Pa.) 272, 1 L. ed. 830; Maryland Ins. Co. *v.* Ruden, 6 Cranch (U. S.) 338, 3 L. ed. 242; Chesapeake Ins. Co. *v.* Stark, 6 Cranch (U. S.) 268, 3 L. ed. 220.

Mixed question of law and fact.— Reynolds *v.* Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Smith *v.* Newburyport Mar. Ins. Co., 4 Mass. 608; Parker *v.* Towers, 2 Browne (Pa.) appendix 80; Livingston *v.* Maryland Ins. Co., 7 Cranch (U. S.) 506, 3 L. ed. 421; Maryland Ins. Co. *v.* Ruden, 6 Cranch (U. S.) 338, 3 L. ed. 242; Chesapeake Mar. Ins. Co. *v.* Stark, 6 Cranch (U. S.) 268, 3 L. ed. 220.

Question of law.— Shepherd *v.* Henderson, 7 App. Cas. 49, 9 Ct. of Sess. Cas. 1. Where the facts are found or agreed on, what is a reasonable time in which to abandon is a question of law. Smith *v.* Newburyport Mar. Ins. Co., 4 Mass. 668.

78. Bell *v.* Smith, 2 Johns. (N. Y.) 98; Richelieu, etc., Nav. Co. *v.* Boston Mar. Ins. Co., 136 U. S. 408, 10 S. Ct. 934, 34 L. ed. 398; Shepherd *v.* Henderson, 7 App. Cas. 49, 9 Ct. of Sess. Cas. 1.

But the circumstances of the case may be such that a jury may be told, as a matter of law, that if they think the underwriters have

In like manner whether an abandonment has been waived[79] or revoked[80] is generally a question for the jury.

i. Proof of Loss. Whether proofs of loss have been submitted or waived are questions for the jury.[81]

3. Instructions. The general rules governing instructions in civil actions, and particularly in actions on other kinds of insurance policies, apply in actions on policies of marine insurance.[82] It is the duty of the court to instruct the jury as to the meaning of the contract[83] and to properly submit every defense which is within the issues and of which there is evidence.[84] It is proper to refuse, and erroneous to give, instructions which are not supported by the pleadings and the evidence.[85]

4. Verdict and Findings. The rules governing general and special verdicts in actions on marine insurance policies are the same as those that apply to civil actions generally.[86]

J. Judgment — 1. In General. The rules as to the judgment in an action on a marine policy are the same as those which apply in civil actions generally,[87] and particularly in other actions on insurance policies.[88] The judgment must conform to the verdict and findings.[89] The extent of liability

done certain acts which are consistent only with their having accepted the abandonment, then they ought to find that the abandonment has been accepted. Shepherd *v.* Henderson, 7 App. Cas. 49, 9 Ct. of Sess. Cas. 1.

79. Curcier *v.* Philadelphia Ins. Co., 5 Serg. & R. (Pa.) 113.

80. Columbian Ins. Co. *v.* Ashby, 4 Pet. (U. S.) 139, 7 L. ed. 809.

81. Enterprise Ins. Co. *v.* Parisot, 35 Ohio St. 35, 35 Am. Rep. 589.

82. See Fire Insurance, 19 Cyc. 964; and, generally, Trial.

83. Norton *v.* Lexington F., etc., Ins. Co., 16 Ill. 235, holding that where a policy declared that the insured should not have the right to abandon until it should be ascertained that the recovery and repair of the vessel were impracticable, it was the duty of the court to instruct the jury as to the true meaning of the contract.

84. Defenses generally see Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108.

Seaworthiness.— Where a policy on a barge provided that it should at all times during the continuance of the policy be in a seaworthy condition, and tight and sound, in an action on the policy, it appearing that the barge remained tight and sound and that it did not leak until it sprang a leak and sank, an instruction was not erroneous for failure to require the jury to find that the barge remained seaworthy until it sank. Paddock-Hawley Iron Co. *v.* Providence-Washington Ins. Co., 118 Mo. App. 85, 93 S. W. 358.

Deviation.— If delay in port be insisted upon as amounting to a deviation, the question should be put to the jury whether such delay was in the exercise of good faith and sound discretion and by necessity or for reasonable cause. Foster *v.* Jackson Mar. Ins. Co., 1 Edm. Sel. Cas. (N. Y.) 290.

Cause of loss see Western Massachusetts Ins. Co. *v.* Norwich, etc., Transp. Co., 12 Wall. (U. S.) 201, 20 L. ed. 380.

Ignoring defense cured by subsequent instruction.— In an action on a policy of insurance on a cargo of merchandise burned with the vessel on which it was being transported, an instruction that the defenses set up might be reduced to two: (1) Unseaworthiness of the vessel; and (2) that she was burned by the procurement of plaintiffs, or that they were accessory to such burning, was held erroneous where the defense was also made that plaintiffs' cargo was fictitious; but it was further held that the error was rendered harmless by the fact that the court later in the charge stated that defendants claimed to have proven that the vessel was loaded with a fictitious cargo and that, if the jury were satisfied that plaintiffs could have been guilty of such frauds, they could not recover. Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108.

85. See, generally, Trial. Where, in an action on a policy covering a cargo of coffee, the evidence was too vague and indefinite as to the damage done to a portion of it to furnish grounds for any estimate of the amount, it was held error for the court to instruct the jury that they ought to allow such an amount of damage as, from the evidence, they might find to have been equivalent to the plaintiff's loss. Merchants' Mut. Ins. Co. *v.* Wilson, 2 Md. 217.

86. See, generally, Trial. See also British-American Assur. Co. *v.* Wilson, 132 Ind. 278, 31 N. E. 938; Graves *v.* Washington Mar. Ins. Co., 12 Allen (Mass.) 391.

The jury may be required to find items of damage which make up the necessary fifty per cent to constitute a constructive total loss. Orrok *v.* Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271.

87. See, generally, Judgments.

88. See Fire Insurance, 19 Cyc. 969.

89. See Fire Insurance, 19 Cyc. 969; Judgments, 23 Cyc. 820.

Consistency of findings.— Where an insurance company set up in defense a local custom and also that the loss was less than five

and amount of recovery under a policy are elsewhere considered.[90] If defendant establishes as a defense that the risk never attached, plaintiff is entitled to a judgment for the premium paid, if the pleadings are such as to warrant such recovery.[91]

2. INTEREST. The insured is entitled to interest upon the amount of the loss from the time the same became payable under the provisions of the policy and a demand for payment was made,[92] and also for interest on amounts advanced by the insured, for which the underwriter is liable, from the time such advances were made.[93] In case of a missing ship interest is generally allowed for twelve months after the vessel was last heard of,[94] but in some cases it is held that no interest whatever is recoverable.[95]

K. New Trial and Appeal or Error. New trials of actions on marine insurance policies and appeals or writs of error are governed by the same rules that apply in civil actions generally.[96] As a rule questions not raised in the trial court will not be ground for reversal on appeal;[97] nor will a judgment be reversed for an error which is harmless.[98]

per cent on the amount insured, a loss less than that being exempted in the policy, and the jury found against the company as to the custom, but for them as to the amount of the loss, it was held that they were entitled to judgment, as the defenses were not inconsistent and the finding against the custom did not preclude recovery of judgment on the other finding. Newlin *v.* Insurance Co. of North America, 20 Pa. St. 312.

90. See *supra*, IX.

Recovery of general average.— Where the assured claims the whole amount insured or his proportion of the average loss, he may prove and recover a general average. Hanse *v.* New Orleans M. & F. Ins. Co., 10 La. 1, 29 Am. Dec. 456.

Partial loss.— Recovery may be had for a partial loss, although the declaration claims for a total loss and there is no proof of an abandonment. Watson *v.* Insurance Co. of North America, 4 Dall. (Pa.) 283, 1 L. ed. 835.

Nominal damages.— Where the evidence shows that the subject-matter of the insurance received some damage, but is not sufficiently definite to show the amount, nominal damages may be recovered. Merchants' Mut. Ins. Co. *v.* Wilson, 2 Md. 217.

91. Foster *v.* U. S. Insurance Co., 11 Pick. (Mass.) 85; Penniman *v.* Tucker, 11 Mass. 66; Waddington *v.* United Ins. Co., 17 Johns. (N. Y.) 23; Penson *v.* Lee, 2 B. & P. 330, 5 Rev. Rep. 614; Anderson *v.* Thornton, 8 Exch. 425.

92. New Orleans Ins. Assoc. *v.* Piaggio, 16 Wall. (U. S.) 378, 21 L. ed. 358.

Where there is a liability only for a partial loss and the insured claimed for a total loss, interest may be allowed only from the commencement of the action. Donath *v.* Insurance Co. of North America, 4 Dall. (Pa.) 463, 1 L. ed. 910.

In an action for return of premium interest was allowed on the premium only from the date of service of the writ. Porter *v.* Bussey, 1 Mass. 436.

In England.— Before 3 & 4 Wm. IV, c. 42, § 29, an underwriter on a policy was not liable to pay interest on the amount of his subscription, although he had no colorable ground for refusing to pay the loss, unless a distinct demand of the money had been made at an earlier period for that purpose. Kingston *v.* McIntosh, 1 Camph. 518; Bain *v.* Case, 3 C. & P. 496, M. & M. 262, 14 E. C. L. 681.

93. Vandenheuvel *v.* United Ins. Co., 1 Johns. (N. Y.) 406.

94. It is a uniform usage, in estimating the loss upon a vessel which has never been heard of and is therefore considered as lost, to calculate interest after twelve months and thirty days from the last period when the vessel was heard from. Hallet *v.* Phœnix Ins. Co., 11 Fed. Cas. No. 5,958, 2 Wash. 279.

95. Osacar *v.* Louisiana State Ins. Co., 5 Mart. N. S. (La.) 386.

96. See, generally, ADMIRALTY; APPEAL AND ERROR; NEW TRIAL.

New trial see Talcot *v.* Commercial Ins. Co., 2 Johns. (N. Y.) 467; De Areos *v.* South Carolina Ins. Co., 2 McCord (S. C.) 113; Foster *v.* Steele, 3 Bing. N. Cas. 892, 3 Hodges 231, 6 L. J. C. P. 265, 5 Scott 25, 32 E. C. L. 409; Gist *v.* Mason, 1 T. R. 88, 1 Rev. Rep. 154; Hodgson *v.* Richardson, W. Bl. 463; Phœnix Ins. Co. *v.* McGhee, 18 Can. Sup. Ct. 61; O'Leary *v.* Pelican Ins. Co., 29 N. Brunsw. 510; Morton *v.* Patillo, 3 Nova Scotia Dec. 17; Haworth *v.* British American Assur. Co., 6 U. C. C. P. 60, 63.

97. Palmer *v.* Great Western Ins. Co., 116 N. Y. 599, 23 N. E. 5; Sun Mut. Ins. Co. *v.* Mississippi Valley Transp. Co., 17 Fed. 919, 5 McCrary 477.

98. See APPEAL AND ERROR, 3 Cyc. 383. Where, in an action on a marine policy, the testimony showed that, if assured had any right to recover for a total loss, it could only be for a constructive total loss, and where in his declaration he declared for a constructive total loss, and all the testimony was addressed to that kind of a loss, the error, if any, in the opinion of the court that a constructive total loss had to be proven, and that proof of a total loss would not prove a constructive total loss, was harmless. Searles *v.* Western Assur. Co., (Miss. 1906) 40 So. 86.

MARINE LEAGUE. See League.

MARINER. A seaman or sailor; one whose occupation is to assist in navigating ships.[1] (Mariner: Bequests For Benefit of, see Charities.[2] See, generally, Seamen.)

MARIS ET FŒMINÆ CONJUNCTIO EST DE JURE NATURÆ. A maxim meaning "The union of male and female is founded on the law of nature."[3]

MARITAGIO AMISSO PER DEFALTAM. An obsolete writ for the tenant in frank marriage to recover lands, etc., of which he was deforced.[4]

MARITAGIUM EST AUT LIBERUM AUT SERVITIO OBLIGATUM; LIBERUM MARITAGIUM DICITUR UBI DONATOR VULT QUOD TERRA SIC DATA QUIETA SIT ET LIBERA AB OMNI SECULARI SERVITIO. A maxim meaning "A marriage portion is either free or bound to service."[5]

MARITAL. Relating to, or connected with, the status of marriage; pertaining to a husband; incident to a husband;[6] of or pertaining to a husband;[7] that which belongs to marriage;[8] synonymous with Conjugal,[9] *q. v.* (See, generally, Divorce; Husband and Wife; Marriage.)

MARITAL PORTION. See Descent and Distribution.

MARITAL RIGHTS. See Husband and Wife.

MARITIME. Pertaining to the sea or ocean or the navigation thereof; or to commerce conducted by navigation of the sea, or, in America, of the great lakes and rivers;[10] an act which contributes to the navigation of a vessel presently or prospectively.[11] (See, generally, Admiralty, and Cross-References Thereunder. See also Marine.)

MARITIME CONTRACT. A contract concerning the sea;[12] a contract to be performed on the high seas;[13] a contract which relates to the business of navigation of the sea or to business pertaining to commerce or navigation to be transacted or done on the sea or in seaports.[14] (See, generally, Admiralty, and Cross-References Thereunder.)

1. Doughten *v.* Vandever, 5 Del. Ch. 51, 73.
2. See 6 Cyc. 922.
3. Bouvier L. Dict.
4. Black L. Dict.
5. Peloubet Leg. Max.
6. Black L. Dict. [*quoted* in McCown *v.* Owens, 15 Tex. Civ. App. 346, 350, 40 S. W. 336].
7. Webster Dict.; Wharton Dict. [*quoted* in McCown *v.* Owens, 15 Tex. Civ. App. 346, 350, 40 S. W. 336].
8. Bouvier L. Dict. [*quoted* in McCown *v.* Owens, 15 Tex. Civ. App. 346, 350, 40 S. W. 336].
9. Sharon *v.* Sharon, 75 Cal. 1, 10, 16 Pac. 345.
10. Black L. Dict.
11. The Sirius, 65 Fed. 226, 228.
12. The Vidal Sala, 12 Fed. 207, 212.
13. The C. C. Trowbridge, 14 Fed. 874, 876, 11 Biss. 154.
14. Holt *v.* Cummings, 102 Pa. St. 212, 215, 48 Am. Rep. 199 (holding further that contracts relating to the navigation of our interstate lakes and great rivers are not in a strict sense maritime contracts, although they are within admiralty jurisdiction); Edwards *v.* Elliott, 21 Wall. (U. S.) 532, 533, 22 L. ed. 487; Freights of The Kate, 63 Fed. 707, 720; U. S. *v.* Burlington, etc., County Ferry Co., 21 Fed. 331; Young *v.* The Orpheus, 30 Fed. Cas. No. 18,169, 2 Cliff. 29, 35. It must concern jurisdiction by sea; it must relate to navigation and to maritime employment; it must be one of navigation and commerce on navigable waters. *In re* Hydraulic Steam Dredge Co. No. 1, 80 Fed. 545, 556, 25 C. C. A. 628; The Richard Winslow, 71 Fed. 426, 428, 18 C. C. A. 344.

Such contracts have been held to include: An agreement of consortship between the master of two vessels engaged in the business of wrecking. Anderson *v.* Wall, 3 How. (U. S.) 568, 572, 11 L. ed. 729. An agreement to transport a steerage passenger from one port to another. The Moses Taylor *v.* Hammons, 4 Wall. (U. S.) 411, 427, 18 L. ed. 397. A charter-party. The Fifeshire, 11 Fed. 743; Maury *v.* Culliford, 10 Fed. 388, 391, 4 Woods 118. A contract of affreightment. Bird *v.* The Josephine, 39 N. Y. 19, 22, 6 Transcr. App. 5; The Queen of the Pacific, 61 Fed. 213, 214; De Lovio *v.* Boit, 7 Fed. Cas. No. 3,776, 2 Gall. 398. A contract of insurance on a proper subject. Bird *v.* The Josephine, *supra*; Marquardt *v.* French, 53 Fed. 603, 606; De Lovio *v.* Boit, *supra*. Contracts and quasi-contracts respecting averages, controversies, and jettisons. Bird *v.* The Josephine, *supra*; De Lovio *v.* Boit, *supra*. Contracts for marine services in the building, repairing, supplying, and navigating ships. Bird *v.* The Josephine, *supra*; De Lovio *v.* Boit, *supra*. A contract for salvage. *Ex p.* Easton, 95 U. S. 68, 76, 24 L. ed. 373. A contract for wharfage. *Ex p.* Easton, *supra*; The John M. Welch, 2 Fed. 364, 371. A contract to furnish materials to repair a vessel. The City of Salem, 10 Fed. 843, 844, 7 Sawy. 477 [*citing* The St. Lawrence, 1 Black (U. S.)

MARITIME INTEREST. The premium paid for a loan secured by means of a contract of bottomry.[15] (See, generally, SHIPPING.)

MARITIME LAW. The general law of nations, not the law of a particular country.[16] (See, generally, ADMIRALTY; COLLISION; COURTS; MARITIME LIENS; PILOTS; PIRACY; SALVAGE; SEAMEN; SHIPPING; TOWAGE.)

522, 525, 17 L. ed. 180]. A contract to furnish motive power to a vessel. The W. J. Walsh, 30 Fed. Cas. No. 17,922, 5 Ben. 72, 73. Marine hypothecations. Bird *v.* The Josephine, *supra*; Freights of The Kate, 63 Fed. 707, 720; De Lovio *v.* Boit, *supra*.

Such contracts have been held not to include: A contract constituting a person general passenger and freight agent of a steamship and giving him entire control of her passenger and freight business. The Humboldt, 86 Fed. 351, 352. A contract for services, such as are usually performed by ship's brokers and business agents, and performed on land. The Humboldt, *supra*. A contract to obtain a charter for a vessel. Taylor *v.* Weir, 110 Fed. 1005. A contract to procure insurance. Marquardt *v.* French, 53 Fed. 603, 606. A contract to reimburse libellant for advances to pay freight on goods to the port at which they were taken by libellant's vessel. Pacific Coast Steamship Co. *v.* Moore, 70 Fed. 870, 871. Contracts for shipbuilding or for labor performed or materials furnished in the construction of ships or vessels. Olsen *v.* Birch, 133 Cal. 479, 65 Pac. 1032, 85 Am. St. Rep. 215; The M. Tuttle *v.* Buck, 23 Ohio St. 565, 567, 13 Am. Rep. 270; Roach *v.* Chapman, 22 How. (U. S.) 129, 132, 16 L. ed. 291; People's Ferry Co. *v.* Beers, 20 How. (U. S.) 393, 401, 15 L. ed. 961; McMaster *v.* One Dredge, 95 Fed. 832, 835.

15. The Dora, 34 Fed. 343, 344.

16. Vasse *v.* Ball, 2 Yeates (Pa.) 178, 182 [*citing* Luke *v.* Lyde, 2 Burr. 882, 887, W. Bl. 190; Vallezjo *v.* Wheeler, Lofft. 631, 639].

This law is only so far operative as law in any country as it is adopted by the laws and usages in that country. In this respect it is like international law, or the laws of war, which have the effect of law in no country further than they are accepted and received as such. Rodd *v.* Heartt, 21 Wall. (U. S.) 558, 572, 22 L. ed. 654.

The term includes jurisdiction of all things done upon or relating to the sea, or, in other words, all transactions and proceedings relating to commerce and navigation, and to remedies and injuries upon the sea (Jervey *v.* The Carolina, 66 Fed. 1013, 1015) and is entirely distinct from the law of the land. It is and always has been a distinct and separate jurisprudence. The Unadilla, 73 Fed. 350, 351. It has no application to flatboats on the Ohio river, their pilots and navigators. Leddo *v.* Hughes, 15 Ill. 41, 45, Scates, J., delivering the opinion of the court.

MARITIME LIENS

By Robert M. Hughes*

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CROSS-REFERENCES

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Mortgage on Vessel, see SHIPPING.
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I. DEFINITION.

A maritime lien is defined by Lord Tenterden to mean a privileged claim upon a thing in respect of service done to it or injury caused by it, to be carried into effect by legal process.[1] Judge Curtis adopts Pothier's definition of a hypothecation as an accurate description of a maritime lien: "The right which a creditor has in a thing of another, which right consists in the power to cause that thing to be sold, in order to have the debt paid out of the price."[2]

II. NATURE IN GENERAL.

A. A Right of Property, Not a Mere Remedy. There are some cases which hold that a maritime lien is a mere right of arrest, that is, a mere remedy unaccompanied by any vested interest in the *res* itself.[3] But the later and conclusive

1. Abbott Shipp. (12th ed.) 106, 595; Harmer *v.* Bell, 7 Moore P. C. 267, 284, 13 Eng. Reprint 884. This definition assumes that the "thing" to which it alludes is a vessel or something connected therewith, and that the "legal process" is the process of an admiralty court.

2. The Young Mechanic, 30 Fed. Cas. No. 18,180, 2 Curt. 404, 410. This definition is accurate if the words "creditor" and "debt" are understood to apply to causes of action *ex delicto* as well as those *ex contractu*. See also Gagnon *v.* Tremblay, 15 Quebec Super. Ct. 403; The Hercyna, 1 Stuart Vice-Adm. (L. C.) 274.

3. The St. Lawrence, 1 Black (U. S.) 522, 17 L. ed. 180; The Globe, 10 Fed. Cas. No. 5,483, 2 Blatchf. 427; The Triumph, 24 Fed. Cas. No. 14,182, 2 Blatchf. 433. In The St. Lawrence, *supra*, Taney, C. J., treats the right to a maritime lien on a domestic vessel as a mere question of procedure, which the supreme court can give or take away by rule, as it sees fit. Under the English and Ameri-

authority is that a maritime lien is something more than a mere right of arrest. It is a *jus in re*, that is, a proprietary interest in the property affected, adhering to it wherever it may go and enforceable against it by seizure and sale under the process of an admiralty court.[4]

B. Independent of Possession. The striking difference between the common-law and maritime lien is, that the latter does not depend upon possession, but follows the *res* wherever or into whosesoever hands it may go.[5] Not being dependent on possession, it is enforceable anywhere, following the vessel around the world with lengthening chain and recognized in any jurisdiction where the powers of an admiralty court may be invoked.[6] There is, however, one class of maritime liens dependent on possession, namely, the lien of a vessel on her cargo for freight or demurrage.[7] And care must be taken to distinguish the maritime lien from the ordinary common-law lien of a shipwright or other artisan for work done, which is dependent on possession.[8]

C. A Claim Primarily Against the Res as Itself a Contracting or Offending Thing — 1. The American Rule. Under the American rule as finally established the vessel is itself looked on as a responsible being; and a maritime lien attaches directly, independent of questions of ownership or agency, the liability of the ship as such being the main thing, and the question of ownership being incidental. Hence such a lien attaches to the vessel, even in cases where the owners are not personally responsible, and even for the acts of persons not

can decisions, as will be seen later on, there is no lien under the maritime law for necessaries furnished a domestic vessel, and possibly as to such vessels it may be considered a question of procedure, but the decision is unsound as to any but domestic vessels.

4. Briggs *v.* A Light Boat, 7 Allen (Mass.) 287, 296; The Jno. G. Stevens, 170 U. S. 113, 18 S. Ct. 544, 42 L. ed. 969; The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345; Rodd *v.* Heartt, 21 Wall. (U. S.) 558, 22 L. ed. 654; The J. W. Tucker, 20 Fed. 129; The Arcturus, 18 Fed. 743; The Avon, 2 Fed. Cas. No. 680, Brown Adm. 170; The Young Mechanic, 30 Fed. Cas. No. 18,180, 2 Curt. 404; Harmer *v.* Bell, 7 Moore P. C. 267, 13 Eng. Reprint 884.

It is so far a right of property that a repeal of the act under which it arose does not affect liens previously vested. The Gazelle *v.* Lake, 1 Oreg. 119.

5. This is well expressed in a leading English case on the subject: "The word is used in Maritime Law not in the strict legal sense in which we understand it in Courts of Common Law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the Civil Law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosesoever possession it came. . . . This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached." The Bold Buccleugh, 7 Moore P. C. 267, 284, 13 Eng. Reprint 884. This decision has often been cited with approval in the American courts. It is sometimes referred to as Harmer *v.* Bell. The Jno. G. Stevens, 170 U. S. 113, 18 S. Ct. 544, 42 L. ed. 969; The Rock Island Bridge, 6 Wall. (U. S.) 213, 18 L. ed. 753; The Lamington, 87 Fed. 752; The Avon, 2 Fed. Cas. No. 680; *Ex p.* Foster, 9 Fed. Cas. No. 4,960, 2 Story 131; Mordecai *v.* The Mary Eddy, 17 Fed. Cas. No. 9,790; Galena, etc., Packet Co. *v.* Rock Island Bridge, 6 Wall. (U. S.) 213, 18 L. ed. 753; The Avon, 2 Fed. Cas. No. 680, Brown Adm. 170. See also Mott *v.* Lansing, 57 N. Y. 112; The Hercyna, 1 Stuart Vice-Adm. (L. C.) 274.

6. White *v.* The Cynthia, 2 Fed. 112; The Champion, 5 Fed. Cas. No. 2,583, Brown Adm. 520; Harney *v.* The Sidney L. Wright, 11 Fed. Cas. No. 6,082*a*, 5 Hughes 474; The Raleigh, 20 Fed. Cas. No. 11,539, 2 Hughes 44.

7. This is due to the fact that property of that character when once delivered would be very difficult to trace; and hence this is rather a qualification of the rule than an exception to it, as the reasons which gave origin to the maritime lien on a vessel would not apply. Sears *v.* Wills, 1 Black (U. S.) 108, 17 L. ed. 35; Two Hundred and Sixteen Loads and Six Hundred and Seventy-eight Barrels of Fertilizer, 88 Fed. 984, 5 Hughes 310; Pioneer Fuel Co. *v.* McBrier, 84 Fed. 495, 28 C. C. A. 466.

8. Downey *v.* Lozier Motor Co., 138 Fed. 173; The Two Marys, 10 Fed. 919, 16 Fed. 697; The B. F. Woolsey, 7 Fed. 108; The Marion, 16 Fed. Cas. No. 9,087, 1 Story 68; Shrewsbury *v.* The Two Friends, 22 Fed. Cas. No. 12,819, Bee 433. See also Fields *v.* His Creditors, 11 La. Ann. 545; Franklin *v.* Hosier, 4 B. & Ald. 341, 23 Rev. Rep. 305, 6 E. C. L. 510; Raitt *v.* Mitchell, 4 Campb. 146, 16 Rev. Rep. 765.

bearing the relation of agent to the owners.[9] But this fiction of the liability of the vessel as herself a contracting or offending thing, while independent of questions of agency as between owner and crew, is not carried so far, even under the American rule, as to make her liable for every injury in which she is a mere passive instrument. In order for such liability to attach, the parties operating her must be lawfully in charge or must occupy a relation of agency to the vessel herself, if not to her owners.[10]

2. THE ENGLISH RULE. Under the English decisions the liability of the vessel and the responsibility of the owner are convertible terms, the procedure *in rem* is considered a mere means of getting at the owner through the vessel; and hence no maritime lien attaches to the vessel except for the acts of those bearing the relation of agent to the owner.[11]

3. EFFECT OF THESE DIVERGENT RULES ON THE REMEDY IN REM IN THE TWO JURISDICTIONS. Whatever may be the case in the continental admiralty, it seems pretty evident historically that the remedy *in rem* in England and America originated as a mere process of attachment incidental to a personal suit against the owner, and was not even limited at the outset to the specific ship, although it gradually assumed that form.[12] In America, however, it has resulted from the doctrine of the primary liability of the ship that, in a proceeding *in rem* to enforce a maritime lien praying only process against the ship and a general citation of all interested, the owner when he appears does so, not as defendant, but as claimant; and that such appearance is limited to the object of defending an interest in the *res* and cannot be made the basis of a personal decree for any deficit over the value of the *res*.[13] In England on the other hand the doctrine that the procedure *in rem* is but an indirect means of reaching the owner has resulted in the corollary that, when the owner appears and gives bail, he submits generally to the jurisdiction, the action changes from one *in rem* to one *in personam*, and a personal decree may be rendered against the owner for any deficit.[14]

9. Tucker *v.* Alexandroff, 183 U. S. 424, 22 S. Ct. 195, 46 L. ed. 264; The Barnstable, 181 U. S. 464, 21 S. Ct. 684, 45 L. ed. 954; The Jno. G. Stevens, 170 U. S. 113, 18 S. Ct. 544, 42 L. ed. 969; The China *v.* Walsh, 7 Wall. (U. S.) 53, 19 L. ed. 67. In The Barnstable, *supra*, the vessel was held liable *in rem* for a collision while being operated by charterers, in which case the owners could not have been held personally.

This is strikingly illustrated by The China *v.* Walsh, 7 Wall. (U. S.) 53, 19 L. ed. 67, in which the vessel was held liable *in rem* for a collision caused by a state pilot, who was in charge under a state statute requiring the vessel to take him, and who therefore was not in any sense the agent of the owners. In fact they would not have been liable even in a personal suit. Homer Ramsdell Transp. Co. *v.* La Compagnie Générale Transatlantique, 182 U. S. 406, 21 S. Ct. 831, 45 L. ed. 1155.

10. The C. E. Conrad, 57 Fed. 256. Hence a ship is not liable for a debt contracted by mutineers. The Anne, 1 Fed. Cas. No. 412, 1 Mason 508. Nor for the damages inflicted by her through the negligence of a tug having her in tow, as a tug is an independent contractor, not an agent. The Clara Clarita, 23 Wall. (U. S.) 1, 23 L. ed. 146. Nor is the question of ownership so far ignored as to allow a proceeding *in rem* against a government vessel in charge of government officers. The Siren *v.* U. S., 7 Wall. (U. S.) 152, 19 L. ed. 129.

11. Currie *v.* McKnight, [1897] A. C. 97, 8 Aspin. 193, 66 L. J. P. C. 19, 75 L. T. Rep. N. S. 457; The Parlement Belge, 5 P. D. 197, 4 Aspin. 234, 42 L. T. Rep. N. S. 273, 28 Wkly. Rep. 642; The Druid, 1 W. Rob. 391. Hence where a ship was damaged by collision with a wreck which was in charge of port authorities who neglected to properly indicate its location, the owners were held not liable for the acts of the port authorities, and as the owners were not liable the wreck itself was held not liable. Owners of Steamship Utopia *v.* Owners and Master of Steamship Primula, [1893] A. C. 492, 7 Aspin. 408, 62 L. J. P. C. 118, 70 L. T. Rep. N. S. 47, 1 Reports 394.

The liability of a chartered ship either in contract or tort is not clear in England. Morgan *v.* The Steamship Castlegate, [1893] A. C. 38, 7 Aspin. 284, 62 L. J. P. C. 17, 68 L. T. Rep. N. S. 99, 1 Reports 97, 41 Wkly. Rep. 349; The Tasmania, 13 P. D. 110, 6 Aspin. 305, 57 L. J. Adm. 49, 59 L. T. Rep. N. S. 263; The Ticonderoga, Swab. 215.

In Canada a ship is liable for the act of a compulsory pilot, although the owner could not be held personally. The Cumberland, 1 Stuart Vice-Adm. (L. C.) 75.

12. See the interesting discussion of this in The Underwriter, 119 Fed. 713. See also Marsden Collisions, c. 3.

13. The Ethel, 66 Fed. 340, 13 C. C. A. 504; The Monte A., 12 Fed. 331.

14. The Gemma, [1899] P. 285, 8 Aspin.

D. Stricti Juris. Although maritime liens tend to build up commerce as furnishing a basis of credit, they are secret liens on movable property, following it into the hands of innocent holders. Hence the law inclines against them, and any one asserting such a lien must satisfy the court of his right to it.[15]

III. CLASSES OF MARITIME LIENS.

A. In General. Maritime liens arise either from contract[16] or tort.[17]

B. Contract Liens — 1. DEFINED. A maritime contract is one relating to a ship as an instrument of commerce or navigation when tending to facilitate its use as such, or in connection with its use as such.[18] A maritime lien, however, does not arise out of every maritime contract. Many such contracts give only a personal right of action against the vessel owner or master, without giving the proprietary interest in the *res* which constitutes the maritime lien. In order for the lien to arise, the service must in some way be brought into relation with the ship itself and tend to facilitate her use as an instrument of commerce. For example, a contract of marine insurance, although maritime, gives no maritime lien; for it merely benefits the owner and does not benefit the vessel itself.[19]

2. EXAMPLES — a. Salvage.[20] Salvage is a reward allowed for a service rendered to marine property at risk or in distress by those under no legal obligation to render it, which results in benefit to the property if eventually saved.[21]

b. Seamen's Wages. Seamen's wages constitute a maritime lien of high rank, adhering to the last nail or plank of a ship.[22]

c. Stevedores' Services.[23] The maritime character of a stevedore's service was long denied, on the ground that it only remotely contributed to the success

585, 68 L. J. P. D. & Adm. 110, 81 L. T. Rep. N. S. 379; The Dictator, [1892] P. 304, 7 Aspin. 251, 61 L. J. Adm. 73, 67 L. T. Rep. N. S. 563. This was not the doctrine of the earlier cases. The Volant, 1 W. Rob. 383.

15. Rodd *v.* Heartt, 21 Wall. (U. S.) 558, 22 L. ed. 654; Peoples Ferry Co. *v.* Beers, 20 How. (U. S.) 393, 15 L. ed. 961; Taylor *v.* Weir, 110 Fed. 1005; The Kiersage, 14 Fed. Cas. No. 7,762, 2 Curt. 421; The Sam Slick, 21 Fed. Cas. No. 12,282, 2 Curt. 480. See also *infra*, VII, B, 2, b, (II), (D).

16. See *infra*, III, B.

17. See *infra*, III, C.

18. Hughes Adm. 16; De Lovio *v.* Boit, 7 Fed. Cas. No. 3,776, 2 Gall. 398; Zane *v.* The President, 30 Fed. Cas. No. 18,201, 4 Wash. 453.

The mere fact that a contract has a ship in view in some incidental connection does not make it maritime. It must contemplate the furtherance of the use of a ship in a maritime enterprise or in preparation for such enterprise in order to be maritime. For instance a mortgage on a ship is not a maritime contract. Bogart *v.* The John Jay, 17 How. (U. S.) 399, 15 L. ed. 95.

19. The City of Camden, 147 Fed. 847; The Hope, 49 Fed. 279; The Daisy Day, 40 Fed. 603; The Waubaushene, 24 Fed. 559 [*affirming* 22 Fed. 109]; The Jennie B. Gilkey, 19 Fed. 127; The John T. Moore, 13 Fed. Cas. No. 7,430, 3 Woods 61; Mercantile Ins. Co. *v.* The Orphan Boy, 17 Fed. Cas. No. 9,431; Mutual F. Ins. Co. *v.* The S. G. Andrews, 17 Fed. Cas. No. 9,978; Tiner *v.* The Bride, 5 La. Ann. 756. *Contra*, The Dolphin, 7 Fed. Cas. No. 3,973, 1 Flipp. 580 [*affirmed* in 7 Fed. Cas. No. 3,974, 1 Flipp. 592]; The Illinois, 12 Fed. Cas. No. 7,005, 2 Flipp. 383.

State statutes giving a lien for insurance premiums are construed in the following cases; but in none of them was a lien sustained on the facts. The Advance, 67 Fed. 345, 14 C. C. A. 410 [*affirming* 61 Fed. 507]; *In re* Pennsylvania Ins. Co., 22 Fed. 109 [*affirmed* in 24 Fed. 559, 23 Blatchf. 293]; The Kearsarge, 14 Fed. Cas. No. 7,634, 1 Ware 546; Srodes *v.* The Collier, 22 Fed. Cas. No. 13,272, 13,272*a*.

20. Salvage generally see SALVAGE.

21. Hughes Adm. 127. Salvage is classed here among the claims arising out of contract because in modern times it almost invariably does so arise. Strictly speaking, however, it does not depend on contract but is awarded on grounds of public policy, as a means of encouraging the saving of property. For instance bringing in a derelict could not possibly be considered a service based on contract. Mason *v.* The Blaireau, 2 Cranch (U. S.) 240, 2 L. ed. 266; Brevoor *v.* The Fair American, 4 Fed. Cas. No. 1,847, 1 Pet. Adm. 87; Cheeseman *v.* Two Ferry Boats, 5 Fed. Cas. No. 2,633, 2 Bond 363.

22. The Niphon, 18 Fed. Cas. No. 10,277, Brunn. Col. Cas. 577; Relf *v.* The Maria, 20 Fed. Cas. No. 11,692, 1 Pet. Adm. 186.

Seamen generally see SEAMEN.

23. A stevedore is a workman or contractor who loads or discharges a ship and properly stows her cargo (Hughes Adm. 113); one whose occupation is to load and unload vessels in port (Rankin *v.* Merchants, etc., Transp. Co., 73 Ga. 229, 54 Am. Rep. 874).

of the voyage.[24] But in view of its growing importance and the greater skill required in the loading of modern vessels, the later, better, and preponderant authority establishes the existence of a maritime lien in such cases.[25]

d. Towage.[26] The party rendering towage service has a maritime lien against the ship aided thereby.[27]

e. Contracts Relating to Use of Vessel. The most familiar instances of contracts relating to use of a vessel are contracts of affreightment and charter-parties. A maritime lien exists in favor of the vessel against the cargo for freight and demurrage.[28] Conversely the shipper has a remedy *in rem* against the ship for any breach of the contract.[29] But there is no remedy *in rem*, or maritime lien, unless there is some act of part performance bringing the cargo and ship into relations; so that a breach of a charter-party by the ship before it has commenced loading or a contract never connected with the ship itself gives no maritime lien.[30]

f. Materialmen's Contracts — (1) *In General.* Under the generic term "materialmen" are included those who repair or equip ships, or furnish them with tackle and necessary provisions.[31] "Materialmen's contracts" relate to supplies, repairs, advances, and necessaries of that general nature which are fit and proper for the use of a ship.[32]

Stevedores are a class of laborers at the ports, whose business it is to load and unload vessels. The Senator, 21 Fed. 191.

The stevedore is not an independent contractor doing the work which, when completed, is to be turned over to the master for his approval or disapproval; but he must load the steamer at all times under the direction of, and so subject to, the control of the master. The Elton, 83 Fed. 519, 31 C. C. A. 496.

24. The John Shay, 81 Fed. 216; The Augustine Kobbe, 37 Fed. 696 [*affirmed* in 39 Fed. 559]; The Wyoming, 36 Fed. 493; The Esteban de Antunano, 31 Fed. 920; The E. A. Barnard, 2 Fed. 712; The Amstel, 1 Fed. Cas. No. 339, Blatchf. & H. 215; The A. R. Dunlap, 1 Fed. Cas. No. 513, 1 Lowell 350; McDermott *v.* The S. G. Owens, 16 Fed. Cas. No. 8,748, 1 Wall. Jr. 370; Paul *v.* The Ilex, 18 Fed. Cas. No. 10,842, 2 Woods 229; Gibbons *v.* The Fanny Barker, 40 Mo. 253. See 34 Cent. Dig. tit. "Maritime Liens," § 13.

25. The Allerton, 93 Fed. 219; The Seguranca, 58 Fed. 908; The Main, 51 Fed. 954, 2 C. C. A. 569; The Senator, 21 Fed. 191; The Hattie M. Bain, 20 Fed. 389; The Canada, 7 Fed. 119, 7 Sawy. 173; The George T. Kemp, 10 Fed. Cas. No. 5,341, 2 Lowell 477. An examination of the more recent authorities cited *supra*, note 20, will show that they do not deny the maritime character of a stevedore's service, but rather base their ruling on the fact that there was no state statute giving a lien. As state statutes only affect domestic vessels, the stevedore's lien on foreign vessels ought therefore to be clear. The doctrine that a state statute is necessary for the existence of a lien will be seen later (see *infra*, VI, B, 2; VII, B, 3) to apply only to claims for repairs, supplies, and necessaries of that general character, not to general admiralty claimants, like seamen or salvors. Stevedores ought on principle to be classed with the latter, not the former, and hence ought to be equally independent of state statutes.

Only when employed by the ship, not when employed by the charterer, has a stevedore a lien against the ship; as the latter is loading the ship for his own benefit and there would be no privity of contract in such case between the stevedore and ship. The Chicklade, 120 Fed. 1003.

26. Towage is a service rendered in the propulsion of uninjured vessels under ordinary services of navigation, irrespective of any unusual peril. Hughes Adm. 117. See also, generally, TOWAGE.

27. Harris *v.* The Elm Park, 50 Fed. 126; Ward *v.* The Banner, 29 Fed. Cas. No. 17,149; The Williams, 29 Fed. Cas. No. 17,710, Brown Adm. 208.

28. Blowers *v.* One Wire Rope Cable, 19 Fed. 444; Certain Logs of Mahogany, 5 Fed. Cas. No. 2,559, 2 Sumn. 589.

29. Bulkley *v.* Naumkeag Steam Cotton Co., 24 How. (U. S.) 386, 16 L. ed. 599; The Rebecca, 20 Fed. Cas. No. 11,619, 1 Ware 188. But the former law on this subject has been materially changed by the act of Feb. 13, 1893 (27 U. S. St. at L. 445 [1 U. S. Comp. St. (1901) p. 2946]), known as the Harter Act. See SHIPPING.

30. Guffey *v.* Alaska, etc., Steamship Co., 130 Fed. 271, 64 C. C. A. 517; The S. L. Watson, 118 Fed. 945, 55 C. C. A. 439; The Ripon City, 102 Fed. 176, 42 C. C. A. 247; The Hiram, 101 Fed. 138; The C. E. Conrad, 57 Fed. 256; The Ira Chaffee, 2 Fed. 401.

But a state statute may create a lien *in rem* on a domestic vessel for breach of such contracts of the owner as would give a right of suit *in personam*. The Energia, 124 Fed. 842.

31. The Neptune, 3 Hagg. Adm. 129, 142, the definition of Sir Leoline Jenkins.

32. Hence in different treatises they are discussed indifferently under the heads of "Materialmen," "Supplies and Repairs," and "Necessaries."

In Admiralty Rule No. 12 of the supreme court, they are designated as claims "by ma-

(II) *THE AMERICAN RULE.* By the American law materialmen have a maritime lien on the ship under the circumstances to be hereafter considered;[33] and this without any express contract therefor, as for example through the medium of a bottomry bond.[34]

(III) *THE ENGLISH RULE.* The English rule is entirely different from the American rule. As a result of the warfare waged by the English common-law courts upon the admiralty courts, contracts of materialmen were hardly ranked as marine by nature, and gave no rise to a maritime lien. The only method of raising funds for the necessities of a ship under English law was by an express contract of bottomry.[35]

C. Liens For Torts — 1. IN GENERAL. All causes of action in tort consummate on navigable waters are within the admiralty jurisdiction.[36] And for torts arising in the use of a vessel, a maritime lien attaches in favor of the injured party against the vessel as an offending thing.[37]

2. EXAMPLES — a. Collision.[38] Collision is a frequent instance of marine tort. The injured party has a maritime lien for damages so caused.[39]

b. Personal Injuries. When personal injuries are caused by the negligence of the vessel in cases for which a legal liability attaches, a maritime lien exists in favor of the injured party.[40]

IV. PROPERTY SUBJECT TO MARITIME LIENS.

A. In General. In order for a maritime lien to attach, the property against which it is asserted must be property marine by nature; that is, it must be a ship, her cargo, or such flotsam or jetsam as constituted part of the cargo or contents of a ship.[41]

terialmen for supplies or repairs or other necessaries."

33. See *infra*, VI, B.

34. The Roanoke, 189 U. S. 185, 23 S. Ct. 491, 47 L. ed. 770; Pendergast *v.* The Kalorama, 10 Wall. (U. S.) 204, 19 L. ed. 941; The Grapeshot *v.* Wallerstein, 9 Wall. (U. S.) 129, 19 L. ed. 651.

35. Laws *v.* Smith, 9 App. Cas. 356, 5 Aspin. 224, 50 L. T. Rep. N. S. 461; Johnson *v.* Blach, L. R. 4 P. C. 161, 1 Aspin. 208, 41 L. J. Adm. 33, 26 L. T. Rep. N. S. 1, 8 Moore P. C. N. S. 398, 20 Wkly. Rep. 592, 17 Eng. Reprint 361; The Heinrich Bjorn, 10 P. D. 44, 5 Aspin. 391, 54 L. J. Adm. 33, 52 L. T. Rep. N. S. 560, 33 Wkly. Rep. 719 [*affirmed* in 11 App. Cas. 270, 6 Aspin. 1, 55 L. J. Adm. 80, 55 L. T. Rep. N. S. 66]; The Woodland, 30 Fed. Cas. No. 17,977, 14 Blatchf. 499; The Mary Jane, 3 Stuart. (L. C.) 267.

But as to repairs done abroad see *Ex p.* Halkett, 2 Rose 194, 3 Ves. & B. 135, 35 Eng. Reprint 430.

Effect of statutes.— Sts. 3 & 4 Vict. c. 65, § 6; 24 Vict. c. 10, §§ 4, 5; and 31 & 32 Vict. c. 71, § 3, have restored the jurisdiction of the admiralty courts over this class of contracts. But as construed by the courts they do not give a maritime lien, existing from the date of the service and following the property into other hands. They give a mere right of arrest or procedure *in rem*, which takes effect only from the time of arrest, and is subject to any interest or rights vesting between the rendition of the service and the arrest. See cases cited *supra*, this note.

36. Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 7 S. Ct. 254, 30 L. ed. 447; *Ex p.* Boyer, 109 U. S. 629, 3 S. Ct. 434, 27 L. ed. 1056.

37. See *supra*, II, C, 1.

38. Collision means in maritime law the striking together of two vessels. Cline *v.* Western Assur. Co., 101 Va. 496, 44 S. E. 700. See COLLISION, 7 Cyc. 302.

39. The John G. Stevens, 170 U. S. 113, 18 S. Ct. 544, 42 L. ed. 969; The China *v.* Walsh, 7 Wall. (U. S.) 53, 19 L. ed. 67.

40. Instances of suits by passengers, members of the crew, or employees of stevedores, or others lawfully on board for injuries received while on a ship from her alleged negligence are very numerous. See cases cited *infra*, this note.

Suits by passengers.— The City of Panama, 101 U. S. 453, 25 L. ed. 1061; The Willamette Valley, 71 Fed. 712; The Furnessia, 35 Fed. 798.

Suits by the crew.— The Lizzie Burrill, 115 Fed. 1015; The Eva B. Hall, 114 Fed. 755; Lafourche Packet Co. *v.* Henderson, 94 Fed. 871, 36 C. C. A. 519; The Neptuno, 30 Fed. 925.

Suits by others lawfully on board.— The Joseph B. Thomas, 86 Fed. 658, 30 C. C. A. 333, 46 L. R. A. 58; Ferguson *v.* The Terrier, 73 Fed. 265; Cavalier *v.* The Christobal Colon, 44 Fed. 803; The Rheola, 19 Fed. 926.

41. This question has been before the courts most frequently in connection with claims for salvage, but, so far as the property affected is concerned, there is no differ-

B. Ship or Vessel — Structures Included Under — 1. As Affected by Form or Shape — a. In General. A vessel is defined in the federal statutes as "every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[42] This definition, however, is prescribed simply as an aid in the construction of federal statutes, and does not limit the meaning of the term in admiralty law. And it will be seen that many craft are included if capable of navigation, although not used or capable of being used as an instrument of transportation. Wrecks are still vessels, although helpless.[43] Nor does the size of the vessel affect the jurisdiction.[44]

b. Barges. A barge, although without means of propulsion, is considered a ship or vessel.[45]

c. Flatboats, Lighters, and Scows. These are about the same thing as open barges, and are within the jurisdiction. Pile drivers or derricks placed upon them do not affect the principle.[46]

ence in principle as among the several kinds of maritime liens. Cope *v.* Vallette Dry-Dock Co., 119 U. S. 625, 7 S. Ct. 336, 30 L. ed. 501; The Gas Float Whitton No. 2, [1896] P. 42, 8 Aspin. 110, 65 L. J. Adm. 17, 73 L. T. Rep. N. S. 698, 44 Wkly. Rep. 263 [*affirmed* in [1897] A. C. 337, 66 L. J. Adm. 99, 76 L. T. Rep. N. S. 663]. In Gardner *v.* Ninety-Nine Gold Coins, 111 Fed. 552, salvage was allowed on gold coins taken from a body found afloat upon the ocean and supposed to have been a passenger from the wreck of the Bourgogne. See also, generally, Salvage.

42. U. S. Rev. St. § 3 [U. S. Comp. St. (1901) p. 4]. See also Horn *v.* The Trial, 22 Wis. 529.

A traveling derrick essential to the use of a wrecking scow is a part of it. The Buffalo, 148 Fed. 331.

A wrecking outfit leased for a special purpose is not so far a part of a ship as to be subject to a lien, although tightly fastened to the ship. The Mildred, 43 Fed. 393 [*distinguishing* The Edwin Post, 11 Fed. 602].

But the diving bell, pump, and other apparatus necessary for pearl fishing is so far a part of a vessel as to be subject to liens upon her. The Witch Queen, 30 Fed. Cas. No. 17,916, 3 Sawy. 201.

What constitutes appurtenances see also Learned *v.* Brown, 94 Fed. 876, 36 C. C. A. 524; Amis *v.* The Louisa, 9 Mo. 629.

A theater erected on the deck of a steamer to be transported from place to place for exhibition is part of the steamer. The Steamboat Virginia, 1 Edm. Sel. Cas. (N. Y.) 98.

43. The Progresso, 46 Fed. 292.

In Michigan, however, it is held that they do not come under the water-craft law of that state. Baker *v.* Casey, 19 Mich. 220.

44. The Ella B., 24 Fed. 508; The Pioneer, 21 Fed. 426.

Under the Pennsylvania statute it has been held that the vessel must be of a permanent character, and not merely temporary. Parkinson *v.* Manny, 2 Grant (Pa.) 521.

45. The New York, 93 Fed. 495; Mosser *v.* The City of Pittsburgh, 45 Fed. 699; Miller *v.* Dredges [*cited* in Seabrook *v.* Raft of Railroad Cross-Ties, 40 Fed. 596]; Disbrow *v.* The Walsh Bros., 36 Fed. 607; The D. C. Salisbury, 7 Fed. Cas. No. 3,694, Olcott 71; Haslett *v.* The Enterprise, 11 Fed. Cas. No. 6,197; The Union Express, 24 Fed. Cas. No. 14,363, Brown Adm. 516; The Resort *v.* Brooke, 10 Mo. 531; The Mac, 7 P. D. 126, 4 Aspin. 555, 51 L. J. Adm. 81, 46 L. T. Rep. N. S. 907. In Everard *v.* Kendall, L. R. 5 C. P. 428, 39 L. J. C. P. 234, 22 L. T. Rep. N. S. 408, 18 Wkly. Rep. 892, jurisdiction was denied in the case of a collision between two dumb barges. But the case turned on the language of the English Admiralty Act of 1861, which defined "ship" as "any description of vessel used in navigation not propelled by oars." These barges were so propelled. In Nease's Appeal, 3 Grant (Pa.) 110, the Pennsylvania act relating to maritime liens was construed as inapplicable to barges. In Leddo *v.* Hughes, 15 Ill. 41, flatboats were held excluded from the class of vessels against which maritime liens could be asserted. In Jones *v.* Coal Barges, 13 Fed. Cas. No. 7,458, 3 Wall. Jr. 53, open flat-boats or barges used to transport coal down a river and then broken up were held beyond admiralty jurisdiction, apparently on account of their temporary character, and small value. In Wood *v.* Two Barges, 46 Fed. 204, open coal barges were held not to be ships. But in view of the decisions first above quoted, and also those to be quoted in relation to craft similar to barges, the preponderance of authority is decisive in favor of the jurisdiction.

46. Lawrence *v.* Flatboat, 84 Fed. 200 [*affirmed* in 86 Fed. 907]; The International, 83 Fed. 840 [*distinguishing* U. S. *v.* Dunbar, 67 Fed. 783, 14 C. C. A. 639]; The Starbuck, 61 Fed. 502; The Wilmington, 48 Fed. 566; The Alabama, 19 Fed. 544 [*affirmed* in 22 Fed. 449]; Endner *v.* Greco, 3 Fed. 411; The Florence, 9 Fed. Cas. No. 4,880, 2 Flipp. 56; The General Cass, 10 Fed. Cas. No. 5,307, Brown Adm. 334; Maltby *v.* Steam Derrick Boat, 16 Fed. Cas. No. 9,000, 3 Hughes 477. The Pile Driver E. O. A., 69 Fed. 1005, is contrary to the great weight of recent authority.

But there are two old decisions in New York and Wisconsin holding the contrary un-

d. Canal-Boats. These clearly come within the jurisdiction.[47]

e. Dredges. There are many cases holding dredges to be a kind of a ship or vessel. They are capable of navigation and are merely large, flat-bottom boats carrying the heavy machinery used in cleaning out navigable channels.[48] But the better authority is that a dredge and her attendant scows are each separate vessels, and that a maritime claimant cannot assert a lien against them all as a unit.[49]

f. Floating Elevators. When not permanently moored, but capable of navigability from place to place, although used only in one harbor, these structures are ships or vessels.[50]

g. Ferry-Boats. These are within the jurisdiction, no matter how small, nor whether used entirely within a state, if used on navigable waters.[51]

h. Light-Boats. These are within the jurisdiction, although used merely as floating lights.[52]

i. Rafts. There is great conflict whether a raft is such a craft as to be subject to a maritime lien.[53] The early cases holding them liable to such a lien on the

der statutes authorizing proceedings against vessels. The Farmers' Delight *v.* Lawrence, 5 Wend. (N. Y.) 564; A Dark Colored Newly Decked Scow Boat *v.* Lynn, 1 Pinn. (Wis.) 239.

47. The Robert W. Parsons, 191 U. S. 17, 24 S. Ct. 8, 48 L. ed. 73; The E. M. McChesney, 8 Fed. Cas. No. 4,463, 8 Ben. 150 [*affirmed* in 8 Fed. Cas. No. 4,464, 15 Blatchf. 183]; The Kate Tremaine, 14 Fed. Cas. No. 7,622, 5 Ben. 60; Winslow *v.* A Floating Steam Pump, 30 Fed. Cas. No. 17,880 (where the pump was rigged upon a canal-boat and used for pumping out a dry-dock); King *v.* Greenway, 71 N. Y. 413 [*distinguishing* Many *v.* Noyes, 5 Hill (N. Y.) 34]; Hippie *v.* The Fashion, 3 Grant (Pa.) 40.

48. The Reed Bros. Dredge No. 1, 135 Fed. 867; McMaster *v.* One Dredge, 95 Fed. 832; Steam Dredge No. 1, 87 Fed. 760; McRae *v.* Bowers Dredging Co., 86 Fed. 344; Saylor *v.* Taylor, 77 Fed. 476, 23 C. C. A. 343; The Atlantic, 53 Fed. 607; The Endless Chain Dredge, 40 Fed. 253; The Pioneer, 30 Fed. 206; The Alabama, 19 Fed. 544 [*affirmed* in 22 Fed. 449]; The Mac, 7 P. D. 126, 4 Aspin. 555, 51 L. J. Adm. 81, 46 L. T. Rep. N. S. 907. In Fredericks *v.* Reese, 135 Fed. 730, 68 C. C. A. 368, turning on the language of the act, dredges were held not to be included in the Pennsylvania Lien Law of 1858. In *In re* Hydraulic Steam Dredge No. 1, 80 Fed. 545, 25 C. C. A. 628, it was decided that a dredge which worked on the suction principle and deposited the mud on shore by lines of pipe not for the purpose of improving navigation, but in order to build a railroad embankment, was not subject to a maritime lien for supplies furnished.

But the test is navigability of the vessel from place to place, and the purpose of the work done is immaterial. If the vessel was a floating structure not permanently moored to the shore it is within the jurisdiction, regardless of the motive of its work. See cases cited *supra*, this note.

The Illinois and Michigan courts, however, have held such structures not to be vessels within the meaning of their lien and attachment laws. Knisely *v.* Parker, 34 Ill. 481; Bartlett *v.* Steam Dredge No. 14, 107 Mich. 74, 64 N. W. 951, 61 Am. St. Rep. 314.

49. The Newport, 114 Fed. 713, 52 C. C. A. 415; The Knickerbocker, 83 Fed. 843; Munn *v.* The Columbus, 65 Fed. 430 [*affirmed* in 67 Fed. 553, 14 C. C. A. 522].

In the cases sustaining a single libel, the point was either not raised or obscured by other more vital questions. The Starbuck, 61 Fed. 502; The Alabama, 19 Fed. 544 [*affirmed* in 22 Fed. 449].

50. The Hezekiah Baldwin, 12 Fed. Cas. No. 6,449, 8 Ben. 556.

51. The St. Louis, 48 Fed. 312; U. S. *v.* Burlington, etc., Ferry Co., 21 Fed. 331; The F. B. Nimick, 2 Fed. 86; The Cheeseman *v.* Two Ferryboats, 5 Fed. Cas. No. 2,633, 2 Bond 363; The Gate City, 10 Fed. Cas. No. 5,267; 5 Biss. 200; The Joseph E. Coffee, 13 Fed. Cas. No. 7,536, Olcott 401. Notwithstanding an old decision on the New York statute then in force in relation to arrest of vessels (Birbeck *v.* Hoboken House Ferry-Boats, 17 Johns. (N. Y.) 54) the later authority includes ferry-boats as vessels (Phœnix Iron Co. *v.* The Hopatcong, 127 N. Y. 206, 27 N. E. 841). In two old cases ferry-boats plying across rivers, although between different states, were held to be without the jurisdiction, apparently on the ground that the business in which they were engaged was too trifling to be considered trade or commerce. Harris *v.* Nugent, 11 Fed. Cas. No. 6,126, 3 Cranch C. C. 649; Thackery *v.* The Farmer of Salem, 23 Fed. Cas. No. 13,852, Gilp. 524.

But the real test is navigability.—The supreme court has uniformly held that the admiralty jurisdiction is independent of the commerce clause of the constitution. The Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443, 13 L. ed. 1058; *Ex p.* Garnett, 141 U. S. 1, 11 S. Ct. 840, 35 L. ed. 631.

52. Briggs *v.* A Light Boat, 7 Allen (Mass.) 287.

53. Subject to lien.—Muntz *v.* A Raft of Timber, 15 Fed. 555, 4 Woods 197; Fifty Thousand Feet of Timber, 9 Fed. Cas. No.

ground that any property on navigable waters is so liable, whether it is a ship or connected with a ship or not, must be considered as overruled, so far as their reasoning goes by the case of Cope *v.* Vallette Dry Dock Co.[54] This case, however, mentions rafts, but forbears any expression of opinion on the subject. Since its decision, a number of cases in the lower courts has held them to be in a sense a kind of ship or vessel and as such liable to a maritime lien.[55]

2. As Affected by Permanency of Attachment to Shore — a. In General. A structure, although floating, is not a ship or vessel if permanently fixed to the shore; for in such case it lacks the attribute of navigability.[56]

b. Dry-Docks. Hence a floating dry-dock so attached is not a ship or vessel.[57]

c. Bridges. These are clearly without the jurisdiction.[58]

d. Dismantled Vessels. If still capable of locomotion from place to place, and retaining its unity as a single structure, the craft remains a vessel, although no longer used in commerce.[59]

4,783, 2 Lowell 64; A Raft of Spars, 20 Fed. Cas. No. 11,529, Abb. Adm. 485.

Not liable to a maritime lien.— Gastrel *v.* Cypress Raft, 10 Fed. Cas. No. 5,266, 2 Woods 213; A Raft of Cypress Logs, 20 Fed. Cas. No. 11,527, 1 Flipp. 543, 14 Alb. L. J. 319; Tome *v.* Cribs of Lumber, 24 Fed. Cas. No. 14,083, Taney 533; The W. H. Clark, 29 Fed. Cas. No. 17,482, 5 Biss. 295.

54. Cope *v.* Vallette Dry-Dock Co., 119 U. S. 625, 7 S. Ct. 336, 30 L. ed. 501.

55. Whitmire *v.* Hudson, 88 Fed. 991, 31 C. C. A. 596; Whitmore *v.* Cobb, 88 Fed. 91, 31 C. C. A. 395; Bywater *v.* A Raft of Piles, 42 Fed. 917; Seabrook *v.* A Raft of Railroad Cross-Ties, 40 Fed. 596. In The Gas Float Whitton No. 2, [1897] A. C. 337, 66 L. J. Adm. 99, 76 L. T. Rep. N. S. 663, Lord Herschell intimates that jurisdiction over a raft might be sustained if in tow, on the ground that it was a subject of transportation like the cargo of a ship; in other words not on the ground that it was itself a ship but rather that it was the object of a ship's efforts.

56. See *infra*, IV, B, 2, b–d.

57. Cope *v.* Vallette Dry-Dock Co., 119 U. S. 625, 7 S. Ct. 336, 30 L. ed. 501; The Warfield, 120 Fed. 847; Snyder *v.* A. Floating Dry-Dock, 22 Fed. 685; Salvor Wrecking Co. *v.* Sectional Dock Co., 21 Fed. Cas. No. 12,273. Under the principle of these cases any floating structure permanently moored to the shore would be excluded from the jurisdiction. Ruddiman *v.* A Scow Platform, 38 Fed. 158. But they would be within the jurisdiction if merely temporarily moored and movable. The Public Bath No. 13, 61 Fed. 692. See also Olmsted *v.* McNall, 7 Blackf. (Ind.) 387, a floating warehouse.

The case of Woodruff v. One Covered Scow, 30 Fed. 269, decided that a floating boat-house permanently fastened to a wharf as a float to serve as a landing from small boats was within the jurisdiction. It cannot be satisfactorily reconciled with Cope *v.* Vallette Dry-Dock Co., 119 U. S. 625, 7 S. Ct. 336, 30 L. ed. 501. This case was probably unknown to the district judge, as it had been decided only a month prior to the delivery of his opinion.

58. Galena, etc., Packet Co. *v.* Rock Island Bridge, 6 Wall. (U. S.) 213, 18 L. ed. 753.

59. The W. F. Brown, 46 Fed. 290 (an old steamer used to propel a floating theater. For a similar case under the New York statute see Franklin *v.* Pendleton, 3 Sandf. (N. Y.) 572); Mosser *v.* The City of Pittsburg, 45 Fed. 699 (a dismantled steamer used as an excursion barge); The Old Natchez, 9 Fed. 476 (a dismantled steamer being made ready for use as a wharf-boat).

In The Hendrick Hudson, 11 Fed. Cas. No. 6,355, 3 Ben. 419, a dismantled steamer had been used as a hotel, although resting on the bottom of the river. It was partly pumped out and while being towed to another place grounded and became immovable. Parties who partly pumped it out and then moved it to a place where it was again allowed to rest on the bottom for further use as a hotel libeled it for the service. The court decided that it was not engaged in commerce and navigation, and therefore was not a marine structure. The case can only be sustained on the theory that this short movement was not navigation. The fact that it was not engaged in commerce is immaterial, navigability being the test. See *supra*, notes 48, 51.

In order to be included, however, the structure must either have been so far completed as to have assumed the form of a ship, or must have retained its character as such. Hence a hull is not a ship. Northup *v.* The Pilot, 6 Oreg. 297. And the broken-up portions of a ship lose their distinctive character. Srodes *v.* The Collier, 22 Fed, Cas. No. 13,272.

In England the leading case of The Gas Float Whitton No. 2, [1896] P. 42, 8 Aspin. 110, 65 L. J. Adm. 17, 73 L. T. Rep. N. S. 698, 44 Wkly. Rep. 263 [*affirmed* in [1897] A. C. 337, 66 L. J. Adm. 99, 76 L. T. Rep. N. S. 663], held that a floating buoy was not such a structure as could be considered a ship or subject to a maritime lien. But the English court had also decided that Cleopatra's Needle while being towed to England in a box constructed for the purpose was such a ship or vessel as could be the subject of a claim for salvage. The Cleopatra, 3 P. D. 145, 47 L. J. Adm. 72.

V. RIGHT TO LIEN AS AFFECTED BY VARIOUS RELATIONS TO VESSEL.

A. Part-Owner — 1. FOR ADVANCES AS SUCH. A part-owner has no maritime lien against his other part-owners for payments on account of the vessel beyond his proportionate share, as such are mere matters of account.[60]

2. FOR CAUSES OF ACTION NOT ARISING FROM RELATION OF PART-OWNER. Under the admiralty doctrine which views the ship as itself an offending or contracting thing,[61] there is no reason why a part-owner should not be allowed a maritime lien for claims not arising out of his relation of part-owner, provided he is subordinated in rank to those claims on which he would be personally responsible. But the authorities are in conflict.[62] But the fact that the claimant's name appears as owner in a bill of sale of the vessel does not defeat his lien. He can show that it was intended as collateral security for a debt, and that he is not the actual owner.[63]

B. Ship's Husband. This is but another name for the general agent of a ship, although if the general agent is a part-owner, he is also called the managing owner.[64] He cannot claim a maritime lien for advances, as it is a mere matter of accounts.[65] But where he is mortgagee and acts as ship's husband merely for the

60. The Orleans *v.* Phœbus, 11 Pet. (U. S.) 175, 9 L. ed. 677; The Daniel Kaine, 35 Fed. 785; The Larch, 14 Fed. Cas. No. 8,085, 2 Curt. 427. *Compare* Merrill *v.* Bartlett, 6 Pick. (Mass.) 46; McDonald *v.* Black, 20 Ohio 185, 55 Am. Dec. 448.

61. See *supra*, II, C.

62. In Pettit *v.* The Chas. Hemje, 19 Fed. Cas. No. 11,047*a*, 5 Hughes 359, Judge Hughes sustained a libel by a part-owner for repairs done at his machine shop, holding it subordinate to any other maritime claims against the ship but good against a mortgage on the interest of the other part-owner. In Langstaff *v.* Rock, 13 Mo. 579, it was also ruled that a part-owner could claim a lien. See also Learned *v.* Brown, 94 Fed. 876, 36 C. C. A. 524. In The West Friesland, Swab. 454, 455, Dr. Lushington held that a part-owner who furnished coals to his vessel could proceed against her, saying: "At Common Law partner cannot sue partner, but that is a rule that does not obtain in this Court; and here the property is sued and not the copartner." In The Feronia, L. R. 2 A. & E. 65, 37 L. J. Adm. 60, 17 L. T. Rep. N. S. 619, 16 Wkly. Rep. 585, Sir Robert Phillimore decided that the right of a master to libel for wages under the act of 24 Victoria was not affected by the fact that he was part-owner. This ruling was followed by Sir William Young in The Aura, Young Adm. (Nova Scotia) 54. The West Friesland case, *supra*, was subsequently reversed on the facts. Van Hasselt *v.* Sack, 2 L. T. Rep. N. S. 613, 13 Moore P. C. 185, 8 Wkly. Rep. 423, 15 Eng. Reprint 70. In Foster *v.* The Pilot No. 2, 9 Fed. Cas. No. 4,980, Newb. Adm. 215, a libel by seamen who were part-owners was sustained against a vessel in the hands of a purchaser who had acquired her at a sheriff's sale held to satisfy debts for which they as part-owners were liable. The decision was reversed by Justice Grier in Gallatin *v.* The Pilot, 9 Fed. Cas. No. 5,199, 2 Wall. Jr. 592, on the ground that they could not claim against the purchaser under such circumstances. In The H. C. Grady, 87 Fed. 232, it was held that a party acting as purser, who was interested in a proposed purchase of the steamer and employed by the proposed purchasers, could not set up a claim for wages against the claim of the vendors for unpaid purchase-money. In The Benton, 3 Fed. Cas. No. 1,334, Judge Brown ruled that a part-owner could not libel his own boat, discussing the question on the assumption that it was an attempt to settle accounts between part-owners, as to which the lack of jurisdiction is clear. But why should not a part-owner assert a lien against the ship for a cause of action entirely disconnected with his relation as part-owner (as for supplies furnished by him as a merchant, or for damages caused by collision), provided only he does not conflict with creditors not part-owners? Such cause of action would not necessarily involve any settlement of accounts. See also The Queen of St. Johns, 31 Fed. 24; The Jennie B. Gilkey, 20 Fed. 161; Petrie *v.* The Coal Bluff No. 2, 3 Fed. 531; Dowling *v.* The Reliance, 7 Fed. Cas. No. 4,042, 1 Woods 284; The St. Joseph, 21 Fed. Cas. No. 12,229, Brown Adm. 202; Atkins *v.* Stanton, 6 Bosw. (N. Y.) 648; The New York Sensation, 15 N. Y. Suppl. 950; Treat *v.* The Etna, 16 Ohio 276.

63. The Ellen Holgate, 30 Fed. 125; The Union Express, 24 Fed. Cas. No. 14,364, Brown Adm. 537; Russell *v.* Marshall, 2 Nova Scotia 330.

64. Managing owner defined see *ante*, p. 124.

65. The Daniel Kaine, 35 Fed. 785; The Raleigh, 32 Fed. 633 [*affirmed* in 37 Fed. 125]; The Esteban de Antunano, 31 Fed. 920; White *v.* $292,300, 19 Fed. 848; The Larch, 14 Fed. Cas. No. 8,085, 2 Curt. 427; Hopkins *v.* Forsyth, 14 Pa. St. 34, 53 Am. Dec. 513. The case of Stewart *v.* Rogers, 19 Md. 98, holding the contrary, is opposed to the great weight of authority. See 34 Cent. Dig. tit. "Maritime Liens," § 10.

purpose of better securing himself, he may be allowed a maritime lien for such advances as pay off claims that if asserted would constitute maritime liens upon the vessel.[66] But it is often a question of fact whether advances by a ship's agent for the purpose of paying off maritime claims were made on the credit of the vessel. If agents make such advances on her credit and it was mutually so understood, they would have a maritime lien.[67]

C. Ship Broker. Parties engaged in securing freights or crews for a ship or business of any sort are not entitled to a maritime lien, as such services are only remotely or indirectly connected with navigation or commerce and savor too much of land services.[68]

D. Shipmaster. Independent of statute the master cannot claim a maritime lien, either for his wages or disbursements, the reason being his confidential relation to the ship.[69] Whether a state statute can give such a lien on domestic vessels is not settled, but the weight of judicial expressions if not of absolute decision is that it may.[70]

E. Ship's Consignee or Agent. There is no reason why a consignee should not have a lien for agency services or advances, and the cases so hold.[71]

F. Charterer. When the charter-party gives the charterer the right to make advances or furnish supplies on the order of the master and the credit of the vessel, a maritime lien will arise therefor.[72]

VI. CHARACTER OF CLAIMS GIVING RISE TO LIEN.

A. In General. It follows from the definition given at the outset[73] that any service rendered to the vessel of a nature to facilitate its use as an instrument of navigation, or any injury caused by the vessel on navigable waters, impresses upon it a maritime lien.[74] As common instances, liens for seamen's wages, salvage, towage, bottomry, collision, and personal injuries might be mentioned.[75] So too labor performed in getting a vessel afloat after she has grounded.[76]

66. The J. C. Williams, 15 Fed. 558.

67. The St. John, 74 Fed. 842, 21 C. C. A. 141; The Advance, 63 Fed. 142; The Raleigh, 32 Fed. 633 [*affirmed* in 37 Fed. 125].

68. The Retriever, 93 Fed. 480 (services in procuring a crew); Black Diamond Coal Min. Co. *v.* The H. C. Grady, 87 Fed. 232 (traveling agent's services in soliciting trade); Grauman *v.* The Humboldt, 86 Fed. 351 (services in securing business); The Crystal Stream, 25 Fed. 575 (same); The Thames, 10 Fed. 848 (commissions on charter-party); The Joseph Cunard, 13 Fed. Cas. No. 7,535, Olcott 120; Scott *v.* The Morning Glory, 21 Fed. Cas. No. 12,542. See 34 Cent. Dig. tit. "Maritime Liens," § 10. *Contra*, The Gustavia, 11 Fed. Cas. No. 5,876, Blatchf. & H. 189.

69. The Orleans *v.* Phœbus, 11 Pet. (U. S.) 175, 9 L. ed. 677; Bruce *v.* Murray, 123 Fed. 366, 59 C. C. A. 494; The Nebraska, 75 Fed. 598, 21 C. C. A. 448; The Grand Turk, 19 Fed. Cas. No. 5,683, 1 Paine 73; The Larch, 14 Fed. Cas. No. 8,085, 2 Curt. 427; The Raleigh, 20 Fed. Cas. No. 11,539, 2 Hughes 44. See 34 Cent. Dig. tit. "Maritime Liens," § 10. *Contra, Ex p.* Clark, 5 Fed. Cas. No. 2,796, 1 Sprague 69; Gardner *v.* The New Jersey, 9 Fed. Cas. No. 5,233, 1 Pet. Adm. 223.

70. Norton *v.* Switzer, 93 U. S. 355, 23 L. ed. 903; Whitney *v.* The Mary Gratwick, 29 Fed. Cas. No. 17,591, 2 Sawy. 342. See in general The Julia, 57 Fed. 233; The City of Norwalk, 55 Fed. 98; The Louis Olsen, 52 Fed. 652 [*reversed* on other grounds in 57 Fed. 845, 6 C. C. A. 608].

The English statutes now give a master a right to proceed *in rem*, both for wages and disbursements. The Tagus, [1903] P. 44, 9 Aspin. 371, 72 L. J. P. D. & Adm. 4, 87 L. T. Rep. N. S. 598; 24 Vict. c. 10, § 10; 52 & 53 Vict. c. 46.

71. The Dora, 34 Fed. 343; The Eliza Jane, 8 Fed. Cas. No. 4,363, 1 Sprague 152.

72. The Robilant, 42 Fed. 162.

73. See *supra*, I.

74. The John G. Stevens, 170 U. S. 113, 18 S. Ct. 544, 42 L. ed. 969; The China *v.* Walsh, 7 Wall. (U. S.) 53, 19 L. ed. 67; The Harriet, 11 Fed. Cas. No. 6,097, Olcott 229; Harmer *v.* Bell, 7 Moore P. C. 267, 13 Eng. Reprint 884.

See 34 Cent. Dig. tit. "Maritime Liens," §§ 13, 31.

75. See *supra*, III; and, generally, COLLISION; SALVAGE; SEAMAN; SHIPPING; TOWAGE.

76. The Murphy Tugs, 28 Fed. 429; The H. C. Yeager, 1 Fed. 285; Murphy *v.* Roberts, 30 Ala. 232. When a materialman who has a contract to furnish a chain cable to a vessel lends the ship an old one till a new one can be procured, on an agreement that the old one shall then be returned, and the ship sails away with both, he can hold her for the value of both. Sarchet *v.* The General Isaac Davis, 21 Fed. Cas. No. 12,357, Crabbe 185.

B. Liens of Materialmen — 1. Materialman Defined. A materialman is one whose trade it is to repair or equip ships or furnish them with tackle and necessary provisions.[77]

2. Classes of Such Liens — a. In General. As the rules governing the liens of materialmen are very different from those relating to other maritime liens, special caution is necessary to distinguish exactly what character of maritime service is included in this class. There are many things constituting a maritime service to a ship and giving rise to a maritime lien upon her which do not come under this category. In fact, as liens of materialmen will appear in the succeeding discussion to be subject to rigid rules as to whom credit was given, and also in many respects to the vagaries of local state legislation, it would be unfortunate to include anything not necessarily falling within its terms.[78]

Persons digging ice and snow from around a vessel on the beach preparatory to launching her do not acquire a maritime lien, as such work is on shore and merely preliminary to the real maritime service. The Arthur B., 1 Alaska 353, 403; Woolly *v.* The Peruvian, 30 Fed. Cas. No. 18,031, 3 Ware 154.

A contract to float a vessel which had been carried far up on the beach by a storm gives a maritime lien, and is really a salvage service. Frame *v.* The Ella, 48 Fed. 569, 5 Hughes 125.

Services of quarantine commissioners in caring for sick seamen, as required by a state quarantine law, are maritime in their nature. Platt *v.* The Georgia, 34 Fed. 79.

Services as watchman or caretaker to a vessel laid up or out of commission are not maritime, but services to a vessel in commission and merely temporarily in port are maritime and give rise to a maritime lien. Williams *v.* The Sirius, 65 Fed. 226; The Seguranca, 58 Fed. 908; Jepson *v.* The America, 56 Fed. 1021; The Erinagh, 7 Fed. 231; The E. A. Barnard, 2 Fed. 712; The Champion, 5 Fed. Cas. No. 2,584; Gurney *v.* Crockett, 11 Fed. Cas. No. 5,874, Abb. Adm. 490; The Harriet, 11 Fed. Cas. No. 6,097, Olcott 229; The Harvest, 11 Fed. Cas. No. 6,175, Olcott 271; The Island City, 13 Fed. Cas. No. 7,109, 1 Lowell 375; The John T. Moore, 13 Fed. Cas. No. 7,430, 3 Woods 61; McGinnis *v.* The Grand Turk, 16 Fed. Cas. No. 8,800, 2 Pittsb. (Pa.) 326.

Wharfage is governed by the same principle. *Ex p.* Easton, 95 U. S. 68, 24 L. ed. 373; The C. Vanderbilt, 86 Fed. 785; The Advance, 60 Fed. 766.

Compressing cotton, although increasing the capacity of the ship, is so far a land duty as to give no maritime lien. The Paola R., 32 Fed. 174; The Joseph Cunard, 13 Fed. Cas. No. 7,535, Olcott 120; United Hydraulic Cotton-Press Co. *v.* The Alexander McNeil, 24 Fed. Cas. No. 14,404.

Cost of advertising a steamer's excursions gives no lien. Turner *v.* The Havana, 54 Fed. 201. *Compare* The Monarch *v.* Potter, 7 Ohio St. 457, holding stationery, bills of fare, bill-heads, notices to consignees, etc., for a steamboat line to be supplies, but not advertisements in the newspapers.

The price of a boat hired to take temporarily the place of a disabled boat is not so far connected with the disabled boat as to constitute a service to her, or give rise to a maritime lien. New York Harbor Tugboat Co. *v.* The Wyoming, 18 Fed. Cas. No. 10,205.

On similar reasoning, a master of a ship who hired a tug (operating the tug himself) to handle his ship under an agreement to return the tug in as good condition as when received, and who injured the tug while using her, was held to have created no maritime lien on his ship, whatever may have been the rights of the tug-owner *in personam.* The Ville de St. Nazaire, 124 Fed. 1008, 126 Fed. 448.

State statutes.— Many such services when maritime by nature may become a lien by virtue of a state statute. The Energia, 124 Fed. 842; Eley *v.* The Shrewsbury, 69 Fed. 1017 (construing the Ohio statute); The Kentucky *v.* Brooks, 1 Greene (Iowa) 398 (liable under the statute for the hire of a barge); Gleim *v.* The Belmont, 11 Mo. 112.

77. The Neptune, 3 Hagg. Adm. 129, 142, the definition of Sir Leoline Jenkins. See also *supra,* III, B, 2, f.

In California the earlier act was held not to give a lien to a domestic creditor on a domestic vessel for materials and supplies. Price *v.* Frankel, 1 Wash. Terr. 33. The present California statute would not bear this construction.

In Louisiana, Code Pr. (1857) § 285, and Code Pr. (1870) § 289, "provisions" are not considered to be included in the term "materials." Request *v.* The B. E. Clarke, 12 La. Ann. 300.

Under the Maine statute in force in 1839, materials include only those articles which become part of the vessel, and no lien is given for charges on account of tools used by the workmen. But merchants and other persons furnishing supplies are materialmen as much as mechanics or laborers. The Kearsarge, 14 Fed. Cas. No. 7,634, 1 Ware 546 [*reversed* on other grounds in 14 Fed. Cas. No. 7,762, 2 Curt. 421].

In Ohio the act of 1840 gives no lien for painting. Scott *v.* The Plymouth, 21 Fed. Cas. No. 12,544, 6 McLean 463, Newb. Adm. 56; Jones *v.* The Commerce, 14 Ohio 408, holding that the lien arises from the seizure, not from the act itself. The present Ohio statute (Rev. St. § 5880) would not be so construed.

78. Admiralty Rule No. 12 of the supreme

b. Supplies. These relate rather to those articles furnished a vessel to fit her for a maritime venture, the articles when furnished being complete in themselves, as distinguished from articles furnished in connection with repair work; in which latter case they would rather be considered a part of the repairs. But they must be of a nature suited to the vessel and as a means of preparing her for her maritime enterprise. If for a completed ship and of a nature to enable her to pursue her business upon the seas, they come within the term.[79] For instance, coal or fuel furnished a steamer for the use of her furnaces is clearly a supply;[80] but coal,[81] salt,[82] whisky,[83] or merchandise[84] shipped on a vessel as cargo is not a supply. So articles for the restaurant of a passenger steamer, and liquors for its bar, where the bar was being operated on account of the steamer, are supplies.[85]

court speaks of their claims as "suits by material-men for supplies, or repairs or other necessaries." This classification is a convenient one to follow, although it is difficult to draw any clear distinction between the three classes of supplies, repairs, and necessaries, as a given article may often be classed by different judges or text-writers in either category.

79. The Marion S. Harris, 85 Fed. 798, 29 C. C. A. 428.

80. *Georgia.* — Kirkpatrick *v.* Augusta Bank, 30 Ga. 465.

Louisiana. — Payne *v.* The Independent Towboat Co., 7 La. Ann. 671.

New York. — Crooke *v.* Slack, 20 Wend. 177.

United States. — The Patapsco *v.* Boyce, 13 Wall. 329, 20 L. ed. 696; The Venture, 26 Fed. 285; The Alida, 1 Fed. Cas. No. 200, Abb. Adm. 173.

England. — The West Friesland, Swab. 454.

See 34 Cent. Dig. tit. "Maritime Liens," §§ 16, 34.

81. Coal. — The Ella, 86 Fed. 666.

82. Salt purchased by the vessel owner and taken to another port for sale is not a supply. The Wyoming, 36 Fed. 493.

83. Whisky furnished to replace whisky taken as freight and lost is not a supply. Bailey *v.* The Concordia, 17 Mo. 357.

84. Merchandise furnished for the purpose of selling it and buying necessaries with the money is not to be considered as a supply. The General Brady *v.* Buckley, 6 Mo. 558.

85. The Mary F. Chisholm, 133 Fed. 598; The Mayflower, 39 Fed. 41; The Long Branch, 15 Fed. Cas. No. 8,484, 9 Ben. 89; The Plymouth Rock, 19 Fed. Cas. No. 11,237, 13 Blatchf. 505 [*affirming* 19 Fed. Cas. No. 11,235, 7 Ben. 448]. Judge Hanford, however, does not consider liquors for the bar as leniently as the judges in the above cases, although the cases do not seem to have been brought to his attention. Perhaps the fact that the vessel in the case passed upon by him was being operated for the benefit of the charterer may have influenced his decision, although he does not say so. The Robert Dollar, 115 Fed. 218. But although liquors for the bar when operated on the vessel's account are supplies or necessaries, the rent of the bar to one not officially connected with the ship does not create any maritime relation between him and the ship. The Josephine Spangler, 9 Fed. 773 [*affirmed* in 11 Fed. 440]; The Illinois, 12 Fed. Cas. No. 7,005, 2 Flipp. 383.

Illustrations. — Meat furnished a vessel for the use of the crew is ordinarily a supply; but if furnished after the discharge of the crew it is not suitable or necessary and hence would not be allowed. The Augustine Kohbe, 37 Fed. 696, 39 Fed. 559. Provisions or shipchandlers' articles are supplies. The Ellen Holgate, 30 Fed. 125; The Ludgate Hill, 21 Fed. 431; Greenlaw *v.* Potter, 5 Sneed (Tenn.) 390. But boarding a mere watchman or custodian of a disabled vessel left by a tug is not sufficiently maritime in its nature nor so connected with the tug as to constitute a supply. The Daniel Kaine, 31 Fed. 746. Clothing, tobacco, and other articles of personal use furnished seamen would not under ordinary circumstances be a supply. The Mary F. Chisholm, 129 Fed. 814; Rosenthal *v.* The Die Gartenlaube, 5 Fed. 827. Nets for a fishing vessel (The Hiram R. Dixon, 33 Fed. 297), water-casks, or casks to a whaling vessel to hold the oil (The Henry Trowbridge, 11 Fed. Cas. No. 6,379, 10 Ben. 415; Zane *v.* The President, 30 Fed. Cas. No. 18,201, 4 Wash. 453), anchors and chains (The Sea Lark, 21 Fed. Cas. No. 12,579, 1 Sprague 571), arms to protect a vessel from pirates (Weaver *v.* The S. G. Owens, 29 Fed. Cas. No. 17,310, 1 Wall. Jr. 359), chronometers (The Georgia, 32 Fed. 637), life-preservers (The Charles Spear, 143 Fed. 185; The Belle of the Coast, 72 Fed. 1019, 19 C. C. A. 345), furniture for the cabin of a passenger steamer (Pitman *v.* The Paraguay, 19 Fed. Cas. No. 11,187), or printed bill-heads and other blanks necessary for the business of the boat (The Monarch *v.* Potter, 7 Ohio St. 457 [*affirming* 2 Disn. 28]), would be supplies.

The Maryland statute giving a lien on a domestic vessel for "material furnished or work done in the building, repairing, or equipping" of a vessel is construed to cover only articles which go into and form a part of the vessel, and hence not to cover provisions for the crew. Milbourne *v.* The Daniel Augusta, 17 Fed. Cas. No. 9,540, 3 Hughes 464.

Under the Ohio statute giving a lien for the price of provisions "supplied for the use of the crew and passengers, to be consumed in the use and navigation of the boat," sup-

c. Repairs — (I) *Character in General.* Any work to a vessel after she has become a marine entity, and materials furnished in connection therewith, if such work and materials are reasonably necessary in facilitating her use as a maritime instrument, come under the head of repairs, and give a maritime lien under the circumstances and conditions to be hereafter discussed.[86]

(II) *Character as Affected by Place Where Work Done.* It has been seen in discussing the admiralty jurisdiction that it extends to all navigable waters, natural or artificial, although within the body of a county,[87] and hence the fact that the vessel is engaged only in internal commerce does not affect the maritime character of the repairs.[88] So the fact that the work is done on land, if it tends to fit the vessel for sea, ought not to affect its maritime character; for locality as a test of jurisdiction is important only in matters of tort.[89] Hence there ought not to be the slightest doubt that work or repairs upon a vessel while in dry-dock or hauled up on a marine railway are maritime and give rise to a maritime lien.[90]

(III) *Character as Affected by Degree of Completion of Vessel* — (A) *No Maritime Lien For Original Construction.* Nothing better illustrates the effect of the warfare waged by the common-law courts upon the admiralty courts in England than the fact that contracts for the building of ships were excluded from the list of maritime causes of action. Under the civil law and the maritime law of continental Europe there was no distinction between construction and repairing. In fact there was no such distinction in England itself for a long time, and the compromise agreement of 1632 made between the common-law and admiralty judges as a means of settling their contentions placed construction and

plies to one leasing the lunch counter and bar aboard are not included, as they were not furnished on account of the vessel. Eley *v.* The Shrewsbury, 69 Fed. 1017.

86. The B. F. Woolsey, 7 Fed. 108; Stevens *v.* The Sandwich, 23 Fed. Cas. No. 13,409, 1 Pet. Adm. 233; Low *v.* The Ship Clarence S. Bement, 2 Pa. Co. Ct. 430.

But a contract for raising a sunken vessel does not fall within the term "building, repairing, fitting, furnishing or equipping," although some work is incidentally done on the vessel herself to keep her afloat after being raised. The D. S. Newcomb, 12 Fed. 735.

87. See Admiralty, 1 Cyc. 815 *et seq.*

88. See Admiralty, 1 Cyc. 815 *et seq.* See also The Robert W. Parsons, 191 U. S. 17, 24 S. Ct. 8, 48 L. ed. 73; McLelland *v.* Morris, 3 Pa. L. J. 493.

89. In contract matters the character of the service is alone important, and the ancient attempt of the English common-law courts to manacle the admiralty jurisdiction by prohibiting it from taking cognizance of contracts made on land, while it had its influence upon the earlier American decisions, has been repudiated. Hughes Adm. 17, 18; New England Mar. Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90.

90. There would not have been any serious doubt of this prior to the recent case of The Robert W. Parsons, 191 U. S. 17, 24 S. Ct. 8, 33, 48 L. ed. 73. In that opinion Mr. Justice Brown, while stating that work done in a dry-dock after it is pumped out is maritime, states *passim* that "had the vessel been hauled up by ways upon the land and there repaired a different question might have been presented, as to which we express no opinion." This certainly seems a distinction without a difference. What is a dry-dock when pumped out, if it is not land? The fact that locality has nothing to do with the maritime character of contract claims was set at rest by New England Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90. Yet that case is not mentioned either in the majority or dissenting opinion in The Robert W. Parsons case. The dissenting opinion cites Boon *v.* The Hornet, 3 Fed. Cas. No. 1,640, Crabbe 426. That case was decided in 1841. It held that repairs to a canal-boat were not maritime, not because they were made on shore, but because the boat was not destined for service on tide-water, a test thoroughly exploded, as navigability is now the sole test. *Ex p.* Garnett, 141 U. S. 1, 11 S. Ct. 840, 35 L. ed. 631; The Genesee Chief, 12 How. (U. S.) 443, 13 L. ed. 1058. The opinion also cited Bradley *v.* Bolles, 3 Fed. Cas. No. 1,773, Abb. Adm. 569. This case decided that work done in a dry-dock in scraping and cleaning the bottom of a vessel preparatory to her being coppered was non-maritime, not because it was done on land, but because it added nothing to the ship and was a mere preliminary to the real service, a narrow distinction rendered at a time (1849) when the tendency was to restrict the admiralty jurisdiction. Four years later the same judge (Betts) decided in Ransom *v.* Mayo, 20 Fed. Cas. No. 11,571*a*, that services of a shipwright in hauling a vessel on his ways and repairing her while out of the water were non-maritime, basing his opinion on the fact that the work was contracted for and done on land. On appeal this decision was affirmed by the circuit court. Ransom *v.* Mayo, 20 Fed. Cas. No. 11,571, 3 Blatchf. 70.

repairs upon the same footing.[91] But the final result of this contest was to exclude construction contracts from the cognizance of the English admiralty courts because made on land and to be performed on land. The act of 24 Victoria[92] has restored the jurisdiction of the admiralty courts over such claims if at the time of instituting such a suit the ship or its proceeds are already under judicial arrest. In the United States the decisions of the lower courts on the subject were for a long time favorable to the maritime character of the contract.[93] But in 1857 the question came squarely before the supreme court, at a time when the death of Judge Story had deprived the admiralty of its strongest advocate, and the court decided against the maritime character of such contracts, holding that they are non-maritime because made on land and to be performed on land (which is certainly not the fact as to the entire contract).[94] And the decision has since been followed or approved in many cases, and must be considered as settled.[95]

But in Wortman *v.* Griffith, 30 Fed. Cas. No. 18,057, 3 Blatchf. 528, 529 (decided in 1856), Mr. Justice Nelson in the same circuit decided that a precisely similar service was maritime. He noticed the argument that the work was done on land but repudiated it, saying: "The nature and character of the contract and of the service have always appeared to me to be sounder guides for determining the question." See also The Vidal Sala, 12 Fed. 207. In view of the repudiation of the locality test in contract matters, the importance to vessels of regular overhauling on the ways, and the constant exercise of jurisdiction in such cases by the courts, the jurisdiction can hardly be seriously denied, despite the cautious reservation of the question in The Robert W. Parsons case, *supra*; The Winnebago, 141 Fed. 945, 73 C. C. A. 295. But even if the main work is done on land, it becomes maritime if not complete until set up and tested on the vessel, as in case of a new engine made on shore and then placed in the vessel. The L. B. X., 93 Fed. 233.

But there are old cases holding under the influence of the English decisions that work contracted for on land does not create a lien cognizable in admiralty. Clinton *v.* The Hannah, 5 Fed. Cas. No. 2,898, Bee 419; Shrewsbury *v.* The Two Friends, 22 Fed. Cas. No. 12,819, Bee 433.

91. Godolphin Adm. Jur. 157; 2 Selden Pl. 15.

92. St. 24 Vict. c. 10, § 4.

93. Prior to the decisions of the United States supreme court settling the question, the decisions of the inferior courts were practically unanimous in favor of a maritime lien for construction. The following cases upheld the lien either by express decision or necessary implication. Beers *v.* The John Adams, 3 Fed. Cas. No. 1,231; The Calisto, 4 Fed. Cas. No. 2,316, 2 Ware 37; Davis *v.* A New Brig, 7 Fed. Cas. No. 3,643, Gilp. 473; Harper *v.* A New Brig, 11 Fed. Cas. No. 6,090, Gilp. 536; Hull of a New Ship, 12 Fed. Cas. No. 6,859, 2 Ware 203; Ludington *v.* The Nucleus, 15 Fed. Cas. No. 8,598; Parmlee *v.* The Charles Mears, 18 Fed. Cas. No. 10,766, Newb. Adm. 197; Read *v.* Hull of a New Brig, 20 Fed. Cas. No. 11,609, 1 Story 244; Wick *v.* The Samuel Strong, 29 Fed. Cas. No. 17,607, Newb. Adm. 187; Pritchard *v.* Muir, 2 Brev. (S. C.) 371. But see *contra*, Clinton *v.* The Hannah, 5 Fed. Cas. No. 2,898, Bee 419, decided in 1781 by the Pennsylvania admiralty court.

94. Peoples' Ferry Co. *v.* Beers, 20 How. (U. S.) 393, 15 L. ed. 961.

95. *Arkansas.*— Davis *v.* Mason, 44 Ark. 553.

California.— Olsen *v.* Birch, 133 Cal. 479, 65 Pac. 1032, 85 Am. St. Rep. 215.

Dakota.— Rees *v.* The Steam-boat Gen. Terry, 3 Dak. 155, 13 N. W. 533.

Indiana.— Sinton *v.* The R. R. Roberts, 46 Ind. 476.

Michigan.— Delaney Forge, etc., Co. *v.* Iroquois Transp. Co., 142 Mich. 84, 105 N. W. 527; Lawson *v.* Higgins, 1 Mich. 225.

New York.— Sheppard *v.* Steele, 43 N. Y. 52, 3 Am. Rep. 660; Coryell *v.* Perine, 6 Rob. 23; Moores *v.* Lunt, 13 Abb. Pr. N. S. 166 [*reversed* on other grounds in 1 Hun 650 (*affirmed* in 60 N. Y. 649)].

Ohio.— The Petrel *v.* Dumont, 28 Ohio St. 602, 22 Am. Rep. 397; The M. Tuttle *v.* Buck, 23 Ohio St. 565, 13 Am. Rep. 270.

Oregon.— The Victorian, 24 Oreg. 121, 32 Pac. 1040, 41 Am. St. Rep. 838.

Pennsylvania.— Scull *v.* Shakespear, 75 Pa. St. 297.

Texas.— Lake Nav. Co. *v.* Austin Electric Supply Co., (Civ. App. 1895) 30 S. W. 832.

United States.— The Robert W. Parsons, 191 U. S. 17, 24 S. Ct. 8, 48 L. ed. 73; The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345; Edwards *v.* Elliott, 21 Wall. 532, 22 L. ed. 487; Roach *v.* Chapman, 22 How. 129, 16 L. ed. 291; The Winnebago, 141 Fed. 945, 73 C. C. A. 295; The John B. Ketcham, 97 Fed. 872, 38 C. C. A. 518; The William Windom, 73 Fed. 496; The J. C. Rich, 46 Fed. 136; The Count de Lesseps, 17 Fed. 460; The Guiding Star, 9 Fed. 521 [*affirmed* in 18 Fed. 263]; The Pacific, 9 Fed. 120, 5 Hughes 257; Allair *v.* The Francis A. Palmer, 1 Fed. Cas. No. 203; The Antelope, 1 Fed. Cas. No. 482, 2 Ben. 405; The Coernine, 5 Fed. Cas. No. 2,944; Foster *v.* Ellis, 9 Fed. Cas. No. 4,968, 5 Ben. 83; McAllister *v.* The Sam Kirkman, 15 Fed. Cas. No. 8,658, 1 Bond 369; The Norway, 18 Fed. Cas. No. 10,359, 3 Ben. 163; Smith *v.* The Royal George, 22 Fed. Cas. No. 13,102, 1 Woods 290; Calkin *v.* U. S., 3 Ct. Cl. 297.

However, many states have enacted statutes giving a lien for construction work, and these statutes are valid for the very reason that they do not create a maritime lien enforceable in the state courts and hence do not interfere with the federal admiralty jurisdiction.[96]

(B) *Difference Between Construction and Repairs* — (1) As Affected by Launching. The decisions agree that everything done before the vessel is launched comes under the head of construction. But there is much conflict on the question whether work done and materials furnished after the vessel has been launched but before final completion should be classed as construction work. Some cases hold that the structure becomes a ship as soon as she rides upon her destined element, others that anything forming part of the ship or her tackle or apparel is when first furnished part of her construction. The better opinion is in favor of the latter view.[97]

In The Richard Busteed, 20 Fed. Cas. No. 11,764, 1 Sprague 441, decided in 1858, just after People's Ferry Co. *v.* Beers, 20 How. (U. S.) 393, 15 L. ed. 961, Judge Sprague held that a construction contract was maritime; that the supreme court in that case merely intended to decide that there was no lien, and did not pass upon its maritime character. The later decisions, however, have not sustained this distinction.

See 34 Cent. Dig. tit. "Maritime Liens," §§ 14, 21, 32.

96. *Indiana.*— Southwick *v.* Packet Boat The Clyde, 6 Blackf. 148.

Maine.— Ames *v.* Dyer, 41 Me. 397, holding that materials used in constructing the molds by which to build the vessel are not part of the construction under the local act.

Massachusetts.— Donnell *v.* The Starlight, 103 Mass. 227.

Mississippi.— Mulholland *v.* Thomson-Houston Electric Co., 66 Miss. 339, 6 So. 211, holding that an electric light plant for a steamer is material furnished about her "erection and construction, alteration or repairs."

Missouri.— Madison County Coal Co. *v.* The Colona, 36 Mo. 446, turning on the special language of the Missouri act.

New York.— Phœnix Iron Co. *v.* The Hopatcong, 127 N. Y. 206, 27 N. E. 841; Wilson *v.* Lawrence, 82 N. Y. 409. In Coryell *v.* Perine, 6 Rob. 23, the New York act was construed to cover charges for the making of the molds and patterns for an engine.

Oregon.— The Victorian, 24 Oreg. 121, 32 Pac. 1040, 41 Am. St. Rep. 838.

Pennsylvania.— The Dictator, 56 Pa. St. 290.

United States.— Edwards *v.* Elliott, 21 Wall. 532, 22 L. ed. 487; Petrie *v.* The Coal Bluff No. 2, 3 Fed. 531.

97. In The Eliza Ladd, 8 Fed. Cas. No. 4,364, 3 Sawy. 519, it was held after full consideration that work done after a ship is launched is not construction work. The same learned judge (Deady) made the same ruling in The Revenue Cutter No. 2, 20 Fed. Cas. No. 11,714, 4 Sawy. 143. See also The Manhattan, 46 Fed. 797. On the other hand it has been very generally held that anything that would technically be a part of the vessel itself or its tackle or apparel, as distinguished from mere supplies, is construction work, although furnished after launching, that everything is construction until the ship is complete as a ship. *In re* Glenmont, 32 Fed. 703 [*affirmed* in 34 Fed. 402]. This ruling has been made more than once as to machinery put in after launching. The Paradox, 61 Fed. 860; The Count de Lesseps, 17 Fed. 460; The Pacific, 9 Fed. 120, 5 Hughes 257; Rees *v.* Steam-boat Gen. Terry, 3 Dak. 155, 13 N. W. 533. So as to sails and rigging. The Iosco, 13 Fed. Cas. No. 7,060, Brown Adm. 495; Wilson *v.* Lawrence, 82 N. Y. 409; Thorsen *v.* The J. B. Martin, 26 Wis. 488, 7 Am. Rep. 91. So as to masts and spars. Griffenberg *v.* The John Laughlin, 11 Fed. Cas. No. 5,811, 2 Wkly. Notes Cas. (Pa.) 612. See also Kirkpatrick *v.* Augusta Bank, 30 Ga. 465 (construing the Georgia statute); Lawson *v.* Higgins, 1 Mich. 225 (construing the Michigan act); Lake Nav. Co. *v.* Austin Electrical Supply Co., (Tex. Civ. App. 1895) 30 S. W. 832. Hence, independent of the supreme court decisions, the weight of authority is clearly in favor of the proposition that everything is construction until the ship becomes complete as a ship. The first supreme court case was People's Ferry Co. *v.* Beers, 20 How. (U. S.) 393, 15 L. ed. 961. It was a libel by parties who had a contract for building the hull and delivering it on the water. Hence their contract was not complete until after launching. Yet the court held that it was not maritime. The next case was Roach *v.* Chapman, 22 How. (U. S.) 129, 16 L. ed. 294. It was a libel for the price of the original engines and boilers. The official report is meager as to the facts, but a personal examination of the original record in the clerk's office of the supreme court, made by the author, disclosed the fact that the engines and boilers were put in while the vessel was lying at the wharf in Louisville, which was after launching. This decision therefore ought to be conclusive, and it would be but for the recent case of Tucker *v.* Alexandroff, 183 U. S. 424, 438, 22 S. Ct. 195, 46 L. ed. 264. In that case, however, Judge Brown says: "A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron — an ordinary piece of personal property. . . . In the baptism of launching she receives her name, and from the moment her keel touches

(2) As Affected by Extent of Alterations. As long as a vessel preserves her identity, any work done in the way of alteration, enlargement, or improvement, no matter how extensive, falls under the head of repairs and not of construction, and hence is a maritime contract and may be the subject of a maritime lien.[98]

d. Other Necessaries — (I) *Necessaries Defined.* This term "necessaries" includes whatever is fit and proper for the service on which the vesssel is engaged, or whatever would have been ordered by a prudent owner if present.[99]

(II) *Advances of Money* — (A) *In General.* One who lends money on request of the proper authority for the purpose of paying off maritime liens upon a vessel, and who looks to the vessel as his security, has a lien upon the vessel for such advances equal in dignity to the liens which he satisfies.[1] But such an advance not made on authority of one having the right to bind the ship does not give a lien.[2] Nor does the lien arise on a mere personal loan of money or credit

the water she is transformed, and becomes a subject of admiralty jurisdiction." The case involved the question whether a Russian sent out as part of the crew of The Variag could be reclaimed by his government, he having deserted while the ship was still incomplete. The court held that his government could have him apprehended, the main part of the opinion being devoted to the international question at issue. No point was involved as to the character of work done upon a ship; and in view of the facts before the court in the two older cases, as explained above, it is difficult to believe that the court intended to change the rule established by them; for they both treated as construction some work at least which was done after launching.

But if the supplies are to be furnished for a voyage, the contract therefor is maritime, although made before the launching. The Hiram R. Dixon, 33 Fed. 297.

98. The Iris, 100 Fed. 104, 40 C. C. A. 301; Hardy *v.* The Ruggles, 11 Fed. Cas. No. 6,062, 2 Hughes 78; U. S. *v.* The Grace Meade, 25 Fed. Cas. No. 15,243, 2 Hughes 83. In McMaster *v.* One Dredge, 95 Fed. 832, and in King *v.* Greenway, 71 N. Y. 413, work which changed the character of the craft in the first case by taking a scow and fitting it up as a dredge, after it had been long used as a scow, and in the second case by altering the propelling machinery, was held to be construction work. The machinery was an addition in the first of these cases and not a mere substitution, and hence was held to come within the domain of construction work. See also The Ferax, 8 Fed. Cas. No. 4,737, 1 Sprague 180, holding that extensive alterations came under the word "construction" in the Massachusetts act.

But if the vessel loses its identity, there is no maritime lien upon the new boat merely because some materials were used from an old one, for work done in fitting them into the new one. Hantupee *v.* Coal Bluff No. 2, 11 Fed. Cas. No. 6,172; Smith *v.* The Royal George, 22 Fed. Cas. No. 13,102, 1 Woods 290.

99. This is practically the definition of Lord Tenterden in Webster *v.* Seekamp, 4 B. & Ald. 352, 23 Rev. Rep. 307, 6 E. C. L. 515, which was followed by Sir Robert Phillimore in The Riga, L. R. 3 A. & E. 516, 1 Aspin. 246, 41 L. J. Adm. 39, 26 L. T. Rep. N. S. 202, 20 Wkly. Rep. 927.

In a well-considered American case substantially the same idea is expressed more accurately: "They were not only in aid of commerce and navigation, but were such as would be ordered by any prudent shipowner, engaged in business similar to that of the transportation company, for the purpose of fitting and equipping his vessel for efficient maritime service." The Ella, 84 Fed. 471, 472. See also The Clara A. McIntyre, 94 Fed. 552; Hubbard *v.* Roach, 2 Fed. 393, 9 Biss. 375; The Gustavia, 11 Fed. Cas. No. 5,876; Knox *v.* The Dallas, 14 Fed. Cas. No. 7,904*a*; The Plymouth Rock, 19 Fed. Cas. No. 11,235, 7 Ben. 448; Hughes Adm. 96.

1. The Emily B. Souder *v.* Pritchard, 17 Wall. (U. S.) 666, 21 L. ed. 683; The City of Camden, 147 Fed. 847; Bank of British North America *v.* The Hutton, 137 Fed. 534, 70 C. C. A. 118; The Evangel, 94 Fed. 680; The Lime Rock, 49 Fed. 383; The Cumberland, 30 Fed. 449; The Thomas Sherlock, 22 Fed. 253; The Guiding Star, 9 Fed. 521 [*affirmed* in 18 Fed. 263]; The A. R. Dunlap, 1 Fed. Cas. No. 513, 1 Lowell 350; Davis *v.* Child, 7 Fed. Cas. No. 3,628, 2 Ware 78; The Home, 12 Fed. Cas. No. 6,657; The J. F. Spencer, 13 Fed. Cas. No. 7,316, 5 Ben. 151; The St. Joseph, 21 Fed. Cas. No. 12,229, Brown Adm. 202; The Union Express, 24 Fed. Cas. No. 14,364, Brown Adm. 537; The Heinrich Bjorn, 10 P. D. 44, 5 Aspin. 391, 54 L. J. Adm. 33, 52 L. T. Rep. N. S. 560, 33 Wkly. Rep. 719 [*affirmed* in 11 App. Cas. 270, 6 Aspin. 1, 55 L. J. Adm. 80, 55 L. T. Rep. N. S. 66]; The Anna, 1 P. D. 253, 3 Aspin. 337, 46 L. J. Adm. 15, 34 L. T. Rep. N. S. 895; The Onni, 3 L. T. Rep. N. S. 447, Lush. 154. See 34 Cent. Dig. tit. "Maritime Liens," §§ 18, 36.

2. The Solveig, 103 Fed. 322, 43 C. C. A. 250; The Clara A. McIntyre, 94 Fed. 552.

Even the master cannot bind the boat when she is out of commission for debts not necessary in such case; and hence he cannot recover for wages of an engineer employed by him and paid off by him, under such circumstances. Gillingham *v.* Charleston Tow-Boat, etc., Co., 40 Fed. 649.

to the vessel owner, although such money or credit may be used by him for the ship's purposes.[3]

(B) *Lender Must See to Application.* As the right of a lender of money to claim a lien is derivative through the lien-holder, it follows that in order to entitle himself to such a right, he must satisfy himself that the liens proposed to be paid are themselves valid and enforceable and that his funds are applied to that purpose.[4]

(C) *Character of Advances.* Wherever the claim taken up is such that it would itself be enforceable by a libel *in rem*, an advance of money to pay it under the circumstances already detailed gives the lender a maritime lien.[5]

3. The Haytian Republic, 65 Fed. 120; The Alliance, 63 Fed. 726; Nippert *v.* The J. B. Williams, 39 Fed. 823, 42 Fed. 533; The City of Salem, 31 Fed. 616, 12 Sawy. 469, 2 L. R. A. 380; The William A. Harris, 29 Fed. Cas. No. 17,686, 8 Ben. 210; Cavender *v.* The Fanny Barker, 40 Mo. 235; Price *v.* Frankel, 1 Wash. Terr. 33.

4. Fechtenburg *v.* The Woodland, 104 U. S. 180, 26 L. ed. 705; Nippert *v.* The J. B. Williams, 42 Fed. 533; The Wyoming, 36 Fed. 493; Merritt *v.* Brewer, 17 Fed. Cas. No. 9,483; Leddo *v.* Hughes, 15 Ill. 41; The Sophie, 1 Notes of Cas. 393, 1 W. Rob. 368; The Alexander, 1 Notes of Cas. 380, 1 W. Rob. 346. The decision of Judge Erskine in Southern Bank *v.* The Alexander McNeil, 22 Fed. Cas. No. 13,186, to the effect that payment by the lender to the master is sufficient to create the lien, although the funds are squandered by the master, is contrary to the current of authority. In United Hydraulic Cotton-Press Co. *v.* The Alexander McNeil, 24 Fed. Cas. No. 14,404, the head-note reports him as deciding the same thing, but the subject is not touched upon in the opinion. In The Worthington, 133 Fed. 725, 66 C. C. A. 555, where an advance of necessary funds was obtained by the owner in a foreign port under circumstances held to create a lien, and the money was diverted to other purposes, it was held that as between the creditor and the owner, where no rights of third parties intervened, the owner was estopped from setting up such defense.

5. See cases cited *infra*, this note.

Lender has lien for money advanced: To pay off seamen's wages. The Pauline, 136 Fed. 815; The Arctic, 75 Fed. 601; The Tangier, 23 Fed. Cas. No. 13,744, 2 Lowell 7. To pay port charges. The Aina, 40 Fed. 269; The Tangier, 23 Fed. Cas. No. 13,744, 2 Lowell 7; The Riga, L. R. 3 A. & E. 516, 1 Aspin. 246, 41 L. J. Adm. 39, 26 L. T. Rep. N. S. 202, 20 Wkly. Rep. 927; The Lucia B. Ives, 15 Fed. Cas. No. 8,590, 10 Ben. 660, was the case of a domestic vessel, and turned on the language of the New York statute. To release a boat from a valid libel, or to prevent a libel (The Augustine Kobbe, 39 Fed. 559; The Menominie, 36 Fed. 197; The J. R. Hoyle, 13 Fed. Cas. No. 7,557, 4 Biss. 234); but not money paid by the sureties on a vessel's bond on a decree against them (Chandler *v.* The Willamette Valley, 76 Fed. 838); nor money advanced to release a vessel from a common-law suit (The A. R. Dunlap, 1 Fed. Cas. No. 513, 1 Lowell 350). In Janney *v.* The Belle Lee, 13 Fed. Cas. No. 7,211, it was decided that advances to prevent a threatened seizure did not create a lien. A better ground for the decision would have been that the threatened seizure was for funds to furnish and finish the boat, that is, for a non-maritime cause of action. So the lender has a lien on money advanced to pay for ordinary supplies, repairs, or disbursements (The Worthington, 133 Fed. 725, 66 C. C. A. 555; The Augustine Kobbe, 37 Fed. 696, 39 Fed. 559; The Wyoming, 36 Fed. 493; The General Tompkins, 9 Fed. 620; Collins *v.* The Fort Wayne, 6 Fed. Cas. No. 3,012, 1 Bond 476; Phelps *v.* The Eureka, 14 Mo. 532); but not for money advanced while the vessel is in the custody of the court, and which is not necessary for its care or preservation, nor for fitting her for another voyage (The Alcalde, 132 Fed. 576; The Augustine Kobbe, 37 Fed. 702, 39 Fed. 559); nor for money advanced to purchase cargo to be shipped by the vessel (The Josephine Spangler, 9 Fed. 773); nor for money advanced to pay for the purchase of a vessel (The Sarah Harris, 21 Fed. Cas. No. 12,346, 7 Ben. 177).

Commissions and profits.— The lender may charge a reasonable commission over and above the actual amount of the bills paid off, and it would have the same dignity as the amount of the bills. The Emily B. Souder *v.* Pritchard, 17 Wall. (U. S.) 666, 21 L. ed. 683; The Sarah Harris, 21 Fed. Cas. No. 12,346, 7 Ben. 177. Of course if the lender occupies a fiduciary position he cannot make a secret profit. The Alvega, 30 Fed. 694. Nor can he make two profits, in the shape of commissions and excessive interest, or charges over and above wages paid and superintendence also. The Augustine Kobbe, 37 Fed. 696, 39 Fed. 559. But under ordinary circumstances a materialman can charge a profit on the amount of wages paid. Brady *v.* The Eva, McGloin (La.) 49.

Under the Alabama code in force in 1863 the proceeds of a cargo of salt, although applied to the payment of crew's wages and other charges against the vessel, do not give rise to a lien. The James Battle *v.* Waring, 39 Ala. 180.

Under the Arkansas statute money advanced to pay the wages of boatmen does not acquire the privileged rank which such wages have. The P. H. White *v.* Levy, 10 Ark. 411.

VII. CIRCUMSTANCES UNDER WHICH LIEN ARISES.

A. In General. As to all maritime liens except those of materialmen, the rendition of the service to the vessel or the bringing her into such relations with any one as creates a maritime cause of action against her impresses upon her a maritime lien irrespective of questions of credit or ownership.[6]

B. Liens of Materialmen — 1. In General. As to liens of materialmen, on account of the fact that they were long considered in English admiralty law to be scarcely maritime at all, a lien does not arise except under rigid conditions, governed and varied by many circumstances.[7]

2. Rule as to Foreign Vessels — a. General Principle. Under the general maritime law a materialman has a lien upon a foreign vessel as security if the requisites hereinafter discussed concur.[8]

b. What Vessels Are Foreign — (I) *General Principle.* A vessel is foreign when the materialman's service is rendered in a port of the state or country to which the vessel does not belong, or where her owner does not reside.[9]

(II) *Character of Vessel as Affected by Registry or Enrolment.* The domestic or foreign character of a vessel is presumptively determined by its registry or enrolment. Parties who deal with it on the strength of this, and of its port as painted on the vessel, are entitled to regard this as binding in the absence of actual or constructive knowledge of the real residence of the owners.[10]

Under Louisiana code (1825), § 3204 [Code (1870), § 3237], advances of money were not classed as necessaries except in one or two instances expressly named (for example loans for the last voyage, and loans on hottomry), and gave no lien. Learned *v.* Brown, 94 Fed. 876, 36 C. C. A. 524; The Canary No. 2, 22 Fed. 532; Elstner-Martin Grocery Co. *v.* Lamont, 113 La. 894, 37 So. 868; Owens *v.* Davis, 15 La. Ann. 22; Hyde *v.* Culver, 4 La. Ann. 9; Grant *v.* Fiol, 17 La. 158.

Under the Missouri and Ohio statutes, advances of money do not give rise to a lien. Bryan *v.* The Pride of the West, 12 Mo. 371; Dewitt *v.* The St. Lawrence, 3 Ohio St. 325; McGuire *v.* The Kentucky, 20 Ohio 62.

Under the Pennsylvania act of April 20, 1858, the discount of a note by a bank for a steamer's use gives no lien. The Daniel Kaine, 31 Fed. 746.

Under the South Carolina act giving laborers a privilege and preference, a contractor does not acquire such rights for money paid by him for labor. Butler *v.* The Julia, 57 Fed. 233.

6. See *supra*, VI, A.

7. See *supra*, III, B, 2, f, (III); VI, B; and *infra*, VII, B, 2–3.

8. *Connecticut.*— Buddington *v.* Stewart, 14 Conn. 404.

Maine.— Perkins *v.* Pike, 42 Me. 141, 66 Am. Dec. 267.

Mississippi.— Hursey *v.* Hassam, 45 Miss. 133.

New York.— American Ins. Co. *v.* Coster, 3 Paige 323.

United States.— The Glide, 167 U. S. 606, 17 S. Ct. 930, 42 L. ed. 296; The Kate, 164 U. S. 458, 17 S. Ct. 135, 41 L. ed. 512; The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345; Insurance Co. *v.* Baring, 20 Wall. 159, 22 L. ed. 250; The Emily B. Souder *v.* Pritchard, 17 Wall. 666, 21 L. ed. 683; The Patapsco *v.* Boyce, 13 Wall. 329, 20 L. ed. 696; Hazlehurst *v.* The Lulu, 10 Wall. 192, 19 L. ed. 906; The St. Jago de Cuba, 9 Wheat. 409, 6 L. ed. 122; The Grapeshot *v.* Wallerstein, 9 Wall. 129, 19 L. ed. 651; Cohan *v.* The Rolling Wave, 6 Fed. Cas. No. 2,959*a*; Dearborn *v.* The Union, 7 Fed. Cas. No. 3,714, 1 Wkly. Notes Cas. (Pa.) 222; Wilson *v.* The Jewess, 30 Fed. Cas. No. 17,812.

9. Pendergast *v.* The Kalorama, 10 Wall. (U. S.) 204, 19 L. ed. 941; Hazelhurst *v.* The Lulu, 10 Wall. (U. S.) 192, 19 L. ed. 906; The H. C. Grady, 87 Fed. 232; The Charlotte Vanderbilt, 19 Fed. 219; The Canada, 7 Fed. 119, 7 Sawy. 173; The Chusan, 5 Fed. Cas. No. 2,716, 1 Sprague 39 [*affirmed* on this point but *reversed* on another point in 5 Fed. Cas. No. 2,717, 2 Story 455]; The Neversink, 18 Fed. Cas. No. 10,133, 5 Blatchf. 539 [*affirming* 20 Fed. Cas. No. 12,079]; The Sarah J. Weed, 21 Fed. Cas. No. 12,350, 2 Lowell 555; Dowell *v.* Goode, 25 Ohio St. 390. See 34 Cent. Dig. tit. "Maritime Liens," §§ 7–9.

10. Weight to be given to the name painted on the vessel and the vessel's papers see Pittman *v.* The Samuel Marshall, 49 Fed. 754 [*affirmed* in 54 Fed. 396, 4 C. C. A. 385]; The Ellen Holgate, 30 Fed. 125; The Lotus No. 2, 26 Fed. 637; Baldwin *v.* The E. Morris, 2 Fed. Cas. No. 799; Collins *v.* The Fort Wayne, 6 Fed. Cas. No. 3,012, 1 Bond 476; Dudley *v.* The Superior, 7 Fed. Cas. No. 4,115, 1 Newb. Adm. 176; The George T. Kemp, 10 Fed. Cas. No. 5,341, 2 Lowell 477; Jones *v.* The Ratler, 13 Fed. Cas. No. 7,490, Taney 456; Pickell *v.* The Loper, 19 Fed. Cas. No. 11,119, Taney 500; The Sarah Starr, 21 Fed. Cas. No. 12,354, 1 Sprague 453; The Susan G. Owens, 23 Fed. Cas. No. 13,634; Tree *v.* The Indiana, 24 Fed. Cas. No. 14,165, Crabbe 479; The Walkyrien, 29 Fed. Cas. No. 17,092,

(III) *CHARACTER OF VESSEL AS AFFECTED BY ACTUAL RESIDENCE OF OWNER.* But if there are local owners or sources of credit, and this is known or easily ascertainable by the materialman, he is bound by such knowledge or means of knowledge, and the presumption arising from the vessel's papers disappears.[11] A "foreign" vessel in this sense includes vessels of other states as well as vessels of other countries.[12]

(IV) *CHARACTER OF VESSEL AS AFFECTED BY PLACE OF DELIVERY.* As delivery to the ship or within the immediate presence or control of her officers is necessary in order to create a maritime lien, it follows that the question whether the transaction is with a domestic or foreign ship is governed by the relation which she bears to the port where she is lying when the articles are delivered on board or the substantial part of the work done, not by the relation of the parties to each other where the supplies are ordered.[13]

11 Blatchf. 241; Weaver *v.* The S. G. Owens, 29 Fed. Cas. No. 17,310, 1 Wall. Jr. 359.

In Nova Scotia see Smith *v.* Fulton, 11 Nova Scotia 225.

In this sense the home port is the port where the vessel should be registered or enrolled as required by the federal statutes, that is, the port at or nearest to which the owner of the vessel usually resides. The Thomas Fletcher, 24 Fed. 375; Parmelee *v.* The Charles Mears, 18 Fed. Cas. No. 10,766, Newb. Adm. 197.

If the vessel has only a temporary enrolment at the time the supplies are furnished her character is presumptively determined by such enrolment. The Glenmont, 34 Fed. 402 [*affirming* 32 Fed. 703]; Scott *v.* Plymouth, 21 Fed. Cas. No. 12,544, 6 McLean 463, Newb. Adm. 56.

11. The St. Jago de Cuba, 9 Wheat. (U. S.) 409, 6 L. ed. 122; The New Brunswick, 125 Fed. 567 [*affirmed* in 129 Fed. 893, 64 C. C. A. 325]; Learned *v.* Brown, 94 Fed. 876, 36 C. C. A. 524; The Marion S. Harriss, 81 Fed. 964; The Havana, 64 Fed. 496, 12 C. C. A. 361; McCarthy *v.* The Richard S. Garrett, 44 Fed. 379; The Augustine Kobbe, 39 Fed. 559 [*affirming* 37 Fed. 696]; The Chelmsford, 34 Fed. 399; The Lotus No. 2, 26 Fed. 637; The Thomas Fletcher, 24 Fed. 375; Stephenson *v.* The Francis, 21 Fed. 715; The Mary Chilton, 4 Fed. 847; The E. A. Barnard, 2 Fed. 712; The Albany, 1 Fed. Cas. No. 131, 4 Dill. 439, 15 Alb. L. J. 67; The Alice Tainter, 1 Fed. Cas. No. 194, 5 Ben. 391 [*affirmed* in 1 Fed. Cas. No. 195, 14 Blatchf. 41]; Dudley *v.* The Superior, 7 Fed. Cas. No. 4,115, 1 Newb. Adm. 176; The Geo. T. Kemp, 10 Fed. Cas. No. 5,341, 1 Lowell 477; The Guisborough, 11 Fed. Cas. No. 5,864, 8 Ben. 407; Hill *v.* The Golden Gate, 12 Fed. Cas. No. 6,492, Newb. Adm. 308; The Island City, 13 Fed. Cas. No. 7,109, 1 Lowell 375; McAllister *v.* The Sam Kirkman, 15 Fed. Cas. No. 8,658, 1 Bond 369; The Mary Bell, 16 Fed. Cas. No. 9,199, 1 Sawy. 135; The Plymouth Rock, 19 Fed. Cas. No. 11,235, 7 Ben. 448 [*affirmed* in 19 Fed. Cas. No. 11,237, 13 Blatchf. 505]; Rees *v.* Steam-boat Gen. Terry, 3 Dak. 155, 13 N. W. 533; Donnell *v.* The Starlight, 103 Mass. 227. See 34 Cent. Dig. tit. "Maritime Liens," §§ 7–9.

Where a vessel has two owners residing opposite each other in different states, separated by a navigable stream, it has been held that the vessel is a domestic vessel in the home of each. The Rapid Transit, 11 Fed. 322. But the better doctrine is that a ship cannot be a domestic vessel in more than one place at a time. The Ellen Holgate, 30 Fed. 125; The Jennie B. Gilkey, 19 Fed. 127.

12. Pendergast *v.* The Kalorama, 10 Wall. (U. S.) 204, 19 L. ed. 941; Pratt *v.* Reed, 19 How. (U. S.) 359, 15 L. ed. 660; The H. C. Grady, 87 Fed. 232; The Augustine Kobbe, 39 Fed. 559; The Cumberland, 30 Fed. 449; The Canada, 7 Fed. 119, 7 Sawy. 173; The Sarah J. Weed, 21 Fed. Cas. No. 12,350, 2 Lowell 555; Thomas *v.* The Kosciusko, 23 Fed. Cas. No. 13,901, 11 N. Y. Leg. Obs. 38; Stearns *v.* Doe, 12 Gray (Mass.) 482, 74 Am. Dec. 608; Dowell *v.* Goode, 25 Ohio St. 390. See also The Golden Rod, 151 Fed. 6.

In the old case of Levering *v.* Bank of Columbia, 15 Fed. Cas. No. 8,286, 1 Cranch C. C. 152, 15 Fed. Cas. No. 8,287, 1 Cranch C. C. 207 (decided in 1803–1804) it was decided that a ship hailing from Alexandria (then in the District of Columbia) was not a foreign vessel as to supplies furnished when in Baltimore. The opinion is meager and does not rest upon any peculiar doctrine as to the District of Columbia. The arguments of counsel would indicate that the court treated the states as not foreign to each other in this sense. If so the case is overruled by the authorities above quoted.

13. The Marion S. Harris, 85 Fed. 798, 29 C. C. A. 428; The Vigilancia, 58 Fed. 698; The Augustine Kobbe, 39 Fed. 559 [*affirming* 37 Fed. 696]; The Chelmsford, 34 Fed. 399 (following the other cases reluctantly); The Huron, 29 Fed. 183; The Agnes Barton, 26 Fed. 542; The Mary McCabe, 22 Fed. 750; The Rapid Transit, 11 Fed. 322; Graham *v.* The Escoriaza, 10 Fed. Cas. No. 5,666; The Sarah J. Weed, 21 Fed. Cas. No. 12,350, 2 Lowell 555; Thomas *v.* The Kosciusko, 23 Fed. Cas. No. 13,901, 11 N. Y. Leg. Obs. 38. See also *infra*, XI, A. *Compare* The Christopher North, 5 Fed. Cas. No. 2,707, 6 Biss. 414.

Canada cases supporting text are Williams

3. Rule as to Domestic Vessels — a. Independent of Statute. Under the general maritime law as administered outside of England and under the early maritime law of England, there was no distinction between domestic and foreign vessels, but materialmen had a lien upon both alike.[14] But in consequence of the warfare of the common-law courts on the English admiralty it became settled in the mother country that materialmen had no lien on either domestic or foreign vessels, except by express hypothecation in the nature of bottomry.[15] Under the influence of this English rule, the American admiralty courts, although not going so far as to deny the right of the materialman to any implied lien at all, construed the general maritime law to deny such lien in the case of domestic vessels where there was no local act creating it.[16]

v. The Ship Flora, 6 Can. Exch. 137; Shipowners' Dry-Dock Co. *v.* The Ship Flora, 6 Can. Exch. 135.

State statutes.— In this respect the construction of the state statutes varies, as might be expected in view of their widely differing language. In Mehan *v.* Thompson, 71 Me. 492, where the contract for the timber to be used in the ship was between two citizens of the state and the circumstances showed that the particular vessel was in contemplation of both parties, the statute was held to apply, although the actual delivery of the timber was in another state. On the other hand the Massachusetts act is held to apply only to materials furnished in the state. McDonald *v.* The Nimbus, 137 Mass. 360. This is also the construction of the Missouri act. James *v.* The Pawnee, 19 Mo. 517; The Raritan *v.* Pollard, 10 Mo. 583. The New Jersey act also is construed to mean that the right of lien is governed by the fact that the work is done within the state, although the contract was made in another state. Baeder *v.* Carnie, 44 N. J. L. 208. This also is the construction of the New York statute. Phœnix Iron Co. *v.* The Hopatcong, 127 N. Y. 206, 27 N. E. 841 [*affirming* 6 N. Y. Suppl. 215]; Moores *v.* Lunt, 1 Hun (N. Y.) 650, 4 Thomps. & C. 154 [*reversing* on other grounds 13 Abb. Pr. N. S. 166]; Phillips *v.* Myers, 30 How. Pr. (N. Y.) 184. Under the Ohio statute the fact that the materials were used in Ohio does not give rise to the lien where they were purchased out of the state. Fearing *v.* Schooner Myrtle, 2 Ohio Dec. (Reprint) 175, 2 West. L. Month. 7. Under the Pennsylvania act, if the materials are used in the state, there is a lien, although the contract therefor was made out of the state, but not if they were furnished out of the state. Low *v.* The Ship Clarence S. Bement, 2 Pa. Co. Ct. 430, 19 Wkly. Notes Cas. 153; Churchman *v.* Keefe, 2 Del. Co. (Pa.) 256. Under the Wisconsin act the claim must arise in the state in order for the lien to vest. If the contract is between citizens of the state and the vessel at the time is out of the state, it does not vest until the vessel returns to the state. Thorsen *v.* The J. B. Martin, 26 Wis. 488, 7 Am. Rep. 91; McRoberts *v.* The Henry Clay, 17 Wis. 101.

14. The Underwriter, 119 Fed. 713; The Susan G. Owens, 23 Fed. Cas. No. 13,634 [*affirmed* in 29 Fed. Cas. No. 17,310]; Taylor *v.* The Commonwealth, 23 Fed. Cas. No. 13,787; Zane *v.* The President, 30 Fed. Cas. No. 18,201, 4 Wash. 453. See especially the dissenting opinion of Mr. Justice Clifford in Rodd *v.* Heartt, 21 Wall. (U. S.) 558, 22 L. ed. 654.

15. The Underwriter, 119 Fed. 713; Zane *v.* The President, 30 Fed. Cas. No. 18,201, 4 Wash. 453. And see *supra*, III, B, 2, f, (III).

16. *Alabama.*— Scatcherd Lumber Co. *v.* Rike, 113 Ala. 555, 21 So. 136, 59 Am. St. Rep. 147.

Connecticut.— Buddington *v.* Stewart, 14 Conn. 404.

Lousiana.—Hyde *v.* Culver, 4 La. Ann. 9.

Maine.— Perkins *v.* Pike, 42 Me. 141, 66 Am. Dec. 267.

Mississippi.— Hursey *v.* Hassam, 45 Miss. 133.

Washington.— Price *v.* Frankel, 1 Wash. Terr. 33.

United States.— The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345; The Edith, 94 U. S. 518, 24 L. ed. 167 [*affirming* 8 Fed. Cas. No. 4,282, 5 Ben. 432 (*affirmed* in 8 Fed. Cas. No. 4,283, 11 Blatchf. 451)]; The Sue, 137 Fed. 133; Alaska, etc., Steamship Co. *v.* Chamberlain, 116 Fed. 600, 54 C. C. A. 56; The John S. Parsons, 110 Fed. 994; The Chelmsford, 34 Fed. 399; The Daniel Kaine, 31 Fed. 746; The Queen of St. Johns, 31 Fed. 24; The Venture, 26 Fed. 285; The Thomas Fletcher, 24 Fed. 375; The Red Wing, 14 Fed. 869, 5 McCrary 122; The D. S. Newcomb, 12 Fed. 735; The E. A. Barnard, 2 Fed. 712; The Albany, 1 Fed. Cas. No. 131, 4 Dill. 439, 15 Alb. L. J. 67; The Alida, 1 Fed. Cas. No. 199, Abb. Adm. 165; The Augusta, 2 Fed. Cas. No. 647; Boon *v.* The Hornet, 3 Fed. Cas. No. 1,640, Crabbe 426; The Calisto, 4 Fed. Cas. No. 2,316, 2 Ware 37; The Circassian, 5 Fed. Cas. No. 2,720*a*, 6 Alb. L. J. 401; Davis *v.* Child, 7 Fed. Cas. No. 3,628, 2 Ware 78, 3 N. Y. Leg. Obs. 147; Davis *v.* New Brig, 7 Fed. Cas. No. 3,643, Gilp. 473; Dudley *v.* The Superior, 7 Fed. Cas. No, 4,115, 1 Newb. Adm. 176; The Eliza Jane, 8 Fed. Cas. No. 4,363, 1 Sprague 152; Hendrickson *v.* The Gesner, 11 Fed. Cas. No. 6,356; Hill *v.* The Golden Gate, 12 Fed. Cas. No. 6,492, 1 Newb. Adm. 308; The Lillie Mills, 15 Fed. Cas. No. 8,352, 1 Sprague 307; McAllister *v.* The Sam Kirkman, 15 Fed. Cas. No. 8,658, 1 Bond 369; Marsh *v.* The Minnie, 16 Fed. Cas. No. 9,117; The Mary Bell, 16

b. Local Statutes as Creating Lien — (I) *General Principle.* Since the decision in The General Smith,[17] the right to an implied lien for supplies, repairs, or other necessaries furnished to domestic vessels, where there is a local act authorizing such lien, is universally recognized.[18]

(II) *Validity of Local Statutes Giving Such Lien* — (A) *As Giving the Lien.* When the cause of action is maritime by nature, although not vested with a lien under the general principles of admiralty law, a local statute can superadd a maritime lien, if the vessel against which it is asserted is within the range of state legislation; and such lien is enforceable in an admiralty court by a proceeding *in rem.* In other words a local statute can add to a cause of action essentially maritime a lien which it did not have before, as such legislation does not affect the general bounds of admiralty jurisdiction; and the federal court, finding a subject maritime by nature, will enforce it without inquiring into its origin, just as it would do in the case of a common-law or equity cause of action created by a state statute.[19] But a state statute cannot create a maritime lien as incident to a cause of action not maritime by nature, for in such case it would be in the power of the states to enlarge the general scope of the admiralty jurisdiction recognized in the federal constitution.[20] Hence a state cannot annex an admiralty lien to a contract for the original construction of a vessel, as that is not under the decisions, maritime by nature, and a state cannot change its nature.[21] But as the power of the state in this regard is limited simply by the admiralty clause of the federal constitution, it follows that it is free to annex liens to non-maritime causes of action, such liens being ordinary statutory liens and not maritime liens. For this reason it can give a lien enforceable in its own courts on a contract for the building of a ship.[22] For the same reason it can give a lien enforceable in its

Fed. Cas. No. 9,199, 1 Sawy. 135; Pickell *v.* The Loper, 19 Fed. Cas. No. 11,119, Taney 500; Read *v.* Hull of a New Brig, 20 Fed. Cas. No. 11,609, 1 Story 244; Seaver *v.* The Thales, 21 Fed. Cas. No. 12,594; The Stephen Allen, 22 Fed. Cas. No. 13,361, 1 Blatchf. & H. 175; The Teller, 23 Fed. Cas. No. 13,822; Zane *v.* The President, 30 Fed. Cas. No. 18,201, 4 Wash. 453; Zollinger *v.* The Emma, 30 Fed. Cas. 18,218.

See 34 Cent. Dig. tit. "Maritime Liens," § 7.

This doctrine was first announced by the supreme court in The General Smith, 4 Wheat. (U. S.) 438, 4 L. ed. 609, in a short opinion written by Mr. Justice Story. A strong effort was made to bring about a reconsideration of the question in Rodd *v.* Heartt, 21 Wall. (U. S.) 558, 22 L. ed. 654, but Mr. Justice Bradley in delivering the opinion, while not denying that the distinction between foreign and domestic vessels had no warrant in the general law of the sea, held to it as a settled principle of American jurisprudence. And the decisions on the subject are innumerable. The decisions in The Union Express, 24 Fed. Cas. No. 14,364, Brown Adm. 537, and Taylor *v.* The Commonwealth, 23 Fed Cas. Nos. 13,787, 13,788, were based upon a misapprehension of the purpose of the supreme court in reënacting the 12th Admiralty Rule as it now stands (then just reënacted). The judges seemed to consider that the right to proceed *in rem* depended on this rule, whereas the supreme court in Rodd *v.* Heartt, 21 Wall. (U. S.) 558, 2 L. ed. 654 (decided just after these cases) based the right to proceed under this rule on the existence of a local statute, as far as the implied lien is concerned.

17. The General Smith, 4 Wheat. (U. S.) 438, 4 L. ed. 609.

18. See *supra*, VII, B, 3, a, b.

19. The Robert W. Parsons, 191 U. S. 17, 24 S. Ct. 8, 48 L. ed. 73; The Glide, 167 U. S. 606, 17 S. Ct. 930, 42 L. ed. 296; The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345; Rodd *v.* Heartt, 21 Wall. (U. S.) 558, 22 L. ed. 654; *Ex p.* McNeil, 13 Wall. (U. S.) 236, 20 L. ed. 624; Frederick *v.* Rees, 135 Fed. 730, 68 C. C. A. 368; The Energia, 124 Fed. 842; The Lida Fowler, 113 Fed. 605; The Iris, 100 Fed. 104, 40 C. C. A. 301; The Menominie, 36 Fed. 197; The Sylvan Stream, 35 Fed. 314; The Island City, 13 Fed. Cas. No. 7,109, 1 Lowell 375; Fralick *v.* Betts, 13 Hun (N. Y.) 632; The Petrel *v.* Dumont, 28 Ohio St. 602, 22 Am. Rep. 397. See 34 Cent. Dig. tit. "Maritime Liens," §§ 21–23.

20. The expressions in The Belfast *v.* Boon, 7 Wall. (U. S.) 624, 19 L. ed. 266, and in The Universe, 108 Fed. 968, that "state legislatures have no authority to create a maritime lien" must be understood with this qualification.

A state statute can add to a maritime cause of action a lien not incident to it independent of such statute, as is abundantly evident by the cases cited *supra*, note 19; but it cannot make a cause of action maritime which is not so by nature, nor add to a non-maritime cause of action a maritime lien.

21. See *supra*, VI, B, 2, c, (III), (A).

22. *Indiana.*— Sinton *v.* The R. R. Roberts, 34 Ind. 448, 7 Am. Rep. 229; Wyatt *v.* Stuckley, 29 Ind. 279.

own courts on vessels plying in waters not included in the federal maritime jurisdiction, for instance, waters entirely within the boundaries of a state and not connected with other waters giving an outlet to other states or countries.[23]

(B) *As Providing Remedies For Its Enforcement* — (1) LOCAL STATUTES GIVING PURE PROCEEDINGS IN REM. Article 3, section 2, of the federal constitution provides that the federal judicial power shall extend *inter alia* "to all cases of admiralty and maritime jurisdiction." The first congress which assembled after the constitution went into effect passed the famous Judiciary Act of September 24, 1789.[24] Chapter 20, section 9, of this act vested the federal district courts with cognizance "of all civil cases of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it. . . . And such jurisdiction shall be exclusive."[25] Under the influence of these provisions the courts have held that the effect of a local statute is merely to add the remedy *in rem*, or lien to a maritime cause of action, which lien, being maritime, is exclusively enforceable as such in the federal district courts. A state statute cannot vest a state court with jurisdiction to enforce such a lien by a proceeding *in rem* in the strict sense in which that term is used, that is, a proceeding against the thing itself as the real defendant.[26]

(2) LOCAL STATUTES GIVING COMMON-LAW REMEDIES. But although a state cannot confer on its courts jurisdiction over a proceeding *in rem*, it can give them jurisdiction over suits against the master or owners. And it can annex to such suit a process of attachment. The proceeding *in rem* which is forbidden to the state courts is a proceeding against the vessel by name as the real defendant in which the vessel itself is judged and sentenced.[27] A proceeding against the

Massachusetts. — Foster *v.* The Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125.

Michigan. — Delaney Forge, etc., Co. *v.* The Winnebago, 142 Mich. 84, 105 N. W. 527.

Mississippi. — Archibald *v.* Citizens' Bank, 64 Miss. 523, 1 So. 739.

New York. — Brookman *v.* Hamill, 43 N. Y. 554, 3 Am. Rep. 731; Sheppard *v.* Steele, 43 N. Y. 52, 3 Am. Rep. 660; Murphy *v.* Salem, 1 Hun 140, 3 Thomps. & C. 660.

Oregon. — The Gazelle *v.* Lake, 1 Oreg. 119.

Pennsylvania. — Baizley *v.* The Odorilla, 121 Pa. St. 231, 15 Atl. 521, 1 L. R. A. 505.

Washington. — Washington Iron-Works *v.* Jensen, 3 Wash. 584, 28 Pac. 1019.

Wisconsin. — Thorsen *v.* The J. B. Martin, 26 Wis. 488, 7 Am. Rep. 91.

United States. — Edwards *v.* Elliott, 21 Wall. 532, 22 L. ed. 487 [*affirming* 36 N. J. L. 449, 13 Am. Rep. 463 (*affirming* 34 N. J. L. 96, 35 N. J. L. 265)]; The Winnebago, 141 Fed. 945, 73 C. C. A. 295; Purinton *v.* Hull of a New Ship, 20 Fed. Cas. No. 11,473, 1 Ware 556 [*affirmed* in 20 Fed. Cas. No. 11,472, 2 Curt. 416].

23. Delancy Forge, etc., Co. *v.* The Winnebago, 142 Mich. 84, 105 N. W. 527; Laing *v.* The Forest Queen, 69 Minn. 537, 72 N. W. 809; Stapp *v.* Steam-Boat Clyde, 43 Minn. 192, 45 N. W. 430.

24. 1 U. S. St. at L. 76.

25. This portion of the original Judiciary Act is now embodied in U. S. Rev. St. § 563, cl. 8 [U. S. Comp. St. (1901) p. 457].

26. *Arkansas.* — Turner *v.* Wallace, 11 Ark. 662.

California. — Crawford *v.* The Caroline Reed, 42 Cal. 469.

Mississippi. — Dever *v.* The Hope, 42 Miss. 715, 2 Am. Rep. 643.

New York. — Brookman *v.* Hamill, 43 N. Y. 554, 3 Am. Rep. 731; Bird *v.* The Josephine, 39 N. Y. 19. The case of Walker *v.* Blackwell, 1 Wend. 557, was decided in 1828, long before this subject had received any consideration.

Ohio. — The Petrel *v.* Dumont, 28 Ohio St. 602, 22 Am. Rep. 397; Dowell *v.* Goode, 25 Ohio St. 390. The older case of Thompson *v.* The Julius D. Morton, 2 Ohio St. 26, 59 Am. Dec. 658, is hardly reconcilable with the above.

Wisconsin. — Campbell *v.* Sherman, 35 Wis. 103.

United States. — The Robert W. Parsons, 191 U. S. 17, 24 S. Ct. 8, 48 L. ed. 73 [*reversing* 168 N. Y. 586, 60 N. E. 1112, 52 N. Y. App. Div. 550, 65 N. Y. Suppl. 350]; The Glide, 167 U. S. 606, 17 S. Ct. 930, 42 L. ed. 296 [*reversing* 157 Mass. 525, 33 N. E. 163, 34 Am. St. Rep. 305]; Rodd *v.* Heartt, 21 Wall. 558, 22 L. ed. 654; The Belfast *v.* Boon, 7 Wall. 624, 19 L. ed. 266; The Moses Taylor, 4 Wall. 411, 18 L. ed. 397; Fredericks *v.* Rees, 135 Fed. 730, 68 C. C. A. 368; The Sylvan Stream, 35 Fed. 314; The Edith, 8 Fed. Cas. No. 4,282, 5 Ben. 432 [*affirmed* in 8 Fed. Cas. No. 4,283, 11 Blatchf. 451]; McAllister *v.* The Sam Kirkman, 15 Fed. Cas. No. 8,658, 1 Bond 369; Riggs *v.* The John Richards, 20 Fed. Cas. No. 11,827, Newh. Adm. 73.

See 34 Cent. Dig. tit. "Maritime Liens," § 111.

27. The Moses Taylor, 4 Wall. (U. S.) 411, 18 L. ed. 397.

owner is not made a proceeding *in rem* by the fact that it is accompanied by an attachment; for such an attachment is a mere incident to a personal suit, and a mere means of reaching the owner's interest; and in it only his title can be sold, and not a clear title to the property itself.[28]

(c) *Vessels Subject to Such Statutes.* Although there is much conflict, the preponderance of authority and the true principle is that a state can by statute give a lien for a maritime cause of action only on domestic vessels. Maritime liens upon foreign vessels arise under the general maritime law and are governed by the principles of that law. It is not within the power of a state to add to or subtract from the liens given by the general maritime law, nor to impose conditions or restrictions upon them, thereby making a foreign vessel subject to a different law in every port. The basis of the state power to legislate is the fact that liens on domestic vessels are not recognized by the general maritime law as con-

28. An examination of the cases cited *supra*, note 26, will show that the state statutes held void in them authorized proceedings against the vessel itself by name. But there is abundant authority in favor of the validity of the state statutes authorizing attachments as ancillary to a personal suit. The Louisiana decisions on the subject are of special interest. In Young *v.* The Princess Royal, 22 La. Ann. 388, 2 Am. Rep. 731, in 1870, the court decided that if the process authorized by their statute was a proceeding *in rem*, it was unconstitutional. In Southern Dry Dock Co. *v.* The J. D. Perry, 23 La. Ann. 39, 8 Am Rep. 585, it was held that a proceeding against "Captain A. Baird and the owners of the steamboat J. D. Perry," claiming also a privilege on the steamer, praying for a writ of provisional seizure and that the owners might be cited and condemned to pay plaintiff the sum claimed, was a proceeding *in rem* and void. The decision was rendered at the January term, 1871. But in Leon *v.* Galceran, 11 Wall. (U. S.) 185, 20 L. ed. 74, decided about the same time, and probably unknown to the Louisiana court, the supreme court sustained a suit in terms against the owner under that same statute, although it was a suit by seamen for their wages, and was accompanied by a process of sequestration or attachment, on the theory that such a process was only an incident to a suit against the owner. Hence in State *v.* Judge, 39 La. Ann. 499, 2 So. 37, 4 Am. St. Rep. 274, decided in 1887, the Louisiana court sustained a proceeding under their statute as constitutional. On this same ground the Alabama act is valid, as the proceeding authorized by it is against the owners, not against the boat. Scatcherd Lumber Co. *v.* Rike, 113 Ala. 555, 21 So. 136, 59 Am. St. Rep. 147. So too the Florida statute. Baars *v.* Creary, 23 Fla. 311, 2 So. 662. In The Montauk *v.* Walker, 47 Ill. 335, the Illinois act of 1857 authorizing a proceeding *in rem* against the vessel by name was sustained on the ground that the vessel was a domestic vessel. The court based its opinion on the ground that congress had no jurisdiction over domestic commerce. The decision is wrong, as the admiralty jurisdiction does not depend on the commerce clause of the constitution, but extends to navigable waters, whether domestic or foreign. *Ex p.* Garnett, 141 U. S. 1, 11 S. Ct. 840, 35 L. ed. 631; The Norway *v.* Jensen, 52 Ill. 373. For the same reason Williamson *v.* Hogan, 46 Ill. 504, cannot be sustained. The court decided that a contract to furnish supplies to a domestic vessel is not maritime at all, confusing the distinction between the maritime character of the contract and the right to a lien. In The E. P. Dorr *v.* Waldron, 62 Ill. 221, a tugboat, a proceeding against a steamer by name was sustained as the equivalent of an ordinary attachment. It is not reconcilable with the federal decisions. In Turner *v.* Friend, 59 Me. 290, it was held that an attachment against the master accompanied by process against the vessel is none the less valid from the fact that he owns no interest in the vessel; but it was for a violation of a state statute relating to fishing, not for a maritime cause of action. If the attachment is maintainable, as shown above, only as an ancillary process to reach defendant's interest, a state statute purporting to give a right of attachment against the vessel for a maritime cause of action and to authorize its sale would hardly be helped by the fact that it also authorizes a suit against someone having no interest in the vessel. The Virginia vessel law is now embodied in section 2963 of the code of 1887. It does not authorize a proceeding against the vessel by name, but is in form a suit against the owner or master and authorizes an attachment in such as "a pending suit." Under the above principles it ought to be valid. But in Stewart *v.* Potomac Ferry Co., 12 Fed. 296, 5 Hughes 372, it was held void as authorizing a proceeding *in rem*. The attempt of the learned judge to distinguish it from Leon *v.* Galceran, 11 Wall. (U. S.) 185, 20 L. ed. 74, was not very successful. A state is not limited by this doctrine to the creation of remedies on the common-law side of its courts, so long as it does not create an admiralty proceeding *in rem*. It may confer the jurisdiction on its chancery courts also. Casey, etc., Mfg. Co. *v.* Weatherly, 97 Tenn. 297, 37 S. W. 6; Washington Iron-Works *v.* Jensen, 3 Wash. 584, 28 Pac. 1019. The possessory lien of a shipwright is unaffected. The Two Marys, 10 Fed. 919; Scott *v.* Delahunt, 65 N. Y. 128.

strued by the English and American courts, and hence such power of legislation only applies to domestic vessels.[29]

(D) *Construction of Such Statutes.* In so far as these statutes create a lien, they are in derogation of the common law and should not be construed retrospectively or as enlarging the lien beyond the terms of the act, although as far as the procedure is concerned they are remedial statutes.[30]

29. In The Chusan, 5 Fed. Cas. No. 2,717, 2 Story 455, Judge Story held that the lien for supplies furnished a foreign vessel was governed by the principles of the maritime law, and that the New York statute then in force, which provided that a lien for supplies should cease upon the departure of the vessel from the state, applied only to domestic vessels, and could not affix such a condition to the general maritime law applying to foreign vessels. See also The George T. Kemp, 10 Fed. Cas. No. 5,341, 2 Lowell 477; Harris *v.* The Henrietta, 11 Fed. Cas. No. 6,121, Newb. Adm. 284; Roosevelt *v.* The C. H. Frost, 20 Fed. Cas. No. 12,033; Wilson *v.* The Jewess, 30 Fed. Cas. No. 17,812. In The Lyndhurst, 48 Fed. 839, Judge Addison Brown, following the Chusan case, *supra*, held that the New York statute requiring a notice of lien to be filed in the clerk's office within thirty days did not affect the lien for supplies furnished foreign vessels. In The Electron, 74 Fed. 689, 21 C. C. A. 12, the circuit court of appeals for that same circuit, although forbearing to pass upon the question whether a state can create a maritime lien upon a foreign vessel, held that it could not change the conditions under which such a lien arose, nor confer a lien where credit was not in fact given to the vessel, being foreign. In Cuddy *v.* Clement, 113 Fed. 454, 51 C. C. A. 288 [*affirming* 107 Fed. 978], the circuit court of appeals for the Massachusetts circuit held that such statutes applied only to domestic vessels. In The New Brunswick, 129 Fed. 893, 64 C. C. A. 325 [*affirming* 125 Fed. 567], the same principle was followed. Even under a state statute supplies are not "furnished" to a vessel in the sense of such a law unless the vessel is at the time in the state Bennett *v.* Beadle, 142 Cal. 239, 75 Pac. 843. The Indiana Water-Craft Law is held not to extend to contracts made and broken out of the state. Copinger *v.* The David Gibson, 14 Ind. 480; The J. P. Tweed *v.* Richards, 9 Ind. 525. See also Bidwell *v.* Whitaker, 1 Mich. 469. On the other hand, in McRae *v.* Bowers Dredging Co., 86 Fed. 344, Judge Hanford, in marshaling the assets of an insolvent corporation, held that the statute of Washington created liens upon foreign as well as domestic vessels, if the supplies were furnished within the state. He made the same ruling in the later cases of The Del Norte, 90 Fed. 506, and The Robert Dollar, 115 Fed. 218. He bases his ruling upon the power of a state to legislate over persons or property within its jurisdiction, whether there permanently or temporarily. Such general power of legislation is of course obvious, but it is subject to constitutional limitations. One of those limitations is that a state cannot add to or detract from the general admiralty law, however extensive its range of legislation over ordinary common-law rights and remedies. He does not refer to the Chusan case, *supra*, in any of the above opinions. The question is practically settled by The Roanoke, 189 U. S. 185, 23 S. Ct. 491, 47 L. ed. 770. In it the supreme court passing upon the same statute of Washington which was before Judge Hanford held that a state could not as to foreign vessels make supplies not ordered by the master a lien and thereby create conditions not recognized by the general maritime law. And it strongly intimated that such a statute could not affect a foreign vessel at all. See also The San Rafael, 141 Fed. 270, 72 C. C. A. 388; The Golden Rod, 151 Fed. 6; Poole *v.* Kermit, 59 N. Y. 554; Stedman *v.* Patchin, 34 Barb. (N. Y.) 218; Dowell *v.* Steamboat Melnotte, 1 Cinc. Super. Ct. 60. The case of Randall *v.* Roche, 30 N. J. L. 220, 82 Am. Dec. 233 [*criticized* in Edwards *v.* Elliott, 36 N. J. L. 449, 13 Am. Rep. 463 (*affirmed* in 21 Wall. (U. S.) 532, 22 L. ed. 487)], holding that the statute confers liens on foreign vessels, is overruled by the decisions cited *supra*, this note.

For the sake of avoiding conflict with federal authorities a statute purporting to confer a lien on vessels "used in navigating the waters of the state" will not be construed to cover foreign vessels casually coming there. Ray *v.* The Henry Harbeck, 1 Cal. 451; Tucker *v.* The Sacramento, 1 Cal. 403; McQueen *v.* The Russell, 1 Cal. 165; Souter *v.* The Sea Witch, 1 Cal. 162; U. S. *v.* The Haytian Republic, 65 Fed. 120.

The Maine and Massachusetts statutes have been construed to give a lien on domestic and foreign vessels. Perkins *v.* Pike, 42 Me. 141, 66 Am. Dec. 267 (a case decided in 1856); The John Walls Jr., 13 Fed. Cas. No. 7,432, 1 Sprague 178 (Massachusetts act of 1848). In Donnell *v.* The Starlight, 103 Mass. 227, it was held that attachment under the state law would lie if the actual owner resided there, although she was registered in another state in the name of one who was really a mortgagee.

Under the Tennessee act of 1833, c. 35, if the debt was contracted in the state and the boat was then in the state, the right of attachment existed, no matter where the parties resided. Hill *v.* Mills, 9 Humphr. (Tenn.) 629.

30. The Chusan, 5 Fed. Cas. No. 2,717, 2 Story 455; The Kiersage, 14 Fed. Cas. No. 7,762, 2 Curt. 421 [*reversing* 14 Fed. Cas. No. 7,634, 1 Ware 546]. Hence the Maine

4. RULE AS AFFECTED BY PARTY ORDERING SUPPLIES — a. The Master — (I) *AS TO FOREIGN VESSELS* — (A) *General Principle.* This is well expressed by Mr. Justice Johnson. "For these purposes, the law-maritime attaches the power of pledging or subjecting the vessel to material-men, to the office of ship-master, and considers the owner as vesting him with those powers, by the mere act of constituting him ship-master. The necessities of commerce require that when remote from his owner, he should be able to subject his owner's property to that liability, without which, it is reasonable to suppose, he will not be able to pursue his owner's interest." In the same opinion he says: "The whole object of giving admiralty process and priority of payment to privileged creditors, is to furnish wings and legs to the forfeited hull to get back, for the benefit of all concerned; that is, to complete her voyage."[31] Hence, when supplies or repairs are apparently necessary, and are ordered by the master in a foreign port, the owner being absent and the party from whom they are ordered does not know, and has no reason to suppose, that the master has any other means of credit, the vessel is charged with an implied lien in favor of such creditor.[32]

act of Feb. 19, 1834, was construed by Mr. Justice Story not to give a lien for merely working upon a vessel as part of a general contract of service, but to presuppose a special contract of employment for the particular vessel. Read *v.* Hull of a New Brig, 20 Fed. Cas. No. 11,609, 1 Story 244 [*affirming* 4 Fed. Cas. No. 2,316, 2 Ware 37]. This same construction was placed upon the act by Judge Ware in Sewall *v.* Hull of a New Ship, 21 Fed. Cas. No. 12,682, 1 Ware 565. So by Justice Curtis in The Young Sam, 30 Fed. Cas. No. 18,186, 1 Brunn. Col. Cas. 600. In Drew *v.* Hull of a New Ship, 7 Fed. Cas. No. 4,078, Judge Sprague construed the Massachusetts act in the same way, following the decision of the Massachusetts supreme court in Rogers *v.* Currier, 13 Gray (Mass.) 129, to the same effect. But in The Antarctic, 1 Fed. Cas. No. 479, 1 Sprague 206, he held that where the ship was under construction and the lumber was delivered at the yard, it would be presumed to have been intended for her, and there would be a lien for such as was actually used in her. The same ruling was made by Judge Betts in Menzies *v.* The Agnes, 17 Fed. Cas. No. 9,430, presumably upon the New York statute, although it is not specifically mentioned in the very brief opinion. See also *supra*, II, D.

The inclination of the state courts is to construe their statutes in the same manner.

Illinois.— Clark *v.* Smith, 14 Ill. 361.

Maine.— Fuller *v.* Nickerson, 69 Me. 228.

Massachusetts.— See Jones *v.* Keen, 115 Mass. 170; Tyler *v.* Currier, 13 Gray 134; Rogers *v.* Currier, 13 Gray 129. *Compare* Briggs *v.* A Light Boat, 7 Allen 287.

Mississippi.— Auter *v.* The James Jacobs, 34 Miss. 269.

Missouri.— Twitchell *v.* The Missouri, 12 Mo. 412; Noble *v.* The St. Anthony, 12 Mo. 261.

Ohio.— The Monarch *v.* Finley, 10 Ohio 384; Fearing *v.* Schooner Myrtle, 2 Ohio Dec. (Reprint) 175, 2 West. L. Month. 7.

Washington.— Callahan *v.* Ætna Indemnity Co., 33 Wash. 583, 74 Pac. 693.

31. The St. Jago de Cuba, 9 Wheat. (U. S.) 409, 416, 6 L. ed. 122.

32. Merchants Mut. Ins. Co. *v.* Baring, 20 Wall. (U. S.) 159, 22 L. ed. 250; Pendergast *v.* The Kalorama, 10 Wall. (U. S.) 204, 19 L. ed. 941; Hazlehurst *v.* The Lulu, 10 Wall. (U. S.) 192, 19 L. ed. 906; The Grapeshot *v.* Wallerstein, 9 Wall. (U. S.) 129, 19 L. ed. 651; The Seefahrer, 143 Fed. 697; The Surprise, 129 Fed. 873, 64 C. C. A. 300; The No. 6, 114 Fed. 115, 52 C. C. A. 63; The North Pacific, 100 Fed. 490, 40 C. C. A. 510; The Cumberland, 30 Fed. 449; Murray *v.* Lazarus, 17 Fed. Cas. No. 9,962, 1 Paine 572; The Regulator, 20 Fed. Cas. No. 11,665, 1 Hask. 17; The Sarah Harris, 21 Fed. Cas. No. 12,347, 13 Blatchf. 503; Taylor *v.* The Commonwealth, 23 Fed. Cas. No. 13,787 [*reversing* 23 Fed. Cas. No. 13,788]. See 34 Cent. Dig. tit. "Maritime Liens," § 47.

Canada case supporting text see Frechette *v.* Martin, 21 Quebec Super. Ct. 417.

Extent and limits of rule.— As this doctrine of the master's authority is based upon the needs of the vessel, he may in case of such need bind the vessel even when he is operating her on shares or is under contract to furnish such supplies himself, if the furnisher has no knowledge or means of knowledge of such fact. Thomas *v.* Osborn, 19 How. (U. S.) 22, 15 L. ed. 534; The Cumberland, 30 Fed. 449; The Ellen Holgate, 30 Fed. 125; The New Champion, 17 Fed. 816; The H. B. Foster, 11 Fed. Cas. No. 6,291, 3 Ware 165; Ross *v.* The Neversink, 20 Fed. Cas. No. 12,079 [*affirmed* in 18 Fed. Cas. No. 10,133, 5 Blatchf. 539]. In fact some cases hold that the vessel is bound, even where the furnisher knew of such agreement, but this is hardly consistent with the rule as to vessels under charter, to be discussed subsequently. The Monsoon, 17 Fed. Cas. No. 9,716, 1 Sprague 37. The true rule is well expressed in The Columbus, 6 Fed. Cas. No. 3,044, 5 Sawy. 487. See also Vose *v.* Cockroft, 45 Barb. (N. Y.) 58 [*affirmed* in 44 N. Y. 415]. This implied power of the master, however, is limited by the usage of trade and the ship's present necessities. The Paragon, 18 Fed.

(B) *Necessity For Repairs or Supplies* — (1) PRESUMPTION OF. When the vessel is in a foreign port and the supplies and repairs are of a character used in the ordinary navigation of the vessel, and are ordered by the master, the presumption is that they are necessary.[33] In this connection the word "necessary" is not used in the stricter sense of "essential." It merely means "fit" or "proper." Whatever a prudent owner would order if present is necessary in this sense.[34] If the supplies or repairs are apparently reasonable and proper, it is sufficient. They need not be absolutely indispensable.[35]

(2) PRESUMPTION REBUTTED. But when the circumstances themselves are sufficient to negative the real or apparent necessity for the repairs or supplies, the furnisher is chargeable with notice, and acquires no implied lien even for articles ordered by the master.[36]

Cas. No. 10,708, 1 Ware 326; The Phebe, 19 Fed. Cas. No. 11,064, 1 Ware 265; The Woodland, 30 Fed. Cas. No. 17,976, 7 Ben. 110 [*affirmed* in 30 Fed. Cas. No. 17,977, 14 Blatchf. 499 (*affirmed* in 104 U. S. 180, 26 L. ed. 705)]. Hence he cannot bind the vessel for services previously rendered. The Hattie M. Bain, 20 Fed. 389. A lien does not arise under such usage for valuables deposited by a ship-carpenter with the master while the carpenter is working on the ship, the custody of such articles not being one of the master's duties. Smith *v.* The Royal George, 22 Fed. Cas. No. 13,102, 1 Woods 290.

If he is master de facto, although not de jure, he can bind the vessel. The Sarah Harris, 21 Fed. Cas. No. 12,347, 13 Blatchf. 503; The Lehigh *v.* Knox, 12 Mo. 508. But the furnisher must satisfy himself that the person holding himself out as master is so in fact. Mannie *v.* The H. C. Grady, 85 Fed. 239; The Hamilton Morton, 11 Fed. Cas. No. 5,992, Brown Adm. 40.

The fact that he is a part-owner or charterer does not defeat his power. Thomas *v.* Osborn, 19 How. (U. S.) 22, 15 L. ed. 534; Revens *v.* Lewis, 20 Fed. Cas. No. 11,711, 2 Paine 202.

33. Pendergast *v.* The Kalorama, 10 Wall. (U. S.) 204, 19 L. ed. 941; The Surprise, 129 Fed. 873, 64 C. C. A. 300; Cuddy *v.* Clement, 113 Fed. 454, 51 C. C. A. 288; The Bertha M. Miller, 79 Fed. 365, 24 C. C. A. 641; The Philadelphia, 75 Fed. 684, 21 C. C. A. 501; The Alvira, 63 Fed. 144; The Bellevue, 47 Fed. 86; The H. B. Foster, 11 Fed. Cas. No. 6,291, 3 Ware 165. See 34 Cent. Dig. tit. "Martime Liens," § 11.

Burden of proof.— Hence, as there is a presumption of a lien under such circumstances, the burden would be on the party disputing it to show that the vessel was not bound, or that personal credit was intended; but it is a question of fact. The Gracie May, 72 Fed. 283, 18 C. C. A. 559; The Havana, 54 Fed. 201; The Gen. Meade, 20 Fed. 923; The George T. Kemp, 10 Fed. Cas. No. 5,341, 2 Lowell 477; Harney *v.* The Sydney L. Wright, 11 Fed. Cas. No. 6,082*a*, 5 Hughes 474; Jones *v.* The Ratler, 13 Fed. Cas. No. 7,490, Taney 456; Kelly *v.* The Pittsburgh, 14 Fed. Cas. No. 7,674; The Native, 17 Fed. Cas. No. 10,054, 14 Blatchf. 34; The Neversink, 18 Fed. Cas. No. 10,133, 5 Blatchf. 539; The Prospect, 20 Fed. Cas. No. 11,443, 3 Blatchf. 526.

34. Pendergast *v.* The Kalorama, 10 Wall. (U. S.) 204, 19 L. ed. 941; Hazlehurst *v.* The Lulu, 10 Wall. (U. S.) 192, 19 L. ed. 906; The Grapeshot *v.* Wallerstein, 9 Wall. (U. S.) 129, 19 L. ed. 651 [*limiting* and *explaining* Pratt *v.* Reed, 19 How. (U. S.) 359, 15 L. ed. 660; Thomas *v.* Osborn, 19 How. (U. S.) 22, 15 L. ed. 534]; The Ella, 84 Fed. 471; Boyce *v.* The Patapsco, 3 Fed. Cas. No. 1,744 [*affirmed* in 13 Wall. (U. S.) 329, 20 L. ed. 696]; The Riga, L. R. 3 A. & E. 516, 1 Aspin. 246, 41 L. J. Adm. 39, 26 L. T. Rep. N. S. 202, 20 Wkly. Rep. 927; Webster *v.* Seekamp, 4 B. & Ald. 352, 23 Rev. Rep. 307, 6 E. C. L. 515. See also *supra*, VI, B, 2, d.

35. The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228; The H. B. Foster, 11 Fed. Cas. No. 6,291, 3 Ware 165; The St. Joseph, 21 Fed. Cas. No. 12,229, Brown Adm. 202 (discussing the difference between the necessity required to sustain an express hypothecation by bottomry, and the less stringent rule as to the implied lien for supplies and repairs); Holcroft *v.* Halbert, 16 Ind. 256; United Ins. Co. *v.* Scott, 1 Johns. (N. Y.) 106. In The Mary F. Chisholm, 133 Fed. 598, Judge Hale, construing the Maine statute, but on reasoning equally applicable to liens on foreign vessels, held that the vessel was bound for supplies of food ordered by the master in good faith, although articles of the nature of luxuries were included.

A more stringent rule was laid down in The Nebraska, 61 Fed. 514 [*affirmed* in 69 Fed. 1009, 17 C. C. A. 94], contemplating the existence of stress or necessity. This is hardly consistent with the cases cited in the previous note, and was not necessary to the decision, as the lien was sustained under a state statute.

36. Hence where the master bought groceries much beyond the vessel's needs, which fact was patent to the furnishers, the vessel was not bound, although the master represented that the articles were for her use. Morton *v.* Day, 6 La. Ann. 762. Nor can he bind the owners for goods bought by him to sell again for profit. Heath *v.* Vaught, 16 La. 515. So, where a party sold a mast for a vessel, making no inquiry whether it was needed, and in fact another had already been ordered and paid for, he acquired no lien. The Eledona,

(c) *Necessity For Credit*—(1) PRESUMPTION OF. When the repairs or supplies are necessary, as defined in the previous discussion, and are ordered by the master in a foreign port, a necessity for credit is presumed, where there is nothing to charge the materialman with actual or constructive knowledge that the master has other available sources of credit; and in such case it is also presumed that the credit is given to the vessel, and the implied lien therefore arises in favor of the materialman.[37] But as the basis of the lien is a credit to the vessel, it must appear, either as a matter of proof or as a presumption of law from the circumtances above named, that credit was actually intended to be given to the vessel.[38]

(2) PRESUMPTION REBUTTED. But if the materialman has knowledge or reasonable means of knowledge that the master has other available funds or sources of credit, or that the vessel owner has made independent arrangements to supply necessary funds for the vessel's purposes, the presumption of necessity for credit and that there was a credit to the ship is rebutted, and the materialman acquires no lien.[39] The act of a materialman in attempting to bind the vessel under

8 Fed. Cas. No. 4,340, 2 Ben. 31 [*affirmed* in 8 Fed. Cas. No. 4,341, 10 Blatchf. 11]. In The Sappho, 89 Fed. 366, Judge Brawley held that the fact that a vessel is out of commission is some notice to the materialman that the master's powers are limited. This case was reversed (94 Fed. 545, 36 C. C. A. 395), but on the ground that the owner had subsequently ratified the master's acts. See also Gillingham *v.* Charleston Tow-Boat, etc., Co., 40 Fed. 649.

Where the lien claimant knowns the limitations of the master's authority, he of course acquires no lien. Mannie *v.* The H. C. Grady, 85 Fed. 239; The Esteban de Antunano, 31 Fed. 920; The Woodland, 30 Fed. Cas. No. 17,976, 7 Ben. 110 [*affirmed* in 30 Fed. Cas. No. 17,977, 14 Blatchf. 499 (*affirmed* in 104 U. S. 180, 26 L. ed. 705)].

When vessel in legal custody.— Under this principle there is no lien on a vessel for supplies or materials furnished while she is in legal custody. Such seizure revokes the master's authority and ends the apparent necessity. All parties dealing with a vessel in such custody have actual or constructive notice of the fact from the attachments and other notices required to be given by the rules of court. The Elexena, 53 Fed. 359; The Augustine Kobbe, 37 Fed. 702; The Esteban de Antunano, 31 Fed. 920. But the owner can by express contract bind the vessel while in custody, subject to the rights of the parties to the suit. The Witch Queen, 30 Fed. Cas. No. 17,915, 3 Sawy. 17. But if the vessel is only formally arrested and there is no keeper aboard or any other indication of her being under arrest, any materialman acting in ignorance of such arrest will obtain a lien. The Young America, 30 Fed. 789; The Sultana, 23 Fed. Cas. No. 13,603, Brown Adm. 35. If she is allowed to operate while under arrest, and the materialman knows of her arrest, his claim is postponed to those in suit. The Grapeshot, 22 Fed. 123. The marshal has no authority to bind a vessel while under arrest. Hoffman *v.* The Nebraska, 61 Fed. 514; The Sultana, *supra*. The proper practice under such circumstances is to apply to court for an order authorizing such work or supplies as are necessary for the preservation or proper custody of the vessel.

37. The Valencia *v.* Ziegler, 165 U. S. 264, 17 S. Ct. 323, 41 L. ed. 710; The Kate, 164 U. S. 458, 17 S. Ct. 135, 41 L. ed. 512; The H. C. Yaeger, 1 Fed. 285, 1 McCrary 67; The Emily B. Souder *v.* Pritchard, 17 Wall. (U. S.) 666, 21 L. ed. 683; Pendergast *v.* The Kalorama, 10 Wall. (U. S.) 204, 19 L. ed. 941; Hazlehurst *v.* The Lulu, 10 Wall. (U. S.) 192, 19 L. ed. 906; The Grapeshot *v.* Wallerstein, 9 Wall. (U. S.) 129, 19 L. ed. 651; The Wyandotte, 136 Fed. 470 [*affirmed* in 145 Fed. 321, 75 C. C. A. 117]; The Kendal, 56 Fed. 237; The Now Then, 55 Fed. 523, 5 C. C. A. 206 [*affirming* 50 Fed. 944]; The Mattie May, 47 Fed. 69; The Solis, 35 Fed. 545; The Comfort, 25 Fed. 158; The Acme, 1 Fed. Cas. No. 28, 7 Blatchf. 366; The A. R. Dunlap, 1 Fed. Cas. No. 513, 1 Lowell 350; The H. B. Foster, 11 Fed. Cas. No. 6,291, 3 Ware 165; The Native, 17 Fed. Cas. No. 10,054, 14 Blatchf. 34; The Plymouth Rock, 19 Fed. Cas. No. 11,236, 9 Ben. 79; Taylor *v.* The Commonwealth, 23 Fed. Cas. No. 13,787 [*reversing* 23 Fed. Cas. No. 13,788]. See 34 Cent. Dig. tit. "Maritime Liens," § 12.

This presumption is not rebutted by evidence that the owners had made other arrangements to supply funds, when there was nothing to show that their arrangements were effective. The Kendal, 56 Fed. 237.

38. The Advance, 60 Fed. 766; The Thomas Fletcher, 24 Fed. 375; Boyce *v.* The Patapsco, 3 Fed. Cas. No. 1,744 [*affirmed* in 13 Wall. 329, 20 L. ed. 696]; The Lulu, 15 Fed. Cas. No. 8,604, 1 Abb. 191 [*reversed* on the facts in 10 Wall. 192, 19 L. ed. 906]; The Neversink, 18 Fed. Cas. No. 10,133, 5 Blatchf. 539; Phelps *v.* The Camilla, 19 Fed. Cas. No. 11,073, Taney 400; The Regulator, 20 Fed. Cas. No. 11,665, 1 Hask. 17; The Transit, 24 Fed. Cas. No. 14,139, 4 Ben. 567.

39. Hence where a fishing vessel came in with a large catch of fish for sale, the materialman, who was familiar with the business, was held chargeable with knowledge that this furnished sufficient funds for the vessel's needs; and he was denied a lien for a small supply bill. The Bertha M. Miller, 79

circumstances showing the master's lack of authority and the possession of necessary funds or sources of credit is condemned by the courts as a connivance with the master in a breach of his trust, and as an act of bad faith.[40] The presumption that credit was actually given to the vessel may be rebutted by evidence to the contrary.[41]

(D) *When Act of Crew Considered Master's Act.* It is not necessary that the supplies or materials be ordered by the master in person. If they are ordered by other members of the crew for their respective departments, with the knowledge or acquiescence of the master, they will be treated as ordered by the master.[42]

(II) *As to Domestic Vessels.* The general rule as to the master's power to bind domestic vessels under state statutes is based on and assimilated to his powers in relation to foreign vessels, although a lesser necessity for credit exists. If the owner is not in the port where the vessel is at the time, his powers are about as

Fed. 365, 24 C. C. A. 641. This seems to the author rather too rigid. The proceeds of the fish sold may have been necessary to pay the crew's wages or older liens. The presumption from the necessity for the supplies being that there was a necessity for credit, the burden of proving the contrary is on the party denying the lien. To hold the lien claimant to the requirement of satisfying himself how the vessel's money is spent before he can sustain a lien is to impose an extremely difficult condition and impair greatly the pledging of the ship as a source of credit. See also Thomas *v.* Osborn, 19 How. (U. S.) 22, 15 L. ed. 534; Stephenson *v.* The Francis, 21 Fed. 715; Phelps *v.* The Camilla, 19 Fed. Cas. No. 11,073, Taney 400; Sutherland *v.* The Lady Maunsel, 23 Fed. Cas. No. 13,642; The Washington Irving, 29 Fed. Cas. No. 17,244, 2 Ben. 318; Harned *v.* Churchman, 4 La. Ann. 310, 50 Am. Dec. 573.

The burden is on the materialman to make some inquiry. The Suliote, 23 Fed. 919; The Lady Franklin, 14 Fed. Cas. No. 7,982, 1 Biss. 557.

When it appears that some other person than the master has been placed by the owner in charge of the ship's business in port, with the necessary funds, or that the owner himself is present and that the materialman knew this or could have easily ascertained it, the presumption of necessity for credit is rebutted. The Jeanie Landles, 17 Fed. 91, 9 Sawy. 102; The New Brunswick, 125 Fed. 567 [*affirmed* in 129 Fed. 893, 64 C. C. A. 325]; Berwind *v.* Schultz, 25 Fed. 912 [*reversed* on the facts in 28 Fed. 110]; The Suliote, 23 Fed. 919; The Joseph Cunard, 13 Fed. Cas. No. 7,535, Olcott 120; The Metropolis, 17 Fed. Cas. No. 9,502, 8 Ben. 19.

40. The Valencia *v.* Ziegler, 165 U. S. 264, 17 S. Ct. 323, 41 L. ed. 710; The Kate, 164 U. S. 458, 17 S. Ct. 135, 41 L. ed. 512; Merchants' Mut. Ins. Co. *v.* Baring, 20 Wall. (U. S.) 159, 22 L. ed. 250; The Emily B. Souder *v.* Pritchard, 17 Wall. (U. S.) 666, 21 L. ed. 683; The Lulu, 10 Wall. (U. S.) 192, 19 L. ed. 906; Thomas *v.* Osborn, 19 How. (U. S.) 22, 15 L. ed. 534; The Sarah Starr, 21 Fed. Cas. No. 12,354, 1 Sprague 453.

41. The Grand Republic, 138 Fed. 615; The Advance, 72 Fed. 793, 19 C. C. A. 194. As where it appears that the materialman expressly agreed to look to the credit of the owner or master. The Amstel, 1 Fed. Cas. No. 339, 1 Blatchf. & H. 215.

But the burden is on defendant to show this. The Alvira, 63 Fed. 144. See *supra*, VII, B, 4, a, (I), (B), (C).

The fact that the charge on the materialman's books is against the vessel by name is a circumstance showing an intent to look to the vessel, but not a strong one as such entries are self-serving. Prince *v.* Ogdensburg Transit Co., 107 Fed. 978 [*affirmed* in 113 Fed. 454, 51 C. C. A. 373]; The Sappho, 89 Fed. 366 [*reversed* in 94 Fed. 545, 36 C. C. A. 395, but not on this point]; The Ella, 84 Fed. 471; The Alvira, 63 Fed. 144; The Samuel Marshall, 54 Fed. 396, 4 C. C. A. 385; The Mary Morgan, 28 Fed. 196; The Suliote, 23 Fed. 919; The Francis, 21 Fed. 715; The Mary Bell, 16 Fed. Cas. No. 9,199, 1 Sawy. 135. On the other hand the fact that the charge is in terms against the owner and not against the vessel, while evidence against the intent to credit the vessel may be explained by other circumstances, and is not conclusive against the lien. The Patapsco *v.* Boyce, 13 Wall. (U. S.) 329, 20 L. ed. 696; The Alvira, *supra*; The Grand Republic, 138 Fed. 615; The Acme, 1 Fed. Cas. No. 28, 7 Blatchf. 366; The Sam Slick, 21 Fed. Cas. No. 12,283, 1 Sprague 289.

42. In view of the size of modern vessels, and the multitudinous duties of a master, this is essential to the transaction of the vessel's business. See cases cited *infra*, this note.

Clerk.— Vessel is bound for a loan for ship's purposes by the clerk, with the master's assent, but not without his knowledge, such power not being incident to the office of clerk. McAllister *v.* The Sam Kirkman, 15 Fed. Cas. No. 8,658, 1 Bond 369.

Engineer.— The vessel is bound for work ordered by the engineer in his department, with the master's knowledge or acquiescence. The Tiger, 89 Fed. 384; The Philadelphia, 75 Fed. 684, 21 C. C. A. 501; Voorhees *v.* The Eureka, 14 Mo. 56.

Mate.— Vessel is bound for work ordered by the mate while in charge during the master's sickness. The E. A. Baisly, 13 Fed. 703.

Superintendent.— Vessel is bound for a marine pump ordered by the superintendent

discussed above in relation to foreign vessels.[43] But no lien arises unless the supplies were actually furnished on the credit of the vessel, despite the broad language of state statutes.[44]

of the line to which the vessel belonged, in the presence of the master, although she was actually being operated by charterers. The Alfred Dunois, 76 Fed. 586.

Steward.— It is quite common to hold the vessel liable for the acts of the steward in his department. The Sylvan Stream, 35 Fed. 314; The Metropolis, 17 Fed. Cas. No. 9,503, 9 Ben. 83; Grisel *v.* Olivia, 6 La. Ann. 461; Voorhees *v.* The Eureka, 14 Mo. 56.

If such subordinates, however, have not been held out by the master or owner as having such power, the vessel will not be bound. Kretzmer *v.* The William A. Levering, 35 Fed. 783; Ernst *v.* The Brooklyn, 22 Wis. 649.

43. See *supra*, VII, B, 4, a, (I).

That the rule is in general the same as to foreign and domestic vessels see The Sappho, 89 Fed. 366 [*reversed* in 94 Fed. 545, 36 C. C. A. 395, but not on this point]; The Alvira, 63 Fed. 144; The Templar, 59 Fed. 203; Bovard *v.* The Mayflower, 39 Fed. 41; The Julia L. Sherwood, 14 Fed. 590; The S. M. Whipple, 14 Fed. 354; The Abby Whitman, 1 Fed. Cas. No. 15; Taylor *v.* The Commonwealth, 23 Fed. Cas. No. 13,787.

44. The scope of state statutes is limited, and they cannot change the basic principles of maritime law. One of these is that there is no lien unless the credit was intended to be given to the vessel. Hence the better authority reads this qualification of the rule into the state statutes, no matter how broadly they may be expressed. Their effect is merely to change the presumption of the general maritime law, as expounded by the English and American courts against the presumption of credit to a domestic vessel into a presumption in favor of such credit; that is, to assimilate the domestic lien to the foreign lien. The Westover, 76 Fed. 381; The Young Mechanic, 30 Fed. Cas. No. 18,180, 2 Curt. 404. The California statute was so construed by the circuit court of appeals for that circuit in Lighters Nos. 27 & 28, 57 Fed. 664, 6 C. C. A. 493. See also The Columbus, 6 Fed. Cas. No. 3,044, 5 Sawy. 487. So with the Michigan act by the circuit court of appeals for that circuit in The Samuel Marshall, 54 Fed. 396, 4 C. C. A. 385 [*affirming* 49 Fed. 754, and *disapproving* an earlier ruling to the contrary by Judge Hammond in The Illinois, 12 Fed. Cas. No. 7,005, 2 Flipp. 383]. The New Jersey law was so construed by the New York circuit court of appeals in The Electron, 74 Fed. 689, 21 C. C. A. 12. Also by Judge Wales in The Howard, 29 Fed. 604, and very recently by the New York circuit court of appeals in The Golden Rod, 151 Fed. 8. So with the New York statute. The Advance, 60 Fed. 766 [*affirmed* in 71 Fed. 987, 18 C. C. A. 404]; The Kate, 56 Fed. 614 [*affirmed* in 164 U. S. 458, 17 S. Ct. 135, 41 L. ed. 512]; Van Pelt *v.* The Ohio, 28 Fed. Cas. No. 16,870*a*. On the other hand in The Iris, 100 Fed. 104, 40 C. C. A. 301 [*reversing* 88 Fed. 902], the circuit court of appeals for the Massachusetts circuit held that a state could legislate over domestic property, and that the Massachusetts act could and did give a lien on a domestic vessel regardless of the fact whether there was a mutual intention to look to the vessel and this has been followed very recently by the circuit court of appeals for the third circuit in The Vigilant, 151 Fed. 747. So in the Del Norte, 90 Fed. 506, Judge Hanford held that the statute of Washington was intended to create a lien regardless of the question of credit to the vessel and even on the order of a person (the charterer) not recognized by the general admiralty law as an agent of the vessel. In McRae *v.* Bowers Dredging Co., 86 Fed. 344, he had held under the Washington statute that parties doing work and furnishing supplies to several vessels could hold each vessel for its several part, if they could apportion their work and supplies by proper proof. The fallacy of these cases is that they assume that the right of a state to legislate generally over property under its jurisdiction and its right to create a maritime lien are coextensive. But a maritime lien imports *ex vi termini* a credit to the vessel. Whatever may be the power of a state to create other kinds of liens, it cannot in the nature of things create a credit to the vessel where the parties show that they did not credit the vessel; for that is a contradiction in terms. Hence in The Kate, 164 U. S. 458, 17 S. Ct. 135, 41 L. ed. 512, the New York statute which, as literally read, authorized the charterer to bind the vessel, was construed to contemplate the general limitations imposed by the maritime law as a condition. And in The Roanoke, 189 U. S. 185, 23 S. Ct. 491, 47 L. ed. 770, it was held that a state statute could not give a person unknown to the maritime law as an agent of a vessel (a contractor) the right to create a secret lien upon the ship. The vessel in the case was foreign, but the decision seems broad enough to cover all.

A lien not maritime and enforceable in the state courts may, however, be created by the language of the state statute.

Indiana.— Sinton *v.* The R. R. Roberts, 46 Ind. 476.

Kentucky.— Stephens *v.* Ward, 11 B. Mon. 337.

Massachusetts.— Young *v.* The Orpheus, 119 Mass. 179.

Michigan.— Delaney Forge, etc., Co. *v.* The Winnebago, 142 Mich. 84, 105 N. W. 527.

New York.— King *v.* The Greenway, 71 N. Y. 413; Nott *v.* Lansing, 57 N. Y. 112; Phillips *v.* Wright, 5 Sandf. 342.

Ohio.— Dowell *v.* Goode, 25 Ohio St. 390; Shailer *v.* Hanlon, 26 Ohio Cir. Ct. 120.

Wisconsin.— Thorsen *v.* The J. B. Martin, 26 Wis. 488, 7 Am. Rep. 91.

b. The Owner — (I) *As to Foreign Vessels* — (A) *Implied Liens.* The basic principle of the lien for necessaries is that it is an implied lien, based upon the needs of the vessel as a stranger in a foreign port and the powers of the master as agent *ex necessitate rei* for those interested in her to supply those needs, in order to enable her to carry out the purposes of her creation. But such powers of an agent cease when his principal is present. The presence of the owner in other words negatives the implied necessity for credit, as he is presumed in the absence of evidence or peculiar circumstances to be in possession of the funds to supply the vessel's needs, and hence the presumption of a lien is rebutted. This is all that Mr. Justice Johnson means when he says that it is not in the power of any one but the shipmaster, not the owner himself, to give these implied liens on the vessel.[45] Hence as to foreign vessels the presumption is against a lien (that is to say, the implied lien does not arise) when the necessaries are contracted for by the owner and nothing is said by the parties about pledging the vessel, and no pledge is inferred either from previous course of dealing or other special circumstances. The mere ordering of the necessaries in such case does not give rise to the implied lien.[46]

(B) *Express Liens.* But this doctrine does not mean that the owner cannot agree to pledge his vessel for a maritime lien, if he chooses. It merely means that he will be presumed not to have done so, in the absence of evidence of such intent. In England, as has been seen, he can only do so by a formal agreement in the nature of a bottomry bond.[47] In America he can pledge his vessel for a maritime lien not only by a bottomry bond but by an ordinary contract with the materialman, whether that contract is express or proven by previous course of dealing, conduct, or circumstances showing a common understanding or meeting of minds between the materialman and the owner.[48] But even the owner can only create a maritime lien on his vessel when there is a maritime necessity therefor. However extensive his right to create ordinary liens on his property, they would not be maritime if this requisite is lacking.[49] But this understanding must

45. The St. Jago de Cuba, 9 Wheat. (U. S.) 409, 417, 6 L. ed. 122.

46. The Reed Bros. Dredge No. 1, 135 Fed. 867; The Surprise, 129 Fed. 873, 64 C. C. A. 300; Whitcomb *v.* Metropolitan Coal Co., 122 Fed. 941, 59 C. C. A. 465; Alaska, etc., Steamship Co. *v.* Chamberlain, 116 Fed. 600, 54 C. C. A. 56; The John S. Parsons, 110 Fed. 994; Prince *v.* Ogdensburg Transit Co., 107 Fed. 978 [*affirmed* in 113 Fed. 454, 51 C. C. A. 288]; The George Farwell, 103 Fed. 882, 43 C. C. A. 373; The Roanoke, 101 Fed. 298 [*affirmed* in 107 Fed. 743, 46 C. C. A. 618]; The Saratoga, 100 Fed. 480; The Jennie Middleton, 94 Fed. 683; The Now Then, 50 Fed. 944 [*affirmed* in 55 Fed. 523, 5 C. C. A. 206]; The James Farrell, 36 Fed. 500; The Mary Morgan, 28 Fed. 196; The Kingston, 23 Fed. 200; Stephenson *v.* The Francis, 21 Fed. 715; Gardner *v.* The Rosedale, 9 Fed. Cas. No. 5,235; The Regulator, 20 Fed. Cas. No. 11,665, 1 Hask. 17; Moore *v.* Lincoln Park, etc., Consol. Co., 196 Pa. St. 519, 46 Atl. 857. See 34 Cent. Dig. tit. "Maritime Liens," § 45. In The Eclipse, 8 Fed. Cas. No. 4,268, 3 Biss. 99, it is assumed from the charging of the supplies to the vessel by name that the implied lien arises, although they were ordered by the owner. The assumption is unsound, and is inconsistent with the previous opinion of the same judge in The Maitland, 16 Fed. Cas. No. 8,979, 2 Biss. 201.

47. See *supra*, III, B, 2, f, (III).

48. The Valencia *v.* Ziegler, 165 U. S. 270, 17 S. Ct. 323, 41 L. ed. 710; Pendergast *v.* The Kalorama, 10 Wall. (U. S.) 204, 19 L. ed. 941; The Worthington, 133 Fed. 725, 66 C. C. A. 555; The Ella, 84 Fed. 471; The Advance, 63 Fed. 726, 72 Fed. 793, 19 C. C. A. 194, 73 Fed. 503, 19 C. C. A. 541, 74 Fed. 256; The Stroma, 53 Fed. 281, 3 C. C. A. 530; The Mary Morgan, 28 Fed. 196; The Union Express, 24 Fed. Cas. No. 14,364, Brown Adm. 537. The question whether the parties mutually intended a lien is one of fact, which may be decided on circumstantial evidence tending to show such intention. The known insolvency of the owner is a circumstance going far to sustain the lien. The Patapsco *v.* Boyce, 13 Wall. (U. S.) 329, 20 L. ed. 696; The Newport, 107 Fed. 744, 46 C. C. A. 399; The Marion S. Harris, 85 Fed. 798, 29 C. C. A. 428; The James Guy, 13 Fed. Cas. No. 7,195, 1 Ben. 112 [*affirmed* in 13 Fed. Cas. No. 7,196, 5 Blatchf. 496 (*affirmed* in 9 Wall. 758, 19 L. ed. 710)]. See *supra*, VII, B, 4, a, (I), (B), (C).

49. The Gordon Campbell, 131 Fed. 963; The Surprise, 129 Fed. 873, 64 C. C. A. 300; Cuddy *v.* Clement, 113 Fed. 454, 51 C. C. A. 288.

Estoppel.— Where the owner himself secures an advance of money for the ship on an express agreement for a lien, and subse-

be mutual. The fact that the materialman supposed he had a lien does not alter the legal presumption against it.[50]

(II) *As to Domestic Vessels*— (A) *Where There Is a Local Statute.* The better opinion is that here also the mere furnishing of the supplies does not create a lien, but that the broad language of local statutes purporting to create a lien must be subject to the further condition that credit was actually given to the vessel; and the fact that the owner ordered the supplies does not obviate the necessity for such proof.[51]

(B) *Where There Is No Local Statute.* As the effect of a local statute is to rebut the presumption that credit was not given to the vessel, it would seem that the owner can by express contract create a lien for a maritime cause of action, on a domestic vessel even where there is no local statute. And although there is no remedy given by the local law for its enforcement, it is nevertheless enforceable in any other forum where such remedy exists; for a maritime lien follows a vessel around the world, and a lien may arise, although no remedy is given for its enforcement.[52] In the federal courts such a remedy would exist to enforce a maritime lien unless expressly forbidden. By the act of congress of August 23, 1842,[53] power was given the supreme court to regulate by rule the practice of the admiralty courts. Accordingly at the December term, 1844, the admiralty rules of practice were promulgated. No. 12 of these rules gave a right of procedure *in rem* for supplies to a foreign ship and denied it for supplies to a domestic ship unless given by the local law. But this was construed merely to adopt the then

quently diverts it, he is estopped, as between himself and the lender, from denying that it was necessary. The Worthington, 133 Fed. 725, 66 C. C. A. 555.

50. The Valencia *v.* Ziegler, 165 U. S. 264, 17 S. Ct. 323, 41 L. ed. 710; Cuddy *v.* Clement, 115 Fed. 301, 53 C. C. A. 94; The Iris, 100 Fed. 104, 40 C. C. A. 301 [*affirmed* in 101 Fed. 1006, 41 C. C. A. 679 (*affirmed* in 179 U. S. 682, 21 S. Ct. 915, 45 L. ed. 384)]; The Havana, 87 Fed. 487 [*affirmed* in 92 Fed. 1007, 35 C. C. A. 148]; The Rosalie, 75 Fed. 29.

The fact that the necessaries were charged against the vessel on the materialman's books is but a circumstance showing an intent to credit the vessel and is of itself insufficient to create the lien. Alaska, etc., Steamship Co. *v.* Chamberlain, 116 Fed. 600, 54 C. C. A. 56; The Havana, 87 Fed. 487 [*affirmed* in 92 Fed. 1007, 35 C. C. A. 148]; The Alvira, 63 Fed. 144; The Samuel Marshall, 54 Fed. 396, 4 C. C. A. 385; The Stroma, 53 Fed. 281, 3 C. C. A. 530. See *supra*, VII, B, 4, a, (I), (B), (C).

Distinguished from owner's other powers.— This discussion as to the nature of the maritime lien when the necessaries are ordered by the owner is not to be confounded with the owner's power to create a common-law possessory lien or his power to bind the other owners personally for necessaries. The Two Marys, 16 Fed. 697; McCready *v.* Thorn, 51 N. Y. 454; Stedman *v.* Feidler, 20 N. Y. 437.

51. See *supra*, VII, B, 4, a, (II), text and note 44, where the cases are reviewed.

The Alabama statute is construed to give a lien only when the work was done on the faith of the lien. Donald *v.* Hewitt, 33 Ala. 534, 73 Am. Dec. 431.

52. The Champion, 5 Fed. Cas. No. 2,583, Brown Adm. 520; The Union Express, 24 Fed. Cas. No. 14,364, Brown Adm. 537. The power to enforce a maritime lien in any forum is well discussed by Mr. Justice Clifford in The Maggie Hammond *v.* Morland, 9 Wall. (U. S.) 435, 19 L. ed. 772. A careful reading of the authorities will show that the supreme court in denying a lien unless there is a local statute was alluding simply to the implied lien. Thus in The General Smith, 4 Wheat. (U. S.) 438, 4 L. ed. 609, which was the first supreme court case to deny the lien on domestic vessels, Mr. Justice Story expressly says that in such case no lien is implied unless recognized by local law. So in Rodd *v.* Heartt, 21 Wall. (U. S.) 558, 22 L. ed. 654, Mr. Justice Bradley is evidently discussing the implied lien throughout. Both cases admit that the subject-matter is maritime and could at least give a right to libel *in personam*. Under the general maritime law there is no difference between foreign and domestic vessels as to supplies ordered by the owner. No implied lien arises in either case. Yet we have seen that the right of an owner to bind his vessel by express contract in case of maritime necessity in a foreign port is clear. The same reasoning allows him under similar circumstances to bind his vessel in a domestic port. His right to do so is no more dependent on a state statute than it would be for salvage, wages of seamen, or any other confessedly maritime cause of action. See a brief discussion of this question in The Underwriter, 119 Fed. 713. Even where the state gives a statutory lien, the owner can by contract create a lien depending on the contract and not on the statute. Donald *v.* Hewitt, 33 Ala. 534, 73 Am. Dec. 431.

53. 5 U. S. St. at L. 518; U. S. Rev. St. (1878) § 917 [U. S. Comp. St. (1901) p. 684].

existing law and not to establish any new rule.[54] It must have been intended to apply simply to the implied lien, not to liens expressly contracted for, as otherwise, if literally construed, it would give a right of procedure against a foreign vessel for supplies ordered by an owner independent of express contract for a lien. Yet the supreme court expressly holds that in such case no lien arises by implication, but may arise by express contract.[55] Under the same principle it could not have been intended to forbid the enforcement of a lien on a domestic vessel given by express contract. This rule was amended by the supreme court in 1859, leaving untouched the provision as to foreign vessels, but limiting the procedure against domestic vessels to a procedure *in personam*. This too must have been intended to regulate simply the implied lien and not to forbid the enforcement of express liens even on domestic vessels; for the Kalorama and Guy cases just cited[56] arose and were decided while the rule was in this form, and recognized the right of the owner to bind his vessel by express contract. This change in the rule was also declared by the supreme court to have been made on account of the conflicting and complicated provisions of the state laws. In its opinion the implied lien alone is discussed, not the right of the owner to bind his vessel by an express contract.[57] The rule remained in this form until 1872, when it was given its present form and made to read as follows: "In all suits by materialmen for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*." This change has been stated by the supreme court to have been intended simply to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens exist by law, and not to create any new lien.[58] It draws no distinction between foreign and domestic vessels in express terms, creates no liens of itself, but provides a method for the enforcement of a lien for repairs or supplies, whether that lien is implied under the general maritime law or under the provisions of a local statute, or whether it is created by an express agreement therefor.

(III) *Character of Owner's Title as Affecting Right to Bind Vessel* — (A) *As Between Owner and Builder*. The question when title passes to a ship in process of construction depends on the same principle as that which governs any other chattel. It is a question of intent. In the absence of special agreement, title does not pass until the article is completed and delivered, although payments on account have been made.[59] Hence the builder is usually the owner

54. The Circassian, 5 Fed. Cas. No. 2,720*a* [*affirmed* in 5 Fed. Cas. No. 2,726, 11 Blatchf. 472].

55. Pendergast *v.* The Kalorama, 10 Wall. (U. S.) 204, 19 L. ed. 941; The Guy, 9 Wall. (U. S.) 758, 19 L. ed. 710.

56. See *supra*, note 55.

57. The St. Lawrence, 1 Black (U. S.) 522, 17 L. ed. 180.

58. Rodd *v.* Heartt, 21 Wall. (U. S.) 558, 22 L. ed. 654. See also The Circassian, 5 Fed. Cas. No. 2,720*a*, for a history of the 12th rule and its various changes.

59. Clarkson *v.* Stevens, 106 U. S. 505, 1 S. Ct. 200, 27 L. ed. 139; The John B. Ketcham 2d, 97 Fed. 872, 38 C. C. A. 518. These cases review the English and American authorities and show that the *dictum* in the English cases of Woods *v.* Russell, 5 B. & Ald. 942, 24 Rev. Rep. 621, 7 E. C. L. 512, and Clark *v.* Spence, 4 A. & E. 448, 1 Harr. & W. 760, 5 L. J. K. B. 161, 6 N. & M. 399, 31 E. C. L. 206, to the effect that the mere making of part payments evidences an intent that the title should pass *pro tanto* has not been adopted in America. The question is too far beyond the domain of admiralty law to justify discussion. See also The Abby Whitman, 1 Fed. Cas. No. 15; Harbeck *v.* The Francis A. Palmer, 11 Fed. Cas. No. 6,045*a*; The Sam Slick, 21 Fed. Cas. No. 12,283, 1 Sprague 289 [*reversed* in 21 Fed. Cas. No. 12,282, 2 Curt. 480]; Edwards *v.* Elliott, 36 N. J. L. 449, 13 Am. Rep. 463 [*affirmed* in 21 Wall. (U. S.) 532, 22 L. ed. 487]; Happy *v.* Mosher, 47 Barb. (N. Y.) 501 [*reversed* on the facts in 48 N. Y. 313]; Low *v.* Austin, 25 Barb. (N. Y.) 26 [*affirmed* in 20 N. Y. 181]. The opinion of Mr. Justice Nelson in Udell *v.* The Ohio, 24 Fed. Cas. No. 14,322, implies that title passed as payments were made. But he cites no authorities and the above later cases must be considered as overruling it. See 34 Cent. Dig. tit. "Maritime Liens," § 4.

By special agreement, however, the parties may make the title pass as the work progresses, and the question whether such was the intent is a question of fact in each case depending on the language of the contract and the special circumstances. *In re* Mac-

till completion, and he alone can create liens on the vessel. But even he cannot create a maritime lien before completion, for it has already been seen that contracts relating to the original construction of a vessel are not maritime.[60]

(B) *As Between Vendor and Purchaser.* Here the principle is that the ostensible owner in possession is treated as the owner as regards parties dealing with him, and that the actual or record ownership in such case vests him with power to bind the vessel.[61] This is true, although the purchaser holds under a conditional sale and the condition is broken. Such breach does not relate back to divest liens contracted in the meanwhile.[62]

(C) *As Between Owner and Mortgagee.* This stands on practically the same footing as a conditional sale. Possession taken by the mortgagee, although under a court decree, does not divest liens contracted by the owner.[63]

c. The Charterer — (I) *Powers in General.* Where the charterer merely hires the use of a vessel, and she is manned, supplied, and operated by the owner, he is simply a freighter and no question of his right to bind the vessel for supply liens could arise. However, numerous cases have arisen under charter-parties giving the charterer the right to operate the vessel on his own account, but requiring him either expressly or impliedly to furnish necessary supplies. In such case the charterer as such has no power to bind the ship for supplies ordered by himself, where the furnisher has knowledge or reasonable means of knowledge that he is a charterer only.[64]

(II) *Presumption as to Crediting Vessel When Supplies Ordered by Charterer.* When necessaries are ordered by the charterer, the same presump-

Donald, 138 Fed. 463; The Poconoket, 67 Fed. 262 [*affirmed* in 70 Fed. 640, 17 C. C. A. 309].

60. See *supra*, VI, B, 2, c, (III).

But in such cases he can create liens under state statutes, although it is a question of construction in each case, and such liens are not maritime. Southwick *v.* Packet Boat Clyde, 6 Blackf. (Ind.) 148; Briggs *v.* A Light Boat, 7 Allen (Mass.) 287; Globe Iron Works Co. *v.* The John B. Ketcham, 100 Mich. 583, 59 N. W. 247, 43 Am. St. Rep. 464; Scull *v.* Shakespear, 75 Pa. St. 297.

Even where title passes proportionately on payments being made, the course of dealing between the parties may vest the builder with power to create liens. Low *v.* The Ship Clarence S. Bement, 2 Pa. Co. Ct. 430, 19 Wkly. Notes Cas. 153.

61. The South Portland, 100 Fed. 494, 40 C. C. A. 514; The Iris, 88 Fed. 902, 100 Fed. 104; The Shrewsbury, 69 Fed. 1017; The James H. Prentice, 36 Fed. 777; McAllister *v.* The Sam Kirkman, 15 Fed. Cas. No. 8,658, 1 Bond 369; Weaver *v.* The S. G. Owens, 29 Fed. Cas. No. 17,310, 1 Wall. Jr. 359; Webster *v.* The Andes, 18 Ohio 187.

62. The Ferax, 8 Fed. Cas. No. 4,737, 1 Sprague 180; Hawes *v.* The James Smith, 11 Fed. Cas. No. 6,238; Jackson *v.* The Julia Smith, 13 Fed. Cas. No. 7,136, Newb. Adm. 61, 6 McLean 484; The John Farron, 13 Fed. Cas. No. 7,341, 14 Blatchf. 24 [*reversing* 13 Fed. Cas. No. 7,340, 7 Ben. 53]; The Susan G. Owens, 23 Fed. Cas. No. 13,634 [*affirmed* in 29 Fed. Cas. No. 17,310, 1 Wall. Jr. 359]. The powers of a purchaser under a conditional sale are like those of a charterer, and the supply man would acquire no lien if he knew or had reasonable means of knowledge of such sale. The Golden Rod, 151 Fed. 6, 8. The H. C. Grady, 87 Fed. 232, which is in apparent conflict with the above, is probably explainable on the ground that the materialmen had actual or constructive knowledge of the purchaser's lack of authority to bind the vessel. In The Sea Witch, 34 Fed. 654, possession had not been delivered to the party contracting for the repairs, and hence the lien was disallowed on the ground that the owner had not misled the materialman by holding him out as having apparent authority.

63. The Granite State, 10 Fed. Cas. No. 5,687, 1 Sprague 277; Scott *v.* Delahunt, 65 N. Y. 128.

64. The Valencia *v.* Ziegler, 165 U. S. 264, 17 S. Ct. 323, 41 L. ed. 710; The Kate, 164 U. S. 458, 17 S. Ct. 135, 41 L. ed. 512 [*affirming* 56 Fed. 614]; The Golden Rod, 151 Fed. 6, 8; The Underwriter, 119 Fed. 713; The C. W. Moore, 107 Fed. 957; The George Dumois, 66 Fed. 353 [*reversed* in 68 Fed. 926, 15 C. C. A. 675, but the effect of the above supreme court decisions is that the district court was right]; The Pirate, 32 Fed. 486; The Norman, 28 Fed. 383 [*affirming* 6 Fed. 406]; Neill *v.* The Francis, 21 Fed. 921; Coal Company *v.* Steamship Norman, 14 Phila. (Pa.) 588. See 34 Cent. Dig. tit. "Maritime Liens," §§ 5, 38.

Canada case supporting text see The Barge David Wallace *v.* Bain, 8 Can. Exch. 205.

There are some cases holding that a charterer has power to bind the vessel, but either they turn upon special facts or must be considered as overruled. In The Lime Rock, 49 Fed. 383, the charterer was the husband of the real owner, and she accompanied him when the repairs were ordered, and did not

tion against a credit to the ship arises as if they were ordered by the owner,[65] for the charterer is at most but an owner *pro hac vice*, and supplies ordered by him are presumed to have been furnished upon his personal credit.[66]

(III) *Powers as Affected by Materialman's Knowledge of Charter.* It has been held that a vessel is not bound for necessaries ordered by the charterer, even though the materialman had no actual or constructive knowledge that the vessel was under charter. This is on the theory that the only person having any implied power to bind the vessel as against the owner is the master, that the charterer is not the agent of the owners for the purpose, and that materialmen deal with him at their peril.[67] But the preponderance of authority has only gone to the extent of holding that the vessel is not bound if the materialman had knowledge, or means of knowledge, of the fact that the vessel was under charter.[68] Actual knowledge of the charter undoubtedly defeats any claim for a lien.[69] And it is equally clear that if the materialman could ascertain the facts by inquiry, he

dissent. The India, 14 Fed. 476 [*affirmed* in 16 Fed. 262, 21 Blatchf. 268]; The City of New York, 5 Fed. Cas. No. 2,758, 3 Blatchf. 187; Harney *v.* The Sydney L. Wright, 11 Fed. Cas. No. 6,082*a*, 5 Hughes 474; and The Lucia B. Ives, 15 Fed. Cas. No. 8,590, 10 Ben. 660, are inconsistent with the later cases. In The Bombay, 38 Fed. 512 [*affirmed* in 38 Fed. 863], the supplies were ordered by the charterer. The main question discussed was whether the charter was a demise of the vessel. The court held that it was, and then held the vessel bound for the supplies, assuming that the vessel was bound if the supplies were received by the master on board, although ordered by the charterer. The materialman did not know of the charter and made no inquiries. The case was decided eight years before the Kate and Valencia cases, cited above, and is hardly consistent with them.

English and Canadian Acts.— Under the English Admiralty Act of 1861 there is no admiralty right of procedure *in rem* for necessaries, if there is an owner domiciled in England or Wales. Under the Colonial Courts Admiralty Act of 1890 and the Canada Admiralty Act of 1891, the "owner" in the English act is held to mean "registered owner," and "Canada" must be understood instead of "England or Wales." Hence an action *in rem* will not lie for goods ordered by a charterer, he not being a registered owner. The Ship Garden City, 7 Can. Exch. 34, 94.

Special agent of charterer.— This limitation of the charterer's power to bind the vessel applies with yet more force to his special agent, as such agent has no implied powers like those of the master, and persons dealing with him are put upon inquiry as to his powers. This is well settled as to supplies ordered by ship-brokers or consignees. The Burton, 84 Fed. 998; The Suliote, 23 Fed. 919; The Joseph Cunard, 13 Fed. Cas. No. 7,535, Olcott 120.

The assignee of a surety on a bond given by the charterer to the owner to perform the conditions of the charter-party, including the condition against debts for supplies, cannot assert a lien for coal furnished the vessel. The Post Steamboat Co. *v.* Loughran, 12 App. Cas. (D. C.) 430.

Even under the New York statute purporting to give a charterer power to bind the vessel, a mere prospective charterer cannot do so, especially where the materialman knew his want of power. The Catherine Whiting, 99 Fed. 445, 39 C. C. A. 592.

65. See *supra*, VII, B, 4, h.

66. Alaska, etc., Steamship Co. *v.* Chamberlain, 116 Fed. 600, 54 C. C. A. 56 [*reversing* 115 Fed. 218]; The Roanoke, 107 Fed. 743, 46 C. C. A. 618 [*affirming* 101 Fed. 298]; Franklin Consolidated Coal Co. *v.* The Curlew, 54 Fed. 899; The Samuel Marshall, 54 Fed. 396, 4 C. C. A. 385 [*affirming* 49 Fed. 754]; The Aeronaut, 36 Fed. 497; The Norman, 28 Fed. 383 [*affirming* 6 Fed. 406]; Stephenson *v.* The Francis, 21 Fed. 715; Hill *v.* The Golden Gate, 12 Fed. Cas. No. 6,492, Newb. Adm. 308. See 34 Cent. Dig. tit. "Maritime Liens," § 12. In The Robert Dollar, 115 Fed. 218, the district court held that the charterer, having obtained necessary supplies on the credit of the ship, cannot set up this violation of its contract with the owner to defeat the lien. But the court in reversing it (116 Fed. 600, 54 C. C. A. 56) held that the charterer could come in and defend the case by denying the lien. As the question at issue was whether credit was actually given to the ship or to the party ordering the supplies, it is difficult to understand why the latter cannot plead such a defense. When an owner orders supplies, he is not estopped from contending that they were ordered on his personal credit; and the charterer ought not to be subject to a more stringent rule.

67. The Norman, 28 Fed. 383 [*affirming* 6 Fed. 406].

68. The Post Steamboat Co. *v.* Loughran, 12 App. Cas. (D. C.) 430; The Valencia *v.* Ziegler, 165 U. S. 264, 17 S. Ct. 323, 41 L. ed. 710; The Kate, 164 U. S. 458, 17 S. Ct. 135, 41 L. ed. 512 [*affirming* 56 Fed. 614].

69. The Samuel Marshall, 54 Fed. 396, 4 C. C. A. 385 [*affirming* 49 Fed. 754]; The Stroma, 53 Fed. 281, 3 C. C. A. 530 [*affirming* 41 Fed. 599]; Stephenson *v.* The Francis, 21 Fed. 715; The William Cook, 12 Fed. 919;

cannot acquire a lien by shutting his eyes and forbearing from inquiry.[70] Under some circumstances the owner, by holding out the charterer as having power to bind the vessel, might be estopped from denying such right. But this question usually arises where the charterer is also the master, and turns rather upon the powers of a master than upon any question of the powers of a charterer.[71] And although the supreme court in the two recent cases[72] so often cited in this connection has carefully limited itself to the actual question before it, which involved only the powers of a charterer where the materialman had means of knowledge, it is believed that the law when necessarily presented to the court for decision will be settled against the right of a charterer to bind the vessel for supplies ordered by him and not by the master, even when the materialman is ignorant of the existence of a charter.[73]

(iv) *Charter-Party as Affecting Implied Powers of Master.* As the master has the implied power in case of maritime necessity to bind the vessel under the conditions heretofore discussed,[74] it follows that, when the supplies are ordered by him and not by the charterer, and the materialman has no actual or constructive knowledge that there is any limitation upon his powers as master, the vessel is bound. But, if the materialman has such knowledge or means of knowledge, the implied powers of the master cease, and the attempt of a materialman to create a lien upon the vessel originating in such fraud of the master upon the owner or in such breach of his duty to the owner would not be upheld by the courts.[75]

(v) *Charterer's Power Under Local Statutes.* The scope of state statutes in shifting the presumption of credit and the method in which they are construed have already been discussed in connection with the power of the master to bind domestic vessels. It has been shown that under the weight of authority these statutes are not construed literally, but the general limitations of marine law must be considered as qualifying them, as for instance the principle that there must have been an actual credit to the vessel.[76] Under the same principle, as a

Robinson *v.* The Medora, 20 Fed. Cas. No. 11,959*a*; Swift *v.* The Albus, 23 Fed. Cas. No. 13,694.

70. The Valencia *v.* Ziegler, 165 U. S. 264, 17 S. Ct. 323, 41 L. ed. 710; The Kate, 164 U. S. 458, 17 S. Ct. 135, 41 L. ed. 512 [*affirming* 56 Fed. 614]. In The Post Steamboat Co. *v.* Loughran, 12 App. Cas. (D. C.) 430, where a bank advanced money to a corporation which chartered the vessel, and the treasurer of the corporation was the cashier of the bank, it was held that his knowledge was the knowledge of the bank and hence that the latter had no lien for its advances.

Knowledge of the existence of a charter puts on the materialman the burden of ascertaining its terms, and whether the charterer or his agents have power to bind the ship. The Stroma, 53 Fed. 281, 3 C. C. A. 530 [*affirming* 41 Fed. 599]; Neill *v.* The Francis, 21 Fed. 921; Beinecke *v.* The Secret, 3 Fed. 665.

71. The Cumberland, 30 Fed. 449. See *supra*, VII, B, 4, a, (I), (A), note 32.

72. See The Valencia *v.* Ziegler, 165 U. S. 264, 17 S. Ct. 323, 41 L. ed. 710; The Kate, 164 U. S. 458, 17 S. Ct. 135, 41 L. ed. 512 [*affirming* 56 Fed. 614].

73. This for the reason that the master is the only person known to marine law as having power to create implied liens. The very fact that supplies are ordered by any one else makes a *prima facie* case against an intent to charge the vessel and ought to put the materialman on inquiry as to the extent of such person's powers.

74. See *supra*, VII, B, 4, a, (I), (A).

75. See *supra*, VII, B, 4, a; The Valencia *v.* Ziegler, 165 U. S. 264, 17 S. Ct. 323, 41 L. ed. 710; The Kate, 164 U. S. 458, 17 S. Ct. 135, 41 L. ed. 512; The S. M. Whipple, 14 Fed. 354, 7 Sawy. 69; The Underwriter, 119 Fed. 713; The Cumberland, 30 Fed. 449. The intimation in The William Cook, 12 Fed. 919, that the master in a foreign port in distress may create a lien contrary to the known terms of a charter-party limiting his powers was not necessary to the decision and cannot be reconciled with the later supreme court cases. It cites The Monsoon, 17 Fed. Cas. No. 9,716, 1 Sprague 37, as authority. See the comments of Judge Lowell on this case in The Underwriter, 119 Fed. 713, 763. It also cites The City of New York, 5 Fed. Cas. No. 2,758, 3 Blatchf. 187, 12 N. Y. Leg. Obs. 300. This decision is inconsistent with the later cases in the same district and in conflict with the late supreme court cases. The Secret, 15 Fed. 480; Beinecke *v.* The Secret, 3 Fed. 665. In Ross *v.* The Neversink, 20 Fed. Cas. No. 12,079 [*affirmed* in 18 Fed. Cas. No. 10,133, 5 Blatchf. 539], the charterer was also master, and there is nothing to show that the materialman had any actual or constructive knowledge of the charter. See also *supra*, VII, B, 4, a, (I), (A), (C).

76. See *supra*, VII, B, 4, a, (II).

charterer is not an agent known to general marine law, he has no power as such to bind a foreign vessel at all, even in a port where there is a local statute, as such statutes do not apply to foreign vessels under such circumstances.[77] As to domestic vessels, the doctrine limiting the powers of the master ought to apply with yet stronger force to a charterer. Even a state statute, no matter how broad its terms, would hardly be construed to give him the power to bind a domestic vessel where credit was not in fact given to the vessel, or where the charter-party expressly limited his power to bind the vessel and the materialman had actual or constructive knowledge of such limitation.[78]

d. The Ship's Agent. Where the ship's agent is held out by the owner under his general course of dealing as having authority to purchase supplies for the ship, he will bind the ship, but he has no implied authority like that of the master.[79] Hence any one acting as agent for the ship or the owners does not bind the ship unless he has special authority, either express or inferred from previous course of dealing or proved as any agency is proved.[80]

e. Persons Not in Privity — (i) *General Principle.* As to foreign vessels, it is settled by a recent decision of the supreme court that persons not in privity are not agents for the purpose of binding the vessel, and cannot be made so by state statute.[81]

(ii) *Effect of Local Statutes.* The doctrine as to the effect of such statutes, often repeated in previous connections, is that they cannot annex a maritime lien to anything that is not a maritime contract. And they are construed as far as possible as subject to the qualifications of the general maritime

77. The Roanoke, 189 U. S. 185, 23 S. Ct. 491, 47 L. ed. 770.

78. This follows necessarily from The Kate, 164 U. S. 458, 17 S. Ct. 135, 41 L. ed. 512 [*affirming* 56 Fed. 614], decided Nov. 30, 1896. There the New York statute (set out in full in the opinion) gave a lien for any debt "contracted by the master, owner, charterer, builder or consignee of any ship or vessel, or the agent of either of them within this State." Yet the supreme court held that this could not be construed to give a lien for coal ordered by the charterer, when the materialman had actual or constructive knowledge that the charter-party limited his powers. In The Alvira, 63 Fed. 144, the facts showed that, although the supplies were contracted by the charterer, the materialman did not know of the charter and the owners on the other hand did know of the work that was being done upon the vessel and forbore to inform the materialman of the charter. The opinion is interesting as showing how far liens on domestic vessels under local statutes are limited and qualified by the general principles of marine law. In The Samuel Marshall, 54 Fed. 396, 4 C. C. A. 385 [*affirming* 49 Fed. 754], the court had under consideration a claim of lien asserted under the Michigan statute which made all craft over five tons burden "subject to a lien . . . for all debts contracted by the owner or part owner, master, clerk, agent, steward of such craft." The supplies were ordered by the master. The vessel was under charter and the materialmen knew it. They contended, however, that the language of the local statute was broad enough to give them a lien regardless of this fact. But the court held that the limitations of the maritime law qualified the general language of the act and defeated recovery.

If a state can create any lien at all contrary to the limitations of marine law, it would be a state statutory lien, not a maritime lien. Lawrenceburgh Ferryboat *v.* Smith, 7 Ind. 520.

The inclination is to construe such statutes against the power of a charterer to bind the vessel. Guffey *v.* Alaska, etc., Steamship Co., 130 Fed. 271, 64 L. ed. 517. But the Tennessee statute is construed by the court of last resort of that state to bind the boat for supplies ordered for the use of the lessee. Greenlaw *v.* Potter, 5 Sneed (Tenn.) 390.

79. The Patapsco *v.* Boyce, 13 Wall. (U. S.) 329, 20 L. ed. 696; The Golden Rod, 145 Fed. 743; The Robert R. Kirkland, 143 Fed. 610; The Burton, 84 Fed. 998; The Suliote, 23 Fed. 919; The Ludgate Hill, 21 Fed. 431; The Joseph Cunard, 13 Fed. Cas. No. 7,535, Olcott 120.

80. The George Farwell, 103 Fed. 882, 43 C. C. A. 373.

An insurer permitted by the owner to raise a vessel acquires no right to bind the vessel in the absence of proof of express authority from the owner to pledge the vessel. The Paul L. Bleakley, 146 Fed. 570.

81. The Roanoke, 189 U. S. 185, 23 S. Ct. 491, 47 L. ed. 770. See also as to the necessity of privity The Hattie M. Bain, 20 Fed. 389; The Mark Lane, 13 Fed. 800; The Eledona, 8 Fed. Cas. No. 4,340, 2 Ben. 31 [*affirmed* in 8 Fed. Cas. No. 4,341, 10 Blatchf. 511]; Harbeck *v.* The Francis A. Palmer, 11 Fed. Cas. No. 6,045*a*; Leslie *v.* Glass, 15 Fed. Cas. No. 8,275, Taney 422; Purinton *v.* Hull of a New Ship, 20 Fed. Cas. No. 11,473, 1 Ware 556 [*affirmed* in 20 Fed. Cas. No. 11,472.

law so as to assimilate them to liens on foreign vessels.[82] Hence these state statutes are rigidly construed whenever they seem intended to modify as to domestic vessels the principles regulating liens on foreign vessels.[83] But when their language is so clear as to force upon the court the conclusion that they were intended to create a lien in favor of subcontractors and regardless of all considerations of privity, the question still remains whether they will have such effect in the admiralty courts. That the states can create such liens on domestic

2 Curt. 416]. Hence a trespasser or intruder who does work upon a vessel acquires no lien therefor. The City of Salem, 10 Fed. 843, 7 Sawy. 477; Glover *v.* Ames, 8 Fed. 351; The Augusta, 2 Fed. Cas. No. 647. But even a trespasser or intruder may bind a vessel if the owners knowing of his work stand by and say nothing. This is illustrated by The Superior, 23 Fed. Cas. No. 13,627, 5 Sawy. 346. There a vessel was stolen from the custody of a sheriff who held her under an attachment, and the party thus acquiring possession was entered on her papers as master. He contracted maritime liens. The sheriff recovered possession, paid the liens, and took assignments. Then the vessel was sold under the attachment. The sheriff then attempted to assert the liens against the purchaser. The court held that they might have been asserted by the original materialmen against the owners, but could not be asserted by the sheriff against the purchaser at his own sale. In The City of Salem, and The Augusta, cited *supra*, Judge Deady held that the mere act of employing a contractor was holding him out by the owners as having authority, and that his employees had a lien against the vessel under such circumstances, irrespective of the state of accounts between the owner and contractor. The general doctrine as to the owners being estopped by their course of conduct from denying an agency is clear; but this application of it is not sustainable. Under general legal principles a contractor is not an agent, and merely seeing his employees at work is certainly a far-stretched application of the doctrine. The Roanoke, opinion cited *supra*, practically overrules this. In The Sappho, 89 Fed. 366, Judge Brawley held that no power existed in a contractor to bind a vessel for work ordered by him, and that a federal inspector of hulls had no such power. The case was reversed in 94 Fed. 545, 36 C. C. A. 395, not on these points, but on the facts, the appellate court holding that the owners had authorized the employment. In The Wandrahm, 67 Fed. 358, 14 C. C. A. 414 [*affirming* 62 Fed. 935], it was held that in the absence of anything to show an apparent agency the materialman is put upon inquiry and cannot assert a lien for supplies or machinery furnished upon the order of one who was practically a contractor. It is impossible to ascertain from the brief report of The Emma V., 8 Fed. Cas. No. 4,468, 2 Hask. 374, by whom the work was ordered. It is clear that it was not ordered by the contractor. In The Whitaker, 29 Fed. Cas. No. 17,524, 1 Sprague 229, Judge Sprague held, as to a claim asserted by subcontractors against a vessel, that a contractor could not bind the vessel to such subcontractors. In The Marquette, 16 Fed. Cas. No. 9,101, Brown Adm. 364, Judge Longyear made the same ruling. In Squire *v.* One Hundred Tons of Iron, 22 Fed. Cas. No. 13,270, 2 Ben. 21, Judge Blatchford made the same ruling as against a claim asserted by one who had hired certain material to parties who were endeavoring to save the vessel. These last three cases were all for services in the nature of salvage, but the principle is the same. See also Southwick *v.* The Packet Boat Clyde, 6 Blackf. (Ind.) 148; Ames *v.* Swett, 33 Me. 479; Burst *v.* Jackson, 10 Barb. (N. Y.) 219; Hubbell *v.* Denison, 20 Wend. (N. Y.) 181.

82. See *supra*, VII, B, 4, a, (II), text and note 44; VII, B, 4, b, (II), (A), note 51. Hence in Smith *v.* The Eastern Railroad, 22 Fed. Cas. No. 13,039, 1 Curt. 253, Mr. Justice Curtis construed the Massachusetts act of May 9, 1848, giving a lien in broad terms for any debt contracted in connection with necessaries for a vessel as not intended to give a lien to a subcontractor after the principal contractor had been paid, but as designed simply to assimilate liens on domestic and foreign vessels. In Woolly *v.* The Peruvian, 30 Fed. Cas. No. 18,031, 3 Ware 154, the later Massachusetts act of 1855, enlarging that of 1848 above referred to, was construed by Judge Ware as creating a lien only for work directly contributing to the construction of a ship and not for mere collateral work. The decision was before the law had been settled against the maritime character of construction work. In Bates *v.* Emery, 134 Mass. 186, a lien in favor of a sail-maker under the state law was denied when the debt was contracted by a party who had an agreement with the owner to furnish the sails and who ordered them from the sail-maker, as such party was not an agent of the owner, or a contractor in the sense of the statute.

83. See *supra*, VII, B, 3, b, (II), (D).

Maine statute.— In Purinton *v.* Hull of a New Ship, 20 Fed. Cas. No. 11,473, 1 Ware 556, Judge Ware, although holding that these acts must be strictly construed, felt constrained by the explicit terms of the Maine act then in force to uphold a lien in favor of a subcontractor, and Mr. Justice Curtis, who decided Smith *v.* The Eastern Railroad, 22 Fed. Cas. No. 13,039, 1 Curt. 253, reluctantly followed him. The same construction was given to the act by the state court, even where the main contractor had been fully paid. Atwood *v.* Williams, 40 Me. 409.

vessels enforceable in their own courts on the assumption that they are non-maritime is settled.[84] But the question is, whether they are so far maritime as to be cognizable by an admiralty court. The decisions of the inferior courts[85] in which some of these statutes were applied in the admiralty courts were rendered before the Roanoke case[86] was decided. That was a case where a state statute attempted to make a contractor an agent of the owner for the purpose of binding his ship even in a foreign port, and the court, cautiously limiting its opinion to the case before it, held that it could not be done. But the reasoning of the opinion is equally decisive against an attempt to create such a lien against a domestic vessel. It holds that the proper marine agent of a ship is the master, and that a contractor as such is unknown to maritime law. Now it has been seen that a state can annex a maritime lien only to a contract maritime by nature. It is difficult to see how a contract can be maritime by nature which is made by a person acting in a capacity unknown to the maritime law, as for instance, a contractor; and which in fact is not a contract at all as respects the vessel or owner, for want of privity. Hence such a cause of action, not being maritime, ought not to be enforceable in the admiralty court, even against a domestic vessel. If a state can give such a lien to a subcontractor at all, it can give it to him, no matter how remote from the main contractor, as that would be a mere question of degree. For instance not only the dealer from whom the lumber was bought but the mill from which he bought it, the man from whom the mill bought the logs and the workmen who cut them could by a broadly worded state statute be made maritime lienors and the vessel could be made to pay for the same service in indefinite succession.

5. Necessity of Delivery to Ship — a. Independent of Statute. The basis of

The Mississippi statute, however, is construed to give no lien for work ordered by an independent contractor, as he is not the agent of the owner. Valverde *v.* Spottswood, 77 Miss. 912, 28 So. 720.

The Missouri act in force in 1855 is construed not to give a lien for work ordered by one not representing the owner. Bersie *v.* The Shenandoah, 21 Mo. 18; Childs *v.* The Brunette, 19 Mo. 518.

The New York statute in terms gives a lien only for debts contracted by the master, owner, charterer, builder, or consignee or the agent of either of them. The strict construction put upon this statute in The Kate, 164 U. S. 458, 17 S. Ct. 135, 41 L. ed. 512, has already been mentioned (see *supra*, VII, B, 3, c, (v), note 78). An independent contractor has no authority to bind the vessel under the terms of this act. The Idlehour, 84 Fed. 358, 28 C. C. A. 426; Fralick *v.* Betts, 13 Hun 632. In cases decided before construction was held to be non-maritime, the builder was held to create a lien for material ordered by him. Concklin *v.* The Sylvan Shore, 6 Fed. Cas. No. 3,090; Egleston *v.* The Agnes, 8 Fed. Cas. No. 4,308. One who contracts directly with the owner is a builder under the state decisions. King *v.* Greenway, 71 N. Y. 413; Kenyon *v.* Covert, 7 N. Y. Suppl. 34. Whatever may be the effect of these decisions as to the right of enforcing a state lien on a non-maritime cause of action in the state courts, they are difficult if not impossible to reconcile with The Kate, *supra*, when the attempt is made to make them cover maritime causes of action.

The Ohio act was construed in an old case decided in 1840 to give a lien to subcontractors. Webster *v.* The Andes, 18 Ohio 187.

Pennsylvania acts.— Under the old Pennsylvania act of March 27, 1784, Judge Hopkinson held that workmen of a contractor acquired no lien. Harper *v.* The New Brig, 11 Fed. Cas. No. 6,090, Gilp. 536. But under the later act of April 20, 1858, a contractor was entitled to a lien for the balance due him. Petrie *v.* The Coal Bluff No. 2, 3 Fed. 531; The Dictator *v.* Heath, 56 Pa. St. 290.

The Rhode Island act was held to give no lien for services of an inspector upon a dredge, and such services were held to be non-maritime. The Saratoga, 100 Fed. 480.

Virginia acts.— The Virginia Mechanic's Lien Law was construed not to apply to a vessel under construction, such not being a "building" under the terms of the law. Stewart *v.* Gorgoza, 23 Fed. Cas. No. 13,428, 3 Hughes 459. The Virginia statute regulating liens on vessels, however, is found in the attachment laws of the state, not in the mechanic's lien laws. Va. Code (1887), § 2963.

The Washington statute, although it purports to make a contractor an agent of the owner for the purpose of binding the vessel, is construed to give no lien for materials furnished generally and not for any particular ship. Callahan *v.* Ætna Indemnity Co., 33 Wash. 583, 74 Pac. 693.

84. See *supra*, VI, B, 2, (III), (A); VII, B, 3, b.

85. See cases cited *supra*, notes 81, 82, 83.

86. The Roanoke, 189 U. S. 185, 23 S. Ct. 491, 47 L. ed. 770.

a lien for necessaries is a benefit rendered the vessel. Hence, in order for such lien to arise, the necessaries must be either delivered on board the vessel or brought into immediate relations to her, as by being delivered on the wharf or into the custody of someone authorized to receive them. No lien attaches to a breach of a contract to furnish supplies.[87] This requirement of delivery does not mean that the materialman must see to their actual incorporation into the vessel or actual use upon the vessel.[88]

b. Under Local Statutes. As a contract to furnish supplies is maritime and at least enforceable *in personam*, it follows under principles often discussed in previous connections that a local statute can add the remedy *in rem*, even for necessaries not delivered. The question whether the special statute in question does this is a question of construction in each case.[89]

6. Steps Necessary to Perfect or Preserve Lien — a. Under General Maritime Law. The previous discussion has shown in many connections that the only thing necessary to create a lien under the general maritime law is the rendition of the service to the vessel or bringing her into such relations with any one as to create a cause of action against her.[90] As to liens of materialmen, the only thing necessary under the general maritime law is to furnish the necessaries on the order of someone having power to bind the vessel, on the credit of the vessel, under an apparent necessity.[91] Hence as to liens under the general maritime law, there are no requirements as to recording or as to proceeding within any given time. And the better opinion is that local statutes cannot make such provisions apply to foreign vessels.[92]

b. Under State Statutes — (i) *Necessity of Compliance With Requirements.* As there is no implied lien on a domestic vessel independent of statute,[93] it follows that a state in conferring such a lien has as included in such power the

87. Dalzell *v.* The Daniel Kaine, 31 Fed. 746; The Cabarga, 4 Fed. Cas. No. 2,276, 3 Blatchf. 75; Delaware, etc., Canal Co. *v.* The Alida, 7 Fed. Cas. No. 3,763*a*; The Pacific, 18 Fed. Cas. No. 10,643, 1 Blatchf. 569. *Contra*, Aitcheson *v.* The Endless Chain Dredge, 40 Fed. 253, where, although the reasoning was general, the case really turned upon the existence of a state statute.

But where, under an express agreement for a lien, an advance of money is procured by the owner and is then diverted by him, he is estopped, as between himself and the lender, from setting up such diversion as a defense. The Worthington, 133 Fed. 725, 66 C. C. A. 555.

88. So held by Mr. Justice Brown in The James H. Prentice, 36 Fed. 777, construing the Michigan act, but on reasoning strongly applying in the absence of a statute.

89. See cases cited *infra*, this note.

The Georgia act of 1847 treats the owner as the unit and contemplates a general lien on all his boats. Kirkpatrick *v.* Augusta Bank, 30 Ga. 465.

The Illinois act is construed to require the use of the supplies for the vessel or someone performing a service for her benefit. Hence where they were ordered and used by an owner living upon it while tied up to the dock for the winter, a lien was denied. The Gordon Campbell, 131 Fed. 963.

The Maine act contemplates an actual furnishing of the materials to the vessel, but not necessarily its incorporation into the vessel. Mehan *v.* Thompson, 71 Me. 492; Fuller *v.* Nickerson, 69 Me. 228. The older act required their incorporation into the vessel. Perkins *v.* Pike, 42 Me. 141, 66 Am. Dec. 267; Taggard *v.* Buckmore, 42 Me. 77; The Kiersage, 14 Fed. Cas. No. 7,762, 2 Curt. 421 [*reversing* 14 Fed. Cas. No. 7,634, 1 Ware 546].

Massachusetts.— In The Antarctic, 1 Fed. Cas. No. 479, 1 Sprague 206, Judge Sprague held that the Massachusetts act of 1848 contemplated that the articles should be actually used in the ship. The Massachusetts supreme court held the same way. Young *v.* The Orpheus, 119 Mass. 179; Barstow *v.* Robinson, 2 Allen 605.

New York.— In Brown *v.* The Alida, 4 Fed. Cas. No. 1,989, it was held that the New York act of 1855 contemplated that the vessel should actually receive the benefit of the articles before a lien arises. This also is the construction placed upon the act by the state courts. Veltman *v.* Thompson, 3 N. Y. 438; Hiscox *v.* Harbeck, 2 Bosw. 506; Phillips *v.* Wright, 5 Sandf. 342.

The Ohio act also contemplates an actual use of the materials by the vessel. The Muskegan *v.* Moss, 7 Ohio St. 377.

The Pennsylvania statute creates no lien unless the articles are actually or constructively delivered. Hays *v.* James Rees, etc., Co., 93 Fed. 984, 36 C. C. A. 45; Dalzell *v.* The Daniel Kaine, 31 Fed. 746.

90. See *supra*, VI, A; and VII, A.

91. See *supra*, VII, B.

92. See *supra*, VII, B, 3, b, (II), (C).

93. See *supra*, VII, B, 3, a.

right to name the conditions on which it shall vest; and a disregard of such conditions will prevent the lien from attaching.[94]

(II) *Decisions on Requisites of Particular Statutes* — (A) *Alabama.* Under the Alabama act of 1848[95] the lien must be enforced within six months from its creation.[96]

(B) *California.* The old decisions hold that the lien attaches from the service of the attachment, not from the rendition of the service, so that judicial proceedings are a necessary step in acquiring the lien.[97]

(C) *Illinois.* On the other hand the Illinois act[98] is construed to give the lien by force of the statute, independent of a seizure under attachment.[99] And under the limitation provided in the act the lien remains in force for the period of three months named in the act after the indebtedness becomes due, irrespective of proceedings to enforce subsequent liens.[1]

(D) *Iowa.* Under the Iowa act[2] a seizure by judicial process is necessary before the lien vests.[3]

(E) *Louisiana.* Under the Louisiana act[4] recording is necessary to preserve the lien, even as against the owner, when the supplies are not ordered by him or an agent, the owner being a "third person" in the sense of the act.[5] Under the section of the code prescribing a limit of six months,[6] and the section providing that the lien shall be lost when the vessel has made a voyage,[7] and the section defining what constitutes a voyage,[8] short trips within the state are not voyages, and in such case the lien continues for six months.[9] Prior to 1858 the limitation had been sixty days.[10]

(F) *Maine.* This act as in force in 1879[11] is construed to continue the lien in

94. Poole *v.* Tyler, 94 U. S. 518, 24 L. ed. 167; Rodd *v.* Heartt, 21 Wall. (U. S.) 558, 22 L. ed. 654; The Sue, 137 Fed. 133; The John S. Parsons, 110 Fed. 994; The Kingston, 23 Fed. 200; The John T. Moore, 13 Fed. Cas. No. 7,430, 3 Woods 61; Scott *v.* The Plymouth, 21 Fed. Cas. No. 12,544, 6 McLean 463, Newb. Adm. 56. See 34 Cent. Dig. tit. "Maritime Liens," § 46 *et. seq.*

Claimant must show compliance with such conditions. Kretzmer *v.* The William A. Levering, 35 Fed. 783.

95. Ala. Laws (1848), p. 146.

96. George *v.* Skeates, 19 Ala. 738, construing Ala. Pamphl. Acts, 146.

These old acts came before the supreme court in The Belfast *v.* Boon, 7 Wall. (U. S.) 624, 19 L. ed. 266, where it was held that the attempt to give a procedure *in rem* to the state court was void. Subsequent to the decision in Rodd *v.* Heartt, 21 Wall. (U. S.) 558, 22 L. ed. 654, the act was redrafted to meet these cases. It is interesting to know as matter of history that the draftsman was Admiral Semmes.

97. Fisher *v.* White, 8 Cal. 418; Meiggs *v.* Scannell, 7 Cal. 405.

Under Cal. Code Civ. Proc. § 813, the lien must be enforced within one year from the time the cause of action accrued. If the supplies are furnished on a credit, the time runs for one year from the expiration of the credit, although this may be more than a year after they were furnished. Edgerly *v.* The San Lorenzo, 29 Cal. 418.

98. See the Illinois acts of 1857, 1855, and 1845.

99. The Great West No. 2 *v.* Oberndorf, 57 Ill. 168; Germain *v.* The Indiana, 11 Ill. 535. The earlier cases of The Montauk *v.* Walker, 47 Ill. 335, and Williamson *v.* Hogan, 46 Ill. 504, are overruled in this respect by the first case above cited.

1. Germain *v.* The Indiana, 11 Ill. 535. The present statute has changed this period of three months to nine months.

2. Iowa Code, § 3432.

3. Seippel *v.* Blake, 86 Iowa 51, 52 N. W. 476.

4. See statutes of Louisiana in effect June, 1870. See also La. Const. art. 123.

5. Rodd *v.* Heartt, 21 Wall. (U. S.) 558, 22 L. ed. 654; The Cara, 50 Fed. 222; Beard *v.* Chappell, 23 La. Ann. 694.

Whenever the boat may be found, whether at the owner's domicile or not, the lien is enforceable. Gails *v.* The Osceola, 14 La. Ann. 54; Henning *v.* The St. Helena, 5 La. Ann. 349.

6. La. Civ. Code, art. 3227.

7. La. Civ. Code, art. 3243.

8. La. Civ. Code, art. 3245.

9. Learned *v.* Brown, 94 Fed. 876, 36 C. C. A. 524; Converse *v.* The Lucy Robinson, 15 La. Ann. 433.

A voyage meant a trip to another port and return to the port of departure; that is, a round voyage. Blake *v.* Bredall, 15 La. 545.

10. Hunter *v.* Bell, 14 La. Ann. 142; Broderick's Succession, 12 La. Ann. 521; Wickham *v.* Levistones, 11 La. Ann. 702; Blanchin *v.* The Fashion, 10 La. Ann. 49; Scott *v.* His Creditors, 3 La. Ann. 40; Shirley *v.* Fabrique, 15 La. 140; Abat *v.* Nartigue, 8 La. 188.

11. See Me. Rev. St. c. 91, § 7.

force four days after completion of the repairs, in case of repairs, or four days after launching in case of construction.[12]

(G) *Massachusetts.* The Massachusetts act[13] requires as a condition of preserving the lien given by it that within thirty days (formerly four days) from the time the vessel leaves port the creditor must file a sworn statement of his account, with all just credits, showing also the person with whom he made the contract and the name of the vessel owner and the vessel; and this statement must be recorded.[14] Even short trips to ports near by are departures in the sense of this act.[15] The certificate may be filed before the departure of the vessel.[16]

(H) *Michigan.* Under the act of 1839[17] it was held that the lien given by it did not vest till the levy of the attachment; in other words, that a seizure is necessary to perfect the lien.[18] But under the Compiled Laws in force in 1878,[19] which is substantially the same as the act now in force[20] and contained in the Compiled Laws of 1897, it is held that the lien dates from the rendition of the service.[21]

(I) *Missouri.* In order to preserve the lien given by this act, suit must be commenced within nine months from the date of the last item of an account, although there may be an interval of more than six months between some of the items, but in case of a special contract the lien attaches on the delivery of the first article under it.[22]

(J) *New York*—(1) PARTICULARITY REQUIRED IN SPECIFICATION. It is necessary under the New York statute to specify in the notice of lien required to be filed in the clerk's office the exact goods furnished the particular vessel; and a lien cannot be filed against two vessels, although operated jointly.[23] The oath attached need not show on its face that it was administered in the jurisdiction of

12. Homer *v.* The Lady of the Ocean, 70 Me. 350.

This means four days after the completion of the entire work on the vessel, not four days after the completion of each material-man's work. Hayford *v.* Cunningham, 72 Me. 128.

Innocent additions of improper items or omissions of proper credits do not invalidate the lien. Fuller *v.* Nickerson, 69 Me. 228; Dyer *v.* Brackett, 61 Me. 587; Deering *v.* Lord, 45 Me. 293.

13. Mass. Gen. St. c. 151, §§ 12, 13.

14. **An inadvertent mistake** in the account filed does not vitiate the lien. McDonald *v.* The Nimbus, 137 Mass. 360; Young *v.* The Orpheus, 119 Mass. 179; Jones *v.* Keen, 115 Mass. 170.

But an intentional misstatement or failure to make proper credits will vitiate it. Jones *v.* Keen, 115 Mass. 170; Story *v.* Buffum, 8 Allen (Mass.) 35.

The character or purpose of the work need not be set out. McMonagle *v.* Nolan, 98 Mass. 320.

The christian name as well as the surname of the lien claimant must be set out. Gove *v.* The Bold Runner, 10 Fed. Cas. No. 5,644.

15. The William E. Cleary, 114 Fed. 756; The Huron, 29 Fed. 183; The Helen Brown, 28 Fed. 111; Hawes *v.* Mitchell, 15 Gray (Mass.) 234.

16. Young *v.* The Orpheus, 119 Mass. 179.

A petition to enforce the lien cannot be filed under the statutes of 1855, chapter 231, until the debt is sixty days overdue. Tyler *v.* Currier, 10 Gray (Mass.) 54.

17. Mich. Laws (1839), p. 70.

18. Moses *v.* The Missouri, 1 Mich. 507; Robinson *v.* The Red Jacket, 1 Mich. 171.

19. Mich. Comp. Laws (1878), § 6648.

20. Mich. Comp. Laws (1897), § 10789.

21. The Theodore Perry, 23 Fed. Cas. No. 13,789.

22. Madison County Coal Co. *v.* The Colona, 36 Mo. 446; Carson *v.* The Daniel Hillman, 16 Mo. 256; The Mary Blane *v.* Beehler, 12 Mo. 477, holding that the day of delivery of the last item should be excluded.

The issue of the writ, not its service, stops the running of the statutory period. McDowell *v.* The David Tatum, 33 Mo. 494.

The accrual of the cause of action, under the old acts, was not postponed by taking a note. Darby *v.* The Inda, 9 Mo. 653.

Alias process.—But although process is issued within the six months against a boat out of the jurisdiction, an alias process issued after the six months, when the boat is in the jurisdiction, does not save the lien. Williamson *v.* The Missouri, 17 Mo. 374.

23. The Warner Miller Co., 120 Fed. 520; The Knickerbocker, 83 Fed. 843.

But a lien for original construction may be enforced in the state court against two vessels in the same proceeding. Phœnix Iron Co. *v.* The Hopatcong, 127 N. Y. 206, 27 N. E. 841.

Under the early acts wood supplied as fuel to a steamer was not included. Johnson *v.* The Sandusky, 5 Wend. (N. Y.) 510.

A general statement that "the amount $2,400, [is] due . . . for work done upon the same and for materials furnished and labor and services performed" is not a sufficient

the notary taking it.[24] The notice need not be filed separately but, if otherwise in proper shape and in time, may be filed as part of the proceedings to enforce.[25]

(2) Time of Filing Specification. Under the older forms of the statute the specifications were required to be filed within a given time after the vessel left the port at which the debt was contracted; and there were a number of decisions construing the statute in this form.[26] But the Laws of 1904[27] substitute a provision that the lien must be filed within thirty days after the debt is contracted, so that these old decisions have lost their importance. The qualification in the older and present form of the act prescribing a different time of filing as to vessels navigating the western and northwestern lakes does not apply to vessels making occasional short trips into the lakes, or to vessels navigating the canal and other tributaries of the lakes.[28]

(3) Vesting of Lien. The lien vests from the rendition of the service, even though the vessel is not then complete.[29] And it continues even without any specification until the expiration of the time allowed for filing it.[30] Thereafter, if the specification is properly filed, it continues till the expiration of the period allowed for enforcement, which period is binding on the lien claimant.[31]

compliance with the statutory requisite that "the particulars of the debt" must be given. The Catherine Whiting, 99 Fed. 445, 39 C. C. A. 592.

But where the work is done under contract for a lump sum, the specification of this lump sum, accompanied by an itemized account of any extra work, is sufficient. The Arctic, 22 Fed. 126.

24. The Arctic, 22 Fed. 126.

25. Sheppard *v.* Steele, 3 Lans. (N. Y.) 417 [*affirmed* in 43 N. Y. 52, 3 Am. Rep. 660].

26. Under the older statute each item of an ordinary running account was treated as a separate transaction from which the limitation ran, each being a separate contracting of a debt. The Alida, 1 Fed. Cas. No. 199, Abb. Adm. 165; Elmore *v.* The Alida, 8 Fed. Cas. No. 4,419; Spencer *v.* The Alida, 22 Fed. Cas. No. 13,231; Veltman *v.* Thompson, 3 N. Y. 438; Rockefeller *v.* Thompson, 2 Sandf. (N. Y.) 395. But where the contract was single and entire the rule was otherwise. Chester Rolling-Mills *v.* The Hopatcong, 1 Silv. Sup. (N. Y.) 567, 6 N. Y. Suppl. 215 [*affirmed* in 127 N. Y. 206, 27 N. E. 841].

The debt was "contracted" in the county where the services were rendered. Brown *v.* The Alida, 4 Fed. Cas. No. 1,989; Crawford *v.* Collins, 30 How. Pr. (N. Y.) 398.

Filing before departure.— As the specifications had to be filed within a given time after the vessel's departure, they were invalid if filed before departure. Squires *v.* Abbott, 61 N. Y. 530. It was not necessary to file any specification where the vessel had not left the port. The Julia L. Sherwood, 14 Fed. 590. Where process to enforce the lien is issued and served before the departure of the vessel from port, the filing of specifications was not necessary. The Henry Trobridge, 11 Fed. Cas. No. 6,379, 10 Ben. 415; Delany *v.* Brett, 4 Rob. (N. Y.) 712 [*affirmed* in 51 N. Y. 78]; Onderdonk *v.* Voorhis, 2 Rob. (N. Y.) 24; Matter of Tilton, 19 Abb. Pr. (N. Y.) 50.

But if after arrest the vessel is permitted to depart without bond, specifications are necessary. Denison *v.* The Appelonia, 20 Johns. (N. Y.) 194.

The issue of an illegal and void attachment, however, does not obviate the necessity for specifications. The Alanson Sumner, 28 Fed. 670.

The mere shifting of a vessel during the progress of the work from one port to another is not a departure in the sense of the act. The John Farron, 13 Fed. Cas. No. 7,341, 14 Blatchf. 24; Sheppard *v.* Steele, 3 Lans. (N. Y.) 417 [*affirmed* in 43 N. Y. 52, 3 Am. Rep. 660].

In case of a vessel leaving a port on one of her regular trips, specifications must be filed whether the trips be between New York ports, or New York and other ports, these as well as a final departure from port being contemplated by the act, as also voyages between ports of the same state. Concklin *v.* The Sylvan Shore, 6 Fed. Cas. No. 3,090; The Monitor, 17 Fed. Cas. No. 9,790, 10 Ben. 188; Sturgis *v.* The Oregon, 23 Fed. Cas. Nos. 13,576*a*, 13,577.

The word "port" is not used in a technical sense, but in the familiar and popular sense of a point where a vessel would stop for supplies, etc. Concklin *v.* The Sylvan Shore, 6 Fed. Cas. No. 3,090. It is wider than the word "place." The Tawtemio, 53 Fed. 835.

27. N. Y. Laws (1904), c. 246.

28. The Ella B., 26 Fed. 111; King *v.* Greenway, 71 N. Y. 413.

29. The Alida, 1 Fed. Cas. No. 200, Abb. Adm. 173; Veltman *v.* Thompson, 3 N. Y. 438; Chester Rolling-Mills *v.* The Hopatcong, 1 Silv. Sup. (N. Y.) 567, 6 N. Y. Suppl. 215 [*affirmed* in 127 N. Y. 206, 27 N. E. 841]; Phillips *v.* Wright, 5 Sandf. (N. Y.) 342.

30. Onderdonk *v.* Voorhis, 2 Rob. (N. Y.) 24.

31. Poole *v.* Tyler, 94 U. S. 518, 24 L. ed. 167; The Tawtemio, 53 Fed. 835; Elmore *v.* The Alida, 8 Fed. Cas. No. 4,419.

(K) *Ohio.* The Ohio statute[32] is an act creating a lien by its own terms, and requires none of the steps prescribed by the Mechanic's Lien Law of the state.[33]

(L) *Oregon.* The Oregon act[34] prescribes elaborate provisions for enforcement but requires no record of the lien. The lien, however, is lost if not enforced within the statutory period.[35]

(M) *Pennsylvania.* The act of April 20, 1858,[36] gives a lien and limits the same to two years from the date of the last item of the account. This applies to a continuous account, and two separate accounts cannot be linked together to preserve the lien.[37]

(N) *Tennessee.* The Tennessee statute[38] gives a lien, without any requirements as to recording, to continue for ninety days from the completion of the work or furnishing of the materials.[39]

(O) *Washington.* The Washington act[40] requires no recording and is construed by the state court to give a lien to the owner of the materials for such as were furnished for the construction of the vessel and intended for her.[41]

(P) *Wisconsin.* The Wisconsin act[42] is construed to give a right of attachment for causes of action arising out of the state, as well as within it.[43]

VIII. LOSS OF LIEN.

A. By Waiver — 1. In General. A lien once vested may be lost in various ways. One of the most common is by a waiver of it. But the burden is on the party asserting such waiver to prove it, as this would be a matter of defense.[44] Such a waiver may be either by express agreement,[45] or implied from the conduct of the parties or other circumstances.[46]

2. By Express Agreement. The right to waive by express agreement is so obvious as to go without saying, the only question in a given case being whether such agreement has actually been made.[47]

3. Implied From Acts Inconsistent With Lien — a. Giving Credit — (I) *In General.* The mere allowance of credit for a maritime service unaccompanied by other acts inconsistent with an intention to claim a lien is not a waiver of the lien,

32. Ohio St. § 5880.

33. The Guiding Star, 9 Fed. 521 [*affirmed* in 18 Fed. 263]; Johnson *v.* Ward, 27 Ohio St. 517.

It gives a lien for coal actually used when furnished in bulk. Shailer *v.* Hanlon, 26 Ohio Cir. Ct. 120.

The older acts covered the hire of a barge used in conjunction with the steamer for transporting lumber. The Steamboat Monarch *v.* Marine, etc., Dock Co., 2 Disn. (Ohio) 117.

The earlier forms of the act had been construed to mean that the lien attached only on seizure under judicial process. Jones *v.* The Commerce, 14 Ohio 408; The Huron *v.* Simmons, 11 Ohio 458. These decisions, however, cannot be applicable to the act in its present form.

34. Ballinger Code Oreg. §§ 5706–5722.

35. The City of Salem, 31 Fed. 616, 12 Sawy. 469, 2 L. R. A. 380.

Where the account is a running account, it is treated as a single transaction in estimating when the cause of action accrues. The Victorian, 24 Oreg. 121, 32 Pac. 1040, 41 Am. St. Rep. 838.

Interest runs from the institution of suit. The Victorian, No. 2, 26 Oreg. 194, 41 Pac. 1103, 46 Am. St. Rep. 616.

36. Pa. Pamphl. Laws (1858), p. 363.

37. Rees *v.* Jutte, 153 Pa. St. 56, 25 Atl. 998.

The amendment of the Pennsylvania vessel lien law, approved June 24, 1895, expressly reserves from its operation this act of April 20, 1858.

The act of June 13, 1836, did not create a lien enforceable against two vessels in one suit. Parkinson *v.* Manny, 2 Grant (Pa.) 521.

38. Tenn. Code, § 1991.

39. The Illinois, 12 Fed. Cas. No. 7,005, 2 Flipp. 383.

40. Ballinger Code Wash. §§ 5953, 5954. See also The Roanoke, 189 U. S. 185, 23 S. Ct. 491, 47 L. ed. 770.

41. Callahan *v.* Ætna Indemnity Co., 33 Wash. 583, 74 Pac. 693.

42. Wis. Gen. Laws (1859), c. 151.

43. McRoberts *v.* The Henry Clay, 17 Wis. 101.

The limitation of three months in the act of 1858 is construed to mean that the accrual of the cause of action dates from the furnishing and is not enlarged by giving credit. Emerson *v.* The Shawano City, 10 Wis. 433.

44. The L. P. X., 93 Fed. 233.

45. See *infra*, VIII, A, 2.

46. See *infra*, VIII, A, 3.

47. The Half Moon, 46 Fed. 812; The City of Salem, 10 Fed. 843, 7 Sawy. 477; Pulis *v.*

the necessity for credit being in fact one of the essentials for the vesting of a lien.[48] But the allowance of credit may be connected with other circumstances negativing the existence of a lien; and in such case the lien would be held to be waived. For example, many local statutes require court proceedings to enforce the lien within a given time. In such case the extension of credit beyond the statutory period would constitute a waiver of the lien.[49]

(II) *Taking Note or Bill.* This is governed by the same principle as the extension of credit in general. The mere giving and receiving of a note, draft, or bill of exchange is not inconsistent with the existence of a lien, nor a waiver of it, in the absence of other circumstances showing an intention to waive the lien.[50] The principle applies equally to statutory liens on domestic vessels.[51] Nor is the principle altered by the fact that the note is the note of a third person, not the note of the original debtor.[52] The fact that the creditor, on receiving the note,

Sanborn, 52 Pa. St. 368; Pritchard *v.* Muir, 2 Brev. (S. C.) 371.

48. The Lime Rock, 49 Fed. 383; The Comfort. 25 Fed. 158 [*affirmed* in 25 Fed. 159]; The Chusan, 5 Fed. Cas. No. 2,717, 2 Story 455; The James Guy, 13 Fed. Cas. No. 7,195, 1 Ben. 112 [*affirmed* in 13 Fed. Cas. No. 7,196, 5 Blatchf. 496 (*affirmed* in 9 Wall. 758, 19 L. ed. 710)]; The Nestor, 18 Fed. Cas. No. 10,126, 1 Sumn. 73; Mehan *v.* Thompson, 71 Me. 492; Young *v.* The Orpheus, 119 Mass. 179. See 34 Cent. Dig. tit. "Maritime Liens," § 78; and *supra*, VII, B, 4, a, (I), (C).

Under the influence of the earlier English decisions as to waiver of common-law liens, in Zane *v.* The President, 30 Fed. Cas. No. 18,201, 4 Wash. 453, Mr. Justice Washington held the mere giving of credit to be a waiver. He cites also as authority the decision of Mr. Justice Story in *Ex p.* Lewis, 15 Fed. Cas. No. 8,310, 2 Gall. 483. This latter case, however, does not turn upon the giving of credit at all, and the later decisions of Justice Story announce the doctrine of the text. See The Nestor, 18 Fed. Cas. No. 10,126, 1 Sumn. 73.

49. Poole *v.* Tyler, 94 U. S. 518, 24 L. ed. 167; Peyroux *v.* Howard, 7 Pet. (U. S.) 324, 8 L. ed. 700; The H. N. Emilie, 70 Fed. 511; The Red Wing, 14 Fed. 869, 5 McCrary 122; The Kearsarge, 14 Fed. Cas. No. 7,634, 1 Ware 546 [*reversed* in 14 Fed. Cas. No. 7,762, 2 Curt. 421, but not on this point]; Remnants in Court, 20 Fed. Cas. No. 11,697, Olcott 382; Mehan *v.* Thompson, 71 Me. 492; Scudder *v.* Balkam, 40 Me. 291; Mott *v.* Lansing, 57 N. Y. 112; Veltman *v.* Thompson, 3 N. Y. 438; Casey, etc., Mfg. Co. *v.* Weatherly, 101 Tenn. 318, 47 S. W. 432. But the allowance of a credit short of the statutory period is not a waiver. The Antarctic, 1 Fed. Cas. No. 479, 1 Sprague 206. Nor an agreement for a credit conditional on receiving a note, if the agreement is not performed by the debtor. Freeborn *v.* The Falcon, 9 Fed. Cas. No. 5,078*a*; Secor *v.* The Highlander, 21 Fed. Cas. No. 12,604, 19 How. Pr. 334 [*affirmed* in 12 Fed. Cas. No. 6,475, 4 Blatchf. 55].

50. The Bird of Paradise *v.* Heyneman, 5 Wall. (U. S.) 545, 18 L. ed. 662; Dungan *v.* The Kimball, 3 Wall. (U. S.) 37, 18 L. ed. 50; The St. Lawrence, 1 Black (U. S.) 522, 17 L. ed. 180; The L. B. X., 93 Fed. 233; The Ella, 84 Fed. 471; The Alfred J. Murray, 60 Fed. 926; The Pioneer, 53 Fed. 279; The John C. Fisher, 50 Fed. 703, 1 C. C. A. 624; The Chelmsford, 34 Fed. 399; The Queen of St. Johns, 31 Fed. 24; The Agnes Barton, 26 Fed. 542; The General Meade, 20 Fed. 923; Drake *v.* The Lime Rock, 7 Fed. Cas. No. 4,064; The Emily B. Souder, 8 Fed. Cas. No. 4,454, 3 Ben. 159, 8 Fed. Cas. No. 4,456, 8 Blatchf. 337, 8 Fed. Cas. No. 4,457, 8 Blatchf. 339 [*affirmed* in 17 Wall. 666, 21 L. ed. 683]; Fitzgerald *v.* The H. A. Richmond, 9 Fed. Cas. No. 4,839; Harris *v.* The Kensington, 11 Fed. Cas. No. 6,122; Logan *v.* The Aeolian, 15 Fed. Cas. No. 8,465, 1 Bond 267; The R. W. Skillinger, 21 Fed. Cas. No. 12,181, 1 Flipp. 436; Srodes *v.* The Collier, 22 Fed. Cas. No. 13,272 [*affirmed* in 22 Fed. Cas. No. 13,272*a*].

51. *Arkansas.*— Merrick *v.* Avery, 14 Ark. 370.

Georgia.— Butts *v.* Cuthbertson, 6 Ga. 166.

Michigan.— Delaney Forge, etc., Co. *v.* The Winnebago, 142 Mich. 84, 105 N. W. 527; Sarmiento *v.* The Catherine C., 110 Mich. 120, 67 N. W. 1085.

Minnesota.— The Falls City *v.* Kerr, 1 Minn. 390.

Missouri.— Morrison *v.* The Laura, 40 Mo. 260; The Charlotte *v.* Kingsland, 9 Mo. 67; The Charlotte *v.* Hammond, 9 Mo. 59, 43 Am. Dec. 536.

New York.— Phœnix Iron Co. *v.* The Hopatcong, 43 Hun 429.

United States.— The Crescent, 88 Fed. 298; The Illinois, 12 Fed. Cas. No. 7,005, 2 Flipp. 383.

There are some decisions holding a note or draft to be a waiver of the lien, but they are contrary to the immense preponderance of authority, or turn upon special circumstances. Davenport *v.* The Sea Flower, 7 Fed. Cas. No. 3,589 [*affirmed* in 21 Fed. Cas. No. 12,577, 1 Blatchf. 361]; Murray *v.* Lazarus, 17 Fed. Cas. No. 9,962, 1 Paine 572.

52. The James T. Easton, 49 Fed. 656; Gest *v.* Packwood, 34 Fed. 368, 13 Sawy. 202; The Active, 1 Fed. Cas. No. 34, Olcott 286. In the Underwriters' Wrecking Co. *v.* The Katie, 24 Fed. Cas. No. 14,342, 3 Woods 182, Mr. Justice Woods held that taking the note of a third party was a novation of the debt,

receipted the original account in full, or receipted it as "paid by note" is not a waiver of the lien, but is subject to explanation.[53] But a maritime creditor who has taken a note for his account and who proceeds on his lien must produce such note in court for cancellation, if the property sells for enough to pay the lien in full, or for the indorsing of a proper credit if it does not.[54] The reason of this requirement is the protection of the debtor against an assertion of the note in the hands of an innocent third party.[55]

b. Delay in Asserting Lien — (i) *As Between Original Parties.* General statutes of limitation are not binding on the admiralty when there is a question of enforcing a lien arising under the general maritime law. But admiralty has its rules on the subject, the general principle being that such a lien must be enforced within a reasonable time, depending on the equitable circumstances of each case. Hence, as between the original parties, a lien will survive much longer than where interests of third parties have intervened.[56] If there has been reasonable diligence in enforcement, a libel would be entertained after the lapse of time named in a statute of limitations.[57] But where there are no exceptional circumstances calling for special equitable consideration, an admiralty court would incline to follow the state statutes of limitation by analogy.[58] Where, however, the question arises on a domestic lien under a state statute the special limitation named in that is binding;[59] but if the local statute does not contain a limit of time for

basing his ruling on Louisiana and Massachusetts cases. In Taylor *v.* The Commonwealth, 23 Fed. Cas. No. 13,787, Mr. Justice Miller held that taking a note with an indorser was a waiver. And in the old case of O'Hara *v.* The Mary, 18 Fed. Cas. No. 10,467, Bee 100, it is intimated that taking a draft on the owner evidenced an intent to look to his personal security alone. On the other hand in The Chusan, 5 Fed. Cas. No. 2,717, 2 Story 455, Mr. Justice Story held that taking a note of one of the owners did not constitute such waiver. The doctrine stated in the text seems best supported by principle and authority.

The New York decisions hold that taking a note is presumptively a waiver. Hall *v.* Stevens, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802; Noel *v.* Murray, 13 N. Y. 167.

There is a Pennsylvania decision to the same effect, although it was largely influenced by special facts. Welsh *v.* Cabot, 39 Pa. St. 342.

53. The Alabama, 22 Fed. 449; The Pride of America, 19 Fed. 607; Moore *v.* Newbury, 17 Fed. Cas. No. 9,772, 6 McLean 472, Newb. Adm. 49; North *v.* The Eagle, 18 Fed. Cas. No. 10,309, Bee 78; Sutton *v.* The Albatross, 23 Fed. Cas. No. 13,645, 2 Wall. Jr. 327.

The burden is on the party asserting it to show an intention to waive. The James Guy, 13 Fed. Cas. No. 7,195, 1 Ben. 112 [*affirmed* in 9 Wall. 758, 19 L. ed. 710].

Maine and Massachusetts doctrine.— In Carter *v.* The Byzantium, 5 Fed. Cas. No. 2,473, 1 Cliff. 1, Mr. Justice Clifford discusses this doctrine in the light of the Maine and Massachusetts decisions. In these states contrary to the common-law rule and the preponderance of authority elsewhere, taking negotiable paper is presumptively a waiver of the lien, on the theory that a subsequent holder of such paper might make the debtor pay a second time. He holds, however, that even in these states such waiver is only *prima facie* and may be explained, and that the danger of a second payment may be prevented by requiring the production of the note in court. See also Page *v.* Hubbard, 18 Fed. Cas. No. 10,663, 1 Sprague 335, for a discussion of the Massachusetts doctrine by Judge Sprague.

54. The St. Lawrence, 1 Black (U. S.) 522, 17 L. ed. 180; The L. B. X., 93 Fed. 233; The Chusan, 5 Fed. Cas. No. 2,717, 2 Story 455; The Eclipse, 8 Fed. Cas. No. 4,268, 3 Biss. 99; McKim *v.* Kelsey, 16 Fed. Cas. No. 8,861, Taney 502; The Napoleon, 17 Fed. Cas. No. 10,011, 7 Biss. 393; Raymond *v.* The Ellen Stewart, 20 Fed. Cas. No. 11,594, 5 McLean 269; Reppert *v.* Robinson, 20 Fed. Cas. No. 11,703, Taney 492; The Sarah J. Weed, 21 Fed. Cas. No. 12,350, 2 Lowell 555; Southern Bank *v.* The Alexander McNeil, 22 Fed. Cas. No. 13,186; The Theodore Perry, 23 Fed. Cas. No. 13,879; Sinton *v.* The R. R. Roberts, 46 Ind. 476; Jones *v.* Keen, 115 Mass. 170.

55. Carter *v.* The Byzantium, 5 Fed. Cas. No. 2,473, 1 Cliff. 1.

56. Young *v.* The Key City, 14 Wall. (U. S.) 653, 20 L. ed. 896; Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 78 Fed. 155 [*affirmed* in 94 Fed. 180, 36 C. C. A. 135]; The Queen of the Pacific, 61 Fed. 213.

57. The Kong Magnus, [1891] P. 223, 6 Aspin. 583, 7 Aspin. 64, 63 L. T. Rep. N. S. 715, 65 L. T. Rep. N. S. 231.

58. Bailey *v.* Sundberg, 49 Fed. 583, 1 C. C. A. 387; Southard *v.* Brady, 36 Fed. 560; Scull *v.* Raymond, 18 Fed. 547; Jay *v.* Allen, 13 Fed. Cas. No. 7,235, 1 Sprague 130; The Sarah Ann, 21 Fed. Cas. No. 12,342, 2 Sumn. 206 [*affirmed* in 13 Pet. (U. S.) 387, 10 L. ed. 213].

59. The James G. Swan, 106 Fed. 94; Srodes *v.* The Collier, 22 Fed. Cas. No. 13,272*a*; Watkins *v.* Atkinson, 2 Mich. 151.

enforcement, liens arising thereunder depend in this respect on the same principles as liens under the general maritime law.[60] Under some circumstances there may be special equities in favor of the vessel owner which would shorten the time of enforcement as to him, and cause him to be treated not as one of the original parties, but as a third party.[61] A long absence of the vessel from the country will excuse delay in enforcement.[62]

(II) *As Against Subsequently Acquired Interests*—(A) *Innocent Purchaser.* A much shorter period will bar a maritime lien when the vessel has passed into the hands of an innocent purchaser where there has been reasonable opportunity to enforce it. Such liens being secret, the reasonable diligence required as against a purchaser is more rigid than that required as between the original parties.[63] Under such circumstances a lien not enforced after reasonable opportunity is waived as against an innocent purchaser.[64] In fact some cases hold that the lien must be enforced before the beginning of a second voyage.[65] But even as against an innocent purchaser the lien is not lost by mere lapse of time. There must be an element of negligence on the part of the lien claimant, such as failure to exercise a reasonable opportunity of enforcement. If the vessel has during the interval been out of his reach and he acts upon the first opportunity after she comes within his reach the lien is not waived.[66] In view of the increased facilities of modern communication, the lien claimant does not discharge the obligation of diligence resting upon him by waiting for the vessel to return

60. The Asher W. Parker, 84 Fed. 832, 28 C. C. A. 224; The Shady Side, 23 Fed. 731.

61. As where the owner had chartered his vessel to her master who contracted the supplies giving rise to the lien, and after a long delay they were asserted against the vessel. McHorney *v.* The D. B. Steelman, 70 Fed. 326. So where the lien claimant waited before intervening until part of the proceeds of sale remaining in the court registry were drawn out by part of the owners, and then he attempted to charge it against the proportionate shares of the other owners. *In re* Wright, 16 Fed. 482.

62. The Sea Lark, 21 Fed. Cas. No. 12,579, 1 Sprague 571. There are some old decisions holding that a lien is waived if not enforced at the termination of the voyage for which the supplies were furnished. The Boston, 3 Fed. Cas. No. 1,669, Blatchf. & H. 309; The Utility, 28 Fed. Cas. No. 16,806, Blatchf. & H. 218. But the change in the duration of voyages and the necessity of credit in modern business have superseded this rule, as is manifest from the cases cited.

63. Norfolk Sand, etc., Co. *v.* Owen, 115 Fed. 778, 53 C. C. A. 96 (barred in fifteen months); The Tiger, 90 Fed. 826 (barred in seventeen months); The Algonquin, 88 Fed. 318 (barred in seven months); The Asher W. Parker, 84 Fed. 832, 28 C. C. A. 224 (barred in two years); The Angler, 83 Fed. 845 (barred in two years).

64. The San Rafael, 141 Fed. 270, 72 C. C. A. 388; The Lyndhurst, 48 Fed. 839 (a delay of a year); The Bristol, 11 Fed. 156 [*affirmed* in 20 Fed. 800] (a delay of four years); The Lauretta, 9 Fed. 622 (a delay of two years); The Dubuque, 7 Fed. Cas. No. 4,110, 2 Abb. 20 (a delay of about three years); The Eliza Jane, 8 Fed. Cas. No. 4,363, 1 Sprague 152 (failure to libel when opportunity presented six months after supplies furnished); The John Lowe, 13 Fed. Cas. No. 7,356, 2 Ben. 394; The Lillie Mills, 15 Fed. Cas. No. 8,352, 1 Sprague 307 (a delay of two years); Stillman *v.* The Buckeye State, 23 Fed. Cas. No. 13,445, Newb. Adm. 111 (a delay of about three years); Winterport Granite, etc., Co. *v.* The Jasper, 30 Fed. Cas. No. 17,898, Holmes 99 (a delay of ten months); The Royal Arch, Swab. 269, 6 Wkly. Rep. 191.

Canada cases see The Haidee, 2 Stuart Vice-Adm. (L. C.) 25, 10 L. C. Rep. 101 (about four years); The Hercyna, 1 Stuart Vice-Adm. (L. C.) 274 (about a year).

65. The Boston, 3 Fed. Cas. No. 1,669, Blatchf. & H. 309; The General Jackson, 10 Fed. Cas. No. 5,314, 1 Sprague 554; The Utility, 28 Fed. Cas. No. 16,806, Blatchf. & H. 218; American Ins. Co. *v.* Coster, 3 Paige (N. Y.) 323. But as already remarked this rule is too rigid. See *supra*, note 62.

66. The Marjorie, 157 Fed. 183; The Tonawanda, 27 Fed. 575 [*affirmed* in 29 Fed. 877]; Baldwin *v.* The E. Morris, 2 Fed. Cas. No. 799 (a delay of eight months); Cole *v.* The Atlantic, 6 Fed. Cas. No. 2,976, Crabbe 440 (a delay of two years without reasonable opportunity to enforce); The Eliza Jane, 8 Fed. Cas. No. 4,363, 1 Sprague 152 (failure to enforce due to absence); The Prospect, 20 Fed. Cas. No. 11,443, 3 Blatchf. 526 (a continuous absence and prompt procedure on ship's return); The Rebecca, 20 Fed. Cas. No. 11,619, 1 Ware 187 (a delay of nine months); The Walkyrien, 29 Fed. Cas. No. 17,092, 11 Blatchf. 241 [*affirming* 29 Fed. Cas. No. 17,091, 3 Ben. 394] (here the ship was out of the country for two years, and was libeled on her return); Young *v.* The Orpheus, 119 Mass. 179.

to the jurisdiction where the lien was contracted. He should follow her into neighboring districts or states or even abroad, if her home port is abroad.[67] On the Great Lakes the rule is established that a lien claimant must proceed during the current season of navigation or at the first opportunity thereafter.[68] The fact that the purchaser has a covenant of warranty from his vendor does not debar him from the right of setting up this defense as against a lien claimant, nor remit him to a suit against the vendor on his covenant.[69] But this doctrine of waiver or laches on behalf of the lien claimant can be invoked by a purchaser only where he is ignorant of the lien and has no such means of knowledge as to put him on inquiry. A purchaser having actual or constructive knowledge of the lien stands in no better position than his vendor.[70]

(B) *Mortgagee* A prior mortgagee or mortgagee for an antecedent indebtedness has no greater equity as against a lien claimant than the owner. In fact a prior mortgagee is practically an owner as far as the lien of a lien claimant is concerned, for the theory of a maritime lien based on contract is a benefit conferred on the *res*; and it is as much the interest of the mortgagee as the owner that services tending to the preservation of the *res* be recognized.[71] But a subsequent mortgagee comes under the same principle as an innocent purchaser. In fact he is an innocent purchaser under the same circumstances and conditions as those governing the holder of a bill of sale.[72]

(C) *Later Lienor.* The relative rank of lienors is rather a question of priority than of waiver. The original admiralty rule is that necessaries furnished for a late voyage rank those for a prior voyage, as contributing more directly to the preservation of the *res*.[73] But this rule cannot be applied as among frequent short voyages and overlapping running accounts. On the lakes and canals the liens are classified by seasons, the later season being preferred.[74] In New York harbor work, claims less than forty days old are preferred.[75] Various periods

67. The Nikita, 62 Fed. 936, 10 C. C. A. 674; The C. N. Johnson, 19 Fed. 782.

68. The Alfred J. Murray, 60 Fed. 926; The Detroit, 7 Fed. Cas. No. 3,832, Brown Adm. 141; The Hercules, 12 Fed. Cas. No. 6,400, Brown Adm. 560; Stillman *v.* The Buckeye State, 23 Fed. Cas. No. 13,445, Newb. Adm. 111.

A year has also been laid down as the rule, this being about equivalent to the current season of navigation. Chard *v.* The Kate L. Bruce, 5 Fed. Cas. No. 2,614.

69. The Bristol, 11 Fed. 156; The Detroit, 7 Fed. Cas. No. 3,832, Brown Adm. 141; The Hercules, 12 Fed. Cas. No. 6,400, Brown Adm. 560.

The lien claimant has his remedy in personam left against the owner, although he has waived his remedy against the property in the hands of the purchaser. It is as easy for him to sue the owner as it is for the purchaser on the warranty. And the lien claimant having rested on his rights, is the one on whom the burden of a suit against a solvent owner or the risks of a suit against an insolvent owner should fall.

70. An unsecured creditor who takes a vessel to save a debt without inquiry is not an innocent purchaser. The Alfred J. Murray, 60 Fed. 926 [*affirmed* in 63 Fed. 270, 11 C. C. A 177]; nor is a transferee not *bona fide*. Jones *v.* The Carrie, 46 Fed. 796; The Paul Boggs, 18 Fed. Cas. No. 10,846, 1 Sprague 369. A purchaser who is informed that there are some outstanding bills is not an innocent purchaser, although the special bill in question may not have been mentioned to him. The Louie Dole, 14 Fed. 862, 11 Biss. 479. In Enslow *v.* The Sarah and Abigail, 8 Fed. Cas. No. 4,495, a purchaser who knew that there was an outstanding account for sails was held not to be an innocent purchaser, although he had no knowledge that a lien was claimed therefor. As to innocent purchasers see The Morning Star, 14 Fed. 866; The Atalanta, 2 Fed. Cas. No. 597, Brown Adm. 489.

71. The Ella, 84 Fed. 471; The James T. Easton, 49 Fed. 656; The Carrie, 46 Fed. 796; The Chusan, 5 Fed. Cas. No. 2,717, 2 Story 455.

72. The Columbia, 6 Fed. Cas. No. 3,036, 13 Blatchf. 521; The Dubuque, 7 Fed. Cas. No. 4,110, 2 Abb. 20; Fitzgerald *v.* The H. A. Richmond, 9 Fed. Cas. No. 4,839; Griswold *v.* The Nevada, 11 Fed. Cas. No. 5,839, 2 Sawy. 144; Leland *v.* Medora, 15 Fed. Cas. No. 8,237, 2 Woodb. & M. 92; The Theodore Perry, 23 Fed. Cas. No. 13,879; Halbert *v.* McCulloch, 3 Metc. (Ky.) 456, 79 Am. Dec. 556.

73. The Omer, 18 Fed. Cas. No. 10,510, 2 Hughes 96; Porter *v.* The Sea Witch, 19 Fed. Cas. No. 11,289, 3 Woods 75.

74. The J. W. Tucker, 20 Fed. 129; The Arcturus, 18 Fed. 743; The City of Tawas, 3 Fed. 170.

75. The Samuel Morris, 63 Fed. 736; The Gratitude, 42 Fed. 299.

As to older claims the only rule is that of

depending on special circumstances have been fixed in different decisions as dividing later and earlier liens in regard to rank.[76]

c. Surrendering Possession. One of the striking attributes of the maritime lien is that it is not dependent on possession and follows the *res* into other hands; the only exception being the lien of the vessel owner on the cargo for freight.[77] Hence a maritime lien is not lost by the mere surrender of possession. But care must be taken to distinguish this from the common-law lien of a shipwright, which is lost by surrendering possession.[78]

d. Permitting Departure of Vessel. As a general maritime lien does not depend on possession, and is based on the necessity of credit, permitting the vessel to depart is not of itself a waiver of such lien.[79] But some of the local statutes require certain action on the part of the lien claimant before the vessel is allowed to leave. In such cases the failure of the creditor to take such action is a waiver of the lien.[80] Hence, where such statutes provide that such lien shall cease on the departure of the vessel from the state, or be enforced before she leaves the state, or use similar phraseology, a departure of the vessel in regular course of business ends the lien.[81] But a surreptitious departure not in the line of business and without the knowledge of the materialman will not be permitted to defeat the lien.[82] And, independent of any intentional fraud, a shifting of the vessel during the work, a trial trip, a resort to the port of another state from stress of weather or circumstances, or acts of this nature not in the ordinary course of business are not departures.[83]

e. Taking Collateral Security. Whether the taking of additional and different security is a waiver of a maritime lien is a question of intent turning on the circumstances of the particular case. As the maritime lien for necessaries is an implied lien, the proof of an express agreement to take some other security would go far toward negativing the existing of an implied lien.[84] Taking a mortgage

reasonable diligence. The Young America, 30 Fed. 789; The Grapeshot, 22 Fed. 123.

76. In The John Dillon, 46 Fed. 527, Judge Green of New Jersey, while premising that each case must stand on its own special circumstances, intimated that items less than a year old should be treated on the same footing. This is the practice in the eastern district of Virginia, although there is no written decision to that effect. In The Thomas Sherlock, 22 Fed. 253, Judge Sage, although declining to lay down any fixed rule, drew the line as between claims less than six months old, and those more than six months old. In The Nellie Bloomfield, 27 Fed. 524, a materialman's claim was preferred to that of a mariner who had postponed action for over two years.

77. The Lime Rock, 49 Fed. 383; McCaffrey *v.* Knapp, etc., Co., 74 Ill. App. 80 [*affirmed* in 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290]; The Charlotte *v.* Hammond, 9 Mo. 59, 43 Am. Dec. 536; and *supra*, II, B.

78. See *supra*, II, B.

79. The Active, 1 Fed. Cas. No. 34, Olcott 286; Anderson *v.* The Solon, 1 Fed. Cas. No. 363, Crabbe 17; The Chusan, 5 Fed. Cas. No. 2,717, 2 Story 455; The Nestor, 18 Fed. Cas. No. 10,126, 1 Sumn. 73; Bourcier *v.* The Ann, 1 Mart. (La.) 165; Mott *v.* Lansing, 57 N. Y. 112.

80. Many of these statutes and the requisites thereby prescribed have already been discussed in connection with the steps necessary to preserve or perfect the lien. See *supra*, VII, B, 6; Heppard *v.* The General Cadwalader, 11 Fed. Cas. No. 6,390.

81. The present form of the New York statute has abolished the requirements in so far as they depend on any departure from the port or state. Under the old form, short trips in regular course of business were departures. See *supra*, VII, B, 6, h, (II), (J), (2); The Whistler, 30 Fed. 199; The Arctic, 22 Fed. 126; Jenkins *v.* The Congress, 13 Fed. Cas. No. 7,264; The Jenny Lind, 13 Fed. Cas. No. 7,287, 3 Blatchf. 513; Rockefeller *v.* Thompson, 2 Sandf. (N. Y.) 395.

82. Freeborn *v.* The Falcon, 9 Fed. Cas. No. 5,078*a*; The Joseph E. Coffee, 13 Fed. Cas. No. 7,536, Olcott 401; Van Winkle *v.* The Henry Morrison, 28 Fed. Cas. No. 16,882, 23 How. Pr. (N. Y.) 371.

83. The Sam Slick, 21 Fed. Cas. No. 12,283, 1 Sprague 289 [*reversed* under an interpretation of the particular statutory provision in 21 Fed. Cas. No. 12,282, 2 Curt. 480]; Sheppard *v.* Steele, 3 Lans. (N. Y.) 417 [*affirmed* in 43 N. Y. 52, 3 Am. Rep. 660]; Hancox *v.* Dunning, 6 Hill (N. Y.) 494; Denison *v.* The Appelonia, 20 Johns. (N. Y.) 194; Low *v.* The Ship Clarence S. Bement, 2 Pa. Co. Ct. 430, 19 Wkly. Notes Cas. 153.

84. See cases cited *infra*, this note.

Where the contract is made with the owner, the presumption is against an implied lien anyhow, and hence where an additional security is contracted for with the owner and nothing is said about a maritime lien the presumption of waiver is irresistible.

on a vessel unaccompanied by other circumstances, such as permitting it to run too long a time, is not inconsistent with the existence of a maritime lien, according to the great weight of authority.[85] But taking a mortgage accompanied by other acts inconsistent with the lien will be a waiver of it.[86]

f. Instituting Suit in Non-Marine Forum. A holder of a maritime lien who seeks his remedy, not by an action *in rem*, but by resort to some other form of action and pursues his remedy so far as to result in a sale of the vessel, is prevented by obvious principles of justice from subsequently asserting any lien against the vessel.[87] So the assertion of a claim in a state court and its reduction to judgment is a merger of the claim in the judgment and a waiver of any maritime claim for it.[88] But this principle does not apply to an absolutely void proceeding involving no change of possession or title.[89] However, the mere institution of a suit in another forum, which is dismissed or not pushed, constitutes no waiver.[90]

g. Other Inconsistent Acts. It may be stated in general that a party cannot occupy inconsistent positions, and cannot assert a maritime lien after having

Stevens *v.* The Sandwich, 23 Fed. Cas. No. 13,409, Pet. Adm. 233; Taylor *v.* The Commonwealth, 23 Fed. Cas. No. 13,787.

An express agreement giving a lien on the freight would under such circumstances negative any intent to look to the maritime lien. Huntington *v.* Proceeds of the Vigilancia, 72 Fed. 791, 793, 19 C. C. A. 192, 194.

Other security see American Ins. Co. *v.* Coster, 3 Paige (N. Y.) 323; The William Money, 2 Hagg. Adm. 136.

85. The Thomas Morgan, 123 Fed. 781; The L. B. X., 93 Fed. 233; The D. B. Steelman, 48 Fed. 580; The A. R. Dunlap, 1 Fed. Cas. No. 513, 1 Lowell 350.

86. In The Nebraska, 69 Fed. 1009, 17 C. C. A. 94 [*affirming* 61 Fed. 514], the mortgage extended the time beyond the period allowed on the lakes for enforcing maritime claims, and this fact was held to constitute a waiver, although the notes secured by the mortgage contained an express reservation of the lien. In The Wexford, 7 Fed. 674, the allowance of a two years' credit by the mortgage was held a waiver, although the judge intimated that the mere taking of the mortgage might have the same effect. In Kornegay *v.* Styron, 105 N. C. 14, 11 S. E. 153, a lien claimant who consented to a sale and agreed to accept notes secured by mortgage was held estopped from asserting his lien against an innocent purchaser, although the notes were actually not executed. There is a *dictum* in The Ann C. Pratt, 1 Fed. Cas. No. 409, 1 Curt. 340, to the effect that taking a mortgage is a waiver. It is based on the following decisions: Fish *v.* Howland, 1 Paige (N. Y.) 20; Boos *v.* Ewing, 17 Ohio 500, 49 Am. Dec. 478; Manly *v.* Slason, 21 Vt. 271, 52 Am. Dec. 60; Little *v.* Brown, 2 Leigh (Va.) 353; Case of an Hostler, Yelv. 66. Of these the Ohio case at least does not bear out the principle for which it is cited. See The D. B. Steelman, 48 Fed. 580, for a discussion of this doctrine.

Taking a mortgage on other property and on long time if expressly understood as collateral security only is not a waiver. The Theodore Perry, 23 Fed. Cas. No. 13,879.

Nor does taking the vessel's papers in the creditor's name, with an express reservation of a lien, constitute a waiver. Stewart *v.* Rogers, 19 Md. 98.

87. In Northwestern Commercial Co. *v.* Bartels, 131 Fed. 25, 65 C. C. A. 263, a lien claimant intervened in receivership proceedings which resulted in a sale, the proceeds not sufficing to reach his lien. He was denied the right to proceed subsequently in admiralty against the purchaser. In The Mary Morgan, 28 Fed. 196, a lien claimant who obtained judgment on a note taken for his lien and sold the vessel on execution was held to have exhausted his remedies.

88. Pendergast *v.* The General Custer, 10 Wall. (U. S.) 204, 19 L. ed. 944; Dudley *v.* The Superior, 7 Fed. Cas. No. 4,115, Newb. Adm. 176; Stapp *v.* The Swallow, 22 Fed. Cas. No. 13,305, 1 Bond 189; Perkins *v.* Pike, 42 Me. 141, 66 Am. Dec. 267; Taggard *v.* Buckmore, 42 Me. 77. In The Cerro Gordo, 54 Fed. 391, a seaman sued a part-owner in a state court and sold his interest on execution, subject to a mortgage. It was held that he could still proceed in admiralty for an unsatisfied balance against one who subsequently purchased the mortgage and the remaining interest in the vessel. *Sed quære.* In The Brothers Apap, 34 Fed. 352, Judge Benedict held that suing *in personam* and reducing the claim to judgment was not a waiver.

89. The B. F. Woolsey, 7 Fed. 108.

90. Pendergast *v.* The General Custer, 10 Wall. (U. S.) 204, 19 L. ed. 944; The Grand Republic, 138 Fed. 615; Learned *v.* Brown, 94 Fed. 876, 36 C. C. A. 524 (withdrawing a joint libel and filing separate ones); Moore *v.* The Robilant, 42 Fed. 162 (suing *in personam*); The Augustine Kobbe, 37 Fed. 696 (attaching in a state court and subsequently dismissing attachment); The Highlander, 12 Fed. Cas. No. 6,476, 1 Sprague 510 (same as above); The Paul Boggs, 18 Fed. Cas. No. 10,846, 1 Sprague 369 (same as above); Southern Bank *v.* The Alexander McNeil, 22 Fed. Cas. No. 13,186 (same as above).

adopted a course of conduct or having been party to a proceeding in a capacity in conflict with the retention of such a lien.[91]

B. By Destruction of Vessel. The total destruction of a vessel extinguishes a maritime lien, as there is no longer any *res* to which it can attach. But if any part is saved or can be reached, the lien still holds to such part.[92]

C. By Forfeiture of Vessel — 1. Liens Created Prior to Forfeiture. A forfeiture for violation of a statute does not affect liens accrued prior to the illegal act.[93]

2. Liens Concurrent With or Subsequent to Forfeiture. Here too the forfeiture does not affect the lien if the party claiming it was innocent of any participation in the illegal act.[94]

D. By Judicial Sale of Vessel — 1. By Admiralty Proceedings In Rem. It is the basis of admiralty law that the ship is itself treated as a responsible thing and hence that a libel *in rem* is against the ship as such regardless of questions of ownership.[95] It follows from this principle that an admiralty proceeding *in rem* when carried to a sale sells the thing itself, and hence passes to the purchaser a good title to the thing itself, free from all prior liens, no matter what their rank may be as among each other or as against the creditor who put in motion the machinery of the admiralty court.[96] But this doctrine applies only to admiralty

91. See, generally, Bailments; Estoppel; and cases cited *infra*, this note.

Illustrations.— Hence a party who claims part of the *res* as owner and obtains possession of it on bond cannot then set up a maritime lien against the *res* and claim to share in the bond. Hawgood, etc., Transit Co. *v.* Dingman, 93 Fed. 1011, 36 C. C. A. 627. So repairs done while in possession of a vessel under claim of ownership do not give rise to a lien. Glover *v.* Ames, 8 Fed. 351. So a builder who has agreed to build and deliver the boat by a certain date and has done so, cannot, where the boat has passed into possession of a third party, proceed against it to assert a lien under a state statute which does not keep his lien alive as against others than the original parties. Canal-Boat Etna *v.* Treat, 15 Ohio 585.

Taking a bottomry bond is a waiver of the lien, as it substitutes an express lien for an implied one. The Ann C. Pratt, 1 Fed. Cas. No. 409, 1 Curt. 340 [*affirmed* in 18 How. 63, 15 L. ed. 267]. In this case the bond was held void for fraud, and that was the main ground of the decision, but there is a strong intimation that even a valid bond is inconsistent with the implied lien.

But a credit to the wrong account is not a waiver of the lien and may be corrected. Roxbury *v.* The Lotta, 65 Fed. 319.

Where a marine claimant is authorized by a trust deed, contingent on the consent of creditors, to run a boat for their benefit and such consent is not given, he is not estopped from asserting his lien. The Illinois, 12 Fed. Cas. No. 7,005, 2 Flipp. 383.

92. Bruce *v.* The America, 4 Fed. Cas. No. 2,046, Newb. Adm. 195; Collins *v.* The Fort Wayne, 6 Fed. Cas. No. 3,012, 1 Bond 476; The Massasoit, 16 Fed. Cas. No. 9,260, 1 Sprague 97; McMonagle *v.* Nolan. 98 Mass. 320.

Under the Ohio water-craft law, if the vessel is so wrecked that she no longer exists as a water-craft, she cannot be attached under the state law. Buffalo Mut. Ins. Co. *v.* Steamboat America, 4 Ohio Dec. (Reprint) 13, 1 Clev. L. Rec. 10.

93. North American Commercial Co. *v.* U. S., 81 Fed. 748, 26 C. C. A. 591 [*reversing* 74 Fed. 246]; The Elexena, 53 Fed. 359; The Florenzo, 9 Fed. Cas. No. 4,886, Blatchf. & H. 52; The Ranier, 20 Fed. Cas. No. 11,565, Deady 438; The Haytian Republic, 65 Fed. 120, deciding that a forfeiture cuts off prior liens, is contrary to the current of authority.

A foreign condemnation as prize cuts off all liens, and may be proved without producing the decree. Pierce *v.* The Alberto, 19 Fed. Cas. No. 11,142.

94. The St. Jago de Cuba, 9 Wheat. (U. S.) 409, 6 L. ed. 122; The Jennie Hayes, 37 Fed. 373; The City of Mexico, 28 Fed. 207; Anderson *v.* The Solon, 1 Fed. Cas. No. 363, Crabbe 17; The Ranier, 20 Fed. Cas. No. 11,565, Deady 438; U. S. *v.* The Laurel, 26 Fed. Cas. No. 15,569, Newb. Adm. 269. But knowledge of the illegal trade would defeat a lien. U. S. *v.* The Catharine, 25 Fed. Cas. No. 14,755, 2 Paine 721. In The Jennie Hayes, *supra*, it was held that where the forfeiture was for an act in which seamen did not participate, their knowledge of the act did not operate to forfeit their wages. See in general 34 Cent. Dig. tit. "Maritime Liens," § 87.

95. See *supra*, II, C.

96. *Indiana.*— The Rover *v.* Stiles, 5 Blackf. 483.

Missouri.— Phegley *v.* The David Tatum, 33 Mo. 461, 84 Am. Dec. 57; Ritter *v.* The Jamestown, 23 Mo. 348; Finney *v.* The Fayette, 10 Mo. 612; The Raritan *v.* Smith, 10 Mo. 527; The General Brady *v.* Buckley, 6 Mo. 558.

New York.— Kelsey *v.* Beers. 16 Abb. Pr. 228.

United States.— The Mary, 9 Cranch 126,

proceedings *in rem*, not to every proceeding in an admiralty court, as is manifest from the reasons on which it is based. A proceeding not *in rem* in which the vessel is involved as incident to questions of ownership or possession does not, although consummated by sale, divest all liens, for in such cases maritime claimants would have no right to intervene and hence could not be bound.[97]

2. By Non-Marine Proceedings. On the other hand a proceeding in a non-maritime court, although authorized by a local statute to be brought against a vessel by name, is but a proceeding to reach the interest of the owner. Hence it sells only his interest. Maritime claimants who do not participate are not bound thereby and can still proceed in admiralty to enforce their liens against the boat in the hands of a purchaser at such sale.[98]

E. By Extrajudicial Sale of Vessel — 1. By the Master. An inherent power of the master exists to sell the vessel when she has met with such a disaster that no possibility of saving her either by means of raising funds on bottomry or otherwise remains, and it is necessary for the benefit of all concerned. Such sale divests all existing liens, which are thereby transferred to the proceeds of sale.[99]

2. By the Owner. An ordinary sale by the owner does not divest a maritime lien, although the purchaser was ignorant of its existence, unless there are some circumstances of laches or estoppel on the part of the maritime claimant.[1] The

3 L. ed. 678; Williams *v.* Armroyd, 7 Cranch 423, 3 L. ed. 392; The Evangel, 94 Fed. 680; The Trenton, 4 Fed. 657; Hill *v.* The Golden Gate, 12 Fed. Cas. No. 6,491.

England.— Bernard *v.* Hyne, 6 Moore P. C. 56, 4 Notes of Cas. 498, 2 W. Rob. 451, 13 Eng. Reprint 604.

97. The Granite State, 10 Fed. Cas. No. 5,687, 1 Sprague 277; Ritter *v.* The Jamestown, 23 Mo. 348.

98. *Alabama.*— Reed *v.* Fawkes, 9 Port. 623.

Illinois.— Germain *v.* The Indiana, 11 Ill. 535.

Iowa.— Ogden *v.* Ogden, 13 Iowa 176; Haight *v.* The Henrietta, 4 Iowa 472, 68 Am. Dec. 669.

Ohio.— Patterson *v.* The Steamboat Gulnare, 2 Disn. 505.

Pennsylvania.— McClelland *v.* The Robert Morris, 3 Pa. L. J. 493.

Wisconsin.— Emerson *v.* The Shawano City, 10 Wis. 433; Hay *v.* The Winnebago, 10 Wis. 428.

United States.— The Lillie, 40 Fed. 367, [*affirmed* in 42 Fed. 237]; Harris *v.* The Henrietta, 11 Fed. Cas. No. 6,121, Newb. Adm. 284; Hill *v.* The Golden Gate, 12 Fed. Cas. No. 6,491; The John Richards, 13 Fed. Cas. No. 7,361, 1 Biss. 106; McAllister *v.* The Sam Kirkman, 15 Fed. Cas. No. 8,658, 1 Bond 369; Maxwell *v.* The Powell, 16 Fed. Cas. No. 9,324, 1 Woods 99; The N. W. Thomas, 18 Fed. Cas. No. 10,386, 1 Biss. 210.

Cases reviewed and criticized.— In Ashbrook *v.* The Golden Gate, 2 Fed. Cas. No. 574, Newb. Adm. 296, Judge Wells held that a sale under process of a state court does not divest liens arising under the general maritime law. As to liens under the local law, he held that they are divested if the local law clearly shows such intent, on the theory that as the state need not give them at all, it can prescribe the conditions under which they will vest or divest. This is true as to local liens non-maritime by nature. As to maritime liens arising under local law, they are enforceable, not because created by state law, but because they are maritime; and it is difficult to understand how a state statute can deprive an admiralty court of its jurisdiction to enforce them, or make a clear title against a maritime claim. There is a *dictum* to the same effect in Woodward *v.* Dillworth, 75 Fed. 415, 21 C. C. A. 417. On the other hand in Moran *v.* Sturges, 154 U. S. 256, 14 S. Ct. 1019, 38 L. ed. 981, it was held that maritime liens could not be divested by a receivership proceeding in a state court. It was a case where both domestic and foreign liens were under consideration. The decision of Judge Campbell in Auther *v.* The Atlantic, 2 Fed. Cas. No. 668, holding that a sale under state process extinguishes prior maritime liens is not sustainable in the face of the authorities above cited.

99. Fitz *v.* The Galiot Amelie, 6 Wall. (U. S.) 18, 18 L. ed. 806 [*affirming* 9 Fed. Cas. No. 4,838, 2 Cliff. 440]; The Raleigh, 37 Fed. 125 [*affirming* 32 Fed. 633].

1. Enslow *v.* The Sarah & Abigail, 8 Fed. Cas. No. 4,495; Harney *v.* The Sydney L. Wright, 11 Fed. Cas. No. 6,082*a*, 5 Hughes 474; McAllister *v.* The Sam Kirkman, 15 Fed. Cas. No. 8,658, 1 Bond 369; Archibald *v.* Citizens' Bank, 64 Miss. 523, 1 So. 739; The Waverly *v.* Clements, 14 Ohio 28; Young *v.* The Steamboat Virginia, 2 Handy (Ohio) 137; The Steamboat Baltimore *v.* Levi, 2 Handy (Ohio) 30; Johnson *v.* Black, L. R. 4 P. C. 161, 1 Aspin. 208, 41 L. J. Adm. 33, 26 L. T. Rep. N. S. 1, 8 Moore P. C. N. S. 398, 20 Wkly. Rep. 592, 17 Eng. Reprint 361; Harmer *v.* Bell, 7 Moore P. C. 267, 13 Eng. Reprint 884.

Even the United States, when it purchases at private sale, takes subject to existing liens. Revenue Cutter No. 1, 20 Fed. Cas.

lien claimant may, however, by his course of dealing be estopped from enforcing his lien against a purchaser at private sale.[2]

F. By Release of Vessel on Bond. A bond given to release a vessel from attachment is in contemplation of law a substitute for the vessel itself, and hence all who have intervened in that case up to the giving of the bond must look to the bond; and the vessel is discharged from their liens.[3] But it does not discharge those who did not intervene. The vessel returns to the owner *cum onere*, and claimants who had liens at the time of giving the bond and did not intervene can proceed against the vessel, leaving those who did intervene to their bond.[4] Nor does it affect liens subsequently arising. The vessel when released on bond

No. 11,713, Brown Adm. 76. The report is not clear whether the property was actually in the possession of the government at the time of the seizure. If so, it is hard to see how the lien could be enforced even though it existed, if the proceeding involved dispossession of the government.

2. As where he represented that he had no claim. Wood *v.* The Lumberman, 30 Fed. Cas. No. 17,949, 3 Hughes 542.

Effect of lapse of time or other circumstances of estoppel as against *bona fide* purchasers has been discussed *supra*, VIII, A, 3.

3. *Alabama.*— Richardson *v.* Cleveland, 5 Port. 251. But if the bond does not conform to the state statute, the lien is not discharged. Bierne *v.* The Triumph, 2 Ala. 738. A bond not conforming to the statute, if given voluntarily and not extorted by the officer *colore officii*, is enforceable as a common-law bond. Bouse *v.* Jayne, 14 Ala. 727; Whitsett *v.* Womack, 8 Ala. 466. When no claim is interposed, a condemnation is a matter of course. Witherspoon *v.* Wallis, 2 Ala. 667.

Illinois.— Bonding a vessel does not relieve plaintiff from the burden of proof. Langdon *v.* Wilcox, 107 Ill. 606. If suit is voluntarily dismissed the lien is not discharged by the bond, and may be renewed against the vessel. The E. P. Dorr *v.* Waldron, 62 Ill. 221, 14 Am. Rep. 86.

Indiana.— Lawrenceburgh Ferryboat *v.* Smith, 7 Ind. 520. Under Rev. St. (1843) c. 42, art. 2, giving a bond is not a general appearance; and it operates to set aside a default judgment. Carson *v.* The Talma, 3 Ind. 194. Judgment cannot be given against the stipulators in the original suit without further proceedings. Brayton *v.* Freese, Smith 35.

Iowa.— Under Code (1851), § 2125, judgment could be given and execution issued in the original suit against the sureties on the bond. Ogden *v.* Ogden, 13 Iowa 176; White *v.* Tisdale, 12 Iowa 75.

Louisiana.— Blanchin *v.* The Fashion, 10 La. Ann. 49. As to the liability of sureties on a bond in this state see Noble *v.* Warner, 21 La. Ann. 284; Norton *v.* Cammack, 10 La. Ann. 10; Kirkland *v.* Boyle, 7 La. Ann. 369.

Missouri.— Carson *v.* The Elephant, 24 Mo. 27; Auvray *v.* The Pawnee, 19 Mo. 537; St. Louis Perpetual Ins. Co. *v.* Ford, 11 Mo. 295. An amendment not changing the cause of action does not affect the liability of the sureties; nor are they entitled to notice of such amendment proceedings, as they are constructively in court. Merrick *v.* Greely, 10 Mo. 106.

New Jersey.— A declaration on a bond in this state must practically show a cause of action on the original claim. Lovegrave *v.* Kuser, 56 N. J. L. 22, 28 Atl. 313. But when voluntarily given, prior irregularities do not vitiate it. Howell *v.* Gaddis, 31 N. J. L. 313.

New York.— The master can bind the owners by such a bond. Stedman *v.* Patchin, 34 Barb. 218. Giving the bond is a waiver of prior irregularities, and *prima facie* evidence that the previous proceedings are regular. Happy *v.* Mosher, 48 N. Y. 313; Onderdonk *v.* Voorhis, 36 N. Y. 358; Delany *v.* Brett, 4 Rob. 712. If voluntarily given it is valid, although not strictly conforming to the statute. Franklin *v.* Pendleton, 3 Sandf. 572 [*affirmed* in 7 N. Y. 508]. A suit upon it must show a cause of action under the statute and plaintiff still has the burden of proof. Atkins *v.* Stanton, 6 Bosw. 648; Clark *v.* Thorp, 2 Bosw. 680; Wakeman *v.* Newton, 21 Wend. 260. As to the surety's liability even when the original claim is not enforceable on account of the vessel's being in possession of the government see Coryell *v.* Perine, 6 Rob. 23.

Pennsylvania.— Cain *v.* Shakespeare, 12 Phila. 196.

United States.— Poole *v.* Tyler, 94 U. S. 518, 24 L. ed. 167 [*affirming* 8 Fed. Cas. No. 4,283, 11 Blatchf. 451]; Hawgood, etc., Transit Co. *v.* Dingman, 94 Fed. 1011, 36 C. C. A. 627; The William F. McRae, 23 Fed. 557; The Antelope, 1 Fed. Cas. No. 481, 1 Ben. 521; The Langdon Cheves, 14 Fed. Cas. No. 8,063, 2 Mason 58; The Old Concord, 18 Fed. Cas. No. 10,482, 2 Abb. 20, Brown Adm. 270; The Thales, 23 Fed. Cas. No. 13,855, 3 Ben. 327 [*affirmed* in 23 Fed. Cas. No. 13,856, 10 Blatchf. 203].

England.— The Wild Ranger, Brown & L. 84; The Kalamazoo, 15 Jur. 885, 9 Eng. L. & Eq. 557.

See 34 Cent. Dig. tit. "Maritime Liens," § 91.

4. The Oregon, 158 U. S. 186, 15 S. Ct. 804, 39 L. ed. 943 [*reversing* 45 Fed. 62]; The Haytien Republic, 154 U. S. 118, 14 S. Ct. 992, 38 L. ed. 930 [*reversing* 57 Fed. 508]; The T. W. Snook, 51 Fed. 244; The Union, 24 Fed. Cas. No. 14,346, 4 Blatchf. 90.

can contract new debts and be held therefor.[5] But by express statute in the United States a vessel owner, when his vessel is arrested, may give bond in double the amount of the claims asserted against her and have her discharged from causes of action then asserted. He may also protect her from causes of action thereafter asserted so long as he keeps the penalty of his bond double the amount of the libels.[6] And, by the provisions of the Limited Liability Act and the rules of court prescribing the method of securing its benefits, a vessel owner may surrender his vessel, have her appraised, give bond for her appraised value and thereafter hold her free from all claims against which that act is a protection, and relegate such claimant to such bond.[7]

G. Effect of Bankruptcy or Other Change of Owner's Status. As an admiralty lien is a claim against the thing itself, regardless of questions of ownership, it ought to be clear on principle that a discharge of the owner under the operation of bankrupt[8] or insolvent[9] laws would only release his personal liability and would not affect the lien. And such is the result of the authorities.[10]

H. Revival of Lien. A lien barred by staleness is not revived by a new remedy given by law so as to affect other rights vested in the meanwhile.[11]

IX. ASSIGNABILITY OF LIEN.

A. By Express Assignment. The better authority is that an ordinary maritime lien is assignable, and may be enforced either in the name of the lien claimant or his assignee.[12] But there is quite a line of cases holding that such a lien is personal and cannot be assigned.[13]

5. *Indiana.*— Scott *v.* McDonald, 27 Ind. 33; The Lawrenceburgh Ferryboat *v.* Smith, 7 Ind. 520; The Odd Fellow *v.* Stewart, 2 Ind. 240; Jones *v.* Gresham, 6 Blackf. 291, holding that when the boat is bonded, the suit becomes a personal one on the bond, but if not bonded it remains a suit against the boat.

Louisiana.— Gordon *v.* Diggs, 9 La. Ann. 422.

Missouri.— St. Louis Perpetual Ins. Co. *v.* Ford, 11 Mo. 295.

New York.— Denning *v.* Smith, 2 Wend. 303.

Pennsylvania.— Shakespear *v.* Fisher, 11 Phila. 248.

Tennessee.— Ferguson *v.* Vance, 3 Lea 90.

United States.— The Union, 24 Fed. Cas. No. 14,346, 4 Blatchf. 90.

The difference between a pure proceeding in rem and an attachment in a common-law court as incident to a claim against defendant has been pointed out in a previous connection *supra*, VII, B, 3, b, (II), (B). State statutes which are merely such attachment proceedings are valid, as there shown. It is true that when there is no appearance, the judgment goes simply against the attached property, but where there is an appearance the suit becomes a personal one against defendant with the bond simply remaining as security. Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931.

6. This is by virtue of U. S. Rev. St. (1878) § 941 [U. S. Comp. St. (1901) p. 692]. Prior to March 3, 1899, this act only allowed bonds for causes of action previously brought. The act of March 3, 1899, c. 441, 30 U. S. St. at L. 1354, added the provision as to subsequent claims.

7. The original Limited Liability Act of March 3, 1851, constitutes U. S. Rev. St. (1878) §§ 4282–4289 [U. S. Comp. St. (1901) p. 2943]. It was extended by the act of June 26, 1884, 23 U. S. St. at L. 57 [U. S. Comp. St. (1901) p. 2945]. Admiralty Rules 54–58 of the United States supreme court prescribe the procedure. The subject is beyond the purview of this treatise.

8. See BANKRUPTCY.

9. See INSOLVENCY.

10. The Home, 12 Fed. Cas. No. 6,657, 18 Nat. Bankr. Reg. 557; The Young Mechanic, 30 Fed. Cas. No. 18,180, 2 Curt. 404; Shoemaker *v.* Norris, 3 Yeates (Pa.) 392.

11. The Circassian, 5 Fed. Cas. No. 2,726, 11 Blatchf. 472; The J. R. Thompson *v.* Lewis, 31 Ala. 497.

12. The New Idea, 60 Fed. 294; The M. Vandercook, 24 Fed. 472; The American Eagle, 19 Fed. 879; Cohan *v.* The Rolling Wave, 6 Fed. Cas. No. 2,959*a*; The Emma L. Coyne, 8 Fed. Cas. No. 4,466; The General Jackson, 10 Fed. Cas. No. 5,314, 1 Sprague 554; Hull of a New Ship, 12 Fed. Cas. No. 6,859, 2 Ware 203; The Norfolk, 18 Fed. Cas. No. 10,297, 2 Hughes 123; The Sarah J. Weed, 21 Fed. Cas. No. 12,350, 2 Lowell 555; Srodes *v.* The Collier, 22 Fed. Cas. No. 13,272*a*; Aiken *v.* The Fanny Barker, 40 Mo. 257; The Charlotte *v.* Kingsland, 9 Mo. 67; The Victorian No. 2, 26 Oreg. 194, 41 Pac. 1103, 46 Am. St. Rep. 616; The Wasp, L. R. 1 A. & E. 367, 16 L. T. Rep. N. S. 854. See 34 Cent. Dig. tit. "Maritime Liens," § 57.

13. The Rapid Transit, 11 Fed. 322; The

B. As Incident to Assignment of Note or Draft. An admiralty lien is not only expressly assignable, but if a note or draft is given for it, and that note or draft is transferred, the lien passes with it as an incident.[14]

X. PRIORITIES.

A. As Between Maritime and Non-Maritime Liens — 1. In General. As a maritime lien is a claim against the *res* as a *res*, regardless of separate interests therein, a maritime lien takes precedence of non-maritime interests or claims.[15]

2. As Between Liens Under General Maritime Law and Non-Maritime Liens or Claims — a. As Against Mortgage — (I) *In America.* It is settled by numberless decisions that a maritime lien, irrespective of questions of waiver or staleness, takes precedence of a mortgage whether prior or subsequent thereto. If the mortgage was prior, the ordinary maritime lien arising on contract, being based on the necessities or maritime use of the vessel, is for the benefit of the mortgage as preserving or bettering the *res*. If the mortgage is subsequent, it vests subject to the lien, there being no requirement of recording as to general maritime liens.[16] This doctrine is not affected by the section in the federal statutes providing that no bill of sale, mortgage, hypothecation, or conveyance of any vessel or part of any vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless recorded in the office of the collector of the customs where such vessel is

Champion, 5 Fed. Cas. No. 2,583, Brown Adm. 520; The A. D. Patchin, 18 Fed. Cas. No. 10,794; The R. W. Skillinger, 21 Fed. Cas. No. 12,181, 1 Flipp. 436; Pearsons *v.* Tincker, 36 Me. 384; Ward *v.* The Dolphin, 1 Pinn. (Wis.) 563.

In addition to the above cases, cited pro and con and which are directly in point, there are a number of *dicta* or intimations in other cases, assuming the assignability or non-assignability of such liens on the mere authority of those cases or without discussion. These are reviewed by Judge Brown in The Emma L. Coyne, 8 Fed. Cas. No. 4,466, and by Judge Lowell in The Sarah J. Weed, 21 Fed. Cas. No. 12,350, 2 Lowell 555, which are the leading cases in favor of assignability. The leading cases against assignability are The R. W. Skillinger, 2 Fed. Cas. No. 12,181, 1 Flipp. 436, and The Champion, 5 Fed. Cas. No. 2,583, Brown Adm. 520.

The shipwright's common-law lien is assignable. Park *v.* The Hull of The Edgar Baxter, 37 Fed. 219.

14. The Chelmsford, 34 Fed. 399; The Pride of America, 19 Fed. 607.

But the holder of a note or draft, although an innocent holder, acquires only such a lien as the original lien claimant had. If items are included which are not maritime he acquires no lien for such items, although the draft purports to cover only maritime claims. Fechtenburg *v.* The Woodland, 104 U. S. 180, 26 L. ed. 705 [*affirming* 30 Fed. Cas. No. 17,976, 7 Ben. 110, 30 Fed. Cas. No. 17,977, 14 Blatchf. 499]; The Joseph Cunard, 13 Fed. Cas. No. 7,535, Olcott 120.

Decisions on the assignability of liens include some cases holding seamen's wages to be assignable.— This is modified by section 61 of the act of June 7, 1872 (U. S Rev. St. (1878) § 4536 [U. S. Comp. St. (1901) p. 3082]. This section renders void the assignment of seamen's wages on the voyages to which it applies.

15. The Guiding Star, 18 Fed. 263 [*affirming* 9 Fed. 521].

Hence even a common-law court which by seizing a vessel has prevented the service of marine process will prefer the maritime liens out of the insurance, the vessel having been lost while in its custody. Cronenwett *v.* Boston, etc., Transp. Co., 95 Fed. 52, an interesting case.

16. The Emily Souder *v.* Pritchard, 17 Wall. (U. S.) 666, 21 L. ed. 683 (mortgage prior in date); The Conveyor, 147 Fed. 586 (mortgage apparently prior in date); The Mary K. Campbell, 40 Fed. 906; The Scotia, 35 Fed. 907; The Isaac May, 21 Fed. 687; The Josephine Spangler, 9 Fed. 773 [*affirmed* in 11 Fed. 440]; The Alice Getty, 1 Fed. Cas. No. 193, 2 Flipp. 18 (mortgages prior in date in this and preceding five cases); The Favorite, 8 Fed. Cas. No. 4,699, 3 Sawy. 405 (mortgage subsequent in date); The Granite State, 10 Fed. Cas. No. 5,687, 1 Sprague 277 (mortgage prior in date); Marsh *v.* The Minnie, 16 Fed. Cas. No. 9,117; The St. Joseph, 21 Fed. Cas. No. 12,229, Brown Adm. 202 (reasoning covers both prior and subsequent mortgages); Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*d* [*overruling* Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*c*] (mortgage prior in date); Zollinger *v.* The Emma, 30 Fed. Cas. No. 18,218 (mortgage prior in date). In the E. M. McChesney, 8 Fed. Cas. No. 4,463, 8 Ben. 150, and Wilson *v.* The Jewess, 30 Fed. Cas. No. 17,812, the priority of the maritime liens was upheld on the ground that the mortgagee, either by passive or active conduct, had held the boat out as worthy of credit. See also Crosby *v.* The Oriental, 6 Fed. Cas. No.

registered or enrolled, and excepting bottomry from its provisions.[17] This act is a mere registry act, intended to regulate the relative rights of those interested in questions of title connected with the vessel, and does not apply to maritime liens.[18]

(II) *IN ENGLAND.* In England it is held that, independent of statute, a materialman has no implied lien, but can protect himself only by an express contract of bottomry, and that the recent English jurisdictional statutes do not give the materialman a lien but only a right of arrest which is subject to liens existing at the time of such arrest.[19] Hence in England a mortgage ranks claims of materialmen.[20] But the sole reason for this ruling is that materialmen have no implied lien at all. In England as in America claims which constitute maritime liens are prior to mortgages or other non-maritime liens.[21]

b. As Against Execution Lien. An execution from a common-law court cannot displace a maritime lien.[22]

c. As Against Receiver's Title. A maritime lien may be incurred while a vessel is being operated by a receiver of a court, and will be good against the claims asserted in such court, even receiver's certificates.[23]

d. As Against Homestead Claim. This is also a common-law title and is subsequent to maritime liens.[24]

e. As Against Construction Claim. A construction claim not being maritime in its nature is postponed to a maritime lien.[25]

f. As Against Express Non-Maritime Hypothecation by the Owner. Such a hypothecation is subsequent to a maritime lien.[26]

3. AS BETWEEN STATUTORY AND NON-MARITIME LIENS — a. Independent of Express Statutory Regulation. It is now settled, despite an early conflict of decisions, that maritime liens arising by virtue of local statutes rank a mortgage; for they

3,424*a*; Scott *v.* Delahunt, 5 Lans. (N. Y.) 372 [*affirmed* in 65 N. Y. 128]. See 34 Cent. Dig. tit. "Maritime Liens," § 62.

But this doctrine does not apply as between advances not creating a maritime lien and mortgages. The Seguranca, 70 Fed. 258 [*following* London Assur. Co. *v.* Proceeds of The Alliance, 65 Fed. 245]. Nor to materialmen's claims not creating a maritime lien, as where a state gives a lien but the supreme court rule as then worded did not permit its enforcement. The Edith, 8 Fed. Cas. No. 4,282, 5 Ben. 432 [*affirmed* in 8 Fed. Cas. No. 4,283, 11 Blatchf. 451 (*affirmed* in 94 U. S. 518, 24 L. ed. 167)].

17. Act of July 29, 1850. 9 U. S. St. at L. 440, U. S. Rev. St. (1878) § 4192 [U. S. Comp. St. (1901) p. 2837].

18. The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345; The Charlotte Vanderbilt, 19 Fed. 219; The De Smet, 10 Fed. 483; The Favorite, 8 Fed. Cas. No. 4,699, 3 Sawy. 405; Marsh *v.* The Minnie, 16 Fed. Cas. No. 9,117; Reeder *v.* The George's Creek, 20 Fed. Cas. No. 11,654, 3 Hughes 584; Reyley *v.* The Carrie Brooks, 20 Fed. Cas. No. 11,718.

The constructive notice given by recording the mortgage does not affect maritime claimants, their rights being independent of such knowledge. Wilson *v.* The Jewess, 30 Fed. Cas. No. 17,812.

19. See *supra*, III, B, 2, f, (III).

20. Johnson *v.* Black, L. R. 4 P. C. 161, 1 Aspin. 208, 41 L. J. Adm. 33, 26 L. T. Rep. N. S. 1, 8 Moore P. C. N. S. 398, 20 Wkly. Rep. 592, 17 Eng. Reprint 361; The Scio, L. R. 1 A. & E. 353, 16 L. T. Rep. N. S. 642; The Lyons, 6 Aspin. 199, 57 L. T. Rep. N. S. 818.

This is true as to an ordinary attachment in a state court not purporting to enforce a lien. The mortgage would be prior. Perkins *v.* Pike, 42 Me. 141, 66 Am. Dec. 267.

21. Raikes & K. Adm. 122, 126; The Hope, 1 Aspin. 563, 28 L. T. Rep. N. S. 287; The Orelia, 3 Hagg. Adm. 75; The Aline, 1 W. Rob. 111.

22. Phillips *v.* The Thomas Scattergood, 19 Fed. Cas. No. 11,106, Gilp 1. The above was an execution in favor of the United States. Even such an execution does not divest liens already accrued. Conard *v.* Atlantic Insurance, 1 Pet. (U. S.) 386, 7 L. ed. 189; *In re* Hambright, 11 Fed. Cas. No. 5,973; U. S. *v.* Charleston, 27 Fed. Cas. No. 16,276, Bee 196.

23. The Willamette Valley, 62 Fed. 293 [*affirmed* in 66 Fed. 565, 13 C. C. A. 635], 76 Fed. 838. The receiver in the above was a foreign receiver and this fact greatly influenced the decision, but the relative priorities would be the same in the case of a receiver of the same state.

24. The Guiding Star, 9 Fed. 521 [*affirmed* in 18 Fed. 263]. See also Johnson *v.* Ward, 27 Ohio St. 517, holding that the owner of the vessel by contracting a debt which made a lien under the state vessel law prevented himself from claiming a homestead out of the boat.

25. The Guiding Star, 9 Fed. 521 [*affirmed* in 18 Fed. 263].

26. The Native, 17 Fed. Cas. No. 10,054, 14 Blatchf. 34. This was an express pledge of the boat by the owner to secure funds ad-

are maritime by nature, regardless of their origin.[27] The same principle applies as against other common-law liens or claims.[28]

b. In Case of Express Statutory Regulation. Some local statutes expressly provide that the domestic liens arising thereunder shall be inferior to mortgage liens. The question whether the admiralty court will regard this attempt to regulate the priority of maritime liens on domestic vessels is an interesting one, and cannot be considered as definitely settled. The state can undoubtedly regulate the priorities of non-maritime liens on domestic vessels, in proceedings in its own jurisdiction.[29] And it has already been seen that parties claiming a lien under a local statute must show a compliance with its conditions.[30] Under the influence of this principle some cases hold that the party claiming under a local statute is bound by its provisions as to priorities, and must take subject to any liens, common-law or otherwise, that the statute may prefer to his.[31] But the better opinion is that, as these domestic liens are enforced, not because the statute gives them, but because when once given they are maritime regardless of their origin, they are inherently and necessarily superior to common-law liens; and hence that a state statute cannot affect their innate priority, however wide its power may be to prescribe conditions as to registry and limitation.[32]

B. As Among Maritime Liens — 1. As Between Contract and Tort Claims. The general principle is that a tort claim ranks a prior contract claim. This is because in the first place a maritime claimant, having a *jus in re*, carries the risk of the vessel's committing torts, just as he carries the risk of perils of the sea; and because in the second place a tort relation is an involuntary relation, and by the Limited Liability Act a tort claimant is limited to the value of the vessel at

vanced to release it from a common-law attachment.

27. The Crescent, 88 Fed. 298; The H. N. Emilie, 70 Fed. 511; Crosby *v.* The Oriental, 6 Fed. Cas. No. 3,424*a*; The Theodore Perry, 23 Fed. Cas. No. 13,879; Jones *v.* Keen, 115 Mass. 170; Donnell *v.* The Starlight, 103 Mass. 227; Scott *v.* Delahunt, 5 Lans. (N. Y.) 372 [*affirmed* in 65 N. Y. 128]; Coffin *v.* The Steamboat Fred Tron, 3 Ohio Dec. (Reprint) 243, 5 Wkly. L. Gaz. 85; Johnson *v.* Rogers, 1 Ohio Dec. (Reprint) 405, 9 West. L. J. 88.

Mr. Justice Gray, with his usual learning and thoroughness, in The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345, which settles this question, discusses the earlier decisions and points out those which are sound and those which are unsound or overruled. He cites the following with approval: The Madrid, 40 Fed. 677 [*overruling* The Josephine Spangler, 9 Fed. 773, 11 Fed. 440; The Emma, 30 Fed. Cas. No. 18,218; Baldwin *v.* The Bradish Johnson, 2 Fed. Cas. No. 798, 3 Woods 582; The John T. Moore, 13 Fed. Cas. No. 7,430, 3 Woods 61]; Clyde *v.* Steam Transp. Co., 36 Fed. 501, 1 L. R. A. 794; The Wyoming, 35 Fed. 548; The Venture, 26 Fed. 285; The Guiding Star, 9 Fed. 521 [*affirmed* in 18 Fed. 263]; The Canada, 7 Fed. 730, 7 Sawy. 184; The City of Tawas, 3 Fed. 170; The Alice Getty, 1 Fed. Cas. No. 193, 2 Flipp. 18; The Hiawatha, 12 Fed. Cas. No. 6,453, 5 Sawy. 160; The Illinois, 12 Fed. Cas. No. 7,005, 2 Flipp. 383; The Island City, 13 Fed. Cas. No. 7,109, 1 Lowell 375; The Kiersage, 14 Fed. Cas. No. 7,762, 2 Curt. 421; The Raleigh, 20 Fed. Cas. No. 11,539, 2 Hughes 44; The St. Joseph, 21 Fed. Cas. No. 12,229, Brown Adm. 202; Strodes *v.* The Collier, 22 Fed. Cas. No. 13,272*a*; Whittaker *v.* The I. A. Travis, 29 Fed. Cas. No. 17,599; The William T. Graves, 30 Fed. Cas. No. 17,758, 8 Ben. 568 [30 Fed. Cas. No. 17,759, 14 Blatchf. 189]. He cites and disapproves the following: The Grace Greenwood, 10 Fed. Cas. No. 5,652, 2 Biss. 131; The Kate Hinchman, 14 Fed. Cas. No. 7,620, 6 Biss. 367 [*affirmed* in 14 Fed. Cas. No. 7,621, 7 Biss. 238]; *In re* Scott, 21 Fed. Cas. No. 12,517, 1 Abb. 336; The Skylark, 22 Fed. Cas. No. 12,928, 2 Biss. 251; The Hilton *v.* Miller, 62 Ill. 230; The Great West No. 2 *v.* Oberndorf, 57 Ill. 168.

But where the claim, although maritime, has no lien attached, it is not prior to the mortgage. Marsh *v.* The Minnie, 16 Fed. Cas. No. 9,117.

28. The Hull of a New Ship, 12 Fed. Cas. No. 6,859, 2 Ware 203; The Young Mechanic, 30 Fed. Cas. No. 18,181, 1 Ware 535 [*affirmed* in 30 Fed. Cas. No. 18,180, 2 Curt. 404].

29. The Guiding Star, 9 Fed. 521 [*affirmed* in 18 Fed. 263]; Underwriters' Wrecking Company *v.* The Katie, 24 Fed. Cas. No. 14,342, 3 Woods 182; The Great West No. 2 *v.* Oberndorf, 57 Ill. 168 [*disapproved* in The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345, in so far as it holds a mortgage prior to a maritime claim].

30. See *supra*, VII, B, 6, b, (I).

31. The D. B. Steelman, 48 Fed. 580; The Marcelia Ann, 34 Fed. 142; Thomas *v.* The Koseiusko, 23 Fed. Cas. No. 13,901.

32. This line of thought is elaborated by Mr. Justice Gray in The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345, although he disclaims any intention to finally pass

the time of the tort, whereas a contract claimant ordinarily has a personal remedy against the owner.[33] The English decisions accord with this view and in fact are the basis of the American decisions on the subject.[34] This principle applies not only to pure tort claims but also to tort claims where there is also a contract relation, as for example damages from negligent towing.[35] But a subsequent contract claim ranks a tort claim; for, under the Limited Liability Act, the tort claimant can only hold the vessel as she was at the time of the tort, and subsequent increments to her value or benefits conferred upon her are in the interests of prior lien claimants of any character.[36]

2. As Among Contract Claims — a. As Affected by Relative Inherent Merit — (i) *In General.* Certain maritime liens have a preference by nature, and this causes a classification of them which adheres to them in the absence of special circumstances.[37] The order of preference may be stated as follows: (1) Seamen's wages;[38] (2) salvage;[39] (3) materialmen's claims, towage, pilotage, and general average;[40] and (4) bottomry.[41] This order is followed, regardless of dates, as

upon the question. And it is forcibly presented by Mr. Justice Matthews in his opinion on circuit in The Guiding Star, 18 Fed. 263. See also The Alice Getty, 1 Fed. Cas. No. 193, 2 Flipp. 18; and *infra*, X, B, 2, c, (I).

33. This question is elaborately discussed in The John G. Stevens, 170 U. S. 113, 18 S. Ct. 544, 42 L. ed. 969 [*disapproving* The Amos D. Carver, 35 Fed. 665; The Grapeshot, 22 Fed. 123; The America, 1 Fed. Cas. No. 288], which was a question between a claim for negligent towage and a previous contract claim. The decisions of the inferior New York courts had been to the contrary, some placing the claims on the same footing, others preferring the contract claims. The following cases also hold the tort claim inferior, all these having been decided before the John G. Stevens case: The John G. Stevens, 58 Fed. 792; The Gratitude, 42 Fed. 299; The Augustine Kobbe, 39 Fed. 559; The Young America, 30 Fed. 789; The Samuel J. Christian, 16 Fed. 796; Provost *v.* The Selkirk, 20 Fed. Cas. No. 11,455. See 34 Cent. Dig. tit. "Maritime Liens," § 69.

On the other hand the following hold the tort claim superior: The Escanaba, 96 Fed. 252; The Daisy Day, 40 Fed. 538; The John G. Stevens, 40 Fed. 331; The R. S. Carter, 38 Fed. 515; The Director, 34 Fed. 57, 13 Sawy. 172; The M. Vandercook, 24 Fed. 472; The Pride of the Ocean, 3 Fed. 162; Hatton *v.* The Melita, 11 Fed. Cas. No. 6,218, 3 Hughes 494.

Tort claims and seamen's wages.—Although The John G. Stevens case (170 U. S. 113, 18 S. Ct. 544, 42 L. ed. 969) disclaims any purpose of passing upon the relative rank of tort claims and prior seamen's wages, its reasoning is equally applicable to this case, and the better authority so holds. The Nettie Woodward, 50 Fed. 224; The F. H. Stanwood, 49 Fed. 577, 1 C. C. A. 379; The Maria & Elizabeth, 12 Fed. 627; The Enterprise, 8 Fed. Cas. No. 4,498, 1 Lowell 455; Rusk *v.* The Freestone, 21 Fed. Cas. No. 12,143, 2 Bond 234. But there are some contrary decisions in the New York courts. The Amos D. Carver, 35 Fed. 665; The Samuel J. Christian, 16 Fed. 796; The Orient, 18 Fed. Cas. No. 10,569, 10 Ben. 620.

34. The Veritas, [1901] P. 304, 9 Aspin. 237, 70 L. J. P. D. & Adm. 75, 85 L. T. Rep. N. S. 136, 50 Wkly. Rep. 30; The Elin, 8 P. D. 129, 5 Aspin. 120, 52 L. J. Adm. 55, 49 L. T. Rep. N. S. 87, 31 Wkly. Rep. 736; The Linda Flor, 4 Jur. N. S. 172, Swab. 309, 6 Wkly. Rep. 197; Harmer *v.* Bell, 7 Moore P. C. 267, 15 Eng. Reprint 884; The Aline, 1 W. Rob. 111.

35. The John G. Stevens, 170 U. S. 113, 18 S. Ct. 544, 42 L. ed. 969. Here also the court overrules a number of decisions of the New York inferior courts which drew a distinction between pure tort claims like collision, and claims where there is an element of contract, like negligent towage. The cases so overruled are: The Glen Iris, 78 Fed. 511; The John G. Stevens, 58 Fed. 792; The Gratitude, 42 Fed. 299; The Young America, 30 Fed. 789; The Grapeshot, 22 Fed. 123; The Samuel J. Christian, 16 Fed. 796. On the other hand the following cases are cited with approval: The Daisy Day, 40 Fed. 538; The M. Vandercook, 24 Fed. 472; The Liberty No. 4, 7 Fed. 226; The Arturo, 6 Fed. 308; The Brooklyn, 4 Fed. Cas. No. 1,938, 2 Ben. 547; The Deer, 7 Fed. Cas. No. 3,737, 4 Ben. 352.

36. The Lillie Laurie, 50 Fed. 219; The Paragon, 18 Fed. Cas. No. 10,708, 1 Ware 326; Harmer *v.* Bell, 7 Moore P. C. 267, 13 Eng. Reprint 884; The Aline, 1 W. Rob. 111.

Comparative rank of salvage and tort claims nearly contemporaneous see The Veritas, [1901] P. 304, 9 Aspin. 237, 70 L. J. P. D. & Adm. 75, 85 L. T. Rep. N. S. 136, 50 Wkly. Rep. 30.

37. Hughes Adm. 332; The City of Tawas, 3 Fed. 170.

A different order is prescribed in Provost *v.* The Selkirk, 20 Fed. Cas. No. 11,455, but both the previous and subsequent discussions show its incorrectness.

38. See *infra*, X, B, 2, a, (II).

39. See *infra*, X, B, 2, a, (III).

40. See *infra*, X, B, 2, a, (IV).

41. See *infra*, X, B, 2, a, (V).

among claims of different classes, subject to exceptions arising from special circumstances.[42]

(II) *Seamen's Wages.* These have always been treated with special favor in the admiralty courts, and are held to rank previous or contemporaneous contract claims.[43] They rank subsequent supply claims that do not add to the permanent value of the vessel.[44] But where a boat had been wrecked, repairs necessary to enable her to reach port were preferred to prior wages and placed on an equality with wages accruing soon thereafter.[45] But a claim for wages cannot be set up against a claim for which the mariner is personally responsible.[46]

(III) *Salvage.* This is of a high order of merit and ranks all claims existing at the date of the service; for it preserves the rest for their benefit.[47]

(IV) *Materialmen's Claims, Towage, Pilotage, and General Average.* These rank equally in the absence of special equities. The claims of materialmen in this connection include everything covered by the expression "necessaries" as heretofore defined.[48] Accordingly materials and supplies and towage practically contemporaneous rank together.[49] Materialmen's claims also rank claims for wharfage and demurrage.[50] Such claims also rank claims for insurance premiums, as the latter have no lien at all.[51] As among each other there is no difference in dignity between supplies and repairs.[52] Subsequent

42. The City of Tawas, 3 Fed. 170; The Paragon, 18 Fed. Cas. No. 10,708, 1 Ware 326.

43. Saylor *v.* Taylor, 77 Fed. 476, 23 C. C. A. 343; The Lillie Laurie, 50 Fed. 219; The Dora, 34 Fed. 348; The G. F. Brown, 24 Fed. 399; The Guiding Star, 9 Fed. 521 [*affirmed* in 18 Fed. 263]; The Graf Klot Trautvetter, 8 Fed. 833, 5 Hughes 237; *In re* Bank of Nova Scotia, 4 Fed. 667; The America, 1 Fed. Cas. No. 288; The Hilarity, 12 Fed. Cas. No. 6,480, Blatchf. & H. 90; The Irma, 13 Fed. Cas. No. 7,064, 6 Ben. 1; The Island City, 13 Fed. Cas. No. 7,109, 1 Lowell 375; The Mary A. Rich, 16 Fed. Cas. No. 9,198, 9 Ben. 187. See 34 Cent. Dig. tit. "Maritime Liens," § 63.

44. The Virgo, 46 Fed. 294.

45. Collins *v.* The Fort Wayne, 6 Fed. Cas. No. 3,012, 1 Bond 476.

46. For instance the master has a lien for wages under many maritime codes. He cannot set up such lien against debts contracted by himself. The Felice B., 40 Fed. 653; The Olga, 32 Fed. 329; The Graf Klot Trautvetter, 8 Fed. 833, 5 Hughes 237; The Erinagh, 7 Fed. 231; Hatton *v.* The Melita, 11 Fed. Cas. No. 6,218, 3 Hughes 494; The Monadnock, 17 Fed. Cas. No. 9,704, 5 Ben. 357; The Selah, 21 Fed. Cas. No. 12,636, 4 Sawy. 40. The same is true as to an engineer who is part-owner. Petrie *v.* The Coal Bluff No. 2, 3 Fed. 531.

In state courts.— This preference of seamen's wages is not necessarily applied in a proceeding in a state court under a state statute creating no preference. McClure *v.* The James Dellett, 38 Ala. 336.

47. The Dredge No. 1, 137 Fed. 110; The Barney Eaton, 2 Fed. Cas. No. 1,028, 1 Biss. 242. Under such circumstances it ranks even prior seamen's wages. The Athenian, 3 Fed. 248; Collins *v.* The Fort Wayne, 6 Fed. Cas. No. 3,012, 1 Bond 476.

It certainly ranks prior claims of materialmen (Collins *v.* The Fort Wayne, 6 Fed. Cas. No. 3,012, 1 Bond 476; Emerson *v.* The Pandora, 8 Fed. Cas. No. 4,442, Newb. Adm. 438), subsequent claims (The Lillie Laurie, 50 Fed. 219), and concurrent claims for general average (The Spaulding, 22 Fed. Cas. No. 13,215, Brown Adm. 310).

Under peculiar circumstances it may be of the same rank as concurrent materialmen's claims. The Virgo, 46 Fed. 294; The Enright, 12 Fed. 157, where the service was so simple that the court did not treat it as salvage. But it is usually ranked ahead of materialmen. The M. Vandercook, 24 Fed. 472; Provost *v.* The Selkirk, 20 Fed. Cas. No. 11,455.

48. See *supra*, VI, B, 2, d, (I).

49. Saylor *v.* Taylor, 77 Fed. 476, 23 C. C. A. 343; The G. F. Brown, 24 Fed. 399; The J. W. Tucker, 20 Fed. 129; The Athenian, 3 Fed. 248. The City of Tawas, 3 Fed. 170; Porter *v.* The Sea Witch, 19 Fed. Cas. No. 11,289, 3 Woods 75. In The Mystic, 30 Fed. 73, Judge Blodgett preferred a towage claim to concurrent home-supply claims, holding that under the peculiar situation in Chicago a towboat practically did the work of the seamen. But if there is any material difference in age between a supply bill and a tow bill, the last in date is preferred. The Dan Brown, 6 Fed. Cas. No. 3,556, 9 Ben. 309; Porter *v.* The Sea Witch, 19 Fed. Cas. No. 11,289, 3 Woods 75.

50. Provost *v.* The Selkirk, 20 Fed. Cas. No. 11,455. In The America, 1 Fed. Cas. No. 288 (an interesting discussion of relative priorities by Judge Hall) supply claims are preferred to liens arising out of contracts of affreightment. The case was decided in 1853, and cannot be sustained under the later authorities as against affreightment claims partaking also of the nature of torts. See *supra*, X, B, 1.

51. The Daisy Day, 40 Fed. 538 [*affirmed* in 40 Fed. 603]; Provost *v.* The Selkirk, 20 Fed. Cas. No. 11,455.

52. The M. Vandercook, 24 Fed. 472; The

general average may rank claims for necessaries; indeed, it seems that considertions similar to those governing salvage claims apply to claims of this kind, although operating in a less degree.[53]

(v) *BOTTOMRY.* A bottomry lien is not favored as against subsequent liens, or even as against liens arising on the same voyage. The reason is that the bottomry claimant can charge a higher rate of interest for his risk and ought therefore to carry it as against perils of the sea or claims enabling the ship to avoid them. Hence a materialman who has contributed to the preservation of the *res* ranks a bottomry.[54] So a lien for advances,[55] or a claim for general average arising during the same voyage, ranks a prior bottomry.[56]

b. As Affected by Dates — (i) *AS AMONG DIFFERENT VOYAGES.* It has long been a favorite doctrine of admiralty law that liens for necessaries furnished on the last voyage rank similar liens for prior voyages. This is because they are for the benefit of prior liens, as more proximately contributing to the preservation of the *res*. In case of long voyages this is still the law, in the absence of special circumstances.[57]

(ii) *AS MODIFIED BY RELATIVE STALENESS.* Under the influence of the preceding doctrine, the general principle is that claims of the same nature separated by an appreciable interval are paid in the inverse order of their dates; the later liens really benefiting the older, and the older by delay holding the vessel out to later lienors as worthy of credit.[58] This is not affected by filing a libel and holding up process, or serving process and permitting the vessel to run, for the creditor by doing this holds her out as worthy of credit to those who subsequently deal with her.[59] But the shortness and frequency of modern voyages and the necessity of a reasonable credit in modern business have brought about a modification of this rule, as applied to claims of comparatively recent date. On the Great Lakes and canals the priorities are determined by the seasons of navigation, the last season ranking. This is about equivalent to classifying them by the year.[60] In New York harbor work claims less than forty days old rank older ones.[61] But ordinarily similar claims varying but slightly in date or overlapping each other or furnished during the same season are placed on the same footing.[62]

c. As Affected by Origin — (i) *AS BETWEEN FOREIGN AND DOMESTIC MARITIME LIENS.* There is quite a number of decisions holding that liens arising

Arctic, 22 Fed. 126; The Grapeshot, 22 Fed. 123. In The Favorite, 8 Fed. Cas. No. 4,699, 3 Sawy. 405, a supply claim was preferred to a materialman because the latter arose under a local statute. Later cases have abolished this distinction. See *infra*, X, B, 2, c.

53. This seems to be the reason for preferring general average to necessaries in Provost *v.* The Selkirk, 20 Fed. Cas. No. 11,455. The commissioner treated the jettison giving rise to the average claim as practically a salvage service for the benefit of prior lienors.

54. The Felice B., 40 Fed. 653; The Jerusalem, 13 Fed. Cas. No. 7,294, 2 Gall. 345.

55. The Aina, 40 Fed. 269; The Dora, 34 Fed. 343.

56. The Dora, 34 Fed. 343; Cargo ex Galem, Brown & L. 167, 10 Jur. N. S. 477, 33 L. J. Adm. 97, 9 L. T. Rep. N. S. 550, 2 Moore P. C. N. S. 216, 3 New Rep. 254, 12 Wkly. Rep. 495, 15 Eng. Reprint 883. In Oologaardt *v.* The Anna, 18 Fed. Cas. No. 10,545, the bottomry was preferred to a general average claim. But the decision was rendered at a time when the authorities were against any lien at all for general average, and turned on that consideration. In The Thomas Fletcher, 24 Fed. 375, the bottomry was preferred, in an opinion not discussing the question but devoted to other issues.

57. The Augustine Kobbe, 39 Fed. 559; The Fanny, 8 Fed. Cas. No. 4,638, 2 Lowell 508; Hatton *v.* The Melita, 11 Fed. Cas. No. 6,218, 3 Hughes 494; The Omer, 18 Fed. Cas. No. 10,510, 2 Hughes 96; Porter *v.* The Sea Witch, 19 Fed. Cas. No. 11,289, 3 Woods 75.

58. The St. Jago de Cuba, 9 Wheat. (U. S.) 409, 6 L. ed. 122; The John T. Williams, 107 Fed. 750; The J. W. Tucker, 20 Fed. 129; The Rapid Transit, 11 Fed. 322; Goble *v.* The Delos de Wolf, 3 Fed. 236; The City of Tawas, 3 Fed. 170; The America, 1 Fed. Cas. No. 288.

59. The F. W. Vosburgh, 93 Fed. 481; The Young America, 30 Fed. 789.

60. The J. W. Tucker, 20 Fed. 129; The Arcturus, 18 Fed. 743; The City of Tawas, 3 Fed. 170. See also *supra*, VIII, A, 3, b, (II), (A), (C), text and notes 68, 74.

61. The Glen Iris, 78 Fed. 511; The Samuel Morris, 63 Fed. 736; The Gratitude, 42 Fed. 299. See also *supra*, VIII, A, 3, b, (II), (C), text and note 75.

62. The Thomas Morgan, 123 Fed. 781;

under the general maritime law are prior in dignity to liens arising under the state law, even where the latter become maritime and are enforceable by admiralty process.[63] But the better authority and the preponderance of authority are that, as both are maritime, their nature is the same regardless of their origin, and hence that they are equal in dignity.[64] The state cannot alter the principles of the maritime law as to the relative rank of liens;[65] but liens created by a state statute which are not maritime by nature nor enforceable by admiralty process are inferior to foreign or domestic maritime liens.[66]

(II) *As Among State Liens.* As among liens arising under state statutes there is no difference of rank when enforced in an admiralty court as admiralty liens;[67] but when the claimant resorts to the state court to enforce his lien not as a maritime lien (in which case the state court cannot enforce it as such), but as a lien arising under the local statute, he is governed by the provisions of that statute as to priorities or enforcement.[68] Yet while a state may regulate the method of distribution in its own courts, it must be borne in mind that state courts cannot sell a vessel clear of maritime liens; and hence that a maritime claimant who does not intervene in the state court is not affected by it.[69]

d. As Affected by Suit or Decree — (I) *Institution of Suit.* It was for a long time the preponderance of authority that as among claims otherwise equal in dignity the one first securing a judicial seizure of the vessel was entitled to priority. This was based not only on the ground of preferring the diligent, of whose efforts others reaped the benefit, but on the idea then prevailing that the maritime lien was not so much an interest in the thing as a mere right of arrest of the thing.[70] But the result of the later investigation holding a maritime lien to be not a mere remedy but an interest in the thing itself has been to overturn this

The Amos D. Carver, 35 Fed. 665; The Grapeshot, 22 Fed. 123; The J. W. Tucker, 20 Fed. 129.

63. The Augustine Kobbe, 37 Fed. 696 [*affirmed* in 39 Fed. 559]; The City of Tawas, 3 Fed. 170; The E. A. Barnard, 2 Fed. 712; Dudley *v.* The Superior, 7 Fed. Cas. No. 4,115, Newb. Adm. 176; The Favorite, 8 Fed. Cas. No. 4,699, 3 Sawy. 405; Francis *v.* The Harrison, 9 Fed. Cas. No. 5,038, 1 Sawy. 353; The John Richards, 13 Fed. Cas. No. 7,361, 1 Biss. 106; The John T. Moore, 13 Fed. Cas. No. 7,430, 3 Woods 61; Reyley *v.* The Carrie Brooks, 20 Fed. Cas. No. 11,718.

64. The City of Camden, 147 Fed. 847; The Madrid, 40 Fed. 677; The Daisy Day, 40 Fed. 538; Clyde *v.* Steam Transp. Co., 36 Fed. 501, 1 L. R. A. 794; The Menominie, 36 Fed. 197; The Amos D. Carver, 35 Fed. 665; The Wyoming, 35 Fed. 548; The Arctic, 22 Fed. 126; The J. W. Tucker, 20 Fed. 129; The Rapid Transit, 11 Fed. 322; The Guiding Star, 9 Fed. 521 [*affirmed* in 18 Fed. 263]; Goble *v.* The Delos de Wolf, 3 Fed. 236; The General Burnside, 3 Fed. 228; Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*d*.

The leading authority in the above is the decision of Justice Matthews in The Guiding Star, 18 Fed. 263. The reasoning of the supreme court in The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345, and its approbation of this case practically settle the question. The reasons on which this equality between foreign and domestic liens is based are well and pithily presented by Judge Benedict in The Dan Brown, 6 Fed. Cas. No. 3,556, 9 Ben. 309.

65. The Augustine Kobbe, 37 Fed. 696 [*affirmed* in 39 Fed. 559]; The Menominie, 36 Fed. 197; The Guiding Star, 18 Fed. 263; Baldwin *v.* The Bradish Johnson, 2 Fed. Cas. No. 798, 3 Woods 582; Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*b*. See *supra*, X, A, 3, b.

66. The Unadilla, 73 Fed. 350; The Daisy Day, 40 Fed. 538 [*affirmed* in 40 Fed. 603]; The Woodward, 32 Fed. 639.

67. Hoffman *v.* The Nebraska, 61 Fed. 514.

68. Merrick *v.* Avery, 14 Ark. 370; Barker *v.* Steamboat Flag, 1 Handy (Ohio) 385, 12 Ohio Dec. (Reprint) 196; *In re* Moore, 1 Oreg. 179; Emerson *v.* The Shawano City, 10 Wis. 433; Hay *v.* The Winnebago, 10 Wis. 428.

69. See *supra*, VIII, D, 2.

70. Baker *v.* The Wm. Gates, 48 Fed. 835; Goble *v.* The Delos de Wolf, 3 Fed. 236; The Adele, 1 Fed. Cas. No. 78, 1 Ben. 309; French *v.* The Superb, 9 Fed. Cas. No. 5,103*a*; The Globe, 10 Fed. Cas. No. 5,483, 2 Blatchf. 427; The Minnie R. Childs, 17 Fed. Cas. No. 9,640, 10 Ben. 553; The Pathfinder, 18 Fed. Cas. No. 10,797, 4 Wkly. Notes Cas. 528; Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*a* [*affirmed* in 21 Fed. Cas. No. 12,483*c* (also *affirmed* in 19 How. 239, 15 L. ed. 625, but without passing on this point)]; The Triumph, 24 Fed. Cas. No. 14,182, 2 Blatchf. 433 note; Barber *v.* Minturn, 1 Day (Conn.) 136; Ingraham *v.* Phillips, 1 Day (Conn.) 117; People *v.* Judges Mayor's Ct., 1 Wend. (N. Y.) 39; Jones *v.* The Commerce, 14 Ohio 408; Coffin *v.* The Steamboat Fred Tron, 3 Ohio Dec. (Reprint) 243, 5 Wkly. L. Gaz. 85.

line of decisions. It is now practically settled that a mere arrest of the vessel gives the party securing it no rights which he did not have before.[71]

(II) *Reduction of Claim to Decree*—(A) *In America.* The practice in the different districts varies greatly as to the effect of a decree establishing a claimant's rights, although the reported cases on the subject are not numerous. The preponderance of American decisions as reported is that the rank of a maritime lien is not affected by merely obtaining a decree proving a claim, as against other claimants intervening at any time before final decree. Such a decree still leaves open all questions of priority.[72] But if the decree is a final adjudication of the creditor's rights, leaving open only the steps necessary to realize on it, the better opinion is that the creditor should be preferred to any later claimant, subject only to the power of the court for special causes shown to reopen the decree.[73] The necessity of this as a guide to bidders at a sale of a vessel and in order to promote the realization of the best price is apparent.[74]

(B) *In England.* In England a maritime claimant who reduces his claim to decree is considered to have the highest security known to the law, and to have obtained a preference thereby.[75]

3. As Among Tort Claims — a. As Affected by Dates. There is a difference of opinion as to whether the older or later tort claim would rank, irrespective of so long an interval of time as would constitute laches. On the one hand it is contended that the prior tort claimant, having a *jus in re* and being in one sense an owner of an interest in the vessel, takes the risk of allowing her to navigate and incur liabilities for torts, just as he takes the risk of the perils of the sea, and hence that the last tort claim ranks.[76] On the other hand it is urged that the preference of the last maritime lien in contract cases is based on the theory of a later and more immediate benefit to the vessel, that this cannot apply to tort claims, and hence that the first tort claimant should be preferred.[77] In view of the nature of the maritime lien as a *jus in re* so firmly established by the more recent decisions, the view that the last tort lien is to be preferred seems best sustained by principle.[78]

b. As Affected by Suit or Decree. The discussion of the effect on contract liens of suit or decree applies equally to tort claims.[79]

XI. LAW GOVERNING.

A. As Among Vessels of the United States. It has been seen in another connection that the local law of the state where the supplies are furnished con-

71. Saylor *v.* Taylor, 77 Fed. 476, 23 C. C. A. 743; The Battler, 67 Fed. 251; The Julia, 57 Fed. 233; The Lady Boone, 21 Fed. 731; The J. W. Tucker, 20 Fed. 129; The Arcturus, 18 Fed. 743; The E. A. Barnard, 2 Fed. 712; Dudley *v.* The Superior, 7 Fed. Cas. No. 4,115, Newb. Adm. 176; The Desdemona, Swab. 158.

Nature of the maritime lien as a jus in re has already been discussed *supra*, II, A. See especially the interesting discussion of its nature in The Young Mechanic, 30 Fed. Cas. No. 18,180, 2 Curt. 404.

But in the state court, in a proceeding to enforce a state lien, an attachment will override an existing lien if the state statute properly construed gives the attachment priority, or makes seizure a necessary condition to the existence of a lien. Donald *v.* Hewitt, 33 Ala. 534, 73 Am. Dec. 431; Dobbyns *v.* St. Louis County Sheriff, 5 Mo. 256.

72. The Aina, 40 Fed. 269; The Lady Boone, 21 Fed. 731; The City of Tawas, 3 Fed. 170; The Fanny, 8 Fed. Cas. No. 4,638, 2 Lowell 508.

73. The America, 1 Fed. Cas. No. 288.

74. See a brief discussion of this in Hughes Admiralty 351. The court will certainly not listen to an application to intervene after sale and distribution of the proceeds, so far as to affect the rights of maritime claimants already adjudicated, or the title of the purchaser. The James G. Swan, 106 Fed. 94; The Dode, 100 Fed. 478; The Kaloolah, 14 Fed. Cas. No. 7,602, Brown Adm. 55; Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*d*.

75. Abbott Adm. c. 4, § 2; Bernard *v.* Hyne, 6 Moore P. C. 56, 4 Notes of Cas. 498, 2 W. & Rob. 451, 13 Eng. Reprint 604.

76. The Frank G. Fowler, 8 Fed. 331.

77. The Frank G. Fowler, 17 Fed. 653, 21 Blatchf. 410.

78. This seems to follow from the nature of a maritime lien for tort as laid down in The John G. Stevens, 170 U. S. 113, 18 S. Ct. 544, 42 L. ed. 969. See also Hughes Adm. 348.

79. See *supra*, X, B, 2, d.

trols if the vessel is a domestic vessel at the port where they are furnished; and that the general maritime law as adopted into our jurisdiction governs if the vessel at the place of furnishing is a vessel of another state.[80] In other words the law of the place where the supplies are furnished governs; but the law of the place in case of domestic vessels is the local statute law, and the law of the place in case of foreign vessels is the general maritime law.[81]

B. As Between Vessels of the United States and Foreign Countries. Here too the law of the place where the supplies are furnished (that is, in case of foreign vessels, the general maritime law as adopted in the United States) governs, although the law of the vessel's flag may be different.[82]

XII. ENFORCEMENT OF LIEN; REMEDIES OF MARITIME CLAIMANT.[83]

A. In General. The discussion of the remedies of a maritime claimant as to the great mass of maritime liens, as for collision,[84] salvage,[85] personal injuries,[86] etc., belongs to those separate subjects, and is beyond the purview of this treatise.

B. As to Materialmen — 1. In General. It is an axiom of marine law as administered in this country that materialmen have a three-fold remedy: (1) Against the vessel; (2) against the owners; (3) against the master.[87]

2. Libel In Rem[88] — a. Rights Enforceable by — (i) *Liens on Foreign Vessels.* A libel *in rem* in the admiralty court is the ancient and customary method of enforcing the lien of a materialman given him by the marine law under the circumstances heretofore discussed.[89]

(ii) *Liens on Domestic Vessels.* Here also if a lien is given by local law

80. See *supra*, VII, B, 2, b, (IV); VII, B, 3, b, (II), (C). See also The Roanoke, 189 U. S. 185, 23 S. Ct. 491, 47 L. ed. 770; The New Brunswick, 125 Fed. 567 [*affirmed* in 129 Fed. 893, 64 C. C. A. 325]; The Active, 1 Fed. Cas. No. 34, Olcott 286; Carroll *v.* The Leathers, 5 Fed. Cas. No. 2,455, Newb. Adm. 432; The Chusan, 5 Fed. Cas. No. 2,717, 2 Story 455; Harper *v.* New Brig, 11 Fed. Cas. No. 6,090, Gilp. 536; The Hilarity, 12 Fed. Cas. No. 6,480, Blatchf. & H. 90; Nall *v.* The Illinois, 17 Fed. Cas. No. 10,005, 6 McLean 413; Irvine *v.* The Hamburg, 3 Minn. 192; Hursey *v.* Hassam, 45 Miss. 133. See 34 Cent. Dig. tit. "Maritime Liens," § 2.

The Louisiana decisions apply their own law to vessels in their jurisdiction, even though the cause of action arose out of the state. Owens *v.* Davis, 15 La. Ann. 22; Swasey *v.* The Montgomery, 12 La. Ann. 800; Bauduc's Syndics *v.* Nicholson, 4 La. 81.

81. The Infanta, 13 Fed. Cas. No. 7,030, Abb. Adm. 263; and cases cited *supra*, note 80.

The state law applies on any body of water included within the general boundary lines of the state, although not assigned to any particular county. The Norway *v.* Jensen, 52 Ill. 373.

82. **United States.** — The Maggie Hammond *v.* Morland, 9 Wall. 435, 19 L. ed. 772; The Scotia, 35 Fed. 907 (reviewing and distinguishing the cases); The Maud Carter, 29 Fed. 156; Hatton *v.* The Melita, 11 Fed. Cas. No. 6,218, 3 Hughes 494. In The Woodland, 30 Fed. Cas. No. 17,977, 14 Blatchf. 499, and Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 465, there are expressions to the contrary, but these are very satisfactorily explained by Judge Brown in The Scotia, *supra*. In The Olga, 32 Fed. 329, the same judge applied the law of the place of contract as far as the claims of parties not connected with the vessel were concerned, and the law of the flag by comity as among those connected with the vessel.

England. — The Mecca, [1895] P. 95, 7 Aspin. 529, 64 L. J. Adm. 40, 71 L. T. Rep. N. S. 711, 11 Reports 742, 43 Wkly. Rep. 209 [*overruling* The India, 9 Jur. N. S. 417, 32 L. J. Adm. 185, 9 L. T. Rep. N. S. 234, 11 Wkly. Rep. 536, and holding under the English acts that the English courts had jurisdiction to enforce a claim for necessaries supplied to a foreign steamer in a foreign port].

Canada. — Coorty *v.* The Steamship George L. Colwell, 6 Can. Exch. 196.

83. **Admiralty practice** generally see ADMIRALTY, 1 Cyc. 846 *et seq.*

84. See COLLISION.

85. See SALVAGE.

86. See SHIPPING.

87. The Chusan, 5 Fed. Cas. No. 2,717, 2 Story 455; Davis *v.* Child, 7 Fed. Cas. No. 3,628, 2 Ware 78; The Mary Bell, 16 Fed. Cas. No. 9,199, 1 Sawy. 135; The Paul Boggs, 18 Fed. Cas. No. 10,846, 1 Sprague 369.

Libel in rem see *infra*, XII, B, 2.

Libel in personam see *infra*, XII, B, 3.

88. **Libel in admiralty** generally see ADMIRALTY, 1 Cyc. 853 *et seq.*

89. See *supra*, VII, B. See also The General Smith, 4 Wheat. (U. S.) 438, 4 L. ed. 609; Davis *v.* Child, 7 Fed. Cas. No. 3,628, 2 Ware 78; Davis *v.* A New Brig, 7 Fed. Cas. No. 3,643, Gilp. 473; The Eledona, 8 Fed. Cas. No. 4,640, 2 Ben. 31; The Nestor, 18 Fed. Cas. No. 10,126, 1 Sumn. 73; Hursey *v.* Hassam, 45 Miss. 133.

a libel *in rem* lies to enforce it in the admiralty court, and in fact is the only method of enforcing it as a maritime lien.[90] In such case, as the admiralty court takes cognizance of it simply on the ground of its being by nature a maritime lien regardless of its origin in state enactment, the court enforces it as an admiralty court according to admiralty procedure unaffected by any provisions of the state statute as to procedure.[91] But even when a local statute gives a lien, it is not enforceable in admiralty when the supreme court, under the power conferred upon it by statute to regulate the proceedings in the inferior courts, so frames its rules as to deny a procedure *in rem* in such cases. Under the present form of the Admiralty Rule No. 12 such liens are enforceable.[92]

b. Time of Instituting. The doctrine as to the period after which a lien cannot be enforced has been discussed in another connection.[93] The fact that suit is instituted before the maturity of a credit given, that is, before the debt is due, does not necessarily involve a dismissal of the libel. The court may deal with such act as a question of costs, although it would not enter any final decree until the expiration of the credit.[94]

c. Form and Requisites of. Omitting the usual caption[95] and verification,[96]

90. See *supra*, VII, B, 3, b, (II), (B). See also The Glide, 167 U. S. 606, 17 S. Ct. 930, 42 L. ed. 296; The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345; Aitcheson *v.* The Endless Chain Dredge, 40 Fed. 253.

Although the claimant also has a shipwright's possessory lien, a lien under a state statute of a maritime nature is thus enforceable. The B. F. Woolsey, 7 Fed. 108.

But unless the statute creates a lien and that lien is by nature maritime, it is not enforceable by libel *in rem*. See *supra*, VII, B, 3, b, (II). See also Boon *v.* The Hornet, 3 Fed. Cas. No. 1,640, Crabbe 426; Stapp *v.* The Swallow, 22 Fed. Cas. No. 13,305, 1 Bond 189; Wick *v.* The Samuel Strong, 30 Fed. Cas. No. 17,607, 6 McLean 587, Newb. Adm. 187.

91. Davis *v.* A New Brig, 7 Fed. Cas. No. 3,643, Gilp. 473.

92. Although in The St. Lawrence, 1 Black (U. S.) 522, 17 L. ed. 180, the supreme court treated the maritime lien as a mere question of procedure, the later cases treat it as a *jus in re* or proprietary interest. See *supra*, II, A. Hence when Admiralty Rule No. 12 was amended to give a procedure *in rem*, it was not retroactive. The Circassian, 5 Fed. Cas. No. 2,726, 11 Blatchf. 472; *In re* Kirkland, 14 Fed. Cas. No. 7,842, holding that the contrary was based on The St. Lawrence, *supra*, and is not sustainable under the later cases.

93. Necessity of compliance with provisions of local statutes see *supra*, VII, B, 6, b, (I).

General doctrine of limitations in admiralty see *supra*, VIII, A, 3, b. See also Barstow *v.* The Aurelia, 45 Oreg. 285, 77 Pac. 835.

If the prescribed limit of enforcement has not expired when suit was commenced, its expiration during the pendency of suit is immaterial. Read *v.* Hull of a New Brig, 20 Fed. Cas. No. 11,609, 1 Story 244 [*affirming* 4 Fed. Cas. No. 2,316, 2 Ware 37].

94. In The Ella, 84 Fed. 471, where suit was brought before the maturity of a note given for the work, the court treated it as a question of costs. See also The Pioneer, 53 Fed. 279; The Papa, 46 Fed. 576. On the other hand in The John Walls, Jr., 113 Fed. Cas. No. 7,432, 1 Sprague 178, Judge Sprague held that where a credit was given, a libel could not be sustained till its expiration. The credit was for six months and the libel had been filed within twenty days after furnishing the supplies. Under such a hasty procedure, he dismissed the libel as to that part of the account not due. He cites as authority The Nestor, 18 Fed. Cas. No. 10,126, 1 Sumn. 73, and The Chusan, 5 Fed. Cas. No. 2,717, 2 Story 455. Neither one of these cases is in point. Where the proceeding was so premature and unnecessary as to amount to an abuse of the court's process and put the vessel owner to trouble and loss in arranging for bond, the court could doubtless dismiss the libel. In The Richard Busteed, 20 Fed. Cas. No. 11,764, 1 Sprague 441, Judge Sprague, passing upon a suit in admiralty to enforce a lien created by the Massachusetts statute, held that the sixty-day period allowed before instituting proceedings was intended to apply to the state courts alone, not to the admiralty court. He based his ruling upon the language of the Massachusetts supreme court in Tyler *v.* Currier, 10 Gray (Mass.) 54.

If time is extended by notes given with fraudulent intent, the lien may be enforced before they fall due. Chester Rolling-Mills *v.* The Hopatcong, 1 Silv. Sup. (N. Y.) 567, 6 N. Y. Suppl. 215 [*affirmed* in 127 N. Y. 206, 27 N. E. 841].

95. Form of caption is as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES, For the [Eastern] District of [Virginia]

In the Matter of [Charles J. Colonna]
vs.
The [Steamer America] } In Admiralty."

96. Verification of libel generally see ADMIRALTY, 1 Cyc. 858.

a form of a libel for supplies, repairs, or other necessaries,[97] which has been in use in the eastern district of Virginia for many years and has withstood all attacks, is as follows: "To the Honorable [Edmund Waddill, Jr.] Judge of the Court aforesaid: The libel of [Charles J. Colonna] of the [City] of [Norfolk] and State of [Virginia], against the [Steamer America] of [New York] whereof [John Jones] is or lately was Master, her tackle, apparel and furniture, and against all persons intervening for their interest therein, in a cause of contract, civil and maritime, alleges as follows.[98] 1. That during the [month] of [October] of the year [1905], the said [Steamer] being in the harbor of [Norfolk, Virginia], and being as to libellant a [foreign][99] vessel and standing in need of certain [repairs][1] the libellant, at the request of the master and owners of said [steamer] or their agents furnished to her certain [repairs].[2] That the schedule hereto annexed and prayed to be made a part of this libel is a just and true statement of the said [repairs].[3] That the charges in the said schedule are just and reasonable, and that said [repairs] were necessary and proper, and were furnished on the credit of the vessel as well as of her owners,[4] and constitute a lien thereon, whether by the general maritime law, or by the statute of [Virginia].[5] 2. That there is now due to the said libellant on account of said [repairs] the sum of [($86.78) Eighty-six 78/100 dollars] with interest thereon as shown by the schedule aforesaid, which although often demanded has not yet been paid. 3. That the said vessel is now in the [Eastern] district of [Virginia]. 4. That all and singular the premises are true, and within the Admiralty and Maritime jurisdiction of the

97. The form was originally prepared by the author to serve both against foreign and domestic vessels, the words and figures in brackets [ ] show the method of filling up the blanks in the printed form. These must of course be varied to suit the special case.

98. Preliminary.— The location of the materialman and the hailing port of the vessel should be given so as to show whether the claim is on a foreign or domestic lien.

99. If the suit is on a domestic lien, the word "foreign" should be changed to "domestic."

1. If the claim is for supplies or advances or other necessaries of any character, the word "repairs" should be altered accordingly.

2. The allegation that the repairs were furnished "at the request of the master and owners of said steamer or their agents" is intended to make the form fit all possible cases, whether by the master, the owners personally, any authorized member of the crew, or an authorized charterer. It is sufficient under the decisions, it being only necessary to show the authority of the party ordering. The Augusta, 2 Fed. Cas. No. 647; The Walkyrien, 29 Fed. Cas. No. 17,092, 11 Blatchf. 241. See also the following cases:

Alabama.— Richardson *v.* Cleaveland, 5 Port. 251.

Delaware.— Carman *v.* Scribner, 3 Houst. 554.

Indiana.— Carson *v.* The Talma, 3 Ind. 194; The Tom Bowling *v.* Hough, 5 Blackf. 188.

Massachusetts.— Miller *v.* Robinson, 2 Allen 610.

Michigan.— Sarmiento *v.* The Catherine C., 110 Mich. 120, 67 N. W. 1085.

Pennsylvania.—The Odorilla *v.* Baizley, 128 Pa. St. 283, 18 Atl. 511.

Wisconsin.— Haney *v.* The Rosabelle, 17 Wis. 392.

3. The schedule should be itemized, and, being made a part of the libel, obviates any further particularity. In fact it is not strictly necessary to set the account out in full detail. Whitlock *v.* The Thales, 29 Fed. Cas. No. 17,578, 20 How. Pr. (N. Y.) 447; Richardson *v.* Cleaveland, 5 Port. (Ala.) 251.

4. The allegation "standing in need of certain repairs" coupled with the further allegation that they were "necessary and proper and were furnished on the credit of the vessel" is a sufficient allegation of the necessity for the repairs and necessity for credit which gives rise to the maritime lien. In Brown *v.* The Albany, 4 Fed. Cas. No. 1,987, Judge Betts held that the libel should also allege that the owner had no other credit or funds except the credit of the vessel. He based his ruling on Pratt *v.* Reed, 19 How. (U. S.) 359, 15 L. ed. 660, then recently decided. But later decisions have much restricted this case, so that it is no longer law. See *supra*, VII, B, 4, a, (I), (A), (B), (C).

5. The allegation that the repairs "constitute a lien thereon, whether by the general maritime law or the statute of Virginia," is correct, although inartificial. The form was prepared before the decisions were as strong as at present against the right of a state statute to regulate liens on foreign vessels. See *supra*, VII, B, 3, b, (II), (C). If the claim is against a foreign vessel, the allegation as to the state statute is surplusage. A claim under the general law may be amended to a claim under a state law, but an amendment is unnecessary, as it only affects the source of title, not its character, and is a mere allegation of law. The Samuel Marshall, 49 Fed. 754 [*affirmed* in 54 Fed.

United States and of this Honorable Court.[6] WHEREFORE, the libellant pray[s] that process in due form of law according to the course of this Honorable Court in cases of Admiralty and Maritime jurisdiction may issue against the said vessel, her tackle, apparel and furniture; and that all persons claiming any right, title or interest therein may be cited to appear and answer on oath all and singular the matters aforesaid; and that the said vessel may be condemned and sold to pay the amount due the libellant, with interest and costs, and that the libellant may have such other and further relief as in law and justice [he] may be entitled to receive. [Hughes & Little], Proctors. [Charles J. Colonna]." If the respondents to the original libel wish relief on a counter-claim, they must file a cross libel and mature it like an original libel. They cannot obtain affirmative relief by answer.[7]

d. Process on. Under Supreme Court Admiralty Rule No. 1 the first step in an admiralty case is filing the libel. Until this is done no process can issue under the express provisions of the rule. Under Supreme Court Admiralty Rule No. 9 the process in an action *in rem* is a warrant of arrest of the property, under which the marshal seizes it. This rule requires public notice of the seizure, the return-day and the hearing day to be given by publication in a newspaper to be designated by the court. A seizure or some other submission of the vessel to the jurisdiction of the court is necessary to the exercise of jurisdiction.[8] Such seizure is itself constructive notice to all parties claiming any right, title, or interest in the vessel, and is sufficient to bring all parties into court, at least to the extent of protecting a decree in the cause from collateral attack. The requirement as to publication is not jurisdictional.[9] Although the lien may have been waived except as against a fractional interest in the vessel, the entire vessel

396, 4 C. C. A. 385]. On the other hand, if the claim is against a domestic vessel, the allegation as to the general maritime law is surplusage. In Parmlee *v.* The Charles Mears, 18 Fed. Cas. No. 10,766, Newb. Adm. 197 (an old case holding a shipbuilding contract to be maritime), it was held necessary to set out the local statute relied on. But a federal court is not an alien court in the district of its session. It takes judicial notice of the public state laws, and matters of law need not be pleaded. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788. It is only requisite to aver the facts necessary to bring the case under the terms of the statute. The Julia Sherwood, 8 Fed. 366; Allman *v.* Ripley, 39 Ala. 351. In one respect the form might not suffice. Suppose a New York vessel contracts a bill for supplies in New York, and is subsequently libeled in Virginia. Here the lien arises under the New York statute. This, being a foreign law in the forum where suit is brought, is to be proved as a fact. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788. Hence it would be better pleading in such case to set it out in the libel or at least aver positively the existence of a statute and the fact that it gives a lien for the character of claim asserted in the libel.

6. The remaining allegations of the form are common to any libel *in rem*, and intended to meet the requirements of Supreme Court Admiralty Rule 23, as follows: "All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be; and, if the libel be *in rem*, that the property is within the district; and, if *in personam*, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of due process to enforce his rights, *in rem* or *in personam* (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof."

7. Ward *v.* Chamberlain, 21 How. (U. S.) 572, 16 L. ed. 219; Hawgood, etc., Transit Co. *v.* Dingman, 94 Fed. 1011, 36 C. C. A. 627.

Filing a cross libel is not a waiver of any defense to the original libel. The Electron, 74 Fed. 689, 21 C. C. A. 12.

8. Bruce *v.* Murray, 123 Fed. 366, 59 C. C. A. 494; Ham *v.* The Hamburg, 2 Iowa 460.

9. Daily *v.* Doe, 3 Fed. 903. This case reviews many decisions, but they are mainly in cases not of an admiralty nature. See, however, Page *v.* U. S., 11 Wall. (U. S.) 268, 20 L. ed. 135; The Mary, 9 Cranch (U. S.) 126, 3 L. ed. 678.

may be seized to enforce the lien against such fractional interest, the lien and the vessel being in their nature indivisible.[10] A vessel under contract of construction for the United States after a trial trip is subject to seizure if the title and possession are still in the contractor. Even the fact that the title is in the United States would not prevent seizure in an action *in rem* if it does not interfere with the possession of the government; as the latter takes *cum onere*.[11] But under the comity prevailing between courts a vessel in the actual custody of a court on valid process cannot be seized under admiralty process.[12]

e. Defense to — (I) *In General.* Any one whose interest in the vessel or dividend out of the proceeds of sale would be affected may appear and defend an asserted lien. This may be done: (1) By exception for matters of law or answer for matters of fact;[13] or (2) by petition of intervention.[14]

(II) *By Exception For Matters of Law or Answer For Matters of Fact.* This is the usual method for parties having any title in the vessel. For instance a charterer may defend on the ground that the credit was not given to the vessel.[15] So too a mortgagee[16] or a shipwright having a possessory lien may defend.[17]

(III) *By Petition of Intervention.* In admiralty practice an answer or defensive pleading is preceded by a claim, and presupposes that the party setting it up can, if he so elects, by interposing the claim, take possession of the vessel on giving the proper bond.[18] But if the vessel is not bonded and the libellant thus relegated to a decree against the stipulators, a sale of the vessel in case of a ruling for the libellant is inevitable. In such case petitions of intervention are filed under the Supreme Court Admiralty Rule No. 43,[19] and there may ensue a general scramble among the petitioners as to their relative rights and priorities, each being entitled to dispute the other's claim. But the only parties entitled to interfere under this rule are those having an interest in, that is, a lien or charge upon, the proceeds, maritime or otherwise. Hence a mortgagee may intervene under this rule, and his lien will be assigned its proper rank.[20] So the holder of a common-law or statutory title to, interest in, or lien upon, a vessel may intervene

But some notice beyond the mere seizure is usually required by the state statutes. The Hilton *v.* Miller, 62 Ill. 230; The Clarion *v.* Moran, 18 Ill. 501; Turner *v.* Friend, 59 Me. 290.

10. The Agnes Barton, 26 Fed. 542.

11. U. S. *v.* Douglas, 10 Wall. (U. S.) 15, 19 L. ed. 875; The Revenue Cutter No. 2, 20 Fed. Cas. No. 11,714, 4 Sawy. 143; Briggs *v.* Light Boat Upper Cedar Point, 11 Allen (Mass.) 157.

A vessel brought in as a prize cannot be libeled by a materialman. Harlan *v.* U. S., 4 Wall. (U. S.) 634, 18 L. ed. 413.

12. Moran *v.* Sturges, 154 U. S. 256, 14 S. Ct. 1019, 38 L. ed. 981; Taylor *v.* Carryl, 20 How. (U. S.) 583, 15 L. ed. 1028; Fountain *v.* 624 Pieces of Timber, 140 Fed. 381; The Robert Fulton, 20 Fed. Cas. No. 11,890, 1 Paine 620. See also 13 Cent. Dig. tit. "Courts," §§ 1386–1390. *Compare* McLelland *v.* The Robert Morris, 3 Pa. L. J. 493.

13. See *infra*, XII, B, 2, e, (II).

14. See *infra*, XII, B, 2, e, (III).

Defense must be made by some pleading.— The sufficiency of the petition cannot be questioned at the hearing by a mere objection of a party entitled to appear as defendant. McMonagle *v.* Nolan, 98 Mass. 320.

15. Alaska, etc., Steamship Co. *v.* Chamberlain, 116 Fed. 600, 54 C. C. A. 56. See *infra*, VII, B, 4, c, (II), text and note 66.

16. The H. N. Emilie, 70 Fed. 511; Elmore *v.* The Alida, 8 Fed. Cas. No. 4,419.

But the court cannot compel the mortgagee to appear and defend. Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*a* [*affirmed* in 21 Fed. Cas. No. 12,483*c*].

17. The Two Marys, 16 Fed. 697.

But a stipulator on the bond is not a party defendant. Witherspoon *v.* Wallis, 2 Ala. 667.

18. Supreme Court Admiralty Rule No. 26; The Two Marys, 12 Fed. 152.

19. This rule is as follows: "Any person having any interest in any proceeds in the registry of the court shall have a right, by petition and summary proceeding, to intervene *pro interesse suo* for delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to right and justice. And if such petition or claim shall be deserted, or, upon a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party."

20. The Gordon Campbell, 131 Fed. 963; The Acme, 1 Fed. Cas. No. 28, 7 Blatchf. 366 [*reversing* 1 Fed. Cas. No. 27, 2 Ben. 386]; The Island City, 13 Fed. Cas. No. 7,109, 1 Lowell 375; The Syracuse, 23 Fed. Cas. No. 13,716, 9 Ben. 348.

under this rule and protect his interest, although that interest is not maritime.[21] In considering these petitions a court of admiralty acts upon equitable principles. Having a fund in its custody it must see that the fund is paid to its rightful owners; and hence it must consider and decide who are its owners. This necessarily involves the consideration of any claim asserting a vested right in the vessel or its proceeds.[22] Hence one who has a mere personal claim against the owner cannot intervene, as such a claim is not an interest in the proceeds, and to admit such a claim would be to try ordinary common-law controversies in an admiralty court and deprive the owner of his right to a trial by jury.[23]

f. Evidence.[24] The general rule as to presumptions for or against a lien has already been discussed.[25]

3. Libel In Personam. This is not a means of enforcing a lien but a personal suit in the admiralty court against the owner, master, or other party personally liable.[26]

21. Thus a receiver appointed in another state in a suit to wind up the affairs of a corporation owning the vessel. The Willamette Valley, 76 Fed. 838. Conversely a party having an admiralty lien may intervene and defend in a state court proceeding. Hawes *v.* Mitchell, 15 Gray (Mass.) 234. So the furnisher of materials for the original construction of a vessel, if given a lien by the state law. The Guiding Star, 18 Fed. 263 [*affirming* 9 Fed. 521]; Petrie *v.* The Coal Bluff No. 2, 3 Fed. 531; Francis *v.* The Harrison, 9 Fed. Cas. No. 5,038, 2 Abb. 74, 1 Sawy. 353; Harper *v.* New Brig, 11 Fed. Cas. No. 6,090, Gilp. 536. In McCaskey *v.* Coal Bluff No. 2, 15 Fed. Cas. No. 8,687, such a claim was disallowed as a maritime lien, and the commissioner passing upon it intimated that it could not be recognized in the distribution of the proceeds; but in this he is wrong. See Petrie *v.* The Coal Bluff No. 2, *supra*. So claimants of liens under a state law. The Island City, 13 Fed. Cas. No. 7,109, 1 Lowell 375; The Lady Franklin, 14 Fed. Cas. No. 7,983, 2 Biss. 121.

22. Poole *v.* Tyler, 94 U. S. 518, 24 L. ed. 167; Rodd *v.* Heartt, 21 Wall. (U. S.) 558, 22 L. ed. 654; Schuchardt *v.* Babbidge, 19 How. (U. S.) 239, 15 L. ed. 625; The Conveyor, 147 Fed. 586; The Pauline, 136 Fed. 815; The Willamette Valley, 76 Fed. 838; The Niagara, 31 Fed. 163; The E. V. Mundy, 22 Fed. 173; The Guiding Star, 18 Fed. 263 [*affirming* 9 Fed. 521]; The Albert Schultz, 12 Fed. 156; The Trenton, 4 Fed. 657; Topfer *v.* The Mary Zephyr, 2 Fed. 824, 6 Sawy. 427; The Skylark, 22 Fed. Cas. No. 12,928, 2 Biss. 251; Town *v.* The American Banner, 24 Fed. Cas. No. 14,112*a*; The Flora, 1 Hagg. Adm. 298; The Nordstjernen, Swab. 260; The Harmonie, 1 W. Rob. 178. A party who is forbidden to libel may intervene when the vessel has been seized on another libel. Zane *v.* The President, 30 Fed. Cas. No. 18,201, 4 Wash. 453; Lachenmeyer *v.* The Angelina, 14 Fed. Cas. No. 7,967; The Boston, 3 Fed. Cas. No. 1,669, Blatchf. & H. 309. In view of these authorities the intimation in The Fanny, 8 Fed. Cas. No. 4,637, that no one can intervene unless he has a claim enforceable in admiralty is not sustainable.

23. Wilson *v.* Bell, 20 Wall. (U. S.) 201, 22 L. ed. 259, 21 Wall. (U. S.) 558, 22 L. ed. 654; The Advance, 73 Fed. 503, 19 C. C. A. 541 [*affirming* 63 Fed. 726]; Miller *v.* The Peerless, 45 Fed. 491; The Wyoming, 37 Fed. 543; Gardner *v.* The New Jersey, 9 Fed. Cas. No. 5,233, 1 Pet. Adm. 223. A judgment obtained in a state court constitutes no lien if execution is not levied before the admiralty proceedings; for execution cannot be served on a court or its officers. Wilson *v.* Bell, 20 Wall. (U. S.) 201, 22 L. ed. 259; *In re* Forsyth, 78 Fed. 296; The Willamette Valley, 76 Fed. 838; The Balize, 52 Fed. 414. So where a local statute gives no lien but a mere right of arrest, a claimant under it has no standing as an intervener. The Velocity, 28 Fed. Cas. No. 16,911. There are a few cases allowing the holder of a mere personal claim against the owner to intervene. Delano *v.* The J. Walls Jr., 7 Fed. Cas. No. 3,752 (a claim for supplies not constituting a lien and also on a broken promise of consignment); The Monongahela, 17 Fed. Cas. No. 9,712, 5 Biss. 131 (a claim for master's wages); The Santa Anna, 21 Fed. Cas. No. 12,325, Blatchf. & H. 79; The Stephen Allen, 22 Fed. Cas. No. 13,361, Blatchf. & H. 175 (a claim for master's wages). These, however, are practically overruled by Wilson *v.* Bell, *supra*, as shown by Mr. Justice Jackson in The Balize, 52 Fed. 414.

An intervener cannot question the method of distribution as between two lienors prior to himself when he cannot be reached in any event. The John T. Moore, 13 Fed. Cas. No. 7,430, 3 Woods 61.

In distributing the proceeds the liens are charged proportionately upon the shares of the part-owners. *In re* Wright, 16 Fed. 482.

In case no notice is given, the proper procedure is to move to set aside the order on that ground. Hamilton *v.* The New York Sensation, 15 N. Y. Suppl. 950.

24. Evidence generally see Evidence.

Evidence in admiralty generally see Admiralty, 1 Cyc. 882 *et seq.*

25. See *supra*, VII, B, 4, a, *et seq.*

With attempts to magnify bills or to assert unfounded claims the court has little patience. The Lurline, 55 Fed. 422, 5 C. C. A. 166; The Enos B. Phillips, 53 Fed. 153.

26. See *supra*, XII, B, 1.

Admiralty jurisdiction and procedure generally see Admiralty, 1 Cyc. 797 *et seq.*

4. Proceedings in Non-Maritime Forum — a. In Chancery or Bankruptcy Courts. Frequently a chancery or bankruptcy court in administering a fund or marshaling liens takes cognizance of admiralty liens as a means of making a proper distribution of the fund.[27]

b. In Other Courts. It has been seen that many of the states have statutes creating liens on domestic vessels and providing remedies in their courts for enforcing such liens. It has also been seen that such statutes are valid in so far as they do not attempt to provide a pure proceeding *in rem* for the enforcement of such of those liens as are maritime.[28] But when such remedies are on the safe side of the prohibited line, it is because they are enforcing those liens as state statutory liens, not as maritime liens; for a maritime lien as such is not and cannot be enforceable in any other than a maritime court. Hence the procedure under these various state statutes is not properly within the scope of this treatise, but is rather a branch of pleading or procedure under the statutes of the several states.[29]

27. Pratt *v.* Paris Gaslight, etc., Co., 168 U. S. 255, 18 S. Ct. 62, 42 L. ed. 458; McRae *v.* Bowers Dredging Co., 86 Fed. 344; *In re* People's Mail Steamship Co., 19 Fed. Cas. No. 10,970, 3 Ben. 226; *In re* Scott, 21 Fed. Cas. No. 12,517, 1 Abb. 336; Lewis *v.* Thatcher, 18 La. Ann. 575; American Ins. Co. *v.* Coster, 3 Paige (N. Y.) 323.

28. See *supra*, VII, B, 3, b, (II).

29. Already in this treatise nearly all of the state decisions have been arranged under what seemed to the author to be the natural and appropriate places therefor. Those relating to the validity of state statutes have been treated *supra*, VII, B, 3, b. Those relating to the steps necessary to perfect and preserve the lien created will be found *supra*, VII, B, 6. Those relating to the effect of bonding a vessel are grouped *supra* under VIII, F. There are, however, a few state decisions still remaining unclassified which merely construe the special language of particular statutes, many of which have been subsequently amended, or discuss special questions under such statutes. Although not involving principles pertinent to the doctrine of maritime liens they are inserted for convenience of reference.

Arkansas.— Case *v.* Maffitt, 19 Ark. 645 (requisites of affidavit); Holeman *v.* The P. H. White, 11 Ark. 237 (right to interplead).

Florida.— Baars *v.* Creary, 23 Fla. 311, 2 So. 662, form of judgment.

Georgia.— Walter *v.* Kierstead, 74 Ga. 18; Kirkpatrick *v.* Augusta Bank, 30 Ga. 465 (right of attorney to make demand or sue); Adkins *v.* Baker, 7 Ga. 56 (requisites of affidavit).

Illinois.— The Col. Mulligan *v.* Buck, 55 Ill. 425; The Clarion *v.* Moran, 18 Ill. 501 (form of judgment, and error in amount not cured by remittitur); Frink *v.* King, 4 Ill. 144 (requisites of affidavit).

Indiana.— Scott *v.* McDonald, 27 Ind. 33 (right to file petitions in main suit); Carson *v.* Talma, 3 Ind. 194; Southwick *v.* Packet Boat Clyde, 6 Blackf. 148 (measure of recovery; sufficiency of proof of demand is for court, not jury); The Tom Bowling *v.* Hough, 5 Blackf. 188 (requisites of affidavit).

Iowa.— Baker *v.* The Milwaukee, 14 Iowa 214; West *v.* The Lady Franklin, 2 Iowa 522; Miller *v.* Galland, 4 Greene 191 (proof of date when services rendered); The Kentucky *v.* Brooks, 1 Greene 398 (averments in petition).

Maine.— Buck *v.* Kimball, 75 Me. 440 (invalidity of sale on writ not running against owners, and choice of an appraiser does not estop owners from contesting sale); Fuller *v.* Nickerson, 69 Me. 228 (objection to specifications may be raised at hearing); Low *v.* Dunham, 61 Me. 566 (order of sale a matter of course after judgment); McCabe *v.* McRea, 58 Me. 95 (necessary allegations in attachment writ); Holyoke *v.* Gilmore, 45 Me. 566 (necessity of notifying creditor holding part of vessel as collateral); Deering *v.* Lord, 45 Me. 293 (effect of including improper items).

Massachusetts.— Donnell *v.* The Starlight, 103 Mass. 227 (service of notice on petition and when may be made returnable); Gove *v.* Prince, 3 Allen 211 (proof of prices charged).

Michigan.— Sarmiento *v.* The Catherine C., 110 Mich. 120, 67 N. W. 1085 (right to amend at trial); Ward *v.* Willson, 3 Mich. 1 (averments in complaint).

Mississippi.— Wallace *v.* Seales, 36 Miss. 53. Act of 1840 relating to attachments against steamers and act of 1822 relating to attachments generally are to be construed *in pari materia*. Auter *v.* The James Jacobs, 34 Miss. 269; Edwards *v.* The Blacksmith, 33 Miss. 190; The General Worth *v.* Hopkins, 30 Miss. 703, sufficiency of affidavit.

Missouri.— Eldridge *v.* The William Campbell, 27 Mo. 595; Hamilton *v.* The Ironton, 19 Mo. 523 (affidavit must show affiant's means of knowledge); Luft *v.* The Envoy, 19 Mo. 476 (requisites of complaint or demand); Blaisdell *v.* The William Pope, 19 Mo. 157 (requisites of return to writ of seizure, and right of officer to amend, although term of office has expired); C. H. Burke Mfg. Co. *v.* The A. Saltzman, 42 Mo. App. 85.

New Jersey.— Randall *v.* Roche, 30 N. J. L. 220, 80 Am. Dec. 233 (allegations of declaration); Wood *v.* Fithian, 24 N. J. L. 838 (right to sue owner *in personam*).

MARITIME LOAN. See SHIPPING.

MARITIME SERVICE. A service rendered upon the high seas or a navigable river, and which has some relation to commerce or navigation — some connection with a vessel employed in trade, with her equipment, her preservation, or the preservation of her crew;[1] a service performed on waters within the ebb and flow of the tide.[2] (See, generally, ADMIRALTY, and Cross-References Thereunder.)

MARITIME TORT. A tort committed upon the high seas, or upon a navigable river or other navigable waters within admiralty jurisdiction;[3] a tort that occurs on any public navigable waters of the United States, whether by wrongful act or omission;[4] an injury, trespass, or unlawful or injurious act done and committed upon the seas or navigable streams connected with the ocean;[5] an unlawful act, injurious to others, independent of contract, happening or being committed on the sea or upon tide water.[6] (Maritime Tort: Collision Between Vessels, see COLLISION. Injury by or to — Seaman, see SEAMEN; Tug or Tow, see TOWAGE; Wreck, see SHIPPING. Jurisdiction of Admiralty, see ADMIRALTY; and the Particular Admiralty Titles. Liability of Vessel or Owner — In General, see SHIPPING; In Carriage of Goods, see SHIPPING; In Carriage of Passengers, see SHIPPING. Obstruction of Navigation, see NAVIGABLE WATERS.)

MARITIME WARFARE. War on the sea.[7] (See, generally, WAR.)

MARK. As a noun, a visible sign made or left upon anything; a line, point, stamp, figure, or the like, drawn or impressed so as to attract attention and carry

New York.— Rhoads *v.* Woods, 41 Barb. 471 (reseizure after surreptitious escape from first attachment); Kenyon *v.* Covert, 7 N. Y. Suppl. 34 (evidence of authority to do work); The Nancy *v.* Fitzpatrick, 3 Cai. 38 (form of judgment, and question as to selling for trial court).

North Carolina.— Kornegay *v.* Farmers', etc., Steamboat Co., 107 N. C. 115, 12 S. E. 123 (mortgagee not a necessary party); Bryan *v.* The Enterprise, 53 N. C. 260 (form of attachment bond); The Hugh Chisholm, 53 N. C. 4 (seizure necessary before leaving place of repairs); Cameron *v.* The Marcellus, 48 N. C. 83 (owner cannot come in under interpleader, that being intended for other claimants).

Ohio.— The Monarch *v.* Finley, 10 Ohio 384 (here a suit in assumpsit against the vessel by name was upheld; this is clearly obsolete and superseded. See *supra*, VII, B, 3, b, (II), (B); Patterson *v.* The Steamboat Gulnare, 2 Disn. 505 (amendment cannot affect priorities as among creditors); Young *v.* Steamboat Virginia, 1 Handy 157, 12 Ohio Dec. (Reprint) 77 (proper form of action is petition).

Pennsylvania.— Low *v.* The Ship Clarence S. Bement, 2 Pa. Co. Ct. 430 (informality in suit against a corporation in receiver's hands, how corrected); Churchman *v.* Keefe, 2 Del. Co. 256 (correcting mistake in names by amendment).

Tennessee.— Casey, etc., Mfg. Co. *v.* Weatherly, 101 Tenn. 318, 47 S. W. 432 (necessity of demand as prerequisite to suit); Ferguson *v.* Vance, 3 Lea 90 (proceeding is at law, and bill of exceptions necessary to question findings in appellate court); Emory Iron, etc., Co. *v.* Wood, 6 Heisk. 198 (sufficiency of account filed with petition); Greenlaw *v.* Potter, 5 Sneed 390 (owners must be made parties).

Wisconsin.— Steamboat Galena *v.* Beals, 5 Wis. 91 (failure to allege jurisdictional fact); Rand *v.* The Barge, 3 Pinn. 363, 4 Chandl. 68 (character of boat included in act and how far a question of fact).

See 34 Cent. Dig. tit. "Maritime Liens," § 109 *et seq.*

1. Black L. Dict. [*quoted* in Cope *v.* Vallette Dry-Dock Co., 16 Fed. 924, 925, 4 Woods 265].

2. The Atlantic, 53 Fed. 607, 609; Thackarey *v.* The Farmers of Salem, 23 Fed. Cas. No. 13,852, Gilp. 524.

This service has been held to include the work of a stevedore in loading or unloading cargo (The Hattie M. Bain, 20 Fed. 389, 390); furnishing an air pump to a water craft commonly called a "chuncker," used for pumping water out of a dry dock in the Hudson river (Winslow *v.* A Floating Steam Pump, 30 Fed. Cas. No. 17,880).

A ship is not employed in a maritime service when she is merely being used and employed as a warehouse to hold her cargo after the completion of a voyage and while navigation is suspended. McRae *v.* Bowers Dredging Co., 86 Fed. 344, 347.

3. Hough *v.* Western Transp. Co., 3 Wall. (U. S.) 20, 33, 18 L. ed. 125, where it is said that the term is never applied to a tort committed upon land, although relating to maritime matters.

4. Holmes *v.* Oregon, etc., R. Co., 5 Fed. 75, 77, 6 Sawy. 262.

Negligence committed upon navigable waters is a marine tort which subjects the vessel to liability to an extent coincident with the liability of the owner. The Rheola, 19 Fed. 926, 927.

5. *In re* Long Island, etc., Transp. Co., 5 Fed. 599, 606.

6. Philadelphia, etc., Steam Towboat Co. *v.* Philadelphia, etc., R. Co., 19 Fed. Cas. No. 11,085.

7. The Ambrose Light, 25 Fed. 408, 412.

some information or intimation; a token; a trace;[8] some change made in some part of an animal by a knife or other means, such as boring or slitting the ear.[9] As a verb, to make a visible sign upon something; to affix a significant mark to; to draw, cut, fasten, brand a token upon, indicating or intimating something; to affix an indication to; to attach one's name or initials to;[10] to point out; to settle; to define; to describe.[11] (Mark: Artificial in Description of Boundary, see BOUNDARIES. Failure to Make, or False or Fraudulent Mark as Ground of Forfeiture, see INTERNAL REVENUE. On Ballot, see ELECTIONS. On Body, see ACCIDENT INSURANCE.[12] On Cattle, see ANIMALS. On Goods Shipped, see CARRIERS. On Inspected Article, see INSPECTION. On Log, see LOGGING. Signature by, see SIGNATURES. Trade-Mark, see TRADE-MARKS AND TRADE-NAMES.)

MARKET. As a noun, a franchise or liberty derived from the town, or in some cases held by prescription which presupposes a grant, and may be granted to a public body or a private person;[13] a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale;[14] a place designated by the municipal authorities of a city or an incorporated town for the sale of articles necessary or convenient for the subsistence of men and domestic animals;[15] a public place and appointed time for buying and selling, a public place appointed by public authority where all sorts of things necessary for the subsistence of, or convenience of life, are sold;[16] a place where vegetables, fish, and meats of all sorts are furnished for the daily sustenance of the population of a city;[17] a public place for the sale of commodities;[18] the demand there is for any particular article.[19] As a verb, to sell.[20] (Market: Engrossing and Forestalling, see MONOPOLIES. Establishment and Regulation of by Municipal Corporation, see MUNICIPAL CORPORATIONS. Franchise For, see FRANCHISES. Taking Private Property For Public Market, see EMINENT DOMAIN. Value, see EVIDENCE.)

MARKETABLE TITLE. A term which when applied to real estate is used to designate a title free from reasonable doubt;[21] one that is not only good, but

8. Webster Dict. [*quoted* in Moorman *v.* Hoge, 17 Fed. Cas. No. 9,783, 2 Sawy. 78, 86].

A mark, for a name or signature, is most often the sign of the cross made in a little space left between the Christian name and surname, with the word "his" usually written above the mark and the word "mark" below it. 2 Blackstone Comm. 305. See also Staples *v.* Bedford Loan, etc., Bank, 98 Ky. 451, 33 S. W. 403, 17 Ky. L. Rep. 1035.

9. Churchill *v.* Georgia R., etc., Co., 108 Ga. 265, 267, 33 S. E. 972.

10. Webster Dict. [*quoted* in Adams *v.* Heisel, 31 Fed. 279, 280].

11. Allen *v.* Smith, 12 N. J. L. 159, 165.

12. See 1 Cyc. 285.

13. Caldwell *v.* Alton, 33 Ill. 416, 419, 75 Am. Dec. 282.

A market is defined by legal writers to be the privilege within a town to hold a market. Hughes *v.* Farmers' Assoc., 1 Phila. (Pa.) 338 [*citing* 2 Coke Inst. 220].

14. Jacksonville *v.* Ledwith, 26 Fla. 163, 188, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69; Caldwell *v.* Alton, 33 Ill. 416, 419, 75 Am. Dec. 282.

15. Strickland *v.* Pennsylvania R. Co., 154 Pa. St. 348, 353, 26 Atl. 431, 31 L. R. A. 224.

16. Bouvier L. Dict. [*quoted* in Jacksonville *v.* Ledwith, 26 Fla. 163, 189, 7 So. 885, 23 Am. St. Rep. 558, 8 L. R. A. 69; Smith *v.* Newbern, 70 N. C. 14, 18, 16 Am. Rep. 766].

17. New Orleans *v.* Morris, 18 Fed. Cas. No. 10,182, 3 Woods 103, 106.

18. Ketchum *v.* Buffalo, 14 N. Y. 356, 361.

The building used for the purpose of the market may be referred to, when the context shows such to be the meaning intended by the use of the word. St. Paul *v.* Traeger, 35 Minn. 248, 253, 33 Am. Rep. 462; Harney *v.* St. Louis, 90 Mo. 214, 218, 2 S. W. 271.

The word is sometimes used as an adjective in connection with other terms, as "market house" or "market place." Tukey *v.* Omaha, 54 Nebr. 370, 374, 74 N. W. 613, 69 Am. St. Rep. 711; Smith *v.* Newbern, 70 N. C. 14, 18, 16 Am. Rep. 766.

"Market square."— The words on a plat of a city, designating a certain block, do not of themselves necessarily indicate more than that such is the name given to the ground. Scott *v.* Des Moines, 64 Iowa 438, 444, 20 N. W. 752.

19. Black L. Dict.

The term implies competition.— Watts *v.* Western, 62 Fed. 136, 138, 10 C. C. A. 302.

20. Milliman *v.* Neher, 20 Barb. (N. Y.) 37, 40.

21. Austin *v.* Barnum, 52 Minn. 136, 139, 53 N. W. 1132; Richmond *v.* Koenig, 43 Minn. 480, 481, 45 N. W. 1093; Hedderly *v.* Johnson, 42 Minn. 443, 444, 44 N. W. 527, 18 Am. St. Rep. 521; Kilpatrick *v.* Barron, 125 N. Y. 751, 755, 26 N. E. 925; Fleming *v.* Burnham, 100 N. Y. 1, 10, 2 N. E. 905; Fuhr *v.* Cronin, 82 N. Y. App. Div. 210, 214, 81 N. Y. Suppl. 536; Sproule *v.* Davies, 69 N. Y.

indubitable;[22] a title in which there is no doubt involved either as to matter of law or fact;[23] a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept;[24] a title reasonably free from such doubts as would affect the market value of the estate; one which a prudent man with knowledge of all the facts and their legal bearings would be willing to accept;[25] a title of such character as should assure to the vendee a peaceable enjoyment of the property.[26] (See Good Title; and, generally, Vendor and Purchaser.)

MARKET OVERT. A fair or market held at stated intervals in particular places by virtue of a charter or provision, to which ordinary markets or stores for the sale of merchandise bear no resemblance.[27] (See, generally, Sales.[28])

MARKET PRICE or **VALUE.**[29] The price fixed by buyer and seller in an open market in the usual and ordinary course of lawful trade and competition;[30] the price or value of the article established or shown by sales, public or private, in the ordinary way of business;[31] the fair value of the property as between one who desires to purchase and one who desires to sell;[32] the current price;[33] the current value;[34] the general or ordinary price for which property may be bought and sold;[35] the actual price at which a commodity is commonly sold;[36] the rate at which a thing is sold;[37] a fixed and established price for the time;[38] the price at which articles are sold and purchased clear of every charge but such as are laid upon them at the time of sale.[39] (Market Price: Evidence, see Evidence. Of Goods Lost or Injured by Carrier, see Carriers. Of Property Converted, see Trover and Conversion. Of Property Sold, see Sales; Vendor and Purchaser. Of Property Taken For Public Use, see Eminent Domain. Under Customs Laws, see Customs Duties.)

MARKET REPORTS. See Evidence.

MARLE. A kind of earth or mineral.[40]

App. Div. 502, 503, 75 N. Y. Suppl. 229; Kerrigan *v.* Backus, 69 N. Y. App. Div. 329, 331, 74 N. Y. Suppl. 906; Wright *v.* Mayer, 47 N. Y. App. Div. 604, 608, 62 N. Y. Suppl. 610; Weil *v.* Radley, 31 N. Y. App. Div. 25, 29, 52 N. Y. Suppl. 398; Simis *v.* McElvoy, 12 N. Y. App. Div. 434, 436, 42 N. Y. Suppl. 290; Holmes *v.* Woods, 168 Pa. St. 530, 539, 32 Atl. 54; Schenck *v.* Wicks, 23 Utah 576, 582, 65 Pac. 732; Morrison *v.* Waggy, 43 W. Va. 405, 411, 27 S. E. 314.

22. Ormsby *v.* Graham, 123 Iowa 202, 210, 98 N. W. 724; Tomlin *v.* McChord, 5 J. J. Marsh. (Ky.) 135; Vought *v.* Williams, 120 N. Y. 253, 257, 24 N. E. 195, 17 Am. St. Rep. 634, 8 L. R. A. 591 [*affirming* 46 Hun 638]; Swayne *v.* Lyon, 67 Pa. St. 436.

23. Dalzell *v.* Crawford, 1 Pars. Eq. Cas. (Pa.) 37, 45.

24. Todd *v.* Union Dime Sav. Inst., 128 N. Y. 636, 639, 28 N. E. 504.

25. Roberts *v.* McFadden, 32 Tex. Civ. App. 47, 53, 74 S. W. 105.

26. Barnard *v.* Brown, 112 Mich. 452, 455, 70 N. W. 1038, 67 Am. St. Rep. 432.

27. Fawcett *v.* Osborn, 32 Ill. 411, 426, 83 Am. Dec. 278. See also 2 Blackstone Comm. 449; 5 Coke 83.

28. See also 5 Cyc. 210 note 72.

29. Value and price are not synonymous or the necessary equivalents of each other, although commonly "market value" and "market price" are legal equivalents. Theiss *v.* Weiss, 166 Pa. St. 9, 17, 31 Atl. 63, 45 Am. St. Rep. 638 [*citing* Kountz *v.* Kirkpatrick, 72 Pa. St. 376, 386, 13 Am. Rep. 687]. The "market price" and "market value" of an article of commerce are ordinarily the same, and therefore generally and ordinarily the two terms mean the same thing, and the courts ordinarily permit the market price of an article to be the measure of its market value. The market price is evidence of market value, but is not conclusive. Johnson-Brinkman Commission Co. *v.* Wabash R. Co., 64 Mo. App. 590, 593.

30. Lovejoy *v.* Michels, 88 Mich. 15, 24, 49 N. W. 901, 13 L. R. A. 770.

31. Murray *v.* Stanton, 99 Mass. 345, 348.

32. Palmer *v.* Penobscot Lumbering Assoc., 90 Me. 193, 198, 38 Atl. 108 [*citing* Chase *v.* Portland, 86 Me. 367, 29 Atl. 1104].

33. Century Dict. [*quoted* in Sloan *v.* Baird, 162 N. Y. 327, 330, 56 N. E. 752]. See also 12 Cyc. 999.

34. See 12 Cyc. 999.

35. Sanford *v.* Peck, 63 Conn. 486, 494, 27 Atl. 1057; Parmenter *v.* Fitzpatrick, 135 N. Y. 190, 196, 31 N. E. 1032.

36. Douglas *v.* Merceles, 25 N. J. Eq. 144, 147.

37. Blydenburgh *v.* Welsh, 3 Fed. Cas. No. 1,583, Baldw. 331, 340.

38. Barrett *v.* The Wacousta, 2 Fed. Cas. No. 1,050, 1 Flipp. 517, 519.

39. So used in the revenue law. Goodwin *v.* U. S., 10 Fed. Cas. No. 5,554, 2 Wash. 493, 499.

40. Ogden *v.* Riley, 14 N. J. L. 186, 187,

MARQUE AND REPRISAL, LETTERS OF. A commission to attack the subjects of a foreign state on the high seas beyond the limits of the state, seize their property, and put it in sequestration.[41] (See, generally, WAR.)

25 Am. Dec. 513 [*citing* Jacob L. Dict.], in its natural state being a part of the freehold.

41. Gibbons *v.* Livingston, 6 N. J. L. 236, 255, being a hostile act of aggression.

Vessels sailing under letters of marque which have not been granted by some sovereign power are illegal and such vessels may be treated as pirates. The Ambrose Light, 25 Fed. 408, 417. And it has been held that the owners of letters of marque are responsible for injuries committed on the high seas by the commanders of the vessels sent out by them, at least to the value of the vessels. Talbot *v.* Commanders and Owners of Three Brigs, 1 Dall. (Pa.) 95, 1 L. ed. 52. So where a vessel is unlawfully captured by a letter of marque, the owner may libel against the capturing vessels and her captain, for reparation of the loss and damage sustained by such capture. Gibbs *v.* The Two Friends, 10 Fed. Cas. No. 5,386, Bee 416.

MARRIAGE

By John Marshall Harlan
Associate Justice of the Supreme Court of the United States
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Reporter of the Supreme Court of the United States *

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* Author of "The Treaty-Making Power of the United States," "Freedom of Private Property;" and joint author of "International Law," 22 Cyc. 1697.

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I. NATURE AND ESSENTIALS IN GENERAL.

A. Definition. In the law "marriage" may mean either the acts, agreements, or ceremony by which two persons enter into wedlock, or their subsequent relation created thereby.[1] In the latter sense, it is the civil status or personal relation of one man and one woman joined together in a matrimonial union which was lawfully entered into, is intended to continue during their joint lives, is not dissoluble by their consent or agreement, and which involves the reciprocal rights and obligations imposed by law on such a union.[2] It is now the commonly accepted doctrine that marriage is a civil contract, requiring only the free and

1. Campbell *v.* Crampton, 2 Fed. 417, 18 Blatchf. 150. And see Linebaugh *v.* Linebaugh, 137 Cal. 26, 69 Pac. 616; Andrews *v.* Andrews, 188 U. S. 14, 30, 23 S. Ct. 237, 47 L. ed. 366; Maynard *v.* Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654.

2. *Arizona.*— U. S. *v.* Tenney, 2 Ariz. 127, 11 Pac. 472.

California.— Kilburn *v.* Kilburn, 89 Cal. 46, 26 Pac. 606, 23 Am. St. Rep. 447; Mott *v.* Mott, 82 Cal. 413, 22 Pac. 1140.

Florida.— Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391.

Indiana.— Roche *v.* Washington, 19 Ind. 53, 81 Am. Dec. 376.

Missouri.— Banks *v.* Galbraith, 149 Mo. 529, 51 S. W. 105; State *v.* Bittick, 103 Mo. 183, 15 S. W. 325, 23 Am. St. Rep. 869, 11 L. R. A. 587.

Ohio.— Swartz *v.* State, 13 Ohio Cir. Ct. 62, 7 Ohio Cir. Dec. 43.

Utah.— Riddle *v.* Riddle, 26 Utah 268, 72 Pac. 1081.

Washington.— *In re* McLaughlin, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699.

Other definitions.— "The word 'marriage' signifies, in the first instance, that act by which a man and woman unite for life, with the intent to discharge towards society and one another those duties which result from the relation of husband and wife. The act of union having been once accomplished, the word comes afterward to denote the relation itself." Schouler Dom. Rel. § 12.

"The civil status . . . of one man and one woman united in law for life, for the discharge to each other, and the community, of the duties legally incumbent on those whose association is founded on the distinction of sex." 1 Bishop Marr., Div. & Sep. § 3 [*quoted* in Olson *v.* Peterson, 33 Nebr. 358, 361, 50 N. W. 155].

"The union of one man and one woman 'so long as they both shall live,' to the exclusion of all others, by an obligation which, during that time, the parties can not, of their own volition and act, dissolve, but which can be dissolved only by authority of the State." Roche *v.* Washington, 19 Ind. 53, 57, 81 Am. Dec. 376.

intelligent consent of parties capable of contracting.[3] But this means only that, as viewed by the law and with reference to its accruing rights and duties, marriage is not a religious rite or engagement, nor under ecclesiastical control,[4] but rests on a purely social and civil basis and needs no ceremony or solemniza-

Monogamy an essential element.— It is implied in the conception of marriage as above set forth, and an essential element of it in all christian countries, that the relation can exist only between one man and one woman, thus excluding both polygamy and polyandry. *In re* Bethell, 38 Ch. D. 220, 57 L. J. Ch. 487, 58 L. T. Rep. N. S. 674, 36 Wkly. Rep. 503; Hyde *v.* Hyde, L. R. 1 P. & D. 130, 12 Jur. N. S. 414, 35 L. J. P. & M. 57, 14 L. T. Rep. N. S. 188. And see cases cited *supra*, this note.

3. *California.*— Norman *v.* Thomson, 121 Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, 42 L. R. A. 343; Mott *v.* Mott, 82 Cal. 413, 22 Pac. 1140; Sharon *v.* Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; Graham *v.* Bennet, 2 Cal. 503.

Delaware.— State *v.* Miller, 3 Pennew. 518, 52 Atl. 262; Doe *v.* Collins, 2 Houst. 128.

Kentucky.— Deitzman *v.* Mullin, 108 Ky. 610, 57 S. W. 247, 22 Ky. L. Rep. 298, 94 Am. St. Rep. 390, 50 L. R. A. 808.

Louisiana.— Holmes *v.* Holmes, 6 La. 463, 26 Am. Dec. 482.

Massachusetts.— Little *v.* Little, 13 Gray 264.

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Missouri.— State *v.* Fry, 4 Mo. 120; Chapline *v.* Stone, 77 Mo. App. 523.

Nebraska.— Michigan University *v.* McGuckin, 64 Nebr. 300, 89 N. W. 778; Bailey *v.* State, 36 Nebr. 808, 55 N. W. 241.

Nevada.— State *v.* Zichfeld, 23 Nev. 304, 46 Pac. 802, 62 Am. St. Rep. 800, 34 L. R. A. 784.

New Hampshire.— Londonderry *v.* Chester, 2 N. H. 268, 9 Am. Dec. 61.

New York.— O'Gara *v.* Eisenlohr, 38 N. Y. 296; Cheney *v.* Arnold, 15 N. Y. 345, 69 Am. Dec. 609; Clayton *v.* Wardell, 4 N. Y. 230; Davis *v.* Davis, 7 Daly 308; Hynes *v.* McDermott, 7 Abb. N. Cas. 98; Jackson *v.* Winne, 7 Wend. 47, 22 Am. Dec. 563; Cunningham *v.* Burdell, 4 Bradf. Surr. 343.

Ohio.— Waymire *v.* Jetmore, 22 Ohio St. 271.

Pennsylvania.— Bonowitz's Appeal, 168 Pa. St. 561, 32 Atl. 98; Phillips *v.* Gregg, 10 Watts 158, 36 Am. Dec. 158; Com. *v.* Haylow, 17 Pa. Super. Ct. 541; Guardians of Poor *v.* Nathans, 2 Brewst. 149.

South Carolina.— Davenport *v.* Caldwell, 10 S. C. 317; State *v.* Barefoot, 2 Rich. 209.

Tennessee.— McKinney *v.* Clarke, 2 Swan 321, 58 Am. Dec. 59.

Texas.— Lewis *v.* Ames, 44 Tex. 319.

United States.— Meister *v.* Moore, 96 U. S. 76, 24 L. ed. 826; Mathewson *v.* Phœnix Iron Foundry, 20 Fed. 281.

See 34 Cent. Dig. tit. "Marriage," § 1. And see *infra*, I, D, 3, b, as to marriage as a civil contract requiring only the consent of competent parties.

Persons who may contract see *infra*, II.

Statutes declaring marriage a civil contract.— In many states statutes have been enacted declaring that marriage is "a civil contract," and in some cases adding, what is necessarily implied in all, that the consent of parties capable in law of contracting is necessary.

Alaska.— Civ. Code (1900), c. 2, § 5.

Arkansas.— Kirby Dig. St. (1904) § 5171.

Colorado.— 2 Mills Annot. St. (1891) § 2988.

Georgia.— See Code (1895), § 2412.

Indiana.— Burns Annot. St. (1901) § 7289.

Indian Territory.— St. (1899) § 2990.

Iowa.— Code (1897), § 3139.

Kansas.— Dassler Gen. St. (1905) § 4194.

Louisiana.— Rev. Civ. Code (1900), art. 90.

Michigan.— 3 Comp. Laws (1897), § 8589.

Minnesota.— Rev. St. (1905) § 3552.

Missouri.— Rev. St. (1899) § 4311.

Nebraska.— Comp. St. (1905) § 4273.

Nevada.— Comp. Laws (1861–1900), § 482.

New Mexico.— Comp. Laws (1897), § 1415.

New York.— Dom. Rel. Law (1896), § 10.

Oregon.— 2 Ballinger & C. Codes & St. (1902) § 5216.

Washington.— Code (1881), § 2380.

Wisconsin.— Rev. St. (1898) § 2328.

Wyoming.— Rev. St. (1899) § 2955.

Statutes declaring marriage a personal relation.— In several states the statutes declare that marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making that contract is necessary.

California.— Civ. Code (1906), § 55.

Idaho.— Civ. Code (1901), § 1989.

Montana.— Civ. Code (1895), § 50.

North Dakota.— Civ. Code (1905), § 4032.

Oklahoma.— St. (1903) § 3482.

Porto Rico.— See Civ. Code (1902), § 129.

South Dakota.— Civ. Code (1903), § 34.

4. *Maryland.*—Fornshill *v.* Murray, 1 Bland 479, 18 Am. Dec. 344.

Missouri.— State *v.* Fry, 4 Mo. 120.

New York.— White *v.* White, 4 How. Pr. 102.

Vermont.— Mountholly *v.* Andover, 11 Vt. 226, 34 Am. Dec. 685.

United States.—Maynard *v.* Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654; Mathewson *v.* Phœnix Iron Foundry, 20 Fed. 281.

Canada.— See Delpit *v.* Coté, 20 Quebec Super. Ct. 338.

Compare Com. *v.* Nesbit, 34 Pa. St. 398, where it is said that marriage is not purely a civil but also a religious contract.

tion.[5] The contract to marry, contemplating a future actual marriage, is indeed an executory agreement having many of the characteristics of ordinary contracts, although differing from other contracts in essential particulars, and terminating with the actual nuptials.[6] But marriage in the sense of the completed matrimonial engagement is unlike any other contract known to the law chiefly because it cannot be terminated or dissolved by the parties, but only by the sovereign power of the state. Nor can its mutual rights and obligations be modified by agreement.[7] In truth, whatever contractual elements it may contain, these are important only in its inception; for once entered upon it becomes a relation rather than a contract, and invests each party with a status toward the other and society at large, involving duties and responsibilities which are no longer matter for private regulation but concern the commonwealth.[8] And in this aspect marriage is a civil or social institution, *publici juris*, being the foundation of the

5. *Illinois.*— McKenna *v.* McKenna, 73 Ill. App. 64.

Massachusetts.— Little *v.* Little, 13 Gray 264.

Nebraska.— Eaton *v.* Eaton, 66 Nebr. 676, 92 N. W. 995, 60 L. R. A. 605.

Utah.— Hilton *v.* Roylance, 25 Utah 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723.

United States.— Meister *v.* Moore, 96 U. S. 76, 24 L. ed. 826.

And see *infra*, I, D, 3, a.

6. A contract for a future marriage resembles other contracts in that an action for damages will lie for its breach. See BREACH OF PROMISE TO MARRY, 5 Cyc. 999, 1018. And it may involve the regulation of the respective property rights of the parties after they are married. See HUSBAND AND WIFE, 21 Cyc. 1243 *et seq.* But whereas infants are precluded from entering into most of the ordinary business contracts, the age of consent to a marriage contract is fixed by common law or statutes at an earlier period than that of legal majority for other purposes. See *infra*, II, A. And see Wade *v.* Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250; White *v.* White, 4 How. Pr. (N. Y.) 102; Randall *v.* Krieger, 23 Wall. (U. S.) 137, 23 L. ed. 124. Again, unlike the case of an ordinary contract, the courts will not compel the specific performance of a contract to marry. Eversley Law Dom. Rel. 127. So also the laws against miscegenation impose a limitation as to this particular contract which does not obtain in ordinary dealings between people of different races. See *infra*, II, E. And as to the validity of such laws as an exercise of the police power see State *v.* Gibson, 36 Ind. 389, 10 Am. Rep. 42; Plessy *v.* Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256; and CONSTITUTIONAL LAW, 8 Cyc. 1074. Unlike ordinary contracts, which may be limited in point of time as the parties may agree, the contract to marry can only be entered into with a view to the continuance of the marital relation through life. Letters *v.* Cady, 10 Cal. 533; Peck *v.* Peck, 155 Mass. 479, 30 N. E. 74; Randall's Case, 5 City Hall Rec. (N. Y.) 141. Nor is a contract to marry within the prohibition of a statute relating to Sunday contracts. Com. *v.* Nesbit, 34 Pa. St. 398. Neither is this contract within the statute of frauds. See FRAUDS, STATUTE OF, 20 Cyc. 199.

7. *Alabama.*— Green *v.* State, 58 Ala. 190, 29 Am. Rep. 739.

Connecticut.— Allen *v.* Allen, 73 Conn. 54, 46 Atl. 242, 84 Am. St. Rep. 135, 49 L. R. A. 142.

Delaware.— Townsend *v.* Griffin, 4 Harr. 440.

Indiana.— Barkshire *v.* State, 7 Ind. 389, 65 Am. Dec. 738.

Kentucky.— Maguire *v.* Maguire, 7 Dana 181.

Maine.— Adams *v.* Palmer, 51 Me. 480.

Maryland.— Ridgely *v.* Ridgely, 79 Md. 298, 29 Atl. 597, 25 L. R. A. 800.

Massachusetts.— Smith *v.* Smith, 13 Gray 209.

Minnesota.— Hulett *v.* Carey, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384.

New York.— Kujek *v.* Goldman, 150 N. Y. 176, 44 N. E. 773, 55 Am. St. Rep. 670, 34 L. R. A. 156; White *v.* White, 4 How. Pr. 102.

Pennsylvania.— Bonowitz's Appeal, 168 Pa. St. 561, 32 Atl. 98.

South Carolina.— Duke *v.* Fulmer, 5 Rich. Eq. 121.

Tennessee.— McKinney *v.* Clarke, 2 Swan 321, 58 Am. Dec. 59.

Utah.— Palmer *v.* Palmer, 26 Utah 31, 72 Pac. 3, 99 Am. St. Rep. 820, 61 L. R. A. 641; Hilton *v.* Roylance, 25 Utah 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723; U. S. *v.* Snow, 4 Utah 313, 9 Pac. 697.

United States.— Maynard *v.* Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654; Reynolds *v.* U. S., 98 U. S. 145, 25 L. ed. 244; Randall *v.* Krieger, 23 Wall. 137, 23 L. ed. 124.

8. *Connecticut.*— Allen *v.* Allen, 73 Conn. 54, 46 Atl. 242, 84 Am. St. Rep. 135, 49 L. R. A. 142.

Illinois.— Roth *v.* Roth, 104 Ill. 35, 44 Am. Rep. 81; East St. Louis *v.* St. Louis Gas Light, etc., Co., 98 Ill. 415, 38 Am. Rep. 97.

Indiana.— Noel *v.* Ewing, 9 Ind. 37.

Mississippi.— Carson *v.* Carson, 40 Miss. 349; Magee *v.* Young, 40 Miss. 164, 90 Am. Dec. 322.

Missouri.— State *v.* Fry, 4 Mo. 120.

New York.— Edgecomb *v.* Buckhout, 83 Hun 168, 31 N. Y. Suppl. 655; White *v.* White, 4 How. Pr. 102.

family and the origin of domestic relations of the utmost importance to civilization and social progress; hence the state is deeply concerned in its maintenance in purity and integrity.[9]

B. Power to Regulate and Control. The legislature of each state has authority, with respect to the matrimonial contracts of its own citizens, to regulate the qualifications of the contracting parties, the forms or proceedings essential to constitute a marriage, the duties and obligations it creates, its effect upon property rights, and the causes for its dissolution.[10] It is also within the legislative power to validate or confirm, by statute, a marriage which was voidable on account of some statutory disability or the neglect of some statutory requisite.[11]

Rhode Island.— Ditson *v.* Ditson, 4 R. I. 87.

South Carolina.— McCreery *v.* Davis, 44 S. C. 195, 22 S. E. 178, 51 Am. St. Rep. 794, 28 L. R. A. 655.

Utah.— Palmer *v.* Palmer, 26 Utah 31, 72 Pac. 3, 99 Am. St. Rep. 820, 61 L. R. A. 641; Hilton *v.* Roylance, 25 Utah 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723.

United States.— Haddock *v.* Haddock, 201 U. S. 562, 608, 26 S. Ct. 525, 50 L. ed. 867; U. S. *v.* Grimley, 137 U. S. 147, 11 S. Ct. 54, 34 L. ed. 636; Holmes *v.* Holmes, 12 Fed. Cas. No. 6,638, 1 Abb. 525, 1 Sawy. 99; Starr *v.* Hamilton, 22 Fed. Cas. No. 13,314, Deady 268.

England.— Sottomayer *v.* De Barros, 5 P. D. 94, 49 L. J. P. D. & Adm. 1, 41 L. T. Rep. N. S. 281, 27 Wkly. Rep. 917; Nihoyet *v.* Niboyet, 4 P. D. 1, 11, 48 L. J. P. D. & Adm. 1, 39 L. T. Rep. N. S. 486, 27 Wkly. Rep. 203. In the case last cited it was said: "Marriage is the fulfilment of a contract satisfied by the solemnization of the marriage, but marriage directly it exists creates by law a relation between the parties and what is called the status of each. The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of a community. That relation between the parties, and that status of each of them with regard to the community, which are constituted upon marriage, are not imposed or defined by contract or agreement but by law."

Consent the only contractual element.—The supreme court of the United States, in speaking of marriage as a contract, said: "Perhaps the only element of a contract, in the ordinary acceptation of the term, that exists is that the consent of the parties is necessary to create the relation." Randall *v.* Krieger, 23 Wall. (U. S.) 137, 147, 23 L. ed. 124.

Marriage a domestic relation.— Marriage, although entered into by a contract, establishes between the parties a social or domestic relation, that of husband and wife, the obligations of which do not arise from the consent of concurring minds, but are the creations of the law. Adams *v.* Palmer, 51 Me. 480; Ditson *v.* Ditson, 4 R. I. 87; Cook *v.* Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706.

Divorce laws as impairment of obligation of contract see CONSTITUTIONAL LAW, 8 Cyc. 992.

9. *California.*— Mott *v.* Mott, 82 Cal. 413, 22 Pac. 1140.

Connecticut.— Allen *v.* Allen, 73 Conn. 54, 46 Atl. 242, 84 Am. St. Rep. 135, 49 L. R. A. 142.

Kentucky.— Maguire *v.* Maguire, 7 Dana 181 [*quoted* in Marriage License Docket, 4 Pa. Dist. 162]. And see Rose *v.* Rose, 104 Ky. 48, 46 S. W. 524, 20 Ky. L. Rep. 417, 84 Am. St. Rep. 430, 41 L. R. A. 353.

Maryland.— Lewis *v.* Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

Massachusetts.— Smith *v.* Smith, 13 Gray 209.

Missouri.— Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. 79, 81 Am. St. Rep. 302, 51 L. R. A. 854.

New Jersey.— Hayden *v.* Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723.

New York.— Livingston *v.* Livingston, 173 N. Y. 377, 66 N. E. 123, 93 Am. St. Rep. 600, 61 L. R. A. 800; Wade *v.* Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250; Fisk *v.* Fisk, 6 N. Y. App. Div. 432, 39 N. Y. Suppl. 537; White *v.* White, 4 How. Pr. 102.

West Virginia.— Flint *v.* Gilpin, 29 W. Va. 740, 3 S. E. 33.

Wisconsin.— Cook *v.* Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706.

United States.— Maynard *v.* Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654.

Marriage in seceded state.— A marriage contracted in Virginia after the secession of that state, and before the reëstablishment of the government under the Alexandria constitution, is not therefore invalid. Oneale *v.* Com., 17 Gratt. (Va.) 582.

10. *Kansas.*— State *v.* Walker, 36 Kan. 297, 13 Pac. 279, 59 Am. Rep. 556.

Louisiana.— Patton *v.* Philadelphia, 1 La. Ann. 98.

New York.— Wade *v.* Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250.

North Carolina.— Baity *v.* Cranfill, 91 N. C. 293, 49 Am. Rep. 641.

West Virginia.— Flint *v.* Gilpin, 29 W. Va. 740, 3 S. E. 33.

Consent of state.— In Eaton *v.* Eaton, 66 Nebr. 676, 92 N. W. 995, 60 L. R. A. 605, it is said that there can be no valid marriage without the consent of the state.

11. *Connecticut.*— Goshen *v.* Stonington, 4 Conn. 209, 10 Am. Dec. 121.

Delaware.—Moore *v.* Whittaker, 4 Harr. 50.

Maryland.— Harrison *v.* State, 22 Md. 468, 85 Am. Dec. 658.

Tennessee.— Andrews *v.* Page, 3 Heisk. 653.

Texas.— Lewis *v.* Ames, 44 Tex. 319.

But *compare* White *v.* White, 105 Mass.

As between the federal and state governments the power to control and regulate marriages is retained by the latter,[12] and is not vested in congress,[13] except in the District of Columbia and in the territories of the United States.

C. What Law Governs — 1. In General. The validity of a marriage is determined by the law of the place where it was contracted or celebrated, and if valid there it will, generally, be held valid in any state or country in which the parties may subsequently reside,[14] although it would have been invalid by the law of such subsequent domicile if contracted there,[15] and, according to some authorities, even where the parties left the state of their domicile and went to a foreign state or country and were there married, for the purpose of evading

325, 7 Am. Rep. 526, where such an act was held an unconstitutional invasion of the judicial power.

Forbidding collateral impeachment.— The legislature has power to pass a statute providing that the validity of existing marriages shall not be questioned in the trial of collateral issues, on account of the insanity or idiocy of either party. Goshen *v.* Richmond, 4 Allen (Mass.) 458.

Operation and effect of curative statutes see *infra*, V, D.

12. Morales *v.* Marigny, 14 La. Ann. 855; Lonas *v.* State, 3 Heisk. (Tenn.) 287; Francois *v.* State, 9 Tex. App. 144; Frasher *v.* State, 3 Tex. App. 263, 30 Am. Rep. 131.

13. State *v.* Gibson, 36 Ind. 389, 10 Am. Rep. 42.

14. *California.*— Pearson *v.* Pearson, 51 Cal. 120.

District of Columbia.— Travers *v.* Reinhardt, 25 App. Cas. 567.

Hawaii.—Hawaii *v.* Si Shee, 12 Hawaii 329.

Kentucky.— Dumaresly *v.* Fishly, 3 A. K. Marsh. 368.

Maine.— Hiram *v.* Pierce, 45 Me. 367, 71 Am. Dec. 555.

Maryland.— Jackson *v.* Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773; Harrison *v.* State, 22 Md. 468, 85 Am. Dec. 658; Fornshill *v.* Murray, 1 Bland 479, 18 Am. Dec. 344.

Massachusetts.— Com. *v.* Kenney, 120 Mass. 387; Com. *v.* Hunt, 4 Cush. 49; Sutton *v.* Warren, 10 Metc. 451.

Minnesota.—McHenry *v.* Bracken, 93 Minn. 510, 101 N. W. 960.

Mississippi.— Carroll *v.* Renich, 7 Sm. & M. 798.

Missouri.— Banks *v.* Galbraith, 149 Mo. 529, 51 S. W. 105; Boyer *v.* Dively, 58 Mo. 510.

Nebraska.— Hills *v.* State, 61 Nebr. 589, 85 N. W. 836, 57 L. R. A. 155.

New Jersey.— Smith *v.* Smith, 52 N. J. L. 207, 19 Atl. 255; Clark *v.* Clark, 52 N. J. Eq. 650, 30 Atl. 81.

New York.— Matter of Denick, 92 Hun 161, 36 N. Y. Suppl. 518; Canjolle *v.* Ferrie, 26 Barb. 177; Minor *v.* Jones, 2 Redf. Surr. 289. See also Matter of Tabor, 31 Misc. 579, 65 N. Y. Suppl. 571. But see Davis *v.* Davis, 1 Abb. N. Cas. 140, holding that a marriage in the Indian Territory between non-resident whites, they not being subject to the local law, is to be judged by the law of their domicile.

Pennsylvania.— *In re* McCausland, 213 Pa. St. 189, 62 Atl. 780, 110 Am. St. Rep. 540; Phillips *v.* Gregg, 10 Watts 158, 36 Am. Dec. 158.

Rhode Island.— *In re* Chace, 26 R. I. 351, 58 Atl. 978, 69 L. R. A. 493.

Tennessee.— Morgan *v.* McGhee, 5 Humphr. 13.

United States.— Travers *v.* Reinhardt, 205 U. S. 424; Patterson *v.* Gaines, 6 How. 550, 12 L. ed. 553; U. S. *v.* Hays, 20 Fed. 710; Campbell *v.* Crampton, 2 Fed. 417, 18 Blatchf. 150; Ponsford *v.* Johnson, 19 Fed. Cas. No. 11,266, 2 Blatchf. 51.

England.— Brinkley *v.* Atty.-Gen., 15 P. D. 76, 59 L. J. P. D. & Adm. 51, 62 L. T. Rep. N. S. 911; Compton *v.* Bearcroft, Buller N. P. 114; Scrimshire *v.* Scrimshire, 2 Hagg. Cons. 395; Herbert *v.* Herbert, 2 Hagg. Cons. 263; Simonin *v.* Mallac, 6 Jur. 561, 29 L. J. P. & M. 97, 2 L. T. Rep. N. S. 327, 2 Swab. & Tr. 67; Fenton *v.* Livingstone, 5 Jur. N. S. 1183, 3 Macq. H. L. 497, 7 Wkly. Rep. 671; Lacon *v.* Higgins, 3 Stark. 178, D. & R. N. P. 38, 25 R. R. 779. And see Brook *v.* Brook, 9 H. L. Cas. 193, 7 Jur. N. S. 422, 4 L. T. Rep. N. S. 93, 9 Wkly. Rep. 461, 11 Eng. Reprint 703; James *v.* James, 51 L. J. P. D. & Adm. 24, 30 Wkly. Rep. 232.

See 34 Cent. Dig. tit. "Marriage," § 3.

Solemnization according to local custom.— Where a marriage ceremony was performed in China according to the laws and customs of that country, but while the bridegroom was in America, it was held that there was no such "solemnization" of the marriage as would entitle it to recognition in America. *In re* Lum Lin Ying, 59 Fed. 682.

Royal marriages.— The Royal Marriage Act, 12 Geo. III, c. 11, extends to prohibit the contracting of marriages, or to annul any already contracted in violation of its provisions, wherever the same may be contracted or solemnized, either within the realm of England or without. *In re* Sussex Peerage, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034.

15. *California.*— Pearson *v.* Pearson, 51 Cal. 120.

Kentucky.— Dannelli *v.* Dannelli, 4 Bush 51; Stevenson *v.* Gray, 17 B. Mon. 193.

Maryland.— Fornshill *v.* Murray, 1 Bland 479, 18 Am. Dec. 344.

Michigan.— Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep. 164.

Missouri.— Johnson *v.* Johnson, 30 Mo. 72, 77 Am. Dec. 598.

United States.— Gaines *v.* Relf, 12 How.

the restrictions of the laws of their domicile, to which they presently return.[16] An exception to the general rule, however, is made in the case of marriages repugnant to the laws of the domicile in respect to incest, polygamy, or miscegenation.[17] Conversely a marriage will not ordinarily be recognized as valid in

472, 13 L. ed. 1071; Campbell *v.* Crampton, 2 Fed. 417, 18 Blatchf. 150.

16. Com. *v.* Graham, 157 Mass. 73, 31 N. E. 706, 34 Am. St. Rep. 255, 16 L. R. A. 578; Courtright *v.* Courtright, 11 Ohio Dec. (Reprint) 413, 26 Cinc. L. Bul. 309; Compton *v.* Bearcroft, Buller N. P. 114. And see *In re* Chace, 26 R. I. 351, 58 Atl. 978, 69 L. R. A. 493; Simonin *v.* Mallac, 6 Jur. N. S. 561, 29 L. J. P. & M. 97, 2 L. T. Rep. N. S. 327, 2 Swab. & Tr. 67. But *compare* Immendorf's Estate, 7 Pa. Dist. 449; Durocher *v.* Degré, 20 Quebec Super. Ct. 456.

Statutes per contra.— Laws have been enacted in several states declaring that marriages contracted in a foreign state and valid under its laws shall nevertheless be invalid when contracted by domiciled citizens of the enacting state, for the purpose of evading the requirements or restrictions of its laws. D. C. Code, § 1287; Ga. Code, § 2424; Ind. Laws (1905), c. 126, p. 215; La. Acts (1904), No. 129, p. 293; Me. Rev. St. c. 61, § 9; Md. Pub. Gen. Laws, art. 27, § 302; Mass. Rev. Laws, c. 151, § 10; Miss. Code, § 1033.

Marriage on the high seas.— Where parties go on the high seas, beyond the territorial jurisdiction of any state or country, to be married, so as to evade the laws of the state of their domicile, and immediately after the marriage return and continue to reside in such state, the laws of their domicile apply to the marriage; but if it would otherwise be valid, it is not invalidated by the mere fact of such evasion. Norman *v.* Norman, 121 Cal. 620, 54 Pac. 143, 42 L. R. A. 343, 66 Am. St. Rep. 74, 42 L. R. A. 343.

Remarriage of guilty divorced party see DIVORCE, 14 Cyc. 929.

17. Incestuous marriages see the following cases and statutes:

Delaware.— Rev. Code (1893), c. 74, § 1.

Kentucky.— Stevenson *v.* Gray, 17 B. Mon. 193.

Massachusetts.— Sutton *v.* Warren, 10 Metc. 451; Putnam *v.* Putnam, 8 Pick. 433; Medway *v.* Needham, 16 Mass. 157, 8 Am. Dec. 131.

Mississippi.— Code, § 3243.

United States.— U. S. *v.* Rodgers, 109 Fed. 886.

England.— Sottomayor *v.* De Barros, 3 P. D. 1, 47 L. J. P. D. & Adm. 23, 37 L. T. Rep. N. S. 415, 26 Wkly. Rep. 455 [*reversing* 2 P. D. 81]; Brook *v.* Brook, 9 H. L. Cas. 193, 7 Jur. N. S. 442, 4 L. T. Rep. N. S. 93, 9 Wkly. Rep. 461, 11 Eng. Reprint 703 [*affirming* 27 L. J. Ch. 401, 3 Smale & G. 481, 65 Eng. Reprint 746]; Fenton *v.* Livingstone, 5 Jur. N. S. 1183, 3 Macq. H. L. 497, 7 Wkly. Rep. 671. But see *In re* Bozzelli, [1902] 1 Ch. 751, 71 L. J. Ch. 505, 86 L. T. Rep. N. S. 445, 50 Wkly. Rep. 447.

Bigamy and polygamy see *In re* Bethell, 38 Ch. D. 220, 57 L. J. Ch. 487, 58 L. T. Rep. N. S. 674, 36 Wkly. Rep. 503; Hyde *v.* Hyde, L. R. 1 P. & D. 130, 12 Jur. N. S. 414, 35 L. J. P. & M. 57, 14 L. T. Rep. N. S. 188, 14 Wkly. Rep. 517. See also 1 Bishop Marr., Div. & Sep. §§ 372, 376; 2 Mills Annot. St. Colo. § 2991. *Compare* Wall *v.* Williamson, 8 Ala. 48.

Miscegenation. — *Delaware.*— Rev. Code (1893), c. 74, § 1.

Louisiana.— Dupre *v.* Boulard, 10 La. Ann. 411.

Mississippi.— Code, § 3244.

North Carolina.— State *v.* Kennedy, 76 N. C. 251, 22 Am. Rep. 683. But *compare* State *v.* Ross, 76 N. C. 242, 22 Am. Rep. 678.

Tennessee.— State *v.* Bell, 7 Baxt. 9, 32 Am. Rep. 549.

Virginia.— Kinney *v.* Com., 30 Gratt. 858, 32 Am. Rep. 690.

Contra.— Medway *v.* Needham, 16 Mass. 157, 8 Am. Dec. 131.

Rule more broadly stated.— In a few decisions it has been broadly stated that the rule making the validity of a marriage depend on the law of the place where it was contracted does not apply if that law is repugnant to the religion, the morality, or the municipal institutions of the country where it is sought to be applied. Eubanks *v.* Banks, 34 Ga. 407; True *v.* Ranney, 21 N. H. 52, 53 Am. Dec. 164.

Where parties have different domiciles.— Two natives of Portugal, one of whom was domiciled in England, the other in Portugal, contracted a marriage in England in 1866. They were first cousins, and were incapable, according to the law of Portugal, of intermarrying, on account of consanguinity, without a papal dispensation. The petitioner, the wife, filed a petition praying that her marriage with the respondent might be declared null and void, and it was held that the *lex loci contractus* should prevail in the matter; and the marriage being valid according to the law of England the court dismissed the petition. Sottomayor *v.* De Barros, 5 P. D. 94, 49 L. J. P. D. & Adm. 1, 41 L. T. Rep. N. S. 281, 27 Wkly. Rep. 917.

Marrying deceased wife's sister.— In England, where this is contrary to law, a marriage between persons occupying this relation was held void, although celebrated abroad and valid by the *lex loci contractus*. Brook *v.* Brook, 9 H. L. Cas. 193, 7 Jur. N. S. 422, 4 L. T. Rep. N. S. 93, 4 Wkly. Rep. 461, 11 Eng. Reprint 703; Mette *v.* Mette, 28 L. J. P. & M. 117, 1 Swab. & Tr. 416, 7 Wkly. Rep. 543. See also Fenton *v.* Livingstone, 5 Jur. N. S. 1183, 3 Macq. H. L. 497, 7 Wkly. Rep. 671. But see *In re* Bozzelli, [1902] 1 Ch. 751, 71 L. J. Ch. 505, 86 L. T. Rep. N. S. 445, 50 Wkly. Rep. 447, holding that a marriage with a deceased husband's brother, if valid according to the law of the country

any state or country if void by the law of the place where contracted.[18] But the law governing the civil consequences of a marriage, as distinguished from the contract by which it is entered into, including the reciprocal rights and obligations of the parties and the causes for which the marriage may be dissolved, is that which obtains in the domicile of the parties.[19] In the absence of statutory provisions regulating marriage, in either of these particulars, the principles of the common law of England will be applied.[20]

2. **Indian Customs.** The North American Indians continuing in their tribal relations, although within the territorial jurisdiction of a state, are not subject to its laws in respect of such matters as their domestic relations; and hence a marriage between Indians, valid by their laws and customs, is recognized as valid, although it would not have satisfied the requirements of the state law.[21]

where it was celebrated and in which the parties were then domiciled, is valid, although the wife was a domiciled English woman at the date of her first marriage, and merely acquired a foreign domicile by reason of that marriage.

18. *Illinois.*— Canale *v.* People, 177 Ill. 219, 52 N. E. 310; McDeed *v.* McDeed, 67 Ill. 545.

Massachusetts.— Blaisdell *v.* Bickum, 139 Mass. 250, 1 N. E. 281. And see Norcross *v.* Norcross, 155 Mass. 425, 29 N. E. 506.

New York.— Matter of Hall, 61 N. Y. App. Div. 266, 70 N. Y. Suppl. 406. And see Wilcox *v.* Wilcox, 46 Hun 32, holding that a marriage between a man and a woman whose former husband had not been heard from or known to be living for more than five years prior to such marriage, solemnized in Canada and void under the laws of that country because of the possible existence of such former husband, may be treated in New York, where both the contracting parties were then domiciled, as a contract to marry *per verba de præsenti*, and valid when followed by cohabitation as husband and wife.

Pennsylvania.—Smith *v.* Thornton, 5 Wkly. Notes Cas. 372. But *compare* Philadelphia *v.* Williamson, 10 Phila. 176.

England.—Dalrymple *v.* Dalrymple, 2 Hagg. Cons. 54. And see *Re* Allison, 31 L. T. Rep. N. S. 638, 23 Wkly. Rep. 226. But *compare* Ruding *v.* Smith, 2 Hagg. Cons. 371; Kent *v.* Burgess, 5 Jur. 166, 10 L. J. Ch. 100, 11 Sim. 361, 34 Eng. Ch. 361, 59 Eng. Reprint 913.

Canada.— Harris *v.* Cooper, 31 U. C. Q. B. 182.

Common-law marriage in new domicile.— A marriage invalid in Virginia for want of license, and invalid in Maryland for want of religious ceremony, will, after the parties have left such states, be deemed valid in New Jersey where the parties take up a permanent residence and live together in the relation of husband and wife, in good faith and openly, until the death of the husband, being regarded by themselves and in the community as husband and wife. Travers *v.* Reinhardt, 205 U. S. 424.

19. Kinnier *v.* Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Barkley *v.* Dumke, (Tex. 1905) 87 S. W. 1147; Kinney *v.* Com., 30 Gratt. (Va.) 858, 32 Am. Rep. 690; Marchildon *v.* Chandonnet, 17 Quebec Super. Ct. 226. But *compare* De Nicols *v.* Curlier, [1900] A. C. 21, 69 L. J. Ch. 109, 81 L. T. Rep. N. S. 733, 48 Wkly. Rep. 269. And see Bourcier *v.* Lanusse, 3 Mart. (La.) 581, holding that a contract of marriage, made in Louisiana, cannot legally stipulate that the rights of the parties shall be determined by any other laws than those of Louisiana or some other state or territory of the Union.

20. Riddle *v.* Riddle, 26 Utah 268, 72 Pac. 1081; Delpit *v.* Coté, 20 Quebec Super. Ct. 338. See Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411; Limerick *v.* Limerick, 32 L. J. P. & M. 92, 4 Swab. & Tr. 252, 11 Wkly. Rep. 503.

On the high seas.— U. S. Rev. St. § 722 [U. S. Comp. St. (1901) p. 582], providing that the United States courts, in the vindication of the civil rights of all persons in the United States, where the laws of the United States do not apply or are deficient, shall be guided by the common law, as modified in the state where the court is held, and section 4290, providing that the master of a vessel shall enter in his log-book every marriage taking place on board, do not declare the common law as to marriage to be in force on the high seas on board American vessels. Norman *v.* Norman, 121 Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, 42 L. R. A. 343.

21. *Alabama.*— Wall *v.* Williamson, 8 Ala. 48.

Michigan.— Kobogum *v.* Jackson Iron Co., 76 Mich. 498, 43 N. W. 602.

Minnesota.— Earl *v.* Godley, 42 Minn. 361, 44 N. W. 254, 18 Am. St. Rep. 517, 7 L. R. A. 125.

Missouri.— Boyer *v.* Dively, 58 Mo. 510.

Oregon.—Kalyton *v.* Kalyton, 45 Oreg. 116, 74 Pac. 491, 78 Pac. 332.

South Dakota.— Henry *v.* Taylor, 16 S. D. 424, 93 N. W. 641.

Tennessee.— Morgan *v.* McGhee, 5 Humphr. 13.

Texas.— Austin First Nat. Bank *v.* Sharpe, 12 Tex. Civ. App. 223, 33 S. W. 676.

Canada.—Connolly *v.* Woolrich, 1 Rev. Lég. 253, 11 L. C. Jur. 197; Reg. *v.* Nan-e-quis-a-ka, 1 Terr. L. Rep. 215. *Compare Re* Sheran, 4 Terr. L. Rep. 83.

See 34 Cent. Dig. tit. "Marriage," § 6.

Contra.— Roche *v.* Washington, 19 Ind. 53, 81 Am. Dec. 376; State *v.* Ta-cha-na-tah, 64 N. C. 614.

3. Laws of Foreign States and Countries. As above stated, the validity of a marriage is to be determined by the law of the place where it was celebrated;[22] and consequently, if contested in another state or country the *lex loci contractus* will be inquired into, and as a general rule the marriage is held valid or void according as it complied or failed to comply with the law.[23] There are, however, decisions holding a marriage to be valid which would be good by the common law or *jus gentium*, although some provisions of the local law, particularly in matters of form or ceremonial, were not obeyed;[24] and an exception to the general rule is made in the case of contracting parties both of whom were aliens in the jurisdiction where they were married and who were so situated that it was not possible for them to comply with the local law.[25] An American citizen temporarily resident in a foreign country may be lawfully married in the presence of any consular officer of the United States, although the ceremony is not in accordance with the law of that country.[26] In England in order to remove doubts as to the validity of certain foreign marriages, it was provided by statute that marriages solemnized by a minister of the church of England in the chapel or house of any British ambassador or minister, or in the chapel of any British factory, should be valid;[27] and a similar provision was made with regard to marriages solemnized within the British lines by any chaplain or officer, or any person officiating under the orders of a commanding officer of a British army serving abroad.[28]

D. Requisites of Valid Marriage — 1. Consent of Parties and Intention to Marry — a. Necessity in General. To constitute a valid marriage, it must be

Place of contract immaterial.— A marriage contracted between Indians and according to the customs of their tribe need not be contracted in the reservation or territory of the tribe in order to be valid. La Rivière *v.* La Rivière, 97 Mo. 80, 10 S. W. 840; Boyer *v.* Dively, 58 Mo. 510. But see Banks *v.* Galbraith, 149 Mo. 529, 51 S. W. 105, holding that where an Indian woman leaves the Indian country and goes to Missouri with her parents and is there sold to a white man, and she lives with him in Missouri, the relation created is governed by the laws of Missouri and not by Indian customs.

Marriage of Indian and white.— The marriage of a white man and an Indian woman according to the laws and customs of her tribe, but not conforming to state law, was held valid in Johnson *v.* Johnson, 30 Mo. 72, 77 Am. Dec. 598, but void in Follansbee *v.* Wilbur, 14 Wash. 242, 44 Pac. 262; Wilbur *v.* Bingham, 8 Wash. 35, 35 Pac. 407, 40 Am. St. Rep. 886.

Federal legislation.— Although the act of congress of Feb. 8, 1887 (24 U. S. St. at L. 390) declares Indians receiving allotments in severalty thereunder to be citizens of the United States and subject to the laws of the state in which they live yet under the direct provisions of the act of congress of Feb. 28, 1891 (26 U. S. St. at L. 794) the issue of a male and female Indian who cohabited as husband and wife according to the custom of Indian life are deemed legitimate for the purpose of determining the descent of land. Kalyton *v.* Kalyton, 45 Oreg. 116, 74 Pac. 491, 78 Pac. 332.

22. See *supra*, I, C, 1.

23. Clark *v.* Clark, 52 N. J. Eq. 650, 30 Atl. 81; Matter of Hall, 61 N. Y. App. Div. 266, 70 N. Y. Suppl. 406.

24. People *v.* Imes, 110 Mich. 250, 68 N. W. 157; Philadelphia *v.* Williamson, 10 Phila. (Pa.) 176; Newbury *v.* Brunswick, 2 Vt. 151, 19 Am. Dec. 703; Hallett *v.* Collins, 10 How. (U. S.) 174, 13 L. ed. 376.

25. Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034; Reg. *v.* Millis, 10 Cl. & F. 534, 8 Eng. Reprint 844; 1 Bishop Marr. Div. & Sep. § 392.

26. U. S. Rev. St. § 4082 [U. S. Comp. St. (1901) p. 2768] providing that "marriages in presence of any consular officer of the United States in a foreign country, between persons who would be authorized to marry if residing in the District of Columbia, shall be valid to all intents and purposes, and shall have the same effect as if solemnized within the United States." And see Loring *v.* Thorndike, 5 Allen (Mass.) 257.

Persons who may solemnize marriage see *infra*, IV, A.

27. See 9 Geo. IV, c. 91. And see Hay *v.* Northcote, [1900] 2 Ch. 262, 69 L. J. Ch. 586, 82 L. T. Rep. N. S. 656, 48 Wkly. Rep. 615; Este *v.* Smyth, 18 Beav. 112, 2 Eq. Rep. 1208, 18 Jur. 300, 23 L. J. Ch. 705, 2 Wkly. Rep. 148, 52 Eng. Reprint 44; Floyd *v.* Petitjean, 2 Curt. Eccl. 251.

Marriage in foreign church.— A marriage solemnized at Antwerp between two English persons in the British church, by a protestant clergyman appointed by the English government, but without performance of the Belgian ceremonies, is void, as being contrary to the *lex loci*, and not coming within 9 Geo. IV, c. 91, which permits marriages abroad at an ambassador's or at a factory chapel. Kent *v.* Burgess, 5 Jur. 166, 10 L. J. Ch. 100, 11 Sim. 361, 34 Eng. Ch. 361, 59 Eng. Reprint 913.

28. *In re* Waldegrave Peerage, 4 Cl. & F. 649, 7 Eng. Reprint 247, holding that the

entered into with the consent and agreement of both parties freely and intelligently given,[29] which may be expressed either verbally or in writing or implied from the acts of the parties or the ceremony performed;[30] but without such consent on both sides the marriage is a nullity, although it was solemnized in form by a properly authorized minister or magistrate.[31] Further, there must be an actual present intention, on the part of both, to enter upon an immediate and continuing matrimonial relation.[32]

b. Effect of Fraud. Fraud or falsehood going to the essentials or fundamentals of the marital relation will deprive the contract of that intelligent consent necessary to its validity, and hence will render the marriage voidable at the instance of the injured party.[33]

marriage of an officer celebrated by a chaplain of the British army within the lines of the army when serving abroad was valid, although the army is not serving in a country in a state of actual hostility, and although no authority for the marriage was previously obtained from the officer superior in command. See also For. Marr. Act (1892), c. 22.

29. *Hawaii.*— Republic *v.* Li Shee, 12 Hawaii 329.

New Hampshire.— Keyes *v.* Keyes, 22 N. H. 553.

New York.— Jaques *v.* Public Administrator, 1 Bradf. Surr. 499.

Texas.— Sapp *v.* Newsom, 27 Tex. 537.

Vermont.— Mountholly *v.* Andover, 11 Vt. 226, 34 Am. Dec. 685.

Canada.— *In re* Ah Lie, 1 Brit. Col. 261.

See 34 Cent. Dig. tit. "Marriage," § 9.

Understanding of parties.— To constitute marriage, it is only necessary that there should exist an agreement to be husband and wife, followed by cohabitation as such, without regard to what the parties considered the legal effect of the agreement to be. Tartt *v.* Negus, 127 Ala. 301, 28 So. 713.

Secret reservations.— The consent of the parties to the alleged marriage is to be determined by what took place at the time of its celebration, and is not affected by a secret reservation of one of the parties. Imboden *v.* St. Louis Union Trust Co., 111 Mo. App. 220, 86 S. W. 263; Barnett *v.* Kimmell, 35 Pa. St. 13.

Intoxication at the time of the marriage will render it voidable, if such in degree as to render the party incapable of understanding the nature and consequence of his acts and hence make him incapable of intelligent consent. Prine *v.* Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87; Gillett *v.* Gillett, 78 Mich. 184, 43 N. W. 1101; Roblin *v.* Roblin, 28 Grant Ch. (U. C.) 437. *Compare* Elzey *v.* Elzey, 1 Houst. (Del.) 308; Barber *v.* People, 203 Ill. 543, 68 N. E. 93; Clement *v.* Mattison, 3 Rich. (S. C.) 93.

Consent of infant see *infra,* II, A.

Mental incapacity: As destroying the intelligent consent necessary to marriage see *infra,* II, B. As ground for annulment see *infra,* VIII, B, 3.

Mutuality of consent required see True *v.* Ranney, 21 N. H. 52; 1 Bishop Marr. Div. & Sep. § 218.

30. Hilton *v.* Roylance, 25 Utah 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723.

Subsequent cohabitation as man and wife will give character to words used or acts done which in themselves are uncertain in indicating the intention of the parties then and there to marry, but will not supply a lack of consent. Hooper *v.* McCaffery, 83 Ill. App. 341.

31. Roszel *v.* Roszel, 73 Mich. 133, 40 N. W. 858, 16 Am. St. Rep. 569; Mountholly *v.* Andover, 11 Vt. 226, 34 Am. Dec. 685.

32. Hooper *v.* McCaffery, 83 Ill. App. 341; Miller *v.* Miller, 31 Cinc. L. Bul. (Ohio) 141; Lee *v.* State, 44 Tex. Cr. 354, 72 S. W. 1005, 61 L. R. A. 904. But see Brooke *v.* Brooke, 60 Md. 524, where the man, just before the marriage ceremony, declared that he consented to it, but that he would never live with the woman; but as a matter of fact he did, and was the father of her children, and it was held that the marriage was valid.

Mistake as to person.— The marriage is vitiated, for lack of the intention spoken of in the text, by a mistake in the identity of one of the persons. Delpit *v.* Young, 51 La. Ann. 923, 25 So. 547. And see other cases cited *infra,* VIII, B, 7.

Mistake as to nature of ceremony.—So also an entire mistake as to the nature or legal consequences of the ceremony, one of the parties having no actual and present intention of marriage, will avoid it. Blumenthal *v.* Tannenholz, 31 N. J. Eq. 194; Clark *v.* Field, 13 Vt. 460; Ford *v.* Stier, [1896] P. 1, 65 L. J. P. D. & Adm. 13, 73 L. T. Rep. N. S. 632, 11 Wkly. Rep. 668.

Mock marriage.— For the same reason a marriage contracted in mere jest, and with no intention that it shall be valid and binding, is a nullity. Barclay *v.* Com., 76 S. W. 4, 25 Ky. L. Rep. 463; McClurg *v.* Terry, 21 N. J. Eq. 225.

Previous agreement ineffectual.— A marriage solemnized in good faith is not void merely because the contracting parties may at some prior time have entered into an agreement or understanding that the marriage should be invalid. Hills *v.* State, 61 Nebr. 589, 85 N. W. 836, 57 L. R. A. 155.

33. *Illinois.*— Orchardson *v.* Cofeild, 171 Ill. 14, 49 N. E. 197, 63 Am. St. Rep. 211, 40 L. R. A. 256.

Kentucky.— Tomppert *v.* Tomppert, 13 Bush 326, 26 Am. Rep. 197. And see Steele *v.* Steele, 96 Ky. 382, 29 S. W. 17, 16 Ky. L. Rep. 517.

Massachusetts.— Smith *v.* Smith, 171 Mass.

c. Effect of Duress. Consent extorted by duress is of course of no value in the making of a valid marriage; and therefore if one of the parties is coerced into the marriage by physical compulsion, abduction, or threats of such a nature as to inspire terror and subjugate the will, it is no lawful marriage.[34]

2. Consent of Parents and Guardians — a. In General. Although the rule was otherwise at common law,[35] by statutes now in force in practically all of the states the consent of parents or guardians is necessary to the lawful marriage of an infant.[36] The age of majority for this purpose is commonly fixed

404, 50 N. E. 933, 68 Am. St. Rep. 440, 41 L. R. A. 800; Cummington *v.* Belchertown, 149 Mass. 223, 21 N. E. 435, 4 L. R. A. 131; Reynolds *v.* Reynolds, 3 Allen 605.

New Hampshire.— Keyes *v.* Keyes, 22 N. H. 553.

New Jersey.— Boehs *v.* Hanger, (Ch. 1905) 59 Atl. 904; Crane *v.* Crane, 62 N. J. Eq. 21, 49 Atl. 734.

New York.— Di Lorenzo *v.* Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 98 Am. St. Rep. 609, 63 L. R. A. 92; Fisk *v.* Fisk, 6 N. Y. App. Div. 432, 39 N. Y. Suppl. 537.

Tennessee.— Castellar *v.* Simmons, 1 Tenn. Cas. 65, Thomps. Cas. 92.

See 34 Cent. Dig. tit. "Marriage," § 20.

Compare Elzey *v.* Elzey, 1 Houst. (Del.) 308; Portsmouth *v.* Portsmouth, 1 Hagg. Eccl. 355.

Nature and kinds of fraud, deceit, falsehood, and imposition sufficient to avoid marriage see *infra*, VIII, B, 8.

Ratification of marriage procured by fraud see *infra*, V, B, 1.

Promotion of marriage by third person.— It would seem that a combination amongst persons, friendly to a woman, to induce a man to consent to marry her, it not being shown that she has done anything to procure her friends to do any improper act in order to bring about the consent, will not avoid the marriage. Roblin *v.* Roblin, 28 Grant Ch. (N. C.) 439.

Marriage of deaf-mute.— If there is no question of mental capacity, the objection that a deaf and dumb person did not understand the nature of the contract of marriage which she had been induced to enter into is an objection on the ground of fraud. Harrod *v.* Harrod, 18 Jur. 853, 1 Kay & J. 4, 2 Wkly. Rep. 612, 69 Eng. Reprint 344.

34. *California.*— Linebaugh *v.* Linebaugh, 137 Cal. 26, 69 Pac. 616.

Kentucky.— Bassett *v.* Bassett, 9 Bush 696.

Maryland.— Ridgely *v.* Ridgely, 79 Md. 298, 29 Atl. 597, 25 L. R. A. 800; Le Brun *v.* Le Brun, 55 Md. 496.

New Jersey.— Avakian *v.* Avakian, (Ch. 1905) 60 Atl. 521.

New York.— Anderson *v.* Anderson, 74 Hun 56, 26 N. Y. Suppl. 492; Sloan *v.* Kane, 10 How. Pr. 66; Ferlat *v.* Gojon, Hopk. 478, 14 Am. Dec. 554.

Pennsylvania.— Brant *v.* Brant, 17 Phila. 655.

Tennessee.— Willard *v.* Willard, 6 Baxt. 297, 32 Am. Rep. 529.

Vermont.— See Mountholly *v.* Andover, 11 Vt. 226, 34 Am. Dec. 685.

England.— Scott *v.* Sembright, 12 P. D. 21, 56 L. J. P. D. & Adm. 11, 57 L. T. Rep. N. S. 421, 35 Wkly. Rep. 258.

See 34 Cent. Dig. tit. "Marriage," §§ 21, 123.

Nature of force or duress sufficient to avoid marriage see *infra*, VIII, B, 9.

Marriage forced by prosecution for seduction or bastardy see *infra*, VIII, B, 9, text and note 52.

Nature of coercion.— The force and coercion necessary to invalidate a marriage must amount to duress *per minas*; mere unwillingness of one of the parties is not sufficient. Stevenson *v.* Stevenson, 7 Phila. (Pa.) 386.

Ratification of marriage obtained by duress see *infra*, V, B, 1.

35. Parton *v.* Hervey, 1 Gray (Mass.) 119; Bennett *v.* Smith, 21 Barb. (N. Y.) 439.

Capacity of infant to marry see *infra*, II, A.

36. See the statutes of the various states. Apparently the only exceptions to this rule are found in Alaska, Idaho, New Hampshire, and New York, where the statutes are silent on this point.

Law in Canada.— The statute called Lord Hardwicke's Act (26 Geo. III, c. 33, § 2) by which the marriage of a minor by license without the consent of the parent or guardian was absolutely void, is not in force in Canada. Lawless *v.* Chamberlain, 18 Ont. 296. And see Reg. *v.* Roblin, 21 U. C. Q. B. 352; Reg. *v.* Bell, 15 U. C. Q. B. 287; Reg. *v.* Secker, 14 U. C. Q. B. 604.

Marriage of indented servants.—An ancient statute of Pennsylvania prohibited the marriage of indented servants without the consent of their masters; but this was held not to include apprentices. Altemus *v.* Ely, 3 Rawle (Pa.) 305.

Marriage of minor and adult.— The statutes referred to are not limited in their application to cases where both the parties are minors, but apply equally where one of them is of age. Cotten *v.* Rutledge, 33 Ala. 110; Caroon *v.* Rogers, 51 N. C. 240.

To whom consent given.—The statutes commonly require that the consent of the parent or guardian shall be given to the officer issuing the license, or, as in Alabama, to the judge of probate. Fitzsimmons *v.* Buckley, 59 Ala. 539.

Abduction of infant by marriage without consent of parent or guardian see Abduction, 1 Cyc. 142 note 7, 147 note 41.

In England, upon committing the custody of an infant to the care of a committee, it was usual to provide that she should not

at twenty-one years for the male and eighteen for the female, although there are some local variations; and the consent is ordinarily required to be given by the father if living, or by the mother in case of his death, or by the guardian of an orphan.[37] It is seldom, if at all, that a court will interfere to dispense with such consent, or substitute its own consent, even though it appointed and has control of the minor's guardian.[38] The parent's or guardian's consent is usually required to be manifested in a particular manner, although there are cases in which it may be made out by implication or estoppel.[39] Unless the statute expressly declares a marriage contracted without the necessary consent to be a nullity, it is to be construed as only directory in this respect, so that the marriage will be valid, although the disobedience to the statute may entail penalties on the licensing or officiating authorities.[40] It is also held that, although a marriage so

marry without leave of court (Tombes *v.* Elers, Dick. 88, 21 Eng. Reprint 201; Beard *v.* Travers, 1 Ves. 313, 27 Eng. Reprint 1052), and to require a recognizance from the committee to such effect (Eyre *v.* Shaftsbury, 2 P. Wms. 103, 24 Eng. Reprint 659; Davis' Case, 1 P. Wms. 698, 24 Eng. Reprint 577).

37. **Parent or guardian.**— In Vermont the statute is construed as requiring the consent of a parent if there be one living. Holgate *v.* Cheney, Brayt. (Vt.) 158. But in Missouri a parent cannot give the required consent if the minor has a guardian. Vaughn *v.* McQueen, 9 Mo. 330.

As between parents.— In case of a difference between the parents as to the marriage of a minor child, the authority of the father prevails. Bosworth *v.* Beiller, 2 La. Ann. 293. And the consent of the mother is not sufficient where the father is also living, although he is absent from the state (Riley *v.* Bell, 89 Ala. 597, 7 So. 155), although it is not known where he is and it is supposed that he is dead (Hayes *v.* Watts, 3 Phillim. 43), or although the father's immoral conduct has been such as to show him an unfit guardian of his children and to give his wife grounds for divorce (Ely *v.* Gammel, 52 Ala. 584).

Stepfather.— A stepfather is not the natural guardian of the minor child, and his consent is not necessary to the validity of her marriage. People *v.* Schoonmaker, 117 Mich. 190, 75 N. W. 439, 72 Am. St. Rep. 560.

Interference of third persons.— Under our statutes, it is probable that no persons other than those named (parents and guardians) have any right to forbid or oppose the marriage of the minor in any form of legal proceedings. In the case of Lee *v.* Hutton, 14 Jur. 638, the question was raised, but not decided, whether third persons, having an interest opposed to the marriage of a female infant, were entitled to interfere.

Withdrawal of consent.—Although a father may withdraw his consent to his daughter's marriage at any time previous to the actual solemnization, yet his consent when duly obtained will be upheld, although he died before any preliminary arrangements for the marriage could be settled. Young *v.* Furse, 2 Jur. N. S. 864, 26 L. J. Ch. 117 [*reversed* on other grounds in 8 De G. M. & G. 756, 3 Jur. N. S. 603, 26 L. J. Ch. 352, 5 Wkly. Rep. 394, 57 Eng. Ch. 584, 44 Eng. Reprint 581].

Illegitimate children were within 26 Geo. II, c. 33, which required the consent of the father, guardian, or mother, to the marriage of persons under age, who were not married by banns. Rex *v.* Hodnett, 1 T. R. 96.

38. See *Ex p.* Colegrave, 7 L. J. Ch. 236, holding that the court has no power to consent to the marriage of an infant on the ground that her father refuses his consent from undue motives. But in *Ex p.* Reibey, 12 L. J. Ch. 436, the lord chancellor gave his approval to the marriage of an infant whose guardian resided abroad. On the other hand, in Tombes *v.* Elers, Dick. 88, 21 Eng. Reprint 201, the court took the care of an infant from her testamentary guardian and ordered her not to marry without leave of court. See also Gordon *v.* Irwin, 4 Bro. P. C. 355, 2 Eng. Reprint 241. In the case of Shutt *v.* Carloss, 36 N. C. 232, it is said that it is not the duty of a guardian to apply to the court to authorize the marriage of his female ward, except perhaps in the case of a "ward of the court."

The provision in 4 Geo. IV, c. 76, § 17, for an application to the lord chancellor for consent, does not apply to a father who is beyond the seas, or who unreasonably withholds his consent; but only in a case in which he is *non compos mentis*. *Ex p.* I. C., 3 Myl. & C. 471, 14 Eng. Ch. 471, 40 Eng. Reprint 1008.

39. Evans *v.* Johnson, (Tex. Civ. App. 1901) 61 S. W. 143; Harrison *v.* Southampton, 4 De G. M. & G. 137, 18 Jur. 1, 22 L. J. Ch. 722, 1 Wkly. Rep. 422, 53 Eng. Ch. 108, 43 Eng. Reprint 459; *Re* Birch, 17 Beav. 358, 51 Eng. Reprint 1072. But *compare* Smyth *v.* State, 13 Ark. 696, holding that the consent of the parent or guardian, if not given in writing, must be manifested by his personal presence at the marriage ceremony.

40. *Georgia.*— Gibbs *v.* Brown, 68 Ga. 803.

Iowa.— Goodwin *v.* Thompson, 2 Greene 329.

Maine.— Damon's Case, 6 Me. 148.

Massachusetts.— Parton *v.* Hervey, 1 Gray 119.

Nevada.— Fitzpatrick *v.* Fitzpatrick, 6 Nev. 63.

Tennessee.— Governor *v.* Rector, 16 Humphr. 57.

contracted without the proper consent may be invalid at the beginning, it may be ratified by the cohabitation of the parties after attaining their majority.[41]

b. Marriage of Ward of Court. Any interference with a person in the custody of the law is as a general rule regarded as a contempt;[42] and under this rule in England the marriage of a ward of the chancery court without the consent of the court was regarded as a criminal contempt,[43] and in aggravated cases as an indictable offense.[44] The punishment of such a contempt is discretionary and not barred by lapse of time.[45] Upon such a marriage the court may cite all the parties concerned to attend upon an inquiry,[46] including the clergyman who solemnized the marriage,[47] and may commit the offending husband[48] or wife,[49] enjoining any communication with the ward.[50] It is usual, upon the marriage having been found valid, to discharge the party in contempt, a proper settlement having been executed and the costs paid.[51]

3. Essentials at Common Law — a. Common-Law Requisites. To constitute a marriage good and valid at common law, that is, in the absence of a statute other

England.— Rex *v.* Birmingham, 8 B. & C. 29, 6 L. J. M. C. O. S. 67, 2 M. & R. 230, 15 E. C. L. 24.

Canada.— Reg. *v.* Roblin, 21 U. C. Q. B. 352.

Liability of licensing officer see *infra*, III, C.

Liability for solemnization see *infra*, IV, E. See 34 Cent. Dig. tit. "Marriage," § 10.

Under the law of France minority of the husband and the want of his father's consent did not invalidate the marriage but only rendered it voidable by the minor or his father. Ferrie *v.* Public Administrator, 4 Bradf. Surr. (N. Y.) 28.

Damages for procuring marriage without consent.— It is held that a parent cannot maintain an action for damages for procuring the marriage, without his consent, of his infant daughter, at least where the question of his loss of her services is not involved. Jones *v.* Tevis, 4 Litt. (Ky.) 25, 14 Am. Dec. 98. And see Eyre *v.* Shaftsbury, 2 P. Wms. 103, 24 Eng. Reprint 659. *Contra*, Hills *v.* Hobert, 2 Root (Conn.) 48.

41. See *infra*, V, B, 2.

42. See Contempt, 9 Cyc. 15.

If one marries a lunatic who is under the care of a committee of the court it is a contempt for which the person marrying may be committed. Ash's Case, Prec. Ch. 203, 24 Eng. Reprint 99.

43. Butler *v.* Freeman, Ambl. 301, 27 Eng. Reprint 204 (holding that it was a contempt, although the father of the infant was living); Brandon *v.* Knight, Dick. 160, 21 Eng. Reprint 230 (holding that the contempt being criminal a defendant in Marshalsea for debt cannot be charged in custody but must be brought before the court by habeas corpus); Salles *v.* Savignon, 6 Ves. Jr. 572, 31 Eng. Reprint 1201.

Ignorance that the person was a ward of the court is not an excuse. Nicholson *v.* Squires, 16 Ves. Jr. 259, 33 Eng. Reprint 983. See Herbert's Case, 3 P. Wms. 116, 24 Eng. Reprint 992. But see More *v.* More, 2 Atk. 157, 26 Eng. Reprint 499.

An attempt to marry is a contempt. Warter *v.* Yorke, 19 Ves. Jr. 451, 34 Eng. Reprint 584.

Prohibition.— A woman who has married a ward of the court may be restrained from proceeding on an excommunication either against the infant or his guardian. Hill *v.* Turner, 1 Atk. 515, 26 Eng. Reprint 326.

Effect on subsequent actions.— A proceeding on behalf of infants against executors, praying an account, will be stayed until the husband of one of the infants whom he married while she was a ward of the court appears. Brummell *v.* McPherson, 7 Ves. Jr. 237, 32 Eng. Reprint 96.

44. Wade *v.* Broughton, 3 Ves. & B. 172, 35 Eng. Reprint 444; Priestley *v.* Lamb, 6 Ves. Jr. 421, 31 Eng. Reprint 1124.

45. Ball *v.* Coutts, 1 Ves. & B. 292, 35 Eng. Reprint 114.

46. More *v.* More, 2 Atk. 157, 26 Eng. Reprint 499 (holding that the person who gave the bride away as her father was liable to be committed); Bathurst *v.* Murray, 8 Ves. Jr. 74, 6 Rev. Rep. 230, 32 Eng. Reprint 279. And see Green *v.* Pritzler, Ambl. 602, 27 Eng. Reprint 391.

47. Millet *v.* Rowse, 7 Ves. Jr. 419, 32 Eng. Reprint 169; Priestley *v.* Lamb, 6 Ves. Jr. 421, 31 Eng. Reprint 1124.

48. Millet *v.* Rowse, 7 Ves. Jr. 419, 32 Eng. Reprint 169; Priestley *v.* Lamb, 6 Ves. Jr. 421, 31 Eng. Reprint 1124. But see Salles *v.* Savignon, 6 Ves. Jr. 572, 31 Eng. Reprint 1201.

Benefit of infant.— A motion to commit a person for contempt in marrying an infant ward should not be made until the matter has been brought before the judge in chambers to consider whether it is for the infant's benefit. Brown *v.* Barrow, 48 L. T. Rep. N. S. 357.

49. See Hill *v.* Turner, 1 Atk. 515, 26 Eng. Reprint 326.

50. Ball *v.* Coutts, 1 Ves. & B. 292, 35 Eng. Reprint 114; Warter *v.* Yorke, 19 Ves. Jr. 451, 34 Eng. Reprint 584; Pearce *v.* Crutchfield, 14 Ves. Jr. 206, 33 Eng. Reprint 500.

51. Field *v.* Brown, 17 Beav. 146, 51 Eng. Reprint 988; Cox *v.* Bennett, 31 L. T. Rep. N. S. 83, 22 Wkly. Rep. 819; Millet *v.* Rowse, 7 Ves. Jr. 419, 32 Eng. Reprint 169; Stevens

wise specifically providing,[52] it is not necessary that it should be solemnized in any particular form or with any particular rite or ceremony.[53] All that is required is that there should be an actual and mutual agreement to enter into a matrimonial relation,[54] permanent and exclusive of all others,[55] between parties capable in law of making such a contract,[56] consummated by their cohabitation as man and wife or their mutual assumption openly of marital duties and obligations.[57] Such "common-law-marriages" are recognized as valid and binding in most of the states.[58]

b. Marriage by Mutual Agreement. In pursuance of the rules just stated, and of the statutes in many states declaring marriage to be a civil contract, it is held that a valid common-law marriage may be constituted by a mutual agreement between two parties who are both capable of entering into marriage, and as

v. Savage, 1 Ves. Jr. 154, 30 Eng. Reprint 277. And see Ball *v.* Coutts, 1 Ves. & B. 292, 35 Eng. Reprint 114; Bathhurst *v.* Murray, 8 Ves. Jr. 74, 6 Rev. Rep. 230, 32 Eng. Reprint 279.

52. Effect of disobedience or failure to comply with statutory directions see *infra*, I, D, 4, a.

53. *California.*— White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; Sharon *v.* Sharon, 75 Cal. 1, 16 Pac. 345.

Georgia.— Askew *v.* Dupree, 30 Ga. 173.

Illinois.— Cartwright *v.* McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105; Port *v.* Port, 70 Ill. 484; McKenna *v.* McKenna, 73 Ill. App. 64.

Iowa.— Blanchard *v.* Lambert, 43 Iowa 228, 22 Am. Rep. 245.

Kansas.—Renfrow *v.* Renfrow, 60 Kan. 277, 56 Pac. 534, 72 Am. St. Rep. 350.

Kentucky.— Dumaresly *v.* Fishly, 3 A. K. Marsh. 368.

Massachusetts.— Little *v.* Little, 13 Gray 264.

Michigan.— Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep. 164.

Minnesota.— State *v.* Worthingham, 23 Minn. 528.

Missouri.— State *v.* Hansbrough, 181 Mo. 348, 80 S. W. 900; Dyer *v.* Brannock, 66 Mo. 391, 27 Am. Rep. 359.

Nebraska.— Eaton *v.* Eaton, 66 Nebr. 676, 92 N. W. 995, 60 L. R. A. 605; Goodrich *v.* Cushman, 34 Nebr. 460, 51 N. W. 1041.

Nevada.— State *v.* Zichfield, 23 Nev. 304, 46 Pac. 802, 62 Am. St. Rep. 800, 34 L. R. A. 784.

New Hampshire.— Londonderry *v.* Chester, 2 N. H. 268, 9 Am. Dec. 61.

New Jersey.— Atlantic City R. Co. *v.* Goodin, 62 N. J. L. 394, 42 Atl. 333, 72 Am. St. Rep. 652, 45 L. R. A. 671.

New York.— Van Tuyl *v.* Van Tuyl, 57 Barb. 235; Bissell *v.* Bissell, 55 Barb. 325; Wright *v.* Wright, 48 How. Pr. 1; Fenton *v.* Reed, 4 Johns. 52, 4 Am. Dec. 244; Rose *v.* Clark, 8 Paige 574.

Ohio.— Carmichael *v.* State, 12 Ohio St. 553.

Pennsylvania.— Com. *v.* Stump, 53 Pa. St. 132, 91 Am. Dec. 198; Hines' Estate, 7 Pa. Dist. 89; Guardians of Poor *v.* Nathans, 2 Brewst. 149.

Texas.— Galveston, etc., R. Co. *v.* Cody, 20 Tex. Civ. App. 520, 50 S. W. 135.

Utah.— Hilton *v.* Roylance, 25 Utah 129, 69 Pac. 660, 58 L. R. A. 723.

United States.— Meister *v.* Moore, 96 U. S. 76, 24 L. ed. 826; Hallett *v.* Collins, 10 How. 174, 13 L. ed. 376; Adger *v.* Ackerman, 115 Fed. 124, 52 C. C. A. 568; Mathewson *v.* Phœnix Iron Foundry, 20 Fed. 281.

See 34 Cent. Dig. tit. "Marriage," § 4.

Compare Denison *v.* Denison, 35 Md. 361.

Solemnization of marriage see *infra*, IV.

Mormon marriage.— The sealing ceremony of the mormon church, whereby the contracting parties agree and are declared by a duly authorized church official to be married for "time and eternity," creates a valid common-law marriage between parties believing and in good faith participating therein; the part of such ceremony referring to eternity being mere surplusage. Hilton *v.* Roylance, 25 Utah 129, 69 Pac. 660, 58 L. R. A. 723.

54. *In re* Maher, 204 Ill. 25, 68 N. E. 159; Renfrow *v.* Renfrow, 60 Kan. 277, 56 Pac. 534, 72 Am. St. Rep. 350; Jackson *v.* Winne, 7 Wend. (N. Y.) 47, 22 Am. Dec. 563. And see *supra*, I, D, 1, a.

Marriage, by law of nature, is constituted by cohabitation by consent for an indefinite period of time for the procreation and bringing up of children; although a mere casual commerce between the sexes does not constitute a marriage by such law. Johnson *v.* Johnson, 30 Mo. 72, 77 Am. Dec. 598.

55. Riddle *v.* Riddle, 26 Utah 268, 72 Pac. 1081. And see *supra*, I, A, text and note 2. But see Johnson *v.* Johnson, 30 Mo. 72, 77 Am. Dec. 598.

56. There can be no valid common-law marriage between persons whose union would be an offense under the criminal laws of the state. Keen *v.* Keen, 184 Mo. 358, 83 S. W. 526.

Persons who may marry see *infra*, II.

57. Hawkins *v.* Hawkins, 142 Ala. 571, 38 So. 640, 110 Am. St. Rep. 53; People *v.* Lehmann, 104 Cal. 631, 38 Pac. 422; Sorensen *v.* Sorensen, (Nebr. 1905) 100 N. W. 930. And see Taylor *v.* Taylor, 10 Colo. App. 303, 50 Pac. 1049, holding that a common-law marriage is not shown by irregular cohabitation and partial reputation.

58. See *infra*, I, D, 4, a.

to whom no impediments exist, whereby they presently undertake and contract to become husband and wife and mutually promise to continue that relation permanently, and thereupon assume their marital duties and cohabit together.[59] There must, however, be a clear and sufficient promise or agreement,[60] which must be acted upon by the parties, although it may not always be necessary that they should hold themselves out to the public as husband and wife;[61] and it is

59. *Alabama.*— Tartt *v.* Negus, 127 Ala. 301, 28 So. 713.

California.— *In re* Ruffino, 116 Cal. 304, 48 Pac. 127.

Illinois.— Hutchinson *v.* Hutchinson, 196 Ill. 432, 63 N. E. 1023; Alden *v.* Church, 106 Ill. App. 347.

Kansas.— Shorten *v.* Judd, 60 Kan. 73, 55 Pac. 286; Matney *v.* Linn, 59 Kan. 613, 54 Pac. 668; State *v.* Walker, 36 Kan. 297, 13 Pac. 279, 59 Am. Rep. 556.

Louisiana.— Patton *v.* Philadelphia, 1 La. Ann. 98.

Michigan.—Williams *v.* Kilburn, 88 Mich. 279, 50 N. W. 293.

Mississippi.— Dickerson *v.* Brown, 49 Miss. 357. And see Taylor *v.* State, 52 Miss. 84.

Missouri.— State *v.* Bittick, 103 Mo. 183, 15 S. W. 325, 23 Am. St. Rep. 869, 11 L. R. A. 587.

Nebraska.— Eaton *v.* Eaton, 66 Nebr. 676, 92 N. W. 995, 60 L. R. A. 605; Michigan University *v.* McGuckin, 64 Nebr. 300, 89 N. W. 778.

New York.— Clayton *v.* Wardell, 4 N. Y. 230; Van Tuyl *v.* Van Tuyl, 57 Barb. 235; Bissell *v.* Bissell, 55 Barb. 325; Davis *v.* Davis, 7 Daly 308, 1 Abb. N. Cas. 140; Herz *v.* Herz, 34 Misc. 125, 69 N. Y. Suppl. 478; Newton *v.* Southworth, 7 N. Y. St. 130; Wright *v.* Wright, 48 How. Pr. 1; Jackson *v.* Winne, 7 Wend. 47, 22 Am. Dec. 563; Fenton *v.* Reed, 4 Johns. 52, 4 Am. Dec. 244; Rose *v.* Clark, 8 Paige 574.

Pennsylvania.— Richard *v.* Brehm, 73 Pa. St. 140, 13 Am. Rep. 733; Com. *v.* Stump, 53 Pa. St. 132, 91 Am. Dec. 198; Com. *v.* Haylow, 17 Pa. Super. Ct. 541; Guardians of Poor *v.* Nathans, 2 Brewst. 149.

Texas.— Sapp *v.* Newsom, 27 Tex. 537; Galveston, etc., R. Co. *v.* Cody, 20 Tex. Civ. App. 520, 50 S. W. 135; Chapman *v.* Chapman, 16 Tex. Civ. App. 382, 41 S. W. 533; Ingersol *v.* McWillie, 9 Tex. Civ. App. 543, 30 S. W. 56.

United States.— Adger *v.* Ackerman, 115 Fed. 124, 52 C. C. A. 568; Davis *v.* Pryor, 112 Fed. 274, 50 C. C. A. 579; Mathewson *v.* Phœnix Iron Foundry, 20 Fed. 281.

See 34 Cent. Dig. tit. "Marriage," § 12.

But *compare* Dunbarton *v.* Franklin, 19 N. H. 257, holding that where parties enter into a contract of marriage and live together in accordance with it, this does not constitute a marriage, but is merely evidence from which a jury may infer a marriage.

In Hawaii it is sufficient to establish the validity of a marriage under the ancient custom, and prior to the law establishing christian marriage, to show that the parties lived together as man and wife. Kamoku *v.* Kalaauaha, 4 Hawaii 548.

Scotch marriages.— To constitute a marriage in accordance with the Scotch law there must be a deliberate and serious agreement to marry, given mutually with the view and for the purpose of creating thenceforth the relation of husband and wife, and it is not necessary that the contract so made should be followed by cohabitation, nor is it necessary to show the particular place or the exact day where such consent was exchanged. Yelverton *v.* Longworth, 10 Jur. N. S. 1209, 11 L. T. Rep. N. S. 118, 4 Macq. H. L. 746, 13 Wkly. Rep. 235. For cases in which the validity of Scotch marriages has been considered see Lawford *v.* Davies, 4 P. D. 61, 47 L. J. P. D. & Adm. 38, 39 L. T. Rep. N. S. 111, 26 Wkly. Rep. 424; Hamilton *v.* Hamilton, 9 Cl. & F. 327, 8 Eng. Reprint 440; Stewart *v.* Menzies, 8 Cl. & F. 309, 8 Eng. Reprint 121; Bell *v.* Graham, 1 L. T. Rep. N. S. 221, 13 Moore P. C. 242, 8 Wkly. Rep. 98, 15 Eng. Reprint 91.

60. See McKenna *v.* McKenna, 180 Ill. 577, 54 N. E. 641; Clancy *v.* Clancy, 66 Mich. 202, 33 N. W. 889; Soper *v.* Halsey, 85 Hun (N. Y.) 464, 33 N. Y. Suppl. 105.

61. Lorimer *v.* Lorimer, 124 Mich. 631, 83 N. W. 609; Hulett *v.* Carey, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384; Wilcox *v.* Wilcox, 46 Hun (N. Y.) 32, holding that matrimonial cohabitation may be established without proof of any announcement by the parties of their relation further than is given by appearances. But see Maryland *v.* Baldwin, 112 U. S. 490, 5 S. Ct. 278, 28 L. ed. 822, holding that where a marriage takes place by words only, without attending ceremonies, religious or civil, some public recognition of it, such as living together as man and wife, is necessary as evidence of its existence. And as to the "mutual assumption of marital rights and duties" under the statute in California see Toon *v.* Huberty, 104 Cal. 260, 37 Pac. 944; Kilburn *v.* Kilburn, 89 Cal. 46, 26 Pac. 636, 23 Am. St. Rep. 447 (holding that where an agreement to marry is not followed by solemnization, there is no assumption of marital rights, duties, or obligations, within the meaning of section 55 of the California civil code, until the commencement of cohabitation by the parties to the agreement. And by cohabitation is meant, not simply the gratification of the sexual passion, but to live and dwell together, and to have the same habitation); Sharon *v.* Sharon, 79 Cal. 633, 22 Pac. 26, 131.

Agreement to keep secret.— The validity of a marriage contracted by mutual agreement,

even held that the agreement may be implied.[62] Although the relations of the parties were at first illicit, this does not prevent them from afterward contracting a valid common-law marriage.[63] Where a contract of common-law marriage is in writing, the courts have jurisdiction of an action either to establish it and declare it valid or to cancel it.[64]

c. Contracts Per Verba De Præsenti or De Futuro. In regard to marriages effected by the agreement of the parties without solemnization, a distinction is made between contracts *per verba de præsenti*, that is, where the parties take each other for husband and wife by words in the present tense, implying that the marital relation is constituted immediately and not at some future time, and contracts *per verba de futuro*, which imply no more than that the parties will marry each other at a later time. Contracts of the former sort have been recognized as creating a present and valid marriage.[65] But a mere agreement for a future marriage, although followed by cohabitation, is no marriage,[66] nor is a conditional promise to marry at a future day, although made as an inducement or cloak for meretricious relations.[67] It is indeed an ancient rule that a marriage may arise from a contract *per verba de futuro cum copula*;[68] but in this case, the copula must

or by a written contract, is not affected by an agreement of the parties to keep its existence a secret either for an indefinite time or until they shall agree to make it public. Sharon *v.* Sharon, 79 Cal. 633, 22 Pac. 26, 131; Hamilton *v.* Hamilton, 9 Cl. & F. 327, 8 Eng. Reprint 440; Dalrymple *v.* Dalrymple, 2 Hagg. Cons. 54; Swift *v.* Kelly, 3 Knapp 257, 12 Eng. Reprint 648.

Cohabitation in another state.— A marriage entered into by contract between the parties in one state, and followed by cohabitation and recognition of the relation in another, is valid and binding. Goodrich *v.* Cushman, 34 Nebr. 460, 51 N. W. 1041; Gibson *v.* Gibson, 24 Nebr. 394, 39 N. W. 450. But *compare* Peck *v.* Peck, 155 Mass. 479, 30 N. E. 74.

62. Adger *v.* Ackerman, 115 Fed. 124, 52 C. C. A. 568. And see Hooper *v.* McCaffery, 83 Ill. App. 341; Hilton *v.* Roylance, 25 Utah 129, 69 Pac. 660, 58 L. R. A. 723.

63. Swartz *v.* State, 13 Ohio Cir. Ct. 62, 7 Ohio Cir. Dec. 43.

In case of prior subsisting marriage see *infra*, V, B, 5.

64. Sharon *v.* Sharon, 79 Cal. 633, 22 Pac. 26, 131; Terry *v.* Sharon, 131 U. S. 40, 9 S. Ct. 705, 33 L. ed. 94; Sharon *v.* Terry, 36 Fed. 337, 13 Sawy. (U. S.) 387, 1 L. R. A. 572; Sharon *v.* Hill, 26 Fed. 337, 11 Sawy. (U. S.) 291.

65. *California.*— Graham *v.* Bennet, 2 Cal. 503.

Illinois.— McKenna *v.* McKenna, 180 Ill. 577, 54 N. E. 641.

Iowa.— Blanchard *v.* Lambert, 43 Iowa 228, 22 Am. Rep. 245.

Michigan.— Peet *v.* Peet, 52 Mich. 464, 18 N. W. 220; Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep. 164.

Minnesota.— State *v.* Worthingham, 23 Minn. 528.

Mississippi.— Floyd *v.* Calvert, 53 Miss. 37.

Missouri.— Dyer *v.* Brannock, 66 Mo. 391, 27 Am. Rep. 359.

New Jersey.— Atlantic City R. Co. *v.* Goodin, 62 N. J. L. 394, 42 Atl. 333, 72 Am. St. Rep. 652, 45 L. R. A. 671.

New York.— Hayes *v.* People, 25 N. Y. 390, 82 Am. Dec. 364; Rose *v.* Clark, 8 Paige 574.

Ohio.— Carmichael *v.* State, 12 Ohio St. 553.

Pennsylvania.—Hantz *v.* Sealy, 6 Binn. 405.

Vermont.— Newbury *v.* Brunswick, 2 Vt. 151, 19 Am. Dec. 703.

United States.— U. S. *v.* Route, 33 Fed. 246; Holabird *v.* Atlantic Mut. L. Ins. Co., 12 Fed. Cas. No. 6,587, 2 Dill. 166.

No form of words necessary.— To constitute a marriage *per verba de præsenti* no particular form of words is necessary. Bowman *v.* Bowman, 24 Ill. App. 165. But there must be words spoken by both parties; a declaration by one, passed in silence by the other, is not sufficient. Weitzel *v.* Central Lodge, No. 19, 1 Pa. Dist. 143.

A written contract of marriage, although not provided for by statute, is a good contract of marriage *per verba de præsenti*. Mathewson *v.* Phœnix Iron Foundry, 20 Fed. 281.

66. *Alabama.*— Robertson *v.* State, 42 Ala. 509.

California.— Beverson's Estate, Myr. Prob. 35.

Illinois.— Hebblethwaite *v.* Hepworth, 98 Ill. 126; Marks *v.* Marks, 108 Ill. App. 371.

Michigan.— Lorimer *v.* Lorimer, 124 Mich. 631, 83 N. W. 609.

Nebraska.— Sorensen *v.* Sorensen, 68 Nebr. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455.

New York.— Cheney *v.* Arnold, 15 N. Y. 345, 69 Am. Dec. 609.

Ohio.— Duncan *v.* Duncan, 10 Ohio St. 181.

Compare Patton *v.* Philadelphia, 1 La. Ann. 98; Hulett *v.* Carey, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384; Hines' Estate, 7 Pa. Dist. 89.

67. Turpin *v.* Public Administrator, 2 Bradf. Surr. (N. Y.) 424; Stewart *v.* Menzies, 8 Cl. & F. 309, 8 Eng. Reprint 121.

68. *In re* McCausland, 52 Cal. 568; Dumaresly *v.* Fishly, 3 A. K. Marsh. (Ky.) 368;

be in fulfilment of the marriage contract, that is, it must be intended and understood by the parties as a consummation of their marriage and as converting their executory agreement to marry into a present, actual marriage; and if it is known and understood to be illicit, and they regard their contract as still executory and intend that it shall be carried into effect at some future time by a ceremony or solemnization of marriage, their cohabitation is not matrimonial.[69] As a question of evidence, however, and in accordance with the general presumption of innocence rather than of guilt, such an intention and understanding will be imputed to the parties as will make them husband and wife rather than paramours, if this can be done without violence to the direct evidence.[70]

d. Cohabitation and Repute. A marriage cannot arise from mere cohabitation of two persons who are generally reputed to be man and wife,[71] although such cohabitation and repute are regarded as circumstantial evidence of an agreement by which the parties have entered into the relation of husband and wife,[72] and may raise a presumption,[73] although not a conclusive one of marriage.

4. Statutory Requirements — a. In General. Statutes requiring marriages to be solemnized in a particular manner or before certain authorized persons or under a license, although they may impose penalties for non-observance, are generally construed as directory only, in so far as this, that a marriage valid at common law, but not celebrated in accordance with the requirements of the statute, will be held valid and binding, unless expressly declared void by the statute.[74] But in several states the law is so framed that no valid marriage can

Comly's Estate, 19 Pa. Co. Ct. 184; Dalrymple *v.* Dalrymple, 2 Hagg. Cons. 54; Reg. *v.* Millis, 10 Cl. & F. 534, 780, 8 Eng. Reprint 844.

69. Stoltz *v.* Doering, 112 Ill. 234; Hebblethwaite *v.* Hepworth, 98 Ill. 126; Port *v.* Port, 70 Ill. 484; Sorensen *v.* Sorensen, 68 Nebr. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; Peck *v.* Peck, 12 R. I. 485, 34 Am. Rep. 702; Reg. *v.* Mills, 10 Cl. & F. 534, 782, 8 Eng. Reprint 844.

70. Marks *v.* Marks, 108 Ill. App. 371; Hines' Estate, 7 Pa. Dist. 89; 1 Bishop Marr., Div. & Sep. § 253. In this connection due weight should be given to the well known maxim "*semper præsumitur pro matrimonio.*" See Piers *v.* Piers, 2 H. L. Cas. 331, 13 Jur. 569, 9 Eng. Reprint 1118. See *infra*, VI, A, 1, a; VI, A, 2.

71. See *infra*, VI, B, 1, f, (I), (B).

72. See *infra*, VI, A, 1, b, (I); VI, B, 1, f, (I), (A).

73. See *infra*, VI, A, 1, b, (I).

Rebuttal of presumption see *infra*, VI, B, 1, f, (I), (B).

74. *Alabama.*—Campbell *v.* Guliatt, 43 Ala. 57. And see Moore *v.* Heineke, 119 Ala. 627, 24 So. 374.

Georgia.— Park *v.* Barron, 20 Ga. 702, 65 Am. Dec. 641.

Illinois.— Port *v.* Port, 70 Ill. 484; Hutchinson *v.* Hutchinson, 96 Ill. App. 52; Bowman *v.* Bowman, 24 Ill. App. 165.

Kansas.—Renfrow *v.* Renfrow, 60 Kan. 277, 56 Pac. 534, 72 Am. St. Rep. 350.

Kentucky.— Stevenson *v.* Gray, 17 B. Mon. 193; Dumaresly *v.* Fishly, 3 A. K. Marsh. 368.

Michigan.— Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep. 164.

Minnesota.— State *v.* Worthingham, 23 Minn. 528.

Mississippi.— Hargroves *v.* Thompson, 31 Miss. 211.

Missouri.— Dyer *v.* Brannock, 66 Mo. 391, 27 Am. Rep. 359.

Nevada.— State *v.* Zichfeld, 23 Nev. 304, 46 Pac. 802, 62 Am. St. Rep. 800, 34 L. R. A. 784.

New Hampshire.— Londonderry *v.* Chester, 2 N. H. 268, 9 Am. Dec. 61.

New Jersey.—Pearson *v.* Howey, 11 N. J. L. 12.

New York.—White *v.* Lowe, 1 Redf. Surr. 376; Ferrie *v.* Public Administrator, 4 Bradf. Surr. 28. But see Pettit *v.* Pettit, 105 N. Y. App. Div. 312, 93 N. Y. Suppl. 1001, construing Laws (1901), c. 339.

North Carolina.—State *v.* Robbins, 28 N. C. 23, 44 Am. Dec. 64.

Ohio.— Swartz *v.* State, 13 Ohio Cir. Ct. 62, 7 Ohio Cir. Dec. 43; Courtright *v.* Courtright, 11 Ohio Dec. (Reprint) 413, 26 Cinc. L. Bul. 309.

Oklahoma.—Reaves *v.* Reaves, 15 Okla. 240, 82 Pac. 490, 2 L. R. A. N. S. 353.

Pennsylvania.— Rodebaugh *v.* Sanks, 2 Watts 9; Helffenstein *v.* Thomas, 5 Rawle 209.

Texas.— Burnett *v.* Burnett, (Civ. App. 1904) 83 S. W. 238. But *compare* Western Union Tel. Co. *v.* Proctor, 6 Tex. Civ. App. 300, 25 S. W. 811.

Washington.—State *v.* McGilvery, 20 Wash. 240, 55 Pac. 115, construing the statute of Idaho.

United States.— Meister *v.* Moore, 96 U. S.

be contracted except in the manner and with the formalities prescribed by the statute.[75]

b. Ceremonial Marriage. The statutes now commonly designate the persons who shall have authority to celebrate marriages, including civil magistrates as well as ecclesiastics, at the same time providing that no particular form or ceremony shall be necessary except a declaration by the parties that they take each other for husband and wife.[76] A marriage solemnized in full conformity with the statutes is complete without cohabitation,[77] and its validity is not affected by a secret intention or reservation of one of the parties, unknown to the other,[78] nor by their acquiescence in the making and recording of a fraudulent certificate of the marriage, which falsely states the date or other particulars of the ceremony.[79]

76, 24 L. ed. 826; Mathewson *v.* Phœnix Iron Foundry, 20 Fed. 281.

England.— Lacon *v.* Higgins, D. & R. N. P. 38, 16 E. C. L. 425, 3 Stark. 178, 3 E. C. L. 643, 25 Rev. Rep. 779; Catterall *v.* Catterall, 11 Jur. 914, 1 Rob. Eccl. 580; Catterall *v.* Sweetman, 9 Jur. 951, 1 Rob. Eccl. 304; Stallwood *v.* Tredger, 2 Phillim. 287.

See 34 Cent. Dig. tit. "Marriage," § 5. And see *supra*, I, D, 3, a.

Contra.— See Norman *v.* Norman, 121 Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, 42 L. R. A. 343; Denison *v.* Denison, 35 Md. 361; Com. *v.* Munson, 127 Mass. 459, 34 Am. Rep. 411; Milford *v.* Worcester, 7 Mass. 48; Mangue *v.* Mangue, 1 Mass. 240; Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411 [*distinguishing* Newbury *v.* Brunswick, 2 Vt. 151, 19 Am. Dec. 703].

Effect of failure to procure license see *infra*, III, A.

Good faith and belief of parties as affecting validity.— The statutes in several of the states provide that no marriage shall be void or voidable for the want of a license or other formality required by law, if either of the parties believed it at the time to be a valid marriage (Burns Rev. St. Ind. § 7295); or that want of authority or qualification in the celebrant shall not invalidate a marriage otherwise valid, if consummated in the belief on the part of either of the parties that it was lawful. Alaska Civ. Code, c. 2, § 11; Ga. Code, § 2423; Ida. Civ. Code, § 2013; Carroll St. Ky. § 2102; Me. Rev. St. c. 61, § 16; Mass. Rev. Laws, c. 151, § 34; Minn. Rev. Laws, § 3566; Mont. Civ. Code, § 80; Nebr. Comp. St. § 4286; N. H. Pub. St. c. 174, § 12; R. I. Laws (1898), c. 549, p. 47; Utah Rev. St. § 1187.

75. *California.*— Under the law of California, as amended in 1895, consent to marriage must be followed by the solemnization by a person authorized by section 70 of the civil code to solemnize marriages; and a marriage between citizens and residents of California, lacking such solemnization, is illegal and void. Norman *v.* Norman, 121 Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, 42 L. R. A. 343. And the effect of the California civil code, section 55, was held to be that a valid marriage cannot be created by mere consent, but must be followed by solemnization or by a mutual assumption of marital rights, duties, and obligations. Sharon *v.* Sharon, 79 Cal. 633, 22 Pac. 26, 131. And see *In re* Ruffino, 116 Cal. 304, 48 Pac. 127.

Kentucky.— Klenke *v.* Noonan, 118 Ky. 436, 81 S. W. 241, 26 Ky. L. Rep. 305; Robinson *v.* Redd, (1897) 43 S. W. 435, 19 Ky. L. Rep. 1422; Estill *v.* Rogers, 1 Bush 62.

Tennessee.— Grisham *v.* State, 2 Yerg. 589; Bashaw *v.* State, 1 Yerg. 177.

Virginia.— Code, § 2222, abrogates the common law on the subject of marriage and invalidates any marriage taking place within the state unless it is shown to have been under a license and solemnized as the statute requires. Offield *v.* Davis, 100 Va. 250, 40 S. E. 910.

Washington.— *In re* Smith, 4 Wash. 702, 30 Pac. 1059, 17 L. R. A. 573; *In re* McLaughlin, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699.

West Virginia.— Beverlin *v.* Beverlin, 29 W. Va. 732, 3 S. E. 36.

United States.— See Holmes *v.* Holmes, 12 Fed. Cas. No. 6,638, 1 Abb. 525, 1 Sawy. 99.

76. See the statutes of the several states.

Form and requisites of ceremonial marriage see *infra*, IV.

Effect of marriage on previous polygamous relation.— In a case in Utah it appeared that a man who had a legal wife living and undivorced married two other women. Subsequently he went through a formal marriage ceremony with one of the women before a justice of the peace. He stated that one of his reasons for marrying was to disqualify the woman from testifying in the event of his arrest. After the ceremony he continued to cohabit with the two women as he had previously done. He told a third woman, whom he also married, that he had two plural wives, and also told her about the marriage before the justice of the peace and his reason for it. It was held that the marriage by the justice was ineffectual to disturb the polygamous relation existing between the parties. Riddle *v.* Riddle, 26 Utah 268, 72 Pac. 1081.

77. Potier *v.* Barclay, 15 Ala. 439.

78. Hilton *v.* Roylance, 25 Utah 129, 69 Pac. 660, 58 L. R. A. 723.

79. State *v.* Tillinghast, 25 R. I. 391, 56 Atl. 181.

II. PERSONS WHO MAY MARRY.

A. Age. Under the common law infants were permitted to marry at the age of consent,[80] which in the case of males was fixed at the age of fourteen,[81] and of females at the age of twelve.[82] The age at which a valid marriage may be contracted has, however, been altered by statute in many jurisdictions,[83] or a provision has been made by which a marriage may be declared void where the female is under a certain age.[84] Statutes of the latter class have been construed to leave the common-law rule otherwise unaltered;[85] so also a statute which merely defines what persons may be joined in marriage does not abrogate the common-law rule as to the ages at which a valid marriage may be contracted.[86] Unless expressly made so by statute a marriage, one or both of the parties to which is under the age of consent, is not void, but is voidable at the option of the party under disability.[87] Where both of the parties are under age, either may disaffirm the marriage upon arriving at the age of consent;[88] but it may as a general rule be avoided only at the election of a party.[89] Marriages of infants are

80. Goodwin *v.* Thompson, 2 Greene (Iowa) 329; Parton *v.* Hervey, 1 Gray (Mass.) 119.

81. Goodwin *v.* Thompson, 2 Greene (Iowa) 329; Parton *v.* Hervey, 1 Gray (Mass.) 119; Bennett *v.* Smith, 21 Barb. (N. Y.) 439.

82. Goodwin *v.* Thompson, 2 Greene (Iowa) 329; Parton *v.* Hervey, 1 Gray (Mass.) 119; Bennett *v.* Smith, 21 Barb. (N. Y.) 439.

Protection of court in case of void marriage.— Where a girl under twelve was married and immediately declared her ignorance of the nature and consequence of the marriage, and her dissent to it, it was held that a court of equity, on a bill filed by her next friend, might order her to be placed under the protection of the court as a ward, and prohibit defendant from all intercourse or correspondence with her under the penalty of punishment for contempt. Aymar *v.* Roff, 3 Johns. Ch. (N. Y.) 49.

A provision establishing the age of consent to unlawful carnal knowledge does not affect the age at which a female may consent to marriage. Fisher *v.* Bernard, 65 Vt. 663, 27 Atl. 316.

83. See the statutes of the several states. Smith *v.* Smith, 84 Ga. 440, 11 S. E. 496, 8 L. R. A. 362; Fitzpatrick *v.* Fitzpatrick, 6 Nev. 63 (males eighteen, females sixteen); Shafher *v.* State, 20 Ohio 1 (males eighteen, females fourteen); Hardy *v.* State, 37 Tex. Cr. 55, 38 S. W. 615 (males sixteen, females fourteen).

Common-law marriages.— Where by statute the parties are forbidden to marry by reason of nonage, they cannot contract a common-law marriage. Hardy *v.* State, 37 Tex. Cr. 55, 38 S. W. 615.

84. Bennett *v.* Smith, 21 Barb. (N. Y.) 439, construing Laws (1841), c. 257, which makes such provision in the case of females under the age of fourteen.

85. See Bennett *v.* Smith, 21 Barb. (N. Y.) 439.

86. See Godwin *v.* Thompson, 2 Greene (Iowa) 329. *Contra,* Elliot *v.* Elliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568. And *compare* People *v.* Slack, 15 Mich. 193.

87. People *v.* Schoonmaker, 119 Mich. 242, 77 N. W. 934; People *v.* Slack, 15 Mich. 193; State *v.* Lowell, 78 Minn. 166, 80 N. W. 877, 79 Am. St. Rep. 358, 46 L. R. A. 440 (holding that the marriage of a person who has not reached the age of statutory competency, but who is competent by the common law, is not void but voidable only by a judicial decree of nullity at the election of the party under the age of consent, to be exercised at any time before reaching such age, or afterward if the parties have not voluntarily cohabited after reaching such age); State *v.* Cone, 86 Wis. 498, 57 N. W. 50. And see Ferrie *v.* Public Administrator, 4 Bradf. Surr. (N. Y.) 28, holding that minority of the husband and want of his father's consent did not, under the law of France, invalidate a marriage, but only rendered it voidable by the minor or his father. *Contra,* Gathings *v.* Williams, 27 N. C. 487, 44 Am. Dec. 49; Shafher *v.* State, 20 Ohio 1; Vernon *v.* Vernon, 9 Ohio Dec. (Reprint) 365, 12 Cinc. L. Bul. 237. But see Courtright *v.* Courtright, 11 Ohio Dec. (Reprint) 413, 26 Cinc. L. Bul. 300.

In the event of the death of the female before attaining the statutory age, without having exercised her election to avoid the marriage entered into under the statutory age, but above the common-law age, the validity of the marriage cannot afterward be questioned. Courtright *v.* Courtright, 11 Ohio Dec. (Reprint) 413, 26 Cinc. L. Bul. 309.

Ratification of marriage see *infra,* V, B, 2.

88. Canale *v.* People, 177 Ill. 219, 52 N. E. 310.

89. Wood *v.* Baker, 43 Misc. (N. Y.) 310, 88 N. Y. Suppl. 854 [*following* Fero *v.* Fero, 62 N. Y. App. Div. 470, 70 N. Y. Suppl. 742, and *distinguishing* Becker *v.* Becker, 58 N. Y. App. Div. 374, 69 N. Y. Suppl. 75; Stivers *v.* Wise, 18 N. Y. App. Div. 316, 46 N. Y. Suppl. 9; Slocum *v.* Slocum, 37 Misc. (N. Y.) 143, 74 N. Y. Suppl. 447].

Right of parent to sue to annul marriage see *infra,* VIII, C, 4.

not invalidated by statutes only punishing persons who solemnize such marriages.[90] Under some statutes a man marrying a woman under the age of consent forfeits all interest in the property of his wife,[91] or he is made punishable criminally.[92]

B. Mental Capacity. A contract of marriage, like other contracts, is of no validity if either of the parties is of unsound mind,[93] imbecile,[94] or insane,[95] unless the contract is made in a lucid interval.[96] The degree of mental imbecility must amount to unsoundness and not merely weakness, unless such weakness be so considerable as to amount to derangement.[97] Great eccentricity of conduct is not sufficient,[98] nor is dejection of mind and singularity of conduct,[99] nor mere dulness of mind,[1] nor subjection to some vice or uncontrollable impulse or propensity.[2] In some cases the capacity to contract generally is made the test,[3] but

90. Parton *v.* Hervey, 1 Gray (Mass.) 119. And see Hunter *v.* Milam, (Cal. 1895) 41 Pac. 332, holding, under a statute making fourteen years the age of consent, and making it a misdemeanor to join a female under eighteen in marriage without the consent of her parents, a marriage without consent is not void where the female is over fourteen.

Liability of person solemnizing marriage of minor see *infra*, IV, E.

Liability of officer issuing marriage license to minor see *infra*, III, C.

91. See Ludwick *v.* Stafford, 51 N. C. 109, holding that the forfeiture provided under the North Carolina act of 1820 arose not from the offense simply, but from that and a conviction following in due time.

92. See State *v.* Watts, 32 N. C. 369, in which it was held that the offense had not been committed in secret so as to operate to prevent the running of the statute of limitations.

93. Rawdon *v.* Rawdon, 28 Ala. 565; Jenkins *v.* Jenkins, 2 Dana (Ky.) 102, 26 Am. Dec. 437; Chapline *v.* Stone, 77 Mo. App. 523; True *v.* Ranney, 21 N. H. 52, 53 Am. Dec. 164.

Capacity of insane person to contract generally see INSANE PERSONS, 22 Cyc. 1194.

94. Johnson *v.* Kincade, 37 N. C. 470; Waymire *v.* Jetmore, 22 Ohio St. 271.

95. *Alabama.*— Rawdon *v.* Rawdon, 28 Ala. 565.

Kansas.— Powell *v.* Powell, 18 Kan. 371, 26 Am. Rep. 774.

Maine.— Unity *v.* Belgrade, 76 Me. 419, statutory.

Massachusetts.— Middleborough *v.* Rochester, 12 Mass. 363.

New Hampshire.—Keyes *v.* Keyes, 22 N. H. 553.

New York.—Wightman *v.* Wightman, 4 Johns. Ch. 343.

North Carolina.— Sims *v.* Sims, 121 N. C. 297, 28 S. E. 407, 61 Am. St. Rep. 665, 40 L. R. A. 737; Crump *v.* Morgan, 38 N. C. 91, 40 Am. Dec. 447.

South Carolina.— Clement *v.* Mattison, 3 Rich. 93; Foster *v.* Means, Speers Eq. 569, 42 Am. Dec. 332.

England.—Turner *v.* Meyers, 1 Hagg. Cons. 414.

See 34 Cent. Dig. tit. "Marriage," § 25.

Evidence held sufficient to show mental incapacity see Pyott *v.* Pyott, 191 Ill. 280, 61 N. E. 88 [*affirming* 90 Ill. App. 210] (senile dementia); Chapline *v.* Stone, 77 Mo. App. 523; Jaques *v.* Public Administrator, 1 Bradf. Surr. (N. Y.) 499 (delirium attendant upon illness).

Evidence held insufficient to show mental incapacity.— Buchanan *v.* Buchanan, 103 Ga. 90, 29 S. E. 608 (holding fact of self-destruction upon day after ceremony insufficient); Durham *v.* Durham, 10 P. D. 80.

96. Rawdon *v.* Rawdon, 28 Ala. 565; Browning *v.* Reane, 2 Phillim. 69. See Forman *v.* Forman, 53 N. Y. St. 639.

Burden of proof.— Where the existence of lunacy is once established the burden is on the opposite party to show that the contract was entered into during a lucid interval. Rawdon *v.* Rawdon, 28 Ala. 565; Browning *v.* Reane, 2 Phillim. 69.

Operation and effect of marriage void for mental incapacity see *infra*, V, A, 2.

Ratification of marriage void for mental incapacity see *infra*, V, B, 3.

Mental incapacity as ground for annulment see *infra*, VIII, B, 3.

97. *Alabama.*— Rawdon *v.* Rawdon, 28 Ala. 565.

Mississippi.—Ward *v.* Dulaney, 23 Miss. 410.

Pennsylvania.— Nonnemacher *v.* Nonnemacher, 159 Pa. St. 634, 28 Atl. 439.

South Carolina.— Foster *v.* Means, Speers Eq. 569, 42 Am. Dec. 332.

Tennessee.— Cole *v.* Cole, 5 Sneed 57, 70 Am. Dec. 275.

But see Hancock *v.* Peaty, L. R. 1 P. & D. 335, 36 L. J. P. & M. 57, 16 L. T. Rep. N. S. 182, 15 Wkly. Rep. 719, where it was said that where the proof shows a diseased mind the court has no means of gauging the extent of the derangement consequent upon that disease.

Deaf and dumb persons may marry. Harrod *v.* Harrod, 18 Jur. 853, 1 Kay & J. 4, 2 Wkly. Rep. 612, 69 Eng. Reprint 344.

98. Ward *v.* Dulaney, 23 Miss. 410.

99. Anonymous, 4 Pick. (Mass.) 32.

1. Harrod *v.* Harrod, 18 Jur. 853, 1 Kay & J. 4, 2 Wkly. Rep. 612, 69 Eng. Reprint 344, holding that fraud must be shown.

2. Lewis *v.* Lewis, 44 Minn. 124, 46 N. W. 323, 20 Am. St. Rep. 559, 9 L. R. A. 505, kleptomania.

3. Atkinson *v.* Medford, 46 Me. 510 (holding that the same degree of mind which will

the better test would appear to be the ability to understand the nature of a contract of this particular nature and the duties and obligations which it entails.[4] Intoxication to such an extent as for the time to deprive the party of reason avoids the marriage,[5] as does insanity from delirium tremens[6] unless the marriage takes place in a lucid interval.[7] A prior judgment of lunacy is not conclusive as to insanity at the time of marriage,[8] and the same rule applies to a retrospective finding, including the date of the marriage.[9]

C. Physical Capacity. Marriages of persons subject to corporal infirmities which were classed by the earlier writers as canonical disabilities,[10] such as impotency,[11] are voidable merely and not void,[12] unless made void by statutory

enable a party to make a valid will or deed will be sufficient to enable him to contract matrimony); Middleborough *v.* Rochester, 12 Mass. 363 (holding that one not having sufficient understanding to be able to make a valid contract respecting property, or to deal with discretion in the common affairs of life, is incompetent to contract matrimony); Aldrich *v.* Steen, (Nebr. 1904) 98 N. W. 445, 100 N. W. 311 (holding mental weakness or even unsoundness not amounting to inability to contract in ordinary affairs will not alone avoid a marriage); Kern *v.* Kern, 51 N. J. Eq. 574, 26 Atl. 837 (holding that no greater, if as much, mental capacity is requisite to make binding a matrimonial, than is required for ordinary business contracts or a valid testamentary disposition). But see *Ex p.* Glen, 4 Desauss. Eq. (S. C.) 546, holding that mental imbecility may be sufficient to incapacitate a person for binding his estate, without rendering him incapable of contracting marriage.

4. *Delaware.*— Elzey *v.* Elzey, 1 Houst. 308, 319, where it is said: "It would be dangerous, perhaps, as well as difficult, to prescribe the precise degree of mental vigor, soundness and capacity essential to the validity of such an engagement, which, after all, in many cases depends more on sentiments of mutual esteem, attachment, and affection, which the weakest may feel as well as the strongest intellects, than on the exercise of a clear, unclouded reason, or sound judgment, or intelligent discernment and discrimination, and in which it differs in a very important respect from all other civil contracts."

Maine.— St. George *v.* Biddeford, 76 Me. 593.

Minnesota.— Lewis *v.* Lewis, 44 Minn. 124, 46 N. W. 323, 20 Am. St. Rep. 559, 9 L. R. A. 505.

Mississippi.—Ward *v.* Dulaney, 23 Miss. 410.

New Hampshire.— Concord *v.* Rumney, 45 N. H. 423; True *v.* Ranney, 21 N. H. 52, 53 Am. Dec. 164.

New Jersey.— Kern *v.* Kern, 51 N. J. Eq. 574, 26 Atl. 837.

New York.— Doe *v.* Roe, 1 Edm. Sel. Cas. 344.

Pennsylvania.— Nonnemacher *v.* Nonnemacher, 159 Pa. St. 634, 28 Atl. 439.

England.— Cannon *v.* Smalley, 10 P. D. 96 (holding evidence insufficient); Hunter *v.* Edney, 10 P. D. 93 (adding that the party must be free from morbid delusions); Durham *v.* Durham, 10 P. D. 80.

There ought to be enough of capacity to comprehend the subject and the duties and responsibilities of the new relation. Smith *v.* Smith, 47 Miss. 211.

5. Prine *v.* Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87 (holding that the person must be so much intoxicated as not to know what he is doing); Gillett *v.* Gillett, 78 Mich. 184, 43 N. W. 1101; Roblin *v.* Roblin, 28 Grant Ch. (U. C.) 439. *Compare* Elzey *v.* Elzey, 1 Houst. (Del.) 308; Barber *v.* People, 203 Ill. 543, 68 N. E. 93.

Intoxication as ground for annulment see *infra*, VIII, B, 4.

6. Jaques *v.* Public Administrator, 1 Bradf. Surr. (N. Y.) 499; Clement *v.* Mattison, 3 Rich. (S. C.) 93.

7. Scott *v.* Paquet, 4 L. C. Jur. 149 [*confirmed* in 11 L. C. J. 289].

8. Payne *v.* Burdette, 84 Mo. App. 332 (holding that marriage is a civil contract, but does not come within the purview of Rev. St. (1889) § 5542, making the contract of an insane person void, since it is a contract peculiarly individual and personal, and incapable of being made by a representative); Keys *v.* Norris, 6 Rich. Eq. (S. C.) 388 (holding that the inquisition of lunacy was only *prima facie* evidence of mental incapacity). And see McCleary *v.* Barcalow, 6 Ohio Cir. Ct. 481, 4 Ohio Cir. Dec. 547, holding that an adjudication that a person is incapable of taking care of himself or his property by reason of intemperance or habitual drunkenness, and the appointment of a guardian for his person and property, is only *prima facie* evidence that the ward is not competent, for want of mental capacity, to enter into a legal marriage.

Operation and effect of adjudication of insanity in general see INSANE PERSONS, 22 Cyc. 1133.

9. Banker *v.* Banker, 63 N. Y. 409, holding that the finding is only presumptive evidence of incapacity at the time of marriage.

10. See 1 Blackstone Comm. 434.

11. G. *v.* G., 67 N. J. Eq. 30, 56 Atl. 736; Anonymous, 24 N. J. Eq. 19; Smith *v.* Morehead, 59 N. C. 360.

12. Smith *v.* Morehead, 59 N. C. 360; A. *v.* A., L. R. 19 Ir. 403; Elliott *v.* Gun, 2 Phillim. 16.

Ratification of marriage voidable for physical incapacity see *infra*, V, B, 4.

provision.[13] The marriage of a woman who is incapable of bearing children, although capable of sexual intercourse, is not void.[14]

D. Consanguinity or Affinity. In the United States marriages in the direct lineal line of consanguinity are unlawful by the law of the land and in the absence of statute,[15] and the same is true of marriages between brother and sister;[16] but in other cases, in the absence of express prohibition in the statute, a marriage is not void for consanguinity,[17] there being no merely canonical disabilities in the United States.[18] By statute in the various states the degrees of affinity and consanguinity within which a valid marriage may be contracted have been expressly defined.[19] In England all marriages within the Levitical degrees[20] of consanguinity and affinity are by statute made void.[21] In the United States relationship by affinity is held to cease with the dissolution of the marriage which created it,[22] and a man may therefore on the death of his wife marry her sister.[23] In England, however, such marriages are prohibited by statute.[24] The rules

Physical disease or incapacity as ground for annulment see *infra*, VIII, B, 2.

13. G. *v.* G., 67 N. J. Eq. 30, 56 Atl. 736.

14. Wendel *v.* Wendel, 30 N. Y. App. Div. 447, 52 N. Y. Suppl. 72 [*reversing* 22 Misc. 152, 49 N. Y. Suppl. 375], holding that there is in this respect no essential difference between a woman who through no fault of her own has lost her ovaries through a surgical operation and one who has suffered the same result through the operation of nature.

15. Wightman *v.* Wightman, 4 Johns. Ch. (N. Y.) 343.

16. Wightman *v.* Wightman, 4 Johns. Ch. (N. Y.) 343.

17. Sutton *v.* Warren, 10 Metc. (Mass.) 451; Wightman *v.* Wightman, 4 Johns. Ch. (N. Y.) 343. And see Bowers *v.* Bowers, 10 Rich. Eq. (S. C.) 551, 73 Am. Dec. 99, holding in the case of a marriage between uncle and niece that, in the absence of statute, a court of equity will not interfere with regard to incapacity with respect to proximity of relationship.

Uncle and niece may marry in the absence of statutory prohibition. *In re* Williams, 2 N. Y. City Ct. 143. And see Bowers *v.* Bowers, 10 Rich. Eq. (S. C.) 551, 73 Am. Dec. 99.

Aunt and nephew may marry in the absence of statutory prohibition. State *v.* Barefoot, 2 Rich. (S. C.) 209.

First cousins may marry in the absence of statutory prohibition. *In re* Hampe, 2 N. Y. City Ct. 401.

18. Walter's Appeal, 70 Pa. St. 392; Bowers *v.* Bowers, 10 Rich. Eq. (S. C.) 551, 73 Am. Dec. 99.

Canonical disabilities affecting the validity of the marriage relation were those which depended on the law of the church and were enforced in the ecclesiastical court. Walter's Appeal, 70 Pa. St. 392.

19. See the statutes of the several states.

Operation and effect of marriage voidable for consanguinity see *infra*, V, A, 3.

Consanguinity or affinity as ground for annulment see *infra*, VIII, B, 10.

20. Leviticus, c. xviii.

21. St. 5 & 6 Wm. IV, c. 54, § 2, makes all marriages between persons within the prohibited degrees of consanguinity or affinity null and void. These degrees are those declared by 28 Hen. VIII, c. 7, § 11, to be prohibited by law, and those in turn are those contained in 25 Hen. VIII, c. 22, which provided that a man might not marry his mother or stepmother, his sister, his son's or daughter's daughter, his father's daughter by his stepmother, his aunt, his uncle's wife, his son's wife, his brother's wife, his wife's daughter, his wife's son's daughter, his wife's daughter's daughter, or his wife's sister. See Reg. *v.* Chadwick, 11 Q. B. 173, 12 Jur. 174, 17 L. J. M. C. 33, 63 E. C. L. 173. This statute which deals with capacity applies to all persons. The exception in favor of Quakers and Jews in the marriage acts of 1836 and 1840, and subsequent acts, relates only to the formalities of marriage. Where therefore a Jew and his niece, both British subjects domiciled in England, went through, in 1876, at Wiesbaden, the form of civil marriage and afterward of marriage according to the custom of the Jews, and subsequently, the niece having in the meantime been admitted a Jewess in Paris, they there went through the form of marriage according to the Jewish custom, such marriage being valid according to law in force at Wiesbaden and the Jewish law, it was held that the marriage was not valid according to the law of England. De Wilton *v.* Montefiore, [1900] 2 Ch. 481, 69 L. J. Ch. 717, 83 L. T. Rep. N. S. 70, 48 Wkly. Rep. 645.

22. Blodget *v.* Brinsmaid, 9 Vt. 27.

23. Blodget *v.* Brinsmaid, 9 Vt. 27. But see Com. *v.* Perryman, 2 Leigh (Va.) 717, holding that a statute forbidding the marriage of a brother's wife prohibits the marriage of his widow.

24. Reg. *v.* Chadwick, 11 Q. B. 173, 12 Jur. 174, 17 L. J. M. C. 33, 63 E. C. L. 173; Brook *v.* Brook, 9 H. L. Cas. 193, 7 Jur. N. S. 422, 4 L. T. Rep. N. S. 93, 9 Wkly. Rep. 461, 11 Eng. Reprint 703 [*affirming* 27 L. J. Ch. 401, 3 Smale & G. 481, 65 Eng. Reprint 746]. See also Fenton *v.* Livingstone, 5 Jur. N. S. 1183, 3 Macq. H. L. 497, 7 Wkly. Rep. 671 (holding a person born of an English marriage with a deceased wife's sister is not legitimate in Scotland as to the succession to real estate); Mette *v.* Mette, 28 L. J.

against consanguinity are applicable to persons of illegitimate birth.[25] Sexual intercourse without marriage will not create affinity.[26] At common law the canonical impediments of consanguinity and affinity rendered a marriage voidable merely,[27] and the same is true where such marriages subject to such impediments are merely prohibited by the statute;[28] and in some jurisdictions statutes declaring such marriages void have been construed as meaning voidable only.[29] But a statute which expressly provides that marriages within prohibited degrees shall be absolutely void, without any decree of divorce or other legal process, renders a marriage contrary to its provisions void;[30] and the same effect has been given a statute making such a marriage a felony.[31]

E. Race or Color. In the absence of statutory prohibition a white person and a negro may contract a valid marriage,[32] as may a white and an Indian,[33] or free person of color,[34] or free persons of color and persons of mixed blood.[35] By statute, however, marriage between white persons and negroes[36] or between white

P. & M. 117, 1 Swab. & Tr. 416, 7 Wkly. Rep. 543; Harris *v.* Hicks, 2 Salk. 548; Hill *v.* Good, Vaugh. 302.

With daughter of wife's half sister.— The marriage of a man with a daughter of the half sister of his deceased wife is null and void by 5 & 6 Wm. IV, c. 54. Reg. *v.* Brighton, 1 B. & S. 447, 30 L. J. M. C. 197, 5 L. T. Rep. N. S. 56, 9 Wkly. Rep. 831, 101 E. C. L. 447.

In Canada.— By the English law as adopted in 1792, marriage with a deceased wife's sister was not *ipso facto* void, but was esteemed valid for all civil purposes, unless annulled during the lifetime of the parties. Such was the law until 45 Vict. c. 42 (D), which removed all disabilities. *Re* Murray Canal, 6 Ont. 685. See also Kidd *v.* Harris, 22 Can. L. T. Dec. Notes 25, 3 Ont. L. Rep. 60; Hodgins *v.* McNeil, 9 Grant Ch. (U. C.) 305.

25. Morgan *v.* State, 11 Ala. 289 (illegitimate daughter); Reg. *v.* Brighton, 1 B. & S. 447, 30 L. J. M. C. 197, 5 L. T. Rep. N. S. 56, 9 Wkly. Rep. 831, 101 E. C. L. 447 (deceased wife's sister); Hains *v.* Jeffell, Comb. 356, 1 Ld. Raym. 68, 5 Mod. 168.

26. Wing *v.* Taylor, 7 Jur. N. S. 737, 30 L. J. M. C. 258, 4 L. T. Rep. N. S. 583, 2 Swab. & Tr. 278, holding, where a man petitioned for a decree of nullity of marriage, on the ground that he had had intercourse with his wife's mother before the fact of marriage with his alleged wife, that affinity could not be so constituted by the law of England, and that 28 Hen. VIII, c. 7, had been repealed and not revived by any subsequent statute.

27. Bonham *v.* Badgley, 7 Ill. 622 (holding, under Laws (1819), c. 26, § 1, permitting marriages "not prohibited by the laws of God," a marriage by a man with the daughter of his sister was voidable during the life of the parties, but could not be questioned after the death of either); Sutton *v.* Warren, 10 Metc. (Mass.) 451; Hayes *v.* Rollins, 68 N. H. 191, 44 Atl. 176; Reg. *v.* Wye, 7 A. & E. 761, 7 L. J. M. C. 18, 3 N. & P. 6, 34 E. C. L. 399 (so holding prior to the statute of 6 Wm. IV, c. 54).

28. Boylan *v.* Deinzer, 45 N. J. Eq. 485, 18 Atl. 119.

29. Harrison *v.* State, 22 Md. 468, 85 Am. Dec. 658, construing Acts (1777), c. 12.

30. Blaisdell *v.* Bickum, 139 Mass. 250, 1 N. E. 281 (construing N. H. Gen. St. (1867) c. 161, as amended by N. H. St. (1869) c. 9, § 1); Hayes *v.* Rollins, 68 N. H. 191, 44 Atl. 176 (holding that the surviving party to such a marriage has no rights by reason thereof in the property of the other).

31. McIlvain *v.* Scheibley, 109 Ky. 455, 59 S. W. 498, 22 Ky. L. Rep. 942, holding that such a marriage did not entitle the wife to dower.

32. Hart *v.* Hoss, 26 La. Ann. 90, giving such effect to the Civil Rights Bill.

33. Wells *v.* Thompson, 13 Ala. 793, 48 Am. Dec. 76. And see Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315; Follansbee *v.* Wilbur, 14 Wash. 242, 44 Pac. 262.

34. Frank *v.* Denham, 5 Litt. (Ky.) 330; Fortier's Succession, 51 La. Ann. 1562, 26 So. 554.

35. Fortier's Succession, 51 La. Ann. 1562, 26 So. 554.

36. See the statutes of the several states. And see the following cases:

Alabama.— Locklayer *v.* Locklayer, 139 Ala. 354, 35 So. 1008.

Georgia.— Scott *v.* State, 39 Ga. 321.

Indiana.— State *v.* Gibson, 36 Ind. 389, 10 Am. Rep. 42.

Louisiana.— Minvielle's Succession, 15 La. Ann. 342.

North Carolina.— State *v.* Reinhardt, 63 N. C. 547; State *v.* Hairston, 63 N. C. 451 (holding that such a statute was not affected by the Civil Rights Bill or the adoption of a new state constitution which provided for the continuance in force of all laws of the state not repugnant to the state constitution or to the constitution and laws of the United States); State *v.* Hooper, 27 N. C. 201; State *v.* Fore, 23 N. C. 378.

Tennessee.—Carter *v.* Montgomery, 2 Tenn. Ch. 216.

Texas.— Oldham *v.* McIver, 49 Tex. 556.

See 34 Cent. Dig. tit. "Marriage," § 26.

Infringement of civil rights by such statutes see CIVIL RIGHTS, 7 Cyc. 173, text and note 63. And see cases cited *supra*, page 8, note 10.

persons and Indians[37] is prohibited in many of the states. The effect of these statutes is to render a marriage contrary to their provisions void *ab initio*.[38] Either party may disregard it,[39] and neither can derive from it any of the advantages of a lawful marriage,[40] nor can the offspring of the union.[41] Such statutes are not, however, retroactive.[42]

F. Slaves. While the institution of slavery existed it was generally held in the slaveholding states that the marriage of slaves was utterly null and void because of the paramount ownership in them as property, their incapacity to make a contract and the incompatibility of the duties and obligations of husband and wife with the relation of slavery,[43] and this was the doctrine of the civil law,[44] although there was a permitted cohabitation called *contubernium* which brought with it no civil rights.[45] The marriage of a fugitive slave in a non-slaveholding state, however, was not to be questioned as long as actual freedom was main-

Deprivation of equal protection of laws by such statutes see CONSTITUTIONAL LAW, 8 Cyc. 1074.

Miscegenation as an offense see MISCEGENATION.

Who are white persons.— A person having but one-sixteenth of Indian blood is a white person and his marriage with a mulatto is within a statute prohibiting the marriage of a white person with any negro, Indian, or mulatto. Bailey *v.* Fiske, 34 Me. 77.

Who are negroes.— A woman who has less than one-fourth negro blood is not a negro. McPherson *v.* Com., 28 Gratt. (Va.) 939.

Who are mulattoes.— A mulatto is a person begotten between a white and a black, and the issue of a mulatto and a white person is not within a statute declaring the marriage of a white person with a mulatto null and void. Medway *v.* Natick, 7 Mass. 88.

A common-law marriage between a white person and a negro is prohibited by such statutes. Keen *v.* Keen, 184 Mo. 358, 83 S. W. 526. But see Dickerson *v.* Brown, 49 Miss. 357, holding that where a white man and a colored woman lived together as husband and wife, desiring marriage, but were unable to be married, because the intermarriage of these races was prohibited by law, their union was consummated by Const. (1869) art. 12, § 22, legalizing the relation between persons who, although not married, were living together as husband and wife at the time of its adoption.

37. See the statutes of the several states. And see *In re* Walker, (Ariz. 1896) 46 Pac. 67; Follansbee *v.* Wilbur, 14 Wash. 242, 44 Pac. 262; Wilbur *v.* Bingham, 8 Wash. 35, 35 Pac. 407, 40 Am. St. Rep. 886.

38. Minvielle's Succession, 15 La. Ann. 342; Carter *v.* Montgomery, 2 Tenn. Ch. 216.

39. Minvielle's Succession, 15 La. Ann. 342.

40. Minvielle's Succession, 15 La. Ann. 342; Oldham *v.* Melver, 49 Tex. 556, holding that a black woman is not entitled to claim a homestead as the widow of a white decedent.

41. *In re* Walker, (Ariz. 1896) 46 Pac. 67, holding that Comp. Lawa (1877), c. 30, § 3, declaring marriages between white persons and Indians illegal and void, renders void a marriage between a white man and an Indian woman, contracted on an Indian reservation within the territory, in accordance with the law of the tribe of which the woman was a member, although followed by cohabitation on the reservation; hence a child of the union has no right of heirship from the father.

42. Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315.

43. *Alabama.*—Malinda *v.* Gardner, 24 Ala. 719; Smith *v.* State, 9 Ala. 990.

District of Columbia.— Brown *v.* Beckett, 6 D. C. 253.

Florida.— Adams *v.* Sneed, 41 Fla. 151, 25 So. 893.

Kentucky.— Ewing *v.* Bibb, 7 Bush 654; Stewart *v.* Munchandler, 2 Bush 278; Estill *v.* Rogers, 1 Bush 62.

Massachusetts.— Irving *v.* Ford, 179 Mass. 216, 60 N. E. 491.

Missouri.— Johnson *v.* Johnson, 45 Mo. 595.

New York.— See Marbletown *v.* Kingston, 20 Johns. 1. But *compare* Minor *v.* Jones, 2 Redf. Surr. 289.

North Carolina.— Howard *v.* Howard, 51 N. C. 235; State *v.* Samuel, 19 N. C. 177.

Ohio.— McDowell *v.* Sapp, 39 Ohio St. 558.

Texas.— Timmins *v.* Lacy, 30 Tex. 115; McKnight *v.* State, 6 Tex. App. 158.

Virginia.— Scott *v.* Raub, 88 Va. 721, 14 S. E. 178.

United States.— See Hall *v.* U. S., 92 U. S. 27, 23 L. ed. 597.

See 34 Cent. Dig. tit. "Marriage," §§ 7, 27.

Contra.—See Downs *v.* Allen, 10 Lea (Tenn.) 652; Andrews *v.* Page, 3 Heisk. (Tenn.) 653, holding that a marriage between slaves with the assent of their owners, whether common law or ceremonial, was valid, although such marriages were not followed by all the legal consequences resulting from the marriage of white persons.

44. See Malinda *v.* Gardner, 24 Ala. 719 [*citing* Cooper Just. 411, 420; Pufendorf bk. 2, c. 7, § 11; Taylor Com. L. 429].

45. Malinda *v.* Gardner, 24 Ala. 719; Harris *v.* Cooper, 31 U. C. Q. B. 182. See Ross *v.* Ross, 34 La. Ann. 860; Girod *v.* Lewis, 6 Mart. (La.) 559.

tained.[46] Slave marriages while recognized and encouraged in the slaveholding states gave rise to no civil rights,[47] and were not binding if repudiated on emancipation;[48] but they were rendered valid and binding by cohabitation,[49] or by the acceptance by the parties of each other as man and wife, after emancipation.[50]

G. Persons Already Married. The marriage of a man or woman, where one of them has a husband or wife, by a prior valid marriage, who is then living and undivorced, is void and not merely voidable,[51] whether it is meretricious or

46. Irving *v.* Ford, 179 Mass. 216, 60 N. E. 491 (holding that where, prior to the abolition of slavery, a slave ran away to a state wherein the institution of slavery did not exist and was there married, and his marriage status was continued after the abolition of slavery, such marriage would not be thereafter disturbed); McDowell *v.* Sapp, 39 Ohio St. 558; Harris *v.* Cooper, 31 U. C. Q. B. 182. And see Price *v.* Slaughter, 1 Cinc. Super. Ct. (Ohio) 429; Slave Grace, 2 Hagg. Adm. 94.

47. Lewis *v.* King, 180 Ill. 259, 54 N. E. 330; Butler *v.* Butler, 161 Ill. 451, 44 N. E. 203; Jones *v.* Jones, 36 Md. 447.

48. Williams *v.* Kimball, 35 Fla. 49, 16 So. 783, 48 Am. St. Rep. 238, 26 L. R. A. 746; Lewis *v.* King, 180 Ill. 259, 54 N. E. 330; Butler *v.* Butler, 161 Ill. 451, 44 N. E. 203; Johnson *v.* Johnson, 45 Mo. 595. But *compare* Pearce's Succession, 30 La. Ann. 1168; Pierre *v.* Fontenette, 25 La. Ann. 617; Girod *v.* Lewis, 6 Mart. (La.) 559.

49. *Georgia.*— Kirk *v.* State, 65 Ga. 159.

Illinois.— Butler *v.* Butler, 161 Ill. 451, 44 N. E. 203.

Kentucky.— Ewing *v.* Bibb, 7 Bush 654.

Louisiana.— Sterrett *v.* Samuel, 108 La. 346, 32 So. 428; Ross *v.* Ross, 34 La. Ann. 860 (holding that the marriage when ratified by continued cohabitation of the parties, after the emancipation of both, produces all civil effects *ab initio*, including the community of acquets and gains); Girod *v.* Lewis, 6 Mart. 559.

Maryland.— Jones *v.* Jones, 36 Md. 447, holding that where a slave, married to a free woman, subsequently became free, and the parties lived together as man and wife long after the emancipation and up to the time of his wife's death, the marriage was valid.

Massachusetts.— Irving *v.* Ford, 179 Mass. 216, 60 N. E. 491.

Missouri.— Johnson *v.* Johnson, 45 Mo. 595.

Tennessee.— McReynolds *v.* State, 5 Coldw. 18.

Texas.—Waff *v.* Sessums, 28 Tex. Civ. App. 183, 66 S. W. 865; Wood *v.* Cole, 25 Tex. Civ. App. 378, 60 S. W. 992; Coleman *v.* Vollmer, (Civ. App. 1895) 31 S. W. 413; Cumby *v.* Henderson, 6 Tex. Civ. App. 519, 25 S. W. 673.

Virginia.— Scott *v.* Rauh, 88 Va. 721, 14 S. E. 178.

Contra.— See Brown *v.* Beckett, 6 D. C. 253; Howard *v.* Howard, 51 N. C. 235.

Statutes validating slave marriage see *infra*, V, D, 2.

50. Lewis *v.* King, 180 Ill. 259, 54 N. E. 330. See also cases cited in preceding note.

51. *Hawaii.*— Maka *v.* Ah Fai, 3 Hawaii 631.

Illinois.— Cartwright *v.* McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105; Reeves *v.* Reeves, 54 Ill. 332.

Indiana.— Tefft *v.* Tefft, 35 Ind. 44; Janes *v.* Janes, 5 Blackf. 141.

Iowa.— Drummond *v.* Irish, 52 Iowa 41, 2 N. W. 622.

Louisiana.— See Taylor's Succession, 39 La. Ann. 823, 2 So. 581.

Massachusetts.— Randlett *v.* Rice, 141 Mass. 385, 6 N. E. 238.

New Hampshire.— Webster *v.* Webster, 58 N. H. 3.

New Jersey.—*In re* Graham, (Ch. 1899) 46 Atl. 224, holding that a woman who had so married the second time and had separated from her husband could not apply, as a married woman living separate from her husband, for an order authorizing her to execute a conveyance alone.

New York.— Blossom *v.* Barrett, 37 N. Y. 434, 97 Am. Dec. 747; Appleton *v.* Warner, 51 Barb. 270; Gall *v.* Gall, 12 N. Y. St. 604.

Ohio.— State *v.* Moore, 1 Ohio Dec. (Reprint) 171, 3 West. L. J. 134.

Pennsylvania.— Clark's Estate, 173 Pa. St. 451, 34 Atl. 68; Grieve's Estate, 165 Pa. St. 126, 30 Atl. 727; Heffner *v.* Heffner, 23 Pa. St. 104; Rumpff *v.* Vichestein, 3 Pittsb. 148.

Tennessee.— Sellars *v.* Davis, 4 Yerg. 503.

Utah.— Riddle *v.* Riddle, 26 Utah 268, 72 Pac. 1081.

England.— Pride *v.* Bath & Montague, 1 Salk. 120.

See 34 Cent. Dig. tit. "Marriage," § 30.

Operation and effect of marriage of persons already married see *infra*, V, A, 4.

Ratification of marriage between persons bound by existing marriage see *infra*, V, B, 5.

Prior existing marriage as ground for annulment see *infra*, VIII, B, 6.

A second marriage after death of former spouse is valid. Sneathen *v.* Sneathen, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326, so holding where a woman married believing her former husband to be dead, but on learning that he was alive commenced divorce proceedings which she discontinued on reliable information of his death, and then remarried her second husband.

An existing common-law marriage is sufficient to defeat a subsequent ceremonial marriage. Archer *v.* Haithcock, 51 N. C. 421. Although it has been held that evidence of cohabitation and repute in another state is

founded in mistake,[52] or although the facts are sufficient to raise a presumption of the death of the former spouse,[53] and although the offending party will be protected from criminal prosecution.[54] It has been held, however, in at least one jurisdiction that such a marriage is merely voidable.[55] As between the parties to the second marriage the presumption of innocence will prevail over that of the continued existence of the first husband or wife.[56] Statutes in some jurisdictions provide that where a marriage is contracted before the dissolution of a prior existing marriage it is not void; but valid until annulled, where the former husband or wife has been absent and not known to be living for a specified period,[57] or where he is generally reputed or so believed by the other to be dead.[58] Under such statutes it is held that a party seeking their benefits must have acted in good faith,[59] and the absentee must have absented himself voluntarily.[60] Such statutes do not

not sufficient to establish a prior marriage to annul a marriage properly solemnized within the state. Smith *v.* Smith, 1 Tex. 621, 46 Am. Dec. 121.

After a decree of absolute divorce either party may remarry unless a statute provides to the contrary. See DIVORCE, 14 Cyc. 729. But the decree must have been valid. McCreery *v.* Davis, 44 S. C. 195, 22 S. E. 178, 51 Am. St. Rep. 794, 28 L. R. A. 655.

After a decree of limited divorce, where a woman marries, a judgment *vinculo matrimonii* never having been decreed, she is not entitled to the rights of a wife in a last will and testament. Carmena *v.* Blaney, 16 La. Ann. 245.

Effect of void foreign divorce see DIVORCE, 14 Cyc. 816.

Remarriage before decree absolute see DIVORCE, 14 Cyc. 712 note 96.

A slave marriage which has become legalized by statute is sufficient to defeat a subsequent common-law marriage (Lee *v.* Bolden, (Tex. Civ. App. 1905) 85 S. W. 1027), but mere cohabitation between slaves, there having been no slave marriage, will not invalidate a subsequent marriage of the slaves (Washington *v.* McCombs, 32 S. W. 398, 17 Ky. L. Rep. 740). In a state where slave marriages were regarded as valid, a separation by a married couple, without the consent of their master, was not such a dissolution of the marriage as would make such separated parties competent to contract a second marriage. Brown *v.* Cheatham, 91 Tenn. 97, 17 S. W. 1033.

Bond for license.— A condition in a bond entered into as precedent to the obtaining of a license to marry a minor "that there is no lawful cause to obstruct the marriage," is broken by the existence of a previous valid marriage. Governor *v.* Rector, 10 Humphr. (Tenn.) 57.

52. Martin *v.* Martin, 22 Ala. 86; Wilson *v.* Allen, 108 Ga. 275, 33 S. E. 975.

53. Glass *v.* Glass, 114 Mass. 563; Pain *v.* Pain, 37 Mo. App. 110; Williamson *v.* Parisien, 1 Johns. Ch. (N. Y.) 389; Thomas *v.* Thomas, 124 Pa. St. 646, 17 Atl. 182; Kenley *v.* Kenley, 2 Yeates (Pa.) 207. But *compare* Yates *v.* Houston, 3 Tex. 433; Rhea *v.* Rhenner, 1 Pet. (U. S.) 105, 7 L. ed. 72. *Contra*, Woods *v.* Woods, 2 Bay (S. C.) 476; Canady *v.* George, 6 Rich. Eq. (S. C.) 103.

54. Pain *v.* Pain, 37 Mo. App. 110; Fenton *v.* Reed, 4 Johns. (N. Y.) 52, 4 Am. Dec. 244; Williamson *v.* Parisien, 1 Johns. Ch. (N. Y.) 389.

Knowledge of continuance of prior marriage as essential to bigamy see BIGAMY, 5 Cyc. 689.

55. Eubanks *v.* Banks, 34 Ga. 407.

56. Stein *v.* Stein, 66 Ill. App. 526. See *infra*, VI, A, 4.

57. See the statutes of the several states. And see *In re* Harrington, 140 Cal. 294, 74 Pac. 136; *In re* Harrington, 140 Cal. 244, 73 Pac. 1000, 98 Am. St. Rep. 51; Strode *v.* Strode, 3 Bush. (Ky.) 227, 96 Am. Dec. 211; Hiram *v.* Pierce, 45 Me. 367, 71 Am. Dec. 555; Taylor *v.* Taylor, 63 N. Y. App. Div. 231, 71 N. Y. Suppl. 411; Jones *v.* Zoller, 29 Hun (N. Y.) 551; Cropsey *v.* McKinney, 30 Barb. (N. Y.) 47 (holding that a second marriage could not be declared void in collateral proceedings instituted by creditors after the death of the first husband); Griffin *v.* Banks, 24 How. Pr. (N. Y.) 213; White *v.* Lowe, 1 Redf. Surr. (N. Y.) 376.

Remarriage of divorced person.— Such a statute does not apply to the marriage of a person divorced and forbidden to remarry. *In re* Borrowdale, 28 Hun (N. Y.) 336; Matter of Tabor, 31 Misc. (N. Y.) 579, 65 N. Y. Suppl. 571.

58. See the statutes of the several states. And see *In re* Harrington, 140 Cal. 294, 74 Pac. 136. *In re* Harrington, 140 Cal. 344, 73 Pac. 1000, 98 Am. St. Rep. 51.

59. Gall *v.* Gall, 114 N. Y. 109, 21 N. E. 106 (holding that he must use all such means to obtain information with respect to the absent spouse as reasonable persons would exercise under the circumstances); Circus *v.* I. O. A. I., 55 N. Y. App. Div. 534, 67 N. Y. Suppl. 342; Tyler *v.* Tyler, 80 Hun (N. Y.) 406, 30 N. Y. Suppl. 330; Jones *v.* Zoller, 29 Hun (N. Y.) 551 (holding that a second marriage was not invalid because the first husband of the woman contracting it remains, during his absence, in the same general locality where she knew him at first to be); Kinzey *v.* Kinzey, 7 Daly (N. Y.) 460; Alixanian *v.* Alixanian, 28 Misc. (N. Y.) 638, 59 N. Y. Suppl. 1068; Wyles *v.* Gibbs, 1 Redf. Surr. (N. Y.) 382.

60. Alixanian *v.* Alixanian, 28 Misc. (N.Y.) 638, 59 N. Y. Suppl. 1068, holding that there

apply where the party remarrying has deserted his former spouse,[61] although it has been held that, where a wife had abandoned her husband and he afterward left the country, she was absent from him within the meaning of the statute and that he might remarry after the lapse of the specified time.[62] Under other statutes it is provided that the marriage cannot be attacked after death of one of the parties, where it has been followed by cohabitation and the birth of issue.[63] Where it is provided that such marriages shall be valid until annulled, a judicial annulment is necessary to terminate their validity, and a mere separation of the parties is not sufficient.[64] It has been held that these statutes do not make a second marriage valid for any purpose concerning property other than that of preserving the inheritance of the offspring thereof from the competent parent.[65]

III. LICENSES AND PUBLICATION OF BANNS.

A. Necessity of License. Unless required by statute the procuring of a license is not a prerequisite to marriage,[66] but statutes in the various jurisdictions commonly require a license to be obtained.[67] The general rule, however, in those states in which a license is required is that a marriage celebrated without a license is valid,[68] unless the statute expressly provides that the marriage shall be

was no presumption of death where a husband was sent to the penitentiary for an assault upon his wife, and she did not see him thereafter for five years, whereupon she married.

61. *In re* Richards, 133 Cal. 524, 65 Pac. 1034; Machini *v.* Zanoni, 5 Redf. Surr. (N. Y.) 492. But see Jones *v.* Zoller, 32 Hun (N. Y.) 280, holding that where a man abandons his residence and keeps his wife in ignorance of his whereabouts, she having refused to live with him, her second marriage is void only from the time it so declared to be. *Contra*, White *v.* Lowe, 1 Redf. Surr. (N. Y.) 376.

62. Jackson *v.* Jackson, 94 Cal. 446, 29 Pac. 957.

63. See Ward *v.* Bailey, 118 N. C. 55, 23 S. E. 926, holding that under such a statute the marriage of a woman whose husband was in fact living, although she believed him dead and had not known him to be living within seven years, was void where there had been no issue born.

64. *In re* Harrington, 140 Cal. 294, 74 Pac. 136; *In re* Harrington, 140 Cal. 244, 73 Pac. 1000, 98 Am. St. Rep. 51.

65. Spicer *v.* Spicer, 16 Abb. Pr. N. S. (N. Y.) 112.

66. Hunter *v.* Milam, (Cal. 1895) 41 Pac. 332; Culling *v.* Culling, [1896] P. 116, 65 L. J. P. D. & Adm. 59, 74 L. T. Rep. N. S. 252 [*following* Reg. *v.* Mills, 10 Cl. & F. 534, 8 Jur. 717, 8 Eng. Reprint 844; Catherwood *v.* Caslon, C. & M. 431, 8 Jur. 1076, 13 L. J. Exch. 334, 13 M. & W. 261, 41 E. C. L. 237] (holding that a marriage solemnized in 1884, according to the rites and ceremonies, and by a duly ordained clergyman of the church of England, on board the queen's ship and in the presence of her captain while the ship was lying at or off a port within her majesty's dominion, was a valid marriage at common law, although there had been no publication of banns, nor any license for or previous public notification of such marriage); Latour *v.* Teesdale, 2 Marsh. 243, 8 Taunt. 830, 17 Rev. Rep. 518, 4 E. C. L. 402 (holding that a marriage between two protestant British subjects, solemnized by a Portuguese catholic priest at Madras according to the rites of the catholic church, followed by conabitation, but without the license of the governor, which it had been uniformly the custom to obtain, is a valid marriage).

67. See the statutes of the several states.

68. *Alabama.*— Farley *v.* Farley, 94 Ala. 501, 10 So. 646, 33 Am. St. Rep. 141, holding that a ceremony of marriage without license, performed by an unauthorized person, and imposed on a woman by false pretenses, but believed by her to be lawful and *bona fide*, is valid for all civil purposes, unless and until avoided by the deceived person. But see Hawkins *v.* Hawkins, 142 Ala. 571, 38 So. 640, 110 Am. St. Rep. 53; Ashley *v.* State, 109 Ala. 48, 19 So. 917, both holding that a formal solemnization under a void license is insufficient to constitute a statutory marriage.

Georgia.— Askew *v.* Dupree, 30 Ga. 173.

Indiana.— Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. 78.

Louisiana.— Sabalot *v.* Populus, 31 La. Ann. 854.

Mississippi.— Holland *v.* Beard, 59 Miss. 161, 42 Am. Rep. 360.

North Carolina.— State *v.* Parker, 106 N. C. 711, 11 S. E. 517; State *v.* Robbins, 28 N. C. 23, 44 Am. Dec. 64.

Texas.— Chapman *v.* Chapman, 11 Tex. Civ. App. 392, 32 S. W. 564.

Washington.— *In re* McLaughlin, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699.

Wyoming.— Connors *v.* Connors, 5 Wyo. 433, 40 Pac. 966.

United States.— Blackburn *v.* Crawford, 3 Wall. 175, 18 L. ed. 186.

Canada.— Thomson *v.* Thomson, 9 Quebec Super. Ct. 389.

See 34 Cent. Dig. tit. "Marriage," § 33; and *supra*, I, D, 4, a.

void,[69] although the persons officiating[70] or the parties may be punishable criminally. And the same rule applies where a license has issued from the wrong county.[71]

B. Issuance of License. A marriage license must be issued by the officer designated by the statute,[72] and the duty, although ministerial,[73] involves official and personal discretion and therefore is not susceptible of being delegated.[74] Under some statutes a record must be made by the officer of the license when issued.[75] So a bond may be required,[76] or both parties may be required to appear before the licensing officer and answer the prescribed interrogatories.[77] A statute conferring a special authority upon an officer must be fully complied with before he is authorized to act.[78] Where a license is improperly issued, neither

69. Askew *v.* Dupree, 30 Ga. 173; Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. 78; Dumaresly *v.* Fishly, 3 A. K. Marsh. (Ky.) 368; Holland *v.* Beard, 59 Miss. 161, 42 Am. Rep. 360. And see *supra*, I, D, 4, a.

Under 4 Geo. IV, c. 76, § 22, a marriage is valid, although celebrated without banns or license first had and obtained, unless both parties were aware at the time of the ceremony of the absence of banns and license. Greaves *v.* Greaves, L. R. 2 P. & D. 423, 41 L. J. P. M. 66, 26 L. T. Rep. N. S. 745, 20 Wkly. Rep. 802.

70. See *infra*, IV, E, 2.

71. Ely *v.* Gammel, 52 Ala. 584; Stevenson *v.* Gray, 17 B. Mon. (Ky.) 193; Gatewood *v.* Tunk, 3 Bibb (Ky.) 246.

72. Ashley *v.* State, 109 Ala. 48, 19 So. 917; Brewer *v.* Kingsberry, 69 Ga. 754; Mahon *v.* State, 46 Tex. Cr. 234, 79 S. W. 28, holding that the deputy county clerk possessed authority.

In England marriage licenses were originally issued solely by the pope of Rome, as head of the catholic church, until by the statute of 25 Hen. VIII, c. 21, it was provided that they should be issued by the archbishop of Canterbury under the supremacy of the king. Under the English Marriage Act the issue of special licenses still remained vested in the archbishop of Canterbury, although common licenses were to be issued by surrogates appointed for that purpose. The common license could not license persons to be married in any other place than the parish church where one of the parties belonged, and within certain hours of the day, while a special license issued by the archbishop of Canterbury could license persons to be married at any convenient time or place. See Delpit *v.* Cote, 20 Quebec Super. Ct. 338.

73. Ashley *v.* State, 109 Ala. 48, 19 So. 917; Cotten *v.* Rutledge, 33 Ala. 110.

74. Ashley *v.* State, 109 Ala. 48, 19 So. 917, holding that the power of a probate judge could not be delegated to one not the regularly appointed and qualified clerk of such officer. And see Cole *v.* Laws, 108 N. C. 185, 12 S. E. 985.

Issuance of a license in blank to a person not authorized to determine the rights of persons to be married is illegal. Hawkins *v.* Hawkins, 142 Ala. 571, 38 So. 640, 110 Am. St. Rep. 53; Brewer *v.* Kingsberry, 69 Ga. 754.

75. State *v.* Moore, 96 Mo. App. 431, 70 S. W. 512.

Penalty.— Where a blank form of marriage license, signed by the register of deeds, is filled up and handed to the person proposing to be married, by the minister solemnizing the marriage, as the register's agent, and at that time the register's term has expired, the paper is invalid because lacking the signature of one *de facto* register, and hence there can be no penalty for not recording it. Maggett *v.* Roberts, 112 N. C. 71, 16 S. E. 919. In an action against the register, under a statute providing a penalty for failure to record a license or the return thereof, no allegation as to failure to record the return is required and it is immaterial that the marriages for which the licenses were issued were not celebrated until after the expiration of defendant's term of office. Maggett *v.* Roberts, 108 N. C. 174, 12 S. E. 890.

A marriage license docket is a public record in the sense that it is open to the public to inspect and copy therefrom, and a citizen may inspect and make memoranda therefrom, and the clerk of the orphans' court is not entitled to a fee for permitting him to do so. Marriage License Docket, 4 Pa. Dist. 162.

76. See Governor *v.* Rector, 10 Humphr. (Tenn.) 57, holding that where the condition of a bond executed under Act (1778), c. 7, § 3, that there is no lawful cause to obstruct a marriage, is broken by the existence of a previous valid marriage, the wife is the party injured and she alone, and not her father, is entitled to sue thereon.

77. Moore *v.* McClelland, 1 Pa. Co. Ct. 555.

Jurisdiction of action for false affidavit.— The arches' court of Canterbury has no jurisdiction to entertain a suit by letters of request against a layman for falsely swearing before a surrogate to an affidavit to lead to the issue of a marriage license. Phillimore *v.* Machon, 1 P. D. 481.

78. People *v.* Schoonmaker, 119 Mich. 242, 77 N. W. 934, holding that under a statute permitting a probate judge to issue a license and perform the marriage ceremony in certain cases specified, when according to the judgment of the judge the marriage would be a benefit to public morals, and the application for license was accompanied by the written request of the parent or guardian of a party who is a minor, it was necessary to appoint

the license nor the marriage solemnized under it is void,[79] although the officer issuing it may incur a penalty for the act.[80] In England a marriage by license as distinguished from one by banns[81] is not invalidated by the fact that the license has been issued to one of the parties under a false name.[82]

C. Liability of Officer For Wrongful Issuance of License. In the absence of statute an officer is not liable in damages to the parent for the marriage of a minor under a license issued without the parent's consent.[83] But by statute in several jurisdictions a penalty is imposed on an officer wrongfully issuing a license for the marriage of a minor.[84] Under some of these statutes the parent

a guardian where there was no parent and no guardian of a minor applicant.

79. Ely *v.* Gammel, 52 Ala. 584; Stevenson *v.* Gray, 17 B. Mon. (Ky.) 193; Gatewood *v.* Tunk, 3 Bibb (Ky.) 246.

80. Ely *v.* Gammel, 52 Ala. 584.

81. See *infra*, III, D.

82. Lane *v.* Goodwin, 4 Q. B. 361, 3 G. & D. 610, 7 Jur. 372, 12 L. J. Q. B. 157, 45 E. C. L. 361; Bevan *v.* McMahon, 7 Jur. N. S. 218, 30 L. J. P. & M. 61, 3 L. T. Rep. N. S. 820, 2 Swab. & Tr. 230; Haswell *v.* Haswell, 51 L. J. P. D. & Adm. 15, 30 Wkly. Rep. 231; Rex *v.* Burton-upon-Trent, 3 M. & S. 537, 16 Rev. Rep. 350; Cope *v.* Burt, 1 Phillim. 224 [*affirming* 1 Hagg. Cons. 434].

83. Holland *v.* Beard, 59 Miss. 161, 42 Am. Rep. 360; Wilkinson *v.* Dellinger, 126 N. C. 462, 35 S. E. 819, holding that the legal marriage of a female infant after attaining the age of consent emancipates her from her former parental duties, and if a parent is damaged thereby because deprived of her services, he cannot recover such damages from the register of deeds for unlawfully issuing the marriage license. But *compare* Barnidge *v.* Kilpatrick, 111 La. 587, 35 So. 757, holding that where a clerk of the court has never seen the intended wife, and there is nothing in the particular case to arouse his suspicions as to her being a minor, he is not guilty of negligence and is not liable in damages for granting a license in reliance on the truthfulness of statements made to him by the intended husband and a friend accompanying him, who signed as surety a bond required to be given under La. Civ. Code, art. 101, that the parties were of age and that everything was right.

An action will not lie on the officer's bond. — Holland *v.* Beard, 59 Miss. 161, 42 Am. Rep. 360; Holt *v.* McLean, 75 N. C. 347; Moretz *v.* Ray, 75 N. C. 170.

A statute providing a punishment for any person who shall solemnize a marriage wherein the parties have not obtained a license, and providing in addition that he shall be subject to a civil action by the parent or guardian, further providing that any recorder who shall issue a license contrary to the provisions of the statute shall be subject to "a like punishment," does not subject a recorder who issues a license unlawfully to a civil action by the parent or guardian. Dunn *v.* Sanders, 48 Mo. App. 610.

84. See the statutes of the several states. And see Fulghum *v.* Roberts, 75 Ala. 341; Roberts *v.* Pippen, 75 Ala. 103, both holding that the provision in the act of March 1, 1881, repealing Code (1876), § 2681, by which liabilities incurred prior to the passage of the act of March 1, 1881, were left unaffected, was not repealed by the act of Feb. 5, 1883.

Pleading.— A declaration averring that complainant is the parent, and that defendant was the clerk who issued a license to complainant's child, then being a minor, without his consent, is sufficient. Gilbert *v.* Bone, 64 Ill. 518; Hilboldt *v.* Caraker, 41 Ill. App. 595. It need not state the sex of the persons named in the license, and that a marriage was solemnized under it, or in the case of a minor that the parents or guardian resided in the state. Ely *v.* Gammel, 52 Ala. 584. It must be charged that defendant issued the license knowingly or without reasonable inquiry, when his liability depends upon such facts. Maggett *v.* Roberts, 108 N. C. 174, 12 S. E. 890. An averment that the license was issued without the consent of the parents sufficiently negatives consent. Wood *v.* Farnell, 50 Ala. 546. It need not be alleged that the other party to the marriage was not of age. Beard *v.* Holland, 59 Miss. 164. Nor need matters of defense be negatived. Bell *v.* Wallace, 81 Ala. 422, 1 So. 24; Adams *v.* Cutright, 53 Ill. 361. A plea setting up a proviso in the statute must bring defendant fully within its terms. Bell *v.* Wallace, *supra*.

Amendment.— The complaint may be amended by an alteration of the mere descriptive names of the parties to whom the license was issued. Mitchell *v.* Davis, 58 Ala. 615.

Aider by verdict.— A complaint in a *qui tam* action against a probate judge for improperly issuing a marriage license which is defective in failing to allege the residence of a female in the county in which the license issued is cured by verdict and judgment where such defect was not objected to in the court below. Ely *v.* Gammel, 52 Ala. 584.

Form of complaint.— For form of complaint alleging the issuance of a license to a minor and another under fictitious names see Mitchell *v.* Davis, 58 Ala. 615.

Burden of proof.— Where the consent of the parent or guardian is a matter of record, plaintiff is not bound to prove the negative averment that such consent was not given. Blann *v.* Beal, 5 Ala. 357. Nor where any person may sue for the penalty is plaintiff bound to prove that the minor designated in the complaint is his daughter. Roberts *v.* Pippen, 75 Ala. 103.

may sue for the penalty in his own name,[85] while under other statutes the suit must be brought in the name of the state.[86] Plaintiff's motive in prosecuting the suit is immaterial.[87] Under some of these statutes, it is no defense that the officer issuing the license shall have been misled or deceived as to the fact, by others than the parent or guardian,[88] nor that he may have been honestly mistaken;[89] while under other statutes the officer is protected if he requires an affidavit, by the minor or some other credible person claiming to know the fact, that the minor was of the age required by law,[90] or if he has in good faith examined either of the parties or other witness on oath, and the evidence tends to prove that the person whose age is the subject of inquiry has attained his or her majority, and the officer so decides.[91] Under still other statutes a reasonable inquiry as to the age of the parties is sufficient.[92] The question of what is a reasonable inquiry, the facts being admitted, is one of law for the court.[93] When the officer has delegated his authority he cannot be said to have made reasonable inquiry.[94] Under a statute providing for a penalty upon the issuance of a license to a minor female, without consent, it is no defense that the person to whom she was licensed to be married was not a minor,[95] nor is it a defense that the father of the minor, having information of the issuance of the license, made no effort to prevent the marriage.[96] Nor where the statute requires a written consent is it a defense that the license was delivered to one who promised that it should not be used until such written consent should be obtained.[97] The statutes, however, are not to be extended by implication to cases not clearly within their scope.[98] And it has been held a good defense that neither the minor nor her parents resided within the state, no provision being made for the issuance of licenses in such cases.[99] A judge of probate in issuing a license acts ministerially and not

Evidence.— The record of a subsequent divorce suit between the parties married under the license is inadmissible (Gilbert *v.* Bone, 79 Ill. 341), as is evidence that the parent had treated the minor harshly (Fitzsimmons *v.* Buckley, 59 Ala. 539). As bearing on the amount of damages, however, the bad character of the husband may be shown. Larwill *v.* Kirby, 14 Ohio 1.

Instructions.— In an action for issuing a license without reasonable inquiry, an instruction submitting to the jury the question of whether defendant signed licenses in blank and sent them to his deputy who delivered them was not prejudicial where the facts were not disputed. Cole *v.* Laws, 104 N. C. 651, 10 S. E. 172.

Indictment.—Under 1 Va. Rev. Code, c. 106, § 16, it was held that an indictment of a clerk of a county court for issuing a license of marriage of an infant never before married, without the consent of the infant's parents or guardian, need not charge that the clerk knew that the party was an infant, that he issued the license maliciously or corruptly, or that a marriage took place in pursuance thereof. Com. *v.* Hill, 6 Leigh (Va.) 636.

85. Adams *v.* Cutright, 53 Ill. 361.

An allegation that plaintiff was the father of the girl to whom the license was issued will be presumed to mean that plaintiff was the legal and not the putative father. Crook *v.* Webb, 125 Ala. 457, 28 So. 384.

86. Caroon *v.* Rogers, 51 N. C. 240.

87. Gilbert *v.* Bone, 79 Ill. 341.

88. Willis *v.* Byrne, 106 Ala. 425, 17 So. 332.

89. Detterly *v.* Yeamans, 39 Miss. 475.

90. Riley *v.* Bell, 89 Ala. 597, 7 So. 155.

91. Gilbert *v.* Bone, 79 Ill. 341; Hilboldt *v.* Caraker, 41 Ill. App. 595.

A personal examination is required and the clerk is not entitled to act upon the affidavit of one of the parties in determining the age of the other. Gilbert *v.* Bone, 64 Ill. 518.

Where the officer has actual notice of minority, he cannot be regarded as having acted honestly in issuing a license upon the oath of a witness. Gilbert *v.* Bone, 64 Ill. 518.

92. See Bowles *v.* Cochran, 93 N. C. 398.

93. Trolinger *v.* Boroughs, 133 N. C. 312, 45 S. E. 662; Harcum *v.* Marsh, 130 N. C. 154, 41 S. E. 6; State *v.* Roberts, 114 N. C. 389, 19 S. E. 645.

Facts held to show reasonable inquiry see Harcum *v.* Marsh, 130 N. C. 154, 41 S. E. 6; Walker *v.* Adams, 109 N. C. 481, 13 S. E. 907; Bowles *v.* Cochran, 93 N. C. 398.

Facts held not to show reasonable inquiry see Trolinger *v.* Boroughs, 133 N. C. 312, 45 S. E. 662; Agent *v.* Willis, 124 N. C. 29, 32 S. E. 322; Cole *v.* Laws, 104 N. C. 651, 10 S. E. 172; Williams *v.* Hodges, 101 N. C. 300, 7 S. E. 786.

94. Cole *v.* Laws, 108 N. C. 185, 12 S. E. 985.

95. Crook *v.* Webb, 125 Ala. 457, 28 So. 384; Cotten *v.* Rutledge, 33 Ala. 110.

96. Wood *v.* Farnell, 50 Ala. 546.

97. Coley *v.* Lewis, 91 N. C. 21.

98. Gilbert *v.* Bone, 79 Ill. 341; Bates *v.* Stokes, 40 Miss. 56.

99 Bates *v.* Stokes, 40 Miss. 56.

judicially;[1] he is responsible for the illegal issuance of a license by a clerk in his office,[2] as is a county clerk for the act of his deputy.[3] A penalty will not be incurred unless a marriage takes place, according to the statute.[4] A statute providing a penalty excludes a proceeding against the officer by indictment, unless the illegal act is done in bad faith.[5]

D. Notice or Publication of Banns. In some states laws have been or are still in force requiring the publication of banns[6] as a preliminary to the solemnization of a marriage, but generally with the proviso that this may be omitted if a license is procured.[7] In others the parties are required to file in the clerk's office a notice of their intention to marry, and that officer delivers them a certificate of such filing, which must be handed to the celebrant;[8] but the omission of any of these formalities will not avoid the marriage, provided it would be good at common law, unless the statute expressly so declares.[9] Generally, however, the only statutory prerequisite is the taking out of a license.[10] In England by the act of Geo. II,[11] it was provided that all marriages should be void unless solemnized either by license or publication of banns.[12] Under this statute all marriages by banns were absolutely void unless there was a due publication of the banns,[13] the

1. Cotten *v.* Rutledge, 33 Ala. 110.
2. Wood *v.* Farnell, 50 Ala. 546.
3. Hilboldt *v.* Caraker, 41 Ill. App. 595; Beard *v.* Holland, 59 Miss. 164, holding the fact that the person who issued the license in the clerk's name was not his legally constituted deputy is no defense if he was put in charge of the office by the clerk to attend to it in his absence and professed to be his deputy.
4. Campbell *v.* Beck, 50 Ill. 171, holding that where a clerk in issuing a license made a mistake in the name of one of the parties, and it was altered by the justice of the peace, to the name of the man applying for the marriage, after which the justice performed the ceremony, the clerk was not liable for the penalty.
5. State *v.* Snuggs, 85 N. C. 541.
6. **Definitions.**— "Public notice or proclamation of a matrimonial contract, and the intended celebration of the marriage of the parties in pursuance of such contract, to the end that persons objecting to the same may have an opportunity to declare such objections before the marriage is solemnized." Bouvier L. Dict.

"Publication, by oral announcement, of an intended marriage, in a church or public chapel" [Anglo Saxon *gebann*. Law Latin *bandum bannam*]. Anderson L. Dict.
7. Del. Rev. Code, c. 74, § 2; Ga. Code, § 2420; Md. Pub. Gen. Laws, art. 62, § 4; 2 Ohio Bates St. § 6389. And see Drake *v.* McMinn, 27 N. C. 639; Rodebaugh *v.* Sanks, 2 Watts (Pa.) 9; Helffenstein *v.* Thomas, 5 Rawle (Pa.) 209; Bashaw *v.* State, 1 Yerg. (Tenn.) 177.
8. Me. Rev. St. c. 61, § 4; Mass. Rev. Laws, c. 151, § 16; N. H. Pub. St. c. 174, § 5.

Sufficiency of certificate.— If the certificate of publication of intention to marry received by a clergyman or magistrate is genuine and specifies the date of the entry of the notice of such intention in the office of the clerk issuing it, the requirements of the statute are complied with. Wood *v.* Adams, 35 N. H. 32.
9. Gardiner *v.* Manchester, 88 Me. 249, 33 Atl. 990; Damon's Case, 6 Me. 148; Ferrie *v.* Public Administrator, 4 Bradf. Surr. (N. Y.) 28; Rodebaugh *v.* Sanks, 2 Watts (Pa.) 9; Helffenstein *v.* Thomas, 5 Rawle (Pa.) 209.
10. See *supra*, III, A.
11. St. 26 Geo. II, c. 33.
12. Rex *v.* Billingshurst, 3 M. & S. 250, 15 Rev. Rep. 474.

All marriages, whether of legitimate or illegitimate children, were within 26 Geo. II, c. 33, and a marriage of an illegitimate minor, had by license with the consent of her mother, was void by section 11. Priestly *v.* Hughes, 11 East 1, 10 Rev. Rep. 406.

A marriage celebrated in Scotland without banns or license is good. *Ex p.* Hall, 1 Rose 30, 1 Ves. & B. 112, 35 Eng. Reprint 44.

By 1 Eliz. and 13 & 14 Car. 2, the laity were bound by the rubric against marrying without publication of banns, and by the first act were expressly punished by the censures of the church; and by the second act the power of the ordinary was directed to be continued and applied for punishing the like offense against the rubric of the then present book of common prayer. Middleton *v.* Crofts, 2 Atk. 650, 26 Eng. Reprint 788.

In Canada the provisions of 26 Geo. II, c. 33, were brought into force in the province of Ontario by 32 Geo. III, c. 1, and 40 Geo. III, c. 1, so far as applicable to the circumstances of the province, but a marriage previously celebrated without a publication of the banns, although void, was legalized by 37 Vict. c. 6, § 1. O'Connor *v.* Kennedy, 15 Ont. 20.
13. Holmes *v.* Simmons, L. R. 1 P. & D. 523, 37 L. J. P. & M. 58, 18 L. T. Rep. N. S. 770, 16 Wkly. Rep. 1024; Rex *v.* Preston, Burr S. Cas. 486, 1 W. Bl. 192.

Place of celebration.— Marriages in chapels not having chapelries or districts annexed to them, and in which banns had not been usually published before the passage of the stat-

provision being strictly construed, it being held that even in the absence of fraudulent intent the names published must be the true and full christian and surname, or at any rate so nearly so as to render recognition easy.[14] By a later statute[15] it was, however, provided that the marriage should be void only where the parties had knowingly and wilfully intermarried without due publication.[16] And under this provision, where the names are misstated, it is necessary that both parties shall have been guilty of a wilful neglect.[17] This statute further provided that after the marriage had been celebrated no question could be raised as to whether the residence of the parties had been truly stated.[18] Under a statute providing for marriage upon due notice given to the registrar,[19] it is not essential that the contents of the notice in respect of christian names, residence, or other details be strictly true or accurate.[20]

ute of 26 Geo. II, c. 33, were void, although banns may have been often published in such chapels. Rex *v.* Northfield, Cald. 115, Dougl. (3d ed.) 659; Taunton *v.* Wyborn, 2 Campb. 297.

Rubric.— The form or words prescribed by the rubric for the publication of banns need not be precisely full, this part of the statute being merely directory. Standen *v.* Standen, 1 Peake N. P. 45, 6 T. R. 331.

Residence of parties.—A marriage by banns may be legal, although only one of the parties resides in the parish (Robinson *v.* Grant, 18 Ves. Jr. 289, 34 Eng. Reprint 327), or although neither resides (Nicholson *v.* Squire, 16 Ves. Jr. 259, 33 Eng. Reprint 983).

14. Holmes *v.* Simmons, L. R. 1 P. & D. 523, 37 L. J. P. & M. 58, 18 L. T. Rep. N. S. 770, 16 Wkly. Rep. 1024; Rex *v.* Tibshelf, 1 B. & Ad. 190, 8 L. J. M. C. O. S. 120, 20 E. C. L. 449. And see Cope *v.* Burt, 1 Hagg. Cons. 434.

The known and acknowledged name is sufficient. Rex *v.* Billingshurst, 3 M. & S. 250, 15 Rev. Rep. 474.

15. St. 4 Geo. IV, c. 76.

16. Reg. *v.* Clarke, 10 Cox C. C. 474, 16 L. T. Rep. N. S. 429, 15 Wkly. Rep. 796, sustaining a marriage where the publication of banns was completed on the first of July and the marriage took place on the first of October following, although the statute required marriages by banns to be solemnized within three months after the complete publication.

17. Holmes *v.* Simmons, L. R. 1 P. & D. 523, 37 L. J. P. & M. 58, 18 L. T. Rep. N. S. 770, 16 Wkly. Rep. 1024; Gompertz *v.* Kensit, L. R. 13 Eq. 369, 41 L. J. Ch. 382, 26 L. T. Rep. N. S. 95, 20 Wkly. Rep. 313; Templeton *v.* Tyree, L. R. 2 P. & D. 420, 41 L. J. P. & M. 86, 27 L. T. Rep. N. S. 429, 21 Wkly. Rep. 81; Rex *v.* Wroxton, 4 B. & Ad. 641, 2 L. J. M. C. 64, 1 N. & M. 712, 24 E. C. L. 282; Brealy *v.* Reed, 2 Curt. Eccl. 833; Wormald *v.* Neale, 19 L. T. Rep. N. S. 93; Tongue *v.* Tongue, 1 Moore P. C. 90, 12 Eng. Reprint 745; Midgeley *v.* Wood, 4 Swab. & Tr. 267.

Marriage or maiden name.— Where, after a decree dissolving her marriage, a woman remarries the banns properly describe her by her marriage name, although in the interval between the decree dissolving her first marriage and the celebration of the second she had usually passed by her maiden name, since a name acquired by marriage can be superseded by a reputed name only in a case where the name has been so far acquired by repute as to obliterate the name acquired by marriage. Fendall *v.* Goldsmid, 2 P. D. 263, 46 L. J. P. D. & Adm. 70. But a marriage has been held legal where a married woman, upon the death of her husband, assumed her maiden name and after several years had elapsed was married by banns to a second husband in that name and describes herself as a widow. Rex *v.* St. Faith, 3 D. & R. 348, 16 E. C. L. 171.

Under the Irish Marriage Act of 1847 (7 & 8 Vict. c. 81, § 9), the use of the name Maria in place of the name Beatrice by which a woman baptized Beatrice Mary Victoria Emma Guy was familiarly known in the publication of banns with the cognizance of both parties, for the purpose of secrecy, renders the marriage null and void. Courtenay *v.* Miles, Ir. R. 11 Eq. 284.

18. Holmes *v.* Simmons, L. R. 1 P. & D. 523, 37 L. J. P. & M. 58, 18 L. T. Rep. N. S. 770, 16 Wkly. Rep. 1024.

19. St. 19 & 20 Vict. c. 119.

Marriage out of district.— The superintendent registrar has no power to grant a certificate pursuant to 6 & 7 Wm. IV, c. 85, § 7, in cases where it is proposed that the marriage shall take place out of his district and without license. *Ex p.* Brady, 8 Dowl. P. C. 332, 4 Jur. 269.

20. Holmes *v.* Simmons, L. R. 1 P. & D. 523, 38 L. J. P. & M. 58, 18 L. T. Rep. N. S. 770, 16 Wkly. Rep. 1024 (sustaining a notice where the christian names inserted were the actual names by which both parties were commonly and familiarly known by those among whom they lived, and where it was doubtful whether there was any intention to deceive any one by the use of those names, and if such intention existed it was only upon the part of the husband, and where the wilful suppression of the remaining christian names of both parties, and the insertion of false residences, was the act of the husband only, without the wife's concurrence); Prowse *v.* Spurway, 46 L. J. P. D. & Adm. 49, 26 Wkly. Rep. 116 (holding that where a notice required by 19 & 20 Vict. c. 119, § 2, was signed by the husband with a wrong name,

IV. SOLEMNIZATION OR CELEBRATION.

A Persons Who May Solemnize — 1. In General. Statutes requiring a ceremonial marriage[21] usually make express provisions as to the persons by whom such marriages may be solemnized.[22]

2. Clergymen. By the statutes of the several states it is usually provided that clergymen shall be authorized to solemnize marriages.[23] Under these statutes it is generally provided that the clergymen must be regularly ordained;[24] and under some a further requirement is made that he be settled in the work of the ministry.[25]

his first christian name being omitted, and it was falsely asserted that both parties were twenty-one years of age, the validity of the marriage could not be questioned).

Knowledge by both parties that no due notice has been given is necessary to render a marriage invalid under 6 & 7 Wm. IV, c. 85, § 42. Reg. *v.* Rea, L. R. 1 C. C. 365, 41 L. J. M. C. 92, 26 L. T. Rep. N. S. 484, 20 Wkly. Rep. 632.

A new surname acquired by use and reputation may be employed by a man in signing a notice for the purpose of procuring his marriage under 6 & 7 Wm. IV, c. 85, without rendering him indictable. Reg. *v.* Smith, 4 F. & F. 1099.

Analogy between marriage by notice and by banns.— By the statute of 6 & 7 Wm. IV, c. 85, the system of marrying before a registrar was first introduced. This statute provided that a previous notice should be given by the persons about to marry to the registrar, and that such notice should be full, giving the names, condition, and residence of the parties, and when given was to be entered in a book accessible to the public and read for three successive weeks at the board of guardians; and a wilful intermarriage without due notice was void. By this statute there was an evident and intended analogy between marriage by notice and by banns. But by 19 & 20 Vict. c. 119, the system of reading a notice to the board of guardians was done away with, and in place of such a contrivance for the purpose of giving parents a warning of the projected marriages of their minor children, it was provided that the parties giving the notice should swear that he or she had the required consent. This statute removed the analogy between marriages by notice before a registrar and marriages by banns and assimilated them to marriages by license, in which case it was always necessary, in case of minors, to swear that the consent of the parents had been obtained. Holmes *v.* Simmons, L. R. 1 P. & D. 523, 37 L. J. P. & M. 58, 18 L. T. Rep. N. S. 770, 16 Wkly. Rep. 1024.

21. Necessity of ceremonial marriage see *supra*, I, D, 4, b.

Requisites of valid marriage apart from ceremony see *supra*, I, D.

Validity of common-law marriage see *supra*, I, D, 3.

What law governs see *supra*, I, C, 1.

22. See the statutes of the several states. And see cases cited *infra*, IV, A, 2, 3.

23. See the statutes of the several states.

24. Kibbe *v.* Antram, 4 Conn. 134 (holding that a person ordained a deacon according to the forms and usages of the methodist episcopal church and commissioned by the bishop of that church to preach and to administer the ordinances of marriage, baptism, and burial is an ordained minister); Com. *v.* Spooner, 1 Pick. (Mass.) 235 (holding that a person ordained according to the form observed in baptist churches and afterward engaged by the baptist societies in the town in which he lived to preach to them alternately was a stated and ordained minister of the gospel); Londonderry *v.* Chester, 2 N. H. 268, 9 Am. Dec. 61 (holding that those who are ordained in conformity with the customs of any denomination of christians are duly ordained); State *v.* Parker, 106 N. C. 711, 11 S. E. 517 (holding that a colored preacher who is an elder of the colored methodist church is an ordained minister). See Roberts *v.* State Treasurer, 2 Root (Conn.) 381. But see Taylor *v.* State, 52 Miss. 84, holding that it is not a valid objection to a marriage that the minister who solemnized it was not properly ordained according to the rules and regulations of his church, his open claim of being such, and the fact that he was generally understood and recognized and acted as such, being all that is necessary.

After expulsion from the religious society to which he belonged, a previously duly ordained minister is not entitled to perform marriages. Matter of Reinhart, 9 Ohio S. & C. Pl. Dec. 441, 6 Ohio N. P. 438.

25. See Goshen *v.* Stonington, 4 Conn. 209, 10 Am. Dec. 121 (holding that a deacon of the methodist episcopal church, licensed to preach and actually preaching as a traveling circuit preacher over a circuit including the town in which he dwelt, was not settled); Kibbe *v.* Antram, 4 Conn. 134 (holding that where a person resided for many years in a town, having charge of a church therein, preaching to the people at their request and exercising all the powers and privileges authorized by his commission, and the people provided for his support by voluntary contributions, and considered him as their minister and head deacon, he was "settled" within the meaning of the statute); Roberts *v.* State Treasurer, 2 Root (Conn.) 381; Ligonia *v.* Buxton, 2 Me. 102, 11 Am. Dec. 46 (holding that a minister ordained over an unincorporated religious society composed of members belonging to different towns is not a

Under the law of England before the Reformation there could be no valid marriage without the presence of a priest episcopally ordained, and after the Reformation without the presence of a priest or deacon,[26] and he must be a third party to the contract.[27] It has, however, been questioned whether the attendance of a clergyman should be required in the case of a marriage in good faith contracted in the colonies or on board ship, where the procuring of a clergyman might be impossible.[28] In Canada a marriage celebrated by a priest or minister of a religious denomination other than that to which the parties belong is void;[29] and a marriage between catholics must be solemnized by the curé of the parish in which one of the parties is domiciled.[30]

3. Justices of the Peace and Magistrates. It is usually provided by statute that marriages may be solemnized by a justice of the peace[31] or other magis-

stated and ordained minister of the gospel). But see State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162 (holding that an ordained minister in regular standing with the denomination to which he belongs may solemnize marriages in any county within the state after causing the credentials of his ordination to be recorded in such county); Londonderry *v.* Chester, 2 N. H. 268, 9 Am. Dec. 61 (holding that a person who has once been set apart as a public teacher of religion, according to the form of the sect to which he belongs, is an ordained minister, and whether settled over any society or not is qualified to solemnize marriages in the county where he has his permanent residence).

Having the "cure of souls."— A statute providing that regular ministers of the gospel of any denomination having the cure of souls shall be authorized to solemnize the rights of matrimony does not require that the minister shall be the incumbent of a church living or the pastor of any congregation in particular. State *v.* Bray, 35 N. C. 289.

26. Reg. *v.* Millis, 10 Cl. & F. 534, 8 Jur. 717, 8 Eng. Reprint 844; Catherwood *v.* Caslon, C. & M. 431, 8 Jur. 1076, 13 L. J. Exch. 334, 13 M. & W. 261, 41 E. C. L. 237; Beamish *v.* Beamish, 9 H. L. Cas. 274, 11 Ir. C. L. 511, 8 Jur. N. S. 770, 5 L. T. Rep. N. S. 97, 11 Eng. Reprint 735; De Moulin *v.* Druitt, 13 Ir. C. L. 212.

Right to officiate.— An incumbent of a district parish validly constituted under 58 Geo. III, c. 45 and 59 Geo. III, c. 134, has an exclusive right to celebrate marriages by banns between parties both of whom are residents within the district parish. Tuckness *v.* Alexander, 2 Dr. & Sm. 614, 9 Jur. N. S. 1026, 32 L. J. Ch. 794, 8 L. T. Rep. N. S. 821, 2 New Rep. 480, 11 Wkly. Rep. 938, 62 Eng. Reprint 752.

Under the act of the Irish parliament, 19 Geo. II, c. 13, § 1, which provides that every marriage celebrated by a popish priest, between a papist and any person that hath been or hath professed himself to be a protestant at any time within twelve months before a celebration, shall be null and void, a party must be deemed to be a protestant where he was born and bred a protestant and of a protestant family, unless he has done some act to denote a change in his religious persuasion. Yelverton *v.* Longworth, 10 Jur. N. S. 1209, 11 L. T. Rep. N. S. 118, 4 Macq. H. L. 746, 13 Wkly. Rep. 235.

Curative statutes.— Marriages contracted in Ireland between members of the church of England and presbyterians, celebrated by ministers not belonging to the church of England, are legalized by the imperial statutes 5 & 6 Vict. c. 26, and such marriages celebrated before that act are legal marriages in Canada. Doe *v.* Breakey, 2 U. C. Q. B. 349.

In the Argentine Republic a marriage between a member of the church of England and an episcopalian methodist is good, although only celebrated once and that in the methodist episcopal church by a minister who was not an ordained minister in the church of England. Lightbody *v.* West, 88 L. T. Rep. N. S. 484.

Marriage in Rome.— A marriage celebrated at Rome between two protestants who had in accordance with the law of Rome abjured the protestant faith and been admitted into the Roman catholic church is void, where the abjuration was fraudulent and colorable and the parties never were or intended to become Roman catholics. Swift *v.* Swift, 3 Knapp 303, 12 Eng. Reprint 664.

27. Beamish *v.* Beamish, 9 H. L. Cas. 274, 11 Ir. C. L. 511, 8 Jur. N. S. 770, 5 L. T. Rep. N. S. 97, 11 Eng. Reprint 735, holding that when a bridegroom was himself the priest, there being no other priest present, a valid marriage was not contracted by him, and that the presence of a priest was not merely for the purpose of securing a religious sanction to the contract of marriage, but that one of the objects was to prevent an unlawful contract which could not be secured unless the priest was a person other than either of the two engaged in the act.

28. Culling *v.* Culling, [1896] P. 116, 65 L. J. P. D. & Adm. 59, 74 L. T. Rep. N. S. 252; Lightbody *v.* West, 87 L. T. Rep. N. S. 138, 50 Wkly. Rep. 494; Standen *v.* Standen, 1 Peake N. P. 45, 6 T. R. 331.

29. Durocher *v.* Dupre, 21 Can. L. T. Occ. Notes 393, 20 Quebec Super. Ct. 456. But see *contra*, Burn *v.* Fontaine, 4 Rev. Lég. 163; Délpit *v.* Coté, 20 Quebec Super. Ct. 338.

30. Durocher *v.* Dupre, 21 Can. L. T. Occ. Notes 393, 20 Quebec Super. Ct. 456; Vallancourt *v.* La Fontaine, 11 L. C. Jur. 305.

31. See the statutes of the several states. And see also the cases cited *infra*, note 33.

trate,[32] and in the absence of statute this authority is not confined to the territory in which such officer has jurisdiction in other cases.[33]

4. Compelling Official to Act. In England it is held that where a license to marry at a particular church is in the proper form, the incumbent of such church is not only entitled but may be compelled to perform the ceremony.[34] The court or a judge thereof has no authority to order one of its officers to celebrate a marriage, unless such officer is properly brought before the court upon a proceeding lawfully instituted in the manner provided by law.[35]

5. Presumptions and Evidence of Authority. In those cases in which it is necessary to prove a marriage in fact, as distinguished from a marriage inferred from circumstances,[36] it must be shown that the person who solemnized the marriage was one having authority to do so,[37] and such authority cannot be proved by his general reputation.[38] A showing that a marriage service was performed by a person acting in a public capacity is, however, *prima facie* evidence as to his authority.[39] By statute in some states the marriage register is sufficient to estab-

The appointment of a woman to solemnize marriages is within the authority of the legislature, although a woman is not competent to serve as a justice of the peace. Opinions of Justices, 62 Me. 596.

Subjection to military authority, removing the authority of the civil officers of the state, renders a marriage performed by a justice of the peace void. Cooke *v.* Cooke, 61 N. C. 583.

32. See Watson *v.* Blaylock, 2 Mill (S. C.) 351.

33. Pearson *v.* Howey, 11 N. J. L. 12; Simon *v.* State, 31 Tex. Cr. 186, 20 S. W. 399, 37 Am. St. Rep. 802. And see State *v.* McKay, 122 Iowa 658, 98 N. W. 510 (holding that under Code, § 3147, declaring that marriages solemnized with the consent of the parties in any other manner than prescribed by the code for ceremonial marriages are valid, a marriage, the ceremony of which is performed by the mayor of the town, outside the corporate limits of the town, is valid as a ceremonial marriage); People *v.* Girdler, 65 Mich. 68, 31 N. W. 624. *Contra*, Bashaw *v.* State, 1 Yerg. (Tenn.) 177.

34. Tuckness *v.* Alexander, 2 Dr. & Sm. 614, 9 Jur. N. S. 1026, 32 L. J. Ch. 794, 8 L. T. Rep. N. S. 821, 2 New Rep. 480, 11 Wkly. Rep. 938, 62 Eng. Reprint 752, holding that the incumbent is under no obligation to inquire whether there has been a sufficient residence to justify the granting of the license.

35. *Ex p.* Fiset, 6 Quebec Pr. 42.

36. See *infra*, VI, B, 1, a.

37. State *v.* Hodgskins, 19 Me. 155, 36 Am. Dec. 742; Miller *v.* Miller, 43 S. C. 306, 21 S. E. 254, holding that the certificate of an alleged justice of the peace by whom a marriage ceremony is claimed to have been performed, in another state, containing the letters, "J. P. C. Co., Ga.," written after his name, without any explanation of their meaning, is insufficient to prove his official character. But see Williams *v.* Walton, etc., Co., 9 Houst. (Del.) 322, 32 Atl. 726, holding, where it was sought to establish an actual marriage in a civil case, that a marriage ceremony being proved, the person shown to have officiated thereat is presumed to have been qualified to do so.

A certificate of ordination as a minister of the baptist church, accompanied by testimony that the holder thereof had continually officiated as such, is sufficient proof of his qualification to solemnize marriages. Kline *v.* Allegair, 40 N. J. Eq. 183.

A paper from the secretary of state, certifying that a person was and is qualified to solemnize marriages, is not legal evidence, not being the commission giving authority to the clergyman or the copy of any record. State *v.* Hasty, 42 Me. 287.

38. Pettyjohn *v.* Pettyjohn, 1 Houst. (Del.) 332, holding, however, that the authority of the minister who performed the marriage is sufficiently shown by evidence that he was received as a regularly ordained minister of the gospel by a methodist church, where he was sent by the conference, and where he officiated at the sacrament and other ordinances for two years, and that he then went to another circuit.

39. Hanon *v.* State, 63 Md. 123; State *v.* Robbins, 28 N. C. 23, 44 Am. Dec. 64, holding that the commission of a justice of the peace need not be produced. And see Verholf *v.* Van Houwenlengen, 21 Iowa 429; Dunn *v.* Kenney, 11 Rob. (La.) 249, holding that the testimony of a witness that he was a justice of the peace in another state is sufficient proof of his capacity to solemnize a marriage.

A clergyman comes within the rule stated in the text. State *v.* Winkley, 14 N. H. 480 (holding that where a marriage was solemnized before a person who had been a preacher for twenty-five years, and there was evidence that he had been ordained, but it did not appear at what time; and evidence that on several occasions he had united persons in marriage, this was competent *prima facie* evidence that he was an ordained minister, as required by the New Hampshire act of 1791); Reg. *v.* Cresswell, 1 Q. B. D. 446, 13 Cox C. C. 126, 45 L. J. M. C. 77, 33 L. T. Rep. N. S. 760, 24 Wkly. Rep. 281. See also Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318 (holding

lish a marriage without other evidence of the authority of the person who solemnized it.[40]

6. Effect of Want of Authority. Unless expressly so provided by statute a marriage solemnized by an unauthorized person is not void where the parties assent to the marriage and it is acknowledged and consummated by cohabitation as husband and wife.[41] And under statutes in some states, although the person who performed the ceremony was not authorized to do so, yet if either party believed he was so authorized the marriage will be valid.[42]

B. Place of Solemnization. By statute in some jurisdictions provision is made for the place in which a marriage shall be solemnized.[43] It is not, in the absence of statute making such a provision, necessary that a marriage shall be solemnized in a church or chapel.[44]

C. Form of Ceremony. As a general rule no particular form of words is essential to a ceremonial marriage, provided the words employed are sufficient to evidence a present contract.[45] A clergyman in British Columbia is not bound to

that, although there is no proof of his ordination, the testimony of one that he is a minister of the gospel, and that he performed a marriage ceremony, is admissible, under Mass. Pub. St. c. 145, § 31, making all "circumstantial or presumptive evidence" competent to prove the fact of marriage); Taylor *v.* State, 52 Miss. 84; *In re* Megginson, 21 Oreg. 387, 28 Pac. 388, 14 L. R. A. 540; Patterson *v.* Gaines, 6 How. (U. S.) 550, 12 L. ed. 553. See, however, State *v.* Bray, 35 N. C. 289, holding that when a marriage is claimed to have been made by a minister, the extent of his authority for that purpose should appear.

Person having two official capacities.— Where the certificate of a person holding the offices of justice of the peace and of judge of the municipal court shows that he performed a marriage, but does not state in which of his official capacities he acted, the presumption is that he acted in that in which the marriage might have been lawfully performed by him. Jones *v.* Jones, 18 Me. 308, 36 Am. Dec. 723.

40. Verholf *v.* Van Houwenlengen, 21 Iowa 429.

41. Hunter *v.* Milam, (Cal. 1895) 41 Pac. 332; Londonderry *v.* Chester, 2 N. H. 268, 9 Am. Dec. 61; Holder *v.* State, 35 Tex. Cr. 19, 29 S. W. 793; Martin *v.* Ryan, 2 Pinn. (Wis.) 24.

42. Haggin *v.* Haggin, 35 Nebr. 375, 53 N. W. 209.

43. Ligonia *v.* Buxton, 2 Me. 102, 11 Am. Dec. 46, holding under St. (1786) c. 3, that a marriage solemnized by a minister at his own house, neither of the parties residing in that town, is void.

44. Reg. *v.* Secker, 14 U. C. Q. B. 604.

The vestry belonging to and in a church is *prima facie* a part of the church. Wing *v.* Taylor, 7 Jur. N. S. 737, 30 L. J. P. & M. 258, 4 L. T. Rep. N. S. 583, 2 Swab. & Tr. 278.

A marriage in Ireland performed by a clergyman of the established church of England is valid, although it was celebrated in the room of a private house and without any special license being granted to the parties, and although it would be invalid in England. Smith *v.* Maxwell, 1 C. & P. 271, R. & M. 80, 12 E. C. L. 163.

Evidence of registration of chapel pursuant to 6 & 7 Wm. IV, c. 85.— The fact of solemnization of a marriage in a chapel in the presence of a registrar who could not lawfully have been present had the chapel not been registered and the entry of the marriage in his book raises a *prima facie* presumption that the chapel was duly registered. Reg. *v.* Mainwaring, 7 Cox C. C. 192, Dears. & B. 132, 2 Jur. N. S. 1236, 26 L. J. M. C. 10, 5 Wkly. Rep. 119. And the same presumption arises where the ceremony was performed by a clergyman in a place where the church service was performed on several occasions. Reg. *v.* Cresswell, 1 Q. B. D. 446, 13 Cox C. C. 126, 45 L. J. M. C. 77, 33 L. T. Rep. N. S. 760, 24 Wkly. Rep. 281.

When a marriage has been solemnized in a registrar's office in the presence of the registrar and deputy registrar, the presumption of law is that the requisites of 6 & 7 Wm. IV, c. 85, § 21, have been complied with. If it appeared from the evidence that such a marriage took place with closed doors, it would not on that account be held to be invalid, so as to disentitle the husband after the wife's death to have administration granted to him of her effects, a marriage so celebrated not being specified in section 42 of the statute as one that is null and void. Campbell *v.* Corley, 4 Wkly. Rep. 675.

45. Milford *v.* Worcester, 7 Mass. 48; People *v.* Taylor, 1 Mich. N. P. 198, holding that a bow of the head in response to the proper interrogatory may indicate assent as well as "Yes" or "I do."

Nature and essentials of contract see *supra*, I, D.

In California, under Civ. Code, § 71, it is declared that no particular form of marriage is required, but the parties must declare in the presence of the person solemnizing the marriage that they take each other as husband and wife. See *In re* Richard, 133 Cal. 524, 65 Pac. 1034; Norman *v.* Norman, 121

perform the ceremony of marriage, but if he does so the rites and usages of his church or denomination must be followed.[46]

D. Return or Record. By statute it is frequently provided that a person solemnizing a marriage shall make a return thereof to a specified officer of the county in which the marriage takes place;[47] and a failure to observe such a statute is made an offense punishable criminally.[48] Other statutes impose a penalty upon the officer to whom the return is made for a failure to record it.[49] The failure of

Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, 42 L. R. A. 343.

Formalities in general.— A marriage in Pennsylvania in the presence of a witness by a catholic priest, completed by words in the present tense, without regard to form, is valid. Patterson *v.* Gaines, 6 How. (U. S.) 550, 12 L. ed. 553.

Jewish marriage.— A marriage between Jews, valid according to the Jewish law, will be regarded as binding. Prince *v.* Prince, 1 Rich. Eq. (S. C.) 282. And see Frank *v.* Carson, 15 U. C. C. P. 135, holding that a written contract was not essential to the validity of a Jewish marriage which had been solemnized with all the usual forms and ceremonies of the Jewish service and faith, and that such a marriage was valid, although there existed in relation to it a written contract not produced. See also Goldsmid *v.* Bromer, 1 Hagg. Cons. 324; Lindo *v.* Belisario, 1 Hagg. Cons. 216.

Quaker marriages are usually made an exception in the statutes prescribing a formal solemnization. See the statutes of the several states. And see Haughton *v.* Haughton, 1 Molloy 611.

Presence of witnesses.— St. 4 Geo. IV, c. 76, § 28, which requires that two witnesses shall be present at a marriage and shall sign to the register is merely directory, and a noncompliance with its directions is no ground for annulling a marriage. Wing *v.* Taylor, 7 Jur. N. S. 737, 30 L. J. P. & M. 258, 4 L. T. Rep. N. S. 583, 2 Swab. & Tr. 278.

The directions contained in the rubric respecting the opening address to the congregation, the adjuration to the persons about to be married as to confessing any lawful impediment to their union, the putting on the ring, etc., are not absolutely essential to the validity of the marriage, the essential part of the service being the reciprocal taking of each other for wedded wife and wedded husband. Beamish *v.* Beamish, 9 H. L. Cas. 274, 11 Ir. C. L. 511, 8 Jur. N. S. 770, 5 L. T. Rep. N. S. 97, 11 Eng. Reprint 735.

Repetition of words of the service.— The contract of marriage is in its essence a consent on the part of a man and a woman to cohabit with each other, and with each other only. The religious element does not require anything more of the parties; and therefore it is not essential to the validity of a marriage that all the words of the marriage service to be repeated by the man and woman should be actually said; but the ceremonies required by law such as the publications of banns and the like being complied with, when the hands of the parties are joined together and the clergyman pronounces them to be man and wife, if they understand that by that act they have agreed to cohabit together as husband and wife and with no other person, they are married. Harrod *v.* Harrod, 1 Kay & J. 4, 18 Jur. 853, 2 Wkly. Rep. 612, 69 Eng. Reprint 344.

46. *In re* Ah Lie, 1 Brit. Col. 261.

Marriages between non-christians should be left to the registrar. *In re* Ah Lie, 1 Brit. Col. 261.

47. See the statutes of the several states. And see State *v.* Pierce, 14 Ind. 302; State *v.* Horsey, 14 Ind. 185; State *v.* Madden, 81 Mo. 421 (holding a statute making it a misdemeanor to wilfully fail to make such return constitutional); Rodebaugh *v.* Sanks, 2 Watts (Pa.) 9.

48. State *v.* McWhinney, 5 Blackf. (Ind.) 364, holding that it is not material to the offense of failing to file a certificate of the solemnization of a marriage by a justice of the peace that a license should have issued.

Indictment or information.— An indictment of a justice of the peace for failing to return a certificate of the solemnization of a marriage need not aver that a license was issued (State *v.* Wilder, 7 Blackf. (Ind.) 582), nor need it allege that a month has elapsed after the time within which the return should have been made (State *v.* Pierce, 14 Ind. 302; State *v.* Horsey, 14 Ind. 185). An indictment charging that defendant being a priest of a Roman catholic church, having authority to join others in marriage, did join and marry certain specified persons at a specified place and on a specified day, and "did then and there unlawfully and willfully, fail, neglect and refuse to transmit to the recorder of the county of Ste. Genevieve the certificate of the marriage" is sufficient under Mo. Rev. St. § 1546. State *v.* Madden, 81 Mo. 421.

When penalty accrues.— Under a statute requiring a certificate to be filed within three months, and imposing a penalty of five dollars a month for delay after the said three months, no indictment can be sustained until the end of four months' delay. Kent *v.* State, 8 Blackf. (Ind.) 163.

Limitations.— A statute imposing a penalty of five dollars a month for each month's delay in filing a certificate of marriage does not create a distinct offense for each month that the officer fails to file a certificate, and hence a prosecution is barred by the expiration of one year after the expiration of the time given in which to file the certificate. State *v.* Pool, 2 Ind. 227.

49. See Maggett *v.* Roberts, 108 N. C. 174, 12 S. E. 890.

the record to show the return of a license does not raise the presumption that a marriage was not solemnized.[50]

E. Liabilities of Persons Solemnizing — 1. Civil Liability. Where a person without sufficient care to ascertain the age of a minor solemnizes his marriage, without the consent of his parent or guardian, it would seem that a civil action for damages will lie in some jurisdictions.[51] By statute in many states a penalty is imposed upon a person who solemnizes the marriage of a minor without the consent of his or her parents or guardian.[52] So likewise a penalty is in some jurisdictions provided in case any justice of the peace or minister shall join any persons in marriage without a certificate of publication of their intention to be married.[53] Early statutes imposed a penalty in case of a marriage where the banns had not been pub-

Duty of health officers as to marriage registers see Health, 21 Cyc. 387 note 30.

Conspiracy to cause a marriage falsely to appear of record see Conspiracy, 8 Cyc. 636.

50. Galveston, etc., R. Co. *v.* Cody, 20 Tex. Civ. App. 520, 50 S. W. 135. See also *infra*, VI, B, 1, a, text and note 50.

51. See Larocque *v.* Michon, 2 L. C. Jur. 267, 8 L. C. Rep. 222; Mignault *v.* Bonar, 1 L. C. L. J. 97, 16 L. C. Rep. 195.

Previous annulment of the marriage is not necessary. Larocque *v.* Michon, 2 L. C. Jur. 267, 8 L. C. Rep. 222.

52. See the statutes of the several states. And see Macklin *v.* Taylor, Add. (Pa.) 212; Reg. *v.* Gallant, 10 N. Brunsw. 115.

Right of action.— Under the Pennsylvania statute of 1729, an action could properly be brought in the name of a surviving mother. Buchanan *v.* Thorn, 1 Pa. St. 431. But such an action cannot be maintained by a parent who has relinquished his parental control over the minor. Robinson *v.* English, 34 Pa. St. 324; Stansbury *v.* Bertron, 7 Watts & S. (Pa.) 362. But see Helffenstein *v.* Thomas, 5 Rawle (Pa.) 209. The act of 1830 was, however, repealed by the Marriage License Act of June 23, 1885, and judgment would not thereafter be rendered in actions, although they were brought before the passage of the said act of 1885. Hilliard *v.* Roach, 2 Pa. Co. Ct. 174; Hunt *v.* Rice, 1 Pa. Co. Ct. 557.

Defenses.—An honest mistake as to the age of the party (Beckham *v.* Nacke, 56 Mo. 546); the fact that the parent, by reason of moral degradation, is unfit to take care of his minor child (Robinson *v.* English, 34 Pa. St. 324); or the fact that there has been a previous seduction (Craft *v.* Jachetti, 47 N. J. L. 205; Macklin *v.* Taylor, Add. (Pa.) 212) has been held not to constitute a defense; but the consent of the parent is a good defense, although not evidenced by a certificate when the ceremony was performed (Rodebaugh *v.* Sanks, 2 Watts (Pa.) 9).

Previous notice.— Under some statutes a previous notice to the justice that it is intended to bring an action against him is made a condition precedent. Mitchell *v.* Cowgill, 4 Binn. (Pa.) 20. Such notice need not possess the technical formality of a declaration, but it is sufficient if it be explicit enough to indicate the injury complained of (Robinson *v.* English, 34 Pa. St. 324); and it need not state the kind of writ it is intended to sue on (Mitchell *v.* Cowgill, *supra*). A notice cannot be proved by the evidence of plaintiff, nor by evidence of a witness that he heard plaintiff read such notice in the presence of defendant, unless the witness identifies the paper and specifies the day. Minor *v.* Neal, 1 Pa. St. 403.

Declaration.— Where the action is brought by a person under whose care the minor was, the declaration should allege that the minor had no parent or guardian living. Castner *v.* Egbert, 12 N. J. L. 259. A mistake in the date is amendable, although the action is in its nature penal. Beates *v.* Retallick, 23 Pa. St. 288.

Burden of proof.— The burden is on defendant to show the consent of the parent or guardian. Medlock *v.* Brown, 4 Mo. 379.

Evidence.—Parol declarations of the parent to a third person that he had no objection to the marriage are inadmissible in an action under a statute providing a penalty for marrying a minor without a certificate in writing or without the parent being present and consenting. Wyckoff *v.* Boggs, 7 N. J. L. 138.

Verdict.—Where in a penal action the jury return a verdict that they find defendant guilty in the manner and form as he stands indicted, the court may properly refuse to receive such a verdict and send the jury out again in order that they may return a verdict in the proper form. Beates *v.* Retallick, 23 Pa. St. 288.

53. See the statutes of the several states. And see Wood *v.* Adams, 35 N. H. 32 (holding that the clergyman or magistrate is not required to receive more than a single certificate from a single town clerk, whether the parties reside in the same or different towns, and that he is not responsible for the correctness of the facts set forth in the certificate); Lakeman *v.* Moore, 32 N. H. 410; Bishop *v.* Marshall, 5 N. H. 407 (holding that no person except a justice of the peace or a minister of the gospel can incur the penalty, and the declaration must aver that defendant acted in one of such capacities); Campbell *v.* Shattuck, 2 Aik. (Vt.) 109 (holding that under such a statute a minister or justice of the peace who joins a minor in marriage is liable to the penalty, although the parents of the minor have consented and the minister and register have been notified thereof previous to the solemnization).

lished,[54] or for the marriage of an apprentice without the consent of his master.[55] These statutes are purely penal,[56] and the right to recover will be strictly construed.[57]

2. Criminal Liability. By statute the solemnization of a marriage of a minor, without the consent of his or her parent or guardian, is in some jurisdictions made punishable as a criminal offense,[58] as is by other statutes the solemnization of marriages between persons who have not obtained a license,[59] or to whose mar-

54. Helffenstein *v.* Thomas, 5 Rawle (Pa.) 209, holding that in an action to recover such a penalty plaintiff has the burden of showing the absence of a publication. And see Drake *v.* McMinn, 27 N. C. 639.

55. Zieber *v.* Boos, 2 Yeates (Pa.) 321, holding that an action will not lie under such a statute unless the apprentice has been regularly bound by indenture.

56. Beates *v.* Retallick, 23 Pa. St. 288; Burnell *v.* Dodge, 33 Vt. 462.

57. Alsup *v.* Ross, 24 Mo. 283 (holding, under a statute providing a penalty for the marriage of a minor, that an action will not lie against one for confederating with another in marrying a minor, but will lie only against the person who celebrated the marriage); Bollin *v.* Shiner, 12 Pa. St. 205 (holding that a penalty imposed for the marrying of a minor without the consent of the parent or guardian was not recoverable where the minor was the daughter of a citizen of another state, not resident within the state).

58. See the statutes of the several states.

Where the statute provides that the penalty shall be recovered in an action of debt it is not an indictable offense for a justice of the peace to marry without a license. State *v.* Loftin, 19 N. C. 31.

Defenses.— The fact that the parties to the marriage informed the officer that they were of age is no defense (Sikes *v.* State, 30 Ark. 496), nor is the fact that the officer acted upon a verbal message communicated through a third person as coming from the parent, consenting to the marriage (Smyth *v.* State, 13 Ark. 696).

Limitations.— Where the parties go to another county and are married in the presence of several witnesses, among whom was a kinsman of the female, and after their marriage they retired to their usual place of residence, such is not a secret marriage, nor is the return from the county in which the marriage takes place a secret departure within the saving clause of a statute of limitations. State *v.* Watts, 32 N. C. 369.

Indictment or information.— For cases in which the sufficiency of an indictment or information for joining in marriage persons under age has been construed see Sikes *v.* State, 30 Ark. 496 (holding that the existence of a parent or guardian within the state must be alleged, and also that the omission of the word "years" following an allegation of the age of the parties is not fatal); State *v.* Willis, 9 Ark. 196 (holding it sufficient to allege that the marriage was solemnized without the consent of the parent and that the parent resided within the state, without setting out the name of the parent, and also that it need not be alleged in terms that defendant's license or credentials of clerical character had been previously recorded); State *v.* Ross, 26 Mo. 260 (holding that the production of a certificate by the minor must be negatived); State *v.* Winright, 12 Mo. 410 (holding that an indictment following the language of the statute was not sufficient without a specific statement of defendant's acts); U. S. *v.* McCormick, 26 Fed. Cas. No. 15,663, 1 Cranch C. C. 593 (holding that the indictment must aver that defendant was at the time of solemnizing the marriage a minister authorized and qualified according to the statute to celebrate the rite of matrimony, and also must contain an averment that it was done without the consent of the parents, and aver that there was a parent then living and that there was no guardian who could consent, or that it was without the consent of the guardian as well as without the consent of the parent, and holding further that the addition of the word "clerk" to the name of defendant was not a sufficient averment of his ministerial capacity.

Evidence.— Testimony as to the size, appearance, and general development of the minor is not admissible for the purpose of showing her age, where the matter is susceptible of direct proof. State *v.* Griffith, 67 Mo. 287. Evidence that the justice omitted all inquiry from the parents of the minor, who were not present, is admissible as tending to show that he had knowledge that the marriage was unlawful. Bonker *v.* People, 37 Mich. 4.

Instructions.— An instruction must not remove from the jury the power to fix the punishment within the limits established by the statute. Sikes *v.* State, 30 Ark. 496.

Punishment.— A statute providing that defendant shall be fined in "any sum at the discretion of the jury, who shall pass on the case, or if the conviction be by confession or demurrer, then at the discretion of the court, not less than $25 or more than $500," fixes the limits of the amount of the fine in all cases whether the amount is fixed by a jury or the court. Smyth *v.* State, 13 Ark. 696.

Harmless error.— The rejection of evidence offered for the purpose of mitigating the punishment is not reversible error where the lowest penalty provided by law has been imposed. State *v.* Griffith, 67 Mo. 287.

59. See the statutes of the several states. And see White *v.* State, 4 Iowa 449; People *v.* McGlaughlin, 108 Mich. 516, 66 N. W. 385, holding that it is no defense under such a

riage there is a legal impediment.[60] In the absence of statute, however, it is not a crime for one not an officer or minister to celebrate a marriage with the consent of the parties to it.[61] But by statute it is sometimes made an offense for a person without authority to solemnize a marriage under pretense of having authority.[62]

V. INFORMAL AND INVALID MARRIAGES.

A. Operation and Effect — 1. IN GENERAL. When a marriage is void *ab initio* no civil rights can be secured thereby,[63] and it may be inquired of in any court where rights are asserted under it,[64] although the parties are dead.[65] Where,

statute that one of the parties married was under a legal disability.

Jurisdiction.— A complaint charging the party with solemnizing a marriage without a license is not within the jurisdiction of a justice of the peace. White *v.* State, 4 Iowa 449.

60. Bonker *v.* People, 37 Mich. 4, holding that the fact that a female is under the age of consent is such a legal impediment.

61. State *v.* Brown, 119 N. C. 825, 25 S. E. 820.

62. See Barclay *v.* Com., 116 Ky. 275, 76 S. W. 4, 25 Ky. L. Rep. 463 (holding that under a statute making accessaries before the fact in all felonies liable as principals, an indictment under a statute making it a penitentiary offense for one not authorized to solemnize a marriage under a pretense of having authority, which alleged that one solemnized a marriage between defendant and another and that defendant procured him so to solemnize it, knowing that he did not have authority, is sufficient); Young *v.* State, 35 Tex. 114 (holding an indictment insufficient which nowhere alleged that defendant was not a minister of the gospel or that he was not legally authorized to solemnize marriages).

63. Ponder *v.* Graham, 4 Fla. 23; Carpenter *v.* Smith, 24 Iowa 200; Middleborough *v.* Rochester, 12 Mass. 363 (holding that the marriage of a woman with one mentally incompetent did not change her lawful settlement); Gathings *v.* Williams, 27 N. C. 487, 44 Am. Dec. 49. *Compare* George *v.* Stevens, 31 Tex. 670.

Legitimacy of children see BASTARDS, 5 Cyc. 625, 626.

Statutes legitimizing children see BASTARDS, 5 Cyc. 632.

Plural marriages.— Although a husband is under a moral obligation to support his plural wives and their children, he is under no legal obligation to do so. Riddle *v.* Riddle, 26 Utah 268, 72 Pac. 1081.

Quasi-partnership.—Where a woman lives with a man not legally her husband, but believes him to be such, their relation will be treated as a partnership as to property acquired by their joint efforts during such relation, and to which each contributed something, thus entitling each to an equal share therein, regardless of the amounts respectively contributed. Lawson *v.* Lawson, 30 Tex. Civ. App. 43, 69 S. W. 246. But see *contra*, Schmitt *v.* Schneider, 109 Ga. 628, 35 S. E. 145, holding that a woman who cohabits with a man, renders to him household services, and delivers to him her earnings, under the belief that the contract of cohabitation between them is the equivalent of a lawful marriage, cannot upon ascertaining that such is not the fact maintain against him an equitable petition to compel a division of the property acquired with the proceeds of the earnings of both.

64. *Florida.*— Ponder *v.* Graham, 4 Fla. 23.

Georgia.— Medlock *v.* Merritt, 102 Ga. 212, 29 S. E. 185.

Kentucky.— Tomppert *v.* Tomppert, 13 Bush 326, 26 Am. Rep. 197; Bassett *v.* Bassett, 9 Bush 696.

Louisiana.— Minvielle's Succession, 15 La. Ann. 342.

Maine.— Unity *v.* Belgrade, 76 Me. 419.

New Hampshire.— Farmington *v.* Somersworth, 44 N. H. 589, holding that either party to a controversy involving the settlement of a pauper may impeach the marriage of any ancestor from whom the settlement is alleged to have been derived.

North Carolina.— Gathings *v.* Williams, 27 N. C. 487, 44 Am. Dec. 49. But *compare In re* Hybart, 119 N. C. 359, 25 S. E. 963, holding that where the wife is not a party to proceedings to have a receiver appointed for an insane husband's estate, the validity of the marriage contract cannot be attacked by *ex parte* affidavits.

See 34 Cent. Dig. tit. "Marriage," § 93.

But *compare* Martin *v.* Ryan, 2 Pinn. (Wis.) 24, holding that the validity of a marriage cannot be questioned by the husband in an action against him and his wife on a debt contracted by the wife before the marriage.

65. Ponder *v.* Graham, 4 Fla. 23; Bell *v.* Bennett, 73 Ga. 784 (holding that the question of whether a man was of unsound mind, and so incapable of contracting a marriage, may be raised twelve years afterward in a proceeding by the woman, after his death, to obtain the year's support given by statute); Fornshill *v.* Murray, 1 Bland (Md.) 479, 18 Am. Dec. 344 (holding that, although no proceedings can be had to have a marriage declared void after the death of one of the parties, yet, where the title to property depends upon the question of legitimacy, the question of the validity of a marriage may be inquired of incidentally, either at law or in equity); Gathings *v.* Williams, 27 N. C. 487, 44 Am. Dec. 49.

When the issue is immaterial the question will not be determined. So, where by statute

however, the marriage is voidable merely it is valid for civil purposes until its nullity has been pronounced by a competent court,[66] which may be done only during the lifetime of the parties,[67] the marriage being good *ab initio* after the death of either of the parties for all purposes.[68] By statute, however, it may be provided that even a void marriage shall not be questioned on the trial of collateral issues.[69] Under the codifications of the civil law it is provided that where a void marriage has been contracted in good faith the party or parties who have acted in good faith, and their issue, are entitled to civil rights.[70]

2. MENTAL INCAPACITY. It has been held that where a marriage contract is void by reason of the mental incapacity of one of the parties thereto, a decree of divorce or annulment is not necessary to restore the parties to their original rights.[71]

the status of the offspring would not be changed were the marriage declared valid, the validity of the marriage of plaintiff's father and mother cannot be inquired into in an action by a son on the bond of his father's administrator to recover his distributive share of the personal estate in the hands of the administrator. State *v.* Setzer, 97 N. C. 252, 1 S. E. 558, 2 Am. St. Rep. 290.

66. *Alabama.*— Farley *v.* Farley, 94 Ala. 501, 10 So. 646, 33 Am. St. Rep. 141.

Florida.— Ponder *v.* Graham, 4 Fla. 23.

Kentucky.— Tomppert *v.* Tomppert, 13 Bush 326, 26 Am. Rep. 197; Bassett *v.* Bassett, 9 Bush 696.

New York.— Perry *v.* Perry, 2 Paige 500.

North Carolina.— Gathings *v.* Williams, 27 N. C. 487, 44 Am. Dec. 49.

Pennsylvania.— Barnett *v.* Kimmell, 35 Pa. St. 13.

Vermont.— See Newbury *v.* Brunswick, 2 Vt. 151, 19 Am. Dec. 703, holding that after cohabitation as man and wife for twenty years, the validity of the marriage will not be gone into collaterally, on a question of the settlement of the parties as paupers.

Canada.— Burn *v.* Fontaine, 17 L. C. Jur. 40. See Cross *v.* Prevost, 15 Quebec Super. Ct. 184.

67. Ponder *v.* Graham, 4 Fla. 23; Gathings *v.* Williams, 27 N. C. 487, 44 Am. Dec. 49; Hodgins *v.* McNeil, 9 Grant Ch. (U. C.) 305.

68. Ponder *v.* Graham, 4 Fla. 23; Stevenson *v.* Gray, 17 B. Mon. (Ky.) 193; Gathings *v.* Williams, 27 N. C. 487, 44 Am. Dec. 49.

69. See Goshen *v.* Richmond, 4 Allen (Mass.) 458, holding that St. (1845) c. 222, providing that the validity of a marriage shall not be so questioned on account of the insanity or idiocy of either party, applies to marriages existing at the time of its passage. And see Charles *v.* Charles, 41 Minn. 201, 42 N. W. 935, holding that under Gen. St. (1878) c. 62, § 1, providing that, where a person whose husband or wife has been absent for five successive years without being known to such person to be living during that time marries during the lifetime of such husband or wife, the marriage is valid to the time of a decree annulling it, made by a court with jurisdiction in such matters, in an action for the purpose, and having the proper parties before it, the validity of such marriage cannot be assailed collaterally.

70. See Smith *v.* Smith, 43 La. Ann. 1140, 10 So. 248 (holding that such good faith means an honest and reasonable belief that the marriage is valid; Taylor's Succession, 39 La. Ann. 823, 2 So. 581; Summerlin *v.* Livingston, 15 La. Ann. 519 (holding that while by statute a null marriage may have such effect, the contract has in other respects no vitality). And see Matter of Hall, 61 N. Y. App. Div. 266, 70 N. Y. Suppl. 406 (in which the operation of the civil code of France is considered); Cathcart *v.* Union Bldg. Soc., 15 L. C. Rep. 467.

Civil effects as employed in such a statute is sufficiently broad to mean all civil effects given to a marriage by law. Smith *v.* Smith, 43 La. Ann. 1140, 10 So. 248, holding that the right of a surviving wife to a marital portion, conferred by La. Rev. Civ. Code, art. 2382, was included.

An error of law, as well as an error of fact, may be pleaded and established to prove good faith in contracting a marriage prohibited by law, and may secure protection to the innocent party. Buissiere's Succession, 41 La. Ann. 217, 5 So. 668.

71. Rawdon *v.* Rawdon, 28 Ala. 565; Powell *v.* Powell, 18 Kan. 371, 26 Am. Rep. 774. *Contra*, Wiser *v.* Lockwood, 42 Vt. 720 (holding that, although a marriage of a lunatic, duly solemnized and followed by cohabitation, may be set aside by means of a proper suit, it is not void if no proceedings are taken, and on his death the wife becomes entitled to the rights of a widow); *Ex p.* Turing, 1 Ves. & B. 140, 35 Eng. Reprint 55 (holding a sentence of the ecclesiastical court necessary, although the marriage was void, as in the case of lunacy).

Annulment by act of parties in general see *infra*, VIII, A. 1.

Collateral attack.—Where a husband was mentally incapable of contracting marriage, it is absolutely void *ab initio*, and may be impeached collaterally without judgment of nullity. Winslow *v.* Troy, 97 Me. 130, 53 Atl. 1008. *Contra*, see Williamson *v.* Williams, 56 N. C. 446, holding that a court of equity will not entertain the question of "nullity of marriage on account of imbecility," collaterally raised, but will stay proceedings in the suit in which the issue is made, that it may be determined by a direct sentence, in either a superior court of law or a court of equity.

A marriage by private contract with a lunatic is not such as is referred to in 2 N. Y.

However, a decree establishing the nullity of the marriage in such a case is proper.[72]

3. Consanguinity or Affinity. A marriage which is voidable merely upon the ground of consanguinity must be attacked during the life of the parties,[73] and such a provision is in some jurisdictions expressly made by statute,[74] some statutes being limited in their operation to a case in which the marriage was followed by cohabitation and birth of issue.[75] Such a statute applies to marriages contracted before its enactment.[76] By the civil law, although a marriage may be null, it will produce civil effects where contracted in good faith, although such good faith may lack legal foundation.[77]

4. Previous Existing Marriage. A marriage contracted during the existence of a prior valid and undissolved marriage, being void,[78] no decree is necessary to avoid it,[79] although by statute the existence of a previous undissolved marriage is made a ground for divorce,[80] or a proceeding to declare the nullity of the marriage authorized.[81] It interposes no obstacle to a subsequent marriage after the dissolution of the original marriage,[82] nor does it confer any rights upon the parties.[83] Under the Spanish law, however, a husband or wife entering in good faith into a marriage with one who has another consort living is, in law, not only innocent of crime but has all the rights, incidents, and privileges of lawful marriage, until the former marriage becomes known to such innocent party.[84] And in Louisiana such a marriage, when contracted in good faith, produces civil effects as to the parties and their children.[85]

Rev. St. p. 199, § 3, declaring that when either of the parties to a marriage shall be incapable, for want of understanding, of consent to a marriage, the marriage shall be void only from the time its nullity shall be declared. Jaques *v.* Public Administrator, 1 Bradf. Surr. (N. Y.) 499.

72. Rawdon *v.* Rawdon, 28 Ala. 565; Powell *v.* Powell, 18 Kan. 371, 26 Am. Rep. 774; Wightman *v.* Wightman, 4 Johns. Ch. (N. Y.) 343. See also Smart *v.* Taylor, 9 Mod. 98.

Mental incapacity as ground for annulment see *infra*, VIII, B, 3.

Intoxication as ground for annulment see *infra*, VIII, B, 4.

73. Bowers *v.* Bowers, 10 Rich. Eq. (S. C.) 551, 73 Am. Dec. 99, holding that the wife was entitled to a distributive share in her husband's estate after his death.

Consanguinity or affinity as ground for annulment see *infra*, VIII, B, 10.

74. See the statutes of the several states. And see Walter's Appeal, 70 Pa. St. 392; Parker's Appeal, 44 Pa. St. 309.

75. See the statutes of the several states. And see Baity *v.* Cranfill, 91 N. C. 293, 49 Am. Rep. 641.

76. Baity *v.* Cranfill, 91 N. C. 293, 49 Am. Rep. 641.

77. Buissiere's Succession, 41 La. Ann. 217, 5 So. 668, holding that a marriage between uncle and niece would produce legal effects as to the wife or child.

78. See *supra*, II, G.

79. *Alabama.*— Martin *v.* Martin, 22 Ala. 86.

Illinois.— Cartwright *v.* McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105.

Massachusetts.— See Randlett *v.* Rice, 141 Mass. 385, 6 N. E. 238.

New York.— Blossom *v.* Barrett, 37 N. Y. 434, 97 Am. Dec. 747.

Pennsylvania. — Klaas *v.* Klaas, 14 Pa. Super. Ct. 550; *In re* Shaak, 4 Brewst. 305; Harrison *v.* Harrison, 1 Phila. 389; Rumpff *v.* Vichestein, 3 Pittsb. 148; Klaas *v.* Klaas, 30 Pittsb. Leg. J. N. S. 238. But see Griffith *v.* Smith, 1 Pa. L. J. Rep. 479.

England.— Riddlesden *v.* Wogan, Cro. Eliz. 858.

See 34 Cent. Dig. tit. "Marriage," § 100.

Prior existing marriage as ground for annulment see *infra*, VIII, B, 6.

80. Smith *v.* Smith, 5 Ohio St. 32.

81. Drummond *v.* Irish, 52 Iowa 41, 2 N. W. 622; Klaas *v.* Klaas, 14 Pa. Super. Ct. 550.

82. Martin *v.* Martin, 22 Ala. 86; *In re* Bethune, 4 Dem. Surr. (N. Y.) 392.

83. Drummond *v.* Irish, 52 Iowa 41, 2 N. W. 622; Cram *v.* Burnham, 5 Me. 213, 17 Am. Dec. 218; Emerson *v.* Shaw, 56 N. H. 418.

Right to homestead.— Under the Donation Act with regard to the settlement of public lands, the rights of the settler's wife become perfect on completion of the settlement and cultivation, and a woman who lives with a settler under the belief that she is his wife, when in fact he is married to another, acquires no legal or equitable estate in the land, since the title vests in the true wife. Murray *v.* Murray, 6 Oreg. 26.

84. Lee *v.* Smith, 18 Tex. 141; Smith *v.* Smith, 1 Tex. 621, 46 Am. Dec. 121.

85. Monnier *v.* Contejean, 45 La. Ann. 419, 12 So. 623 (holding that no civil effect is produced where there is knowledge of the former marriage); Taylor's Succession, 39 La. Ann. 823, 2 So. 581 (holding the evidence to establish a want of good faith).

B. Ratification — 1. In General. A marriage which is void by statute *ab initio* cannot be made valid by a subsequent ratification by the parties,[86] such as by a continued cohabitation as husband and wife,[87] although it has been held that where the cause rendering the marriage void has been removed, continued cohabitation may prevent the parties from asserting, at least as between themselves, that the marital relation does not exist.[88] A marriage which is merely voidable, however, may be ratified and made valid by the subsequent assent of the parties;[89] for example, where it has been accomplished by fraud[90] or by duress;[91] but in order that a marriage obtained through duress may be validated it is necessary that the ratification be after the duress has ceased to be operative.[92]

2. Nonage. A marriage between persons incapacitated by nonage is rendered irrevocable by cohabitation after the incapacity is removed;[93] but prior cohabitation does not have such effect.[94]

3. Mental Incapacity. A marriage of a lunatic may be validated by ratification or consummation in a lucid interval,[95] and similarly a marriage contracted by a person when intoxicated may be affirmed when he has become sober.[96]

4. Physical Incapacity. A marriage voidable by reason of physical incapacity may be ratified by the acts of the party in recognizing the relation and in not seeking an annulment.[97]

86. See cases cited *infra*, V, B, 5.

87. Williams *v.* State, 44 Ala. 24; Pettit *v.* Pettit, 105 N. Y. App. Div. 312, 93 N. Y. Suppl. 1001, holding that under Laws (1901), p. 933, c. 339, requiring a marriage to be solemnized by a clergyman or one of certain officers, or to be evidenced by a written contract of marriage, signed and acknowledged by the parties, was in force, a marriage void when entered into, because of the existence of a prior undissolved marriage, cannot be validated by mere cohabitation after the dissolution of such prior marriage. See also Lewis *v.* Ames, 44 Tex. 319.

Proof of marriage after illicit relations see *infra*, VI, B, 2.

88. U. S. *v.* Hays, 20 Fed. 710. See also *infra*, V, C.

Under the Spanish law, a putative marriage to which there is an impediment unknown to one of the parties becomes a real marriage whenever the impediment is removed. Lee *v.* Smith, 18 Tex. 141.

89. Philadelphia *v.* Williamson, 5 Leg. Gaz. (Pa.) 42; Philadelphia *v.* Williamson, 10 Phila. (Pa.) 176.

90. Hampstead *v.* Plaistow, 49 N. H. 84; Steimer *v.* Steimer, 37 Misc. (N. Y.) 26, 74 N. Y. Suppl. 714. And see Steele *v.* Steele, 96 Ky. 382, 29 S. W. 17, 19 Ky. L. Rep. 517.

Effect of fraud as invalidating marriage see *supra*, I, D, 1, b.

91. Schwartz *v.* Schwartz, 29 Ill. App. 516; Hampstead *v.* Plaistow, 49 N. H. 84.

Effect of duress as invalidating marriage see *supra*, I, D, 1, c.

92. Hampstead *v.* Plaistow, 49 N. H. 84; Avakian *v.* Avakian, (N. J. Ch. 1905) 60 Atl. 521.

93. Smith *v.* Smith, 84 Ga. 440, 11 S. E. 496, 8 L. R. A. 362 (so holding, although by statute it was declared that marriages of persons unable to contract were void); Koonce *v.* Wallace, 52 N. C. 194 (holding that the common-law rule had not been altered by statute); Holtz *v.* Dick, 42 Ohio St. 23, 51 Am. Rep. 791; Courtright *v.* Courtright, 11 Ohio Dec. (Reprint) 413, 26 Cinc. L. Bul. 309; Vernon *v.* Vernon, 9 Ohio Dec. (Reprint) 365, 12 Cinc. L. Bul. 237.

94. Eliot *v.* Eliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568, so holding under statutes providing that when either of the parties, for want of age or understanding, was incapable of assenting thereto, or when the consent of either party was obtained by force or fraud and there has been no subsequent cohabitation, the marriage is void from such time as may be fixed by the judgment of a court of competent authority declaring the nullity thereof, and further that "no marriage shall be declared a nullity on the ground that one of the parties was under the age of legal consent, if it shall appear that the parties after they had attained such age, had for any time, freely cohabited together as husband and wife."

95. *Louisiana.*— Sabalot *v.* Populus, 31 La. Ann. 854.

Missouri.—Gross *v.* Gross, 96 Mo. App. 486, 70 S. W. 393. See also Johnson *v.* Johnson, 45 Mo. 595.

New York.— Wightman *v.* Wightman, 4 Johns. Ch. 343. See Forman *v.* Forman, 53 N. Y. St. 639.

Tennessee.— Cole *v.* Cole, 5 Sneed 57, 70 Am. Dec. 275, holding no new solemnization necessary.

England.— Ash's Case, 1 Eq. Cas. Abr. 278, Pl. 6, 21 Eng. Reprint 1044, Prec. Ch. 203, 24 Eng. Reprint 99.

Contra, Sims *v.* Sims, 121 N. C. 297, 28 S. E. 407, 61 Am. St. Rep. 665, 40 L. R. A. 737. And see Ward *v.* Dulaney, 23 Miss. 410; Crump *v.* Morgan, 38 N. C. 91, 40 Am. Dec. 447.

96. Prine *v.* Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87; Roblin *v.* Roblin, 28 Grant Ch. (U. C.) 439.

97. G. *v.* G., 67 N. J. Eq. 30, 56 Atl. 736,

5. Previous Existing Marriage. Since a marriage contracted while a prior existing marriage is in force is void it is incapable of ratification,[98] although the parties may when the disability is removed contract a valid common-law marriage.[99] In some cases, however, upon the theory that the relations of the parties are originally meretricious and will be presumed to continue so, it is held that there must, after the removal of the impediment, be a new agreement between the parties to become husband and wife in order that a valid common-law marriage may be established; and a mere continuance of the former cohabitation and repute is not sufficient,[1] although by the weight of authority it seems that continued cohabitation in the same manner as before is sufficient to establish, at least as in favor of the innocent party, a valid common-law marriage.[2] Where by statute common-law marriages have been abolished, continued cohabitation and recognition of the marital relations will not of course validate a marriage void in its inception.[3] In some jurisdictions it has been provided by statute that where one of the parties to the void marriage has acted in good faith, in the belief that the former husband or wife was dead, or without knowledge of the former marriage, the parties shall be deemed legally married from the time of the removal of the impediment to the marriage by death or divorce.[4]

C. Estoppel to Assert or Deny Marriage. It would seem that where a marriage is void *ab initio* neither of the parties may by their acts become, as against the other, estopped to deny its existence,[5] although it has been held that

holding that where a woman lived with her impotent husband for twenty years, and then, without suing for annulment of the marriage, separated herself from him and accepted a competent support for ten years longer and until he discovered her in adultery and brought suit for divorce, such conduct on her part constituted an affirmance of the voidable marriage. See also W. *v.* R., 1 P. D. 405, 43 L. J. P. & M. 89, 25 Wkly. Rep. 25; Hall *v.* Castleden, 6 Jur. N. S. 348, 29 L. J. P. & M. 81, 1 L. T. Rep. N. S. 489, 1 Swab. & Tr. 605 [*affirmed* in 9 H. L. Cas. 186, 31 L. J. P. & M. 103, 5 L. T. Rep. N. S. 164, 4 Macq. H. L. 159, 11 Eng. Reprint 701; M. *v.* B., 33 L. J. P. & M. 203].

Effect of delay in instituting proceedings for annulment see *infra*, VIII, C, 3.

Physical disease or incapacity as ground for annulment see *infra*, VIII, B, 2.

98. Summerlin *v.* Livingston, 15 La. Ann. 519; Blanks *v.* Southern R. Co., 82 Miss. 703, 35 So. 570; Pain *v.* Pain, 37 Mo. App. 110; Pettit *v.* Pettit, 105 N. Y. App. Div. 312, 93 N. Y. Suppl. 1001.

99. Land *v.* Land, 206 Ill. 288, 68 N. E. 1109, 99 Am. St. Rep. 171; Schuchart *v.* Schuchart, 61 Kan. 597, 60 Pac. 311, 78 Am. St. Rep. 342, 50 L. R. A. 180; Flanagan *v.* Flanagan, 122 Mich. 386, 81 N. W. 258; Taylor *v.* Taylor, 63 N. Y. App. Div. 231, 71 N. Y. Suppl. 411; Taylor *v.* Taylor, 25 Misc. (N. Y.) 566, 55 N. Y. Suppl. 1052, 28 N. Y. Civ. Proc. 323; Staiger's Estate, 7 Pa. Dist. 351.

1. Cartwright *v.* McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105; Hunt's Appeal, 86 Pa. St. 294; Bergdoll's Estate, 7 Pa. Dist. 137; Hunt *v.* Cleveland, 6 Pa. Co. Ct. 592; King's Estate, 9 Kulp (Pa.) 54; Edelstein *v.* Brown, 35 Tex. Civ. App. 625, 80 S. W. 1027. And see Harbeck *v.* Harbeck, 102 N. Y. 714, 7 N. E. 408. But see *contra*, Stein *v.* Stein, 66 Ill. App. 526.

Proof of fact of marriage of persons previously sustaining illicit relations see *infra*, VI, B, 2.

2. Busch *v.* Supreme Tent K. M. of W., 81 Mo. App. 562; Chamberlain *v.* Chamberlain, 68 N. J. Eq. 414, 59 Atl. 813 [*distinguishing* Collins *v.* Voorhees, 47 N. J. Eq. 315, 20 Atl. 676, 24 Am. St. Rep. 412, 47 N. J. Eq. 555, 22 Atl. 1054, 14 L. R. A. 364 [*affirming* 46 N. J. Eq. 411, 19 Atl. 172, 19 Am. St. Rep. 404] (holding that where a man and a woman were formally married and entered into matrimonial relations in good faith, believing that the woman's husband was dead, whereas he was in fact alive, the relation of husband and wife began between them when a decree of divorce obtained for additional security was rendered in favor of the wife against her supposedly dead husband, after which the parties continued to live together as before in the continued and uninterrupted belief that the were married); De Thoren *v.* Atty.-Gen., 1 App. Cas. 686.

3. Harris *v.* Harris, 85 Ky. 49, 2 S. W. 549, 8 Ky. L. Rep. 727.

4. See the statutes of the several states. And see Lufkin *v.* Lufkin, 182 Mass. 476, 65 N. E. 840, holding that the words "good faith" as employed in such a statute were used in their common signification and did not require, in addition to an honest intention, a freedom from knowledge of any circumstances which ought to put a person of ordinary intelligence and prudence on inquiry.

5. Ponder *v.* Graham, 4 Fla. 23; Gathings *v.* Williams, 27 N. C. 487, 44 Am. Dec. 49; Rumpff *v.* Vichestein, 3 Pittsb. (Pa.) 148 (holding that where a second marriage is contracted by a wife during the existence of a first marriage, she is not estopped from denying

where one of the parties by false representations as to the non-existence of a legal impediment has induced the other to enter into the marriage he will, where the other has continued to act on such representations after the impediment has been removed, be estopped to deny their truth.[6] The parties may, however, with regard to third persons become estopped to deny[7] or assert[8] a marital relation as in the case of other matters *in pais*.[9] A third person may by recognition of a

the validity of the second marriage by the fact that she lived with her second husband after a divorce from her first husband was granted. But *compare* Mason *v.* Mason, 101 Ind. 25, holding that where a divorced wife remarried within two years after divorce, in violation of N. Y Rev. St. (1881) § 1030, her second husband, who lived with her for two years after the expiration of the inhibited period, is estopped to deny the validity of their marriage, in a subsequent suit by the wife to obtain a divorce from him); Everett *v.* Morrison, 69 Hun (N. Y.) 146, 23 N. Y. Suppl. 377 (where a woman silently withholds her assent to a formal marriage, but subsequently treats it as valid, she is estopped to assert that it is not binding); Johnson *v.* Johnson, 1 Coldw. (Tenn.) 626 (where persons have represented themselves to be married, or have assumed the relation of husband and wife, cohabiting and holding themselves out to the public as such, although not in fact married, they will not be permitted to deny the marriage as between themselves when either is seeking to defeat rights acquired by the other, either directly or indirectly, on the faith of the marriage).

Estoppel of infant.— A youth who, by falsely and fraudulently representing himself to be nineteen years old, induced defendant to marry him, is not estopped by his fraud, in an action by him to annul the marriage, to show that he was under legal age, under Rev. St. §§ 2329, 2350, 2351, 2353, providing that a male party to a marriage, under eighteen years of age, may, on the ground that he was under legal age, have the marriage annulled. Eliot *v.* Eliot, 81 Wis. 295, 51 N. W. 81, 15 L. R. A. 259.

6. Chamberlain *v.* Chamberlain, 68 N. J. Eq. 414, 59 Atl. 813, holding that where complainant and defendant were formally married, and entered into matrimonial relations in the belief that the complainant's then husband was dead, but, in order to place the legality of their relations beyond question, complainant procured a divorce from her lawful husband, who was in fact alive, but in parts unknown, after which defendant, in the presence of witnesses, assured complainant that she was his legal wife, and that no further ceremony was necessary, and thereby induced complainant, in reliance upon such representations, to remain with him, cohabiting with him as his wife, for over twenty years, defendant was estopped to deny that he had intended to enter into marriage relations with complainant.

7. Ponder *v.* Graham, 4 Fla. 23; Divoll *v.* Leadbetter, 4 Pick. (Mass.) 220; Gathings *v.* Williams, 27 N. C. 487, 44 Am. Dec. 49. And see Applegate *v.* Applegate, 45 N. J. Eq. 116, 17 Atl. 293, where a man and woman declared themselves to be married and were recognized as husband and wife by their friends and relatives, and cohabited for years, and a child was born to them after which the woman left the man, and was formally married to a third person, and it was held that she was estopped to claim support as the wife of the latter. But *compare* Carpenter *v.* Smith, 24 Iowa 200, holding that the fact that a woman, believing herself lawfully married, joined her supposed husband with her as co-plaintiff in an action for assault upon her, and recovered judgment, will not estop her from denying his rights in the judgment, where she subsequently, on discovering that he had a lawful wife living at the time of the marriage, obtains a divorce from him on that ground.

In action against husband for supplies furnished reputed wife see HUSBAND AND WIFE, 21 Cyc. 1233.

Description in a deed.— The fact that defendant is described in a deed of settlement under which she claims as the wife of B will not estop her from denying such fact where the deed was made by one trustee to another, both of whom were strangers to her, for her benefit, and was not signed by her. Brown *v.* Beckett, 6 D. C. 253.

8. Alabama, etc., R. Co. *v.* Beardsley, 79 Miss. 417, 30 So. 660, 89 Am. St. Rep. 660 (holding that where the declaration in an action for wrongful death showed that one plaintiff was the wife of the decedent and the other his daughter by a prior marriage, there was not such estoppel against the wife to assert the validity of the marriage as dispensed with the necessity that defendant prove that there was no divorce, in order to show that the second marriage was not legal); Richardson's Estate, 6 Pa. Co. Ct. 653 (where a woman, claiming to be the wife of A, did not assert herself as such for nearly thirty years, and acquiesced in his subsequent marriage with another woman, and herself married B; and it was held that she was estopped to claim, after the death of A, that she was his wife).

Estoppel by void marriage.— Where a woman who was married under the sealing ceremony of the mormon church obtained a "church divorce," and, believing such divorce to be valid, went through a marriage ceremony with another man, and lived with him as his wife, she was not thereby estopped, on learning that her divorce was invalid, from asserting her first marriage, and denying the legality of the second marriage. Hilton *v.* Roylance, 25 Utah 129, 69 Pac. 660, 58 L. R. A. 723.

9. See, generally, ESTOPPEL.

marriage estop himself from denying it as against other third persons.[10] Estoppel may also arise from a judgment in which the fact of a marriage is necessarily involved or to which it is incident.[11] The fact that a man by his will recognizes a person as his wife will not estop his executor from asserting the invalidity of the marriage as against the wife, where she attempts to secure dower in opposition to the terms of the will.[12]

D. Curative Legislation — 1. In General. Provision has been made in some states by statute for the legalization of the relationship of persons cohabiting as husband and wife at the time of the passage of such statutes,[13] or for the validation of informal marriages previously contracted.[14] These statutes will not be construed to operate retrospectively for the creation of disabilities unless the intent is clearly apparent.[15] A void marriage is not rendered valid by the mere fact that a prohibiting statute was repealed shortly after the marriage was contracted.[16] A statute legitimizing the issue of a void marriage does not affect the relationship of the parties to such marriage.[17]

2. Slave Marriages. Since, during the existence of slavery, slaves with the consent of their owners frequently, either by a formal ceremony of marriage or by a simple agreement to live with each other as husband and wife and to be recognized by each as such, entered into what are termed "moral marriages," upon the abolition of slavery statutes were generally passed in the former slaveholding

10. Spicer *v.* Spicer, 16 Abb. Pr. N. S. (N. Y.) 112 (holding that where a man living with a woman, under color of a void marriage, was about to make a testamentary disposition of his property in her favor and he was induced to convey the property to his brother, upon the promise by the brother to pay the woman an amount equal to her dower, upon her husband's death; that, having thus diverted the property by the force of this promise, the brother was estopped from denying the validity of the marriage, and that, as against him, the woman could recover the value of her dower); Scott *v.* Paquet, 4 L. C. Jur. 149 [*confirmed* in 11 L. C. Jur. 289].

The mere acceptance of a conveyance, in which a woman is described as the wife of the person named, does not estop the grantee from assailing the marriage. Cram *v.* Burnham, 5 Me. 213, 17 Am. Dec. 218; Spicer *v.* Spicer, 16 Abb. Pr. N. S. (N. Y.) 112.

11. Doe *v.* Roe, 2 Houst. (Del.) 49, holding that where lands of a decedent are ordered sold for the payment of his debts, subject to his widow's right of dower therein, the purchaser at such sale is estopped to deny the validity of the marriage between the widow and decedent.

Estoppel by judgment generally see Judgments, 23 Cyc. 1215 *et seq.*

12. Ponder *v.* Graham, 4 Fla. 23. And see George *v.* Thomas, 10 U. C. Q. B. 604, holding that plaintiff having put in a will in which the testator spoke of H as his wife was not estopped from denying the marriage.

13. See the statutes of the several states. And see Floyd *v.* Calvert, 53 Miss. 37, in which it was held that Const. art. 12, § 22, affirming the marriage relation between persons then cohabiting as husband and wife, did not operate to establish marriage between persons then cohabiting illicitly, and that in order to assert a relation under such constitutional provision, where it appears that the persons were previously cohabiting unlawfully, there must be shown some formal and explicit agreement between the parties that they will and do accept the new organic law as establishing thenceforward between them a new relationship, or there must be such open and visible change in the conduct and declarations of the parties that an agreement to accept the new law may fairly be inferred.

Validity of curative statutes see Constitutional Law, 8 Cyc. 1026 text and note 98.

Impairment of obligation of contract see Constitutional Law, 8 Cyc. 992.

14. See the statutes of the several states. And see Ligonia *v.* Buxton, 2 Me. 102, 11 Am. Dec. 46 (holding that the resolve of March 19, 1821, by which sundry marriages solemnized within the state by ministers who were not stated and ordained ministers of the gospel were confirmed, did not validate a marriage solemnized by a minister at his own house, where it appeared that neither of the parties resided within the town); Cooke *v.* Cooke, 61 N. C. 583 (holding that a marriage solemnized in 1865, by a justice of the peace appointed under the confederate government, was within the provision of the ordinance of Oct. 18, 1865); Rice *v.* Rice, 31 Tex. 174 (holding that the act of Feb. 5, 1841, legalizing irregular marriages did not operate upon a marriage, the parties of which had separated before the statute took effect).

15. Pringle *v.* Allan, 18 U. C. Q. B. 575, holding that 11 Geo. IV, c. 36, did not destroy a deed executed by a married woman as if she were sole, she having been informed that her previous marriage by a clergyman without authority to solemnize a ceremony of marriage was illegal.

16. Wilbur *v.* Bingham, 8 Wash. 35, 35 Pac. 407, 40 Am. St. Rep. 886, so holding, although the parties continued to live together, common-law marriages being prohibited by statute.

17. Light *v.* Lane, 41 Ind. 539.

states, legalizing the relations between parties who had contracted such marriages and were continuing to live together recognizing each other as husband and wife.[18] In some jurisdictions these statutes were sufficiently broad to cover all persons of color, although born free;[19] but in others their operation was confined to those persons who, while incapacitated from slavery from entering into a marriage relation, had assumed such a relation.[20] These statutes do not apply to relations which have terminated before emancipation,[21] or before their enactment,[22] or to polygamous relations;[23] nor will they invalidate a legal marriage,[24] or a slave marriage which has been validated by ratification, although the parties have sepa-

18. See the statutes of the several states. And see the following cases:

Alabama.—Washington *v.* Washington, 69 Ala. 281.

Florida.— Johnson *v.* Wilson, 48 Fla. 76, 37 So. 179.

Georgia.—Williams *v.* State, 67 Ga. 260.

Mississippi.— Reed *v.* Mosely, 76 Miss. 1, 23 So. 451; Andrews *v.* Simmons, 68 Miss. 732, 10 So. 65.

Missouri.— Lee *v.* Lee, 161 Mo. 52, 61 S. W. 630.

North Carolina.—State *v.* Melton, 120 N. C. 591, 26 S. E. 933; Jones *v.* Hoggard, 108 N. C. 178, 12 S. E. 906, 907; Branch *v.* Walker, 102 N. C. 34, 8 S. E. 896; State v. Whitford, 86 N. C. 636.

South Carolina.—Roberson *v.* McCanley, 61 S. C. 411, 39 S. E. 570; Clement *v.* Riley, 33 S. C. 66, 11 S. E. 699; James *v.* Mickey, 26 S. C. 270, 2 S. E. 130; Myers *v.* Ham, 20 S. C. 522; State *v.* Whaley, 10 S. C. 500.

Tennessee.— Brown *v.* Cheatham, 91 Tenn. 97, 17 S. W. 1033, holding that Milliken & V. Code, §§ 3303, 3304, declaring to be husband and wife all colored persons living as such while in slavery and conferring the right of inheritance on their children, does not apply to marriages contracted without consent of the owner of the contracting parties.

Texas.— Hill *v.* Fairfax, 38 Tex. 220; Steward *v.* State, 7 Tex. App. 326; McKnight *v.* State, 6 Tex. App. 158.

Virginia.— Francis *v.* Francis, 31 Gratt. 283.

United States.— Thomas *v.* East Tennessee, etc., R. Co., 63 Fed. 420.

Power of legislature to regulate marriage see CONSTITUTIONAL LAW, 8 Cyc. 992.

An act validating marriages within forbidden degrees will not validate a slave marriage. Andrews *v.* Simmons, 68 Miss. 732, 10 So. 65.

19. Francis *v.* Francis, 31 Gratt. (Va.) 283.

20. Clements *v.* Crawford, 42 Tex. 601 [*overruling* Honey *v.* Clark, 37 Tex. 686, so far as in conflict], holding that Const. art. 12, § 27, providing that all persons who at any time theretofore had lived together as husband and wife, and both of whom by the law of bondage were precluded from the rights of matrimony, and who had continued to live together until the death of one of the parties, should be considered as having been legally married, did not apply to persons so living together, only one of whom was precluded by the law of bondage from marrying.

21. Harrison *v.* Alexander, 135 Ala. 307, 33 So. 543; Cantelou *v.* Hood, 56 Ala. 519 [*overruling* Haden *v.* Ivey, 51 Ala. 381; Stikes *v.* Swanson, 44 Ala. 633, so far as in conflict]. But *compare* Carver *v.* Maxwell, 110 Tenn. 75, 71 S. W. 752.

22. Butler *v.* Butler, 161 Ill. 451, 44 N. E. 203. And see Jackson *v.* State, 53 Ala. 472, holding that the act of Dec. 31, 1868, extending the provisions of "an ordinance relative to marriages between freedmen and freedwomen" to July 13, 1869, operated to establish legal marital relations between freedmen and freedwomen living together as husband and wife at the date of the act, and continuing to so do until July 13, 1869.

Where one party is dead at the time the act is passed the marriage is not validated. Woods *v.* Moten, 129 Ala. 228, 30 So. 324; Andrews *v.* Simmons, 68 Miss. 732, 10 So. 65. *Contra*, see Davenport *v.* Caldwell, 10 S. C. 317, holding that where two slaves went through the form of a marriage, lived together as husband and wife for a number of years, and died, leaving children, before the general emancipation took place, they would be considered as husband and wife.

23. Branch *v.* Walker, 102 N. C. 34, 8 S. E. 896. But see Knox *v.* Moore, 41 S. C. 355, 19 S. E. 683, holding that under 13 St. p. 291, regulating marriage between former slaves, and declaring those who lived together at that time as husband and wife to be husband and wife, a woman with whom decedent had lived from the passage of the act until his death as his wife, having been married to her in 1863 after the manner of slaves, is his wife, although he had previously lived with another woman as his wife, and even after the act had lived with such woman.

Where the relation began during the lifetime of a former wife who is deceased when the statute takes effect and the parties continue living together their relation is legalized. Adams *v.* Adams, 57 Miss. 267.

By express provision in some statutes in case a man was living with two wives or a woman with two husbands, such man or woman was required to have a ceremony of marriage performed with one of such wives or husbands and mere selection and cohabitation was not sufficient. Comer *v.* Comer, 91 Ga. 314, 18 S. E. 300.

24. Callahan *v.* Callahan, 36 S. C. 454, 15 S. E. 727, holding that where a free negro man married a free negro woman before such act was passed, and while he had a slave wife living and undivorced, the latter acquired no rights by virtue of such a statute.

rated before the statute takes effect.[25] To bring the parties within their provisions there must have been an agreement to live as husband and wife, a mere relation of concubinage not being sufficient.[26] The agreement to enter into the relation of husband and wife need not have been express, but as in other cases it may be implied from conduct and declarations.[27] While under some statutes the parties are required to make a formal declaration of intent to live as husband and wife,[28] such provisions have been often held merely directory and continued cohabitation is sufficient.[29] The effect of such statutes is, as between the parties, to legalize the customary marriage and not to institute a new marriage.[30] The relation when legalized is not affected by the fact that the parties separate and contract other marriages.[31] A statute recognizing the voluntary dissolution of "moral marriages" between slaves does not apply to a ceremonial marriage between freed men and women.[32]

E. Criminal Responsibility. Persons who assume to contract a marriage in a manner forbidden by statute may be punished under a statute rendering living together as man and wife without being married an offense.[33]

VI. EVIDENCE.[1]

A. Burden of Proof and Presumptions[2]**— 1. As to Fact of Marriage Generally — a. In General.** The burden of proving a marriage rests on the party

25. Cumby *v.* Henderson, 6 Tex. Civ. App. 519, 25 S. W. 673.

26. Washington *v.* Washington, 69 Ala. 281; Roberson *v.* McCauley, 61 S. C. 411, 39 S. E. 570; Livingston *v.* Williams, 75 Tex. 653, 13 S. W. 173.

27. Francis *v.* Francis, 31 Gratt. (Va.) 283.

28. See Dowd *v.* Hurley, 78 Ky. 260; Estill *v.* Rogers, 1 Bush (Ky.) 62; State *v.* Harris, 63 N. C. 1.

29. State *v.* Melton, 120 N. C. 591, 26 S. E. 933; Long *v.* Barnes, 87 N. C. 329; State *v.* Whitford, 86 N. C. 636; State *v.* Adams, 65 N. C. 537.

30. Dowd *v.* Hurley, 78 Ky. 260.

As to third persons acquiring rights in the interim between the emancipation and compliance with the statute, however, the marriage does not relate back. Stewart *v.* Munchandler, 2 Bush (Ky.) 278.

A common-law marriage, however, although the indirect result of a slave marriage, is a new contract and not a ratification of the slave marriage, the parties having separated years before emancipation and each having had a subsequent slave marriage to another, and not entered into their common-law marriage until years after emancipation, although living in the same county. Gilbert *v.* Edwards, 32 Tex. Civ. App. 460, 74 S. W. 959.

31. Thomas *v.* East Tennessee, etc., R. Co., 63 Fed. 420.

32. McConico *v.* State, 49 Ala. 6.

33. State *v.* Walker, 36 Kan. 297, 13 Pac. 279, 59 Am. Rep. 556, so holding where defendants entered into what they termed an "autonomistic marriage." See, generally, Adultery; Fornication; Lewdness.

1. See, generally, Evidence. And see cross-references *infra*, note 41.

Evidence as to legitimacy of child see Bastards, 5 Cyc. 626 *et seq.*

Evidence in particular actions and proceedings: Action against person officiating at marriage, see *supra*, IV, E. Action by or against husband or wife see Husband and Wife, 21 Cyc. 1568 *et seq.*, 1607. Action for alienating affections of wife or enticing her away see Husband and Wife, 21 Cyc. 1624. Action for alimony see Divorce, 14 Cyc. 751 *et seq.* Action for causing death of spouse see Death, 13 Cyc. 348 *et seq.* Action for criminal conversation see Husband and Wife, 21 Cyc. 1630 *et seq.* Action for divorce see Divorce, 14 Cyc. 681 *et seq.* Action for dower see Dower, 14 Cyc. 990 *et seq.* Action for necessaries furnished wife see Husband and Wife, 21 Cyc. 1568. Action for separate maintenance of wife see Husband and Wife, 21 Cyc. 1607. Action or proceeding to establish or protect homestead right see Homesteads, 21 Cyc. 525, 559, 589, 620, 638 *et seq.* Bastardy proceedings see Bastards, 5 Cyc. 659 *et seq.* Proceedings for abandonment and non-support see Husband and Wife, 21 Cyc. 1614. Proceedings for widow's allowance see Executors and Administrators, 18 Cyc. 401. Proceeding to establish right as heir or distributee see Descent and Distribution, 14 Cyc. 98 *et seq.*

Evidence in particular prosecutions: Prosecution for abandonment and non-support see Husband and Wife, 21 Cyc. 1614. Prosecution for adultery see Adultery, 1 Cyc. 960, 963 *et seq.* Prosecution for bastardy see Bastards, 5 Cyc. 659. Prosecution for bigamy see Bigamy, 5 Cyc. 699 *et seq.* Prosecution for conspiracy to cause marriage falsely to appear of record see Conspiracy, 8 Cyc. 636. Prosecution for incest see Incest, 22 Cyc. 53 *et seq.* Prosecution for living in adultery see Lewdness, 25 Cyc. 214 *et seq.* Prosecution for procuring one without authority to solemnize marriage see *supra*, IV, E, 3. Prosecution for seduction see Seduction.

Judicial notice of ecclesiastical law see Evidence, 16 Cyc. 883.

2. See, generally, Evidence, 16 Cyc. 926

who asserts it.[3] So if a second marriage is attacked on the ground of a prior existing marriage between one of the spouses and a third person, the burden of proving the prior marriage rests on the party asserting it.[4] If, however, the prior marriage is shown to have existed at the time of the second marriage, the burden of proving a remarriage to the second spouse after the dissolution of the first marriage by death or divorce rests on the party asserting the validity of the second marriage.[5] The burden of proving that a ceremonial marriage was *de futuro* rather than *per verba de præsenti* rests also on the party asserting it.[6]

b. Cohabitation and Reputation as Creating Presumption of Marriage[7] — (i) *In General.* In some states all marriages are declared by statute to be void which are not attended with certain formalities,[8] to be evidenced by record or other writing, and the mode of proving a marriage is accordingly limited to documentary evidence.[9] In the absence of such legislation a marriage may be proved by circumstantial evidence; and since the presumption is in favor of marriage and against concubinage, the fact that a man and woman have openly cohabited as husband and wife for a considerable length of time, holding each other out and recognizing and treating each other as such by declarations, admissions, or conduct, and are accordingly generally reputed to be such among their relatives and acquaintances, and those who come in contact with them, may give rise to a presumption that they had previously entered into an actual marriage, although there be no documentary evidence thereof or direct testimony to that effect;[10]

et seq., 1050 *et seq.* And see cross-references *supra*, note 1.

Burden of proof and presumptions as to authority of person officiating see *supra*, IV, A, 5.

3. *District of Columbia.*— Brown *v.* Beckett, 6 D. C. 253.

Georgia.— Wilson *v.* Allen, 108 Ga. 275, 33 S. E. 975; Clark *v.* Cassidy, 62 Ga. 407.

New York.— See Matter of Gerlach, 29 Misc. 90, 60 N. Y. Suppl. 574.

Pennsylvania.— *In re* Davis, 204 Pa. St. 602, 54 Atl. 475.

Canada.— McNab *v.* Jamieson, 5 Rev. Lég. 529.

See 34 Cent. Dig. tit. "Marriage," § 68.

Burden of proving marriage of persons previously sustaining illicit relations see *infra*, VI, A, 3, b.

4. Hager *v.* Brandt, 111 Iowa 746, 82 N. W. 1016; Bowman *v.* Little, 101 Md. 273, 61 Atl. 223, 657, 1084; Rhode Island Hospital Trust Co. *v.* Thorndike, 24 R. I. 105, 52 Atl. 873; Goldwater *v.* Burnside, 22 Wash. 215, 60 Pac. 409.

5. *Illinois.*— Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. 631.

Iowa.— Barnes *v.* Barnes, 90 Iowa 282, 57 N. W. 851.

Michigan.— Rose *v.* Rose, 67 Mich. 619, 35 N. W. 802.

Minnesota.— State *v.* Worthingham, 23 Minn. 528.

New York.— Collins *v.* Collins, 80 N. Y. 1; Foster *v.* Hawley, 8 Hun 68; Bell *v.* Clarke, 45 Misc. 272, 92 N. Y. Suppl. 163; Matter of Stanley, 1 N. Y. St. 325.

Pennsylvania.— Hunt's Appeal, 86 Pa. St. 294; Jones *v.* Jones, 4 Pa. Dist. 223; Hunt *v.* Cleveland, 6 Pa. Co. Ct. 592.

Wisconsin.— Williams *v.* Williams, 46 Wis. 464, 1 N. W. 98, 32 Am. Rep. 722.

United States.— Adger *v.* Ackerman, 115 Fed. 124, 52 C. C. A. 568.

England.— Lapsley *v.* Grierson, 1 H. L. Cas. 498, 9 Eng. Reprint 853.

See 34 Cent. Dig. tit. "Marriage," § 66.

See, however, Johnson *v.* Johnson, 1 Coldw. (Tenn.) 626.

Sufficiency of evidence of new marriage see *infra*, VI, B, 2.

6. Davis *v.* Davis, 1 Abb. N. Cas. (N. Y.) 140.

7. See cross-references *supra*, note 1.

Cohabitation and reputation as sufficient proof of marriage see *infra*, VI, B, 1, f, (I), (A).

Cohabitation as consummation of marriage see *supra*, I, D, 3.

Cohabitation as validating void marriage see *infra*, V, B.

8. See *supra*, I, D, 4; IV, A–D.

9. See, as bearing generally on this subject, Klenke *v.* Noonan, 118 Ky. 436, 81 S. W. 241, 26 Ky. L. Rep. 305; Estill *v.* Rogers, 1 Bush (Ky.) 62; Pettit *v.* Pettit, 105 N. Y. App. Div. 312, 93 N. Y. Suppl. 1001; Smith *v.* Smith, 1 Tex. 621, 46 Am. Dec. 121; Summerville *v.* Summerville, 31 Wash. 411, 72 Pac. 84; *In re* McLaughlin, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699.

10. *Alabama.*— Bynon *v.* State, 117 Ala. 80, 23 So. 640, 67 Am. St. Rep. 163. And see Williams *v.* State, 44 Ala. 24.

California.— *In re* Ruffino, 116 Cal. 304, 48 Pac. 127; *In re* Titcomb, Myr. Prob. 55.

Colorado.— Poole *v.* People, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245.

District of Columbia.— Jennings *v.* Webb, 8 App. Cas. 43.

Illinois.— Land *v.* Land, 206 Ill. 288, 68 N. E. 1109, 99 Am. St. Rep. 171; *In re* Maher, 204 Ill. 25, 68 N. E. 159; Manning *v.* Spurck, 199 Ill. 447, 65 N. E. 342; Myatt

and in the absence of evidence in rebuttal [11] the presumption may be conclusive of the fact of marriage.[12] This presumption, it will be observed, rests upon three essential facts: (1) Marital cohabitation.[13] (2) Recognition of the marriage rela-

v. Myatt, 44 Ill. 473; McKenna *v.* McKenna, 73 Ill. App. 64.

Indiana.— Nossaman *v.* Nossaman, 4 Ind. 648.

Iowa.— Hager *v.* Brandt, 111 Iowa 746, 82 N. W. 1016.

Louisiana.— Powers *v.* Charbmury, 35 La. Ann. 630; Blasini *v.* Blasini, 30 La. Ann. 1388; Holmes *v.* Holmes, 6 La. 463, 26 Am. Dec. 482.

Massachusetts.— Newburyport *v.* Boothbay, 9 Mass. 414.

Michigan.— Hoffman *v.* Simpson, 110 Mich. 133, 67 N. W. 1107; Peet *v.* Peet, 52 Mich. 464, 18 N. W. 220.

Mississippi.— Henderson *v.* Cargill, 31 Miss. 367; Stevenson *v.* McReary, 12 Sm. & M. 9, 51 Am. Dec. 102.

Montana.— Soyer *v.* Great Falls Water Co., 15 Mont. 1, 37 Pac. 838.

Nebraska.— Sorensen *v.* Sorensen, 68 Nebr. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455.

New Jersey.— Stevens *v.* Stevens, 56 N. J. Eq. 488, 38 Atl. 460.

New York.— Chamberlain *v.* Chamberlain, 71 N. Y. 423; Matter of Brush, 25 N. Y. App. Div. 610, 49 N. Y. Suppl. 803; Matter of Schmidt, 42 Misc. 463, 87 N. Y. Suppl. 428; Degnan *v.* Degnan, 17 N. Y. Suppl. 883; Newton *v.* Southworth, 7 N. Y. St. 130; Hicks *v.* Cochran, 4 Edw. 107; Jackson *v.* Claw, 18 Johns. 346; Matter of Taylor, 9 Paige 611; Rose *v.* Clark, 8 Paige 574; Grotgen *v.* Grotgen, 3 Bradf. Surr. 373; Tummalty *v.* Tummalty, 3 Bradf. Surr. 369; Christie's Estate, Tuck. Surr. 81.

Pennsylvania.— Durning *v.* Hastings, 183 Pa. St. 210, 38 Atl. 627; Com. *v.* Haylow, 17 Pa. Super. Ct. 541; Hine's Estate, 10 Pa. Super. Ct. 124, 44 Wkly. Notes Cas. 109; Staiger's Estate, 7 Pa. Dist. 351; Janney's Estate, 2 Pa. Dist. 145, 12 Pa. Co. Ct. 550; King's Estate, 9 Kulp 56; Philadelphia *v.* Williamson, 5 Leg. Gaz. 42; Brice's Estate, 11 Phila. 98.

Rhode Island.— State *v.* Tillinghast, 25 R. I. 391, 56 Atl. 181; Williams *v.* Herrick, 21 R. I. 401, 43 Atl. 1036, 79 Am. St. Rep. 809.

South Carolina.— Allen *v.* Hall, 2 Nott & M. 114, 10 Am. Dec. 578.

Texas.—Chapman *v.* Chapman, 16 Tex. Civ. App. 382, 41 S. W. 533.

Utah.— Riddle *v.* Riddle, 26 Utah 268, 72 Pac. 1081.

Virginia.— Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477; Francis *v.* Francis, 31 Gratt. 283.

United States.— Adger *v.* Ackerman, 115 Fed. 124, 52 C. C. A. 568.

England.— *In re* Dysart Peerage, 6 App. Cas. 489; De Thoren *v.* Atty.-Gen., 1 App. Cas. 686; Campbell *v.* Campbell, L. R. 1 H. L. Sc. 182; *In re* Shephard, [1904] 1 Ch. 456, 73 L. J. Ch. 401, 90 L. T. Rep. N. S. 249; Fox *v.* Bearblock, 17 Ch. D. 429, 45 J. P. 648, 50 L. J. Ch. 489, 44 L. T. Rep. N. S. 508, 29 Wkly. Rep. 661; Lyle *v.* Ellwood, L. R. 19 Eq. 98, 44 L. J. Ch. 164, 23 Wkly. Rep. 157; Goodman *v.* Goodman, 5 Jur. N. S. 902, 28 L. J. Ch. 745.

Canada.— Robb *v.* Robb, 20 Ont. 591; Wright *v.* Skinner, 17 U. C. C. P. 317; Doe *v.* Breakey, 2 U. C. Q. B. 349.

See 34 Cent. Dig. tit. "Marriage," §§ 61, 62.

Exceptions to rule.— A marriage cannot be proved by cohabitation and reputation in an action by the next of kin of a deceased supposed wife to recover her personalty of her supposed husband (Kuhl *v.* Knauer, 7 B. Mon. (Ky.) 130), or in an action for criminal conversation (see HUSBAND AND WIFE, 21 Cyc. 1630), or, it seems, in proceedings for the removal of a husband and wife as paupers (Poultney *v.* Fair Haven, Brayt. (Vt.) 185). Nor can a marriage be thus proved in prosecutions for adultery (see ADULTERY, 1 Cyc. 963. See, however, State *v.* Wilson, 22 Iowa 364), bigamy (see BIGAMY, 5 Cyc. 702), incest (see INCEST, 22 Cyc. 59), or living in adultery (see LEWDNESS, 25 Cyc. 216). No exception exists in an action for alienating a wife's affections or enticing her away (Scherpf *v.* Szadeczky, 4 E. D. Smith (N. Y.) 110. And see HUSBAND AND WIFE, 21 Cyc. 1624), or in an action for divorce (Summerville *v.* Summerville, 31 Wash. 411, 72 Pac. 84. And see DIVORCE, 14 Cyc. 691).

Negro marriages may be presumed from marital cohabitation and reputation. Scoggins *v.* State, 32 Ark. 205; Green *v.* Norment, 5 Mackey (D. C.) 80; Stover *v.* Boswell, 3 Dana (Ky.) 232; Long *v.* Barnes, 87 N. C. 329; State *v.* Whitford, 86 N. C. 636. Marriage of caucasian and negro see *infra*, page 892, note 96.

11. See *infra*, VI, B, 1, f, (I), (B).

12. Allen *v.* Hall, 2 Nott & M. (S. C.) 114, 10 Am. Dec. 578. See also Long *v.* Barnes, 87 N. C. 329; State *v.* Whitford, 86 N. C. 636, and cases cited *supra*, note 10. *Contra*, Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752. And see Apong *v.* Marks, 1 Hawaii 83; Stevenson *v.* McReary, 12 Sm. & M. (Miss.) 9, 51 Am. Dec. 102; State *v.* St. John, 94 Mo. App. 229, 68 S. W. 374.

Province of court and of jury see *infra*, VII, A.

13. *Illinois.*— Laurence *v.* Laurence, 164 Ill. 367, 45 N. E. 1071.

Minnesota.— Heminway *v.* Miller, 87 Minn. 123, 91 N. W. 428.

New Jersey.— *In re* Wallace, 49 N. J. Eq. 530, 25 Atl. 260; Voorhees *v.* Voorhees, 46 N. J. Eq. 411, 19 Atl. 172, 19 Am. St. Rep. 404 [*affirmed* in 47 N. J. Eq. 315, 20 Atl. 676, 14 L. R. A. 366, 47 N. J. Eq. 555, 22 Atl. 1054, 24 Am. St. Rep. 412, 14 L. R. A. 364].

tion by the parties, and a holding out of each other as husband and wife respectively. The parties must recognize and treat each other as husband and wife, and so conduct themselves as to create a reputation of being such. They must hold each other out to the public as husband and wife; and if an occasion arises when lawful spouses would naturally admit or declare the existence of a marriage, they must do likewise; and hence if on such an occasion they deny that a marriage exists or admit its non-existence, it tends to defeat the presumption.[14] And (3) to

New York.— Cunningham *v.* Burdell, 4 Bradf. Surr. 343.

Pennsylvania.— Smyth's Estate, 1 Leg. Gaz. 210.

Rhode Island.— Williams *v.* Herrick, 21 R. I. 401, 43 Atl. 1036, 79 Am. St. Rep. 809, holding that in order to constitute evidence from which a marriage may be inferred, the origin of the cohabitation must have been consistent with a matrimonial intent, and the cohabitation must have been of such a character, and the conduct of the parties such, as to lead to the belief in the community that a marriage existed, and thereby to create the reputation of a marriage.

Virginia.— Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477, holding that where the cohabitation is not shown to have been matrimonial and justified by contemporaneous behavior sufficient to give the reputation of marriage, it is not sufficient.

See 34 Cent. Dig. tit. "Marriage," §§ 61, 62. And see cases cited *supra*, note 10, and *infra*, this note.

An irregular, limited, or partial cohabitation is not sufficient; it must be continuing and complete, and such as is usual between persons lawfully married. McKenna *v.* McKenna, 180 Ill. 577, 54 N. E. 641 [*affirming* 73 Ill. App. 64] (where the man lodged and boarded apart from the woman); Imboden *v.* St. Louis Union Trust Co., 111 Mo. App. 220, 86 S. W. 263 (where the cohabitation was only occasional); Haley *v.* Goodheart, 58 N. J. Eq. 368, 44 Atl. 193 (where the man regularly lodged and boarded apart from the woman); Matter of Brush, 25 N. Y. App. Div. 610, 49 N. Y. Suppl. 803 (where the woman lived apart in a house of ill fame, and the man had a home elsewhere); *In re* Yardley, 75 Pa. St. 207 (where the cohabitation was irregular); Green's Estate, 5 Pa. Co. Ct. 605 (where the man's regular home was with his parents); Bicking's Appeal, 2 Brewst. (Pa.) 202 (where the man merely lodged in the woman's boarding-house); *In re* Smith, 3 Lack. Leg. N. (Pa.) 122 (where the cohabitation was only periodical); Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477 (where the cohabitation was partial and irregular).

Secret cohabitation is not sufficient; it must be open to the observation of those who come in contact with the parties. Quackenbush *v.* Swortbiguer, 136 Cal. 149, 68 Pac. 590; McKenna *v.* McKenna, 180 Ill. 577, 54 N. E. 641 [*affirming* 73 Ill. App. 64]; Heminway *v.* Miller, 87 Minn. 123, 91 N. W. 428; *In re* Terry, 58 Minn. 268, 59 N. W. 1013; Haley *v.* Goodheart, 58 N. J. Eq. 368, 44 Atl. 193; Cunningham *v.* Burdell, 4 Bradf. Surr. (N. Y.) 343; Hill *v.* Burger, 3 Bradf. Surr. (N. Y.) 432; Turpin *v.* Public Administrator, 2 Bradf. Surr. (N. Y.) 424.

The duration of the cohabitation should be taken into consideration. Moore *v.* Heineke, 119 Ala. 627, 24 So. 374; Odd Fellows' Ben. Assoc. *v.* Carpenter, 17 R. I. 720, 24 Atl. 578. If a marriage agreement is proved lapse of time is unimportant. In the absence of proof of an agreement the cohabitation must have continued for a long period of time, unless there has been an express acknowledgment of marriage, in which case a short cohabitation is sufficient. Hill *v.* Hibbit, 25 L. T. Rep. N. S. 183, 19 Wkly. Rep. 250. A short cohabitation may be sufficient where it terminated by the man's compulsory absence on military duty and his subsequent death while absent. Dream's Estate, 9 Pa. Co. Ct. 559. And see Wilkinson *v.* Payne, 4 T. R. 468. Separation of parties as rebutting presumption see *infra*, VI, B, 1, f, (I), (B). Subsequent ceremonial marriage as rebutting presumption of prior marriage by cohabitation and reputation see *infra*, VI, B, 1, f, (I), (B).

Cohabitation in a state where common-law marriages are not recognized may be considered in connection with cohabitation in the state of the forum, where such marriages are valid, in determining the question of marriage. Moore *v.* Heineke, 119 Ala. 627, 24 So. 374; *In re* Dysart Peerage, 6 App. Cas. 489. But see Norcross *v.* Norcross, 155 Mass. 425, 29 N. E. 506.

Illicit origin of cohabitation as defeating presumption of marriage see *infra*, VI, B, 1, f, (I), (B).

14. *California.*— Hinckley *v.* Ayres, 105 Cal. 357, 38 Pac. 735, where the parties corresponded with each other as uncle and niece, and he introduced her and spoke of her as his niece and she signed her maiden name.

Illinois.— McKenna *v.* McKenna, 180 Ill. 577, 54 N. E. 641 [*affirming* 73 Ill. App. 64] (where the man executed conveyances as a bachelor); Laurence *v.* Laurence, 164 Ill. 367, 45 N. E. 1071 (where it appeared that the woman was colored and the man white; that she had never claimed to be his wife, went by her own name, acquired property by that name, associated with colored people while he associated with white, was introduced to his associates as his housekeeper, took an obligation from him for money loaned by her, payable at his death to her by her name, and void in case he should survive her, and that she filed her claim against his estate in her own name).

give rise to the presumption of a previous actual marriage the parties thereto

Indian Territory.— Davis *v.* Pryor, 3 Indian Terr. 396, 58 S. W. 660.

Iowa.— Brisbin *v.* Huntington, 128 Iowa 166, 103 N. W. 144.

Louisiana.— Hubee's Succession, 20 La. Ann. 97; Philbrick *v.* Spangler, 15 La. Ann. 46, in both which cases the parties had admitted and declared that they were not married.

Maryland.— Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752, holding that the fact that the house where an alleged husband and wife lived was disreputable tends to disprove marriage. However, the statement by a witness that an alleged husband never told him he was married is not admissible to disprove the marriage. Jackson *v.* Jackson, *supra*.

Michigan.— Van Dusan *v.* Van Dusan, 97 Mich. 70, 56 N. W. 234, where, on various occasions when it was to their advantage, the parties had each denied the existence of any marriage between them.

Minnesota.— Heminway *v.* Miller, 87 Minn. 123, 91 N. W. 428 (where the man executed a mortgage in which he was described as a widower and to which the alleged wife subscribed her maiden name as a witness); *In re* Terry, 58 Minn. 268, 59 N. W. 1013 (where the woman did not claim to be the man's wife until after his death).

New Jersey.— Haley *v.* Goodheart, 58 N. J. Eq. 368, 44 Atl. 193, where it appeared that the only places at which the man introduced the woman as his wife were in saloons and at questionable halls; that she knew that his father was wealthy, and, although meagerly supported, was apparently content; that during the time he traveled for his health they had no correspondence; that he never inquired about her during his absence, and for a few years before he died he had had no communication with her; that on his death-bed he made no allusion to her; and that after his death she made no claim as his wife.

New York.— Matter of Brush, 25 N. Y. App. Div. 610, 49 N. Y. Suppl. 803 (where the woman resided in a house of ill fame and was never introduced and never sought recognition as the man's wife); Stackhouse *v.* Stotenbur, 22 N. Y. App. Div. 312, 47 N. Y. Suppl. 940; Fagan *v.* Fagan, 57 Hun 592, 11 N. Y. Suppl. 748 (where the man had declared that the woman was not his wife, and their companionship was restricted to their own apartments, where he seldom appeared in the daytime, and she was excluded from the acquaintance of his relatives and friends, and he did not make calls with her or take her to places of amusement); Matter of Taylor, 9 Paige 611; Rose *v.* Clark, 8 Paige 574; Davis *v.* Brown, 1 Redf. Surr. 259 (the woman having, in the last two cases, stated that she was not married); Cunningham *v.* Burdell, 4 Bradf. Surr. 343 (where there was no acknowledgment of the marriage, and the declarations and acts of the parties were repugnant to the existence of such a relation); Hill *v.* Burger, 3 Bradf. Surr. 432; Turpin *v.* Public Administrator, 2 Bradf. Surr. 424.

Pennsylvania.— Reading F. Ins., etc., Co.'s Appeal, 113 Pa. St. 204, 6 Atl. 60, 57 Am. Rep. 448 (where the man had declared and the woman had admitted that they were not married); Com. *v.* Stump, 53 Pa. St. 132, 91 Am. Dec. 198 (where, after the man's death, the woman had an act passed by the legislature legitimatizing their sons, who were described therein as "illegitimate"); Bott's Estate, 10 Pa. Dist. 122 (where the woman admitted that she was not married); Green's Estate, 5 Pa. Co. Ct. 605 (where the woman had children of the alleged marriage baptized as if illegitimate, and in an action against her failed to plead coverture as a defense, and did not attend the man in his last illness or go to his funeral); Bicking's Appeal, 2 Brewst. 202 (where the man did not introduce the woman as his wife or deal with her as such, and she had declared that another man was her husband); *In re* Smith, 3 Lack. Leg. N. 122 (where the parties transacted business as if single); Smyth's Estate, 1 Leg. Gaz. 210 (where the man had declared that he was single).

Rhode Island.— Odd Fellows' Ben. Assoc. *v.* Carpenter, 17 R. I. 720, 24 Atl 578, where the man's statements as to marriage were contradictory.

South Carolina.— Rutledge *v.* Tunno, 69 S. C. 400, 48 S. E. 297.

South Dakota.— Henry *v.* Taylor, 16 S. D. 424, 93 N. W. 641.

Washington.— Stans *v.* Baitey, 9 Wash. 115, 37 Pac. 316.

United States.— Jewell *v.* Jewell, 1 How. 219, 11 L. ed. 108; Arnold *v.* Chesebrough, 58 Fed. 833, 7 C. C. A. 508 [*affirming* 46 Fed. 700], where the man never introduced the woman as his wife to his relatives, and both had admitted that they were not married, and he executed conveyances as if single.

England.— Robertson *v.* Crawford, 3 Beav. 102, 43 Eng. Ch. 102, 49 Eng. Reprint 40 (where the woman, the widow of another, with the view to the receipt of a widow's pension, yearly made a solemn declaration of continuing widowhood); *Re* Haynes, 94 L. T. Rep. N. S. 431 (where the woman registered a child of the alleged marriage in her maiden name).

See 34 Cent. Dig. tit. "Marriage," §§ 61, 62.

Acquiescence in subsequent ceremonial marriage of alleged spouse.— If a woman acquiesces for a long period of time in a ceremonial marriage entered into by the man with another after the cohabitation had terminated, it defeats the presumption of marriage which otherwise might arise from the cohabitation. Matter of Stanley, 1 N. Y. St. 325. And see *In re* Dysart Peerage, 6 App. Cas. 489 Subsequent ceremonial marriage as rebutting presumption of marriage see *infra*, VI, B, 1, f, (I), (B).

must have been reputed to be married.[15] The facts of marital cohabitation and

Conclusiveness of admissions and declarations.— The presumption of marriage arising from evidence that a man and a woman lived together as husband and wife, and acknowledged and treated each other as such, and were so regarded and treated by their relations, will not be overturned by proof that the parties made declarations denying the existence of the marriage, unless they were made under circumstances of peculiar seriousness and solemnity. Henderson *v.* Cargill, 31 Miss. 367. And admissions and declarations of marriage, in connection with cohabitation, are not necessarily conclusive of the fact of marriage. Laurence *v.* Laurence, 164 Ill. 367, 45 N. E. 1071; Van Dusan *v.* Van Dusan, 97 Mich. 70, 56 N. W. 234; Heminway *v.* Miller, 87 Minn. 123, 91 N. W. 428 (holding that a marriage will not be presumed from occasional admissions and secret cohabitation); Fagan *v.* Fagan, 57 Hun (N. Y.) 592, 11 N. Y. Suppl. 748; Turpin *v.* Public Administrator, 2 Bradf. Surr. (N. Y.) 424; Reading F. Ins., etc., Co.'s Appeal, 113 Pa. St. 204, 6 Atl. 60, 57 Am. Rep. 448; Odd Fellows' Ben. Assoc. *v.* Carpenter, 17 R. I. 720, 24 Atl. 578; Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477; Arnold *v.* Chesebrough, 58 Fed. 833, 7 C. C. A. 508 [*affirming* 46 Fed. 700]; George *v.* Thomas, 10 U. C. Q. B. 604.

Declarations subsequent to cohabitation.— Declarations repugnant to the existence of a marriage, if made after the cohabitation had terminated, have been held to be insufficient to defeat the presumption of marriage. Moore *v.* Heineke, 119 Ala. 627, 24 So. 374; Matter of Taylor, 9 Paige (N. Y.) 611; Janey's Estate, 2 Pa. Dist. 145, 12 Pa. Co. Ct. 550. So subsequent declarations of marriage are not conclusive in favor of its existence. Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477. See, however, cases cited *supra*, this note.

The woman must be recognized as wife in the place where the parties reside.— Recognition in another place where the parties are sojourning is not sufficient. Com. *v.* Omohundro, 2 Brewst. (Pa.) 298.

15. *California.*— Hinckley *v.* Ayres, 105 Cal. 357, 38 Pac. 735.

Illinois.— McKenna *v.* McKenna, 180 Ill. 577, 54 N. E. 641 [*affirming* 73 Ill. App. 64].

Indian Territory.— Davis *v.* Pryor, 3 Indian Terr. 396, 58 S. W. 660.

Iowa.— Brisbin *v.* Huntington, 128 Iowa 166, 103 N. W. 144.

Louisiana.— Hubee's Succession, 20 La. Ann. 97.

Missouri.— Cargile *v.* Wood, 63 Mo. 501.

New Jersey.— Wallace's Case, 49 N. J. Eq. 530, 25 Atl. 260.

New York.— Rose *v.* Clark, 8 Paige 574.

Pennsylvania.— Com. *v.* Stump, 53 Pa. St. 132, 91 Am. Dec. 198; Green's Estate, 5 Pa. Co. Ct. 605; Bicking's Appeal, 2 Brewst. 202; *In re* Smith, 3 Lack. Leg. N. 122.

Rhode Island.— Odd Fellows' Ben. Assoc. *v.* Carpenter, 17 R. I. 720, 24 Atl. 578.

South Dakota.— Henry *v.* Taylor, 16 S. D. 424, 93 N. W. 641.

See 34 Cent. Dig. tit "Marriage," §§ 61, 62.

Duration of reputation.— The evidence of neighbors and mere acquaintances of habit and repute must extend through a long series of years to raise the presumption of a marriage agreement; but if the consensus is once proved lapse of time is unimportant; and where there is evidence of express acknowledgment, a very short cohabitation in accordance therewith will be sufficient for this purpose. Hill *v.* Hibbit, 25 L. T. Rep. N. S. 183, 19 Wkly. Rep. 250. Duration of cohabitation see *supra*, note 13.

Family reputation.— The fact that a man is not reputed to be married among the members of his family does not necessarily defeat the presumption of marriage. Badger *v.* Badger, 88 N. Y. 546, 42 Am. Rep. 263. And see Collins *v.* Bishop, 48 L. J. Ch. 31.

Place of reputation.— The reputation which is material on the question of marriage is that which exists in the place where the parties cohabit. Davis *v.* Orme, 36 Ala. 540; Jones *v.* Hunter, 2 La. Ann. 254 (holding that the testimony of one person that he knew another as a married woman for a few months before her death in a neighborhood into which she had lately removed, a stranger from another state, is not sufficient to prove her marriage); Badger *v.* Badger, 88 N. Y. 546, 42 Am. Rep. 263 (holding that evidence that among the man's friends and relatives, who resided in another place and did not know of his relations with the woman, he was reputed to be unmarried, is mere hearsay); Comly's Estate, 6 Pa. Dist. 119, 19 Pa. Co. Ct. 184; Com. *v.* Omohundro, 2 Brewst. (Pa.) 298 (reputation in a place where the parties were sojourning being held insufficient).

Reputation must be uniform and general, not divided or singular.— In order to establish a marriage, the reputation thereof must be uniform and general; divided or singular reputation is not sufficient. Quackenbush *v.* Swortfiguer, 136 Cal. 149, 68 Pac. 590; Taylor *v.* Taylor, 10 Colo. App. 303, 50 Pac. 1049; Powers *v.* Charbmury, 35 La. Ann. 630; *In re* Yardley, 75 Pa. St. 207; *In re* Smith, 3 Lack. Leg. N. (Pa.) 122; Williams *v.* Herrick, 21 R. I. 401, 43 Atl. 1036, 79 Am. St. Rep. 809 (holding that the fact that a ceremonial marriage after a cohabitation of nineteen years was deemed necessary by a friend, who advised it, is evidence that there was no general and uniform reputation in the community that the parties were married); Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477; Arnold *v.* Chesebrough, 58 Fed. 833, 7 C. C. A. 503 [*affirming* 46 Fed. 700]; Henderson *v.* Weis, 25 Grant Ch. (U. C.) 69. And see Cross *v.* Cross, 55 Mich. 280, 21 N. W. 309. However, a witness cannot testify that parties alleged to be married had a divided reputation on the subject. Jackson *v.* Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773. And

reputation may be proved by the testimony of any person having knowledge thereof.[16]

(II) *Estoppel to Assert Presumption.*[17] Where a marriage is set up as having been performed at a particular time or place or by a particular form or ceremony, and the evidence fails to support the assertion, the party asserting the marriage will not be allowed to rely on cohabitation and reputation to establish it.[18] And the fact that a third person delays asserting rights under an alleged marriage for a long period of time and until after both parties have died is adverse to the presumption of marriage arising from their cohabitation.[19]

2. As to Validity of Marriage Generally[20] **— a. In General.** If a marriage in fact is established by evidence or admission, it is presumed to be regular and valid, and the burden of adducing evidence to the contrary rests on the party who attacks it.[21]

the fact that the testimony of the different witnesses as to reputation is conflicting does not necessarily show that there was no general and uniform reputation, since this fact, like any other, may be proved by a preponderance of evidence. Klenke *v.* Noonan, 118 Ky. 436, 81 S. W. 241, 26 Ky. L. Rep. 305; Lyle *v.* Ellwood, L. R. 19 Eq. 98, 44 L. J. Ch. 164, 23 Wkly. Rep. 157. And see Davis *v.* Pryor, 3 Indian Terr. 396, 58 S. W. 660. *Contra,* Ashford *v.* Metropolitan L. Ins. Co., 80 Mo. App. 638. Thus the opinion of a few immediate neighbors who make up the social circle will outweigh the negative testimony of a thousand citizens who know nothing and care nothing about the matter. Comly's Estate, 6 Pa. Dist. 119, 19 Pa. Co. Ct. 184. And see Badger *v.* Badger, 88 N. Y. 546, 42 Am. Rep. 263.

Subsequent reputation.— In order to show marriage the reputation must be contemporaneous with the cohabitation and not subsequent to its termination. Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477. And reputation of singleness, in order to disprove marriage, should likewise be contemporaneous with the cohabitation. Matter of Taylor, 9 Paige (N. Y.) 611. So evidence of a woman's reputation, after she left her husband, for chastity during the time she lived with him, is not competent to disprove marriage. Jackson *v.* Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773.

The fact of reputation of marriage may be outweighed by the declarations of the parties that they had never been married. Philbrick *v.* Spangler, 15 La. Ann. 46.

General reputation against marriage.— It has been held that evidence of general reputation and belief against marriage in the neighborhood is not admissible for the purpose of disproving the existence of a marriage. Henderson *v.* Cargill, 31 Miss. 367; Bartlett *v.* Musliner, 28 Hun (N. Y.) 235. *Contra,* Boone *v.* Purnell, 28 Md. 607, 92 Am. Dec. 713. And *compare* Jackson *v.* Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773; Matter of Taylor, 9 Paige (N. Y.) 611.

Individual opinion that certain parties were married is not admissible to prove the marriage. Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752.

To prove the general reputation that a woman is married, addresses of letters written her are admissible in evidence. Cuneo *v.* De Cuneo, 24 Tex. Civ. App. 436, 59 S. W. 284.

Secret cohabitation see *supra,* note 13.

16. Boone *v.* Purnell, 28 Md. 607, 92 Am. Dec. 713; Knower *v.* Wesson, 13 Metc. (Mass.) 143, holding that the evidence need not come from the members or connections of the families of the parties whose marriage is in question.

General reputation cannot be proved by testimony of the parties, however. It should be proved by neighbors and acquaintances. Com. *v.* Stump, 53 Pa. St. 132, 91 Am. Dec. 198.

17. **Estoppel to assert or deny marriage** see *supra,* V, C.

18. Bowman *v.* Little, 101 Md. 273, 61 Atl. 223, 657, 1084; Jackson *v.* Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773; Jones *v.* Jones, 48 Md. 391, 30 Am. Rep. 466; Barnum *v.* Barnum, 42 Md. 251; Redgrave *v.* Redgrave, 38 Md. 93; Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477; Blackburn *v.* Crawford, 3 Wall. (U. S.) 175, 18 L. ed. 186; *Re* Sheran, 4 Terr. L. Rep. (Can.) 83. *Contra,* Tummalty *v.* Tummalty, 3 Bradf. Surr. (N. Y.) 369; James *v.* Mickey, 26 S. C. 270, 2 S. E. 130.

19. Powers *v.* Charbmury, 35 La. Ann. 630.

20. See cross-references *supra,* note 1.

21. *District of Columbia.*— Green *v.* Norment, 5 Mackey 80.

Illinois.— Barber *v.* People, 203 Ill. 543, 68 N. E. 93; Jones *v.* Gilbert, 135 Ill. 27, 25 N. E. 566.

Indiana.— Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. 78.

Kentucky.— See Botts *v.* Botts, 108 Ky. 414, 56 S. W. 677, 961, 22 Ky. L. Rep. 109, 212.

Michigan.— People *v.* Schoonmaker, 117 Mich. 190, 75 N. W. 439, 72 Am. St. Rep. 560 (holding that the presumption arising from proof of performance of a ceremony of marriage by an officer authorized to perform it is in favor of its legality); People *v.* Calder, 30 Mich. 85.

Mississippi.— Wilkie *v.* Collins, 48 Miss. 496; Ward *v.* Dulaney, 23 Miss. 410.

b. Foreign Marriage.[22] There is no presumption that the marriage laws of another state or country are different from the laws obtaining in the forum.[23] Accordingly, if a foreign marriage is valid under the laws of the forum, a party attacking it as contrary to the *lex loci contractus* bears the burden of proving the foreign law on which he relies;[24] and if the marriage is invalid under the

New Mexico.— U. S. *v.* Chaves, 6 N. M. 180, 27 Pac. 489; U. S. *v.* De Lujan, 6 N. M. 179, 27 Pac. 489; U. S. *v.* De Amador, 6 N. M. 173, 27 Pac. 488.

Oregon.— Megginson's Estate, 21 Oreg. 387, 28 Pac. 388, 14 L. R. A. 540.

United States.— Gaines *v.* New Orleans, 6 Wall. 642, 18 L. ed. 950.

England.— *In re* Lauderdale Peerage, 10 App. Cas. 692; Reg. *v.* Cresswell, 1 Q. B. D. 446, 13 Cox C. C. 126, 45 L. J. M. C. 77, 33 L. T. Rep. N. S. 760, 24 Wkly. Rep. 281; Sichel *v.* Lambert, 15 C. B. N. S. 781, 10 Jur. N. S. 617, 33 L. J. C. P. 137, 9 L. T. Rep. N. S. 687, 12 Wkly. Rep. 312, 109 E. C. L. 718; Piers *v.* Tuite, 1 Dr. & Wal. 279; Harrod *v.* Harrod, 18 Jur. 853, 1 Kay & J. 4, 2 Wkly. Rep. 612, 63 Eng. Reprint 344; Campbell *v.* Corley, 4 Wkly. Rep. 675. And see *In re* Shephard, [1904] 1 Ch. 456, 73 L. J. Ch. 401, 90 L. T. Rep. N. S. 249 (holding that where it is proved that there was an intention to marry, that some form was gone through to perfect that intention, and that this was followed by open cohabitation as man and wife for thirty years, those who claim by virtue of the marriage need not prove that all necessary ceremonies were performed according to law); Gompertz *v.* Kensit, L. R. 13 Eq. 369, 41 L. J. Ch. 382, 26 L. T. Rep. N. S. 95, 20 Wkly. Rep. 313; Reg. *v.* Mainwaring, 7 Cox C. C. 192, Dears. & B. 132, 2 Jur. N. S. 1236, 26 L. J. M. C. 10, 5 Wkly. Rep. 119.

Canada.— O'Connor *v.* Kennedy, 15 Ont. 20; Delpit *v.* Coté, 20 Quebec Super. Ct. 338.

See 34 Cent. Dig. tit. "Marriage," § 58.

Burden of proving negative.— The law is so positive in requiring a party who asserts the illegality of a marriage to take the burden of proving it that such requirement is enforced, although it involves the proving of a negative. Senge *v.* Senge, 106 Ill. App. 140.

If a marriage in due form is proved it is presumed to be valid. Cash *v.* Cash, 67 Ark. 278, 54 S. W. 744; Schmisseur *v.* Beatrie, 147 Ill. 210, 35 N. E. 525.

This presumption applies in favor of foreign marriages. Green *v.* Norment, 5 Mackey (D. C.) 80; Summerville *v.* Summerville, 31 Wash. 411, 72 Pac. 84; Rex *v.* Brampton, 10 East 282, 10 Rev. Rep. 289; Thomson *v.* Thomson, 9 Quebec Super. Ct. 389.

Capacity of parties.— When the celebration of a marriage is shown the capacity of the parties will be presumed. Ferrell *v.* State, 45 Fla. 26, 34 So. 220; Barber *v.* People, 203 Ill. 543, 68 N. E. 93; Wilkie *v.* Collins, 48 Miss. 496; U. S. *v.* Chaves, 6 N. M. 180, 27 Pac. 489; U. S. *v.* De Lujan, 6 N. M. 179, 27 Pac. 489; U. S. *v.* De Amador, 6 N. M. 173, 27 Pac. 488; Durham *v.* Durham, 10 P. D. 80; Harrod *v.* Harrod, 18 Jur. 853, 1 Kay & J. 4, 2 Wkly. Rep. 612, 29 Eng. Reprint 344.

Consent of parties.— An actual marriage being shown the consent of the parties thereto will be presumed in its favor. Barber *v.* People, 203 Ill. 543, 68 N. E. 93; Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep. 164; Wilkie *v.* Collins, 48 Miss. 496; U. S. *v.* De Amador, 6 N. M. 173, 27 Pac. 488; Cooper *v.* Crane, [1891] P. 369, 40 Wkly. Rep. 127. And see Jackson *v.* Winne, 7 Wend. (N. Y.) 47, 22 Am. Dec. 563.

Consent of the parents of an infant who has entered into a marriage will be presumed to have been given (Doe *v.* Price, 6 L. J. K. B. O. S. 157, 1 M. & R. 683), especially after long lapse of time (Harrison *v.* Southampton, 4 De G. M. & G. 137, 18 Jur. 1, 22 L. J. Ch. 722, 1 Wkly. Rep. 422. And see Green *v.* Norment, 5 Mackey (D. C.) 80, where the consent of the master was presumed in favor of a slave marriage).

Issuance of license.—It may be presumed in favor of a marriage that a license was duly issued. Piers *v.* Piers, 2 H. L. Cas. 331, 13 Jur. 569, 9 Eng. Reprint 1118; O'Connor *v.* Kennedy, 15 Ont. 20. And see Thomson *v.* Thomson, 9 Quebec Super. Ct. 389.

Burden of proof and presumptions as to authority of person officiating see *supra*, IV, A, 5.

Rebuttal of presumption of validity see *infra*, VI, B, 5.

22. See cross-references *supra*, note 1.

Presumption of regularity of foreign marriage see *supra*, note 21.

23. Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538 [*affirming* 9 Daly 4, 7 Abb. N. Cas. 98].

Presumptions as to foreign law: Generally see EVIDENCE, 16 Cyc. 1084 *et seq.* In prosecution for bigamy see BIGAMY, 5 Cyc. 699 notes 73, 74, 102 note 8.

24. *Alabama.*— Haden *v.* Ivey, 51 Ala. 381.

California.— Matter of Richards, 133 Cal. 524, 65 Pac. 1034.

Illinois.— Laurence *v.* Laurence, 164 Ill. 367, 45 N. E. 1071.

Massachusetts.—Com. *v.* Kenney, 120 Mass. 387; Raynham *v.* Canton, 3 Pick. 293.

Michigan.— People *v.* Loomis, 106 Mich. 250, 64 N. W. 18; Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep. 164.

New York.— Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538 [*affirming* 9 Daly 4, 7 Abb. N. Cas. 98]; Hynes *v.* McDermott, 91 N. Y. 451, 43 Am. Rep. 677 [*affirming* 10 Daly 423]; Degnan *v.* Degnan, 17 N. Y. Suppl. 883.

North Carolina.— State *v.* Patterson, 24 N. C. 346, 38 Am. Dec. 699.

laws of the forum, the burden of proving that the *lex loci contractus* is such as to give it validity is on the party asserting it.[25] In determining what law governs a common-law marriage, the court will presume, in the absence of evidence to the contrary, that it was contracted in the state wherein the acts occurred which are relied on as establishing the marriage.[26]

3. As to Prëexistence or Continuance of Relation Shown Once to Exist[27] — **a. Marital Relation.** The fact that a marriage exists at a certain time raises no presumption of its prior existence;[28] but if the marriage relation is shown once to exist it will be presumed to continue in the absence of evidence of its dissolution by death or divorce.[29]

b. Meretricious Relation.[30] If intercourse between persons of opposite sex was illicit in its inception because of their failure to enter into a marriage by ceremony or by agreement, it is presumed to continue so, and the burden of proving a subsequent intermarriage rests on the party asserting it.[31]

Wisconsin.— Lanctot *v.* State, 98 Wis. 136, 73 N. W. 575, 67 Am. St. Rep. 800.

England.— See Rex *v.* Brampton, 10 East 282, 10 Rev. Rep. 289.

Canada.—Matter of Tiernay, 25 N. Brunsw. 286; Smith *v.* Cook, 24 Quebec Super. Ct. 469; De Grandmont *v.* Société des Artisans, 16 Quebec Super. Ct. 532 [*affirming* 15 Quebec Super. Ct. 147]; Thomson *v.* Thomson, 9 Quebec Super. Ct. 389.

See 34 Cent. Dig. tit. "Marriage," §§ 65, 69.

It has been held, however, that the production in the courts of Texas of a certified copy from the office of a county recorder in the state of Missouri of a certificate, under the sign manual of a justice of the peace, that he had solemnized a former marriage according to law, cannot be admitted as competent evidence to establish the former marriage to the exclusion of a marriage contracted in Texas, without due proof of the laws of Missouri relating to the subject-matter. Smith *v.* Smith, 1 Tex. 621, 46 Am. Dec. 121.

25. Randall's Succession, 26 La. Ann. 163; Armitage *v.* Armitage, L. R. 3 Eq. 343, 16 Wkly. Rep. 643.

If a marriage on the high seas is in violation of the laws of the domicile and the forum, the burden of proof rests on the party asserting its validity to show that it was administered under some recognized law. Norman *v.* Norman, 121 Cal. 620, 54 Pac. 143, 66 Am. St. Rep. 74, 42 L. R. A. 343. But this burden does not rest on him if the marriage is valid by the laws of the forum. Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538 [*affirming* 9 Daly 4, 7 Abb. N. Cas. 98], holding that it would not be presumed that the nationality of the vessel was that of a country whose law of marriage was different from that of the forum; nor that she was English from the fact that she sailed from an English port.

26. Matter of Tabor, 31 Misc. (N. Y.) 579, 65 N. Y. Suppl. 571.

27. See cross-references *supra*, note 1.

Burden of proof and presumptions: As to death or divorce of prior spouse see *infra*, VI, A, 4. As to death of prior spouse in prosecution for bigamy see Bigamy, 5 Cyc. 699.

Presumption of continuance: Generally see Evidence, 16 Cyc. 1052 *et seq.* Of marriage relation in prosecution for bigamy see Bigamy, 5 Cyc. 699, 700.

28. Murdock *v.* State, 68 Ala. 567; Reavis *v.* Gardner, (Cal. 1900) 60 Pac. 964 (holding that it cannot be presumed that a woman was married in 1889 from proof of coverture at a later time, although in 1897 a son of the same name as her supposed husband commenced a suit, and was presumably of full age); Erskine *v.* Davis, 25 Ill. 251.

29. *California.*— People *v.* Stokes, 71 Cal. 263, 12 Pac. 71.

Colorado.— Lampkin *v.* Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040, 1042, *semble.*

Georgia.— Wilson *v.* Allen, 108 Ga. 275, 33 S. E. 975.

Illinois.— Erskine *v.* Davis, 25 Ill. 251.

Indiana.— Wiseman *v.* Wiseman, 89 Ind. 479.

Iowa.— Goodwin *v.* Goodwin, 113 Iowa 319, 85 N. W. 31.

Oregon.— State *v.* Eggleston, 45 Oreg. 346, 77 Pac. 738.

Pennsylvania.— Wile's Estate, 6 Pa. Super. Ct. 435, 41 Wkly. Notes Cas. 572.

Texas.— Summerhill *v.* Darrow, 94 Tex. 71, 57 S. W. 942.

Washington.— Canadian, etc., Trust Co. *v.* Bloomer, 14 Wash. 491, 45 Pac. 34, *semble.*

Canada.— Edinburgh L. Assur. Co. *v.* Ferguson, 32 U. C. Q. B. 253.

See 34 Cent. Dig. tit. "Marriage," § 66.

Presumption of death or divorce in case of second marriage see *infra*, VI, A, 4.

30. See cross-references *supra*, note 1.

Presumption of continuance of illicit relation in general see Evidence, 16 Cyc. 1053.

31. *California.*— White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

Illinois.— Pike *v.* Pike, 112 Ill. App. 243; Marks *v.* Marks, 108 Ill. App. 371.

Maryland.— Jones *v.* Jones, 45 Md. 144; Barnum *v.* Barnum, 42 Md. 251.

Minnesota.— *In re* Terry, 58 Minn. 268, 59 N. W. 1013.

Missouri.— Cargile *v.* Wood, 63 Mo. 501.

New York.— Caujolle *v.* Ferrie, 23 N. Y.

4. As to Dissolution of Prior Marriage of Alleged Spouse by Death or Divorce.[32] It has been seen in another connection that if a marriage has actually taken place, the presumption is in favor of its validity.[33] In the case of conflicting marriages of the same spouse, this presumption operates in favor of the second marriage.[34] Accordingly the burden of showing the validity of the first marriage is on the party asserting it,[35] and even where this is established it may be presumed in favor of the second marriage that at the time thereof the first marriage had been dissolved[36] either by a decree of divorce[37] or by the death of the former

90 [*affirming* 26 Barb. 177]; Wilcox *v.* Wilcox, 46 Hun 32; Matter of Rawson, 29 Misc. 534, 61 N. Y. Suppl. 1078; Bates *v.* Bates, 7 Misc. 547, 27 N. Y. Suppl. 872.

Pennsylvania.— Reading F. Ins., etc., Co.'s Appeal, 113 Pa. St. 204, 6 Atl. 60, 57 Am. Rep. 448; Strauss' Estate, 34 Wkly. Notes Cas. 478.

South Carolina.— Rutledge *v.* Tunno, 69 S. C. 400, 48 S. E. 297.

South Dakota.— Henry *v.* Taylor, 16 S. D. 424, 93 N. W. 641.

Virginia.— Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477.

See 34 Cent. Dig. tit. "Marriage," § 66.

If a marriage is invalid because one of the parties has a prior spouse, the burden of proving a new marriage after death or divorce of the prior spouse rests on the party asserting it. See *supra*, VI, A, 1, a.

Illicit origin of relation as rebutting presumption of marriage from cohabitation see *supra*, VI, B, 1, f, (I), (B).

Rebuttal of presumption of continuance see *infra*, VI, B, 4.

32. See cross-references *supra*, note 1.

Burden of proving: Prior marriage see *supra* VI, A, 1, a. Remarriage to second spouse after death or divorce of first spouse see *supra*, VI, A, 1, a.

Presumption of marriage from continued cohabitation after death or divorce of prior spouse see *infra*, VI, B, 2.

Rebuttal of presumption of dissolution of prior marriage see *infra*, VI, B, 4.

33. See *supra*, VI, A, 2.

34. See cases cited *infra*, note 36 *et seq.* And see Gerlach *v.* Turner, 89 Cal. 446, 26 Pac. 870.

Where a man twice married was accused of bigamy and acquitted, there is no presumption of the nullity of the second marriage. Burn *v.* Fontaine, 4 Rev. Lég. 163.

If a man is thrice married, and the validity of the third marriage is in issue, the presumption is in favor of the third rather than the second marriage. Palmer *v.* Palmer, 162 N. Y. 130, 56 N. E. 501 [*affirming* 50 N. Y. Suppl. 1131], holding that where a man left his wife, contracted a second marriage more than five years later, subsequently obtained a divorce from his first wife, and then married a third time, the presumption is that at the time of the second marriage he knew that the first wife was living, and accordingly the second marriage was illegal.

Effect of conditional divorce from prior spouse.— On an application to revoke letters of administration, granted to respondent as widow of deceased, because she was not his widow, the introduction by petitioners of a decree of divorce from a former husband prohibiting her remarriage in the state is *prima facie* sufficient to put respondent on proof of a marriage between decedent and herself without the state. Matter of Gerlach, 29 Misc. (N. Y.) 90, 60 N. Y. Suppl. 574.

35. Patterson *v.* Gaines, 6 How. (U. S.) 550, 12 L. ed. 553; U. S. *v.* Green, 98 Fed. 63; Reg. *v.* Millis, 10 Cl. & F. 534, 8 Jur. 717, 8 Eng. Reprint 844.

Burden of proving fact of prior marriage see *supra*, VI, A, 1, a.

36. Lampkin *v.* Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040; Goldwater *v.* Burnside, 22 Wash. 215, 60 Pac. 409.

37. *Colorado.*— Pittinger *v.* Pittinger, 28 Colo. 308, 64 Pac. 195, 89 Am. St. Rep. 193.

Connecticut.— Erwin *v.* English, 61 Conn. 502, 23 Atl. 753.

Illinois.— Potter *v.* Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322; Schmisseur *v.* Beatrie, 147 Ill. 210, 35 N. E. 525; Coal Run Coal Co. *v.* Jones, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89 [*affirming* 19 Ill. App. 365].

Indiana.—Wenning *v.* Teeple, 144 Ind. 189, 41 N. E. 600; Boulden *v.* McIntire, 119 Ind. 574, 21 N. E. 445, 12 Am. St. Rep. 453; Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. 78.

Iowa.— Tuttle *v.* Raish, 116 Iowa 331, 90 N. W. 66; Parsons *v.* Grand Lodge A. O. U. W., 108 Iowa 6, 78 N. W. 676; Leach *v.* Hall, 95 Iowa 611, 64 N. W. 790 (holding that where a person after his second marriage lived in the town where the first wife lived, and the latter never questioned the validity of the second marriage or the legitimacy of the issue thereof, the presumption is that the parties to the first marriage were divorced before the second marriage); *In re* Edwards, 58 Iowa 431, 10 N. W. 793 (holding that where a woman married during the life of another man to whom she had at one time been married, and by reason of the destruction of records it cannot be shown that she had ever been divorced, the presumption of innocence will be sufficient, in the absence of evidence to the contrary, to establish the divorce); Blanchard *v.* Lamhert, 43 Iowa 228, 22 Am. Rep. 245 (holding that where a husband and wife separate, and the former lives and cohabits for years with a woman whom he claims and who is reputed to be his wife, the law presumes a divorce from the first wife, and the latter may legally marry again). See, however, Goodwin *v.* Goodwin, 113 Iowa 319, 85 N. W. 31 (holding that where a man was married to two women,

spouse,[38] so as to cast the burden of adducing evidence to the contrary on the

the presumption of the validity of the second marriage, in the absence of other evidence of a divorce, would not overcome the presumption of the continuance of the first marriage in a case involving property rights); Gilman *v.* Sheets, 78 Iowa 499, 43 N. W. 299 (holding that a divorce will not be presumed where there is no evidence of conduct inconsistent with the continuance of the marriage relation on the part of a wife, although the husband has deserted her and married again); Ellis *v.* Ellis, 58 Iowa 720, 13 N. W. 65 (holding that the facts that husband and wife had lived apart for years and that he had contracted a subsequent marriage does not create a presumption that he had procured a divorce, in the face of testimony of the wife that she did not know that her husband had married again or was cohabiting with another woman, and where there is nothing to show that she did not regard the marriage as an existing fact).

Kentucky.— Scott *v.* Scott, 77 S. W. 1122, 25 Ky. L. Rep. 1356 (where a man went to another state for the purpose of getting a divorce, and on his return contracted a second marriage, and on the second wife's death contracted a third marriage, and the first wife apparently recognized the later marriages); Howton *v.* Gilpin, 69 S. W. 766, 24 Ky. L. Rep. 630 (holding that where a conveyance executed by persons claiming to be husband and wife and who have been regularly married has been acquiesced in for almost forty years by those who have any interest in the matter, and the only person making the question has no direct interest in it, the deed will not be declared void because there is no evidence that the wife had been divorced from a former husband who was living when the deed was made and who did not join in it).

Mississippi.—Alabama, etc., R. Co. *v.* Beardsley, 79 Miss. 417, 30 So. 660, 89 Am. St. Rep. 660.

Missouri.— Klein *v.* Landman, 29 Mo. 259.

Montana.— *In re* Rash, 21 Mont. 170, 53 Pac. 312.

Pennsylvania.— Wile's Estate, 6 Pa. Super. Ct. 435, 41 Wkly. Notes Cas. 572.

Texas.— Nixon *v.* Wichita Land, etc., Co., 84 Tex. 408, 19 S. W. 560; Carroll *v.* Carroll, 20 Tex. 731, where a first wife remarried before the husband's remarriage, and a divorce was presumed in favor of the husband's second marriage.

Washington.— Canadian, etc., Trust Co. *v.* Bloomer, 14 Wash. 491, 45 Pac. 34.

See 34 Cent. Dig. tit. "Marriage," § 64.

See, however, Wilson *v.* Allen, 108 Ga. 275, 33 S. E. 975; Com. *v.* Boyer, 7 Allen (Mass.) 306; Williams *v.* Williams, 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253. And *compare* McCarty *v.* McCarty, 2 Strobh. (S. C.) 6, 47 Am. Dec. 585.

38. *Arkansas.*— Cash *v.* Cash, 67 Ark. 278, 54 S. W. 744, where the first spouse had not been seen or heard of for over five years.

California.— Hunter *v.* Hunter, 111 Cal. 261, 43 Pac. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180.

Connecticut.— Erwin *v.* English, 61 Conn. 502, 23 Atl. 753.

Illinois.— Schmisseur *v.* Beatrie, 147 Ill. 210, 35 N. E. 525; Johnson *v.* Johnson, 114 Ill. 611, 3 N. E. 232, 55 Am. Rep. 883; Stein *v.* Stein, 66 Ill. App. 526 (all holding that a prior spouse may be presumed to be dead after an absence of less than seven years); Harris *v.* Harris, 8 Ill. App. 57 (where the prior husband had been absent over seven years).

Indiana.— Cooper *v.* Cooper, 86 Ind. 75 (where a wife, when she contracted the second marriage, had heard nothing of her first husband for six years, and for the following twenty years he was unheard of); Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. 78.

Massachusetts.— Kelly *v.* Drew, 12 Allen 107, 90 Am. Dec. 138, where a woman married a second husband after living separate from her first husband for about four years without hearing of him or of his death, and did not hear of him during sixteen years afterward.

Michigan.— Dixon *v.* People, 18 Mich. 84.

Mississippi.— Spears *v.* Burton, 31 Miss. 547, holding that where the wife of one who has departed from the state marries another man, the presumption will be indulged that the first husband is dead.

Missouri.— Klein *v.* Laudman, 29 Mo. 259.

New York.— Jackson *v.* Claw, 18 Johns. 346, where the prior spouse had been absent for seven years.

Oregon.— Murray *v.* Murray, 6 Oreg. 17.

Pennsylvania.— Williams' Estate, 13 Phila. 325, where a woman left her husband's domicile in England and came to this country, where, not having heard from her husband for twenty years, she contracted a second marriage.

South Carolina.— Chapman *v.* Cooper, 5 Rich. 452, where the prior spouse had been absent less than seven years.

Texas.— Nixon *v.* Wichita Land, etc., Co., 84 Tex. 408, 19 S. W. 560; Lockhart *v.* White, 18 Tex. 102 (where a woman for twelve months prior to her second marriage had not heard of her first husband, from whom she had been separated five years, and she had children by her second husband); Yates *v.* Houston, 3 Tex. 433.

Vermont.— Greensborough *v.* Underhill, 12 Vt. 604, where the husband absconded and after his absence for nearly two years, unheard of, the wife married again.

England.— Rex *v.* Twyning, 2 B. & Ald. 386, 20 Rev. Rep. 480, where a woman, twelve months after her first husband was last heard of, married a second husband, and had children by him.

See 34 Cent. Dig. tit. "Marriage," § 64.

Contra.— Lindsay *v.* Lindsay, 42 N. J. Eq. 150, 7 Atl. 666, *semble*.

Length of absence.— Save in Louisiana,

party attacking the second marriage.[39] It has been held, however, that the presumption of divorce or death of a prior spouse will not be indulged in favor of an alleged second marriage the proof of which rests merely on cohabitation and repute.[40]

B. Mode and Sufficiency of Proof[41] — **1. As to Fact of Marriage Generally — a. In General.** Save in actions for criminal conversation[42] and in prosecutions for certain crimes,[43] the fact of marriage may be proved either by direct evidence or by circumstantial or presumptive evidence, and either by documentary evidence or by parol,[44] and the sufficiency of the evidence to establish a marriage is

where ten years' absence is required (McCaffrey *v.* Benson, 38 La. Ann. 198), if a person absents himself for seven years, and in that time nothing is heard of him by those who would naturally receive tidings were he alive, he is presumed to be dead (see DEATH, 13 Cyc. 297 *et seq.*). This rule applies to married persons. See cases cited *supra*, this note. And in the absence of statute to the contrary (Harrison *v.* Lincoln, 48 Me. 205), a spouse who has been absent for less than seven years may be presumed to be dead, so as to give effect to a second marriage of the deserted spouse (see cases cited *supra*, this note. *Contra*, McCaffrey *v.* Benson, *supra*).

If one spouse deserts the other and marries again, the death of the deserted spouse will not ordinarily be presumed in favor of the second marriage. Williams *v.* Williams, 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253. And see *In re* Richards, 133 Cal. 524, 65 Pac. 1034; Machini *v.* Zanoni, 5 Redf. Surr. (N. Y.) 492.

If a deserted spouse leaves the state and marries again in less than seven years, the death of the prior spouse at the time of the second marriage will not be presumed. Hyde Park *v.* Canton, 130 Mass. 505; Thomas *v.* Thomas, 19 Nebr. 81, 27 N. W. 84.

Presumptions as to life and death in general see DEATH, 13 Cyc. 295 *et seq.*

39. See cases cited *supra*, notes 36–38.

However, the burden of proving death as distinguished from the burden of adducing evidence thereof (see EVIDENCE, 16 Cyc. 926 *et seq.*) rests on the party who alleges it in his pleadings as part of his case. McCaffrey *v.* Benson, 38 La. Ann. 198; Thomas *v.* Thomas, 19 Nebr. 81, 27 N. W. 84.

Burden of proof as to death of prior spouse in prosecution for bigamy see BIGAMY, 5 Cyc. 699.

Sufficiency of evidence of continuance of prior marriage see *infra*, VI, B, 4.

40. Nossaman *v.* Nossaman, 4 Ind. 648 (holding that where a cohabitation was known by the parties to be adulterous in its origin, no presumption of the death or divorce of the prior spouse will be indulged); Jones *v.* Jones, 45 Md. 144 (where the court refused to presume a divorce); Machini *v.* Zanoni, 5 Redf. Surr. (N. Y.) 492 (where the court refused to presume death). See, however, Jackson *v.* Claw, 18 Johns. (N. Y.) 346 (where death was presumed); Canadian, etc., Mortg., etc., Co. *v.* Bloomer, 14 Wash. 491, 45 Pac. 34 (where a divorce was presumed).

Prior marriage as defeating presumption of marriage from cohabitation see *infra*, VI, B, 1, f, (I), (B).

41. See, generally, EVIDENCE. And see cross-references *supra*, note 1.

Evidence of consent see *infra*, page 898, note 22.

Family tradition as evidence of marriage see also EVIDENCE, 16 Cyc. 1226, 1227, 1233.

Hearsay evidence of marriage see also EVIDENCE, 16 Cyc. 1126, 1211 note 66.

Opinion evidence of marriage see also 16 Cyc. 1126.

Parol evidence of marriage see also EVIDENCE, 16 Cyc. 1126; 17 Cyc. 491.

Relevancy of evidence as to marriage see also EVIDENCE, 16 Cyc. 1126, 1127 note 58, 1128 note 72.

Sufficiency of evidence to take case to jury see *infra*, VII, A.

42. See HUSBAND AND WIFE, 21 Cyc. 1630.

43. See ADULTERY, 1 Cyc. 963 *et seq.*; BIGAMY, 5 Cyc. 702; INCEST, 22 Cyc. 59; LEWDNESS, 25 Cyc. 216.

44. *Alabama.*— Bynon *v.* State, 117 Ala. 80, 23 So. 640, 67 Am. St. Rep. 163.

District of Columbia.— Pierce *v.* Jacobs, 7 Mackey 498; Green *v.* Norment, 5 Mackey 80.

Iowa.— Casley *v.* Mitchell, 121 Iowa 96, 96 N. W. 725.

Louisiana.— Albinest *v.* Yazoo, etc., R. Co., 107 La. 133, 31 So. 675; Taylor *v.* Taylor, 15 La. Ann. 313; Beaulieu *v.* Ternoir, 5 La. Ann. 476.

New York.— Clayton *v.* Wardell, 4 N. Y. 230; Matter of Hamilton, 76 Hun 200, 27 N. Y. Suppl. 813 [*affirming* 12 N. Y. Suppl. 708, 2 Connoly Surr. 471].

England.— Tracey *v.* McArlton, 7 Dowl. P. C. 532, 3 Jur. 124, 1 W. W. & H. 550, holding that in an action against an alleged husband and wife for a debt due from the alleged wife before coverture, it is not necessary to give actual proof of the marriage, but presumptive evidence of it is sufficient.

Canada.— Connolly *v.* Woolrich, 3 Can. L. J. N. S. 14, 1 Rev. Lég. 253, 11 L. C. Jur. 197, holding that a marriage contracted where there are no priests, no civil or religious authority, and no registers, may be proved by oral evidence; and that the admission of the parties, combined with long cohabitation and repute, will be the best evidence.

See 34 Cent. Dig. tit. "Marriage," §§ 70, 79.

This rule applies to foreign marriages. White *v.* Holsten, 4 Mart. (La.) 471.

governed by the general rules of evidence.[45] Among the facts to be considered as evidence of marriage, on the one hand, are the facts that the parties cohabited as husband and wife and were reputed to be such;[46] that the man introduced the woman as his wife;[47] that she assumed his name;[48] and that they were recognized as husband and wife by their relatives.[49] As tending to disprove a marriage, on the other hand, the court or jury should take into consideration the facts that the proper records or memoranda are silent as to the marriage;[50] that the woman did not assume the man's name;[51] that the parties never cohabited as man and wife;[52]

Record evidence is not necessary. Martin *v.* Martin, 22 Ala. 86 (holding that a license with the minister's return thereon is not indispensable to prove a marriage); Pierce *v.* Jacobs, 7 Mackey (D. C.) 498; Green *v.* Norment, 5 Mackey (D. C.) 80; Casley *v.* Mitchell, 121 Iowa 96, 96 N. W. 725; State *v.* Marvin, 35 N. H. 22; Mathews *v.* Silvander, 14 S. D. 505, 85 N. W. 998; Womack *v.* Tankersley, 78 Va. 242; Currie *v.* Stairs, 25 N. Brunsw. 4.

Testimony of an eye-witness is not necessary. Martin *v.* Martin, 22 Ala. 86; Pierce *v.* Jacobs, 7 Mackey (D. C.) 498; Green *v.* Norment, 5 Mackey (D. C.) 80; Womack *v.* Tankersley, 78 Va. 242.

The conduct of the parties may be considered in determining whether or not they are married. McPhelemy *v.* McPhelemy, 78 Conn. 180, 61 Atl. 477; Kenyon *v.* Ashbridge, 35 Pa. St. 157; Whittle *v.* State, 43 Tex. Cr. 468, 66 S. W. 771. See, however, Imboden *v.* St. Louis Union Trust Co., 111 Mo. App. 220, 86 S. W. 263.

Best and secondary evidence of marriage see also EVIDENCE, 17 Cyc. 491, 522.

Presumptive evidence of marriage see *supra*, VI, A, 1, b, (I).

45. See EVIDENCE, 17 Cyc. 779, 782, 822.

Evidence held sufficient to establish marriage see Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442; Hawley *v.* Hawley, 180 Ill. 594, 54 N. E. 626; Casley *v.* Mitchell, 121 Iowa 96, 96 N. W. 725; Soyer *v.* Great Falls Water Co., 15 Mont. I, 37 Pac. 838; Kalyton *v.* Kalyton, 45 Oreg. 116, 74 Pac. 491, 78 Pac. 332; Rhode Island Hospital Trust Co. *v.* Thorndike, 24 R. I. 105, 52 Atl. 873; *In re* Lauderdale Peerage, 10 App. Cas. 692.

Evidence held insufficient to establish marriage see Henry *v.* McNealey, 24 Colo. 456, 50 Pac. 37; Barnum *v.* Barnum, 42 Md. 251; Redgrave *v.* Redgrave, 38 Md. 93; Haley *v.* Goodheart, 58 N. J. Eq. 368, 44 Atl. 193; Matter of Rawson, 29 Misc. (N. Y.) 534, 61 N. Y. Suppl. 1078; Cunningham *v.* Burdell, 4 Bradf. Surr. (N. Y.) 343; Turpin *v.* Public Administrator, 2 Bradf. Surr. (N. Y.) 424; *In re* Davis, 204 Pa. St. 602, 54 Atl. 475; Henry *v.* Taylor, 16 S. D. 424, 93 N. W. 641; Blackburn *v.* Crawford, 3 Wall. (U. S.) 175, 18 L. ed. 186.

46. See *infra*, VI, B, 1, f, (I), (A).

47. Robinson *v.* Robinson, 188 Ill. 371, 58 N. E. 906; Hawley *v.* Hawley, 180 Ill. 594, 54 N. E. 626; Bailey *v.* State, 36 Nebr. 808, 55 N. W. 241; Galveston, etc., R. Co. *v.* Cody, 20 Tex. Civ. App. 520, 50 S. W. 135. See, however, Henry *v.* McNealey, 24 Colo. 456, 50 Pac. 37; Haley *v.* Goodheart, 58 N. J. Eq. 368, 44 Atl. 193.

48. State *v.* Worthingham, 23 Minn. 528; Prickett *v.* Muck, 74 Wis. 199, 42 N. W. 256; *In re* Lauderdale Peerage, 10 App. Cas. 692.

49. Summerhill *v.* Darrow, 94 Tex. 71, 57 S. W. 942 (recognition in will of alleged wife's mother); Galveston, etc., R. Co. *v.* Cody, 20 Tex. Civ. App. 520, 50 S. W. 135. And see *In re* Lauderdale Peerage, 10 App. Cas. 692.

50. Henry *v.* McNealey, 24 Colo. 456, 50 Pac. 37; Barnum *v.* Barnum, 42 Md. 251; Redgrave *v.* Redgrave, 38 Md. 93; Haley *v.* Goodheart, 58 N. J. Eq. 368, 44 Atl. 193; Blackburn *v.* Crawford, 3 Wall. (U. S.) 175, 18 L. ed. 186. See, however, Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. 78; Campbell *v.* McFadden, 9 Tex. Civ. App. 379, 31 S. W. 436; Rooker *v.* Rooker, 9 Jur. N. S. 1329, 33 L. J. P. & M. 42, 3 Swab. & Tr. 526, 12 Wkly. Rep. 807.

Failure to produce record.— The failure of the party asserting the marriage to produce the marriage records is a circumstance to be considered against him (McConnell *v.* New Orleans, 15 La. Ann. 410), in the absence of explanation (Perrine *v.* Kohr, 20 Pa. Super. Ct. 36; Rooker *v.* Rooker, 9 Jur. N. S. 1329, 33 L. J. P. & M. 42, 3 Swab. & Tr. 526, 12 Wkly. Rep. 807. And see Clapier *v.* Banks, 10 La. 60).

51. *California.*— Harron *v.* Harron, 128 Cal. 308, 65 Pac. 932.

Maryland.— Redgrave *v.* Redgrave, 38 Md. 93.

Michigan.— Cross *v.* Cross, 55 Mich. 280, 21 N. W. 309.

New York.— Scudder *v.* Gori, 3 Rob. 661, 18 Abb. Pr. 223.

Pennsylvania.— Luce's Estate, 5 Pa. Dist. 137, 17 Pa. Co. Ct. 465. *Contra*, Hill *v.* Hill, 32 Pa. St. 511.

See 34 Cent. Dig. tit. "Marriage," § 70.

52. *Nebraska.*— Sorensen *v.* Sorensen, 68 Nebr. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455.

New Jersey.— Haley *v.* Goodheart, 58 N. J. Eq. 368, 44 Atl. 193.

New York.— Matter of Rawson, 29 Misc. 534, 61 N. Y. Suppl. 1078; Cunningham *v.* Burdell, 4 Bradf. Surr. 343; Turpin *v.* Public Administrator, 2 Bradf. Surr. 424.

Washington.— Canadian, etc., Mortg., etc., Co. *v.* Bloomer, 14 Wash. 491, 45 Pac. 34.

England.— Wilson *v.* Mitchell, 3 Campb. 393.

See 34 Cent. Dig. tit. "Marriage," § 79.

that the woman was unchaste before the alleged marriage;[53] that the relation between the parties was illicit in its inception;[54] that the party asserting the marriage subsequently married another person in the lifetime of the alleged spouse without obtaining a divorce;[55] and that the alleged marriage was kept secret.[56] An existing agreement between a man and a woman to marry at a future day conclusively negatives the claim of a marriage *per verba de præsenti* between the same parties.[57] The identity of the parties to a marriage may be established by the testimony of an eye-witness to the ceremony[58] or by circumstantial evidence,[59] but, it has been held, not by declarations of the parties or conclusions derived therefrom.[60]

b. Documentary Evidence.[61] The performance of a marriage ceremony between given persons may properly be established by documentary evidence,[62] such as marriage records or registers or authenticated abstracts therefrom,[63] the marriage

Reputation.— A formal marriage being proved, evidence that the cohabitation was reputed to be unlawful is incompetent. Northrop *v.* Knowles, 52 Conn. 522, 52 Am. Rep. 613.

53. Redgrave *v.* Redgrave, 38 Md. 93; Bell *v.* Clarke, 45 Misc. (N. Y.) 272, 92 N. Y. Suppl. 163, holding that in order to establish marriage to a woman of dissolute character, more evidence will be required than in the case of a woman of chaste character. See, however, *In re* James, 124 Cal. 653, 57 Pac. 578, 1008; *In re* Comly, 185 Pa. St. 208, 39 Atl. 890.

54. See *supra*, VI, A, 3, b.

55. Redgrave *v.* Redgrave, 38 Md. 93; *In re* Dysart Peerage, 6 App. Cas. 489. See, however, Kilburn *v.* Kilburn, 89 Cal. 46, 26 Pac. 636, 23 Am. St. Rep. 447; James *v.* Mickey, 26 S. C. 270, 2 S. E. 130.

56. *Nebraska.*— Sorensen *v.* Sorensen, 68 Nebr. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455.

New Jersey.— Haley *v.* Goodheart, 58 N. J. Eq. 368, 44 Atl. 193.

New York.— Cunningham *v.* Burdell, 4 Bradf. Surr. 343 (holding that where the parties to an alleged marriage have always lived as single persons, and the alleged contract is not made known till after the death of one of them, the presumption of law is not in favor of marriage, but against it, and strict proof will be demanded); Turpin *v.* Public Administrator, 2 Bradf. Surr. 424.

Virginia.— Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477.

England.— Wilson *v.* Mitchell, 3 Campb. 393. See, however, Beard *v.* Travers, 1 Ves. 313, 27 Eng. Reprint 1052.

See 34 Cent. Dig. tit. "Marriage," § 79.

See, however, Hawley *v.* Hawley, 180 Ill. 594, 54 N. E. 626.

57. Sorensen *v.* Sorensen, 68 Nebr. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455.

58. Williams *v.* Walton, etc., Co., 9 Houst. (Del.) 322, 32 Atl. 726.

59. Rooker *v.* Rooker, 9 Jur. N. S. 1329, 33 L. J. P. & M. 42, 3 Swab. & Tr. 526, 12 Wkly. Rep. 807.

60. Bowman *v.* Little, 101 Md. 273, 61 Atl. 223, 657, 1084.

61. See cross-references *supra*, notes 1, 41.

Documentary evidence of marriage see also EVIDENCE, 17 Cyc. 311, 332 note 32, 337 note 54, 357 note 8, 358 note 10, 360, 405.

62. Martin *v.* Martin, 22 Ala. 86 (holding that a bond given by an intended husband as a legal preliminary to the issuance of a marriage license is relevant and legal proof of the marriage); Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442; *In re* Shrewsbury Peerage, 7 H. L. Cas. 1, 11 Eng. Reprint 1. See, however, Edinburgh L. Assur. Co. *v.* Ferguson, 32 U. C. Q. B. 253, where a recital in a patent describing the patentee as a married woman was held not to be conclusive.

Grant of letters of administration as establishing marriage see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 140.

Judgment as establishing marriage see JUDGMENTS.

63. *Alabama.*— Hawes *v.* State, 88 Ala. 37, 7 So. 302; Beggs *v.* State, 55 Ala. 108.

Illinois.— Groom *v.* Parables, 28 Ill. App. 152.

Maryland.— Shorter *v.* Boswell, 2 Harr. & J. 359.

Massachusetts.— Shutesbury *v.* Hadley, 133 Mass. 242; Milford *v.* Worcester, 7 Mass. 48.

New Jersey.— Dare *v.* Dare, 52 N. J. Eq. 195, 27 Atl. 654.

New York.— Maxwell *v.* Chapman, 8 Barb. 579. See, however, Chambers *v.* Chambers, 32 N. Y. Suppl. 875, 24 N. Y. Civ. Proc. 187.

Vermont.— State *v.* Potter, 52 Vt. 33; Northfield *v.* Plymouth, 20 Vt. 582. See, however, State *v.* Colby, 51 Vt. 291.

Wisconsin.— West *v.* State, 1 Wis. 209.

England.— Doe *v.* Grazebrook, 4 Q. B. 406, 3 G. & D. 334, 7 Jur. 530, 12 L. J. Q. B. 221, 45 E. C. L. 406; Sayer *v.* Glossop, 2 C. & K. 694, 2 Exch. 409, 12 Jur. 465, 17 L. J. Exch. 300, 61 E. C. L. 694; Malone *v.* L'Estrange, 2 Ir. Eq. 16.

See 34 Cent. Dig. tit. "Marriage," §§ 59, 74, 83; and also EVIDENCE, 17 Cyc. 311, 360, 405.

See, however, Erwin *v.* English, 61 Conn. 502, 23 Atl. 753 (holding that the abstract of a marriage register was insufficient, in that it did not appear that the officiating clergyman entered in the register the date of the marriage and the names of the parties, together with his certificates that he married

license[64] or marriage certificate[65] or certified copies thereof, and also by private

the parties whose names are thereon entered, that he was duly authorized to perform the marriage ceremony, and that he was required to keep a record thereof); State *v.* Dooris, 40 Conn. 145 (holding that a copy of a marriage register is incompetent where it does not appear that the person certifying to it was custodian of the register, or that his signature was genuine).

Foreign marriages also may be thus proved. Hawes *v.* State, 88 Ala. 37, 7 So. 302; Casley *v.* Mitchell, 121 Iowa 96, 96 N. W. 725; Taylor *v.* Taylor, 15 La. Ann. 313; Homans *v.* Corning, 60 N. H. 418; Ratcliff *v.* Ratcliff, 5 Jur. N. S. 714, 1 Swab. & Tr. 467, 7 Wkly. Rep. 726; Abbott *v.* Abbott, 29 L. J. P. & M. 57; Wallace *v.* Wallace, 74 L. T. Rep. N. S. 253; Craig *v.* Templeton, 8 Grant Ch. (U. C.) 483. *Compare* Niles *v.* Sprague, 13 Iowa 198. See, however, Stranglein *v.* State, 17 Ohio St. 453 (holding that a transcript of the registry of marriage in a foreign country, however well authenticated, is not *prima facie* evidence of the marriage, without proof of the laws of the foreign country requiring a registry to be made and kept); Miller *v.* Miller, 43 S. C. 306, 21 S. E. 254 (holding that a copy of the record of one state, where the law pertaining to the registry of marriage licenses applies only to residents of that state, of a marriage claimed to have been solemnized therein of parties residing in another state is not conclusive evidence of the marriage, so as to preclude proof that the ceremony was performed while defendant was under duress); *In re* Athlone, 8 Cl. & F. 262, 8 Eng. Reprint 102 (holding that the book kept at the British ambassador's hotel in Paris, in which the ambassador's chaplain makes and subscribes entries of all marriages of British subjects celebrated by him, has not the authenticity of a British parish register, and that an attested copy of an entry in it is not admissible to prove a marriage); Leader *v.* Barry, 1 Esp. 353 (holding that a copy of a foreign marriage is not evidence to prove a marriage); McCarthy *v.* Hart, 8 L. C. Rep. 369 (holding that a certified abstract of a foreign marriage record does not make proof of its contents).

Identification of parties.— A copy of the record of a marriage, although admissible in evidence, is not sufficient to establish the fact of marriage without proof of identity of the parties. Wedgwood's Case, 8 Me. 75. And see West *v.* State, 1 Wis. 209; Draycott *v.* Talbot, 3 Bro. P. C. 564, 1 Eng. Reprint 1501.

Effect of failure to produce record see *supra*, note 50.

Effect of silence of proper records see *supra*, VI, B, 1, a.

Necessity of record evidence see *supra*, note 44.

64. Beggs *v.* State, 55 Ala. 108; Tucker *v.* People, 122 Ill. 583, 13 N. E. 809; State *v.* Barrow, 31 La. Ann. 691, foreign license. See, however, Rice *v.* State, 7 Humphr. (Tenn.) 14, holding that a certified copy from the clerk of the county court of a marriage license, and the return of a justice of the peace thereon showing a marriage, is not conclusive proof of the marriage, but may be rebutted by evidence showing the originals to be forgeries.

65. Northrop *v.* Knowles, 52 Conn. 522, 2 Atl. 395, 52 Am. Rep. 613; Prevost's Succession, 4 La. Ann. 347; State *v.* Tillinghast, 25 R. I. 391, 56 Atl. 181; Doe *v.* McWilliams, 2 U. C. Q. B. 77. And see EVIDENCE, 17 Cyc. 337 note 54, 357 note 8, 405. See, however, Ellis *v.* Ellis, 11 Mass. 92; Mangue *v.* Mangue, 1 Mass. 240; Smith *v.* Smith, 52 N. J. L. 207, 19 Atl. 255; Dann *v.* Kingdom, 1 Thomps. & C. (N. Y.) 492; State *v.* Brink, 68 Vt. 659, 35 Atl. 492; Gaines *v.* Relf, 12 Row. (U. S.) 472, 13 L. ed. 1071.

Foreign marriages also may be thus proved. Niles *v.* Sprague, 13 Iowa 198; Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep 164; Westmacott *v.* Westmacott, [1899] P. 183, 68 L. J. P. D. & Adm. 663, 80 L. T. Rep. N. S. 632. See, however, Rooney *v.* Rooney, 54 N. J. Eq. 231, 34 Atl. 682; State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449; State *v.* Horn, 43 Vt. 20; Finlay *v.* Finlay, 31 L. J. P. & M. 149. The certificate of a marriage performed in another state is treated as an original document, and need not be authenticated. Erwin *v.* English, 61 Conn. 502, 23 Atl. 753; Rex *v.* Mangent, Quincy (Mass.) 162. See, however, Rooney *v.* Rooney, *supra*.

The parties to the ceremony must be identified, it has been held, in order to render the certificate admissible. Snowman *v.* Masson, 99 Mc. 490, 59 Atl. 1019; Bowman *v.* Little, 101 Md. 273, 61 Atl. 223, 657, 1084. *Contra*, Hubbard *v.* Lees, L. R. 1 Exch. 255, 4 H. & C. 418, 12 Jur. N. S. 435, 35 L. J. Exch. 169, 14 L. T. Rep. N. S. 442, 14 Wkly. Rep. 694. *Compare* Dailey *v.* Frey, 206 Pa. St. 227, 55 Atl. 962.

Authority of person officiating.— The words "M. of Gospel" after the name of a person who signed a marriage certificate and therein certified that he solemnized the marriage sufficiently indicate that such person was a minister of the gospel. Erwin *v.* English, 61 Conn. 502, 23 Atl. 753.

The signature of the person officiating must be identified to render the certificate admissible. State *v.* Colby, 51 Vt. 291; State *v.* Horn, 43 Vt. 20. See, however, Fratini *v.* Caslini, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843, where the identification was held to be sufficient.

Certificate in connection with other circumstances held to establish a marriage see Hawley *v.* Hawley, 180 Ill. 594, 54 N. E. 626; Gilman *v.* Sheets, 78 Iowa 499, 43 N. W. 299; Glaser *v.* Dambmann, 82 Md. 643, 32 Atl. 522; State *v.* Tillinghast, 25 R. I. 391, 56 Atl. 181; *In re* Lauderdale Peerage, 10 App. Cas. 692.

memoranda of the person officiating.[66] And the date of the marriage also may be thus established.[67]

c. Testimony of Eye-Witnesses or Person Officiating. A marriage may be proved by the testimony of eye-witnesses to the ceremony[68] or of the person officiating.[69]

d. Testimony of Parties. A marriage may be established by the testimony of one of the parties thereto.[70]

e. Admissions and Declarations.[71] If a party to an alleged marriage has

66. Johnson *v.* Cowdrey, 19 N. Y. Suppl. 678; Blackburn *v.* Crawford, 3 Wall. (U. S.) 175, 18 L. ed. 186.

Silence of memoranda as disproving marriage see *supra*, VI, B, 1, a.

67. Stoker *v.* Patton, (Tex. Civ. App. 1896) 35 S. W. 64 (holding that the return on a marriage license is admissible to prove the date of the marriage); Doe *v.* Barnes, 1 M. & Rob. 386 (holding that the registry of a marriage is evidence between strangers of the time of the marriage). See, however, Viall *v.* Smith, 6 R. I. 417 (holding that a certified copy from a marriage registry was no proof of the time of marriage, unless traced by evidence to information furnished by the persons married, or by members of their family); Chew *v.* State, 23 Tex. App. 230, 5 S. W. 373 (holding that where the fact of a marriage having taken place on a particular day is material, the best evidence of the fact is the testimony of those who witnessed the ceremony; and a certified copy of a certificate of its solemnization is not admissible).

68. *Illinois.*—Lyman *v.* People, 98 Ill. App. 386 [*affirmed* in 198 Ill. 544, 64 N. E. 974].

Indiana.— Nixon *v.* Brown, 4 Blackf. 157.

Iowa.— Kilburn *v.* Mullen, 22 Iowa 498.

Kansas.— Baughman *v.* Baughman, 29 Kan. 283.

Massachusetts.— Com. *v.* Hayden, 163 Mass. 543, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; Com. *v.* Norcross, 9 Mass. 492.

Missouri.— Imboden *v.* St. Louis Union Trust Co., 111 Mo. 220, 86 S. W. 263.

New Hampshire.— State *v.* Clark, 54 N. H. 456; State *v.* Marvin, 35 N. H. 22; State *v.* Winkley, 14 N. H. 480; State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162.

New Mexico.—U. S. *v.* Chaves, 6 N. M. 180, 27 Pac. 489; U. S. *v.* De Lujan, 6 N. M. 179, 27 Pac. 489; U. S. *v.* De Amador, 6 N. M. 173, 27 Pac. 488.

New York.— Winslow *v.* Winslow, 6 Abb. Pr. 294.

Oregon.— State *v.* Eggleston, 45 Oreg. 346, 77 Pac. 738.

Vermont.— McQuade *v.* Hatch, 65 Vt. 482, 27 Atl. 136.

England.— Reg. *v.* Mainwaring, 7 Cox C. C. 192, Dears. & B. 132, 2 Jur. N. S. 1236, 26 L. J. M. C. 10, 5 Wkly. Rep. 119. See, however, Horn *v.* Noel, 1 Campb. 61, where it was contended that to prove a Jewish marriage it is not enough to produce witnesses who were present at the ceremony in the synagogue, but that the written contract between the parties should be produced and the execution of it proved.

Canada.— Currie *v.* Stairs, 25 N. Brunsw. 4.

See 34 Cent. Dig. tit. "Marriage," §§ 72, 80; and also Evidence, 17 Cyc. 491.

Testimony of eye-witnesses in connection with other circumstances held to prove a marriage see Casley *v.* Mitchell, 121 Iowa 96, 96 N. W. 725; Glaser *v.* Dambmann, 82 Md. 643, 32 Atl. 522.

The testimony of eye-witnesses is not conclusive of the fact of marriage. Barnum *v.* Barnum, 42 Md. 251; *In re* Davis, 204 Pa. St. 602, 54 Atl. 475; Perrine *v.* Kohr, 20 Pa. Super. Ct. 36.

Declaration of eye-witness see *infra*, VI, B, 1, e.

Necessity of testimony of eye-witnesses see *supra*, note 44.

69. Casley *v.* Mitchell, 121 Iowa 96, 96 N. W. 725; Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318.

Declaration of person officiating see *infra*, VI, B, 1, e.

70. *In re* Richards, 133 Cal. 524, 65 Pac. 1034; Com. *v.* Dill, 156 Mass. 226, 30 N. E. 1016; Leighton *v.* Sheldon, 16 Minn. 243; Rockwell *v.* Tunnicliff, 2 Barb. (N. Y.) 408.

Testimony of alleged spouse in connection with other circumstances held to show a marriage see Meyers *v.* Pope, 110 Mass. 314; Bailey *v.* State, 36 Nebr. 808, 55 N. W. 241; Mathews *v.* Silvander, 14 S. D. 505, 85 N. W. 998.

Testimony of alleged spouse held insufficient to show a marriage see Henry *v.* McNealey, 24 Colo. 456, 50 Pac. 37; Knorst *v.* Knorst, 181 Ill. 347, 54 N. E. 951 [*affirming* 80 Ill. App. 344]; Sorensen *v.* Sorensen, 68 Nebr. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; *In re* Davis, 204 Pa. St. 602, 54 Atl. 475; Luce's Estate, 5 Pa. Dist. 137, 17 Pa. Co. Ct. 465; Canadian, etc., Mortg., etc., Co. *v.* Bloomer, 14 Wash. 491, 45 Pac. 34; Blackburn *v.* Crawford, 3 Wall. (U. S.) 175, 18 L. ed. 186.

Competency of alleged spouse to testify to fact of marriage see Witnesses.

71. Admissions as evidence of marriage see also Evidence, 16 Cyc. 1044 note 52, 1126.

Declarations as evidence of marriage see also Evidence, 16 Cyc. 1126. Declarations of marriage on question of pedigree see also Evidence, 16 Cyc. 1226, 1227.

admitted or otherwise declared that the marriage exists, the admission or declaration may be availed of as evidence of the marriage;[72] and declarations of an intention to marry a particular woman may be considered on the question whether the marriage subsequently took place.[73] On the other hand if the parties or either of them have denied a marriage or admitted that none existed, or otherwise made declarations repugnant to the existence of a marriage, these statements

72. *Alabama.*— Moore *v.* Heinecke, 119 Ala. 627, 24 So. 374; Green *v.* State, 59 Ala. 68; Buchanan *v.* State, 55 Ala. 154.

Colorado.— Hardenbrook *v.* Harrison, 11 Colo. 9, 17 Pac. 72; Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

Georgia.— Bryan *v.* Doolittle, 38 Ga. 255.

Maine.— Camden *v.* Belgrade, 78 Me. 204, 3 Atl. 652; Laughlin *v.* Eaton, 54 Me. 156.

Maryland.— Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752; Crawford *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323.

Minnesota.— Hulett *v.* Carey, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384.

Missouri.— Imboden *v.* St. Louis Union Trust Co., 111 Mo. App. 220, 86 S. W. 263.

New York.— Badger *v.* Badger, 88 N. Y. 546, 42 Am. Rep. 263; Alexander *v.* Chamberlin, 1 Thomps. & C. 600; Scudder *v.* Gori, 3 Rob. 661, 18 Abb. Pr. 223; Matter of Baker, 6 Dem. Surr. 271.

North Carolina.— Jones *v.* Reddick, 79 N. C. 290.

Pennsylvania.— Vincent's Appeal, 60 Pa. St. 228; Kenyon *v.* Ashbridge, 35 Pa. St. 157; Hill *v.* Hill, 32 Pa. St. 511; Perrine *v.* Kohr, 20 Pa. Super. Ct. 36; De Amarelli's Estate, 2 Brewst. 239; Guardians of Poor *v.* Nathans, 3 Pa. L. J. Rep. 139; King's Estate, 9 Kulp 56.

South Carolina.— Allen *v.* Hall, 2 Nott & M. 114, 10 Am. Dec. 578.

Virginia.— Womack *v.* Tankersley, 78 Va. 242; Purcell *v.* Purcell, 4 Hen. & M. 507.

Wisconsin.— West *v.* State, 1 Wis. 209.

England.— Forster *v.* Forster, L. R. 2 H. L. Sc. 244; *In re* Sussex Peerage, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034; Hervey *v.* Hervey, 2 W. Bl. 877.

See 34 Cent. Dig. tit. "Marriage," §§ 60, 75, 84.

Compare Gaines *v.* Relf, 12 How. (U. S.) 472, 13 L. ed. 1071.

Admissions and declarations of marriage are to be considered, in connection with other circumstances, as evidence of marriage. Glaser *v.* Dambmann, 82 Md. 643, 32 Atl. 522; Soyer *v.* Great Falls Water Co., 15 Mont. 1, 37 Pac. 838; Prickett *v.* Muck, 74 Wis. 199, 42 N. W. 256; Patrickson *v.* Patrickson, L. R. 1 P. & D. 86, 12 Jur. N. S. 30, 35 L. J. P. & M. 48, 13 L. T. Rep. N. S. 567, 14 Wkly. Rep. 212.

Admissions and declarations held insufficient to establish a marriage see Carpenter *v.* Smith, 24 Iowa 200 (holding that the joinder by a woman of a man whom she believes her lawful husband as co-plaintiff in an action for assault upon her, and the judgment recovered in the action, do not raise a presumption conclusive upon her that her marriage with the man was valid as to grounds peculiarly within his knowledge rendering it invalid); McConnell *v.* New Orleans, 15 La. Ann. 410; Matter of Rawson, 29 Misc. (N. Y.) 534, 61 N. Y. Suppl. 1078; Bates *v.* Bates, 7 Misc. (N. Y.) 547, 27 N. Y. Suppl. 872 (holding that a paper signed by a man, to the effect "that Annette F. McGrath is my true and beloved wife," is not sufficient to prove a marriage, where the facts tend to show that it was given as a sham to enable the woman to conceal illicit intercourse); Turpin *v.* Public Administrator, 2 Bradf. Surr. (N. Y.) 424; Van Ness *v.* Van Ness, 28 Fed. Cas. No. 16,869, 1 Hayw. & H. 251 (holding that the admissions and acknowledgments of the parties to a pretended marriage alleged to have taken place in Pennsylvania but not solemnized as required by the statutes of that state are not sufficient to establish a valid marriage between the parties when made only in the presence of each other and not in the presence of a third person); Wilson *v.* Mitchell, 3 Campb. 393 (holding that to support a defense to an action that plaintiff was under coverture when the cause of action accrued, although she lived as a single woman, it is not enough to prove a bare declaration by her that she had been married to a man who is still alive, without actual proof of the marriage or of cohabitation with her supposed husband, particularly if there appears to be any reason to doubt that the marriage was valid).

Declarations held to be inadmissible see Smith *v.* Smith, 52 N. J. L. 207, 19 Atl. 255; Van Tuyl *v.* Van Tuyl, 57 Barb. (N. Y.) 235, 8 Abb. Pr. N. S. 5; *In re* Sussex Peerage, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034.

Weight of admissions and declarations.— The value of a party's declarations to prove his marriage depends on the circumstances under which they were made. Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477. Admissions as to the fact of one's own marriage are entitled to more weight than denials. Greenawalt *v.* McEnelley, 85 Pa. St. 352. And see Drinkhouse's Estate, 151 Pa. St. 294, 24 Atl. 1083. See, however, Henry *v.* McNealey, 24 Colo. 456, 50 Pac. 37; McConnell *v.* New Orleans, 15 La. Ann. 410; Com. *v.* Omohundro, 2 Brewst. (Pa.) 298 (holding that verbal assertions of the alleged husband during his lifetime will not establish a marriage in favor of a claimant under his will, if the will repels all presumption of marriage).

73. Hawley *v.* Hawley, 180 Ill. 594, 54 N. E. 626; Johnson *v.* Clancy, 105 Iowa 242, 74 N. W. 760; Baughman *v.* Baughman, 32 Kan. 538, 4 Pac. 1003.

may be considered as tending to disprove a marriage.[74] The declaration of a person since deceased that he had celebrated a marriage between certain persons,[75] or that he had witnessed a marriage ceremony,[76] is not competent proof of the marriage. Declarations of third persons that no marriage existed are not as a rule competent evidence against the parties to an alleged marriage;[77] but declarations of members of the families of the parties to an alleged marriage are competent evidence on an issue of pedigree.[78]

f. Cohabitation and Reputation[79]—(i) *As Establishing Marriage*—(a) *In General.* Independent of any presumption of law,[80] and independent of any direct or documentary evidence,[81] a marriage may be circumstantially established by the fact that a man and woman have for a considerable period of time openly cohabited as husband and wife and recognized and treated each other as such, so that they are generally reputed to be married among those who have come in contact with them. Such circumstances justify a finding that at the commencement of the cohabitation the parties actually entered into a marriage.[82]

74. *California.*— Sharon *v.* Sharon, 79 Cal. 633, 22 Pac. 26, 131, where the admission was tacit. See however *In re* James, 124 Cal. 653, 57 Pac. 578, 1008, holding that declarations of a decedent, made a few weeks before his death, that he was a widower, are inadmissible in opposition to a claim that he was married at that time.

Colorado.— Henry *v.* McNealey, 24 Colo. 456, 50 Pac. 37.

Illinois.— Laurence *v.* Laurence, 164 Ill. 367, 45 N. E. 1071. See, however, Hawley *v.* Hawley, 180 Ill. 594, 54 N. E. 626, where the alleged husband's denial of marriage was explained by his desire to keep it secret from his sons.

Maryland.— Barnum *v.* Barnum, 42 Md. 251.

Missouri.— Imboden *v.* St. Louis Union Trust Co., 111 Mo. App. 220, 86 S. W. 263.

New York.— Matter of Rawson, 29 Misc. 534, 61 N. Y. Suppl. 1078; Cunningham *v.* Burdell, 4 Bradf. Surr. 343; Turpin *v.* Public Administrator, 2 Bradf. Surr. 424.

See 34 Cent. Dig. tit. "Marriage," §§ 75, 84.

See, however, Johnson *v.* Clancy, 105 Iowa 242, 74 N. W. 760; Hulett *v.* Carey, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, 34 L. R. A. 384 (holding that on an issue whether deceased executed a marriage contract with petitioner, conveyances executed by him subsequent to the contract, in which he is described as a single man, are not admissible against petitioner); Smith *v.* Smith, 52 N. J. L. 207, 19 Atl. 255; Hill *v.* Hill, 32 Pa. St. 511 (holding that a reputed husband's declarations in denial of his marriage cannot be admitted to disprove it); Moore's Estate, 9 Pa. Co. Ct. 338 (where declarations of the man against marriage were held to be no evidence as against the woman).

Relative weight of admissions and denials see *supra,* note 72.

75. *In re* Sussex Peerage, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034.

76. Sharp *v.* Johnson, 22 Ark. 79. See, however, *In re* Lauderdale Peerage, 10 App. Cas. 692.

77. *In re* James, 124 Cal. 653, 57 Pac. 578, 1008.

78. See Evidence, 16 Cyc. 1226, 1227.

79. See cross-references *supra,* notes 1, 41.

Cohabitation as consummation of marriage see *supra,* I, D, 3.

Cohabitation as validating void marriage see *supra,* V, B.

80. See *supra,* VI, A, 1, b, (I).

81. See *supra,* VI, B, 1, a–e.

Cohabitation and reputation as corroborating direct evidence of marriage see *infra,* VI, B, 1, f, (II).

82. *Alabama.*— Tartt *v.* Negus, 127 Ala. 301, 28 So. 713; Moore *v.* Heineke, 119 Ala. 627, 24 So. 374; Bynon *v.* State, 117 Ala. 80, 23 So. 640, 67 Am. St. Rep. 163; Ford *v.* Ford, 4 Ala. 142. An . see Green *v.* State, 59 Ala. 68, holding that the question whether cohabitation and the confessions of the parties are sufficient and convincing evidence of marriage depends on their connection and consistency in the particular case.

Arkansas.— Scoggins *v.* State, 32 Ark. 205.

Connecticut.— Budington *v.* Munson, 33 Conn. 481.

Delaware.— State *v.* Miller, 3 Pennew. 518, 52 Atl. 262.

District of Columbia.— Jennings *v.* Webb, 8 App. Cas. 43.

Hawaii.— Apong *v.* Marks, 1 Hawaii 83.

Illinois.— Miller *v.* White, 80 Ill. 580; Harman *v.* Harman, 16 Ill. 85; Marks *v.* Marks, 108 Ill. App. 371.

Indiana.— Bowers *v.* Van Winkle, 41 Ind. 432; Trimble *v.* Trimble, 2 Ind. 76; Fleming *v.* Fleming, 8 Blackf. 234.

Kentucky.— Klenke *v.* Noonan, 118 Ky. 436, 81 S. W. 241, 26 Ky. L. Rep. 305; Chiles *v.* Drake, 2 Metc. 146, 74 Am. Dec. 406; Donnelly *v.* Donnelly, 8 B. Mon. 113; Taylor *v.* Shemwell, 4 B. Mon. 575; Crozier *v.* Gano, 1 Bibb 257.

Louisiana.— Cole *v.* Langley, 14 La. Ann. 770; Alloway *v.* Babineau, 8 La. Ann. 469; Hobdy *v.* Jones, 2 La. Ann. 944; Holmes *v.* Holmes, 6 La. 463, 26 Am. Dec. 482; Taylor *v.* Swett, 3 La. 33, 22 Am. Dec. 156.

Maine.— Taylor *v.* Robinson, 29 Me. 323; Carter *v.* Parker, 28 Me. 509.

Maryland.— Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752; Barnum *v.* Barnum, 42 Md.

(B) *Rebuttal of Presumption of Marriage.*[83] Marital cohabitation and reputation do not constitute marriage; they are merely facts from which it may be presumed that the party actually entered into a marriage when the cohabitation commenced;[84] and this presumption of marriage is not conclusive, but is open to rebuttal.[85] Accordingly if it appears that there was in fact no marriage between the parties either by ceremony or by contract the presumption is dispelled and loses

251; Formshill *v.* Murray, 1 Bland 479, 18 Am. Dec. 344.

Massachusetts.— Com. *v.* Hurley, 14 Gray 411; Means *v.* Welles, 12 Metc. 356.

Michigan.— Proctor *v.* Bigelow, 38 Mich. 282.

Minnesota.— Heminway *v.* Miller, 87 Minn. 123, 91 N. W. 428; State *v.* Worthingham, 23 Minn. 528.

New Hampshire.—Stevens *v.* Reed, 37 N H. 49; Dunbarton *v.* Franklin, 19 N. H. 257.

New York.— Gall *v.* Gall, 114 N. Y. 109, 21 N. E. 106 [*affirming* 12 N. Y. St. 604]; Chamberlain *v.* Chamberlain, 71 N. Y. 423; Matter of Brush, 25 N. Y. App. Div. 610, 49 N. Y. Suppl. 803; People *v.* Bartholf, 24 Hun 272; Rockwell *v.* Tunnicliff, 62 Barb. 408; Percival *v.* Percival, 14 N. Y. St. 255; Baker *v.* Metzler, Anth. N. P. 263; Fenton *v.* Reed, 4 Johns. 52, 4 Am. Dec. 244; Jenkins *v.* Bisbee, 1 Edw. 377; People *v.* McCormack, 4 Park. Cr. 9.

North Carolina.— Jones *v.* Reddick, 79 N. C. 290; Archer *v.* Haithcock, 51 N. C. 421; Weaver *v.* Cryer, 12 N. C. 337; Whitehead *v.* Clinch, 3 N. C. 3; Felts *v.* Foster, 1 N. C. 121. If persons who were formerly slaves lived together as husband and wife after the passage of the act of 1886, validating marriages between such persons their cohabitation constitutes conclusive evidence of their consent to the marriage contract. Long *v.* Barnes, 87 N. C. 329; State *v.* Whitford, 86 N. C. 636.

Ohio.— Bruner *v.* Briggs, 39 Ohio St. 478; Johnson *v.* Dudley, 4 Ohio S. & C. Pl. Dec. 243, 3 Obio N. P. 196.

Oregon.— Murray *v.* Murray, 6 Oreg. 26.

Pennsylvania.— Durning *v.* Hastings, 183 Pa. St. 210, 38 Atl. 627; Strauss' Estate, 168 Pa. St. 561, 32 Atl. 98 [*affirming* 3 Pa. Dist. 425, 14 Pa. Co. Ct. 593]; Drinkhouse's Estate, 151 Pa. St. 294, 24 Atl. 1083; Lehigh Valley R. Co. *v.* Hall, 61 Pa. St. 361; Thorndell *v.* Morrison, 25 Pa. St. 326; Senser *v.* Bower, 1 Penr. & W. 450; Chambers *v.* Dicks, 2 Serg. & R. 475; Com. *v.* Haylow, 17 Pa. Super. Ct. 541; Physick's Estate, 2 Brewst. 179; Guardians of Poor *v.* Nathans, 2 Brewst. 149, 5 Pa. L. J. 1.

South Carolina.— James *v.* Mickey, 26 S. C. 270, 2 S. E. 130.

Texas.— Wright *v.* Wright, 6 Tex. 3; Tarpley *v.* Poage, 2 Tex. 139; Jackson *v.* State, 8 Tex. App. 60.

Vermont.— Northfield *v.* Vershire, 33 Vt. 110; Mitchell *v.* Mitchell, 11 Vt. 134.

Virginia.— Womack *v.* Tankersley, 78 Va. 242; Purcell *v.* Purcell, 4 Hen. & M. 507.

Wisconsin.— Eaton *v.* Tallmadge, 24 Wis. 217.

United States.— Travers *v.* Reinhardt, 205 U. S. 424; Adger *v.* Ackerman, 115 Fed. 124, 52 C. C. A. 568; Hinde *v.* Vattier, 12 Fed. Cas. No. 6,512, 1 McLean 110 [*reversed* on another ground in 7 Pet. 252, 8 L. ed. 675].

England.— Campbell *v.* Campbell, L. R. 1 H. L. Sc. 182; Patrickson *v.* Patrickson, L. R. 1 P. & D. 86, 12 Jur. N. S. 30, 35 L. J. P. & M. 48, 13 L. T. Rep. N. S. 567, 14 Wkly. Rep. 212; Doe *v.* Fleming, 4 Bing. 266, 5 L. J. C. P. O. S. 169, 12 Moore C. P. 500, 13 E. C. L. 497; Rex *v.* Stockland, Burr. S. Cas. 508, 1 W. Bl. 368 note; Rooker *v.* Rooker, 9 Jur. N. S. 1329, 33 L. J. P. & M. 42, 3 Swab. & Tr. 526, 12 Wkly. Rep. 807; Collins *v.* Bishop, 48 L. J. Ch. 31. And see Evans *v.* Morgan, 2 Cromp. & J. 453, 2 Tyrw. 396.

Canada.— Baker *v.* Wilson, 8 Grant Ch. (U. C.) 376. And see Power *v.* Howie, 11 N. Brunsw. 210.

See 34 Cent. Dig. tit. "Marriage," §§ 86, 87.

Exceptions to rule see *supra*, note 10.

83. See cross-references *supra*, notes 1, 2, 41.

84. *Alabama.*— Moore *v.* Heineke, 119 Ala. 627, 24 So. 374.

California.— Letters *v.* Cady, 10 Cal. 533.

Delaware.— State *v.* Wilson, (1904) 62 Atl. 227.

Illinois.— McKenna *v.* McKenna, 180 Ill. 577, 54 N. E. 641 [*affirming* 73 Ill. App. 64]; Marks *v.* Marks, 108 Ill. App. 371.

Massachusetts.— Norcross *v.* Norcross, 155 Mass. 425, 29 N. E. 506.

Missouri.— State *v.* St. John, 94 Mo. App. 229, 68 S. W. 374.

New Hampshire.— Dunbarton *v.* Franklin, 19 N. H. 257.

New Jersey.— Collins *v.* Voorhees, 47 N. J. Eq. 315, 20 Atl. 676, 14 L. R. A. 366, 47 N. J. Eq. 555, 22 Atl. 1054, 24 Am. St. Rep. 412, 14 L. R. A. 364 [*affirming* 46 N. J. Eq. 411, 19 Atl. 172, 19 Am. St. Rep. 404].

New York.— Clayton *v.* Wardell, 4 N. Y. 230.

Pennsylvania.— Reading F. Ins., etc., Co.'s Appeal, 113 Pa. St. 204, 6 Atl. 60, 57 Am. Rep. 448; Hunt's Appeal, 86 Pa. St. 294; Com. *v.* Haylow, 17 Pa. Super. Ct. 541; Hine's Estate, 10 Pa. Super. Ct. 124, 44 Wkly. Notes Cas. 109; Hunt *v.* Cleveland, 6 Pa. Co. Ct. 592.

Virginia.— Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477.

United States.— Holmes *v.* Holmes, 12 Fed. Cas. No. 6,638, 1 Sawy. 99.

See 34 Cent. Dig. tit. "Marriage," §§ 61, 62, 86, 87.

85. *Hawaii.*—Apong *v.* Marks, 1 Hawaii 83.

all effect,[86] and for the same reason the presumption is rebutted by proof that the cohabitation was in its inception illicit and non-marital.[87] So the presumption of

Illinois.— Myatt *v.* Myatt, 44 Ill. 473; Crymble *v.* Crymble, 50 Ill. App. 544.

Indiana.— Nossaman *v.* Nossaman, 4 Ind. 648.

Louisiana.— Powers *v.* Charbmury, 35 La. Ann. 630; Philbrick *v.* Spangler, 15 La. Ann. 46.

Massachusetts.—Randlett *v.* Rice, 141 Mass. 385, 6 N. E. 238.

Missouri.— Adair *v.* Mette, 156 Mo. 496, 57 S. W. 551.

Nebraska.— Olson *v.* Peterson, 33 Nebr. 358, 50 N. W. 155.

New Jersey.— Collins *v.* Voorhees, 47 N. J. Eq. 315, 20 Atl. 676, 14 L. R. A. 366, 47 N. J. Eq. 555, 22 Atl. 1054, 24 Am. St. Rep. 412, 14 L. R. A. 364 [*affirming* 46 N. J. Eq. 411, 19 Atl. 172, 19 Am. St. Rep. 404]; Goldbeck *v.* Goldbeck, 18 N. J. Eq. 42.

New York.— Clayton *v.* Wardell, 4 N. Y. 230; Makel *v.* John Hancock Mut. L. Ins. Co., 95 N. Y. App. Div. 241, 88 N. Y. Suppl. 757.

Oregon.— McBean *v.* McBean, 37 Oreg. 195, 61 Pac. 418.

Pennsylvania.— Reading F. Ins. Co.'s Appeal, 113 Pa. St. 204, 6 Atl. 60, 57 Am. Rep. 448; Com. *v.* Haylow, 17 Pa. Super. Ct. 541; Hunt *v.* Cleveland, 6 Pa. Co. Ct. 592.

South Carolina.— Allen *v.* Hall, 2 Nott & M. 114, 10 Am. Dec. 578.

Texas.— Edelstein *v.* Brown, (Civ. App. 1904) 80 S. W. 1027; Lee *v.* State, 44 Tex. Cr. 354, 72 S. W. 1005, 61 L. R. A. 904; Cuneo *v.* De Cuneo, 24 Tex. Civ. App. 436, 59 S. W. 284.

Utah.— Riddle *v.* Riddle, 26 Utah 268, 72 Pac. 1081.

Virginia.— Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477.

Canada.— Preston *v.* Lyons, 24 Grant Ch. (U. C.) 142.

See 34 Cent. Dig. tit. "Marriage," §§ 61, 62, 86, 87.

It has been held, however, that where the rights of third persons are affected and the legitimacy of children is called in question, cohabitation and reputation may be conclusive evidence of marriage. Guardians of Poor *v.* Nathans, 2 Brewst. (Pa.) 149.

Measure of proof required to rebut presumption.— It has been variously held that the presumption of marriage arising from cohabitation and reputation can be rebutted only by overwhelming proof (Jackson *v.* Rhem, 59 N. C. 141), clear proof (*In re* Shephard, [1904] 1 Ch. 456, 73 L. J. Ch. 401, 90 L. T. Rep. N. S. 249), and strong and weighty evidence (Fox *v.* Bearblock, 17 Ch. D. 429, 45 J. P. 648, 50 L. J. Ch. 489, 44 L. T. Rep. N. S. 508, 29 Wkly. Rep. 661); that the presumption must be rebutted by positive testimony (Guardians of Poor *v.* Nathans, 2 Brewst. (Pa.) 149; Doe *v.* Breakey, 2 U. C. Q. B. 349), and that negative testimony of persons who never witnessed the intercourse is not sufficient (Guardians of Poor *v.* Nathan, *supra*); and finally that every reasonable possibility of an actual marriage must be disproved (Ferrie *v.* Public Administrator, 4 Bradf. Surr. (N. Y.) 28).

Weight of testimony of parties in denial of marriage.— The presumption may be sufficiently rebutted by the testimony of the parties in denial of the marriage (Benavais *v.* Barba, 32 La. Ann. 1264; Christy *v.* Clarke, 45 Barb. (N. Y.) 529; *In re* Bott, 10 Pa. Dist. 122), although they are interested in negativing the fact of marriage (Preston *v.* Lyons, 24 Grant Ch. (U. C.) 142. *Contra*, Stevens *v.* Stevens, 56 N. J. Eq. 488, 38 Atl. 460). Admissions and declarations of parties against marriage see *supra*, note 72.

Conclusiveness of presumption in the absence of evidence in rebuttal see *supra*, VI, A, 1, b, (I).

Rebuttal by admissions and declarations against marriage, by word or by conduct, see *supra*, VI, A, 1, b, (I).

Rebuttal by disproving facts on which presumption rests, such as the fact of open marital cohabitation, general reputation, and public recognition of the marriage has been considered in another connection. See *supra*, VI, A, 1, b, (I).

86. *Illinois.*— Port *v.* Port, 70 Ill. 484.

Louisiana.—Benavais *v.* Barba, 32 La. Ann. 1264.

New Jersey.— Goldbeck *v.* Goldbeck, 18 N. J. Eq. 42.

New York.— Christy *v.* Clarke, 45 Barb. 529.

Pennsylvania.— Tholey's Appeal, 93 Pa. St. 36; Hunt's Appeal, 86 Pa. St. 294; Bott's Estate, 10 Pa. Dist. 122; Gross' Estate, 9 Pa. Dist. 76; Hunt *v.* Cleveland, 6 Pa. Co. Ct. 592. See, however, Com. *v.* Haylow, 17 Pa. Super. Ct. 541.

South Carolina.— Rutledge *v.* Tunno, 69 S. C. 400, 48 S. E. 297.

Wisconsin.— Spencer *v.* Pollock, 83 Wis. 215, 53 N. W. 490, 17 L. R. A. 848.

See 34 Cent. Dig. tit. "Marriage," §§ 61, 62, 86, 87.

However, proof that there was no formal ceremonial marriage does not necessarily rebut the presumption; *non constat* that the parties did not enter into a marriage by contract. Mullaney *v.* Mullaney, 65 N. J. Eq. 384, 54 Atl. 1086; People *v.* Bartholf, 24 Hun (N. Y.) 272; Hicks *v.* Cochran, 4 Edw. (N. Y.) 107; Grotgen *v.* Grotgen, 3 Bradf. Surr. (N. Y.) 373; Richard *v.* Brehm, 73 Pa. St. 140, 13 Am. Rep. 733.

Admissions and declarations of parties against marriage as defeating presumption see *supra*, VI, A, 1, b, (I).

Weight of testimony of parties in denial of marriage see *supra*, note 85.

87. Howe's Estate, Myr. Prob. (Cal.) 100; Clayton *v.* Wardell, 4 N. Y. 230; U. S. Trust Co. *v.* Maxwell, 26 Misc. (N. Y.) 276, 57 N. Y. Suppl. 53; Bates *v.* Bates, 7 Misc.

marriage arising from cohabitation and reputation is effectually rebutted by proof that at its commencement the parties, either by ceremony or by contract, in fact entered into a marriage which was void either because one or both of them had a prior spouse living and undivorced or because it was otherwise repugnant to law,[88] or by proof that one of the parties was at the commencement of the cohabitation the lawful spouse of another[89] or that he or she had previously cohabited with another in such a manner as to give rise to a presumption of marriage.[90] And if, during the cohabitation with one woman, the man cohabits also with another woman, no presumption of a marriage with either arises.[91] And the presumption may be rebutted by proof that the parties to the cohabitation finally separated without just cause,[92] and that one or both afterward entered into a marriage with another[93]

(N. Y.) 547, 27 N. Y. Suppl. 872; Ahlberg *v.* Ahlberg, 24 N. Y. Suppl. 919; McBean *v.* McBean, 37 Oreg. 195, 61 Pac. 418; Physick's Estate, 2 Brewst. (Pa.) 179.

Subsequent cohabitation is presumed to continue to be illicit (see *supra*, VI, A, 3, b), and in the absence of evidence of a subsequent marriage (see *infra*, VI, B, 2) none can be presumed.

88. Clark *v.* Cassidy, 64 Ga. 602; McKenna *v.* McKenna, 73 Ill. App. 64 [*affirmed* in 180 Ill. 577, 54 N. E. 641], holding that if the entire transaction is established by direct evidence, and it appears therefrom that the parties entered into a contract of marriage, the court cannot presume from any subsequent conduct of the parties that any other or different contract was entered into. And see Lewis *v.* Ames, 44 Tex. 319; *In re* Sheran, 4 Terr. L. Rep. (Can.) 83. See, however, Caujolle *v.* Ferrié, 23 N. Y. 90 [*affirming* 26 Barb. 177] (holding that the presumption is not overcome by the fact that the man had declared and caused to be recorded his purpose to solemnize the marriage by the public acts prescribed by the law of his domicile, and that such purpose was not shown to have been consummated, but that there was an entry on the record of such declaration importing that nothing came of it); Johnson *v.* Johnson, 1 Coldw. (Tenn.) 626; Wilkinson *v.* Payne, 4 T. R. 468.

Reason of rule.— The entire transaction between the parties being thus shown by direct evidence, and there being no direct evidence of a subsequent marriage, the cohabitation is presumed to have been continued by virtue of the void marriage, and the burden of proving a subsequent marriage is on the party who asserts it. See *supra*, VI, A, 1, a. Sufficiency of evidence of subsequent marriage see *infra*, VI, B, 2.

89. *California.*— Case *v.* Case, 17 Cal. 598.

Indiana.— Nossaman *v.* Nossaman, 4 Ind. 648.

Missouri.— Waddingham *v.* Waddingham, 21 Mo. App. 609.

New York.— Decker *v.* Morton, 1 Redf. Surr. 477, *semble*.

South Carolina.— State *v.* Whaley, 10 S. C. 500.

Tennessee.— Moore *v.* Moore, 102 Tenn. 148, 52 S. W. 778.

Wisconsin.— Spencer *v.* Pollock, 83 Wis. 215, 53 N. W. 490, 17 L. R. A. 848.

Canada.— Kidd *v.* Harris, 3 Ont. L. Rep. 60; Wright *v.* Skinner, 17 U. C. C. P. 317; Hodgins *v.* McNeil, 9 Grant Ch. (U. C.) 305.

See 34 Cent. Dig. tit. "Marriage," §§ 61, 62, 86, 87.

Burden of proving prior marriage see *supra*, VI, A, 1, a.

Presumption of death or divorce of prior spouse see *supra*, VI, A, 4.

Sufficiency of evidence of prior marriage see *infra*, VI, B, 3.

90. George *v.* Thomas, 10 U. C. Q. B. 604. And see Quackenbush *v.* Swortfigner, 136 Cal. 149, 68 Pac. 590.

91. Riddle *v.* Riddle, 26 Utah 268, 72 Pac. 1081. *Compare* Branch *v.* Walker, 102 N. C. 34, 8 S. E. 896.

92. Costill *v.* Hill, 55 N. J. Eq. 479, 40 Atl. 32. See, however, Caujolle *v.* Ferrié, 23 N. Y. 90 [*affirming* 26 Barb. 177]; Com. *v.* Haylow, 17 Pa. Super. Ct. 541.

93. *Alabama.*— Moore *v.* Heineke, 119 Ala. 627, 24 So. 374; Weatherford *v.* Weatherford, 20 Ala. 548, 56 Am. Dec. 206.

Georgia.— Norman *v.* Goode, 113 Ga. 121, 28 S. E. 317.

Illinois.— *In re* Maher, 204 Ill. 25, 68 N. E. 159; Maher *v.* Maher, 183 Ill. 61, 56 N. E. 124; Hiler *v.* People, 156 Ill. 511, 41 N. E. 181, 47 Am. St. Rep. 221.

Louisiana.— Casimir *v.* Blanc, 10 Rob. 448.

Maryland.— Jones *v.* Jones, 45 Md. 144.

New York.— Chamberlain *v.* Chamberlain, 71 N. Y. 423; Newton *v.* Southworth, 7 N. Y. St. 130; *In re* Stanley, 1 N. Y. St. 325.

Vermont.— Poultney *v.* Fair Haven, Brayt. 185.

See 34 Cent. Dig. tit. "Marriage," §§ 61, 62, 86, 87.

The presumption is not conclusively rebutted by proof of a subsequent formal marriage of one of the parties to a third person. Jenkins *v.* Jenkins, 83 Ga. 283, 9 S. E. 541, 20 Am. St. Rep. 316; Christy *v.* Clarke, 45 Barb. (N. Y.) 529 (holding that a marriage ceremony, performed when the man is *in extremis*, helpless, surrounded by the wife and her friends, and when he is apparently oblivious not only of a previous wife but of his children also, can afford no presumption against a previous marriage by cohabitation); James *v.* Mickey, 26 S. C. 270, 2 S. E. 130; Northfield *v.* Plymouth, 20 Vt. 582. And see *infra*, VI, B, 3.

or afterward cohabited with another as a spouse.[94] However, the presumption of marriage arising from cohabitation and reputation is not necessarily rebutted by the fact that the same parties subsequently enter into a ceremonial marriage;[95] nor by the fact that the parties are of different social rank;[96] nor by the fact that the proper records disclose no evidence of marriage.[97]

(II) *As Corroborating Direct Evidence of Marriage.*[98] The fact of cohabitation and repute is frequently proved, not as in itself establishing a marriage, but in connection with direct or record evidence that a marriage was entered into at a particular time or place; and in this event it may afford strong corroboration of such evidence, and a marriage be thus established.[99]

94. Hooper *v.* McCaffery, 83 Ill. App. 341; Casimir *v.* Blanc, 10 Rob. (La.) 448.

95. Betsinger *v.* Chapman, 88 N. Y. 487 [*affirming* 24 Hun 15]; Starr *v.* Peck, 1 Hill (N. Y.) 270; Simmons *v.* Simmons, (Tex. Civ. App. 1897) 39 S. W. 639; Shank *v.* Wilson, 33 Wash. 612, 74 Pac. 812; Adger *v.* Ackerman, 115 Fed. 124, 52 C. C. A. 568.

96. Vincent's Appeal, 60 Pa. St. 228, 2 Brewst. 239, holding that while difference of rank between a man and a woman alleged to be husband and wife will have some weight in determining the question of their marriage, it will not prevail against unequivocal and frequent admissions of marriage, cohabitation, and reputation among those to whom they were jointly known, his support of her and his children, his constant recognition of them as the offspring of their reputed relation, and his many and strong expressions of attachment for her and for them.

Marriage between a caucasian and a negro may be proved by cohabitation and reputation (Johnson *v.* Dudley, 4 Ohio S. & C. Pl. Dec. 243, 3 Ohio N. P. 196; Honey *v.* Clark, 37 Tex. 686; Bonds *v.* Foster, 36 Tex. 68); but there is a presumption against such a marriage (Rutledge *v.* Tunno, 69 S. C. 400, 48 S. E. 297), or at least there is no presumption in favor of it (Armstrong *v.* Hodges, 2 B. Mon. (Ky.) 69; *In re* Omohundro, 66 Pa. St. 113, 2 Brewst. 298, holding that the fact that a man has cohabited with and introduced a slave as his wife and declared her children to be his is not sufficient to establish a former emancipation and marriage). And see Laurence *v.* Laurence, 164 Ill. 367, 45 N. E. 1071; Spencer *v.* Pollock, 83 Wis. 215, 53 N. W. 490, 17 L. R. A. 848.

97. Ferrie *v.* Public Administrator, 4 Bradf. Surr. (N. Y.) 28. And see Caujolle *v.* Ferrié, 23 N. Y. 90 [*affirming* 26 Barb. 177]. *Contra*, Nossaman *v.* Nossaman, 4 Ind. 648, holding that a marriage cannot be presumed from cohabitation where, during the only period in which the parties could have lawfully entered into a marriage, the woman resided in a certain county, and the record of marriages therein, which it was the duty of the clerk to keep, disclosed no marriage, and the clerk of no other county could lawfully have issued a license; that it will not be presumed in favor of a marriage that either the parties or the county officers violated the law.

98. See cross-references *supra*, notes 1, 41.

Cohabitation as consummation of marriage contract see *supra*, I, D, 3.

99. *Illinois.*— Hawley *v.* Hawley, 180 Ill. 594, 54 N. E. 626.

Iowa.— Johnson *v.* Clancy, 105 Iowa 242, 74 N. W. 760; Gilman *v.* Sheets, 78 Iowa 499, 43 N. W. 299, cohabitation in connection with a marriage certificate.

Louisiana.— Dunn *v.* Kenney, 11 Rob. 249 (cohabitation in connection with the fact that a marriage was celebrated by a person acting as a justice of the peace); Wyche *v.* Wyche, 10 Mart. 408 (cohabitation in connection with marriage contract).

Maryland.— Cheseldine *v.* Brewer, 1 Harr. & M. 152, cohabitation in connection with evidence of agreement to marry.

Massachusetts.— Meyers *v.* Pope, 110 Mass. 314.

Michigan.— Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep. 164.

New Jersey.— Smith *v.* Smith, 52 N. J. L. 207, 19 Atl. 255; Mullaney *v.* Mullaney, 65 N. J. Eq. 384, 54 Atl. 1086; Costill *v.* Hill, 55 N. J. Eq. 479, 40 Atl. 32.

New York.— Hayes *v.* People, 25 N. Y. 390, 82 Am. Dec. 364 [*affirming* 15 Abb. Pr. 163, 5 Park. Cr. 325]; Starr *v.* Peck, 1 Hill 270, cohabitation following courtship.

Pennsylvania.— Drinkhouse's Estate, 151 Pa. St. 294, 24 Atl. 1083 (cohabitation following courtship); Hine's Estate, 10 Pa. Super. Ct. 124, 44 Wkly. Notes Cas. 109; Guardians of Poor *v.* Nathans, 3 Pa. L. J. Rep. 139 (cohabitation in connection with evidence of agreement *per verbe de præsenti*); Com. *v.* Cronin, 13 Wkly. Notes Cas. 76.

Rhode Island.— State *v.* Tillinghast, 25 R. I. 391, 56 Atl. 181; Peck *v.* Peck, 12 R. I. 485, 34 Am. Rep. 702, holding that cohabitation following a marriage promise is *prima facie* evidence, but not conclusive, of consent between the parties to become husband and wife *de præsenti*.

South Carolina.— Prince *v.* Prince, 1 Rich. Eq. 282.

Texas.— Simmons *v.* Simmons, (Civ. App. 1897) 39 S. W. 639 (cohabitation following engagement to marry); Patterson *v.* State, 17 Tex. App. 102.

Vermont.— Northfield *v.* Plymouth, 20 Vt. 582 (cohabitation in connection with record evidence); State *v.* Rood, 12 Vt. 396 (holding that evidence that a man and woman appeared before a person acting as a magistrate

2. As to Fact of Marriage of Persons Previously Sustaining Illicit Relations.[1] It has been seen that the presumption is that an intercourse illicit in its origin because of the failure of the parties to enter into a marriage either by ceremony or by agreement continues to be illicit.[2] This presumption is, however, rebuttable, and a subsequent intermarriage of the parties may be shown either by direct evidence or by evidence of circumstances from which a subsequent marriage may be inferred.[3] Accordingly, while the mere fact that the parties continued to cohabit does not give rise to a presumption of marriage,[4] yet if it appears that the later cohabitation took on a matrimonial character, and that the parties held themselves out as man and wife, and treated each other as such and were generally reputed to be married, the presumption of the continuance of the original illicit relation is rebutted, and a subsequent marriage may be inferred.[5]

in a foreign state and declared their consent to a marriage, and that it was followed by cohabitation and recognition of each other as husband and wife, is sufficient *prima facie* proof of a marriage).

Washington.—Summerville *v.* Summerville, 31 Wash. 411, 72 Pac. 84.

Wisconsin.— Thompson *v.* Nims, 83 Wis. 261, 53 N. W. 502, 17 L. R. A. 847.

England.— See *In re* Dysart Peerage, 6 App. Cas. 489.

Evidence held insufficient to prove a marriage see Henry *v.* McNealy, 24 Colo. 456, 50 Pac. 37; McKenna *v.* McKenna, 180 Ill. 577, 54 N. E. 641 [*affirming* 73 Ill. App. 64]; Matter of Brush, 25 N. Y. App. Div. 610, 49 N. Y. Suppl. 803; Luce's Estate, 5 Pa. Dist. 137, 17 Pa. Co. Ct. 465; Green's Estate, 5 Pa. Co. Ct. 605; Blackburn *v.* Crawford, 3 Wall. (U. S.) 175, 18 L. ed. 186; Arnold *v.* Chesebrough, 58 Fed. 833, 7 C. C. A. 508 [*affirming* 46 Fed. 700]. And see Hinckley *v.* Ayres, 105 Cal. 357, 38 Pac. 735, where a finding against marriage was upheld.

1. See cross-references *supra*, page 871, note 1; page 882, note 41.

2. See *supra*, VI, A, 3, b.

3. See cases cited *infra*, note 5.

No distinct act of marriage need be proved in order to overcome the presumption. A subsequent marriage may be inferred from circumstances. Caujolle *v.* Ferrié, 23 N. Y. 90 [*affirming* 26 Barb. 177]; Wilcox *v.* Wilcox, 46 Hun (N. Y.) 32. And see Travers *v.* Reinhardt, 205 U. S. 424. See, however, U. S. Trust Co. *v.* Maxwell, 26 Misc. (N. Y.) 276, 57 N. Y. Suppl. 53.

4. *California.*—Quackenbush *v.* Swortfiguer, 136 Cal. 149, 68 Pac. 590; Harron *v.* Harron, 128 Cal. 303, 60 Pac. 932.

Illinois.— Pike *v.* Pike, 112 Ill. App. 243; Marks *v.* Marks, 108 Ill. App. 371; Crymble *v.* Crymble, 50 Ill. App. 544, holding that where the relations between a man and a woman were originally illicit, their action in passing as husband and wife will be regarded as induced by a desire to conceal the illicit relation, and not as an acknowledgment of the marital relation. And see Robinson *v.* Robinson, 188 Ill. 371, 58 N. E. 906.

Maryland.— Jones *v.* Jones, 45 Md. 144.

New York.— Clayton *v.* Wardell, 4 N. Y. 230; U. S. Trust Co. *v.* Maxwell, 26 Misc. 276, 57 N. Y. Suppl. 53; Bates *v.* Bates, 7 Misc. 547, 27 N. Y. Suppl. 872; Fagan *v.* Fagan, 11 N. Y. Suppl. 748; Turpin *v.* Public Administrator, 2 Bradf. Surr. 424. And see Matter of Rawson, 29 Misc. 534, 61 N. Y. Suppl. 1078.

Pennsylvania.— Reading F. Ins., etc., Co.'s Appeal, 113 Pa. St. 204, 6 Atl. 60, 57 Am. Rep. 448.

Texas.— Cuneo *v.* De Cuneo, 24 Tex. Civ. App. 436, 59 S. W. 284.

United States.— Arnold *v.* Chesebrough, 58 Fed. 833, 7 C. C. A. 508 [*affirming* 46 Fed. 700].

See 34 Cent. Dig. tit. "Marriage," § 66.

5. *California.*— White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

Illinois.— Elzas *v.* Elzas, 171 Ill. 632, 49 N. E. 717 [*affirming* 72 Ill. App. 94], holding that, although the relation between the parties was in its inception meretricious, a marriage is sufficiently proven by the woman's testimony that they made a contract of marriage, the fact that they immediately moved from disreputable into respectable quarters and continued to live as man and wife, he introducing and representing her as such, and, on the birth of their child, sending her congratulations, and testimony that he told another that he made such a contract.

Iowa.— Johnson *v.* Clancy, 105 Iowa 242, 74 N. W. 760.

Maryland.— Jones *v.* Jones, 45 Md. 144, holding that marriage may be inferred, notwithstanding the connection between the parties was illicit in its inception, from the facts that after the birth of a bastard child the parents cohabited together and treated each other as man and wife, and treated the child as their own, the mother assuming the father's name, and were treated as and reputed to be man and wife by their acquaintances.

New York.— Gall *v.* Gall, 114 N. Y. 109, 21 N. E. 106 [*affirming* 12 N. Y. St. 604]; Hynes *v.* McDermott, 91 N. Y. 451, 43 Am. Rep. 677; Caujolle *v.* Ferrié, 23 N. Y. 90 [*affirming* 26 Barb. 177], holding that the facts that the man desired to marry the woman, and that, although he might have maintained the meretricious intercourse without opposition from his family, he abandoned his home and parents to live with her, are some evidence that he did contract a marriage.

It has been seen also that if the relation between two parties is illicit in its origin because of a prior subsisting marriage between either of them and a third person, the burden of proving an intermarriage of the parties after dissolution of the prior marriage by death or divorce of the prior spouse rests on whomsoever asserts that the parties are husband and wife.[6] This burden may be discharged and the subsequent marriage be shown by either direct or circumstantial evidence.[7] The authorities are not in accord, however, as to whether the fact that after the death or divorce of the prior spouse the parties continued to cohabit as husband and wife is sufficient to justify an inference that they entered into a new marriage after the removal of the impediment.[8] In case an actual marriage is

Ohio.— Johnson *v.* Dudley, 4 Ohio S. & C. Pl. Dec. 243, 3 Ohio N. P. 196.

Pennsylvania.— Physick's Estate, 2 Brewst. 179.

England.— Hill *v.* Hibbit, 25 L. T. Rep. N. S. 133, 19 Wkly. Rep. 250. And see *Re* Haynes, 94 L. T. Rep. N. S. 431.

See 34 Cent. Dig. tit. "Marriage," § 66.

Time and manner of change of relation.— Under the rule that a connection confessedly illicit in its origin will be presumed to retain that character until some change is established, it is not necessary in order to establish such change to show the precise time or occasion thereof; but it is sufficient if the facts show that a change must have occurred, transforming the illicit intercourse into matrimonial cohabitation (White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; Badger *v.* Badger, 88 N. Y. 546, 42 Am. Rep. 263; Caujolle *v.* Ferrié, 23 N. Y. 90 [*affirming* 26 Barb. 177]; and the presumption may be repelled, although the circumstances fail to show how the change from concubinage to matrimony took place (Caujolle *v.* Ferrié, *supra*).

Sufficiency of cohabitation and reputation to found presumption of marriage see *supra*, VI, A, 1, b, (I).

6. See *supra*, VI, A, 1, a.

7. Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. 631; Teter *v.* Teter, 101 Ind. 129, 51 Am. Rep. 742; Foster *v.* Hawley, 8 Hun (N. Y.) 68.

Evidence of subsequent marriage agreement.— A marriage agreement entered into after the removal of the impediment may be sufficiently evidenced by any clear and unambiguous language or conduct. Michigan University *v.* McGuckin, 62 Nebr. 489, 87 N. W. 180, 57 L. R. A. 917, 64 Nebr. 300, 89 N. W. 778. However, the fact that after the man obtained a divorce from his prior spouse the other woman declared a desire that they might live together as husband and wife is not sufficient to show an express marriage contract which will legalize the relation. Wertzel *v.* Central Lodge, No. 19, A. O. U. W., 11 Pa. Co. Ct. 269.

Measure of proof of subsequent marriage.— It has been held that when circumstantial evidence is relied on, the circumstances must be such as to exclude the inference that the former relation continued, and satisfactorily prove that it was changed into that of actual marriage by mutual consent. Foster *v.* Hawley, 8 Hun (N. Y.) 68; Williams *v.* Williams, 46 Wis. 464, 1 N. W. 98, 32 Am. Rep. 722. In other cases, however, it has been held that where a connection is unlawful in its inception because of some illegal impediment to marriage, slight circumstances may be availed of to show that its character was thereafter changed to a lawful union (State *v.* Worthingham, 23 Minn. 528; Adger *v.* Ackerman, 115 Fed. 124, 52 C. C. A. 568), and that evidence of the time or place of the change is not indispensable to its proof (Adger *v.* Ackerman, *supra*).

8. **Cohabitation held to establish a subsequent marriage** see Manning *v.* Spunck, 199 Ill. 447, 65 N. E. 342 (where a husband procured a divorce on constructive notice in a state in which neither party was domiciled, and thereafter the husband and another woman were married, both believing that no impediment existed, and they publicly lived as husband and wife for many years, including over a year after the death of the first wife); Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. 631 (where a woman entered into a marriage innocently, and after the removal of the impediment the parties, with knowledge thereof, continued to cohabit as man and wife, and it was held, in favor of their children, that a subsequent marriage was established); Teter *v.* Teter, 88 Ind. 494 (where the marriage was contracted in good faith); Blanchard *v.* Lambert, 43 Iowa 228, 22 Am. Rep. 245; Barker *v.* Valentine, 125 Mich. 336, 84 N. W. 297, 84 Am. St. Rep. 578, 51 L. R. A. 787 (where the woman entered into a marriage innocently, and it was held in her favor that cohabitation after the removal of the impediment proved a subsequent marriage); Eaton *v.* Eaton, 66 Nebr. 676, 92 N. W. 995, 60 L. R. A. 605 (so holding, even though the existence of the impediment and its removal were unknown to the parties); Taylor *v.* Taylor, 63 N. Y. App. Div. 231, 71 N. Y. Suppl. 411 (where the parties married innocently and continued to cohabit long after learning of the removal of the impediment); Fordham *v.* Gouverneur Village, 5 N. Y. App. Div. 565, 39 N. Y. Suppl. 396 (where the parties married innocently); Jackson *v.* Claw, 18 Johns. (N. Y.) 346 (where the parties continued to cohabit long after the lapse of the period necessary to create a presumption of a prior spouse's death); Fenton *v.* Reed, 4 Johns. (N. Y.) 52, 4 Am. Dec. 244 (where both parties were apparently aware of the subsequent death of the prior spouse); Rose *v.* Clark, 8 Paige (N. Y.) 574; Hyde *v.* Hyde,

void for other reasons than an existing impediment, a subsequent intermarriage of the parties may be presumed from marital cohabitation and repute.[9]

3. As to Fact of Prior Marriage of Alleged Spouse.[10] A prior marriage when asserted in derogation of a subsequent marriage of one of the parties with a different person must be established by strict proof.[11] It may, however, be

3 Bradf. Surr. (N. Y.) 509 (where a man had lived on terms of criminal intimacy with a woman during the life of his wife, and after the death of his wife the intimacy continued, and the parties held themselves out to the public as man and wife and professed by their conduct and declarations to be bound by marital ties, exhibiting a continuation of cohabitation on a footing different from the former cohabitation); Machini *v.* Zanoni, 5 Redf. Surr. (N. Y.) 492 (*semble*); Yates *v.* Houston, 3 Tex. 433 (where the parties continued to cohabit after the expiration of the period necessary to create a presumption of a prior spouse's death); Bull *v.* Bull, 29 Tex. Civ. App. 364, 68 S. W. 727; Adger *v.* Ackerman, 115 Fed. 124, 52 C. C. A. 568 (holding that where parties incompetent to marry enter an illicit relation with a manifest desire to live in a matrimonial union rather than in a state of concubinage, and the obstacle to their marriage is subsequently removed to their knowledge, their continued cohabitation raises a presumption of a marriage immediately after the removal of the impediment); Campbell *v.* Campbell, L. R. 1 H. L. Sc. 182.

Cohabitation held not to establish a subsequent marriage see Cartwright *v.* McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105 (where the woman did not know of the man's first marriage, and the man did not know of his first wife's obtaining a divorce); Howland *v.* Burlington, 53 Me. 54 (where the parties did not know of the removal of the impediment); Randlett *v.* Rice, 141 Mass. 385, 6 N. E. 238 (where the woman did not know of the man's prior marriage, and the man did not know of his first wife's subsequent death); Collins *v.* Voorhees, 47 N. J. Eq. 315, 20 Atl. 676, 14 L. R. A. 366, 47 N. J. Eq. 555, 22 Atl. 1054, 24 Am. St. Rep. 412, 14 L. R. A. 364 [*affirming* 46 N. J. Eq. 411, 19 Atl. 172, 19 Am. St. Rep. 404] (holding that cohabitation following an illegal marriage and continued after the obstacle to a legal marriage is removed does not of itself prove a legal marriage); O'Gara *v.* Eisenlohr, 38 N. Y. 296 (holding that there is no presumption of remarriage where the second spouse did not know of the first marriage); Wright *v.* Wright, 48 How. Pr. (N. Y.) 1 (where the parties were not reputed to be man and wife, and the man spoke of the woman as his wife only four times in sixteen years); Matter of Stanley, 1 N. Y. St. 325; Jones *v.* Jones, 4 Pa. Dist. 223; Riddle *v.* Riddle, 26 Utah 268, 72 Pac. 1081; Williams *v.* Williams, 46 Wis. 464, 1 N. W. 98, 32 Am. Rep. 722 (holding that proof of cohabitation or conduct, unless referring to a time subsequent to the removal of the impediment, is not sufficient to show a subsequent marriage); Lapsley *v.* Grierson, 1 H. L. Cas. 498, 9 Eng. Reprint 853. And see Northfield *v.* Plymouth, 20 Vt. 582.

Cohabitation as ratification of void marriage see *supra*, V, B.

Sufficiency of cohabitation and reputation to create presumption of marriage see *supra*, VI, A, 1, b, (I).

9. Travers *v.* Reinhardt, 25 App. Cas. (D. C.) 567; Johnson *v.* Dudley, 4 Ohio S. & C. Pl. Dec. 243, 3 Ohio N. P. 196; Com. *v.* Haylow, 17 Pa. Super. Ct. 541; Wilkinson *v.* Rayner, 4 T. R. 468.

10. See cross-references *supra*, page 871, note 1; page 882, note 41.

Burden of proof: As to fact of prior marriage see *supra*, V, A, 1, a. As to validity of prior marriage see *supra*, VI, A, 4.

Presumption in favor of second marriage see *supra*, VI, A, 4.

11. Hager *v.* Brandt, 111 Iowa 746, 82 N. W. 1016 (holding that the evidence must be clear); Bowman *v.* Little, 101 Md. 273, 61 Atl. 223, 657, 1084 (especially where there is issue of the second marriage); U. S. *v.* Green, 98 Fed. 63 (where clear and convincing evidence was required).

Evidence held insufficient to establish a prior marriage see Jones *v.* Gilbert, 135 Ill. 27, 25 N. E. 566 (where an alleged former husband's testimony to the fact of marriage was held insufficient to invalidate a subsequent marriage of the alleged wife, she having denied a former marriage, and the alleged former husband having remarried without divorce); Myatt *v.* Myatt, 44 Ill. 473; Rooney *v.* Rooney, 54 N. J. Eq. 231, 34 Atl. 682; Dailey *v.* Frey, 206 Pa. St. 227, 55 Atl. 962 (holding that where plaintiff's legitimacy is denied on the ground of a prior marriage of her mother, a finding in favor of plaintiff will be sustained where the evidence of a previous marriage had opposed to it the evidence of the reception of the parents of plaintiff by her mother's family as married, the acknowledgment of the husband and the treatment of plaintiff from her birth as a legitimate child, the entire absence of any appearance or question of the alleged first husband during the whole life of the alleged wife, the possibility of confusion of two families of the same name, and finally the presumption in favor of innocence of the alleged bigamy); Simon *v.* State, 31 Tex. Cr. 186, 20 S. W. 399, 716, 37 Am. Rep. 802 (holding that a prior marriage of a woman is not proved by the fact that she bore a man's name and that her child claimed the man as father); Gaines *v.* Relf, 12 How. (U. S.) 472, 13 L. ed. 1071; U. S. *v.* Green, 98 Fed. 63 (where it was held that under the circumstances evidence of a prior marriage ceremony, without evidence of the alleged former wife's competency to marry, was insufficient).

established by proof of marital cohabitation, recognition, and reputation,[12] or by the admissions of the spouse who is alleged to have contracted the prior marriage.[13]

4. As to Continuance of Prior Marriage of Alleged Spouse.[14] It has been seen that where a person has been twice married, it may be presumed in favor of the second marriage that at the time thereof the first marriage had been dissolved by divorce or by death of the former spouse.[15] This presumption, however, is not conclusive; the party against whom it operates may rebut it by any competent evidence tending to show that at the time of the second marriage the first marriage was subsisting.[16] The presumption may nevertheless be reinforced by

Evidence held sufficient to establish a prior marriage see Matter of Hamilton, 12 N. Y. Suppl. 798, 2 Connoly Surr. 471 [*affirmed* in 76 Hun 200, 27 N. Y. Suppl. 813]; Rhode Island Hospital Trust Co. *v.* Thorndike, 24 R. I. 105, 52 Atl. 873.

12. *Alabama.*— Moore *v.* Heineke, 119 Ala. 627, 24 So. 374.

Kentucky.— Ewing *v.* Bibb, 7 Bush 654.

Maine.— Camden *v.* Belgrade, 75 Me. 126, 46 Am. Rep. 364.

New York.— O'Gara *v.* Eisenlohr, 38 N. Y. 296; Brower *v.* Bowers, 1 Abb. Dec. 214; Degnan *v.* Degnan, 17 N. Y. Suppl. 883; *In re* Hamilton, 12 N. Y. Suppl. 708, 2 Connoly Surr. 471 [*affirmed* in 76 Hun 200, 27 N. Y. Suppl. 813]. *Contra,* Clayton *v.* Wardell, 4 N. Y. 230.

Pennsylvania.— King's Estate, 9 Kulp 56. *Compare* Bowman *v.* Little, 110 Md. 273, 61 Atl. 223, 657, 1084; Greenland *v.* Brown, 1 Desauss. Eq. (S. C.) 196.

Contra.— Doe *v.* McWilliams, 3 U. C. Q. B. 165.

The presumption of marriage from cohabitation and repute is generally rebutted by proof of a subsequent formal marriage of one of the parties and a third person. See *supra,* VI, B, 1, f, (I), (B).

13. Gaines *v.* Hennen, 24 How. (U. S.) 553, 16 L. ed. 770; Patterson *v.* Gaines, 6 How. (U. S.) 550, 12 L. ed. 553. *Contra,* see Myatt *v.* Myatt, 44 Ill. 473; Culver's Estate, 7 Kulp (Pa.) 219; Gaines *v.* Relf, 12 How. (U. S.) 472, 13 L. ed. 1071.

14. See cross-references *supra,* page 871, note 1; page 882, note 41.

15. See *supra,* VI, A, 4.

16. Murray *v.* Murray, 6 Oreg. 17; Thomas *v.* Thomas, 124 Pa. St. 646, 17 Atl. 182; Williams *v.* Williams, 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253. And see Edinburgh L. Assur. Co. *v.* Ferguson, 32 U. C. Q. B. 253.

Evidence held sufficient to rebut presumption of dissolution see People *v.* Willard, 92 Cal. 482, 29 Pac. 585 (where the refusal of a woman twice married to disclose the name of her former husband, and her failure to show a dissolution of the marriage in any manner, were held sufficient to discredit her statement that she was single at the date of the second marriage, and sufficient to warrant the jury in finding that her second marriage was unlawful); Wilson *v.* Allen, 108 Ga. 275, 33 S. E. 975 (where the evidence produced by a woman twice married to show a divorce from the former husband consisted of records of the court showing only one verdict for divorce, and an entry afterward made on the docket that the divorce case was dismissed); Cole *v.* Cole, 153 Ill. 585, 38 N. E. 703 (holding that where it is proved that a man and a woman were legally married; that she has in no way violated her marriage obligations; that he deserted her without cause; that the marriage was never dissolved in the jurisdiction in which they lived together and in which she continued to live; and that she has no personal knowledge of his obtaining a divorce, the presumption is that a second marriage contracted by him during her life is invalid); Schmisseur *v.* Beatrie, 147 Ill. 210, 35 N. E. 525 (where a man filed a bill for divorce, and on the same day he was married to another woman and suffered the bill to be dismissed, and the records of the county in which both he and his first wife had resided show no other suit for divorce); Thomas *v.* Thomas, 19 Nebr. 81, 27 N. W. 84; Rex *v.* Harborne, 2 A. & E. 540, 1 Harr. & W. 36, 4 L. J. M. C. 49, 4 N. & M. 341, 9 E. C. L. 255 (where a man's first wife was alive in a distant colony twenty-six days before the second marriage, and it was held that the jury were justified in finding the second marriage to be void).

Evidence held insufficient to rebut presumption of dissolution see Gerlach *v.* Turner, 89 Cal. 446, 26 Pac. 870 (hearsay evidence of invalidity of divorce); Pittinger *v.* Pittinger, 28 Colo. 308, 64 Pac. 195, 89 Am. St. Rep. 193 (evidence that a woman married deceased in Colorado six years after his separation from his first wife in Pennsylvania, with whom he had lived but three years, and whom he left, believing her guilty of conduct which would entitle him to a divorce, and that the first wife never obtained a divorce, but married again, and the testimony of the first wife that deceased never obtained a divorce from her, and that no papers for that purpose were ever served on her); Potter *v.* Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322; Coal Run Coal Co. *v.* Jones, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89 [*affirming* 19 Ill. App. 365] (holding that the presumption is not overcome by the fact that a man's first wife was living at the time of his second marriage and had not obtained a divorce, since a divorce may have been obtained by him); Boulden *v.* McIntire, 119 Ind. 574, 21 N. E. 445, 12 Am. St. Rep. 453 (holding that the record of a divorce obtained by the woman's first husband in Ohio subsequent to

proof of such facts as will establish a dissolution of the prior marriage;[17] and on an issue as to the validity of a marriage, hearsay evidence that the husband had previously been married to another woman is offset by hearsay evidence that he was subsequently divorced from her.[18]

5. As to Validity of Marriage Generally.[19] It has been seen that the validity of a marriage which has in fact been contracted may be established by presumptive evidence; that is to say, in the absence of evidence to the contrary, an actual marriage is presumed to be regular and valid.[20] This presumption is not conclusive; it may be rebutted by evidence of facts invalidating the marriage.[21] To overcome the presumption, however, the evidence of the invalidating facts must be strong, distinct, satisfactory, and conclusive;[22] and if there is any evidence to

the death of her second husband is not conclusive evidence that she had not previously obtained a divorce in Indiana); Tuttle *v.* Raish, 116 Iowa 331, 90 N. W. 66 (where the evidence was held insufficient to preclude a finding against divorce); Scott *v.* Scott, 77 S. W. 1122, 25 Ky. L. Rep. 1356 (holding that the presumption of the legality of the last marriage was not overthrown by the mere denial of the first wife, wholly unsupported, that the husband was divorced from her); Le Brun *v.* Le Brun, 55 Md. 496; Nixon *v.* Wichita Land, etc., Co., 84 Tex. 408, 19 S. W. 560 (where both husband and wife contracted second marriages, and the validity of the husband's second marriage was in issue, and it was held that the mere fact that one of the children of the first marriage testified that she never heard of any divorce, and that another witness swore that the first wife believed her first husband to be dead when she married her second husband, would not overcome the presumption of divorce).

Degree of evidence.— Although the burden of proving the contention that a divorce had not been obtained before the second marriage is on the party attacking it, yet he is not required to make plenary proof of that contention. It is enough that he introduces such evidence as, in the absence of all counter testimony, will afford reasonable ground for presuming that the contention is true. Schmisseur *v.* Beatrie, 147 Ill. 210, 35 N. E. 525.

17. Dixon *v.* People, 18 Mich. 84, where the facts were held to conclusively establish death of the former spouse.

18. Lampkin *v.* Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040.

19. See cross-references *supra*, page 871, note 1; page 882, note 41.

20. See *supra*, VI, A, 2.

21. Barber *v.* People, 203 Ill. 543, 68 N. E. 93; Whittle *v.* State, 43 Tex. Cr. 468, 66 S. W. 771 (holding that where the prosecution claimed that defendant's marriage to a certain woman whose name was alleged to be forged was illegal and fraudulent, it was proper to permit evidence that defendant, subsequent to his alleged marriage to such woman, introduced another woman as his wife); Lacon *v.* Higgins, D. & R. N. P. 38, 16 E. C. L. 428, 3 Stark. 178, 3 E. C. L. 643, 25 Rev. Rep. 779; Standen *v.* Standen, 1 Peake N. P. 45, 6 T. R. 331 note.

22. Piers *v.* Piers, 2 H. L. Cas. 331, 13 Jur. 569, 9 Eng. Reprint 1118 (holding that the presumption in favor of the issuance of a special license is not repelled by evidence of the bishop of the diocese, thirty years after the marriage, that he never granted a license for the marriage, where the license might have been granted by the late bishop, who died a year and a half before the marriage); Delpit *v.* Cote, 20 Quebec Super. Ct. 338 (holding that in the case of persons who had previously professed the Roman catholic religion going before a protestant minister for the purpose of being married, any presumption in favor of their continuing to profess their previous religion would yield to the stronger presumption in favor of the validity of the marriage).

The presumption is less strong where there is no issue and where the parties to the marriage admit its invalidity. *In re* McLoughlin, L. R. 1 Ir. 421.

Evidence held sufficient to rebut presumption of validity see Locklayer *v.* Locklayer, 139 Ala. 354, 35 So. 1008 (where the evidence was held to support a finding that the reputed husband of a white woman was a negro, so that their marriage was void); Gall *v.* Gall, 114 N. Y. 109, 21 N. E. 106 (where the evidence was held to support a finding that a man contracted a second marriage in bad faith without taking proper steps to learn whether his first wife was living); Jaques *v.* Public Administrator, 1 Bradf. Surr. (N. Y.) 499 (where the woman did not regard an informal marriage as binding).

Evidence held insufficient to rebut presumption of validity see Aldrich *v.* Steen, (Nebr. 1904) 98 N. W. 445, 100 N. W. 311 (where the evidence was held not to show such a total want of understanding as to avoid a marriage for insanity, in the absence of fraud or undue influence); Davis *v.* Davis, 7 Daly (N. Y.) 308 (although the woman did not intend that the marriage should create any real obligation); Maggett *v.* Roberts, 112 N. C. 71, 16 S. E. 919 (holding that the mere fact that a marriage is solemnized two days after the date of expiration of the register's term of office is not of itself sufficient evidence to go to the jury to rebut the presumption that the license was issued during the register's term of office); Hilton *v.* Roylance, 25 Utah 129, 69 Pac. 660, 95 Am. St. Rep.

support a finding in favor of the marriage it will be sustained.[23] While the presumption in question is rebuttable, yet the evidence may be such as conclusively to establish the validity of the marriage.[24]

VII. TRIAL.[25]

A. Questions For Court and For Jury. The existence in fact of a marriage,[26] and the existence of the facts essential to a valid marriage,[27] and of other facts relating thereto,[28] are to be determined by the jury (if it be a jury case), where the evidence is conflicting;[29] and it rests with the trier of the facts whether or not the testimony of a witness is to be believed.[30] It is likewise within the province of the jury in such case to say whether a marriage is to be inferred from marital cohabitation and reputation;[31] whether the presumption arising from marital cohabitation and reputation is rebutted;[32] whether a cohabitation illicit in its origin continued so or whether the parties subsequently entered into a marriage;[33]

821, 58 L. R. A. 723 (where the evidence relating to a ceremony of sealing performed between a man and woman, members of the mormon church, was held to show such belief and good faith on the part of the contracting parties as would make a valid common-law marriage).

Consent to marriage.— Assuming the marriage to be regular, previous and subsequent conduct of the parties is admissible evidence upon the question of consent. Macneill *v.* Macgregor, 2 Bligh N. S. 393, 4 Eng. Reprint 1178. Thus assumption of the rights and duties of the marital relation is evidence of present consent to marriage, which is supported by a previous contract of the parties for present marriage. *In re* Ruffino, 116 Cal. 304, 48 Pac. 127. And see Hamilton *v.* Hamilton, 9 Cl. & F. 327, 8 Eng. Reprint 440. In deciding upon the sufficiency of the assent, the court ought to confine its attention almost exclusively to what took place at the ceremony; and that the man's consent was the result of duress will not be concluded from the fact that at the time he was in the custody of the constable under proceedings instituted against him as the father of a bastard child. Jackson *v.* Winne, 7 Wend. (N. Y.) 47, 22 Am. Dec. 563. Evidence held not to rebut presumption of consent see Cooper *v.* Crane, [1891] P. 369, 30 Wkly. Rep. 127.

23. Hynes *v.* McDermott, 10 Daly (N. Y.) 423 [*affirmed* in 91 N. Y. 451, 43 Am. Rep. 677].

24. Botts *v.* Botts, 108 Ky. 414, 56 S. W. 961, 22 Ky. L. Rep. 212, where a man and a woman were publicly married in a church by the pastor in charge, and thereafter lived together as husband and wife, and were so recognized by the community in which they lived for nearly thirty years.

25. See, generally, TRIAL.

Trial of action to annul marriage see *infra*, VIII, C, 8.

26. *Alabama.*— Mickle *v.* State, (1896) 21 So. 66.

Maryland.— Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752.

Michigan.— Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep. 164, question of identity of parties.

Texas.— Burnett *v.* Burnett, (Civ. App. 1904) 83 S. W. 238.

England.— See Carlin *v.* Carlin, 70 J. P. 143.

See 34 Cent. Dig. tit. "Marriage," § 90.

27. Doe *v.* Roe, 2 Houst. (Del.) 49 (question of consent); Davis *v.* Pryor, 3 Indian Terr. 396, 58 S. W. 660 (question of marital recognition and reputation); Kope *v.* People, 43 Mich. 41, 4 N. W. 551 (question of duress).

28. Wilcox *v.* Wilcox, 46 Hun (N. Y.) 32 (construction of letters passing between the parties); Jewell *v.* Jewell, 1 How. (U. S.) 219, 11 L. ed. 108 (whether a contract between the parties was obtained by fraud); Jewell *v.* Jewell, *supra* (question whether an advertisement signed by the alleged husband announcing separation of the parties was inserted by him, and, if so, what were his motives). And see Carlin *v.* Carlin, 70 J. P. 143, question as to foreign law.

29. Davis *v.* Pryor, 3 Indian Terr. 396, 58 S. W. 660; Lorimer *v.* Lorimer, 124 Mich. 631, 83 N. W. 609; Cockrill *v.* Calhoun, 1 Nott & M. (S. C.) 285.

30. Littlefield *v.* Littlefield, 174 Mass. 216, 54 N. E. 531.

31. *Hawaii.*— Apong *v.* Marks, 1 Hawaii 83.

Indian Territory.— Davis *v.* Pryor, 3 Indian Terr. 396, 58 S. W. 660.

Maryland.— Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752.

Michigan.— See Lorimer *v.* Lorimer, 124 Mich. 631, 83 N. W. 609.

Missouri.— Adair *v.* Mette, 156 Mo. 496, 57 S. W. 551; State *v.* St. John, 94 Mo. App. 229, 68 S. W. 374.

Pennsylvania.— Richard *v.* Brehm, 73 Pa. St. 140, 13 Am. Rep. 733.

See 34 Cent. Dig. tit. "Marriage," § 90. See, however, *supra*, VI, A, 1, b, (I).

32. Stevenson *v.* McReary, 12 Sm. & M. (Miss.) 9, 51 Am. Dec. 102; Allen *v.* Hall, 2 Nott & M. (S. C.) 114, 10 Am. Dec. 578.

33. Lorimer *v.* Lorimer, 124 Mich. 631, 83 N. W. 609; State *v.* Worthingham, 23 Minn.

and whether at the time of a marriage a former spouse of one of the parties was dead or divorced.[34]

B. Instructions. Instructions to a jury as to marriage are, generally speaking, governed by the ordinary rules of law relating to instructions.[35]

VIII. ANNULMENT AND DISSOLUTION.[36]

A. In General — 1. By Act of Parties. Marriage differs from other civil contracts in that it creates a legal status, and hence is not dissoluble at the will of the parties by their mutual consent or their renunciation or denial of it;[37] nor by abandonment however long continued;[38] nor by decree of a church judicatory;[39] nor, with a few statutory exceptions, in any other way than by the sovereign power of the state speaking through its tribunals.[40] And this rule applies to com-

528; Fordham *v.* Gouverneur Village, 5 N. Y. App. Div. 564, 39 N. Y. Suppl. 396; Northfield *v.* Plymouth, 20 Vt. 582. See *supra*, VI, A, 3, b; VI, B, 2.

34. Gerlach *v.* Turner, 89 Cal. 446, 26 Pac. 870; Murray *v.* Murray, 6 Oreg. 17; Thomas *v.* Thomas, 124 Pa. St. 646, 17 Atl. 182. See *supra*, VI, A, 4; VI, B, 4.

35. Imboden *v.* St. Louis Union Trust Co., 111 Mo. App. 220, 86 S. W. 263; James *v.* Mickey, 26 S. C. 270, 2 S. E. 130; Maryland *v.* Baldwin, 112 U. S. 490, 5 S. Ct. 278, 28 L. ed. 822; Blackburn *v.* Crawford, 3 Wall. (U. S.) 175, 18 L. ed. 186. See, generally, TRIAL.

Instructions as to cohabitation and repute. — A charge, in an action to determine the fact of a marriage, that it was incumbent on plaintiff to prove "facts, from which a valid marriage may be presumed," but which fails to state what facts are required for that purpose, is erroneous; and where there was other evidence than that of reputation to establish a marriage, it was error to charge that, under the evidence set forth in the instruction, marriage by reputation was not established. Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752. On the issue of a common-law marriage, where there is no evidence of such cohabitation as raises a presumption of marriage but merely of occasional instances of cohabitation, instructions on cohabitation and repute are improper. Imboden *v.* St. Louis Union Trust Co., 111 Mo. App. 220, 86 S. W. 263.

Instructions as to mental capacity. — On a question as to the mental capacity of a man to contract marriage, it was not error for the court to state to the jury, merely by way of illustrating the test of competency, that a man would be considered incompetent if he had not mental capacity enough to be able to provide a support for a family when he was possessed of means sufficient for that purpose, such instruction not being open to the criticism that the husband must necessarily succeed in earning a livelihood. St. George *v.* Biddeford, 76 Me. 593. And the court may properly direct the jury to inquire as to mental condition at the very time of the marriage, where it also charges that evidence of his condition both before and after the ceremony should be considered in determining his condition at the time of the marriage. Nonnemacher *v.* Nonnemacher, 159 Pa. St. 634, 28 Atl. 439.

36. **Distinguished from divorce** see Rooney *v.* Rooney, 54 N. J. Eq. 231, 241, 34 Atl. 682. See also *infra*, VIII, B, 1; VIII, C, 1. And see DIVORCE, 14 Cyc. 573. And *compare* Wait *v.* Wait, 4 Barb. (N. Y.) 192, 202 *et seq.* In some states many common-law grounds of annulment are declared by statute to be grounds of divorce, and accordingly cases in which they have been put forward as grounds of divorce are treated in the article dealing with that subject. See DIVORCE, 14 Cyc. 595 *et seq.*

37. Ridgely *v.* Ridgely, 79 Md. 298, 29 Atl. 597, 25 L. R. A. 800; Duke *v.* Fulmer, 5 Rich. Eq. (S. C.) 121; McKinney *v.* Clarke, 2 Swan (Tenn.) 321, 58 Am. Dec. 59; Hilton *v.* Roylance, 25 Utah 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723. And see DIVORCE, 14 Cyc. 577.

38. Wells *v.* Thompson, 13 Ala. 793, 48 Am. Dec. 76; *In re* Roth, 9 Ohio S. & C. Pl. Dec. 429, 6 Ohio N. P. 498, holding that one lawfully married to a man becomes his legal widow on his death, although they live apart in different countries for twenty-five years, during which time the husband enters into another marriage.

39. Delpit *v.* Cote, 20 Quebec Super. Ct. 338, holding that a decree of the Roman catholic church, dissolving a marriage which was valid by the law of the country where it was performed on the ground that it was not authorized by that church, is void. See *infra*, page 88, note 8; page 89, note 15; page 99, note 76.

40. Hilton *v.* Roylance, 25 Utah 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723.

Statutory exception; imprisonment for life. — Wis. Rev. St. § 2355, provides that when a party shall be sentenced to imprisonment for life, his marriage shall be thereby absolutely dissolved without any judgment of divorce or other legal process; and under this provision a marriage dissolved by a sentence of imprisonment for life is not restored by the subsequent reversal of the sentence. State *v.* Duket, 90 Wis. 272, 63 N. W. 83, 48 Am. St. Rep. 928, 31 L. R. A. 515.

Separation of minor spouses. — As to effect of a statute providing, in the case of mar-

mon-law marriages as well as to those formally solemnized,[41] and to such as may be voidable for cause, although a party to a marriage absolutely void *ab initio* may contract a subsequent valid marriage without the protection of a judicial decree.[42]

2. Statutory Provisions. Although the jurisdiction of the courts to annul marriages may in certain cases exist independently of statute and in virtue of their general equity powers,[43] these powers may in this particular be either enlarged or restricted by statutes, which must then be looked to as the measure of their authority.[44] Such statutes are not necessarily inconsistent with laws denouncing as crimes some of the causes or acts which furnish grounds for annulment, or providing additional remedies to the injured party, and should be so construed if possible that all may stand and be effective.[45] The repeal of a statute legalizing informal or defective marriages will not have the effect of dissolving them.[46]

3. Necessity and Propriety of Annulling Void Marriage. A marriage absolutely void at the time it was contracted, as where it was bigamous,[47] is no impediment to either party in contracting a subsequent lawful marriage, nor is it necessary that it should be first annulled by judicial decree.[48] Nevertheless, in this and other cases of absolute nullity, the courts will make a decree on proper application and proofs, as well for the sake of the good order of society as for the quiet and relief of the injured party and the adjustment of property interests.[49]

4. Annulment in Divorce Proceedings. A decree annulling a marriage may be entered in a proper case, although the relief asked is a divorce.[50] So defendant in a divorce proceeding may allege the nullity of the marriage and have a decree on proper proofs.[51]

B. Grounds — 1. In General. A suit for the annulment of a marriage, unlike a suit for divorce, must be founded on some cause which existed at the

riage of parties either of whom is under the age of consent, that if they shall separate during such nonage and not subsequently cohabit, the marriage shall be deemed void without legal process see People *v.* Schoonmaker, 119 Mich. 242, 77 N. W. 934.

Unexplained absence of spouse for five years, and validity of marriage of remaining spouse thereafter contracted see *infra*, note 73.

41. Hutchinson *v.* Hutchinson, 196 Ill. 432, 63 N. E. 1023 [*affirming* 96 Ill. App. 52]; Guardians of Poor *v.* Nathans, 2 Brewst. (Pa.) 149; Mathewson *v.* Phœnix Iron Foundry, 20 Fed. 281.

42. See *infra*, VIII, A, 3.

43. See *infra*, VIII, C, 2.

44. See Smith *v.* Smith, 171 Mass. 404, 50 N. E. 933, 68 Am. St. Rep. 440, 41 L. R. A. 800; Pitcairn *v.* Pitcairn, 201 Pa. St. 368, 50 Atl. 963; Mattison *v.* Mattison, 1 Strobh. Eq. (S. C.) 387, 47 Am. Dec. 541. See Punku *v.* Kaleleku, 8 Hawaii 77.

45. Walter's Appeal, 70 Pa. St. 392; Heinzman *v.* Heinzman, 15 Pa. Co. Ct. 669.

46. Steward *v.* State, 7 Tex. App. 326.

47. See *infra*, VIII, B, 6.

48. *California.*— *In re* Eichhoff, 101 Cal. 600, 36 Pac. 11.

Iowa.— Drummond *v.* Irish, 52 Iowa 41, 2 N. W. 622.

Louisiana.— Summerlin *v.* Livingston, 15 La. Ann. 519; Minvielle's Succession, 15 La. Ann. 342.

New Jersey.— Dare *v.* Dare, 52 N. J. Eq. 195, 27 Atl. 654.

New York.— Pettit *v.* Pettit, 105 N. Y. App. Div. 312, 93 N. Y. Suppl. 1001.

Vermont.— Mountholly *v.* Andover, 11 Vt. 226, 34 Am. Dec. 685.

United States.— Gaines *v.* Relf, 12 How. 472, 13 L. ed. 1071; Patterson *v.* Gaines, 6 How. 550, 12 L. ed. 553.

See 34 Cent. Dig. tit. "Marriage," § 113.

Contra.— Thompson *v.* Thompson, 10 Phila. (Pa.) 131.

49. *Alabama.*— Rawdon *v.* Rawdon, 28 Ala. 565.

Kansas.— Powell *v.* Powell, 18 Kan. 371, 26 Am. Rep. 774.

New York.— Pettit *v.* Pettit, 105 N. Y. App. Div. 312, 93 N. Y. Suppl. 1001; Wightman *v.* Wightman, 4 Johns. Ch. 343.

North Carolina.— Johnson *v.* Kincade, 37 N. C. 470.

Ohio.— Waymire *v.* Jetmore, 22 Ohio St. 271.

50. Bassett *v.* Bassett, 9 Bush (Ky.) 696.

51. Nadra *v.* Nadra, 79 Mich. 591, 44 N. W. 1046. See *infra*, VIII, C, 1.

Previous decree of divorce.—Where the wife has already obtained a decree of divorce in another state, the husband omitting to defend the proceedings because he claimed that the marriage was absolutely void for bigamy, the court will not afterward annul the marriage on his application. Brockle *v.* Brockle, 7 Ky. L. Rep. 747.

time of the marriage, not a supervening cause;[52] and in general such an action must be based on some physical, mental, or legal impediment disqualifying the party from entering into marital relations,[53] or on some circumstance, such as mistake, fraud, or duress, that prevented him from giving to the contract that free and intelligent consent without which it cannot be legally formed.[54]

2. Physical Disease or Incapacity.[55] Impotence, or the inability of either party from defect, malformation, or disease to sustain marital relations according to the ordinance of nature, is ground for annulling the marriage;[56] but it

52. Denial of marital relations.— The absolute and continued refusal of either party to consummate the marriage by sexual intercourse is not a circumstance going to the original validity of the marriage and therefore not a ground for annulling it. Cowles *v.* Cowles, 112 Mass. 298; Dunbar *v.* Dunbar, 4 Ohio Dec. (Reprint) 237, 1 Clev. L. Rep. 149; McKinney *v.* McKinney, 9 Ohio S. & C. Pl. Dec. 655, 7 Ohio N. P. 259. *Contra*, in England, E. *v.* E., 87 L. T. Rep. N. S. 149, 50 Wkly. Rep. 607. See also *infra*, VIII, B, 2.

53. See *infra*, VIII, B, 2–6, 10.

Nonage of parties.— See People *v.* Schoonmaker, 119 Mich. 242, 77 N. W. 934; Silveira *v.* Silveira, 34 Misc. (N. Y.) 267, 69 N. Y. Suppl. 634. A marriage will not be annulled for nonage where the parties have freely cohabited as man and wife after attaining legal age. Mokunui *v.* Mokunui, 8 Hawaii 360.

Legal impediment see Mignault *v.* Hapeman, 10 L. C. Jur. 137.

Failure to publish banns see Mignault *v.* Hapeman, 10 L. C. Jur. 137. *Compare* Holmes *v.* Simmons, L. R. 1 P. & D. 523, 37 L. J. P. & M. 58, 18 L. T. Rep. N. S. 770, 16 Wkly. Rep. 1024, undue publication of banns.

54. See *infra*, VIII, B, 3, 4, 7, 8, 9.

Consent of parents of a minor is not generally necessary to the validity of his marriage, nor is the want of it ground for annulling the marriage. Lacoste *v.* Guidroz, 47 La. Ann. 295, 16 So. 836. See also Robertson *v.* Cole, 12 Tex. 356.

The nullity of a marriage of a minor daughter may be demanded on the ground of having been unlawfully contracted and solemnized without the consent of the father and without publication of banns, and where fraud and artifice and threats have been made use of toward the said minor, and on the ground of a legal impediment between the parties. Mignault *v.* Hapeman, 10 L. C. Jur. 137. It is doubtful whether the marriage of a minor can be declared null and void by reason of undue publication of banns if there is no parent or guardian whose consent or dissent can be given to such marriage. Holmes *v.* Simmons, L. R. 1 P. & D. 523, 37 L. J. P. & M. 58, 18 L. T. Rep. N. S. 770, 16 Wkly. Rep. 1024.

In the kingdom of Hawaii proof of nonconsent to a marriage was not a ground for the annulment of the marriage. Puuku *v.* Keleleku, 8 Hawaii 77.

55. Antenuptial physical incapacity as ground for divorce see Divorce, 14 Cyc. 595 note 46, 596.

Incapacity defined see 22 Cyc. 41.

Inflammation of the bladder or a swollen tongue is no ground for annulment. Riley *v.* Riley, 73 Hun (N. Y.) 575, 26 N. Y. Suppl. 164.

56. See W. *v.* W., [1905] P. 231, 74 L. J. P. D. & Adm. 112, 93 L. T. Rep. N. S. 456; B. *v.* B., [1901] P. 39, 70 L. J. P. D. & Adm. 4; H. *v.* P., L. R. 3 P. & D. 126; U. *v.* J., L. R. 1 P. & D. 460, 37 L. J. P. & M. 7, 16 Wkly. Rep. 518; T. *v.* D., L. R. 1 P. & D. 127, 12 Jur. N. S. 673, 35 L. J. P. & M. 51, 14 L. T. Rep. N. S. 227; F. *v.* D., 11 Jur. N. S. 307, 34 L. J. P. & M. 66, 12 L. T. Rep. N. S. 84, 4 Swab. & Tr. 86, 13 Wkly. Rep. 546; F. *v.* P., 75 L. T. Rep. N. S. 192; M. *v.* M., 22 T. L. R. 719; S. *v.* B., 21 T. L. R. 219; A. *v.* A., L. R. 19 Ir. 403. See also cases cited *infra*, this note *et seq.*

If consummation is practically impossible, although there is no malformation or structural defect rendering consummation physically impossible, the marriage is void. G. *v.* G., L. R. 2 P. & D. 287, 40 L. J. P. & M. 83, 25 L. T. Rep. N. S. 510, 20 Wkly. Rep. 103; P. *v.* P., 11 Brit. Col. 369.

There is no rule as to any particular age constituting a bar to a petition for nullity of marriage by reason of malformation of the woman. Williams *v.* Homfray, 7 Jur. N. S. 315, 30 L. J. P. & M. 73, 4 L. T. Rep. N. S. 89, 2 Swab. & Tr. 240, 9 Wkly. Rep. 619.

Statutory authority for decree.— In a case in New Jersey the court refused to annul a marriage for impotence, in the absence of statutory authority therefor, holding that the general jurisdiction of equity extends only to annulling contracts which are void, while the contract of marriage in this case was voidable only. Anonymous, 24 N. J. Eq. 19.

What constitutes impotence.— To constitute impotence, it is not necessary that there should be an inability for procreation, that is, incapacity on the part of the male to beget children, or on the part of the female to conceive; for although this condition may exist, there is no impotence in the legal sense if there is a mutual capacity for complete sexual intercourse; but otherwise if the act of copulation is impossible from any genital or other defect. Anonymous, 89 Ala. 291, 7 So. 100, 18 Am. St. Rep. 116, 7 L. R. A. 425; Griffeth *v.* Griffeth, 162 Ill. 368, 44 N. E. 820; J. G. *v.* H. G., 33 Md. 401, 3 Am. Rep. 183; Payne *v.* Payne, 46 Minn. 467, 49 N. W. 230, 24 Am. St. Rep. 240; Wendel *v.* Wendel, 30 N. Y. App. Div. 447, 52 N. Y. Suppl. 72; D. *v.* A., 1 Rob. Eccl. 279.

must be shown to have existed at the time of the marriage,[57] and to be incurable.[58] It is also cause for annulment if either party was suffering at the time of the marriage from a chronic and contagious venereal disease, if it prevents the consummation of the marriage, or if it was so concealed or misrepresented as to constitute a fraud on the other party,[59] and in some states, by statute, this is also true of epilepsy.[60] Either the husband or wife may complain of the other's impotence and have a decree.[61]

3. MENTAL INCAPACITY.[62] A marriage may be annulled where either of the

Sterility.— Although the term "impotence" is sometimes used as synonymous with "sterility," it is properly used only of the male. Black L. Dict.; Century Dict. And mere sterility or barrenness can in no case be sufficient ground for decreeing the marriage void. Devanbagh *v.* Devanbagh, 5 Paige (N. Y.) 554, 28 Am. Dec. 443. And in any event one who marries a woman knowing her to be past the age of child-bearing cannot have the marriage annulled on the ground of her sterility. Briggs *v.* Morgan, 2 Hagg. Cons. 324; Brown *v.* Brown, 1 Hagg. Eccl. 523.

Removal of ovaries.— The possession of the organs necessary to conception cannot be held essential to capacity to enter into the marriage state, so long as there is no impediment to the indulgence of the passions incident to that state; and in this respect there is no essential difference between a woman who, through no fault of her own, has lost her ovaries by a surgical operation, and one who has suffered the same result through the operation of nature. Wendel *v.* Wendel, 30 N. Y. App. Div. 447, 52 N. Y. Suppl. 72 [*reversing* 22 Misc. 152, 49 N. Y. Suppl. 375].

Concealment of impotence as fraud.— The contracting of a marriage by one who is conscious of his own impotence with one who is ignorant of it is regarded as a gross fraud. Guilford *v.* Oxford, 9 Conn. 321; Benton *v.* Benton, 1 Day (Conn.) 111; Briggs *v.* Morgan, 3 Phillim. 325.

57. Powell *v.* Powell, 18 Kan. 371, 26 Am. Rep. 774; Newell *v.* Newell, 9 Paige (N. Y.) 25; Devanbagh *v.* Devanbagh, 5 Paige (N. Y.) 554, 28 Am. Dec. 443; Brown *v.* Brown, 1 Hagg. Eccl. 523; Welde *v.* Welde, 2 Lee Eccl. 580.

Supervening impotence, after the marriage, is no ground for annulment, although resulting from previous incontinence. Bascomb *v.* Bascomb, 25 N. H. 267. And see Berger *v.* Berger, 23 Pa. Co. Ct. 232.

58. *Alabama.*— Anonymous, 35 Ala. 226.
Connecticut.— Ferris *v.* Ferris, 8 Conn. 166.
Illinois.— Lorenz *v.* Lorenz, 93 Ill. 376.
Maryland.— J. G. *v.* H. G., 33 Md. 401, 3 Am. Rep. 183.
New Hampshire.— Bascomb *v.* Bascomb, 25 N. H. 267.
New York.— Newell *v.* Newell, 9 Paige 25; Devanbagh *v.* Devanbagh, 5 Paige 554, 28 Am. Dec. 443.
England.— L. *v.* L., 7 P. D. 16, 51 L. J. P. D. & Adm. 23, 47 L. T. Rep. N. S. 132, 30 Wkly. Rep. 444; T. *v.* M., L. R. 1 P. & D. 31, 35 L. J. P. & M. 10, 13 L. T. Rep. N. S. 614; Brown *v.* Brown, 1 Hagg. Eccl. 523; S. *v.* E., 9 Jur. N. S. 698, 32 L. J. P. & M. 153, 8 L. T. Rep. N. S. 643, 3 Swab. & Tr. 240, 12 Wkly. Rep. 19; Welde *v.* Welde, 2 Lee Eccl. 580.

Curability by surgery.— There is no ground for a decree of nullity if the defect or malformation is of such a nature that it might be removed or remedied by a surgical operation without serious danger to life, and the party affected refuses to submit thereto. Devanbagh *v.* Devanbagh, 6 Paige (N. Y.) 175. See also Serrell *v.* Serrell, 31 L. J. P. & M. 55, 5 L. T. Rep. N. S. 691, 2 Swab. & Tr. 422. But see W. *v.* H., 2 Swab. & Tr. 240, where it appeared that the operation would involve considerable danger and its success would be doubtful, and a decree was granted.

59. Smith *v.* Smith, 171 Mass. 404, 50 N. E. 933, 68 Am. St. Rep. 440, 41 L. R. A. 800; Crane *v.* Crane, 62 N. J. Eq. 21, 49 Atl. 734; Svenson *v.* Svenson, 178 N. Y. 54, 70 N. E. 120 [*reversing* on other grounds 78 N. Y. App. Div. 536, 79 N. Y. Suppl. 657]; Anonymous, 21 Misc. (N. Y.) 765, 49 N. Y. Suppl. 331; Meyer *v.* Meyer, 49 How. Pr. (N. Y.) 311. But *compare* Vondal *v.* Vondal, 175 Mass. 383, 56 N. E. 586, 78 Am. St. Rep. 502, where a decree was refused, although the wife had concealed the fact that she was afflicted with syphilis at the time of the marriage, as it was not in a contagious form at that time, although it would probably taint any issue of the marriage, and there had been cohabitation for four months.

60. See Gould *v.* Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. N. S. 531, holding that where a statute prohibiting persons afflicted with epilepsy to marry does not expressly declare the marriage of such a person to be void, it is not a nullity at common law; but if the marriage was induced by fraudulent concealment or misrepresentation, it may be annulled on that ground.

61. Briggs *v.* Morgan, 3 Phillim. 325.

An impotent man cannot maintain a nullity suit merely on the ground of his own impotency; but if a woman altogether repudiates the relation of wife and the obligations of the marriage contract, the impotent man may show that there is no *verum matrimonium*, and maintain such a suit. A. *v.* A., L. R. 19 Ir. 403. See *infra*, VIII, C, 4, a.

62. **Mental incapacity:** As ground of divorce see DIVORCE, 14 Cyc. 597. Generally see INSANE PERSONS.

parties was an idiot or a lunatic at the time it was contracted.[63] Mere weakness or imbecility of mind is not sufficient for this purpose, nor eccentricity or partial dementia, but it must be such a general mental derangement as prevents the party from comprehending the nature of the contract of marriage and from giving to it his free and intelligent consent.[64] Insanity occurring after the marriage is not ground for its annulment;[65] but on the other hand, if it existed at the time of the marriage, it is immaterial that the person was sane before and after that time, or that he is habitually sane.[66]

4. Intoxication[67] at Time of Marriage. Intoxication from alcohol, if so profound as to deprive the party of all reason and comprehension of what he is doing, and of the nature and effect of his acts, will be sufficient ground to annul a marriage contracted by him while in that condition.[68]

5. Pregnancy at Time of Marriage. When a woman about to marry pretends to be chaste and conceals from her prospective husband the fact that she is then pregnant by another man, the concealment is such a fraud as to justify the annulment of the marriage.[69] But this relief will not be granted where the com-

63. *Alabama.*— Price *v.* Price, 142 Ala. 631, 38 So. 802; Rawdon *v.* Rawdon, 28 Ala. 565.
District of Columbia.— Mackey *v.* Peters, 22 App. Cas. 341.
Illinois.— Orchardson *v.* Cofield, 171 Ill. 14, 49 N. E. 197, 63 Am. St. Rep. 211, 40 L. R. A. 256; Pyott *v.* Pyott, 90 Ill. App. 210. *Compare* Hamaker *v.* Hamaker, 18 Ill. 137, 65 Am. Dec. 705.
Kansas.— Powell *v.* Powell, 18 Kan. 371, 26 Am. Rep. 774.
Kentucky.— Jenkins *v.* Jenkins, 2 Dana 102, 26 Am. Dec. 437.
Maine.— Winslow *v.* Troy, 97 Me. 130, 53 Atl. 1008; Unity *v.* Belgrade, 76 Me. 419; Atkinson *v.* Medford, 46 Me. 510.
Missouri.— Chapline *v.* Stone, 77 Mo. App. 523.
New Hampshire.—Keyes *v.* Keyes, 22 N. H. 553; True *v.* Ranney, 21 N. H. 52, 53 Am. Rep. 164.
New York.— Wightman *v.* Wightman, 4 Johns. Ch. 343.
North Carolina.— Johnson *v.* Kincade, 37 N. C. 470. See also Crump *v.* Morgan, 38 N. C. 91, 40 Am. Dec. 447.
Ohio.— Waymire *v.* Jetmore, 22 Ohio St. 271; Goodheart *v.* Ransley, 11 Ohio Dec. (Reprint) 655, 28 Cinc. L. Bul. 227.
South Carolina.— Foster *v.* Means, Speers Eq. 569, 42 Am. Dec. 332.
Tennessee.— Cole *v.* Cole, 5 Sneed 57, 70 Am. Dec. 275.
England.— Hancock *v.* Peaty, L. R. 1 P. & D. 335, 36 L. J. P. & M. 57, 16 L. T. Rep. N. S. 182, 15 Wkly. Rep. 719.
See 34 Cent. Dig. tit. "Marriage," § 117.
Contra, in Georgia. Although insanity at the time of the marriage is ground for divorce, it is not ground for a sentence of nullity. Brown *v.* Westbrook, 27 Ga. 102.
Lunacy need not have been adjudged in an independent proceeding before nullity is decreed. Mackey *v.* Peters, 22 App. Cas. (D. C.) 341 [*distinguishing* Groff *v.* Miller, 20 App. Cas. (D. C.) 353], so holding although a statute provided that the marriage of "a person adjudged to be a lunatic shall be void from the time its nullity is decreed."

64. *Alabama.*—Rawdon *v.* Rawdon, 28 Ala. 565.
Delaware.— Elzey *v.* Elzey, 1 Houst. 308.
Kansas.— Baughman *v.* Baughman, 32 Kan. 538, 4 Pac. 1002.
Mississippi.— Ward *v.* Dulaney, 23 Miss. 410.
England.— Browning *v.* Reane, 2 Phillim. 69.
Kleptomania.— Nullity of a marriage cannot be decreed because the wife, otherwise sane and able to understand the nature and obligations of the contract, was at the time a kleptomaniac. Lewis *v.* Lewis, 44 Minn. 124, 46 N. W. 323, 20 Am. St. Rep. 559, 9 L. R. A. 505.

65. Powell *v.* Powell, 18 Kan. 371, 26 Am. Rep. 774; Forman *v.* Forman, 24 N. Y. Suppl. 917.

66. Smith *v.* Smith, 47 Miss. 211; Parker *v.* Parker, 2 Lee Eccl. 382. *Compare* Goodheart *v.* Ransley, 11 Ohio Dec. (Reprint) 655, 28 Cinc. L. Bul. 227.

67. **Intoxication** generally see Drunkards.

68. Prine *v.* Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87 (the intoxication must be such as to deprive the party of his reason or to render him *non compos mentis*); Gillett *v.* Gillett, 78 Mich. 184, 43 N. W. 1101 (in this case there were other circumstances showing fraud and imposition); Johnston *v.* Brown, 2 Shaw & D. 437; Roblin *v.* Roblin, 28 Grant Ch. (U. C.) 439. *Contra,* Elzey *v.* Elzey, 1 Houst. (Del.) 308, where the statute did not specify intoxication as a ground of nullity. And see Clement *v.* Mattison, 3 Rich. (S. C.) 93, holding that delirium tremens produced by drunkenness would be a cause of nullity, but not mere intoxication.

69. *California.*— Baker *v.* Baker, 13 Cal. 87. But the ground of the decree in such cases is the fraudulent concealment; antenuptial pregnancy is not "physical incapacity" within the meaning of the statute. Franke *v.* Franke, (1892) 31 Pac. 571, 18 L. R. A. 375.
District of Columbia.— Lenoir *v.* Lenoir, 24 App. Cas. 160.
Indiana.— Ritter *v.* Ritter, 5 Blackf. 81.

plainant had previously had illicit relations with the woman,[70] and particularly where he is informed of her pregnancy, although he is deceived or misled as to the paternity of the child.[71]

6. Prior Existing Marriage.[72] If either of the parties to a marriage had a lawful spouse living and undivorced at the time, the second marriage is absolutely void and may be so declared by decree of court in proper proceedings.[73] But this is not the case where the first marriage was void, although it has not been so declared judicially; in that event it constitutes no ground for annulling the second marriage.[74] Nor does it cause the nullity of the second marriage if, at the time of its occurrence, such former spouse had been lawfully divorced by competent judicial decree.[75] But if the former marriage was fully in force at the time of the second marriage, it is not necessary that it should continue in force to the commencement of the action of nullity.[76]

7. Mistake. Equity may decree the annulment of a marriage which was entered into under the influence of a mistake of such a nature as to vitiate the entire contract, as a mistake in the identity of the person,[77] or a mistake as to the legal effect and consequences of the ceremony, one of the parties not understand-

Massachusetts.— Donovan *v.* Donovan, 9 Allen 140; Reynolds *v.* Reynolds, 3 Allen 605.

Michigan.—Harrison *v.* Harrison, 94 Mich. 559, 54 N. W. 275, 34 Am. St. Rep. 364; Nadra *v.* Nadra, 79 Mich. 591, 44 N. W. 1046; Sissung *v.* Sissung, 65 Mich. 168, 31 N. W. 770.

New Jersey.— Sinclair *v.* Sinclair, 57 N. J. Eq. 222, 40 Atl. 679; Carris *v.* Carris, 24 N. J. Eq. 516.

New York.— Shrady *v.* Logan, 17 Misc. 329, 40 N. Y. Suppl. 1010. But see Scott *v.* Shufeldt, 5 Paige 43.

Ohio.— Morris *v.* Morris, Wright 630.

Pennsylvania.— Allen's Appeal, 99 Pa. St. 196, 44 Am. Rep. 101.

See 34 Cent. Dig. tit. "Marriage," § 119.

Contra, in England. See Moss *v.* Moss, [1897] P. 263, 66 L. J. P. D. & Adm. 154, 77 L. T. Rep. N. S. 220, 45 Wkly. Rep. 635.

Fraud generally see *infra,* VIII, B, 8.

Pregnancy at time of marriage as ground of divorce see Divorce, 14 Cyc. 595 *et seq.*

70. Crehore *v.* Crehore, 97 Mass. 330, 93 Am. Dec. 98; Hoffman *v.* Hoffman, 30 Pa. St. 417; Bartholomew *v.* Bartholomew, 14 Pa. Co. Ct. 230.

71. Franke *v.* Franke, (Cal. 1892) 31 Pac. 571, 18 L. R. A. 375; Foss *v.* Foss, 12 Allen (Mass.) 26.

72. Bigamy, generally, see Bigamy.

Prior existing marriage as ground for divorce see Divorce, 14 Cyc. 595 note 46.

73. *Kansas.*— Fuller *v.* Fuller, 33 Kan. 582, 7 Pac. 241.

Louisiana.— Monnier *v.* Contejean, 45 La. Ann. 419, 12 So. 623.

New York.— Appleton *v.* Warner, 51 Barb. 270; McCarron *v.* McCarron, 26 Misc. 158, 56 N. Y. Suppl. 745.

Pennsylvania.— Heinzman *v.* Heinzman, 15 Pa. Co. Ct. 669.

England.— Bateman *v.* Bateman, 78 L. T. Rep. N. S. 472.

See 34 Cent. Dig. tit. "Marriage," § 120.

Compare Le Brun *v.* Le Brun, 55 Md. 496; Thomas *v.* Thomas, 19 Nebr. 81, 27 N. W. 84; Rooney *v.* Rooney, 54 N. J. Eq. 231, 34 Atl. 682.

Dissolution of second bigamous marriage by consent of parties see *supra,* VIII, A, 1.

Necessity and propriety of decree annulling second bigamous marriage see *supra,* VIII, A, 3.

Unexplained absence for five years.—Where a wife married a second time, believing that her former husband, who had not been heard from for more than five years, was dead, such marriage is voidable only, under the statute of New York providing that a marriage by a person having a spouse living shall be void only from the time of its annulment by a competent court, where such spouse shall have absented himself for five years without being known by such person to be living. Taylor *v.* Taylor, 25 Misc. (N. Y.) 566, 55 N. Y. Suppl. 1052, 28 N. Y. Civ. Proc. 323. And see Hervey *v.* Hervey, 92 N. Y. Suppl. 218. *Compare* Spicer *v.* Spicer, 16 Abb. Pr. N. S. (N. Y.) 112.

74. Reeves *v.* Reeves, 54 Ill. 332; Appleton *v.* Warner, 51 Barb. (N. Y.) 270; Klaas *v.* Klaas, 14 Pa. Super. Ct. 550.

75. Clarke *v.* Clarke, 11 Abb. Pr. (N. Y.) 228. See Divorce, 14 Cyc. 729. And see Boehs *v.* Hanger, (N. J. Ch. 1905) 59 Atl. 904, where the husband misled the wife by a false statement that he had never been married, whereas he had been divorced from his former wife, and she would not have consented to the marriage but for the deception, being a member of a church under whose laws a marriage could not be dissolved except by the death of one of the contracting parties and by which a marriage with a divorced person was a sin. The wife's prayer for annulment of the marriage was refused, because her marriage was valid by the law of the land and could not be annulled because invalid by the law of the church.

76. Hervey *v.* Hervey, 92 N. Y. Suppl. 218. But *compare* Turner *v.* Turner, 189 Mass. 373, 75 N. E. 612, 109 Am. St. Rep. 643.

77. Delpit *v.* Young, 51 La. Ann. 923, 25 So. 547.

ing or intending that it should be an actual present marriage,[78] or in the case of a mock marriage performed in jest and not intended by either party to be a binding contract of marriage.[79]

8. Fraud, Misrepresentation, or Imposition.[80] Fraud which vitiates the marriage contract is cause for its annulment.[81] But the fraud or falsehood must be one which goes to the very fundamentals or essentials of the marital relation;[82] deceit, concealment, or misrepresentation concerning the party's health, character, wealth, social position, previous history or habits, is not sufficient for this purpose,[83] except perhaps in New York, where the rule has been broadly laid down that every misrepresentation of a material fact, made with intent to induce the other party to enter into the marriage contract, and without which it would not have

False personation.— It is not a cause of nullity that one assumes a false name and thereby deludes another into marriage with him, there being no mistake as to the identity of the person. Meyer *v.* Meyer, 7 Ohio Dec. (Reprint) 627, 4 Cinc. L. Bul. 368; Clowes *v.* Jones, 3 Curt. Eccl. 185. But see Rex *v.* Burton-upon-Trent, 3 M. & S. 537, 16 Rev. Rep. 350. Otherwise where there is a mistake as to the person, as where A, intending to marry B, is actually united to C, whom he has no intention of marrying, by means of a substitution or other deception. Meyer *v.* Meyer, *supra*; Reg. *v.* Millis, 10 Cl. & F. 534, 785, 8 Eng. Reprint 844; 2 Kent Comm. 77.

"Mistake in the person" in a statute.— This phrase means mistake in the identity of the person, not mistake as to his character, attributes, condition in life, or previous habits; and hence mistake as to the wife's previous character for chastity is not ground for annulment under the statute. Delpit *v.* Young, 51 La. Ann. 923, 25 So. 547.

78. Clark *v.* Field, 13 Vt. 460. And see Blumenthal *v.* Tannenholz, 31 N. J. Eq. 194 (where the bill was filed by an infant wife to annul her marriage on the ground of her husband's fraud and misrepresentation as to the effect of a Jewish ceremony of marriage which she at the time believed to be merely a betrothal); Barnes *v.* Wyethe, 28 Vt. 41 (where the authorities of a certain town hired A, who was settled in another town, to marry B, a pauper, in order to impose B's support on that town, A never intending to fulfil the obligations of marriage, and the contract was annulled on B's petition).

79. Barclay *v.* Com., 116 Ky. 275, 76 S. W. 4, 25 Ky. L. Rep. 463; McClurg *v.* Terry, 21 N. J. Eq. 225.

80. **Fraud:** As ground of divorce see Divorce, 14 Cyc. 595 *et seq.* Generally see Fraud.

81. See Mignault *v.* Hapeman, 10 L. C. Jur. 137. And *Compare* Field's Bill, 2 H. L. Cas. 48, 9 Eng. Reprint 1010, where the fraud was not sufficiently shown by the evidence. See also *infra*, notes 82–90.

82. Smith *v.* Smith, 171 Mass. 404, 50 N. E. 933, 68 Am. St. Rep. 440, 41 L. R. A. 800; Cummington *v.* Belchertown, 149 Mass. 223, 21 N. E. 435, 4 L. R. A. 131; Reynolds *v.* Reynolds, 3 Allen (Mass.) 605; Boehs *v.* Hanger, (N. J. Ch. 1905) 59 Atl. 904; Crane *v.* Crane, 62 N. J. Eq. 21, 49 Atl. 734; Fisk *v.* Fisk, 6 N. Y. App. Div. 432, 39 N. Y. Suppl. 537; Anonymous, 21 Misc. (N. Y.) 765, 49 N. Y. Suppl. 331.

Because of fraud in its inducement, the court of divorce has no power to pronounce a decree of nullity of marriage, or to dissolve a marriage. Templeton *v.* Tyree, L. R. 2 P. & D. 420, 41 L. J. P. & M. 86, 27 L. T. Rep. N. S. 429, 21 Wkly. Rep. 81.

83. Wier *v.* Still, 31 Iowa 107; Carris *v.* Carris, 24 N. J. Eq. 516; Meyer *v.* Meyer, 7 Ohio Dec. (Reprint) 627, 4 Cinc. L. Bul. 368; Kraus *v.* Kraus, 9 Ohio S. & C. Pl. Dec. 515, 6 Ohio N. P. 248; Ewing *v.* Wheatley, 2 Hagg. Cons. 175. See also Lewis *v.* Lewis, 44 Minn. 124, 46 N. W. 323, 20 Am. St. Rep. 559, 9 L. R. A. 505.

False representations as to health.— The fraudulent concealment of the fact of impotence or of a chronic venereal disease will be ground for annulling the marriage. Crane *v.* Crane, 62 N. J. Eq. 21, 49 Atl. 734. And see *supra*, VIII, B, 2. So also of the fact that the party is an epileptic, where a statute forbids such persons to marry. Gould *v.* Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. N. S. 531. But this does not apply to minor physical ailments or diseases not affecting the marital relation, as shown in the case of Kraus *v.* Kraus, 9 Ohio S. & C. Pl. Dec. 515, 6 Ohio N. P. 248, where a husband asked the annulment of the marriage on the ground that his wife had a glass eye.

Concealment of insanity is ground for annulling the marriage. See *supra*, VIII, B, 3. And see Keyes *v.* Keyes, 22 N. H. 553.

False representations as to previous chastity are not ground for decreeing annulment of the marriage. Farr *v.* Farr, 2 MacArthur (D. C.) 35; Leavitt *v.* Leavitt, 13 Mich. 452; Hedden *v.* Hedden, 21 N. J. Eq. 61; Varney *v.* Varney, 52 Wis. 120, 8 N. W. 739, 38 Am. Rep. 726. So in Glean *v.* Glean, 70 N. Y. App. Div. 576, 75 N. Y. Suppl. 622, where the husband concealed the fact that he had unlawfully cohabited for several years with another woman and had several children by her, and it was held not such fraud as to vitiate the marriage. But it is doubtful whether this decision could be sustained in view of the broad rule laid down in Di Lorenzo *v.* Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 95 Am. St. Rep. 609, 63 L. R. A. 92. See *infra*, note 84.

been made, authorizes its annulment.[84] But some courts are disposed to relax the severity of this rule, especially where the fraud or deceit has been accompanied by some measure of coercion or imposition, in the case of very young girls duped or decoyed into an unsuitable marriage,[85] and in the case of aged persons of feeble intelligence who have been tricked or deluded.[86] In every case, however, the fraud must have been an effective cause, and one cannot complain of a false representation where he knew the truth at the time,[87] where it was rendered possible only by his own previous immoral conduct,[88] or where the fraud only affects third persons.[89] Imposition in the nature of a fraud may also be ground for annulling the marriage, especially where it was exerted by playing upon the party's superstitions or religious delusions.[90]

9. Duress.[91] A marriage brought about by force, duress, abduction, or terror under threats may be annulled.[92] But these influences must have been brought

Concealment of pregnancy will be ground for annulling the marriage. See *supra*, VIII, B, 5.

Deceit as to paternity of bastard child may be sufficient cause for a decree annulling the marriage. Scott *v.* Shufeldt, 5 Paige (N. Y.) 43.

Misrepresentation as to previous marriage or divorce.— A deceit or falsehood as to the fact of the party's previous marriage, or a false representation as to the death of the former spouse, such spouse having been in fact divorced, is no ground for annulling the marriage, provided of course that the former marriage was not in force at the time of the second. Donnelly *v.* Strong, 175 Mass. 157, 55 N. E. 892; Clarke *v.* Clarke, 11 Abb. Pr. (N. Y.) 228.

Previous criminal record.— It is not ground for annulling a marriage that the husband concealed the fact that he had previously served a term in the penitentiary. Wier *v.* Still, 31 Iowa 107.

Kleptomania.— A marriage is not avoided for fraud by reason of the concealment of the fact that the wife was at the time a kleptomaniac. Lewis *v.* Lewis, 44 Minn. 124, 46 N. W. 323, 20 Am. St. Rep. 559, 9 L. R. A. 505.

False personation see *supra*, VIII, B, 7.

84. Di Lorenzo *v.* Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 95 Am. St. Rep. 609, 63 L. R. A. 92 [*reversing* 71 N. Y. App. Div. 509, 75 N. Y. Suppl. 878 (*reversing* 34 Misc. 692, 70 N. Y. Suppl. 1012)], holding that where defendant induces plaintiff to marry her by false representations that he is the father of her bastard child, it is obtaining his consent to the marriage by fraud, within the meaning of the statute, and authorizes the dissolution of the marriage. So also in King *v.* Brewer, 8 Misc. (N. Y.) 587, 29 N. Y. Suppl. 1114, 31 Abb. N. Cas. 325, where the wife discovered after marriage that the husband's business was conducting a pool room, which is a statutory crime in New York. And so in Keyes *v.* Keyes, 6 Misc. (N. Y.) 355, 26 N. Y. Suppl. 910, where she was led to believe that he was an honest and industrious man, but in fact he was a professional thief. But on the other hand see Shrady *v.* Logan, 17 Misc. (N. Y.) 329, 40 N. Y. Suppl. 1010, holding that the concealment by a woman of the fact that she has borne a bastard child is not such fraud as will justify the annulment of the marriage. And see Fisk *v.* Fisk, 6 N. Y. App. Div. 432, 39 N. Y. Suppl. 537, where the court refused to annul a marriage because of a representation by the woman that she had never been married, when in fact she had been married but had been legally divorced.

85. Lyndon *v.* Lyndon, 69 Ill. 43; Moot *v.* Moot, 37 Hun (N. Y.) 288; Robertson *v.* Cole, 12 Tex. 356; Parsons *v.* Parsons, 68 Vt. 95, 34 Atl. 33.

86. Pyott *v.* Pyott, 90 Ill. App. 210.

87. Donnelly *v.* Strong, 175 Mass. 157, 55 N. E. 892; Wendel *v.* Wendel, 30 N. Y. App. Div. 447, 52 N. Y. Suppl. 72.

88. Tait *v.* Tait, 3 Misc. (N. Y.) 218, 23 N. Y. Suppl. 597.

89. Kinnier *v.* Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; McKinney *v.* Clarke, 2 Swan (Tenn.) 321, 58 Am. Dec. 59. And see Com. *v.* Philadelphia County Prison, 11 Wkly. Notes Cas. (Pa.) 341.

90. Orchardson *v.* Cofeild, 171 Ill. 14, 49 N. E. 197, 63 Am. St. Rep. 211, 40 L. R. A. 256; Hides *v.* Hides, 65 How. Pr. (N. Y.) 17. In both these cases the dupe was a believer in "spiritualism," and was morally coerced by the control of a stronger will operating through this delusion.

91. Duress: As ground of divorce see Divorce, 14 Cyc. 595 *et seq.* Generally see Duress.

92. *California.*— Linebaugh *v.* Linebaugh, 137 Cal. 26, 69 Pac. 616.

Kentucky.— Bassett *v.* Bassett, 9 Bush 696.

Maryland.— Ridgely *v.* Ridgely, 79 Md. 298, 29 Atl. 597, 25 L. R. A. 800; Le Brun *v.* Le Brun, 55 Md. 496.

New Jersey.— Avakian *v.* Avakian, (Ch. 1905) 60 Atl. 521.

New York.— Anderson *v.* Anderson, 74 Hun 56, 26 N. Y. Suppl. 492; Sloan *v.* Kane, 10 How. Pr. 66; Ferlat *v.* Gojon, Hopk. 478, 14 Am. Dec. 554.

Vermont.— Mountholly *v.* Andover, 11 Vt. 226, 34 Am. Dec. 685.

England.— Ford *v.* Stier, [1896] P. 1, 65 L. J. P. D. & Adm. 13, 73 L. T. Rep. N. S. 632, 11 Wkly. Rep. 668; Cooper *v.* Crane, [1891] P. 369, 40 Wkly. Rep. 127; Scott *v.*

to bear by the other contracting party or with his procurement or connivance.[93] And threats of any legal or penal measures authorized by law and the circumstances of the case will not invalidate the contract.[94] Thus, in particular, if a man under lawful arrest for seduction or bastardy, the complaint being based on probable cause, chooses to marry the woman as a means of obtaining his release and terminating the proceedings against him, he cannot allege duress as a ground for annulling the marriage.[95] But it is otherwise if the prosecution was maliciously instituted and without probable cause,[96] or if the accused, being pliant and inexperienced, is bullied by the magistrate and yields under threats of more severe penalties than the law allows.[97]

10. Consanguinity[98] or Affinity.[99] A marriage between relations within the prohibited degrees is void, its continuance is repugnant to good morals and public policy, and it will be annulled at the instance of either party, notwithstanding the applicant entered into it knowingly and wilfully.[1]

C. Actions For Annulment[2]—1. Nature and Form of Remedy. Unless otherwise provided by statute, a proceeding in a state court for the annulment of a marriage should be by bill in equity or its equivalent,[3] and the prayer for relief should specifically ask that the marriage be declared null and void, and not for a divorce, which is an entirely different matter.[4] Further, the question of the nullity of a marriage should be made the subject of a direct proceeding, and

Sebright, 12 P. D. 21, 56 L. J. P. D. & Adm. 11, 57 L. T. Rep. N. S. 421, 35 Wkly. Rep. 258; Bartlett *v.* Rice, 72 L. T. Rep. N. S. 122.

Canada.— Mignault *v.* Hapeman, 10 L. C. Jur. 137.

It must be manifest that force preponderated throughout, so as to disable the one interested from acting as a free agent. Lawless *v.* Chamberlain, 18 Ont. 296, where plaintiff alleged that he was forced into the marriage by intimidation and threats, and it appeared that he at first protested, but that by his subsequent conduct he displayed a readiness to assist in the preliminary and final details submitted to the proposed method of procedure, and intelligently forwarded its accomplishment.

93. Marks *v.* Crume, 29 S. W. 436, 16 Ky. L. Rep. 707; Sherman *v.* Sherman, 20 N. Y. Suppl. 414.

94. Lacoste *v.* Guidroz, 47 La. Ann. 295, 16 So. 836.

Where threats are relied on to establish coercion, in cases of this kind, they must be such threats against life, or to do bodily harm, as would overpower the judgment and coerce the will. Todd *v.* Todd, 149 Pa. St. 60, 24 Atl. 128, 17 L. R. A. 320; Stevenson *v.* Stevenson, 7 Phila. (Pa.) 386.

95. *Alabama.*— Williams *v.* State, 44 Ala. 24.

Arkansas.— Marvin *v.* Marvin, 52 Ark. 425, 12 S. W. 875, 20 Am. St. Rep. 191; Honnett *v.* Honnett, 33 Ark. 156, 34 Am. Rep. 39.

Louisiana.— Collins *v.* Ryan, 49 La. Ann. 1710, 22 So. 920, 43 L. R. A. 814.

Missouri.— Meredith *v.* Meredith, 79 Mo. App. 636.

New Jersey.— Ingle *v.* Ingle, (Ch. 1897) 38 Atl. 953; Sickles *v.* Carson, 26 N. J. Eq. 440.

New York.— Jackson *v.* Winne, 7 Wend. 47, 22 Am. Dec. 563; Scott *v.* Shufeldt, 5 Paige 43.

North Carolina.— See State *v.* Davis, 79 N. C. 603.

Pennsylvania.— Richards *v.* Richards, 19 Pa. Co. Ct. 322.

Texas.— Johns *v.* Johns, 44 Tex. 40.

See 34 Cent. Dig. tit. "Marriage," § 123.

96. Hawkins *v.* Hawkins, 142 Ala. 571, 38 So. 640, 110 Am. St. Rep. 53; Collins *v.* Collins, 2 Brewst. (Pa.) 515; Pyle *v.* Pyle, 10 Phila. (Pa.) 58; Shoro *v.* Shoro, 60 Vt. 268, 14 Atl. 177, 6 Am. St. Rep. 118.

97. Hawkins *v.* Hawkins, 142 Ala. 571, 38 So. 640, 110 Am. St. Rep. 53; Smith *v.* Smith, 51 Mich. 607, 17 N. W. 76.

98. Consanguinity: As ground for divorce see Divorce, 14 Cyc. 595 note 46. Definition see 8 Cyc. 582.

99. Affinity: As ground for divorce see Divorce, 14 Cyc. 595 note 46. Definition see 2 Cyc. 38.

1. Stapleberg *v.* Stapleberg, 77 Conn. 31, 58 Atl. 233; Martin *v.* Martin, 54 W. Va. 301, 46 S. E. 120; Andrews *v.* Ross, 14 P. D. 15, 58 L. J. P. D. & Adm. 14, 59 L. T. Rep. N. S. 900, 37 Wkly. Rep. 239; Levesque *v.* Ouellet, 22 Quebec Super. Ct. 181.

2. Pendency of suit for annulment as abating suit for divorce see Abatement and Revival, 1 Cyc. 31.

3. Selah *v.* Selah, 23 N. J. Eq. 185; Conte *v.* Conte, 82 N. Y. App. Div. 335, 81 N. Y. Suppl. 923.

4. Brown *v.* Westbrook, 27 Ga. 102; Valleau *v.* Valleau, 6 Paige (N. Y.) 207; Wilhelmi *v.* Wilhelmi, 9 Pa. Dist. 685.

Difference between nullity and divorce.— The purpose of a divorce suit is to dissolve a valid marriage which the parties had legal capacity to contract and generally for subsequent cause, while a nullity suit is for the judicial annulment of a marriage which was voidable or absolutely void when contracted

should not be adjudicated as a matter merely collateral or incidental to an action for another purpose,[5] although relief of this kind may properly be sought by answer or crossbill in a suit for divorce or maintenance.[6]

2. Jurisdiction and Authority of Court.[7] A court of chancery, in the exercise of its ordinary powers and jurisdiction and without the authority of a statute, may take jurisdiction of a suit to annul a marriage, where the cause alleged is one of the well known grounds on which equity gives relief in cases of contract, such as fraud, error, duress, or mental incapacity,[8] although not where the marriage is alleged to be void on account of a prior existing marriage, as in that case the proceedings must be founded on a statute.[9] Jurisdiction depends upon the residence of complainant or petitioner, and it is immaterial where the marriage was solemnized.[10] Defendant is brought within the jurisdiction by personal

for causes then existing. Pyott *v.* Pyott, 191 Ill. 280, 61 N. E. 88. And see Ridgely *v.* Ridgely, 79 Md. 298, 29 Atl. 597, 25 L. R. A. 800.

5. Williamson *v.* Williamson, 56 N. C. 446; Johnson *v.* Kincade, 37 N. C. 470. And see Uhl *v.* Uhl, 52 Cal. 250, holding that a cause of action to annul a marriage by reason of a former marriage of plaintiff to one who is still alive cannot be joined with a cause of action to quiet her title to her separate property, in which defendant falsely claims an interest.

6. Pyott *v.* Pyott, 191 Ill. 280, 61 N. E. 88; Taylor *v.* Taylor, 173 N. Y. 266, 65 N. E. 1098. See *supra*, VIII, A, 4.

Necessity of prayer for decree.— Where defendant, by his plea to an action for separation from bed and board, alleges the nullity of his marriage with plaintiff, but does not ask that the nullity be judicially pronounced, the court cannot take his pretensions into consideration. Smith *v.* Cook, 24 Quebec Super. Ct. 469.

The parties had presented cross suits, one for nullity of marriage on the ground of the man's impotence, the other for dissolution on the ground of the woman's adultery. It was held in the course of the nullity suit that the woman might be cross-examined as to her adultery with the co-respondent in the dissolution suit. M. *v.* D., 10 P. D. 175, 34 Wkly. Rep. 48.

7. Chancery jurisdiction generally see Equity.

8. *Indiana.*— Tefft *v.* Tefft, 35 Ind. 44.

Maryland.— Ridgely *v.* Ridgely, 79 Md. 298, 29 Atl. 597, 25 L. R. A. 800.

Missouri.— Meredith *v.* Meredith, 79 Mo. App. 636.

New Jersey.—Avakian *v.* Avakian, (Ch. 1905) 60 Atl. 521; Carris *v.* Carris, 24 N. J. Eq. 516; Selah *v.* Selah, 23 N. J. Eq. 185.

New York.— Ferlat *v.* Gojon, Hopk. 478, 14 Am. Dec. 554; Wightman *v.* Wightman, 4 Johns. Ch. 343.

Ohio.—Waymire *v.* Jetmore, 22 Ohio St. 271; Vernon *v.* Vernon, 9 Ohio Dec. (Reprint) 365, 12 Cinc. L. Bul. 237.

Vermont.— Clark *v.* Field, 13 Vt. 460.

West Virginia.— Martin *v.* Martin, 54 W. Va. 301, 46 S. E. 120.

See 34 Cent. Dig. tit. "Marriage," § 127.

Contra, in Pennsylvania.—The courts of this state do not possess general equity powers, but only such as have been conferred upon them by statute, and therefore have no jurisdiction to determine the validity of a marriage alleged to be void on account of the lunacy of one of the parties. Pitcairn *v.* Pitcairn, 201 Pa. St. 368, 50 Atl. 963. And see Thompson *v.* Thompson, 10 Phila. 131.

So also in South Carolina.— See Mattison *v.* Mattison, 1 Strobh. Eq. 387, 47 Am. Dec. 541. But a court of equity in this state may decide upon the validity of a marriage so far as it affects rights of property in a suit in chancery. Young *v.* Naylor, 1 Hill Eq. 383.

Other remedy available.— The supreme court of Rhode Island will not take jurisdiction in equity to annul a marriage voidable on account of fraud in procuring it, since another ample remedy is provided by the statute relating to divorce. Selby *v.* Selby, 27 R. I. 172, 61 Atl. 142.

In Ontario the high court of justice has jurisdiction, where a marriage correct in form is ascertained to be void *de jure* by reason of the absence of some essential preliminary, to declare the same null and void *ab initio*. Lawless *v.* Chamberlain, 18 Ont. 296.

In Quebec it has been held that the civil tribunals cannot declare the nullity of a marriage between two catholics on the ground of impotence until the ecclesiastical decision has been given. Langevin *v.* Barette, 4 Rev. Lég. 160; Vaillancourt *v.* Lafontaine, 11 L. C. Jur. 305; Lussier *v.* Archambault, 11 L. C. Jur. 53.

9. Kelley *v.* Kelley, 161 Mass. 111, 36 N. E. 837, 42 Am. St. Rep. 389, 25 L. R. A. 806.

10. *Minnesota.*—Wilson *v.* Wilson, 95 Minn. 464, 104 N. W. 300.

New Jersey.— Avakian *v.* Avakian, (Ch. 1905) 60 Atl. 521; Blumenthal *v.* Tannenholz, 31 N. J. Eq. 194.

New York.— See Kinnier *v.* Kinnier, 45 N. Y. 535, 6 Am. Rep. 132.

Vermont.— Barney *v.* Cuness, 68 Vt. 51, 33 Atl. 897.

England.— Roberts *v.* Brennan, [1902] P. 143, 71 L. J. P. D. & Adm. 74, 86 L. T. Rep. N. S. 599, 50 Wkly. Rep. 414 [*following* Nibovet *v.* Nibovet, 4 P. D. 1, 48 L. J. P. D. & Adm. 1, 39 L. T. Rep. N. S. 486, 27 Wkly. Rep. 203]: Bater *v.* Bater, 21 T. L. R. 517. *Compare* Argent *v.* Argent, 11 Jur. N. S. 864, 34 L. J. P. M. 133, 12 L. T. Rep. N. S. 768,

service of process or such constructive service as the statute may legally authorize.[11] The courts will be vigilant in these cases to guard against collusion of the parties, and will never make a decree unless entirely satisfied on this point.[12]

3. Time to Sue. A right of action for the annulment of a marriage accrues immediately upon knowledge or discovery of the invalidating fact or circumstance,[13] and, unless sooner barred by some statute of limitation,[14] continues until the marriage is dissolved by the death of one of the parties, after which event no decree of nullity will be made except under very exceptional circumstances.[15] But long and unreasonable delay in bringing the suit, while not an absolute bar,[16] may justify the refusal of a decree, especially where the case is not strong or not clearly proved, or where it may be taken as evidence of waiver or acquiescence or as indicating an ulterior motive in bringing the action.[17]

4 Swab. & Tr. 52; Simonin *v.* Mallac, 6 Jur. N. S. 561, 29 L. J. P. & M. 97, 2 L. T. Rep. N. S. 327, 2 Swab. & Tr. 67.

11. Winslow *v.* Troy, 97 Me. 130, 53 Atl. 1008; Becker *v.* Becker, 58 N. Y. App. Div. 374, 69 N. Y. Suppl. 75; Pepper *v.* Shearer, 48 S. C. 492, 26 S. E. 797.

12. Sickles *v.* Carson, 26 N. J. Eq. 440; Svenson *v.* Svenson, 78 N. Y. App. Div. 536, 79 N. Y. Suppl. 657; E. B. *v.* E. C. B., 28 Barb. (N. Y.) 299; Wilhelmi *v.* Wilhelmi, 9 Pa. Dist. 685.

13. **Annulment for nonage.**— An action to annul a marriage on the ground that complainant was under the statutory age of consent may be brought at once; it is not necessary for him to wait until he attains that age. Eliot *v.* Eliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568.

14. See Kaiser *v.* Kaiser, 16 Hun (N. Y.) 602; Montgomery *v.* Montgomery, 3 Barb. Ch. (N. Y.) 132.

Statutes of limitations generally see Limitations of Actions.

The limit of three years fixed by law for the bringing of an action in nullity of a marriage is not absolute. Lussier *v.* Archambault, 11 L. C. Jur. 53.

15. *Maryland.*— Fornshill *v.* Murray, 1 Bland 479, 18 Am. Dec. 344.

Massachusetts.— Rawson *v.* Rawson, 156 Mass. 578, 31 N. E. 653.

New York.— Combs *v.* Combs, 17 Abb. N. Cas. 265; Montgomery *v.* Montgomery, 3 Barb. Ch. 132.

Pennsylvania.— Parker's Appeal, 44 Pa. St. 309; Thompson *v.* Thompson, 10 Phila. 131.

Vermont.— Pingree *v.* Goodrich, 41 Vt. 47.

England.— Hemming *v.* Price, 12 Mod. 432; Hinks *v.* Harris, 4 Mod. 182; Brownsword *v.* Edwards, 2 Ves. 243, 28 Eng. Reprint 157.

See 34 Cent. Dig. tit. "Marriage," § 126.

A marriage contracted previous to the promulgation of the civil code may be declared null seventeen years after its celebration, by reason of impotency existing at the time of the marriage, where the parties have lived separately since its celebration, and defendant has established his domicile in a foreign country, especially where such nullity has been ecclesiastically pronounced. Langevin *v.* Barette, 4 Rev. Lég. 160.

Adjudication on validity of marriage necessary to settle estate.— Where a question is raised as to the validity of an alleged marriage after the death of one of the parties to it, and a judicial determination of this question is necessary to settle the proper descent or distribution of his estate, an action for that purpose may be instituted and a decree made. Pingree *v.* Goodrich, 41 Vt. 47. And see Nonnemacher *v.* Nonnemacher, 159 Pa. St. 634, 28 Atl. 439.

16. G. *v.* M., 10 App. Cas. 171, 53 L. T. Rep. N. S. 398; Mansfield *v.* Cuno, L. R. 2 H. L. Sc. 300, 29 L. T. Rep. N. S. 316 (the objection of delay in seeking relief may be got over when the proof of impotency is complete; but not otherwise); M. *v.* M., 22 T. L. R. 719; S. *v.* B., 21 T. L. R. 219. See also Castleden *v.* Castleden, 9 H. L. Cas. 186, 31 L. J. P. & M. 105, 5 L. T. Rep. N. S. 164, 11 Eng. Reprint 701, 4 Macq. H. L. 159 [*affirming* 6 Jur. N. S. 348, 29 L. J. P. & M. 81, 1 L. T. Rep. N. S. 489, 1 Swab. & Tr. 605].

But such delay renders it necessary that the evidence to support the suit should be of the clearest and most satisfactory kind (Castleden *v.* Castleden, 9 H. L. Cas. 186, 31 L. J. P. & M. 103, 5 L. T. Rep. N. S. 164, 11 Eng. Reprint 701, 4 Macq. H. L. 159 [*affirming* 6 Jur. N. S. 348, 29 L. J. P. & M. 81, 1 L. T. Rep. N. S. 489, 1 Swab. & Tr. 605]); and that an explanation of the delay be given before making a decree (Ewens *v.* Tytherleigh, 9 Jur. N. S. 1301, 33 L. J. P. & M. 37, 9 L. T. Rep. N. S. 424, 3 Swab. & Tr. 312, 12 Wkly. Rep. 444).

17. *Alabama.*— Price *v.* Price, 142 Ala. 631, 38 So. 802; Rawdon *v.* Rawdon, 28 Ala. 565.

District of Columbia.— Secor *v.* Secor, 1 MacArthur 630.

New York.— Taylor *v.* Taylor, 63 N. Y. App. Div. 231, 71 N. Y. Suppl. 411.

North Carolina.— Schonwald *v.* Schonwald, 62 N. C. 215.

England.— W. *v.* R., 1 P. D. 405, 45 L. J. P. D & Adm. 89, 25 Wkly. Rep. 25; Castleden *v.* Castleden, 9 H. L. Cas. 186, 31 L. J. P. & M. 103, 5 L. T. Rep. N. S. 164, 4 Macq. H. L. 159, 11 Eng. Reprint 701; Marriott *v.* Burgess, 10 Jur. N. S. 885, 33 L. J. P. & M. 203, 10 L. T. Rep. N. S. 847, 3 Swab. & Tr. 550.

See 34 Cent. Dig. tit. "Marriage," § 126.

Compare Chapline *v.* Stone, 77 Mo. App. 523.

4. Parties[18]— a. In General. In England and in some of the American states either of the parties to a void or voidable marriage may sue for its annulment, even though complainant himself caused or knew of the alleged disability, except only where the marriage was induced by his actual fraud.[19] But generally in this country, it is only the innocent or injured party who may sue;[20] and no right to maintain such a suit is recognized in any third person,[21] except that in some jurisdictions the father or mother of the injured party is permitted to maintain the action,[22] and in others, by statute, this right is accorded to any "relative" of the

"Doctrine of want of sincerity."—Relief in suits of this nature is never accorded unless petitioner is prompt in seeking it and sincere in the motive for doing so. M. *v.* C., L. R. 2 P. & D. 414, 41 L. J. P. & M. 37, 26 L. T. Rep. N. S. 321, 20 Wkly. Rep. 495. A petitioner made cognizant within four or five years after her marriage of her husband's impotency could not delay proceedings for three years more, without being open to the charge of want of sincerity or promptitude. M. *v.* C., L. R. 2 P. & D. 414, 41 L. J. P. & M. 37, 26 L. T. Rep. N. S. 321, 20 Wkly. Rep. 495. The doctrine, designated as the "doctrine of want of sincerity" in an action of this kind, has been too much extended in recent English decisions, and that doctrine, apart from "approbate" and "reprobate," has never been recognized by the law of Scotland. G. *v.* M., 10 App. Cas. 171, 53 L. T. Rep. N. S. 398, where it is said, however, that in a suit for nullity of marriage on the ground of impotency there may be facts and circumstances proved which so plainly imply on the part of the complaining spouse a recognition of the existence and validity of the marriage as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect. Where at the end of seven years' cohabitation a marriage had not been consummated through the impotence of the alleged husband, and the wife subsequently cohabited with another man, and upon the alleged husband discovering her misconduct she instituted a suit for nullity of marriage against him, and he a suit for dissolution of marriage against her, it was held that, the proof of impotence being clear, her conduct did not show such a want of sincerity as to deprive her of her right to have the marriage annulled. When the impotence is undoubted mere delay is not sufficient to disentitle the injured party to relief. M. *v.* D., 10 P. D. 75, 54 L. J. P. D. & Adm. 68, 33 Wkly. Rep. 657. See also L. *v.* B., [1895] P. 274, 64 L. J. P. D. & Adm. 121, 11 Reports 673, where the court refused to dismiss the petition on the ground of insincerity merely because of the delay in presenting the petition, and granted a decree *nisi*.

18. Parties generally see Parties.

19. Thompson *v.* Thompson, 10 Phila. (Pa.) 131.

Parties to bigamous marriage.—An action to annul a marriage on the ground of an existing and undissolved previous marriage may be brought by the party bound by such previous marriage as well as by the other. Glass *v.* Glass, 114 Mass. 563; Anonymous, 2 Thomps. & C. (N. Y.) 558; Miles *v.* Chilton, 1 Rob. Eccl. 684. *Contra*, Tefft *v.* Tefft, 35 Ind. 44.

20. O'Keefe *v.* O'Keefe, 3 Pa. Dist. 451; Heinzman *v.* Heinzman, 15 Pa. Co. Ct. 669.

21. Ridgely *v.* Ridgely, 79 Md. 298, 29 Atl. 597, 25 L. R. A. 800 (holding that the court cannot, at the instance of a divorced husband, declare void a subsequent marriage between his divorced wife and a third person, on the ground that the divorce was illegal); Wood *v.* Baker, 43 Misc. (N. Y.) 310, 88 N. Y. Suppl. 854 [*following* Fero *v.* Fero, 62 N. Y. App. Div. 470, 70 N. Y. Suppl. 742]. But in another case in New York, where the action was to have a certain marriage declared void by reason of defendant's fraud, and it appeared that plaintiff had subsequently married another person, and was seeking the probate of his will, which his heirs at law were contesting on the ground of her former marriage, it was held that they were properly admitted as parties. Tilby *v.* Hayes, 27 Hun (N. Y.) 251. See also McKinney *v.* Clarke, 2 Swan (Tenn.) 321, 58 Am. Dec. 59; Mountholly *v.* Andover, 11 Vt. 226, 34 Am. Dec. 685.

An administrator cannot maintain a suit for a decree of nullity of his intestate's marriage, unless it appears that such decree is necessary to the proper descent or distribution of the estate. Pingree *v.* Goodrich, 41 Vt. 47. See also Bevan *v.* McMahon, 5 Jur. N. S. 686, 28 L. J. P. & M. 127, 2 L. T. Rep. N. S. 255, 2 Swab. & Tr. 58, 8 Wkly. Rep. 453.

Right of king's proctor to intervene see A. *v.* A., [1901] P. 284, 70 L. J. P. D. & Adm. 90, 85 L. T. Rep. N. S. 171; Soltomayer *v.* De Barros, 5 P. D. 94, 49 L. J. P. D. & Adm. 1, 41 L. T. Rep. N. S. 281, 27 Wkly. Rep. 917; Childers *v.* Childers, 68 L. J. P. D. & Adm. 90. Before 36 & 37 Vict. c. 31, king's proctor had no power to intervene in suits for nullity of marriage, however collusive or concerted. D. *v.* M., 28 L. T. Rep. N. S. 73, 21 Wkly. Rep. 417.

22. Ray *v.* Sherwood, 1 Curt. Eccl. 193; Wells *v.* Wells, 10 Jur. N. S. 1208, 34 L. J. P. & M. 12, 11 L. T. Rep. N. S. 318, 3 Swab. & Tr. 593, 13 Wkly. Rep. 279; Sherwood *v.* Ray, 1 Moore P. C. 353, 12 Eng. Reprint 848.

It is otherwise in New York. Wood *v.* Baker, 43 Misc. 310, 88 N. Y. Suppl. 854 [*following* Fero *v.* Fero, 62 N. Y. App. Div. 470, 70 N. Y. Suppl. 742]. And see E. B. *v.* E. C. B., 28 Barb. 299. See, however, Sloan *v.* Kane, 10 How. Pr. 66.

A father has sufficient interest under 43

injured party, provided the party himself is joined in the suit.[23] In case the injured party is insane and under guardianship, the suit should generally be brought in the name of the guardian,[24] and where the common-law disabilities of married women still exist, a wife bringing an action of this sort should not sue in her maiden name but as a wife and by her next friend.[25]

b. Guardian For Defendant. Where defendant in a nullity suit is an infant or is is insane, a guardian *ad litem* should be appointed.[26] But in Louisiana, where minors are emancipated by marriage, this is not necessary, at least in so far as the disability of infancy is concerned.[27]

5. Defenses. Beside denying and disproving the facts relied on to show the invalidity of the marriage,[28] defendant in these cases may defend on the ground that complainant does not come into court with a good conscience and a clean record, having been guilty of fraud or misconduct,[29] or, as it is otherwise expressed,

Eliz. c. 2, § 7, to institute a suit to establish the nullity of his daughter's marriage; but where a father died after such suit was instituted and the pleadings in it were finished but before trial, it was held that the court had no authority to allow the widow and executrix of the father to take up the suit at the point at which it was left at the father's death. Bevan *v.* Macmahon, 5 Jur. N. S. 686, 28 L. J. P. & M. 127, 2 L. T. Rep. N. S. 255, 2 Swab. & Tr. 58, 8 Wkly. Rep. 453.

Whether the father has instituted the suit in his own right or as guardian of the minor, must appear upon the face of the petition. Wells *v.* Wells, 10 Jur. N. S. 444, 33 L. J. P. & M. 41, 10 L. T. Rep. N. S. 138, 3 Swab. & Tr. 364, 12 Wkly. Rep. 672.

In Louisiana it is ruled that where the nullity charged against a marriage is relative and not absolute, the contracting parties retain their status as married persons until such nullity is declared by a competent court; and therefore the father of a minor emancipated by marriage has no right of action in himself to sue for the annulment of the marriage, and his minor son does not need his aid in bringing the suit. Delpit *v.* Young, 51 La. Ann. 923, 25 So. 547.

Parent and child generally see Parent and Child.

23. See N. Y. Code Civ. Proc. §§ 1744, 1750, authorizing a relative of one of the parties to a marriage to bring suit for its annulment where such party had not attained the legal age of consent, or his consent was obtained by force or fraud, or where he was a lunatic. And see on the construction and interpretation of this statute Coddington *v.* Larner, 75 N. Y. App. Div. 532, 78 N. Y. Suppl. 276; Fero *v.* Fero, 62 N. Y. App. Div. 470, 70 N. Y. Suppl. 742; Wood *v.* Baker, 43 Misc. (N. Y.) 310, 83 N. Y. Suppl. 854; Slocum *v.* Slocum, 37 Misc. (N. Y.) 143, 74 N. Y. Suppl. 447.

Collateral relatives.— Where it was pleaded in such action that plaintiff, being only a relative of the deceased in the collateral line, was not entitled to demand the nullity of the marriage, it was held that where the status of the wife was recognized collateral relations had no power to dispute the marriage. Scott *v.* Paquet, 4 L. C. Jur. 149 [*confirmed* in 11 L. C. Jur. 289].

24. Crump *v.* Morgan, 38 N. C. 91, 40 Am. Dec. 447; Waymire *v.* Jetmore, 22 Ohio St. 271. See Insane Persons.

It is otherwise in those states where the statute specifically directs that the suit shall be instituted by or in the name of one of the parties to the marriage. See Pence *v.* Aughe, 101 Ind. 317; Winslow *v.* Troy, 97 Me. 130, 53 Atl. 1008.

Under D. C. Code, § 1286, a proceeding on behalf of a lunatic to annul a marriage contracted by him during his lunacy is properly instituted by his next friend and not by his committee; but the committee should be made a party defendant to such a proceeding. Mackey *v.* Peters, 22 App. Cas. 341.

25. Howard *v.* Lewis, 6 Phila. (Pa.) 50.

26. Montgomery *v.* Montgomery, 3 Barb. Ch. (N. Y.) 132. *Compare* Fry *v.* Fry, 15 P. D. 50, 59 L. J. P. D. & Adm. 43, 62 L. T. Rep. N. S. 501, 38 Wkly. Rep. 615.

Guardian ad litem generally see Infants.

Without having been duly elected and appointed a guardian cannot appear and plead on behalf of a minor. Wells *v.* Wells, 10 Jur. N. S. 444, 33 L. J. P. & M. 41, 10 L. T. Rep. N. S. 138, 3 Swab. & Tr. 364, 12 Wkly. Rep. 672.

Where no guardian ad litem is appointed for defendant in such a case, complainant will derive no benefit from the tacit admission of the fraud charged in the bill arising from the wife's suffering such bill to be taken as confessed against her. Montgomery *v.* Montgomery, 3 Barb. Ch. (N. Y.) 132.

In Quebec it has been held that the father only of the minor can bring the action, unless the minor herself be in the cause assisted according to law. Burn *v.* Fontaine, 3 Rev. Lég. 516.

27. Delpit *v.* Young, 51 La. Ann. 923, 25 So. 547; Lacoste *v.* Guidroz, 47 La. Ann. 295, 16 So. 836.

28. Grounds for annulment see *supra*, VIII, B.

29. Rooney *v.* Rooney, 54 N. J. Eq. 231, 34 Atl. 682 (where complainant, the husband, had falsely represented himself as competent to marry, whereas he had a wife living and undivorced); Adams *v.* Adams, 2 Chest. Co.

that he is not an innocent and injured party,[30] or that he had full knowledge at the time of the marriage of the defects or impediments alleged,[31] or that the marriage, although originally voidable, has been ratified and confirmed by the subsequent cohabitation of the parties with knowledge of the facts and under circumstances showing a waiver of the defects or acquiescence in the existing state of affairs.[32] Also the court will refuse a decree if it appears that the suit is collusively brought or maintained.[33]

6. PLEADING.[34] The petition or complaint must set forth clearly and in apt terms the specific causes relied on to annul the marriage,[35] and aver plaintiff's innocence

Rep. (Pa.) 560 (where a decree was refused because both parties had been divorced from their former spouses because of their adultery). But see Quigg *v.* Quigg, 42 Misc. (N. Y.) 48, 85 N. Y. Suppl. 550, holding that it is no defense to a husband's action to annul the marriage that he falsely represented to defendant that he was of legal age and thereby deceived her into marrying him. And a parent's action to annul the marriage of his minor son on account of his not having attained the legal age of consent cannot be defeated by an answer setting up as a counter-claim the infidelity of the minor and asking for a divorce. Slocum *v.* Slocum, 37 Misc. (N. Y.) 143, 74 N. Y. Suppl. 447. In Taverner *v.* Ditchford, 33 L. J. P. & M. 105, where, to a petition by a woman for a decree of nullity of marriage on the ground of impotence, respondent pleaded that since the marriage petitioner had committed adultery, and the court ordered the plea to be struck out as impertinent. And so in Williams *v.* Homfray, 6 Jur. N. S. 151, 29 L. J. P. & M. 62, 2 Swab. & Tr. 30, where a husband presented a petition praying that his marriage, *de facto* celebrated with the woman, might be annulled by reason of her malformation, and she denied the malformation, pleaded cruelty, and prayed for a judicial separation by reason thereof, and it was held that in a suit for nullity of marriage the only question to be decided is marriage or no marriage, and that consequently a charge of cruelty against the husband and a prayer for a judicial separation contained in an answer must be struck out.

30. Jones *v.* Jones, 4 Pa. Dist. 223, 7 Kulp 515; Heinzman *v.* Heinzman, 15 Pa. Co. Ct. 669; Thompson *v.* Thompson, 31 Leg. Int. (Pa.) 124.

31. Donnelly *v.* Strong, 175 Mass. 157, 55 N. E. 892; Thompson *v.* Thompson, 31 Leg. Int. (Pa.) 124. But see Martin *v.* Martin, 54 W. Va. 301, 46 S. E. 120, holding that a marriage between relations within the forbidden degrees will be annulled at the instance of either party, although the applicant may have entered into it knowingly and wilfully. And as to dissolving a bigamous marriage at the suit of the party bound by the former marriage see *supra*, VIII, C, 4, a.

32. *District of Columbia.*— Lenoir *v.* Lenoir, 24 App. Cas. 160.

Florida.— Prine *v.* Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87.

Illinois.— Peipho *v.* Peipho, 88 Ill. 438.

Kentucky.— Hoffman *v.* Hoffman, 51 S. W. 176, 21 Ky. L. Rep. 263.

New York.— Wendel *v.* Wendel, 30 N. Y. App. Div. 447, 52 N. Y. Suppl. 72; Steimer *v.* Steimer, 37 Misc. 26, 74 N. Y. Suppl. 714.

Canada.— Roblin *v.* Roblin, 28 Grant Ch. (U. C.) 439.

And see *supra*, VIII, C, 3.

33. Wilhelmi *v.* Wilhelmi, 9 Pa. Dist. 685. And see *supra*, VIII, C, 2.

The queen's proctor, although intervening before decree *nisi*, is not precluded from setting up other defenses in addition to that of collusion. Sottomayer *v.* De Barros, 5 P. D. 94, 49 L. J. P. D. & Adm. 1, 41 L. T. Rep. N. S. 281, 27 Wkly. Rep. 917.

Effect of agreements between parties.— In a petition by a husband against the wife praying that the marriage celebrated between them might be declared void on the ground of her incapacity, respondent pleaded that she and petitioner after a year's cohabitation had agreed to live apart, and had bound themselves not to make any claim against each other either in a court of law or equity; and that if either party should break the agreement the other should be entitled to an injunction to restrain such breach; that it was further agreed that if respondent committed a breach of agreement petitioner should be entitled to proceed for a declaration of nullity; and that there had been no breach of agreement on the part of respondent. It was held that respondent's agreement not to sue was a sufficient consideration for the husband's engagement to do the like, and that such an agreement, although not by deed, was therefore a bar to the petition for a declaration of nullity. Aldridge *v.* Aldridge, 13 P. D. 210, 58 L. J. P. D. & Adm. 8, 59 L. T. Rep. N. S. 896, 37 Wkly. Rep. 240. *Compare* Wilson *v.* Wilson, 14 Sim. 405, 37 Eng. Ch. 405, 60 Eng. Reprint 415 [*affirmed* in 1 H. L. Cas. 538, 12 Jur. 467, 9 Eng. Reprint 870], where it was held that an agreement to put an end to a suit for nullity of marriage on the ground of impotency is not void as against public policy.

34. Pleading generally see EQUITY; PLEADING.

35. See cases cited *infra*, this note *et seq.*

Impotence; sufficiency of allegations see Ferris *v.* Ferris, 8 Conn. 166; Peipho *v.* Peipho, 88 Ill. 438.

Allegation of marriage as still subsisting.— Where the marriage is sought to be annulled on a ground which makes it voidable only and

or ignorance of the disability or impediment alleged,[36] and ask for a decree annulling the marriage rather than for a decree of divorce.[37] The answer may controvert the allegations of plaintiff,[38] or defendant may, if he has sufficient ground for it, put in a cross complaint asking for a divorce.[39]

7. Evidence[40] — a. In General. The burden is on plaintiff to sustain his material allegations,[41] and in view of the peculiar nature of the contract of marriage and the grave consequences of dissolving it, the courts will not grant a decree except upon the production of clear, satisfactory, and convincing evidence,[42] which, however, according to the circumstances of the case may be either direct or inferential.[43] According to the generally accepted rule, such a decree will not be given on the mere admissions or confessions of the parties alone without

not void, the complaint is not bad for averring that the parties were married on a certain day "and ever since have been, and now are, husband and wife." Linebaugh *v.* Linebaugh, 137 Cal. 26, 69 Pac. 616.

36. Tefft *v.* Tefft, 35 Ind. 44; States *v.* Cromwell, (N. Y. 1887) 14 N. E. 448.

37. Wilhelmi *v.* Wilhelmi, 9 Pa. Dist. 685.

38. **Answer under oath.**— Where a suit is brought to declare a marriage contract void for a cause not within the statute, the statutory provision that defendant shall not answer under oath does not apply. Selah *v.* Selah, 23 N. J. Eq. 185.

39. Wadsworth *v.* Wadsworth, 81 Cal. 182, 22 Pac. 648, 15 Am. St. Rep. 38.

A counter-claim, interposed by a wife to an action brought under the statute by her mother-in-law to annul her son's marriage on the ground that he had not attained the age of legal consent, alleging the son's adultery and demanding a divorce from him is demurrable for insufficiency, as the son is not a party to the action and relief against him is impossible therein. Slocum *v.* Slocum, 37 Misc. (N. Y.) 143, 74 N. Y. Suppl. 447.

40. Evidence generally see Evidence.

41. Bassett *v.* Bassett, 9 Bush (Ky.) 696; Mansfield *v.* Cuno, L. R. 2 H. L. Sc. 300, 29 L. T. Rep. N. S. 316. But see Thomas *v.* Thomas, 19 Nebr. 81, 27 N. W. 84; Lewis *v.* Hayward, 35 L. J. P. & M. 105.

42. *Illinois.*— Beckley *v.* Beckley, 115 Ill. App. 27.

Louisiana.— Lutenbacher *v.* Loscher, 37 La. Ann. 831.

Maryland.— Le Brun *v.* Le Brun, 55 Md. 496.

Michigan.— Van Haaften *v.* Van Haaften, 139 Mich. 479, 102 N. W. 989.

Mississippi.— Powell *v.* Powell, 27 Miss. 783; Ward *v.* Dulaney, 23 Miss. 410.

Missouri.— Slais *v.* Slais, 9 Mo. App. 96.

Nebraska.— Thomas *v.* Thomas, 19 Nebr. 81, 27 N. W. 84.

New Jersey.— Rooney *v.* Rooney, 54 N. J. Eq. 231, 34 Atl. 682; Kern *v.* Kern, 51 N. J. Eq. 574, 26 Atl. 837.

England.— W. *v.* W., [1905] P. 231, 74 L. J. P. D. & Adm. 112, 93 L. T. Rep. N. S. 456; Cooper *v.* Crane, [1891] P. 369, 40 Wkly. Rep. 127; Scott *v.* Sebright, 12 P. D. 21, 56 L. J. P. D. & Adm. 11, 57 L. T. Rep. N. S. 421, 35 Wkly. Rep. 258.

Canada.— Lawless *v.* Chamberlain, 18 Ont. 296.

See 34 Cent. Dig. tit. "Marriage," § 131.

Expert medical testimony.— As a general rule, a decree of nullity of marriage on the ground of malformation will not be granted, unless the existence of incurable malformation is proved by a medical man who has examined the person of the respondent. T. *v.* M., L. R. 1 P. & D. 31, 35 L. J. P. & M. 10, 13 L. T. Rep. N. S. 614. Upon the question of incapacity, although no application had been made for a monition or an order for a personal inspection of either of the parties, the court received medical evidence of an examination. Serrell *v.* Serrell, 2 Swab. & Tr. 422, 31 L. J. P. & M. 55, 5 L. T. Rep. N. S. 691. See also Williams *v.* Homfray, 7 Jur. N. S. 315, 30 L. J. P. & M. 73, 4 L. T. Rep. N. S. 89, 2 Swab. & Tr. 240, 9 Wkly. Rep. 619; A. *v.* A., L. R. 19 Ir. 403.

43. See cases cited *infra*, this note.

Any evidence is admissible in a suit for nullity which tends to throw light on the case set up by petitioner or respondent during their cohabitation, although the only issues raised by the pleadings are the respondent's impotency and the consummation of the marriage. X. *v.* Y., 34 L. J. P. & M. 81.

Inquisition of lunacy.— An inquisition of lunacy found two days after the marriage and declaring that the husband was of unsound mind and had been so for six months previous is only presumptive evidence of his insanity on the day of the marriage. Banker *v.* Banker, 63 N. Y. 409.

Marriage certificate.— An exemplified copy of a paper purporting to be a certificate of a marriage ceremony, signed by a person without any designation of character, and without proof of its genuineness, on file in the office of a clerk of a court in another state, without proof of the laws of that state, is not sufficient proof of such marriage ceremony to sustain a decree of nullity of a later marriage by reason of it. Rooney *v.* Rooney, 54 N. J. Eq. 231, 34 Atl. 682.

Proof of physical capacity.— In an action to annul a marriage on the ground of the physical incapacity of the wife, proof that in due time after the marriage she gave birth to twins is sufficient to support a decree in her favor. Riley *v.* Riley, 73 Hun (N. Y.) 575, 26 N. Y. Suppl. 164.

Identity of parties.— In an undefended suit

satisfactory extraneous evidence,[44] or upon the uncorroborated testimony of plaintiff.[45]

b. Physical Examination. Where the ground of nullity alleged is the impotence or physical incapacity of either party, the court, it has been held, has power to require such party to submit to an examination of his person by competent phy-

for nullity on the ground of impotence, although the identity of both parties is proved in the registry at the time of the medical examination, the identity of the party not appearing must be proved again in open court. H. *v.* G., 69 L. J. P. D. & Adm. 120.

Duress.— Evidence sufficient to show duress see Ford *v.* Stier, [1896] P. 1, 65 L. J. P. D. & Adm. 13, 73 L. T. Rep. N. S. 632, 11 Wkly. Rep. 668; Scott *v.* Sebright, 12 P. D. 21, 56 L. J. P. D. & Adm. 11, 57 L. T. Rep. N. S. 421, 35 Wkly. Rep. 258; Bartlett *v.* Rice, 72 L. T. Rep. N. S. 122. Evidence insufficient to show duress see Cooper *v.* Crane, [1891] P. 369, 40 Wkly. Rep. 127; Lawless *v.* Chamberlain, 18 Ont. 296.

Fraud.—Evidence insufficient to show fraud see Field's Bill, 2 H. L. Cas. 48, 9 Eng. Reprint 1010. *Compare* Wortham's Case, 2 H. L. Cas. 73, 9 Eng. Reprint 1020.

Physical incapacity.— Evidence sufficient to show physical incapacity see W. *v.* W., [1905] P. 231, 74 L. J. P. D. & Adm. 112, 93 L. T. Rep. N. S. 456 (reviewing cases on mere inference of incapacity apart from positive evidence); B. *v.* B., [1901] P. 39, 70 L. J. P. D. & Adm. 4; H. *v.* P., L. R. 3 P. & D. 126; D. *v.* F., 11 Jur. N. S. 307, 34 L. J. P. & M. 66, 12 L. T. Rep. N. S. 84, 4 Swab. & Tr. 86, 13 Wkly. Rep. 546; F. *v.* P., 75 L. T. Rep. N. S. 192 (decree *nisi*); M. *v.* M., 22 T. L. R. 719 (decree *nisi*); S. *v.* B., 21 T. L. R. 219. Evidence insufficient to show physical incapacity see U. *v.* J., L. R. 1 P. & D. 460, 37 L. J. P. & M. 7, 16 Wkly. Rep. 518; T. *v.* D., L. R. 1 P. & D. 127, 12 Jur. N. S. 673, 35 L. J. P. & M. 51, 14 L. T. Rep. N. S. 227. The fact of the physical incapacity of either a husband or a wife to consummate a marriage may be inferred from his or her conduct during their married life. B. *v.* B., [1901] P. 39, 70 L. J. P. D. & Adm. 4.

Admission of paternity by third person.— In a husband's action to annul a marriage for fraud, an admission of a third person that he is the father of a child borne by the wife after the marriage but begotten before does not overcome the legal presumption that the child is the child of the husband. Montgomery *v.* Montgomery, 3 Barb. Ch. (N. Y.) 132.

Prior existing marriage.— Evidence sufficient to show prior existing marriage see Thomas *v.* Thomas, 19 Nebr. 81, 27 N. W. 84; Winslow *v.* Winslow, 6 Abb. Pr. (N. Y.) 294. Evidence insufficient to show prior existing marriage see Le Brun *v.* Le Brun, 55 Md. 496; Rooney *v.* Rooney, 54 N. J. Eq. 231, 34 Atl. 682.

Non-consummation and refusal to submit to inspection as raising inference of physical incapacity see W. *v.* W., [1905] P. 231, 74 L. J. P. D. & Adm. 112, 93 L. T. Rep. N. S. 456; B. *v.* B., [1901] P. 39, 70 L. J. P. D. & Adm. 4; H. *v.* P., L. R. 3 P. & D. 126; D. *v.* F., 4 Swab. & Tr. 86, 34 L. J. P. & M. 66, 11 Jur. N. S. 307, 12 L. T. Rep. N. S. 84, 13 Wkly. Rep. 546; S. *v.* B., 21 T. L. R. 219.

Refusal of wife to consummate marriage see S. *v.* A., 3 P. D. 72, 47 L. J. P. D. & Adm. 75, 39 L. T. Rep. N. S. 127; F. *v.* P., 75 L. T. Rep. N. S. 192; M. *v.* M., 22 T. L. R. 719. Refusal to consummate the marriage is evidence from which the impotence of the party may be inferred under some circumstances. Merrill *v.* Merrill, 126 Mass. 228; B. *v.* B., [1901] P. 39, 70 L. J. P. D. & Adm. 4. See, however, S. *v.* A., 3 P. D. 72, 47 L. J. P. D. & Adm. 75, 39 L. T. Rep. N. S. 127, where it was held that wilful and wrongful refusal of marital intercourse is not in itself sufficient to justify the court in declaring a marriage null by reason of impotence.

Admissibility of affidavits see Sanford *v.* Sanford, 94 N. Y. Suppl. 1096, 35 N. Y. Civ. Proc. 65; M. *v.* H., 11 L. T. Rep. N. S. 317, 3 Swab. & Tr. 592, 13 Wkly. Rep. 108. See also B. *v.* C., 32 L. J. P. & M. 135 (where the court, with the consent of respondent, allowed her evidence to be given on the affidavits); Lumley *v.* Victor, 26 L. T. Rep. N. S. 141 (where it was held that in a suit for nullity on the ground of bigamy, the court has no power to permit the facts to be proved by reading affidavits taken in a suit in chancery).

Interrogatories.— Under the English practice in a suit for nullity of marriage the court has power to order interrogatories. Euston *v.* Smith, 9 P. D. 57, 32 Wkly. Rep. 596. See Harvey *v.* Lovekin, 10 P. D. 122, 54 L. J. P. D. & Adm. 1, 33 Wkly. Rep. 188, giving the reasons for and the history of such practice. And see Redfern *v.* Redfern, [1891] P. 139, 55 J. P. 37, 60 L. J. P. D. & Adm. 9, 64 L. T. Rep. N. S. 68, 39 Wkly. Rep. 212.

44. Freeman *v.* Freeman, 13 S. W. 246, 11 Ky. L. Rep. 822; Dawson *v.* Dawson, 18 Mich. 335; Crane *v.* Crane, 62 N. J. Eq. 21, 49 Atl. 734; Dare *v.* Dare, 52 N. J. Eq. 195, 27 Atl. 654; Steimer *v.* Steimer, 37 Misc. (N. Y.) 26, 74 N. Y. Suppl. 714; Chambers *v.* Chambers, 32 N. Y. Suppl. 875, 24 N. Y. Civ. Proc. 187; Montgomery *v.* Montgomery, 3 Barb. Ch. (N. Y.) 132. See also Le Brun *v.* Le Brun, 55 Md. 496; Harrison *v.* Harrison, 4 Moore P. C. 96.

45. Lenoir *v.* Lenoir, 24 App. (D. C.) 160; Crane *v.* Crane, 62 N. J. Eq. 21, 49 Atl. 734; Costill *v.* Costill, 47 N. J. Eq. 346, 21 Atl. 35; McShane *v.* McShane, 45 N. J. Eq. 341, 19 Atl. 465; Bange *v.* Bange, 46 Misc. (N. Y.) 196, 94 N. Y. Suppl. 8; U. *v.* J.,

sicians or surgeons for the purpose of determining the truth of the matter alleged,[45] and to enforce its order in this behalf, if necessary, by contempt proceedings.[47]

e. Triennial Cohabitation Rule. The canon law rule of triennial cohabitation has not been recognized in England[48] beyond this point, that where a husband or a wife seeks a decree of nullity *propter impotentiam*, if there is no more evidence than that they have for a period of three years lived together in the same house and with ordinary opportunities of intercourse, and it is clearly proved that there has been no consummation of the marriage, inability on the part of the one or the other to consummate it will be presumed.[49] On the other hand, the presumption of inability to be drawn from the fact of non-consummation after three years' cohabitation is capable of being rebutted.[50] And also every case need not be fortified with the presumption of inability; for although no presumption can be raised from the absence of consummation within a less period than three years,[51]

L. R. 1 P. & D. 460, 37 L. J. P. & M. 7, 16 Wkly. Rep. 518; T. *v.* D., L. R. 1 P. & D. 127, 12 Jur. N. S. 673, 35 L. J. P. & M. 51, 14 L. T. Rep. N. S. 227. But see Hunter *v.* Milam, (Cal. 1895) 41 Pac. 332.

46. Anonymous, 89 Ala. 291, 7 So. 100, 18 Am. St. Rep. 116, 7 L. R. A. 425; Anonymous, 35 Ala. 226; Anonymous, 34 Misc. (N. Y.) 109, 69 N. Y. Suppl. 547; Cahn *v.* Cahn, 21 Misc. (N. Y.) 506, 48 N. Y. Suppl. 173; Newell *v.* Newell, 9 Paige (N. Y.) 25; Devanbagh *v.* Devanbagh, 5 Paige (N. Y.) 554, 28 Am. Dec. 443 note; Le Barron *v.* Le Barron, 35 Vt. 365; Briggs *v.* Morgan, 3 Phillim. 325. And see *dictum* in Union Pac. R. Co. *v.* Botsford, 141 U. S. 250, 11 S. Ct. 1000, 35 L. ed. 734.

English practice.— The appointment of two medical inspectors rests with the court; but it will allow the parties to select them, and should they not agree, each will be allowed to nominate one. C. *v.* C., 32 L. J. P. & M. 12. Each party has a right to nominate two medical inspectors to examine him or her. It is not necessary that both parties should be examined by the same inspectors. B. *v.* C., 32 L. J. P. & M. 135. But it is not the practice of the court to make an order for an inspection of petitioner. B. *v.* L., 16 Wkly. Rep. 943. Petitioner, on moving for an appointment of inspectors, should also move for an order that respondent submit to inspection. S. *v.* E., 31 L. J. P. & M. 164.

Respondent not within the jurisdiction.— In a suit for nullity by a man on the ground of malformation, no evidence could be given that respondent was suffering from an incurable defect, where she had never submitted to a medical examination, and, being out of the jurisdiction, had not been personally served with the citation. The court suspended its decree in order to give petitioner an opportunity of having her examined if she should thereafter be found within the jurisdiction. T. *v.* M., L. R. 1 P. & D. 31, 35 L. J. P. & M. 10, 13 L. T. Rep. N. S. 614.

Neither is the court nor are the parties concluded by the terms of the report of medical inspectors, but the inspectors themselves and other medical men may be examined. Williams *v.* Homfray, 7 Jur. N. S. 315, 30 L. J. P. & M. 73, 4 L. T. Rep. N. S. 89, 2 Swab. & Tr. 240, 9 Wkly. Rep. 619.

47. Cahn *v.* Cahn, 21 Misc. (N. Y.) 506, 48 N. Y. Suppl. 173. In a suit for nullity of marriage by reason of malformation respondent refused to comply with the order for inspection. The court declined to issue an attachment against her until after the hearing, but intimated that the attachment would issue forthwith if she attempted to remove out of the jurisdiction. B. *v.* L., L. R. 1 P. & D. 639, 38 L. J. P. & M. 35, 20 L. T. Rep. N. S. 280.

Decree pro confesso.— In Quebec where in an action to annul a marriage on the ground of impotency the proof is otherwise insufficient, the consort against whom the action is brought may be compelled to submit to a surgical examination, and in default of doing so the grounds of action may be taken *pro confesso* and judgment rendered accordingly. Dorion *v.* Laurent, 17 L. C. Jur. 324.

48. In this country the rule does not apply. Griffeth *v.* Griffeth, 162 Ill. 368, 372, 44 N. E. 820.

49. Lewis *v.* Hayward, 35 L. J. P. & M. 105.

50. Marshall *v.* Hamilton, 10 Jur. N. S. 853, 33 L. J. P. & M. 159, 10 L. T. Rep. N. S. 787, 13 Wkly. Rep. 108; Lewis *v.* Hayward, 35 L. J. P. & M. 105; A. *v.* B., 1 Spinks 12.

51. Marshall *v.* Hamilton, 10 Jur. N. S. 853, 33 L. J. P. & M. 159, 10 L. T. Rep. N. S. 787, 13 Wkly. Rep. 108; Lewis *v.* Hayward, 35 L. J. P. & M. 105.

Where there had been a cohabitation for two years and ten months without consummation, but the court was not satisfied on the evidence that the failure to consummate arose from the impotency of the husband, it suspended its decree and intimated that petitioner should forthwith return to cohabitation in order to give an opportunity for consummation. Marshall *v.* Hamilton, 10 Jur. N. S. 853, 33 L. J. P. & M. 159, 10 L. T. Rep. N. S. 787, 13 Wkly. Rep. 108. But afterward, on affidavits to the effect that the woman had returned to cohabitation and that the marriage remained unconsummated, the court made a decree of nullity, the husband not appearing. M. *v.* H., 11 L. T. Rep. N. S. 317, 3 Swab. & Tr. 592, 13 Wkly. Rep. 108.

yet positive evidence may be given from which the same inference of inability may be drawn.[52]

8. TRIAL OR HEARING[53] — a. Reference.[54] Nullity suits may generally be referred to a master or referee to take and report the evidence,[55] but the court must act on his report; a sentence annulling a marriage, entered up *ex parte* by plaintiff on the referee's report, without application to the court, is irregular.[56]

b. Trial by Jury.[57] Suits for the annulment of marriage contracts being originally cognizable in the English ecclesiastical courts, where juries were not summoned, and being now generally considered as addressed to the equitable jurisdiction of our courts, a trial by jury is not demandable as of right in such actions unless granted by the local statute.[58] But even without statutory directions, the court may frame and submit to a jury issues as to disputed questions of fact.[59]

9. JUDGMENT OR DECREE[60] — a. Relief Granted — (1) *IN GENERAL.* If the issues are found for complainant, the judgment or decree will declare the pretended marriage null and void; if for defendant, the bill will be dismissed.[61] Incidentally or as collateral to the decree the court has power to make such

52. Lewis *v.* Hayward, 35 L. J. P. & M. 105.

The object of the triennial cohabitation rule is to provide that sufficient time may be afforded for ascertaining beyond a doubt the true condition of the party complained of. If the court can be satisfied by circumstances that the complaint of the promoter of the suit is well founded, it never ought to be driven *sine gravissima causa* after a cohabitation, although less than three years, to order a return. U. *v.* F., 2 Rob. Eccl. 618.

When the court is satisfied by other evidence, for example, that of petitioner herself, of the man's impotence, the rule of apparent virginity after a cohabitation of three years does not apply. D. *v.* F., 11 Jur. N. S. 307, 34 L. J. P. & M. 66, 12 L. T. Rep. N. S. 84, 4 Swab. & Tr. 86, 13 Wkly. Rep. 546.

If impotence is clearly proved the court never resorts to the rule. D. *v.* F., 11 Jur. N. S. 307, 34 L. J. P. & M. 66, 12 L. T. Rep. N. S. 84, 4 Swab. & Tr. 86, 13 Wkly. Rep. 546.

Although the rule has been relaxed where the malformation is congenital or manifest and incurable, yet a cohabitation of only a few months will not be sufficient, especially if the impotency is ascribable to a temporary cause. S. *v.* E., 9 Jur. N. S. 698, 32 L. J. P. & M. 153, 8 L. T. Rep. N. S. 643, 3 Swab. & Tr. 240, 12 Wkly. Rep. 19.

53. **Trial** generally see EQUITY; TRIAL.

54. **Reference** generally see EQUITY; REFERENCES.

55. Morrell *v.* Morrell, 17 Hun (N. Y.) 324; Devanbagh *v.* Devanbagh, 5 Paige (N. Y.) 554, 28 Am. Dec. 443 note; Borradaile *v.* Borradaile, 1 Edw. (N. Y.) 40; Le Barron *v.* Le Barron, 35 Vt. 365. But see Mangels *v.* Mangels, 6 Mo. App. 481.

56. Blott *v.* Rider, 47 How. Pr. (N. Y.) 90.

57. **Trial by jury** generally see EQUITY; JURIES.

58. Gross *v.* Gross, 96 Mo. App. 486, 70 S. W. 393. See also Ricketts *v.* Ricketts, 35 L. J. P. & M. 92, 13 L. T. Rep. N. S. 761.

A suit on the ground of alleged impotency is unfit to be tried before a jury or in open court; and the judge has a discretionary power to hear *in camera* all suits which the ancient ecclesiastical courts would have heard privately. A. *v.* A., L. R. 3 P. & D. 230, 44 L. J. P. & M. 15, 31 L. T. Rep. N. S. 801, 23 Wkly. Rep. 386. And see C. *v.* C., L. R. 1 P. & D. 640, 38 L. J. P. & M. 37, 20 L. T. Rep. N. S. 280.

59. Maier *v.* Lillibridge, 112 Mich. 491, 70 N. W. 1032, holding that the court, in a nullity suit, may on its own motion frame and submit an issue to a jury, and that the verdict of the jury thereon is not conclusive on the court but merely advisory; also that the statute in Michigan (Howell Annot. St. § 6622) declaring that all issues on the legality of marriage, except where physical capacity is involved, shall be tried by a jury, is not mandatory; and that where a proceeding to annul a marriage has been noticed for hearing without mention of a desire for a trial by jury, and complainant is in attendance and ready for trial, the court may in its discretion refuse defendant's request for a jury trial on the issue of complainant's mental competency, on the ground that the right to such trial has been waived.

Question for jury as to mental capacity.— Where the statute makes mental incapacity a cause of annulment but does not define the extent or degree of insanity which shall have this effect, the question whether the party at the time of the marriage was laboring under such a defect of reason from disease of the mind as not to know the nature of the act he was performing is a question of fact to be determined by the jury. Doe *v.* Roe, 1 Edm. Sel. Cas. (N. Y.) 344.

60. **Judgment or decree** generally see EQUITY; JUDGMENTS.

61. Crump *v.* Morgan, 38 N. C. 91, 40 Am. Dec. 447.

In the kingdom of Hawaii the power to annul marriage was based solely on the statute and was limited by it; hence it was

orders as may be necessary to adjust and fix the rights and interests of the parties left unsettled by the dissolution of their marital relation.[62]

(II) *ALIMONY AND ALLOWANCES.*[63] As a general rule the right to alimony depends on a valid and subsisting marriage, since without this there is no obligation for the support of the alleged wife, and before it can be claimed or allowed the marriage must be proved or admitted, or, if it is contested, there must appear to the court a fair probability that it will be established.[64] Hence where a wife brings suit for the annulment of the marriage, thereby denying the fundamental

necessary for the decree to state a statutory ground therefor. Puuku *v.* Kaleleku, 8 Hawaii 77.

Dismissal on motion without costs.— A wife petitioner obtained a decree *nisi* for nullity, on the ground of her husband's impotence, *in camera*. Subsequently the king's proctor intervened. Previous to such intervention petitioner had herself instructed her solicitor to take steps to get her petition dismissed and the decree *nisi* rescinded. On a motion being made in open court to this effect, the president, having considered the matter in chambers, allowed the decree *nisi* to be rescinded and the petition dismissed on petitioner's own motion, and — the king's proctor consenting — without condemning her in his costs. A. *v.* A., [1901] P. 284, 70 L. J. P. D. & Adm. 90, 85 L. T. Rep. N. S. 171.

Decree nisi under English practice.— The principle on which decrees of nullity of marriage have been ordered to be decrees *nisi* in the first instance is that the queen's proctor may have an opportunity of intervening wherever there is any doubt as to the facts of the case. Where, however, the status of the parties is definitely settled, as where it has been proved beyond question that the marriage which it is sought to set aside was bigamous, there is no reason why the court should not at once exercise its discretion and relieve a petitioner from the obligation to pay alimony *pendente lite* between decree *nisi* and decree absolute. Childers *v.* Childers, 68 L. J. P. D. & Adm. 90. See also Yarrow *v.* Yarrow, [1892] P. 92, 61 L. J. P. D. & Adm. 69, 66 L. T. Rep. N. S. 383; Durham *v.* Durham, 10 P. D. 80; M. *v.* B., L. R. 3 P. & D. 200, 43 L. J. P. & M. 42, 30 L. T. Rep. N. S. 345, 910, 22 Wkly. Rep. 556; Hancock *v.* Peaty, L. R. 1 P. & D. 335, 36 L. J. P. & M. 57, 16 L. T. Rep. N. S. 182, 15 Wkly. Rep. 719.

62. Custody of insane plaintiff.— Where the marriage of an insane person is annulled at the suit of his guardian, it is proper for the decree to determine the right of the guardian to the absolute and exclusive control of the person and estate of his ward. Waymire *v.* Jetmore, 22 Ohio St. 271.

Custody of children.— A statute directing the custody of the children to be awarded to the innocent party has no application where the marriage is annulled on the ground of a prior existing marriage, but it appears that the parties voluntarily cohabited after knowledge of the facts and after suit brought, as neither party can be regarded as "innocent," and the court will leave the custody of the children where it is. Safford *v.* Safford, 27 N. Y. Suppl. 640, 31 Abb. N. Cas. 73.

Maintenance of children.— Under a statute authorizing the court to provide for the maintenance of the children by the guilty parent where the marriage is annulled for force, duress, or fraud, no such provision can be made where the ground of annulment is a prior existing marriage. Park *v.* Park, 24 Misc. (N. Y.) 372, 53 N. Y. Suppl. 677. See also Langworthy *v.* Langworthy, 11 P. D. 85, 55 L. J. P. D. & Adm. 33, 54 L. T. Rep. N. S. 776, 34 Wkly. Rep. 356, for rule under English statutes.

Saving legitimacy of children.— Where a woman's second marriage was annulled because she had a husband living and undivorced, but it appeared that the second marriage was contracted in good faith and in the genuine belief that the former husband was dead, it was held proper for the court to insert in its decree of nullity a recital of such good faith and erroneous belief, in order to save the legitimacy of children begotten before the commencement of the suit. Glass *v.* Glass, 114 Mass. 563.

63. Alimony in divorce proceedings see DIVORCE, 14 Cyc. 742.

64. Hite *v.* Hite, 124 Cal. 389, 57 Pac. 227, 71 Am. St. Rep. 82, 45 L. R. A. 793; Banks *v.* Banks, 42 Fla. 362, 29 So. 318; Freeman *v.* Freeman, 49 N. J. Eq. 102, 23 Atl. 113. See DIVORCE, 14 Cyc. 751.

Stipulation to share costs.— Where the husband stipulated to pay half the referee's fees in an action by the wife to annul the marriage, such stipulation will be enforced, although in the absence of it he would not have been compelled to pay them. Bloodgood *v.* Bloodgood, 59 How. Pr. (N. Y.) 42.

Action by husband's mother.— In an action by a parent to annul the marriage of her infant son, alimony cannot be awarded against plaintiff. Stivers *v.* Wise, 18 N. Y. App. Div. 316, 46 N. Y. Suppl. 9.

What court allows alimony.— In order for an appellate court to make an allowance of alimony, counsel fees, and suit money while an appeal in an action to annul a marriage is pending therein, it must have other proof than that taken in the lower court on a similar application. Prine *v.* Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87. See Blankenmiester *v.* Blankenmiester, 106 Mo. App. 390, 80 S. W. 706.

fact on which a claim for alimony should be based, no allowance can be made for her support pending the action or for suit money,[65] unless it be authorized by a statute.[66] On the other hand, where the husband brings the suit and the wife defends, asserting the validity of the marriage, she is in position to claim alimony *pendente lite* and an allowance for the expenses of the suit and for counsel fees, and it will be granted to her on a proper showing.[67] But of course it is otherwise if the wife as defendant admits that the marriage was null and void.[68] Permanent alimony cannot be granted in cases of this kind, for if a decree is made in accordance with the prayer of the petition it must adjudge the pretended marriage void *ab initio* and consequently that the parties never sustained the relation of husband and wife.[69] But where the woman is of good character and blameless in the affair, even though the marriage is declared void, she may be entitled to receive a substantial allowance, not technically as alimony, but by way of compensation for the pecuniary benefits derived by the man during the supposed marriage relation.[70] And if the wife prevails in her contention that the marriage was valid and the court dismisses the husband's bill for annulment, an allowance may be made to her for her expenses and counsel fees beyond the taxable costs.[71]

(III) *Restitution and Recovery of Property and Compensation.* Where a marriage is declared void, the wife may sue at law and recover her

65. Taylor *v.* Taylor, 7 Colo. App. 549, 44 Pac. 675; Griffin *v.* Griffin, 47 N. Y. 134; Herron *v.* Herron, 28 Misc. (N. Y.) 323, 59 N. Y. Suppl. 861; Meo *v.* Meo, 2 N. Y. Suppl. 569, 22 Abb. N. Cas. 58; Bloodgood *v.* Bloodgood, 59 How. Pr. (N. Y.) 42; Bartlett *v.* Bartlett, Clarke (N. Y.) 460; Warner *v.* Warner, 11 Ohio Dec. (Reprint) 379, 26 Cinc. L. Bul. 217. *Compare* Gore *v.* Gore, 103 N. Y. App. Div. 74, 92 N. Y. Suppl. 634 [*affirming* 44 Misc. 323, 89 N. Y. Suppl. 902]; Allen *v.* Allen, 59 How. Pr. (N. Y.) 27. And see Lee *v.* Lee, 66 How. Pr. (N. Y.) 207.

66. Lea *v.* Lea, 104 N. C. 603, 10 S. E. 488, 17 Am. St. Rep. 692 (construing N. C. Code, § 1291, and holding that plaintiff's allegation that her marriage is void does not estop her to claim alimony *pendente lite*); Arey *v.* Arey, 22 Wash. 261, 60 Pac. 724.

67. *California.*— Allen *v.* San Francisco Super. Ct., 133 Cal. 504, 65 Pac. 977; Hite *v.* Hite, 124 Cal. 389, 57 Pac. 227, 71 Am. St. Rep. 82, 45 L. R. A. 793; Poole *v.* Wilber, 95 Cal. 339, 30 Pac. 548.

Florida.— Prine *v.* Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87.

New Jersey.— Vandegrift *v.* Vandegrift, 30 N. J. Eq. 76; Vroom *v.* Marsh, 29 N. J. Eq. 15.

New York.— Higgins *v.* Sharp, 164 N. Y. 4, 58 N. E. 9; Brinkley *v.* Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Di Lorenzo *v.* Di Lorenzo, 78 N. Y. App. Div. 577, 79 N. Y. Suppl. 566; O'Dea *v.* O'Dea, 31 Hun 441; Wabberson *v.* Wabberson, 27 Misc. 125, 57 N. Y. Suppl. 405; North *v.* North, 1 Barb. Ch. 241, 43 Am. Dec. 778.

Pennsylvania.—Kline *v.* Kline, 1 Phila. 383. See 34 Cent. Dig. tit. "Marriage," § 137.

In England alimony continues payable after the decree *nisi* until the decree is made absolute. S. *v.* B., 9 P. D. 80, 53 L. J. P. D. & Adm. 63, 32 Wkly. Rep. 756. A *de facto* marriage being established, the court has jurisdiction to order alimony *pendente lite*, although a decree *nisi* has been made. Foden *v.* Foden, [1894] P. 307, 63 L. J. P. D. & Adm. 163, 71 L. T. Rep. N. S. 279, 6 Reports 633, 42 Wkly. Rep. 689 [*following* Bird *v.* Bird, 1 Lee Eccl. 209, and *commenting* on Blackmore *v.* Mills, 16 Wkly. Rep. 893].

68. Knott *v.* Knott, (N. J. Ch. 1902) 51 Atl. 15; Hopper *v.* Hopper, 92 Hun (N. Y.) 415, 36 N. Y. Suppl. 610; Appleton *v.* Warner, 51 Barb. (N. Y.) 270.

69. Sinclair *v.* Sinclair, 57 N. J. Eq. 222, 40 Atl. 679; Park *v.* Park, 24 Misc. (N. Y.) 372, 53 N. Y. Suppl. 677; Stewart *v.* Vandervort, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50; Bateman *v.* Bateman, 78 L. T. Rep. N. S. 472. See Pearce *v.* Pearce, 16 S. W. 271, 13 Ky. L. Rep. 67. *Contra*, in Connecticut by statute. See Stapleberg *v.* Stapleberg, 77 Conn. 31, 58 Atl. 233.

70. Stapleberg *v.* Stapleberg, 77 Conn. 31, 58 Atl. 233; Werner *v.* Werner, 59 Kan. 399, 53 Pac. 127, 68 Am. St. Rep. 372, 41 L. R. A. 349; Strode *v.* Strode, 3 Bush (Ky.) 227, 96 Am. Dec. 211.

71. Griffin *v.* Griffin, 47 N. Y. 134.

Costs under English practice.— Where suit is brought by husband see Hancock *v.* Peaty, L. R. 1 P. & D. 335, 36 L. J. P. & M. 57, 16 L. T. Rep. N. S. 182, 15 Wkly. Rep. 719; Wells *v.* Wells, 10 Jur. N. S. 444, 33 L. J. P. & M. 41, 10 L. T. Rep. N. S. 138, 3 Swab. & Tr. 364, 12 Wkly. Rep. 672, 10 Jur. N. S. 1208, 34 L. J. P. & M. 12, 11 L. T. Rep. N. S. 318, 3 Swab. & Tr. 593, 13 Wkly. Rep. 279. Where suit is brought by wife see M. *v.* C., L. R. 2 P. & D. 414, 41 L. J. P. & M. 37, 26 L. T. Rep. N. S. 321, 20 Wkly. Rep. 495; Hayward *v.* Hayward, L. R. 1 P. & D. 293, 36 L. J. P. & M. 76, 15 L. T. Rep. N. S. 299, 15 Wkly. Rep. 319; M. *v.* De B., 44 L. J. P. & M. 41, 33 L. T. Rep. N. S. 263. See also Attwood *v.* Attwood, [1903] P. 7, 71 L. J. P. D. & Adm. 129, 87 L. T. Rep. N. S. 750.

property.[72] So, in passing sentence of annulment, the court has power by statute in some states, and apparently at common law, to make an order for the restitution to the wife of the property which the husband received from her or of which he acquired possession by virtue of the marriage.[73] And in other cases where a party has been tricked or duped into a marriage and it is annulled, the court may order the restoration to him of his property fraudulently acquired and converted by the other party.[74] Also where the wife entered into the marriage in good faith and is free from blame and it is annulled for the fault of the husband, she may be allowed substantial compensation for the benefits which he received or the loss which she suffered in consequence of the marriage.[75]

b. Operation and Effect. A decree annulling a marriage is final and conclusive and not open to collateral impeachment,[76] although it may be vacated or set

72. Kriger *v.* Day, 2 Pick. (Mass.) 316; Lawson *v.* Shotwell, 27 Miss. 630.

73. Young *v.* Naylor, 1 Hill Eq. (S. C.) 383; Wheeler *v.* Wheeler, 79 Wis. 303, 48 N. W. 260; Wheeler *v.* Wheeler, 76 Wis. 631, 45 N. W. 531; Attwood *v.* Attwood, [1903] P. 7, 71 L. J. P. D. & Adm. 129, 87 L. T. Rep. N. S. 750.

Enforcement of order.— In Iowa an order of this kind for the restoration of plaintiff's property on the annulment of a marriage may be enforced by an attachment against defendant's property. Daniels *v.* Morris, 54 Iowa 369, 6 N. W. 532. But in Washington, where the statute authorizes the court in granting a divorce to dispose of the property of the parties but makes no provision as to enforcing its decree by attachment, the court has no power to enforce by attachment and imprisonment as for contempt an order requiring defendant to pay into court money of plaintiff fraudulently acquired and converted by him. *In re* Van Alstine, 21 Wash. 194, 57 Pac. 348.

The power of inquiring into and varying settlements after a decree of nullity vested in the court by the provisions of Matrimonial Causes Act (1859), § 5, as extended by Matrimonial Causes Act (1878), § 3, applies equally to all cases of nullity, and the jurisdiction of the court is not affected by the fact that the decree has been pronounced on the ground of respondent's impotence. Dormer *v.* Ward, [1901] P. 20, 69 L. J. P. D. & Adm. 144, 83 L. T. Rep. N. S. 556, 49 Wkly. Rep. 149 [*affirming* [1900] P. 130]. See also Attwood *v.* Attwood, [1903] P. 7, 71 L. J. P. D. & Adm. 129, 87 L. T. Rep. N. S. 750; A. *v.* M., 10 P. D. 178, 54 L. J. P. D. & Adm. 31, 33 Wkly. Rep. 232; Leeds *v.* Leeds, 57 L. T. Rep. N. S. 373.

74. See *In re* Van Alstine, 21 Wash. 194, 57 Pac. 348.

75. Barber *v.* Barber, 74 Iowa 301, 37 N. W. 381, where the marriage was annulled on account of the husband's insanity, of which the wife was ignorant at the time, and it appeared that he was worth fifteen thousand dollars, and she was allowed three thousand five hundred dollars as compensation for serious injury to her health resulting from his cruel and miserly treatment. And see *supra*, VIII, C, 9, a, (II), and cases cited *supra*, note 70.

76. Steimer *v.* Steimer, 37 Misc. (N. Y.) 26, 74 N. Y. Suppl. 714, where, however, it is held that a decree of nullity may be attacked by the wife's mother as an *amicus curiæ*, the wife being an infant, on the ground that it was procured by collusion between the infant and her husband. *Compare* Harrison *v.* Southampton, 4 De G. M. & G. 137, 18 Jur. 1, 22 L. J. Ch. 722, 1 Wkly. Rep. 422, 53 Eng. Ch. 108, 43 Eng. Reprint 459.

Effect of ecclesiastical decree of nullity.— In Quebec it has been held that, notwithstanding the ecclesiastical decree declaring a marriage invalid for relationship in the fourth degree, civil obligations continue until the judgment of the civil court declaring the marriage void is pronounced. Consequently, pending the action, the consorts continue to be regarded as such for their civil obligations; the community established by the marriage contract continues in existence; and the husband (plaintiff) continues liable to furnish maintenance to his wife (defendant). A child being born of the marriage after the canonical decree, and although the consorts have ceased cohabitation, such child being only a few months old, the wife (defendant), who has by nature its custody and care in her own right and without being appointed tutrix, may obtain from her husband, pending the action, provision for the child and for necessaries. The wife has also a right to obtain from plaintiff, head of the community provided for in the marriage contract, the means of paying the costs of her defense when it is taken in good faith. It is for plaintiff as head of the community to provide for payment of all costs, as well those of the demand as those of the legitimate defense of the action to have the marriage annulled as a necessary result of the canonical decree of nullity made at his instance; and the costs of the defense are charged on the community. Levesque *v.* Ouellet, 22 Quebec Super. Ct. 181.

Effect of foreign decree see Hay *v.* Northcote, [1900] 2 Ch. 262, 69 L. J. Ch. 586, 82 L. T. Rep. N. S. 656, 48 Wkly. Rep. 615 [*applying* Simonin *v.* Mallac, 6 Jur. N. S. 561, 29 L. J. P. D. & M. 97, 2 L. T. Rep. N. S. 327, 2 Swab. & Tr. 67].

aside for good cause on a proper application.[77] Its effect is to make the supposed or pretended marriage as if it had never existed, and hence it restores both parties to their former status and to all rights of property as before the marriage.[78] Hence also its effect is to make any children of the marriage illegitimate,[79] unless their legitimacy is saved by a statute, as is now the case in several states.[80]

10. Review.[81] A judgment or decree annulling a marriage may be reviewed on error or appeal as in other cases.[82] But if the evidence on which it was based was disputed or conflicting, the appellate court will not be inclined to disturb the decision.[83]

IX. JACTITATION OF MARRIAGE.

Jactitation of marriage arises where one person, not being married to another, pretends that a marriage exists between them and proclaims it to others.[84] It is a subject of legal redress, the person against whom the marriage is thus falsely set up being entitled to a decree enjoining the offender to abstain from the false boasting.[85] Cases of this nature seem never to have arisen in America, and but rarely in Great Britain.[86] A jactitation suit has been said to be in the nature of a criminal proceeding,[87] and to have something in common with proceedings for defamation.[88] The suit can be instituted only by the party with whom the marriage is falsely pretended to exist.[89] To a charge of jactitation three different defenses may be opposed: (1) Respondent may deny the boasting.[90] (2) He may admit the boasting and allege that his pretensions are true because a marriage does in fact exist.[91] (3) He may admit the false boasting, and justify on the ground

77. Golden *v.* Whiteside, 109 Mo. App. 519, 84 S. W. 1125; Blank *v.* Blank, 107 N. Y. 91, 13 N. E. 615; Everett *v.* Everett, 48 N. Y. App. Div. 475, 62 N. Y. Suppl. 1042.

An amendment to a complaint to set aside a decree annulling a marriage, which states that plaintiff has a good defense to the annulment proceedings, will not be refused for failure to state specifically the grounds of the defense. Everett *v.* Everett, 48 N. Y. App. Div. 475, 62 N. Y. Suppl. 1042.

78. Roth *v.* Roth, 104 Ill. 35, 44 Am. Rep. 81; Kelly *v.* Scott, 5 Gratt. (Va.) 479.

Competency as witnesses.— A decree of nullity makes either party a competent witness to communications passing between them during the continuance of the putative marriage and which would otherwise be privileged. Wells *v.* Fletcher, 5 C. & P. 12, 24 E. C. L. 429.

79. 1 Bishop Marr. Div. & Sep. § 118. And see Bastards, 5 Cyc. 625.

80. See Bastards, 5 Cyc. 632.

81. Appeal generally see Appeal and Error.

82. Gross *v.* Gross, 96 Mo. App. 486, 70 S. W. 393.

Who may appeal.— The mother of an infant defendant, not being entitled to intervene, has no right to appeal from a decree dissolving the marriage. E. B. *v.* E. C. B., 28 Barb. (N. Y.) 299.

83. Prine *v.* Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87.

84. Hawke *v.* Corri, 2 Hagg. Cons. 280. And see cases cited *infra*, note 85 *et seq.*

85. Hawke *v.* Corri, 2 Hagg. Cons. 280, 285, where it is said: "If a person pretends such a marriage, and proclaims it to others, the law considers it as a malicious act, subjecting the party, against whom it is set up, to various disadvantages of fortune and reputation, and imposing upon the public (which, for many reasons, is interested in knowing the real state and condition of the individuals, who compose it) an untrue character; interfering in many possible consequences with the good order of society, as well as the rights of those who are entitled to its protection. It is, therefore, a fit subject of legal redress; and this redress is to be obtained, by charging the supposed offender, with having falsely and maliciously boasted of a matrimonial connexion, and upon proof of the fact, obtaining a sentence, enjoining him, or her, to abstain in future from such false and injurious representations, and punishing the past offence by a condemnation in the costs of the proceeding." And see cases cited *infra*, note 86 *et seq.*

86. Thompson *v.* Rourke, [1893] P. 70, 62 L. J. P. D. & Adm. 46, 67 L. T. Rep. N. S. 788, 1 Reports 501.

87. Thompson *v.* Rourke, [1893] P. 70, 62 L. J. P. D. & Adm. 46, 67 L. T. Rep. N. S. 788, 1 Reports 501 [*citing* Hawke *v.* Corri, 2 Hagg. Cons. 280].

88. Thompson *v.* Rourke, [1893] P. 70, 62 L. J. P. D. & Adm. 46, 67 L. T. Rep. N. S. 788, 1 Reports 501.

89. Campbell *v.* Corley, 31 L. J. P. & M. 60, where marriage with a widow was falsely pretended after her death, and the suit was brought by her son.

90. Hawke *v.* Corri, 2 Hagg. Cons. 280; Bodkin *v.* Case, Milw. 356.

91. Hawke *v.* Corri, 2 Hagg. Cons. 280, 285,

that it was authorized by complainant either expressly or by acquiescence.[92] If no defense is interposed the case is not triable by a jury.[93] On a decree against respondent he is chargeable with costs.[94] It has been held that a decree for complainant in a jactitation cause is conclusive of the fact that the parties were not married.[95]

X. RESTITUTION OF CONJUGAL RIGHTS.

A. Right of Action and Defenses. In Great Britain,[96] but not in the United States,[97] if one spouse wrongfully subtracts or withholds conjugal rights from the other by living separate and apart without just cause, he or she may be compelled at the suit of the latter to renew cohabitation. This compulsory resumption of cohabitation is known as restitution of conjugal rights.[98] The right which the courts interfere to protect in these cases is that of marital cohabitation, and consequently if the parties are living together the suit does not lie;[99] nor will restitution be decreed where the parties are living apart under a separation deed in which petitioner has covenanted not to seek to compel cohabitation.[1] As a rule nothing

(where it is said: "In that state of things, the proceeding assumes another shape, that of a suit of nullity, and of restitution of conjugal rights, on an inquiry into the fact and validity of such asserted marriage; and it will depend upon the result of that inquiry, whether the party has falsely pretended, or truly asserted such a marriage. In the former case, the Court would pronounce a sentence of nullity, and enjoin silence in future. In the latter, the Court would enjoin the accuser to return to matrimonial cohabitation, unless it could be shown, that some other reason was interposed to dissolve that obligation"); Walton *v.* Rider, 1 Lee Eccl. 16; Bodkin *v.* Case, Milw. 356.

Cohabitation and repute are insufficient to prove a marriage in such a case, it has been held. Bodkin *v.* Case, Milw. 356.

92. Thompson *v.* Rourke, [1893] P. 70, 62 L. J. P. D. & Adm. 46, 67 L. T. Rep. N. S. 788, 1 Reports 501 [*affirming* [1893] P. 11]; Hawke *v.* Corri, 2 Hagg. Cons. 280; Bodkin *v.* Case, Milw. 356.

93. Thompson *v.* Rourke, [1892] P. 244, 61 L. J. P. D. & Adm. 132, 67 L. T. Rep. N. S. 137.

94. Hawke *v.* Corri, 2 Hagg. Cons. 280.

95. Dacosta *v.* Villa Real, 2 Str. 961; Clews *v.* Bathurst, 2 Str. 960. See, however, Kingston's Case, 20 How. St. Tr. 537, 2 Smith Lead. Cas. 713.

96. See cases cited *infra*, note 99 *et seq.*

97. *Maryland.*— Jamison *v.* Jamison, 4 Md. Ch. 289.

Massachusetts.— Adams *v.* Adams, 100 Mass. 365, 1 Am. Rep. 111.

Michigan.— Baugh *v.* Baugh, 37 Mich. 59, 26 Am. Rep. 495; Briggs *v.* Briggs, 20 Mich. 34.

New York.—Cruger *v.* Douglas, 4 Edw. 433 [*affirmed* in 5 Barb. 225].

Ohio.— Westlake *v.* Westlake, 34 Ohio St. 621, 32 Am. Rep. 397.

South Carolina.— Rhame *v.* Rhame, 1 McCord Eq. 197, 16 Am. Dec. 597, *semble.*

98. Bouvier L. Dict. "Restitution of Conjugal Rights."

99. Weldon *v.* Weldon, 9 P. D. 52, 53 L. J. P. D. & Adm. 9, 32 Wkly. Rep. 231; Orme *v.* Orme, 2 Add. Eccl. 382, 2 Eng. Eccl. 354; Forster *v.* Forster, 1 Hagg. Cons. 144, 4 Eng. Eccl. 358.

1. Clark *v.* Clark, 10 P. D. 188, 49 J. P. 516, 54 L. J. P. D. & Adm. 57, 52 L. T. Rep. N. S. 234, 33 Wkly. Rep. 405; Marshall *v.* Marshall, 5 P. D. 19, 48 L. J. P. D. & Adm. 49, 39 L. T. Rep. N. S. 640, 27 Wkly. Rep. 399. *Contra*, Hunt *v.* Hunt, 32 L. J. P. & M. 168.

Injunction against suit for restitution.— Such a covenant is enforceable in equity by an injunction against proceedings in the divorce court for the restitution of conjugal rights. Besant *v.* Wood, 12 Ch. D. 605, 48 L. J. Ch. 497, 40 L. T. Rep. N. S. 445; Hunt *v.* Hunt, 4 De G. F. & J. 221, 8 Jur. N. S. 85, 31 L. J. Ch. 161, 5 L. T. Rep. N. S. 412, 778, 10 Wkly. Rep. 215, 65 Eng. Ch. 171, 45 Eng. Reprint 1168; Kitchin *v.* Kitchin, 19 L. T. Rep. N. S. 674.

In the absence of such a covenant the separation deed is no defense. Spering *v.* Spering, 32 L. J. P. & M. 116, 9 L. T. Rep. N. S. 24, 3 Swab. & Tr. 211, 11 Wkly. Rep. 810. And see Anquez *v.* Anquez, L. R. 1 P. & D. 76, 35 L. J. P. & M. 93, 14 L. T. Rep. N. S. 635, 14 Wkly. Rep. 972. See, however, Woodey *v.* Woodey, 31 L. T. Rep. N. S. 647, 23 Wkly. Rep. 386.

Estoppel to attack deed.— By a deed of separation between the husband, the wife, and a trustee, containing a recital that the husband and wife had agreed to live separate, the husband covenanted with the trustee to pay the wife £25 a year till their only child should attain twenty-one or die under that age or become chargeable to the husband, and to allow her to enjoy all her present and future property for her separate use, and the trustee covenanted with the husband to indemnify him against the debts of the wife, and that the wife should not take any proceedings to compel him to live with her. The annuity was paid until the child died, a minor. The wife after this presented her petition for the restitution of conjugal rights, and the husband pleaded the separation deed. It was held that the recital of the agreement to live separate, being contained in a deed to

can be pleaded in bar to a suit for restitution but what would entitle respondent to a judicial separation;[2] but it seems that in cases where misconduct of petitioner has led to desertion by respondent and has amounted to sufficient cause to disentitle petitioner to maintain a suit for judicial separation on the ground of desertion, the court is empowered to refuse restitution of conjugal rights, although such misconduct may not be sufficiently grave to enable respondent to obtain a judicial separation.[3] Any misconduct on the part of petitioner that would entitle respondent to a judicial separation is sufficient to bar a suit for restitution of conjugal rights.[4]

B. Jurisdiction, Proceedings, and Relief.[5] Originally the jurisdiction to decree restitution of conjugal rights resided in the ecclesiastical courts,[6] but in England this jurisdiction is now vested in the probate and divorce division of the high court of justice.[7] The courts of England cannot entertain a suit for restitu-

which the wife was a party, was evidence of a contract by her to allow her husband to live separate from her, and that after accepting benefits under the deed, she could not be heard to say that she had not contracted because the covenant not to sue was entered into only by the trustee and not by her. Clark *v.* Clark, 10 P. D. 188, 49 J. P. 516, 54 L. J. P. D. & Adm. 57, 52 L. T. Rep. N. S. 234, 33 Wkly. Rep. 405.

Effect of breach of covenant by respondent. — If the deed contains covenants on respondent's part and he has failed to fulfil them he cannot avail himself of petitioner's covenant not to sue for restitution of conjugal rights. Tress *v.* Tress, 12 P. D. 128, 51 J. P. 504, 56 L. J. P. D. & Adm. 93, 57 L. T. Rep. N. S. 501, 35 Wkly. Rep. 672. But it is not every breach of covenant in the deed which will prevent the party committing it from setting up the deed in answer to the suit. To have this effect the breach must be substantial, serious, and deliberate. Besant *v.* Wood, 12 Ch. D. 605, 48 L. J. Ch. 497, 40 L. T. Rep. N. S. 445; Kunski *v.* Kunski, 68 L. J. P. D. & Adm. 18.

2. Yeatman *v.* Yeatman, L. R. 1 P. & D. 489, 37 L. J. P. & M. 37, 18 L. T. Rep. N. S. 415, 16 Wkly. Rep. 734; Manning *v.* Manning, Ir. R. 7 Eq. 520; Burroughs *v.* Burroughs, 7 Jur. N. S. 610, 30 L. J. P. & M. 186, 4 L. T. Rep. N. S. 374, 2 Swab. & Tr. 303, 9 Wkly. Rep. 680; Rippingall *v.* Rippingall, 24 Wkly. Rep. 967. See, however, Molony *v.* Molony, 2 Add. Eccl. 249.

Antenuptial incontinence of the wife is no defense to her suit for restitution. Mason *v.* Mason, 61 L. T. Rep. N. S. 304.

Bad faith of petitioner. — Unless a respondent can establish a legal defense, petitioner is entitled to a decree, and the court has no discretion to inquire into his sincerity in bringing the suit. Scott *v.* Scott, 34 L. J. P. & M. 23, 13 L. T. Rep. N. S. 211, 4 Swab. & Tr. 113.

The fact that the marriage was procured by petitioner's false representation that respondent had seduced her is no defense. Green *v.* Green, 21 L. T. Rep. N. S. 401.

Insanity of petitioner see *infra*, note 3.

Misconduct short of matrimonial offense as affecting allowance to petitioner on respondent's refusal to cohabit see *infra*, note 30.

3. Oldroyd *v.* Oldroyd, [1896] P. 175, 65 L. J. P. D. & Adm. 113, 75 L. T. Rep. N. S. 281; Russell *v.* Russell, [1895] P. 315, 64 L. J. P. D. & Adm. 105, 73 L. T. Rep. N. S. 295, 44 Wkly. Rep. 213. And see Stace *v.* Stace, 37 L. J. P. & M. 51, 18 L. T. Rep. N. S. 740, 16 Wkly. Rep. 1176; Woodey *v.* Woodey, 31 L. T. Rep. N. S. 647, 23 Wkly. Rep. 386.

Drunkenness of petitioner, if such as to render cohabitation dangerous, is a defense. Beer *v.* Beer, 94 L. T. Rep. N. S. 704, 22 T. L. R. 338, 54 Wkly. Rep. 564. And see Ruxton *v.* Ruxton, L. R. 5 Ir. 455.

Insanity of petitioner is no defense unless it renders cohabitation unsafe. Radford *v.* Radford, 20 L. T. Rep. N. S. 279. *A fortiori* it is no defense if petitioner has recovered. Hayward *v.* Hayward, 1 Swab. & Tr. 81, 6 Wkly. Rep. 638.

Cruelty as a defense see *infra*, note 4.

4. See cases cited *infra*, this note.

Adultery by petitioner is a defense to a suit for restitution of conjugal rights (Green *v.* Green, 21 L. T. Rep. N. S. 401; Moore *v.* Moore, 3 Moore P. C. 84, 13 Eng. Reprint 39. And see Blackborne *v.* Blackborne, L. R. 1 P. & D. 563, 37 L. J. P. & M. 73, 18 L. T. Rep. N. S. 450), even though respondent also has been guilty of like misconduct (Hope *v.* Hope, 4 Jur. N. S. 515, 27 L. J. P. & M. 43, 1 Swab. & Tr. 94, 6 Wkly. Rep. 585. *Contra*, Seaver *v.* Seaver, 2 Swab. & Tr. 665). **Antenuptial incontinence as a defense** see *supra*, note 2.

Cruelty practised by petitioner is a defense to the suit for restitution. D'Arcy *v.* D'Arcy, L. R. 19 Ir. 369; Ruxton *v.* Ruxton, L. R. 5 Ir. 455.

Desertion of respondent by petitioner is, it seems, a defense to the suit for restitution. Anquez *v.* Anquez, L. R. 1 P. & M. 176, 35 L. J. P. & M. 93, 14 L. T. Rep. N. S. 635, 14 Wkly. Rep. 972; Meara *v.* Meara, 14 Wkly. Rep. 50. *Contra*, Manning *v.* Manning, Ir. R. 7 Eq. 520. And see Rippingall *v.* Rippingall, 24 Wkly. Rep. 967.

5. **Competency of parties as witnesses** see WITNESSES.

Right to open and close argument see TRIAL.

6. 3 Blackstone Comm. 94.

7. See cases cited *passim*, X.

tion of conjugal rights instituted against a husband who is not domiciled there;[8] nor could the supreme court of Bombay, on its ecclesiastical side, decree restitution of conjugal rights as between a husband and wife who were Parsees professing the religion of that sect.[9] A written demand for resumption of cohabitation is a condition precedent to the right to institute a suit for restitution.[10] The court will not dismiss a petition for restitution solely on the ground of delay in presenting the petition.[11] Substituted service of process may be allowed in a proper case,[12] and where a respondent is a domiciled Englishman, he may be served with any proceeding in such suit anywhere outside of the jurisdiction of the court.[13] A prayer for restitution cannot, in a suit for dissolution of marriage, be added to an answer alleging desertion.[14] Defenses should be pleaded with particularity,[15] and an answer denying that respondent withdrew from cohabitation

8. Firebrace *v.* Firebrace, 4 P. D. 63, 47 L. J. P. D. & Adm. 41, 39 L. T. Rep. N. S. 94, 26 Wkly. Rep. 617; Yelverton *v.* Yelverton, 6 Jur. N. S. 24, 29 L. J. P. & M. 34, 1 L. T. Rep. N. S. 194, 1 Swab. & Tr. 574, 8 Wkly. Rep. 134.

9. Ardaseer Cursetjee *v.* Perozeboye, 6 Moore Indian App. 348, 19 Eng. Reprint 130.

10. Matter of Tucker, [1897] P. 83, 66 L. J. P. D. & Adm. 65, 77 L. T. Rep. N. S. 140, 45 Wkly. Rep. 656, holding that before a citation is permitted to issue, the court must be satisfied by affidavit that a written demand for cohabitation and restitution of conjugal rights has previously been made by petitioner on the party to be cited.

The demand need not be made by petitioner himself; and therefore where it is made by petitioner's solicitor at petitioner's request it is sufficient. Field *v.* Field, 14 P. D. 26, 58 L. J. P. D. & Adm. 21, 59 L. T. Rep. N. S. 880, 37 Wkly. Rep. 134.

Sufficiency of demand.— The preliminary letter which must be sent by petitioner to respondent demanding a resumption of cohabitation before a suit for restitution can be brought must be of a friendly and conciliatory character. Field *v.* Field, 14 P. D. 26, 58 L. J. P. D. & Adm. 21, 59 L. T. Rep. N. S. 880, 51 Wkly. Rep. 134; Elliott *v.* Elliott, 85 L. T. Rep. N. S. 648. Therefore where there had been no previous friendly negotiations on the subject, a demand for the restitution of conjugal rights couched in the form of a formal lawyer's letter is not sufficient. Field *v.* Field, *supra*. The demand need not, however, be of an affectionate nature, and if the request is clear the court will not inquire too closely into the peremptory character or the precise words used. Elliott *v.* Elliott, *supra*. Accordingly where a wife, after eleven years' separation and before filing the petition, addressed a letter to her husband expressing a desire to return to cohabitation, and demanding restitution of conjugal rights, and threatening to commence legal proceedings in case of refusal, the letter was a sufficient demand. Smith *v.* Smith, 15 P. D. 47, 59 L. J. P. D. & Adm. 9, 62 L. T. Rep. N. S. 237, 38 Wkly. Rep. 276. And where, prior to the institution of any proceedings, friendly and conciliatory applications were made by a wife to her husband, and a letter was subsequently written by her solicitors asking him to take her back and threatening proceedings in case of his refusal, and that letter was followed by a formal and peremptory demand in writing by the wife upon his non-compliance with those requests for cohabitation, these demands were sufficient. Mason *v.* Mason, 61 L. T. Rep. N. S. 304.

Mode of serving demand.— If the guilty spouse's whereabouts are unknown and cannot be ascertained, the court may authorize the demand to be served on his solicitor. Matter of Tucker, [1897] P. 83, 66 L. J. P. D. & Adm. 65, 77 L. T. Rep. N. S. 140, 45 Wkly. Rep. 656 (where it appeared that the husband had left the country); Macarthur *v.* Macarthur, 58 L. J. P. D. & Adm. 70, 61 L. T. Rep. N. S. 308; Waters *v.* Waters, 34 L. T. Rep. N. S. 33, 24 Wkly. Rep. 190. And where there was reason to believe that the husband was keeping out of the way to avoid a suit for restitution, the court allowed the demand to be served on his father, coupled with the requirement that it should be advertised. Matter of Sheehy, 1 P. D. 423, 34 L. T. Rep. N. S. 367.

11. Beauclerk *v.* Beauclerk, 59 J. P. 8, 71 L. T. Rep. N. S. 376, 6 Reports 657.

12. Waters *v.* Waters, 34 L. T. Rep. N. S. 33, 24 Wkly. Rep. 190, where service was allowed to be made on respondent's solicitor. *Compare* Macarthur *v.* Macarthur, 58 L. J. P. D. & Adm. 70, 61 L. T. Rep. N. S. 308.

13. Bateman *v.* Bateman, [1901] P. 136, 70 L. J. P. D. & Adm. 29, 84 L. T. Rep. N. S. 64, 331; Dicks *v.* Dicks, [1899] P. 275, 68 L. J. P. D. & Adm. 118, 81 L. T. Rep. N. S. 462. *Compare* Pearson *v.* Pearson, 33 L. J. P. & M. 156, where at the time of pronouncing a decree of restitution respondent was abroad, and the court directed that the decree should be served on his return to England.

The rule was formerly otherwise. Chichester *v.* Chichester, 10 P. D. 186, 34 Wkly. Rep. 65; Firebrace *v.* Firebrace, 4 P. D. 63, 47 L. J. P. D. & Adm. 41, 39 L. T. Rep. N. S. 94, 26 Wkly. Rep. 617.

14. Drysdale *v.* Drysdale, L. R. 1 P. & D. 365, 36 L. J. P. M. 39, 15 L. T. Rep. N. S. 512.

15. D'Arcy *v.* D'Arcy, L. R. 19 Ir. 369 (defense of cruelty); Green *v.* Green, 21 L. T. Rep. N. S. 401 (defense of adultery).

[X, B]

without just cause should state the cause of withdrawal.[16] If a separation deed containing a covenant not to sue for restitution is relied on it must be alleged as a defense.[17] The court cannot, on demurrer, reject an answer which contains only facts which apparently do not constitute a case of legal cruelty;[18] and it is the practice of the court not to strike out a pleading where a reasonable doubt exists as to the legal effect of the allegation therein contained and where the legal effect could properly be discussed after all the facts had been elicited at the trial.[19] The pleadings may be amended as in other cases.[20] Where the husband in his answer states his willingness to take his wife home, the court will not give directions as to the mode of trial, but will order the matter to be adjourned into chambers, and require the husband to file an affidavit in snpport of the answer.[21] The court has power to hear suits for restitution *in camera*.[22] If the cause is heard out of its turn without notice to respondent, a default decree for restitution will be set aside.[23] When the wife pleads the impotence of her husband, the court will, on her application, appoint medical inspectors to examine her.[24] The court has no jurisdiction to make a decree until the marriage has been formally proved, although respondent may have filed an answer not taking issue on the marriage.[25] A decree will not be granted in an undefended suit on mere proof of the marriage;[26] but where no answer is filed the court may allow the petition to be proved by affidavit.[27] The decree of restitution cannot be enforced by attachment and imprisonment of respondent;[28] but if respondent whether husband or wife, fails to comply with the decree after the expiration of a reasonable time after service thereof,[29] the court may make a settlement or allow

16. Ward *v.* Ward, 32 L. J. P. & M. 120, holding, however, that the objection is waived by filing a replication.

17. Marshall *v.* Marshall, 5 P. D. 19, 48 L. J. P. D. & Adm. 49, 39 L. T. Rep. N. S. 640, 27 Wkly. Rep. 399, holding that the deed affords no ground for summary dismissal.

If not pleaded, it cannot be proved. Bateman *v.* Bateman, [1901] P. 136, 70 L. J. P. D. & Adm. 29, 84 L. T. Rep. N. S. 64 [*following* Tress *v.* Tress, 12 P. D. 128, 51 J. P. 504, 56 L. J. P. D. & Adm. 93, 57 L. T. Rep. N. S. 501, 35 Wkly. Rep. 672]; Gleig *v.* Gleig, 22 T. L. R. 716. Nevertheless, if a decree for restitution is made the basis of subsequent proceedings, it is open to the court to go into the whole matter. Bateman *v.* Bateman, *supra*.

18. Stace *v.* Stace, 37 L. J. P. & M. 51, 18 L. T. Rep. N. S. 740, 16 Wkly. Rep. 1176.

19. Russell *v.* Russell, 71 L. T. Rep. N. S. 268. And see D'Arcy *v.* D'Arcy, L. R. 10 Ir. 369; Woodey *v.* Woodey, 31 L. T. Rep. N. S. 647, 23 Wkly. Rep. 386. *Compare* Radford *v.* Radford, 20 L. T. Rep. N. S. 279.

20. Manning *v.* Manning, Ir. R. 7 Eq. 365.

21. Crothers *v.* Crothers, L. R. 1 P. & D. 568, 19 L. T. Rep. N. S. 661.

22. A. *v.* A., L. R. 3 P. & D. 230, 44 L. J. P. & M. 15, 31 L. T. Rep. N. S. 801, 23 Wkly. Rep. 386.

23. Keane *v.* Keane, 41 L. J. P. & M. 41, 25 L. T. Rep. N. S. 857, 20 Wkly. Rep. 304, where respondent appeared but did not file an answer, and after due notice the cause was set down for hearing, and subsequently on motion of petitioner the court ordered the cause to be heard out of its turn and a decree was made, respondent having received no notice of the motion or the order, and the court ordered the cause to be reheard, giving respondent, who had a defense on the merits, leave to file an answer.

24. C. *v.* C., 32 L. J. P. & M. 31.

25. Scott *v.* Scott, 34 L. J. P. & M. 23, 12 L. T. Rep. N. S. 211, 4 Swab. & Tr. 113.

26. Pearson *v.* Pearson, 33 L. J. P. & M. 156, holding that evidence of the other facts of the case must be given.

27. Ford *v.* Ford, 36 L. J. P. & M. 86, 15 L. T. Rep. N. S. 595.

28. Reg. *v.* Jackson, [1891] 1 Q. B. 671, 55 J. P. 246, 60 L. J. Q. B. 346, 64 L. T. Rep. N. S. 679, 39 Wkly. Rep. 407.

Formerly the rule was otherwise. Weldon *v.* Weldon, 9 P. D. 52, 53 L. J. P. D. & Adm. 9, 32 Wkly. Rep. 231; Morris *v.* Freeman, 3 P. D. 65, 47 L. J. P. D. & Adm. 79, 39 L. T. Rep. N. S. 125, 27 Wkly. Rep. 62; Milne *v.* Milne, L. R. 2 P. & D. 202, 40 L. J. P. & M. 13, 23 L. T. Rep. N. S. 877, 19 Wkly. Rep. 423; Miller *v.* Miller, L. R. 2 P. & D. 13, 39 L. J. P. & M. 34, 21 L. T. Rep. N. S. 471, 18 Wkly. Rep. 152; Weldon *v.* Weldon, 49 J. P. 517, 54 L. J. P. D. & Adm. 60, 52 L. T. Rep. N. S. 233, 33 Wkly. Rep. 427; Alexander *v.* Alexander, 30 L. J. P. & M. 173, 5 L. T. Rep. N. S. 138, 2 Swab. & Tr. 385, 9 Wkly. Rep. 620; Cherry *v.* Cherry, 29 L. J. P. & M. 141.

29. Bateman *v.* Bateman, [1901] P. 136, 70 L. J. P. D. & Adm. 27, 84 L. T. Rep. N. S. 64, 331, holding that a respondent who is served with a decree for restitution while abroad should be allowed sufficient time to return to England and comply with the order, if he desires to do so; and if petitioner takes further proceedings in consequence of respondent's non-compliance with the decree, he must satisfy the court that respondent has been given sufficient time to comply with it. *Com-*

ance out of his or her estate to be paid to petitioner;[30] and non-compliance with a decree for restitution may be treated as desertion and a judicial separation decreed.[31] By statute the court has power to make an order as to the custody of children pending a suit for restitution.[32] A judicial separation may be granted in a suit for restitution upon an answer setting up legal grounds therefor and proof thereof.[33] In a suit for restitution the court will decline to make the usual order for the wife's costs where the grounds of the litigation are altogether unreasonable.[34] Costs may be allowed against a respondent wife who has a separate estate.[35] On dismissing a petition to obtain a settlement out of the property of a respondent who has failed to comply with a decree of restitution the court may in its discretion refuse to award costs.[36]

pare Pearson *v.* Pearson, 33 L. J. P. & M. 156.

On the hearing of the petition for restitution the court will not consider any question as to the amount of allowance respondent should be ordered to pay to his wife in the event of a decree of restitution being pronounced and of his refusing to comply therewith. Mason *v.* Mason, 61 L. T. Rep. N. S. 304.

Service of decree see cases cited *supra*, note 13.

30. Swift *v.* Swift, 15 P. D. 118, 59 L. J. P. D. & Adm. 61, 62 L. T. Rep. N. S. 669 (where a wife who had refused to obey the decree was in the enjoyment of a separate income, part of which was payable under the trusts of the marriage settlement, and the court ordered her to settle a permanent maintenance on her husband); Theobald *v.* Theobald, 15 P. D. 26, 59 L. J. P. D. & Adm. 21, 62 L. T. Rep. N. S. 187 (where the husband failed to comply with the decree, and the court ordered him to secure to the wife for their joint lives a "periodical payment" equal to one third of their joint incomes).

However, the court has no power to order a settlement out of property settled to the separate use of a wife without power of anticipation. Michell *v.* Michell, [1891] P. 208, 60 L. J. P. 46, 64 L. T. Rep. N. S. 607, 39 Wkly. Rep. 680.

On an application for a settlement or allowance petitioner may tender evidence as to the conduct of the other party during cohabitation; and the husband's power of earning money must also be taken into account. Swift *v.* Swift, [1891] P. 129, 60 L. J. P. D. & Adm. 14, 63 L. T. Rep. N. S. 711. In estimating the amount of the husband's average income the court refused to allow a deduction in respect of losses sustained by him during the previous three years in a branch of his business which had been closed. Theobald *v.* Theobald, 15 P. D. 26, 59 L. J. P. D. & Adm. 21, 62 L. T. Rep. N. S. 187.

Restraining removal of property.— The court cannot, on an *ex parte* application, restrain a respondent who is in contempt from removing property out of the country, the object of the application being to put pressure on respondent in respect of the decree which had been disobeyed and which could not be enforced owing to respondent's being outside the court's jurisdiction. Wallis *v.* Wallis, 65 L. T. Rep. N. S. 796.

31. Harding *v.* Harding, 11 P. D. 111, 55 L. J. P. D. & Adm. 59, 56 L. T. Rep. N. S. 919. And see Bigwood *v.* Bigwood, 13 P. D. 89, 57 L. J. P. D. & Adm. 80, 58 L. T. Rep. N. S. 642, 36 Wkly. Rep. 928. *Compare* Russell *v.* Russell, [1895] P. 315, 64 L. J. P. D. & Adm. 105, 73 L. T. Rep. N. S. 295, 44 Wkly. Rep. 213.

32. Paine *v.* Paine, 50 Wkly. Rep. 382, holding also that in order to save expense the court will make such an order at the time of pronouncing a decree of restitution.

The rule was formerly otherwise. Chambers *v.* Chambers, 39 L. J. P. & M. 56, 22 L. T. Rep. N. S. 727, 18 Wkly. Rep. 528.

Enforcement of order.—A husband obtained a decree for restitution which was not complied with, and the court afterward made an order giving petitioner the custody of the only child of the marriage. A copy of the order for custody was left at the house where respondent was residing, but respondent had not given up the child to petitioner. The court, being satisfied that the order as to the custody of the child had come to the knowledge of respondent, ordered a writ of sequestration to issue against her for non-compliance with the order, without a previous writ of attachment, and ordered respondent to pay the costs of the motion. Allen *v.* Allen, 10 P. D. 187, 54 L. J. P. D. & Adm. 77, 33 Wkly. Rep. 826. See also Hyde *v.* Hyde, 13 P. D. 166, 57 L. J. P. D. & Adm. 89, 59 L. T. Rep. N. S. 529, 36 Wkly. Rep. 708.

33. Meara *v.* Meara, 13 Wkly. Rep. 50. *Compare* Blackborne *v.* Blackborne, L. R. 1 P. & D. 563, 37 L. J. P. & M. 73, 18 L. T. Rep. N. S. 450; Burroughs *v.* Burroughs, 8 Jur. N. S. 624, 31 L. J. P. & M. 124, 5 L. T. Rep. N. S. 771, 2 Swab. & Tr. 544.

34. Beer *v.* Beer, 94 L. T. Rep. N. S. 704, 22 T. L. R. 338, 54 Wkly. Rep. 564.

35. Morris *v.* Freeman, 3 P. D. 65, 47 L. J. P. D. & Adm. 79, 39 L. T. Rep. N. S. 125, 27 Wkly. Rep. 62; Milne *v.* Milne, L. R. 2 P. & D. 202, 40 L. J. P. & M. 13, 23 L. T. Rep. N. S. 877, 19 Wkly. Rep. 423; Miller *v.* Miller, L. R. 2 P. & D. 54, 39 L. J. P. & M. 38, 22 L. T. Rep. N. S. 418, 18 Wkly. Rep. 585; Miller *v.* Miller, L. R. 2 P. & D. 13, 39 L. J. P. & M. 4, 21 L. T. Rep. N. S. 471, 18 Wkly. Rep. 152. And see Allen *v.* Allen, 10 P. D. 187, 54 L. J. P. D. & Adm. 77, 33 Wkly. Rep. 826.

36. Michell *v.* Michell, [1891] P. 305.

MARRIAGEABLE WOMAN. A woman able to bear children to her husband.[1] (See, generally, MARRIAGE.)

MARRIAGE ARTICLES. See HUSBAND AND WIFE.

MARRIAGE-BROKAGE CONTRACT. An agreement for the payment of money or other consideration for the procurement of a marriage.[2]

MARRIAGE BROKERAGE. The act by which a person interferes, for a consideration to be received by him, between a man and a woman, for the purpose of promoting a marriage between them.[3]

MARRIAGE INSURANCE. A so-called[4] contract of insurance which is in effect a contract in restraint of marriage,[5] and therefore void;[6] a speculation in marriage futures.[7] (See, generally, INSURANCE.)

MARRIAGE PORTION. See DESCENT AND DISTRIBUTION; HUSBAND AND WIFE.

MARRIAGE SETTLEMENT. See HUSBAND AND WIFE.

MARRIED WOMAN. See HUSBAND AND WIFE.

MARSHAL. As a noun, an officer of the peace, appointed by authority of a city or borough, who holds himself in readiness to answer such calls as fall within the general duties of a constable or sheriff.[8] As a verb, in general usage, to arrange or rank in order; and in the sense in which it is used in courts of equity, so to arrange different funds under administration that all parties having equities therein may receive their due proportions.[9] (See DISTRICT OF COLUMBIA; MARSHALING ASSETS AND SECURITIES; MUNICIPAL CORPORATIONS; SHERIFFS AND CONSTABLES; UNITED STATES MARSHALS.)

1. Baker *v.* Baker, 13 Cal. 87, 103.

2. White *v.* Equitable Nuptial Ben. Union, 76 Ala. 251, 258, 52 Am. Rep. 325. See also CONTRACTS, 9 Cyc. 518.

3. Bouvier L. Dict. [*quoted* in Hellen *v.* Anderson, 83 Ill. App. 506, 509]. See also CONTRACTS, 9 Cyc. 518.

4. **Not properly an insurance contract** see INSURANCE, 22 Cyc. 1384 note 2.

5. Joyce Ins. § 2513. See also James *v.* Jellison, 94 Ind. 292, 48 Am. Rep. 151; Chalfant *v.* Payton, 91 Ind. 202, 205, 46 Am. Rep. 586 (the "Immediate Marriage Benefit Association of Dunkirk"); State *v.* Towle, 80 Me. 287, 288, 14 Atl. 195 ("Single Men's Endowment Association").

6. White *v.* Equitable Nuptial Ben. Union, 76 Ala. 251, 52 Am. Rep. 325 (where, under its charter, defendant, a private corporation, was organized to unite acceptable young people in such a way as to endow each with a sum of money, not to exceed six thousand dollars, to be paid at marriage or endowment, according to the regulations adopted); Chalfant *v.* Payton, 91 Ind. 202, 46 Am. Rep. 586 (where the contract was to pay money on condition that the payee should not marry within two years, and that if he should, then to pay a certain sum per day during the time he remained unmarried). See also CONTRACTS, 9 Cyc. 518 text and note 8.

Contract to carry marriage benefit insurance.— A contract to pay a certain sum of money to A on his marriage with B, on condition that A give the promisor the exclusive right to carry marriage benefit insurance on A and B, is void. James *v.* Jellison, 94 Ind. 292, 48 Am. Rep. 151.

7. White *v.* Equitable Nuptial Ben. Union, 76 Ala. 251, 258, 52 Am. Rep. 325.

8. Anderson L. Dict. [*quoted* in Atty.-Gen. *v.* Connors, 27 Fla. 329, 342, 9 So. 7].

9. Quinnipiac Brewing Co. *v.* Fitzgibbons, 73 Conn. 191, 196, 47 Atl. 128.

MARSHALING ASSETS AND SECURITIES

By Ernest G. Chilton *

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Admiralty, see Admiralty.

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Subjection of Property in Inverse Order of Alienation:

To Judgment Lien, see Executions; Judgments.

To Mortgage Lien, see Mortgages.

To Vendor's Lien, see Vendor and Purchaser.

I. NATURE OF DOCTRINE.

The doctrine of marshaling assets and securities is that where a creditor has a lien on two funds in the hands of the same debtor, and another creditor has a lien on one of them only, equity, on the application of the latter, will compel the former

* Author of "Livery-Stable Keepers," 25 Cyc. 1504; and joint author of "Licenses," 25 Cyc. 593.

to make his debt out of that fund to which the latter cannot resort.[1] Marshaling

1. *Alabama.*—Orr *v.* Blackwell, 93 Ala. 212, 8 So. 413; Gusdorf *v.* Ikelheimer, 75 Ala. 148; Henderson *v.* Alabama Gold L. Ins. Co., 72 Ala. 32; Turner *v.* Flinn, 67 Ala. 529; Bryant *v.* Stephens, 58 Ala. 636; Gordon *v.* Bell, 50 Ala. 213; Relfe *v.* Bibb, 43 Ala. 519; Chapman *v.* Hamilton, 19 Ala. 121; Nelson *v.* Dunn, 15 Ala. 501.

Arkansas.— Bagley *v.* Weaver, 72 Ark. 29, 77 S. W. 903; Buck *v.* Bransford, 58 Ark. 289, 24 S. W. 103; Howell *v.* Duke, 40 Ark. 102; Terry *v.* Rosell, 32 Ark. 478; Marr *v.* Lewis, 31 Ark. 203, 25 Am. Rep. 553; Hannah *v.* Carrington, 18 Ark. 85.

Connecticut.— Ayres *v.* Husted, 15 Conn. 504.

Florida.— Ritch *v.* Eichelberger, 13 Fla. 169.

Georgia.— McLellan *v.* Wallace, Dudley 127.

Illinois.— Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Latham *v.* Sumner, 89 Ill. 233, 31 Am. Rep. 79; Brown *v.* Cozard, 68 Ill. 178; Rogers *v.* Meyers, 68 Ill. 92; Iglehart *v.* Crane, 42 Ill. 261; Marshall *v.* Moore, 36 Ill. 321; Hurd *v.* Eaton, 28 Ill. 122; Doyle *v.* Murphy, 22 Ill. 502, 74 Am. Dec. 165; Wise *v.* Shepherd, 13 Ill. 41; Heidelbach *v.* Fenton, 79 Ill. App. 357.

Indiana.— Rownd *v.* State, 152 Ind. 39, 51 N. E. 914, 52 N. E. 395; Bank of Commerce *v.* Evansville First Nat. Bank, 150 Ind. 588, 50 N. E. 566; Trentman *v.* Eldridge, 98 Ind. 525; Hahn *v.* Behrman, 73 Ind. 120; Applegate *v.* Mason, 13 Ind. 75.

Indian Territory.— Webb *v.* Hunt, 2 Indian Terr. 612, 53 S. W. 437.

Iowa.— *In re* Hobson, 81 Iowa 392, 46 N. W. 1095, 11 L. R. A. 255; Smith *v.* Grimes, 43 Iowa 356; Miller *v.* Clarke, 37 Iowa 325; Wolf *v.* Smith, 36 Iowa 454; Dickson *v.* Chorn, 6 Iowa 19, 71 Am. Dec. 382.

Kansas.— Equitable Mortg. Co. *v.* Lowe, 53 Kan. 39, 35 Pac. 829; Colby *v.* Crocker, 17 Kan. 527.

Kentucky.— Swigert *v.* Commonwealth Bank, 17 B. Mon. 268; Commonwealth Bank *v.* Vance, 4 Litt. 168; Madison First Nat. Bank *v.* Schussler, (1886) 2 S. W. 145; Brown *v.* Lapp, 89 S. W. 304, 28 Ky. L. Rep. 409; Jones *v.* Dulaney, 86 S. W. 547, 977, 27 Ky. L. Rep. 702, 810; Griffin *v.* Gingell, 79 S. W. 284, 25 Ky. L. Rep. 2031; Columbia Finance, etc., Co. *v.* First Nat. Bank, 76 S. W. 156, 25 Ky. L. Rep. 561; Goepper *v.* Phœnix Brewing Co., 74 S. W. 726, 25 Ky. L. Rep. 84; Smith *v.* May, 70 S. W. 199, 24 Ky. L. Rep. 873; Schupp *v.* Thomasson, 9 Ky. L. Rep. 360.

Louisiana.— Willey *v.* St. Charles Hotel Co., 52 La. Ann. 1581, 28 So. 182; Marx's Succession, 27 La. Ann. 99; O'Laughlin's Succession, 18 La. Ann. 142.

Maryland.— Johns *v.* Reardon, 11 Md. 465; Watson *v.* Bane, 7 Md. 117; Cornish *v.* Willson, 6 Gill 299; U. S. Insurance Co *v.* Shriver, 3 Md. Ch. 381; Winder *v.* Diffenderffer, 2 Bland 166.

Michigan.— Slater *v.* Breese, 36 Mich. 77; Trowbridge *v.* Harleston, Walk. Ch. 185.

Minnesota.— Aldrich *v.* Press Printing Co., 9 Minn. 133, 86 Am. Dec. 84.

Mississippi.— Davis *v.* Walker, 51 Miss. 659; Keaton *v.* Miller, 38 Miss. 630; Terry *v.* Woods, 6 Sm. & M. 139, 45 Am. Dec. 274.

Missouri.— Dunlap *v.* Dumseth, 81 Mo. App. 17; Paddock-Hawley Iron Co. *v.* McDonald, 61 Mo. App. 559; Sternberg *v.* Valentine, 6 Mo. App. 176.

Nebraska.— Anthes *v.* Schroeder, 68 Nebr. 370, 94 N. W. 611; Citizens' State Bank *v.* Iddings, 60 Nebr. 709, 84 N. W. 78; Norfolk State Bank *v.* Schwenk, 51 Nebr. 146, 70 N. W. 970; Lee *v.* Gregory, 12 Nebr. 282, 11 N. W. 297; Davenport Plow Co. *v.* Mewis, 10 Nebr. 317, 4 N. W. 1059.

New Hampshire.—Kidder *v.* Page, 48 N. H. 380.

New Jersey.— Harron *v.* Du Bois, 64 N. J. Eq. 657, 54 Atl. 857; Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203; Reilly *v.* Mayer, 12 N. J. Eq. 55; McKelway *v.* New England Mfg. Co., 9 N. J. Eq. 371; State Bank *v.* New-Brunswick Bank, 3 N. J. Eq. 266.

New York.— Ingalls *v.* Morgan, 10 N. Y. 178; Clarke *v.* Calvert, 72 N. Y. App. Div. 630, 78 N. Y. Suppl. 17; Herriman *v.* Skillman, 33 Barb. 378; Mechanics' Bank *v.* Edwards, 1 Barb. 271, 2 Barb. 545; Geller *v.* Hoyt, 7 How. Pr. 265; Reynolds *v.* Tooker, 18 Wend. 591; Evertson *v.* Booth, 19 Johns. 486; De Peyster *v.* Hildreth, 2 Barb. Ch. 109; Dorr *v.* Shaw, 4 Johns. Ch. 17; Cheesebrough *v.* Millard, 1 Johns. Ch. 409, 7 Am. Dec. 494; White *v.* Gardiner, 4 Redf. Surr. 71.

North Carolina.— Graves *v.* Currie, 132 N. C. 307, 43 S. E. 897; Pope *v.* Harris, 94 N. C. 62; Harris *v.* Ross, 57 N. C. 413.

North Dakota.— Merchants' State Bank *v.* Tufts, (1905) 103 N. W. 760.

Ohio.— Mason *v.* Hull, 55 Ohio St. 256, 45 N. E. 632; Fassett *v.* Traber, 20 Ohio 540; Muskingum Bank *v.* Carpenter, 7 Ohio 21, 28 Am. Dec. 616; Lodwick *v.* Johnson, Wright 498; Jennings *v.* Ohio Nat. Bank, 17 Ohio Cir. Ct. 654, 8 Ohio Cir. Dec. 657; *In re* Cincinnati Consumers' Brewing Co., 9 Ohio S. & C. Pl. Dec. 519, 6 Ohio N. P. 472; Atlas Nat. Bank *v.* Rheinstrom, etc., Co., 6 Ohio S. & C. Pl. Dec. 215, 4 Ohio N. P. 15.

Pennsylvania.— Hallman *v.* Hallman, 124 Pa. St. 347, 16 Atl. 871; Pittman's Appeal, 48 Pa. St. 315; Lloyd *v.* Galbraith, 32 Pa. St. 103; Bruner's Appeal, 7 Watts & S. 269; Ramsey's Appeal, 2 Watts 228, 27 Am. Dec. 301; Ziegler *v.* Long, 2 Watts 205; Peterson *v.* Russell, 9 Pa. Super. Ct. 332; Clausen *v.* Building Assoc., 6 Pa. Dist. 234; *In re* U. S. Bank, 2 Pars. Eq. Cas. 110.

South Carolina.— Bailey *v.* Wood, 71 S. C. 36, 50 S. E. 631; Messervey *v.* Barelli, 2 Hill Eq. 567.

Tennessee.— White *v.* Fulghum, 87 Tenn. 281, 10 S. W. 501; Henshaw *v.* Wells, 9

is not founded on contract,[2] nor is it in any sense a vested right or lien,[3] but rests upon equitable principles only and the benevolence of the court.[4] This doctrine is applied as well in the lifetime as after the death of the debtor.[5]

II. ENFORCEMENT.

A. Basis of Proceeding. In marshaling assets or securities, the fact that the course is necessary for the satisfaction of the claims or liens of both creditors

Humphr. 568; White *v.* Dougherty, Mart. & Y. 309, 17 Am. Dec. 802.

Texas.— Ohio Cultivator Co. *v.* People's Nat. Bank, 22 Tex. Civ. App. 643, 55 S. W. 765; Walhoefer *v.* Hobgood, 19 Tex. Civ. App. 629, 48 S. W. 32, 18 Tex. Civ. App. 291, 44 S. W. 566; Wahrmund *v.* Edgewood Distilling Co., (Civ. App. 1895) 32 S. W. 227, where the paramount creditor held a landlord's lien for rent.

Vermont.—Edgerton *v.* Martin, 35 Vt. 116; Warren *v.* Warren, 30 Vt. 530.

Virginia.— Nelson *v.* Turner, 97 Va. 54, 33 S. E. 390.

West Virginia.— Hudkins *v.* Ward, 30 W. Va. 204, 3 S. E. 600, 8 Am. St. Rep. 22; Kanawha Valley Bank *v.* Wilson, 25 W. Va. 242; Wiley *v.* Mahood, 10 W. Va. 206.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909; White *v.* Polleys, 20 Wis. 503, 91 Am. Dec. 432.

United States.— Rock Springs First Nat. Bank *v.* Roder, 114 Fed. 451, 52 C. C. A. 253; Covington City Nat. Bank *v.* Commercial Bank, 65 Fed. 547; Merchants' Nat. Bank *v.* McLaughlin, 2 Fed. 128, 1 McCrary 258; The Edith, 8 Fed. Cas. No. 4,282, 5 Ben. 432; Findley *v.* U. S. Bank, 9 Fed. Cas. No. 4,791, 2 McLean 44; McLean *v.* La Fayette Bank, 16 Fed. Cas. No. 8,888, 3 McLean 430; The Romp, 20 Fed. Cas. No. 12,030, Olcott 196; Russell *v.* Howard, 21 Fed. Cas. No. 12,156, 2 McLean 489; *In re* Sauthoff, 21 Fed. Cas. No. 12,379, 7 Biss. 167, 3 N. Y. Wkly. Dig. 96; U. S. *v.* Duncan, 25 Fed. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523.

England.— Dolphin *v.* Aylward, L. R. 4 H. L. 486; Lanoy *v.* Athol, 2 Atk. 444, 26 Eng. Reprint 668; Mills *v.* Eden, 10 Mod. 487; *Ex p.* Kendall, 1 Rose 71, 17 Ves. Jr. 514, 11 Rev. Rep. 122, 34 Eng. Reprint 199; Sagitary *v.* Hyde, 1 Vern. Ch. 455, 23 Eng. Reprint 581; Aldrich *v.* Cooper, 8 Ves. Jr. 382, 2 White & T. Lead. Cas. Eq. 82, 7 Rev. Rep. 86, 32 Eng. Reprint 402.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 1.

In California the rule stated in the text is substantially prescribed by statute. Kent *v.* Williams, 114 Cal. 537, 46 Pac. 462.

In Georgia the rule, as prescribed by statute, is that a creditor having a lien on two funds of the debtor "equally accessible" to him will be compelled to pursue that fund upon which other creditors have no lien. Denham *v.* Williams, 39 Ga. 312.

2. *Indian Territory.*— Webb *v.* Hunt, 2 Indian Terr. 612, 53 S. W. 437.

New York.— Cheesebrough *v.* Millard, 1 Johns. Ch. 409, 7 Am. Dec. 494.

North Carolina.— Butler *v.* Stainback, 87 N. C. 216.

Tennessee.— Gilliam *v.* McCormack, 85 Tenn. 597, 611, 4 S. W. 521, where it was said that "marshaling is a pure equity, and does not at all rest upon contract."

Wisconsin.— Smith *v.* Wait, 39 Wis. 512.

3. Williams *v.* Washington, 16 N. C. 137; Gilliam *v.* McCormack, 85 Tenn. 597, 4 S. W. 521 (holding further that the right to marshal does not become a vested right until proper steps are taken to have it enforced and that until this is done it is subject to defeat by subsequent liens); Smith *v.* Wait, 39 Wis. 512. See also Orangeburg Bank *v.* Kohn, 52 S. C. 120, 29 S. E. 625.

4. *Alabama.*— Robinson *v.* Lehman, 72 Ala. 401.

Indian Territory.— Webb *v.* Hunt, 2 Indian Terr. 612, 53 S. W. 437.

Minnesota.— Miller *v.* McCarty, 47 Minn. 321, 50 N. W. 235, 28 Am. St. Rep. 375.

New York.— Cheesebrough *v.* Millard, 1 Johns. Ch. 409, 7 Am. Dec. 494.

North Carolina.— Butler *v.* Stainback, 87 N. C. 216.

Wisconsin.— Smith *v.* Wait, 39 Wis. 512, 514, where it is said: "In other words, the right rested in the sound judicial discretion of the chancellor, and was not an absolute rule of law."

The principle upon which this arrangement is made is not deduced from that which may properly be considered as the contract between debtor and creditor, but is founded on a natural and moral equity that it shall not depend upon the will or caprice of one creditor who has within his reach a double fund to disappoint another creditor of his satisfaction. Ross *v.* Duggan, 5 Colo. 85; Bank of Commerce *v.* Evansville First Nat. Bank, 150 Ind. 588, 50 N. E. 566; Post *v.* Mackall, 3 Bland (Md.) 486; Keaton *v.* Miller, 38 Miss. 630; Sternberger *v.* Sussman, (N. J. Ch. 1905) 60 Atl. 195; Williams *v.* Washington, 16 N. C. 137; Green *v.* Ramage, 18 Ohio 428, 51 Am. Dec. 458; Wolf *v.* Ferguson, 129 Pa. St. 272, 18 Atl. 139; Hastings' Case, 10 Watts (Pa.) 303; Ramsey's Appeal, 2 Watts (Pa.) 228, 27 Am. Dec. 301; Solon *v.* Gunther, 8 Pa. Super. Ct. 319; Gilliam *v.* McCormack, 85 Tenn. 597, 4 S. W. 521; Trimmer *v.* Bayne, 9 Ves. Jr. 209, 32 Eng. Reprint 582; Aldrich *v.* Cooper, 8 Ves. Jr. 382, 2 White & T. Lead. Cas. Eq. 82, 32 Eng. Reprint 402.

5. Post *v.* Mackall, 3 Bland (Md.) 486; Aguilar *v.* Aguilar, 5 Madd. 414, 56 Eng. Reprint 953; Lacam *v.* Mertins, 1 Ves. 312, 27 Eng. Reprint 1051.

constitutes the main ground for equitable interference.[6] Accordingly equity will not interfere where the party invoking the doctrine has a complete remedy at law.[7]

B. Not Enforced to Defeat Equities — 1. Of Paramount Creditor. The doctrine of marshaling is never enforced where it will operate to suspend or put in peril the claim of the paramount creditor,[8] or where the fund to be resorted to is one which may involve such creditor in litigation.[9] Thus a creditor who has a lien on two funds, one within and the other beyond the jurisdiction of the court, cannot be compelled to go first into the other jurisdiction and pursue his remedy there,[10] except in rare cases in which it is clear that the creditor having the two funds will sustain no loss in delay or additional expense if required to resort first

Application to debts of decedents see Executors and Administrators, 18 Cyc. 696.

6. Franklin *v.* Warden, 9 Minn. 124; Staniels *v.* Whitcher, 73 N. H. 152, 59 Atl. 934; *In re* Cincinnati Consumers' Brewing Co., 9 Ohio S. & C. Pl. 519, 6 Ohio N. P. 472; Hudkins *v.* Ward, 30 W. Va. 204, 3 S. E. 600, 8 Am. St. Rep. 22. See also U. S. Insurance Co. *v.* Shriver, 3 Md. Ch. 381.

7. Kirksey *v.* Stewart, 38 Ala. 692 (where complainant's alleged claim constituted a valid title to the property at law); Moss *v.* Adams, 32 Ark. 562.

8. *Alabama.*— Coker *v.* Shropshire, 59 Ala. 542.

Connecticut.— Butler *v.* Elliott, 15 Conn. 187.

Florida.— Ritch *v.* Eichelberger, 13 Fla. 169.

Georgia.— Behn *v.* Young, 21 Ga. 207.

Illinois.— Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Palmer *v.* Snell, 111 Ill. 161; Sweet *v.* Redhead, 76 Ill. 374; Brown *v.* Cozard, 68 Ill. 178; Iglehart *v.* Crane, 42 Ill. 261; Hurd *v.* Eaton, 28 Ill. 122; Morrison *v.* Kurtz, 15 Ill. 193; Ft. Dearborn Nat. Bank *v.* Wyman, 80 Ill. App. 150; Heidelbach *v.* Fenton, 79 Ill. App. 357 [*affirmed* in 180 Ill. 312, 34 N. E. 329, 72 Am. St. Rep. 207].

Indiana.— Applegate *v.* Mason, 13 Ind. 75.

Iowa.— Cutler *v.* Ammon, 65 Iowa 281, 21 N. W. 604; Wolf *v.* Smith, 36 Iowa 454; Clarke *v.* Bancroft, 13 Iowa 320.

Kentucky.— Logan *v.* Anderson, 18 B. Mon. 114.

Maine.— Emmons *v.* Bradley, 56 Me. 333.

Maryland.— General Ins. Co. *v.* U. S. Insurance Co., 10 Md. 517, 69 Am. Dec. 174; Watkins *v.* Worthington, 2 Bland 509.

Massachusetts.— Thayer *v.* Daniels, 113 Mass. 129.

Michigan.— Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430.

New Jersey.— Van Mater *v.* Ely, 12 N. J. Eq. 271; Reilly *v.* Mayer, 12 N. J. Eq. 55.

New York.— Herriman *v.* Skillman, 33 Barb. 378; Jenkins *v.* Smith, 21 Misc. 750, 48 N. Y. Suppl. 126; Jervis *v.* Smith, 7 Abb. Pr. N. S. 217; Evertson *v.* Booth, 19 Johns. 486; Woolcocks *v.* Hart, 1 Paige 185.

North Carolina.— Jones *v.* Zollicoffer, 9 N. C. 623, 11 Am. Dec. 795.

Pennsylvania.— Bruner's Appeal, 7 Watts & S. 269; Order of Solon *v.* Gunther, 8 Pa. Super. Ct. 319.

South Carolina.— Witte *v.* Clarke, 17 S. C. 313; Walker *v.* Covar, 2 S. C. 16.

Tennessee.— Mowry *v.* Davenport, 6 Lea 80; Henshaw *v.* Wells, 9 Humphr. 568.

Texas.— Wilkes *v.* Adler, 68 Tex. 689, 5 S. W. 497; Ohio Cultivator Co. *v.* People's Nat. Bank, 22 Tex. Civ. App. 643, 55 S. W. 765; Walhoefer *v.* Hobgood, 19 Tex. Civ. App. 629, 48 S. W. 32, where it is said that a modification of the rule of marshaling is that the man holding the lien on the two funds shall not be delayed or inconvenienced in the collection of his debt.

Virginia.— Blakemore *v.* Wise, 95 Va. 269, 28 S. E. 332, 64 Am. St. Rep. 781; Russell *v.* Randolph, 26 Gratt. 705.

West Virginia.— Hudkins *v.* Ward, 30 W. Va. 204, 3 S. E. 600, 8 Am. St. Rep. 22.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

United States.— U. S. *v.* Duncan, 25 Fed. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523.

England.— Lanoy *v.* Athol, 2 Atk. 444, 26 Eng. Reprint 668; Aldrich *v.* Cooper, 8 Ves. Jr. 282, 7 Rev. Rep. 86, 2 White & T. Lead. Cas. Eq. 82, 32 Eng. Reprint 402.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 7.

9. Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Walker *v.* Covar, 2 S. C. 16; Moore *v.* Wright, 14 Rich. Eq. (S. C.) 132; Fowler *v.* Barksdale, Harp. Eq. (S. C.) 164; Goodwyn *v.* State Bank, 4 Desauss. (S. C.) 389.

10. *Georgia.*— Calloway *v.* People's Bank, 54 Ga. 572; Denham *v.* Williams, 39 Ga. 312.

Maryland.— Morton *v.* Grafflin, 68 Md. 545, 13 Atl. 341, 15 Atl. 298; Post *v.* Mackall, 3 Bland 486.

Michigan.— Farwell *v.* Bigelow, 112 Mich. 285, 70 N. W. 579.

New Jersey.—Sternberger *v.* Sussman, (Ch. 1905) 60 Atl. 195.

Tennessee.— Mowry *v.* Davenport, 6 Lea 80.

United States.— Lewis *v.* U. S., 92 U. S. 618, 623, 23 L. ed. 513, where it is said: "A court of equity will not entertain the question of marshaling assets, unless both funds are within the jurisdiction and control of the court."

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 7.

Compare Willey *v.* St. Charles Hotel Co., 52 La. Ann. 1581, 28 So. 182; Hayes *v.* Ward, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554;

to the fund without the jurisdiction.[11] Nor can such paramount creditor be compelled to exhaust, in the first instance, a mere personal remedy.[12]

2. Of Common Debtor. Moreover, the application of the doctrine of marshaling is attended with the further qualification that no injustice be done the common debtor.[13]

3. Of Third Persons. The equity to marshal assets, it is held, is not one which fastens itself upon the situation at the time the successive securities are taken up, but on the contrary is one to be determined at the time the marshaling is invoked. The equity can only become a fixed right by taking proper steps to have it enforced, and until this is done it is subject to displacement and defeat by subsequently acquired liens upon the funds.[14] The doctrine will never be applied where it is injurious to a third party,[15] over whom the party claiming the benefit of the principle has no superior equity;[16] but the rule is otherwise where the third person injuriously affected has an inferior right or equity only.[17]

C. Property or Funds Affected — 1. In General. The operation of the principle of marshaling is not affected by the nature of the property which constitutes the double fund,[18] but applies whenever a paramount creditor holds col-

York, etc., Steamboat Ferry Co. *v.* Jersey Co., Hopk. (N. Y.) 460.

11. Sternberger *v.* Sussman, (N. J. Ch. 1905) 60 Atl. 195.

12. Palmer *v.* Snell, 111 Ill. 161; Wolf *v.* Smith, 36 Iowa 454.

13. *Delaware.*— Cannon *v.* Hudson, 5 Del. Ch. 112.

Illinois.— Brown *v.* Cozard, 68 Ill. 178; Hurd *v.* Eaton, 28 Ill. 122.

Iowa.— Dickson *v.* Chorn, 6 Iowa 19, 17 Am. Dec. 382.

Mississippi.— Hodges *v.* Hickey, 67 Miss. 715, 7 So. 404.

New York.— Cheesebrough *v.* Millard, 1 Johns. Ch. 409, 7 Am. Dec. 494.

North Carolina.— Butler *v.* Stainback, 87 N. C. 216.

Tennessee.— White *v.* Fulghum, 87 Tenn. 281, 10 S. W. 501.

14. Gilliam *v.* McCormack, 85 Tenn. 597, 4 S. W. 521.

15. *Indian Territory.*— Webb *v.* Hunt, 2 Indian Terr. 612, 53 S. W. 437.

Kansas.— Cannon *v.* Kreipe, 14 Kan. 324.

Kentucky.— Griffin *v.* Gingell, 79 S. W. 284, 25 Ky. L. Rep. 2031; Hughes *v.* Shannon, 13 Ky. L. Rep. 782.

Maryland.— Dize *v.* Beacham, 81 Md. 603, 32 Atl. 243; Hamilton *v.* Schwehr, 34 Md. 177.

New Jersey.— Reilly *v.* Mayer, 12 N. J. Eq. 55.

North Carolina.— See Butler *v.* Stainback, 87 N. C. 216.

Pennsylvania.— Hoff's Appeal, 84 Pa. St. 40.

Tennessee.— Gilliam *v.* McCormack, 85 Tenn. 597, 4 S. W. 521.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 8.

16. *Delaware.*— Cannon *v.* Hudson, 6 Houst. 21.

Georgia.— Craigmiles *v.* Gamble, 85 Ga. 439, 11 S. E. 838; Green *v.* Ingram, 16 Ga. 164.

Kansas.— Colby *v.* Crocker, 17 Kan. 527.

Maryland.— Leib *v.* Stribling, 51 Md. 285.

Massachusetts.— George *v.* Kent, 7 Allen 16.

Michigan.— Sager *v.* Tupper, 35 Mich. 134; Sibley *v.* Baker, 23 Mich. 312.

New Jersey.— New York Mut. L. Ins. Co. *v.* Boughrum, 24 N. J. Eq. 44; Benedict *v.* Benedict, 15 N. J. Eq. 150; Mechanics' Bldg., etc., Assoc. *v.* Conover, 14 N. J. Eq. 219.

New York.— Reynolds *v.* Tooker, 18 Wend. 591; Besley *v.* Lawrence, 11 Paige 581.

Ohio.— Green *v.* Ramage, 18 Ohio 428, 51 Am. Dec. 458.

Pennsylvania.— McGinnis' Appeal, 16 Pa. St. 445; Solon *v.* Gunther, 8 Pa. Super. Ct. 319, 333 (where it is said: "The rule is never enforced to defeat a superior or even equal right of another"); MacVeagh *v.* Darlington, 1 Chest. Co. Rep. 150.

Virginia.— Withers *v.* Carter, 4 Gratt. 407, 50 Am. Dec. 78.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 8.

17. *Maryland.*— Hamilton *v.* Schwehr, 34 Md. 107.

New Jersey.— Bacon *v.* Devinney, 55 N. J. Eq. 449, 37 Atl. 144; Phillipsburg Mut. Loan, etc., Assoc. *v.* Hawk, 27 N. J. Eq. 355; Herbert *v.* Mechanics' Bldg., etc., Assoc., 17 N. J. Eq. 497, 90 Am. Dec. 601.

New York.— Oppenheimer *v.* Walker, 3 Hun 30; New York L. Ins., etc., Co. *v.* Vanderbilt, 12 Abb. Pr. 458.

Ohio.— Jennings *v.* Ohio Nat. Bank, 17 Ohio Cir. Ct. 664, 8 Ohio Cir. Dec. 657.

Pennsylvania.— McDevitt's Appeal, 70 Pa. St. 373.

South Carolina.— Fowler *v.* Barksdale, Harp. Eq. 164.

West Virginia.— Ball *v.* Setzer, 33 W. Va. 444, 10 S. E. 798.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 9.

18. Gusdorf *v.* Ikelheimer, 75 Ala. 148; Ross *v.* Duggan, 5 Colo. 85; Aldrich *v.* Cooper, 8 Ves. Jr. 382, 2 White & T. Lead. Cas. Eq. 82, 7 Rev. Rep. 86, 32 Eng. Reprint 402.

However, an imperfect personal obligation, that is, one that cannot be enforced by suit, is

lateral security, or can resort collaterally to other real or personal estate for the satisfaction of the debt.[19]

2. Necessity For Two Funds. As a general rule, before the doctrine of marshaling assets will be applied, there must be two funds or properties, on both of which one party has a claim or lien, and on one only of which the other party has a claim or lien.[20] Accordingly equity will not interfere to marshal assets after a creditor who has his debt secured by two funds has in good faith appropriated in satisfaction of his claim one of the funds, since in such case there are not two funds left to be marshaled.[21]

3. Funds Must Be in Hands of Common Debtor. The rule of marshaling does not prevail except where both funds are in the hands of the common debtor of both creditors.[22] In some jurisdictions, however, the rule is subject to the exception, that where independent equities exist, from which there arises a duty on the

not a security which can be marshaled. Hand *v.* Savannah, etc., R. Co., 12 S. C. 314, the promise of the state to pay money.

A security which had not become a lien at the time that the invoker of marshaling procured his security will not be marshaled. Miller *v.* Jacobs, 3 Watts (Pa.) 477.

The fact that some of the bonds of a railroad company were indorsed does not make marshaling applicable, so as to compel the bond-holder to first pursue the indorsers. Weed *v.* Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885.

Security of small value.— On a bill to foreclose a mortgage given to secure advances, where complainant holds as collateral corporate shares of very small value, he will not be required, as against other creditors, first to exhaust his remedy against such shares, but will be allowed to transfer them in blank and deposit them in court. U. S. Trust Co. *v.* Lanahan, 50 N. J. Eq. 796, 27 Atl. 1032; Lanahan *v.* Lawton, 50 N. J. Eq. 276, 23 Atl. 476.

Security nominal and valueless.— Where the security to which the paramount creditor can alone resort is merely nominal and valueless, marshaling is not enforceable. Sandidge *v.* Graves, 1 Patt. & H. (Va.) 101.

19. *Alabama.*— Gusdorf *v.* Ikelheimer, 75 Ala. 148.

Colorado.— Ross *v.* Duggan, 5 Colo. 85.

New York.— Ingalls *v.* Morgan, 10 N. Y. 178.

United States.— The Buffalo, 4 Fed. Cas. No. 2,111.

England.—Aldrich *v.* Cooper, 2 White & T. Lead. Cas. Eq. 82.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 2.

For application of rule between: Realty and personalty see Kimball *v.* Connor, 3 Kan. 414; De Peyster *v.* Hildreth, 2 Barb. Ch. (N. Y.) 109; Parr *v.* Fumbanks, 11 Lea (Tenn.) 391; Goss *v.* Lester, 1 Wis. 43. Realty and shares of corporate stock see Phillipsburg Mut. Loan, etc., Assoc. *v.* Hawk, 27 N. J. Eq. 355; Red Bank Mut. Bldg., etc., Assoc. *v.* Patterson, 27 N. J. Eq. 223; Herbert *v.* Mechanics' Bldg., etc., Assoc., 17 N. J. Eq. 497, 90 Am. Dec. 601; Bishop Bailey Bldg., etc., Assoc. *v.* Kennedy, (N. J. Ch. 1888) 12 Atl. 141. Realty and choses in action see Ingalls *v.* Morgan, 10 N. Y. 178. But see Wolf *v.* Smith, 36 Iowa 454. Realty and money see Wattengel *v.* Schultz, 11 Misc. (N. Y.) 165, 32 N. Y. Suppl. 91. Money and choses in action see Clark *v.* Manufacturers' Mut. F. Ins. Co., 130 Ind. 332, 30 N. E. 212; Edgerton *v.* Martin, 35 Vt. 116.

20. *Alabama.*— Turner *v.* Flinn, 67 Ala. 529.

Illinois.— Ft. Dearborn Nat. Bank *v.* Wyman, 80 Ill. App. 150.

Maryland.—Winder *v.* Diffenderffer, 2 Bland 166.

New York.— White *v.* Gardiner, 4 Redf. Surr. 71.

Pennsylvania.— Taylor's Appeal, 81 Pa. St. 460.

Tennessee.— Gilliam *v.* McCormack, 85 Tenn. 597, 4 S. W. 521.

England.— *In re* Professional L. Assur. Co., L. R. 3 Eq. 668, 36 L. J. Ch. 442, 15 Wkly. Rep. 544.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 1.

The fact, however, that the claims are against a single tract of land, not susceptible of division, does not render the two-fund doctrine inapplicable. Craig *v.* Miller, 41 S. C. 37, 19 S. E. 192.

21. Turner *v.* Flinn, 67 Ala. 529; Franklin *v.* Warden, 9 Minn. 124; Bane *v.* Williams, 10 Sm. & M. (Miss.) 113; Drake *v.* Collins, 5 How. (Miss.) 253; Muskingum Bank *v.* Carpenter, 7 Ohio St. 21.

Subrogation to rights of paramount creditor see *infra*, II, F, 2.

22. *Alabama.*— Robinson *v.* Lehman, 72 Ala. 401.

Arkansas.— Buck *v.* Bransford, 58 Ark. 289, 24 S. W. 103.

Connecticut.— Quinnipiac Brewing Co. *v.* Fitzgibbons, 73 Conn. 191, 196, 47 Atl. 128 (where it is said: "As a general rule, however, before a court of equity will marshal securities between two persons, it must appear (1) that they are creditors of the same debtor, (2) that there are two funds belonging to that debtor, and (3) that one of them alone has the right to resort to both funds"); Stevens *v.* Church, 41 Conn. 369; Ayres *v.* Husted, 15 Conn. 504.

Georgia.— Carter *v.* Neal, 24 Ga. 346, 71 Am. Dec. 136.

part of one to pay in exoneration of another, the court will enforce that duty by subjecting the fund of the principal debtor.[23]

4. Effect of Exemption of Singly Charged Fund. Although by the great weight of authority marshaling can never be invoked, so as to deprive a debtor of his homestead or other exempt property, by a creditor as to whose lien there has been no waiver of such homestead or exempt property,[24] yet in a few jurisdictions

Illinois.— Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Wise *v.* Shepherd, 13 Ill. 41.

Indiana.— Bank of Commerce *v.* Evansville First Nat. Bank, 150 Ind. 588, 50 N. E. 566; Shuey *v.* Latta, 90 Ind. 136 (holding that a mortgagee who has a senior lien on land cannot be deprived of his seniority merely because he may have a right to make the debt out of a bond executed by his predecessor in the trust, by virtue of which the mortgage came to him); Sanders *v.* Cook, 22 Ind. 436.

Kentucky.— Columbia Finance, etc., Co. *v.* First Nat. Bank, 116 Ky. 364, 76 S. W. 156, 45 Ky. L. Rep. 561.

Maryland.— Woollen *v.* Hillen, 9 Gill 185, 52 Am. Dec. 690.

Nebraska.— Citizens' Bank *v.* Iddings, 60 Nebr. 709, 84 N. W. 78; Lee *v.* Gregory, 12 Nebr. 282, 11 N. W. 297.

New York.— Reynolds *v.* Tooker, 18 Wend. 591; Dorr *v.* Shaw, 4 Johns. Ch. 17.

Pennsylvania.— Knouf's Appeal, 91 Pa. St. 78; Lloyd *v.* Galbraith, 32 Pa. St. 103; Jones' Estate, 15 Phila. 584; Blank *v.* Eichelberger, 6 Wkly. Notes Cas. 25; Bertolet's Estate, 1 Woodw. 8.

Tennessee.— House *v.* Thompson, 3 Head 512.

Texas.— Rogers *v.* Blum, 56 Tex. 1.

Virginia.— Peery *v.* Elliott, 101 Va. 709, 44 S. E. 919; Blakemore *v.* Wise, 95 Va. 269, 28 S. E. 332, 64 Am. St. Rep. 781; Russell *v.* Randolph, 26 Gratt. 705; Withers *v.* Carter, 4 Gratt. 407, 50 Am. Dec. 78.

England.— *Ex p.* Kendall, 1 Rose 71, 17 Ves. Jr. 514, 11 Rev. Rep. 122, 34 Eng. Reprint 199; Aldrich *v.* Cooper, 8 Ves. Jr. 382, 2 White & T. Lead. Cas. Eq. 82, 7 Rev. Rep. 86, 32 Eng. Reprint 402.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 10.

Claim against principal and surety.— A creditor who has a claim against two debtors, one a principal and the other a surety, cannot be compelled by another creditor of the principal debtor to exhaust his remedy against the surety before proceeding against the principal. Trentman *v.* Eldridge, 98 Ind. 525; *In re* Hobson, 81 Iowa 392, 46 N. W. 1095, 11 L. R. A. 255; Garrett *v.* Burlington Plow Co., 70 Iowa 697, 29 N. W. 395, 59 Am. Rep. 461; Johns *v.* Reardon, 11 Md. 465; Woollen *v.* Hillen, 9 Gill (Md.) 185, 52 Am. Dec. 690; Thompson *v.* Spittle, 102 Mass. 207; Mason *v.* Hull, 55 Ohio St. 256, 45 N. E. 632; Stewart *v.* Stewart, 207 Pa. St. 59, 56 Atl. 323; South Carolina Mfg. Co. *v.* State Bank, 6 Rich. Eq. (S. C.) 227; Union Bank *v.* Laird, 2 Wheat. (U. S.) 390, 4 L. ed. 269; Swift *v.* Kortrecht, 112 Fed. 709, 50 C. C. A. 429. *Compare* Rixey *v.* Deitrick, 85 Va. 42, 6 S. E. 615.

23. *Illinois.*— Wise *v.* Shepherd, 13 Ill. 41.

Iowa.— See *In re* Hobson, 81 Iowa 392, 46 N. W. 1095, 11 L. R. A. 255.

Mississippi.— Hodges *v.* Hickey, 67 Miss. 715, 7 So. 404.

New York.— King *v.* McVicker, 3 Sandf. Ch. 192.

Pennsylvania.— Huston's Appeal, 69 Pa. St. 485; Lloyd *v.* Galbraith, 32 Pa. St. 103.

Tennessee.— Foy *v.* Sinclair, 93 Tenn. 296, 30 S. W. 28.

Virginia.— Guggenheimer *v.* Martin, 93 Va. 634, 25 S. E. 881; Rixey *v.* Pearre, 89 Va. 113, 15 S. E. 498; Rixey *v.* Deitrick, 85 Va. 42, 6 S. E. 615.

England.— *Ex p.* Kendall, 1 Rose 71, 17 Ves. Jr. 514, 11 Rev. Rep. 122, 34 Eng. Reprint 199.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 10.

24. *Alabama.*— Talladega First Nat. Bank *v.* Browne, 128 Ala. 557, 29 So. 552, 86 Am. St. Rep. 156. See also Ray *v.* Adams, 45 Ala. 168.

Arkansas.— Flask *v.* Tindall, 39 Ark. 571; Marr *v.* Lewis, 31 Ark. 203, 25 Am. Rep. 553.

Illinois.— Brown *v.* Cozard, 68 Ill. 178; Belvidere First Nat. Bank *v.* Briggs, 22 Ill. App. 228. See also Dodds *v.* Snyder, 44 Ill. 53.

Iowa.— Grant *v.* Parsons, 67 Iowa 31, 24 N. W. 578; Equitable L. Ins. Co. *v.* Gleason, 62 Iowa 277, 17 N. W. 524; Dickson *v.* Chorn, 6 Iowa 19, 17 Am. Dec. 382.

Kansas.— Frick Co. *v.* Ketels, 42 Kan. 527, 22 Pac. 580, 16 Am. St. Rep. 507; La Rue *v.* Gilbert, 18 Kan. 220; Colby *v.* Crocker, 17 Kan. 527.

Kentucky.—Ralls *v.* Prather, 52 S. W. 800, 21 Ky. L. Rep. 555, 51 S. W. 318, 21 Ky. L. Rep. 322; Flowers *v.* Miller, 16 S. W. 705, 13 Ky. L. Rep. 250.

Minnesota.— McArthur *v.* Martin, 23 Minn. 74.

Mississippi.— Koen *v.* Brill, 75 Miss. 870, 23 So. 481, 65 Am. St. Rep. 633. See also Hodges *v.* Hickey, 67 Miss. 715, 7 So. 404.

Nebraska.— Mitchelson *v.* Smith, 28 Nebr. 583, 44 N. W. 871, 26 Am. St. Rep. 357; McCreery *v.* Schaffer, 26 Nebr. 173, 41 N. W. 996.

North Carolina.— Pope *v.* Harris, 94 N. C. 62; Butler *v.* Stainback, 87 N. C. 216.

Ohio.— Kilgore *v.* Miller, 19 Ohio Cir. Ct. 93, 10 Ohio Cir. Dec. 464.

Tennessee.— White *v.* Fulghum, 87 Tenn. 281, 10 S. W. 501.

United States.— *In re* Cogbill, 6 Fed. Cas. No. 2,954, 2 Hughes 313.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 3.

the doctrine has been applied although the singly charged fund consisted of a homestead or exempt property.[25]

5. Effect of Release or Loss of One Fund — a. In General. Where a loss of the singly charged fund is occasioned by collusion of a creditor with the debtor, or by wilful or intentional neglect to preserve the fund, relief, if invoked in the proper time and manner, may be afforded to other creditors who have been injured thereby.[26] But to charge a senior creditor with a fund which was available to him and not to a junior creditor, the loss of the fund with which he is sought to be charged must have been by the wilful act of the senior creditor.[27] And the release of one of his securities by the paramount creditor only operates to postpone his claim to the extent of the value of the property released.[28] The lien of the paramount creditor will not be postponed where he releases one of his two liens before the junior creditor's rights attach to the other,[29] where the

However, the making of a declaration of homestead, subsequent to the creation of liens on the double fund, cannot affect the right of the junior creditor to compel the senior creditor to exhaust the singly charged fund. Abbott *v.* Powell, 1 Fed. Cas. No. 13, 6 Sawy. 91.

A debtor who voluntarily sells part of the mortgaged property, so that the remaining portion becomes the primary fund for the payment of the mortgage, has no equitable right, as against his grantee, to invoke marshaling to preserve his homestead. Merchants' Nat. Bank *v.* Stanton, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491.

In Wisconsin, where the contrary rule formerly obtained (White *v.* Polleys, 20 Wis. 503, 91 Am. Dec. 432), the rule as stated in the text is now statutory, and is enforced where the junior creditor's lien was acquired before the passage of the act as well as where it was acquired thereafter (Smith *v.* Wait, 39 Wis. 512; Hanson *v.* Edgar, 34 Wis. 653).

Right of debtor to compel creditor to satisfy claim out of non-exempt property see Homestead, 21 Cyc. 523, text and note 17 *et seq.*

25. Hallman *v.* Hallman, 124 Pa. St. 347, 16 Atl. 871; Thomas' Appeal, 69 Pa. St. 120; Pittman's Appeal, 48 Pa. St. 315; Laucks' Appeal, 44 Pa. St. 395; Shelly's Appeal, 36 Pa. St. 373; Garrett's Appeal, 32 Pa. St. 160, 72 Am. Dec. 779; Bowyer's Appeal, 21 Pa. St. 210; Peterson *v.* Russell, 9 Pa. Super. Ct. 332; Grover, etc., Sewing Mach. Co. *v.* Gruber, 2 Pearson (Pa.) 288; People's Bank *v.* Brice, 47 S. C. 134, 24 S. E. 1038; Craig *v.* Miller, 41 S. C. 37, 19 S. E. 192; State Sav. Bank *v.* Harbin, 18 S. C. 425; Bowen *v.* Barkesdale, 33 S. C. 142, 11 S. E. 640; *In re* Sauthoff, 21 Fed. Cas. No. 12,379, 7 Biss. 167, 3 N. Y. Wkly. Dig. 96. *Compare* Feak's Appeal, 81* Pa. St. 76; McCowen *v.* Eisenhuth, 2 Pearson (Pa.) 262; Pearson *v.* Pearson, 59 S. C. 367, 37 S. E. 917, 82 Am. St. Rep. 846, holding that an unsecured creditor may not compel a lienor to first exhaust exempt property.

26. *Alabama.*— Shields *v.* Kimbrough, 64 Ala. 504.

Arkansas.— Birnie *v.* Main, 29 Ark. 591.

Kansas.— St. Marys First Nat. Bank *v.* Taylor, 69 Kan. 28, 76 Pac. 425; Burnham *v.* Citizens' Bank, 55 Kan. 545, 40 Pac. 912.

Kentucky.— Glass *v.* Pullen, 6 Bush 346.

Missouri.— Dunlap *v.* Dunseth, 81 Mo. App. 17.

Nebraska.— Jordan *v.* Hamilton County Bank, 11 Nebr. 499, 9 N. W. 654.

New Jersey.— Bergen Sav. Bank *v.* Barrows, 30 N. J. Eq. 89; Washington Bldg., etc., Assoc. *v.* Beaghen, 27 N. J. Eq. 98; Blair *v.* Ward, 10 N. J. Eq. 119; Johnson *v.* Johnson, 8 N. J. Eq. 561.

New York.— Frost *v.* Koon, 30 N. Y. 428; Stuyvesant *v.* Hall, 2 Barb. Ch. 151; Patty *v.* Pease, 8 Paige 277, 35 Am. Dec. 683; Guion *v.* Knapp, 6 Paige 35, 29 Am. Dec. 741 note.

Pennsylvania.— Turner *v.* Flenniken, 164 Pa. St. 469, 30 Atl. 486, 44 Am. St. Rep. 624.

West Virginia.— Huntington First Nat. Bank *v.* Simms, 49 W. Va. 442, 38 S. E. 525.

Wisconsin.— Sexton *v.* Pickett, 24 Wis. 346; Deuster *v.* McCamus, 14 Wis. 307.

United States.— McLean *v.* Lafayette Bank, 16 Fed. Cas. No. 8,889, 4 McLean 430.

England.— Aldrich *v.* Cooper, 8 Ves. Jr. 282, 2 White & T. Lead. Cas. Eq. 82, 7 Rev. Rep. 86, 32 Eng. Reprint 402.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 5.

A first mortgagee who has released a part of the land subject to his mortgage, not included in the lien of a subsequent mortgage, cannot defeat the right of the subsequent mortgagee to priority over his lien on the part subject to both mortgages, by setting up the rights of another mortgagee of the part released, where such other mortgagee is not a party to the proceedings. Deuster *v.* McCamus, 14 Wis. 307.

27. Shields *v.* Kimbrough, 64 Ala. 504; Ross *v.* Duggan, 5 Colo. 85.

Negligent release.— After notice by the junior creditor of his intention to invoke the principle of marshaling, if the paramount creditor, through negligence, fails to realize on the fund singly charged, such negligence, unless it be wanton or amount to a constructive fraud, will not justify postponement of the permanent creditor's lien. Ross *v.* Duggan, 5 Colo. 85; Emmons *v.* Bradley, 56 Me. 333. See also Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57. *Compare* Bryant *v.* Stephens, 58 Ala. 636.

28. Frost *v.* Koon, 30 N. Y. 428.

29. Kent *v.* Matthews, 12 Leigh (Va.) 573.

value of the funds originally covered by the superior lien did not exceed the paramount creditor's claim,[30] or where the fund remaining is ample to secure both liens.[31] So the principle can apply only when the creditor's right to resort to both funds is clear, and not seriously disputed, and when the remedies available for reaching and applying the funds are reasonably prompt and efficient.[32]

b. Notice of Inferior Lien Necessary. In any case the prior encumbrancer is entitled to notice of the existence of the junior claim, and of the intention of the junior creditor to compel the former to make his election in compliance with this principle.[33]

6. Effect of Giving One Security in Exoneration of Another. The doctrine of marshaling securities is not applied where one security was given and expressly declared to be in exoneration of another previously given, even though other interests might be involved in the later security and it should prove to be insufficient fully to protect them all.[34]

D. Against Whom. The right to marshal assets is not a right of the inferior against the paramount creditor, but is a right against the debtor himself, to prevent his getting the fund singly charged free from both debts and throwing both creditors on the fund doubly charged,[35] and this right is enforceable against a

See also Pittsburgh Bank's Appeal, 29 Pa. St. 330.

30. Avery *v.* Popper, (Tex. Civ. App. 1898) 45 S. W. 951.

31. Kelley *v.* Whitney, 45 Wis. 110, 30 Am. Rep. 697.

32. Kidder *v.* Page, 48 N. H. 380.

33. *Colorado.*— Ross *v.* Duggan, 5 Colo. 85.

Iowa.— Clarke *v.* Bancroft, 13 Iowa 320.

Michigan.— James *v.* Brown, 11 Mich. 25.

Minnesota.— Groesbeck *v.* Mattison, 43 Minn. 547, 46 N. W. 135.

Mississippi.— Terry *v.* Woods, 6 Sm. & M. 139, 45 Am. Dec. 274.

New Hampshire.— Johnson *v.* Bell, 58 N. H. 395.

New Jersey.— Ward *v.* Hague, 25 N. J. Eq. 397; Vanorden *v.* Johnson, 14 N. J. Eq. 376, 82 Am. Dec. 254; Reilly *v.* Mayer, 12 N. J. Eq. 55.

New York.— Patty *v.* Pease, 8 Paige 277, 35 Am. Dec. 683; Guion *v.* Knapp, 6 Paige 35, 29 Am. Dec. 741 note; Cheesebrough *v.* Millard, 1 Johns. Ch. 409, 7 Am. Dec. 494; King *v.* McVicker, 3 Sandf. Ch. 192; Stuyvesant *v.* Hone, 1 Sandf. Ch. 419.

Ohio.— Sharp *v.* Myers, 2 Ohio Cir. Ct. 82, 2 Ohio Cir. Dec. 47.

Pennsylvania.— Hart *v.* Anderson, 198 Pa. St. 558, 48 Atl. 636; McIlvain *v.* Mutual Assur. Co., 93 Pa. St. 30; Uniontown Bldg., etc., Assoc.'s Appeal, 92 Pa. St. 200; Crozier's Appeal, 90 Pa. St. 384, 35 Am. Rep. 666; Taylor *v.* Maris, 5 Rawle 51; Quakertown Bldg., etc., Assoc. *v.* Sorver, 11 Phila. 532.

South Carolina.— McAfee *v.* McAfee, 28 S. C. 218, 5 S. E. 593.

South Dakota.— Blanchette *v.* Farch, 18 S. D. 20, 99 N. W. 79.

United States.— Rock Springs First Nat. Bank *v.* Roder, 114 Fed. 451, 52 C. C. A. 253.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 5.

The record of the inferior lien is not sufficient notice to the superior lien-holder. Annan *v.* Hays, 85 Md. 505, 37 Atl. 20; Blair *v.* Ward, 10 N. J. Eq. 119; Stuyvesant *v.* Hall, 2 Barb. Ch. (N. Y.) 151; Deuster *v.* McCamus, 14 Wis. 307.

Where at the time a second mortgage is executed, the mortgagee has notice of an agreement between the first mortgagee and mortgagor that portions of the premises shall be released from time to time on certain conditions, and knows that some tracts have been released and takes no steps to protect his rights by warning the first mortgagee against further releases, he cannot claim the right to have the first mortgage postponed to his as to the premises covered by his mortgage, although the rest of the premises were released with notice of his mortgage. Wilbur's Appeal, 10 Wkly. Notes Cas. (Pa.) 133.

34. Butler *v.* Stainback, 87 N. C. 216.

35. *Georgia.*— Weed *v.* Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885.

Indiana.— See Herbert *v.* Rupertus, 31 Ind. App. 553, 68 N. E. 598.

Iowa.— Bennett *v.* First Nat. Bank, 128 Iowa 1, 102 N. W. 129.

New Jersey.— Benedict *v.* Benedict, 15 N. J. Eq. 150.

North Carolina.— Harrington *v.* Rawls, 136 N. C. 65, 48 S. E. 571; Pope *v.* Harris, 94 N. C. 62.

Pennsylvania.— Stewart *v.* Stewart, 207 Pa. St. 59, 56 Atl. 323.

Virginia.— Blakemore *v.* Wise, 95 Va. 269, 28 S. E. 332, 64 Am. St. Rep. 781; Russell *v.* Randolph, 26 Gratt. 705.

Wisconsin.—Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

United States.— U. S. *v.* Duncan, 25 Fed. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," §§ 1, 13.

Marshaling is enforceable against a wife, surviving her husband, where she and her husband mortgaged all the estates of the wife to one person, and subsequently one of such estates to another person. Tidd *v.* Lister, 10 Hare 140, 44 Eng. Ch. 136, 68 Eng. Reprint 872.

person to whom the property of the common debtor has descended,[36] or against the assignees in bankruptcy of the common debtor,[37] or against the fraudulent grantee of such common debtor.[38]

E. At Whose Instance. The rule as to compelling a paramount creditor to satisfy his claim out of one fund to the exclusion of another has no application in favor of a debtor against his creditor — it applies only as between different creditors.[39] Thus a judgment creditor,[40] a mortgagee,[41] or the holder of a mechanic's[42] or a vendor's lien[43] may invoke the doctrine. Moreover the doctrine has been applied in favor of an attachment creditor.[44] But a general

36. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 696.

37. *Ex p.* Hartley, 1 Deac. 288, 5 L. J. Bankr. 13, 2 Mont. & A. 496, 38 E. C. L. 639.

38. Whittaker *v.* Belvidere Roller-Mill Co., 55 N. J. Eq. 674, 38 Atl. 289.

39. Boone *v.* Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Plain *v.* Roth, 107 Ill. 588; Rogers *v.* Meyers, 68 Ill. 92; Watkins *v.* Worthington, 2 Bland (Md.) 509; White *v.* Polleys, 20 Wis. 503, 91 Am. Dec. 432. See also Jones *v.* Dow, 18 Wis. 241.

A corporation cannot, as a plaintiff, maintain an equitable suit to marshal its own assets. Steele Lumber Co. *v.* Laurens Lumber Co., 98 Ga. 329, 24 S. E. 755.

Right of fraudulent grantee to invoke doctrine see FRAUDULENT CONVEYANCES, 20 Cyc. 705.

Right of assignee for benefit of creditors to compel secured creditors to exhaust security see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 270 *et seq.*

The holder of an invalid tax title cannot compel a mortgagee to exhaust his remedy against other property on which he holds another mortgage securing the same debt before bringing suit to set aside the tax title. Miller *v.* Cook, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292.

The purchaser at a foreclosure sale, under a second mortgage, receives the title which the mortgagor had at the time of the delivery of that mortgage, and, attendant upon that title, he takes the right which the second mortgagee received to have the assets marshaled, and he may assert this equity against the subsequent voluntary and fraudulent grantee of the mortgagor. Whittaker *v.* Belvidere Roller-Mill Co., 55 N. J. Eq. 674, 38 Atl. 289.

Between one claiming the right to possession of property by transfer of a bill of lading and one who has levied an attachment thereon as the property of a transferrer of the bill of lading, the equitable rule as to marshaling securities between lien-holders has no application, if the validity of the attachment lien depends upon the invalidity of the transfer. Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672.

Legatees. — In New York the view is taken that the equitable rule of marshaling assets is enforceable at the instance of legatees as well as creditors. Rice *v.* Harbeson, 63 N. Y. 493.

Right of homesteader to compel prior exhaustion of non-exempt property see HOMESTEADS, 21 Cyc. 523 *et seq.*

40. *Alabama.* — Gusdorf *v.* Ikelheimer, 75 Ala. 148.

New Jersey. — Ayers *v.* Hawk, (Ch. 1887) 11 Atl. 744.

New York. — Dorr *v.* Shaw, 4 Johns. Ch. 17; Cheesebrough *v.* Millard, 1 Johns. Ch. 409, 7 Am. Dec. 494.

Ohio. — Stone *v.* Morris, 4 Ohio Dec. (Reprint) 101, 1 Clev. L. Rep. 28; Knox *v.* Carr, 26 Ohio Cir. Ct. 345 [*affirmed* in 69 Ohio St. 575, 70 N. E. 1125].

Pennsylvania. — Kramer's Appeal, 37 Pa. St. 71; Hasting's Case, 10 Watts 303; *In re* U. S. Bank, 2 Pars. Eq. Cas. 110.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 4.

41. *Colorado.* — Fassett *v.* Mulock, 5 Colo. 466.

Connecticut. — Pettibone *v.* Stevens, 15 Conn. 19, 38 Am. Dec. 57.

District of Columbia. — Creswell *v.* National Sav. Bank, 2 MacArthur 333.

Florida. — Rich *v.* Eichelberger, 13 Fla. 169.

Illinois. — Warner *v.* De Witt County Nat. Bank, 4 Ill. App. 305.

Maryland. — Ober, etc., Co. *v.* Keating, 77 Md. 100, 26 Atl. 501; Watson *v.* Bane, 7 Md. 117.

New Jersey. — Hoy *v.* Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687; Mickle *v.* Rambo, 1 N. J. Eq. 501.

Ohio. — Lytle *v.* Reed, Wright 248.

Pennsylvania. — Lehman *v.* Tammany, 7 Kulp 235.

South Carolina. — Gadberry *v.* McClure, 4 Strobh. Eq. 175; Fowler *v.* Barksdale, Harp. Eq. 164.

Texas. — Willis *v.* Holland, 13 Tex. Civ. App. 689, 36 S. W. 329.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 4.

But where a chattel mortgage is absolutely void as to judgment creditors of the mortgagor, a mortgagee's claim to marshal the assets is properly denied, as such a mortgage will not be allowed to interfere with a creditor's right to resort to the most speedy and efficacious mode of obtaining satisfaction. Boice *v.* Conover, 63 N. J. Eq. 273, 53 Atl. 910.

42. Hamilton *v.* Schwehr, 34 Md. 107; *In re* Olympic Theater, 2 Browne (Pa.) 75. *Compare* Coburn *v.* Stephens, 137 Ind. 683, 36 N. E. 132, 45 Am. St. Rep. 218.

43. Gordon *v.* Bell, 50 Ala. 213.

44. Wahrmund *v.* Edgewood Distilling Co., (Tex. Civ. App. 1895) 32 S. W. 227. *Compare* Tucker *v.* Clisby, 12 Pick. (Mass.) 22; Gore *v.* Clisby, 8 Pick. (Mass.) 555; Lupton

creditor without a lien,[45] or a single creditor who is himself bound to the party entitled to the other security,[46] cannot maintain such a proceeding. So the rule is not applicable where the two claims are in the hands of the same person.[47]

F. How Enforced — 1. By Bill or Cross Bill in Equity — a. In General. One of the modes of enforcing the marshaling of assets is by a bill[48] or a cross bill in equity[49] to compel the paramount creditor to exhaust his lien on the singly charged fund.

b. Jurisdiction. In marshaling assets in equity it is indispensable that all the parties in interest should be before the court, so that the decree shall be final and conclusive upon their rights,[50] or at least that the fund should be so before the court that the judgment may operate *in rem*.[51]

c. Parties. To a proceeding to marshal assets, by whomsoever filed, the common debtor himself is an indispensable party defendant.[52] A creditor not made a party to a bill to marshal may be brought in as defendant to a cross bill.[53]

d. Pleading.[54] A party claiming the benefit of marshaling must, it is held, allege such facts as entitle him thereto,[55] and especially that the fund to which the paramount creditor alone has recourse is adequate to satisfy his debt.[56] So it is held that the junior lienor must allege that he himself will receive a benefit from the proceeding, and that the senior lienor will not be materially prejudiced thereby, and that a failure to make such allegation will render the pleading demurrable.[57] On the other hand it has been asserted that so free and large is the equitable doc-

v. Cutter, 8 Pick. (Mass.) 298; Scharf *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672; Shedd *v.* Brattleboro Bank, 32 Vt. 709.

45. Moses *v.* Home Bldg., etc., Assoc., 100 Ala. 465, 14 So. 412; Steele Lumber Co. *v.* Laurens Lumber Co., 98 Ga. 329, 24 S. E. 755; Colby *v.* Crocker, 17 Kan. 527; Emmons *v.* Bradley, 56 Me. 333, holding that there is no law by which a creditor, holding security upon different kinds of property, can be compelled to select that which is least convenient and available to himself, in order to aid other creditors, not secured in the collection of their demands. See also Scharf *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672.

46. Dolphin *v.* Aylward, L. R. 4 H. L. 486, where Lord Westbury speaks of the person having a right to resort to one of the funds only as a "single creditor."

47. Blasser *v.* Smith, 11 York Leg. Rec. (Pa.) 121.

48. Rock Springs First Nat. Bank *v.* Roder, 114 Fed. 451, 52 C. C. A. 253.

Dissolution of injunction. — Where a junior judgment creditor brings suit to enjoin a sale of lands under a prior mortgage, and to require the mortgagee to first apply personal property which is subject to the mortgage, and, on motion of the mortgagee, the injunction is dissolved as to the personalty, but the motion is overruled as to the realty, and plaintiff appeals from the order, thus preventing the application of the very remedy which he seeks in his complaint, it is proper to dissolve the injunction on the sale of the realty. Osburn *v.* Andre, 58 Miss. 609.

Appointment of receiver. — On a bill filed by a junior judgment creditor to enjoin a senior judgment creditor also holding collaterals securing the payment of his judgment from selling the debtor's property under his judgment, and to compel him to make his money out of the collaterals, it is not error for the court to appoint a receiver to make a sale for the best price of the collaterals, having a known market value, but it is error to make a disposition of the money, without answer or proof, upon bill and exhibits alone. Davis *v.* Walker, 51 Miss. 659.

49. Coster *v.* Georgia Bank, 24 Ala. 37; Huntington *v.* Headley, (N. J. Ch. 1898) 41 Atl. 670; King *v.* McVicker, 3 Sandf. Ch. (N. Y.) 192.

When cross bill necessary. — In Alabama the rule is that a party defendant who is compelled to assert his right to marshaling affirmatively, and asks for affirmative relief, must do so by a cross bill, and not by answer. Watts *v.* Eufaula Nat. Bank, 76 Ala. 474.

Issue not raised by counter-claim see New York Co-operative Bldg., etc., Assoc. *v.* Brennan, 62 N. Y. App. Div. 610, 70 N. Y. Suppl. 916.

50. Dews *v.* Cornish, 20 Ark. 332; Post *v.* Mackall, 3 Bland (Md.) 486; Quackenbush *v.* O'Hare, 61 Hun (N. Y.) 388, 16 N. Y. Suppl. 33 [*affirmed* in 129 N. Y. 485, 29 N. E. 958]; Shedd *v.* Brattleboro Bank, 32 Vt. 709.

51. Post *v.* Mackall, 3 Bland (Md.) 486; Quackenbush *v.* O'Hare, 61 Hun (N. Y.) 388, 16 N. Y. Suppl. 33 [*affirmed* in 129 N. Y. 485, 29 N. E. 958]; Shedd *v.* Brattleboro Bank, 32 Vt. 709.

52. Steele Lumber Co. *v.* Laurens Lumber Co., 98 Ga. 329, 24 S. E. 755.

53. Coster *v.* Georgia Bank, 24 Ala. 37.

54. Pleading generally see Pleading.

55. Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430.

56. Moore *v.* Wright, 14 Rich. Eq. (S. C.) 132; Felder *v.* Murphy, 2 Rich. Eq. (S. C.) 58.

57. Gibson *v.* Honnett, 72 Ark. 412, 82 S. W. 838, (1904) 84 S. W. 502.

trine that assets will in many cases be marshaled, provided the facts which move the court appear at any time during the progress of the trial, even though they have not been alleged in the pleadings.[58]

e. Evidence.[59] In a proceeding to marshal assets, the burden of proof is on the party invoking the doctrine to prove facts entitling him to such relief.[60] The burden is on the party who seeks the benefit of a proceeding to marshal to show that the double fund is not adequate to satisfy the claims of both creditors,[61] and that the senior lienor can realize his claim out of the fund to which he alone can resort.[62] The burden is also upon plaintiff to show that the remedy to which it is proposed the paramount creditor shall resort is as certain, prompt, and efficient as that which he is required to forego.[63]

2. By Subrogation.[64] The junior creditor who has been affected by the election of the paramount creditor is usually protected by substitution or subrogation.[65] If a creditor who has a lien on two funds, on one of which another creditor has a junior lien, elects to take his whole amount out of the fund on which the junior creditor has a lien, the latter will be entitled to have the prior lien assigned to him.[66] Or as the rule is otherwise expressed, if a creditor having a choice of two funds should, contrary to equity, so exercise his legal rights as to exhaust that fund to which alone other creditors can resort, then those other

58. Sherron *v.* Acton, (N. J. Ch. 1890) 18 Atl. 978; Gibbs *v.* Ougier, 12 Ves. Jr. 413, 8 Rev. Rep. 348, 33 Eng. Reprint 156.

59. Evidence generally see Evidence, 16 Cyc. 821.

60. New York Co-operative Bldg., etc., Assoc. *v.* Brennan, 62 N. Y. App. Div. 610, 70 N. Y. Suppl. 916; Herriman *v.* Skillman, 33 Barb. (N. Y.) 378.

61. New York Co-operative Bldg., etc., Co. *v.* Brennan, 62 N. Y. App. Div. 610, 70 N. Y. Suppl. 916.

62. Gibson *v.* Honnett, 72 Ark. 412, 82 S. W. 838, (1904) 84 S. W. 502; New York Co-operative Bldg., etc., Assoc. *v.* Brennan, 62 N. Y. App. Div. 610, 70 N. Y. Suppl. 916; Harriman *v.* Skillman, 33 Barb. (N. Y.) 378; Moore *v.* Wright, 14 Rich. Eq. (S. C.) 132; Felder *v.* Murphy, 2 Rich. Eq. (S. C.) 58. See also Brown *v.* Lapp, 89 S. W. 304, 28 Ky. L. Rep. 409.

63. Moore *v.* Wright, 14 Rich. Eq. (S. C.) 132.

64. Subrogation generally see Subrogation.

65. Ross *v.* Duggan, 5 Colo. 85, 102 (where it is said: "The right of the junior creditor to have this principle administered is ordinarily enforced by a decree of subrogation"); Cheesebrough *v.* Millard, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494 note.

66. *Colorado.*— Ross *v.* Duggan, 5 Colo. 85.

Illinois.— Wyman *v.* Ft. Dearborn Nat. Bank, 181 Ill. 279, 54 N. E. 946, 72 Am. St. Rep. 259, 48 L. R. A. 565 [*reversing* 80 Ill. App. 150].

Indiana.— Hannegan *v.* Hannah, 7 Blackf. 353.

Kansas.— Equitable Mortg. Co. *v.* Lowe, 53 Kan. 39, 35 Pac. 829.

Kentucky.— Commonwealth Bank *v.* Vance, 4 Litt. 168.

Nebraska.—Anthes *v.* Schroeder, 68 Nebr. 370, 94 N. W. 611.

New Jersey.—Boice *v.* Conover, 63 N. J. Eq. 273, 53 Atl. 910. See McKelway *v.* New England Mfg. Co., 9 N. J. Eq. 371.

New York.— Farwell *v.* Importers', etc., Nat. Bank, 90 N. Y. 485; Slade *v.* Van Vechten, 11 Paige 21; Woolcocks *v.* Hart, 1 Paige 185; Cheesebrough *v.* Millard, 1 Johns. Ch. 409, 7 Am. Dec. 494; Hunt *v.* Townsend, 4 Sandf. Ch. 510; King *v.* McVicker, 3 Sandf. Ch. 192.

North Carolina.— Roberts *v.* Oldham, 63 N. C. 297; Williams *v.* Washington, 16 N. C. 137; Jones *v.* Zollicoffer, 9 N. C. 623, 11 Am. Dec. 795.

Pennsylvania.— Milligan's Appeal, 104 Pa. St. 503; Delaware, etc., Canal Co.'s Appeal, 38 Pa. St. 512; Ramsey's Appeal, 2 Watts 228, 27 Am. Dec. 301; Selinger *v.* Myers, 24 Pa. Co. Ct. 71; Quakertown Bldg., etc., Assoc. *v.* Sorver, 11 Phila. 532.

Texas.— Brown *v.* Thompson, 79 Tex. 58, 15 S. W. 168; Ohio Cultivator Co. *v.* People's Nat. Bank, 22 Tex. Civ. App. 643, 55 S. W. 765; Walhoefer *v.* Hobgood, 19 Tex. Civ. App. 629, 48 S. W. 32; Willis *v.* Holland, 13 Tex. Civ. App. 689, 36 S. W. 329; Wahrmund *v.* Edgewood Distilling Co., (Civ. App. 1895) 32 S. W. 227.

Virginia.— Kent *v.* Matthews, 12 Leigh 573.

West Virginia.— Hudkins *v.* Ward, 30 W. Va. 204, 3 S. E. 600, 8 Am. St. Rep. 22.

United States.— Hawkins *v.* Blake, 108 U. S. 422, 2 S. Ct. 804, 27 L. ed. 775; Rock Springs First Nat. Bank *v.* Roder, 114 Fed. 451, 52 C. C. A. 253; Alston *v.* Munford, 1 Fed. Cas. No. 267, 1 Brock. 266; Findlay *v.* U. S. Bank, 9 Fed. Cas. No. 4,791, 2 McLean 44; *In re* Foot, 9 Fed. Cas. No. 4,906, 8 Ben. 228.

England.— Wright *v.* Morley, 11 Ves. Jr. 12, 8 Rev. Rep. 69, 32 Eng. Reprint 992; Aldrich *v.* Cooper, 8 Ves. Jr. 382, 2 White & T. Lead. Cas. Eq. 82, 7 Rev. Rep. 86, 32 Eng. Reprint 402.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 6.

creditors will be placed by a court of equity in his situation, so far as he has applied their fund to the satisfaction of his claim.[67] And the rule is the same where the parties are creditors of different debtors, where, as between the debtors, equity demands that one of them should discharge the debt in exoneration of the other.[68]

3. Not by Action at Law. The doctrine of marshaling assets is a creature of equity and as a general rule has no application to an action at law.[69] But it is held that when an equitable defense is permitted at law, to which the rule of marshaling securities is a reply, the countervailing equity of plaintiff will be considered, as well as that of defendant.[70]

G. Effect of Laches.[71] The rule in regard to marshaling of assets does not apply to a case where a creditor, having originally, equally with all the other creditors, the right to proceed against the real as well as the personal estate of the debtor, loses by laches the right of recourse against the realty.[72]

MARSHALSEA. See Court of Marshalsea.

MARTE SUO DECURRERE. A maxim meaning "To run by its own force."[1]

MARTIAL LAW. See War.

MARTINMAS. There are two Martinmasses, one, the old Martinmas, which falls on November 11, and the other, the new Martinmas, which falls on November 23.[2]

MASH. To beat into a confused mass.[3]

MASON. One whose occupation is to lay bricks and stones, or to construct the walls of buildings, chimneys, or the like which consists of bricks and stones.[4] (See, generally, Builders and Architects; Mechanics' Liens.)

MASONIC LODGES. See Associations; Charities; Mutual Benefit Insurance.

MASONRY. A term which may include either brick or stone.[5]

MASON'S MEASURE. The term applied to a custom among stone masons and builders whereby stone masons are entitled to claim in the measurement of work done by them not only the actual solid contents of a wall or structure built by

67. Ross *v.* Duggan, 5 Colo. 85.

68. Dorr *v.* Shaw, 4 Johns. Ch. (N. Y.) 17; Huston's Appeal, 69 Pa. St. 485; Sterling *v.* Brightbill, 5 Watts (Pa.) 229, 30 Am. Dec. 304; *In re* Foot, 9 Fed. Cas. No. 4,906, 8 Ben. 228; *Ex p.* Kendall, 1 Rose 71, 17 Ves. Jr. 521, 11 Rev. Rep. 122, 34 Eng. Reprint 199.

69. *Florida.*— Clonts *v.* Rich, 12 Fla. 633, 95 Am. Dec. 345.

Illinois.— Hunter *v.* Whitfield, 89 Ill. 229.

Maryland.— Cornish *v.* Willson, 6 Gill 299, holding that where one of the funds is legal assets, and the other equitable, and the creditor is pursuing the legal assets, a court of law will not marshal the assets, and oblige such creditor to seek payment out of the equitable assets.

Massachusetts.— Lupton *v.* Cutter, 8 Pick. 298.

Mississippi.— Cain *v.* Moyse, 71 Miss. 653, 15 So. 115; Johnson *v.* Moyse, (1893) 12 So. 483.

See 34 Cent. Dig. tit. "Marshaling Assets and Securities," § 12.

Compare Nelson *v.* Dunn, 15 Ala. 501, where the court says that "the rule of marshaling seems to obtain, at least to a qualified extent, at law."

In **Louisiana** the courts being under statute courts of equity as well as of law recognize the doctrine of marshaling, although there is no express law governing the same. Wiley *v.* St. Charles Hotel Co., 52 La. Ann. 1581, 28 So. 182.

70. Barlow *v.* Brittain, 70 Miss. 427, 12 So. 460; Black *v.* Robinson, 61 Miss. 54.

71. **Laches and stale demands** generally see Equity, 16 Cyc. 150 *et seq.*

72. Groot *v.* Hitz, 3 Mackey (D. C.) 247. See also Fordham *v.* Wallis, 10 Hare 217, 17 Jur. 228, 22 L. J. Ch. 548, 1 Wkly. Rep. 118, 44 Eng. Ch. 210, 68 Eng. Reprint 905.

Failure to give notice of junior claim see *supra*, II, C, 5, b.

Failure to invoke doctrine prior to appropriation of doubly charged fund by senior lienor see *supra*, II, C, 2, text and note 21.

1. Burrill L. Dict.

2. Smith *v.* Walton, 8 Bing. 235, 2 L. J. C. P. 85, 1 Moore & S. 380, 21 E. C. L. 521.

3. Walker Dict. [*quoted* in State *v.* Noblett, 47 N. C. 418, 433].

4. Webster Dict. [*quoted* in Fox *v.* Rucker, 30 Ga. 525, 527].

5. Shannon *v.* Hinsdale, 180 Ill. 202, 204, 54 N. E. 181.

such masons, but credit for all openings, such as windows, etc., in the same manner as if the same were solid masonry.[6] (See, generally, WEIGHTS AND MEASURES.)

MASS. A religious ceremonial or observance of the Catholic church;[7] a Catholic ceremonial celebrated by the priest in open church, where all who choose may be present and participate therein;[8] the sacrifice in the sacrament of the eucharist or the consecration and oblation of the host.[9] (Mass: Charity For, see CHARITIES.)

MASSAGE. A rubbing and kneading of the body.[10]

MASS CONVENTION. One where every voter represents himself, and himself only.[11] (See, generally, ELECTIONS.)

MASTER. See APPRENTICES; MASTER AND SERVANT.

MASTER AND APPRENTICE. See APPRENTICES.

6. Patterson *v.* Crowther, 70 Md. 124, 128, 16 Atl. 531.

7. Sherman *v.* Baker, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717 [*citing In re* Schonler, 134 Mass. 426].

8. Webster *v.* Sughrow, 69 N. H. 380, 383, 45 Atl. 139, 48 L. R. A. 100, where it is said: "It is a solemn and impressive ritual, from which many draw spiritual solace, guidance, and instruction. It is religious in its form and teaching."

9. Webster Int. Dict. [*quoted* in Coleman *v.* O'Leary, 114 Ky. 388, 402, 70 S. W. 1068, 24 Ky. L. Rep. 1248, where it is said: "It is . . . a public service — a public act of worship — by which, according to the tenets of the Roman Catholic Church, the priest who celebrates it [the mass] 'helps the living and obtains rest for the dead.'"].

10. Dunlop *v.* U. S., 165 U. S. 486, 498, 17 S. Ct. 375, 41 L. ed. 799.

11. Manston *v.* McIntosh, 58 Minn. 525, 528, 60 N. W. 672, 28 L. R. A. 605, in which case Minn. Laws (1893), c. 4, §§ 31, 33, 34, were construed.

MASTER AND SERVANT

By J. Breckinridge Robertson* and Clark A. Nichols†

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I. DEFINITIONS.

A. Master.[1] He is to be deemed a master who has the superior choice, control, and direction of the servant, and whose will the servant represents, not merely in the ultimate result of the work, but in the details.[2]

B. Servant[3]**— 1. In General.** A servant has been defined to be: (1) A person employed to labor for the pleasure or interest of another; especially, in law, one employed to render service or assistance in some trade or vocation, but without authority to act as agent in place of his employer; an employee;[4] and

1. Employer defined see 15 Cyc. 1034.
Independent contractor defined see *infra*, II, A, 4, a.
Vice-principal defined see *infra*, IV, G, 4, a, (VI).

2. Shearman & Redf. Negl. p. 83 [*quoted* in Central Coal, etc., Co. *v.* Grider, 115 Ky. 745, 755, 74 S. W. 1058, 25 Ky. L. Rep. 165, 65 L. R. A. 455; Robinson *v.* Webb, 11 Bush (Ky.) 464, 477].
Other definitions are: "One who not only prescribes the end, but directs, or at any time may direct, the means and methods of doing the work." Bailey *v.* Troy, etc., R. Co., 57 Vt. 252, 261, 52 Am. Rep. 129.
"One who not only prescribes to the workman the end of his work, but directs, or at any moment may direct, the means also, or, as it has been put, retains the power of controlling the work." Pollock Torts (4th ed.) 72 [*quoted* in Powers *v.* Massachusetts Homœopathic Hospital, 109 Fed. 294, 298, 47 C. C. A. 122, 65 L. R. A. 372].
"One who exercises personal authority over another, and that other is his servant." 1 Minor Inst. (3d ed.) c. 14, p. 179 [*quoted* in Ginter *v.* Shelton, 102 Va. 185, 188, 45 S. E. 892].

3. The correlative of "master" see Imperial Dict. [*quoted* in Lang *v.* Simmons, 64 Wis. 525, 530, 25 N. W. 650]; Worcester Dict. [*quoted* in Lang *v.* Simmons, *supra*].
Fellow servant defined see *infra*, IV, G, 3, a.
Distinguished from: Agent see PRINCIPAL AND AGENT. Independent contractor see *infra*, II, A, 4.
The several classes of servants are [(1) slaves;] (2) menial servants; (3) apprentices; (4) laborers; (5) stewards, bailiffs, factors, agents, etc. Ginter *v.* Shelton, 102 Va. 185, 45 S. E. 892. The first sort of servants acknowledged by the laws of England are "menial servants," so called from being *intra mœnia*, or domestics. Another species of servants are called "apprentices," from *apprendre*, to learn. A third species of servants are laborers," who are only hired by the day or week, and do not live *intra mœnia*, as part of the family. There is yet a fourth species of servants, if they may be so called, being rather in a superior — a ministerial — capacity, such as stewards, factors, and bailiffs, whom, however, the law considers as servants *pro tempore* with regard to such of their acts as affect their master's or employer's property. Besides these four sorts of servants may be mentioned clerks and shopmen, who, however confidentially they may be employed, are servants in the eye of the law; merchant seamen; persons working in mills and factories, or mines and collieries. Lewis *v.* Fisher, 80 Md. 139, 30 Atl. 608, 45 Am. St. Rep. 327, 26 L. R. A. 278 [*citing* 1 Blackstone Comm. c. 14)].
Common-law distinction between menial and other servants repudiated see Haskins *v.* Royster, 70 N. C. 601, 16 Am. Rep. 780 [*disapproving* Burgess *v.* Carpenter, 2 S. C. 7, 16 Am. Rep. 643]. See also Salter *v.* Howard, 43 Ga. 601; Jones *v.* Blocker, 43 Ga. 331; Walker *v.* Cronin, 107 Mass. 555. *Compare* Boniface *v.* Scott, 3 Serg. & R. (Pa.) 351; *Ex p.* Meason, 5 Binn. (Pa.) 167.

4. Standard Dict. [*quoted* in Ginter *v.* Shelton, 102 Va. 185, 188, 45 S. E. 892].
Other definitions are: "A person employed by another to render personal services to the employer." *In re* Grubbs-Wiley Grocery Co., 96 Fed. 183, 184.
"A person that attends another for the purpose of performing menial offices for hire, or who is employed by another for such offices or other labor, and is subject to his command." Imperial Dict. [*quoted* in Lang *v.* Simmons, 64 Wis. 525, 530, 25 N. W. 650].
"A person who, by contract or operation of law, is for a limited period subject to the control of another in a particular trade, business, or occupation." Wood M. & S. § 1 [*quoted* in Ginter *v.* Shelton, 102 Va. 185, 188, 45 S. E. 892].
"One who does work under the direction of another, who not only prescribes to the workman the nature of his work, but directs, or at any moment may direct, the means also, or, as it has been put, retains the power of controlling the work." Powers v. Massachusetts Homœopathic Hospital, 109 Fed. 294, 298, 47 C. C. A. 122, 65 L. R. A. 372.
"One who, for a valuable consideration, engages in the service of another, and undertakes to observe his directions in some lawful business." Central Coal, etc., Co. *v.* Grider, 115 Ky. 745, 755, 74 S. W. 1058, 25 Ky. L. Rep. 165.
"One who, for wages, serves his employer, following his direction in performing the work." Holmes *v.* Tennessee Coal, etc., Co., 49 La. Ann. 1465, 1469, 22 So. 403.
"One who is employed to perform an inferior and menial service." Epps *v.* Epps, 17 Ill. App. 196, 201.
"One who is employed to render personal service to his employer, otherwise than in the

(2) specifically, a person hired to assist in domestic matters, living within the employer's house, and making part of his family; hired help.[5] The word "servant" in our legal nomenclature has a broad significance, and embraces all persons, of whatever rank or position, who are in the employ and subject to the direction or control of another in any department of labor or business. Indeed, it may in most cases be said to be synonymous with employee.[6] However, the proper meaning to be given to the word in the particular case is frequently governed by the context or the intent with which it is employed.[7]

2. Public Servant. There are two classes of public servants — officers, or those whose functions appertain to the administration of government;[8] and employees, or those whose employment is merely contracted.[9]

II. The Relation.[10]

A. Creation and Existence — 1. What Constitutes Relation. The relation of master and servant exists whenever the employer retains the right to direct the

pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master." Hedge *v.* Williams, 131 Cal. 455, 459, 63 Pac. 721, 64 Pac. 106, 82 Am. St. Rep. 366; Murray *v.* Dwight, 161 N. Y. 301, 305, 55 N. E. 901, 902, 48 L. R. A. 673; Baldwin *v.* Abraham, 57 N. Y. App. Div. 67, 77, 67 N. Y. Suppl. 1079; Singer *v.* McDermott, 30 Misc. (N. Y.) 738, 741 62 N. Y. Suppl. 1086.

"A person who performs for another any kind of service; in which sense the word would be equivalent to 'employe' or 'agent.'" Epps *v.* Epps, 17 Ill. App. 196, 201.

"One who serves" (Worcester Dict. [*quoted* in Lang *v.* Simmons, 64 Wis. 525, 530, 25 N. W. 650]), or attends, whether voluntarily or involuntarily, a person employed by another, and subject to his orders; one who exerts himself or herself or labors for the benefit of a master or employer." Century Dict. [*quoted* in Ginter *v.* Shelton, 102 Va. 185, 188, 45 S. E. 892), "or does service voluntarily or involuntarily; a person who is employed by another for menial offices or for other labor, and is subject to his command; a person who labors or exerts himself for the benefit of another, his master or employer; a subordinate helper." Webster Dict. [*quoted* in Flesh *v.* Lindsay, 115 Mo. 1, 18, 21 S. W. 907, 37 Am. St. Rep. 374].

5. Standard Dict. [*quoted* in Ginter *v.* Shelton, 102 Va. 185, 188, 45 S. E. 892].

6. Wood M. & S. § 1 [*quoted* in Hand *v.* Cole, 88 Tenn. 400, 404, 12 S. W. 922, 7 L. R. A. 96].

The term "servant" is very broad, and, if taken in its legal sense, would embrace all classes of persons retained, hired, or employed in the business of another. Matter of Miller, 1 Ashm. (Pa.) 323, 327.

Employee defined see 15 Cyc. 1029.

Laborer defined see 24 Cyc. 810.

"Any person who works for another for a salary is a servant in the eye of the law." Frank *v.* Herold, 63 N. J. Eq. 443, 451, 52 Atl. 152.

A workman by the piece, who, by his industry and labor, gives the required shape to the material of his employer, and who has no interest in the work, and is not under a contract, is a servant and ordinary employee. The same is true of a laboring man who works by the job in unloading a car of coal under the direction and subject to the control of the employer. Holmes *v.* Tennessee Coal, etc., Co., 49 La. Ann. 1465, 22 So. 403.

7. State *v.* Conover, 3 Harr. (Del.) 565; Epps *v.* Epps, 17 Ill. App. 196; Burgess *v.* Carpenter, 2 S. C. 7, 16 Am. Rep. 643; Quinn *v.* Kansas City, etc., R. Co., 94 Tenn. 713, 30 S. W. 1036, 45 Am. St. Rep. 767, 28 L. R. A. 552; Hand *v.* Cole, 88 Tenn. 400, 12 S. W. 922, 7 L. R. A. 96; *In re* Scanlan, 97 Fed. 26; Rex *v.* Hayden, 7 C. & P. 445, 32 E. C. L. 699. See also 24 Cyc. 813 note 95.

8. Moll *v.* Sbisa, 51 La. Ann. 290, 25 So. 141. See State *v.* King, 154 Ind. 621, 57 N. E. 535, where it is said: The term 'public servants' is commonly used, and properly so, to include county officials, who, in a political sense, are considered as the agents of the people in managing and conducting the business of the county."

Public officers: Generally see Officers, and Cross-References Thereunder. Of county see Counties. Of municipality see Municipal Corporations. Of state see States. Of town see Towns. Of United States see United States. See also Army and Navy; Clerks of Courts; Courts; Court Commissioners; Judges; Militia; Prosecuting Attorneys; Sheriffs and Constables; United States Commissioners; United States Marshals; War.

9. Moll *v.* Sbisa, 51 La. Ann. 290, 25 So. 141.

Public employees: Of county see Counties. Of municipality see Municipal Corporations. Of state see States. Of town see Towns. Of United States see United States.

10. **As affecting liability for injuries to:** Third persons see *infra*, V, A, 2, b. To servant see *infra*, IV, A, 2, a.

As basis of liability for injuries to third persons see *infra*, V, A, 2, a.

Authority of: Corporation to engage employee see Corporations. Officers and agents

manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done.[11]

of corporations to make contracts of employment for corporations see CORPORATIONS. Railroad to engage employee see RAILROADS.

Contracts: For carrying mail see POST-OFFICE. For personal service as subjects of protection and relief see INJUNCTIONS. For services of infants see INFANTS. For working mines, quarries, and wells see MINES AND MINERALS. To be rendered by or for insane persons see INSANE PERSONS.

Contracts of employment: By agents see PRINCIPAL AND AGENT. By corporations see CORPORATIONS.

Creation and existence of relation of agency see PRINCIPAL AND AGENT.

Effect of custom to explain contract of employment see CUSTOMS AND USAGES.

Effect of express or implied contract for services see WORK AND LABOR.

Employment of: Prohibited person as offense under liquor laws see INTOXICATING LIQUORS. Seamen see SEAMEN. Servant by a married woman see HUSBAND AND WIFE. Teachers see SCHOOLS AND SCHOOL-DISTRICTS.

Evidence of knowledge of custom as to contract of employment see CUSTOMS AND USAGES.

Implied contract for services in general see WORK AND LABOR. By persons in family or other relation see WORK AND LABOR.

Municipal employees see MUNICIPAL CORPORATIONS.

Power of assignee to employ servant see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Power of county to contract for employment of servants see COUNTIES.

Relevancy of evidence to prove contract of employment see CUSTOMS AND USAGES.

Services to corporation by member or stock-holder see CORPORATIONS.

11. Singer Mfg. Co. *v.* Rahn, 132 U. S. 518, 10 S. Ct. 175, 33 L. ed. 440 [*following* New Orleans, etc., R. Co. *v.* Hanning, 15 Wall. (U. S.) 649, 656, 21 L. ed. 220]. See also, as sustaining the proposition, the following cases:

Illinois.—Wadsworth Howland Co. *v.* Foster, 50 Ill. App. 513.

Indiana.— Indiana Iron Co. *v.* Cray, 19 Ind. App. 565, 48 N. E. 803 [*distinguishing* New Albany Forge, etc., Rolling Mill *v.* Cooper, 131 Ind. 363, 30 N. E. 294].

Kentucky.— Robinson *v.* Webb, 11 Bush 464.

Louisiana.— Moffet *v.* Koch, 106 La. 371, 31 So. 40.

Missouri.— Mound City Paint, etc., Co. *v.* Conlon, 92 Mo. 221, 4 S. W. 922.

New York.— Butler *v.* Townsend, 126 N. Y. 105, 26 N. E. 1017; Michael *v.* Stanton, 3 Hun 462; Boniface *v.* Relyea, 5 Abb. Pr. N. S. 259.

Ohio.— Gravatt *v.* State, 25 Ohio St. 162.

Pennsylvania.— Stock *v.* O'Hara, 2 Pa. Co. Ct. 348.

Utah.—Wilson *v.* Sioux Consol. Min. Co., 16 Utah 392, 52 Pac. 626.

England.— Reg. *v.* Steel, 2 Q. B. D. 37, 13 Cox C. C. 354, 46 L. J. M. C. 1, 35 L. T. Rep. N. S. 534, 25 Wkly. Rep. 34; General Steam Nav. Co. *v.* British, etc., Steam Nav. Co., L. R. 3 Exch. 330; Sadler *v.* Henlock, 3 C. L. R. 760, 4 E. & B. 570, 1 Jur. N. S. 677, 24 L. J. Q. B. 138, 3 Wkly. Rep. 181, 82 E. C. L. 570.

See 34 Cent. Dig. tit. "Master and Servant," § 1.

The real test by which to determine whether a person is acting as servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control, and was liable to be discharged by him for disobedience of orders or misconduct. Wood M. & S. § 317 [*quoted* in Indiana Iron Co. *v.* Cray, 19 Ind. App. 565, 48 N. E. 803].

The relation exists where one person is willing to work for another from day to day, and that other desires the labor and makes his business arrangements accordingly. Frank *v.* Herold, 63 N. J. Eq. 443, 52 Atl. 152.

"A servant sharing in a profit instead of wages is not a partner." Leonard *v.* Sparks, 109 La. 543, 33 So. 594 [*citing* Maunsell *v.* Willett, 36 La. Ann. 322; Halliday *v.* Bridewell, 36 La. Ann. 238; Miller *v.* Chandler, 29 La. Ann. 88]. See also Ross *v.* Parkyns, L. R. 20 Eq. 331, 44 L. J. Ch. 610, 30 L. T. Rep. N. S. 331, 24 Wkly. Rep. 5; Peacock *v.* Peacock, 2 Campb. 45; Reg. *v.* Wortley, 5 Cox C. C. 382, 2 Den. C. C. 333, 15 Jur. 1137, 21 L. J. M. C. 44, T. & M. 636; Harrington *v.* Churchward, 6 Jur. N. S. 576, 29 L. J. Ch. 521, 2 L. T. Rep. N. S. 114, 8 Wkly. Rep. 302.

Assent of both parties necessary to relation see Chicago, etc., R. Co. *v.* Argo, 82 Ill. App. 667. See also St. Louis, etc., R. Co. *v.* Smith, 71 Ark. 290, 73 S. W. 101.

Special police officer.—A special police officer appointed on application of the keeper of a theater, by giving a bond to the city, is not a servant of the proprietor of the theater, who did not appoint him, could not remove him, and could not control his official conduct. Healey *v.* Lothrop, 171 Mass. 263, 50 N. E. 540.

Power of discharge as test of relation see Indiana Iron Co. *v.* Cray, 19 Ind. App. 565, 48 N. E. 803 [*distinguishing* New Albany Forge, etc., Rolling Mill *v.* Cooper, 131 Ind. 363, 30 N. E. 294. See also Pioneer Fireproof Constr. Co. *v.* Hansen, 176 Ill. 100, 52 N. E. 17 [*affirming* 69 Ill. App. 659]; Butler *v.* Townsend, 126 N. Y. 105, 26 N. E. 1017.

Where a daughter over age resides with her father, and by a tacit understanding continues to perform certain domestic services, and is supplied by him with food and clothing, the relation of master and servant exists. Lipe *v.* Eisenlerd, 32 N. Y. 229.

Right of father to control minor children as showing relation of master and servant see

2. Parties. As a general rule, every person of the full age of twenty-one years, and not under any legal disability, is capable of becoming either a master or a servant. But in order that a contract of hiring and service may be legally binding, it is necessary that, at the time such a contract is entered into, the party about to be hired should be free from any other engagement incompatible with that into which he is about to enter; in other words, he must be *sui juris*.[12]

3. Contracts of Employment[13] — a. In General. The relation of master and servant arises only out of contract, which, except where controlled by the statute of frauds,[14] may be either express or implied, verbal or written;[15] and may contain

Clark *v.* Fitch, 2 Wend. (N. Y.) 459, 20 Am. Dec. 639.

To change the relation of parent and minor child into that of master and servant there must be unequivocal acts clearly proving an agreement to that effect. Swartz *v.* Hazlett, 8 Cal. 118.

Possession of servant that of master see Perret *v.* Sanchez, 12 La. Ann. 687; Com. *v.* Dudley, 10 Mass. 403; Doe *v.* Birchmore, 9 A. & E. 662, 8 L. J. K. B. 108, 1 P. D. 448, 36 E. C. L. 350; Doe *v.* Baytup, 3 A. & E. 188, 1 Harr. & W. 270, 4 L. J. K. B. 263, 4 N. & M. 837, 30 E. C. L. 104; Delaney *v.* Fox, 2 C. B. N. S. 768, 26 L. J. C. P. 248, 89 E. C. L. 768.

12. Smith M. & S. 1.

13. Amount of wages see *infra*, III, B, 3.

Application of statute of frauds to contracts of employment relating to the sale of goods see Frauds, Statute of.

Certainty of contracts in general see Contracts.

Construction of stipulations for liquidating damages or penalties see Damages.

Contract by a parent with third persons for services of child see Parent and Child.

Contracts limiting liability for injuries see *infra*, IV, A, 7.

Contracts not to be performed within one year see Frauds, Statute of.

Entire and severable contracts see *infra*, III, B, 4, c.

Indemnity for service see *infra*, V, A, 7.

Inventions or discoveries and literary productions by servants see *infra*, III, A, 7.

Recovery for services rendered under contract voidable under statute of frauds see Frauds, Statute of.

Right to wages see *infra*, III, B, 1.

Validity of contract for personal services as affected by public policy see Contracts.

Validity of contract for service in prohibited traffic see Contracts.

14. See Frauds, Statute of, 20 Cyc. 147 *et seq.*

15. Illustrative cases.— *Georgia.*— Pitts *v.* Allen, 72 Ga. 69.

Indiana.— Price *v.* Jones, 105 Ind. 543, 5 N. E. 683, 55 Am. Rep. 230; Everitt *v.* Bassler, 25 Ind. App. 303, 57 N. E. 560; Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

Kentucky.— Yellow Poplar Lumber Co. *v.* Rule, 106 Ky. 455, 50 S. W. 685, 20 Ky. L. Rep. 2006.

Michigan.— Sax *v.* Detroit, etc., R. Co., 125 Mich. 252, 84 N. W. 314, 84 Am. St. Rep. 572; Gerardo *v.* Brush, 120 Mich. 405, 79 N. W. 646.

Minnesota.— Magoon *v.* Minnesota Packing Co., 34 Minn. 434, 26 N. W. 235.

Mississippi.— Lee *v.* Hampton, 79 Miss. 321, 30 So. 721.

Nebraska.— Pettis *v.* Green River Asphalt Co., (1904) 99 N. W. 235.

New Jersey.— Pangburn *v.* Phelps, 63 N. J. L. 346, 43 Atl. 977. *Compare* Shaw *v.* Woodbury Glass Works, 52 N. J. L. 7, 18 Atl. 696 [*affirmed* in 53 N. J. L. 666, 24 Atl. 1004].

New York.— Usher *v.* New York Cent., etc., R. Co., 76 N. Y. App. Div. 422, 78 N. Y. Suppl. 508; Nounenbocker *v.* Hooper, 4 E. D. Smith 401; Nicholas *v.* McIntire, 21 N. Y. Suppl. 67.

South Carolina.—State *v.* Sanders, 52 S. C. 580, 30 S. E. 616.

Texas.— East Line, etc., R. Co. *v.* Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758; Lang *v.* Fritze, (Civ. App. 1899) 54 S. W. 36.

Wisconsin.— Hooker *v.* Hyde, 61 Wis. 204, 21 N. W. 52.

England.— Gravely *v.* Barnard, L. R. 18 Eq. 518, 43 L. J. Ch. 659, 30 L. T. Rep. N. S. 863, 22 Wkly. Rep. 891; Stirling *v.* Maitland, 5 B. & S. 840, 34 L. J. Q. B. 1, 11 L. T. Rep. N. S. 337, 13 Wkly. Rep. 76, 117 E. C. L. 840; Whittle *v.* Frankland, 2 B. & S. 49, 8 Jur. N. S. 382, 31 L. J. M. C. 81, 5 L. T. Rep. N. S. 639, 110 E. C. L. 49; Hartley *v.* Cummings, 5 C. B. 247, 57 E. C. L. 247, 2 C. & K. 433, 61 E. C. L. 433, 12 Jur. 57, 17 L. J. C. P. 84; Reg. *v.* Welch, 2 E. & B. 357, 75 E. C. L. 357; Pilkington *v.* Scott, 15 L. J. Exch. 329, 15 M. & W. 657; De Francesco *v.* Barnum, 63 L. T. Rep. N. S. 514.

A letter containing an offer to pay a specified sum for certain services, and the acceptance of such order, shown by the performance of the services, constitute a contract in writing. Hooker *v.* Hyde, 61 Wis. 204, 21 N. W. 52.

An agreement to accept employment is not necessary to the validity of a promise to employ, made as a part of the compromise of an action. East Line, etc., R. Co. *v.* Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758.

Signature as assent.— A memorandum, signed by both parties, reciting that "I have engaged" plaintiff's services for the season at a specified salary is not unilateral. Walton *v.* Mather, 10 Misc. (N. Y.) 546, 38 N. Y. Suppl. 782.

The assent of an employee to a rule requiring two weeks' notice of an intention to

such terms and conditions as the parties see fit to make, provided they are not illegal and do not contravene public policy.[16] Where the consideration is tainted by no illegality, but some of the promises are illegal, the illegality of those which are bad does not communicate itself to or contaminate those which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable, or dependent upon one another.[17]

b. Construction — (i) *In General.* Contracts of employment are subject to the same rules of construction as other contracts. In construing them regard is to be had to the intention of the parties, as shown by the terms of the contract, taking into consideration the circumstances surrounding its making, and the object had in view.[18] Where there is no express contract between an employer and an employee, imposing on the latter a higher degree of skill, care, diligence, and

quit service, on pain of forfeiture of wages due, may be express or implied. If the rule was read to him, and without objecting he entered the employment, the law implies assent. Diamond State Iron Co. *v.* Bell, 2 Marv. (Del.) 303, 43 Atl. 161.

Contract induced by fraud violable see Mexican Amole Soap Co. *v.* Clarke, 72 Ill. App. 655.

Withdrawal of offer after acceptance.— A person making an offer of employment, who does not receive a timely letter of acceptance, is not bound, after receiving such letter, to notify the writer that the acceptance is too late. Maclay *v.* Harvey, 90 Ill. 525, 32 Am. Rep. 35.

Contract must conform to statutory requirements see State *v.* Williams, 32 S. C. 123, 10 S. E. 876, construing Gen. St. § 2081.

16. See, generally, CONTRACTS, 9 Cyc. 465.

Contract for permanent employment not against public polic see Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289; Jessup *v.* Chicago, etc., R. Co., 82 Iowa 243, 48 N. W. 77; Louisville, etc., R. Co. *v.* Offutt, 99 Ky. 427, 36 S. W. 181, 18 Ky. L. Rep. 303, 59 Am. St. Rep. 467.

A contract is not against public policy because the master agrees to pay his employee for his time while employed, although discharged for inability or misconduct. Edwards *v.* Crepin, 68 Cal. 37, 8 Pac. 616.

Contract binding on one party for a certain length of time but which the other might terminate at pleasure held valid see Gulf, etc., R. Co. *v.* Jackson, 29 Tex. Civ. App. 342, 69 S. W. 89.

Notice of claim.— A provision in a contract that the servant shall commence no action relating to the employment until ten days after service of notice of his claim on the master is valid. Prudential Ins. Co. *v.* Hite, 69 Ill. App. 416.

Contract forbidden by law void see *In re* Clark, 1 Blackf. (Ind.) 122, 12 Am. Dec. 213.

17. St. Louis, etc., R. Co. *v.* Matthews, 64 Ark. 398, 42 S. W. 902, 39 L. R. A. 467.

18. *Alabama.*— Evans *v.* Cincinnati, etc., R. Co., 78 Ala. 341.

Georgia.— Horan *v.* Strachan, 86 Ga. 408, 12 S. E. 678, 22 Am. St. Rep. 471.

Indiana.— Phares *v.* Lake Shore, etc., R. Co., 20 Ind. App. 54, 50 N. E. 306.

Louisiana.— Tete *v.* Lanaux, 45 La. Ann. 1343, 14 So. 241; Jeter *v.* Penn, 28 La. Ann. 230, 26 Am. Rep. 98.

Maryland.— Dugan *v.* Anderson, 36 Md. 567, 11 Am. Rep. 509.

Massachusetts.— Carnig *v.* Carr, 167 Mass. 544, 46 N. E. 117, 57 Am. St. Rep. 488, 35 L. R. A. 512; Blair *v.* Laflin, 127 Mass. 518.

Michigan.— Schaub *v.* Welded-Barrel Co., 125 Mich. 591, 84 N. W. 1095; Schaub *v.* Arc Welding Co., 123 Mich. 487, 82 N. W. 235.

Missouri.—Burnetta *v.* Marceline Coal Co., 180 Mo. 241, 79 S. W. 136; Estes *v.* Desnoyers Shoe Co., 155 Mo. 577, 56 S. W. 316.

New York.— Ludlum *v.* Couch, 10 N. Y. App. Div. 603, 42 N. Y. Suppl. 370; Pullar *v.* Easton, 6 Lans. 247; Schlesinger *v.* Burland, 42 Misc. 206, 85 N. Y. Suppl. 350; Osgood *v.* Paragon Silk Co., 19 Misc. 186, 43 N. Y. Suppl. 271.

Pennsylvania.— Peniston *v.* John Y. Huber Co., 196 Pa. St. 580, 46 Atl. 934.

South Dakota.— Bowers *v.* Graves, etc., Co., 8 S. D. 385, 66 N. W. 931.

Wisconsin.— Ornstein *v.* Yahr, etc., Drug Co., 119 Wis. 429, 96 N. W. 826; Wright *v.* C. S. Graves Land Co., 100 Wis. 269, 75 N. W. 1000; Kellogg *v.* Citizens' Ins. Co., 94 Wis. 554, 69 N. W 362; Jennings *v.* Lyons, 39 Wis. 553, 20 Am. Rep. 57.

United States.— Mallory *v.* Mackaye, 92 Fed. 749, 34 C. C. A. 653; Davis *v.* U. S., 27 Ct. Cl. 181.

Canada.— Macmath *v.* Confederation Life Assoc., 36 U. C. Q B. 459; Fortier *v.* Royal Canadian Ins. Co., 29 U. C. C. P. 353; Sims *v.* Harris, 1 Ont. L. Rep. 445.

See 34 Cent. Dig. tit. "Master and Servant," § 3.

Where a contract is made in view of well-established customs of the trade to which it relates, it is to be construed in the light of those customs. Estes *v.* Desnoyers Shoe Co., 155 Mo. 577, 56 S. W. 316.

The use of the term "general superintendent" in a written contract of employment does not render it so ambiguous as to make the contract void, since the parties must be deemed to have used the term in the sense in which it would be understood by those engaged in the same kind of business. Schaub *v.* Arc Welding Co., 123 Mich. 487, 82 N. W. 235.

A rule adopted several years after the employment of a conductor by a railroad com-

attention in the discharge of the duties of the position he contracts to fill, only the ordinary and reasonable skill, care, diligence, and attention implied by law can be required of him. But if the employee contracts for a higher degree of skill, care, and diligence than the law implies, he cannot excuse himself from a failure to live up to his contract by merely showing that he performed the duties of his position with the ordinary and reasonable degree of skill, care, and diligence required of him by law. He must perform his duties with the degree and grade of service for which he contracts.[19]

(11) *Contracts of Hire or Lease.*[20] Whether in a given instance a contract is to be construed as a contract of employment or as a lease is to be determined by the terms of the contract itself, its object, and the intention of the parties as gathered from the circumstances surrounding the transaction.[21]

4. Independent Contractors and Their Employees[22] **— a. Who Are Independent Contractors.** One who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely in accordance with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is an independent contractor, and not a servant.[23]

b. Relation Between Employer and Contractor's Servants.[24] The relation of master and servant does not exist between an employer and the servants of an

pany does not form part of the contract of employment. Cleveland, etc., R. Co. *v.* Jenkins, 174 Ill. 398, 51 N. E. 811, 66 Am. St. Rep. 296, 62 L. R. A. 922 [*reversing* 75 Ill. App. 17].

19. Hatton *v.* Mountford, 105 Va. 96, 52 S. E. 847 [*citing* Crescent Horse Shoe, etc., Co. *v.* Eynon, 95 Va. 151, 27 S. E. 935].

20. Creation of tenancy at will or at sufferance by occupancy incident to service or employment see Landlord and Tenant.

Implied tenancy from occupancy incident to employment see Landlord and Tenant.

21. Contracts construed as contracts of employment.— *Kansas.*— Grubb *v.* Troy, 7 Kan. App. 108, 53 Pac. 78.

Missouri.— Woodward *v.* Conder, 33 Mo. App. 147, where the contract was to cut and harvest the grass on plaintiff's lot for a compensation of one half of the hay harvested.

North Carolina.— Neal *v.* Bellamy, 73 N. C. 384; Haywood *v.* Rogers, 73 N. C. 320.

Tennessee.— Mann *v.* Taylor, 5 Heisk. 267.

Wisconsin.— Whitney *v.* Clifford, 46 Wis. 138, 49 N. W. 835, 32 Am. Rep. 703.

England.— Reg. *v.* Ashley, 1 C. & K. 198, 47 E. C. L. 198; Rex *v.* Rees, 7 C. & P. 568, 32 E. C. L. 762; Bertie *v.* Beaumont, 16 East 33; St. Anne Parish *v.* Linnean Soc., 3 E. & B. 793, 77 E. C. L. 793; Rex *v.* Stock, 2 Leach C. C. 1015, R. & R. 138, 2 Taunt. 339, 11 Rev. Rep. 605.

See 34 Cent. Dig. tit. "Master and Servant," § 4.

Contracts construed as leases.— *California.* — Walls *v.* Preston, 25 Cal. 59.

Massachusetts.—Fiske *v.* Framingham Mfg. Co., 14 Pick. 491.

Minnesota.— Lightbody *v.* Truelsen, 39 Minn. 310, 40 N. W. 67.

New York.— Jackson *v.* Brownell, 1 Johns. 267, 3 Am. Dec. 326.

South Carolina.— Whaley *v.* Jacobson, 21 S. C. 51.

United States.— Doyle *v.* Union Pac. R. Co., 147 U. S. 413, 13 S. Ct. 333, 37 L. ed. 223.

See 34 Cent. Dig. tit. "Master and Servant," § 4.

22. Liability for injuries see *infra*, V, B.

Statutes imposing liability on railroad company see Railroads.

23. Hale *v.* Johnson, 80 Ill. 185 [*followed* and *adopted* in Whitney, etc., Co. *v.* O'Rourke, 172 Ill. 177, 50 N. E. 242 (*affirming* 68 Ill. App. 487)].

"An independent contractor is not, in any proper legal sense, a servant of his employer, but is one exercising an independent employment under a contract to do certain work by his own methods, without subjection to the control of his employer except as to the product or result of the work. . . . It has been said that the test is, who has the general control of the work? Who has the right to direct what shall be done, and how to do it?" Indiana Iron Co. *v.* Cray, 19 Ind. App. 565, 48 N. E. 803, 807. See also Moffet *v.* Koch, 106 La. 371, 31 So. 40; Faren *v.* Sellers, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256; Eldred *v.* Mackie, 178 Mass. 1, 59 N. E. 673; Berger *v.* Mandel, 25 Misc. (N. Y.) 766, 54 N. Y. Suppl. 987.

A person employed by the day to do a piece of work, and allowed by the contract to adopt his own methods in performing it — the employer paying the expenses incurred, and looking to him for results only — is an independent contractor. Groesbeck *v.* Pinson, 21 Tex. Civ. App. 44, 50 S. W. 620.

Where right to direct is reserved to employer, the relation is that of master and servant. Moffet *v.* Koch, 106 La. 371, 31 So. 40. See also Andrews Bros. Co. *v.* Burns, 22 Ohio Cir. Ct. 437, 12 Ohio Cir. Dec. 305.

24. Liability for injuries see *infra*, V, B, 3.

independent contractor, nor between an independent contractor and the servants of a subcontractor, and he is not responsible as master either to or for them.[25] If, however, the employer assumes control over the servant of an independent contractor and the work performed by him, the relation of master and servant exists,[26] and the mere fact of nominal employment by an independent contractor will not relieve the master of liability where the servant is in fact in his employ.[27]

5. Evidence of Employment.[28] Whether or not the relation of master and servant exists in a given case is a question of fact, or of mixed law and fact, and is to be proved, as any other like question. Generally speaking, any evidence tending to prove or disprove the relationship is admissible, its weight and sufficiency being left to the jury under the instructions of the court.[29]

25. *Illinois.* — Whitney, etc., Co. *v.* O'Rourke, 172 Ill. 177, 50 N. E. 242.

Indiana.— Marks *v.* Indianapolis, etc., R. Co., 38 Ind. 440; Indianapolis, etc., R. Co. *v.* O'Reily, 38 Ind. 140; Schnurr *v.* Huntington County, 22 Ind. App. 188, 53 N. E. 425.

Iowa.— Nash *v.* Chicago, etc., R. Co., 62 Iowa 49, 17 N. W. 106; Ney *v.* Dubuque, etc., R. Co., 20 Iowa 347.

Massachusetts.— Hennebry *v.* Maynard, 174 Mass. 428, 54 N. E. 871.

New York.— Deane *v.* Buffalo, 42 N. Y. App. Div. 205, 58 N. Y. Suppl. 810; Myles *v.* Ballston Terminal R. Co., 35 N. Y. App. Div. 143, 54 N. Y. Suppl. 1072; Hughes *v.* Smith, 31 Misc. 269, 63 N. Y. Suppl. 1042; Atcherson *v.* Troy, etc., R. Co., 6 Abb. Pr. N. S. 329.

Pennsylvania.— Plymouth Coal Co. *v.* Kommiskey, 116 Pa. St. 365, 9 Atl. 646; Guthrie *v.* Horner, 12 Pa. St. 236; Allentown School Dist. *v.* McConn, 2 Walk. 85; Haddock *v.* Rodkofski, 7 Pa. Cas. 9, 9 Atl. 652.

United States.— Walters *v.* Western, etc., R. Co., 69 Fed. 679; Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314.

England.— Peachey *v.* Rowland, 13 C. B. 182, 17 Jur. 764, 22 L. J. C. P. 81, 76 E. C. L. 182, 16 Eng. L. & Eq. 442; Cuthbertson *v.* Parsons, 12 C. B. 304, 16 Jur. 860, 21 L. J. C. P. 165, 74 E. C. L. 304; Ellis *v.* Sheffield Gas Consumers Co., 2 C. L. R. 249, 2 E. & B. 767, 18 Jur. 146, 23 L. J. Q. B. 42, 2 Wkly. Rep. 19, 75 E. C. L. 767; Knight *v.* Fox, 5 Exch. 721, 14 Jur. 963, 20 L. J. Exch. 9; Reedie *v.* London, etc., R. Co., 4 Exch. 244, 20 L. J. Exch. 65, 6 R. & Can. Cas. 184; Murphey *v.* Caralli, 3 H. & C. 462, 10 Jur. N. S. 1207, 34 L. J. Exch. 14, 13 Wkly. Rep. 165; Butler *v.* Hunter, 7 H. & N. 826, 31 L. J. Exch. 214, 10 Wkly. Rep. 214.

See 34 Cent. Dig. tit. "Master and Servant," § 5.

26. Green *v.* Sansom, 41 Fla. 94, 25 So. 332.

27. American Contracting Co. *v.* Sammon, 27 Ohio Cir. Ct. 337.

28. Evidence of employment in actions for injuries by employees see *infra*, IV, H, 3, a, (I), (A), b, (II), c, (II).

29. Evidence held admissible.— Meinert *v.* Snow, 2 Ida. (Hasb.) 851, 27 Pac. 677 (telegram from employer to employee); Hinchcliffe *v.* Koontz, 121 Ind. 422, 23 N. E. 271, 16 Am. St. Rep. 403 (letter from master written before, but not received by servant until after, contract was made); Wright *v.* Elk Rapids Iron Co., 129 Mich. 543, 89 N. W. 335 [*following* Chamberlain *v.* Detroit Stove Works, 103 Mich. 124, 61 N. W. 532; Sines *v.* Superintendent of Poor, 58 Mich. 503, 25 N. W. 485; Tallon *v.* Grand Portage Min. Co., 55 Mich. 147, 20 N. W. 878] (evidence of previous hiring by year to show employment by year at time of discharge); Sax *v.* Detroit, etc., R. Co., 125 Mich. 252, 84 N. W. 314, 84 Am. St. Rep. 572; Corning *v.* Walker, 100 N. Y. 547, 3 N. E. 290 (evidence that one had not been on pay roll for a number of years competent to show non-employment); Gilmore *v.* Atlantic, etc., R. Co., 35 Barb. (N. Y.) 279 (partial settlements with agents competent to show employment by agents, not by principal); Barnes *v.* Syracuse, etc., R. Co., 12 N. Y. St. 354.

Admissibility of parol evidence see Evidence, 17 Cyc. 567 *et seq.*

Presumption of joint employment by persons jointly interested see McMahon *v.* Davidson, 12 Minn. 357.

Evidence of custom held inadmissible to show terms of express contract see Hartsell *v.* Masterson, 132 Ala. 275, 31 So. 616.

A letter, on its face a reply to one from plaintiff, is not admissible to prove an employment, without the production of the letter to which it was a reply, or an explanation of its absence. Breen *v.* Miehle Printing Press, etc., Co., 8 Pa. Dist. 151.

Evidence held sufficient to establish relation.— Elbert *v.* Los Angeles Gas Co., 97 Cal. 244, 32 Pac. 9; Paige *v.* Barrett, 151 Mass. 67, 23 N. E. 725; Alberts *v.* Stearns, 50 Mich. 349, 15 N. W. 505; Curley *v.* Electric Vehicle Co., 68 N. Y. App. Div. 18, 74 N. Y. Suppl. 35, evidence *prima facie* sufficient.

Evidence held insufficient to show relation. *Connecticut.*— Corbin *v.* American Mills, 27 Conn. 274, 71 Am. Dec. 63, to the effect that the payment of an employee by the day, or the control and supervision of the work by the employer, are not in themselves decisive of the existence of the relation; that "to get at the truth we must look further, and see if the person said to be a hired servant and agent is acting at the time for and in the place of his master, in accordance with and representing his master's will and not his own."

Illinois.— Revere Rubber Co. *v.* Reinhardt, 88 Ill. App. 195.

6. Modification or Rescission of Contract.[30] It is competent for the parties to a contract of employment to change or modify the same, and thus by new conditions add to or qualify its terms,[31] provided a sufficient consideration moves between them.[32] But a contract of employment cannot be modified[33] or rescinded[34] unless by mutual consent, except, in the latter case, for a cause which would justify a discharge from, or abandonment of, service.[35] An employment terminable at any time is, however, subject to modification at any time by either party as a condition of its continuance,[36] and may even be split up so as to allow a recovery for one part of a continuous service and disallow it for another part.[37]

7. Commencement and Duration of Employment[38] **— a. In General.** The commencement and duration of service under a contract of employment is controlled by the intention of the parties, as gathered from the terms of the contract, the circumstances surrounding the transaction, and the object had in view.[39]

Iowa.— Smith *v.* Jackson, 97 Iowa 112, 66 N. W. 80.

Louisiana.— Holmes *v.* Cromwell, etc., Co., 51 La. Ann. 352, 25 So. 265.

Michigan.— Tousignant *v.* Shafer Iron Co., 96 Mich. 87, 55 N. W. 681; Willis *v.* Toledo, etc., R. Co., 72 Mich. 160, 40 N. W. 205.

New York.— Osterberg *v.* Trinity Church, 69 N. Y. App. Div. 612, 74 N. Y. Suppl. 579; Hess *v.* Citron, 37 Misc. 849, 76 N. Y. Suppl. 994; Lee *v.* Smith, 33 Misc. 792, 67 N. Y. Suppl. 463; Diringer *v.* Moynihan, 10 N. Y. Suppl. 540.

Oregon.— Miles *v.* Columbia Packers' Assoc., 41 Oreg. 617, 69 Pac. 827.

England.— Appleby *v.* Johnson, L. R. 9 C. P. 158, 43 L. J. C. P. 146, 30 L. T. Rep. N. S. 261, 22 Wkly. Rep. 515; Barnsley *v.* Taylor, 37 L. J. Q. B. 39; Chiodi *v.* Waters, 1 Stark. 335, 18 Rev. Rep. 777, 2 E. C. L. 132.

See 34 Cent. Dig. tit. "Master and Servant," § 6.

Evidence held not inconsistent with claim of employment see Mathews *v.* Wallace, 104 Mo. App. 96, 78 S. W. 296.

30. Abandonment of employ by servant see *infra*, II, C, 1, j, (I).

Causes for abandoning service see *infra*, II, C, 1, j, (II).

Grounds for discharge see *infra*, II, C, 1, j, (II).

31. Youngberg *v.* Lamberton, 91 Minn. 100, 97 N. W. 571, in which a written contract was modified by parol, and it was said that where reciprocal rights are granted or concessions are made by both parties under the parol modifications, and have been acquiesced in by each, the new arrangement will be sustained.

Where, after an oral contract had been partly performed, a written agreement was executed, specifying the term of service, including the past as well as the future time, and stating the compensation, it was held that the written agreement should be deemed to embody the contract relating to the past as well as to future service. Blondel *v.* Le Vesconte, 41 Minn. 35, 42 N. W. 544.

32. Davis *v.* Morgan, 117 Ga. 504, 43 S. E. 732, 97 Am. St. Rep. 171, 61 L. R. A. 148.

33. Burgen *v.* Dwinal, 11 Ark. 314; Allcott *v.* Boston Steam Flour Mill Co., 9 Cush. (Mass.) 17.

34. Ryan *v.* Dayton, 25 Conn. 188, 65 Am. Dec. 560; Horn *v.* Western Land Assoc., 22 Minn. 233; Remington *v.* Van Ingen, 6 Misc. (N. Y.) 215, 26 N. Y. Suppl. 878 [*affirmed* in 9 Misc. 128, 29 N. Y. Suppl. 301].

35. Johnson *v.* Gorman, 30 Ga. 612.

Repudiation.— If one who has hired a servant ascertains that he is a drunkard before the term of service begins, the contract may be repudiated. Nolan *v.* Thompson, 11 Daly (N. Y.) 314.

36. Norton *v.* Brookline, 181 Mass. 360, 63 N. E. 930 [*citing* Lamson *v.* American Axe, etc., Co., 177 Mass. 144, 58 N. E. 585, 83 Am. St. Rep. 269; Preston *v.* American Linen Co., 119 Mass. 400].

37. Norton *v.* Brookline, 181 Mass. 360, 63 N. E. 930 [*citing* May *v.* Gloucester, 174 Mass. 583, 55 N. E. 465].

38. As affecting master's liability for injuries to servant see *infra*, IV, A, 2, f.

Termination of employment see *infra*, II, C.

39. *Illinois.*— American Glucose Co. *v.* Lubitz, 71 Ill. App. 638.

Massachusetts.— Poole *v.* Massachusetts Mohair Plush Co., 171 Mass. 49, 50 N. E. 451.

Missouri.— Hendricks *v.* R. T. Davis Mill Co., 77 Mo. App. 224.

New York.— Kochmann *v.* Baumeister, 49 N. Y. App. Div. 369, 63 N. Y. Suppl. 503; Freeman *v.* U. S. Electric Lighting Co., 76 Hun 215, 27 N. Y. Suppl. 799; Sagalowitz *v.* Pellman, 32 Misc. 508, 66 N. Y. Suppl. 433; Howe *v.* Robinson, 13 Misc. 256, 34 N. Y. Suppl. 85; Sherwood *v.* Crane, 12 Misc. 83, 33 N. Y. Suppl. 17 [*affirming* 9 Misc. 711, 29 N. Y. Suppl. 1149]; Strakosch *v.* Strakosch, 11 N. Y. Suppl. 251.

Ohio.— Minzey *v.* Marcy Mfg. Co., 25 Ohio Cir. Ct. 593; Kevil *v.* Standard Oil Co., 11 Ohio S. & C. Pl. Dec. 114, 8 Ohio N. P. 311.

Pennsylvania.— Kane *v.* Moore, 167 Pa. St. 275, 31 Atl. 631; Beck *v.* Walkers, 24 Pa. Co. Ct. 403.

Wisconsin.— Wright *v.* C. S. Graves Land Co., 100 Wis. 269, 75 N. W. 1000; Lewis *v.* Newton, 93 Wis. 405, 67 N. W. 724.

See 34 Cent. Dig. tit. "Master and Servant," § 8.

b. Presumption as to Commencement. Where no time is fixed in a contract of employment at which the person employed is to commence work, the presumption is that he is to commence either at once, or within a reasonable time.[40]

c. Duration of General or Indefinite Hiring — (i) *ENGLAND AND CANADA.* In England and Canada, where no time is limited either expressly or by implication for the duration of a contract of hiring and service, the hiring is considered as a general hiring, and in point of law a hiring for a year, whatever the form of the contract or nature of the service to be rendered.[41] Nevertheless, it has been held that the presumption that a general hiring is a hiring for a year may be rebutted by evidence of a custom with reference to which the parties contracted,[42] by the terms of the contract itself, or the nature of the services to be rendered,[43] or by other presumptions rising out of the circumstances surrounding the transac-

Employment held conditional on the giving of satisfaction see Daveny *v.* Shattuck, 9 Daly (N. Y.) 66.

Rules as to notice.— A manufacturing company has a right to make reasonable rules and regulations for the government of its employees; and a rule that employees must "work a six days' notice when leaving the employ of this mill" is a reasonable one, and, when employees with a knowledge of this rule enter the service of the company, such rule becomes a part of the contract and is binding upon such employees. Willis *v.* Muscogee Mfg. Co., 120 Ga. 597, 48 S. E. 177.

40. Barnard *v.* Babbitt, 54 Ill. App. 62. *Compare* however Russell *v.* Slade, 12 Conn. 455, in which case it was held that the legal effect of an agreement for service during the term of one year is not that the services must commence at a reasonable time after the making of the agreement, but that the servant has a right to tender his services immediately.

41. Lilley *v.* Elwin, 11 Q. B. 742, 12 Jur. 623, 17 L. J. Q. B. 132, 63 E. C. L. 742; Williams *v.* Byrne, 7 A. & E. 177, 1 Jur. 578, 6 L. J. K. B. 239, 2 N. & P. 139, W. W. & D. 535, 34 E. C. L. 112; Rex *v.* Ardington, 1 A. & E. 260, 28 E. C. L. 137; Fawcett *v.* Cash, 5 B. & Ad. 904, 3 L. J. K. B. 113, 3 N. & M. 177, 27 E. C. L. 381; Rex *v.* South Newton, 10 B. & C. 838, 21 E. C. L. 351; Beeston *v.* Collyer, 4 Bing. 309, 13 E. C. L. 517, 2 C. & P. 607, 12 E. C. L. 760, 5 L. J. C. P. O. S. 180, 12 Moore C. P. 552, 29 Rev. Rep. 576; Emmens *v.* Elderton, 13 C. B. 495, 76 E. C. L. 495, 4 H. L. Cas. 624, 10 Eng. Reprint 606, 18 Jur. 21 [*affirming* 6 C. & B. 160, 17 L. J. C. P. 307, 60 E. C. L. 160 (*reversing* 4 C. B. 479, 11 Jur. 612, 16 L. J. C. P. 209, 56 E. C. L. 479)]; Huttman *v.* Boulnois, 2 C. & P. 510, 12 E. C. L. 704; Turner *v.* Mason, 2 D. & L. 898, 14 L. J. Exch. 311, 14 M. & W. 112; Fairman *v.* Oakford, 5 H. & N. 635, 29 L. J. Exch. 459; Forgan *v.* Burke, 12 Ir. C. L. 495; Buckingham *v.* Surrey, etc., Canal Co., 46 J. P. 774, 46 L. T. Rep. N. S. 885; Foxall *v.* International Land Credit Co., 16 L. T. Rep. N. S. 637; Rex *v.* Worfield, 5 T. R. 506; Rex *v.* Macclesfield, 3 T. R. 76; Fortier *v.* Royal Canadian Ins. Co., 29 U. C. C. P. 353; Rettinger *v.* Macdougall, 9 U. C. C. P. 485; Watson *v.* Miller, 23 U. C. Q. B. 217; McGuffin *v.* Cayley, 2 U. C. Q. B. 308.

A hiring at an annual salary is *prima facie,* and in the absence of any custom to the contrary, a hiring for a year certain. Ridgway *v.* Hungerford Market Co., 3 A. & E. 171, 12 Harr. & W. 244, 4 L. J. K. B. 157, 4 N. & M. 797, 30 E. C. L. 97; Buckingham *v.* Surrey, etc., Canal Co., 46 J. P. 774, 46 L. T. Rep. N. S. 885; Foxall *v.* International Land Credit Co., 16 L. T. Rep. N. S. 637. *Compare* McGreevy *v.* Quebec Harbour Com'rs, 11 Quebec Super. Ct. 455.

Presumption strengthened by custom see Baxter *v.* Nurse, 1 C. & K. 10, 47 E. C. L. 8, 8 Jur. 273, 13 L. J. C. P. 82, 6 M. & G. 935, 46 E. C. L. 934, 7 Scott N. R. 801; Holcroft *v.* Barber, 1 C. & K. 4.

On a contract to pay a salesman by commission no implication of a yearly hiring arises. Nayler *v.* Yearsley, 2 F. & F. 41.

42. Baxter *v.* Nurse, 1 C. & K. 10, 47 E. C. L. 8, 8 Jur. 273, 13 L. J. C. P. 82, 6 M. & G. 935, 46 E. C. L. 934, 7 Scott N. R. 801.

43. Rex *v.* Northwingfield, 1 B. & Ad. 912, 9 L. J. M. C. O. S. 57, 20 E. C. L. 741; Rex *v.* Walls, 1 B. & Ad. 166, 20 E. C. L. 440; Bradshaw *v.* Hayward, C. & M. 591, 41 E. C. L. 322; Rex *v.* Stokesley, 6 T. R. 757; Dick *v.* Heron, 8 U. C. C. P. 67; Hughes *v.* Canada Permanent Loan, etc., Soc., 39 U. C. Q. B. 221.

If the hiring is expressly for less than a year, although done purposely to avoid the consequences of a yearly hiring, it cannot be held a yearly hiring. Rex *v.* Standon Massey, 10 East 576; Rex *v.* Coggeshall, 6 M. & S. 264; *In re* Dunsford Parish, 2 Salk. 535; Rex *v.* Mursley, 1 T. R. 694. But *compare* Rex *v.* Ulverstone, 7 T. R. 564.

If either party may determine the service at any time, the hiring cannot be considered a yearly hiring. Rex *v.* Great Bowden, 7 B. & C. 249, 14 E. C. L. 117.

If the master has not entire control of the servant during the year, although he pays yearly wages, the hiring is not a yearly hiring. Rex *v.* Killingholme, 10 B. & C. 802, 21 E. C. L. 337; Rex *v.* Lydd, 2 B. & C. 754, 9 E. C. L. 327; Rex *v.* Polesworth, 2 B. & C. 715, 9 E. C. L. 311. *Compare* Reg. *v.* Ravenstonedale, 12 A. & E. 73, 40 E. C. L. 46.

Contracts for job or piece work not yearly contracts see Rex *v.* Woodhurst, 1 B. & Ald.

tion.[44] Nor does the rule apply to cases in which there has been a service, but no contract of hiring, and no circumstances from which a contract can be implied.[45]

(II) *UNITED STATES.* In the United States a general or indefinite hiring is presumed to be a hiring at will,[46] in the absence of evidence of custom,[47] or of facts and circumstances showing a contrary intention on the part of the parties.[48] While it is generally held that the fact that a hiring at so much per day, week, month, quarter, or year raises no presumption that the hiring was for such a period, but only at the rate fixed for whatever time the party may serve,[49] yet the

325; Trinity *v.* St. Peter's, W. Bl. 444. *Compare In re* King's Norton, 2 Str. 1139.

44. Williams *v.* Byrne, 7 A. & E. 177, 1 Jur. 578, 6 L. J. K. B. 239, 2 N. & P. 139, W. W. & D. 535, 34 E. C. L. 112; Baxter *v.* Nurse, 1 C. & K. 10, 17 E. C. L. 8, 8 Jur. 273, 13 L. J. C. P. 82, 6 M. & G. 935, 46 E. C. L. 934, 7 Scott N. R. 801; Holcroft *v.* Barber, 1 C. & K. 4, 47 E. C. L. 4; Bain *v.* Anderson, 24 Ont. App. 296 [*affirmed* in 28 Can. Sup. Ct. 481].

45. Bayley *v.* Rimmell, 1 M. & W. 506. See also Broxham *v.* Wagstaffe, 5 Jur. 845. *Compare* Beeston *v.* Collyer, 4 Bing. 309, 13 E. C. L. 517, 2 C. & P. 607, 12 E. C. L. 760, 5 L. J. C. P. O. S. 180, 12 Moore C. P. 552, 29 Rev. Rep. 576.

46. *Alabama.*— Lambie *v.* Sloss Iron, etc., Co., 118 Ala. 427, 24 So. 108; Clark *v.* Ryan, 95 Ala. 406, 11 So. 22; Howard *v.* East Tennessee, etc., R. Co., 91 Ala. 268, 8 So. 868.

Arkansas.— St. Louis, etc., R. Co. *v.* Matthews, 64 Ark. 398, 42 S. W. 902, 39 L. R. A. 467.

California.— Davidson *v.* Laughlin, (1902) 68 Pac. 101. But *compare* Rosenberger *v.* Pacific Coast R. Co., 111 Cal. 313, 43 Pac. 963, construing Civ. Code, § 2010.

Colorado.— Kansas Pac. R. Co. *v.* Roberson, 3 Colo. 142.

Georgia.— Parks *v.* Atlanta, 76 Ga. 828. But see Hobbs *v.* Davis, 30 Ga. 423, where it was held that the law presumes that when a negro is hired for plantation purposes he is hired for the year.

Illinois.— Gray *v.* Wulff, 68 Ill. App. 376; Morris *v.* Agnew, 57 Ill. App. 229. See also Lynch *v.* Eimer, 24 Ill. App. 185.

Indiana.— Speeder Cycle Co. *v.* Teeter, 18 Ind. App. 474, 48 N. E. 595.

Kentucky.—Louisville, etc., R. Co. *v.* Offutt, 99 Ky. 427, 36 S. W. 181, 18 Ky. L. Rep. 303, 59 Am. St. Rep. 467; Louisville, etc., R. Co. *v.* Harvey, 99 Ky. 157, 34 S. W. 1069, 17 Ky. L. Rep. 1368.

Maryland.— McCullough Iron Co. *v.* Carpenter, 67 Md. 554, 11 Atl. 176.

New York.— Martin *v.* New York L. Ins. Co., 148 N. Y. 117, 42 N. E. 416 [*affirming* 73 Hun 496, 26 N. Y. Suppl. 283]; Hotchkiss *v.* Godkin, 63 N. Y. App. Div. 468, 71 N. Y. Suppl. 629; Thill *v.* Hoyt, 37 N. Y. App. Div. 521, 56 N. Y. Suppl. 78; Clover Condensed Milk Co. *v.* Cushman Bros. Co., 31 N. Y. App. Div. 108, 52 N. Y. Suppl. 769; Lieber *v.* Friedlander, 10 N. Y. App. Div. 50, 41 N. Y. Suppl. 897; Campbell *v.* Jimenes, 3 Misc. 516, 23 N. Y. Suppl. 333.

Ohio.— Milner *v.* Hill, 19 Ohio Cir. Ct. 663, 10 Ohio Cir. Dec. 749. *Compare* Bascom *v.* Shillito, 37 Ohio St. 431 [*reversing* 5 Ohio Dec. (Reprint) 511].

Oregon.— Christensen *v.* Pacific Coast Borax Co., 26 Oreg. 302, 38 Pac. 127.

Rhode Island.— Booth *v.* National India Rubber Co., 19 R. I. 696, 36 Atl. 714.

United States.— Truesdale *v.* Young, 24 Fed. Cas. No. 14,204.

See 34 Cent. Dig. tit. "Master and Servant," §§ 8, 9, 10.

47. See Beck *v.* Thompson, etc., Spice Co., 108 Ga. 242, 33 S. E. 894.

48. Facts held to show hiring for a year.— *Alabama.*— Roddy *v.* McGetrick, 49 Ala. 159.

California.— Nash *v.* Kreling, (1899) 56 Pac. 260.

Kentucky.— Smith *v.* Theobald, 86 Ky. 141, 5 S. W. 394, 9 Ky. L. Rep. 449.

Louisiana.— Miller *v.* Gidiere, 36 La. Ann. 201, contract for residue of year.

Maryland.— Norton *v.* Cowell, 65 Md. 359, 4 Atl. 408, 57 Am. Rep. 331; Babcock, etc., Co. *v.* Moore, 62 Md. 161.

Michigan.— Graves *v.* Lyon, 110 Mich. 670, 68 N. W. 985; Chamberlain *v.* Detroit Stove Works, 103 Mich. 124, 61 N. W. 532; Laughlin *v.* School Dist. No. 17, 98 Mich. 523, 57 N. W. 571; Koehler *v.* Buhl, 94 Mich. 496, 54 N. W. 157; Franklin Min. Co. *v.* Harris, 24 Mich. 115.

New York.— Sabin *v.* Kendrick, 36 N. Y. App. Div. 443, 55 N. Y. Suppl. 840; Krieger *v.* Kaye, 60 N. Y. Suppl. 992 [*affirmed* in 31 Misc. 775, 65 N. Y. Suppl. 213]; Bleeker *v.* Johnson, 51 How. Pr. 380.

Ohio.— Kelly *v.* Carthage Wheel Co., 62 Ohio St. 598, 57 N. E. 984; Bascom *v.* Shillito, 37 Ohio St. 431.

Pennsylvania.— Kane *v.* Moore, 167 Pa. St. 275, 31 Atl. 631; Kirk *v.* Hartman, 63 Pa. St. 97; Philadelphia Packing, etc., Co.'s Estate, 4 Pa. Dist. 57; Hassenfus *v.* Philadelphia Packing, etc., Co., 15 Pa. Co. Ct. 650.

Texas.— Texas Brewing Co. *v.* Walters, (Civ. App. 1897) 43 S. W. 548; Strauss *v.* Gross, 2 Tex. Civ. App. 432, 21 S. W. 305.

See 34 Cent. Dig. tit. "Master & Servant," §§ 8, 9, 10.

49. *Alabama.*— Howard *v.* East Tennessee, etc., R. Co., 91 Ala. 268, 8 So. 868.

Colorado.— Kansas Pac. R. Co. *v.* Roberson, 3 Colo. 142.

Delaware.— Greer *v.* Arlington Mills Mfg. Co., 1 Pennew. 581, 43 Atl. 609.

Maryland.— McCullough Iron Co. *v.* Carpenter, 67 Md. 554, 11 Atl. 176.

rate and mode of payment are often determinative of the period of service,[50] and in some cases it has been held that they do raise a presumption as to the period of service.[51] If there is a single hiring, and the terms of service of the employee, and

Massachusetts.— Tatterson *v.* Suffolk Mfg. Co., 106 Mass. 56.

Michigan.— Fuller *v.* Peninsular White Lead, etc., Works, 111 Mich. 221, 69 N. W. 492; Palmer *v.* Marquette, etc., Rolling Mill Co., 32 Mich. 274.

Missouri.— Evans *v.* St. Louis, etc., R. Co., 24 Mo. App. 114.

New Jersey.— See Standford *v.* Fisher Varnish Co., 43 N. J. L. 151.

New York.— Martin *v.* New York L. Ins. Co., 148 N. Y. 117, 42 N. E. 416; Tucker *v.* Philadelphia, etc., Coal, etc., Co., 53 Hun 139, 6 N. Y. Suppl. 134; Granger *v.* American Brewing Co., 25 Misc. 701, 55 N. Y. Suppl 695 [*reversing* 25 Misc. 302, 54 N. Y. Suppl. 590].

North Carolina.— Edwards *v.* Seaboard, etc., R. Co., 121 N. C. 490, 28 S. E. 137.

Texas.— Young *v.* Lewis, 9 Tex. 73.

See 34 Cent. Dig. tit. "Master and Servant," §§ 9, 10.

Employment by the year or at a yearly salary is not changed to a quarterly, monthly, or weekly hiring by the fact that the payments are to be made quarterly, monthly, or weekly. Hassenfus *v.* Philadelphia Packing, etc., Co., 15 Pa. Co. Ct. 650. See also Heminway, etc., Silk Co. *v.* Porter, 94 Ill. App. 609; Norton *v.* Cowell, 65 Md. 359, 4 Atl. 408, 57 Am. Rep. 331 (where it is said that payment of wages quarterly, monthly, or weekly is not inconsistent with a yearly hiring); Horn *v.* Western Land Assoc., 22 Minn. 233; Larkin *v.* Hecksher, 51 N. J. L. 133, 16 Atl. 703, 3 L. R. A. 137; Hotchkiss *v.* Godkin, 63 N. Y. App. Div. 468, 71 N. Y. Suppl. 629; Kelly *v.* Carthage Wheel Co., 62 Ohio St. 598, 57 N. E. 984; Tarbox *v.* Hartenstein, 4 Baxt. (Tenn.) 78. See 34 Cent. Dig. tit. "Master and Servant," § 9. But see Rose *v.* Eclipse Carbonating Co., 60 Mo. App. 28; Pinckney *v.* Talmage, 32 S. C. 364, 10 S. E. 1083.

50. Hiring at so much per month held monthly hiring.— *Georgia.*— Magarahan *v.* Wright, 83 Ga. 773, 10 S. E. 584.

Massachusetts.— Nichols *v.* Coolahan, 10 Metc. 449.

Nevada.— Capron *v.* Strout, 11 Nev. 304.

New York.— Tucker *v.* Philadelphia, etc., Coal, etc., Co., 53 Hun 139, 6 N. Y. Suppl. 134; Zender *v.* Seliger-Toothill Co., 17 Misc. 126, 39 N. Y. Suppl. 346 [*reversing* 16 Misc. 296, 38 N. Y. Suppl. 116].

South Carolina.— Pinckney *v.* Talmage, 32 S. C. 364, 10 S. E. 1083.

Texas.— San Antonio, etc., R. Co. *v.* Sale, (Civ. App. 1895) 31 S. W. 325.

See 34 Cent. Dig. tit. "Master and Servant," § 10.

Control of intention.— "If the intention of the parties to a written contract be intelligible upon the face of the instrument, extrinsic proof of its meaning is inadmissible, and its construction is for the court alone. Glacius *v.* Black, 67 N. Y. 563, 567; Norton *v.* Woodruff, 2 N. Y. 153, 156. But if its terms be so obscure or ambiguous as not to be understood without the aid of adventitious light, then evidence, not only of the surrounding circumstances, but of the acts and conversations of the parties, is competent to illustrate their intention; and upon such evidence the meaning of the instrument is for determination by the jury." Campbell *v.* Jimenes, 3 Misc. (N. Y.) 516, 517, 23 N. Y. Suppl. 333.

Absence of agreement of duration of service.— "Where a person is hired to serve another without any agreement as to the duration of the service, there is no inflexible rule of law as to the length of time the hiring is to continue. The question as to the length of time the hiring is to continue will be governed by the circumstances of each particular case. If one is hired to work in a crop being raised, the presumption is, in the absence of circumstances showing a contrary intention, that his term of service is to continue during the crop season. If one is hired to do general service on a farm, the presumption is, in the absence of an agreement to the contrary or circumstances showing a contrary intention, that the term of service is to continue for a year. The same rule applies to the hiring of persons to do service in any business that requires constant labor. As this rule is not inflexible, and may be controlled by circumstances, the circumstance of agreeing on weekly, monthly, quarterly or half-yearly payment of wages, may be sufficient of itself to create the presumption of a hiring for the corresponding period. But the circumstances of the hiring, though no time is expressly agreed upon, may show that it was to continue for a year, although the payment of the wages was to occur monthly." Smith *v.* Theobald, 86 Ky. 141, 146, 5 S. W. 394, 9 Ky. L. Rep. 449 [*quoted* with approval in Magarahan *v.* Wright, 83 Ga. 773, 777, 10 S. E. 584].

In the absence of other terms a contract of employment at a certain rate per month implies a hiring for one month at least. Great Northern Hotel Co. *v.* Leopold, 72 Ill. App. 108.

The reservation of wages payable monthly or weekly will not control the contract so as to destroy its entirety when the parties have expressly agreed for a specified term, as a year. But if the payment of monthly or weekly wages is the only circumstance from which a duration of the contract is to be inferred, it will he taken to be a hiring for a month or for a week. Beach *v.* Mullin, 34 N. J. L. 343.

51. Great Northern Hotel Co. *v.* Leopold, 72 Ill. App. 108; Jones *v.* Trinity Parish Vestry, 19 Fed. 59; The Hudson, 12 Fed. Cas. No. 6,831.

also the time when his compensation shall become due, are not fixed by agreement, and the hiring and service continue without interruption or payment until duly terminated, the employment, in the absence of a general custom or usage, may be deemed continuous, and the statute of limitations will not begin to run against a claim for compensation until the services are ended.[52]

8. RENEWAL OR CONTINUANCE OF EMPLOYMENT.[53] Where one enters into the service of another for a definite period, and continues in the employment after the expiration of that period, without any new contract, the presumption is that the employment is continued on the terms of the original contract;[54] and this pre-

Mode of payment strongly indicative of period of service see Kellogg *v.* Citizens' Ins. Co., 94 Wis. 554, 69 N. W. 362. See also Magarahan *v.* Wright, 83 Ga. 773, 10 S. E. 584.

Under Cal. Civ. Code, § 2010, "a servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year," etc. Rosenberger *v.* Pacific Coast R. Co., 111 Cal. 313, 43 Pac. 963; Luce *v.* San Diego Land, etc., Co., (1894) 37 Pac. 390.

52. Grisham *v.* Lee, 61 Kan. 533, 60 Pac. 312 [*distinguishing* Greenwell *v.* Greenwell, 28 Kan. 675; Ayres *v.* Hull, 5 Kan. 419]. See also the following cases:

Indiana.— Littler *v.* Smiley, 9 Ind. 116; Taggart *v.* Tevanny, 1 Ind. App. 339, 27 N. E. 511; Story *v.* Story, 1 Ind. App. 284, 27 N. E. 573.

Massachusetts.— Hall *v.* Wood, 9 Gray 60.

Michigan.— Carter *v.* Carter, 36 Mich. 207.

North Carolina.— Hauser *v.* Sain, 74 N. C. 552.

Washington.— Ah How *v.* Furth, 13 Wash. 550, 43 Pac. 639.

Wyoming.— Jackson *v.* Mull, 6 Wyo. 55, 42 Pac. 603.

See 34 Cent. Dig. tit. "Master and Servant," §§ 8, 9, 10.

53. After change in business of master see *infra*, II, C, 1, f.

54. *Arizona.*— Glendale Fruit Co. *v.* Hirst, 6 Ariz. 428, 59 Pac. 103.

Arkansas.— Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430.

California.— Hermann *v.* Littlefield, 109 Cal. 430, 42 Pac. 443.

Colorado.— State Bd. of Agriculture *v.* Meyers, 20 Colo. App. 139, 77 Pac. 372.

Georgia.— Standard Oil Co. *v.* Gilbert, 84 Ga. 714, 11 S. E. 491, 8 L. R. A. 410.

Illinois.— Crane Bros. Mfg. Co. *v.* Adams, 142 Ill. 125, 30 N. E. 1030; Ingalls *v.* Allen, 132 Ill. 170, 23 N. E. 1026; Grover, etc., Sewing-Mach. Co. *v.* Bulkley, 48 Ill. 189; Moline Plow Co. *v.* Booth, 17 Ill. App. 574.

Louisiana.— Lalande *v.* Aldrich, 41 La. Ann. 307, 6 So. 28; Alba *v.* Moriarty, 36 La. Ann. 680.

Maryland.— Lister's Agricultural Chemical Works *v.* Pender, 74 Md. 15, 21 Atl. 686; McCullough Iron Co. *v.* Carpenter, 67 Md. 554, 11 Atl. 176.

Massachusetts.— Tatterson *v.* Suffolk Mfg. Co., 106 Mass. 56.

Michigan.— Laughlin *v.* School Dist. No. 17, 98 Mich. 523, 57 N. W. 571; Sines *v.* Superintendents of Poor, 58 Mich. 503, 25 N. W. 485.

Nebraska.— Fitch *v.* Martin, (1905) 104 N. W. 1072; Home F. Ins. Co. *v.* Barber, 67 Nebr. 644, 93 N. W. 1024, 108 Am. St. Rep. 716, 60 L. R. A. 927.

New Hampshire.— Rindge *v.* Lamb, 58 N. H. 278; Chamberlain *v.* Davis, 33 N. H. 121; New Hampshire Iron Factory Co. *v.* Richardson, 5 N. H. 294.

New York.—Adams *v.* Fitzpatrick, 125 N. Y. 124, 26 N. E. 143 [*affirming* 56 N. Y. Super. Ct. 580, 5 N. Y. Suppl. 181]; Donglass *v.* Merchants' Ins. Co., 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822; Huntingdon *v.* Claffin, 38 N. Y. 182; Vail *v.* Jersey Little Falls Mfg. Co., 32 Barb. 564; Greer *v.* People's Tel., etc., Co., 50 N. Y. Super. Ct. 517; Hodge *v.* Newton, 14 Daly 372, 13 N. Y. St. 139; Bacon *v.* New Home Sewing-Mach. Co., 13 N. Y. Suppl. 359.

Ohio.— Kelly *v.* Carthage Wheel Co., 62 Ohio St. 598, 57 N. E. 984.

Pennsylvania.— Ranck *v.* Albright, 36 Pa. St. 367; Wallace *v.* Floyd, 29 Pa. St. 184, 72 Am. Dec. 620.

Wisconsin.— Dickinson *v.* Norwegian Plow Co., 96 Wis. 376, 71 N. W. 606, 101 Wis. 157, 76 N. W. 1108; Kellogg *v.* Citizens' Ins. Co., 94 Wis. 554, 69 N. W. 362; Weise *v.* Milwaukee County, 51 Wis. 564, 8 N. W. 295.

England.— Rex *v.* Sow, 1 B. & Ald. 178; Beeston *v.* Collyer, 4 Bing. 309, 13 E. C. L. 517, 2 C. & P. 607, 12 E. C. L. 760, 5 L. J. C. P. O. S. 180, 12 Moore C. P. 552, 29 Rev. Rep. 576; Down *v.* Pinto, 2 C. L. R. 547, 9 Exch. 327, 23 L. J. Exch. 103, 2 Wkly. Rep. 202.

See 34 Cent. Dig. tit. "Master and Servant," § 11.

Contra.— Harnwell *v.* Parry Sound Lumber Co., 24 Ont. App. 110.

The original negotiations between the parties are competent evidence to show the terms of the contract, express or implied, under which the parties continue their relation. Tatterson *v.* Suffolk Mfg. Co., 106 Mass. 56. See also Hermann *v.* Littlefield, 109 Cal. 430, 42 Pac. 443.

Presumption analogous to presumption in case of a lease.— Kellogg *v.* Citizens' Ins. Co., 94 Wis. 554, 69 N. W. 362. And see LANDLORD AND TENANT.

Renewal from year to year where original contract was for longer period see Brightson *v.* H. B. Claflin Co., 84 N. Y. App. Div. 557, 82 N. Y. Suppl. 667.

sumption must prevail, unless there be a new agreement shown, or at least facts which are sufficient to rebut the legal presumption, and show that a different hiring was in fact intended by the parties.[55]

9. Actions For Breach of Contract to Employ[56] — a. Right of Action. Where, at the time fixed for the commencement of services under a contract of employment, the employer repudiates the contract, the remedy of the employee is an action, not for wages, but to recover damages for the breach of the contract.[57]

b. Accrual of Right. Where a binding contract of employment to commence at a future day is entered into, and before that day arrives the employer announces that he will not take the employee into his service, the latter may at once bring an action against him, and need not wait until the day for the commencement of his services shall have arrived.[58] It seems, however, that if the servant does not immediately bring suit, and becomes incapacitated to perform the services before the day of their proposed commencement, the master may rescind the contract without incurring any liability.[59]

c. Conditions Precedent. Where an employee is ready and willing to perform the services contracted for, but the employer has repudiated the contract, the former need not thereafter tender his services or keep himself in readiness to perform. His only further duty is to use reasonable care and diligence in entering into other employment of the same kind, and thus to reduce the damages.[60]

d. Defenses. Whatever would be a good reason for discharging a servant[61] would be an equally good reason for refusing to take him into one's service, after having engaged to do so.[62] But it is no defense to an action for breach of con-

That the original contract was void under the statute of frauds does not defeat the presumption of renewal for another year. Hodge *v.* Newton, 14 Daly (N. Y.) 372, 13 N. Y. St. 139.

Where a servant is "reëmployed," the term "reëmployment" means the same service in which he was formerly employed. Sax *v.* Detroit, etc., R. Co., 129 Mich. 502, 89 N. W. 368.

Tacit reconduction see National Automatic Fire Alarm Co. *v.* New Orleans, etc., R. Co., 115 La. 633, 39 So. 738.

55. Presumption rebuttable.— *Arkansas.*— Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430.

Illinois.— Ingalls *v.* Allen, 132 Ill. 170, 23 N. E. 1026.

Louisiana.—Burton *v.* Behan, 47 La. Ann. 117, 16 So. 769.

Maryland.—McCullough Iron Co. *v.* Carpenter, 67 Md. 554, 11 Atl. 176.

Massachusetts.—O'Connor *v.* Briggs, 182 Mass. 387, 65 N. E. 836; Commonwealth Ins. Co. *v.* Crane, 6 Metc. 64.

Nebraska.— Home F. Ins. Co. *v.* Barber, 67 Nebr. 644, 93 N. W. 1024, 108 Am. St. Rep. 716, 60 L. R. A. 927.

New York.—Brightson *v.* H. B. Claflin Co., 84 N. Y. App. Div. 557, 82 N. Y. Suppl. 667; Caldwell *v.* Caldwell Co., 88 N. Y. Suppl. 970.

Pennsylvania.— Ranck *v.* Albright, 36 Pa. St. 367.

Washington.— Burden *v.* Cropp, 7 Wash. 198, 34 Pac. 834.

Wisconsin.— Dickinson *v.* Norwegian Plow Co., 96 Wis. 376, 71 N. W. 606, 101 Wis. 157, 76 N. W. 1108.

See 34 Cent. Dig. tit. "Master and Servant," § 11.

In the absence of proof that the original contract was for a whole year's service, and that services were rendered thereunder for at least one year, the presumption of an implied contract for services for another year at the same salary has no application. Caldwell *v.* Caldwell Co., 88 N. Y. Suppl. 970.

56. Action for wrongful discharge see *infra*, II, C, 2, b.

57. Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285 [*disapproving* the doctrine of constructive service laid down in Thompson *v.* Wood, 1 Hilt. (N. Y.) 93; Huntington *v.* Ogdensburgh, etc., R. Co., 33 How. Pr. (N. Y.) 416]. See also Polk *v.* Daly, 4 Daly (N. Y.) 411; Bracegirdle *v.* Heald, 1 B. & Ald. 722, 19 Rev. Rep. 442; Blogg *v.* Kent, 6 Bing. 614, 8 L. J. C. P. O. S. 229, 4 M. & P. 433, 19 E. C. L. 278; Clarke *v.* Allatt, 4 C. B. 335, 56 E. C. L. 335. But see Wiseman *v.* Panama R. Co., 1 Hilt. (N. Y.) 300.

58. Hochster *v.* De la Tour, 2 E. & B. 678, 17 Jur. 972, 22 L. J. Q. B. 455, 1 Wkly. Rep. 469, 75 E. C. L. 678. See also Avery *v.* Bowden, 5 E. & B. 714, 85 E. C. L. 714; Danube, etc., R., etc., Harbour Co. *v.* Xenos, 31 L. J. C. P. 84, 284; Frost *v.* Knight, 41 L. J. Exch. 111.

59. See Frost *v.* Knight, L. R. 7 Exch. 111, 41 L. J. Exch. 78, 26 L. T. Rep. N. S. 77, 20 Wkly. Rep. 471; Reid *v.* Hoskins, 5 E. & B. 729, 85 E. C. L. 729; Avery *v.* Bowden, 5 E. & B. 714, 85 E. C. L. 714; Croockewit *v.* Fletcher, 1 H. & N. 893, 26 L. J. Exch. 153, 5 Wkly. Rep. 348; Roberts *v.* Brett, 28 L. J. C. P. 323; Barwick *v.* Buba, 26 L. J. C. P. 280.

60. Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285.

61. See *infra*, II, C, 2, a, (II).

62. Smith M. & S. 183.

tract to employ that, at a time subsequent to the alleged contract, the master had employees enough, without plaintiff, to do all his business;[63] nor is it any answer to such an action that the servant has entered into a conspiracy to depart from the agreement, unless the conspiracy has been acted upon.[64]

e. Pleading. The general rules of pleading in actions for breach of contract obtain in actions for breach of contracts of employment.[65]

f. Evidence.[66] The unexplained fact that one is seen operating the machinery of a carrier has been held sufficient, in the absence of circumstances negativing the conclusion, to justify the inference that such person is acting as a servant of the carrier.[67] And it has been held, in an action on a written contract of service for one year, with a right of renewal by plaintiff for another year, unless there should be given written notice of any cause of dissatisfaction, evidence of causes of dissatisfaction other than those alleged in the required notice is not admissible.[68] Evidence tending to prove plaintiff's discharge is properly admitted under a complaint alleging a refusal to furnish him with employment.[69]

g. Damages. In an action for a breach of contract to employ the measure of recovery is the actual damages sustained by the servant by reason of such breach.[70]

B. Statutory Regulation.[71] It is held that in the exercise of its police

63. Sayre *v.* Durwood, 35 Ala. 247.

64. Hemingway *v.* Hamilton, 4 M. & W. 115.

65. See CONTRACTS, 9 Cyc. 711 *et seq.*

Sufficiency of answer.— In an action for breach of contract for services, where the work mentioned in the correspondence which constituted the contract was not made certain, and no provision was made for the time of duration or manner of termination of the contract, an answer denying the contract, and setting out further correspondence tending to show that the parties did not regard it as complete, is not demurrable. Havens *v.* American F. Ins. Co., 11 Ind. App. 315, 39 N. E. 40.

Variance.—Where, in covenant, the declaration averred that on the day stipulated in the covenant plaintiff was ready, and tendered his services to defendant, it was held that this averment was not supported by evidence that on the day stipulated plaintiff was sick, and that defendant agreed to dispense with his services until he should recover, and that on a subsequent day he tendered his services, and that defendant refused to employ him. Marks *v.* Robinson, 1 Bailey (S. C.) 89.

66. **Evidence held to sustain contract of hiring** see Thomas *v.* International Silver Co., 48 Misc. (N. Y.) 509, 96 N. Y. Suppl. 218.

67. Wilson *v.* Alexander, 115 Tenn. 125, 88 S. W. 935.

68. Hughes *v.* Gross, 166 Mass. 61, 43 N. E. 1031, 55 Am. St. Rep. 375, 32 L. R. A. 620.

69. Moore *v.* Chicago, etc., R. Co., 65 Iowa 505, 22 N. W. 650, 54 Am. Rep. 26.

70. Macguire *v.* Woodside, 2 Hilt. (N. Y.) 59.

Where a contract specifies no time of service, and the employer refuses to permit performance, the measure of damages is the price of one day's services. Davis *v.* Barr, 12 N. Y. St. 111.

Liquidated damages.— Where a contract provided that the employer might cancel the contract at any time on giving the employee one week's notice, and paying one week's additional salary, and the employer refused to allow the employee to enter on the service, it was held that such refusal was, in contemplation of law, a termination of the contract under its provisions, and the employee's damages were, by its terms, liquidated at the amount of two weeks' salary Watson *v.* Russell, 149 N. Y. 388, 44 N. E. 161 [*reversing* 7 Misc. 636, 28 N. Y. Suppl. 26].

Full amount of wages held measure of damages see Thompson *v.* Wood, 1 Hilt. (N. Y.) 93.

71. **Amount and payment of wages** see *infra*, III, B, 3.

Constitutional guaranty against class legislation as applied to statutes regulating hours of labor see CONSTITUTIONAL LAW, 8 Cyc. 1043.

Constitutional guaranty against deprivation of property as applied to statutes providing for protection of employees see CONSTITUTIONAL LAW, 8 Cyc. 1119, 1120.

Constitutionality of statutes regulating hours of labor see CONSTITUTIONAL LAW, 8 Cyc. 889.

Enticing servant to leave employment see *infra*, VI, A, 1.

Fraudulent breach of contract by servant see *infra*, III, A, 12.

Hours of service of government employees see UNITED STATES.

Hours of service of letter carriers see POST-OFFICE.

Hours of service of municipal employees see MUNICIPAL CORPORATIONS.

Hours of service of state employees see STATES.

License of fellow servant as affecting master's liability for negligence see *infra*, IV, G, 4, b, (VI), (B), (2).

Medical attendance on injured servant see *infra*, IV, A, 1, f.

Neglect of statutory duty as affecting

power,[72] the state may impose such regulations and restrictions upon the relation of master and servant as are conducive to the public welfare,[73] health,[74]

master's liability for injury to servant see *infra*, IV, A, 4, b.

Regulating employment of servants see CONSTITUTIONAL LAW, 8 Cyc. 1119.

72. See, generally, CONSTITUTIONAL LAW, 8 Cyc. 863.

73. State *v.* Pasco, 153 Ind. 214, 54 N. E. 802 (construing Rev. St. §§ 7465, 7467, requiring the weighing and crediting to miners of the full weight of coal mined by them); State *v.* Balch, 178 Mo. 392, 77 S. W. 547 (construing Rev. St. (1899) § 8142, prohibiting employers from requiring employees to purchase their supplies of, and expend their wages for goods furnished by, their employers).

Employer's liability.— Southern Pac. Co. *v.* Schoer, 114 Fed. 466, 52 C. C. A. 268, 57 L. R. A. 707.

Arbitration.— New Orleans City, etc., R. Co. *v.* State Bd. of Arbitration, 47 La. Ann. 874, 17 So. 418; Pingree *v.* State Ct. of Mediation & Arbitration, 130 Mich. 229, 89 N. W. 943.

Coercing or discharging employee.— A statute prohibiting the coercing of an employee by a threat to discharge him because of his connection with a labor organization is constitutional. State *v.* Darlington, 153 Ind. 1, 53 N. E. 925; State *v.* Davis, 11 Ohio Dec. (Reprint) 786, 29 Cinc. L. Bul. 305. *Compare* State *v.* Bateman, 10 Ohio S. & C. Pl. Dec. 68, holding that the act of April 14, 1892, prohibiting an employer from reserving the right to discharge an employee at pleasure, or having reserved such right, prohibiting him from exercising it, directly infringes his right of liberty to contract, and is not a valid exercise of the police power.

74. Hours of labor.— *California.*— Worthington *v.* Breed, 142 Cal. 102, 75 Pac. 675, construing St. (1899) p. 149, c. 114.

Maine.— Fitzgerald *v.* International Paper Co., 96 Me. 220, 52 Atl. 655 (construing Rev. St. c. 82, § 43); Bachelder *v.* Bickford, 62 Me. 526 (construing Rev. St. c. 82, § 36).

Nebraska.— Wenham *v.* State, 65 Nebr. 394, 91 N. W. 421, 58 L. R. A. 825, holding the act of March 31, 1899, regulating the hours of employment of females, constitutional.

New York.— Downey *v.* Bender, 57 N. Y. App. Div. 310, 68 N. Y. Suppl. 96 (construing Laws (1897), c. 415, as amended by Laws (1899), c. 567); People *v.* Waring, 52 N. Y. App. Div. 36, 64 N. Y. Suppl. 865 (construing Laws (1899), c. 567, § 1, providing that eight hours shall constitute a day's work for all classes of employees, except in cases of extraordinary emergency, caused by fire, flood, or danger of life or property).

Pennsylvania.— Com. *v.* Junker, 7 Pa. Dist. 125.

Utah.— Short *v.* Bullion-Beck, etc., Min. Co., 20 Utah 20, 57 Pac. 720, 45 L. R. A. 603; State *v.* Holden, 14 Utah 71, 46 Pac. 756, 37 L. R. A. 103 [*affirmed* in 169 U. S. 366, 18 S. Ct. 383, 42 L. ed. 780], holding the "Eight-Hour Law" (Laws (1896), p. 219) constitutional.

United States.— Holden *v.* Hardy, 169 U. S. 366, 18 S. Ct. 383, 42 L. ed. 780 [*affirming* 14 Utah 71, 46 Pac. 756] (holding the Utah "Eight-Hour Law" constitutional); U. S. *v.* San Francisco Bridge Co., 88 Fed. 891.

England.— Smith *v.* Kyle, [1902] 1 K. B. 286, 20 Cox C. C. 54, 66 J. P. 101, 71 L. J. K. B. 16, 85 L. T. Rep. N. S. 428, 50 Wkly. Rep. 319; Savoy Hotel Co. *v.* London County Council, [1900] 1 Q. B. 665, 64 J. P. 262, 69 L. J. Q. B. 274, 82 L. T. Rep. N. S. 56, 48 Wkly. Rep. 351 (both construing Shop-Hours Act of 1892); Hoare *v.* Truman, 66 J. P. 342, 71 L. J. K. B. 381, 86 L. T. Rep. N. S. 417, 50 Wkly. Rep. 396 [*distinguishing* Law *v.* Graham, [1901] 2 K. B. 327, 19 Cox C. C. 709, 65 J. P. 501, 70 L. J. K. B. 608, 84 L. T. Rep. N. S. 599, 49 Wkly. Rep. 622] (construing Factory Acts of 1878 and 1895).

See 34 Cent. Dig. tit. "Master and Servant," § 14.

Bakers.— The provision of the Labor Law (Laws (1897), p. 496, c. 415, art. 8, § 110), restricting the hours of labor in bakeries, is constitutional. People *v.* Lochner, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773 [*affirming* 73 N. Y. App. Div. 120, 76 N. Y. Suppl. 396].

Railroad employees.— A statute restricting the hours of labor of railroad employees is constitutional. People *v.* Phyfe, 136 N. Y. 554, 32 N. E. 978, 19 L. R. A. 141, 19 L. R. A. 414 (construing Laws (1892), c. 711, §§ 2, 3); *In re* Ten Hour Law, etc., 24 R. I. 603, 54 Atl. 603, 61 L. R. A. 612 (construing Pub. Laws, c. 1004).

State employees.— A statute declaring that all laborers, workmen, or mechanics engaged in the service of the state shall not work more than eight hours per day is constitutional. State *v.* Atkin, 64 Kan. 174, 67 Pac. 519; *In re* Dalton, 61 Kan. 257, 59 Pac. 336, 47 L. R. A. 380. But see People *v.* Orange County Road Constr. Co., 175 N. Y. 84, 67 N. E. 129, 65 L. R. A. 33 [*reversing* 73 N. Y. App. Div. 581], holding that Pen. Code, § 384*b*, subd. 1, prohibiting any person or corporation contracting with the state or a municipal corporation from requiring more than eight hours labor per day, is unconstitutional, as creating an arbitrary distinction between persons contracting with a state or municipality, and other employers of labor.

Permanent employees.— Mass St. (1874) c. 221, as amended by St. (1880) c. 194, regulating the hours of labor of minors and women employed in laboring in a manufacturing establishment, applies only to permanent employees. Com. *v.* Osborn Mill, 130 Mass. 33.

safety,[75] or morals. The constitutionality of statutes of this character is well settled.

C. Termination and Discharge[76] — **1. Termination**[77] — **a. In General.** Where a contract of employment is for a definite term, it cannot be terminated at an earlier period,[78] unless the right to do so is reserved in the contract,[79] or unless there is a general custom authorizing an earlier termination.[80]

b. Expiration of Term.[81] A contract of service for a definite period terminates by its own terms at the end of such period,[82] and where the hiring is by the

Underground mineral workers.— Mo. Rev. St. §§ 8793, 8794, providing that underground mineral workers shall not labor more than eight hours per day is constitutional. State *v.* Cantwell, 179 Mo. 245, 78 S. W. 569.

75. *Illinois.*— Chicago, etc., Coal Co. *v.* People, 181 Ill. 270, 54 N. E. 961, 48 L. R. A. 554, holding that the legislature has the right to provide for the inspection of mines, and may require the mine owners to pay the inspection fees.

Michigan.— Monforton *v.* Detroit Pressed Brick Co., 113 Mich. 39, 71 N. W. 586 (construing Laws (1893), Act 126, § 1112]; Borck *v.* Michigan Bolt, etc., Works, 111 Mich. 129, 69 N. W. 254 (construing 3 Howell Annot. St. § 1997, c. 6, c. 7); People *v.* Smith, 108 Mich. 527, 66 N. W. 382, 62 Am. St. Rep. 715, 32 L. R. A. 853 (construing Laws (1893), Act 111).

Montana.— State *v.* Anaconda Copper-Min. Co., 23 Mont. 498, 59 Pac. 854 (construing Laws (1897), p. 245).

New York.— Huda *v.* American Glucose Co., 154 N. Y. 474, 48 N. E. 897, 40 L. R. A. 411 [*affirming* 12 N. Y. App. Div. 624, 42 N. Y. Suppl. 1126]; Wingert *v.* Krakauer, 76 N. Y. App. Div. 34, 78 N. Y. Suppl. 664 (construing Laws (1897), c. 415, § 18); Holzman *v.* Katzman, 87 N. Y. Suppl. 478 (construing Laws (1897), c. 415, § 20).

Texas.— Hernischel *v.* Texas Drug Co., 26 Tex. Civ. App. 1, 61 S. W. 419.

Wisconsin.— Dunlavey *v.* Racine Malleable, etc., Iron Co., 110 Wis. 391, 85 N. W. 1025, construing Rev. St. (1898) § 4390.

Canada.— Moore *v.* J. D. Moore Co., 4 Ont. L. Rep. 167, construing The Ontario Factories Act.

76. As affecting master's liability for injuries to servant see *infra*, IV, A, 1, f.

Discharge of seamen see Seamen.

Obligation of master to furnish work in general see *infra*, III, A, 2.

Removal and discharge of municipal employees see Municipal Corporations.

Removal and discharge of school-teachers see Schools and School-Districts.

Termination of relation of agency see Principal and Agent.

Terms and duration of employment in general see *supra*, II, A, 7.

77. As affecting liability for injuries to third persons see *infra*, V, A, 2, d.

78. World's Columbian Exposition *v.* Crandall, 59 Ill. App. 357; Larkin *v.* Hecksher, 51 N. J. L. 133, 16 Atl. 703, 3 L. R. A. 137; Hathaway *v.* Bennett, 10 N. Y. 108, 61 Am. Dec. 739; Lilley *v.* Elwin, 11 Q. B. 742, 12 Jur. 623, 17 L. J. Q. B. 132, 63 E. C. L. 742; Ridgway *v.* Hungerford Market Co., 3 A. & E. 171, 1 Harr. & W. 244, 4 L. J. K. B. 157, 4 N. & M. 797, 30 E. C. L. 97; Turner *v.* Robinson, 5 B. & Ad. 789, 27 E. C. L. 333, 6 C. & P. 15, 25 E. C. L. 298, 2 N. & M. 829; Beeston *v.* Collyer, 4 Bing. 309, 13 E. C. L. 517, 2 C. & P. 607, 12 E. C. L. 760, 5 L. J. C. P. O. S. 180, 12 Moore C. P. 552, 29 Rev. Rep. 576; Forgan *v.* Burke, 12 Ir. C. L. 495; Spain *v.* Arnott, 2 Stark. 256, 19 Rev. Rep. 715, 3 E. C. L. 400. *Compare* Tyng *v.* Theological Seminary, 46 N. Y. Super. Ct. 250.

An agreement to work for a specific sum per year, where the payments are made quarterly, cannot be terminated by three months' notice. Tatterson *v.* Suffolk Mfg. Co., 106 Mass. 56.

79. See *infra*, II, C, 1, d.

80. In England in the case of menial servants, the contract of employment may by custom be terminated at any time upon one month's notice, or the payment of a month's wages. Fawcett *v.* Cash, 5 B. & Ad. 904, 3 L. J. K. B. 113, 3 N. M. 177, 27 E. C. L. 381; Beeston *v.* Collyer, 4 Bing. 313, 13 E. C. L. 517, 2 C. & P. 607, 12 E. C. L. 760, 5 L. J. C. P. O. S. 180, 12 Moore C. P. 552, 29 Rev. Rep. 576. See also Williams *v.* Byrne, 7 A. & E. 177, 1 Jur. 578, 6 L. J. K. B. 239, 2 N. & P. 139, W. W. & D. 535, 34 E. C. L. 112; Rex *v.* Buckingham, 5 B. & Ad. 953, 3 L. J. M. C. 64, 3 N. & M. 72, 27 E. C. L. 400; Nicoll *v.* Greaves, 17 C. B. N. S. 27, 10 Jur. N. S. 919, 33 L. J. C. P. 259, 10 L. T. Rep. N. S. 531, 12 Wkly. Rep. 961, 112 E. C. L. 27; Metzner *v.* Bolton, 2 C. L. R. 685, 9 Exch. 518, 23 L. J. Exch. 130, 2 Wkly. Rep. 302; Nowlan *v.* Ablett, 2 C. M. & R. 54, 1 Gale 72, 4 L. J. Exch. 155, 5 Tyrw. 709; Turner *v.* Mason, 2 D. & L. 898, 14 L. J. Exch. 311, 14 M. & W. 112.

There is no general custom that a person hired for a year, with monthly payments, may be discharged, without cause, on one month's notice, on one month's wages paid. Larkin *v.* Hecksher, 51 N. J. L. 133, 16 Atl. 703, 3 L. R. A. 137.

The rule allowing a month's notice in case of a menial is not applicable as between the proprietor of a newspaper and a carrier. Hathaway *v.* Bennett, 10 N. Y. 108, 61 Am. Dec. 739.

81. Continuance of employment after expiration of term see *supra*, II, A, 8.

82. Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430, where it was held that it was not necessary for defendant, in order to defeat a recovery on the contract beyond its terms, to

day,[83] or from month to month,[84] either party has a right to terminate it at the end of any particular day or month, but a contract from month to month can be terminated only at the end of a month except by consent.[85]

c. **Indefinite Term.**[86] A contract of employment for an indefinite term may, in the United States, be terminated at the will of either party.[87] This rule, however, does not apply where the consideration for the employment is paid wholly or partly in advance, as by the relinquishment of a claim for personal injuries.[88]

d. **Termination Under Provisions of Contract**[89] — (i) *In General.* A contract of employment may be validly terminated upon the happening of any event stipulated for in the contract itself.[90]

show that he discharged plaintiff, or by any express notice declared the contract terminated.

83. Under an ordinary contract of hiring by the day, the person hired is not bound to prolong his services, in order to complete any particular piece of work on which he may happen to be employed. Wyngert *v.* Norton, 4 Mich. 286.

84. Capron *v.* Strout, 11 Nev. 304; Whitmore *v.* Werner, 88 N. Y. Suppl. 373; Young *v.* Lewis, 9 Tex. 73; Jones *v.* Trinity Parish, 19 Fed. 59; The Hudson, 12 Fed. Cas. No. 6,831.

85. Dodson-Braun Mfg. Co. *v.* Dix, (Tex. Civ. App. 1903) 76 S. W. 451. See also Hartsell *v.* Masterson, 132 Ala. 275, 31 So. 616.

86. Apportionment of wages see *infra*, III, B, 4, e, (v).

87. *Alabama.*— Howard *v.* East Tennessee, etc., R. Co., 91 Ala. 268, 8 So. 868.

California.— Davidson *v.* Laughlin, (1902) 68 Pac. 101; Lord *v.* Goldberg, 81 Cal. 596, 22 Pac. 1126, 15 Am. St. Rep. 82; De Briar *v.* Minturn, 1 Cal. 450.

Florida.— Savannah, etc., R. Co. *v.* Willett, 43 Fla. 311, 31 So. 246.

Illinois.— Griffin *v.* Domas, 22 Ill. App. 203.

Kentucky.— Louisville, etc., R. Co. *v.* Offutt, 99 Ky. 427, 36 S. W. 181, 18 Ky. L. Rep. 303, 59 Am. St. Rep. 467, in which the employer agreed to give the employee work as long as he did honest and faithful work.

Maine.— Blaisdell *v.* Lewis, 32 Me. 515.

Massachusetts.— See Harper *v.* Hassard, 113 Mass. 187, where it was held that the employer could terminate the contract at any time on giving reasonable notice.

Michigan.— Sullivan *v.* Detroit, etc., R. Co., 135 Mich. 661, 98 N. W. 756, 106 Am. St. Rep. 403, 64 L. R. A. 673.

Mississippi.— Butler *v.* Smith, 35 Miss. 457.

Missouri.— Harrington *v.* F. W. Brockman Comm. Co., 107 Mo. App. 418, 81 S. W. 629; Finger *v.* Koch, etc., Brewing Co., 13 Mo. App. 310.

New Jersey.— Shaw *v.* Woodbury Glass-Works, 52 N. J. L. 7, 18 Atl. 696; Water Com'rs *v.* Brom, 32 N. J. L. 504.

New York.— Douglass *v.* Merchants' Ins. Co., 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822; Martin *v.* New York L. Ins. Co., 73 Hun 496, 26 N. Y. Suppl. 283 [*affirmed* in 148 N. Y. 117, 42 N. E. 416]; Morrison *v.* Ogdensburgh, etc., R. Co., 52 Barb. 173; Ward *v.* Ruckman, 34 Barb. 419 (upon reasonable notice); Campbell *v.* Jimenes, 7 Misc. 77, 27 N. Y. Suppl. 351 [*reversing* 5 Misc. 593, 25 N. Y. Suppl. 1143]; Greenburg *v.* Early, 4 Misc. 99, 23 N. Y. Suppl. 1009; Davis *v.* Barr, 12 N. Y. St. 111. *Compare* Potter *v.* New York, 59 N. Y. App. Div. 70, 68 N. Y. Suppl. 1039; Gates *v.* Stead, 54 N. Y. App. Div. 448, 66 N. Y. Suppl. 829; Downes *v.* Poncet, 38 Misc. 799, 78 N. Y. Suppl. 883.

Pennsylvania.— Peacock *v.* Cummings, 46 Pa. St. 434; Beck *v.* Walkers, 24 Pa. Co. Ct. 403; Coffin *v.* Landis, 5 Phila. 176.

United States.— Boyer *v.* Western Union Tel. Co., 124 Fed. 246; Truesdale *v.* Young, 24 Fed. Cas. No. 14,204.

See 34 Cent. Dig. tit. "Master and Servant," § 19.

But see Long *v.* Kee, 42 La. Ann. 899, 8 So. 610.

For English rule see *supra*, II, A, 7, c.

Employment at weekly salary.— Where plaintiff is employed for an indefinite time at a fixed weekly sum, the contract may be determined by either party at the expiration of any week. Dunbar *v.* Cuban Land, etc., Co., 37 Misc. (N. Y.) 360, 75 N. Y. Suppl. 498.

88. Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289; Harrington *v.* Kansas City Cable R. Co., 60 Mo. App. 223. But *compare* Texas Midland R. Co. *v.* Morris, 29 Tex. Civ. App. 491, 69 S. W. 102, in which plaintiff executed a release upon defendant's paying him a small sum and agreeing to employ him "during his lifetime, or so long as he might desire." He entered into and continued the service for more than a year, without electing that the employment should continue for life or for any definite period, and it was held that, in the absence of such election, defendant had the right to discharge him at any time without cause.

89. Apportionment of wages see *infra*, III, B, 4, e, (v).

90. *Illinois.*— Wilmington Coal Min., etc., Co. *v.* Lamb, 90 Ill. 465 (in which the contract provided that the servant might leave, if he wished in good faith to do so, and it was held that he need not show that he left for good cause, in the absence of proof of bad faith); Western Mut. Life Assoc. *v.*

(II) *Provisions as to Notice.* Where a contract of employment provides for its termination at any time, upon the giving of a stipulated notice, such provision must be complied with, and a discharge or abandonment without the required notice is unlawful.[91] But a party claiming the benefit of a notice under the contract of employment must show compliance on his part with the terms of the contract,[92] and the right to notice may be waived by a party, the question as to whether his acts constitute a waiver being ordinarily one of fact for the jury.[93] On the other hand, the giving of notice of termination by an employer after the abandonment of the service by the employee does not waive such previous breach of the contract, with an assent to the restoration of their previous relations.[94]

(III) *Termination by Reason of Dissatisfaction.* The authorities are con-

Robinson, 74 Ill. App. 458 (contract terminable upon servant's failure to perform a certain amount of work); Wilmington Coal Min., etc., Co. *v.* Barr, 2 Ill. App. 84 (right of servant to leave, if he in good faith wished to do so).

Louisiana.— Leonard *v.* Sparks, 109 La. 543, 33 So. 594, to the effect that where a person employs two others to do certain work, and retains the right to discharge them at will, he may discharge one and retain the other.

Maine.— Durgin *v.* Baker, 32 Me. 273, in which A was to labor for B for a specified time, and at stipulated wages, "if they could agree," and it was held that either party might terminate the contract at pleasure, and without showing any reasonable cause for disagreement.

New York.— Smith *v.* Buffalo St. R. Co., 35 Hun 204 (contract giving right to discharge servant at any time); Gates *v.* Davenport, 29 Barb. 160 (*bona fide* disagreement all that is necessary under provision that servant may leave in case of disagreement); Baros *v.* Jarmulowsky, 31 Misc. 746, 64 N. Y. Suppl. 53 (provision for discharge on payment of specified sum construed); Willis *v.* Rose, 29 Misc. 111, 60 N. Y. Suppl. 271 (provision for termination upon master's abandoning the work for which servant was employed); Hecht *v.* Brandus, 4 Misc. 58, 23 N. Y. Suppl. 1004 [*affirming* 2 Misc. 471, 21 N. Y. Suppl. 1034] (provision for termination upon paying servant a specified sum). *Compare* Edelsohn *v.* Singer Mfg. Co., 1 Misc. 166, 20 N. Y. Suppl. 655.

United States.— Egbert *v.* Sun Co., 126 Fed. 568, construing provision for termination upon paying employee a fixed sum.

Canada.— McRae *v.* Marshall, 19 Can. Sup. Ct. 10; Doyle *v.* Wurtzburg, 32 Nova Scotia 107.

See 34 Cent. Dig. tit. "Master and Servant," § 20.

Contract terminable for specified reasons. — A contract of employment, terminable for specified reasons, of the existence of which the employer was to be the sole judge, gives the employee the right to the exercise by the employer of his personal judgment on the existence of the specified grounds, and it cannot be terminated by another employee on his own judgment. Lipshutz *v.* Proctor, 95 N. Y. Suppl. 566.

Provision held not to justify termination see World's Columbian Exposition *v.* Thompson, 57 Ill. App. 606.

91. *Arizona.*— Old Dominion Copper Min., etc., Co. *v.* Andrews, 6 Ariz. 205, 56 Pac. 969.

Delaware.— Shea *v.* Kerr, 1 Pennew. 530, 43 Atl. 843.

Illinois.— McCormick Harvesting Mach. Co. *v.* Cordsiemon, 101 Ill. App. 140.

Indiana.— Indianapolis *v.* Bly, 39 Ind. 373.

New York.— Gates *v.* Stead, 54 N. Y. App. Div. 448, 66 N. Y. Suppl. 829; Fisher *v.* Monroe, 1 Misc. 14, 20 N. Y. Suppl. 664 [*reversed* on another point in 2 Misc. 826, 21 N. Y. Suppl. 995]; De Gellert *v.* Poole, 2 N. Y. Suppl. 651.

See 34 Cent. Dig. tit. "Master and Servant," § 20.

Compare Lyon *v.* Pollard, 20 Wall. (U. S.) 403, 22 L. ed. 361.

A rule requiring two weeks' notice of intention to quit service, on pain of forfeiture of wages due, is reasonable, and, if assented to by the employee, becomes part of the contract of employment. Diamond State Iron Co. *v.* Bell, 2 Marv. (Del.) 303, 43 Atl. 161.

Notice held a substantial compliance with contract see Leslie *v.* Robie, 84 N. Y. Suppl. 289.

Proof of notice.—The giving of the required notice so as to terminate a contract of employment is not conclusively shown by an admission that the employee, shortly before the contract would have expired by its terms, sought other employment. Ince *v.* Weber, 18 Misc. (N. Y.) 254, 41 N. Y. Suppl. 396.

Facts held to excuse failure to give notice see Cote *v.* Bates Mfg. Co., 91 Me. 59, 39 Atl. 280.

Contract held not to give right to terminate on notice see Hannay *v.* Zerban, 16 Daly (N. Y.) 372, 11 N. Y. Suppl. 577 [*reversing* 8 N. Y. Suppl. 97].

Contract held not to require notice see Newcomer *v.* Blaney, 33 Misc. (N. Y.) 95, 67 N. Y. Suppl. 170.

92. Basse *v.* Allen, 43 Tex. 481.

93. Nashua, etc., R. Corp. *v.* Paige, 135 Mass. 145.

94. Mallory *v.* Mackaye, 92 Fed. 749, 34 C. C. A. 653, in which the notice stated that

flicting as to the rule to be applied when the contract provides for the satisfactory performance of the employee's duties. Some of the cases hold that the employer is the sole judge of what is satisfactory or not;[95] others, that he must be in good faith dissatisfied, and that this presents a question of fact.[96] And this latter rule necessarily prevails where the contract expressly so provides.[97] Where the employment is continued after its expiration, a provision of the original contract that the servant should be retained during satisfaction does not attach to the reëmployment, and give the master the right of removal at will.[98]

e. Termination by Mutual Agreement.[99] Like any other contract, a contract of employment may be terminated by agreement of the parties, or by their consent, either express or implied;[1] and where one party declares that he will not perform

it was given "without prejudice to any rights I may have arising from any violation by you" of the agreement.

95. *Alabama.*— Allen *v.* Mutual Compress Co., 101 Ala. 574, 14 So. 362.

Colorado.— Bush *v.* Koll, 2 Colo. App. 48, 29 Pac. 919.

Illinois.— Alexis Stoneware Mfg. Co. *v.* Young, 59 Ill. App. 226.

Michigan.— Teichner *v.* Pope Mfg. Co., 125 Mich. 91, 83 N. W. 1031.

New York.— Crawford *v.* Mail, etc., Pub. Co., 163 N. Y. 404, 57 N. E. 616 [*affirming* 22 N. Y. App. Div. 54, 47 N. Y. Suppl. 747, and *distinguishing* Smith *v.* Robson, 148 N. Y. 252, 42 N. E. 677, on the ground that there the master had power under the contract to discharge, if, in good faith, he was dissatisfied, while in the principal case the question of taste, fancy, interest, personal satisfaction, and judgment was involved in the contract]; Spring *v.* Ansonia Clock Co., 24 Hun 175; Glyn *v.* Miner, 6 Misc. 637, 27 N. Y. Suppl. 341; Weaver *v.* Klaw, 16 N. Y. Suppl. 931. But *compare* Crawford *v.* Mail, etc., Pub. Co., 9 N. Y. App. Div. 481, 41 N. Y. Suppl. 325; Levin *v.* Standard Fashion Co., 14 N. Y. Suppl. 139; Brandt *v.* Godwin, 3 N. Y. Suppl. 807 [*affirmed* in 15 Daly 456].

Vermont.— Rossiter *v.* Cooper, 23 Vt. 522.

See 34 Cent. Dig. tit. "Master and Servant," § 21.

Incompetency must appear after the contract was made.— Walton *v.* Godwin, 58 Hun (N. Y.) 87, 11 N. Y. Suppl. 391.

96. *Maine.*— Winship *v.* Portland Base Ball, etc., Assoc., 78 Me. 571, 7 Atl. 706.

Minnesota.— Frary *v.* American Rubber Co., 52 Minn. 264, 53 N. W. 1156, 18 L. R. A. 644.

Mississippi.— Atlanta Stove Works *v.* Hamilton, 83 Miss. 704, 35 So. 763.

Missouri.— Beggs *v.* Fowler, 82 Mo. 599.

Texas.— Rhodes-Haverty Furniture Co. *v.* Frazier, (Civ. App. 1900) 55 S. W. 192.

See 34 Cent. Dig. tit. "Master and Servant," § 21.

And see Hotchkiss *v.* Gretna Ginnery, etc., Co., 36 La. Ann. 517, where it was held that a proviso in a contract of employment for one year that the employee may be sooner discharged, if the employer be dissatisfied, will be enforced, unless there be clear proof that the discharge was for other cause.

Where a servant is taken on trial for a specified time, the master is entitled to a reasonable time, to be determined by the jury, after the expiration of the trial period, to give notice of dissatisfaction. Baldwin Fertilizer Co. *v.* Cope, 110 Ga. 325, 35 S. E. 316. But *compare* Stagg *v.* Belden, 26 La. Ann. 455.

That a servant is retained after his work becomes unsatisfactory is not a condonation of the acts which caused the dissatisfaction, and will not prevent his discharge at any time thereafter, without new cause of dissatisfaction. Alexis Stoneware Mfg. Co. *v.* Young, 59 Ill. App. 226.

97. Smith *v.* Robson, 148 N. Y. 252, 42 N. E. 677 [*reversing* 6 Misc. 639, 26 N. Y. Suppl. 1131]; Grinnell *v.* Kiralfy, 55 Hun (N. Y.) 422, 8 N. Y. Suppl. 623.

98. Laughlin *v.* School Dist. No. 17, 98 Mich. 523, 57 N. W. 571.

99. Apportionment of wages see *infra*, III, B, 4, e, (IV).

1. *Illinois.*— Grannemann *v.* Kloepper, 24 Ill. App. 277; White *v.* Gray, 4 Ill. App. 228.

Massachusetts.— Pray *v.* Standard Electric Co., 155 Mass. 561, 30 N. E. 464.

New Hampshire.— Laton *v.* King, 19 N. H. 280.

New York.— Bowdish *v.* Briggs, 5 N. Y. App. Div. 592, 39 N. Y. Suppl. 371; Merrill *v.* Wakefield Rattan Co., 1 N. Y. App. Div. 118, 37 N. Y. Suppl. 64; Levin *v.* Standard Fashion Co., 4 N. Y. Suppl. 867 [*reversed* on other points in 16 Daly 404, 11 N. Y. Suppl. 706]; Gartlan *v.* Searle, 1 N. Y. City Ct. 349. *Compare* Martin *v.* New York L. Ins. Co., 148 N. Y. 117, 42 N. E. 416 [*reversing* 73 Hun 496, 26 N. Y. Suppl. 283], in which the evidence was held insufficient to show consent.

Ohio.— Moses *v.* Union Cent. L. Ins. Co., 7 Ohio Dec. (Reprint) 609, 4 Cinc. L. Bul. 214.

Texas.— Greer *v.* Featherston, (Civ. App. 1902) 68 S. W. 48 [*affirmed* in 95 Tex. 654, 69 S. W. 69].

Vermont.— Boyle *v.* Parker, 46 Vt. 343; Patnote *v.* Sanders, 41 Vt. 66, 98 Am. Dec. 564; Rogers *v.* Steele, 24 Vt. 513.

Wisconsin.— Bell *v.* Gund, 110 Wis. 271, 85 N. W. 1031; Southmayd *v.* Watertown F. Ins. Co., 47 Wis. 517, 2 N. W. 1137.

England.— Thomas *v.* Williams, 1 A. & E.

the contract, the other need not wait until the time for performance before acting on such declaration.[2]

f. Change in Business of Master[3] — (I) *In General.* Where a master disposes of or changes his business, and thereby becomes unable to perform his contract, the contract is terminated, and if not terminable at will the servant can recover for its breach.[4] So where the master disposes of his business to another, without notifying the servant of the change, and the latter continues his services thereafter, the master is liable for the servant's wages, so long as he remains without notice.[5] But in case of contracts terminable at will actual knowledge by the servant of the change of employers, however acquired, will release his employer.[6]

(II) *Formation or Dissolution of Partnership.* Where, pending the term of service, the master enters into a partnership with another, and the servant, without any new contract, enters into the service of the firm, his contract with his original master is at an end.[7] The weight of authority is to the effect that the death of a partner dissolves a contract of employment made by the firm.[8]

685, 3 L. J. K. B. 202, 3 N. & M. 545, 28 E. C. L. 322; Ferguson *v.* McKinzie, Hume 21; Lamburn *v.* Cruden, 5 Jur. 151, 10 L. J. C. P. 121, 2 M. & G. 253, 2 Scott N. R. 533.

Canada.— Burnet *v.* Hope, 9 Ont. 10.

See 34 Cent. Dig. tit. "Master and Servant," § 22.

Consent implied from words and acts of parties see Boyle *v.* Parker, 46 Vt. 343.

Apportionment of wages see *infra*, III, B, 4.

2. Collins Ice-Cream Co. *v.* Stephens, 189 Ill. 200, 59 N. E. 524, to the effect that where plaintiff was employed by defendant, and they had a disagreement on Sunday, an instruction that if plaintiff declared he would stop work right there, to which defendant assented, this would not end the employment, if thereafter plaintiff was willing to and did work for defendant under the contract, was erroneous.

3. **Death of master** see *infra*, II, C, 1, h.

4. Woodberry *v.* Warner, 53 Ark. 488, 14 S. W. 671; Globe, etc., F. Ins. Co. *v.* Jones, 129 Mich. 664, 89 N. W. 580; Woodley *v.* Bond, 66 N. C. 396.

Merger of corporation.— Where one contracted to give his personal services to a corporation for a certain period, and such corporation was thereafter merged in a corporation made up of several corporations, he cannot be required to give his services to the new corporation. Globe, etc., F. Ins. Co. *v.* Jones, 129 Mich. 664, 89 N. W. 580.

The mere forming of a corporation by an employer and use of the corporate name in the business for which he had hired a person do not terminate the employment, there being no change otherwise in the manner of conducting the business, and the employer continuing to be the real owner. Sands *v.* Potter, 165 Ill. 397, 46 N. E. 282, 56 Am. St. Rep. 253 [*affirming* 59 Ill. App. 206].

Immaterial change in business no cause of action for damages see Levy *v.* Friedlander, 24 La. Ann. 439.

Apportionment of wages see *infra*, III, B, 4.

5. Perry *v.* Simpson Waterproof Mfg. Co., 37 Conn. 520; Marietta, etc., R. Co. *v.* Hilburn, 75 Ga. 379; North Chicago Rolling Mill Co. *v.* Hyland, 94 Ind. 448; Tousignant *v.* Shafer Iron Co., 96 Mich. 87, 55 N. W. 681.

6. Jones *v.* Shafer Iron Co., 96 Mich. 98, 55 N. W. 684. See also Dyer *v.* Tyler, 49 Mich. 366, 13 N. W. 777.

Where a servant recognizes a corporation as the successor of his master, and continues in its employ, the contract of employment is as binding on him, in favor of the corporation, as if the original master had continued in such capacity. Kessler *v.* Chappelle, 73 N. Y. App. Div. 447, 77 N. Y. Suppl. 285.

Notice a question for the jury.— Jones *v.* Shafer Iron Co., 96 Mich. 98, 55 N. W. 684.

7. Anderson *v.* Freeman, 75 Ga. 93, 80 Ga. 364, 9 S. E. 1075. *Contra*, McGuire *v.* O'Hallaran, Lalor (N. Y.) 85. And *compare* Tifield *v.* Adams, 3 Iowa 487, where it was held that to continue to labor for a partnership, according to a contract made with the partner who originally carried on the business alone, does not *per se* amount to a rescission of the old contract and the substitution of a new one with the firm.

8. *California.*—Louis *v.* Elfelt, 89 Cal. 547, 26 Pac. 1095.

Georgia.— Griggs *v.* Swift, 82 Ga. 392, 9 S. E. 1062, 14 Am. St. Rep. 176, 5 L. R. A. 405.

Missouri.— Redheffer *v.* Leathe, 15 Mo. App. 12.

New York.— Mason *v.* Secor, 76 Hun 178, 27 N. Y. Suppl. 570; Greenburg *v.* Early, 4 Misc. 99, 23 N. Y. Suppl. 1009.

England.— Tasker *v.* Shepherd, 6 H. & N. 575, 30 L. J. Exch. 207, 4 L. T. Rep. N. S. 19, 9 Wkly. Rep. 476.

Canada.— Burnet *v.* Hope, 9 Ont. 10.

See 34 Cent. Dig. tit. "Master and Servant," §§ 24, 26.

Contra.— Fereira *v.* Sayres, 5 Watts & S. (Pa.) 210, 40 Am. Dec. 496; Johnson *v.* Judge, 16 Pa. Super. Ct. 137. And *compare* Hughes *v.* Gross, 166 Mass. 61, 43 N. E. 1031, 55 Am. St. Rep. 375, 32 L. R. A. 620.

If a surviving partner retains a former employee to assist in winding up the affairs of the partnership without an express agree-

But where the dissolution is voluntary, and the business is not closed, but is continued in the same manner and at the same place, the dissolution does not terminate the contract of employment.[9]

g. Insolvency of Master or Appointment of Receiver. A contract of employment is not terminated by reason of the insolvency of the master;[10] and the fact that an employer who has become insolvent notifies his employee that his services will be no longer required does not absolve him from his obligation to pay according to the terms of the agreement unless the employee assents thereto.[11] The appointment of a receiver has, however, been held to terminate a contract of employment.[12]

h. Death or Disability of Master.[13] The death of the master during the term will terminate a contract of employment,[14] unless the contract is capable of performance by his personal representative, in whose service the servant continues,[15] or unless the contrary is stipulated by the terms of the contract.[16] But a contract of employment for a definite term is not terminated by the master's becoming insane during the term, although the contract gives the master the option to terminate it at any time on payment of a certain amount.[17]

i. Death or Disability of Servant.[18] A contract of employment is terminated by the death of the servant,[19] or where by reason of sickness or other permanent

ment, the implied contract is only for such time as his services may be needed, and at such salary as his services may reasonably be worth. Louis *v.* Elfelt, 89 Cal. 547, 26 Pac. 1095.

9. Nickerson *v.* Russell, 172 Mass. 584, 53 N. E. 141; Hughes *v.* Gross, 166 Mass. 61, 43 N. E. 1031, 55 Am. St. Rep. 375, 32 L. R. A. 620. See also Brace *v.* Calder, [1895] 2 Q. B. 253, 59 J. P. 693, 64 L. J. Q. B. 582, 72 L. T. Rep. N. S. 829, 14 Reports 473. But see Hurlbut *v.* Post, 1 Bosw. (N. Y.) 28.

10. Hassenfus *v.* Philadelphia Packing, etc., Co., 15 Pa. Co. Ct. 650; *In re* English Joint Stock Bank, L. R. 4 Eq. 350; Thomas *v.* Williams, 1 A. & E. 685, 3 L. J. K. B. 202, 3 N. & M. 545, 28 E. C. L. 322 (bankruptcy); Laishley *v.* Goold Bicycle Co., 4 Ont. L. Rep. 350.

11. Vanuxem *v.* Bostwick, 4 Pa. Cas. 532, 7 Atl. 598.

12. Eddy *v.* Co-Operative Dress Assoc., 3 N. Y. Civ. Proc. 442.

13. Deduction or forfeiture and apportionment of wages see *infra*, III, B, 4.

14. *Georgia.*— Harris *v.* Johnson, 98 Ga. 434, 25 S. E. 525.

Massachusetts.— Harrison *v.* Conlan, 10 Allen 85.

New York.— Lacy *v.* Getman, 119 N. Y. 109, 23 N. E. 452, 16 Am. St. Rep. 806, 6 L. R. A. 728 [*reversing* 1 N. Y. Suppl. 883]; Babcock *v.* Goodrich, 3 How. Pr. N. S. 52. *Contra*, Lacy *v.* Getman, 35 Hun 46.

Pennsylvania.— Zinnell *v.* Bergdoll, 19 Pa. Super. Ct. 508; Womrath's Estate, 6 Pa. Co. Ct. 262.

Rhode Island.— Yerrington *v.* Greene, 7 R. I. 589, 84 Am. Dec. 578.

England.— Farrow *v.* Wilson, L. R. 4 C. P. 744, 38 L. J. C. P. 326, 20 L. T. Rep. N. S. 810, 18 Wkly. Rep. 43; Plymouth *v.* Throgmorton, 1 Salk. 65; Barker *v.* Parker, 1 T. R. 287, 1 Rev. Rep. 201.

See 34 Cent. Dig. tit. "Master and Servant," § 26.

15. *Arkansas.*—McDaniel *v.* Parks, 19 Ark. 671.

Illinois.— Phoebe *v.* Jay, 1 Ill. 268.

Indiana.— Toland *v.* Wells, 59 Ind. 529; Toland *v.* Stevenson, 59 Ind. 485.

Louisiana.— Under Rev. Civ. Code, art. 2007, all contracts for the hire of labor, skill, or industry, unless there is some special agreement to the contrary, are considered as personal on the part of the obligor, but heritable on the part of the obligee. Tete *v.* Lanaux, 45 La. Ann. 1343, 14 So. 241.

Mississippi.— Hill *v.* Robeson, 2 Sm. & M. 541.

North Carolina.— Pugh *v.* Baker, 127 N. C. 2, 37 S. E. 82.

England.— Jackson *v.* Bridge, 12 Mod. 650.

See 34 Cent. Dig. tit. "Master and Servant," § 26.

16. Farrow *v.* Wilson, L. R. 4 C. P. 744, 38 L. J. C. P. 326, 20 L. T. Rep. N. S. 810, 18 Wkly. Rep. 43.

17. Sands *v.* Potter, 165 Ill. 397, 46 N. E. 282, 56 Am. St. Rep. 253 [*affirming* 59 Ill. App. 206].

18. Deduction or forfeiture and apportionment of wages see *infra*, III, B, 4, c, (II), (C).

19. Jarrel *v.* Farris, 6 Mo. 159; Spalding *v.* Rosa, 71 N. Y. 40, 27 Am. Rep. 7; Devlin *v.* New York, 63 N. Y. 8; Wolfe *v.* Howes, 20 N. Y. 197, 75 Am. Dec. 388; Seymour *v.* Cagger, 13 Hun (N. Y.) 29; Clark *v.* Gilbert, 32 Barb. (N. Y.) 576; Fahy *v.* North, 19 Barb. (N. Y.) 341; Jennings *v.* Lyons, 39 Wis. 553, 20 Am. Rep. 57; Boast *v.* Firth, L. R. 4 C. P. 1, 38 L. J. C. P. 1, 19 L. T. Rep. N. S. 264, 17 Wkly. Rep. 29; Stubbs *v.* Holywell R. Co., L. R. 2 Exch. 311, 36 L. J. Exch. 166, 16 L. T. Rep. N. S. 631, 15 Wkly. Rep. 869; Taylor *v.* Caldwell, 3 B. & S. 826, 32 L. J. Q. B. 167, 8 L. T. Rep. N. S. 356, 11 Wkly. Rep. 726, 113 E. C. L. 826; Hyde *v.* Windsor, Cro. Eliz. 552.

disability he is unable to perform his contract;[20] but where a master has wrongfully discharged his servant, he cannot treat the subsequent sickness of the servant while in the employment of another, for which he is not discharged by that other, as a cancellation of his own contract.[21]

j. Abandonment of Employment by Servant[22]—(i) *In General.* Where a servant refuses to serve or voluntarily abandons the service, whether with or without justifiable cause, the contract of employment is terminated.[23] The rights and liabilities of the parties arising out of the abandonment of the contract by the servant are fully treated elsewhere in this article.[24]

(ii) *Grounds For Abandonment.* A servant is not justified in abandoning his contract before the expiration of the term, unless good and just causes exist therefor.[25] Generally speaking, any breach of the express or implied provisions of the contract of employment by the master, or any act or neglect on his part which is prejudicial to the safety, health, comfort, morals, or reputation of the servant, will be deemed a sufficient ground for abandonment.[26] Whether, in a

20. *Maine.*— Dickey *v.* Linscott, 20 Me. 453, 37 Am. Dec. 66.

Massachusetts.— O'Connor *v.* Briggs, 182 Mass. 387, 65 N. E. 836; Fuller *v.* Brown, 11 Metc. 440.

New York.— Prior *v.* Flagler, 13 Misc. 115, 34 N. Y. Suppl. 152 [*affirming* 10 Misc. 496, 31 N. Y. Suppl. 193].

Vermont.— Hubbard *v.* Belden, 27 Vt. 645.

Wisconsin.— Green *v.* Gilbert, 21 Wis. 395.

Canada.— Dartmouth Ferry Commission *v.* Marks, 34 Can. Sup. Ct. 366.

See 34 Cent. Dig. tit. "Master and Servant," § 27.

Compare Egan *v.* Winnipeg Baseball Club, 96 Minn. 345, 104 N. W. 947, in which the contract contained a stipulation not to release the servant within the time specified under any circumstances whatever.

21. Bassett *v.* French, 10 Misc. (N. Y.) 672, 31 N. Y. Suppl. 667.

22. **Action by master for breach of contract** see *infra*, III, A, 10.

Deduction or forfeiture and apportionment of wages see *infra*, III, B, 4, c, (II).

Time to sue for wages see *infra*, III, B, 9, c.

23. **Evidence held to show abandonment.**— *California.*— Wiley *v.* California Hosiery Co., (1893) 32 Pac. 522.

Illinois.— Leopold *v.* Salkey, 89 Ill. 412, 31 Am. Rep. 93, where it was held that the master had the right to treat the contract as abandoned upon the arrest and imprisonment of the servant for about two weeks during the busiest part of the season.

Massachusetts.— Thayer *v.* Wadsworth, 19 Pick. 349.

Michigan.— Nash *v.* H. R. Gladding Co., 118 Mich. 529, 77 N. W. 7.

New York.— Newkirk *v.* New York, etc., R. Co., 38 N. Y. 158; Peters *v.* Whitney, 23 Barb. 24; Placide *v.* Burton, 17 Bosw. 512; Kupfer *v.* Holtzmann, 88 N. Y. Suppl. 362.

Ohio.— New York, etc., R. Co. *v.* Wenger, 9 Ohio Dec. (Reprint) 815, 17 Cinc. L. Bul. 306.

See 34 Cent. Dig. tit. "Master and Servant," § 28.

Evidence held not to show abandonment.— Thrift *v.* Payne, 71 Ill. 408; Nickerson *v.* Russell, 172 Mass. 584, 53 N. E. 141; Merkin *v.* Gersh, 30 Misc. (N. Y.) 758, 63 N. Y. Suppl. 75; Allen *v.* Maronne, 93 Tenn. 161, 23 S. W. 113.

Waiver of right to abandon see Thayer *v.* Wadsworth, 19 Pick. (Mass.) 349.

24. **Action by master for breach of contract** see *infra*, III, A, 10.

As ground for discharge see *infra*, II, C, 2, a, (II), (B).

Deductions or forfeiture and apportionment of wages see *infra*, III, B, 4, c, (II).

Indictment of servant see *infra*, III, A, 12, b.

Set-off of damages in action for wages see *infra*, III, B, 9, d, (II).

Time to sue for wages see *infra*, III, B, 9, c.

25. Word *v.* Winder, 16 La. Ann. 111; Suber *v.* Vanlew, 2 Speers (S. C.) 126.

Grounds held insufficient to justify abandonment.— Stix *v.* Roulston, 88 Ga. 743, 15 S. E. 826 (violation by master of a contract unconnected with the contract of service); Angle *v.* Hanna, 22 Ill. 429, 74 Am. Dec. 161 (requiring servant to do severe or unpleasant labor); Aaron *v.* Moore, 34 Mo. 79 (disagreement with fellow servant); Henderhen *v.* Cook, 66 Barb. (N. Y.) 21; Saunders *v.* Anderson, 2 Hill (S. C.) 486 (mere disagreement with, or rude remark by, the master, no justification); Forsyth *v.* Hastings, 27 Vt. 646 (harsh language); Mullen *v.* Gilkinson, 19 Vt. 503 (disagreement with fellow servant, whom master refuses to discharge).

26. **Neglect or refusal to pay wages.**— Dobbins *v.* Higgins, 78 Ill. 440; Central Military Tract R. Co. *v.* Spurck, 24 Ill. 587; Lefrancois *v.* Charbonnet, 5 Rob. (La.) 185, 39 Am. Dec. 533; South Fork Canal Co. *v.* Gordon, 6 Wall. (U. S.) 561, 18 L. ed. 894. *Compare* Dockham *v.* Smith, 113 Mass. 320, 18 Am. Rep. 495, where it was held that the neglect of the master to pay wages elsewhere than at his established place of business does not, in the absence of any demand and refusal, amount to such a violation of the contract as to justify an abandonment of it.

given case, the ground assigned for abandoning the employment is sufficient is usually a question of fact,[27] the burden of proving which is upon the servant.[28]

2. DISCHARGE[29] — a. In General — (I) *WHAT CONSTITUTES.* No set form of words is necessary to constitute a discharge; but any words or acts which show a clear intention on the part of the master to dispense with the servant's services, and which are equivalent to a declaration to the servant that his services will be no longer accepted, are sufficient.[30]

(II) *GROUNDS* — (A) *In General.* Unless the contract of employment is terminable at will an employer cannot arbitrarily discharge his employee,[31] but only

Denial of servant's right under, and attempt to rescind, contract.— Hartman *v.* Rogers, 69 Cal. 643, 11 Pac. 581.

Restriction of servant's rights under contract.— Baldwin *v.* Marqueze, 91 Ga. 404, 18 S. E. 309.

Wrongful assault by master on servant.— Matthews *v.* Terry, 10 Conn. 455; Erickson *v.* Sorby, 90 Minn. 327, 96 N. W. 791; Bishop *v.* Ranney, 59 Vt. 316, 7 Atl. 820. But *compare* Morgan *v.* Shelton, 28 La. Ann. 822, where an assault made in a quarrel unconnected with the contract of service was held not to justify an abandonment. And see Mather *v.* Brokaw, 43 N. J. L. 587, to the effect that an assault upon a servant's child, not residing upon the master's premises, by one not under the master's control, and not by his direction, knowledge, or consent, is not a good cause for abandoning his service.

Attempt upon a female servant's virtue by a member of another family living in the same house is good ground for abandoning the service, although it appears that her master had no control over the other family. Patterson *v.* Gage, 23 Vt. 558, 56 Am. Dec. 96.

Furnishing unsafe place for work.— Hammer *v.* Breidenbach, 31 Mo. 49.

Requiring services not contemplated in contract.— Baron *v.* Placide, 7 La. Ann. 229. But *compare* Mullen *v.* Gilkinson, 19 Vt. 503 (in which the servant consented to the new employment); Hair *v.* Bell, 6 Vt. 35 (in which the servant made no objection); Koplitz *v.* Powell, 56 Wis. 671, 14 N. W. 831 (in which there was merely a request to perform the service).

Requiring illegal or immoral services.— Com. *v.* St. German, 1 Browne (Pa.) 24.

Exposing servant to immoral influences.— Warner *v.* Smith, 8 Conn. 14; Patterson *v.* Gage, 23 Vt. 558, 56 Am. Dec. 96.

Compelling Sunday work.— Com. *v.* St. German, 1 Browne (Pa.) 24.

Wrongfully charging servant with crime.— Longmuir *v.* Thomson, 11 Sc. Sess. Cas. 571, not accessible.

27. Erickson *v.* Sorby, 90 Minn. 327, 96 N. W. 791.

28. Griffin *v.* Kaericher, 29 Ill. App. 162; Erving *v.* Ingram, 24 N. J. L. 520.

29. Deduction or forfeiture and apportionment of wages see *infra*, III, B, 4, c, (III).

30. *Colorado.*—St. Kevin Min. Co. *v.* Isaacs, 18 Colo. 400, 32 Pac. 822.

Illinois.— Van Sicklen *v.* Ballard, 97 Ill. App. 640.

Louisiana.—National Automatic Fire Alarm Co. *v.* New Orleans, etc., R. Co., 115 La. 633, 39 So. 738.

Maryland.— Cumberland, etc., R. Co. *v.* Slack, 45 Md. 161.

Michigan.— Schaub *v.* Welded-Barrel Co., 125 Mich. 591, 84 N. W. 1095; Pinet *v.* Montague, 103 Mich. 516, 61 N. W. 876; Jones *v.* Graham, etc., Transp. Co., 51 Mich. 539, 16 N. W. 893.

Minnesota.— Bennett *v.* Morton, 46 Minn. 113, 48 N. W. 678.

New York.— McNamara *v.* New York, 152 N. Y. 228, 46 N. E. 507; Griffin *v.* Brooklyn Ball Club, 68 N. Y. App. Div. 566, 73 N. Y. Suppl. 864 [*affirmed* in 174 N. Y. 535, 66 N. E. 1109]; Coy *v.* Martin, 29 N. Y. App. Div. 418, 51 N. Y. Suppl. 962; Arnold *v.* Adams, 27 N. Y. App. Div. 345, 49 N. Y. Suppl. 1041.

Tennessee.— East Tennessee, etc., R. Co. *v.* Staub, 7 Lea 397.

Vermont.— Sutton *v.* Tyrell, 12 Vt. 79.

Washington.— Paine *v.* Hill, 7 Wash. 437, 35 Pac. 136.

Canada.— Feneron *v.* O'Keefe, 2 Manitoba 40; Lash *v.* Meriden Britannia Co., 8 Ont. App. 680.

See 34 Cent. Dig. tit. "Master and Servant," § 37.

"I am very sorry to have to ask you to resign your position" is properly construed as a peremptory discharge. Jones *v.* Graham, etc., Transp. Co., 51 Mich. 539, 16 N. W. 893. See also Cumberland, etc., R. Co. *v.* Slack, 45 Md. 161.

A notice of suspension does not carry with it the implication of an absolute discharge. Gregory *v.* New York, 11 N. Y. St. 506.

Verbal notice that "you quit us in Norfolk," cannot, as a matter of law, be held a discharge, so as to limit recovery of salary to two weeks thereafter, under a contract allowing cancellation upon two weeks' notice in writing. De Vere *v.* Gilmore, 25 Misc. (N. Y.) 306, 54 N. Y. Suppl. 587.

Facts held not to show discharge.— Daniell *v.* Boston, etc., R. Co., 184 Mass. 337, 68 N. E. 337; Isaacsen *v.* Andrews, 69 N. Y. App. Div. 430, 74 N. Y. Suppl. 1039 (conditional discharge); Kuno *v.* Fitzgerald Bros. Brewing Co., 65 N. Y. App. Div. 612, 72 N. Y. Suppl. 742 (contract already broken by servants); Cooper *v.* Gannett, 3 N. Y. Suppl. 697; McDonald *v.* Montague, 30 Vt. 357.

31. Summers *v.* Colver, 38 N. Y. App. Div. 553, 56 N. Y. Suppl. 624; Brall *v.* Clauson, 35 Misc. (N. Y.) 861, 72 N. Y. Suppl. 1095

for good cause.[32] But as a general proposition any act of a servant which injures or has a tendency to injure his master's business, interests, or reputation will justify his dismissal.[33] Actual loss is, however, unnecessary, but it is sufficient if from the circumstances it appears that the master has been or is likely to be damaged by the act complained of.[34]

[*affirming* 35 Misc. 129, 71 N. Y. Suppl. 311]; Rhoades *v.* Chesapeake, etc., R. Co., 49 W. Va. 494, 39 S. E. 209, 87 Am. St. Rep. 826, 55 L. R. A. 170.

32. *Louisiana.*— Madden *v.* Jacobs, 52 La. Ann. 2107, 28 So. 225, 50 L. R. A. 827; Word *v.* Winder, 16 La. Ann. 111; Beckman *v.* New Orleans Cotton Press Co., 12 La. 67.

Michigan.— Sax *v.* Detroit, etc., R. Co., 125 Mich. 252, 84 N. W. 314, 84 Am. St. Rep. 572.

Missouri.— Beggs *v.* Fowler, 82 Mo. 599; Sugg *v.* Blow, 17 Mo. 359.

New York.— Burt *v.* Catlin, 65 N. Y. App. Div. 456, 72 N. Y. Suppl. 924 [*affirmed* in 175 N. Y. 486, 67 N. E. 1081]; Stern *v.* Congregation Schaare Rachmin, 2 Daly 415; Jackson *v.* U. S. Mineral Wool Co., 9 N. Y. St. 359; Pepper *v.* Kisch, 2 N. Y. City Ct. 131; Warner *v.* Holy Church, 1 N. Y. City Ct. 419.

North Carolina.—Kerr *v.* Sanders, 122 N. C. 635, 29 S. E. 943.

Ohio.— Kelly *v.* Carthage Wheel Co., 62 Ohio St. 598, 57 N. E. 984.

Pennsylvania.— Clay Commercial Tel. Co. *v.* Root, 1 Pa. Cas. 485, 4 Atl. 828.

Wisconsin.— Moody *v.* Streissguth Clothing Co., 96 Wis. 202, 71 N. W. 99.

United States.— New York Insulated Wire Co. *v.* Broadnax, 107 Fed. 634, 46 C. C. A. 518.

Canada.— Millan *v.* Dominion Carpet Co, 22 Quebec Super. Ct. 234.

See 34 Cent. Dig. tit. "Master and Servant," §§ 30, 38.

An employer cannot discharge for trivial reasons, which do not lead to any prejudice, or from the simple apprehension of danger or prejudice. Millan *v.* Dominion Carpet Co., 22 Quebec Super. Ct. 234.

That his services are no longer needed will not justify the discharge of the servant. Sax *v.* Detroit, etc, R. Co., 125 Mich. 252, 84 N. W. 314.

Refusal to submit to diminution of salary, for any part of the term of service, is not good cause of dismissal. Beckman *v.* New Orleans Cotton Press Co., 12 La. 67.

Suing master on an independent contract is not sufficient cause for discharge. Clay Commercial Tel. Co. *v.* Root, 1 Pa. Cas. 485, 4 Atl. 828.

An assault upon a fellow servant does not necessarily justify the discharge of the assailant, but the right depends upon the circumstances of the case. Burt *v.* Catlin, 65 N. Y. App. Div. 456, 72 N. Y. Suppl. 924 [*affirmed* in 175 N. Y. 486, 67 N. E. 1081].

33. *Georgia.*— Newman *v.* Reagan, 65 Ga. 512.

Iowa.— Kidd *v.* American Pill, etc., Co., 91 Iowa 261, 59 N. W. 41.

Maryland.— Adams' Express Co. *v.* Trego, 35 Md. 47.

New York.— Townsley *v.* Bankers' L. Ins. Co., 56 N. Y. App. Div. 232, 67 N. Y. Suppl. 664; Deane *v.* Cutler, 20 N. Y. Suppl. 617; Fisher *v.* Monroe, 17 N. Y. Suppl. 837; McDonald *v.* Lord, 26 How. Pr. 404; Reimers *v.* Ridner, 26 How. Pr. 385.

Ohio.— New York, etc., R. Co. *v.* Schaffer, 65 Ohio St. 414, 62 N. E. 1036, 87 Am. St. Rep. 628, 62 L. R. A. 931.

Pennsylvania.— Singer *v.* McCormick, 4 Watts & S. 265.

England.— Pearce *v.* Foster, 17 Q. B. D. 536, 51 J. P. 213, 55 L. J. Q. B. 306, 54 L. T. Rep. N. S. 664, 34 Wkly. Rep. 602; Amor *v.* Fearon, 9 A. & E. 548, 8 L. J. Q. B. 95, 1 P. & D. 398, 2 W. W. & H. 81, 36 E. C. L. 295; Turner *v.* Robinson, 5 B. & Ad. 789, 27 E. C. L. 333, 6 C. & P. 15, 25 E. C. L. 298, 2 N. & M. 829; Lacy *v.* Osbaldiston, 8 C. & P. 80, 34 E. C. L. 620; Rutherford *v.* Book, 9 Fac. Coll. 84; Horton *v.* McMurtry, 5 H. & N. 667, 29 L. J. Exch. 260, 2 L. T. Rep. N. S. 297, 8 Wkly. Rep. 285.

Canada.— Eastmure *v.* Canada Acc. Ins. Co., 25 Can. Sup. Ct. 691; McGeorge *v.* Ross, 5 Terr. L. Rep. 116; Tozer *v.* Hutchison, 12 N. Brunsw. 548.

See 34 Cent. Dig. tit. "Master and Servant," § 30.

Engaged in competing business.— Adams' Express Co. *v.* Trego, 35 Md. 47; Stoney *v.* Farmers' Transp. Co., 17 Hun (N. Y.) 579; Dayton *v.* Hayes, 1 N. Y. City Ct. 417; Dieringer *v.* Meyer, 42 Wis. 311, 24 Am. Rep. 415. *Compare* Day *v.* American Machinist Press, 86 N. Y. App. Div. 613, 83 N. Y. Suppl. 263; Brownell *v.* Ehrich, 43 N. Y. App. Div. 369, 60 N. Y. Suppl. 112; Fuede *v.* Weissenthanner, 57 N. Y. Suppl. 831, 29 N. Y. Civ. Proc. 187.

Misappropriation of employer's time sufficient ground.— Atlantic Compress Co. *v.* Young, 118 Ga. 868, 45 S. E. 677. *Compare* Drennen *v.* Satterfield, 119 Ala. 84, 24 So. 723.

Acts inconsistent with duties assumed sufficient ground.— McDonald *v.* Lord, 26 How. Pr. (N. Y.) 404; Reimers *v.* Ridner, 26 How. Pr. (N. Y.) 385.

Spreading defamatory reports sufficient ground.— Beeston *v.* Collyer, 4 Bing. 309, 13 E. C. L. 517, 2 C. & P. 607, 12 E. C. L. 760, 5 L. J. C. P. O. S. 180, 12 Moore C. P. 552, 29 Rev. Rep. 576. See also Pearce *v.* Foster, 17 Q. B. D. 536, 51 J. P. 213, 55 L. J. Q. B. 306, 54 L. T. Rep. N. S. 664, 34 Wkly. Rep. 602.

34. Deane *v.* Cutler, 20 N. Y. Suppl. 617. *Compare* Millan *v.* Dominion Carpet Co., 22 Quebec Super. Ct. 234, holding that the simple apprehension of danger or prejudice is insufficient, that the servant's conduct must give grounds for apprehension.

(B) *Breach of Contract or Refusal to Serve.* A master is justified in discharging his servant for any breach of the express or implied conditions of the contract of employment.[35] But a substantial compliance with the terms of the contract is all that is required,[36] and the refusal of a servant to perform services not provided for in the contract will not justify his discharge.[37]

(C) *Inducing Contract by False Representations.* Where a contract of employment has been entered into by reason of the false representations of the servant, the master is justified in discharging him.[38]

(D) *Incompetency.* There is an implied contract upon the part of a servant

35. *Illinois.*— Morris *v.* Taliaferro, 44 Ill. App. 359; Sterling Emery Wheel Co. *v.* Magee, 40 Ill. App. 340.

Louisiana.— Ford *v.* Danks, 16 La. Ann. 119.

New Jersey.— Allen *v.* Aylesworth, 58 N. J. Eq. 349, 44 Atl. 178.

New York.— Jerome *v.* Queen City Cycle Co., 163 N. Y. 351, 57 N. E. 485 [*affirming* 48 N. Y. Suppl. 1107]; Sabin *v.* Kendrick, 46 N. Y. App. Div. 90, 61 N. Y. Suppl. 336; Waters *v.* Davies, 55 N. Y. Super. Ct. 39; Stahl *v.* Allert, 32 Misc. 93, 65 N. Y. Suppl. 493; Deane *v.* Cutler, 20 N. Y. Suppl. 617; Green *v.* Watson, 14 N. Y. Suppl. 820.

North Carolina.—Johnson *v.* E. Van Winkle Gin, etc., Co., 130 N. C. 441, 41 S. E. 882.

Pennsylvania.— Carson *v.* West Branch Hosiery Co., 15 Pa. Super. Ct. 476; Elliott *v.* Wanamaker, 9 Pa. Co. Ct. 497.

Texas.— Hochstadter *v.* Sam, 83 Tex. 464, 18 S. W. 753.

Washington.— Nelson *v.* Pyramid Harbor Packing Co., 4 Wash. 689, 30 Pac. 1096.

England.— Turner *v.* Robinson, 5 B. & Ad. 789, 27 E. C. L. 333, 6 C. & P. 15, 25 E. C. L. 298, 2 N. & M. 829; Callo *v.* Brouncker, 4 C. & P. 518, 19 E. C. L. 629; Atkin *v.* Acton, 4 C. & P. 208, 19 E. C. L. 478; Robinson *v.* Hindman, 3 Esp. 235.

Canada.— Bélanger *v.* Bélanger, 24 Can. Sup. Ct. 678; Tozer *v.* Hutchison, 12 N. Brunsw. 548.

See 34 Cent. Dig. tit. "Master and Servant," § 31.

The abandonment of service, even for a day, has been held to give the employer the right to discharge the servant. Ford *v.* Danks, 16 La. Ann. 119. But *compare* Fillieul *v.* Armstrong, 7 A. & E. 557, 1 Jur. 921, 7 L. J. Q. B. 7, 2 N. & P. 406, W. W. & D. 616, 34 E. C. L. 298, where it was held that an absence of four days without leave would not justify the servant's discharge, where no injury resulted to the master.

Secret endeavor to examine master's books, to which the servant had no right of access, justifies his discharge. Allen *v.* Aylesworth, 58 N. J. Eq. 349, 44 Atl. 178.

Revealing master's trade secrets justifies discharge. Turner *v.* Robinson, 5 B. & A. 789, 27 E. C. L. 333, 6 C. & P. 15, 25 E. C. L. 298, 2 N. & M. 829. See also Rutherford *v.* Book, 9 Fac. Coll. 84.

Where Sunday work is contemplated by the contract, a refusal to work on Sunday warrants a servant's discharge. Nelson *v.* Pyramid Harbor Packing Co., 4 Wash. 689, 30 Pac. 1096. *Compare* Van Winkle *v.* Satterfield, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853, where it was held that a contract for services as a salesman in a store did not imply a covenant to violate the law by working on Sunday, and that a discharge for refusal to do so was wrongful.

Particular facts held not to show breach of contract see Daniell *v.* Boston, etc., R. Co., 184 Mass. 337, 68 N. E. 337; McMullan *v.* Dickinson Co., 63 Minn. 405, 65 N. W. 661.

Failure to furnish a bond is not ground for canceling a contract of employment, not requiring it, although one had been demanded during the correspondence leading up to the contract. Kerr *v.* Sanders, 122 N. C. 635, 29 S. E. 943.

36. Potter *v.* Barton, 86 Minn. 288, 90 N. W. 529.

37. *Alabama.*— Marx *v.* Miller, 134 Ala. 347, 32 So. 765.

Arkansas.— Van Winkle *v.* Satterfield, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853.

Illinois.— Berriman *v* Marvin, 59 Ill. App. 440 [*affirmed* in 162 Ill. 415, 44 N. E. 719].

Louisiana.— Baron *v.* Placide, 7 La. Ann. 229.

Missouri.— Sugg *v.* Blow, 17 Mo. 359.

New York.— Pepper *v.* Kisch, 2 N. Y. City Ct. 131; Warner *v.* Holy Church, 1 N. Y. City Ct. 419.

Wisconsin.—Koplitz *v.* Powell, 56 Wis. 671, 14 N. W. 831.

See 34 Cent. Dig. tit. "Master and Servant," § 31.

To justify a termination of a contract for services of various kinds, a demand and refusal to do some kind of work not inconsistent with the performance of other duties under it must be shown. Wright *v.* C. S. Graves Land Co., 100 Wis. 269, 75 N. W. 1000.

38. *California.*— Lord *v.* Goldberg, 81 Cal. 596, 22 Pac. 1126, 15 Am. St. Rep. 82.

Illinois.— Mexican Amole Soap Co. *v.* Clarke, 72 Ill. App. 655.

Missouri.— Cartmell *v.* Hunt, 58 Mo. App. 115; Anstee *v.* Ober, 26 Mo. App. 665.

Pennsylvania.— Marr *v.* Cooke, 14 Lanc. Bar 19.

United States.— Jones *v.* Trinity Parish, 19 Fed. 59.

England.— Harmer *v.* Cornelius, 5 C. B. N. S. 236, 4 Jur. N. S. 1110, 28 L. J. C. P. 85, 6 Wkly. Rep. 749, 94 E. C. L. 236.

See 34 Cent. Dig. tit. "Master and Servant," §§ 31, 32.

that he is competent to discharge the duties for which he is employed, and a breach of such contract will warrant his discharge.[39] But the failure of a servant to perform his work in an absolutely skilful and satisfactory manner does not, in the absence of a special contract, authorize his discharge, but only failure to perform it in a reasonably skilful manner;[40] and where a master, in settlement of a claim for personal injuries, agrees to employ a man in a new capacity, he is bound to give him a reasonable opportunity to learn the business before discharging him for incompetency.[41]

(E) *Neglect of Duty.* A servant is bound to use due care,[42] and habitual negligence in the discharge of his duties,[43] or any neglect which may or does affect his master injuriously,[44] will warrant his dismissal.

(F) *Misconduct*—(1) IN GENERAL. While it has been held that to justify the discharge of a servant he must have been guilty of some moral misconduct, pecuniary or otherwise, wilful disobedience, or habitual neglect,[45] the better view seems to be that any misconduct, inconsistent with the relation of master and

39. *Georgia.*—Newman *v.* Reagan, 63 Ga. 755.

Louisiana.—Griffin *v.* Haynes, 24 La. Ann. 480.

Maine.—Winship *v.* Portland Base Ball, etc., Assoc., 78 Me. 571, 7 Atl. 706.

Maryland.—Keedy *v.* Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759.

Michigan.—Child *v.* Detroit Mfg. Co., 72 Mich. 623, 40 N. W. 916.

New York.—Runyon *v.* Doherty, 38 N. Y. App. Div. 40, 55 N. Y. Suppl. 1033.

Pennsylvania.—Waugh *v.* Shunk, 20 Pa. St. 130.

Tennessee.—Glasgow *v.* Hood, (Ch. App. 1900) 57 S. W. 162.

United States.—Lyon *v.* Pollard, 20 Wall. 403, 22 L. ed. 361; Jones *v.* Trinity Parish, 19 Fed. 59 (in which there was an actual representation of competency); Leatherberry *v.* Odell, 7 Fed. 641.

England.—Harmer *v.* Cornelius, 5 C. B. N. S. 236, 4 Jur. N. S. 1110, 28 L. J. C. P. 85, 6 Wkly. Rep. 749, 94 E. C. L. 236; Searle *v.* Ridley, 28 L. T. Rep. N. S. 411.

See 34 Cent. Dig. tit. "Master and Servant," § 32.

Inaccuracies and discrepancies in the books of a merchant are sufficient cause for the discharge of the bookkeeper. Griffin *v.* Haynes, 24 La. Ann. 480.

A master may discharge for a mistake, even though it has not worked very great damage. Newman *v.* Reagan, 63 Ga. 755.

Mere evidence of high temper is insufficient to show incompetency. Troy Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46.

40. Baltimore Base Ball Club, etc., Co. *v.* Pickett, 78 Md. 375, 28 Atl. 279, 44 Am. St. Rep. 304, 22 L. R. A. 690; Crescent Horse-Shoe, etc., Co. *v.* Eynon, 95 Va. 151, 27 S. E. 935.

Mere dissatisfaction insufficient see Summers *v.* Colver, 38 N. Y. App. Div. 553, 56 N. Y. Suppl. 624; Klingenberg *v.* Werner, 16 N. Y. Suppl. 853.

41. Moore *v.* Chicago, etc., R. Co., 65 Iowa 505, 22 N. W. 650, 54 Am. Rep. 26.

42. Savage *v.* Walthew, 11 Mod. 135.

43. Siselman *v.* Cohen, 25 Misc. (N. Y.) 529, 54 N. Y. Suppl. 991; Peltz *v.* Printz, 186 Pa. St. 347, 40 Atl. 486; Elliott *v.* Wanamaker, 155 Pa. St. 67, 25 Atl. 826; Wyatt *v.* Brown, (Tenn. Ch. App. 1897) 42 S. W. 478; Callo *v.* Brouncker, 4 C. & P. 518, 19 E. C. L. 629; Robinson *v.* Hindman, 3 Esp. 235.

Even though a servant possesses the required skill, frequent and important breaches of duty by an employee are sufficient grounds for his discharge. Peltz *v.* Printz, 186 Pa. St. 347, 40 Atl. 486.

Where violations of duty are repeated from time to time until the servant's discharge the entire course of his conduct may be considered in determining whether the discharge was justified, even though the master retained the servant, knowing of his misconduct. Siselman *v.* Cohen, 25 Misc. (N. Y.) 529, 54 N. Y. Suppl. 991.

44. Armour-Cudahy Packing Co. *v.* Hart, 36 Nebr. 166, 54 N. W. 262; Zulkee *v.* Wing, 20 Wis. 408, 91 Am. Dec. 425; Baster *v.* London, etc., Printing Works, [1899] 1 Q. B. 901, 63 J. P. 439, 68 L. J. Q. B. 622, 80 L. T. Rep. N. S. 757, 47 Wkly. Rep. 639; Pritchard *v.* Hitchcock, 12 L. J. C. P. 322, 6 M. & G. 151, 6 Scott N. R. 851, 46 E. C. L. 151.

Single act of neglect held sufficient when injurious see Baster *v.* London, etc., Printing Works, [1899] 1 Q. B. 901, 63 J. P. 439, 68 L. J. Q. B. 622, 80 L. T. Rep. N. S. 757, 47 Wkly. Rep. 639; Turner *v.* Robinson, 5 B. & Ad. 789, 27 E. C. L. 333, 6 C. & P. 15, 25 E. C. L. 298, 2 N. & M. 829; Cunningham *v.* Fonblanque, 6 C. & P. 44, 25 E. C. L. 313; Edwards *v.* Levy, 2 F. & F. 94; Cussons *v.* Skinner, 12 L. J. Exch. 347, 11 M. & W. 161.

Forgetfulness need not be habitual in order to amount to negligence justifying a servant's dismissal without notice. A single act of forgetfulness may under certain circumstances be sufficient. Baster *v.* London, etc., Printing Works, [1899] 1 Q. B. 901, 63 J. P. 439, 68 L. J. Q. B. 622, 80 L. T. Rep. N. S. 757, 47 Wkly. Rep. 639.

45. Parke, J., in Callo *v.* Brouncker, 4 C. & P. 518, 19 E. C. L. 629. But see Read *v.* Dunsmore, 9 C. & P. 588, 38 E. C. L. 344.

servant, will justify the master in terminating the contract of service at any time.[46] Where moral turpitude is alleged as the ground of dismissal, the test is, not morality in the abstract, but whether, taking the nature of the servant's

Moral turpitude not essential.— "That it is not necessary that the misconduct should include moral turpitude manifestly appears from the case of Smith *v.* Thompson, 8 C. B. 44, 18 L. J. C. P. 314, 65 E. C. L. 44, where all that the servant did was to appropriate, in payment of his own salary, 30*l.* out of some money sent him by his master for business purposes." Horton *v.* McMurtry, 5 H. & N. 667, 676, 29 L. J. Exch. 260, 2 L. T. Rep. N. S. 297, 8 Wkly. Rep. 285, per Bramwell, B.

46. Singer *v.* McCormick, 4 Watts & S. (Pa.) 265. See also the following cases:

Georgia.— Newman *v.* Reagan, 65 Ga. 512, wilfully selling at a loss, or conduct calculated to drive off customers.

Illinois.— Gould *v.* Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896 [*affirming* 108 Ill. App. 203] associating with persons, particularly one woman, of bad repute.

Louisiana.—Lalande *v.* Aldrich, 41 La. Ann. 307, 6 So. 28 (rudeness to third persons which jeopardizes the master's interests); Wilson *v.* Bossier, 11 La. Ann. 640 (shooting an escaping negro); Frederich *v.* Ralli, 11 La. Ann. 425 (disrespect to master and insulting conduct to customers); Dwyer *v.* Cane, 6 La. Ann. 707 (cruelty to slaves and immoral conduct toward female slaves); Kearney *v.* Holmes, 6 La. Ann. 373 (engaging in fight and drawing pistol in store frequented by women); Darden *v.* Nolan, 4 La. Ann. 374 (abusive and insulting language to employer); Youngblood *v.* Dodd, 2 La. Ann. 187 (abusive and threatening language by overseer to fellow employees).

Michigan.— Smith *v.* Baker, 101 Mich. 155, 59 N. W. 394, largely overdrawing salary from funds in his hands.

New York.— Hutchinson *v.* Washburn, 80 N. Y. App. Div. 367, 80 N. Y. Suppl. 691 (charging up regular hotel rates in expense account, when only commercial rates were paid); Gray *v.* Shepard, 79 Hun 467, 29 N. Y. Suppl. 975 [*affirmed* in 147 N. Y. 177, 41 N. E. 500] (retaining letter from master with reference to employment, after matter referred to in letter had been closed, for the purpose of blackmailing master); Forsyth *v.* McKinney, 56 Hun 1, 8 N. Y. Suppl. 561 (insolence to master's foreman); Engel *v.* Schoolherr, 12 Daly 417 (taking bribes from subordinate workmen); Brink *v.* Fay, 7 Daly 562 (repeatedly suing master for wages not due, and slandering his credit); Drayton *v.* Reid, 5 Daly 442 (indecent and immoral conduct of an actress, so gross as to cause other members of the company to refuse to associate with her, and so open as to become a public scandal).

North Carolina.— See Hendrickson *v.* Anderson, 50 N. C. 246, in which numerous acts of misconduct were charged.

Ohio.— Beckman *v.* Garrett, 66 Ohio St. 136, 64 N. E. 62, absence, without reasonable excuse, having a tendency to injure the business.

Pennsylvania.— Libhart *v.* Wood, 1 Watts & S. 265, 37 Am. Dec. 461, commission of felony.

Tennessee.— Wyatt *v.* Brown, (Ch. App. 1897) 42 S. W. 478, to the effect that the engaging in, and introduction of, gambling into a first-class hotel is ground for dismissing the manager, although his employers have not thereby suffered actual loss.

Washington.— Moynahan *v.* Interstate Min., etc., Co., 31 Wash. 417, 72 Pac. 81, mining superintendent keeping dissolute women on premises.

United States.—Darst *v.* Matthieson Alkali Works, 81 Fed. 284 (insulting, disrespectful, or abusive language to superior employee, and advising other servants to disobey orders); Jones *v.* Trinity Parish, 19 Fed. 59 (misleading master in respect to a matter of confidence); Leatherberry *v.* Odell, 7 Fed. 641 (disposition and deportment of servant such as seriously to injure business).

England.— Baillie *v.* Kell, Arn. 245, 4 Bing. N. Cas. 638, 7 L. J. C. P. 249, 6 Scott 379, 33 E. C. L. 900 (failure to account for money or goods); Rex *v.* Welford, Cald. 57 (immorality); Shaw *v.* Chairitie, 3 C. & K. 25 (insolent and insulting language to master's family); Brown *v.* Croft [*cited* in Turner *v.* Robinson, 6 C. & P. 15, 25 E. C. L. 298, 2 N. & M. 829] (embezzlement from master); Turner *v.* Robinson, *supra* (inciting another servant to leave, and to embezzle from master); Atkin *v.* Acton, 4 C. & P. 208, 19 E. C. L. 478 (criminal assault on maid servant); Blenkarn *v.* Hodges' Distillery Co., 16 L. T. Rep. N. S. 608 (failure to remit money).

Canada.— Dolby *v.* Kinnear, 3 N. Brunsw. 480 (commission of felony); Cook *v.* Halifax School Com'rs, 35 Nova Scotia 405 (insolence and neglect of duty); Priestman *v.* Bradstreet, 15 Ont. 558 (speculating in "bucket shops").

See 34 Cent. Dig. tit. "Master and Servant," § 33.

The established rule upon the subject is that the employer may discharge for misconduct any servant whose necessary tendency is to the injury of his business. Beckman *v.* Garrett, 66 Ohio St. 136, 142, 64 N. E. 62.

Slight discourtesies, hasty words, and occasional exhibitions of temper, or even ill temper, are not sufficient cause for a discharge, where there are many petty causes for annoyance and irritation in the business. Leatherberry *v.* Odell, 7 Fed. 641.

Mere annoyance, caused by the servant's conduct, does not justify his discharge. Stevens *v.* Crane, 37 Mo. App. 487.

Particular facts held not to warrant discharge see Larkin *v.* Hecksher, 51 N. J. L.

employment into account, the acts complained of rendered him unfit to perform the duties which he had undertaken,[47] or did, or were likely to, affect the master's business injuriously.[48] Actual loss is unnecessary.[49]

(2) Disobedience and Insubordination. The obligation of a servant to obey all lawful[50] and reasonable[51] commands of his master is implied from the contract of employment, and a refusal or neglect on his part to obey such a command, which, in view of all the circumstances of the case, amounts to insubordination, and is inconsistent with his duties to his master, is a sufficient ground for his discharge.[52] In England, and also in some American cases, it is held that the wilful disobedience of any lawful order of the master is a good cause of discharge,[53] even

133, 16 Atl. 703, 3 L. R. A. 137; Hood *v.* Hampton Plains Exploration Co., 106 Fed. 408.

47. Child *v.* Boyd, etc., Mfg. Co., 175 Mass. 493, 56 N. E. 608. But see Moynahan *v.* Interstate Min., etc., Co., 31 Wash. 417, 72 Pac. 81.

48. Brownell *v.* Ehrich, 43 N. Y. App. Div. 369, 60 N. Y. Suppl. 112; Preyer *v.* Bidwell, 11 N. Y. Suppl. 71.

49. Wyatt *v.* Brown, (Tenn. Ch. App. 1897) 42 S. W. 478.

50. Command must be lawful. — Reg. *v.* Mutters, 10 Cox C. C. 50, 11 Jur. N. S. 144, L. & C. 511, 34 L. J. M. C. 54, 11 L. T. Rep. N. S. 642, 13 Wkly. Rep. 326; Callon *v.* Thompson, 4 Macq. 424. See also Lehigh Valley R. Co. *v.* Snyder, 56 N. J. L. 326, 28 Atl. 376.

51. Jacquot *v.* Bourra, 7 Dowl. P. C. 348, 3 Jur. 776.

52. *Illinois.*— Hamlin *v.* Race, 78 Ill. 422; Shields *v.* Carson, 102 Ill. App. 38; Kendall *v.* West, 98 Ill. App. 116 [*affirmed* in 196 Ill. 221, 63 N. E. 683, 89 Am. St. Rep. 317]. *Compare* Stover Mfg. Co. *v.* Latz, 42 Ill. App. 230.

Indiana.— Pape *v.* Lathrop, 18 Ind. App. 633, 46 N. E. 154. *Compare* Hamilton *v.* Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384, (1896) 43 N. E. 873, holding that a request in an action for breach of contract of employment that if the servant refused to obey rules of the master he had a right to discharge them was properly modified so as to condition such right on the servant's having notice of the rules.

Louisiana.— Kenner *v.* Southwestern Oil Co., 113 La. 80, 36 So. 895; Railey *v.* Lanahan, 34 La. Ann. 426.

Michigan.— Degen *v.* Manistee, etc., R. Co., 113 Mich. 66, 71 N. W. 459 [*distinguished* in Schaub *v.* Arc Welding Co., 123 Mich. 487, 82 N. W. 235]; Child *v.* Detroit Mfg. Co., 72 Mich. 623, 40 N. W. 916.

Minnesota.— Von Heyne *v.* Tompkins, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. N. S. 524.

Missouri.— McCain *v.* Desnoyers, 64 Mo. App. 66.

New York.— Jerome *v.* Queen City Cycle Co., 163 N. Y. 351, 57 N. E. 485 [*reversing* 48 N. Y. Suppl. 1107]; Costet *v.* Jeantet, 108 N. Y. App. Div. 201, 95 N. Y. Suppl. 638; Russell *v.* Inman, 79 N. Y. App. Div. 227, 79 N. Y. Suppl. 681; Forsyth *v.* McKinney, 56 Hun 1, 8 N. Y. Suppl. 561; Tullis *v.* Hassell, 54 N. Y. Super. Ct. 391; Dunkell *v.* Simons, 15 Daly 352, 7 N. Y. Suppl. 655; Jacoby *v.* Fox, 33 Misc. 767, 67 N. Y. Suppl. 955 [*affirming* 66 N. Y. Suppl. 488]; Ball *v.* Livonia Salt, etc., Co., 8 Misc. 333, 28 N. Y. Suppl. 537.

North Carolina.— Lane *v.* Phillips, 51 N. C. 455.

Ohio.— Voelckel *v.* Banner Brewing Co., 9 Ohio Cir. Ct. 318, 6 Ohio Cir. Dec. 80.

Pennsylvania.— Gallagher *v.* Wayne Steam Co., 188 Pa. St. 95, 41 Atl. 296; Matthews *v.* Park, 159 Pa. St. 579, 28 Atl. 435.

South Carolina.— Mitchell *v.* Toale, 25 S. C. 238, 60 Am. Rep. 502; Boone *v.* Lyde, 3 Strobh. 77.

Texas.— Shute *v.* McVitie, (Civ. App. 1903) 72 S. W. 433.

United States.— Leatherberry *v.* Odell, 7 Fed. 641.

England.— Spain *v.* Arnott, 2 Stark. 256, 19 Rev. Rep. 715, 3 E. C. L. 400.

Canada.— McRae *v.* Marshall, 19 Can. Sup. Ct. 10 [*reversing* 17 Ont. App. 139 (*affirming* 16 Ont. 495)]; Guildford *v.* Anglo-French Steamship Co., 9 Can. Sup. Ct. 303; McEdwards *v.* Ogilvie Milling Co., 5 Manitoba 77; Fleming *v.* Hill, 10 Nova Scotia 268.

See 34 Cent. Dig. tit. "Master and Servant," § 34.

53. Sterling Emery Wheel Co. *v.* Magee, 40 Ill. App. 340; Kessee *v.* Mayfield, 14 La. Ann. 90; Forsyth *v.* McKinney, 56 Hun (N. Y.) 1, 8 N. Y. Suppl. 561; Lilley *v.* Elwin, 11 Q. B. 742, 12 Jur. 623, 17 L. J. Q. B. 132, 63 E. C. L. 742; Amor *v.* Fearon, 9 A. & E. 548, 8 L. J. Q. B. 75, 1 P. & D. 398, 2 W. W. & H. 81, 36 E. C. L. 295; Callo *v.* Brouncker, 4 C. & P. 518, 19 E. C. L. 629; Turner *v.* Mason, 2 D. & L. 898, 14 L. J. Exch. 311, 14 M. & W. 112; Churchward *v.* Chambers, 2 F. & F. 229; Spain *v.* Arnott, 2 Stark. 256, 19 Rev. Rep. 715, 3 E. C. L. 400.

"**Wilful disobedience,** in the sense in which the word is used by the authorities, means something more than a conscious failure to obey. It involves a wrongful or perverse disposition, such as to render the conduct unreasonable, and inconsistent with proper subordination." Shaver *v.* Ingham, 58 Mich. 649, 654, 26 N. W. 162, 55 Am. Rep. 712, per Campbell, C. J. *Compare* Matthews *v.* Park, 146 Pa. St. 384, 23 Atl. 208.

though there has been no resulting loss;[54] but the better view seems to be that, to constitute just cause for the discharge of a servant, the disobedience must be in regard to matters of such importance in the conduct of the business as reasonably require obedience and fulfilment,[55] and that in such employments as involve a higher order of services, and some degree of discretion and judgment, it would be unauthorized and unreasonable to regard skilled mechanics or other employees as subject to the whim and caprice of their employers or as deprived of all right of action to such a degree as to be liable to lose their places upon every omission to obey orders, involving no serious consequences.[56] The courts will not permit juries to guess or speculate when from the undisputed evidence it is apparent that the order of the master was reasonable and that the servant was guilty of insubordination.[57] Where the fact of disobedience is in dispute it is of course a matter for the jury.[58]

(3) Intoxication or Intemperance. Independently of any agreement to that effect a master may discharge his servant when by intoxication he unfits himself for the full and proper discharge of his duties,[59] and he may discharge him even when he is not incapacitated thereby, if his intoxication is or may be prejudicial to the master's interests.[60]

(G) *Illness of Servant.* It is an implied condition of a contract of employ-

54. Matthews *v.* Park, 146 Pa. St. 384, 23 Atl. 208.

55. Jordan *v.* J. R. Weber Moulding Co., 77 Mo. App. 572. See also Hamilton *v.* Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384, (1896) 43 N. E. 873; Shaver *v.* Ingham, 58 Mich. 649, 26 N. W. 162, 55 Am. Rep. 712; Park *v.* Bushnell, 60 Fed. 583, 9 C. C. A. 138.

Slight deviations from the master's instructions in immaterial matters will not warrant a servant's discharge, especially where he is retained in the service for a considerable time thereafter without complaint. Hamilton *v.* Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 7 Am. St. Rep. 384, (1896) 43 N. E. 873.

56. Shaver *v.* Ingham, 58 Mich. 649, 26 N. W. 162, 55 Am. Rep. 712. See also Park *v.* Bushnell, 60 Fed. 583, 9 C. C. A. 138 [*citing* Shaver *v.* Ingham, 58 Mich. 649, 26 N. W. 162, 55 Am. Rep. 712; Turner *v.* Kouwenhoven, 100 N. Y. 115, 2 N. E. 637], which was an action for wrongful discharge, in which it appeared that plaintiff was engaged for a long term of years as superintendent of a large and important business, and was constantly obliged to represent defendant in different states, and to attend with promptness, resoluteness, and good judgment to large pecuniary interests, and it was held proper to charge the jury that what would justify the discharge of a mere clerk or workman might not justify the discharge of one like plaintiff, and that where a contract has been substantially performed as to time and its most material parts, the employer has no right to dismiss an employee for mere disobedience of general orders of a slight character, which involve no serious consequences or danger to the business, unless such disobedience is perverse or unreasonable.

57. Jerome *v.* Queen City Cycle Co., 163 N. Y. 351, 57 N. E. 485 [*quoted* with approval in Costet *v.* Jeantet, 108 N. Y. App. Div. 201, 95 N. Y. Suppl. 638].

58. Costet *v.* Jeantet, 108 N. Y. App. Div. 201, 95 N. Y. Suppl. 638 [*citing* Tullis *v.* Hassell, 54 N. Y. Super. Ct. 391]. And see *infra*, II, C, 2, b, (VIII), (B).

59. *Georgia.*— Physioc *v.* Shea, 75 Ga. 466.

Louisiana.— Nolan *v.* Danks, 1 Rob. 332.

Minnesota.— Smith *v.* St. Paul, etc., R. Co., 60 Minn. 330, 62 N. W. 392.

Missouri.— Gonsolis *v.* Gearhart, 31 Mo. 585; Carson *v.* McCormick Harvesting Mach. Co., 36 Mo. App. 462.

Nebraska.— McCormick *v.* Demary, 10 Nebr. 515, 7 N. W. 283.

New York.— Mowbray *v.* Gould, 83 N. Y. App. Div. 255, 82 N. Y. Suppl. 102; Huntington *v.* Claflin, 10 Bosw. 262 [*affirmed* in 38 N. Y. 182]; Dunkell *v.* Simons, 15 Daly 352, 7 N. Y. Suppl. 655 [*reversing* 5 N. Y. Suppl. 417].

North Carolina.— Fly *v.* Armstrong, 50 N. C. 339.

Pennsylvania.— Ulrich *v.* Hower, 156 Pa. St. 414, 27 Atl. 243.

England.— Wise *v.* Wilson, 1 C. & K. 662, 47 E. C. L. 662; Speck *v.* Phillips, 7 Dowl. P. C. 470, 8 L. J. Exch. 249, 277, 5 M. & W. 279.

Canada.— McEdwards *v.* Ogilvie Milling Co., 4 Manitoba 1; Martin *v.* Lane, 3 Manitoba 314.

See 34 Cent. Dig. tit. "Master and Servant," § 35.

If drunkenness while off duty impairs the efficiency of the servant while on duty it is a ground for discharge. Ulrich *v.* Hower, 156 Pa. St. 414, 27 Atl. 243.

That liquor was drunk for sanitary reasons is no excuse for gross intoxication while on duty. Dunkell *v.* Simons, 15 Daly (N. Y.) 352, 7 N. Y. Suppl. 655 [*reversing* 5 N. Y. Suppl. 417].

60. Bass Furnace Co. *v.* Glasscock, 82 Ala. 452, 2 So. 315, 60 Am. Rep. 748, in which

ment that inability from sickness or disease to perform the services on which the contract depends will be a sufficient excuse for non-performance on the part of either party, and will justify the master in terminating the relation.[61] But a mere temporary absence which causes no injury to the master's business is not sufficient to warrant a servant's discharge.[62]

(III) *Condonation of Breach of Contract and Effect of Reparation.* A master who, after knowledge[63] of a material breach of contract on the part of his servant, continues to accept his services, without reasonable cause for delay in discharging him,[64] is presumed to have waived the breach, and will not be allowed to set it up afterward;[65] but such condonation can in no respect extend to subsequent offenses or to a continued deficiency.[66] But on the other hand subsequent misconduct may be considered in the light of the delinquencies waived;[67] and

there was a single act of public drunkenness, accompanied by disorderly conduct, but which did not incapacitate the servant or cause him to fail in the performance of his work. See also Robinson *v.* Gleason, 9 N. J. L. J. 303, in which a servant employed by a hotelkeeper took two drinks at the bar on the invitation of two guests at eleven thirty o'clock P. M., when no one was present but the barkeeper, the guests, and himself, and it was held good cause for his discharge, although there was no rule prohibiting him from drinking at the bar.

61. *Louisiana.*— Jeter *v.* Penn, 28 La. Ann. 230, 26 Am. Rep. 98.

Massachusetts.— Johnson *v.* Walker, 155 Mass. 253, 29 N. E. 522, 31 Am. St. Rep. 550, in which the servant was incapacitated for seven weeks.

New York.— McGarrigle *v.* McCosker, 83 N. Y. App. Div. 184, 82 N. Y. Suppl. 494 (absence from work for two weeks); Prior *v.* Flagler, 13 Misc. 115, 34 N. Y. Suppl. 152.

Vermont.— Hubbard *v.* Belden, 27 Vt. 645; Fenton *v.* Clark, 11 Vt. 557.

Wisconsin.— Green *v.* Gilbert, 21 Wis. 395.

England.— Poussard *v.* Spiers, 1 Q. B. D. 410, 45 L. J. C. P. 621, 34 L. T. Rep. N. S. 572, 24 Wkly. Rep. 819; Boast *v.* Firth, L. R. 4 C. P. 1, 38 L. J. C. P. 1, 19 L. T. Rep. N. S. 264, 17 Wkly. Rep. 29. See also Cuckson *v.* Stones, 1 E. & E. 248, 5 Jur. N. S. 337, 28 L. J. Q. B. 25, 7 Wkly. Rep. 134, 102 E. C. L. 248.

The fact that the servant is incapacitated by causes beyond his control, or, as it is termed, by the act of God, does not deprive the master of his right to terminate the contract. Johnson *v.* Walker, 155 Mass. 253, 29 N. E. 522, 31 Am. St. Rep. 550.

62. Ryan *v.* Dayton, 25 Conn. 188, 65 Am. Dec. 560; Cuckson *v.* Stones, 1 E. & E. 248, 5 Jur. N. S. 337, 28 L. J. Q. B. 25, 7 Wkly. Rep. 134, 102 E. C. L. 248.

Sickness combined with other causes.— Although a sickness incapacitating an overseer from work for half a month is not alone sufficient cause for discharging him, this, combined with such repeated failures correctly to keep the time of the hands as to cause discontent, may constitute such cause. Miller *v.* Gidiere, 36 La. Ann. 201.

63. Moynahan *v.* Interstate Min., etc., Co., 31 Wash. 417, 72 Pac. 81.

64. Atlantic Compress Co. *v.* Young, 118 Ga. 868, 45 S. E. 677; Newman *v.* Reagan, 63 Ga. 755; Harrington *v.* Chittenango First Nat. Bank, 1 Thomps. & C. (N. Y.) 361; Huntington *v.* Claflin, 10 Bosw. (N. Y.) 262; Dunkell *v.* Simons, 15 Daly (N. Y.) 352, 7 N. Y. Suppl. 655 [*reversing* 5 N. Y. Suppl. 417]; Jones *v.* Trinity Parish, 19 Fed. 59; Baillie *v.* Kell, Arn. 245, 4 Bing. N. Cas. 638, 7 L. J. C. P. 249, 6 Scott 379, 33 E. C. L. 900.

The question of lapse of time is not a question of law for the judge, but a question of fact for the jury. Harrington *v.* Chittenango First Nat. Bank, 1 Thomps. & C. (N. Y.) 361.

65. *Alabama.*— Jonas *v.* Field, 83 Ala. 445, 3 So. 893; Martin *v.* Everett, 11 Ala. 375; Roberts *v.* Brownrigg, 9 Ala. 106.

Illinois.— Collins Ice-Cream Co. *v.* Stephens, 189 Ill. 200, 59 N. E. 524.

Louisiana.—Marshal *v.* Sims, McGloin 223, 293.

Massachusetts.— Daniell *v.* Boston, etc., R. Co., 184 Mass. 337, 68 N. E. 337.

Missouri.— Jordan *v.* J. R. Weber Moulding Co., 77 Mo. App. 572.

New York.— Sabin *v.* Kendrick, 58 N. Y. App. Div. 108, 68 N. Y. Suppl. 546.

South Carolina.—Dillard *v.* Wallace, 1 McMull. 480.

Utah.— Hauerbach *v.* Calder, 15 Utah 371, 49 Pac. 649.

Wisconsin.— Tickler *v.* Andrae Mfg. Co., 95 Wis. 352, 70 N. W. 292.

United States.— Jones *v.* Trinity Parish, 19 Fed. 59; Leatherberry *v.* Odell, 7 Fed. 641.

England.— Ridgway *v.* Hungerford Market Co., 3 A. & E. 171, 1 Harr. & W. 244, 4 L. J. K. B. 157, 4 N. & M. 797, 30 E. C. L. 97.

Canada.— Cook *v.* Halifax School Com'rs, 35 Nova Scotia 405. See also McIntyre *v.* Hockin, 16 Ont. App. 498.

See 34 Cent. Dig. tit. "Master and Servant," § 36.

66. Leatherberry *v.* Odell, 7 Fed. 641.

Continuing incompetency see Glasgow *v.* Hood, (Tenn. Ch. App. 1900) 57 S. W. 162.

67. Daniell *v.* Boston, etc., R. Co., 184 Mass. 337, 68 N. E. 337; Hauerbach *v.* Calder, 15 Utah 371, 49 Pac. 649.

the retention of a servant after knowledge of certain breaches of duty does not prevent their use as grounds of discharge when the offense is repeated.[68] Although a servant has fulfilled a stipulation to make reparation for his mistakes, these may justify his employer in rescinding the contract.[69]

(iv) *CAUSE FOR DISCHARGE AND STATEMENT THEREOF.* The motives which actuate a master in discharging a servant are wholly immaterial, if any legal ground exists for such discharge;[70] and it is immaterial whether or not all or any of the grounds were known to the master when he discharged the servant.[71] Neither is it necessary for him to assign a reason for the discharge;[72] nor is he estopped to rely upon some other or different reason, whether known to him at the time of the discharge or not.[73] Manifestly a cause arising subsequently to the

68. Jerome *v.* Queen City Cycle Co., 163 N. Y. 351, 57 N. E. 485 [*citing* Gray *v.* Shepard, 147 N. Y. 177, 41 N. E. 500; Arkush *v.* Hanan, 60 Hun (N. Y.) 518, 15 N. Y. Suppl. 219]. See also Sabin *v.* Kendrick, 58 N. Y. App. Div. 108, 68 N. Y. Suppl. 546; McIntyre *v.* Hockin, 16 Ont. App. 498.

69. Burkham *v.* Daniel, 56 Ala. 604.

70. *Indiana.*— Pape *v.* Lathrop, 18 Ind. App. 633, 46 N. E. 154.

Minnesota.— Von Heyne *v.* Tompkins, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. N. S. 524.

New York.— Jackson *v.* New York Post Graduate Medical School, etc., 6 Misc. 101, 26 N. Y. Suppl. 27 [*reversing* 3 Misc. 622, 23 N. Y. Suppl. 119].

Virginia.— Crescent Horse-Shoe, etc., Co. *v.* Eynon, 95 Va. 151, 27 S. E. 935.

England.— Spotswood *v.* Barrow, 5 Exch. 110, 19 L. J. Exch. 226. See also Mercer *v.* Whall, 5 Q. B. 447, 9 Jur. 576, 14 L. J. Q. B. 267, 48 E. C. L. 447.

See 34 Cent. Dig. tit. "Master and Servant," § 38.

71. *Alabama.*—Loveman *v.* Brown, 138 Ala. 608, 35 So. 708.

Illinois.— Abendpost Co. *v.* Hertel, 67 Ill. App. 501.

Minnesota.— Von Heyne *v.* Tompkins, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. N. S. 524.

Mississippi.— Odeneal *v.* Henry, 70 Miss. 172, 12 So. 154.

New York.— Hutchinson *v.* Washburn, 80 N. Y. App. Div. 367, 80 N. Y. Suppl. 691; Arkush *v.* Hanan, 60 Hun 518, 15 N. Y. Suppl. 219 [*citing* Green *v.* Edgar, 21 Hun 414].

Virginia.—Crescent Horse-Shoe, etc., Co. *v.* Eynon, 95 Va. 151, 27 S. E. 935.

England.— Mercer *v.* Whall, 5 Q. B. 447, 9 Jur. 576, 14 L. J. Q. B. 267, 48 E. C. L. 447; Boston Deep Sea Fishing, etc., Co. *v.* Ansell, 39 Ch. D. 339, 59 L. T. Rep. N. S. 345; Ridgway *v.* Hungerford Market Co., 3 A. & E. 171, 1 Harr. & W. 244, 4 L. J. K. B. 157, 4 N. & M. 797, 30 E. C. L. 97; Baillie *v.* Kell, Arn. 245, 4 Bing. N. Cas. 638, 7 L. J. C. P. 249, 6 Scott 379, 33 E. C. L. 900; Willets *v.* Green, 3 C. & K. 59; Spotswood *v.* Barrow, 5 Exch. 110, 19 L. J. Exch. 226. But see Cussons *v.* Skinner, 12 L. J. Exch. 347, 11 M. & W. 161.

Canada.— McGeorge *v.* Ross, 5 Terr. L. Rep. 116; Tozer *v.* Hutchison, 12 N. Brunsw. 548; McIntyre *v.* Hockin, 16 Ont. App. 498.

See 34 Cent. Dig. tit. "Master and Servant," § 38.

72. *Alabama.*— Strauss *v.* Meertief, 64 Ala. 229, 38 Am. Rep. 8.

Illinois.— Orr *v.* Ward, 73 Ill. 318; Sterling Emery Wheel Co. *v.* Magee, 40 Ill. App. 340.

Minnesota.— Von Heyne *v.* Tompkins, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. N. S. 524.

Mississippi.— Odeneal *v.* Henry, 70 Miss. 172, 12 So. 154.

New York.— Green *v.* Edgar, 21 Hun 414; Harrington *v.* Chittenango First Nat. Bank, 1 Thomps. & C. 361; Ball *v.* Livonia Salt, etc., Co., 8 Misc. 333, 28 N. Y. Suppl. 537.

Ohio.— Under the act of April 2, 1890, a railroad employee has no right of action against the company for refusing to furnish the reason for his discharge in writing. Crall *v.* Toledo, etc., R. Co., 7 Ohio Cir. Ct. 132, 3 Ohio Cir. Dec. 696. See also Busby *v.* Pittsburg, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 823.

England.— Mercer *v.* Whall, 5 Q. B. 447, 9 Jur. 576, 14 L. J. Q. B. 267, 48 E. C. L. 447; Ridgway *v.* Hungerford, 3 A. & E. 171, 1 Harr. & W. 244, 4 L. J. K. B. 157, 4 N. & M. 797, 30 E. C. L. 97.

See 34 Cent. Dig. tit. "Master and Servant," § 38.

Statute requiring statement of reasons for discharge unconstitutional see Wallace *v.* Georgia, etc., R. Co., 94 Ga. 732, 22 S. E. 579.

73. Any good reason existing at time of discharge sufficient.— *Alabama.*— Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8.

Illinois.— Abendpost Co. *v.* Hertel, 67 Ill. App. 501; Sterling Emery Wheel Co. *v.* Magee, 40 Ill. App. 340.

Minnesota.— Von Heyne *v.* Tompkins, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. N. S. 524.

New Jersey.— Allen *v.* Aylesworth, 58 N. J. Eq. 349, 44 Atl. 178.

New York.—Arkush *v.* Hanan, 60 Hun 518, 15 N. Y. Suppl. 219.

United States.— Park *v.* Bushnell, 60 Fed. 583, 9 C. C. A. 138.

England.— Mercer *v.* Whall, 5 Q. B. 447, 9 Jur. 576, 14 L. J. Q. B. 267, 48 E. C. L. 447; Ridgway *v.* Hungerford Market Co., 3 A. & E. 171, 1 Harr. & W. 244, 4 L. J. K. B. 157, 4 N. & M. 797, 30 E. C. L. 97; Baillie *v.* Kell, Arn. 245, 4 Bing. N. Cas. 638, 7 L. J. C. P. 249, 6 Scott 379, 33 E. C. L.

discharge cannot be urged in defense of an action for breach of contract of hiring.[74]

(v) *Testimonials as to Character.* At common law no duty is imposed on an employer to give his employee a testimonial of character, letter of recommendation, or clearance card on the severance of the relation, in the absence of any custom or usage requiring it.[75] And unless restrained by contract, the master may suspend or discharge an employee at pleasure, with or without cause, and the fact that the employee's reputation is affected by unfavorable inferences drawn from the suspension or discharge itself will not render the employer liable in damages.[76] In order to support an action in respect of a character given by a master to a servant, it must be shown that the character was false, and also that it was maliciously given.[77] If, however, the person giving the character knows what he says to be untrne, that may deprive him of the protection given *bona fide* communications.[78]

(vi) *Operation and Effect of Discharge.* Upon his discharge, a servant must leave peaceably, whether or not the discharge was rightful[79] and vacate the house or premises occupied by him as servant.[80] If he fails to leave peaceably or after doing so returns, he becomes a trespasser, and may be ejected by the master,[81] although his wages may not all have been paid.[82] Under a contract allowing cancellation by giving a stipulated notice in writing, a discharge is equivalent to such notice as fixing the amount that can thereafter be recovered.[83]

900. But *compare* Cussons *v.* Skinner, 12 L. J. Exch. 347, 11 M. & W. 161, where there is a *dictum* to the effect that the master must have known of the cause afterward relied on at the time of the discharge.

Canada.— Tozer *v.* Hutchison, 12 N. Brunsw. 548; Tibbs *v.* Wilkes, 23 Grant Ch. (U. C.) 439.

See 34 Cent. Dig. tit. "Master and Servant," § 38.

74. Gerardo *v.* Brush, 120 Mich. 405, 79 N. W. 646, assault committed by servant after discharge.

75. Cleveland, etc., R. Co. *v.* Jenkins, 174 Ill. 398, 51 N. E. 811, 66 Am. St. Rep. 296, 62 L. R. A. 922 [*reversing* 70 Ill. App. 415]; New York, etc., R. Co. *v.* Schaffer, 65 Ohio St. 414, 62 N. E. 1036, 87 Am. St. Rep. 628, 62 L. R. A. 931 [*reversing* 17 Ohio Cir. Ct. 77, 9 Ohio Cir. Dec. 158]; Carrol *v.* Bird, 3 Esp. 201, 6 Rev. Rep. 824; Handley *v.* Moffat, Ir. R. 7 C. L. 104, 21 Wkly. Rep. 231. But *compare* Thornton *v.* Suffolk Mfg. Co., 10 Cush. (Mass.) 376, where it was held that a usage among certain manufacturers to give an honorable discharge to an employee who had worked faithfully for twelve months and who had given a fortnight's notice, whereby he might obtain other employment, did not render it obligatory to give such discharge in all cases where the above conditions were complied with; but that it was a matter of discretion and judgment.

Burden on servant to show custom see Cleveland, etc., R. Co. *v.* Jenkins, 174 Ill. 398, 51 N. E. 811, 66 Am. St. Rep. 296, 62 L. R. A. 922.

76. Henry *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 289, 21 Atl. 157.

77. Fountain *v.* Boodle, 3 Q. B. 5, 2 G. & D. 455, 43 E. C. L. 605; Webb *v.* East, 5 Ex. D. 108, 44 J. P. 300, 49 L. J. Exch. 250, 41 L. T. Rep. N. S. 715, 28 Wkly. Rep. 336; Weatherston *v.* Hawkins, 1 T. R. 111. See also Harris *v.* Thompson, 13 C. B. 33, 76 E. C. L. 333. See Libel and Slander, 25 Cyc. 225.

78. Hodgson *v.* Scarlett, 1 B. & Ald. 232, 240, 19 Rev. Rep. 301, per Lord Ellenborough, C. J.

False entries of reasons for discharge.— Where there is a custom among railroad companies to keep a record of the causes for which employees have been discharged, and for one company not to employ persons discharged by another for certain causes, a company is liable to a discharged employee for making a false entry on its records as to the cause of his discharge, where such entry has been either directly or indirectly communicated to other companies, and he has thereby been prevented from obtaining employment. Hundley *v.* Louisville, etc., R. Co., 105 Ky. 162, 48 S. W. 429, 20 Ky. L. Rep. 1085, 88 Am. St. Rep. 298, 63 L. R. A. 289.

79. Ross *v.* Pender, 10 Sc. Sess. Cas. 301 [*cited* in Wood M. & S. 290].

80. Reg. *v.* Spurrell, L. R. 1 Q. B. 72, 12 Jur. N. S. 208, 35 L. J. M. C. 74, 13 L. T. Rep. N. S. 364, 14 Wkly. Rep. 81; White *v.* Bailey, 10 C. B. N. S. 227, 7 Jur. N. S. 948, 30 L. J. C. P. 253, 100 E. C. L. 227; Mayhew *v.* Shuttle, 3 C. L. R. 59, 4 E. & B. 347, 1 Jur. N. S. 303, 24 L. J. Q. B. 54, 3 Wkly. Rep. 108, 82 E. C. L. 347; Bertie *v.* Beaumont, 16 East 33.

81. Champion *v.* Hartshorne, 9 Conn. 564; Kerrains *v.* People, 60 N. Y. 221, 19 Am. Rep. 158; Foye *v.* Sewell, 21 Abb. N. Cas. (N. Y.) 15; Haywood *v.* Miller, 3 Hill (N. Y.) 90.

82. Champion *v.* Hartshorne, 9 Conn. 564; Foye *v.* Sewell, 21 Abb. N. Cas. (N. Y.) 15.

83. De Vere *v.* Gilmore, 25 Misc. (N. Y.) 306, 54 N. Y. Suppl. 587.

b. Actions For Wrongful Discharge[84] — (i) *Right of Action and Condition Precedent.*[85] Unless the contract of employment is for some definite time the servant has no right of action on being discharged;[86] nor where he is discharged under the terms of the contract.[87] If employed for a definite time the servant's right of action is dependent upon the wrongfulness of his discharge.[88] In an action for wrongful discharge, the servant must show his readiness and willingness to carry out the contract,[89] but an actual offer to perform or a demand for work is unnecessary.[90]

84. Action by servant for malicious procurement of discharge see *infra*, VI, A, 2.

Compelling specific performance see Specific Performance.

Merger and bar of causes of action as depending on splitting of causes in actions see Judgments.

New trial see New Trial.

85. Duty to seek other employment see *infra*, II, C, 2, b, (III), (B), (2).

86. Blaisdell *v.* Lewis, 32 Me. 515; Foreman *v.* Goldberg, 30 Misc. (N. Y.) 785, 62 N. Y. Suppl. 753; Fuller *v.* Northern Pac. Elevator Co., 2 N. D. 220, 50 N. W. 359.

87. Roberts *v.* Crowley, 81 Ga. 429, 7 S. E. 740; Harder *v.* Marion County, 97 Ind. 455.

88. Action lies for breach of contract upon wrongful discharge.— Given *v.* Charron, 15 Md. 502; Wiseman *v.* Panama R. Co., 1 Hilt. (N. Y.) 300; Nations *v.* Cudd, 22 Tex. 550.

Upon a termination by mutual consent, and an agreement as to the amount then due, a recovery for the full period of the contract, as upon a wrongful discharge, cannot be sustained. Grannemann *v.* Kloepper, 24 Ill. App. 277.

Where a discharge is justified, the servant can only recover for his services upon a *quantum meruit,* and cannot recover at all upon the contract. Hunter *v.* Litterer, 1 Baxt. (Tenn.) 168.

Estoppel.—Where plaintiff was discharged, and paid for the time he had worked, taking the money without objection, it was held that he could not afterward claim to be entitled to a full year's salary on the ground that he was employed by the year. Tanner *v.* Cambon, 26 La. Ann. 353.

89. *Missouri.*—Cramer *v.* Mack, 8 Mo. App. 531.

Nebraska.— Hale *v.* Sheehan, 36 Nebr. 439, 54 N. W. 682.

New York.— Polk *v.* Daly, 4 Daly 411; Wiseman *v.* Panama R. Co., 1 Hilt. 300.

United States.— Jones *v.* Trinity Parish, 19 Fed. 59.

England.— Griffith *v.* Selby, 2 C. L. R. 486, 9 Exch. 393, 18 Jur. 178, 23 L. J. Exch. 226, 2 Wkly. Rep. 221; Wallis *v.* Warren, 7 D. & L. 58, 4 Exch. 361, 18 L. J. Exch. 449; Granger *v.* Dacre, 1 D. & L. 573, 13 L. J. Exch. 93, 12 M. & W. 431; De Medina *v.* Norman, 2 Dowl. P. C. N. S. 239, 11 L. J. Exch. 320, 9 M. & W. 820; Peeters *v.* Opie, 2 Saund. 350.

See 34 Cent. Dig. tit. "Master and Servant," § 42.

Compare Van Schaick *v.* Wannemacher, (Pa. 1886) 5 Atl. 31, holding that where a master, without good cause, notifies his servant that his services will be dispensed with after a given date, prior to that appointed in the contract, it is not necessary for the servant to show that he was ready and willing to continue in the service at the expiration of the notice.

"Ready does not imply willing (Granger *v.* Dacre, 1 D. & L. 573, 13 L. J. Exch. 93, 12 M. & W. 431), but ready and willing implies disposition, capacity, and ability (Griffith *v.* Selby, 2 C. L. R. 486, 9 Exch. 393, 18 Jur. 178, 23 L. J. Exch. 226, 2 Wkly. Rep. 221; Wallis *v.* Warren, 7 D. & L. 58, 4 Exch. 361, 18 L. J. Exch. 449; De Medina *v.* Norman, 2 Dowl. P. C. N. S. 239, 11 L. J. Exch. 320, 9 M. & W. 820); that is, not physical disability (Cuckson *v.* Stones, 1 E. & E. 248, 5 Jur. N. S. 537, 28 L. J. Q. B. 25, 7 Wkly. Rep. 134, 102 E. C. L. 248), but freedom from any other inconsistent engagement (Spotswood *v.* Barrow, 5 D. & L. 373, 1 Exch. 804, 17 L. J. Exch. 98)." Smith M. & S. 192.

90. *Illinois.*— Stumer *v.* Wilson, 82 Ill. App. 384.

Michigan.— Jones *v.* Graham, etc., Transp. Co., 51 Mich. 539, 16 N. W. 893.

Minnesota.— McMullen *v.* Dickinson Co., 63 Minn. 405, 65 N. W. 661, 663; Mackubin *v.* Clarkson, 5 Minn. 247.

New York.— Bacon *v.* New Home Sewing Mach. Co., 13 N. Y. Suppl. 359 [*affirmed* in 129 N. Y. 658, 30 N. E. 65]; Pettit *v.* Turner, 2 Thomps. & C. 608; Hess *v.* Citron, 37 Misc. 849, 76 N. Y. Suppl. 994.

England.— Wallis *v.* Warren, 7 D. & L. 58, 4 Exch. 361, 18 L. J. Exch. 449; Levy *v.* Herbert, 1 Moore C. P. 56, 7 Taunt. 314, 2 E. C. L. 379. But see Wilkinson *v.* Gaston, 9 Q. B. 137, 10 Jur. 804, 15 L. J. Q. B. 339, 58 E. C. L. 137.

See 34 Cent. Dig. tit. "Master and Servant," § 42.

Where plaintiff was discharged by an authorized agent, it was held that he was not bound to find defendant, inform him of his discharge, and demand a continuance in his employ. Gerardo *v.* Brush, 120 Mich. 405, 79 N. W. 646. *Compare* Collins *v.* Hazelton, 65 Mich. 220, 31 N. W. 843, in which it was held that an employee who claims wages under a yearly agreement made directly with his employer, and who, on being told by his employer's foreman that he was not wanted longer, but had better see their employer, goes away without informing his employer that he is ready to carry out his contract,

(II) *Accrual of Right.* Where a master wrongfully discharges his servant before the expiration of his term the latter may sue immediately for the value of his services[91] or bring an action for damages, either immediately or at the expiration of the term.[92] But in those states in which the doctrine of "constructive service" obtains, an action for wages accruing after the discharge cannot be brought until the expiration of the term,[93] unless the contract is divisible, in which case an action may be brought for each instalment as it falls due.[94] If a servant is discharged during the term for just cause, he cannot maintain an action on the contract or on a *quantum meruit*, until the end of the term named therein.[95]

(III) *Nature and Form of Remedy*—(A) *Contract or Tort.* The remedy of a servant wrongfully discharged before the expiration of his term of service lies in contract, not in tort.[96]

(B) *Action For Wages*—(1) Where Wages Are Due. One employed to serve for a certain time and subsequently discharged for no fault of his own before the expiration of the term may recover by action the wages due or damages for the wrongful discharge.[97] It is held in some cases, however, that wages due cannot be recovered in an action for breach of contract, unless a count therefor is contained in the declaration;[98] and consequently a judgment in an action simply for breach of contract does not operate as a bar to a subsequent action for such wages.[99]

is estopped by such neglect in an action to recover wages for the balance of the year.

91. Knutson *v.* Knapp, 35 Wis. 86. And see *infra*, II, C, 2, b, (III), (C).

92. *Alabama.*— Martin *v.* Everett, 11 Ala. 375; Davis *v.* Ayres, 9 Ala. 292.

Georgia.— Rogers *v.* Parham, 8 Ga. 190.

Indiana.— Hamilton *v.* Love, [1896] 43 N. E. 873; Ætna L. Ins. Co. *v.* Nexsen, 84 Ind. 347, 43 Am. Rep. 91.

Kentucky.— Forked Deer Pants Co. *v.* Shipley, 80 S. W. 476, 25 Ky. L. Rep. 2299; John C. Lewis Co. *v.* Scott, 14 Ky. L. Rep. 713.

Maryland.— Olmstead *v.* Bach, 78 Md. 132, 27 Atl. 501, 44 Am. St. Rep. 273, 22 L. R. A. 74; Dugan *v.* Anderson, 36 Md. 567, 11 Am. Rep. 509.

New York.—Justison *v.* Crawford, 25 How. Pr. 465.

North Carolina.— Brinkley *v.* Swicegood, 65 N. C. 626.

Texas.— Lichenstein *v.* Brooks, 75 Tex. 196, 12 S. W. 975; Hearne *v.* Garrett, 49 Tex. 619; Hassell *v.* Nutt, 14 Tex. 260; Sullivan *v.* McFarland, 1 Tex. App. Civ. Cas. § 1198.

See 34 Cent. Dig. tit. "Master and Servant," § 44. And see *infra*, II, C, 2, b, (III), (D).

Action brought before actual breach is premature.— Pellet *v.* Manufacturers', etc., Ins. Co., 104 Fed. 502, 43 C. C. A. 669.

93. Harris *v.* Moss, 112 Ga. 95, 37 S. E. 123; Kirk *v.* Hartman, 63 Pa. St. 97; Union Bank *v.* Heyward, 15 S. C. 296; Bradshaw *v.* Branan, 5 Rich. (S. C.) 465. See also *infra*, II, C, 2, b, (III), (D).

Under La. Civ. Code, art. 2720, all persons, except menial servants, who have been discharged "without any serious ground of complaint," may bring an action for their wages immediately, and the prescription of one year will commence when the right of action has accrued. Shoemaker *v.* Bryan, 12 La. Ann. 697.

94. Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8; Trawick *v.* Peoria, etc., St. R. Co., 68 Ill. App. 156; Markham *v.* Markham, 110 N. C. 356, 14 S. E. 963.

95. Knutson *v.* Knapp, 35 Wis. 86.

96. Westwater *v.* Grace Church, 140 Cal. 339, 73 Pac. 1055; Comerford *v.* West End St. R. Co., 164 Mass. 13, 41 N. E. 59. *Compare* Lee *v.* Hill, 84 Va. 919, 6 S. E. 473.

97. *Alabama.*— Fowler *v.* Armour, 24 Ala. 194.

Colorado.— Saxonia Min., etc., Co. *v.* Cook, 7 Colo. 569, 4 Pac. 1111.

Indiana.— Richardson *v.* Eagle Mach. Works, 78 Ind. 422, 41 Am. Rep. 584.

Missouri.— Ehrlich *v.* Ætna L. Ins. Co., 88 Mo. 249.

New York.— Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Moody *v.* Leverich, 4 Daly 401; Wiseman *v.* Panama R. Co., 1 Hilt. 300; Elliott *v.* Miller, 17 N. Y. Suppl. 526.

Pennsylvania.— Allen *v.* Colliery Engineers' Co., 196 Pa. St. 512, 46 Atl. 899.

South Carolina.— Bradshaw *v.* Branan, 5 Rich. 465.

Vermont.— Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

Canada.— Jeykal *v.* Nova Scotia Glass Co., 20 Nova Scotia 388.

See 34 Cent. Dig. tit. "Master and Servant," § 41.

98. Perry *v.* Dickerson, 85 N. Y. 345, 39 Am. Rep. 663; Tullis *v.* Hassell, 54 N. Y. Super. Ct. 391; Hartley *v.* Harman, 11 A. & E. 798, 9 L. J. Q. B. 179, 3 P. & D. 567, 39 E. C. L. 423.

99. Perry *v.* Dickerson, 85 N. Y. 345, 39 Am. Rep. 663; Levin *v.* Standard Fashion Co., 4 N. Y. Suppl. 867. See also Hartley *v.* Harman, 11 A. & E. 798, 9 L. J. Q. B. 179, 3 P. & D. 567, 39 E. C. L. 423.

(2) WAGES FOR UNEXPIRED TERM. It was formerly held in England that a servant wrongfully discharged might treat the contract as existing, and sue for his wages as they became due.[1] The doctrine of constructive service, as laid down in the early English cases, permitting a servant wrongfully discharged to sue on the contract for wages for the unexpired term,[2] was followed in the early cases in this country, and is still upheld by several courts.[3] This doctrine has since been repudiated by the courts of England,[4] and by many of the courts of this country. These authorities hold that if a servant be wrongfully discharged he has no action for wages, except for services past rendered. As far as any other claim on the contract is concerned, he must sue for the injury he has sustained by his discharge, in not being allowed to serve and earn the wages agreed on.[5] In

1. **Former English rule.**— In an early *nisi prius* case the fiction of a "constructive" service was resorted to, and a servant discharged without cause was allowed to recover wages for the unexpired term. Gandell *v.* Pontigny, 4 Campb. 375, 1 Stark. 198, 2 E. C. L. 82. To the same effect see Aspdin *v.* Austin, 5 Q. B. 671, Dav. & M. 515, 8 Jur. 355, 13 L. J. Q. B. 155, 48 E. C. L. 671; Collins *v.* Price, 5 Bing. 132, 6 L. J. C. P. O. S. 244, 2 M. & P. 233, 30 Rev. Rep. 542, 15 E. C. L. 507; Pagani *v.* Gandolfi, 2 C. & P. 370, 31 Rev. Rep. 671, 12 E. C. L. 623.

2. See *supra*, II, C, 2, b, (II).

3. *Alabama.*— Liddell *v.* Chidester, 84 Ala. 508, 4 So. 426, 5 Am. St. Rep. 387; Wilkinson *v.* Black, 80 Ala. 329; Holloway *v.* Talbot, 70 Ala. 389; Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8; Fowler *v.* Armour, 24 Ala. 194; Ramey *v.* Holcombe, 21 Ala. 567.

Arkansas.— Gardenhire *v.* Smith, 39 Ark. 280.

Delaware.— Spahn *v.* Willman, 1 Pennew. 125, 39 Atl. 787.

Georgia.— Moore *v.* Kelly, etc., Co., 111 Ga. 371, 36 S. E. 802; Beck *v.* Thompson, etc., Spice Co., 108 Ga. 242, 33 S. E. 894; Ansley *v.* Jordan, 61 Ga. 482; Tyler Cotton Press Co. *v.* Chevalier, 56 Ga. 494; Britt *v.* Hays, 21 Ga. 157; Rogers *v.* Parham, 8 Ga. 190.

Louisiana.— Tete *v.* Lanaux, 45 La. Ann. 1343, 14 So. 241; Alba *v.* Moriarty, 36 La. Ann. 680; Decamp *v.* Hewitt, 11 Rob. 290, 43 Am. Dec. 204.

Mississippi.— Armfield *v.* Nash, 31 Miss. 361; Prichard *v.* Martin, 27 Miss. 305.

Montana.— Isaacs *v.* McAndrew, 1 Mont. 437.

North Carolina.— Markham *v.* Markham, 110 N. C. 356, 14 S. E. 963.

Pennsylvania.— Allen *v.* Colliery Engineers Co., 196 Pa. St. 512, 46 Atl. 899; Emery *v.* Seckel, 126 Pa. St. 171, 17 Atl. 601, 12 Am. St. Rep. 857; Chamberlin *v.* Morgan, 68 Pa. St. 168; Kirk *v.* Hartman, 63 Pa. St. 97; King *v.* Steiren, 44 Pa. St. 99, 84 Am. Dec. 419; Fereira *v.* Sayers, 5 Watts & S. 210, 40 Am. Dec. 496.

South Carolina.— Bradshaw *v.* Branan, 5 Rich. 465; Rye *v.* Stubbs, 1 Hill 384; Byrd *v.* Boyd, 4 McCord 246, 17 Am. Dec. 740.

Tennessee.— Allen *v.* Maronne, 93 Tenn. 161, 23 S. W. 113; Jones *v.* Jones, 2 Swan 605.

Wisconsin.— Gordon *v.* Brewster, 7 Wis. 355.

Instalments recoverable as they fall due.— If the wages are payable in instalments, a servant wrongfully discharged may sue for and recover each instalment as it becomes due. Liddell *v.* Chidester, 84 Ala. 508, 4 So. 426, 5 Am. St. Rep. 387; Wilkinson *v.* Black, 80 Ala. 329; Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8; Fowler *v.* Armour, 24 Ala. 194; Davis *v.* Preston, 6 Ala. 83; Moore *v.* Kelly, etc., Co., 111 Ga. 371, 36 So. 802 [*citing* Isaacs *v.* Davies, 68 Ga. 169; Blun *v.* Holitzer, 53 Ga. 82]; Armfield *v.* Nash, 31 Miss. 361.

4. Goodman *v.* Pocock, 15 Q. B. 576, 14 Jur. 1042, 19 L. J. Q. B. 410, 69 E. C. L. 576; Smith *v.* Hayward, 7 A. & E. 544, 2 Jur. 232, 7 L. J. Q. B. 3, 2 N. & P. 432, W. W. & D. 635, 34 E. C. L. 292; East Anglian R. Co. *v.* Lythgoe, 10 C. B. 726, 20 L. J. C. P. 87, 2 L. M. & P. 221, 70 E. C. L. 726; Elderton *v.* Emmons, 6 C. B. 160, 17 L. J. C. P. 307, 60 E. C. L. 160 [*affirmed* in 13 C. B. 495, 76 E. C. L. 495, 4 H. L. Cas. 624, 10 Eng. Reprint 606, 18 Jur. 21]; Archard *v.* Horner, 3 C. & P. 349, 14 E. C. L. 604 [*overruling* Gandell *v.* Pontigny, 4 Campb. 375, 1 Stark. 198, 2 E. C. L. 82]; Fewings *v.* Tisdal, 5 D. & L. 196, 1 Exch. 295, 11 Jur. 977, 17 L. J. Exch. 18; Beekham *v.* Drake, 2 H. L. Cas. 579, 13 Jur. 921, 9 Eng. Reprint 1213; Barnsley *v.* Taylor, 37 L. J. Q. B. 39; Wood *v.* Moyes, 1 Wkly. Rep. 166.

5. *Arizona.*— Old Dominion Copper Min., etc., Co. *v.* Andrews, 6 Ariz. 205, 56 Pac. 969.

California.— Stone *v.* Bancroft, 112 Cal. 652, 44 Pac. 1069. But see Webster *v.* Wade, 19 Cal. 291, 79 Am. Dec. 218.

Colorado.— Sams Automatic Car Coupler Co. *v.* League, 25 Colo. 129, 54 Pac. 642.

Illinois.— Soldiers' Orphans' Home *v.* Shaffer, 63 Ill. 243; Monarch Cycle Mfg. Co. *v.* Mueller, 83 Ill. App. 359; Jacksonville *v.* Allen, 25 Ill. App. 54; Jones *v.* Dunton, 7 Ill. App. 580. But see Chiles *v.* Belleville Nail Mill Co., 68 Ill. 123.

Indiana.— Hamilton *v.* Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384; Ætna L. Ins. Co. *v.* Nexsen, 84 Ind. 347, 43 Am. Rep. 91; Richardson *v.* Eagle Mach. Works, 78 Ind. 422, 41 Am. Rep. 584; Ricks *v.* Yates, 5 Ind. 115.

Kentucky.— Wood *v.* Morgan, 6 Bush 507 [*cited* in William Tarr Co. *v.* Kimbrough, 34

either case it is the servant's duty to use reasonable efforts to obtain employment elsewhere;[6] and defendant may prove in mitigation of damages that after plaintiff's discharge, and during the remainder of the time, he received, or was offered and might have received, wages in similar employment.[7]

(c) *Action on Quantum Meruit.* Where a servant is discharged after partial performance without just cause, he may treat the contract as rescinded, and sue for the value of the service performed;[8] and such an action precludes a subsequent

S. W. 528, 17 Ky. L. Rep. 1284]; Whitaker *v.* Sandifer, 1 Duv. 261; Chamberlin *v.* McCallister, 6 Dana 352.

Maine.— Miller *v.* Goddard, 34 Me. 102, 56 Am. Dec. 638.

Maryland.— Olmstead *v.* Bach, 78 Md. 132, 27 Atl. 501, 44 Am. St. Rep. 273, 22 L. R. A. 74; Keedy *v.* Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759.

Minnesota.— McMullan *v.* Dickinson Co., 60 Minn. 156, 62 N. W. 120, 51 Am. St. Rep. 511, 27 L. R. A. 409.

Missouri.— Booge *v.* Pacific R. Co., 33 Mo. 212, 82 Am. Dec. 160 [*explained* in Soursin *v.* Salorgne, 14 Mo. App. 486]; Evans *v.* St. Louis, etc., R. Co., 24 Mo. App. 114; Bennett *v.* St. Louis Car Roofing Co., 23 Mo. App. 587; Soursin *v.* Salorgne, 14 Mo. App. 486; Stone *v.* Vimont, 7 Mo. App. 277.

New York.— Weed *v* Burt, 78 N. Y. 191 [*affirming* 7 Daly 267]; Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285 [*explaining* Taylor *v.* Bradley, 39 N. Y. 129, 100 Am. Dec. 415; Polk *v.* Daly, 4 Daly 411]; Arnold *v.* Adams, 27 N. Y. App. Div. 345, 49 N. Y. Suppl. 1041; Durkee *v.* Mott, 8 Barb. 423; Moody *v.* Leverich, 4 Daly 401; Elliott *v.* Miller, 17 N. Y. Suppl. 526. But see Thompson *v.* Wood, 1 Hilt. 93; Huntington *v.* Ogdensburgh, etc., R. Co., 33 How. Pr. 416.

Ohio.— Tiffin Glass Co. *v.* Stoehr, 54 Ohio St. 157, 43 N. E. 279; James *v.* Allen County, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821.

Texas.— Lichenstein *v.* Brooks, 75 Tex. 196, 12 S. W. 975.

Virginia.— Willoughby *v.* Thomas, 24 Gratt. 521.

The doctrine of constructive service is not only at war with principle, but with the rules of political economy, as it encourages idleness, and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor. Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; James *v.* Allen County, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821.

6. Emery *v.* Steckel, 126 Pa. St. 171, 17 Atl. 601, 12 Am. St. Rep. 857; Chamberlin *v.* Morgan, 68 Pa. St. 168; Allen *v.* Maronne, 93 Tenn. 161, 23 S. W. 113; Jones *v.* Jones, 2 Swan (Tenn.) 605.

7. *Alabama.*— Wilkinson *v.* Black, 80 Ala. 329; Holloway *v.* Talbot, 70 Ala. 389; Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8.

Arkansas.— Gardenhire *v.* Smith, 39 Ark. 280.

Colorado.— Saxonia Min., etc., Co. *v.* Cook, 7 Colo. 569, 4 Pac. 1111.

Delaware.— Spahn *v.* Willman, 1 Pennew. 125, 39 Atl. 787.

Illinois.— Soldiers' Orphans' Home *v.* Shaffer, 63 Ill. 243.

Mississippi.— Armfield *v.* Nash, 31 Miss. 361.

North Carolina.— Markham *v.* Markham, 110 N. C. 356, 14 S. E. 963.

Pennsylvania.— Chamberlin *v.* Morgan, 68 Pa. St. 168; Kirk *v.* Hartman, 63 Pa. St. 97; King *v.* Steiren, 44 Pa. St. 99, 84 Am. Dec. 419.

Tennessee.— Allen *v.* Maronne, 93 Tenn. 161 23 S. W. 113; Jones *v.* Jones, 2 Swan 605.

Wisconsin.— Gordon *v.* Brewster, 7 Wis. 355.

Acceptance of new employment not waiver of claim for damages.— Acceptance of new employment by the wrongfully discharged employee, during the unexpired term of the service, is not a waiver or abandonment of his claim for damages against his first employer. Wilkinson *v.* Black, 80 Ala. 329; Allen *v.* Maronne, 93 Tenn. 161, 23 S. W. 113.

8. *Alabama.*— Liddell *v.* Chidester, 84 Ala. 508, 4 So. 426, 5 Am. St. Rep. 387; Wilkinson *v.* Black, 80 Ala. 329; Holloway *v.* Talbot, 70 Ala. 389.

Arizona.— Old Dominion Copper Min., etc., Co. *v.* Andrews, 6 Ariz. 205, 56 Pac. 969.

Arkansas.— Gardenhire *v.* Smith, 39 Ark. 280; McDaniel *v.* Parks, 19 Ark. 671.

Connecticut.— Connelly *v.* Devoe, 37 Conn. 570; Ryan *v.* Dayton, 25 Conn. 188, 65 Am. Dec. 560.

Georgia.— Beck *v.* Thompson, etc., Spice Co., 108 Ga. 242, 33 S. E. 894; Tyler Cotton Press Co. *v.* Chevalier, 56 Ga. 494; Rogers *v.* Parham, 8 Ga. 190.

Illinois.— Jones *v.* Dunton, 7 Ill. App. 580.

Indiana.— Richardson *v.* Eagle Mach. Works, 78 Ind. 422, 41 Am. Rep. 584; Ricks *v.* Yates, 5 Ind. 115; Fulton *v.* Heffelfinger, 23 Ind. App. 104, 54 N. E. 1079.

Maryland.— Keedy *v.* Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759.

Massachusetts.— Moulton *v.* Trask, 9 Metc. 577; Hill *v.* Green, 4 Pick. 114.

Minnesota.— Mackubin *v.* Clarkson, 5 Minn. 247.

Montana.— Isaacs *v.* McAndrew, 1 Mont. 437.

New Hampshire.— Clark *v.* Manchester, 51 N. H. 594.

New York.— Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285.

North Carolina.— Harris *v.* Separks, 71 N. C. 372; Brinkley *v.* Swicegood, 65 N. C. 626.

action for breach of contract. It is not permissible to split up a single cause of action into two or more suits.[9]

(D) *Action For Breach of Contract.* Instead of treating the contract as rescinded and suing on a *quantum meruit*, a servant who has been wrongfully discharged may treat the contract as continuing, notwithstanding its breach by the master, and sue for damages for the wrongful discharge, either immediately, at any time during, or at the expiration of, the term;[10] and in some cases it has been held that a servant suing for a wrongful discharge must declare specially, the common counts not being sufficient.[11] Where an action has been brought for damages, no further action can be brought upon a *quantum meruit*,[12] nor can another action be brought for breach of the contract.[13]

Vermont.— Green *v.* Hulett, 22 Vt. 188.

England.— See Goodman *v.* Pocock, 15 Q. B. 576, 14 Jur. 1042, 19 L. J. Q. B. 410, 69 E. C. L. 576; Smith *v.* Hayward, 7 A. & E. 544, 2 Jur. 232, 7 L. J. Q. B. 3, 2 N. & P. 432, W. W. & D. 635, 34 E. C. L. 292; Planche *v.* Colburn, 8 Bing. 14, 21 E. C. L. 424, 5 C. & P. 58, 24 E. C. L. 452, 1 L. J. C. P. 7, 1 Moore & S. 51; Archard *v.* Hornor, 3 C. & P. 349, 14 E. C. L. 604; Fewings *v.* Tisdal, 5 D. & L. 196, 1 Exch. 295, 11 Jur. 977, 17 L. J. Exch. 18.

Canada.— Giles *v.* McEwan, 11 Manitoba 150 [*followed* in Rose *v.* Winters, 4 Terr. L. Rep. 353]; McPherson *v.* Usborne School Section No. 7, 1 Ont. L. Rep. 261.

See 34 Cent. Dig. tit. "Master and Servant," § 41.

Where the contract of hiring is within the statute of frauds, it cannot be sued upon; but plaintiff is entitled to recover the value of his services upon a *quantum meruit*. Giles *v.* McEwan, 11 Manitoba 150.

9. Liddell *v.* Chidester, 84 Ala. 508, 4 So. 426, 5 Am. St. Rep. 387; Wilkinson *v.* Black, 80 Ala. 329; Keedy *v.* Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759; Colburn *v.* Woodworth, 31 Barb. (N. Y.) 381.

10. *Alabama.*— Marx *v.* Miller, 134 Ala. 347, 32 So. 765; Ramey *v.* Holcombe, 21 Ala. 567.

Arizona.— Old Dominion Copper Min., etc., Co. *v.* Andrews, 6 Ariz. 205, 56 Pac. 969.

Colorado.— Saxonia Min., etc., Co. *v.* Cook, 7 Colo. 569, 4 Pac. 1111.

Georgia.— Beck *v.* Thompson, etc., Spice Co., 108 Ga. 242, 33 S. E. 894; Britt *v.* Hays, 21 Ga. 157; Rogers *v.* Parham, 8 Ga. 190.

Indiana.— Hamilton *v.* Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384, (1896) 43 N. E. 873; French *v.* Cunningham, 149 Ind. 632, 49 N. E. 797; Richardson *v.* Eagle Mach. Works, 78 Ind. 422, 41 Am. Rep. 584; Fulton *v.* Heffelfinger, 23 Ind. App. 104, 54 N. E. 1079; Pape *v.* Lathrop, 18 Ind. App. 633, 46 N. E. 154; Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

Maine.— Miller *v.* Goddard, 34 Me. 102, 56 Am. Dec. 638.

Maryland.— Olmstead *v.* Bach, 78 Md. 132, 27 Atl. 501, 44 Am. St. Rep. 273, 22 L. R. A. 74; Keedy *v.* Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759.

Missouri.— Booge *v.* Pacific R. Co., 33 Mo. 212, 82 Am. Dec. 160; Halsey *v.* Meinrath, 54 Mo. App. 335.

Montana.— Isaacs *v.* McAndrew, 1 Mont. 437.

New York.— Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Colburn *v.* Woodworth, 31 Barb. 381; Wiseman *v.* Panama R. Co., 1 Hilt. 300; Foreman *v.* Goldberg, 30 Misc. 785, 62 N. Y. Suppl. 753; Fallon *v.* Farber, 30 Misc. 626, 62 N. Y. Suppl. 742.

Ohio.— James *v.* Allen County, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821.

Pennsylvania.— King *v.* Steiren, 44 Pa. St. 99, 84 Am. Dec. 419.

Texas.— Litchenstein *v.* Brooks, 75 Tex. 196, 12 S. W. 975.

United States.— Pierce *v.* Tennessee Coal, etc., Co., 173 U. S. 1, 19 S. Ct. 335, 45 L. ed. 591 [*reversing* 81 Fed. 814, 26 C. C. A. 632].

England.— Pagani *v.* Gandolfi, 2 C. & P. 370, 31 Rev. Rep. 671, 12 E. C. L. 623.

Canada.— Meade *v.* Doherty, 7 N. Brunsw. 195.

See 34 Cent Dig. tit. "Master and Servant," § 41 *et seq.*

The rule in Louisiana, under Civ. Code, arts. 1920, 1924, is that an action for breach of contract is the only remedy for laborers on plantations or in factories. Word *v.* Winder, 16 La. Ann. 111. See also Perret *v.* Sanchez, 12 La. Ann. 687.

11. Davis *v.* Ayres, 9 Ala. 292; World's Columbian Exposition *v.* Thompson, 57 Ill. App. 606; White *v.* Gray, 4 Ill. App. 228; Moore *v.* Nason, 48 Mich. 300, 12 N. W. 162; Algeo *v.* Algeo, 10 Serg. & R. (Pa.) 235; Donaldson *v.* Fuller, 3 Serg. & R. (Pa.) 235. *Contra*, Holloway *v.* Talbot, 70 Ala. 389; Moulton *v.* Trask, 9 Metc. (Mass.) 577.

See 34 Cent. Dig. tit. "Master and Servant," § 41.

12. Wynn *v.* Longley, 31 Ill. App. 616; Colburn *v.* Woodworth, 31 Barb. (N. Y.) 381; Goodman *v.* Pocock, 15 Q. B. 576, 14 Jur. 1042, 19 L. J. Q. B. 410, 69 E. C. L. 576.

13. *Illinois.*— Monarch Cycle Mfg. Co. *v.* Mueller, 83 Ill. App. 359.

Indiana.— Richardson *v.* Eagle Mach. Works, 78 Ind. 422, 41 Am. Rep. 584.

Maryland.— Olmstead *v.* Bach, 78 Md. 132, 27 Atl. 501, 44 Am. St. Rep. 273, 22 L. R. A. 74.

Massachusetts.— Cutter *v.* Gillette, 163 Mass. 95, 39 N. E. 1010.

(IV) *DEFENSES.*[14] Where a sufficient cause exists for the discharge of a servant, although not the inducing motive to the discharge, or even known to the master,[15] it will justify the discharge.[16] So too a master may defend an action for wrongful discharge by showing that the discharge was by mistake, and that as soon as the mistake was discovered, and before the servant had sustained any damages, he offered to revoke, and insisted on revoking the discharge;[17] by showing a voluntary resignation by the servant subsequent to his discharge;[18] or by showing a reconciliation and return to service;[19] and he may show by way of recoupment any loss of custom or other injury caused by the servant's conduct.[20] But it is no defense to such an action that the servant has had, or, by the exercise of reasonable diligence, might have had, other employment;[21] whatever might be its effect as reducing damages;[22] that the servant has rejected the master's offer to continue him in his service at a reduced rate;[23] that the servant has accepted employment by the master in another capacity;[24] that the servant has engaged in business for himself in competition with his master;[25] that after his discharge the servant has taken away customers, originally brought by him to his master under the terms of his contract, and carried them to his new employers;[26] that the servant, after his discharge, applied for and obtained a letter of recommendation, where he notifies the master that he claims under, and intends to enforce, his contract;[27] that a collateral agreement to refer disputes exists between the parties;[28] or that the master is insolvent and unable to continue his business.[29]

(V) *PLEADING* — (A) *Declaration, Petition, or Complaint*[30] — (1) IN GENERAL. Generally it may be said that the declaration, petition, or complaint in an action for wrongful discharge is sufficient if it contains all that it is necessary for plaintiff to prove under a plea of the general issue;[31] and where a complaint

Missouri.— Booge *v.* Pacific R. Co., 33 Mo. 212, 82 Am. Dec. 160.

New York.— Moody *v.* Leverich, 4 Daly 401; Wiseman *v.* Panama R. Co., 1 Hilt. 300.

Ohio.— James *v.* Allen County, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821.

Tennessee.— East Tennessee, etc., R. Co. *v.* Staub, 7 Lea 397.

Texas.— Litchenstein *v.* Brooks, 75 Tex. 196, 12 S. W. 975.

See 34 Cent. Dig. tit. "Master and Servant," § 41.

14. Other employment for reduction of damages see *infra*, II, C, 2, b, (VII), (D), (2).

Discharge of claim by accord and satisfaction see ACCORD AND SATISFACTION.

15. See *supra*, II, C, 2, a, (IV).

16. Crescent Horse-Shoe, etc., Co. *v.* Eynon, 95 Va. 151, 158, 27 S. E. 935, where it is further said: "The law only requires that there should be an actual breach of the express or implied conditions of the contract in order to justify the discharge, and, if such cause in fact exists, the master may avail himself of such breach in defence of an action brought against him for damages resulting from an alleged wrongful dismissal." See also Hewitt *v.* Roudebush, 24 La. Ann. 254.

17. Texas Benev. Assoc. *v.* Bell, 3 Tex. App. Civ. Cas. § 277.

18. Wharton *v.* Christie, 53 N. J. L. 607, 23 Atl. 258.

19. Chevalier *v.* Borie, 3 La. 299.

20. Newman *v.* Reagan, 63 Ga. 755.

Lack of diligence.—Where a salesman receives a fixed sum for traveling expenses, and a salary dependent on the amount of his sales, it is admissible, in an action for wrongful discharge, to show his lack of diligence in reduction or bar of damages. Alberts *v.* Stearns, 50 Mich. 349, 15 N. W. 505.

21. Troy Fertilizer Co. *v.* Logan, 96 Ala. 619, 12 So. 712; Wilkinson *v.* Black, 80 Ala. 329; Armfield *v.* Nash, 31 Miss. 361; Howson *v.* Mestayer, 14 Daly (N. Y.) 83, 3 N. Y. St. 571; Van Schaick *v.* Wannemacher, (Pa. 1886) 5 Atl. 31.

Offer of employments in different capacity no defense.— De Loraz *v.* McDowell, 68 Hun (N. Y.) 170, 22 N. Y. Suppl. 606 [*affirmed* in 142 N. Y. 664, 37 N. E. 570].

22. See *infra*, II, C, 2, b, (VII), (D), (2).

23. Trawick *v.* Peoria, etc., R. Co., 68 Ill. App. 156.

24. Hamill *v.* Foute, 51 Md. 419.

25. Stone *v.* Vimont, 7 Mo. App. 277.

26. Lichtenhein *v.* Fisher, 87 Hun (N. Y.) 397, 34 N. Y. Suppl. 304.

27. Wright *v.* Elk Rapids Iron Co., 129 Mich. 543, 89 N. W. 335.

28. Griggs *v.* Billington, 27 U. C. Q. B. 520.

29. *In re* Silverman, 101 Fed. 219 [*citing* White *v.* Mann, 26 Me. 361; Lewis *v.* Atlas Mut. L. Ins. Co., 61 Mo. 534; Tompkins *v.* Dudley, 25 N. Y. 272, 82 Am. Dec. 349; Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Wood *v.* Worsley, 2 H. Bl. 574, 6 T. R. 710, 3 Rev. Rep. 323].

30. Form of complaint for breach of contract see Marx *v.* Miller, 134 Ala. 347, 32 So. 765.

31. *Alabama.*— Montgomery Mfg. Co. *v.* Thomas, 20 Ala. 473, to the effect that a

alleges facts sufficient to constitute a cause of action for damages for breach of contract, the fact that the prayer is for a judgment for wages instead of for damages does not render it fatally defective.[32] On the other hand, where plaintiff sues upon the common count in assumpsit, without inserting a count upon the special contract, he can only recover for the time he has actually served.[33]

(2) PARTICULAR AVERMENTS — (a) PERIOD OF HIRING. A declaration setting out a contract to pay a certain sum per year for services as long as a person shall remain in such services, and a readiness and willingness to continue, must plainly and directly allege that defendant agreed to retain plaintiff in his service for the period within which he is stated to have been dismissed.[34]

(b) WRONGFUL DISCHARGE. In an action for damages the wrongful discharge must be averred as the breach of the contract, and as the fact constituting the cause of action.[35] A formal dismissal need not, however, be alleged or proved, an allegation of the denial and repudiation of the contract being sufficient.[36]

(c) DATE OF DISCHARGE. In an action for damages for wrongful discharge the precise date of the discharge need not be alleged, as in such a case time is not of the essence of the claim.[37]

(d) READINESS AND WILLINGNESS TO PERFORM. Where a servant, in an action for breach of contract of hiring, counts on the breach alone, not attempting to recover on the contract as such, an averment of readiness and willingness to perform is unnecessary.[38]

(e) NON-PAYMENT. Where the declaration in an action for wrongful discharge claims damages in a specified amount, it need not contain an averment that plaintiff was not paid for the services rendered, the claim for damages being a sufficient allegation of that fact.[39]

declaration for breach of a written contract, averring all the stipulations, is sufficient if it merely shows a wrongful discharge before the end of the contract period.

Arizona.— Old Dominion Copper Min., etc., Co. *v.* Andrews, 6 Ariz. 205, 56 Pac. 969.

Indiana.— Rockebrandt *v.* Madison, 9 Ind. App. 227, 36 N. E. 444, 53 Am. St. Rep. 348.

Mississippi.— Gibson-Moore Mfg. Co. *v.* Meek, 71 Miss. 614, 15 So. 789.

Missouri.— Teazer *v.* Gilmore, 114 Mo. App. 210, 89 S. W. 341.

New York.— Murray *v.* O'Donohue, 109 N. Y. App. Div. 696, 96 N. Y. Suppl. 335.

Texas.— Efron *v.* Clayton, (Civ. App. 1896) 35 S. W. 424 (complaint alleging that a certain sum was due for services performed, and that the servant was damaged to the amount of a certain further sum by the discharge, sufficiently pleads the latter damages); Tompkins *v.* Hart, 2 Tex. Unrep. Cas. 348 (when the damage claimed results *prima facie* as a matter of legal inference from the facts stated, the petition is always sufficient).

Washington.— See Prescott *v.* Puget Sound Bridge, etc., Co., 31 Wash. 177, 71 Pac. 772.

See 34 Cent. Dig. tit. "Master and Servant," § 45.

A complaint to recover damages should show that plaintiff's claim is for that part of his services which he was prevented from performing by the wrongful discharge. Hartsell *v.* Masterson, 132 Ala. 275, 31 So. 616.

32. Williams *v.* Conners, 53 N. Y. App. Div. 599, 66 N. Y. Suppl. 11. See also Winkler *v.* Racine Wagon, etc., Co., 99 Wis. 184, 74 N. W. 793, where it was held that a complaint alleging a contract of employment for a certain time and a wrongful discharge before the expiration of the contract period substantially stated an action for breach of contract, although to show damages it avers that there is due the employee a certain sum by virtue of the contract.

33. Madden *v.* Porterfield, 53 N. C. 166.

A complaint is on a quantum meruit, and not for damages for breach of contract, where it alleges a contract of employment, the rendering of services and the expenditure of moneys in performance thereof, plaintiff's wrongful discharge, and the value of his services and expenditures, and prays judgment therefor, less receipts. Glover *v.* Henderson, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695.

34. Raines *v.* Credit Harbour Co., 1 U. C. Q. B. 174.

35. Saxonia Min., etc., Co. *v.* Cook, 7 Colo. 569, 4 Pac. 1111.

Sufficiency of allegation.— A complaint is sufficient on demurrer where it alleges that plaintiff was discharged "without any reasonable cause whatever." Foley *v.* Mial, etc., Pub. Co., 8 Misc. (N. Y.) 91, 28 N. Y. Suppl. 778.

36. East Tennessee, etc., R. Co. *v.* Staub, 7 Lea (Tenn.) 397.

37. Spencer *v.* Trafford, 42 Md. 1.

38. Marx *v.* Miller, 134 Ala. 347, 32 So. 765. But *compare* Williams *v.* Scott, 70 Ill. App. 51, where it was held that an averment of readiness to perform is not surplusage, nor variant with proof of efforts to find employment.

39. Spencer *v.* Trafford, 42 Md. 1.

(f) Time of Issuing Writ or Filing Declaration. The fact that a declaration alleges that the term of service has expired, without making any reference to the time when it was filed or to the issuing of the writ, cannot prejudice the finding of the jury, where the proof is ample to show a good cause of action as stated by plaintiff.[40]

(g) Negativing Defenses. The declaration, petition, or complaint in an action for wrongful discharge need not negative matters of defense.[41]

(3) Joinder of Counts. Where a count for damages for breach of contract of employment and one on a *quantum meruit* for services rendered are joined, and a trial had, the evidence being sufficient to support either count, judgment should not be given for defendant, but plaintiff should be required to elect between the counts, or the jury directed to find a verdict on one only.[42]

(4) Amendment. Where a servant upon his discharge before the expiration of the term in an action on the contract files the common counts only, he may amend by filing a special count founded on the breach of the contract.[43]

(b) *Plea or Answer*—(1) General Issue. By statute in some states, the general issue must be verified to have the effect of putting the making of the contract sued on in issue;[44] consequently, in a suit by a servant for a wrongful discharge, upon a contract in writing set out in the declaration *in hæc verba*, an unverified plea of the general issue does not put in issue the making of the contract by the master.[45]

(2) Inconsistent Defenses. In many jurisdictions a defendant may, by statute, set up as many defenses as he may have, although inconsistent with one another.[46]

(3) Argumentative Denials. An argumentative denial is bad;[47] and a plea which sets up a contract different from the one declared on is bad as amounting to the general issue. It is an argumentative, instead of a direct, denial of the contract.[48]

40. Davis *v.* Ayres, 9 Ala. 292.

41. Collins *v.* Glass, 46 Mo. App. 297; Wilkinson *v.* Gaston, 9 Q. B. 137, 10 Jur. 804, 15 L. J. Q. B. 339, 58 E. C. L. 137.

Inability to obtain employment or to earn anything need not be alleged.—*Alabama.*—Marx *v.* Miller, 134 Ala. 347, 32 So. 765; Wilkinson *v.* Black, 80 Ala. 329; Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8.

California.—Rosenberger *v.* Pacific Coast R. Co., 111 Cal. 313, 43 Pac. 963. But see Westwater *v.* Grace Church, 140 Cal. 339, 73 Pac. 1055, in which a complaint alleging a wrongful discharge, and that the same was malicious, and for the purpose of injuring plaintiff's feelings and reputation, etc., but failing to allege the wages she was receiving, or that anything was due her when she was dismissed, or that she could not get employment in her profession at better wages, was held demurrable.

Indiana.—Hamilton *v.* Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384, (1896) 43 N. E. 873.

Minnesota.—Horn *v.* Western Land Assoc., 22 Minn. 233.

Nebraska.—Wirth *v.* Calhoun, 64 Nebr. 316, 89 N. W. 785.

New York.—Merrill *v.* Blanchard, 7 N. Y. App. Div. 167, 40 N. Y. Suppl. 48 [*affirmed* in 158 N. Y. 682, 52 N. E. 1125].

Texas.—Porter *v.* Burkett, 65 Tex. 383; Missouri, etc., R. Co. *v.* Faulkner, (Civ. App. 1895) 31 S. W. 543. But see Hearne *v.* Garrett, 49 Tex. 619; Fowler *v.* Waller, 25 Tex. 695.

Wisconsin.—Barker *v.* Knickerbocker L. Ins. Co., 24 Wis. 630.

See 34 Cent. Dig. tit. "Master and Servant," § 45.

But *compare* Winn *v.* Poe, 42 S. W. 89, 19 Ky. L. Rep. 811.

42. Millaly *v.* Austin, 97 Mass. 30.

43. Mt. Hope Cemetery Assoc. *v.* Weidenmann, 139 Ill. 67, 28 N. E 834, where it was held that a motion for arrest of judgment on the grounds that by filing the common counts plaintiff elected to sue for wages due him at the time of his discharge upon a *quantum meruit*, and was barred from afterward proceeding for damages for the breach of the contract, was properly denied, since he could have recovered in *indebitatus assumpsit* under the contract for the services performed, and could not therefore be said to have elected to proceed upon the *quantum meruit*.

44. See Contracts, 9 Cyc. 733.

45. Catholic Press Co. *v.* Ball, 69 Ill. App. 591.

46. Conklin *v.* John H. Woodbury Dermatological Inst., 37 N. Y. App. Div. 610, 56 N. Y. Suppl. 258. And see Pleading.

47. Spotswood *v.* Barrow, 5 D. & L. 373, 1 Exch. 804, 17 L. J. Exch. 98; Campbell *v.* Black, 4 U. C. Q. B. 488.

48. Cleworth *v.* Pickford, 8 Dowl. P. C. 873, 10 L. J. Exch. 41, 7 M. & W. 314.

(4) MATTER IN JUSTIFICATION — (a) IN GENERAL. In an action for breach of a contract of employment by reason of a wrongful discharge, evidence of facts justifying the discharge of the servant is inadmissible under a general denial;[49] nor is the mere denial of a wrongful discharge, without an allegation of facts justifying it, sufficient.[50] But where evidence of justification for the discharge of a servant is received without objection, it should be submitted to the jury, although not specially pleaded.[51]

(b) PLAINTIFF MAY DEMAND PARTICULARS. Where the defense to an action for wrongful discharge is misconduct generally, plaintiff is entitled to an order for particulars, showing the nature and character of the instances relied on by the master, and setting forth the dates and substantial facts and circumstances of all the instances and occasions wherein and whereon plaintiff misconducted himself, on which defendant intends to rely;[52] and leave should be given to supplement with further particulars, if discovered before trial.[53]

(5) MATTER IN MITIGATION OF DAMAGES. In an action for breach of a contract of employment, that the servant earned or could, by the exercise of reasonable diligence, have earned a certain amount after his discharge, must be pleaded specially in mitigation of damages.[54] But where the complaint alleges that plaintiff, since the dismissal, has been unable to obtain steady or profitable employment, evidence as to his earnings in the meantime is admissible under a general denial.[55]

(6) AMENDMENT. Where defendant in an action for wrongful discharge does not plead matters in justification, it is error to refuse to allow him to plead such matters by way of amendment, when objections are first interposed to evidence in justification.[56]

(c) *Issues, Proof, and Variance* — (1) ISSUES AND PROOF — (a) UNDER DECLARATION ON SPECIAL CONTRACT. Where plaintiff in an action for wrongful discharge declares on a special contract, and undertakes to prove it, he cannot at the same time offer proof of the value of his services and recover on a *quantum meruit*, defendant having denied the making of any contract at all.[57]

(b) UNDER PLEA OF JUSTIFICATION. Where a master discharges a servant for breach of duty, the issuable fact is not whether there was a breach of duty, but whether there was such a breach as constituted reasonable ground for terminating the contract.[58]

(2) VARIANCE. A material variance between the allegations and proof in an

49. Champlain *v.* Detroit Stamping Co., 68 Mich. 238, 36 N. W. 57; Schreiber *v.* Ash, 84 N. Y. Suppl. 946. *Contra*, see Beyle *v.* Reid, 31 Kan. 113, 1 Pac. 264; Brown *v.* Baldwin, etc., Co., 13 N. Y. Suppl. 893. And see Haines *v.* Thompson, 2 Misc. (N. Y.) 385, 21 N. Y. Suppl. 991 [*reversing* 19 N. Y. Suppl. 184].

50. Browne *v.* Empire Type Setting Mach. Co., 44 N. Y. App. Div. 598, 61 N. Y. Suppl. 126. See also Patterson *v.* Scott, 38 U. C. Q. B. 642.

Facts warranting discharge must be pleaded. — Sugg *v.* Blow, 17 Mo. 359; Mowbray *v.* Gould, 83 N. Y. App. Div. 255, 82 N. Y. Suppl. 102 (intoxication pleaded without setting it up in connection with a counter-claim or set-off); Hicks *v.* New Jersey Car Spring, etc., Co., 22 Misc. (N. Y.) 585, 49 N. Y. Suppl. 401; Powell *v.* Bradbury, 7 C. B. 201, 13 Jur. 349, 18 L. J. C. P. 116, 62 E. C. L. 201.

Plea held sufficient see Hunter *v.* Foote, 12 U. C. C. P. 175.

51. Lesser *v.* Gilbert Mfg. Co., 72 N. Y. App. Div. 147, 75 N. Y. Suppl. 486.

52. Crabbe *v.* Hickson, 14 Ont. Pr. 42. See also Scott *v.* Newberg, 3 Ont. L. Rep. 252.

53. Crabbe *v.* Hickson, 14 Ont. Pr. 42.

54. Ansley *v.* Jordan, 61 Ga. 482; Latimer *v.* York Cotton Mills, 66 S. C. 135, 44 S. E. 559.

55. Latimer *v.* York Cotton Mills, 66 S. C. 135, 44 S. E. 559.

56. Lesser *v.* Gilbert Mfg. Co., 72 N. Y. App. Div. 147, 75 N. Y. Suppl. 486.

57. Rockwell Stock, etc., Co. *v.* Castroni, 6 Colo. App. 528, 42 Pac. 182.

58. Schumaker *v.* Heinemann, 99 Wis. 251, 74 N. W. 785.

Where plaintiff alleges a wrongful discharge, which defendant denies, and the parties go to trial without objection to the state of the pleadings, it is manifestly error to exclude testimony showing misconduct of plaintiff a month prior to the discharge. Little *v.* Dougherty, 11 Colo. 103, 17 Pac. 292.

action for wrongful discharge is fatal,[59] but, since it is the duty of a wrongfully discharged servant to earn what he can after his discharge, an averment of readiness and willingness to perform subsequent to the discharge is not materially variant from proof of efforts to find employment,[60] or even from proof that he did find it.[61]

(VI) *Evidence*—(A) *Presumptions and Burden of Proof*—(1) In General. As in other actions, the burden of proof is generally upon the party holding the affirmative of the issue.[62] In the first instance, the burden is on plaintiff to prove his contract and its performance up to the time of his discharge,[63] and where the contract of hiring is indefinite, the burden of showing the hiring to have been for a certain term rests on the servant.[64]

(2) Matters of Justification. Where a servant enters upon his duties and continues until he is dismissed he need not prove that he performed his services faithfully, as a presumption arises that such is the fact,[65] and the burden of proving a sufficient cause for his discharge is on the master.[66]

(3) Matters in Mitigation of Damages. The measure of damages for the breach of a contract of employment by the employer is *prima facie* the sum stipulated to be paid for the services, and the burden of reducing the damages by proof that the servant has, or might, with reasonable diligence, have, obtained other remunerative employment after his discharge rests on the employer.[67]

59. Texas, etc., R. Co. *v.* Morris, 29 Tex. Civ. App. 491, 69 S. W. 102.

Facts held not to show material variance see Sax *v.* Detroit, etc., R. Co., 125 Mich. 252, 84 N. W. 314, 84 Am. St. Rep. 572; McGowan *v.* Givern Mfg. Co., 54 N. Y. App. Div. 233, 66 N. Y. Suppl. 708.

60. Williams *v.* Scott, 70 Ill. App. 51.

61. Morris Min. Co. *v.* Knox, 96 Ala. 320, 11 So. 207.

62. Finger *v.* Koch, etc., Brewing Co., 13 Mo. App. 310, where it was held that the burden of establishing a contract or hiring for a year is on him who seeks to do so.

63. Milligan *v.* Sligh Furniture Co., 111 Mich. 629, 70 N. W. 133.

Burden on plaintiff to show change in contract see Stanford *v.* Fisher Varnish Co., 43 N. J. L. 151.

64. Hotchkiss *v.* Godkin, 63 N. Y. App. Div. 468, 71 N. Y. Suppl. 629. See also Mandel *v.* Hocquard, 99 Ill. App. 75.

65. Roberts *v.* Brownrigg, 9 Ala. 106; Echols *v.* Fleming, 58 Ga. 156.

66. *Alabama.*— Roberts *v.* Brownrigg, 9 Ala. 106.

Arkansas.— Van Winkle *v.* Satterfield, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853.

Georgia.— See Echols *v.* Fleming, 58 Ga. 156.

Illinois.— School Directors *v.* Reddick, 77 Ill. 628; Morris *v.* Taliaferro, 44 Ill. App. 359. But see Mendel *v.* Hocquard, 99 Ill. App. 75.

Michigan.— Milligan *v.* Sligh Furniture Co., 111 Mich. 629, 70 N. W. 133.

Missouri.— Koenigkraemer *v.* Missouri Glass Co., 24 Mo. App. 124.

New York.— Linton *v.* Unexcelled Fire-Works Co., 124 N. Y. 533, 27 N. E. 406; Stern *v.* Congregation Schaare Rachmin, 2 Daly 415. *Compare* Zeiss *v.* American Wringer Co., 62 N. Y. App. Div. 463, 70 N. Y. Suppl. 1110. But see McDonald *v.* Lord, 26 How. Pr. 404, to the effect that the law presumes that sales by a clerk in a store to a firm in which he is a partner, without his employer's knowledge, are injurious to the latter, and that such presumption cannot be rebutted.

North Carolina.— Eubanks *v.* Alspaugh, 139 N. C. 520, 52 S. E. 207; Deitrick *v.* Cashie, etc., Lumber Co., 127 N. C. 25, 37 S. E. 64.

West Virginia.— Rhoades *v.* Chesapeake, etc., R. Co., 49 W. Va. 494, 39 S. E. 209, 89 Am. St. Rep. 826, 55 L. R. A. 170.

Wisconsin.— See Norris *v.* Cargill, 57 Wis. 251, 15 N. W. 148.

England.— Mercer *v.* Whall, 5 Q. B. 447, 9 Jur. 576, 14 L. J. Q. B. 267, 48 E. C. L. 447; Lush *v.* Russell, 7 D. & L. 228, 5 Exch. 203, 14 Jur. 435, 19 L. J. Exch. 244, 1 L. M. & P. 369.

Canada.— McInnes *v.* Ferguson, 32 Nova Scotia 516; Jeykal *v.* Nova Scotia Glass Co., 20 Nova Scotia 388; Griggs *v.* Billington, 27 U. C. Q. B. 520.

See 34 Cent. Dig. tit. "Master and Servant," § 47.

But *compare* Russell *v.* Arthur, 17 S. C. 447, holding that where a party stands on his strict legal right, and sues for services not rendered, the onus rests on him to prove what the contract was, and to show that he was not in fault.

Burden on master to show justification.— Eubanks *v.* Alspaugh, 139 N. C. 520, 52 S. E. 207 [*citing* Deitrich *v.* Cashie, etc., Lumber Co., 127 N. C. 25, 37 S. E. 64]; McKeitham *v.* American Tel., etc., Co., 136 N. C. 213, 48 S. E. 646.

67. *Alabama.*— Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8.

Arkansas.— Van Winkle *v.* Satterfield, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853.

California.—Hancock *v.* Santa Barbara Bd. of Education, 140 Cal. 554, 74 Pac. 44; Ros-

(B) *Admissibility.* — (1) In General. As in other actions, to be admissible, the evidence in an action for wrongful discharge must have a tendency to support the cause of action or defense.[68]

(2) Evidence as to Contract. Where a contract of employment is in writing, the writing itself, if it can be produced, is the only admissible evidence of the contract, and parol evidence is not admissible to contradict, vary, or modify the written contract in any particular.[69] But where the duration of the employment

senberger *v.* Pacific Coast R. Co., 111 Cal. 313, 43 Pac. 693.

Colorado.— Saxonia Min., etc., R. Co. *v.* Cook, 7 Colo. 569, 4 Pac. 1111.

Georgia.— Cox *v.* Bearden, 84 Ga. 304, 10 S. E. 627, 20 Am. St. Rep. 359; Johnson *v.* Gorman, 30 Ga. 612.

Illinois.— Fuller *v.* Little, 61 Ill. 21; School Directors Dist. No. 2 *v.* Orr, 88 Ill. App. 648; World's Columbian Exposition *v.* Richards, 57 Ill. App. 601; Kelley *v.* Louisville, etc., R. Co., 49 Ill. App. 304; Brown *v.* Board of Education, 29 Ill. App. 572; Jacksonville *v.* Allen, 25 Ill. App. 54.

Indiana.— Hamilton *v.* Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384, (1896) 43 N. E. 873; Hinchcliffe *v.* Koontz, 121 Ind. 422; Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

Michigan.— Allen *v.* Whitlark, 99 Mich. 492, 58 N. W. 470; Farrell *v.* Rubicon Tp. School-Dist. No. 2, 98 Mich. 43, 56 N. W. 1053.

Minnesota.— Horn *v.* Western Land Assoc., 22 Minn. 233.

Mississippi.— Odeneal *v.* Henry, 70 Miss. 172, 12 So. 154; Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381.

Missouri.— Teazer *v.* Gilmore, 114 Mo. App. 210, 89 S. W. 384; Miller *v.* Woolman-Todd Boot, etc., Co., 26 Mo. App. 57.

Nebraska.— Wirth *v.* Calhoun, 64 Nebr. 316, 89 N. W. 785.

New York.— Griffin *v.* Brooklyn Ball Club, 174 N. Y. 535, 66 N. E. 1109 [*affirming* 68 N. Y. App. Div. 566, 73 N. Y. Suppl. 864]; Howard *v.* Daly, 61 N. Y. 362, 19 Am. Rep. 285; Taylor *v.* Bradley, 39 N. Y. 129, 100 Am. Dec. 415; Crawford *v.* Mail, etc., Pub. Co., 22 N. Y. App. Div. 54, 47 N. Y. Suppl. 747; Gillis *v.* Space, 63 Barb. 177; Howson *v.* Mestayer, 14 Daly 83, 3 N. Y. St. 571; Thompson *v.* Wood, 1 Hilt. 93; O'Neill *v.* Traynor, 24 Misc. 686, 53 N. Y. Suppl. 918 [*affirming* 23 Misc. 770, 52 N. Y. Suppl. 770]; Costigan *v.* Mohawk, etc., R. Co., 2 Den. 609, 43 Am. Dec. 758.

North Carolina.—Hendrickson *v.* Anderson, 50 N. C. 246.

Pennsylvania.— Emery *v.* Steckel, 126 Pa. St. 171, 17 Atl. 601, 12 Am. St. Rep. 857; Chamberlin *v.* Morgan, 68 Pa. St. 168; Wolf *v.* Studebaker, 65 Pa. St. 459; King *v.* Steiren, 44 Pa. St. 99, 84 Am. Dec. 419; Heyer *v.* Cunningham Piano Co., 6 Pa. Super. Ct. 504; Smiley *v.* Brownfield, 21 Wkly. Notes Cas. 528.

Texas.— Weber Gas, etc., Engine Co. *v.* Bradford, 34 Tex. Civ. App. 543, 79 S. W. 46; Allgeyer *v.* Rutherford, (Civ. App. 1898) 45 S. W. 628; Southwestern Tel., etc., Co. *v.* Bross, (Civ. App. 1898) 45 S. W. 178. But see Fowler *v.* Waller, 25 Tex. 695, which seems in conflict with this doctrine.

Wisconsin.— Winkler *v.* Racine Wagon, etc., Co., 99 Wis. 184, 74 N. W. 793, 67 N. W. 33; Babcock *v.* Appleton Mfg. Co., 93 Wis. 124, 67 N. W. 33; Barker *v.* Knickerbocker L. Ins. Co., 24 Wis. 630.

United States.— Mathesius *v.* Brooklyn Heights R. Co., 96 Fed. 792; Leatherberry *v.* Odell, 7 Fed. 641.

See 34 Cent. Dig. tit. "Master and Servant," §§ 47, 54.

Contra.— Lewis Co. *v.* Scott, 95 Ky. 484, 26 S. W. 192, 16 Ky. L. Rep. 49, 44 Am. St. Rep. 257 [*following* Whitaker *v.* Sandifer, 1 Duv. (Ky.) 261, and *citing* Frazier *v.* Clark, 88 Ky. 260, 10 S. W. 806, 11 S. W. 83, 10 Ky. L. Rep. 786; Chamberlin *v.* McCallister, 6 Dana (Ky.) 352]; Dufficy *v.* Brennan, 10 Ky. L. Rep. 637; Hill *v.* Hager, 7 Ky. L. Rep. 518.

68. Evidence held inadmissible.— *Alabama.* —Troy Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46.

Illinois.— Arthur Jordan Co. *v.* Covill, 65 Ill. App. 418.

Indiana.— Hinchcliffe *v.* Kountz, 121 Ind. 422, 23 N. E. 271, 16 Am. St. Rep. 403.

Maryland.— Hamill *v.* Foute, 51 Md. 419.

Massachusetts.—Dunton *v.* Derby Desk Co., 186 Mass. 35, 71 N. E. 91; Cutter *v.* Gillette, 163 Mass. 95, 39 N. E. 1010.

Michigan.— Milligan *v.* Sligh Furniture Co., 111 Mich. 629, 70 N. W. 133.

Minnesota.— Johnson *v.* Crookston Lumber Co., 92 Minn. 393, 100 N. W. 225.

Missouri.— Estes *v.* Desnoyers Shoe Co., 155 Mo. 577, 56 S. W. 316; Cartmell *v.* Hunt, 58 Mo. App. 115; Rich *v.* Fendler, 55 Mo. App. 236; Suttie *v.* Aloe, 39 Mo. App. 38; Stone *v.* Vimont, 7 Mo. App. 277.

Nebraska.— Omaha School Dist. *v.* McDonald, 68 Nebr. 610, 94 N. W. 829, 97 N. W. 584.

New York.— Peck *v.* Dexter Sulphite Pulp, etc., Co., 164 N. Y. 127, 58 N. E. 6 [*reversing* 46 N. Y. Suppl. 1098]; Hancock *v.* Flynn, 5 Silv. Sup. 122, 8 N. Y. Suppl. 133; Otto *v.* Young, 88 N. Y. Suppl. 188; Tishman *v.* Kline, 84 N. Y. Suppl. 452.

Washington.— See Prescott *v.* Puget Sound Bridge, etc., Co., 40 Wash. 354, 82 Pac. 606.

See 34 Cent. Dig. tit. "Master and Servant," § 48.

69. See, generally, Contracts, 9 Cyc. 763. Contract admissible to show term and duration of hiring see Tallon *v.* Grand Portage

was not fixed by the contract, and plaintiff introduces evidence of the customary duration of similar contracts, defendant may show a custom of the business to cancel contracts on certain notice.[70] Evidence of the terms of a contract of employment between the master and servants other than plaintiff is not admissible in an action for wrongful discharge, in which the terms of the contract are in issue.[71]

(3) EVIDENCE OF PERFORMANCE. Any evidence tending to establish his cause of action is admissible on behalf of the servant,[72] and where the master justifies, the servant may introduce any competent evidence in rebuttal of the defense,[73] or the improbability of a discharge without probable cause.[74]

(4) EVIDENCE OF BREACH. In an action for wrongful discharge defendant has a right to introduce any competent evidence tending to show a breach of any express or implied condition of the contract of employment by plaintiff,[75] provided the proof is limited to the reasons for the discharge set forth in his plea or answer as a justification.[76] Although an employer cannot dismiss an employee for neglect or misconduct which he has condoned,[77] he may prove such former irregularities to show that the misconduct which led directly to the employee's dismissal was not a solitary instance.[78]

Copper Min. Co., 55 Mich. 147, 20 N. W. 878.

Parol evidence is inadmissible to limit the word "incompatibility," named as one of the grounds of discharge in a contract of employment on a newspaper, to "unsuitableness" of the employee for the employment. Gray *v.* Shepard, 147 N. Y. 177, 41 N. E. 500 [*reversing* 79 Hun 467, 29 N. Y. Suppl. 975].

70. Hart *v.* Thompson, 10 N. Y. App. Div. 183, 41 N. Y. Suppl. 909.

71. Shaff *v.* Schlachetzky, 62 N. Y. App. Div. 459, 70 N. Y. Suppl. 1133.

72. See Brighton *v.* Lake Shore, etc., R. Co., 112 Mich. 217, 70 N. W. 432; Evesson *v.* Ziegfeld, 22 Pa. Super. Ct. 79.

73. *Georgia.*— Vinson *v.* Kelly, 99 Ga. 270, 25 S. E. 630.

Michigan.— Schaub *v.* Arc Welding Co., 123 Mich. 487, 82 N. W. 235; Jones *v.* Graham, etc., Transp. Co., 51 Mich. 539, 16 N. W. 893.

New Jersey.— Gwynn *v.* Hitchner, 67 N. J. L. 654, 52 Atl. 997; Continental Match Co. *v.* Swett, 61 N. J. L. 457, 38 Atl. 969.

New York.— Hare *v.* Mahoney, 60 Hun 576, 14 N. Y. Suppl. 81; Linton *v.* Unexcelled Fire-Works Co., 57 Hun 591, 10 N. Y. Suppl. 928; O'Neill *v.* Traynor, 24 Misc. 686, 53 N. Y. Suppl. 918 [*affirming* 23 Misc. 770, 52 N. Y. Suppl. 251].

Texas.— Allgeyer *v.* Rutherford, (Civ. App. 1898) 45 S. W. 628; Texas Brewing Co. *v.* Walters, (Civ. App. 1897) 43 S. W. 548.

See 34 Cent. Dig. tit. "Master and Servant," § 48.

Where the competency of plaintiff is in issue, rebutting proof need not be limited to work done for defendant. Continental Match Co. *v.* Sweet, 61 N. J. L. 457, 38 Atl. 969. See also Hare *v.* Mahoney, 60 Hun (N. Y.) 576, 14 N. Y. Suppl. 81, in which plaintiff was allowed to show by witnesses knowing his qualifications that he was capable of performing the work satisfactorily. And see Jones *v.* Graham, etc., Transp. Co., 51 Mich. 539, 16 N. W. 893.

Evidence of dissatisfaction.— In an action for wrongful discharge under a contract to do work to the satisfaction of the employer, evidence is admissible on the question whether he was dissatisfied, and whether he discharged the workman because of such dissatisfaction. Gwynn *v.* Hitchner, 67 N. J. L. 654, 52 Atl. 997.

Promise of recommendation admissible in rebuttal see O'Neill *v.* Traynor, 24 Misc. (N. Y.) 686, 53 N. Y. Suppl. 918 [*affirming* 23 Misc. 770, 52 N. Y. Suppl. 251].

74. Gallagher *v.* Wayne Steam Co., 188 Pa. St. 95, 41 Atl. 296.

75. Evidence held admissible to show justification.— *Illinois.*— Gould *v.* Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896 [*affirming* 108 Ill. App. 203]; Mexican Amole Soap Co. *v.* Clarke, 72 Ill. App. 655; Erwin *v.* Holloway, 69 Ill. App. 458; Weaver *v.* Halsey, 1 Ill. App. 558.

Iowa.— Kidd *v.* American Pill, etc., Co., 91 Iowa 261, 59 N. W. 41.

Michigan.— Child *v.* Detroit Mfg. Co., 72 Mich. 623, 40 N. W. 916.

Missouri.— Squire *v.* Wright, 1 Mo. App. 172.

New York.— Fisher *v.* Monroe, 17 N. Y. Suppl. 837.

Vermont.— Stoddard *v.* Hill, 33 Vt. 459.

See 34 Cent. Dig. tit. "Master and Servant," § 48.

Plaintiff may be cross-examined as to his competency, if his incompetency is set up as a ground of defense. Squire *v.* Wright, 1 Mo. App. 172.

Grounds for discharge see *supra*, II, C, 2, a, (II).

76. Proof must be limited to reasons pleaded.— Sams Automatic Car Coupler Co. *v.* League, 25 Colo. 129, 54 Pac. 642.

77. See *supra*, II, C, 2, a, (II), (G).

78. Cook *v.* Halifax School Com'rs, 35 Nova Scotia 405.

(5) Evidence of Other Employment. In an action for wrongful discharge evidence is admissible on behalf of either party, on the question of damages, to show whether plaintiff has, or might have, obtained other remunerative[79] employment, with the exercise of reasonable diligence.[80] But it is not admissible where plaintiff, before his employment by defendant, had been employed by others to sell goods of a similar, but not identical, character with those he was employed to sell for defendant, to give evidence as to the amount of his average earnings while in the employ of such other firms, and as to the amount of his sales for them, for the purpose of showing prospective profits which he might have made under his contract with defendant but for the wrongful termination thereof.[81]

(c) *Weight and Sufficiency.* The weight and sufficiency of the evidence in an action for wrongful discharge is a question dependent upon the facts and circumstances of the particular case, and is one wholly for the determination of the jury, whose finding will not be disturbed unless manifestly erroneous.[82]

(vii) *Damages*[83]—(a) *In General.* Although it has been broadly stated in many cases that a servant who has been wrongfully discharged before the expiration of the term is entitled to recover the stipulated wages, less what he may have received,[84] this is to be taken as merely the *prima facie* measure of his

79. Gwinn *v.* King, 107 Iowa 207, 77 N. W. 834.

Unprofitable employment.— Where it appeared that after his discharge the servant engaged in another occupation, which was unprofitable, it was held proper to exclude evidence offered by defendant to show why it was unprofitable. Heagy *v.* Irondale Lead Co., 101 Mo. App. 361, 73 S. W. 1006.

80. Holloway *v.* Talbot, 70 Ala. 389; Mounce *v.* Kurtz, 101 Iowa 192, 70 N. W. 119; St. Bernard *v.* Reig, 13 Ohio Cir. Ct. 540, 7 Ohio Cir. Dec. 539; Lone Star Salt Co. *v.* Wilderspin, (Tex. Civ. App. 1904) 81 S. W. 327.

81. Roth *v.* Spero, 48 Misc. (N. Y.) 506, 96 N. Y. Suppl. 211.

82. Evidence held sufficient to show the alleged contract and a wrongful discharge (Johnson *v.* Crookston Lumber Co., 92 Minn. 393, 100 N. W. 225), to show unfaithfulness and disobedience (Von Heyne *v.* Thompkins, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. 524), to sustain verdict for plaintiff (Turnbull *v.* Frey, (Nebr. 1904) 99 N. W. 648), to sustain finding that master was not justified (Brightson *v.* H. B. Claflin Co., 84 N. Y. App. Div. 557, 82 N. Y. Suppl. 667), to sustain finding of contract for definite time (Leichman *v.* Jughardt, 4 N. Y. Suppl. 525), to sustain finding of contract for a year (Cox *v.* Baeder, 5 N. Y. St. 51), to show termination by consent (Bell *v.* Gund, 110 Wis. 271, 85 N. W. 1031), to show hiring for a year (Dickinson *v.* Norwegian Plow Co., 101 Wis. 157, 76 N. W. 1108), to show competency (La Coursier *v.* Russell, 82 Wis. 265, 52 N. W. 176), and to show contract alleged by plaintiff (Stubbe *v.* Waldeck, 78 Wis. 437, 47 N. W. 833).

Evidence held insufficient to show mismanagement and neglect of duty (Patterson *v.* Worrell, (La. 1888) 4 So. 308), to show expenses exceeding contract allowance (Sabin *v.* Kendrick, 36 N. Y. App. Div. 443, 55 N. Y. Suppl. 840), to show incompetency (Bloom *v.* P. Cox Shoe Mfg. Co., 31 N. Y. Suppl. 517 [*affirmed* in 154 N. Y. 711, 49 N. E. 56]), to show wrongful discharge (Shelmire *v.* Williams, etc., Co., 68 Hun (N. Y.) 196, 22 N. Y. Suppl. 847), to show sales claimed to have been made by plaintiff (Deitsch *v.* Schanning, 59 N. Y. Super. Ct. 583, 14 N. Y. Suppl. 126), to sustain finding of employment for a "season" (Walker *v.* McCormick, 88 N. Y. Suppl. 406), to show hiring for a definite time (Lertora *v.* Central Fruit Co., 87 N. Y. Suppl. 425), to show dishonesty (Meyerson *v.* Levy, 60 N. Y. Suppl. 996), and to show breach by servant (Hand *v.* Clearfield Coal Co., 143 Pa. St. 408, 22 Atl. 709).

83. Other employment in mitigation of damages see *infra*, II, C, 2, b, (VII), (D), (2).

Deduction or forfeiture and apportionment of wages see *infra*, III, B, 4.

84. *Alabama.*—Moss *v.* Decatur Land Imp., etc., Co., 93 Ala. 269, 9 So. 188, 30 Am. St. Rep. 55.

California.— Webster *v.* Wade, 19 Cal. 291, 79 Am. Dec. 218.

Delaware.— Hitchens *v.* Sussex School Dist. No. 180, (1905) 62 Atl. 897.

Illinois.— Chiles *v.* Belleville Nail Mill Co., 68 Ill. 123; Leyenberger *v.* Rebanks, 55 Ill. App. 441.

Louisiana.— Under Rev. Civ. Code, art. 2749, it has been decided that a laborer, if turned away from his employment without sufficient cause, is entitled to the salaries he would have received had the term of his services arrived. Tete *v.* Lanaux, 45 La. Ann. 1343, 14 So. 241. See also Taylor *v.* Kehlor, 26 La. Ann. 369; Leche *v.* Claverie, 25 La. Ann. 308; Bormann *v.* Thiele, 23 La. Ann. 495; Jones *v.* Jackson, 22 La. Ann. 112; De Puilly *v.* St. Louis Church, 7 La. Ann. 443; Decamp *v.* Hewitt, 11 Rob. 290, 43 Am. Dec. 204; Lartique *v.* Peet, 5 Rob. 91; Shea *v.* Schlatre, 1 Rob. 319; Sherburne *v.* Orleans Cotton Press Co., 15 La. 360; Orphan Asylum *v.* Mississippi Mar. Ins. Co., 8 La. 181. *Compare* Trefethen *v.* Locke, 16 La. Ann. 19, a

recovery, the real measure being the loss actually sustained by him by reason of the wrongful discharge,[85] together with compensation for the services per-

case of contract for letting and hiring unperformed in all its parts.

Maryland.— Cumberland, etc., R. Co. *v.* Slack, 45 Md. 161; Jaffray *v.* King, 34 Md. 217.

Missouri.— Posey *v.* Garth, 7 Mo. 94, 37 Am. Dec. 183.

New York.— Decker *v.* Hassel, 26 How. Pr. 528; Costigan *v.* Mohawk, etc., R. Co., 2 Den. 609, 43 Am. Dec. 758.

Pennsylvania.— Fereira *v.* Sayres, 5 Watts & S. 210, 40 Am. Dec. 496; Schnuth *v.* Aber, 13 Pa. Super. Ct. 174.

South Carolina.— Adams *v.* Cox, 1 Nott & M. 284. See also Clancey *v.* Robertson, 2 Mill 404.

Tennessee.— Children of Israel Cong. *v.* Peres, 2 Coldw. 620; Jones *v.* Jones, 2 Swan 605.

Wyoming.— Dunn *v.* Hereford, 1 Wyo. 206.

United States.— The Hudson, 12 Fed. Cas. No. 6,831.

See 34 Cent. Dig. tit. "Master and Servant," § 50.

Contract price limit of recovery see Lambert *v.* Hartshorne, 65 Mo. 549; Glasgow *v.* Hood, (Tenn. Ch. App. 1900) 57 S. W. 162; Fowler *v.* Waller, 25 Tex. 695; Hassell *v.* Nutt, 14 Tex. 260. See also Metzdorf *v.* Western Supply Co., 60 Minn. 365, 62 N. W. 397.

La. Civ. Code, art. 2720, speaks only of wages, and should not be extended to anything else, as board, lodging, etc. Shea *v.* Schlatre, 1 Rob. 319; Sherburne *v.* Orleans Cotton Press Co., 15 La. 360.

85. *Alabama.*— Fowler *v.* Armour, 24 Ala. 194.

Arkansas.— McDaniel *v.* Parks, 19 Ark. 671.

California.— Davidson *v.* Laughlin, 138 Cal. 320, 71 Pac. 345, 5 L. R. A. N. S. 579; Wiley *v.* California Hosiery Co., (1893) 32 Pac. 522.

Delaware.— Spahn *v.* Willman, 1 Pennew. 125, 39 Atl. 787.

Georgia.— Ansley *v.* Jordan, 61 Ga. 482; Putney *v.* Swift, 54 Ga. 266.

Illinois.— Hessel *v.* Thompson, 65 Ill. App. 44.

Indiana.— Indianapolis *v.* Bly, 39 Ind. 373.

Iowa.— Worthington *v.* Oak, etc., Imp. Co., (1896) 69 N. W. 258.

Kentucky.— Whitaker *v.* Sandifer, 1 Duv. 261; William Tarr Co. *v.* Kimbrough, 34 S. W. 528, 17 Ky. L. Rep. 1284.

Maine.— Miller *v.* Goddard, 34 Me. 102, 56 Am. Dec. 638.

Maryland.— Hamill *v.* Foute, 51 Md. 419.

Massachusetts.— Daniell *v.* Boston, etc., R. Co., 184 Mass. 337, 68 N. E. 337; Tufts *v.* Plymouth Gold Min. Co., 14 Allen 407; Croucher *v.* Oakman, 3 Allen 185; Moulton *v.* Trask, 9 Metc. 577.

Michigan.— Stearns *v.* Lake Shore, etc., R. Co., 112 Mich. 651, 71 N. W. 148; Brighton *v.* Lake Shore, etc., R. Co., 103 Mich. 420, 61 N. W. 550. *Compare* Sax *v.* Detroit, etc., R. Co., 129 Mich. 502, 89 N. W. 368, in which plaintiff was held entitled to only nominal damages.

Minnesota.— McMullan *v.* Dickinson Co., 60 Minn. 156, 62 N. W. 120, 51 Am. St. Rep. 511, 27 L. R. A. 409. *Compare* Bolles *v.* Sachs, 37 Minn. 315, 33 N. W. 862, where the contract was so uncertain that plaintiff could not recover substantial damages.

Missouri.— Nearns *v.* Harbert, 25 Mo. 352; Hansard *v.* Menderson Clothing Co., 73 Mo. App. 584.

Nebraska.— Omaha School Dist. *v.* McDonald, (1903) 94 N. W. 829; Wirth *v.* Calhoun, 64 Nebr. 316, 89 N. W. 785.

New Jersey.— Larkin *v.* Hecksher, 51 N. J. L. 133, 16 Atl. 703, 3 L. R. A. 137.

New York.— Heroy *v.* Fin de Siecle Co., 16 N. Y. App. Div. 171, 44 N. Y. Suppl. 611; De Leon *v.* Echeverria, 45 N. Y. Super. Ct. 610; Cohen *v.* Walker, 38 Misc. 114, 77 N. Y. Suppl. 105; Moody *v.* Leverich, 14 Abb. Pr. N. S. 145; Clark *v.* Marsiglia, 1 Den. 317, 43 Am. Dec. 670.

Ohio.— James *v.* Allen County, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821.

Pennsylvania.— Stewart *v.* Walker, 14 Pa. St. 293.

Texas.— Nations *v.* Cudd, 22 Tex. 550; Allgeyer *v.* Rutherford, (Civ. App. 1898) 45 S. W. 628; Sullivan *v.* McFarland, 1 Tex. App. Civ. Cas. § 1198.

Virginia.— Crescent Horse-Shoe, etc., Co. *v.* Eynon, 95 Va. 151, 27 S. E. 935.

West Virginia.— Rhoades *v.* Chesapeake, etc., R. Co., 49 W. Va. 494, 39 S. E. 209, 89 Am. St. Rep. 826, 55 L. R. A. 170.

Wisconsin.— Kennedy *v.* South Shore Lumber Co., 102 Wis. 284, 78 N. W. 567.

United States.— Alaska Fish, etc., Co. *v.* Chase, 128 Fed. 886, 64 C. C. A. 1.

England.— Emmens *v.* Elderton, 13 C. B. 495, 76 E. C. L. 495, 4 H. L. Cas. 624, 10 Eng. Reprint 606, 18 Jur. 21.

Canada.— Laishley *v.* Goold Bicycle Co., 6 Ont. L. Rep. 319 [*reversing* 4 Ont. L. Rep. 350; and special leave to appeal *refused* in 35 Can. Sup. Ct. 184]; Glenn *v.* Rudd, 3 Ont. L. Rep. 422. *Compare* Jeykal *v.* Nova Scotia Glass Co., 20 Nova Scotia 388.

See 34 Cent. Dig. tit. "Master and Servant," §§ 50, 52.

If the contract is for an indefinite time, only nominal damages can be recovered for its breach. Atkins *v.* Van Buren School Tp., 77 Ind. 447.

Plaintiff entitled to nominal damages, although benefited by discharge, see Excelsior Needle Co. *v.* Smith, 61 Conn. 56, 23 Atl. 693.

That the services were not profitable to the master is immaterial where there is no evidence to show the servant's incompetency or unfaithfulness. Weber Gas, etc., Co. *v.* Bradford, 34 Tex. Civ. App. 543, 79 S. W. 46.

formed.[86] That the damages resulting from a wrongful discharge consist of profits lost will not prevent their recovery, if the evidence furnishes reasonable data upon which to compute them.[87] Where no specific wages have been agreed upon, the measure of damages is obtained by considering what is the usual rate of wages for the employment contracted for, and what time would be lost before a similar employment could be obtained.[88] Where, however, a servant's contract provides that he shall receive a stipulated sum, he is entitled to that sum for the unexpired term.[89]

Where the contract was for permanent employment, and the servant had the option of continuing in it or not, a contention that merely nominal damages were recoverable for his wrongful discharge was held untenable. Daniell *v.* Boston, etc., R. Co., 184 Mass. 337, 68 N. E. 337 [*following* Carnig *v.* Carr, 167 Mass. 544, 46 N. E. 117, 57 Am. St. Rep. 488, 35 L. R. A. 512]. See also Johnson *v.* Walker, 155 Mass. 253, 29 N. E. 522, 31 Am. St. Rep. 550.

Prospective damages recoverable see Stearns *v.* Lake Shore, etc., R. Co., 112 Mich. 651, 71 N. W. 148; Brighton *v.* Lake Shore, etc., R. Co., 103 Mich. 420, 61 N. W. 550; East Tennessee, etc., R. Co. *v.* Staub, 7 Lea (Tenn.) 397.

Prospective expenses for board and lodging recoverable see Estes *v.* Desnoyers Shoe Co., 155 Mo. 577, 56 S. W. 316.

Where a servant occupies a house and garden in part remuneration for his services, he may recover damages for deprivation of the use thereof by reason of his wrongful discharge. Fulton *v.* Heffelfinger, 23 Ind. App. 104, 54 N. E. 1079. But *compare* Odell *v.* Webendorfer, 50 N. Y. App. Div. 579, 64 N. Y. Suppl. 451, in which the money value of the use of the house, etc., was not shown.

Interest allowed as element of damages see Catholic Press Co. *v.* Ball, 69 Ill. App. 591.

Punitive damages not recoverable see Richardson *v.* Wilmington, etc., R. Co., 126 N. C. 100, 35 S. E. 235. But *compare* Sullivan *v.* McFarland, 1 Tex. App. Civ. Cas. § 1198, where it is said that, while remote and speculative damages are not ordinarily recoverable, there might be cases where the elements of malice and gross oppression entered into the breach that would authorize punitory damages.

Depreciation of stock in an insurance company purchased from it by one upon engaging as its agent cannot be considered in estimating damages for his wrongful discharge. Ray *v.* Lewis, 67 Minn. 365, 69 N. W. 1100.

Under Cal. Civ. Code, §§ 3300, 3301, a servant cannot recover damages to his health, nor for injury to his feelings or reputation, by reason of his wrongful discharge. Westwater *v.* Grace Church, 140 Cal. 339, 73 Pac. 1055.

86. *Indiana.*— Ricks *v.* Yates, 5 Ind. 115.

Maryland.— Mallonee *v.* Duff, 72 Md. 283, 19 Atl. 708.

Mississippi.— Prichard *v.* Martin, 27 Miss. 305.

Texas.— Carroll *v.* Welch, 26 Tex. 147.

United States.— The Frank C. Baker, 19 Fed. 332.

See 34 Cent. Dig. tit. "Master and Servant," § 50.

Under a contract for a year at so much a month, which was drawn to the time of his discharge, a servant is entitled to recover what his services were worth during the whole period he worked, deducting the monthly payments, on a *quantum meruit.* Clark *v.* Manchester, 51 N. H. 594. *Compare* Burton *v.* Behan, 47 La. Ann. 117, 16 So. 769.

87. *Michigan.*— Mueller *v.* Bethesda Min. Spring Co., 88 Mich. 390, 50 N. W. 319.

Missouri.— Wilcox *v.* Baer, 85 Mo. App. 587.

New York.— Hess *v.* Citron, 37 Misc. 849, 76 N. Y. Suppl. 994. *Compare* Gifford *v.* Waters, 67 N. Y. 80 [*affirming* 6 Daly 302].

South Dakota.— Cranmer *v.* Kohn, 7 S. D. 247, 64 N. W. 125.

Texas.— Greenwall Theatrical Circuit Co. *v.* Markowitz, 97 Tex. 479, 79 S. W. 1069, 65 L. R. A. 302 [*reversing* (Civ. App. 1903) 75 S. W. 74].

Wisconsin.— Schumaker *v.* Heinemann, 99 Wis. 251, 74 N. W. 785.

Canada.— Laishley *v.* Goold Bicycle Co., 6 Ont. L. Rep. 319 [*reversing* 4 Ont. L. Rep. 350].

See 34 Cent. Dig. tit. "Master and Servant," § 50.

Compare Kelly *v.* Carthage Wheel Co., 62 Ohio St. 598, 57 N. E. 984.

Where the contract is for no definite term, prospective commissions are not recoverable by a salesman upon his discharge. Louisville Soap Co. *v.* Vance, 58 S. W. 985, 22 Ky. L. Rep. 847.

The rule for estimating the amount of sales plaintiff would have made during the remainder of his term should be based on the sales made during the part of the term which had expired at the time of the discharge, modified by the fact as to whether the sales would be greater or less during the early or later period. Wiley *v.* California Hosiery Co., (Cal. 1893) 32 Pac. 522.

88. Beckham *v.* Drake, 2 H. L. Cas. 579, 606, 13 Jur. 921, 9 Eng. Reprint 1213, per Erle, J. See also Schmerenbeck *v.* Funke, 17 N. Y. Suppl. 717.

Recovery based on salary under a former contract see Thompson *v.* Detroit, etc., Copper Co., 80 Mich. 422, 45 N. W. 189.

89. Schreiber *v.* Klingenstein, 95 N. Y. Suppl. 549, in which the servant's contract provided that he should receive ten dollars a week when traveling, and twenty dollars a week when at home, and to travel as directed

(B) *As Dependent on Time of Bringing Suit* — (1) SUIT BROUGHT AFTER EXPIRATION OF TERM. Where an action for wrongful discharge is brought after the expiration of the term of service, the servant is entitled to full damages, which are *prima facie* the stipulated wages for the term.[90]

(2) SUIT BROUGHT BEFORE EXPIRATION OF TERM[91] — (a) TRIAL BEFORE EXPIRATION OF TERM. There is a decided conflict of authority as to the damages recoverable where the action is tried before the expiration of the term. Some decisions hold that the damages are to be computed up to, but not after, the time of trial,[92] while other cases of equally respectable authority hold that damages for the whole term are recoverable.[93]

(b) TRIAL AFTER EXPIRATION OF TERM. Where a servant's action is brought before the expiration of the term of service, but the trial is had after the expiration of the term, damages may be awarded as though the suit had been brought after the expiration of the term.[94]

(c) *Where Contract Is Terminable on Notice.* Where, by its terms or by custom, a contract of employment may be terminated at any time upon the giving of a specified notice, the damages for a wrongful discharge can be no more than the wages which would have accrued under the contract after the notice, had one been given.[95]

by his employer. He was wrongfully discharged and it was held that he was entitled to receive twenty dollars per week for the unexpired term.

Prospective profits.— In a suit for breach of contract of employment for a year at a fixed commission with a certain advance per week, it was held that plaintiff was entitled to recover prospective profits which it was reasonably certain would have been realized but for defendant's default, although the amount was necessarily uncertain. Roth *v.* Spero, 48 Misc. (N. Y.) 506, 96 N. Y. Suppl. 211.

90. See *supra*, II, C, 2, b, (VII), (A), and cases cited.

91. Actions for instalments see *supra*, II, C, 2, b, (II), (III), (B), (2).

92. *Alabama.*— Fowler *v.* Armour, 24 Ala. 194. See also Wright *v.* Falkner, 37 Ala. 274; Martin *v.* Everett, 11 Ala. 375; Davis *v.* Ayres, 9 Ala. 292.

Arkansas.— Van Winkle *v.* Satterfield, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853.

Illinois.— McCormick Harvesting Mach. Co. *v.* Cordsiemon, 101 Ill. App. 140.

Minnesota.— McMullan *v.* Dickinson Co., 60 Minn. 156, 62 N. W. 120, 51 Am. St. Rep. 511, 27 L. R. A. 409.

New York.— Zender *v.* Seliger-Toothill Co., 17 Misc. 126, 39 N. Y. Suppl. 346; Bassett *v.* French, 10 Misc. 672, 31 N. Y. Suppl. 667; Toles *v.* Hazen, 57 How. Pr. 516.

Wisconsin.— Gordon *v.* Brewster, 7 Wis. 355. And see Barker *v.* Knickerbocker L. Ins. Co., 24 Wis. 630.

United States.— Schroeder *v.* California Yukon Trading Co., 95 Fed. 296; Darst *v.* Mathieson Alkali Works, 81 Fed. 284.

Canada.— See McGuffin *v.* Cayley, 2 U. C. Q. B. 308, which was an action on the common counts.

See 34 Cent. Dig. tit. "Master and Servant," § 51.

93. *Indiana.*— Hamilton *v.* Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384, (1896) 43 N. E. 873; Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

Massachusetts.— Cutter *v.* Gillette, 163 Mass. 95, 39 N. E. 1010; Blair *v.* Laflin, 127 Mass. 518.

Michigan.— Stearns *v.* Lake Shore, etc., R. Co., 112 Mich. 651, 71 N. W. 148; Brighton *v.* Lake Shore, etc., R. Co., 103 Mich. 420, 61 N. W. 550.

Missouri.— Ream *v.* Watkins, 27 Mo. 516, 72 Am. Dec. 283.

New Jersey.— Moore *v.* Central Foundry Co., 68 N. J. L. 14, 52 Atl. 292.

Pennsylvania.— Wilke *v.* Harrison, 166 Pa. St. 202, 30 Atl. 1125.

Texas.— See Weber Gas, etc., Engine Co. *v.* Bradford, 34 Tex. Civ. App. 543, 79 S. W. 46, in which plaintiff only asked damages up to the time of trial, thereby relinquishing any claim for the balance of the term.

United States.— Pierce *v.* Tennessee Coal, etc., Co., 173 U. S. 1, 19 S. Ct. 335, 43 L. ed. 591 [*reversing* 81 Fed. 814, 26 C. C. A. 632].

Canada.— Hopkins *v.* Gooderham, 10 Brit. Col. 250.

See 34 Cent. Dig. tit. "Master and Servant," § 51.

94. Wilkinson *v.* Black, 80 Ala. 329; Halsey *v.* Meinrath, 54 Mo. App. 335; Solomon *v.* Vallette, 152 N. Y. 147, 46 N. E. 324 [*reversing* 9 Misc. 389, 30 N. Y. Suppl. 193]; Everson *v.* Powers, 89 N. Y. 527, 42 Am. Rep. 319; O'Neill *v.* Traynor, 24 Misc. (N. Y.) 686, 53 N. Y. Suppl. 918 [*affirming* 23 Misc. 770, 52 N. Y. Suppl. 251]; Brnell *v.* Colell, 1 N. Y. City Ct. 308; Howay *v.* Going-Northrup Co., 24 Wash. 88, 64 Pac. 135, 85 Am. St. Rep. 942.

95. Watson *v.* Russell, 149 N. Y. 388, 44 N. E. 161 [*reversing* 7 Misc. 636, 28 N. Y. Suppl. 26 (*affirming* 5 Misc. 352, 25 N. Y. Suppl. 517)]; Dallas *v.* Murry, 37 Misc. (N. Y.) 599, 75 N. Y. Suppl. 1040; Briscoe

(D) *Evidence of Damage* — (1) IN GENERAL. In an action for wrongful discharge the original contract is admissible in evidence, as showing the value of the services rendered,[96] and all relevant facts transpiring subsequently to the discharge may be considered in estimating the damages.[97] Where the servant is to be paid, wholly or in part, otherwise than in money, evidence is admissible to show the money value of the medium of payment;[98] and, in the case of a traveling salesman who is entitled to expenses on the road, it is permissible to show what such expenses would probably have been had the contract not been broken.[99] Under an agreement to pay an injured servant certain wages as long as his disability to do full work shall continue, the servant may, in an action for wrongful discharge, where it is shown that the injury is permanent, introduce evidence as to his expectancy of life.[1] Where the declaration contains no allegation of malice or of special damage beyond the loss of position and wages, the admission of evidence of special damage by loss of character is reversible error.[2]

(2) OTHER EMPLOYMENT IN MITIGATION OF DAMAGES — (a) IN GENERAL. A discharged servant cannot lie by unemployed for the remainder of his term, and then claim full compensation; he is bound to make the best use of his time, and seek other employment;[3] and the master may show in mitigation of damages that the servant has received compensation, during the unexpired term of the contract, from other employment, or that he might have received compensation in other similar employment by using proper efforts.[4] *Prima facie* the measure of dam-

v. Litt, 19 Misc. (N. Y.) 5, 42 N. Y. Suppl. 908; Fisher *v.* Monroe, 2 Misc. (N. Y.) 326, 21 N. Y. Suppl. 995 [*reversing* 1 Misc. 14, 20 N. Y. Suppl. 664]; Hartley *v.* Harman, 11 A. & E. 798, 9 L. J. Q. B. 179, 3 P. & D. 567, 39 E. C. L. 423; Fewings *v.* Tisdal, 5 D. & L. 196, 1 Exch. 295, 11 Jur. 977, 17 L. J. Exch. 18; Baker *v.* Denkera Ashanti Min. Corp., 20 T. L. R. 37; Holloway *v.* Lindberg, 29 Nova Scotia 460. *Compare* Griffin *v.* Brooklyn Ball Club, 68 N. Y. App. Div. 566, 73 N. Y. Suppl. 864 [*affirmed* in 174 N. Y. 535, 66 N. E. 1109]. *Contra,* Leslie *v.* Robie, 84 N. Y. Suppl. 289.

96. Britt *v.* Hays, 21 Ga. 157.

Evidence of the value of an employee's services is inadmissible in an action based on a special contract entered into for a definite period of time to recover wages expressly agreed upon in the contract. Mahon *v.* Daly, 70 Ill. 653.

Value of invention. — Where the contract fixes a definite compensation, and provides that all inventions shall belong to the master, the value of a particular invention is immaterial in an action for wrongful discharge. Pape *v.* Lathrop, 18 Ind. App. 633, 46 N. E. 154.

97. Roberts *v.* Rigden, 81 Ga. 440, 7 S. E. 742; Roberts *v.* Crowley, 81 Ga. 429, 7 S. E. 740.

98. Value of crop.—Where one had engaged to serve as overseer for a specified part of the crop, and was discharged before the term of service was ended, he may introduce evidence to show the value of the crop. Hassell *v.* Nutt, 14 Tex. 260.

Value of house and food.—Where part of plaintiff's compensation was to be the use of a house and food for himself and family, evidence as to the value of such house and food is admissible. Western Union Beef Co. *v.* Kirchevalle, (Tex. Civ. App. 1894) 26 S. W. 147.

99. Estes *v.* Desnoyers Shoe Co., 155 Mo. 577, 56 S. W. 316. *Compare* Brown *v.* Baldwin, etc., Co., 13 N. Y. Suppl. 893, in which evidence of expenses after the breach, and after the employee had gone into business for himself, was held inadmissible.

1. Pierce *v.* Tennessee Coal, etc., Co., 173 U. S. 1, 19 S. Ct. 335, 43 L. ed. 591 [*reversing* 81 Fed. 814, 26 C. C. A. 632].

2. Lee *v.* Hill, 84 Va. 919, 6 S. E. 473.

3. *California.*— Utter *v.* Chapman, 38 Cal. 659.

Kentucky.— Raine *v.* Newberger, 14 Ky. L. Rep. 524.

Missouri.— Tenzer *v.* Gilmore, 114 Mo. App. 210, 89 S. W. 341.

Vermont.— Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

England.— Emmens *v.* Elderton, 13 C. B. 495, 76 E. C. L. 495, 4 H. L. Cas. 624, 10 Eng. Reprint 606, 18 Jur. 21 [*following* Beckham *v.* Drake, 2 H. L. Cas. 579, 13 Jur. 921, 9 Eng. Reprint 1213].

4. *Alabama.*— Holloway *v.* Talbot, 70 Ala. 389.

Arkansas.— Van Winkle *v.* Satterfield, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853; McDaniel *v.* Parks, 19 Ark. 671; Walworth *v.* Pool, 9 Ark. 394.

California.— Rosenberger *v.* Pacific Coast R. Co., 111 Cal. 313, 43 Pac. 963.

Colorado.— Saxonia Min., etc., Co. *v.* Cook, 7 Colo. 569, 4 Pac. 1111.

Delaware.— Spahn *v.* Willman, 1 Pennew. 125, 39 Atl. 787.

Illinois.— School Directors *v.* Birch, 93 Ill. App. 499; McKinley *v.* Goodman, 67 Ill. App. 374; Hessel *v.* Thompson, 65 Ill. App. 44; Fish *v.* Glass, 54 Ill. App. 655.

Indiana.— Gazette Printing Co. *v.* Morss,

ages for a wrongful discharge is the stipulated wages for the unexpired term, and the burden is on the master to show that the servant has obtained, or might, with reasonable diligence, have obtained, other employment.[5]

(b) EFFORTS TO OBTAIN, AND NATURE OF, EMPLOYMENT. While it is the duty of a discharged servant to seek other employment,[6] he is only required to use reasonable diligence[7] to obtain employment of substantially the same character and

60 Ind. 153; Pape *v.* Lathrop, 18 Ind. App. 633, 46 N. E. 154 [*following* Hamilton *v.* Love, (App. 1896) 43 N. E. 873].

Kentucky.— Warren *v.* Nash, 68 S. W. 658, 24 Ky. L. Rep. 479; John C. Lewis Co. *v.* Scott, 14 Ky. L. Rep. 713.

Maryland.— Baltimore Base Ball Club, etc., Co. *v.* Pickett, 78 Md. 375, 28 Atl. 279, 44 Am. St. Rep. 304, 22 L. R. A. 690; Cumberland, etc., R. Co. *v.* Slack, 45 Md. 161.

Michigan.— Champlain *v.* Detroit Stamping Co., 68 Mich. 238, 36 N. W. 57; Owen *v.* Union Match Co., 48 Mich. 348, 12 N. W. 175.

Minnesota.— Bennett *v.* Morton, 46 Minn. 113, 48 N. W. 678; Williams *v.* Anderson, 9 Minn. 50.

Mississippi.— Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381.

Missouri.— Estes *v.* Desnoyers Shoe Co., 155 Mo. 577, 56 S. W. 316; Boland *v.* Glendale Quarry Co., 127 Mo. 520, 30 S. W. 151; Lewis *v.* Atlas Mut. L. Ins. Co., 61 Mo. 534; Stevens *v.* Crane, 37 Mo. App. 487.

New York.— Southwick *v.* Bernhard, 60 N. Y. Super. Ct. 493; Heim *v.* Wolf, 1 E. D. Smith 70; Gluck *v.* Duberstein, 28 Misc. 777, 59 N. Y. Suppl. 497; Toplitz *v.* Ullman, 20 N. Y. Suppl. 50; Huntington *v.* Ogdensburgh, etc., R. Co., 33 How. Pr. 416; Costigan *v.* Mohawk, etc., R. Co., 2 Den. 609, 43 Am. Dec. 758.

North Carolina.— Hendrickson *v.* Anderson, 50 N. C. 246.

Ohio.— See St. Bernard *v.* Reig, 13 Ohio Cir. Ct. 540, 7 Ohio Cir. Dec. 539, to the effect that it is a complete defense that, during the entire time in which the services were to have been rendered, plaintiff had like employment from others at greater compensation.

Pennsylvania.— Rightmire *v.* Hirner, 188 Pa. St. 325, 41 Atl. 538; King *v.* Steiren, 44 Pa. St. 99, 84 Am. Dec. 419.

South Carolina.— Latimer *v.* York Cotton Mills, 66 S. C. 135, 44 S. E. 559. See also Hughes *v.* School Dist. No. 37, 66 S. C. 259, 44 S. E. 784.

Tennessee.— Allen *v.* Maronne, 93 Tenn. 161, 23 S. W. 113; Children of Israel Cong. *v.* Peres, 2 Coldw. 620; Jones *v.* Jones, 2 Swan 605.

Texas.— Meade *v.* Rutledge, 11 Tex. 44; Weber Gas, etc., Engine Co. *v.* Bradford, 34 Tex. Civ. App. 543, 79 S. W. 46; Allgeyer *v.* Rutherford, (Civ. App. 1898) 45 S. W. 628; Efron *v.* Clayton, (Civ. App. 1896) 35 S. W. 424; Bluefields Banana Co. *v.* Wollfe, (Civ. App. 1893) 22 S. W. 269; Abernathy *v.* Hewlett, 2 Tex. App. Civ. Cas. § 805; Sullivan *v.* McFarland, 1 Tex. App. Civ. Cas. § 1198.

Vermont.— Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

Wisconsin.— Winkler *v.* Racine Wagon, etc., Co., 99 Wis. 184, 74 N. W. 793; Littlefield *v.* William Bergenthal Co., 87 Wis. 394, 58 N. W. 743; La Coursier *v.* Russell, 82 Wis. 265, 52 N. W. 176; Barker *v.* Knickerbocker L. Ins. Co., 24 Wis. 330; Gordon *v.* Brewster, 7 Wis. 355.

United States.— Leatherberry *v.* Odell, 7 Fed. 641.

See 34 Cent. Dig. tit. "Master and Servant," § 54.

Presumption as to wages obtained.—When, after his discharge, a servant obtains employment, the presumption is that he gets the best wages he can, unless it be shown by the adverse party, or otherwise, that he accepted less wages than he could have obtained. Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381.

Only the amount earned can be credited, not the actual value of the services in the new employment. Toplitz *v.* Ullman, 20 N. Y. Suppl. 50. But *compare* Jones *v.* Jones, 2 Swan (Tenn.) 605.

Where the amount received exceeds that contracted for there can be no recovery. Laishley *v.* Goold Bicycle Co., 4 Ont. L. Rep. 350. See also St. Bernard *v.* Reig, 13 Ohio Cir. Ct. 540, 7 Ohio Cir. Dec. 539. *Contra*, Wilkinson *v.* Black, 80 Ala. 329; Armfield *v.* Nash, 31 Miss. 361.

Money earned after discharge out of working hours, and which the servant might have earned extra if he had been regularly employed, does not entitle defendant to an abatement of the damages. Allgeyer *v.* Rutherford, (Tex. Civ. App. 1898) 45 S. W. 628.

Refusal of less wages before discharge is no ground for reducing damages. People's Co-operative Assoc. *v.* Lloyd, 77 Ala. 387.

Where other employment cannot be obtained, the measure of damages is the stipulated wages for the unexpired term. Prichard *v.* Martin, 27 Miss. 305; Southwick *v.* Bernhard, 60 N. Y. Super. Ct. 493; Heim *v.* Wolf, 1 E. D. Smith (N. Y.) 70; Byrd *v.* Boyd, 4 McCord (S. C.) 246, 17 Am. Dec. 740.

5. See *supra*, II, C, 2, h, (VI), (B), (5).

6. See *supra*, II, C, 2, b, (VI), (A), (3).

7. *Michigan.*— Jones *v.* Graham, etc., Transp. Co., 51 Mich. 539, 16 N. W. 893.

Minnesota.— McMullen *v.* Dickinson Co., 63 Minn. 405, 65 N. W. 661, 663, where it is said that an honest effort to obtain other employment is all that is necessary.

New Jersey.— Goebel *v.* Pomeroy Bros. Co., 69 N. J. L. 610, 55 Atl. 690, to the effect that reasonably earnest efforts must be made.

New York.— Ruland *v.* Waukesha Water

grade as that in which he had been employed,[8] and he is not bound to accept employment in a different place,[9] nor under a contract requiring his services for a period in excess of the unexpired term.[10] But where an employee is offered the same or like employment to that for which he has been discharged for the same period and on the same terms, and before he has sustained any injury by reason of the discharge, he cannot recover any damages.[11] A servant is not entitled to recover his expenses in seeking other employment, in an action for wrongful discharge, although his earnings in such other employment are charged in reduction of his damages.[12]

(c) REËMPLOYMENT BY MASTER. A master may prove in mitigation of damages that he offered to give the discharged servant employment at the same compensation and in the same general line of business as that provided for by the contract.[13] But a servant cannot be required to accept a new employment under circumstances which permit the claim that he consents to a modification of the contract, and an abandonment of his right of action, and ordinarily, acceptance of service in silence would at least give color to a claim that the contract was modified by consent, tacit, if not express.[14] Nor is a servant who has been discharged

Co., 52 N. Y. App. Div. 280; 65 N. Y. Suppl. 87; Bassett *v.* French, 10 Misc. 672, 31 N. Y. Suppl. 667.

Texas.— Gulf, etc., R. Co. *v.* Jackson, 29 Tex. Civ. App. 342, 69 S. W. 89.

United States.— Alaska Fish, etc., Co. *v.* Chase, 128 Fed. 886, 64 C. C. A. 1; Leatherberry *v.* Odell, 7 Fed. 641.

See 34 Cent. Dig. tit. "Master and Servant," § 55.

The cancellation of an engagement contracted after discharge, if in good faith, because of sickness, is no breach of the obligation to the original master. Bassett *v.* French, 10 Misc. (N. Y.) 672, 31 N. Y. Suppl. 667. *Compare* Champlain *v.* Detroit Stamping Co., 68 Mich. 238, 36 N. W. 57.

Accepting less remunerative employment.— Where a servant, after notice that he will be discharged on a certain day, succeeds in finding only a less remunerative employment, which he enters on the day of his discharge, his failure to seek other employment will not defeat his right to recover as for a wrongful discharge. Adams *v.* Fitzpatrick, 56 N. Y. Super. Ct. 580, 5 N. Y. Suppl. 181 [*affirmed* in 125 N. Y. 124, 26 N. E. 143].

Expectation of recall.— A servant is not bound to seek other employment, where he is waiting in reasonable expectation of being recalled by his master at any time. Mathews *v.* Wallace, 104 Mo. App. 96, 78 S. W. 296.

8. Need not accept substantially different employment.—*Alabama.*—Wilkinson *v.* Black, 80 Ala. 329; Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8.

Illinois.— McKinley *v.* Goodman, 67 Ill. App. 374.

Indiana.— Hinchcliffe *v.* Koontz, 121 Ind. 422, 23 N. E. 271, 16 Am. St. Rep. 403.

Michigan.— Jones *v.* Graham, etc., Transp. Co., 51 Mich. 539, 16 N. W. 893.

New York.— Fuchs *v.* Koerner, 107 N. Y. 529, 14 N. E. 445 [*affirming* 52 N. Y. Super. Ct. 77]; Briscoe *v.* Litt, 19 Misc. 5, 42 N. Y. Suppl. 908; Costigan *v.* Mohawk, etc., R. Co., 2 Den. 609, 43 Am. Dec. 758.

Pennsylvania.— Harger *v.* Jenkins, 17 Pa. Super. Ct. 615.

Texas.— Simon *v.* Allen, 76 Tex. 398, 13 S. W. 296; Weber Gas, etc., Engine Co. *v.* Bradford, 34 Tex. Civ. App. 543, 79 S. W. 46.

United States.— Leatherberry *v.* Odell, 7 Fed. 641.

See 34 Cent. Dig. tit. "Master and Servant," § 55.

9. Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8; Costigan *v.* Mohawk, etc., R. Co., 2 Den. (N. Y.) 609, 43 Am. Dec. 758.

10. Griffin *v.* Brooklyn Ball Club, 68 N. Y. App. Div. 566, 73 N. Y. Suppl. 864 [*affirmed* in 174 N. Y. 535, 66 N. E. 1109], where it was held that, instead of accepting such a contract, the servant might accept other employment at much less salary.

11. Kramer *v.* Wolf Cigar Stores Co., (Tex. 1906) 91 S. W. 775, 777 [*reversing* upon another point (Civ. App. 1905) 89 S. W. 995], where it is said that "if by reasonable diligence and within a reasonable time he [the servant] could have secured another position of substantially the same character and grade as that which he had held with defendant, such amount as he could have earned therein during the entire term of service should be deducted from the contract price."

12. Tickler *v.* Andrae Mfg. Co., 95 Wis. 352, 70 N. W. 292.

13. Birdsong *v.* Ellis, 62 Miss. 418; Squire *v.* Wright, 1 Mo. App. 172; Bigelow *v.* American Forcite Powder Mfg. Co., 39 Hun (N. Y.) 599. *Contra*, Younggerg *v.* Lamberton, 91 Minn. 100, 97 N. W. 571; Levin *v.* Standard Fashion Co., 16 Daly (N. Y.) 404, 11 N. Y. Suppl. 706 [*reversing* 4 N. Y. Suppl. 867].

Right of action not waived by accepting new employment see Beck *v.* Walkers, 24 Pa. Co. Ct. 403.

14. Chisholm *v.* Preferred Bankers' L. Assur. Co., 112 Mich. 50, 70 N. W. 415 [*following* Thompson *v.* Powell, 77 Ala. 391]. See also Jackson *v.* Steamboat Rock Independent School Dist., (Iowa 1899) 77 N. W.

bound to return to the service upon the master's recall, or to perform any of the duties required under the contract.[15]

(d) WHERE SERVANT WORKS FOR HIMSELF. Where after his discharge a servant engages in work on his own account, the value of his work to himself should be taken into account in assessing his damages in an action for wrongful discharge.[16]

(VIII) *QUESTIONS OF LAW AND FACT*—(A) *In General.* In an action for wrongful discharge, as in other actions for breach of contract, questions of law are for the court,[17] while questions of fact, or mixed questions of law and fact, are for the jury, under proper instructions by the court.[18]

(B) *Sufficiency of Grounds For Discharge.* What constitutes good and sufficient cause for the discharge of a servant is a question of law,[19] and where the facts are undisputed, it is for the court to say whether the discharge was justified.[20] But where the facts are disputed it is for the jury to say upon all the evidence whether there were sufficient grounds to warrant the discharge.[21]

860; Howard *v.* Vaughan-Mounig Shoe Co., 82 Mo. App. 405; Whitmarsh *v.* Littlefield, 46 Hun (N. Y.) 418.

15. Mitchell *v.* Toale, 25 S. C. 238, 60 Am. Rep. 502.

16. Perry *v.* Simpson Waterproof Mfg. Co., 37 Conn. 520; Lee *v.* Hampton, 79 Miss. 321, 30 So. 721; Richardson *v.* Hartmann, 68 Hun (N. Y.) 9, 22 N. Y. Suppl. 645; Toplitz *v.* Ullman, 2 Misc. (N. Y.) 130, 20 N. Y. Suppl. 863. *Compare* Kyle *v.* Pou, 96 Ga. 166, 23 S. E. 114. But see Harrington *v.* Gies, 45 Mich. 374, 8 N. W. 87.

17. Where there is no evidence to sustain plaintiff's cause of action, the complaint should be dismissed. Kuno *v.* Fitzgerald Bros. Brewing Co., 65 N. Y. App. Div. 612, 72 N. Y. Suppl. 742. *Compare* Barber *v.* Roseboro, 97 N. C. 192, 1 S. E. 849, where it was held that the court should direct a verdict.

Construction of contract question for the court see Hart *v.* Ryer, 16 N. Y. Suppl. 855.

18. See the following cases:

Georgia.—Alexander *v.* Americus, 61 Ga. 36.

Massachusetts.—Dunton *v.* Derby Desk Co., 186 Mass. 35, 71 N. E. 91.

Missouri.—Bloom *v.* Pope, 36 Mo. App. 410.

New York.—Gates *v.* Stead, 54 N. Y. App. Div. 448, 66 N. Y. Suppl. 829; Newcombe *v.* Fraser, 18 N. Y. Suppl. 856.

Ohio.—Creasey *v.* Amazon Ins. Co., 9 Ohio Dec. (Reprint) 315, 12 Cinc. L. Bul. 153.

Wisconsin.—Knutson *v.* Knapp, 35 Wis. 86.

England.—Hopkins *v.* Wanostrocht, 2 F. & F. 368.

See 34 Cent. Dig. tit. "Master and Servant," § 57.

Existence of contract question for jury.—Dunton *v.* Derby Desk Co., 186 Mass. 35, 71 N. E. 91.

Duration of contract question for jury see Davis *v.* Ames Mfg. Co., 177 Mass. 54, 58 N. E. 280; Thompson *v.* Detroit, etc., Copper Co., 80 Mich. 422, 45 N. W. 189; Tallon *v.* Grand Portage Copper Min. Co., 55 Mich. 147, 20 N. W. 878; Jackson *v.* Illinois Cent. R. Co., 76 Miss. 607, 24 So. 874; Zender *v.* Seliger Toothill Co., 16 Misc. (N. Y.) 296, 38 N. Y. Suppl. 116; Howell *v.* Joseph Edwards Dredging Co., 13 N. Y. Suppl. 349 [*affirmed* in 129 N. Y. 625, 29 N. E. 1030].

Fact of discharge question for jury see Dexter *v.* Ivins, (N. Y. 1892) 30 N. E. 986; Ryan *v.* New York, 86 Hun (N. Y.) 223, 33 N. Y. Suppl. 260; Klaw *v.* Ehrich, 31 N. Y. Suppl. 773; Markham *v.* Markham, 110 N. C. 356, 14 S. E. 963; Lewis *v.* Moorhead, 201 Pa. St. 245, 50 Atl. 960.

Diligence in seeking other employment a question for the jury see Connor *v.* Hurley, 112 Mich. 622, 71 N. W. 158.

Reasonableness of excuse for not seeking other employment is a question for the jury. Chisholm *v.* Preferred Bankers' L. Assur. Co., 112 Mich. 50, 70 N. W. 415.

19. Stevens *v.* Crane, 37 Mo. App. 487; Forsyth *v.* McKinney, 56 Hun (N. Y.) 1, 8 N. Y. Suppl. 561; Dunkell *v.* Simons, 15 Daly (N. Y.) 352, 7 N. Y. Suppl. 655 [*reversing* 5 N. Y. Suppl. 417]; Honigstein *v.* Hollingsworth, 39 Misc. (N. Y.) 314, 79 N. Y. Suppl. 867; Hendrickson *v.* Anderson, 50 N. C. 246; McIntyre *v.* Hockin, 16 Ont. App. 498.

20. Edgecomb *v.* Buckhout, 146 N. Y. 332, 40 N. E. 991, 28 L. R. A. 816 [*affirming* 83 Hun 168, 31 N. Y. Suppl. 655]; Peniston *v.* John Y. Huber Co., 196 Pa. St. 580, 46 Atl. 934 [*following* Matthews *v.* Park, 146 Pa. St. 384, 23 Atl. 208].

21. *California.*—Nash *v.* Kreling, (1899) 56 Pac. 260.

Georgia.—Waxelbaum *v.* Limberger, 78 Ga. 43, 3 S. E. 257; Echols *v.* Fleming, 58 Ga. 156.

Illinois.—Heminway, etc., Silk Co. *v.* Porter, 94 Ill. App. 609; Stover Mfg. Co. *v.* Latz, 42 Ill. App. 230.

Indiana.—Hamilton *v.* Love, (1896) 43 N. E. 873.

Michigan.—Shaver *v.* Ingham, 58 Mich. 649, 26 N. W. 162, 55 Am. Rep. 712.

Missouri.—Suttie *v.* Aloe, 59 Mo. App. 38; Carson *v.* McCormick Harvesting Mach. Co., 36 Mo. App. 462.

New York.—Conklin *v.* John H. Woodbury Dermatological Inst., 170 N. Y. 571, 62 N. E. 1095 [*affirming* 51 N. Y. App. Div. 638, 64 N. Y. Suppl. 608]; Day *v.* American Machinist Press, 86 N. Y. App. Div. 613, 83 N. Y. Suppl. 263; Brownell *v.* Ehrich, 43 N. Y.

(c) *Waiver or Condonation by Master.* Whether by his conduct a master has waived or condoned a breach of contract which would justify the discharge of his servant is a question of fact for the jury.[22]

(ix) *Instructions.* The general principles of law governing instructions in other actions for breach of contract are controlling in actions for wrongful discharge.[23]

(x) *Appeal and Error.* On appeal from, or writ of error to, a judgment in an action for wrongful discharge, the judgment will not be reversed for harmless or non prejudicial error;[24] nor, where judgment is prayed for the amount agreed on as wages, and the defense is in bar, can a verdict for plaintiff for such amount be attacked for the first time on error, because the complaint failed to state that the breach was to plaintiff's damage in so much money.[25] Where the master fails to prove that the servant has been employed since his discharge, or that employment was offered him and refused, and the evidence is vague and indefinite as to the servant's earnings during that time, the judgment will not be reversed because no deduction was made.[26] Where plaintiff, who was employed for a definite term of years, the master having the right to terminate the contract at the end of the first year on paying him a stipulated sum, was discharged before the end of the year, and brought suit for such sum, expressly disclaiming any demand for loss of wages, which, however, was conceded by the master, on a reversal of plaintiff's judgment for the amount sued for, he is entitled to judgment on the master's admitted liability.[27]

(xi) *Attorney's Fees.* An act providing for attorney's fees when an employee brings suit for wages owing under the terms of the contract of employment does not apply when the employee sues for damages for a wrongful discharge.[28]

III. SERVICES AND COMPENSATION.

A. Performance of Services[29] — **1. Duty of Master to Furnish Work and Appliances.** Where a contract for services is entered into between master and servant, there is an implied agreement on the part of the master to furnish employment,[30] so that the master is liable, although he temporarily or permanently

App. Div. 369, 60 N. Y. Suppl. 112; Jackson *v.* New York Post Graduate Medical School, etc., 6 Misc. 101, 26 N. Y. Suppl. 27 [*reversing* 3 Misc. 622, 23 N. Y. Suppl. 119]; Webb *v.* Whitesell, 87 N. Y. Suppl. 454; Marsh *v.* Bergman, 84 N. Y. Suppl. 469; Lippus *v.* Columbus Watch Co., 7 N. Y. Suppl. 478.

Pennsylvania.— Peniston *v.* John Y. Huber Co., 196 Pa. St. 580, 46 Atl. 934; Hargar *v.* Jenkins, 17 Pa. Super. Ct. 615.

Vermont.— Fairbanks *v.* Nelson, 56 Vt. 657.

England.— Smith *v.* Allen, 3 F. & F. 157.

See 34 Cent. Dig. tit. "Master and Servant." § 58.

Where the servant binds himself to give satisfaction, the employer is the sole judge as to whether his work is satisfactory, and the question of the reasonableness of his judgment is not for the jury. Koehler *v.* Buhl, 94 Mich. 496, 54 N. W. 157.

22. Drennen *v.* Satterfield, 119 Ala. 84, 24 So. 723; Jonas *v.* Field, 83 Ala. 445, 3 So. 893; McMurray *v.* Boyd, 58 Ark. 504, 25 S. W. 505; McGrath *v.* Bell, 33 N. Y. Super. Ct. 195; Leatherberry *v.* Odell, 7 Fed. 641.

23. See Contracts, 9 Cyc. 778.

As to instructions generally see Trial.

24. Waxelbaum *v.* Limberger, 78 Ga. 43, 3 S. E. 257; Lambert *v.* Hartshorne, 65 Mo. 549; Norris *v.* Cargill, 57 Wis. 251, 15 N. W. 148.

25. San Juan County School Dist. No. 1 *v.* Ross, 4 Colo. App. 493, 36 Pac. 560.

26. Fuller *v.* Little, 61 Ill. 21.

27. Baros *v.* Jarmulowsky, 31 Misc. (N. Y.) 746, 64 N. Y. Suppl. 53.

28. Great Northern Hotel Co. *v.* Leopold, 72 Ill. App. 108; World's Columbian Exposition *v.* Thompson, 57 Ill. App. 606, construing Rev. St. c. 13, par. 13.

29. **Grounds for discharge** see *supra*, I, C, 2, a, (II).

Sufficiency of performance as defense to action for wages see *infra*, III, B, 9, d.

Execution of agency see Principal and Agent.

Municipal employees see Municipal Corporations.

Performance of contracts for services in general see Contracts.

30. Stone *v.* Bancroft, 139 Cal. 78, 70 Pac. 1017, 72 Pac. 717; Stone *v.* Bancroft, 112 Cal. 652, 44 Pac. 1069; Wentworth *v.* Whitney, 25 Pa. Super. Ct. 100; Coghlan *v.* Stetson, 19 Fed. 727; Cook *v.* Sherwood, 2 New Rep. 28, 11 Wkly. Rep. 595. And see Bunning *v.* Lyric Theatre, 71 L. T. Rep. N. S. 396.

discontinues his business in which the servant is employed,[31] or although the building in which the work is to be done is destroyed by fire.[32] Likewise, where the servant is bound to furnish a certain grade of work, there is an implied obligation on the part of the master to furnish proper materials and place for the manufacture thereof.[33]

2. Tender of Performance.[34] An actual tender of one's services is usually not necessary where the employer has refused to furnish work or to continue the employment.[35] What constitutes a sufficient tender, where necessary, is governed by no fixed rules.[36]

3. Services Outside Scope of Employment. The construction of a contract for services as to the nature and extent of the services to be performed is governed by the rules applicable to contracts in general.[37] A person engaged as a superintendent, or in some leading capacity requiring more than ordinary skill, is not obliged to take an inferior position or to perform ordinary labor.[38] So one engaged for a particular position is not obliged to accept employment of an

See Granger *v.* American Brewing Co., 25 Misc. (N. Y.) 701, 55 N. Y. Suppl. 695 [*reversing* 25 Misc. 302, 54 N. Y. Suppl. 590], holding that the prevention by an employer of an employee in the performance of a contract terminable at will does not constitute a breach, since it terminates the employment. *Compare* Texas Cent. R. Co. *v.* Newby, (Tex. Civ. App. 1897) 41 S. W. 102, holding that a locomotive engineer employed by the mile, without any agreement as to the period of employment or the number of trips, cannot recover in excess of mileage, although called out for service but once in over ten months, he holding himself in readiness to perform the contract during all of such time.

31. St. Louis, etc., Land, etc., Co. *v.* Tierney, 5 Colo. 582; Vail *v.* Jersey Little Falls Mfg. Co., 32 Barb. (N. Y.) 564; Devonald *v.* Rosser, 93 L. T. Rep. N. S. 274, 21 T. L. R. 595.

Waiver of servant's rights by subsequent performance.—Where an actor is employed by a manager, who agrees that the actor shall appear at least seven times a week, and be paid one hundred dollars for each appearance, which stipulation the manager violates by failing to provide employment for the actor for a period of three weeks, the actor waives none of his rights by subsequently appearing under the contract and receiving pay pursuant to its provisions. Coghlan *v.* Stetson, 19 Fed. 727.

32. Eastman *v.* Eastman, etc., Co., 1 N. Y. Suppl. 16. See also Langdon *v.* Purdy, 1 MacArthur (D. C.) 23. But see Hall *v.* School Dist. No. 10, 24 Mo. App. 213 (holding that when a laborer is employed to work for a series of days in a particular building, the burning of the building stops the employer's liability for wages); Ellis *v.* Midland R. Co., 7 Ont. App. 464 (holding that where one was employed for a season as master to manage a steamer, and he continued in the employment until the steamer was burned, he was not entitled to more than a proportionate share of the salary agreed on, since the contract was subject to the continued existence of the vessel). See, generally, Contracts, 9 Cyc. 625 *et seq.*

33. Hammer *v.* Breidenbach, 31 Mo. 49, where agreement was to make "an excellent article of beer."

34. **Necessity of tender of performance in order to maintain action for wrongful discharge** see *supra*, II, C, 2, b, (I).

35. See *supra*, II, C, 2, b, (I).

36. See Griffin *v.* Brooklyn Ball Club, 68 N. Y. App. Div. 566, 73 N. Y. Suppl. 864 [*affirmed* in 174 N. Y. 535, 66 N. E. 1109].

Time for tender.— A demand for employment by one injured by a railway company which agreed to employ him in settlement of the injuries is sufficient where made as soon as he is able to work, although it is several years after the making of the promise. East Line, etc., R. Co. *v.* Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758.

37. See Contracts, 9 Cyc. 577 *et seq.* See also Alpaugh *v.* Wood, 53 N. J. L. 638, 23 Atl. 261, in which case it was held that one contracting to take entire charge of the manufacturing of pottery was obliged to superintend the manufacture of a higher grade of pottery than that previously manufactured, where the contract expressly provided for a new decorating department to be under his charge.

Construction of contract by parties.—Where one was employed generally to work around a sawmill, an agreement made when he was required to act as engineer that he was to receive higher wages while doing that work was a practical construction of the original contract as not including engineer's services. Wilson *v.* Godkin, 136 Mich. 106, 98 N. W. 985.

38. Marx *v.* Miller, 134 Ala. 347, 32 So. 765 (holding that one employed to take charge of a dressmaking department, as manager and dressmaker, is not required to do the work of a seamstress); Roserie *v.* Kiralfy, 12 Phila. (Pa.) 209 (holding that one engaged as a *première danseuse* cannot be compelled to take an inferior position in the ballet). See Excelsior Needle Co. *v.* Smith, 61 Conn. 56, 23 Atl. 693, holding that the getting a room in order for certain work was within the duty of the superintendent of a particular branch of a business.

entirely different kind.[39] Of course, if the contract expressly provides that the services are to be rendered in a certain state or states, the employee is not required to perform services in other states.[40]

4. Sufficiency of Performance — a. In General. Substantial rather than exact performance is all that is required in the case of any contract for services to entitle the person rendering the services to recover therefor.[41] There is an implied obligation on the part of the servant to serve his master honestly and faithfully.[42] But performance of services during all or a part of the time for which the servant is employed is not necessary, where the servant is ready and willing to perform during all of such time.[43] Where the contract calls for all the time of the employee, the usual custom in the line of business in which he is employed determines whether he is obliged to work on Sundays.[44] A servant is not required to work during unseasonable hours unless the contract and the nature of the employment makes it reasonable that he should do so.[45] The sufficiency of the performance is in no way affected by the acts of third persons rendering nugatory the services rendered.[46]

b. Skill and Care Required.[47] One engaged to work for another impliedly contracts that he has a reasonable amount of skill in the employment, and engages to use it, with a reasonable amount of care;[48] in case of damage to the employer

39. Campbell *v.* Jimenes, 3 Misc. (N. Y.) 144, 23 N. Y. Suppl. 312 [*reversed* on other grounds in 3 Misc. 516, 23 N. Y. Suppl. 333], holding that one engaged as chief engineer of a steamer for service in the West Indies is not obliged to take service in the Haytian navy.

40. Menage *v.* Rosenthal, 175 Mass. 358, 56 N. E. 579.

41. Peterson *v.* Mayer, 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72; Jacoby *v.* Fox, 32 Misc. (N. Y.) 763, 66 N. Y. Suppl. 488, holding that an instruction that the servant was only required substantially to perform his contract, qualified by a statement that it was necessary for him to perform it, except in technical and trivial matters, was proper.

42. Robb *v.* Green, [1895] 2 Q. B. 315, 59 J. P. 695, 64 L. J. Q. B. 593, 73 L. T. Rep. N. S. 15, 14 Reports 580, 44 Wkly. Rep. 25, copying list of master's customers with intention of using after leaving.

43. *Connecticut.*— Douglas *v.* Chapin, 26 Conn. 76.

Illinois.— Curlee *v.* Reiger, 45 Ill. App. 544.

Massachusetts.— Johnson *v.* Trinity Church Soc., 11 Allen 123.

Minnesota.— Sterling *v.* Bock, 37 Minn. 29, 32 N. W. 865.

New York.— Goldsmith *v.* Wells Co., 86 Hun 489, 33 N. Y. Suppl. 727; Berg *v.* Carroll, 16 Daly 73, 9 N. Y. Suppl. 509; Hilleary *v.* Skookum Root Hair Grower Co., 4 Misc. 127, 23 N. Y. Suppl. 1016.

Pennsylvania.— Jennings *v.* Beale, 146 Pa. St. 125, 23 Atl. 225.

See 34 Cent. Dig. tit. "Master and Servant," §§ 66, 69.

44. Collins Ice-Cream Co. *v.* Stephens, 189 Ill. 200, 50 N. E. 524.

45. Koplitz *v.* Powell, 56 Wis. 671, 14 N. W. 831.

46. Wolfe *v.* Parham, 18 Ala. 441.

47. **Actions for negligence** see *infra*, III, A, 10, b.

Contributory negligence of servant injured see *infra*, IV, F.

Deduction or forfeiture of wages see *infra*, III, B, 4.

Want of skill as defense to action for wages see *infra*, III, B, 9, d.

Fidelity insurance see FIDELITY AND GUARANTY INSURANCE, 19 Cyc. 516.

48. *Alabama.*— Roberts *v.* Brownrigg, 9 Ala. 106. See also Woodrow *v.* Hawving, 105 Ala. 240, 16 So. 720.

Illinois.— Parker *v.* Platt, 74 Ill. 430.

Louisiana.— Garahan *v.* Weeks, 8 Mart. N. S. 190. See McCan *v.* The Robert J. Ward, 11 La. Ann. 427.

Massachusetts.—Talbot *v.* Heath, 126 Mass. 139, holding, however, that a servant placed in charge of a brickyard is not a guarantor that the bricks shall be made in the best manner and at the lowest possible cost, without regard to the kind of materials and machinery furnished by the employer.

Missouri.— See De Reamer *v.* Pacific Express Co., 84 Mo. 529.

New Jersey.— Alpaugh *v.* Wood, 53 N. J. L. 638, 23 Atl. 261.

New York.— Smith *v.* London Assur. Corp., 109 N. Y. App. Div. 882, 96 N. Y. Suppl. 820 (holding that public accountants are liable for sums embezzled by the cashier of the employer because of their negligence); Newton *v.* Pope, 1 Cow. 109.

South Carolina.— McCracken *v.* Hair, 2 Speers 256, holding that an overseer is held to such care of property intrusted to him as an ordinarily prudent man would exercise over his own property.

Wisconsin.— Eaton *v.* Woolly, 28 Wis. 628.

United States.— Sun Printing, etc., Assoc. *v.* Edwards, 113 Fed. 445, 51 C. C. A. 279.

See 34 Cent. Dig. tit. "Master and Servant," § 67.

As dependent on place of performance.— Where the contract is to do good work, the place where it is to be done is to be taken into

arising from unskilfulness, the employee is liable therefor;[49] but if the servant has a reasonable amount of skill and uses due care, he is not liable for mere errors of judgment.[50] If the employee contracts for a higher degree of skill and diligence than the law implies, he cannot excuse himself for failure to perform his duties with the skill for which he contracted, by showing that he performed them with the ordinary degree of skill and diligence required by law.[51]

5. Duty to Serve Master Exclusively — a. In General.[52] It has been said, independent of any particular provision in the contract therefor, that the master is entitled to the servant's exclusive services during the period of employment.[53] This statement, it is submitted, is too broad. For instance, if the work does not require the whole time of the employee, there is no breach of contract, where the employee devotes the balance of his time to a business not injurious to the interest of his employer, and not impairing the value of his services to the employer.[54] Even where there is an agreement to devote one's whole time to the service, such agreement must be reasonably construed.[55] While an employee must be loyal and faithful to the interest of his employer and cannot serve or acquire any private interest of his own in opposition thereto,[56] yet a contract to devote his whole time to the business of his employer does not prevent him from performing work for himself or others, of a different kind, and not conflicting with the work for his employer, outside of business hours.[57]

b. Earnings of Employee From Third Persons. It is often stated that the earnings of a servant in the course of, or in connection with, his services, belong to the master;[58] but a contract to give all of one's time to his employer does not mean that outside earnings of the employee are to belong to the employer, espe-

account. Carter *v.* Adams, Wright (Ohio) 471.

"Where skill as well as care is required in performing the undertaking, if the party purport to have skill in the business, and he undertakes for hire, he is bound to the exercise of due and ordinary skill in the employment of his art or business about it, or, in other words, to perform in a workmanlike manner. In cases of this sort he must be understood to have engaged to use a degree of diligence and attention and skill adequate to the performance of his undertaking. Ordinary skill means that degree which men engaged in that particular art usually employ, not that which belongs to a few men only of extraordinary endowments and capacities." Baltimore Base Ball Club, etc., Co. *v.* Pickett, 78 Md. 375, 385, 28 Atl. 279, 44 Am. St. Rep. 304, 22 L. R. A. 690; Waugh *v.* Shunk, 20 Pa. St. 130.

49. Woodrow *v.* Hawving, 105 Ala. 240, 16 So. 720.

50. Page *v.* Wells, 37 Mich. 415.

51. Hatton *v.* Mountford, 105 Va. 96, 52 S. E. 847, holding that a music teacher contracting to be loyal in the management of the school, to put forth his best efforts for the advancement thereof, to unite in building up the institution, and to assist in maintaining discipline, must give a higher degree and grade of service than is implied by law in the ordinary contract of service.

52. Engaging in other business or employment as ground of discharge see *supra*, I, C, 2, a, (II), (A).

53. Seaburn *v.* Zachmann, 99 N. Y. App. Div. 218, 90 N. Y. Suppl. 1005; Stoney *v.* Farmers' Transp. Co., 17 Hun (N. Y.) 579. See also Stebbins *v.* Waterhouse, 58 Conn. 370, 20 Atl. 480.

54. Jaffray *v.* King, 34 Md. 217. To the same effect see Wheeler, etc., Co. *v.* Dahms, 50 Ill. App. 531.

55. Shoemaker *v.* Acker, 116 Cal. 239, 48 Pac. 62, holding that an agreement to devote "his whole time and attention" to the management of a business does not prevent the employee from absenting himself from the premises at times when his presence is not necessary.

56. Chaddock College *v.* Bretherick, 36 Ill. App. 621 (holding, however, that the act of the principal of the musical department of a college, establishing a conservatory of music in the same town, on his own account and for his own benefit, was not, under the circumstances, so at variance with his duty to the college as to prevent his recovering his salary from it); Thompson *v.* Havelock, 1 Camph. 527, 10 Rev. Rep. 744.

57. Stone *v.* Bancroft, 139 Cal. 78, 70 Pac. 1017, 72 Pac. 717; Hermann *v.* Littlefield, 109 Cal. 430, 42 Pac. 443. But see Hughes *v.* Toledo Scale, etc., Co., 112 Mo. App. 91, 86 S. W. 895, holding that an employee cannot give some of his time to the business of another, although the attention so given does not interfere with his duty to his employer.

58. Leach *v.* Hannibal, etc., R. Co., 86 Mo. 27, 56 Am. Rep. 408 (holding that a railroad company is *prima facie* entitled to notary fees earned by its servant, employed in settling claims against the road); Morison *v.* Thompson, L. R. 9 Q. B. 480, 43 L. J. Q. B. 215, 30 L. T. Rep. N. S. 869, 22 Wkly. Rep. 859; Jones *v.* Linde British Refrigeration Co., 2 Ont. L. Rep. 428 [*reversing* on other grounds

cially where earned in a different line of business.[59] Of course the employer may enforce his right to profits or earnings of the employee, where the contract of hire provides that he shall have a fixed interest therein.[60] One to whom services are rendered, both in and out of business hours, cannot refuse to pay therefor because the servant was in the employ of a third person in another line of business, who impliedly consented to the outside work;[61] but a servant of one person cannot recover for trivial services rendered to other members of the employer's family, where there is no express agreement to pay therefor.[62]

6. Trade Secrets of Master. A person employed by one using a secret process, with knowledge that the employer was trying to keep his secret, impliedly agrees not to divulge the secret;[63] and will be enjoined from divulging or using the same to the injury of his employer.[64]

7. Inventions and Discoveries of Servant.[65] In the absence of any agreement to the contrary,[66] the employer has no exclusive right to the inventions of his employee,[67] except where employed solely to exercise his inventive ability for the

32 Ont. 191]. See also Reynolds *v.* Roosevelt, 8 N. Y. Suppl. 749.

59. Hillsboro Nat. Bank *v.* Hyde, 7 N. D. 400, 75 N. W. 781.

The servant's share of the profits arising from a partnership in which he is a member do not belong to his employer, although the servant is required by his contract to give his entire time to the master, where he does not give any personal attention to the partnership and does not neglect his duties to the master. Jackson *v.* Seevers, 115 Iowa 370, 88 N. W. 931.

The manager of a cold storage company, instead of the company itself, is entitled to a commission on the sale of another cold storage plant to another company, effected through his efforts, where the procuring of customers for cold storage plants was not a part of his duties, and his employer did not carry on any business of that nature. Jones *v.* Linde British Refrigeration Co., 2 Ont. L. Rep. 428 [*reversing* 32 Ont. 191].

A servant may devote his time before and after business hours to work in another line of employment without giving the master any right to such earnings. Wallace *v.* De Young, 98 Ill. 638, 38 Am. Rep. 108.

Question for jury.— Genco *v.* Remington, 100 N. Y. App. Div. 223, 91 N. Y. Suppl. 898.

60. Blakely *v.* Sousa, 197 Pa. St. 335, 47 Atl. 289.

61. Wallace *v.* De Young, 98 Ill. 638, 38 Am. Rep. 108. See also Elwell *v.* Roper, 72 N. H. 585, 58 Atl. 507; Simonson *v.* Simonson, 2 Silv. Sup. (N. Y.) 559, 6 N. Y. Suppl. 130.

62. Reynolds *v.* Roosevelt, 8 N. Y. Suppl. 749.

63. O. & W. Thum Co. *v.* Tloczynski, 114 Mich. 149, 72 N. W. 140, 68 Am. St. Rep. 469, 38 L. R. A. 200; Vulcan Detinning Co. *v.* American Can Co., (N. J. Ch. 1906) 62 Atl. 881. And see Merryweather *v.* Moore, [1892] 2 Ch. 518, 61 L. J. Ch. 505, 66 L. T. Rep. N. S. 719, 40 Wkly. Rep. 540; Louis *v.* Smellie, 73 L. T. Rep. N. S. 226.

64. See Injunctions, 22 Cyc. 843.

65. Literary property in general see Literary Property.

Right of master to compel assignment of patents see Patents.

Right of master to acquire patents see Patents.

Title to copyright see Copyrights.

66. See cases cited *infra*, this note.

Validity of contract.— A contract for the assignment of any improvements made by the employee in the employer's machines is a part of the contract of hiring, based on a good consideration. Hulse *v.* Bonsack Mach. Co., 65 Fed. 864, 13 C. C. A. 180.

Construction of agreement.— One employed in the manufacture of shellers and powers, who contracts to give the employer any improvements made, is not bound to assign his interest in an invention in check-rowers, although the employer added the manufacture of check-rowers to its other business and the employee used his time in perfecting his invention, by the consent of the employer, and with the assistance of other employees. Dice *v.* Joliet Mfg. Co., 11 Ill. App. 109 [*affirmed* in 105 Ill. 649].

Inventions after expiration of contract.— A contract to assign inventions made by the employee "while in his employ," which by its terms has expired, cannot be considered as existing afterward from the fact that it has been so treated by the employee, or from the fact that he has made oral statements that he was bound by it. Hopedale Mach. Co. *v.* Entwistle, 133 Mass. 443.

Compelling disclosure of discovery.—Where one is employed to make experiments in dyeing, the fruits of which were to be the property of his employer, and he discovered the process which he refused to disclose without special compensation, the employer was entitled to a decree for disclosure without further compensation. Silver Spring Bleaching, etc., Co. *v.* Woolworth, 16 R. I. 729, 19 Atl. 528.

Sufficiency of evidence to show agreement to transfer invention see Niagara Radiator Co. *v.* Meyers, 16 Misc. (N. Y.) 593, 40 N. Y. Suppl. 572.

67. Joliet Mfg. Co. *v.* Dice, 105 Ill. 649 [*affirming* 11 Ill. App. 109]; Ft. Wayne, etc., R. Co. *v.* Haberkorn, 15 Ind. App. 479, 44

benefit of his employer.[68] The employee may patent his inventions,[69] and the employer cannot compel an assignment of the patent to him,[70] although the employer may in certain cases have an irrevocable right to use such inventions.[71]

8. Property Found by Servant. A servant who finds a lost chattel while engaged in work for his master is entitled thereto as against his master if the latter is not the owner.[72] And a statute providing that everything that an employee acquires by virtue of his employment, except his compensation, belongs to the employer, does not apply to gold found on public land while grading a site for a mill, it not being found by virtue of the employment, since the employment was not to search for gold, but to excavate and throw away the earth removed.[73]

9. Compelling Performance — a. Order of Court. The rendition of services, or a return to service, cannot be compelled by an injunction,[74] or by an action for specific performance,[75] or in any other way by an order of court.[76]

b. Corporal Punishment. A master has no right to inflict corporal punishment on his servant, even though a minor,[77] unless the power has been delegated to the master by the father of the infant.[78] Even moderate force cannot be used to compel a servant to obey reasonable commands.[79] Of course a master has greater power where the servant is an apprentice.[80]

10. Recovery of Damages For Breach by Servant — a. In General.[81] The employer may recover damages from his employee for failure to perform the

N. E. 322; Clark *v.* Fernoline Chemical Co., 57 N. Y. Super. Ct. 36, 5 N. Y. Suppl. 190; Bloxam *v.* Elsee, 6 B. & C. 169, 13 E. C. L. 88, 1 C. & P. 558, 12 E. C. L. 320, 9 D. & R. 215, 5 L. J. K. B. O. S. 104, R. & M. 187, 30 Rev. Rep. 275.

"The mere fact, outside of any specific contract, that the appellant was in the employment of appellee and received wages, and even used the material of appellee in the manufacture of his models, and even received assistance in making models, from the latter's employes, would not give it the property in the invention to the exclusion of the former. An invention is the product of the mind, and the making of models and performing of the experiments, are only mechanical operations, and mere labor performed for appellant under his direction, for which he would be liable to be charged, or the time lost deducted from his wages or time. As between employer and employe, the right to the invention belongs to the one who conceives the idea, and follows it out to practical invention." Dice *v.* Joliet Mfg. Co., 11 Ill. App. 109, 114 [*affirmed* in 105 Ill. 649].

An employer has a right to recipes for mixing colors, obtained by an employee by experiments in the course of his employment as a color mixer, and required to be entered in a book furnished by the employer for that purpose, and which are necessary for the manufacturing of the designs submitted to the employee and their subsequent reproduction. Dempsey *v.* Dobson, 174 Pa. St. 122, 130, 34 Atl. 459, 52 Am. St. Rep. 816, 32 L. R. A. 761. In this case, the court said: "The recipes prepared by the color mixer, for the use of his employers in the manufacture of their carpets, belong to them so far at least, as to give them the right to continue the use of the various colors and shades produced by them. The plaintiff had a right if he chose so to do, to preserve them for his own use in the future, but his right was not an exclusive one. It was his duty by virtue of his employment and by reason of the relation his work bore to his employer's business to enter all these recipes in his employer's color book; for none of the patterns of carpet manufactured during the twenty years of the plaintiff's service could be reproduced without the use of the same receipes, for the preparation of the colors to be employed, that had been used when the pattern was first produced."

68. Connelly Mfg. Co. *v.* Wattles, 49 N. J. Eq. 92, 23 Atl. 123.

69. See Patents.

70. See Patents.

71. See Patents.

72. See Finding Lost Goods, 19 Cyc. 536.

73. Burns *v.* Clark, 133 Cal. 634, 66 Pac. 12, 85 Am. St. Rep. 233.

74. See Injunctions, 22 Cyc. 844.

75. See Specific Performance.

76. Jaremillo *v.* Romero, 1 N. M. 190; Milburne *v.* Byrne, 17 Fed. Cas. No. 9,542, 1 Cranch C. C. 239.

77. Matthews *v.* Terry, 10 Conn. 455; Com. *v.* Baird, 1 Ashm. (Pa.) 267; Davis *v.* State, 6 Tex. App. 133, holding that even under a statute providing that violence used to the person does not amount to an assault and battery in certain relations, such as parent and child, etc., a master has no right to whip a minor servant, even for misconduct.

78. Cooper *v.* State, 8 Baxt. (Tenn.) 324, 35 Am. Rep. 704.

79. Tinkle *v.* Dunivant, 16 Lea (Tenn.) 503.

80. See Apprentices, 3 Cyc. 552.

81. **Set-off of damages,** in action by servant see *infra*, III, B, 9, d, (II).

Measure of damages for failure to perform services see Damages, 13 Cyc. 162.

duties devolving upon the employee,[82] or for quitting the work before the termination of the contract.[83] But no damages can be recovered where no injuries resulted, nor where the employer has made no effort to fill the employee's place.[84]

b. Action For Negligence or Wrongful Act of Servant.[85] A servant is directly liable to his master for any damage occasioned by his negligence or misconduct in connection with his work,[86] whether such damage is direct to the property of the master, or arises from compensation which the master has been obliged to make to third persons for injuries sustained by them;[87] and this is so notwithstanding the negligence of another servant concurred in producing the injuries.[88] But a master cannot recover for faulty construction by a servant, if defects in the plans he has prescribed, and the tools he has furnished for the work, have contributed

82. Stebbins *v.* Waterhouse, 58 Conn. 370, 20 Atl. 480.

Who may sue.— A cannot recover in an action of special assumpsit brought against B for B's failure to fulfill a promise made to C to do a job of work which C had promised to perform for A. Pipp *v.* Reynolds, 20 Mich. 88.

83. Bowes *v.* Press, [1894] 1 Q. B. 202, 58 J. P. 280, 63 L. J. Q. B. 165, 70 L. T. Rep. N. S. 116, 9 Reports 302, 42 Wkly. Rep. 340; Batty *v.* Melillo, 10 C. B. 282, 19 L. J. C. P. 362, 1 L. M. & P. 571, 70 E. C. L. 282; Huttman *v.* Boulnois, 2 C. & P. 510, 12 E. C. L. 704. See Braun *v.* Weill, 111 La. 973, 36 So. 87, holding that where a contract of employment was terminated by reason of ill-feeling between the parties, and, by reason of the fault of both, their relations were so strained that it was no longer possible for them to transact business together, the demand of both parties for damages should be rejected and the employee allowed the amount actually earned by him.

Knowledge of requirement of notice of intention to quit.— But one employed by the piece in a factory, for no definite time, without notice of the rule requiring employees to give a fortnight's notice of intention to quit is not liable in damages for leaving without notice. Stevens *v.* Reeves, 9 Pick (Mass.) 198.

84. Fuqua *v.* Massie, 37 S. W. 587, 18 Ky. L. Rep. 842. See also Hasselman Printing Co. *v.* Fry, 9 Ind. App. 393, 35 N. E. 1045, 36 N. E. 863, holding that the fact that an employer cannot supply the place of a leaving workman with one of like capacity is no proof of damages, since the employer must show that his expenses were thereby increased, or business lost to him, or that he could not without loss hire men capable of doing the work.

85. **Counter-claim in action by servant for wages** see *infra*, III, B, 9, d, (II).

86. *Alabama.*— Mobile, etc., R. Co. *v.* Clanton, 59 Ala. 392, 31 Am. Rep. 15.

Massachusetts.— Bickford *v.* Richards, 154 Mass. 163, 27 N. E. 1014, 26 Am. St. Rep. 324, holding that one to whom an employee sublet a contract to remove buildings was liable to the original employer for negligently injuring the buildings, although the latter might not, as master, be liable for his acts.

Michigan.— Page *v.* Wells, 37 Mich. 415.

Minnesota.— Bidwell *v.* Madison, 10 Minn. 13.

New York.— See Whisten *v.* Brengal, 16 Misc. 37, 37 N. Y. Suppl. 813, as to what constitutes negligence.

Texas.— Waul *v.* Hardie, 17 Tex. 553.

Wisconsin.— Zulkee *v.* Wing, 20 Wis. 408, 91 Am. Dec. 425.

See 34 Cent. Dig. tit. "Master and Servant," § 74.

The negligence need not be wilful.— Texas, etc., R. Co. *v.* Hurless, 1 Tex. App. Civ. Cas. § 582.

An engineer of a tugboat is liable to his employer for any damage thereto by fire or otherwise which could be fairly attributable to any act done or omitted by him as a natural result or just consequence, even though not directly so attributable. Gilson *v.* Collins, 66 Ill. 136.

Imperfect equipment of train does not relieve the conductor from the exercise of due care in its management, so as to absolve him from liability to the company for his negligence. Mobile, etc., R. Co. *v.* Clanton, 59 Ala. 392, 31 Am. Rep. 15.

Consent of master.— A servant sued by a master for injury received by his animal while in the servant's use need not show an express leave to put the animal to that use. Hathaway *v.* Smith, 2 Tyler (Vt.) 248.

Burden of proof.— The burden is on the master to prove negligence, unskilfulness, or wilful misconduct on the part of a servant. Newton *v.* Pope, 1 Cow. (N. Y.) 109.

Damages.— Where a mechanic injures the materials furnished him, or wastes them, he must account to his employer for the original value of the materials, less what they may be sold for for any purpose whatsoever, if retained by the employer. Hillyard *v.* Crabtree, 11 Tex. 264, 62 Am. Dec. 475.

Subcontractors, not contracting with the owners of a building, but with the person with whom the owner agreed for the construction, are not liable to the owner in an action for negligently and unskilfully doing their work, by which the owner is injured. There is no privity of contract. The action must be brought against the principal contractor. Bissell *v.* Roden, 34 Mo. 63, 84 Am. Dec. 71.

87. Zulkee *v.* Wing, 20 Wis. 408, 91 Am. Dec. 425.

88. Zulkee *v.* Wing, 20 Wis. 408, 91 Am. Dec. 425.

to render the result faulty.[89] Subsequent payments to the employee, and continuing him in the employment, do not waive a claim for damages.[90]

11. Substitution of Parties. Contracts for personal services are not assignable.[91] It follows that a servant cannot, without the consent of his master, substitute another in his place to perform his services, irrespective of the ability or capacity of the substitute.[92]

12. Breach of Contract by Servant as Criminal Offense — a. Offenses.[93] While somewhat different in phraseology, the statutes in several states provide in effect that the obtaining of money or other property by entering into a contract of employment with intent to defraud the employer, and the refusal to perform with like intent, is punishable as a criminal offense.[94] There cannot be a conviction where the contract is void,[95] nor, in some states, unless the contract complies with the form required by statute for laborer's contracts.[96] Intent to defraud is an essential ingredient of the offense,[97] as is loss or damage to the employer;[98] but the intent to defraud is *prima facie* shown by proof of failure to perform the services or return the advances.[99] The offense is complete when the advances have been procured and the employee has failed to commence work on the day set, without lawful excuse.[1] It has been held that the statutes apply to a cropper,[2] although the contrary has also been held.[3]

b. Indictment or Complaint.[4] The indictment or complaint must set forth a contract certain as to its terms and duration,[5] and of such a character as that described in the statute.[6] It must also specify what the advances consisted of,[7] and from whom obtained.[8] But it is not necessary to allege a failure to pay for the advances where there is an averment of failure to return the money,[9] nor is it necessary to allege that the term of service had expired before the indictment was preferred.[10] Of course the proof must correspond with the accusation in regard to material matters.[11]

89. Wilder *v.* Stanley, 49 Vt. 105.

90. Stoddard *v.* Treadwell, 26 Cal. 294; Bidwell *v.* Madison, 10 Minn. 13.

91. See Assignments, 4 Cyc. 1003.

92. Hariston *v.* Sale, 6 Sm. & M. (Miss.) 634.

93. See, generally, Criminal Law.

94. See the statutes of the several states.

It is no defense that the employer knew that the employee was under contract to cultivate the land of a third person. State *v.* Robinson, 70 S. C. 468, 50 S. E. 192.

A violation of the contract on the day the statute takes effect is punishable under such statute, although the contract was entered into before the statute took effect. State *v.* Robinson, 70 S. C. 468, 50 S. E. 192.

Either party may testify to the terms of the contract. State *v.* Easterlin, 61 S. C. 71, 39 S. E. 250.

Sufficiency of evidence to sustain conviction see Millinder *v.* State, 124 Ga. 452, 52 S. E. 760; McCoy *v.* State, 124 Ga. 218, 52 S. E. 434; Townsend *v.* State, 124 Ga. 69, 52 S. E. 293; Glenn *v.* State, 123 Ga. 585, 51 S. E. 605.

95. State *v.* Robinson, 70 S. C. 468, 50 S. E. 192, where money was advanced to settle a criminal prosecution.

96. State *v.* Long, 66 S. C. 398, 44 S. E. 960 (holding that a contract reduced to writing and signed by the parties in the presence of one witness is sufficient under a statute requiring a verbal contract to be witnessed by at least two disinterested persons); State *v.* Leak, 62 S. C. 405, 40 S. E. 774 (holding that a particular contract was sufficiently specific to show that the employer had a farm).

97. *Ex p.* Riley, 94 Ala. 82, 10 So. 528.

98. Millinder *v.* State, 124 Ga. 452, 52 S. E. 760.

99. Millinder *v.* State, 124 Ga. 452, 52 S. E. 760.

But if the employee was suffering from serious physical injuries at the time he should have commenced the work, a conviction is erroneous. Hart *v.* State, 121 Ga. 140, 48 S. E. 925.

1. State *v.* Norman, 110 N. C. 484, 14 S. E. 968.

2. Vinson *v.* State, 124 Ga. 19, 52 S. E. 79.

3. Gill *v.* State, 124 Ala. 73, 27 So. 253.

4. See, generally, Indictments and Informations.

5. Watson *v.* State, 124 Ga. 454, 52 S. E. 751; Presley *v.* State, 124 Ga. 446, 52 S. E. 750; Wilson *v.* State, 124 Ga. 22, 52 S. E. 82.

6. State *v.* Williams, 32 S. C. 123, 10 S. E. 876.

7. Campbell *v.* State, 121 Ga. 167, 48 S. E. 920.

8. Hilliard *v.* State, 137 Ala. 89, 34 So. 848, holding that it must be alleged that the money or other property was obtained from the employer himself.

9. Gill *v.* State, 124 Ala. 73, 27 So. 253.

10. Millinder *v.* State, 124 Ga. 452, 52 S. E. 760.

11. Williams *v.* State, 124 Ga. 136, 52 S. E.

B. Wages and Other Remuneration[12] — **1. Right to Wages.**[13] The right to wages does not necessarily depend upon the performance of work,[14] nor on the amount of wages being fixed by contract.[15] It is immaterial, where the wages are fixed by contract, whether the employer derived profit or value from the services.[16] On the other hand, if the right to payment depends upon the happening of a certain contingency which does not occur, no recovery can be had, however beneficial the services may have been.[17] Wages may be recovered for a period of time prior to the commencement of work, where the contract so provides, since the subsequent service is a sufficient consideration.[18] Whether work performed by one engaged for a particular investigation is within the scope of his employment, so as to entitle him to compensation therefor, depends upon the particular circumstances of each case.[19] Where the right to compensation is by agreement primarily collectable only from the proceeds of certain property, there is no individual liability until such source is exhausted.[20] The person actually employing and agreeing to pay a servant is liable for his wages, notwithstanding a corporation received the benefit of his services.[21] An agreement between the employers, a firm, as to who shall pay for certain services rendered by an employee, does not prevent a recovery by the employee from the firm.[22]

2. Statutory Regulations — a. Mining and Weighing of Coal.[23] To protect employees in coal mines, statutes have been passed in several states as to the payment of wages.[24] They usually provide for the mode of weighing the coal, the weight so determined to be the basis on which to compute the miners' wages.[25]

156 (holding that an accusation that defendant was employed by a certain person, and proof that he was employed by a certain other person who made the advances, do not authorize conviction); Banks *v.* State, 124 Ga. 15, 52 S. E. 74, 2 L. R. A. N. S. 1007.

12. Particular employees: Agent see PRINCIPAL AND AGENT. Employees of municipality or on public works see MUNICIPAL CORPORATIONS. Letter carriers see POST-OFFICE. Seamen see SEAMEN. Teachers see SCHOOLS AND SCHOOL-DISTRICTS.

Between husband and wife see HUSBAND AND WIFE, 21 Cyc. 1277.

Right of infant to recover wages due him under contract see INFANTS, 22 Cyc. 599.

Custom as to wages see CUSTOMS AND USAGES, 12 Cyc. 1070, 1071.

Exemption of wages see EXEMPTIONS, 18 Cyc. 1429 *et seq.*

Enforcement of claim for wages against homestead see HOMESTEADS, 21 Cyc. 518.

13. Assignability of future wages see ASSIGNMENTS, 4 Cyc. 17.

Implied contracts for services in general see WORK AND LABOR.

14. See *supra*, III, A, 4.

15. Mugnier *v.* Dendinger, 104 La. 767, 29 So. 345. See, generally, WORK AND LABOR.

16. Bonner *v.* Runals, 76 Mich. 136, 42 N. W. 1087; Rockwell *v.* Hurst, 13 N. Y. Suppl. 290; Shute *v.* McVitie, (Tex. Civ. App. 1903) 72 S. W. 433.

17. Suits *v.* Taylor, 20 Mo. App. 166.

18. Mesinger *v.* Mesinger Bicycle Saddle Co., 44 N. Y. App. Div. 26, 60 N. Y. Suppl. 431.

19. Brown *v.* Travelers' L., etc., Ins. Co., 26 N. Y. App. Div. 544, 50 N. Y. Suppl. 729, holding that one employed by an insurance company to investigate as to the cause of an accident could recover for attendance at a coroner's investigation of the accident for the purpose of informing himself of the facts in respect to which the witnesses testified.

20. Cotton *v.* Rand, (Tex. Civ. App. 1895) 29 S. W. 682.

21. Stone *v.* Bancroft, 112 Cal. 652, 44 Pac. 1069.

22. Brewer *v.* Wright, 25 Nebr. 305, 41 N. W. 159.

23. See, generally, MINES AND MINERALS.

Constitutional guaranty against abridgment of privilege of citizens as applied to statutes regulating payment of wages see CONSTITUTIONAL LAW, 8 Cyc. 1043, 1044.

Constitutional guaranty against deprivation of property as applied to regulation of payment of wages and sale of goods to employees see CONSTITUTIONAL LAW, 8 Cyc. 1100.

Constitutionality of statutes regulating payment of wages and sale of goods to employees see CONSTITUTIONAL LAW, 8 Cyc. 888, 889.

Liability of railroad company for work and labor in construction of roads see RAILROADS.

24. See the statutes of the several states.

Construction.— A statute providing that miners shall be paid for all coal mined, including egg, nut, pea, and slack, and such other grades as the coal may be divided into, at such prices as may be agreed on between the parties, does not prohibit a mine owner from contracting with his employee to pay only for lump coal screened from all the coal mined. Whitebreast Fuel Co. *v.* People, 175 Ill. 51, 51 N. E. 853.

25. See the statutes of the several states.

In Illinois the 1883 statute requires operators of coal mines to furnish a track scale for weighing the coal and on which to base

Such statutes, being penal ones, the rule is that they are to be strictly construed.[26]

b. Number of Hours of Service.[27] Where the statute fixes a maximum number of hours as constituting a day's labor, an employee who works in excess of such time is not entitled to extra compensation, in the absence of any special agreement in regard thereto,[28] except where the statute expressly provides that *pro rata* compensation shall be paid for extra time unless there is an express agreement to the contrary.[29] Where the statute provides that ten hours of actual labor shall be taken to be a day's work, and no objection was made that the employee did not

the wages of the miners on the weight of the coal mined. This statute does not apply, however, where a contract exists between such operator and his employees for the payment of wages on a different basis, nor does it prevent the making of such contract. Jones *v.* People, 110 Ill. 590. The statute applies only to mines where the weight of the coal mined is to be taken as a basis of compensation to the miners; and hence a mine operator who paid his men by the day is not obliged to purchase a track scale. Reinecke *v.* People, 15 Ill. App. 241. It follows that, in an action for not providing a track scale, evidence that the miners had for several years been paid by the box for the coal mined, and did not want their wages based upon the weight, is admissible. Jones *v.* People, *supra*.

Under an Indiana statute requiring coal mined under contracts providing for payment by specified quantity to be weighed before being screened, and the full weight credited to the miner, provided that the payment for impurities loaded with or among the coal shall not thereby be compelled, a conviction for failure to weigh before screening was improper where the evidence for the prosecution showed that the coal mined was of such a nature that it was impossible to weigh the coal before screening, and credit the miner with the weight, without giving him credit for impurities among the coal. Martin *v.* State, 143 Ind. 545, 42 N. E. 911.

In Tennessee the statute providing for the appointment of a check weighman by miners, and that he shall not be "interfered with or intimidated by," the agent, owner, etc., is not violated by the president of a mining company notifying the miners that he will shut down the mine unless the miners discharge the check weighman hired by them. State *v.* Jenkins, 90 Tenn. 580, 18 S. W. 249. A weighman indicted for not weighing a certain load of coal cannot defend on the ground of a custom not to weigh a car containing more than twenty-five hundred pounds. Smith *v.* State, 90 Tenn. 575, 18 S. W. 248.

26. Reinecke *v.* People, 15 Ill. App. 241.

27. Constitutionality of statutes see CONSTITUTIONAL LAW, 8 Cyc. 889, 1043, 1065.

Eight hour law confined to particular institutions.— In Pennsylvania the proviso in the act of 1891 (the eight hour law), "that this Act shall not be construed to have reference to any institution wherein all the employees are resident," can apply only to institutions where all the employees are resident. Eight-Hour Law, 12 Pa. Dist. 758, 27 Pa. Co. Ct. 672.

28. *Connecticut.*— Luske *v.* Hotchkiss, 37 Conn. 219, 9 Am. Rep. 314.

Illinois.— Christian County *v.* Merrigan, 191 Ill. 484, 61 N. E. 479 [*affirming* 92 Ill. App. 428]; Chicago Sanitary Dist. *v.* Burke, 88 Ill. App. 196.

Indiana.— Grisell *v.* Noel Bros. Flour-Feed Co., 9 Ind. App. 251, 36 N. E. 452; Helphenstine *v.* Hartig, 5 Ind. App. 172, 31 N. E. 845.

New York.— McCarthy *v.* New York, 96 N. Y. 1, 48 Am. Rep. 601; Gray *v.* Hall, 32 Misc. 683, 66 N. Y. Suppl. 500, holding, under a contract stipulating that an employee should receive a certain sum per day for each day he worked, and "proportionately thereto for parts of a day," that the latter phrase did not refer to extra compensation for overtime, but meant that, if plaintiff worked part of a day, he was to receive such proportion of his day's wages as the time he worked bore to a whole day; and that the employee was not entitled to recover compensation for work in excess of eight hours a day.

United States.— U. S. *v.* Martin, 94 U. S. 400, 24 L. ed. 128; Collins *v.* U. S., 24 Ct. Cl. 340; Averill *v.* U. S., 14 Ct. Cl. 200; Martin *v.* U. S., 10 Ct. Cl. 276.

See 34 Cent. Dig. tit. "Master and Servant," § 81.

Statute making extra employment a misdemeanor.— In Utah, statutes make the employment of miners and persons in smelters for more than eight hours a day a misdemeanor, and it is held that the employee is impliedly forbidden to make such a contract, so that he cannot claim an express or implied contract to pay for services rendered in excess of eight hours a day. Short *v.* Bullion-Beck, etc., Min. Co., 20 Utah 20, 57 Pac. 720, 45 L. R. A. 603.

Construction of statutes.— The act of March 6, 1889, providing that eight hours shall constitute a legal day's work, but permitting overwork by agreement, for an extra compensation, applies only where the employment is by the day. Helphenstine *v.* Hartig, 5 Ind. App. 172, 31 N. E. 845.

29. Schurr *v.* Savigny, 85 Mich. 144, 48 N. W. 547. See also Bartlett *v.* Grand Rapids St. R. Co., 82 Mich. 658, 46 N. W. 1034.

In Michigan the statute provides that in all factories, work-shops, salt blocks, sawmills, logging and lumber camps, booms and drives, mines, or other places used for mechanical,

work daily as much as ten hours, it is a question for the jury whether the work done in a day was by the understanding and implied agreement of the parties to be reckoned as a day's work.[30]

c. Mode and Time of Payment — (I) *CONSTITUTIONALITY OF STATUTES.* The constitutionality of statutes regulating the time of payment of wages, and forbidding payment other than in lawful money or paper redeemable therein, is a question concerning which there is much conflict in the authorities.[31]

(II) *TIME OF PAYMENT.* Statutes in many states require the payment of wages, by all or particular classes of employers, at least once a week,[32] or every two weeks or semimonthly,[33] or once a month.[34] Statutes in other states provide

manufacturing, or other purposes, within the state, where men or women are employed, ten hours per day shall constitute a legal day's work. It also provides that it shall not be construed to apply to domestic or farm laborers or other laborers who agree to work more than ten hours per day. If the employee works more than ten hours a day the employer must pay him for all extra time at the regular *per diem* rate unless there is an agreement to the contrary. It was held that the statute was not intended to apply to one employed as an expert in taking, finishing, or retouching photographs, nor to any service or employment where the hiring was by the week, the month, or the year. Schurr *v.* Savigny, 85 Mich. 144, 48 N. W. 547.

30. Brooks *v.* Cotton, 48 N. H. 50, 2 Am. Rep. 172.

31. See CONSTITUTIONAL LAW, 8 Cyc. 888, 1043, 1053, 1065, 1119.

32. Republic Iron, etc., Co. *v.* State, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136, holding that the Indiana act of Feb. 28, 1899, is not sustainable as a proper exercise of the state's police power.

In Massachusetts, the effect of St. (1895) c. 438, relating to payment of wages weekly, is to make persons and partnerships engaged in any manufacturing business, and having more than twenty-five employees, subject to the general provisions of St. (1894) c. 508, § 51, concerning manufacturing corporations, except that the special provision of that section concerning municipal corporations not cities, and concerning counties, coöperative corporations or associations, and railroad corporations, are not applicable to such persons and partnerships. Com. *v.* Dunn, 170 Mass. 140, 49 N. E. 110.

Agreement for deduction of fines. — An agreement between a manufacturer and the employee that the weekly payment of wages shall be provisional, and that fines due for any week shall be deducted from the wages of the week following, is not repugnant to a statute requiring manufacturers to pay their employees weekly. Gallagher *v.* Hathaway Mfg. Co., 172 Mass. 230, 51 N. E. 1086.

A complaint in an action for a violation of a statute in relation to the weekly payment of wages, which fails to allege that the wages were due at the time when it is alleged defendant neglected to pay them is fatally defective. Com. *v.* Dunn, 170 Mass. 140, 49 N. E. 110.

33. See the statutes of the several states.

In Kentucky semimonthly payments are provided for in behalf of persons engaged in mining, and such statute is not unconstitutional. Com. *v.* Reinecke Coal Min. Co., 117 Ky. 885, 79 S. W. 287, 25 Ky. L. Rep. 2027. An indictment alleging that defendant unlawfully and wilfully failed and refused on or about the fifteenth and thirtieth days of a certain month to pay to within fifteen days of the fifteenth and thirtieth the wages due a certain person employed by defendant, was sufficiently specific, and it was not necessary to allege that the employee whose wages it was alleged were not paid as required was present at the time his wages were payable, or, if absent, that he demanded them on his return. Com. *v.* Reinecke Coal Min. Co., *supra.*

In Pennsylvania the act of 1891 applies only to those engaged in mining or manufacturing. Com. *v.* Marsh, 3 Pa. Dist. 489; Bauer *v.* Reynolds, 14 Pa. Co. Ct. 497; Com. *v.* Marsh, 14 Pa. Co. Ct. 369. The act of May 23, 1887 (Pamphl. Laws 180), providing that certain employers shall pay their servants semimonthly, does not deprive the master of his right to set off against wages due a servant a claim held by him against the servant. Welliver *v.* Fox, 4 Pa. Dist. 197.

34. Terre Haute, etc., R. Co. *v.* Baker, 4 Ind. App. 66, 30 N. E. 431, holding that the Indiana statute applies to railroad as well as other companies.

In Indiana a penalty of one dollar a day, together with reasonable attorney's fees, is imposed by statute after thirty days have elapsed after a demand for payment, but no penalty can be recovered which had not accrued at the commencement of the action. Terre Haute, etc., R. Co. *v.* Baker, 122 Ind. 433, 24 N. E. 83. The demand must be made by the employee, a demand by the assignee of the claim not being sufficient. Chicago, etc., R. Co. *v.* Glover, 159 Ind. 166, 62 N. E. 11. The complaint must aver facts showing the absence of a written contract to the contrary, which is made an exception by the statute. Toledo, etc., R. Co. *v.* Long, 160 Ind. 564, 67 N. E. 259. And the absence of such written contract to the contrary must be affirmatively shown. Chicago, etc., R. Co. *v.* Glover, *supra.*

Kentucky.— Under St. § 2739*a*, only such persons or companies engaged in the mining industry as are unable to pay their em-

a penalty for failure to pay the wages of a discharged employee on the day of his discharge.[35]

(III) *Medium of Payment.* In many states the statute forbids the payment of wages other than in lawful money or by an evidence of indebtedness payable in lawful money.[36] The purpose of these statutes is to protect the laborer, and it

ployees in lawful money at the time required by the statute are given fifteen days to execute due-bills, and therefore, where the employer is able to pay, an indictment against him for failing to do so may be returned before the expiration of the fifteen days. Com. *v.* Hillside Coal Co., 109 Ky. 47, 58 S. W. 441, 22 Ky. L. Rep. 559.

35. See the statutes of the several states.

Under the Arkansas statute fixing as a penalty for failure to pay employees on the day of their discharge, liability for their regular wages each day until paid, a servant may sue for such penalty independent of any action for actual damages, as where he has received his wages due up to the time of his discharge, before his action was commenced. St. Louis, etc., R. Co. *v.* Pickett, 70 Ark. 226, 67 S. W. 870. The fact that the master paid the servant one day's wages after his discharge is proper to be considered by the jury, in an action under the statute to recover such penalty, as bearing on the question of his indebtedness for wages, although the master claims that the payment was merely to settle a dispute. St. Louis, etc., R. Co. *v.* Pickett, *supra*. Such a statute, however, does not protect an employee neither employed nor discharged in the state, even though part of the services sued for were performed in the state. Louisiana, etc., R. Co. *v.* Phelps, 70 Ark. 17, 65 S. W. 709. Of course the employer is not subject to the penalty from the time of the discharge, where the amount due the employee is not immediately ascertainable, at least until the amount of wages due is ascertained or can be known by reasonable diligence. Fordyce *v.* Gorey, 69 Ark. 344, 65 S. W. 429. The day's wages as a penalty continue until judgment is rendered. Kansas City, etc., R. Co. *v.* Moon, 66 Ark. 409, 50 S. W. 996 [*following* St. Louis, etc., R. Co. *v.* Paul, 64 Ark. 83, 40 S. W. 705, 62 Am. St. Rep. 154, 37 L. R. A. 504].

36. State *v.* Haun, 7 Kan. App. 509, 54 Pac. 130; Cumberland Glass Mfg. Co. *v.* State, 58 N. J. L. 224, 33 Atl. 310; Evans *v.* Kingston Coal Co., 6 Kulp (Pa.) 351 (holding that the statute applies to persons or companies who occasionally pay in scrip as well as to those who habitually so pay); Harbison *v.* Knoxville Iron Co., 103 Tenn. 421, 23 S. W. 955, 76 Am. St. Rep. 682, 56 L. R. A. 316. See also Shaffer *v.* Union Min. Co., 55 Md. 74; State *v.* Loomis, (Mo. 1892) 20 S. W. 332. And see the statutes of the several states.

A contract between a storekeeper and an employer is void as against public policy where its effect is to nullify the constitutional provision that all wage-earners shall be paid for their labor in lawful money. Hudnall *v.* Watts Steel, etc., Syndicate, 49 S. W. 21, 20 Ky. L. Rep. 1211.

That it is immaterial by whom the order or check is issued or put in circulation see State *v.* Benn, 95 Mo. App. 516, 69 S. W. 484.

In England the statutes forbidding payment except in money are called the "Truck Acts." St. 1 & 2 Wm. IV, c. 37, amended by 50 & 60 Vict. c. 44. See also Athersmith *v.* Drury, 1 E. & E. 46, 5 Jur. N. S. 433, 28 L. J. M. C. 5, 7 Wkly. Rep. 14, 102 E. C. L. 46. The deduction from their wages of fines incurred by artificers is not a "payment otherwise than in the current coin of the realm," so as to make the employer guilty of an offense under the Truck Act. Redgrave *v.* Kelly, 54 J. P. 70, 37 Wkly. Rep. 543. Mere payment in goods instead of money, although not the result of any contract or understanding between the employer and the employee, is a violation of the statute. Wilson *v.* Cookson, 13 C. B. N. S. 496, 9 Jur. N. S. 177, 32 L. J. M. C. 177, 8 L. T. Rep. N. S. 53, 11 Wkly. Rep. 426, 106 E. C. L. 496. And the statute cannot be evaded by a mere colorable transaction whereby money is paid and immediately given back. Gould *v.* Haynes, 16 Cox C. C. 732, 54 J. P. 405, 59 L. J. M. C. 9, 61 L. T. Rep. N. S. 732. Compelling a weaver to take part payment in cloth defectively woven is an offense. Smith *v.* Walton, 3 C. P. D. 109, 47 L. J. M. C. 45, 37 L. T. Rep. N. S. 437. The statute applies only to artificers, workmen, and laborers, that is, such as contract to use their personal services and to receive payment for such services in wages, as distinguished from contractors. Sharman *v.* Sanders, 13 C. B. 166, 3 C. & K. 298, 17 Jur. N. S. 765, 22 L. J. C. P. 86, 1 Wkly. Rep. 152, 76 E. C. L. 166 (holding that one who contracts to do work upon a large scale, employing laborers under him, is not within the statute, although he superintends the work and from time to time labors personally therein); Bowers *v.* Lovekin, 6 E. & B. 584, 2 Jur. N. S. 1187, 25 L. J. Q. B. 371, 4 Wkly. Rep. 600, 88 E. C. L. 584; Riley *v.* Warden, 2 Exch. 59, 18 L. J. Exch. 120; Sleeman *v.* Barrett, 2 H. & C. 934, 10 Jur. N. S. 476, 33 L. J. Exch. 153, 9 L. T. Rep. N. S. 834, 12 Wkly. Rep. 411; Weaver *v.* Floyd, 16 Jur. 289, 21 L. J. Q. B. 151. A workman for a coal and iron company whose personal skill and labors are of the essence of the contract is an artificer, although part of his work was piece work which he could do at home and in fact get others to do for him, and although he sometimes worked for other people. Pillar *v.* Llynvi Coal, etc., Co., L. R. 4 C. P. 752, 38 L. J. C. P. 294, 20 L. T. Rep. N. S. 923, 17

has been held that he cannot waive, by contract or otherwise, the protection afforded to him by the statute.[37] The statutes do not apply to time checks issued, not as payment for work but merely as a statement of account or an acknowledgment of the amount due,[38] nor to a check issued as a credit and not in payment.[39] So an order on a third person to pay a specified sum to a laborer is not an evidence of indebtedness for wages payable otherwise than in lawful money so as to be a violation of the statute.[40] In some states the statute provides that store orders are redeemable in money at their face value in the hands of the laborer or a *bona fide* holder.[41] Where payment is made in money by an employer at the instance or with the authority of his employee to a third person on behalf of

Wkly. Rep. 1123. One not bound by his contract to do any part of the work personally is not an artificer. Ingram *v.* Barnes, 7 E. & B. 115, 132, 3 Jur. N. S. 861, 26 L. J. Q. B. 319, 5 Wkly. Rep. 726, 90 E. C. L. 115. A frame-work knitter is an artificer (Moorhouse *v.* Lee, 4 F. & F. 354), as is a person employed in loading boats with iron at a private canal close to the iron works (Millard *v.* Kelly, 7 Wkly. Rep. 12). A guard of goods on a railway train, although he occasionally assists in loading and unloading and coupling and uncoupling trucks, is not a workman or person engaged in manual labor, within the statute. Hunt *v.* Great Northern R. Co., [1891] 1 Q. B. 601, 55 J. P. 470, 60 L. J. Q. B. 216, 64 L. T. Rep. N. S. 418. Under such statutes the employer may supply *inter alia* medicine, medical attendance, and fuel, or materials, tools, or implements to be used in the work, provided a deduction therefor shall not be in any case made from the wages of such artificer, unless the agreement therefor is in writing and signed by the artificer. St. 1 & 2 Wm. IV, c. 37, § 23. Lamb *v.* Great Northern R. Co., [1891] 2 Q. B. 281, 56 J. P. 22, 60 L. J. Q. B. 489, 65 L. T. Rep. N. S. 225, 39 Wkly. Rep. 475; Chawner *v.* Cummings, 8 Q. B. 311, 10 Jur. 454, 15 L. J. Q. B. 161, 55 E. C. L. 311; *Ex p.* Cooper, 26 Ch. D. 693, 51 L. T. Rep. N. S. 374. There must be a written agreement (Pillar *v.* Llynvi Coal, etc., Co., L. R. 4 C. P. 752, 38 L. J. C. P. 294, 20 L. T. Rep. N. S. 923, 17 Wkly. Rep. 1123), but the amount to be deducted in respect of each head of deduction need not be specified in the written contract (Cutts *v.* Ward, L. R. 2 Q. B. 357, 36 L. J. Q. B. 161, 15 L. T. Rep. N. S. 614, 15 Wkly. Rep. 445). A deduction from the wages of an overlooker for engaging a child before having the child's name entered in the register, where the amount of forfeiture is regulated by the rules of the employer, is not a penalty but liquidated damages so that the Truck Act does not apply. Beetham *v.* Crewdson, 55 J. P. 55. A contract between an employer and an employee by which the employee agrees to become a member of a sick and accident club and impliedly authorizes the employer to make a weekly deduction from her wages and to pay the sum deducted to the treasurer of the fund is not a violation of the Truck Act. Hewlett *v.* Allen, [1894] A. C. 383, 58 J. P. 700, 63 L. J. Q. B. 608, 71 L. T. Rep. N. S. 94, 6 Reports 175, 42 Wkly. Rep. 670 [*affirming* [1892] 2 Q. B. 662, 62 L. J. Q. B. 9, 67 L. T. Rep. N. S. 45, 41 Wkly. Rep. 197].

37. State *v.* Benn, 95 Mo. App. 516, 69 S. W. 484.

The statutes in some states expressly make unlawful every contract by which the right to receive wages in lawful money is waived. Hancock *v.* Yaden, 121 Ind. 366, 23 N. E. 253, 16 Am. St. Rep. 396, 6 L. R. A. 576. But such a provision does not prevent an employee from making a valid contract that the amount due on a store account shall be taken from future wages. Hamilton *v.* Jutte, 16 Pa. Co. Ct. 193.

Constitutionality of provision against waiver see CONSTITUTIONAL LAW, 8 Cyc. 883.

38. Pere Marquette R. Co. *v.* McCaully, 36 Ind. App. 703, 74 N. E. 1129; Pere Marquette R. Co. *v.* McGovern, 36 Ind. App. 703, 74 N. E. 1128; Pere Marquette R. Co. *v.* Baertz, 36 Ind. App. 408, 74 N. E. 51.

39. Johnson *v.* Spartan Mills, 68 S. C. 339, 47 S. E. 695. See also Avent Beattyville Coal Co. *v.* Com., 96 Ky. 218, 28 S. W. 502, 16 Ky. L. Rep. 414, 28 L. R. A. 273, holding that it was not a violation of the statute, where employees were paid each month in lawful money for the past month's labor, that checks were issued during the month, upon the application of employees, payable in merchandise at the company's store, and the amount of such checks deducted from their wages at the end of the month, where the balance was paid in cash and no money was paid for outstanding checks.

40. Agee *v.* Smith, 7 Wash. 471, 35 Pac. 370.

41. See the statutes of the several states.

Who is a bona fide holder.— One purchasing coal orders, which were issued by a corporation to its employees in payment of their wages, at a discount of fifteen per cent, in the open market, and in good faith, is a *bona fide* holder, and is entitled to recover their face value from the employer. Harbison *v.* Knoxville Iron Co., 103 Tenn. 421, 53 S. W. 955, 76 Am. St. Rep. 682, 56 L. R. A. 316.

The fact that the order declares on its face that it is not transferable does not prevent a *bona fide* holder from recovering its face value from the person or corporation issuing it. Dayton Coal, etc., Co. *v.* Barton, 103 Tenn. 604, 53 S. W. 970.

the employee, this is considered equivalent to the payment of money to the employee.[42]

d. Deductions and Forfeitures. Statutes prohibiting deductions from the amount due as wages, on discharging an employee or on his abandonment of the contract, are in force in some of the states.[43] On the other hand statutes have been enacted in some states authorizing a forfeiture of the servant's wages where he leaves during the time for which he is employed.[44] The matter of fines for imperfections in the work is also regulated by statute in some states.[45]

3. Amount of Wages[46] — a. Where Not Fixed by Contract. If the contract does not fix the amount of compensation, the employee is entitled to recover what the services are reasonably worth.[47] The value to the employer of the benefits

42. Hewlett *v.* Allen, [1894] A. C. 383, 58 J. P. 700, 63 L. J. Q. B. 608, 71 L. T. Rep. N. S. 94, 6 Reports 175, 42 Wkly. Rep. 670 [*affirming* [1892] 2 Q. B. 662, 62 L. J. Q. B. 9, 67 L. T. Rep. N. S. 457, 41 Wkly. Rep. 197]. And Md. Acts (1880), c. 273, prohibiting the payment of employees of certain corporations operating in Allegany county otherwise than in legal money of the United States, does not prevent such employees from assigning what is due them from such a corporation by orders drawn on it specifying that the amounts thereof be deducted from their wages. Shaffer *v.* Union Min. Co., 55 Md. 74.

43. See the statutes of the several states.

Discharge of railroad employee.— A statute requiring payment without deduction, on the discharge of a railroad employee, means without discount for paying in advance of the time fixed by the contract, and does not prevent the corporation from offsetting the damages sustained by the employee's failure to perform his contract. Leep *v.* St. Louis, etc., R. Co., 58 Ark. 407, 25 S. W. 75, 41 Am. St. Rep. 109, 23 L. R. A. 264.

Forfeiture of wages on quitting without notice.— A statute providing that any person who shall withhold any part of the wages of an employee, because of an agreement requiring notice before leaving the employment, shall forfeit fifty dollars, does not apply to a contract of employment by which each party agrees to give the other two weeks' notice of intention to terminate it, and in default of such notice to forfeit or pay two weeks' wages. Pierce *v.* Whittlesey, 58 Conn. 104, 19 Atl. 513, 7 L. R. A. 286.

In Louisiana the code does not authorize a forfeiture of wages where a laborer is discharged for good cause before the expiration of his term (Taylor *v.* Paterson, 9 La. Ann. 251; Nolan *v.* Danks, 1 Rob. 332), although the code provides for forfeiture where the employee voluntarily leaves the employment without just cause (Taylor *v.* Paterson, *supra*).

Under English Truck Acts see Warburton *v.* Heyworth, 6 Q. B. D. 1, 45 J. P. 38, 50 L. J. Q. B. 137, 43 L. T. Rep. N. S. 461, 29 Wkly. Rep. 91; Wallis *v.* Thorp, L. R. 10 Q. B. 383, 44 L. J. Q. B. 137, 33 L. T. Rep. N. S. 11, 23 Wkly. Rep. 730; Archer *v.* James, 2 B. & S. 61, 8 Jur. N. S. 166, 31 L. J. Q. B. 153, 6 L. T. Rep. N. S. 167, 10 Wkly. Rep. 489, 110 E. C. L. 61; Gregson *v.* Watson, 34 L. T. Rep. N. S. 143, leaving employment without giving notice. See also *supra*, III, B, 2, c, (III).

44. Steed *v.* McRae, 18 N. C. 435.

45. See the statutes of the several states.

A statute required the amount of fine for imperfections in work to be agreed upon between manufacturer and employee. It was held thereunder that a weaver may, by acquiescence in similar conduct, expressly agree, that where he is paid in full for one week's work, fines for imperfections in work of that week may be deducted from the succeeding week's wages. It was also held that where notices were posted in the shop specifying the wages to be paid for weaving, according to the quality thereof, and the employee acquiesced in the terms of the notice, that there was an agreement on the amount of the fine within the statute; and that an agreement to pay according to the quality of weaving was not invalid for failure to determine what constitutes first or second quality as designated in the rules, although the employee himself is unaware of the difference. The agreement does not cover cases where poor yarn makes the cloth of second quality so as to be repugnant to the statutory provision limiting an agreement for fines to fines for imperfections in the work. Gallagher *v.* Hathaway Mfg. Corp., 172 Mass. 230, 51 N. E. 1086.

46. **Damages in action for services** see *infra*, III, B, 9, j.

Deduction or forfeiture and apportionment of wages see *infra*, III, B, 4.

47. Anderson *v.* Dezonia, 23 Ill. App. 422; Connor *v.* Hackley, 2 Metc. (Mass.) 613; Elwell *v.* Roper, 72 N. H. 585, 58 Atl. 507; Hendrickson *v.* Woods, 77 N. Y. App. Div. 644, 78 N. Y. Suppl. 949. See, generally, WORK AND LABOR.

Current wages.— Where nothing is said of wages, the master is held to contract for the current wages. Lawson *v.* Perry, Wright (Ohio) 242. But the value of the services of one having the care and management of a business in the absence of his employer cannot be determined alone by the rate of wages generally paid for salesmen or clerks. The value of the services will depend much upon the man himself as to his capacity and fidelity as well as upon the customary wages paid for that class of work. While the customary

received by him is to be considered as well as the labor spent by the employee;[48] but where one employs a person whom he knows is unskilful, without any express agreement as to compensation, and afterward accepts the work, a promise to pay the customary prices of the employee is implied, especially where the work corresponds with the work usually done by him.[49] The rate of compensation agreed upon for a certain period during a preceding year has been held to govern the wages payable under the same contract for the same work for a similar period of a following year;[50] and where the wages were agreed upon for the last year of services extending over several years, the jury are authorized to infer a like contract for each preceding year.[51] But the fact that a charge for a certain number of hours' services for the first year is assented to by the employer does not create an implied obligation on his part to pay twice as much the second year because the number of hours are doubled in the latter.[52]

b. Contracts in General — (i) *Contract Wage Governs.* The compensation fixed by the contract governs the recovery of wages,[53] and no other compensation

wages might be a criterion it would not be the only one. Where the services in their nature involve trust and confidence, and peculiar fitness and capacity to manage there can hardly be said to be a "ruling rate of wages" for employment of such a character applicable alike to all persons who might be employed. It cannot be said that the value of the services cannot in any degree be based upon the wages for like services at places in the county other than where the services are to be performed unless it is shown that the rate of wages elsewhere in the county was the same, since a comparison might be made, even if the wages differed in the county, which would in some degree tend to show the value of the services at the place where performed. Crusoe *v.* Clark, 127 Cal. 341, 59 Pac. 700.

Salary as expert.— A person employed to do work such as is done by an expert bookkeeper may be entitled to an expert bookkeeper's salary, although the word "expert" was not used in the contract of hire. Von Kaas *v.* Hamilton, 63 Wis. 132, 23 N. W. 424.

Services as "housekeeper."— The value of the services performed as a "housekeeper" is to be decided by the duties actually performed; and the recovery is not restricted to services involving merely the control and care of the house. Edgecomb *v.* Buckhout, 146 N. Y. 332, 40 N. E. 991, 28 L. R. A. 816. But where one employed under a contract by which she was to receive "housekeeper's wages" also performed services as teacher, it was held that she should have been limited to a recovery for housekeeper's services. Heideman *v.* Bolger, 65 Ill. App. 658.

Expectation to pay liberally.— In an action *ex contractu* for services, where the evidence authorizes the conclusion that the employer intended to pay, and the person employed expected to receive, a very liberal compensation, a verdict may be in conformity with the intention and expectation. Chiles *v.* Craig, 4 Dana (Ky.) 544.

Amount work is worth to employee.— Where A employed B to do a certain work, knowing B's habits and ability to do the work, it was held that B was entitled to recover for the work what it was worth to him to do it. Felt *v.* Rockingham School Dist. No. 2, 24 Vt. 297.

By statute a justice of the peace may have power to fix the rate of wages where no rate has been agreed upon. Holness *v.* Niebergall, 5 Terr. L. Rep. 250.

48. Metz *v.* Luckemeyer, 59 N. Y. Super. Ct. 53, 12 N. Y. Suppl. 550.

49. Peters *v.* Craig, 6 Dana (Ky.) 307.

50. Van Horn *v.* Van Horn, (N. J. Ch. 1890) 20 Atl. 826.

51. Tippin *v.* Brockwell, 89 Ga. 467, 15 S. E. 539.

52. Miller *v.* Hooper, 7 Hun (N. Y.) 200.

53. Laubach *v.* Cedar Rapids Supply Co., 122 Iowa 643, 98 N. W. 511; Houghton *v.* Kittleman, 7 Kan. App. 207, 52 Pac. 898; Smith *v.* The Joshua Levines, 4 Fed. 846. And see Flaherty *v.* Herring-Hall-Marvin Safe Co., 22 Misc. (N. Y.) 329, 49 N. Y. Suppl. 174.

Acceptance of offer.— The failure of the employer to object to the price named by the employee shows an acceptance of the compensation proposed. Norton *v.* Higbee, 38 Mo. App. 467; Wilder *v.* Stanley, 49 Vt. 105.

Limitation as to time.— The written appointment of claimant to supervise the construction of a gun, having a device of his own invention, stated, "You will be allowed a compensation of $200 a month for two months." Claimant continued his supervision for nineteen months. It was held that four hundred dollars was the limit of his compensation, although the period of two months stated in the appointment was necessarily less than that required to complete the work. Yates *v.* U. S., 25 Ct. Cl. 296.

Change of work or place of work.— If a person is employed by contract to do certain work, or to act in a certain capacity, and he is sent to some other place, or put at some other work, and nothing is said as to wages, it will be presumed that he is working at the wages fixed by the contract; but such presumption will not arise where the employee,

can be recovered,[54] irrespective of what the services were actually worth.[55] The employer cannot reduce the wages for the term during the period of employment,[56] unless the employee consents thereto or acquiesces therein.[57]

(II) *Amount Optional With Employer, Employee, or Third Person.* If the employer agrees to pay what the services are worth, he cannot fix the compensation at such sum as he pleases but must pay what the services are reasonably worth.[58] So, even if the compensation is left entirely to the employer, the employee is entitled to recover a reasonable remuneration for services performed by him.[59] Where the employer is to fix the compensation, the employee may recover the reasonable value of the services unless the employer exercises his right to fix the compensation at the completion of the services, or at least when called

at the request of the employer, removes to a foreign state where he renders no service for the employer, although the employer pays the amount of the employee's board in such state. Granz *v.* Lichtenhein, 84 Hun (N. Y.) 131, 32 N. Y. Suppl. 469.

Different wages for different work.— Where the contract provides different wages for different kinds of work, the amount which the employee can recover thereunder depends on the time which he spent respectively in the different kinds of work. Brown *v.* Vinal, 3 Metc. (Mass.) 533; Pressey *v.* H. B. Smith Mach. Co., 45 N. J. Eq. 872, 19 Atl. 618; Riley *v.* New York, 96 N. Y. 331 [*affirming* 49 N. Y. Super. Ct. 537].

Percentage of master's salary.— Where an employee was to receive for his services one half of the salary and compensation allowed to his employer, an officer, and the latter's compensation was increased retrospectively, the employee was entitled to one half of the increased compensation. Adair *v.* Maxwell, 17 Ill. 98.

Days for which recovery permissible.— The day of employment and the day of discharge will be considered as entire days in estimating the amount due for personal services. Olson *v.* Rushfeldt, 81 Minn. 381, 84 N. W. 123. Where the employment is for so much a day, "Sundays and all," from the day the employee starts "until his return," he is entitled to recover the agreed compensation for the Sundays included in the time he spent away from home, although he performed no work on those days. Alfree *v.* Gates, 82 Iowa 19, 47 N. W. 993. And where one was employed as a superintendent of a mining corporation, his right to recover for services was not limited to days when he was actually employed with the men working at the mines, where the by-law defining his duties plainly contemplated other duties which might properly be performed at other times. Calkins *v.* Seabury-Calkins Consol. Min. Co., 5 S. D. 299, 58 N. W. 797.

Number of hours.— Where one employed by the day, but not beginning work on some days at the usual time, informed his employer that he charged for full time as he did a full day's work, to which no objection was made, he may recover his full charge. Willey *v.* Warden, 27 Vt. 655. One employed to work a certain number of hours per day cannot recover for parts of days less than the prescribed number of hours, where his failure to work is not due to any interference or neglect on the part of the employer, although the contract provides for payment by the hour. Wilson *v.* Lyle, (Pa. 1889) 16 Atl. 861.

Implied contract by assignee to pay same wages as assignor.— Where one is employed at stipulated wages, and afterward the contract is assigned to a third person, and the employment continued without any new agreement, there is no implied contract that the employee should work for the same wages for the assignee, but only evidence from which the jury may infer such contract. Connor *v.* Hackley, 2 Metc. (Mass.) 613.

Construction of particular contracts as to amount of wages see Jova *v.* Southern Imp. Co., 68 Hun (N. Y.) 559, 22 N. Y. Suppl. 1031.

54. Wetmore *v.* C. A. Wetmore Co., 113 Cal. 321, 45 Pac. 679. See also Douglas *v.* Chapin, 26 Conn. 76.

55. Bradbury *v.* Helms, 92 Ill. 35.

56. Hackman *v.* Flory, 16 Pa. St. 196. See also Walker *v.* Grant, 40 Ill. App. 359 (holding that where the contract provides for a given salary and traveling expenses, the employer cannot subsequently limit such traveling expenses to a given sum); Flaherty *v.* Herring-Hall-Marvin Safe Co., 22 Misc. (N. Y.) 329, 49 N. Y. Suppl. 174.

57. Jennings *v.* Prudential Ins. Co. of America, 18 Misc. (N. Y.) 470, 42 N. Y. Suppl. 50 (holding that a servant who to avoid discharge acquiesces in deductions from his salary is estopped to sue for the amount thereof); Romaine *v.* Beacon Lith. Co., 13 Misc. (N. Y.) 122, 34 N. Y. Suppl. 124.

58. Miller *v.* Cuddy, 43 Mich. 273, 5 N. W. 316, 38 Am. Rep. 181.

59. Bryant *v.* Flight, 2 H. & H. 84, 3 Jur. 681, 8 L. J. Exch. 189, 5 M. & W. 114. But see Butler *v.* Winona Mill Co., 28 Minn. 205, 9 N. W. 697, 41 Am. Rep. 277, holding that where the compensation was to be determined by the employer at such amount as, under all the circumstances, he should consider right and proper, the employee could not recover more than the amount so determined, in the absence of any fraud or bad faith on the part of the employer, although such sum is considerably less than the reasonable value of the services.

upon to do so.[60] If the compensation is left optional with the employee, he cannot make an unreasonable and oppressive charge.[61] If the compensation is to be fixed by a third person, no recovery can be had for the services where no application has been made to him to fix the compensation.[62]

(III) *AGREEMENT FOR INCREASE IN WAGES.* An agreement for an increase of wages at a future time, made when the contract of employment is entered into, must be specific,[63] and is not enforceable if it rests in effect in the option of the employer.[64] The right to an increase, as provided for in the contract, may be forfeited,[65] or waived,[66] and cannot be recovered if the agreement for an increase is conditional unless such condition has been fulfilled.[67]

c Commissions.[68] The wages of an employee may by contract consist wholly of commissions or a fixed sum and certain commissions.[69] Termination of the

60. Toledo, etc., R. Co. *v.* Lott, 10 Ohio Cir. Ct. 249, 6 Ohio Cir. Dec. 447.

61. Van Arman *v.* Byington, 38 Ill. 443.

62. Owen *v.* Bowen, 4 C. & P. 93, 19 E. C. L. 423.

63. See Mackintosh *v.* Kimball, 101 N. Y. App. Div. 494, 92 N. Y. Suppl. 132; Mackintosh *v.* Thompson, 58 N. Y. App. Div. 25, 68 N. Y. Suppl. 492.

Mistake.— Where a promise of an increase in wages by reason of a change to work requiring greater skill is followed by the receipt of increased wages, without any further agreement, the employer cannot contend that the money was received by mistake or with knowledge of the overpayment so as to raise an implied promise to repay. Kennedy *v.* Murphy Iron Works, 91 Mich. 500, 51 N. W. 1120.

64. Blaine *v.* Knapp, 140 Mo. 241, 41 S. W. 787, holding, under an agreement for an increase if at any time the character of the employee's work should fairly justify a change of mind on the part of the employers, that their opinion that he was entitled to such increase was a condition to his right to it.

What employer can afford to pay.— An agreement to increase the wages after a certain day, without stating how much, if the employer could afford to pay the same, does not entitle the employee to an increase without a new contract. Munchoff *v.* Ford, 17 Ind. App. 131, 46 N. E. 357.

65. Kirk *v.* Hodgson, 3 Johns. Ch. (N. Y.) 400, holding, however, that where a clerk, under contract for an increase of salary after the first year, secretly overdrew, without intending any fraud, but on the faith of such increase, he did not forfeit his right to the increase where he was continued in the service.

66. Seeber *v.* American Min., etc., Co., 57 Hun (N. Y.) 591, 10 N. Y. Suppl. 851, holding that the acceptance of a partial increase without objection, although less than the amount claimed, prevented the employee from recovering the latter sum.

67. *Arkansas.*— Van Vleet *v.* Hayes, 56 Ark. 128, 19 S. W. 427.

Colorado.— See McCormick *v.* Cox, 8 Colo. App. 17, 44 Pac. 768, holding that where an employee agreed to work for half wages until ore was struck, whereupon he was to be paid his back wages from the proceeds thereof, but the proceeds proved inadequate for full reimbursement of both employer and employee, the latter could recover only his *pro rata* share, in the absence of any agreement as to priorities.

Connecticut.— Woodbridge *v.* Pratt, etc., Co., 69 Conn. 304, 37 Atl. 688.

Massachusetts.—Collett *v.* Smith, 143 Mass. 473, 10 N. E. 173, holding that where the increase depended on the employer continuing the business there was a continuance of the business where he carried on the same business with a partner.

Wisconsin.— Whitworth *v.* Brown, 85 Wis. 375, 55 N. W. 422, continuance in manufacturing business.

68. See also PRINCIPAL AND AGENT.

69. See Gillett *v.* Deranco, 5 Rob. (La.) 13 (holding that one employed to liquidate the affairs of a commercial partnership cannot claim a commission on the value of goods divided in kind among the partners, but may claim a compensation proportioned to his trouble); Byrnes *v.* Baldwin, 17 Misc. (N. Y.) 280, 40 N. Y. Suppl. 386 (holding that, under a contract whereby the employee was to be paid for superintending the manufacture of liquor at the end of each month, a certain sum per gallon on the amount of actual sales effected during each month, he is entitled to such sum on every gallon manufactured under his superintendence, the amount to become due on the sale of the liquor, although it was not sold until after he left the employer's service).

Consideration for agreement.—Where plaintiff was engaged to work life insurance for defendant at a stated salary, expense incurred in boarding defendant, and work performed in renewing old policies, which was not contemplated in the original contract, were sufficient consideration to support a subsequent agreement granting him commissions in addition to salary. Raipe *v.* Gorrell, 105 Wis. 636, 81 N. W. 1009.

Allowance to employee for sums paid to others.— One who agreed to make cheese for a factory, and to "make all the sales" and draw all the checks for a certain sum for each one hundred pounds of cheese made, was entitled, in addition, to commissions paid by him to brokers in distant places, whose services were necessary in making sales, and

employment by consent,[70] or pursuant to an option in the contract,[71] or by discharge for cause,[72] before the end of the term provided for in the contract, does not, in the absence of special circumstances, forfeit the right to commissions already earned.

d. Profits or Products of Business — (i) *CONTRACTS IN GENERAL.*[73] Compensation for the services of an employee is sometimes fixed, wholly or in part, at a certain per cent of the net profits of the business in which he is employed.[74]

were according to the ordinary usage. Bilsborrow *v.* James, 25 Hun (N. Y.) 18.

What constitutes expenses.— Where a contract provided for a salary and a commission on the receipts less expenses, the cost of merchandise was not a portion of the expenses. Freudenberger *v.* Sternberg, 67 N. J. L. 297, 51 Atl. 699.

Time when payable.—Where a contract provided for commission on cash receipts, to be computed yearly, payable after three months' notice, the commission was not payable, except on three months' notice after the termination of the year. Freudenberger *v.* Sternberg, 67 N. J. L. 297, 51 Atl. 699.

Where no time is fixed for the payment of commissions the commission account is to be deducted at the end of the period of employment, and a provision for weekly withdrawals, to be charged to the commission account, imports an agreement to pay such sum from week to week as provided for in the contract, irrespective of the question whether commissions had accrued for application to each withdrawal. Weinberg *v.* Blum, 13 Daly (N. Y.) 399; Schwerin *v.* Rosen, 45 Misc. (N. Y.) 409, 90 N. Y. Suppl. 407.

Construction of particular contracts see Weik *v.* Williamson Gunning Advertising Co., 109 Mo. App. 6, 84 S. W. 144 (contract for twenty-five dollars a week and a commission, with provision that the employee's compensation should equal fifty dollars per week, was held to mean that the minimum compensation under the contract was fifty dollars per week); Fry *v.* Hestwood, 21 Wash. 424, 58 Pac. 206.

Waiver of right to claim by laches see Des Moines Ins. Co. *v.* Tones, 113 Iowa 119, 84 N. W. 948.

Mercantile reports as evidence to prove amount of sales see Segler *v.* Bernstein, 82 N. Y. App. Div. 267, 81 N. Y. Suppl. 1082.

70. Freudenberger *v.* Sternberg, 67 N. J. L. 297, 51 Atl. 699; Mayer *v.* Goldberg, 116 Wis. 96, 92 N. W. 556.

How estimated where contract terminated before end of year.— Where a contract of employment of a manager of a sales branch of a business provided for commission on the cash receipts less expenses, to be computed yearly, the commission could be ascertained only by deducting the cash receipts of the whole year from the expenses, and reckoning the agreed percentage of the proportionate part of the residue represented by the manager's time of service during the year; the contract having been terminated within such year. Freudenberger *v.* Sternberg, 67 N. J. L. 297, 51 Atl. 699.

71. Blasdell *v.* Souther, 6 Gray (Mass.) 149, holding, however, that where commissions are to be based on the sale of the goods by the employee during the term of the contract, and the contract is terminated by the employer, according to provisions therein, before it would otherwise terminate, no commissions are payable on goods then in the process of manufacture, but not finished or paid for, although made under contracts procured by the solicitations of the employee.

72. Abendpost Co. *v.* Hertel, 67 Ill. App. 501, holding that where an employee to solicit advertisements is properly discharged before the expiration of his term, he is, in the absence of any particular provision in the contract, entitled to a commission on all advertising procured by him prior to that time, although not then published.

73. **Action for account as remedy** see ACCOUNTS AND ACCOUNTING, 1 Cyc. 407.

74. *Massachusetts.*— Allcott *v.* Boston Steam Flour Mill Co., 9 Cush. 376, holding, under a particular contract, that the compensation was intended to be calculated upon the profits of an entire year, and not on the profits of a part of a year.

Minnesota.— Scase *v.* Gillette-Herzog Mfg. Co., 55 Minn. 349, 57 N. W. 58, holding that where the agreement was for a percentage of the profits, defined as a certain per cent of the dividend declared for each year, that the employee was entitled to have his percentage computed each year upon the net profits subject to dividend, under the contract, irrespective of whether a dividend was actually declared.

New Jersey.— Dwyer *v.* Bonitz, (Ch. 1895) 31 Atl. 172, where a yearly rest to ascertain profits at the end of the contract year instead of the end of the calendar year was held proper under particular circumstances.

New York.— Jennery *v.* Olmstead, 90 N. Y. 363 (holding that where an employee under a contract for years was to receive a salary not to exceed a certain sum, from the net profits, the employee could not claim compensation for the services of a particular year during which no profits were made, from the profits of a subsequent year); Osbrey *v.* Reimer, 49 Barb. 265; Clapp *v.* Astor, 2 Edw. 379, holding that where the employee was to receive the dividends or profits upon a certain amount of stock during the time of his employment, which was not fixed, and no dividend was declared until after he had left the service, a subsequent dividend could not be apportioned in favor of the employee.

Canada.— Sims *v.* Harris, 1 Ont. L. Rep. 445, where the employment was for a year

Where provision is also made for a fixed salary in addition, the right to receive such salary is generally held to be independent of whether any profits are made.[75] The fact that a contract of employment provides that the employee shall have a share of the profits does not of itself make the parties partners.[76]

(II) *WHAT ARE NET PROFITS.* The net profits of a business, a percentage of which an employee is to receive for his services, is what remains after all legitimate expenses thereof have been paid.[77] The interest on capital invested by

unless the business was disposed of before the expiration of that time, and the employee was to be given a specified percentage of the net profits of the business at the end of the year, and it was held that he was entitled to such percentage of the net profits up to the time of the sale of the business before the end of the year.

See 34 Cent. Dig. tit. "Master and Servant," § 85.

Effect of increase in amount of stock.— Where the salary of the employee was to be based on a certain per cent of the amount paid as dividends, and thereafter the capital stock was doubled, it was held a question for the jury whether it was the intent of the parties, in entering into the contract, that the amount of capital on which the employee's interest was to be computed was to remain the same. Bradburn *v.* Solvay Process Co., 18 N. Y. App. Div. 542, 46 N. Y. Suppl. 161.

Interest on profits.— An employee whose compensation is measured by a share in the profits is entitled to interest on compensation remaining, after it is due, in the hands of the employer. Goldsmith *v.* Latz, 96 Va. 680, 32 S. E. 483.

What constitutes a sale.— A transfer of their shares by all the stock-holders of a corporation to a syndicate, to continue the business under a new form of incorporation, at the same place, and a subsequent transfer of the plant and all the stock on hand to the new company, is not a sale of the goods manufactured by the company, within the meaning of a contract between the old company and a superintendent, under which he was entitled to a commission on the profits realized on all sales of manufactured goods. Woodbridge *v.* Pratt, etc., Co., 69 Conn. 304, 37 Atl. 688.

Profits on goods actually sold after the termination of the employee's contract are not to be considered where the contract calls for a certain per cent of the net profits for a certain number of years from a certain date. Wallace *v.* Beebe, 12 Allen (Mass.) 354. See also Briggs *v.* Groves, 9 N. Y. Suppl. 765 [*affirmed* in 132 N. Y. 545, 30 N. E. 865].

Half interest in increase of live stock.— Where the employee is to receive a half interest in the increase in stock on a farm, he is entitled only to a half of the stock on hand at the termination of the agreement, after deducting the full number furnished by the owner at the commencement of the hiring. Long *v.* Kee, 42 La. Ann. 899, 8 So. 610.

75. Gifford *v.* Waters, 6 Daly (N. Y.) 302 [*affirmed* in 67 N. Y. 80]; Coughtry *v.* Levine, 4 Daly (N. Y.) 335; Michael *v.* Kronthal, 13 Misc. (N. Y.) 428, 34 N. Y. Suppl. 681; Davis *v.* Manchester, 17 R. I. 577, 23 Atl. 1016.

76. See PARTNERSHIP.

77. Arthur Jordan Co. *v.* Caylor, 36 Ind. App. 640, 76 N. E. 419.

The phrase "cash receipts, less all expenses," is not synonymous with "net profits." Freudenberger *v.* Sternberg, 67 N. J. L. 297, 51 Atl. 699.

Items held chargeable as expenses: Salary paid to a partner (McDonald *v.* Buckstaff, 56 Nebr. 88, 76 N. W. 476); cost of materials consumed and depreciation of property bought for use in business (Danolds *v.* Lord, 83 Hun (N. Y.) 359, 31 N. Y. Suppl. 915); allowance for bad debts, the usual rebates to the employer's customers, payment for repairs charged to the account of the merchandise repaired, and taxes paid which had been charged to stock account (Conville *v.* Shook, 144 N. Y. 686, 39 N. E. 405); salary of bookkeeper in whose employment plaintiff acquiesced (Boisnot *v.* Wilson, 109 N. Y. App. Div. 569, 96 N. Y. Suppl. 581); depreciation arising from the running out of the lease and the waste of the plant and machinery (Rishton *v.* Grissell, L. R. 5 Eq. 326).

Items not chargeable as expenses: Salary for services rendered by the master, or money expended in moving the master's store to a new location (Boisnot *v.* Wilson, 109 N. Y. App. Div. 569, 96 N. Y. Suppl. 581), or deterioration in the value of property belonging to one of the parties individually (Mack *v* Shortle, 76 N. Y. App. Div. 586, 79 N. Y. Suppl. 109).

What constitutes receipts.— Outstanding accounts are properly regarded as receipts in the absence of anything to show that they are not good and collectable. Mack *v.* Shortle, 76 N. Y. App. Div. 586 79 N. Y. Suppl. 109. The cash surrender value of a liquor-tax certificate and insurance policy which were paid for out of the proceeds of the business is properly included in the profits. Mack *v.* Shortle, *supra*. But the amount the master realized from the sale of the lease, on moving his store, should not be included in the profits. Boisnot *v.* Wilson, 109 N. Y. App. Div. 569, 96 N. Y. Suppl. 581.

Profits upon the sale of the business during a particular year, that is, the excess of the amount realized by the sale over the estimated value, cannot be included as the basis on which to figure the net profits. Rishton *v.* Grisnell, L. R. 5 Eq. 326; Sims *v.* Harris, 1 Ont. L. Rep. 445.

Profits from another branch of business.— One employed to conduct a coal business, to

the employer,[78] especially where the employee had no knowledge of any agreement between the employers therefor,[79] or the interest on loans obtained by the employer and used in the business,[80] is ordinarily not chargeable as expense. Whether the amounts paid to the employee as a periodical compensation or as advances are chargeable to the expense account depends on the terms of the particular contract.[81] If an employee is to receive a per cent of the net profits of all sums realized on certain contracts, only the expenses necessary on account of such contracts should be deducted, and not any of the expenses incidental to the management of the employer's business.[82]

e. Additional Compensation and Charges[83]—(i) *Extra Work.* Unless there is an express agreement to pay therefor,[84] or a uniform and notorious custom sufficient to warrant the presumption that a contract was made with reference

be paid a portion of the net profits of the business, is not entitled to any portion of the advance in value of the real estate purchased by the coal company upon which to locate its coal yard. Hawley *v.* Kansas, etc., Coal Co., 48 Kan. 593, 30 Pac. 14. So where the erection of a warehouse was not within the legitimate scope of the business of the firm in which an employee was to have an interest in the profits, he was not entitled to commissions on the difference between the investment and what the firm received from the warehouse on dissolution. Amsden *v.* Dunham, 78 N. Y. App. Div. 33, 78 N. Y. Suppl. 989.

Bad faith on part of employer.— Loss of receipts or increased expenditures due to bad faith on the part of the employer are to be added to the profits actually earned in computing the compensation to be paid the employee. McDonald *v.* Buckstaff, 56 Nebr. 88, 76 N. W. 476.

Actions against employer after accounting. — The amount due the employee should be determined by accountings between them without regard to suits subsequently brought by a third person, or threatened, against the employer for breach of contract; and, in case judgment subsequently should go against the employer in such suits, his remedy would be against the employee for contribution. Elbert *v.* Haehler, 149 N. Y. 343, 43 N. E. 914. See also Morrow *v.* Murphy, 120 Mich. 204, 79 N. W. 193, 80 N. W. 255.

Property used by employee.— Where a factory superintendent, whose compensation was a share of the profits, used property belonging to it for himself, he was chargeable with the value thereof, although it was customary to permit the use of such property by the superintendent and charge it to expense, where it does not appear that the owner knew the custom. Morrow *v.* Murphy, 120 Mich. 204, 79 N. W. 193, 80 N. W. 255.

The construction of the parties of a prior similar contract, as to what constitutes expenses, should be adopted in construing a second contract. Arthur Jordan Co. *v.* Caylor, 36 Ind. App. 640, 76 N. E. 419.

78. Morrow *v.* Murphy, 120 Mich. 204, 79 N. W. 193, 80 N. W. 255; Paine *v.* Howells, 90 N. Y. 660; Rishton *v.* Grissell, L. R. 5 Eq. 326.

79. Buning *v.* Kittell, 4 Silv. Sup. (N. Y.) 474, 7 N. Y. Suppl. 485.

80. Selz *v.* Buel, 105 Ill. 122. See also McDonald *v.* Buckstaff, 56 Nebr. 88, 76 N. W. 476, holding that interest on moneys borrowed by a partner for the benefit of another manufacturing plant in which he was interested is not an expense.

81. See Briggs *v.* Groves, 9 N. Y. Suppl. 565 [*affirmed* in 132 N. Y. 545, 30 N. E. 865], where there was no salary but a portion of the net profits, a part of which was paid weekly as the work progressed, and it was held that such weekly payments should not be treated as a part of the expense account. The cases of Buning *v.* Kittell, 4 Silv. Sup. (N. Y.) 474, 7 N. Y. Suppl. 485, and Fuller *v.* Miller, 105 Mass. 103, are therein distinguished as involving a fixed weekly compensation in addition to a portion of the net profits. In Selz *v.* Buel, 105 Ill. 122, an employer agreed to pay a sum equal to one fifth of the net profits of the business, which sum he guaranteed should not be less than seven thousand five hundred dollars a year, and it was held that the amount to be paid the employee could not be charged as an expense. In Rishton *v.* Grissell, L. R. 5 Eq. 326, an employee was to have £500 a year for his services, and in addition the excess of a certain per cent from the profits over said sum, and it was held that the employer could not deduct £500 before the profits were estimated.

82. *Re* British Columbia, etc., Spar, etc., Co., 25 L. T. Rep. N. S. 653.

83. Statutory regulation see *supra*, III, B, 2.

Government employees see United States.

Letter carriers see Post-Office.

Municipal employees see Municipal Corporations.

84. Wilson *v.* Lyle, (Pa. 1888) 12 Atl. 365 (holding that where so much an hour was fixed as compensation for work in excess of ten hours a day, the employee was not entitled to compensation for the time spent in going to and returning from work); Elliott's Estate, 15 Montg. Co. Rep. (Pa.) 53 (holding that a servant may recover for extra services if he shows a contract to that effect, although no rate was agreed upon). See also Flicker *v.* Graner, 23 Misc. (N. Y.) 112, 50 N. Y.

thereto,[85] a servant cannot ordinarily recover additional compensation for extra work within the scope of his employment.[86] On the other hand the general rule is that where a servant, employed for a certain time for special work, renders services outside the scope of his employment, on the request of the employer, although without any express agreement for extra compensation, he may recover the reasonable value thereof;[87] but it has been held that this rule must be cautiously applied, and that the service must be so far outside of the sphere of the employment as to indicate a probable intention on the part of the master to allow extra compensation therefor.[88]

(II) *PROMISE OF BONUS.* Where a bonus is promised the employee at a certain time and on certain conditions, he has no right thereto until after such time,[89] nor is he entitled to the bonus until the conditions designated have been

Suppl. 769 [*affirming* 22 Misc. 764, 48 N. Y. Suppl. 1104].

85. Schurr *v.* Savigny, 85 Mich. 144, 48 N. W. 547.

86. *California.*— Cany *v.* Halleck, 9 Cal. 198.

Georgia.— Smith *v.* Central R., etc., Co., 88 Ga. 266, 14 S. E. 567.

Illinois.—See Western Manufacturers' Mut. Ins. Co. *v.* Boughton, 136 Ill. 317, 26 N. E. 591 [*affirming* 37 Ill. App. 183].

Louisiana.— Turnell's Succession, 34 La. Ann. 888.

Michigan.— Forster *v.* Green, 111 Mich. 264, 69 N. W. 647.

Missouri.— New York L. Ins. Co. *v.* Goodrich, 74 Mo. App. 355. See also Leach *v.* Hannibal, etc., R. Co., 86 Mo. 27, 56 Am. Rep. 408.

New York.—Lyons *v.* Jube, 17 N. Y. Suppl. 664; Perry *v.* Woodbury, 17 N. Y. Suppl. 530; Benjamin *v.* Public Service Pub. Co., 11 N. Y. Suppl. 208; Moffat *v.* Brooklyn, 1 N. Y. Suppl. 781.

Pennsylvania.— Ranck *v.* Albright, 36 Pa. St. 367. See also Delaney *v.* Grove, 162 Pa. St. 138, 29 Atl. 401.

See 34 Cent. Dig. tit. "Master and Servant," § 87.

Compare Edrington *v.* Leach, 34 Tex. 285, holding that where one contracts to serve half the time and to receive but half pay, he may show that he served all the time and recover at the rate stipulated for in the contract.

Extra hours.— No extra compensation can be recovered by an employee for working overtime, in the absence of an express agreement. Luske *v.* Hotchkiss, 37 Conn. 219, 9 Am. Rep. 314; Levi *v.* Reid, 91 Ill. App. 430; Mathison *v.* New York Cent., etc., R. Co., 72 N. Y. App. Div. 254, 76 N. Y. Suppl. 89; Koplitz *v.* Powell, 56 Wis. 671, 14 N. W. 831; Steam Dredge No. 1, 87 Fed. 760. And see *supra*, III, B, 2, b.

Work on Sunday.— In the absence of a special contract to pay therefor, a servant cannot recover extra compensation for Sunday work (Guthrie *v.* Merrill, 4 Kan. 187), especially where he knew that certain work would be required of him on Sunday (Robinson *v.* Webb, 73 Ill. App. 569).

Working during vacation period.— An employee cannot recover extra compensation, in the absence of any express agreement therefor, where he works during the time in which he might have taken a vacation with pay; nor can he recover if the employer had refused to allow the vacation. Schurr *v.* Savigny, 85 Mich. 144, 48 N. W. 547.

Presumption against agreement to pay extra compensation.— In a suit for extra compensation brought by a bookkeeper against his employer, when the proof discloses false entries by plaintiff in defendant's books, evidencing defendant's assent to pay extra compensation, if unexplained and unsupported by confirmatory and satisfactory evidence, they create a strong presumption against the demand. Levy *v.* McCan, 44 La. Ann. 528, 10 So. 794.

87. *Illinois.*— Dull *v.* Bramhall, 49 Ill. 364.

Indiana.— Cincinnati, etc., R. Co. *v.* Clarkson, 7 Ind. 595; Pittsburgh, etc., R. Co. *v.* Henderson, 9 Ind. App. 480, 36 N. E. 376.

Michigan.— Lewis *v.* Roulo, 93 Mich. 475, 53 N. W. 622.

New York.— Kleb *v.* Wallace, 6 N. Y. App. Div. 583, 39 N. Y. Suppl. 654.

Pennsylvania.— Delaney *v.* Grove, 162 Pa. St. 138, 29 Atl. 401.

See 34 Cent. Dig. tit. "Master and Servant," § 87. See also WORK AND LABOR.

Questions of fact.— Whether extra work was regarded by the servant as in the line of his employment, from the fact that he made no demand for compensation until after he was discharged, is a question of fact. Snyder *v.* Zearfoss, 41 Wkly. Notes Cas. (Pa.) 525.

88. Mathison *v.* New York Cent., etc., R. Co., 72 N. Y. App. Div. 254, 76 N. Y. Suppl. 89. See also Houghton *v.* Kittleman, 7 Kan. App. 207, 52 Pac. 898 (holding that one employed as housekeeper cannot recover for services as nurse in addition to her wages as housekeeper, when it does not appear that any agreement was made to pay for such extra services, or that the employer had any knowledge that she expected to charge therefor); Murray *v.* Griffiths, 48 Misc. (N. Y.) 398, 95 N. Y. Suppl. 573.

89. Allen *v.* Aylesworth, 58 N. J. Eq. 349, 44 Atl. 178.

A provision that if the employee "should leave" the company his right to a bonus in the stock of the company, promised to him on the happening of a certain contingency, should

fulfilled.[90] When the parties mutually terminate a contract of employment before the expiration of its term, a bonus already earned is recoverable.[91]

f. Renewal or Continuance of Employment.[92] It will be presumed, in the absence of other proof, where an employee hired for a definite term at a fixed price, and continues in his employment after the term without any new contract, that the parties intended that he should be paid the same wages which were payable to him under the original contract.[93] There is no such presumption, however, where the employee continues in other or different employment;[94] where the agreement as to the period of service and the amount of wages was not made until some time after the creation of the relation;[95] or where the employer assigns his contract to a third person, and the employee continues in the service

be only to *pro rata* shares, the dismissal of the employee was not a leaving of the corporation. Price *v.* Minot, 107 Mass. 49.

Time to sue.— Where a stock-holder contracted with an employee to transfer to him certain stock after a certain period of employment, his participating in the dismissal of the employee, and attempting to terminate the contract before the date stipulated, entitles the employee to sue to establish his right to the stock at once. Price *v.* Minot, 107 Mass. 49.

90. Winter *v.* Southern Loan, etc., Co., (Va. 1897) 26 S. E. 507, holding that where the bonus was conditioned on the sale of specific bonds there was no implied agreement that the employer would put the bonds on the market.

Satisfactory performance of services.— Where a bonus was agreed upon if the services of the employee were satisfactory, and it was provided that the employee might be discharged at any time if his services were not up to his employer's expectations, in which event he was to receive no bonus, the fact that the employee continued in his employment until the end of the term was sufficient evidence that his services were satisfactory and entitled him to recover the bonus. Fischer *v.* Conhaim, 35 Misc. (N. Y.) 791, 72 N. Y. Suppl. 1102 [*affirming* 35 Misc. 125, 71 N. Y. Suppl. 315]. But where a bonus is promised if the employee shall faithfully and satisfactorily perform his duties for the term fixed, the right thereto depends on the employer's decision, at the end of the period fixed on, as to the question of the employee's faithfulness, so that if he is discharged for cause there can be no recovery. Dwyer *v.* Rathbone, 1 Silv. Sup. (N. Y.) 418, 5 N. Y. Suppl. 505. And see Joseph Campbell Preserve Co. *v.* Holcomb, 67 Kan. 48, 72 Pac. 552, holding that where the payment of a bonus was to depend entirely on the determination of the employer at the end of the services that the services were satisfactory, the employee must show the satisfaction of the employer at the end of the services.

91. Scheuer *v.* Monash, 40 Misc. (N. Y.) 668, 83 N. Y. Suppl. 253.

92. Effect in general see *supra*, II, A, 8.

93. *California.*— Hermann *v.* Littlefield, 109 Cal. 430, 42 Pac. 443; Nicholson *v.* Patchin, 5 Cal. 474.

Illinois.— Crane Bros. Mfg. Co. *v.* Adams, 142 Ill. 125, 30 N. E. 1030 (holding that where a corporation has been paying a secretary a certain fixed salary, and also allowing him to receive the dividends on certain stock as additional compensation, a withdrawal by the company of the right to such dividends does not take away the employee's right thereto until he is notified of such withdrawal); Grover, etc., Sewing-Mach. Co. *v.* Bulkley, 48 Ill. 189; Morgan *v.* McCaslin, 114 Ill. App. 427; Moline Plow Co. *v.* Booth, 17 Ill. App. 574.

Louisiana.—Sullivan *v.* New Orleans Stave, etc., Co., 44 La. Ann. 787, 11 So. 89; Lalande *v.* Aldrich, 41 La. Ann. 307, 6 So. 28. See also Louisiana Nat. Automatic Fire Alarm Co. *v.* New Orleans, etc., R. Co., 115 La. 633, 39 So. 738; Vowell *v.* Metairie Assoc., 19 La. Ann. 298.

New Hampshire.— New Hampshire Iron Factory Co. *v.* Richardson, 5 N. H. 294.

New York.— Douglass *v.* Merchants' Ins. Co., 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822; Huntingdon *v.* Claffin, 38 N. Y. 182; Vail *v.* Jersey Little Falls Mfg. Co., 32 Barb. 564; Adams *v.* Fitzpatrick, 56 N. Y. Super. Ct. 580, 5 N. Y. Suppl. 181 [*affirmed* in 125 N. Y. 124, 26 N. E. 143]; Bacon *v.* New Home Sewing-Mach. Co., 13 N. Y. Suppl. 359 [*affirmed* in 129 N. Y. 658, 30 N. E. 65].

Pennsylvania.— Ranck *v.* Albright, 36 Pa. St. 367; Wallace *v.* Floyd, 29 Pa. St. 184, 72 Am. Dec. 620.

Washington.— Burden *v.* Cropp, 7 Wash. 198, 34 Pac. 834.

See 34 Cent. Dig. tit. "Master and Servant," § 86.

Proof of the original contract, in the absence of sufficient evidence to show a change in the terms of employment, will limit the right of recovery to the salary fixed therein. Mears *v.* O'Donoghue, 58 Ill. App. 345.

A promise of a present at the end of a year in connection with the contract of services for one year is renewed, where the servant continues in his employment beyond the specified term for an additional year or years, nothing being said to the contrary. Mansfield *v.* Scott, 1 Cl. & F. 319, 6 Eng. Reprint 936.

94. Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430; Ingalls *v.* Allen, 132 Ill. 170, 23 N. E. 1026 [*reversing* 33 Ill. App. 458]. See also Reed *v.* Swift, 45 Cal. 255.

95. Smith *v.* Velie, 60 N. Y. 106.

of the assignee without any express agreement between them as to the wages to be paid.[96]

g. Time During Which Interest Runs.[97] If the wages are not payable on a certain date,[98] or if the amount due as wages is unliquidated,[99] interest does not begin to run thereon until after a demand of payment. On the other hand, if wages are payable at a specified time, the general rule is that interest runs from such date.[1]

h. Waiver or Estoppel of Employee. A servant who presents a monthly account;[2] who gives a receipt in full each week or month for the services performed therein;[3] who accepts periodical payments, without objection, with knowledge that the employer regards them as payment in full;[4] or who acquiesces in monthly statements rendered by his employer, and by which he is requested to advise the employer of any error therein,[5] cannot thereafter claim wages for such periods in excess of such amounts.

4. Deductions or Forfeitures[6] **— a. In General.** Forfeiture of, or deductions from, the wages agreed to be paid an employee[7] may result from an express provision therefor in a contract of hire;[8] or may follow, independent of a contract provision as to forfeiture or deduction, from a failure to fully perform the serv-

96. Connor *v.* Hackley, 2 Metc. (Mass.) 613.

97. See, generally, INTEREST, 22 Cyc. 1547, *et seq.*

Interest as damages for breach of contract see DAMAGES, 13 Cyc. 85.

98. Soule *v.* Soule, 157 Mass. 451, 32 N. E. 663. See also Paducah Land, etc., Co. *v.* Hays, 24 S. W. 237, 15 Ky. L. Rep. 517.

99. Dexter *v.* Collins, 21 Colo. 455, 42 Pac. 664; Ford *v.* Tirrell, 9 Gray (Mass.) 401, 69 Am. Dec. 297; Farr *v.* Semple, 81 Wis. 230, 51 N. W. 319.

1. Douglas *v.* Chapin, 26 Conn. 76; Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372. But see The Elizabeth Frith, 8 Fed. Cas. No. 4,361, 1 Blatchf. & H. 195; Gammell *v.* Skinner, 9 Fed. Cas. No. 5,210, 2 Gall. 45.

2. Lachine *v.* Manistique R. Co., 126 Mich. 519, 85 N. W. 1102.

3. Forster *v.* Green, 111 Mich. 264, 69 N. W. 647; Bartlett *v.* Grand Rapids St. R. Co., 82 Mich. 658, 46 N. W. 1034. See also Davis *v.* Detroit Boat Works, 121 Mich. 261, 80 N. W. 38.

4. Levi *v.* Reid, 91 Ill. App. 430.

Presumptions.— Where a servant is paid less wages than he had been receiving under his contract of employment, and takes the money, week after week, without objection or demand for more, there is a legal presumption that the money is paid and received under an agreement for a reduction, and that the amount paid and received is in full payment. He cannot remain in the service with a mental reservation of an intention to sue for an alleged balance after his employment has come to an end. Osborn *v.* Presser, 8 Pa. Dist. 271.

5. Shade *v.* Sisson Mill, etc., Co., 115 Cal. 357, 47 Pac. 135.

6. Statutory provisions see *supra*, III, B, 2.

Amounts earned outside see *supra*, III, A, 5.

7. See cases cited *infra*, this note.

Willingness to work.— A contract of theatrical employment providing for weekly payment with deductions only "for any nights or days on which the party of the second part may not be able to perform or sing, through illness or other unavoidable cause, or at such times that the company may not be giving performances," does not authorize a deduction for an evening when a performance was omitted owing to the absence of performers which was not the fault of either party to the contract, where the employee was ready and willing to play her part. Wentworth *v.* Whitney, 25 Pa. Super. Ct. 100.

Losses on sales.— Where the compensation was to be one half the profits on sales made by the employee subject to one half the losses, the employer could recover one half the losses without obtaining a judgment for the price of goods sold by the employee and issuing execution thereon in order to prove that such claim was uncollectable. McLaren *v.* Stokes, 14 N. Y. Suppl. 489.

A voluntary dissolution of a partnership, if such dissolution occurs before the end of the year for which it had employed a person, makes the firm liable for a proportional part of a sum to be paid at the end of the year if the contract became void by "death or mutual consent." Redheffer *v.* Leathe, 15 Mo. App. 12.

Deducting pay of assistant.—Where an employee contracted to employ an assistant for the service of his employer, without any agreement on the part of the employee to pay such assistant, the sum so paid such assistant cannot be deducted from the wages of the employee. Frazer *v.* Gregg, 20 Ill. 299.

Allowance for shrinkages to driver of ice wagon see Warner *v.* Consolidated Ice Co., 39 N. Y. App. Div. 630, 57 N. Y. Suppl. 6.

8. See *infra*, III, B, 4, b.

Indefinite agreement.— One rendering services under a contract providing for fixed wages, and that a part of the wages shall be applied to a claim against his father, can recover the full amount, in the absence of an agreement as to the amount to be so applied.

ices to the end of the term agreed upon;[9] or from the negligence or misconduct of the employee in the course of his employment.[10] Gifts by the employer to the employee, in the absence of special circumstances, are not to be deducted from his wages.[11]

b. Improper Acts of Servant — (I) *As Precluding Any Recovery.* A breach of the contract of employment other than by quitting the service may prevent a recovery of any wages thereunder,[12] as where the employee embezzles the money of his employer,[13] or commits other criminal offenses, although not immediately injurious to the person or property of the employer.[14] But a breach, after part performance, where it does not go to the essence of the contract, will not prevent a recovery thereon,[15] except where the breach was wilful and intentional.[16] If the employee has failed to perform the contract according to its terms, but the employer has received the benefit of the labor which exceeds the damage resulting from the breach of the contract, a recovery on a *quantum meruit* is ordinarily permissible;[17] and this is true whether the labor was received by the assent of the employer before the breach or whether it was received after the performance of all the work which was in fact done.[18]

(II) *As Ground For Deductions.* If an employee is negligent, or performs his services without a reasonable amount of skill, he can recover only what his services are reasonably worth, or the contract price less the damages resulting therefrom.[19] But acts sufficient to justify a dismissal will not justify a refusal to

Vansickle *v.* Furgeson, 122 Ind. 450, 23 N. E. 858.

9. See *infra*, III, B, 4, c.

10. See *infra*, III, B, 4, h, (II).

11. Neal *v.* Gilmore, 79 Pa. St. 421.

12. Henderson *v.* Stiles, 14 Ga. 135; World's Columbian Exposition *v.* Liesegang, 57 Ill. App. 594; Foster *v.* Watson, 16 B. Mon. (Ky.) 377.

Gross misconduct in the course of his employment or intentional frauds practised upon his employer may preclude all right to compensation. Prescott *v.* White, 18 Ill. App. 322. See also Lilley *v.* Elwin, 11 Q. B. 742, 12 Jur. 623, 17 L. J. Q. B. 132, 63 E. C. L. 742.

Assault on employer.— Any acts of violence on the part of the employee incompatible with the employer's peaceable exercise of all the rights of dominion over his property, such as an assault by the employee on the employer, forfeits the employee's right to recover anything under the contract. Henderson *v.* Stiles, 14 Ga. 135.

Falsifying accounts has been held to forfeit the right to compensation. Paul *v.* Minneapolis Threshing Mach. Co., 87 Mo. App. 647.

13. Peterson *v.* Mayer, 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72, holding that to allow a dishonest servant to recover the value of his services less the amount which may be shown to have been stolen would neither subserve the ends of justice nor tend to promote common honesty. *Contra*, see Massey *v.* Taylor, 5 Coldw. (Tenn.) 447, 98 Am. Dec. 429.

14. Libhart *v.* Wood, 1 Watts & S. (Pa.) 265, 37 Am. Dec. 461; Williams *v.* Eldridge, 9 Kulp (Pa.) 566.

15. Sipley *v.* Stickney, 190 Mass. 43, 76 N. E. 226, 5 L. R. A. N. S. 469; Sampson *v.* Somerset Iron Works Co., 6 Gray (Mass.) 120; Turner *v.* Kouwenhoven, 100 N. Y. 115, 2 N. E. 637 (holding that ordinarily the damages sustained by a failure to perform some of the conditions of the contract may properly be allowed against the full amount claimed; but, unless the failure is substantial, material, and strikes at the very essence of the contract, or it appears that the parties intended that any such violation should render the contract of no effect, it cannot defeat a recovery). See also Russel *v.* New York, 1 Luz. Leg. Obs. (N. Y.) 323.

A mere failure to pay over moneys received, belonging to the employer, which failure may not have been criminal, and may have been caused by a mistake or neglect, is not a bar to the recovery of wages. Turner *v.* Kouwenhoven, 100 N. Y. 115, 2 N. E. 637.

16. Sipley *v.* Stickney, 190 Mass. 43, 76 N. E. 226, 5 L. R. A. N. S. 469, holding that the "wilful" failure of one managing a farm for the owner to return accurate statements of the expenses bars a recovery for services as manager, although the stipulation of the contract for an accurate statement of expenses is not of the essence of the contract.

17. Downey *v.* Burke, 23 Mo. 228.

18. Downey *v.* Burke, 23 Mo. 228.

19. Parker *v.* Platt, 74 Ill. 430; Taylor *v.* Paterson, 9 La. Ann. 251; Harper *v.* Ray, 27 Miss. 622; Sharp *v.* Hainsworth, 3 B. & S. 139, 9 Jur. N. S. 353, 32 L. J. M. C. 33, 7 L. T. Rep. N. S. 320, 11 Wkly. Rep. 36, 113 E. C. L. 139. See also Wood *v.* Alpaugh, 43 N. J. Eq. 455, 11 Atl. 469.

The employer must show that wages retained by him to pay for damages resulting from injuries to third persons through the negligence of his employee were rightfully retained, in an action by the employee to recover the amount held back. Sondheimer *v.* Troy, etc., R. Co., 3 N. Y. Suppl. 444.

pay less than the price stipulated, where such acts produce no direct pecuniary damage to the employer who did not discharge the employee, although aware thereof.[20]

e. Part Performance[21]—(i) *ENTIRETY OF CONTRACT.*[22] A contract to render personal services for a specified time,[23] as for a year,[24] or years,[25] even though the wages are a fixed sum per month,[26] is usually considered an entire contract so that a recovery thereon can be had only upon showing full performance or some valid excuse for non-performance. Where one employed for a definite time under a contract fixing the damages for its breach is prevented, without default either of himself or of his employer, from fulfilling it, he may recover for

Day laborers.— Where a man working by the day fails to exercise ordinary care and skill, or to do his work in an ordinary, fair, and workmanlike manner, he cannot recover as wages the value of work properly done, but the employer is entitled to a deduction for any defect in the labor or in the manner of its performance. Eaton *v.* Woolly, 28 Wis. 628.

Damages equal to, or in excess of, wages.— If the employer suffers damages by the neglect or unskilfulness of his employee, equal to or in excess of the wages agreed upon, the employee can recover nothing for his labor. Byrd *v.* Boyd, 4 McCord (S. C.) 246, 17 Am. Dec. 740; Goslin *v.* Hodson, 24 Vt. 140.

Knowledge of unskilfulness.— One who employs an unskilful artisan, or tyro, knowing his deficiencies, is liable to him for his usual prices, however inferior the performance may be, especially when the work has been received. Peters *v.* Craig, 6 Dana (Ky.) 307.

Loss charged to another servant.— It is no defense to a suit by an employee for wages to show that the employee had made a mistake whereby the employer had suffered loss, where such loss had been charged to an agent who was the employer's superior, and under whom he was employed, and it was merely to reimburse such agent that it had stopped the wages; such a course not being authorized by any rule of the company known to the employee, or agreed to by him. Georgia R. Co. *v.* Gouedy, 111 Ga. 310, 36 S. E. 691.

Acts same as those done by employer.— The employer cannot sustain a counter-claim for the loss of wheat left unloaded where he gave no orders as to any unloading, and had himself previously left wheat exposed in the same manner. Rawlings *v.* Clark, 19 Colo. App. 214, 74 Pac. 346.

20. McCracken *v.* Hair, 2 Speers (S. C.) 256.

21. **Where servant an infant** see INFANTS, 22 Cyc. 617.

22. **Entire or severable contracts in general** see CONTRACTS, 9 Cyc. 648–651.

23. *Alabama.*— Wright *v.* Turner, 1 Stew. 29, 18 Am. Dec. 25.

Illinois.— Thrift *v.* Payne, 71 Ill. 408; Angle *v.* Hanna, 22 Ill. 429, 74 Am. Dec. 161; Badgley *v.* Heald, 9 Ill. 64; Curlee *v.* Reiger, 45 Ill. App. 544.

Maine.— Miller *v.* Goddard, 34 Me. 102, 56 Am. Dec. 638.

Mississippi.— Timberlake *v.* Thayer, 71 Miss. 279, 14 So. 446, 24 L. R. A. 231.

New Jersey.— Beach *v.* Mullin, 34 N. J. L. 343.

New York.— Lantry *v.* Parks, 8 Cow. 63; McMillan *v.* Vanderlip, 12 Johns. 165, 7 Am. Dec. 299.

Tennessee.— Halloway *v.* Lacy, 4 Humphr. 468.

Vermont.—Mullen *v.* Gilkinson, 19 Vt. 503.

See 34 Cent. Dig. tit. "Master and Servant," § 91.

Contra.— Winterhalter *v.* Johnson, 1 Ohio Dec. (Reprint) 575, 10 West. L. J. 462.

But a contract for ordinary services for a stipulated time, where the wages are payable in instalments and there is nothing in the nature of the work which shows that its entire performance was required or contemplated in order to bind the employer to pay any part of the stated compensation, has been held not an entire contract so that a complete performance is a condition precedent to a recovery for services rendered. Walsh *v.* New York, etc., Co., 88 N. Y. App. Div. 477, 85 N. Y. Suppl. 83.

24. See cases cited *infra*, this note.

Where an overseer is hired for a year the contract is entire. Whitley *v.* Murray, 34 Ala. 155; Leaird *v.* Davis, 17 Ala. 448. *Contra*, Robinson *v.* Sanders, 24 Miss. 391; Hariston *v.* Sale, 6 Sm. & M. (Miss.) 634; Byrd *v.* Boyd, 4 McCord (S. C.) 246, 17 Am. Dec. 740.

25. Isaacs *v.* McAndrew, 1 Mont. 437, holding that a contract for five years at so much a year, no provision being made as to when the employee should receive pay for his services, was an entire contract so that services for the whole period was a condition precedent to a suit on the contract.

26. *Alabama.*— Norris *v.* Moore, 3 Ala. 676.

Arkansas.— Turner *v.* Baker, 30 Ark. 186.

California.—Hutchinson *v.* Wetmore, 2 Cal. 310, 56 Am. Dec. 337.

Illinois.— Hansell *v.* Erickson, 28 Ill. 257.

Massachusetts.— Davis *v.* Maxwell, 12 Metc. 286.

New York.— Henderhen *v.* Cook, 66 Barb. 21; Casten *v.* Decker, 3 N. Y. St. 429; Reab *v.* Moor, 19 Johns. 337.

Ohio.— Larkin *v.* Buck, 11 Ohio St. 561.

Wisconsin.— Koplitz *v.* Powell, 56 Wis. 671, 14 N. W. 831.

See 34 Cent. Dig. tit. "Master and Servant," § 91.

the wages actually earned less the liquidated damages actually stipulated for the breach.[27]

(II) *ABANDONMENT OF SERVICE BY EMPLOYEE*[28] — (A) *For Cause.* If the employee has good cause for quitting,[29] as where the employer fails or refuses to pay instalments of wages as they become due,[30] he may recover for the services actually performed.

(B) *Without Cause.* If one employed for a specified time quits before the expiration thereof without adequate cause or excuse, no recovery can be had upon the contract itself for the part performance;[31] and the weight of authority holds in such a case that there can be no recovery upon a *quantum meruit*,[32]

27. Walsh *v.* Fisher, 102 Wis. 172, 78 N. W. 437, 72 Am. St. Rep. 865, 43 L. R. A. 810.

28. Termination of relation see *supra*, II, C.

29. Keyser *v.* Rehberg, 16 Mont. 331, 41 Pac. 74; Gates *v.* Davenport, 29 Barb. (N. Y.) 160; Ellison *v.* Jones, 15 N. Y. Suppl. 356; Marsh *v.* Rulesson, 1 Wend. (N. Y.) 514. See De Camp *v.* Stevens, 4 Blackf. (Ind.) 24.

Grounds for abandonment see *supra*, II, C, 1, j, (II).

30. Tichenor *v.* Bruckheimer, 40 Misc. (N. Y.) 194, 81 N. Y. Suppl. 653; Dover *v.* Plemmons, 32 N. C. 23.

31. Hill *v.* Balkcom, 79 Ga. 444, 5 S. E. 200; Britton *v.* Turner, 6 N. H. 481, 26 Am. Dec. 713; Scheuer *v.* Monash, 35 Misc. (N. Y.) 276, 71 N. Y. Suppl. 818.

32. *Alabama.*— Pettigrew *v.* Bishop, 3 Ala. 440; Wright *v.* Turner, 1 Stew. 29, 18 Am. Dec. 25.

Arkansas.— Hibbard *v.* Kirby, 38 Ark. 102.

District of Columbia.— Fowler *v.* Great Falls Ice Co., 1 MacArthur 14.

Illinois.— Hansell *v.* Erickson, 28 Ill. 257; Badgley *v.* Heald, 9 Ill. 64; Eldridge *v.* Rowe, 7 Ill. 91, 43 Am. Dec. 41; Hofstetter *v.* Gash, 104 Ill. App. 455; Eveland *v.* Van Dyke, 78 Ill. App. 410; American Pub. House *v.* Wilson, 63 Ill. App. 413. *Contra*, see White *v.* Gray, 4 Ill. App. 228.

Louisiana. — Bartell *v.* Lallande, 23 La. Ann. 317; Callehan *v.* Stafford, 18 La. Ann. 556; Hays *v.* Marsh, 11 La. 369. This rule has been declared by statute in Louisiana.

Maine.— Miller *v.* Goddard, 34 Me. 102, 56 Am. Dec. 638.

Massachusetts.— Rice *v.* Dwight Mfg. Co., 2 Cush. 80; Davis *v.* Maxwell, 12 Metc. 286; Olmstead *v.* Beale, 19 Pick. 528; Thayer *v.* Wadsworth, 19 Pick. 349; Stark *v.* Parker, 2 Pick. 267, 13 Am. Dec. 425.

Mississippi. — Timberlake *v.* Thayer, 71 Miss. 279, 14 So. 446, 24 L. R. A. 231; Wooten *v.* Read, 2 Sm. & M. 585.

Missouri.— Earp *v.* Tyler, 73 Mo. 617; Aaron *v.* Moore, 34 Mo. 79; Henson *v.* Hampton, 32 Mo. 408; Schnerr *v.* Hemp, 19 Mo. 40; Banse *v.* Tate, 62 Mo. App. 150.

New Jersey.— Avella *v.* Valentino, (Sup. 1904) 59 Atl. 1118; Natalizzio *v.* Valentino, 71 N. J. L. 500, 59 Atl. 8.

New York.—Seaburn *v.* Zachmann, 99 N. Y. App. Div. 218, 90 N. Y. Suppl. 1005; Eden *v.* Silberberg, 89 N. Y. App. Div. 259, 85 N. Y. Suppl. 781; Hogg *v.* Stortz, 2 E. D. Smith 192; Goldstein *v.* White, 16 N. Y. Suppl. 860; Marsh *v.* Rulesson, 1 Wend. 514; Reab *v.* Moor, 19 Johns. 337; Webb *v.* Duckingfield, 13 Johns. 390, 7 Am. Dec. 388; Thorpe *v.* White, 13 Johns. 53.

North Carolina.— Chamblee *v.* Baker, 95 N. C. 98; Pullen *v.* Green, 75 N. C. 215.

Ohio.— Larkin *v.* Buck, 11 Ohio St. 561; Snyder *v.* Walker, 13 Ohio Cir. Ct. 93, 7 Ohio Cir. Dec. 99.

South Carolina.— Byrd *v.* Boyd, 4 McCord 246, 17 Am. Dec. 740.

Vermont.— Mullen *v.* Gilkinson, 19 Vt. 503; Winn *v.* Southgate, 17 Vt. 355; Ripley *v.* Chipman, 13 Vt. 268; St. Albans Steam Boat Co. *v.* Wilkins, 8 Vt. 54; Hair *v.* Bell, 6 Vt. 35.

Wisconsin.—Walsh *v.* Fisher, 102 Wis. 172, 78 N. W. 437, 72 Am. St. Rep. 865, 43 L. R. A. 810; Diefenback *v.* Stark, 56 Wis. 462, 14 N. W. 621, 43 Am. Rep. 719.

United States.— The Hudson, 12 Fed. Cas. No. 6,831, Olcott 396.

England.— Lamburn *v.* Cruden, 5 Jur. 151, 10 L. J. C. P. 121, 2 M. & G. 253, 2 Scott N. R. 533, 40 E. C. L. 588; Saunders *v.* Whittle, 33 L. T. Rep. N. S. 816, 24 Wkly. Rep. 406. *Contra*, see Sinclair *v.* Bowles, 9 B. & C. 92, 7 L. J. K. B. O. S. 178, 4 M. & R. 1, 17 E. C. L. 50; Spain *v.* Arnott, 2 Stark. 256, 19 Rev. Rep. 715, 3 E. C. L. 400.

Canada.— Knox *v.* Munro, 13 Manitoba 16; Blake *v.* Shaw, 10 U. C. Q. B. 180.

See 34 Cent. Dig. tit. "Master and Servant," § 94.

What constitutes abandonment before end of term — Making up lost time.— Where a servant contracts to labor for a limited period, he cannot be required, after the expiration of the period, to render additional services under such contract to make up for lost time. McDonald *v.* Montague, 30 Vt. 357; Bast *v.* Byrne, 51 Wis. 531, 8 N. W. 494, 37 Am. Rep. 841. Where the contract is for a certain number of years and for such additional time as will make up any time lost by the servant, the latter is not bound to make up time during which the employer suspended business, it being agreed that no wages should be paid during that time. Pennsylvania R. Co. *v.* Bost, 104 Pa. St. 26.

Abandonment by mistake.— Where one employed for a specified time quit a few days before the end of the term, under an erroneous belief that according to the legal mode of computing time under such contracts his time was up, he cannot recover the balance

although there is considerable authority to the contrary, especially where the employer has received a benefit from the labor in excess of any damages from the breach.[33] But even where a recovery is not otherwise allowable, if instalments of wages are to be paid at stated periods under an entire contract, the right thereto, after the expiration of one of the periods, is vested so as not to be affected by a subsequent abandonment of the contract.[34]

(c) *Sickness, Death, or Other Disability.* As has been previously shown in the sections of another chapter, death of either party to a contract of employment, or sickness or other disability preventing the employee from performing the contract, terminates the contract unless it is otherwise agreed.[35] But sickness,[36] or

of wages due him, although the employer had consented to his absence during a part of the term and had refused to take him back after he had broken his contract by leaving. Winn *v.* Southgate, 17 Vt. 355.

Return and refusal of employer to continue employment.— Where one employed for a specified time quits, after working a part thereof, but shortly after returns and offers to complete the contract, to which the employer will not agree, the employee can recover nothing for the time he has worked. Nelichka *v.* Esterly, 29 Minn. 146, 12 N. W. 457; Lantry *v.* Parks, 8 Cow. (N. Y.) 63.

It is no excuse that danger of injury by strikers was such that a man of ordinary nerve would have refused to continue the work. Walsh *v.* Fisher, 102 Wis. 172, 78 N. W. 437, 72 Am. St. Rep. 865, 43 L. R. A. 810.

33. *Indiana.*— Pitts *v.* Pitts, 21 Ind. 309; Ricks *v.* Yates, 5 Ind. 115 [*overruling* in effect De Camp *v.* Stevens, 4 Blackf. 24].

Iowa.— Byerlee *v.* Mendel, 39 Iowa 382; Pixler *v.* Nichols, 8 Iowa 106, 74 Am. Dec. 298. *Compare* Haggin *v.* Garwood, 96 Iowa 683, 65 N. W. 989, holding that where the contract provided for arbitration in case of a disagreement as to the amount due, if the employee left the service without the fault of the employer, the contract impliedly prevented recovery of any compensation, where the employee left the service without excuse.

Kansas.— Duncan *v.* Baker, 21 Kan. 99.

Nebraska.— Burkholder *v.* Burkholder, 25 Nebr. 270, 41 N. W. 145; Parcell *v.* McComber, 11 Nebr. 209, 7 N. W. 529, 38 Am. Rep. 366.

New Hampshire.— Britton *v.* Turner, 6 N. H. 481, 26 Am. Dec. 713, which is the leading case to sustain this view.

South Dakota.— Bedow *v.* Tonkin, 5 S. D. 432, 59 N. W. 222.

Texas.— Carroll *v.* Welch, 26 Tex. 147; Hillyard *v.* Crabtree, 11 Tex. 264, 62 Am. Dec. 475; Riggs *v.* Horde, 25 Tex. Suppl. 456, 78 Am. Dec. 584; Stoddard *v.* Martin, 3 Tex. App. Civ. Cas. § 85.

See 34 Cent. Dig. tit. "Master and Servant," § 94.

The contract price for the services limits the amount of recovery. Britton *v.* Turner, 6 N. H. 481, 26 Am. Dec. 713.

Damages equal to, or in excess of, value of services.— If the damages accruing to the employer by the breach, where pleaded as a set-off, equal or exceed the value of the services rendered, no recovery can be had. Pixler *v.* Nichols, 8 Iowa 106, 74 Am. Dec. 298.

Payment other than in money.— Where one employed for a definite time was to be paid in boarding, clothing, and schooling, and he voluntarily abandoned the service before the end of the term, a promise to pay in money what the services were reasonably worth, beyond the damages, will not be implied, the employer being always ready to pay in the manner stipulated. Roundy *v.* Thatcher, 49 N. H. 526.

34. *Alabama.*— Davis *v.* Preston, 6 Ala. 83.

New York.—Seaburn *v.* Zachmann, 99 N. Y. App. Div. 218, 90 N. Y. Suppl. 1005.

North Carolina.— Chamblee *v.* Baker, 95 N. C. 98.

Ohio.— Winterhalter *v.* Johnson, 1 Ohio Dec. (Reprint) 575, 10 West. L. J. 462. *Contra*, Larkin *v.* Buck, 11 Ohio St. 561.

Pennsylvania.— Stilley *v.* Walker, 1 Pittsb. Leg. J. 98.

England.— Taylor *v.* Laird, 1 H. & N. 266, 25 L. J. Exch. 329.

See 34 Cent. Dig. tit. "Master and Servant," § 94.

35. See *supra*, II, C, 1, h, i.

36. *Alabama.*— Hunter *v.* Waldron, 7 Ala. 753. See also Greeen *v.* Linton, 7 Port. 133, 31 Am. Dec. 707.

Connecticut.— Ryan *v.* Dayton, 25 Conn. 188, 65 Am. Dec. 560.

Massachusetts.— Fuller *v.* Brown, 11 Metc. 440.

Minnesota.— See Egan *v.* Winnipeg Baseball Club, 96 Minn. 345, 104 N. W. 947.

New York.— Casten *v.* Decker, 3 N. Y. St. 429.

South Dakota.— McClellan *v.* Harris, 7 S. D. 447, 64 N. W. 522, statute.

Vermont.— Patrick *v.* Putnam, 27 Vt. 759; Hubbard *v.* Belden, 27 Vt. 645; Seaver *v.* Morse, 20 Vt. 620; Fenton *v.* Clark, 11 Vt. 557.

See 34 Cent. Dig. tit. "Master and Servant," § 100.

But see Mills *v.* Buffin, 12 Ill. App. 111, where the employee was ill the day before the quitting and voluntarily resumed work the day he quitted, and in the meantime engaged to work for a third person, and it was held that he could not recover on a *quantum meruit*.

Rules of employer.— No recovery can be had where an employee leaves his work by

death,[37] of the employee is generally regarded as an act of God which excuses performance so that a recovery may be had for services actually performed. And the fact that an employee who has been sick does not return and offer to complete the period of service, after his health is restored, does not prevent a recovery.[38] But where the sickness ought to have been anticipated, as in case of confinement in child birth, no recovery can be had on a *quantum meruit* after the servant has left the work because thereof.[39] Whether the recovery is to be based upon the reasonable value of the services,[40] or upon the contract wage,[41] is the subject of conflicting decisions; but at any event the damages sustained by reason of non-performance are to be deducted.[42] Recovery can only be had for the completed services, and not for services for the entire contract period,[43] and ordinarily no recovery is allowable for the time which the employee loses during his sickness[44] or other disability.[45]

reason of sickness, where a rule of the employer provides that in case of sickness employees must send word to the employer of the cause of their absence, and the contract provides for forfeiture of wages for failure to comply with the rules, where the employee did not send word as to the cause of his absence when sick, although able to do so. Noon v. Salisbury Mills, 3 Allen (Mass.) 340.

37. Clark v. Gilbert, 26 N. Y. 279, 84 Am. Dec. 189; Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388; Parker v. Macomber, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858; Stubbs v. Holywell R. Co., L. R. 2 Exch. 311, 36 L. J. Exch. 166, 16 L. T. Rep. N. S. 631, 15 Wkly. Rep. 869. *Contra*, Cutter v. Powell, 6 T. R. 320, 3 Rev. Rep. 185.

Contract fixing rights on death of party.— Under a contract between employer and employee for the payment of a per cent of the profits of each year as wages, and in case of the death of either during the year, at the rate, for the expired term, of a certain sum per annum, the executor of the employee may recover the proportional part of the sum agreed, to the date of his death, although by reason of sickness he stopped work some time before. Dunlap v. Montgomery, 123 Pa. St. 27, 16 Atl. 41.

In Alabama a rule contrary to that laid down in the text was held at an early day (Givhan v. Dailey, 4 Ala. 336), but the rule is now changed by statute which authorizes the personal representatives of a deceased servant to recover a ratable compensation for services actually rendered (Dryer v. Lewis, 57 Ala. 551).

38. Seaver v. Morse, 20 Vt. 620.

39. Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57.

40. Coe v. Smith, 4 Ind. 79, 58 Am. Dec. 618; Green v. Gilbert, 21 Wis. 395.

41. Clark v. Gilbert, 26 N. Y. 279, 84 Am. Dec. 189. See also Greene v. Linton, 7 Port. (Ala.) 133, 31 Am. Dec. 707.

42. See *infra*, III, B, 9, d, (II).

43. Clark v. Gilbert, 32 Barb. (N. Y.) 576.

44. Nichols v. Coolahan, 10 Metc. (Mass.) 449; Hughes v. Toledo Scale, etc., Register Co., 112 Mo. App. 91, 86 S. W. 895; Adlets v. Progressive Shoe Co., 84 Mo. App. 288; Miller v. Morton, 8 Manitoba 1. But see Mott v. Baxter, (Colo. App. 1899) 56 Pac. 192 (holding that it will not be presumed that any deduction from the wages of a stenographer should be made because he was necessarily absent a short time on account of sickness, in the absence of any agreement to the contrary); Cuckson v. Stones, 1 E. & E. 248, 5 Jur. N. S. 337, 28 L. J. Q. B. 25, 7 Wkly. Rep. 134, 102 E. C. L. 248; K. v. Raschen, 38 L. T. Rep. N. S. 38.

Construction of contract as to payment for lost time.— A contract of employment, terminable at the option of either party on notice, provided that the employee should give his "entire time and ability" to his employer, for which he was to receive a certain sum per month "during said year, except the portion of said time that, through illness or any other cause, is not devoted to" the employer's interests, although, if he sold a certain amount of goods for the employer during the year, there was to be no reduction. It was held that where the employer terminated the contract during the year, before the employee had sold the required amount of goods, the employee could not claim compensation for time lost through sickness. Foster v. Henderson, 29 Oreg. 210, 45 Pac. 899.

Injuries received in line of duty.— A receiver of a railroad company is liable to an employee of the road for wages during recovery from injuries received in the line of his duty, and without fault. Missouri Pac. R. Co. v. Texas, etc., R. Co., 41 Fed. 319; Missouri Pac. R. Co. v. Texas, etc., R. Co., 33 Fed. 701.

45. McDonald v. Montague, 30 Vt. 357, holding that if one agrees to work for another for a certain number of months, and is employed under his agreement until the expiration of the stipulated period, he will not be obliged, before he can recover for his services, to make up for time which he has reasonably lost during said period, neither will the employer be obliged to pay him for the time he has lost; but he must pay him such proportion of the stipulated price for the whole period contracted for as the time he has actually worked bears to the whole time agreed upon.

Attendance as witness.— The temporary absence of a servant while in attendance as a witness in court is no ground for deduction from his salary. Macintyre v. McLeod, 27 N. Brunsw. 199.

(III) *DISCHARGE FOR CAUSE.* According to one line of cases, the rule is established that a dismissal for cause operates to prevent the employee from recovering any compensation for his services,[46] except that where there is a provision for periodical payments during the term of the contract, an employee who has been discharged for cause may recover, after the expiration of one or more of the periods, wages which have become due, subject to recoupment by the master for any damages suffered by him by reason of any neglect, unskilfulness, or nonperformance of the services.[47] The more equitable rule, however, which prevails in many states, is that the employee is entitled to recover *pro rata* for the reasonable value of his services, not to exceed the contract price, up to the time of the discharge, taking into consideration the damages resulting to the employer.[48] It is generally held that no recovery of the stipulated wages is permissible in an action upon the express contract of hire,[49] although it has been held that the action must be based on the contract and not on a *quantum meruit*, and that the recovery should be the amount of wages up to the time of discharge less the legal damages to the employer resulting from the acts that justified the termination of the contract.[50]

46. Von Heyne *v.* Tompkins, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. N. S. 524; Paul *v.* Minneapolis Threshing Mach. Co., 87 Mo. App. 647; Lane *v.* Phillips, 51 N. C. 455; Lilley *v.* Elwin, 11 Q. B. 742, 12 Jur. 623, 17 L. J. Q. B. 132, 63 E. C. L. 742; Boston Deep Sea Fishing, etc., Co. *v.* Ansell, 39 Ch. D. 339, 59 L. T. Rep. N. S. 345; Amer *v.* Feason, 9 A. & E. 548, 8 L. J. Q. B. 95, 1 P. & D. 398, 2 W. W. & H. 81, 36 E. C. L. 295; Ridgway *v.* Hungerford Market Co., 3 A. & E. 171, 1 Harr. & W. 244, 4 L. J. K. B. 157, 4 N. & M. 797, 30 E. C. L. 97 (holding that where a justifiable cause of dismissal exists it is sufficient to prevent the recovery of wages, although the servant was not in fact dismissed upon that ground, and that it is not necessary that the cause relied on in the answer to an action for wages should have been stated at the time of dismissal); Turner *v.* Robinson, 5 B. & Ad. 789, 27 E. C. L. 333, 6 C. & P. 15, 25 E. C. L. 298, 2 N. & M. 829; Atkin *v.* Acton, 4 C. & P. 208, 19 E. C. L. 478; Turner *v.* Mason, 2 D. & L. 898, 14 L. J. Exch. 311, 14 M. & W. 112; Spain *v.* Arnott, 2 Stark. 256, 19 Rev. Rep. 715, 3 E. C. L. 400. See also Posey *v.* Garth, 7 Mo. 94, 37 Am. Dec. 183; Huntington *v.* Claffin, 38 N. Y. 182.

47. Hartman *v.* Rogers, 69 Cal. 643, 11 Pac. 581; Beach *v.* Mullin, 34 N. J. L. 343; Tipton *v.* Feitner, 20 N. Y. 423; Walsh *v.* New York, etc., Co., 88 N. Y. App. Div. 477, 85 N. Y. Suppl. 83; Waters *v.* Davies, 55 N. Y. Super. Ct. 39, 8 N. Y. St. 163. See also Silberman *v.* Schwarez, 45 Misc. (N. Y.) 352, 90 N. Y. Suppl. 382 (return of amounts deducted from weekly salary); Voelckel *v.* Banner Brewing Co., 9 Ohio Cir. Ct. 318, 6 Ohio Cir. Dec. 80.

48. *Illinois.*— Hoffmann *v.* World's Columbian Exposition, 55 Ill. App. 290.

Kentucky.— Fuqua *v.* Massie, 95 Ky. 387, 25 S. W. 875, 15 Ky. L. Rep. 849.

Louisiana.— McWilliams *v.* Elder, 52 La. Ann. 995, 27 So. 352; Jeter *v.* Penn, 28 La. Ann. 230, 26 Am. Rep. 98; Kessee *v.* Mayfield, 14 La. Ann. 90.

Maine.— Lawrence *v.* Gullifer, 38 Me. 532.

Mississippi.— Robinson *v.* Sanders, 24 Miss. 391 [*following* Hariston *v.* Sale, 6 Sm. & M. 634].

Missouri.— See Parks *v.* Tolman, 113 Mo. App. 14, 87 S. W. 576, holding that where a married woman obtains employment by representing that she is single, the employer is nevertheless liable for services performed and accepted before her discharge.

New York.— Leacock *v.* Striker, 10 N. Y. Suppl. 540, holding that where one who has worked nine days refuses a tender of half a month's pay, he cannot recover for services rendered, on a *quantum meruit*.

South Carolina.— Eaken *v.* Harrison, 4 McCord 249; Byrd *v.* Boyd, 4 McCord 246, 17 Am. Dec. 740.

Tennessee.— Massey *v.* Taylor, 5 Coldw. 447, 98 Am. Dec. 429; Children of Israel Cong. *v.* Peres, 2 Coldw. 620; Jones *v.* Jones, 2 Swan 605.

Texas.—Shute *v.* McVitie, (Civ. App. 1903) 72 S. W. 433, holding, however, that the employee cannot recover his full salary, although no considerable work remained to be done by him after the time of his discharge; and also that the fact that his services had not been profitable to the employer has no bearing in determining the compensation.

See 34 Cent. Dig. tit. "Master and Servant," § 99.

Estimating value where wages were to be portion of proceeds of crop see Jeter *v.* Penn, 28 La. Ann. 230, 26 Am. Rep. 98; Lambert *v.* King, 12 La. Ann. 662.

49. Parker *v.* Farlinger, 122 Ga. 315, 50 S. E. 98; Fulton *v.* Heffelfinger, 23 Ind. App. 104, 54 N. E. 1079; Walsh *v.* New York, etc., Co., 88 N. Y. App. Div. 477, 85 N. Y. Suppl. 83; Arnold *v.* Adams, 27 N. Y. App. Div. 345, 49 N. Y. Suppl. 1041; Elliott *v.* Miller, 17 N. Y. Suppl. 526; Massey *v.* Taylor, 5 Coldw. (Tenn.) 447, 98 Am. Dec. 429.

50. Jenkins *v.* Long, 8 Md. 132; Hildebrand *v.* American Fine Art Co., 109 Wis. 171, 85 N. W. 268, 53 L. R. A. 826. See also Pullen *v.* Green, 75 N. C. 215.

The reason for the rule that where an employee is prevented from carrying out his

Of course, where the servant has been discharged for cause, future wages cannot be recovered.[51]

(iv) *Consent or Option to Terminate.* Where the contract is terminable at the option of either party, the employee may quit at any time and recover for the services actually performed.[52] So, on discharge by the employer, under such a contract, the employee may recover *pro rata*.[53] Likewise, when the parties terminate the employment by mutual consent before the expiration of the term, the contract becomes fully executed,[54] and the employee may recover for the services actually performed.[55]

(v) *Indefinite Term.* Where there is no term of service fixed by the contract, and the employee quits[56] or is discharged,[57] he may recover at the stipulated rate for the time he has worked.

d. Provisions For Forfeitures, Deductions, or Fines — (i) *Validity.* A contract which provides for a forfeiture of all or a part of the wages due, or a fixed sum, or a deposit made at the time of entering into the contract, on the occurrence of certain breaches by the employee, is generally considered valid.[58] For instance, a provision for a forfeiture of wages, on quitting the service without giving a specified notice, where not reasonable or oppressive, will be enforced as a provision for liquidated damages;[59] but where the forfeiture covers all the wages due at the time of the breach, regardless of the amount, or

contract by the justifiable conduct of his employer in discharging him that an action should be based on the contract for wages up to the time of the discharge is that the contract is still in force. Jenkins *v.* Long, 8 Md. 132.

51. Shields *v.* Carson, 102 Ill. App. 38; Du Quoin Star Coal Min. Co. *v.* Thorwell, 3 Ill. App. 394; Pullen *v.* Green, 75 N. C. 215; Matthews *v.* Park, 146 Pa. St. 384, 23 Atl. 208. See also Parker *v.* Farlinger, 122 Ga. 315, 50 S. E. 98.

52. Sisk *v.* Cunningham, 8 Mo. 132; Booth *v.* Ratcliffe, 107 N. C. 6, 12 S. E. 112; Whitcomb *v.* Gilman, 35 Vt. 297; Provost *v.* Harwood, 29 Vt. 219; Evans *v.* Bennett, 7 Wis. 404. See also Coxe *v.* Skeen, 25 N. C. 443.

53. Youngberg *v.* Lamberton, 91 Minn. 100, 97 N. W. 571. See also Beenel *v.* Ashton Plantation Co., 105 La. 677, 30 So. 152.

Where the right to dismiss on a specified notice is optional with the employer, such a dismissal before the end of the term does not affect the employee's right to his wages or commissions already earned. Jenkins *v.* Long, 8 Md. 132. See also Birch *v.* Glasgow Sav. Bank, 114 Mo. App. 711, 90 S. W. 746.

54. Jeffery *v.* Walker, 72 Hun (N. Y.) 628, 25 N. Y. Suppl. 161; Scheuer *v.* Monash, 40 Misc. (N. Y.) 668, 83 N. Y. Suppl. 253.

55. Given *v.* Charron, 15 Md. 502; Stilley *v.* Walker, 1 Pittsb. Leg. J. (Pa.) 98; Craig *v.* Pride, 2 Speers (S. C.) 121; Graham *v.* Lewis, 2 Hill (S. C.) 477; Byrd *v.* Boyd, 4 McCord (S. C.) 246, 17 Am. Dec. 740; McClure *v.* Pyatt, 4 McCord (S. C.) 26; Thomas *v.* Williams, 1 A. & E. 685, 3 L. J. K. B. 202, 3 N. & M. 545, 28 E. C. L. 322; Lamburn *v.* Cruden, 5 Jur. 151, 10 L. J. C. P. 121, 2 M. & G. 253, 2 Scott N. R. 533, 40 E. C. L. 588. See 34 Cent. Dig. tit. "Master and Servant," § 101. See also Trawick *v.* Trussell, 122 Ga. 320, 50 S. E. 86; Pitts *v.* Pitts, 21 Ind. 309.

Acquiescence of employer.— An employee who voluntarily leaves before the termination of his contract, but with the acquiescence of the employer, can recover compensation for his services *pro rata* on the basis of the contract price. Merrill *v.* Fish, 68 Vt. 475, 35 Atl. 368; Patnote *v.* Sanders, 41 Vt. 66, 98 Am. Dec. 564 [*followed* in Boyle *v.* Parker, 46 Vt. 343].

56. Griffin *v.* Domas, 22 Ill. App. 203.

57. Foley *v.* Western New York, etc., R. Co., 19 N. Y. Suppl. 826.

58. Myers *v.* Rehkopf, 30 Ill. App. 209; Gallagher *v.* Christopher, etc., St. R. Co., 14 Daly (N. Y.) 366; Birdsall *v.* Twenty-third St. R. Co., 8 Daly (N. Y.) 419; Walls *v.* Coleman, 11 N. Y. Suppl. 907. *Contra*, see Foster *v.* Watson, 16 B. Mon. (Ky.) 377, holding that the agreement will ordinarily be relieved against so as to permit the employee to recover on a *quantum meruit* after a breach.

Strict construction.— Such contracts are to receive a rigidly strict construction. Chicago City R. Co. *v.* Blanchard, 35 Ill. App. 481.

Validity of contract where statute forbids deduction or forfeitures see *supra*, II, B, 2, c.

59. Richardson *v.* Woehler, 26 Mich. 90; Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 18 S. W. 262, 30 Am. St. Rep. 865, 15 L. R. A. 211. See also Schietenger *v.* Bridgeport Knife Co., 54 Conn. 64, 5 Atl. 859; Harmon *v.* Salmon Falls Mfg. Co., 35 Me. 447, 58 Am. Dec. 718; Pottsville Iron, etc., Co. *v.* Good, 116 Pa. St. 385, 9 Atl. 497, 2 Am. St. Rep. 614.

What are liquidated damages in general see DAMAGES, 13 Cyc. 89 *et seq.*

whether arrearages were due to the fault of the employer, although designated as liquidated damages, it has been held that it will not be enforced.[60] A contract for forfeiture is not invalid for want of mutuality because there is no corresponding obligation on the part of the employer to give a specified notice before dismissing an employee.[61]

(II) *Existence and Notice Thereof.* There can be no forfeiture for a failure to give notice of intention to quit, although a specified notice is required by the rules of the employer, where neither the contract nor the rules provide that failure to give such notice shall constitute a forfeiture.[62] However, the provision for forfeiture need not be contained in the contract of hiring; the signing by the employee of a receipt providing for a forfeiture on leaving without giving a certain notice, where the hiring was by the week but for no fixed time, binds the employee.[63] So assent to a rule of the employer providing for a forfeiture may be inferred from the employee's knowledge thereof and his continuance in the employment without objection thereto;[64] but mere knowledge of such a rule does not conclusively, and as a matter of law, show such assent.[65]

(III) *Construction of Particular Provisions*—(A) *Absences.* A forfeiture of wages is sometimes provided for where an employee is absent from work,[66] or when he absents himself without giving notice.[67]

(B) *Notice of Intention to Quit.*[68] A stipulation to forfeit part or all of the wages due on quitting without giving a specified notice will not be enforced where the quitting is not voluntary, as where the employee is arrested and imprisoned,[69] or is kept from work by sickness;[70] nor can the forfeiture be enforced where there is a mere temporary absence not constituting an abandonment.[71] But the fact that the employee intended to be absent only temporarily will not avoid a forfeiture if the employer might reasonably regard his leaving and continued absence as an abandonment of the work, rendering it necessary to procure another

60. Richardson *v.* Woehler, 26 Mich. 90; Schrimpf *v.* Tennessee Mfg. Co., 86 Tenn. 219, 6 S. W. 131, 6 Am. St. Rep. 832.

61. Harmon *v.* Salmon Falls Mfg. Co., 35 Me. 447, 58 Am. Dec. 718; Preston *v.* American Linen Co., 119 Mass. 400.

62. Hunt *v.* Otis Co., 4 Metc. (Mass.) 464, holding that mere knowledge of a rule of the employer requiring a specified notice of intention to quit, by one employed for no definite time, does not authorize a forfeiture of wages on his quitting without giving notice.

63. Pottsville Iron, etc., Co. *v.* Good, 116 Pa. St. 385, 9 Atl. 497, 2 Am. St. Rep. 614.

64. Harmon *v.* Salmon Falls Mfg. Co., 35 Me. 447, 58 Am. Dec. 718; Preston *v.* American Linen Co., 119 Mass. 400.

65. Collins *v.* New England Iron Co., 115 Mass. 23; Bradley *v.* Salmon Falls Mfg. Co., 30 N. H. 487.

66. Tomlinson *v.* Ashworth, 50 J. P. 164, holding that where an employee was late, and on being refused an entrance said he would leave for the day, but returned shortly afterward without knowledge of the superintendent, and work was refused him, he absented himself within the rule.

Necessity for physician's certificate.—Where a contract provided for forfeiture of all wages whenever the employee should fail to perform, but that if his neglect was caused by sickness the forfeiture should not operate if a physician's certificate should be made stating that sickness unfitted the employee to do his work, it was sufficient that the physician told the employee and others similarly situated that they were unfitted for work and must leave the place where their services had been required, although he gave no written certificate. Lyons *v.* Story, 3 E. D. Smith (N. Y.) 113.

67. Taylor *v.* Carr, 30 L. J. M. C. 201, 4 L. T. Rep. N. S. 414, 9 Wkly. Rep. 699, holding that where an employee was given leave of absence for half a day on his promise to return to work the next morning, but he did not return until the following afternoon, there was no right of forfeiture, since he could not be said to be absent without notice merely by continuing his absence longer than the period which he had mentioned.

68. Stipulation by employer to give employee notice of intent to discharge see *supra*, II, C, 1, d, (II).

69. Hughes *v.* Wamsutta Mills, 11 Allen (Mass.) 201.

70. Harrington *v.* Fall River Iron Works Co., 119 Mass. 82, in which it was held that where the employee gives reasonable notice of his sickness to the employer and is absent only so long as he is unable to work, such absence does not forfeit his right to wages. See also Fuller *v.* Brown, 11 Metc. (Mass.) 440.

71. Partington *v.* Wamsutta Mills, 110 Mass. 467 (abandonment depends on acts of servant and not on his undisclosed intentions); Heber *v.* U. S. Flax Mfg. Co., 13 R. I. 303.

to supply his place.[72] The notice need not be given where the employer reduces the wages and the employee refuses to accept the reduction and quits without giving the specified notice.[73] Where the provision is considered as liquidated damages the employer need not show the amount of his actual damages.[74]

(c) *Termination of Contract.* Where a contract authorized the employer to terminate the employment at any time, and provides for a forfeiture of a month's salary on the termination of the contract, it has been held that the employer cannot arbitrarily terminate the contract so as to be entitled to retain a month's salary.[75] And where a forfeiture of the compensation, in so far as it consists of commissions and net profits, is provided for in case the employee should enter the employment of any person engaged in the same business, no right to forfeit exists where he enters into such employment after his discharge.[76]

(d) *Performance to Satisfaction of Employer.* A provision that the employer may retain part of the employee's wages until the contract is fulfilled to the employer's "entire satisfaction" must be construed to mean "reasonable" satisfaction.[77]

(e) *Fines Against Ball Players.* A discretion vested in the manager of a ball team to fine or suspend any player without pay does not authorize him to impose a fine for a cause wholly disconnected with the rendition of services under the contract.[78] The notice of suspension is sufficient where the contract gives the right to suspend the player for a definite period without pay in case of failure to keep himself in sound physical condition, where it merely states that the player is suspended without pay until he is in a fit condition to play according to his contract.[79]

e. Waiver of Right to Deduct or to Enforce Forfeiture. The right to claim a forfeiture of all or a part of the employee's wages, where he abandons the work before the end of the term, or is guilty of misconduct authorizing his discharge, may be waived by acts of the employer inconsistent with an intention to insist upon a forfeiture.[80] For example, the right to declare a forfeiture may be waived by an offer to pay *pro rata* the wages earned up to the time of quitting,[81] or a tender of payment in full for the services,[82] or the giving of a note for the wages earned.[83] So a continuance of the employment to the end of the term, after notice of the alleged misconduct of an employee,[84] or the taking the servant back

72. Naylor *v.* Fall River Iron Works Co., 118 Mass. 317.

73. Schietenger *v.* Bridgeport Knife Co., 54 Conn. 64, 5 Atl. 859.

74. Pierce *v.* Whittlesey, 58 Conn. 104, 19 Atl. 513, 7 L. R. A. 286.

Amount forfeitable.— Where one employed by the week is to forfeit all wages in default of notice of intention to quit, and the wages are ascertained on Thursday but not paid until Saturday, an employee who has worked a week, from Thursday until Thursday, but leaves on Friday, will forfeit the wages due on the Thursday but not payable until Saturday as well as the wages earned after Thursday. Walsh *v.* Walley, L. R. 9 Q. B. 367, 43 L. J. Q. B. 102, 22 Wkly. Rep. 571.

75. Adams-Smith Co. *v.* Hayward, 52 Nebr. 79, 71 N. W. 949.

76. Collins *v.* Singer Mfg. Co., 53 Wis. 305, 10 N. W. 477.

77. Sloan *v.* Hayden, 110 Mass. 141. And see to the same effect Armstrong *v.* South London Tramways Co., 55 J. P. 340, 64 L. T. Rep. N. S. 96.

78. Cross *v.* Detroit Base Ball Club, 84 Mo. App. 526.

79. Russell *v.* National Exhibition Co., 60 N. Y. App. Div. 40, 69 N. Y. Suppl. 732.

80. Dayton *v.* Dean, 23 Conn. 99; Cahill *v.* Patterson, 30 Vt. 592, holding that acts and declarations of the employer recognizing a continued liability to the employee for his wages after he has left his employment are competent testimony to show a waiver of the forfeiture.

81. Rice *v.* Dwight Mfg. Co., 2 Cush. (Mass.) 80; Merrill *v.* Fish, 68 Vt. 475, 35 Atl. 368 (holding that a statement by the employer that he would not pay the employee any more wages until the expiration of the term, made after knowledge that the employee had quit, is equivalent to a promise to pay at that time); Seaver *v.* Morse, 20 Vt. 620. But see Lane *v.* Phillips, 51 N. C. 455.

82. Paine *v.* Howells, 90 N. Y. 660; Patnote *v.* Sanders, 41 Vt. 66, 98 Am. Dec. 564. See also Bast *v.* Byrne, 51 Wis. 531, 8 N. W. 494, 37 Am. Rep. 841.

83. Thorpe *v.* White, 13 Johns. (N. Y.) 53.

84. Person *v.* McCargar, 92 Minn. 294, 99 N. W. 885; Wynnstay Collieries *v.* Edwards, 62 J. P. 823, 79 L. T. Rep. N. S. 378. But

after an absence,[85] is a waiver of the right to insist on a forfeiture of wages because of such misconduct. Likewise voluntary payments for time when the employee was absent because of sickness precludes the right to deduct therefor on final settlement.[86]

5. Benefit and Relief Funds. In connection with many enterprises employing a large number of laborers is an employee's relief association for their benefit in case of sickness or injury, usually supported in part from deductions from the wages of the employees and voluntary contributions by the employer.[87] Generally only employees of the company are entitled to membership,[88] the deduction by an authorized agent of the master of dues from the servant's wages being held an acceptance of the application for membership.[89] Usually the rules of the association provide that the servant renounces all claims for damages against the master where he accepts relief from the fund,[90] and that the right to participate in the relief fund is forfeited by the recovery from the employer of damages for personal injuries.[91] So generally the rights of the servant cease on his leaving the master,[92] but such a provision does not preclude liability for a death benefit where the employee was in fact dead when the notice of discharge was sent to him.[93] Acquiescence in the deduction of a certain sum per month for the fund and giving a receipt each month for wages in full, especially where the employee has accepted allowances from the fund, precludes him from thereafter recovering such deductions.[94] Where the fund is contributed entirely by the employer, any rules which he makes regulating the disposition thereof are binding on the employee so that he has no rights therein except as provided for by such rules.[95]

6. Medical Attendance.[96] Except where provided for by contract,[97] an employer is not bound to provide a servant with medical attendance,[98] unless the employer

see Gallagher *v.* Christopher, etc., St. R. Co., 14 Daly (N. Y.) 366; Birdsall *v.* Twenty-third St. R. Co., 8 Daly (N. Y.) 419.

85. Bast *v.* Byrne, 51 Wis. 531, 8 N. W. 494, 37 Am. Rep. 841; Prentiss *v.* Ledyard, 28 Wis. 131.

86. Raipe *v.* Gorrell, 105 Wis. 636, 81 N. W. 1009; Dickinson *v.* Norwegian Plow Co., 101 Wis. 157, 76 N. W. 1108.

87. See, generally, Mutual Benefit Insurance; Railroads.

88. Fitzgerald *v.* Burden Benev. Assoc., 69 Hun (N. Y.) 532, 23 N. Y. Suppl. 647; Kimbrough *v.* Hoffman, 6 Pa. Super. Ct. 60.

89. Burlington Voluntary Relief Dept. *v.* White, 41 Nebr. 561, 59 N. W. 751; Burlington Voluntary Relief Dept. *v.* White, 41 Nebr. 547, 59 N. W. 747, 43 Am. St. Rep. 701; Baltimore, etc., Employés' Relief Assoc. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44.

90. Fuller *v.* Baltimore, etc., Employés' Relief Assoc., 67 Md. 433, 10 Atl. 237, rule held reasonable. And see Reg. *v.* Grenier, 30 Can. Sup. Ct. 42.

91. Baltimore, etc., R. Co. *v.* Ray, 36 Ind. App. 430, 73 N. E. 942; Walters *v.* Chicago, etc., R. Co., (Nebr. 1905) 104 N. W. 1066; Clinton *v.* Chicago, etc., R. Co., 60 Nebr. 692, 84 N. W. 90.

A judgment on demurrer is not a judgment in a suit against the employer for damages which will preclude any claim on the relief fund, within a rule of the company, since the judgment intended by such a rule is a judgment awarding the employee some damages. O'Reilly *v.* Pennsylvania R. Co., 69 N. J. L. 119, 54 Atl. 233 [*affirmed* in 70 N. J. L. 828, 59 Atl. 1118].

92. Ulmer *v.* Minster, 16 Misc. (N. Y.) 42, 37 N. Y. Suppl. 679 (discharge on account of sickness); Kimbrough *v.* Hoffman, 6 Pa. Super. Ct. 60, 41 Wkly. Notes Cas. 275 (subsequent acceptance of dues in ignorance of servant having quit, where tendered back as soon as fact discovered, no estoppel); Bunch *v.* Tennessee Mfg. Co's. Operatives' Voluntary Relief Assoc., (Tenn Ch. App. 1900) 62 S. W. 240.

93. Johnson *v.* Pennsylvania R. Co., 26 Misc. (N. Y.) 241, 55 N. Y. Suppl. 1050.

94. Mocomber *v.* Proctor, 22 Pa. Super. Ct. 483.

95. McNevin *v.* Solvay Process Co., 32 N. Y. App. Div. 610, 53 N. Y. Suppl. 98 [*affirmed* in 167 N. Y. 530, 60 N. E. 1115].

96. On servant injured by master's negligence see *infra*, IV, A, 1, f.

Authority of agent to employ see Principal and Agent.

Liability of master for negligence of physician furnished see *infra*, IV, A, 1, f.

Effect of customs in general see Customs and Usages, 12 Cyc. 1030.

97. See *infra*, III, B, 7.

98. Denver, etc., R. Co. *v.* Iles, 25 Colo. 19, 53 Pac. 222; Evans *v.* Collier, 79 Ga. 315, 4 S. E. 264; Sweetwater Mfg. Co. *v.* Glover, 29 Ga. 399; Vorass *v.* Rosenberry, 85 Ill. App. 623; Davis *v.* Forbes, 171 Mass. 548, 51 N. E. 20, 47 L. R. A. 170; Wennall *v.* Adney, 3 B. & P. 247, 6 Rev. Rep. 780; Reg. *v.*

was paying nothing for the services of the servant,[99] at least except in a case of great emergency where it is imperative to save life or to prevent great harm.[1] The employer is not liable for medical attendance even where the employee was injured in the course of his employment so as to make the employer liable for the injuries.[2] By contract, however, the employer may be bound to furnish medical attendance,[3] as where the employer retains a portion of the wages of each employee for medical services.[4] And in such a case the employer is liable to the employee in damages for failure to properly provide medical attendance in case the employee is sick or injured.[5] Independent of contract, a physician cannot recover from an employer for services rendered an employee,[6] even where the services have been requested by the employer,[7] except perhaps where the servant performs his services without compensation,[8] or where the employer or someone authorized to act in his behalf promises to pay for the services, or requests them where it is his duty to furnish medical attendance.[9]

7. Food, Clothing, and Lodging. Under the contract the employee may be entitled, as his compensation, or as a part thereof, to food, clothing, and lodging.[10]

Smith, 8 C. & P. 153, 34 E. C. L. 662; Sellen *v.* Norman, 4 C. & P. 80, 19 E. C. L. 416. See also Cooper *v.* Phillips, 4 C. & P. 581, 19 E. C. L. 659. *Contra*, see Scarman *v.* Castell, 1 Esp. 270.

99. Evans *v.* Collier, 79 Ga. 315, 4 S. E. 264.

1. Denver, etc., R. Co. *v.* Iles, 25 Colo. 19, 53 Pac. 222.

2. Davis *v.* Forbes, 171 Mass. 548, 51 N. E. 20, 47 L. R. A. 170.

3. Galveston, etc., R. Co. *v.* Rubio, (Tex. Civ. App. 1901) 65 S. W. 1126; Morse *v.* Powers, 45 Vt. 300.

4. Southern Pac. Co. *v.* Mauldin, 19 Tex. Civ. App. 166, 46 S. W. 650.

5. Illinois Cent. R. Co. *v.* Gheen, 112 Ky. 695, 66 S. W. 639, 68 S. W. 1087, 23 Ky. L. Rep. 1952.

Damages.— Where an employee is improperly refused admission to the hospital of the employer, he may recover the cost of such skilled surgical treatment and accommodations as he would have received had he gone to the hospital; but where the employee, instead of employing medical attention, accepted the services of the local surgeon of the employer, the employer is not liable for any aggravation of his injury by the failure of that surgeon to give him proper treatment, as he should have procured aid elsewhere. Illinois Cent. R. Co. *v.* Gheen, 112 Ky. 695, 66 S. W. 639, 68 S. W. 1087, 23 Ky. L. Rep. 1952. Where medical assistance is refused, the employee is entitled to recover for both physical and mental suffering. But damages suffered by reason of the employee being compelled to walk from the place where he was taken sick to his home, by reason of his lack of funds to pay railroad fare, and the employer's refusal to transport him, are not recoverable, since too remote. Galveston, etc., R. Co. *v.* Rubio, (Tex. Civ. App. 1901) 65 S. W. 1126.

Continuance of the medical attention so long as the sickness or injury requires it is necessary, in the absence of any understanding to the contrary; and the employee is not bound by rules adopted by the employer after he entered the employment, and shortly before the injury and not within the knowledge of the employee, to the effect that the treatment would continue so long as the surgeon deemed necessary and that benefits would not be given for injuries received in a fight. Scanlon *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1905) 86 S. W. 930.

Free transportation.— The duty to furnish free medical attendance may include the duty to furnish free transportation to the employer's hospital, where such free transportation is the custom of the employer; and the employee is entitled to damages for increased suffering due to the refusal of the employer's foreman to wire for a free pass to the hospital, where it was his duty so to do. Gulf, etc., R. Co. *v.* Harney, (Tex. Civ. App. 1899) 54 S. W. 791.

6. Sweet Water Mfg. Co. *v.* Glover, 29 Ga. 399; Malone *v.* Knickerbocker Ice Co., 88 Wis. 542, 60 N. W. 999; Wennall *v.* Adney, 3 B. & P. 247, 6 Rev. Rep. 780; Atkins *v.* Banwell, 2 East 505. And see Scarman *v.* Castell, 1 Esp. 270.

7. Jesserich *v.* Walruff, 51 Mo. App. 270. But see Sellen *v.* Norman, 4 C. & P. 80, 19 E. C. L. 416, holding that if a master calls in his physician to attend his servant he will not be allowed to deduct the charge for such medical attendance out of the servant's wages unless there is a special contract between master and servant therefor.

8. Wells *v.* Kennerly, 4 McCord (S. C.) 123 (slave); Clark *v.* Waterman, 7 Vt. 76, 29 Am. Dec. 150.

9. See Florida Southern R. Co. *v.* Steen, 45 Fla. 313, 34 So. 571 (holding, however, that a physician employed by the relief and hospital department of a railroad company to treat an injured employee in an emergency, for no definite period, cannot recover for services rendered after notice that they were no longer needed, because the hospital surgeons were ready to take care of the case); Cooper *v.* Phillips, 4 C. & P. 581, 19 E. C. L. 659.

10. Cook *v.* Bates, 88 Me. 455, 34 Atl. 266 (holding that an employer could sue his em-

But ordinarily there is no implied contract to furnish it,[11] even where the employee is injured in the performance of his duties.[12] A termination of the employment usually ends the right to food, clothing, or lodging.[13]

8. Payment[14] — a. Time When Due.[15] Except where regulated by statute,[16] the time when wages are payable is to be determined by the original contract of hire[17] or subsequent agreements.[18] But a wrongful discharge renders the wages already earned at once due and payable.[19] The right to monthly payments, as provided for by the contract, is not waived by neglecting to demand the wages each month.[20] Under an employment by the day, week, or month, for no fixed time, with no agreement as to the time of payment, the wages are due at the close of each day, week, or month, as the case may be.[21] If neither the amount of wages nor the time of payment are specified the wages do not accrue monthly.[22] It has already been stated that a contract to work for an entire number of months at a specified sum per month is an entire contract;[23] and it follows that where there is no agreement as to the time when the monthly wages are payable they are not

ployee for board where the latter agreed to serve for his board but instead sued for the value of his services and recovered therefor by default of the employer in defending); Nichols *v.* Coolahan, 10 Metc. (Mass.) 449 (holding, where one agreed to pay an employee so much per month and board, and no charge was made for time while the employee was sick, that the employer could not recover for board of the employee while sick); Spencer *v.* Storrs, 38 Vt. 156 (holding that, where one agreed to work for his board and clothes, and worked for some six months until the fall of the year and received board, but no clothes, the employee could recover the reasonable value of the services because of the breach for failure to furnish clothes for the winter); Griffin *v.* Tyson, 17 Vt. 35 (holding that, where the employee is to be boarded by the employer in a particular way or at a particular place, the employee has no right to procure his board in a different way in a place not designated and charge the employer therefor, without showing some failure of performance on the part of the employer).

Board of children of servant.— Where a woman worked as housekeeper, without any express agreement as to wages, but with the understanding that she should be entitled to free board for her son, and brought with her two sons who were boarded by her employer, he had a right to offset against her claim for wages a reasonable amount for the board of her second son. Fletcher *v.* Massey, 49 Ill. App. 36.

Board while sick.— Where a servant contracted to work for a certain sum per month and board, and was sick so as to be unable to work for a few weeks, during which time no charge was made for services, the master cannot charge the servant for board during the sickness. Nichols *v.* Coolahan, 10 Metc. (Mass.) 449.

Agreement to furnish house as creating relation of landlord and tenant see Landlord and Tenant, 24 Cyc. 880.

11. See Godbold *v.* Harrison, McGloin (La.) 31, holding, however, that where one had been employed several years by another, during which time his salary had been several times increased, and throughout his board had been considered as included, without special mention, that he had the right to suppose, in subsequent negotiations about salary, that board is included.

12. Chicago, etc., R. Co. *v.* Behrens, 9 Ind. App. 575, 37 N. E. 26.

13. Bowman *v.* Bradley, 151 Pa. St. 351, 24 Atl. 1062, 17 L. R. A. 213, holding that the termination ends right to occupy house belonging to employer. But see on this proposition Seal *v.* Erwin, 2 Mart. N. S. (La.) 245, where discharge of employee was held not to authorize withholding of provisions promised.

14. **Statutory provisions as to payment in goods** see *supra*, III, B, 2, c, (III).

15. **Time to sue** see *infra*, III, B, 9, c.

16. See *supra*, III, B, 2, c, (II).

17. Reynolds *v.* Reeder, 104 Mich. 265, 62 N. W. 355, holding, under a contract to sell a certain amount of goods in a year for a specified compensation, with a commission on the goods sold over that amount, there being no time stated for the payment of the compensation, that it is payable when goods are sold of the value stated.

Time of payment indefinite.— Where one was employed as care-taker of a mine, one half of his wages to be paid at the end of each month and one half when the mining company should resume work or dispose of its property, it was an implied condition that operations should be resumed or the property sold within a reasonable time, so that the employee could recover the balance after the lapse of four years, although work had not been resumed nor the property disposed of. Hood *v.* Hampton Plains Exploration Co., 106 Fed. 408.

18. Booth *v.* Ratcliffe, 107 N. C. 6, 12 S. E. 112.

19. See Hood *v.* Hampton Plains Exploration Co., 106 Fed. 408.

20. White *v.* Atkins, 8 Cush. (Mass.) 367.

21. De Lappe *v.* Sullivan, 7 Colo. 182, 2 Pac. 926.

22. Mixer *v.* Mixer, 2 Cal App. 227, 83 Pac. 273.

23. See *supra*, III, B, 4, c, (I).

payable until the end of the term.[24] It has been held that an agreement to pay a yearly salary is simply an agreement to pay so much for services by or for the year, and does not mean that the amount is to be paid at any particular time, in the absence of any usage or understanding, express or implied, to that effect.[25] Failure, through sickness, to fully perform the contract precludes the right to payment for the services actually performed before the end of the term.[26]

b. Satisfaction. What constitutes a payment[27] or an accord and satisfaction[28] of a claim for wages is governed by the rules generally pertaining thereto. Dealings between the employer and his agent, where the employee is not actually paid, do not relieve the employer from liability.[29] If payments of wages have been made on account, and thereafter the employee quits before the expiration of the term, and is defeated in an action to recover for his services, the employer cannot recover the amount of the part payment previously made.[30]

9. Actions[31] — a. Nature and Form of Remedy. Whether an action to recover compensation shall be based on the contract itself or on a *quantum meruit* depends on the principles governing actions on contracts in general.[32] An action for an accounting is usually not maintainable.[33]

b. Conditions Precedent. The service upon the employer of a notice of the particulars of the employee's claim is, where provided for by contract, a condition precedent to an action for wages.[34] So a certificate of a third person may constitute a condition precedent,[35] although a recovery is permissible notwithstanding a failure to furnish a certificate where it is unreasonably withheld.[36]

24. Larkin *v.* Buck, 11 Ohio St. 561; Tebo *v.* Ballard, 36 Vt. 612. *Compare In re* Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809. *Contra*, Osgood *v.* Paragon Silk Co., 19 Misc. (N. Y.) 186, 43 N. Y. Suppl. 271 (uniform practice to pay in monthly instalments); Heim *v.* Wolf, 1 E. D. Smith (N. Y.) 70; Winterhalter *v.* Johnson, 1 Ohio Dec. (Reprint) 575, 10 West. L. J. 462. And see Stone *v.* Bancroft, 139 Cal. 78, 70 Pac. 1017, 72 Pac. 717.

25. Soule *v.* Soule, 157 Mass. 451, 32 N. E. 663.

26. Tebo *v.* Ballard, 36 Vt. 612.

27. See PAYMENT.

28. See ACCORD AND SATISFACTION, 1 Cyc. 305.

29. Kruse *v.* Seiffert, etc., Lumber Co., 108 Iowa 352, 79 N. W. 118 (holding that payment by the employer to his agent of the wages of an employee hired by the agent will not relieve the employer from liability where the agent does not make the payment); Noble *v.* The Northern Illinois, 23 Iowa 109 (holding that an employee may recover the balance of his wages, although the employer's agent has fraudulently taken from the employee a receipt in full and has been allowed by his principal, on settlement, the full amount).

30. Winn *v.* Southgate, 17 Vt. 355.

31. **On implied contracts for services** see WORK AND LABOR.

For wrongful discharge see *supra*, II, C, 2, b.

32. See CONTRACTS, 9 Cyc. 685, 690. See also Purdy *v.* C. C. White Paper Mfg. Co., 29 Misc. (N. Y.) 775, 61 N. Y. Suppl. 254.

Full performance prevented by defendant. — In an action for services rendered under a contract, defendant having prevented the completion thereof, plaintiff is not confined to an action for damages for the breach, but may sue on a *quantum meruit* for services performed. Welch *v.* Livingston, 33 Misc. (N. Y.) 116, 67 N. Y. Suppl. 149. See also CONTRACTS, 9 Cyc. 688.

Contract not performed by employee. — Where plaintiff seeks to recover damages for defendant's breach of a contract for the performance of labor by plaintiff, which contract has not been performed upon the part of plaintiff, he must declare specially, and not on the common counts in assumpsit. Weymouth *v.* Beatham, 93 Me. 454, 45 Atl. 511.

Amount of compensation not fixed. — Where the amount of compensation is not fixed for a portion of the period of employment, a recovery for such time may be based on a *quantum meruit*. McWilliams *v.* Elder, 52 La. Ann. 995, 27 So. 352.

Action on special contract. — Where there is a special agreement for wages during a time when the employee was injured, entered into some time after the injury, in consideration of a release of damages, a recovery therefor should be in an action based on such special contract. Louisville, etc., R. Co. *v.* Barnes, 16 Ind. App. 312, 44 N. E. 1113.

After discharge for cause see *supra*, III, B, 4, c, (III).

After wrongful discharge see *supra*, II, C, 2, b.

Where contract voidable under statute of frauds see FRAUDS, STATUTE OF, 20 Cyc. 299.

33. See ACCOUNTS AND ACCOUNTING, 1 Cyc. 407.

34. Prudential Ins. Co. *v.* Myers, 15 Ind. App. 339, 44 N. E. 55.

35. See, generally, CONTRACTS, 9 Cyc. 700, 701.

36. Kinnerk *v.* Philadelphia Ball Club, 92

c. Time to Sue.[37] Where a contract for services for a specified time calls for periodical payments of instalments, each instalment constitutes a separate cause of action which accrues immediately after the instalment is due.[38] But where the employee quits before the end of the term,[39] or is discharged for cause,[40] and no wages are then due, he cannot recover compensation *pro rata* or on a *quantum meruit* until the wages are due and payable under the contract. So where the amount of profits of which the employee was entitled to a certain per cent cannot be ascertained, according to the terms of the contract, until the termination of the year, and the employment is terminated before, no action can be brought to recover such percentage before the close of the year.[41] Where wages are to be paid from time to time as needed by the employee, who hired for a year, and he quits before the end of the year, he may sue at once to recover the actual value of the labor.[42] If a contract for a year is terminable at the option of either party, with a provision for payment when the services are completed, an action may be brought at once after termination before the end of the year.[43] Where the employee quits for cause he may at once sue for his compensation.[44]

d. Defenses — (i) *In General.* Certain defenses to actions for compensation for services have been already noticed.[45] The following have been held not defenses: Work unskilfully done where the servant was employed by the day;[46] employee lazy, and failure to produce good results;[47] failure of employer to have the expected work to do, where the employee was not discharged and was always ready to perform his duties;[48] order given to employee, on employer, although not returned, where it had not been accepted or paid;[49] order given employer by employee directing payment to third person where no payment had been made and the order was still in the employer's possession;[50] work in which employee was engaged being performed for the employer by a third person, under contract, where the employee was not hired by the third person;[51] services rendered as the employer's mistress where the employer had induced her to believe that she was his wife.[52] It is a defense that the servant falsely and fraudulently represented that

Mo. App. 669. See also CONTRACTS, 9 Cyc. 701.

37. Accrual of right of action on accounts for services rendered see LIMITATIONS OF ACTIONS.

Accrual of right of action on implied contract for services rendered see LIMITATIONS OF ACTIONS.

Accrual of right of action on several contracts for employment see LIMITATIONS OF ACTIONS.

Application of general statutes of limitations to actions on contracts of employment see LIMITATIONS OF ACTIONS.

Time when wages due see *supra*, III, B, 8, a.

38. *Alabama.*— Liddell *v.* Chidester, 84 Ala. 508, 4 So. 426, 5 Am. St. Rep. 387; Davis *v.* Preston, 6 Ala. 83.

District of Columbia.— Fowler *v.* Great Falls Ice Co., 1 MacArthur 14.

New York.—Seaburn *v.* Zachmann, 99 N. Y. App. Div. 218, 90 N. Y. Suppl. 1005 (holding that the employee was bound to show performance of the contract down to the time that such instalment became payable); Huntington *v.* Ogdensburgh, etc., R. Co., 7 Am. L. Reg. N. S. 143.

Pennsylvania.—Clay Commercial Tel. Co. *v.* Root, 1 Pa. Cas. 485, 4 Atl. 828.

Texas.— Mohrhardt *v.* Sabiene Pass, etc., R. Co., 2 Tex. App. Civ. Cas. § 322.

Wisconsin.— La Coursier *v.* Russell, 82 Wis. 265, 52 N. W. 176.

See 34 Cent. Dig. tit. "Master and Servant," § 109.

Splitting of action see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 442.

39. Clark *v.* Terry, 25 Conn. 395; Powers *v.* Wilson, 47 Iowa 666; Hartwell *v.* Jewett, 9 N. H. 249; Fairfield *v.* Wyoming Valley Coal Co., 142 Pa. St. 397, 21 Atl. 874.

40. Smith *v.* The Columbus, 43 Fed. 686; Smith *v.* Hayward, 7 A. & E. 544, 2 Jur. 232, 7 L. J. Q. B. 3, 2 N. & P. 432, W. W. & D. 635, 34 E. C. L. 292.

41. Woodbridge *v.* Pratt, etc., Co., 69 Conn. 304, 37 Atl. 688.

42. Parcell *v.* McComber, 11 Nebr. 209, 7 N. W. 529, 38 Am. Rep. 366.

43. Rossiter *v.* Cooper, 23 Vt. 522.

44. La Coursier *v.* Russell, 82 Wis. 265, 52 N. W. 176.

45. See *supra*, III, B, 4, d.

46. Clark *v.* Fensky, 3 Kan. 389.

47. Hobbs *v.* Riddick, 50 N. C. 80.

48. Vail *v.* Jersey Little Falls Mfg. Co., 32 Barb. (N. Y.) 564. See also *supra*, III, A, 1.

49. Burgen *v.* Dwinal, 11 Ark. 314.

50. C. L. Pritchard Mfg. Co. *v.* Hartney, 68 Ill. App. 336.

51. McFadden *v.* Crawford, 39 Cal. 662.

52. Mixer *v.* Mixer, 2 Cal. App. 227, 83 Pac. 273.

he possessed certain essential qualifications for the labor which he did not in fact possess.[53]

(II) *Set-Off and Counter-Claim.* An employer sued for services rendered may set off damages incurred by him because of the failure of the employee to exercise due care and use reasonable skill in his work,[54] from quitting before the end of the term,[55] from quitting without giving the required notice,[56] from sickness of the servant during the term,[57] or from misconduct in the course of his employment,[58] or a fine properly imposed by the employer.[59] So if an employee is discharged for cause the employer may set off damages from the acts justifying such discharge,[60] but not damages arising from a failure to complete the services unless the acts justifying the discharge were voluntary and wilful breaches of the contract.[61] If the employee quits pursuant to an option to do so contained in the contract, no damage resulting therefrom can be set off.[62]

e. Parties. The rules relating to parties in actions on contracts in general apply equally well to actions for compensation for services.[63]

53. Connor *v.* Lasseter, 98 Ga. 708, 25 S. E. 830.

54. *Arkansas.*— Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430.

California.— Stoddard *v.* Treadwell, 26 Cal. 294.

Illinois.— Parker *v.* Platt, 74 Ill. 430.

Michigan.— Hudson *v.* Feige, 58 Mich. 148, 24 N. W. 863.

Mississippi.— Dunlap *v.* Hand, 26 Miss. 460.

New York.— Harris *v.* Rathbun, 2 Abb. Dec. 326, 2 Keyes 312 (holding that the acceptance of the work does not prevent a set-off where the employer objected at the time of receiving it that the work was not well done); Still *v.* Hall, 20 Wend. 51.

Pennsylvania.— See Laverty *v.* Harrisburg Rolling Mill Co., 17 Pa. Super. Ct. 66.

Texas.— Stoddard *v.* Martin, 3 Tex. App. Civ. Cas. § 85.

See 34 Cent. Dig. tit. "Master and Servant," § 111.

Damages not resulting from negligence cannot be recouped. Goss *v.* Runner, 29 Nebr. 481, 45 N. W. 778.

Liability to third persons.— In an action for wages it is no defense that the employee has by negligently injuring a third person exposed the employer to liability for damages, unless the employer has actually paid, or has been adjudged liable to pay, damages. Merlette *v.* North River, etc., Steamboat Co., 13 Daly (N. Y.) 114.

Damages equal to, or in excess of, wages.— The damages may be set off, although they exceed the amount of wages earned. Glennon *v.* Lebanon Mfg. Co., 140 Pa. St. 594, 21 Atl. 429, 12 L. R. A. 321. And, if the facts justify, the employer may recover a judgment for the excess. Mobile, etc., R. Co. *v.* Clanton, 59 Ala. 392, 31 Am. Rep. 15; South Chicago City R. Co. *v.* Workman, 64 Ill. App. 383.

Acquiescence of employer.— If the employer is present and sees the quality of the work being done by the employee, he must pay the stipulated wages so long as he continues the employment, and he cannot set up the plea of bad work or recoup for damages on that ground. Starke *v.* Crilley, 59 Wis. 203, 18 N. W. 6. But see Morris *v.* Redfield, 23 Vt. 295.

55. *Alabama.*— Hunter *v.* Waldron, 7 Ala. 753; Greene *v.* Linton, 7 Port. 133, 31 Am. Dec. 707.

Iowa.— Riech *v.* Bolch, 68 Iowa 526, 27 N. W. 507, holding, however, that the employer cannot set off damages resulting from inability to obtain a laborer in the place of his employee, whereby he lost a considerable amount of hay which was being harvested.

New York.—Seaburn *v.* Zachmann, 99 N. Y. App. Div. 218, 90 N. Y. Suppl. 1005. See also Clark *v.* Gilbert, 26 N. Y. 279, 84 Am. Dec. 189.

Ohio.— Snyder *v.* Walker, 13 Ohio Cir. Ct. 93, 7 Ohio Cir. Dec. 99.

Vermont.— Patrick *v.* Putnam, 27 Vt. 759; Fenton *v.* Clark, 11 Vt. 557.

See 34 Cent. Dig. tit. "Master and Servant," § 111.

56. Hunt *v.* Otis Co., 4 Metc. (Mass.) 464.

Damages.— The employer may recoup damages to the extent of injury actually sustained by him by the conduct of the employee; and it is not sufficient to allow the employer as damages simply what it would cost to procure another one in his place, although the damages must not be so uncertain and indefinite in their character that no estimate can be made of their amount. Satchwell *v.* Williams, 40 Conn. 371.

57. Jones *v.* Deyer, 16 Ala. 221.

58. Miller *v.* Stewart, 12 La. Ann. 170; Kennedy *v.* Mason, 10 La. Ann. 519; Hendricks *v.* Phillips, 3 La. Ann. 618.

59. Gallagher *v.* Hathaway Mfg. Corp., 172 Mass. 230, 51 N. E. 1086.

60. Hildebrand *v.* American Fine Art Co., 109 Wis. 171, 85 N. W. 268, 53 L. R. A. 826.

61. Lawrence *v.* Gullifer, 38 Me. 532.

62. Wilmington Coal Min., etc., Co. *v.* Lamb, 90 Ill. 465.

63. See Contracts, 9 Cyc. 702 *et seq.*; Parties.

Real party in interest.— One who has performed labor for another may sue for his wages a third person who contracted with the hirer to pay the wages, although plain-

f. Pleading — (I) *COMPLAINT.*[64] A complaint in an action to recover compensation for services must clearly set forth all the facts to show the existence of a cause of action.[65] As in all actions on contracts, the complaint must show a binding agreement between the parties.[66] Performance of the services sued for must be distinctly alleged,[67] and it must appear that the services were

tiff was not a party to the contract, was not consulted, and did not consent to it. Millani *v.* Tognini, 19 Nev. 133, 7 Pac. 279.

Joinder of plaintiffs.— Persons contracting severally to perform certain services for another, at an agreed price per day, cannot join in an action to recover for their services. No. 5 Min. Co. *v.* Bruce, 4 Colo. 293. An accepted proposal made to the workmen in a foundry collectively, by a partner therein, that if they will go to work his firm will pay them the amount due from a former proprietor is a promise to each of them individually, upon which separate actions only will lie. Wills *v.* Cutler, 61 N. H. 405. See also CONTRACTS, 9 Cyc. 704.

Defendants.— Where one is employed by a firm for a period of years, and agrees to act for them and their successors under their direction and control, and the firm is dissolved before the end of the term, and the employee continues in the service of the successors, it is not necessary to join as defendants, in an action on the contract for wages earned, after the dissolution, the members of the new firm who were not parties to the written agreement. Smith *v.* Douglass, 4 Daly (N. Y.) 191.

64. See, generally, CONTRACTS, 9 Cyc. 711 *et seq.*; PLEADING.

65. See International Power Co. *v.* Hardy, 118 Ga. 512, 45 S. E. 311; Sandberg *v.* Victor Gold, etc., Min. Co., 24 Utah 1, 66 Pac. 360 (holding that it was proper to allege an agreement to pay certain wages fixed in an adjustment agreed upon after the contract was entered into, although the original contract sued upon provided for the payment of what the services were worth); Littlefield *v.* William Bergenthal Co., 87 Wis. 394, 58 N. W. 743 (holding that a complaint was not bad because of failure to state when the employment began, where it set forth the written contract of a certain date providing that defendant "agrees to employ, and does hereby employ" plaintiff for one year, although no time for the services to begin was fixed).

If a substitution of employers is alleged it must be averred that the employee assented thereto. Chapin *v.* Longworth, 31 Ohio St. 421.

Quantum meruit.— In an action to recover for services as a housekeeper it is proper to show the character and the quality of the services rendered, by an averment of services rendered for an inmate of the house other than defendant. Berry *v.* Collins, 9 Ohio Cir. Ct. 656, 6 Ohio Cir. Dec. 597, where the servant was employed to build and run a cotton factory under a contract by which for the first year he should make his wages as low as possible, after which and when the factory went into operation he was to be paid according to the profits, there is no such special contract as precludes a recovery on a *quantum meruit* and to require the contract to be set up. Norment *v.* Hull, 1 Humphr. (Tenn.) 320.

Prayer for relief.— A complaint setting forth the agreement for a share of the profits and demanding judgment that an account be taken and that defendant pay the amount found due plaintiff states a cause of action for the amount of the unpaid compensation, notwithstanding the prayer for relief is applicable to an equitable action which is not maintainable. Parker *v.* Pullman, 24 Misc. (N. Y.) 505, 53 N. Y. Suppl. 839.

Where payment is to be made in a share of the crop, an allegation that defendant did not, at the close of the year, pay plaintiff such part of the crop made on the plantation, after setting forth what crop was made, is good after verdict. Laughlin *v.* Flood, 3 Munf. (Pa.) 255.

66. See CONTRACTS, 9 Cyc. 712.

67. Russell *v.* Slade, 12 Conn. 455; Nye *v.* Bill Nye Milling Co., 42 Oreg. 560, 71 Pac. 1043; Pennypacker *v.* Royersford Glass Co., 12 Montg. Co. Rep. (Pa.) 119; Shuttuck *v.* Griffin, 44 Tex. 566. See also Gillespie *v.* Montgomery, 93 N. Y. App. Div. 403, 87 N. Y. Suppl. 701. See, generally, CONTRACTS, 9 Cyc. 719.

Sufficiency of allegations.— An averment that plaintiff performed all the conditions of the contract so far as defendant permitted is a sufficient averment of performance unless the complaint is attacked by motion. Culbertson Irr., etc., Co. *v.* Wildman, 45 Nebr. 663, 63 N. W. 947. So averments showing that plaintiff entered defendant's employ under a contract at a specified time and continued therein during a specified period are a sufficient averment of performance. Joy *v.* Glidden Varnish Co., 83 Fed. 90.

Construction of allegations.— Where an employee sued for unpaid salary up to the time of the insolvency of the employer, which occurred before the end of the term of hiring, an allegation that the employee had duly performed all the conditions of the contract on his part must be construed to allege performance only during the time for which he sued. Tichenor *v.* Bruckheimer, 40 Misc. (N. Y.) 194, 81 N. Y. Suppl. 653.

Part performance.— A contract to serve for a year on a monthly salary does not oblige the employee to aver and prove performance of the whole year's services, or that he was prevented from performing, as a condition precedent to a recovery. Matthews *v.* Jenkins, 80 Va. 463. See also *supra*, III, B, 4, c, (I).

requested.[68] Where the contract does not specify the nature of the services to be rendered they need not be specified in the complaint.[69] A demand for payment need not be averred.[70]

(II) *Answer.*[71] An answer is sufficient where it specifically denies the agreement alleged in the complaint;[72] but if there is no denial, it is not sufficient to merely set up a version of the transaction inconsistent with that set up in the complaint.[73] The answer is sufficient where it alleges a discharge and states the grounds therefor.[74] Statutory defenses must be specially pleaded.[75] If a set-off is relied on there must be a special plea.[76] Failure to allege payment does not rebut the presumption that wages of a menial servant were periodically paid.[77]

(III) *Reply.* A reply must not contain material allegations inconsistent with the allegations of the complaint.[78]

(IV) *Issues, Proof, and Variance*—(A) *In General.* The evidence must correspond with the allegations in the pleadings.[79] For instance, if the complaint is for the recovery of wages, under a special contract, damages for breach of the contract cannot be proved.[80] So, if a full performance of the contract is averred, evidence of an excuse for non-performance is inadmissible.[81] And if an express contract is alleged, evidence is not admissible to show an implied contract.[82] Where the answer denies the contract sued on, and alleges payment, a discharge for intoxication cannot be shown.[83]

(B) *Evidence Admissible Under General Issue.*[84] Under the general issue, evidence is admissible to show a good cause for discharge,[85] or a breach or failure of performance of the contract by the employee,[86] or employment by a third person during the time for which the employee sues to recover wages.[87]

68. Joubert *v.* Carli, 26 Wis. 594, holding that an averment that plaintiff performed work for defendant at an agreed price, which is specified, sufficiently imports a request.

69. Lynd *v.* Apponaug Bleaching, etc., Co., 20 R. I. 344, 39 Atl. 188.

70. Hartford L. Ins. Co. *v.* Bryan, 25 Ind. App. 406, 58 N. E. 262. See also Pleading.

71. See, generally, Contracts, 9 Cyc. 731.

72. Kraus *v.* Agnew, 80 N. Y. App. Div. 1, 80 N. Y. Suppl. 518; Reichley *v.* Leingang, 7 Pa. Co. Ct. 556.

73. Place *v.* Bleyl, 45 N. Y. App. Div. 17, 60 N. Y. Suppl. 800, 7 N. Y. Annot. Cas. 95.

74. Basse *v.* Allen, 43 Tex. 481; Mudgett *v.* Texas Tobacco Growing, etc., Co., (Tex. Civ. App. 1901) 61 S. W. 149, holding that it is not sufficient to merely set up a discharge for unsatisfactory work without alleging any specific default.

75. Stone *v.* Bancroft, 139 Cal. 78, 70 Pac. 1017, 72 Pac. 717.

76. Stafford *v.* Sibley, 113 Ala. 447, 21 So. 459.

77. Taylor *v.* Beatty, 202 Pa. St. 120, 51 Atl. 771.

78. Alexander *v.* Wales, 6 T. B. Mon. (Ky.) 323.

79. See, generally, Contracts, 9 Cyc. 748; Pleading. See also Biest *v.* Versteeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081; Carrere *v.* Dun, 26 Misc. (N. Y.) 717, 57 N. Y. Suppl. 82 [*affirming* 26 Misc. 848, 55 N. Y. Suppl. 441]; McCartney *v.* Westmoreland Coal Co., 8 Pa. Super. Ct. 74, 42 Wkly. Notes Cas. 438; Bean *v.* Percival Copper Min. Co., 111 Wis. 598, 87 N. W. 465.

A denial of the rendition of services authorizes evidence that plaintiff violated the contract by engaging in other employment while defendant was entitled to his services. Seaburn *v.* Zachmann, 99 N. Y. App. Div. 218, 90 N. Y. Suppl. 1005.

Subsequent agreement as to wages.—Evidence of an agreement as to the rate of wages after the contract of hire was entered into does not constitute a variance because the action is on the contract and the agreement for the rate of wages was made thereafter. Sandberg *v.* Victor Gold, etc., Min. Co., 24 Utah 1, 66 Pac. 360.

80. Culbertson Irr., etc., Co. *v.* Wildman, 45 Nebr. 663, 63 N. W. 947.

81. O'Leary *v.* Board of Education, 9 Daly (N. Y.) 161 [*reversed* on other grounds in 93 N. Y. 1, 45 Am. Rep. 156]; Bancroft *v.* Hambly, 94 Fed. 975, 36 C. C. A. 595.

82. Brightson *v.* H. B. Claflin Co., 180 N. Y. 76, 72 N. E. 920; Sandberg *v.* Victor Gold, etc., Min. Co., 24 Utah 1, 66 Pac. 360, holding, however, that testimony that the agreement in regard to wages was that they should be "made all right" did not show an implied contract so as to constitute a variance. See also Contracts, 9 Cyc. 749.

83. Murphy *v.* De Haan, 116 Iowa 61, 89 N. W. 100.

84. See, generally, Contracts, 9 Cyc. 743.

85. McCurdy *v.* Alaska, etc., Commercial Co., 102 Ill. App. 120.

86. Blodgett *v.* Berlin Mills Co., 52 N. H. 215. See also O'Brien *v.* O'Brien, 75 Ill. App. 263. But see Bolt *v.* Friederick, 56 Mich. 20, 22 N. W. 187, holding that an employer cannot, under the general issue, avail himself of violations of duty by the servant.

87. Phinney *v.* Bronson, 43 Kan. 451, 23 Pac. 624.

g. Evidence — (I) *PRESUMPTIONS.*[88] Services performed by an employee at the request of the employer will be presumed to have been done in the course of his employment, although not technically in the line of his duty.[89] So, where the services are rendered by one in the employ of another, even upon request, it will be presumed that they were rendered under the contract of employment unless the contrary is shown.[90] It will be presumed that the contract is to be performed in the state where it is executed,[91] and that where the relation of employer and employee is shown to exist the employment continued to the end of the term.[92] But evidence of payment for certain periods of service will not raise a presumption of payment for prior periods of service, where time has intervened between the periods of service.[93] And an unusual contract, such as an agreement to work a year for a certain sum per day with payment at the end of the term, is not to be presumed.[94] The rule in England that where one serves in the capacity of a domestic servant and no demand for wages is made until a considerable period after the termination of the services, it will be presumed either that the wages have been paid or that they were gratuitous,[95] has been followed in this country in some of the states.[96]

(II) *BURDEN OF PROOF.* The burden is on the employee who sues to recover compensation for his services to establish the terms of the contract on which his right to recover depends.[97] So where the employee seeks to recover for a period when he was not working, the burden is on him to show his right to recover therefor.[98] And where an employee holds over after the term, the burden is on him to prove that he performed the services under an express or implied contract that he was to receive the original rate of compensation,[99] although if the employee

88. **In general** see EVIDENCE, 16 Cyc. 1050 *et seq.*

89. Bee *v.* San Francisco, etc., R. Co., 46 Cal. 248.

90. Cooper *v.* Brooklyn Trust Co., 109 N. Y. App. Div. 211, 96 N. Y. Suppl. 56.

91. Cook *v.* Todd, 72 S. W. 779, 24 Ky. L. Rep. 1909.

92. Berg *v.* Carroll, 16 Daly (N. Y.) 73, 9 N. Y. Suppl. 509.

93. Bougher *v.* Kimball, 30 Mo. 193.

94. Chicago Soap, etc., Co. *v.* Stansbury, 99 Ill. App. 488.

95. Sellen *v.* Norman, 4 C. & P. 80, 19 E. C. L. 416; Gough *v.* Findon, 7 Exch. 48, 1 L. J. Exch. 58.

96. Taylor *v.* Beatty, 202 Pa. St. 120, 51 Atl. 771; Houck *v.* Houck, 99 Pa. St. 552; McConnell's Appeal, 97 Pa. St. 31 (holding that the presumption is not affected by a statute making servant's wages for one year a preferred claim against a decedent's estate); Hayes' Estate, 17 Pa. Super. Ct. 412.

To whom presumption applicable.—The presumption of payment for domestic services applies, not only to domestics living in the house of the employer, but also to persons rendering domestic services, but not living in the employer's house. Hayes' Estate, 17 Pa. Super. Ct. 412. Where decedent's house was a small country tavern, whose patrons were very few, one who was employed by the decedent to work about the house, do the cleaning, tend bar, cook, and all such other necessary things, including the washing and ironing, and serving drinks in the parlor, was a servant, and not a housekeeper, so as to raise the presumption that she had been paid periodically. Taylor *v.* Beatty, 202 Pa. St. 120, 51 Atl. 771.

Rebuttal of presumption.— The presumption that a decedent regularly paid a woman who did his washing and ironing and rendered him other domestic services, but who did not live in the same house with him, is not rebutted by the claimant's declarations to third persons that she made frequent demands for money, and that the decedent refused to pay her the amount she asked for, and by the account-book of the decedent, which was not a full record either of his receipts or disbursements, but which contained occasional charges against the claimant. Hayes' Estate, 17 Pa. Super. Ct. 412.

The rule cannot be invoked where the head of a house assumes relations of intimacy with his servant, and takes her out riding, and by what he says and does indicates an intention to marry her. Schrader *v.* Beatty, 206 Pa. St. 184, 55 Atl. 958.

97. Leveridge *v.* Lipscomb, 36 Mo. App. 630 (holding that where plaintiff alleged a hiring for no definite time, and the answer alleged a hiring for a definite time, not fulfilled by the employee, the burden was on plaintiff to prove the hiring for no definite time, since the defense was merely a denial); Fell *v.* H. Fell Poultry Co., 69 N. J. L. 429, 55 Atl. 236. See also Douglas *v.* McWhirter, 9 Heisk. (Tenn.) 69.

98. Wilson *v.* Smith, 111 Ala. 170, 20 So. 134; Barlow *v.* Taylor Placer Min., etc., Co., 29 Oreg. 132, 44 Pac. 492.

99. Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430.

continues to render the same services the presumption that the services were continued under the original contract will shift the burden of proving the contrary on to the employer.[1] On the other hand, if the employer sets up a new contract superseding the original one, on which the employee sues, the burden of proving the new contract and performance thereunder is on the employer.[2] If the employer seeks to recoup damages by reason of the employee's quitting before the end of the term, the burden is on the employer to prove the damages;[3] but where the employer sets up a counter-claim for moneys lost by the employee, and the employee alleges that the loss was not through his negligence, the burden of showing the absence of negligence is on the employee.[4] If an employee without means delays for a considerable time in bringing suit and in bringing the case to trial, especially where the services cover a period of years, the burden is on him to explain his neglect in failing to enforce the payment of his wages.[5]

(III) *ADMISSIBILITY*— (A) *In General.* Generally speaking, evidence of any facts which are logically relevant and material to a fact in issue is admissible.[6]

1. Travelers' Ins. Co. *v.* Parker, 92 Md. 22, 47 Atl. 1042.

2. Lyman *v.* Schwartz, 13 Colo. App. 318, 57 Pac. 735; Pitstick *v.* Osterman, (Iowa 1897) 73 N. W. 587, holding, however, that if the new contract is based on a condition which the employer refuses to perform, the employee can recover on the original contract.

3. Asher *v.* Tomlinson, 60 S. W. 714, 22 Ky. L. Rep. 1494.

4. Becket *v.* Iowa Imp. Co., 67 Iowa 337, 25 N. W. 271.

5. Taylor *v.* Beatty, 202 Pa. St. 120, 51 Atl. 771.

6. See cases cited *infra*, this note.

To whom services were rendered.— In an action for services rendered as employee of defendant, an award and judgment thereon in favor of plaintiff against a third person, for the same services, should have been admitted in evidence as tending to show that the services in question were not rendered defendant. De Forrest *v.* Butler, 62 Iowa 78, 17 N. W. 177.

Nature of services.— The fact that an employee is designated as a housekeeper does not preclude extrinsic evidence for the purpose of raising a presumption, in an action for wages, that periodical payments of wages have been made, and that she is in fact a servant and not a housekeeper. Taylor *v.* Beatty, 202 Pa. St. 120, 51 Atl. 771.

Change of employer.— Where the employee alleges want of notice in the change of employers, evidence of the method of paying the men prior to the date of the change is admissible as well as the method after such date. Tousignant *v.* Shafer Iron Co., 96 Mich. 87, 55 N. W. 681. Where an employee was to receive the same wages from the successor of his original employer as he was entitled to under the original employment, but the wages under the original employment were in dispute, evidence as to the previous employment is inadmissible. Ganther *v.* Jenks, 76 Mich. 510, 43 N. W. 600.

Contingent salary.— Where the amount sued for was to be paid only on condition that the employer's business was prosperous, evidence was admissible to show that his business resulted in loss, the amount of such loss, and from what it resulted. Diffin *v.* Reid, 15 Misc. (N. Y.) 268, 36 N. Y. Suppl. 407.

Extra time.— Evidence that the master's agent told plaintiff that he would receive compensation for overtime is admissible to negative any waiver by plaintiff of his right to such compensation, although the agent had no authority to make any contract with plaintiff. O'Boyle *v.* Detroit, 131 Mich. 15, 90 N. W. 669.

To show the sums received by an employee for his employer, the opinions of witnesses of the annual value of the work done, where the employee was charged with the collection of the accounts contracted in the business, is not admissible. Hale *v.* Brown, 11 Ala. 87.

Payment.— Where payment is alleged, evidence is admissible to show that the employer stated after the completion of the services that he would pay the employee a specified sum. Murphy *v.* De Haan, 116 Iowa 61, 89 N. W. 100. Where payment is alleged, checks received by the employee, some payable to him personally and some on account of the business, are admissible in evidence to show that his personal account was kept separate from the labor expense account. Miller *v.* Brown, 82 Iowa 79, 47 N. W. 895.

Commissions on shares of profits.— Where an employee was to be paid according to the amount of goods sold during the year, evidence of the amount of sales in immediately preceding years and in the year in question down to his dismissal, being the best evidence procurable under the circumstances, is not so speculative and remote as to be inadmissible. Kauffman *v.* Mendelsohn, 24 Misc. (N. Y.) 182, 52 N. Y. Suppl. 631. Where commissions were to be paid if the yearly sales of the store exceeded a certain sum, and the employee, for a part of the time, was not given an opportunity to examine the sale slips, and the cash proceeds of the sales were not all the time kept separate on the employer's books but were combined with those received from other sources, the employee may introduce evidence comparing the amount of business during the months of which no record was

(B) *Existence and Terms of Contract.* Where the issue is as to the existence or terms of the contract, any legal evidence is admissible to show the existence or non-existence of the contract or what the contract really was.[7] Evidence of the value of the employee's services, irrespective of the contract, is admissible where there is an issue as to the wages agreed upon, as such evidence tends to show whose contention is properly correct.[8] So, as bearing upon such issue, evidence of other independent contracts between the same parties for like services is admissible,[9] as is a bill previously paid the employee by the employer for like services at the rate which the employee contends was agreed upon,[10] or evidence of what the employee was receiving as wages from a third person whose service he left to become the employee of defendant.[11] So evidence of how the employee came to work for the employer and of his employment by it prior and up to the time of the contract is admissible as part of the history of the transaction and explanatory of what followed.[12] But evidence that the employee, about the time of the hiring, offered to work for a third person at the price which the employer contends was agreed upon, is immaterial.[13] So evidence of custom is inadmissible

kept of the amount of sales, with certain months in which a record had been kept. Parrott *v.* Jacobson, 27 Wash. 265, 67 Pac. 589. Where the wages were to be estimated according to the profits, and the books were kept by plaintiff and a fellow employee, and it was claimed that the employer acquiesced in the entries therein, the employer may show in contradiction of his assumed acquiescence what was said to the fellow employee who made the entries, such employee having been asked upon the stand as to the conversation, and denied that there was such conversation. Tuthill *v.* Smith, 88 N. Y. Suppl. 942.

By whom employed.— Admissibility of evidence on issue as to whether plaintiff was employed by defendant or by one for whom defendant acted see McDonald *v.* Wesendonck, 30 Misc. (N. Y.) 601, 62 N. Y. Suppl. 764.

7. See Hammond *v.* Hammond Buckle Co., 72 Conn. 130, 44 Atl. 25; Higgins *v.* Shepard, 186 Mass. 57, 70 N. E. 1014; Abbott *v.* Andrews, 130 Mass. 145 (evidence held not inadmissible as evidence of an offer to compromise); Bannon *v.* Harris, 24 N. Y. App. Div. 557, 49 N. Y. Suppl. 935; McDonald *v.* Alexander, 35 Misc. (N. Y.) 279, 71 N. Y. Suppl. 813 (evidence held admissible to contradict employee as to reason why his board was agreed to be paid by the employer in addition to his regular wages).

Parol evidence.— The general rule of parol evidence to vary the contract applies. Taylor *v.* Enoch Morgan's Sons' Co., 48 Hun (N. Y.) 483, 1 N. Y. Suppl. 293 [*affirmed* in 124 N. Y. 184, 26 N. E. 314]. See also EVIDENCE, 17 Cyc. 567 *et seq.*

Reduction of salary.— In the absence of evidence that it had been intimated to plaintiff that his salary would be reduced, evidence of the amount of sales and of the embarrassed condition of defendant's business during the time it was claimed his salary was a certain sum per month is inadmissible. Paulsen *v.* Schultz, 85 Cal. 538, 24 Pac. 1070.

Where defendant denies any contract of employment, he cannot show what wages were paid to other employees. Williams *v.* Williams, 82 Mich. 449, 46 N. W. 734.

Holding over.— Parol evidence is admissible to rebut the presumption that services rendered after the expiration of a contract of hiring were on the same terms as the original contract. Hale *v.* Sheehan, 41 Nebr. 102, 59 N. W. 554.

Renewal of contract for specified time.— Where the issue is as to whether the contract of hire was verbally renewed for a year, evidence of conduct of the employee entirely inconsistent with the claim that he had bound himself for another year is admissible. Segler *v.* Bernstein, 82 N. Y. App. Div. 267, 81 N. Y. Suppl. 1082.

Former adjudication.— Evidence as to the amount of compensation agreed upon is inadmissible where in conflict with facts decided by a former judgment between the same parties concerning the same subject-matter. Menage *v.* Rosenthal, 175 Mass. 358, 56 N. E. 579. But where a former action for wages under the same contract was settled, but it does not appear for what sum, the proceedings in that action are not evidence in the second action on the same contract as to the rate of compensation agreed on between the parties. Briggs *v.* Smith, 4 Daly (N. Y.) 110.

8. Rosenberg *v* Heidelberg, 98 N. Y. App. Div. 17, 90 N. Y. Suppl. 684; Knallakan *v.* Beck, 47 Hun (N. Y.) 117. See also CONTRACTS, 9 Cyc. 767 note 74.

9. Rosenberg *v.* Heidelberg, 98 N. Y. App. Div. 17, 90 N. Y. Suppl. 684.

Terms of contract at beginning.— Where the issue is as to whether the contract was for stipulated wages or for what the services were reasonably worth evidence is admissible to show what the contract was at the beginning, although it does not cover the period for which the suit is brought. Mears *v.* O'Donoghue, 58 Ill. App. 345.

10. Glucose Sugar Refining Co. *v.* Flinn, 184 Ill. 123, 56 N. E. 400.

11. Rocco *v.* Parczyk, 9 Lea (Tenn.) 328.

12. Selley *v.* American Lubricator Co., 119 Iowa 591, 93 N. W. 590.

13. Roles *v.* Mintzer, 27 Minn. 31, 6 N. W. 378.

to show that certain kinds of contracts were usually made in the business in the neighborhood.[14]

(c) *Breach of Contract.* In an action to recover compensation for services, evidence is admissible to show that the employee quit before the end of the term,[15] and as to whether the quitting was in good faith where the employee was given the option to leave in good faith.[16] Any legal evidence is admissible to show non-performance of the contract on the part of the employee.[17]

(d) *Reasonable Value of Services.*[18] In an action on an express contract for a fixed salary, evidence of the reasonable value of the services is inadmissible,[19] except where the wages provided for by the contract are incapable of estimation,[20] or where the terms or validity of the contract is in issue, in which case the evidence is admissible for consideration if it becomes necessary to base the claim on a *quantum meruit*.[21] If the action is based on a *quantum meruit*, account-books are admissible to explain the nature and show the extent of the services performed in keeping them.[22] So, where it is alleged that the employer agreed to pay what he could afford to pay for managing the business, evidence of the value of the services, considering their nature and the profits of the business, is admissible.[23]

14. Smith *v.* Sheridan, 57 Hun (N. Y.) 585, 10 N. Y. Suppl. 365; Kosloski *v.* Kelly, 122 Wis. 665, 100 N. W. 1037. See, generally, CUSTOMS AND USAGES, 12 Cyc. 1088.

15. Doerr *v.* Brune, 56 Ill. App. 657; Goldstein *v.* White, 16 N. Y. Suppl. 860.

Evidence to rebut ground for quitting.— In an action for wages, a master cannot, for the purpose of justifying his treatment of his servant, introduce evidence of information received by him from a third person about the servant's conduct. Chapman *v.* Coffin, 14 Gray (Mass.) 454.

16. Wilmington Coal Min., etc., Co. *v.* Barr, 2 Ill. App. 84.

17. See Pungs *v.* American Brake-Beam Co., 128 Mich. 318, 87 N. W. 364.

Devoting time and attention to business.— On an issue as to whether an employee devoted his time and attention to the services of his employment, according to his best knowledge and ability, as called for by the contract, evidence is inadmissible to show that he sold a far less amount of goods than the other salesmen in his department. Greene *v.* Washburn, 7 Allen (Mass.) 390.

Negligence.— Where the employer introduces a counter-claim for negligence, but presents no evidence to show want of due care, testimony as to statements by the employee that he performed certain acts which would show due care is immaterial. Rawlings *v.* Clark, 19 Colo. App. 214, 74 Pac. 346.

Misconduct not connected with employment.— Questions to show the bad conduct of an employee, not connected with the subject of his employment, are properly excluded. Macdonald *v.* Garrison, 2 Hilt. (N. Y.) 510.

Embezzlement.— The embezzlement by the employee of money from the business, amounting to more than the unpaid wages, may be shown, to prove that the services sued for were worthless and injurious. Schoenberg *v.* Voigt, 36 Mich. 310.

Faithfulness.— Where an employee agrees to labor faithfully for defendant's interests, evidence that he told co-employees that they would not get their pay and that he did not expect to get his was inadmissible, in the absence of any showing that the men quit or that defendant was injured by such declarations. Eckelund *v.* Talbot, 80 Iowa 569, 46 N. W. 661.

Skilfulness of employee.— See Koehler *v.* Buhl, 94 Mich. 496, 54 N. W. 157.

Rebuttal.— Where defendant interposes a counter-claim based on certain acts claimed to constitute negligence, evidence that defendant had himself performed like acts is admissible on the question of negligence. Rawlings *v.* Clark, 19 Colo. App. 214, 74 Pac. 346. Where the employer introduces evidence to show that the servant was unable to render efficient physical service because of an injury, the servant may show in rebuttal a letter written by the employer stating that the servant had a thorough knowledge of the business, as tending to show that the services of the servant were valuable notwithstanding his disability to perform severe physical labor. Lalor *v.* McDonald, 44 Mo. App. 439.

18. **Opinion and expert evidence** see EVIDENCE, 17 Cyc. 116, 121, 126, 130.

Value of services of particular servants see ATTORNEY AND CLIENT, 4 Cyc. 1001; FACTORS AND BROKERS, 19 Cyc. 284; PHYSICIANS AND SURGEONS; PRINCIPAL AND AGENT.

19. Marsh *v.* Tunis, 39 Mich. 100. See also CONTRACTS, 9 Cyc. 767 note 71.

20. Kent Furniture Mfg. Co. *v.* Ransom, 46 Mich. 416, 9 N. W. 454.

21. Hammond *v.* Hammond Buckle Co., 72 Conn. 130, 44 Atl. 25; Butcher *v.* Auld, 3 Kan. 217. See also Sands *v.* Potter, 165 Ill. 397, 46 N. E. 282, 56 Am. St. Rep. 253, holding that the giving evidence in rebuttal to show the reasonable worth of the employee's services does not waive his right to recover the contract price thereof.

22. Crusoe *v.* Clark, 127 Cal. 341, 59 Pac. 700.

23. Philliber *v.* Edelblute, 188 Pa. St. 468, 41 Atl. 643.

But evidence that the business had largely increased during the period of the alleged employment of plaintiff as manager is inadmissible, where it is not shown that the increase was due in whole or in part to his services.[24] In determining the value of the services rendered after the employer had told the employee that the former price for his work was not to be paid, evidence as to the cause of the employer's inability to pay the former wages is immaterial.[25] Where an employee abandons the service before the end of the term, his stipulated yearly salary is not evidence of the value of his services for the time while he worked.[26] The relevancy of evidence to show the value of personal services in general is treated elsewhere.[27]

(IV) *Weight and Sufficiency.* The weight and sufficiency of the evidence in an action by an employee to recover compensation for services is governed by the general rules of evidence which have been discussed elsewhere.[28] A *prima*

24. Hammond *v.* Hammond Buckle Co., 72 Conn. 130, 44 Atl. 25.

25. Andrews *v.* Johnston, 7 Colo. App. 551, 44 Pac. 73.

26. Scheuer *v.* Monash, 35 Misc. (N. Y.) 276, 71 N. Y. Suppl. 818.

27. See Evidence, 16 Cyc. 1145.

28. See Evidence, 17 Cyc. 753 *et seq.*

Sufficiency of evidence on particular issues—*Existence of contract of employment.*—Monnahan *v.* Judd, 165 Mass. 93, 42 N. E. 555; Martin *v.* Milwaukee, etc., R. Co., 138 Mich. 155, 101 N. W. 219; Mattock *v.* Goughnour, 11 Mont. 265, 28 Pac. 301; Hart *v.* Kip, 74 Hun (N. Y.) 412, 26 N. Y. Suppl. 522; Dougherty *v.* Gallagher, 3 E. D. Smith (N. Y.) 570; Preyer *v.* Schwenck, 38 Misc. (N. Y.) 769, 78 N. Y. Suppl. 826; Daly *v.* Minke, 86 N. Y. Suppl. 92.

Terms of contract.— Anderson *v.* Dezonia, 29 Ill. App. 491 (salary or commission); Miller *v.* Brown, (Iowa 1889) 42 N. W. 561; Smith *v.* Kegley, 77 Iowa 475, 42 N. W. 376; Auer *v.* Daufer, 30 S. W. 201, 17 Ky. L. Rep. 26; Given *v.* Charron, 15 Md. 502 (holding that an allegation that the rate of compensation was eight hundred dollars for six months is not proved by showing that after discharge the employee obtained one hundred dollars per month from another employer); Wommer *v.* Segelbaum, 78 Minn. 182, 80 N. W. 952 (share in profits); Martin *v.* Victor Mill, etc., Co., 19 Nev. 180, 8 Pac. 161; Shall *v.* Old Forge Co., 109 N. Y. App. Div. 907, 96 N. Y. Suppl. 75; Cooper *v.* Brooklyn Trust Co., 109 N. Y. App. Div. 211, 96 N. Y. Suppl. 56 (extra pay for additional services); Martine *v.* Huyler, 5 Silv. Sup. (N. Y.) 466, 8 N. Y. Suppl. 734; Benta *v.* Harris, 27 Misc. (N. Y.) 648, 58 N. Y. Suppl. 398; Broaker *v.* Morrill, 88 N. Y. Suppl. 937; Constable *v.* Lefever, 21 N. Y. Suppl. 38; Webb *v.* Lees, 153 Pa. St. 436, 25 Atl. 1081, 149 Pa. St. 13, 24 Atl. 169; Chapin *v.* Cambria Iron Co., 145 Pa. St. 478, 22 Atl. 1041; *In re* Elliott, 15 Montg. Co. Rep. (Pa.) 53 (holding that declarations to a stranger that the master intends to make a gift to his servant or increase his pay if not communicated to the servant in the lifetime of the master will not establish a contract for extra compensation); Moller *v.* J. L. Gates Land Co., 119 Wis. 548, 97 N. W. 174; McNutt *v.* McDonald, 3 Nova Scotia Dec. 175.

New contract and substitution of employers.— Daly *v.* Dallmeyer, 20 Pa. Super. Ct. 366; Galveston, etc., R. Co. *v.* Scheidemantel, (Tex. Civ. App. 1893) 23 S. W. 453.

Continuance under old contract after end of term.— Travelers' Ins. Co. *v.* Parker, 92 Md. 22, 47 Atl. 1042.

Performance of services in general.— Ashland Land, etc., Co. *v.* May, 59 Nebr. 735, 82 N. W. 10.

Consent to employee's quitting.— Hogan *v.* Titlow, 14 Cal. 255, holding that slight evidence of assent, or an agreement to apportion the contract, on the part of the employer, is sufficient to permit a recovery, where the employee has quit before the end of the term.

Reason for discharge.— St. Kevin Min. Co. *v.* Isaacs, 18 Colo. 400, 32 Pac. 822.

Continuance of contract during sickness.— O'Connor *v.* Briggs, 182 Mass. 387, 65 N. E. 836.

Persons entitled to wages.— Charron *v.* Pine Tree Lumber Co., 79 Minn. 425, 82 N. W. 679.

Reasonable value of services.— Grisham *v.* Lee, 61 Kan. 533, 60 Pac. 312; Howe *v.* Lincoln, 23 Kan. 468.

Time when wages due.— Newhall *v.* Appleton, 58 N. Y. Super. Ct. 585, 11 N. Y. Suppl. 50.

Amount due.— Paulsen *v.* Schultz, 85 Cal. 538, 24 Pac. 1070; Lattemore *v.* Baldwin, 70 Cal. 40, 11 Pac. 395; Biest *v.* Versteeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081 (traveling expenses); Brightson *v.* H. B. Claflin Co., 180 N. Y. 76, 72 N. E. 920 (holding that where an employee was to have a share in the profits of the sales of his department, and was discharged before the end of the term, the amount of his commissions cannot be established by the result in his department for the two years preceding the year in which he was discharged, especially where there were no profits during the first six months of the year, but the employee should produce the books and inventories of the department, or require them to be produced); Greer *v.* People's Tel., etc., Co., 50 N. Y. Super. Ct. 110.

Payment.— Caldwell *v.* Caldwell Co., 47

facie case is made by proof of the rendition of services on property owned by defendant,[29] or evidence of an employment at stipulated wages and the rendition of services.[30]

h. Questions For Jury — (1) *In General.* Questions of fact arising in an action for compensation for services are for the jury,[31] as where the facts are to be determined from conflicting evidence.[32] Where the existence or the terms of a contract, and not its validity or construction, is in issue, and the evidence is conflicting, or the question depends on the intention of the parties, the question of the existence or terms of the contract is one for the jury.[33] So where an employee holds over after the term the question whether such continued service is of a character different from the original is for the jury.[34] But the reasonableness of a provision of a contract is a question of law for the court.[35]

Misc. (N. Y.) 599, 94 N. Y. Suppl. 476, holding that proof that an employee stated that during his employment he drew moneys "from time to time as shown by" an account produced as a counter-claim does not amount to proof of an admission of the correctness of the account.

29. Dougherty *v.* Gallagher, 3 E. D. Smith (N. Y.) 570.

30. Moyle *v.* Hocking, 10 Colo. App. 446, 51 Pac. 533.

31. See, generally, TRIAL.

Rules of employer as binding.— It is a question for the jury whether the contents of the rules of the employer in possession of the employee were known to the employee (Bradley *v.* Salmon Falls Mfg. Co., 30 N. H. 487), as is the question whether rules posted about the premises of the employer became part of the contract of hiring so as to bind a person entering the service with knowledge of the regulation (Dean *v.* Wilder, 65 N. H. 90, 18 Atl. 87).

Notice of change of employers.— Whether the employee had notice of a change of the employment is for the jury. Jones *v.* Shafer Iron Co., 96 Mich. 98, 55 N. W. 684.

Rescission or modification of contract.— Where there is any evidence to support the inference of the employee's assent to the rescission of the contract it should be submitted to the jury. Vanuxem *v.* Bostwick, 4 Pa. Cas. 532, 7 Atl. 598. So where a proposition for reduction of salary has been made by the employer, and a counter proposition is made by the employee, it is a question for the jury whether the contract has been modified. American Lamp, etc., Co. *v.* Baldwin, 12 Ohio Cir. Ct. 403, 5 Ohio Cir. Dec. 228.

Enlargement of employment.— Where defendant employed plaintiff to furnish plans for machinery for a cotton mill, and superintend its construction, and a letter of plaintiff accepting the employment was ambiguous in its terms, but both parties acted in pursuance of this contract, and the scope of plaintiff's employment was subsequently enlarged, and, on settlement, he claimed more than the amount of compensation at first agreed, it was held that the questions whether the larger employment was within the terms of the contract, and whether plaintiff has estopped himself to deny that fact by his own ambiguous letter, were for the jury. Hill *v.* John P. King Mfg. Co., 79 Ga. 105, 3 S. E. 445.

What is reasonable compensation to the employee, when the contract authorizes him to charge what he sees fit, is a question for the jury. Van Arman *v.* Byington, 38 Ill. 443.

The time when payment should be made for services, where the contract is silent in regard thereto, is a question for the jury. Thayer *v.* Wadsworth, 19 Pick. (Mass.) 349.

Damages.— It is proper to refuse to submit issues raised by a plea in reconvention for damages where the evidence furnishes no basis for measuring and computing such damages. Shute *v.* McVitie, (Tex. Civ. App. 1903) 72 S. W. 433.

32. Pagan *v.* Ft. Pitt Gas Co., 27 Pa. Super. Ct. 75.

33. *Alabama.*— Townsly-Myrick Dry Goods Co. *v.* Greenfield, 58 Ark. 625, 25 S. W. 282.

Illinois.— Crane Bros. Mfg. Co. *v.* Adams, 37 Ill. App. 94 [*affirmed* in 142 Ill. 125, 30 N. E. 1030].

Kansas.— Grisham *v.* Lee, 61 Kan. 533, 60 Pac. 312.

Michigan.— Sullivan *v.* Deiter, 86 Mich. 404, 49 N. W. 261.

New York.— Rosenfeld *v.* New, 10 N. Y. Suppl. 232.

Pennsylvania.— Wilson *v.* Lyle, (1889) 16 Atl. 861; Neale *v.* Engle, 4 Pa. Cas. 1, 7 Atl. 60.

See 34 Cent. Dig. tit. "Master and Servant," § 121. See also CONTRACTS, 9 Cyc. 776.

New contract of hiring.— Where the salary book of the employer, under an entry of an employee's name, contained an item specifying a yearly salary at a certain sum, and on the line below an entry fixing an increased salary and dated less than a year after the first entry, and the employee continued in the employment for several years thereafter, the question whether a new hiring for a year commenced on the anniversary of the date of the second entry is for the jury. Western Manufacturers' Mut. Ins. Co. *v.* Boughton, 37 Ill. App. 183 [*affirmed* in 136 Ill. 317, 26 N. E. 591].

34. Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430.

35. Wilson *v.* Lyle, (Pa. 1888) 12 Atl. 365.

(II) *Performance of Contract.* Performance of the contract by the employee, where the evidence in regard thereto is conflicting, is a question for the jury.[36] So the question whether services sued for were accepted by the employer as a full performance or only as all that he could get toward a performance is for the jury.[37] And the question whether acquiescence in the manner of performance of the work precludes the right to deduct for imperfections therein is ordinarily one for the jury.[38] Whether a certain absence of the employee for several days, as shown by uncontroverted evidence, is a breach of the contract, is a question of law for the court;[39] but where an employer told an employee called away by illness in his family that his wages would continue while absent the question as to how long he could remain away with pay, as dependent on the intent of the parties, is one for the jury.[40] The existence of justification for quitting is for the determination of the jury,[41] as is the negligence of the employee in the performance of his duties.[42]

(III) *Waiver.* Whether an employee waived his right to additional compensation by accepting a smaller sum, under protest, is a question for the jury,[43] as is the question whether the acceptance of services after the termination of a notice to quit is a waiver of the notice.[44]

i. Instructions. The necessity for, and propriety of, instructions to the jury are governed by the rules relating to instructions in civil actions generally,[45] such

36. Bruno *v.* Walsh, 5 Misc. (N. Y.) 355, 25 N. Y. Suppl. 511.

37. Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430.

38. Morris *v.* Redfield, 23 Vt. 295.

39. Fowler *v.* Great Falls Ice Co., 1 MacArthur (D. C.) 14.

40. Barlow *v.* Taylor Placer Min., etc., Co., 29 Oreg. 132, 44 Pac. 492.

41. Chapman *v.* Coffin, 14 Gray (Mass.) 454; Erving *v.* Ingram, 24 N. J. L. 520; Ellison *v.* Jones, 15 N. Y. Suppl. 356.

42. Nelson *v.* Chicago, etc., R. Co., 60 Wis. 320, 19 N. W. 52.

43. Stevens *v.* Michigan Soap Works, 134 Mich. 350, 96 N. W. 435.

44. Lauhach *v.* Cedar Rapids Supply Co., 122 Iowa 643, 98 N. W. 511.

45. See, generally, Trial.

Discharge of employee.— Where the facts are undisputed, and amount to a legal justification for the discharge of a servant, the court should so charge the jury. Von Heyne *v.* Tompkins, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. N. S. 524. A charge that a discharge was wrongful if the employee was properly performing his duties at the time of his discharge is erroneous, in the absence of a showing that prior violations of the contract by the employee had been condoned. Moynahan *v.* Interstate Min., etc., Co., 31 Wash. 417, 72 Pac. 81. See, generally, Mee *v.* Bowden Gold Min. Co., 47 Oreg. 143, 81 Pac. 980; Mudgett *v.* Texas Tobacco Growing, etc., Co., (Tex. Civ. App. 1901) 61 S. W. 149.

Misconduct preventing recovery.— In an action for wages it is error to charge without qualification that plaintiff's drunkenness while off duty would not be such misconduct as would prevent a recovery, since such misconduct might incapacitate for work; or to charge in regard to misconduct of one employed as a teamster that reckless driving and using the team for other people's work will not prevent the recovery of wages, unless such conduct is "general, or frequent, or habitual." Ulrich *v.* Hower, 156 Pa. St. 414, 27 Atl. 243.

Excuse for quitting.— Where an employee has abandoned his contract on the ground of ill usage, and seeks to recover on a *quantum meruit*, the jury should not be charged that "if they believe the fact of ill usage made out, plaintiff was entitled to recover," but they should be instructed that if the conduct of the employer justified the employee in quitting the employment he was entitled to recover. Erving *v.* Ingram, 24 N. J. L. 520.

Incompetency or negligence.— An instruction that, if defendants knew that plaintiff was incompetent any time during the nine months he was in their employ, their business was to make it known to plaintiff, is erroneous, as implying that if they overlooked such infraction, plaintiff would be secure in his employment. Koehler *v.* Buhl, 94 Mich. 496, 54 N. W. 157. An instruction that the employer cannot recover from an employee for damages to, or destruction of, machinery by the employee, unless occasioned by the negligent or wrongful act of the employee, is proper. Brewer *v.* Wright, 25 Nebr. 305, 41 N. W. 159.

Continuance of business.— Where an employee was to receive an increase in salary if the employer continued in the manufacturing business, after the original term of employment, an instruction that if "with the knowledge of plaintiff," the making of certain additional implements by the employer after the term was an experiment, it would not be a continuance of the manufacturing business, was proper. Whitworth *v.* Brown, 85 Wis. 375, 55 N. W. 422.

Exclusive attention to employer's business. — An instruction that if plaintiff gave some

as that they must be applicable to the issues[46] and to the evidence,[47] and must not be confusing,[48] or misleading,[49] or assume as a fact a matter in dispute.[50] Where an instruction is given stating the law as applicable to the contention of one party, a request by the opposing party to charge a correct rule of law stating the converse of the proposition should be granted.[51] An instruction, although correct as an abstract rule, should be modified to correspond to the circumstances of the particular case, where such circumstances take the case out of the general rule.[52] A charge that there is no evidence of a hiring for a year should not be given where both parties understood that it might continue a year, and the compensation is fixed at a definite sum per year.[53]

j. Damages and Amount of Recovery — (i) *In General.* The measure of damages for a breach of a contract of employment is the damages resulting as the natural and necessary result of the breach.[54] Where the employer wrongfully refuses work and the employee is without means, the latter may recover damages for his suffering.[55] *Prima facie* the amount recoverable in an action for wages is the wages fixed by the contract,[56] although in case of part perform-

attention to his own affairs with defendant's consent, but not so as to take up time which should have been devoted to defendant's business, such acts were not breaches of plaintiff's contract, is proper, where instructions have been given for defendant that if plaintiff neglected defendant's business to attend to his own it was a breach of the contract. Biest *v.* Versteeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081.

Amount recoverable.— Where the employer agreed to hire a hand for the employee if the latter would leave his crop and perform the services, an instruction, where there is no agreement as to the price to be paid for the services, that the employee cannot recover a greater sum than necessary to hire such a hand, is improper. Graves *v.* Graves, 70 Ark. 541, 69 S. W. 544. Where an employee claims to have rendered services under a special contract at a stipulated price per month, and the answer thereto is merely a general denial, it was proper to charge that if the contract was made and plaintiff performed labor thereunder he was entitled to recover the contract price for the time he actually served. Skeels *v.* Storm Lake Electric Light, etc., Co., (Iowa 1900) 81 N. W. 688. In an action where an employer sought to recoup damages resulting from negligence of the employee, it is proper to instruct that plaintiff would only be liable for the damage which followed or resulted to defendant as the natural and proximate result or consequence of the negligence, and that the measure of damages would be the cost of repairing machinery claimed to have been injured, and place it in as good repair as it was immediately preceding such injury. Brewer *v.* Wright, 25 Nebr. 305, 41 N. W. 159.

Ruling rate of wages.— Refusal of an instruction limiting the value of services of a bookkeeper, and manager of his employer's business in his absence, to the "ruling rate of wages," generally paid for similar services, was proper; and so it is proper to refuse to instruct that the value of the services cannot in any degree be based on the wages for like services elsewhere in the county unless it is shown that the wages elswhere in the county are the same. Crusoe *v.* Clark, 127 Cal. 341, 59 Pac. 700.

Extra pay.— Where four electric light companies contracted for the construction of an underground conduit, and engaged plaintiff to superintend the work, and he was already in the employ of one of the companies as engineer, an instruction, in an action by plaintiff for extra pay on account of such services, that if the jury believed from all the facts and circumstances that plaintiff, when he was appointed, did not intend to charge for his services, he could not thereafter change his mind and charge therefor, although the services were beneficial to defendant, was proper. Wagner *v.* Edison Electric Illuminating Co., 82 Mo. App. 287.

Ownership.— Instruction as to judgment as establishing ownership of property on which employee worked as improper see Gardiner *v.* Earle, 25 R. I. 542, 56 Atl. 1035.

46. McCurdy *v.* New York L. Ins. Co., 115 Mich. 20, 72 N. W. 996.

47. Clark *v.* Ryan, 95 Ala. 406, 11 So. 22; Mudgett *v.* Texas Tobacco Growing, etc., Co., (Tex. Civ. App. 1901) 61 S. W. 149; Moynahan *v.* Interstate Min., etc., Co., 31 Wash. 417, 72 Pac. 81, holding that an instruction based on evidence which had been ruled out was improper.

48. Moynahan *v.* Interstate Min., etc., Co., 31 Wash. 417, 72 Pac. 81.

49. Helfrich Lumber, etc., Co. *v.* Bland, 54 S. W. 728, 21 Ky. L. Rep. 1185.

50. See Glucose Sugar Refining Co. *v.* Flinn, 184 Ill. 123, 56 N. E. 400, holding that an instruction was not open to such objection.

51. Wrought Iron Range Co. *v.* Young, 76 Ark. 18, 88 S. W. 586.

52. Williams *v.* Jeter, 64 Ga. 737.

53. Franklin Min. Co. *v.* Harris, 24 Mich. 115.

54. See DAMAGES, 13 Cyc. 162.

55. Gulf, etc., R. Co. *v.* Jackson, 29 Tex. Civ. App. 342, 69 S. W. 89.

56. See Hildebrand *v.* American Fine Art Co., 109 Wis. 171, 85 N. W. 268, 53 L. R. A. 826.

ance the recovery may be limited to the reasonable value of the services,[57] which, however, cannot exceed the *pro rata* contract price.[58] In an action by an employee for the wages fixed by the contract, the employer may recoup damages resulting from breaches of the contract by the employee;[59] but damages cannot be deducted as such where the action is to recover the reasonable value of the services.[60] Where the contract provides for its termination by the employer upon a specified notice, the employee is entitled to his salary only for the period of notice, on refusal of the employer to continue the employment.[61]

(II) *ATTORNEY'S FEES.*[62] The statutes in some states authorize the allowance of attorney's fees to a successful plaintiff in an action to recover wages.[63]

k. Judgment. The general rule that the judgment must accord with and be warranted by the pleadings[64] is applicable;[65] and hence in an action on a special contract there can be no recovery upon a *quantum meruit*,[66] especially where the judgment is by default.[67] So a judgment for less than, or in excess of, what is warranted by any evidence, is voidable.[68] And if defendants are sued jointly on the ground that the services were performed at their joint request, no judgment for plaintiff employee can be rendered where it is not shown that one of the defendants requested the services.[69] Ordinarily no judgment for the value of serv-

57. Fulton *v.* Heffelfinger, 23 Ind. App. 104, 54 N. E. 1079. But see Hildebrand *v.* American Fine Art Co., 109 Wis. 171, 85 N. W. 268, 53 L. R. A. 826, holding that it will be presumed that the servant earned and deserves the contract price for the time his services continued, until the contrary is shown by evidence to sustain a properly pleaded counter-claim.

Employment of servant to take place of discharged servant.— No damages the employer has suffered by employing another to take the place of an employee discharged on account of his bad conduct should be deducted from the value of his services, since the employer has himself chosen to prevent the continuance of the labor under the contract. It is only when the employee has intentionally and wilfully conducted himself in such a manner as to render it necessary that he should be discharged that he is required to pay other damages than the loss of his agreed compensation. Lawrence *v.* Gullifer, 38 Me. 532.

58. Crump *v.* Rebstock, 20 Mo. App. 37; Culbertson Irr., etc., Co. *v.* Wildman, 45 Nebr. 663, 63 N. W. 947. See also CONTRACTS, 9 Cyc. 689 note 21.

59. See *supra*, III, B, 9, d, (II).

60. Feith *v.* Johnson, (Conn. 1891) 21 Atl. 923.

61. Derry *v.* East Saginaw Bd. of Education, 102 Mich. 631, 61 N. W. 61.

62. **Rights of purchasers** see VENDOR AND PURCHASER.

63. See the statutes of the several states. And see, generally, DAMAGES, 13 Cyc. 80.

In Illinois a traveling salesman is not a "laborer or servant" within the statute (Standard Fashion Co. *v.* Blake, 51 Ill. App. 233); and such pleas should not be allowed in the absence of a showing required by the statute (Rowland *v.* Records, 43 Ill. App. 198), it being necessary that the jury specially find that the amount sued for is "earned and due" and is for the wages of such servant (Great Northern Hotel Co. *v.* Leopold, 72 Ill. App. 108).

In Ohio a demand for payment of the wages is a condition precedent to a recovery for attorney's fees either before a justice of the peace or on appeal from his decision to the common pleas. Gasser *v.* Nash, 2 Ohio S. & C. Pl. Dec. 86.

64. See JUDGMENTS, 23 Cyc. 816.

65. Reed *v.* Newman, 31 Misc. (N. Y.) 792, 65 N. Y. Suppl. 218 (holding that under a complaint for wages due no recovery can be had for damages for breach of contract); Elliott *v.* Miller, 17 N. Y. Suppl. 526 (holding that in an action to recover wages judgment for damages for wrongful discharge cannot be rendered). See also Paul *v.* Minneapolis Threshing Mach. Co., 87 Mo. App. 647.

Statutory actions.— But in an action brought under a statute giving the right to body execution against the employer in an action for wages, a judgment for work, labor, and services is recoverable, notwithstanding the employee fails to show what the statute requires, since the statute does not give a new cause of action but merely a new remedy. Wah Kee *v.* Young, 29 Misc. (N. Y.) 658, 61 N. Y. Suppl. 894.

66. Fulton *v.* Heffelfinger, 23 Ind. App. 104, 54 N. E. 1079; Provost *v.* Carlin, 28 La. Ann. 595. See also Henry *v.* Fisher, 2 Pa. Dist. 71. But see Rocco *v.* Parczyk, 9 Lea (Tenn.) 328, holding that where both parties testified to a contract of employment between them, but differed as to the wages to be paid, the jury might allow what the services were worth if they found there was no contract. See, generally, CONTRACTS, 9 Cyc. 749.

67. Reidy *v.* Bleistift, 30 Misc. (N. Y.) 203, 61 N. Y. Suppl. 915.

68. Lattemore *v.* Baldwin, 70 Cal. 40, 11 Pac. 395; Howe *v.* Lincoln, 23 Kan. 468; Ostrom *v.* Smith, (Tex. Civ. App. 1894) 25 S. W. 1130.

69. Johnson *v.* Lawson, 18 Colo. App. 297, 71 Pac. 652.

ices can be rendered in the absence of evidence as to the value thereof,[70] or at least for no more than a nominal sum.[71] If the contract calls for stock of a corporation in payment of wages a judgment for the value thereof is proper where the employer refuses to deliver the stock.[72] Affirmative relief to defendant cannot be granted unless prayed for by a proper plea.[73] In some states the judgment must state that it is for a particular class of services in order to prevent the employer from claiming exemptions against it.[74]

l. Appeal and Error. The rules regulating the decisions of appeals in civil actions in general apply to appeals from a judgment in an action to recover compensation for services.[75]

10. Liens and Preferences[76] — a. Creation and Existence in General — (i) *At Common Law.* At common law a servant has no lien for his compensation.[77] Independent of statute or a contract provision for a lien, he is not authorized to take or retain property of his employer until his wages are paid,[78] nor is he entitled to a lien on a manufactured article which is in part the product of his labor.[79] However, if the workman is in fact a bailee rather than a servant he has a common-law lien.[80]

(ii) *Statutory Provisions.* The statutes in many of the states expressly provide for a lien or preference in favor of a servant to protect his claim for wages.[81] These statutes vary greatly in their terms, and while some of them pro-

70. Talbert *v.* Stone, 10 La. Ann. 537, holding that where an employee was to receive for his services a certain part of the crop produced by him he must show its value where he sues to recover money compensation for his services. But see Pungs *v.* American Brake-Beam Co., 124 Mich. 344, 82 N. W. 1066, holding that after discharge the contract wage is some evidence of value in an action for services rendered.

71. Owen *v.* O'Reilly, 20 Mo. 603.

72. Spinney *v.* Hill, 81 Minn. 316, 84 N. W. 116.

73. Brunson *v.* Martin, 17 Ark. 270. See, generally, Judgments, 23 Cyc. 802.

74. Buis *v.* Cooper, 63 Mo. App. 196, holding that the statute in Missouri is mandatory. See also Exemptions, 18 Cyc. 394.

75. See Appeal and Error, 3 Cyc. 220 *et seq.* See also Peale *v.* Hill, 33 Ill. App. 444 (reversal for alleged fact not shown by evidence); Wood *v.* Rockwell, 4 Silv. Sup. (N. Y.) 80, 7 N. Y. Suppl. 370 (reversal where judgment in conflict with admitted facts).

Presumptions.— Where the evidence is not before the appellate court, it will not presume that there was no agreement as to the time a servant's wages were to be paid, in order to render available a presumption authorized by a provision of the code in the absence of any agreement in regard thereto. Kuschel *v.* Hunter, (Cal. 1897) 50 Pac. 397.

Reversal where evidence is conflicting see McCall *v.* France, 11 Colo. 333, 17 Pac. 912; Goldstein *v.* White, 16 N. Y. Suppl. 860.

Harmless error.— Griffin *v.* Kaercher, 29 Ill. App. 162 (refusal of instruction); Diffin *v.* Reid, 15 Misc. (N. Y.) 268, 36 N. Y. Suppl. 407 (admission of evidence); Gardiner *v.* Earle, 25 R. I. 542, 56 Atl. 1035 (giving of instruction).

76. Liens of particular employees: Agent see Principal and Agent. Contractors and materialmen see Mechanics' Liens. Farm laborers see Agriculture, 2 Cyc. 58. Laborers in mines, quarries, or wells see Mines and Minerals. Laborers in constructing railroads see Railroads; Street Railroads. Laborers engaged in constructing telegraph or telephone lines see Telegraphs and Telephones. Loggers see Logging. Seamen see Seamen. Municipal employees see Municipal Corporations.

Liability of stock-holders where assets of corporation are exhausted see Corporations, 10 Cyc. 688 *et seq.*

Right to prefer laborers' claims in assignments for benefit of creditors see Assignments For Benefit of Creditors, 4 Cyc. 173.

77. *Ex p.* Corran, (Cal. 1895) 41 Pac. 464; Michaelson *v.* Fish, 1 Cal. App. 116, 81 Pac. 661; Wilcox *v.* Matthews, 44 Mich. 192, 6 N. W. 215.

78. *Ex p.* Corran, (Cal. 1895) 41 Pac. 464.

79. Michaelson *v.* Fish, 1 Cal. App. 116, 81 Pac. 661.

80. See Bailments, 5 Cyc. 193 *et seq.*

81. See the statutes of the several states.

In Arkansas, under the statute of 1875, there can be no laborer's lien unless there is a written contract. Gates *v.* Burkett, 44 Ark. 90.

In California, under St. (1891) p. 195, a lien for wages is allowable only where they are payable weekly or monthly. Spaulding *v.* Mammoth Spring Min. Co., (1897) 49 Pac. 183.

In Washington, under 2 Ballinger Annot. Codes & St. § 5902, giving any person who clears realty at the owner's request a lien thereon for the labor performed, a party who clears land under contract with the owner has a lien thereon for the work performed, if he has not waived it, although no lien was referred to in the agreement. Stringham *v.* Davis, 23 Wash. 568, 63 Pac. 230.

vide for a lien enforceable against the property of the employer independent of his insolvency, the majority of them provide for a preference for claims for wages for work performed before the seizure of the employer's property on process or the suspension of his business by the action of creditors or before his property is, by any other means, put in the hands of a receiver or trustee.[82] Such statutes should be liberally construed in favor of the servant,[83] and are generally held constitutional.[84] The statutes should not be given a retroactive effect unless they expressly provide therefor.[85] The right to a preference in the distribution of assets of the employer in bankruptcy proceedings,[86] in insolvency proceedings in general,[87] in assignment for the benefit of creditors,[88] or in the distribution of the proceeds of an execution sale[89] is treated elsewhere, as is the priority of claims against the estate of a deceased person.[90]

b. Nature of Claim Secured — (i) *PERSONAL LABOR.* The statutes are generally construed as intended to protect only claims for actual work or labor performed by the employee personally,[91] and hence contractors are not pro-

Bailee's lien.— A statutory provision giving a lien to a bailee for hire who makes, alters, repairs, or improves an article, authorizing him to retain possession until his charges are paid, does not create a lien in favor of a person who performs services with reference to personal property in his possession as a mere servant. Michaelson *v.* Fish, 1 Cal. App. 116, 81 Pac. 661.

Construction and validity of particular statutes in general see Lupton *v.* Hughes, 2 Pennew. (Del.) 515, 47 Atl. 624 (conflict in statutes); Small *v.* Hammes, 156 Ind. 556, 60 N. E. 342 (validity).

82. See the statutes of the several states.

Voluntary sale.— In Pennsylvania, where laborer's claims are entitled to a preference in the distribution of the proceeds of a sale of property by execution or otherwise on account of the death or insolvency of the employer, it is held that a voluntary sale by an insolvent employer in payment of his debts is not such a sale as is contemplated by the statute which is intended to embrace only judicial sales. Wilkinson *v.* Patton, 162 Pa. St. 12, 29 Atl. 293. The contrary rule prevails in Indiana where it is held that a lien of a laborer is superior to the rights of a purchaser from an insolvent debtor to pay debts due the purchaser where the business of the debtor is suspended by such act. Bass *v.* Doerman, 112 Ind. 390, 14 N. E. 377; Bell *v.* Hiner, 16 Ind. App. 184, 44 N. E. 576. And see Lupton *v.* Hughes, 2 Pennew. (Del.) 515, 47 Atl. 624. In Florida persons entitled to liens for wages, whether in possession or not, may enforce them against purchasers with notice. St. Augustine First Nat. Bank *v.* Kirkby, 43 Fla. 376, 32 So. 881.

Evidence of insolvency.— The fact that the debts of a master largely exceed the proceeds of the sheriff's sale of property seized on execution is sufficient evidence of insolvency to permit an employee to assert his lien. Torpy *v.* Webster, 20 Pa. Co. Ct. 475.

Specific lien.— Where an employee is given a right to a preference in the proceeds of a forced sale of the property of his insolvent employer, there is no specific lien on the property in the hands of the owner or his vendee. Wilkinson *v.* Patton, 162 Pa. St. 12, 29 Atl. 293. See also People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680].

83. Heckman *v.* Tammen, 84 Ill. App. 537 [*affirmed* in 184 Ill. 144, 56 N. E. 361]; People *v.* Beveridge Brewing Co., 91 Hun (N. Y.) 313, 36 N. Y. Suppl. 525, 3 N. Y. Annot. Cas. 4. But see Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 29 N. J. Eq. 252 (holding that a statutory provision giving a preference upon the insolvency of the employer corporation is in derogation of the rights of creditors to be paid equally and should not be extended by construction); People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680].

84. Graham *v.* Magann Fawke Lumber Co., 118 Ky. 192, 80 S. W. 799, 26 Ky. L. Rep. 70; Trust *v.* Miami Oil Co., 19 Ohio Cir. Ct. 727, 10 Ohio Cir. Dec. 372. See also CONSTITUTIONAL LAW, 8 Cyc. 695 *et seq.*

85. People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680].

86. See BANKRUPTCY, 5 Cyc. 385, 386.

87. See INSOLVENCY, 22 Cyc. 1320.

88. See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 269.

89. See EXECUTIONS, 17 Cyc. 354.

90. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 552.

91. Cox *v.* Cagle, 112 Ga. 157, 37 S. E. 176; Cochran *v.* Swann, 53 Ga. 39; Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 29 N. J. Eq. 252. See Clark *v.* Brown, 141 Cal. 93, 74 Pac. 548, holding that the fact that a laborer makes an entire contract for the service of himself and his team does not deprive him of a right to a lien for his own labor where its value can be distinguished from the amount due for the services of the team.

Interest which has accrued on a claim for wages before the lien attaches is not embraced within the lien. Delaware, etc., R. Co. *v.* Oxford Iron Co., 33 N. J. Eq. 192.

When wages earned.— Under the New Jersey statute giving laborers in the employ of an insolvent corporation at the time of its insolvency a lien for the whole amount of wages due them, it is immaterial how long

tected.[92] Claims for the use of teams[93] or machinery,[94] or for the hire of other property of the employee,[95] or for expenses incurred by the employee,[96] in connection with the labor, are not protected. So in some states the statute only protects wages for a specified time preceding the actual sale and transfer of the property on account of the insolvency of the employer;[97] and the amount of the claim of the laborer which is entitled to a preference is sometimes limited by statute.[98]

(II) *WAGES AS DISTINGUISHED FROM SALARIES, FEES, ETC.* Where the lien or preference is confined to one working for wages, it has been held that a person employed on a salary or on commission is not protected;[99] nor is an attorney whose claim is for fees,[1] or one carrying on an independent business.[2] So a claim for damages for breach of contract is not a claim for wages due.[3] But it has been held, under one statute, that it is immaterial whether the compensation is by the day, week, or month, or by piece, weight, or measurement.[4]

e. Character of Business in Which Services Performed. The statutes oftentimes limit the lien or preference to employment in particular kinds of business.[5] In some states the labor must have been performed in connection with the business in which the insolvent employer was engaged,[6] and contribute to the permanent and continuous use of the particular business,[7] so that services contributed to the construction and equipment of such work or business are not entitled to a preference.[8] Employees of a contractor or log jobber have been held not protected because the employer was not engaged in a permanent and continuing business such as contemplated by the statute.[9]

d. Servants Protected by Statutes — (I) *IN GENERAL.* The statutes in the different states vary to a considerable extent in their enumeration of the classes of persons entitled to a lien or preference.[10] And in many of the states the statutes

before the date of the insolvency the wages may have accrued. Delaware, etc., R. Co. *v.* Oxford Iron Co., 33 N. J. Eq. 192.

Labor discontinued before end of contract. — Where the property on which the work is being done is sold on judicial sale during the term of employment it would seem that the amount of the lien is the amount due as wages at the time of the sale. Scarborough *v.* Stinson, 15 La. Ann. 665.

92. See *infra*, III, B, 10, d, (I).

93. Dart *v.* McMinds, 21 Pa. Co. Ct. 43. But see St. Augustine First Nat. Bank *v.* Kirkby, 43 Fla. 376, 32 So. 881.

94. Dart *v.* McMinds, 21 Pa. Co. Ct. 43.

95. Cox *v.* Cagle, 112 Ga. 157, 37 S. E. 176.

96. Mudgett *v.* Texas Tobacco Growing, etc., Co., (Tex. Civ. App. 1901) 61 S. W. 149.

97. Lord *v.* Toby Valley Supply Co., 5 Pa. Dist. 290; Bell *v.* Faust, 20 Pa. Co. Ct. 394.

98. Allentown Nat. Bank *v.* Helios Dry Color, etc., Co., 9 Pa. Super. Ct. 275, holding that the act of 1872 limiting the amount to two hundred dollars does not exclude a claimant whose accrued wages exceed two hundred dollars, but only requires that he remit the excess.

99. People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680].

1. Lewis *v.* Fisher, 80 Md. 139, 30 Atl. 608, 45 Am. St. Rep. 327, 26 L. R. A. 278 (holding that a claim for attorney's fees is not money due for "wages or salaries"); People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680].

2. Steininger *v.* Butler, 5 Pa. Dist. 43, 17 Pa. Co. Ct. 97, laundryman.

3. Spader *v.* Mural Decoration Mfg. Co., 47 N. J. Eq. 18, 20 Atl. 378.

4. Jones *v.* Susquehanna Coal Co., 1 Pa. Super. Ct. 331.

5. See the statutes of the several states.

In Pennsylvania, under the act of 1872 giving a lien to clerks, miners, etc., employed in any works, mines, manufactories, "or other business," it was held that the latter phrase merely referred to places of employment similar to those mentioned, and did not include a hotel. Allen *v.* Fehl, 33 Leg. Int. 366. But by the act of 1883 and its amendment in 1891 the words "other business" are extended so as to include all kinds of business in which any of the classes of employees named in the act are engaged. Sproul *v.* Murray, 156 Pa. St. 293, 27 Atl. 302; James Rees, etc., Co. *v.* Hulings, 9 Pa. Super. Ct. 265, 43 Wkly. Notes Cas. 389; *In re* Clymer Distilling Co., 2 Pa. Co. Ct. 111.

6. McDaniel *v.* Osborn, (Ind. App. 1904) 72 N. E. 601; Winter *v.* Howell, 109 Ky. 163, 58 S. W. 591, 22 Ky. L. Rep. 697; James Rees, etc., Co. *v.* Hulings, 9 Pa. Super. Ct. 265, 43 Wkly. Notes Cas. 389.

7. Wolf *v.* Krick, 3 Pa. Super. Ct. 601 [*affirming* 17 Pa. Co. Ct. 118].

8. Allentown Nat. Bank *v.* Helios Dry Color, etc., Co., 9 Pa. Super. Ct. 275; James Rees, etc., Co. *v.* Hulings, 9 Pa. Super. Ct. 265, 43 Wkly. Notes Cas. 389; Wolf *v.* Krick, 3 Pa. Super. Ct. 601 [*affirming* 17 Pa. Co. Ct. 118].

9. Pacific Guano Co. *v.* Kuhns, 7 Pa. Dist. 531.

10. See the statutes of the several states.

have been from time to time enlarged in this respect by amendments so that decisions under earlier statutes should be carefully read in connection with subsequent statutes.[11] A person cannot have a laborer's lien for work done by others hired by him;[12] and it is almost universally held that a contractor is not entitled to a preference or a lien,[13] even though he performs manual labor in part.[14] In some states the employee, to be entitled to a preference, must have been an employee at the time of the suspension of business.[15]

(II) *LABORERS.* A laborer has been defined as one who labors in toilsome occupation — a man who does work that requires little skill as distinguished from an artisan.[16] The term cannot be confined, however, to one who performs only

In Florida, under a statute giving to bookkeepers, clerks, agents, porters, and other employees, a lien for wages, a timekeeper who had to attend to a commissary and also one contracting to haul logs to the mill of the employer at so much a day with his own team are entitled to liens on the product of the mill. St. Augustine First Nat. Bank *v.* Kirkby, 43 Fla. 376, 32 So. 881.

In Indiana a general manager of a shop is not entitled to a lien under the statute giving a lien to mechanics and laborers employed about any shop. Raynes *v.* Kokomo Ladder, etc., Co., 153 Ind. 315, 54 N. E. 1061.

In Louisiana it has been held that a foreman has no privilege (Lewis *v.* Patterson, 20 La. Ann. 294; Lauran *v.* Hotz, 1 Mart. N. S. 140), nor has a teacher (Labat *v.* Labat, 2 Mart. N. S. 652), nor laborers employed in a sawmill at daily or monthly wages (Barbour *v.* Duncan, 17 La. 439), nor an engineer (McRae *v.* His Creditors, 16 La. Ann. 305).

In New York a statute providing that "the wages of employés, operatives and laborers" of an insolvent corporation shall be preferred to other creditors applies only to subordinate laborers, and does not entitle to preference, on account of services, either a bookkeeper, draughtsman, superintendent, or foreman working for a monthly salary, payable at the end of each month, although they also perform manual labor. Wakefield *v.* Fargo, 90 N. Y. 213; *In re* New York Locomotive Works, 73 Hun 327, 26 N. Y. Suppl. 209.

In Pennsylvania a salesman paid by commissions on accounts sold by him is not a miner, mechanic, clerk, or laborer, even though he performed occasional services as clerk or superintendent. Willauer's Estate, 1 Chest. Co. Rep. 533. So laundrymen carrying on an independent business are not "tradesmen" within the meaning of the statute. Steininger *v.* Butler, 5 Pa. Dist. 43, 17 Pa. Co. Ct. 97.

In Washington manual labor incidentally performed by the general manager of a corporation with the expectation of reward by increased profits is not within the statute. Addison *v.* Pacific Coast Milling Co., 79 Fed. 459.

An attorney at law is not a clerk, servant, or employee. Lewis *v.* Fisher, 80 Md. 139, 30 Atl. 608, 45 Am. St. Rep. 327, 26 L. R. A. 278.

The president of a corporation is not included within the terms of the Virginia statute specifying in detail the persons protected and not referring to officers of the corporation. Philadelphia Seventh Nat. Bank *v.* Shenandoah Iron Co., 35 Fed. 436.

11. See the statutes of the several states.

Conflict of statutes in Pennsylvania see Hall's Estate, 148 Pa. St. 121, 23 Atl. 992; *In re* Wells, 2 Del. Co. 172; Zug's Estate, 2 Lanc. L. Rev. 108.

12. See *supra*, III, B, 10, b, (I).

13. *Michigan.*— *In re* Clark, 92 Mich. 351, 52 N. W. 637.

New Jersey.— Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 29 N. J. Eq. 252.

New York.— People *v.* Remington, 45 Hun 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680]; People *v.* Remington, 3 Silv. Sup. 478, 6 N. Y. Suppl. 796 [*affirmed* in 121 N. Y. 675, 24 N. E. 1095].

Oregon.— Johnston *v.* Barrills, 27 Oreg. 251, 41 Pac. 656, 50 Am. St. Rep. 717.

Pennsylvania.—Diller *v.* Frantz, 5 Pa. Dist. 180, 17 Pa. Co. Ct. 306.

United States.— Vane *v.* Newcombe, 132 U. S. 220, 10 S. Ct. 60, 33 L. ed. 310 [*affirming* 27 Fed. 536]; Fortier *v.* Delgado, 122 Fed. 604, 59 C. C. A. 180; Malcomson *v.* Wappoo Mills, 85 Fed. 907.

See 34 Cent. Dig. tit. "Master and Servant," § 129.

14. *In re* Clark, 92 Mich. 351, 52 N. W. 637.

15. Delaware, etc., R. Co. *v.* Oxford Iron Co., 33 N. J. Eq. 192; Bedford *v.* Newark Mach. Co., 16 N. J. Eq. 117, holding, however, that the apprentices of an insolvent manufacturing company are entitled to a priority in payment of their wages without regard to the time that they were last actually laboring for the company.

16. Dano *v.* Missouri, etc., R. Co., 27 Ark. 564, 567 [*citing* Webster Dict.].

Other definitions.— A laborer is one who performs with his own hands the contract which he makes with his employer. Wentroth's Appeal, 82 Pa. St. 469. See also LABORER, 24 Cyc. 810-814.

A driver of a milk wagon, one who helped in loading milk at a creamery and washed the milk cans, bottles, etc., and one who worked about the creamery, are laborers. Wilbur *v.* Hankins, 19 Pa. Co. Ct. 222.

In Michigan a statute gives a preference to "debts owing for labor." Under such statute it has been held that one employed to adjust and start machinery in mills supplied with machinery by the employer, and to

services that require no skill.[17] Except where specially defined by statute,[18] the term "laborer" has been held to include a mechanic who performs actual manual labor for his employer,[19] and a bar-tender who is also required to keep books.[20] The following have been held not laborers within the statutes: Superintendent of employer;[21] a professional chemist;[22] a bookkeeper;[23] officers of the employer corporation;[24] a farm overseer;[25] a clerk who does not perform manual labor;[26] salesmen paid by commissions;[27] an architect's draftsman;[28] or a civil engineer.[29]

(III) *EMPLOYEES.* The term "employee" is a word of more comprehensive signification than "laborers" or "operatives,"[30] and has been held to include all persons who are employed.[31] The word "employee" as used in the body of the

operate it until it fulfilled the contract, or to discover and report wherein it was deficient, involving much manual labor and requiring a high degree of skill, was entitled to a preference. *In re* George T. Smith Middlings Purifier Co., 83 Mich. 513, 47 N. W. 342. But a general traveling agent of a machinery company, although occasionally doing some manual work in adjusting machines sold and in making them work properly, has no preference for his salary. Clark's Appeal, 100 Mich. 448, 59 N. W. 150. So one who employs men and teams is not a wage-earner within the statute, although he labors himself, since the profits of the contract cannot be separated from the value of his personal services. *In re* Clark, 92 Mich. 351, 52 N. W. 637. And a lumber inspector, although he performs considerable manual labor, is not a wage-earner within the statute. *In re* Sayles, 92 Mich. 354, 52 N. W. 637.

In Pennsylvania a cook in a hotel is not within the act of 1872 which includes laborers. Sullivan's Appeal, 77 Pa. St. 107.

17. Heckman *v.* Tammen, 184 Ill. 144, 148, 56 N. E. 361 [*affirming* 84 Ill. App. 537]. In this case the court used the following language: "That in their employment they had acquired and used skill would not render the designation of 'laborer' inapplicable. They labored with their hands for their employer for wages, and were clearly laborers within the meaning of the statute. To so construe the statute as to limit its benefits to mere menial servants performing the lowest forms of labor requiring no skill would, we think, do violence to the meaning of the act and leave the evil intended to be cured to remain in existence only slightly mitigated. While we are disposed to hold that the statute must be confined to those who perform manual services, still it cannot be confined to such services only that require no skill in the performance of them."

18. See the statutes of the several states.

In New Jersey the term "laborer," as used in the wage-preference statute, is defined as including all persons doing labor or services of whatever character; and it has been held thereunder that the term as so defined includes a drayman (Watson *v.* Watson Mfg. Co., 30 N. J. Eq. 588) or a bookkeeper, although incidentally he is a director but with no pecuniary interest in the concern (Consolidated Coal Co. *v.* Keystone Chemical Co., 54 N. J. Eq. 309, 35 Atl. 157); but not the president of the employer corporation (England *v.* Beatty Organ Co., 41 N. J. Eq. 470, 4 Atl. 307), even in so far as he assists the manager at the request of the directors in conducting the business (Weatherby *v.* Saxony Wool Co., (Ch. 1894) 29 Atl. 326).

19. Adams *v.* Goodrich, 55 Ga. 233.

20. Lowenstein *v.* Meyer, 114 Ga. 709, 40 S. E. 726.

21. Cole *v.* McNeill, 99 Ga. 250, 25 S. E. 402 (holding that it was immaterial that in the performance of his duties he did a considerable amount of manual labor); Raynes *v.* Kokomo Ladder, etc., Co., 153 Ind. 315, 54 N. E. 1061; Moore *v.* American Industrial Co., 138 N. C. 304, 50 S. E. 687; Malcomson *v.* Wappoo Mills, 86 Fed. 192. But see Pendergast *v.* Yandes, 124 Ind. 159, 24 N. E. 724, 8 L. R. A. 849, holding that a man employed by a gas company to have the sole superintendence of the digging of trenches and the laying of pipes, with authority to hire and discharge employees at his pleasure, is a laborer.

22. Cullum *v.* Lickdale Iron Co., 5 Pa. Dist. 622, holding that he was not a laborer, although the work could have been done by a laborer.

23. Malcomson *v.* Wappoo Mills, 86 Fed. 192.

24. Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 81 Fed. 439.

25. Flournoy *v.* Shelton, 43 Ark. 168.

26. Hinton *v.* Goode, 73 Ga. 233; Oliver *v.* Boehm, 63 Ga. 172, holding that a person employed as clerk, bar-tender, and boy of all work to labor in and about a retail grocery and liquor store is a laborer. *Compare* Oliver *v.* Macon Hardware Co., 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300, holding that ordinarily a clerk is not a laborer, although the proper discharge of his duties may include the performance of some amount of manual labor.

27. Willauer's Estate, 1 Chest. Co. Rep. (Pa.) 533.

28. Leinau *v.* Albright, 10 Pa. Co. Ct. 171.

29. Pennsylvania, etc., R. Co. *v.* Leuffer, 84 Pa. St. 168, 24 Am. Rep. 189.

30. People *v.* Beveridge Brewing Co., 91 Hun (N. Y.) 313, 36 N. Y. Suppl. 525; Conlee Lumber Co. *v.* Ripon Lumber, etc., Co., 66 Wis. 481, 29 N. W. 285. See also St. Augustine First Nat. Bank *v.* Kirkby, 43 Fla. 376, 32 So. 881.

31. People *v.* Beveridge Brewing Co., 91

statute must be limited to "laborers," however, where the latter word is the only one used in the title of the statute.[32] The term has been held to include a traveling salesman,[33] a bookkeeper,[34] and one employed to assist the general manager of a corporation in keeping its books, shipping goods, etc.;[35] but does not include a contractor[36] or an attorney at law.[37]

(IV) *OPERATIVES.* The term "operative" has no well defined meaning as distinguished from a laborer,[38] although it is more commonly used in connection with persons employed in manufacturing establishments. It does not include a secretary of a manufacturing company, although he acted as manager and superintendent and incidentally performed manual labor.[39]

(V) *CLERKS.* The term "clerk" does not include a traveling salesman,[40] an attorney at law,[41] or one employed in and about a pool-room to perform general work.[42] An employer who lets out the services of a bookkeeper is not entitled to a preference for his wages, since the employer himself is not a clerk.[43]

e. Inception and Duration of Lien. A lien attaches in some states as of the date of the performance of the labor,[44] so that, if the employer dies indebted, his estate in the hands of his personal representatives is charged with the lien.[45] But ordinarily where the employee is merely given a right to a preference in the distribution of the proceeds of the sale of the property of an insolvent employer, there is no specific lien, at least not until the property is converted into money.[46] The statutes sometimes limit the duration of a lien to a specified number of days.[47] Of course the lien ceases after the employee has been paid.[48]

f. Subject-Matter to Which Lien Attaches. The lien or preference attaches only to the property of the employer.[49] A chose in action has been held not subject to the lien,[50] while a trust estate has been held to be subject.[51] In some states the lien has been confined to the production of the employee's labor.[52] In

Hun (N. Y.) 313, 36 N. Y. Suppl. 525. See, generally, EMPLOYEES, 15 Cyc. 1031–1033.

32. Malcomson *v.* Wappoo Mills, 86 Fed. 192.

33. Mayer *v.* Stern, 22 N. Y. App. Div. 628, 47 N. Y. Suppl. 965; Lewis *v.* Dawson, 6 Ohio Cir. Ct. 243, 3 Ohio Cir. Dec. 436. But see People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680].

34. People *v.* Beveridge Brewing Co., 91 Hun (N. Y.) 313, 36 N. Y. Suppl. 525.

35. Brown *v.* A. B. C. Fence Co., 52 Hun (N. Y.) 151, 5 N. Y. Suppl. 95.

36. Vane *v.* Newcombe, 132 U. S. 220, 10 S. Ct. 60, 33 L. ed. 310 [*affirming* 27 Fed. 536].

37. Lewis *v.* Fisher, 80 Md. 139, 30 Atl. 608, 45 Am. St. Rep. 327, 26 L. R. A. 278.

38. See Green *v.* Weller, 6 Ohio Cir. Ct. 351, 3 Ohio Cir. Dec. 488.

39. Green *v.* Weller, 6 Ohio Cir. Ct. 351, 3 Ohio Cir. Dec. 488.

40. Weems *v.* Delta Moss Co., 33 La. Ann. 973; Mulholland *v.* Wood, 166 Pa. St. 486, 31 Atl. 248; Willauer's Estate, 1 Chest. Co. Rep. (Pa.) 533.

41. Lewis *v.* Fisher, 80 Md. 139, 30 Atl. 608, 45 Am. St. Rep. 327, 26 L. R. A. 278.

42. Holt *v.* Mullahey, 7 Pa. Dist. 294, 20 Pa. Co. Ct. 426.

43. Guion *v.* Brown, 6 La. Ann. 112.

44. Camp *v.* Mayer, 47 Ga. 414; Everett *v.* Avery, 19 Md. 136.

45. Everett *v.* Avery, 19 Md. 136.

46. See *supra*, III, B, 10, a, (II).

47. Blackburn *v.* Bell, 125 Cal. 171, 57 Pac. 775; *In re* Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809.

48. Starling *v.* Wyatt, (Miss. 1900) 27 So. 526.

49. Lanier *v.* Bailey, 120 Ga. 878, 48 S. E. 324, holding that the property of a third person intrusted to the employer to be repaired is not the subject of a lien for work done in repairing it. But see Lambert *v.* Davis, 116 Cal. 292, 48 Pac. 123; Church *v.* Garrison, 75 Cal. 199, 16 Pac. 885, both holding, under a statute giving a lien on a threshing-machine for work connected therewith, that the actual ownership of the machine was immaterial.

Movable railroad tracks.— Where a sawmill corporation has eight miles of railroad track used exclusively in connection with its mill business, and which is subject to removal from one locality to another as the timber hauled thereon becomes exhausted, its employees have a lien thereon for their wages. St. Augustine First Nat. Bank *v.* Kirkby, 43 Fla. 376, 32 So. 881.

Proceeds from real or personal property.— The right to a preference in the proceeds of property placed in the hands of an assignee, receiver, or trustee, is not, in Ohio, dependent on whether the property was real or personal property. *In re* Hobelman, 5 Ohio S. & C. Pl. Dec. 403, 7 Ohio N. P. 661.

50. Jones' Appeal, 102 Pa. St. 285, insurance policy.

51. Ricks *v.* Redwine, 73 Ga. 273.

52. Emerson *v.* Hedrick, 42 Ark. 263 (holding, under an earlier statute than the one now in force, that hay is the production of a

other states where a preference is given in the proceeds of a sale of the employer's property, the property must be shown to have been used in connection with the business in the course of which the services were rendered.[53] If parcels of the property subject to the lien have been sold at different times they must be exhausted in the inverse order of alienation.[54]

g. Assignment.[55] Where a lien for wages has attached it may be assigned by an assignment of the claim for wages;[56] and the assignee may assert the claim and enforce the lien in the same manner, and to the same extent, as the laborer.[57] But where a preference is secured by statute, in the proceeds of property of an insolvent employer, there is generally no lien before the employer's property is put into the hands of an officer, receiver, or assignee;[58] and hence where a claim for wages was assigned before such time the assignee has no lien.[59]

h. Priorities.[60] The statutes in the several states differ so greatly in their terms that it is impossible to state any general rules as to the priority between a laborer's lien and other liens.[61] In some states the laborers' claims have a preference, not only against unsecured claims but also against secured claims in existence before the laborer's claim.[62] In such states the employee's lien has been held to be superior to a prior mortgage lien,[63] including a purchase-price mort-

laborer who cuts and rakes it); Boyce *v.* Poore, 84 Ga. 574, 10 S. E. 1094 (holding that a "special" lien of a laborer attaches only to the products of his labor).

Definition of production see Dano *v.* Mississippi, etc., R. Co., 27 Ark. 564.

53. James Rees, etc., Co. *v.* Hulings, 9 Pa. Super. Ct. 265, 43 Wkly. Notes Cas. 389; Decker's Estate, 20 Pa. Co. Ct. 318.

54. Aurora Nat. Bank *v.* Black, 129 Ind. 595, 29 N. E. 396. See, generally, MARSHALING ASSETS AND SECURITIES.

55. Right of subrogation see SUBROGATION.

56. Clark *v.* Brown, 141 Cal. 93, 74 Pac. 548; Mohle *v.* Tschirch, 63 Cal. 381; Kerr *v.* Moore, 54 Miss. 286. See also ASSIGNMENTS, 4 Cyc. 26 note 50.

What constitutes assignment.— The holder of orders given by an insolvent iron manufacturing company on a mercantile firm, to employees, in payment of wages, has no lien prior to that of mortgage bondholders, under Va. Acts (1878–1879), pp. 352, 353, which gives laborers who receive store orders for their wages a prior lien on the property of the company by which they are employed. Philadelphia Seventh Nat. Bank *v.* Shenandoah Iron Co., 35 Fed. 436. See also People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680].

57. Drennen *v.* Mercantile Trust, etc., Co., 115 Ala. 592, 23 So. 164, 67 Am. St. Rep. 72, 39 L. R. A. 623; Kerr *v.* Moore, 54 Miss. 286.

58. See *supra*, III, B, 10, a, (II).

59. People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680], holding that the holder of an order payable generally, drawn by a laborer upon, and accepted by a corporation in favor of a third person, is not an assignee of the laborer's wages so as to be entitled to a preference.

In **New Jersey** only those persons in the employ of an insolvent corporation at the time it is declared insolvent are entitled to a preference. It follows that where wages are assigned before such time the assignee has no right to a preference. Delaware, etc., R. Co. *v.* Oxford Iron Co., 33 N. J. Eq. 192; Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 29 N. J. Eq. 252.

60. Between landlord's lien and laborer's lien see LANDLORD AND TENANT, 24 Cyc. 1260.

Rights of purchasers see VENDOR AND PURCHASER.

61. See the statutes of the several states.

In **Pennsylvania**, under the acts of May 12, 1891, and April 9, 1872, the employee's lien is prior to every claim except a prior mortgage or judgment. Allentown Nat. Bank *v.* Helios Dry Color, etc., Co., 9 Pa. Super. Ct. 275 (entitled to priority over a prior mechanic's lien); James Rees, etc., Co. *v.* Hulings, 9 Pa. Super. Ct. 265, 43 Wkly. Notes Cas. 389; Booth *v.* McCance, 7 Pa. Dist. 454, 20 Pa. Co. Ct. 92. *Compare In re* Johnston, 33 Pa. St. 511, rule under the act of April 2, 1849. The act of 1872 which provides that a lien shall not impair existing contracts does not give the laborers a preference over one whose judgment was on a contract made before the passage of the statute. *In re* Modes, 76 Pa. St. 502. Under the act of 1891 wages due for manual labor have no preference over moneys due for other labor and services. Brown *v.* German-American Title, etc., Co., 174 Pa. St. 443, 34 Atl. 335.

In **Florida** a lien is created, by statute, against the owner, etc., or "purchasers or creditors with notice." It is held that creditors without notice are only those who have, without notice of the lien for wages, acquired liens by judgments or otherwise, and are not merely general creditors. St. Augustine First Nat. Bank *v.* Kirkby, 43 Fla. 376, 32 So. 881.

In **Louisiana** see World's Industrial, etc., Exposition *v.* North, etc., Exposition, 39 La. Ann. 1, 1 So. 358; Tiernan *v.* Murrah, 1 Rob. 443.

62. Heckman *v.* Tammen, 184 Ill. 144, 56 N. E. 361 [*affirming* 84 Ill. App. 537].

63. *Arkansas.*— Sheeks-Stephens Store Co. *v.* Richardson, 76 Ark. 282, 88 S. W. 983.

gage on the property against which the laborer's lien was sought to be enforced,[64] providing the lien was not created before the passage of the statute authorizing the laborer's lien.[65] In other states prior mortgages are entitled to priority,[66] although such decisions are not necessarily in conflict with decisions in other states holding the contrary under differently worded statutes. The lien is ordinarily superior to that of a general creditor who attaches after the wages of an employee are due.[67] Of course liens existing before the passage of the statute creating the laborer's lien are entitled to priority.[68] The costs occasioned by the seizure of the property of the employer, where the employee is given a lien on property in the hands of a receiver, officer, or other trustee, are generally expressly declared by statute to be a superior lien.[69]

i. Enforcement — (i) *In General.*[70] The statutes, in so far as they provide for the protection and enforcement of employee's liens by affirmative acts of the employee, are to be strictly construed.[71] The burden is upon persons claiming preferences to bring themselves within the statute.[72] To protect the lien the employee is generally required to foreclose it within a certain time.[73] Where the

Georgia.— Allred *v.* Haile, 84 Ga. 570, 10 S. E. 1095; Langston *v.* Anderson, 69 Ga. 65.

Illinois.— Heckman *v.* Tammen, 184 Ill. 144, 56 N. E. 361 [*affirming* 84 Ill. App. 537].

Indiana.— Bell *v.* Hiner, 16 Ind. App. 184, 44 N. E. 576.

Iowa.— Reynolds *v.* Black, 91 Iowa 1, 58 N. W. 922. See also Anundsen *v.* Standard Printing Co., 129 Iowa 200, 105 N. W. 424.

Kentucky.— Graham *v.* Magann Fawke Lumber Co., 118 Ky. 192, 80 S. W. 799, 26 Ky. L. Rep. 70, statute so providing held constitutional.

See 34 Cent. Dig. tit. "Master and Servant," § 131.

But see M. A. Furbush, etc., Mach. Co. *v.* Liberty Woolen Mills, 81 Fed. 425, construing Virginia statute.

After foreclosure.— The fact that a mortgage has been foreclosed, and execution levied, and the property redelivered to the mortgagor on the execution of a forthcoming bond, does not prevent a laborer's lien from attaching to the property notwithstanding the contract of labor was entered into after the redelivery of the property under the forthcoming bond. Georgia Loan, etc., Co. *v.* Dunlop, 108 Ga. 218, 33 S. E. 882.

64. Bradley *v.* Cassels, 117 Ga. 517, 43 S. E. 857; Georgia Loan, etc., Co. *v.* Dunlop, 108 Ga. 218, 33 S. E. 882; Small *v.* Hammes, 156 Ind. 556, 60 N. E. 342; Goodenow *v.* Foster, 108 Iowa 503, 79 N. W. 288. See also Anundsen *v.* Standard Printing Co., 129 Iowa 200, 105 N. W. 424. *Contra*, M. A. Furbush, etc., Mach. Co. *v.* Liberty Woolen Mills, 81 Fed. 425, construing Virginia statute.

65. Allred *v.* Haile, 84 Ga. 570, 10 S. E. 1095.

66. Fitzgerald *v.* Meyer, 65 Mo. App. 665; Salt Lake Lith. Co. *v.* Ibex Mine, etc., Co., 15 Utah 445, 49 Pac. 832.

In New Jersey, under a statute which gives an employee of an insolvent corporation a lien for his services on the assets of the corporation prior to any other debt of the company, it is held that a mortgage or other lien antedating the time when the court adjudges the corporation insolvent is entitled to priority as against the employee's lien, on the ground that the priority secured to laborers is a priority over the debts which are payable out of the corporation's property after the liens existing upon it at the adjudication of the insolvency are discharged. Wright *v.* Wynockie Iron Co., 48 N. J. Eq. 29, 21 Atl. 862; Hinkle *v.* Camden Safe-Deposit, etc., Co., 47 N. J. Eq. 333, 21 Atl. 861.

67. Cambria Iron Co. *v.* Laclede Wire, etc., Co., 26 Fed. 420, construing Missouri statute. See also Tiernan *v.* Murrah, 1 Rob. (La.) 443.

In Tennessee, under a statute making the employee's lien superior to all others, except liens to secure purchase-money and liens created before the passage of the act, an employee's lien for wages is entitled to priority over an attachment levied prior to the commencement of the employee's suit. Ruston *v.* Perry Lumber Co., 104 Tenn. 538, 58 S. W. 268.

68. *In re* Modes, 76 Pa. St. 502.

69. See St. Paul Title Ins., etc., Co. *v.* Diagonal Coal Co., 95 Iowa 551, 64 N. W. 606, holding that the costs, as provided for in such a statute, include fees of the receiver of the employing corporation and his attorney, but not compensation to a trustee and his attorney for services growing out of the foreclosure of a trust deed on property of the corporation.

70. Right to jury trial see Juries, 24 Cyc. 116.

71. Booth *v.* McCance, 20 Pa. Co. Ct. 92; Philadelphia Seventh Nat. Bank *v.* Shenandoah Iron Co., 35 Fed. 436. See also Columbia Hardwood Lumber Co. *v.* Brandenberger, 82 Ill. App. 327.

72. People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680].

73. Love *v.* Cox, 68 Ga. 269.

Process.— The process in a proceeding to enforce a laborer's lien under the act of 1870 should be made returnable to the proper court of the county of defendant's residence, if he resides in the state; and the issue made by

property of the employer is in the hands of an officer, receiver, assignee, or other trustee, it is necessary for the employee to present and prove his claim to entitle him to share in the proceeds.[74] Where the proceeds of the property against which a statutory lien for wages exists in a sister state are paid into court, the rights of the laborer who has been interpleaded will be protected.[75]

(II) *Notice of Lien.* In some states it is necessary to file a notice of claim or lien.[76] In other states the right to a preference is independent of the filing of any lien.[77]

(III) *Pleadings and Affidavits* — (A) *Complaint.* In an action to enforce an employee's lien, the complaint must clearly state the facts to bring the claim within the statute giving the lien or preference.[78] If the lien is given only where the wages are payable weekly or monthly, the facts showing such a contract must be stated.[79] Of course the complaint is defective where it merely alleges conclusions of law.[80]

(B) *Affidavit.* In some of the states the lien may be summarily enforced by affidavit.[81]

his counter affidavit should be tried in the same court. Tharpe *v.* Foster, 52 Ga. 79.

74. See Duryee *v.* U. S. Credit System Co., (N. J. Ch. 1895) 32 Atl. 690.

75. Schuler *v.* T. M. McCord Co., 79 Minn. 39, 81 N. W. 547.

76. Donnan *v.* Shaw, 7 Pa. Dist. 605, 21 Pa. Co. Ct. 39; Seventh Nat. Bank *v.* Shenandoah Iron Co., 35 Fed. 436, holding that the time is not suspended by the pendency of a suit in which receivers have been appointed but is suspended by a decree of reference to a master to take an account of debts and their priorities against the employer.

Under the Illinois statute it is necessary, where the business of the employer is suspended or put in the hands of a trustee, by the acts of creditors, in order that debts for labor shall be treated as preferred claims, that a claim for wages be presented within ten days after seizure on execution or within thirty days after the property has been placed in the hands of a trustee; and when property has been seized on execution the claim must be presented within ten days after the seizure notwithstanding an assignment for the benefit of creditors is made within such ten days and the property is turned over to the attorney subject to the lien of the execution creditor. Columbia Hardwood Lumber Co. *v.* Brandenberger, 82 Ill. App. 327.

In North Carolina a laborer's lien filed after the employer's death, if otherwise sufficient in form and substance, is valid, although the employer is named in the caption instead of the administrator. Pugh *v.* Baker, 127 N. C. 2, 37 S. E. 82.

In Pennsylvania the kind of business in which an employer is engaged should be set forth in the notice of a claim for wages. Leinau *v.* Albright, 10 Pa. Co. Ct. 171. See also Executions, 17 Cyc. 1355.

In Virginia a memorandum of the amount and consideration of the claim, required to be filed within a specified time after the services are rendered, need not state that the services were rendered within a specified time. Overholt *v.* Old Dominion Mfg. Co., 98 Va. 654, 37 S. E. 307. But the mere recording of labor tickets within the specified time, with nothing to show that the wages were due on the day the tickets were dated, is insufficient, and the record cannot be supplemented by parol evidence in regard thereto after suit brought to enforce the lien. Liberty Perpetual Bldg., etc., Co. *v.* M. A. Furbush, etc., Mach. Co., 80 Fed. 631, 26 C. C. A. 38. If the claim is not filed within the ninety days after the completion of the contract it will not be severed and so much allowed as falls within ninety days before the notice. Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 81 Fed. 439.

Separate notice. — Under a statute giving a lien for wages, one hired for a year with wages payable monthly is not required to file a separate lien for the wages falling due each month. Mudgett *v.* Texas Tobacco Growing, etc., Co., (Tex. Civ. App. 1901) 61 S. W. 149.

To authorize preference in distribution of proceeds of execution sale see Executions, 17 Cyc. 1355.

77. *In re* Duhme Co., 6 Ohio S. & C. Pl. Dec. 526.

78. Dano *v.* Mississippi, etc., R. Co., 27 Ark. 564 (holding that the property, and the nature of the estate therein, upon which the lien is claimed, must be averred); Sheeley *v.* Funderburk, 47 Ga. 287 (holding that a demand of payment of the exact sum due, and of a refusal to pay, must be averred); Bell *v.* Hiner, 16 Ind. App. 184, 44 N. E. 576 (holding that an allegation sufficiently showed the transfer of all the property used in the business of the employer). See Small *v.* Hammes, 156 Ind. 556, 60 N. E. 342.

79. Ackley *v.* Black Hawk Gravel Min. Co., 112 Cal. 42, 44 Pac. 330; Keener *v.* Eagle Lake Land, etc., Co., 110 Cal. 627, 43 Pac. 14; Kuschel *v.* Hunter, (Cal. 1897) 50 Pac. 397, holding that an allegation that claimant "agreed to do work by the month" at the "agreed rate of $100 per month" is not an allegation that the employer agreed to pay him monthly.

80. Weithoff *v.* Murray, 76 Cal. 508, 18 Pac. 435. See, generally, Pleading.

81. See the statutes of the several states.

(iv) *Claims of Third Persons.* It has been held that a claimant of personal property, levied on in proceedings to foreclose a laborer's lien, cannot have the proceedings dismissed on the ground that they are irregular or invalid, but can merely move to dismiss the levy as to the property shown to be his.[82]

(v) *Evidence.* Ordinarily a person claiming a laborer's lien has the burden of proof.[83] If the lien is given only when the wages are payable weekly or monthly, he must show such fact.[84] The admissibility of evidence is governed by the rules relating to evidence in civil actions in general.[85]

(vi) *Findings, Judgment, and Execution.* The rules relating to the construction and effect of findings in civil actions in general apply to actions to enforce a laborer's lien.[86] A stipulation for judgment for plaintiff on certain conditions authorizes a judgment against both defendants on the happening of such conditions.[87] The judgment in a foreclosure proceeding may be limited to a special judgment against the property.[88] Attorney's fees may be awarded by statute in some states.[89] The appointment of a receiver may be necessary to sell the property and distribute the proceeds.[90] The execution issued on an affidavit, in at least one state, operates as a final process until arrested by a valid counter affidavit raising an issue to be passed upon by the proper tribunal.[91]

j. Waiver and Forfeiture. The acceptance of a promissory note without security, for wages due, is not a waiver of the lien unless an intention to waive

In Georgia a general laborer's lien cannot be foreclosed upon realty by affidavit but only by action after properly recording the claim of lien; but it may be foreclosed on personalty by affidavit. Allred *v.* Haile, 84 Ga. 570, 10 S. E. 1095. The affidavit must allege that the work was done by plaintiff claiming such lien (Floyd *v.* Chess-Carley Co., 76 Ga. 752; Hoyt *v.* Glenn, 54 Ga. 571); that the service was that of a laborer (Hinton *v.* Goode, 73 Ga. 233; Richardson *v.* Langston, 68 Ga. 658); that the contract for labor was completed on the part of the laborer (McDonald *v.* Night, 63 Ga. 161; Dexter *v.* Glover, 62 Ga. 312; Brantley *v.* Raybon, 61 Ga. 211; Walls *v.* Rutherford, 60 Ga. 439), and that a demand for payment has been made of the debtor since the debt became due (Brantley *v.* Raybon, 61 Ga. 211). But it is not necessary to specify any particular items or articles of property. Allred *v.* Haile, 84 Ga. 570, 10 S. E. 1095. A laborer's affidavit alleging that affiant is "a laborer and mechanic, and that as such" he was employed "to work and labor" in a printing office is sufficient. Georgia Loan, etc., Co. *v.* Dunlop, 108 Ga. 218, 33 S. E. 882. An affidavit which alleges that affiant has a lien on defendant's property is sufficient where the execution is levied upon personal property only; and the fact that the clerk in issuing it inserted therein the words "lands and tenements" does not vitiate the execution as to the personal property. Dixon *v.* Williams, 82 Ga. 105, 9 S. E. 468. Affidavits to foreclose laborers' liens are filed when given to the clerk of the court, although he does not indorse an entry of filing thereon. Floyd *v.* Chess-Carley Co., 76 Ga. 752.

Counter affidavits.—Where a counter affidavit filed was invalid, it did not operate to convert the execution issued on the foreclosure into a mesne process returnable by the court, so that there was no suit pending and nothing to amend, and the court properly refused to consider the question as to the sufficiency of the levy of the execution. Moultrie Lumber Co. *v.* Jenkins, 121 Ga. 721, 49 S. E. 678.

82. Dixon *v.* Williams, 82 Ga. 105, 9 S. E. 468.

83. Thornton *v.* McDonald, 108 Ga. 3, 33 S. E. 680. See McCarty *v.* Key, (Miss. 1906) 39 So. 780, holding, in replevin, where it was *prima facie* shown that the property replevied was embraced in a trust deed in which plaintiff was the substituted trustee, that a laborer claiming the goods under his lien has the burden of proof to show that the trust deed did not embrace the property replevied.

84. Kuschel *v.* Hunter, (Cal. 1897) 50 Pac. 397.

85. See Evidence. See also Hines *v.* Beers, 74 Ga. 839.

86. See, generally, Trial. See also Kuschel *v.* Hunter, (Cal. 1897) 50 Pac. 397 (holding that a certain finding was not equivalent to a finding that the employer agreed to pay the wages of a laborer monthly); Howey *v.* Bingham, 14 Wash. 450, 44 Pac. 886.

87. Goodenow *v.* Foster, 108 Iowa 508, 79 N. W. 288. See, generally, Stipulations.

88. Barnett *v.* Tant, 115 Ga. 659, 42 S. E. 65.

89. Ackley *v.* Black Hawk Gravel Min. Co., 112 Cal. 42, 44 Pac. 330, holding that attorney's fees could not be awarded where it was not shown that the wages were payable weekly or monthly.

90. Small *v.* Hammes, 156 Ind. 556, 60 N. E. 342.

91. Moultrie Lumber Co. *v.* Jenkins, 121 Ga. 721, 49 S. E. 678.

such lien is clearly manifested.[92] So the acceptance and negotiation of a draft given for wages is not a waiver where the servant obtains a return of the draft and offers to surrender it.[93] The right to a statutory lien, where inconsistent with the lien reserved by contract, will be presumed to have been waived and the contract lien substituted therefor.[94] Proving a claim in excess of that really due,[95] or presenting a claim embracing other items than wages,[96] does not work a forfeiture of the right to a lien for wages actually due.

IV. MASTER'S LIABILITY FOR INJURIES TO SERVANT.[97]

A. Nature and Extent of Liability — 1. IN GENERAL[98] — a. Rule Stated. The rule of law regulating the obligation between master and servant is that the former is liable for all accidents occurring in the course of the employment, which are not induced by the carelessness or improper conduct of the employee. In other words the master is bound to use reasonable care and diligence to prevent accident or injury, and if he does not he will be responsible for the damages,[99]

92. Delaware, etc., R. Co. *v.* Oxford Iron Co., 33 N. J. Eq. 192; *In re* Minor Fire Clay Co., 9 Ohio S. & C. Pl. Dec. 627, 7 Ohio N. P. 557. But see People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680] (holding that where the holders of orders drawn on the employer by laborers to whom it was indebted for wages surrendered them to the employer and received in lieu thereof its promissory notes or securities upon its books, the laborer's wages were paid by delegation, and such notes and securities were not entitled to preference); Silver *v.* Williams, 17 Serg. & R. (Pa.) 292 (holding that the preference is lost by taking a single bill payable at a future day with interest).

93. Balkcom *v.* Empire Lumber Co., 91 Ga. 651, 17 S. E. 1020, 44 Am. St. Rep. 58.

94. Howe *v.* Wiscasset Brick, etc., Co., 78 Me. 227, 3 Atl. 650.

95. Delaware, etc., R. Co. *v.* Oxford Iron Co., 33 N. J. Eq. 192.

96. Delaware, etc., R. Co. *v.* Oxford Iron Co., 33 N. J. Eq. 192.

97. **Commission of manslaughter in correcting servant** see HOMICIDE, 21 Cyc. 763.

Constitutional guaranty against deprivation of property as applied to statutes providing for protection of employees see CONSTITUTIONAL LAW, 8 Cyc. 1120.

Constitutional guaranty of equal protection of laws as applied to statutes creating liability for injuries to employees see CONSTITUTIONAL LAW, 8 Cyc. 1072.

Injuries to persons not employees working on or about railroad cars see RAILROADS.

Injury to property of railroad employee by negligence of railroad company see RAILROADS.

Insurance against liability for personal injuries to employees see EMPLOYERS' LIABILITY INSURANCE, 15 Cyc. 1035 *et seq.*

Liabilities of receivers of railroads for injuries to employees see RAILROADS.

Liability of landlord for injuries to employees of tenant from defects in premises see LANDLORD AND TENANT, 24 Cyc. 1114 *et seq.*

Liability of lessor of railroad company for injuries to employees of lessee see RAILROADS.

Recovery by master for injuries to servant by third person see *infra*, VI.

98. **Admissibility of evidence** see *infra*, IV, H, 3, b.

Appeal and error see *infra*, IV, H, 10.

Competency of fellow servants see *infra*, IV, G, 4, a, (III).

Duty to promulgate rules see *infra*, IV, C, 2, a.

Instructions see *infra*, IV, H, 7.

Presumptions and burden of proof see *infra*, IV, H, 3, a.

Questions for jury see *infra*, IV, H, 6.

Verdict and findings see *infra*, IV, H, 8.

Weight and sufficiency of evidence see *infra*, IV, H, 3, c.

99. Hallower *v.* Henley, 6 Cal. 209. To the same effect see the following cases:

Alabama.— Bessemer Land, etc., Co. *v.* Campbell, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17; Louisville, etc., R. Co. *v.* Thornton, 117 Ala. 274, 23 So. 778.

California.— Layng *v.* Mt. Shasta Mineral Spring Co., 135 Cal. 141, 67 Pac. 48.

Delaware.—Karczewski *v.* Wilmington City R. Co., 4 Pennew. 24, 54 Atl. 746.

Georgia.— Western, etc., R. Co. *v.* Bailey, 105 Ga. 100, 31 S. E. 547.

Illinois.— Baltimore, etc., R. Co. *v.* Alsop, 176 Ill. 471, 52 N. E. 253, 732 [*affirming* 71 Ill. App. 54]; Pressed Steel Car Co. *v.* Herath, 110 Ill. App. 596 [*affirmed* in 207 Ill. 576, 69 N. E. 959]; Otstot *v.* Indiana, etc., R. Co., 103 Ill. App. 136; Illinois Steel Co. *v.* Ryska, 102 Ill. App. 347 [*affirmed* in 200 Ill. 280, 65 N. E. 734]; Consolidated Ice Mach. Co. *v.* Kiefer, 26 Ill. App. 466.

Indiana.— Indianapolis Union R. Co. *v.* Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; Wabash R. Co. *v.* Kelley, 153 Ind. 119, 52 N. E. 152, 54 N. E. 752.

Iowa.— Jensen *v.* Omaha, etc., R. Co., 115 Iowa 404, 88 N. W. 952; Doyle *v.* Chicago, etc., R. Co., 77 Iowa 607, 42 N. W. 555, 4 L. R. A. 420; Worden *v.* Humeston, etc., R. Co., 72 Iowa 201, 33 N. W. 629; Conners *v.* Burlington, etc., R. Co., 71 Iowa 490, 32 N. W. 465, 60 Am. Rep. 814.

Kentucky.—Illinois Cent. R. Co. *v.* Langan, 116 Ky. 318, 76 S. W. 32, 25 Ky. L. Rep. 500;

unless the servant assumed the risk, or contributed to the injury through his own negligence.[1] The master is not, however, liable as an insurer, and is only required to exercise such ordinary and reasonable care and precaution for the safety of his servants as the nature and dangers of the business admit of and demand.[2] As between master and servant negligence should be measured by the

Louisville, etc., R. Co. *v.* Foard, 104 Ky. 456, 47 S. W. 342, 20 Ky. L. Rep. 646; Louisville, etc., R. Co. *v.* Grubbs, (1899) 49 S. W. 3; Illinois Cent. R. Co. *v.* Burton, 79 S. W. 231, 25 Ky. L. Rep. 1916; Illinois Cent. R. Co. *v.* Stewart, 63 S. W. 596, 23 Ky. L. Rep. 637; Southern R. Co. *v.* Barr, 55 S. W. 900, 21 Ky. L. Rep. 1615.

Louisiana.— McGraw *v.* Texas, etc., R. Co., 50 La. Ann. 466, 23 So. 461, 69 Am. St. Rep. 450.

Maine.— Rhoades *v.* Varney, 91 Me. 222, 39 Atl. 552.

Maryland.— Lorentz *v.* Robinson, 61 Md. 64.

Massachusetts.— Bowes *v.* New York, etc., R. Co., 181 Mass. 89, 62 N. E. 949; Slattery *v.* Walker, etc., Mfg. Co., 179 Mass. 307, 60 N. E. 782; Cavagnaro *v.* Clark, 171 Mass. 359, 50 N. E. 542; Fairman *v.* Boston, etc., R. Co., 169 Mass. 170, 47 N. E. 613.

Michigan.— Geller *v.* Briscoe Mfg. Co., 136 Mich. 330, 99 N. W. 281.

Minnesota.— Lyons *v.* Dee, 88 Minn. 490, 93 N. W. 899; Christianson *v.* Chicago, etc., R. Co., 67 Minn. 94, 69 N. W. 640; Schumaker *v.* St. Paul, etc., R. Co., 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257.

Mississippi.— Howd *v.* Mississippi Cent. R. Co., 50 Miss. 178.

Missouri.— Bane *v.* Irwin, 172 Mo. 306, 72 S. W. 522; Black *v.* Missouri Pac. R. Co., 172 Mo. 177, 72 S. W. 559; Rinard *v.* Omaha, etc., R. Co., 164 Mo. 270, 64 S. W. 124; Hunt *v.* Desloge Consol. Lead Co., 104 Mo. App. 377, 79 S. W. 710; Kane *v.* Falk Co., 93 Mo. App. 209; Hyatt *v.* Hannibal, etc., R. Co., 19 Mo. App. 287.

Montana.— Kelley *v.* Cable Co., 7 Mont. 70, 14 Pac. 633.

Nebraska.— Union Pac. R. Co. *v.* Elliott, 54 Nebr. 299, 74 N. W. 627.

New Jersey.— Harrison *v.* Central R. Co., 31 N. J. L. 293.

New York.— Simone *v.* Kirk, 173 N. Y. 7, 65 N. E. 739 [*reversing* 57 N. Y. App. Div. 461, 67 N. Y. Suppl. 1019]; Stimper *v.* Fuchs etc., Mfg. Co., 26 N. Y. App. Div. 333, 49 N. Y. Suppl. 785; McMahon *v.* Walsh, 43 N. Y. Super. Ct. 36; Frank *v.* Otis, 15 N. Y. St. 601 [*affirmed* in 113 N. Y. 654, 21 N. E. 415].

North Carolina.— Smith *v.* Atlanta, etc., R. Co., 132 N. C. 819, 44 S. E. 663; Kinney *v.* North Carolina R. Co., 122 N. C. 961, 30 S. E. 313; Purcell *v.* Southern R. Co., 119 N. C. 728, 26 S. E. 161.

Ohio.— Pittsburgh, etc., R. Co. *v.* Lewis, 33 Ohio St. 196; Pittsburg, etc., R. Co. *v.* Devinney, 17 Ohio St. 197.

Rhode Island.— Vartanian *v.* New York, etc., R. Co., 25 R. I. 398, 56 Atl. 184; Carll *v.* Interstate Consol. R. Co., 23 R. I. 592, 51 Atl. 305.

South Carolina.— Scott *v.* Seaboard Air Line R. Co., 67 S. C. 136, 45 S. E. 129; Bodie *v.* Charleston, etc., R. Co., 66 S. C. 302, 44 S. E. 943.

Tennessee.— Freeman *v.* Illinois Cent. R. Co., 107 Tenn. 340, 64 S. W. 1.

Texas.— Chicago, etc., R. Co. *v.* Long, 32 Tex. Civ. App. 40, 74 S. W. 59 [writ of error *denied* in 97 Tex. 69, 75 S. W. 483]; Missouri, etc., R. Co. *v.* Walden, 27 Tex. Civ. App. 567, 66 S. W. 584; Texas, etc., Coal Co. *v.* Connaughten, 20 Tex. Civ. App. 642, 50 S. W. 173; Missouri, etc., R. Co. *v.* Johnson, (Civ. App. 1898) 49 S. W. 265; International, etc., R. Co. *v.* Culpepper, 19 Tex. Civ. App. 182, 46 S. W. 922; Houston, etc., R. Co. *v.* Runnels, (Civ. App. 1898) 46 S. W. 394.

Utah.— Johnson *v.* Union Pac. Coal Co., 28 Utah 46, 76 Pac. 1089, 67 L. R. A. 506.

Washington.— Myrberg *v.* Baltimore, etc., Min., etc., Co., 25 Wash. 364, 65 Pac. 539; Bateman *v.* Peninsular R. Co., 20 Wash. 133, 54 Pac. 996.

Wisconsin.— Lago *v.* Walsh, 98 Wis. 348, 74 N. W. 212.

United States.— Continental Trust Co. *v.* Toledo, etc., R. Co., 87 Fed. 133, 32 C. C. A. 44; Patton *v.* Southern R. Co., 82 Fed. 979, 27 C. C. A. 287; Killien *v.* Hyde, 63 Fed. 172 [*reversed* on another point in 67 Fed. 365, 14 C. C. A. 418]; Adams *v.* West Roxbury, 1 Fed. Cas. No. 67, 1 Hask. 576.

England.—Hutchinson *v.* York, etc., R. Co., 5 Exch. 343, 19 L. J. Exch. 296, 6 R. & Can. Cas. 580; Priestley *v.* Fowler, 1 Jur. 987, 7 L. J. Exch. 42, 3 M. & W. 1, M. & H. 305; Weems *v.* Mathieson, 4 Macq. H. L. 215; Brydon *v.* Stewart, 2 Macq. H. L. 30; Paterson *v.* Wallace, 1 Macq. H. L. 748. See also Riley *v.* Baxendale, 6 H. & N. 445, 30 L. J. Exch. 87, 9 Wkly. Rep. 347.

Canada.— George Matthews Co. *v.* Bouchard, 8 Quebec Q. B. 550; Price *v.* Roy, 8 Quebec Q. B. 170; Sparano *v.* Canadian Pac. R. Co., 22 Quebec Super. Ct. 292; St. Arnaud *v.* Gibson, 13 Quebec Super. Ct. 22; Ibbottson *v.* Trevethick, 4 Quebec Super. Ct. 318.

See 34 Cent. Dig. tit. "Master and Servant," §§ 135, 139, 157.

1. **Assumption of risk** see *infra*, IV, E. **Contributory negligence** see *infra*, IV, F.

2. *Delaware.*— Huber *v.* Jackson, etc., Co., 1 Marv. 97, 41 Atl. 92.

Illinois.— Illinois Steel Co. *v.* Wierzbicky, 107 Ill. App. 69 [*affirmed* in 206 Ill. 201, 68 N. E. 1101]; Illinois Cent. R. Co. *v.* Schumann, 101 Ill. App. 668; Western Screw Co. *v.* Johnson, 86 Ill. App. 89; Agnew *v.* Supple,

character and risk of the business engaged in, and the degree of care of all par-

80 Ill. App. 437 [*reversed* on another point in 191 Ill. 439, 61 N. E. 392].

Indiana.— Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399.

Iowa.— Fosburg *v.* Phillips Fuel Co., 93 Iowa 54, 61 N. W. 400.

Kentucky.— Lewis *v.* Taylor Coal Co., 112 Ky. 845, 66 S. W. 1044, 23 Ky. L. Rep. 2218, 57 L. R. A. 447.

Maine.— Cowett *v.* American Woolen Co., 97 Me. 543, 55 Atl. 494.

Massachusetts.— O'Reilly *v.* Bowker Fertilizer Co., 174 Mass. 202, 54 N. E. 534; O'Driscoll *v.* Faxon, 156 Mass. 527, 31 N. E. 685; King *v.* Boston, etc., R. Corp., 9 Cush. 112.

Michigan.—Michigan Cent. R. Co. *v.* Dolan, 32 Mich. 510.

Mississippi.— Morehead *v.* Yazoo, etc., R. Co., 84 Miss. 112, 36 So. 151.

Missouri.— Keown *v.* St. Louis R. Co., 141 Mo. 86, 41 S. W. 926; Kelly *v.* Stewart, 93 Mo. App. 47; Hysell *v.* Swift, 78 Mo. App. 59. *Compare* Zellars *v.* Missouri Water, etc., Co., 92 Mo. App. 107, where it was held that the master is an absolute insurer against any negligent act of his own.

Nebraska.— Weed *v.* Chicago, etc., R. Co., 5 Nebr. (Unoff.) 623, 99 N. W. 827.

New York.— Slater *v.* Jewett, 85 N. Y. 61, 39 Am. Rep. 627; Frank *v.* Otis, 15 N. Y. St. 681 [*affirmed* in 113 N. Y. 654, 21 N. E. 415]; Harr *v.* New York, etc., R. Co., 13 N. Y. St. 227 [*affirmed* in 114 N. Y. 623, 21 N. E. 425]; Eiser *v.* Archer, 1 N. Y. City Ct. 356.

Ohio.— Love *v.* Ohio, etc., R. Co., 6 Ohio Dec. (Reprint) 839, 8 Am. L. Rec. 417.

Pennsylvania.— Wannamaker *v.* Burke, 111 Pa. St. 423, 2 Atl. 500; Weger *v.* Pennsylvania R. Co., 55 Pa. St. 460.

Rhode Island.— King *v.* Interstate Consol. R. Co., 23 R. I. 583, 51 Atl. 301, 70 L. R. A. 924; McGeary *v.* Old Colony R. Co., 21 R. I. 76, 41 Atl. 1007.

South Carolina.— Gallman *v.* Union Hardwood Mfg. Co., 65 S. C. 192, 43 S. E. 524.

Texas.— Poling *v.* San Antonio, etc., R. Co., 32 Tex. Civ. App. 487, 75 S. W. 69; English *v.* Galveston, etc., R. Co., 22 Tex. Civ. App. 3, 53 S. W. 57; Mayton *v.* Sonnefield, (Civ. App. 1898) 48 S. W. 608.

Utah.— Downey *v.* Gemini Min. Co., 24 Utah 431, 68 Pac. 414, 91 Am. St. Rep. 798.

Virginia.— Norfolk, etc., R. Co. *v.* Stevens, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367; Bertha Zinc Co. *v.* Martin, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999.

West Virginia.— Oliver *v.* Ohio River R. Co., 42 W. Va. 703, 26 S. E. 444; Berns *v.* Gaston Gas Coal Co., 27 W. Va. 285, 55 Am. Rep. 304.

United States.— F. C. Austin Mfg. Co. *v.* Johnson, 89 Fed. 677, 32 C. C. A. 309.

See 34 Cent. Dig. tit. "Master and Servant," §§ 136, 139.

Ordinary care implies and includes the exercise of such reasonable diligence, care, skill, watchfulness, and forethought as, under all the circumstances of the particular service, a careful, prudent man, or officer of a corporation, would exercise under the same or similar circumstances; and by "same circumstances" is meant all the circumstances of time, place, and attendant conditions. Downey *v.* Gemini Min. Co., 24 Utah 431, 68 Pac. 414, 91 Am. St. Rep. 798. See also F. C. Austin Mfg. Co. *v.* Johnson, 89 Fed. 677, 32 C. C. A. 309.

Necessity of showing negligence see Saylor *v.* Parsons, 122 Iowa 679, 98 N. W. 500, 101 Am. St. Rep. 283, 64 L. R. A. 542; Louisville, etc., R. Co. *v.* Foard, 104 Ky. 456, 47 S. W. 342, 20 Ky. L. Rep. 646.

Negligence a question for the jury.—Walker *v.* Atlanta, etc., R. Co., 103 Ga. 820, 30 S. E. 503; Baltimore, etc., R. Co. *v.* Alsop, 176 Ill. 471, 52 N. E. 253, 732 [*affirming* 71 Ill. App. 54]; Walker *v.* Gillett, 59 Kan. 214, 52 Pac. 442; Atchison, etc., R. Co. *v.* Slattery, 57 Kan. 499, 46 Pac. 941; Bouck *v.* Jackson Sawmill Co., 49 S. W. 472, 20 Ky. L. Rep. 1542; O'Brien *v.* West End St. R. Co., 173 Mass. 105, 53 N. E. 149; Dean *v.* Smith, 169 Mass. 569, 48 N. E. 619; Scullane *v.* Kellogg, 169 Mass. 544, 48 N. E. 622; Tremblay *v.* Mapes-Reeve Constr. Co., 169 Mass. 284, 47 N. E. 1010; Wood *v.* Chicago, etc., R. Co., 66 Minn. 49, 68 N. W. 462; Raynor *v.* Trolan, 22 N. Y. App. Div. 107, 47 N. Y. Suppl. 897; White *v.* Houston, etc., R. Co., (Tex. Civ. App. 1898) 46 S. W. 382; Pier *v.* Chicago, etc., R. Co., 94 Wis. 357, 68 N. W. 464; Egan *v.* Sawyer, etc., Lumber Co., 94 Wis. 137, 68 N. W. 756.

Evidence held not to show liability.— McQueeney *v.* Norcross, 75 Conn. 381, 53 Atl. 780, 54 Atl. 301; Nolan *v.* New York, etc., R. Co., 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305; Daniels *v.* Liebig Mfg. Co., 2 Marv. (Del.) 207, 42 Atl. 447; Walker *v.* Atlanta, etc., R. Co., 103 Ga. 820, 30 S. E. 503; O'Donnell *v.* MacVeagh, 205 Ill. 23, 68 N. E. 646; Cummings *v.* Chicago, etc., R. Co., 89 Ill. App. 199 [writ of error *dismissed* in 189 Ill. 608, 60 N. E. 51]; Kelsey *v.* Chicago, etc., R. Co., 106 Iowa 253, 76 N. W. 670; Cox *v.* Chicago, etc., R. Co., 102 Iowa 711, 72 N. W. 301; Smith *v.* Chicago, etc., R. Co., 99 Iowa 617, 68 N. W. 908; Hurt *v.* Louisville, etc., R. Co., 116 Ky. 545, 76 S. W. 502, 25 Ky. L. Rep. 755; Jacobs *v.* Chesapeake, etc., R. Co., 72 S. W. 308, 24 Ky. L. Rep. 1879; Illinois Cent. R. Co. *v.* Stewart, 63 S. W. 596, 23 Ky. L. Rep. 637; Coleman *v.* Pittsburg, etc., R. Co., 63 S. W. 39, 23 Ky. L. Rep. 401; Louisville, etc., R. Co. *v.* Bass, 43 S. W. 463, 19 Ky. L. Rep. 1474; Louisville, etc., R. Co. *v.* Fox, 42 S. W. 922, 20 Ky. L. Rep. 81; Fleming *v.* Elston, 171 Mass. 187, 50 N. E. 531; Fairman *v.* Boston, etc., R. Co., 169 Mass. 170, 47 N. E. 613; Crowley *v.* Appleton, 148 Mass. 98, 18 N. E. 675; Lang *v.* H. W. Williams Transp. Line, 119 Mich. 80, 77 N. W. 633; Koralewski *v.* Great Northern

ties is higher when the lives and limbs of themselves and others are endangered than in ordinary cases.[3]

b. Conflict of Laws.[4] In an action for damages for personal injuries to a servant, the law of the state in which the injury occurred governs,[5] unless it is against the public policy of the state in which the action is brought.[6]

c. Statutory Provisions.[7] In a number of jurisdictions the legislatures have,

Co., 85 Minn. 140, 88 N. W. 410; Crane *v.* Chicago, etc., R. Co., 83 Minn. 278, 86 N. W. 328; Parker *v.* Winona, etc., R. Co., 83 Minn. 212, 86 N. W. 2; Moore *v.* Great Northern R. Co., 67 Minn. 394, 69 N. W. 1103; Keown *v.* St. Louis R. Co., 141 Mo. 86, 41 S. W. 926; Fifer *v.* Burch, 68 Nebr. 217, 94 N. W. 107; Ecklund *v.* Chicago, etc., R. Co., 52 Nebr. 729, 73 N. W. 224; Union Pac. R. Co. *v.* Doyle, 50 Nebr. 555, 70 N. W. 43; Huda *v.* American Glucose Co., 154 N. Y. 474, 48 N. E. 897, 40 L. R. A. 411 [*affirming* 42 N. Y. Suppl. 1126]; Hawke *v.* Brown, 28 N. Y. App. Div. 37, 50 N. Y. Suppl. 1032; Cooper *v.* New York, etc., R. Co., 25 N. Y. App. Div. 383, 49 N. Y. Suppl. 481; Bryan *v.* Southern R. Co., 128 N. C. 387, 38 S. E. 914; Corcoran *v.* Wanamaker, 185 Pa. St. 496, 39 Atl. 1108; Nye *v.* Pennsylvania R. Co., 178 Pa. St. 134, 35 Atl. 627; Russell *v.* Riverside Worsted Mills, 24 R. I. 591, 54 Atl. 375; Healey *v.* New York, etc., R. Co., 20 R. I. 136, 37 Atl. 676; Southern Pac. Co. *v.* Mauldin, 19 Tex. Civ. App. 166, 46 S. W. 650; Norfolk, etc., R. Co. *v.* Cromer, 101 Va. 667, 44 S. E. 898; Wilson *v.* Northern Pac. R. Co., 31 Wash. 67, 71 Pac. 713; Hughes *v.* Oregon Imp. Co., 20 Wash. 294, 55 Pac. 119; Phillips *v.* The Pilot, 82 Fed. 111.

3. Galveston, etc., R. Co. *v.* Gormley, (Tex. Civ. App. 1894) 27 S. W. 1051.

The test of liability is the negligence of the master, not the danger of the employment, although the danger of the employment may help to determine the ordinary care required in the case. Knight *v.* Cooper, 36 W. Va. 232, 14 S. E. 999.

When life is at stake, the rule of diligence requires the doing of everything that gives reasonable promise of its preservation, regardless of difficulties and expense. Bessemer Land, etc., Co. *v.* Campbell, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17.

4. **Protection for wrongful death** see DEATH, 13 Cyc. 316.

5. *Arkansas.*— Kansas City, etc., R. Co. *v.* Becker, 67 Ark. 1, 53 S. W. 406, 77 Am. St. Rep. 78, 46 L. R. A. 814, in which the law of Arkansas, where the injuries were received, were held to govern, although the contract of employment was made in another state.

Illinois.— Chicago, etc., R. Co. *v.* Rouse, 178 Ill. 132, 52 N. E. 951, 44 L. R. A. 410 [*affirming* 78 Ill. App. 286].

Iowa.— Brewster *v.* Chicago, etc., R. Co., 114 Iowa 144, 86 N. W. 221, 89 Am. St. Rep. 348.

Kentucky.— Illinois Cent. R. Co. *v.* Jordan, 117 Ky. 512, 78 S. W. 426, 25 Ky. L. Rep. 1610.

Michigan.— Rick *v.* Saginaw Bay Towing Co., 132 Mich. 237, 93 N. W. 632, 102 Am. St. Rep. 422; Turner *v.* St. Clair Tunnel Co., 121 Mich. 616, 80 N. W. 720, 47 L. R. A. 112.

Minnesota.— Herrick *v.* Minneapolis, etc., R. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771. But *compare* Jones *v.* Chicago, etc., R. Co., 80 Minn. 488, 83 N. W. 446, 49 L. R. A. 640.

Mississippi.— Illinois Cent. R. Co. *v.* Harris, (1901) 29 So. 760. *Compare* Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977, in which the omission of duty occurred in Mississippi, but the consequence was manifested physically in Tennessee, and it was held that the law of Tennessee governed.

Missouri.— Fogarty *v.* St. Louis Transfer Co., 180 Mo. 490, 79 S. W. 664; Williams *v.* Chicago, etc., R. Co., 106 Mo. App. 61, 79 S. W. 1167; Benedict *v.* Chicago Great Western R. Co., 104 Mo. App. 218, 78 S. W. 60.

New Hampshire.— Leazotte *v.* Boston, etc., R. Co., 70 N. H. 5, 45 Atl. 1084.

Texas.— El Paso, etc., R. Co. *v.* McComus, (Civ. App. 1903) 72 S. W. 629, 36 Tex. Civ. App. 170, 81 S. W. 760, in which the negligence took place in New Mexico, but the injury occurred in Texas, and it was held that the law of Texas governed. But see Missouri, etc., R. Co. *v.* Thompson, 11 Tex. Civ. App. 658, 33 S. W. 718.

Utah.— Johnson *v.* Union Pac. Coal Co., 28 Utah 46, 76 Pac. 1089, 67 L. R. A. 506; Sartin *v.* Oregon Short Line R. Co., 27 Utah 447, 76 Pac. 219.

Vermont.— Morrisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102.

United States.— Northern Pac. R. Co. *v.* Babcock, 154 U. S. 190, 14 S. Ct. 978, 38 L. ed. 958; The City of Alexandria, 17 Fed. 390, in which the injury occurred on the high seas, and it was held that the rules of maritime law governed.

See 34 Cent. Dig. tit. "Master and Servant," § 137.

But see Pennsylvania Co. *v.* McCann, 54 Ohio St. 10, 42 N. E. 768, 56 Am. St. Rep. 695, 31 L. R. A. 651; Louisville, etc., R. Co. *v.* Reagan, 96 Tenn. 128, 33 S. W. 1050.

6. See Morrisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102, where it was held that the fact that the law of Canada, where the injury was received, was contrary to the law of Vermont, did not show that it was so contrary to the public policy of the state that the courts would not enforce it.

7. **Statutory regulations in general** see *supra*, II, B.

Power to regulate see *supra*, II, B.

under their police power,[8] enacted laws regulating the liability of masters for injuries to their servants.[9]

d. Employment and Care of Minors.[10] The mere employment of a minor without his parent's consent about dangerous work is not negligence *per se*,[11] unless forbidden by statute,[12] or unless the employer knows that he is a minor, and that the contract is made without the consent of his parent.[13] But persons who employ minors must anticipate the ordinary behavior of children, must take notice of their lack of judgment, and must exercise greater care toward and for them than is required by law to be exercised toward and for adults;[14] and where

8. The legislature may, for the greater safety and protection of laborers, prescribe specific measures for the proper fitting of a working place. Green *v.* American Car, etc., Co., 163 Ind. 135, 71 N. E. 268.

9. Statutes construed.— *Alabama.*— Northern Alabama R. Co. *v.* Mansell, 138 Ala. 548, 36 So. 459, construing Code (1896), § 27.

Arkansas.— Neal *v.* St. Louis, etc., R. Co., 71 Ark. 445, 78 S. W. 220, construing 27 U. S. St. at L. 531 [U. S. Comp. St. (1901) p. 3175].

Colorado.— Colorado Milling, etc., Co. *v.* Mitchell, 26 Colo. 28, 58 Pac. 28 [*affirming* 12 Colo. App. 277, 55 Pac. 736], construing Laws (1893), p. 129.

Indiana.— Baltimore, etc., R. Co. *v.* Cavanaugh, 35 Ind. App. 32, 71 N. E. 239; Brower *v.* Locke, 31 Ind. App. 353, 67 N. E. 1015, construing Burns Annot. St. (1901) § 7087*i*.

Iowa.— Duree *v.* Chicago, etc., R. Co., 118 Iowa 640, 92 N. W. 890 (construing Code (1897), § 2056); Reddington *v.* Chicago, etc., R. Co., 108 Iowa 96, 78 N. W. 800, (1898) 75 N. W. 679 (construing Code (1873), § 1307).

Massachusetts.— Riley *v.* Tucker, 179 Mass. 190, 60 N. E. 484, construing St. (1887) c. 270, § 1, cl. 1.

Mississippi.— Gulf, etc., R. Co. *v.* Bussey, 82 Miss. 616, 35 So. 166, construing Const. § 193.

Missouri.— Stagg *v.* Edward Weston Tea, etc., Co., 169 Mo. 489, 69 S. W. 391, construing a city ordinance regulating the operation of elevators.

New York.— McHugh *v.* Manhattan R. Co., 88 N. Y. App. Div. 554, 85 N. Y. Suppl. 184 (construing Laws (1902), p. 1748, c. 600, § 1, subd. 1); Gmaehle *v.* Rosenberg, 40 Misc. 267, 81 N. Y. Suppl. 930 (construing Laws (1897), p. 461, c. 415, § 18).

See 34 Cent. Dig. tit. "Master and Servant," § 138.

The repeal of an act giving plaintiff a right of action by an act which is a substantial reënactment of its provisions, and which amplifies its scope, will not operate to deprive plaintiff of his rights. San Antonio, etc., R. Co. *v.* Keller, 11 Tex. Civ. App. 569, 32 S. W. 847.

10. Application of fellow servant doctrine see *infra*, IV, G, 4, a, (I), (A).

Assumption of risk see *infra*, IV, E, 7.

Contributory negligence see *infra*, IV, F, 2, b.

Negligence in giving orders see *infra*, IV, C, 3, d.

Right of action by infants see INFANTS, 22 Cyc. 629.

Right of parent to recover for injuries to child see PARENT AND CHILD.

Scope of employment see *infra*, IV, A, 3.

Warning and instructing see *infra*, IV, D, 3, h.

11. Pennsylvania Co. *v.* Long, 94 Ind. 250; Texas, etc., R. Co. *v.* Crowder, 61 Tex. 262; Texas, etc., R. Co. *v.* Carlton, 60 Tex. 397.

12. Morris *v.* Stanfield, 81 Ill. App. 264 (in which the injury resulted while the child was exercising such care as a child of his age might reasonably be expected to exercise); Cooke *v.* Lalance Grosjean Mfg. Co., 33 Hun (N. Y.) 351 [*reversed* on authority of Hickey *v.* Taaffe, *infra*]; Hickey *v.* Taaffe, 32 Hun (N. Y.) 7 [*reversed* in 99 N. Y. 204, 1 N. E. 685, 52 Am. Rep. 19, on the ground that the employment did not come within the statute, Laws (1876), c. 122]; Queen *v.* Dayton Coal, etc., Co., 95 Tenn. 458, 32 S. W. 460, 49 Am. St. Rep. 935, 30 L. R. A. 82. But see White *v.* Witteman Lith. Co., 58 Hun (N. Y.) 381, 12 N. Y. Suppl. 188 [*affirmed* in 131 N. Y. 631, 30 N. E. 236]; Belles *v.* Jackson, 4 Pa. Dist. 194.

13. If the employer believes on reasonable grounds, from his size, appearance, conduct, and statements, that the minor is of full age, he is not negligent in hiring him. Pittsburgh, etc., R. Co. *v.* McLaughlin, 14 Ohio Cir. Ct. 286, 7 Ohio Cir. Dec. 354. See also Youll *v.* Sioux City, etc., R. Co., 66 Iowa 346, 23 N. W. 736; Goff *v.* Norfolk, etc., R. Co., 36 Fed. 299.

14. Taylor *v.* Wootan, 1 Ind. App. 188, 27 N. E. 502, 50 Am. St. Rep. 200. See also the following cases:

Alabama.— Marbury Lumber Co. *v.* Westbrook, 121 Ala. 179, 25 So. 914.

Indiana.— Hill *v.* Gust, 55 Ind. 45.

Kansas.— Larson *v.* Berquist, 34 Kan. 334, 8 Pac. 407, 55 Am. Rep. 249.

Massachusetts.— O'Connor *v.* Adams, 120 Mass. 427; Sullivan *v.* India Mfg. Co., 113 Mass. 396; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506.

Michigan.— East Saginaw City R. Co. *v.* Bohn, 27 Mich. 503.

New York.— Flynn *v.* Erie Preserving Co., 12 N. Y. St. 88.

Pennsylvania.— Smith *v.* O'Connor, 48 Pa. St. 218, 86 Am. Dec. 582; Rauch *v.* Lloyd, 31 Pa. St. 358, 72 Am. Dec. 747.

a minor is employed in a business, the danger of which he is unable, by reason of his immature judgment, to comprehend, and is injured, the master is liable.[15] That a minor answers falsely as to his age, and secures employment by so doing, in violation of a known rule against employing minors, does not make him a trespasser, or deprive him of his right to protection as an employee, when actually engaged in his employer's service.[16]

e. Delegation of Duty.[17] As to the acts which a master or principal is bound as such to perform toward his employees, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present, and liable for the manner in which they are performed. This rule is as applicable to individuals as to corporations.[18]

Vermont.— Robinson *v.* Cone, 22 Vt. 213, 54 Am. Dec. 67.

Canada.— McIntosh *v.* Firstbrook Box Co., 8 Ont. L. Rep. 419; Robitaille *v.* White, 19 Quebec Super. Ct. 431; McCarthy *v.* Thomas Davidson Mfg. Co., 18 Quebec Super. Ct. 272; Légaré *v.* Esplin, 12 Quebec Super. Ct. 113.

See 34 Cent. Dig. tit. "Master and Servant," § 141.

In determining whether a place of work is dangerous to a boy of fourteen, the jury may consider the instincts and disposition of a boy of that age. Marbury Lumber Co. *v.* Westbrook, 121 Ala. 179, 25 So. 914.

15. *Alabama.*— Marbury Lumber Co. *v.* Westbrook, 121 Ala. 179, 25 So. 914, where it was held that the questions of negligence and contributory negligence were immaterial.

Delaware.— Chielinsky *v.* Hoopes, etc., Co., 1 Marv. 273, 40 Atl. 1127.

Indiana.— Taylor *v.* Wootan, 1 Ind. App. 188, 27 N. E. 502, 50 Am. St. Rep. 200. See also Brower *v.* Locke, 31 Ind. App. 353, 67 N. E. 1015, construing Burns Rev. St. (1901) § 7087*i*.

Kansas.— Larson *v.* Berquist, 34 Kan. 334, 8 Pac. 407, 55 Am. Rep. 249.

Missouri.— Goins *v.* Chicago, etc., R. Co., 37 Mo. App. 221.

See 34 Cent. Dig. tit. "Master and Servant," § 141.

Master not insurer of infant's safety see Swift *v.* Holoubek, 55 Nebr. 228, 75 N. W. 584.

Injury must result from inexperience or want of knowledge.— See Ash *v.* Verlanden, 154 Pa. St. 246, 26 Atl. 374.

Danger must be reasonably anticipated.— See Byrne *v.* Nye, etc., Carpet Co., 46 N. Y. App. Div. 479, 61 N. Y. Suppl. 741.

Setting a minor to do a more dangerous class of work than that for which he was employed is not negligence *per se* on the part of the master. Anderson *v.* Morrison, 22 Minn. 274.

16. Lake Shore, etc., R. Co. *v.* Baldwin, 19 Ohio Cir. Ct. 338, 10 Ohio Cir. Dec. 333.

17. Delegation of duty to fellow servant see *infra*, IV, G.

Delegation of duty to furnish safe appliances see *infra*, IV, B, 1, c.

Effect of issuance of public license to fellow servant see *infra*, IV, G, 4, b, (VI), (B), (2).

Methods of work see *infra*, IV, C, 1, a, (IV).

Selection and employment of fellow servants see *infra*, IV, G, 4, a, (III).

Warning and instructing servant see *infra*, IV, D, 1, b.

18. Corcoran *v.* Holbrook, 59 N. Y. 517, 17 Am. Rep. 369 [*citing* Flike *v.* Boston, etc., R. Co., 53 N. Y. 549, 13 Am. Rep. 545]. See also the following cases:

Alabama.— Bessemer Land, etc., Co. *v.* Campbell, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17.

Connecticut.— McElligott *v.* Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181.

Illinois.— North Chicago St. R. Co. *v.* Dudgeon, 83 Ill. App. 528 [*affirmed* in 184 Ill. 477, 56 N. E. 796].

Louisiana.— Evans *v.* Louisiana Lumber Co., 111 La. 534, 35 So. 736.

Michigan.— Sipes *v.* Michigan Starch Co., 137 Mich. 258, 100 N. W. 447.

New York.— Malone *v.* Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; Laning *v.* New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Holzman *v.* Katzman, 87 N. Y. Suppl. 478.

Pennsylvania.— Ortlip *v.* Philadelphia, etc., Traction Co., 198 Pa. St. 586; Mullan *v.* Philadelphia, etc., Steamship Co., 78 Pa. St. 25, 21 Am. Rep. 2.

Rhode Island.— See Sanford *v.* Pawtucket St. R. Co., 19 R. I. 537, 35 Atl. 67, 33 L. R. A. 564, to the effect that the rule that a railroad cannot delegate to a contractor its charter right to construct the road, so as to exempt it from liability, does not extend to the use of the ordinary means employed for its construction, but to the use of such extraordinary powers as the corporation itself could not exercise without first having complied with the conditions of its charter.

Texas.— St. Louis, etc., R. Co. *v.* Skaggs, 32 Tex. Civ. App. 363, 74 S. W. 783; Missouri, etc., R. Co. *v.* Ferch, (Civ. App. 1896) 36 S. W. 487.

United States.— Brady *v.* Chicago, etc., R. Co., 114 Fed. 100, 52 C. C. A. 48, 57 L. R. A. 712; Western Union Tel. Co. *v.* Burgess, 108 Fed. 26, 47 C. C. A. 168; Killien *v.* Hyde, 63 Fed. 172 [*reversed* on another ground in 67 Fed. 365, 14 C. C. A. 418].

England.— Murphy *v.* Smith, 19 C. B. N. S. 361, 12 L. T. Rep. N. S. 605, 115 E. C. L. 361; Grizzle *v.* Frost, 3 F. & F. 622; Clarke *v.* Holmes, 7 H. & N. 937, 8 Jur. N. S. 992, 31

f. Medical Attendance on Injured Servant.[19] It is well settled that a master has performed his entire duty in respect to furnishing medical attention to a servant injured while at work, when he employs a person of ordinary competency and skill in the profession; and, having done so, he cannot be made liable for the carelessness or negligence of the person employed in the performance of his duties.[20] So too where a hospital is maintained by a master for the sole purpose of relieving injured servants, without any intention of profit to himself, he is not liable to his servants for the malpractice of the physician employed, if ordinary care was exercised in selecting him, although the hospital is supported by the contributions of the servants.[21]

2. Relation of Parties[22] **— a. Necessity of Relation of Master and Servant.** Where, in an action for personal injuries, it is sought to charge one as master,

L. J. Exch. 356, 10 Wkly. Rep. 405; Paterson *v.* Wallace, 1 Macq. H. L. 748.

See 34 Cent. Dig. tit. "Master and Servant," § 142.

Limitation of rule.— A railway company, running its trains over another road, is liable to its employees for the negligence of the servants of the licensing road in the discharge of the absolute duties of the master, but not for negligence in the discharge of their duties as servants. Brady *v.* Chicago, etc., R. Co., 114 Fed. 100, 52 C. C. A. 48, 57 L. R. A. 712.

Although a foreman may be a fellow servant, yet when his negligence is in the failure to discharge a positive duty which the master owes to the subordinate servant, and which cannot be delegated, the fellow servant rule does not apply, and the master is responsible for the foreman's negligence. Western Union Tel. Co. *v.* Burgess, 108 Fed. 26, 47 C. C. A. 168.

Mere passive consent by a master that one servant direct another, when unaccompanied with a duty on the part of the latter to obey the directions given, will not fix liability on the master for negligent directions so given. Texas, etc., Coal Co. *v.* Manning, 34 Tex. Civ. App. 322, 78 S. W. 545.

19. Authority of servant to employ medical attendance see Principal and Agent.

Employment of physician see Physicians and Surgeons.

Medical attendance for injured seamen see Seamen.

20. *Florida.*—South Florida R. Co. *v.* Price, 32 Fla. 46, 13 So. 638.

Indiana.— Pittsburgh, etc., R. Co. *v.* Sullivan, 141 Ind. 83, 40 N. E. 138, 50 Am. St. Rep. 313, 27 L. R. A. 840; Ohio, etc., R. Co. *v.* Early, 141 Ind. 73, 40 N. E. 257, 28 L. R. A. 546. *Compare* Wabash, etc., R. Co. *v.* Kelley, 153 Ind. 119, 52 N. E. 152, 54 N. E. 752.

Iowa.— York *v.* Chicago, etc., R. Co., 98 Iowa 544, 67 N. W. 574; Eighmy *v.* Union Pac. R. Co., 93 Iowa 538, 61 N. W. 1056, 27 L. R. A. 296.

Kansas.— Atchison, etc., R. Co. *v.* Zeiler, 54 Kan. 340, 38 Pac. 282; Clark *v.* Missouri Pac. R. Co., 48 Kan. 654, 29 Pac. 1138.

Kentucky.—Louisville, etc., R. Co. *v.* Foard, 104 Ky. 456, 47 S. W. 342, 20 Ky. L. Rep. 646.

Maryland.—Baltimore, etc., R. Co. *v.* State, 41 Md. 268.

Massachusetts.— O'Brien *v.* Cunard Steamship Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329; McDonald *v.* Massachusetts Gen. Hospital, 120 Mass. 432, 21 Am. Rep. 529.

Nebraska.— Chicago, etc., R. Co. *v.* Howard, 45 Nebr. 570, 63 N. W. 872.

New York.— Laubheim *v.* De Koninglyke Neder, etc., Co., 107 N. Y. 228, 13 N. E. 781, 1 Am. St. Rep. 815.

Tennessee.— Quinn *v.* Kansas City, etc., R. Co., 94 Tenn. 713, 30 S. W. 1036, 45 Am. St. Rep. 767, 28 L. R. A. 552.

Washington.— Richardson *v.* Carbon Hill Coal Co., 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338; Richardson *v.* Carbon Hill Coal Co., 10 Wash. 648, 39 Pac. 95.

United States.— Pierce *v.* Union Pac. R. Co., 66 Fed. 44, 13 C. C. A. 323; Union Pac. R. Co. *v.* Artist, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581; Secord *v.* St. Paul, etc., R. Co., 18 Fed. 221, 2 McCrary 515.

See 34 Cent. Dig. tit. "Master and Servant," § 143.

The relation of master and servant does not exist between a master and a physician employed to care for men injured in his employment, so as to make the master liable for the physician's carelessness. He is not employed to do ordinary corporate work but to render services requiring special training, skill, and experience. Quinn *v.* Kansas City, etc., R. Co., 94 Tenn. 713, 30 S. W. 1036, 45 Am. St. Rep. 767, 28 L. R. A. 552.

21. Richardson *v.* Carbon Hill Coal Co., 10 Wash. 648, 39 Pac. 95. But *compare* Texas, etc., Coal Co. *v.* Connaughten, 20 Tex. Civ. App. 642, 50 S. W. 173, in which there was a profit to the master by reason of a reduction in the wages of the servants, in consideration of his furnishing medical attention.

22. Effect of consolidation of railroad companies see Railroads.

Injuries to third persons see *infra*, V, A, 2.

Liability of manufacturers of articles for injuries to employees of purchaser see Negligence.

Liability to purchaser of railroad for injuries inflicted before passing title see Railroads.

Persons not employees working on or about railroad cars see Railroads.

plaintiff must show that at the time of the alleged injury the relation of master and servant existed between the parties.[23] Various tests have been proposed for determining when the relation of master and servant exists so as to render the master liable to indemnify the servant for personal injuries;[24] but it is impossible

Servants of different masters in same work as fellow servant see *infra*, IV, G, 3, b, (II).

23. *Connecticut.*— Corbin *v.* American Mills, 27 Conn. 274, 71 Am. Dec. 63.

Illinois.— Western Wheel Works *v.* Stachnick, 102 Ill. App. 420; Johnson Chair Co. *v.* Agresto, 73 Ill. App. 384.

Michigan.— Lellis *v.* Michigan Cent. R. Co., 124 Mich. 37, 82 N. W. 828, 70 L. R. A. 598.

Minnesota.— Roe *v.* Winston, 86 Minn. 77, 90 N. W. 122.

Missouri.— Coleman *v.* Himmelberger-Harrison Land, etc., Co., 105 Mo. App. 254, 79 S. W. 981.

New York.— Higgins *v.* Western Union Tel. Co., 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537 [*reversing* 11 Misc. 32, 31 N. Y. Suppl. 841]; McInerney *v.* Delaware, etc., Canal Co., 151 N. Y. 411, 45 N. E. 848; Wendler *v.* Equitable L. Assur. Soc., 19 N. Y. App. Div. 50, 45 N. Y. Suppl. 866; Horton *v.* Vulcan Iron Works Co., 13 N. Y. App. Div. 508, 43 N. Y. Suppl. 699; Singer *v.* McDermott, 30 Misc. 738, 62 N. Y. Suppl. 1086 [*reversing* 61 N. Y. Suppl. 1111].

North Carolina.— Wilson *v.* Clark, 110 N. C. 364, 14 S. E. 962.

Pennsylvania.— Wieder *v.* Bethlehem Steel Co., 205 Pa. St. 186, 54 Atl. 778; Bullock *v.* Gaffigan, 100 Pa. St. 276; Anderson *v.* Pittsburgh, etc., R. Co., 5 Pa. Dist. 400.

Rhode Island.— Beehler *v.* Daniels, 19 R. I. 49, 31 Atl. 582.

Texas.— Missouri Pac. R. Co. *v.* Ivy, 71 Tex. 409, 9 S. W. 346, 10 Am. St. Rep. 758, 1 L. R. A. 500; Southern Cotton-Oil Co. *v.* Wallace, (Civ. App. 1897) 38 S. W. 1137.

United States.— Doyle *v.* Union Pac. R. Co., 147 U. S. 413, 13 S. Ct. 333, 37 L. ed. 223; The Slingsby, 120 Fed. 748, 57 C. C. A. 52 [*affirming* 116 Fed. 227].

England.— Vamplex *v.* Parkgate Iron, etc., Co., [1903] 1 K. B. 851, 67 J. P. 417, 72 L. J. K. B. 575, 88 L. T. Rep. N. S. 756, 51 Wkly. Rep. 691; Fitzpatrick *v.* Evans, [1901] 1 K. B. 756, 70 L. J. K. B. 353, 84 L. T. Rep. N. S. 233, 49 Wkly. Rep. 491.

See 34 Cent. Dig. tit. "Master and Servant," § 144.

The doctrine of respondeat superior applies only when the relation of master and servant is shown to exist between the wrong-doer and the person sought to be charged for the result of the wrong at the time and in respect to the very transaction out of which the injury arose. Higgins *v.* Western Union Tel. Co., 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537 [*reversing* 11 Misc. 32, 31 N. Y. Suppl. 841]. See also Roe *v.* Winston, 86 Minn. 77, 90 N. W. 122.

24. **To show that the relation of master and servant exists,** so as to render applicable the rule of law that the master must indemnify the servant, it must appear that the servant is acting at the time for and in the place of his master, in accordance with and representing his master's will, and not his own, and that the business which he is doing is strictly that of his master, and not in any respect his own. Corbin *v.* American Mills, 27 Conn. 274, 71 Am. Dec. 63.

For the relation to exist, so as to make the master responsible, he must not only have the power to select the servant, but to direct the mode of executing, and to so control him in his acts in the course of his employment as to prevent injuries to others. Robinson *v.* Webb, 11 Bush (Ky.) 464 [*approved* in Quinn *v.* Kansas City, etc., R. Co., 94 Tenn. 713, 30 S. W. 1036, 45 Am. St. Rep. 767, 28 L. R. A. 552]. To the same effect see Andrews *v.* Boedecker, 17 Ill. App. 213; Wiltse *v.* State Road Bridge Co., 63 Mich. 639, 30 N. W. 370; Mound City Paint, etc., Co. *v.* Conlon, 92 Mo. 221, 4 S. W. 922.

The test is whether the person holding the position of master has the control over the servant in respect to the performance of his duties; and the right to employ and discharge the servant is an element tending to show a right to control. Roe *v.* Winston, 86 Minn. 77, 90 N. W. 122.

Power to discharge held the test see Pioneer Fireproof Constr. Co. *v.* Hansen, 176 Ill. 100 52 N. E. 17 [*affirming* 69 Ill. App. 659].

A general agent may be loaned or hired to a third party for some special service, and as to that particular service he will become the servant of the third party; the test is whether, in the particular service, the servant continues liable to the direction and control of his master, or becomes subject to the party to whom he is loaned or hired. Grace, etc., Co. *v.* Probst, 208 Ill. 147, 70 N. E. 12. See also Gagnon *v.* Dana, 69 N. H. 264, 39 Atl. 982, 76 Am. St. Rep. 170, 41 L. R. A. 389; Hardy *v.* Shedden Co., 78 Fed. 610, 24 C. C. A. 261, 37 L. R. A. 33. And see Higgins *v.* Western Union Tel. Co., 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537, where it is said that a servant employed and paid by one person may nevertheless be *ad hoc* the servant of another in a particular transaction, even when the general employer is interested in the work.

Manner of payment is a circumstance to be considered, but not the criterion. Corbin *v.* American Mills, 27 Conn. 274, 71 Am. Dec. 63. See also Tennessee Coal, etc., R. Co. *v.* Hayes, 97 Ala. 201, 12 So. 98, where it was held that the fact that plaintiff's name was not on defendant's pay-roll, and that he personally received nothing from it for his labor, was immaterial, where his father was entitled to, and did, receive the compensation for his work.

to lay down any definite and satisfactory rule applicable to all cases, and the question must be determined, as it arises, upon the facts and circumstances of the particular case.[25]

b. Employment of Convict Labor.[26] Neither the state[27] nor its public officers[28] can be held liable by a convict for injuries received by him while employed during his confinement; but an individual or company which employs convict labor may be held liable;[29] and the fact that the convict is under the general charge of a state officer,[30] or that his wages go to the public,[31] does not relieve the employer of liability.

c. Independent Contractors.[32] Where the relation between the parties is that of contractor and contractee, and not that of master and servant, the contractee is not liable for injuries to the contractor's servants caused by the latter's negligence,[33] unless he has retained direction and control of the work,[34] or himself

Express contract unnecessary to create relation see Missouri, etc., R. Co. *v.* Reasor, 28 Tex. Civ. App. 302, 68 S. W. 332.

25. See the following illustrative cases:

California.— Donnelly *v.* San Francisco Bridge Co., 117 Cal. 417, 49 Pac. 559.

Illinois.— Chicago, etc., Coal Co. *v.* Moran, 210 Ill. 9, 71 N. E. 38; Chicago Economic Fuel Gas Co. *v.* Myers, 64 Ill. App. 270; St. Clair Nail Co. *v.* Smith, 43 Ill. App. 105.

Indiana.— Ft. Wayne *v.* Christie, 156 Ind. 172, 59 N. E. 385; Wabash R. Co. *v.* Kelley, 153 Ind. 119, 52 N. E. 152, 54 N. E. 752.

Kansas.— Solomon R. Co. *v.* Jones, 30 Kan. 601, 2 Pac. 657.

Kentucky.— Old Times Distillery Co. *v.* Zehnder, 52 S. W. 1051, 21 Ky. L. Rep. 753.

Massachusetts.— Olsen *v.* Andrews, 168 Mass. 261, 47 N. E. 90; Hanlon *v.* Thompson, 167 Mass. 190, 45 N. E. 88; Breen *v.* Field, 157 Mass. 277, 31 N. E. 1075; Eaton *v.* Woburn, 127 Mass. 270.

Minnesota.— Roe *v.* Winston, 86 Minn. 77, 90 N. W. 122; Wallin *v.* Eastern R. Co., 83 Minn. 149, 86 N. W. 76, 54 L. R. A. 481.

Missouri.— Reed *v.* Missouri, etc., R. Co., 94 Mo. App. 371, 68 S. W. 364.

New York.— Anderson *v.* Steinreich, 32 Misc. 680, 65 N. Y. Suppl. 799.

Ohio.— Baltimore, etc., R. Co. *v.* McCamey, 12 Ohio Cir. Ct. 543, 5 Ohio Cir. Dec. 631.

Oregon.— Ringue *v.* Oregon Coal Co., 44 Oreg. 407, 75 Pac. 703.

Texas.— Missouri, etc., R. Co. *v.* Reasor, 28 Tex. Civ. App. 302, 68 S. W. 332; Galveston, etc., R. Co. *v.* Adams, (Civ. App. 1900) 55 S. W. 803 [*affirmed* in 94 Tex. 100, 58 S. W. 831]; The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

United States.— Huntzicker *v.* Illinois Cent. R. Co., 129 Fed. 548, 64 C. C. A. 78; The Slingsby, 120 Fed. 748, 57 C. C. A. 52 [*affirming* 116 Fed. 227]; Atlantic Transport Co. *v.* Coneys, 82 Fed. 177, 28 C. C. A. 388

See 34 Cent. Dig. tit. "Master and Servant," § 144.

Where two principals unite in the performance of work for their mutual benefit, each owes to the servants of the other engaged in the work the same duty to furnish safe implements as to those employed by him directly. Hannigan *v.* Union Warehouse Co., 3 N. Y. App. Div. 618, 38 N. Y. Suppl. 272.

Hiring for undisclosed principal.— Where it is not disclosed to an employee that his employer in hiring him is acting for a third party, the employer will be answerable for negligence to the same extent as though he were a principal in the contract of hiring. Morris *v.* Malone, 200 Ill. 132, 65 N. E. 704, 93 Am. St. Rep. 180.

Question for jury see Sullivan *v.* Dunham, 35 N. Y. App. Div. 342, 54 N. Y. Suppl. 962; Wallace *v.* Southern Cotton Oil Co., 91 Tex. 18, 40 S. W. 399.

26. Application of fellow servant doctrine see *infra*, IV, G, 4, a, (I), (B).

27. Lewis *v.* State, 96 N. Y. 71, 48 Am. Rep. 607.

28. O'Hare *v.* Jones, 161 Mass. 391, 37 N. E. 371; Alamango *v.* Albany County, 25 Hun (N. Y.) 551.

29. Dade Coal Co. *v.* Haslett, 83 Ga. 549, 10 S. E. 435; Baltimore Boot, etc., Mfg. Co. *v.* Jamar, 93 Md. 404, 49 Atl. 847, 86 Am. St. Rep. 428; Hartwig *v.* Bay State Shoe, etc., Co., 43 Hun (N. Y.) 425 [*reversed* on another ground in 118 N. Y. 664, 23 N. E. 24]; Dalheim *v.* Lemon, 45 Fed. 225. *Contra*, Rayborn *v.* Patton, 11 Ohio Dec. (Reprint) 100, 24 Cinc. L. Bul. 434.

30. Chattahoochee Brick Co. *v.* Braswell, 92 Ga. 631, 18 S. E. 1015.

31. Hartwig *v.* Bay State Shoe, etc., Co., 43 Hun (N. Y.) 425 [*reversed* on another ground in 118 N. Y. 664, 23 N. E. 24].

32. Who are independent contractors see *supra*, II, A, 4, a.

33. *Indiana.*— Ault Woodenware Co. *v.* Baker, 26 Ind. App. 374, 58 N. E. 265.

Iowa.— Branstrator *v.* Keokuk, etc., R. Co., 108 Iowa 377, 79 N. W. 130.

New York.— Higgins *v.* Western Union Tel. Co., 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537 [*reversing* 11 Misc. 32, 31 N. Y. Suppl. 841].

Tennessee.— Hanna *v.* Chattanooga, etc., R. Co., 88 Tenn. 310, 12 S. W. 718, 6 L. R. A. 727.

England.— Marrow *v.* Flimby, etc., Coal, etc., Co., [1898] 2 Q. B. 588, 67 L. J. Q. B. 976, 79 L. T. Rep. N. S. 397.

See 34 Cent. Dig. tit. "Master and Servant," § 146.

34. Speed *v.* Atlantic, etc., R. Co., 71 Mo. 303; Stegeman *v.* Humbers, 2 Ohio Cir. Ct.

furnishes the machinery and appliances,[35] or unless the negligence consists in a duty which cannot be delegated.[36] And the same rules apply as between a contractor and subcontractor.[37]

d. Volunteers[38] — (I) *In General.* A person who voluntarily assumes to act as the servant of another cannot recover for personal injuries as though he were in fact a servant.[39]

(II) *Effect of Employment or Invitation by Master's Servants.*[40] The fact that a volunteer was requested or ordered by a servant of the master to give his assistance will not authorize him to recover for personal injuries on the ground that he thereby became a servant of the employer,[41] unless, by reason of his position or the necessities of the case, such servant had authority to make the request.[42] On the other hand, the fact that a person is a volunteer does not

51, 1 Ohio Cir. Dec. 356; Southern Cotton-Oil Co. *v.* Wallace, 23 Tex. Civ. App. 12, 54 S. W. 638; Bauer *v.* Richter, 103 Wis. 412, 79 N. W. 404; Schultz *v.* Chicago, etc., R. Co., 48 Wis. 375, 4 N. W. 399.

Where part of the work was done by defendant's servants and part by another company by contract with defendant, and the tools and appliances of each company were used by the other as occasion required, defendant was liable for an injury to one of its servants from the breaking of a chain belonging to the other company while being used by defendant, if the chain was unsuitable for the purpose for which it was used and the breaking resulted from that fact. Covington, etc., Bridge Co. *v.* Goodnight, 60 S. W. 415, 22 Ky. L. Rep. 1242.

35. McCall *v.* Pacific Mail Steamship Co., 123 Cal. 42, 55 Pac. 706.

36. **Delegation of duty** see *supra*, III, A, 1, e.

37. Pioneer Fireproof Constr. Co. *v.* Hansen, 176 Ill. 100, 52 N. E. 17 [*affirming* 69 Ill. App. 659]; Patton *v.* McDonald, 204 Pa. St. 517, 54 Atl. 356; Powell *v.* Virginia Constr. Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925.

38. **As affecting fellow servant rule** see *infra*, IV, G, 3, b, (III).

39. *Georgia.*—Manchester Mfg. Co. *v.* Polk, 115 Ga. 542, 41 S. E. 1015.

Indiana.— Stalcup *v.* Louisville, etc., R. Co., 16 Ind. App. 584, 45 N. E. 802.

Massachusetts.— Barstow *v.* Old Colony R. Co., 143 Mass. 535, 10 N. E. 255.

Minnesota.— Wagen *v.* Minneapolis, etc., R. Co., 80 Minn. 92, 82 N. W. 1107.

Mississippi.— New Orleans, etc., R. Co. *v.* Harrison, 48 Miss. 112, 12 Am. Rep. 356.

Missouri.— Chaney *v.* Louisiana, etc., R. Co., 176 Mo. 598, 75 N. W. 595.

Canada.— Chartier *v.* Quebec Steamship Co., 12 Quebec Super. Ct. 261.

See 34 Cent. Dig. tit. "Master and Servant," § 147.

Compare Catlett *v.* Young, 143 Ill. 74, 32 N. E. 447; McIntire R. Co. *v.* Bolton, 43 Ohio St. 224, 1 N. E. 333; Weatherford, etc., R. Co. *v.* Duncan, 88 Tex. 611, 32 S. W. 878, in which the facts did not show mere voluntary service.

40. **As affecting fellow servant rule** see *infra*, IV, G, 3, b, (IV).

41. *Alabama.*—McDaniel *v.* Highland Ave., etc., R. Co., 90 Ala. 64, 8 So. 41; Georgia Pac. R. Co. *v.* Propst, 83 Ala. 518, 3 So. 764.

Arkansas.— Hot Springs R. Co. *v.* Dial, 58 Ark. 318, 24 S. W. 500.

Georgia.— Sparks *v.* East Tennessee, etc., R. Co., 82 Ga. 156, 8 S. E. 424.

Illinois.— See Chicago, etc., R. Co. *v.* West, 125 Ill. 320, 17 N. E. 788, 8 Am. St. Rep. 380, in which an instruction as to volunteers was refused because inapplicable to the facts of the case.

Indiana.— Everhart *v.* Terre Haute, etc., R. Co., 78 Ind. 292, 41 Am. Rep. 567.

Iowa.— Hurst *v.* Chicago, etc., R. Co., 49 Iowa 76.

Kansas.— Atchison, etc., R. Co. *v.* Lindley, 42 Kan. 714, 22 Pac. 703, 16 Am. St. Rep. 515, 6 L. R. A. 646.

Kentucky.— Kentucky Cent. R. Co., *v.* Gastineau, 83 Ky. 119. But *compare* Louisville etc., R. Co. *v.* Willis, 83 Ky. 57, 4 Am. St. Rep. 124, which turned upon the fact of the minority of the alleged volunteer.

Massachusetts.—Shea *v.* Gurney, 163 Mass. 184, 39 N. E. 996, 47 Am. St. Rep. 446; Kelly *v.* Johnson, 128 Mass. 530, 35 Am. Rep. 398.

Minnesota.— Church *v.* Chicago, etc., R. Co., 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861.

Missouri.— Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423.

New Jersey.—Longa *v.* Stanley Hod Elevator Co., 69 N. J. L. 31, 54 Atl. 251.

New York.— Geibel *v.* Elwell, 19 N. Y. App. Div. 285, 46 N. Y. Suppl. 76.

Pennsylvania.— Flower *v.* Pennsylvania R. Co., 69 Pa. St. 210, 8 Am. Rep. 251.

Texas.— Texas, etc., R. Co. *v.* Skinner, 4 Tex. Civ. App. 661, 23 S. W. 1001.

Utah.— Mickelson *v.* New East Tintic R. Co., 23 Utah 42, 64 Pac. 463.

United States.— Langan *v.* Tyler, 114 Fed. 716, 51 C. C. A. 503.

See 34 Cent. Dig. tit. "Master and Servant," § 148.

But *compare* Louisville, etc., R. Co. *v.* Ward, 98 Tenn. 123, 38 S. W. 727, 60 Am. St. Rep. 848.

Master's acquiescence and silence not a ratification see Mickelson *v.* New East Tintic R. Co., 23 Utah 42, 64 Pac. 463.

42. *Alabama.*— Georgia Pac. R. Co. *v.*

deprive him of his right to be protected by the same degree of care which the master owes to other strangers.[43]

e. Traffic Arrangements and Other Contracts Between Railroads.[44] Where two railroad companies have a servant in common who is injured while working for, and under the control of, one of them, that one is liable;[45] and a servant in the general employment and pay of one road, but engaged in special services for another through an agreement between the roads, may recover from the one for whom such special services are performed for an injury received by reason of its negligence.[46] One railway company is not answerable for injuries suffered by the servants of another railway while passing over a track of the former upon a train of the latter,[47] unless such injury was caused by defects in the track or equipment, or by some negligence on the part of the servants of the former;[48] but if an injury to an employee of a railway while riding in the cars of his employer over another railway is jointly caused by the trucks or cars of the one and the track of the other, he is entitled to recover from the two in the proportion in which the cars of the one and the track of the other contributed to the injury.[49] Where, under an agreement for running continuous trains over connected roads, one company has the exclusive right to employ and discharge trainmen, and is required to repair the locomotives for both roads, it is liable for an injury to a servant caused by a defective engine, although it occurs on the other road.[50]

f. Commencement, Suspension, or Termination of Relation.[51] A master's duty to protect his servant continues so long as the latter may be said to be actu-

Propst, 83 Ala. 518, 3 So. 764, 85 Ala. 203, 4 So. 711.

California.— Davis *v.* Button, 78 Cal. 247, 18 Pac. 133, 20 Pac. 545.

Illinois.— Goff *v.* Toledo, etc., R. Co., 28 Ill. App. 529.

Iowa.— Sloan *v.* Central Iowa R. Co., 62 Iowa 728, 16 N. E. 331.

Kentucky.— Kentucky Cent. R. Co. *v.* Gastineau, 83 Ky. 119.

New York.— Marks *v.* Rochester R. Co., 77 Hun 77, 26 N. Y. Suppl. 314 [*reversed* on other points in 146 N. Y. 181, 40 N. E. 782]; Bellman *v.* New York Cent., etc., R. Co., 42 Hun 130.

Pennsylvania.— Rummell *v.* Dilworth, 111 Pa. St. 343, 2 Atl. 355, 363.

Tennessee.— Louisville, etc., R. Co. *v.* Ginley, 100 Tenn. 472, 45 S. W. 348.

Texas.— Eason *v.* Sabine, etc., R. Co., 65 Tex. 577, 57 Am. Rep. 606.

Wisconsin.— Johnson *v.* Ashland Water Co., 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243; Chamberlain *v.* Milwaukee, etc., R. Co., 11 Wis. 238.

United States.—Central Trust Co. *v.* Texas, etc., R. Co., 32 Fed. 448.

See 34 Cent. Dig. tit. "Master and Servant," § 148.

Authority implied from emergency see Louisville, etc., R. Co. *v.* Ginley, 100 Tenn. 472, 45 S. W. 348.

43. Cleveland Terminal, etc., R. Co. *v.* Marsh, 17 Ohio Cir. Ct. 1, 9 Ohio Cir. Dec. 48, in which case it appeared that the volunteer was injured by the negligence of a railroad company's servants, while traveling a walk which defendant permitted persons to use.

44. As affecting question as to who are fellow servants see *infra*, IV, G, 3, b, (II), (D).

Parties in actions for injuries see *infra*, IV, H, 1, d.

45. Dean *v.* East Tennessee, etc., R. Co., 98 Ala. 586, 13 So. 489. *Compare* Louisville, etc., R. Co. *v.* Chesapeake, etc., R. Co., 107 Ky. 191, 53 S. W. 277, 21 Ky. L. Rep. 875, in which the workmen were held to be the joint servants of the two companies at the time of the injury.

46. Missouri Pac. R. Co. *v.* Jones, 75 Tex. 151, 12 S. W. 972, 16 Am. St. Rep. 879 [*approving* the principles announced in Gulf, etc., R. Co. *v.* Dorsey, 66 Tex. 148, 18 S. W. 444, in which, however, the general employer was held liable]. See also Varny *v.* Burlington, etc., R. Co., 42 Iowa 246. *Compare* Eastern Kentucky R. Co. *v.* Powell, 33 S. W. 629, 17 Ky. L. Rep. 1051.

47. Banks *v.* Georgia R., etc., Co., 112 Ga. 655, 37 S. E. 992 [*following* Jones *v.* Georgia Southern R. Co., 66 Ga. 558, and *distinguishing* Singleton *v.* Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574; Macon, etc., R. Co. *v.* Mayes, 49 Ga. 355, 15 Am. Rep. 673]; Augusta, etc., R. Co. *v.* Killian, 79 Ga. 234, 4 S. E. 165; Swice *v.* Maysville, etc., R. Co., 116 Ky. 253, 75 S. W. 278, 25 Ky. L. Rep. 436.

48. Killian *v.* Augusta, etc., R. Co., 79 Ga. 234, 4 S. E. 165, 11 Am. St. Rep. 410; Nugent *v.* Boston, etc., R. Co., 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151. *Compare* Kelly *v.* Union Traction Co., 199 Pa. St. 322, 49 Atl. 70, construing the act of April 4, 1868, § 1.

49. Killian *v.* Augusta, etc., R. Co., 79 Ga. 234, 4 S. E. 165, 11 Am. St. Rep. 410.

50. Hurlbut *v.* Wabash R. Co., 130 Mo. 657, 31 S. W. 1051.

51. As affecting fellow servant rule see *infra*, IV, G, 3, b, (VII).

ally or constructively in his employment and under his control.[52] It arises as soon as the servant makes known his intention to commence work,[53] and is held to exist during his carriage to and from his business by his master, by consent, custom, or contract,[54] and also during his progress to his place of work along a path over his master's premises, which he and other employees are accustomed to use.[55] A mere intermission for dinner,[56] or to obtain a drink of water,[57] does not suspend the relation; but the master is not liable for injuries occurring after working hours.[58] So too where an injured servant is being transported on the master's train to a place where medical attention may be obtained, he is not an employee of the railroad company, so as to entitle him to the care which the company would owe him under other circumstances.[59] On the other hand the liability of a master to a servant does not cease — the servant not having been informed of any change — although, as between the master and a third person, a change is made by which thereafter the work is to be done for such third person;[60] nor is the relation ended by reason of the fact that one joint employer,

Scope of employment see *infra*, IV, A, 3.

52. McElligott *v.* Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181; Adams *v.* Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441.

53. Donovan *v.* Gay, 97 Mo. 440, 11 S. W. 44.

Where plaintiff's offer of work was accepted by defendant's manager, and the latter was proceeding to take him to the place where he was to work on defendant's premises, when plaintiff was injured by falling into an unguarded ditch, which he could not see for the darkness, it was held that the relation of master and servant existed and defendant was responsible for the injury. Powers *v.* Calcasieu Sugar Co., 48 La. Ann. 483, 19 So. 455.

54. Fitzpatrick *v.* New Albany, etc., R. Co., 7 Ind. 436; Bowles *v.* Indiana R. Co., 27 Ind. App. 672, 62 N. E. 94, 87 Am. St. Rep. 279; Wilson *v.* Banner Lumber Co., 108 La. 590, 32 So. 460. See also the following cases in which the fellow servant doctrine was applied so as to defeat a recovery: McQueen *v.* Central Branch Union Pac. R. Co., 30 Kan. 689, 1 Pac. 139; Kansas Pac. R. Co. *v.* Salmon, 11 Kan. 83; Gilman *v.* Eastern R. Corp., 10 Allen (Mass.) 233, 87 Am. Dec. 635; Seaver *v.* Boston, etc., R. Co., 14 Gray (Mass.) 466; Gillshannon *v.* Stony Brook R. Corp., 10 Cush. (Mass.) 228; Higgins *v.* Hannibal, etc., R. Co., 36 Mo. 418; Vick *v.* New York, etc., R. Co., 95 N. Y. 267, 47 Am. Rep. 36; Russell *v.* Hudson River R. Co., 17 N. Y. 134; Ryan *v.* Cumberland Valley R. Co., 23 Pa. St. 384; Tunney *v.* Midland R. Co., L. R. 1 C. P. 291, 12 Jur. N. S. 691. *Compare* Doyle *v.* Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770, 40 Am. St. Rep. 335, 25 L. R. A. 157.

55. Ewald *v.* Chicago, etc., R. Co., 70 Wis. 420, 36 N. W. 12, 591, 5 Am. St. Rep. 178. See also Boldt *v.* New York Cent. R. Co., 18 N. Y. 432, in which the servant was injured while walking along defendant's railroad track. *Compare* Benson *v.* Lancashire, etc., R. Co., [1904] 1 K. B. 242, 68 J. P. 149, 73 L. J. K. B. 122, 89 L. T. Rep. N. S. 715, 20 T. L. R. 139, 52 Wkly. Rep. 243. But see Baltimore, etc., R. Co. *v.* State, 33 Md. 542.

56. Heldmaier *v.* Cobbs, 195 Ill. 172, 62 N. E. 853 [*affirming* 96 Ill. App. 315]; Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; Cleveland, etc., R. Co. *v.* Martin, (Ind. App. 1895) 39 N. E. 759, 13 Ind. App. 485, 41 N. E. 1051; Boyle *v.* Columbian Fire Proofing Co., 182 Mass. 93, 64 N. E. 726; Broderick *v.* Detroit Union R. Station, etc., Co., 56 Mich. 261, 22 N. W. 802, 56 Am. Rep. 382. *Compare* Ellsworth *v.* Metheney, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389.

The facts that the servant was not actually paid for, and was not obliged to remain upon the master's premises during the dinner hour, do not necessarily take the case out of the rule. Blovelt *v.* Sawyer, [1904] 1 K. B. 271, 68 J. P. 110, 73 L. J. K. B. 155, 89 L. T. Rep. N. S. 658, 20 T. L. R. 105, 52 Wkly. Rep. 503.

Servant working during dinner hour not a volunteer see Mitchell-Tranter Co. *v.* Ehmett, 65 S. W. 835, 23 Ky. L. Rep. 1788, 55 L. R. A. 710. And see Prior *v.* Slaithwaite Spinning Co., [1898] 1 Q. B. 881, 19 Cox C. C. 54, 62 J. P. 358, 67 L. J. Q. B. 615, 78 L. T. Rep. N. S. 532, 46 Wkly. Rep. 488.

57. Jarvis *v.* Hitch, (Ind. App. 1902) 65 N. E. 608.

58. Neff *v.* Broom, 70 Ga. 256; Wink *v.* Weiler, 41 Ill. App. 336; Cincinnati, etc., R. Co. *v.* Conley, 20 S. W. 816, 14 Ky. L. Rep. 568; Baltimore, etc., R. Co. *v.* State, 33 Md. 542. *Compare* Rombough *v.* Balch, 27 Ont. App. 32.

Where the servant was changing his clothes, preparatory to going home, at the time of the accident, it was held that the relation of master and servant still existed between him and his employer. Helmke *v.* Thilmany, 107 Wis. 216, 83 N. W. 360.

59. Baltimore, etc., R. Co. *v.* State, 41 Md. 268.

60. Missouri, etc., R. Co. *v.* Ferch, 18 Tex. Civ. App. 46, 44 S. W. 317. See also Goodwin *v.* Smith, 66 S. W. 179, 23 Ky. L. Rep. 1810.

in accordance with an arrangement between himself and the other joint employer, takes upon himself the functions of a workman.[61]

g. Effect of Operation of Railroad by Receiver. A receiver operating a railroad under order of court, having exclusive control of the road and its agents and employees, is liable in his official capacity to his employees for injuries sustained through the negligent discharge of his duties by himself or his agents, in all cases where the railroad company, if it were operating the road, would also have been liable;[62] and where he voluntarily assumes the management of other property over which the court has no control he is responsible individually for its careful and proper management.[63] A receiver is not a "proprietor, owner, charterer, or hirer of a railroad," within a statute giving a right of action for injuries resulting in death, caused by the negligence of such a person or his servants or agents.[64] It has been held, however, that a receiver is a person, within a statute which gave a right of action against any person or corporation through whose wrongful act or fault death resulted, if the injury would have given cause of action to deceased had he lived;[65] and where a receiver steps out of his proper function as receiver and engages in business foreign to the administration of the property in the court, he stands, as to such business and as to all persons employed by him or having business relations with him in the conduct of such foreign business, not as a receiver in the sense that he is therein an officer of the court, but as a party *sui juris*, acting as his own principal and upon his own responsibility.[66]

3. Scope of Employment.[67] In order to render a master liable for personal injuries to his servant, the injuries must have been received in the line of the servant's duty, or, as usually expressed, within the scope of his employment;[68]

61. Rhoades *v.* Varney, 91 Me. 222, 39 Atl. 552.

62. Murphy *v.* Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633. See also Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13, 15 S. W. 214.

Where a receiver is appointed through fraud and collusion, he will be treated as the agent of the company, and an action may be brought against the company for injuries to an employee occurring under his management. Texas, etc., R. Co. *v.* Gay, 88 Tex. 111, 30 S. W. 543.

63. Kain *v.* Smith, 80 N. Y. 458 [*reversing* 11 Hun 552].

64. Turner *v.* Cross, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262; Dillingham *v.* Blake, (Tex. Civ. App. 1894) 32 S. W. 77; Dillingham *v.* Scales, (Tex. Civ. App. 1893) 24 S. W. 975; Texas, etc., R. Co. *v.* Thedens, (Tex. Civ. App. 1892) 21 S. W. 132; Bonner *v.* Thomas, (Tex. Civ. App. 1892) 20 S. W. 722; Burke *v.* Dillingham, 60 Fed. 729, 9 C. C. A. 255; Allen *v.* Dillingham, 60 Fed. 176, 8 C. C. A. 544.

65. Meara *v.* Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633. See also Little *v.* Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445, which was an action brought against a receiver of a railway company's property, for an injury resulting in death, based on a statute which provided that in every such case the person who, or the corporation which, would have been liable had death not ensued shall be liable to an action for damages.

66. Lyman *v.* Central Vermont R. Co., 59 Vt. 167, 10 Atl. 346.

67. **Acting outside scope of employment as contributory negligence** see *infra*, IV, F, 2, a, (IV), 4, a, (II), (D).

As affecting fellow servant rule see *infra*, IV, G, 3, b, (VI).

As affecting master's liability under the statutes limiting fellow servant doctrine see *infra*, IV, G, 4, b, (I).

Assumption of risk see *infra*, IV, E, 1.

Commencement, suspension, or termination of relation see *supra*, IV, A, 2, f.

Warning and instruction to servant see *infra*, IV, D.

68. *Alabama.*— Southern R. Co. *v.* Guyton, 122 Ala. 231, 25 So. 34. *Compare* Whatley *v.* Zenida Coal Co., 122 Ala. 118, 26 So. 124.

California.— Kennedy *v.* Chase, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153.

Delaware.— Chielinsky *v.* Hoopes, etc., Co., 1 Marv. 273, 40 Atl. 1127.

Georgia.— Allen *v.* Hixson, 111 Ga. 460, 36 S. E. 810; Whitton *v.* South Carolina, etc., R. Co., 106 Ga. 796, 32 S. E. 857; Central R., etc., Co. *v.* Chapman, 96 Ga. 769, 22 S. E. 273; Atlanta, etc., Air Line R. Co. *v.* Ray, 70 Ga. 674.

Illinois.— Mandel *v.* Wheeler, 59 Ill. App. 459; East St. Louis Connecting R. Co. *v.* Craven, 52 Ill. App. 415; Chicago, etc., Smelting, etc., Co. *v.* Collins, 43 Ill. App. 478.

Indiana.— Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 151, 5 N. E. 187. *Compare* Terre Haute, etc., R. Co. *v.* Fowler, 154 Ind. 682, 56 N. E. 228, 48 L. R. A. 531 (which was a case of emergency); Indiana Pipe Line, etc., Co. *v.* Neusbaum, 21 Ind. App. 1361, 52 N. E. 471.

and the rule applies as well to inexperienced and youthful as to adult and experienced employees.[69] Where the injury is sustained while the servant is acting without the scope of his regular employment at the command or request of another servant, the master is not liable,[70] unless the latter servant is, either

Kansas.— Chicago, etc., R. Co. *v.* Smith, 10 Kan. App. 162, 63 Pac. 294. *Compare* Parkinson Sugar Co. *v.* Riley, 50 Kan. 401, 31 Pac. 1090, 34 Am. St. Rep. 123.

Kentucky.— Louisville, etc., R. Co. *v.* Hocker, 111 Ky. 707, 64 S. W. 638, 23 Ky. L. Rep. 982, 65 S. W. 119, 23 Ky. L. Rep. 1274; Illinois Cent. R. Co. *v.* Dotson, 71 S. W. 636, 24 Ky. L. Rep. 1459; Mitchell-Tranter Co. *v.* Ehmett, 65 S. W. 835, 23 Ky. L. Rep. 1788, 55 L. R. A. 710; Bowling Green Stone Co. *v.* Capshaw, 64 S. W. 507, 23 Ky. L. Rep. 945. *Compare* Illinois Cent. R. Co. *v.* Mahan, 34 S. W. 16, 17 Ky. L. Rep. 1200; Collins *v.* Cincinnati, etc., R. Co., 18 S. W. 11, 13 Ky. L. Rep. 670.

Maine.— Moran *v.* Rockland, etc., St. R. Co., 99 Me. 127, 58 Atl. 676; Nelson *v.* Sanford Mills, 89 Me. 219, 36 Atl. 79.

Massachusetts.— De Souza *v.* Stafford Mills, 155 Mass. 476, 30 N. E. 81; Leistritz *v.* American Zylonite Co., 154 Mass. 382, 28 N. E. 294.

Michigan.— Lindstrand *v.* Delta Lumber Co., 65 Mich. 254, 32 N. W. 427. *Compare* Findlay *v.* Russel Wheel, etc., Co., 108 Mich. 286, 66 N. W. 50.

Minnesota.— Wagen *v.* Minneapolis, etc., R. Co., 80 Minn. 92, 82 N. W. 1107; Olson *v.* Minneapolis, etc., R. Co., 76 Minn. 149, 78 N. W. 975, 48 L. R. A. 796. *Compare* Nutzmann *v.* Germania L. Ins. Co., 82 Minn. 116, 84 N. W. 730; Rosenbaum *v.* St. Paul, etc., R. Co., 38 Minn. 173, 36 N. W. 447, 8 Am. St. Rep. 653.

Missouri.— Schaub *v.* Hannibal, etc., R. Co., 106 Mo. 74, 16 S. W. 924; Lenk *v.* Kansas, etc., Coal Co., 80 Mo. App. 374.

New Jersey.— Longa *v.* Stanley Hod Elevator Co., 69 N. J. L. 31, 54 Atl. 251.

New York.— Cowhill *v.* Roberts, 71 Hun 127, 24 N. Y. Suppl. 533 [*affirmed* in 144 N. Y. 649, 39 N. E. 493]; Sammon *v.* New York, etc., R. Co., 38 N. Y. Super. Ct. 414 [*affirmed* in 62 N. Y. 251]; Pfeiffer *v.* Ringler, 12 Daly 437. *Compare* Upton *v.* Bartlett, 13 N. Y. Suppl. 451.

South Carolina.— Davis *v.* Atlanta, etc., Air Line R. Co., 63 S. C. 370, 577, 41 S. E. 468, 892.

Texas.— Texas, etc., R. Co. *v.* Taylor, (Civ. App. 1898) 44 S. W. 892; Jackson *v.* Galveston, etc., R. Co., 14 Tex. Civ. App. 685, 37 S. W. 786.

Virginia.— Shenandoah Valley R. Co. *v.* Lucado, 86 Va. 390, 10 S. E. 422. *Compare* Virginia, etc., Wheel Co. *v.* Chalkley, 98 Va. 62, 34 S. E. 976.

United States.—Ellsworth *v.* Metheney, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389; Johnson *v.* Armour, 18 Fed. 490, 5 McCrary 629. *Compare* Union Pac. R. Co. *v.* Jarvi, 53 Fed. 65, 3 C. C. A. 433.

[69]

England.— See Smith *v.* South Normanton Colliery Co., [1903] 1 K. B. 204, 67 J. P. 381, 72 L. J. K. B. 76, 88 L. T. Rep. N. S. 5, 51 Wkly. Rep. 209; Armitage *v.* Lancashire, etc., R. Co., [1902] 2 K. B. 178, 66 J. P. 613, 71 L. J. K. B. 778, 86 L. T. Rep. N. S. 883; Whitehead *v.* Reader, [1901] 2 K. B. 48, 65 J. P. 403, 70 L. J. K. B. 546, 84 L. T. Rep. N. S. 514, 49 Wkly. Rep. 562; Holmes *v.* Great Northern R. Co., [1900] 2 Q. B. 409, 64 J. P. 532, 69 L. J. Q. B. 854, 83 L. T. Rep. N. S. 44, 48 Wkly. Rep. 681; Holness *v.* Mackay, [1899] 2 Q. B. 319, 68 L. J. Q. B. 724, 80 L. T. Rep. N. S. 831, 47 Wkly. Rep. 531; Flowers *v.* Chambers, [1899] 2 Q. B. 142, 68 L. J. Q. B. 648, 80 L. T. Rep. N. S. 834, 47 Wkly. Rep. 513; Chambers *v.* Whitehaven Harbour Com'rs, [1899] 2 Q. B. 132, 68 L. J. Q. B. 740, 80 L. T. Rep. N. S. 586, 47 Wkly. Rep. 533; Rees *v.* Thomas, [1899] 1 Q. B. 1015, 68 L. J. Q. B. 539, 80 L. T. Rep. N. S. 578, 47 Wkly. Rep. 504; Powell *v.* Brown, [1899] 1 Q. B. 157, 68 L. J. Q. B. 151, 79 L. T. Rep. N. S. 63, 47 Wkly. Rep. 145; Smith *v.* Lancashire, etc., R. Co., [1899] 1 Q. B. 141, 68 L. J. Q. B. 51, 79 L. T. Rep. N. S. 633, 47 Wkly. Rep. 146, construing the Workmen's Compensation Act of 1897.

Canada.— Finlay *v.* Miscampbell, 20 Ont. 29.

See 34 Cent. Dig. tit. "Master and Servant," § 153.

Compare Butler *v.* Chicago, etc., R. Co., 87 Iowa 206, 54 N. W. 208; Moore *v.* W. R. Pickering Lumber Co., 105 La. 504, 29 So. 990; Conley *v.* Lincoln Foundry Co., 14 Pa. Super. Ct. 626.

69. Daly *v.* H. Halleer Mfg. Co., 48 La. Ann. 214, 19 So. 116; O'Brien *v.* Western Steel Co., 100 Mo. 182, 13 S. W. 402, 18 Am. St. Rep. 536; Hillsboro Oil Co. *v.* White, (Tex. Civ. App. 1897) 41 S. W. 874; Tilly *v.* Brown, 23 Fed. Cas. No. 14,053, 1 Hayw. & H. 148. See also Kiser *v.* Hot Springs Barytes Co., 131 N. C. 595, 42 S. E. 986. But see Hayes *v.* Colchester Mills, 69 Vt. 1, 37 Atl. 269, 60 Am. St. Rep. 915.

70. *Illinois.*— Garden City Wire Spring Co. *v.* Boecher, 94 Ill. App. 96.

Iowa.— Baker *v.* Chicago, etc., R. Co., 95 Iowa 163, 63 N. W. 667.

Kentucky.— Mitchell-Tranter Co. *v.* Ehmett, 65 S. W. 835, 23 Ky. L. Rep. 1788, 55 L. R. A. 710.

Massachusetts.—Mellor *v.* Merchants' Mfg. Co., 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792.

Tennessee.— Bradley *v.* Nashville, etc., R., 14 Lea 374; Nashville, etc., R. Co. *v.* McDaniel, 12 Lea 386.

See 34 Cent. Dig. tit. "Master and Servant," § 155.

[IV, A, 3]

expressly or impliedly, authorized to make the command or request.[71] But the scope of a servant's duties is to be defined by what he was employed to perform, and by what, with the knowledge and approval of his master, he actually did perform, rather than by the mere verbal designation of his position; and where it is shown that the servants were in the habit of performing the work at which plaintiff was injured, he is not to be considered a mere volunteer.[72]

4. Particular Acts or Omissions[73] — a. Acts or Omissions of Third Persons.[74] A master is not as a rule liable for injuries to his servants caused by the acts or omissions of third persons over whom he has no control.[75] But a railroad company is liable for an injury to its servant caused by the negligence of another company while using its line of road by its permission, but without legislative authority.[76]

b. Neglect of Statutory Duty.[77] The neglect by a master of a duty imposed by statute for the protection of employees[78] is actionable negligence,[79] provided

71. *Alabama.*— Southern R. Co. *v.* Guyton, 122 Ala. 231, 25 So. 34.

Massachusetts.— Patnode *v.* Warren Cotton Mills, 157 Mass. 283, 32 N. E. 161, 34 Am. St. Rep. 275.

Michigan.— Broderick *v.* Detroit Union Railroad Station, etc., Depot Co., 56 Mich. 261, 22 N. W. 802, 56 Am. Rep. 382.

New York.— Krueger *v.* Bartholomay Brewing Co., 94 N. Y. App. Div. 58, 87 N. Y. Suppl. 1054.

Ohio.— Brown *v.* Toledo, etc., R. Co., 19 Ohio Cir. Ct. 510, 10 Ohio Cir. Dec. 278.

Texas.— De Walt *v.* Houston, etc., R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534.

United States.— See Stevens *v.* Chamberlin, 100 Fed. 378, 40 C. C. A. 421, 51 L. R. A. 513, to the effect that whether, in rendering assistance in repairing a machine at the request of the foreman, the servant injured was acting within the scope of his employment or not is immaterial.

See 34 Cent. Dig. tit. "Master and Servant," § 155.

72. Rummell *v.* Dilworth, 111 Pa. St. 343, 2 Atl. 355, 363. See also Morbey *v.* Chicago, etc., R. Co., 105 Iowa 46, 74 N. W. 751 (in which the practice did not amount to a general custom); Nutzmann *v.* Germania L. Ins. Co., 82 Minn. 116, 84 N. W. 730.

The custom of miners to visit their fellow workmen, and the acquiescence of the master in such custom, cannot be regarded as an invitation for the workmen to leave their proper places and frequent dangerous parts of the mine at the risk of the master. Wright *v.* Rawson, 52 Iowa 329, 3 N. W. 106, 35 Am. Rep. 275.

73. **Concurrent negligence of master as affecting assumption of risk** see *infra*, IV, E, 10.

Defects in appliances and places for work see *infra*, IV, B.

Giving orders see *infra*, IV, C, 3.

Injury avoidable notwithstanding contributory negligence see *infra*, IV, F, 3.

Methods of work see *infra*, IV, C, 1.

74. **Instrumentality in control of and provided by third persons** see *infra*, IV, B, 3.

75. *Illinois.*— Illinois Cent. R. Co. *v.* Quirk, 51 Ill. App. 607.

Louisiana.— Mire *v.* East Louisiana R. Co., 42 La. Ann. 385, 7 So. 473.

Mississippi.— Memphis, etc., R. Co. *v.* Thomas, 51 Miss. 637.

New York.— Reilly *v.* Parker, 11 Misc. 68, 31 N. Y. Suppl. 1014.

Wisconsin.— Muster *v.* Chicago, etc., R. Co., 61 Wis. 325, 21 N. W. 223, 50 Am. Rep. 141.

See 34 Cent. Dig. tit. "Master and Servant," § 158.

76. Central R., etc., Co. *v.* Passmore, 90 Ga. 203, 15 S. E. 760.

Warning and instructions to servant see *infra*, IV, D.

77. **Assumption of risk** see *infra*, IV, E, 1, e, (II).

Effect as to contributory negligence see *infra*, IV, F, 1, c, (II).

Furnishing appliances and places for work see *infra*, IV, B, 3, h, (II).

Methods of work see *infra*, IV, C, 1, a, (II).

78. **Duty must be imposed for protection of servants.**— Ruane *v.* Lake Shore, etc., R. Co., 64 Ill. App. 359 (holding that the signals required of trains approaching a crossing are for the protection of the public and not of the employees); Newsom *v.* Norfolk, etc., R. Co., 81 Fed. 133 (statute requiring railroads to fence their tracks not for the benefit of employees); Wright *v.* Southern R. Co., 80 Fed. 260 (ordinances limiting speed of trains not for protection of employees); Carper *v.* Norfolk, etc., R. Co., 78 Fed. 94, 23 C. C. A. 669, 35 L. R. A. 135 (fencing law not for protection of railroad employees). But see East St. Louis Connecting R. Co. *v.* Eggmann, 170 Ill. 538, 48 N. E. 981, 62 Am. St. Rep. 400 [*affirming* 65 Ill. App. 345], in which it was held that the protection intended by speed and signal ordinances extends to railroad employees.

79. **Negligence per se.**— *Illinois.*— Western Anthracite Coal, etc., Co. *v.* Beaver, 192 Ill. 333, 61 N. E. 335 [*affirming* 95 Ill. App. 95]; Pawnee Coal Co. *v.* Royce, 184 Ill. 402, 56 N. E. 621 [*reversing* 79 Ill. App. 469]; Terre Haute, etc., R. Co. *v.* Williams, 172 Ill. 379, 50 N. E. 116, 64 Am. St. Rep. 44; East St. Louis Connecting R. Co. *v.* Eggmann, 170 Ill. 538, 48 N. E. 981, 62 Am. St. Rep. 400; Kellyville Coal Co. *v.* Yehnka, 94 Ill. App. 74.

the injury is caused thereby.[80] But that a duty is imposed on the master by statute does not change the rules of law as to contributory negligence or assumption of risks by the servant, unless an intention to do so clearly appears from the statute;[81] and where a master has complied with a statute by employing a competent mine boss, or similar officer, he thereby discharges his duty to his employees so far as concern the duties required by the statute to be performed by such mine boss, and is not liable for injuries arising from his negligence.[82]

e. Unlawful Employment or Services — (I) *In General.* Where a servant is injured while voluntarily engaged in an unlawful employment or service, he cannot recover from his master.[83]

(II) *Employment of Minors.*[84] Where a master employs a minor child contrary to the provisions of a statute prohibiting or regulating such employment, he is liable for injuries received by the child by reason of the employment;[85] and cannot set up his violation of the statute as a defense to an action for negligence.[86] Nor is it a defense to such an action that the employment of the child is made a misdemeanor by the statute.[87]

d. Wilful Injury by Master.[88] Where a servant is injured by reason of the wilful negligence of the master, the latter is liable.[89]

Indiana.— Brower *v.* Locke, 31 Ind. App. 353, 67 N. E. 1015; Diamond Block Coal Co. *v.* Cuthbertson, (App. 1903) 67 N. E. 558; Bodell *v.* Brazil Block Coal Co., 25 Ind. App. 654, 58 N. E. 856.

Iowa.— Mosgrove *v.* Zimbleman Coal Co., 110 Iowa 169, 81 N. W. 227.

Louisiana.— Clements *v.* Louisiana Electric Light Co., 44 La. Ann. 692, 11 So. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43.

North Carolina.— Greenlee *v.* Southern R. Co., 122 N. C. 977, 30 S. E. 115, 65 Am. St. Rep. 734, 41 L. R. A. 399.

Wisconsin.— Klatt *v.* N. C. Foster Lumber Co., 97 Wis. 641, 73 N. W. 563.

England.— Baddeley *v.* Granville, 19 Q. B. D. 423, 51 J. P. 822, 56 L. J. Q. B. 501, 57 L. T. Rep. N. S. 268, 36 Wkly. Rep. 63.

Canada.— Curran *v.* Grand Trunk R. Co., 25 Ont. App. 407.

See 34 Cent. Dig. tit. "Master and Servant," § 159.

That a penalty is imposed will not affect the liability, unless it is given to the party injured. Klatt *v.* N. C. Foster Lumber Co., 97 Wis. 641, 73 N. W. 563. See also Groves *v.* Wimborne, [1898] 2 Q. B. 402, 67 L. J. Q. B. 862, 79 L. T. Rep. N. S. 284, 47 Wkly. Rep. 87.

80. Stewart *v.* Ferguson, 34 N. Y. App. Div. 515, 54 N. Y. Suppl. 615; Stephen *v.* Stevens, 21 N. Y. Suppl. 721; Christner *v.* Cumberland, etc., Coal Co., 146 Pa. St. 67, 23 Atl. 221.

81. Anderson Co. *v.* C. N. Nelson Lumber Co., 67 Minn. 79, 69 N. W. 630.

82. Williams *v.* Thacker Coal, etc., Co., 44 W. Va. 599, 30 S. E. 107, 40 L. R. A. 812.

83. Wallace *v.* Cannon, 38 Ga. 199, 95 Am. Dec. 385. See also Jordan *v.* Hovey, 72 Mo. 574, 37 Am. Rep. 447.

84. Employment and care of minors generally see *supra*, IV, A, 1, d.

85. *Illinois.*— Marquette Third Vein Coal Co. *v.* Dielie, 110 Ill. App. 684, construing Mining Act, § 22.

Minnesota.— Perry *v.* Tozer, 90 Minn. 431, 97 N. W. 137, 101 Am. St. Rep. 416, construing Laws (1895), p. 386, c. 171.

New York.— Young *v.* Eugene Dietzgen Co., 176 N. Y. 590, 68 N. E. 1126 [*affirming* 72 N. Y. App. Div. 618, 76 N. Y. Suppl. 123] (construing Laws (1897), c. 415, § 79); Marino *v.* Lehmaier, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811 [*affirming* 72 N. Y. Suppl. 1118] (construing Laws (1897), c. 415, § 70); Lowry *v.* Anderson, 96 N. Y. App. Div. 465, 89 N. Y. Suppl. 107 (construing Laws (1897), c. 415, §§ 79, 162); Gallenkamp *v.* Garvin Mach. Co., 91 N. Y. App. Div. 141, 86 N. Y. Suppl. 378 (construing Laws (1897), c. 415, § 81).

Ohio.— E. P. Breckenridge Co. *v.* Reagan, 22 Ohio Cir. Ct. 71, 12 Ohio Cir. Dec. 50, construing Rev. St. § 6986-1.

Tennessee.— Ornamental Iron, etc., Co. *v.* Green, 108 Tenn. 161, 65 S. W. 399, construing Acts (1893), c. 159.

Canada.— See Roberts *v.* Taylor, 31 Ont. 10, to the effect that there must be evidence to connect the violation of the statute with the accident.

86. Dion *v.* Richmond Mfg. Co., 24 R. I. 187, 52 Atl. 889.

87. Marino *v.* Lehmaier, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811 [*affirming* 72 N. Y. Suppl. 1118]. See also Ornamental Iron, etc., Co. *v.* Green, 108 Tenn. 161, 65 S. W. 399.

88. Assessment of damages see *infra*, IV, H, 4.

89. Louisville, etc., R. Co. *v.* York, 128 Ala. 305, 30 So. 676 (construing Code, § 1749); Odin Coal Co. *v.* Denman, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45 [*affirming* 84 Ill. App. 190]; Riverton Coal Co. *v.* Shepherd, 111 Ill. App. 294; Girard Coal Co. *v.* Wiggins, 52 Ill. App. 69; Cincinnati, etc., R. Co. *v.* Sampson, 97 Ky. 65, 30 S. W. 12, 16 Ky. L. Rep. 819; Louisville, etc., R. Co. *v.* Potts, 92 Ky. 30, 17 S. W. 185, 13 Ky. L. Rep. 344; Claxton *v.* Lexington, etc., R. Co., 13 Bush (Ky.) 636; Shumacher *v.* St. Louis,

5. Cause and Probability of Injury[90]**—a. Proximate or Remote Cause.** A master's liability for personal injury to a servant depends upon whether or not his negligence was the proximate cause of the injury.[91] A master is not liable for injuries to a servant caused by a combination of several causes, where none of the alleged causes of the injury is alone sufficient to render him liable,[92] or where the evidence does not show which of several possible causes, some of which do not involve negligence on the part of the master, produced the injury;[93] and the same is true where the cause of injury is purely conjectural.[94] But where the master's negligence is the efficient cause of the injury, he is liable, although his negligence is combined with some ulterior cause;[95] and the fact that the negligence of a third person contributes to that of the master in causing the injury is no defense, if the injury would not have occurred but for the master's negligence.[96] So too the fact that the injury might have occurred in the same manner in the absence of negligence on the part of the master is no defense where it was in fact caused by his negligence.[97]

b. Accidental or Improbable Injury.[98] For an injury which results from pure accident, or from causes which could not be reasonably anticipated, unaccompanied by want of ordinary care on the part of the master, he is not liable.[99] But the fact that an accident was so unusual and extraordinary that it could not

etc., R. Co., 39 Fed. 174. *Compare* Sangamon Coal Min. Co. *v.* Wiggerhaus, 122 Ill. 279, 13 N. E. 648; Filbin *v.* Chesapeake, etc., R. Co., 91 Ky. 444, 16 S. W. 92, 13 Ky. L. Rep. 14.

Wilful negligence is negligence so gross in character as to amount to recklessness, and to indicate a willingness to subject employees to a known or avoidable risk, and a failure to use ordinary care does not necessarily include the elements of wilfulness. Girard Coal Co. *v.* Wiggins, 52 Ill. App. 69.

Any conscious omission or failure to comply with a statutory duty provided for the protection of employees in a dangerous calling is wilful. Riverton Coal Co. *v.* Shepherd, 111 Ill. App. 294. See also Odin Coal Co. *v.* Denman, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45 [*affirming* 84 Ill. App. 190].

Direct intent not necessary to wilfulness see Shumacher *v.* St. Louis, etc., R. Co., 39 Fed. 174.

Low bridge.— The maintenance by a railroad of a bridge over its track at such a height as to endanger the lives of brakemen on freight cars is wilful negligence. Cincinnati, etc., R. Co. *v.* Sampson, 97 Ky. 65, 30 S. W. 12, 16 Ky. L. Rep. 819. *Contra*, Louisville, etc., R. Co. *v.* Banks, 104 Ala. 508, 16 So. 547.

90. **Appliances and places for work** see *infra*, IV, H, 9.

Concurrent negligence of master and fellow servant see *infra*, IV, G, 4, a, (IV).

Contributory negligence see *infra*, IV, F.

Incompetency of fellow servants see *infra*, IV, G, 4, a, (III).

Methods of work see *infra*, IV, C, 1, (VII).

Negligence of fellow servant see *infra*, IV, G, 4, a, (V).

Number and supervision of fellow servants see *infra*, IV, G, 4, a, (II).

Rules see *infra*, IV, C, 2, g.

Warning and instructing servant see *infra*, IV, D, 1, h.

91. See *infra*, IV, B, 9.

92. Creswell *v.* Wilmington, etc., R. Co., 2 Pennew. (Del.) 210, 43 Atl. 629.

93. Kenneson *v.* East End St. R. Co., 168 Mass. 1, 46 N. E. 114.

94. Owen *v.* Illinois Cent. R. Co., 77 Miss. 142, 24 So. 899. See also Jacobson *v.* Smith, 123 Iowa 263, 98 N. W. 773; Dominion Cartridge Co. *v.* McArthur, 31 Can. Sup. Ct. 392; Stamer *v.* Hall Mines, 6 Brit. Col. 579; Farmer *v.* Grand Trunk R. Co., 21 Ont. 299; Brunell *v.* Canadian Pac. R. Co., 15 Ont. 375; Brown *v.* Waterous Engine Works Co., 8 Ont. L. Rep. 37.

95. Malott *v.* Hood, 99 Ill. App. 360; New York, etc., R. Co. *v.* Green, 90 Tex. 257, 38 S. W. 31 [*affirming* 36 S. W. 812]; Texas, etc., R. Co. *v.* McClane, 24 Tex. Civ. App. 321, 62 S. W. 565; Galveston, etc., R. Co. *v.* Lynch, 22 Tex. Civ. App. 336, 55 S. W. 389.

96. Neal *v.* St. Louis, etc., R. Co., 71 Ark. 445, 78 S. W. 220; Larkin *v.* Washington Mills Co., 45 N. Y. App. Div. 6, 61 N. Y. Suppl. 93.

97. Denver, etc., R. Co. *v.* Smock, 23 Colo. 456, 48 Pac. 681.

98. **Hidden dangers** see *infra*, IV, B, 7, d.

Improper or unusual use or test see *infra*, IV, B, 8.

Knowledge of consequences of defects see *infra*, IV, B, 7, a.

Latent defects see *infra*, IV, B, e.

99. *California.*— Rodgers *v.* Central Pac. R. Co., 67 Cal. 607, 8 Pac. 377.

Georgia.— Stewart *v.* Seaboard Air Line R. Co., 115 Ga. 624, 41 S. E. 981; Richmond, etc., R. Co. *v.* Dickey, 90 Ga. 491, 16 S. E. 212; East Tennessee, etc., R. Co. *v.* Suddeth, 86 Ga. 388, 12 S. E. 682; Lee *v.* Central R., etc., Co., 86 Ga. 231, 12 S. E. 307.

Illinois.— Earnshaw *v.* Western Stone Co., 200 Ill. 200, 65 N. E. 661 [*affirming* 98 Ill. App. 538]; Webster Mfg. Co. *v.* Nisbett, 87 Ill. App. 551; Independent Tug Line *v.* Jacobson, 84 Ill. App. 684; Acme Coal Co. *v.*

reasonably have been expected to happen does not relieve the master from the effect of his negligence,[1] and where the injury is such as might have been reasonably anticipated, he is liable.[2] In England, under the Workmen's Compensation Act of 1897, a master is liable for an injury caused by an "accident" arising out of and in the course of the servant's employment.[3]

Kusnir, 71 Ill. App. 446; Illinois Steel Co. *v.* Trafas, 69 Ill. App. 87; Armour *v.* Ryan, 61 Ill. App. 314; Elgin, etc., R. Co. *v.* Malaney, 59 Ill. App. 114; Chicago, etc., R. Co. *v.* Dunn, 23 Ill. App. 148.

Indiana.— Standard Oil Co. *v.* Helmick, 148 Ind. 457, 47 N. E. 14; Wabash, etc., R. Co. *v.* Locke, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193.

Iowa.— Duree *v.* Chicago, etc., R. Co., 118 Iowa 640, 92 N. W. 890; McKee *v.* Chicago, etc., R. Co., 83 Iowa 616, 50 N. W. 209, 13 L. R. A. 817; Koontz *v.* Chicago, etc., R. Co., 65 Iowa 224, 21 N. W. 577, 54 Am. Rep. 5.

Kansas.—McQueen *v.* Central Branch Union Pac. R. Co., 30 Kan. 689, 1 Pac. 139; Union Pac. R. Co. *v.* Mahaffy, 4 Kan. App. 88, 46 Pac. 187.

Kentucky.— Lee *v.* Chesapeake, etc., R. Co., 38 S. W. 509, 18 Ky. L. Rep. 829.

Louisiana.—Henry *v.* Brackenridge Lumber Co., 48 La. Ann. 950, 20 So. 221; Smith *v.* Sellars, 40 La. Ann. 527, 4 So. 333.

Massachusetts.— Jones *v.* Granite Mills, 126 Mass. 84, 30 Am. Rep. 661.

Michigan.— Viets *v.* Toledo, etc., R. Co., 55 Mich. 120, 20 N. W. 818; Sjogren *v.* Hall, 53 Mich. 274, 18 N. W. 812; Richards *v.* Rough, 53 Mich. 212, 18 N. W. 785.

Minnesota.— Murphy *v.* Great Northern R. Co., 68 Minn. 526, 71 N. W. 662.

Missouri.— Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434; Hysell *v.* Swift, 78 Mo. App. 39.

Montana.— Kelley *v.* Cable Co., 8 Mont. 440, 20 Pac. 669.

Nebraska.— Erb *v.* Eggleston, 41 Nebr. 860, 60 N. W. 98.

New Jersey.— Coyle *v.* A. A. Griffing Iron Co., 62 N. J. L. 540, 41 Atl. 680.

New York.— Mancuso *v.* Cataract Constr. Co., 87 Hun 519, 34 N. Y. Suppl. 273; Knox *v.* New York, etc., R. Co., 69 Hun 93, 23 N. Y. Suppl. 198; Martin *v.* Cook, 60 Hun 577, 14 N. Y. Suppl. 329 [*affirmed* in 142 N. Y. 654, 37 N. E. 569]; Dillon *v.* Sixth Ave. R. Co., 48 N. Y. Super. Ct. 283.

North Carolina.—Bingham *v.* Carolina Cent. R. Co., 130 N. C. 623, 41 S. E. 807; Raiford *v.* Wilmington, etc., R. Co., 130 N. C. 597, 41 S. W. 806; Crutchfield *v.* Richmond, etc., R. Co., 76 N. C. 320.

Ohio.— Scanlon *v.* Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 256; Shailer, etc., Co. *v.* Corcoran, 21 Ohio Cir. Ct. 639, 11 Ohio Cir. Dec. 599.

Pennsylvania.— Johnston *v.* Youghiogheny River Coal Co., 183 Pa. St. 623, 39 Atl. 10; Walton *v.* Bryn Mawr Hotel Co., 160 Pa. St. 3, 28 Atl. 438.

Tennessee.— Coal Creek Min. Co. *v.* Davis, 90 Tenn. 711, 18 S. W. 387.

Texas.— Gulf, etc., R. Co. *v.* Wood, (Civ. App. 1901) 63 S. W. 164; Gulf, etc., R. Co. *v.* Wittig, (Civ. App. 1896) 35 S. W. 857.

Virginia.— Persinger *v.* Alleghany Ore, etc., Co., 102 Va. 350, 46 S. E. 325.

Washington.— Watts *v.* Hart, 7 Wash. 178, 34 Pac. 423, 711.

Wisconsin.— Schultz *v.* Chicago, etc., R. Co., 67 Wis. 616, 31 N. W. 221, 58 Am. Rep. 881. See also McGowan *v.* Chicago, etc., R. Co., 91 Wis. 147, 64 N. W. 891.

United States.— Hough *v.* Texas, etc., R. Co., 100 U. S. 213, 25 L. ed. 612; Hunter *v.* Kansas City, etc., R., etc., Co., 85 Fed. 379, 29 C. C. A. 206; McCain *v.* Chicago, etc., R. Co., 76 Fed. 125, 22 C. C. A. 99; Saunders *v.* The Coleridge, 72 Fed. 676; Central Trust Co. *v.* East Tennessee, etc., R. Co., 68 Fed. 635; The Ida B. Cothell, 62 Fed. 765, 10 C. C. A. 634; Melville *v.* Missouri River, etc., R. Co., 48 Fed. 820; Grant *v.* Union Pac. R. Co., 45 Fed. 673; Nelson *v.* Allen Paper Car-Wheel Co., 29 Fed. 840; The Henry P. Dewey, 12 Fed. 159; The Cynosure, 6 Fed. Cas. No. 3,529; Haugh *v.* Texas, etc., R. Co., 11 Fed. Cas. No. 6,221.

See 34 Cent. Dig. tit. "Master and Servant," § 163.

An accident is an event from an unknown cause, or an unusual and unexpected event from a known cause — a chance or casualty. Crutchfield *v.* Richmond, etc., R. Co., 76 N. C. 320.

The mere fact of injury raises no presumption of negligence. Scanlon *v.* Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 256.

Failure to anticipate improbable danger is not negligence. Standard Oil Co. *v.* Helmick, 148 Ind. 457, 47 N. E. 14.

Injury caused by act of God see Rodgers *v.* Central Pac. R. Co., 67 Cal. 607, 8 Pac. 377; Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434.

1. Doyle *v.* Chicago, etc., R. Co., 77 Iowa 607, 42 N. W. 555, 4 L. R. A. 420; Reed *v.* Missouri, etc., R. Co., 94 Mo. App. 371, 68 S. W. 364; El Paso, etc., R. Co. *v.* McComus, 36 Tex. Civ. App. 170, 81 S. W. 760.

2. Geller *v.* Briscoe Mfg. Co., 136 Mich. 330, 99 N. W. 281; Craver *v.* Christian, 34 Minn. 397, 26 N. W. 8; Lilly *v.* New York Cent., etc., R. Co., 107 N. Y. 566, 14 N. E. 503.

3. Fenton *v.* Thorley, [1903] A. C. 443, 72 L. J. K. B. 787, 89 L. T. Rep. N. S. 314, 52 Wkly. Rep. 81; Andrew *v.* Failsworth Industrial Soc., [1904] 2 K. B. 32, 68 J. P. 409, 73 L. J. K. B. 510, 90 L. T. Rep. N. S. 611, 20 T. L. R. 429, 52 Wkly. Rep. 451; Higgins *v.* Campbell, [1904] 1 K. B. 328, 68 J. P. 193, 73 L. J. K. B. 158, 89 L. T. Rep. N. S. 660, 20 T. L. R. 129, 52 Wkly. Rep. 195; Boardman *v.* Scott, [1902] 1 K. B. 43, 66 J. P. 260, 71 L. J. K. B. 3, 85 L. T. Rep.

6. Persons Liable[4] — a. In General. It may be broadly stated that in no case can the master be held liable for an injury to his servant, unless negligence or fault can be imputed to him.[5]

b. Joint and Several Liability.[6] Where a servant is injured by reason of the concurrent negligence of several parties, they are jointly and severally liable.[7]

7. Contracts Affecting Liability[8] — a. Nature and Validity — (i) *In General.* A contract between master and servant, before the happening of an injury, whereby the servant, in consideration of the employment, or of the wages, agrees to release and discharge his master from liability on account of injuries caused by the negligence of his master or of the latter's servants, is void as against public policy,[9]

N. S. 502, 50 Wkly. Rep. 184; Hensey *v.* White, [1900] 1 Q. B. 481, 63 J. P. 804, 69 L. J. Q. B. 188, 81 L. T. Rep. N. S. 767, 48 Wkly. Rep. 257; Thompson *v.* Ashington Coal Co., 65 J. P. 356, 84 L. T. Rep. N. S. 412; Timmins *v.* Leeds Forge Co., 83 L. T. Rep. N. S. 120.

The word "accident" in section 1 of the Workmen's Compensation Act of 1897, involves the idea of something fortuitous and unexpected. Hensey *v.* White, [1900] 1 Q. B. 481, 63 J. P. 804, 69 L. J. Q. B. 188, 81 L. T. Rep. N. S. 767, 48 Wkly. Rep. 257.

Overstrain or over-exertion held an "accident" see Fenton *v.* Thorley, [1903] A. C. 443, 72 L. J. K. B. 787, 89 L. T. Rep. N. S. 314, 52 Wkly. Rep. 81 [*approving* Stewart *v.* Wilson, etc., Coal Co., 5 Fraser 120, and *disapproving* Hensey *v.* White, [1900] 1 Q. B. 481, 63 J. P. 804, 69 L. J. Q. B. 188, 81 L. T. Rep. N. S. 767, 48 Wkly. Rep. 257; Roper *v.* Greenwood, 83 L. T. Rep. N. S. 471].

4. Liability of partners see Partnership.

5. Mauer *v.* Ferguson, 17 N. Y. Suppl. 349; Clarke *v.* Holmes, 7 H. & N. 937, 8 Jur. N. S. 992, 31 L. J. Exch. 356, 10 Wkly. Rep. 405; Barton's Hill Coal Co. *v.* Reid, 4 Jur. N. S. 767, 3 Macq. H. L. 266, 6 Wkly. Rep. 664.

6. Parties in actions for injuries see *infra*, IV, E, 1, d.

7. *Illinois.*— Wisconsin Cent. R. Co. *v.* Ross, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49 [*affirming* 43 Ill. App. 454]; Consolidated Ice Mach. Co. *v.* Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696 [*affirming* 26 Ill. App. 466].

Indiana.— Hoosier Stone Co. *v.* McCain, 133 Ind. 231, 31 N. E. 956.

Iowa.— Vary *v.* Burlington, etc., R. Co., 42 Iowa 246.

Louisiana.—Carey *v.* Courcelle, 17 La. Ann. 108.

Minnesota.— Dieters *v.* St. Paul Gaslight Co., 86 Minn. 474, 91 N. W. 15.

New Hampshire.— Story *v.* Concord, etc., R. Co., 70 N. H. 364, 48 Atl. 288.

New York.— Scarff *v.* Metcalf, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. Rep. 807; Kain *v.* Smith, 80 N. Y. 458.

Ohio.— Pennsylvania R. Co. *v.* Snyder, 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. Rep. 700; Pennsylvania R. Co. *v.* Meyers, 12 Ohio Cir. Ct. 263, 4 Ohio Cir. Dec. 280. *Compare* McGatrick *v.* Wason, 4 Ohio St. 566, holding that if the owner of goods, in shipping them, has no control over the process, which is entirely in the hands of the master of the vessel, an action for an injury sustained by one employed by the owner to assist in shipping the goods, by reason of a defect in the tackle unknown to the servant, and which, by the use of ordinary care, might have been cured, should be brought against the master alone, unless the duty lies wholly upon the owner, or is jointly divided between him and the shipmaster.

Texas.— San Antonio Waterworks Co. *v.* White, (Civ. App. 1898) 44 S. W. 181; Southwestern Tel., etc., Co. *v.* Crank, (Civ. App. 1894) 27 S. W. 38; Galveston, etc., R. Co. *v.* Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486.

Wisconsin.— Olson *v.* Phœnix Mfg. Co., 103 Wis. 337, 79 N. W. 409.

See 34 Cent. Dig. tit. "Master and Servant," § 165.

Compare Caledonian R. Co. *v.* Mulholland, [1898] A. C. 216, 67 L. J. P. C. 1, 77 L. T. Rep. N. S. 570, 46 Wkly. Rep. 236.

8. Contracts by parent affecting child see Parent and Child.

Discharge of claim by accord and satisfaction see Accord and Satisfaction, 1 Cyc. 305.

Injuries to seamen see Seamen.

Release of liability incurred see Release.

9. *Alabama.*— Richmond, etc., R. Co. *v.* Jones, 92 Ala. 218, 9 So. 276; Louisville, etc., R. Co. *v.* Orr, 91 Ala. 548, 8 So. 360; Hissong *v.* Richmond, etc., R. Co., 91 Ala. 514, 8 So. 776.

Arkansas.— Little Rock, etc., R. Co. *v.* Eubanks, 48 Ark. 460, 3 S. W. 808, 3 Am. St. Rep. 245.

Illinois.— Himrod Coal Co. *v.* Clark, 197 Ill. 514, 64 N. E. 282 [*affirming* 99 Ill. App. 332]; St. Louis Consol. Coal Co. *v.* Lundak, 196 Ill. 594, 63 N. E. 1079 [*affirming* 97 Ill. App. 109]; Mt. Olive, etc., Coal Co. *v.* Herbeck, 92 Ill. App. 441 [*affirmed* in 190 Ill. 39, 60 N. E. 105]; Chicago, etc., Coal Co. *v.* Peterson, 39 Ill. App. 114. See also Fairbank Canning Co. *v.* Innes, 24 Ill. App. 33 [*affirmed* in 125 Ill. 410, 17 N. E. 720].

Kansas.— Kansas Pac. R. Co. *v.* Peavey, 29 Kan. 169, 44 Am. Rep. 630.

New York.— Simpson *v.* New York Rubber Co., 80 Hun 415, 30 N. Y. Suppl. 339; Runt *v.* Herring, 2 Misc. 105, 21 N. Y. Suppl. 244. *Compare* Purdy *v.* Rome, etc., R. Co., 125

especially where such contracts are forbidden by statute,[10] or where the liability is of statutory origin.[11] It has been held, however, that in the absence of a statutory prohibition,[12] an express or sleeping car-company may, as a condition of employment, require an employee to release it from all liability, including indemnifying contracts with the railroads for negligence of its agents and servants

N. Y. 209, 26 N. E. 255, 21 Am. St. Rep. 736 [*affirming* 52 Hun 267, 5 N. Y. Suppl. 217], in which the contract was made after the service had begun, and was held void for want of consideration. The court declined to express an opinion as to whether the contract was against public policy.

Ohio.— Lake Shore, etc., R. Co. *v.* Spangler, 44 Ohio St. 471, 8 N. E. 467, 58 Am. Rep. 833. But see Little Miami R. Co. *v.* Stevens, 20 Ohio 415.

Texas.— Gulf, etc., R. Co. *v.* Darby, 28 Tex. Civ. App. 413, 67 S. W. 446. See also Missouri, etc., R. Co. *v.* Wood, (Civ. App. 1896) 35 S. W. 879, to the effect that a stipulation in a contract of employment between a railroad company and a brakeman, requiring the latter not to attempt to couple cars unless he knows the coupling is in proper condition, is not binding, so as to require him to perform the master's duty of seeing that its appliances are in proper condition.

Vermont.— Tarbell *v.* Rutland R. Co., 73 Vt. 347, 51 Atl. 6, 87 Am. St. Rep. 734, 56 L. R. A. 656, in which the contract was made by the next of kin of the servant.

Virginia.— Johnson *v.* Richmond, etc., R. Co., 86 Va. 975, 11 S. E. 829.

United States.— Roesner *v.* Hermann, 8 Fed. 782, 10 Biss. 486.

See 34 Cent. Dig. tit. "Master and Servant," § 166.

Contra.— Mitchell *v.* Pennsylvania R. Co., 1 Am. L. Reg. (Pa.) 717, in which, however, the injury was due to the negligence of a fellow servant, and the validity of the contract seems not to have been questioned.

In Georgia a servant may assume all risks, save such as arise from criminal negligence (Fulton Bag, etc., Mills *v.* Wilson, 89 Ga. 318, 15 S. E. 322; Western, etc., R. Co. *v.* Strong, 52 Ga. 461; Western, etc., R. Co. *v.* Bishop, 50 Ga. 465); but any negligence, either of omission or commission, on the part of other servants of a railroad company, in connection with their business, from which injury results, constitutes criminal negligence, and a contract waiving a right to sue for injuries resulting therefrom is contrary to public policy (Cook *v.* Western, etc., R. Co., 72 Ga. 48).

Printed rules of a mining company, posted in the mine, warning workmen against risking themselves under bad roofs, and requiring them to ascertain whether places had been made safe before entering them, in so far as they can be claimed to operate as a contract against negligence, are void. Himrod Coal Co. *v.* Clark, 197 Ill. 514, 64 N. E. 282 [*affirming* 99 Ill. App. 332]. See also St. Louis Consol. Coal Co. *v.* Lundak, 196 Ill. 594, 63 N. E. 1079 [*affirming* 97 Ill. App. 109].

Waiver of liability for results of disobedience.— Where a railroad company by rule forbids its brakeman going between freight cars to couple them, and provides that coupling must be done by means of a stick, the company is not liable for the death of a brakeman who, in consideration of employment, signed a written recognition of such rule, waiving all liability of the company to him for any results of disobedience, when it appears that he understood what he was signing, and the company providing the necessary coupling stick. Russell *v.* Richmond, etc., R. Co., 47 Fed. 204.

Injuries during carriage to and from work. — A contract between a street-car company and its servant, contained in a free pass ticket, limiting its liability for injuries received by him while riding to and from work on its cars is not against public policy. Peterson *v.* Seattle Traction Co., 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586.

10. **N. C. Priv. Laws (1897), c. 56, § 2,** providing that any contract, express or implied, made by any employee of a railroad company to waive the benefit of section 1 of such act, which gives him a right of action for injury caused by defective machinery or negligence of a fellow servant, shall be null and void, is constitutional. Coley *v.* North Carolina R. Co., 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817, 128 N. C. 534, 39 S. E. 43.

Mass. Pub. St. c. 74, § 3, which prohibits contracts between master and servant releasing the master from liability, is not contravened by an application for employment, by which the servant undertakes to make a careful examination of all things near to the railroad tracks, so that he may understand the dangers attending them. Quinn *v.* New York, etc., R. Co., 175 Mass. 150, 55 N. E. 891.

11. Hissong *v.* Richmond, etc., R. Co., 91 Ala. 514, 8 So. 776; Mt. Olive, etc., Coal Co. *v.* Herbeck, 92 Ill. App. 441 [*affirmed* in 190 Ill. 39, 60 N. E. 105]; Chicago, etc., Coal Co. *v.* Peterson, 39 Ill. App. 114; Kansas Pac. R. Co. *v.* Peavey, 29 Kan. 169, 44 Am. Rep. 630; Simpson *v.* New York Rubber Co., 80 Hun (N. Y.) 415, 30 N. Y. Suppl. 339. But see De Young *v.* Irving, 5 N. Y. App. Div. 499, 38 N. Y. Suppl. 1089, holding that an employee in a factory may waive the protection afforded by Laws (1892), c. 673, § 8, providing that "no woman under twenty-one years of age, shall be allowed to clean machinery while in motion."

12. Mexican Nat. R. Co. *v.* Jackson, 118 Fed. 549, 55 C. C. A. 315 (construing Tex. Laws (1897), Spec. Sess. p. 14); O'Brien *v.* Chicago, etc., R. Co., 116 Fed. 502 (construing Iowa Code, §§ 2071, 2074, and Iowa Acts, 27th Gen. Assembl. c. 49).

and of other carriers. Contracts of this character, it is said, do not contravene public policy.[13]

(II) *Contracts Providing For Benefits From Relief Association.* A contract whereby an employee agrees, on becoming a member of his employer's relief association, that the acceptance of relief therefrom, on being injured, shall bar his right of action against his employer for the injury, is not void as against public policy,[14] nor for want of consideration or mutuality;[15] and the acceptance of benefits under such a contract bars an action for damages.[16] There is no waiver of any right of action that the person injured may thereafter be entitled

13. Pittsburgh, etc., R. Co. *v.* Mahony, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 62 Am. St. Rep. 503, 40 L. R. A. 101; McDermon *v.* Southern Pac. Co., 122 Fed. 669.

14. *Georgia.*— Petty *v.* Brunswick, etc., R. Co., 109 Ga. 666, 35 S. E. 82.

Illinois.— Eckman *v.* Chicago, etc., R. Co., 169 Ill. 312, 48 N. E. 496, 28 L. R. A. 750 [*affirming* 64 Ill. App. 444].

Indiana.— Pittsburgh, etc., R. Co. *v.* Hosea, 152 Ind. 412, 53 N. E. 419; Pittsburgh, etc., R. Co. *v.* Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638 [*disapproving* Pittsburgh, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301, 69 L. R. A. 875].

Iowa.— Maine *v.* Chicago, etc., R. Co., 109 Iowa 260, 70 N. W. 630, 80 N. W. 315; Donald *v.* Chicago, etc., R. Co., 93 Iowa 284, 61 N. W. 971, 33 L. R. A. 492.

Maryland.— See Spitze *v.* Baltimore, etc., R. Co., 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378.

Nebraska.— Oyster *v.* Burlington Relief Dept., 65 Nebr. 789, 91 N. W. 699, 59 L. R. A. 291; Chicago, etc., R. Co. *v.* Curtis, 51 Nebr. 442, 71 N. W. 42, 66 Am. St. Rep. 456; Chicago, etc., R. Co. *v.* Bell, 44 Nebr. 44, 62 N. W. 314.

New Jersey.— Beck *v.* Pennsylvania R. Co., 63 N. J. L. 232, 43 Atl. 908, 76 Am. St. Rep. 211.

Ohio.— Pittsburgh, etc., R. Co. *v.* Cox, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 507.

Pennsylvania.— Ringle *v.* Pennsylvania R. Co., 164 Pa. St. 529, 30 Atl. 492, 44 Am. St. Rep. 628; Johnson *v.* Philadelphia, etc., R. Co., 163 Pa. St. 127, 29 Atl. 854; Graft *v.* Baltimore, etc., R. Co., 5 Pa. Cas. 94, 8 Atl. 206.

South Carolina.— Johnson *v.* Charleston, etc., R. Co., 55 S. C. 152, 32 S. E. 2, 33 S. E. 174, 44 L. R. A. 645.

United States.— Shaver *v.* Pennsylvania Co., 71 Fed. 931; Otis *v.* Pennsylvania Co., 71 Fed. 136; Owens *v.* Baltimore, etc., R. Co., 35 Fed. 715, 1 L. R. A. 75.

Canada.— Ferguson *v.* Grand Trunk R. Co., 20 Quebec Super. Ct. 54.

See 34 Cent. Dig. tit. "Master and Servant," § 167.

15. Petty *v.* Brunswick, etc., R. Co., 109 Ga. 666, 35 S. E. 82; Pittsburgh, etc., R. Co. *v.* Cox, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 507; Otis *v.* Pennsylvania Co., 71 Fed. 136.

16. *Georgia.*— Carter *v.* Brunswick, etc., R. Co., 115 Ga. 853, 42 S. E. 239; Petty *v.* Brunswick, etc., R. Co., 109 Ga. 666, 35 S. E. 82.

Illinois.— Eckman *v.* Chicago, etc., R. Co., 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750 [*affirming* 64 Ill. App. 444].

Indiana.— Pittsburgh, etc., R. Co. *v.* Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638 [*disapproving* Pittsburgh, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301, 69 L. R. A. 875]; Lease *v.* Pennsylvania Co., 10 Ind. App. 47, 37 N. E. 423.

Iowa.— Maine *v.* Chicago, etc., R. Co., 109 Iowa 260, 70 N. W. 630, 80 N. W. 315; Donald *v.* Chicago, etc., R. Co., 93 Iowa 284, 61 N. W. 971, 33 L. R. A. 492.

Maryland.— Fuller *v.* Baltimore, etc., Assoc., 67 Md. 433, 10 Atl. 237.

Nebraska.— Chicago, etc., R. Co. *v.* Curtis, 51 Nebr. 442, 71 N. W. 42, 66 Am. St. Rep. 456; Chicago, etc., R. Co. *v.* Bell, 44 Nebr. 44, 62 N. W. 314.

New Jersey.— Beck *v.* Pennsylvania R. Co., 63 N. J. L. 232, 43 Atl. 908, 76 Am. St. Rep. 211.

Ohio.— Pittsburgh, etc., R. Co. *v.* Cox, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 507; Farrow *v.* Pittsburgh, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 582, 7 Ohio N. P. 606.

Pennsylvania.— Ringle *v.* Pennsylvania R. Co., 164 Pa. St. 529, 30 Atl. 492, 44 Am. St. Rep. 628; Johnson *v.* Philadelphia, etc., R. Co., 163 Pa. St. 127, 28 Atl. 854.

South Carolina.— Johnson *v.* Charleston, etc., R. Co., 55 S. C. 152, 32 S. E. 2, 33 S. E. 174, 44 L. R. A. 645.

United States.— Shaver *v.* Pennsylvania Co., 71 Fed. 931; Otis *v.* Pennsylvania Co., 71 Fed. 136; Maryland *v.* Baltimore, etc., R. Co., 36 Fed. 655; Owens *v.* Baltimore, etc., R. Co., 35 Fed. 715, 1 L. R. A. 75.

See 34 Cent. Dig. tit. "Master and Servant," § 167.

But *compare* Dover *v.* Mississippi River, etc., R. Co., 100 Mo. App. 330, 73 S. W. 298.

That the employee contributes to the association is immaterial. Lease *v.* Pennsylvania Co., 10 Ind. App. 47, 37 N. E. 423.

The acceptance by the wife of benefits due from a relief association after her husband's death through the negligence of the railroad company does not bar a recovery for such wrongful death for the decedent's child, under Burns Rev. St. Ind. (1894) § 285. Pittsburgh R. Co. *v.* Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638.

to. It is not the signing of the contract but the acceptance of benefits after the accident that constitutes the release. The injured party therefore is not stipulating for the future, but settling for the past; he is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby.[17]

b. Construction and Operation. Contracts between master and servant affecting the master's liability for personal injuries will not, unless the intention to do so is manifest,[18] be construed so as to give a right of action which would not otherwise exist,[19] or to defeat a right which would exist but for the contract.[20] Where an injured employee agrees to accept a certain sum per week until he shall have sufficiently recovered to return to his work, in satisfaction of all claims for damages, the contract means that the payments shall not cease until he shall have sufficiently recovered to return to work of a similar character to that in which he had been engaged.[21]

c. Avoidance. It is no ground for the avoidance of a contract of release that the employee signed it without reading it or understanding its import, and that he was at a disadvantage in dealing with his employer, in the absence of any evidence of fraud, misrepresentation, or undue influence;[22] nor, under a contract to elect between the benefits of a relief association and his right of action, can an employee who has accepted such benefits avoid the effect of such acceptance on the ground that he was not aware, at the time of receiving the benefits, of the strength of his case or of the witnesses by whom it could be established.[23]

d. Waiver by Master. Where an employee enters into an agreement with his employer waiving all liability for injuries resulting from any infraction of a rule of the employer, an order by the employer's representative to the employee to disregard the rule is a waiver of the agreement.[24]

B. Tools, Machinery, Appliances, and Places For Work[25] — **1. In General — a. Rule Stated.**[26] It is the positive duty of a master to furnish his servant with

17. Johnson *v.* Philadelphia, etc., R. Co., 163 Pa. St. 127, 29 Atl. 854.

18. Contracts held to defeat recovery see Fulton Bag, etc., Mills *v.* Wilson, 89 Ga. 318, 15 S. E. 322; Galloway *v.* Western, etc., R. Co., 57 Ga. 512; Hendricks *v.* Western, etc., R. Co., 52 Ga. 467; Western, etc., R. Co. *v.* Strong, 52 Ga. 461.

Accident within risks assumed by master see Phillips *v.* Michaels, 11 Ind. App. 672, 39 N. E. 669.

19. The assumption by the master of all risks of accident does not include injuries caused by contributory negligence. Phillips *v.* Michaels, 11 Ind. App. 672, 39 N. E. 669.

20 A contract releasing from future liability will not be construed, in the absence of an express provision therefor, to apply to a claim for personal injuries sustained before the contract was made. Hughson *v.* Richmond, etc., R. Co., 2 App. Cas. (D. C.) 98. See St. Louis Southwestern R. Co. *v.* Arnold, 32 Tex. Civ. App. 272, 74 S. W. 819.

The release of one railroad company from liability for an injury sustained by a collision between trains of two different companies does not operate to release the other company, in the absence of any showing that the released company was in any way liable for the injury, or that the servant ever claimed that it was. Kentucky, etc., Bridge Co. *v.* Hall, 125 Ind. 220, 25 N. E. 219.

21. Springfield Iron Co. *v.* McIntyre, 72 Ill. App. 444. See also Pierce *v.* Tennessee Coal, etc., Co., 173 U. S. 1, 19 S. Ct. 335, 43 L. ed. 591 [*reversing* 81 Fed. 814, 26 C. C. A. 632].

22. New York Cent., etc., R. Co. *v.* Difendaffer, 125 Fed. 893, 62 C. C. A. 1; Vickers *v.* Chicago, etc., R. Co., 71 Fed. 139.

Evidence held not to show coercion see Eckman *v.* Chicago, etc., R. Co., 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750 [*affirming* 64 Ill. App. 444].

23. Vickers *v.* Chicago, etc., R. Co., 71 Fed. 139.

24. Mason *v.* Richmond, etc., R. Co., 111 N. C. 482, 16 S. E. 698, 32 Am. St. Rep. 814, 18 L. R. A. 845.

25. Accidental or improbable injury see *supra*, IV, A, 5, b.

Assumption of risk see *infra*, IV, E, 2.

Concurrent negligence of master and fellow servant see *infra*, IV, G, 4, a, (IV).

Concurrent negligence of master and servant as affecting assumption of risk see *infra*, IV, E, 10.

Contributory negligence of servant injured see *infra*, IV, F.

Liability of employer of independent contractor see *infra*, V, B, 3, b.)

Method of work, rules, and orders see *infra*, IV, C.

Negligence of fellow servant performing duties of master see *infra*, IV, G, 4, a, (IX).

Warning and instructions to servant see *infra*, IV, D.

26. Assumption of risk see *infra*, IV, E, 2.

reasonably safe instrumentalities wherewith, and places wherein, to do his work,[27]

Covering and guarding dangerous places see *infra*, IV, B, 5.

Negligence of fellow servants performing duties of master see *infra*, IV, G, 4, a, b.

Particular appliances see *infra*, IV, B, 4.

Particular ways or places see *infra*, IV, B, 4.

27. *Alabama.*— Code (1896), § 1749, subs. 1, makes a master liable for injuries received by a servant owing to any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master. See Davis *v.* Kornman, 141 Ala. 479, 37 So. 789; Sloss-Sheffield Steel, etc., Co. *v.* Mobley, 139 Ala. 425, 36 So. 181; Houston Biscuit Co. *v.* Dial, 135 Ala. 168, 33 So. 268; Southern R. Co. *v.* Moore, 128 Ala. 434, 29 So. 659; Clements *v.* Alabama Great Southern R. Co., 127 Ala. 166, 28 So. 643; U. S. Rolling Stock Co. *v.* Weir, 96 Ala. 396, 11 So. 436; Anniston Pipe-Works *v.* Dickey, 93 Ala. 418, 9 So. 720.

Arkansas.— Little Rock, etc., R. Co. *v.* Duffey, 35 Ark. 602.

California.— Silveira *v.* Iversen, 128 Cal. 187, 60 Pac. 687; McAlpine *v.* Laydon, 115 Cal. 68, 46 Pac. 865; Pacheco *v.* Judson Mfg. Co., 113 Cal. 541, 45 Pac. 833; Mullin *v.* California Horseshoe Co., 105 Cal. 77, 38 Pac. 535; Jager *v.* California Bridge Co., 104 Cal. 542, 38 Pac. 413; McNamara *v.* MacDonough, 102 Cal. 575, 36 Pac. 941; Malone *v.* Hawley, 46 Cal. 409. See also Roche *v.* Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147; Corletti *v.* Southern Pac. Co., 136 Cal. 642, 69 Pac. 422.

Colorado.— Greeley *v.* Foster, 32 Colo. 292, 75 Pac. 351; Empson Packing Co. *v.* Vaughn, 27 Colo. 66, 59 Pac. 749; Roche *v.* Denver, etc., R. Co., 19 Colo. App. 204, 73 Pac. 880.

Connecticut.—Rincicotti *v.* John J. O'Brien Contracting Co., 77 Conn. 617, 60 Atl. 115, 69 L. R. A. 936; Julian *v.* Stony Creek Red Granite Co., 71 Conn. 632, 42 Atl. 994; McElligott *v.* Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181.

Dakota.— Herbert *v.* Northern Pac. R. Co., 3 Dak. 38, 13 N. W. 349, construing Civ. Code, §§ 1130, 1131.

Delaware.—Karczewski *v.* Wilmington City R. Co., 4 Pennew. 24, 54 Atl. 746; Strattner *v.* Wilmington City Electric Co., 3 Pennew. 245, 53 Atl. 436; Croker *v.* Pusey, etc., Co., 3 Pennew. 1, 50 Atl. 61; Stewart *v.* Philadelphia, etc., R. Co., 8 Houst. 450, 17 Atl. 639. See also Maul *v.* Queen Anne's R. Co., 1 Pennew. 561, 42 Atl. 990.

District of Columbia.— Staubley *v.* Potomac Electric Power Co., 21 App. Cas. 160; Washington Asphalt Block, etc., Co. *v.* Mackey, 15 App. Cas. 410.

Florida.— Green *v.* Sanson, 41 Fla. 94, 25 So. 332.

Georgia.— Riverside Mills *v.* Jones, 121 Ga. 33, 48 S. E. 700; Babcock Bros. Lumber Co. *v.* Johnson, 120 Ga. 1030, 48 S. E. 438; Jackson *v.* Merchants', etc., Transp. Co., 118 Ga. 651, 45 S. E. 254.

Illinois.— Libby *v.* Banks, 209 Ill. 109, 70 N. E. 599 [*affirming* 110 Ill. App. 330]; Barnett, etc., Record Co. *v.* Schlapka, 208 Ill. 426, 70 N. E. 343 [*affirming* 110 Ill. App. 672]; Morton *v.* Zwierzykowski, 192 Ill. 328, 61 N. E. 413 [*affirming* 91 Ill. App. 462]; Union Bridge Co. *v.* Teehan, 190 Ill. 374, 60 N. E. 533 [*affirming* 92 Ill. App. 259]; Ashley Wire Co. *v.* Mercier, 163 Ill. 486, 45 N. E. 222; Illinois Steel Co. *v.* Schymanowski, 162 Ill. 447, 44 N. E. 876 [*affirming* 59 Ill. App. 32]; Chicago, etc., R. Co. *v.* Swett, 45 Ill. 197, 92 Am. Dec. 206; Pressed Steel Car Co. *v.* Herath, 110 Ill. App. 596; Decatur Cereal Mill Co. *v.* Gogerty, 80 Ill. App. 632; Tudor Iron Works *v.* Weber, 31 Ill. App. 306 [*affirmed* in 129 Ill. 535, 21 N. E. 1078]. See also Ryan *v.* Armour, 166 Ill. 568, 47 N. E. 60 [*affirming* 67 Ill. App. 102]; Huffer *v.* Herman, 66 Ill. App. 481; Parlin, etc., Co. *v.* Finfrouck, 65 Ill. App. 174; Chicago, etc., R. Co. *v.* Du Bois, 65 Ill. App. 142; Eckels *v.* Chicago Ship Bldg. Co., 63 Ill. App. 436.

Indiana.— Consolidated Stone Co. *v.* Morgan, 160 Ind. 241, 66 N. E. 696; Big Creek Stone Co. *v.* Wolf, 138 Ind. 496, 38 N. E. 52; Pennsylvania Co. *v.* Whitcomb, 111 Ind. 212, 12 N. E. 380; Bradbury *v.* Goodwin, 108 Ind. 286, 9 N. E. 302; Indiana Car Co. *v.* Parker, 100 Ind. 181; Nordyke, etc., Co. *v.* Van Sant, 99 Ind. 188; Indiana, etc., Coal Co. *v.* Batey, 34 Ind. App. 16, 71 N. E. 191; Indiana Mfg. Co. *v.* Wells, 31 Ind. App. 460, 68 N. E. 319; Indiana Pipe Line, etc., Co. *v.* Neusbaum, 21 Ind. App. 361, 52 N. E. 471; Baltimore, etc., R. Co. *v.* Amos, 20 Ind. App. 378, 49 N. E. 854; Lauter *v.* Duckworth, 19 Ind. App. 535, 48 N. E. 864; Pennsylvania Co. *v.* Witte, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377.

Indian Territory.— Purcell Mill, etc., Co. *v.* Kirkland, 2 Indian Terr. 169, 47 S. W. 311.

Iowa.— Fosburg *v.* Phillips Fuel Co., 93 Iowa 54, 61 N. W. 400; Haworth *v.* Seevers Mfg. Co., 87 Iowa 765, 51 N. W. 68, 62 N. W. 325. See also Miniter *v.* Chicago, etc., R. Co., 122 Iowa 46, 96 N. W. 1108.

Kansas.— Cudahy Packing Co. *v.* Sedlack, 69 Kan. 472, 77 Pac. 102; Emporia *v.* Kowalski, 66 Kan. 64, 71 Pac. 232; Mirick *v.* Morton, 62 Kan. 870, 64 Pac. 609; Atchison, etc., R. Co. *v.* McKee, 37 Kan. 592, 15 Pac. 484.

Kentucky.— Quaid *v.* Cornwall, 13 Bush 601; Buey *v.* Chess, etc., Co., 84 S. W. 563, 27 Ky. L. Rep. 198; Conrad Tanning Co. *v.* Munsey, 76 S. W. 841, 25 Ky. L. Rep. 936.

Louisiana.— Bonnin *v.* Crowley, 112 La. 1025, 36 So. 842; Collins *v.* H. F. Lewis, etc., Co., 111 La. 741, 35 So. 886; Broadfoot *v.* Shreveport Cotton Oil Co., 111 La. 467, 35 So. 643; Budge *v.* Morgan's, Louisiana, etc., R., etc., Co., 108 La. 349, 32 So. 535, 58 L. R. A. 333; Gaulden *v.* Kansas City, etc., R. Co., 106 La. 409, 30 So. 889.

Maine.— Dixon *v.* Swift, 98 Me. 207, 56 Atl. 761; Cowett *v.* American Woolen Co., 97 Me. 543, 55 Atl. 494; Drapeau *v.* International Paper Co., 96 Me. 299, 52 Atl. 647;

and in the performance of these obligations imposed by law, it is essential that

Sawyer *v.* Rumford Falls Paper Co., 90 Me. 354, 38 Atl. 318, 60 Am. St. Rep. 260. See also Bessey *v.* Newichawanick Co., 94 Me. 61, 46 Atl. 806.

Maryland.— Hearn *v.* Quillen, 94 Md. 39, 50 Atl. 402; Hanrathy *v.* Northern Cent. R. Co., 46 Md. 280; Wonder *v.* Baltimore, etc., R. Co., 32 Md. 411, 3 Am. Rep. 143.

Massachusetts.— Foster *v.* New York, etc., R. Co., 187 Mass. 21, 72 N. E. 331; Fay *v.* Wilmarth, 183 Mass. 71, 66 N. E. 410; Slattery *v.* Walker, etc., Mfg. Co., 179 Mass. 307, 60 N. E. 782; Austin *v.* Fitchburg R. Co., 172 Mass. 484, 52 N. E. 527; Ellis *v.* Pierce, 172 Mass. 220, 51 N. E. 974; Hanlon *v.* Thompson, 167 Mass. 190, 45 N. E. 88; Geloneck *v.* Dean Steam Pump Co., 165 Mass. 202, 43 N. E. 85; McCauley *v.* Norcross, 155 Mass. 584, 30 N. E. 464; Gustafsen *v.* Washburn, etc., Mfg. Co., 153 Mass. 468, 27 N. E. 179; Rice *v.* King Philip Mills, 144 Mass. 229, 11 N. E. 101, 59 Am. Rep. 80. See also Nye *v.* Dutton, 187 Mass. 549, 73 N. E. 654; Gauges *v.* Fitchburg R. Co., 185 Mass. 76, 69 N. E. 1063; Alvey *v.* American Writing Paper Co., 184 Mass. 234, 68 N. E. 333; Brundige *v.* Dodge Mfg. Co., 183 Mass. 100, 66 N. E. 604; Morris *v.* Walworth Mfg. Co., 181 Mass. 326, 63 N. E. 910; Wyman *v.* Clark, 180 Mass. 173, 62 N. E. 245; Haskell *v.* Cape Ann Anchor Works, 178 Mass. 485, 59 N. E. 1113, 4 L. R. A. N. S. 220; Harnois *v.* Cutting, 174 Mass. 398, 54 N. E. 842; McKay *v.* Hand, 168 Mass. 270, 47 N. E. 104; Whittaker *v.* Bent, 167 Mass. 588, 46 N. E. 121; Dolan *v.* Atwater, 167 Mass. 274, 45 N. E. 742; May *v.* Whittier Mach. Co., 154 Mass. 29, 27 N. E. 768; Palmer *v.* Lawrence Mfg. Co., 12 Allen 69.

Michigan.— Swoboda *v.* Ward, 40 Mich. 420. See also Wachsmuth *v.* Shaw Electric Crane Co., 118 Mich. 275, 76 N. W. 497; Hennig *v.* Globe Foundry Co., 112 Mich. 616, 71 N. W. 156; Voigt *v.* Michigan Peninsular Car Co., 112 Mich. 504, 70 N. W. 1103.

Minnesota.— Vant Hul *v.* Great Northern R. Co., 90 Minn. 329, 96 N. W. 789; Morris *v.* Eastern R. Co., 88 Minn. 112, 92 N. W. 535; Jacobson *v.* Johnson, 87 Minn. 185, 91 N. W. 465; Dieters *v.* St. Paul Gaslight Co., 86 Minn. 474, 91 N. W. 15; Gray *v.* Commutator Co., 85 Minn. 463, 89 N. W. 322; Attix *v.* Minnesota Sandstone Co., 85 Minn. 142, 88 N. W. 436; Stiller *v.* Bohn Mfg. Co., 80 Minn. 1, 82 N. W. 981; Pruke *v.* South Park Foundry, etc., Co., 68 Minn. 305, 71 N. W. 276. See also Gittens *v.* William Porten Co., 90 Minn. 512, 97 N. W. 378; Bell *v.* Lang, 83 Minn. 228, 86 N. W. 95.

Mississippi.— White *v.* Louisville, etc., R. Co., 72 Miss. 12, 16 So. 248.

Missouri.— Goransson *v.* Riter-Conley Mfg. Co., 186 Mo. 300, 85 S. W. 338; Lore *v.* American Mfg. Co., 160 Mo. 608, 61 S. W. 678; Hoepper *v.* Southern Hotel Co., 142 Mo. 378, 44 S. W. 257; Dayharsh *v.* Hannibal, etc., R. Co., 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900; Gibson *v.* Pacific R. Co., 46 Mo. 163, 2 Am. Rep. 497; McDermott *v.* Pacific R. Co., 30 Mo. 115; Dean *v.* St. Louis Woodenware Works, 106 Mo. App. 167, 80 S. W. 292; Robbins *v.* Big Circle Min. Co., 105 Mo. App. 78, 79 S. W. 480; Reichla *v.* Gruensfelder, 52 Mo. App. 43; Muirhead *v.* Hannibal, etc., R. Co., 19 Mo. App. 634; McMillan *v.* Union Press-Brick Works, 6 Mo. App. 434. See also Furber *v.* Kansas City Bolt, etc., Co., 185 Mo. 301, 84 S. W. 890; Chandler *v.* Kansas City Missouri Gas Co., 174 Mo. 321, 73 S. W. 502, 97 Am. St. Rep. 570, 62 L. R. A. 474; Anderson *v.* Forrester-Nace Box Co., 103 Mo. App. 382, 77 S. W. 486; Beckman *v.* Anheuser-Busch Brewing Assoc., 98 Mo. App. 555, 72 S. W. 710.

Montana.— Kelley *v.* Fourth of July Min. Co., 16 Mont. 484, 41 Pac. 273.

Nebraska.— Huffman *v.* Newman, 55 Nebr. 713, 76 N. W. 409; Ecklund *v.* Chicago, etc., R. Co., 52 Nebr. 729, 73 N. W. 224.

New Hampshire.— Edwards *v.* Tilton Mills, 70 N. H. 574, 50 Atl. 102.

New Jersey.— Burns *v.* Delaware, etc., Tel. Co., 70 N. J. L. 745, 59 Atl. 220, 592, 67 L. R. A. 956; Tompkins *v.* Marine Engine, etc., Co., 70 N. J. L. 330, 58 Atl. 393; McDonald *v.* Standard Oil Co., 69 N. J. L. 445, 55 Atl. 289.

New York.— Welle *v.* Celluloid Co., 175 N. Y. 401, 67 N. E. 609 [*reversing* 52 N. Y. App. Div. 522, 65 N. Y. Suppl. 370]; Rosa *v.* Volkening, 173 N. Y. 590, 65 N. E. 1122 [*affirming* 64 N. Y. App. Div. 426, 72 N. Y. Suppl. 236]; Dorney *v.* O'Neill, 172 N. Y. 595, 64 N. E. 1120 [*affirming* 60 N. Y. App. Div. 19, 69 N. Y. Suppl. 729]; Yaw *v.* Whitmore, 167 N. Y. 605, 60 N. E. 1123 [*affirming* 46 N. Y. App. Div. 422, 61 N. Y. Suppl. 731]; Stimper *v.* Fuchs, etc., Mfg. Co., 161 N. Y. 636, 57 N. E. 1125 [*affirming* 26 N. Y. App. Div. 333, 49 N. Y. Suppl. 785]; Doing *v.* New York, etc., R. Co., 151 N. Y. 579, 45 N. E. 1028 [*reversing* 73 Hun 270, 26 N. Y. Suppl. 405]; De Graff *v.* New York Cent., etc., R. Co., 76 N. Y. 125; McConnell *v.* Morse Iron Works, etc., Co., 102 N. Y. App. Div. 324, 92 N. Y. Suppl. 477; Wood *v.* New York Cent., etc., R. Co., 93 N. Y. App. Div. 53, 86 N. Y. Suppl. 817; Leaux *v.* New York, 87 N. Y. App. Div. 405, 84 N. Y. Suppl. 511; Muhlens *v.* Obermeyer, 83 N. Y. App. Div. 88, 82 N. Y. Suppl. 527; Wagner *v.* New York, etc., R. Co., 76 N. Y. App. Div. 552, 78 N. Y. Suppl. 696; Fink *v.* Slade, 66 N. Y. App. Div. 105, 72 N. Y. Suppl. 821; Butler *v.* New York, etc., R. Co., 42 N. Y. App. Div. 280, 58 N. Y. Suppl. 1061; Dodd *v.* Bell, 15 N. Y. App. Div. 258, 44 N. Y. Suppl. 198; Garety *v.* King, 9 N. Y. App. Div. 443, 41 N. Y. Suppl. 633; Tomaselli *v.* John Griffiths Cycle Corp., 9 N. Y. App. Div. 127, 41 N. Y. Suppl. 51; Boardman *v.* Brown, 44 Hun 336; Dunn *v.* Connell, 20 Misc. 727, 46 N. Y. Suppl. 684. See also Welsh *v.* Cornell, 168 N. Y. 508, 61 N. E. 891; Cowhill *v.* Roberts, 144 N. Y.

regard should be had not only to the character of the work to be performed but

649, 39 N. E. 493 [*affirming* 71 Hun 127, 24 N. Y. Suppl. 533]; Baker *v.* Empire Wire Co., 102 N. Y. App. Div. 125, 92 N. Y. Suppl. 355; Hackett *v.* Masterson, 88 N. Y. App. Div. 73, 84 N. Y. Suppl. 751; Bookman *v.* Masterson, 83 N. Y. App. Div. 4, 81 N. Y. Suppl. 962; Corbett *v.* St. Vincent's Industrial School, 79 N. Y. App. Div. 334, 79 N. Y. Suppl. 369; Brown *v.* Terry, 67 N. Y. App. Div. 223, 73 N. Y. Suppl. 733; Hesketh *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 78, 55 N. Y. Suppl. 898; D'Arcy *v.* Long Island R. Co., 34 N. Y. App. Div. 275, 54 N. Y. Suppl. 553; Sullivan *v.* Third Ave. R. Co., 19 N. Y. App. Div. 195, 45 N. Y. Suppl. 1083; Doyle *v.* White, 9 N. Y. App. Div. 521, 35 N. Y. Suppl. 760, 41 N. Y. Suppl. 628 [*affirming* 35 N. Y. Suppl. 760]; Whallon *v.* Sprague Electric Elevator Co., 1 N. Y. App. Div. 264, 37 N. Y. Suppl. 174; Smith *v.* Empire Transp. Co., 89 Hun 588, 35 N. Y. Suppl. 534; Griffiths *v.* New Jersey, etc., R. Co., 5 Misc. 320, 25 N. Y. Suppl. 812 [*affirmed* in 8 Misc. 3, 28 N. Y. Suppl. 75]; Rikel *v.* Ferguson, 5 N. Y. Suppl. 774 [*affirmed* in 117 N. Y. 658, 22 N. E. 1134]; Van Horn *v.* Boston, etc., R. Co., 4 N. Y. St. 782; Cooke *v.* Lalance, etc., Mfg. Co., 1 N. Y. St. 590.

North Carolina.— Womble *v.* Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493; Marks *v.* Harriet Cotton Mills, 135 N. C. 287, 47 S. E. 432; Myers *v.* Concord Lumber Co., 129 N. C. 252, 39 S. E. 960; Wright *v.* Southern R. Co., 122 N. C. 959, 30 S. E. 348; Hardy *v.* Carolina Cent. R. Co., 76 N. C. 5.

North Dakota.— Boss *v.* Northern Pac. R. Co., 2 N. D. 128, 49 N. W. 655, 33 Am. St. Rep. 756.

Ohio.— See Scanlon *v.* Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 256.

Oregon.— Miller *v.* Inman, 40 Oreg. 161, 66 Pac. 713; Anderson *v.* Bennett, 16 Oreg. 515, 19 Pac. 765, 8 Am. St. Rep. 311; Stone *v.* Oregon City Mfg. Co., 4 Oreg. 52. See also Duntley *v.* Inman, 42 Oreg. 334, 70 Pac. 529, 59 L. R. A. 785.

Pennsylvania.— Finnerty *v.* Burnham, 205 Pa. St. 305, 54 Atl. 996; Winters *v.* Boll, 204 Pa. St. 41, 53 Atl. 529; Honifus *v.* Chambersburg Engineering Co., 196 Pa. St. 47, 46 Atl. 259; Vanesse *v.* Catsburg Coal Co., 159 Pa. St. 403, 28 Atl. 200. See also Faber *v.* Carlisle Mfg. Co., 126 Pa. St. 387, 17 Atl. 621.

Rhode Island.— Collins *v.* Harrison, 25 R. I. 489, 56 Atl. 678, 64 L. R. A. 156; Disano *v.* New England Steam Brick Co., 20 R. I. 452, 40 Atl. 7. See also Briggs *v.* Callender, etc., Co., 23 R. I. 359, 50 Atl. 653.

South Carolina.— Koon *v.* Southern R. Co., 69 S. C. 101, 48 S. E. 86; Carson *v.* Southern R. Co., 68 S. C. 55, 46 S. E. 525 [*affirmed* in 194 U. S. 136, 24 S. Ct. 609, 48 L. ed. 907]; Sims *v.* Southern R. Co., 66 S. C. 520, 45 S. E. 90; Rinake *v.* Victor Mfg. Co., 58 S. C. 360, 36 S. E. 700. See also Gunter *v.* Graniteville Mfg. Co., 15 S. C. 443.

Tennessee.— Central Mfg Co. *v.* Cotton, 108 Tenn. 63, 65 S. W. 403; Whitelaw *v.* Memphis, etc., R. Co., 16 Lea 391, 1 S. W. 37. See also National Fertilizer Co. *v.* Travis, 102 Tenn. 16, 49 S. W. 832.

Texas.— Galveston, etc., R. Co. *v.* Delahunty, 53 Tex. 206; San Antonio Foundry Co. *v.* Drish, (Civ. App. 1905) 85 S. W. 440; St. Louis, etc., R. Co. *v.* Arnold, (Civ. App. 1903) 74 S. W. 819; Gulf, etc., R. Co. *v.* Hayden, 29 Tex. Civ. App. 280, 68 S. W. 530; Wells *v.* Page, 29 Tex. Civ. App. 489, 68 S. W. 528; Ladonia Cotton Oil Co. *v.* Shaw, 27 Tex. Civ. App. 65, 65 S. W. 693; Galveston, etc., R. Co. *v.* Newport, 26 Tex. Civ. App. 583, 65 S. W. 657; Gulf, etc., R. Co. *v.* Delaney, 22 Tex. Civ. App. 427, 55 S. W. 538; San Antonio, etc., R. Co. *v.* Brooking, (Civ. App. 1899) 51 S. W. 537; Hillsboro Oil Co. *v.* White, (Civ. App. 1897) 41 S. W. 874.

Utah.— Boyle *v.* Union Pac. R. Co., 25 Utah 420, 71 Pac. 988; Hill *v.* Southern Pac. Co., 23 Utah 94, 63 Pac. 814.

Vermont.— Geno *v.* Fall Mountain Paper Co., 68 Vt. 568, 35 Atl. 475. See also Noyes *v.* Smith, 28 Vt. 59, 65 Am. Dec. 222.

Virginia.— Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827; Baltimore, etc., R. Co. *v.* McKenzie, 81 Va. 71. See also Riverside Cotton Mills *v.* Green, 98 Va. 58, 34 S. E. 963.

Washington.— Hencke *v.* Babcock, 24 Wash. 556, 64 Pac. 755; McDonough *v.* Great Northern R. Co., 15 Wash. 244, 46 Pac. 334.

West Virginia.— Williams *v.* Belmont Coal, etc., Co., 55 W. Va. 84, 46 S. E. 802; Giebell *v.* Collins Co., 54 W. Va. 518, 46 S. E. 569.

Wisconsin.— Suter *v.* Park, etc., Lumber Co., 90 Wis. 118, 62 N. W. 927.

United States.— Armour *v.* Hahn, 111 U. S. 313, 4 S. Ct. 433, 28 L. ed. 440; Hough *v.* Texas, etc., R. Co., 100 U. S. 213, 25 L. ed. 612; Bunker Hill, etc., Min., etc., Co. *v.* Jones, 130 Fed. 813, 65 C. C. A. 363; Harder, etc., Min. Co. *v.* Schmidt, 104 Fed. 282, 43 C. C. A. 532; O'Rorke *v.* Union Pac. R. Co., 22 Fed. 189; Johnson *v.* Armour, 18 Fed. 490, 5 McCrary 629. See also Garnett *v.* Phœnix Bridge Co., 98 Fed. 192.

England.— Cameron *v.* Nystrom, [1893] A. C. 308, 7 Aspin. 320, 57 J. P. 550, 62 L. J. P. C. 85, 68 L. T. Rep. N. S. 772, 1 Reports 362; Williams *v.* Birmingham Battery, etc., Co., [1899] 2 Q. B. 338, 68 L. J. Q. B. 918, 81 L. T. Rep. N. S. 62, 47 Wkly. Rep. 680; Tate *v.* Latham, [1897] 1 Q. B. 502, 66 L. J. Q. B. 349, 76 L. T. Rep. N. S. 336, 45 Wkly. Rep. 400; Seymour *v.* Maddox, 16 Q. B. 326, 15 Jur. 723, 20 L. J. Q. B. 327, 71 E. C. L. 326; Indermaur *v.* Dames, L. R. 1 C. P. 274; Mellors *v.* Shaw, 1 B. & S. 437, 7 Jur. N. S. 845, 30 L. J. Q. B. 333, 9 Wkly. Rep. 748, 101 E. C. L. 437; Wigmore *v.* Jay, 5 Exch. 354, 14 Jur. 837, 19 L. J. Exch. 300; Webb *v.* Rennie, 4 F. & F. 608; Roberts *v.* Smith, 2 H. & N 213, 3 Jur. N. S. 469, 26 L. J. Exch. 319, 5 Wkly. Rep. 581; Carter *v.* Clarke, 78 L. T. Rep. N. S. 76; Murphy *v.* Phillips, 35 L. T. Rep. N. S. 477, 24 Wkly. Rep. 647; Fowler *v.* Lock, 30 L. T. Rep. N. S.

also to the ordinary hazards of the employment;[28] and the servant may assume that the master has performed such duty.[29] This rule does not apply where the servant makes an improper or unusual use of the appliances furnished him,[30] or where the place becomes unsafe during the progress of the work.[31]

800; Weems *v.* Mathieson, 4 Macq. H. L. 215.

Canada.— Miller *v.* King, 34 Can. Sup. Ct. 710; Durand *v.* Asbestos, etc., Co., 19 Quebec Super. Ct. 39 [*affirmed* in 30 Can. Sup. Ct. 285]; Ferguson *v.* Galt Public School Bd., 27 Ont. App. 480; Wilson *v.* Boulter, 26 Ont. App. 184; O'Connor *v.* Hamilton Bridge Co., 25 Ont. 12; Caldwell *v.* Mills, 24 Ont. 462; Markle *v.* Donaldson, 7 Ont. L. Rep. 376; Sim *v.* Dominion Fish Co., 2 Ont. L. Rep. 69; Scanlon *v.* Detroit Bridge, etc., Works, 16 Quebec Super. Ct. 264.

See 34 Cent. Dig. tit. "Master and Servant," §§ 171, 178, 179, 199, 203.

Duty to furnish safe ways used in work.— Iroquois Furnace Co. *v.* McCrea, 91 Ill. App. 337 [*affirmed* in 191 Ill. 340, 61 N. E. 79]; Indiana Pipe-Line, etc., Co. *v.* Neusbaum, 21 Ind. App. 361, 52 N. E. 471; Lauter *v.* Duckworth, 19 Ind. App. 535, 48 N. E. 864; Ferris *v.* Hernsheim, 51 La. Ann. 178, 24 So. 771; Buzzell *v.* Laconia Mfg. Co., 48 Me. 113, 77 Am. Dec. 212; Johnson *v.* Field-Thurber Co., 171 Mass. 481, 51 N. E. 18; Hanlon *v.* Thompson, 167 Mass. 190, 45 N. E. 88; Gustafsen *v.* Washburn, etc., Mfg. Co., 153 Mass. 468, 27 N. E. 179; Irmer *v.* St. Louis Brewing Co., 69 Mo. App. 17; Edwards *v.* Tilton Mills, 70 N. H. 574, 50 Atl. 102; Dorney *v.* O'Neill, 60 N. Y. App. Div. 19, 69 N. Y. Suppl. 729; Kiras *v.* Nichols Chemical Co., 59 N. Y. App. Div. 79, 69 N. Y. Suppl. 44; Cavanagh *v.* O'Neill, 27 N. Y. App. Div. 48, 50 N. Y. Suppl. 207; Millen *v.* New York Cent., etc., R. Co., 20 N. Y. App. Div. 92, 46 N. Y. Suppl. 748; Cheevers *v.* Ocean Steamship Co., 26 Misc. 193, 55 N. Y. Suppl. 445. See McCann *v.* Atlantic Mills, 20 R. I. 566, 40 Atl. 500; Rinake *v.* Victor Mfg. Co., 58 S. C. 360, 36 S. E. 700; Powers *v.* Standard Oil Co., 53 S. C. 358, 31 S. E. 276; Carlson *v.* Wilkeson Coal, etc., Co., 19 Wash. 473, 53 Pac. 725; Craig *v.* The Saratoga, 87 Fed. 349. See also McIntire *v.* White, 171 Mass. 170, 50 N. E. 524; Olsen *v.* Andrews, 168 Mass. 261, 47 N. E. 90; Neumeister *v.* Eggers, 29 N. Y. App. Div. 385, 51 N. Y. Suppl. 481.

Where the servant is himself employed to repair the defect through which he is injured, the rule does not apply. Kleine *v.* S. E. Freunds Sons Shoe, etc., Co., 91 Mo. App. 102. See also Indiana, etc., Coal Co. *v.* Batey, 34 Ind. App. 16, 71 N. E. 191.

The selection of the particular appliance to be used is no part of the master's duty, where a number of safe appliances adapted to the work are within reach of an experienced servant. Haskell *v.* Cape Ann Anchor Works, 178 Mass. 485, 59 N. E. 1113, 4 L. R. A. N. S. 220. See also Amburg *v.* International Paper Co., 97 Me. 327, 54 Atl. 765.

Where an appliance is used as a temporary incident of a particular job, an employer is not liable for an injury resulting from defects therein. Harnois *v.* Cutting, 174 Mass. 398, 54 N. E. 842.

That an appliance may become dangerous if carelessly used is not a test of the master's liability. Donohoe *v.* Lonsdale Co., 25 R. I. 187, 55 Atl. 326. See also Smith *v.* Foster, 93 Ill. App. 138; Tobin *v.* Friedman Mfg. Co., 67 Ill. App. 149, apparatus adopted by servant for his own convenience.

Particularly dangerous appliances may be employed, when necessary, provided precautions are taken to reduce the danger to a condition of reasonable safety. Welch *v.* Bath Iron Works, 98 Me. 361, 57 Atl. 88.

A machine which works improperly is a defective machine, irrespective of the cause. Mallen *v.* Waldowski, 101 Ill. App. 367; Norton *v.* Sczpurak, 70 Ill. App. 686.

Not master's duty to see to proper construction of machinery see Strange *v.* McCormick, 1 Phila. (Pa.) 156.

Rule limited to places permanent in character see Greeley *v.* Foster, 32 Colo. 292, 75 Pac. 351.

Where a precaution is impossible without serious interference with the work, negligence cannot be predicated upon a failure to take it. McDonnell *v.* Illinois Cent. R. Co., 105 Iowa 459, 75 N. W. 336.

28. Pressed Steel Car Co. *v.* Herath, 110 Ill. App. 596; Robinson *v.* Blake Mfg. Co., 143 Mass. 528, 10 N. E. 314; Dayharsh *v.* Hannibal, etc., R. Co., 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900; Hysell *v.* Swift, 78 Mo. App. 39; Bunker Hill, etc., Min., etc., Co. *v.* Jones, 130 Fed. 813, 65 C. C. A. 363; Union Pac. R. Co. *v.* Jarvi, 53 Fed. 65, 3 C. C. A. 433.

29. San Antonio, etc., R. Co. *v.* Brooking, (Tex. Civ. App. 1899) 51 S. W. 537. And see cases cited *supra*, note 27.

30. See *infra*, IV, B, 8, b.

31. Oleson *v.* Maple Grove Coal, etc., Co., 115 Iowa 74, 87 N. W. 736. See also Clark *v.* Liston, 54 Ill. App. 578; Beique *v.* Hosmer, 169 Mass. 541, 48 N. E. 338; McCann *v.* Kennedy, 167 Mass. 23, 44 N. E. 1055; Carlson *v.* Oregon Short Line, etc., R. Co., 21 Oreg. 450, 28 Pac. 497; Durst *v.* Carnegie Steel Co., 173 Pa. St. 162, 33 Atl. 1102; Walton *v.* Bryn Mawr Hotel Co., 160 Pa. St. 3, 28 Atl. 438; Weideman *v.* Tacoma R., etc., Co., 7 Wash. 517, 35 Pac. 414; Porter *v.* Silver Creek, etc., Coal Co., 84 Wis. 418, 54 N. W. 1019; Armour *v.* Hahn, 111 U. S. 313, 4 S. Ct. 433, 28 L. ed. 440; Finalyson *v.* Utica Min., etc., Co., 67 Fed. 507, 14 C. C. A. 492; Gulf, etc., R. Co. *v.* Jackson, 65 Fed. 48, 12 C. C. A. 507.

Where the danger could have been entirely obviated at slight expense, the master is liable. Barnett, etc., Co. *v.* Schlapka, 208 Ill. 426, 70 N. E. 343 [*affirming* 110 Ill. App. 672].

b. Degree of Care Required.[32] The master is not an insurer of his servant's safety,[33] but is only required to exercise such ordinary care and diligence as may be reasonable in view of the work to be performed and the dangers incident to the employment.[34] Nevertheless the degree of care which the law requires of the

32. Buildings see *infra*, IV, B, 4, a, (III).
Inspection see *infra*, IV, B, 6.
Master's knowledge of defect see *infra*, IV, B, 7.
Railroads see *infra*, IV, B, 4, b.
Repairs see *infra*, IV, B, 6.

33. *Alabama.*— Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494.

Arkansas.— Little Rock, etc., R. Co. *v.* Duffey, 35 Ark. 602.

California.— Brymer *v.* Southern Pac. Co., 90 Cal. 496, 27 Pac. 371.

Colorado.— Wells *v.* Coe, 9 Colo. 159, 11 Pac. 50.

Georgia.— Robert Portner Brewing Co. *v.* Cooper, 116 Ga. 171, 42 S. E. 408.

Illinois.— Indianapolis, etc., R. Co. *v.* Toy, 91 Ill. 474, 33 Am. Rep. 57; Columbus, etc., R. Co. *v.* Troesch, 68 Ill. 545, 18 Am. Rep. 578; Toledo, etc., R. Co. *v.* Conroy, 61 Ill. 162; Chicago, etc., R. Co. *v.* Platt, 14 Ill. App. 346; Wabash, etc., R. Co. *v.* Fenton, 12 Ill. App. 417; Chicago, etc., R. Co. *v.* Bragonier, 11 Ill. App. 516; Chicago, etc., R. Co. *v.* Mahoney, 4 Ill. App. 262.

Indiana.—Indianapolis, etc., R. Co. *v.* Love, 10 Ind. 554.

Iowa.— Fosburg *v.* Phillips Fuel Co., 93 Iowa 54, 61 N. W. 400.

Kansas.— St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660, 7 Pac. 204.

Kentucky.—Wilson *v.* Chess, etc., Co., 117 Ky. 567, 78 S. W. 453, 25 Ky. L. Rep. 1655.

Louisiana.— Smith *v.* Sellars, 40 La. Ann. 527, 4 So. 333.

Maryland.— O'Connell *v.* Baltimore, etc., R. Co., 20 Md. 212, 83 Am. Dec. 549.

Massachusetts.— Flynn *v.* Beebe, 98 Mass. 575.

Michigan.— Batterson *v.* Chicago, etc., R. Co., 49 Mich. 184, 13 N. W. 508.

Missouri.— Siela *v.* Hannibal, etc., R. Co., 82 Mo. 430; Porter *v.* Hannibal, etc., R. Co., 71 Mo. 66, 36 Am. Rep. 454; Glasscock *v.* Swofford Bros. Dry Goods Co., (App. 1903) 74 S. W. 1039.

Nebraska.— Lincoln St. R. Co. *v.* Cox, 48 Nebr. 807, 67 N. W. 740.

New York.— Biddiscombe *v.* Cameron, 161 N. Y. 637, 57 N. E. 1104 [*affirming* 35 N. Y. App. Div. 561, 55 N. Y. Suppl. 127]; Probst *v.* Delamater, 100 N. Y. 266, 3 N. E. 184; Pointon *v.* Northern Cent. R. Co., 83 N. Y. 7; Warner *v.* Erie R. Co., 49 Barb. 558; Lee *v.* Barrow Steamship Co., 14 Daly 230, 6 N. Y. St. 285; Frank *v.* Otis, 15 N. Y. St. 681.

North Carolina.—Pleasants *v.* Raleigh, etc., Air Line R. Co., 95 N. C. 195.

Ohio.— Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Davies *v.* Griffith, 11 Ohio Dec. (Reprint) 495, 27 Cinc. L. Bul. 180.

Oregon.— Nutt *v.* Southern Pac. Co., 25 Oreg. 291, 35 Pac. 653.

Pennsylvania.— Sykes *v.* Packer, 99 Pa. St. 465; Green, etc., St. Pass. R. Co. *v.* Bresmer, 97 Pa. St. 103.

Tennessee.— Nashville, etc., R. Co. *v.* Jones, 9 Heisk. 27.

Texas.— Galveston, etc., R. Co. *v.* Delahunty, 53 Tex. 206.

Washington.— Watts *v.* Hart, 7 Wash. 178, 34 Pac. 423, 771.

United States.— Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. ed. 624; Washington, etc., R. Co. *v.* McDade, 135 U. S. 554, 10 S. Ct. 1044, 34 L. ed. 235; Texas, etc., R. Co. *v.* Thompson, 70 Fed. 944, 71 Fed. 531, 17 C. C. A. 524; The Lizzie Frank, 31 Fed. 477; Woodworth *v.* St. Paul, etc., R. Co., 18 Fed. 282, 2 McCrary 574.

See 34 Cent. Dig. tit. "Master and Servant," § 172.

34. *Alabama.*— Going *v.* Alabama Steel, etc., Co., 141 Ala. 537, 37 So. 784; Davis *v.* Kornman, 141 Ala. 479, 37 So. 789; Mobile, etc., R. Co. *v.* Thomas, 42 Ala. 672.

Arkansas.— St. Louis, etc., R. Co. *v.* Jagerman, 59 Ark. 98, 26 S. W. 591; Little Rock, etc., R. Co. *v.* Eubanks, 48 Ark. 460, 3 S. W. 808, 3 Am. St. Rep. 245.

California.— Dolan *v.* Sierra R. Co., 135 Cal. 435, 67 Pac. 686; Brymer *v.* Southern Pac. Co., 90 Cal. 496, 27 Pac. 371.

Colorado.— Last Chance Min., etc., Co. *v.* Ames, 23 Colo. 167, 47 Pac. 382; Roche *v.* Denver, etc., R. Co., 19 Colo. App. 204, 73 Pac. 880.

Delaware.— Boyd *v.* Blumenthal, 3 Pennew. 564, 52 Atl. 330; Croker *v.* Pusey, etc., Co., 3 Pennew. 1, 50 Atl. 61; Huber *v.* Jackson, etc., Co., 1 Marv. 374, 41 Atl. 92; Diamond State Iron Co. *v.* Giles, 7 Houst. 557, 11 Atl. 189.

Florida.— Green *v.* Sansom, 41 Fla. 94, 25 So. 332.

Georgia.— Babcock Bros. Lumber Co. *v.* Johnson, 120 Ga. 1030, 48 S. E. 438; Hunting *v.* Quarterman, 120 Ga. 344, 47 S. E. 928; Chenall *v.* Palmer Brick Co., 117 Ga. 106, 43 S. E. 443; Central R., etc., Co. *v.* Ryles, 84 Ga. 420, 11 S. E. 499; Western, etc., R. Co. *v.* Bishop, 50 Ga. 465.

Illinois.— Pioneer Fireproof Constr. Co. *v.* Howell, 189 Ill. 123, 59 N. E. 535 [*affirming* 90 Ill. App. 122]; Ross *v.* Shanley, 185 Ill. 390, 56 N. E. 1105 [*affirming* 86 Ill. App. 144]; Toledo, etc., R. Co. *v.* Fredericks, 71 Ill. 294; Illinois Terminal R. Co. *v.* Thompson, 112 Ill. App. 463 [*affirmed* in 210 Ill. 226, 71 N. E. 328]; McCormick Harvesting Mach. Co. *v.* Wojciechowski, 111 Ill. App. 641; Wabash R. Co. *v.* Burress, 111 Ill. App. 258; Allen B. Wrisley Co. *v.* Burke, 106 Ill.

master is greater than that which is required of the servant, and the master

App. 30; Illinois Steel Co. *v.* Ryska, 102 Ill. App. 347 [*affirmed* in 200 Ill. 280, 65 N. E. 734]; Eckhart, etc., Milling Co. *v.* Schaefer, 101 Ill. App. 500; American Malting Co. *v.* Lelivelt, 101 Ill. App. 320; Meyer *v.* Meyer, 101 Ill. App. 92, 86 Ill. App. 417; Rock Island Sash, etc., Works *v.* Pohlman, 99 Ill. App. 670; Himrod Coal Co. *v.* Clark, 99 Ill. App. 332 [*affirmed* in 197 Ill. 514, 64 N. E. 282]; Hass *v.* Chicago, etc., R. Co., 97 Ill. App. 624; Street's Western Stable Car Line *v.* Bonander, 97 Ill. App. 601 [*affirmed* in 196 Ill. 15, 63 N. E. 688]; Western Stone Co. *v.* Muscial, 96 Ill. App. 288 [*affirmed* in 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325]; Western Screw Co. *v.* Johnson, 86 Ill. App. 89; American Glucose Co. *v.* Lavin, 81 Ill. App. 482; Wabash R. Co. *v.* Farrell, 79 Ill. App. 508; Chicago, etc., R. Co. *v.* Garner, 78 Ill. App. 281; Gormully, etc., Mfg. Co. *v.* Olsen, 72 Ill. App. 32; Belleville Pump, etc., Works *v.* Bender, 69 Ill. App. 189; Cleveland, etc., R. Co. *v.* Selsor, 55 Ill. App. 685; Illinois Cent. R. Co. *v.* Barslow, 55 Ill. App. 203; Rice, etc., Malting Co. *v.* Paulsen, 51 Ill. App. 123; McCarthy *v.* Muir, 50 Ill. App. 510; Peoria, etc., R. Co. *v.* Hardwick, 48 Ill. App. 562.

Indiana.— Consumers' Paper Co. *v.* Eyer, 160 Ind. 424, 66 N. E. 994; Wabash Paper Co. *v.* Webb, 146 Ind. 303, 45 N. E. 474; Krueger *v.* Louisville, etc., R. Co., 111 Ind. 51, 11 N. E. 957; Chicago, etc., R. Co. *v.* Lee, 29 Ind. App. 480, 64 N. E. 675; Southern Indiana R. Co. *v.* Moore, 29 Ind. App. 52, 63 N. E. 863.

Iowa.— Lanza *v.* Le Grand Quarry Co., 115 Iowa 299, 88 N. W. 805; Cooper *v.* Iowa Cent. R. Co., 44 Iowa 134.

Kansas.— Kansas City, etc., R. Co. *v.* Ryan, 52 Kan. 637, 35 Pac. 292; Hannibal, etc., R. Co. *v.* Kanaley, 39 Kan. 1, 17 Pac. 324; Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660, 7 Pac. 204.

Kentucky.— Wilson *v.* Chess, etc., Co., 117 Ky. 567, 78 S. W. 453, 25 Ky. L. Rep. 1655; Adams Express Co. *v.* Smith, 72 S. W. 752, 24 Ky. L. Rep. 1915; Tradewater Coal Co. *v.* Johnson, 72 S. W. 274, 24 Ky. L. Rep. 1777, 61 L. R. A. 161.

Louisiana.— Kimbell *v.* Homer Compress, etc., Co., 109 La. 963, 34 So. 39; Stucke *v.* Orleans R. Co., 50 La. Ann. 172, 23 So. 342.

Maine.— Caven *v.* Bodwell Granite Co., 99 Me. 278, 59 Atl. 285; Twombly *v.* Consolidated Electric Light Co., 98 Me. 353, 57 Atl. 85, 64 L. R. A. 551; Frye *v.* Bath Gas, etc., Co., 94 Me. 17, 46 Atl. 804; Rhoades *v.* Varney, 91 Me. 222, 39 Atl. 552.

Maryland.— Wonder *v.* Baltimore, etc., R. Co., 32 Md. 411, 3 Am. Rep. 143; Shauck *v.* Northern Cent. R. Co., 25 Md. 462.

Massachusetts.— Thompson *v.* American Writing Paper Co., 187 Mass. 93, 72 N. E. 343; Kirk *v.* Sturdy, 187 Mass. 87, 72 N. E. 349; Copithorne *v.* Hardy, 173 Mass. 400, 53 N. E. 915; Trimble *v.* Whitin Mach. Works, 172 Mass. 150, 51 N. E. 463; Seaver *v.* Boston, etc., R. Co., 14 Gray 466.

Michigan.— Beunk *v.* Valley City Desk Co., 133 Mich. 440, 95 N. W. 548; Shadford *v.* Ann Arbor St. R. Co., 111 Mich. 390, 69 N. W. 661; Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 34 N. W. 659.

Minnesota.— Jacobson *v.* Johnson, 87 Minn. 185, 91 N. W. 465.

Missouri.— Burdict *v.* Missouri Pac. R. Co., 123 Mo. 221, 27 S. W. 453, 45 Am. St. Rep. 528, 26 L. R. A. 384; Williams *v.* St. Louis, etc., R. Co., 119 Mo. 316, 24 S. W. 782; Porter *v.* Hannibal, etc., R. Co., 71 Mo. 66, 36 Am. Rep. 454; Glasscock *v.* Swafford Bros. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364, (App. 1903) 74 S. W. 1039; Sinberg *v.* Falk Co., 98 Mo. App. 546, 72 S. W. 947; Franklin *v.* Missouri, etc., R. Co., 97 Mo. App. 473, 71 S. W. 540; Palmer *v.* Kinloch Tel. Co., 91 Mo. App. 106; Goins *v.* Chicago, etc., R. Co., 37 Mo. App. 221; Dedrick *v.* Missouri Pac. R. Co., 21 Mo. App. 433.

Montana.— McCabe *v.* Montana Cent. R. Co., 30 Mont. 323, 76 Pac. 701; Johnson *v.* Boston, etc., Consol. Copper, etc., Min. Co., 16 Mont. 164, 40 Pac. 298.

Nebraska.— New Omaha Thompson-Houston Electric Light Co. *v.* Rombold, 68 Nebr. 54, 93 N. W. 966, 97 N. W. 1030; O'Neill *v.* Chicago, etc., R. Co., 66 Nebr. 638, 92 N. W. 731, 60 L. R. A. 443; Chicago, etc., R. Co. *v.* Oyster, 58 Nebr. 1, 78 N. W. 359; Weed *v.* Chicago, etc., R. Co., 5 Nebr. (Unoff.) 623, 99 N. W. 827.

New Jersey.— Burns *v.* Delaware, etc., Tel., etc., Co., 70 N. J. L. 745, 59 Atl. 220, 592, 67 L. R. A. 956; Campbell *v.* T. A. Gillespie Co., 69 N. J. L. 279, 55 Atl. 276; Meany *v.* Standard Oil Co., (Sup. 1900) 47 Atl. 803; Guggenheim Smelting Co. *v.* Flanigan, 62 N. J. L. 354, 41 Atl. 844, 42 Atl. 145; Comben *v.* Belleville Stone Co., 59 N. J. L. 226, 36 Atl. 473.

New York.— Probst *v.* Delamater, 100 N. Y. 266, 3 N. E. 184; Quinlivan *v.* Buffalo, etc., R. Co., 52 N. Y. App. Div. 1, 64 N. Y. Suppl. 795; Hutchinson *v.* Parker, 39 N. Y. App. Div. 133, 57 N. Y. Suppl. 168, 58 N. Y. Suppl. 190; Hesketh *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 78, 55 N. Y. Suppl. 898; Biddiscomb *v.* Cameron, 35 N. Y. App. Div. 561, 55 N. Y. Suppl. 127; Moore *v.* McNeil, 35 N. Y. App. Div. 323, 54 N. Y. Suppl. 956; Golden *v.* Sieghardt, 33 N. Y. App. Div. 161, 53 N. Y. Suppl. 460; Garvey *v.* New York, etc., Mail Steamship Co., 26 N. Y. App. Div. 456, 50 N. Y. Suppl. 77; Harroun *v.* Brush Electric Light Co., 12 N. Y. App. Div. 126, 42 N. Y. Suppl. 716; Jones *v.* New York Cent., etc., R. Co., 22 Hun 284; De Forest *v.* Jewett, 19 Hun 509; Frank *v.* Otis, 15 N. Y. St. 681; Arnold *v.* Delaware, etc., Canal Co., 6 N. Y. St. 368; Odell *v.* New York Cent., etc., R. Co., 6 N. Y. St. 99; Haug *v.* Rissner, 4 N. Y. St. 644; Appel *v.* Buffalo, etc., R. Co.,

may be chargeable with negligence in failing to ascertain a danger, where the servant is not.[35]

c. Delegation of Duty.[36] This duty of the master is a positive obligation resting upon him, and he is liable for the negligent performance of such duty, whether he undertakes its performance personally or delegates it to another.[37]

2 N. Y. St. 257; Cooke *v.* Lalance, etc., Mfg. Co., 1 N. Y. St. 590.

North Carolina.— Womble *v.* Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493; Carter *v.* Cape Fear Lumber Co., 129 N. C. 203, 39 S. E. 828; Leak *v.* Carolina Cent. R. Co., 124 N. C. 455, 32 S. E. 884.

Ohio.— Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Schaal *v.* Heck, 17 Ohio Cir. Ct. 38, 8 Ohio Cir. Dec. 596; Davies *v.* Griffith, 11 Ohio Dec. (Reprint) 495, 27 Cinc. L. Bul. 180.

Oregon.— Nutt *v.* Southern Pac. Co., 25 Oreg. 291, 35 Pac. 653.

Pennsylvania.— Corcoran *v.* Wanamaker, 185 Pa. St. 496, 39 Atl. 1108.

Rhode Island.— Disano *v.* New England Steam Brick Co., 20 R. I. 452, 40 Atl. 7.

South Carolina.— Bodie *v.* Charleston, etc., R. Co., 66 S. C. 302, 44 S. E. 943; Bussey *v.* Charleston, etc., R. Co., 52 S. C. 438, 30 S. E. 477; Sanders *v.* Etiwan Phosphate Co., 19 S. C. 510; *Ex p.* Johnson, 19 S. C. 492.

Tennessee.— Bruce *v.* Beall, 99 Tenn. 303, 41 S. W. 445; East Tennessee, etc., R. Co. *v.* Aiken, 89 Tenn. 245, 14 S. W. 1082.

Texas.— Galveston, etc., R. Co. *v.* Gormley, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894 [*reversing* (Civ. App. 1897) 42 S. W. 314]; International, etc., R. Co. *v.* Williams, 82 Tex. 342, 18 S. W. 700; Hightower *v.* Gray, 36 Tex. Civ. App. 674, 83 S. W. 254; Missouri, etc., R. Co. *v.* Smith, (Civ. App. 1904) 82 S. W. 787; Texas, etc., R. Co. *v.* Hartnett, 33 Tex. Civ. App. 103, 75 S. W. 809; Bering Mfg. Co. *v.* Peterson, 28 Tex. Civ. App. 194, 67 S. W. 133; Galveston, etc., R. Co. *v.* Smith, 24 Tex. Civ. App. 127, 57 S. W. 999; International, etc., R. Co. *v.* Hawes, (Civ. App. 1899) 54 S. W. 325; Gulf, etc., R. Co. *v.* Beall, (Civ. App. 1898) 43 S. W. 605; Jones *v.* Shaw, 16 Tex. Civ. App. 290, 41 S. W. 690; Quintana *v.* Consolidated Kansas City Smelting, etc., Co., 14 Tex. Civ. App. 347, 37 S. W. 369; Texas Cent. R. Co. *v.* Lyons, (Civ. App. 1896) 34 S. W. 362; Galveston, etc., R. Co. *v.* Daniels, 9 Tex. Civ. App. 253, 28 S. W. 548, 711; Galveston, etc., R. Co. *v.* Goodwin, (Civ. App. 1894) 26 S. W. 1007; Missouri, etc., R. Co. *v.* Woods, (Civ. App. 1894) 25 S. W. 741; Gulf, etc., R. Co. *v.* McNeill, (Civ. App. 1894) 25 S. W. 647.

Utah.— Roth *v.* Eccles, 28 Utah 456, 79 Pac. 918; Wood *v.* Rio Grande Western R. Co., 28 Utah 351, 79 Pac. 182; Fritz *v.* Salt Lake, etc., Gas, etc., Co., 18 Utah 493, 56 Pac. 90.

Virginia.— Parlatt *v.* Dunn, 102 Va. 459, 46 S. E. 467; Atlantic, etc., R. Co. *v.* West, 101 Va. 13, 42 S. E. 914; Norfolk, etc., R. Co. *v.* Phillips, 100 Va. 362, 41 S. E. 726; Southern R. Co. *v.* Mauzy, 98 Va. 692, 37 S. E. 285; Bertha Zinc Co. *v.* Martin, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999.

West Virginia.— Fulton *v.* Crosby, etc., Co., 57 W. Va. 91, 49 S. E. 1012; Giebell *v.* Collins Co., 54 W. Va. 518, 46 S. E. 569.

Wisconsin.— Wedgwood *v.* Chicago, etc., R. Co., 41 Wis. 478.

United States.— Hough *v.* Texas, etc., R. Co., 100 U. S. 213, 25 L. ed. 612; Westinghouse Electric, etc., Co. *v.* Heimlich, 127 Fed. 92, 62 C. C. A. 92; Glenmont Lumber Co. *v.* Roy, 126 Fed. 524, 61 C. C. A. 506; Choctaw, etc., R. Co. *v.* Holloway, 114 Fed. 458, 52 C. C. A. 260; Kelly *v.* Jutte, etc., Co., 104 Fed. 955, 44 C. C. A. 274; Mason, etc., R. Co. *v.* Yockey, 103 Fed. 265, 43 C. C. A. 228; Bethlehem Iron Co. *v.* Weiss, 100 Fed. 45, 40 C. C. A. 270; Garnett *v.* Phœnix Bridge Co., 98 Fed. 192; Clow *v.* Boltz, 92 Fed. 572, 34 C. C. A. 550; Louisville, etc., R. Co. *v.* Johnson, 81 Fed. 679, 27 C. C. A. 367; Texas, etc., R. Co. *v.* Thompson, 70 Fed. 944, 71 Fed. 531, 17 C. C. A. 524; Jones *v.* Yeager, 13 Fed. Cas. No. 7,510, 2 Dill. 64.

Canada.— Myers *v.* Sault St. Marie Pulp, etc., Co., 3 Ont. L. Rep. 600.

See 34 Cent. Dig. tit. "Master and Servant," §§ 173, 174.

The unbending test of the master's negligence, as against a servant as to methods, machinery, and appliances, is the ordinary usage of the business. Weed *v.* Chicago, etc., R. Co., 5 Nebr. (Unoff.) 623, 99 N. W. 827.

Care required in proportion to danger.— Boyd *v.* Blumenthal, 3 Pennew. (Del.) 564, 52 Atl. 330; Croker *v.* Pusey, etc., Co., 3 Pennew. (Del.) 1, 50 Atl. 61; Central R., etc., Co. *v.* Ryles, 84 Ga. 420, 11 S. E. 499; Harroun *v.* Brush Electric Light Co., 12 N. Y. App. Div. 126, 42 N. Y. Suppl. 716; Disano *v.* New England Steam Brick Co., 20 R. I. 452, 40 Atl. 7.

Where the work is necessarily attended with danger, the rule that it is incumbent on the master to furnish the servant a reasonably safe place in which to do his work does not apply. Western Wrecking, etc., Co. *v.* O'Donnell, 101 Ill. App. 492; Merchant *v.* Mickelson, 101 Ill. App. 401.

35. Clow *v.* Boltz, 92 Fed. 572, 34 C. C. A. 550.

36. **Delegation of duty to fellow servant** see *infra*, IV, G, 4, a, (IX).

Duty of servant injured to make inspections see *infra*, IV, F, 4, a, (II).

Warning and instructing servant see *infra*, IV, D.

37. *California.*— Shea *v.* Pacific Power Co., 145 Cal. 680, 79 Pac. 373.

Colorado.— Denver, etc., R. Co. *v.* Sipes, 26 Colo. 17, 55 Pac. 1093.

Connecticut.— Julian *v.* Stony Creek Red Granite Co., 71 Conn. 632, 42 Atl. 994.

Nevertheless it is competent for the master to impose on, and for the servant to

Delaware.— Huber *v.* Jackson, etc., Co., 1 Marv. 374, 41 Atl. 92.

District of Columbia.— McCauley *v.* Southern R. Co., 10 App. Cas. 560.

Illinois.— Ide *v.* Fratcher, 194 Ill. 552, 62 N. E. 814 [*affirming* 96 Ill. App. 549]; Chicago, etc., R. Co. *v.* Eaton, 194 Ill. 441, 62 N. E. 784 [*affirming* 96 Ill. App. 570]; Edward Hines Lumber Co. *v.* Ligas, 172 Ill. 215, 50 N. E. 225, 64 Am. St. Rep. 38 [*affirming* 68 Ill. App. 523]; Chicago, etc., R. Co. *v.* Maroney, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396 [*affirming* 67 Ill. App. 618]; Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Allen B. Wrisley Co. *v.* Burke, 106 Ill. App. 30; Frost Mfg. Co. *v.* Smith, 98 Ill. App. 308 [*affirmed* in 197 Ill. 253, 64 N. E. 305]; McBeath *v.* Rawle, 93 Ill. App. 212 [*affirmed* in 192 Ill. 626, 61 N. E. 847, 69 L. R. A. 697]. *Compare* Wabash, etc., R. Co. *v.* Kastner, 80 Ill. App. 572.

Indiana.— G. H. Hammond Co. *v.* Mason, 12 Ind. App. 469, 40 N. E. 642; Muncie Pulp Co. *v.* Jones, 11 Ind. App. 110, 38 N. E. 547.

Kansas.— Atchison, etc., R. Co. *v.* Kingscott, 65 Kan. 131, 69 Pac. 184.

Kentucky.— Clay City Lumber, etc., Co. *v.* Noe, 76 S. W. 195, 25 Ky. L. Rep. 668.

Louisiana.— Ferris *v.* Hernsheim, 51 La. Ann. 178, 24 So. 771.

Maine.— Beal *v.* Bryant, 99 Me. 112, 58 Atl. 428; Twombly *v.* Consolidated Electric Light Co., 98 Me. 353, 57 Atl. 85, 64 L. R. A. 551; Frye *v.* Bath Gas, etc., Co., 94 Me. 17, 46 Atl. 804.

Massachusetts.— Kirk *v.* Sturdy, 187 Mass. 87, 72 N. E. 349; Chisholm *v.* New England Tel., etc., Co., 185 Mass. 82, 69 N. E. 1042; Copithorne *v.* Hardy, 173 Mass. 400, 53 N. E. 916. *Compare* Wosbigian *v.* Washburn, etc., Mfg. Co., 167 Mass. 20, 44 N. E. 1058.

Minnesota.—See Oelschegel *v.* Chicago, etc., R. Co., 71 Minn. 50, 73 N. W. 631.

Missouri.— Herdler *v.* Buck's Stove, etc., Co., 136 Mo. 3, 37 S. W. 115; Burnes *v.* Kansas City, etc., R. Co., 129 Mo. 41, 31 S. W. 347; Franklin *v.* Missouri, etc., R. Co., 97 Mo. App. 473, 71 S. W. 540; Sackewitz *v.* American Biscuit Mfg. Co., 78 Mo. App. 144; Bridges *v.* St. Louis, etc., R. Co., 6 Mo. App. 389.

New Hampshire.— English *v.* Amidon, 72 N. H. 301, 56 Atl. 548.

New Jersey.— Smith *v.* Erie R. Co., 67 N. J. L. 636, 52 Atl. 634; Flanigan *v.* Guggenheim Smelting Co., 63 N. J. L. 647, 44 Atl. 762; Cole *v.* Warren Mfg. Co., 63 N. J. L. 626, 44 Atl. 647; Hustis *v.* James A. Banister Co., 63 N. J. L. 465, 43 Atl. 651; Nord Deutscher Lloyd Steamship Co. *v.* Ingebregsten, 57 N. J. L. 400, 31 Atl. 619, 51 Am. St. Rep. 604.

New York.— Pursley *v.* Edge Moor Bridge Works, 168 N. Y. 589, 60 N. E. 1119 [*affirming* 56 N. Y. App. Div. 71, 67 N. Y. Suppl. 719]; Cavanagh *v.* O'Neill, 161 N. Y. 657, 57 N. E. 1106 [*affirming* 27 N. Y. App. Div. 48, 50 N. Y. Suppl. 207]; Siversen *v.* Jenks, 102 N. Y. App. Div. 313, 92 N. Y. Suppl. 382; Starer *v.* Stern, 100 N. Y. App. Div. 393, 91 N. Y. Suppl. 821; Newton *v.* New York Cent., etc., R. Co., 96 N. Y. App. Div. 81, 89 N. Y. Suppl. 23; Eichholz *v.* Niagara Falls Hydraulic Power, etc., Co., 68 N. Y. App. Div. 441, 73 N. Y. Suppl. 842; Hoes *v.* Ocean Steamship Co., 56 N. Y. App. Div. 259, 67 N. Y. Suppl. 782; McLaughlin *v.* Eidlitz, 50 N. Y. App. Div. 518, 64 N. Y. Suppl. 193; Scandell *v.* Columbia Constr. Co., 50 N. Y. App. Div. 512, 64 N. Y. Suppl. 232; Stewart *v.* Ferguson, 34 N. Y. App. Div. 515, 54 N. Y. Suppl. 615; Galasso *v.* National Steamship Co., 27 N. Y. App. Div. 169, 50 N. Y. Suppl. 417; Dougherty *v.* Milliken, 26 N. Y. App. Div. 386, 49 N. Y. Suppl. 905; Capasso *v.* Woolfolk, 25 N. Y. App. Div. 234, 49 N. Y. Suppl. 409; Simmons *v.* Peters, 20 N. Y. App. Div. 251, 46 N. Y. Suppl. 800; Rollings *v.* Levering, 18 N. Y. App. Div. 223, 45 N. Y. Suppl. 942; Hoffnagle *v.* New York Cent., etc., R. Co., 1 Thomps. & C. 346; Haug *v.* Rissner, 4 N. Y. St. 644. *Compare* Brown *v.* Terry, 67 N. Y. App. Div. 223, 73 N. Y. Suppl. 733; Yaw *v.* Whitmore, 37 N. Y. App. Div. 98, 55 N. Y. Suppl. 1091; White *v.* Eidlitz, 19 N. Y. App. Div. 256, 46 N. Y. Suppl. 184; Wittenberg *v.* Friederich, 8 N. Y. App. Div. 433, 40 N. Y. Suppl. 895.

North Carolina.— Wright *v.* Southern R. Co., 123 N. C. 280, 31 S. E. 652.

North Dakota.— Meehan *v.* Great Northern R. Co., 13 N. D. 432, 101 N. W. 183.

Ohio.— Michigan Cent. R. Co. *v.* Waterworth, 21 Ohio Cir. Ct. 495, 11 Ohio Cir. Dec. 621.

Oklahoma.— Neeley *v.* Southwestern Cotton Seed Oil Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145.

Pennsylvania.— Newton *v.* Vulcan Iron Works, 199 Pa. St. 646, 49 Atl. 339; Trainor *v.* Philadelphia, etc., R. Co., 137 Pa. St. 148, 20 Atl. 632; Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. Rep. 631; Kless *v.* Youghiogheny Min. Co., 18 Pa. Super. Ct. 551. *Compare* Cunningham *v.* Ft. Pitt Bridge Works, 197 Pa. St. 625, 47 Atl. 846.

Rhode Island.— Moran *v.* Corliss Steam Engine Co., 21 R. I. 386, 43 Atl. 874, 45 L. R. A. 267.

Texas.— St. Louis, etc., R. Co. *v.* Kelton, 28 Tex. Civ. App. 137, 66 S. W. 887; Southern Pac. Co. *v.* Winton, 27 Tex. Civ. App. 503, 66 S. W. 477; Galveston, etc., R. Co. *v.* Buck, 27 Tex. Civ. App. 283, 65 S. W. 681; Gulf, etc., R. Co. *v.* Delaney, 22 Tex. Civ. App. 427, 55 S. W. 538.

Utah.— Wood *v.* Rio Grande Western R. Co., 28 Utah 351, 79 Pac. 182.

Virginia.— Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226.

Washington.— Metzler *v.* McKenzie, 34 Wash. 470, 76 Pac. 114; Allend *v.* Spokane Falls, etc., R. Co., 21 Wash. 324, 58 Pac. 244.

accept, by contract or mutual understanding, the burden of inspection or examination, of the appliances or places he is required to use, such as he is competent to make.[38]

d. Failure to Furnish Tools or Appliances. It is actionable negligence on the part of a master to fail to furnish his servant with such tools and appliances as may be required for the reasonably safe prosecution of his work.[39] But to make out a case, it must be shown that such appliances were necessary,[40] and that none was at hand;[41] and where the lack of them arises from a temporary condition in the progress of the work, caused by the negligence of fellow workmen, no liability attaches to the master.[42] Nor is a master liable for a failure to furnish appliances to prevent an injury which could not be anticipated by the exercise of ordinary care and foresight.[43]

2. Nature and Kind of Appliances and Places — a. In General. It is sufficient if a master furnishes his servants with reasonably safe and suitable appliances and places, and he need not furnish the most expensive,[44] nor those of a particular

United States.— Texas, etc., R. Co. *v.* Barrett, 166 U. S. 617, 17 S. Ct. 707, 41 L. ed. 1136; National Steel Co. *v.* Lowe, 127 Fed. 311, 62 C. C. A. 229; Western Union Tel. Co. *v.* Tracy, 114 Fed. 282, 52 C. C. A. 168 [*affirming* 110 Fed. 103]; *In re* California Nav., etc., Co., 110 Fed. 670; Beattie *v.* Edge Moor Bridge Works, 109 Fed. 233; Lafayette Bridge Co. *v.* Olsen, 108 Fed. 335, 47 C. C. A. 367, 54 L. R. A. 33; Ellis *v.* Northern Pac. R. Co., 103 Fed. 416; Toledo Brewing, etc., Co. *v.* Bosch, 101 Fed. 530, 41 C. C. A. 482; New York, etc., R. Co. *v.* O'Leary, 93 Fed. 737, 35 C. C. A. 562; Baird *v.* Reilly, 92 Fed. 884, 35 C. C. A. 78; Sommer *v.* Carbon Hill Coal Co., 89 Fed. 54, 32 C. C. A. 156; Pennsylvania R. Co. *v.* La Rue, 81 Fed. 148, 27 C. C. A. 363.

See 34 Cent. Dig. tit. "Master and Servant," § 175.

But *compare* Woodward Iron Co. *v.* Cook, 124 Ala. 349, 27 So. 455.

If a place is originally safe, but becomes unsafe during its use by the servants through the negligence of a fellow servant, such fact is a defense to an action against the master for a resulting injury. Baird *v.* Reilly, 92 Fed. 884, 35 C. C. A. 78.

Way constructed by servant.—An employer is not liable at common law for an injury to a hod carrier caused by the insufficient nailing of a plank in a gangway constructed by him and the mason to whom he was carrying mortar. Ferguson *v.* Galt Public School Bd., 27 Ont. App. 480.

38. *Alabama.*— Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545, 10 So. 283.

Illinois.—Chicago, etc., R. Co. *v.* Merriman, 95 Ill. App. 628.

Kentucky.— Buey *v.* Chess, etc., Co., 84 S. W. 563, 27 Ky. L. Rep. 198.

Minnesota.— Scott *v.* Eastern R. Co., 90 Minn. 135, 95 N. W. 892.

Texas.— Maughmer *v.* Behring, 19 Tex. Civ. App. 299, 46 S. W. 917.

Canada.— Fawcett *v.* Canadian Pac. R. Co., 32 Can. Sup. Ct. 721 [*affirming* 8 Brit. Col. 393].

See 34 Cent. Dig. tit. "Master and Servant," § 175.

39. *Indiana.*— Republic Iron, etc., Co. *v.* Ohler, 161 Ind. 393, 68 N. E. 901.

Iowa.— See Eller *v.* Loomis, 106 Iowa 276, 76 N. W. 686.

New York.—Strauss *v.* Haberman Mfg. Co., 23 N. Y. App. Div. 1, 48 N. Y. Suppl. 425.

North Carolina.— Orr *v.* Southern Bell Tel. Co., 130 N. C. 627, 41 S. E. 880.

Ohio.— Crumley *v.* Cincinnati, etc., R. Co., 12 Ohio Cir. Ct. 164, 5 Ohio Cir. Dec. 353.

Texas.— Greenville Oil, etc., Co. *v.* Harkey, 20 Tex. Civ. App. 225, 48 S. W. 1005.

United States.— Choctaw, etc., R. Co. *v.* Holloway, 114 Fed. 458, 52 C. C. A. 260.

Canada.— Thompson *v.* Wright, 22 Ont. 127.

See 34 Cent. Dig. tit. "Master and Servant," § 176.

Failure to furnish must be cause of injury. — Spring Valley Coal Co. *v.* Patting, 86 Fed. 433, 30 C. C. A. 168.

New safety device.— Where a witness testified that a certain safety device should have been used in connection with the work being done by the servant, it was held that, until it was shown that the device was in use in the state, that its use was known to the master, or that it was a generally known safety device for the kind of work being prosecuted, questions as to whether it was in use in other parts of the world, and whether it was easily obtainable, were improper. Christiansen *v.* Dunham Towing, etc., Co., 75 Ill. App. 267.

40. De Lisle *v.* Ward, 168 Mass. 579, 47 N. E. 436; Paoline *v.* J. W. Bishop Co., 25 R. I. 298, 55 Atl. 752; Gowen *v.* Harley, 56 Fed. 973, 6 C. C. A. 190.

41. Kellogg *v.* Denver City Tramway Co., 18 Colo. App. 475, 72 Pac. 609; Conner *v.* Draper Co., 182 Mass. 184, 65 N. E. 39; Cogan *v.* Burnham, 175 Mass. 391, 56 N. E. 585; Clark *v.* Riter-Conley Co., 39 N. Y. App. Div. 598, 57 N. Y. Suppl. 755.

42. Cogan *v.* Burnham, 175 Mass. 391, 56 N. E. 585.

43. G. A. Duerler Mfg. Co. *v.* Dullnig, (Tex. Civ. App. 1904) 83 S. W. 899 [*affirmed* in (1905) 87 S. W. 332].

44. Berns *v.* Gaston Gas Coal Co., 27 W. Va. 285, 55 Am. Rep. 304.

kind;[45] nor does his duty require him to provide machinery and appliances similar to those used by others, although they may be less dangerous than his own[46]

b. Newest, Safest, and Best Appliances and Places — (1) *In General.* The master is not required to furnish the newest, safest, and best machinery, appliances, and places for work, but his obligation is met when he furnishes such as are reasonably safe and suitable for the purpose had in view.[47] But in all occu-

45. Nutt *v.* Southern Pac. Co., 25 Oreg. 291, 35 Pac. 653.

Replacing machinery.— In the absence of defective construction, or of negligence or want of care in the repair, of machinery furnished by him, the master incurs no liability for injuries arising from its use, or through his failure to discard a machine, or part of a machine, and supply its place with something different. Sweeney *v.* Berlin, etc., Envelope Co., 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722.

46. Richmond, etc., R. Co. *v.* Weems, 97 Ala. 270, 12 So. 186; Wood *v.* Heiges, 83 Md. 257, 34 Atl. 872.

47. *California.*— Sappenfield *v.* Main St., etc., R. Co., 91 Cal. 48, 27 Pac. 590; Brymer *v.* Southern Pac. Co., 90 Cal. 496, 27 Pac. 371.

Delaware.— Murphy *v.* Hughes, 1 Pennew. 250, 40 Atl. 187.

Illinois.— Chicago, etc., R. Co. *v.* Lonergan, 118 Ill. 41, 7 N. E. 55; Camp Point Mfg. Co. *v.* Ballou, 71 Ill. 417; Wabash R. Co. *v.* Burress, 111 Ill. App. 258; American Malting Co. *v.* Lelivelt, 101 Ill. App. 320; Meyer *v.* Meyer, 101 Ill. App. 92; Chicago, etc., R. Co. *v.* Finnan, 84 Ill. App. 383; Chicago, etc., R. Co. *v.* Armstrong, 62 Ill. App. 228; Harsha *v.* Babiex, 54 Ill. App. 586; Girard Coal Co. *v.* Wiggins, 52 Ill. App. 69; St. Louis Consol. Coal Co. *v.* Bonner, 43 Ill. App. 17; Chicago, etc., R. Co. *v.* Smith, 18 Ill. App. 119.

Indiana.— Louisville, etc., R. Co. *v.* Orr, 84 Ind. 50; Lake Shore, etc., R. Co. *v.* McCormick, 74 Ind. 440.

Iowa.— Burns *v.* Chicago, etc., R. Co., 69 Iowa 450, 30 N. W. 25, 58 Am. Rep. 227; Greenleaf *v.* Illinois Cent. R. Co., 29 Iowa 14, 4 Am. Rep. 181.

Kansas.— Atchison, etc., R. Co. *v.* McKee, 37 Kan. 592, 15 Pac. 484.

Kentucky.— Derby *v.* Kentucky Cent. R. Co., (1887) 4 S. W. 303.

Maryland.— Wood *v.* Heiges, 83 Md. 257, 34 Atl. 872.

Massachusetts.— Rooney *v.* Sewall, etc., Cordage Co., 161 Mass. 153, 36 N. E. 789.

Michigan.— Lyttle *v.* Chicago, etc., R. Co., 84 Mich. 289, 47 N. W. 571; Richards *v.* Rough, 53 Mich. 212, 18 N. W. 785.

Minnesota.— Lorimer *v.* St. Paul City R. Co., 48 Minn. 391, 51 N. W. 125.

Mississippi.— Hatter *v.* Illinois Cent. R. Co., 69 Miss. 642, 13 So. 827.

Missouri.— Steinhauser *v.* Spraul, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441; Friel *v.* Citizens' R. Co., 115 Mo. 503, 22 S. W. 498; Tabler *v.* Hannibal, etc., R. Co., 93 Mo. 79, 5 S. W. 810; Huhn *v.* Missouri Pac. R. Co., 92 Mo. 440, 4 S. W. 937; Smith *v.* St. Louis, etc., R. Co., 69 Mo. 32, 33 Am. Rep. 484; Berning *v.* Medart, 56 Mo. App. 443; Higgins *v.* Missouri Pac. R. Co., 43 Mo. App. 547.

New York.— Soderman *v.* Kemp, 145 N. Y. 427, 40 N. E. 212; Hickey *v.* Taaffe, 105 N. Y. 26, 12 N. E. 286; Sweeney *v.* Berlin, etc., Envelope Co., 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722; Spencer *v.* Worthington, 44 N. Y. App. Div. 496, 60 N. Y. Suppl. 873; Jacobson *v.* Cornelius, 52 Hun 377, 5 N. Y. Suppl. 306; De Forest *v.* Jewett, 19 Hun 509; Salters *v.* Delaware, etc., Canal Co., 5 Thomps. & C. 559; Van Horn *v.* Boston, etc., R. Co., 4 N. Y. St. 782; Cooke *v.* Lalance, etc., Mfg. Co., 1 N. Y. St. 590.

North Carolina.— Womble *v.* Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493; Marks *v.* Harriet Cotton Mills, 135 N. C. 287, 47 S. E. 432; Lloyd *v.* Hanes, 126 N. C. 359, 35 S. E. 611.

Ohio.— National Malleable Castings Co. *v.* Luscomb, 19 Ohio Cir. Ct. 673, 6 Ohio Cir. Dec. 313.

Pennsylvania.— Titus *v.* Bradford, etc., R. Co., 136 Pa. St. 618, 20 Atl. 517, 20 Am. St. Rep. 944; Lehigh, etc., Coal Co. *v.* Hayes, 128 Pa. St. 294, 18 Atl. 387, 15 Am. St. Rep. 680, 5 L. R. A. 441; Philadelphia, etc., R. Co. *v.* Hughes, 119 Pa. St. 301, 13 Atl. 286; Allison Mfg. Co. *v.* McCormick, 118 Pa. St. 519, 12 Atl. 273, 4 Am. St. Rep. 613; Philadelphia, etc., R. Co. *v.* Keenan, 103 Pa. St. 124; Payne *v.* Reese, 100 Pa. St. 301; Pittsburgh, etc., R. Co. *v.* Sentmeyer, 92 Pa. St. 276, 37 Am. Rep. 684; Bonner *v.* Pittsburgh Bridge Co., 5 Pa. Super. Ct. 281; Stack *v.* Patterson, 6 Phila. 225.

Rhode Island.— Dwyer *v.* Shaw, 22 R. I. 648, 50 Atl. 389; Disano *v.* New England Steam Brick Co., 20 R. I. 452, 40 Atl. 7.

Texas.— Nix *v.* Texas Pac. R. Co., 82 Tex. 473, 18 S. W. 571, 27 Am. St. Rep. 897; International, etc., R. Co. *v.* Williams, 82 Tex. 342, 18 S. W. 700; International, etc., R. Co. *v.* Bell, 75 Tex. 50, 12 S. W. 21; Gulf, etc., R. Co. *v.* Beall, (Civ. App. 1898) 43 S. W. 605; Gulf, etc., R. Co. *v.* Warner, (Civ. App. 1896) 36 S. W. 118; Galveston, etc., R. Co. *v.* Gormley, (Civ. App. 1894) 27 S. W. 1051.

Virginia.— Bertha Zinc Co. *v.* Martin, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; Richmond, etc., R. Co. *v.* Risdon, 87 Va. 335, 12 S. E. 786; Norfolk, etc., R. Co. *v.* Jackson, 85 Va. 489, 8 S. E. 370.

Washington.— Hoffman *v.* American Foundry Co., 18 Wash. 287, 51 Pac. 385.

Wisconsin.— Innes *v.* Milwaukee, 96 Wis. 170, 70 N. W. 1064.

pations attended with great and unusual danger there must be used all appliances readily attainable which are known to science for the prevention of accidents, and the neglect to provide such readily attainable appliances is proof of culpable negligence. Under this latter rule it is held that railroad companies are bound to avail themselves of all new inventions and improvements known to them, whenever their utility has been thoroughly tested and demonstrated.[48]

(II) *APPLIANCES AND METHODS IN ORDINARY USE.* While not conclusive on the question of negligence,[49] evidence is generally admissible in an action for personal injuries to show whether or not the master's machinery, appliances, ways, and methods are such as are in ordinary and common use by others in the same business.[50] But customary negligence, either on the part of himself or others, is

United States.— Glenmont Lumber Co. *v.* Roy, 126 Fed. 524, 61 C. C. A. 506; Texas, etc., R. Co. *v.* Thompson, 70 Fed. 944, 71 Fed. 531, 17 C. C. A. 524; The Maharajah, 40 Fed. 784; Robertson *v.* Cornelson, 34 Fed. 716.

Canada.— Black *v.* Ontario Wheel Co., 19 Ont. 578.

See 34 Cent. Dig. tit. "Master and Servant," §§ 181–184.

Newest pattern or invention not required.— American Malting Co. *v.* Lelivelt, 101 Ill. App. 320; Chicago, etc., R. Co. *v.* Armstrong, 62 Ill. App. 228; Lorimer *v.* St. Paul City R. Co., 48 Minn. 391, 51 N. W. 125 (before practical utility has been demonstrated); Norfolk, etc., R. Co. *v.* Jackson, 85 Va. 489, 8 S. E. 370.

That machinery is old does not show negligence on the part of an employer, if it is sound and in good repair. Richards *v.* Rough, 53 Mich. 212, 18 N. W. 785.

Where a common switch was as safe as any other, if properly cared for, the want of a target switch, which by its signals would have given notice of the danger and avoided the accident, was not negligence. Salters *v.* Delaware, etc., Canal Co., 3 Hun (N. Y.) 338.

The use of a T rail for a guard to switches, such rail being in general use, does not render a railroad company liable to an employee, injured by having his foot caught between the rails, although a U rail would have been safer. Smith *v.* St. Louis, etc., R. Co., 69 Mo. 32, 33 Am. Rep. 484.

A failure to block the joints of a switch with a new blocking which is still an experimental device is not a failure of duty. Chicago, etc., R. Co. *v.* Lonergan, 118 Ill. 41, 7 N. E. 55.

48. Smith *v.* New York, etc., R. Co., 19 N. Y. 127, 75 Am. Dec. 305 [*affirming* 6 Duer 225]. See also Richmond, etc., R. Co. *v.* Jones, 92 Ala. 218, 9 So. 276; Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494, holding that it is sufficient to adopt such new inventions as are used by prudently conducted railroads under like circumstances. And see Nashville, etc., R. Co. *v.* Elliott, 1 Coldw. (Tenn.) 611, 78 Am. Dec. 506, holding that a railroad company is bound to see that its engines are perfect and properly constructed according to present improvements in the art.

49. McCormick Harvesting Mach. Co. *v.* Burandt, 136 Ill. 170, 26 N. E. 588.

50. *Alabama.*— Richmond, etc., R. Co. *v.* Jones, 92 Ala. 218. *Compare* Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88.

Arkansas.— Arkadelphia Lumber Co. *v.* Bethea, 57 Ark. 76, 20 S. W. 808.

California.— Burns *v.* Sennett, 99 Cal. 363, 33 Pac. 916; Martin *v.* California Cent. R. Co., 94 Cal. 326, 29 Pac. 645; Sappenfield *v.* Main St., etc., R. Co., 91 Cal. 48, 27 Pac. 590.

Illinois.— Pennsylvania Co. *v.* Hankey, 93 Ill. 580; Toledo, etc., R. Co. *v.* Ashbury, 84 Ill. 429; Hart, etc., Mfg. Co. *v.* Tima, 85 Ill. App. 310; Atchison, etc., R. Co. *v.* Alsdurf, 47 Ill. App. 200; Chicago, etc., R. Co. *v.* Smith, 18 Ill. App. 119.

Indiana.— Lake Shore, etc., R. Co. *v.* McCormick, 74 Ind. 440. But *compare* Lake Erie, etc., R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 564.

Iowa.— Young *v.* Burlington Wire Mattress Co., 79 Iowa 415, 44 N. W. 693.

Kansas.— Sanborn *v.* Atchison, etc., R. Co., 35 Kan. 292, 10 Pac. 860; Atchison, etc., R. Co. *v.* Croll, 3 Kan. App. 242, 45 Pac. 112.

Maryland.— Wonder *v.* Baltimore, etc., R. Co., 32 Md. 411, 3 Am. Rep. 143.

Massachusetts.— Donahue *v.* Washburn, etc., Mfg. Co., 169 Mass. 574, 48 N. E. 842; McCarthy *v.* Boston Duck Co., 165 Mass. 165, 42 N. E. 568; Ross *v.* Pearson Cordage Co., 164 Mass. 257, 41 N. E. 284, 49 Am. St. Rep. 459; Hale *v.* Cheney, 159 Mass. 268, 34 N. E. 255.

Michigan.— Shadford *v.* Ann Arbor St. R. Co., 111 Mich. 390, 69 N. W. 661; Werbowlsky *v.* Ft. Wayne, etc., R. Co., 86 Mich. 236, 48 N. W. 1097, 24 Am. St. Rep. 120; Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 34 N. W. 659.

Minnesota.— Stiller *v.* Bohn Mfg. Co., 80 Minn. 1, 82 N. W. 981; Manley *v.* Minneapolis Paint Co., 76 Minn. 169, 78 N. W. 1050; Bergquist *v.* Chandler Iron Co., 49 Minn. 511, 52 N. W. 136; Doyle *v.* St. Paul, etc., R. Co., 42 Minn. 79, 43 N. W. 787.

Mississippi.— Kent *v.* Yazoo, etc., R. Co., 77 Miss. 494, 27 So. 620, 78 Am. St. Rep. 534.

Missouri.— Hamilton *v.* Rich Hill Coal Min. Co., 108 Mo. 364, 18 S. W. 977; Huhn *v.* Missouri Pac. R. Co., 92 Mo. 440, 4 S. W. 937; Cagney *v.* Hannibal, etc., R. Co., 69 Mo. 416; Smith *v.* St. Louis, etc., R. Co., 69 Mo. 32, 33 Am. Rep. 484; Warmington *v.* Atchison, etc., R. Co., 46 Mo. App. 159.

Nebraska.— Omaha Bottling Co. *v.* Theiler,

no defense to the master;[51] nor can he set up a custom which is in contravention of positive law.[52]

c. Uniform Character of Appliances.[53] The law does not require that the master shall furnish uniform machinery and appliances,[54] but evidence of non-uniformity may be admissible upon the question of negligence.[55]

3. Appliances or Places Furnished by, or in Control of, Third Persons[56]**— a. In General.** A master is not in general liable for injuries to his servant by reason of defects in appliances or places for work which are furnished by or under the control of a third person;[57] but where the injury is wholly or partially the direct

59 Nebr. 257, 80 N. W. 821, 80 Am. St. Rep. 673; Missouri Pac. R. Co. *v.* Lewis, 24 Nebr. 848, 40 N. W. 401, 2 L. R. A. 67.

New York.— Sisco *v.* Lehigh, etc., R. Co., 145 N. Y. 296, 39 N. E. 958; Burke *v.* Witherbee, 98 N. Y. 562; Warner *v.* Erie R. Co., 39 N. Y. 468; O'Hare *v.* Keeler, 22 N. Y. App. Div. 191, 48 N. Y. Suppl. 376; France *v.* Rome, etc., R. Co., 88 Hun 318, 34 N. Y. Suppl. 408; French *v.* Aulls, 72 Hun 442, 25 N. Y. Suppl. 188; Sweeney *v.* Page, 64 Hun 172, 18 N. Y. Suppl. 890; Wright *v.* Delaware, etc., Canal Co., 40 Hun 343.

North Carolina.— Lloyd *v.* Hanes, 126 N. C. 359, 35 S. E. 611.

Ohio.— Toledo, etc., R. Co. *v.* Beard, 20 Ohio Cir. Ct. 681, 11 Ohio Cir. Dec. 406; National Malleable Castings Co. *v.* Luscomb, 19 Ohio Cir. Ct. 673, 6 Ohio Cir. Dec. 313.

Pennsylvania.— Service *v.* Shoneman, 196 Pa. St. 63, 46 Atl. 292, 79 Am. St. Rep. 689, 69 L. R. A. 792; Higgins *v.* Fanning, 195 Pa. St. 599, 46 Atl. 102; Keenan *v.* Waters, 181 Pa. St. 247, 37 Atl. 342; Dooner *v.* Delaware, etc., Canal Co., 171 Pa. St. 581, 33 Atl. 415; Dooner *v.* Delaware, etc., Canal Co., 164 Pa. St. St. 17, 30 Atl. 269; Reese *v.* Hershey, 163 Pa. St. 253, 29 Atl. 907, 43 Am. St. Rep. 795; Kehler *v.* Schwenk, 144 Pa. St. 348, 22 Atl. 910, 27 Am. St. Rep. 633, 13 L. R. A. 374; Augerstein *v.* Jones, 139 Pa. St. 183, 21 Atl. 24, 23 Am. St. Rep. 174; Lehigh, etc., Coal Co. *v.* Hayes, 128 Pa. St. 294, 18 Atl. 387, 15 Am. St. Rep. 680, 5 L. R. A. 441; Delaware River Iron Ship-Building Co. *v.* Nuttall, 119 Pa. St. 149, 13 Atl. 65; Shaffer *v.* Haish, 110 Pa. St. 575, 1 Atl. 575.

Rhode Island.— Desrosiers *v.* Bourn, 26 R. I. 6, 57 Atl. 935.

Utah.— Fritz *v.* Salt Lake, etc., Gas, etc., Co., 18 Utah 493, 56 Pac. 90.

Washington.— Hoffman *v.* American Foundry Co., 18 Wash. 287, 51 Pac. 385.

Wisconsin.— Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644; Prybilski *v.* Northwestern Coal R. Co., 98 Wis. 413, 74 N. W. 117; Nadau *v.* White River Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29.

United States.— Southern Pac. Co. *v.* Seley, 152 U. S. 145, 14 S. Ct. 530, 38 L. ed. 391 [*reversing* 6 Utah 319, 23 Pac. 751]; Washington, etc., R. Co. *v.* McDade, 135 U. S. 554, 10 S. Ct. 1044, 34 L. ed. 235; Keats *v.* National Heeling Mach. Co., 65 Fed. 940, 13 C. C. A. 221; Louisville, etc., R. Co. *v.* Kelly, 63 Fed. 407, 11 C. C. A. 260; Northern Pac. R. Co. *v.* Blake, 63 Fed. 45, 11 C. C. A. 93; Sunney *v.* Holt, 15 Fed. 880.

See 34 Cent. Dig. tit. "Master and Servant," §§ 185–191.

Custom must be general see Couch *v.* Watson Coal Co., 46 Iowa 17.

51. *Alabama.*— Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88.

Georgia.— Central R. Co. *v.* De Bray, 71 Ga. 406.

Indiana.— Lake Erie, etc., R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 564.

Iowa.— Austin *v.* Chicago, etc., R. Co., 93 Iowa 236, 61 N. W. 849; Hosic *v.* Chicago, etc., R. Co., 75 Iowa 683, 37 N. W. 963, 9 Am. St. Rep. 518; Allen *v.* Burlington, etc., R. Co., 64 Iowa 94, 19 N. W. 870; Hamilton *v.* Des Moines Valley R. Co., 36 Iowa 31.

Maine.— Sawyer *v.* J. M. Arnold Shoe Co., 90 Me. 369, 38 Atl. 333.

Missouri.— Reichla *v.* Gruensfelder, 52 Mo. App. 43.

New York.— Siversen *v.* Jenks, 102 N. Y. App. Div. 313, 92 N. Y. Suppl. 382.

Wisconsin.— Propsom *v.* Leatham, 80 Wis. 608, 50 N. W. 586.

United States.—Homestake Min. Co. *v.* Fullerton, 69 Fed. 923, 16 C. C. A. 545; Bean *v.* Oceanic Steam Nav. Co., 24 Fed. 124.

See 34 Cent. Dig. tit. "Master and Servant," §§ 185–191.

Comparative condition of other road-beds not admissible see Georgia Pac. R. Co. *v.* Dooley, 86 Ga. 294, 12 S. E. 923, 12 L. R. A. 342 [*following* Louisville, etc., R. Co. *v.* Chaffin, 84 Ga. 519, 11 S. E. 891]; Bonner *v.* Hickey, (Tex. Civ. App. 1893) 23 S. W. 85.

52. Cayzer *v.* Taylor, 10 Gray (Mass.) 274, 69 Am. Dec. 317.

53. **Warning of change in appliances** see *infra*, IV, D, 2, a.

54. Whitwam *v.* Wisconsin, etc., R. Co., 58 Wis. 408, 17 N. W. 124.

55. Nugent *v.* Boston, etc., R. Co., 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151.

56. **Assumption of risk** see *infra*, IV, E, 9.
Joint liability see *supra*, IV, A, 6, b.
Latent defects see *infra*, IV, B, 7, e.
Liability of railroad company for injuries to employees of other companies see Railroads.
Liability of third persons to servant see Negligence.

57. Conway *v.* Furst, 57 N. J. L. 645, 32 Atl. 380; Devlin *v.* Smith, 89 N. Y. 470, 42 Am. Rep. 311 [*reversing* 25 Hun 206]; Matthes *v.* Kerrigan, 53 N. Y. Super. Ct. 431;

or proximate result of the master's negligence, he is liable, in the absence of contributory negligence on the part of the servant.[58]

b. Operation of Railroads[59] — (i) *Effect of Constitutional and Statutory Provisions.* Constitutional and statutory provisions which compel railroad companies to receive and transport over their lines the cars of other companies, without delay or discrimination, do not require them to receive cars in an unsafe condition, or so defective in their construction as to make it dangerous for their servants to handle them, and do not relieve the receiving company from liability for injuries sustained by one of its servants from such defective cars.[60]

(ii) *Cars of Other Companies.* While there are decisions to the effect that the responsibilities of a railroad company to its servants are the same in respect to cars of other companies which the servants are compelled to handle as in respect to its own,[61] the better view seems to be that the duty of a railroad company in respect to a car received by it for transportation over its road, in the ordinary course of business, is one of inspection only, and that it is not to be held responsible for latent defects which cannot be discovered by such an inspection as the exigencies of traffic will permit in the exercise of a reasonable care.[62] Where

Mauer *v.* Ferguson, 17 N. Y. Suppl. 349; McEnanny *v.* Kyle, 8 N. Y. St. 358. See also Haley *v.* Jump River Lumber Co., 81 Wis. 412, 51 N. W. 321, 956.

58. *Georgia.*— Georgia Cent. R. Co. *v.* McClifford, 120 Ga. 90, 47 S. E. 590, in which the master constantly used the appliance, and so dealt with it as practically to adopt it as his own.

Iowa.— Blink *v.* Hubinger, 90 Iowa 642, 57 N. W. 593.

New York.— Culligan *v.* Jones, 14 N. Y. St. 186, defects discoverable by use of ordinary care.

Utah.— Wood *v.* Rio Grande Western R. Co., 28 Utah 351, 79 Pac. 182.

Wisconsin.— Meier *v.* Morgan, 82 Wis. 289, 52 N. W. 174, 33 Am. St. Rep. 39.

59. Injuries to employees of other railroads see Railroads.

60. *Alabama.*— Louisville, etc., R. Co. *v.* Davis, 91 Ala. 487, 8 So. 552.

Illinois.— Chicago, etc., R. Co. *v.* Armstrong, 62 Ill. App. 228.

Kentucky.— Louisville, etc., R. Co. *v.* Williams, 95 Ky. 199, 24 S. W. 1, 15 Ky. L. Rep. 548, 44 Am. St. Rep. 214.

Mississippi.— Illinois Cent. R. Co. *v.* Price, 72 Miss. 862, 18 So. 415.

Pennsylvania.— Dooner *v.* Delaware, etc., Canal Co., 164 Pa. St. 17, 30 Atl. 269.

Vermont.— Reynolds *v.* Boston, etc., R. Co., 64 Vt. 66, 24 Atl. 134, 33 Am. St. Rep. 908. See 34 Cent. Dig. tit. "Master and Servant," § 194.

But see Simms *v.* South Carolina R. Co., 26 S. C. 490, 2 S. E. 486.

61. *Alabama.*— Louisville, etc., R. Co. *v.* Davis, 91 Ala. 487, 8 So. 552.

Illinois.— Chicago, etc., R. Co. *v.* Avery, 109 Ill. 314.

Indiana.—St. Louis, etc., R. Co. *v.* Valirius, 56 Ind. 511.

South Carolina.— Youngblood *v.* South Carolina, etc., R. Co., 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824.

Texas.— International, etc., R. Co. *v.* Kernan, 78 Tex. 294, 14 S. W. 668, 22 Am. St. Rep. 52, 9 L. R. A. 703; Missouri Pac. R. Co. *v.* White, 76 Tex. 102, 13 S. W. 65, 18 Am. St. Rep. 33.

Vermont.— Reynolds *v.* Boston, etc., R. Co., 64 Vt. 66, 24 Atl. 134, 33 Am. St. Rep. 908. See 34 Cent. Dig. tit. "Master and Servant," §§ 195, 236.

62. Wabash R. Co. *v.* Farrell, 79 Ill. App. 508. See also the following illustrative cases:

District of Columbia.— Mackey *v.* Baltimore, etc., R. Co., 19 D. C. 282, where it was held that it is the duty of the company to remedy defects, or refuse to take the car.

Illinois.— Sack *v.* Dolese, 137 Ill. 129, 27 N. E. 62 [*affirming* 35 Ill. App. 636]; Illinois Cent. R. Co. *v.* Barslow, 94 Ill. App. 206; Chicago, etc., R. Co. *v.* Gillison, 72 Ill. App. 207; Chicago, etc., R. Co. *v.* Armstrong, 62 Ill. App. 228.

Indiana.— Louisville, etc., R. Co. *v.* Bates, 146 Ind. 564, 45 N. E. 108.

Kansas.— Atchison, etc., R. Co. *v.* Penfold, 57 Kan. 148, 45 Pac. 574; Missouri Pac. R. Co. *v.* Barber, 44 Kan. 612, 24 Pac. 969.

Kentucky.— Louisville, etc., R. Co. *v.* Williams, 95 Ky. 199, 24 S. W. 1, 15 Ky. L. Rep. 548, 44 Am. St. Rep. 214.

Louisiana.— Budge *v.* Morgan's Louisiana R., etc., Steamship Co., 108 La. 349, 32 So. 535.

Massachusetts.— Bowers *v.* Connecticut River R. Co., 162 Mass. 312, 38 N. E. 508; Spaulding *v.* W. N. Flynt Granite Co., 159 Mass. 587, 34 N. E. 1134; Keith *v.* New Haven, etc., R. Co., 140 Mass. 175, 3 N. E. 28. *Compare* Coffee *v.* New York, etc., R. Co., 155 Mass. 21, 28 N. E. 1128, holding that a mere isolated, empty car, on its way to take its place in a train to be delivered to another company, is not within St. (1887) c. 270.

Michigan.— See Michigan Cent. R. Co. *v.* Smithson, 45 Mich. 212, 7 N. W. 791.

Minnesota.— Moon *v.* Northern Pac. R. Co., 46 Minn. 106, 48 N. W. 697, 24 Am. St. Rep. 194; Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231, 15 N. W. 241.

a railroad company receives a car of another company, and it is examined, and notice is given that it is defective and is to be returned, the company has fulfilled its duty in regard to the car, and is not liable for injuries resulting from such defect, which a servant receives while the car is shifting about the yard.[63]

(III) *IMPROPER LOADING OF CARS.* Where the servant of a railroad company is injured by reason of the improper loading of a car received from another company,[64] or which has been loaded by the shipper,[65] the company is not liable, unless it has been in the habit of receiving and transporting cars loaded in such a manner,[66] or unless it has failed to provide a system of inspection and proper persons to inspect cars after they have been loaded and before they have been received for transportation.[67]

Missouri.— Oglesby *v.* Missouri Pac. R. Co., 150 Mo. 137, 37 S. W. 829, 51 S. W. 758; Bender *v.* St. Louis, etc., R. Co., 137 Mo. 240, 37 S. W. 132; Mateer *v.* Missouri Pac. R. Co., (1891) 15 S. W. 970; Gutridge *v.* Missouri Pac. R. Co., 94 Mo. 468, 7 S. W. 476, 4 Am. St. Rep. 392.

Nebraska.— Union Stock-Yards Co. *v.* Goodwin, 57 Nebr. 138, 77 N. W. 357.

New Jersey.— Anderson *v.* Erie R. Co., 68 N. J. L. 647, 54 Atl. 830.

New York.— Eaton *v.* New York Cent., etc., R. Co., 163 N. Y. 391, 57 N. E. 609, 79 Am. St. Rep. 600 [*reversing* 14 N. Y. App. Div. 20, 43 N. Y. Suppl. 666]; Goodrich *v.* New York Cent., etc., R. Co., 116 N. Y. 398, 22 N. E. 397, 15 Am. St. Rep. 410, 5 L. R. A. 750; Bushby *v.* New York, etc., R. Co., 107 N. Y. 374, 14 N. E. 407, 1 Am. St. Rep. 844 [*affirming* 37 Hun 104]; Gottlieb *v.* New York, etc., R. Co., 100 N. Y. 462, 3 N. E. 344.

North Carolina.— Leak *v.* Carolina Cent. R. Co., 124 N. C. 455, 32 S. E. 884; Mason *v.* Richmond, etc., R. Co., 111 N. C. 482, 16 S. E. 698, 32 Am. St. Rep. 814, 18 L. R. A. 845.

North Dakota.— Bennett *v.* Northern Pac. R. Co., 2 N. D. 112, 49 N. W. 408, 13 L. R. A. 465.

Pennsylvania.— Elkins *v.* Pennsylvania R. Co., 171 Pa. St. 121, 33 Atl. 74; Dooner *v.* Delaware, etc., Canal Co., 164 Pa. St. 17, 30 Atl. 269; McMullen *v.* Carnegie, 158 Pa. St. 518, 27 Atl. 1043, 23 L. R. A. 448. *Compare* Anderson *v.* Oliver, 138 Pa. St. 156, 20 Atl. 981.

Rhode Island.— Jones *v.* New York, etc., R. Co., 20 R. I. 210, 37 Atl. 1033.

Tennessee.— Louisville, etc., R. Co. *v.* Reagan, 96 Tenn. 128, 33 S. W. 1050.

Texas.—Gulf, etc., R. Co. *v.* Dorsey, 66 Tex. 148, 18 S. W. 444; Mexican Cent. R. Co. *v.* Shean, (1891) 18 S. W. 151; Texas, etc., R. Co. *v.* Carlton, 60 Tex. 397; Southern Pac. Co. *v.* Winton, 27 Tex. Civ. App. 503, 66 S. W. 477; Houston, etc., R. Co. *v.* Milam, (Civ. App. 1900) 58 S. W. 735, (Civ. App. 1901) 60 S. W. 591; Galveston, etc., R. Co. *v.* Nass, (Civ. App. 1900) 57 S. W. 910; Jones *v.* Shaw, 16 Tex. Civ. App. 290, 41 S. W. 690; Eddy *v.* Prentice, 8 Tex. Civ. App. 58, 27 S. W. 1063; St. Louis, etc., R. Co. *v.* Putnam, 1 Tex. Civ. App. 142, 20 S. W. 1002; Texas, etc., R. Co. *v.* McClanahan, 2 Tex. Unrep. Cas. 270.

Virginia.— Richmond, etc., R. Co. *v.* Dudley, 90 Va. 304, 18 S. E. 274.

Wisconsin.— Ballou *v.* Chicago, etc., R. Co., 54 Wis. 257, 11 N. W. 559, 41 Am. Rep. 31.

United States.— Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. ed. 624; Felton *v.* Bullard, 94 Fed. 781, 37 C. C. A. 1; Atchison, etc., R. Co. *v.* Meyers, 76 Fed. 443, 22 C. C. A. 268.

See 34 Cent. Dig. tit. "Master and Servant," §§ 195, 236.

The duty to inspect will be measured by what the company ought to have done while the cars were in its possession, and not before, as the negligence of the connecting line before the delivery of the cars cannot be imputed to it. Illinois Cent. R. Co. *v.* Barslow, 94 Ill. App. 206.

An inspection will be presumed to have been proper in the absence of evidence to the contrary. Oglesby *v.* Missouri Pac. R. Co., 150 Mo. 137, 37 S. W. 829, 51 S. W. 758.

That cars are only used a brief time, or carried a short distance, will not excuse a railroad company from its duty of inspecting them. Atchison, etc., R. Co. *v.* Penfold, 57 Kan. 148, 45 Pac. 574.

Not negligence to receive cars with different couplings see Louisville, etc., R. Co. *v.* Boland, 96 Ala. 626, 11 So. 667, 18 L. R. A. 260; Wabash R. Co. *v.* Farrell, 79 Ill. App. 508; Thomas *v.* Missouri Pac. R. Co., 109 Mo. 187, 18 S. W. 980; Kohn *v.* McNulta, 147 U. S. 238, 13 S. Ct. 298, 37 L. ed. 150.

63. Atchison, etc., R. Co. *v.* Meyers, 76 Fed. 443, 22 C. C. A. 268.

64. Dewey *v.* Detroit, etc., R. Co., 97 Mich. 329, 52 N. W. 842, 56 N. W. 756, 37 Am. St. Rep. 348, 16 L. R. A. 342, 22 L. R. A. 292. *Contra*, Mexican Cent. R. Co. *v.* Shean, (Tex. 1891) 18 S. W. 151.

65. Haugh *v.* Chicago, etc., R. Co., 73 Iowa 66, 35 N. W. 116.

Company must furnish car appropriate for proposed load.— Bushby *v.* New York, etc., R. Co., 107 N. Y. 374, 14 N. E. 407, 1 Am. St. Rep. 844.

66. McIntosh *v.* Missouri Pac. R. Co., 58 Mo. App. 281.

67. Byrnes *v.* New York, etc., R. Co., 113 N. Y. 251, 21 N. E. 50, 4 L. R. A. 151 [*reversing* 14 N. Y. St. 554], in which the car was so loaded as to render the brake useless, but the company was held not to be liable, since its reception in this condition was due

(IV) *Railroad Tracks and Road-Beds.* A railroad company, as between itself and its servants, must exercise reasonable and ordinary care and diligence to make its road safe, whether it owns the road or uses it under contract with the owner;[68] and where two or more companies use a track in common, it is, although the exclusive property of one of the companies, for the time being the track of each company using it, and the proprietary company is not liable to its servants for injuries caused by the negligent use of the track by the servants of another company.[69]

(V) *Obstructions On, Over, or Near Railroad Tracks.* Where a railroad company permits an obstruction, of which it has actual or constructive knowledge, to remain on, over, or near its track, and by reason of such obstruction its servant is injured, the company is liable, although the obstruction belongs to or is under the control of a third person.[70]

4. Particular Appliances and Places[71] — a. In General — (I) *Dangerous Instrumentalities, Places, and Substances* — (A) *In General.* Negligence cannot be imputed to a master merely by reason of the fact that the instrumentalities or places furnished by him are dangerous;[72] but where the service required of a servant is of a peculiarly dangerous character, it is the duty of the master to make reasonable provision to protect him from the dangers to which he is exposed while engaged in the discharge of his duties.[73]

(B) *Explosives.* The measure of care imposed on the master for the safety of his servant in the use of dynamite or other explosives is that ordinary care which reasonable and prudent men would and do exercise under like circumstances;[74] and where a master furnishes an explosive known to him to be dangerous and unsafe for the use to which it is to be put,[75] or which has never been used for

to the negligence of fellow servants of the servant injured.

68. *Arkansas.*— Little Rock, etc., R. Co. *v.* Cagle, 53 Ark. 347, 14 S. W. 89.

Illinois.— Wisconsin Cent. R. Co. *v.* Ross, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49 [*affirming* 43 Ill. App. 454].

Kansas.— St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176.

Ohio.— Toledo Consol. St. R. Co. *v.* Sweeney, 8 Ohio Cir. Ct. 298, 4 Ohio Cir. Dec. 11.

Texas.— See Gulf, etc., R. Co. *v.* Dorsey, 2 Tex. Unrep. Cas. 247.

Wisconsin.— Stetler *v.* Chicago, etc., R. Co., 46 Wis. 497, 1 N. W. 112.

United States.— Smith *v.* Memphis, etc., R. Co., 18 Fed. 304.

See 34 Cent. Dig. tit. "Master and Servant," § 197.

But see Engel *v.* New York, etc., R. Co., 160 Mass. 260, 35 N. E. 547, 22 L. R. A. 283; Trask *v.* Old Colony R. Co., 156 Mass. 298, 31 N. E. 6, construing Acts (1887), c. 270.

Servant lent to another company.— A railroad company sending an engineer (hired by the month) with one of its engines to haul temporarily for another company the trains of the latter over its line is not responsible to the engineer for the bad condition of the track, nor for the want of adaptation of the engine to the track, it not being alleged that the employing company knew of such bad condition or want of adaptation, and concealed its information. Dunlap *v.* Richmond, etc., R. Co., 81 Ga. 136, 7 S. E. 283.

69. Georgia R., etc., Co. *v.* Friddell, 79 Ga. 489, 7 S. E. 214, 11 Am. St. Rep. 444.

70. Chicago, etc., R. Co. *v.* Russell, 91 Ill. 298, 33 Am. Rep. 54. *Compare* Martin *v.* Louisville, etc., R. Co., 95 Ky. 612, 26 S. W. 801, 16 Ky. L. Rep. 150; Sellars *v.* Richmond, etc., R. Co., 94 N. C. 654; Dalton *v.* Receivers, 6 Fed. Cas. No. 3,550, 4 Hughes 180, in which the facts did not show actionable negligence.

71. **Hidden dangers** see *infra*, IV, B, 7, d.
Inspection see *infra*, IV, B, 6.
Latent defects see *infra*, IV, B, 7, e.
Master's knowledge of defects see *infra*, IV, B, 7.

72. Gould *v.* Chicago, etc., R. Co., 66 Iowa 590, 24 N. W. 227.

73. Hannibal, etc., R. Co. *v.* Fox, 31 Kan. 586, 3 Pac. 320. *Compare* Chicago, etc., R. Co. *v.* Clark, 108 Ill. 113.

74. Schwartz *v.* Shull, 45 W. Va. 405, 31 S. E. 914. See also Mather *v.* Rillston, 156 U. S. 391, 15 S. Ct. 464, 39 L. ed. 464.

In determining the care and prudence a master must use in furnishing his servant with explosives for blasting, it may be considered how far such kind of explosives was in general use, and ordinarily considered safe and proper for the purpose, and how far the particular brand or manufacture of the explosives furnished was generally considered a safe article by those using it. Adams *v.* West Roxbury, 1 Fed. Cas. No. 67, 1 Hask. 576.

75. Adams *v.* West Roxbury, 1 Fed. Cas. No. 67, 1 Hask. 576, in which the master furnished an inferior explosive on account of its cheapness.

the purpose, and is in fact unfit and unsafe therefor,[76] he is guilty of negligence. So too where a servant is injured by an explosion which is the necessary result of improper appliances the master is liable.[77]

(II) *HORSES AND VEHICLES.*[78] Where the master knows or should know[79] that an animal used by him is vicious,[80] or that his harness or vehicle is not reasonably safe,[81] he is liable for injuries to his servant caused thereby. So too a master must furnish a reasonably safe appliance for unloading a vehicle,[82] and the master is also liable for injuries sustained by a servant through the premature starting of his team resulting from the master's negligence while the servant is in a dangerous position about the vehicle in the prosecution of his duties.[83]

(III) *BUILDING AND PLACES FOR WORK*[84] — (A) *In General.* A master owes it to his servant to furnish him with a reasonably safe building or other place in which to do his work, and is liable for injuries occasioned by his negligence in this regard.[85] This rule does not apply to a case where servants are creating a

76. Spelman *v.* Fisher Iron Co., 56 Barb. (N. Y.) 151.

77. Nichols *v.* Brush, etc., Mfg. Co., 53 Hun (N. Y.) 137, 6 N. Y. Suppl. 601 [*affirmed* in 117 N. Y. 646, 22 N. E. 1131].

78. **Contributory negligence** see *infra*, IV, F, 4, c, (I).

79. **Necessity of knowledge** see Weigand *v.* Atlantic Refining Co., 189 Pa. St. 248, 42 Atl. 132. See also Hardy *v.* Shedden Co., 78 Fed. 610, 24 C. C. A. 261, 37 L. R. A. 33.

80. *Kentucky.*— East Jellico Coal Co. *v.* Stewart, 68 S. W. 624, 24 Ky. L. Rep. 420.

Missouri.— McCready *v.* Stepp, 104 Mo. App. 340, 78 S. W. 671.

Nebraska.— George H. Hammond Co. *v.* Johnson, 38 Nebr. 244, 56 N. W. 967.

United States.— Knickerbocker Ice Co. *v.* Finn, 80 Fed. 483, 25 C. C. A. 579.

England.— Yarmouth *v.* France, 19 Q. B. D. 647, 57 L. J. Q. B. 7, 36 Wkly. Rep. 281.

See 34 Cent. Dig. tit. "Master and Servant," § 204.

Compare Devlin *v.* Metropolitan St. R. Co., 17 N. Y. App. Div. 491, 45 N. Y. Suppl. 505.

81. Cooper *v.* Robert Portner Brewing Co., 112 Ga. 894, 38 S. E. 91; Boyce *v.* Schroeder, 21 Ind. App. 28, 51 N. E. 376; Toledo Consol. St. R. Co. *v.* Yunker, 9 Ohio Cir. Ct. 262, 4 Ohio Cir. Dec. 23. *Compare* Deane *v.* Buffalo, 42 N. Y. App. Div. 205, 58 N. Y. Suppl. 810.

82. Beard *v.* American Car Co., 63 Mo. App. 382.

83. Borden *v.* Falk Co., 97 Mo. App. 566, 71 S. W. 478; Sweain *v.* Donahue, 105 Wis. 142, 81 N. W. 119.

84. **Assumption of risk** see *infra*, IV, E, 2, a.

Proximate cause of injury see *infra*, IV, B, 9.

85. *California.*— Davies *v.* Oceanic Steamship Co., 89 Cal. 280, 26 Pac. 827.

Georgia.— Babcock Bros. Lumber Co. *v.* Johnson, 120 Ga. 1030, 48 S. E. 438.

Illinois.— Missouri Malleable Iron Co. *v.* Dillon, 206 Ill. 145, 69 N. E. 12 [*affirming* 106 Ill. App. 649]; Frost Mfg. Co. *v.* Smith, 197 Ill. 253, 64 N. E. 305 [*affirming* 98 Ill. App. 308]; Montgomery Coal Co. *v.* Barringer, 109 Ill. App. 185; Chicago Gen. R. Co. *v.* McNamara, 94 Ill. App. 188; Pioneer Fireproof Constr. Co. *v.* Howell, 90 Ill. App. 122 [*affirmed* in 189 Ill. 123, 59 N. E. 535].

Indiana.— W. C. De Pauw Co. *v.* Stubblefield, 132 Ind. 182, 31 N. E. 796; Indiana Pipe Line, etc., Co. *v.* Neusbaum, 21 Ind. App. 361, 52 N. E. 471; Lauter *v.* Duckworth, 19 Ind. App. 535, 48 N. E. 864; Muncie Pulp Co. *v.* Jones, 11 Ind. App. 110, 38 N. E. 547.

Iowa.— Nugent *v.* Cudahy Packing Co., 126 Iowa 517, 102 N. W. 442; McDonnell *v.* Illinois Cent. R. Co., 105 Iowa 459, 75 N. W. 336.

Kentucky.— Angel *v.* Jellico Coal Min. Co., 115 Ky. 728, 74 S. W. 714, 25 Ky. L. Rep. 108.

Louisiana.— Ferris *v.* Hernsheim, 51 La. Ann. 178, 24 So. 771.

Maine.— Frye *v.* Bath Gas, etc., Co., 94 Me. 17, 46 Atl. 804.

Maryland.— Hearn *v.* Quillen, 94 Md. 39, 50 Atl. 402.

Massachusetts.— McCauley *v.* Norcross, 155 Mass. 584, 30 N. E. 464. *Compare* Dene *v.* Arnold Print Works, 181 Mass. 560, 64 N. E. 203; Campbell *v.* Dearborn, 175 Mass. 183, 55 N. E. 1042; Regan *v.* Donovan, 159 Mass. 1, 33 N. E. 702.

Michigan.—Smith *v.* Peninsular Car-Works, 60 Mich. 501, 27 N. W. 662, 1 Am. St. Rep. 542.

Minnesota.— Harding *v.* Minneapolis R. Transfer Co., 80 Minn. 504, 83 N. W. 395.

Montana.— Shaw *v.* New Year Gold Mines Co., 31 Mont. 138, 77 Pac. 515.

New Jersey.— Saunders *v.* Eastern Hydraulic Pressed Brick Co., 63 N. J. L. 554, 44 Atl. 630, 76 Am. St. Rep. 222.

New York.— Devaney *v.* Degnon-McLean Constr. Co., 178 N. Y. 620, 70 N. E. 1098 [*affirming* 79 N. Y. App. Div. 62, 79 N. Y. Suppl. 1050]; Ryan *v.* Fowler, 24 N. Y. 410, 82 Am. Dec. 315; Duggan *v.* Phelps, 82 N. Y. App. Div. 509, 81 N. Y. Suppl. 916; Hoelter *v.* McDonald, 82 N. Y. App. Div. 423, 81 N. Y. Suppl. 616; Merker *v.* C. R. Remington, etc., Co., 62 N. Y. App. Div. 472, 70 N. Y. Suppl. 1070; Cochran *v.* Sess, 49 N. Y. App. Div. 223, 62 N. Y. Suppl. 1088; Siedentop *v.* Buse, 21 N. Y. App. Div. 592, 47 N. Y. Suppl. 809; Dillon *v.* Sixth Ave. R. Co., 48 N. Y. Super.

place of work, when it is constantly changing in character by their labor, when it only becomes dangerous by the carelessness or negligence of the workmen, when the dangers which arise are very short-lived, or when, by the negligence of the workmen, the place is rendered unsafe without the master's fault or knowledge.[86]

(B) *Fire-Escapes.* It is no part of the duty of a master to his servant, employed in a building properly constructed for the ordinary business carried on within it, in the absence of a statute requirement,[87] to provide a means of escape from a fire which is not caused by his negligence.[88]

Ct. 283; Anderson *v.* Steinreich, 32 Misc. 680, 65 N. Y. Suppl. 799 [*reversing* 32 Misc. 237, 65 N. Y. Suppl. 498]; Raftery *v.* Central Park, etc., R. Co., 14 Misc. 560, 35 N. Y. Suppl. 1067. *Compare* Bateman *v.* New York Cent., etc., R. Co., 67 N. Y. App. Div. 241, 73 N. Y. Suppl. 390; Brown *v.* Terry, 67 N. Y. App. Div. 223, 73 N. Y. Suppl. 733; Evans *v.* Vogt, etc., Mfg. Co., 5 Misc. 330, 25 N. Y. Suppl. 509.

North Carolina.— Myers *v.* Concord Lumber Co., 129 N. C. 252, 39 S. E. 960.

Pennsylvania.— See Casey *v.* Pennsylvania Asphalt Pav. Co., 198 Pa. St. 348, 47 Atl. 1128; Pawling *v.* Hoskins, 132 Pa. St. 617, 19 Atl. 301, 19 Am. St. Rep. 617.

Washington.— Johnson *v.* Bellingham Bay Imp. Co., 13 Wash. 455, 43 Pac. 370. *Compare* Decker *v.* Stimson Mill Co., 31 Wash. 522, 72 Pac. 98.

Wisconsin.— Engstrom *v.* Ashland Iron, etc., Co., 87 Wis. 166, 58 N. W. 241; Johnson *v.* Ashland First Nat. Bank, 79 Wis. 414, 48 N. W. 712, 24 Am. St. Rep. 722.

United States.— Fournier *v.* Pike, 128 Fed. 991; Sansol *v.* Compagnie Générale Transatlantique, 101 Fed. 390; Grace, etc., Co. *v.* Kennedy, 99 Fed. 679, 40 C. C. A. 69; Barber Asphalt Pav. Co. *v.* Odasz, 85 Fed. 754, 29 C. C. A. 631. *Compare* McKenna Steel Working Co. *v.* Lewis, 111 Fed. 320, 49 C. C. A. 369; Dwyer *v.* Nixon, 108 Fed. 751, 47 C. C. A. 666.

Canada.— See Dugal *v.* Peoples Bank, 34 N. Brunsw. 581.

See 34 Cent. Dig. tit. "Master and Servant," § 205.

Duty to light place of work.— *Illinois.*— National Syrup Co. *v.* Carlson, 155 Ill. 210, 40 N. E. 492.

Maine.— Sawyer *v.* Rumford Falls Paper Co., 90 Me. 354, 38 Atl. 318, 60 Am. St. Rep. 260.

Missouri.— Irmer *v.* St. Louis Brewing Co., 69 Mo. App. 17.

New York.— Devaney *v.* Degnon-McLean Constr. Co., 178 N. Y. 620, 70 N. E. 1098 [*affirming* 79 N. Y. App. Div. 62, 79 N. Y. Suppl. 1050].

Wisconsin.— Haley *v.* Western Transit Co., 76 Wis. 344, 45 N. W. 16.

United States.— The Saratoga, 87 Fed. 349 [*reversed* on another ground in 94 Fed. 221, 36 C. C. A. 208]; H. C. Akeley Lumber Co. *v.* Rauen, 58 Fed. 668, 7 C. C. A. 424.

See 34 Cent. Dig. tit. "Master and Servant," § 205.

Compare Schoultz *v.* Eckardt Mfg. Co., 112 La. 568, 36 So. 593, 104 Am. St. Rep. 452, holding that a master is not bound to keep his premises so lighted that all repair work may be done without the necessity of additional light.

Place such as is ordinarily used for similar work sufficient see Manley *v.* Minneapolis Paint Co., 76 Minn. 169, 78 N. W. 1050.

Where the work is the construction of a new building, the master is not under the same duty as he would be if the building were complete and fitted for use, and he cannot be held to the same degree of care with respect to temporary floors, or other structures, mainly constructed by the workmen for their own use, for purposes which are constantly changing as the work progresses, and which uses in the nature of things cannot in all cases be foreseen by the master. Fournier *v.* Pike, 128 Fed. 991.

Where a servant chooses his own position on a bridge in course of construction while a portion of the work is going on, it is not the master's duty to have a representative present to see that such place is safe. Southern Indiana R. Co. *v.* Harrell, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460.

86. Shaw *v.* New Year Gold Mines Co., 31 Mont. 138, 77 Pac. 515. See also Kennedy *v.* Grace, etc., Co., 92 Fed. 116 [*affirmed* in 99 Fed. 679, 40 C. C. A. 69].

87. Arms *v.* Ayer, 192 Ill. 601, 61 N. E. 851, 85 Am. St. Rep. 357, 58 L. R. A. 277; Johnson *v.* Steam Gauge, etc., Co., 146 N. Y. 152, 40 N. E. 773 [*affirming* 72 Hun 535, 25 N. Y. Suppl. 689]; Pauley *v.* Steam Gauge, etc., Co., 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194 [*reversing* 61 Hun 254, 16 N. Y. Suppl. 820]; Greenhaus *v.* Alter, 30 N. Y. App. Div. 585, 52 N. Y. Suppl. 268. See also Huda *v.* American Glucose Co., 13 Misc. (N. Y.) 657, 34 N. Y. Suppl. 931. But see Maker *v.* Slater Mill, etc., Co., 15 R. I. 112, 23 Atl. 63; Grant *v.* Slater Mill, etc., Co., 14 R. I. 380.

Substantial compliance with statute sufficient see Pauley *v.* Steam Gauge, etc., Co., 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194; Gorman *v.* McArdle, 67 Hun (N. Y.) 484, 22 N. Y. Suppl. 479.

A safe landing-place is an essential part of the fire-escapes required by statute. Johnson *v.* Steam Gauge, etc., Co., 72 Hun (N. Y.) 535, 25 N. Y. Suppl. 689 [*affirmed* in 146 N. Y. 152, 40 N. E. 773].

88. Jones *v.* Granite Mills, 126 Mass. 84, 30 Am. Rep. 661; Pauley *v.* Steam Gauge, etc., Co., 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194 [*reversing* 61 Hun 254, 16 N. Y. Suppl. 820].

(IV) *PLATFORMS, SCAFFOLDS, AND SUPPORTS.*[89] Where a master furnishes, or causes to be built under his direction and control, a platform, scaffold, staging, or like structure for the use of his servants in the prosecution of their work, it is his duty to exercise ordinary care to see that it is reasonably safe for the purpose contemplated.[90] But where the structure is erected by the workmen from material furnished by the master, and the master has no direction or control of the construction, he is not liable for injuries sustained by one of the workmen by reason of defects in the structure,[91] provided he has used reasonable care in the

89. **Negligence of fellow servant performing duties of master** see *infra*, IV, G, 4, a, (IX), (B).

90. *California.*— Alexander *v.* Central Lumber, etc., Co., 104 Cal. 532, 38 Pac. 410.

Delaware.— Donovan *v.* Harlan, etc., Co., 2 Pennew. 190, 44 Atl. 619.

Illinois.— McBeath *v.* Rawle, 192 Ill. 626, 61 N. E. 847, 69 L. R. A. 697 [*affirming* 93 Ill. App. 212]; Chicago, etc., R. Co. *v.* Maroney, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396 [*affirming* 67 Ill. App. 618]; John S. Metcalf Co. *v.* Nystedt, 102 Ill. App. 71 [*affirmed* in 203 Ill. 333, 67 N. E. 764], servant ordered to work on platform built by another.

Iowa.— Fink *v.* Des Moines Ice Co., 84 Iowa 321, 51 N. W. 155.

Kansas.— Kelley *v.* Union Pac. R. Co., 58 Kan. 161, 48 Pac. 843.

Kentucky.— Adams Express Co. *v.* Smith, 72 S. W. 752, 24 Ky. L. Rep. 1915.

Louisiana.— Ingham *v.* John B. Honor Co., 113 La. 1040, 37 So. 963.

Maine.— McCarthy *v.* Claflin, 99 Me. 290, 59 Atl. 293.

Massachusetts.—Bourbonnais *v.* West Boylston Mfg. Co., 184 Mass. 250, 68 N. E. 232; Gurney *v.* Le Baron, 182 Mass. 368, 65 N. E. 789 (defective upright furnished with intention that planking might be laid across it); Prendible *v.* Connecticut River Mfg. Co., 160 Mass. 131, 35 N. E. 675.

Michigan.— Corbett *v.* American Screen Door Co., 133 Mich. 669, 95 N. W. 737; Zimmerman *v.* Detroit Sulphite Fibre Co., 113 Mich. 1, 71 N. W. 321.

Minnesota.— Harding *v.* Minneapolis R. Transfer Co., 80 Minn. 504, 83 N. W. 395.

Missouri.— Doyle *v.* Missouri, etc., Trust Co., 140 Mo. 1, 41 S. W. 255. See also Wendall *v.* Chicago, etc., R. Co., 100 Mo. App. 556, 75 S. W. 689.

Nebraska.— Stevens *v.* Howe, 28 Nebr. 547, 44 N. W. 865.

New York.— Laws (1897), c. 415, giving a remedy to a servant injured while working on a scaffold, because of some defect therein, refers to a completed scaffold. Schapp *v.* Bloomer, 181 N. Y. 125, 73 N. E. 563 [*reversing* 90 N. Y. App. Div. 612, 85 N. Y. Suppl. 1146]; Pursley *v.* Edge Moor Bridge Works, 168 N. Y. 589, 60 N. E. 1119 [*affirming* 56 N. Y. App. Div. 71, 67 N. Y. Suppl. 719]; Siversen *v.* Jenks, 102 N. Y. App. Div. 313, 92 N. Y. Suppl. 382; Welk *v.* Jackson Architectural Iron-Works, 98 N. Y. App. Div. 247, 90 N. Y. Suppl. 541; Chaffee *v.* Union Dry Dock Co., 68 N. Y. App. Div. 578, 73 N. Y. Suppl. 908; Berry *v.* Atlantic Storage Co., 50 N. Y. App. Div. 590, 64 N. Y. Suppl. 292; Boyle *v.* Degnon-McLean Constr. Co., 47 N. Y. App. Div. 311, 61 N. Y. Suppl. 1043 [leave to appeal *denied* in 63 N. Y. Suppl. 1105]; Brown *v.* Todd, 46 N. Y. App. Div. 546, 61 N. Y. Suppl. 963; Stewart *v.* Ferguson, 34 N. Y. App. Div. 515, 54 N. Y. Suppl. 615; Healy *v.* Burke, 36 Misc. 792, 74 N. Y. Suppl. 1131 [*affirming* 35 Misc. 384, 71 N. Y. Suppl. 1027]; Kuss *v.* Freid, 32 Misc. 628, 66 N. Y. Suppl. 487. See also McLean *v.* Standard Oil Co., 21 N. Y. Suppl. 874.

Ohio.— Davies *v.* Griffith, 11 Ohio Dec. (Reprint) 495, 27 Cinc. L. Bul. 180.

West Virginia.— Richards *v.* Riverside Iron Works, 56 W. Va. 510, 49 S. E. 437.

Wisconsin.— Cadden *v.* American Steel Barge Co., 88 Wis. 409, 60 N. W. 800; Behm *v.* Armour, 58 Wis. 1, 15 N. W. 806.

United States.— Beattie *v.* Edge Moor Bridge Works, 109 Fed. 233; F. C. Austin Mfg. Co. *v.* Johnson, 89 Fed. 677, 32 C. C. A. 309; H. C. Akeley Lumber Co. *v.* Rauen, 58 Fed. 668, 7 C. C. A. 424; Woods *v.* Lindvall, 48 Fed. 62, 1 C. C. A. 37 [*affirming* 47 Fed. 195].

England.— Cripps *v.* Judge, 13 Q. B. D. 583, 49 J. P. 100, 53 L. J. Q. B. 517, 51 L. T. Rep. N. S. 182, 33 Wkly. Rep. 35. *Compare* Church *v.* Appleby, 58 L. J. Q. B. 144, 60 L. T. Rep. N. S. 542.

Canada.— Kelly *v.* Davidson, 27 Ont. App. 657 [*affirming* 32 Ont. 8].

See 34 Cent. Dig. tit. "Master and Servant," § 207.

Master not liable for non-discoverable defects see Bannon *v.* Sanden, 68 Ill. App. 164. See also Stourbridge *v.* Brooklyn City R. Co., 9 N. Y. App. Div. 129, 41 N. Y. Suppl. 128.

Where a platform could not have averted the injury, the master is not liable for failure to furnish one. Miniter *v.* Chicago, etc., R. Co., 122 Iowa 46, 96 N. W. 1108.

Where a scaffold was adequate to the work for which it was originally erected, and which was contemplated by those who directed its construction and the selection of the material, and by the employer, the fact that it was not adequate to an extra strain which was not contemplated does not necessarily prove negligence. Chicago Architectural Iron Works *v.* Nagel, 80 Ill. App. 492.

91. *California.*— Noyes *v.* Wood, 102 Cal. 389, 36 Pac. 766.

Connecticut.— Channon *v.* Sanford, 70

selection of proper and suitable material. This is the only duty which the law imposes upon him.[92]

(v) *Elevators, Hoistways, Runways, and Shafts.*[93] Where a master uses elevators, hoistways, runways, shafts, or like appliances in his business, he must use ordinary care to see that they are reasonably safe and suitable for the purposes for which they are intended.[94] The master's duty is, however, performed

Conn. 573, 40 Atl. 462, 66 Am. St. Rep. 133, 41 L. R. A. 200.

Delaware.— Donovan *v.* Harlan, etc., Co., 2 Pennew. 190, 44 Atl. 619.

Iowa.— Trcka *v.* Burlington, etc., R. Co., 100 Iowa 205, 69 N. W. 422.

Massachusetts.— Hayes *v.* New York, etc., R. Co., 187 Mass. 182, 72 N. E. 841; Thompson *v.* Worcester, 184 Mass. 354, 68 N. E. 833; Brady *v.* Norcross, 172 Mass. 331, 52 N. E. 528; McKay *v.* Hand, 168 Mass. 270, 47 N. E. 104; Reynolds *v.* Barnard, 168 Mass. 226, 46 N. E. 703.

Michigan.— Landowski *v.* Chapoton, 137 Mich. 429, 100 N. W. 564; Lockwood *v.* Tennant, 137 Mich. 305, 100 N. W. 562; Dewey *v.* Parke, 76 Mich. 631, 43 N. W. 644.

Minnesota.— Marsh *v.* Herman, 47 Minn. 537, 50 N. W. 611.

Missouri.— Bowen *v.* Chicago, etc., R. Co., 95 Mo. 268, 8 S. W. 230; Flynn *v.* Union Bridge Co., 42 Mo. App. 529.

Nebraska.— Stevens *v.* Howe, 28 Nebr. 547, 44 N. W. 865.

New York.— Kimmer *v.* Weber, 151 N. Y. 417, 45 N. E. 860, 56 Am. St. Rep. 630; Conley *v.* Lackawanna Iron, etc., Co., 94 N. Y. App. Div. 149, 88 N. Y. Suppl. 123; Rotondo *v.* Smyth, 92 N. Y. App. Div. 153, 86 N. Y. Suppl. 1103; Kiffin *v.* Wendt, 39 N. Y. App. Div. 229, 57 N. Y. Suppl. 109; McCone *v.* Gallagher, 16 N. Y. App. Div. 272, 44 N. Y. Suppl. 697.

Pennsylvania.— Ross *v.* Walker, 139 Pa. St. 42, 21 Atl. 157, 159, 23 Am. St. Rep. 160.

Rhode Island.— See Durell *v.* Hartwell, 26 R. I. 125, 58 Atl. 448.

Texas.— Maughmer *v.* Behring, 19 Tex. Civ. App. 299, 46 S. W. 917.

Vermont.— Garrow *v.* Miller, 72 Vt. 284, 47 Atl. 1087; Lambert *v.* Missisquoi Pulp Co., 72 Vt. 278, 47 Atl. 1085.

See 34 Cent. Dig. tit. "Master and Servant," § 207.

Master not liable for defects in temporary scaffolds.— Birmingham Furnace, etc., Co. *v.* Gross, 97 Ala. 220, 12 So. 36; Reynolds *v.* Barnard, 168 Mass. 226, 46 N. E. 703; Haughey *v.* Thatcher, 89 N. Y. App. Div. 375, 85 N. Y. Suppl. 935; Phœnix Bridge Co. *v.* Castleberry, 131 Fed. 175, 65 C. C. A. 418.

92. Farrell *v.* Eastern Mach. Co., 77 Conn. 484, 59 Atl. 611, 107 Am. St. Rep. 45, 68 L. R. A. 239; Twomey *v.* Swift, 163 Mass. 273, 39 N. E. 1018; Stewart *v.* Ferguson, 34 N. Y. App. Div. 515, 54 N. Y. Suppl. 615; Rollings *v.* Levering, 18 N. Y. App. Div. 223, 45 N. Y. Suppl. 942; Richards *v.* Hayes, 17 N. Y. App. Div. 422, 45 N. Y. Suppl. 234; Davies *v.* Griffith, 11 Ohio Dec. (Reprint) 495, 27 Cinc. L. Bul. 180.

93. Covering or guarding shafts see *infra*, IV, B, 5, c.

Inspection and test generally see *infra*, IV, B, 6.

Negligence of fellow servants performing duties of master see *infra* IV, G, 4, a, (IX), (A).

Who are fellow servants see *infra*, IV, G, 3.

94. *California.*— Hillebrand *v.* Standard Biscuit Co., 139 Cal. 233, 73 Pac. 163, insecure hatches over freight elevator.

Delaware.— Boyd *v.* Blumenthal, 3 Pennew. 564, 52 Atl. 330.

Illinois.— McGregor *v.* Reid, 178 Ill. 464, 53 N. E. 323, 69 Am. St. Rep. 332 [*reversing* 76 Ill. App. 610]; Leonard *v.* Kinnare, 174 Ill. 532, 51 N. E. 688 [*affirming* 75 Ill. App. 145] (defective hoisting apparatus); Knickerbocker Ice Co. *v.* Bernhardt, 95 Ill. App. 23 (dangerous runway); Pioneer Fireproof Constr. Co. *v.* Hansen, 69 Ill. App. 659 (hoisting apparatus).

Kentucky.— Continental Tobacco Co. *v.* Knoop, 71 S. W. 3, 24 Ky. L. Rep. 126; Wilson *v.* Williams, 58 S. W. 444, 22 Ky. L. Rep. 567.

Maryland.— Baltimore Boot, etc., Mfg. Co. *v.* Jamar, 93 Md. 404, 49 Atl. 847, 86 Am. St. Rep. 428; Wise *v.* Ackerman, 76 Md. 375, 25 Atl. 424, freight elevator used by servants as passenger elevator.

Massachusetts.—Kleibaz *v.* Middleton Paper Co., 180 Mass. 363, 62 N. E. 371, defective safety clutches. *Compare* Hoard *v.* Blackstone Mfg. Co., 177 Mass. 69, 58 N. E. 180, construing Pub. St. c. 104, § 14.

Minnesota.— McDonough *v.* Lanpher, 55 Minn. 501, 57 N. W. 152, 43 Am. St. Rep. 541.

Missouri.— Wendler *v.* People's House Furnishing Co., 165 Mo. 527, 65 S. W. 737 (failure to provide barriers to elevator shaft); Nash *v.* Kansas City Hydraulic Press Brick Co., 109 Mo. App. 600, 83 S. W. 90 (servant injured while working about bottom of elevator which was dark).

Nebraska.— Oberfelder *v.* Doran, 26 Nebr. 118, 41 N. W. 1094, 18 Am. St. Rep. 771.

New York.—Wolf *v.* Devitt, 179 N. Y. 569, 72 N. E. 1152 [*affirming* 83 N. Y. App. Div. 42, 82 N. Y. Suppl. 189] (injury caused by elevator gates falling down shaft); Brennan *v.* Gordon, 118 N. Y. 489, 23 N. E. 810, 16 Am. St. Rep. 775, 8 L. R. A. 818 [*reversing* 14 Daly 47]; Young *v.* Mason Stable Co., 96 N. Y. App. Div. 305, 89 N. Y. Suppl. 349; Auld *v.* Manhattan L. Ins. Co., 34 N. Y. App. Div. 491, 54 N. Y. Suppl. 222; Dougherty *v.* Milliken, 26 N. Y. App. Div. 386, 49 N. Y. Suppl. 905 (hoisting derrick); Simmons *v.* Peters, 20 N. Y. App. Div. 251, 46 N. Y. Suppl. 800; Freeman *v.* Glens Falls Paper-

where he purchases his elevator from reliable and competent manufacturers, has it placed in working order by them, and has it regularly inspected by experts.[95]

(VI) *MINES, QUARRIES, AND EXCAVATIONS.*[96] Where a servant is employed in a mine, quarry, tunnel, pit, trench, or other excavation, the master owes him the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work admits of,[97] and must comply

Mill Co., 61 Hun 125, 15 N. Y. Suppl. 657 [*following* McRickard *v.* Flint, 114 N. Y. 222, 21 N. E. 153]; Hart *v.* Naumburg, 50 Hun 392, 3 N. Y. Suppl. 227; Dervin *v.* Herrman, 58 N. Y. Super. Ct. 193, 9 N. Y. Suppl. 722.

Ohio.— Frolich *v.* Cranker, 21 Ohio Cir. Ct. 615, 11 Ohio Cir. Dec. 592.

Pennsylvania.— McGuigan *v.* Beatty, 186 Pa. St. 329, 40 Atl. 490; McKinnie *v.* Kilgallon, 8 Pa. Cas. 519, 11 Atl. 614; Skelley *v.* Crutchfield, 17 Pa. Super. Ct. 198.

Rhode Island.— Mulvey *v.* Rhode Island Locomotive Works, 14 R. I. 204.

Tennessee.— Bruce *v.* Beall, 99 Tenn. 303, 41 S. W. 445.

Texas.— Oriental Inv. Co. *v.* Sline, 17 Tex. Civ. App. 692, 41 S. W. 130; The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

Virginia.— Parlett *v.* Dunn, 102 Va. 459, 46 S. E. 467, hoisting apparatus.

Wisconsin.— Anderson *v.* Hayes, 101 Wis. 519, 77 N. W. 903; Thompson *v.* Johnston Bros. Co., 86 Wis. 576, 57 N. W. 298.

England.— Lloyd *v.* Wooland, 87 L. T. Rep. N. S. 73.

See 34 Cent. Dig. tit. "Master and Servant," § 208.

"An elevator is in many respects a dangerous machine, and though it may be primarily intended only as a freight elevator, yet, if the employés, in the course of their employment, are authorized or directed to use the elevator as a means of personal transportation, the employer, controlling the operation of the elevator, is required to exercise great care and caution both in the construction and operation of the machine; so as to render it as free from danger as careful foresight and precaution may reasonably dictate." Wise *v.* Ackerman, 76 Md. 375, 389, 25 Atl. 424 [*quoted* with approval in McDonough *v.* Lanpher, 55 Minn. 501, 505, 57 N. W. 152, 43 Am. St. Rep. 541, and *adopted* in Frolich *v.* Cranker, 21 Ohio Cir. Ct. 615, 11 Ohio Cir. Dec. 592].

Master need not furnish best known elevator.— Young *v.* Mason Stable Co., 96 N. Y. App. Div. 305, 89 N. Y. Suppl. 349.

Failure to put on safety appliances and to inclose an elevator to be used exclusively for freight does not constitute negligence. Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399. See also Kern *v.* De Castro, etc., Sugar Refining Co., 125 N. Y. 50, 25 N. E. 1071 [*reversing* 5 N. Y. Suppl. 548]; Boess *v.* Clausen, etc., Brewing Co., 12 N. Y. App. Div. 366, 42 N. Y. Suppl. 848.

Negligence not shown see Hyde *v.* Mendel, 75 Conn. 140, 52 Atl. 744; Duffy *v.* Williams, 71 N. Y. App. Div. 110, 75 N. Y. Suppl. 600; Tisch *v.* Hirsch, 34 N. Y. App. Div. 623, 53 N. Y. Suppl. 926, 32 N. Y. App. Div. 635, 52 N. Y. Suppl. 1076; Montgomery *v.* Bloomingdale, 34 N. Y. App. Div. 375, 54 N. Y. Suppl. 329; Bucher *v.* Pryibil, 19 N. Y. App. Div. 126, 45 N. Y. Suppl. 972; Hoehmann *v.* Moss Engraving Co., 4 Misc. (N. Y.) 160, 23 N. Y. Suppl. 787; Healey *v.* Smith, 17 N. Y. Suppl. 851; Spees *v.* Boggs, 198 Pa. St. 112, 47 Atl. 875, 82 Am. St. Rep. 792, 52 L. R. A. 933.

95. McGregor *v.* Reid, 76 Ill. App. 610; Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; Kaye *v.* Rob Roy Hosiery Co., 51 Hun (N. Y.) 519, 4 N. Y. Suppl. 571.

96. **Assumption of risks** see *infra*, IV, E, 2, e.

Concurrent negligence of fellow servants see *infra*, IV, G, 4, a, (IV).

Criminal liability for failure to ventilate mines see MINES AND MINERALS.

Customary methods and appliances see *supra*, IV, B, 2, b, (II).

Negligence of fellow servant performing duties of master see *infra*, IV, G, 4, a, (IX), (C).

Who are fellow servants see *infra*, IV, G, 3.

97. *Alabama.*—Lewis *v.* Montgomery, (1894) 16 So. 34 (failure to brace sides of excavation); McNamara *v.* Logan, 100 Ala. 187, 14 So. 175 (defective mine entry). *Compare* Whatley *v.* Zenida Coal Co., 122 Ala. 118, 26 So. 124, where it was held that a mine owner is not required, as a matter of law, to cut a manway for the ingress and egress of employees, different and separate from the slope through which the ore is brought out.

California.— Hanley *v.* California Bridge, etc., Co., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597 (finished part of tunnel under construction an appliance for the prosecution of remaining work); Elledge *v.* National City, etc., R. Co., 100 Cal. 282, 34 Pac. 720, 38 Am. St. Rep. 290 (injury from fall of embankment).

Colorado.— Union Gold Min. Co. *v.* Crawford, 29 Colo. 511, 69 Pac. 600, defective tramway in upper level of mine.

Illinois.— Henrietta Coal Co. *v.* Campbell, 211 Ill. 216, 71 N. E. 863 [*affirming* 112 Ill. App. 452] (duty to keep roadway in mine in reasonably safe condition); St. Louis Consol. Coal Co. *v.* Lundak, 196 Ill. 594, 63 N. E. 1079 [*affirming* 97 Ill. App. 109] (injury from fall of roof elsewhere than where miners were working); St. Louis Consol. Coal Co. *v.* Gruber, 188 Ill. 584, 59 N. E. 254 [*affirming* 91 Ill. App. 15] (fall of coal in mine); Coal Valley Min. Co. *v.* Haywood, 98 Ill. App. 258 (unsafe mine entry); St. Louis Consol. Coal Co. *v.* Scheiber, 65 Ill. App. 304 (reasonable care required as to roof of mine); Girard Coal Co. *v.* Wiggins, 52 Ill. App. 69

with all statutory requirements which have been enacted for the protection of the

(duty to provide safe means of ingress and egress).

Iowa.— McQueeny *v.* Chicago, etc., R. Co., 120 Iowa 522, 94 N. W. 1124 (caving in of bank); Lanza *v.* Le Grand Quarry Co., 115 Iowa 299, 88 N. W. 805 (in which no negligence was shown); Taylor *v.* Star Coal Co., 110 Iowa 40, 81 N. W. 249 (instruction as to liability for accident from fall of roof of entry held sufficient); Corson *v.* Coal Hill Co., 101 Iowa 224, 70 N. W. 185 (McClain's Code, §§ 2463, 2465, does not apply where miner is not bound to look after safety of entry where he works); Heath *v.* Whitebreast Coal, etc., Co., 65 Iowa 737, 23 N. W. 148 (not negligence to build switch track in mine on a grade).

Kentucky.— Lexington, etc., Min. Co. *v.* Stephens, 104 Ky. 502, 47 S. W. 321, 20 Ky. L. Rep. 696 (accumulation of noxious gases); Ashland Coal, etc., R. Co. *v.* Wallace, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207, 19 Ky. L. Rep. 849 (failure to have mine entry inspected by competent person); Godfrey *v.* Beattyville Coal Co., 101 Ky. 339, 41 S. W. 10, 19 Ky. L. Rep. 501 (duty as to exclusion from mine of inflammable gases); Wilson *v.* Alpine Coal Co., 81 S. W. 278, 26 Ky. L. Rep. 337 (fall of stone from roof of mine); East Jellico Co. *v.* Golden, 79 S. W. 291, 25 Ky. L. Rep. 2056 (rule as to liability for fall of roof); Tradewater Coal Co. *v.* Johnson, 72 S. W. 274, 24 Ky. L. Rep. 177, 61 L. R. A. 161 (fall of coal from negligent blasting); Koltinsky *v.* Wood, 65 S. W. 848, 23 Ky. L. Rep. 1665 (injury caused by unsound props in mine).

Maine.— Haggerty *v.* Hallowell Granite Co., 89 Me. 118, 35 Atl. 1029 (fall of rock in quarry); Mayhew *v.* Sullivan Min. Co., 76 Me. 100 (unprotected ladder hole in mine).

Massachusetts.— Bartolomeo *v.* McKnight, 178 Mass. 242, 59 N. E. 804 (failure of master to furnish material to shore up trench); McCoy *v.* Westhorough, 172 Mass. 504, 52 N. E. 1064 (caving in of sewer excavation); Fitzsimmons *v.* Taunton, 160 Mass. 223, 35 N. E. 549 (failure to shore up trench). *Compare* Hughes *v.* Malden, etc., Gas Light Co., 168 Mass. 395, 47 N. E. 125; Shea *v.* Wellington, 163 Mass. 364, 40 N. E. 173; Lynch *v.* Allyn, 160 Mass. 248, 35 N. E. 550, as to what constitute "ways, works, or machinery" within the Employers' Liability Act.

Michigan.— Smizel *v.* Odanah Iron Co., 116 Mich. 149, 74 N. W. 488 (platform for use of miners disturbed by blasting); Petaja *v.* Aurora Iron Min. Co., 106 Mich. 463, 64 N. W. 335, 66 N. W. 951, 58 Am. St. Rep. 505, 32 L. R. A. 435 (portions of stope room are not, from time it becomes necessary to timber them, places for work within the rule).

Minnesota.— Stahl *v.* Duluth, 71 Minn. 341, 74 N. W. 143, in which master was held liable for an injury caused by the explosion of an unexploded charge of dynamite in ditch where servant was working.

Missouri.— Bradley *v.* Chicago, etc., R. Co., 138 Mo. 293, 39 S. W. 763 (fall of earth from top of bank left overhanging for several hours); Deweese *v.* Meramec Iron Min. Co., 128 Mo. 423, 31 S. W. 110 [*affirming* 54 Mo. App. 476] (fall of stones in mine); Carter *v.* Baldwin, 107 Mo. App. 217, 81 S. W. 204 (rule as to mines stated); Quigley *v.* Bambrick, 58 Mo. App. 192 (fall of tunnel walls).

Montana.— Kelley *v.* Fourth of July Min. Co., 16 Mont. 484, 41 Pac. 273, duty to take proper precautions to prevent falling of tunnel roof.

New Jersey.—Belleville Stone Co. *v.* Mooney, 61 N. J. L. 253, 39 Atl. 764, 39 L. R. A. 834 [*affirming* 60 N. J. L. 323, 38 Atl. 835], failure to give warning of blast in quarry.

New York.— Del Sejnore *v.* Hallinan, 153 N. Y. 274, 47 N. E. 308 [*reversing* 36 N. Y. Suppl. 1124] (facts held not to show negligence in caving in of trench); Belt *v.* Henry Du Bois' Sons Co., 97 N. Y. App. Div. 392, 89 N. Y. Suppl. 1072 (master not liable, the place being reasonably safe, and made dangerous only by the manner of work); Schmit *v.* Gillen, 41 N. Y. App. Div. 302, 58 N. Y. Suppl. 458 (duty as to sewer trench); Dolan *v.* McLaughlin, 33 N. Y. App. Div. 628, 53 N. Y. Suppl. 273 (negligence not shown in fall of rocks); Rhodes *v.* Lauer, 32 N. Y. App. Div. 206, 53 N. Y. Suppl. 162 (negligence not shown); Byrne *v.* Brooklyn City R. Co., 6 Misc. 441, 27 N. Y. Suppl. 126 [*affirmed* in 144 N. Y. 705, 39 N. E. 857] (defendant liable for giving way of side of excavation because of the insufficiency of grade); Bulkley *v.* Port Henry Iron Ore Co., 2 N. Y. Suppl. 133 [*affirmed* in 117 N. Y. 645, 22 N. E. 1131] (defendant held not liable for failing to slope wall of mine so as to prevent fall of earth).

Ohio.— New York, etc., R. Co. *v.* Roe, 25 Ohio Cir. Ct. 628, master liable for injury to servant removing ashes from cinder pit caused by locomotive, left standing unbraked, running down into pit.

Pennsylvania.— Kennedy *v.* Alden Coal Co., 200 Pa. St. 1, 49 Atl. 341 (test of liability is reasonable safety of appliance for purpose for which it is used); Kless *v.* Youghiogheny Min. Co., 18 Pa. Super. Ct. 551 (explosion in mine of gas allowed to accumulate in dangerous quantities).

Utah.— Garity *v.* Bullion-Beck, etc., Min. Co., 27 Utah 534, 76 Pac. 556 (duty to provide reasonably safe passageways in mine); Utah Sav., etc., Co. *v.* Diamond Coal, etc., Co., 26 Utah 299, 73 Pac. 524 (negligently permitting combustible materials to remain in mine); Downey *v.* Gemini Min. Co., 24 Utah 431, 68 Pac. 414, 91 Am. St. Rep. 798 (injury from stepping from ladder into hole negligently left open in mine).

Virginia.— Russell Creek Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614, holding that injury must be "directly" caused by negligence.

Washington.— Uren *v.* Golden Tunnel Min.

servant.[98] Where, however, it is the duty of the workman to shore up, or otherwise make safe, the place of work as the work progresses, the master's duty is

Co., 24 Wash. 261, 64 Pac. 174 (negligently rolling stone down on workman below); Shannon *v.* Consolidated Tiger, etc., Min. Co., 24 Wash. 119, 64 Pac. 169 (danger from unexploded blast in mine). *Compare* Hughes *v.* Oregon Imp. Co., 20 Wash. 294, 55 Pac. 119, in which a fire of unknown origin in a mine inspected the evening before, not the result of spontaneous combustion or any act imputable to the owner, was held not of itself proof of negligence.

West Virginia.— Williams *v.* Belmont Coal, etc., Co., 55 W. Va. 84, 46 S. E. 802, duty of owner as to dark tunnel leading into mine.

Wisconsin.— McMahon *v.* Ida Min. Co., 101 Wis. 102, 76 N. W. 1098, in which the facts did not show liability for injury caused by an unexploded blast.

United States.— Alaska United Gold Min. Co. *v.* Muset, 114 Fed. 66, 52 C. C. A. 14 (failure to provide adequate means of escape for men engaged in blasting); Portland Gold Min. Co. *v.* Flaherty, 111 Fed. 312, 49 C. C. A. 361 (ordering men to go into an up-raise known to be filled with gas and foul air); Westland *v.* Gold Coin Mines Co., 101 Fed. 59, 41 C. C. A. 193 (requiring miners to work on dangerous platform); Sommers *v.* Carbon Hill Coal Co., 91 Fed. 337 (facts held not to show negligence in allowing accumulation of gas); Western Coal, etc., Co. *v.* Ingraham, 70 Fed. 219, 17 C. C. A. 71 (duty to see that timbers in mine are properly set).

Canada.— Pender *v.* War Eagle Consol. Min., etc., Co., 7 Brit. Col. 162, in which defendant was held liable for not having a platform so fixed as to prevent drills which were thrown down from bounding into the tunnel.

See 34 Cent. Dig. tit. "Master and Servant," § 209.

Duty as to gas in mine.— It is the duty of a master operating a mine to use all appliances readily attainable, known to science, for the prevention of accidents arising from the accumulation of gas or other explosive substances. Western Coal, etc., Co. *v.* Berberich, 94 Fed. 329, 36 C. C. A. 364.

98. *Illinois.*— Himrod Coal Co. *v.* Stevens, 203 Ill. 115, 67 N. E. 389 [*affirming* 104 Ill. App. 639]; Spring Valley Coal Co. *v.* Rowatt, 196 Ill. 156, 63 N. E. 649 [*affirming* 96 Ill. App. 248]; Mt. Olive, etc., Coal Co. *v.* Herbeck, 190 Ill. 39, 60 N. E. 105 [*affirming* 92 Ill. App. 441]; Catlett *v.* Young, 143 Ill. 74, 32 N. E. 447 [*affirming* 38 Ill. App. 198]; Sangamon Coal Min. Co. *v.* Wiggerhaus, 122 Ill. 279, 13 N. E. 648 [*affirming* 25 Ill. App. 77]; Beard *v.* Skeldon, 113 Ill. 584; Hamilton *v.* State, 102 Ill. 367; Brookside Coal Min. Co. *v.* Hajnal, 101 Ill. App. 175; Brookside Coal Min. Co. *v.* Dolph, 101 Ill. App. 169; Donk Bros. Coal, etc., Co. *v.* Stroff, 100 Ill. App. 576; Carterville Coal Co. *v.* Abbott, 81 Ill. App. 279; Missouri, etc., Coal Co. *v.* Schwalb, 74 Ill. App. 567; Girard Coal Co. *v.* Wiggins, 52 Ill. App. 69; Muddy Valley Min., etc., Co. *v.* Phillips, 39 Ill. App. 376; Loose *v.* People, 11 Ill. App. 445. See also Himrod Coal Co. *v.* Schroath, 91 Ill. App. 234.

Indiana.— J. Wooley Coal Co. *v.* Bracken, 30 Ind. App. 624, 66 N. E. 775. *Compare* Island Coal Co. *v.* Greenwood, 151 Ind. 476, 50 N. E. 36, holding that Rev. St. (1894) § 7472, does not require the mining boss to place props in such a way as to interfere with the necessary working of the mine.

Iowa.— See Jacobson *v.* Smith, 123 Iowa 263, 98 N. W. 773.

Missouri.— Durant *v.* Lexington Coal Min. Co., 97 Mo. 62, 10 S. W. 484; Spiva *v.* Osage Coal, etc., Co., 88 Mo. 68; McDaniels *v.* Royle Min. Co., 110 Mo. App. 706, 85 S. W. 679; Weston *v.* Lackawanna Min. Co., 105 Mo. App. 702, 78 S. W. 1044. See also Barron *v.* Missouri Lead, etc., Co., 172 Mo. 228, 72 S. W. 534.

New Mexico.— Cerrillos Coal R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807.

Pennsylvania.— Com. *v.* Elk Hill Coal, etc., Co., 4 Lack. Leg. N. 80.

Tennessee.— Russell *v.* Dayton Coal, etc., Co., 109 Tenn. 43, 70 S. W. 1; Knoxville Iron Co. *v.* Pace, 101 Tenn. 476, 48 S. W. 232; Coal Creek Min. Co. *v.* Davis, 90 Tenn. 711, 18 S. W. 387.

Washington.— Czarecki *v.* Seattle, etc., R., etc., Co., 30 Wash. 288, 70 Pac. 750; Green *v.* Western American Co., 30 Wash. 87, 70 Pac. 310.

West Virginia.— Graham *v.* Newburg Orrel Coal, etc., Co., 38 W. Va. 273, 18 S. E. 584.

United States.— Fulton *v.* Wilmington Star Min. Co., 133 Fed. 193, 68 L. R. A. 168, 66 C. C. A. 247; Chicago-Coulterville Coal Co. *v.* Fidelity, etc., Co., 130 Fed. 957. *Compare* Spring Valley Coal Co. *v.* Patting, 86 Fed. 433, 30 C. C. A. 168, in which the violation of the statute neither caused nor affected the injury.

See 34 Cent. Dig. tit. "Master and Servant," § 209.

Statutory and common-law duties.—Mining companies are obligated to observe, not only the duties imposed by statute, but those which exist by virtue of the common law. Junction Min. Co. *v.* Ench, 111 Ill. App. 346.

The only matter of inquiry is whether the requirements of the statute have been complied with, and, if not, whether the injury complained of was caused by such neglect. Spiva *v.* Osage Coal, etc., Co., 88 Mo. 68.

The question of fellow servants is not involved in an action for injuries alleged to have been sustained through the violation of the mining act. Spring Valley Coal Co. *v.* Rowatt, 196 Ill. 156, 63 N. E. 649 [*affirming* 96 Ill. App. 248].

A "wilful" violation of a statute is a violation of its provisions knowingly and delib-

fulfilled when he furnishes them with suitable materials for the purpose;[99] nor does the general rule apply to a place which is constantly changing by reason of the work done.[1]

(VII) *ELECTRICAL APPARATUS AND STRUCTURES.* Where a master employs electricity in his business he must exercise every reasonable precaution known to those possessed of the knowledge requisite for the safe treatment of electricity, to protect his servants from injury,[2] and must see to it that his poles and other places for work are in a reasonably safe condition.[3] But as in other cases the master is not required to adopt a new device merely because it is new, where its practical utility has not been demonstrated.[4]

(VIII) *SHIPPING.*[5] Shipowners and others employing labor on or about vessels are bound to the same rule of care in regard to furnishing their servants with

erately. Girard Coal Co. *v.* Wiggins, 52 Ill. App. 69.

Where a statute does not define the degree of care required of a master, such care must be determined by the principles of the common law. Cecil *v.* American Sheet Steel Co., 129 Fed. 542, 64 C. C. A. 72.

99. Western Anthracite Coal, etc., Co. *v.* Beaver, 192 Ill. 333, 61 N. E. 335 [*affirming* 95 Ill. App. 95]; Consolidated Coal Co. *v.* Carson, 66 Ill. App. 434; Consolidated Coal Co. *v.* Scheller, 42 Ill. App. 619; Bartolomeo *v.* McKnight, 178 Mass. 242, 59 N. E. 804; Golden *v.* Sieghardt, 33 N. Y. App. Div. 161, 53 N. Y. Suppl. 460; Laporte *v.* Cook, 22 R. I. 554, 48 Atl. 798; Rogers *v.* Granger, 21 R. I. 83, 41 Atl. 1010. *Compare* Consolidated Coal Co. *v.* Bokamp, 181 Ill. 9, 54 N. E. 567 [*affirming* 75 Ill. App. 605], in which the servant injured was not a miner, and had nothing to do with propping the roof, and the company was held liable.

Assumption of duty by master renders him liable for negligent performance. Consolidated Coal Co. *v.* Scheiber, 167 Ill. 539, 47 N. E. 1052.

It is the duty of the owner to know when props are needed, and then to supply them, without waiting for request by the workmen. Bowerman *v.* Lackawanna Min. Co., 98 Mo. App. 308, 71 S. W. 1062, construing Rev. St. § 8822. See also Adams *v.* Kansas, etc., Coal Co., 85 Mo. App. 486.

Failure to furnish props of the exact length required is no ground for recovery, in the absence of evidence that the servant requested them to be of a particular length. Sugar Creek Min. Co. *v.* Peterson, 177 Ill. 324, 52 N. E. 475 [*reversing* 75 Ill. App. 631].

That there may have been props somewhere in the mine is not a substantial compliance with the statute that they are to be at the "usual place," particularly when the miner knows nothing about them. Donk Bros. Coal, etc., Co. *v.* Stroff, 100 Ill. App. 576.

1. Heald *v.* Wallace, 100 Tenn. 346, 71 S. W. 80.

2. *Connecticut.*— McAdam *v.* Central R., etc., Co., 67 Conn. 445, 35 Atl. 341, in which a lineman received an electric shock from taking hold of a support wire, due to the fact that a span wire, which was not insulated, had come in contact with the trolley wire. *Compare* Bergin *v.* Southern New England Tel. Co., 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192.

Indiana.— Indiana, etc., R. Co. *v.* Bundy, 152 Ind. 590, 53 N. E. 175.

Iowa.— Barto *v.* Iowa Tel. Co., 126 Iowa 241, 101 N. W. 876, 106 Am. St. Rep. 347. *Compare* Aga *v.* Harbach, (1903) 93 N. W. 601.

Kentucky.— Paducah R., etc., Co. *v.* Bell, 85 S. W. 216, 27 Ky. L. Rep. 428, in which the injury was caused by imperfect insulation.

Minnesota.— Beardsley *v.* Minneapolis St. R. Co., 54 Minn. 504, 56 N. W. 176, in which the injury was caused by the old and worn-out condition of one of the electrical fields of the car.

Nebraska.— New Omaha Thompson-Houston Electric Light Co. *v.* Rombold, 68 Nebr. 54, 93 N. W. 966, 97 N. W. 1030.

New Hampshire.— See Carr *v.* Manchester Electric Co., 70 N. H. 308, 48 Atl. 286.

New York.— Harroun *v.* Brush Electric Light Co., 12 N. Y. App. Div. 126, 42 N. Y. Suppl. 716, where it was held that the question of negligence was for the jury.

Rhode Island.— Moran *v.* Corliss Steam Engine Co., 21 R. I. 386, 43 Atl. 874, 45 L. R. A. 267.

Texas.— General Electric Co. *v.* Murray, (Civ. App. 1903) 74 S. W. 50.

Canada.— Griffiths *v.* Hamilton Electric Light, etc., Co., 6 Ont. L. Rep. 296.

See 34 Cent. Dig. tit. "Master and Servant," § 210.

3. North American Constr. Co. *v.* Patry, 10 Kan. App. 55, 61 Pac. 871; Essex County Electric Co. *v.* Kelly, 61 N. J. L. 289, 41 Atl. 1115 [*affirming* 60 N. J. L. 306, 37 Atl. 619]; Riker *v.* New York, etc., R. Co., 64 N. Y. App. Div. 357, 72 N. Y. Suppl. 168; Byron *v.* New York State Printing Tel. Co., 26 Barb. (N. Y.) 39. *Compare* Maryland Tel., etc., Co. *v.* Cloman, 97 Md. 620, 55 Atl. 681; Carr *v.* Manchester Electric Co., 70 N. H. 308, 48 Atl. 286.

Pole held an appliance and not a place for work see Britton *v.* Central Union Tel. Co., 131 Fed. 844, 65 C. C. A. 598.

4. Lorimer *v.* St. Paul City R. Co., 48 Minn. 391, 51 N. W. 125.

5. **Assumption of risk** see *infra*, V, E, 2, d.
Concurrent negligence of fellow servants see *infra*, IV, G, 4, a, (IV).

reasonably safe appliances and places for work as other masters, and will be held liable for injuries caused by negligence in this respect.[6] But the master is not liable for an injury arising from negligence in a mere detail of the work which is temporary in its nature;[7] nor is he liable where he has furnished suitable materials and appliances, which are either not used or improperly used,[8] where the accident could not be reasonably anticipated,[9] or where the servants themselves furnish an appliance not required of the master;[10] and where the use of certain appliances is neither customary nor practical, negligence cannot be predicated upon a failure to furnish them.[11]

b. Railroads[12] — (I) *Degree of Care Required.* Railway companies are held to no higher degree of care than other masters, and are only required to

Injuries to persons working on or about vessels see SHIPPING.

Injuries to seamen in general see SEAMEN.

Negligence of fellow servant performing duties of master see *infra*, IV, G, 4, a, (IX), (E).

6. *Alaska.*— Gibson *v.* Canadian Pac. Nav. Co., 1 Alaska 407, where it was held that, although appliances for unloading cargo may be suitable and sufficient at one stage of the tide, nevertheless if used when the tide is so low as to render their use in raising heavy loads dangerous, it becomes actionable negligence.

California.— Silveira *v.* Iverson, 125 Cal. 266, 57 Pac. 996, in which the injury was caused by reason of an insufficient reefing pennant. *Compare* Kennedy *v.* Chase, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153, in which a stevedore was injured by falling into an unguarded hatchway in a part of the ship over which he was not allowed to pass, and the owners were held not to be liable.

Kentucky.— Louisville, etc., Packet Co. *v.* Samuels, 59 S. W. 3, 22 Ky. L. Rep. 979, in which an insufficient gang-plank was furnished.

New York.— Olsen *v.* Starin, 43 N. Y. App. Div. 422, 60 N. Y. Suppl. 134, insufficient appliance for unloading.

United States.— The Westport, 131 Fed. 815 (insufficient capstan); The King Gruffydd, 131 Fed. 189, 65 C. C. A. 495 (breaking of "topping lift"); The Columbia, 124 Fed. 745 (breaking of hawser); The Anchoria, 120 Fed. 1017, 56 C. C. A. 452 [*affirming* 113 Fed. 982] (loading appliances); The Nordfarer, 115 Fed. 416 (defective winch); *In re* California Nav., etc., Co., 110 Fed. 670 (bursting of defective steam drum); Sansol *v.* Compagnie Générale Transatlantique, 101 Fed. 390 (injury by reason of open trapdoor in dark passage of vessel); The Ethelred, 96 Fed. 446 (defective rope); New York, etc., Steamship Co. *v.* McLaughlin, 67 Fed. 797 (machinery in unsafe condition); McDowell *v.* The France, 53 Fed. 843 (injury caused by fall of unsound ash bag); The Neptuno, 30 Fed. 925 (weak and dangerous tackle); The Max Morris, 24 Fed. 860 (injury caused by peculiarity of construction of vessel); The Edith Godden, 23 Fed. 43 (defective derrick); Sunney *v.* Holt, 15 Fed. 880 (unsafe hatchway).

England.— Carter *v.* Clarke, 78 L. T. Rep. N. S. 76, in which the injury was caused by the explosion of accumulated gas in the hold of the vessel, which was not properly ventilated.

Canada.— Abbott *v.* Anderson, 15 Quebec Super. Ct. 281, in which the servant was injured by the giving away of the chock holding the hawser used in towing. *Compare* Wyman *v.* The Duart Castle, 6 Can. Exch. 387, in which case it was held that the mere fact that a stop valve is broken in some way while a vessel is in port, causing injury to a servant, is not in itself sufficient to create a liability on the part of the owners.

See 34 Cent. Dig. tit. "Master and Servant," § 211.

Where a master has furnished a competent man, and he is conducting business in the fair exercise of capable judgment, and the question is one of opinion as to whether it was prudent to go on a steamboat wheel without a footboard, the master is not responsible for an error of judgment in that regard. Memphis, etc., Packet Co. *v.* Britton, 25 Ohio Cir. Ct. 153.

7. Direct Nav. Co. *v.* Anderson, 29 Tex. Civ. App. 65, 69 S. W. 174.

8. Kalleck *v.* Deering, 169 Mass. 200, 47 N. E. 698; Balleng *v.* New York, etc., Steamship Co., 28 Misc. (N. Y.) 238, 58 N. Y. Suppl. 1074; Divver *v.* Hall, 21 Misc. (N. Y.) 452, 47 N. Y. Suppl. 630.

9. See Beasley *v.* Linehan Transfer Co., 148 Mo. 413, 50 S. W. 87.

10. Jeffries *v.* De Hart, 96 Fed. 494.

11. Red River Line *v.* Smith, 99 Fed. 520, 39 C. C. A. 620.

12. **Care required in general** see *supra*, IV, B, 1, b.

Contributory negligence see *infra*, IV, F, 4, c, (II), (C).

Latent defects see *infra*, IV, B, 7, e.

Master's knowledge of defects see *infra*, IV, B, 7.

Methods of work see *infra*, IV, C, 1, a, (II).

Negligence of fellow servant performing duties of master see *infra*, IV, G, 4, a, (IX), (D).

Newest, safest, and best of appliances see *supra*, IV, B, 2, b.

Orders of master see *infra*, IV, B, 3.

Repairs see *infra*, IV, B, 6.

Rules of master see *infra*, IV, C, 2.

Signals, lights, and warnings see *infra*, IV, B, 4, b, (V), (B), (2).

Statutory regulations as to methods of work see *infra*, IV, C, 1, a, (II).

exercise such reasonable care for the safety of their servants as the nature of, and the dangers incident to, their business call for.[13]

(II) *Locomotives*[14]—(A) *In General.* Railway companies are required to exercise reasonable care and diligence to provide and maintain reasonably safe and suitable locomotives.[15]

(B) *Overloading Tenders.* Where an employee of a railway company is

13. *Illinois.*— Chicago, etc., R. Co. *v.* Sullivan, 63 Ill. 293. But see Chicago, etc., R. Co. *v.* Taylor, 69 Ill. 461, 18 Am. Rep. 626, where it was held that it is the duty of a railway company to furnish safe structures, etc.

Iowa.— Conway *v.* Illinois Cent. R. Co., 50 Iowa 465.

Tennessee.— East Tennessee, etc., R. Co. *v.* Aiken, 89 Tenn. 245, 14 S. W. 1082.

Texas.— Texas, etc., R. Co. *v.* Huffman, 83 Tex. 286, 18 S. W. 741; Eddy *v.* Adams, (1892) 18 S. W. 490; Gulf, etc., R. Co. *v.* Wells, 81 Tex. 685, 17 S. W. 511, (1891) 16 S. W. 1025; Missouri Pac. R. Co. *v.* Lyde, 57 Tex. 505; Texas Mexican R. Co. *v.* King, 14 Tex. Civ. App. 34, 37 S. W. 34; Gulf, etc., R. Co. *v.* Abbott, (Civ. App. 1893) 24 S. W. 299; Gulf, etc., R. Co. *v.* Schwabbe, 1 Tex. Civ. App. 573, 21 S. W. 706. See also Gulf, etc., R. Co. *v.* Winton, 7 Tex. Civ. App. 57, 26 S. W. 770.

United States.— Grand Trunk R. Co. *v.* Walker, 154 U. S. 653, 14 S. Ct. 1189, 25 L. ed. 977 [*affirming* 29 Fed. Cas. No. 17,070]; Gravelle *v.* Minneapolis, etc., R. Co., 11 Fed. 569, 3 McCrary 359.

See 34 Cent. Dig. tit. "Master and Servant," § 212.

14. Assumption of risk see *infra*, IV, E, 3, b, (I).

Concurrent negligence of fellow servant see *infra*, IV, G, 4, a, (IV).

15. *Alabama.*— Tennessee Coal, etc., Co. *v.* Tutwiler, 108 Ala. 483, 18 So. 668; Tennessee Coal, etc., Co. *v.* Kyle, 93 Ala. 1, 8 So. 764, 12 L. R. A. 103; Mobile, etc., R. Co. *v.* Thomas, 42 Ala. 672.

District of Columbia.— See McCauley *v.* Southern R. Co., 10 App. Cas. 560.

Georgia.— Savannah, etc., R. Co. *v.* Phillips, 90 Ga. 829, 17 S. E. 82.

Illinois.— Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 [*affirming* 109 Ill. App. 468]; Chicago, etc., R. Co. *v.* Delaney, 169 Ill. 581, 48 N. E. 476; Indianapolis, etc., R. Co. *v.* Estes, 96 Ill. 470; Flynn *v.* Wabash, etc., R. Co., 18 Ill. App. 235.

Indiana.— Krueger *v.* Louisville, etc., R. Co., 111 Ind. 51, 11 N. E. 957; Columbus, etc., R. Co. *v.* Arnold, 31 Ind. 174, 99 Am. Dec. 615.

Kansas.— Atchison, etc., R. Co. *v.* Holt, 29 Kan. 149.

Kentucky.— Harper *v.* Newport News, etc., R. Co., 90 Ky. 359, 14 S. W. 346, 12 Ky. L. Rep. 333.

Massachusetts.— Ford *v.* Fitchburg R. Co., 110 Mass. 240, 14 Am. Rep. 598.

Minnesota.— Hungerford *v.* Chicago, etc., R. Co., 41 Minn. 444, 43 N. W. 324.

Mississippi.— See as supporting the rule stated in the text Illinois Cent. R. Co. *v.* Jones, (1894) 16 So. 300, in which, however, it was held that failure to have sand in the dome of a locomotive is not a failure to provide a safe appliance.

Missouri.— Hurlbut *v.* Wabash R. Co., 130 Mo. 657, 31 S. W. 1051; O'Mellia *v.* Kansas City, etc., R. Co., 115 Mo. 205, 21 S. W. 503. *Compare* Tabler *v.* Hannibal, etc., R. Co., 93 Mo. 79, 5 S. W. 810.

New Hampshire.— See Young *v.* Boston, etc., R. Co., 69 N. H. 356, 41 Atl. 268.

New York.— Smith *v.* Buffalo, etc., R. Co., 148 N. Y. 727, 42 N. E. 726 [*affirming* 72 Hun 545, 25 N. Y. Suppl. 638]; Donohue *v.* Brooklyn City R. Co., 131 N. Y. 623, 30 N. E. 865 [*affirming* 14 N. Y. Suppl. 639]; Cone *v.* Delaware, etc., R. Co., 81 N. Y. 206, 37 Am. Rep. 491 [*affirming* 15 Hun 172]; Kirkpatrick *v.* New York Cent., etc., R. Co., 79 N. Y. 240; Keegan *v.* Western R. Corp., 8 N. Y. 175, 59 Am. Dec. 476; Pierson *v.* New York, etc., R. Co., 53 N. Y. App. Div. 363, 65 N. Y. Suppl. 1039; Hudson *v.* Rome, etc., R. Co., 73 Hun 467, 26 N. Y. Suppl. 386 [*reversed* on another ground in 145 N. Y. 408, 40 N. E. 8]. *Compare* Garrison *v.* McCullough, 28 N. Y. App. Div. 467, 51 N. Y. Suppl. 128.

North Carolina.— Fleming *v.* Southern R. Co., 131 N. C. 476, 42 S. E. 905, 132 N. C. 714, 44 S. E. 551; Coley *v.* North Carolina R. Co., 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817, 128 N. C. 534, 39 S. E. 43, 57 L. R. A. 817.

Tennessee.— Nashville, etc., R. Co. *v.* Elliott, 1 Coldw. 611, 78 Am. Dec. 506.

Texas.— St. Louis, etc., R. Co. *v.* McClain, 80 Tex. 85, 15 S. W. 789; Missouri Pac. R. Co. *v.* Henry, 75 Tex. 220, 12 S. W. 828; Texas, etc., R. Co. *v.* Hartnett, 33 Tex. Civ. App. 103, 75 S. W. 809.

Vermont.— Noyes *v.* Smith, 28 Vt. 59, 65 Am. Dec. 222.

Wisconsin.— Wedgwood *v.* Chicago, etc., R. Co., 41 Wis. 478. *Compare* Whitwam *v.* Wisconsin, etc., R. Co., 58 Wis. 408, 17 N. W. 124, where it was held that it is not negligence *per se* for a railroad to use a locomotive, the draw-bar of which is too short to permit one of its cars to be safely coupled thereto or detached.

United States.— Texas, etc., R. Co. *v.* Barrett, 67 Fed. 214, 14 C. C. A. 373; Hudson *v.* Charleston, etc., R. Co., 55 Fed. 248; Central Trust Co. *v.* Texas, etc., R. Co., 32 Fed. 448. *Compare* Briggs *v.* Chicago, etc., R. Co., 125 Fed. 745, 60 C. C. A. 513.

See 34 Cent. Dig. tit. "Master and Servant," § 214.

injured by the fall of coal from a locomotive tender which has been improperly overloaded, the company is liable.[16]

(III) *CARS*[17] — (A) *In General.* It is the duty of a railroad company to use reasonable care and diligence to provide reasonably safe and suitable cars and rolling-stock,[18] and a failure to comply with any statutory requirements in this

16. Croll *v.* Atchison, etc., R. Co., 57 Kan. 548, 46 Pac. 972. See also Union Pac. R. Co. *v.* Erickson, 41 Nebr. 1, 59 N. W. 347, 29 L. R. A. 137. But see Schultz *v.* Chicago, etc., R. Co., 67 Wis. 616, 31 N. W. 321, 58 Am. Rep. 881, which seems to maintain the contrary doctrine.

17. Assumption of risk see *infra*, IV, E, 3.
Concurrent negligence of fellow servant see *infra*, IV, G, 4, a, (IV).
Customary appliances see *supra*, IV, B, 2, b, (II).
Newest and safest appliances see *supra*, IV, B, 2, b.
Proximate cause see *infra*, IV, B, 9.

18. *Alabama.*— Hissong *v.* Richmond, etc., R. Co., 91 Ala. 514, 8 So. 776.

Arkansas.— St. Louis, etc., R. Co. *v.* Higgins, 53 Ark. 458, 14 S. W. 653.

California.— Murdock *v.* Oakland, etc., Electric R. Co., 128 Cal. 22, 60 Pac. 469.

Colorado.— Denver, etc., R. Co. *v.* Simpson, 16 Colo. 55, 26 Pac. 339, 25 Am. St. Rep. 242; Colorado Cent. R. Co. *v.* Ogden, 3 Colo. 499. *Compare* Colorado Cent. R. Co. *v.* Martin, 7 Colo. 592, 4 Pac. 1118.

Illinois.— Chicago, etc., R. Co. *v.* Taylor, 69 Ill. 461, 18 Am. Rep. 626; Chicago, etc., R. Co. *v.* Gillison, 72 Ill. App. 207; Elgin, etc., R. Co. *v.* Eselin, 68 Ill. App. 96; Murphy *v.* Lake Shore, etc., R. Co., 67 Ill. App. 527; Louisville, etc., R. Co. *v.* Hawthorn, 45 Ill. App. 635. *Compare* North Chicago St. R. Co. *v.* Conway, 76 Ill. App. 621.

Indiana.— Cincinnati, etc., R. Co. *v.* McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; Terre Haute Electric Co. *v.* Kieley, 35 Ind. App. 180, 72 N. E. 658.

Iowa.— McDermott *v.* Iowa Falls, etc., R. Co., 85 Iowa 180, 52 N. W. 181; Hosic *v.* Chicago, etc., R. Co., 75 Iowa 683, 37 N. W. 963, 9 Am. St. Rep. 518; Baldwin *v.* Chicago, etc., R. Co., 50 Iowa 680; Greenleaf *v.* Illinois Cent. R. Co., 29 Iowa 14, 4 Am. Rep. 181.

Kansas.— Bradshaw *v.* Chicago, etc., R. Co., 58 Kan. 618, 50 Pac. 876.

Kentucky.— Southern R. Co. *v.* Duvall, 56 S. W. 988, 22 Ky. L. Rep. 56, 54 S. W. 741, 21 Ky. L. Rep. 1153, 22 Ky. L. Rep. 56, 50 S. W. 535, 20 Ky. L. Rep. 1915; Illinois Cent. R. Co. *v.* Hilliard, 37 S. W. 75, 18 Ky. L. Rep. 505.

Louisiana.— Meyers *v.* Illinois Cent. R. Co., 49 La. Ann. 21, 21 So. 120; Towns *v.* Vicksburg, etc., R. Co., 37 La. Ann. 630, 55 Am. Rep. 508.

Maine.— Guthrie *v.* Maine Cent. R. Co., 81 Me. 572, 18 Atl. 295. *Compare* Judkins *v.* Maine Cent. R. Co., 80 Me. 417, 14 Atl. 735, where it was held that it is not necessarily negligence to use a freight car so damaged and crippled that it exposes the servant to more than the common risk incurred in handling ordinary cars.

Massachusetts.— Foster *v.* New York, etc., R. Co., 187 Mass. 21, 72 N. E. 331; Shea *v.* New York, etc., R. Co., 173 Mass. 177, 53 N. E. 396. *Compare* Miller *v.* New York, etc., R. Co., 175 Mass. 363, 56 N. E. 282.

Michigan.— Morton *v.* Detroit, etc., R. Co., 81 Mich. 423, 46 N. W. 111. *Compare* Turner *v.* Detroit Southern R. Co., 137 Mich. 142, 100 N. W. 268.

Minnesota.— Beardsley *v.* Minneapolis St. R. Co., 54 Minn. 504, 56 N. W. 176.

Mississippi.— Buckner *v.* Richmond, etc., R. Co., 72 Miss. 873, 18 So. 449.

Missouri.— Rodney *v.* St. Louis, South Western R. Co., 127 Mo. 676, 28 S. W. 887, 30 S. W. 150; Settle *v.* St. Louis, etc., R. Co., 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633; Coontz *v.* Missouri Pac. R. Co., 121 Mo. 652, 26 S. W. 661.

Nebraska.— Thompson *v.* Missouri Pac. R. Co., 51 Nebr. 527, 71 N. W. 61.

New Hampshire.— Fifield *v.* Northern R. Co., 42 N. H. 225.

New York.— Bushby *v.* New York, etc., R. Co., 107 N. Y. 374, 14 N. E. 407, 1 Am. St. Rep. 844 [*affirming* 37 Hun 104]; Ellis *v.* New York, etc., R. Co., 95 N. Y. 546; Newton *v.* New York Cent., etc., R. Co., 96 N. Y. App. Div. 81, 89 N. Y. Suppl. 23; Strauss *v.* New York, etc., R. Co., 91 N. Y. App. Div. 583, 87 N. Y. Suppl. 67; Woods *v.* Long Island R. Co., 11 N. Y. App. Div. 16, 42 N. Y. Suppl. 140; Lucco *v.* New York Cent., etc., R. Co., 87 Hun 612, 34 N. Y. Suppl. 277; Shields *v.* New York Cent., etc., R. Co., 15 N. Y. Suppl. 613; Disher *v.* New York Cent., etc., R. Co., 2 N. Y. St. 276. *Compare* Smith *v.* New York Cent., etc., R. Co., 118 N. Y. 645, 23 N. E. 990; Filbert *v.* New York, etc., R. Co., 95 N. Y. App. Div. 199, 88 N. Y. Suppl. 438; Hanrahan *v.* Brooklyn El. R. Co., 17 N. Y. App. Div. 588, 45 N. Y. Suppl. 474.

North Carolina.— Elmore *v.* Seaboard Air Line R. Co., 130 N. C. 506, 41 S. E. 786, 131 N. C. 569, 42 S. E. 989; Harden *v.* North Carolina R. Co., 129 N. C. 354, 40 S. E. 184, 85 Am. St. Rep. 747, 55 L. R. A. 784; Troxler *v.* Southern R. Co., 124 N. C. 189, 32 S. E. 550, 70 Am. St. Rep. 580, 44 L. R. A. 313; Greenlee *v.* Southern R. Co., 122 N. C. 977, 30 S. E. 115, 65 Am. St. Rep. 734, 41 L. R. A. 399; Cowles *v.* Richmond, etc., R. Co., 84 N. C. 309, 37 Am. Rep. 620.

North Dakota.— Cameron *v.* Great Northern R. Co., 8 N. D. 124, 77 N. W. 1016; Bennett *v.* Northern Pac. R. Co., 2 N. D. 112, 49 N. W. 408, 13 L. R. A. 465.

Ohio.— Little Miami R. Co. *v.* Fitzpatrick, 42 Ohio St. 318; Columbus, etc., R. Co. *v.*

respect will constitute negligence *per se* which if it results in injuries to an employee will render the company liable.[19]

(B) *Improper Loading.* It is the duty of a railway company to use reasonable

Webb, 12 Ohio St. 475; Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Hunt *v.* Caldwell, 22 Ohio Cir. Ct. 283, 11 Ohio Cir. Dec. 562. *Compare* Toledo, etc., R. Co. *v.* Beard, 20 Ohio Cir. Ct. 681, 11 Ohio Cir. Dec. 406.

Pennsylvania.— Elkins *v.* Pennsylvania R. Co., 171 Pa. St. 121, 33 Atl. 74; Dooner *v.* Delaware, etc., Canal Co., 164 Pa. St. 17, 30 Atl. 269. *Compare* Brommer *v.* Philadelphia, etc., R. Co., 205 Pa. St. 432, 54 Atl. 1092.

Rhode Island.— Jones *v.* New York, etc., R. Co., 20 R. I. 210, 37 Atl. 1033.

Texas.— Texas Pac. R. Co. *v.* White, 82 Tex. 543, 18 S. W. 478; Bonner *v.* Glenn, 79 Tex. 531, 15 S. W. 572; Gulf, etc., R. Co. *v.* Silliphant, 70 Tex. 623, 8 S. W. 673; St. Louis Southwestern R. Co. *v.* Corrigan, (Civ. App. 1904) 81 S. W. 554; International, etc., R. Co. *v.* Bayne, 28 Tex. Civ. App. 392, 67 S. W. 443; Southern Pac. Co. *v.* Winton, 27 Tex. Civ. App. 503, 66 S. W. 477; Missouri, etc., R. Co. *v.* Chambers, 17 Tex. Civ. App. 487, 43 S. W. 1090; Texas, etc., R. Co. *v.* Bell, (Civ. App. 1897) 39 S. W. 636; Galveston, etc., R. Co. *v.* Sweeney, 14 Tex. Civ. App. 216, 36 S. W. 800; Houston, etc., R. Co. *v.* Kelley, 13 Tex. Civ. App. 1, 34 S. W. 809, 46 S. W. 863. *Compare* Galveston, etc., R. Co. *v.* Perry, 36 Tex. Civ. App. 414, 82 S. W. 343; Gulf, etc., R. Co. *v.* Mayo, 14 Tex. Civ. App. 253, 37 S. W. 659.

Utah.— Boyle *v.* Union Pac. R. Co., 25 Utah 420, 71 Pac. 988.

Virginia.— Richmond, etc., R. Co. *v.* George, 88 Va. 223, 13 S. E. 429; Goodman *v.* Richmond, etc., R. Co., 81 Va. 576; Richmond, etc., R. Co. *v.* Moore, 78 Va. 93.

Wisconsin.—Wedgwood *v.* Chicago, etc., R. Co., 41 Wis. 478.

United States.—Texas, etc., R. Co. *v.* Archibald, 170 U. S. 665, 18 S. Ct. 777, 42 L. ed. 1188; Northern Pac. R. Co. *v.* Tynan, 119 Fed. 288, 56 C. C. A. 192; Voelker *v.* Chicago, etc., R. Co., 116 Fed. 867; King *v.* Ohio, etc., R. Co., 14 Fed. 277, 11 Biss. 362. *Compare* Graham *v.* Chicago, etc., R. Co., 62 Fed. 896.

See 34 Cent. Dig. tit. "Master and Servant," § 215.

Hand and push cars.— Georgia Cent. R. Co. *v.* Lamb, 124 Ala. 172, 26 So. 969; King *v.* Covington, etc., R. Co., 72 S. W. 757, 24 Ky. L. Rep. 1942; Carey *v.* Boston, etc., R. Co., 158 Mass. 228, 33 N. E. 512; Wallin *v.* Eastern R. Co., 83 Minn. 149, 86 N. W. 76, 54 L. R. A. 481; Siela *v.* Hannibal, etc., R. Co., 82 Mo. 430; Mitchell *v.* Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647; Texas, etc., R. Co. *v.* Kane, 2 Tex. App. Civ. Cas. § 18; Northern Pac. R. Co. *v.* Charles, 51 Fed. 562, 2 C. C. A. 380; Toronto R. Co. *v.* Bond, 24 Can. Sup. Ct. 715 [*affirming* 22 Ont. App. 78]. *Compare* Miller *v.* Union Pac. R. Co., 17 Fed. 67, 5 McCrary 300, where it was held that push cars need not be supplied with brakes.

The use of cars of unequal height and mismatched couplings is not such negligence on the part of a railroad company as will render it liable for an injury to a brakeman resulting therefrom. Norfolk, etc., R. Co. *v.* Brown, 91 Va. 668, 22 S. E. 496. See also St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293.

That draw-heads or draw-bars are of different heights does not constitute negligence. Holmes *v.* Southern Pac. Co., 120 Cal. 357, 52 Pac. 652; Ellshury *v.* New York, etc., R. Co., 172 Mass. 130, 51 N. E. 415, 70 Am. St. Rep. 248; Dolan *v.* Burden Iron Co., 62 N. Y. App. Div. 545, 71 N. Y. Suppl. 145; Edall *v.* New England R. Co., 18 N. Y. App. Div. 216, 45 N. Y. Suppl. 959.

The fact that bumpers are not on a level does not show negligence. Frounfelker *v.* Delaware, etc., R. Co., 74 N. Y. App. Div. 224, 77 N. Y. Suppl. 470. But see Toronto R. Co. *v.* Bond, 24 Can. Sup. Ct. 715 [*affirming* 22 Ont. App. 78].

Double buffers.— The mere use by a railway company of cars with double buffers to protect the draw-heads is not negligence, although it renders the coupling of cars more dangerous. Illinois Cent. R. Co. *v.* Harris, 53 Ill. App. 592. To the same effect see Indianapolis, etc., R. Co. *v.* Flanigan, 77 Ill. 365.

Failure to place deadwoods on cars not negligence see Hannigan *v.* Lehigh, etc., R. Co., 157 N. Y. 244, 51 N. E. 992 [*reversing* 91 Hun 300, 36 N. Y. Suppl. 293].

Difference from regular construction.— The fact that the construction of a car used as a cahoose is different from that of a regular cahoose does not show the unsuitableness of such car for the purpose. Galveston, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1893) 23 S. W. 1019.

The fact that a car was out of repair, with the knowledge of the company, does not establish negligence, if it was not in general use. Brown *v.* Chicago, etc., R. Co., 59 Kan. 70, 52 Pac. 65.

Where a company provides sticks for coupling cars, and directs its servants to use them, it is not guilty of negligence in furnishing cars so constructed that they cannot be coupled by hand. Pennsylvania Co. *v.* Whitcomb, 111 Ind. 212, 12 N. E. 380.

19. Philadelphia, etc., R. Co. *v.* Winkler, 4 Pennew. (Del.) 387, 56 Atl. 112; Chicago, etc., R. Co. *v.* Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264 [*reversing* 116 Fed. 867]. See also Neal *v.* St. Louis, etc., R. Co., 71 Ark. 445, 78 S. W. 220.

The United States act of March 2, 1893, requiring cars used in interstate commerce to be equipped with automatic couplers, requires such cars to be equipped with couplers which

care to see that its cars are properly loaded, so as not to cause injury to its servants.[20]

(IV) *TRACKS AND ROAD-BEDS*[21] — (A) *In General.* A railway company, as to its servants, is not bound to furnish a safe road-bed and track. Its duty in that respect is to use all reasonable care and precaution in putting and keeping the road-bed and track in reasonably safe and good condition, and what constitutes reasonable care must depend upon the surroundings, and the dangers to be fairly apprehended and encountered.[22] But the rule has no application where the place

will couple automatically with cars equipped with automatic couplers of other makes. Johnson *v.* Southern Pac. Co., 196 U. S. 1, 25 S. Ct. 158, 49 L. ed 363 [*reversing* 117 Fed. 462, 54 C. C. A. 508].

20. Austin *v.* Fitchburg R. Co., 172 Mass. 484, 52 N. E. 527; Dougherty *v.* Rome, etc., R. Co., 138 N. Y. 641, 34 N. E. 512 [*affirming* 18 N. Y. Suppl. 841]; Ryan *v.* New York Cent., etc., R. Co., 88 Hun (N. Y.) 269, 34 N. Y. Suppl. 665; Houston, etc., R. Co. *v.* Kelley, 13 Tex. Civ. App. 1, 34 S. W. 809, 46 S. W. 863; George *v.* Clark, 85 Fed. 608, 29 C. C. A. 374. But *compare* Miller *v.* New York Cent., etc., R. Co., 14 N. Y. St. 656.

21. **Assumption of risk** see *infra*, IV, E, 3, b.

Concurrent negligence of fellow servant see *infra*, IV, G, 4, a, (IV).

Contributory negligence see *infra*, IV, F, 4, e, (I).

Customary appliances see *supra*, IV, B, 2, b, (II).

Fellow servant's negligence in performing master's duties see *infra*, IV, G, 4, a, (VII), (E), (4), (a).

Proximate cause of injury see *infra*, IV, B, 9.

22. *Alabama.*— Kansas City, etc., R. Co. *v.* Webb, 97 Ala. 157, 11 So. 888. *Compare* Louisville, etc., R. Co. *v.* Bouldin, 110 Ala. 185, 20 So. 325.

Arkansas.— St. Louis, etc., R. Co. *v.* Robbins, 57 Ark. 377, 21 S. W. 886; Little Rock, etc., R. Co. *v.* Eubanks, 48 Ark. 460, 3 S. W. 808, 3 Am. St. Rep. 245. *Compare* St. Louis, etc., R. Co. *v.* Ferguson, 65 Ark. 126, 44 S. W. 1123.

California.— Peters *v.* McKay, 136 Cal. 73, 68 Pac. 478; Bowman *v.* White, 110 Cal. 23, 42 Pac. 470; Trask *v.* California Southern R. Co., 63 Cal. 96.

Colorado.— Colorado Midland R. Co. *v.* Naylon, 17 Colo. 501, 30 Pac. 249, 31 Am. St. Rep. 335; Colorado Midland R. Co. *v.* O'Brien, 16 Colo. 219, 27 Pac. 701. *Compare* Anderson *v.* Union Pac., etc., R. Co., 8 Colo. App. 521, 46 Pac. 840.

Georgia.— Central R. Co. *v.* Mitchell, 63 Ga. 173.

Illinois.— Chicago, etc., R. Co. *v.* Wise, 206 Ill. 453, 69 N. E. 500 [*affirming* 106 Ill. App. 174]; Lake Erie, etc., R. Co. *v.* Morrissey, 177 Ill. 376, 52 N. E. 299 [*affirming* 75 Ill. App. 466]; Illinois Cent. R. Co. *v.* Cozby, 174 Ill. 109, 50 N. E. 1011 [*affirming* 69 Ill. App. 256]; Illinois Cent. R. Co. *v.* Sanders, 166 Ill. 270, 46 N. E. 799 [*affirming* 66 Ill. App. 439]; Chicago, etc., R. Co. *v.* Swett, 45 Ill. 197, 92 Am. Dec. 206; Baltimore, etc., R. Co. *v.* Clifford, 99 Ill. App. 381; Chicago, etc., R. Co. *v.* Hause, 71 Ill. App. 147; St. Louis Bridge Co. *v.* Fellows, 52 Ill. App. 504. *Compare* Chicago, etc., R. Co. *v.* Driscoll, 176 Ill. 330, 52 N. E. 921; St. Louis Nat. Stock Yards *v.* Burns, 97 Ill. App. 175.

Indiana.— Terre Haute, etc., R. Co. *v.* Fowler, 154 Ind. 682, 56 N. E. 228, 48 L. R. A. 531; Indiana, etc., R. Co. *v.* Bundy, 152 Ind. 590, 53 N. E. 175; Union Traction Co. *v.* Buckland, 34 Ind. App. 420, 72 N. E. 158; Chicago, etc., R. Co. *v.* Cunningham, 33 Ind. App. 145, 69 N. E. 304.

Iowa.— McFall *v.* Iowa Cent. R. Co., 104 Iowa 47, 73 N. W. 355.

Kansas.— Kansas City, etc., R. Co. *v.* Kier, 41 Kan. 661, 671, 21 Pac. 770, 13 Am. St. Rep. 311; St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; Brown *v.* Atchison, etc., R. Co., 31 Kan. 1, 1 Pac. 605. *Compare* Atchison, etc., R. Co. *v.* Croll, 3 Kan. App. 242, 45 Pac. 112.

Kentucky.— Chesapeake, etc., R. Co. *v.* Venable, 111 Ky. 41, 63 S. W. 35, 23 Ky. L. Rep. 427; Southern R. Co. *v.* Cooper, 62 S. W. 858, 23 Ky. L. Rep. 290. *Compare* Louisville, etc., R. Co. *v.* McGary, 104 Ky. 509, 47 S. W. 440, 20 Ky. L. Rep. 691.

Louisiana.— Stewart *v.* Texas, etc., R. Co., 113 La. 525, 37 So. 129; Lynn *v.* Antrim Lumber Co., 105 La. 451, 29 So. 874; Wilson *v.* Louisiana, etc., R. Co., 51 La. Ann. 1133, 25 So. 961; McFee *v.* Vicksburg, etc., R. Co., 42 La. Ann. 790, 7 So. 720.

Massachusetts.— Donahue *v.* Boston, etc., R. Co., 178 Mass. 251, 59 N. E. 663; Snow *v.* Housatonic R. Co., 8 Allen 441, 85 Am. Dec. 720.

Michigan.— Culver *v.* South Haven, etc., R. Co., 138 Mich. 443, 101 N. W. 663; Hamilton *v.* Michigan Cent. R. Co., 135 Mich. 95, 97 N. W. 392; De Cair *v.* Manistee, etc., R. Co., 133 Mich. 578, 95 N. W. 726; Eastman *v.* Lake Shore, etc., R. Co., 101 Mich. 597, 60 N. W. 309; Ragon *v.* Toledo, etc., R. Co., 91 Mich. 379, 51 N. W. 1004. *Compare* Piquegno *v.* Chicago, etc., R. Co., 52 Mich. 40, 17 N. W. 232, 50 Am. Rep. 243.

Minnesota.— Baker *v.* Great Northern R. Co., 83 Minn. 184, 86 N. W. 82; Rifley *v.* Minneapolis, etc., R. Co., 72 Minn. 469, 75 N. W. 704; Fay *v.* Chicago, etc., R. Co., 72 Minn. 192, 75 N. W. 15; Rosenbaum *v.* St. Paul, etc., R. Co., 38 Minn. 173, 36 N. W. 447, 8 Am. St. Rep. 653.

Mississippi.— Howd *v.* Mississippi Cent. R. Co., 50 Miss. 178.

to work is constantly changing by reason of the work itself, and is necessarily

Missouri.— Hollenbeck *v.* Missouri Pac. R. Co., 141 Mo. 97, 38 S. W. 723, 41 S. W. 887; Swadley *v.* Missouri Pac. R. Co., 118 Mo. 268, 24 S. W. 140, 40 Am. St. Rep. 366; Devlin *v.* Wabash, etc., R. Co., 87 Mo. 545; Flynn *v.* Kansas City, etc., R. Co., 78 Mo. 195, 47 Am. Rep. 99. *Compare* Godfrey *v.* St. Louis Transit Co., 107 Mo. App. 193, 81 S. W. 1230.

Nebraska.— Chicago, etc., R. Co. *v.* Oyster, 58 Nebr. 1, 78 N. W. 359.

New Jersey.— Smith *v.* Erie R. Co., 67 N. J. L. 636, 52 Atl. 634.

New York.— True *v.* Niagara Gorge R. Co., 175 N. Y. 487, 67 N. E. 1090 [*affirming* 70 N. Y. App. Div. 383, 75 N. Y. Suppl. 216]; Mulvaney *v.* Brooklyn City R. Co., 142 N. Y. 651, 37 N. E. 568 [*affirming* 1 Misc. 425, 21 N. Y. Suppl. 427]; Pidgeon *v.* Long Island R. Co., 87 Hun 43, 33 N. Y. Suppl. 870 [*affirmed* in 152 N. Y. 652, 47 N. E. 1110]; Hines *v.* New York Cent., etc., R. Co., 78 Hun 239, 28 N. Y. Suppl. 829 [*affirmed* in 149 N. Y. 569, 43 N. E. 967]; Harr *v.* New York Cent., etc., R. Co., 13 N. Y. St. 227. *Compare* Ryan *v.* Third Ave. R. Co., 92 N. Y. App. Div. 306, 86 N. Y. Suppl. 1070; Nugent *v.* Brooklyn Union El. R. Co., 64 N. Y. App. Div. 351, 72 N. Y. Suppl. 67; Bruen *v.* Uhlmann, 44 N. Y. App. Div. 620, 60 N. Y. Suppl. 222, 30 N. Y. App. Div. 453, 51 N. Y. Suppl. 958.

North Carolina.— Wilkie *v.* Raleigh, etc., R. Co., 127 N. C. 203, 37 S. E. 204; Marcom *v.* Raleigh, etc., R. Co., 126 N. C. 200, 35 S. E. 423.

North Dakota.— Boss *v.* Northern Pac. R. Co., 2 N. D. 128, 49 N. W. 655, 33 Am. St. Rep. 756.

Ohio.— Toledo, etc., R. Co. *v.* Frick, 14 Ohio Cir. Ct. 453, 8 Ohio Cir. Dec. 28. *Compare* Crawford *v.* New York, etc., R. Co., 23 Ohio Cir. Ct. 207.

Oregon.— Miller *v.* Southern Pac. Co., 20 Oreg. 285, 26 Pac. 70.

Pennsylvania.— O'Donnell *v.* Allegheny Valley R. Co., 59 Pa. St. 239, 98 Am. Dec. 336. *Compare* Costello *v.* Philadelphia, etc., R. Co., 32 Wkly. Notes Cas. 134. But see Kerrigan *v.* Pennsylvania R. Co., 194 Pa. St. 98, 44 Atl. 1069, where it was held that a railroad company owes no duty to its employees to maintain a safe footway along the road-bed.

South Carolina.— Richey *v.* Southern R. Co., 69 S. C. 387, 48 S. E. 285; Coleman *v.* Wilmington, etc., R. Co., 25 S. C. 446, 60 Am. Rep. 516.

Tennessee.— Chesapeake, etc., R. Co. *v.* Higgins, 85 Tenn. 620, 4 S. W. 47.

Texas.— Southern Pac. R. Co. *v.* Aylward, 79 Tex. 675, 15 S. W. 697; Gulf, etc., R. Co. *v.* Redeker, 67 Tex. 181, 2 S. W. 513; Texas, etc., R. Co. *v.* Kelly, (Civ. App. 1903) 80 S. W. 1073; Galveston, etc., R. Co. *v.* Brown, 33 Tex. Civ. App. 589, 77 S. W. 832; Jefferson, etc., R. Co. *v.* Woods, (Civ. App. 1901) 64 S. W. 830; International, etc., R. Co. *v.* Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772; Texas, etc., R. Co. *v.* Kenna, (Civ. App. 1899) 52 S. W. 555; Ft. Worth, etc., R. Co. *v.* Wrenn, 20 Tex. Civ. App. 628, 50 S. W. 210; International, etc., R. Co. *v.* Bonatz, (Civ. App. 1898) 48 S. W. 767; Galveston, etc., R. Co. *v.* Ford, (Civ. App. 1898) 46 S. W. 77; Galveston, etc., R. Co. *v.* Norris, (Civ. App. 1894) 29 S. W. 950; Texas, etc., R. Co. *v.* Guy, (Civ. App. 1893) 23 S. W. 633.

Vermont.— Davis *v.* Central Vermont R. Co., 55 Vt. 84, 45 Am. Rep. 590.

Virginia.— Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489; Norfolk, etc., R. Co. *v.* Cromer, 99 Va. 763, 40 S. E. 54; Norfolk, etc., R. Co. *v.* Gilman, 88 Va. 239, 13 S. E. 475; Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827.

Washington.— Walker *v.* McNeill, 17 Wash. 582, 50 Pac. 518.

West Virginia.—Fulton *v.* Crosby, etc., Co., 57 W. Va. 91, 49 S. E. 1012; Riley *v.* West Virginia Cent., etc., R. Co., 27 W. Va. 145; Cooper *v.* Pittsburgh, etc., R. Co., 24 W. Va. 37.

Wisconsin.— Crouse *v.* Chicago, etc., R. Co., 102 Wis. 196, 78 N. W. 446, 778; Welty *v.* Lake Superior Terminal, etc., R. Co., 100 Wis. 128, 75 N. W. 1022; Hennesey *v.* Chicago, etc., R. Co., 99 Wis. 109, 74 N. W. 554; Kennedy *v.* Lake Superior Terminal, etc., R. Co., 93 Wis. 32, 66 N. W. 1137; McClarney *v.* Chicago, etc., R. Co., 80 Wis. 277, 49 N. W. 963.

United States.— Morris *v.* Duluth, etc., R. Co., 108 Fed. 747, 47 C. C. A. 661; Hunt *v.* Kane, 100 Fed. 256, 40 C. C. A. 372; Valley R. Co. *v.* Keegan, 87 Fed. 849, 31 C. C. A. 255; Cross *v.* Evans, 86 Fed. 1, 29 C. C. A. 523; Patton *v.* Southern R. Co., 82 Fed. 979, 27 C. C. A. 287; Atchison, etc., R. Co. *v.* Wilson, 48 Fed. 57, 1 C. C. A. 25; Southerland *v.* Northern Pac. R. Co., 43 Fed. 646.

See 34 Cent. Dig. tit. "Master and Servant," §§ 218, 220.

Ties and rails.— Peters *v.* McKay, 136 Cal. 73, 68 Pac. 478; McFee *v.* Vicksburg, etc., R. Co., 42 La. Ann. 790, 7 So. 720; Rosenbaum *v.* St. Paul, etc., R. Co., 38 Minn. 173, 36 N. W. 447, 8 Am. St. Rep. 653; Wright *v.* Southern R. Co., 122 N. C. 959, 30 S. E. 348; New York, etc., R. Co. *v.* Lambright, 5 Ohio Cir. Ct. 433, 3 Ohio Cir. Dec. 213 (construing 85 Ohio Laws, p. 105); Gulf, etc., R. Co. *v.* Pettis, 69 Tex. 689, 7 S. W. 93. See Louisville, etc., R. Co. *v.* McGary, 104 Ky. 509, 47 S. W. 440, 20 Ky. L. Rep. 691. *Compare* Barrett *v.* Great Northern R. Co., 75 Minn. 113, 77 N. W. 540; Ward *v.* Bonner, 80 Tex. 168, 15 S. W. 805.

An employee on a construction train cannot recover for injuries resulting from an uneven or unballasted track. Rosenbaum *v.* St. Paul, etc., R. Co., 38 Minn. 173, 36 N. W.

incomplete and dangerous;[23] and generally it is sufficient if the tracks and roadbed were substantial and durable at the time of their construction, by competent engineers, and were properly supervised thereafter.[24] If a servant knows of the danger, or it is obvious, he is bound to exercise ordinary care to avoid it.[25]

(B) *Side-Tracks.* Railroad companies are not held to the same degree of care in maintaining their side-tracks as their main tracks, and are not liable for injuries caused by defects in their construction, unless it appears that they are guilty of gross carelessness in handling their cars.[26]

(C) *Switches.* It is the duty of a railway company to furnish and to keep in order and rightly placed switches which are free from defects and reasonably safe and suitable for the purpose in view.[27] Where this is done, the company's duty

447, 8 Am. St. Rep. 653. But *compare* Gulf, etc., R. Co. *v.* Reddeker, 67 Tex. 181, 2 S. W. 513.

Construction by different company.—A railroad company is not liable for injuries sustained by a servant by the sliding out or giving way of the foundation on which an embankment rests, where it was made by a different company forty years before the accident, and there was no obvious defect in its construction. Norfolk, etc., R. Co. *v.* Pool, 100 Va. 148, 40 S. E. 627.

Acts of trespassers.— A railroad is not liable for injuries resulting from a defect in its track caused by the wanton and malicious act of a trespasser, unless it could have prevented the consequences thereof by the exercise of reasonable diligence. Marcom *v.* Raleigh, etc., R. Co., 126 N. C. 200, 35 S. E. 423.

Rule not applicable to construction of tracks in yards see St. Louis Nat. Stock Yards *v.* Burns, 97 Ill. App. 175.

Semaphores.— It is the duty of a company maintaining semaphores for signal purposes to construct and keep them in a reasonably safe condition for the use of its servants. Welty *v.* Lake Superior Terminal, etc., R. Co., 100 Wis. 128, 75 N. W. 1022.

23. Cully *v.* Northern Pac. R. Co., 35 Wash. 241, 77 Pac. 202. See also Galow *v.* Chicago, etc., R. Co., 131 Fed. 242, 65 C. C. A. 507.

24. Houston, etc., R. Co. *v.* Fowler, 56 Tex. 452.

25. Texas, etc., R. Co. *v.* Kenna, (Tex. Civ. App. 1899) 52 S. W. 555.

Any danger where a wreck has occurred is as open and obvious to a servant sent to remove the wreckage as it is to the railroad, and the purpose of clearing away the wreckage being to make the place safe, the rule as to the master's duty to furnish a safe place to work does not apply. Baltimore, etc., R. Co. *v.* Hunsucker, 33 Ind. App. 27, 70 N. E. 556.

26. O'Donnell *v.* Duluth, etc., R. Co., 89 Mich. 174, 50 N. W. 801. See also Atchison, etc., R. Co. *v.* Tindall, 57 Kan. 719, 48 Pac. 12.

Ballasting.— A railroad company owes no duty to a brakeman in its employ to ballast storage or switch tracks so as to prevent his foot being caught between the ties. Finnell *v.* Delaware, etc., R. Co., 129 N. Y. 669, 29 N. E. 825. See also Ragon *v.* Toledo, etc., R. Co., 97 Mich. 265, 56 N. W. 612, 37 Am. St. Rep. 336, in which the side-track was so ballasted that while the ties were covered in the middle of the track, at the sides, near the rails, the dirt was two to four inches below the rails, thus leaving holes between the ties.

Curves.— There is no rule of law to restrict railroad companies as to the curves they shall use in their freight stations and yards, where the safety of passengers and of the public are not involved. Tuttle *v.* Detroit, etc., R. Co., 122 U. S. 189, 7 S. Ct. 1166, 30 L. ed. 1114.

Repairs.— The failure of a railroad company to keep a side-track in such repair as to afford a secure footing does not render it liable for a resulting injury to a brakeman. Batterson *v.* Chicago, etc., R. Co., 53 Mich. 125, 18 N. W. 584.

Use of worn rails not negligence see Michigan Cent. R. Co. *v.* Austin, 40 Mich. 247.

Failure to use stop-blocks not negligence see Chicago, etc., R. Co. *v.* Driscoll, 176 Ill. 330, 52 N. E. 921; Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 34 N. W. 659.

Necessity of fish-plates question for jury see McCombs *v.* Pittsburgh, etc., R. Co., 130 Pa. St. 182, 18 Atl. 613.

Proximity to main line.— It is actionable negligence for a railroad company so to construct a side-track that, when cars are standing on it, freight trains cannot pass on the main line without endangering the lives of brakemen engaged in the discharge of their duties. Pennsylvania Co. *v.* McCormack, 131 Ind. 250, 30 N. E. 27.

27. *Illinois.*— Wabash, etc., R. Co. *v.* Schevers, 18 Ill. App. 52, in which the accident was due to a rusted pin in a comparatively new apparatus.

Iowa.— Brooke *v.* Chicago, etc., R. Co., 81 Iowa 504, 47 N. W. 74, in which the space between the rail and the switch rail was too narrow.

Minnesota.— Franklin *v.* Winona, etc., R. Co., 37 Minn. 409, 34 N. W. 898, 5 Am. St. Rep. 856, in which a culvert was left uncovered too near the switch.

New York.— Cooper *v.* New York, etc., R. Co., 84 N. Y. App. Div. 42, 82 N. Y. Suppl. 98, in which the accident was caused by the want of a derailing switch.

is performed, and it is not liable for injuries sustained by a servant in the performance of his duties.[28]

(D) *Blocking Frogs, Switches, and Guard-Rails.* In the absence of a statutory requirement,[29] it is generally held that a railway company is not guilty of

South Carolina.— Coleman *v.* Wilmington, etc., R. Co., 25 S. C. 446, 60 Am. Rep. 516.

See 34 Cent. Dig. tit. "Master and Servant," § 221.

Locks.— Subcontractors employed in the construction of a road of which they are in control for the purpose are liable for the death of an employee, due to the misplacement of a switch not otherwise securely guarded, and for which no lock had been provided. Rombough *v.* Balch, 27 Ont. App. 32. See also Birmingham R., etc., Co. *v.* Allen, 99 Ala. 359, 13 So. 8, 20 L. R. A. 457. But *compare* Bennett *v.* Long Island R. Co., 163 N. Y. 1, 57 N. E. 79 [*reversing* 21 N. Y. App. Div. 25, 47 N. Y. Suppl. 258], holding that it is not negligence to fail to provide a lock where the road is in course of construction, it not being customary to do so.

A light so attached to a switch that an engineer can see whether it is open in time to stop the train if necessary is a reasonable provision against danger, and a jury may well find that a failure to provide such a light is negligence. Chicago, etc., R. Co. *v.* Hause, 71 Ill. App. 147. *Compare* Grant *v.* Union Pac. R. Co., 45 Fed. 673, where it was held that the want of a light is not negligence, unless it is usual and customary to have them. And see Town *v.* Michigan Cent. R. Co., 84 Mich. 214, 47 N. W. 665.

28. Bivins *v.* Georgia Pac. R. Co., 96 Ala. 325, 11 So. 68; Ladd *v.* New Bedford R. Co., 119 Mass. 412, 20 Am. Rep. 331; Grattis *v.* Kansas City, etc., R. Co., 153 Mo. 380, 55 S. W. 108, 77 Am. St. Rep. 721, 48 L. R. A. 399 (stub switch); Piper *v.* New York Cent., etc., R. Co., 1 Thomps. & C. (N. Y.) 290 [*affirmed* in 56 N. Y. 630].

Form in common use sufficient see Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 3 S. Ct. 322, 27 L. ed. 1003. *Compare* Indiana, etc., R. Co. *v.* Bundy, 152 Ind. 590, 53 N. E. 175, where it was held that freedom from negligence cannot be established by showing a construction of a switch device to be similar to like devices on first-class railroads, without showing that if it was dangerous to employees to work about it, they had notice of the danger.

Construction on grade not negligence see Hoosier Stone Co. *v.* McCain, 133 Ind. 231, 31 N. E. 956. *Compare* International, etc., R. Co. *v.* Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772, where it was held that where a switch is located on a grade and curve, so that the danger to employees in operating the road is increased, the company must exercise a commensurate degree of care for the safety of its track at that point.

Target signals unnecessary see Bennett *v.* Long Island R. Co., 163 N. Y. 1, 57 N. E. 79 [*reversing* 21 N. Y. App. Div. 25, 47 N. Y. Suppl. 258] (road in course of construction); Salters *v.* Delaware, etc., Canal Co., 3 Hun (N. Y.) 338.

Location of signal target.— The fact that defendant had placed its switch signal target on the same side of the main track on which its side-track was placed instead of on the opposite side did not constitute negligence, where the evidence showed that there was no uniform rule as to which side of the track it should be placed. Grattis *v.* Kansas City, etc., R. Co., 153 Mo. 380, 55 S. W. 108, 77 Am. St. Rep. 721, 48 L. R. A. 399.

A switch negligently left open is not a defect in the road-bed for which a person thereby injured can recover from the company, on an allegation of failure to maintain its road-bed in safe condition. Pleasants *v.* Raleigh, etc., R. Co., 121 N. C. 492, 28 S. E. 267, 61 Am. St. Rep. 674.

Railroad not liable for injury from switch opened by stranger see Bennett *v.* Long Island R. Co., 21 N. Y. App. Div. 25, 47 N. Y. Suppl. 258.

29. **Statutes construed.**— *Massachusetts.*— Turner *v.* Boston, etc., R. Co., 158 Mass. 261, 33 N. E. 520.

Michigan.— Eastman *v.* Lake Shore, etc., R. Co., 101 Mich. 597, 60 N. W. 309; Ashman *v.* Flint, etc., R. Co., 90 Mich. 567, 51 N. W. 645; Grand *v.* Michigan Cent. R. Co., 83 Mich. 564, 47 N. W. 837, 11 L. R. A. 402.

Wisconsin.— Holum *v.* Chicago, etc., R. Co., 80 Wis. 299, 50 N. W. 99.

United States.— Atkyn *v.* Wabash R. Co., 41 Fed. 193.

Canada.— Washington *v.* Grand Trunk R. Co., 28 Can. Sup. Ct. 184 [*reversing* 24 Ont. App. 183]; Cooper *v.* Hamilton Steel, etc., Co., 8 Ont. L. Rep. 353.

See 34 Cent. Dig. tit. "Master and Servant," §§ 218, 219, 221.

Defective blocking.— Where, by the method used by defendant, the flanges of the car wheels would in a few days wear the blocking so that it would be two inches below the rail, and there were other systems of blocking in common use, which prevented the wheels from wearing down the blocking, it was held that the system used was not a compliance with 3 Howell Annot. St. Mich. § 3397*a*, requiring railroad companies to block their switches. Eastman *v.* Lake Shore, etc., R. Co., 101 Mich. 597, 60 N. W. 309.

Where two companies receive cars from each other over a delivery track at a certain point, a person employed by one of them to take the number of its cars, and inspect their seals, as trains are made up at such place by the other, is an employee of the latter, within the meaning of the Ohio act of March 23, 1888. Atkyn *v.* Wabash R. Co., 41 Fed. 193.

negligence in leaving its frogs, switches, or guard-rails unblocked,[30] unless blocking is generally used in the same section of the country,[31] or unless the company undertakes to maintain blocking, and allows it to become defective.[32] As the object of blocking is only to prevent the feet from catching, a servant cannot recover for injuries received by reason of his arm's catching in an unblocked guard-rail.[33] Injuries to an arm caused by an unblocked guard-rail furnish no ground of recovery, because blocking is intended to prevent feet from being caught and held, and not hands and arms.[34]

(E) *Fences and Cattle-Guards* — (1) At Common Law. As between a railway company and its employees, there is no common-law duty upon the company to fence its tracks and provide cattle-guards;[35] but where a company erects a cattle-guard at a point which its employees are constantly compelled to cross, the guard must be made reasonably safe for that purpose, it not being enough that it be made sufficient and safe to turn stock.[36]

(2) Under Statute. There are two lines of decisions under statutes requiring railroad companies to fence their tracks and erect cattle-guards. Under the terms of some it is held that, the statutes being primarily for the protection of stock, a company is not liable to its servants for injuries received by reason of a failure to comply with the statutory requirements;[37] while under the terms of others it is held that the intent is to afford protection to persons upon the company's trains as well as to animals.[38]

(F) *Bridges, Trestles, and Culverts.* It is the duty of a railway company to

30. Missouri Pac. R. Co. *v.* Lewis, 24 Nebr. 848, 40 N. W. 401, 2 L. R. A. 67. See also Chicago, etc., R. Co. *v.* Lonergan, 118 Ill. 41, 7 N. E. 55; Chicago, etc., R. Co. *v.* Smith, 18 Ill. App. 119.

Where unblocked frogs are in general use in the same section of country, and it is doubtful whether they are not the better kind, it is not negligence for a railroad company to use unblocked frogs in its freight yard. Kilpatrick *v.* Choctaw, etc., R. Co., 121 Fed. 11, 57 C. C. A. 255. See also Southern Pac. Co. *v.* Seley, 152 U. S. 145, 14 S. Ct. 530, 38 L. ed. 391 [*reversing* 6 Utah 319, 23 Pac. 751].

A company constructing new switches does not owe the duty to a brakeman of blocking a frog, which constitutes a part of the new construction, during the progress of the work, it being impracticable to block it till the tracks are ballasted and the alignment of the rails of the frog is perfected. Hauss *v.* Lake Erie, etc., R. Co., 105 Fed. 733, 46 C. C. A. 94.

31. See Southern Pac. Co. *v.* Seley, 152 U. S. 145, 14 S. Ct. 530, 38 L. ed. 391 [*reversing* 6 Utah 319].

32. Hunt *v.* Kane, 100 Fed. 256, 40 C. C. A. 372.

When a company has made use of blocking on some parts of its road, and it is clear that the blocking of guard-rails adds to the security of the employees, a verdict against the company for the death of a yardmaster, who got his foot caught in an unblocked guard-rail, and was run down, will not be set aside on the ground that there is no evidence to show negligence. Huhn *v.* Missouri Pac. R. Co., 92 Mo. 440, 4 S. W. 937.

33. Rutledge *v.* Missouri Pac. R. Co., 110 Mo. 312, 19 S. W. 38.

34. State *v.* Blunt, 110 Mo. 332, 19 S. W. 650.

35. *California.*— Sweeney *v.* Central Pac. R. Co., 57 Cal. 15.

Iowa.— Patton *v.* Central Iowa R. Co., 73 Iowa 306, 35 N. W. 149.

Louisiana.— Tillotson *v.* Texas, etc., R. Co., 44 La. Ann. 95, 10 So. 400.

New York.— Langlois *v.* Buffalo, etc., R. Co., 19 Barb. 364.

United States.— Cowan *v.* Union Pac. R. Co., 35 Fed. 43.

See 34 Cent. Dig. tit. "Master and Servant," § 222.

Where a railroad voluntarily fences a part of its track, it does not thereby impose upon itself the obligation to fence more of it. Tillotson *v.* Texas, etc., R. Co., 44 La. Ann. 95, 11 So. 140. But see Quill *v.* Houston, etc., R. Co., 93 Tex. 616, 55 S. W. 1126, 57 S. W. 948.

36. Ford *v.* Chicago, etc., R. Co., 91 Iowa 179, 59 N. W. 5, 24 L. R. A. 657. See also Fuller *v.* Lake Shore, etc., R. Co., 108 Mich. 690, 66 N. W. 593.

37. Fleming *v.* St. Paul, etc., R. Co., 27 Minn. 111, 6 N. W. 448; Langlois *v.* Buffalo, etc., R. Co., 19 Barb. (N. Y.) 364; Snyder *v.* Pennsylvania R. Co., 205 Pa. St. 619, 55 Atl. 778; Ward *v.* Bonner, 80 Tex. 168, 15 S. W. 805.

See 34 Cent. Dig. tit. "Master and Servant," § 222.

38. *Illinois.*— Terre Haute, etc., R. Co. *v.* Williams, 172 Ill. 379, 50 N. E. 116, 64 Am. St. Rep. 44 [*affirming* 69 Ill. App. 392].

Missouri.— Dickson *v.* Omaha, etc., R. Co., 124 Mo. 140, 27 S. W. 476, 46 Am. St. Rep. 429, 25 L. R. A. 320.

New York.— Donegan *v.* Erhardt, 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527 [*reversing* 55 N. Y. Super. Ct. 502, 3 N. Y. Suppl. 820].

exercise reasonable care and diligence to construct and maintain reasonably safe and sufficient bridges and culverts on its line, and it will be liable to its servants for injuries sustained by reason of its failure to do so.[39] But where a company has exercised such reasonable care as usual and ordinary conditions require, it will not be held liable for injuries sustained by reason of storms and floods of unusual and extraordinary violence, and which could not have been reasonably foreseen by competent and skilful persons.[40]

(v) *Obstructions or Erections On, Over, or Near Tracks*[41] — (a) *In General.* A railway company is bound to exercise reasonable care and diligence to prevent obstructions or erections on, over, or near its tracks which are a source of danger to its servants, and will be held liable for injuries occasioned by its neglect of duty.[42]

Wisconsin.—Quackenbush *v.* Wisconsin, etc., R. Co., 62 Wis. 441, 22 N. W. 519.

United States.— Atchison, etc., R. Co. *v.* Reesman, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768.

See 34 Cent. Dig. tit. "Master and Servant," § 222.

39. *California.*— Rodgers *v.* Central Pac. R. Co., 67 Cal. 607, 8 Pac. 377.

Colorado.— Denver, etc., R. Co. *v.* McComas, 7 Colo. App. 121, 42 Pac. 676.

Illinois.— Toledo, etc., R. Co. *v.* Conroy, 68 Ill. 560.

Indiana.— Terre Haute, etc., R. Co. *v.* Fowler, 154 Ind. 682, 56 N. E. 228, 48 L. R. A. 531.

Iowa.— Scagel *v.* Chicago, etc., R. Co., 83 Iowa 380, 49 N. W. 990.

Kansas.— Atchison, etc., R. Co. *v.* Croll, 3 Kan. App. 242, 45 Pac. 112.

Kentucky.— Southern R. Co. *v.* Cooper, 62 S. W. 858, 23 Ky. L. Rep. 290.

Louisiana.—Van Amburg *v.* Vicksburg, etc., R. Co., 37 La. Ann. 650, 55 Am. Rep. 517.

Massachusetts.— Elmer *v.* Locke, 135 Mass. 575.

Michigan.— See Illick *v.* Flint, etc., R. Co., 67 Mich. 632, 35 N. W. 708.

Minnesota.— Gates *v.* Southern Minnesota R. Co., 28 Minn. 110, 9 N. W. 579.

Missouri.— Copeland *v.* Wabash R. Co., 175 Mo. 650, 75 S. W. 106; Stoher *v.* St. Louis, etc., R. Co., 105 Mo. 192, 16 S. W. 591.

New Jersey.— Harrison *v.* Central R. Co., 31 N. J. L. 293.

New York.— Fosburg *v.* Lake Shore, etc., R. Co., 94 N. Y. 374, 46 Am. Rep. 148, in which the bridge had been constructed by another company from whom the road was bought by defendant.

North Carolina.— Bolden *v.* Southern R. Co., 123 N. C. 614, 31 S. E. 851.

Ohio.— New York, etc., R. Co. *v.* Ellis, 13 Ohio Cir. Ct. 704, 6 Ohio Cir. Dec. 304.

Texas.— Bonner *v.* Mayfield, 82 Tex. 234, 18 S. W. 305; Taylor, etc., R. Co. *v.* Taylor, 79 Tex. 104, 14 S. W. 918, 23 Am. St. Rep. 316; Bonner *v.* Wingate, 78 Tex. 333, 14 S. W. 790; Galveston, etc., R. Co. *v.* Daniels, 9 Tex. Civ. App. 253, 28 S. W. 548, 711.

Vermont.— Davis *v.* Central Vermont R. Co., 55 Vt. 84, 45 Am. Rep. 590.

Washington.— Bateman *v.* Peninsular R. Co., 20 Wash. 133, 54 Pac. 996.

Wisconsin.— Kennedy *v.* Lake Superior Terminal, etc., R. Co., 93 Wis. 32, 66 N. W. 1137.

United States.— Union Pac. R. Co. *v.* O'Brien, 161 U. S. 451, 16 S. Ct. 618, 40 L. ed. 766; Chicago, etc., R. Co. *v.* Healy, 86 Fed. 245, 30 C. C. A. 11; Woods *v.* Lindvall, 48 Fed. 62, 1 C. C. A. 37.

England.— Great Western R. Co. *v.* Braid, 9 Jur. N. S. 339, 8 L. T. Rep. N. S. 31, 1 Moore P. C. N. S. 101, 1 New Rep. 527, 11 Wkly. Rep. 444, 15 Eng. Reprint 640.

Canada.— Carney *v.* Caraquet R. Co., 29 N. Brunsw. 425.

See 34 Cent. Dig. tit. "Master and Servant," § 223.

Road in course of construction.— A company is liable for injury to an engineer caused by an unsafe bridge, although the road was in course of construction and not open for trade or travel. Van Amburg *v.* Vicksburg etc., R. Co., 37 La. Ann. 650, 55 Am. Rep. 517.

40. *Alabama.*— Columbus, etc., R. Co. *v.* Bridges, 86 Ala. 448, 5 So. 864, 11 Am. St. Rep. 58.

California.—Rodgers *v.* Central Pac. R. Co., 67 Cal. 607, 8 Pac. 377.

Minnesota.— Gates *v.* Southern Minnesota R. Co., 28 Minn. 110, 9 N. W. 579.

Missouri.— Stoher *v.* St. Louis, etc., R. Co., 105 Mo. 192, 16 S. W. 591.

Texas.— Houston, etc., R. Co. *v.* Fowler, 56 Tex. 452; Houston, etc., R. Co. *v.* Parker, 50 Tex. 330.

Virginia.— Binns *v.* Richmond, etc., R. Co., 88 Va. 891, 14 S. E. 701.

See 34 Cent. Dig. tit. "Master and Servant," § 223.

41. **Assumption of risk** see *infra*, IV, E, 3, b, 1.

Concurrent negligence of fellow servant see *infra*, IV, G, 4, a, (IV).

Negligence of fellow servant performing duties of master see *infra*, IV, G, 4, a, (VII), (E), (4), (a).

Uniform character of appliances see *supra*, IV, B, 2, e.

42. *Alabama.*— Northern Alabama R. Co. *v.* Mansell, 138 Ala. 548, 36 So. 459; Louisville, etc., R. Co. *v.* Bouldin, 121 Ala. 197, 25 So. 903; East Tennessee, etc., R. Co. *v.* Thompson, 94 Ala. 636, 10 So. 280; Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. Rep. 47.

(B) *Overhead Bridges*— (1) IN GENERAL. If a railway company knowingly maintains or permits a bridge over its track so low that brakemen cannot perform their duties on the top of the cars with reasonable safety, it is liable to a brake-

Arkansas.— Little Rock, etc., R. Co. *v.* Voss, (1892) 18 S. W. 172.

Colorado.— Wilson *v.* Denver, etc., R. Co., 7 Colo. 101, 2 Pac. 1.

Dakota.— Boss *v.* Northern Pac. R. Co., 5 Dak. 308, 40 N. W. 590.

Georgia.— See Sundy *v.* Savannah St. R., 96 Ga. 819, 23 S. E. 841; Wolf *v.* East Tennessee, etc., R. Co., 88 Ga. 210, 14 S. E. 199, in which the evidence failed to show negligence.

Illinois.— Illinois Terminal R. Co. *v.* Thompson, 210 Ill. 226, 71 N. E. 328 [*affirming* 112 Ill. App. 463]; Chicago, etc., R. Co. *v.* Kinnare, 190 Ill. 9, 60 N. E. 57 [*affirming* 91 Ill. App. 508]; Chicago, etc., R. Co. *v.* Stevens, 189 Ill. 226, 59 N. E. 577 [*affirming* 91 Ill. App. 171]; Chicago, etc., R. Co. *v.* Russell, 91 Ill. 298, 33 Am. Rep. 54; Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 226; Illinois Cent. R. Co. *v.* Welch, 52 Ill. 183, 4 Am. Rep. 593; Malott *v.* Laufman, 89 Ill. App. 178; Illinois, etc., R. Co. *v.* Whalen, 19 Ill. App. 116.

Indiana.— New York, etc., R. Co. *v.* Ostman, 146 Ind. 452, 45 N. E. 651; Pittsburgh, etc., R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514.

Iowa.— Keist *v.* Chicago, etc., R. Co., 110 Iowa 32, 81 N. W. 181; Bryce *v.* Chicago, etc., R. Co., 103 Iowa 665, 72 N. W. 780; Kearns *v.* Chicago, etc., R. Co., 66 Iowa 599, 24 N. W. 231; Allen *v.* Burlington, etc., R. Co., 57 Iowa 623, 11 N. W. 614.

Kansas.— Southern Kansas R. Co. *v.* Michaels, 57 Kan. 474, 46 Pac. 938.

Kentucky.— Linck *v.* Louisville, etc., R. Co., 107 Ky. 370, 54 S. W. 184, 21 Ky. L. Rep. 1097; Hughes *v.* Louisville, etc., R. Co., 104 Ky. 774, 48 S. W. 671, 20 Ky. L. Rep. 1029.

Louisiana.— Erslew *v.* New Orleans, etc., R. Co., 49 La. Ann. 86, 21 So. 153.

Maine.— Withee *v.* Somerset Traction Co., 98 Me. 61, 56 Atl. 204; Nugent *v.* Boston, etc., R., 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151.

Maryland.—Pikesville, etc., R. Co. *v.* State, 88 Md. 563, 42 Atl. 214.

Massachusetts.— Ferren *v.* Old Colony R. Co., 143 Mass. 197, 9 N. E. 608; Holden *v.* Fitchburg R. Co., 129 Mass. 268, 37 Am. Rep. 343. *Compare* Fearns *v.* New York Cent., etc., R. Co., 186 Mass. 529, 72 N. E. 68; Hall *v.* Wakefield, etc., St. R. Co., 178 Mass. 98, 59 N. E. 668; Fisk *v.* Fitchburg R. Co., 158 Mass. 238, 33 N. E. 510.

Michigan.— Doyle *v.* Toledo R. Co., 127 Mich. 94, 86 N. W. 524, 89 Am. St. Rep. 456, 54 L. R. A. 461; Pahlan *v.* Detroit, etc., R. Co., 122 Mich. 232, 81 N. W. 103; Cregg *v.* Chicago, etc., R. Co., 91 Mich. 624, 52 N. W. 62; Sweet *v.* Michigan Cent. R. Co., 87 Mich. 559, 49 N. W. 882.

Mississippi.— Illinois Cent. R. Co. *v.* Bishop, 76 Miss. 758, 25 So. 867.

Missouri.— Hurst *v.* Kansas City, etc., R. Co., 163 Mo. 309, 63 S. W. 695, 85 Am. St. Rep. 539; Murphy *v.* Wabash R. Co., 115 Mo. 111, 21 S. W. 862; Hall *v.* Missouri Pac. R. Co., 74 Mo. 298.

New Hampshire.— Fifield *v.* Northern R. Co., 42 N. H. 225.

New York.—Mendizabal *v.* New York Cent., etc., R. Co., 89 N. Y. App. Div. 386, 85 N. Y. Suppl. 896; Benthin *v.* New York Cent., etc., R. Co., 24 N. Y. App. Div. 303, 48 N. Y. Suppl. 503; True *v.* Lehigh Valley R. Co., 22 N. Y. App. Div. 588, 48 N. Y. Suppl. 86; Sisco *v.* Lehigh, etc., R. Co., 75 Hun 582, 27 N. Y. Suppl. 671 [*reversed* on another ground in 145 N. Y. 296, 39 N. E. 958]. *Compare* Richmond *v.* New York Cent., etc., R. Co., 8 N. Y. App. Div. 382, 40 N. Y. Suppl. 812.

North Carolina.— Lindsay *v.* Norfolk, etc., R. Co., 132 N. C. 59, 43 S. E. 511; Bean *v.* Western North Carolina R. Co., 107 N. C. 731, 12 S. E. 600.

Ohio.— Lake Shore, etc., R. Co. *v.* Andrews, 14 Ohio Cir. Ct. 564, 8 Ohio Cir. Dec. 73.

Oregon.— Johnston *v.* Oregon Short Line, etc., R. Co., 23 Oreg. 94, 31 Pac. 283.

Rhode Island.— Whipple *v.* New York, etc., R. Co., 19 R. I. 587, 35 Atl. 305, 61 Am. St. Rep. 796.

South Dakota.— Gates *v.* Chicago, etc., R. Co., 2 S. D. 422, 50 N. W. 907.

Texas.— Bonner *v.* Lanone, 80 Tex. 117, 15 S. W. 803; Southern Pac. R. Co. *v.* Markey, (1892) 19 S. W. 392; Texas, etc., R. Co. *v.* Vallie, 60 Tex. 481 (construing Rev. St. § 4169); Houston, etc., R. Co. *v.* Oram, 49 Tex. 341; Galveston, etc., R. Co. *v.* Brown, 33 Tex. Civ. App. 589, 77 S. W. 832; Burns *v.* Merchants', etc., Oil Co., 26 Tex. Civ. App. 223, 63 S. W. 1061; Texas, etc., R. Co. *v.* Taylor, (Civ. App. 1899) 53 S. W. 362; Galveston, etc., R. Co. *v.* Pitts, (Civ. App. 1897) 42 S. W. 255; Texas, etc., R. Co. *v.* Echols, 17 Tex. Civ. App. 677, 41 S. W. 488; Texas, etc., R. Co. *v.* Hohn, 1 Tex. Civ. App. 36, 21 S. W. 942.

Vermont.— Morrisette *v.* Canadian Pac. R. Co., 74 Vt. 232, 52 Atl. 520.

Virginia.— Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489.

West Virginia.— Riley *v.* West Virginia Cent., etc., R. Co., 27 W. Va. 145.

Wisconsin.— Kelleher *v.* Milwaukee, etc., R. Co., 80 Wis. 584, 50 N. W. 942; Hulehan *v.* Green Bay, etc., R. Co., 58 Wis. 319, 17 N. W. 17; Bessex *v.* Chicago, etc., R. Co., 45 Wis. 477; Dorsey *v.* Phillips, etc., Constr. Co., 42 Wis. 583.

United States.—Choctaw, etc., R. Co. *v.* McDade, 191 U. S. 64, 24 S. Ct. 24, 48 L. ed. 96 [*affirming* 112 Fed. 888, 50 C. C. A. 591]; Wood *v.* Louisville, etc., R. Co., 88 Fed. 44; Thomas *v.* Ross, 75 Fed. 552, 21 C. C. A.

man who, having no knowledge of the dangerous character of the bridge,[43] is struck by it and injured while in the performance of his duty.[44]

444; Central Trust Co. *v.* East Tennessee, etc., R. Co., 73 Fed. 661. *Compare* Kenney *v.* Meddaugh, 118 Fed. 209, 55 C. C. A. 115; Morris *v.* Duluth, etc., R. Co., 108 Fed. 747, 47 C. C. A. 661; Carper *v.* Norfolk, etc., R. Co., 78 Fed. 94, 23 C. C. A. 669, 35 L. R. A. 135; Dalton *v.* Receivers, 6 Fed. Cas. No. 3,550, 4 Hughes 180.

Canada.— Day *v.* Dominion Iron, etc., Co., 36 Nova Scotia 113.

See 34 Cent. Dig. tit. "Master and Servant," § 224.

Other cars.— *Alabama.*— Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88, in which, however, it was held that leaving a car temporarily on a side-track, in dangerous proximity to the main track, is not a defect in the "ways" within Code, § 2590, subs. 1 [*overruling* on this point Highland Ave., etc., R. Co. *v.* Walters, 91 Ala. 435, 8 So. 357].

Kansas.— Atchison, etc., R. Co. *v.* Butler, 56 Kan. 433, 43 Pac. 767. *Compare* Atchison, etc., R. Co. *v.* Slattery, 57 Kan. 499, 46 Pac. 941, in which a push car, which had been left a safe distance from the track, was taken back and left dangerously near the track by third persons, not connected with the company, and it was held that the company was not liable for a resulting collision.

Missouri.— See Jackson *v.* Missouri Pac. R. Co., 104 Mo. 448, 16 S. W. 413.

Pennsylvania.— Voorhees *v.* Lake Shore, etc., R. Co., 193 Pa. St. 115, 44 Atl. 335.

Texas.— Ft. Worth, etc., R. Co. *v.* Wrenn, 20 Tex. Civ. App. 628, 50 S. W. 210.

See 34 Cent. Dig. tit. "Master and Servant," § 227.

Warning of danger.— Where it is necessary to place posts for the support of a coal chute so near to a side-track as to render it dangerous for a person to ride on the side of a car in passing, it is not negligence in the railroad company toward its servants so to maintain them, if the servants are properly warned of the danger. Mobile, etc., R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416.

Obstructions on adjacent land.— A street railroad company is not chargeable with negligence in permitting telephone poles to be erected on land not owned or controlled by the company so near the track as to be dangerous to employees operating its cars. Chattanooga Electric R. Co. *v.* More, 113 Tenn. 531, 82 S. W. 478.

Mail cranes.— Negligence cannot be predicated on the fact that a mail crane, when in position, was, at its nearest point, only thirteen and a half inches from the side of the locomotive — this being the usual distance, and the master car-builder, who was familiar with the government regulations, and under whose supervision the catches on the mail-cars were constructed, testifying that they could not be operated efficiently if placed at a greater distance. Kenney *v.* Meddaugh, 118 Fed. 209, 55 C. C. A. 115.

Master not liable for act of third person see Neider *v.* Illinois Cent. R. Co., 108 La. 154, 32 So. 366.

43. **Assumption of known risk** see *infra*, IV, E, 3, b, (I).

44. *Alabama.*— Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863.

Illinois.— Cleveland, etc., R. Co. *v.* Walter, 147 Ill. 60, 35 N. E. 529 [*affirming* 45 Ill. App. 642]; Chicago, etc., R. Co. *v.* Johnson, 116 Ill. 206, 4 N. E. 381.

Indiana.— Pennsylvania Co. *v.* Sears, 136 Ind. 460, 34 N. E. 15, 36 N. E. 353; Louisville, etc., R. Co. *v.* Wright, 115 Ind. 378, 16 N. E. 145, 17 N. E. 584, 7 Am. St. Rep. 432; Baltimore, etc., R. Co. *v.* Rowan, 104 Ind. 88, 3 N. E. 627.

Kansas.— Atchison, etc., R. Co. *v.* Rowan, 55 Kan. 270, 39 Pac. 1010; St. Louis, etc., R. Co. *v.* Irwin, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266.

Kentucky.—Cincinnati, etc., R. Co. *v.* Sampson, 97 Ky. 65, 30 S. W. 12, 16 Ky. L. Rep. 819; Louisville, etc., R. Co. *v.* Tucker, 65 S. W. 453, 23 Ky. L. Rep. 1929; Louisville, etc., R. Co. *v.* Cooley, 49 S. W. 339, 20 Ky. L. Rep. 1372.

Louisiana.— Gusman *v.* Caffery Cent. Refinery, etc., Co., 49 La. Ann. 1265, 22 So. 742.

New Hampshire.— Hardy *v.* Boston, etc., R. Co., 63 N. H. 523, 41 Atl. 179.

South Carolina.— Altee *v.* South Carolina R. Co., 21 S. C. 550; Hooper *v.* Columbia, etc., R. Co., 21 S. C. 541, 53 Am. Rep. 691.

Texas.— Gulf, etc., R. Co. *v.* Knox, 25 Tex. Civ. App. 450, 61 S. W. 969.

United States.— See Myers *v.* Chicago, etc., R. Co., 95 Fed. 406, 37 C. C. A. 137, in which negligence was not shown, the bridge having been built at the height required by the municipal authorities for public convenience, and the brakeman having been warned, both verbally and by whiplashes placed at proper distances each side of the bridge.

See 34 Cent. Dig. tit. "Master and Servant," § 225.

But see Lake Shore, etc., R. Co. *v.* Shook, 16 Ohio Cir. Ct. 665, 9 Ohio Cir. Dec. 9, where it was held that a company is not bound to ascertain whether the cars in its trains will permit a safe passage for a brakeman under a bridge.

A bridge below line of absolute safety may be justified by circumstances; but in no case can a company build a bridge so low that a brakeman cannot pass under it in a stooping position. Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863. See also Louisville, etc., R. Co. *v.* Cooley, 49 S. W. 339, 20 Ky. L. Rep. 1372, in which the brakeman was struck while sitting on top of a car.

(2) Whipping Straps, Telltales, or Bridge Guards. In the absence of a statutory requirement on the subject,[45] the failure of a railway company to maintain whipping straps, telltales, or bridge guards to warn brakemen who are on top of a train that it is about to pass under a bridge so low as to imperil their lives is not legal negligence, unless such devices are so manifestly serviceable as to command the consensus of intelligent railroad men, and such men do not honestly differ in judgment as to their utility.[46]

5. Covering or Guarding Dangerous Machinery or Places[47] — a. In General. Under the general rule that the master must exercise reasonable care to provide his servants with a reasonably safe place to work, and with reasonably safe machinery and appliances, it is his duty to cover or otherwise guard dangerous machinery or places, where the nature of the work and the circumstances are such as reasonably to require such precaution.[48]

b. Machinery — (1) *In General.* Independently of statutory requirement, it is not negligence *per se* for a master to leave his machinery uncovered or otherwise unguarded;[49] but the question depends on the circumstances of each

Railroad not liable if bridge safe when servant careful see Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105.

Question of expense may be taken into consideration see Louisville, etc., R. Co. *v.* Hall, 91 Ala 112, 8 So. 371, 24 Am. St. Rep. 863.

45. Statutes construed.— Hardy *v.* Boston, etc., R. Co., 68 N. H. 523, 41 Atl. 179; Wallace *v.* Central Vermont R. Co., 138 N. Y. 302, 33 N. E. 1069 [*reversing* 18 N. Y. Suppl. 280]; Hines *v.* New York Cent., etc., R. Co., 78 Hun (N. Y.) 239, 28 N. Y. Suppl. 829 [*affirmed* in 149 N. Y. 569, 43 N. E. 987]; Ryan *v.* Long Island R. Co., 51 Hun (N. Y.) 607, 4 N. Y. Suppl. 381 [*affirmed* in 124 N. Y. 654, 27 N. E. 413]; Darling *v.* New York, etc., R. Co., 17 R. I. 708, 24 Atl. 462, 16 L. R. A. 643.

Telltale too near bridge to satisfy statute see Wallace *v.* Central Vermont R. Co., 138 N. Y. 302, 33 N. E. 1069 [*reversing* 18 N. Y. Suppl. 280].

Negligence to allow telltale to get out of order see Hines *v.* New York Cent., etc., R. Co., 78 Hun (N. Y.) 239, 28 N. Y. Suppl. 829 [*affirmed* in 149 N. Y. 569, 43 N. E. 987].

Injury from bridge guard.— A railway company is liable to its servant caused by his being struck by a bridge guard which is out of position, by reason of the wearing out of a rope attached to the guard, which it had provided no suitable means for keeping in a safe condition. Warden *v.* Old Colony R. Co., 137 Mass. 204. See also Darling *v.* New York, etc., R. Co., 17 R. I. 708, 24 Atl. 462, 16 L. R. A. 643, in which the telltale was safe for cars of ordinary height, but dangerous for brakemen on cars of a greater height.

Tunnel telltales.— It is no defense to an action for the wrongful death of a brakeman, who was put to work where he would have to pass through a tunnel, on the top of box-cars, and without warning him that he could not safely sit on such cars, that the company maintained telltales on either end of the tunnel, where such telltales did not hang low enough to reach a person sitting on a box-car. Wainright *v.* Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 530.

46. Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863.

47. Assumption of risk see *infra*, IV, E, 2, b.

48. *Iowa.*— Norris *v.* Cudahy Packing Co., 124 Iowa 748, 100 N. W. 853, in which the injury arose from an unguarded ditch into which plaintiff fell on her way to work before daylight.

Missouri.— Curtis *v.* McNair, 173 Mo. 270, 73 S. W. 167, in which plaintiff sustained injuries because a screen in front of a blast furnace, which had been removed during repairs to the furnace, was not afterward replaced.

Texas.— Missouri, etc., R. Co. *v.* Johnson, (Civ. App. 1901) 67 S. W. 769 [*affirmed* in 95 Tex. 409, 67 S. W. 768] (injury from uncovered ditch); Texas, etc., R. Co. *v.* Echols, (Civ. App. 1894) 25 S. W. 1087.

United States.— Ellsworth *v.* Metheney, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389, injury resulting from uninsulated electric wire.

Canada.— Price *v.* Talon, 32 Can. Sup. Ct. 123; Bisnaw *v.* Shields, 7 Ont. L. Rep. 210.

See 34 Cent. Dig. tit. "Master and Servant," § 228.

Compare Sorenson *v.* Menasha Paper, etc., Co., 56 Wis. 338, 14 N. W. 446, in which it was held that negligence was not shown, plaintiff having fallen into an unguarded excavation of which he knew, and which he had occasion to pass.

Failure to fence roof not negligence see Kinnare *v.* Chicago, 70 Ill. App. 106. And see Quinn *v.* New York, etc., R. Co., 175 Mass. 150, 55 N. E. 891, construing Pub. St. c. 112, § 160.

Massachusetts statute construed.—The want of a guard on a run in a coal shed on which a servant had worked, from time to time, for fifteen years before his injury, is not a defect, within the meaning of Mass. St. (1887) c. 270, § 1. O'Maley *v.* South Boston Gas Light Co., 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161.

49. Facts held not to show negligence.— *Arizona.*— Arizona Lumber, etc., Co. *v.* Mooney, (1895) 42 Pac. 952.

case, the nature of the service, the degree of exposure, and notice thereof to the servant.[50]

(II) *Statutory Provisions.* In a number of jurisdictions statutes have been enacted requiring employers to cover or guard dangerous machinery, and where a servant is injured by reason of the master's failure to comply with such requirement the master will be held liable.[51]

c. Elevators, Hoistways, and Shafts. It is the duty of a master to exercise

Indiana.— Guedelhofer *v.* Ernsting, 23 Ind. App. 188, 55 N. E. 113.

Kentucky.— Chicago Veneer Co. *v.* Walden, (1904) 82 S. W. 294; Hood *v.* Argonaut Cotton Mill Co., 62 S. W. 1043, 23 Ky. L. Rep. 460.

Louisiana.— Schoultz *v.* Eckardt Mfg. Co., 112 La. 568, 36 So. 593, 104 Am. St. Rep. 452.

Maine.— Cunningham *v.* Bath Iron Works, 92 Me. 501, 43 Atl. 106.

Massachusetts.— O'Connor *v.* Whittall, 169 Mass. 563, 48 N. E. 844; Wilson *v.* Massachusetts Cotton Mills, 169 Mass. 67, 47 N. E. 506; McGuerty *v.* Hale, 161 Mass. 51, 36 N. E. 682; Tinkham *v.* Sawyer, 153 Mass. 485, 27 N. E. 6; Foley *v.* Pettee Mach. Works, 149 Mass. 294, 21 N. E. 304, 4 L. R. A. 51; Rock *v.* Indian Orchard Mills, 142 Mass. 522, 8 N. E. 401; Sullivan *v.* India Mfg. Co., 113 Mass. 396.

Minnesota.— Carroll *v.* Williston, 44 Minn. 287, 46 N. W. 352.

Missouri.— Bair *v.* Heibel, (App. 1903) 77 S. W. 1017.

New York.— Van Horn *v.* Boston, etc., R. Co., 4 N. Y. St. 782.

North Carolina.— Marks *v.* Harriet Cotton Mills, 135 N. C. 287, 47 S. E. 432.

Wisconsin.— Schiefelbein *v.* Badger Paper Co., 101 Wis. 402, 77 N. W. 742.

United States.— Townsend *v.* Langles, 41 Fed. 919.

See 34 Cent. Dig. tit. "Master and Servant," § 229.

Where the danger was manifest and understood by a servant using a machine, the fact that it might have been made safer by a guard is immaterial. O'Connor *v.* Whittall, 169 Mass. 563, 48 N. E. 844. See also Guedelhofer *v.* Ernsting, 23 Ind. App. 188, 55 N. E. 113.

Where gearing is uncovered and plainly exposed, a master is not liable to a servant injured by coming in contact with it, on the ground that it might have been made less dangerous by being covered. Foley *v.* Pettee Mach. Works, 149 Mass. 294, 21 N. E. 304, 4 L. R. A. 51. See also Wilson *v.* Massachusetts Cotton Mills, 169 Mass. 67, 47 N. E. 506; McGuerty *v.* Hale, 161 Mass. 51, 36 N. E. 682.

Inner and ordinarily inaccessible parts of machinery need not be provided with a hood or guard. Schoultz *v.* Eckardt Mfg. Co., 112 La. 568, 36 So. 593, 104 Am. St. Rep. 452.

50. Carroll *v.* Williston, 44 Minn. 287, 46 N. W. 352. See also the following illustrative cases:

Illinois.— Bradley *v.* Sattler, 54 Ill. App. 504.

Iowa.— Buehner *v.* Creamery Package Mfg. Co., 124 Iowa 445, 100 N. W. 345, 104 Am. St. Rep. 354.

Kansas.— Mastin *v.* Levagood, 47 Kan. 36, 27 Pac. 122, 27 Am. St. Rep. 277, 47 Kan. 764, 28 Pac. 977.

Maryland.— Levy *v.* Clark, 90 Md. 146, 44 Atl. 990.

Michigan.—King *v.* Ford River Lumber Co., 93 Mich. 172, 53 N. W. 10.

New York.— McCarragher *v.* Rogers, 120 N. Y. 526, 24 N. E. 812; Levy *v.* Grove Mills Paper Co., 80 N. Y. App. Div. 384, 80 N. Y. Suppl. 730.

North Carolina.— Creech *v.* Wilmington Cotton Mills, 135 N. C. 680, 47 S. E. 671.

Texas.— Miller *v.* Itasca Cotton Seed Oil Co., (Civ. App. 1897) 41 S. W. 366.

Virginia.— Richlands Iron Co. *v.* Elkins, 90 Va. 249, 17 S. E. 890.

Wisconsin.— Egan *v.* Sawyer, etc., Lumber Co., 94 Wis. 137, 68 N. W. 756.

England.— Weems *v.* Mathieson, 4 Macq. H. L. 215.

Canada.— Myers *v.* Sault St. Marie Pulp, etc., Co., 3 Ont. L. Rep. 600; Godwin *v.* Newcombe, 1 Ont. L. Rep. 525.

See 34 Cent. Dig. tit. "Master and Servant," § 229.

51. **Statutes construed.**— *Illinois.*—Swift *v.* Fue, 66 Ill. App. 651, construing an ordinance requiring that belting, shafting, and gearing, when so located as to endanger the lives and limbs of those employed, shall be guarded.

Indiana.— Green *v.* American Car, etc., Co., 163 Ind. 135, 71 N. E. 268 (construing Burns Annot. St. (1901) § 7087); Monteith *v.* Kokomo Wood Enameling Co., 159 Ind. 149, 64 N. E. 610, 59 L. R. A. 944 (construing Burns Annot. St. (1901) § 7087*i*); Crum *v.* North Vernon Pump, etc., Co., 34 Ind. App. 253, 72 N. E. 193 [*affirmed* in 163 Ind. 596, 72 N. E. 587] (construing Acts (1899), p. 234, c. 142); La Porte Carriage Co. *v.* Sullender, (App. 1904) 71 N. E. 922 (construing Burns Annot. St. (1901) § 7087*i*); Blanchard-Hamilton Furniture Co. *v.* Colvin, 32 Ind. App. 398, 69 N. E. 1032 (construing Acts (1899), p. 234, c. 142, § 9); Buehner Chair Co. *v.* Feulner, 28 Ind. App. 479, 63 N. E. 239 (construing Acts (1899), p. 231).

Iowa.— Messenger *v.* Pate, 42 Iowa 443.

Minnesota.— McGinty *v.* Waterman, 93 Minn. 242, 101 N. W. 300; Walker *v.* Grand Forks Lumber Co., 86 Minn. 328, 90 N W. 573; Christianson *v.* Northwestern Compo-Board Co., 83 Minn. 25, 85 N. W. 826, 85 Am. St. Rep. 440 (all construing Gen. St.

ordinary and reasonable care to guard his elevators, hoistways, or shafts, so as to protect his servants against such dangers therefrom as may be reasonably apprehended.[52]

d. Hatchways and Chutes. A master is bound to use ordinary care to protect his servants from dangers which may be reasonably anticipated from open and unguarded hatchways or chutes.[53]

(1894) § 2248); Peterson *v.* Johnson-Wentworth Co., 70 Minn. 538, 73 N. W. 510 (construing Laws (1893), c. 7, § 1).

Missouri.— Henderson *v.* Kansas City, 177 Mo. 477, 76 S. W. 1045 (construing Rev. St. (1899) §§ 6433, 6434); Lore *v.* American Mfg. Co., 160 Mo. 608, 61 S. W. 678 (construing Act, April 20, 1891); Colliott *v.* American Mfg. Co., 71 Mo. App. 163 (construing Acts (1891), p. 160, § 3).

New York.— Glens Falls Portland Cement Co. *v.* Travelers' Ins. Co., 162 N. Y. 399, 56 N. E. 897 [*affirming* 11 N. Y. App. Div. 411, 42 N. Y. Suppl. 285] (construing Laws (1886), c. 409, as amended by Laws (1892), c. 673); Klein *v.* Garvey, 94 N. Y. App. Div. 183, 87 N. Y. Suppl. 998 (construing Laws (1897), p. 480, c. 415, § 81); Shaw *v.* Union Bag, etc., Co., 76 N. Y. App. Div. 296, 79 N. Y. Suppl. 276 (construing Laws (1897), p. 480, c. 415, § 81); Foster *v.* International Paper Co., 71 N. Y. App. Div. 47, 75 N. Y. Suppl. 610 (construing Laws (1886), c. 409, § 8, as amended by Laws (1892), c. 673); Byrne *v.* Nye, etc., Carpet Co., 46 N. Y. App. Div. 479, 61 N. Y. Suppl. 741 (construing Laws (1886), c. 409, § 8, as amended by Laws (1892), c. 673); Spaulding *v.* Tucker, etc., Cordage Co., 13 Misc. 398, 34 N. Y. Suppl. 237 (construing Laws (1889), c. 560, § 6); Glassheim *v.* New York Economical Printing Co., 13 Misc. 174, 34 N. Y. Suppl. 69 (construing Laws (1892), c. 673, § 8).

Ohio.— Crossman *v.* P. & T. Degnan Sand, etc., Co., 24 Ohio Cir. Ct. 585, construing 94 Ohio Laws, p. 42.

Pennsylvania.— Belles *v.* Jackson, 4 Pa. Dist. 194, construing the act of May 20, 1889.

Rhode Island.— Pierce *v.* Contrexville Mfg. Co., 25 R. I. 512, 56 Atl. 778, construing Gen. Laws (1896), c. 68, § 6.

Wisconsin.— Powalske *v.* Cream City Brick Co., 110 Wis. 461, 86 N. W. 153 (construing Rev. St. § 1636*j*); Guinard *v.* Knapp-Stout, etc., Co., 95 Wis. 482, 70 N. W. 671 (construing Sanborn & B. Annot. St. § 1636*f*, subs. 2); Thompson *v.* Edward P. Allis Co., 89 Wis. 523, 62 N. W. 527 (construing Sanborn & B. Annot. St. § 1636*f*).

United States.— Rabe *v.* Consolidated Ice Co., 113 Fed. 905, 51 C. C. A. 535, construing N. Y. Laws (1897), c. 415.

England.— Mile End Guardians *v.* Hoare, [1903] 2 K. B. 483, 67 J. P. 395, 72 L. J. K. B. 651, 1 Loc. Gov. 732, 89 L. T. Rep. N. S. 276; Tate *v.* Latham, [1897] 1 Q. B. 502, 66 L. J. Q. B. 349, 76 L. T. Rep. N. S. 336, 45 Wkly. Rep. 400 [*distinguishing* Willetts *v.* Watt, [1892] 2 Q. B. 92, 56 J. P. 772, 61 L. J. Q. B. 549, 66 L. T. Rep. N. S. 818, 40 Wkly. Rep. 497; Morgan *v.* Hutchins, 59 L. J. Q. B. 197, 38 Wkly. Rep. 412.

Canada.—Hamilton Bridge Co. *v.* O'Connor, 24 Can. Sup. Ct. 598 [*affirming* 21 Ont. App. 596]; Billing *v.* Semmens, 7 Ont. L. Rep. 340 [*following* Groves *v.* Wimborne, [1898] 2 Q. B. 402, 67 L. J. Q. B. 862, 79 L. T. Rep. N. S. 284, 47 Wkly. Rep. 87; Sault Ste. Marie Pulp, etc., Co. *v.* Myers, 33 Can. Sup. Ct. 23, and *distinguishing* Canadian Coloured Cotton Mills Co. *v.* Kervin, 29 Can. Sup. Ct. 478; Montreal Rolling Mills Co. *v.* Corcoran, 26 Can. Sup. Ct. 595]; Moore *v.* J. D. Moore Co., 4 Ont. L. Rep. 167; Godwin *v.* Newcombe, 1 Ont. L. Rep. 525. *Compare* British Columbia Mills Co. *v.* Scott, 24 Can. Sup. Ct. 702; Hamilton *v.* Groesbeck, 18 Ont. App. 437.

See 34 Cent. Dig. tit. "Master and Servant," § 229.

Master not insurer.— Mo. Acts (1891), p. 160, § 3, does not make the master an insurer of his servant's safety, but increases the degree of care required. Colliott *v.* American Mfg. Co., 71 Mo. App. 163.

Every machine is not required to be fenced, under N. Y. Laws (1886), c. 409, § 8, as amended by N. Y. Laws (1892), c. 673, but only those which, in reasonable anticipation, may be a source of danger. Byrne *v.* Nye, etc., Carpet Co., 46 N. Y. App. Div. 479, 61 N. Y. Suppl. 741.

The removal of a guard, except to make repairs, is negligence. Baltimore, etc., R. Co. *v.* Cavanaugh, 35 Ind. App. 32, 71 N. E. 239.

Worn guard not proper protection see Jaroszeski *v.* Osgood, etc., Mfg. Co., 80 Minn. 393, 83 N. W. 389.

Sufficiency of guard question for jury see Fitzhenry *v.* Lamson, 19 N. Y. App. Div. 54, 45 N. Y. Suppl. 875.

52. National Syrup Co. *v.* Carlson, 155 Ill. 210, 40 N. E. 492 [*affirming* 47 Ill. App. 178] (in which plaintiff fell down an unguarded shaft); Schultz *v.* Moon, 33 Mo. App. 329; Raftery *v.* Central Park, etc., R. Co., 14 Misc. (N. Y.) 560, 35 N. Y. Suppl. 1067. *Compare* Morrison *v.* Burgess Sulphite-Fibre Co., 70 N. H. 406, 47 Atl. 412, 85 Am. St. Rep. 634, where the master was held not liable, as the elevator shaft was not intended for the purpose to which plaintiff put it.

Elevator of kind in ordinary use.— Where the elevator, in running which the operator was injured, was not out of repair, and was of a kind in ordinary use, the master is not liable, although the operator had told the superintendent that there should be guards at the side of the elevator, and the superintendent had promised to provide them. Leonard *v.* Herrmann, 195 Pa. St. 222, 45 Atl. 723.

53. The E. B. Ward Jr., 20 Fed. 702; The Helios, 12 Fed. 732. *Compare* The Gladiolus, 22 Fed. 454.

6. Inspection and Repair[54] — a. Rule Stated. It is not only the duty of a master to use ordinary care to furnish his servants with a reasonably safe place to work, and with reasonably safe machinery and appliances, but he must also, by inspection from time to time, and by the use of ordinary care and diligence in making repairs, keep them in a reasonably safe condition.[55] Nevertheless the rule is well settled that the mere failure to inspect is not negligence, where an

Chute left uncovered during repairs and alterations not negligence see Wannamaker *v.* Burke, 111 Pa. St. 423, 2 Atl. 500.

54. Negligence of fellow servant performing duties of master see *infra*, IV, G, 4, a, (VII), (E).

55. *Alabama.*— Houston Biscuit Co. *v.* Dial, 135 Ala. 168, 33 So. 268; Smoot *v.* Mobile, etc., R. Co., 67 Ala. 13.

California.— Dyas *v.* Southern Pac. Co., 140 Cal. 296, 73 Pac. 972; Silveira *v.* Iverson, 128 Cal. 187, 60 Pac. 687; Russell *v.* Pacific Cau Co., 116 Cal. 527, 48 Pac. 616; Bowman *v.* White, 110 Cal. 23, 42 Pac. 470; Jager *v.* California Bridge Co., 104 Cal. 542, 38 Pac. 413; Alexander *v.* Central Lumber, etc., Co., 104 Cal. 532, 38 Pac. 410.

Colorado.— See Kellogg *v.* Denver City Tramway Co., 18 Colo. App. 475, 72 Pac. 609, in which, under the facts, it was held that there was no duty of inspection.

Connecticut.— Rincicotti *v.* John J. O'Brien Contracting Co., 77 Conn. 617, 60 Atl. 115, 69 L. R. A. 936.

Delaware.— Karczewski *v.* Wilmington City R. Co., 4 Pennew. 24, 54 Atl. 746.

Georgia.— Georgia Cent. R. Co. *v.* Grady, 113 Ga. 1045, 39 S. E. 441.

Illinois.— Missouri Malleable Iron Co. *v.* Dillon, 206 Ill. 145, 69 N. E. 12 [*affirming* 106 Ill. App. 649]; Momence Stone Co. *v.* Turrell, 205 Ill. 515, 68 N. E. 1078 [*affirming* 106 Ill. App. 160]; Chicago, etc., R. Co. *v.* Gillison, 173 Ill. 264, 50 N. E. 657, 64 Am. St. Rep. 117 [*affirming* 72 Ill. App. 207]; Ryan *v.* Armour, 166 Ill. 568, 47 N. E. 60 [*affirming* 67 Ill. App. 102]; Toledo, etc., R. Co. *v.* Conroy, 68 Ill. 560; Chicago, etc., R. Co. *v.* Swett, 45 Ill. 197, 92 Am. Dec. 206; Belt R. Co. *v.* Confrey, 111 Ill App. 473; Union Show Case Co. *v.* Blindauer, 75 Ill. App. 358; Tudor Iron Works *v.* Weber, 31 Ill. App. 306.

Indiana.— Louisville, etc., R. Co. *v.* Howell, 147 Ind. 266, 45 N. E. 584; Columbus, etc., R. Co. *v.* Arnold, 31 Ind. 174, 99 Am. Dec. 615.

Iowa.— Klaffke *v.* Bettendorf Axle Co., 125 Iowa 223, 100 N. W. 1116; Shebeck *v.* National Cracker Co., 120 Iowa 414, 94 N. W. 930.

Kansas.— Schmalstieg *v.* Leavenworth Coal Co., 65 Kan. 753, 70 Pac. 888 (construing Laws (1897), c. 159, as increasing duty of mine owner by requiring daily inspection); Atchison, etc., R. Co. *v.* Kingscott, 65 Kan. 131, 69 Pac. 184; Kansas City, etc., R. Co. *v.* Ryan, 52 Kan. 637, 35 Pac. 292; Atchison, etc., R. Co. *v.* Holt, 29 Kan. 149.

Kentucky.— Ashland Coal, etc., R. Co. *v.* Wallace, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207, 19 Ky. L. Rep. 849; Buey *v.* Chess, etc., Co., 84 S. W. 563, 27 Ky. L. Rep. 198; Henderson Brewing Co. *v.* Folden, 76 S. W. 520, 25 Ky. L. Rep. 969; Clay City Lumber, etc., Co. *v.* Noe, 76 S. W. 195, 25 Ky. L. Rep. 668. *Compare* Langdon-Creasy Co. *v.* Rouse, 72 S. W. 1113, 24 Ky. L. Rep. 2095.

Louisiana.— Budge *v.* Morgan's Louisiana, etc., R., etc., Co., 108 La. 349, 32 So. 535.

Maine.— Twombly *v.* Consolidated Electric Light Co., 98 Me. 353, 57 Atl. 85, 64 L. R. A. 551; Hall *v.* Emerson-Stevens Mfg. Co., 94 Me. 445, 47 Atl. 924.

Massachusetts.— Rapson *v.* Leighton, 187 Mass. 432, 73 N. E. 540; McMahon *v.* McHale, 174 Mass. 320, 54 N. E. 854; Spicer *v.* South Boston Iron Co., 138 Mass. 426; Warden *v.* Old Colony R. Co., 137 Mass. 204.

Michigan.— Wachsmuth *v.* Shaw Electric Crane Co., 118 Mich. 275, 76 N. W. 497; Anderson *v.* Michigan Cent. R. Co., 107 Mich. 591, 65 N. W. 585; Irvine *v.* Flint, etc., R. Co., 89 Mich. 416, 50 N. W. 1008; Tangney *v.* Wilson, 87 Mich. 453, 49 N. W. 666; Johnson *v.* Spear, 76 Mich. 139, 42 N. W. 1092, 15 Am. St. Rep. 298, 82 Mich. 453, 46 N. W. 733.

Minnesota.— Miller *v.* Great Northern R. Co., 85 Minn. 272, 88 N. W. 758; Closson *v.* Oakes, 69 Minn. 67, 71 N. W. 915; Kennedy *v.* Chicago, etc., R. Co., 57 Minn. 227, 58 N. W. 878; McDonald *v.* Chicago, etc., R. Co., 41 Minn. 439, 43 N. W. 380, 16 Am. St. Rep. 711; Tierney *v.* Minneapolis, etc., R. Co., 33 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35.

Missouri.— Settle *v.* St. Louis, etc., R. Co., 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633; Gorham *v.* Kansas City, etc., R. Co., 113 Mo. 408, 20 S. W. 1060; Johnson *v.* Missouri Pac. R. Co., 96 Mo. 340, 9 S. W. 790, 9 Am. St. Rep. 351; Zellars *v.* Missouri Water, etc., Co., 92 Mo. App. 107; Dedrick *v.* Missouri Pac. R. Co., 21 Mo. App. 433; Reber *v.* Tower, 11 Mo. App. 199. *Compare* Brown *v.* Hershey Land, etc., Co., 2 Mo. App. Rep. 1186.

Nebraska.— Union Stock-Yards Co. *v.* Goodwin, 57 Nebr. 138, 77 N. W. 357.

New Hampshire.— Fifield *v.* Northern R. Co., 42 N. H. 225.

New Jersey.— Randolph *v.* New York Cent., etc., R. Co., 69 N. J. L. 420, 55 Atl. 240; McGrath *v.* Delaware, etc., R. Co., 69 N. J. L. 331, 55 Atl. 242; Carroll *v.* Tide-Water Oil Co., 67 N. J. L. 679, 52 Atl. 275. *Compare* Fulton *v.* Grieb Rubber Co., 69 N. J. L. 221, 54 Atl. 561; Coyle *v.* A. A. Griffing Iron Co., 62 N. J. L. 540, 41 Atl. 680.

New York.— Walsh *v.* New York, etc., R. Co., 178 N. Y. 588, 70 N. E. 1111 [*affirming* 80 N. Y. App. Div. 316, 80 N. Y. Suppl. 767]; Simone *v.* Kirk, 173 N. Y. 7, 65 N. E. 739 [*reversing* 57 N. Y. App. Div. 461, 67 N. Y.

inspection would only show what was already known to the servant and all

Suppl. 1019]; Hoes *v.* Ocean Steamship Co., 170 N. Y. 581, 63 N. E. 1118 [*affirming* 56 N. Y. App. Div. 259, 67 N. Y. Suppl. 782]; Meehan *v.* Atlas Safe Moving, etc., Co., 94 N. Y. App. Div. 306, 87 N. Y. Suppl. 1031; Stackpole *v.* Wray, 74 N. Y. App. Div. 310, 77 N. Y. Suppl. 633; Pierson *v.* New York, etc., R. Co., 53 N. Y. App. Div. 363, 65 N. Y. Suppl. 1039; O'Connor *v.* Pennsylvania R. Co., 48 N. Y. App. Div. 244, 62 N. Y. Suppl. 723; Larkin *v.* Washington Mills Co., 45 N. Y. App. Div. 6, 61 N. Y. Suppl. 93; Capasso *v.* Woolfolk, 25 N. Y. App. Div. 234, 49 N. Y. Suppl. 409; McDonald *v.* Fitchburg R. Co., 19 N. Y. App. Div. 577, 46 N. Y. Suppl. 600; Crowell *v.* Thomas, 18 N. Y. App. Div. 520, 46 N. Y. Suppl. 137; Perry *v.* Rogers, 91 Hun 243, 36 N. Y. Suppl. 208; Ballard *v.* Hitchcock Mfg. Co., 71 Hun 582, 24 N. Y. Suppl. 1101; King *v.* New York Cent., etc., R. Co., 4 Hun 769; Haug *v.* Rissner, 4 N. Y. St. 644.

North Carolina.— Womble *v.* Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493; Elmore *v.* Seaboard Air Line R. Co., 132 N. C. 865, 44 S. E. 620; Chesson *v.* John L. Roper Lumber Co., 118 N. C. 59, 23 S. E. 925; Johnson *v.* Richmond, etc., R. Co., 81 N. C. 453.

North Dakota.— Meehan *v.* Great Northern R. Co., 13 N. D. 432, 101 N. W. 183.

Ohio.— Lake Shore, etc., R. Co. *v.* Fitzpatrick, 31 Ohio St. 479; Stewart *v.* Toledo Bridge Co., 15 Ohio Cir. Ct. 601, 8 Ohio Cir. Dec. 454.

Pennsylvania.— Sharpley *v.* Wright, 205 Pa. St. 253, 54 Atl. 896; Pennsylvania, etc., Canal, etc., Co. *v.* Mason, 109 Pa. St. 296, 58 Am. Rep. 722; Mansfield Coal, etc., Co. *v.* McEnery, 91 Pa. St. 185, 36 Am. Rep. 662.

Rhode Island.— Dwyer *v.* Shaw, 22 R. I. 648, 50 Atl. 389.

South Carolina.— Gunter *v.* Graniteville Mfg. Co., 15 S. C. 443.

South Dakota.— Gates *v.* Chicago, etc., R. Co., 2 S. D. 422, 50 N. W. 907.

Tennessee.— Ritt *v.* True Tag Paint Co., 108 Tenn. 646, 69 S. W. 324.

Texas.— Missouri Pac. R. Co. *v.* McElyea, 71 Tex. 386, 9 S. W. 313, 10 Am. St. Rep. 749, 1 L. R. A. 411; Houston, etc., R. Co. *v.* Marcelles, 59 Tex. 334; San Antonio, etc., R. Co. *v.* Hahl, (Civ. App. 1904) 83 S. W. 27; Dupree *v.* Tamborilla, 27 Tex. Civ. App. 603, 66 S. W. 595; Westbrook *v.* Crowdus, (Civ. App. 1900) 58 S. W. 195; Bookrum *v.* Galveston, etc., R. Co., (Civ. App. 1900) 57 S. W. 919; International, etc., R. Co. *v.* Elkins, (Civ. App. 1899) 54 S. W. 931; Galveston, etc., R. Co. *v.* Edmunds, (Civ. App. 1894) 26 S. W. 633; Texas, etc., R. Co. *v.* Nix, (Civ. App. 1893) 23 S. W. 328; Texas, etc., R. Co. *v.* Crow, 3 Tex. Civ. App. 266, 22 S. W. 928. *Compare* Gulf, etc., R. Co. *v.* Larkin, 98 Tex. 225, 82 S. W. 1026, 1 L. R. A. N. S. 944 [*reversing* (Civ. App. 1904) 80 S. W. 94].

Utah.— Boyle *v.* Union Pac. R. Co., 25 Utah 420, 71 Pac. 988.

Vermont.— Hard *v.* Vermont, etc., R. Co., 32 Vt. 473.

Virginia.— Norfolk, etc., R. Co. *v.* Ward, 90 Va. 687, 19 S. E. 849, 44 Am. St. Rep. 945, 24 L. R. A. 717; Norfolk, etc., R. Co. *v.* Nunnally, 88 Va. 546, 14 S. E. 367.

Washington.— Ralph *v.* American Bridge Co., 30 Wash. 500, 70 Pac. 1098.

West Virginia.— Hoffman *v.* Dickinson, 31 W. Va. 142, 6 S. E. 53.

Wisconsin.— Ferris *v.* Berlin Mach. Works, 90 Wis. 541, 63 N. W. 234; Wedgwood *v.* Chicago, etc., R. Co., 44 Wis. 44.

United States.— Union Pac. R. Co. *v.* Snyder, 152 U. S. 684, 14 S. Ct. 756, 38 L. ed. 597 [*affirming* 6 Utah 357, 23 Pac. 762]; The King Gruffydd, 131 Fed. 189, 65 C. C. A. 495; Lafayette Bridge Co. *v.* Olsen, 108 Fed. 335, 47 C. C. A. 367, 54 L. R. A. 33; Dunn *v.* New York, etc., R. Co., 107 Fed. 666, 46 C. C. A. 546; Herrick *v.* Quigley, 101 Fed. 187, 41 C. C. A. 294; New Orleans, etc., R. Co. *v.* Clements, 100 Fed. 415, 40 C. C. A. 465; Western Coal, etc., Co. *v.* Ingraham, 70 Fed. 219, 17 C. C. A. 71; Little Rock, etc., R. Co. *v.* Moseley, 56 Fed. 1009, 6 C. C. A. 225; Totten *v.* Pennsylvania R. Co., 11 Fed. 564.

England.— Richardson *v.* Great Eastern R. Co., 1 C. P. D. 342, 35 L. T. Rep. N. S. 351, 24 Wkly. Rep. 907; Murphy *v.* Phillips, 35 L. T. Rep. N. S. 477, 24 Wkly. Rep. 647.

Canada.— Martel *v.* Ross, 16 Quebec Super. Ct. 118.

See 34 Cent. Dig. tit. "Master and Servant," §§ 235, 252.

Inspection and repair of overhead shafting not merely incidental to running of engine connected therewith. Hustis *v.* James A. Banister Co., 63 N. J. L. 465, 43 Atl. 651.

Duty to inspect places and appliances belonging to or provided by third persons.— Atchison, etc., R. Co. *v.* Penfold, 57 Kan. 148, 45 Pac. 574; Atchison, etc., R. Co. *v.* Seeley, 54 Kan. 21, 37 Pac. 104; Missouri Pac. R. Co. *v.* Barber, 44 Kan. 612, 24 Pac. 969; Union Stock-Yards Co. *v.* Goodwin, 57 Nebr. 138, 77 N. W. 357; Hoes *v.* Ocean Steamship Co., 170 N. Y. 581, 63 N. E. 1118 [*affirming* 56 N. Y. App. Div. 259, 67 N. Y. Suppl. 782]; McGuire *v.* Bell Tel. Co., 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437 [*affirming* 52 N. Y. App. Div. 635, 66 N. Y. Suppl. 1137]; Goodrich *v.* New York, etc., R. Co., 116 N. Y. 398, 22 N. E. 397, 15 Am. St. Rep. 410, 5 L. R. A. 750; Gottlieb *v.* New York, etc., R. Co., 100 N. Y. 462, 3 N. E. 344; McDonald *v.* Fitchburg R. Co., 19 N. Y. App. Div. 577, 46 N. Y. Suppl. 600; Frolich *v.* Cranker, 21 Ohio Cir. Ct. 615, 11 Ohio Cir. Dec. 592; Sharpley *v.* Wright, 205 Pa. St. 253, 54 Atl. 896; San Antonio Edison Co. *v.* Dixon, 17 Tex. Civ. App. 320, 42 S. W. 1009; Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. ed. 624; Richardson *v.* Great Eastern R. Co., 1 C. P. D. 342, 35 L. T. Rep. N. S. 351, 24 Wkly. Rep. 907. But see Huebner *v.* Hammond, 80 N. Y. App. Div. 122, 80 N. Y. Suppl. 295.

others.[56] So too a master is under no obligation to his servants to inspect during their use those common tools and appliances with which everyone is conversant;[57] nor is it the master's duty to repair defects arising in the daily use of an appliance, for which proper and suitable materials are supplied, and which may easily be remedied by the workmen, and are not of a permanent character, or requiring the help of skilled mechanics,[58] and while a master is bound to keep his machinery in reasonably safe condition, he need not keep it in the best possible order.[59] Nor again is a master required to exercise that exquisite and exhaustive care in the constant examination and overhauling of his machinery and work which would be incompatible with the proper furtherance of business.[60]

The casual use of a telephone pole of another company does not, in the absence of custom, impose upon the company so using it the duty of inspecting it before directing an employee to climb it. Dixon *v.* Western Union Tel. Co., 71 Fed. 143.

Tool belonging to servant — Duty of master to fellow servant.—Where a hammer, the property of a servant, was purchased from a reputable firm, the master does not owe a fellow servant the duty of inspecting it. Dompier *v.* Lewis, 131 Mich. 144, 91 N. W. 152.

Where machinery is in good repair the master is not liable for failing to inspect as to the cleaning and oiling of it. Quigley *v.* Levering, 167 N. Y. 58, 60 N. E. 276, 54 L. R. A. 62 [*affirming* 50 N. Y. App. Div. 354, 63 N. Y. Suppl. 1059].

Appliance used for purpose not intended.—Where a master is not chargeable with negligence because an appliance fails to serve a purpose not intended, neither is he chargeable because he has omitted to inspect it, so as to discover that it was not suited for such unexpected use. Babcock Bros. Lumber Co. *v.* Johnson, 120 Ga. 1030, 48 S. E. 438; Quirouet *v.* Alabama, etc., R. Co., 111 Ga. 315, 36 S. E. 599; East Tennessee, etc., R. Co. *v.* Reynolds, 93 Ga. 570, 20 S. E. 70; Hamilton *v.* Richmond, etc., R. Co., 83 Ga. 346, 9 S. E. 670. *Compare* Stewart *v.* Toledo Bridge Co., 15 Ohio Cir. Ct. 601, 8 Ohio Cir. Dec. 454.

Machine used by third person.—Where a planer in a factory was used indiscriminately by defendant's workmen and by contractors, and was liable to cause injury if not properly adjusted, no duty rested on defendant to inspect it, whenever it was used by defendant's workmen or by the contractors, to see that it was left in a proper condition. Wyman *v.* Clark, 180 Mass. 173, 62 N. E. 245.

The danger from "missed shots" being incident to the work of drilling a mine, it is not the duty of the master to make inspections for them after each explosion. Browne *v.* King, 100 Fed. 561, 40 C. C. A. 545. But see McMillan *v.* North Star Min. Co., 32 Wash. 579, 73 Pac. 685, 48 Am. St. Rep. 908.

Visual inspection of derrick held sufficient see Westinghouse Electric, etc., Co. *v.* Heimlich, 127 Fed. 92, 62 C. C. A. 92.

Facts held to show sufficient inspection of freight elevator see Young *v.* Mason Stable Co., 96 N. Y. App. Div. 305, 89 N. Y. Suppl. 349.

Unsuccessful attempt to repair.— It is not enough when a machine is dangerously defective, and known to be so, to make a futile effort to put it in order, and then leave it to itself; and in such case the master is still liable, although he has no notice that the attempt to repair was ineffectual. Pioneer Cooperage Co. *v.* Romanowicz, 85 Ill. App. 407 [*affirmed* in 186 Ill. 9, 57 N. E. 864].

56. Shea *v.* Kansas City, etc., R. Co., 76 Mo. App. 29.

57. Wachsmuth *v.* Shaw Electric Crane Co., 118 Mich. 275, 76 N. W. 497; Marsh *v.* Chickering, 101 N. Y. 396, 5 N. E. 56; Miller *v.* Erie R. Co., 21 N. Y. App. Div. 45, 47 N. Y. Suppl. 285; Gulf, etc., R. Co. *v.* Larkin, (Tex. 1904) 82 S. W. 1026 [*reversing* (Civ. App. 1904) 80 S. W. 94]; O'Brien *v.* Missouri, etc., R. Co., 36 Tex. Civ. App. 523, 82 S. W. 319. See Garragan *v.* Fall River Iron Works Co., 158 Mass. 596, 33 N. E. 652. *Compare* Twombly *v.* Consolidated Electric Light Co., 98 Me. 353, 57 Atl. 85, 64 L. R. A. 551, extension ladder not common tool within rule.

58. Cregan *v.* Marston, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854 [*reversing* 10 N. Y. Suppl. 681, and *distinguishing* Daley *v.* Boston, etc., R. Co., 147 Mass. 101, 16 N. E. 690]; Webber *v.* Piper, 109 N. Y. 496, 17 N. E. 216. See also Whittaker *v.* Bent, 167 Mass. 588, 46 N. E. 121; McGee *v.* Boston Cordage Co., 139 Mass. 445, 1 N. E. 745; Johnson *v.* Boston Tow-Boat Co., 135 Mass. 209, 46 Am. Rep. 458.

Ordinary repairs.— The replacing of a rotten round in a forty-foot ladder is not "ordinary repairs," which a workman is expected to make, in the absence of proof that the defective condition was known to him. Twombly *v.* Consolidated Electric Light Co., 98 Me. 353, 57 Atl. 85, 64 L. R. A. 551.

59. Dwyer *v.* Shaw, 22 R. I. 648, 50 Atl. 389 (newest-type not required); Robertson *v.* Cornelson, 34 Fed. 716.

Unavoidable accident.— Liability cannot attach where no sort of reasonable inspection would have guarded against an unexplained and instantaneous event. Coyle *v.* A. A. Griffing Iron Co., 62 N. J. L. 540, 41 Atl. 680.

Rule does not extend to duty to keep in original safe condition. Hard *v.* Vermont, etc., R. Co., 32 Vt. 473.

60. Smoot *v.* Mobile, etc., R. Co., 67 Ala. 13 (not such as would embarrass operations); Fulton *v.* Grieb Rubber Co., 40 N. J. L. 221,

b. Defects Not Discoverable by Inspection. In the absence of evidence that an inspection would have disclosed the defect which caused the injury, the mere failure to inspect will not warrant holding the master liable,[61] and it is a question for the jury whether a proper inspection would have prevented the injury.[62]

c. Manner and Extent of Inspection or Test — (i) *In General.* Reasonable care in the matter of inspection requires a master to make such an examination and test as a reasonably prudent man would deem necessary, under the same circumstances, for the discovery of possible defects,[63] and he is not required, unless put upon notice as to the probable existence of defects, to employ unusual or extraordinary tests,[64] nor to adopt the latest and most improved methods of

54 Atl. 561 (when appliances not normally subject to wear and tear, and without apparent likelihood of getting out of order or becoming dangerous, less frequent inspection necessary than when machinery in constant use); Ehni *v.* National Tube Works Co., 203 Pa. St. 186, 52 Atl. 166, 13 Am. St. Rep. 761. See Island Coal Co. *v.* Greenwood, 151 Ind. 476, 50 N. E. 36.

61. *Alabama.*— Louisville, etc., R. Co. *v.* Campbell, 97 Ala. 147, 12 So. 574; Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494.

Illinois.— Sack *v.* Dolese, 137 Ill. 129, 27 N. E. 62.

Maryland.— South Baltimore Car Works *v.* Schaefer, 96 Md. 88, 53 Atl. 665, 94 Am. St. Rep. 560.

Massachusetts.— Ladd *v.* New Bedford R. Co., 119 Mass. 412, 20 Am. Rep. 331.

New Jersey.— Atz *v.* Newark Line, etc., Mfg. Co., 59 N. J. L. 41, 34 Atl. 980; Essex County Electric Co. *v.* Kelly, 28 N. J. L. 100, 29 Atl. 427.

New York.— De Graff *v.* New York Cent., etc., R. Co., 76 N. Y. 125; Stackpole *v.* Wray, 74 N. Y. App. Div. 310, 77 N. Y. Suppl. 633.

Rhode Island.— Read *v.* New York, etc., R. Co., 20 R. I. 209, 37 Atl. 947.

See 34 Cent. Dig. tit. "Master and Servant," § 237.

62. Burnside *v.* Novelty Mfg. Co., 121 Mich. 115, 79 N. W. 1108.

63. *Kentucky.* — Covington Sawmill, etc., Mfg. Co. *v.* Clark, 116 Ky. 461, 76 S. W. 348, 25 Ky. L. Rep. 694.

Maryland.— South Baltimore Car Works *v.* Schaefer, 96 Md. 88, 53 Atl. 665, 94 Am. St. Rep. 560, where it was held that it is not a master's duty to inspect the daily adjustment of machinery.

Nebraska.—Union Stock-Yards Co. *v.* Goodwin, 57 Nebr. 138, 77 N. W. 357.

New York.— Durkin *v.* Sharp, 88 N. Y. 225 (careless inspection of railroad track); Rowley *v.* American Illuminating Co., 83 N. Y. App. Div. 609, 81 N. Y. Suppl. 1099; Swenson *v.* Metropolitan St. R. Co., 78 N. Y. App. Div. 379, 80 N. Y. Suppl. 281.

Ohio.— Michigan Cent. R. Co. *v.* Butler, 23 Ohio Cir. Ct. 459 (construing Rev. St. § 2365-21); Lake Shore, etc., R. Co. *v.* Gilday, 16 Ohio Cir. Ct. 649, 9 Ohio Cir. Dec. 27; Columbus, etc., R. Co. *v.* Celley, 1 Ohio Cir. Ct. 267, 1 Ohio Cir. Dec. 146.

Texas.— Southern Kansas R. Co. *v.* Sage, (1905) 84 S. W. 814 [*reversing* (Civ. App. 1904) 80 S. W. 1038]; Gulf, etc., R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151; Missouri Pac. R. Co. *v.* McElyea, 71 Tex. 386, 9 S. W. 313, 1 L. R. A. 411, 10 Am. St. Rep. 749; Gulf, etc., R. Co. *v.* Hayden, 29 Tex. Civ. App. 280, 68 S. W. 530; San Antonio, etc., R. Co. *v.* Lindsey, 27 Tex. Civ. App. 316, 65 S. W. 668; Galveston, etc., R. Co. *v.* Buch, 27 Tex. Civ. App. 283, 65 S. W. 681.

United States.— Felton *v.* Bullard, 94 Fed. 781, 37 C. C. A. 1.

See 34 Cent. Dig. tit. "Master and Servant," § 238.

Inspection must be such as would probably reveal a defect if one exists. Union Stock-Yards Co. *v.* Goodwin, 57 Nebr. 138, 77 N. W. 357.

If only the very closest character of inspection can discover the defect reasonable diligence requires that inspection. Galveston, etc., R. Co. *v.* Davis, 27 Tex. Civ. App. 279, 65 S. W. 217.

A mere ceremony of inspection, even though performed by competent inspectors, is not a performance of the master's duty. Columbus, etc., R. Co. *v.* Celley, 1 Ohio Cir. Ct. 267, 1 Ohio Cir. Dec. 146. See also Durkin *v.* Sharp, 88 N. Y. 225; Southern Kansas R. Co. *v.* Sage, (Tex. 1905) 84 S. W. 814 [*reversing* (Civ. App. 1904) 80 S. W. 1038]; Missouri Pac. R. Co. *v.* McElyea, 71 Tex. 386, 9 S. W. 313.

Failure to discover discoverable defects negligence see Galveston, etc., R. Co. *v.* Buch, 27 Tex. Civ. App. 283, 65 S. W. 681.

The manner of inspection is immaterial, where the most careful inspection demanded by the law would not show the defect. Louisville, etc., R. Co. *v.* Campbell, 97 Ala. 147, 12 So. 574.

Where an inspection was solely for the purpose of cutting out defective cars, the railroad company owed no duty to a yard brakeman, part of whose duty was to board defective cars as they were sent from the main to the repair track and bring them to a stop, as to the manner in which such inspection should be made. Gerstner *v.* New York Cent., etc., R. Co., 178 N. Y. 627, 71 N. E. 1131 [*affirming* 81 N. Y. App. Div. 562, 80 N. Y. Suppl. 1063].

64. *Alabama.*— Louisville, etc., R. Co. *v.* Campbell, 97 Ala. 147, 12 So. 574; Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494.

Maryland.— South Baltimore Car Works *v.*

testing machinery or appliances.[65] The reasonableness and sufficiency of an inspection, when made, is a question of fact for the jury.[66]

(11) *Customary Methods.* While not conclusive upon the question of negligence,[67] the adoption by a master of the customary and approved means or tests for the discovery of defects in his machinery or appliances will as a rule discharge his duty to his servants in that regard, and an injury which happens to a servant notwithstanding must be accepted as resulting from one of the risks of the occupation.[68]

d. Time and Opportunity For Inspection and Repair — (1) *Inspection.* While a master is entitled to a reasonable opportunity for inspection,[69] the duty is a continuing one,[70] and must be performed at reasonably frequent intervals,[71] and whenever the circumstances are such as to suggest the propriety of an inspection ;[72]

Schaefer, 96 Md. 88, 53 Atl. 665, 94 Am. St. Rep. 560.

Massachusetts.— Shea *v.* Wellington, 163 Mass. 364, 40 N. E. 173.

Minnesota.— Thompson *v.* Great Northern R. Co., 79 Minn. 291, 82 N. W. 637.

New York.— Carlson *v.* Phœnix Bridge Co., 132 N. Y. 273, 30 N. E. 750 [*affirming* 55 Hun 485, 8 N. Y. Suppl. 634].

Rhode Island.— Burns *v.* New York, etc., R. Co., 20 R. I. 789, 38 Atl. 926.

Utah.— Bennett *v.* Tintic Iron Co., 9 Utah 291, 34 Pac. 61; Allen *v.* Union Pac. R. Co., 7 Utah 239, 26 Pac. 297.

United States.— Texas, etc., R. Co. *v.* Barrett, 166 U. S. 617, 17 S. Ct. 707, 41 L. ed. 1136; Westinghouse Electric, etc., Co. *v.* Heimlich, 127 Fed. 92, 62 C. C. A. 92; Clyde *v.* Richmond, etc., R. Co., 65 Fed. 482.

See 34 Cent. Dig. tit. "Master and Servant," § 238.

Use of physical force.— Inspectors of railroad cars are not bound to apply physical force to the rounds of the ladder on a freight car, in order to test its condition, unless they see some indication of weakness. Allen *v.* Union Pac. R. Co., 7 Utah 239, 26 Pac. 297. See also Thompson *v.* Great Northern R. Co., 79 Minn. 291, 82 N. W. 670.

Where a master buys from reliable manufacturers, he discharges his duty by applying ordinary tests to the machinery or appliances to determine their strength and efficiency, and is not bound to employ experts or apply the highest tests. Clyde *v.* Richmond, etc., R. Co., 65 Fed. 482. See also Shea *v.* Wellington, 163 Mass. 364, 40 N. E. 173; Carlson *v.* Phœnix Bridge Co., 132 N. Y. 273, 30 N. E. 750 [*affirming* 55 Hun 485, 8 N. Y. Suppl. 634]; Westinghouse Electric, etc., Co. *v.* Heimlich, 127 Fed. 92, 62 C. C. A. 92.

65. Bell *v.* Consolidated Gas., etc., Co., 36 N. Y. App. Div. 242, 56 N. Y. Suppl. 780.

66. Solomon R. Co. *v.* Jones, 30 Kan. 601, 2 Pac. 657; Felton *v.* Bullard, 94 Fed. 781, 37 C. C. A. 1.

67. Atchison, etc., R. Co. *v.* Kingscott, 65 Kan. 131, 69 Pac. 184; Missouri Pac. R. Co. *v.* Dwyer, 36 Kan. 58, 12 Pac. 352; Read *v.* New York, etc., R. Co., 20 R. I. 209, 37 Atl. 947; International, etc., R. Co. *v.* Hawes, (Tex. Civ. App. 1899) 54 S. W. 325.

68. Columbus, etc., R. Co. *v.* Celley, 1 Ohio Cir. Ct. 267, 1 Ohio Cir. Dec. 146; Read *v.* New York, etc., R. Co., 20 R. I. 209, 37 Atl. 947; Galveston, etc., R. Co. *v.* Davis, 27 Tex. Civ. App. 279, 65 S. W. 217; Texas, etc., R. Co. *v.* Barrett, 166 U. S. 617, 17 S. Ct. 707, 41 L. ed. 1136; Richmond, etc., R. Co. *v.* Elliott, 149 U. S. 266, 13 S. Ct. 837, 37 L. ed. 728; Illinois Cent. R. Co. *v.* Coughlin, 132 Fed. 801, 65 C. C. A. 101; Clyde *v.* Richmond, etc., R. Co., 65 Fed. 482. See also Mooney *v.* Beattie, 180 Mass. 451, 62 N. E. 725, 70 L. R. A. 831.

69. Brown *v.* Terry, 67 N. Y. App. Div. 223, 73 N. Y. Suppl. 733. See also Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494, where it was held that, the hydraulic test for boilers being extraordinary, and rarely used, except where engines are overhauled periodically, failure to apply such test when the engine was last overhauled, about ten months before the explosion, was not negligence, when the defect had existed only from four to six months.

70. **Continuing duty.**— Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380, where it was held that the fact that machinery had been in daily use for a long time, and had proved safe and efficient, did not show that the master had exercised due care, since he was under a continuing duty of inspection. See also Deppe *v.* Chicago, etc., R. Co., 38 Iowa 592.

71. Atchison, etc., R. Co. *v.* Holt, 29 Kan. 149 (railroad required to make frequent examinations and inspections of engines and machinery); Merritt *v.* Victoria Lumber Co., 111 La. 159, 35 So. 497; Egan *v.* Dry Dock, etc., R. Co., 12 N. Y. App. Div. 556, 42 N. Y. Suppl. 188; Missouri, etc., R. Co. *v.* Miller, 25 Tex. Civ. App. 460, 61 S. W. 978.

How frequently an inspection should be made in the exercise of due care is a question of fact. E. E. Jackson Lumber Co. *v.* Cunningham, 141 Ala. 206, 37 So. 445.

Statute requiring daily inspection.— Under Ill. Laws (1883), p. 114, providing that the owner or operator of every coal-mine in which fire-damp is generated shall examine the shafts every morning with a safety lamp before any persons are allowed to enter, it was held that, although the miners may not have been at the moment engaged in mining, the duty of the owners still existed to make the required examination. Coal Run Coal Co. *v.* Jones, 19 Ill. App. 365.

72. Norfolk, etc., R. Co. *v.* Nunnally, 88 Va. 546, 14 S. E. 367.

and the fact that the master has purchased a completed and presumably tested structure from another does not relieve him of the obligation to take reasonable care to know or ascertain the safety of its design and construction, and he will be charged with knowledge of defects which a competent examination would have disclosed.[73]

(11) *Opportunity to Remedy Defects.* Actual or constructive knowledge by a master of the defective condition of his places for work, machinery, or appliances does not make him liable for injuries resulting therefrom, unless he has had a reasonable opportunity, after acquiring such knowledge, to remedy the defect.[74]

e. Inspection by Public Authorities. In some states statutes have been enacted providing for official inspection of places for work, machinery, and appliances in certain cases.[75] But such an inspection and test, pursuant to a

Where two hand-cars collide, and the patent injuries to one of them are serious, and such as to indicate great violence in the collision, it is the duty of the railroad company to make a reasonable examination and inspection to see if there are no latent injuries. Solomon R. Co. *v.* Jones, 30 Kan. 601, 2 Pac. 657.

Duty to inspect track after violent storm see St. Louis, etc., R. Co. *v.* George, 85 Tex. 150, 19 S. W. 1036.

73. Vosburgh *v.* Lake Shore, etc., R. Co., 94 N. Y. 374, 46 Am. Rep. 148 [*distinguishing* Devlin *v.* Smith, 89 N. Y. 470, 42 Am. Rep. 311, on the ground that there defendant, having no knowledge of scaffold-building, employed a builder known to him to be skilful and experienced, and owed to no one the duty of inspection].

74. *Alabama.*— U. S. Rolling Stock Co. *v.* Weir, 96 Ala. 396, 11 So. 436; Seaboard Mfg. Co. *v.* Woodson, 94 Ala. 143, 10 So. 87, 98 Ala. 378, 11 So. 733; Wilson *v.* Louisville, etc., R. Co., 85 Ala. 269, 4 So. 701; Mobile, etc., R. Co. *v.* Holborn, 84 Ala. 133, 4 So. 146.

Colorado.— McKean *v.* Colorado Fuel, etc., Co., 18 Colo. App. 285, 71 Pac. 425.

Georgia.— Central R., etc., Co. *v.* Kent, 87 Ga. 402, 13 S. E. 502.

Illinois.— Indianapolis, etc., R. Co. *v.* Flanigan, 77 Ill. 365; Alabaster Co. *v.* Lonergan, 90 Ill. App. 353; Chicago, etc., R. Co. *v.* Stites, 26 Ill. App. 430.

Kentucky.— Louisville, etc., R. Co. *v.* Law, 21 S. W. 648, 14 Ky. L. Rep. 850.

Michigan.— Lyttle *v.* Chicago, etc., R. Co., 84 Mich. 289, 47 N. W. 571. *Compare* Fluhrer *v.* Lake Shore, etc., R. Co., 121 Mich. 212, 80 N. W. 23.

Minnesota.— See Kerrigan *v.* Chicago, etc., R. Co., 86 Minn. 407, 90 N. W. 976, in which there was evidence that defendant had notice of the defect in time to have repaired it before the accident, and it was held liable.

Missouri.— Pavey *v.* St. Louis, etc., R. Co., 85 Mo. App. 218.

New Jersey.— Fenderson *v.* Atlantic City R. Co., 56 N. J. L. 708, 31 Atl. 767.

New York.— Hansen *v.* Schneider, 58 Hun 60, 11 N. Y. Suppl. 347. *Compare* Murray *v.* Usher, 117 N. Y. 542, 23 N. E. 564. But see *contra,* Franck *v.* American Tartar Co., 91 N. Y. App. Div. 571, 87 N. Y. Suppl. 219.

Tennessee.— Heald *v.* Wallace, 109 Tenn. 346, 71 S. W. 80.

Texas.— Manson *v.* Eddy, 3 Tex. Civ. App. 148, 22 S. W. 66. *Compare* Galveston, etc., R. Co. *v.* Templeton, 87 Tex. 42, 26 S. W. 1066, in which the defective car was carried by a number of stations at which it could have been readily inspected, and the defect remedied.

United States.— Johnson *v.* Armour, 18 Fed. 490, 5 McCrary 629.

See 34 Cent. Dig. tit. "Master and Servant," § 253.

Reasonable time a question for jury.— Larkin *v.* Washington Mills Co., 45 N. Y. App. Div. 6, 61 N. Y. Suppl. 93.

In determining what is a reasonable time for making the repairs and changes required, the jury should consider all the circumstances, such as the opportunity for making repairs, and the frequency with which the engine was used. Lyttle *v.* Chicago, etc., R. Co., 84 Mich. 289, 47 N. W. 571.

Immediate compliance with statutory requirement necessary see Bartlett Coal, etc., Co. *v.* Roach, 68 Ill. 174.

Whether the condition of apparatus was permanently dangerous, or only became so temporarily, but before the injured servant was put to work there, does not affect the liability of the master. Hess *v.* Rosenthal, 160 Ill. 621, 43 N. E. 743.

Sending out engine known to be defective.— A railroad company is not relieved from liability to a servant for negligence in sending him out with a defective engine simply because it did not have sufficient time to repair it after notice of the defect, and had no other engine in proper condition to send out. Greene *v.* Minneapolis, etc., R. Co., 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785.

Liability of receivers.—In an action against the receivers of a railroad company for injuries resulting from the defective condition of the track, where it is not sought to charge the receivers personally, it is no defense that the defect existed when they took possession, and that they had not been in charge a sufficient time to enable them to remedy it. Bonner *v.* Mayfield, 82 Tex. 234, 18 S. W. 305.

75. Statutes construed see Spaulding *v.* Tucker, etc., Cordage Co., 13 Misc. (N. Y.)

statute, do not necessarily relieve the master, in the absence of notice or suspicion of any defect, from the duty, as regards a servant, of making further tests;[76] and the certificate of a factory inspector, approving a fire-escape, does not relieve the employer from liability for negligence in not providing a safe landing-place.[77]

f. Operation and Effect. Where machinery or appliances have been carefully tested and found to be in good condition, the master is not liable for injuries resulting from defects which were not disclosed by such test.[78] But to excuse him from liability, it must appear not only that the inspector was competent, but also that the inspection was a reasonably careful one;[79] and a master, by having appliances inspected to determine whether they are safe and fit for a certain use, does not relieve himself from responsibility to a servant who acting under orders devotes them to a use totally different from that with respect to which such inspection was made.[80]

7. Knowledge by Master of Defect or Danger[81] — a. Rule Stated. The master's liability for injuries to a servant arising from defects in the place for work, or in the machinery or appliances, is dependent upon his knowledge, actual or constructive, of such defects. If he knew or should have known, by the exercise of reasonable care and diligence, of their existence, he is liable; negligent ignorance is equivalent to knowledge;[82] but if he had no knowledge

398, 34 N. Y. Suppl. 237 (construing Laws (1889), c. 560, as amended by N. Y. Laws (1892), c. 673); Boehm *v.* Mace, 18 N. Y. Suppl. 106 (construing Laws (1887), c. 462, § 8).

76. Egan *v.* Dry Dock, etc., R. Co., 12 N. Y. App. Div. 556, 42 N. Y. Suppl. 188. But *compare* Foley *v.* Pettee Mach. Works, 149 Mass. 294, 21 N. E. 304, 4 L. R. A. 51, construing Pub. St. c. 104, §§ 13, 22.

77. Johnson *v.* Steam Gauge, etc., Co., 72 Hun (N. Y.) 535, 25 N. Y. Suppl. 689.

78. O'Connor *v.* Illinois Cent. R. Co., 83 Iowa 105, 48 N. W. 1002 (in which the car was carefully tested before its derailment, and found in good condition, and was found in apparently the same condition after the accident); Atchison, etc., R. Co. *v.* Myers, 63 Fed. 793, 11 C. C. A. 439.

Inspection of material before use.—The fact that lumber used for the handles of hand-cars was inspected before it was sent to the shops for use does not relieve the company from liability if it is defective. Indiana, etc., R. Co. *v.* Snyder, 140 Ind. 647, 39 N. E. 912.

79. Cleveland, etc., R. Co. *v.* Ward, 147 Ind. 256, 45 N. E. 325, 46 N. E. 462.

80. Stewart *v.* Toledo Bridge Co., 15 Ohio Cir. Ct. 601, 8 Ohio Cir. Dec. 454.

81. Master's knowledge: As bearing on duty to warn servant see *infra*, IV, D, 1, c. Of absence of fellow servant from post of duty see *infra*, IV, G, 4, a, (II), (B), (3). Of dangers in methods of work see *infra*, IV, C, 1, a, (VI). Of incompetency of fellow servant see *infra*, IV, G, 4, a, (III), (F). Of negligence in giving orders see *infra*, IV, C, 3, b. Of violation of rules see *infra*, IV, C, 2, e.

Servant's contributory negligence see *infra*, IV, F, 2, a, (III).

Servant's knowledge as affecting assumption of risk see *infra*, IV, E, 5.

Servant's right to receive warning and instruction see *infra*, IV, D, 2, c.

82. *Colorado.* — Denver, etc., R. Co. *v.* Smock, 23 Colo. 456, 48 Pac. 681; Roche *v.* Denver, etc., R. Co., 19 Colo. App. 204, 73 Pac. 880.

Georgia.— Ocean Steamship Co. *v.* Matthews, 86 Ga. 418, 12 S. E. 632; Schmidt *v.* Block, 76 Ga. 823.

Indiana.— Johnson *v.* Gebhauer, 159 Ind. 271, 64 N. E. 855; Indianapolis, etc., R. Co. *v.* Love, 10 Ind. 554.

Indian Territory.— Purcell Mill, etc., Co. *v.* Kirkland, 2 Indian Terr. 169, 47 S. W. 311.

Iowa.— King *v.* Chicago, etc., R. Co., 108 Iowa 748, 78 N. W. 837.

Kansas.— St. Louis, etc., R. Co. *v.* Irwin, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266; Atchison, etc., R. Co. *v.* Holt, 29 Kan. 149.

Kentucky.—Louisville, etc., R. Co. *v.* Chandler, 70 S. W. 666, 24 Ky. L. Rep. 998, 72 S. W. 805, 24 Ky. L. Rep. 2035.

Louisiana.— Myhan *v.* Louisiana Electric Light, etc., Co., 41 La. Ann. 964, 6 So. 799, 17 Am. St. Rep. 436, 7 L. R. A. 172.

Maine.— Buzzell *v.* Laconia Mfg. Co., 48 Me. 113, 77 Am. Dec. 212.

Massachusetts.— Keevan *v.* Walker, 172 Mass. 56, 51 N. E. 449.

Minnesota.— Gray *v.* Commutator Co., 85 Minn. 463, 89 N. W. 322.

Missouri.— O'Mellia *v.* Kansas City, etc., R. Co., 115 Mo. 205, 21 S. W. 503; Hamilton *v.* Rich Hill Min. Co., 108 Mo. 364, 18 S. W. 977; Mateer *v.* Missouri Pac. R. Co., (1891) 15 S. W. 970; Hester *v.* Jacob Dold Packing Co., 84 Mo. App. 451; Bullmaster *v.* St. Joseph, 70 Mo. App. 60.

New Jersey.—Carroll *v.* Tide-Water Oil Co., 67 N. J. L. 679, 52 Atl. 275.

New York.— Keegan *v.* Western R. Corp., 8 N. Y. 175, 59 Am. Dec. 476; Spelman *v.* Fisher Iron Co., 56 Barb. 151.

Ohio. — Werk *v.* Armburst, 7 Ohio Dec. (Reprint) 544, 3 Cinc. L. Bul. 866.

Texas.— Smith *v.* Gulf, etc., R. Co., (Civ. App. 1901) 65 S. W. 83; Missouri, etc., R.

thereof, and his ignorance was not the result of want of due care, he is not liable.[83]

b. Effect of Statutes Imposing Liability. The fact that a liability is imposed upon the master by statute for negligence of its agents or employees does not

Co. *v.* Walker, (Civ. App. 1894) 26 S. W. 513; Galveston, etc., R. Co. *v.* Templeton, (Civ. App. 1894) 25 S. W. 135.

United States.— Davidson *v.* Southern Pac. Co., 44 Fed. 476; Palmer *v.* Denver, etc., R. Co., 12 Fed. 392, 3 McCrary 635.

Canada.—Webster *v.* Foley, 21 Can. Sup. Ct. 580.

See 34 Cent. Dig. tit. "Master and Servant," § 243.

Knowledge of defect in tool furnished fellow servant.—Where there is evidence that a fellow servant of plaintiff was furnished with a defective tool by the master, with full notice to the latter of the defect, and that, by the use of the tool by the fellow servant, plaintiff, who had no notice of the defect, was injured, a verdict finding the master liable will be sustained. Savannah, etc., R. Co. *v.* Pughsley, 113 Ga. 1012, 39 S. E. 473.

83. *Alabama.*— Clements *v.* Alabama Great Southern R. Co., 127 Ala. 166, 28 So. 643.

Arkansas.— Park Hotel Co. *v.* Lockhart, 59 Ark. 465, 28 S. W. 23; St. Louis, etc., R. Co. *v.* Rice, 51 Ark. 467, 11 S. W. 699, 4 L. R. A. 173; St. Louis, etc., R. Co. *v.* Gaines, 46 Ark. 555; St. Louis, etc., R. Co. *v.* Harper, 44 Ark. 524.

California.— Malone *v.* Hawley, 46 Cal. 409.

Colorado.— Colorado Cent. R. Co. *v.* Ogden, 3 Colo. 499.

Connecticut.— Hayden *v.* Smithville Mfg. Co., 29 Conn. 548.

District of Columbia.— Hayzel *v.* Columbia R. Co., 19 App. Cas. 359.

Illinois.— East St. Louis Packing, etc., Co. *v.* Hightower, 92 Ill. 139; Chicago, etc., R. Co. *v.* Platt, 89 Ill. 141; Richardson *v.* Cooper, 88 Ill. 270; Columbus, etc., R. Co. *v.* Troesch, 68 Ill. 545, 18 Am. Rep. 578; Baltimore, etc., R. Co. *v.* Greer, 103 Ill. App. 448; Illinois Cent. R. Co. *v.* Schumann, 101 Ill. App. 668; Chicago, etc., R. Co. *v.* Merriman, 86 Ill. App. 454, 95 Ill. App. 628; Myers *v.* American Steel Barge Co., 64 Ill. App. 187; Illinois Cent. R. Co. *v.* Barslow, 55 Ill. App. 203; Illinois Cent. R. Co. *v.* Harris, 53 Ill. App. 592; Chicago, etc., R. Co. *v.* Dixon, 49 Ill. App. 292; Louisville, etc., R. Co. *v.* Allen, 47 Ill. App. 465; Chicago, etc., R. Co. *v.* Stites, 20 Ill. App. 648.

Indiana.— Pennsylvania Co. *v.* Congdon, 134 Ind. 226, 33 N. E. 795, 39 Am. St. Rep. 251; Wabash, etc., R. Co. *v.* Locke, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193.

Iowa.— Baldwin *v.* St. Louis, etc., R. Co., 68 Iowa 37, 25 N. W. 918.

Kansas.— Lanyon Zinc Co. *v.* Bell, 64 Kan. 739, 68 Pac. 609; Atchison, etc., R. Co. *v.* Taylor, 60 Kan. 758, 57 Pac. 973; Atchison, etc., R. Co. *v.* Swarts, 58 Kan. 235, 48 Pac. 953; Carruthers *v.* Chicago, etc., R. Co., 55 Kan. 600, 40 Pac. 915; Atchison, etc., R. Co. *v.* Ledbetter, 34 Kan. 326, 8 Pac. 411; Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660, 7 Pac. 204; Atchison, etc., R. Co. *v.* Holt, 29 Kan. 149; Cherokee, etc., Coal, etc., Co. *v.* Britton, 3 Kan. App. 292, 45 Pac. 100.

Kentucky.— Bogenschutz *v.* Smith, 84 Ky. 330, 1 S. W. 578.

Maine.— Nason *v.* West, 78 Me. 253, 3 Atl. 911; Hull *v.* Hall, 78 Me. 114, 3 Atl. 38.

Massachusetts.— Reed *v.* Boston, etc., R. Co., 164 Mass. 129, 41 N. E. 64; Ladd *v.* New Bedford R. Co., 119 Mass. 412, 20 Am. Rep. 331. See also Vallie *v.* Hall, 184 Mass. 358, 68 N. E. 829.

Michigan.— Loranger *v.* Lake Shore, etc., R. Co., 104 Mich. 80, 62 N. W. 137; Miller *v.* Chicago, etc., R. Co., 90 Mich. 230, 51 N. W. 370.

Minnesota.— Doyle *v.* St. Paul, etc., R. Co., 42 Minn. 79, 43 N. W. 787.

Missouri.— O'Mellia *v.* Kansas City, etc., R. Co., 115 Mo. 205, 21 S. W. 503; Covey *v.* Hannibal, etc., R. Co., 86 Mo. 635; Glasscock *v.* Swofford Bros. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364, (App. 1903) 74 S. W. 1039; Hester *v.* Jacob Dold Packing Co., 84 Mo. App. 451; Breen *v.* St. Louis Cooperage Co., 50 Mo. App. 202; McDonald *v.* Crystal Plate-Glass Co., 9 Mo. App. 577.

Nebraska.— Cudahy Packing Co. *v.* Roy, (1904) 99 N. W. 231; Lincoln St. R. Co. *v.* Cox, 48 Nebr. 807, 67 N. W. 740; George H. Hammond Co. *v.* Johnson, 38 Nebr. 244, 56 N. W. 967.

New Hampshire.— Dube *v.* Gay, 69 N. H. 670, 46 Atl. 1049.

New Jersey.— Carrington *v.* Mueller, 65 N. J. L. 244, 47 Atl. 564; Bien *v.* Unger, 64 N. J. L. 596, 46 Atl. 593; Essex County Electric Co. *v.* Kelly, 57 N. J. L. 100, 29 Atl. 427.

New York.— Stackpole *v.* Wray, 99 N. Y. App. Div. 262, 90 N. Y. Suppl. 1045; Artis *v.* Buffalo, etc., R. Co., 3 N. Y. App. Div. 1, 37 N. Y. Suppl. 977, 38 N. Y. Suppl. 42; Mickee *v.* Walter A. Wood Mowing, etc., Mach. Co., 77 Hun 559, 28 N. Y. Suppl. 918; Moran *v.* Racine Wagon Co., 74 Hun 454, 26 N. Y. Suppl. 852; Doing *v.* New York, etc., R. Co., 73 Hun 270, 26 N. Y. Suppl. 405; Faulkner *v.* Erie R. Co., 49 Barb. 324; McMillan *v.* Saratoga, etc., R. Co., 20 Barb. 449; Hotis *v.* New York Cent., etc., R. Co., 2 Silv. Sup. 598, 6 N. Y. Suppl. 605; Anderson *v.* New Jersey Steamboat Co., 7 Rob. 611; McEnanny *v.* Kyle, 14 Daly 268, 8 N. Y. St. 358; Nelson *v.* Dubois, 11 Daly 127; Kunz *v.* Stuart, 1 Daly 431; Quinn *v.* Fish, 6 Misc. 105, 26 N. Y. Suppl. 10; Klupp *v.* United Ice Lines, 15 N. Y. Suppl. 597 [*affirmed* in 133 N. Y. 666, 31 N. E. 624]; Martin *v.* Cook, 14 N. Y. Suppl. 329 [*affirmed* in 142 N. Y. 654, 37 N. E. 569].

North Dakota.— Meehan *v.* Great Northern R. Co., 13 N. D. 432, 101 N. W. 183.

Ohio.— Mad River, etc., R. Co. *v.* Barber, 5

affect the rule that he is not liable for injuries to a servant caused by defects in machinery or appliances of which he has neither actual nor constructive knowledge.[84] If, however, the master has failed to comply with a positive requirement as to the construction of his appliances, the servant need not show knowledge on his part that he has not complied with the rule.[85]

e. Structural Defects. Where the defect in an appliance is shown to be structural and is of such a character as renders it unsafe it may be inferred that the employer was aware of the defect and an employee who has been injured by such an appliance need not show that the master knew that it was defective.[86] But if a particular structure, machine, or appliance is without fault as to plan, mode of construction, and character of material, so that it was originally sufficient for all the purposes for which it was designed, and if the master has it afterward properly inspected by competent and skilful men, who exercise ordinary diligence to keep it in repair, the master has discharged his duty, and is not liable to a servant for an injury received by reason of a defect therein, unless it is shown that he had knowledge of such defect, and failed to remedy it.[87]

d. Hidden or Improbable Dangers. While there is a presumption that a master, having knowledge of defects in the place for work, or in the machinery or appliances, has knowledge of the consequences which may result therefrom,[88]

Ohio St. 541, 67 Am. Dec. 312; Record *v.* Dean, 11 Ohio Cir. Dec. 808.

Pennsylvania.— Purdy *v.* Westinghouse Electric Co., 197 Pa. St. 257, 47 Atl. 237, 80 Am. St. Rep. 816, 51 L. R. A. 881; McMullen *v.* Carnegie, 158 Pa. St. 518, 27 Atl. 1043, 23 L. R. A. 448; Bradbury *v.* Kingston Coal Co., 157 Pa. St. 231, 27 Atl. 400; Mensch *v.* Pennsylvania R. Co., 150 Pa. St. 598, 25 Atl. 31, 17 L. R. A. 450.

South Carolina.— Branch *v.* Port Royal, etc., R. Co., 35 S. C. 405, 14 S. E. 808; Gunter *v.* Graniteville Mfg. Co., 15 S. C. 443.

Tennessee.— Nashville, etc., R. Co. *v.* Elliott, 1 Coldw. 611, 78 Am. Dec. 506.

Texas.— Missouri Pac. R. Co. *v.* Henry, 75 Tex. 220, 12 S. W. 828; Gulf, etc., R. Co. *v.* Pettis, 69 Tex. 689, 7 S. W. 93; Missouri Pac. R. Co. *v.* Lyde, 57 Tex. 505. But see Smith *v.* Gulf, etc., R. Co., (Civ. App. 1901) 65 S. W. 83.

Utah.— Allen *v.* Union Pac. R. Co., 7 Utah 239, 26 Pac. 297.

West Virginia.— Johnson *v.* Chesapeake, etc., R. Co., 36 W. Va. 73, 14 S. E. 432.

Wisconsin.— Ballou *v.* Chicago, etc., R. Co., 54 Wis. 257, 11 N. W. 559, 41 Am. Rep. 31.

United States.— Erskine *v.* Chino Valley Beet-Sugar Co., 71 Fed. 270; Bean *v.* Oceanic Steam Nav. Co., 24 Fed. 124; Thompson *v.* Chicago, etc., R. Co., 18 Fed. 239, 5 McCrary 542; The Rheola, 7 Fed. 781; Haugh *v.* Texas, etc., R. Co., 11 Fed. Cas. No. 6,221, 2 N. Y. Wkly. Dig. 174.

Canada.—Jarvis *v.* May, 26 U. C. C. P. 523.

See 34 Cent. Dig. tit. "Master and Servant," § 243.

84. Statutes construed.— Solomon R. Co. *v.* Jones, 30 Kan. 601, 2 Pac. 657 (construing Comp. Laws (1879), p. 784, par. 29); Elliott *v.* St. Louis, etc., R. Co., 67 Mo. 272 (construing 1 Wagner St. p. 520, § 3).

Statute creating prima facie presumption of knowledge see Pittsburgh, etc., R. Co. *v.* Thompson, 82 Fed. 720, 72 C. C. A. 333, construing Ohio Act, April 2, 1890 (87 Ohio Laws, p. 149).

85. St. Louis, etc., R. Co. *v.* Neal, (Ark. 1903) 78 S. W. 220, construing the rule of the interstate commerce commission, made pursuant to 27 U. S. St. at L. 531 [U. S. Comp. St. (1901) p. 3175], as to the maximum variation from the standard height of draw-bars to be allowed between the draw-bars of empty and loaded cars.

86. *Arkansas.*— St. Louis, etc., R. Co. *v.* Davis, 54 Ark. 389, 15 S. W. 895, 26 Am. St. Rep. 48.

Illinois.— Edward Hines Lumber Co. *v.* Ligas, 172 Ill. 315, 50 N. E. 225, 64 Am. St. Rep. 38; Chicago, etc., R. Co. *v.* Hines, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; Crown Coal Co. *v.* Hiles, 43 Ill. App. 310.

Indiana.— Standard Oil Co. *v.* Bowker, 141 Ind. 12, 40 N. E. 128.

Iowa.— Greenleaf *v.* Illinois Cent. R. Co., 29 Iowa 14, 4 Am. Rep. 181.

Kansas.— Atchison, etc., R. Co. *v.* Carey, (1897) 49 Pac. 662.

Massachusetts.— Donahue *v.* Drown, 154 Mass. 21, 27 N. E. 675.

Michigan.— Morton *v.* Detroit, etc., R. Co., 81 Mich. 423, 46 N. W. 111; Broderick *v.* Detroit Union R. Station, etc., Co., 56 Mich. 261, 22 N. W. 802, 56 Am. Rep. 382.

Pennsylvania.— Finnerty *v.* Burnham, 205 Pa. St. 305, 54 Atl. 996.

United States.—Union Pac. R. Co. *v.* James, 56 Fed. 1001, 6 C. C. A. 217.

England.— Watting *v.* Oastler, L. R. 6 Exch. 73, 40 L. J. Exch. 43, 23 L. T. Rep. N. S. 815, 19 Wkly. Rep. 388.

See 34 Cent. Dig. tit. "Master and Servant," § 245.

87. Warner *v.* Erie R. Co., 39 N. Y. 468; Simpson *v.* Pittsburgh Locomotive Works, 139 Pa. St. 245, 21 Atl. 386; Gohen *v.* Texas Pac. R. Co., 10 Fed. Cas. No. 5,507.

88. Pennsylvania Coal Co. *v.* Kelly, 54 Ill. App. 622; Ryan *v.* Fowler, 24 N. Y. 410, 82

and will be held liable for injuries to a servant resulting from known or probable dangers,[89] yet he is not liable for the result of hidden or improbable dangers, of which he did not have, and, by the exercise of reasonable care, could not obtain, knowledge.[90] But facts which do not necessarily operate to charge a servant with notice of the danger arising from the defective condition of machinery may operate to charge the master with such notice, since the obligation upon each arising from the mere knowledge of the defective condition is not alike.[91]

e. Latent Defects. A master is not liable for injuries resulting to a servant by reason of latent defects of which he was ignorant, and which could not be discovered in the exercise of reasonable care and diligence.[92]

Am. Dec. 315; Levy *v.* Rosenblatt, 21 Pa. Super. Ct. 543.

89. *Illinois.*— St. Louis Consol. Coal Co. *v.* Haenni, 146 Ill. 614, 35 N. E. 162; Kewanee Boiler Co. *v.* Erickson, 78 Ill. App. 35.

Indiana.— East Chicago Iron, etc., Co. *v.* Williams, 17 Ind. App. 573, 47 N. E. 26.

Kentucky.— Louisville, etc., R. Co. *v.* Semones, 51 S. W. 612, 21 Ky. L. Rep. 444.

Missouri.—Hysell *v.* Swift, 78 Mo. App. 39.

New York.— Pantzar *v.* Tilly Foster Iron Min. Co., 99 N. Y. 368, 2 N. E. 24; Latorre *v.* Central Stamping Co., 9 N. Y. App. Div. 145, 41 N. Y. Suppl. 99; Dunn *v.* Connell, 21 Misc. 295, 47 N. Y. Suppl. 185 [*affirming* 20 Misc. 727, 46 N. Y. Suppl. 684].

Texas.— Texas, etc., R. Co. *v.* Hohn, 1 Tex. Civ. App. 36, 21 S. W. 942.

See 34 Cent. Dig. tit. "Master and Servant," §§ 232, 247.

The master must keep pace with scientific development as it affects his business, and keep himself and his foreman informed of latent danger, even though it be scientific information, if it be readily attainable. Hysell *v.* Swift, 78 Mo. App. 39.

90. *Arkansas.*— Little Rock, etc., R. Co. *v.* Duffey, 35 Ark. 602.

Illinois.— Morris *v.* Gleason, 1 Ill. App. 510.

Iowa.— Kitteringham *v.* Sioux City, etc., R. Co., 62 Iowa 285, 17 N. W. 585.

Maine.— Hull *v.* Hall, 78 Me. 114, 3 Atl. 38.

Minnesota.— Doyle *v.* St. Paul, etc., R. Co., 42 Minn. 79, 43 N. W. 787.

Missouri.—Lawless *v.* Laclede Gaslight Co., 72 Mo. App. 679.

New York.— Burns *v.* Matthews, 146 N. Y. 386, 40 N. E. 731; Farrell *v.* Middletown, 56 N. Y. App. Div. 525, 67 N. Y. Suppl. 483; Benfield *v.* Vacuum Oil Co., 75 Hun 209, 27 N. Y. Suppl. 16; Kelley *v.* Forty-second St., etc., R. Co., 58 Hun 93, 11 N. Y. Suppl. 344; Kranz *v.* Long Island R. Co., 49 Hun 608, 1 N. Y. Suppl. 751.

North Carolina.— Whitson *v.* Wrenn, 134 N. C. 86, 46 S. E. 17.

Ohio.— Maitland *v.* Cleveland, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 636, 7 Ohio N. P. 353.

Pennsylvania.— Allison Mfg. Co. *v.* McCormick, 118 Pa. St. 519, 12 Atl. 273, 4 Am. St. Rep. 613.

Texas.— Trinity County Lumber Co. *v.* Denham, 85 Tex. 56, 19 S. W. 1012.

Wisconsin.— Schultz *v.* Chicago, etc., R. Co., 67 Wis. 616, 31 N. W. 321, 58 Am. Rep. 881.

See 34 Cent. Dig. tit. "Master and Servant," §§ 232, 247.

Compare Jennings *v.* Tacoma R., etc., Co., 7 Wash. 275, 34 Pac. 937.

91. Union Show Case Co. *v.* Blindauer, 75 Ill. App. 358.

92. *Alabama.*— Southern Car, etc., Co. *v.* Jennings, 137 Ala. 247, 34 So. 1002; Kansas City, etc., R. Co. *v.* Webb, 97 Ala. 157, 11 So. 888.

California.— McCall *v.* Pacific Mail Steamship Co., 123 Cal. 42, 55 Pac. 706.

Colorado.— Denver, etc., R. Co. *v.* McComas, 7 Colo. App. 121, 42 Pac. 676.

Georgia.—Atlantic, etc., R. Co. *v.* Reynolds, 117 Ga. 47, 43 S. E. 456; Baxley *v.* Satilla Mfg. Co., 114 Ga. 720, 40 S. E. 730; Georgia R., etc., Co. *v.* Nelms, 83 Ga. 70, 9 S. E. 1049, 20 Am. St. Rep. 308; Central R. Co. *v.* Freeman, 75 Ga. 331; Central R., etc., Co. *v.* Kenny, 58 Ga. 485.

Illinois.— Indianapolis, etc., R. Co. *v.* Toy, 91 Ill. 474, 33 Am. Rep. 57; Sanden *v.* Bannon, 85 Ill. App. 17; Colfax Coal, etc., Co. *v.* Johnson, 52 Ill. App. 383; Chicago, etc., R. Co. *v.* Scheuring, 4 Ill. App. 533.

Indiana.— Chestnut *v.* Southern Indiana R. Co., 157 Ind. 509, 62 N. E. 32; Louisville, etc., R. Co. *v.* Bates, 146 Ind. 564, 45 N. E. 108; Indiana, etc., R. Co. *v.* Snyder, (1893) 32 N. E. 1129.

Kansas.— See Missouri, etc., R. Co. *v.* Young, 4 Kan. App. 219, 45 Pac. 963.

Kentucky.— Louisville, etc., R. Co. *v.* Hinder, 30 S. W. 399, 16 Ky. L. Rep. 841.

Massachusetts.— Girard *v.* Griswold, 177 Mass. 57, 58 N. E. 179; Roughan *v.* Boston, etc., Block Co., 161 Mass. 24, 36 N. E. 461.

Missouri.—Howard *v.* Missouri Pac. R. Co., 173 Mo. 524, 73 S. W. 467; Bohn *v.* Chicago, etc., R. Co., 106 Mo. 429, 17 S. W. 580; Cunningham *v.* Journal Co., 95 Mo. App. 47, 68 S. W. 592; Breen *v.* St. Louis Cooperage Co., 50 Mo. App. 202; Moran *v.* Brown, 27 Mo. App. 487.

Montana.— Mulligan *v.* Montana Union R. Co., 19 Mont. 130, 47 Pac. 795.

New York.— Smith *v.* New York Cent., etc., R. Co., 164 N. Y. 491, 58 N. E. 655; Doyle *v.* White, 159 N. Y. 548, 54 N. E. 1090 [*affirming* 9 N. Y. App. Div. 521, 35 N. Y. Suppl. 760, 41 N. Y. Suppl. 628]; Kaare *v.* Troy Steel, etc., Co., 139 N. Y. 369, 34 N. E. 901; Grant *v.* Pennsylvania, etc.,

f. Constructive Notice — (i) *In General.* To render a master liable for an injury to a servant, caused by a defect in the place of work, or in the machinery or appliances, it is not necessary that the master should have had actual knowledge of the defect; but it is sufficient to show that he could have discovered it by the exercise of reasonable, proper, and ordinary care and diligence in performing the duties of master.[93]

(ii) *Time and Opportunity For Discovery of Defects.* A master will be charged with constructive notice of a defect which has existed such a length

Canal, etc., Co., 133 N. Y. 657, 31 N. E. 220; De Graff *v.* New York Cent., etc., R. Co., 76 N. Y. 125; La Point *v.* Howland Paper Co., 75 N. Y. App. Div. 611, 77 N. Y. Suppl. 669; Stackpole *v.* Wray, 74 N. Y. App. Div. 310, 77 N. Y. Suppl. 633; Hoskins *v.* Stewart, 57 Hun 380, 10 N. Y. Suppl. 833; Kelly *v.* Hogan, 37 Misc. 761, 76 N. Y. Suppl. 913; Sullivan *v.* Poor, 32 Misc. 575, 66 N. Y. Suppl. 409; Prentice *v.* Wellsville, 21 N. Y. Suppl. 820.

North Carolina.— Martin *v.* Highland Park Mfg. Co., 128 N. C. 264, 38 S. E. 876, 83 Am. St. Rep. 671.

Ohio.—Warner *v.* National Malleable Castings Co., 5 Ohio S. & C. Pl. Dec. 106, 7 Ohio N. P. 331.

Oregon.— Nutt *v.* Southern Pac. Co., 25 Oreg. 291, 35 Pac. 653.

Pennsylvania.—Alexander *v.* Pennsylvania Water Co., 201 Pa. St. 252, 50 Atl. 991; McAvoy *v.* Philadelphia Woolen Co., 140 Pa. St. 1, 21 Atl. 246; Davis *v.* Spencer, 7 Lack. Leg. N. 95.

Texas.— Galveston, etc., R. Co. *v.* Buch, 27 Tex. Civ. App. 283, 65 S. W. 681; Pippin *v.* Sherman, etc., R. Co., (Civ. App. 1900) 58 S. W. 961; The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117; Quintana *v.* Consolidated Kansas City Smelting, etc., Co., 14 Tex. Civ. App. 347, 37 S. W. 369.

Vermont.— Noyes *v.* Smith, 28 Vt. 59, 65 Am. Dec. 222.

West Virginia.— Skidmore *v.* West Virginia, etc., R. Co., 41 W. Va. 293, 23 S. E. 713.

United States.— Killman *v.* Robert Palmer, etc., Shipbuilding, etc., Co., 102 Fed. 224, 42 C. C. A. 281; The Flowergate, 31 Fed. 762; The Lizzie Frank, 31 Fed. 477.

England.— Hanrahan *v.* Ardnamult Steamship Co., L. R. 22 Ir. 55.

See 34 Cent. Dig. tit. "Master and Servant," §§ 233, 246.

Instrumentalities belonging to third parties within rule see Sack *v.* Dolese, 137 Ill. 129, 27 N. E. 62.

93. *Arkansas.*— St. Louis, etc., R. Co. *v.* Higgins, 53 Ark. 458, 14 S. W. 653.

Georgia.— Ocean Steamship Co. *v.* Matthews, 86 Ga. 418, 12 S. E. 632.

Illinois.— Momence Stone Co. *v.* Turrell, 205 Ill. 515, 68 N. E. 1078 [*affirming* 106 Ill. App. 160]; Chicago, etc., R. Co. *v.* Rung, 104 Ill. 641; Toledo, etc., R. Co. *v.* Conroy, 61 Ill. 162; Montgomery Coal Co *v.* Barringer, 109 Ill. App. 185; McLean County Coal Co. *v.* Simpson, 97 Ill. App. 21 [*affirmed* in 196 Ill. 258, 63 N. E. 626]; Western Tube Co. *v.* Polobinski, 94 Ill. App. 640 [*affirmed* in 192 Ill. 113, 61 N. E. 451]; Pioneer Cooperage Co. *v.* Romanowicz, 85 Ill. App. 407 [*affirmed* in 186 Ill. 9, 57 N. E. 864]; Chicago, etc., R. Co. *v.* Driscoll, 70 Ill. App. 91.

Indiana.— Lake Erie, etc., R. Co. *v.* McHenry, 10 Ind. App. 525, 37 N. E. 186.

Iowa.— King *v.* Chicago, etc., R. Co., 108 Iowa 748, 78 N. W. 837; Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462; Deppe *v.* Chicago, etc., R. Co., 36 Iowa 52.

Massachusetts.—See Regan *v.* Donovan, 159 Mass. 1, 33 N. E. 702.

Minnesota.— Gray *v.* Commutator Co., 85 Minn. 463, 89 N. W. 322; Munch *v.* Great Northern R. Co., 75 Minn. 61, 77 N. W. 541. *Compare* James *v.* Northern Pac. R. Co., 46 Minn. 168, 48 N. W. 783.

Missouri.— Mateer *v.* Missouri Pac. R. Co., (1891) 15 S. W. 970; Glasscock *v.* Swafford Bros. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364, (App. 1903) 74 S. W. 1039; Herbert *v.* Mound City Boot, etc., Co., 90 Mo. App. 305; Dedrick *v.* Missouri Pac. R. Co., 21 Mo. App. 433.

Nebraska.— Sioux City, etc., R. Co. *v.* Finlayson, 16 Nebr. 578, 20 N. W. 860, 49 Am. Rep. 724.

New York.— Benzing *v.* Steinway, 101 N. Y. 547, 5 N. E. 449; Butler *v.* New York, etc., R. Co., 42 N. Y. App. Div. 280, 58 N. Y. Suppl. 1061; Dunn *v.* Connell, 21 Misc. 295, 47 N. Y. Suppl. 185 [*affirming* 20 Misc. 727, 46 N. Y. Suppl. 684]; Cielfield *v.* Browning, 9 Misc. 98, 29 N. Y. Suppl. 710; Haug *v.* Rissner, 4 N. Y. St. 644.

Ohio.— Columbus, etc., R. Co. *v.* Erick, 51 Ohio St. 146, 37 N. E. 128, construing 87 Laws 149.

Pennsylvania.— Newton *v.* Vulcan Iron Works, 199 Pa. St. 646, 49 Atl. 339.

Tennessee.— Morriss *v.* Bowers, 105 Tenn. 59, 58 S. W. 328.

Texas.— Texas, etc., R. Co. *v.* McAtee, 61 Tex. 695; Houston, etc., R. Co. *v.* Myers, 55 Tex. 110.

Vermont.— Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380.

See 34 Cent. Dig. tit. "Master and Servant," §§ 248, 249.

Facts held not to show constructive notice see Bauer *v.* American Car, etc., Co., 131 Mich. 537, 94 N. W. 9; James *v.* Northern Pac. R. Co., 46 Minn. 168, 48 N. W. 783; Schulz *v.* Rohe, 149 N. Y. 132, 43 N. E. 420; Kern *v.* De Castro, etc., Sugar Refining Co., 125 N. Y. 50, 25 N. E. 1071 [*reversing* 5 N. Y. Suppl. 548]; Connors *v.* Elmira, etc., R. Co., 92 Hun (N. Y.) 339, 36 N. Y. Suppl. 926; Loonam *v.* Brockway, 3 Roh. (N. Y.) 74.

of time that it must have been discovered, in the exercise of ordinary and reasonable care and diligence on his part.[94] How long a defect must have existed to charge the master with notice is generally a question of fact, depending upon the facts and circumstances of the particular case.[95]

(III) *NOTICE TO SERVANTS OR AGENTS.*[96] Notice to a fellow servant,[97] or to a servant or agent who has no control or supervision over the place of work, machinery, or appliances, the defective condition of which cause the injury complained of,[98] does not charge the master with constructive notice. But notice to a servant or agent who stood in the position of a vice-principal, and who was charged with those duties of the master, the neglect of which occasioned the injury, is notice to the master;[99] and if such representative, instead of perform-

94. *Illinois.*— Monmouth Min., etc., Co. *v.* Erling, 148 Ill. 521, 36 N. E. 117, 39 Am. St. Rep. 187 [*affirming* 45 Ill. App. 411]; McLean County Coal Co. *v.* Simpson, 97 Ill. App. 21 [*affirmed* in 196 Ill. 258, 63 N. E. 626].

Indiana.—Baltimore, etc., R. Co. *v.* Spaulding, 21 Ind. App. 323, 52 N. E. 410.

Iowa.— Cushman *v.* Carbondale Fuel Co., 116 Iowa 618, 88 N. W. 817.

Massachusetts.— Sweat *v.* Boston, etc., R. Co., 156 Mass. 284, 31 N. E. 296.

Minnesota.— Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231, 15 N. W. 241.

Missouri.— Houts *v.* St. Louis Transit Co., 108 Mo. App. 686, 84 S. W. 161.

New York.— Stapf *v.* Loewer's Gambrinus Brewing Co., 1 N. Y. App. Div. 405, 37 N. Y. Suppl. 256; Haskins *v.* New York Cent., etc., R. Co., 79 Hun 159, 29 N. Y. Suppl. 274; Van Tassell *v.* New York, etc., R. Co., 1 Misc. 299, 20 N. Y. Suppl. 708; Sutton *v.* New York, etc., R. Co., 21 N. Y. Suppl. 312.

Wisconsin.— Paine *v.* Eastern R. Co., 91 Wis. 340, 64 N. W. 1005.

See 34 Cent. Dig. tit. "Master and Servant," § 250.

95. *Illinois.*— Chicago, etc., R. Co. *v.* Maroney, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396 [*affirming* 67 Ill. App. 618]; Chicago, etc., R. Co. *v.* Delaney, 169 Ill. 581, 48 N. E. 476 [*affirming* 68 Ill. App. 307].

Indiana.— Chicago, etc., R. Co. *v.* Fry, 131 Ind. 319, 28 N. E. 989.

Missouri.— Goodrich *v.* Kansas City, etc., R. Co., 152 Mo. 222, 53 S. W. 917.

New York.— Peet *v.* H. Remington, etc., Pulp, etc., Co., 86 N. Y. App. Div. 101, 83 N. Y. Suppl. 524; Page *v.* Naughton, 63 N. Y. App. Div. 377, 71 N. Y. Suppl. 503.

Rhode Island.— Burke *v.* National India Rubber Co., 21 R. I. 446, 44 Atl. 307.

Virginia.— Binns *v.* Richmond, etc., R. Co., 88 Va. 891, 14 S. E. 701.

See 34 Cent. Dig. tit. "Master and Servant," § 250.

96. Construction of rules see *infra*, IV, C, 2, f.

97. *Alabama.*— Smoot *v.* Mobile, etc., R. Co., 67 Ala. 13.

Illinois.— Richardson *v.* Cooper, 88 Ill. 270; Chicago, etc., R. Co. *v.* Merriman, 95 Ill. App. 628.

Indiana.— Indiana, etc., R. Co. *v.* Snyder, (1893) 32 N. E. 1129.

Michigan.— Bauer *v.* American Car, etc., Co., 132 Mich. 537, 94 N. W. 9.

Missouri.— Brown *v.* Hershey Land, etc., Co., 65 Mo. App. 162.

Pennsylvania.— McKenna *v.* Martin, etc., Paper Co., 176 Pa. St. 306, 35 Atl. 131.

United States.— Kidwell *v.* Houston, etc., R. Co., 13 Fed. Cas. No. 7,757, 3 Woods 313.

See 34 Cent. Dig. tit. "Master and Servant," § 251.

98. Buchanan *v.* Rome, etc., R. Co., 10 N. Y. St. 326; Galveston, etc., R. Co. *v.* Gormley, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894 [*reversing* (Civ. App. 1897) 42 S. W. 314]; St. Louis Southwestern R. Co. *v.* Threat, 12 Tex. Civ. App. 375, 34 S. W. 152. But see Chicago, etc., R. Co. *v.* Cullen, 187 Ill. 523, 58 N. E. 455 [*affirming* 87 Ill. App. 374]; Allison *v.* Western North Carolina R. Co., 64 N. C. 382.

99. *California.*— Elledge *v.* National City, etc., R. Co., 100 Cal. 282, 34 Pac. 720, 38 Am. St. Rep. 290.

Georgia.— Krogg *v.* Atlanta, etc., R. Co., 77 Ga. 202, 4 Am. St. Rep. 77.

Illinois.— Riverton Coal Co. *v.* Shepherd, 207 Ill. 395, 69 N. E. 921 [*affirming* 111 Ill. App. 294]; Hess *v.* Rosenthal, 160 Ill. 621, 43 N. E. 743; Sangamon Coal Min. Co. *v.* Wiggerhaus, 122 Ill. 279, 13 N. E. 648; Quincy Coal Co. *v.* Hood, 77 Ill. 68; Chicago, etc., R. Co. *v.* Jackson, 55 Ill. 492, 8 Am. Rep. 661; Allen B. Wrisley Co. *v.* Burke, 106 Ill. App. 30; Union Bridge Co. *v.* Teehan, 92 Ill. App. 259 [*affirmed* in 190 Ill. 374, 60 N. E. 533]; Falkenau *v.* Abrahamson, 66 Ill. App. 352; Consolidated Coal Co. *v.* Scheiber, 65 Ill. App. 304.

Indiana.— Ft. Wayne *v.* Christie, 156 Ind. 172, 59 N. E. 385; Ohio, etc., R. Co. *v.* Stein, 140 Ind. 61, 39 N. E. 246; Indiana Iron Co. *v.* Cray, 19 Ind. App. 565, 48 N. E. 803. But see Columbus, etc., R. Co. *v.* Arnold, 31 Ind. 174, 99 Am. Dec. 615, where it was held that notice to the board of directors of a railroad company of the defective condition of an engine, in the absence of notice that it is being used in that condition, is not sufficient to render the company liable for injuries to a servant caused by such defects.

Iowa.— Worden *v.* Humeston, etc., R. Co., 76 Iowa 310, 41 N. W. 26; Reed *v.* Burlington, etc., R. Co., 72 Iowa 166, 33 N. W. 451, 2 Am. St. Rep. 243.

ing his duties himself, enjoins their performance upon another servant in his employ, he is chargeable with whatever notice such servant has or ought to have while performing such duties.[1]

8. Dangerous Operations, and Improper or Unusual Use or Test[2] — a. Dangerous Operations — (I) *In General.* A master is not bound to provide a safe place, where the work on which the servant is engaged is such as to render the place where it is done temporarily insecure.[3]

(II) *Making Repairs.* The rule as to the duty of the master with regard to the place of work, machinery, and appliances does not apply to cases in which the work the servant is engaged upon consists in making repairs.[4]

Kansas.— Atchison, etc., R. Co. *v.* Napole, 55 Kan. 401, 40 Pac. 669.

Louisiana.— Bland *v.* Shreveport Belt R. Co., 48 La. Ann. 1057, 20 So. 284, 36 L. R. A. 114; Mattise *v.* Consumers' Ice Mfg. Co., 46 La. Ann. 1535, 16 So. 400, 49 Am. St. Rep. 356.

Maryland.— See American Tobacco Co. *v.* Strickling, 88 Md. 500, 41 Atl. 1083, 69 L. R. A. 909.

Michigan.— Lyttle *v.* Chicago, etc., R. Co., 84 Mich. 289, 47 N. W. 571.

Missouri.— Sullivan *v.* Hannibal, etc., R. Co., 107 Mo. 66, 17 S. W. 748, 28 Am. St. Rep. 388; Speed *v.* Atlantic, etc., R. Co., 71 Mo. 303; Banks *v.* Wabash Western R. Co., 40 Mo. App. 458; Dedrick *v.* Missouri Pac. R. Co., 21 Mo. App. 433.

New York.— Eichholz *v.* Niagara Falls Hydraulic Power, etc., Co., 174 N. Y. 519, 66 N. E. 1107 [*affirming* 68 N. Y. App. Div. 441, 73 N. Y. Suppl. 842]; Doing *v.* New York, etc., R. Co., 151 N. Y. 579, 45 N. E. 1028; Franck *v.* American Tartar Co., 91 N. Y. App. Div. 571, 87 N. Y. Suppl. 219; Larkin *v.* Washington Mills Co., 45 N. Y. App. Div. 6, 61 N. Y. Suppl. 93 [*distinguishing* McCarthy *v.* Washburn, 42 N. Y. App. Div. 252, 58 N. Y. Suppl. 1125]; Fox *v.* Le Comte, 2 N. Y. App. Div. 61, 37 N. Y. Suppl. 316; McGarry *v.* New York, etc., R. Co., 60 N. Y. Super. Ct. 367, 18 N. Y. Suppl. 195 [*affirmed* in 137 N. Y. 627, 33 N. E. 745]; Delaney *v.* Hilton, 50 N. Y. Super. Ct. 341.

Ohio.— Wellston Coal Co. *v.* Smith, 65 Ohio St. 70, 61 N. E. 143, 87 Am. St. Rep. 547, 55 L. R. A. 99; Pittsburg, etc., R. Co. *v.* Stone, 24 Ohio Cir. Ct. 192.

Pennsylvania.— Kingan *v.* Pittsburg Traction Co., 5 Pa. Super. Ct. 436.

Tennessee.— Nashville, etc., R. Co. *v.* Elliott, 1 Coldw. 611, 78 Am. Dec. 506.

Texas.— Missouri Pac. R. Co. *v.* Sasse, (Civ. App. 1893) 22 S. W. 187. See also Hillje *v.* Hettich, (Civ. App. 1901) 65 S. W. 491 [*reversed* on other grounds in 95 Tex. 321, 67 S. W. 90].

Utah.— Chapman *v.* Southern Pac. Co., 12 Utah 30, 41 Pac. 551.

Virginia.— Baltimore, etc., R. Co. *v.* McKenzie, 81 Va. 71.

Wisconsin.— Wysocki *v.* Wisconsin Lakes Ice, etc., Co., 121 Wis. 96, 98 N. W. 950; Boelter *v.* Ross Lumber Co., 103 Wis. 324, 79 N. W. 243; Johnson *v.* Ashland First Nat. Bank, 79 Wis. 414, 48 N. W. 712, 24 Am. St. Rep. 722; Brabbits *v.* Chicago, etc., R. Co., 38 Wis. 289.

United States.— Texas, etc., R. Co. *v.* Barrett, 166 U. S. 617, 17 S. Ct. 707, 41 L. ed. 1136 [*affirming* 67 Fed. 214, 14 C. C. A. 373].

Canada.— Kelly *v.* Davidson, 27 Ont. App. 657 [*reversing* 31 Ont. 521]; Dean *v.* Ontario Cotton Mills Co., 14 Ont. 119; Day *v.* Dominion Iron, etc., Co., 36 Nova Scotia 113.

See 34 Cent. Dig. tit. "Master and Servant," § 251.

Where plaintiff was the only person employed by defendant at the place where the injury occurred, his knowledge as to the defective condition of the place was the knowledge of his master. Shemwell *v.* Owensboro, etc., R. Co., 117 Ky. 556, 78 S. W. 448, 25 Ky. L. Rep. 1671.

A mining boss is not the representative of the owners, so as to charge them with constructive notice of information given to him by the workmen, under rule 24, art. 12, of the Pennsylvania Mining Boss Act of 1885, which requires employees to give notice of apprehended danger to the mining boss. Lineoski *v.* Susquehanna Coal Co., 157 Pa. St. 153, 27 Atl. 577.

Notice a question for the jury see American Tobacco Co. *v.* Strickling, 88 Md. 500, 41 Atl. 1083, 69 L. R. A. 909; Crowell *v.* Thomas, 18 N. Y. App. Div. 520, 46 N. Y. Suppl. 137; Valentine *v.* A. Colburn Co., 10 Pa. Super. Ct. 453.

1. Wellston Coal Co. *v.* Smith, 65 Ohio St. 70, 61 N. E. 143, 87 Am. St. Rep. 547, 55 L. R. A. 99.

2. **Assumption of risk** see *infra*, IV, E, 3. **Contributory negligence** see *infra*, IV, F, 4, e.

Hidden dangers see *supra*, IV, B, 7, d.

3. Gulf, etc., R. Co. *v.* Jackson, 65 Fed. 48. **Tearing down building.**—A master, engaged in the work of tearing down a building, is not required to furnish his servants a safe place in which to work; but his only duty is not to send them into a place which he knows and which the servants do not know to be dangerous. Clark *v.* Liston, 54 Ill. App. 578.

4. *Georgia.*— Dartmouth Spinning Co. *v.* Achord, 84 Ga. 14, 10 S. E. 449, 6 L. R. A. 190.

Illinois.— Chicago, etc., R. Co. *v.* Ward, 61 Ill. 130.

Minnesota.— Fraker *v.* St. Paul, etc., R. Co., 32 Minn. 54, 19 N. W. 349. But see

b. Improper or Unusual Use or Test. Where the place of work, machinery, or appliance was reasonably safe and suitable for the purpose for which it was intended, a servant cannot hold his master liable for personal injuries resulting from its inappropriate, unauthorized, unnecessary, careless, improper, or unusual use or test.[5] But when an appliance is improperly used with the knowledge of the master, it makes no difference, so far as his liability for such improper use is concerned, whether or not it was originally built for such purpose;[6] and where a master subjects an appliance to an unusual and uncontemplated service or strain, by reason of which a servant is injured, he will be held liable.[7]

9. Proximate Cause of Injury.[8] In order to hold a master liable for injuries to a servant alleged to have been caused by defects in the place for work, or in the machinery or appliances, the defects complained of must be shown to have been the proximate cause of the injuries,[9] and this, it has been held, is the case

Madden *v.* Minneapolis, etc., R. Co., 32 Minn. 303, 20 N. W. 317.

New York.— Murphy *v.* Boston, etc., R. Co., 88 N. Y. 146, 42 Am. Rep. 240.

United States.— Finalyson *v.* Utica Min., etc., Co., 67 Fed. 507, 14 C. C. A. 492.

See 34 Cent. Dig. tit. "Master and Servant," § 255.

But see Engstrom *v.* Ashland Iron, etc., Co., 87 Wis. 166, 58 N. W. 241.

5. *California.*— Fanjoy *v.* Seales, 29 Cal. 243.

Iowa.— Young *v.* Burlington Wire Mattress Co., 79 Iowa 415, 44 N. W. 693.

Massachusetts.— McLean *v.* Cole, 175 Mass. 5, 55 N. E. 458.

Michigan.— Jayne *v.* Sebewaing Coal Co., 108 Mich. 242, 65 N. W. 971; Preston *v.* Chicago, etc., R. Co., 98 Mich. 128, 57 N. W. 31.

Mississippi.— Bell *v.* Refuge Oil-Mill Co., 77 Miss. 387, 27 So. 382.

Missouri.— York *v.* Kansas City, etc., R. Co., 117 Mo. 405, 22 S. W. 1081; Rutledge *v.* Missouri Pac. R. Co., 110 Mo. 312, 19 S. W. 38.

Nebraska.—Chicago, etc., R. Co. *v.* Barnard, 32 Nebr. 306, 49 N. W. 362.

New Hampshire.— Young *v.* Boston, etc., R. Co., 69 N. H. 356, 41 Atl. 268.

New York.— Preston *v.* Ocean Steamship Co., 33 N. Y. App. Div. 193, 53 N. Y. Suppl. 444; White *v.* Eidlitz, 19 N. Y. App. Div. 256, 46 N. Y. Suppl. 184; Crebarry *v.* National Transit Co., 77 Hun 74, 28 N. Y. Suppl. 291.

Texas.—Hettich *v.* Hillje, 33 Tex. Civ. App. 571, 77 S. W. 641.

See 34 Cent. Dig. tit. "Master and Servant," § 256.

Since blocking is only intended to prevent feet being caught, where a switchman was thrown by the sudden moving of the train, while uncoupling cars, and his arm was caught and crushed between the guard and main rails, the failure of defendant to block the guard-rail should not be submitted to the jury as a ground of recovery. Rutledge *v.* Missouri Pac. R. Co., 110 Mo. 312, 19 S. W. 38.

6. Lauter *v.* Duckworth, 19 Ind. App. 535, 48 N. E. 864. See also Hart *v.* Naumburg, 50 Hun (N. Y.) 392, 3 N. Y. Suppl. 227 [*reversed* on other grounds in 123 N. Y. 641, 25 N. E. 385].

7. Cincinnati, etc., R. Co. *v.* Roesch, 126 Ind. 445, 26 N. E. 171; Johnson *v.* Boston, etc., Min. Co., 16 Mont. 164, 40 Pac. 298. See also Wilson *v.* Owen Sound Portland Cement Co., 27 Ont. App. 328 [*overruling* on account of changes in legislation Hamilton *v.* Groesbeck, 19 Ont. 76].

8. **Contributory negligence** see *infra*, IV, F, 3.

Methods of work see *infra*, IV, C, 1, a, (VII).

9. *Alabama.*— Boyd *v.* Indian Head Mills, 131 Ala. 356, 31 So. 80; Williams *v.* Woodward Iron Co., 106 Ala. 254, 17 So. 517; Pryor *v.* Louisville, etc., R. Co., 90 Ala. 32, 8 So. 55.

Arkansas.— Little Rock, etc., R. Co. *v.* Voss, (1892) 18 S. W. 172.

California.— Luman *v.* Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307; Grijalva *v.* Southern Pac. Co., 137 Cal. 569, 70 Pac. 622; Dolan *v.* Sierra R. Co., 135 Cal. 435, 67 Pac. 686; Daubert *v.* Western Meat Co., 135 Cal. 144, 67 Pac. 133; Kauffman *v.* Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124.

Colorado.— Union Gold Min. Co. *v.* Crawford, 29 Colo. 511, 69 Pac. 600; Denver, etc., R. Co. *v.* Sipes, 26 Colo. 17, 55 Pac. 1093; Denver, etc., R. Co. *v.* Smock, 23 Colo. 456, 48 Pac. 681.

Connecticut.— Broughel *v.* Southern New England Tel. Co., 72 Conn. 617, 45 Atl. 435, 49 L. R. A. 404.

Delaware.— Murphy *v.* Hughes, 1 Pennew. 250, 40 Atl. 187.

Georgia.—Western, etc., R. Co. *v.* Esslinger, 95 Ga. 734, 22 S. E. 580.

Illinois.— Rock Island Sash, etc., Works *v.* Pohlman, 210 Ill. 133, 71 N. E. 428 [*affirming* 99 Ill. App. 670]; Chicago, etc., R. Co. *v.* Wise, 206 Ill. 453, 69 N. E. 500 [*affirming* 106 Ill. App. 174]; Missouri Malleable Iron Co. *v.* Dillon, 206 Ill. 145, 69 N. E. 12 [*affirming* 106 Ill. App. 649]; Ehlen *v.* O'Donnell, 205 Ill. 38, 68 N. E. 766 [*affirming* 102 Ill. App. 141]; Dallemand *v.* Saalfeldt, 175 Ill. 310, 51 N. E. 645, 48 L. R. A. 753, 67 Am. St. Rep. 214 [*affirming* 73 Ill. App. 151];

even where the defect consists in the master's failure to comply with a statutory

Illinois Cent. R. Co. *v.* Cozby, 174 Ill. 109, 50 N. E. 1011 [*affirming* 69 Ill. App. 256]; Taylor *v.* Felsing, 164 Ill. 331, 45 N. E. 161; Coal Run Coal Co. *v.* Jones, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89; Middendorf *v.* Schulze, 105 Ill. App. 121; Webster Mfg. Co. *v.* Goodrich, 104 Ill. App. 76; Wells *v.* Bourdages, 88 Ill. App. 473; Chicago, etc., R. Co. *v.* Gillison, 72 Ill. App. 207. *Compare* Wesley City Coal Co. *v.* Healer, 84 Ill. 126.

Indiana.— Baltimore, etc., R. Co. *v.* Henderson, 31 Ind. App. 441, 68 N. E. 308; Southern Indiana R. Co. *v.* Harrell, (App. 1903) 66 N. E. 1016 [*reversed* on other grounds in (1903) 68 N. E. 262]; Louisville, etc., R. Co. *v.* Southwick, 16 Ind. App. 486, 44 N. E. 263.

Iowa.— Phinney *v.* Illinois Cent. R. Co., 122 Iowa 488, 98 N. W. 358; Cox *v.* Chicago, etc., R. Co., 102 Iowa 711, 72 N. W. 301; Young *v.* Burlington Wire Mattress Co., 79 Iowa 415, 44 N. W. 693; Handelun *v.* Burlington, etc., R. Co., 72 Iowa 709, 32 N. W. 4; Williams *v.* Iowa Cent. R. Co., 43 Iowa 396. *Compare* Hathaway *v.* Illinois Cent. R. Co., 92 Iowa 337, 60 N. W. 651.

Kentucky.— Illinois Cent. R. Co. *v.* McIntosh, 118 Ky. 145, 80 S. W. 496, 26 Ky. L. Rep. 14, 81 S. W. 270, 26 Ky. L. Rep. 347; Cumberland Tel., etc., Co. *v.* Ware, 115 Ky. 581, 74 S. W. 289, 24 Ky. L. Rep. 2519; Edmonson *v.* Kentucky Cent. R. Co., 105 Ky. 479, 49 S. W. 200, 448, 20 Ky. L. Rep. 1296; Central Coal, etc., Co. *v.* Pierce, 80 S. W. 449, 25 Ky. L. Rep. 2269; Monongahela River Consol. Coal, etc., Co. *v.* Campbell, 78 S. W. 405, 25 Ky. L. Rep. 1599; Illinois Cent. R. Co. *v.* Stewart, 63 S. W. 596, 23 Ky. L. Rep. 637; Wadlington *v.* Newport News, etc., R. Co., 20 S. W. 783, 14 Ky. L. Rep. 559.

Louisiana.— Ray *v.* Vicksburg, etc., R. Co., 113 La. 502, 37 So. 43; Schoultz *v.* Eckardt Mfg. Co., 112 La. 568, 36 So. 593; Jones *v.* Texas, etc., R. Co., 51 La. Ann. 1247, 26 So. 86; Smith *v.* Louisiana, etc., R. Co., 49 La. Ann. 1325, 22 So. 359.

Maine.— Conley *v.* American Express Co., 87 Me. 352, 32 Atl. 965.

Massachusetts.—Ward *v.* Connor, 182 Mass. 170, 64 N. E. 968; Moynihan *v.* King's Windsor Cement, etc., Co., 168 Mass. 450, 47 N. E. 425; Daigle *v.* Lawrence Mfg. Co., 159 Mass. 378, 34 N. E. 458.

Michigan.— Seccombe *v.* Detroit Electric R. Co., 133 Mich. 170, 94 N. W. 747; Smizel *v.* Odanah Iron Co., 116 Mich. 149, 74 N. W. 488; Zimmerman *v.* Detroit Sulphite Fibre Co., 113 Mich. 1, 71 N. W. 321; Borck *v.* Michigan Bolt, etc., Works, 111 Mich. 129, 69 N. W. 254.

Minnesota.— Crandall *v.* Great Northern R. Co., 83 Minn. 190, 86 N. W. 10, 85 Am. St. Rep. 458; Weisel *v.* Eastern R. Co., 79 Minn. 245, 82 N. W. 576; Murphy *v.* Great Northern R. Co., 68 Minn. 526, 71 N. W. 662; Moore *v.* Great Northern R. Co., 67 Minn. 394, 69 N. W. 1103; Christianson *v.* Chicago, etc., R. Co., 67 Minn. 94, 69 N. W. 640; Freeberg *v.* St. Paul Plow-Works, 48 Minn. 99, 50 N. W. 1026.

Mississippi.—Yazoo, etc., R. Co. *v.* Schraag, 84 Miss. 125, 36 So. 193; Illinois Cent. R. Co. *v.* Seamans, 79 Miss. 106, 31 So. 546.

Missouri.— Sams *v.* St. Louis, etc., R. Co., 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475; Herbert *v.* Wiggins Ferry Co., 107 Mo. App. 287, 80 S. W. 978; Browning *v.* Kasten, 107 Mo. App. 59, 80 S. W. 354; Browning *v.* Chicago, etc., R. Co., 106 Mo. App. 729, 80 S. W. 591; Anderson *v.* Forrester-Nace Box Co., 103 Mo. App. 382, 77 S. W. 486; Reed *v.* Missouri, etc., R. Co., 94 Mo. App. 371, 68 S. W. 364; Worheide *v.* Missouri Car, etc., Co., 32 Mo. App. 367.

New Hampshire.— Aldrich *v.* Concord, etc., R. Co., 67 N. H. 380, 36 Atl. 252.

New York.— Pauley *v.* Steam Gauge, etc., Co., 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194; Bajus *v.* Syracuse, etc., R. Co., 103 N. Y. 312, 8 N. E. 529, 57 Am. Rep. 723; Hofnagle *v.* New York Cent., etc., R. Co., 55 N. Y. 608; Franck *v.* American Tartar Co., 91 N. Y. App. Div. 571, 87 N. Y. Suppl. 219; Leaux *v.* New York, 87 N. Y. App. Div. 405, 84 N. Y. Suppl. 511; O'Connall *v.* Thompson-Starrett Co., 72 N. Y. App. Div. 47, 76 N. Y. Suppl. 296; Monahan *v.* Eidlitz, 59 N. Y. App. Div. 224, 69 N. Y. Suppl. 335; Pierson *v.* New York, etc., R. Co., 53 N. Y. App. Div. 363, 65 N. Y. Suppl. 1039; White *v.* Eidlitz, 38 N. Y. App. Div. 149, 56 N. Y. Suppl. 629; Fitzgerald *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 127, 55 N. Y. Suppl. 1124; Byrnes *v.* Brooklyn Heights R. Co., 36 N. Y. App. Div. 355, 55 N. Y. Suppl. 269; Di Vito *v.* Crage, 35 N. Y. App. Div. 155, 55 N. Y. Suppl. 64; France *v.* Rome, etc., R. Co., 25 N. Y. App. Div. 315, 49 N. Y. Suppl. 566; Beichert *v.* Reed, 20 N. Y. App. Div. 635, 47 N. Y. Suppl. 119; Sann *v.* H. W. Johns Mfg. Co., 16 N. Y. App. Div. 252, 44 N. Y. Suppl. 641; McFarland *v.* New York Cent., etc., R. Co., 9 N. Y. App. Div. 628, 41 N. Y. Suppl. 525; Hope *v.* Fall Brook Coal Co., 3 N. Y. App. Div. 70, 38 N. Y. Suppl. 1040; Benfield *v.* Vacuum Oil Co., 75 Hun 209, 27 N. Y. Suppl. 16; Carr *v.* North River Constr. Co., 48 Hun 266; Gordon *v.* Reynolds' Card Mfg. Co., 47 Hun 278; Morse *v.* New York Cent., etc., R. Co., 39 Hun 414. *Compare* Ryan *v.* Miller, 12 Daly 77.

Ohio.— Crawford *v.* New York, etc., R. Co., 23 Ohio Cir. Ct. 207; Lake Shore, etc., R. Co. *v.* Whidden, 23 Ohio Cir. Ct. 85; Lake Shore, etc., R. Co. *v.* Schultz, 19 Ohio Cir. Ct. 639, 9 Ohio Cir. Dec. 816; Michigan Cent. R. Co. *v.* Shea, 17 Ohio Cir. Ct. 574, 8 Ohio Cir. Dec. 325; Lake Shore, etc., R. Co. *v.* Gilday, 16 Ohio Cir. Ct. 649, 9 Ohio Cir. Dec. 27; Wabash R. Co. *v.* Heeter, 14 Ohio Cir. Ct. 257, 7 Ohio Cir. Dec. 485.

Oregon.— Robinson *v.* Taku Fishing Co., 42 Oreg. 537, 71 Pac. 790.

Pennsylvania.— Davis *v.* Pennsylvania Coal

requirement.[10] Whether the defect was the proximate cause of the injury is usually a question of fact for the determination of the jury.[11]

C. Methods of Work, Rules, and Orders[12] **— 1. Methods of Work**[13] **— a. In General** — (i) *Rule Stated.* A master is not bound to protect his servants further than by providing competent fellow servants, and prescribing such regulations as experience shows may be best calculated to secure their safety;[14]

Co., 209 Pa. St. 153, 58 Atl. 271; Fullmer *v.* New York Cent., etc., R. Co., 208 Pa. St. 598, 57 Atl. 1062; Webster *v.* Monongahela River Consol. Coal, etc., Co., 201 Pa. St. 278, 50 Atl. 964; Bradbury *v.* Kingston Coal Co., 157 Pa. St. 231, 27 Atl. 400; Costello *v.* Philadelphia, etc., R. Co., 2 Pa. Dist. 453.

Rhode Island.— Langlois *v.* Dunn Worsted Mills, 25 R. I. 645, 57 Atl. 910; McGough *v.* Bates, 21 R. I. 213, 42 Atl. 873; McGeary *v.* Old Colony R. Co., 21 R. I. 76, 41 Atl. 1007.

Texas.— Jackson *v.* Galveston, etc., R. Co., 90 Tex. 372, 38 S. W. 745 [*affirming* 14 Tex. Civ. App. 685, 37 S. W. 786]; Chicago, etc., R. Co. *v.* Harton, 36 Tex. Civ. App. 475, 81 S. W. 1236; International, etc., R. Co. *v.* Bayne, 28 Tex. Civ. App. 392, 67 S. W. 443; Roe *v.* Thomason, 25 Tex. Civ. App. 67, 61 S. W. 528; Galveston, etc., R. Co. *v.* Johnson, 24 Tex. Civ. App. 180, 58 S. W. 622; Galveston, etc., R. Co. *v.* Lynch, 22 Tex. Civ. App. 336, 55 S. W. 389; International, etc., R. Co. *v.* Culpeper, 19 Tex. Civ. App. 182, 46 S. W. 922; Missouri, etc., R. Co. *v.* Hines, (Civ. App. 1897) 40 S. W. 152; Campbell *v.* Texas, etc., R. Co., 16 Tex. Civ. App. 665, 39 S. W. 1105. *Compare* Bonner *v.* Mayfield, 82 Tex. 234, 18 S. W. 305; Bonner *v.* Wingate, 78 Tex. 333, 14 S. W. 790; Texas Pac. R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60.

Vermont.— Kilpatrick *v.* Grand Trunk R. Co., 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887.

Wisconsin.— Pautz *v.* Plankington Packing Co., 118 Wis. 47, 94 N. W. 654; Youngbluth *v.* Stephens, 104 Wis. 343, 80 N. W. 443.

United States.— Choctaw, etc., R. Co. *v.* Holloway, 191 U. S. 334, 24 S. Ct. 102, 48 L. ed. 207 [*affirming* 114 Fed. 458, 52 C. C. A. 200]; Robinson *v.* Pittsburg Coal Co., 129 Fed. 324, 63 C. C. A. 258; Briggs *v.* Chicago, etc., R. Co., 125 Fed. 745, 60 C. C. A. 513; Voelker *v.* Chicago, etc., R. Co., 116 Fed. 867; Southern Pac. Co. *v.* Schoer, 114 Fed. 466, 52 C. C. A. 268, 57 L. R. A. 707; Mexican Cent. R. Co. *v.* Murray, 102 Fed. 264, 42 C. C. A. 334; Hunt *v.* Kane, 100 Fed. 256, 40 C. C. A. 372; Garnett *v.* Phœnix Bridge Co., 98 Fed. 192; Wallace *v.* Standard Oil Co., 66 Fed. 260; Cincinnati, etc., R. Co. *v.* Mealer, 50 Fed. 725, 1 C. C. A. 633; Johnson *v.* Armour, 18 Fed. 490, 5 McCrary 629.

England.— Lloyd *v.* Woolland, 87 L. T. Rep. N. S. 73.

Canada.— Sault Ste. Marie Pulp, etc., Co. *v.* Myers, 33 Can. Sup. Ct. 23 [*affirming* 3 Ont. L. Rep. 600]; Tooke *v.* Bergeron, 27 Can. Sup. Ct. 567 [*reversing* 9 Can. Sup. Ct. 506]; Montreal Rolling Mills Co. *v.* Corcoran, 26 Can. Sup. Ct. 595; Grant *v.* Acadia Coal Co., 34 Nova Scotia 319; Ross *v.* Cross, 17 Ont. App. 29; Kervin *v.* Canadian, etc., Coloured Cotton Mills Co., 28 Ont. 73.

See 34 Cent. Dig. tit. "Master and Servant," §§ 257-263.

General rule for ascertainment.— An injury which results to one from surrounding circumstances under the control of another, the consequences of which, in the exercise of reasonable care and prudence, that other might and ought to have seen and known, but neglects to avoid, is to be attributed to that negligence as its proximate cause. Banks *v.* Wabash Western R. Co., 40 Mo. App. 458.

10. Coal Run Coal Co. *v.* Jones, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89. *Compare* Illinois Fuel Co. *v.* Parsons, 38 Ill. App. 182.

11. *Alabama.*— Southern R. Co. *v.* Guyton, 122 Ala. 231, 25 So. 34.

Indiana.— Baltimore, etc., R. Co. *v.* Amos, 20 Ind. App. 378, 49 N. E. 854.

Iowa.— Brownfield *v.* Chicago, etc., R. Co., 107 Iowa 254, 77 N. W. 1038.

Kentucky.— Richards *v.* Louisville, etc., R. Co., 49 S. W. 419, 20 Ky. L. Rep. 1478.

Massachusetts.— Johnson *v.* Field-Thurber Co., 171 Mass. 481, 51 N. E. 18.

Michigan.— Knapp *v.* Chicago, etc., R. Co., 114 Mich. 199, 72 N. W. 200.

Missouri.—Oglesby *v.* Missouri Pac. R. Co., 150 Mo. 137, 37 S. W. 829, 51 S. W. 758.

North Dakota.— Cameron *v.* Great Northern R. Co., 8 N. D. 124, 77 N. W. 1016.

12. Accidental or improbable injuries see *supra*, IV, A, 5, b.

Assumption of risk see *infra*, IV, E, 3.

Concurrent negligence of fellow servant see *infra*, IV, G, 4, a, (IV).

Concurrent negligence of master as affecting assumption of risk see *infra*, IV, E, 10.

Contributory negligence see *infra*, IV, F, 4, e.

Gross or wilful negligence of fellow servant see *infra*, IV, G, 4, a, (V).

Negligence of fellow servant performing duties of master see *infra*, IV, G, 4, a, (VII), (E).

13. Customary method see *infra*, IV, C, 1, b, 2.

Inspection see *supra*, IV, B, 6.

Negligence in giving orders see *infra*, IV, C, 3, b.

Warning and instructing servant see *infra*, IV, D.

Warning servants of changes in methods of work see *infra*, IV, D, 2, a.

14. Central R. Co. *v.* Keegan, 160 U. S. 259, 16 S. Ct. 269, 40 L. ed. 418.

That another method of work would have been safer does not of itself show negligence. Conway *v.* Hannibal, etc., R. Co., 24 Mo. App. 235.

and the law does not require him to oversee and supervise the details of the work.[15] He must, however, take such reasonable precautions as the circumstances demand to protect his servants from injury,[16] and will be held liable for injuries resulting from his failure to give such reasonable signals and warnings to a

The adoption of a dangerous method of work, where other and safer methods might have been adopted, is actionable negligence. Rickhoff *v.* Heckman, 3 Silv. Sup. (N. Y.) 563, 7 N. Y. Suppl. 471.

Evidence admissible to show that safer methods might have been adopted see Fogus *v.* Chicago, etc., R. Co., 50 Mo. App. 250.

15. *Indiana.*— Dill *v.* Marmon, 164 Ind. 507, 73 N. E. 67 [*affirming* (App. 1904) 71 N. E. 669].

Maine.— Stewart *v.* International Paper Co., 96 Me. 30, 51 Atl. 237, holding that the ordinary use of suitable appliances may be left to competent servants with no further attention from master.

Minnesota.— Eicheler *v.* Hanggi, 40 Minn. 263, 41 N. W. 975, not required to attend to the regulation of those parts of a machine which necessarily have to be adjusted during use.

New York.— O'Connall *v.* Thompson-Starrett Co., 72 N. Y. App. Div. 47, 76 N. Y. Suppl. 296.

Pennsylvania.—Durst *v.* Carnegie Steel Co., 173 Pa. St. 162, 33 Atl. 1102.

Washington.— Anderson *v.* Oregon R., etc., Co., 28 Wash. 467, 68 Pac. 863.

See 34 Cent. Dig. tit. "Master and Servant," § 266.

16. *Connecticut.*— Wilson *v.* Willimantic Linen Co., 50 Conn. 433, 47 Am. Rep. 653.

Illinois.— Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 109; Brookside Coal Min. Co. *v.* Dolph, 101 Ill. App. 169; Decatur Cereal Mill Co. *v.* Boland, 95 Ill. App. 601.

Iowa.— Collingwood *v.* Illinois, etc., Fuel Co., 125 Iowa 537, 101 N. W. 283.

Kentucky.— Louisville, etc., R. Co. *v.* Lowe, 80 S. W. 768, 25 Ky. L. Rep. 2317, 65 L. R. A. 122; Louisville, etc., R. Co. *v.* Wallingford, 22 S. W. 439, 15 Ky. L. Rep. 170.

Massachusetts.— Crowley *v.* Cutting, 165 Mass. 436, 43 N. E. 197.

Michigan.— Swoboda *v.* Ward, 40 Mich. 420.

Missouri.— Browning *v.* Wabash Western R. Co., 124 Mo. 55, 27 S. W. 644; Williams *v.* Missouri Pac. R. Co., 109 Mo. 475, 18 S. W. 1098; Barry *v.* Hannibal, etc., R. Co., 98 Mo. 62, 11 S. W. 308, 14 Am. St. Rep. 610; Claybaugh *v.* Kansas City, etc., R. Co., 56 Mo. App. 630.

Nebraska.— O'Neill *v.* Chicago, etc., R. Co., 62 Nebr. 358, 86 N. W. 1098; Union Pac. R. Co. *v.* O'Hern, 24 Nebr. 775, 40 N. W. 293.

New York.— Fleming *v.* Tuttle, 98 N. Y. App. Div. 222, 90 N. Y. Suppl. 661.

Ohio.— Lake Shore, etc., R. Co. *v.* Lavalley, 36 Ohio St. 221.

Oregon.— Anderson *v.* Bennett, 16 Oreg. 515, 19 Pac. 765, 8 Am. St. Rep. 311.

Texas.— Galveston, etc., R. Co. *v.* Norris, (Civ. App. 1894) 29 S. W. 950; Texas, etc., R. Co. *v.* French, (Civ. App. 1893) 22 S. W. 866.

Utah.— Pool *v.* Southern Pac. Co., 20 Utah 210, 58 Pac. 326.

Virginia.— Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827.

United States.— Southern R. Co. *v.* Craig, 113 Fed. 76, 51 C. C. A. 63; Red River Line *v.* Cheatham, 60 Fed. 517, 9 C. C. A. 124 [*reversing* 56 Fed. 248]; Southern Pac. Co. *v.* Lafferty, 57 Fed. 536, 6 C. C. A. 474; Cleveland, etc., R. Co. *v.* Brown, 56 Fed. 804, 6 C. C. A. 142; Clowes *v.* The Frank and Willie, 45 Fed. 494; Shumacher *v.* St. Louis, etc., R. Co., 39 Fed. 174.

Canada.— Webster *v.* Foley, 21 Can. Sup. Ct. 580.

See 34 Cent. Dig. tit. "Master and Servant," §§ 269, 272, 273.

A master engaged in a dangerous business is charged with the duty, not only of furnishing reasonably safe appliances for his servants to use, but also of correcting a habitual abuse on non-use of such appliances, or of discharging the servant who has offended. Brookside Coal Min. Co. *v.* Dolph, 101 Ill. App. 169.

A master who uses complex machinery should take such precautionary measures as are usual and customary with careful and prudent men to protect his servants from dangers arising from such machinery. Swoboda *v.* Ward, 40 Mich. 420.

Where a master places his servant in a position of unusual danger, he must adopt every reasonable precaution to avoid injury to such servant. Claybaugh *v.* Kansas City, etc., R. Co., 56 Mo. App. 630.

Servant has right to assume that master has taken ordinary precautions.— See O'Neill *v.* Chicago, etc., R. Co., 62 Nebr. 358, 86 N. W. 1098.

Where several methods of work are reasonably adequate for the purpose intended to be subserved, the courts cannot dictate a choice between them. Norfolk, etc., R. Co. *v.* Cromer, 101 Va. 667, 44 S. E. 898.

In the following cases the facts were held not to show negligence: Morris *v.* Winchester Repeating Arms Co., 73 Conn. 680, 49 Atl. 180; Terre Haute, etc., R. Co. *v.* Leeper, 60 Ill. App. 194 [*affirmed* in 162 Ill. 215, 44 N. E. 492]; Chicago, etc., R. Co. *v.* McDonald, 21 Ill. App. 409; Bedford Belt R. Co. *v.* Brown, 142 Ind. 659, 42 N. E. 359; Henry *v.* Brackenridge Lumber Co., 48 La. Ann. 950, 20 So. 221; Illinois Cent. R. Co. *v.* Bowles, 71 Miss. 1003, 15 So. 138; Loring *v.* Kansas City, etc., R. Co., 128 Mo. 349, 31 S. W. 6; Smith *v.* Missouri Pac. R. Co., 113 Mo. 70, 20 S. W. 896; Relyea *v.* Kansas City, etc., R. Co., 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817; Steffen *v.* Mayer, 96 Mo. 420, 9 S. W. 630; Stephens

servant in a dangerous position as a reasonably prudent man would deem necessary.[17] So too if a master directs a servant to do certain work in a manner not reasonably safe, and the performance of the work in the manner directed is the proximate cause of injury to the servant, the master is guilty of actionable negligence.[18]

(II) *STATUTES REGULATING THE OPERATION OF RAILROADS.*[19] In a number

v. Hannibal, etc., R. Co., 86 Mo. 221; Henry *v.* Staten Island R. Co., 81 N. Y. 373; Wright *v.* New York Cent. R. Co., 25 N. Y. 562 [*reversing* 28 Barb. 80]; Carr *v.* North River Constr. Co., 48 Hun (N. Y.) 266; Smith *v.* Bispham, 52 N. Y. Super. Ct. 33; Harris *v.* Balfour Quarry Co., 131 N. C. 553, 42 S. E. 973; Hahn *v.* Smith, 6 Pa. Co. Ct. 207; Baldwin *v.* Pennsylvania R. Co., 2 Lanc. Bar (Pa.) Sept. 10, 1870; International, etc., R. Co. *v.* Arias, 10 Tex. Civ. App. 190, 30 S. W. 446; Roytio *v.* Litchfield, 113 Fed. 240, 51 C. C. A. 197; Finalyson *v.* Utica Min., etc., Co., 67 Fed. 507, 14 C. C. A. 492; Johnston *v.* Canadian Pac. R. Co., 50 Fed. 886; Naylor *v.* New York Cent., etc., R. Co., 33 Fed. 801.

17. *Illinois.*— Toledo, etc., R. Co. *v.* O'Connor, 77 Ill. 391.

Indiana.— Louisville, etc., R. Co. *v.* Hanning, 131 Ind. 528, 31 N. E. 187, 31 Am. St. Rep. 443.

Iowa.— Kelley *v.* Chicago, etc., R. Co., 187 Iowa 387, 92 N. W. 45.

Kansas.— Coffeyville Vitrified Brick, etc., Co. *v.* Shanks, 69 Kan. 306, 76 Pac. 856.

Kentucky.— Illinois Cent. R. Co. *v.* McIntosh, 80 S. W. 496, 26 Ky. L. Rep. 14, 81 S. W. 270, 26 Ky. L. Rep. 347; Illinois Cent. R. Co. *v.* Jones, 80 S. W. 484, 26 Ky. L. Rep. 31; Southern R. Co. *v.* Otis, 78 S. W. 480, 25 Ky. L. Rep. 1686; Louisville, etc., R. Co. *v.* Lowe, (1902) 66 S. W. 736; Cincinnati, etc., R. Co. *v.* Barber, 31 S. W. 482, 17 Ky. L. Rep. 424.

Louisiana.— Lindsey *v.* Tioga Lumber Co., 108 La. 468, 32 So. 464, 92 Am. St. Rep. 384.

Missouri.— Reagan *v.* St. Louis, etc., R. Co., 93 Mo. 348, 6 S. W. 371, 3 Am. St. Rep. 542.

New York.— Aleckson *v.* Erie R. Co., 101 N. Y. App. Div. 395, 91 N. Y. Suppl. 1029; De Vau *v.* Pennsylvania, etc., Canal, etc., Co., 7 N. Y. Suppl. 692.

North Carolina.— Peoples *v.* North Carolina R. Co., 137 N. C. 96, 49 S. E. 87.

Ohio.— Pennsylvania Co. *v.* Mahoney, 22 Ohio Cir. Ct. 469, 12 Ohio Cir. Dec. 366; Andrews *v.* Toledo, etc., R. Co., 19 Ohio Cir. Ct. 699, 8 Ohio Cir. Dec. 584.

Texas.— Texas, etc., R. Co. *v.* Mallon, 65 Tex. 115; International, etc., R. Co. *v.* Gray, 65 Tex. 32; International, etc., R. Co. *v.* Jacobs, (Civ. App. 1904) 84 S. W. 288; Galveston, etc., R. Co. *v.* Quay, 27 Tex. Civ. App. 516, 66 S. W. 219.

Virginia.— Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827.

Washington.— Northern Pac. R. Co. *v.* O'Brien, 1 Wash. 599, 21 Pac. 32.

See 34 Cent. Dig. tit. "Master and Servant," § 270.

Signals must be shown to be feasible and useful.— Atchison, etc., R. Co. *v.* Carruthers, 56 Kan. 309, 43 Pac. 230. See also Crowe *v.* New York Cent., etc., R. Co., 70 Hun (N. Y.) 37, 23 N. Y. Suppl. 1100, where it was held that a railroad company is not negligent in not requiring lights on all moving cars in its yard, as it would require so many men and lanterns and so much time as to be impracticable. And see Aerkfetz *v.* Humphreys, 145 U. S. 418, 12 S. Ct. 835, 36 L. ed. 758.

Negligence not presumed from absence of telltales see Hollingsworth *v.* Chicago, etc., R. Co., 160 Ind. 259, 65 N. E. 750.

The use of switches without lights is not negligence, unless it is the common and uniform practice to have such lights, and the switchmen have a right to expect them. Grant *v.* Union Pac. R. Co., 45 Fed. 673.

Failure to maintain signal at crossing of another railroad is not negligence, unless such signal is shown to be necessary. Cleveland, etc., R. Co. *v.* McLaughlin, 56 Ill. App. 53.

Signals at snow banks along railroad not required see Brown *v.* Chicago, etc., R. Co., 69 Iowa 161, 28 N. W. 487.

No duty to warn men on hand-car of situation of section men at work on track see Brunell *v.* Southern Pac. Co., 34 Oreg. 256, 56 Pac. 129.

Where a brakeman was fully aware of the duties and dangers of his employment, it was not negligence in the railroad company to back an engine with which he was working toward a switch which he had just opened without giving signals, although other trains were passing and making loud noises; there being sufficient space about the switch where he could stand without danger from passing cars and locomotives. Greenwald *v.* Marquette, etc., R. Co., 49 Mich. 197, 13 N. W. 513.

Warning to train in advance.— Negligence in failing to give a train in advance special warning orders of a train following, which was dangerously made up, is not shown where it is not proved to have been the company's duty to notify such trains, and the dangerous make-up was not known. Driver *v.* Southern R. Co., 103 Va. 650, 49 S. E. 1000.

Facts held not to show negligence see Shepard *v.* Boston, etc., R. Co., 158 Mass. 174, 33 N. E. 508.

18. Jones *v.* American Warehouse Co., 137 N. C. 337, 49 S. E. 355, 138 N. C. 546, 51 S. E. 106.

19. **Negligence of co-employees under statute limiting fellow servant doctrine** see *infra*, IV, G, 4, b, (VIII).

of states statutes and ordinances have been enacted regulating the speed of trains, requiring signals or watchmen at crossings, and like precautions against accidents. Under such statutes and ordinances there are two lines of decisions, due in a large measure to their difference in terms. On the one hand it is held that they are not for the benefit of employees of the railroads, and that they cannot recover for injuries received by reason of non-compliance with the statutory requirements;[20] while on the other it is held that the fact that the person injured is a servant of the company is no excuse for the violation of the statute or ordinance.[21] A statute requiring signals upon the approach of a train to a public road crossing has no bearing upon an action for injuries to a brakeman by coming in contact with a highway bridge across the railroad track, and it is error to consider it.[22]

(III) *Degree of Care Required.* Such reasonable care is required of the master in the methods of work adopted by him as is commensurate with the danger to be reasonably apprehended, and as reasonable and prudent men would exercise under similar circumstances.[23]

(IV) *Delegation of Duty.*[24] There is some conflict of authority with regard to the effect of a master's delegating to a servant or agent his duty of providing reasonably safe methods of work. In some cases it is held that he cannot delegate this duty so as to relieve himself of responsibility for injuries caused by the negligence of his agent;[25] while in others it is held that where the master has employed a competent and experienced superintendent or foreman, and has furnished the proper and usual appliances for the performance of the

20. Evans *v.* Atlantic, etc., R. Co., 62 Mo. 49 (construing Wagner St. p. 310, par. 38). Haley *v.* Mobile, etc., R. Co., 7 Baxt. (Tenn.) 239; Louisville, etc., R. Co. *v.* Robertson, 9 Heisk. (Tenn.) 276 (both construing Code, § 1166); Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 3 S. Ct. 322, 27 L. ed. 1003 (construing W. Va. St. (1873) c. 88, § 31); Kansas City, etc., R. Co. *v.* Kirksey, 60 Fed. 999, 9 C. C. A. 321 (ordinance).

21. *Georgia.*—Central R., etc., Co. *v.* Brantley, 93 Ga. 259, 20 S. E. 98.

Illinois.— St. Louis, etc., R. Co. *v.* Eggman, 161 Ill. 155, 43 N. E. 620 [*affirming* 60 Ill. App. 291]; Illinois Cent. R. Co. *v.* Gilbert, 157 Ill. 354, 41 N. E. 724; Toledo, etc., R. Co. *v.* O'Connor, 77 Ill. 391.

Iowa.— Tobey *v.* Burlington, etc., R. Co., 94 Iowa 256, 62 N. W. 761, 33 L. R. A. 496.

Kentucky.— Illinois Cent. R. Co. *v.* McIntosh, 80 S. W. 496, 26 Ky. L. Rep. 14, 81 S. W. 270, 26 Ky. L. Rep. 347, construing St. (1903) §§ 786, 466.

Mississippi.— Dowell *v.* Vicksburg, etc., R. Co., 61 Miss. 519, construing Code (1880), § 1047.

Missouri.— Bluedorn *v.* Missouri Pac. R. Co., 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615.

United States.— Grant *v.* Union Pac. R. Co., 45 Fed. 673.

See 34 Cent. Dig. tit. "Master and Servant," § 265.

22. Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710, construing Code (1886), § 1144.

23. Bertha Zinc Co. *v.* Martin, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999. See also Middlesborough R. Co. *v.* Stallard, 72 S. W. 17, 24 Ky. L. Rep. 1666; Louisville, etc., R. Co. *v.* Simpson, 64 S. W. 750, 23 Ky. L. Rep. 1075; El Paso, etc., R. Co. *v.* McComas, (Tex. Civ. App. 1903) 72 S. W. 629; Missouri, etc., R. Co. *v.* Smith, 31 Tex. Civ. App. 332, 72 S. W. 418; Galveston, etc., R. Co. *v.* Courtney, 30 Tex. Civ. App. 544, 71 S. W. 307; St. Louis, etc., R. Co. *v.* Jacobson, 28 Tex. Civ. App. 150, 66 S. W. 1111. But see Louisville, etc., R. Co. *v.* Davis, 91 Ala. 487, 8 So. 552, where it was held that a railroad company, in putting a car on a repair track, whereon are other cars, under which employees are at work, should, to prevent a collision, exercise that degree of care which very careful and prudent men exercise in their own affairs.

All that can be required of a master is that he use reasonable care to avoid exposing his servant to extraordinary risks. Wonder *v.* Baltimore, etc., R. Co., 32 Md. 411, 3 Am. Rep. 143.

Work outside of line of employment.— Where a servant is employed in working outside of the regular line of his employment, greater care is required of the master toward him than if he had been working in his regular employment. Virginia Portland Cement Co. *v.* Luck, 103 Va. 427, 49 S. E. 577.

Facts held not to show negligence see Martin *v.* Chicago, etc., R. Co., 194 Ill. 138, 62 N. E. 599 [*reversing* 92 Ill. App. 133]; Dillon *v.* Iowa Cent. R. Co., 118 Iowa 645, 92 N. W. 855; Merchants', etc., Oil Co. *v.* Burns, 96 Tex. 573, 74 S. W. 758 [*reversing* (Civ. App. 1903) 72 S. W. 626].

24. **Delegation of duty generally** see *supra*, IV, A, 1, e.

25. Bessemer Land, etc., Co. *v.* Campbell, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17; Coffeyville Vitrified Brick, etc., Co. *v.* Shanks, 69 Kan. 306, 76 Pac. 856; East Jellico Coal

work, he is not liable for injuries resulting from the method adopted by such agent for doing the work.[26]

(v) *Customary Methods.* While the test of a master's liability is the exercise of reasonable and ordinary care for the safety of his servant, and not whether he has employed customary methods,[27] yet as a general rule a master will not be held responsible for injuries to a servant in the course of his employment where the usual and customary methods of work are employed,[28] provided such methods do not disregard the safety of the servant;[29] and where a servant, knowing the hazards of his employment as the business is conducted, is injured while engaged therein, he cannot recover merely on the ground that there was a safer mode in which the business might have been conducted, the adoption of

Co. *v.* Stewart, 68 S. W. 624, 24 Ky. L. Rep. 420.

26. Van Derhoff *v.* New York Cent., etc., R. Co., 88 N. Y. App. Div. 418, 84 N. Y. Suppl. 650. To the same effect see Murray *v.* Crimmins, 14 Misc. (N. Y.) 466, 35 N. Y. Suppl. 1023.

For duty delegated to a servant engaged in the work see Livengood *v.* Joplin-Galena Consol. Lead, etc., Co., 179 Mo. 229, 77 S. W. 1077.

27. Texas, etc., R. Co. *v.* Behymer, 189 U. S. 468, 23 S. Ct. 622, 47 L. ed. 905 [*affirming* 112 Fed. 35, 50 C. C. A. 106]. See also East Tennessee, etc., R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315, where it is said that testimony as to the customs or usages of railroads, without reference to whether they are wisely or badly managed, or to their particular location or surroundings, to peculiar circumstances which, in any given instance, would tend to illustrate the diligence or negligence of a company would be too vague, uncertain, and indefinite to aid a jury in determining in a case on trial whether the railroad company was diligent or negligent; the view was taken that the better and safer rule is to allow the jury to determine every case upon its own individual merits, and in the light of its own particular facts.

Appliances and methods of construction see *supra*, IV, B, 2, b, (II).

As affecting contributory negligence see *infra*, IV, F, 4, a, (I), (F).

Employment of fellow servants see *infra*, IV, G, 4, a, (VII), (H).

Giving orders see *infra*, IV, C, 3, b, (II).

Negligence of fellow servant performing duties of master see *infra*, IV, G, 4, a, (VII), (G).

Warning and instructing servant see *infra*, IV, D, 1, d.

Adoption of unusual method of work.— Negligence of the master is not shown by the mere fact that the method of doing work is unusual. It must also be more dangerous in itself than the ordinary one. Cunningham *v.* Ft. Pitt Bridge Works, 197 Pa. St. 625, 47 Atl. 846. See also Gorman *v.* Minneapolis, etc., R. Co., 117 Iowa 720, 90 N. W. 79. *Compare* Myers *v.* W. C. De Pauw Co., 138 Ind. 590, 38 N. E. 37.

28. *Illinois.*— Pennsylvania Co. *v.* Stoelke, 104 Ill. 201 (in which case the court held that it was error to refuse to allow an inquiry to be made as to the custom in defendant's yard concerning the running in of cars); Illinois Cent. R. Co. *v.* Neer, 31 Ill. App. 126 [*reversed* on other grounds in 138 Ill. 29, 27 N. E. 705].

Massachusetts.— Galvin *v.* Old Colony R. Co., 162 Mass. 533, 39 N. E. 186.

Michigan.— La Barre *v.* Grand Trunk Western R. Co., 133 Mich. 192, 94 N. W. 735; Carr *v.* St. Clair Tunnel Co., 131 Mich. 592, 92 N. W. 110; Schaible *v.* Lake Shore, etc., R. Co., 97 Mich. 318, 56 N. W. 565, 21 L. R. A. 660.

Minnesota.— Larson *v.* St. Paul, etc., R. Co., 43 Minn. 423, 45 N. W. 722, holding that proof of a general custom as to the running of extra trains is competent, as affecting the question whether it is negligence so to operate them.

Missouri.— Relyea *v.* Kansas City, etc., R. Co., 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817; Jackson *v.* Missouri Pac. R. Co., 104 Mo. 448, 16 S. W. 413.

Nebraska.— Weed *v.* Chicago, etc., R. Co., 5 Nebr. (Unoff.) 623, 99 N. W. 827.

New York.— Bookman *v.* Masterson, 83 N. Y. App. Div. 4, 81 N. Y. Suppl. 962; Davidson *v.* Cornell, 10 N. Y. Suppl. 521.

Ohio.— Memphis, etc., Packet Co. *v.* Britton, 25 Ohio Cir. Ct. 153; Lake George, etc., R. Co. *v.* Vogelson, 23 Ohio Cir. Ct. 361.

South Carolina.— Gideon *v.* Enoree Mfg. Co., 44 S. C. 442, 22 S. E. 598.

United States.— Olsen *v.* North Pac. Lumber Co., 119 Fed. 77, 55 C. C. A. 665; Hunt *v.* Hurd, 98 Fed. 683, 39 C. C. A. 226.

See 34 Cent. Dig. tit. "Master and Servant," § 271.

Compare Berg *v.* Chicago, etc., R. Co., 50 Wis. 419, 7 N. W. 347, where it was held that a custom that, in switching cars in a depot yard, it is not the duty of the company to have any one on the cars in motion to warn men at work in the yard will not relieve it of liability for injuries to a brakeman caused by a moving car, where there was a brakeman on the car who could have warned the trackman or stopped the car in time to avoid the injury.

29. Allen *v.* Burlington, etc., R. Co., 64 Iowa 94, 19 N. W. 870.

One is not relieved from the consequences of carelessness because no injury had resulted from former carelessness. Hennesey *v.* Bingham, 125 Cal. 627, 58 Pac. 200.

which would have prevented the injury.[30] On the other hand a servant has the right to rely upon the continued observance by the master of such methods of work and precautions as he has been accustomed to follow and observe,[31] even though they are not required by the printed rules of the master.[32] But where a servant is injured by reason of a violation of his duty, the fact that he and other employees of his class had been in the habit of so violating their duty, with the knowledge of, and in pursuance of a custom known to, the agents of the master, will not give a right of action.[33]

(VI) *KNOWLEDGE OF DANGER.*[34] In order to hold a master liable for injuries to a servant alleged to have been caused by the unsafe methods of work adopted by him, it must be shown that he had, or ought to have had, knowledge of the danger.[35]

(VII) *PROXIMATE CAUSE OF INJURY.* The master's methods of work must be shown to have been the proximate cause of the injury to warrant a recovery by his servant.[36]

b. Liability of Master Under Statutes Modifying Fellow Servant Doctrine[37] — (I) *IN GENERAL.* Under statutes modifying and limiting the fellow servant doctrine,[38] a master will be liable for injuries to a servant resulting from the negligence of a fellow servant, although the master has been guilty of no negligence in respect to his methods of work,[39] provided the servant could not, by

30. Degenhart *v.* Gent, 97 Ill. App. 145. See also Conway *v.* Hannibal, etc., R. Co., 24 Mo. App. 235.

Assumption of risk generally see *infra*, IV, E.

31. Lake Shore, etc., R. Co. *v.* Schultz, 19 Ohio Cir. Ct. 639, 9 Ohio Cir. Dec. 816.

32. Galveston, etc., R. Co. *v.* Collins, 24 Tex. Civ. App. 143, 57 S. W. 884.

33. Chattanooga Southern R. Co. *v.* Myers, 112 Ga. 237, 37 S. E. 439.

34. **Defects in appliances** see *supra*, IV, B, 7.

35. Stanley *v.* Richmond, etc., Extension Co., 72 Ga. 202; Hooper *v.* Snead Iron Works, 14 S. W. 542, 12 Ky. L. Rep. 483; Muster *v.* Chicago, etc., R. Co., 61 Wis. 325, 21 N. W. 223, 50 Am. Rep. 141.

Facts held sufficient to give notice see Cleveland, etc., R. Co. *v.* Zider, 61 Fed. 908, 10 C. C. A. 151.

36. *Iowa.*— Martin *v.* Chicago, etc., R. Co., 118 Iowa 148, 91 N. W. 1034, 96 Am. St. Rep. 371, 59 L. R. A. 698.

Missouri.— Lee *v.* Kansas City Gas Co., 91 Mo. App. 612.

South Carolina.— Glenn *v.* Columbia, etc., R. Co., 21 S. C. 466.

Texas.— Houston, etc., R. Co. *v.* Barrager, (1890) 14 S. W. 242.

Wisconsin.— Meier *v.* Morgan, 82 Wis. 289, 52 N. W. 174, 33 Am. St. Rep. 39. *Compare* Faerber *v.* T. B. Scott Lumber Co., 86 Wis. 226, 56 N. W. 745.

Canada.—Alexander *v.* Miles, 7 Ont. L. Rep. 103.

See 34 Cent. Dig. tit. "Master and Servant," § 275.

37. **Construction and operation of statutes** generally see *infra*, IV, G, 4, b.

Injury avoidable notwithstanding negligence see *infra*, IV, F, 2, a, (II), (C).

Proximate cause of injury see *infra*, II, B, 9.

Warning and instructing servant see *infra*, IV, D, 1, f.

38. **Statutory provisions limiting fellow servant doctrine** generally see *infra*, IV, G, 4, b.

39. *Alabama.*— Jones *v.* Alabama Mineral R. Co., 107 Ala. 400, 18 So. 30; Louisville, etc., R. Co. *v.* Baker, 106 Ala. 624, 17 So. 452 (failure of engineer to obey signal); Louisville, etc., R. Co. *v.* Davis, 91 Ala. 487, 8 So. 552.

Georgia.—Alabama Great Southern R. Co. *v.* Fulghum, 94 Ga. 571, 19 S. E. 981 (failure of conductor to stop train on signal); Northeastern R. Co. *v.* Barnett, 89 Ga. 399, 15 S. E. 492 (engineer's starting engine without awaiting signal); Central R., etc., Co. *v.* Dickinson, 82 Ga. 629, 10 S. E. 203 (sudden slacking of speed of train without awaiting signal).

Iowa.— Strong *v.* Iowa Cent. R. Co., 94 Iowa 380, 62 N. W. 799 (negligence suddenly and without notice to increase speed of engine, after it has been slowed on signal from brakeman about to couple it to a car, without his orders); Tobey *v.* Burlington, etc., R. Co., 94 Iowa 256, 62 N. W. 761, 33 L. R. A. 496; Lowe *v.* Chicago, etc., R. Co., 89 Iowa 420, 56 N. W. 519 (injury to brakeman uncoupling cars by sudden increase of speed, without his orders); Grannis *v.* Chicago, etc., R. Co., 81 Iowa 444, 46 N. W. 1067 (injury to servant from careless movement of engine); Hawley *v.* Chicago, etc., R. Co., 71 Iowa 717, 29 N. W. 787; Pringle *v.* Chicago, etc., R. Co., 64 Iowa 613, 21 N. W. 108; Farley *v.* Chicago, etc., R. Co., 56 Iowa 337, 9 N. W. 230; Lombard *v.* Chicago, etc., R. Co., 47 Iowa 494.

Kansas.— St. Louis, etc., R. Co. *v.* French, 56 Kan. 584, 44 Pac. 12 (brakeman injured by sudden and rapid movement of engine, without any signal to him); Kansas City, etc., R. Co. *v.* Murray, 55 Kan. 336, 40 Pac. 646 (brakeman injured by sudden and unsignaled lessening of speed); Atchison, etc.,

the exercise of ordinary care, have avoided the consequences to himself of such negligence, and provided further that he was not himself guilty of any contributory negligence.[40]

(II) *CUSTOMARY METHODS.* As a general rule it is not negligence in a fellow servant to follow the customary methods of work,[41] unless the circumstances are such as to render such methods dangerous.[42] On the other hand the master will be held liable for injuries to a servant caused by the negligence of a fellow servant in failing to observe the customary methods of work.[43]

(III) *PROXIMATE CAUSE OF INJURY.* Where the right of recovery is predicated upon the negligence of a fellow servant, such negligence must be the proximate cause of the injury.[44]

2. RULES[45] — a. Duty to Adopt and Promulgate — (I) *IN GENERAL.* Where a master is engaged in a complex or dangerous business he must adopt and promulgate such rules and regulations for the conduct of his business and the government of his servants in the discharge of their duties as will afford reasonable protection to them.[46] But no duty to adopt rules is imposed upon the

R. Co. *v.* Brassfield, 51 Kan. 167, 32 Pac. 814; Atchison, etc., R. Co. *v.* Koehler, 37 Kan. 463, 15 Pac. 567; Missouri Pac. R. Co. *v.* Mackey, 33 Kan. 298, 6 Pac. 291.

Minnesota.— Britton *v.* Northern Pac. R. Co., 47 Minn. 340, 50 N. W. 231, injury caused by unsignaled backing of engine upon hand-car, of which there was an unobstructed view.

Montana.— Criswell *v.* Montana Cent. R. Co., 17 Mont. 189, 42 Pac. 767, running train into yard at night without headlight, and without sending a flagman to see if the track was clear.

See 34 Cent. Dig. tit. "Master and Servant," §§ 276–280.

Violation of speed ordinance negeligence per se see Tobey *v.* Burlington, etc., R. Co., 94 Iowa 256, 62 N. W. 761, 33 L. R. A. 496.

Mistake of judgment.— A railroad company is not liable for a mistake of judgment of a conductor in applying the brakes so as to injure a brakeman, if he acted as an ordinarily prudent man would have done under like circumstances. Dunlavy *v.* Chicago, etc., R. Co., 66 Iowa 435, 23 N. W. 911.

The reversing of an engine in switching and making up a train is not negligence *per se.* Jackson *v.* Kansas City, etc., R. Co., 31 Kan. 761, 3 Pac. 501.

Duty of engineer on train following a hand-car see Nelling *v.* Chicago, etc., R. Co., 98 Iowa 554, 63 N. W. 568, 67 N. W. 404.

Facts held not to show negligence of fellow servant see Alabama Midland R. Co. *v.* McDonald, 112 Ala. 216, 20 So. 472; Louisville, etc., R. Co. *v.* Markee, 103 Ala. 160, 15 So. 511, 49 Am. St. Rep. 21; Alabama Great Southern R. Co. *v.* Richie, 99 Ala. 346, 12 So. 612; Hamilton *v.* Chicago, etc., R. Co., 93 Iowa 46, 61 N. W. 415; Gorman *v.* Minneapolis, etc., R. Co., 78 Iowa 509, 43 N. W. 303; Brady *v.* Burlington, etc., R. Co., 72 Iowa 53, 33 N. W. 360; Missouri Pac. R. Co. *v.* Haley, 25 Kan. 35.

40. Central R., etc., Co. *v.* Lanier, 83 Ga. 587, 10 S. E. 279.

41. Gorman *v.* Minneapolis, etc., R. Co., 78 Iowa 509, 43 N. W. 303.

42. Knott *v.* Dubuque, etc., R. Co., 84 Iowa 462, 51 N. W. 57, where it was held that a custom of an engineer to start his engine, after taking water, without warning to his fireman, whose duty it was to go on the tender and adjust the spout, did not apply if the fireman's position on the tender was rendered unusually perilous by the presence of coarse, slippery chunks of coal, or if the engine moved more suddenly than usual in such cases.

43. Romick *v.* Chicago, etc., R. Co., 62 Iowa 167, 17 N. W. 458; Moran *v.* Eastern R. Co., 48 Minn. 46, 50 N. W. 930.

44. East Tennessee, etc., R. Co. *v.* Reynolds, 93 Ga. 570, 20 S. E. 70; Gould *v.* Chicago, etc., R. Co., 66 Iowa 590, 24 N. W. 227; Lockwood *v.* Chicago, etc., R. Co., 55 Wis. 50, 12 N. W. 401. *Compare* Crowley *v.* Burlington, etc., R. Co., 65 Iowa 658, 20 N. W. 467, 22 N. W. 918.

45. **Proximate cause of injury** see *infra,* IV, C, 2, g.

46. *Alabama.*— Louisville, etc., R. Co. *v.* York, 128 Ala. 305, 30 So. 676.

California.— Daubert *v.* Western Meat Co., 135 Cal. 144, 67 Pac. 133.

Delaware.— Giordano *v.* Brandywine Granite Co., 3 Pennew. 423, 52 Atl. 332; Murphy *v.* Hughes, 1 Pennew. 250, 40 Atl. 187.

Georgia.— Little *v.* Southern R. Co., 120 Ga. 347, 47 S. E. 953, 102 Am. St. Rep. 104, 66 L. R. A. 509.

Illinois.— Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 109; Chicago, etc., R. Co. *v.* Taylor, 69 Ill. 461, 18 Am. Rep. 626; Chicago, etc., R. Co. *v.* George, 19 Ill. 510, 71 Am. Dec. 239; Chicago, etc., R. Co. *v.* Bell, 111 Ill. App. 280.

Iowa.— Cooper *v.* Iowa Cent. R. Co., 44 Iowa 134.

Maine.— Moran *v.* Rockland, etc., St. R. Co., 99 Me. 127, 58 Atl. 676.

Massachusetts.— Daley *v.* American Printing Co., 152 Mass. 581, 26 N. E. 135.

Minnesota.— Le Duc *v.* Northern Pac. R. Co., 92 Minn. 287, 100 N. W. 108; Wallin *v.* Eastern R. Co., 83 Minn. 149, 86 N. W. 76, 54 L. R. A. 481.

master where the business is neither complex nor extrahazardous;[47] where the

Missouri.— Reagan *v.* St. Louis, etc., R. Co., 93 Mo. 348, 6 S. W. 371, 3 Am. St. Rep. 542.

Montana.— Shaw *v.* New Year Gold Mines Co., 31 Mont. 138, 77 Pac. 515.

Nebraska.— Chicago, etc., R. Co. *v.* Oyster, 58 Nebr. 1, 78 N. W. 359.

New Hampshire.— Hill *v.* Boston, etc., R. Co., 72 N. H. 518, 57 Atl. 924.

New Jersey.— See Voss *v.* Delaware, etc., R. Co., 62 N. J. L. 59, 41 Atl. 224.

New York.— Doing *v.* New York, etc., R. Co., 151 N. Y. 579, 45 N. E. 1028 [*reversing* 73 Hun 270, 26 N. Y. Suppl. 405]; Morgan *v.* Hudson River Ore, etc., Co., 133 N. Y. 666, 31 N. E. 234 [*reversing* 15 N. Y. Suppl. 609]; Berrigan *v.* New York, etc., R. Co., 131 N. Y. 582, 30 N. E. 57 [*reversing* 14 N. Y. Suppl. 26]; Ford *v.* Lake Shore, etc., R. Co., 124 N. Y. 493, 26 N. E. 1101, 12 L. R. A. 454; Bushby *v.* New York, etc., R. Co., 107 N. Y. 374, 4 N. E. 407, 1 Am. St. Rep. 844; Abel *v.* Delaware, etc., Canal Co., 103 N. Y. 581, 9 N. E. 325, 57 Am. Rep. 773; Slater *v.* Jewett, 85 N. Y. 61, 39 Am. Rep. 627; Koszlowski *v.* American Locomotive Co., 96 N. Y. App. Div. 40, 89 N. Y. Suppl. 55; Smith *v.* Lidgerwood Mfg. Co., 56 N. Y. App. Div. 528, 67 N. Y. Suppl. 533; Tully *v.* New York, etc., Steamship Co., 10 N. Y. App. Div. 463, 42 N. Y. Suppl. 29; Warn *v.* New York Cent., etc., R. Co., 80 Hun 71, 29 N. Y. Suppl. 897; Bohn *v.* Havemeyer, 46 Hun 557 [*affirmed* in 114 N. Y. 296, 21 N. E. 402]; Haskin *v.* New York Cent., etc., R. Co., 65 Barb. 129 [*affirmed* in 56 N. Y. 608]; Mulvaney *v.* Brooklyn City R. Co., 1 Misc. 425, 21 N. Y. Suppl. 427 [*affirmed* in 142 N. Y. 651, 37 N. E. 560].

Ohio.— Lake Shore, etc., R. Co. *v.* Murphy, 50 Ohio St. 135, 33 N. E. 403; Dick *v.* Indianapolis, etc., R. Co., 38 Ohio St. 389; Hill *v.* Lake Shore, etc., R. Co., 22 Ohio Cir. Ct. 291, 12 Ohio Cir. Dec. 241; Lake Shore, etc., R. Co. *v.* Topliff, 18 Ohio Cir. Ct. 709, 6 Ohio Cir. Dec. 234.

Pennsylvania.— Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. Rep. 631; O'Rourke *v.* Alphons Custodis Chimney Constr. Co., 21 Pa. Super. Ct. 52.

Texas.— International, etc., R. Co. *v.* Hall, 78 Tex. 657, 15 S. W. 108; Texas, etc., R. Co. *v.* Cumpston, 15 Tex. Civ. App. 493, 40 S. W. 546.

Utah.— Johnson *v.* Union Pac. Coal Co., 28 Utah 46, 76 Pac. 1089, 67 L. R. A. 506; Boyle *v.* Union Pac. R. Co., 25 Utah 420, 71 Pac. 988; Pool *v.* Southern Pac. Co., 20 Utah 210, 58 Pac. 326.

Virginia.— Wright *v.* Southern R. Co., 101 Va. 36, 42 S. E. 913; Norfolk, etc., R. Co. *v.* Graham, 96 Va. 430, 31 S. E. 604; Moore Lime Co. *v.* Richardson, 95 Va. 326, 28 S. E. 334, 64 Am. St. Rep. 785.

West Virginia.— Madden *v.* Chesapeake, etc., R. Co., 28 W. Va. 610, 57 Am. Rep. 695.

United States.— Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87.

England.— Vose *v.* Lancashire, etc., R. Co., 2 H. & N. 728, 4 Jur. N. S. 364, 27 L. J. Exch. 249, 6 Wkly. Rep. 295.

Canada.— Parent *v.* Schloman, 12 Quebec Super. Ct. 283.

See 34 Cent. Dig. tit. "Master and Servant," § 283.

Mere failure to adopt rules is not proof of negligence, unless it appears that the master, in the exercise of reasonable care, should have foreseen the necessity for such precaution. Shaw *v.* New Year Gold Mines Co., 31 Mont. 138, 77 Pac. 515. See also Dooling *v.* Deutscher Verein, 97 N. Y. App. Div. 39, 89 N. Y. Suppl. 580; Sanner *v.* Atchison, etc., R. Co., 17 Tex. Civ. App. 337, 43 S. W. 533; Moore Lime Co. *v.* Richardson, 95 Va. 326, 28 S. E. 334, 64 Am. St. Rep. 785.

Failure to make rules which might have prevented an accident is not negligence, where the accident was occasioned by circumstances which could not have been reasonably anticipated, and where a compliance with the general body of rules and the exercise of ordinary care and prudence by the servant would have avoided it. Berrigan *v.* New York, etc., R. Co., 131 N. Y. 582, 30 N. E. 57 [*reversing* 14 N. Y. Suppl. 26]. See also Koszlowski *v.* American Locomotive Co., 96 N. Y. App. Div. 40, 89 N. Y. Suppl. 55; Merchants', etc., Oil Co. *v.* Burns, 96 Tex. 573, 74 S. W. 758 [*reversing* (Civ. App. 1903) 72 S. W. 626].

Where the adoption of a rule is impracticable, the failure to adopt is not negligence. Haskin *v.* New York Cent., etc., R. Co., 65 Barb. (N. Y.) 129 [*affirmed* in 56 N. Y. 608].

Where rules could not have prevented the injury, the failure of the master to adopt them is not negligence. Carr *v.* North River Constr. Co., 48 Hun (N. Y.) 266.

Operation of trains during snowstorms.— A railroad company is not negligent in failing to make rules for the management of trains during severe and long-continued snowstorms merely because it has made a special rule as to their operation in foggy weather. Niles *v.* New York Cent., etc., R. Co., 14 N. Y. App. Div. 58, 43 N. Y. Suppl. 751.

Negligence question for jury see Tully *v.* New York, etc., Steamship Co., 10 N. Y. App. Div. 463, 42 N. Y. Suppl. 29.

47. *Delaware.*— Punkowski *v.* New Castle Leather Co., 4 Pennew. 544, 57 Atl. 559.

Minnesota.— Boyer *v.* Eastern R. Co., 87 Minn. 367, 92 N. W. 326.

New York.— Wagner *v.* New York, etc., R. Co., 76 N. Y. App. Div. 552, 78 N. Y. Suppl. 696; Forey *v.* Syracuse, etc., R. Co., 12 N. Y. St. 198.

Oregon.— Johnson *v.* Portland Stone Co., 40 Oreg. 436, 67 Pac. 1013, 68 Pac. 425; Wagner *v.* Portland, 40 Oreg. 389, 60 Pac. 985, 67 Pac. 300.

Texas.— Texas, etc., R. Co. *v.* Echols, 87 Tex. 339, 27 S. W. 60, 28 S. W. 517.

Virginia.— Norfolk, etc., R. Co. *v.* Graham, 96 Va. 430, 31 S. E. 604.

See 34 Cent. Dig. tit. "Master and Servant," § 283.

dangers incident to the work are obvious,[48] or of common knowledge and fully understood by the servants,[49] or where the practice actually in force renders a rule unnecessary;[50] nor is the master bound to make rules as to how his servants shall conduct themselves outside the scope of their employment, nor as to how business shall be carried on or any act done which is not carried on or done with his knowledge and permission.[51]

(II) *EFFECT OF CUSTOM OF OTHERS.* While the adoption or non-adoption of rules by others in the same line of business is not conclusive as to the duty of the master in this respect,[52] yet as a rule his adoption of such regulations as are in general use will relieve him from liability;[53] and where there is no evidence that any rules relating to the business had been adopted by others, or were necessary or practicable, he is not chargeable with negligence in failing to adopt any.[54] On the other hand, if persons of ordinary prudence, engaged in the same line of business, have found it necessary to provide rules for its management, the failure of a master to prescribe such rules is evidence of negligence.[55]

b. Duty to Enforce Obedience.[56] It is the duty of the master to use reasonable care to see that the rules adopted by him for the safety of his servants are complied with, and if he fails to do so he will be responsible for injuries resulting from non-compliance therewith.[57]

c. Reasonableness and Sufficiency.[58] The presumption is that rules which the master has adopted for the government of his servants, to prevent injuries to them, are reasonable and sufficient.[59] But to require obedience a rule must be

48. Voss *v.* Delaware, etc., R. Co., 62 N. J. L. 59, 41 Atl. 224; Austin *v.* Fisher Tanning Co., 96 N. Y. App. Div. 550, 89 N. Y. Suppl. 137; Norfolk, etc., R. Co. *v.* Graham, 96 Va. 430, 31 S. E. 604.

49. Fritz *v.* Salt Lake, etc., Gas, etc., Co., 18 Utah 493, 56 Pac. 90.

50. Rutledge *v.* Missouri Pac. R. Co., 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327; Kudik *v.* Lehigh Valley R. Co., 78 Hun (N. Y.) 492, 29 N. Y. Suppl. 533.

51. Moran *v.* Rockland, etc., St. R. Co., 99 Me. 127, 58 Atl. 676.

52. Hannibal, etc., R. Co. *v.* Kanaley, 39 Kan. 1, 17 Pac. 324; Abel *v.* Delaware, etc., Canal Co., 128 N. Y. 662, 28 N. E. 663; Eastwood *v.* Retsof Min. Co., 86 Hun (N. Y.) 91, 34 N. Y. Suppl. 196 [*affirmed* in 152 N. Y. 561, 47 N. E. 1106].

Question for jury see Eastwood *v.* Retsof Min. Co., 86 Hun (N. Y.) 91, 34 N. Y. Suppl. 196 [*affirmed* in 152 N. Y. 561, 47 N. E. 1106].

53. Seccombe *v.* Detroit Electric R. Co., 133 Mich. 170, 94 N. W. 747.

54. Ely *v.* New York Cent., etc., R. Co., 88 Hun (N. Y.) 323, 34 N. Y. Suppl. 739; Larow *v.* New York, etc., R. Co., 61 Hun (N. Y.) 11, 15 N. Y. Suppl. 384.

55. Hill *v.* Boston, etc., R. Co., 72 N. H. 518, 57 Atl. 924.

Custom of providing rules must be a general one.— St. Louis, etc., R. Co. *v.* Nelson, 20 Tex. Civ. App. 536, 49 S. W. 710.

56. Customary violation see *infra*, IV, C, 2, e.

57. *Colorado.* — Silver Cord Combination Min. Co. *v.* McDonald, 14 Colo. 191, 23 Pac. 346.

Connecticut.— Nolan *v.* New York, etc., R. Co., 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305; Gerrish *v.* New Haven Ice Co., 63 Conn. 9, 27 Atl. 235.

Illinois.— Chicago, etc., R. Co. *v.* Taylor, 69 Ill. 461, 18 Am. Rep. 626.

Indiana.— Ohio, etc., R. Co. *v.* Collarn, 73 Ind. 261, 38 Am. Rep. 134.

Minnesota.— Le Duc *v.* Northern Pac. R. Co., 92 Minn. 287, 100 N. W. 108.

Missouri.— Rinard *v.* Omaha, etc., R. Co., 164 Mo. 270, 64 S. W. 124; Rutledge *v.* Missouri Pac. R. Co., 110 Mo. 312, 19 S. W. 38, 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327.

New York.— Whittaker *v.* Delaware, etc., Canal Co., 126 N. Y. 544, 27 N. E. 1042; Warn *v.* New York Cent., etc., R. Co., 80 Hun 71, 29 N. Y. Suppl. 897 [*affirmed* in 157 N. Y. 109, 51 N. E. 744]. *Compare* Slater *v.* Jewett, 85 N. Y. 61, 39 Am. Rep. 627.

Tennessee.— Louisville, etc., R. Co. *v.* Reagan, 96 Tenn. 128, 33 S. W. 1050.

Texas.— International, etc., R. Co. *v.* Hinzie, 82 Tex. 623, 18 S. W. 681; Missouri, etc., R. Co. *v.* Jones, (Civ. App. 1903) 75 S. W. 53; Missouri, etc., R. Co. *v.* Goss, 31 Tex. Civ. App. 300, 72 S. W. 94; Texas, etc., R. Co. *v.* Eberhart, (Civ. App. 1897) 40 S. W. 1060.

Utah.— Konold *v.* Rio Grande Western R. Co., 21 Utah 379, 60 Pac. 1021, 81 Am. St. Rep. 693.

West Virginia.— Criswell *v.* Pittsburgh, etc., R. Co., 30 W. Va. 798, 6 S. E. 31; Madden *v.* Chesapeake, etc., R. Co., 28 W. Va. 610, 57 Am. Rep. 695.

See 34 Cent. Dig. tit. "Master and Servant," § 284.

58. Assumption of risk see *infra*, IV, E, 3.

Proximate cause of injury see *infra*, IV, C, 2, g.

59. Rex *v.* Pullman's Palace Car Co., 2 Marv. (Del.) 337, 43 Atl. 246; Little Rock,

practicable and possible of performance;[60] and where, under the guise of rules, a master seeks to evade duties imposed upon him by law, the servant is not bound thereby.[61] To be sufficient rules must be specific and definite,[62] and must afford reasonable protection to the servants.[63]

d. Notice to Servant.[64] To relieve the master of liability for injuries to a servant resulting from the disregard of the rules adopted by him for the management of his business and the government of his servants, the servant must have had knowledge, actual or constructive, of the rule.[65] But knowledge, however acquired, is sufficient to bind the servant, although the master has failed to give

etc., R. Co. *v.* Barry, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349.

For rules held reasonable and sufficient see Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176 (rule requiring servants to inspect tools, machinery, and cars before use); Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545, 10 So. 283 (forbidding servants to go between moving cars to uncouple); Kansas City, etc., R. Co. *v.* Hammond, 58 Ark. 324, 24 S. W. 723 (rule as to signals in case of obstructions on spur track); Nolan *v.* New York, etc., R. Co., 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305 (holding that rules, substantially the same as those of ninety per cent of the railroads in the country, are sufficient); Terre Haute, etc., R. Co. *v.* Becker, 146 Ind. 202, 45 N. E. 96 (rule as to movement of wild trains); Hannibal, etc., R. Co. *v.* Kanaley, 39 Kan. 1, 17 Pac. 324 (rules as to movement of trains); Whalen *v.* Michigan Cent. R. Co., 114 Mich. 512, 72 N. W. 323 (rule regulating approach of train to station); Peterson *v.* Chicago, etc., R. Co., 67 Mich. 102, 34 N. W. 260, 11 Am. St. Rep. 564 (rule for protection of car-inspectors and repairmen); Scott *v.* Eastern R. Co., 90 Minn. 135, 95 N. W. 892 (rule requiring brakemen to inspect steps of cars, and conductors to see that the duty is performed); Richmond, etc., R. Co. *v.* Rush, 71 Miss. 987, 15 So. 133 (rule as to coupling); Francis *v.* Kansas City, etc., R. Co., 110 Mo. 387, 19 S. W. 935 (rule forbidding switchmen from standing on track and jumping on footboard of moving engine); Corcoran *v.* Delaware, etc., R. Co., 126 N. Y. 673, 27 N. E. 1022 (rule for protection of car-repairers); Wright *v.* New York Cent. R. Co., 25 N. Y. 562 (rule regulating passing of trains); Lane *v.* New York Cent., etc., R. Co., 93 N. Y. App. Div. 40, 86 N. Y. Suppl. 947 (rule as to clearing out ash-pans of locomotives); Simpson *v.* Central Vermont R. Co., 5 N. Y. App. Div. 614, 39 N. Y. Suppl. 464 (rules as to passing of trains); Flannagan *v.* Chicago, etc., R. Co., 50 Wis. 462, 7 N. W. 337 (sending cars to shop for inspection); Little Rock, etc., R. Co. *v.* Barry, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349 (rules as to sending out flagmen, and placing torpedoes, in case of unusual stoppages).

60. Rules held unreasonable.— *California.* — Holmes *v.* Southern Pac. Co., 120 Cal. 357, 52 Pac. 652.

Illinois.— Junction Min. Co. *v.* Ench, 111 Ill. App. 346.

Iowa.— Strong *v.* Iowa Cent. R. Co., 94 Iowa 380, 62 N. W. 799.

Kentucky.— Alexander *v.* Louisville, etc., R. Co., 83 Ky. 589.

Michigan.— Eastman *v.* Lake Shore, etc., R. Co., 101 Mich. 597, 60 N. W. 309.

Minnesota.— Le Duc *v.* Northern Pac. R. Co., 92 Minn. 287, 100 N. W. 108.

New York.— Carr *v.* North River Constr. Co., 48 Hun 266.

North Carolina.— Willis *v.* Atlantic, etc., R. Co., 122 N. C. 905, 29 S. E. 941.

Texas.— Gulf, etc., R. Co. *v.* McMahan, 6 Tex. Civ. App. 601, 26 S W. 159; Bonner *v.* Moore, 3 Tex. Civ. App. 416, 22 S. W. 272.

Reasonableness of rules a question of law see Little Rock, etc., R. Co. *v.* Barry, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349.

61. St. Louis Consol. Coal Co. *v.* Lundak, 196 Ill. 594, 63 N. E. 1079 [*affirming* 97 Ill. App. 109].

62. Chicago, etc., R. Co. *v.* McGraw, 22 Colo. 363, 43 Pac. 383; Evansville, etc., R. Co. *v.* Holcomb, 9 Ind. App. 198, 36 N. E. 39.

63. *Alabama.*— Louisville, etc., R. Co. *v.* York, 128 Ala. 305, 30 So. 676.

Indiana.— Chicago, etc., R. Co. *v.* Fry, 131 Ind. 319, 28 N. E. 989.

New Hampshire.— See Wallace *v.* Boston, etc., R. Co., 72 N. H. 504, 57 Atl. 913.

New York.— Dowd *v.* New York, etc., R. Co., 170 N. Y. 459, 63 N. E. 541.

United States.— Little Rock, etc., R. Co. *v.* Barry, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87.

See 34 Cent. Dig. tit. "Master and Servant," § 285.

64. Concurrent negligence of master and fellow servant see *infra*, IV, G, 4, a, (IV).

Notice as affecting contributory negligence see *infra*, IV, F, 2, a, (III).

65. *California.*— Daubert *v.* Western Meat Co., 135 Cal. 144, 67 Pac. 133, in which a statement by the foreman that a certain rule existed was held insufficient to charge the servant with knowledge of it.

Georgia.— Little *v.* Southern R. Co., 120 Ga. 347, 47 S. E. 953, 102 Am. St. Rep. 104, 66 L. R. A. 509; Georgia Pac. R. Co. *v.* Dooley, 86 Ga. 294, 12 S. E. 923, 12 L. R. A. 342 (in which the servant's attention was not called to the rule otherwise than by giving him a rule book containing it); Central R., etc., Co. *v* Ryles, 84 Ga. 420, 11 S. E. 499; Carroll *v.* East Tennessee, etc., R. Co., 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214.

Illinois.— Himrod Coal Co. *v.* Clark, 197

him notice of its existence, or to afford him a reasonable opportunity to ascertain its terms.[66]

e. Waiver and Customary Violation[67] — (i) *In General.* When the rules and regulations established by the master are habitually disobeyed, with the knowledge or express consent of the master,[68] or have been disregarded without his express consent in such a manner and for such a length of time as to raise a presumption that he must have become aware of such habitual disregard, and approved the same,[69] such rules and regulations will be regarded as waived.[70]

Ill. 514, 64 N. E. 282 [*affirming* 99 Ill. App. 332], in which a servant who could not read was held not to be bound by a printed rule posted in the mine.

Nebraska.— Chicago, etc., R. Co. *v.* Oyster, 58 Nebr. 1, 78 N. W. 359.

New Jersey.— Lehigh Valley R. Co. *v.* Snyder, 56 N. J. L. 326, 28 Atl. 376.

New York.— Daley *v.* Brown, 45 N. Y. App. Div. 428, 60 N. Y. Suppl. 840; Wooden *v.* Western New York, etc., R. Co., 18 N. Y. Suppl. 768.

See 34 Cent. Dig. tit. "Master and Servant," § 286.

Duty of conductor to acquaint himself with rules see Alexander *v.* Louisville, etc., R. Co., 83 Ky. 589.

Necessity of notice to fellow servant.— To relieve a master of liability for injuries to a servant, caused by the negligence of a fellow servant, it is essential that such rule must have been brought to the notice of such fellow servant. Smith *v.* New York Cent., etc., R. Co., 9 N. Y. St. 612.

Temporary and special change of time-table need not be brought to the notice of all employees to be governed thereby. Slater *v.* Jewett, 85 N. Y. 61, 39 Am. Rep. 627.

66. Port Royal, etc., R. Co. *v.* Davis, 95 Ga. 292, 22 S. E. 833.

Printing of rules not required see Whalen *v.* Michigan Cent. R. Co., 114 Mich. 512, 72 N. W. 323; Grady *v.* Southern R. Co., 92 Fed. 491, 34 C. C. A. 494.

Posting in conspicuous places sufficient see Pennsylvania R. Co. *v.* Langdon, 92 Pa. St. 21, 37 Am. Rep. 651; Norfolk, etc., R. Co. *v.* Williams, 89 Va. 165, 15 S. E. 522.

The master is not required to read a rule to the servant, but only to give him a reasonable opportunity to learn it. Louisville, etc., R. Co. *v.* Bocock, 106 Ky. 223, 51 S. W. 580, 53 S. W. 262, 21 Ky. L. Rep. 383, 896.

Actual delivery of copy unnecessary see Lehigh Valley R. Co. *v.* Snyder, 56 N. J. L. 326, 28 Atl. 376.

67. Compliance with commands involving violation of rule as contributory negligence see *infra*, IV, F, 4, f, (II).

Effect as to contributory negligence see *infra*, IV, F, 4, d, (III), (B).

Excuses for disobedience see *infra*, IV, F, 4, d, (III).

68. Necessity of knowledge.— O'Neill *v.* Keokuk, etc., R. Co., 45 Iowa 546; Louisville, etc., R. Co. *v.* Scaulon, 60 S. W. 643, 22 Ky. L. Rep. 1400; Konold *v.* Rio Grande Western R. Co., 21 Utah 379, 60 Pac. 1021, 81 Am. St. Rep. 693.

69. Constructive knowledge sufficient.— *Alabama.*— Louisville, etc., R. Co. *v.* Richardson, 100 Ala. 232, 14 So. 209.

Kentucky.— Alexander *v.* Louisville, etc., R. Co., 83 Ky. 589.

Massachusetts.— McNee *v.* Coburn Trolley Track Co., 170 Mass. 283, 49 N. E. 437.

Michigan.— Nichols *v.* Chicago, etc., R. Co., 125 Mich. 394, 84 N. W. 470; Fluhrer *v.* Lake Shore, etc., R. Co., 124 Mich. 482, 83 N. W. 149.

Mississippi.— White *v.* Louisville, etc., R. Co., 72 Miss. 12, 16 So. 248.

New York.— See Clark *v.* Manhattan R. Co., 77 N. Y. App. Div. 284, 79 N. Y. Suppl. 220.

Ohio.— Cleveland, etc., R. Co. *v.* Ullom, 20 Ohio Cir. Ct. 512, 11 Ohio Cir. Dec. 321.

Utah.— Konold *v.* Rio Grande Western R. Co., 21 Utah 379, 60 Pac. 1021, 81 Am. St. Rep. 693.

Virginia.— Wright *v.* Southern R. Co., 101 Va. 36, 42 S. E. 913.

See 34 Cent. Dig. tit. "Master and Servant," § 287.

Custom must have been so universal and notorious that the master must be presumed to know and assent thereto. Nichols *v.* Chicago, etc., R. Co., 125 Mich. 394, 84 N. W. 470; Fluhrer *v.* Lake Shore, etc., R. Co., 121 Mich. 212, 80 N. W. 23. See also Clark *v.* Manhattan R. Co., 77 N. Y. App. Div. 284, 79 N. Y. Suppl. 220.

Occasional violations of a rule of a railroad company are not sufficient to prove that the rule has been abandoned or revoked, where there is nothing to show that the superior officers of the company knew of such violations. Louisville, etc., R. Co. *v.* Scanlon, 60 S. W. 643, 22 Ky. L. Rep. 1400. See also Konold *v.* Rio Grande Western R. Co., 21 Utah 379, 60 Pac. 1021, 81 Am. St. Rep. 693.

70. *Alabama.*— Louisville, etc., R. Co. *v.* Richardson, 100 Ala. 232, 14 So. 209.

Arkansas.— Little Rock, etc., R. Co. *v.* Leverett, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230.

Illinois.— Chicago, etc., R. Co. *v.* Flynn, 154 Ill. 448, 40 N. E. 332; Brookside Coal Min. Co. *v.* Dolph, 101 Ill. App. 169.

Indiana.— Pennsylvania Co. *v.* Roney, 89 Ind. 453, 46 Am. Rep. 173; Ohio, etc., R. Co. *v.* Collarn, 73 Ind. 261, 38 Am. Rep. 134.

Iowa.— O'Neill *v.* Keokuk, etc., R. Co., 45 Iowa 546.

Kansas.— Kansas City, etc., R. Co. *v.* Kier, 41 Kan. 661, 671, 21 Pac. 770, 13 Am. St. Rep. 311.

Kentucky.— Louisville, etc., R. Co. *v.* Hilt-

(II) *NOTICE TO SERVANT OR AGENT OF MASTER.* Generally the master will be charged with the knowledge of a servant or agent that a rule which it is such servant's duty to enforce is habitually violated.[71]

f. Construction and Operation.[72] Where a master adopts reasonable rules, which are brought to the knowledge of his servant, such rules constitute an element of the contract of hiring,[73] disregard of which will preclude recovery for injuries sustained,[74] unless obedience thereto would have augmented the danger or been impracticable.[75] But the mere adoption of rules and regulations will not exempt a master from liability for negligence;[76] and while all rules are to receive

ner, 60 S. W. 2, 22 Ky. L. Rep. 1141, 56 S. W. 654, 21 Ky. L. Rep. 1826.

Massachusetts.— McNee *v.* Coburn Trolley Track Co., 170 Mass. 283, 49 N. E. 437.

Michigan.— Nichols *v.* Chicago, etc., R. Co., 125 Mich. 394, 84 N. W. 470; Fluhrer *v.* Lake Shore, etc., R. Co., 124 Mich. 482, 83 N. W. 149.

Minnesota.— Le Duc *v.* Northern Pac. R. Co., 92 Minn. 287, 100 N. W. 108; Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231, 15 N. W. 241.

Mississippi.— White *v.* Louisville, etc., R. Co., 72 Miss. 12, 16 So. 248.

Missouri.— Barry *v.* Hannibal, etc., R. Co., 98 Mo. 62, 11 S. W. 308, 14 Am. St. Rep. 610.

New York.— See Whittaker *v.* Delaware, etc., Canal Co., 126 N. Y. 544, 27 N. E. 1042 [*affirming* 11 N. Y. Suppl. 914], where it was held that the question of defendant's negligence should have been submitted to the jury.

Ohio.— Cleveland, etc., R. Co. *v.* Ullom, 20 Ohio Cir. Ct. 512, 11 Ohio Cir. Dec. 321.

Tennessee.— Louisville, etc., R. Co. *v.* Reagan, 96 Tenn. 128, 33 S. W. 1050.

Texas.— Galveston, etc., R. Co. *v.* Gormley, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894; Galveston, etc., R. Co. *v.* Slinkard, 17 Tex. Civ. App. 585, 44 S. W. 35.

Utah.— Konold *v.* Rio Grande Western R. Co., 21 Utah 379, 60 Pac. 1021, 81 Am. St. Rep. 693.

Virginia.— Wright *v.* Southern R. Co., 101 Va. 36, 42 S. E. 913.

United States.— Tullis *v.* Lake Erie, etc., R. Co., 105 Fed. 554, 44 C. C. A. 597.

Canada.— Warmington *v.* Palmer, 32 Can. Sup. Ct. 126 [*reversing* 8 Brit. Col. 344].

See 34 Cent. Dig. tit. "Master and Servant," § 287.

Burden of proof on party relying upon non-enforcement of rule see Galveston, etc., R. Co. *v.* Gormley, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894 [*reversing* (Civ. App. 1897) 42 S. W. 314].

71. Brookside Coal Min. Co. *v.* Dolph, 101 Ill. App. 169; O'Neill *v.* Keokuk, etc., R. Co., 45 Iowa 546; Wright *v.* Southern R. Co., 101 Va. 36, 42 S. E. 913.

Notice to master mechanic held notice to master see Ohio, etc., R. Co. *v.* Collarn, 73 Ind. 261, 38 Am. Rep. 134.

Knowledge of division superintendent imputed to master see Galveston, etc., R. Co. *v.* Slinkard, 17 Tex. Civ. App. 585, 44 S. W. 35.

Railroad freight conductors do not so far represent the company as to be authorized to rescind rules made by the company for the guidance of its brakemen in coupling cars. Russell *v.* Richmond, etc., R. Co., 47 Fed. 204.

72. **Disobedience of rules as contributory negligence** see *infra*, IV, E, 4, d.

73. Pennsylvania Co. *v.* Whitcomb, 111 Ind. 212, 12 N. E. 380; Terre Haute, etc., R. Co. *v.* Pruitt, 25 Ind. App. 227, 57 N. E. 949; Gordy *v.* New York, etc., R. Co., 75 Md. 297, 23 Atl. 607, 32 Am. St. Rep. 391. And see Collins *v.* New England Iron Co., 115 Mass. 23; Bradley *v.* Salmon Falls Mfg. Co., 30 N. H. 487.

Voluntary submission to rules.— A conductor who voluntarily, even though with the acquiescence of the company, undertakes to uncouple cars, subjects himself to all reasonable rules prescribed for those whose duty it is to do such work. Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545, 10 So. 283. See also Helm *v.* Louisville, etc., R. Co., 33 S. W. 396, 17 Ky. L. Rep. 1004.

74. Terre Haute, etc., R. Co. *v.* Pruitt, 25 Ind. App. 227, 57 N. E. 949; Louisville, etc., R. Co. *v.* Hiltner, 60 S. W. 2, 22 Ky. L. Rep. 1141, 56 S. W. 654, 21 Ky. L. Rep. 1826; White *v.* Eidlitz, 19 N. Y. App. Div. 256, 46 N. Y. Suppl. 184; International, etc., R. Co. *v.* Culpepper, 19 Tex. Civ. App. 182, 46 S. W. 922.

75. *California.*— Holmes *v.* Southern Pac. Co., 120 Cal. 357, 52 Pac. 652.

District of Columbia.— Hayzel *v.* Columbia R. Co., 19 App. Cas. 359.

Illinois.— Junction Min. Co. *v.* Ench, 111 Ill. App. 346.

Indiana.— Terre Haute, etc., R. Co. *v.* Pruitt, 25 Ind. App. 227, 57 N. E. 949.

Iowa.— Strong *v.* Iowa Cent. R. Co., 94 Iowa 380, 62 N. W. 799.

Kentucky.— Louisville, etc., R. Co. *v.* Foley, 94 Ky. 220, 21 S. W. 866, 15 Ky. L. Rep. 17.

Michigan.— Eastman *v.* Lake Shore, etc., R. Co., 101 Mich. 597, 60 N. W. 309.

Minnesota.— Le Duc *v.* Northern Pac. R. Co., 92 Minn. 287, 100 N. W. 108.

North Carolina.— Fleming *v.* Southern R. Co., 131 N. C. 476, 42 S. E. 905, 132 N. C. 714, 44 S. E. 551.

Texas.— Bonner *v.* Moore, 3 Tex. Civ. App. 416, 22 S. W. 272.

See 34 Cent. Dig. tit. "Master and Servant," § 288.

76. *Alabama.*— Hissong *v.* Richmond, etc., R. Co., 91 Ala. 514, 8 So. 776.

Massachusetts.— Ford *v.* Fitchburg R. Co., 110 Mass. 240, 14 Am. Rep. 598.

a reasonable construction,[77] there is a presumption that they have been carefully considered and accurately expressed, and they ought to be construed more strongly against the master, who has made and adopted them, than against the servant, who has merely assented to, and agreed to be bound by, them.[78]

g. Proximate Cause of Injury. In order that a servant may recover for injuries alleged to have been caused by the failure of the master to adopt or, having adopted, to enforce reasonable rules for the government of his servants, such failure must be shown to have been the proximate cause of the injuries.[79]

3. Orders[80] **— a. Authority to Give.** A master is bound by orders given to a servant by an authorized agent, and will be liable to the servant for injuries received while acting in obedience thereto, even though under the master's rules the agent had no right to give such orders;[81] and where two agents are over one

New York.— See O'Malley *v.* New York, etc., R. Co., 67 Hun 130, 22 N. Y. Suppl. 48 [*affirmed* in 142 N. Y. 665, 37 N. E. 570], holding that a rule of a railroad company, requiring its freight brakemen to examine for themselves the brake appliances before using them, does not relieve the company of liability for injuries caused by defective appliances, unless it appears that the injured brakeman had time and opportunity to make such an examination as would have revealed the defect.

Texas.— Missouri Pac. R. Co. *v.* McElyea, 71 Tex. 386, 9 S. W. 313, 10 Am. St. Rep. 749, 1 L. R. A. 411.

United States.— Southern R. Co. *v.* Craig, 113 Fed. 76, 51 C. C. A. 63; Hall *v.* Galveston, etc., R. Co., 39 Fed. 18; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87.

See 34 Cent. Dig. tit. "Master and Servant," § 288.

77. *Alabama.*— Louisville, etc., R. Co. *v.* Mothershed, 110 Ala. 143, 20 So. 67.

Illinois.— Lake Shore, etc., R. Co. *v.* Parker, 131 Ill. 557, 23 N. E. 237, in which rules regulating the running of trains were held not to increase the liability of the engineers, but simply to call their attention to their common-law duty of using due skill and diligence.

Indiana.— Sheets *v.* Chicago, etc., R. Co., 139 Ind. 682, 39 N. E. 154, holding that a rule prohibiting "running switches," except when absolutely necessary, applies to the "kicking of cars into switches."

Iowa.— Kerns *v.* Chicago, etc., R. Co., 94 Iowa 121, 62 N. W. 692; McKee *v.* Chicago, etc., R. Co., 83 Iowa 616, 50 N. W. 209, 13 L. R. A. 817.

Kentucky.— Louisville, etc., R. Co. *v.* Bryant, 22 S. W. 606, 15 Ky. L. Rep. 181.

New Hampshire.— Wallace *v.* Boston, etc., R. Co., 72 N. H. 504, 57 Atl. 913.

New York.— Warn *v.* New York Cent., etc., R. Co., 157 N. Y. 109, 51 N. E. 744 [*reversing* 92 Hun 91, 36 N. Y. Suppl. 336]; Huda *v.* American Glucose Co., 13 Misc. 657, 34 N. Y. Suppl. 931.

Ohio.— Lake Shore, etc., R. Co. *v.* Gilday, 16 Ohio Cir. Ct. 649, 9 Ohio Cir. Dec. 27, holding that rules requiring servants to inspect appliances and promptly to report defects do not require the brakeman of a train, made up in a yard where inspectors are provided, to make a careful investigation of the train.

Texas.— East Line, etc., R. Co. *v.* Scott, 71 Tex. 703, 10 S. W. 298, 10 Am. St. Rep. 804; St. Louis Southwestern R. Co. *v.* Pope, (Civ. App. 1904) 82 S. W. 360; Galveston, etc., R. Co. *v.* Sweeney, 14 Tex. Civ. App. 216, 36 S. W. 800.

See 34 Cent. Dig. tit. "Master and Servant," § 288.

Rule held to refer to safety of train and not of trackmen see Sullivan *v.* Fitchburg R. Co., 161 Mass. 125, 36 N. E. 751.

Rule for protection of public not of employees see Carlson *v.* Cincinnati, etc., R. Co., 120 Mich. 481, 79 N. W. 688.

Rule for benefit of master not for protection of servant see McGinn *v.* McCormick, 109 La. 396, 33 So. 382.

78. Richmond, etc., R. Co. *v.* Mitchell, 92 Ga. 77, 18 S. E. 290. And see also Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545, 10 So. 283; Richmond, etc., R. Co. *v.* Jones, 92 Ala. 218, 9 So. 276; Richmond, etc., R. Co. *v.* Bell, 92 Ga. 493, 18 S. E. 292; Cleveland, etc., R. Co. *v.* Bergschicker, 162 Ind. 108, 69 N. E. 1000; Pearl *v.* Omaha, etc., R. Co., 115 Iowa 535, 88 N. W. 1078.

79. *Massachusetts.*— Peaslee *v.* Fitchburg R. Co., 152 Mass. 155, 25 N. E. 71.

Minnesota.— Smithson *v.* Chicago Great Western R. Co., 71 Minn. 216, 73 N. W. 853.

Missouri.— Rutledge *v.* Missouri Pac. R. Co., 110 Mo. 312, 19 S. W. 38; Poindexter *v.* Benedict Paper Co., 84 Mo. App. 352.

New York.— Wright *v.* New York Cent. R. Co., 25 N. Y. 562; De Young *v.* Irving, 5 N. Y. App. Div. 499, 38 N. Y. Suppl. 1089; Benfield *v.* Vacuum Oil Co., 75 Hun 209, 27 N. Y. Suppl. 16; Corcoran *v.* Delaware, etc., R. Co., 19 N. Y. Suppl. 994.

Pennsylvania.— Kennelty *v.* Baltimore, etc., R. Co., 166 Pa. St. 60, 30 Atl. 1014.

Texas.— Texas, etc., R. Co. *v.* Cumpston, 4 Tex. Civ. App. 25, 23 S. W. 47.

See 34 Cent. Dig. tit. "Master and Servant," § 289.

80. **Assumption of risk of compliance with commands** see *infra*, IV, E, 7, g, 8.

Compliance with commands as contributory negligence see *infra*, IV, F, 4, f.

Disobedience of orders as contributory negligence see *infra*, IV, F, 4, d.

81. Central R. Co. *v.* De Bray, 71 Ga. 406.

servant, he may obey the superior of the two.[82] But a master will not be bound by orders given by an unauthorized person,[83] even though the servant believed that it was his duty to obey such orders;[84] unless the master has clothed the person giving the order with such apparent authority as to justify the servant in believing that he was in fact authorized.[85]

b. Negligence in Giving Orders — (I) *In General.* Since it is the duty of a servant to obey an order given by one in authority over him, if not manifestly unreasonable, the master must use reasonable care to protect his servants from danger in the execution of orders, and will be held liable for his own or his vice-principal's negligence in this regard.[86] In the absence of negligence, the master cannot be held liable.[87]

(II) *Customary Methods.* The master may show, in defense to an action

82. Sims *v.* Omaha, etc., R. Co., 89 Mo. App. 197, holding that where a foreman with servants under him was under a superintendent, and one of the servants was injured while obeying the orders of the latter, an instruction confining the question of the servant's orders to such as his foreman might have given him was improper.

83. Felch *v.* Allen, 98 Mass. 572; Richmond, etc., R. Co. *v.* Finley, 63 Fed. 228, 12 C. C. A. 595 [*reversing* 59 Fed. 419], where it was held that an engineer in temporary charge of a train, in the absence of the conductor, cannot waive a rule prohibiting brakemen from coupling and uncoupling cars except with a stick by ordering a brakeman to go between the cars and place in position, by hand, a bent coupling link, which cannot be controlled without coupling sticks.

84. Newbury *v.* Getchel, etc., Lumber, etc., Co., 100 Iowa 441, 69 N. W. 743, 62 Am. St. Rep. 582.

85. See The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117, holding that, where the housekeeper of a hotel employed and discharged chambermaids, who looked to her for instructions, and she directed a chambermaid to use an elevator in passing from one floor to another in the discharge of her duties, and the chambermaid in good faith believed that the housekeeper was authorized to give the instruction, she was justified in acting thereon, although in fact the housekeeper was without such authority.

86. *Colorado.*—Denver, etc., R. Co. *v.* Simpson, 16 Colo. 55, 26 Pac. 339, 25 Am. St. Rep. 242, in which the conductor ordered plaintiff to make a coupling with a defective link.

Georgia.— Augusta Factory *v.* Hill, 83 Ga. 709, 10 S. E. 450.

Illinois.— Illinois Steel Co. *v.* Schymanowski, 59 Ill. App. 32 [*affirmed* in 162 Ill. 447, 44 N. E. 876], in which the servant was directed to work in an unsafe place.

Indiana.— Ervin *v.* Evans, 24 Ind. App. 335, 56 N. E. 725, in which plaintiff, employed for no other purpose than to operate machinery, was ordered to repair it, which was different from, and more dangerous than, the work he was employed to do, to the knowledge of defendant.

Kansas.— Atchison, etc., R. Co. *v.* Vincent, 56 Kan. 344, 43 Pac. 251.

Kentucky.— McLeod *v.* Ginther, 80 Ky. 399.

Massachusetts.— Eaves *v.* Atlantic Novelty Mfg. Co., 176 Mass. 369, 57 N. E. 669.

Minnesota.— Johnson *v.* Minneapolis Gen. Electric Co., 67 Minn. 141, 69 N. W. 713; Myhre *v.* Tromanhauser, 64 Minn. 541, 67 N. W. 660.

Missouri.— Foster *v.* Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916; Schroeder *v.* Chicago, etc., R. Co., 108 Mo. 322, 18 S. W. 1094, 18 L. R. A. 827.

North Carolina.— Allison *v.* Southern R. Co., 129 N. C. 336, 40 S. E. 91; Means *v.* Carolina Cent. R. Co., 126 N. C. 424, 35 S. E. 813.

Texas.— Texas, etc., R. Co. *v.* Reed, (Civ. App. 1895) 32 S. W. 118; Sulphur Lumber Co. *v.* Kelley, (Civ. App. 1895) 30 S. W. 696.

Virginia.— Ayers *v.* Richmond, etc., R. Co., 84 Va. 679, 5 S. E. 582.

West Virginia.— Hoffman *v.* Dickinson, 31 W. Va. 142, 6 S. E. 53.

Canada.— Madden *v.* Hamilton Iron Forging Co., 18 Ont. 55; Cox *v.* Hamilton Sewer Pipe Co., 14 Ont. 300; Macdonald *v.* Thibaudeau, 8 Quebec Q. B. 449.

See 34 Cent. Dig. tit. "Master and Servant," § 291.

Negligence in giving orders question for jury see Johnson *v.* Minneapolis Gen. Electric Co., 67 Minn. 141, 69 N. W. 713.

Peremptory manner in which order was given admitted in evidence see Myhre *v.* Tromanhauser, 64 Minn. 541, 67 N. W. 660.

87. *Alabama.*— Coosa Mfg. Co. *v.* Williams, 133 Ala. 606, 32 So. 232.

Colorado.— Wanner *v.* Kindel, 4 Colo. App. 168, 34 Pac. 1014.

Illinois.— Sanks *v.* Chicago, etc., R. Co., 112 Ill. App. 385; Miller *v.* Western Stone Co., 61 Ill. App. 662; Wiggins Ferry Co. *v.* Heilig, 43 Ill. App. 238; Illinois Cent. R. Co. *v.* Neer, 31 Ill. App. 126 [*reversed* on other grounds in 138 Ill. 29, 27 N. E. 705]; Chicago, etc., R. Co. *v.* Bliss, 6 Ill. App. 411.

Kansas.— Atchison, etc., R. Co. *v.* Plunkett, 25 Kan. 188.

Maine.— Lasky *v.* Canadian Pac. R. Co., 83 Me. 461, 22 Atl. 367.

Massachusetts.— Fairman *v.* Boston, etc., R. Co., 169 Mass. 170, 47 N. E. 613; Ruchinsky *v.* French, 168 Mass. 68, 46 N. E. 417.

Michigan.— Rodman *v.* Michigan Cent. R. Co., 55 Mich. 57, 20 N. W. 788, 54 Am. Rep. 348.

for personal injuries, that the course pursued by him in giving the order complained of was that followed by other well-regulated companies in the same line of business,[88] or that the work which the servant was ordered to do was customarily done by servants of this class, and that he was willing to do the work for the extra pay.[89]

c. Knowledge of Defect or Danger. A master is not liable for injuries to a servant, received by the latter while obeying an authorized command, unless the person giving the command knew, or, by the exercise of reasonable care, could have known, of the defect or danger which resulted in the injuries.[90]

d. Duty Toward Inexperienced or Youthful Servants.[91] Where a master knows that a servant is inexperienced or not of an age to appreciate the danger incident to an act which he is ordered to do, the master will be held liable to the servant for injuries received by him while executing an order which the master knows, or ought to know, involves danger.[92] But it is not negligence for a master to set his servant to a piece of work, where such servant is of sufficient age and intelligence to appreciate the risk, which is both patent and incident to the particular work;[93] nor will the mere fact that a servant was under age show negligence on the part of the master, where the servant had worked for some time in the capacity in which he was working when injured, and understood the duties and responsibilities of the position.[94]

e. Proximate Cause of Injury. In an action for personal injuries alleged to have resulted from obedience to a negligent order, there can be no recovery unless it is shown that the act of the servant in obeying such order was the proximate cause of the injury.[95]

D. Warning and Instructing Servant[96] **— 1. Duty and Liability of Master Generally — a. Rule Stated.** It is the duty of the master to warn and instruct

Missouri.— York *v.* Kansas City, etc., R. Co., 117 Mo. 405, 22 S. W. 1081.

Texas.— Houston, etc., R. Co. *v.* Fowler, 56 Tex. 452; Newnom *v.* Southwestern Tel., etc., Co., (Civ. App. 1898) 47 S. W. 669.

Wisconsin.— Gumz *v.* Chicago, etc., R. Co., 52 Wis. 672, 10 N. W. 11.

United States.—Coyne *v.* Union Pac. R. Co., 133 U. S. 370, 10 S. Ct. 382, 33 L. ed. 651; Hudson *v.* Charleston, etc., R. Co., 55 Fed. 248.

See 34 Cent. Dig. tit. "Master and Servant," § 291.

Order given for safety of passengers.— It is not negligence on the part of a railroad company to direct an employee to undertake an unusually dangerous service for the safety of passengers. Houston, etc., R. Co. *v.* Fowler, 56 Tex. 452.

88. Holland *v.* Tennessee Coal, etc., R. Co., 91 Ala. 444, 8 So. 524, 12 L. R. A. 232.

89. Wadlington *v.* Newport News, etc., R. Co., 20 S. W. 783, 14 Ky. L. Rep. 559.

90. McCarthy *v.* Chicago, etc., R. Co., 83 Iowa 485, 50 N. W. 21; Larich *v.* Moies, 18 R. I. 513, 28 Atl. 661; Gulf, etc., R. Co. *v.* Knott, 14 Tex. Civ. App. 158, 36 S. W. 491. *Compare* Swift *v.* Creasey, 9 Kan. App. 303, 61 Pac. 314.

91. **Customary methods** see *infra*, IV, C, 3, b, (II).

Application of fellow servant rule to minors see *infra*, IV, G, 4, a, (I), (A).

Warning and instructing see *infra*, IV, D, 3, b.

92. *Illinois.*— Gartside Coal Co. *v.* Turk, 147 Ill. 120, 35 N. E. 467 [*affirming* 47 Ill. App. 332].

Indiana.— Noblesville Foundry, etc., Co. *v.* Yeaman, 3 Ind. App. 521, 30 N. E. 10. *Compare* Spencer *v.* Ohio, etc., R. Co., 130 Ind. 181, 29 N. E. 915, in which plaintiff was employed to clean engines, and, being inexperienced, was placed under the charge of certain other employees, and it was held that there was no negligence on their part in ordering him to clean an engine standing still on the track, where they had no reason to suppose that he would go under the engine, whereby he was injured.

Texas.—Campbell *v.* Walker, (Civ. App. 1893) 22 S. W. 823.

Virginia.— Johnson *v.* Richmond, etc., R. Co., 84 Va. 713, 5 S. E. 707; Jones *v.* Old Dominion Cotton Mills, 82 Va. 140, 3 Am. St. Rep. 92.

West Virginia.— Riley *v.* West Virginia Cent., etc., R. Co., 27 W. Va. 145.

United States.— Northern Pac. Coal Co. *v.* Richmond, 58 Fed. 756, 7 C. C. A. 485 [*following* Union Pac. R. Co. *v.* Fort, 17 Wall. 553, 21 L. ed. 739].

See 34 Cent. Dig. tit. "Master and Servant," § 295.

93. Evans *v.* Vogt Mfg. Co., 5 Misc. (N. Y.) 330, 25 N. Y. Suppl. 509.

94. Greenwald *v.* Marquette, etc., R. Co., 49 Mich. 197, 13 N. W. 513.

95. Dantzler *v.* De Bardeleben Coal, etc., Co., 101 Ala. 309, 14 So. 10, 22 L. R. A. 361.

96. **Assumption of risk** see *infra*, IV, E, 3.

Disregarding warning see *infra*, IV, F, 4, e.

his servant as to defects and dangers of which he knows, or ought, in the exercise of reasonable care and diligence, to know, and of which the servant has no knowledge, actual or constructive.[97] But a master is under no obligation to warn his servant of a special danger which springs out of a particular fact, which in

Negligence of fellow servant performing duties of master see *infra*, IV, G, 4, a, (VII), (F).
Precautions against injuries see *supra*, IV, C, 1, a.
Right of servant injured to rely on care of master see *infra*, IV, F, 2, a, (II).
Supervision and direction of fellow servant see *infra*, IV, G, 4, a, (II), (C).

97. *Alabama.*— Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262.
Arkansas.— Fones *v.* Phillips, 39 Ark. 17, 43 Am. Rep. 264.
California.— Elledge *v.* National City, etc., R. Co., 100 Cal. 282, 34 Pac. 720, 38 Am. St. Rep. 290; Ingerman *v.* Moore, 90 Cal. 410, 27 Pac. 306, 25 Am. St. Rep. 138.
Colorado.— Colorado City *v.* Liafe, 28 Colo. 468, 65 Pac. 630; Holshouser *v.* Denver Gas, etc., Co., 18 Colo. App. 431, 72 Pac. 289.
Delaware.— Punkowski *v.* New Castle Leather Co., 4 Pennew. 544, 57 Atl. 559.
District of Columbia.— McDade *v.* Washingtou, etc., R. Co., 5 Mackey 144.
Georgia.— Augusta *v.* Owens, 111 Ga. 464, 36 S. E. 830; Cheency *v.* Ocean Steamship Co., 92 Ga. 726, 19 S. E. 33, 44 Am. St. Rep. 113; East Tennessee, etc., R. Co. *v.* Bridges, 92 Ga. 399, 17 S. E. 645.
Illinois.— Illinois Steel Co. *v.* Ryska, 200 Ill. 280, 65 N. E. 734 [*affirming* 102 Ill. App. 347]; Western Stone Co. *v.* Muscial, 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325 [*affirming* 96 Ill. App. 288]; Kewanee Boiler Co. *v.* Erickson, 181 Ill. 549, 54 N. E. 1044 [*affirming* 78 Ill. App. 35]; Pittsburg, etc., R. Co. *v.* Hewitt, 102 Ill. App. 428 [*affirmed* in 202 Ill. 28, 66 N. E. 829]; McFarland *v.* Edmunds Mfg. Co., 97 Ill. App. 629; Walsh *v.* Chicago, 94 Ill. App. 311; Kirk *v.* Scally, 79 Ill. App. 67; Swift *v.* Fue, 66 Ill. App. 651.
Indiana.— Salem Stone, etc., Co. *v.* Griffin, 139 Ind. 141, 38 N. E. 411; Louisville, etc., R. Co. *v.* Wright, 115 Ind. 378, 16 N. E. 145, 17 N. E. 584, 7 Am. St. Rep. 432; George H. Hammond, etc., Co. *v.* Schweitzer, 112 Ind. 246, 13 N. E. 869; St. Louis, etc., R. Co. *v.* Valirius, 56 Ind. 511; Hill *v.* Gust, 55 Ind. 45.
Iowa.— Crane *v.* Chicago, etc., R. Co., 124 Iowa 81, 99 N. W. 169; Graunis *v.* Chicago, etc., R. Co., 81 Iowa 444, 46 N. W. 1067. See also McLeod *v.* Chicago, etc., R. Co., 104 Iowa 139, 73 N. W. 614; Koontz *v.* Chicago, etc., R. Co., 65 Iowa 224, 21 N. W. 577, 54 Am. Rep. 5.
Kansas.— Brower *v.* Timreck, 66 Kan. 770, 71 Pac. 581.
Kentucky.— Shanks *v.* Citizens' General Electric Co., 76 S. W. 379, 25 Ky. L. Rep. 811; United Laundry Co. *v.* Schilling, 56 S. W. 425, 21 Ky. L. Rep. 1798; Louisville, etc., R. Co. *v.* Bowcock, 51 S. W. 580, 21 Ky. L. Rep. 383.
Louisiana.— Daly *v.* Kiel, 106 La. 170, 30 So. 254; James *v.* Rapides Lumber Co., 50 La. Ann. 717, 23 So. 469, 44 L. R. A. 33; Stucke *v.* Orleans R. Co., 50 La. Ann. 172, 23 So. 342; Myhan *v.* Louisiana Electric Light, etc., Co., 41 La. Ann. 964, 6 So. 799, 17 Am. St. Rep. 436, 7 L. R. A. 172.
Maine.— Welch *v.* Bath Iron Works, 98 Me. 361, 57 Atl. 88.
Maryland.— Lorentz *v.* Robinson, 61 Md. 64.
Massachusetts.— Joyce *v.* American Writing Paper Co., 184 Mass. 230, 68 N. E. 213; Knight *v.* Overman Wheel Co., 174 Mass. 455, 54 N. E. 890; Martineau *v.* National Blank Book Co., 166 Mass. 4, 43 N. E. 513; O'Connor *v.* Adams, 120 Mass. 427; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506.
Michigan.— Geller *v.* Briscoe Mfg. Co., 136 Mich. 330, 99 N. W. 281; Bradburn *v.* Wabash R. Co., 134 Mich. 575, 96 N. W. 929; Smith *v.* Peninsular Car Works, 60 Mich. 501, 27 N. W. 662, 1 Am. St. Rep. 542; Hathaway *v.* Michigan Cent. R. Co., 51 Mich. 253, 16 N. W. 634, 47 Am. Rep. 569; Michigan Cent. R. Co. *v.* Smithson, 45 Mich. 212, 7 N. W. 791; Chicago, etc., R. Co. *v.* Bayfield, 37 Mich. 205.
Minnesota.— Jensen *v.* Commodore Min. Co., 94 Minn. 53, 101 N. W. 944; Dell *v.* McGrath, 92 Minn. 187, 99 N. W. 629; Gray *v.* Commutator Co., 85 Minn. 463, 89 N. W. 322; McDonald *v.* Chicago, etc., R. Co., 41 Minn. 439, 43 N. W. 380, 16 Am. St. Rep. 711.
Missouri.— Deweese *v.* Meramec Iron Min. Co., 128 Mo. 423, 31 S. W. 110 [*affirming* 54 Mo. App. 476]; Rodney *v.* St. Louis, etc., R. Co., 127 Mo. 676, 28 S. W. 887, 30 S. W. 150; Dowling *v.* Allen, 74 Mo. 13, 41 Am. Rep. 298; Hysell *v.* Swift, etc., Co., 78 Mo. App. 39; Girard *v.* St. Louis Car-Wheel Co., 46 Mo. App. 79.
Montana.— Berg *v.* Boston, etc., Copper, etc., Min. Co., 12 Mont. 212, 29 Pac. 545.
Nebraska.— Evans Laundry Co. *v.* Crawford, 67 Nebr. 153, 93 N. W. 177, 67 Nebr. 153, 94 N. W. 814; Stephenson *v.* Ravenscroft, 25 Nebr. 678, 41 N. W. 652; Chicago, etc., R. Co. *v.* Lundstrom, 16 Nebr. 254, 20 N. W. 198, 49 Am. Rep. 718.
New Jersey.— Tompkins *v.* Marine Engine, etc., Co., 70 N. J. L. 330, 58 Atl. 393; Curley *v.* Hoff, 62 N. J. L. 758, 42 Atl. 731; Lechman *v.* Hooper, 52 N. J. L. 253, 19 Atl. 215.
New York.— Gates *v.* State, 128 N. Y. 221, 28 N. E. 373; Nelson *v.* New York, 101 N. Y. App. Div. 18, 91 N. Y. Suppl. 763; Maltby *v.* Belden, 45 N. Y. App. Div. 384, 60 N. Y. Suppl. 824; Fowler *v.* Buffalo Furnace Co., 41 N. Y. App. Div. 84, 58 N. Y. Suppl. 223; Felice *v.* New York Cent., etc., R. Co., 14 N. Y. App. Div. 345, 43 N. Y. Suppl. 922; Helmke *v.* Stetler, 69 Hun 107, 23 N. Y.

its details cannot be anticipated,[98] nor generally of any dangers that cannot be reasonably apprehended.[99] So too a master need not warn a servant of a risk naturally incident to the employment,[1] unless he knows that the servant is ignorant thereof.[2]

b. Delegation of Duty.[3] The duty of warning and instructing a servant is a primary duty of the master, and the delegation of such duty to another servant, whether higher or lower in the scale of employment than the one exposed to danger, cannot relieve him of the responsibility imposed on him by the law.[4]

Suppl. 392; Bohn *v.* Havemeyer, 46 Hun 557 [*affirmed* in 114 N. Y. 296, 21 N. E. 402]; Campbell *v.* New York Cent., etc., R. Co., 35 Hun 506; McGarry *v.* New York, etc., R. Co., 60 N. Y. Super. Ct. 367, 18 N. Y. Suppl. 195; Spaulding *v.* O'Brien, 26 Misc. 184, 56 N. Y. Suppl. 1095.

North Carolina.—Turner *v.* Goldsboro Lumber Co., 119 N. C. 387, 26 S. E. 23.

Oregon.— Hough *v.* Grants Pass Power Co., 41 Oreg. 531, 69 Pac. 655.

Pennsylvania.— Levy *v.* Rosenblatt, 21 Pa. Super. Ct. 543; Garrity *v.* Pennsylvania Casting, etc., Co., 17 Pa. Super. Ct. 623; Sheetram *v.* Trexler Stave, etc., Co., 13 Pa. Super. Ct. 219; Stapleton *v.* Citizens Traction Co., 5 Pa. Super. Ct. 253.

South Carolina.— Gallman *v.* Union Hardwood Mfg. Co., 65 S. C. 192, 43 S. E. 524; Hightower *v.* Bamberg Cotton Mills, 48 S. C. 190, 26 S. E. 222.

Tennessee.— Tennessee Coal, etc., R. Co. *v.* Jarrett, 111 Tenn. 565, 82 S. W. 224.

Texas.— Texas Mexican R. Co. *v.* Douglas, 73 Tex. 325, 11 S. W. 333; Missouri Pac. R. Co. *v.* Callbreath, 66 Tex. 526, 1 S. W. 622; Galveston, etc., R. Co. *v.* Manns, (Civ. App. 1904) 84 S. W. 254; Gulf, etc., R. Co. *v.* Cooper, 33 Tex. Civ. App. 319, 77 S. W. 263; Houston, etc., R. Co. *v.* Higgins, 22 Tex. Civ. App. 430, 55 S. W. 744; International, etc., R. Co. *v.* Smith, (Civ. App. 1895) 30 S. W. 501.

Utah.— Mathews *v.* Daly-West Min. Co., 27 Utah 193, 75 Pac. 722.

Virginia.— Gay *v.* Southern R. Co., 101 Va. 466, 44 S. E. 707; Richmond, etc., R. Co. *v.* Williams, 86 Va. 165, 9 S. E. 990, 19 Am. St. Rep. 876.

Washington.— Shoemaker *v.* Bryant Lumber, etc., Co., 27 Wash. 637, 68 Pac. 380.

Wisconsin.— Dahlke *v.* Illinois Steel Co., 100 Wis. 431, 76 N. W. 362; Stackman *v.* Chicago, etc., R. Co., 80 Wis. 428, 50 N. W. 404; Strahlendorf *v.* Rosenthal, 30 Wis. 674.

United States.— Mather *v.* Rillston, 156 U. S. 391, 15 S. Ct. 464, 39 L. ed. 464 [*affirming* 44 Fed. 743]; The Anchoria, 120 Fed. 1017, 56 C. C. A. 452 [*affirming* 113 Fed. 982]; Orman *v.* Salvo, 117 Fed. 233, 54 C. C. A. 265; Mercantile Trust Co. *v.* Pittsburgh, etc., R. Co., 115 Fed. 475, 53 C. C. A. 207; Nyback *v.* Champagne Lumber Co., 109 Fed. 732, 48 C. C. A. 632; Ellis *v.* Northern Pac. R. Co., 103 Fed. 416; Pullman's Palace-Car Co. *v.* Harkins, 55 Fed. 932, 5 C. C. A. 326; McGowan *v.* La Plata Min., etc., Co., 9 Fed. 861, 3 McCrary 393.

Canada.— Lamoureux *v.* Fournier, 33 Can. Sup. Ct. 675; Canadian Pac. R. Co. *v.* Boisseau, 32 Can. Sup. Ct. 424; Choate *v.* Ontario Rolling Mill Co., 27 Ont. App. 155; George Matthews Co. *v.* Bouchard, 8 Quebec Q. B. 550; Fournier *v.* Lamoureux, 21 Quebec Super. Ct. 99. And see Bridges *v.* Ontario Rolling Mills Co., 19 Ont. 731.

See 34 Cent. Dig. tit. "Master and Servant," §§ 297, 305.

Where the business is complex or dangerous in its nature, the master is bound to point out to servants the particular defects and dangers incident thereto. Bohn *v.* Havemeyer, 46 Hun (N. Y.) 557 [*affirmed* in 114 N. Y. 296, 21 N. E. 402].

Duty to warn servant of sudden danger see Hough *v.* Grants Pass Power Co., 41 Oreg. 531, 69 Pac. 655.

False information.— The rule that a master is not bound to provide and maintain a safe place for his servants to work, where they are creating the place, and when it is constantly changing in character by their labor, and becomes dangerous solely by their negligence, does not justify a vice-principal in giving a workman false information as to the safety of the place of work. Allen *v.* Bell, 32 Mont. 69, 79 Pac. 582.

Negligence a question for the jury.— Kochman *v.* Chase, 32 N. Y. App. Div. 630, 52 N. Y. Suppl. 740; Stock *v.* Le Boutillier, 19 Misc. (N. Y.) 112, 43 N. Y. Suppl. 248; Bowman *v.* Texas Brewing Co., 17 Tex. Civ. App. 446, 43 S. W. 808.

98. Gay *v.* Southern R. Co., 101 Va. 466, 44 S. E. 707.

99. Smith *v.* Thomas Iron Co., 69 N. J. L. 11, 54 Atl. 562; Donohoe *v.* Lonsdale Co., 25 R. I. 187, 55 Atl. 326; San Antonio Sewer Pipe Co. *v.* Noll, (Tex. Civ. App. 1904) 83 S. W. 900; Dahlke *v.* Illinois Steel Co., 100 Wis. 431, 76 N. W. 352. And see Durst *v.* Carnegie Steel Co., 173 Pa. St. 162, 33 Atl. 1102.

1. **Assumption of risk** see *infra*, IV, E.

2. Murphy *v.* Rockwell Engineering Co., 70 N. J. L. 374, 57 Atl. 444.

3. **Delegation of duty to fellow servant** see *infra*, IV, G, 4, a, (VII), (F).

4. *California.*— Tedford *v.* Los Angeles Electric Co., 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85.

Florida.— Camp *v.* Hall, 39 Fla. 535, 22 So. 792.

Illinois.— Mallen *v.* Waldowski, 101 Ill. App. 367.

Massachusetts.— Grimaldi *v.* Lane, 177 Mass. 565, 59 N. E. 451; Wheeler *v.* Wason Mfg. Co., 135 Mass. 294.

But where a servant has notice of the general risks and dangers of his employment, such as that many of the cars which he is required to handle as a switchman are defective, the master is not guilty of negligence in failing to notify him of each particular defect, as such duty, if required, is one necessarily devolving on fellow servants, for whose particular acts of negligence the master is not responsible;[5] and a master who properly selects and instructs a man to give notice to the other servants of the movements of the apparatus being used by them is not responsible for his failure to give warning.[6]

c. Knowledge of Master of Defect or Danger.[7] The master's liability in respect to warning and instructing his servant depends upon his knowledge, actual or constructive, of the defect or danger to which his servant was exposed, and negligence cannot be imputed to him unless he knew, or ought, in the exercise of reasonable and ordinary care and diligence, to have known, that a warning was necessary.[8]

d. Customary Methods and Warnings. A servant has the right to rely on the warnings and signals customarily given in the conduct of the business, and if the master fails to give these, he is negligent.[9] But negligence cannot be predicated upon the master's failure to give a warning in a particular instance, where, to the servant's knowledge, it has never been the custom to give such warning.[10]

e. Agreement of Master to Give Warning. Where there is a special agreement by the master to warn the servant, the non-performance of which is the occasion of injury to the latter, the master will be held liable.[11]

f. Effect of Statutes Limiting Fellow Servant Doctrine. Under statutes limiting the fellow servant doctrine, the master is liable for injuries to a servant resulting from the negligence of fellow servants in failing to warn him of danger.[12]

New Jersey.— Addicks *v.* Christoph, 62 N. J. L. 786, 43 Atl. 196, 72 Am. St. Rep. 687.

New York.— Simone *v.* Kirk, 173 N. Y. 7, 65 N. E. 739 [*reversing* 57 N. Y. App. Div. 461, 67 N. Y. Suppl. 1019]. But *compare* O'Brien *v.* Buffalo Furnace Co., 68 N. Y. App. Div. 451, 73 N. Y. Suppl. 830.

Pennsylvania.—Smith *v.* Hillside Coal, etc., Co., 186 Pa. St. 28, 40 Atl. 287.

United States.— Mercantile Trust Co. *v.* Pittsburgh, etc., R. Co., 115 Fed. 475, 53 C. C. A. 207; Louisville, etc., R. Co. *v.* Miller, 104 Fed. 124, 43 C. C. A. 436; The Pioneer, 78 Fed. 600.

See 34 Cent. Dig. tit. "Master and Servant," § 298.

5. Chesapeake, etc., R. Co. *v.* Hennessey, 96 Fed. 713, 38 C. C. A. 307.

6. Portance *v.* Lehigh Valley Coal Co., 101 Wis. 574, 77 N. W. 875, 70 Am. St. Rep. 932.

7. Knowledge of servant's age or inexperience see *infra*, IV, D, 3, b.

8. *Arkansas.*— Southwestern Tel. Co. *v.* Woughter, 56 Ark. 206, 19 S. W. 575.

Missouri.— Clark *v.* Missouri, etc., R. Co., 179 Mo. 66, 77 S. W. 882; Musick *v.* Jacob Dold Packing Co., 58 Mo. App. 322.

New Jersey.— Smith *v.* Oxford Iron Co., 42 N. J. L. 467, 36 Am. Rep. 535.

Pennsylvania.—Durst *v.* Carnegie Steel Co., 173 Pa. St. 162, 33 Atl. 1102.

Texas.— Hernischel *v.* Texas Drug Co., 26 Tex. Civ. App. 1, 61 S. W. 419.

Wisconsin.— Sladky *v.* Marinette Lumber Co., 107 Wis. 250, 83 N. W. 514.

United States.— Thompson *v.* Chicago, etc., R. Co., 14 Fed. 564, 4 McCrary 629.

See 34 Cent. Dig. tit. "Master and Servant," § 299.

The master's liability depends, not on whether he could have discovered the defect before the servant obeyed his orders, but on whether he used the means a prudent man would or ought to use to discover them, and failed to make known to the servant the defect and consequent risk. Southwestern Tel. Co. *v.* Woughter, 56 Ark. 206, 19 S. W. 575.

9. Anderson *v.* Northern Mill Co., 42 Minn. 424, 44 N. W. 315; Burlington, etc., R. Co. *v.* Crockett, 19 Nebr. 138, 26 N. W. 921; Hough *v.* Grants Pass Power Co., 41 Oreg. 531, 69 Pac. 655; Andreson *v.* Ogden Union R., etc., Co., 8 Utah 128, 30 Pac. 305.

10. Starne *v.* Schlothane, 21 Ill. App. 97; Olson *v.* St. Paul, etc., R. Co., 38 Minn. 117, 35 N. W. 866; Moules *v.* Delaware, etc., Canal Co., 141 Pa. St. 632, 21 Atl. 733; Olsen *v.* North Pac. Lumber Co., 106 Fed. 298; Olsen *v.* North Pac. Lumber Co., 100 Fed. 384, 40 C. C. A. 427.

Movement of engines.—There is no duty on a master to inform a servant that engines will, without notice, be run into a pit where ashes are taken out of them, where the master has provided a method for the approach of the engines to be made with proper signals and notice. Chicago, etc., R. Co. *v.* Bell, 209 Ill. 25, 70 N. E. 754.

11. Postal Tel. Cable Co. *v.* Hulsey, 132 Ala. 444, 31 So. 527; Chicago, etc., R. Co. *v.* Gross, 35 Ill. App. 178; Wendell *v.* Pennsylvania R. Co., 57 N. J. L. 467, 31 Atl. 720; Bradley *v.* New York Cent. R. Co., 62 N. Y. 99 [*affirming* 3 Thomps. & C. 288].

12. Donahoe *v.* Old Colony R. Co., 153 Mass. 356, 26 N. E. 868; Schulz *v.* Chicago,

g. Sufficiency of Warnings and Instructions.[13] To be sufficient, a warning or instruction must be so plain and explicit that the servant will understand and appreciate the danger and know how to avoid it by the exercise of due care,[14] and where extraordinary risks may be encountered, the servant should be warned of their character and extent, so far as possible.[15] But it is not necessary that the servant should be warned of every possible manner in which injury may occur to him, or of risks that are as obvious to him as to the master, or which are readily discoverable by him by the use of ordinary care, with such knowledge, experience, and judgment as he actually possesses, or as the master is justified in believing him to possess.[16]

h. Proximate Cause of Injury. In an action for personal injuries alleged to have resulted from the failure of the master properly to warn and instruct the servant, a recovery can only be had where the master's negligence was the proximate cause of the injury.[17]

2. Particular Defects and Dangers[18] **— a. Changes in Appliances or Methods of Work.**[19] It is the duty of the master to warn his servants of new or increased

etc., R. Co., 57 Minn. 271, 59 N. W. 192; Sobieski *v.* St. Paul, etc., R. Co.; 41 Minn. 169, 42 N. W. 863. *Compare* Burns *v.* Washburn, 160 Mass. 457, 36 N. E. 199, construing St. (1887) c. 270, § 1, cl. 2.

13. As affected by age or inexperience of servant see *infra*, IV, D, 3, h, (III).

14. *Kentucky.*— United Laundry Co. *v.* Steele, 72 S. W. 305, 24 Ky. L. Rep. 1899.

Michigan.— Bradburn *v.* Wabash R. Co., 134 Mich. 575, 96 N. W. 929.

New Jersey.— Addicks *v.* Christoph, 62 N. J. L. 786, 43 Atl. 196, 72 Am. St. Rep. 687.

Ohio.— Lake Shore, etc., R. Co. *v.* Baldwin, 19 Ohio Cir. Ct. 338, 10 Ohio Cir. Dec. 333.

Rhode Island.— Honlahan *v.* New American File Co., 17 R. I. 141, 20 Atl. 268.

Utah.— Wilson *v.* Sioux Consol. Min. Co., 16 Utah 392, 52 Pac. 626.

United States.— Thomas *v.* Cincinnati, etc., R. Co., 97 Fed. 245.

See 34 Cent. Dig. tit. "Master and Servant," § 303.

Warnings and instructions held sufficient.— Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863 (verbal warning as to low bridge); St. Louis, etc., R. Co. *v.* Mize, 71 Ark. 159, 71 S. W. 660 (notice of burning of trestle, giving its number, and the milestones between which it was located); Lobstein *v.* Sajatovitch, 111 Ill. App. 654 (warning which, if not heard, could have been heard by servant); Welch *v.* Grace, 167 Mass. 590, 46 N. E. 387 (instruction as to thawing frozen dynamite cartridges which were unexploded after blast); Fox *v.* Peninsular White Lead, etc., Works, 84 Mich. 676, 48 N. W. 203 (duty of manufacturer of Paris green to inform servants of its poisonous character, and precautions necessary in its manufacture, but not of its particular ingredients); Sell *v.* Charles Rietz, etc., Lumber Co., 70 Mich. 479, 38 N. W. 451; Speed *v.* Atlantic, etc., R. Co., 71 Mo. 303 (verbal signal of approach of cars in train yard); Brown *v.* Southern R. Co., 126 N. C. 458, 36 S. E. 19 (notice as to meeting and passing of trains); Atchison, etc., R. Co. *v.* Myers, 63 Fed. 793, 11 C. C. A. 439 (warning of defects in foreign car); Willis *v.* The Aspotogan, 49 Fed. 163 (master justified in believing that servant will heed warnings).

Rule as to approach of trains to stations.— Where a rule of a railroad company requires all trains to approach stations with great care, expecting to find some other train occupying the main track, an engineer who is approaching a station is not entitled to notice of a train in front of him, although that train is four hours late, and he has been ordered to make his run in a certain time. Illinois Cent. R. Co. *v.* Neer, 26 Ill. App. 356. See also Whalen *v.* Michigan Cent. R. Co., 114 Mich. 512, 72 N. W. 323.

Right of master to assume that servant understands English see Lobstein *v.* Sajatovitch, 111 Ill. App. 654.

15. Smith *v.* Peninsular Car-Works, 60 Mich. 501, 27 N. W. 662, 1 Am. St. Rep. 542.

Where a master has to use particularly hazardous agencies, it is his duty to give full information to the servant as to the danger arising therefrom, and sufficient instructions, that he may know how to avoid the danger by due care on his part. Welch *v.* Bath Iron Works, 98 Me. 361, 57 Atl. 88.

16. Chicago, etc., R. Co. *v.* Pettigrew, 82 Ill. App. 33. See also Foster *v.* Pusey, 8 Houst. (Del.) 168, 14 Atl. 545; Kopf *v.* Monroe Stone Co., 133 Mich. 286, 95 N. W. 72; Thompson *v.* Edward P. Allis Co., 89 Wis. 523, 62 N. W. 527; Hauss *v.* Lake Erie, etc., R. Co., 105 Fed. 733, 46 C. C. A. 94.

17. Holland *v.* Tennessee Coal, etc., Co., 91 Ala. 445, 8 So. 524, 12 L. R. A. 232; Arizona Lumber, etc., Co. *v.* Mooney, 4 Ariz. 366, 42 Pac. 952; McCarthy *v.* Mulgrew, 107 Iowa 76, 77 N. W. 527; Fronk *v.* J. H. Evans City Steam Laundry Co., 70 Nebr. 75, 96 N. W. 1053; Boelter *v.* Ross Lumber Co., 103 Wis. 324, 79 N. W. 243.

18. Negligence of co-employees under statutes limiting fellow servant doctrine see *supra*, IV, D, 1, f.

19. Inexperienced employee see *infra*, IV, D, 3, b.

dangers caused by a change in his machinery, appliances, or place or methods of work, and he will be held liable for injuries resulting from his neglect of duty in this respect.[20]

b. Dangers From Negligence of Fellow Servants. The master has a right to assume that his servants, being competent, will not be negligent, and it is not his duty, on employing a servant, to warn him against possible or probable dangers in case they are negligent.[21] But a master who knows that a need of warning an inexperienced servant, working on a dangerous machine, has arisen, is bound to give it, although the danger arose from the negligence of a fellow servant.[22]

c. Dangers Known to Servant. Although a master is negligent in not giving his servant instructions as to the dangers of his employment, if the servant receives such information from other sources, whether from other persons or from his own observation, and is thereafter injured, the master is not liable, since his negligence is not the proximate cause of the injury.[23] Where, however, the

20. *Connecticut.*— Ryan *v.* Chelsea Paper Mfg. Co., 69 Conn. 454, 37 Atl. 1062; O'Keefe *v.* National Folding Box, etc., Co., 66 Conn. 38, 33 Atl. 587.

Delaware.— Stewart *v.* Philadelphia, etc., R. Co., 8 Houst. 450, 17 Atl. 639.

Illinois.— Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Walsh *v.* Chicago, 94 Ill. App. 311; Clark *v.* Liston, 54 Ill. App. 578.

Kentucky.— Louisville, etc., R. Co. *v.* Bocock, 107 Ky. 223, 51 S. W. 580, 53 S. W. 262, 21 Ky. L. Rep. 383, 896.

Missouri.— Crane *v.* Missouri Pac. R. Co., 87 Mo. 588.

New Jersey.— Smith *v.* Oxford Iron Co., 42 N. J. L. 467, 36 Am. Rep. 535.

New York.— Spelman *v.* Fisher Iron Co., 56 Barb. 151.

Pennsylvania.— Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. Rep. 631.

Virginia.— Baltimore, etc., R. Co. *v.* Whittington, 30 Gratt. 805.

United States.— Cincinnati, etc., R. Co. *v.* Gray, 101 Fed. 623, 41 C. C. A. 535, 50 L. R. A. 47; Withcofsky *v.* Wier, 32 Fed. 301; O'Neil *v.* St. Louis, etc., R. Co., 9 Fed. 337, 3 McCrary 423.

See 34 Cent. Dig. tit. "Master and Servant," § 306.

But *compare* Simms *v.* South Carolina R. Co., 26 S. C. 490, 2 S. E. 486.

Where a train schedule is departed from, such orders must be issued by the company as will afford reasonable protection to employees engaged in running its trains. Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. Rep. 631.

Use of new explosive.— It is negligence for a master to furnish his servant with a newly invented blasting powder without informing him of an unusually dangerous property which it possesses. Spelman *v.* Fisher Iron Co., 56 Barb. (N. Y.) 151.

21. Klos *v.* Hudson River Ore, etc., Co., 77 N. Y. App. Div. 566, 79 N. Y. Suppl. 156. See also Fay *v.* Wilmarth, 183 Mass. 71, 66 N. E. 410; Siddall *v.* Pacific Mills, 162 Mass. 378, 38 N. E. 969.

22. Bjbjian *v.* Woonsocket Rubber Co., 164 Mass. 214, 41 N. E. 265.

23. *Alabama.*— Melton *v.* E. E. Jackson Lumber Co., 133 Ala. 580, 31 So. 848; North Birmingham St. R. Co. *v.* Wright, 130 Ala. 419, 30 So. 360; Bessemer Land, etc., Co. *v.* Dubose, 125 Ala. 442, 28 So. 380; Worthington *v.* Goforth, 124 Ala. 656, 26 So. 531; Alabama Connellsville Coal, etc., Co. *v.* Pitts, 98 Ala. 285, 13 So. 135.

Arkansas.— St. Louis, etc., R. Co. *v.* Morgart, (1888) 8 S. W. 179.

Georgia.— Allen *v.* Augusta Factory, 82 Ga. 76, 8 S. E. 68.

Illinois.— Trakal *v.* Heusner Baking Co., 204 Ill. 179, 68 N. E. 399 [*affirming* 107 Ill. App. 327]; Simmons *v.* Chicago, etc., R. Co., 110 Ill. 340; Pennsylvania Co. *v.* Lynch, 90 Ill. 333; Illinois Cent. R. Co. *v.* Modglin, 85 Ill. 481; Electrical Installation Co. *v.* Kelly, 110 Ill. App. 334; McArthur Bros. Co. *v.* Nordstrom, 87 Ill. App. 554; Chicago, etc., R. Co. *v.* McDonald, 21 Ill. App. 409.

Indiana.— Big Creek Stone Co. *v.* Wolf, 138 Ind. 496, 38 N. E. 52.

Iowa.— Hanson *v.* Hammell, 107 Iowa 171, 77 N. W. 839; Yeager *v.* Burlington, etc., R. Co., 93 Iowa 1, 61 N. W. 215; Patton *v.* Central Iowa R. Co., 73 Iowa 306, 35 N. W. 149.

Kentucky.— Jones *v.* Louisville, etc., R. Co., 95 Ky. 576, 26 S. W. 590, 16 Ky. L. Rep. 132.

Louisiana.— Stucke *v.* Orleans R. Co., 50 La. Ann. 172, 23 So. 342.

Maryland.— Hettchen *v.* Chipman, 87 Md. 729, 41 Atl. 65.

Massachusetts.— Nye *v.* Dutton, 187 Mass. 549, 73 N. E. 654; Bence *v.* New York, etc., R. Co., 181 Mass. 221, 63 N. E. 417; Perry *v.* Old Colony R. Co., 164 Mass. 296, 41 N. E. 289; Rooney *v.* Sewall, etc., Cordage Co., 161 Mass. 153, 36 N. E. 789; Richstain *v.* Washington Mills Co., 157 Mass. 538, 32 N. E. 908; Downey *v.* Sawyer, 157 Mass. 418, 32 N. E. 654; Sullivan *v.* India Mfg. Co., 113 Mass. 396.

Michigan.— Berlin *v.* Mershon, 132 Mich. 183, 93 N. W. 248; Nowakowski *v.* Detroit Stove Works, 130 Mich. 308, 89 N. W. 956; Davis *v.* Port Huron Engine, etc., Co., 126 Mich. 429, 85 N. W. 1125; Balle *v.* Detroit Leather Co., 73 Mich. 158, 41 N. W. 216.

Minnesota.— Wendler *v.* Red Wing Gas,

servant has knowledge of the facts, but is entirely ignorant of the risks involved, it is the duty of the master to warn him.[24]

d. Obvious Dangers.[25] A master is not bound to warn and instruct his servant as to dangers which are patent and obvious.[26]

etc., Co., 92 Minn. 122, 99 N. W. 625; Saxton *v.* Northwestern Tel. Exch. Co., 81 Minn. 314, 84 N. W. 109; Manley *v.* Minneapolis Paint Co., 76 Minn. 169, 78 N. W. 1050; Truntle *v.* North Star Woolen-Mill Co., 57 Minn. 52, 58 N. W. 832.

Missouri.— Hill *v.* Meyer Bros. Drug Co., 140 Mo. 433, 41 S. W. 909; Mueller *v.* La Prelle Shoe Co., 109 Mo. App. 506, 84 S. W. 1010; Bair *v.* Heibel, 103 Mo. App. 621, 77 S. W. 1017; Herbert *v.* Mound City Boot, etc., Co., 90 Mo. App. 305.

New Hampshire.— St. Jean *v.* Tolles, 72 N. H. 587, 58 Atl. 506.

New Jersey.— Tompkins *v.* Marine Engine, etc., Co., 70 N. J. L. 330, 58 Atl. 393.

New York.— White *v.* Wittemann Lith. Co., 131 N. Y. 631, 30 N. E. 236 [*affirming* 58 Hun 381]; McManus *v.* Davitt, 94 N. Y. App. Div. 481, 88 N. Y. Suppl. 55; McGovern *v.* Central Vermont R. Co., 6 N. Y. Suppl. 838 [*reversed* on the facts in 123 N. Y. 280, 25 N. E. 373, on the ground that the case should have been submitted to the jury]; Michaels *v.* Levison, 2 N. Y. City Ct. 411.

North Carolina.— Kiser *v.* Hot Springs Barytes Co., 131 N. C. 595, 42 S. E. 986.

Ohio.— Connell *v.* Miller, etc., Mfg. Co., 10 Ohio Dec. (Reprint) 129, 19 Cinc. L. Bul. 22.

Pennsylvania.— Lehigh, etc., Coal Co. *v.* Hayes, 128 Pa. St. 294, 18 Atl. 387, 15 Am. St. Rep. 680, 5 L. R. A. 441. But *compare* Sheetram *v.* Trexler Stave, etc., Co., 13 Pa. Super. Ct. 219, where it was held that, although a servant be as fully conscious of the danger incident to the discharge of a duty in a particular way as if he had been expressly warned of the danger, it does not necessarily follow that his master is relieved of the duty to instruct him further.

Texas.— Tucker *v.* National Loan, etc., Co., 35 Tex. Civ. App. 474, 80 S. W. 879; Ladonia Cotton Oil Co. *v.* Shaw, 27 Tex. Civ. App. 65, 65 S. W. 693.

Vermont.— Brainard *v.* Van Dyke, 71 Vt. 359, 45 Atl. 758. *Compare* Hayes *v.* Colchester Mills, 69 Vt. 1, 37 Atl. 269, 60 Am. St. Rep. 915.

Wisconsin.— Kath *v.* Wisconsin Cent. R. Co., 121 Wis. 503, 99 N. W. 217.

United States.— Olsen *v.* North Pac. Lumber Co., 106 Fed. 298; Andersen *v.* Berlin Mills Co., 88 Fed. 944, 32 C. C. A. 143.

See 34 Cent. Dig. tit. "Master and Servant," §§ 308, 309.

24. Pullman's Palace-Car Co. *v.* Harkins, 55 Fed. 932, 5 C. C. A. 326; George Matthews Co. *v.* Bouchard, 8 Quebec Q. B. 550.

25. As affected by age and inexperience of servant see *infra*, IV, D, 3, b, (II).

26. *Alabama.*— Louisville, etc., R. Co. *v.* Bouldin, 121 Ala. 197, 25 So. 903; Louisville, etc., R. Co. *v.* Boland, 96 Ala. 626, 11 So. 667, 18 L. R. A. 260.

Arkansas.— Fones *v.* Phillips, 39 Ark. 17, 43 Am. Rep. 264.

Georgia.—Commercial Guano Co. *v.* Neather, 114 Ga. 416, 40 S. E. 299.

Illinois.— Chicago, etc., R. Co. *v.* Bell, 209 Ill. 25, 70 N. E. 754; Ryan *v.* Armour, 166 Ill. 568, 47 N. E. 60 [*affirming* 67 Ill. App. 102]; Marsden Co. *v.* Johnson, 89 Ill. App. 100; Colson *v.* Craver, 80 Ill. App. 99; Consolidated Coal Co. *v.* Scheller, 42 Ill. App. 619.

Indiana.— Atlas Engine Works *v.* Randall, 100 Ind. 293, 50 Am. Rep. 798.

Iowa.— McCarthy *v.* Mulgrew, 107 Iowa 76, 77 N. W. 527.

Kentucky.— McCormick Harvesting Mach. Co. *v.* Liter, 66 S. W. 761, 23 Ky. L. Rep. 2154.

Maine.— Wormell *v.* Maine Cent. R. Co., 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321.

Massachusetts.— Meehan *v.* Holyoke St. R. Co., 186 Mass. 511, 72 N. E. 61; Hofnauer *v.* R. H. White Co., 186 Mass. 47, 70 N. E. 1038; Gavin *v.* Fall River Automatic Tel. Co., 185 Mass. 78, 69 N. E. 1055; Arkland *v.* Taber-Prang Art Co., 184 Mass. 2431, 68 N. E. 219; Chmiel *v.* Thorndike Co., 182 Mass. 112, 65 N. E. 47; Dene *v.* Arnold Print Works, 181 Mass. 560, 64 N. E. 203; Demers *v.* Marshall, 178 Mass. 9, 59 N. E. 454; Lemoine *v.* Aldrich, 177 Mass. 89, 58 N. E. 178; Buttle *v.* George G. Page Box Co., 175 Mass. 318, 56 N. E. 583; Campbell *v.* Dearborn, 175 Mass. 183, 55 N. E. 1042; Ford *v.* Mt. Tom Sulphite Pulp Co., 172 Mass. 544, 52 N. E. 1065, 48 L. R. A. 96; Gleason *v.* Smith, 172 Mass. 50, 51 N. E. 460; Gilmore *v.* Mittineague Paper Co., 169 Mass. 471, 48 N. E. 623; Wilson *v.* Massachusetts Cotton Mills, 169 Mass. 67, 47 N. E. 506; Ruchinsky *v.* French, 168 Mass. 68, 46 N. E. 417; Perry *v.* Smith, 156 Mass. 340, 31 N. E. 9.

Michigan.— Mushinski *v.* Vincent, 135 Mich. 26, 97 N. W. 43; Findlay *v.* Russel Wheel, etc., Co., 108 Mich. 286, 66 N. W. 50; Hathaway *v.* Michigan Cent. R. Co., 51 Mich. 253, 16 N. W. 634, 47 Am. Rep. 569.

Minnesota.— Berger *v.* St. Paul, etc., R. Co., 39 Minn. 78, 38 N. W. 814.

Missouri.— Rodney *v.* St. Louis, etc., R. Co., 127 Mo. 676, 28 S. W. 887, 30 S. W. 150; Ring *v.* Missouri Pac. R. Co., 112 Mo. 220, 20 S. W. 436.

Nebraska.— Norfolk Beet-Sugar Co. *v.* Preuner, 55 Nebr. 656, 75 N. W. 1097.

New Hampshire.— Collins *v.* Laconia Car Co., 68 N. H. 196, 38 Atl. 1047; Henderson *v.* Williams, 66 N. H. 405, 23 Atl. 365.

New Jersey.— Hesse *v.* National Casket Co., 66 N. J. L. 652, 52 Atl. 384.

New York.— McCue *v.* National Starch Mfg. Co., 142 N. Y. 106, 36 N. E. 809 [*reversing* 21 N. Y. Suppl. 551]; Burke *v.* Thomson Meter Co., 135 N. Y. 651, 32 N. E.

e. Dangers From Extraneous Causes. If the master has knowledge that the particular employment is, from extraneous causes, hazardous or dangerous to a degree beyond what it fairly imports or is understood by the servant to be, he is bound to inform him of the fact, and if he fails to do so he is liable for such damages as the servant may sustain by reason of such causes.[27]

f. Dangers From Work Outside Scope of Employment. Where a servant is ordered to do work outside of the scope of his employment, the master is under the same obligation to warn and instruct him as though he were engaged in his regular employment.[28] But where the servant is injured while working outside of the scope of his employment, voluntarily and without orders, the master is not chargeable with negligence for failing to warn him of danger.[29]

3. Age and Experience of Employee[30] — a. Experienced Employee. An employee of mature years is presumed to be acquainted with the dangers incident

647 [*affirming* 18 N. Y. Suppl. 436]; Bohn *v.* Havemeyer, 114 N. Y. 296, 21 N. E. 402 [*affirming* 46 Hun 557]; Wahl *v.* Chatillon, 56 N. Y. App. Div. 554, 67 N. Y. Suppl. 504; Monzi *v.* Friedline, 33 N. Y. App. Div. 217, 53 N. Y. Suppl. 482; O'Hare *v.* Keeler, 22 N. Y. App. Div. 191, 48 N. Y. Suppl. 376; Cmielewski *v.* Mollenhauer Sugar Refining Co., 11 N. Y. App. Div. 111, 42 N. Y. Suppl. 936; McCampbell *v.* Cunard Steamship Co., 13 N. Y. Suppl. 288; Wendling *v.* Bainbridge, 6 N. Y. St. 21.

Oregon.— Gibson *v.* Oregon Short Line, etc., R. Co., 23 Oreg. 493, 32 Pac. 295.

Pennsylvania.— Cracraft *v.* Bessemer Limestone Co., 210 Pa. St. 15, 59 Atl. 432; Casey *v.* Pennsylvania Asphalt Paving Co., 198 Pa. St. 348, 47 Atl. 1128; Cunningham *v.* Ft. Pitt Bridge Works, 197 Pa. St. 625, 47 Atl. 846; Delaware River Iron Ship-Bldg. Co. *v.* Nuttall, 119 Pa. St. 149, 13 Atl. 65.

Rhode Island.— Durell *v.* Hartwell, 26 R. I. 125, 58 Atl. 448; Paoline *v.* J. W. Bishop Co., 25 R. I. 298, 55 Atl. 752; Baumler *v.* Narragansett Brewing Co., 23 R. I. 430, 50 Atl. 841.

South Carolina.— Owings *v.* Moneynick Oil Mill, 55 S. C. 483, 33 S. E. 511.

Tennessee.— Ferguson *v.* Phœnix Cotton Mills, 106 Tenn. 236, 61 S. W. 53.

Texas.— San Antonio Gas Co. *v.* Robertson, 93 Tex. 503, 56 S. W. 323 [*reversing* (Civ. App. 1899) 55 S. W. 347]; Seery *v.* Gulf, etc., R. Co., 34 Tex. Civ. App. 89, 77 S. W. 950.

Virginia.— Richmond Locomotive Works *v.* Ford, 94 Va. 627, 27 S. E. 509.

Washington.— Watts *v.* Hart, 7 Wash. 178, 34 Pac. 423, 771.

Wisconsin.— Groth *v.* Thomann, 110 Wis. 488, 86 N. W. 178; Johnson *v.* Ashland Water Co., 77 Wis. 51, 45 N. W. 807.

United States.— Garnett *v.* Phœnix Bridge Co., 98 Fed. 192; Keats *v.* National Heeling Mach. Co., 65 Fed. 940, 13 C. C. A. 221; Thompson *v.* Chicago, etc., R. Co., 14 Fed. 564, 4 McCrary 629.

See 34 Cent. Dig. tit. "Master and Servant," § 310.

27. *Alabama.*— Perry *v.* Marsh, 25 Ala. 659.

California.— Baxter *v.* Roberts, 44 Cal. 187, 13 Am. Rep. 160.

Louisiana.— Ragland *v.* St. Louis, etc., R. Co., 49 La. Ann. 1166, 22 So. 366.

Minnesota.— Lane *v.* Minnesota State Agricultural Soc., 62 Minn. 175, 64 N. W. 382, 29 L. R. A. 708.

North Carolina.— Smith *v.* Atlanta, etc., Air Line R. Co., 132 N. C. 819, 44 S. E. 663.

United States.— The Pioneer, 78 Fed. 600.

See 34 Cent. Dig. tit. "Master and Servant," § 311.

That the danger is from the felonious and tortious designs of third persons, acting in hostility to the master, does not affect the principle. Baxter *v.* Roberts, 44 Cal. 187, 13 Am. Rep. 160.

28. *Delaware.*— Quinn *v.* Johnson Forge Co., 9 Houst. 338, 32 Atl. 858.

Florida.— Camp *v.* Hall, 39 Fla. 535, 22 So. 792.

Indiana.— Keller *v.* Gaskill, 20 Ind. App. 502, 50 N. E. 363.

Iowa.— Nelson *v.* Chicago, etc., R. Co., 77 Iowa 405, 42 N. W. 335.

Kentucky.— See Kentucky Cent. R. Co. *v.* McGinty, 9 Ky. L. Rep. 288.

Massachusetts.— Laplante *v.* Warren Cotton Mills, 165 Mass. 487, 43 N. E. 294.

New York.— Dyer *v.* Brown, 64 N. Y. App. Div. 89, 71 N. Y. Suppl. 623.

Pennsylvania.— Rummel *v.* Dilworth, 131 Pa. St. 509, 19 Atl. 345, 346, 17 Am. St. Rep. 827; Shipbuilding Works *v.* Nuttall, 4 Lanc. L. Rev. 161.

Rhode Island.— Mann *v.* Oriental Print Works, 11 R. I. 152.

Tennessee.— Tennessee Coal, etc., Co. *v.* Jarrett, 111 Tenn. 565, 82 S. W. 224.

See 34 Cent. Dig. tit. "Master and Servant," § 312.

Where the danger is obvious no duty rests upon the master to warn the servant, although he is engaged in service outside the scope of his employment. Reed *v.* Stockmeyer, 74 Fed. 186, 20 C. C. A. 381.

29. Kelly *v.* Shelby R. Co., 22 S. W. 445, 15 Ky. L. Rep. 311; De Souza *v.* Stafford Mills, 155 Mass. 476, 30 N. W. 81; Leistritz *v.* American Zylonite Co., 154 Mass. 382, 28 N. W. 294; McCue *v.* National Starch Mfg. Co., 142 N. Y. 106, 36 N. E. 809; Reinig *v.* Broadway R. Co., 49 Hun (N. Y.) 269, 1 N. Y. Suppl. 907; St. Louis Southwestern R. Co. *v.* Spivey, 97 Tex. 143, 76 S. W. 748 [*reversing* (Civ. App. 1903) 73 S. W. 973].

30. Assumption of risk see *infra*, IV, E, 7.

to the service;[31] and no duty rests upon the master to warn and instruct him as to the possible or probable dangers of the employment, where he is mature, intelligent, and experienced in the work, and the master has no notice or reason to believe that he is not fully competent and acquainted with such dangers.[32]

b. Inexperieneed or Youthful Servants — (I) *RULE STATED.* Where the master knows, or ought to know, the dangers of the employment,[33] and knows, or ought to know, that the servant, by reason of his immature years or inexperience, is ignorant of, or unable to appreciate, such dangers,[34] it is his duty to give

Care required in general see *infra*, IV, A, 1, d.

Dangers arising from negligence of fellow servants see *supra*, IV, D, 2, b.

Duty to discover or remedy defects see *infra*, IV, F, 2, b, (V).

Negligence of fellow servant performing duties of master see *infra*, IV, G, 4, a, (VII), (F).

Representations of servant as to age or experience see *infra*, IV, E, 2, b, (II).

31. *Indiana.*— Peterson *v.* New Pittsburg Coal, etc., Co., 149 Ind. 260, 49 N. E. 8, 63 Am. St. Rep. 289.

Nebraska.— Omaha Bottling Co. *v.* Theiler, 59 Nebr. 257, 80 N. W. 821, 80 Am. St. Rep. 673.

New Hampshire.— Saucier *v.* New Hampshire Spinning Mills, 72 N. H. 292, 56 Atl. 545.

Pennsylvania. — Fletcher *v.* Philadelphia Traction Co., 190 Pa. St. 117, 42 Atl. 527.

United States.—Kohn *v.* McNulta, 147 U. S. 238, 13 S. Ct. 298, 37 L. ed. 150.

See 34 Cent. Dig. tit. "Master and Servant," § 313.

32. *Illinois.*— American Malting Co. *v.* Lelivelt, 101 Ill. App. 320.

Indiana.— Peterson *v.* New Pittsburg Coal, etc., Co., 149 Ind. 260, 49 N. E. 8, 63 Am. St. Rep. 289; Arcade File Works *v.* Juteau, 15 Ind. App. 460, 40 N. E. 818, 44 N. E. 326.

Iowa.— Campbell *v.* Illinois Cent. R. Co., 124 Iowa 302, 100 N. W. 30; Hathaway *v.* Illinois Cent. R. Co., 92 Iowa 337, 60 N. W. 651.

Massachusetts. — Kennedy *v.* Merrimack Paving Co., 185 Mass. 442, 70 N. E. 437; Buston *v.* Harvard Brewing Co., 183 Mass. 438, 67 N. E. 356; Brundige *v.* Dodge Mfg. Co., 183 Mass. 100, 66 N. E. 604; Harrington *v.* Union Cotton Mfg. Co., 182 Mass. 566, 66 N. E. 414; Conner *v.* Draper Co., 182 Mass. 184, 65 N. E. 39; Bence *v.* New York, etc., R. Co., 181 Mass. 221, 63 N. E. 417; Cushman *v.* Cushman, 179 Mass. 601, 61 N. E. 262; La Belle *v.* Montague, 174 Mass. 453, 54 N. E. 859; Thain *v.* Old Colony R. Co., 161 Mass. 353, 37 N. E. 309; Flynn *v.* Campbell, 160 Mass. 128, 35 N. E. 453; Coullard *v.* Tecumseh Mills, 151 Mass. 85, 23 N. E. 731; Foley *v.* Pettee Mach. Works, 149 Mass. 294, 21 N. E. 304, 4 L. R. A. 51.

Michigan.—Willis *v.* Besser-Churchill Co., 126 Mich. 659, 86 N. W. 133; Fenlon *v.* Duluth, etc., R. Co., 108 Mich. 284, 66 N. W. 51; Prentiss *v.* Kent Furniture Mfg. Co., 63 Mich. 478, 30 N. W. 109.

Missouri. — Livengood *v.* Joplin-Galena Consol. Lead, etc., Co., 179 Mo. 229, 77 S. W. 1077; Jackson *v.* Missouri Pac. R. Co., 104 Mo. 448, 16 S. W. 413.

Nebraska.— Omaha Bottling Co. *v.* Theiler, 59 Nebr. 257, 80 N. W. 821, 80 Am. St. Rep. 673; Weed *v.* Chicago, etc., R. Co., 5 Nebr. (Unoff.) 623, 99 N. W. 827.

New Hampshire.— Saucier *v.* New Hampshire Spinning Mills, 72 N. H. 292, 56 Atl. 545; O'Hare *v.* Cocheco Mfg. Co., 71 N. H. 104, 51 Atl. 257, 93 Am. St. Rep. 499.

New York.— Ogley *v.* Miles, 139 N. Y. 458, 43 N. E. 1059; Benfield *v.* Vacuum Oil Co., 75 Hun 209, 27 N. Y. Suppl. 16.

Pennsylvania.— Cracraft *v.* Bessemer Limestone Co., 210 Pa. St. 15, 59 Atl. 432; Fletcher *v.* Philadelphia Traction Co., 190 Pa. St. 117, 42 Atl. 527; Bellows *v.* Pennsylvania, etc., Canal, etc., Co., 157 Pa. St. 51, 27 Atl. 685; Hahn *v.* Smith, 6 Pa. Co. Ct. 207.

Texas.—Hettich *v.* Hillje, 33 Tex. Civ. App. 571, 77 S. W. 641; Parish *v.* Missouri, etc., R. Co., (Civ. App. 1903) 76 S. W. 234.

Wisconsin.— Dougherty *v.* West Superior Iron, etc., Co., 88 Wis. 343, 60 N. W. 274.

United States.— King *v.* Morgan, 109 Fed. 446, 48 C. C. A. 507; Mississippi River Logging Co. *v.* Schneider, 74 Fed. 195, 20 C. C. A. 390; Cincinnati, etc., R. Co. *v.* Mealer, 50 Fed. 725, 1 C. C. A. 633.

See 34 Cent. Dig. tit. "Master and Servant," § 313.

33. Knowledge by master of defects and dangers see *supra*, IV, B, 7.

34. Knowledge of servant's youth or inexperience necessary.—*Arkansas.*— Ford *v.* Bodcaw Lumber Co., 73 Ark. 49, 83 S. W. 346.

Delaware. — Punkowski *v.* New Castle Leather Co., 4 Pennew. 544, 57 Atl. 559.

Indiana.— Arcade File Works *v.* Juteau, 15 Ind. App. 460, 40 N. E. 818, 44 N. E. 326.

Kansas.— Patterson *v.* Cole, 67 Kan. 441, 73 Pac. 54.

Massachusetts.— Gaudet *v.* Stansfield, 182 Mass. 451, 65 N. E. 850.

Michigan.— Stanley *v.* Chicago, etc., R. Co., 101 Mich. 202, 59 N. W. 393.

New Jersey.— Diehl *v.* Standard Oil Co., 70 N. J. L. 424, 57 Atl. 131.

See 34 Cent. Dig. tit. "Master and Servant," § 316.

The master has the right to presume, in the absence of knowledge to the contrary, that the servant has the knowledge, discretion, and experience of the average servant of his age and intelligence. Punkowski *v.* New Castle Leather Co., 4 Pennew. (Del.) 544, 57 Atl. 559.

him such instruction and warning of the dangerous character of the employment as may reasonably enable him to understand its perils.[35] But the mere fact of the servant's minority does not charge the master with the duty to warn and

35. *Alabama.*— Louisville, etc., R. Co. *v.* Binion, 107 Ala. 645, 18 So. 75; Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710.

Arizona.— Arizona Lumber, etc., Co. *v.* Mooney, 4 Ariz. 96, 33 Pac. 590.

Arkansas.— Ford *v.* Bodcaw Lumber Co., 73 Ark. 49, 83 S. W. 346; Emma Cotton Seed Oil Co. *v.* Hale, 56 Ark. 232, 19 S. W. 600.

California.—Verdelli *v.* Gray's Harbor Commercial Co., 115 Cal. 517, 47 Pac. 364; Ryan *v.* Los Angeles Ice, etc., Co., 112 Cal. 244, 44 Pac. 471, 32 L. R. A. 524; Ingerman *v.* Moore, 90 Cal. 410, 27 Pac. 306, 25 Am. St. Rep. 138.

Delaware.— Karczewski *v.* Wilmington City R. Co., 4 Pennew. 24, 54 Atl. 746; Giordano *v.* Brandywine Granite Co., 3 Pennew. 423, 52 Atl. 332; Strattner *v.* Wilmington City Electric Co., 3 Pennew. 245, 50 Atl. 57.

Georgia.— Atlanta, etc., R. Co. *v.* Smith, 94 Ga. 107, 20 S. E. 763; May *v.* Smith, 92 Ga. 95, 18 S. E. 360, 44 Am. St. Rep. 84; Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838.

Illinois.— Pittsburg, etc., R. Co. *v.* Hewitt, 202 Ill. 28, 66 N. E. 829 [*affirming* 102 Ill. App. 428]; Harris *v.* Shebek, 151 Ill. 287, 37 N. E. 1015; Nelson Mfg. Co. *v.* Stoltzenburg, 59 Ill. App. 628.

Indiana.— Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; New Albany Forge, etc., Mill *v.* Cooper, 131 Ind. 363, 30 N. E. 294; Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18, 9 N. E. 594; Atlas Engine Works *v.* Randall, 100 Ind. 293, 50 Am. Rep. 798; Brower *v.* Locke, 31 Ind. App. 353, 67 N. E. 1015; Keller *v.* Gaskell, 9 Ind. App. 670, 36 N. E. 303, 20 Ind. App. 502, 50 N. E. 363.

Iowa.— Sachau *v.* Milner, 123 Iowa 387, 98 N. W. 900.

Kansas.— Patterson *v.* Cole, 67 Kan. 441, 73 Pac. 54; Missouri Pac. R. Co. *v.* Peregoy, 36 Kan. 424, 14 Pac. 7.

Kentucky.— Standard Oil Co. *v.* Eiler, 110 Ky. 209, 61 S. W. 8, 22 Ky. L. Rep. 1641; James *v.* Ames, 82 S. W. 229, 26 Ky. L. Rep. 498; Henderson Cotton Mills *v.* Warren, 70 S. W. 658, 24 Ky. L. Rep. 1030; Louisville, etc., R. Co. *v.* Veach, 46 S. W. 493, 20 Ky. L. Rep. 403.

Louisiana.— Carter *v.* Fred W. Dubach Lumber Co., 113 La. 239, 36 So. 952; Bonnin *v.* Crowley, 112 La. 1025, 36 So. 842; Lindsey *v.* Tioga Lumber Co., 108 La. 468, 32 So. 464, 92 Am. St. Rep. 384; Myhan *v.* Louisiana Electric Light, etc., Co., 41 La. Ann. 964, 6 So. 799, 17 Am. St. Rep. 436, 7 L. R. A. 172.

Maryland.—Skinner *v.* McLaughlin, 94 Md. 524, 51 Atl. 98; National Enameling, etc., Co. *v.* Brady, 93 Md. 646, 49 Atl. 845.

Massachusetts.— De Costa *v.* Hargraves Mills, 170 Mass. 375, 49 N. E. 735; Gilbert *v.* Guild, 144 Mass. 601, 12 N. E. 368; Atkins *v.* Merrick Thread Co., 142 Mass. 431, 8 N. E. 241; O'Connor *v.* Adams, 120 Mass. 427; Walsh *v.* Peet Valve Co., 110 Mass. 23; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506.

Michigan.— Allen *v.* Jakel, 115 Mich. 484, 73 N. W. 555; Parkhurst *v.* Johnson, 50 Mich. 70, 15 N. W. 107, 45 Am. Rep. 28.

Minnesota.— Lund *v.* Woodworth, 75 Minn. 501, 78 N. W. 81; Holman *v.* Kempe, 70 Minn. 422, 73 N. W. 186.

Mississippi.— Illinois Cent. R. Co. *v.* Price, 72 Miss. 862, 18 So. 415.

Missouri.— Vanesler *v.* Moser Cigar, etc., Box Co., 108 Mo. App. 621, 84 S. W. 201; Lemser *v.* St. Joseph Furniture Mfg. Co., 70 Mo. App. 209.

Nebraska.— Ittner Brick Co. *v.* Killian, 67 Nebr. 589, 93 N. W. 951; Evans Laundry Co. *v.* Crawford, 67 Nebr. 153, 93 N. W. 177, 94 N. W. 814; Omaha Bottling Co. *v.* Theiler, 59 Nebr. 257, 80 N. W. 821, 80 Am. St. Rep. 673; Norfolk Beet-Sugar Co. *v.* Hight, 56 Nebr. 162, 76 N. W. 566; Kearney Electric Co. *v.* Laughlin, 45 Nebr. 390, 63 N. W. 941.

New Hampshire.— Lapelle *v.* International Paper Co., 71 N. H. 346, 51 Atl. 1068.

New Jersey.— Addicks *v.* Christoph, 62 N. J. L. 786, 43 Atl. 196, 72 Am. St. Rep. 687; Smith *v.* Irwin, 51 N. J. L. 507, 18 Atl. 852, 14 Am. St. Rep. 699.

New York.— Sullivan *v.* Metropolitan St. R. Co., 170 N. Y. 570, 62 N. E. 1100 [*affirming* 53 N. Y. App. Div. 89, 65 N. Y. Suppl. 842]; Owens *v.* Ernst, 142 N. Y. 661, 37 N. E. 569 [*affirming* 1 Misc. 388, 21 N. Y. Suppl. 426]; Lofrano *v.* New York, etc., Water Co., 130 N. Y. 658, 29 N. E. 1033 [*affirming* 55 Hun 452, 8 N. Y. Suppl. 717]; Brennan *v.* Gordon, 118 N. Y. 489, 23 N. E. 810, 16 Am. St. Rep. 775, 8 L. R. A. 818; Hickey *v.* Taaffe, 105 N. Y. 26, 12 N. E. 286; Lowry *v.* Anderson Co., 96 N. Y. App. Div. 465, 89 N. Y. Suppl. 107; Dyer *v.* Brown, 64 N. Y. App. Div. 89, 71 N. Y. Suppl. 623; Thall *v.* Carnie, 1 Silv. Sup. 401, 5 N. Y. Suppl. 244; Gamble *v.* Hine, 2 N. Y. Suppl. 778; Burke *v.* Brown, 14 N. Y. St. 619; Flynn *v.* Erie Preserving Co., 12 N. Y. St. 88; Murphy *v.* Mairs, 6 N. Y. St. 42.

North Carolina.— Marcus *v.* Loane, 133 N. C. 54, 45 S. E. 354; Turner *v.* Goldsboro Lumber Co., 119 N. C. 387, 26 S. E. 23.

Ohio.— Cleveland Rolling-Mill Co. *v.* Corrigan, 46 Ohio St. 283, 20 N. E. 466, 3 L. R. A. 385; Breckenridge *v.* Reagan, 22 Ohio Cir. Ct. 71, 12 Ohio Cir. Dec. 50; Toomey *v.* Avery Stamping Co., 20 Ohio Cir. Ct. 183, 11 Ohio Cir. Dec. 216; Wainwright *v.* Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 530.

Oregon.— Roth *v.* Northern Pac. Lumbering Co., 18 Oreg. 205, 22 Pac. 842. *Compare* Gibson *v.* Oregon Short Line, etc., R. Co., 23 Oreg. 493, 32 Pac. 295.

Pennsylvania.— Doyle *v.* Pittsburg Waste Co., 204 Pa. St. 618, 54 Atl. 363; Welsh *v.*

instruct him, if he in fact knows and appreciates the dangers of the employment;[36] and generally it is for the jury to determine whether, under all the circumstances, it was incumbent upon the master to give the minor, at the time of his employment, or at some time previous to the injury, instructions regarding the dangers of the work, and how he could safely perform it.[37]

Butz, 202 Pa. St. 59, 51 Atl. 591; Tagg *v.* McGeorge, 155 Pa. St. 368, 26 Atl. 671, 35 Am. St. Rep. 889; Rummel *v.* Dilworth, 131 Pa. St. 509, 19 Atl. 345, 346, 17 Am. St. Rep. 827; Brislin *v.* Kingston Coal Co., 20 Pa. Super. Ct. 234; Royer *v.* Tinkler, 16 Pa. Super. Ct. 457; Davis *v.* Pennsylvania R. Co., 5 Pa. Co. Ct. 567.

South Carolina.— Hightower *v.* Bamberg, Cotton Mills, 48 S. C. 190, 26 S. E. 222.

Texas.—International, etc., R. Co. *v.* Hinzie, 82 Tex. 623, 18 S. W. 681; Missouri Pac. R. Co. *v.* White, 76 Tex. 102, 13 S. W. 65, 18 Am. St. Rep. 33; Texas, etc., R. Co. *v.* Utley, 27 Tex. Civ. App. 472, 66 S. W. 311; Waxahachie Cotton Oil Co. *v.* McLain, 27 Tex. Civ. App. 334, 66 S. W. 226; Gulf, etc., R. Co. *v.* Newman, 27 Tex. Civ. App. 77, 64 S. W. 790; Texarkana, etc., R. Co. *v.* Preacher, (Civ. App. 1900) 59 S. W. 593; Galveston, etc., R. Co. *v.* Hughes, 22 Tex. Civ. App. 134, 54 S. W. 264; Greenville Oil, etc., Co. *v.* Harkey, 20 Tex. Civ. App. 225, 48 S. W. 1005; Missouri, etc., R. Co. *v.* Evans, 16 Tex. Civ. App. 68, 41 S. W. 80; Houston, etc., R. Co. *v.* Strycharski, (Civ. App. 1896) 35 S. W. 851; Wrought Iron Range Co. *v.* Martin, (Civ. App. 1894) 28 S. W. 557.

Utah.—Anderson *v.* Daly Min. Co., 15 Utah 22, 49 Pac. 126.

Vermont.— Reynolds *v.* Boston, etc., R. Co., 64 Vt. 66, 24 Atl. 134, 33 Am. St. Rep. 908.

Virginia.—Lynchburg Cotton Mills *v.* Stanley, 102 Va. 590, 46 S. E. 908.

Washington.— Jancko *v.* West Coast Mfg., etc., Co., 34 Wash. 556, 76 Pac. 78.

West Virginia.— Giebell *v.* Collins Co., 54 W. Va. 518, 46 S. E. 569.

Wisconsin.— Horn *v.* La Crosse Box Co., 123 Wis. 399, 101 N. W. 935; Greenberg *v.* Whitcomb Lumber Co., 90 Wis. 225, 63 N. W. 93, 48 Am. St. Rep. 911, 28 L. R. A. 439; Nadau *v.* White River Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29.

United States.— Mather *v.* Rillston, 156 U. S. 391, 15 S. Ct. 464, 39 L. ed. 464 [*affirming* 44 Fed. 743]; Wright *v.* Stanley, 119 Fed. 330, 56 C. C. A. 234; Nyback *v.* Champagne Lumber Co., 109 Fed. 732, 48 C. C. A. 632; Reed *v.* Stockmeyer, 74 Fed. 186, 20 C. C. A. 381; Burke *v.* Anderson, 69 Fed. 814, 16 C. C. A. 442; Wallace *v.* Standard Oil Co., 66 Fed. 260.

England.— Ogden *v.* Rummens, 3 F. & F. 751; Grizzle *v.* Frost, 3 F. & F. 622; Barton's Hill Coal Co. *v.* Reid, 4 Jur. N. S. 767, 3 Macq. H. L. 266, 6 Wkly. Rep. 664.

Canada.— Sparano *v.* Canadian Pac. R. Co., 22 Quebec Super. Ct. 292; McCarthy *v.* Thomas, Davidson Mfg. Co., 18 Quebec Super. Ct. 272. See also Vicary *v.* Keith, 34 U. C. Q. B. 212.

See 34 Cent. Dig. tit. "Master and Servant," §§ 314, 315.

Where there is a safe and an unsafe way of doing the work, the master must give an unskilled servant instructions how to do it so as to avoid injury. Wright *v.* Stanley, 119 Fed. 330, 56 C. C. A. 234. See also Brislin *v.* Kingston Coal Co., 20 Pa. Super. Ct. 234; Sheetram *v.* Trexler Stove, etc., Co., 13 Pa. Super. Ct. 219.

The servant's failure to ask information does not relieve the master from liability. Missouri Pac. R. Co. *v.* Watts, 64 Tex. 568.

Where experience and instructions are not necessary to enable an inexperienced servant to do his work safely, it is not the duty of the master to warn him of the dangers of his service. Ford *v.* Bodcaw Lumber Co., 73 Ark. 49, 83 S. W. 346.

Where there is neither real nor apparent danger, instructions are unnecessary. Briggs *v.* Newport News, etc., Co., 24 S. W. 1069, 15 Ky. L. Rep. 618.

36. *Alabama.*— Northern Alabama Coal, etc., Co. *v.* Beacham, 140 Ala. 422, 37 So. 227; Worthington *v.* Goforth, 124 Ala. 656, 26 So. 531.

California.— Fries *v.* American Lead Pencil Co., 141 Cal. 610, 75 Pac. 164.

Georgia.— Alabama East, etc., R. Co. *v.* Sims, 80 Ga. 807, 6 So. 595.

Illinois.— Ryan *v.* Armour, 166 Ill. 568, 47 N. E. 60 [*affirming* 67 Ill. App. 102].

Maine.— Bessey *v.* Newichawanick Co., 94 Me. 61, 46 Atl. 806; Cunningham *v.* Bath Iron Works, 92 Me. 501, 43 Atl. 106.

Massachusetts.— Crowley *v.* Pacific Mills, 148 Mass. 228, 19 N. E. 344.

Michigan.— Prentiss *v.* Kent Furniture Mfg. Co., 63 Mich. 478, 30 N. W. 109.

Nebraska.— Omaha Bottling Co. *v.* Theiler, 59 Nebr. 257, 80 N. W. 821, 80 Am. St. Rep. 673.

New York.— Ogley *v.* Miles, 139 N. Y. 458, 34 N. E. 1059; Rikel *v.* Ferguson, 117 N. Y. 658, 22 N. E. 1134 [*affirming* 5 N. Y. Suppl. 774]; Gordon *v.* Reynolds' Card Mfg. Co., 47 Hun 278.

See 34 Cent. Dig. tit. "Master and Servant," § 314.

37. Question for jury.— Atlanta, etc., R. Co. *v.* Smith, 94 Ga. 107, 20 S. E. 763 [*following* Davis *v.* Augusta Factory, 92 Ga. 712, 714, 18 S. E. 974, where it is said: "Without doubt, in some cases even minors are not necessarily entitled to any warning at all as to the character of the machinery about which they are at work, or as to the proper method of operating it and avoiding obvious dangers. Much depends upon the nature of the machinery, the age, capacity, intelligence and experience of the employee, as well as all the surrounding facts and circumstances"]. See also Egan *v.* Sawyer, etc., Lumber Co., 94 Wis. 137, 68 N. W. 756.

(II) *Obvious Dangers.* As a general rule the master is not required to warn and instruct an inexperienced or youthful servant as to risks and dangers which are patent and obvious to persons of ordinary intelligence.[38] But in determining what dangers are obvious and apparent, within the rule, the experience or lack of experience of the servant must be considered;[39] and if, through youth, inexperience, or other cause, a servant is incompetent fully to understand and appreciate the danger, although patent and obvious, it is the duty of the master to warn and instruct him fully, and failing so to do, he is liable.[40]

(III) *Sufficiency of Warnings or Instructions.* It is the duty of a master who employs a servant in a place of danger to give him such warning and instruction as is reasonably required by his youth, inexperience, or want of capacity, and as will enable him, with the exercise of reasonable care, to perform the duties of his employment with reasonable safety to himself.[41] And where

38. *Alabama.*— Boland *v.* Louisville, etc., R. Co., 106 Ala. 641, 18 So. 99, 96 Ala. 626, 11 So. 667; East Tennessee, etc., R. Co. *v.* Turvaville, 97 Ala. 122, 12 So. 63.

Arkansas.— Fones *v.* Phillips, 39 Ark. 17, 43 Am. Rep. 264.

Illinois.— Shickle-Harrison, etc., Iron Co. *v.* Beck, 112 Ill. App. 444; Marsden Co. *v.* Johnson, 89 Ill. App. 100; Jones *v.* Roberts, 57 Ill. App. 56.

Massachusetts.— Sullivan *v.* Simplex Electrical Co., 178 Mass. 35, 59 N. E. 645; Silvia *v.* Sagamore Mfg. Co., 177 Mass. 476, 59 N. E. 73; Robinska *v.* Mills, 174 Mass. 432, 54 N. E. 873, 75 Am. St. Rep. 364; Shine *v.* Cocheco Mfg. Co., 173 Mass. 558, 54 N. E. 245; Lowcock *v.* Franklin Paper Co., 169 Mass. 313, 47 N. E. 1000; Stuart *v.* West End St. R. Co., 163 Mass. 391, 40 N. E. 180; Connors *v.* Morton, 160 Mass. 333, 35 N. E. 860.

Michigan.— Mackin *v.* Alaska Refrigerator Co., 100 Mich. 276, 58 N. W. 999.

Missouri.— Nugent *v.* Kauffman Milling Co., 131 Mo. 241, 33 S. W. 428.

Nebraska.—Norfolk Beet-Sugar Co. *v.* Preuner, 55 Nebr. 656, 75 N. W. 1097.

New Jersey.— Hesse *v.* National Casket Co., 66 N. J. L. 652, 52 Atl. 384.

New York.— Oszkoscil *v.* Eagle Pencil Co., 119 N. Y. 631, 23 N. E. 1145 [*affirming* 57 N. Y. Super. Ct. 217, 6 N. Y. Suppl. 501]; Buckley *v.* Gutta Percha, etc., Mfg. Co., 113 N. Y. 540, 21 N. E. 717; Wahl *v.* Chatillon, 56 N. Y. App. Div. 554, 67 N. Y. Suppl. 504; Gaertner *v.* Schmitt, 21 N. Y. App. Div. 403, 47 N. Y. Suppl. 521; Costello *v.* Judson, 21 Hun 396.

Tennessee.— Ferguson *v.* Phœnix Cotton Mills, 106 Tenn. 236, 61 S. W. 53.

Wisconsin.—Wagner *v.* Plano Mfg. Co., 110 Wis. 48, 85 N. W. 643.

See 34 Cent. Dig. tit. "Master and Servant," § 316½.

39. Shickle-Harrison, etc., Iron Co. *v.* Beck, 112 Ill. App. 444.

40. *California.*— Fisk *v.* Central Pac. R. Co., 72 Cal. 38, 13 Pac. 144, 1 Am. St. Rep. 22; Kline *v.* Central Pac. R. Co., 37 Cal. 400, 99 Am. Dec. 282.

Illinois.— Chicago Anderson Pressed Brick Co. *v.* Reinneiger, 140 Ill. 334, 29 N. E. 1106, 33 Am. St. Rep. 249 [*affirming* 41 Ill. App. 324].

Indiana.— Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18, 9 N. E. 594; Hill *v.* Gust, 55 Ind. 45.

Massachusetts.—Sullivan *v.* India Mfg. Co., 113 Mass. 396; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506.

Missouri.— Dowling *v.* Allen, 74 Mo. 13, 41 Am. Rep. 298.

New Hampshire.— Collins *v.* Laconia Car Co., 68 N. H. 196, 38 Atl. 1047.

New Jersey.— Addicks *v.* Christoph, 62 N. J. L. 786, 43 Atl. 196, 72 Am. St. Rep. 687.

New York.— Latorre *v.* Central Stamping Co., 9 N. Y. App. Div. 145, 41 N. Y. Suppl. 99.

West Virginia.— Giebell *v.* Collins Co., 54 W. Va. 518, 46 S. E. 569.

United States.— See Union Pac. R. Co. *v.* Fort, 17 Wall. 553, 21 L. ed. 739.

England.— Grizzle *v.* Frost, 3 F. & F. 622.

"To a mere child . . . dangers which would be patent to the adult of experience are or may be latent." Fisk *v.* Central Pac. R. Co., 72 Cal. 38, 13 Pac. 144, 1 Am. St. Rep. 22.

41. *Kentucky.*— Louisville Bagging Co. *v.* Dolan, 13 Ky. L. Rep. 493.

Louisiana.— Powers *v.* Calcasieu Sugar Co., 48 La. Ann. 483, 19 So. 455.

Maine.— Bessey *v.* Newichawanick Co., 94 Me. 61, 46 Atl. 806.

Massachusetts.— Atkins *v.* Merrick Thread Co., 142 Mass. 431, 8 N. E. 241.

Tennessee.—Whitelaw *v.* Memphis, etc., R. Co., 16 Lea 391, 1 S. W. 37.

West Virginia.— Giebell *v.* Collins Co., 54 W. Va. 518, 46 S. E. 569.

See 34 Cent. Dig. tit. "Master and Servant," § 317.

Warnings and instructions held sufficient see Kolb *v.* Chicago Stamping Co., 33 Ill. App. 488; Wilson *v.* Steel Edge Stamping, etc., Co., 163 Mass. 315, 39 N. E. 1039; Rood *v.* Lawrence Mfg. Co., 155 Mass. 590, 30 N. E. 174; Tinkham *v.* Sawyer, 153 Mass. 485, 27 N. E. 6; Hathaway *v.* Michigan Cent. R. Co., 51 Mich. 253, 16 N. W. 634, 47 Am. Rep. 569, warning in general terms of the danger of coupling cars of different construction, and direction to take no chances in making such couplings.

the servant is a minor, the master must put his warning in such plain language as to be sure that the servant understands and appreciates the danger. It is not enough that he should do his best to make the servant understand; he must actually understand and appreciate the danger.[42]

E. Risks Assumed by Servant[43] **— 1. General Principles — a. Rule Stated.** While a servant does not assume the extraordinary and unusual risks of the employment,[44] the rule is well settled both in England[45] and in this country[46] that on accepting employment he does assume all the ordinary and usual risks

42. Chicago Anderson Pressed Brick Co. *v.* Reinmeiger, 140 Ill. 334, 29 N. E. 1106, 33 Am. St. Rep. 249 [*affirming* 41 Ill. App. 324]; Taylor *v.* Wootan, 1 Ind. App. 188, 27 N. E. 502, 50 Am. St. Rep. 200; Addicks *v.* Christoph, 62 N. J. L. 786, 43 Atl. 196, 72 Am. St. Rep. 687; Lynchburg Cotton Mills *v.* Stanley, 102 Va. 590, 46 S. E. 687.

Sufficiency of warning a question for the jury see Bibb Mfg. Co. *v.* Taylor, 95 Ga. 615, 23 S. E. 188.

43. By persons not employees see Negligence.

By persons working about railroad tracks see Railroads.

Contracts limiting liability by licensee of railroad trains see Railroads.

44. *Alabama.*— Louisville, etc., R. Co. *v.* Bouldin, 127 Ala. 197, 25 So. 903.

Arkansas.— St. Louis, etc., R. Co. *v.* Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773.

District of Columbia.— Staubley *v.* Potomac Electric Power Co., 21 App. Cas. 160.

Illinois.—Illinois Terminal R. Co. *v.* Thompson, 210 Ill. 226, 71 N. E. 328 [*affirming* 112 Ill. App. 463]; Malott *v.* Hood, 201 Ill. 202, 66 N. E. 247 [*affirming* 99 Ill. App. 360]; Landgraf *v.* Kuh, 188 Ill. 484, 59 N. E. 501 [*reversing* 90 Ill. App. 134]; John Spry Lumber Co. *v.* Duggan, 182 Ill. 218, 54 N. E. 1002 [*affirming* 80 Ill. App. 394]; Decatur Cereal Mill Co. *v.* Gogerty, 180 Ill. 197, 54 N. E. 231; Dallemand *v.* Saalfeldt, 175 Ill. 310, 51 N. E. 645, 48 L. R. A. 753, 67 Am. St. Rep. 214 [*affirming* 73 Ill. App. 151]; Chicago Hair, etc., Co. *v.* Mueller, 106 Ill. App. 21 [*affirmed* in 203 Ill. 558, 68 N. E. 51]; Mallen *v.* Waldowski, 101 Ill. App. 367; Colson *v.* Craver, 80 Ill. App. 99; Illinois Cent. R. Co. *v.* Gilbert, 51 Ill. App. 404.

Indiana.— Republic Iron, etc., Co. *v.* Ohler, 161 Ind. 393, 68 N. E. 901.

Missouri.— Dupuy *v.* Chicago, etc., R. Co, 110 Mo. App. 110, 84 S. W. 103; Harris *v.* H. D. Williams Cooperage Co., 107 Mo. App. 294, 80 S. W. 924; Benedict *v.* Chicago, etc., R. Co., 104 Mo. App. 218, 78 S. W. 60; Nickel *v.* Columbia Paper Stock Co., 95 Mo. App. 226, 68 S. W. 955.

New York.— Dohn *v.* Dawson, 157 N. Y. 686, 51 N. E. 1090 [*affirming* 90 Hun 271, 35 N. Y. Suppl. 984]; Nelson *v.* New York, 101 N. Y. App. Div. 18, 91 N. Y. Suppl. 763; Smith *v.* Lidgerwood Mfg. Co., 56 N. Y. App. Div. 528, 67 N. Y. Suppl. 533; Spelman *v.* Fisher Iron Co., 56 Barb. 151; Burke *v.* Brown, 14 N. Y. St. 619.

Ohio.— Little Miami R. Co. *v.* Stevens, 20 Ohio 415.

Texas.— St. Louis Southwestern R. Co. *v.* McDowell, (Civ. App. 1903) 73 S. W. 974.

Utah.— Garity *v.* Bullion-Beck, etc., Min. Co., 27 Utah 534, 76 Pac. 556.

Virginia.— Richland's Iron Co. *v.* Elkins, 90 Va. 249, 17 S. E. 890.

United States.—National Steel Co. *v.* Lowe, 127 Fed. 311, 62 C. C. A. 229; Northwestern Fuel Co. *v.* Danielson, 57 Fed. 915, 6 C. C. A. 636; Gravelle *v.* Minneapolis, etc., R. Co., 10 Fed. 711, 3 McCrary 352.

See 34 Cent. Dig. tit. "Master and Servant," § 543.

45. Seymour *v.* Maddox, 16 Q. B. 326, 15 Jur. 723, 20 L. J. Q. B. 327, 71 E. C. L. 326; Britton *v.* Great Western Cotton Co., L. R. 7 Exch. 130, 41 L. J. Exch. 99, 27 L. T. Rep. N. S. 125, 20 Wkly. Rep. 525; Couch *v.* Steel, 2 C. L. R. 940, 3 E. & B. 402, 18 Jur. 515, 23 L. J. Q. B. 121, 2 Wkly. Rep. 170, 77 E. C. L. 402, 24 Eng. L. & Eq. 77; Skipp *v.* Eastern Counties R. Co., 2 C. L. R. 185, 9 Exch. 223, 23 L. J. Exch. 23; Hutchinson *v.* York, etc., R. Co., 5 Exch. 343, 19 L. J. Exch. 296, 6 R. & Can. Cas. 580; Clarke *v.* Holmes, 7 H. & N. 937, 8 Jur. N. S. 992, 31 L. J. Exch. 356, 9 L. T. Rep. N. S. 178, 10 Wkly. Rep. 405; Griffiths *v.* Gidlow, 3 H. & N. 648, 27 L. J. Exch. 404; Priestley *v.* Fowler, 1 Jur. 987, 7 L. J. Exch. 42, M. & H. 305, 3 M. & W. 1; Barton's Hill Coal Co. *v.* Reid, 4 Jur. N. S. 767, 3 Macq. H. L. 266, 6 Wkly. Rep. 664; Saxton *v.* Hawksworth, 26 L. T. Rep. N. S. 851.

46. *Alabama.*— Alabama Mineral R. Co. *v.* Marcus, 115 Ala. 389, 22 So. 135.

Arkansas.—St. Louis, etc., R. Co. *v.* Touhey, 67 Ark. 209, 54 S. W. 577, 77 Am. St. Rep. 109.

California.—Hennesey *v.* Bingham, 125 Cal. 627, 58 Pac. 200.

Colorado.— Summerhays *v.* Kansas Pac. R. Co., 2 Colo. 484; Kellogg *v.* Denver City Tramway Co., 18 Colo. App. 475, 72 Pac. 609.

Connecticut.— Hayden *v.* Smithville Mfg. Co., 29 Conn. 548.

Dakota.— Songstad *v.* Burlington, etc., R. Co., 5 Dak. 517, 41 N. W. 755.

Delaware.— Strattner *v.* Wilmington City Electric Co., 3 Pennew. 245, 50 Atl. 57; Croker *v.* Pusey, etc., Co., 3 Pennew. 1, 50 Atl. 61; Foster *v.* Pusey, 8 Houst. 168, 14 Atl. 545.

District of Columbia.— Staubley *v.* Potomac Electric Power Co., 21 App. Cas. 160.

Georgia.—Wrightsville, etc., R. Co. *v.* Lattimore, 118 Ga. 581, 45 S. E. 453; Daniel *v.*

and perils incident thereto, whether it be dangerous or otherwise, and also

Forsyth, 106 Ga. 568, 32 S. E. 621; Noble *v.* Jones, 103 Ga. 584, 30 S. E. 535; Worlds *v.* Georgia R. Co., 99 Ga. 283, 25 S. E. 646; Central R., etc., Co. *v.* Kelly, 58 Ga. 107.

Idaho.— Minty *v.* Union Pac. R. Co., 2 Ida. (Hasb.) 437, 21 Pac. 660, 4 L. R. A. 409.

Illinois.—Illinois Terminal R. Co. *v.* Thompson, 210 Ill. 226, 71 N. E. 328 [*affirming* 112 Ill App. 463]; Malott *v.* Hood, 201 Ill. 202, 66 N. E. 247 [*affirming* 99 Ill. App. 360]; Chicago, etc., R. Co. *v.* Clark, 108 Ill. 113; Chicago, etc., R. Co. *v.* Donahue, 75 Ill. 106; Chicago, etc., R. Co. *v.* Bell, 111 Ill. App. 280; Chicago, etc., R. Co. *v.* Wild, 109 Ill. App. 38; Heusner Baking Co. *v.* Trakal, 107 Ill. App. 327 [*affirmed* in 204 Ill. 179, 68 N. E. 399]; International Packing Co. *v.* Cichowicz, 107 Ill. App. 234 [*affirmed* in 206 Ill. 346, 68 N. E. 1083]; Chicago Hair, etc., Co. *v.* Mueller, 106 Ill. App. 21 [*affirmed* in 203 Ill. 558, 68 N. E. 51]; Chicago City R. Co. *v.* Leach, 104 Ill. App. 30; Pittsburg, etc., R. Co. *v.* Hewitt, 102 Ill. App. 428 [*affirmed* in 202 Ill. 28, 66 N. E. 829]; Dolese, etc., Co. *v.* Schultz, 101 Ill. App. 569; Chicago Edison Co. *v.* Davis, 93 Ill. App. 284; William Graver Tank Works *v.* O'Donnell, 91 Ill. App. 524; Mattson *v.* Qualey Constr. Co., 90 Ill. App. 260; Western Stone Co. *v.* Musial, 85 Ill. App. 82; Wabash, etc., R. Co. *v.* Kastner, 80 Ill. App. 572; Inland Steel Co. *v.* Eastman, 80 Ill. App. 59; Illinois Cent. R. Co. *v.* Swisher, 74 Ill. App. 164; Banks *v.* Effingham, 63 Ill. App. 221.

Indiana.— Stone *v.* Bedford Quarries Co., 156 Ind. 432, 60 N. E. 35; Pennsylvania Co. *v.* Ehaugh, 152 Ind. 531, 53 N. E. 763; Thompson *v.* Citizens' St. R. Co., 152 Ind. 461, 53 N. E. 462; Salem-Bedford Stone Co. *v.* Hobbs, 144 Ind. 146, 42 N. E. 1022; Southern Indiana R. Co. *v.* Moore, 29 Ind. App. 52, 63 N. E. 863; Baltimore, etc., R. Co. *v.* Welsh, 17 Ind. App. 505, 47 N. E. 182.

Iowa.—Wahlquist *v.* Maple Grove Coal, etc., Min. Co., 116 Iowa 720, 89 N. W. 98; Stockwell *v.* Chicago, etc., R. Co., 106 Iowa 63, 75 N. W. 665.

Kansas.— Atchison, etc., R. Co. *v.* Bancord, 66 Kan. 81, 71 Pac. 253; Emporia *v.* Kowalski, 66 Kan. 64, 71 Pac. 232.

Kentucky.— Kentucky Freestone Co. *v.* McGee, 118 Ky. 306, 80 S. W. 1113, 25 Ky. L. Rep. 2211; Louisville, etc., R. Co. *v.* Bocock, 107 Ky. 223, 51 S. W. 580, 53 S. W. 262, 21 Ky. L. Rep. 383; Ashland Coal, etc., R. Co. *v.* Wallace, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207, 19 Ky. L. Rep. 849; Greer *v.* Louisville, etc., R. Co., 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345; Louisville, etc., R. Co. *v.* Milliken, 51 S. W. 796, 21 Ky. L. Rep. 489; Ohio Valley R. Co. *v.* McKinley, 33 S. W. 186, 17 Ky. L. Rep. 1028.

Louisiana.— Moffet *v.* Koch, 106 La. 371, 31 So. 40; Smith *v.* Sellars, 40 La. Ann. 527, 4 So. 333; Spalding *v.* Jefferson, 27 La. Ann. 159.

Maine.— Jones *v.* Manufacturing, etc., Co., 92 Me. 565, 43 Atl. 512, 69 Am. St. Rep. 535; Rhoades *v.* Varney, 91 Me. 222, 39 Atl. 552; Haggerty *v.* Hallowell Granite Co., 89 Me. 118, 35 Atl. 1029.

Maryland.—Baltimore, etc., R. Co. *v.* State, 41 Md. 268.

Massachusetts.— Tanner *v.* New York, etc., R. Co., 180 Mass. 572, 62 N. E. 993; McIsaac *v.* Northampton Electric Lighting Co., 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244; Tenanty *v.* Boston Mfg. Co., 170 Mass. 323, 49 N. E. 654; Beique *v.* Hosmer, 169 Mass. 541, 48 N. E. 338; Dacey *v.* New York, etc., R. Co., 168 Mass. 479, 47 N. E. 418; Bell *v.* New York, etc., R. Co., 168 Mass. 443, 47 N. E. 118; Thain *v.* Old Colony R. Co., 161 Mass. 353, 37 N. E. 309; Kleinest *v.* Kunhardt, 160 Mass. 230, 35 N. E. 458; Wood *v.* Locke, 147 Mass. 604, 18 N. E. 578; Murphy *v.* Greeley, 146 Mass. 196, 15 N. E. 654; Taylor *v.* Carew Mfg. Co., 143 Mass. 470, 10 N. E. 308; Snow *v.* Housatonic R. Co., 8 Allen 441, 85 Am. Dec. 720.

Michigan.—Whalen *v.* Michigan Cent. R. Co., 114 Mich. 512, 72 N. W. 323; Marquette, etc., R. Co. *v.* Taft, 28 Mich. 289.

Minnesota.— Broderick *v.* St. Paul City R. Co., 74 Minn. 163, 77 N. W. 28; Wolf *v.* Great Northern R. Co., 72 Minn. 435, 75 N. W. 702; Reiter *v.* Winona, etc., R. Co., 72 Minn. 225, 75 N. W. 219; Swanson *v.* Great Northern R. Co., 68 Minn. 184, 70 N. W. 978; Soutar *v.* Minneapolis International Electric Co., 68 Minn. 18, 70 N. W. 796; Fraker *v.* St. Paul, etc., R. Co., 32 Minn. 54, 19 N. W. 349.

Mississippi.— Howd *v.* Mississippi Cent. R. Co., 50 Miss. 178; Vicksburg, etc., R. Co. *v.* Wilkins, 47 Miss. 404.

Missouri.— Haviland *v.* Kansas City, etc., R. Co., 172 Mo. 106, 72 S. W. 515; Beasley *v.* Linehan Transfer Co., 148 Mo. 413, 50 S. W. 87; Bradley *v.* Chicago, etc., R. Co., 138 Mo. 293, 39 S. W. 763; Winkler *v.* St. Louis Basket, etc., Co., 137 Mo. 394, 38 S. W. 921; Smith *v.* Hammond Packing Co., 111 Mo. App. 13, 85 S. W. 625; Depuy *v.* Chicago, etc., R. Co., 110 Mo. App. 110, 84 S. W. 103; Nash *v.* Dowling, 93 Mo. App. 156; Halliburton *v.* Wabash R. Co., 58 Mo. App. 27.

Montana.— McCabe *v.* Montana Cent. R. Co., 30 Mont. 323, 76 Pac. 701.

Nebraska.— Evans Laundry Co. *v.* Crawford, 67 Nebr. 153, 93 N. W. 177, 94 N. W. 814; Fremont Brewing Co. *v.* Hansen, 65 Nebr. 456, 91 N. W. 279, 93 N. W. 211; Dailey *v.* Burlington, etc., R. Co., 58 Nebr. 396, 78 N. W. 722; Norfolk Beet-Sugar Co. *v.* Hight, 56 Nebr. 162, 76 N. W. 566.

New Hampshire.— Nourie *v.* Theohald, 68 N. H. 564, 41 Atl. 182.

New Jersey.— Christensen *v.* Lambert, 67 N. J. L. 341, 51 Atl. 702; Dillenberger *v.* Weingartner, 64 N. J. L. 292, 45 Atl. 638; Atha, etc., Co. *v.* Costello, 63 N. J. L. 27, 42 Atl. 766; Johnson *v.* Devoe Snuff Co., 62 N. J. L. 417, 41 Atl. 936; Chandler *v.* Atlantic Coast Electric R. Co., 61 N. J. L. 380, 39 Atl. 674.

all risks which he knows, or may, in the exercise of reasonable care, know, to

New Mexico.— Cerrillos Coal R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807.

New York.— Davidson *v.* Cornell, 132 N. Y. 228, 30 N. E. 573; Shaw *v.* Sheldon, 103 N. Y. 667, 9 N. E. 183; Dana *v.* New York Cent., etc., R. Co., 92 N. Y. 639; Curran *v.* Warren Chemical, etc., Co., 36 N. Y. 153; Batty *v.* Niagara Falls Hydraulic Power, etc., Co., 79 N. Y. App. Div. 466, 79 N. Y. Suppl. 734; Carlson *v.* Monitor Iron Works, 38 N. Y. App. Div. 38, 55 N. Y. Suppl. 992; Berry *v.* Atlantic White Lead, etc., Co., 30 N. Y. App. Div. 205, 51 N. Y. Suppl. 602; Spelman *v.* Fisher Iron Co., 56 Barb. 151; Balleng *v.* New York, etc., Steamship Co., 28 Misc. 238, 58 N. Y. Suppl. 1074; Karch *v.* Kipp, 90 N. Y. Suppl. 404.

North Carolina.— Marks *v.* Harriet Cotton Mills, 135 N. C. 287, 47 S. E. 432; Bryan *v.* Southern R. Co., 128 N. C. 387, 38 S. E. 914.

North Dakota.— Boss *v.* Northern Pac. R. Co., 2 N. D. 128, 49 N. W. 655, 33 Am. St. Rep. 756.

Ohio.— Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Scanlon *v.* Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 256; Pittsburg, etc., R. Co. *v.* Stone, 24 Ohio Cir. Ct. 192; National Malleable Castings Co. *v.* Luscomb, 19 Ohio Cir. Ct. 673, 6 Ohio Cir. Dec. 313; Stewart *v.* Toledo Bridge Co., 15 Ohio Cir. Ct. 601, 8 Ohio Cir. Dec. 454.

Oklahoma.— Neeley *v.* Southwestern Cotton Seed Oil Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145.

Oregon.—Conlon *v.* Oregon Short Line, etc., R. Co., 23 Oreg. 499, 32 Pac. 397.

Pennsylvania.— Moore *v.* Pennsylvania R. Co., 167 Pa. St. 495, 31 Atl. 734; Johnson *v.* Bruner, 61 Pa. St. 58, 100 Am. Dec. 613 [*reversing* on the evidence 6 Phila. 554]; Caldwell *v.* Brown, 53 Pa. St. 453; Ortlip *v.* Philadelphia, etc., Traction Co., 9 Pa. Dist. 291; Grabowski *v.* Pennsylvania Steel Co., 2 Dauph. Co. Rep. 118.

Rhode Island.— Brodeur *v.* Valley Falls Co., 16 R. I. 448, 17 Atl. 54.

South Carolina.— Walling *v.* Congaree Constr. Co., 41 S. C. 388, 19 S. E. 723.

South Dakota.— McKeever *v.* Homestake Min. Co., 10 S. D. 599, 73 N. W. 1053.

Tennessee.— Ferguson *v.* Phœnix Cotton Mills, 106 Tenn. 236, 61 S. W. 53; Coal Creek Min. Co. *v.* Davis, 90 Tenn. 711, 18 S. W. 387.

Texas.— Gulf, etc., R. Co. *v.* Kizziah, 86 Tex. 81, 23 S. W. 578; Eason *v.* Sabine, etc., R. Co., 65 Tex. 577, 57 Am. Rep. 606; Dallas *v.* Gulf, etc., R. Co., 61 Tex. 196; De la Vergne Refrigerating Mach. Co. *v.* Stahl, 24 Tex. Civ. App. 471, 60 S. W. 319; San Antonio, etc., R. Co. *v.* Engelhorn, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68; Texas, etc., R. Co. *v.* McClane, 24 Tex. Civ. App. 321, 62 S. W. 565; Brown *v.* Miller, (Civ. App. 1901) 62 S. W. 547; San Antonio, etc., R. Co. *v.* Williams, (Civ. App. 1899) 52 S. W. 89; Missouri, etc., R. Co. *v.* St. Clair, 21 Tex. Civ. App. 345, 51 S. W. 666; Mayton *v.* Sonnefield, (Civ. App. 1898) 48 S. W. 608; Jones *v.* Shaw, 16 Tex. Civ. App. 290, 41 S. W. 690; Allen *v.* Galveston, etc., R. Co., 14 Tex. Civ. App. 344, 37 S. W. 171; Throckmorton *v.* Missouri, etc., R. Co., 14 Tex. Civ. App. 222, 39 S. W. 174; Texas Mexican R. Co. *v.* King, 14 Tex. Civ. App. 290, 37 S. W. 34.

Utah.— Garity *v.* Bullion-Beck, etc., Min. Co., 27 Utah 534, 76 Pac. 556; Hill *v.* Southern Pac. Co., 23 Utah 94, 63 Pac. 814.

Vermont.— Carbine *v.* Bennington, etc., R. Co., 61 Vt. 348, 17 Atl. 491; Noyes *v.* Smith, 28 Vt. 59, 65 Am. Dec. 222.

Virginia.— Big Stone Gap Iron Co. *v.* Ketron, 102 Va. 23, 45 S. E. 740, 102 Am. St. Rep. 839; Moore Lime Co. *v.* Richardson, 95 Va. 326, 28 S. E. 334, 64 Am. St. Rep. 785; Richlands Iron Co. *v.* Elkins, 90 Va. 249, 17 S. E. 890.

Washington.— Towle *v.* Stimson Mill Co., 33 Wash. 305, 74 Pac. 471; Bullivant *v.* Spokane, 14 Wash. 577, 45 Pac. 42.

West Virginia.—Richards *v.* Riverside Iron Works, 56 W. Va. 510, 49 S. E. 437; Reese *v.* Wheeling, etc., R. Co., 42 W. Va. 333, 26 S. E. 204; Stewart *v.* Ohio River R. Co., 40 W. Va. 188, 20 S. E. 922; Knight *v.* Cooper, 36 W. Va. 232, 14 S. E. 999.

Wisconsin.— Koepcke *v.* Wisconsin Bridge, etc., Co., 116 Wis. 92, 92 N. W. 558; Borden *v.* Daisy Roller Mill Co., 98 Wis. 407, 74 N. W. 91, 67 Am. St. Rep. 816; Deisenrieter *v.* Kraus-Merkel Malting Co., 97 Wis. 279, 72 N. W. 735; Osborne *v.* Lehigh Valley Coal Co., 97 Wis. 27, 71 N. W. 814; Larsson *v.* McClure, 95 Wis. 533, 70 N. W. 662.

United States.— Fortin *v.* Manville Co., 128 Fed. 642; St. Louis Cordage Co. *v.* Miller, 126 Fed. 495, 61 C. C. A. 477; Rockport Granite Co. *v.* Bjornholm, 115 Fed. 947, 53 C. C. A. 429; Narramore *v.* Cleveland, etc., R. Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68; Yager *v.* Receivers, 88 Fed. 773; Patton *v.* Southern R. Co., 82 Fed. 979, 27 C. C. A. 287; Mentzer *v.* Armour, 18 Fed. 373, 5 McCrary 617; Woodworth *v.* St. Paul, etc., R. Co., 18 Fed. 282, 5 McCrary 574; Gravelle *v.* Minneapolis, etc., R. Co., 10 Fed. 711, 3 McCrary 352.

See 34 Cent. Dig. tit. "Master and Servant," §§ 538, 550.

The ordinary risks of a particular business are those which are a part of the natural and ordinary method of conducting the business, even though they might fairly be called extraordinary with reference to a different business, or a different department of the same business. Chicago, etc., R. Co. *v.* Wild, 109 Ill. App. 38.

"Usual" is that which is common, frequent, customary. "Ordinary" is that which is often recurring. Chicago City R. Co. *v.* Leach, 104 Ill. App. 30.

Necessity of relation of master and servant see Russell *v.* Hudson River R. Co., 5 Duer (N. Y.) 39 (holding that a servant hired by the day, and whose day's work is over, does not assume the risk of injury while being transported on the master's train to and from

exist,[47] unless there is some agreement to the contrary.[48] He does not, however, assume such risks as are created by the master's negligence,[49] nor such as are latent,[50] or are only discovered at the time of the injury.[51] The doctrine of assumption of risk is distinct from that of contributory negligence,[52] and rests upon an agreement of the servant with his master, express or implied, from the circumstances of his employment, that his master shall not be liable for any injury incident to the service, resulting from a known or obvious danger arising in the performance of the service.[53]

b. Risks Arising After Commencement of Service.[54] The doctrine of the assumption of obvious risks by the servant applies as well to those which arise or become known to the servant during the service as to those in contemplation at the original hiring.[55]

c. Effect of Statutory Provisions — (I) *STATUTES REGULATING DOCTRINE.* In some states constitutional or statutory provisions have been adopted abolishing the defense of assumption of risk, so far at least as railroads are concerned;[56] while in others the doctrine has been embodied in employers' liability acts.[57] In the latter case the repeal of the act embodying the common-law doctrine leaves the doctrine as it existed at common law.[58]

(II) *NEGLECT OF STATUTORY DUTY.*[59] There is some conflict of authority as

his work); Pool *v.* Chicago, etc., R. Co., 53 Wis. 657, 11 N. W. 15. See also Turner *v.* Indianapolis, 96 Ind. 51; Coots *v.* Detroit, 75 Mich. 628, 43 N. W. 17, 5 L. R. A. 315; Galveston *v.* Hemmis, 72 Tex. 558, 11 S. W. 129, 13 Am. St. Rep. 828, which hold that a fireman or policeman bears no such relation to the city by reason of his employment as to prevent his recovery for an injury caused by defects in the streets.

When recovery is sought from a third person, whose negligence caused the injury, the rule does not apply, although the exposure to such injury is one of the risks of the employment. Pennsylvania Co. *v.* Backes, 133 Ill. 255, 24 N. E. 563.

A convict leased out by the state cannot recover for injuries sustained by his voluntarily placing himself in a position of danger, but he does not assume the risks visible in and ordinarily incident to the service, which a free man would be charged with having assumed. Simonds *v.* Georgia Iron, etc., Co., 133 Fed. 776 [*affirmed* in 133 Fed. 1019].

47. Knowledge by servant of defect or danger see *infra*, IV, E, 5.

48. Foster *v.* Pusey, 8 Houst. (Del.) 168, 14 Atl. 545.

49. See *infra*, IV, E, 10.

50. Obvious or latent dangers see *infra*, IV, E. 6.

51. North Chicago St. R. Co. *v.* Dudgeon, 184 Ill. 477, 56 N. E. 796 [*affirming* 83 Ill. App. 528]; Missouri, etc., R. Co. *v.* Milam, 20 Tex. Civ. App. 688, 50 S. W. 417.

52. Bradburn *v.* Wabash R. Co., 134 Mich. 575, 96 N. W. 929; McCabe *v.* Montana Cent. R. Co., 30 Mont. 323, 76 Pac. 701; St. Louis Cordage Co. *v.* Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551.

53. Atchison, etc., R. Co. *v.* Bancord, 66 Kan. 81, 71 Pac. 253. See also Pittsburg Bridge Co. *v.* Walker, 170 Ill. 550, 48 N. E. 915 [*affirming* 70 Ill. App. 55]; Stucke *v.* Orleans R. Co., 50 La. Ann. 172, 23 So. 342.

54. Continuing work with knowledge of danger see *infra*, IV, E, 5, g.

Necessity of notice or complaint to master see *infra*, IV, E, 5, g, (I), (B).

Promise to remedy defect or remove danger see *infra*, IV, E, 5, g, (II), (B).

55. Johnson *v.* Devoe Snuff Co., 62 N. J. L. 417, 41 Atl. 936. See also Hennesey *v.* Bingham, 125 Cal. 627, 58 Pac. 200; Dailey *v.* Burlington, etc., R. Co., 58 Nebr. 396, 78 N. W. 722; Norfolk Beet-Sugar Co. *v.* Hight, 56 Nebr. 162, 76 N. W. 566; Dillenberger *v.* Weingartner, 64 N. J. L. 292, 45 Atl. 638; Missouri, etc., R. Co. *v.* St. Clair, 21 Tex. Civ. App. 345, 51 S. W. 666; Texas Mexican R. Co. *v.* King, 14 Tex. Civ. App. 290, 37 S. W. 34. *Compare* Fitzgerald *v.* Connecticut River Paper Co., 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537.

56. N. C. Priv. Laws (1897), p. 83, c. 55, deprives railroad companies of the defense of assumption of risk. Walker *v.* Carolina Cent. R. Co., 135 N. C. 738, 47 S. E. 675; Mott *v.* Southern R. Co., 131 N. C. 234, 42 S. E. 601; Coley *v.* North Carolina, etc., R. Co., 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817, 128 N. C. 534, 39 S. E. 43, 57 L. R. A. 817; Cogdell *v.* Southern R. Co., 129 N. C. 398, 40 S. E. 202; Thomas *v.* Raleigh, etc., R. Co., 129 N. C. 392, 40 S. E. 201.

57. Birmingham R., etc., Co. *v.* Allen, 99 Ala. 359, 13 So. 8, 20 L. R. A. 457; Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145 (both construing Code, § 2590); Cassady *v.* Boston, etc., R. Co., 164 Mass. 168, 41 N. E. 129 (construing St. (1887) c. 270); Ward *v.* Manhattan R. Co., 95 N. Y. App. Div. 437, 88 N. Y. Suppl. 758 (construing Laws (1902), c. 600, § 3).

58. American Rolling Mill Co. *v.* Hullinger, 161 Ind. 673, 67 N. E. 986, 60 N. E. 460, construing Acts (1895), p. 148, c. 64, repealing Acts (1893), p. 294, c. 130, § 2.

59. Effect as to contributory negligence see *infra*, IV, F, 1, c, (II).

to whether a master may avail himself of the defense of assumption of risk where the injury complained of resulted from his neglect of a duty imposed by statute. Where the defense is forbidden by the statute itself, he cannot of course rely upon it;[60] and where there is no such inhibition, the weight of authority seems to be to the same effect,[61] although there are decisions which maintain a contrary doctrine.[62] If the object of the statute is other than the protection of the

Inexperienced or youthful employee see *infra*, IV, E, 7, h.

60. Southern R. Co. *v.* Carson, 194 U. S. 136, 24 S. Ct. 609, 48 L. ed. 893 [*affirming* 68 S. C. 55, 46 S. E. 525]; Chicago, etc., R. Co. *v.* Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264 [*reversing* 116 Fed. 867]. *Compare* Larabee *v.* New York, etc., R. Co., 182 Mass. 348, 66 N. E. 1032, where it was held that the tender of a locomotive is not a car within the statute.

Act Cong. March 2, 1893, c. 196, provides that a common carrier engaged in interstate commerce, which fails to equip its cars with automatic couplers, as required therein, shall not avail itself, against an employee injured by such failure, of the doctrine of assumption of risk. Kansas City, etc., R. Co. *v.* Flippo, 138 Ala. 487, 35 So. 457.

Under Vt. St. §§ 3886, 3887, prohibiting any railroad company from running cars of its own with ladders on the sides, and providing that a company not complying with such requirement shall be liable for damages and injuries to employees resulting from such neglect, the defense of assumption of risk is inadmissible, and the doctrine cannot be upheld on the theory of contract, as to do so would be against public policy. Kilpatrick *v.* Grand Trunk R. Co., 74 Vt. 288, 52 Atl. 531, 98 Am. St. Rep. 887; Morrisette *v.* Canadian Pac. R. Co., 74 Vt. 232, 52 Atl. 520.

61. *Illinois.*— Spring Valley Coal Co. *v.* Patting, 210 Ill. 342, 71 N. E. 371 [*affirming* 112 Ill. App. 4]; Terre Haute, etc., R. Co. *v.* Williams, 172 Ill. 379, 50 N. E. 116, 64 Am. St. Rep. 44 [*affirming* 69 Ill. App. 392].

Indiana.— Island Coal Co. *v.* Swaggerty, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026; Baltimore, etc., R. Co. *v.* Peterson, 156 Ind. 364, 59 N. E. 1044; Pittsburgh, etc., R. Co. *v.* Moore, 152 Ind. 345, 53 N. E. 200, 44 L. R. A. 638; Espenlaub *v.* Ellis, 34 Ind. App. 163, 72 N. E. 527; American Car, etc., Co. *v.* Clark, 32 Ind. App. 644, 70 N. E. 828; La Porte Carriage Co. *v.* Sullender, (App. 1904) 71 N. E. 922; Brower *v.* Locke, 31 Ind. App. 353, 67 N. E. 1015; Eureka Block Coal Co. *v.* Wells, 29 Ind. App. 1, 61 N. E. 236, 94 Am. St. Rep. 259; Buehner Chair Co. *v.* Feulner, 28 Ind. App. 479, 63 N. E. 239; Bodell *v.* Brazil Block Coal Co., 25 Ind. App. 654, 58 N. E. 856; Boyd *v.* Brazil Block Coal Co., (App. 1898) 50 N. E. 368.

Iowa.— Camp *v.* Chicago Great Western R. Co., 124 Iowa 238, 99 N. W. 735. *Compare* Bryce *v.* Burlington, etc., R. Co., 119 Iowa 274, 93 N. W. 275. But see Martin *v.* Chicago, etc., R. Co., (1901) 87 N. W. 654, 118 Iowa 148, 91 N. W. 1034, 96 Am. St. Rep. 371.

Louisiana.— Hailey *v.* Texas, etc., R. Co., 113 La. 533, 37 So. 131.

Michigan.— Sipes *v.* Michigan Starch Co., 137 Mich. 258, 100 N. W. 447.

Minnesota.— Christianson *v.* Northwestern Compo-Board Co., 83 Minn. 25, 85 N. W. 826, 85 Am. St. Rep. 440. But see Fleming *v.* St. Paul, etc., R. Co., 27 Minn. 111, 6 N. W. 448.

Missouri.— Durant *v.* Lexington Coal Min. Co., 97 Mo. 62, 10 S. W. 484; Bair *v.* Heibel, 103 Mo. App. 621, 77 S. W. 1017. But see Spiva *v.* Osage Coal, etc., Co., 88 Mo. 68.

North Carolina.— Elmore *v.* Seaboard Air Line R. Co., 132 N. C. 865, 44 S. E. 620, 131 N. C. 569, 42 S. E. 989, 130 N. C. 506, 41 S. E. 786.

Texas.— Missouri, etc., R. Co. *v.* Goss, 31 Tex. Civ. App. 300, 72 S. W. 94.

Washington.— Green *v.* Western American Co., 30 Wash. 87, 70 Pac. 310.

United States.— Narramore *v.* Cleveland, etc., R. Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68.

England.— Britton *v.* Great Western Cotton Co., L. R. 7 Exch. 130, 41 L. J. Exch. 99, 27 L. T. Rep. N. S. 125, 20 Wkly. Rep. 525; Schofield *v.* Schunck [*cited* in Doel *v.* Sheppard, 5 E. & B. 856, 858, 2 Jur. N. S. 218, 25 L. J. Q. B. 124, 4 Wkly. Rep. 232, 85 E. C. L. 856]; Caswell *v.* Worth, 5 E. & B. 849, 2 Jur. N. S. 116, 25 L. J. Q. B. 121, 4 Wkly. Rep. 231, 85 E. C. L. 849; Coe *v.* Platt, 6 Exch. 752 [*affirmed* in 7 Exch. 460, 16 Jur. 174, 21 L. J. Exch. 146], 7 Exch. 923, 22 L. J. Exch. 164; Holmes *v.* Clarke, 6 H. & N. 349, 7 Jur. N. S. 397, 30 L. J. Exch. 135, 3 L. T. Rep. N. S. 675, 9 Wkly. Rep. 419 [*affirmed* in 7 H. & N. 937, 8 Jur. N. S. 992, 31 L. J. Exch. 356, 9 L. T. Rep. N. S. 178, 10 Wkly. Rep. 405].

Canada.— McCloherty *v.* Gale Mfg. Co., 19 Ont. App. 117; Rodgers *v.* Hamilton Cotton Co., 23 Ont. 425.

See 34 Cent. Dig. tit. "Master and Servant," §§ 545, 580.

62. *Maine.*— Gillin *v.* Patten, etc., R. Co., 93 Me. 80, 44 Atl. 361.

Massachusetts.— Keenan *v.* Edison Electric Illuminating Co., 159 Mass. 379, 34 N. E. 366; O'Maley *v.* South Boston Gas Light Co., 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161.

New York.— Knisley *v.* Pratt, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367 [*reversing* 75 Hun 323, 26 N. Y. Suppl. 1010]; Sitts *v.* Waiontha Knitting Co., 94 N. Y. App. Div. 38, 87 N. Y. Suppl. 911; Stewart *v.* Ferguson, 34 N. Y. App. Div. 515, 54 N. Y. Suppl. 615; Monzi *v.* Friedline, 33 N. Y. App. Div. 217, 53 N. Y. Suppl. 482; Horton *v.* Vulcan Iron Works Co., 13 N. Y. App. Div. 508, 43 N. Y. Suppl. 699; Shields *v.* Robins, 3 N. Y.

servant, the master's neglect of the duty imposed will not prevent his relying on the servant's assumption of risk.[63]

(III) *NEGLIGENCE OF FELLOW SERVANTS.* Under statutes making the master liable to a servant injured through the negligence of a fellow servant, there is no assumption of the risk of such negligence by the servant.[64] But such a statute does not absolve a servant from other risks incident to his employment;[65] and it is held that where a mine-owner exercises due care in the selection of a mining boss, as required by law, the employees assume the risk of his negligence.[66]

d. Reliance on Care of Master — (I) *IN GENERAL.*[67] In the absence of knowledge to the contrary, a servant has a right to presume that his master has exercised due care and diligence to fulfil the obligations imposed on him by law,[68]

App. Div. 582, 38 N. Y. Suppl. 214; Freeman *v.* Glens Falls Paper Mill Co., 70 Hun 530, 24 N. Y. Suppl. 403; Ryan *v.* Long Island R. Co., 51 Hun 607, 4 N. Y. Suppl. 381 [*affirmed* in 124 N. Y. 654, 27 N. E. 413]; Fitzgerald *v.* Elsas Paper Co., 30 Misc. 438, 62 N. Y. Suppl. 597. But see Fitzgerald *v.* New York Cent., etc., R. Co., 37 N. Y. App. Div. 127, 55 N. Y. Suppl. 1124; Gorman *v.* McArdle, 67 Hun 484, 22 N. Y. Suppl. 479.

Ohio.— Cleveland, etc., R. Co. *v.* Somers, 24 Ohio Cir. Ct. 67; Johns *v.* Cleveland, etc., R. Co., 23 Ohio Cir. Ct. 442.

Wisconsin.— Williams *v.* J. G. Wagner Co., 110 Wis. 456, 86 N. W. 157. But see Quackenbush *v.* Wisconsin, etc., R. Co., 62 Wis. 411, 22 N. W. 519.

United States.—Nottage *v.* Sawmill Phœnix 133 Fed. 979; Glenmont Lumber Co. *v.* Roy, 126 Fed. 524, 61 C. C. A. 506; St. Louis Cordage Co. *v.* Miller, 126 Fed. 495, 61 C. C. A. 477; E. S. Higgins Carpet Co. *v.* O'Keefe, 79 Fed. 900, 25 C. C. A. 220.

See 34 Cent. Dig. tit. "Master and Servant," §§ 545, 580.

Where the act of the master does not amount to a violation of the statute, and is known to the servant, he assumes the risk. Huda *v.* American Glucose Co., 154 N. Y. 474, 48 N. E. 897, 40 L. R. A. 411 [*affirming* 12 N. Y. App. Div. 624, 43 N. Y. Suppl. 1126], construing Laws (1892), c. 673, § 6.

63. Sweeney *v.* Central Pac. R. Co., 57 Cal. 15; Fleming *v.* St. Paul, etc., R. Co., 27 Minn. 111, 6 N. W. 448.

64. Phinney *v.* Illinois Cent. R. Co., 122 Iowa 488, 98 N. W. 358; Malcolm *v.* Fuller, 152 Mass. 160, 25 N. E. 83.

65. Andrews *v.* Chicago, etc., R. Co., 96 Wis. 348, 71 N. W. 372.

66. Redstone Coke Co. *v.* Roby, 115 Pa. St. 364, 8 Atl. 593.

67. As affecting contributory negligence see *infra*, IV, F, 2, a, (II).

Failure of master to give customary warning see *supra*, IV, D, 1, d.

Necessity of complaint to master see *infra*, IV, E, 5, g, (I), (B).

On fulfilment of promise to remedy defects see *infra*, IV, E, 5, g, (II), (B).

68. *Alabama.*— Louisville, etc., R. Co. *v.* Baker, 106 Ala. 624, 17 So. 452.

California.— Beeson *v.* Green Mountain Gold Min. Co., 57 Cal. 20.

Colorado.— Colorado Electric Co. *v.* Lubbers, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255.

Delaware.— Croker *v.* Pasey, etc., Co., 3 Pennew. 1, 50 Atl. 61; Diamond State Iron Co. *v.* Giles, 7 Houst. 557, 11 Atl. 189.

Illinois.— John Spry Lumber Co. *v.* Duggan, 182 Ill. 218, 54 N. E. 1002; St. Louis, etc., R. Co. *v.* Holman, 155 Ill. 21, 39 N. E. 573 [*affirming* 53 Ill. App. 617]; Chicago, etc., R. Co. *v.* Hines, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; Illinois Terminal R. Co. *v.* Thompson, 112 Ill. App. 463 [*affirmed* in 210 Ill. 226, 71 N. E. 328]; Riverton Coal Co. *v.* Shepherd, 111 Ill. App. 294; Chicago, etc., R. Co. *v.* Bell, 111 Ill. App. 280; Barnett, etc., Co. *v.* Schlapka, 110 Ill. App. 672 [*affirmed* in 208 Ill. 426, 70 N. E. 343]; Pressed Steel Car Co. *v.* Herath, 110 Ill. App. 596; Pittsburg, etc., R. Co. *v.* Hewitt, 102 Ill. App. 428 [*affirmed* in 202 Ill. 28, 66 N. E. 829]; Ehlen *v.* O'Donnell, 102 Ill. App. 141; McLean County Coal Co. *v.* Simpson, 97 Ill. App. 21 [*affirmed* in 196 Ill. 258, 63 N. E. 626]; Ide *v.* Fratcher, 96 Ill. App. 549 [*affirmed* in 194 Ill. 552, 62 N. E. 814]; Spring Valley Coal Co. *v.* Rowatt, 96 Ill. App. 248 [*affirmed* in 196 Ill. 156, 63 N. E. 649]; La Salle *v.* Kostka, 92 Ill. App. 91 [*affirmed* in 190 Ill. 130, 60 N. E. 72]; William Graver Tank Works *v.* O'Donnell, 91 Ill. App. 524; Pioneer Fireproof Constr. Co. *v.* Howell, 90 Ill. App. 122 [*affirmed* in 189 Ill. 123, 59 N. E. 535]; Swift *v.* Wyatt, 75 Ill. App. 348; Edward Hines Lumber Co. *v.* Ligas, 68 Ill. App. 523; Consolidated Coal Co. *v.* Bruce, 47 Ill. App. 444; Whalen *v.* Illinois, etc., R., etc., Co., 16 Ill. App. 320. *Compare* East St. Louis Connecting R. Co. *v.* Shannon, 52 Ill. App. 420.

Indiana.— Union Traction Co. *v.* Buckland, 34 Ind. App. 420, 72 N. E. 158; Lebanon *v.* McCoy, 12 Ind. App. 500, 40 N. E. 700; Louisville, etc., R. Co. *v.* Berry, 2 Ind. App. 427, 28 N. E. 714.

Iowa.— Lanza *v.* Le Grand Quarry Co., 124 Iowa 659, 100 N. W. 488; Olson *v.* Hanford Produce Co., 111 Iowa 347, 82 N. W. 903; Mosgrove *v.* Zimbleman Coal Co., 110 Iowa 169, 81 N. W. 227.

Kansas.— Schwarzschild *v.* Drysdale, 69 Kan. 119, 76 Pac. 441; Buoy *v.* Clyde Milling, etc., Co., 68 Kan. 436, 75 Pac. 466; Atchison, etc., R. Co. *v.* Swarts, 58 Kan. 235, 48 Pac. 953; St. Louis, etc., R. Co. *v.* Irwin, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266.

and he does not assume the risk consequent upon the failure of the master to discharge his duty.[69] The rule does not, however, apply where the servant is

Kentucky.— Long *v.* Illinois Cent. R. Co., 113 Ky. 806, 68 S. W. 1095, 24 Ky. L. Rep. 567, 101 Am. St. Rep. 374, 58 L. R. A. 237; Ohio Valley R. Co. *v.* McKinley, 33 S. W. 186, 17 Ky. L. Rep. 1028.

Louisiana.— Bell *v.* Globe Lumber Co., 107 La. 725, 31 So. 994; Wilson *v.* Louisiana, etc., R. Co., 51 La. Ann. 1133, 25 So. 961; Helm *v.* O'Rourke, 46 La. Ann. 178, 15 So. 400; Faren *v.* Sellers, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256.

Massachusetts.— Thompson *v.* American Writing Paper Co., 187 Mass. 93, 72 N. E. 343; Foster *v.* New York, etc., R. Co., 187 Mass. 21, 72 N. E. 331; Murphy *v.* New York, etc., R. Co., 187 Mass. 18, 72 N. E. 330; Knight *v.* Overman Wheel Co., 174 Mass. 455, 54 N. E. 890; Donahoe *v.* Old Colony R. Co., 153 Mass. 356, 26 N. E. 868.

Michigan.— Clark *v.* Wolverine Portland Cement Co., 138 Mich. 673, 101 N. W. 845; Harrison *v.* Detroit, etc., R. Co., 79 Mich. 409, 44 N. W. 1034, 19 Am. St. Rep. 180, 7 L. R. A. 623; Ft. Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 133.

Minnesota.— Dieters *v.* St. Paul Gaslight Co., 86 Minn. 474, 91 N. W. 15; Delude *v.* St. Paul City R. Co., 55 Minn. 63, 56 N. W. 461.

Missouri.— Helfenstein *v.* Medart, 136 Mo. 595, 36 S. W. 863, 37 S. W. 829, 38 S. W. 294; Parsons *v.* Missouri Pac. R. Co., 94 Mo. 286, 6 S. W. 464; Gibson *v.* Pacific R. Co., 46 Mo. 163, 2 Am. Rep. 497; Depuy *v.* Chicago, etc., R. Co., 110 Mo. App. 110, 84 S. W. 103; Wills *v.* Cape Girardeau Southwestern R. Co., 44 Mo. App. 51; Dedrick *v.* Missouri Pac. R. Co., 21 Mo. App. 433.

New Jersey.— Smith *v.* Erie R. Co., 67 N. J. L. 636, 52 Atl. 634, 59 L. R. A. 302; Belleville Stove Co. *v.* Mooney, 61 N. J. L. 253, 39 Atl. 764, 39 L. R. A. 834 [*affirming* 60 N. J. L. 323, 38 Atl. 835]; Nord Deutscher Lloyd Steamship Co. *v.* Ingebregsten, 57 N. J. L. 400, 31 Atl. 619, 51 Am. St. Rep. 604.

New York.— Connolly *v.* Poillon, 41 Barb. 366; Duggan *v.* Third Ave. R. Co., 9 Misc. 158, 29 N. Y. Suppl. 13; Pullutro *v.* Delaware, etc., R. Co., 7 N. Y. Suppl. 510.

Ohio.— Wellston Coal Co. *v.* Smith, 65 Ohio St. 70, 61 N. E. 143, 87 Am. St. Rep. 547, 55 L. R. A. 99; Smith *v.* Wm. Powell Co., 10 Ohio Dec. (Reprint) 799, 23 Cinc. L. Bul. 436.

Oklahoma.— Neeley *v.* Southwestern Cotton Seed Oil Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145.

Tennessee.— McMillan Marble Co. *v.* Black, 89 Tenn. 118, 14 S. W. 479.

Texas.— Texas, etc., R. Co. *v.* Eberheart, 91 Tex. 321, 43 S. W. 510 [*affirming* (Civ. App. 1897) 40 S. W. 1060]; Texas, etc., R. Co. *v.* Hartnett, 33 Tex. Civ. App. 103, 75 S. W. 809; Merchants', etc., Oil Co. *v.* Burns, (Civ. App. 1903) 72 S. W. 626; San Antonio, etc., R. Co. *v.* Waller, 27 Tex. Civ. App. 44, 65 S. W. 210; Galveston, etc., R. Co. *v.* Smith, 24 Tex. Civ. App. 127, 57 S. W. 999; Quill *v.* Houston, etc., R. Co., 93 Tex. 616, 55 S. W. 1126, 57 S. W. 948; International, etc., R. Co. *v.* Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772; Ft. Worth, etc., R. Co. *v.* Kime, 21 Tex. Civ. App. 271, 51 S. W. 558; Missouri Pac. R. Co. *v.* Hill, 3 Tex. App. Civ. Cas. § 381.

Utah.— Hone *v.* Mammoth Min. Co., 27 Utah 168, 75 Pac. 381; Faulkner *v.* Mammoth Min. Co., 23 Utah 437, 66 Pac. 799.

Virginia.— Michael *v.* Roanoke Mach. Works, 90 Va. 492, 19 S. E. 261, 44 Am. St. Rep. 927.

United States.—Texas, etc., R. Co. *v.* Archibald, 170 U. S. 665, 18 S. Ct. 777, 42 L. ed. 1188; Mountain Copper Co. *v.* Van Buren, 133 Fed. 1, 66 C. C. A. 151; Bunker Hill, etc., Min., etc., Co. *v.* Jones, 130 Fed. 813, 65 C. C. A. 363; Mason, etc., R. Co. *v.* Yockey, 103 Fed. 265, 43 C. C. A. 228; New York, etc., R. Co. *v.* O'Leary, 93 Fed. 737, 35 C. C. A. 562.

See 34 Cent. Dig. tit. "Master and Servant," § 547.

69. *Alabama.*— Alabama Great Southern R. Co. *v.* Brooks, 135 Ala. 401, 33 So. 181; Louisville, etc., R. Co. *v.* Bouldin, 121 Ala. 197, 25 So. 903; Highland Ave., etc., R. Co. *v.* Miller, 120 Ala. 535, 24 So. 955; Perry *v.* Marsh, 25 Ala. 659.

Arkansas.— St. Louis, etc., R. Co. *v.* Touhey, 67 Ark. 209, 54 S. W. 577, 77 Am. St. Rep. 109.

Connecticut.— O'Donnell *v.* Sargent, 69 Conn. 476, 38 Atl. 216.

Delaware.— Giles *v.* Diamond State Iron Co., (1887) 8 Atl. 368.

Georgia.— Middle Georgia, etc., R. Co. *v.* Barnett, 104 Ga. 582, 30 S. E. 771.

Illinois.— Slack *v.* Harris, 200 Ill. 96, 65 N. E. 669 [*affirming* 101 Ill. App. 527]; Sinclair Co. *v.* Waddill, 200 Ill. 17, 65 N. E. 437 [*affirming* 99 Ill. App. 334]; Chicago, etc., R. Co. *v.* Spurney, 197 Ill. 471, 64 N. E. 302 [*affirming* 97 Ill. App. 570]; Pioneer Fireproof Constr. Co. *v.* Hansen, 176 Ill. 100, 52 N. E. 17 [*affirming* 69 Ill. App. 659]; Illinois Terminal R. Co. *v.* Thompson, 112 Ill. App. 463 [*affirmed* in 210 Ill. 226, 71 N. E. 328]; Barnett, etc., Co. *v.* Schlapka, 110 Ill. App. 672 [*affirmed* in 208 Ill. 426, 70 N. E. 343]; Chicago, etc., R. Co. *v.* Howell, 109 Ill. App. 546 [*affirmed* in 208 Ill. 155, 70 N. E. 15]; Montgomery Coal Co. *v.* Barringer, 109 Ill. App. 185; Chicago Hair, etc., Co. *v.* Mueller, 106 Ill. App. 21 [*affirmed* in 203 Ill. 558, 68 N. E. 51]; Mallen *v.* Waldowski, 101 Ill. App. 367; Himrod Coal Co. *v.* Clark, 99 Ill. App. 332 [*affirmed* in 197 Ill. 514, 64 N. E. 282]; Street's Western Stable Car Line *v.* Bonander, 97 Ill. App. 601 [*affirmed* in 196 Ill. 15, 63 N. E. 688]; Walter *v.* Fisher, 96 Ill. App. 590; Pullman Palace Car Co. *v.* Connell, 74 Ill. App. 447.

Indiana.— Brazil Block Coal Co. *v.* Gibson, 160 Ind. 319, 66 N. E. 882, 98 Am. St. Rep.

charged with the duty of keeping the appliance by which he is injured in proper

281; Southern Indiana R. Co. *v.* Harrell, (App. 1903) 66 N. E. 1016.

Iowa.— Nugent *v.* Cudahy Packing Co., 126 Iowa 517, 102 N. W. 442; Wahlquist *v.* Maple Grove Coal, etc., Co., 116 Iowa 720, 89 N. W. 98; Meloy *v.* Chicago, etc., R. Co., 77 Iowa 743, 42 N. W. 563, 14 Am. St. Rep. 325, 4 L. R. A. 287.

Kansas.—Emporia *v.* Kowalski, 66 Kan. 64, 71 Pac. 232.

Kentucky.— Louisville, etc., R. Co. *v.* Poulter, 84 S. W. 576, 27 Ky. L. Rep. 193; Ohio Valley R. Co. *v.* McKinley, 33 S. W. 186, 17 Ky. L. Rep. 1028.

Louisiana.— McGinn *v.* McCormick, 109 La. 396, 33 So. 382; Thompson *v.* New Orleans, etc., R. Co., 108 La. 52, 32 So. 177.

Maine.— Frye *v.* Bath Gas, etc., Co., 94 Me. 17, 46 Atl. 804; Rhoades *v.* Varney, 91 Me. 222, 39 Atl. 552; Mayhew *v.* Sullivan Min. Co., 76 Me. 100; Shanny *v.* Androscoggin Mills, 66 Me. 420; Buzzell *v.* Laconia Mfg. Co., 48 Me. 113, 77 Am. Dec. 212.

Maryland.— National Enameling, etc., Co. *v.* Brady, 93 Md. 646, 49 Atl. 845; Pikesville, etc., R. Co. *v.* State, 88 Md. 563, 42 Atl. 214.

Massachusetts.— Mahoney *v.* Bay State Pink Granite Co., 184 Mass. 287, 68 N. E. 234; Bourbonnais *v.* West Boylston Mfg. Co., 184 Mass. 250, 68 N. E. 232; Boucher *v.* Robeson Mills, 182 Mass. 500, 65 N. E. 819; Pierce *v.* Arnold Print Works, 182 Mass. 260, 65 N. E. 368; Boyle *v.* Columbian Fire Proofing Co., 182 Mass. 93, 64 N. E. 726; Slattery *v.* Walker, etc., Mfg. Co., 179 Mass. 307, 60 N. E. 782; McMahon *v.* McHale, 174 Mass. 320, 54 N. E. 854; Dean *v.* Smith, 169 Mass. 569, 48 N. E. 619; Donahue *v.* Drown, 154 Mass. 21, 27 N. E. 675.

Michigan.— Corbett *v.* American Screen Door Co., 133 Mich. 669, 95 N. W. 737; Chilson *v.* Lansing Wagon Works, 128 Mich. 43, 87 N. W. 79.

Minnesota.— Attix *v.* Minnesota Sandstone Co., 85 Minn. 142, 88 N. W. 436; Steen *v.* St. Paul, etc., R. Co., 37 Minn. 310, 34 N. W. 113.

Mississippi.— Bradford *v.* Taylor, 85 Miss. 409, 37 So. 812.

Missouri.— Cole *v.* St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; Lore *v.* American Mfg. Co., 160 Mo. 608, 61 S. W. 678; Studenroth *v.* Hammond Packing Co., 106 Mo. App. 480, 81 S. W. 487; Hester *v.* Jacob Dodd Packing Co., 95 Mo. App. 16, 75 Pac. 695; Nash *v.* Dowling, 93 Mo. App. 156; Zellars *v.* Missouri Water, etc., Co., 92 Mo. App. 107.

Nebraska.—New Omaha Thompson-Houston Electric Light Co. *v.* Dent, 68 Nebr. 668, 94 N. W. 810, 103 N. W. 1091; O'Neill *v.* Chicago, etc., R. Co., 62 Nebr. 358, 86 N. W. 1098.

New Hampshire.— Thomas *v.* Exeter, etc., R. Co., 73 N. H. 1, 58 Atl. 838.

New Jersey.— Christensen *v.* Lamhert, 67 N. J. L. 341, 51 Atl. 702 [*affirming* 66 N. J. L. 531, 49 Atl. 577].

New York.— Goodrich *v.* New York Cent., etc., R. Co., 116 N. Y. 398, 22 N. E. 397, 15 Am. St. Rep. 410, 5 L. R. A. 750; Crispin *v.* Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Wingert *v.* Krakauer, 76 N. Y. App. Div. 34, 78 N. Y. Suppl. 664; Riker *v.* New York, etc., R. Co., 64 N. Y. App. Div. 357, 72 N. Y. Suppl. 168; Thompson *v.* Cary Mfg. Co., 62 N. Y. App. Div. 279, 70 N. Y. Suppl. 1086; Pursley *v.* Edgemoor Bridge Works, 56 N. Y. App. Div. 71, 67 N. Y. Suppl. 719; Hines *v.* New York Cent., etc., R. Co., 78 Hun 239, 28 N. Y. Suppl. 829; Knisley *v.* Pratt, 75 Hun 323, 26 N. Y. Suppl. 1010; Lofrano *v.* New York, etc., Water Co., 55 Hun 452, 8 N. Y. Suppl. 717.

Ohio.— Pittsburg, etc., R. Co. *v.* Stone, 24 Ohio Cir. Ct. 192.

Oregon.—Conlon *v.* Oregon Short Line, etc., R. Co., 23 Oreg. 499, 32 Pac. 397; Carlson *v.* Oregon Short Line, etc., R. Co., 21 Oreg. 450, 28 Pac. 497.

Pennsylvania.— Doyle *v.* Pittsburg Waste Co., 204 Pa. St. 618, 54 Atl. 363; Johnson *v.* Bruner, 61 Pa. St. 58, 100 Am. Dec. 613 [*reversing* 6 Phila. 554].

South Carolina.— Hyland *v.* Southern Bell Tel., etc., Co., 70 S. C. 315, 49 S. E. 879.

Tennessee.— Nashville, etc., R. Co. *v.* Elliott, 1 Coldw. 611, 78 Am. Dec. 506. And see Nashville, etc., R. Co. *v.* Carroll, 6 Heisk. 347.

Texas.— Southern Pac. R. Co. *v.* Aylward, 79 Tex. 675, 15 S. W. 697; San Antonio Foundry Co. *v.* Drish, (Civ. App. 1905) 85 S. W. 440; Galveston, etc., R. Co. *v.* Manns, (Civ. App. 1904) 84 S. W. 254; Gulf, etc., R. Co. *v.* Whisenhunt, (Civ. App. 1904) 81 S. W. 332; Missouri, etc., R. Co. *v.* Walden, 27 Tex. Civ. App. 567, 66 S. W. 584; Delavergne Refrigerating Mach. Co. *v.* Stahl, 24 Tex. Civ. App. 471, 60 S. W. 319; Smith *v.* Gulf, etc., R. Co., (Civ. App. 1901) 65 S. W. 83; San Antonio, etc., R. Co. *v.* Engelhorn, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68; Missouri, etc., R. Co. *v.* Hamilton, (Civ. App. 1895) 30 S. W. 679.

Utah.— Garity *v.* Bullion-Beck, etc., Min. Co., 27 Utah 534, 76 Pac. 556; Hill *v.* Southern Pac. Co., 23 Utah 94, 63 Pac. 814; Pidcock *v.* Union Pac. R. Co., 5 Utah 612, 19 Pac. 191, 1 L. R. A. 131.

Vermont.— Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380. And see Davis *v.* Central Vermont R. Co., 55 Vt. 84, 45 Am. Rep. 590.

Washington.— Goldthorpe *v.* Clark-Nickerson Lumber Co., 31 Wash. 467, 71 Pac. 1091.

Wisconsin.— Curtis *v.* Chicago, etc., R. Co., 95 Wis. 460, 70 N. W. 665; Paine *v.* Eastern R. Co., 91 Wis. 340, 64 N. W. 1005; Promer *v.* Milwaukee, etc., R. Co., 90 Wis. 215, 63 N. W. 90, 48 Am. St. Rep. 905; Colf *v.* Chicago, etc., R. Co., 87 Wis. 273, 58 N. W. 408.

United States.— Swensen *v.* Bender, 114 Fed. 1, 51 C. C. A. 627; Grace, etc., Co. *v.* Kennedy, 99 Fed. 679, 40 C. C. A. 69; Lafourche Packet Co. *v.* Henderson, 94 Fed. 871, 36 C. C. A. 519.

England.— Smith *v.* Baker, [1891] A. C.

repair,[70] and neither does it apply where he is injured while making an unsafe place safe.[71]

(II) *Representations or Assurances of Master.*[72] A servant has the right to rely upon the representations and assurances of the master, or his vice-principal, as to the absence of, or precautions against, danger,[73] unless the danger is obvious and imminent.[74]

(III) *Selection of Fellow Servants.* A servant is entitled to assume that the master has exercised due care and diligence in the selection and retention of reasonably competent and careful servants.[75]

2. Defective or Dangerous Tools, Machinery, Appliances, or Places[76] — **a. Buildings or Places For Work.** A servant does not assume the risk of accident and injury due to the failure of the master to exercise reasonable care in furnishing him with a reasonably safe place to do his work, but he does assume all risks which are necessarily incident to his employment, or which are obvious or known to him.[77]

325, 55 J. P. 660, 60 L. J. Q. B. 683, 65 L. T. Rep. N. S. 467, 40 Wkly. Rep. 392.

See 34 Cent. Dig. tit. "Master and Servant," §§ 538, 550.

70. Drum *v.* New England Cotton Yarn Co., 180 Mass. 113, 61 N. E. 812.

71. Kanz *v.* Page, 168 Mass. 217, 46 N. E. 620.

72. After complaint to master see *infra*, IV, E, 5, g, (II), (B), (4).

73. *Georgia.*— Cheeney *v.* Ocean Steamship Co., 92 Ga. 726, 19 S. E. 33, 44 Am. St. Rep. 113.

Illinois.—Barnett, etc., Co. *v.* Schlapka, 110 Ill. App. 672 [*affirmed* in 208 Ill. 426, 70 N. E. 343]; Chicago, etc., Coal Co. *v.* Moran, 110 Ill. App. 664 [*affirmed* in 210 Ill. 9, 71 N. E. 38].

Kentucky.— Dryden *v.* H. E. Pogue Distillery Co., 82 S. W. 262, 26 Ky. L. Rep. 528.

Michigan.— Burnside *v.* Novelty Mfg. Co., 121 Mich. 115, 79 N. W. 1108.

Missouri.— Durest *v.* St. Louis Stamping Co., 163 Mo. 607, 63 S. W. 827; Carter *v.* Baldwin, 107 Mo. App. 217, 81 S. W. 204.

New York.— Daley *v.* Schaaf, 28 Hun 314.

Ohio.— Toledo St. R. Co. *v.* Mammet, 13 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 244.

Pennsylvania.— Levy *v.* Rosenblatt, 21 Pa. Super. Ct. 543.

Rhode Island.— Pintorelli *v.* Horton, 22 R. I. 374, 48 Atl. 142.

See 34 Cent. Dig. tit. "Master and Servant," § 548.

74. Toomey *v.* Eureka Iron, etc., Works, 89 Mich. 249, 50 N. W. 850.

75. *Delaware.*— Giordano *v.* Brandywine Granite Co., 3 Pennew. 423, 52 Atl. 332.

Illinois.— U. S. Rolling-stock Co. *v.* Wilder, 116 Ill. 100, 5 N. E. 92.

Indiana.— Chicago, etc., R. Co. *v.* Beatty, 13 Ind. App. 604, 40 N. E. 753, 42 N. E. 284; Chicago, etc., R. Co. *v.* Champion, 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 53 Am. St. Rep. 357.

Texas.— B. Lantry Sons *v.* Lowrie, (Civ. App. 1900) 58 S. W. 837.

United States.— Northern Pac. R. Co. *v.* Mares, 123 U. S. 710, 8 S. Ct. 321, 31 L. ed. 296.

See 34 Cent. Dig. tit. "Master and Servant," § 549.

76. Compliance with commands see *infra*, IV, E, 8.

Concurrent negligence of master see *infra*, IV, E, 10.

Conditions arising after commencement of employment see *supra*, IV, E, 11, b.

Contributory negligence see *infra*, IV, F, 4, a.

Inexperienced or youthful employee see *infra*, IV, E, 7, b.

Knowledge by servant of defect or danger see *infra*, IV, E, 5.

Negligence of fellow servants see *infra*, IV, G, 4, a, (III).

Notice or complaint to master and promise to remedy defects see *infra*, IV, E, 5, g, (II).

Obvious or latent defects or dangers see *infra*, IV, E, 6.

Reliance on care of master see *supra*, IV, E, 1, d.

Risks outside scope of employment see *infra*, IV, E, 9.

77. *Arkansas.*— Brinkley Car Works, etc., Co. *v.* Lewis, 68 Ark. 316, 57 S. W. 1108; Emma Cotton Seed Oil Co. *v.* Hale, 56 Ark. 232, 19 S. W. 600.

Colorado.— McKean *v.* Colorado Fuel, etc., Co., 18 Colo. App. 285, 71 Pac. 425.

Illinois.— Browne *v.* Siegel, 191 Ill. 226, 60 N. E. 815 [*affirming* 90 Ill. App. 49]; O'Donnell *v.* Armour Curled Hair Works, 111 Ill. App. 516; Ewald *v.* Michigan Cent. R. Co., 107 Ill. App. 294.

Indiana.— Thompson *v.* Citizens' St. R. Co., 152 Ind. 461, 53 N. E. 462; Island Coal Co. *v.* Greenwood, 151 Ind. 476, 50 N. E. 36.

Kentucky.— Wilson *v.* Chess, etc., Co., 117 Ky. 567, 78 S. W. 453, 25 Ky. L. Rep. 1655.

Massachusetts.— Gillette *v.* General Electric Co., 187 Mass. 1, 72 N. E. 255; Donovan *v.* American Linen Co., 180 Mass. 127, 61 N. E. 808; McIsaac *v.* Northampton Electric Lighting Co., 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244; Murphy *v.* American Rubber Co., 159 Mass. 266, 34 N. E. 268; Moulton *v.* Gage, 138 Mass. 390.

Michigan.— Balle *v.* Detroit Leather Co., 73 Mich. 158, 41 N. W. 216.

b. Machinery and Appliances. Subject to the rule that he does not assume risks created by reason of the master's negligence,[78] a servant cannot recover for injuries resulting from defective or dangerous machinery or appliances, where the risks are incident to the employment, or are known, or ought to be known, by him.[79]

Missouri.— Roberts *v.* Missouri, etc., Tel. Co., 166 Mo. 370, 66 S. W. 155.

New Jersey.— Conway *v.* Furst, 57 N. J. L. 645, 32 Atl. 380.

New York.— Grant *v.* National R. Spring Co., 86 N. Y. App. Div. 593, 83 N. Y. Suppl. 1021; Willdigg *v.* Knox, 80 N. Y. App. Div. 390, 80 N. Y. Suppl. 1018; O'Connall *v.* Thompson-Starrett Co., 72 N. Y. App. Div. 47, 76 N. Y. Suppl. 296; O'Sullivan *v.* Flynn, 67 N. Y. App. Div. 516, 73 N. Y. Suppl. 1108; Dorney *v.* O'Neill, 34 N. Y. App. Div. 497, 54 N. Y. Suppl. 235; Reinig *v.* Broadway R. Co., 49 Hun 269, 1 N. Y. Suppl. 907; Clark *v.* Barnes, 37 Hun 389; Huda *v.* American Glucose Co., 13 Misc. 657, 34 N. Y. Suppl. 931.

Pennsylvania.— Fricker *v.* Penn Bridge Co., 197 Pa. St. 442, 47 Atl. 354; Moore *v.* Pennsylvania R. Co., 167 Pa. St. 495, 31 Atl. 734.

Tennessee.— Ferguson *v.* Phœnix Cotton Mills, 106 Tenn. 236, 61 S. W. 53.

Utah.—Christienson *v.* Rio Grande Western R. Co., 27 Utah 132, 74 Pac. 876, 101 Am. St. Rep. 945.

Wisconsin.— Bormann *v.* Milwaukee, 93 Wis. 522, 67 N. W. 924, 33 L. R. A. 652; Goff *v.* Chippewa River, etc., R. Co., 86 Wis. 237, 56 N. W. 465.

United States.— Crawford *v.* American Steel, etc., Co., 123 Fed. 275, 59 C. C. A. 293; Moon-Anchor Consol. Gold Mines *v.* Hopkins, 111 Fed. 298, 49 C. C. A. 347; Yager *v.* Receivers, 88 Fed. 773.

Canada.— Dugal *v.* Peoples Bank, 34 N. Brunsw. 581.

See 34 Cent. Dig. tit. "Master and Servant," § 551.

Risk incident to making alterations in place of work assumed see Rooney *v.* Carson, 161 Pa. St. 26, 28 Atl. 996.

A servant may assume the construction of the place in which, or provide the tools with which, he works, and if he does so his master is relieved from that duty and liability for injuries to him caused by defects therein. Donovan *v.* Harlan, etc., Co., 2 Pennew. (Del.) 190, 44 Atl. 619.

Ways and passages on premises.— Servant using ways not built by, or under control of, master assumes risk (Campbell *v.* Mullen, 60 Ill. App. 497); using passage other than safe and proper one constructed by master assumes risk (Gillette *v.* General Electric Co., 187 Mass. 1, 72 N. E. 255); and even though proper means of egress be barred he assumes risk from negligent use of others (Gibbons *v.* British, etc., Steam Nav. Co., 175 Mass. 212, 55 N. E. 987).

Means of ingress and egress.— Adequate means being supplied by master to provide escape in case of fire, servant assumes risk of situation occasioned by known nature of business requiring windows to be closed. Huda *v.* American Glucose Co., 13 Misc. (N. Y.) 657, 34 N. Y. Suppl. 931.

Contrivances constructed by workmen.— The rule charging the master with liability for defects in premises and appliances does not apply when the same are not furnished by the master or by his direction or which he is not charged by law to provide. McKean *v.* Colorado Fuel, etc., Co., 18 Colo. App. 285, 71 Pac. 425.

Failure to light premises.— The servant assumes transitory risks caused by darkness of a passageway with which he is acquainted. Donovan *v.* American Linen Co., 180 Mass. 127, 61 N. E. 808. So he assumes risks incident to knowledge that the premises are not lighted and his own want of care in not procuring sufficient light. Willdigg *v.* Knox, 80 N. Y. App. Div. 390, 80 N. Y. Suppl. 1018. Extinguishment of lights usually kept burning must be shown to be due to the fault of the master, otherwise servant assumes risk from accident occasioned thereby. Dorney *v.* O'Neill, 34 N. Y. App. Div. 497, 54 N. Y. Suppl. 235.

Risks from means employed.— Servant assumes risks from means employed in carrying out master's order to perform work. O'Sullivan *v.* Flynn, 67 N. Y. App. Div. 516, 73 N. Y. Suppl. 1108.

78. See IV, E, 10.

Primary liability of master.— The risk of injury to a servant from defective machinery is primarily on the master, and remains on him unless the servant voluntarily assumes it. Dempsey *v.* Sawyer, 95 Me. 295, 49 Atl. 1035.

79. *Delaware.*— Quinn *v.* Johnson Forge Co., 9 Houst. 338, 32 Atl. 858.

Georgia.— Reid *v.* Central R., etc., Co., 81 Ga. 694, 8 S. E. 629.

Illinois.— Deering Harvester Co. *v.* Heffernan, 107 Ill. App. 636; Peoria Gen. Electric Co. *v.* Gallagher, 68 Ill. App. 248; Litchfield Car, etc., Co. *v.* Romine, 39 Ill. App. 642.

Kentucky.— Chicago Veneer Co. *v.* Walden, (1904) 82 S. W. 294.

Maine.— Moore *v.* Stetson, 96 Me. 197, 52 Atl. 767; Dempsey *v.* Sawyer, 95 Me. 295, 49 Atl. 1035; Demers *v.* Deering, 93 Me. 272, 44 Atl. 922.

Maryland.— Wood *v.* Heiges, 83 Md. 257, 34 Atl. 872; Michael *v.* Stanley, 75 Md. 464, 23 Atl. 1094; Yates *v.* McCullough Iron Co., 69 Md. 370, 16 Atl. 280.

Massachusetts.— Archambault *v.* Archambault, 184 Mass. 274, 68 N. E. 199; Lodi *v.* Maloney, 184 Mass. 240, 68 N. E. 229; McAuliffe *v.* Gale, 180 Mass. 361, 62 N. E. 269; Kenney *v.* Hingham Cordage Co., 168 Mass. 278, 47 N. E. 117; Daigle *v.* Lawrence Mfg.

c. Mining and Excavating. A servant assumes the ordinary and usual risks incident to mining or excavating, the existence of which are, or ought to be, known to him.[80]

Co., 159 Mass. 378, 34 N. E. 458; Murphy *v.* American Rubber Co., 159 Mass. 266, 34 N. E. 268.

Michigan.—Lockwood *v.* Tennant, 137 Mich. 305, 100 N. W. 562; Taylor *v.* Withington, etc., Mfg. Co., 136 Mich. 652, 99 N. W. 873; Kupkofski *v.* John S. Spiegel Co., 135 Mich. 7, 97 N. W. 48; Rando *v.* Detroit Screw Works, 134 Mich. 343, 96 N. W. 454; Fischer *v.* Goldie, 132 Mich. 574, 94 N. W. 5; Cronin *v.* Russel Wheel, etc., Co., 132 Mich. 500, 93 N. W. 1070; Leppala *v.* Cleveland Iron-Min. Co., 122 Mich. 633, 81 N. W. 553; Swoboda *v.* Ward, 40 Mich. 420.

Minnesota.—Gittens *v.* William Porten Co., 90 Minn. 512, 97 N. W. 378; Perras *v.* Booth, 82 Minn. 191, 84 N. W. 739, 85 N. W. 179; Soutar *v.* Minneapolis International Electric Co., 68 Minn. 18, 70 N. W. 796; Hess *v.* Adamant Mfg. Co., 66 Minn. 79, 68 N. W. 774; Olmschied *v.* Nelson-Tenney Lumber Co., 66 Minn. 61, 68 N. W. 605; Greene *v.* Minneapolis, etc., R. Co., 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785.

Missouri.—Mathis *v.* Kansas City Stockyards Co., 185 Mo. 434, 84 S. W. 66; Stagg *v.* Edward Western Tea, etc., Co., 169 Mo. 489, 69 S. W. 391; Glover *v.* Kansas City Bolt, etc., Co., 153 Mo. 327, 55 S. W. 88; Glover *v.* Meinrath, 133 Mo. 292, 34 S. W. 72.

New York.—Ehrenfried *v.* Lackawanna Iron, etc., Co., 180 N. Y. 515, 72 N. E. 1141 [*affirming* 89 N. Y. App. Div. 130, 85 N. Y. Suppl. 57]; Scheir *v.* Quirin, 177 N. Y. 568, 69 N. E. 1130 [*affirming* 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956]; Wagner *v.* New York, etc., R. Co., 93 N. Y. App. Div. 14, 86 N. Y. Suppl. 921; French *v.* Aulls, 72 Hun 442, 25 N. Y. Suppl. 188; Daly *v.* Alexander Smith, etc., Carpet Co., 69 Hun 77, 23 N. Y. Suppl. 269.

Oregon.—Stone *v.* Oregon City Mfg. Co., 4 Oreg. 52.

Pennsylvania.—Masterson *v.* Eldridge, 208 Pa. St. 242, 57 Atl. 515; Toohey *v.* Equitable Gas Co., 179 Pa. St. 437, 36 Atl. 314; Wojciechowski *v.* Spreckels' Sugar Refining Co., 177 Pa. St. 57, 35 Atl. 596; Shaffer *v.* Haish, 110 Pa. St. 575, 1 Atl. 575; O'Dowd *v.* Burnham, 19 Pa. Super. Ct. 464.

Tennessee.—Record *v.* Chickasaw Cooperage Co., 108 Tenn. 657, 69 S. W. 334.

Texas.—H. S. Hopkins Bridge Co. *v.* Burnett, 85 Tex. 16, 9 S. W. 886; Gulf, etc., R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151; Waxahachie Cotton Oil Co. *v.* McLain, 27 Tex. Civ. App. 334, 66 S. W. 226.

Utah.—Konold *v.* Rio Grande Western R. Co., 21 Utah 379, 60 Pac. 1021, 81 Am. St. Rep. 693.

Washington.—Brown *v.* Tabor Mill Co., 22 Wash. 317, 60 Pac. 1126.

Wisconsin.—Koepcke *v.* Wisconsin Bridge, etc., Co., 116 Wis. 92, 92 N. W. 558; McDougall *v.* Ashland Sulphite-Fibre Co., 97 Wis. 382, 73 N. W. 327; Erdman *v.* Illinois Steel Co., 95 Wis. 6, 69 N. W. 993, 60 Am. St. Rep. 66.

United States.—Britton *v.* Central Union Tel. Co., 131 Fed. 844, 65 C. C. A. 598; Hunt *v.* Kile, 98 Fed. 49, 38 C. C. A. 641; Valley R. Co. *v.* Keegan, 87 Fed. 849, 31 C. C. A. 255; Smith *v.* The Serapis, 51 Fed. 91, 2 C. C. A. 102; The Maharajah, 40 Fed. 784 [*affirmed* in 49 Fed. 111, 1 C. C. A. 181].

See 34 Cent. Dig. tit. "Master and Servant," §§ 552, 560.

80. *Colorado.*—Harvey *v.* Mountain Pride Gold Min. Co., 18 Colo. App. 234, 70 Pac. 1001.

Illinois.—Mattson *v.* Qualey Constr. Co., 90 Ill. App. 260; Coal Valley Min. Co. *v.* Nelson, 87 Ill. App. 180. *Compare* La Salle *v.* Kostka, 190 Ill. 130, 60 N. E. 72 [*affirming* 92 Ill. App. 91], where it was held that the danger from the caving-in of the sides of a sewer excavation cannot be said, as matter of law, to be an assumed risk.

Indiana.—Island Coal Co. *v.* Greenwood, 151 Ind. 476, 50 N. E. 36; Swanson *v.* Lafayette, 134 Ind. 625, 33 N. E. 1033; Griffin *v.* Ohio, etc., R. Co., 124 Ind. 326, 24 N. E. 888; Smallwood *v.* Bedford Quarries Co., 28 Ind. App. 692, 63 N. E. 869.

Iowa.—Jacobson *v.* Smith, 123 Iowa 263, 98 N. W. 773; McQueeny *v.* Chicago, etc., R. Co., 120 Iowa 522, 94 N. W. 1124. *Compare* Cushman *v.* Carbondale Fuel Co., 116 Iowa 618, 88 N. W. 817; Mosgrove *v.* Zimbleman Coal Co., 110 Iowa 169, 81 N. W. 227.

Massachusetts.—Allard *v.* Hildreth, 173 Mass. 26, 52 N. E. 1061; McCoy *v.* Westborough, 172 Mass. 504, 52 N. E. 1064.

Michigan.—Lenderink *v.* Rockford, 135 Mich. 531, 98 N. W. 4. *Compare* James *v.* Emmet Min. Co., 55 Mich. 335, 21 N. W. 361, where it was held that the caving-in of a mine was not within the risks of the employment of a laborer, not a miner, employed to work on the surface.

Minnesota.—Hill *v.* Winston, 73 Minn. 80, 75 N. W. 1030; Pederson *v.* Rushford, 41 Minn. 289, 42 N. W. 1063.

Missouri.—Boemer *v.* Central Land Co., 69 Mo. App. 601. *Compare* Chambers *v.* Chester, 172 Mo. 461, 72 S. W. 904, holding that a miner employed in blasting with powder of a certain explosive quality does not assume the risk of a substitution, without notice to him, of a powder of a higher explosive and more dangerous character.

New Mexico.—Cerrillos Coal R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807.

New York.—Litchfield *v.* Buffalo, etc., R. Co., 73 N. Y. App. Div. 1, 76 N. Y. Suppl. 80; Sharpsteen *v.* Livonia Salt, etc., Co., 3 N. Y. App. Div. 144, 38 N. Y. Suppl. 49. *Compare* Di Vito *v.* Crage, 35 N. Y. App. Div. 155, 55 N. Y. Suppl. 64, where it was held

d. Shipping. The ordinary risks incident to employment on or about a ship, the existence of which are, or should be known, to him, are assumed by a servant,[81] but not such as result from the master's negligence.[82]

3. Dangerous Operations and Methods of Work[83] — a. In General. The fact that the work in which he is engaged or the methods of work in use are of a peculiarly hazardous character does not affect the rule as to the assumption of incidental or obvious risks by a servant;[84] notwithstanding the fact that the

that a laborer working in an excavation in the side of a bluff does not assume the risk of injury from the rolling down of stones thrown out in the process of blasting for such excavation, and allowed by the master to remain on the rock above.

Pennsylvania.— McKinzie *v.* Philadelphia, 8 Pa. Co. Ct. 293.

Tennessee.— Heald *v.* Wallace, 109 Tenn. 346, 71 S. W. 80; Coal Creek Min. Co. *v.* Davis, 90 Tenn. 711, 18 S. W. 387.

Texas.— Ft. Worth Stock Yards Co. *v.* Whittenburg, 34 Tex. Civ. App. 163, 78 S. W. 363.

Utah.— Christienson *v.* Rio Grande Western R. Co., 27 Utah 132, 74 Pac. 876, 101 Am. St. Rep. 945; Anderson *v.* Daly Min. Co., 16 Utah 28, 50 Pac. 815. *Compare* Faulkner *v.* Mammoth Min. Co., 23 Utah 437, 66 Pac. 799, in which it was held that where a miner was making excavations preparatory to the placing of supporting timbers by other workmen, he was not engaged in making a dangerous place safe, so as to work an assumption of risk.

Virginia.— Russell Creek Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614; Robinson *v.* Dinnny, 96 Va. 41, 30 S. E. 442.

Washington.— See Czarecki *v.* Seattle, etc., Nav. Co., 30 Wash. 288, 70 Pac. 750. *Compare* McMillan *v.* North Star Min. Co., 32 Wash. 579, 73 Pac. 685, 98 Am. St. Rep. 908; Uren *v.* Golden Tunnel Min. Co., 24 Wash. 261, 64 Pac. 174.

Wisconsin.— Mielke *v.* Chicago, etc., R. Co., 103 Wis. 1, 79 N. W. 22, 74 Am. St. Rep. 834. *Compare* Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565, where it was held that a common laborer placed at the bottom of a cistern by his superintendent did not assume the risk of injury from the collapse of the wall supporting the sides of the cistern.

See 34 Cent. Dig. tit. "Master and Servant," § 557.

81. *Illinois.*— Gunderson *v.* Peterson, 65 Ill. 193.

New York.— Hudson *v.* Ocean Steamship Co., 110 N. Y. 625, 17 N. E. 342; Toohey *v.* Ocean Steamship Co., 78 N. Y. App. Div. 178, 79 N. Y. Suppl. 567.

Ohio.— Memphis, etc., Packet Co. *v.* Britton, 25 Ohio Cir. Ct. 153.

Texas.— Direct Nav. Co. *v.* Anderson, 29 Tex. Civ. App. 65, 69 S. W. 174.

United States.— The Esperanza, 133 Fed. 1015; Sievers *v.* Eyre, 122 Fed. 734; Red River Line *v.* Smith, 99 Fed. 520, 39 C. C. A. 620.

See 34 Cent. Dig. tit. "Master and Servant," § 558.

82. McCampbell *v.* Cunard Steamship Co., 69 Hun (N. Y.) 131, 23 N. Y. Suppl. 477; Hogan *v.* Hendersen, 2 N. Y. St. 119; Young *v.* Habn, (Tex. Civ. App. 1902) 69 S. W. 203.

83. **Compliance with commands** see *infra*, IV, E, 7, g, 8.
Concurrent negligence of master see *infra*, IV, E, 10.
Contributory negligence see *infra*, IV, F, 4, b.
Knowledge by servant of defect or danger see *infra*, IV, E, 5.
Negligence of fellow servants see *infra*, IV, G, 4, a, (VII).
Notice or complaint to master and promise to remedy defect see *infra*, IV, E, 5, g, (II), (B).
Obvious or latent danger see *infra*, IV, E, 6.
Reliance on care of master see *supra*, IV, E, 1, d.
Risks outside scope of employment see *infra*, IV, E, 9.

84. *Alabama.*— Southern R. Co. *v.* Guyton, 122 Ala. 231, 25 So. 34.

California.— Yearsley *v.* Sunset Tel., etc., Co., 110 Cal. 236, 42 Pac. 638.

Colorado.— Colorado Midland R. Co. *v.* O'Brien, 16 Colo. 219, 27 Pac. 701, holding that a servant cannot voluntarily and knowingly incur unusual and extraordinary dangers at the risk of his master.

Georgia.— Daniel *v.* Forsyth, 106 Ga. 568, 32 S. E. 621.

Illinois.— Pennsylvania Co. *v.* Backes, 133 Ill. 255, 24 N. E. 563; Illinois Cent. R. Co. *v.* Swisher, 61 Ill. App. 611.

Indiana.— Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; Myers *v.* W. C. De Pauw Co., 138 Ind. 590, 38 N. E. 37.

Iowa.— Branco *v.* Illinois Cent. R. Co., 119 Iowa 211, 93 N. W. 97; Beckman *v.* Consoldiated Coal Co., 90 Iowa 252, 57 N. W. 889.

Kentucky.— Chesapeake, etc., R. Co. *v.* McDowell, 24 S. W. 607, 16 Ky. L. Rep. 1.

Maine.— Cunningham *v.* Bath Iron Works, 92 Me. 501, 43 Atl. 106.

Massachusetts.— Lyons *v.* Boston Towage, etc., Co., 163 Mass. 158, 39 N. E. 800; Goldthwait *v.* Haverhill, etc., St. R. Co., 160 Mass. 554, 36 N. E. 486, holding that the mere fact that the servant does not know of the exact time of performance of an act making his position more dangerous will not aid him where he knows that the act is to be performed); Flynn *v.* Campbell, 160 Mass. 128, 35 N. E. 453.

Michigan.— Welch *v.* Brainard, 108 Mich.

service is a dangerous one, this adds nothing to the liability of the master for injuries resulting from the nature and ordinary incidents of the undertaking;[85] and where there are two or more ways in which a servant may perform his duties and he voluntarily chooses an unusual or more hazardous method, knowing it to be such, he does so at his own risk.[86] The voluntary choice of an unusual or more dangerous method of work by the servant is scarcely distinguished from contributory negligence, and is so regarded in many decisions.[87]

b. Operation of Railroads — (I) *In General.* Upon entering the service of a railroad company a servant assumes the usual and ordinary risks incident to his employment and the methods of work adopted, so far as such risks are known to him, or will be known by the exercise of ordinary and reasonable care;[88] but he

38, 65 N. W. 667; Burke *v.* Parker, 107 Mich. 88, 64 N. W. 1065; Kean *v.* Detroit Copper, etc., Rolling-Mills, 66 Mich. 277, 33 N. W. 395, 11 Am. St. Rep. 492.

Minnesota.— Hjelm *v.* Western Granite Contracting Co., 94 Minn. 169, 102 N. W. 384; Smith *v.* Tromanhauser, 63 Minn. 98, 65 N. W. 144.

Missouri.— Bradley *v.* Chicago, etc., R. Co., 138 Mo. 293, 39 S. W. 763; Cagney *v.* Hannibal, etc., R. Co., 69 Mo. 416; McKee *v.* Chicago, etc., R. Co., 96 Mo. App. 671, 70 S. W. 922.

Nebraska.— Dehning *v.* Detroit Bridge, etc., Works, 46 Nebr. 556, 65 N. W. 186.

New Hampshire.— See Lintott *v.* Nashua Iron, etc., Works, 68 N. H. 628, 44 Atl. 98.

New Jersey.— Smith *v.* Oxford Iron Co., 42 N. J. L. 467.

New York.—Hutchinson *v.* Parker, 39 N. Y. App. Div. 133, 57 N. Y. Suppl. 168, 58 N. Y. Suppl. 190; Crowe *v.* New York Cent., etc., R. Co., 70 Hun 37, 23 N. Y. Suppl. 1100; Thorn *v.* New York City Ice Co., 46 Hun 497.

North Carolina.— Smith *v.* Wilmington, etc., R. Co., 129 N. C. 173, 39 S. E. 805, 85 Am. St. Rep. 740.

Oklahoma.— Chaddick *v.* Lindsay, 5 Okla. 616, 49 Pac. 940, by reason of insufficient accommodations.

Oregon.— Brown *v.* Oregon Lumber Co., 24 Oreg. 315, 33 Pac. 557, increased risk from change of method of doing work.

Texas.— Gulf, etc., R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151 (through known defects in machinery); Watson *v.* Houston, etc., R. Co., 58 Tex. 434.

Utah.— Anderson *v.* Daly Min. Co., 16 Utah 28, 50 Pac. 815.

Washington.— Hogele *v.* Wilson, 5 Wash. 160, 31 Pac. 469.

Wisconsin.— Portance *v.* Lehigh Valley Coal Co., 101 Wis. 574, 77 N. W. 875, 70 Am. St. Rep. 932; Powell *v.* Ashland Iron, etc., Co., 98 Wis. 35, 73 N. W. 573; Kelley *v.* Chicago, etc., R. Co., 53 Wis. 74, 9 N. W. 816.

United States.— Hunt *v.* Kile, 98 Fed. 49, 38 C. C. A. 641; Red River Line *v.* Cheatham, 60 Fed. 517, 9 C. C. A. 124.

England.— Smith *v.* Baker, [1891] A. C. 325, 55 J. P. 660, 60 L. J. Q. B. 683, 65 L. T. Rep. N. S. 467, 40 Wkly. Rep. 392; Clarke *v.* Holmes, 7 H. & N. 937, 8 Jur. N. S. 992, 31 L. J. Exch. 356, 9 L. T. Rep. N. S. 178, 10 Wkly. Rep. 405.

See 34 Cent. Dig. tit. "Master and Servant," § 559.

85. Myers *v.* W. C. De Pauw Co., 138 Ind. 590, 38 N. E. 37.

86. *Illinois.*— Foster *v.* Lake St. El. R. Co., 108 Ill. App. 113; Illinois Steel Co. *v.* McNulty, 105 Ill. App. 594; Freak *v.* Potts, 105 Ill. App. 92; Wabash R. Co. *v.* Propst, 92 Ill. App. 485; Lehman *v.* Bagley, 82 Ill. App. 197; Chicago, etc., R. Co. *v.* Goltz, 71 Ill. App. 414; St. Louis, Bolt, etc., Co. *v.* Burke, 12 Ill. App. 369.

Louisiana.— Jenkins *v.* Maginnis Cotton Mills, 51 La. Ann. 1011, 25 So. 643; Sauer *v.* Union Oil Co., 43 La. Ann. 699, 9 So. 566.

Massachusetts.— Henderson *v.* Boynton, 173 Mass. 217, 53 N. E. 401; Thompson *v.* Norman Paper Co., 169 Mass. 416, 48 N. E. 757.

Michigan.— Deering *v.* Canfield, etc., Co., 126 Mich. 373, 85 N. W. 874; Davis *v.* Detroit, etc., R. Co., 20 Mich. 105, 4 Am. Rep. 364.

Missouri.— Hurst *v.* Kansas City, etc., R. Co., 163 Mo. 309, 63 S. W. 695, 85 Am. St. Rep. 539; Herbert *v.* Wiggins Ferry Co., 107 Mo. App. 287, 80 S. W. 978; Palmer *v.* Kinlock Tel. Co., 91 Mo. App. 106.

Nebraska.— Weed *v.* Chicago, etc., R. Co., 5 Nebr. (Unoff.) 623, 99 N. W. 827.

Ohio.— Crawford *v.* New York, etc., R. Co., 23 Ohio Cir. Ct. 207.

Texas.— Hettich *v.* Hillje, 33 Tex. Civ. App. 571, 77 S. W. 641.

Utah.— Fritz *v.* Salt Lake, etc., Gas, etc., Co., 18 Utah 493, 56 Pac. 90.

Wisconsin.— Larson *v.* Knapp, etc., Co., 98 Wis. 178, 73 N. W. 992.

United States.— Morris *v.* Duluth, etc., R. Co., 108 Fed. 747, 47 C. C. A. 661.

See 34 Cent. Dig. tit. "Master and Servant," § 559.

87. See *infra*, IV, F, 4, a, (I), (E), b, (I), (B).

88. *Alabama.*— Louisville, etc., R. Co. *v.* Smith, 129 Ala. 553, 30 So. 571.

Arkansas.— Fordyce *v.* Edwards, 65 Ark. 98, 44 S. W. 1034, risk incident to use of defective engine.

Colorado.— Denver Tramway Co. *v.* Nesbit, 22 Colo. 408, 45 Pac. 405.

Georgia.— Plunkett *v.* Georgia Cent. R. Co., 105 Ga. 203, 30 S. E. 728 (passing

does not assume risks arising from the company's failure to perform the duties

through opening in train, the cars of which are shifting); East Tennessee, etc., R. Co. *v.* Reynolds, 93 Ga. 570, 20 S. E. 70.

Illinois.— Chicago, etc., R. Co. *v.* Barr, 204 Ill. 163, 68 N. E. 543 [*reversing* 107 Ill. App. 111]; Chicago, etc., R. Co. *v.* Ward, 61 Ill. 130 (risk incident to removing defective cars to repair shop); Illinois Cent. R. Co. *v.* Jewell, 46 Ill. 99, 92 Am. Dec. 240 (brakeman assumes risk of defective brake under his charge); Baltimore, etc., R. Co. *v.* Greer, 103 Ill. App. 448; Mobile, etc., R. Co. *v.* Healy, 100 Ill. App. 586 (risk incident to number of tracks and switches in railroad yard); St. Louis Nat. Stock Yards *v.* Burns, 97 Ill. App. 175 (risks incident to making up and moving of trains in yards); Pfeiffer *v.* Chicago, etc., R. Co., 73 Ill. App. 416 (section hand assumes risks arising from running trains at high speed, without signals); Peoria etc., R. Co. *v.* Puckett, 52 Ill. App. 222; Peoria, etc., R. Co. *v.* Puckett, 42 Ill. App. 642 (risks incident to methods of work, although a safer method might have been adopted); Wabash, etc., R. Co. *v.* Deardorff, 14 Ill. App. 401; Chicago, etc., R. Co. *v.* Abend, 7 Ill. App. 130.

Indiana.— Union Traction Co. *v.* Buckland, 34 Ind. App. 420, 72 N. E. 158.

Iowa.— Branco *v.* Illinois Cent. R. Co., 119 Iowa 211, 93 N. W. 97; Duree *v.* Chicago, etc., R. Co., 118 Iowa 640, 92 N. W. 890 (risks from sparks and cinders assumed by section hand); Martin *v.* Chicago, etc., R. Co., (1901) 87 N. W. 654 (risks from inclement weather assumed by brakeman); Brown *v.* Chicago, etc., R. Co., 64 Iowa 652, 21 N. W. 193, 69 Iowa 161, 28 N. W. 487.

Kansas.— Brown *v.* Chicago, etc., R. Co., 59 Kan. 70, 52 Pac. 65.

Kentucky.— O'Bannon *v.* Louisville, etc., R. Co., 6 S. W. 434, 9 Ky. L. Rep. 706, brakeman assumes risks from ice forming on edge of car.

Maine.— Coolbroth *v.* Maine Cent. R. Co., 77 Me. 165.

Massachusetts.— Hall *v.* Wakefield, etc., R. Co., 178 Mass. 98, 59 N. E. 668.

Michigan.— Whalen *v.* Michigan Cent. R. Co., 114 Mich. 512, 72 N. W. 323 (unusual and unaccountable failure of air-brakes); Fuller *v.* Lake Shore, etc., R. Co., 108 Mich. 690, 66 N. W. 593 (risks incident to operating trains over cattle-guards); Piquegno *v.* Chicago, etc., R. Co., 52 Mich. 40, 17 N. W. 232, 50 Am. Rep. 243 (danger incident to ice and snow near tracks); Michigan Cent. R. Co. *v.* Austin, 40 Mich. 247 (risks incident to use of worn rails on side-tracks).

Minnesota.— Kletschka *v.* Minneapolis, etc., R. Co., 80 Minn. 238, 83 N. W. 133; Lawson *v.* Truesdale, 60 Minn. 410, 62 N. W. 546 (accumulation of ice and snow on tracks incident to employment in a cold climate); Olson *v.* St. Paul, etc., R. Co., 38 Minn. 117, 35 N. W. 866 (track repairer assumes risk of trains approaching without notice, where that is the uniform practice of the company).

[IV, E 3, b, (I)]

Mississippi.— Morehead *v.* Yazoo, etc., R. Co., 84 Miss. 112, 36 So. 151, danger incident to walking on side-track rather than on path provided by company.

Missouri.— Minnier *v.* Sedalia, etc., R. Co., 167 Mo. 99, 66 S. W. 1072; Winkler *v.* St. Louis Basket, etc., Co., 137 Mo. 394, 38 S. W. 921; Francis *v.* Kansas City, etc., R. Co., 127 Mo. 658, 28 S. W. 842, 30 S. W. 129 (risks incident to boarding footboard of moving switch engine from middle of track).

Nebraska.— Union Stock-Yards Co. *v.* Goodwin, 57 Nebr. 138, 77 N. W. 357, car or appliance belonging to third person.

New Hampshire.— Murphy *v.* Grand Trunk R. Co., 73 N. H. 18, 58 Atl. 835; Young *v.* Boston, etc., R. Co., 69 N. H. 356, 41 Atl. 268.

New Jersey.— McGrath *v.* Delaware, etc., R. Co., 68 N. J. L. 425, 53 Atl. 207.

New York.— Gerstner *v.* New York Cent., etc., R. Co., 178 N. Y. 627, 71 N. E. 1131 [*affirming* 81 N. Y. App. Div. 562, 80 N. Y. Suppl. 1063]; Kilkin *v.* New York Cent., etc., R. Co., 177 N. Y. 566, 69 N. E. 1125 [*affirming* 76 N. Y. App. Div. 529, 78 N. Y. Suppl. 568] (brakeman held to have assumed risk from snow and ice on top of freight car); Brick *v.* Rochester, etc., R. Co., 98 N. Y. 211 (risks incident to repair of worn-out road); Field *v.* New York Cent., etc., R. Co., 86 N. Y. App. Div. 148, 83 N. Y. Suppl. 535 (risks incident to method of operating trains); Bennett *v.* Long Island R. Co., 21 N. Y. App. Div. 25, 47 N. Y. Suppl. 258 (risks incident to working on construction track); Cole *v.* Rome, etc., R. Co., 72 Hun 467, 25 N. Y. Suppl. 276; Gibson *v.* Northern Cent. R. Co., 22 Hun 289 (risks incident to duty of moving and coupling defective cars); Van Sickle *v.* Atlantic Ave. R. Co., 12 Misc. 217, 33 N. Y. Suppl. 265; Miller *v.* New York Cent., etc., R. Co., 14 N. Y. St. 656.

Ohio.— Lake Shore, etc., R. Co. *v.* Knittal, 33 Ohio St. 468; Toledo, etc., R. Co. *v.* Beard, 20 Ohio Cir. Ct. 681, 11 Ohio Cir. Dec. 406.

Oklahoma.— Chaddick *v.* Lindsay, 5 Okla. 616, 49 Pac. 940.

Pennsylvania.— Simmons *v.* Southern Traction Co., 207 Pa. St. 589, 57 Atl. 45, 64 L. R. A. 205; Nelson *v.* Oil City St. R. Co., 207 Pa. St. 363, 56 Atl. 933; Sanker *v.* Pennsylvania R. Co., 205 Pa. St. 609, 55 Atl. 833 (workmen repairing track near a tunnel assume the risk of passing trains); Titus *v.* Bradford, etc., R. Co., 136 Pa. St. 618, 20 Atl. 517, 20 Am. St. Rep. 944; Golwitzer *v.* Pennsylvania R. Co., 1 Mona. 72; Palko *v.* New Jersey Cent. R. Co., 9 Kulp 550 (track repairer assumes risks of trains passing on side line).

South Carolina.— Walling *v.* Congaree Constr. Co., 41 S. C. 388, 19 S. E. 723 (assumption of risks incident to construction); Couch *v.* Charlotte, etc., R. Co., 22 S. C. 557.

Texas.— Quill *v.* Houston, etc., R. Co., 93 Tex. 616, 55 S. W. 1126, 57 S. W. 948 (risk

imposed upon it by law for the protection of its servants.[89] More particularly the rule and its qualification has been applied to the risks incident to the despatch

of collision with live stock); Houston, etc., R. Co. *v.* O'Hare, 64 Tex. 600 (risk incident to running defective engine to repair shop); International, etc., R. Co. *v.* Hester, 64 Tex. 401; Missouri Pac. R. Co. *v.* Watts, 63 Tex. 549; Gulf, etc., R. Co. *v.* Smith, (Civ. App. 1904) 83 S. W. 719; Galveston, etc., R. Co. *v.* Perry, 36 Tex. Civ. App. 414, 82 S. W. 343; Parish *v.* Missouri, etc., R. Co., (Civ. App. 1903) 76 S. W. 234; Galveston, etc., R. Co. *v.* Walker, (Civ. App. 1903) 76 S. W. 228; Texas Cent. R. Co. *v.* Bender, 32 Tex. Civ. App. 568, 75 S. W. 561; St. Louis, etc., R. Co. *v.* Austin, (Civ. App. 1903) 72 S. W. 212; International, etc., R. Co. *v.* Cochrane, (Civ. App. 1902) 71 S. W. 41; Gulf, etc., R. Co. *v.* Williams, (Civ. App. 1897) 39 S. W. 967; Missouri, etc., R. Co. *v.* Thompson, 11 Tex. Civ. App. 658, 33 S. W. 718.

West Virginia.— Seldomridge *v.* Chesapeake, etc., R. Co., 46 W. Va. 569, 33 S. E. 293.

Wisconsin.— Kath *v.* Wisconsin Cent. R. Co., 121 Wis. 503, 99 N. W. 217; Flannagan *v.* Chicago, etc., R. Co., 50 Wis. 462, 7 N. W. 337, risks incident to moving cars to shops for inspection and repair.

United States.—Williams *v.* Northern Lumber Co., 113 Fed. 382; West *v.* Southern Pac. Co., 85 Fed. 392, 29 C. C. A. 219; Bowes *v.* Hopkins, 84 Fed. 767, 28 C. C. A. 524; Southern Pac. Co. *v.* Johnson, 69 Fed. 559, 16 C. C. A. 317 (risk incident to going or running aboard of engine to remedy some difficulty); Gowen *v.* Harley, 56 Fed. 973, 6 C. C. A. 190; Kresakowski *v.* Northern Pac. R. Co., 18 Fed. 229, 5 McCrary 528 (risk of collision assumed by servant riding to work on pilot of engine).

See 34 Cent. Dig. tit. "Master and Servant," §§ 554, 555, 561.

89. Reliance on care of master generally see *infra*, IV, E, 1, d. And see the following cases more particularly applicable to railroads:

Alabama.— Northern Alabama R. Co. *v.* Shea, 142 Ala. 119, 37 So. 796 (risks arising from defective track condition); Kansas City, etc., R. Co. *v.* Thornhill, 141 Ala. 215, 37 So. 412 (perils arising from negligent directions); Highland Ave., etc., R. Co. *v.* Miller, 120 Ala. 535, 24 So. 955.

California.— Dolan *v.* Sierra R. Co., 135 Cal. 435, 67 Pac. 686, defective bridge.

Colorado.— Colorado Midland R. Co. *v.* Naylon, 17 Colo. 501, 30 Pac. 249, 31 Am. St. Rep. 335, risks incident to insufficient spiking of rails.

Georgia.— Middle Georgia, etc., R. Co. *v.* Barnett, 104 Ga. 582, 30 S. E. 771; Lawhorn *v.* Millen, etc., R. Co., 97 Ga. 742, 25 S. E. 492, risk from running train at dangerous and unusual speed over defective part of track not assumed.

Illinois.—Chicago, etc., R. Co. *v.* White, 209 Ill. 124, 70 N. E. 588; North Chicago St. R. Co. *v.* Dudgeon, 184 Ill. 477, 56 N. E. 796 [*affirming* 83 Ill. App. 528] (stones piled near track); Chicago, etc., R. Co. *v.* Gillison, 173 Ill. 264, 50 N. E. 657, 64 Am. St. Rep. 117 [*affirming* 72 Ill. App. 207] (risk of separation of train by reason of defective draw-bar not assumed by brakeman); Terre Haute, etc., R. Co. *v.* Williams, 172 Ill. 379, 50 N. E. 116, 64 Am. St. Rep. 44 [*affirming* 69 Ill. App. 392]; Pittsburg, etc., R. Co. *v.* Hewitt, 102 Ill. App. 428 [*affirmed* in 202 Ill. 28, 66 N. E. 829]; Illinois Cent. R. Co. *v.* Johnson, 95 Ill. App. 54 (danger from defective condition of freight car through loss of draw-bar not a risk incident to business).

Indiana.— Pittsburgh, etc., R. Co. *v.* Gipe, 160 Ind. 360, 65 N. E. 1034; Baltimore, etc., R. Co. *v.* Peterson, 156 Ind. 364, 59 N. E. 1044; Pittsburgh, etc., R. Co. *v.* Nicholas, (App. 1905) 73 N. E. 195, 74 N. E. 626; Chicago, etc., R. Co. *v.* Martin, 31 Ind. App. 308, 65 N. E. 591; Barley *v.* Southern Indiana R. Co., 30 Ind. App. 406, 66 N. E. 72; Terre Haute, etc., R. Co. *v.* Rittenhouse, 28 Ind. App. 633, 62 N. E. 295; Pittsburgh, etc., R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. Rep. 120; Pittsburgh, etc., R. Co. *v.* Elwood, 25 Ind. App. 671, 58 N. E. 866.

Iowa.— Camp *v.* Chicago Great Western R. Co., 124 Iowa 238, 99 N. W. 735; Coles *v.* Union Terminal R. Co., 124 Iowa 48, 99 N. W. 108; Meloy *v.* Chicago, etc., R. Co., (1888) 37 N. W. 335, risk incident to riding over new track not assumed by civil engineer engaged in the construction of the road.

Kansas.— Croll *v.* Atchison, etc., R. Co., 57 Kan. 548, 46 Pac. 972, ditcher does not assume risk of fall of coal from negligently loaded tender.

Louisiana.— Wilson *v.* Louisiana, etc., R. Co., 51 La. Ann. 1133, 25 So. 961.

Massachusetts.— Carroll *v.* New York, etc., R. Co., 182 Mass. 237, 65 N. E. 69 (risk of failure to give warning of having trains on side-track not assumed by workman in car against which train was violently pushed); Houlihan *v.* Connecticut River R. Co., 164 Mass. 555, 42 N. E. 108.

Michigan.— Noe *v.* Rapid R. Co., 133 Mich. 152, 94 N. W. 743.

Minnesota.— Kerrigan *v.* Chicago, etc., R. Co., 86 Minn. 407, 90 N. W. 976 (risk of defective step on engine not assumed by fireman); Harding *v.* Minneapolis R. Transfer Co., 80 Minn. 504, 83 N. W. 395; Clapp *v.* Minneapolis, etc., R. Co., 36 Minn. 6, 29 N. W. 340, 1 Am. St. Rep. 629 (risk from broken switch-rail not assumed by engineer).

Missouri.— Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434 (engineer does not assume risk of cars which, having escaped from siding, are unattended on main track); Hurst *v.* Kansas City, etc., R. Co., 163 Mo. 309, 63 S. W. 695, 85 Am. St. Rep. 539 (risk from defective condition of yards, resulting from the making of improvements not assumed by freight

and operation of trains;[90] to those incident to the coupling and uncoupling of

brakeman); Schroeder *v.* Chicago, etc., R. Co., 108 Mo. 322, 18 S. W. 1094, 18 L. R. A. 827; Taylor *v.* Missouri Pac. R. Co., (1891) 16 S. W. 206 (risk arising from use of defective coupling by yard-master not assumed by switchman); Brimr *v.* Chicago, etc., R. Co., 109 Mo. App. 493, 85 S. W. 653; Montgomery *v.* Chicago Great Western R. Co., 109 Mo. App. 88, 83 S. W. 66 (risk from defective track not assumed by switchman); Mitchell *v.* Chicago, etc., R. Co., 108 Mo. App. 142, 83 S. W. 289; Reed *v.* Missouri, etc., R. Co., 94 Mo. App. 371, 68 S. W. 364.

New Hampshire.— Story *v.* Concord, etc., R. Co., 70 N. H. 364, 48 Atl. 288, holding that a foreman does not assume risk of defective track merely because he knows that another company owns it, and owes the duty of keeping it in repair.

New Jersey.— Smith *v.* Erie R. Co., 67 N. J. L. 636, 52 Atl. 634, 59 L. R. A. 302, risk from defective road-bed not assumed by trainman, unless known to him or obvious.

New York.— Smith *v.* New York, etc., R. Co., 178 N. Y. 635, 71 N. E. 1139 [*affirming* 86 N. Y. App. Div. 188, 83 N. Y. Suppl. 259]; Pierson *v.* New York, etc., R. Co., 53 N. Y. App. Div. 363, 65 N. Y. Suppl. 1039 (risk from defective air-brakes not assumed by engineer); True *v.* Lehigh Valley R. Co., 22 N. Y. App. Div. 588, 48 N. Y. Suppl. 86 (risk from landslide, which a proper inspection would have prevented, not assumed by engineer).

Pennsylvania.— Ortlip *v.* Philadelphia, etc., Traction Co., 198 Pa. St. 586, 48 Atl. 497.

South Carolina.— Carson *v.* Southern R. Co., 68 S. C. 55, 46 S. E. 525.

Texas.— Texas, etc., R. Co. *v.* Kelly, 98 Tex. 123, 80 S. W. 79; Texas, etc., R. Co. *v.* Eberheart, 91 Tex. 321, 43 S. W. 510 [*affirming* (Civ. App. 1897) 40 S. W. 1060]; Missouri, etc., R. Co. *v.* Keefe, (Civ. App. 1905) 84 S. W. 679; Galveston, etc., R. Co. *v.* Fitzpatrick, (Civ. App. 1904) 83 S. W. 406; San Antonio, etc., R. Co. *v.* Stevens, (Civ. App. 1904) 83 S. W. 235; International, etc., R. Co. *v.* McVey, (Civ. App. 1904) 81 S. W. 991, 83 S. W. 34; Missouri, etc., R. Co. *v.* Gearhart, (Civ. App. 1904) 81 S. W. 325; Missouri, etc., R. Co. *v.* Hutchens, 35 Tex. Civ. App. 343, 80 S. W. 415; Texas, etc., R. Co. *v.* Kelly, 34 Tex. Civ. App. 21, 80 S. W. 1073; Texas Cent. R. Co. *v.* Pelfrey, (Civ. App. 1904) 80 S. W. 1036; Gulf, etc., R. Co. *v.* Cooper, 33 Tex. Civ. App. 319, 77 S. W. 263; International, etc., R. Co. *v.* Moynahan, 33 Tex. Civ. App. 302, 76 S. W. 803; International, etc., R. Co. *v.* Hoyt, 30 Tex. Civ. App. 518, 70 S. W. 1012; Texas, etc., R. Co. *v.* Scott, 30 Tex. Civ. App. 496, 71 S. W. 26; International, etc., R. Co. *v.* Vinson, 28 Tex. Civ. App. 247, 66 S. W. 800; Southern Pac. R. Co. *v.* Winton, 27 Tex. Civ. App. 503, 66 S. W. 477; Gulf, etc., R. Co. *v.* Wood, (Civ. App. 1901) 63 S. W. 164 (section hand does not assume risk of coal falling from passing train); International, etc., R. Co. *v.* Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772 (risk from open switch not assumed by brakeman); International, etc., R. Co. *v.* Stephenson, 22 Tex. Civ. App. 220, 54 S. W. 1086; Missouri, etc., R. Co. *v.* Quarles, 22 Tex. Civ. App. 83, 54 S. W. 251; Galveston, etc., R. Co. *v.* Slinkard, 17 Tex. Civ. App. 585, 44 S. W. 35; Missouri, etc., R. Co. *v.* Chambers, 17 Tex. Civ. App. 487, 43 S. W. 1090 (risks incident to negligent inspection of cars not assumed by brakeman); Gulf, etc., R. Co. *v.* Hohl, (Civ. App. 1895) 29 S. W. 1131 (risk from defective track or road-bed not assumed by brakeman).

Virginia.— Beard *v.* Chesapeake, etc., R. Co., 90 Va. 351, 18 S. E. 559.

Washington.—Walker *v.* McNeill, 17 Wash. 582, 50 Pac. 518.

United States.— Texas, etc., R. Co. *v.* Archibald, 170 U. S. 665, 18 S. Ct. 777, 42 L. ed. 1188 [*affirming* 75 Fed. 802, 21 C. C. A. 520] (defects in foreign cars discoverable by inspection not assumed by servant); Pennsylvania R. Co. *v.* Jones, 123 Fed. 753, 59 C. C. A. 87 (risk from failure to place bumper at open end of switch terminating on trestle not assumed by servant); Northern Pac. R. Co. *v.* Tynan, 119 Fed. 288, 56 C. C. A. 192; Valley R. Co. *v.* Keegan, 87 Fed. 849, 31 C. C. A. 255; Union Pac. R. Co. *v.* O'Brien, 49 Fed. 538, 1 C. C. A. 354.

See 34 Cent. Dig. tit. "Master and Servant," §§ 554–556, 561–564.

A risk ordinarily incident to the employment of a railroad servant is a risk of injury that does not arise or grow out of an act of negligence on the part of the railroad or its servants. Texas, etc., R. Co. *v.* Kelly, 98 Tex. 123, 80 S. W. 79.

90. *Georgia.*—Central R., etc., Co. *v.* Smith, 82 Ga. 236, 8 S. E. 311; Central R., etc., Co. *v.* Sims, 80 Ga. 749, 7 S. E. 176.

Illinois.— Illinois Cent. R. Co. *v.* Neer, 31 Ill. App. 126 [*reversed* on other grounds in 138 Ill. 29, 27 N. E. 705] (engineer of special train assumes risk of collision with another train on main track at a station where it is not customary to give him notice of such train); Wabash, etc., R. Co. *v.* Gordon, 17 Ill. App. 63; Wabash, etc., R. Co. *v.* Conkling, 15 Ill. App. 157.

Iowa.— Kroy *v.* Chicago, etc., R. Co., 32 Iowa 357.

Maryland.— Pennsylvania R. Co. *v.* Wachter, 60 Md. 395, holding that an employee who knows that it is customary to run special trains without notice assumes the risk of injury therefrom.

Massachusetts.— Sullivan *v.* Fitchburg R. Co., 161 Mass. 125, 36 N. E. 751, to the effect that a trackman whose duty it is to watch for and protect himself against wild trains assumes the danger of a collision between a wild train and a hand-car which he is pushing. *Compare* Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112, holding a custom of sending cars upon a side-track,

cars;[91] likewise also to those incident to unblocked frogs, switches, and guard-

on which trains are making up, at a speed of twelve miles an hour, unreasonable.

Minnesota.— See Schulz *v.* Chicago, etc., R. Co., 57 Minn. 271, 59 N. W. 192, where it was held that, although a section hand assumes the risk of trains running at a dangerous speed, he does not assume the risk of the engineer's neglect to give a signal, if this is required by the circumstances of the case.

Pennsylvania.— Kennedy *v.* Pennsylvania R. Co., (1889) 17 Atl. 7.

Rhode Island.— McGrath *v.* New York, etc., R. Co., 14 R. I. 357, 15 R. I. 95, 22 Atl. 927, risk of being run down by special assumed by track workman while riding from work on hand-car.

Texas.— Galveston, etc., R. Co. *v.* Arispe, 81 Tex. 517, 17 S. W. 47.

West Virginia.— Unfried *v.* Baltimore, etc., R. Co., 34 W. Va. 260, 12 S. E. 512.

See 34 Cent. Dig. tit. "Master and Servant," § 562.

Compare Cincinnati, etc., R. Co. *v.* Lang, 118 Ind. 579, 21 N. E. 317, in which the facts alleged were held to show actionable negligence on the part of the company.

Imperfect system of transmitting telegrams.— A fireman does not assume the risk of an imperfect system of sending and receiving telegrams to and from the superintendent of the road and the operators at the various stations, which admitted of mistakes and misinterpretation of orders as to the running of trains. Sheehan *v.* New York Cent., etc., R. Co., 91 N. Y. 332.

91. *Alabama.*— Southern R. Co. *v.* Arnold, 114 Ala. 183, 21 So. 954. *Compare* Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545, 10 So. 283.

Florida.— Jacksonville, etc., R. Co. *v.* Galvin, 29 Fla. 636, 11 So. 231, 16 L. R. A. 337.

Illinois.— Toledo, etc., R. Co. *v.* Black, 88 Ill. 112; Peoria, etc., R. Co. *v.* Puckett, 52 Ill. App. 222 (attempting to uncouple car in motion); Henderson *v.* Coons, 31 Ill. App. 75 (risk of stepping into cattle-guard); Wabash, etc., R. Co. *v.* Deardorff, 14 Ill. App. 401.

Indiana.— Pennsylvania Co. *v.* Whitcomb, 111 Ind. 212, 12 N. E. 380; Lake Shore, etc., R. Co. *v.* McCormick, 74 Ind. 440, risk of catching foot in unblocked frog. *Compare* Pennsylvania Co. *v.* Brush, 130 Ind. 347, 28 N. E. 615, holding that a yard conductor does not assume the risk of injury from stepping on a defective tie while coupling cars, where he was ignorant of the defect.

Iowa.— Sedgwick *v.* Illinois Cent. R. Co., 76 Iowa 340, 41 N. W. 35; Kroy *v.* Chicago, etc., R. Co., 32 Iowa 357, in both of which plaintiff was injured while uncoupling cars in motion.

Kansas.— Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660, 7 Pac. 204, danger from defective spring in draw-bar.

Kentucky.— Shannon *v.* Louisville, etc., R. Co., 70 S. W. 626, 24 Ky. L. Rep. 1083, in which plaintiff's foot was caught in a frog while attempting to couple moving train to a caboose.

Massachusetts.— Boyle *v.* New York, etc., R. Co., 151 Mass. 102, 23 N. E. 827, risk from projecting timbers on moving car. *Compare* Bowes *v.* New York, etc., R. Co., 181 Mass. 89, 62 N. E. 949.

Michigan.— Miller *v.* Detroit, etc., R. Co., 133 Mich. 564, 95 N. W. 718 (risk of stepping into open train while coupling moving car); Secord *v.* Chicago, etc., R. Co., 107 Mich. 540, 65 N. W. 550 (risk from defective draw-bar in common use on road); Day *v.* Toledo, etc., R. Co., 42 Mich. 523, 4 N. W. 203 (risks from projecting lumber); Botsford *v.* Michigan Cent. R. Co., 33 Mich. 256; Ft. Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 133.

Minnesota.— Puffer *v.* Chicago Great Western R. Co., 65 Minn. 350, 68 N. W. 39; Woods *v.* St. Paul, etc., R. Co., 39 Minn. 435, 40 N. W. 510.

Missouri.— Rutledge *v.* Missouri Pac. R. Co., 110 Mo. 312, 19 S. W. 38; Shields *v.* Kansas City Suburban Belt R. Co., 87 Mo. App. 637.

New York.— Hannigan *v.* Lehigh, etc., R. Co., 157 N. Y. 244, 51 N. E. 992 [*reversing* 91 Hun 300, 36 N. Y. Suppl. 293]; Arnold *v.* Delaware, etc., Canal Co., 125 N. Y. 15, 25 N. E. 1064 (risk incident to duty of cutting out defective cars); McCosker *v.* Long Island R. Co., 84 N. Y. 77 (risk incident to coupling damaged cars with aid of chain); Renninger *v.* New York Cent., etc., R. Co., 11 N. Y. App. Div. 565, 42 N. Y. Suppl. 813. *Compare* Mahoney *v.* New York Cent., etc., R. Co., 15 N. Y. Suppl. 501, in which the servant attempted to couple two slowly moving cars, one of which was without a bumper, and was caught between and killed, and it was held that such accident was not an assumed risk.

Oregon.— Tucker *v.* Northern Terminal Co., 41 Oreg. 82, 68 Pac. 426.

Texas.— Watson *v.* Houston, etc., R. Co., 58 Tex. 434 (risk incident to duty of coupling damaged cars for removal to shops); Louisiana Extension R. Co. *v.* Carstens, 19 Tex. Civ. App. 190, 47 S. W. 36; Houston, etc., R. Co. *v.* Smith, (Civ. App. 1896) 38 S. W. 51 (brakeman, going between rails to adjust a link in the drawhead of moving car, assumes risk of his tool being caught by brake beam); Johnson *v.* Galveston, etc., R. Co., (Civ. App. 1895) 30 S. W. 95 (risk incident to coupling while standing on pilot of moving engine); Gulf, etc., R. Co. *v.* Schwabbe, 1 Tex. Civ. App. 573, 21 S. W. 706. *Compare* Missouri, etc., R. Co. *v.* Keefe, (Civ. App. 1905) 84 S. W. 679.

Virginia.— Richmond, etc., R. Co. *v.* Pannill, 89 Va. 552, 16 S. E. 748; Darracott *v.* Chesapeake, etc., R. Co., 83 Va. 288, 2 S. E. 511, 5 Am. St. Rep. 266, risk from use of "three-link coupling" frequently used on freight trains. *Compare* Ayers *v.* Richmond, etc., R. Co., 84 Va. 679, 5 S. E. 582, holding

rails;[92] to those incident to obstructions or erections on, over, or near the tracks;[93]

that brakeman does not assume risk of projecting lumber, unless himself at fault.

West Virginia.— Johnson *v.* Chesapeake, etc., R. Co., 38 W. Va. 206, 18 S. E. 573, risk from stepping between moving cars.

Wisconsin.— Zahn *v.* Milwaukee, etc., R. Co., 114 Wis. 38, 89 N. W. 889; Nash *v.* Chicago, etc., R. Co., 95 Wis. 327, 70 N. W. 293, risk from projecting lumber assumed by brakeman.

United States.— Tuttle *v.* Detroit, etc., R. Co., 122 U. S. 189, 7 S. Ct. 1166, 30 L. ed. 1114; Chesapeake, etc., R. Co. *v.* Hennessey, 96 Fed. 713, 38 C. C. A. 307, risk incident to duty of coupling and handling defective cars.

See 34 Cent. Dig. tit. "Master and Servant," § 563.

Risks from mismatched couplings assumed. — Boland *v.* Louisville, etc., R. Co., 106 Ala. 641, 18 So. 99; Louisville, etc., R. Co. *v.* Boland, 96 Ala. 626, 11 So. 667; St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293; Holmes *v.* Southern Pac. Co., 120 Cal. 357, 52 Pac. 652; Murphy *v.* Lake Shore, etc., R. Co., 67 Ill. App. 527; Van Winkle *v.* Chicago, etc., R. Co., 93 Iowa 509, 61 N. W. 929; Coffman *v.* Chicago, etc., R. Co., 90 Iowa 462, 57 N. W. 955; Ellsbury *v.* New York, etc., R. Co., 172 Mass. 130, 51 N. E. 415, 70 Am. St. Rep. 248; Ft. Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 133; Pittsburg, etc., R. Co. *v.* Henly, 48 Ohio St. 608, 29 N. E. 575, 15 L. R. A. 384; McDonald *v.* Norfolk, etc., R. Co., 95 Va. 98, 27 S. E. 821; Norfolk, etc., R. Co. *v.* Brown, 91 Va. 668, 22 S. E. 496; Norfolk, etc., R. Co. *v.* Emmert, 83 Va. 640, 3 S. E. 145; Kohn *v.* McNulta, 147 U. S. 238, 13 S. Ct. 298, 37 L. ed. 150; Johnson *v.* Southern Pac. Co., 117 Fed. 462, 54 C. C. A. 508; Texas, etc., R. Co. *v.* Rhodes, 71 Fed. 145, 18 C. C. A. 9; Woodworth *v.* St. Paul, etc., R. Co., 18 Fed. 282, 5 McCrary 574. But see Thompson *v.* Missouri Pac. R. Co., 51 Nebr. 527, 71 N. W. 61; Goodrich *v.* New York Cent., etc., R. Co., 116 N. Y. 398, 22 N. E. 397, 15 Am. St. Rep. 410, 5 L. R. A. 750.

Risk of coupling at cattle-guard assumed see Fuller *v.* Lake Shore, etc., R. Co., 108 Mich. 690, 66 N. W. 593. *Contra*, Illinois Cent. R. Co. *v.* Sanders, 166 Ill. 270, 46 N. E. 799.

Coupling without stick.—A servant assumes the risk of attempting to couple cars without a stick in violation of rule (Pennsylvania Co. *v.* Whitcomb, 111 Ind. 212, 12 N. E. 380; Richmond, etc., R. Co. *v.* Pannill, 89 Va. 552, 16 S. E. 748), unless the rule has been abandoned or waived (Newport News, etc., R. Co. *v.* Campbell, 25 S. W. 267, 15 Ky. L. Rep. 714; Finley *v.* Richmond, etc., R. Co., 59 Fed. 419), or unless he is commanded by the conductor to do so (Mason *v.* Richmond, etc., R. Co., 111 N. C. 482, 16 S. E. 698, 32 Am. St. Rep. 814, 18 L. R. A. 845).

Railroad companies have been held liable for injuries due to projecting timbers on cars (Illinois Cent. R. Co. *v.* Reardon, 56 Ill. App. 542; Atchison, etc., R. Co. *v.* Wells, 56 Kan. 222, 42 Pac. 699; Northern Pac. R. Co. *v.* Everett, 152 U. S. 107, 14 S. Ct. 474, 38 L. ed. 373), to defective couplings (Elgin, etc., R. Co. *v.* Eselin, 68 Ill. App. 96; Fordyce *v.* Yarborough, 1 Tex. Civ. App. 260, 21 S. W. 421; Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226), to latent defects (Louisville, etc., R. Co. *v.* Howell, 147 Ind. 266, 45 N. E. 584; Missouri, etc., R. Co. *v.* Murphy, 59 Kan. 774, 52 Pac. 863; Sabine, etc., R. Co. *v.* Ewing, 7 Tex. Civ. App. 8, 26 S. W. 638; Chesapeake, etc., R. Co. *v.* Lash, (Va. 1896) 24 S. E. 385), to their failure to provide an approach to the cars (Missouri, etc., R. Co. *v.* Kirkland, 11 Tex. Civ. App. 528, 32 S. W. 588), to obstructions on or near track (Kennedy *v.* Lake Superior Terminal, etc., R. Co., 93 Wis. 32, 66 N. W. 1137), to uncovered ditches (Hollenbeck *v.* Missouri Pac. R. Co., 141 Mo. 97, 38 S. W. 723, 41 S. W. 887; Bird *v.* Long Island R. Co., 11 N. Y. App. Div. 134, 42 N. Y. Suppl. 888; San Antonio, etc., R. Co. *v.* Parr, (Tex. Civ. App. 1894) 26 S. W. 861), or to the jamming together of the cars (Missouri, etc., R. Co. *v.* Crane, 13 Tex. Civ. App. 426, 35 S. W. 797).

92. *Georgia.*— Banks *v.* Georgia R., etc., Co., 112 Ga. 655, 37 S. E. 992.

Indiana.— Wabash R. Co. *v.* Ray, 152 Ind. 392, 51 N. E. 920; Sheets *v.* Chicago, etc., Coal R. Co., 139 Ind. 682, 39 N. E. 154; Lake Shore, etc., R. Co. *v.* McCormick, 74 Ind. 440.

Kentucky.— Shannon *v.* Louisville, etc., R. Co., 70 S. W. 626, 24 Ky. L. Rep. 1083.

New York.— McNeil *v.* New York, etc., R. Co., 71 Hun 24, 24 N. Y. Suppl. 616 [*affirmed* in 142 N. Y. 631, 37 N. E. 566]; Spencer *v.* New York Cent., etc., R. Co., 67 Hun 196, 22 N. Y. Suppl. 100.

United States.— Southern Pac. Co. *v.* Seley, 152 U. S. 145, 14 S. Ct. 530, 38 L. ed. 391 [*reversing* 6 Utah 319, 23 Pac. 751]; Narramore *v.* Cleveland, etc., R. Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68.

See 34 Cent. Dig. tit. "Master and Servant," § 555.

But see Pierson *v.* Chicago, etc., R. Co., 127 Iowa 13, 102 N. W. 149; Curtis *v.* Chicago, etc., R. Co., 95 Wis. 460, 70 N. W. 665.

Where one company uses another's newly constructed road a brakeman of the former cannot rightfully assume that the frogs and guard-rails of the new road are filled or blocked as required by Me. St. (1889) c. 216, and dismiss all thought of them from his mind. Gillin *v.* Patten, etc., R. Co., 93 Me. 80, 44 Atl. 361.

93. *Illinois.*— Mobile, etc., R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416. *Compare* Illinois Cent. R. Co. *v.* Welch, 52 Ill. 183, 4 Am. Rep. 593.

Indiana.— See Indiana, etc., R. Co. *v.* Bundy, 152 Ind. 590, 53 N. E. 175.

Iowa.— Dowell *v.* Burlington, etc., R. Co., 62 Iowa 629, 17 N. W. 901.

Kansas.— See St. Louis, etc., R. Co. *v.* Irwin, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266; Consolidated Kansas City Smelting, etc.,

and to those which are incident to the removal of snow from the tracks of the company.[94]

(II) *Receiving Cars of Other Companies.* It does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances; and the transportation or use of such cars by the company is one of the risks which a servant assumes in undertaking the employment.[95]

c. Insufficient Force For Work. Where a servant knows, or ought to know, that the master has furnished too few servants for the reasonably safe prosecution of the work, he assumes the risks incident to working with insufficient assistance.[96]

Co. *v.* Peterson, 8 Kan. App. 316, 55 Pac. 673.

Louisiana.— Neider *v.* Illinois Cent. R. Co., 108 La. 154, 32 So. 366; Erslew *v.* New Orleans, etc., R. Co., 49 La. Ann. 86, 21 So. 153.

Maryland.— Baltimore, etc., R. Co. *v.* Stricker, 51 Md. 47, 34 Am. Rep. 291.

Massachusetts.— Ryan *v.* New York, etc., R. Co., 169 Mass. 267, 47 N. E. 877; Dacey *v.* New York, etc., R. Co., 168 Mass. 479, 47 N. E. 418; Bell *v.* New York, etc., R. Co., 168 Mass. 443, 47 N. E. 118; Vining *v.* New York, etc., R. Co., 167 Mass. 539, 46 N. E. 117; Content *v.* New York, etc., R. Co., 165 Mass. 267, 43 N. E. 94.

Michigan.— Pennington *v.* Detroit, etc., R. Co., 90 Mich. 505, 51 N. W. 634; Illick *v.* Flint, etc., R. Co., 67 Mich. 632, 35 N. W. 708.

Minnesota.— Smith *v.* Winona, etc., R. Co., 42 Minn. 87, 43 N. W. 968.

Missouri.—Jackson *v.* Missouri Pac. R. Co., (1890) 14 S. W. 54. *Compare* Murphy *v.* Wabash R. Co., 115 Mo. 111, 21 S. W. 862; Henry *v.* Wabash Western R. Co., 109 Mo. 488, 19 S. W. 239.

New Hampshire.— Allen *v.* Boston, etc., R. Co., 69 N. H. 271, 39 Atl. 978.

New Jersey.— Baylor *v.* Delaware, etc., R. Co., 40 N. J. L. 23, 29 Am. Rep. 208.

Ohio.— Erie R. Co. *v.* McCormick, 69 Ohio St. 45, 68 N. E. 571.

Rhode Island.— See Crandall *v.* New York, etc., R. Co., 19 R. I. 594, 35 Atl. 307.

Texas.— Missouri Pac. R. Co. *v.* Somers, 71 Tex. 700, 9 S. W. 741; Manson *v.* Eddy, 3 Tex. Civ. App. 148, 22 S. W. 66. *Compare* Gulf, etc., R. Co. *v.* Darby, 28 Tex. Civ. App. 413, 67 S. W. 446.

Wisconsin.— Scidmore *v.* Milwaukee, etc., R. Co., 89 Wis. 188, 61 N. W. 765.

See 34 Cent. Dig. tit. "Master and Servant," § 556.

Risk held not assumed see New York, etc., R. Co. *v.* Ostman, (Ind. 1895) 41 N. E. 1037; Pennsylvania Co. *v.* Sears, 136 Ind. 460, 34 N. E. 15, 36 N. E. 353; Pittsburgh, etc., R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514; Kentucky Cent. R. Co. *v.* Ryle, 18 S. W. 938, 13 Ky. L. Rep. 862; Hines *v.* New York Cent., etc., R. Co., 78 Hun (N. Y.) 239, 28 N. Y. Suppl. 829; Hunter *v.* New York, etc., R. Co., 5 N. Y. St. 64; Boss *v.* Northern Pac. R. Co., 2 N. D. 128, 49 N. W. 655, 33 Am. St. Rep. 756; Darling *v.* New York, etc., R. Co., 17 R. I. 708, 24 Atl. 462, 16 L. R. A. 643; Houston, etc., R. Co. *v.* Quill, 92 Tex. 335, 48 S. W. 168; Galveston, etc., R. Co. *v.* Bohan, (Tex. Civ. App. 1898) 47 S. W. 1050.

94. Bryant *v.* Burlington, etc., R. Co., 66 Iowa 305, 23 N. W. 678, 55 Am. Rep. 275; Brown *v.* Chicago, etc., R. Co., 64 Iowa 652, 21 N. W. 193, 69 Iowa 161, 28 N. W. 487; Dowell *v.* Burlington, etc., R. Co., 62 Iowa 629, 17 N. W. 901; Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358; Derr *v.* Lehigh Valley R. Co., 158 Pa. St. 365, 27 Atl. 1002, 38 Am. St. Rep. 848; Howland *v.* Milwaukee, etc., R. Co., 54 Wis. 226, 11 N. W. 529.

95. Baldwin *v.* Chicago, etc., R. Co., 50 Iowa 680. See also Thomas *v.* Missouri Pac. R. Co., 109 Mo. 187, 18 S. W. 980; Kohn *v.* McNulta, 147 U. S. 238, 13 S. Ct. 298, 37 L. ed. 150.

Unauthorized use of road by another company.— A servant of a railroad company does not assume the risk of all dangers arising from the use, with the company's permission, of a section of its main line by another company without legislative authority. Central R., etc., Co. *v.* Passmore, 90 Ga. 203, 15 S. E. 760.

96. *California.*— Long *v.* Coronado R. Co., 96 Cal. 269, 31 Pac. 170.

Illinois.— Swift *v.* Rutkowski, 167 Ill. 156, 47 N. E. 362 [*reversing* 67 Ill. App. 209], servant's duty to quit on discovering failure.

Kentucky.— Louisville, etc., R. Co. *v.* Semones, 51 S. W. 612, 21 Ky. L. Rep. 444.

Massachusetts.— Marnin *v.* Kitson Mach. Co., 159 Mass. 156, 34 N. E. 89.

Ohio.— Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312.

Pennsylvania.— See Fricker *v.* Penn Bridge Co., 197 Pa. St. 442, 47 Atl. 354.

Rhode Island.— Mayott *v.* Norcross, 24 R. I. 187, 52 Atl. 894.

South Carolina.— See Mew *v.* Charleston, etc., R. Co., 55 S. C. 90, 32 S. E. 828.

Texas.— Texas, etc., R. Co. *v.* Miller, 36 Tex. Civ. App. 240, 81 S. W. 535; Seery *v.* Gulf, etc., R. Co., 34 Tex. Civ. App. 89, 77 S. W. 950; Hettich *v.* Hellje, 33 Tex. Civ. App. 571, 77 S. W. 641; San Antonio Traction Co. *v.* De Rodriquez, (Civ. App. 1903) 77 S. W. 420. *Compare* Ft. Worth, etc., R. Co. *v.* Wrenn, 20 Tex. Civ. App. 628, 50 S. W. 210.

4. Incompetency or Negligence of Fellow Servants. The assumption by a servant of risks resulting from the incompetency or negligence of a fellow servant will be found fully treated in a subsequent section of this article.[97]

5. Knowledge by Servant of Defect or Danger[98] — a. Necessity and Effect of Knowledge. The doctrine of assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knows, or in the exercise of reasonable and ordinary care should know, the risks to which he is exposed, he will as a rule be held to have assumed them;[99]

United States.— Slavens *v.* Northern Pac. R. Co., 97 Fed. 255, 38 C. C. A. 151; Texas, etc., R. Co. *v.* Smith, 67 Fed. 524, 14 C. C. A. 509, 31 L. R. A. 321.

See 34 Cent. Dig. tit. "Master and Servant," § 566.

But *compare* Wright *v.* Southern Pac. R. Co., 14 Utah 383, 46 Pac. 374.

Insufficient force for work.— Duty of servant to quit on discovery of fact. Swift *v.* Rutkowski, 167 Ill. 156, 47 N. E. 362 [*reversing* 67 Ill. App. 209]; Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312.

97. See *infra*, IV, G, 4, a, (III).

98. **Compliance with commands** see *infra*, IV, E, 8.

Contributory negligence see *infra*, IV, F, 2, a, (III).

Injury avoidable by care of master see *infra*, IV, E, 10, a.

Notice of master's rules see *supra*, IV, C, 2, d.

Notice or complaint to master see *infra*, IV, E, 5, g, (II).

Obvious or latent dangers see *infra*, IV, E, 6.

Warning and instructing servant see *supra*, IV, D.

99. *Alabama.*— Worthington *v.* Goforth, 124 Ala. 656, 26 So. 531. See also Williams *v.* Taylor, 4 Port. 234.

Arkansas.— Fordyce *v.* Lowman, 57 Ark. 160, 20 S. W. 1090; Emma Cotton-Seed Oil Co. *v.* Hale, 56 Ark. 232, 19 S. W. 600; St. Louis, etc., R. Co. *v.* Higgins, 53 Ark. 458, 14 S. W. 653.

California.— Turner *v.* Southern Pac. R. Co., 142 Cal. 580, 76 Pac. 384; Corletti *v.* Southern Pac. Co., 136 Cal. 642, 69 Pac. 422; Long *v.* Coronado R. Co., 96 Cal. 269, 31 Pac. 170; Malone *v.* Hawley, 46 Cal. 409; McGlynn *v.* Brodie, 31 Cal. 376.

Colorado.— Iowa Gold Min. Co. *v.* Diefenthaler, 32 Colo. 391, 76 Pac. 981; Lord *v.* Pueblo Smelting, etc., Co., 12 Colo. 390, 21 Pac. 148; Hughes *v.* Schnavel, 20 Colo. App. 306, 78 Pac. 623; Floyd *v.* Colorado Fuel, etc., Co., 18 Colo. App. 153, 70 Pac. 452; Denver Tramway Co. *v.* O'Brien, 8 Colo. App. 74, 44 Pac. 766; Colorado Coal, etc., Co. *v.* Lamb, 6 Colo. App. 255, 40 Pac. 251; Acme Coal Min. Co. *v.* McIver, 5 Colo. App. 267, 38 Pac. 596.

Connecticut.— Hayden *v.* Smithville Mfg. Co., 29 Conn. 548.

Delaware.— Punkowski *v.* New Castle Leather Co., 4 Pennew. 544, 57 Atl. 559; Strattner *v.* Wilmington City Electric Co., 3 Pennew. 245, 50 Atl. 57; Chielinsky *v.* Hoopes, etc., Co., 1 Marv. 273, 40 Atl. 1127.

District of Columbia.— Hayzel *v.* Columbia R. Co., 19 App. Cas. 359.

Florida.— South Florida R. Co. *v.* Weese, 32 Fla. 212, 13 So. 436.

Georgia.— Western, etc., R. Co. *v.* Moran, 116 Ga. 441, 42 S. E. 737; Smalls *v.* Southern R. Co., 115 Ga. 137, 41 S. E. 492; Porter *v.* Ocean Steamship Co., 113 Ga. 1007, 39 S. E. 470; Cheeney *v.* Ocean Steamship Co., 92 Ga. 726, 19 S. E. 33, 44 Am. St. Rep. 113; Richmond, etc., R. Co. *v.* Mitchell, 92 Ga. 77, 18 S. E. 290; Nelson *v.* Central R., etc., Co., 88 Ga. 225, 14 S. E. 210; Baker *v.* Western, etc., R. Co., 68 Ga. 699; Johnson *v.* Western, etc., R. Co., 55 Ga. 133.

Illinois.— Cobb Chocolate Co. *v.* Knudson, 207 Ill. 452, 69 N. E. 816 [*affirming* 107 Ill. App. 668]; Cichowicz *v.* International Packing Co., 206 Ill. 346, 68 N. E. 1083 [*affirming* 107 Ill. App. 234]; Browne *v.* Siegel, 191 Ill. 226, 60 N. E. 815 [*affirming* 90 Ill. App. 49]; Coal Run Coal Co. *v.* Jones, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89; Simmons *v.* Chicago etc., R. Co., 110 Ill. 340 [*affirming* 11 Ill. App. 147]; Chicago, etc., R. Co. *v.* Donahue, 75 Ill. 106; St. Louis, etc., R. Co. *v.* Britz, 72 Ill. 256; Moss *v.* Johnson, 22 Ill. 633; Chicago City R. Co. *v.* Enroth, 113 Ill. App. 285; Alton Roller Milling Co. *v.* Bender, 112 Ill. App. 484; Stationers' Mfg. Co. *v.* Benjamin, 109 Ill. App. 96; Moster *v.* Terminal R. Assoc., 106 Ill. App. 494; Middendorf *v.* Schulze, 105 Ill. App. 221; Harte *v.* Fraser, 104 Ill. App. 201; Webster Mfg. Co. *v.* Goodrich, 104 Ill. App. 76; Illinois Steel Co. *v.* Downey, 103 Ill. App. 101; Anderberg *v.* Chicago, etc., R. Co., 98 Ill. App. 207; Helbig *v.* Slaughter, 95 Ill. App. 623; Cleveland, etc., R. Co. *v.* Carr, 95 Ill. App. 576; Doolittle *v.* Pfaff, 92 Ill. App. 301; Pointon *v.* St. Louis, etc., R. Co., 90 Ill. App. 623; Westville Coal Co. *v.* Milka, 75 Ill. App. 538; East St. Louis Ice, etc., Co. *v.* Sculley, 63 Ill. App. 147; Pitrowsky *v.* J. W. Reedy Elevator Mfg. Co., 54 Ill. App. 253; Atchison, etc., R. Co. *v.* Alsdurf, 47 Ill. App. 200; Glass *v.* Chicago, etc., R. Co., 41 Ill. App. 87; Illinois Cent. R. Co. *v.* Neer, 31 Ill. App. 126; Chicago, etc., R. Co. *v.* Stafford, 16 Ill. App. 84; Chicago, etc., R. Co. *v.* Simmons, 11 Ill. App. 147.

Indiana.— Indianapolis, etc., Rapid Transit Co. *v.* Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; Roberts *v.* Indianapolis St. R. Co., 158 Ind. 634, 64 N. E. 217; Stalder *v.* Huntington, 153 Ind. 354, 55 N. E. 88; Pennsylvania Co. *v.* Ebaugh, 152 Ind. 531, 53 N. E. 763; Wolf *v.* Big Creek Stone Co., 148

but where he either does not know, or knowing, does not appreciate, such risks,

Ind. 317, 47 N. E. 664; Evansville, etc., R. Co. *v.* Barnes, 137 Ind. 306, 36 N. E. 1092; Lake Shore, etc., R. Co. *v.* McCormick, 74 Ind. 440; Thayer *v.* St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409; Indianapolis, etc., R. Co. *v.* Klein, 11 Ind. 38; Indiana, etc., Coal Co. *v.* Batey, 34 Ind. App. 16, 71 N. E. 191; Chicago, etc., R. Co. *v.* Tackett, 33 Ind. App. 379, 71 N. E. 524; Chicago, etc., Stone Co. *v.* Nelson, 32 Ind. App. 355, 69 N. E. 705; L. T. Dickason Coal Co. *v.* Unverferth, 30 Ind. App. 546, 66 N. E. 759; Corning Steel Co. *v.* Pohlplatz, 29 Ind. App. 250, 64 N. E. 476; Lebanon *v.* McCoy, (App. 1894) 36 N. E. 547; Becker *v.* Baumgartner, 5 Ind. App. 576, 32 N. E. 786.

Iowa.— Collingwood *v.* Illinois, etc., Fuel Co., 125 Iowa 537, 101 N. W. 283; Campbell *v.* Illinois Cent. R. Co., 124 Iowa 302, 100 N. W. 30; Forbes *v.* Boone Valley Coal, etc., Co., 113 Iowa 94, 84 N. W. 970; Box *v.* Chicago, etc., R. Co., 107 Iowa 660, 78 N. W. 694; Michaelson *v.* Sergeant Bluffs, etc., Brick Co., 94 Iowa 725, 62 N. W. 15; Kerns *v.* Chicago, etc., R. Co., 94 Iowa 121, 62 N. W. 692; Kuhns *v.* Wisconsin, etc., R. Co., 70 Iowa 561, 31 N. W. 868.

Kansas.— Walker *v.* Scott, (1901) 64 Pac. 615; Foster *v.* Kansas Salt Co., (1899) 57 Pac. 961; Rush *v.* Missouri Pac. R. Co., 36 Kan. 129, 12 Pac. 582; Jackson *v.* Kansas City, etc., R. Co., 31 Kan. 761, 3 Pac. 501.

Kentucky.— Louisville, etc., R. Co. *v.* Hall, 115 Ky. 567, 74 S. W. 280, 24 Ky. L. Rep. 2487; Williams *v.* Louisville, etc., R. Co., 111 Ky. 822, 64 S. W. 738, 23 Ky. L. Rep. 1124; Ashland Coal, etc., R. Co. *v.* Wallace, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207, 19 Ky. L. Rep. 849; Mellott *v.* Louisville, etc., R. Co., 101 Ky. 212, 40 S. W. 696, 19 Ky. L. Rep. 379; Buey *v.* Chess, etc., Co., 84 S. W. 563, 27 Ky. L. Rep. 198; Arnold *v.* Louisville, etc., R. Co., 58 S. W. 370, 22 Ky. L. Rep. 511.

Louisiana.— Jenkins *v.* Maginnis Cotton Mills, 51 La. Ann. 1011, 25 So. 643; Carey *v.* Sellers, 41 La. Ann. 500, 6 So. 813.

Maine.— Caven *v.* Bodwell Granite Co., 99 Me. 278, 59 Atl. 285; Gillin *v.* Patten, etc., R. Co., 93 Me. 80, 44 Atl. 361; Nason *v.* West, 78 Me. 253, 3 Atl. 911.

Maryland.— State *v.* Lazaretto Guano Co., 90 Md. 177, 44 Atl. 1017; Wonder *v.* Baltimore, etc., R. Co., 32 Md. 411, 3 Am. Rep. 143.

Massachusetts.— Meehan *v.* Holyoke St. R. Co., 186 Mass. 511, 72 N. E. 61; Daily *v.* Fiberloid Co., 186 Mass. 318, 71 N. E. 554; Archibald *v.* Cygolf Shoe Co., 186 Mass. 213, 71 N. E. 315; Langley *v.* Wheelock, 181 Mass. 474, 63 N. E. 944; Hall *v.* Wakefield, etc., R. Co., 178 Mass. 98, 59 N. E. 668; Demers *v.* Marshall, 178 Mass. 9, 59 N. E. 454; Barry *v.* New York Biscuit Co., 177 Mass. 449, 59 N. E. 75; Kelley *v.* Calumet Woolen Co., 177 Mass. 128, 58 N. E. 182; Fuller *v.* New York, etc., R. Co., 175 Mass. 424, 56 N. E. 574; Quinn *v.* New York, etc., R. Co., 175 Mass. 150, 55 N. E. 891; O'Reilly *v.* Bowker Fertilizer Co., 174 Mass. 202, 54 N. E. 534; Whelton *v.* West End St. R. Co., 172 Mass. 555, 52 N. E. 1072; O'Neil *v.* Keyes, 168 Mass. 517, 47 N. E. 416; Lehman *v.* Van Nostrand, 165 Mass. 233, 42 N. E. 1125; Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112; Cunningham *v.* Merrimac Paper Co., 163 Mass. 89, 39 N. E. 774; Fisk *v.* Fitchburg R. Co., 158 Mass. 238, 33 N. E. 510; Anderson *v.* Clark, 155 Mass. 368, 29 N. E. 589; Linch *v.* Sagamore Mfg. Co., 143 Mass. 206, 9 N. E. 728; Rock *v.* Indian Orchard Mills, 142 Mass. 522, 8 N. E. 401; Joyce *v.* Worcester, 140 Mass. 245, 4 N. E. 565; Taylor *v.* Carew Mfg. Co., 140 Mass. 150, 3 N. E. 21; Yeaton *v.* Boston, etc., R. Corp., 135 Mass. 418; Duffy *v.* Upton, 113 Mass. 544; Farwell *v.* Boston, etc., R. Corp., 4 Metc. 49, 38 Am. Dec. 339.

Michigan.— Harrison *v.* Detroit, etc., R. Co., 137 Mich. 78, 100 N. W. 451; Seccombe *v.* Detroit Electric R. Co., 133 Mich. 170, 94 N. W. 747; Price *v.* U. S. Baking Co., 130 Mich. 500, 90 N. W. 286; Crawford *v.* Detroit, etc., R. Co., 127 Mich. 312, 86 N. W. 817; Journeaux *v.* E. H. Stafford Co., 122 Mich. 396, 81 N. W. 259; Mackey *v.* Newberry Furnace Co., 119 Mich. 552, 78 N. W. 783; Lang *v.* H. W. Williams Transp. Line, 119 Mich. 80, 77 N. W. 633; Niles *v.* Minneapolis, etc., R. Co., 107 Mich. 238, 65 N. W. 103; Fisher *v.* Chicago, etc., R. Co., 77 Mich. 546, 43 N. W. 926; Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 34 N. W. 659.

Minnesota.— McGinty *v.* Waterman, 93 Minn. 242, 101 N. W. 300; Nelson *v.* Kelso, 91 Minn. 77, 97 N. W. 459; Blom *v.* Yellow Stone Park Assoc., 86 Minn. 237, 90 N. W. 397; Bartley *v.* Howell, 82 Minn. 382, 85 N. W. 167; Sieber *v.* Great Northern R. Co., 76 Minn. 269, 79 N. W. 95; Scharenbroich *v.* St. Cloud Fiber-Ware Co., 59 Minn. 116, 60 N. W. 1093; Rutherford *v.* Chicago, etc., R. Co., 57 Minn. 237, 59 N. W. 302; McLaren *v.* Williston, 48 Minn. 299, 51 N. W. 373; Bengston *v.* Chicago, etc., R. Co., 47 Minn. 486, 50 N. W. 531; Olson *v.* St. Paul, etc., R. Co., 38 Minn. 117, 35 N. W. 866; Wilson *v.* Winona, etc., R. Co., 37 Minn. 326, 33 N. W. 908, 5 Am. St. Rep. 851.

Mississippi.— Truly *v.* North Lumber Co., 83 Miss. 430, 36 So. 4; Memphis, etc., R. Co. *v.* Thomas, 51 Miss. 637.

Missouri.— Clark *v.* Missouri, etc., R. Co., 179 Mo. 66, 77 S. W. 882; Lucey *v.* Hannibal Oil Co., 129 Mo. 32, 31 S. W. 340; Steinhauser *v.* Spraul, 127 Mo. 541, 28 S. W. 620, 30 S. W. 125, 48 Am. St. Rep. 633; Gibson *v.* Pacific R. Co., 46 Mo. 163, 2 Am. Rep. 497; Beymer *v.* Hammond Packing Co., 106 Mo. App. 726, 80 S. W. 685; Harrington *v.* Wabash R. Co., 104 Mo. App. 663, 78 S. W. 662; Beckman *v.* Anheuser-Busch Brewing Assoc., 98 Mo. App. 555, 72 S. W. 710; Cothron *v.* Cudahy Packing Co., 98 Mo. App. 343, 73 S. W. 279; Franklin *v.* Missouri, etc., R. Co., 97 Mo. App. 473, 71 S. W. 540; Shea *v.* Kansas City, etc., R. Co., 76 Mo. App. 29; McKenna *v.* Mis-

and his ignorance or non-appreciation is not due to negligence or want of due

souri Pac. R. Co., 54 Mo. App. 161; Watson *v.* Kansas, etc., Coal Co., 52 Mo. App. 366.

Montana.— McCabe *v.* Montana Cent. R. Co., 30 Mont. 323, 76 Pac. 701.

Nebraska.— Omaha Bottling Co. *v.* Theiler, 59 Nebr. 257, 80 N. W. 821, 80 Am. St. Rep. 673; Chicago, etc., R. Co. *v.* McGinnis, 49 Nebr. 649, 68 N. W. 1057; Weed *v.* Chicago, etc., R. Co., 5 Nebr. (Unoff.) 623, 99 N. W. 827.

New Hampshire.— Carr *v.* Manchester Electric Co., 70 N. H. 308, 48 Atl. 286; Collins *v.* Laconia Car Co., 68 N. H. 196, 38 Atl. 1047; Casey *v.* Grand Trunk R. Co., 68 N. H. 162, 44 Atl. 92; Foss *v.* Baker, 62 N. H. 247.

New Jersey.— Conway *v.* Furst, 57 N. J. L. 645, 32 Atl. 380.

New York.— Kline *v.* Abraham, 178 N. Y. 377, 70 N. E. 923 [*reversing* 80 N. Y. App. Div. 641, 81 N. Y. Suppl. 1132]; Hutchinson *v.* Parker, 169 N. Y. 579, 61 N. E. 1130 [*affirming* 39 N. Y. App. Div. 133, 57 N. Y. Suppl. 168, 58 N. Y. Suppl. 190]; Huda *v.* American Glucose Co., 154 N. Y. 474, 48 N. E. 897, 40 L. R. A. 411 [*affirming* 12 N. Y. App. Div. 624, 42 N. Y. Suppl. 1126]; Hogan *v.* Smith, 125 N. Y. 774, 26 N. E. 742 [*reversing* 9 N. Y. Suppl. 881]; Hickey *v.* Taaffe, 105 N. Y. 26, 12 N. E. 286; Shaw *v.* Sheldon, 103 N. Y. 667, 9 N. E. 183; De Forest *v.* Jewett, 88 N. Y. 264 [*affirming* 23 Hun 490]; Wright *v.* New York Cent. R. Co., 25 N. Y. 562; Ryan *v.* Third Ave. R. Co., 92 N. Y. App. Div. 306, 86 N. Y. Suppl. 1070; Van Derhoff *v.* New York Cent., etc., R. Co., 88 N. Y. App. Div. 418, 84 N. Y. Suppl. 650; Vykess *v.* Duncan Co., 88 N. Y. App. Div. 129, 84 N. Y. Suppl. 398; Hall *v.* U. S. Canning Co., 76 N. Y. App. Div. 475, 78 N. Y. Suppl. 617; Ingram *v.* Fosburgh, 73 N. Y. App. Div. 129, 76 N. Y. Suppl. 344; Sherlock *v.* Sherlock, 66 N. Y. App. Div. 328, 72 N. Y. Suppl. 712; Nugent *v.* Brooklyn Union El. R. Co., 64 N. Y. App. Div. 351, 72 N. Y. Suppl. 67; Warszawski *v.* McWilliams, 64 N. Y. App. Div. 63, 71 N. Y. Suppl. 680; Carlson *v.* Walsh, 56 N. Y. App. Div. 551, 67 N. Y. Suppl. 516; Rice *v.* New York Cent., etc., R. Co., 55 N. Y. App. Div. 339, 67 N. Y. Suppl. 136; Watson *v.* Duncan, 47 N. Y. App. Div. 640, 62 N. Y. Suppl. 257, 46 N. Y. App. Div. 298, 61 N. Y. Suppl. 667; Farrell *v.* Tatham, 36 N. Y. App. Div. 319, 55 N. Y. Suppl. 199; Gibbons *v.* Brush Electric Illuminating Co., 36 N. Y. App. Div. 140, 55 N. Y. Suppl. 378; Parento *v.* Taylor, 26 N. Y. App. Div. 518, 50 N. Y. Suppl. 518; Hanrahan *v.* Brooklyn El. R. Co., 17 N. Y. App. Div. 588, 45 N. Y. Suppl. 474; Horrigan *v.* New York Cent., etc., R. Co., 7 N. Y. App. Div. 377, 39 N. Y. Suppl. 938; Sweeney *v.* Page, 64 Hun 172, 18 N. Y. Suppl. 890; Reynolds *v.* Kneeland, 63 Hun 283, 17 N. Y. Suppl. 895; Carr *v.* North River Constr. Co., 48 Hun 266; Monoghan *v.* New York Cent., etc., R. Co., 45 Hun 113; Haas *v.* Buffalo, etc., R. Co., 40 Hun 145; Haskin *v.* New York Cent., etc., R. Co., 65 Barb. 129 [*affirmed* in 56 N. Y. 608]; Piper *v.* New York Cent., etc., R. Co., 1 Thomps. & C. 290; Benda *v.* Keil, 31 Misc. 812, 63 N. Y. Suppl. 971; McDugan *v.* New York Cent., etc., R. Co., 10 Misc. 336, 31 N. Y. Suppl. 135; Fannessey *v.* Western Union Tel. Co., 6 Misc. 322, 26 N. Y. Suppl. 796; Headifen *v.* Cooper, 6 Misc. 263, 26 N. Y. Suppl. 763; Recka *v.* Ocean Steamship Co., 3 Misc. 526, 23 N. Y. Suppl. 3; Jenkins *v.* Mahopac Iron-Ore Co., 10 N. Y. Suppl. 484; Ehalt *v.* Marshall, 14 N. Y. St. 552; Buchanan *v.* Rome, etc., R. Co., 10 N. Y. St. 326; Burns *v.* Bostwick, 5 N. Y. St. 50; Van Horn *v.* Boston, etc., R. Co., 4 N. Y. St. 782; Michaels *v.* Levison, 2 N. Y. City Ct. 411.

North Carolina.— Jones *v.* American Warehouse Co., 137 N. C. 337, 49 S. E. 355, 138 N. C. 546, 51 S. E. 106.

Ohio.— Davis *v.* Turner, 69 Ohio St. 101, 68 N. E. 819; Lake Shore, etc., R. Co. *v.* Knittal, 33 Ohio St. 468; Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Cleveland, etc., R. Co. *v.* Somers, 24 Ohio Cir. Ct. 67; Lake Shore, etc., R. Co. *v.* Whidden, 23 Ohio Cir. Ct. 85; Beucker *v.* Baker, 21 Ohio Cir. Ct. 540, 11 Ohio Cir. Dec. 642; Cincinnati, etc., R. Co. *v.* Hedges, 15 Ohio Cir. Ct. 254, 8 Ohio Cir. Dec. 265; Circleville *v.* Throne, 1 Ohio Cir. Ct. 359, 1 Ohio Cir. Dec. 200. But see Groff *v.* Cincinnati, etc., R. Co., 1 Cinc. Super. Ct. 264.

Oklahoma.— Neeley *v.* Southwestern Cotton Seed Oil Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 146.

Oregon.— Wagner *v.* Portland, 40 Oreg. 389, 60 Pac. 985, 67 Pac. 300; Carlson *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 450, 28 Pac. 497.

Pennsylvania.— Masterson *v.* Eldridge, 208 Pa. St. 242, 57 Atl. 515; Cisney *v.* Pennsylvania Sewer Pipe Co., 199 Pa. St. 519, 49 Atl. 309; Devlin *v.* Phœnix Iron Co., 182 Pa. St. 109, 37 Atl. 927; Nuss *v.* Rafsnyder, 178 Pa. St. 397, 35 Atl. 958; Diehl *v.* Lehigh Iron Co., 140 Pa. St. 487, 21 Atl. 430; Carroll *v.* Pennsylvania Coal Co., (1885) 15 Atl. 688; Sykes *v.* Packer, 99 Pa. St. 465; Baird *v.* Pettit, 70 Pa. St. 477; O'Dowd *v.* Burnham, 19 Pa. Super. Ct. 464; Auburn *v.* National Tube Works Co., 14 Pa. Super. Ct. 568; Strange *v.* McCormick, 1 Phila. 156.

Rhode Island.— Desrosiers *v.* Bourn, 25 R. I. 6, 57 Atl. 935; Morancy *v.* Hennessey, 24 R. I. 205, 52 Atl. 1021; Day *v.* Achron, 23 R. I. 627, 50 Atl. 654; Baumler *v.* Narragansett Brewing Co., 23 R. I. 430, 50 Atl. 841; Disano *v.* New England Steam Brick Co., 20 R. I. 452, 40 Atl. 7.

Tennessee.— Ohio River, etc., R. Co. *v.* Edwards, 111 Tenn. 31, 76 S. W. 897; Ferguson *v.* Phœnix Cotton Mills, 106 Tenn. 236, 61 S. W. 53; Gann *v.* Nashville, etc., R. Co., 101 Tenn. 380, 47 S. W. 493, 70 Am. St. Rep. 687; Corbett *v.* J. Allen Smith, etc., Co., 101 Tenn. 368, 47 S. W. 694; East Tennessee, etc., R. Co. *v.* Smith, 9 Lea 685.

Texas.— Mexican Cent. R. Co. *v.* Shean, (1891) 18 S. W. 151; Gulf, etc., R. Co. *v.*

care on his part, there is no assumption of risk on the part of the servant preventing a recovery for injuries.[1]

b. Extent of Knowledge. In order to charge a servant with assumption of

Harriett, 80 Tex. 73, 15 S. W. 556; Missouri Pac. R. Co. *v.* Somers, 78 Tex. 439, 14 S. W. 779; Missouri Pac. R. Co. *v.* Henry, 75 Tex. 220, 12 S. W. 828; Houston, etc., R. Co. *v.* Myers, 55 Tex. 110; Smith *v.* Armour, (Civ. App. 1905) 84 S. W. 675; Ft. Worth, etc., R. Co. *v.* Robinson, (Civ. App. 1904) 84 S. W. 410 [*affirmed* in (1905) 87 S. W. 667]; San Antonio Sewer Pipe Co. *v.* Noll, (Civ. App. 1904) 83 S. W. 900; Sauls *v.* Chicago, etc., R. Co., 36 Tex. Civ. App. 155, 81 S. W. 89; Houston Ice, etc., Co. *v.* Pisch, 33 Tex. Civ. App. 684, 77 S. W. 1047; Hettich *v.* Hillje, 33 Tex. Civ. App. 571, 77 S. W. 641; Galveston, etc., R. Co. *v.* Walker, (Civ. App. 1903) 76 S. W. 228; Texas, etc., R. Co. *v.* Peden, 32 Tex. Civ. App. 315, 74 S. W. 932; Texas Portland Cement Co. *v.* Poe, 32 Tex. Civ. App. 469, 74 S. W. 563; St. Louis Southwestern R. Co. *v.* Barrett, (Civ. App. 1903) 72 S. W. 884; Rio Grande, etc., R. Co. *v.* Lynch, (Civ. App. 1900) 66 S. W. 712; Ladonia Cotton Oil Co. *v.* Shaw, 27 Tex. Civ. App. 65, 65 S. W. 693; Webb *v.* Gulf, etc., R. Co., 27 Tex. Civ. App. 75, 65 S. W. 684; Ft. Worth, etc., R. Co. *v.* Gilstrap, 25 Tex. Civ. App. 304, 61 S. W. 351; Lantry *v.* Lowrie, (Civ. App. 1900) 58 S. W. 837; Quill *v.* Houston, etc., R. Co., 93 Tex. 616, 55 S. W. 1126, 57 S. W. 948; Eddy *v.* Rogers, (Civ. App. 1894) 27 S. W. 295; Dillingham *v.* Strycharski, (Civ. App. 1894) 26 S. W. 642; Missouri, etc., R. Co. *v.* Walker, (Civ. App. 1894) 26 S. W. 513; Houston, etc., R. Co. *v.* Strycharski, 6 Tex. Civ. App. 555, 26 S. W. 253; Gulf, etc., R. Co. *v.* Schwabbe, 1 Tex. Civ. App. 573, 21 S. W. 706.

Utah.— Faulkner *v.* Mammoth Min. Co., 23 Utah 437, 66 Pac. 799.

Vermont.— Sias *v.* Consolidated Lighting Co., 73 Vt. 35, 50 Atl. 554.

Virginia.— Parlett *v.* Dunn, 102 Va. 459, 46 S. E. 467; Norfolk, etc., R. Co. *v.* Marpole, 97 Va. 594, 34 S. E. 462; Russell Creek Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614.

Washington.— Young *v.* O'Brien, 36 Wash. 570, 79 Pac. 211; French *v.* First Ave. R. Co., 24 Wash. 83, 63 Pac. 1108.

West Virginia.— Williams *v.* Belmont Coal, etc., Co., 55 W. Va. 84, 46 S. E. 802; Sanderson *v.* Panther Lumber Co., 50 W. Va. 42, 40 S. E. 368, 88 Am. St. Rep. 84, 55 L. R. A. 908; Knight *v.* Cooper, 36 W. Va. 232, 14 S. E. 999.

Wisconsin.— Kreider *v.* Wisconsin River Paper, etc., Co., 110 Wis. 645, 86 N. W. 662; Kramer *v.* Willy, 109 Wis. 602, 85 N. W. 499; Dugal *v.* Chippewa Falls, 101 Wis. 533, 77 N. W. 878; Darcey *v.* Farmers' Lumber Co., 98 Wis. 573, 74 N. W. 337; Hinz *v.* Chicago, etc., R. Co., 93 Wis. 16, 66 N. W. 718; Haley *v.* Jump River Lumber Co., 81 Wis. 412, 51 N. W. 321, 956; Naylor *v.* Chicago, etc., R. Co., 53 Wis. 661, 11 N. W. 24; Kelley *v.* Chicago, etc., R. Co., 53 Wis. 74, 9 N. W. 816.

United States.— Southern Pac. Co. *v.* Seley, 152 U. S. 145, 14 S. Ct. 530, 38 L. ed. 391 [*reversing* 6 Utah 319, 23 Pac. 751]; Riley *v.* Louisville, etc., R. Co., 133 Fed. 904, 66 C. C. A. 598; St. Louis Cordage Co. *v.* Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551; Bunker Hill, etc., Min. Co. *v.* Kettleson, 121 Fed. 529, 58 C. C. A. 525; Kenney *v.* Meddaugh, 118 Fed. 209, 55 C. C. A. 115; Johnson *v.* Southern Pac. Co., 117 Fed. 462, 54 C. C. A. 508; Davis *v.* Trade Dollar Consol. Min. Co., 117 Fed. 122, 54 C. C. A. 636; Choctaw, etc., R. Co. *v.* Holloway, 114 Fed. 458, 52 C. C. A. 260; King *v.* Morgan, 109 Fed. 446, 48 C. C. A. 507; Hodges *v.* Kimball, 104 Fed. 745, 44 C. C. A. 193; Chesapeake, etc., R. Co. *v.* Hennessey, 96 Fed. 713, 38 C. C. A. 307; The Saratoga, 94 Fed. 221, 36 C. C. A. 208 [*reversing* 87 Fed. 349]; The J. W. Taylor, 92 Fed. 192; Valley R. Co. *v.* Keegan, 87 Fed. 849, 31 C. C. A. 255; Peirce *v.* Clavin, 82 Fed. 550, 27 C. C. A. 227; Wright *v.* Southern R. Co., 80 Fed. 260; Motey *v.* Pickle Marble, etc., Co., 74 Fed. 155, 20 C. C. A. 366; Texas, etc., R. Co. *v.* Patton, 61 Fed. 259, 9 C. C. A. 487; Anglin *v.* Texas, etc., R. Co., 60 Fed. 553, 9 C. C. A. 130; Texas, etc., R. Co. *v.* Minnick, 57 Fed. 362, 6 C. C. A. 387; Askew *v.* The Luckenbach, 53 Fed. 662; Smith *v.* The Serapis, 51 Fed. 91, 2 C. C. A. 102; Easton *v.* Houston, etc., R. Co., 39 Fed. 65; Naylor *v.* New York Cent., etc., R. Co., 33 Fed. 801; Thompson *v.* Chicago, etc., R. Co., 18 Fed. 239, 5 McCrary 542; Malone *v.* Western Transp. Co., 16 Fed. Cas. No. 8,996, 5 Biss. 315.

England.— Griffiths *v.* London, etc., Dock Co., 13 Q. B. D. 259, 49 J. P. 100, 53 L. J. Q. B. 504, 51 L. T. Rep. N. S. 533, 33 Wkly. Rep. 35; Skipp *v.* Eastern Counties R. Co., 2 C. L. R. 185, 9 Exch. 223, 23 L. J. Exch. 23; Dynen *v.* Leach, 26 L. J. Exch. 221, 5 Wkly. Rep. 490. *Compare* Hoey *v.* Dublin, etc., R. Co., Ir. R. 5 C. L. 206, 18 Wkly. Rep. 930.

Canada.— Miller *v.* Reid, 10 Ont. 419.

See 34 Cent. Dig. tit. "Master and Servant," §§ 574, 577, 584–600.

But see Carson *v.* Southern R. Co., 68 S. C. 55, 46 S. E. 525 [*affirmed* in 194 U. S. 136, 24 S. Ct. 609, 48 L. ed. 907]; Youngblood *v.* South Carolina, etc., R. Co., 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824, construing Const. (1895) art. 9, § 15.

1. *Alabama.*— Southern R. Co. *v.* Howell, 135 Ala. 639, 34 So. 6; Osborne *v.* Alabama Steel, etc., Co., 135 Ala. 571, 33 So. 687; Highland Ave., etc., R. Co. *v.* Miller, 120 Ala. 535, 24 So. 955.

Arkansas.— Arkansas Cent. R. Co. *v.* Jackson, 70 Ark. 295, 67 S. W. 757; Fordyce *v.* Lowman, 57 Ark. 160, 20 S. W. 1090.

California.— Keast *v.* Santa Ysabel Gold Min. Co., 136 Cal. 256, 68 Pac. 771; Nofsinger *v.* Goldman, 122 Cal. 609, 55 Pac. 425;

risk, he must not only know, but he must also appreciate the danger to which he

Smith *v.* Occidental, etc., Steamship Co., 99 Cal. 462, 34 Pac. 84.

Colorado.— Mollie Gibson Consol. Min. Co. *v.* Sharp, 5 Colo. App. 321, 38 Pac. 850.

Delaware.—Giordano *v.* Brandywine Granite Co., 3 Pennew. 423, 52 Atl. 332.

Illinois.— Cobb Chocolate Co. *v.* Knudson, 207 Ill. 452, 69 N. E. 816 [*affirming* 107 Ill. App. 668]; Chicago, etc., R. Co. *v.* Stevens, 189 Ill. 226, 59 N. E. 577 [*affirming* 91 Ill. App. 171]; Lake Erie, etc., R. Co. *v.* Morrissey, 177 Ill. 376, 52 N. E. 299 [*affirming* 75 Ill. App. 466]; Alton Paving, etc., Co. *v.* Hudson, 176 Ill. 270, 52 N. E. 256 [*affirming* 74 Ill. App. 612]; Whitney, etc., Co. *v.* O'Rourke, 172 Ill. 177, 50 N. E. 242 [*affirming* 68 Ill. App. 487]; Chicago, etc., R. Co. *v.* Bell, 111 Ill. App. 280; Illinois Steel Co. *v.* Wierzbicky, 107 Ill. App. 69 [*affirmed* in 206 Ill. 201, 68 N. E. 1101]; Terre Haute, etc., R. Co. *v.* Williams, 69 Ill. App. 392; Elgin, etc., R. Co. *v.* Eselin, 68 Ill. App. 96.

Indiana.— Chicago, etc., R. Co. *v.* Tackett, (App. 1904) 71 N. E. 524; Parker *v.* Sample, 11 Ind. App. 698, 39 N. E. 173.

Iowa.— Barto *v.* Iowa Tel. Co., 126 Iowa 241, 101 N. W. 876, 106 Am. St. Rep. 347; Morbey *v.* Chicago, etc., R. Co., 116 Iowa 84, 89 N. W. 105; Hosic *v.* Chicago, etc., R. Co., 75 Iowa 683, 37 N. W. 963, 9 Am. St. Rep. 518.

Kansas.— Brinkmeier *v.* Missouri Pac. R. Co., 69 Kan. 738, 77 Pac. 586; Hoffmeier *v.* Kansas City-Leavenworth R. Co., 68 Kan. 831, 75 Pac. 1117; Seeds *v.* American Bridge Co., 68 Kan. 522, 75 Pac. 480.

Kentucky.— Shanks *v.* Citizens' Gen. Electric Co., 76 S. W. 379, 25 Ky. L. Rep. 811.

Massachusetts.— Packer *v.* Thomson-Houston Electric Co., 175 Mass. 496, 56 N. E. 704; La Fortune *v.* Jolly, 167 Mass. 170, 45 N. E. 83; Flaherty *v.* Powers, 167 Mass. 61, 44 N. E. 917; Breen *v.* Field, 157 Mass. 277, 31 N. E. 1075.

Michigan.— Bernard *v.* Pittsburg Coal Co., 137 Mich. 279, 100 N. W. 396; Bradburn *v.* Wabash R. Co., 134 Mich. 575, 96 N. W. 929; Potter *v.* Detroit, etc., R. Co., 122 Mich. 179, 81 N. W. 80, 82 N. W. 245; Fluhrer *v.* Lake Shore, etc., R. Co., 121 Mich. 212, 80 N. W. 23; Thomas *v.* Ann Arbor R. Co., 114 Mich. 59, 72 N. W. 40.

Minnesota.— Lyons *v.* Dee, 88 Minn. 490, 93 N. W. 899; Bergquist *v.* Chandler Iron Co., 49 Minn. 511, 52 N. W. 136; Le Clair *v.* First Div. St. Paul, etc., R. Co., 20 Minn. 9.

Missouri.— Henderson *v.* Kansas City, 177 Mo. 477, 76 S. W. 1045; Curtis *v.* McNair, 173 Mo. 270, 73 S. W. 167; Wendler *v.* People's House Furnishing Co., 165 Mo. 527, 65 S. W. 737; Hurst *v.* Kansas City, etc., R. Co., 163 Mo. 309, 63 S. W. 695, 85 Am. St. Rep. 539; Blanton *v.* Dold, 109 Mo. 64, 18 S. W. 1149; McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285; Weston *v.* Lackawanna Min. Co., 105 Mo. App. 702, 78 S. W. 1044; Parsons *v.* Hammond Packing Co., 96 Mo. App. 372, 70 S. W. 519.

Nebraska.— Norfolk Beet-Sugar Co. *v.* Hight, 59 Nebr. 100, 80 N. W. 276; Kearney Electric Co. *v.* Laughlin, 45 Nebr. 390, 63 N. W. 941.

New Hampshire.— Quimby *v.* Boston, etc., R. Co., 69 N. H. 334, 41 Atl. 266.

New York.— True *v.* Niagara Gorge R. Co., 175 N. Y. 487, 67 N. E. 1090 [*affirming* 70 N. Y. App. Div. 383, 75 N. Y. Suppl. 216]; Finn *v.* Cassidy, 165 N. Y. 584, 59 N. E. 311, 53 L. R. A. 877; Eastland *v.* Clarke, 165 N. Y. 420, 59 N. E. 202, 70 L. R. A. 751; Butler *v.* New York, etc., R. Co., 42 N. Y. App. Div. 280, 58 N. Y. Suppl. 1061; Cielfield *v.* Browning, 9 Misc. 98, 29 N. Y. Suppl. 710; Selleck *v.* J. Langdon, etc., Co., 13 N. Y. Suppl. 858.

North Carolina.— Womble *v.* Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493.

North Dakota.— Meehan *v.* Great Northern R. Co., 13 N. D. 432, 101 N. W. 183.

Ohio.— Michigan Cent. R. Co. *v.* Butler, 23 Ohio Cir. Ct. 459.

Oregon.— Geldard *v.* Marshall, 43 Oreg. 438, 73 Pac. 330.

Rhode Island.— McGar *v.* National, etc., Worsted Mills, 22 R. I. 347, 47 Atl. 1092.

Tennessee.— Knoxville Iron Co. *v.* Pace, 101 Tenn. 476, 48 S. W. 232.

Texas.— Texas, etc., R. Co. *v.* Johnson, 89 Tex. 519, 35 S. W. 1042; Galveston, etc., R. Co. *v.* McAdams, (Civ. App. 1905) 84 S. W. 1076; Texarkana, etc., R. Co. *v.* Toliver, (Civ. App. 1904) 84 S. W. 375; St. Louis Southwestern R. Co. *v.* Pope, (Civ. App. 1904) 82 S. W. 360; International, etc., R. Co. *v.* Shaughnessy, (Civ. App. 1904) 81 S. W. 1026; Galveston, etc., R. Co. *v.* Pendleton, 30 Tex. Civ. App. 431, 70 S. W. 996; Waxahachie Oil Co. *v.* McLain, 27 Tex. Civ. App. 334, 66 S. W. 226; San Antonio, etc., R. Co. *v.* Waller, 27 Tex. Civ. App. 44, 65 S. W. 210; Galveston, etc., R. Co. *v.* Smith, 24 Tex. Civ. App. 127, 57 S. W. 999; Bookrum *v.* Galveston, etc., R. Co., (Civ. App. 1900) 57 S. W. 919; Gulf, etc., R. Co. *v.* Warner, 22 Tex. Civ. App. 167, 54 S. W. 1064.

Wisconsin.— Grant *v.* Keystone Lumber Co., 119 Wis. 229, 96 N. W. 535, 100 Am. St. Rep. 883; Johnson *v.* Ashland First Nat. Bank, 79 Wis. 414, 48 N. W. 712, 24 Am. St. Rep. 722.

United States.— Choctaw, etc., R. Co. *v.* McDade, 191 U. S. 64, 24 S. Ct. 24, 48 L. ed. 96 [*affirming* 112 Fed. 888, 50 C. C. A. 591]; Union Pac. R. Co. *v.* O'Brien, 161 U. S. 451, 16 S. Ct. 618, 40 L. ed. 766; Voelker *v.* Chicago, etc., R. Co., 116 Fed. 867; Choctaw, etc., R. Co. *v.* Holloway, 114 Fed. 458, 52 C. C. A. 260; The Ethelred, 96 Fed. 446; Peirce *v.* Clavin, 82 Fed. 550, 27 C. C. A. 227; Davidson *v.* Southern Pac. Co., 44 Fed. 476; Bean *v.* Oceanic Steam Nav. Co., 24 Fed. 124; Thompson *v.* Chicago, etc., R. Co., 18 Fed. 239, 5 McCrary 542.

Canada.— Canadian Coloured Cotton Mills *v.* Talbot, 27 Can. Sup. Ct. 198.

See 34 Cent. Dig. tit. "Master and Servant," §§ 574, 584–600.

is exposed, and one does not voluntarily[2] assume a risk who merely knows that there is some danger, without appreciating it.[3] Thus the mere knowledge of defects in the appliances or place of work, or of other negligence on the part of the master, without knowledge and appreciation of the danger occasioned thereby, will not defeat a recovery,[4] unless the danger is so obvious that the servant cannot

2. **The maxim is** *volenti non fit injuria*, not *sciente non fit injuria*. Thomas *v.* Quartermaine, 18 Q. B. D. 685, 51 J. P. 516, 56 L. J. Q. B. 340, 57 L. T. Rep. N. S. 537, 35 Wkly. Rep. 555.

3. *Alabama.*— Southern R. Co. *v.* Howell, 135 Ala. 639, 34 So. 6.

Illinois.— Illinois Steel Co. *v.* Schymanowski, 162 Ill. 447, 44 N. E. 876; Indiana, etc., R. Co. *v.* Otstot, 113 Ill. App. 37 [*affirmed* in 212 Ill. 429, 72 N. E. 387]; Henrietta Coal Co. *v.* Campbell, 112 Ill. App. 452 [*affirmed* in 211 Ill. 216, 71 N. E. 863]; Chicago, etc., R. Co. *v.* Bell, 111 Ill. App. 280; Kelley *v.* Wilson, 21 Ill. App. 141.

Indiana.— Avery *v.* Nordyke, etc., Co., 34 Ind. App. 541, 70 N. E. 888.

Kentucky.— Cincinnati, etc., R. Co. *v.* Maley, 76 S. W. 334, 25 Ky. L. Rep. 690.

Louisiana.— Gusman *v.* Caffrey Cent. Refinery, etc., Co., 49 La. Ann. 1264, 22 So. 742.

Maine.— Frye *v.* Bath Gas, etc., Co., 94 Me. 17, 46 Atl. 804; Mundle *v.* Hill Mfg. Co., 86 Me. 400, 30 Atl. 16.

Massachusetts.— Fitzgerald *v.* Connecticut River Paper Co., 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537 [*citing* Scanlon *v.* Boston, etc., R. Co., 147 Mass. 484, 18 N. E. 209, 9 Am. St. Rep. 733; Ferren *v.* Old Colony R. Co., 143 Mass. 197, 9 N. E. 608; Taylor *v.* Carew Mfg. Co., 140 Mass. 150, 3 N. E. 21; Williams *v.* Churchill, 137 Mass. 243, 50 Am. Rep. 304; Lawless *v.* Connecticut River R. Co., 136 Mass. 1; Linnehan *v.* Sampson, 126 Mass. 506, 30 Am. Rep. 692].

Minnesota.— Hall *v.* Chicago, etc., R. Co., 46 Minn. 439, 49 N. W. 239.

Missouri.— Hurst *v.* Kansas City, etc., R. Co., 163 Mo. 309, 63 S. W. 695, 85 Am. St. Rep. 539; Edwards *v.* Barber Asphalt Paving Co., 92 Mo. App. 221; Cardwell *v.* Chicago, etc., R. Co., 90 Mo. App. 31.

Texas.— Galveston, etc., R. Co. *v.* Manns, (Civ. App. 1904) 84 S. W. 254; Galveston, etc., R. Co. *v.* Davis, 27 Tex. Civ. App. 279, 65 S. W. 217.

England.— Smith *v.* Baker, [1891] A. C. 325, 55 J. P. 660, 60 L. J. Q. B. 683, 65 L. T. Rep. N. S. 467, 40 Wkly. Rep. 392; Yarmouth *v.* France, 19 Q. B. D. 647, 57 L. J. Q. B. 7, 36 Wkly. Rep. 281; Thomas *v.* Quartermaine, 18 Q. B. D. 685, 51 J. P. 516, 56 L. J. Q. B. 340, 57 L. T. Rep. N. S. 537, 35 Wkly. Rep. 555; Brooke *v.* Ramsden, 55 J. P. 262, 63 L. T. Rep. N. S. 287.

Canada.— Haight *v.* Wortman, etc., Mfg. Co., 24 Ont. 618.

See 34 Cent. Dig. tit. "Master and Servant," § 575.

4. *California.*— Nofsinger *v.* Goldman, 122 Cal. 609, 55 Pac. 425; Lee *v.* Southern Pac. R. Co., 101 Cal. 118, 35 Pac. 572; Sanborn *v.* Madera Flume, etc., Co., 70 Cal. 261, 11 Pac. 710.

District of Columbia.— Hayzel *v.* Columbia R. Co., 19 App. Cas. 359.

Illinois.— Slack *v.* Harris, 200 Ill. 96, 65 N. E. 669 [*affirming* 101 Ill. App. 527]; Union Show Case Co. *v.* Blindauer, 175 Ill. 325, 51 N. E. 709 [*affirming* 75 Ill. App. 358]; Pennsylvania Coal Co. *v.* Kelly, 54 Ill. App. 622.

Indiana.— Wright *v.* Chicago, etc., R. Co., 160 Ind. 583, 66 N. E. 454; Romona Oolitic Stone Co. *v.* Phillips, 11 Ind. App. 118, 39 N. E. 96. But see Louisville, etc., R. Co. *v.* Kemper, 147 Ind. 561, 47 N. E. 214, where it was held that where a servant who knows of a defect, but does not appreciate its dangers, disregards the defect, and attempts an act rendered dangerous by it, he assumes the risk.

Iowa.— Fish *v.* Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995.

Kansas.— Atchison, etc., R. Co. *v.* Bancord, 66 Kan. 81, 71 Pac. 253.

Kentucky.— Louisville, etc., R., Co. *v.* Vestal, 105 Ky. 461, 49 S. W. 204, 20 Ky. L. Rep. 1288.

Louisiana.— Gaulden *v.* Kansas City R. Co., 106 La. 409, 30 So. 889; Faren *v.* Sellers, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256.

Massachusetts.— Prendible *v.* Connecticut River Mfg. Co., 160 Mass. 131, 35 N. E. 131; Fitzgerald *v.* Connecticut River Paper Co., 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537; Lawless *v.* Connecticut River R. Co., 136 Mass. 1; Ford *v.* Fitchburg R. Co., 110 Mass. 240, 14 Am. Rep. 598.

Michigan.— Hayes *v.* Stearns, 130 Mich. 287, 89 N. W. 947.

Minnesota.— Wuotilla *v.* Duluth Lumber Co., 37 Minn. 153, 33 N. W. 551, 5 Am. St. Rep. 832.

Missouri.— Donahoe *v.* Kansas City, 136 Mo. 657, 38 S. W. 571; Hamilton *v.* Rich Hill Coal Min. Co., 108 Mo. 364, 18 S. W. 977; Waldhier *v.* Hannibal, etc., R. Co., 87 Mo. 37; Studenroth *v.* Hammond Packing Co., 106 Mo. App. 480, 81 S. W. 487; Franklin *v.* Missouri, etc., R. Co., 97 Mo. App. 473, 71 S. W. 540; Herbert *v.* Mound City Boot, etc., Co., 90 Mo. App. 305; Compton *v.* Omaha, etc., R. Co., 82 Mo. App. 175; Benham *v.* Taylor, 66 Mo. App. 308.

New Hampshire.—See Demars *v.* Glen Mfg. Co., 67 N. H. 404, 40 Atl. 902.

New Jersey.— Burns *v.* Delaware, etc., Tel., etc., Co., 70 N. J. L. 745, 59 Atl. 220, 592, 67 L. R. A. 956.

New York.— Windover *v.* Troy City R. Co., 4 N. Y. App. Div. 202, 38 N. Y. Suppl. 591.

North Carolina.— Lloyd *v.* Hanes, 126 N. C. 359, 35 S. E. 611.

Ohio.— Werk *v.* Armburst, 7 Ohio Dec. (Reprint) 544, 3 Cinc. L. Bul. 866.

help understanding it fully.[5] If, however, the servant has a general knowledge of defects sufficient to charge him with knowledge of danger, he assumes the risk, although he may not know of the particular defects which cause the injury;[6] and where he is injured by a known risk of the employment assumed by him, it is immaterial that he did not know the precise extent or character of the injury liable to be sustained.[7] To constitute an assumption of risk, knowledge of the risk must come in time to be of use.[8]

c. Comparative Knowledge of Master and Servant.[9] The general rule is well settled that where the master and servant are possessed of equal knowledge, or means of knowledge, of defects and dangers,[10] or where they are equally ignorant

Rhode Island.— McGarrity *v.* New York, etc., R. Co., 25 R. I. 269, 55 Atl. 718.

Texas.— Missouri Pac. R. Co. *v.* Somers, 78 Tex. 439, 14 S. W. 779; Missouri, etc., R. Co. *v.* Crum, 35 Tex. Civ. App. 609, 81 S. W. 72; Missouri, etc., R. Co. *v.* Bailey, 28 Tex. Civ. App. 609, 68 S. W. 803; San Antonio, etc., R. Co. *v.* Engelhorn, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68; Galveston, etc., R. Co. *v.* Smith, 24 Tex. Civ. App. 127, 57 S. W. 999; Galveston, etc., R. Co. *v.* Hughes, 22 Tex. Civ. App. 134, 54 S. W. 264.

Wisconsin.—Dorsey *v.* Phillips, etc., Constr. Co., 42 Wis. 583.

United States.— Southern Pac. Co. *v.* Yeargin, 109 Fed. 436, 48 C. C. A. 497.

England.— Williams *v.* Birmingham Battery, etc., Co., [1899] 2 Q. B. 338, 68 L. J. Q. B. 918, 81 L. T. Rep. N. S. 62, 47 Wkly. Rep. 680.

See 34 Cent. Dig. tit. "Master and Servant." § 575.

5. *California.*— Lee *v.* Southern Pac. R. Co., 101 Cal. 118, 35 Pac. 572; Sanborn *v.* Madera Flume, etc., Co., 70 Cal. 261, 11 Pac. 710.

Illinois.— Chicago, etc., R. Co. *v.* Bell, 111 Ill. App. 280.

Missouri.— Benham *v.* Taylor, 66 Mo. App. 308.

New York.— Delaney *v.* Heartt, 10 N. Y. Suppl. 595.

Texas.— San Antonio Sewer Pipe Co. *v.* Noll, (Civ. App. 1904) 83 S. W. 900.

Utah.— Allen *v.* Logan City, 10 Utah 279, 37 Pac. 496.

Wisconsin.— Showalter *v.* Fairbanks, 88 Wis. 376, 60 N. W. 257.

See 34 Cent. Dig. tit. "Master and Servant," § 575.

6. Drake *v.* Union Pac. R. Co., 2 Ida. (Hasb.) 487, 21 Pac. 560; Green *v.* Cross, 79 Tex. 130, 15 S. W. 220; Missouri Pac. R. Co. *v.* Somers, 78 Tex. 439, 14 S. W. 779; Missouri Pac. R. Co. *v.* Somers, 71 Tex. 700, 9 S. W. 741 [*distinguished* in Fordyce *v.* Culver, 2 Tex. Civ. App. 569, 22 S. W. 237]. But *compare* Graham *v.* Chapman, 11 N. Y. Suppl. 318, where it was held that knowledge by a locomotive fireman that the general condition of the track was rough does not charge him with notice that the ties were rotten, so that the nails would not hold the rails in their place.

Knowledge of all the facts except one, which, in view of those known, is immaterial, charges a servant with assumption of risk.

Ohio River, etc., R. Co. *v.* Edwards, 111 Tenn. 31, 76 S. W. 897.

7. Feely *v.* Pearson Cordage Co., 161 Mass. 426, 37 N. E. 368.

8. Louisville, etc., R. Co. *v.* Kelly, 63 Fed. 407, 11 C. C. A. 260. See also Wright *v.* Chicago, etc., R. Co., 160 Ind. 583, 66 N. E. 454; St. Louis, etc., R. Co. *v.* McClain, 80 Tex. 85, 15 S. W. 789.

9. **Obvious or latent defects or dangers** see *infra*, IV, E, 6, b.

10. *California.*— Wright *v.* Pacific Coast Oil Co., (1898) 53 Pac. 1086; Fisk *v.* Central Pac. R. Co., 72 Cal. 38, 13 Pac. 144, 1 Am. St. Rep. 22; Malone *v.* Hawley, 46 Cal. 409.

Colorado.—Burlington, etc., R. Co. *v.* Liehe, 17 Colo. 280, 29 Pac. 175.

Georgia.— Cartledge *v.* Pierpont Mfg. Co., 120 Ga. 221, 47 S. E. 586; Stewart *v.* Seaboard Air Line R. Co., 115 Ga. 624, 41 S. E. 981.

Illinois.— Stover Mfg. Co. *v.* Millane, 89 Ill. App. 532; Westville Coal Co. *v.* Milka, 75 Ill. App. 638; Tobin *v.* Friedman Mfg. Co., 67 Ill. App. 149.

Indiana.— Staldter *v.* Huntington, 153 Ind. 354, 55 N. E. 88; Jenney Electric Light, etc., Co. *v.* Murphy, 115 Ind. 566, 18 N. E. 30; Thayer *v.* St. Louis, etc., R., 22 Ind. 26, 85 Am. Dec. 409; Salem Bedford Stone Co. *v.* Hobbs, 11 Ind. App. 27, 38 N. E. 538.

Kansas.— Walker *v.* Scott, (1901) 64 Pac. 615; Morbach *v.* Home Min. Co., 53 Kan. 731, 37 Pac. 122.

Massachusetts.— Davis *v.* Forbes, 171 Mass. 548, 51 N. E. 20, 47 L. R. A. 170; Carey *v.* Boston, etc., R. Co., 158 Mass. 228, 33 N. E. 512; Nourse *v.* Packard, 138 Mass. 307.

Michigan.— Ft. Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 133; Michigan Cent. R. Co. *v.* Dolan, 32 Mich. 510; Davis *v.* Detroit, etc., R. Co., 20 Mich. 105, 4 Am. Rep. 364.

Minnesota.— Olson *v.* McMullen, 34 Minn. 94, 24 N. W. 318.

Mississippi.— Yazoo City Transp. Co. *v.* Smith, 78 Miss. 140, 28 So. 807.

Missouri.— Watson *v.* Kansas, etc., Coal Co., 52 Mo. App. 366.

Nebraska.— Kitzberger *v.* Chicago, etc., R. Co., 4 Nebr. (Unoff.) 324, 93 N. W. 935.

New Hampshire.— Dube *v.* Gay, 69 N. H. 670, 46 Atl. 1049.

New York.— Hart *v.* Naumburg, 123 N. Y. 641, 25 N. E. 385 [*reversing* 50 Hun 392, 3 N. Y. Suppl. 227]; French *v.* Aulls, 72 Hun

thereof,[11] the servant assumes the risk; and the same is true *a fortiori* where the servant has better means of knowledge than the master.[12] But if the master knows, or is under an obligation to know, of dangers of which the servant is ignorant, and of which he is not under an equal obligation to know, there is no assumption of risk.[13]

d. Constructive Notice[14] — (i) *In General.* To warrant a finding that a servant assumed the risks of his employment, he need not have had absolute knowledge of the risks, if they were such that an ordinarily prudent man under the circumstances could by reasonable diligence have discovered them.[15]

442, 25 N. Y. Suppl. 188; Thorn *v.* New York City Ice Co., 46 Hun 497; Prentice *v.* Wellsville, 21 N. Y. Suppl. 820; Burns *v.* Bostwick, 5 N. Y. St. 50. But see Muller *v.* McKesson, 73 N. Y. 195, 29 Am. Rep. 123 [*affirming* 10 Hun 44].

Ohio.— Shadle *v.* Cleveland Electric Illuminating Co., 22 Ohio Cir. Ct. 49, 12 Ohio Cir. Dec. 37; Cincinnati, etc., R. Co. *v.* Hedges, 15 Ohio Cir. Ct. 254, 8 Ohio Cir. Dec. 265.

Oregon.— Weekland *v.* Southern Oregon Co., 20 Oreg. 591, 27 Pac. 260.

Tennessee.— Nashville, etc., R. Co. *v.* Handman, 13 Lea 423.

Texas.— Galveston, etc., R. Co. *v.* Lempe, 59 Tex. 19; Missouri, etc., R. Co. *v.* Spellman, (Civ. App. 1896) 34 S. W. 298; Bonnet *v.* Galveston, etc., R. Co., (Civ. App. 1895) 31 S. W. 525; Eddy *v.* Rogers, (Civ. App. 1894) 27 S. W. 295. But see International, etc., R. Co. *v.* Cook, 16 Tex. Civ. App. 386, 41 S. W. 665.

Vermont.— Latremouille *v.* Bennington, etc., R. Co., 63 Vt. 336, 22 Atl. 656.

West Virginia.— Giebell *v.* Collins Co., 54 W. Va. 518, 46 S. E. 569.

United States.— Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 13 S. Ct. 914, 37 L. ed. 772; Detroit Crude-Oil Co. *v.* Grable, 94 Fed. 73, 36 C. C. A. 94; Johnson *v.* Oakes, 70 Fed. 566; Gulf, etc., R. Co. *v.* Jackson, 65 Fed. 48, 12 C. C. A. 507.

England.— Ogden *v.* Rummens, 3 F. & F. 751; Griffiths *v.* Gidlow, 3 H. & N. 648, 27 L. J. Exch. 404; Williams *v.* Clough, 3 H. & N. 258, 27 L. J. Exch. 325; Assop *v.* Yates, 2 H. & N. 768, 27 L. J. Exch. 156; Priestley *v.* Fowler, 1 Jur. 987, 7 L. J. Exch. 42, M. & H. 305, 3 M. & W. 1; Dynen *v.* Leach, 26 L. J. Exch. 221, 5 Wkly. Rep. 490.

Canada.— Ross *v.* Cross, 17 Ont. App. 29; Murphy *v.* Ottawa, 13 Ont. 334.

See 34 Cent. Dig. tit. "Master and Servant," § 576.

11. Louisville, etc., R. Co. *v.* Quinn, 14 Ind. App. 554, 43 N. E. 240; Bradbury *v.* Kingston Coal Co., 157 Pa. St. 231, 27 Atl. 400; Watts *v.* Hart, 7 Wash. 178, 34 Pac. 423, 771. But see Faren *v.* Sellers, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256, where it was held that when a master has created the danger, he is bound to guard against it, and if he himself does not believe or know that it exists he cannot require superior knowledge and judgment from the servant.

12. *Colorado.*— Fairmount Cemetery Assoc. *v.* Davis, 4 Colo. App. 570, 36 Pac. 911.

Illinois.— Westville Coal Co. *v.* Milka, 75 Ill. App. 638.

New York.— Hart *v.* Maunburg, 123 N. Y. 641, 25 N. E. 385.

Texas.— Houston, etc., R. Co. *v.* Fowler, 56 Tex. 452.

Washington.— Schulz *v.* Johnson, 7 Wash. 403, 35 Pac. 130; Week *v.* Freemont Mill Co., 3 Wash. 629, 29 Pac. 215.

United States.— Easton *v.* Houston, etc., R. Co., 39 Fed. 65.

See 34 Cent. Dig. tit. "Master and Servant," § 576.

13. *Connecticut.*— Hayden *v.* Smithville Mfg. Co., 29 Conn. 548.

Indiana.— Indianapolis, etc., R. Co. *v.* Love, 10 Ind. 554.

Kansas.— St. Louis, etc., R. Co. *v.* Irwin, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266.

Kentucky.— Pfisterer *v.* Peter, 117 Ky. 501, 78 S. W. 450, 25 Ky. L. Rep. 1605.

Maine.— Hull *v.* Hall, 78 Me. 114, 3 Atl. 650; Buzzell *v.* Laconia Mfg. Co., 48 Me. 113, 77 Am. Dec. 212.

Missouri.— Nichols *v.* Crystal Plate Glass Co., 126 Mo. 55, 28 S. W. 991; Sullivan *v.* Hannibal, etc., R. Co., 107 Mo. 66, 17 S. W. 748, 28 Am. St. Rep. 388; Sackewitz *v.* American Biscuit Mfg. Co., 78 Mo. App. 144.

New York.— Koosorowska *v.* Glasser, 8 N. Y. Suppl. 197.

United States.— Davidson *v.* Southern Pac. Co., 44 Fed. 476; Bean *v.* Oceanic Steam Nav. Co., 24 Fed. 124; Thompson *v.* Chicago, etc., R. Co., 14 Fed. 564, 4 McCrary 629.

See 34 Cent. Dig. tit. "Master and Servant," § 576.

Structural defects.— The right of a servant to recover for injuries caused by the fall of a platform on which he was standing is not affected by the fact that he had equal means with his master of knowing that it had not been constructed in a reasonably safe manner. Pfisterer *v.* Peter, 117 Ky. 501, 78 S. W. 450, 25 Ky. L. Rep. 1605.

14. **Inexperienced or youthful employee** see *infra*, IV, E, 7, c.

15. See cases cited *supra*, IV, E, 5, a, note 99.

Presumptions.— A servant who undertakes to use machinery provided for him by the master is presumed to know its character and the dangers incident to its operation (Strange *v.* McCormick, 5 Pa. L. J. Rep. 10); but there is no presumption that a brakeman has sufficient skill to determine, from an inspection of the brakes, their fitness for use (Central R. Co. *v.* Haslett, 74 Ga. 59), or that a baggage-master knows of defects in the schedule or time-table (Georgia R., etc., Co. *v.* Rhodes, 56 Ga. 645).

(II) *Opportunity to Acquire Knowledge.*[16] A servant assumes not only such risks as, from the nature of the business as ordinarily conducted, he must have known, but also those which the exercise of his opportunities for inspection would have disclosed to him.[17] On the other hand he is not charged with the assumption of risks which are not incidental to his employment, and of which he has had no opportunity to learn.[18]

(III) *Knowledge by Fellow Servant.* A servant is not charged with a fellow servant's knowledge of defects and dangers.[19]

e. Effect of Duty to Discover or Remedy Defect. Ordinarily a servant is charged with no duty of inspection to discover latent defects or danger;[20] but

The general reputation of an incompetent servant among his fellows for incompetency is not alone sufficient to charge a servant, injured by reason of such incompetency, with knowledge thereof. Texas, etc., R. Co. *v.* Johnson, 89 Tex. 519, 35 S. W. 1042.

Marked cars.— A brakeman, in handling a damaged car, is chargeable with the notice conveyed by the mark "out of order" on the car, whether he was able to read it or not. Watson *v.* Houston, etc., R. Co., 58 Tex. 434.

16. Obvious or latent defects or dangers see *infra*, IV, E, 6, c.

17. *Illinois.*— Peoria, etc., R. Co. *v.* Ross, 55 Ill. App. 638; Peoria, etc., R. Co. *v.* Hardwick, 48 Ill. App. 562; Litchfield Car, etc., Co. *v.* Romine, 39 Ill. App. 642; Henderson *v.* Coons, 31 Ill. App. 75.

Indiana.— Umback *v.* Lake Shore, etc., R. Co., 83 Ind. 191; Linton Coal, etc., Co. *v.* Persons, 15 Ind. App. 69, 43 N. E. 651.

Iowa.— Perigo *v.* Chicago, etc., R. Co., 52 Iowa 276, 3 N. W. 43; Lumley *v.* Caswell, 47 Iowa 159.

Kentucky.— Buey *v.* Chess, etc., Co., 84 S. W. 563, 27 Ky. L. Rep. 198. But see Hughes *v.* Louisville, etc., R. Co., 104 Ky. 774, 48 S. W. 671, 20 Ky. L. Rep. 1029.

Massachusetts.— Barry *v.* New York Biscuit Co., 177 Mass. 449, 59 N. E. 75; Fuller *v.* New York, etc., R. Co., 175 Mass. 424, 56 N. E. 574; Lehman *v.* Van Nostrand, 165 Mass. 233, 42 N. E. 1125; Goodes *v.* Boston, etc., R. Co., 162 Mass. 287, 38 N. E. 500; Gleason *v.* New York, etc., R. Co., 159 Mass. 68, 34 N. E. 79; O'Maley *v.* South Boston Gas Light Co., 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161; Leary *v.* Boston, etc., R. Co., 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733.

Michigan.— Ragon *v.* Toledo, etc., R. Co., 97 Mich. 265, 56 N. W. 612, 37 Am. St. Rep. 336.

Minnesota.— Larson *v.* St. Paul, etc., R. Co., 43 Minn. 423, 45 N. W. 722; Olson *v.* McMullen, 34 Minn. 94, 24 N. W. 318.

Missouri.— Thomas *v.* Missouri Pac. R. Co., 109 Mo. 187, 18 S. W. 980.

Pennsylvania.— Brossman *v.* Lehigh Valley R. Co., 113 Pa. St. 83, 4 Atl. 218, 57 Am. Rep. 442; Auburn *v.* Tube Works Co., 14 Pa. Super. Ct. 568; Fick *v.* Jackson, 3 Pa. Super. Ct. 378.

Texas.— Houston, etc., R. Co. *v.* Barrager, (1890) 14 S. W. 242; Houston, etc., R. Co. *v.* Fowler, 56 Tex. 452; Texas, etc., R. Co. *v.* Peden, 32 Tex. Civ. App. 315, 74 S. W. 932.

Virginia.— Richmond, etc., R. Co. *v.* Risdon, 87 Va. 335, 12 S. E. 786.

West Virginia.— Williamson *v.* Newport News, etc., Co., 34 W. Va. 657, 12 S. E. 824, 26 Am. St. Rep. 927, 12 L. R. A. 297.

United States.— Henion *v.* New York, etc., R. Co., 79 Fed. 903, 25 C. C. A. 223.

Canada.— Miller *v.* Reid, 10 Ont. 419.

See 34 Cent. Dig. tit. "Master and Servant," § 578.

But see Eldridge *v.* Atlas Steamship Co., 58 Hun (N. Y.) 96, 11 N. Y. Suppl. 468.

18. *Alabama.*— Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. Rep. 47.

Illinois.— Lake Erie, etc., R. Co. *v.* Morrissey, 177 Ill. 376, 52 N. E. 299 [*affirming* 75 Ill. App. 466]; Illinois Cent. R. Co. *v.* Sanders, 166 Ill. 270, 46 N. E. 799 [*affirming* 66 Ill. App. 439]; Fraser *v.* Schroeder, 163 Ill. 459, 45 N. E. 288; Perry *v.* Ricketts, 55 Ill. 234; Illinois Cent. R. Co. *v.* Welch, 52 Ill. 183, 4 Am. Rep. 593.

Indiana.— Indiana, etc., R. Co. *v.* Bundy, 152 Ind. 590, 53 N. E. 175; Chicago, etc., R. Co. *v.* Fry, 131 Ind. 319, 28 N. E. 989.

Missouri.— Burton *v.* Missouri Pac. R. Co., 32 Mo. App. 455.

New York.— Wooden *v.* Western New York, etc., R. Co., 18 N. Y. Suppl. 768 [*affirming* 16 N. Y. Suppl. 840].

North Carolina.— Bean *v.* Western North Carolina R. Co., 107 N. C. 731, 12 S. E. 600.

Texas.— Houston, etc., R. Co. *v.* McNamara, 59 Tex. 255; Texas Pac. R. Co. *v.* Crow, 3 Tex. Civ. App. 266, 22 S. W. 928.

See 34 Cent. Dig. tit. "Master and Servant," § 578.

19. Illinois Cent. R. Co. *v.* Pirtle, 47 Ill. App. 498; Covey *v.* Hannihal, etc., R. Co., 27 Mo. App. 170.

20. Reliance on care of master see *supra*, IV, E, 1, d. And see the following cases:

Indiana.— Louisville, etc., R. Co. *v.* Buck, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520; Summit Coal Co. *v.* Shaw, 16 Ind. App. 9, 44 N. E. 676.

Iowa.— Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462.

Kentucky.— Champion Ice Mfg., etc., Co. *v.* Carter, 51 S. W. 16, 21 Ky. L. Rep. 210.

Massachusetts.— Knight *v.* Overman Wheel Co., 174 Mass. 455, 54 N. E. 890.

Michigan.— Rick *v.* Saginaw Bay Towing Co., 132 Mich. 237, 93 N. W. 632, 102 Am. St. Rep. 422.

where it is a part of his duties to discover or remedy defects in the master's appliances or places for work, he will be held to have assumed the risk of injury therefrom,[21] provided they are discoverable from inspection.[22]

f. Risks Outside Scope of Employment. If a servant knows of a defect or danger through which he is injured, he assumes the risk, even where it is outside of the scope of his employment;[23] but he is not bound to exercise care in knowing the fact, unless it is in the line of his duty.[24] The material question is whether the servant had sufficient experience or knowledge to understand the hazards of the extra work required of him.[25]

g. Continuing Work After Knowledge of Danger[26] — (I) *Without Complaint or Promise of Remedy* — (A) *Right to Demand Alterations.* Since a servant assumes the incidental risks of his employment and those which are apparent to ordinary observation, he cannot call upon his master to make alterations to secure greater safety, or hold him liable in case of injury.[27]

(B) *Necessity of Notice or Complaint* — (1) In General. The rule that a servant has the right to rely upon the performance by his master of the duties imposed on him by law for the protection of his servants[28] is qualified by the further rule that where a servant knows, or is charged with knowledge of danger, and continues in the master's employment voluntarily and without complaint, and without any promise that the defect will be remedied or the danger removed, he assumes the risk of any injuries which may result from such defect.[29] This

Nebraska.— Union Stock-Yards Co. *v.* Goodwin, 57 Nebr. 138, 77 N. W. 357.

New York.— Goodrich *v.* New York Cent., etc., R. Co., 116 N. Y. 398, 22 N. E. 397, 15 Am. St. Rep. 410, 5 L. R. A. 750.

Ohio.— Davis *v.* Turner, 69 Ohio St. 101, 68 N. E. 819.

United States.— Texas, etc., R. Co. *v.* Swearingen, 122 Fed. 193, 59 C. C. A. 31.

21. *Colorado.*— Wells *v.* Coe, 9 Colo. 159, 11 Pac. 50.

Georgia.— White *v.* Kennon, 83 Ga. 343, 9 S. E. 1082.

Iowa.— Beckman *v.* Consolidation Coal Co., 90 Iowa 252, 57 N. W. 889.

Missouri.— Gleeson *v.* Excelsior Mfg. Co., 94 Mo. 201, 7 S. W. 188.

North Carolina.— Pleasants *v.* Raleigh, etc., Air Line R. Co., 95 N. C. 195.

Pennsylvania.— Smith *v.* Drake, 125 Pa. St. 501, 17 Atl. 449.

Texas.— St. Louis, etc., R. Co. *v.* Denny, 5 Tex. Civ. App. 359, 24 S. W. 317.

See 34 Cent. Dig. tit. "Master and Servant," § 581.

22. Galveston, etc., R. Co. *v.* McCray, (Tex. Civ. App. 1897) 43 S. W. 275.

23. Clark *v.* Chicago, etc., R. Co., 92 Ill. 43 [*affirming* 2 Ill. App. 596]; Foley *v.* Chicago, etc., R. Co., 48 Mich. 622, 12 N. W. 879, 42 Am. Rep. 481; Paule *v.* Florence Min. Co., 80 Wis. 350, 50 N. W. 189.

Constructive knowledge sufficient see East St. Louis Ice, etc., Co. *v.* Sculley, 63 Ill. App. 147.

24. Taylor, etc., R. Co. *v.* Taylor, 79 Tex. 104, 14 S. W. 918, 23 Am. St. Rep. 316.

25. St. Louis Consol. Coal Co. *v.* Haenni, 146 Ill. 614, 35 N. E. 162 [*affirming* 48 Ill. App. 115].

26. **After notice or complaint to master and promise to remedy defect** see *infra*, IV, E, 5, g, (II), (B).

As contributory negligence see *infra*, IV, F, 2, a, (III), (B).

27. Sweeney *v.* Berlin, etc., Envelope Co., 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722; De Forest *v.* Jewett, 88 N. Y. 264 [*affirming* 23 Hun 490]; Gibson *v.* Erie R. Co., 63 N. Y. 449, 20 Am. Rep. 552.

No right to complain of increased risk from change of schedule see Robinson *v.* Houston, etc., R. Co., 46 Tex. 540.

28. **Reliance on care of master** see *supra*, IV, E, 1, d.

29. *Alabama.*— Sloss-Sheffield Steel, etc., Co. *v.* Mobley, 139 Ala. 425, 36 So. 181; Thomas *v.* Bellamy, 126 Ala. 253, 28 So. 707.

California.— Limberg *v.* Glenwood Lumber Co., 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33; Long *v.* Coronado R. Co., 96 Cal. 269, 31 Pac. 170.

Colorado.— Iowa Gold Min. Co. *v.* Diefenthaler, 32 Colo. 391, 76 Pac. 981; Burlington, etc., R. Co. *v.* Liehe, 17 Colo. 280, 29 Pac. 175; Acme Coal Min. Co. *v.* McIver, 5 Colo. App. 267, 38 Pac. 596. But *compare* Maydole *v.* Denver, etc., R. Co., 15 Colo. App. 449, 62 Pac. 964.

Delaware.—Creswell *v.* Wilmington, etc., R. Co., 2 Pennew. 210, 43 Atl. 629; Huber *v.* Jackson, 1 Marv. 374, 41 Atl. 92; Foster *v.* Pusey, 8 Houst. 168, 14 Atl. 545.

Florida.— South Florida R. Co. *v.* Weese, 32 Fla. 212, 13 So. 436.

Georgia.— Gunn *v.* Willingham, 111 Ga. 427, 36 S. E. 804; Cheeney *v.* Ocean Steamship Co., 92 Ga. 726, 19 S. E. 33, 44 Am. St. Rep. 113; Richmond, etc., R. Co. *v.* Worley, 92 Ga. 84, 18 S. E. 361.

Illinois.— Homersky *v.* Winkle Terra Cotta Co., 178 Ill. 562, 53 N. E. 346 [*affirming* 77 Ill. App. 42]; Swift *v.* Rutkowski, 167 Ill. 156, 47 N. E. 362; Stafford *v.* Chicago, etc., R. Co., 114 Ill. 244, 2 N. E. 185; Chicago, etc., R. Co. *v.* Geary, 110 Ill. 383; Pennsyl-

rule is not, however, without qualifications. Thus it has frequently been held that

vania Co. *v.* Lynch, 90 Ill. 333; Chicago, etc., R. Co. *v.* Munroe, 85 Ill. 25; Illinois Terminal R. Co. *v.* Thompson, 112 Ill. App. 463 [*affirmed* in 210 Ill. 226, 71 N. E. 328]; Montgomery Coal Co. *v.* Barringer, 109 Ill. App. 185; Illinois Cent. R. Co. *v.* Satkowski, 107 Ill. App. 524; International Packing Co. *v.* Cichowicz, 107 Ill. App. 234 [*affirmed* in 206 Ill. 346, 68 N. E. 1083]; Harte *v.* Fraser, 104 Ill. App. 201; Webster Mfg. Co. *v.* Goodrich, 104 Ill. App. 76; Kinmundy *v.* Anderson, 103 Ill. App. 457; Chicago, etc., R. Co. *v.* Merriman, 95 Ill. App. 628; Helbig *v.* Slaughter, 95 Ill. App. 623; Cleveland, etc., R. Co. *v.* Carr, 95 Ill. App. 576; Munn *v.* L. Wolff Mfg. Co., 94 Ill. App. 122; Chicago, etc., R. Co. *v.* Garner, 78 Ill. App. 281; McAleenan *v.* Myrick, 68 Ill. App. 225; Illinois Cent. R. Co. *v.* Swisher, 61 Ill. App. 611, 53 Ill. App. 411; William Graver Tank Works *v.* McGee, 58 Ill. App. 250; St. Louis Press Brick Co. *v.* Kenyon, 57 Ill. App. 640; Chicago Packing, etc., Co. *v.* Rohan, 47 Ill. App. 640; Louisville, etc., R. Co. *v.* Allen, 47 Ill. App. 465; Evans *v.* Chessmond, 38 Ill. App. 615; Chicago, etc., R. Co. *v.* Merckes, 36 Ill. App. 195; Chicago, etc., R. Co. *v.* Stafford, 16 Ill. App. 84; Chicago, etc., R. Co. *v.* Clark, 11 Ill. App. 104.

Indiana.— Hollingsworth *v.* Chicago, etc., R. Co., 160 Ind. 259, 65 N. E. 750; Hattaway *v.* Atlanta Steel, etc., Co., 155 Ind. 507, 58 N. E. 718; Lake Shore, etc., R. Co. *v.* Stupak, 108 Ind. 1, 8 N. E. 630; Toledo, etc., R. Co. *v.* Trimble, 8 Ind. App. 333, 35 N. E. 716; Pennsylvania Co. *v.* Burgett, 7 Ind. App. 338, 33 N. E. 914, 34 N. E. 650.

Iowa.— Foster *v.* Chicago, etc., R. Co., 127 Iowa 84, 102 N. W. 422; Crane *v.* Chicago, etc., R. Co., 124 Iowa 81, 99 N. W. 169; Forbes *v.* Boone Valley Coal, etc., Co., 113 Iowa 94, 84 N. W. 970; Box *v.* Chicago, etc., R. Co., 107 Iowa 660, 78 N. W. 694; Brownfield *v.* Chicago, etc., R. Co., 107 Iowa 254, 77 N. W. 1038; McCarthy *v.* Mulgrew, 107 Iowa 76, 77 N. W. 527; Cowles *v.* Chicago, etc., R. Co., 102 Iowa 507, 71 N. W. 580; Scott *v.* Darby Coal Co., 90 Iowa 689, 57 N. W. 619; Nicholaus *v.* Chicago, etc., R. Co., 90 Iowa 85, 57 N. W. 694; Burns *v.* Chicago, etc., R. Co., 69 Iowa 450, 30 N. W. 25, 58 Am. Rep. 227; Rasmussen *v.* Chicago, etc., R. Co., 65 Iowa 236, 21 N. W. 583; Wells *v.* Burlington, etc., R. Co., 56 Iowa 520, 9 N. W. 364; Way *v.* Illinois Cent. R. Co., 40 Iowa 341; Kroy *v.* Chicago, etc., R. Co., 32 Iowa 357.

Kansas.—Southern Kansas R. Co. *v.* Moore, 49 Kan. 616, 31 Pac. 138; Atchison, etc., R. Co. *v.* Schroeder, 47 Kan. 315, 27 Pac. 965.

Kentucky.— Needham *v.* Louisville, etc., R. Co., 85 Ky. 423, 3 S. W. 797, 11 S. W. 306, 8 Ky. L. Rep. 869; Bogenschutz *v.* Smith, 84 Ky. 330, 1 S. W. 578, 8 Ky. L. Rep. 376; Buey *v.* Chess, etc., Co., 84 S. W. 563, 27 Ky. L. Rep. 198; Breckinridge, etc., Syndicate *v.* Murphy, 38 S. W. 700, 18 Ky. L. Rep. 915.

Louisiana.— Pollich *v.* Sellers, 42 La. Ann. 623, 7 So. 786.

Maine.— Gillin *v.* Patten, etc., R. Co., 93 Me. 80, 44 Atl. 361; Jones *v.* Manufacturing, etc., Co., 92 Me. 565, 43 Atl. 512, 69 Am. St. Rep. 535; Mundle *v.* Hill Mfg. Co., 86 Me. 400, 30 Atl. 16; Buzzell *v.* Laconia Mfg. Co., 48 Me. 113, 77 Am. Dec. 212.

Maryland.— Baltimore, etc., R. Co. *v.* State, 75 Md. 152, 23 Atl. 310, 32 Am. St. Rep. 372; Baltimore, etc., R. Co. *v.* State, 41 Md. 268.

Massachusetts.—Dobbins *v.* Lang, 181 Mass. 397, 63 N. E. 911; Bence *v.* New York, etc., R. Co., 181 Mass. 221, 63 N. E. 417; Silvia *v.* Wampanoag Mills, 177 Mass. 194, 58 N. E. 590; Feely *v.* Pearson Cordage Co., 161 Mass. 426, 37 N. E. 368; Watts *v.* Boston Tow-Boat Co., 161 Mass. 378, 37 N. E. 197; Goldthwait *v.* Haverhill, etc., St. R. Co., 160 Mass. 554, 36 N. E. 486; Hatt *v.* Nay, 144 Mass. 186, 10 N. E. 807.

Michigan.— Carr *v.* St. Clair Tunnel Co., 131 Mich. 592, 92 N. W. 110; Soderstrom *v.* Holland-Emery Lumber Co., 114 Mich. 83, 72 N. W. 13; La Pierre *v.* Chicago, etc., R. Co., 99 Mich. 212, 58 N. W. 60; Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 34 N. W. 659; Davis *v.* Detroit, etc., R. Co., 20 Mich. 105, 4 Am. Rep. 364.

Minnesota.— Wexler *v.* Salisbury, 91 Minn. 308, 98 N. W. 95; Reberk *v.* Horne, etc., Co., 85 Minn. 326, 88 N. W. 1003; Lally *v.* Crookston Lumber Co., 82 Minn. 407, 85 N. W. 157; Hughes *v.* Winona, etc., R. Co., 27 Minn. 137, 6 N. W. 553.

Missouri.— Williams *v.* St. Louis, etc., R. Co., 119 Mo. 316, 24 S. W. 782; McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285; Warmington *v.* Atchison, etc., R. Co., 46 Mo. App. 159.

Montana.— McAndrews *v.* Montana Union R. Co., 15 Mont. 290, 39 Pac. 85.

Nebraska.— Thompson *v.* Missouri Pac. R. Co., 51 Nebr. 527, 71 N. W. 61; Missouri Pac. R. Co. *v.* Baxter, 42 Nebr. 793, 60 N. W. 1044.

New Hampshire.— Shaw *v.* Manchester St. R. Co., 73 N. H. 65, 58 Atl. 1073; Leazotte *v.* Boston, etc., R. Co., 70 N. H. 5, 45 Atl. 1084.

New Jersey.— Enright *v.* Oliver, 69 N. J. L. 357, 55 Atl. 277, 101 Am. St. Rep. 710; Johnson *v.* Devoe Snuff Co., 62 N. J. L. 417, 41 Atl. 936; Hampton *v.* Camden, etc., R. Co., 10 N. J. L. J. 236.

New Mexico.— Cerrillos Coal R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807; Alexander *v.* Tennessee, etc., Gold, etc., Min. Co., 3 N. M. 173, 3 Pac. 735.

New York.— Drake *v.* Auburn City R. Co., 173 N. Y. 466, 66 N. E. 121; Kaare *v.* Troy Steel, etc., Co., 139 N. Y. 369, 34 N. E. 901; Anthony *v.* Leeret, 105 N. Y. 591, 12 N. E. 561; Field *v.* New York Cent., etc., R. Co., 86 N. Y. App. Div. 148, 83 N. Y. Suppl. 535; Standtke *v.* Swits Condé Co., 53 N. Y. App. Div. 500, 65 N. Y. Suppl. 942; Freeman *v.* Dennison Mfg. Co., 40 N. Y. App. Div. 99, 57 N. Y. Suppl. 478; Fitzgerald *v.* Elsas Paper Co., 30 Misc. 438, 62 N. Y. Suppl. 597; Howey

a servant, after learning of the risks, is entitled to time and opportunity for making

v. Lake Shore, etc., R. Co., 13 Misc. 641, 34 N. Y. Suppl. 1089; Van Sickle *v.* Atlantic Ave. R. Co., 12 Misc. 217, 33 N. Y. Suppl. 265; Coyle *v.* Mangan, 3 Misc. 11, 21 N. Y. Suppl. 773. But see Murtaugh *v.* New York Cent., etc., R. Co., 49 Hun 456, 3 N. Y. Suppl. 483, in which it was held that the continuance of plaintiff at work with a defective machine, after discovering the defects, was merely a circumstance to go to the jury on the question of contributory negligence.

North Carolina.— Jones *v.* American Warehouse Co., 137 N. C. 337, 49 S. E. 355, 138 N. C. 546, 51 S. E. 106; Lloyd *v.* Hanes, 126 N. C. 359, 35 S. E. 611; Bolden *v.* Southern R. Co., 123 N. C. 614, 31 S. E. 851; Cowles *v.* Richmond, etc., R. Co., 84 N. C. 309, 37 Am. Rep. 620.

Ohio.— Pennsylvania Co. *v.* McCurdy, 66 Ohio St. 118, 63 N. E. 585; Crawford *v.* New York, etc., R. Co., 23 Ohio Cir. Ct. 207; Lake Shore, etc., R. Co. *v.* Whidden, 23 Ohio Cir. Ct. 85; Hill *v.* Lake Shore, etc., R. Co., 22 Ohio Cir. Ct. 291, 12 Ohio Cir. Dec. 241; Pittsburgh, etc., R. Co. *v.* Eis, 2 Ohio Cir. Ct. 3, 1 Ohio Cir. Dec. 329.

Oklahoma.— Neeley *v.* Southwestern Cotton Seed Oil Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145.

Oregon.— Johnson *v.* Portland Stone Co., 40 Oreg. 436, 67 Pac. 1013, 68 Pac. 425; Wagner *v.* Portland, 40 Oreg. 389, 60 Pac. 985, 67 Pac. 300; Scott *v.* Oregon R., etc., Co., 14 Oreg. 211, 13 Pac. 98.

Pennsylvania.— Cisney *v.* Pennsylvania Sewer Pipe Co., 199 Pa. St. 519, 49 Atl. 309; Wilkinson *v.* H. W. Johns Mfg. Co., 198 Pa. St. 634, 48 Atl. 810; McCarthy *v.* Shoneman, 198 Pa. St. 568, 48 Atl. 493; Rumsey *v.* Delaware, etc., R. Co., 151 Pa. St. 74, 25 Atl. 37; Rickert *v.* Stephens, 133 Pa. St. 538, 19 Atl. 410; New York, etc., R. Co. *v.* Lyons, 119 Pa. St. 324, 13 Atl. 205; Wannamaker *v.* Burke, 111 Pa. St. 423, 2 Atl. 500; Green, etc., St. Pass. R. Co. *v.* Bresmer, 97 Pa. St. 103; Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467; Orrison *v.* Pennsylvania Co., 1 Walk. 134; Hawk *v.* Pennsylvania R. Co., 7 Pa. Cas. 212, 11 Atl. 459; Shaw *v.* Deal, 7 Pa. Co. Ct. 378.

Rhode Island.— Langlois *v.* Dunn Worsted Mills, 25 R. I. 645, 57 Atl. 910; Morancy *v.* Hennessey, 24 R. I. 205, 52 Atl. 1021; Baumler *v.* Narragansett Brewing Co., 23 R. I. 611, 51 Atl. 203; Kelley *v.* Silver Spring Bleaching, etc., Co., 12 R. I. 112, 34 Am. Rep. 615.

South Carolina.— Hooper *v.* Columbia, etc., R. Co., 21 S. C. 541, 53 Am. Rep. 691.

Tennessee.— Fletcher *v.* Louisville, etc., R. Co., 102 Tenn. 1, 49 S. W. 739.

Texas.— St. Louis, etc., R. Co. *v.* Lemon, 83 Tex. 143, 18 S. W. 331; Gulf, etc., R. Co. *v.* Brentford, 79 Tex. 619, 15 S. W. 561, 23 Am. St. Rep. 377; Brown *v.* Brown, 71 Tex. 355, 9 S. W. 261; Texas, etc., R. Co. *v.* Dillard, 70 Tex. 62, 8 S. W. 113; Ft. Worth, etc., R. Co. *v.* Ramp, 30 Tex. Civ. App. 483, 70 S. W. 568; Webb *v.* Gulf, etc., R. Co., 27 Tex. Civ. App. 75, 65 S. W. 684; Texas Midland R. Co. *v.* Taylor, (Civ. App. 1898) 44 S. W. 892; Texas, etc., R. Co. *v.* Bryant, 8 Tex. Civ. App. 134, 27 S. W. 825.

Utah.— Faulkner *v.* Mammoth Min. Co., 23 Utah 437, 66 Pac. 799; Fritz *v.* Salt Lake, etc., Gas, etc., Light Co., 18 Utah 493, 56 Pac. 90.

Vermont.—Latremouille *v.* Bennington, etc., R. Co., 63 Vt. 336, 22 Atl. 656; Carbine *v.* Bennington, etc., R. Co., 61 Vt. 348, 17 Atl. 491.

Virginia.— Parlett *v.* Dunn, 102 Va. 459, 46 S. E. 467; McDonald *v.* Norfolk, etc., R. Co., 95 Va. 98, 27 S. E. 821; Norfolk, etc., R. Co. *v.* McDonald, 88 Va. 352, 13 S. E. 706; Darracott *v.* Chesapeake, etc., R. Co., 83 Va. 288, 2 S. E. 511, 5 Am. St. Rep. 266. But see Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827.

West Virginia.— Sanderson *v.* Panther Lumber Co., 50 W. Va. 42, 40 S. E. 368, 88 Am. St. Rep. 841, 55 L. R. A. 908; Oliver *v.* Ohio River R. Co., 42 W. Va. 703, 26 S. E. 444; Woodell *v.* West Virginia Imp. Co., 38 W. Va. 23, 17 S. E. 386.

Wisconsin.— Pautz *v.* Plankinton Packing Co., 118 Wis. 47, 94 N. W. 654; Yerkes *v.* Northern Pac. R. Co., 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961; Hinz *v.* Chicago, etc., R. Co., 93 Wis. 16, 66 N. W. 718; Dougherty *v.* West Superior Iron, etc., Co., 88 Wis. 343, 60 N. W. 274; Cole *v.* Chicago, etc., R. Co., 71 Wis. 114, 37 N. W. 84, 5 Am. St. Rep. 201; Schultz *v.* Chicago, etc., R. Co., 67 Wis. 616, 31 N. W. 321, 58 Am. Rep. 881; Fowler *v.* Chicago, etc., R. Co., 61 Wis. 159, 21 N. W. 40.

United States.— Southern Pac. Co. *v.* Seley, 152 U. S. 145, 14 S. Ct. 530, 38 L. ed. 391 [*reversing* 6 Utah 319]; Riley *v.* Louisville, etc., R. Co., 133 Fed. 904, 66 C. C. A. 598; Chicago, etc., R. Co. *v.* Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264 [*reversing* 116 Fed. 867]; Glenmont Lumber Co. *v.* Roy, 126 Fed. 524, 61 C. C. A. 506; St. Louis Cordage Co. *v.* Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551; Bunker Hill, etc., Min., etc., Co. *v.* Kettleson, 121 Fed. 529, 58 C. C. A. 525; Weeks *v.* Scharer, 111 Fed. 330, 49 C. C. A. 372; Myers *v.* Chicago, etc., R. Co., 95 Fed. 406, 37 C. C. A. 137; Detroit Crude-Oil Co. *v.* Grable, 94 Fed. 73, 36 C. C. A. 94; Clow *v.* Boltz, 92 Fed. 572, 34 C. C. A. 550; Peirce *v.* Clavin, 82 Fed. 550, 27 C. C. A. 227; Askew *v.* The Luckenbach, 53 Fed. 662; Hansen *v.* The Julia Fowler, 49 Fed. 277; Melville *v.* Missouri River, etc., R. Co., 48 Fed. 820; Davidson *v.* Southern Pac. Co., 44 Fed. 476; Dillon *v.* Union Pac. R. Co., 7 Fed. Cas. No. 3,916, 3 Dill. 319; Kielley *v.* Belcher Silver Min. Co., 14 Fed. Cas. No. 7,761, 3 Sawy. 500, 1 N. Y. Wkly. Dig. 349. But see Mexican Cent. R. Co. *v.* Murray, 102 Fed. 264, 42 C. C. A. 334.

England.— Woodley *v.* Metropolitan Dist. R. Co., 2 Ex. D. 384, 46 L. J. Exch. 521, 36

complaint;[30] that he may continue in the employment a reasonable time for the remedy of defects and the removal of danger;[31] that he does not assume the risks of known defects, resulting from his master's negligence, unless they are so glaring and the danger so obvious that a man of common prudence would refuse to run them;[32] and that his failure to complain does not necessarily charge him with assumption of risk, where his services are hired for a limited time, and he has no right to terminate his contract at will.[33]

(2) DEFECTS OR DANGERS KNOWN TO MASTER. Where a defect or danger is caused by the master's negligence, and is known, or ought to be known, by him, he cannot rely upon the servant's failure to make complaint after learning thereof.[34]

(c) *Form and Sufficiency of Notice or Complaint* — (1) IN GENERAL. When complaining of defects or dangers, it is not necessary that the servant shall state in exact words that he apprehends danger to himself, nor need there be a formal notification that he will leave the service unless the defect is repaired or the danger removed. It is sufficient if from the circumstances and conversation it can be fairly inferred that the servant was complaining on his own account, and that he desired the removal of the danger;[35] but this at least is necessary.[36]

(2) TO WHOM MADE. To be sufficient, a complaint must be made to the master or his vice-principal, or to someone charged with the duty of remedying defects, and not to a fellow servant.[37]

L. T. Rep. N. S. 419; Griffiths *v.* Gidlow, 3 H. & N. 648, 27 L. J. Exch. 404.

Canada.— Poll *v.* Hewitt, 23 Ont. 619.

See 34 Cent. Dig. tit. "Master and Servant," §§ 583, 626, 631–635.

Risks outside scope of employment not within rule see Moran *v.* Harris, 63 Iowa 390, 19 N. W. 278.

30. Fordyce *v.* Edwards, 60 Ark. 438, 30 S. W. 758; Missouri, etc., R. Co. *v.* Williams, 28 Tex. Civ. App. 615, 68 Pac. 805. *Compare* Crane *v.* Chicago, etc., R. Co., 123 Iowa 81, 99 N. W. 169.

31. McCabe *v.* Montana Cent. R. Co., 30 Mont. 323, 76 Pac. 701.

32 *Illinois.*— Hartrich *v.* Hawes, 103 Ill. App. 433 [*affirmed* in 202 Ill. 334, 67 N. E. 13]. But see Harte *v.* Fraser, 104 Ill. App. 201, where it was held that the question cannot be submitted to the jury to decide whether a man of ordinary prudence and caution would have continued in the employment.

Minnesota.— Wuotilla *v.* Duluth Lumber Co., 37 Minn. 153, 33 N. W. 551, 5 Am. St. Rep. 832; Cook *v.* St. Paul, etc., R. Co., 34 Minn. 45, 24 N. W. 311; Russell *v.* Minneapolis, etc., R. Co., 32 Minn. 230, 20 N. W. 147.

Missouri.— Settle *v.* St. Louis, etc., R. Co., 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633; Williams *v.* Missouri Pac. R. Co., 109 Mo. 475, 18 S. W. 1098; Huhn *v.* Missouri Pac. R. Co., 92 Mo. 440, 4 S. W. 937; Devlin *v.* Wabash, etc., R. Co., 87 Mo. 545; Nash *v.* Dowling, 93 Mo. App. 156.

New Jersey.— Dowd *v.* Erie R. Co., 70 N. J. L. 451, 57 Atl. 248.

Ohio.— Pittsburgh, etc., R. Co. *v.* Ackworth, 10 Ohio Cir. Ct. 583, 6 Ohio Cir. Dec. 622.

South Carolina.— Parker *v.* South Carolina, etc., R. Co., 48 S. C. 364, 26 S. E. 669.

Utah.— Mangum *v.* Bullion, etc., Min. Co., 15 Utah 534, 50 Pac. 834.

West Virginia.— Graham *v.* Newburg Orrel Coal, etc., Co., 38 W. Va. 273, 18 S. E. 584.

Wisconsin.— Curran *v.* A. H. Stange Co., 98 Wis. 598, 74 N. W. 377.

United States.— Dwyer *v.* St. Louis, etc., R. Co., 52 Fed. 87.

See 34 Cent. Dig. tit. "Master and Servant," § 628.

Contra.— Worden *v.* Humeston, etc., R. Co., 72 Iowa 201, 33 N. W. 629, where it was held that it is immaterial that other prudent men would have continued work under the same circumstances.

33. Poirier *v.* Carroll, 35 La. Ann. 699.

34. Seaboard Mfg. Co. *v.* Woodson, 98 Ala. 378, 11 So. 733; Mobile, etc., R. Co. *v.* Holborn, 84 Ala. 133, 4 So. 146; Pauck *v.* St. Louis Dressed Beef, etc., Co., 159 Mo. 467, 61 S. W. 806. *Contra*, Roskee *v.* Mt. Tom Sulphite Pulp Co., 169 Mass. 528, 48 N. E. 766.

35. Rothenberger *v.* Northwestern Consol. Milling Co., 57 Minn. 461, 59 N. W. 531; Thorpe *v.* Missouri Pac. R. Co., 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120; Gulf, etc., R. Co. *v.* Donnelly, 70 Tex. 371, 8 S. W. 52, 8 Am. St. Rep. 608. *Compare* Werk *v.* Armhurst, 7 Ohio Dec. (Reprint) 544, 3 Cinc. L. Bul. 866.

36. Complaints held insufficient see the following cases:

Colorado.— Burlington, etc., R. Co. *v.* Liehe, 17 Colo. 280, 29 Pac. 175.

Massachusetts.— Lewis *v.* New York, etc., R. Co., 153 Mass. 73, 26 N. E. 431, 10 L. R. A. 513.

Michigan.— Balle *v.* Detroit Leather Co., 73 Mich. 158, 41 N. W. 216.

Montana.— McAndrews *v.* Montana Union R. Co., 15 Mont. 290, 39 Pac. 85.

New Mexico.— Alexander *v.* Tennessee, etc., Gold, etc., Min. Co., 3 N. M. 173, 3 Pac. 735.

37. *Alabama.*— Thomas *v.* Bellamy, 126

(II) *After Notice or Complaint to Master*—(A) *In General.* The fact that a servant has complained of defects and dangers will not relieve him of the assumption of risk, if he continues to work without any assurance or promise by the master that the danger will be removed,[38] or *a fortiori*, where he is told that no change will be made.[39] It has been held, however, that where the fact that machinery is unfit for use is brought to the attention of the master, the servant is absolved from increased risk, if the danger is not such that none but a reckless person would continue to use the machinery.[40]

(B) *Promise to Remedy Defect or Remove Danger*—(1) In General. Where the master or someone acting in his place promises to remedy the defect complained of, the servant by continuing in his employment for a reasonable time after such promise does not assume the risk of injury from the defect unless the danger was so patent that no person of ordinary prudence would have continued to work.[41] This rule does not apply in the case of ordinary labor with

Ala. 253, 28 So. 707; Eureka Co. *v.* Bass, 81 Ala. 200, 8 So. 216, 60 Am. Rep. 152.

Iowa.— Pieart *v.* Chicago, etc., R. Co., 82 Iowa 148, 47 N. W. 1017.

Kansas.— Union Pac. R. Co. *v.* Springsteen, 41 Kan. 724, 21 Pac. 774.

New York.— Szotak *v.* Berwind-White Coal Min. Co., 36 Misc. 98, 72 N. Y. Suppl. 647.

Pennsylvania.— Lineoski *v.* Susquehanna Coal Co., 157 Pa. St. 153, 27 Atl. 577.

Tennessee.— Louisville, etc., R. Co. *v.* Kenley, 92 Tenn. 207, 21 S. W. 326.

United States.— Weeks *v.* Scharer, 111 Fed. 330, 49 C. C. A. 372; Kidwell *v.* Houston, etc., R. Co., 14 Fed. Cas. No. 7,757, 3 Woods 313.

See 34 Cent. Dig. tit. "Master and Servant," § 637.

38. *Alabama.*— Bridges *v.* Tennessee Coal, etc., R. Co., 109 Ala. 287, 19 So. 495.

Illinois.— Ames *v.* Quigley, 75 Ill. App. 446,

Kentucky.— Sullivan *v.* Louisville Bridge Co., 9 Bush 81.

Michigan.— Hayball *v.* Detroit, etc., R. Co., 114 Mich. 135, 72 N. W. 145.

Minnesota.— Woods *v.* St. Paul, etc., R. Co., 39 Minn. 435, 40 N. W. 510.

New York.— Webber *v.* Piper, 38 Hun 353 [*affirmed* in 109 N. Y. 496, 17 N. E. 216]; Ehalt *v.* Marshall, 14 N. Y. St. 552; Eiser *v.* Archer, 1 N. Y. City Ct. 356.

Texas.— Haywood *v.* Galveston, etc., R. Co., (Civ. App. 1905) 85 S. W. 433.

United States.— McPeck *v.* Central Vermont R. Co., 79 Fed. 590, 25 C. C. A. 110.

England.— Assop *v.* Yates, 2 H. & N. 768, 27 L. J. Exch. 156.

See 34 Cent. Dig. tit. "Master and Servant," § 641.

39. Alton Roller Milling Co. *v.* Bender, 112 Ill. App. 484. See also Lamson *v.* American Axe, etc., Co., 177 Mass. 144, 58 N. E. 585, 83 Am. St. Rep. 267, in which the servant was told that he might either continue to use the appliance of which he had complained or leave.

40. Buey *v.* Chess, etc., Co., 84 S. W. 563, 27 Ky. L. Rep. 198.

41. *Alabama.*— Eureke Co. *v.* Bass, 81 Ala. 200, 8 So. 216, 60 Am. Rep. 152.

Arkansas.— King-Ryder Lumber Co. *v.* Cochran, 71 Ark. 55, 70 S. W. 606.

Delaware.— Boyd *v.* Blumenthal, 3 Pennew. 564, 52 Atl. 330; Ray *v.* Diamond State Steel Co., 2 Pennew. 525, 47 Atl. 1017; Huber *v.* Jackson, etc., Co., 1 Marv. 374, 41 Atl. 92.

Illinois.— Swift *v.* O'Neill, 187 Ill. 337, 58 N. E. 416 [*affirming* 88 Ill. App. 162]; McCormick Harvesting Mach. Co. *v.* Burandt, 136 Ill. 170, 26 N. E. 588; Weber Wagon Co. *v.* Kehl, 139 Ill. 644, 29 N. E. 714; Alton Roller Milling Co. *v.* Bender, 112 Ill. App. 484; Shickle, etc., Iron Co. *v.* Glon, 106 Ill. App. 645; Illinois Steel Co. *v.* Mann, 100 Ill. App. 367 [*affirmed* in 197 Ill. 186, 64 N. E. 328]; Illinois Cent. R. Co. *v.* North, 97 Ill. App. 124; Westville Coal Co. *v.* Wood, 96 Ill. App. 616; Chicago Bridge, etc., Co. *v.* Hayes, 91 Ill. App. 269; Illinois Cent. R. Co. *v.* Creighton, 63 Ill. App. 165; St. Clair Nail Co. *v.* Smith, 43 Ill. App. 105.

Indiana.— McFarlan Carriage Co. *v.* Potter, (1898) 52 N. E. 209, 153 Ind. 465, 53 N. E. 465; Standard Oil Co. *v.* Helmick, 148 Ind. 457, 47 N. E. 14; Meador *v.* Lake Shore, etc., R. Co., 138 Ind. 290, 37 N. E. 721, 46 Am. St. Rep. 384; Rogers *v.* Leyden, 127 Ind. 50, 26 N. E. 210; Indianapolis, etc., R. Co. *v.* Watson, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. Rep. 578; Terre Haute Electric Co. *v.* Keely, 35 Ind. App. 180, 72 N. E. 658; East Chicago Iron, etc., Co. *v.* Williams, 17 Ind. App. 573, 47 N. E. 26.

Iowa.— Foster *v.* Chicago, etc., R. Co., 127 Iowa 84, 102 N. W. 422; Buehner *v.* Creamery Package Mfg. Co., 124 Iowa 445, 100 N. W. 345, 104 Am. St. Rep. 354; Taylor *v.* Star Coal Co., 110 Iowa 40, 81 N. W. 249, question for jury.

Kansas.— Atchison, etc., R. Co. *v.* Sledge, 68 Kan. 321, 74 Pac. 1111; Missouri, etc., R. Co. *v.* Puckett, 62 Kan. 770, 64 Pac. 631; Southern Kansas R. Co. *v.* Croker, 41 Kan. 747, 21 Pac. 785, 13 Am. St. Rep. 320; Atchison, etc., R. Co. *v.* Sadler, 38 Kan. 128, 16 Pac. 46, 5 Am. St. Rep. 729.

Kentucky.— Shemwell *v.* Owensboro, etc., R. Co., 117 Ky. 556, 78 S. W. 448, 25 Ky. L. Rep. 1671; Reiser *v.* Southern Planing Mill, etc., Co., 114 Ky. 1, 69 S. W. 1085, 24 Ky. L. Rep. 796; Brown *v.* Levy, 108 Ky. 163,

common implements with which the servant is perfectly familiar,[42] or where neither the master nor the servant contemplates any increased danger to the latter from the continued use of the defective appliance.[43] Nor does the master's promise relieve the servant from the duty of exercising such care as is reasonably

55 S. W. 1079, 21 Ky. L. Rep. 1724; Louisville Hotel Co. *v.* Kaltenbrun, 82 S. W. 378, 26 Ky. L. Rep. 669; Republic Iron, etc., Works *v.* Gregg, 71 S. W. 900, 24 Ky. L. Rep. 1627; Bell, etc., Co. *v.* Applegate, 62 S. W. 1124, 23 Ky. L. Rep. 470.

Louisiana.— Poirier *v.* Carroll, 35 La. Ann. 699.

Massachusetts.— McKinnon *v.* Riter-Conley Mfg. Co., 186 Mass. 155, 71 N. E. 296; Lynch *v.* Allyn, 160 Mass. 248, 35 N. E. 550. *Compare* Counsell *v.* Hall, 145 Mass. 468, 14 N. E. 530.

Michigan.— Roux *v.* Blodgett, etc., Lumber Co., 85 Mich. 519, 48 N. W. 1092, 24 Am. St. Rep. 102, 13 L. R. A. 728; Lyttle *v.* Chicago, etc., R. Co., 84 Mich. 289, 47 N. W. 571.

Minnesota.—Anderson *v.* Fielding, 92 Minn. 42, 99 N. W. 357; Gray *v.* Red Lake Falls Lumber Co., 85 Minn. 24, 88 N. W. 24; Smith *v.* E. W. Backus Lumber Co., 64 Minn. 447, 67 N. W. 358; Harris *v.* Hewitt, 64 Minn. 54, 65 N. W. 1085; Schlitz *v.* Pabst Brewing Co., 57 Minn. 303, 59 N. W. 188; Snowberg *v.* Nelson-Spencer Paper Co., 43 Minn. 532, 45 N. W. 1131.

Missouri.— Curtis *v.* McNair, 173 Mo. 270, 73 S. W. 167; Stephens *v.* Hannibal, etc., R. Co., 96 Mo. 207, 9 S. W. 589; Conroy *v.* Vulcan Iron Works, 62 Mo. 35; Studenroth *v.* Hammond Packing Co., 106 Mo. App. 480, 81 S. W. 487; Prophet *v.* Kemper, 95 Mo. App. 219, 68 S. W. 956; Nash *v.* Dowling, 93 Mo. App. 156; Muirhead *v.* Hannibal, etc., R. Co., 19 Mo. App. 634; Conroy *v.* Vulcan Iron Works, 6 Mo. App. 102.

New Jersey.— Dunkerley *v.* Webendorfer Mach. Co., 71 N. J. L. 60, 58 Atl. 94; Dowd *v.* Erie R. Co., 70 N. J. L. 451, 57 Atl. 248; Belleville Stone Co. *v.* Mooney, 60 N. J. L. 323, 38 Atl. 835.

New York.— Rice *v.* Eureka Paper Co., 174 N. Y. 385, 66 N. E. 979, 95 Am. St. Rep. 585 [*reversing* 70 N. Y. App. Div. 336, 75 N. Y. Suppl. 49]; Larkin *v.* Washington Mills Co., 45 N. Y. App. Div. 6, 61 N. Y. Suppl. 93.

Ohio.— Union Mfg. Co. *v.* Morrissey, 40 Ohio St. 148, 48 Am. Rep. 669; Toledo Stove Co. *v.* Reep, 18 Ohio Cir. Ct. 58, 9 Ohio Cir. Dec. 467; Lake Shore, etc., R. Co. *v.* Wislow, 10 Ohio Cir. Ct. 193, 4 Ohio Cir. Dec. 242.

Oklahoma.— Neeley *v.* Southwestern Cotton Seed Oil Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145.

Pennsylvania.— Webster *v.* Monongahela River Consol. Coal, etc., Co., 201 Pa. St. 278, 50 Atl. 964; Brownfield *v.* Hughes, 128 Pa. St. 194, 18 Atl. 340, 15 Am. St. Rep. 667.

Rhode Island.—Collins *v.* Harrison, 25 R. I. 489, 56 Atl. 678, 64 L. R. A. 156. See also Jones *v.* New American File Co., 21 R. I. 125, 42 Atl. 509.

South Carolina.— See Powers *v.* Standard Oil Co., 53 S. C. 358, 31 S. E. 276.

Tennessee.— Louisville, etc., R. Co. *v.* Kenley, 92 Tenn. 207, 21 S. W. 326.

Texas.— Gulf, etc., R. Co. *v.* Donnelly, 70 Tex. 371, 8 S. W. 52, 8 Am. St. Rep. 608; Missouri, etc., R. Co. *v.* Baker, 35 Tex. Civ. App. 542, 81 S. W. 67; Gulf, etc., R. Co. *v.* Garren, (Civ. App. 1903) 72 S. W. 1028; Missouri, etc., R. Co. *v.* Nordell, 20 Tex. Civ. App. 362, 50 S. W. 601; Texas, etc., R. Co. *v.* Bingle, 9 Tex. Civ. App. 322, 29 S. W. 674; Southern Pac. Co. *v.* Leash, 2 Tex. Civ. App. 68, 21 S. W. 563; Texas, etc., R. Co. *v.* Kane, 2 Tex. App. Civ. Cas. § 18.

Utah.— Miller *v.* Bullion-Beck, etc., Min. Co., 18 Utah 358, 55 Pac. 58.

Virginia.— Virginia, etc., Wheel Co. *v.* Chalkley, 98 Va. 62, 34 S. E. 976.

Washington.— Crooker *v.* Pacific Lounge, etc., Co., 34 Wash. 191, 75 Pac. 633.

Wisconsin.— Yerkes *v.* Northern Pac. R. Co. 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961; Nelson *v.* Shaw, 102 Wis. 274, 78 N. W. 417; Curran *v.* A. H. Stange Co., 98 Wis. 598, 74 N. W. 377; Ferriss *v.* Berlin Mach. Works, 90 Wis. 541, 63 N. W. 234; Burnell *v.* West Side R. Co., 87 Wis. 387, 58 N. W. 772.

United States.— Northern Pac. R. Co. *v.* Babcock, 154 U. S. 190, 14 S. Ct. 978, 38 L. ed. 958; Hough *v.* Texas, etc., R. Co., 100 U. S. 213, 25 L. ed. 612; Cudahy Packing Co. *v.* Skoumal, 125 Fed. 470, 60 C. C. A. 306; Barney Dumping Boat Co. *v.* Clark, 112 Fed. 921, 50 C. C. A. 616 [*affirming* 109 Fed. 235]; Detroit Crude-Oil Co. *v.* Grable, 94 Fed. 73, 36 C. C. A. 94; Homestake Min. Co. *v.* Fullerton, 69 Fed. 923, 16 C. C. A. 545; New Jersey, etc., R. Co. *v.* Young, 49 Fed. 723, 1 C. C. A. 428; Smith *v.* The Serapis, 49 Fed. 393 [*reversed* on other grounds in 51 Fed. 91, 2 C. C. A. 102]; Ross *v.* Chicago, etc., R. Co., 8 Fed. 544, 2 McCrary 235 [*affirmed* in 112 U. S. 377, 28 L. ed. 377].

England.— Holmes *v.* Worthington, 2 F. & F. 533; Clarke *v.* Holmes, 7 H. & N. 937, 8 Jur. N. S. 992, 31 L. J. Exch. 356, 9 L. T. Rep. N. S. 178, 10 Wkly. Rep. 405 [*affirming* 6 H. & N. 349, 7 Jur. N. S. 397, 30 L. J. Exch. 135, 3 L. T. Rep. N. S. 675, 9 Wkly. Rep. 419].

Canada.— Day *v.* Dominion Iron, etc., Co., 36 Nova Scotia 113.

See 34 Cent. Dig. tit. "Master and Servant," §§ 638, 642, 644.

42. Webster Mfg. Co. *v.* Nisbett, 205 Ill. 273, 68 N. E. 936 [*reversing* 105 Ill. App. 261]; McCormick Harvesting Mach. Co. *v.* Wojcicchowski, 111 Ill. App. 641; Meador *v.* Lake Shore, etc., R. Co., 138 Ind. 290, 37 N. E. 721, 46 Am. St. Rep. 384; Marsh *v.* Chickering, 101 N. Y. 396, 5 N. E. 56; Baumwald *v.* Trenkman, 88 N. Y. Suppl. 182. But see Louisville Hotel Co. *v.* Kaltenbrun, 80 S. W. 1163, 26 Ky. L. Rep. 208.

43. Tesmer *v.* Boehm, 58 Ill. App. 609.

commensurate with the danger complained of,[44] and where the promise is to repair after the completion of the work on hand, the servant assumes the risk of injury until such time by continuing at work.[45]

(2) IMMINENCE OF DANGER AS AFFECTING RULE. Where the danger is so obvious and imminent that no prudent person would undertake to perform the service, the servant is not justified in continuing in the performance of his services and assumes the risk of any injury which he may sustain;[46] and where neither the master nor the servant contemplates any additional danger to the servant in the use of the defective instrument, the servant assumes the risk of injury notwithstanding the master's promise to repair.[47]

(3) FORM AND SUFFICIENCY OF PROMISE — (a) IN GENERAL. To be sufficient, a promise by the master to remedy defects or remove danger must be definite and certain,[48] and must be made with a view to the servant's safety, and as an induce-

44. *Indiana.*— McFarlan Carriage Co. *v.* Potter, 153 Ind. 107, 53 N. E. 465; Phillips *v.* Michaels, 11 Ind. App. 672, 39 N. E. 669.

Kentucky.— Reiser *v.* Southern Planing Mill, etc., Co., 114 Ky. 1, 69 S. W. 1085, 24 Ky. L. Rep. 796.

Ohio.— Brown Oil Can Co. *v.* Green, 22 Ohio Cir. Ct. 518, 12 Ohio Cir. Dec. 510.

Texas.— Gulf, etc., R. Co. *v.* Brentford, 79 Tex. 619, 15 S. W. 561, 23 Am. St. Rep. 377.

Utah.— Miller *v.* Bullion-Beck, etc., Min. Co., 18 Utah 358, 55 Pac. 58.

Inspection.— Where the master has promised to repair machinery a servant is not required to inspect the same before using it to see whether the repairs have been made, unless there is something apparent in its condition which would lead an ordinarily prudent man to do so. Missouri, etc., R. Co. *v.* Nordell, 20 Tex. Civ. App. 362, 50 S. W. 601.

45. McFarlan Carriage Co. *v.* Potter, 153 Ind. 107, 52 N. E. 209; Standard Oil Co. *v.* Helmick, 148 Ind. 457, 47 N. E. 14.

46. *Arkansas.*— King-Ryder Lumber Co. *v.* Cochran, 71 Ark. 55, 70 S. W. 606; St. Louis, etc., R. Co. *v.* Kelton, 55 Ark. 483, 18 S. W. 933.

Illinois.— Kinmundy *v.* Anderson, 103 Ill. App. 457; Illinois Cent. R. Co. *v.* North, 97 Ill. App. 124; Illinois Cent. R. Co. *v.* Weiland, 67 Ill. App. 332.

Indiana.— Crum *v.* North Vernon Pump, etc., Co., 34 Ind. App. 253, 72 N. E. 193 [*affirmed* in 163 Ind. 596, 72 N. E. 587].

Kansas.—Southern Kansas R. Co. *v.* Croker, 41 Kan. 747, 21 Pac. 785, 13 Am. St. Rep. 320; Atchison, etc., R. Co. *v.* Midgett, 1 Kan. App. 138, 40 Pac. 995.

Kentucky.— Shemwell *v.* Owensboro, etc., R. Co., 117 Ky. 556, 78 S. W. 448, 25 Ky. L. Rep. 1671; Louisville Hotel Co. *v.* Kaltenbrun, 82 S. W. 378, 26 Ky. L. Rep. 669.

Maine.— Conley *v.* American Express Co., 87 Me. 352, 32 Atl. 965.

Michigan.— Shackelton *v.* Manistee, etc., R. Co., 107 Mich. 16, 64 N. W. 728.

Minnesota.— Rothenberger *v.* Northwestern Consol. Milling Co., 57 Minn. 461, 59 N. W. 531.

Missouri.— Holloran *v.* Union Iron, etc., Co., 133 Mo. 470, 35 S. W. 260; Francis *v.* Kansas City, etc., R. Co., 127 Mo. 658, 28 S. W. 842, 30 S. W. 129.

Montana.— McAndrews *v.* Montana Union R. Co., 15 Mont. 290, 39 Pac. 85.

New York.— Spencer *v.* Worthington, 44 N. Y. App. Div. 496, 60 N. Y. Suppl. 873.

Pennsylvania.— Fick *v.* Jackson, 3 Pa. Super. Ct. 378.

Rhode Island.— Mayott *v.* Norcross, 24 R. I. 187, 52 Atl. 894.

Wisconsin.— Jensen *v.* Hudson Sawmill Co., 98 Wis. 73, 73 N. W. 434; Erdman *v.* Illinois Steel Co., 95 Wis. 6, 69 N. W. 993, 60 Am. St. Rep. 66.

United States.—Musser-Sauntry Land, etc., Co. *v.* Brown, 126 Fed. 141, 61 C. C. A. 207; Gowen *v.* Harley, 56 Fed. 973, 6 C. C. A. 190.

England.— Smith *v.* Dowell, 3 F. & F. 238.

See 34 Cent. Dig. tit. "Master and Servant," § 645.

47. Tesmer *v.* Boehm, 58 Ill. App. 609.

48. *Indiana.*— Indianapolis, etc., R. Co. *v.* Watson, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. Rep. 578.

Indian Territory.— Purcell Mill, etc., Co. *v.* Kirkland, 2 Indian Terr. 169, 47 S. W. 311.

Iowa.— Buehner *v.* Creamery Package Mfg. Co., 124 Iowa 445, 100 N. W. 345, 104 Am. St. Rep. 354.

Minnesota.— Wilson *v.* Winona, etc., R. Co., 37 Minn. 326, 33 N. W. 908, 5 Am. St. Rep. 851.

New York.— Mull *v.* Curtice Bros. Co., 74 N. Y. App. Div. 561, 77 N. Y. Suppl. 813; Rice *v.* Eureka Paper Co., 70 N. Y. App. Div. 336, 75 N. Y. Suppl. 49; McCarthy *v.* Washburn, 42 N. Y. App. Div. 252, 58 N. Y. Suppl. 1125.

Tennessee.— Brewer *v.* Tennessee Coal, etc., Co., 97 Tenn. 615, 37 S. W. 549.

Texas.— Gulf, etc., R. Co. *v.* Garren, 96 Tex. 605, 74 S. W. 897, 97 Am. St. Rep. 939.

United States.— Dwyer *v.* Nixon, 108 Fed. 751, 47 C. C. A. 666.

See 34 Cent. Dig. tit. "Master and Servant," § 639.

Compare Conroy *v.* Vulcan Iron Works, 62 Mo. 35; Dowd *v.* Erie R. Co., 70 N. J. L. 451, 57 Atl. 248.

Conditional promise insufficient see Wilson *v.* Winona, etc., R. Co., 37 Minn. 326, 33 N. W. 908, 5 Am. St. Rep. 851.

"I will have it fixed" held insufficient see Gulf, etc., R. Co. *v.* Garren, 96 Tex. 605, 75 S. W. 897, 97 Am. St. Rep. 939.

ment to him to continue work.[49] The promise may, however, be implied as well as express,[50] general as well as individual.[51]

(b) By Whom Made. The promise of a vice-principal or representative of the master is as binding as the promise of the master himself;[52] and it is immaterial whether the servant making the promise had authority to do so, provided the injured servant, upon reasonable grounds, supposed that he did.[53]

(4) Reliance on Fulfilment of Promise. In order that a servant may be relieved from the operation of the doctrine of assumed risk from a defect complained of and the danger of which he was no longer willing to incur, it is essential that his remaining in the employment was induced by the promise of the master to remedy the defect, when he would not otherwise have done so;[54] and where the reliance is placed, not upon the promise, but upon an assurance of absence of danger, he cannot recover.[55]

(5) Duration of Continuance in Employment. If the servant remains in

49. Shemwell *v.* Owensboro, etc., R. Co., 117 Ky. 556, 78 S. W. 448, 25 Ky. L. Rep. 1671; Industrial Lumber Co. *v.* Johnson, 22 Tex. Civ. App. 596, 55 S. W. 362; International, etc., R. Co. *v.* Turner, 3 Tex. Civ. App. 487, 23 S. W. 146.

50. Poirier *v.* Carroll, 35 La. Ann. 699.

51. Atchison, etc., R. Co. *v.* Sadler, 38 Kan. 128, 16 Pac. 46, 5 Am. St. Rep. 729.

52. *Delaware.*— Boyd *v.* Blumenthal, 3 Pennew. 564, 52 Atl. 330; Ray *v.* Diamond State Steel Co., 2 Pennew. 525, 47 Atl. 1017.

Illinois.— Weber Wagon Co. *v.* Kehl, 139 Ill. 644, 29 N. E. 714 [*affirming* 40 Ill. App. 584].

Massachusetts.— See Collins *v.* Greenfield, 172 Mass. 78, 51 N. E. 454; Scullane *v.* Kellogg, 169 Mass. 544, 48 N. E. 622.

Michigan.— Lyttle *v.* Chicago, etc., R. Co., 84 Mich. 289, 47 N. W. 571.

Minnesota.— See Ehmcke *v.* Porter, 45 Minn. 338, 47 N. W. 1066.

Ohio.— Lake Shore, etc., R. Co. *v.* Winslow, 10 Ohio Cir. Ct. 193, 4 Ohio Cir. Dec. 242.

Tennessee.— Louisville, etc., R. Co. *v.* Kenley, 92 Tenn. 207, 21 S. W. 326.

Texas.— Hillje *v.* Hettich, (Civ. App. 1901) 65 S. W. 491; Galveston, etc., R. Co. *v.* Eckols, 7 Tex. Civ. App. 429, 26 S. W. 1117.

United States.— Homestake Min. Co. *v.* Fullerton, 69 Fed. 923, 16 C. C. A. 545; Parody *v.* Chicago, etc., R. Co., 15 Fed. 205, 5 McCrary 38.

See 34 Cent. Dig. tit. "Master and Servant," § 640.

Compare Chesapeake, etc., R. Co. *v.* McDowell, 24 S. W. 607, 16 Ky. L. Rep. 1; Hempstock *v.* Lackawanna Iron, etc., Co., 98 N. Y. App. Div. 332, 90 N. Y. Suppl. 663.

53. Dells Lumber Co. *v.* Erickson, 80 Fed. 257, 25 C. C. A. 397.

54. *Alabama.*— Eureka Co. *v.* Bass, 81 Ala. 200, 8 So. 216, 60 Am. Rep. 152.

Georgia.— Bolton *v.* Georgia Pac. R. Co., 83 Ga. 659, 10 S. E. 352.

Illinois.— Alton Roller Milling Co. *v.* Bender, 112 Ill. App. 484; Chicago Bridge, etc., Co. *v.* Hayes, 91 Ill. App. 269.

Indiana.— Daugherty *v.* Midland Steel Co., 23 Ind. App. 78, 53 N. E. 844.

Kansas.— Atchison, etc., R. Co. *v.* Midgett, 1 Kan. App. 138, 40 Pac. 995.

Massachusetts.— Daily *v.* Fiberloid Co., 186 Mass. 318, 71 N. E. 554; McClusky *v.* Garfield, etc., Coal Co., 180 Mass. 115, 61 N. E. 804.

Missouri.— Holloran *v.* Union Iron, etc., Co., 133 Mo. 470, 35 S. W. 260; Flynn *v.* Kansas City, etc., R. Co., 78 Mo. 195, 47 Am. Rep. 99; Conroy *v.* Vulcan Iron Works, 62 Mo. 35.

New Hampshire.— Bodwell *v.* Nashua Mfg. Co., 70 N. H. 390, 47 Atl. 613.

New York.— Kueckel *v.* O'Connor, 73 N. Y. App. Div. 594, 76 N. Y. Suppl. 829 [*affirming* 36 Misc. 335, 73 N. Y. Suppl. 546].

Oklahoma.— Neeley *v.* Southwestern Cotton Seed Oil Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145.

Pennsylvania.— Marean *v.* New York, etc., R. Co., 167 Pa. St. 220, 31 Atl. 562.

Tennessee.— Trotter *v.* Chattanooga Furniture Co., 101 Tenn. 257, 47 S. W. 425; Brewer *v.* Tennessee Coal, etc., Co., 97 Tenn. 615, 37 S. W. 549.

Texas.—Houston *v.* Owen, (Civ. App. 1902) 67 S. W. 788.

Wisconsin.— Olson *v.* Doherty Lumber Co., 102 Wis. 264, 78 N. W. 572; Showalter *v.* Fairbanks, 88 Wis. 376, 60 N. W. 257.

United States.— Musser-Sauntry Land, etc., Co. *v.* Brown, 126 Fed. 141, 61 C. C. A. 207.

England.— Clarke *v.* Holmes, 7 H. & N. 937, 8 Jur. N. S. 992, 31 L. J. Exch. 356, 9 L. T. Rep. N. S. 178, 10 Wkly. Rep. 405 [*affirming* 6 H. & N. 349, 7 Jur. N. S. 397, 30 L. J. Exch. 135, 3 L. T. Rep. N. S. 675, 9 Wkly. Rep. 419].

See 34 Cent. Dig. tit. "Master and Servant," § 643.

Revocation of promise before injury defeats recovery see Neeley *v.* Southwestern Cotton Seed Oil Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145.

That servant might have repaired the defect does not deprive him of his right to recover. Gibson *v.* Minneapolis, etc., R. Co., 55 Minn. 177, 56 N. W. 686, 43 Am. St. Rep. 482.

55. Showalter *v.* Fairbanks, 88 Wis. 376, 60 N. W. 257.

the service longer than a reasonable time after the master's promise to repair the defect, he will be held to have assumed the risk.[56] In some cases it is held that what is a reasonable time is to be determined by the time which might reasonably be required by the master in which to make the repairs;[57] while in others it is held that the servant is entitled to remain for any period which will not preclude the reasonable expectation that the promise will be kept.[58] Where the master fixes a definite time within which the repair is to be made, the servant may wait until the expiration of the time named,[59] but no longer.[60]

(III) *AFTER ASSURANCE OF ABSENCE OF DANGER.* Where a servant knows of defects in machinery appliances, or place of work, but is by words, acts, or conduct of his master lulled into a sense of security, and continues in the service, and is injured by reason of such defects, he may nevertheless recover,[61] unless the danger is well known to him, or is so plain and obvious that a prudent, careful man would refuse to run the risk.[62]

6. OBVIOUS OR LATENT DEFECTS AND DANGERS[63] — a. Rule Stated. A person assumes the risk of injury from dangers and defects which are so patent and

56. *Alabama.*— Eureka Co. *v.* Bass, 81 Ala. 200, 8 So. 216, 60 Am. Rep. 152.

Colorado.— Davis *v.* Graham, 2 Colo. App. 210, 29 Pac. 1007.

Illinois.— Gunning System *v.* Lapointe, 212 Ill. 274, 72 N. E. 393 [*reversing* 113 Ill. App. 405].

Iowa.— Belair *v.* Chicago, etc., R. Co., 43 Iowa 662.

Kansas.— Morbach *v.* Home Min. Co., 53 Kan. 731, 37 Pac. 122.

Missouri.— Stalzer *v.* Jacob Dold Packing Co., 84 Mo. App. 565.

New Jersey.— Dowd *v.* Erie R. Co., 70 N. J. L. 451, 57 Atl. 248.

Texas.— Hilje *v.* Hettich, 95 Tex. 321, 67 S. W. 90 [*reversing* (Civ. App. 1901) 65 S. W. 491].

Wisconsin.— Albrecht *v.* Chicago, etc., R. Co., 108 Wis. 530, 84 N. W. 882, 53 L. R. A. 653. See also Showalter *v.* Fairbanks, 88 Wis. 376, 60 N. W. 257.

United States.— Parody *v.* Chicago, etc., R. Co., 15 Fed. 205, 5 McCrary 38.

See 34 Cent. Dig. tit. "Master and Servant," § 644.

57. Gunning System *v.* Lapointe, 212 Ill. 274, 72 N. E. 393 [*reversing* 113 Ill. App. 405]; Donley *v.* Dougherty, 174 Ill. 582, 51 N. E. 714 [*affirming* 75 Ill. App. 379]; Illinois Steel Co. *v.* Mann, 170 Ill. 200, 48 N. E. 417, 62 Am. St. Rep. 370, 40 L. R. A. 781 [*reversing* 67 Ill. App. 66]; Illinois Steel Co. *v.* Mann, 100 Ill. App. 367 [*affirmed* in 197 Ill. 186, 64 N. E. 328]; Detroit Crude-Oil Co. *v.* Grable, 94 Fed. 73, 36 C. C. A. 94.

58. Shearman & R. Negl. § 96; Toledo Stove Co. *v.* Keep, 18 Ohio Cir. Ct. 58, 9 Ohio Cir. Dec. 467; Hough *v.* Texas, etc., R. Co., 100 U. S. 213, 25 L. ed. 612. See also Conroy *v.* Vulcan Iron Works, 62 Mo. 35.

59. Louisville Hotel Co. *v.* Kaltenbrun, 80 S. W. 1163, 26 Ky. L. Rep. 208.

60. Eureka Co. *v.* Bass, 81 Ala. 200, 8 So. 216, 60 Am. Rep. 152; Trotter *v.* Chattanooga Furniture Co., 101 Tenn. 257, 47 S. W. 425.

61. *Alabama.*— Alabama Great Southern R. Co. *v.* Davis, 119 Ala. 572, 24 So. 862.

Minnesota.—Rogers *v.* Chicago Great Western R. Co., 65 Minn. 308, 67 N. W. 1003; Nelson *v.* St. Paul Plow Works, 57 Minn. 43, 58 N. W. 868.

Missouri.— Haworth *v.* Mineral Belt Tel. Co., 105 Mo. App. 161, 79 S. W. 727; Dutzi *v.* Geisel, 23 Mo. App. 676.

New York.— Floettl *v.* Third Ave. R. Co., 10 N. Y. App. Div. 308, 41 N. Y. Suppl. 792; Stephens *v.* Hudson Valley Knitting Co., 69 Hun 375, 23 N. Y. Suppl. 656 [*affirmed* in 143 N. Y. 633, 37 N. E. 826].

Ohio.— Barbour *v.* Miles, 14 Ohio Cir. Ct. 628, 7 Ohio Cir. Dec. 682.

Texas.— Gulf, etc., R. Co. *v.* Wells, (1891) 16 S. W. 1025; Gulf, etc., R. Co. *v.* Brentford, 79 Tex. 619, 15 S. W. 561, 23 Am. St. Rep. 377.

West Virginia.— Graham *v.* Newburg Orrel Coal, etc., Co., 38 W. Va. 273, 18 S. E. 584.

United States.— Harder, etc., Coal Min. Co. *v.* Schmidt, 104 Fed. 282, 43 C. C. A. 532.

See 34 Cent. Dig. tit. "Master and Servant," § 646.

Mere expressions of opinion insufficient see Weigreffe *v.* Daw, 40 Ill. App. 53; Starne *v.* Schlothane, 21 Ill. App. 97; Chicago, etc., R. Co. *v.* Simmons, 11 Ill. App. 147.

62. *Michigan.*— Rohrabacher *v.* Woodard, 124 Mich. 125, 82 N. W. 797.

Missouri.— Epperson *v.* Postal Tel. Cable Co., 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050.

Ohio.— Engel *v.* Standard Lighting Co., 12 Ohio Cir. Ct. 489, 5 Ohio Cir. Dec. 572.

West Virginia.— Graham *v.* Newburg Orrel Coal, etc., Co., 38 W. Va. 273, 18 S. E. 584.

Wisconsin.— Showalter *v.* Fairbanks, 83 Wis. 376, 60 N. W. 257.

United States.— Kansas City Southern R. Co. *v.* Bellingslea, 116 Fed. 335, 54 C. C. A. 109.

See 34 Cent. Dig. tit. "Master and Servant," § 646.

63. Compliance with commands see *infra*, IV, E, 8, b.

Continuing work after promise to remedy obvious defects or dangers see *supra*, IV, E, 5, g, (II), (B).

obvious, that he either knew, or in the exercise of ordinary care should have known, of their existence.[64] On the other hand a servant is under no primary

Inexperienced or youthful employee see *infra*, IV, E, 7, e.

Injury avoidable by care of master see *infra*, IV, E, 10, a.

64. *Alabama.*— Boyd *v.* Indian Head Mills, 131 Ala. 356, 31 So. 80; Louisville, etc., R. Co. *v.* Stutts, 105 Ala. 368, 17 So. 29, 53 Am. St. Rep. 127.

Arkansas.— Fordyce *v.* Stafford, 57 Ark. 503, 22 S. W. 161.

Delaware.— Boyd *v.* Blumenthal, 3 Pennew. 564, 52 Atl. 330.

Florida.— Green *v.* Sansom, 41 Fla. 94, 25 So. 332.

Georgia.— Steele *v.* Georgia Iron, etc., Co., 121 Ga. 459, 49 S. E. 291; Pitts *v.* Florida Cent., etc., R. Co., 98 Ga. 655, 27 S. E. 189.

Illinois.— McCormick Harvesting Mach. Co. *v.* Wojciechowski, 111 Ill. App. 641; Electrical Installation Co. *v.* Kelly, 110 Ill. App. 334; Mobile, etc., R. Co. *v.* Healy, 109 Ill. App. 531; Chicago, etc., R. Co. *v.* Wild, 109 Ill. App. 38; Illinois Cent. R. Co. *v.* Brown, 107 Ill. App. 512; Illinois Steel Co. *v.* Mann, 100 Ill. App. 367 [*affirmed* in 197 Ill. 186, 64 N. E. 328]; Anderberg *v.* Chicago, etc., R. Co., 98 Ill. App. 207; Western Stone Co. *v.* Muscial, 96 Ill. App. 288 [*affirmed* in 196 Ill. 382, 63 N. E. 664]; Campbell *v.* Mullen, 60 Ill. App. 497; Stobba *v.* Fitzsimmons, etc., Co., 58 Ill. App. 427; Legnard *v.* Lage, 57 Ill. App. 223; Clay *v.* Chicago, etc., R. Co., 56 Ill. App. 235; Chicago, etc., R. Co. *v.* Massig, 50 Ill. App. 666; Buhle *v.* Harland, 37 Ill. App. 350; Moline Plow Co. *v.* Anderson, 19 Ill. App. 417.

Indiana.— Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; Louisville, etc., R. Co. *v.* Kemper, 147 Ind. 561, 47 N. E. 214; Evansville, etc., R. Co. *v.* Henderson, 134 Ind. 636, 33 N. E. 1021; O'Neal *v.* Chicago, etc., R. Co., 132 Ind. 110, 31 N. E. 669; Chicago, etc., R. Co. *v.* Tackett, 33 Ind. App. 379, 71 N. E. 524; Railsback *v.* Wayne County Turnpike Co., 10 Ind. App. 622, 38 N. E. 221.

Iowa.— Buehner *v.* Creamery Package Mfg. Co., 124 Iowa 445, 100 N. W. 345, 104 Am. St. Rep. 354; Olson *v.* Hanford Produce Co., 118 Iowa 55, 91 N. W. 806; Branstrator *v.* Keokuk, etc., R. Co., 108 Iowa 377, 79 N. W. 130; Mayes *v.* Chicago, etc., R. Co., 63 Iowa 562, 14 N. W. 340, 19 N. W. 680.

Kansas.— Lanyon Zinc Co. *v.* Bell, 64 Kan. 739, 68 Pac. 609; Consolidated Kansas City Smelting, etc., Co. *v.* Tinchert, 5 Kan. App. 130, 48 Pac. 889.

Kentucky.— Reis *v.* Struck, 64 S. W. 729, 23 Ky. L. Rep. 1113.

Louisiana.— Paland *v.* Chicago, etc., R. Co., 44 La. Ann. 1003, 11 So. 707.

Maine.— Babb *v.* Oxford Paper Co., 99 Me. 298, 59 Atl. 290; Caven *v.* Bodwell Granite Co., 99 Me. 278, 59 Atl. 285; Demers *v.* Deering, 93 Me. 272, 44 Atl. 922.

Maryland.— State *v.* South Baltimore Car Works, 99 Md. 461, 58 Atl. 447.

Massachusetts.— Hofnauer *v.* R. H. White Co., 186 Mass. 47, 70 N. E. 1038; Ladd *v.* Brockton St. R. Co., 180 Mass. 454, 62 N. E. 730; Donahue *v.* Boston, etc., R. Co., 178 Mass. 251, 59 N. E. 663; Whalen *v.* Whitcomb, 178 Mass. 33, 59 N. E. 666; Lemoine *v.* Aldrich, 177 Mass. 89, 58 N. E. 178; Hoard *v.* Blackstone Mfg. Co., 177 Mass. 69, 58 N. E. 180; Chisholm *v.* New England Tel., etc., Co., 176 Mass. 125, 57 N. E. 383; Smith *v.* Beaudry, 175 Mass. 286, 56 N. E. 596; Nealand *v.* Lynn, etc., R. Co., 173 Mass. 42, 53 N. E. 137; Austin *v.* Fitchburg R. Co., 172 Mass. 484, 52 N. E. 527; Cunningham *v.* Lynn, etc., R. Co., 170 Mass. 298, 49 N. E. 440; Donahue *v.* Washburn, etc., Mfg. Co., 169 Mass. 574, 48 N. E. 842; French *v.* Columbia Spinning Co., 169 Mass. 531, 48 N. E. 269; De Lisle *v.* Ward, 168 Mass. 579, 47 N. E. 436; Barnard *v.* Schrafft, 168 Mass. 211, 46 N. E. 621; Cassady *v.* Boston, etc., R. Co., 164 Mass. 168, 41 N. E. 129; Connelly *v.* Hamilton Woolen Co., 163 Mass. 156, 39 N. E. 787; Connolly *v.* Eldridge, 160 Mass. 566, 36 N. E. 469; McGuirk *v.* Shattuck, 160 Mass. 45, 35 N. E. 110, 39 Am. St. Rep. 454; Wilson *v.* Tremont, etc., Mills, 159 Mass. 154, 34 N. E. 90; Coombs *v.* Fitchburg R. Co., 156 Mass. 200, 30 N. E. 1140; Ciriack *v.* Merchants' Woolen Co., 146 Mass. 182, 15 N. E. 579, 4 Am. St. Rep. 307.

Michigan.— Bauer *v.* American Car, etc., Co., 132 Mich. 537, 94 N. W. 9; Bays *v.* Warren Featherbone Co., 131 Mich. 205, 91 N. W. 164; Foley *v.* Grand Rapids Gas Light Co., 127 Mich. 671, 87 N. W. 53; Storrs *v.* Michigan Starch Co., 126 Mich. 666, 86 N. W. 134; Davis *v.* Port Huron Engine, etc., Co., 126 Mich. 429, 85 N. W. 1125; Shanke *v.* U. S. Heater Co., 125 Mich. 346, 84 N. W. 283; Juchatz *v.* Michigan Alkali Co., 120 Mich. 654, 79 N. W. 907; Peppett *v.* Michigan Cent. R. Co., 119 Mich. 640, 78 N. W. 900; Lamotte *v.* Boyce, 105 Mich. 545, 63 N. W. 517; Brewer *v.* Flint, etc., R. Co., 56 Mich. 620, 23 N. W. 440; Richards *v.* Rough, 53 Mich. 212, 18 N. W. 785.

Minnesota.— Saxton *v.* Northwestern Tel. Exch. Co., 81 Minn. 314, 84 N. W. 109; Vogt *v.* Honstain, 81 Minn. 174, 83 N. W. 533; Manley *v.* Minneapolis Paint Co., 76 Minn. 169, 78 N. W. 1050; Fay *v.* Chicago, etc., R. Co., 72 Minn. 192, 75 N. W. 15; Berger *v.* St. Paul, etc., R. Co., 39 Minn. 78, 38 N. W. 814; Olson *v.* St. Paul, etc., R. Co., 38 Minn. 117, 35 N. W. 866; Walsh *v.* St. Paul, etc., R. Co., 27 Minn. 367, 8 N. W. 145.

Missouri.— Cole *v.* St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; Minnier *v.* Sedalia, etc., R. Co., 167 Mo. 99, 66 S. W. 1072; Junior *v.* Missouri Electric Light, etc., Co., 127 Mo. 79, 29 S. W. 988; Kleine *v.* Freunds Sons Shoe, etc., Co., 91 Mo. App. 102; Claybaugh *v.* Kansas City, etc., R. Co., 56 Mo. App. 630; Berning *v.* Medart, 56 Mo. App. 443.

Nebraska.— Thompson *v.* Missouri Pac. R.

obligation to investigate for latent defects and test the fitness and safety of the

Co., 51 Nebr. 527, 71 N. W. 61; Chicago, etc., R. Co. *v.* Curtis, 51 Nebr. 442, 71 N. W. 42, 66 Am. St. Rep. 456.

New Hampshire.— Burnham *v.* Concord, etc., R. Co., 68 N. H. 567, 44 Atl. 750; Collins *v.* Laconia Car Co., 68 N. H. 196, 38 Atl. 1047; Bancroft *v.* Boston, etc., R. Co., 67 N. H. 466, 30 Atl. 409.

New Jersey.— Burns *v.* Delaware, etc., Tel., etc., Co., 70 N. J. L. 745, 59 Atl. 220, 592, 67 L. R. A. 956; McDonald *v.* Standard Oil Co., 69 N. J. L. 445, 55 Atl. 289; Henggler *v.* Cohn, 68 N. J. L. 240, 52 Atl. 280; Durand *v.* New York, etc., R. Co., 65 N. J. L. 656, 48 Atl. 1013; Meany *v.* Standard Oil Co. (Sup. 1900) 47 Atl. 803; Dillenberger *v.* Weingartner, 64 N. J. L. 292, 45 Atl. 638; Coyle *v.* Griffing Iron Co., 63 N. J. L. 609, 44 Atl. 665, 47 L. R. A. 147 [*affirming* 62 N. J. L. 540, 41 Atl. 680]; Saunders *v.* Eastern Hydraulic Pressed Brick Co., 63 N. J. L. 554, 44 Atl. 630, 76 Am. St. Rep. 222; Essex County Electric Co. *v.* Kelly, 57 N. J. L. 100, 29 Atl. 427.

New York.— Harvey *v.* McConchie, 177 N. Y. 569, 69 N. E. 1124 [*affirming* 77 N. Y. App. Div. 361, 79 N. Y. Suppl. 241]; McCampbell *v.* Cunard Steamship Co., 144 N. Y. 552, 39 N. E. 637 [*reversing* 27 N. Y. Suppl. 1112]; Loushay *v.* Erie R. Co., 95 N. Y. App. Div. 102, 88 N. Y. Suppl. 446; Rohan *v.* Metropolitan St. R. Co., 59 N. Y. App. Div. 250, 69 N. Y. Suppl. 570; Miller *v.* Grieme, 53 N. Y. App. Div. 276, 65 N. Y. Suppl. 813; Shields *v.* Robbins, 3 N. Y. App. Div. 582, 38 N. Y. Suppl. 214; Kennedy *v.* Manhattan R. Co., 33 Hun 457; De Forest *v.* Jewett, 19 Hun 509; Evans *v.* Lake Shore, etc., R. Co., 12 Hun 289; De Graff *v.* New York Cent., etc., R. Co., 3 Thomps. & C. 255; Reilly *v.* Parker, 11 Misc. 68, 31 N. Y. Suppl. 1014; Welch *v.* New York Cent., etc., R. Co., 17 N. Y. Suppl. 342; Plunkett *v.* Donovan, 12 N. Y. Suppl. 454; Buchanan *v.* Rome, etc., R. Co., 10 N. Y. St. 326; Ferguson *v.* Fall Brook Coal Co., 4 N. Y. St. 423.

Ohio.— Johns *v.* Cleveland, etc., R. Co., 10 Ohio S. & C. Pl. Dec. 348, 7 Ohio N. P. 592.

Oregon.— Brown *v.* Oregon Lumber Co., 24 Oreg. 315, 33 Pac. 557; Scott *v.* Oregon R., etc., Co., 14 Oreg. 211, 13 Pac. 98.

Pennsylvania.— Simmons *v.* Southern Traction Co., 207 Pa. St. 589, 57 Atl. 45, 64 L. R. A. 205; Davis *v.* Baltimore, etc., R. Co., 152 Pa. St. 314, 25 Atl. 498; Kelly *v.* Baltimore, etc., R. Co., 9 Pa. Cas. 48, 11 Atl. 659; Grabowski *v.* Pennsylvania Steel Co., 2 Dauph. Co. Rep. 118; Dillman *v.* Hamilton, 14 Montg. Co. Rep. 92.

Rhode Island.— Frangiose *v.* Horton, 26 R. I. 291, 58 Atl. 949; Paoline *v.* Bishop Co., 25 R. I. 298, 55 Atl. 752; Disano *v.* New England Steam Brick Co., 20 R. I. 452, 40 Atl. 7; Larich *v.* Moies, 18 R. I. 513, 28 Atl. 661.

South Carolina.— Morrow *v.* Gaffney Mfg. Co., 70 S. C. 242, 49 S. E. 573.

South Dakota.— Carlson *v.* Sioux Falls Water Co., 8 S. D. 47, 65 N. W. 419.

Tennessee.— Brown *v.* Chattanooga Electric R. Co., 101 Tenn. 252, 47 S. W. 415, 70 Am. St. Rep. 666.

Texas.— Gulf, etc., R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151; St. Louis, etc., R. Co. *v.* Lemon, 83 Tex. 143, 18 S. W. 331; Gulf, etc., R. Co. *v.* Williams, 72 Tex. 159, 12 S. W. 172; San Antonio, etc., R. Co. *v.* Drake, (Civ. App. 1905) 85 S. W. 447; International, etc., R. Co. *v.* Royal, (Civ. App. 1904) 83 S. W. 713; Hightower *v.* Gray, 36 Tex. Civ. App. 674, 83 S. W. 254; Houston, etc., R. Co. *v.* Scott, (Civ. App. 1901) 62 S. W. 1077; International, etc., R. Co. *v.* Story, 26 Tex. Civ. App. 23, 62 S. W. 130; Missouri, etc., R. Co. *v.* Chambers, 17 Tex. Civ. App. 487, 43 S. W. 1090; Bowman *v.* Texas Brewing Co., 17 Tex. Civ. App. 446, 43 S. W. 808; Bonnet *v.* Galveston, etc., R. Co., (Civ. App. 1895) 31 S. W. 525. But see Gulf, etc., R. Co. *v.* Davis, 35 Tex. Civ. App. 285, 80 S. W. 253.

Utah.— Higgins *v.* Southern Pac. Co., 26 Utah 164, 72 Pac. 690.

Vermont.— Skinner *v.* Central Vermont R. Co., 70 Vt. 336, 50 Atl. 1099.

Virginia.— Norfolk, etc., R. Co. *v.* Jackson, 85 Va. 489, 8 S. E. 370.

Washington.— Woods *v.* Northern Pac. R. Co., 36 Wash. 658, 79 Pac. 309; Bier *v.* Hosford, 35 Wash. 544, 77 Pac. 867; Robare *v.* Seattle Traction Co., 24 Wash. 577, 64 Pac. 784; Danuser *v.* Seller, 24 Wash. 565, 64 Pac. 783; Jennings *v.* Tacoma R., etc., Co., 7 Wash. 275, 34 Pac. 937.

Wisconsin.— McMillan *v.* Spider Lake Saw Mill, etc., Co., 115 Wis. 332, 91 N. W. 979; Muenchow *v.* Theo. Zschetzsche, etc., Co., 113 Wis. 8, 88 N. W. 909; Relyea *v.* Tomahawk Pulp, etc., Co., 110 Wis. 307, 85 N. W. 960; Renne *v.* U. S. Leather Co., 107 Wis. 305, 83 N. W. 473; Helmke *v.* Thilmany, 107 Wis. 216, 83 N. W. 360; Olson *v.* Doherty Lumber Co., 102 Wis. 264, 78 N. W. 572; Sweet *v.* Ohio Coal Co., 78 Wis. 127, 47 N. W. 182, 9 L. R. A. 861; Kelly *v.* Abbot, 63 Wis. 307, 23 N. W. 890, 53 Am. Rep. 292.

United States.— Kohn *v.* McNulta, 147 U. S. 238, 13 S. Ct. 298, 37 L. ed. 150; Glenmont Lumber Co. *v.* Roy, 126 Fed. 524, 61 C. C. A. 506; St. Louis Cordage Co. *v.* Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551; Crawford *v.* American Steel, etc., Co., 123 Fed. 275, 59 C. C. A. 293; Lindsay *v.* New York, etc., R. Co., 112 Fed. 384, 50 C. C. A. 298; King *v.* Morgan, 109 Fed. 446, 48 C. C. A. 507; Volk *v.* B. F. Sturtevant Co., 104 Fed. 276, 43 C. C. A. 527 [*affirming* 99 Fed. 532, 39 C. C. A. 646]; Chicago Great Western R. Co. *v.* Price, 97 Fed. 423, 38 C. C. A. 239; McCain *v.* Chicago, etc., R. Co., 76 Fed. 125, 22 C. C. A. 99; McGrath *v.* Texas, etc., R. Co., 60 Fed. 555, 9 C. C. A. 133.

See 34 Cent. Dig. tit. "Master and Servant," §§ 610, 614, 616–623.

place, fixtures, or appliances provided him by the master.[65] He has a right to rely upon the obligation resting upon the master to exercise reasonable care to see that they are fit and safe;[66] and, although the circumstances may be such that a servant is chargeable with knowledge of such defects as are patent and obvious, and of such defects as in the exercise of ordinary care he ought to have knowledge of,[67] he is not to be deemed as having notice, or as assuming the risks, of such defects and insufficiencies as can be ascertained only by investigation and inspection for the purpose of ascertaining that there is no danger.[68]

Uncovered or unguarded machinery or places.— Steele *v.* Georgia Iron, etc., Co., 121 Ga. 459, 49 S. E. 291; East St. Louis Ice, etc., Co. *v.* Crow, 155 Ill. 74, 39 N. E. 589 [*reversing* 52 Ill. App. 573]; Chicago, etc., R. Co. *v.* Standart, 16 Ill. App. 145; Wortman *v.* Minich, 28 Ind. App. 31, 62 N. E. 85; Arkland *v.* Taber-Prang Art Co., 184 Mass. 243, 68 N. E. 219; Carrigan *v.* Washburn, etc., Mfg. Co., 170 Mass. 79, 48 N. E. 1079; Quigley *v.* Thomas G. Plant Co., 165 Mass. 368, 43 N. E. 205; Schroeder *v.* Michigan Car Co., 56 Mich. 132, 22 N. W. 220; Cagney *v.* Hannibal, etc., R. Co., 69 Mo. 416; Burns *v.* Nichols Chemical Co., 65 N. Y. App. Div. 424, 72 N. Y. Suppl. 919; Bond *v.* Smith, 14 N. Y. Suppl. 932; Ausley *v.* American Tobacco Co., 130 N. C. 34, 40 S. E. 819; Texas, etc., R. Co. *v.* McKee, 9 Tex. Civ. App. 100, 29 S. W. 544; Stephenson *v.* Duncan, 73 Wis. 404, 41 N. W. 337, 9 Am. St. Rep. 806; Thomas *v.* Suartermaine, 18 Q. B. D. 685, 51 J. P. 516, 56 L. J. Q. B. 340, 57 L. T. Rep. N. S. 537, 35 Wkly. Rep. 555. *Compare* Pierce *v.* Contrexille Mfg. Co., 25 R. I. 512, 56 Atl. 778.

An "obvious defect" is a defect which one by the exercise of ordinary care would discover. Missouri, etc., R. Co. *v.* Chambers, 17 Tex. Civ. App. 487, 43 S. W. 1090.

65. *Florida.*— Green *v.* Sansom, 41 Fla. 94, 25 So. 332.

Illinois.— Allen B. Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. 818; Rice, etc., Malting Co. *v.* Paulsen, 51 Ill. App. 123.

Kentucky.— Adams Express Co. *v.* Smith, 72 S. W. 752, 24 Ky. L. Rep. 1915.

Massachusetts.— Murphy *v.* Marston Coal Co., 183 Mass. 385, 67 N. E. 342.

Missouri.— Connolly *v.* St. Joseph Press Printing Co., 166 Mo. 447, 66 S. W. 268; Doyle *v.* Missouri, etc., Trust Co., 140 Mo. 1, 41 S. W. 255; Nicholds *v.* Crystal Plate-Glass Co., (1894) 27 S. W. 516.

Texas.— Missouri, etc., R. Co. *v.* Blackman, 32 Tex. Civ. App. 200, 74 S. W. 74; San Antonio, etc., R. Co. *v.* Lindsey, 27 Tex. Civ. App. 316, 65 S. W. 668.

Washington.— Johnson *v.* Tacoma Mill Co., 22 Wash. 88, 60 Pac. 53.

See 34 Cent. Dig. tit. "Master and Servant," §§ 610, 614, 616, 623.

The master has the duty of inspection as well as observation; the obligation of the servant is that of observation. Illinois Steel Co. *v.* Mann, 100 Ill. App. 367 [*affirmed* in 197 Ill. 186, 64 N. E. 328].

66. *Florida.*— Green *v.* Sansom, 41 Fla. 94, 25 So. 332.

Illinois.— Allen B. Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. 818; Western Stone Co. *v.* Muscial, 96 Ill. App. 288 [*affirmed* in 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325].

Kentucky.— Adams Express Co. *v.* Smith, 72 S. W. 752, 24 Ky. L. Rep. 1915.

Louisiana.— Faren *v.* Sellers, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256.

Michigan.— McLean *v.* Pere Marquette R. Co., 137 Mich. 482, 100 N. W. 748.

Missouri.— Doyle *v.* Missouri, etc., Trust Co., 140 Mo. 1, 41 S. W. 255; Herdler *v.* Buck's Stove, etc., Co., 136 Mo. 3, 37 S. W. 115; Clowers *v.* Wabash, etc., R. Co., 21 Mo. App. 213.

New York.— Kiras *v.* Nichols Chemical Co., 59 N. Y. App. Div. 79, 69 N. Y. Suppl. 44; Jarvis *v.* Northern New York Marble Co., 55 N. Y. App. Div. 272, 67 N. Y. Suppl. 78.

Texas.— Galveston, etc., R. Co. *v.* Smith, 24 Tex. Civ. App. 127, 57 S. W. 999.

Utah.— Faulkner *v.* Mammoth Min. Co., 23 Utah 437, 66 Pac. 799.

Washington.— Johnson *v.* Tacoma Mill Co., 22 Wash. 88, 60 Pac. 53.

See 34 Cent. Dig. tit. "Master and Servant," §§ 610, 614, 616, 623.

67. See cases cited *supra*, note 64.

68. *Illinois.*— Allen B. Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. 818; Chicago Hair, etc., Co. *v.* Mueller, 106 Ill. App. 21 [*affirmed* in 203 Ill. 558, 68 N. E. 51]; Illinois Steel Co. *v.* Mann, 100 Ill. App. 367 [*affirmed* in 197 Ill. 186, 64 N. E. 328]; Western Stone Co. *v.* Muscial, 96 Ill. App. 288 [*affirmed* in 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325]; Rice, etc., Malting Co. *v.* Paulsen, 51 Ill. App. 123.

Kansas.— Consolidated Kansas City Smelting, etc., Co. *v.* Tinchert, 5 Kan. App. 130, 48 Pac. 889.

Louisiana.— Ingham *v.* John B. Honor Co., 113 La. 1040, 37 So. 963; Faren *v.* Sellers, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256.

Massachusetts.— Murphy *v.* Marston Coal Co., 183 Mass. 385, 67 N. E. 342; Garant *v.* Cashman, 183 Mass. 13, 66 N. E. 599; Scanlon *v.* Boston, etc., R. Co., 147 Mass. 484, 18 N. E. 209, 9 Am. St. Rep. 733.

Michigan.— McLean *v.* Pere Marquette R. Co., 137 Mich. 482, 100 N. W. 748.

Missouri.— Connolly *v.* St. Joseph Press Printing Co., 166 Mo. 447, 66 S. W. 268; Doyle *v.* Missouri, etc., Trust Co., 140 Mo. 1, 41 S. W. 255; Herdler *v.* Buck's Stove, etc., Co., 136 Mo. 3, 37 S. W. 115; Nicholds *v.*

b. Comparative Knowledge of Master and Servant. A servant does not assume the risk of injuries from a latent defect because his opportunity of discovering it is the same as the master's;[69] but it is otherwise in the case of obvious defects, and a servant will be held to have assumed the risk where he had an equal opportunity with the master to discover them.[70]

c. Opportunity to Discover Defect or Danger. There is no assumption of risks where there is an opportunity to discover the defect or danger,[71] but where there is such opportunity, a servant assumes such risks as arise from open and obvious causes.[72]

d. Apparent Danger From Obvious Defect. To show that a servant assumed the risks connected with his employment, it must appear, not only that a defect was patent and obvious, but that he knew the danger of working under such

Crystal Plate-Glass Co., (1894) 27 S. W. 516; Clowers *v.* Wabash, etc., R. Co., 21 Mo. App. 213.

New Jersey.— Meany *v.* Standard Oil Co., (Sup. 1903) 55 Atl. 653.

New York.— Kiras *v.* Nichols Chemical Co., 59 N. Y. App. Div. 79, 69 N. Y. Suppl. 44; Jarvis *v.* Northern New York Marble Co., 55 N. Y. App. Div. 272, 67 N. Y. Suppl. 78; Wyman *v.* Orr, 47 N. Y. App. Div. 136, 62 N. Y. Suppl. 195; Spaulding *v.* O'Brien, 26 Misc. 184, 56 N. Y. Suppl. 1095.

Rhode Island.— Vartanian *v.* New York, etc., R. Co., 25 R. I. 398, 56 Atl. 184; Whipple *v.* New York, etc., R. Co., 19 R. I. 587, 35 Atl. 305, 61 Am. St. Rep. 796.

South Dakota.— Carlson *v.* Sioux Falls Water Co., 8 S. D. 47, 65 N. W. 419.

Texas.— Galveston, etc., R. Co. *v.* Smith, 24 Tex. Civ. App. 127, 57 S. W. 999; Missouri, etc., R. Co. *v.* Blackman, 32 Tex. Civ. App. 200, 74 S. W. 74; San Antonio, etc., R. Co. *v.* Lindsey, 27 Tex. Civ. App. 316, 65 S. W. 668; Gulf, etc., R. Co. *v.* Gray, 25 Tex. Civ. App. 99, 63 S. W. 927.

Utah.— Faulkner *v.* Mammoth Min. Co., 23 Utah 437, 66 Pac. 799.

Washington.— Johnson *v.* Tacoma Mill Co., 22 Wash. 88, 60 Pac. 53; Columbia, etc., R. Co. *v.* Hawthorne, 3 Wash. Terr. 353, 19 Pac. 25.

United States.— Crawford *v.* American Steel, etc., Co., 123 Fed. 275, 59 C. C. A. 293; Rockport Granite Co. *v.* Bjornholm, 115 Fed. 947, 53 C. C. A. 429.

See 34 Cent. Dig. tit. "Master and Servant," §§ 610, 614, 616, 623.

Latent defects are not a part of the ordinary risk which an employee assumes as incident to his employment. Clowers *v.* Wabash, etc., R. Co., 21 Mo. App. 213.

The fact that the master and servant have equal opportunities to discover a defect will not defeat a recovery by the servant if the defect was unknown to him, and reasonable care on his part would not have disclosed it. Nicholds *v.* Crystal Plate-Glass Co., (Mo. 1894) 27 S. W. 516; Jarvis *v.* Northern New York Marble Co., 55 N. Y. App. Div. 272, 67 N. Y. Suppl. 78.

Latent defects unknown to master.— If there is no neglect of due and ordinary care and diligence on the part of the master, and the injury is caused by latent defects, unknown alike to the master and the servant, and not discoverable by due and ordinary skill and diligence, it is a misadventure falling among the casualties incident to the business, and for which no one can be blamed. But if the defects which cause the injury are actually unknown either to the master or the servant, and not discoverable by due and ordinary inspection, and yet are such as result from a neglect of reasonable and ordinary care and diligence on the part of the master, the master will be liable in damages for the injury. Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312.

69. Salem Stone, etc., Co. *v.* Tepps, 10 Ind. App. 516, 38 N. E. 229; Pittsburgh, etc., R. Co. *v.* Woodward, 9 Ind. App. 169, 36 N. E. 294; Speed *v.* Atlantic, etc., R. Co., 71 Mo. 303. But see Carlson *v.* Sioux Falls Water Co., 5 S. D. 402, 59 N. W. 217.

70. *Georgia.*— Hazlehurst *v.* Brunswick Lumber Co., 94 Ga. 535, 19 S. E. 756.

Indiana.— Vincennes Water-Supply Co. *v.* White, 124 Ind. 376, 24 N. E. 747; Reitman *v.* Stolte, 120 Ind. 314, 20 N. E. 304; Guedelhofer *v.* Ernsting, 23 Ind. App. 188, 55 N. E. 113.

Massachusetts.—Cunningham *v.* Lynn, etc., R. Co., 170 Mass. 298, 49 N. E. 440.

South Dakota.— Carlson *v.* Sioux Falls Water Co., 5 S. D. 402, 59 N. W. 217.

Texas.— Texas, etc., R. Co. *v.* French, 86 Tex. 96, 23 S. W. 642 [*reversing* (Civ. App. 1893) 22 S. W. 866].

United States.— Thompson *v.* Chicago, etc., R. Co., 14 Fed. 564, 4 McCrary 629.

Canada.— Rudd *v.* Bell, 13 Ont. 47.

See 34 Cent. Dig. tit. "Master and Servant," § 611.

71. Ocean Steamship Co. *v.* Matthews, 86 Ga. 418, 12 S. E. 632; Nicholds *v.* Crystal Plate-Glass Co., 126 Mo. 55, 28 S. W. 991; Gorman *v.* McArdle, 67 Hun (N. Y.) 484, 22 N. Y. Suppl. 479.

The mere daily use of a railway water tank will not charge an employee with notice of latent defects in the apparatus connected with it. Missouri, etc., R. Co. *v.* Gordon, 11 Tex. Civ. App. 672, 33 S. W. 684.

72. *Massachusetts.*— Austin *v.* Boston, etc., R. Co., 164 Mass. 282, 41 N. E. 288.

New York.— Ryan *v.* Porter Mfg. Co., 57 Hun 253, 10 N. Y. Suppl. 774; McGrath *v.* Walsh, 15 Daly 210, 4 N. Y. Suppl. 705.

defective conditions. The mere fact that he could see and know the defect will not debar a recovery, unless the danger is so open and apparent that no ordinarily prudent person would encounter it.[73]

e. Risks Outside Scope of Employment. The master is not liable for injuries resulting to a servant from causes open to the observation of the servant, and which it requires no special skill or training to foresee are likely to injure him, even though the undertaking be out of the line of his employment; but he is liable for injuries resulting from defects unknown to the servant, but known to the master or ascertainable by ordinary care on his part.[74]

7. Inexperienced or Youthful Servant[75] — a. In General. The fact that a servant is young or inexperienced does not of itself relieve him from the assumption of ineidental, known, or obvious risks,[76] unless his youth or inexperience is

Texas.— Gulf, etc., R. Co. *v.* Hohl, (Civ. App. 1895) 29 S. W. 1131.

Virginia.— Bertha Zinc Co. *v.* Martin, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999.

Washington.— Schulz *v.* Johnson, 7 Wash. 403, 35 Pac. 130.

See 34 Cent. Dig. tit. "Master and Servant," § 612.

73. *Illinois.*— Howe *v.* Medaris, 82 Ill. App. 515.

Maine.— Langlois *v.* Maine Cent. R. Co., 84 Me. 161, 24 Atl. 804.

Massachusetts.— Pingree *v.* Leyland, 135 Mass. 398.

Michigan.— Alford *v.* Metcalf, 74 Mich. 369, 42 N. W. 52.

Minnesota.— Stiller *v.* Bohn Mfg. Co., 80 Minn. 1, 82 N. W. 981; Newhart *v.* St. Paul City R. Co., 51 Minn. 42, 52 N. W. 983; Bengston *v.* Chicago, etc., R. Co., 47 Minn. 486, 50 N. W. 531.

Missouri.— Waldhier *v.* Hannibal, etc., R. Co., 87 Mo. 37; Weldon *v.* Omaha, etc., R. Co., 93 Mo. App. 668, 67 S. W. 698; Booth *v.* Kansas City, etc., Air Line, 76 Mo. App. 516; Reichla *v.* Gruensfelder, 52 Mo. App. 43; Jones *v.* St. Louis, etc., Packet Co., 43 Mo. App. 398; Fugler *v.* Bothe, 43 Mo. App. 44.

New York.— Mickee *v.* Walter A. Wood Mowing, etc., Mach. Co., 70 Hun 456, 24 N. Y. Suppl. 501; Freeman *v.* Glens Falls Paper-Mill Co., 61 Hun 125, 15 N. Y. Suppl. 657.

Rhode Island.— Cox *v.* American Agricultural Chemical Co., 24 R. I. 503, 53 Atl. 871, 60 L. R. A. 629.

Washington.— Shoemaker *v.* Bryant Lumber, etc., Mill Co., 27 Wash. 637, 68 Pac. 380.

United States.— Everhard *v.* Diamond Match Co., 98 Fed. 555; Blumenthal *v.* Craig, 81 Fed. 320, 26 C. C. A. 427.

See 34 Cent. Dig. tit. "Master and Servant," § 613.

But *compare* Missouri, etc., R. Co. *v.* Wood, (Tex. Civ. App. 1896) 35 S. W. 879, where it was held that a servant using defective appliances furnished by the master, with knowledge of the defects, assumes the risk of injuries therefrom, notwithstanding they were not so unsafe as to render it patent that they could not be used without danger of injury.

74. Cummings *v.* Collins, 61 Mo. 520. See also Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168, 24 S. W. 106; Myers *v.* Hudson Iron Co., 150 Mass. 125, 22 N. E. 631, 15 Am. St. Rep. 176.

75. **Care required of master** see *supra*, IV, A, 1, d.

Contributory negligence see *infra*, IV, F, 2, b.

Injury avoidable by care of master see *infra*, IV, E, 10, a.

76. *Alabama.*— Alabama Mineral R. Co. *v.* Marcus, 115 Ala. 389, 22 So. 135.

Illinois.— Chicago, etc., R. Co. *v.* Eggman, 59 Ill. App. 680.

Indiana.— Evansville, etc., R. Co. *v.* Henderson, 134 Ind. 636, 33 N. E. 1021; Brazil, etc., Coal Co. *v.* Cain, 98 Ind. 282.

Kansas.— Union Pac. R. Co. *v.* Estes, 37 Kan. 715, 16 Pac. 131.

Louisiana.— Carrierre *v.* McWilliams, 104 La. 678, 29 So. 333.

Missouri.—Carter *v.* Baldwin, 107 Mo. App. 217, 81 S. W. 204.

Nebraska.— Evans Laundry Co. *v.* Crawford, 67 Nebr. 153, 93 N. W. 177, 94 N. W. 814; Omaha Bottling Co. *v.* Theiler, 59 Nebr. 257, 80 N. W. 821, 80 Am. St. Rep. 673.

New Jersey.— Carrington *v.* Mueller, 65 N. J. L. 244, 47 Atl. 564; Dunn *v.* McNamee, 59 N. J. L. 498, 37 Atl. 61.

New York.— De Graff *v.* New York Cent., etc., R. Co., 76 N. Y. 125; Sitts *v.* Waiontha Knitting Co., 94 N. Y. App. Div. 38, 87 N. Y. Suppl. 911; Reardon *v.* New York Consol. Card Co., 51 N. Y. Super. Ct. 134; Schliermann *v.* Hammond Typewriter Co., 11 Misc. 546, 32 N. Y. Suppl. 748; Malsky *v.* Schumacher, 7 Misc. 8, 27 N. Y. Suppl. 331.

Ohio.— Weigand *v.* Mitchell, 3 Ohio Dec. (Reprint) 298.

Pennsylvania.— Sheetram *v.* Treeler Stave, etc., Co., 13 Pa. Super. Ct. 219.

Rhode Island.— Langlois *v.* Dunn Worsted Mills, 25 R. I. 645, 57 Atl. 910.

Texas.— International, etc., R. Co. *v.* Arias, 10 Tex. Civ. App. 190, 30 S. W. 446. But see as to minors Texas, etc., R. Co. *v.* Brick, 83 Tex. 598, 20 S. W. 511.

Virginia.— Norfolk, etc., R. Co. *v.* Cottrell, 83 Va. 512, 3 S. E. 123.

West Virginia.— Williams *v.* Belmont Coal, etc., Co., 55 W. Va. 84, 46 S. E. 802.

Wisconsin.— Casey *v.* Chicago, etc., R. Co., 90 Wis. 113, 62 N. W. 624; Dougherty *v.* West Superior Iron, etc., Co., 88 Wis. 343, 60 N. W. 274.

such as to prevent his appreciation of the danger to which he is exposed.[77] It is, however, the duty of the master to instruct a young or inexperienced servant;[78] but where he has given him such reasonable instructions and cautions regarding the dangers of his employment as are best calculated to enable him to avoid injury, the servant is upon the same footing as any other servant, and will be deemed to have assumed the usual and ordinary risks incident to his employment.[79]

b. Knowledge by Master of Servant's Age or Inexperience. A master has the right to presume that a servant is qualified to perform the duties of his employment, and is not liable for injuries caused by the servant's inexperience, unless he was informed thereof.[80] So too a master is not liable for injuries to an infant, if his age, intelligence, and experience were such as to induce a man of ordinary care and prudence to believe him qualified for his employment.[81]

c. Knowledge by Servant of Defect or Danger. Where a servant by reason of his youth or inexperience is not acquainted with the dangers incident to his employment, he does not assume the risk thereof until the master apprises him of the dangers.[82] Mere knowledge of a defect without appreciation of the danger

United States.— Moon-Anchor Consol. Gold Mines *v.* Hopkins, 111 Fed. 298, 49 C. C. A. 347; Cudahy Packing Co. *v.* Marcan, 106 Fed. 645, 45 C. C. A. 515, 54 L. R. A. 258.

See 34 Cent. Dig. tit. "Master and Servant," §§ 601, 608, 609.

77. *Missouri.*— Henderson *v.* Kansas City, 177 Mo. 477, 76 S. W. 1045.

New York.— Pursley *v.* Edge Moor Bridge Works, 168 N. Y. 589, 60 N. E. 1119 [*affirming* 56 N. Y. App. Div. 71, 67 N. Y. Suppl. 719]; Hickey *v.* Taaffe, 105 N. Y. 26, 12 N. E. 286; Kern *v.* De Castro, etc., Sugar Refining Co., 5 N. Y. Suppl. 548 [*reversed* on other grounds in 125 N. Y. 50, 25 N. E. 1071].

West Virginia.— Turner *v.* Norfolk, etc., R. Co., 40 W. Va. 675, 22 S. E. 83.

Wisconsin.— Guinard *v.* Knapp, 90 Wis. 123, 62 N. W. 625, 48 Am. St. Rep. 901; Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565.

United States.— Western Union Tel. Co. *v.* Burgess, 108 Fed. 26, 47 C. C. A. 168.

See 34 Cent. Dig. tit. "Master and Servant," § 601.

The test is whether an ordinarily prudent person of the servant's age and experience under like circumstances would have appreciated the danger. Craven *v.* Smith, 89 Wis. 119, 61 N. W. 317.

78. Uninstructed servant does not assume risks.— *Louisiana.*— James *v.* Rapides Lumber Co., 50 La. Ann. 717, 23 So. 469, 44 L. R. A. 33.

Maine.— Drapeau *v.* International Paper Co., 96 Me. 299, 52 Atl. 647.

Montana.— Coleman *v.* Perry, 28 Mont. 1, 72 Pac. 42.

Pennsylvania.— Welsh *v.* Butz, 202 Pa. St. 59, 51 Atl. 591.

Texas.— Texas, etc., R. Co. *v.* Gardner, 29 Tex. Civ. App. 90, 69 S. W. 217.

England.— Grizzle *v.* Frost, 3 F. & F. 622.

The fact that the servant solicited the employment and represented himself to be competent does not relieve the master of the duty of instructing him, if he knows that the servant is inexperienced, unless the danger is so obvious that even an inexperienced man would escape it by the exercise of ordinary care. Louisville, etc., R. Co. *v.* Miller, 104 Fed. 124, 43 C. C. A. 436. See also Felton *v.* Girardy, 104 Fed. 127, 43 C. C. A. 439.

Where there are two modes in which the duty of a servant can be discharged, one safe and the other dangerous, and the servant is young and inexperienced and is not instructed, it cannot be declared as matter of law that the risk of making a wrong choice is one of the incidental risks which he accepted when he entered the service. Royer *v.* Tinkler, 16 Pa. Super. Ct. 457; Sheetram *v.* Treeler Stave, etc., Co., 13 Pa. Super. Ct. 219.

79. Evans Laundry Co. *v.* Crawford, 67 Nebr. 153, 93 N. W. 177, 94 N. W. 814. See also King *v.* Ford River Lumber Co., 93 Mich. 172, 53 N. W. 10; Schliermann *v.* Hammond Typewriter Co., 11 Misc. (N. Y.) 546, 32 N. Y. Suppl. 748; McDevitt *v.* Miller, 17 Lanc. L. Rev. (Pa.) 247.

If the servant is too young to realize, after full instruction, the danger of the work, and the necessity of exercising care, the master puts or keeps him at such work at his own risk. Hickey *v.* Taaffe, 105 N. Y. 26, 12 N. E. 286.

80. Whittaker *v.* Coombs, 14 Ill. App. 498; Weigand *v.* Mitchell, 3 Ohio Dec. (Reprint) 298; Sunney *v.* Holt, 15 Fed. 880.

81. De Lozier *v.* Kentucky Lumber Co., 18 S. W. 451, 13 Ky. L. Rep. 818. See also Sinclair *v.* Elizabethtown Milling Co., 16 S. W. 450, 13 Ky. L. Rep. 120.

82. *Arkansas.*— Emma Cotton Seed Oil Co. *v.* Hale, 56 Ark. 232, 19 S. W. 600; St. Louis, etc., R. Co. *v.* Higgins, 53 Ark. 458, 14 S. W. 653.

Colorado.— Colorado Midland R. Co. *v.* O'Brien, 16 Colo. 219, 27 Pac. 701.

Georgia.— Cartter *v.* Cotter, 88 Ga. 286, 14 S. E. 476.

Maryland.— Pikesville, etc., R. Co. *v.* State, 88 Md. 563, 42 Atl. 214.

Missouri.— Henderson *v.* Kansas City, 177 Mo. 477, 76 S. W. 1045.

is not enough to charge him with assumption of risk;[83] but his youth or inexperience will not excuse him, if he does, or ought to, know and appreciate the danger to which he is exposed.[84]

d. Comparative Knowledge of Master and Servant. Where neither master nor servant has actual knowledge of a defect in machinery or appliances, but the servant is unskilled, and is not charged with the duty of inspection, knowledge of the defect will not be so readily imputed to him as to the master, upon whom rests the duty of inspection.[85]

e. Obvious or Latent Dangers.[86] A servant, although under age or inexperienced, assumes all patent and obvious risks of his employment which he has sufficient intelligence to understand and appreciate.[87] Latent risks are not assumed unless brought to the servant's knowledge.[88]

Pennsylvania.— McCray *v.* Sterling Varnish Co., 7 Pa. Super. Ct. 610.

Rhode Island.— McGar *v.* National, etc., Worsted Mills, 22 R. I. 347, 47 Atl. 1092.

Texas.— Galveston, etc., R. Co. *v.* Hitzfelder, (Civ. App. 1900), 66 S. W. 707.

United States.— Sink *v.* Sikes Co., 134 Fed. 144.

See 34 Cent. Dig. tit. "Master and Servant," § 603.

No presumption of knowledge see Anderson *v.* Illinois Cent. R. Co., 109 Iowa 524, 80 N. W. 561.

83. McDermott *v.* Iowa Falls, etc., R. Co., (Iowa 1891) 47 N. W. 1037; Goins *v.* Chicago, etc., R. Co., 47 Mo. App. 173; Goins *v.* Chicago, etc., R. Co., 37 Mo. App. 221; Northern Pac. Coal Co. *v.* Richmond, 58 Fed. 756, 7 C. C. A. 485.

84. Known and appreciated dangers assumed.— *Indiana.*— Pennsylvania Co. *v.* Congdon, 134 Ind. 226, 33 N. E. 795, 39 Am. St. Rep. 251.

Louisiana.— Tillotson *v.* Texas, etc., R. Co., 44 La. Ann. 95, 10 So. 400.

Maryland.—Michael *v.* Stanley, 75 Md. 464, 23 Atl. 1094.

Michigan.— McGinnis *v.* Canada Southern Bridge Co., 49 Mich. 466, 13 N. W. 819.

New York.— Hickey *v.* Taaffe, 105 N. Y. 26, 12 N. E. 286; Buckley *v.* Gutta Percha, etc., Mfg. Co., 41 Hun 450; Oszkoscil *v.* Eagle Pencil Co., 57 N. Y. Super. Ct. 217 [*affirmed* in 119 N. Y. 631, 23 N. E. 1145]; Headifen *v.* Cooper, 6 Misc. 263, 26 N. Y. Suppl. 763.

Pennsylvania.— Greenway *v.* Conroy, 160 Pa. St. 185, 28 Atl. 692, 40 Am. St. Rep. 715.

West Virginia.—Williams *v.* Belmont Coal, etc., Co., 55 W. Va. 84, 46 S. E. 802.

Wisconsin.— Upthegrove *v.* Jones, etc., Coal Co., 118 Wis. 673, 96 N. W. 385; Kreider *v.* Wisconsin River Paper, etc., Co., 110 Wis. 645, 86 N. W. 662; Herold *v.* Pfister, 92 Wis. 417, 66 N. W. 355.

United States.— Terry *v.* Schmidt, 116 Fed. 627, 54 C. C. A. 83; Cudahy Packing Co. *v.* Marcan, 106 Fed. 645, 45 C. C. A. 515, 54 L. R. A. 258; E. S. Higgins Carpet Co. *v.* O'Keefe, 79 Fed. 900, 25 C. C. A. 220; Goff *v.* Norfolk, etc., R. Co., 36 Fed. 299.

See 34 Cent. Dig. tit. "Master and Servant," § 603.

On the issue of assumption of risk, the age and experience of the servant are to be considered in determining whether he knew or ought to have known and appreciated the peril. Shebeck *v.* National Cracker Co., 120 Iowa 414, 94 N. W. 930.

85. Pennsylvania Co. *v.* Witte, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377.

86. Obvious and latent dangers generally see *supra*, IV, E, 6.

87. *Illinois.*— Ritchie *v.* Krueger, 102 Ill. App. 654; U. S. Rolling Stock Co. *v.* Chadwick, 35 Ill. App. 474.

Kentucky.— Kelly *v.* Barber Asphalt Co., 93 Ky. 363, 20 S. W. 271, 14 Ky. L. Rep. 356.

Massachusetts.— Cohen *v.* Hamblin, etc., Mfg. Co., 186 Mass. 544, 71 N. E. 948; O'Connor *v.* Whittall, 169 Mass. 563, 48 N. E. 844; Goodridge *v.* Washington Mills Co., 160 Mass. 234, 35 N. E. 484; Downey *v.* Sawyer, 157 Mass. 418, 32 N. E. 654; Probert *v.* Phipps, 149 Mass. 258, 21 N. E. 370.

Michigan.— Dysinger *v.* Cincinnati, etc., R. Co., 93 Mich. 646, 53 N. W. 825; Melzer *v.* Peninsular Car Co., 76 Mich. 94, 42 N. W. 1078.

Minnesota.— Hefferen *v.* Northern Pac. R. Co., 45 Minn. 471, 48 N. W. 1, 526.

Missouri.—Carter *v.* Baldwin, 107 Mo. App. 217, 81 S. W. 204; Goins *v.* Chicago, etc., R. Co., 37 Mo. App. 676.

New Jersey.— Smith *v.* Irwin, 51 N. J. L. 507, 18 Atl. 852, 14 Am. St. Rep. 699.

New York.— Crown *v.* Orr, 140 N. Y. 450, 35 N. E. 648; Evans *v.* Lake Shore, etc., R. Co., 12 Hun 289; McCann *v.* Mathison, 12 Misc. 214, 33 N. Y. Suppl. 263; Evans *v.* Vogt, etc., Mfg. Co., 5 Misc. 330, 25 N. Y. Suppl. 509.

Pennsylvania.— O'Keefe *v.* Thorn, (1889) 16 Atl. 737; Sheetram *v.* Trexler Stove, etc., Co., 12 Pa. Super. Ct. 219.

Texas.— Hightower *v.* Gray, 36 Tex. Civ. App. 674, 83 S. W. 254.

Vermont.— Williamson *v.* Sheldon Marble Co., 66 Vt. 427, 29 Atl. 669.

Wisconsin.— Hazen *v.* West Superior Lumber Co., 91 Wis. 208, 64 N. W. 857; Burnell *v.* West Side R. Co., 87 Wis. 387, 58 N. W. 772.

United States.— Townsend *v.* Tangles, 41 Fed. 919.

See 34 Cent. Dig. tit. "Master and Servant," § 604.

88. Evans *v.* Josephine Mills, 119 Ga. 448,

f. Risks Outside Scope of Employment. If a servant of full age and ordinary intelligence, upon being required by his master to perform duties more complicated and dangerous than those embraced in his original hiring, undertakes the same, and is injured by reason of his ignorance and inexperience, he cannot recover.[89] In the case of a child, however, it is the duty of the master to see that he does not assume risks outside of the scope of his employment.[90]

g. Compliance With Commands or Threats.[91] Where a young or inexperienced servant is injured while acting in obedience to the commands of, or under the compulsion of threats by, the master, he will not be held to have assumed the risks involved in doing so,[92] unless he knew and appreciated the danger.[93]

h. Neglect of Statutory Duty. A young or inexperienced servant does not assume risks arising upon his master's neglect of a statutory duty;[94] and where a statute forbids the employment of a child under a certain age, it is in effect a determination that a child of that age does not possess the judgment and discretion necessary for the pursuit of a dangerous work, and is not as a matter of law chargeable with the assumption of any risks of the employment.[95]

8. Compliance With Commands or Threats[96]**— a. In General.** A servant acting under the commands or threats of his master does not assume the risk incident to the act commanded,[97] unless the danger incurred is fully appreciated and is such

46 S. E. 674; Gagnon *v.* Seaconnet Mills, 165 Mass. 221, 43 N. E. 82; Wheeler *v.* Wason Mfg. Co., 135 Mass. 294; Bannon *v.* Lutz, 158 Pa. St. 166, 27 Atl. 890.

89. Cheney *v.* Middlesex Co., 161 Mass. 296, 37 N. E. 175; Goodnow *v.* Walpole Emery Mills, 146 Mass. 261, 15 N. E. 576; Reed *v.* Stockmeyer, 74 Fed. 186, 20 C. C. A. 381. But *compare* Browning *v.* Kasten, 107 Mo. App. 59, 80 S. W. 354; Gulf, etc., R. Co. *v.* Newman, 27 Tex. Civ. App. 77, 64 S. W. 790.

90. Robertson *v.* Cornelson, 34 Fed. 716. See also Weaver *v.* Iselin, 161 Pa. St. 386, 29 Atl. 49.

91. Authority to give see *infra*, IV, E, 8, a.

92. *Illinois.*— Hinckley *v.* Horazdowsky, 133 Ill. 359, 24 N. E. 421, 23 Am. St. Rep. 618, 8 L. R. A. 490.

Indiana.—Brazil Block Coal Co. *v.* Gaffney, 119 Ind. 455, 21 N. E. 1102, 12 Am. St. Rep. 422, 4 L. R. A. 850.

Maine.— Drapeau *v.* International Paper Co., 96 Me. 299, 52 Atl. 647.

Michigan.— Chicago, etc., R. Co. *v.* Bayfield, 37 Mich. 205.

Missouri.— Dowling *v.* Allen, 102 Mo. 213, 14 S. W. 751.

New York.— Kranz *v.* Long Island R. Co., 123 N. Y. 1, 25 N. E. 206, 20 Am. St. Rep. 716.

Texas.— Waxahachie Oil Co. *v.* McLain, 28 Tex. Civ. App. 334, 66 S. W. 226; Galveston, etc., R. Co. *v.* Sanchez, (Civ. App. 1901) 65 S. W. 893; Dillingham *v.* Harden, 6 Tex. Civ. App. 474, 26 S. W. 914.

See 34 Cent. Dig. tit. "Master and Servant," § 606.

93. Williams *v.* Churchill, 137 Mass. 243, 50 Am. Rep. 304; Leitner *v.* Grieb, 104 Mo. App. 173, 77 S. W. 764.

94. Thompson *v.* Johnston Bros. Co., 86 Wis. 576, 57 N. W. 298.

95. Marino *v.* Lehmaier, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 801; O'Brien *v.* Sanford, 22 Ont. 136; Fahey *v.* Jepheott, 2 Ont. L. Rep. 449 [*reversing* 1 Ont. L. Rep. 18, and *overruling* Roberts *v.* Taylor, 31 Ont. 10].

96. Contributory negligence see *infra*, IV, F, 5, f.

Risks outside scope of employment see *infra*, IV, E, 9.

97. *Delaware.*— Karezewski *v.* Wilmington City R. Co., 4 Pennew. 24, 54 Atl. 746.

Illinois.— Henrietta Coal Co. *v.* Campbell, 211 Ill. 216, 71 N. E. 863 [*affirming* 112 Ill. App. 452]; Barrett, etc., Co. *v.* Schlapka, 208 Ill. 426, 70 N. E. 343 [*affirming* 110 Ill. App. 672]; Slack *v.* Harris, 200 Ill. 96, 65 N. E. 669 [*affirming* 101 Ill. App. 527]; Pressed Steel Car Co. *v.* Herath, 110 Ill. App. 596 [*affirmed* in 207 Ill. 576, 69 N. E. 959]; Kapaczyuski *v.* Wells, etc., Co., 110 Ill. App. 477; Chicago Hair, etc., Co. *v.* Mueller, 106 Ill. App. 21 [*affirmed* in 203 Ill. 558, 68 N. E. 51]; Illinois Steel Co. *v.* Ryska, 102 Ill. App. 347 [*affirmed* in 200 Ill. 280, 65 N. E. 734]; Hass *v.* Chicago, etc., R. Co., 97 Ill. App. 624; Pagels *v.* Meyer, 88 Ill. App. 169; Morris *v.* Pfeffer, 77 Ill. App. 516; Wells, etc., Co. *v.* Gortorski, 50 Ill. App. 445.

Indiana.—Indianapolis, etc., R. Co. *v.* Love, 10 Ind. 544; Lebanon *v.* McCoy, 12 Ind. App. 500, 40 N. E. 700.

Iowa.— Stomne *v.* Hanford Produce Co., 108 Iowa 137, 78 N. W. 841.

Kansas.—Wurtenberger *v.* Metropolitan St. R. Co., 68 Kan. 642, 75 Pac. 1049.

Kentucky.— Illinois Cent. R. Co. *v.* Keebler, 84 S. W. 1167, 27 Ky. L. Rep. 305; Southern R. Co. *v.* Hart, 64 S. W. 650, 23 Ky. L. Rep. 1054 [*distinguishing* Chesapeake, etc., R. Co. *v.* Hennessey, 96 Fed. 713, 38 C. C. A. 307].

Louisiana.— Stewart *v.* Texas, etc., R. Co., 113 La. 525, 37 So. 129.

Massachusetts.— Lord *v.* Wakefield, 185 Mass. 214, 70 N. E. 123; Millard *v.* West End St. R. Co., 173 Mass. 512, 53 N. E.

that no person of ordinary prudence would consent to encounter it;[98] and the mere fact that the servant knows that there is some danger will not defeat his right to recover if in obeying he has acted with ordinary care under the circum-

900; Haley *v.* Case, 142 Mass. 316, 7 N. E. 877.

Minnesota.— Hagerty *v.* Evans, 87 Minn. 435, 92 N. W. 399.

Missouri.— Bane *v.* Irwin, 172 Mo. 306, 72 S. W. 522; Stephens *v.* Hannibal, etc., R. Co., 86 Mo. 221, 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336; Herriman *v.* Chicago, etc., R. Co., 27 Mo. App. 435.

New York.— Eichholz *v.* Niagara Falls Hydraulic Power, etc., Co., 174 N. Y. 519, 66 N. E. 1107 [*affirming* 68 N. Y. App. Div. 441, 73 N. Y. Suppl. 842]; Sweeney *v.* Berlin, etc., Envelope Co., 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722.

Pennsylvania.—Patterson *v.* Pittsburg, etc., R. Co., 76 Pa. St. 389, 18 Am. Rep. 412.

Tennessee.— East Tennessee, etc., R. Co. *v.* Duffield, 12 Lea 63, 47 Am. Rep. 319.

Texas.— Wall *v.* Texas Pac. R. Co., 2 Tex. Unrep. Cas. 432; Ft. Worth, etc., R. Co. *v.* Wrenn, 26 Tex. Civ. App. 628, 50 S. W. 210.

United States.— Allen *v.* Gilman, 127 Fed. 609; Miller *v.* Union Pac. R. Co., 17 Fed. 67, 5 McCrary 300.

England.— Thrussell *v.* Handyside, 20 Q. B. D. 359, 52 J. P. 279, 57 L. J. Q. B. 347, 58 L. T. Rep. N. S. 344 [*distinguishing* Woodley *v.* Metropolitan Dist. R. Co., 2 Ex. D. 384, 46 L. J. Exch. 521, 36 L. T. Rep. N. S. 419]; Williams *v.* Clough, 3 H. & N. 258, 27 L. J. Exch. 325.

See 34 Cent. Dig. tit. "Master and Servant," §§ 648–650.

Where a master coerces a servant into entering a dangerous employment, the servant does not assume the risk. Wells, etc., Co. *v.* Gortorski, 50 Ill. App. 445.

Non-assumption of risk by seamen see Eldridge *v.* Atlas Steamship Co., 134 N. Y. 127, 32 N. E. 66 [*affirming* 55 Hun 309, 8 N. Y. Suppl. 433].

Non-assumption of risk by convicts see Chattahoochee Brick Co. *v.* Braswell, 92 Ga. 631, 18 S. E. 1015.

98. Obvious and imminent risks assumed.— *California.*— Taylor *v.* Baldwin, 78 Cal. 517, 21 Pac. 124.

Colorado.— Greeley *v.* Foster, 32 Colo. 292, 75 Pac. 351.

Delaware.— Punkowski *v.* New Castle Leather Co., 4 Pennew. 544, 57 Atl. 559.

Georgia.— Worlds *v.* Georgia R. Co., 99 Ga. 283, 25 S. E. 646; Bell *v.* Western, etc., R. Co., 70 Ga. 566.

Illinois.— Henrietta Coal Co. *v.* Campbell, 211 Ill. 216, 71 N. E. 863 [*affirming* 112 Ill. App. 452]; Pressed Steel Car Co. *v.* Herath, 207 Ill. 576, 69 N. E. 959 [*affirming* 110 Ill. App. 596]; Illinois Steel Co. *v.* Wierzbicky, 206 Ill. 201, 68 N. E. 1101 [*affirming* 107 Ill. App. 69]; Slack *v.* Harris, 200 Ill. 96, 65 N. E. 669 [*affirming* 101 Ill. App. 527]; Equitable Powder Mfg. Co. *v.* Green, 109 Ill. App. 403; Swift *v.* Campbell, 97 Ill. App. 360; Pagels *v.* Meyer, 88 Ill. App. 169; McArthur Bros. Co. *v.* Nordstrom, 87 Ill. App. 554; Morris *v.* Pfeffer, 77 Ill. App. 516; Illinois Cent. R. Co. *v.* Neer, 26 Ill. App. 356.

Indiana.— Bowles *v.* Indiana R. Co., 27 Ind. App. 672, 62 N. E. 94, 87 Am. St. Rep. 279; Indiana Natural, etc., Gas Co. *v.* Marshall, 22 Ind. App. 121, 52 N. E. 232; Stuart *v.* New Albany Mfg. Co., 15 Ind. App. 184, 43 N. E. 961; Lebanon *v.* McCoy, 12 Ind. App. 500, 70 N. E. 700.

Kansas.— Wurtenberger *v.* Metropolitan St. R. Co., 68 Kan. 642, 75 Pac. 1049.

Kentucky.— Bradshaw *v.* Louisville, etc., R. Co., 21 S. W. 346, 14 Ky. L. Rep. 688; Brice *v.* Louisville, etc., R. Co., 9 S. W. 288, 10 Ky. L. Rep. 526.

Massachusetts.— Wilson *v.* Tremont, etc., Mills, 159 Mass. 154, 34 N. E. 90; Haley *v.* Case, 142 Mass. 316, 7 N. E. 877; Russell *v.* Tillotson, 140 Mass. 201, 4 N. E. 231.

Mississippi.—Truley *v.* J. E. North Lumber Co., (1904) 36 So. 4.

Missouri.— Harff *v.* Green, 168 Mo. 308, 67 S. W. 576; Holloran *v.* Union Iron, etc., Co., 133 Mo. 470, 35 S. W. 260; Stephens *v.* Hannibal, etc., R. Co., 86 Mo. 221, 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336; Leitner *v.* Grieb, 104 Mo. App. 173, 77 S. W. 764; Zentz *v.* Chappell, 103 Mo. App. 208, 77 S. W. 86.

Nebraska.— Weed *v.* Chicago, etc., R. Co., (1904) 99 N. W. 827.

New York.— Miller *v.* Grieme, 53 N. Y. App. Div. 276, 65 N. Y. Suppl. 813; O'Connell *v.* Clark, 22 N. Y. App. Div. 466, 48 N. Y. Suppl. 74; Greves *v.* Brewer, 4 N. Y. App. Div. 327, 38 N. Y. Suppl. 566.

North Carolina.— Orr *v.* Southern Bell Tel. etc., Co., 130 N. C. 627, 41 S. E. 880; Allison *v.* Southern R. Co., 129 N. C. 336, 40 S. E. 91.

Rhode Island.— Mayott *v.* Norcross, 24 R. I. 187, 52 Atl. 894.

Texas.— Texas, etc., R. Co. *v.* Bradford, 66 Tex. 732, 2 S. W. 595, 59 Am. Rep. 639; Bering Mfg. Co. *v.* Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869; Newnom *v.* Southwestern Tel., etc., Co., (Civ. App. 1898) 47 S. W. 669; Jones *v.* Galveston, etc., R. Co., 11 Tex. Civ. App. 39, 31 S. W. 706.

Washington.— Christianson *v.* Pacific Bridge Co., 27 Wash. 582, 68 Pac. 191.

Wisconsin.— Hencke *v.* Ellis, 110 Wis. 532, 86 N. W. 171.

United States.— Dixon *v.* Western Union Tel. Co., 68 Fed. 630; Anderson *v.* Winston, 31 Fed. 528; Miller *v.* Union Pac. R. Co., 17 Fed. 67, 5 McCrary 300.

See 34 Cent. Dig. tit. "Master and Servant," §§ 648–650.

Risks assumed after instruction see Gorman *v.* Minneapolis, etc., R. Co., 117 Iowa 720, 90 N. W. 79.

stances.[99] These rules apply as well when the risk is without as when it is within the scope of the servant's employment.[1] and as well when the order is given by a vice-principal or other authorized agent as when it is given by the master;[2] and the fact that the servant obeys the order through fear of being discharged will not relieve him from the assumption of obvious and imminent risks.[3]

99. Danger must be obviously imminent.— *Illinois.*— Barnett, etc., Co. *v.* Schlapka, 208 Ill. 426, 70 N. E. 343 [*affirming* 110 Ill. App. 672]; Illinois Steel Co. *v.* Ryska, 200 Ill. 280, 65 N. E. 734 [*affirming* 102 Ill. App. 347]; Offutt *v.* World's Columbian Exposition Co., 175 Ill. 472, 51 N. E. 651 [*reversing* 73 Ill. App. 231]; Illinois Steel Co. *v.* Wierzbicky, 107 Ill. App. 69 [*affirmed* in 206 Ill. 201, 68 N. E. 1101]; Chicago Hair, etc., Co. *v.* Mueller, 106 Ill. App. 21 [*affirmed* in 203 Ill. 558, 68 N. E. 51]; Hass *v.* Chicago, etc., R. Co., 97 Ill. App. 624; McFadden *v.* Sollitt, 94 Ill. App. 271; Union Show Case Co. *v.* Blindauer, 75 Ill. App. 358.

Indiana.— Indianapolis, etc., R. Co. *v.* Love, 10 Ind. 544.

Kentucky.— Illinois Cent. R. Co. *v.* Keebler, 84 S. W. 1167, 27 Ky. L. Rep. 305.

Pennsylvania.—Patterson *v.* Pittsburg, etc., R. Co., 76 Pa. St. 389, 18 Am. Rep. 412.

Tennessee.— East Tennessee, etc., R. Co. *v.* Duffield, 12 Lea 63, 47 Am. Rep. 319.

United States.— Allen *v.* Gilman, 127 Fed. 609.

See 34 Cent. Dig. tit. "Master and Servant," §§ 648–650.

1. *Georgia.*— Blackman *v.* Thomson-Houston Electric Co., 102 Ga. 64, 29 S. E. 120.

Illinois.— Dallemand *v.* Saalfeldt, 175 Ill. 310, 51 N. E. 645, 48 L. R. A. 753, 67 Am. St. Rep. 214 [*affirming* 73 Ill. App. 151]; St. Louis Consol. Coal Co. *v.* Haenni, 146 Ill. 614, 35 N. E. 162 [*affirming* 48 Ill. App. 115]; Lalor *v.* Chicago, etc., R. Co., 52 Ill. 401, 4 Am. Rep. 616; Decatur Cereal Mill Co. *v.* Gogerty, 80 Ill. App. 632; George Lehman, etc., Co. *v.* Siggeman, 35 Ill. App. 161.

Indiana.— Cincinnati, etc., R. Co. *v.* Madden, 134 Ind. 462, 34 N. E. 227; Brazil Block Coal Co. *v.* Hoodlet, 129 Ind. 327, 27 N. E. 741; Chicago, etc., R. Co. *v.* Harney, 28 Ind. 28, 92 Am. Dec. 282; American Car, etc., Co. *v.* Clark, 32 Ind. App. 644, 70 N. E. 828; Indiana Natural, etc., Illuminating Gas Co. *v.* Marshall, 22 Ind. App. 121, 53 N. E. 322.

Iowa.— Branz *v.* Omaha, etc., R., etc., Co., 120 Iowa 406, 94 N. W. 906.

Michigan.— Brown *v.* Ann Arbor R. Co., 118 Mich. 205, 76 N. W. 407; Jones *v.* Lake Shore, etc., R. Co., 49 Mich. 573, 14 N. W. 551.

New York.— Fitzhenry *v.* Lamson, 19 N. Y. App. Div. 54, 45 N. Y. Suppl. 875. *Compare* Slatterly *v.* New York, etc., R. Co., 4 N. Y. Suppl. 910, in which the facts were held to show that the work ordered was within the scope of the servant's employment.

Pennsylvania.— Nuttal *v.* Shipbuilding Works, 4 Lanc. L. Rev. 161.

Texas.— International, etc., R. Co. *v.* Gaitanes, (Civ. App. 1902) 70 S. W. 101; Gulf, etc., R. Co. *v.* Newman, 27 Tex. Civ. App. 77, 64 S. W. 790; Ft. Worth, etc., R. Co. *v.* Wrenn, 20 Tex. Civ. App. 628, 50 S. W. 210.

Utah.— Frank *v.* Bullion Beck, etc., Min. Co., 19 Utah 35, 56 Pac. 419.

United States.— Felton *v.* Girardy, 104 Fed. 127, 43 C. C. A. 439; Miller *v.* Union Pac. R. Co., 17 Fed. 67, 5 McCrary 300; Thompson *v.* Chicago, etc., R. Co., 14 Fed. 564, 4 McCrary 629.

See 34 Cent. Dig. tit. "Master and Servant," § 655.

Facts held to show assumption of risks see McGhee *v.* Bell, (Ky. 1897) 39 S. W. 823; Wheeler *v.* Berry, 95 Mich. 250, 54 N. W. 876; Alford *v.* Metcalf, 74 Mich. 369, 42 N. W. 52; Mann *v.* Oriental Print Works, 11 R. I. 152; Houston, etc., R. Co. *v.* Fowler, 56 Tex. 452; Dixon *v.* Western Union Tel. Co., 71 Fed. 143.

2. *Indiana.*— Brazil Block Coal Co. *v.* Gaffney, 119 Ind. 455, 21 N. E. 1102, 12 Am. St. Rep. 422, 4 L. R. A. 850; Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 151, 5 N. E. 187.

Louisiana.— Bonnin *v.* Crowley, 112 La. 1025, 36 So. 842.

Massachusetts.— Patnode *v.* Warren Cotton Mills, 157 Mass. 283, 32 N. E. 161, 34 Am. St. Rep. 275.

New York.— Lofrano *v.* New York, etc., Water Co., 55 Hun 452, 8 N. Y. Suppl. 717 [*affirmed* in 130 N. Y. 658, 29 N. E. 1033].

Texas.— East Line, etc., R. Co. *v.* Scott, 68 Tex. 694, 5 S. W. 501; Hillsboro Oil Co. *v.* White, (Civ. App. 1899) 54 S. W. 432.

United States.— Gilmore *v.* Northern Pac. R. Co., 18 Fed. 866, 9 Sawy. 558. *Compare* Richmond, etc., R. Co. *v.* Finley, 63 Fed. 228, 12 C. C. A. 595; Hogan *v.* Northern Pac. R. Co., 53 Fed. 519, in which the facts were held to show an assumption of risk.

See 34 Cent. Dig. tit. "Master and Servant," § 657.

Risk of obedience to unauthorized order assumed see Parent *v.* Nashua Mfg. Co., 70 N. H. 199, 47 Atl. 261; Martin *v.* Highland Park Mfg. Co., 128 N. C. 264, 38 S. E. 876, 83 Am. St. Rep. 671; Mann *v.* Oriental Print Works, 11 R. I. 152; Watts *v.* Hart, 7 Wash. 178, 34 Pac. 423, 771.

3. Wormell *v.* Maine Cent. R. Co., 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321; Leary *v.* Boston, etc., R. Co., 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733; Gavigan *v.* Lake Shore, etc., R. Co., 110 Mich. 71, 67 N. W. 1097; Prentiss *v.* Kent Furniture Mfg. Co., 63 Mich. 478, 30 N. W. 109; Orr *v.* Southern Bell Tel. Co., 130 N. C. 627, 41 S. E. 880. *Compare* Erickson *v.* Milwaukee, etc., R. Co., 83 Mich. 281, 47 N. W. 237; Jones *v.* Lake Shore, etc., R. Co., 49 Mich. 573, 14 N. W. 551.

b. After Notice or Complaint. Where a servant has knowledge of a defect or danger, and calls the attention of the master to it, but is ordered to proceed with the work, he will not be held to have assumed the risk of so doing,[4] unless the danger is so manifest that a person of ordinary prudence and caution would not have incurred it.[5]

c. After Promise to Point Out Dangers. The rule that a servant engaging in a hazardous employment assumes the risks of the ordinary perils of the business does not apply where the servant is required by his master to enter upon a hazardous task, under an unfulfilled promise to point out its hazards to him.[6]

9. Risks Outside Scope of Employment[7] — a. Voluntary Act of Servant. Where a servant voluntarily and of his own motion exposes himself to risks outside of the scope of his regular employment, without or against the order of the master or vice-principal, and is injured thereby, the master is not liable.[8] But

4. *Georgia.*— Jackson *v.* Georgia R. Co., 77 Ga. 82.

Illinois.— Chicago Screw Co. *v.* Weiss, 107 Ill. App. 39 [*affirmed* in 203 Ill. 536, 68 N. E. 54]; Harte *v.* Fraser, 104 Ill. App. 201; Sendzikowski *v.* McCormick Harvesting Mach. Co., 58 Ill. App. 418.

Kentucky.— Illinois Cent. R. Co. *v.* Langan, 116 Ky. 318, 76 S. W. 32, 25 Ky. L. Rep. 500.

New York.— McAleer *v.* Walter, 34 Misc. 474, 70 N. Y. Suppl. 335; Kaare *v.* Troy Steel, etc., Co., 19 N. Y. Suppl. 789.

England.— Yarmouth *v.* France, 19 Q. B. D. 647, 57 L. J. Q. B. 7, 36 Wkly. Rep. 281 [*distinguishing* Thomas *v.* Quartermaine, 18 Q. B. D. 685, 51 J. P. 516, 56 L. J. Q. B. 340, 57 L. T. Rep. N. S. 537, 35 Wkly. Rep. 555].

See 34 Cent. Dig. tit. "Master and Servant," § 647.

Question for jury see Morris *v.* Pfeffer, 77 Ill. App. 516.

5. Anderson *v.* H. C. Akeley Lumber Co., 47 Minn. 128, 49 N. W. 664; Recka *v.* Ocean Steamship Co., 3 Misc. (N. Y.) 526, 23 N. Y. Suppl. 3; Corcoran *v.* Milwaukee Gas Light Co., 81 Wis. 191, 51 N. W. 328.

6. McCormick Harvesting Mach. Co. *v.* Burandt, 136 Ill. 170, 26 N. E. 588.

7. **Inexperienced or youthful employee** see IV, E, 7, f.

Knowledge of defects or dangers see *supra*, IV, E, 5, f.

Notice or complaint to master see *supra*, IV, E, 5, g, (II).

Obvious or latent dangers see *supra*, IV, E, 6, e.

Reliance on care of master see *supra*, IV, E, 1, d.

Risks arising after commencement of employment see *supra*, IV, E, 1, b.

Warning and instructing servant see *supra*, IV, D, 2, f.

8. *Alabama.*— See Louisville, etc., R. Co. *v.* York, 128 Ala. 305, 30 So. 676.

Delaware.— Pankowski *v.* New Castle Leather Co., 4 Pennew. 544, 57 Atl. 559; Boyd *v.* Blumenthal, 3 Pennew. 564, 52 Atl. 330; Giordano *v.* Brandywine Granite Co., 3 Pennew. 423, 52 Atl. 332; Ray *v.* Diamond State Steel Co., 2 Pennew. 525, 47 Atl. 1017; Chielinsky *v.* Hoopes, etc., Co., 1 Marv. 273, 40 Atl. 1127.

Florida.— Louisville, etc., R. Co. *v.* Wade, 46 Fla. 197, 35 So. 863.

Georgia.— Georgia Cent. R. Co. *v.* McWhorter, 115 Ga. 476, 42 S. E. 82; Allen *v.* Hixson, 111 Ga. 460, 36 S. E. 810; Carroll *v.* East Tennessee, etc., R. Co., 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214; Central R., etc., Co. *v.* Sears, 59 Ga. 436.

Illinois.— Supple *v.* Agnew, 191 Ill. 439, 61 N. E. 392 [*reversing* 80 Ill. App. 437]; Lobstein *v.* Sajatovich, 111 Ill. App. 654; Cleveland, etc., R. Co. *v.* Carr, 95 Ill. App. 576; Aurora Cotton Mills *v.* Ogert, 44 Ill. App. 634.

Indiana.— Brown *v.* Byroads, 47 Ind. 435.

Kansas.— Fowler *v.* Brooks, 65 Kan. 861, 70 Pac. 600.

Kentucky.— Shadona *v.* Cincinnati, etc., R. Co., 82 S. W. 567, 26 Ky. L. Rep. 828; Ehmett *v.* Mitchell-Tranter Co., 80 S. W. 1148, 26 Ky. L. Rep. 303; Hollingsworth *v.* Pineville Coal Co., 74 S. W. 205, 24 Ky. L. Rep. 2437; Floyd *v.* Kentucky Lumber Co., 66 S. W. 501, 23 Ky. L. Rep. 1914; Louisville, etc., R. Co. *v.* Tucker, 65 S. W. 453, 23 Ky. L. Rep. 1929; Smith *v.* Trimble, 64 S. W. 915, 23 Ky. L. Rep. 1206.

Maryland.— Wise *v.* Ackerman, 76 Md. 375, 25 Atl. 424.

Michigan.— Kopf *v.* Monroe Stone Co., 133 Mich. 286, 95 N. W. 72.

Minnesota.— Green *v.* Brainerd, etc., R. Co., 85 Minn. 318, 88 N. W. 974; Sliney *v.* Duluth, etc., R. Co., 46 Minn. 384, 49 N. W. 187.

Mississippi.— Natchez Cotton Mill Co. *v.* McLain, (1903) 33 So. 723.

New Hampshire.— Parent *v.* Nashua Mfg. Co., 70 N. H. 199, 47 Atl. 261; McGill *v.* Maine, etc., Granite Co., 70 N. H. 125, 46 Atl. 684. *Compare* Stone *v.* Boscawen Mills, 71 N. H. 288, 52 Atl. 119.

New Jersey.— Sharp *v.* Durand, 71 N. J. L. 354, 59 Atl. 7.

New York.— Young *v.* Eugene Dietzgen Co., 176 N. Y. 590, 68 N. E. 1126 [*affirming* 72 N. Y. App. Div. 618, 76 N. Y. Suppl. 123]; Maltbie *v.* Belden, 167 N. Y. 307, 60 N. E. 645, 54 L. R. A. 52 [*reversing* 60 N. Y. Suppl. 824]; McCue *v.* National Starch Mfg. Co., 142 N. Y. 106, 36 N. E. 809; Di Pietro *v.* Empire Portland Cement Co., 70 N. Y. App. Div. 501, 75 N. Y. Suppl. 275; Devoe *v.* New

where a servant is injured not by anything occurring in his employment or that is incident thereto, but by a temporary peril to which he is exposed by the negligent positive act of the master, without any negligence on his part he may recover.[9]

b. Departments of Business. A servant engaged in one branch of a business cannot be presumed to have assumed risks arising from other connected branches of the same business,[10] unless the defect or danger is such that the servant saw or should have seen it.[11]

10. Concurrent Negligence of Master[12]—a. Risks Avoidable by Care of Master. Unless a risk is obvious,[13] or is known and appreciated by the servant,[14] he does not assume it, if it might have been avoided by due care on the part of the master.[15] But the fact that the master was negligent, and that the servant

York Cent., etc., R. Co., 70 N. Y. App. Div. 495, 75 N. Y. Suppl. 136.

North Carolina.— See Martin *v.* Highland Park Mfg. Co., 128 N. C. 264, 38 S. E. 876, 83 Am. St. Rep. 671.

Ohio.— Cleveland, etc., R. Co. *v.* Workman, 66 Ohio St. 509, 64 N. E. 582, 90 Am. St. Rep. 602.

Pennsylvania.— Durst *v.* Bromley Bros. Carpet Co., 208 Pa. St. 573, 57 Atl. 986.

Texas.— St. Louis Southwestern R. Co. *v.* Spivey, 97 Tex. 143, 76 S. W. 748 [*reversing* (Civ. App. 1903) 73 S. W. 973]; Hettich *v.* Hillje, 33 Tex. Civ. App. 571, 77 S. W. 641; Werner *v.* Trautwein, 25 Tex. Civ. App. 608, 61 S. W. 447. *Compare* The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

Washington.— Richardson *v.* Carbon Hill Coal Co., 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338.

United States.— Baltimore, etc., R. Co. *v.* Doty, 133 Fed. 866.

England.— Lowe *v.* Pearson, [1899] 1 Q. B. 261, 68 L. J. Q. B. 122, 79 L. T. Rep. N. S. 654, 47 Wkly. Rep. 193.

See 34 Cent. Dig. tit. "Master and Servant," §§ 552, 554.

Servant acting against orders assumes risks.— See Indiana Natural, etc., Gas Co. *v.* Marshall, 22 Ind. App. 121, 52 N. E. 232; Richmond, etc., R. Co. *v.* Finley, 63 Fed. 228, 12 C. C. A. 595.

9. Fairbank *v.* Haentzsche, 73 Ill. 236.

10. Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565. See also Moran *v.* Harris, 63 Iowa 390, 19 N. W. 278.

11. Avery *v.* Nordyke, etc., Co., 34 Ind. App. 541, 70 N. E. 888.

12. Reliance on care of master generally see *supra*, IV, E, 6, d.

13. Harris *v.* Missouri Pac. R. Co., 40 Mo. App. 255; Thorn *v.* New York City Ice Co., 46 Hun (N. Y.) 497; Petersen *v.* Sherry, Lumber Co., 90 Wis. 83, 62 N. W. 948.

Assumption of risk by minor see Toledo, etc., R. Co. *v.* Trimble, 8 Ind. App. 333, 35 N. E. 716.

14. **Known risks assumed.**—*Arkansas.*—St. Louis, etc., R. Co. *v.* Davis, 54 Ark. 389, 15 S. W. 895, 26 Am. St. Rep. 48.

District of Columbia.— Birmingham *v.* Pettit, 21 D. C. 209.

Georgia.— Smith *v.* Sibley Mfg. Co., 85 Ga. 333, 11 S. E. 616.

Kentucky.— Louisville, etc., R. Co. *v.* Law, 21 S. W. 648, 14 Ky. L. Rep. 850.

Maine.— Mundle *v.* Hill Mfg. Co., 86 Me. 400, 30 Atl. 16.

Massachusetts.—Gilbert *v.* Guild, 144 Mass. 601, 12 N. E. 368.

Michigan.— King *v.* Ford River Lumber Co., 93 Mich. 172, 53 N. W. 10.

New York.— Anthony *v.* Leeret, 105 N. Y. 591, 12 N. E. 561; Wright *v.* New York Cent. R. Co., 28 Barb. 80.

Pennsylvania.— Drew *v.* Gaylord Coal Co., 2 Pa. Cas. 340, 4 Atl. 214.

Utah.— McCharles *v.* Horn Silver Min., etc., Co., 10 Utah 470, 37 Pac. 733.

Vermont.— See Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380.

See 34 Cent. Dig. tit. "Master and Servant," § 662.

Compare St. Louis, etc., R. Co. *v.* Doyle, (Tex. Civ. App. 1894) 25 S. W. 461.

15. *Arkansas.*— Little Rock, etc., R. Co. *v.* Voss, (1892) 18 S. W. 172.

Illinois.— Consolidated Coal Co. *v.* Gruber, 188 Ill. 584, 59 N. E. 254 [*affirming* 91 Ill. App. 15].

Indiana.— Louisville, etc., R. Co. *v.* Hanning, 131 Ind. 528, 31 N. E. 187, 31 Am. St. Rep. 443.

Iowa.— Foster *v.* Chicago, etc., R. Co., 127 Iowa 84, 102 N. W. 422; Knapp *v.* Sioux City, etc., R. Co., 71 Iowa 41, 32 N. W. 18.

Maine.— Rhoades *v.* Varney, 91 Me. 222, 39 Atl. 552.

Massachusetts.— Murphy *v.* City Coal Co., 172 Mass. 324, 52 N. E. 503.

Missouri.— Lore *v.* American Mfg. Co., 160 Mo. 608, 61 S. W. 678.

New York.— Goodrich *v.* New York Cent. R. Co., 116 N. Y. 398, 22 N. E. 397, 15 Am. St. Rep. 410, 5 L. R. A. 750; Lofrano *v.* New York, etc., Water Co., 55 Hun 452, 8 N. Y. Suppl. 717 [*affirmed* in 130 N. Y. 658, 29 N. E. 1033]; Van Tassel *v.* New York, etc., R. Co., 1 Misc. 299, 20 N. Y. Suppl. 700 [*affirmed* in 142 N. Y. 634, 37 N. E. 566]; Bulkley *v.* Port Henry Iron Co., 2 N. Y. Suppl. 133 [*affirmed* in 117 N. Y. 645, 22 N. E. 1131].

Ohio.— Frolich *v.* Cranker, 21 Ohio Cir. Ct. 615, 11 Ohio Cir. Dec. 592.

Oregon.— Conlon *v.* Oregon, etc., R. Co., 23 Oreg. 499, 32 Pac. 397.

Texas.— Texas Cent. R. Co. *v.* Bender, 32

was free from contributory negligence, does not make the master liable, where the injury to the servant resulted from a risk which he assumed.[16]

b. Personal Direction of Work by Master. A servant does not assume the risk of injury from the negligence of the master while the latter is personally directing the work.[17]

c. Comparative Negligence. In some jurisdictions a servant may recover for an injury caused by the gross negligence of the master, if he is free from contributory negligence, or such negligence is slight as compared with that of the master.[18] The doctrine of comparative negligence does not, however, apply where a risk has been voluntarily assumed by the servant.[19]

d. Concurrent Negligence of Master and Fellow Servant. A servant does not assume the risk of injury from the concurrent negligence of the master and a fellow servant.[20]

F. Contributory Negligence[21] — **1. General Nature and Application of Doctrine — a. Rule Stated.** Where the negligence, or want of ordinary care and caution, of a servant so far contributes to his injury that it would not have occurred but for such negligence, he cannot as a general rule recover therefor.[22]

Tex. Civ. App. 568, 75 S. W. 561; New York, etc., R. Co. *v.* Green, (Civ. App. 1896) 36 S. W. 812.

Wisconsin.— Strahlendorf *v.* Rosenthal, 30 Wis. 674.

United States.— Southern Pac. Co. *v.* Lafferty, 57 Fed. 536, 6 C. C. A. 474.

England.— Mellors *v.* Shaw, 1 B. & S. 437, 7 Jur. N. S. 845, 30 L. J. Q. B. 333, 9 Wkly. Rep. 748, 101 E. C. L. 437; Webb *v.* Rennie, 4 F. & F. 608; Feltham *v.* England, 4 F. & F. 460; Fowler *v.* Lock, 30 L. T. Rep. N. S. 800.

See 34 Cent. Dig. tit. "Master and Servant," §§ 659, 660.

16. Garety *v.* King, 27 N. Y. App. Div. 114, 50 N. Y. Suppl. 179. See also Stoll *v.* Hoopes, 4 Pa. Co. Ct. 474, where it was held that a servant cannot recover for injuries received from dangers incident to his employment, although the risks thereof might have been greatly lessened by the adoption of simple precautions. And see Brooks *v.* Courtney, 20 L. T. Rep. N. S. 440.

Risks assumed by inexperienced servant see Alexander *v.* Louisville, etc., R. Co., 83 Ky. 589; Louisville, etc., R. Co. *v.* Bryant, 22 S. W. 606, 15 Ky. L. Rep. 181; Malsky *v.* Schumacher, 7 Misc. (N. Y.) 8, 27 N. Y. Suppl. 331.

17. Lorentz *v.* Robinson, 61 Md. 64; Leonard *v.* Collins, 70 N. Y. 90; Ryan *v.* Fowler, 24 N. Y. 410, 82 Am. Dec. 315; Connolly *v.* Poillon, 41 Barb. (N. Y.) 366; Flynn *v.* Harlow, 61 N. Y. Super. Ct. 293; Ormond *v.* Holland, E. B. & E. 102, 96 E. C. L. 102; Ashworth *v.* Stanwix, 3 E. & E. 701, 7 Jur. N. S. 467, 30 L. J. Q. B. 183, 4 L. T. Rep. N. S. 85, 107 E. C. L. 701; Brown *v.* Accrington Cotton-Spinning, etc., Co., 3 H. & C. 511, 34 L. J. Exch. 208, 13 L. T. Rep. N. S. 94; Roberts *v.* Smith, 2 H. & N. 213, 3 Jur. N. S. 469, 26 L. J. Exch. 319, 5 Wkly. Rep. 581.

18. Toledo, etc., R. Co. *v.* O'Connor, 77 Ill. 391.

19. Illinois Cent. R. Co. *v.* Neer, 26 Ill. App. 356.

Where unusual dangers are known to the servant, who voluntarily assumes them, if he is thereby injured he cannot recover on account of his contributory fault, even if the master at the same time is negligent. Powell *v.* Ashland Iron, etc., Co., 98 Wis. 35, 73 N. W. 573.

20. *Illinois.*— Rice, etc., Malting Co. *v.* Paulson, 51 Ill. App. 123.

Iowa.— Meloy *v.* Chicago, etc., R. Co., 77 Iowa 743, 42 N. W. 563, 14 Am. St. Rep. 325, 4 L. R. A. 287; Frandsen *v.* Chicago, etc., R. Co., 36 Iowa 372.

Missouri.— Craig *v.* Chicago, etc., R. Co., 54 Mo. App. 523.

New York.—Benzing *v.* Steinway, 101 N. Y. 547, 5 N. E. 449; Hollingsworth *v.* Long Island R. Co., 91 Hun 641, 36 N. Y. Suppl. 1126; Warn *v.* New York Cent., etc., R. Co., 80 Hun 71, 29 N. Y. Suppl. 897.

Wisconsin.— Chamberlain *v.* Milwaukee, etc., R. Co., 11 Wis. 238.

See 34 Cent. Dig. tit. "Master and Servant," §§ 666, 667.

21. Concurrent negligence of master and fellow servant see *supra*, IV, E, 10, d.

Contributory negligence as defense to action for wrongful death see DEATH, 13 Cyc. 323.

Injuries received while working on Sunday see SUNDAY.

Right of servant to complain of defects or dangers see *supra*, IV, E, 5, g, (I), (A).

22. *Alabama.*— Shorter *v.* Southern R. Co., 121 Ala. 158, 25 So. 853; Louisville, etc., R. Co. *v.* Mothershed, 97 Ala. 261, 12 So. 714; Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88; Highland Ave., etc., R. Co. *v.* Walters, 91 Ala. 435, 8 So. 357.

Alaska.— See Gibson *v.* Canadian Pac. Nav. Co., 1 Alaska 407.

Colorado.— Baker *v.* Hughes, 2 Colo. 79.

Connecticut.— Julian *v.* Stony Creek Red Granite Co., 71 Conn. 632, 42 Atl. 994.

Delaware.— Karezewski *v.* Wilmington City R. Co., 4 Pennew. 24, 54 Atl. 746; Boyd *v.* Blumenthal, 3 Pennew. 564, 52 Atl. 330; Murphy *v.* Hughes, 1 Pennew. 250, 40 Atl. 187.

District of Columbia.— McDade *v.* Washington, etc., R. Co., 5 Mackey 144.

If, however, the injury is caused by the gross or wilful negligence of the master

Florida.— Florida Cent. R. Co. *v.* Mooney, 40 Fla. 17, 24 So. 148.

Georgia.— Little *v.* Southern R. Co., 120 Ga. 347, 47 S. E. 953, 102 Am. St. Rep. 104, 66 L. R. A. 509; Central R., etc., Co. *v.* Kitchens, 83 Ga. 83, 9 S. E. 827; Central R., etc., Co. *v.* Kenny, 58 Ga. 485; Rowland *v.* Cannon, 35 Ga. 105.

Idaho.— Snyder *v.* Viola Min., etc., Co., 3 Ida. 28, 26 Pac. 127.

Illinois.— Sugar Creek Min. Co. *v.* Peterson, 177 Ill. 324, 52 N. E. 475 [*reversing* 75 Ill. App. 631]; Allerton Packing Co. *v.* Egan, 86 Ill. 253; Illinois Steel Co. *v.* Rolewicz, 113 Ill. App. 312, Chicago, etc., R. Co. *v.* Myers, 95 Ill. App. 578; Clark *v.* Wabash R. Co., 52 Ill. App. 104; Springfield Iron Co. *v.* Gould, 11 Ill. App. 439.

Indiana.— Pennsylvania Co. *v.* Finney, 145 Ind. 551, 42 N. E. 816.

Iowa.— Kitteringham *v.* Sioux City, etc., R. Co., 62 Iowa 285, 17 N. W. 585.

Kansas.— Carrier *v.* Union Pac. R. Co., 61 Kan. 447, 59 Pac. 1075.

Kentucky.— Louisville, etc., R. Co. *v.* Hocker, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119, 23 Ky. L. Rep. 982, 1274.

Louisiana.— McGinn *v.* McCormick, 109 La. 396, 33 So. 382.

Maine.— Buzzell *v.* Laconia Mfg. Co., 48 Me. 113, 77 Am. Dec. 212.

Maryland.— State *v.* Malster, 57 Md. 287.

Massachusetts.— Barstow *v.* Old Colony R. Co., 143 Mass. 535, 10 N. E. 255.

Michigan.— Schwandt *v.* William Wright Co., 126 Mich. 609, 85 N. W. 1107.

Minnesota.—Hocum *v.* Weitherick, 22 Minn. 152; Goltz *v.* Winona, etc., R. Co., 22 Minn. 55.

Mississippi.— Vicksburg, etc., R. Co. *v.* Wilkins, 47 Miss. 404.

Missouri.— Roblin *v.* Kansas City, etc., R. Co., 119 Mo. 476, 24 S. W. 1011; Soeder *v.* St. Louis, etc., R. Co., 100 Mo. 673, 13 S. W. 714, 18 Am. St. Rep. 724. *Compare* Nicholds *v.* Crystal Plate Glass Co., 126 Mo. 55, 28 S. W. 991.

Nebraska.— Norfolk Beet-Sugar Co. *v.* Preuner, 55 Nebr. 656, 75 N. W. 1097.

New Jersey.— Dillenberger *v.* Weingartner, 64 N. J. L. 292, 45 Atl. 638.

New Mexico.— Alexander *v.* Tennessee, etc., Gold, etc., Min. Co., 3 N. M. 173, 3 Pac. 735.

New York.— McQuigan *v.* Delaware, etc., R. Co., 122 N. Y. 618, 26 N. E. 13 [*reversing* 14 N. Y. St. 651]; Piper *v.* New York Cent., etc., R. Co., 1 Thomps. & C. 290 [*affirmed* in 56 N. Y. 630].

North Carolina.— Cowles *v.* Richmond, etc., R. Co., 84 N. C. 309, 37 Am. Rep. 620.

North Dakota.— Cameron *v.* Great Northern R. Co., 8 N. D. 618, 80 N. W. 885.

Ohio.— Little Miami R. Co. *v.* Stevens, 20 Ohio 415. *Compare* Gamble *v.* Akron, etc., R. Co., 63 Ohio St. 352, 59 N. E. 99.

Oregon.— Hurst *v.* Burnside, 12 Oreg. 520, 8 Pac. 888.

Pennsylvania.— Johnson *v.* Bruner, 61 Pa. St. 58, 100 Am. Dec. 613 [*reversing* 6 Phila. 554].

Rhode Island.— Brady *v.* New York, etc., R. Co., 20 R. I. 338, 39 Atl. 186.

South Carolina.— Farley *v.* Charleston Basket, etc., Co., 51 S. C. 222, 28 S. E. 193, 401.

Tennessee.— Louisville, etc., R. Co. *v.* Burke, 6 Coldw. 45.

Texas.— Galveston, etc., R. Co. *v.* Manns, (Civ. App. 1904) 84 S. W. 254; Texas Cent. R. Co. *v.* Yerbo, 32 Tex. Civ. App. 246, 74 S. W. 357; Texas, etc., R. Co. *v.* Maupin, 26 Tex. Civ. App. 385, 63 S. W. 346.

Utah.— Faulkner *v.* Mammoth Min. Co., 23 Utah 437, 66 Pac. 799.

Virginia.— Russell Creek Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614.

Washington.— Steeples *v.* Panel, etc., Box Co., 33 Wash. 359, 74 Pac. 475.

Wisconsin.— Gossens *v.* Mattoon Mfg. Co., 104 Wis. 406, 80 N. W. 589.

United States.— Northern Pac. R. Co. *v.* Tynan, 119 Fed. 288, 56 C. C. A. 192; Daub *v.* Northern Pac. R. Co., 18 Fed. 625; Callahan *v.* Louisville, etc., R. Co., 11 Fed. 536 [*affirmed* in 122 U. S. 391, 7 S. Ct. 1254, 30 L. ed. 1230].

England.— Skelton *v.* London, etc., R. Co., L. R. 2 C. P. 631, 36 L. J. C. P. 249, 16 L. T. Rep. N. S. 563, 15 Wkly. Rep. 925; Griffiths *v.* Gidlow, 3 H. & N. 648, 27 L. J. Exch. 404.

Canada.— Burland *v.* Lee, 28 Can. Sup. Ct. 348; Cowans *v.* Marshall, 28 Can. Sup. Ct. 161; Brunell *v.* Canadian Pac. R. Co., 15 Ont. 375; Plant *v.* Grand Trunk R. Co., 27 U. C. Q. B. 78; Scanlan *v.* Detroit Bridge, etc., Works, 16 Quebec Super. Ct. 264.

See 34 Cent. Dig. tit. "Master and Servant," § 668.

Contributory negligence consists in the performance of some negligent act, or the negligent omission to perform some duty, which materially contributed to, and, in conjunction with the negligence of the master, was one of the elements of the proximate cause of, the injury to the servant. Faulkner *v.* Mammoth Min. Co., 23 Utah 437, 66 Pac. 799.

Where a person is employed in the presence of known danger, to constitute contributory negligence it must be shown that he voluntarily and unnecessarily exposed himself to the danger. Potts *v.* Shreveport Belt R. Co., 110 La. 1, 34 So. 103, 98 Am. St. Rep. 452.

There is no practical distinction between commissive contributory negligence and such as might be imputed to the servant for voluntarily submitting himself to known dangers and risks arising from the master's negligence. Goltz *v.* Winona, etc., R. Co., 22 Minn. 55.

Acts of fellow servants.— In an action against a railroad company for injuries to plaintiff, a licensee of its tracks, it was held that the acts of his co-servants, engaged in the common service with him, were, for the pur-

or vice-principal,[23] or if the consequences of the servant's negligence might have been avoided by the exercise of ordinary and reasonable care on the part of the master,[24] the servant may recover, notwithstanding his contributory negligence.

pose of the case, to be considered his acts, in determining whether he was guilty of contributory negligence. Stevenson *v.* Chicago, etc., R. Co., 18 Fed. 493, 5 McCrary 634.

Neither assumed risk nor the negligence of co-employees constitutes contributory negligence on the part of a deceased servant. Cooper *v.* New York, etc., R. Co., 84 N. Y. App. Div. 42, 82 N. Y. Suppl. 98.

Application of doctrine in maritime law see The E. B. Ward, Jr., 20 Fed. 702.

23. *Alabama.*— Louisville, etc., R. Co. *v.* York, 128 Ala. 305, 30 So. 676; Hissong *v.* Richmond, etc., R. Co., 91 Ala. 514, 8 So. 776; Louisville, etc., R. Co. *v.* Watson, 90 Ala. 68, 8 So. 249. *Compare* Anniston Pipe-Works *v.* Dickey, 93 Ala. 418, 9 So. 720.

Illinois.— Riverton Coal Co. *v.* Shepherd, 207 Ill. 395, 69 N. E. 921; Spring Valley Coal Co. *v.* Rowatt, 196 Ill. 156, 63 N. E. 649 [*affirming* 96 Ill. App. 248]; Western Anthracite Coal, etc., Co. *v.* Beaver, 192 Ill. 333, 61 N. E. 335 [*affirming* 95 Ill. App. 95]; Sugar Creek Min. Co. *v.* Peterson, 177 Ill. 324, 52 N. E. 475 [*reversing* 75 Ill. App. 631]; Donk Bros. Coal, etc., Co. *v.* Stroff, 100 Ill. App. 576; Sunnyside Coal Co. *v.* Perry Center, 100 Ill. App. 546; Himrod Coal Co. *v.* Adack, 94 Ill. App. 1. *Compare* Browne *v.* Siegel, 191 Ill. 226, 60 N. E. 815 [*affirming* 90 Ill. App. 49].

Kentucky.— Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403; Louisville, etc., R. Co. *v.* Mahony, 7 Bush 235; Louisville, etc., R. Co. *v.* Robinson, 4 Bush 507. *Compare* Louisville, etc., R. Co. *v.* Coniff, 27 S. W. 865, 16 Ky. L. Rep. 296.

Missouri.— See Sharp *v.* Missouri Pac. R. Co., 161 Mo. 214, 61 S. W. 829.

Tennessee.— Freeman *v.* Illinois Cent. R. Co., 107 Tenn. 340, 64 S. W. 1.

Texas.— McDonald *v.* International, etc., R. Co., (Civ. App. 1893) 21 S. W. 774. See also East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834.

United States.— Shumacher *v.* St. Louis, etc., R. Co., 39 Fed. 174.

See 34 Cent. Dig. tit. "Master and Servant," § 673.

But see Vicksburg, etc., R. Co. *v.* Wilkins, 47 Miss. 404.

Contributing fault must be more than gross neglect.— In no case will the wilful neglect of a party be excused by the contributing negligence of the person injured, unless the contributing fault is more than gross neglect, and amounts to a purposed injury which could not be avoided by a proper degree of care before or after its discovery. Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403.

"When the danger is very great, and the care to prevent disaster is very slight, or none at all, the neglect of a party becomes a willful act in law." Shumacher *v.* St. Louis, etc., R. Co., 39 Fed. 174, 177.

24. *Alabama.*— Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130.

Arkansas.— Kansas, etc., R. Co. *v.* Fitzhugh, 61 Ark. 339, 33 S. W. 208.

Connecticut.— Smithwick *v.* Hall, etc., Co., 59 Conn. 261, 21 Atl. 924, 21 Am. St. Rep. 104, 12 L. R. A. 279.

Delaware.— Chielinsky *v.* Hoopes, etc., Co., 1 Marv. 273, 40 Atl. 1127.

Georgia.— Central R., etc., Co. *v.* Lanier, 83 Ga. 587, 10 S. E. 279; Central R. Co. *v.* Harrison, 73 Ga. 744.

Illinois.— Chicago, etc., R. Co. *v.* Donahue, 75 Ill. 106.

Indiana.— Summit Coal Co. *v.* Shaw, 16 Ind. App. 9, 44 N. E. 676. But *compare* Rush *v.* Coal Bluff Min. Co., 131 Ind. 135, 30 N. E. 904.

Iowa.—Ford *v.* Chicago, etc., R. Co., (1897) 71 N. W. 332; Haden *v.* Sioux City, etc., R. Co., 92 Iowa 226, 60 N. W. 537; Conners *v.* Burlington, etc., R. Co., 87 Iowa 147, 53 N. W. 1092; Beems *v.* Chicago, etc., R. Co., 58 Iowa 150, 12 N. W. 222, 67 Iowa 435, 25 N. W. 693. *Compare* Keefe *v.* Chicago, etc., R. Co., 92 Iowa 182, 60 N. W. 503, 54 Am. St. Rep. 542.

Kentucky.— Louisville, etc., R. Co. *v.* Lowe, 118 Ky. 260, 80 S. W. 768, 25 Ky. L. Rep. 2317, 65 L. R. A. 122; Illinois Cent. R. Co. *v.* Josey, 110 Ky. 342, 61 S. W. 703, 22 Ky. L. Rep. 1795, 96 Am. St. Rep. 455, 54 L. R. A. 78; Greer *v.* Louisville, etc., R. Co., 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345; Barber *v.* Cincinnati, etc., R. Co., 21 S. W. 340, 14 Ky. L. Rep. 869. *Compare* Illinois Cent. R. Co. *v.* Mencer, 80 S. W. 816, 25 Ky. L. Rep. 2250.

Louisiana.— Davenport *v.* F. B. Dubach Lumber Co., 112 La. 943, 36 So. 812.

Michigan.— Bouwmeester *v.* Grand Rapids, etc., R. Co., 63 Mich. 557, 30 N. W. 337.

Minnesota.— Evarts *v.* St. Paul, etc., R. Co., 56 Minn. 141, 57 N. W. 459, 45 Am. St. Rep. 460.

Mississippi.— Mississippi Cotton Oil Co. *v.* Ellis, 72 Miss. 191, 17 So. 214.

Missouri.— Church *v.* Chicago, etc., R. Co., 119 Mo. 203, 23 S. W. 1056; Payne *v.* Missouri Pac. R. Co., 105 Mo. App. 155, 79 S. W. 719. See also Evans *v.* Wabash R. Co., 178 Mo. 508, 77 S. W. 515. *Compare* Koons *v.* Kansas City Suburban Belt R. Co., 178 Mo. 591, 77 S. W. 755.

Nebraska.— Sioux City, etc., R. Co. *v.* Smith, 22 Nebr. 775, 36 N. W. 285.

New York.— Booth *v.* Boston, etc., R. Co., 73 N. Y. 38, 29 Am. Rep. 97; Harvey *v.* New York Cent., etc., R. Co., 19 Hun 566.

North Carolina.— Lassiter *v.* Raleigh, etc., R. Co., 133 N. C. 244, 45 S. E. 570; Fleming *v.* Southern R. Co., 131 N. C. 476, 42 S. E. 905, 132 N. C. 714, 44 S. E. 551; Elmore *v.* Seaboard Air Line R. Co., 130 N. C. 506, 41 S. E. 786, 131 N. C. 569, 42 S. E. 989.

The doctrine does not apply to an action against the master to recover damages for an injury to one of two fellow servants by the negligence or wilful act of the other, where the master had no such notice of plaintiff's supposed negligence, or of the alleged wilfulness, that he could guard against them.[25]

b. What Law Governs. In a suit brought in one state by a servant against his master for injuries received in another state, the law of the latter as to contributory negligence prevails.[26]

c. Statutory Provisions — (i) *Effect of Employers' Liability Acts.* In a number of jurisdictions statutes have been enacted regulating the liability of the master for injuries to his servant, more especially where the injury is caused by the negligence of a fellow servant. Such statutes do not, however, change the preëxisting rules as to contributory negligence.[27] Where, however, a statute gives a right of action to a servant of a railroad company injured by any defect

Compare Holland *v.* Seaboard Air Line R. Co., 137 N. C. 368, 49 S. E. 359.

Ohio.— Erie R. Co. *v.* McCormick, 24 Ohio Cir. Ct. 86; Cincinnati, etc., R. Co. *v.* Curtis, 17 Ohio Cir. Ct. 554, 9 Ohio Cir. Dec. 112; Pittsburg, etc., R. Co. *v.* Burroughs, 9 Ohio S. & C. Pl. Dec. 324, 6 Ohio N. P. 37.

Texas.— Ft. Worth, etc., R. Co. *v.* Bowen, 95 Tex. 364, 67 S. W. 408; Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288; International, etc., R. Co. *v.* Gray, 65 Tex. 32; International, etc., R. Co. *v.* McVey, (Civ. App. 1904) 81 S. W. 991, 83 S. W. 34; Galveston, etc., R. Co. *v.* Collins, 24 Tex. Civ. App. 143, 57 S. W. 884; Louisiana Extension R. Co. *v.* Carstens, 19 Tex. Civ. App. 190, 47 S. W. 36; White *v.* Houston, etc., R. Co., (Civ. App. 1898) 46 S. W. 382; Texas, etc., R. Co. *v.* Gale, (Civ. App. 1896) 35 S. W. 802. *Compare* Missouri, etc., R. Co. *v.* Collins, 15 Tex. Civ. App. 21, 39 S. W. 150.

Virginia.— Chesapeake, etc., R. Co. *v.* Lee, 84 Va. 642, 5 S. E. 579; Virginia Midland R. Co. *v.* White, 84 Va. 498, 5 S. E. 573, 10 Am. St. Rep. 874; Norfolk, etc., R. Co. *v.* Cottrell, 83 Va. 512, 3 S. E. 128. *Compare* Norfolk, etc., R. Co. *v.* Cromer, 99 Va. 763, 40 S. E. 54.

Washington.— Costa *v.* Pacific Coast Co., 26 Wash. 138, 66 Pac. 398.

United States.— Newport News, etc., Co. *v.* Howe, 52 Fed. 362, 3 C. C. A. 121; Olson *v.* Flavel, 34 Fed. 477, 13 Sawy. 232. But *compare* The Wanderer, 20 Fed. 140, a case in admiralty.

England.— Radley *v.* London, etc., R. Co., 1 App. Cas. 754, 46 L. J. Exch. 573, 35 L. T. Rep. N. S. 637, 25 Wkly. Rep. 147.

See 34 Cent. Dig. tit. "Master and Servant," §§ 801–804.

Compare Stager *v.* Troy Laundry Co., 38 Oreg. 480, 63 Pac. 645, 53 L. R. A. 459; Stoll *v.* Hoopes, 4 Pa. Co. Ct. 474.

Rule limited to case where master's negligence was committed after knowledge of servant's danger see Summit Coal Co. *v.* Shaw, 16 Ind. App. 9, 44 N. E. 676.

25. McPeck *v.* Central Vermont R. Co., 79 Fed. 590, 25 C. C. A. 110.

26. Illinois Cent. R. Co. *v.* Jordan, 78 S. W. 426, 25 Ky. L. Rep. 1610; East Tennessee, etc., R. Co. *v.* Lewis, 89 Tenn. 235, 14 S. W. 603.

27. *Florida.*— Florida Cent., etc., R. Co. *v.* Mooney, 40 Fla. 17, 24 So. 148; Duval *v.* Hunt, 34 Fla. 85, 15 So. 876.

Georgia.— Roul *v.* East Tennessee, etc., R. Co., 85 Ga. 197, 11 S. E. 558; Central R. Co. *v.* Henderson, 69 Ga. 715; Gassaway *v.* Georgia Southern Co., 69 Ga. 347; Baker *v.* Western, etc., R. Co., 68 Ga. 699; Central R. Co. *v.* Mitchell, 63 Ga. 173; Kenney *v.* Central R. Co., 61 Ga. 590; Atlanta, etc., R. Co. *v.* Webb, 61 Ga. 586; McDade *v.* Georgia R. Co., 60 Ga. 119; Western, etc., R. Co. *v.* Adams, 55 Ga. 279; Thompson *v.* Central R., etc., Co., 54 Ga. 509; Atlanta, etc., R. Co. *v.* Ayers, 53 Ga. 12; East Tennessee, etc., R. Co. *v.* Duggan, 51 Ga. 212. See also Southern R. Co. *v.* Harbin, 110 Ga. 808, 36 S. E. 218, construing Ala. Code, § 2590. *Compare* Savannah, etc., R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183.

Indiana.— Pittsburgh, etc., R. Co. *v.* Collins, 163 Ind. 569, 71 N. E. 661; Whitcomb *v.* Standard Oil Co., 153 Ind. 513, 55 N. E. 440; Perigo *v.* Indianapolis Brewing Co., 21 Ind. App. 338, 52 N. E. 462.

Iowa.— Cooper *v.* Central R. Co., 44 Iowa 134; Hoben *v.* Burlington, etc., R. Co., 20 Iowa 562.

Kansas.— Kansas Pac. R. Co. *v.* Peavey, 34 Kan. 472, 8 Pac. 780; Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660, 7 Pac. 204; Missouri Pac. R. Co. *v.* Haley, 25 Kan. 35.

Mississippi.— Richmond, etc., R. Co. *v.* Rush, 71 Miss. 987, 15 So. 133.

North Carolina.— Coley *v.* North Carolina R. Co., 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817, 128 N. C. 534, 39 S. E. 43; Hancock *v.* Norfolk, etc., R. Co., 124 N. C. 222, 32 S. E. 679.

Tennessee.— East Tennessee, etc., R. Co. *v.* Lewis, 89 Tenn. 235, 14 S. W. 603, decided under the statutes of Georgia, where the injury occurred.

Virginia.— Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489.

United States.— Dixon *v.* Western Union Tel. Co., 68 Fed. 630.

England.— Weblin *v.* Ballard, 17 Q. B. D. 122, 50 J. P. 597, 55 L. J. Q. B. 395, 54 L. T. Rep. N. S. 532, 34 Wkly. Rep. 455; McEvoy *v.* Waterford Steamship Co., L. R. 18 Ir. 159.

See 34 Cent. Dig. tit. "Master and Servant," § 670.

in the company's machinery, the use of obviously defective machinery will not prevent a recovery, unless the apparent danger is so great that its assumption would amount to a reckless indifference to probable consequences.[28]

(II) *Neglect of Statutory Duty*—(A) *By Master.*[29] It is very generally held that the failure of the master to comply with statutory requirements for the safety of his servants does not deprive him of the defense of contributory negligence,[30] unless the terms of the statute are such as clearly to exclude such defense.[31]

(B) *By Servant.* Where a statute directly commands or prohibits a certain act, a servant who is injured while acting in violation of its provisions cannot recover.[32] But a servant who has no control over the roof of the mine in which he is working is not guilty of contributory negligence where, in obedience to orders, he fails to prop the roof in compliance with a statute making it a misdemeanor for a miner to fail to prop the roofs and entries under his control.[33] Nor

28. Coley *v.* North Carolina R. Co., 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817, 128 N. C. 534, 39 S. E. 43.

29. Effect as to assumption of risk see *supra*, IV, E, 1, c, (II).

30. *Delaware.*— Winkler *v.* Philadelphia, etc., R. Co., 4 Pennew. 80, 53 Atl. 90.

Illinois.— Wabash, etc., R. Co. *v.* Thompson, 15 Ill. App. 117. But see *infra*, note 31.

Indiana.— Baltimore, etc., R. Co. *v.* Cavanaugh, 35 Ind. App. 32, 71 N. E. 239.

Iowa.— Reynolds *v.* Hindman, 32 Iowa 146.

Michigan.— Grand *v.* Michigan Cent. R. Co., 83 Mich. 564, 47 N. W. 837, 11 L. R. A. 402.

Minnesota.— Swenson *v.* Osgood, etc., Mfg. Co., 91 Minn. 509, 98 N. W. 645; Hocum *v.* Weitherick, 22 Minn. 152.

Missouri.— Kelly *v.* Union R., etc., Co., 11 Mo. App. 1.

New York.— White *v.* Wittemann Lith. Co., 131 N. Y. 631, 30 N. E. 236 [*affirming* 58 Hun 381, 12 N. Y. Suppl. 188]; Dieboldt *v.* U. S. Baking Co., 72 Hun 403, 25 N. Y. Suppl. 205; Fitzgerald *v.* New York Cent., etc., R. Co., 59 Hun 225, 12 N. Y. Suppl. 932; Guenther *v.* Lockhart, 16 N. Y. Suppl. 717 [*affirmed* in 137 N. Y. 529, 33 N. E. 336]. See also Wallace *v.* Central Vermont R. Co., 138 N. Y. 302, 33 N. E. 1069.

Ohio.— Krause *v.* Morgan, 53 Ohio St. 26, 40 N. E. 886; Cleveland, etc., R. Co. *v.* Ullom, 20 Ohio Cir. Ct. 512, 11 Ohio Cir. Dec. 321.

Tennessee.— Queen *v.* Dayton Coal, etc., Co., 95 Tenn. 458, 32 S. W. 460, 49 Am. St. Rep. 935, 30 L. R. A. 82.

Vermont.— Kilpatrick *v.* Grand Trunk R. Co., 72 Vt. 263, 47 Atl. 827, 62 Am. St. Rep. 939.

Wisconsin.— Thompson *v.* Edward P. Allis Co., 89 Wis. 523, 62 N. W. 527; Holum *v.* Chicago, etc., R. Co., 80 Wis. 299, 50 N. W. 99.

United States.— Denver, etc., R. Co. *v.* Arrighi, 129 Fed. 347, 63 C. C. A. 649; Gilbert *v.* Burlington, etc., R. Co., 128 Fed. 529, 63 C. C. A. 27 [*affirming* 123 Fed. 832]; Cleveland, etc., R. Co. *v.* Baker, 91 Fed. 224, 33 C. C. A. 468; Lake Erie, etc., R. Co. *v.* Craig, 73 Fed. 642, 19 C. C. A. 631.

England.— Caswell *v.* Worth, 5 E. & B. 849, 2 Jur. N. S. 116, 25 L. J. Q. B. 121, 4 Wkly. Rep. 231, 85 E. C. L. 849.

See 34 Cent. Dig. tit. "Master and Servant," § 671.

31. Defense excluded.— *Illinois.*— Riverton Coal Co. *v.* Shepherd, 207 Ill. 395, 69 N. E. 921 [*affirming* 111 Ill. App. 294]; Spring Valley Coal Co. *v.* Rowatt, 196 Ill. 156, 63 N. E. 649 [*affirming* 96 Ill. App. 248]; Western Anthracite Coal, etc., Co. *v.* Beaver, 192 Ill. 333, 61 N. E. 335 [*affirming* 95 Ill. App. 95]; Catlett *v.* Young, 143 Ill. 74, 32 N. E. 447 [*affirming* 38 Ill. App. 198]; Dock Bros. Coal, etc., Co. *v.* Stroff, 100 Ill. App. 576; Sunnyside Coal Co. *v.* Center, 100 Ill. App. 546; Himrod Coal Co. *v.* Adack, 94 Ill. App. 1.

Kentucky.— Illinois Cent. R. Co. *v.* Jordan, 117 Ky. 512, 78 S. W. 426, 25 Ky. L. Rep. 1610, construing Thompson & S. Code, §§ 1298, 1299.

Missouri.— See Coleman *v.* Himmelberger-Harrison Land, etc., Co., 105 Mo. App. 254, 79 S. W. 981.

North Carolina.— Elmore *v.* Seaboard Air Line R. Co., 132 N. C. 865, 44 S. E. 620, 131 N. C. 569, 130 N. C. 506, 41 S. E. 786, 42 S. E. 989].

Wisconsin.— Quackenbush *v.* Wisconsin, etc., R. Co., 71 Wis. 472, 37 N. W. 834.

United States.—Fulton *v.* Wilmington Star Min. Co., 133 Fed. 193, 68 L. R. A. 168, 66 L. R. A. 247; Chicago-Coulterville Coal Co. *v.* Fidelity, etc., Co., 130 Fed. 957.

See 34 Cent. Dig. tit. "Master and Servant," § 671.

32. Chicago, etc., R. Co. *v.* Snyder, 117 Ill. 376, 7 N. E. 604 (in which the conductor of a train was injured in a collision by his failure to perform his statutory duty to stop his train at least two hundred feet before reaching a crossing); Voshefskey *v.* Hillside Coal, etc., Co., 21 N. Y. App. Div. 168, 47 N. Y. Suppl. 386 (decided under the statutes of Pennsylvania, prohibiting all persons from riding on loaded cars in any slope, shaft, or place in or about a mine); Missouri, etc., R. Co. *v.* Roberts, (Tex. Civ. App. 1898) 46 S. W. 270 (running locomotive faster than allowed by ordinance).

33. Taylor *v.* Star Coal Co., 110 Iowa 40, 81 N. W. 249. *Compare* Consolidated Coal,

is a servant prevented from recovering for personal injuries caused by his master's negligence in allowing the use of frozen dynamite, because he has not obtained a written permit to use dynamite as required by statute.[34]

d. Comparative Negligence.[35] The doctrine of comparative negligence obtains in some jurisdictions, and the liability of the master for a personal injury to a servant depends upon the relative degree of care or want of care manifested by both parties.[36]

2. What Constitutes Contributory Negligence[37] **— a. In General —** (I) *Care Required of Servant.* To render the master liable for injuries to a servant, the latter must have exercised ordinary and reasonable care, that is, such care as an ordinarily prudent person would exercise under the same or similar circumstances.[38]

etc., Co. *v.* Clay, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848, where it was held, under a similar statute, that a custom which imposes upon another servant the work of posting and propping the roof of a mine will not exonerate a miner from the duty enjoined by the statute.

34. Currelli *v.* Jackson, 77 Conn. 115, 58 Atl. 762.

35. Assumption of risk see *supra*, IV, E, 10, c.

Proximate cause of injury see *infra*, IV, F, 3. See, generally, Negligence.

36. Chicago, etc., R. Co. *v.* Sweeney, 52 Ill. 325.

If the servant's negligence was slight as compared with that of the master, and the negligence of the master was gross, the servant will not be prevented from recovering on account of his own negligence. Chicago, etc., R. Co. *v.* Johnson, 116 Ill. 206, 4 N. E. 381. See also Lake Shore, etc., R. Co. *v.* O'Conner, 115 Ill. 254, 3 N. E. 501; Toledo, etc., R. Co. *v.* O'Connor, 77 Ill. 391; Fairbank *v.* Haentzsche, 73 Ill. 236; Toledo, etc., R. Co. *v.* Fredericks, 71 Ill. 294; Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 226; Perry *v.* Ricketts, 55 Ill. 234. *Compare* Illinois Cent. R. Co. *v.* Patterson, 93 Ill. 290; Burling *v.* Illinois Cent. R. Co., 85 Ill. 18; Foster *v.* Chicago, etc., R. Co., 84 Ill. 164, in which the servant's negligence was such as to defeat a recovery.

The doctrine does not obtain in Delaware (Stewart *v.* Philadelphia, etc., R. Co., 8 Houst. (Del.) 450, 17 Atl. 639), Georgia (East Tennessee, etc., R. Co. *v.* Maloy, 77 Ga. 237, 2 S. E. 941), Kansas (Chicago, etc., R. Co. *v.* Brown, 44 Kan. 384, 24 Pac. 497; Union Pac. R. Co. *v.* Young, 19 Kan. 488; Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37), or Tennessee (East Tennessee, etc., R. Co. *v.* Lewis, 89 Tenn. 235, 14 S. W. 603).

Slight negligence on the part of railroad company will not make it liable for an injury to a brakeman, caused by his negligence in failing to avoid being struck by a bridge, the location of which he well knew. Jones *v.* Louisville, etc., R. Co., 82 Ky. 610.

37. Acts in emergencies see *infra*, IV, F, 2, g.

Assumption of risk see *supra*, IV, E.

Care required of inexperienced or youthful servant see *infra*, IV, F, 2, b, (I).

Duty of servant to discover or remedy defects or dangers see *infra*, IV, F, 4, a, (II).

Inexperienced and youthful employee see *infra*, IV, F, 2, b.

Warning and instructing servants see *supra*, IV, D.

38. *Alabama.*— Highland Ave., etc., R. Co. *v.* Walters, 91 Ala. 435, 8 So. 357; Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710.

California.— Hanley *v.* California Bridge, etc., Co., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597.

Florida.— Florida Cent. etc., R. Co. *v.* Mooney, 40 Fla. 17, 24 So. 148.

Georgia.— Freeman *v.* Nashville, etc., R. Co., 120 Ga. 469, 47 S. E. 931; Georgia Cent. R. Co. *v.* McClifford, 120 Ga. 90, 47 S. E. 590; Wrightsville, etc., R. Co. *v.* Lattimore, 118 Ga. 581, 45 S. E. 453; Georgia Cotton Oil Co. *v.* Jackson, 112 Ga. 620, 37 S. E. 873; Hoyle *v.* Excelsior Steam Laundry Co., 95 Ga. 34, 21 S. E. 1001; Savannah, etc., R. Co. *v.* Barber, 71 Ga. 644; Central R., etc., Co. *v.* Kelly, 58 Ga. 107; Atlanta, etc., Air Line R. Co. *v.* Ayers, 53 Ga. 12.

Illinois.—Donley *v.* Dougherty, 174 Ill. 582, 51 N. E. 714 [*affirming* 75 Ill. App. 379]; Chicago, etc., R. Co. *v.* Bragonier, 119 Ill. 51, 7 N. E. 688; Pittsburgh, etc., R. Co. *v.* McGrath, 115 Ill. 172, 3 N. E. 439; Chicago, etc., R. Co. *v.* Warner, 108 Ill. 538; Chicago, etc., R. Co. *v.* Donahue, 75 Ill. 106; Wiggins Ferry Co. *v.* Hill, 112 Ill. App. 475; Hass *v.* Chicago, etc., R. Co., 97 Ill. App. 624; Street's Western Stable Car Line *v.* Bonander, 97 Ill. App. 601 [*affirmed* in 196 Ill. 15, 63 N. E. 688]; Wabash R. Co. *v.* Propst, 92 Ill. App. 485; Mutual Wheel Co. *v.* Mosher, 85 Ill. App. 240; Elgin, etc., R. Co. *v.* Docherty, 66 Ill. App. 17; Chicago, etc., R. Co. *v.* Ruttka, 59 Ill. App. 56; Chicago, etc., R. Co. *v.* Anderson, 55 Ill. App. 649; Chicago, etc., R. Co. *v.* Kneirim, 48 Ill. App. 243 [*affirmed* in 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259]; Chicago, etc., R. Co. *v.* Mahoney, 4 Ill. App. 262. *Compare* Kingma *v.* Chicago, etc., R. Co., 85 Ill. App. 138; Chicago, etc., R. Co. *v.* Hause, 71 Ill. App. 147.

Indiana.— Ft. Wayne *v.* Christie, 156 Ind. 172, 59 N. E. 385; Terre Haute, etc., R. Co. *v.* Fowler, 154 Ind. 682, 56 N. E. 228, 48 L. R. A. 531; Shoner *v.* Pennsylvania Co., 130 Ind. 170, 28 N. E. 616, 29 N. E. 775; Baltimore, etc., R. Co. *v.* Cavanaugh, 35 Ind. App. 32, 71 N. E. 239; Baltimore, etc., R. Co. *v.* Hunsucker, 33 Ind. App. 27, 70 N. E. 556;

The degree of care which must be taken must be adjusted to the character of

Louisville, etc., R. Co. *v.* Hobbs, 3 Ind. App. 445, 29 N. E. 934.

Iowa.— Seagel *v.* Chicago, etc., R. Co., 83 Iowa 380, 49 N. W. 990.

Kentucky.— Louisville, etc., R. Co. *v.* Shumakers, 67 S. W. 829, 23 Ky. L. Rep. 2458; Wilson *v.* Williams, 58 S. W. 444, 22 Ky. L. Rep. 567; Louisville, etc., R. Co. *v.* Bocock, 107 Ky. 223, 51 S. W. 580, 53 S. W. 262, 21 Ky. L. Rep. 383, 896; Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403. *Compare* Louisville, etc., R. Co. *v.* Cooley, 49 S. W. 339, 20 Ky. L. Rep. 1372.

Louisiana.— Merchant *v.* Pine Woods Lumber Co., 107 La. 463, 31 So. 878; Jenkins *v.* Maginnis Cotton Mills, 51 La. Ann. 1011, 25 So. 643.

Maine.— Buzzell *v.* Laconia Mfg. Co., 48 Me. 113, 77 Am. Dec. 212.

Massachusetts.— Brick *v.* Bosworth, 162 Mass. 334, 39 N. E. 36.

Michigan.— See Geller *v.* Briscoe Mfg. Co., 136 Mich. 330, 99 N. W. 281.

Minnesota.— Sours *v.* Great Northern R. Co., 88 Minn. 504, 93 N. W. 517; Guthrie *v.* Great Northern R. Co., 76 Minn. 277, 79 N. W. 107; Roskoyek *v.* St. Paul, etc., R. Co., 76 Minn. 28, 78 N. W. 872; Holman *v.* Kempe, 70 Minn. 422, 73 N. W. 186; Hall *v.* Chicago, etc., R. Co., 46 Minn. 439, 49 N. W. 239.

Missouri.— Cole *v.* St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; O'Mellia *v.* Kansas City, etc., R. Co., 115 Mo. 205, 21 S. W. 503; Taylor *v.* Missouri Pac. R. Co., (1891) 16 S. W. 206; Montgomery *v.* Chicago Great Western R. Co., 109 Mo. App. 88, 83 S. W. 66; Meily *v.* St. Louis, etc., R. Co., 107 Mo. App. 466, 81 S. W. 639; Hester *v.* Jacob Dold Packing Co., 95 Mo. App. 16, 75 S. W. 695; Lee *v.* Kansas City Gas Co., 91 Mo. App. 612.

New Jersey.— Smith *v.* Thomas Iron Co., 69 N. J. L. 11, 54 Atl. 562; Loid *v.* J. S. Rogers Co., 68 N. J. L. 713, 54 Atl. 837.

New York.— Cunningham *v.* Sicilian Asphalt Pav. Co., 49 N. Y. App. Div. 380, 63 N. Y. Suppl. 357; Roll *v.* Northern Cent. R. Co., 15 Hun 496 [*affirmed* in 80 N. Y. 647]; Murphy *v.* New York Cent., etc., R. Co., 11 Daly 122.

North Carolina.— Creech *v.* Wilmington Cotton Mills, 135 N. C. 680, 47 S. E. 671; Cogdell *v.* Southern R. Co., 129 N. C. 398, 40 S. E. 202; Crutchfield *v.* Richmond, etc., R. Co., 78 N. C. 300.

Ohio.— Pittsburg, etc., R. Co. *v.* Lynch, 69 Ohio St. 123, 68 N. E. 703, 100 Am. St. Rep. 658, 63 L. R. A. 504; Timmons *v.* Central Ohio R. Co., 6 Ohio St. 105; Carl *v.* Pierce, 20 Ohio Cir. Ct. 68, 10 Ohio Cir. Dec. 711; Joswoyak *v.* Lake Shore, etc., R. Co., 4 Ohio Dec. (Reprint) 317, 1 Clev. L. Rep. 306; Pittsburg, etc., R. Co. *v.* Burroughs, 9 Ohio S. & C. Pl. Dec. 324, 6 Ohio N. P. 37.

Tennessee.—Cumberland Tel. Co. *v.* Loomis, 87 Tenn. 504, 11 S. W. 356.

Texas.—Trinity County Lumber Co. *v.* Denham, 85 Tex. 56, 19 S. W. 1012; Louisiana Extension R. Co. *v.* Carstens, 19 Tex. Civ. App. 190, 47 S. W. 36.

Utah.— See Wilson *v.* Sioux Consol. Min. Co., 16 Utah 392, 52 Pac. 626.

Virginia.— Southern R. Co. *v.* Mauzy, 98 Va. 692, 37 S. E. 285.

Washington.— Jancko *v.* West Coast Mfg., etc., Co., 34 Wash. 556, 76 Pac. 78.

West Virginia.— Johnson *v.* Chesapeake, etc., R. Co., 36 W. Va. 73, 14 S. E. 432.

Wisconsin.—Upthegrove *v.* Jones, etc., Coal Co., 118 Wis. 673, 96 N. W. 385; Buckmaster *v.* Chicago, etc., R. Co., 108 Wis. 353, 84 N. W. 845; Schultz *v.* Chicago, etc., R. Co., 44 Wis. 638.

United States.— Kansas City, etc., R. Co. *v.* Spellman, 102 Fed. 251, 42 C. C. A. 321; Motey *v.* Pickle Marble, etc., Co., 74 Fed. 155, 20 C. C. A. 366; Overman Wheel Co. *v.* Griffin, 67 Fed. 659, 14 C. C. A. 609; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87.

Canada.— Headford *v.* McClary Mfg. Co., 24 Can. Sup. Ct. 291 [*affirming* 21 Ont. App. 164 (*affirming* 23 Ont. 335)].

See 34 Cent. Dig. tit. "Master and Servant," § 674.

Highest degree of care not required see Hester *v.* Jacob Dold Packing Co., 95 Mo. App. 16, 75 S. W. 695.

Intelligence and understanding of servant not the test.— In testing the conduct of a servant suing for an injury, the inquiry should be, not what degree of care his "intelligence and understanding" would have enabled him to exercise under the existing circumstances, but what amount of care might under such circumstances be reasonably expected of an ordinarily prudent adult. Georgia Cotton Oil Co. *v.* Jackson, 112 Ga. 620, 37 S. E. 873.

Care of the "common run" of people insufficient see National Syrup Co. *v.* Carlson, 42 Ill. App. 178.

Equal means of knowledge with master.— Where the servant had equal means with the master of ascertaining the defective condition of the appliances causing the injury no recovery can be had. Hobbs *v.* Bowie, 121 Ga. 421, 49 S. E. 285.

Where a servant assumes the selection of materials for a job of work, he must examine them and exercise his best judgment in selecting such only as are fit for the purpose. Lee *v.* Kansas City Gas Co., 91 Mo. App. 612.

The rule requiring a traveler to stop, look, and listen before crossing a railroad is inapplicable to a servant about to cross, in the course of his work, a private railway in his master's plant. Weiss *v.* Bethlehem Iron Co., 88 Fed. 23, 31 C. C. A. 363. *Compare* Pennsylvania Co. *v.* Mahoney, 22 Ohio Cir. Ct. 469, 12 Ohio Cir. Dec. 366, holding that where a servant is not engaged at work on the track in such a way as to have his attention drawn from trains coming or going, but is simply passing over the track, he is obliged to exercise as high a degree of care with respect to

the work,[39] and it should also be commensurate with the dangers of the employment.[40]

(II) *Reliance on Care of Master or Fellow Servants*[41] — (A) *In General.* Unless the danger is actually known to the servant,[42] or is so obvious and imminent that an ordinarily prudent person would refuse to incur it,[43] he has the right to rely upon the performance by the master or his authorized agents, other than his own fellow servants,[44] of the duties imposed upon the master by law for the protection of his servants;[45] and where two servants are charged with the

looking and listening as any other person lawfully or of right passing over the track.

39. Wrightsville, etc., R. Co. *v.* Lattimore, 118 Ga. 581, 45 S. E. 453; Motey *v.* Pickle Marble, etc., Co., 74 Fed. 155, 20 C. C. A. 366; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87.

40. *Illinois.*— Toledo, etc., R. Co. *v.* Ashbury, 84 Ill. 429; Chicago, etc., R. Co. *v.* Donahue, 75 Ill. 106.

Minnesota.— Hall *v.* Chicago, etc., R. Co., 46 Minn. 439, 49 N. W. 239.

Missouri.— Poindexter *v.* Benedict Paper Co., 84 Mo. App. 352.

New York.— Pullutro *v.* Delaware, etc., R. Co., 15 N. Y. Suppl. 783.

North Carolina.— Crutchfield *v.* Richmond, etc., R. Co., 78 N. C. 300.

United States.— Gowen *v.* Harley, 56 Fed. 973, 6 C. C. A. 190.

Canada.— Garand *v.* Allan, 15 Quebec Super. Ct. 81.

See 34 Cent. Dig. tit. "Master and Servant," § 674.

41. As affecting servant's duty to take precautions against injury see *infra,* IV, F, 4, c.

Assumption of risk see *supra,* IV, E.

Failure of master to give customary warning see *supra,* IV, D, 1, d.

In complying with commands see *infra,* IV, F, 4, f.

42. In the absence of actual knowledge to the contrary, a servant has the right to act upon the assumption that the master has discharged his duty. Chicago, etc., R. Co. *v.* Maroney, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396 [*affirming* 67 Ill. App. 618, and *citing* Pennsylvania Coal Co. *v.* Kelly, 156 Ill. 9, 40 N. E. 938; Monmouth Min., etc., Co. *v.* Erling, 148 Ill. 521, 36 N. E. 117, 39 Am. St. Rep. 187; Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Chicago, etc., R. Co. *v.* Hines, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; U. S. Rolling-stock Co. *v.* Wilder, 116 Ill. 100, 5 N. E. 92]; Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462.

43. *Dakota.*— Schmidt *v.* Leistekow, 6 Dak. 386, 43 N. W. 820.

Georgia.— Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788.

Kentucky.— Helm *v.* Louisville, etc., R. Co., 33 S. W. 396, 17 Ky. L. Rep. 1004.

Minnesota.— Anderson *v.* C. N. Nelson Lumber Co., 67 Minn. 79, 69 N. W. 630.

Missouri.— Halliburton *v.* Wabash R. Co., 58 Mo. App. 27.

Nebraska.— Union Stock-Yards Co. *v.* Goodwin, 57 Nebr. 138, 77 N. W. 357.

Ohio.— Columbus, etc., R. Co. *v.* Burns, 9 Ohio Cir. Ct. 276, 4 Ohio Cir. Dec. 21.

United States.— Holland *v.* Chicago, etc., R. Co., 18 Fed. 243, 5 McCrary 549.

See 34 Cent. Dig. tit. "Master and Servant," § 675.

Where a servant is required to give his attention to the work in hand, while working in a dangerous place, he is entitled to rely on the fact that the master, knowing such to be the fact will exercise due care and diligence to protect him from danger not directly arising from such work. But the rule will not apply in case of a servant who, walking across a track to get his tools, is run over by an approaching train, since the act of walking, being automatic, is not such an act as would engross a man's attention to such an extent that, with ordinary care and diligence, he would not see or hear an approaching train. Holland *v.* Chicago, etc., R. Co., 18 Fed. 243, 5 McCrary 549.

44. Lambert *v.* Missisquoi Pulp Co., 72 Vt. 278, 47 Atl. 1085 (staging for temporary use prepared by fellow servants); Southern Pac. Co. *v.* Pool, 160 U. S. 438, 16 S. Ct. 338, 40 L. ed. 485 (failure of fellow servant to give warning of danger).

45. *Alabama.*— E. E. Jackson Lumber Co. *v.* Cunningham, 141 Ala. 206, 37 So. 445; Tibbs *v.* Alabama Great Southern R. Co., 111 Ala. 449, 19 So. 969; Louisville, etc., R. Co. *v.* Bouldin, 110 Ala. 185, 20 So. 325, 121 Ala. 197, 25 So. 903.

Arizona.— Hobson *v.* New Mexico, etc., R. Co., 2 Ariz. 171, 11 Pac. 545.

Arkansas.— Mt. Nebo Anthracite Coal Co. *v.* Williamson, 73 Ark. 530, 84 S. W. 779.

Colorado.— Carleton Min., etc., Co. *v.* Ryan, 29 Colo. 401, 68 S. W. 279.

Delaware.— Diamond State Iron Co. *v.* Giles, 7 Houst. 557, 11 Atl. 189.

Georgia.— Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788.

Illinois.— Rock Island Sash, etc., Works *v.* Pohlman, 210 Ill. 133, 71 N. E. 428 [*affirming* 99 Ill. App. 670]; Barnett, etc., Co. *v.* Schlapka, 208 Ill. 426, 70 N. E. 343 [*affirming* 110 Ill. App. 672]; Momence Stone Co. *v.* Turrell, 205 Ill. 515, 68 N. E. 1078 [*affirming* 106 Ill. App. 160]; Chicago, etc., R. Co. *v.* Eaton, 194 Ill. 441, 62 N. E. 784, 88 Am. St. Rep. 161 [*affirming* 96 Ill. App. 570]; Chicago, etc., R. Co. *v.* Cullen, 187 Ill. 523, 58 N. E. 455 [*affirming* 87 Ill. App. 374]; Watson Cut Stone Co. *v.* Small, 181 Ill. 366, 54 N. E. 995 [*affirming* 80 Ill. App. 328]; Chicago, etc., R. Co. *v.* Maroney, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396 [*affirming*

control and management of the same work, if one assumes to attend to an act within their common line of duties, which act may be performed by one, the

67 Ill. App. 618]; Lake Shore, etc., R. Co. *v.* Conway, 169 Ill. 505, 48 N. E. 483 [*affirming* 67 Ill. App. 155]; Monmouth Min., etc., Co. *v.* Erling, 148 Ill. 521, 36 N. E. 117, 39 Am. St. Rep. 187; Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 109; Montgomery Coal Co. *v.* Barringer, 109 Ill. App. 185; Chicago, etc., R. Co. *v.* Huff, 104 Ill. App. 594; Chicago, etc., R. Co. *v.* Vipond, 101 Ill. App. 607; Illinois Steel Co. *v.* Mann, 100 Ill. App. 367 [*affirmed* in 197 Ill. 186, 64 N. E. 328]; D. Sinclair Co. *v.* Waddill, 99 Ill. App. 334 [*affirmed* in 200 Ill. 17, 65 N. E. 437]; Himrod Coal Co. *v.* Clark, 99 Ill. App. 332 [*affirmed* in 197 Ill. 514, 64 N. E. 282]; McBeath *v.* Rawle, 93 Ill. App. 212; Chicago, etc., R. Co. *v.* Cleveland, 92 Ill. App. 308; Morton *v.* Zwierzykowski, 91 Ill. App. 462; Alabaster Co. *v.* Lonergan, 90 Ill. App. 353; Pioneer Cooperage Co. *v.* Romanowicz, 85 Ill. App. 407 [*affirmed* in 186 Ill. 9, 57 N. E. 864]; Lake Shore, etc., R. Co. *v.* Ryan, 70 Ill. App. 45; Charles Pope Glucose Co. *v.* Byrne, 60 Ill. App. 17; West Chicago St. R. Co. *v.* Dwyer, 57 Ill. App. 440 [*distinguishing* Slack *v.* Dolese, 137 Ill. 129, 27 N. E. 62].

Indiana.—Republic Iron, etc., Co. *v.* Berkes, 162 Ind. 517, 70 N. E. 815; Heltonville Mfg. Co. *v.* Fields, 138 Ind. 58, 36 N. E. 529; Chicago, etc., R. Co. *v.* Wicker, (App. 1904) 71 N. E. 223; Diamond Block Coal Co. *v.* Cuthbertson, (App. 1903) 67 N. E. 558; Gould Steel Co. *v.* Richards, 30 Ind. App. 348, 66 N. E. 68; American Tin-Plate Co. *v.* Williams, 30 Ind. App. 46, 65 N. E. 304; Ft. Wayne *v.* Patterson, 25 Ind. App. 547, 58 N. E. 747; Baltimore, etc., R. Co. *v.* Spaulding, 21 Ind. App. 323, 52 N. E. 410; Boyce *v.* Schroeder, 21 Ind. App. 28, 51 N. E. 376; Island Coal Co. *v.* Risher, 13 Ind. App. 98, 40 N. E. 158; Lebanon *v.* McCoy, 12 Ind. App. 500, 40 N. E. 700; Chicago, etc., R. Co. *v.* Branyan, 10 Ind. App. 570, 37 N. E. 190.

Iowa.— Flockhart *v.* Hocking Coal Co., 126 Iowa 576, 102 N. W. 494; Corson *v.* Coal Hill Coal Co., 101 Iowa 224, 70 N. W. 185; Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462.

Kansas.— Coffeyville Vitrified Brick, etc., Co. *v.* Shanks, 69 Kan. 306, 76 Pac. 856; Atchison, etc., R. Co. *v.* Tunnell, (1897) 49 Pac. 661; Kelley *v.* Union Pac. R. Co., 58 Kan. 161, 48 Pac. 843.

Kentucky.— Ashland Coal, etc., R. Co. *v.* Wallace, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207, 19 Ky. L. Rep. 849; Ahrens, etc., Mfg. Co. *v.* Rellihan, 82 S. W. 993, 26 Ky. L. Rep. 919; Wilson *v.* Alpine Coal Co., 81 S. W. 278, 26 Ky. L. Rep. 337; St. Bernard Coal Co. *v.* Southard, 76 S. W. 167, 25 Ky. L. Rep. 638; Richards *v.* Louisville, etc., R. Co., 49 S. W. 419, 20 Ky. L. Rep. 1478.

Louisiana.— Carter *v.* Fred W. Dubach Lumber Co., 113 La. 239, 36 So. 952.

Maine.— Frye *v.* Bath Gas, etc., Co., 94 Me. 17, 46 Atl. 804; Rhoades *v.* Varney, 91 Me. 222, 39 Atl. 552.

Massachusetts.— Welch *v.* New York, etc., R. Co., 182 Mass. 84, 64 N. E. 695; Bowes *v.* New York, etc., R. Co., 181 Mass. 89, 62 N. E. 949; Coan *v.* Marlborough, 164 Mass. 206, 41 N. E. 238; Davis *v.* New York, etc., R. Co., 159 Mass. 532, 34 N. E. 1070.

Minnesota.— Gray *v.* Commutator Co., 85 Minn. 463, 89 N. W. 322; Delude *v.* St. Paul City R. Co., 55 Minn. 63, 56 N. W. 461; Schumaker *v.* St. Paul, etc., R. Co., 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257; Anderson *v.* Northern Mill Co., 42 Minn. 424, 44 N. W. 315.

Missouri.— Rinard *v.* Omaha, etc., R. Co., 164 Mo. 270, 64 S. W. 124; Payne *v.* Missouri Pac. R. Co., 105 Mo. App. 155, 79 S. W. 719; Halliburton *v.* Wabash R. Co., 58 Mo. App. 27; Wills *v.* Cape Girardeau Southwestern R. Co., 44 Mo. App. 51; Banks *v.* Wabash Western R. Co., 40 Mo. App. 458.

Montana.— McCabe *v.* Montana Cent. R. Co., 30 Mont. 323, 76 Pac. 701.

Nebraska.—Union Stock-Yards Co. *v.* Goodwin, 57 Nebr. 138, 77 N. W. 357.

New Jersey.— Carroll *v.* Tide-Water Oil Co., 67 N. J. L. 679, 52 Atl. 275; Cole *v.* Warren Mfg. Co., 63 N. J. L. 626, 44 Atl. 647; Nord Deutcher Lloyd Steamship Co. *v.* Ingebregsten, 57 N. J. L. 400, 31 Atl. 619, 51 Am. St. Rep. 604.

New York.— Koren *v.* National Conduit, etc., Co., 179 N. Y. 552, 71 N. E. 1132 [*affirming* 82 N. Y. App. Div. 527, 81 N. Y. Suppl. 614]; Quinn *v.* Brooklyn Heights R. Co., 91 N. Y. App. Div. 489, 86 N. Y. Suppl. 883; Pierson *v.* New York, etc., R. Co., 53 N. Y. App. Div. 363, 65 N. Y. Suppl. 1039; Cunningham *v.* Sicilian Asphalt Pav. Co., 49 N. Y. App. Div. 380, 63 N. Y. Suppl. 357; Barkley *v.* New York Cent., etc., R. Co., 35 N. Y. App. Div. 228, 54 N. Y. Suppl. 766; Harroun *v.* Brush Electric Light Co., 12 N. Y. App. Div. 126, 42 N. Y. Suppl. 716; Schulz *v.* Rohe, 4 Misc. 384, 24 N. Y. Suppl. 118; Rigdon *v.* Alleghany Lumber Co., 13 N. Y. Suppl. 871 [*affirmed* in 131 N. Y. 668, 30 N. E. 867]; Byrnes *v.* New York, etc., R. Co., 14 N. Y. St. 554.

North Carolina.— Wilkie *v.* Raleigh, etc., R. Co., 127 N. C. 203, 37 S. E. 204.

Ohio.—Cleveland, etc., R. Co. *v.* Kernochan, 55 Ohio St. 306, 45 N. E. 531; New York, etc., R. Co. *v.* Roe, 25 Ohio Cir. Ct. 628; Carl *v.* Pierce, 20 Ohio Cir. Ct. 68, 10 Ohio Cir. Dec. 711; Strabler *v.* Toledo Bridge Co., 11 Ohio Cir. Dec. 87; Pittsburg, etc., R. Co. *v.* Burroughs, 9 Ohio S. & C. Pl. Dec. 324, 6 Ohio N. P. 37.

Pennsylvania.— O'Brien *v.* Sullivan, 195 Pa. St. 474, 46 Atl. 130; Vanesse *v.* Catsburg Coal Co., 159 Pa. St. 403, 28 Atl. 200; Ortlip *v.* Philadelphia, etc., Traction Co., 9 Pa. Dist. 291.

Rhode Island.— Lebeau *v.* Dyerville Mfg.

other may rely upon the presumption that it was properly performed.[46] The servant has a right to assume superior knowledge and skill in his master, to rely on his judgment, and to believe that he will not unnecessarily jeopardize his person by avoidable risk;[47] but he cannot, in the performance of a hazardous service, negligently omit to adopt the usual and proper precautions which have been previously required by the master, and which his own experience in the service has shown to be useful as tending to diminish the risks of the service, in a supposed reliance on the prudence and judgment of his master, whose suggestions and directions he wilfully disregards.[48]

(B) *Assurances or Representations as to Absence of Danger.* A servant is not guilty of contributory negligence where he relies upon the assurances or representations of the master or his vice-principal as to the safety of the place of work, tools, machinery, or appliances,[49] or upon his promise to protect and guard

Co., 26 R. I. 34, 57 Atl. 1092; McDonald *v.* Postal Tel. Co., 22 R. I. 131, 46 Atl. 407; Mulvey *v.* Rhode Island Locomotive Works, 14 R. I. 204.

Tennessee.— Ritt *v.* True Tag Paint Co., 108 Tenn. 646, 69 S. W. 324.

Texas.— Missouri, etc., R. Co. *v.* Hannig, 91 Tex. 347, 43 S. W. 508 [*reversing* (Civ. App. 1897) 41 S. W. 196]; St. Louis Southwestern R. Co. *v.* Rea, (Civ. App. 1904) 84 S. W. 428; Missouri, etc., R. Co. *v.* Smith, (Civ. App. 1904) 82 S. W. 787; Southern Kansas R. Co. *v.* Sage, (Civ. App. 1904) 80 S. W. 1038; San Antonio, etc., R. Co. *v.* Brock, (Civ. App. 1904) 80 S. W. 422; Missouri, etc., R. Co. *v.* Hutchens, 35 Tex. Civ. App. 343, 80 S. W. 415; Gulf, etc., R. Co. *v.* Larkin, (Civ. App. 1904) 80 S. W. 94 [*reversed* on other points in (1904) 82 S. W. 1026]; Missouri, etc., R. Co. *v.* Hoskins, 34 Tex. Civ. App. 627, 79 S. W. 369; Texas, etc., R. Co. *v.* Hartnett, 33 Tex. Civ. App. 103, 75 S. W. 809; El Paso, etc., R. Co. *v.* McComas, (Civ. App. 1903) 72 S. W. 629; Galveston, etc., R. Co. *v.* Courtney, 30 Tex. Civ. App. 544, 71 S. W. 307; Gulf, etc., R. Co. *v.* Moore, 28 Tex. Civ. App. 603, 68 S. W. 559; Galveston, etc., R. Co. *v.* Adams, (Civ. App. 1900) 55 S. W. 803 [*affirmed* in 94 Tex. 100, 58 S. W. 831]; Missouri, etc., R. Co. *v.* Crowder, (Civ. App. 1899) 55 S. W. 380; International, etc., R. Co. *v.* Stephenson, 22 Tex. Civ. App. 220, 54 S. W. 1086; International, etc., R. Co. *v.* Elkins, (Civ. App. 1899) 54 S. W. 931; Terrell Compress Co. *v.* Arrington, (Civ. App. 1898) 48 S. W. 59; Gulf, etc., R. Co. *v.* Kelly, (Civ. App. 1896) 34 S. W. 140; Dillingham *v.* Harden, 6 Tex. Civ. App. 474, 26 S. W. 914.

Utah.— Pool *v.* Southern Pac. Co., 20 Utah 210, 58 Pac. 326; Wilson *v.* Sioux Consol. Min. Co., 16 Utah 392, 52 Pac. 626.

Virginia.— Richlands Iron Co. *v.* Elkins, 90 Va. 249, 17 S. E. 890; Norfolk, etc., R. Co. *v.* Nunnally, 88 Va. 546, 14 S. E. 367.

Wisconsin.— Schultz *v.* Chicago, etc., R. Co., 44 Wis. 638.

United States.— Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 6 S. Ct. 590, 29 L. ed. 755; Bunker Hill, etc., Min., etc., Co. *v.* Jones, 130 Fed. 813, 65 C. C. A. 363; Kasadarian *v.* James Hill Mfg. Co., 130 Fed. 62; Continental Trust Co. *v.* Toledo, etc., R. Co., 87 Fed. 133, 32 C. C. A. 44; Grand Trunk R. Co. *v.* Tennant, 66 Fed. 922, 14 C. C. A. 190. See also Mexican Cent. R. Co. *v.* Murray, 102 Fed. 264, 42 C. C. A. 334.

See 34 Cent. Dig. tit. "Master and Servant," §§ 675, 713, 724.

In order to hold a servant guilty of contributory negligence, when injured in the course of his employment, it must appear that he was sufficiently acquainted with the work assigned to him to know and appreciate the dangers incident thereto; and, where nothing dangerous is apparent to the servant in connection with his employment, he has the right to presume that it is reasonably safe, and that he will be notified of special elements of danger not open to ordinary observation, but which are known to his master. Lebeau *v.* Dyerville Mfg. Co., 26 R. I. 34, 57 Atl. 1092.

Selection of fellow servants.— A servant is not bound to ascertain at his peril whether the master has used reasonable care in the selection of those employed in the same branch of service, but is warranted in assuming that his employer has performed his duty in that respect, and, until notice to the contrary is brought home to him, may act on such assumption. Charles Pope Glucose Co. *v.* Byrne, 60 Ill. App. 17.

46. Merritt *v.* Great Northern R. Co., 81 Minn. 496, 84 N. W. 321.

47. Carter *v.* Fred W. Dubach Lumber Co., 115 La. 239, 36 So. 952. See also Halliburton *v.* Wabash R. Co., 58 Mo. App. 27.

48. Jones *v.* Roach, 41 N. Y. Super. Ct. 248.

49. *Illinois.*— Watson Cut Stone Co. *v.* Small, 181 Ill. 366, 54 N. E. 995 [*affirming* 80 Ill. App. 328]; Chicago Anderson Pressed Brick Co. *v.* Sobkowiak, 148 Ill. 573, 36 N. E. 572 [*affirming* 45 Ill. App. 317]; Chicago Edison Co. *v.* Hudson, 66 Ill. App. 639.

Indian Territory.— Purcell Mill, etc., Co. *v.* Kirkland, 2 Indian Terr. 169, 47 S. W. 311.

Iowa.— Nugent *v.* Cudahy Packing Co., 126 Iowa 517, 102 N. W. 442.

Kansas.— Atchison, etc., R. Co. *v.* McKee, 37 Kan. 592, 15 Pac. 484.

the servant from danger,[50] unless the danger is so obvious and imminent that no ordinarily prudent person would undertake to perform the service.[51]

(c) *On Care of Fellow Servants Under Statutes.* While, under statutes limiting the fellow servant doctrine, a servant has the right to rely upon the exercise of reasonable care by his fellow servants,[52] this does not absolve him from caring for his own safety, as an ordinarily prudent man would do under like circumstances,[53] and he cannot recover for an injury received by reason of the negligence of a fellow servant, if he knew, or, by the exercise of ordinary care, might have known, thereof.[54]

(III) *Knowledge of Defects or Dangers*[55]—(A) *In General.* Where a servant has actual or constructive knowledge of defects and dangers of such a character that a reasonably prudent man, under similar circumstances, would exercise due care to avoid the dangers, and is injured by reason of his failure to use ordinary care, he is guilty of contributory negligence.[56] But if a servant had

Kentucky.—Lasch *v.* Stratton, 101 Ky. 672, 42 S. W. 756, 19 Ky. L. Rep. 889; Smith *v.* Kentucky Lumber Co., 78 S. W. 120, 25 Ky. L. Rep. 1366; St. Bernard Coal Co. *v.* Southard, 76 S. W. 167, 25 Ky. L. Rep. 638; Wake *v.* Price, 58 S. W. 519, 22 Ky. L. Rep. 696.

Massachusetts.— Lynch *v.* M. T. Stevens, etc., Co., 187 Mass. 397, 73 N. E. 478; O'Brien *v.* Nute-Hallett Co., 177 Mass. 422, 59 N. E. 65.

Missouri.— Connolly *v.* St. Joseph Press Printing Co., 166 Mo. 447, 66 S. W. 268; Malone *v.* Morton, 84 Mo. 436; Monahan *v.* Kansas City Clay, etc., Co., 58 Mo. App. 68.

Montana.— Allen *v.* Bell, 32 Mont. 69, 79 Pac. 582.

New York.—Schmit *v.* Gillen, 41 N. Y. App. Div. 302, 58 N. Y. Suppl. 458; Chadwick *v.* Brewsher, 15 N. Y. Suppl. 598.

Ohio.— Davis *v.* Griffith, 11 Ohio Dec. (Reprint) 495, 27 Cinc. L. Bul. 180.

Pennsylvania.— Wagner *v.* H. W. Jayne Chemical Co., 147 Pa. St. 475, 23 Atl. 772, 30 Am. St. Rep. 745.

Utah.— See Mathews *v.* Daly-West Min. Co., 27 Utah 193, 75 Pac. 722, in which the servant relied on the statement of the foreman that he was going to shut down for repairs, and was injured by the starting of the mill without warning.

United States.— Swensen *v.* Bender, 114 Fed. 1, 51 C. C. A. 627.

See 34 Cent. Dig. tit. "Master and Servant," § 676.

50. Scullane *v.* Kellogg, 169 Mass. 544, 48 N. E. 622; Moore *v.* Wabash, etc., R. Co., 85 Mo. 588; Bradley *v.* New York Cent. R. Co., 3 Thomps. & C. (N. Y.) 288 [*affirmed* in 62 N. Y. 99]; Mullane *v.* Houston, etc., Ferry R. Co., 21 Misc. (N. Y.) 10, 46 N. Y. Suppl. 957 [*affirming* 20 Misc. 434, 45 N. Y. Suppl. 1039]; Missouri Pac. R. Co. *v.* Williams, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867. *Compare* Louisiana Extension R. Co. *v.* Carstens, 19 Tex. Civ. App. 190, 47 S. W. 36, holding that if the division superintendent and conductor assured the brakeman that they would guard against his injury by regulating the movement of the train, and they did all that was incumbent on them to stop it, and its failure to stop was not caused or contributed to by their negligence, no recovery could be had for his death.

51. Chicago, etc., R. Co. *v.* McGraw, 22 Colo. 363, 45 Pac. 383; Chicago Anderson Pressed Brick Co. *v.* Sohkowiak, 148 Ill. 573, 36 N. E. 572 [*affirming* 45 Ill. App. 317]; Wake *v.* Price, 58 S. W. 519, 22 Ky. L. Rep. 696.

Where a servant has better means of knowledge than the master, he cannot rely upon assurances as to the absence of danger. Chicago Consol. Bottling Co. *v.* Mitton, 41 Ill. App. 154.

52. Henry *v.* Sioux City, etc., R. Co., 75 Iowa 84, 39 N. W. 193, 9 Am. St. Rep. 457; Pringle *v.* Chicago, etc., R. Co., 64 Iowa 613, 21 N. W. 108; Beems *v.* Chicago, etc., R. Co., 58 Iowa 150, 12 N. W. 222; Rahman *v.* Minnesota, etc., R. Co., 43 Minn. 42, 44 N. W. 522.

53. Central R., etc., Co. *v.* Brantley, 93 Ga. 259, 20 S. E. 98.

54. Nichols *v.* Chicago, etc., R. Co., 69 Iowa 154, 28 N. W. 571.

55. **Acts in emergencies** see *infra*, IV, F, 4, g.

As affecting assumption of risk see *supra*, IV, E, 5.

Compliance with commands see *infra*, IV, F, 4, f.

Continuing work with knowledge of danger see *infra*, IV, F, 2, a, (III), (B).

Inexperienced or youthful employee see *supra*, IV, F, 2, h, (IV).

Knowledge of rules and orders see *infra*, IV, F, 4, d.

Opportunity to discover defects or dangers see *infra*, IV, F, 4, a, (II), (B).

Precautions against known or apparent dangers see *infra*, IV, F, 4, c.

56. *Alabama.*—Coosa Mfg. Co. *v.* Williams, 133 Ala. 606, 32 So. 232; Birmingham R., etc., Co. *v.* Allen, 99 Ala. 359, 13 So. 8, 20 L. R. A. 457; Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88.

Alaska.—Gibson *v.* Canadian Pac. Nav. Co., 1 Alaska 407.

California.—Mullin *v.* California Horseshoe Co., 105 Cal. 77, 38 Pac. 535. See also Goggin *v.* Osborne, 115 Cal. 437, 47

no actual knowledge of the danger which threatened him, and, in the exercise of ordinary care, would not have apprehended the danger in time to avoid it, he can

Pac. 248, where it is held that the servant's knowledge is a question for the jury.

Georgia.—Blackstone *v.* Georgia Cent. R. Co., 112 Ga. 762, 38 S. E. 79; Southern R. Co. *v.* Harbin, 110 Ga. 808, 36 S. E. 218.

Illinois.— Montgomery Coal Co. *v.* Barringer, 109 Ill. App. 185; Illinois Steel Co. *v.* McNulty, 105 Ill. App. 594; Illinois Cent. R. Co., *v.* Curran, 94 Ill. App. 182; Ruane *v.* Lake Shore, etc., R. Co., 64 Ill. App. 359; Clark *v.* Murton, 63 Ill. App. 49; Lake Shore, etc., R. Co. *v.* Roy, 5 Ill. App. 82.

Indiana.—New York, etc., R. Co. *v.* Ostman, 146 Ind. 452, 45 N. E. 651; Wabash Paper Co. *v.* Webb, 146 Ind. 303, 45 N. E. 474.

Iowa.— Quinn *v.* Chicago, etc., R. Co., 107 Iowa 710, 77 N. W. 464; McDonnell *v.* Illinois Cent. R. Co., 105 Iowa 459, 75 N. W. 336; Blazenic *v.* Iowa, etc., Coal Co., 102 Iowa 706, 72 N. W. 292; Cowles *v.* Chicago, etc., R. Co., 102 Iowa 507, 71 N. W. 580; McKee *v.* Chicago, etc., R. Co., 83 Iowa 616, 50 N. W. 209, 13 L. R. A. 817.

Kansas.—Beal *v.* Atchison, etc., R. Co., 62 Kan. 250, 62 Pac. 321.

Kentucky.—Jacobs *v.* Chesapeake, etc., R. Co., 72 S. W. 308, 24 Ky. L. Rep. 1879; Downey *v.* Pence, 32 S. W. 737, 17 Ky. L. Rep. 824.

Maine.— Caven *v.* Bodwell Granite Co., 99 Me. 278, 59 Atl. 285.

Maryland.— Meister *v.* Alber, 85 Md. 72, 36 Atl. 360.

Massachusetts.—Gavin *v.* Fall River Automatic Tel. Co., 185 Mass. 78, 69 N. E. 1055; Connors *v.* Merchants' Mfg. Co., 184 Mass. 466, 69 N. E. 218; Meunier *v.* Chemical Paper Co., 180 Mass. 109, 61 N. E. 810; Kelley *v.* Calumet Woolen Co., 177 Mass. 128, 58 N. E. 182; Arnold *v.* Eastman Freight-Car Heater Co., 176 Mass. 135, 57 N. E. 209; Young *v.* Miller, 167 Mass. 224, 45 N. E. 628.

Michigan.—Shippey *v.* Grand Rapids Leather Co., 124 Mich. 533, 83 N. W. 284; Andrews *v.* Tamarack Min. Co., 114 Mich. 375, 72 N. W. 242; Sakol *v.* Rickel, 113 Mich. 476, 71 N. W. 833.

Minnesota.— Hitchcock *v.* Minneapolis R. Transfer Co., 81 Minn. 352, 84 N. W. 42; Anderson *v.* C. N. Nelson Lumber Co., 67 Minn. 79, 69 N. W. 630.

Mississippi.—Hatter *v.* Illinois Cent. R. Co., 69 Miss. 642, 13 So. 827; Dowell *v.* Vicksburg, etc., R. Co., 61 Miss. 519.

Missouri.—Bradley *v.* Chicago, etc., R. Co., 138 Mo. 293, 39 S. W. 763; Adams *v.* Kansas, etc., Coal Co., 85 Mo. App. 486; Warmington *v.* Atchison, etc., R. Co., 46 Mo. App. 159.

Montana.—Cummings *v.* Helena, etc., Smelting, etc., Co., 26 Mont. 434, 68 Pac. 852. *Compare* McCabe *v.* Montana Cent. R. Co., 30 Mont. 323, 76 Pac. 701.

New Hampshire.—Burnham *v.* Concord R. Co., 69 N. H. 280, 45 Atl. 563, knowledge question for jury.

New York.—Renninger *v.* New York Cent., etc., R. Co., 162 N. Y. 595, 57 N. E. 1123 [*affirming* 11 N. Y. App. Div. 565, 42 N. Y. Suppl. 813]; Tydeman *v.* Prince Line, 102 N. Y. App. Div. 279, 92 N. Y. Suppl. 446; Skapura *v.* National Sugar Refining Co., 83 N. Y. App. Div. 21, 81 N. Y. Suppl. 1085; Goodman *v.* Crystal, 56 N. Y. App. Div. 64, 67 N. Y. Suppl. 200; Anderson *v.* New York, etc., Mail Steamship Co., 13 N. Y. App. Div. 218, 43 N. Y. Suppl. 213; Koehler *v.* Syracuse Specialty Mfg. Co., 12 N. Y. App. Div. 50, 42 N. Y. Suppl. 182; Kueckel *v.* O'Connor, 36 Misc. 335, 43 N. Y. Suppl. 546 [*affirmed* in 76 N. Y. Suppl. 829].

North Carolina.—Harrill *v.* South Carolina, etc., R. Co., 135 N. C. 601, 47 S. E. 730; Crutchfield *v.* Richmond, etc., R. Co., 78 N. C. 300.

Ohio.—Huron Dock Co. *v.* Swart, 24 Ohio Cir. Ct. 504; McCarty *v.* Baltimore, etc., R. Co., 20 Ohio Cir. Ct. 536, 11 Ohio Cir. Dec. 229; Miller *v.* Lozier Mfg. Co., 19 Ohio Cir. Ct. 666, 9 Ohio Cir. Dec. 755; Pennsylvania R. Co. *v.* Hammond, 18 Ohio Cir. Ct. 727, 4 Ohio Cir. Dec. 299; Lake Shore, etc., R. Co. *v.* Shook, 16 Ohio Cir. Ct. 665, 9 Ohio Cir. Dec. 9.

Pennsylvania.—Tomaczewski *v.* Dobson, 208 Pa. St. 324, 57 Atl. 718; Hurley *v.* Lukens Iron, etc., Co., 186 Pa. St. 187, 40 Atl. 321; Devlin *v.* Phœnix Iron Co., 182 Pa. St. 109, 37 Atl. 927.

Texas.—Galveston, etc., R. Co. *v.* Walker, (Civ. App. 1905) 85 S. W. 28; Bookrum *v.* Galveston, etc., R. Co., (Civ. App. 1900) 57 S. W. 919.

Utah.— Roth *v.* Eccles, 28 Utah 456, 79 Pac. 918; Sullivan *v.* Salt Lake City, 13 Utah 122, 44 Pac. 652.

Virginia.—Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489; White *v.* Newport News Shipbuilding, etc., Co., 95 Va. 355, 28 S. E. 577.

Washington.—McHugh *v.* Northern Pac. R. Co., 32 Wash. 30, 72 Pac. 450.

West Virginia.—Oliver *v.* Ohio River R. Co., 42 W. Va. 703, 26 S. E. 444; Massie *v.* Peel Splint Coal Co., 41 W. Va. 620, 24 S. E. 644.

Wisconsin.—Powell *v.* Ashland Iron, etc., Co., 98 Wis. 35, 73 N. W. 573; Kennedy *v.* Lake Superior Terminal, etc., Co., 87 Wis. 28, 57 N. W. 976.

United States.—Tuttle *v.* Detroit, etc., R. Co., 122 U. S. 189, 7 S. Ct. 1166, 30 L. ed. 1114; Vany *v.* Peirce, 82 Fed. 162, 26 C. C. A. 521; Louisville, etc., R. Co. *v.* Ward, 61 Fed. 927, 10 C. C. A. 166.

England.—Senior *v.* Ward, 1 E. & E. 385, 5 Jur. N. S. 172, 28 L. J. Q. B. 139, 7 Wkly. Rep. 261, 102 E. C. L. 385.

See 34 Cent. Dig. tit. "Master and Servant," § 706.

recover;[57] nor is a servant necessarily charged with contributory negligence

Belief in dangerous nature.— Servant may disregard defect where person of ordinary prudence would not believe same dangerous. Colorado Cent. R. Co. *v.* Ogden, 3 Colo. 499.

Knowledge by a servant of one defect will not exonerate the master from liability for injuries caused by another defect unless it appears that the servant, with the knowledge he had, under the circumstances, acted imprudently in using the appliance. El Paso Northeastern R. Co. *v.* Ryan, 36 Tex. Civ. App. 190, 81 S. W. 563.

Knowledge of a fellow servant, who had charge of the work in hand, that a certain tool was defective, will not prevent a recovery from the master for an injury to a servant caused thereby, since contributory negligence, to defeat a cause of action, must be that of the party injured. Noble *v.* Bessemer Steamship Co., 127 Mich. 103, 86 N. W. 520, 89 Am. St. Rep. 461, 54 L. R. A. 456 [*distinguishing* Wachsmuth *v.* Shalo Electric Crane Co., 118 Mich. 275, 76 N. W. 497; Rawley *v.* Colliau, 90 Mich. 31, 51 N. W. 350; Hefferen *v.* Northern Pac. R. Co., 45 Minn. 471, 48 N. W. 1].

Servant charged with knowledge of obvious dangers see Tuscaloosa Waterworks Co. *v.* Herren, 131 Ala. 81, 31 So. 444; Illinois Steel Co. *v.* McNulty, 105 Ill. App. 594; Cowles *v.* Chicago, etc., R. Co., 102 Iowa 507, 71 N. W. 580; Heath *v.* Whitebreast Coal, etc., Co., 65 Iowa 737, 23 N. W. 148; Merchant *v.* Pine Woods Lumber Co., 107 La. 463 31 So. 878; Pollich *v.* Sellers, 42 La. Ann. 623, 7 So. 786; Anderson *v.* C. N. Nelson Lumber Co., 67 Minn. 79, 69 N. W. 630; Adams *v.* Kansas, etc., Coal Co., 85 Mo. App. 486; Wray *v.* Southwestern Electric Light, etc., Co., 68 Mo. App. 380; Regan *v.* Palo, 62 N. J. L. 30, 41 Atl. 364; Holmes *v.* Pennsylvania Co., 13 Ohio Cir. Ct. 397, 7 Ohio Cir. Dec. 165; Gropp *v.* Carnegie Steel Co., 4 Pa. Super. Ct. 621; Jennings *v.* Tacoma R., etc., Co., 7 Wash. 275, 34 Pac. 937; Borden *v.* Daisy Roller Mill Co., 98 Wis. 407, 74 N. W. 91, 67 Am. St. Rep. 816; Bunker Hill, etc., Min., etc., Co. *v.* Oberder, 79 Fed. 726, 25 C. C. A. 171.

57. *Alabama.*— E. E. Jackson Lumber Co. *v.* Cunningham, 141 Ala. 206, 37 So. 445; Osborne *v.* Alabama Steel, etc., Co., 135 Ala. 571, 33 So. 687.

California.— See Hanley *v.* California Bridge, etc., Co., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597.

Connecticut.—Julian *v.* Stony Creek Red Granite Co., 71 Conn. 652, 42 Atl. 994.

Georgia.— Winship Mach. Co. *v.* Burger, 110 Ga. 296, 35 S. E. 120.

Illinois.—Illinois Terminal R. Co. *v.* Thompson, 210 Ill. 226, 71 N. E. 328 [*affirming* 112 Ill. App. 463]; North Chicago St. R. Co. *v.* Dudgeon, 184 Ill. 477, 56 N. E. 796 [*affirming* 83 Ill. App. 528] Westville Coal Co. *v.* Schwartz, 177 Ill. 272, 52 N. E. 276 [*affirming* 75 Ill. App. 468]; Edward Hines Lumber Co. *v.* Ligas, 172 Ill. 315, 50 N. E. 225, 64 Am. St. Rep. 38 [*affirming* 68 Ill. App. 523]; Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215 [*affirming* 41 Ill. App. 34]; Chicago, etc., R. Co. *v.* Russell, 91 Ill. 298, 33 Am. Rep. 54; Illinois Steel Co. *v.* Ryska, 102 Ill. App. 347 [*affirmed* in 200 Ill. 280, 65 N. E. 734].

Indiana.— Salem-Bedford Stone Co. *v.* O'Brien, 150 Ind. 656, 49 N. E. 457 [*reversing* 12 Ind. App. 217, 40 N. E. 430]; Brown *v.* Ohio, etc., R. Co., 138 Ind. 648, 37 N. E. 717, 38 N. E. 176; Louisville, etc., R. Co. *v.* Buck, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520; Lebanon *v.* McCoy, 12 Ind. App. 500, 40 N. E. 700.

Iowa.—Bryce *v.* Chicago, etc., R. Co., 103 Iowa 665, 72 N. W. 780; Grimmelman *v.* Union Pac. R. Co., 101 Iowa 74, 70 N. W. 90.

Kansas.—Southern Kansas R. Co. *v.* Michaels, 57 Kan. 474, 46 Pac. 938.

Kentucky.—Louisville Hotel Co. *v.* Kaltenbrun, 80 S. W. 1163, 26 Ky. L. Rep. 208; Board *v.* Chesapeake, etc., R. Co., 70 S. W. 625, 24 Ky. L. Rep. 1079.

Louisiana.—Thompson *v.* New Orleans, etc., R. Co., 108 La. 52, 32 So. 177.

Maine.—Fickett *v.* Lisbon Falls Fibre Co., 91 Me. 268, 39 Atl. 996.

Maryland.—See Pikesville, etc., R. Co. *v.* State, 88 Md. 563, 42 Atl. 214.

Massachusetts.—Joyce *v.* American Writing Paper Co., 184 Mass. 230, 68 N. E. 213; Cote *v.* Lawrence Mfg. Co., 178 Mass. 295, 59 N. E. 656; Donahue *v.* Boston, etc., R. Co., 178 Mass. 251, 59 N. E. 663; Spaulding *v.* Forbes Lith. Mfg. Co., 171 Mass. 271, 50 N. E. 543, 68 Am. St. Rep. 424; Donahue *v.* Drown, 154 Mass. 21, 27 N. E. 675.

Michigan.—Corbett *v.* American Screen Door Co., 133 Mich. 669, 95 N. W. 737; Shumway *v.* Walworth, etc., Mfg. Co., 98 Mich. 411, 57 N. W. 251; Smith *v.* Peninsular Car-Works, 60 Mich. 501, 27 N. W. 662, 1 Am. St. Rep. 542.

Minnesota.—Lyons *v.* Dee, 88 Minn. 490, 93 N. W. 899; Kerrigan *v.* Chicago, etc., R. Co., 86 Minn. 407, 90 N. W. 976; Pruke *v.* South Park Foundry, etc., Co., 68 Minn. 365, 71 N. W. 276.

Missouri.—Robbins *v.* Big Circle Min. Co., 105 Mo. App. 78, 79 S. W. 480; Huth *v.* Dohle, 76 Mo. App. 671.

New York.—Walsh *v.* New York, etc., R. Co., 178 N. Y. 588, 70 N. E. 1111 [*affirming* 80 N. Y. App. Div. 316, 80 N. Y. Suppl. 767]; McGuire *v.* Bell Tel. Co., 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437 [*affirming* 66 N. Y. Suppl. 1137]; Finn *v.* Cassidy, 165 N. Y. 584, 59 N. E. 311, 53 L. R. A. 877 [*affirming* 57 N. Y. Suppl. 1138]; Stewart *v.* Ferguson, 34 N. Y. App. Div. 515, 54 N. Y. Suppl. 615; Stewart *v.* New York, etc., R. Co., 5 Silv. Sup. 198, 8 N. Y. Suppl. 19 [*affirmed* in 126 N. Y. 631, 27 N. E. 410]; Connolly *v.* Poil-

where, in the discharge of his duties, he has forgotten a danger of which he had notice.[58]

(B) *Continuing Work With Knowledge of Danger*—(1) IN GENERAL. Where a servant continued work with knowledge, actual or constructive, of dangers which an ordinarily prudent man would refuse to subject himself to, he is guilty of contributory negligence;[59] but where there is nothing to show that the danger which a servant encountered was so imminent that any reasonably prudent man would have abandoned the work, the servant in continuing to work is not guilty of such negligence as will bar his right to recover for injuries sustained by him.[60]

lon, 41 Barb. 366; Flynn *v.* Harlow, 61 N. Y. Super. Ct. 293, 19 N. Y. Suppl. 705.

North Carolina.— Harrill *v.* South Carolina, etc., R. Co., 135 N. C. 601, 47 S. E. 730; Thomas *v.* Raleigh, etc., R. Co., 129 N. C. 392, 40 S. E. 201; Sims *v.* Lindsay, 122 N. C. 678, 30 S. E. 19; Crutchfield *v.* Richmond, etc., R. Co., 78 N. C. 300.

Pennsylvania.— Denning *v.* Midvale Steel Co., 192 Pa. St. 182, 43 Atl. 965.

Rhode Island.— Pilling *v.* Narragansett Mach. Co., 19 R. I. 666, 36 Atl. 130; Crandall *v.* New York, etc., R. Co., 19 R. I. 594, 35 Atl. 307.

Texas.— Texarkana, etc., R. Co. *v.* Toliver, (Civ. App. 1904) 84 S. W. 375; St. Louis Southwestern R. Co. *v.* Pope, (Civ. App. 1904) 82 S. W. 360; Gulf, etc., R. Co. *v.* Darby, 28 Tex. Civ. App. 413, 67 S. W. 446; International, etc., R. Co. *v.* Bayne, 28 Tex. Civ. App. 392, 67 S. W. 443; Texas, etc., R. Co. *v.* Magrill, 15 Tex. Civ. App. 353, 40 S. W. 188.

Virginia.— Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489.

Washington.— Gaudie *v.* Northern Lumber Co., 34 Wash. 34, 74 Pac. 1009; McDonald *v.* Svenson, 25 Wash. 441, 65 Pac. 789.

United States.— American Distributing Co. *v.* Thorne, 122 Fed. 431, 58 C. C. A. 413; Hunt *v.* Kane, 100 Fed. 256, 40 C. C. A. 372; Louisville, etc., R. Co. *v.* Ward, 61 Fed. 927, 10 C. C. A. 166.

See 34 Cent. Dig. tit. "Master and Servant," §§ 706, 708.

Danger caused by accident.— Although a rule requires trains to approach time-table stations under control, "expecting to find the main track occupied," the engineer of the second section of a train is not chargeable with knowledge that the front section is there, when, but for an accident, unknown to him, it would have passed on before his arrival. Louisville, etc., R. Co. *v.* Mothershed, 121 Ala. 650, 26 So. 10.

Reliance on custom.— Where it was not the custom to make flying switches with cars in front of the engine, the fact that a servant, while standing on the repair track, saw an engine with two cars in front passing on the main line, but had no notice that four cars were behind the engine, does not show contributory negligence, where the cars behind the engine were thrown on the repair track, and struck plaintiff, without any warning of their approach. Galveston, etc., R. Co. *v.* Hynes, 21 Tex. Civ. App. 34, 50 S. W. 624.

58. Louisville, etc., R. Co. *v.* Cooley, 49 S. W. 339, 20 Ky. L. Rep. 1372. See also Republic Iron, etc., Co. *v.* Jones, 32 Ind. App. 189, 69 N. E. 189.

Service requiring exclusive attention.— In an action for death caused by defects of which deceased had notice it is not error to instruct that the service in which he was engaged required his exclusive attention, he could not be expected always to bear in mind the existence of the defect, and under such circumstances a finding of contributory negligence would not be justified, the jury being fully instructed to determine from all the circumstances whether deceased exercised reasonable prudence. Ford *v.* Chicago, etc., R. Co., (Iowa 1897) 71 N. W. 332.

59. *Alabama.*— Highland Ave., etc., R. Co. *v.* Walters, 91 Ala. 435, 8 So. 357.

Connecticut.— See Julian *v.* Stony Creek Red Granite Co., 71 Conn. 632, 42 Atl. 994.

Georgia.— Nelling *v.* Industrial Mfg. Co., 78 Ga. 260.

Kentucky.— Ashland Coal, etc., R. Co. *v.* Wallace, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207, 19 Ky. L. Rep. 849.

Massachusetts.—Watts *v.* Boston Tow Boat Co., 161 Mass. 378, 37 N. E. 197.

Michigan.—Andrews *v.* Tamarack Min. Co., 114 Mich. 375, 72 N. W. 242.

Missouri.— Thorpe *v.* Missouri Pac. R. Co., 89 Mo. 650, 2 S. W. 3.

New York.— Schulz *v.* Rohe, 149 N. Y. 132, 43 N. E. 420; Jones *v.* Roach, 41 N. Y. Super. Ct. 248.

North Carolina.— Sims *v.* Lindsay, 122 N. C. 678, 30 S. E. 19.

Ohio.— Consolidated Coal, etc., Co. *v.* Clay, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848; Rayborn *v.* Patton, 11 Ohio Dec. (Reprint) 100, 24 Cinc. L. Bul. 434.

Pennsylvania.— Mansfield Coal, etc., Co. *v.* McEnery, 91 Pa. St. 185, 36 Am. Rep. 662.

South Carolina.— See Bussey *v.* Charleston, etc., R. Co., 52 S. C. 438, 30 S. E. 477, where it is held that the question of the servant's negligence is one of fact, unless but one inference can be drawn.

Tennessee.— Heald *v.* Wallace, 109 Tenn. 346, 71 S. W. 80.

United States.— Smith *v.* Memphis, etc., R. Co., 18 Fed. 304.

See 34 Cent. Dig. tit. "Master and Servant." § 684.

60. Riverton Coal Co. *v.* Shepherd, 207 Ill. 395, 69 N. E. 921.

(2) After Notice or Complaint to Master. Whether a servant is guilty of contributory negligence in continuing at work after notice or complaint to the master of defects or dangers is generally a question of fact for the jury.[61] The mere fact that the servant has complained to the master will not exonerate him of contributory negligence,[62] unless he has reason to expect that, in consequence of his notification to the master, the defect will be repaired before he will be subjected to danger from it.[63] On the other hand, the mere continued use of a defective appliance after complaint is not necessarily contributory negligence, where the servant is injured in the hurry of business, while in the discharge of his duty;[64] and where a servant is injured owing to the failure of the master to enforce a certain rule, there is no contributory negligence on the part of the servant in continuing in the service after the master was notified of the violation of the rule, and had ordered its enforcement.[65]

(3) After Promise to Remedy Defect.[66] Where a servant notifies his master of defects in the tools, machinery, appliances, or ways and places for work, and the master promises to remove them, the servant is not guilty of contributory negligence by continuing at work for a reasonable time,[67] unless the danger is so obvious and imminent that no ordinarily prudent man would do so.[68]

(c) *Extent of Knowledge.* There is a distinction between knowledge of defects and knowledge of the risks resulting from such defects, and a servant is not chargeable with contributory negligence if he knows that defects exist, but does not know, or cannot know by the exercise of ordinary care, that there is danger;[69]

61. International, etc., R. Co. *v.* Williams, 82 Tex. 342, 18 S. W. 700.

62. Mahan *v.* Clee, 87 Mich. 161, 49 N. W. 556; Galveston, etc., R. Co. *v.* Drew, 59 Tex. 10, 46 Am. Rep. 261.

63. Galveston, etc., R. Co. *v.* Drew, 59 Tex. 10, 46 Am. Rep. 261. See also Chicago, etc., Coal Co. *v.* Peterson, 39 Ill. App. 114; Sommer *v.* Carbon Hill Coal Co., 89 Fed. 54, 32 C. C. A. 156.

64. See Central Trust Co. *v.* Wabash, etc., R. Co., 26 Fed. 897.

65. St. Louis, etc., R. Co. *v.* Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773.

66. **Assumption of risk** see *supra*, IV, E, 5, g, (II), (B).

67. *Alabama.*— Woodward Iron Co. *v.* Jones, 80 Ala. 123.

Illinois.— Swift *v.* Madden, 165 Ill. 41, 45 N. E. 979; Taylor *v.* Felsing, 164 Ill. 331, 45 N. E. 161; McCormick Harvesting Mach. Co. *v.* Sendzikowski, 72 Ill. App. 402; St. Clair Nail Co. *v.* Smith, 43 Ill. App. 105. See also Illinois Cent. R. Co. *v.* Creighton, 63 Ill. App. 165, holding that the master is not exempt from liability because the servant makes an unwise choice as to the best method of obviating the difficulties and dangers arising from the defects which the master has promised to repair.

Massachusetts.— See Keevan *v.* Walker, 172 Mass. 56, 51 N. E. 449.

Minnesota.— Snowberg *v.* Nelson-Spencer Paper Co., 43 Minn. 532, 45 N. W. 1131; Lyberg *v.* Northern Pac. R. Co., 39 Minn. 15, 38 N. W. 632.

Montana.— Kelley *v.* Fourth of July Min. Co., 16 Mont. 484, 41 Pac. 273.

New York.— Laning *v.* New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Leaux *v.* New York, 87 N. Y. App. Div. 405, 84 N. Y. Suppl. 511.

Pennsylvania.— Wust *v.* Erie City Iron Works, 149 Pa. St. 263, 24 Atl. 291.

Texas.— Galveston, etc., R. Co. *v.* Drew, 59 Tex. 10, 46 Am. Rep. 261; Gulf, etc., R. Co. *v.* Garren, (Civ. App. 1903) 72 S. W. 1028.

Wisconsin.— Nelson *v.* Shaw, 102 Wis. 274, 78 N. W. 417; Jensen *v.* Hudson Sawmill Co., 98 Wis. 73, 73 N. W. 434.

See 34 Cent. Dig. tit. "Master and Servant," § 686.

Promise to repair in reasonable time sufficient see McCormick Harvesting Mach. Co. *v.* Sendzikowski, 72 Ill. App. 402.

Promise indefinite as to time insufficient see Hannigan *v.* Smith, 28 N. Y. App. Div. 176, 50 N. Y. Suppl. 845.

68. District of Columbia *v.* McElligott, 117 U. S. 621, 6 S. Ct. 884, 29 L. ed. 946; Musser-Sauntry Land, etc., Co. *v.* Brown, 126 Fed. 141, 61 C. C. A. 207.

Duty of servant to use ordinary care see Louisville Hotel Co. *v.* Kaltenbrun, 80 S. W. 1163, 26 Ky. L. Rep. 208; Crooker *v.* Pacific Lounge, etc., Co., 34 Wash. 191, 75 Pac. 632; Johnson *v.* Anderson, etc., Lumber Co., 31 Wash. 554, 72 Pac. 107.

69. *Alabama.*— Osborne *v.* Alabama Steel, etc., Co., 135 Ala. 571, 33 So. 687.

Alaska.— Gibson *v.* Canadian Pac. Nav. Co., 1 Alaska 407.

California.—Colbert *v.* Rankin, 72 Cal. 197, 13 Pac. 491.

Illinois.— Hartrich *v.* Hawes, 202 Ill. 334, 67 N. E. 13 [*affirming* 103 Ill. App. 433]; Chicago, etc., R. Co. *v.* Knapp, 176 Ill. 127, 52 N. E. 927 [*affirming* 74 Ill. App. 148]; Union Show Case Co. *v.* Blindauer, 175 Ill. 325, 51 N. E. 709 [*affirming* 75 Ill. App. 358]; Chicago Hair, etc., Co. *v.* Mueller, 106 Ill.

and even the fact that a servant has performed work, knowing it to be dangerous, does not of itself make him guilty of contributory negligence, but it must appear that he did that which was dangerous in a negligent manner.[70] On the other hand, a servant's knowledge of danger need not amount to full information, or to absolute certainty;[71] and a servant who has been advised of a certain danger, and how to avoid it, is not excused for exposing himself to it by the fact that he does not realize the magnitude of the possible injuries.[72]

(D) *Comparative Knowledge of Master and Servant.* Where a danger is as open and obvious to the servant as to the master,[73] or where the servant has better means of knowledge than the master,[74] he will be charged with such negligence as to bar a recovery. So too where it does not appear that the master knew or with ordinary care ought to have known of the defect which caused the injury, and it does appear that the servant had equal means with the master of ascertaining its existence, the servant cannot recover.[75]

(IV) *SCOPE OF EMPLOYMENT.*[76] Where a servant sustains injuries while attempting without authority to do something not within the scope of his employment, he cannot recover,[77] unless there be a pressing emergency upon him to do

App. 21 [*affirmed* in 203 Ill. 558, 68 N. E. 51]; Batchelor *v.* Union Stock Yard, etc., Co., 88 Ill. App. 395; Chicago, etc., R. Co. *v.* Merriman, 86 Ill. App. 454.

Indiana.—Indiana, etc., R. Co. *v.* Barnhart, 115 Ind. 399, 16 N. E. 121; Island Coal Co. *v.* Risher, 13 Ind. App. 98, 40 N. E. 158. See also Pennsylvania Co. *v.* McCaffery, 139 Ind. 430, 38 N. E. 67, 29 L. R. A. 104.

Iowa.— See Brownfield *v.* Chicago, etc., R. Co., 107 Iowa 254, 77 N. W. 1038.

Kansas.— Brinkmeier *v.* Missouri Pac. R. Co., 69 Kan. 738, 77 Pac. 586; Chicago, etc., R. Co. *v.* Blevins, 46 Kan. 370, 26 Pac. 687.

Kentucky.— Ashland Coal, etc., R. Co. *v.* Wallace, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207, 19 Ky. L. Rep. 849; Wake *v.* Price, 58 S. W. 519, 22 Ky. L. Rep. 696.

Massachusetts.— Murphy *v.* City Coal Co., 172 Mass. 324, 52 N. E. 503. *Compare* Lovejoy *v.* Boston, etc., R. Corp., 125 Mass. 79, 28 Am. Rep. 206 [*following* Ladd *v.* New Bedford R. Co., 119 Mass. 412, 20 Am. Rep. 331].

Michigan.— Eddy *v.* Aurora Iron Min. Co., 81 Mich. 548, 46 N. W. 17.

Minnesota.— Wuotilla *v.* Duluth Lumber Co., 37 Minn. 153, 33 N. W. 551, 5 Am. St. Rep. 832.

Missouri.— Pauck *v.* St. Louis Dressed Beef, etc., Co., 159 Mo. 467, 61 S. W. 806; Houts *v.* St. Louis Transit Co., 108 Mo. App. 686, 84 S. W. 161; Adams *v.* Kansas, etc., Coal Co., 85 Mo. App. 486; Harriman *v.* Kansas City Star Co., 81 Mo. App. 124; Smith *v.* Little Pittsburg Coal Co., 75 Mo. App. 177.

New York.— Mehan *v.* Syracuse, etc., R. Corp., 73 N. Y. 585; Vitto *v.* Farley, 15 Misc. 153, 36 N. Y. Suppl. 1105.

Pennsylvania.— See Catawissa R. Co. *v.* Armstrong, 49 Pa. St. 186.

Rhode Island.— See Langlois *v.* Dunn Worsted Mills, 25 R. I. 645, 57 Atl. 910, where it was held that while knowledge of a defect is not conclusive evidence of contributory negligence yet, when it appears, the servant's cause of action must be considered with reference to his knowledge and something must be shown to excuse or rebut the presumed assumption of risk.

South Carolina.— Farley *v.* Charleston Basket, etc., Co., 51 S. C. 222, 28 S. E. 193, 401.

Texas.— Ft. Worth, etc., R. Co. *v.* Wilson, 3 Tex. Civ. App. 583, 24 S. W. 686.

Vermont.— Dumas *v.* Stone, 65 Vt. 442, 25 Atl. 1097.

United States.— Tennessee Coal, etc., R. Co. *v.* Currier, 108 Fed. 19, 47 C. C. A. 161.

See 34 Cent. Dig. tit. "Master and Servant," § 707.

70. Mobile, etc., R. Co. *v.* Holburn, 84 Ala. 133, 4 So. 146.

71. Illinois Cent. R. Co. *v.* Sanders, 58 Ill. App. 117.

72. Truntle *v.* North Star Woolen-Mill Co., 57 Minn. 52, 58 N. W. 832.

73. *Indiana.*— See Flutter *v.* New York, etc., R. Co., 27 Ind. App. 511, 59 N. E. 337.

Kentucky.— See Louisville, etc., R. Co. *v.* Ross, 56 S. W. 14, 21 Ky. L. Rep. 1730.

New York.— Parker *v.* Totten, 2 N. Y. City Ct. 155.

Ohio.— Pennsylvania R. Co. *v.* Hammond, 18 Ohio Cir. Ct. 727, 4 Ohio Cir. Dec. 299.

Utah.— Roth *v.* Eccles, 28 Utah 456, 79 Pac. 918.

United States.— Carolan *v.* Southern Pac. Co., 84 Fed. 84.

See 34 Cent. Dig. tit. "Master and Servant," §§ 706 *et seq.*

Compare Austin *v.* Appling, 88 Ga. 54, 13 S. E. 955, in which the defect was latent, and no duty of inspection rested on the servant.

74. Chesapeake, etc., R. Co. *v.* Sparrow, 98 Va. 630, 37 S. E. 302.

75. De Lay *v.* Southern R. Co., 115 Ga. 934, 42 S. E. 218.

76. Assumption of risk see *supra*, IV, E, 1, b, 9.

Inexperienced or youthful employee see *infra*, IV, F, 2, b, (III).

Liability of master in general see *supra*, IV, A, 3.

77. *Alabama.*— Wilson *v.* Louisville, etc., R. Co., 85 Ala. 269, 4 So. 701.

that work;[78] and the same is true where the injury is sustained while he is voluntarily and unnecessarily absent from his post of duty,[79] or where, not in the performance of his duty, he places himself in a perilous position, and neglects to exercise ordinary care for his own safety.[80]

(v) *Inadvertent Act or Mistake of Judgment.*[81] Whether or not a servant is chargeable with contributory negligence where he is injured through an inadvertent act or error of judgment wholly depends upon the facts and circumstances of the particular case.[82] If at the time of his injury he was acting as an ordinarily prudent person would act under the same or similar circumstances, he is not chargeable with negligence;[83] but if his injury was caused by a want of due care on his part, he cannot recover,[84] in the absence of any circumstances producing hurry, excitement, or confusion.[85]

Georgia.— Central R., etc., Co. *v.* Sears, 59 Ga. 436; Sears *v.* Central R., etc., Co., 53 Ga. 630.

Illinois.— Aurora Cotton Mills *v.* Ogert, 44 Ill. App. 634; East St. Louis Packing, etc., Co. *v.* McElroy, 29 Ill. App. 504.

Indiana.— Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 151, 5 N. E. 187.

Michigan.— Lindstrand *v.* Delta Lumber Co., 65 Mich. 254, 32 N. W. 427.

Minnesota.— Freeberg *v.* St. Paul Plow-Works, 48 Minn. 99, 50 N. W. 1026.

New York.— Schultz *v.* Rohe, 149 N. Y. 132, 43 N. E. 420; Lee *v.* Barrow Steamship Co., 14 Daly 230.

Virginia.— Shugart *v.* Norfolk, etc., R. Co., (1895) 22 S. E. 484.

United States.— The John B. Lyon, 33 Fed. 184.

Canada.— Finlay *v.* Miscampbell, 20 Ont. 29.

See 34 Cent. Dig. tit. "Master and Servant," § 678.

78. Central R., etc., Co. *v.* Sears, 59 Ga. 436; Sears *v.* Central R., etc., Co., 53 Ga. 630.

79. *Alabama.*— Warden *v.* Louisville, etc., R. Co., 94 Ala. 277, 10 So. 276, 14 L. R. A. 552.

Indiana.— Cincinnati, etc., R. Co. *v.* Lang, 118 Ind. 579, 21 N. E. 317. *Compare* Louisville, etc., R. Co. *v.* Hobbs, 3 Ind. App. 445, 29 N. E. 934.

Iowa.— O'Neill *v.* Keokuk, etc., R. Co., 45 Iowa 546.

Kansas.— Missouri Pac. R. Co. *v.* Holley, 30 Kan. 465, 474, 1 Pac. 130, 554.

West Virginia.— Eastburn *v.* Norfolk, etc., R. Co., 34 W. Va. 681, 12 S. E. 819.

United States.— The E. B. Ward, Jr., 20 Fed. 702.

See 34 Cent. Dig. tit. "Master and Servant," § 680.

Absence from post must be proximate cause of injury.— Terre Haute, etc., R. Co. *v.* Mansberger, 65 Fed. 196, 12 C. C. A. 574 [*following* Phillips *v.* Chicago, etc., R. Co., 64 Wis. 475, 25 N. W. 544]. See also Pease *v.* Chicago, etc., R. Co., 61 Wis. 163, 20 N. W. 908.

Mere exchange of places with a fellow servant is not contributory negligence where it is not shown that the new position was more dangerous than the servant's regular post of duty. Little Rock, etc., R. Co. *v.* Eubanks, 48 Ark. 460, 3 S. W. 808, 3 Am. St. Rep. 245.

Servant injured at post of duty not negligence in being there see Gulf, etc., R. Co. *v.* Delaney, 22 Tex. Civ. App. 427, 55 S. W. 538.

80. Central R. Co. *v.* Henderson, 69 Ga. 715; East St. Louis Connecting R. Co. *v.* Craven, 52 Ill. App. 415; Evans *v.* Atlantic, etc., R. Co., 62 Mo. 49; Moore *v.* Norfolk, etc., R. Co., 87 Va. 489, 12 S. E. 968.

81. **Acts in emergencies** see *infra*, IV, F, 4, g.

Duty to take precautions while occupied with duties of employment see *infra*, IV, F, 4, c.

82. Port Royal, etc., R. Co. *v.* Davis, 95 Ga. 292, 22 S. E. 833. See also McCormick Harvesting Mach. Co. *v.* Burandt, 37 Ill. App. 165 [*affirmed* in 136 Ill. 170, 26 N. E. 588] (in which plaintiff, while at work at night in defendant's foundry, in a room where there were eight hundred feet of sand conveyors, having but little experience and being compelled to act quickly when called, in the dim light, clouded with steam, when called by his superior, accidentally stepped into a conveyor, and was injured. The conveyors might, with little expense and inconvenience to the business, have been guarded. It was held that a verdict for plaintiff should not be disturbed); Floettl *v.* Johnson Engineering, etc., Co., 19 N. Y. App. Div. 136, 45 N. Y. Suppl. 980.

83. Colbert *v.* Rankin, 72 Cal. 197, 13 Pac. 491 (in which the servant did not know, and was not chargeable with notice, of the defect which caused the injury); St. Louis Consol. Coal Co. *v.* Bruce, 150 Ill. 449, 37 N. E. 912 [*affirming* 47 Ill. App. 444] (servant not charged with notice of danger); Reisert *v.* Williams, 51 Mo. App. 13 (in which the dangers were admittedly latent); Pullman's Palace-Car Co. *v.* Harkins, 55 Fed. 932, 5 C. C. A. 326 (in which the servant was ignorant of the dangers).

84. Vreeland *v.* Chicago, etc., R. Co., 92 Iowa 279, 60 N. W. 542; Magee *v.* Chicago, etc., R. Co., 82 Iowa 249, 48 N. W. 92; 89 Iowa 752, 56 N. W. 681; Pieart *v.* Chicago, etc., R. Co., 82 Iowa 148, 47 N. W. 1017; Wallace *v.* Central Vermont R. Co., 18 N. Y. Suppl. 280 (forgetfulness of danger); Aiken *v.* Smith, 54 Fed. 896, 4 C. C. A. 654.

85. Wallace *v.* Central Vermont R. Co., 18 N. Y. Suppl. 280.

(VI) *Suggestions or Remonstrances by Servant.* Negligence cannot be imputed to a servant for failing to remonstrate with another servant over whom he has no control, and who represents the master with respect to the work, in the performance of which the injury is sustained.[86] But where a servant participates in a dangerous course of action either by advising or instigating it, or by neglecting to expostulate, and is in a position to obviate the danger, he cannot recover;[87] and even where the injury results from the action of a superior officer, the servant cannot recover if such action was induced by negligent statements on his part.[88] So too where a servant fails to obey an order of his superior as first given and acquiesces in the adoption of a different course of action suggested by his fellow servants, and consented to by such superior, and by reason of which the injury is sustained, he is guilty of contributory negligence, barring recovery.[89]

(VII) *Disease or Other Physical Condition.* Where a servant whose duty requires him to be in a position of danger becomes sick and unconscious, and is unable to get away, and injury results to him from such condition, he is not guilty of contributory negligence;[90] but if he negligently falls asleep in a dangerous position,[91] or becomes sick or unconscious while wrongfully in a position of danger,[92] and injury results, he cannot recover. Nor can a servant recover for an injury such as blood-poisoning, which is proximately caused by the impurity of his blood and the diseased condition of his system.[93]

b. Inexperienced or Youthful Servant — (I) *In General.* While the youth or inexperience of a servant does not of itself relieve him from the effect of contributory negligence,[94] yet his age, intelligence, and experience are matters which may properly be considered by the jury on the issue of his negligence;[95] and he is only bound to exercise such care and prudence as may reasonably be

86. Haas *v.* Chicago, etc., R. Co., 90 Iowa 259, 57 N. W. 894; Missouri, etc., R. Co. *v.* Fowler, 61 Kan. 320, 59 Pac. 648; Cincinnati Ice Co. *v.* Higdon, 7 Ohio Dec. (Reprint) 239, 2 Cinc. L. Bul. 3; New Jersey, etc., R. Co. *v.* Young, 49 Fed. 723, 1 C. C. A. 428.

87. Smith *v.* Memphis, etc., R. Co., 18 Fed. 304. See also as sustaining this doctrine Farmer *v.* Central Iowa R. Co., 67 Iowa 136, 24 N. W. 895.

88. Morgan *v.* Carbon Hill Coal Co., 6 Wash. 577, 34 Pac. 152, 772.

89. Chicago, etc., R. Co. *v.* Bliss, 6 Ill. App. 411.

90. Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276.

91. Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276; Price *v.* Hannibal, etc., R. Co., 77 Mo. 508; East Tennessee, etc., R. Co. *v.* Rush, 15 Lea (Tenn.) 145.

92. Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276.

93. Kitteringham *v.* Sioux City, etc., R. Co., 62 Iowa 285, 17 N. W. 585.

94. *Illinois.*— Union R., etc., Co. *v.* Leahy, 9 Ill. App. 353.

Indiana.— Atlas Engine Works *v.* Randall, 100 Ind. 293, 50 Am. Rep. 798; Chicago, etc., R. Co. *v.* Harney, 28 Ind. 28, 92 Am. Dec. 282; Morewood Co. *v.* Smith, 25 Ind. App. 264, 57 N. E. 199; Keller *v.* Gaskill, 9 Ind. App. 670, 36 N. E. 303.

New York.— Flynn *v.* Erie Preserving Co., 12 N. Y. St. 88; Appel *v.* Buffalo, etc., R. Co., 2 N. Y. St. 257.

Texas.— Hildenbrand *v.* Marshall, 30 Tex. Civ. App. 135, 69 S. W. 492.

Virginia.— Norfolk, etc., R. Co. *v.* Cottrell, 83 Va. 512, 3 S. E. 123.

See 34 Cent. Dig. tit. "Master and Servant," § 687.

Choice of dangerous place for work negligence see Schwartz *v.* Cornell, 13 N. Y. Suppl. 355; Nyback *v.* Champagne Lumber Co., 90 Fed. 774, 33 C. C. A. 269.

Choice of dangerous way negligence see Hoehmann *v.* Moss Engraving Co., 4 Misc. (N. Y.) 160, 23 N. Y. Suppl. 787.

Mistake of judgment held not contributory negligence see Barg *v.* Bousfield, 65 Minn. 355, 68 N. W. 45.

95. *Delaware.*— Adams *v.* Clymer, 1 Marv. 80, 36 Atl. 1104.

Georgia.— Manchester Mfg. Co. *v.* Polk, 115 Ga. 542, 41 S. E. 1015; Atlanta Cotton Factory Co. *v.* Speer, 69 Ga. 137, 47 Am. Rep. 750.

Michigan.— Swoboda *v.* Ward, 40 Mich. 420.

New York.— Dodd *v.* Bell, 15 N. Y. App. Div. 258, 44 N. Y. Suppl. 198.

North Carolina.— Fitzgerald *v.* Alma Furniture Co., 131 N. C. 636, 42 S. E. 946.

Texas.— Hildenbrand *v.* Marshall, 30 Tex. Civ. App. 135, 69 S. W. 492.

Utah.— Hill *v.* Southern Pac. Co., 23 Utah 94, 63 Pac. 814.

Wisconsin.—McDougall *v.* Ashland Sulphite-Fibre Co., 97 Wis. 382, 73 N. W. 327.

United States.— George *v.* Clark, 85 Fed. 608, 29 C. C. A. 374; Blumenthal *v.* Craig, 81 Fed. 320, 26 C. C. A. 427.

See 34 Cent. Dig. tit. "Master and Servant," § 687.

expected of a person of his age, capacity, and experience in the same circumstances, and not as high a degree of care as would be required from a person of maturity and experience.[96]

(II) *Representations as to Age and Experience.* A minor who, to obtain employment, represents himself to be of age, is to be judged by the same rule of negligence as an adult;[97] and where an inexperienced person has obtained employment by pretending to an experience which he has not had, he cannot recover for an injury caused by his inexperience;[98] and the same has been held to be true, although the servant made known the fact that he was wholly inexperienced in the occupation which he solicited.[99] But a representation as to experience will not impute to the servant knowledge of dangers arising from the gross negligence of the master, but only those incident to the work when conducted with ordinary care and prudence.[1]

(III) *Scope of Employment.* Where a minor or inexperienced servant voluntarily places himself in a position of danger, not called for by the nature of his employment, he is guilty of contributory negligence barring recovery for injuries received by him.[2]

(IV) *Knowledge of Danger.*[3] While a young and inexperienced servant is chargeable with less foresight and care than a man, yet, if he is aware of the danger, his negligence will defeat recovery for an injury to which it directly contributed.[4] But, in order to charge a minor or inexperienced adult with contributory negligence, he must have actual or constructive knowledge of the danger, and not merely of the defects which cause it.[5]

(V) *Duty to Discover or Remedy Defects.* An inexperienced or youthful servant is not precluded by contributory negligence from recovering from his master for an injury caused by a hidden danger;[6] and where a master places a

96. *Georgia.*— Roberts *v.* Porter Mfg. Co., 110 Ga. 474, 35 S. E. 674.

Illinois.— Norton *v.* Volzke, 54 Ill. App. 545 [*affirmed* in 158 Ill. 402, 41 N. E. 1085, 49 Am. St. Rep. 167]; Glover *v.* Gray, 9 Ill. App. 329.

Indiana.—St. Louis, etc., R. Co. *v.* Valirius, 56 Ind. 511.

Missouri.— Rogers *v.* Meyerson Printing Co., 103 Mo. App. 683, 78 S. W. 79.

Nebraska.— Omaha, etc., R. Co. *v.* Morgan, 40 Nebr. 604, 59 N. W. 81.

New Hampshire.— Kasjeta *v.* Nashua Mfg. Co., 73 N. H. 22, 58 Atl. 874 [*citing* Boyce *v.* Johnson, 72 N. H. 41, 54 Atl. 707; Bresnehan *v.* Gove, 71 N. H. 236, 51 Atl. 916].

Texas.— Hillsboro Oil Co. *v.* White, (Civ. App. 1897) 41 S. W. 874.

See 34 Cent. Dig. tit. "Master and Servant," § 688.

97. McDermott *v.* Iowa Falls, etc., R. Co., (Iowa 1891) 47 N. W. 1037; Lake Shore, etc., R. Co. *v.* Baldwin, 19 Ohio Cir. Ct. 338, 10 Ohio Cir. Dec. 333.

98. Stanley *v.* Chicago, etc., R. Co., 101 Mich. 202, 59 N. W. 393.

99. McDermott *v.* Atchison, etc., R. Co., 56 Kan. 319, 43 Pac. 248.

1. Portland Gold Min. Co. *v.* Flaherty, 111 Fed. 312, 49 C. C. A. 361.

2. Colorado Coal, etc., Co. *v.* Carpita, 6 Colo. App. 248, 40 Pac. 248; Sinclair *v.* Berndt, 87 Ill. 174; Gillen *v.* Rowley, 134 Pa. St. 209, 19 Atl. 504. See also as supporting doctrine Nault *v.* O'Shaughnessy, 19 Quebec Super. Ct. 448.

3. Duty of master to warn and instruct see *supra*, IV, D, 2, c.

Knowledge of defects and dangers generally see *supra*, IV, F, 2, a, (III).

4. Dowling *v.* Allen, 88 Mo. 293.

5. *California.*— Bjorman *v.* Ft. Bragg Redwood Co., 104 Cal. 626, 38 Pac. 451.

Indiana.— La Porte Carriage Co. *v.* Sullender, (App. 1904) 71 N. E. 922.

Kansas.— Brown *v.* Atchison, etc., R. Co., 31 Kan. 1, 1 Pac. 605.

Massachusetts.— Grimaldi *v.* Lane, 177 Mass. 565, 59 N. E. 451.

Minnesota.—Jaroszeski *v.* Osgood, etc., Mfg. Co., 80 Minn. 393, 83 N. W. 389.

Missouri.— Beard *v.* American Car Co., 72 Mo. App. 583; Lemser *v.* St. Joseph Furniture Mfg. Co., 70 Mo. App. 209; Dutzi *v.* Geisel, 23 Mo. App. 676.

New Hampshire.— Brown *v.* Concord, etc., R. Co., 68 N. H. 518, 39 Atl. 581.

New York.— Mulvaney *v.* Brooklyn City R. Co., 1 Misc. 425, 21 N. Y. Suppl. 427 [*affirmed* in 142 N. Y. 651, 37 N. E. 568]. See also Tully *v.* New York, etc., Steamship Co., 10 N. Y. App. Div. 463, 42 N. Y. Suppl. 29.

Ohio.— Cleveland Rolling-Mill Co. *v.* Corrigan, 46 Ohio St. 283, 20 N. E. 466, 3 L. R. A. 385.

United States.— Mather *v.* Rillston, 156 U. S. 391, 15 S. Ct. 464, 39 L. ed. 464.

See 34 Cent. Dig. tit. "Master and Servant," § 694.

6. Dowling *v.* Allen, 6 Mo. App. 195; Howard Oil Co. *v.* Farmer, 56 Tex. 301.

young or inexperienced person at work in an exposed and dangerous situation, he is bound to give him due caution and instruction, and his failure to do so is not excused by the fact that the servant by the use of his eyesight might have seen the danger, or by the use of his reason might have realized and avoided it.[7]

(VI) *PRECAUTIONS AGAINST KNOWN DANGERS.*[8] A person of such age and experience as to be capable of exercising discretion, and of appreciating the risks of the work in which he is engaged, cannot recover for injuries caused by his inattention to his surroundings, and failure to take due precautions against known or obvious dangers.[9]

(VII) *DISOBEDIENCE OF RULES OR ORDERS.*[10] Where a young or inexperienced servant, while acting in disobedience to his master's rules or orders, assumes unusual dangers, and is injured before his action can, in the exercise of proper care, be discovered and stopped, the master is not liable.[11] If, however, a rule has been habitually disobeyed, and the work cannot well be done without disregarding it, the servant is not guilty of contributory negligence in doing so.[12]

(VIII) *COMPLIANCE WITH COMMANDS OR THREATS.* Where a young or inexperienced servant undertakes dangerous work in obedience to the commands or threats of the master or his authorized agent, he will not be held guilty of contributory negligence,[13] unless the danger was so manifest and glaring that it must have been known to one of his age and experience that he could not do it without injury.[14]

(IX) *ACTS IN EMERGENCIES.*[15] Where a young and inexperienced servant is

7. Haynes *v.* Erk, 6 Ind. App. 332, 33 N. E. 637. See also Hill *v.* Gust, 55 Ind. 45; O'Connor *v.* Adams, 120 Mass. 427; Anderson *v.* Morrison, 22 Minn. 274. *Compare* Rood *v.* Lawrence Mfg. Co., 155 Mass. 590, 30 N. E. 174.

Failure to solicit information not negligence see Missouri Pac. R. Co. *v.* Watts, 64 Tex. 568.

8. Precautions against known dangers generally see *infra*, IV, F, 4, c.

9. *Illinois.*— Chicago, etc., R. Co. *v.* Kane, 50 Ill. App. 100.

Indiana.— Rush *v.* Coal Bluff Min. Co., 131 Ind. 135, 30 N. E. 904; Levey *v.* Bigelow, 6 Ind. App. 677, 34 N. E. 128.

Kentucky.— Jones *v.* Louisville, etc., R. Co., 95 Ky. 576, 26 S. W. 590, 16 Ky. L. Rep. 132.

Massachusetts.— Gardner *v.* Cohannet Mills, 165 Mass. 507, 43 N. E. 294; Tinkham *v.* Sawyer, 153 Mass. 485, 27 N. E. 6; Pratt *v.* Prouty, 153 Mass. 333, 26 N. E. 1002. *Compare* Carey *v.* Arlington Mills, 148 Mass. 338, 19 N. E. 525.

Michigan.— Palmer *v.* Harrison, 57 Mich. 182, 23 N. W. 624; Greenwald *v.* Marquette, etc., R. Co., 49 Mich. 197, 13 N. W. 513.

Minnesota.— Olmscheid *v.* Nelson-Tenney Lumber Co., 66 Minn. 61, 68 N. W. 605; Ludwig *v.* Pillsbury, 35 Minn. 256, 28 N. W. 505.

New York.— Ekendahl *v.* Hayes, 10 N. Y. App. Div. 487, 42 N. Y. Suppl. 226; Dieboldt *v.* U. S. Baking Co., 72 Hun 403, 25 N. Y. Suppl. 205, 81 Hun 195, 30 N. Y. Suppl. 745; Coffey *v.* Chapal, 2 N. Y. Suppl. 648.

Canada.— Robitaille *v.* White, 19 Quebec Super. Ct. 431.

See 34 Cent. Dig. tit. "Master and Servant," § 696.

10. Negligence in giving orders see *supra*, IV, C, 3, b.

11. Robertson *v.* Cornelson, 34 Fed. 716. See also Beckham *v.* Hillier, 47 N. J. L. 12. *Compare* Central R., etc., Co. *v.* Maltsby, 90 Ga. 630, 16 S. E. 953.

12. Hayes *v.* Bush, etc., Mfg. Co., 41 Hun (N. Y.) 407.

13. *California.*— Foley *v.* California Horseshoe Co., 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87.

Florida.— Camp *v.* Hall, 39 Fla. 535, 22 So. 792.

Illinois.— Fanter *v.* Clark, 15 Ill. App. 470.

Mississippi.— Illinois Cent. R. Co. *v.* Price, 72 Miss. 862, 18 So. 415.

Missouri.— Shortel *v.* St. Joseph, 104 Mo. 114, 16 S. W. 397, 24 Am. St. Rep. 317; Beard *v.* American Car Co., 72 Mo. App. 583.

Nebraska.— Ittner Brick Co. *v.* Killian, 67 Nebr. 589, 93 N. W. 951.

New Hampshire.— Kasjeta *v.* Nashua Mfg. Co., 73 N. H. 22, 58 Atl. 874.

New York.— Smith *v.* Buffalo, etc., R. Co., 72 Hun 545, 25 N. Y. Suppl. 638 [*affirmed* in 148 N. Y. 727, 42 N. E. 726].

North Carolina.— Shadd *v.* Georgia, etc., R. Co., 116 N. C. 968, 21 S. E. 554.

Pennsylvania.— Tagg *v.* McGeorge, 155 Pa. St. 368, 26 Atl. 671, 35 Am. St. Rep. 889. *Compare* McCool *v.* Lucas Coal Co., 150 Pa. St. 638, 24 Atl. 350.

Texas.— Greenville Oil, etc., Co. *v.* Harkey, 20 Tex. Civ. App. 225, 48 S. W. 1005; Gulf, etc., R. Co. *v.* Duvall, 12 Tex. Civ. App. 348, 35 S. W. 699.

West Virginia.— Turner *v.* Norfolk, etc., R. Co., 40 W. Va. 675, 22 S. E. 83.

14. Shortel *v.* St. Joseph, 104 Mo. 114, 16 S. W. 397, 24 Am. St. Rep. 317; Ittner Brick Co. *v.* Killian, 67 Nebr. 589, 93 N. W. 951.

15. Acting in emergencies generally see *infra*, IV, F, 4, g.

injured while acting in an emergency caused by the master's negligence, he may recover, although, in the excitement of the moment, he loses his presence of mind, and does an act which contributes to his injury.[16]

3. Proximate Cause of Injury. To conclude a servant from maintaining an action for injuries received through the negligence of the master, his own negligence must have contributed to the injury in such a way that if he had not been negligent no injury would have resulted from the negligence of the master.[17]

16. McMillan Marble Co. *v.* Black, 89 Tenn. 118, 14 S. W. 479; South West Imp. Co. *v.* Smith, 85 Va. 306, 7 S. E. 365, 17 Am. St. Rep. 59.

Acting in emergencies generally see *infra*, IV, F, 4, g.

17. *Alabama.*— Louisville, etc., R. Co. *v.* Morgan, 114 Ala. 449, 22 So. 20; Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130; Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176; Holland *v.* Tennessee Coal, etc., R. Co., 91 Ala. 444, 8 So. 524, 12 L. R. A. 232.

Arkansas.— Kansas, etc., R. Co. *v.* Fitzhugh, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211.

Connecticut.— Smithwick *v.* Hall, etc., Co., 59 Conn. 261, 21 Atl. 924, 21 Am. St. Rep. 104, 12 L. R. A. 279.

Delaware.— Punkowski *v.* New Castle Leather Co., (1904) 57 Atl. 559.

Georgia.— Hamby *v.* Union Paper-Mills Co., 110 Ga. 1, 35 S. E. 279; Southern R. Co. *v.* Baston, 99 Ga. 798, 27 S. E. 163; Western, etc., R. Co. *v.* Bussey, 95 Ga. 584, 23 S. E. 207; Atlanta, etc., R. Co. *v.* Johnson, 66 Ga. 259; Central R. Co. *v.* Mitchell, 63 Ga. 173; Rowland *v.* Cannon, 35 Ga. 105.

Illinois.— Chicago, etc., R. Co. *v.* Howell, 208 Ill. 155, 70 N. E. 15 [*affirming* 109 Ill. App. 546]; Chicago, etc., R. Co. *v.* Camper, 199 Ill. 569, 65 N. E. 448 [*reversing* 100 Ill. App. 21]; Citizens' Gas-Light, etc., Co. *v.* O'Brien, 118 Ill. 174, 8 N. E. 310 [*affirming* 19 Ill. App. 231]; Electrical Installation Co. *v.* Kelly, 110 Ill. App. 334; Doolittle *v.* Pfaff, 92 Ill. App. 301; O'Fallon Coal Co. *v.* Laquet, 89 Ill. App. 13; Peoria, etc., R. Co. *v.* Puckett, 42 Ill. App. 642; Gartside Coal Co. *v.* Turk, 40 Ill. App. 22.

Indiana.— P. H. & H. M. Roots Co. *v.* Meeker, (1905) 73 N. E. 253; Princeton Coal, etc., Co. *v.* Roll, 162 Ind. 115, 66 N. E. 169; Thompson *v.* Citizens' St. R. Co., 152 Ind. 461, 53 N. E. 462; Standard Oil Co. *v.* Bowker, 141 Ind. 12, 40 N. E. 128; Eureka Block Coal Co. *v.* Wells, 29 Ind. App. 1, 61 N. E. 236, 94 Am. St. Rep. 259.

Iowa.— Reed *v.* Burlington, etc., R. Co., 72 Iowa 166, 33 N. W. 451, 2 Am. St. Rep. 243; Knapp *v.* Sioux City, etc., R. Co., 65 Iowa 91, 21 N. W. 198, 54 Am. Rep. 1, 71 Iowa 41, 32 N. W. 18; Hatfield *v.* Chicago, etc., R. Co., 61 Iowa 434, 16 N. W. 336.

Kentucky.— Illinois Cent. R. Co. *v.* Clark, 55 S. W. 699, 21 Ky. L. Rep. 1549.

Louisiana.— Williams *v.* Illinois Cent. R. Co., 114 La. 13, 37 So. 992.

Maine.— Fickett *v.* Lisbon Falls Fibre Co., 91 Me. 268, 39 Atl. 996; Nelson *v.* Sanford Mills, 89 Me. 219, 36 Atl. 79.

Maryland.— Maryland Steel Co. *v.* Marney, 88 Md. 482, 42 Atl. 60, 71 Am. St. Rep. 441, 42 L. R. A. 842.

Massachusetts.— Roskee *v.* Mt. Tom Sulphite Pulp Co., 169 Mass. 528, 48 N. E. 766; Ford *v.* Fitchburg R. Co., 110 Mass. 240, 14 Am. St. Rep. 598.

Michigan.— McDonald *v.* Michigan Cent. R. Co., 108 Mich. 7, 65 N. W. 597; Powers *v.* Thayer Lumber Co., 92 Mich. 535, 52 N. W. 937.

Mississippi.— White *v.* Louisville, etc., R. Co., 72 Miss. 12, 16 So. 248.

Missouri.— Clark *v.* Missouri, etc., R. Co., 179 Mo. 66, 77 S. W. 882; Helfenstein *v.* Medarb, 136 Mo. 595, 36 S. W. 863, 37 S. W. 829, 38 S. W. 294; Dickson *v.* Omaha, etc., R. Co., 124 Mo. 140, 27 S. W. 476, 46 Am. St. Rep. 429, 25 L. R. A. 320; Flynn *v.* Kansas City, etc., R. Co., 78 Mo. 195, 47 Am. Rep. 99; Whitley *v.* Chicago, etc., R. Co., 109 Mo. App. 123, 83 S. W. 68; Hamlett *v.* Chicago, etc., R. Co., 89 Mo. App. 354; Hogue *v.* Sligo Furnace Co., 62 Mo. App. 491.

Nebraska.— Swift *v.* Holonbek, 60 Nebr. 784, 84 N. W. 249, 62 Nebr. 31, 86 N. W. 900.

New Hampshire.—Stone *v.* Boscawen Mills, 71 N. H. 288, 52 Atl. 119.

New Jersey.— Cole *v.* Warren Mfg. Co., 63 N. J. L. 626, 44 Atl. 647; Saunders *v.* Eastern Hydraulic Pressed Brick Co., 63 N. J. L. 554, 44 Atl. 630, 76 Am. St. Rep. 222; Smith *v.* Irwin, 51 N. J. L. 507, 18 Atl. 852, 14 Am. St. Rep. 699; Paulmier *v.* Erie R. Co., 34 N. J. L. 151.

New York.— Walsh *v.* New York, etc., R. Co., 178 N. Y. 588, 70 N. E. 1111 [*affirming* 80 N. Y. App. Div. 316, 80 N. Y. Suppl. 767]; Powers *v.* New York, etc., R. Co., 98 N. Y. 274; Voegele *v.* Bardusch, 98 N. Y. App. Div. 127, 90 N. Y. Suppl. 735; Shannon *v.* New York Cent., etc., R. Co., 88 N. Y. App. Div. 349, 84 N. Y. Suppl. 646; Standtke *v.* Swits Condé Co., 53 N. Y. App. Div. 500, 65 N. Y. Suppl. 942; Freeman *v.* Glens Falls Paper-Mill Co., 61 Hun 125, 15 N. Y. Suppl. 657 [*reversed* on other points in 131 N. Y. 582, 30 N. E. 57]; Carr *v.* North River Constr. Co., 48 Hun 266; Berrigan *v.* New York, etc., R. Co., 14 N. Y. Suppl. 26; Hussey *v.* Coger, 9 N. Y. St. 340.

North Carolina.— Whitson *v.* Wrenn, 134 N. C. 86, 46 S. E. 17; Orr *v.* Southern Bell Tel., etc., Co., 132 N. C. 691, 44 S. E. 401; Lindsay *v.* Norfolk, etc., R. Co., 132 N. C. 59, 43 S. E. 511; Styles *v.* Richmond, etc., R. Co., 118 N. C. 1084, 24 S. E. 740.

4. Rules Applied — a. Tools, Machinery, Appliances, and Places[18] — (i) *In General* — (a) *Duty to Use Appliances Furnished.* It is the duty of a servant to use the appliances furnished him by his master for the prosecution of his work, and where proper appliances have been furnished him, and he is injured by reason of his failure to use them, he cannot recover,[19] if he knows or is

Ohio.— Pennsylvania Co. *v.* Mahoney, 22 Ohio Cir. Ct. 469, 12 Ohio Cir. Dec. 366; Cincinnati, etc., R. Co. *v.* Bradshaw, 10 Ohio Cir. Ct. 645, 5 Ohio Cir. Dec. 117; Smith *v.* Wm. Powell Co., 10 Ohio Dec. (Reprint) 799, 23 Cinc. L. Bul. 436.

Oregon.—Gibson *v.* Oregon Short Line, etc., R. Co., 23 Oreg. 493, 32 Pac. 295.

Pennsylvania.— Tomaczewski *v.* Dobson, 208 Pa. St. 324, 57 Atl. 718; Christner *v.* Cumberland, etc., Coal Co., 146 Pa. St. 67, 23 Atl. 221.

Rhode Island.— Desrosiers *v.* Bourn, 26 R. I. 6, 57 Atl. 935.

South Carolina.— Lowrimore *v.* Palmer Mfg. Co., 60 S. C. 153, 38 S. E. 430.

Tennessee.— Chattanooga Light, etc., Co. *v.* Hodges, 109 Tenn. 331, 70 S. W. 616, 97 Am. St. Rep. 844, 60 L. R. A. 459.

Texas.— Hilje *v.* Hettich, 95 Tex. 321, 67 S. W. 90 [*reversing* (Civ. App. 1901) 65 S. W. 491]; Texas Pac. R. Co. *v.* Overheiser, 76 Tex. 437, 13 S. W. 468; Murray *v.* Gulf, etc., R. Co., 73 Tex. 2, 11 S. W. 125; Missouri, etc., R. Co. *v.* Jones, 35 Tex. Civ. App. 584, 80 S. W. 852; Houston, etc., R. Co. *v.* Turner, 34 Tex. Civ. App. 397, 78 S. W. 712; Missouri, etc., R. Co. *v.* Schilling, 32 Tex. Civ. App. 417, 75 S. W. 64; San Antonio, etc., R. Co. *v.* Ankerson, 31 Tex. Civ. App. 327, 72 S. W. 219; Galveston, etc., R. Co. *v.* Pendleton, 30 Tex. Civ. App. 431, 70 S. W. 996; Southern Pac. Co. *v.* Wellington, 27 Tex. Civ. App. 309, 65 S. W. 219; St. Louis, etc., R. Co. *v.* Nelson, 20 Tex. Civ. App. 536, 49 S. W. 710; Greenville Oil, etc., Co. *v.* Harkey, (Civ. App. 1899) 48 S. W. 1005; Newnom *v.* Southwestern Tel., etc., Co., (Civ. App. 1898) 47 S. W. 669; Texas, etc., R. Co. *v.* Cumpston, 4 Tex. Civ. App. 25, 23 S. W. 47; Texas, etc., R. Co. *v.* Wynne, (Civ. App. 1893) 22 S. W. 1064; Gulf, etc., R. Co. *v.* Shearer, 1 Tex. Civ. App. 343, 21 S. W. 133.

Vermont.— Morrisetie *v.* Canadian Pac. R. Co., 74 Vt. 232, 52 Atl. 520.

Virginia.— Russell Creek Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614; Richmond, etc., R. Co. *v.* Brown, 89 Va. 749, 17 S. E. 132; Richmond, etc., R. Co. *v.* Pannill, 89 Va. 552, 16 S. E. 748; Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648, 14 S. E. 361; Chesapeake, etc., R. Co. *v.* Lee, 84 Va. 642, 5 S. E. 579.

Wisconsin.— Mielke *v.* Chicago, etc., R. Co., 103 Wis. 1, 79 N. W. 22, 74 Am. St. Rep. 834.

United States.— Alaska United Gold Min. Co. *v.* Keating, 116 Fed. 561, 53 C. C. A. 655; Motey *v.* Pickle Marble, etc., Co., 74 Fed. 155, 20 C. C. A. 366; Lake Erie, etc., R. Co. *v.* Craig, 73 Fed. 642, 19 C. C. A. 631; Terre Haute, etc., R. Co. *v.* Mansberger, 65 Fed. 196, 12 C. C. A. 574; Aiken *v.* Smith, 54 Fed. 896, 4 C. C. A. 654; Lockhart *v.* Little Rock, etc., R. Co., 40 Fed. 631; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87.

Canada.— Dominion Iron, etc., Co. *v.* Day, 34 Can. Sup. Ct. 387 [*reversing* 36 Nova Scotia 113].

See 34 Cent. Dig. tit. "Master and Servant," §§ 795–800.

18. **Assumption of risk** see *supra*, IV, E, 2. **Comparative negligence** see *supra*, IV, F, 1, d. **Neglect of statutory duty** see *supra*, IV, F, 1, c, (II). **Scope of employment** see *supra*, IV, F, 2, a, (IV). **Use by servant as proximate cause of injury** see *infra*, IV, F, 3.

19. *Alabama.*— Shorter *v.* Southern R. Co., 121 Ala. 158, 25 So. 853; Burgin *v.* Louisville, etc., R. Co., 97 Ala. 274, 12 So. 395.

Arkansas.— Henry Wrape Co. *v.* Huddleston, 66 Ark. 237, 50 S. W. 452; St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293.

California.— Gribben *v.* Yellow Aster Min., etc., Co., 142 Cal. 248, 75 Pac. 839; Long *v.* Coronado R. Co., 96 Cal. 269, 31 Pac. 170.

Colorado.— Victor Coal Co. *v.* Muir, 20 Colo. 320, 38 Pac. 378, 46 Am. St. Rep. 299, 26 L. R. A. 435.

Illinois.— Norton *v.* Sczpurak, 70 Ill. App. 686; Elgin, etc., R. Co. *v.* Docherty, 66 Ill. App. 17.

Maryland.— Piper *v.* Cambria Iron Co., 78 Md. 249, 27 Atl. 939.

Massachusetts.— Levesque *v.* Janson, 165 Mass. 16, 42 N. E. 335; McKinnon *v.* Norcross, 148 Mass. 533, 20 N. E. 183, 3 L. R. A. 320; Floyd *v.* Sugden, 134 Mass. 563.

Michigan.— Robinson *v.* Wright, 94 Mich. 283, 53 N. W. 938; Wilson *v.* Michigan Cent. R. Co., 94 Mich. 20, 53 N. W. 797; Jolly *v.* Detroit, etc., R. Co., 93 Mich. 370, 53 N. W. 526; Rawley *v.* Collian, 90 Mich. 31, 51 N. W. 350.

Missouri.—Anderson *v.* Forrester-Nace Box Co., 103 Mo. App. 382, 77 S. W. 486.

New York.— Kaare *v.* Troy Steel, etc., Co., 139 N. Y. 369, 34 N. E. 901; Cregan *v.* Marston, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854 [*reversing* 10 N. Y. Suppl. 681]; Whallon *v.* Sprague Electric Elevator Co., 1 N. Y. App. Div. 264, 37 N. Y. Suppl. 174; Dana *v.* Crown Point Iron Co., 67 Hun 586, 22 N. Y. Suppl. 455; Flynn *v.* Maine Steamship Co., 14 Misc. 446, 35 N. Y. Suppl. 1031; Fleming *v.* Buswell, 62 N. Y. Suppl. 1137; McGoldrick *v.* Metcalf, 14 N. Y. Suppl. 269 [*affirmed* in 144 N. Y. 630, 39 N. E. 494].

Pennsylvania.— Hart *v.* Allegheny County Light Co., 201 Pa. St. 234, 50 Atl. 1010; Christner *v.* Cumberland, etc., Coal Co., 146 Pa. St. 67, 23 Atl. 221; Stack *v.* Patterson, 6 Phila. 225.

charged with knowledge of the fact that they have been furnished.[20] Similarly, where appliances for doing certain work can be picked up at any time around the place of work, the failure of the master to furnish them specially does not render him liable for an injury to a servant, caused by his not using them.[21] If, however, the servant, on the exigency of the occasion, uses the appliances most convenient, and they fail to operate properly, then the defective appliance is the proximate cause of the injury, and the servant is entitled to recover.[22]

(B) *Duty to Obtain Appliances.*[23] Where a servant knows, or is charged with knowledge of, defects or dangers, and is injured by reason of his failure to demand or obtain appliances by which the danger might have been obviated, he is guilty of such contributory negligence as to bar a recovery.[24]

(C) *Choice of Appliances.* Where proper appliances are furnished to, or are procurable by, a servant, and he voluntarily and unnecessarily elects to use an improper, defective, or dangerous appliance and is injured, his negligence will bar a recovery.[25] He has, however, the right to use such of the appliances furnished as appear to him to be reasonably safe for the performance of his task.[26]

(D) *Choice of Ways and Places For Work.* Where a servant unnecessarily and of his own volition uses an unsafe way or place to do his work, when other and safer ways or places are available, he cannot recover for injuries sustained by reason of his negligent action, if the danger is such that no ordinarily prudent

Virginia.— Norfolk, etc., R. Co. *v.* Briggs, (1892) 14 S. E. 753, (1893) 16 S. E. 748.

Washington.—Anderson *v.* Inland Tel., etc., Co., 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410.

United States.— The Saratoga, 87 Fed. 349; Lambos *v.* The Tammerlane, 47 Fed. 822.

See 34 Cent. Dig. tit. "Master and Servant," § 719.

The breaking of the only proper tool in the possession of workmen, and the substitution by them of an improper one, will not render the master liable for injuries to one of the workmen owing to the use of the improper tool, in the absence of evidence that the master did not furnish a sufficiency of proper tools at the place from which those used were taken, or within convenient reach. Carroll *v.* Western Union Tel. Co., 160 Mass. 152, 35 N. E. 456.

20. See Light *v.* Chicago, etc., R. Co., 93 Iowa 83, 61 N. W. 380, holding that where a section hand, directed to go with a coal car to unload it, was injured by its starting while he was getting on, he will not be charged with knowledge that it had a handhold and stirrup which he should have used, where most of defendant's coal cars were not furnished with hand-holds and stirrups.

21. Hathaway *v.* Illinois Cent. R. Co., 92 Iowa 337, 60 N. W. 651.

22. Finley *v.* Richmond, etc., R. Co., 59 Fed. 419.

23. Infant servants see *supra*, IV, F, 2, b.

24. *Colorado.*— Victor Coal Co. *v.* Muir, 20 Colo. 320, 38 Pac. 378, 46 Am. St. Rep. 299, 26 L. R. A. 435.

Georgia.— Countryman *v.* East Tennessee, etc., R. Co., 89 Ga. 835, 16 S. E. 84.

Illinois.— St. Louis Consol. Coal Co. *v.* Young, 31 Ill. App. 417.

Indiana.—Myers *v.* W. C. De Pauw Co., 138 Ind. 590, 38 N. E. 37.

Louisiana.— Smart *v.* Louisiana Electric Light Co., 47 La. Ann. 869, 17 So. 346.

Massachusetts.—Allen *v.* G. W. & F. Smith Iron Co., 160 Mass. 557, 36 N. E. 581.

Missouri.— Kelley *v.* Chicago, etc., R. Co., 105 Mo. App. 365, 79 S. W. 973.

New York.— Van Sickle *v.* Atlantic Ave. R. Co., 12 Misc. 217, 33 N. Y. Suppl. 265.

United States.— Craig *v.* The Saratoga, 87 Fed. 349.

See 34 Cent. Dig. tit. "Master and Servant," § 715.

25. *Arkansas.*— Henry Wrape Co. *v.* Huddleston, 66 Ark. 237, 50 S. W. 452.

Georgia.— East Tennessee, etc., R. Co. *v.* Perkins, 88 Ga. 1, 13 S. E. 952.

Indiana.—American Carbon Co. *v.* Jackson, 24 Ind. App. 390, 56 N. E. 862.

Kentucky.— Bush *v.* Grant, 61 S. W. 363, 22 Ky. L. Rep. 1766.

Massachusetts.— Maloney *v.* U. S. Rubber Co., 169 Mass. 347, 47 N. E. 1012; Adasken *v.* Gilbert, 165 Mass. 443, 43 N. E. 199.

New Jersey.— Campbell *v.* T. A. Gillespie Co., 69 N. J. L. 279, 55 Atl. 276.

New York.— Hogan *v.* Field, 44 Hun 72; Oellerich *v.* Hayes, 8 Misc. 211, 28 N. Y. Suppl. 579; McGoldrick *v.* Metcalf, 14 N. Y. Suppl. 269, 18 N. Y. Suppl. 169 [*affirmed* in 144 N. Y. 630, 39 N. E. 494].

Texas.— Houston, etc., R. Co. *v.* Myers, 55 Tex. 110.

Virginia.— Piedmont Electric Illuminating Co. *v.* Patterson, 84 Va. 747, 6 S. E. 4.

Wisconsin.— Borden *v.* Daisy Roller Mill Co., 98 Wis. 407, 74 N. W. 91, 67 Am. St. Rep. 816.

See 34 Cent. Dig. tit. "Master and Servant," § 701.

26. Walsh *v.* New York, etc., R. Co., 80 N. Y. App. Div. 316, 80 N. Y. Suppl. 767. See also Boyle *v.* Columbian Fire Proofing Co., 182 Mass. 93, 64 N. E. 726.

person would incur it under like circumstances.[27] But a servant is not guilty of contributory negligence in using a way kept open as a common passage or thoroughfare of the master;[28] and where there are different ways over which a servant can pass in the performance of his duties, and all of them are apparently equally safe, the act of choosing one in preference to the others will not preclude a recovery for injuries sustained while passing over it.[29]

(E) *Unnecessary Occupation of Dangerous Position.*[30] If a servant voluntarily and unnecessarily puts himself into a dangerous position, where there are other positions which he may take, in connection with the discharge of his duties, which are safe, or reasonably so, he cannot recover damages for an injury contributed to by his negligence in so doing.[31] But to constitute negligence there

27. *Colorado.*— Acme Coal Min. Co. *v.* McIver, 5 Colo. App. 267, 38 Pac. 596.

Georgia.— Walker *v.* Atlanta, etc., R. Co., 103 Ga. 820, 30 S. E. 503; Hamilton *v.* Richmond, etc., R. Co., 83 Ga. 346, 9 S. E. 670.

Illinois.— Chicago, etc., R. Co. *v.* Rush, 84 Ill. 570.

Indiana.— Wabash Paper Co. *v.* Webb, 146 Ind. 303, 45 N. E. 474; Pennsylvania Co. *v.* O'Shaughnessy, 122 Ind. 588, 23 N. E. 675; Salem-Bedford Stone Co. *v.* O'Brien, 12 Ind. App. 217, 40 N. E. 430; Romona Oolitic Stone Co. *v.* Tate, 12 Ind. App. 57, 37 N. E. 1065, 39 N. E. 529. *Compare* Indiana Pipe Line, etc., Co. *v.* Neusbaum, 21 Ind. App. 361, 52 N. E. 471.

Iowa.— Kelsey *v.* Chicago, etc., R. Co., 106 Iowa 253, 76 N. W. 670. See also Norris *v.* Cudahy Packing Co., 124 Iowa 748, 100 N. W. 853.

Kansas.— Union Pac. R. Co. *v.* Estes, 37 Kan. 715, 16 Pac. 131. *Compare* Kansas City, etc., R. Co. *v.* Murray, 55 Kan. 336, 40 Pac. 646.

Kentucky.— Tradewater Coal Co. *v.* Head, 66 S. W. 721, 23 Ky. L. Rep. 2064.

Massachusetts.—Slade *v.* Beattie, 186 Mass. 267, 71 N. E. 540; Kennedy *v.* Merrimack Paving Co., 185 Mass. 442, 70 N. E. 437; Connors *v.* Merchants' Mfg. Co., 184 Mass. 466, 69 N. E. 218; Dyer *v.* Fitchburg R. Co., 170 Mass. 148, 48 N. E. 1087; Galvin *v.* Old Colony R. Co., 162 Mass. 533, 39 N. E. 186.

Missouri.— Nolan *v.* Shickle, 69 Mo. 336 [*affirming* 3 Mo. App. 300].

Nebraska.— Chicago, etc., R. Co. *v.* Cowles, 54 Nebr. 269, 74 N. W. 579.

New York.— Burk *v.* Edison Gen. Electric Co., 89 Hun 498, 35 N. Y. Suppl. 313; Kneckel *v.* O'Connor, 36 Misc. 335, 73 N. Y. Suppl. 546 [*affirmed* in 73 N. Y. App. Div. 594, 76 N. Y. Suppl. 829]; Patterson *v.* V. J. Hedden, etc., Co., 90 N. Y. Suppl. 1069.

North Dakota.— Bennett *v.* Northern Pac. R. Co., 2 N. D. 112, 49 N. W. 408, 13 L. R. A. 465.

Ohio.— Miller *v.* Lozier Mfg. Co., 19 Ohio Cir. Ct. 666, 9 Ohio Cir. Dec. 755.

Pennsylvania.— Kinney *v.* Corbin, 132 Pa. St. 341, 19 Atl. 141; Collins *v.* Second Ave. Traction Co., 7 Pa. Super. Ct. 318.

Rhode Island.— Benson *v.* New York, etc., R. Co., 26 R. I. 405, 59 Atl. 79.

Texas.—Consumers' Cotton Oil Co. *v.* Jonte, 36 Tex. Civ. App. 18, 80 S. W. 847.

Utah.— Cook *v.* Bullion-Beck, etc., Min. Co., 12 Utah 51, 41 Pac. 557.

Virginia.— Harris *v.* Chesapeake, etc., R. Co., (1895) 23 S. E. 219.

Washington.— Lewis *v.* Simpson, 3 Wash. 641, 29 Pac. 207. *Compare* Sayward *v.* Carlson, 1 Wash. 29, 23 Pac. 830.

West Virginia.— Cawley *v.* Winifrede R. Co., 31 W. Va. 116, 5 S. E. 318.

Wisconsin.— Wilber *v.* Wisconsin Cent. Co., 86 Wis. 535, 57 N. W. 356.

United States.— Anderson *v.* The Ashebrooke, 44 Fed. 124; The Privateer, 14 Fed. 872.

Canada.— Dominion Iron, etc., Co. *v.* Day, 34 Can. Sup. Ct. 387 [*reversing* 36 Nova Scotia 113].

See 34 Cent. Dig. tit. "Master and Servant," § 702.

28. Moore *v.* W. R. Pickering Lumber Co., 105 La. 504, 29 So. 990.

29. Ætna Powder Co. *v.* Earlandson, 33 Ind. App. 251, 71 N. E. 185; Lauter *v.* Duckworth, 19 Ind. App. 535, 48 N. E. 864.

30. **Customary acts** see *infra*, IV, F, 4, a, (I), (F).

Scope of employment see *infra*, IV, F, 4, a, (II), (D).

31. *Alabama.*— Alabama Great Southern R. Co. *v.* Richie, 99 Ala. 346, 12 So. 612; Warden *v.* Louisville, etc., R. Co., 94 Ala. 277, 10 So. 276, 14 L. R. A. 552. See also Georgia Cent. R. Co. *v.* Lamb, 124 Ala. 172, 26 So. 969. *Compare* Alabama, etc., R. Co. *v.* Davis, 119 Ala. 572, 24 So. 862.

Arkansas.— Choctaw, etc., R. Co. *v.* Stallings, 70 Ark. 603, 70 S. W. 303; St. Louis, etc., R. Co. *v.* Marker, 41 Ark. 542.

Georgia.— Allen *v.* Hixson, 111 Ga. 460, 36 S. E. 810; Quironet *v.* Alabama, etc., R. Co., 111 Ga. 315, 36 S. E. 599; Georgia, etc., R. Co. *v.* Hallman, 97 Ga. 317, 23 S. E. 73.

Illinois.—Illinois Steel Co. *v.* McNulty, 105 Ill. App. 594.

Indiana.— Coyle *v.* Pittsburgh, etc., R. Co., 155 Ind. 429, 58 N. E. 545.

Iowa.— Campbell *v.* Illinois Cent. R. Co., 124 Iowa 302, 100 N. W. 30; Dillon *v.* Iowa Cent. R. Co., 118 Iowa 645, 92 N. W. 855; Haynes *v.* Ft. Dodge, etc., R. Co., 118 Iowa 393, 92 N. W. 57; Haggerty *v.* Chicago, etc., R. Co., 90 Iowa 405, 57 N. W. 896; Gibbons *v.* Chicago, etc., R. Co., 66 Iowa 231, 23 N. W. 644; Martensen *v.* Chicago, etc., R. Co., 60 Iowa 705, 15 N. W. 569. *Compare* Jeffrey *v.*

must be reason to apprehend danger;[32] and that, as between two apparently safe positions, a servant fails to choose the one which proves to be safe in fact cannot be ascribed to him as negligence.[33]

(F) *Customary Acts.*[34] It is not contributory negligence on the part of a servant to follow a custom habitually followed by his fellow servants, to the knowledge of the master,[35] unless the danger is so obvious that an ordinarily

Keokuk, etc., R. Co., 56 Iowa 546, 9 N. W. 884.

Kansas.— Carrier *v.* Union Pac. R. Co., 61 Kan. 447, 59 Pac. 1075; Atchison, etc., R. Co. *v.* Tindall, 57 Kan. 719, 48 Pac. 12; Union Pac. R. Co. *v.* Estes, 37 Kan. 715, 16 Pac. 131.

Kentucky.— Calvert *v.* Brosius, 77 S. W. 1098, 25 Ky. L. Rep. 1393; Louisville, etc., R. Co. *v.* Fox, 42 S. W. 922, 20 Ky. L. Rep. 81. But *compare* Southern R. Co. *v.* Duvall, 54 S. W. 741, 21 Ky. L. Rep. 1153, 50 S. W. 535, 20 Ky. L. Rep. 1915.

Louisiana.— Jenkins *v.* Maginnis Cotton Mills, 51 La. Ann. 1011, 25 So. 643.

Maine.— Demers *v.* Deering, 93 Me. 272, 44 Atl. 922; Osborne *v.* Knox, etc., R. Co., 68 Me. 49, 28 Am. Rep. 16.

Massachusetts.— Tiffaney *v.* Hathaway, 182 Mass. 431, 65 N. E. 811; Powers *v.* Boston, etc., R. Co., 175 Mass. 466, 56 N. E. 710.

Michigan.— Leppala *v.* Cleveland Iron-Min. Co., 122 Mich. 633, 81 N. W. 553; Perlick *v.* Detroit Wooden-Ware Co., 119 Mich. 331, 78 N. W. 127.

Minnesota.— Groff *v.* Duluth Imperial Mill Co., 58 Minn. 333, 59 N. W. 1049; McCarthy *v.* Lehigh Valley Transp. Co., 48 Minn. 533, 51 N. W. 480.

Mississippi.— Vicksburg Mfg. Co. *v.* Vaughn, (1900) 27 So. 599.

Missouri.— Richardson *v.* Mesker, 171 Mo. 666, 72 S. W. 506; George *v.* St. Louis Mfg. Co., 159 Mo. 333, 59 S. W. 1097; Montgomery *v.* Chicago Great Western R. Co., 109 Mo. App. 88, 83 S. W. 66; Sparks *v.* Kansas City, etc., R. Co., 31 Mo. App. 111.

New Hampshire.— McGill *v.* Maine, etc., Granite Co., 70 N. H. 125, 46 Atl. 684, 85 Am. St. Rep. 618.

New York.— Finnell *v.* Delaware, etc., R. Co., 129 N. Y. 669, 29 N. E. 825; O'Donnell *v.* International Nav. Co., 49 N. Y. App. Div. 408, 63 N. Y. Suppl. 290; Clancy *v.* Guaranty Constr. Co., 25 N. Y. App. Div. 355, 50 N. Y. Suppl. 800; Kerrigan *v.* Hart, 40 Hun 389; Smith *v.* Bispham, 52 N. Y. Super. Ct. 33; Sammon *v.* New York, etc., R. Co., 38 N. Y. Super. Ct. 414; Arnold *v.* Delaware, etc., Canal Co., 1 N. Y. Suppl. 409 [*affirmed* in 125 N. Y. 15, 25 N. E. 1064].

North Carolina.— Taylor *v.* Richmond, etc., R. Co., 109 N. C. 233, 13 S. E. 736; Chambers *v.* Western North Carolina R. Co., 91 N. C. 471.

Ohio.— Lake Shore, etc., R. Co. *v.* Eagan, 18 Ohio Cir. Ct. 886, 4 Ohio Cir. Dec. 20. See also Forest City Stone Co. *v.* Richardson, 22 Ohio Cir. Ct. 139, 12 Ohio Cir. Dec. 177.

Pennsylvania.— Dooner *v.* Delaware, etc., Canal Co., 171 Pa. St. 581, 33 Atl. 415; Pittsburgh, etc., R. Co. *v.* Sentmeyer, 92 Pa. St. 276, 37 Am. Rep. 684.

Texas.— Gulf, etc., R. Co. *v.* Hernandez, (Civ. App. 1898) 45 S. W. 197; Houston, etc., R. Co. *v.* Smith, (Civ. App. 1896) 38 S. W. 51. *Compare* International, etc., R. Co. *v.* Culpepper, 19 Tex. Civ. App. 182, 46 S. W. 922.

Utah.— Fowler *v.* Pleasant Valley Coal Co., 16 Utah 348, 52 Pac. 594.

Virginia.— Norfolk, etc., R. Co. *v.* Hawkes, 102 Va. 452, 46 S. E. 471; Norfolk, etc., R. Co. *v.* Mann, 99 Va. 180, 37 S. E. 849.

West Virginia.— Seldomridge *v.* Chesapeake, etc., R. Co., 46 W. Va. 569, 33 S. E. 293; Reese *v.* Wheeling, etc., R. Co., 42 W. Va. 333, 26 S. E. 204; Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

Wisconsin.— Hulien *v.* Chicago, etc., R. Co., 107 Wis. 122, 82 N. W. 710.

United States.— Tuttle *v.* Detroit, etc., R. Co., 122 U. S. 189, 7 S. Ct. 1166, 30 L. ed. 1114; Baltimore, etc., R. Co. *v.* Jones, 95 U. S. 439, 24 L. ed. 506; Erie R. Co. *v.* Kane, 118 Fed. 223, 55 C. C. A. 129; Posey *v.* Texas, etc., R. Co., 102 Fed. 236, 42 C. C. A. 293; Chicago, etc., R. Co. *v.* Davis, 53 Fed. 61, 3 C. C. A. 429; Martin *v.* Baltimore, etc., R. Co., 41 Fed. 125; Kresanowzki *v.* Northern Pac. R. Co., 18 Fed. 229, 5 McCrary 528; Cunningham *v.* Chicago, etc., R. Co., 17 Fed. 882, 5 McCrary 465.

See 34 Cent. Dig. tit. "Master and Servant," § 703.

Whether in riding on the footboard of an engine a switchman was chargeable with negligence is a question for the jury, where there was another switchman on top of each of the two cars being pushed, neither of whom saw the open switch causing the accident. Chicago, etc., R. Co. *v.* Harrington, 77 Ill. App. 499.

32. Layag *v.* Mt. Shasta Mineral Spring Co., 135 Cal. 141, 67 Pac. 48; Chicago, etc., R. Co. *v.* Cleveland, 92 Ill. App. 308; Ashley Wire Co. *v.* McFadden, 66 Ill. App. 26; Gulf, etc., R. Co. *v.* Wood, (Tex. Civ. App. 1901) 63 S. W. 164; McGough *v.* Ropner, 87 Fed. 534; McDowell *v.* The France, 53 Fed. 843.

Riding from work on a flat-car, instead of in the caboose, is not negligence as matter of law. Barley *v.* Southern Indiana R. Co., 30 Ind. App. 406, 66 N. E. 72. See also Illinois Cent. R. Co. *v.* Clark, 55 S. W. 699, 21 Ky. L. Rep. 1549, in which the servant rode with his legs hanging over the side of the car.

33. McElligott *v.* Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181.

34. Methods of work see *infra*, IV, F, 4, b, (I), (B), (3).

35. Pennsylvania Coal Co. *v.* Nee, 9 Pa. Cas. 579, 13 Atl. 841; Taylor, etc., R. Co. *v.* Taylor, 79 Tex. 104, 14 S. W. 918, 23 Am. St. Rep. 316.

prudent person would refuse to take the risk arising from such a method of work.[36]

(II) *Duty to Discover or Remedy Defects*—(A) *In General.*[37] While a servant is bound to observe open and obvious defects and dangers,[38] and such as would be disclosed by the exercise of ordinary care,[39] he has the right to assume

36. Warden *v.* Louisville, etc., R. Co., 94 Ala. 277, 10 So. 276, 14 L. R. A. 552.

37. **Choice of appliances** see *supra*, IV, F, 4, a, (I), (C).

Choice of ways and places for work see *supra*, IV, F, 4, a, (I), (D).

Construction and operations of rules see *supra*, IV, C, 2, f.

Disregarding warnings or signals see *infra*, IV, F, 4, e.

Duty of master to inspect and repair see *supra*, IV, A, 16.

Inexperienced or youthful employee see *supra*, IV, F, 2, b, (IV).

Occupying dangerous position see *infra*, IV, F, 1, e.

38. *Georgia.*— Central R., etc., Co. *v.* Kenny, 58 Ga. 485.

Illinois.— Armour *v.* Brazeau, 191 Ill. 117, 60 N. E. 904 [*reversing* 93 Ill. App. 235]; Montgomery Coal Co. *v.* Barringer, 109 Ill. App. 185; Anderberg *v.* Chicago, etc., R. Co., 98 Ill. App. 207.

Indiana.— McBride *v.* Indianapolis Frog, etc., Co., 5 Ind. App. 482, 32 N. E. 579.

Iowa.— Flockhart *v.* Hocking Coal Co., 126 Iowa 576, 102 N. W. 494.

Kentucky.— Ahrens, etc., Mfg. Co. *v.* Rellihan, 82 S. W. 993, 26 Ky. L. Rep. 919.

Maine.— Caven *v.* Bodwell Granite Co., 99 Me. 278, 59 Atl. 285.

Massachusetts.— Gavin *v.* Fall River Automatic Tel. Co., 185 Mass. 78, 69 N. E. 1055.

New York.— See Walsh *v.* New York, etc., R. Co., 178 N. Y. 588, 70 N. E. 1111 [*affirming* 80 N. Y. App. Div. 316, 80 N. Y. Suppl. 767].

Ohio.— Strabler *v.* Toledo Bridge Co., 11 Ohio Cir. Dec. 87.

Rhode Island.— Durell *v.* Hartwell, 26 R. I. 125, 58 Atl. 448.

Texas.— O'Brien *v.* Missouri, etc., R. Co., 36 Tex. Civ. App. 523, 82 S. W. 319.

Virginia.— Piedmont Electric Illuminating Co. *v.* Patterson, 84 Va. 747, 6 S. E. 4.

Wisconsin.— Holt *v.* Chicago, etc., R. Co., 94 Wis. 596, 69 N. W. 352.

United States.— Kansas City, etc., R. Co. *v.* Spellman, 102 Fed. 251, 42 C. C. A. 321.

See 34 Cent. Dig. tit. "Master and Servant," § 717.

39. *Alabama.*— Pioneer Min., etc., Co. *v.* Thomas, 133 Ala. 279, 32 So. 15.

Arkansas.— Little Rock, etc., R. Co. *v.* Voss, (1892) 18 S. W. 172.

Georgia.— Chenall *v.* Palmer Brick Co., 117 Ga. 106, 43 S. E. 443; Stubbs *v.* Atlanta Cotton-Seed Oil Mills, 92 Ga. 495, 17 S. E. 746; Nelling *v.* Industrial Mfg. Co., 78 Ga. 260; Atlanta, etc., R. Co. *v.* Webb, 61 Ga. 586. *Compare* Central R., etc., Co. *v.* Attaway, 90 Ga. 656, 16 S. E. 956.

Illinois.— Illinois Cent. R. Co. *v.* Sanders, 58 Ill. App. 117; Illinois Cent. R. Co. *v.* Pummell, 58 Ill. App. 33; Williams *v.* Hensler, 38 Ill. App. 584.

Indiana.— Baxter *v.* Lusher, 159 Ind. 381, 65 N. E. 211; Whitcomb *v.* Standard Oil Co., 153 Ind. 513, 55 N. E. 440; Diamond Plate Glass Co. *v.* De Hority, 143 Ind. 381, 40 N. E. 681; Bedford Belt R. Co. *v.* Brown, 142 Ind. 659, 42 N. E. 359; Day *v.* Cleveland, etc., R. Co., 137 Ind. 206, 36 N. E. 854; Cleveland, etc., R. Co. *v.* Goddard, 33 Ind. App. 321, 71 N. E. 514; Bedford Quarries Co. *v.* Thomas, 29 Ind. App. 85, 63 N. E. 880; Chicago, etc., R. Co. *v.* Wagner, 17 Ind. App. 22, 45 N. E. 76, 1121.

Iowa.— Kitteringham *v.* Sioux City, etc., R. Co., 62 Iowa 285, 17 N. W. 585. See also King *v.* Chicago, etc., R. Co., 108 Iowa 748, 78 N. W. 837. *Compare* Crabell *v.* Wapello Coal Co., 68 Iowa 751, 28 N. W. 56, holding that the fact that a servant could know by ordinary care of defects which render his employment more than ordinarily hazardous and continues at work tends to show contributory negligence, but is not conclusive thereof.

Kansas.— McQueen *v.* Central Branch Union Pac. R. Co., 30 Kan. 689, 1 Pac. 139. See also Foster *v.* Kansas Salt Co., 60 Kan. 859, 57 Pac. 961.

Kentucky.— Tradewater Coal Co. *v.* Head, 68 S. W. 721, 23 Ky. L. Rep. 2064.

Massachusetts.— Wyman *v.* Clark, 180 Mass. 173, 62 N. E. 245; Ladd *v.* New Bedford R. Co., 119 Mass. 412, 20 Am. Rep. 331. *Compare* McCoy *v.* Westborough, 172 Mass. 504, 52 N. E. 1064; Austin *v.* Fitchburg R. Co., 172 Mass. 484, 52 N. E. 527, holding that the question of contributory negligence was for the jury.

Michigan.— Pahlan *v.* Detroit, etc., R. Co., 122 Mich. 232, 81 N. W. 103; Goulin *v.* Canada Southern Bridge Co., 64 Mich. 190, 31 N. W. 44.

Minnesota.— Bischoff *v.* St. Paul Bethel Assoc., 82 Minn. 105, 84 N. W. 731; Jennings *v.* Iron Bay Co., 47 Minn. 111, 49 N. W. 685.

Mississippi.— Illinois Cent. R. Co. *v.* Bowles, 71 Miss. 1003, 15 So. 138.

New Jersey.— McGrath *v.* Delaware, etc., R. Co., 68 N. J. L. 425, 53 Atl. 207.

New York.— McCarthy *v.* Emerson, 77 N. Y. App. Div. 562, 79 N. Y. Suppl. 180; Nugent *v.* Brooklyn Union El. R. Co., 64 N. Y. App. Div. 351, 72 N. Y. Suppl. 67; Watson *v.* Duncan, 46 N. Y. App. Div. 298, 61 N. Y. Suppl. 667, 47 N. Y. App. Div. 640, 62 N. Y. Suppl. 257; Connors *v.* Elmira, etc., R. Co., 92 Hun 339, 36 N. Y. Suppl. 926; Kenney *v.* Second Ave. R. Co., 89 Hun 340, 35 N. Y. Suppl. 395.

Ohio.— Wellston Coal Co. *v.* Smith, 65 Ohio St. 70, 61 N. E. 143, 87 Am. St. Rep. 547.

that his master has used due care to furnish him with reasonably safe and suitable tools, appliances, places for work, etc.,[40] and is under no obligation to examine and inspect them in order to discover latent defects not open to ordinary observation.[41] Where, however, it is the servant's duty, by the terms of his employ-

55 L. R. A. 99; Wainwright *v.* Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 530.

Pennsylvania.— Kelly *v.* Baltimore, etc., R. Co., 9 Pa. Cas. 48, 11 Atl. 659.

South Carolina.— Barksdale *v.* Charleston, etc., R. Co., 66 S. C. 204, 44 S. W. 743. But see Evans *v.* Chamberlain, 40 S. C. 104, 18 S. E. 213.

Tennessee.— Record *v.* Chickasaw Cooperage Co., 108 Tenn. 657, 69 S. W. 334.

Texas.—International, etc., R. Co. *v.* Royal, (Civ. App. 1904) 83 S. W. 713; Horton *v.* Ft. Worth Packing, etc., Co., 33 Tex. Civ. App. 150, 76 S. W. 211; Direct Nav. Co. *v.* Anderson, 29 Tex. Civ. App. 65, 69 S. W. 174; Missouri, etc., R. Co. *v.* Wood, (Civ. App. 1896) 35 S. W. 879.

Washington.— Steeples *v.* Panel, etc., Box Co., 33 Wash. 359, 74 Pac. 475; Schulz *v.* Johnson, 7 Wash. 403, 35 Pac. 130.

United States.— Choctaw, etc., R. Co. *v.* Holloway, 191 U. S. 334, 24 S. Ct. 102, 48 L. ed. 207 [*affirming* 114 Fed. 458, 52 C. C. A. 260]; Northern Pac. R. Co. *v.* Everett, 152 U. S. 107, 14 S. Ct. 474, 38 L. ed. 373; The Louisiana, 74 Fed. 748, 21 C. C. A. 60.

See 34 Cent. Dig. tit. "Master and Servant," §§ 710, 712.

But see Porter *v.* Hannibal, etc., R. Co., 60 Mo. 160, holding that, in a suit by a servant against a railroad company for personal injuries caused by a defective track, an instruction declaring defendant not liable, notwithstanding its unsafe condition, if plaintiff knew, or could by the exercise of ordinary diligence have known, the state of the track, is properly refused.

Custom no excuse for want of due care see McIsaac *v.* Northampton Electric Lighting Co., 172 Mass. 89, 51 N. E. 524, 70 Am. St. St. Rep. 244.

40. Reliance on care of master see *supra*, IV, F, 2, a, (II).

41. *Alabama.*— Louisville, etc., R. Co. *v.* Orr, 91 Ala. 548, 8 So. 360.

California.— Silveira *v.* Iversen, 128 Cal. 187, 60 Pac. 687.

Colorado.— Victor Coal Co. *v.* Muir, 20 Colo. 320, 38 Pac. 378, 46 Am. St. Rep. 299, 26 L. R. A. 435.

Connecticut.— Wilson *v.* Willimantic Linen Co., 50 Conn. 433, 47 Am. Rep. 653.

Delaware.— Giles *v.* Diamond State Iron Co., 7 Houst. 453, 8 Atl. 368.

Georgia.— Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788. See also Ousley *v.* Central R., etc., Co., 86 Ga. 538, 12 S. E. 938.

Illinois.— Rock Island Sash, etc., Works *v.* Pohlman, 210 Ill. 133, 71 N. E. 428 [*affirming* 99 Ill. App. 670]; Barnett, etc., Co. *v.* Schlapka, 208 Ill. 426, 70 N. E. 343 [*affirming* 110 Ill. App. 672]; Momence Stone Co. *v.* Turrell, 205 Ill. 515, 68 N. E. 1078 [*affirming* 106 Ill. App. 160]; Ehlen *v.* O'Donnell, 205 Ill. 38, 68 N. E. 766 [*affirming* 102 Ill. App. 141]; Chicago, etc., R. Co. *v.* Rains, 203 Ill. 417, 67 N. E. 840; Ross *v.* Shanley, 185 Ill. 390, 56 N. E. 1105 [*affirming* 86 Ill. App. 144]; Pennsylvania Coal Co. *v.* Kelly, 156 Ill. 9, 40 N. E. 938 [*affirming* 54 Ill. App. 622]; Chicago, etc., R. Co. *v.* Kneirim, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259 [*affirming* 48 Ill. App. 243]; Chicago, etc., R. Co. *v.* Hines, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; Chicago, etc., R. Co. *v.* Johnson, 116 Ill. 206, 4 N. E. 381; Montgomery Coal Co. *v.* Barringer, 109 Ill. App. 185; McBeath *v.* Rawle, 93 Ill. App. 212 [*affirmed* in 192 Ill. 626, 61 N. E. 847, 69 L. R. A. 696]; Morton *v.* Zwierzykowski, 91 Ill. App. 462 [*affirmed* in 192 Ill. 328, 61 N. E. 413]; Alabaster Co. *v.* Lonergan, 90 Ill. App. 353; Pioneer Cooperage Co. *v.* Romanowicz, 85 Ill. App. 407 [*affirmed* in 186 Ill. 9, 57 N. E. 864]; Leonard *v.* Kinnare, 75 Ill. App. 145; Chicago, etc., R. Co. *v.* Driscoll, 70 Ill. App. 91; Wells, etc., Co. *v.* Miskowicz, 50 Ill. App. 452.

Indiana.— Indiana, etc., R. Co. *v.* Bundy, 152 Ind. 590, 53 N. E. 175; Pennsylvania Co. *v.* McCormack, 131 Ind. 250, 30 N. E. 27; Ohio, etc., R. Co. *v.* Pearcy, 128 Ind. 197, 27 N. E. 479; Cincinnati, etc., R. Co. *v.* McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67 (conductor not held to reasonable care in inspecting machinery, etc., of train); Chicago, etc., R. Co. *v.* Tackett, 33 Ind App. 379, 71 N. E. 524; Indiana Bituminous Coal Co. *v.* Buffey, 28 Ind. App. 108, 62 N. E. 279; Ft. Wayne *v.* Patterson, 25 Ind. App. 547, 58 N. E. 747; Indiana Natural, etc., Gas Co. *v.* Marshall, 22 Ind. App. 121, 52 N. E. 232; Baltimore, etc., R. Co. *v.* Spaulding, 21 Ind. App. 323, 52 N. E. 410; Boyce *v.* Schroeder, 21 Ind. App. 28, 51 N. E. 376; Island Coal Co. *v.* Risher, 13 Ind. App. 98, 40 N. E. 151; Lebanon *v.* McCoy, 12 Ind. App. 500, 40 N. E. 700; Hancock *v.* Keene, 5 Ind. App. 408, 32 N. E. 329.

Iowa.— Flockhart *v.* Hocking Coal Co., 126 Iowa 576, 102 N. W. 494; Cushman *v.* Carbondale Fuel Co., 116 Iowa 618, 88 N. W. 817; Bryce *v.* Chicago, etc., R. Co., 103 Iowa 665, 72 N. W. 780; Kearns *v.* Chicago, etc., R. Co., 66 Iowa 599, 24 N. W. 231; Schermer *v.* Gendt, 52 Iowa 742, 3 N. W. 535.

Kansas.— Kelley *v.* Union Pac. R. Co., 58 Kan. 161, 48 Pac. 843; Rouse *v.* Ledbetter, 56 Kan. 348, 43 Pac. 249.

Kentucky.— Illinois Cent. R. Co. *v.* Hilliard, 99 Ky. 684, 37 S. W. 75, 18 Ky. L. Rep. 505 (freight conductor not bound to discover latent defect, although required to examine condition of train before taking charge of it); Louisville, etc., R. Co. *v.* Foley, 94 Ky. 220, 21 S. W. 866, 15 Ky. L. Rep. 17; Ahrens etc., Mfg. Co. *v.* Rellihan, 82

ment or by reason of the nature of the work, to inspect, or to inspect and keep in order, the machinery, appliances, or places for work, he cannot recover for

S. W. 993, 26 Ky. L. Rep. 919; Wilson *v.* Alpine Coal Co., 81 S. W. 278, 26 Ky. L. Rep. 337; Kentucky Freestone Co. *v.* McGee, 80 S. W. 1113, 25 Ky. L. Rep. 2211; Continental Tobacco Co. *v.* Knoop, 71 S. W. 3, 24 Ky. L. Rep. 1268; Louisville, etc., R. Co. *v.* Roberts, 70 S. W. 833, 24 Ky. L. Rep. 1160; 75 S. W. 267, 25 Ky. L. Rep. 438; Southern R. Co. *v.* Hart, 64 S. W. 650, 23 Ky. L. Rep. 1054.

Maine.— Caven *v.* Bodwell Granite Co., 99 Me. 278, 59 Atl. 285; Frye *v.* Bath Gas, etc., Co., 94 Me. 17, 46 Atl. 804.

Massachusetts.— Foster *v.* New York, etc., R. Co., 187 Mass. 21, 72 N. E. 331; Mahoney *v.* Bay State Pink Granite Co., 184 Mass. 287, 68 N. E. 234; Kleibaz *v.* Middleton Paper Co., 180 Mass. 363, 62 N. E. 371; Haskell *v.* Cape Ann Anchor Works, 178 Mass. 485, 59 N. E. 1113, 4 L. R. A. N. S. 220; Bartolomeo *v.* McKnight, 178 Mass. 242, 59 N. E. 804.

Michigan.— McDonald *v.* Michigan Cent. R. Co., 132 Mich. 372, 93 N. W. 1041, 102 Am. St. Rep. 426 (conductor need not make minute inspection for latent defects in brakes); Morton *v.* Detroit, etc., R. Co., 81 Mich. 423, 46 N. W. 111 (brakeman need not examine for latent defects in brake chain).

Minnesota.— Ransier *v.* Minneapolis, etc., R. Co., 32 Minn. 331, 20 N. W. 332.

Missouri.— Devlin *v.* Wabash, etc., R. Co., 87 Mo. 545; Siela *v.* Hannibal, etc., R. Co., 82 Mo. 430; Porter *v.* Hannibal, etc., R. Co., 60 Mo. 160; Brimer *v.* Chicago, etc., R. Co., 109 Mo. App. 493, 85 S. W. 653; Adams *v.* McCormick Harvesting Mach. Co., 95 Mo. App. 111, 68 S. W. 1053; Banks *v.* Wabash Western R. Co., 40 Mo. App. 458; Bridges *v.* St. Louis, etc., R. Co., 6 Mo. App. 389.

New Jersey.— Cole *v.* Warren Mfg. Co., 63 N. J. L. 626, 44 Atl. 647.

New York.— Walsh *v.* New York, etc., R. Co., 178 N. Y. 588, 70 N. E. 1111 [*affirming* 80 N. Y. App. Div. 316, 80 N. Y. Suppl. 767]; Meehan *v.* Atlas Safe Moving, etc., Co., 94 N. Y. App. Div. 306, 87 N. Y. Suppl. 1031; Dyer *v.* Brown, 64 N. Y. App. Div. 89, 71 N. Y. Suppl. 623; Jarvis *v.* Northern New York Marble Co., 55 N. Y. App. Div. 272, 67 N. Y. Suppl. 78; Cunningham *v.* Sicilian Asphalt Pav. Co., 49 N. Y. App. Div. 380, 63 N. Y. Suppl. 357; Meehan *v.* Judson, 43 N. Y. App. Div. 46, 59 N. Y. Suppl. 578; Healy *v.* Burke, 36 Misc. 792, 74 N. Y. Suppl. 1131 [*affirming* 35 Misc. 384, 71 N. Y. Suppl. 1027]; Rigdon *v.* Alleghany Lumber Co., 13 N. Y. Suppl. 871 [*affirmed* in 131 N. Y. 668, 30 N. E. 867]; Appel *v.* Buffalo, etc., R. Co., 2 N. Y. St. 257.

North Carolina.— Wilkie *v.* Raleigh, etc., R. Co., 127 N. C. 203, 37 S. E. 204.

Ohio.— Lake Shore, etc., R. Co. *v.* Corcoran, 14 Ohio Cir. Ct. 377, 6 Ohio Cir. Dec. 773; Strabler *v.* Toledo Bridge Co., 11 Ohio Cir. Dec. 87; Pittsburg, etc., R. Co. *v.* Burroughs, 9 Ohio S. & C. Pl. Dec. 324, 6 Ohio N. P. 37.

Oregon.— Miller *v.* Inman, 40 Oreg. 161, 66 Pac. 713.

Pennsylvania.— O'Brien *v.* Sullivan, 195 Pa. St. 474, 46 Atl. 130; Pennsylvania R. Co. *v.* Zink, 126 Pa. St. 288, 17 Atl. 614; Ortlip *v.* Philadelphia, etc., Traction Co., 9 Pa. Dist. 291.

Rhode Island.— McDonald *v.* Postal Tel. Co., 22 R. I. 131, 46 Atl. 407 [*distinguishing* Disano *v.* New England Steam Brick Co., 20 R. I. 452, 40 Atl. 7; Larich *v.* Moies, 18 R. I. 513, 28 Atl. 661; Kelley *v.* Silver Spring Bleaching, etc., Co., 12 R. I. 112, 34 Am. Rep. 615].

South Carolina.— Barksdale *v.* Charleston, etc., R. Co., 66 S. C. 204, 44 S. W. 743 (conductor need not examine cars turned over to him before taking them out, where a car-inspector is employed at the station); Evans *v.* Chamberlain, 40 S. C. 104, 18 S. E. 213; Lasure *v.* Graniteville Mfg. Co., 18 S. C. 275.

Tennessee.— Louisville, etc., R. Co. *v.* Reagan, 96 Tenn. 128, 33 S. W. 1050; Guthrie *v.* Louisville, etc., R. Co., 11 Lea 372, 47 Am. Rep. 286.

Texas.— Texas, etc., R. Co. *v.* Conroy, 83 Tex. 214, 18 S. W. 609; Missouri Pac. R. Co. *v.* Henry, 75 Tex. 220, 12 S. W. 828; Missouri Pac. R. Co. *v.* James, (1888) 10 S. W. 332; Missouri, etc., R. Co. *v.* Smith, (Civ. App. 1904) 82 S. W. 787; St. Louis Southwestern R. Co. *v.* Pope, (Civ. App. 1904) 82 S. W. 360 [*reversed* on other points in 98 Tex. 535, 86 S. W. 5]; Southern Kansas R. Co. *v.* Sage, (Civ. App. 1904) 80 S. W. 1038; Missouri, etc., R. Co. *v.* Hutchens, 35 Tex. Civ. App. 343, 80 S. W. 415; Gulf, etc., R. Co. *v.* Larkin, (Civ. App. 1904) 80 S. W. 94 [*reversed* on other points in 98 Tex. 225, 82 S. W. 1026, 1 L. R. A. N. S. 944]; International, etc., R. Co. *v.* Reeves, 35 Tex. Civ. App. 162, 79 S. W. 1099; Missouri, etc., R. Co. *v.* Hoskins, 34 Tex. Civ. App. 627, 79 S. W. 369; Galveston, etc., R. Co. *v.* Brown, 33 Tex. Civ. App. 589, 77 S. W. 832; Texas, etc., R. Co. *v.* Hartnett, 33 Tex. Civ. App. 103, 75 S. W. 809; Galveston, etc., R. Co. *v.* Mortson, 31 Tex. Civ. App. 142, 71 S. W. 770; Dupree *v.* Tamborilla, 27 Tex. Civ. App. 603, 66 S. W. 595; San Antonio, etc., R. Co. *v.* Lindsey, 27 Tex. Civ. App. 316, 65 S. W. 668; San Antonio, etc., R. Co. *v.* Waller, 27 Tex. Civ. App. 44, 65 S. W. 210; Missouri, etc., R. Co. *v.* Baker, (Civ. App. 1900) 58 S. W. 964; Galveston, etc., R. Co. *v.* Smith, 24 Tex. Civ. App. 127, 57 S. W. 999; Galveston, etc., R. Co. *v.* Adams, (Civ. App. 1900) 55 S. W. 803 [*affirmed* in 94 Tex. 100, 58 S. W. 831]; Houston, etc., R. Co. *v.* Higgins, 22 Tex. Civ. App. 430, 55 S. W. 744; Missouri, etc., R. Co. *v.* Cox, (Civ. App. 1900) 55 S. W. 354, 56 S. W. 97; Missouri, etc., R. Co. *v.* Crowder, (Civ. App. 1899) 55 S. W. 380; International, etc., R. Co. *v.* Elkins, (Civ. App. 1899) 54 S. W. 931; Terrell Com-

injuries caused by defects which he might have discovered and remedied upon proper inspection;[42] and where a servant assumes the duty of removing a known

press Co. *v.* Arrington, (Civ. App. 1898) 43 S. W. 59; Missouri, etc., R. Co. *v.* Hauer, (Civ. App. 1897) 43 S. W. 1078; Gulf, etc., R. Co. *v.* Kelly, (Civ. App. 1896) 34 S. W. 140; Dillingham *v.* Harden, 6 Tex. Civ. App. 474, 26 S. W. 914.

Utah.— Downey *v.* Gemini Min. Co., 24 Utah 431, 68 Pac. 414, 91 Am. St. Rep. 798.

Washington.— McDonald *v.* Svenson, 25 Wash. 441, 65 Pac. 789; Zintek *v.* Stimson Mill Co., 9 Wash. 395, 37 Pac. 340.

United States.— Choctaw, etc., R. Co. *v.* Holloway, 191 U. S. 334, 24 S. Ct. 102, 48 L. ed. 207 [*affirming* 114 Fed. 458, 52 C. C. A. 260]; Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 6 S. Ct. 590, 29 L. ed. 755; Bunker Hill, etc., Min., etc., Co. *v.* Jones, 130 Fed. 813, 65 C. C. A. 363; Kasadarian *v.* James Hill Mfg. Co., 130 Fed. 62; Kansas City, etc., R. Co. *v.* Spellman, 102 Fed. 251, 42 C. C. A. 321; New Orleans, etc., R. Co. *v.* Clements, 100 Fed. 415, 40 C. C. A. 465; Wood *v.* Louisville, etc., R. Co., 88 Fed. 44; Central Trust Co. *v.* East Tennessee, etc., R. Co., 73 Fed. 661; Carpenter *v.* Mexican Nat. R. Co., 39 Fed. 315; The E. B. Ward, Jr., 20 Fed. 702.

See 34 Cent. Dig. tit. "Master and Servant," §§ 711, 714, 717.

Where there is no reason to apprehend any danger a servant need not look out for any. Downey *v.* Gemini Min. Co., 24 Utah 431, 68 Pac. 414, 91 Am. St. Rep. 798.

A stranger who is asked to assist in lowering heavy casks into a cellar, by means of a windlass with which he is unfamiliar, and which is situated in a dimly lighted cellar, cannot be said, as a matter of law, to be guilty of contributory negligence in not observing that the cranks are not properly fastened, or that the brake is not a proper one. Radman *v.* Haberstro, 13 N. Y. Suppl. 561 [*affirmed* in 119 N. Y. 659, 23 N. E. 1150].

42. *Alabama.*— Louisville, etc., R. Co. *v.* Orr, 91 Ala. 548, 8 So. 360.

Colorado.— Colorado Cent. R. Co. *v.* Martin, 7 Colo. 592, 4 Pac. 1118.

Connecticut.— McGorty *v.* Southern New England Tel. Co., 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62.

Illinois.—Jarvis *v.* Drake, 97 Ill. App. 153; Chicago, etc., R. Co. *v.* Merriman, 95 Ill. App. 628; Illinois Cent. R. Co. *v.* Barslow, 94 Ill. App. 206; St. Louis Consol. Coal Co. *v.* Scheller, 42 Ill. App. 619 (construing Rev. St. c. 93, § 16); Beaucoup Coal Co. *v.* Cooper, 12 Ill. App. 373.

Iowa.— Conway *v.* Chicago Great Western R. Co., 103 Iowa 373, 72 N. W. 543; Beckman *v.* Consolidation Coal Co., 90 Iowa 252, 57 N. W. 889.

Kentucky.— Louisville, etc., R. Co. *v.* Mounce, 71 S. W. 518, 24 Ky. L. Rep. 1378.

Maine.— Caven *v.* Bodwell Granite Co., 99 Me. 278, 59 Atl. 285.

Massachusetts.— Ladd *v.* Brockton St. R. Co., 180 Mass. 454, 62 N. E. 730; Conroy *v.* Clinton, 158 Mass. 318, 33 N. E. 525.

Michigan.—Andrews *v.* Tamarack Min. Co., 114 Mich. 375, 72 N. W. 242; Johnson *v.* Hovey, 98 Mich. 343, 57 N. W. 172.

Missouri.— Roberts *v.* Missouri, etc., Tel. Co., 166 Mo. 370, 66 S. W. 155; Boettger *v.* Scherpe, etc., Architectural Iron Co., 124 Mo. 87, 27 S. W. 466.

Nebraska.— New Omaha Thompson-Houston Electric Light Co. *v.* Rombold, 68 Nebr. 54, 93 N. W. 966, 97 N. W. 1030.

New Hampshire.— Murphy *v.* Grand Trunk R. Co., 73 N. H. 18, 58 Atl. 835.

New York.— Flood *v.* Western Union Tel. Co., 131 N. Y. 603, 30 N. E. 196; Baker *v.* Empire Wire Co., 102 N. Y. App. Div. 125, 92 N. Y. Suppl. 355; Lee *v.* Barrow Steamship Co., 14 Daly 230, 6 N. Y. St. 285; Walsh *v.* Commercial Steam Laundry Co., 11 Misc. 3, 31 N. Y. Suppl. 833.

Ohio.— Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312, holding that a conductor must use ordinary skill and judgment in the inspection of machinery and cars.

Pennsylvania.— Hoover *v.* Beech Creek R. Co., 154 Pa. St. 362, 26 Atl. 315; Reading Iron Works *v.* Devine, 109 Pa. St. 246; Carroll *v.* Pennsylvania Coal Co., (1888) 15 Atl. 688.

Texas.—Houston, etc., R. Co. *v.* McNamara, 59 Tex. 255; Dupree *v.* Alexander, 29 Tex. Civ. App. 31, 68 S. W. 739; Maes *v.* Texas, etc., R. Co., (Civ. App. 1893) 23 S. W. 725. *Compare* Galveston, etc., R. Co. *v.* Smith, 24 Tex. Civ. App. 127, 57 S. W. 999, holding that rule requiring inspection by servant has no reference to defects in mechanical construction of the machinery over which he had right to assume that master has exercised proper care to ascertain its freedom from defects.

Utah.— Butte *v.* Pleasant Valley Coal Co., 14 Utah 282, 47 Pac. 77.

Virginia.— Norfolk, etc., R. Co. *v.* Emmert, 83 Va. 640, 3 S. E. 145.

Washington.— Steeples *v.* Panel, etc., Box Co., 33 Wash. 359, 74 Pac. 475; Anderson *v.* Inland Tel., etc., Co., 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410.

United States.— Sievers *v.* Eyre, 122 Fed. 734; Baltimore, etc., R. Co. *v.* Burris, 111 Fed. 882, 50 C. C. A. 48.

Canada.— Fawcett *v.* Canadian Pac. R. Co., 8 Brit. Col. 393; Badgerow *v.* Grand Trunk R. Co., 19 Ont. 191.

See 34 Cent. Dig. tit. "Master and Servant," §§ 711, 714.

Conductors not presumed to be charged with duty of inspection see Ransier *v.* Minneapolis, etc., R. Co., 32 Minn. 331, 20 N. W. 332.

Rule requiring conductors to inspect trains construed see Baltimore, etc., R. Co. *v.* Burris, 111 Fed. 882, 50 C. C. A. 48.

A locomotive engineer is not charged with the duty of inspecting his engine for dan-

danger, it is held that he is guilty of contributory negligence if he fails to do so.[43]

(B) *Opportunity to Discover or Remedy.*[44] In order to charge a servant with contributory negligence for failure to observe or remedy defects, it must appear that he had, and neglected to avail himself of, an opportunity to discover them;[45] and where the nature of a servant's duties or the exigencies of the occasion are such as to require his whole attention, he is not required to anticipate, look for, or expect danger,[46] especially where it arises from the discharge of a duty outside of his usual routine.[47]

(C) *Duty to Notify Master of Defect or Danger.*[48] Where a servant has knowledge or is chargeable with knowledge of defects which render his work dangerous, and fails to report such defects to the master in order that they may be remedied, he is guilty of such contributory negligence as will bar his right of recovery for injuries sustained by him by reason of such defects,[49] unless it is

gerous defects, although furnished with tools to make repairs during trips. San Antonio, etc., R. Co. *v.* Lindsey, 27 Tex. Civ. App. 316, 65 S. W. 668.

That there is no car inspector in a large town does not cast upon the servant of a railroad company the duty of inspection. Missouri, etc., R. Co. *v.* Crowder, (Tex. Civ. App. 1899) 55 S. W. 380.

43. Birmingham Furnace, etc., Co. *v.* Gross, 97 Ala. 220, 12 So. 36.

44. **Precautions against known dangers** see *infra*, IV, F, 4, c.

45. *Alabama.*— Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88.

California.— Higgins *v.* Williams, 114 Cal. 176, 45 Pac. 1041.

Illinois.— Chicago, etc., R. Co. *v.* Kneirim, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259 [*affirming* 48 Ill. App. 243].

Iowa.— McFall *v.* Iowa Cent. R. Co., 96 Iowa 723, 65 N. W. 321.

Kentucky.— Louisville, etc., R. Co. *v.* Earl, 94 Ky. 368, 22 S. W. 607, 15 Ky. L. Rep. 184. *Compare* Martin *v.* Louisville, etc., R. Co, 64 S. W. 417, 23 Ky. L. Rep. 798.

Massachusetts.— Boucher *v.* Robeson Mills, 182 Mass. 500, 65 N. E. 819; Gustafsen *v.* Washburn, etc., Mfg. Co., 153 Mass. 468, 27 N. E. 179; Lawless *v.* Connecticut River R. Co., 136 Mass. 1.

Missouri.— Lore *v.* American Mfg. Co., 160 Mo. 608, 61 S. W. 678.

New York.— Dukes *v.* Eastern Distilling Co., 51 Hun 605, 4 N. Y. Suppl. 562 [*affirmed* in 123 N. Y. 652, 25 N. E. 954].

Ohio.— Wainright *v.* Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 530.

Wisconsin.— Bright *v.* Barnett, etc., Co., 88 Wis. 299, 60 N. W. 418, 26 L. R. A. 524.

See 34 Cent. Dig. tit. "Master and Servant," § 718.

Compare Georgia Cent. R. Co. *v.* Price, 121 Ga. 651, 49 S. E. 683; Olson *v.* McMurray Cedar Lumber Co., 9 Wash. 500, 37 Pac. 679.

Brakeman not required to face front of train see Wainright *v.* Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 530.

46. *Illinois.*— Baltimore, etc., R. Co. *v.* Clifford, 99 Ill. App. 381; Anderberg *v.* Chicago, etc., R. Co., 98 Ill. App. 207.

Iowa.— Bryce *v.* Chicago, etc., R. Co., 103 Iowa 665, 72 N. W. 780; Haugh *v.* Chicago, etc., R. Co., 73 Iowa 66, 35 N. W. 116.

Kentucky.— Cincinnati, etc., R. Co. *v.* Sampson, 97 Ky. 65, 30 S. W. 12, 16 Ky. L. Rep. 819; Louisville, etc., R. Co. *v.* Robinson, 16 S. W. 707, 13 Ky. L. Rep. 153.

Massachusetts.— Maher *v.* Boston, etc., R. Co., 158 Mass. 36, 32 N. E. 950.

Michigan.— Irvine *v.* Flint, etc., R. Co., 89 Mich. 416, 50 N. W. 1008.

New York.— Brown *v.* New York Cent., etc., R. Co., 166 N. Y. 626, 60 N. E. 1107 [*affirming* 42 N. Y. App. Div. 548, 59 N. Y. Suppl. 672]; Wallace *v.* Central Vermont R. Co., 138 N. Y. 302, 33 N. E. 1069 [*reversing* 18 N. Y. Suppl. 280]; Mahoney *v.* New York Cent., etc., R. Co., 15 N. Y. Suppl. 501 [*affirmed* in 131 N. Y. 623, 30 N. E. 864].

North Carolina.— Leak *v.* Carolina Cent. R. Co., 124 N. C. 455, 32 S. E. 884.

Ohio.— Spronk *v.* Addyston Pipe, etc., Co., 19 Ohio Cir. Ct. 714, 10 Ohio Cir. Dec. 675.

South Carolina.— Carter *v.* Oliver Oil Co., 37 S. C. 604, 15 S. E. 928.

Texas.— Gulf, etc., R. Co. *v.* Hockaday, 14 Tex. Civ. App. 613, 37 S. W. 475; Missouri, etc., R. Co. *v.* Hauer, (Civ. App. 1895) 33 S. W. 1010; Texas, etc., R. Co. *v.* Hohn, 1 Tex. Civ. App. 36, 21 S. W. 942.

Vermont.— Reynolds *v.* Boston, etc., R. Co., 64 Vt. 66, 24 Atl. 134, 33 Am. St. Rep. 908.

Wisconsin.— Stackman *v.* Chicago, etc., R. Co., 80 Wis. 428, 50 N. W. 404.

See 34 Cent. Dig. tit. "Master and Servant," § 718.

47. Central Trust Co. *v.* East Tennessee, etc., R. Co., 73 Fed. 661.

48. **Continuing work without notice or complaint to master** see *supra*, IV, F, 2, a, (III), (A).

49. *Colorado.*— Victor Coal Co. *v.* Muir, 20 Colo. 320, 38 Pac. 378, 46 Am. St. Rep. 299, 26 L. R. A. 435.

Georgia.—Atlanta, etc., Air Line R. Co. *v.* Ray, 70 Ga. 674.

Illinois.— Chicago, etc., R. Co. *v.* Bragonier, 119 Ill. 51, 7 N. E. 688; Toledo, etc., R. Co. *v.* Eddy, 72 Ill. 138; Chicago, etc., R. Co. *v.* Jackson, 55 Ill. 492, 8 Am. Rep. 661.

Indiana.— Pennsylvania Co. *v.* Congden,

shown that the master has actual notice of the defect which caused the injury.[50]

(D) *Scope of Employment.* A servant is not bound to investigate for himself a department of work with which he has nothing to do, to determine the safety of the appliances furnished by the master;[51] and where he is employed to operate a particular part of certain machinery, he need not, before beginning work, make himself familiar with all the machinery, and the dangers he may incur in case he comes in contact therewith.[52] Where, however, a servant is acting in place of another, whose duty it is to inspect appliances before using them, he will be charged with contributory negligence if he fails to make such inspection.[53]

b. Dangerous Operations and Methods of Work[54] — (I) *IN GENERAL* — (A) *Undertaking Dangerous Work.* It is not contributory negligence for a servant to undertake dangerous work, where it is required by the nature of his employment,[55] unless the danger is so obvious and imminent that no ordinarily

134 Ind. 226, 33 N. E. 795, 39 Am. St. Rep. 251.

Louisiana.— McCarthy *v.* Whitney Iron Works Co., 48 La. Ann. 978, 20 So. 171.

Massachusetts.— Degnan *v.* Jordan, 164 Mass. 84, 41 N. E. 117.

Missouri.— Glasscock *v.* Swafford Bros. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364, (App. 1903) 74 S. W. 1039.

New York.— McMillan *v.* Saratoga, etc., R. Co., 20 Barb. 449.

Pennsylvania.— Cooper *v.* Butler, 103 Pa. St. 412.

Wisconsin.— Kerrigan *v.* Chicago, etc., R. Co., 104 Wis. 166, 80 N. W. 586.

United States.— Hammergren *v.* Schurmeier, 7 Fed. 766, 2 McCrary 520; Dalton *v.* Receivers, 6 Fed. Cas. No. 3,550, 4 Hughes 180.

England.— Weblin *v.* Ballard, 17 Q. B. D. 122, 50 J. P. 597, 55 L. J. Q. B. 395, 54 L. T. Rep. N. S. 532, 34 Wkly. Rep. 455.

See 34 Cent. Dig. tit. "Master and Servant," § 716.

But see Texas, etc., R. Co. *v.* Wynne, (Tex. Civ. App. 1893) 22 S. W. 1064.

50. McMillan *v.* Saratoga, etc., R. Co., 20 Barb. (N. Y.) 449; Weblin *v.* Ballard, 17 Q. B. D. 122, 50 J. P. 597, 55 L. J. Q. B. 395, 54 L. T. Rep. N. S. 532, 34 Wkly. Rep. 455. See also Missouri, etc., R. Co. *v.* Fowler, 61 Kan. 320, 59 Pac. 648, holding that a locomotive fireman is not negligent in failing to call the engineer's attention to the absence of a safety signal, when the latter can and does not observe its absence.

51. Devlin *v.* Wabash, etc., R. Co., 87 Mo. 545; Waldhier *v.* Hannibal, etc., R. Co., 87 Mo. 37; Goldthorpe *v.* Clark-Nickerson Lumber Co., 31 Wash. 467, 71 Pac. 1091.

52. It is sufficient if, upon entering into the active discharge of the duties assigned him, the servant ascertains what he is expected to do, and the dangers directly connected therewith. Swoboda *v.* Ward, 40 Mich. 420.

53. Lee *v.* Barrow Steamship Co., 14 Daly (N. Y.) 230, 6 N. Y. St. 285.

54. Acts in emergencies see *infra*, IV, F, 4, g.

As affecting assumption of risk see *supra*, IV, E, 3.

Compliance with commands or threats see *infra*, IV, F, 4, f.

Disobedience of rules and orders see *infra*, IV, E, 4, d.

Duty to discover defects or dangers see *supra*, IV, F, 4, a, (II).

Inadvertent act on mistake of judgment see *supra*, IV, F, 2, a, (V).

Inexperienced or youthful employee see *supra*, IV, F, 2, b.

Precautions against known or apparent dangers see *infra*, IV, F, 4, c.

55. Dooner *v.* Delaware, etc., Canal Co., 164 Pa. St. 17, 30 Atl. 269. See also Schumaker *v.* St. Paul, etc., R. Co., 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257; Spronk *v.* Addyston Pipe, etc., Co., 19 Ohio Cir. Ct. 714, 10 Ohio Cir. Dec. 675.

Coupling moving cars is not necessarily negligence, the question being whether the servant acted as an ordinarily prudent person would under the circumstances of the case. Baird *v.* Chicago, etc., R. Co., 61 Iowa 359, 13 N. W. 731, 16 N. W. 207. See Ohio, etc., R. Co. *v.* Bass, 36 Ill. App. 126; Lowe *v.* Chicago, etc., R. Co., 89 Iowa 420, 56 N. W. 519; Horan *v.* Chicago, etc., R. Co., 89 Iowa 328, 56 N. W. 507; Rifley *v.* Minneapolis, etc., R. Co., 72 Minn. 469, 75 N. W. 704; Hollenbeck *v.* Missouri Pac. R. Co., 141 Mo. 97, 38 S. W. 723, 41 S. W. 887; Plank *v.* New York Cent., etc., R. Co., 60 N. Y. 607; Toledo, etc., R. Co. *v.* Frick, 14 Ohio Cir. Ct. 453, 8 Ohio Cir. Dec. 28 (uncoupling); Houston, etc., R. Co. *v.* Crawford, (Tex. Civ. App. 1895) 32 S. W. 155 [*reversed* on other grounds in 89 Tex. 89, 33 S. W. 534]; Wright *v.* Southern Pac. Co., 14 Utah 383, 46 Pac. 374; Denver, etc., R. Co. *v.* Arrighi, 129 Fed. 347, 63 C. C. A. 649 (in which the particular facts of the case were held to show contributory negligence as a matter of law).

Making coupling from inside of cars not negligence per se see Hewitt *v.* East Jordan Lumber Co., 136 Mich. 110, 98 N. W. 992; Mahoney *v.* New York Cent., etc., R. Co., 60 Hun (N. Y.) 586, 15 N. Y. Suppl. 501 [*affirmed* in 131 N. Y. 623, 30 N. E. 864].

prudent person would consent to undertake.[56] Where, however, the servant has control of, or is connected with, the cause or subject of danger, and his injury is caused by his failure to exercise ordinary care, he cannot recover.[57]

(B) *Adopting Dangerous Methods* — (1) IN GENERAL. As a legal proposition, independent of any rules provided by the master, if a servant selects a dangerous way to perform a duty, knowing it to be attended with danger, when there is a safe way apparent to him, and he undertakes to perform the duty in

Boarding or alighting from moving cars and locomotives not negligence per se see Consolidated Coal Co. *v.* Bokamp, 181 Ill. 9, 54 N. E. 564 [*affirming* 75 Ill. App. 605]; Donahue *v.* Boston, etc., R. Co., 178 Mass. 251, 59 N. E. 663; Mitchell *v.* Chicago, etc., R. Co., 108 Mo. App. 142, 83 S. W. 289 (some evidence of negligence); Kansas City Southern R. Co. *v.* Billingslea, 116 Fed. 335, 54 C. C. A. 109.

Riding on trains and locomotives not negligence per se see Atchison, etc., R. Co. *v.* McCandliss, 33 Kan. 366, 6 Pac. 587; James *v.* Northern Pac. R. Co., 46 Minn. 168, 48 N. W. 783 (for switchman to ride on front, instead of rear, footboard of engine, not evidence of contributory negligence); Lockhart *v.* Little Rock, etc., R. Co., 40 Fed. 631 (not negligence for switchman to ride on front footboard of engine).

Riding on the tender of a backing engine is not contributory negligence in a brakeman, where it is necessary for someone to be in that position to keep a lookout for obstructions on the track. Southern R. Co. *v.* Barr, 55 S. W. 900, 21 Ky. L. Rep. 1615.

Iowa Laws (1880), c. 202, which forbids any minor, workman, or other person from riding upon a loaded car or wagon in a shaft of a mine does not include the conductor, who is necessary to the operation of the mine. Crabell *v.* Wapello Coal Co., 68 Iowa 751, 28 N. W. 56.

56. Roul *v* East Tennessee, etc., R. Co., 85 Ga. 197, 11 S. E. 558 (attempting to get on engine running between six and twelve miles an hour); Louisville, etc., R. Co. *v.* Wallace, 90 Tenn. 53, 15 S. W. 921 (holding that the utmost skill and care on the part of the employee in attempting to board a train running about ten miles an hour would not make the master liable); Kilpatrick *v.* Grand Trunk R. Co., 72 Vt. 263, 47 Atl. 827, 82 Am. St. Rep. 939 (servant attempting to board train running eight miles an hour, after dark, and with a lantern in his hand).

57. *Alabama.*— Shorter *v.* Southern R. Co., 121 Ala. 158, 25 So. 853.

Arkansas.— St. Louis, etc., R. Co. *v.* Morgart, 45 Ark. 318; St. Louis, etc., R. Co. *v.* Mara, (1891) 16 S. W. 196.

California.— Brown *v.* Central Pac. R. Co., 72 Cal. 523, 14 Pac. 138.

Illinois.— Braun *v.* Conrad Seipp Brewing Co., 72 Ill. App. 232; St. Louis Bolt, etc., Co. *v.* Brennan, 20 Ill. App. 555.

Iowa.— Geesen *v.* Saguin, 115 Iowa 7, 87 N. W. 745; Gorman *v.* Des Moines Brick Mfg. Co., 99 Iowa 257, 68 N. W. 674; Muldowney *v.* Illinois Cent. R. Co., 39 Iowa 615.

Kansas.— McDermott *v.* Atchison, etc., R. Co., 56 Kan. 319, 43 Pac. 248.

Massachusetts.— Kennedy *v.* Merrimack Paper Co., 185 Mass. 442, 70 N. E. 437; Brown *v.* New York, etc., R. Co., 158 Mass. 247, 33 N. E. 650.

Minnesota.— Cleary *v.* Dakota Packing Co., 71 Minn. 150, 73 N. W. 717.

Missouri.— Evans *v.* Atlantic, etc., R. Co., 62 Mo. 49; Towner *v.* Missouri Pac. R. Co., 52 Mo. App. 648.

New York.— Finnell *v.* Delaware, etc., R. Co., 129 N. Y. 669, 29 N. E. 825; Frounfelker *v.* Delaware, etc., R. Co., 48 N. Y. App. Div. 206, 62 N. Y. Suppl. 840.

North Dakota.— Cameron *v.* Great Northern R. Co., 8 N. D. 618, 80 N. W. 885.

Pennsylvania.— Alexander *v.* Pennsylvania Water Co., 201 Pa. St. 252, 50 Atl. 991; New York, etc., R. Co. *v.* Lyons, 119 Pa. St. 324, 13 Atl. 205.

Texas.— International, etc., R. Co. *v.* Vinson, 28 Tex. Civ. App. 247, 66 S. W. 800; Matthews *v.* Missouri, etc., R. Co., (Civ. App. 1901) 66 S. W. 902; Galveston, etc., R. Co. *v.* Butchek, (Civ. App. 1901) 66 S. W. 335; St. Louis, etc., R. Co. *v.* Denny, 5 Tex. Civ. App. 359, 24 S. W. 317.

Wisconsin.— Bibby *v.* Wausau Lumber Co., 80 Wis. 367, 50 N. W. 337.

United States.—Williams *v.* Northern Lumber Co., 113 Fed. 382.

See 34 Cent. Dig. tit. "Master and Servant," § 744.

Running train at dangerous speed.— Louisville, etc., R. Co. *v.* Stutts, 105 Ala. 368, 17 So. 29, 53 Am. St. Rep. 971; St. Louis, etc., R. Co. *v.* Morgart, (Ark. 1888) 8 S. W. 179; Illinois Cent. R. Co. *v.* Patterson, 69 Ill. 650; Hudson *v.* People's St. R. Co., 175 Mass. 23, 55 N. E. 464 (holding that where an experienced motorman was running his car back to meet another car, and did not run slowly and watch constantly, and the cars collided, he was guilty of negligence); Sweeney *v.* Minneapolis, etc., R. Co., 33 Minn. 153, 22 N. W. 289; Illinois Cent. R. Co. *v.* Guess, 74 Miss. 170, 21 So. 50; Sutherland *v.* Troy, etc., R. Co., 125 N. Y. 737, 26 N. E. 609 [*reversing* 8 N. Y. Suppl. 83; Shannon *v.* New York Cent. R. Co., 88 N. Y. App. Div. 349, 84 N. Y. Suppl. 646; Wert *v.* Kein, 8 Pa. Cas. 620, 13 Atl. 548; International, etc., R. Co. *v.* Vinson, 28 Tex. Civ. App. 247, 66 S. W. 800; Norfolk, etc., R. Co. *v.* Williams, 89 Va. 165, 15 S. E. 522. *Compare* Gulf, etc., R. Co. *v.* Pettis, 69 Tex. 689, 7 S. W. 93.

Starting train after schedule time.— An engineer cannot recover for injuries received in a collision, caused by his starting the

the dangerous way, and in consequence thereof is injured, he is guilty of such contributory negligence as to cut off all legal remedy for the injury.[58] But the mere fact that a servant is injured because of the way of performing a duty

trip fifteen minutes after the schedule time. Georgia R., etc., Co. *v.* McDade, 59 Ga. 73.

58. Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545, 10 So. 283. See also the following illustrative cases:

Alabama.— Southern R. Co. *v.* Guyton, 122 Ala. 231, 25 So. 34; Shorter *v.* Southern R. Co., 121 Ala. 158, 25 So. 853; Richmond, etc., R. Co. *v.* Bivins, 103 Ala. 142, 15 So. 515; Highland Ave., etc., R. Co. *v.* Walters, 91 Ala. 435, 8 So. 357; Mobile, etc., R. Co. *v.* Holborn, 84 Ala. 137, 4 So. 146. *Compare* Whatley *v.* Zenida Coal Co., 122 Ala. 118, 26 So. 124.

California.— Long *v.* Coronado R. Co., 96 Cal. 269, 31 Pac. 170.

Georgia.— Georgia Cent. R. Co. *v.* Mosely, 112 Ga. 914, 38 S. E. 350; Quirouet *v.* Alabama Great Southern R. Co., 111 Ga. 315, 36 S. E. 599; Willingham *v.* Rockdale Oil, etc., Co., 101 Ga. 713, 29 S. E. 30; East Tennessee, etc., R. Co. *v.* Head, 92 Ga. 723, 18 S. E. 976.

Illinois.— Illinois Cent. R. Co. *v.* Swift, 213 Ill. 307, 72 N. E. 737; Jorgenson *v.* Johnson Chair Co., 169 Ill. 429, 48 N. E. 822 [*affirming* 67 Ill. App. 80]; Columbus, etc., R. Co. *v.* Troesch, 57 Ill. 155; Greaser *v.* Chicago, etc., R. Co., 93 Ill. App. 476; Luxen *v.* Chicago, etc., R. Co., 69 Ill. App. 648; Star Elevator Co. *v.* Carlson, 69 Ill. App. 212; Chicago, etc., R. Co. *v.* Bliss, 6 Ill. App. 411.

Indiana.— Chamberlain *v.* Waymire, 32 Ind. App. 442, 68 N. E. 306, 70 N. E. 81.

Iowa.— Ferguson *v.* Chicago, etc., R. Co., 100 Iowa 733, 69 N. W. 1026; Bucklew *v.* Central Iowa R. Co., 64 Iowa 603, 21 N. W. 103; Ferguson *v.* Central Iowa R. Co., 58 Iowa 293, 12 N. W. 293.

Kansas.— Carrier *v.* Union Pac. R. Co., 61 Kan. 447, 59 Pac. 1075; Atchison, etc., R. Co. *v.* Tindall, 57 Kan. 719, 48 Pac. 12.

Kentucky.— Illinois Cent. R. Co. *v.* Mercer, 70 S. W. 287, 24 Ky. L. Rep. 908.

Louisiana.— Schoultz *v.* Eckardt Mfg. Co., 112 La. 568, 36 So. 593; Carrierre *v.* McWilliams, 104 La. 678, 29 So. 333.

Massachusetts.— Demers *v.* Marshall, 178 Mass. 9, 59 N. E. 454; Wilson *v.* Steel Edge Stamping, etc., Co., 163 Mass. 315, 39 N. E. 1039; Lothrop *v.* Fitchburg R. Co., 150 Mass. 423, 23 N. E. 227; Russell *v.* Tillotson, 140 Mass. 201, 4 N. E. 231.

Michigan.— Chapman *v.* Pere Marquette R. Co., 133 Mich. 311, 94 N. W. 1049; Deering *v.* Canfield, etc., Co., 126 Mich. 373, 85 N. W. 874; Secord *v.* Chicago, etc., R. Co., 107 Mich. 540, 65 N. W. 550.

Minnesota.— Cleary *v.* Dakota Packing Co., 76 Minn. 495, 79 N. W. 531; Wulff *v.* Walter A. Wood Harvester Co., 67 Minn. 423, 70 N. W. 156; Groff *v.* Duluth Imperial Mill Co., 58 Minn. 333, 59 N. W. 1049.

Missouri.— Doerr *v.* St. Louis Brewing Assoc., 176 Mo. 547, 75 S. W. 600; Hulett *v.* St. Louis, etc., R. Co., 67 Mo. 239; Montgomery *v.* Chicago Great Western R. Co., 109 Mo. App. 88, 83 S. W. 66; Craig *v.* Chicago, etc., R. Co., 54 Mo. App. 523; Wetjen *v.* Southern White Lead Co., 5 Mo. App. 598.

New Hampshire.— Young *v.* Boston, etc., R. Co., 69 N. H. 356, 41 Atl. 268.

New York.— Sheehan *v.* Standard Gas Light Co., 87 N. Y. App. Div. 174, 84 N. Y. Suppl. 34; Walsh *v.* New York, etc., R. Co., 80 N. Y. App. Div. 316, 80 N. Y. Suppl. 767; Deane *v.* Buffalo, 42 N. Y. App. Div. 205, 58 N. Y. Suppl. 810; Fleming *v.* Buswell, 39 N. Y. App. Div. 196, 57 N. Y. Suppl. 230; Maxwell *v.* Thomas, 31 N. Y. App. Div. 546, 52 N. Y. Suppl. 30; Reiser *v.* New York, etc., R. Co., 24 N. Y. App. Div. 23, 48 N. Y. Suppl. 868; Foley *v.* Brooklyn Gas Light Co., 9 N. Y. App. Div. 91, 41 N. Y. Suppl. 66; Wooster *v.* Bliss, 90 Hun 79, 35 N. Y. Suppl. 514; White *v.* Sharp, 27 Hun 94; Glassheim *v.* New York Economical Printing Co., 13 Misc. 174, 34 N. Y. Suppl. 69; Fleming *v.* Buswell, 62 N. Y. Suppl. 1137. *Compare* Vincent *v.* Alden, 62 N. Y. App. Div. 558, 71 N. Y. Suppl. 149.

North Carolina.— Elmore *v.* Seaboard Air Line R. Co., 132 N. C. 865, 44 S. E. 620, 131 N. C. 569, 42 S. E. 989, 130 N. C. 506, 41 S. E. 786.

Ohio.— Crossman *v.* P. & T. Degnan Sand, etc., Co., 24 Ohio Cir. Ct. 585; Lake Shore, etc., R. Co. *v.* Whidden, 23 Ohio Cir. Ct. 85.

Pennsylvania.— Hart *v.* Allegheny County Light Co., 201 Pa. St. 234, 50 Atl. 1010; Betz *v.* Winter, 195 Pa. St. 346, 45 Atl. 1068; Brown *v.* Wood, (1888) 16 Atl. 42.

Rhode Island.— Sullivan *v.* Nicholson File Co., 21 R. I. 540, 45 Atl. 549; McGeary *v.* Old Colony R. Co., 21 R. I. 76, 41 Atl. 1007.

Texas.— Gulf, etc., R. Co. *v.* Hernandez, (Civ. App. 1898) 45 S. W. 197.

Virginia.—Newport News Pub. Co. *v.* Beaumeister, 102 Va. 677, 47 S. E. 821; Norfolk, etc., R. Co. *v.* McDonald, 88 Va. 352, 13 S. E. 706.

Washington.— Hoffman *v.* American Foundry Co., 18 Wash. 287, 51 Pac. 385.

West Virginia.— Young *v.* West Virginia, etc., R. Co., 42 W. Va. 112, 24 S. E. 615.

Wisconsin.— Gardner *v.* Paine Lumber Co., 123 Wis. 338, 101 N. W. 700; Foss *v.* Bigelow, 102 Wis. 413, 78 N. W. 570; Rysdorp *v.* George Pankratz Lumber Co., 95 Wis. 622, 70 N. W. 677.

United States.—Debro *v.* James Lee's Sons Co., 130 Fed. 385; Gilbert *v.* Burlington, etc., R. Co., 128 Fed. 529, 63 C. C. A. 27 [*affirming* 123 Fed. 832]; Dawson *v.* Chicago, etc., R. Co., 114 Fed. 870, 52 C. C. A. 286; Morris *v.* Duluth, etc., R. Co., 108 Fed. 747, 47 C. C. A. 661; McCain *v.* Chicago, etc., R. Co., 76 Fed. 125, 22 C. C. A. 99; Erskine *v.* Chino Valley Beet-Sugar Co., 71 Fed. 270; Gowen *v.* Harley, 56 Fed. 973, 6 C. C. A. 190.

England.—Noonan *v.* Dublin Distilling Co.,

selected by him, when, if he had selected another way, injury would have been avoided, does not conclusively show contributory negligence;[59] and where two or more methods of doing his work are open to a servant, and he has no instructions to pursue a particular method, he is not negligent if, in good faith, he adopts that which is more hazardous, if it is one which reasonable and prudent persons would adopt under the circumstances.[60] Obviously a servant is not chargeable with negligence as a matter of law, where, in the discharge of his duties, he adopts the less dangerous of two dangerous methods,[61] or where the method adopted is the only one in which his work can be accomplished.[62]

(2) ATTEMPTING WORK WITH INSUFFICIENT HELP. It is contributory negligence for a servant to attempt to do his work without, or with insufficient, help where sufficient help is available, and he fails to call for assistance.[63]

(3) ADOPTING CUSTOMARY METHODS.[64] A servant is not chargeable with con-

L. R. 32 Ir. 399; Martin *v.* Connah's Quay Alkali Co., 33 Wkly. Rep. 216.

See 34 Cent. Dig. tit. "Master and Servant," § 745.

The choice of an easier, rather than a safer, method of doing an act is contributory negligence. Penwell *v.* Harvey, 78 Ill. App. 278. See also Quirouet *v.* Alabama Great Southern R. Co., 111 Ga. 315, 36 S. E. 599; McCauley *v.* Springfield St. R. Co., 169 Mass. 301, 47 N. E. 1006. But see Mobile, etc., R. Co. *v.* Bromberg, 141 Ala. 258, 37 So. 395.

59. "The adoption of the more hazardous course of conduct is not necessarily negligence. That depends upon the knowledge of the actor and the circumstances under which he is called upon to act. He might be ignorant of the less hazardous course, and he might be called upon to act under such circumstances as that he should not be required to exercise the best judgment in choosing between different courses of conduct." Hawkins *v.* Johnson, 105 Ind. 29, 36, 4 N. E. 172, 55 Am. Rep. 169. See also the following cases:

Alabama.—Tennessee Coal, etc., Co. *v.* Herndon, 100 Ala. 451, 14 So. 287.

Colorado.— Denver Tramway Co. *v.* Crumbaugh, 23 Colo. 363, 48 Pac. 503.

Connecticut.— McQuillan *v.* Willimantic Electric Light Co., 70 Conn. 715, 40 Atl. 928.

Illinois.— Taylor *v.* Felsing, 164 Ill. 331, 45 N. E. 161; Norton *v.* Sczpurak, 70 Ill. App. 686.

Indiana.— Flutter *v.* New York, etc., R. Co., 27 Ind. App. 511, 59 N. E. 337.

Iowa.— Gibson *v.* Burlington, etc., R. Co., 107 Iowa 596, 78 N. W. 190; Pieart *v.* Chicago, etc., R. Co., 82 Iowa 148, 47 N. W. 1017.

Louisiana.— Ragland *v.* St. Louis, etc., R. Co., 49 La. Ann. 1166, 22 So. 366; Bland *v.* Shreveport Belt R. Co., 48 La. Ann. 1057, 20 So. 284, 36 L. R. A. 114.

Minnesota.— Munch *v.* Great Northern R. Co., 75 Minn. 61, 77 N. W. 541; Holman *v.* Kempe, 70 Minn. 422, 73 N. W. 186; Closson *v.* Oakes, 69 Minn. 67, 71 N. W. 915.

New York.— Walsh *v.* New York, etc., R. Co., 80 N. Y. App. Div. 316, 80 N. Y. Suppl. 767; Butler *v.* New York, etc., R. Co., 42 N. Y. App. Div. 280, 58 N. Y. Suppl. 1061; Bird *v.* Long Island R. Co., 11 N. Y. App. Div. 134, 42 N. Y. Suppl. 888.

Ohio.— Michigan Cent. R. Co. *v.* Butler, 23 Ohio Cir. Ct. 459; Andrews *v.* Toledo, etc., R. Co., 8 Ohio Cir. Dec. 584.

Tennessee.— National Fertilizer Co. *v.* Travis, 102 Tenn. 16, 49 S. W. 832.

Texas.— Houston, etc., R. Co. *v.* Smith, (Civ. App. 1897) 39 S. W. 582.

Washington.—Dixon *v.* Bausman, 17 Wash. 304, 49 Pac. 540.

60. Florida Cent., etc., R. Co. *v.* Mooney, 40 Fla. 17, 24 So. 148, 45 Fla. 286, 33 So. 1010, 110 Am. St. Rep. 73, where it was held that shifting cars by means of "kicking back" process is not necessarily at all times an act of negligence *per se*, even though there may be a safer method of shifting them. See also Brinkmeier *v.* Missouri Pac. R. Co., 69 Kan. 738, 77 Pac. 586; Gualden *v.* Kansas City Southern R. Co., 106 La. 409, 30 So. 889; Bradburn *v.* Wabash R. Co., 134 Mich. 575, 96 N. W. 929.

61. Making a coupling while riding upon the tender of the engine is not contributory negligence, when the danger attending it is not so great as it would be if the coupling were made while standing on the ground between the cars. Elgin, etc., R. Co. *v.* Eselin, 68 Ill. App. 96.

62. Texas, etc., R. Co. *v.* McCoy, 17 Tex. Civ. App. 494, 44 S. W. 25. *Compare* Pullutro *v.* Delaware, etc., R. Co., 15 N. Y. Suppl. 783, in which there was no other way of boarding the train than that adopted, but the servant was negligent in the manner of performance.

Standing on the pilot of the engine to make a running switch is not contributory negligence, where the brakeman did so by direction of the conductor and engineer, and the duty could not have been performed by him from any other place. Louisville Southern R. Co. *v.* Tucker, 105 Ky. 492, 49 S. W. 314, 20 Ky. L. Rep. 1303.

63. Way *v.* Chicago, etc., R. Co., 76 Iowa 393, 41 N. W. 51; Dunlap *v.* Barney Mfg. Co., 148 Mass. 51, 18 N. E. 599; Alberts *v.* Bache, 69 Hun (N. Y.) 255, 23 N. Y. Suppl. 502; Bajus *v.* Syracuse, etc., R. Co., 5 N. Y. Suppl. 804 [*affirmed* in 119 N. Y. 651, 23 N. E. 1149]; Bodie *v.* Charleston, etc., R. Co., 66 S. C. 302, 44 S. E. 943.

64. Admissibility of evidence see *infra*, IV, H, 3, b, (III), (G).

tributory negligence in adopting a method of work which is usual and customary,[65] unless the danger therefrom is so obvious that no ordinarily prudent person would consent to follow the custom.[66] Conversely, where there is a safe, or reasonably safe, way to do work, which to the servant's knowledge is the customary way, and he is injured by reason of his adopting another way, he cannot recover.[67]

(II) *IMPROPER USE OF MACHINERY AND APPLIANCES.* Where a servant sustains injuries by reason of his improper use of machinery or appliances furnished for the work he cannot recover,[68] in the absence of evidence showing that

65. *California.*— Gier *v.* Los Angeles Consol. Electric R. Co., 108 Cal. 129, 41 Pac. 22.

Georgia.— Riverside Mills *v.* Jones, 121 Ga. 33. 48 S. E. 700; Rebb *v.* East Tennessee, etc., R. Co., 87 Ga. 631, 13 S. E. 566. *Compare* Mayfield *v.* Savannah, etc., R. Co., 87 Ga. 374, 13 S. E. 459, holding that evidence of the usual custom of coupling cars is inadmissible on the question of contributory negligence, where it is not shown that such custom was adopted by defendant.

Illinois.— Illinois Cent. R. Co. *v.* Cozby, 174 Ill. 109, 50 N. E. 1011 [*affirming* 69 Ill. App. 256]. But see Chicago, etc., R. Co. *v.* Clark, 108 Ill. 113.

Iowa.— Whitsett *v.* Chicago, etc., R. Co., 67 Iowa 150, 25 N. W. 104. See also Pierson *v.* Chicago, etc., R. Co., 127 Iowa 13, 102 N. W. 149.

Kentucky.— Louisville, etc., R. Co. *v.* Bocock, 107 Ky. 223, 51 S. W. 580, 53 S. W. 262, 21 Ky. L. Rep. 383, 896.

Louisiana.— Broadfoot *v.* Shreveport Cotton Oil Co., 111 La. 467, 35 So. 643; Gualden *v.* Kansas City Southern R. Co., 106 La. 409, 30 So. 889.

Maryland.— See Winkelmann, etc., Co. *v.* Colladay, 88 Md. 78, 40 Atl. 1078.

Massachusetts.— Goodes *v.* Boston, etc., R. Co., 162 Mass. 287, 38 N. E. 500; Daley *v.* American Printing Co., 152 Mass. 581, 26 N. E. 135.

Michigan.— Lyttle *v.* Chicago, etc., R. Co., 84 Mich. 289, 47 N. W. 571.

Minnesota.— Flanders *v.* Chicago, etc., R. Co., 51 Minn. 193, 53 N. W. 544.

Missouri.— O'Mellia *v.* Kansas City, etc., R. Co., 115 Mo. 205, 21 S. W. 503.

New York.— Sprong *v.* Boston, etc., R. Co., 58 N. Y. 56 [*affirming* 3 Thomps. & C. 54]; Teetsel *v.* Simmons, 88 Hun 621, 34 N. Y. Suppl. 972.

Ohio.— Wabash R. Co. *v.* Heeter, 14 Ohio Cir. Ct. 257, 7 Ohio Cir. Dec. 485.

Texas.— Houston, etc., R. Co. *v.* McGowan, (Civ. App. 1903) 74 S. W. 339; Galveston, etc., R. Co. *v.* Mortson, 31 Tex. Civ. App. 142, 71 S. W. 770; International, etc., R. Co. *v.* Turner, (Civ. App. 1897) 43 S. W. 560; Texas, etc., R. Co. *v.* Magrill, 15 Tex. Civ. App. 353, 40 S. W. 188.

Wisconsin.— Curtis *v.* Chicago, etc., R. Co., 95 Wis. 460, 70 N. W. 665.

United States.— Miller *v.* Union Pac. R. Co., 17 Fed. 67, 5 McCrary 300.

See 34 Cent. Dig. tit. "Master and Servant," § 747.

But see Southern Kansas R. Co. *v.* Robbins, 43 Kan. 145, 23 Pac. 113.

To get on the pilot of a slowly moving engine to do coupling is not negligence, where this has been the usual and necessary way of doing it, and it has always been done in that way, to the knowledge of the master. Wabash R. Co. *v.* Heeter, 14 Ohio Cir. Ct. 257, 7 Ohio Cir. Dec. 485.

Going between slowly moving cars to uncouple them is not negligence *per se*, where there was evidence that this method was universal in the master's yards, and that it had been practised with the knowledge and tacit approval of the yardmaster for years, and no rule was shown to the contrary. Hennessey *v.* Chicago, etc., R. Co., 99 Wis. 109, 74 N. W. 554.

66. *Alabama.*— Andrews *v.* Birmingham Mineral R. Co., 99 Ala. 438, 12 So. 432, negligence *per se* for brakeman to jump from pilot of moving engine on to the track in front of it to attend to a switch.

California.— Gribben *v.* Yellow Aster Min., etc., Co., 142 Cal. 248, 75 Pac. 839.

Georgia.— Mayfield *v.* Savannah, etc., R. Co., 87 Ga. 374, 13 S. E. 459, attempting to jump on narrow rim around pilot of engine running at rate of four miles an hour.

Iowa.— Bucklew *v.* Central Iowa R. Co., 64 Iowa 603, 21 N. W. 103 (negligence for brakeman to go on track in front of moving train to get links or make couplings, if he could have waited until the train stopped in obedience to his signal); Ferguson *v.* Central Iowa R. Co., 58 Iowa 293, 12 N. W. 293 (uncoupling moving cars according to custom permitted by defendant, but yet negligent, where it might be done in another way).

Ohio.— Grant *v.* Pittsburgh, etc., R. Co., 10 Ohio Cir. Ct. 362, 6 Ohio Cir. Dec. 516, stepping off pilot of moving engine between the rails to turn a switch.

Wisconsin.— Colf *v.* Chicago, etc., R. Co., 87 Wis. 273, 58 N. W. 408, jumping from moving engine.

67. *Georgia.*— Georgia, etc., R. Co. *v.* Hallman, 97 Ga. 317, 23 S. E. 73.

Indiana.— Chamberlain *v.* Waymire, 32 Ind. App. 442, 68 N. E. 306, 70 N. E. 81.

Michigan.— Stanley *v.* Chicago, etc., R. Co., 101 Mich. 202, 59 N. W. 393.

Missouri.— Hulett *v.* St. Louis, etc., R. Co., 67 Mo. 239.

Virginia.— Street *v.* Norfolk, etc., R. Co., 101 Va. 746, 45 S. E. 284.

Wisconsin.— Andrews *v.* Chicago, etc., R. Co., 96 Wis. 348, 71 N. W. 372.

68. *California.*— Kauffman *v.* Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124.

Dakota.— Schmidt *v.* Leistekow, 6 Dak. 386, 43 N. W. 820.

his use thereof was with the acquiescence, or at least with the knowledge, of his master.[69]

c. Precautions Against Known or Apparent Dangers[70] — (I) *DEFECTIVE OR DANGEROUS MACHINERY, APPLIANCES, OR PLACES.* A servant is bound to take such precautions against known or apparent dangers arising from defective or dangerous machinery, appliances, or places as an ordinarily prudent man would take under the same or similar circumstances;[71] and this, it is held, is

District of Columbia.— McDade *v.* Washington, etc., R. Co., 5 Mackey 144.

Georgia.— Quirouet *v.* Alabama Great Southern R. Co., 111 Ga. 315, 36 S. E. 599.

Illinois.— Block *v.* Swift, 161 Ill. 107, 43 N. E. 591 [*affirming* 58 Ill. App. 354]; Goss, etc., Mfg. Co. *v.* Suelau, 35 Ill. App. 103. *Compare* St. Louis, etc., R. Co. *v.* Dorsey, 189 Ill. 251, 59 N. E. 593 [*affirming* 89 Ill. App. 555], holding that to rebut the inference that a brakeman, killed by the giving way of the brake, was negligent in swinging on it so hard, it is competent to show that there was no other brake on the train in working order, so that it was necessary to put an unusual strain on it.

Indiana.— Standard Pottery Co. *v.* Moudy, 35 Ind. App. 427, 73 N. E. 188 [motion to transfer to supreme court *denied* in 164 Ind. 656, 74 N. E. 242]; Buehner Chair Co. *v.* Feulner, 28 Ind. App. 479, 63 N. E. 239; American Carbon Co. *v.* Jackson, 24 Ind. App. 390, 56 N. E. 862.

Kentucky.— Tradewater Coal Co. *v.* Head, 66 S. W. 721, 23 Ky. L. Rep. 2064.

Massachusetts.—Mulligan *v.* McCaffery, 182 Mass. 420, 65 N. E. 831; Cluny *v.* Cornell Mills, 160 Mass. 218, 35 N. E. 772.

Michigan.— Kopf *v.* Monroe Stone Co., 133 Mich. 286, 95 N. W. 72; Jayne *v.* Sebewaing Coal Co., 108 Mich. 242, 65 N. W. 971; Lindstrand *v.* Delta Lumber Co., 65 Mich. 254, 32 N. W. 427, 68 Mich. 261, 36 N. W. 67.

Minnesota.— Groff *v.* Duluth Imperial Mill Co., 58 Minn. 333, 59 N. W. 1049.

Mississippi.— Vicksburg Mfg. Co. *v.* Vaughn, (1900) 27 So. 599; Illinois Cent. R. Co. *v.* Daniels, 73 Miss. 258, 19 So. 830.

Missouri.— Moran *v.* Brown, 27 Mo. App. 487.

New York.— Wagner *v.* New York, etc., R. Co., 93 N. Y. App. Div. 14, 86 N. Y. Suppl. 921; Vincent *v.* Alden, 45 N. Y. App. Div. 627, 61 N. Y. Suppl. 62; Tisch *v.* Hirsch, 32 N. Y. App. Div. 635, 52 N. Y. Suppl. 1076; Rogen *v.* Enoch Morgan's Sons Co., 15 Daly 25; Burke *v.* Thomson Meter Co., 18 N. Y. Suppl. 436 [*affirmed* in 135 N. Y. 651, 32 N. E. 647].

Pennsylvania.—Prescott *v.* Ball Engine Co., 176 Pa. St. 459, 35 Atl. 224, 53 Am. St. Rep. 683.

Texas.— Houston, etc., R. Co. *v.* Conrad, 62 Tex. 627; Anderson *v.* Jefferson Cotton Oil, etc., Co., 32 Tex. Civ. App. 288, 74 S. W. 342.

Virginia.— Piedmont Electric Illuminating Co. *v.* Patterson, 84 Va. 747, 6 S. E. 4.

United States.— Dawson *v.* Chicago, etc., R. Co., 114 Fed. 870, 52 C. C. A. 286.

See 34 Cent. Dig. tit. "Master and Servant," § 749.

69. McCauley *v.* Southern R. Co., 10 App. Cas. (D. C.) 560.

70. **Acts in emergencies** see *infra*, IV, F, 4, g.

Disregarding warnings or signals see *infra*, IV, F, 4, g.

Duty to discover or remedy defect see *supra*, IV, F, 4, a, (II).

Inexperienced or youthful employee see *supra*, IV, F, 2, b, (VI).

71. *Alabama.*— Louisville, etc., R. Co. *v.* Banks, 104 Ala. 508, 16 So. 547; Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105. See also Woodward Iron Co. *v.* Andrews, 114 Ala. 243, 21 So. 440. *Compare* Jones *v.* Alabama Mineral R. Co., 107 Ala. 400, 18 So. 30.

Arkansas.— Little Rock, etc., R. Co. *v.* Voss, (1892) 18 S. W. 172.

California.— Limberg *v.* Glenwood Lumber Co., 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33; Ingerman *v.* Moore, (1890) 25 Pac. 275.

Colorado.— Victor Coal Co. *v.* Muir, 20 Colo. 320, 38 Pac. 378, 46 Am. St. Rep. 299, 26 L. R. A. 435.

Delaware.— Donovan *v.* Harlan, etc., Co., 2 Pennew. 190, 44 Atl. 619.

Georgia.— Parker *v.* Georgia Pac. R. Co., 83 Ga. 539, 10 S. E. 233.

Illinois.— Chicago, etc., R. Co. *v.* Van Every, 101 Ill. App. 451; Meyer *v.* Meyer, 101 Ill. App. 92; Munn *v.* L. Wolff Mfg. Co., 94 Ill. App. 122; Swift *v.* McInerny, 90 Ill. App. 294; St. Louis Consol. Coal Co. *v.* Bonner, 43 Ill. App. 17; Kolb *v.* Sandwich Enterprise Co., 36 Ill. App. 419; Chicago, etc., R. Co. *v.* Merckes, 36 Ill. App. 195; Starne *v.* Schlothane, 21 Ill. App. 97; Chicago, etc., R. Co. *v.* Simmons, 11 Ill. App. 147. *Compare* Illinois Steel Co. *v.* Olste, 214 Ill. 181, 73 N. E. 422; Goss Printing Press Co. *v.* Lempke, 90 Ill. App. 427 [*affirmed* in 191 Ill. 199, 60 N. E. 968].

Indiana.— New York, etc., R. Co. *v.* Ostman, 146 Ind. 452, 45 N. E. 651; Pennsylvania Co. *v.* Finney, 145 Ind. 551, 42 N. E. 816; Ervin *v.* Evans, 24 Ind. App. 335, 56 N. E. 725. *Compare* Heltonville Mfg. Co. *v.* Fields, 138 Ind. 58, 36 N. E. 529; Brazil Block Coal Co. *v.* Hoodlet, 129 Ind. 327, 27 N. E. 741, walking by mouth or unguarded shaft not negligence *per se*.

Iowa.— Crane *v.* Chicago, etc., R. Co., 124 Iowa 81, 99 N. W. 169; Haden *v.* Sioux City, etc., R. Co., 99 Iowa 735, 48 N. W. 733; Beck *v.* Firmenich Mfg. Co., 82 Iowa 286, 48 N. W. 81.

Kansas.— Missouri, etc., R. Co. *v.* Puckett,

especially true where the servant is himself in control of the cause or subject of

62 Kan. 770, 64 Pac. 631; Greef *v.* Brown, 7 Kan. App. 394, 51 Pac. 926.

Kentucky.— Shemwell *v.* Owensboro, etc., R. Co., 117 Ky. 556, 78 S. W. 448, 25 Ky. L. Rep. 1671; Ray *v.* Jeffries, 86 Ky. 367, 5 S. W. 867, 9 Ky. L. Rep. 602; Louisville Hotel Co. *v.* Kaltenbrun, 80 S. W. 1163, 26 Ky. L. Rep. 208; Mann *v.* Moore, 68 S. W. 402, 24 Ky. L. Rep. 253; Daniels *v.* Covington, etc., R., etc., Co., 66 S. W. 187, 23 Ky. L. Rep. 1800; Brown *v.* Louisville, etc., R. Co., 65 S. W. 588, 23 Ky. L. Rep. 1504.

Louisiana.— Dixon *v.* Louisiana Electric Light, etc., Co., 47 La. Ann. 1147, 17 So. 696.

Massachusetts.— Droney *v.* Doherty, 186 Mass. 205, 71 N. E. 547; Gaudet *v.* Stansfield, 182 Mass. 451, 65 N. E. 850; Ward *v.* Connor, 182 Mass. 170, 64 N. E. 968; Tirrell *v.* New York, etc., R. Co., 180 Mass. 490, 62 N. E. 745; Cushman *v.* Cushman, 179 Mass. 601, 61 N. E. 262; Whelton *v.* West End St. R. Co., 172 Mass. 555, 52 N. E. 1072; Degnan *v.* Jordan, 164 Mass. 84, 41 N. E. 117; Watts *v.* Boston Tow-Boat Co., 161 Mass. 378, 37 N. E. 197; Horne *v.* Old Colony R. Co., 161 Mass. 180, 36 N. E. 792; Kilroy *v.* Foss, 161 Mass. 138, 36 N. E. 746; Murphy *v.* Webster, 151 Mass. 121, 23 N. E. 842; Taylor *v.* Carew Mfg. Co., 143 Mass. 470, 10 N. E. 308. *Compare* McPhee *v.* Scully, 163 Mass. 216, 39 N. E. 1007.

Michigan.— Chapman *v.* Pere Marquette R. Co., 133 Mich. 311, 94 N. W. 1049; Pahlan *v.* Detroit, etc., R. Co., 122 Mich. 232, 81 N. W. 103; Johnson *v.* Hovey, 98 Mich. 343, 57 N. W. 172; Robinson *v.* Wright, 94 Mich. 283, 53 N. W. 938; Mahan *v.* Clee, 87 Mich. 161, 49 N. W. 556; Caniff *v.* Blanchard Nav. Co., 66 Mich. 638, 33 N. W. 744, 11 Am. St. Rep. 541.

Minnesota.— Parker *v.* Pine Tree Lumber Co., 85 Minn. 13, 88 N. W. 261; Holtz *v.* Great Northern R. Co., 69 Minn. 524, 72 N. W. 805; Moody *v.* Smith, 64 Minn. 524, 67 N. W. 633; McCallum *v.* McCallum, 58 Minn. 238, 59 N. W. 1019; Eicheler *v.* Hanggi, 40 Minn. 263, 41 N. W. 975; Clark *v.* St. Paul, etc., R. Co., 28 Minn. 128, 9 N. W. 581.

Missouri.— McCarty *v.* Rood Hotel Co., 144 Mo. 397, 46 S. W. 172; Junior *v.* Missouri Electric Light, etc., Co., 127 Mo. 79, 29 S. W. 988; Steffen *v.* Mayer, 96 Mo. 420, 9 S. W. 630; Rains *v.* St. Louis, etc., R. Co., 71 Mo. 164, 36 Am. Rep. 459; Beymer *v.* Hammond Packing Co., 106 Mo. App. 726, 80 S. W. 685; Glasscock *v.* Swafford Bros. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364, (App. 1903) 74 S. W. 1039.

Nebraska.— Norfolk Beet-Sugar Co. *v.* Preuner, 55 Nebr. 656, 75 N. W. 1097; Nelson *v.* Swift, 55 Nebr. 598, 75 N. W. 1107.

New Hampshire.— Foss *v.* Baker, 62 N. H. 247.

New Jersey.— Smith *v.* Van Seiver, 58 N. J. L. 190, 33 Atl. 390.

New York.— Walsh *v.* New York, etc., R. Co., 178 N. Y. 588, 70 N. E. 1111 [*affirming* 80 N. Y. App. Div. 316, 80 N. Y. Suppl. 767]; Riddle *v.* Forty-Second St., etc., R. Co., 173 N. Y. 327, 66 N. E. 22 [*reversing* 76 N. Y. Suppl. 1029]; Kennedy *v.* Manhattan R. Co., 145 N. Y. 288, 39 N. E. 956; Williams *v.* Delaware, etc., R. Co., 116 N. Y. 628, 22 N. E. 1117; Mullen *v.* Metropolitan St. R. Co., 89 N. Y. App. Div. 21, 85 N. Y. Suppl. 134; Sheehan *v.* Standard Gaslight Co., 87 N. Y. App. Div. 174, 84 N. Y. Suppl. 34; Mull *v.* Curtice Bros. Co., 74 N. Y. App. Div. 561, 77 N. Y. Suppl. 813; Freeman *v.* Glens Falls Paper Mill Co., 70 Hun 530, 24 N. Y. Suppl. 403; Owen *v.* New York Cent. R. Co., 1 Lans. 108; Behsmann *v.* Waldo, 38 Misc. 820, 78 N. Y. Suppl. 1108 [*affirming* 36 Misc. 863, 74 N. Y. Suppl. 929]; Reichert *v.* Buffalo Spring, etc., Co., 15 Misc. 222, 36 N. Y. Suppl. 402; Burke *v.* Thomson Meter Co., 18 N. Y. Suppl. 436 [*affirmed* in 135 N. Y. 651, 32 N. E. 647]; Wallace *v.* Central Vermont R. Co., 18 N. Y. Suppl. 280; Rock *v.* Retsof Min. Co., 15 N. Y. Suppl. 872; Kossmann *v.* Stutz, 5 N. Y. Suppl. 764.

Ohio.— Coal Co. *v.* Estievenard, 53 Ohio St. 43, 40 N. E. 725; Brown Oil Can Co. *v.* Green, 22 Ohio Cir. Ct. 518, 12 Ohio Cir. Dec. 510.

Oregon.— Stone *v.* Oregon City Mfg. Co., 4 Oreg. 52.

Pennsylvania.—Ingram *v.* Lehigh Coal, etc., Co., 148 Pa. St. 177, 23 Atl. 1001; Green, etc., St. Pass. R. Co. *v.* Bresmer, 97 Pa. St. 103; Pittsburgh, etc., R. Co. *v.* Sentmeyer, 92 Pa. St. 276, 37 Am. Rep. 684; Stoll *v.* Hoopes, 10 Pa. Cas. 291, 14 Atl. 658.

Rhode Island.— Langlois *v.* Dunn Worsted Mills, 25 R. I. 645, 57 Atl. 910; Donohoe *v.* Lonsdale Co., 25 R. I. 187, 55 Atl. 326; Sullivan *v.* Nicholson File Co., 21 R. I. 540, 45 Atl. 549; McCann *v.* Atlantic Mills, 20 R. I. 566, 40 Atl. 500.

South Carolina.— Barksdale *v.* Charleston, etc., R. Co., 66 S. C. 204, 44 S. E. 743.

Texas.— Consumers' Cotton Oil Co. *v.* Jonte, 36 Tex. Civ. App. 18, 80 S. W. 847; Louisiana Extension R. Co. *v.* Carstens, 19 Tex. Civ. App. 190, 47 S. W. 36.

Utah.— Smith *v.* Centennial Eureka Min. Co., 27 Utah 307, 75 Pac. 749; Fowler *v.* Pleasant Valley Coal Co., 16 Utah 348, 52 Pac. 594; Quibell *v.* Union Pac. R. Co., 7 Utah 122, 25 Pac. 734.

Virginia.— Haffner *v.* Chesapeake, etc., R. Co., 96 Va. 528, 31 S. E. 899; Bertha Zinc Co. *v.* Martin, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; Chesapeake, etc., R. Co. *v.* Hafner, 90 Va. 621, 19 S. E. 166; Sexton *v.* Turner, 89 Va. 341, 15 S. E. 862; Sheeler *v.* Chesapeake, etc., R. Co., 81 Va. 188, 59 Am. Rep. 654.

Washington.— Crooker *v.* Pacific Lounge, etc., Co., 34 Wash. 191, 75 Pac. 632; Hughes *v.* Oregon Imp. Co., 20 Wash. 294, 55 Pac. 119; Brennan *v.* Front St. Cable R. Co., 8 Wash. 363, 36 Pac. 272.

Wisconsin.— Youngbluth *v.* Stephens, 104 Wis. 343, 80 N. W. 443; Kerrigan *v.* Chicago,

danger.[72] The rule, however, does not apply to dangers which cannot be reasonably anticipated,[73] nor where the nature of the servant's duties is such as to take up his whole attention.[74]

(II) *AVOIDANCE OF INJURY FROM DANGEROUS OPERATIONS OR METHODS*[75]— (A) *In General.* Where the work in which a servant is engaged is in itself dangerous, or where the servant knows, or ought to know, that the method of work adopted involves danger, he is bound to exercise ordinary care to avoid injury therefrom.[76]

etc., R. Co., 104 Wis. 166, 80 N. W. 586; Schultz *v.* C. C. Thompson Lumber Co., 91 Wis. 626, 65 N. W. 498. *Compare* Lago *v.* Walsh, 98 Wis. 348, 74 N. W. 212.

United States.— Bunt *v.* Sierra Butte Gold Min. Co., 138 U. S. 483, 11 S. Ct. 464, 34 L. ed. 1031 [*affirming* 24 Fed. 847, 11 Sawy. 178]; McKenna Steel Working Co. *v.* Lewis, 111 Fed. 320, 49 C. C. A. 369; Browne *v.* King, 100 Fed. 561, 40 C. C. A. 545; Vany *v.* Peirce, 82 Fed. 162, 26 C. C. A. 521; Keiley *v.* The Cyprus, 55 Fed. 332; Smith *v.* The Serapis, 51 Fed. 91, 2 C. C. A. 102 [*reversing* 49 Fed. 393]; The Sir Garnet Wolseley, 41 Fed. 896; Hammergren *v.* Schurmeier, 7 Fed. 766, 2 McCrary 520. *Compare* Elliott *v.* Canadian Pac. R. Co., 129 Fed. 163.

See 34 Cent. Dig. tit. "Master and Servant," §§ 723, 727–736.

Knowledge of defect implied from allegation of forgetfulness see Langlois *v.* Dunn Worsted Mills, 25 R. I. 645, 57 Atl. 910.

Failure to take precautions not excused by reliance on custom see Collins *v.* Burlington, etc., R. Co., 83 Iowa 346, 49 N. W. 848; Coops *v.* Lake Shore, etc., R. Co., 66 Mich. 448, 33 N. W. 541; Tomko *v.* New Jersey Cent. R. Co., 1 N. Y. App. Div. 289, 37 N. Y. Suppl. 144.

72. *Alabama.*— See Woodward Iron Co. *v.* Herndon, 114 Ala. 191, 21 So. 430.

Georgia.— Brunswick, etc., R. Co. *v.* Smith, 97 Ga. 777, 25 S. E. 759.

Illinois.— Chicago, etc., R. Co. *v.* Van Every, 101 Ill. App. 451.

Iowa.— Lane *v.* Central Iowa R. Co., 69 Iowa 443, 29 N. W. 419.

New Mexico.— Alexander *v.* Tennessee, etc., Gold, etc., Min. Co., 3 N. M. 255, 3 Pac. 735.

Texas.— St. Louis Southwestern R. Co. *v.* Barrett, (Civ. App. 1903) 72 S. W. 884.

United States.— McKenna Steel Working Co. *v.* Lewis, 111 Fed. 320, 49 C. C. A. 369.

See 34 Cent. Dig. tit. "Master and Servant," § 726.

73. Croll *v.* Atchison, etc., R. Co., 57 Kan. 548, 46 Pac. 972 [*reversing* 3 Kan. App. 242, 45 Pac. 112], where it was held that a section hand, working near the track, was not guilty of contributory negligence in not stopping work and looking up at a passing train, so as to avoid injury from a chunk of coal which fell from the tender.

74. *Iowa.*— Greenleaf *v.* Dubuque, etc., R. Co., 33 Iowa 52.

Massachusetts.— See Hannah *v.* Connecticut River R. Co., 154 Mass. 529, 28 N. E. 682.

Michigan.— Kinney *v.* Folkerts, 78 Mich. 687, 44 N. W. 152, 84 Mich. 616, 48 N. W. 283.

New York.— Plank *v.* New York Cent., etc., R. Co., 60 N. Y. 607; Brown *v.* New York Cent., etc., R. Co., 42 N. Y. App. Div. 548, 59 N. Y. Suppl. 672; Fitzgerald *v.* New York Cent., etc., R. Co., 88 Hun 379, 34 N. Y. Suppl. 824 [*reversed* on other grounds in 154 N. Y. 263, 48 N. E. 514]; Fiero *v.* New York Cent., etc., R. Co., 71 Hun 213, 24 N. Y. Suppl. 805 [*affirmed* in 143 N. Y. 674, 39 N. E. 20].

Texas.— Missouri, etc., R. Co. *v.* Goss, 31 Tex. Civ. App. 300, 72 S. W. 94.

Compare Brennan *v.* Front St. Cable R. Co., 8 Wash. 363, 36 Pac. 272, holding that a servant of a cable-car company who is injured by falling into an opening under the tracks which he had left uncovered cannot recover, although he was engrossed in obeying an order of the superintendent.

75. **Acts in emergencies** see *infra*, IV, F, 4, g.

Choice of appliances see *supra*, IV, F, 4, a, (I), (C).

Choice of ways and places see *supra*, IV, F, 4, a, (I), (D).

Compliance with commands or threats see *infra*, IV, F, 4, f.

Continuing work with knowledge of danger see *infra*, IV, F, 2, a, (III), (B).

Duty to discover or remedy defect or danger see *supra*, IV, F, 4, a, (II).

Inexperienced or youthful employee see *supra*, IV, F, 4, b, (VI).

Methods of work by servant injured see *supra*, IV, F, 4, b.

Neglect of statutory duty see *supra*, IV, F, 1, c, (II), (B).

Proximate cause of injury see *supra*, IV, F, 3.

76. *Alabama.*— McDonald *v.* Alabama Midland R. Co., 123 Ala. 227, 26 So. 165; Burgin *v.* Louisville, etc., R. Co., 97 Ala. 274, 12 So. 395; Woodward Iron Co. *v.* Jones, 80 Ala. 123.

Illinois.— Pennsylvania Co. *v.* Hankey, 93 Ill. 580; Chicago, etc., R. Co. *v.* Donahue, 75 Ill. 106; Jarvis *v.* Drake, 97 Ill. App. 153; Werk *v.* Illinois Steel Co., 54 Ill. App. 302 [*affirmed* in 154 Ill. 427, 40 N. E. 442]; Illinois Cent. R. Co. *v.* Harris, 53 Ill. App. 592.

Indiana.— L. T. Dickason Coal Co. *v.* Peach, 32 Ind. App. 33, 69 N. E. 189.

Iowa.— Ford *v.* Chicago, etc., R. Co., 106 Iowa 85, 75 N. W. 650; Rebelsky *v.* Chicago, etc., R. Co., 79 Iowa 55, 44 N. W. 536.

Kentucky.— East Jellico Co. *v.* Golden, 79 S. W. 291, 25 Ky. L. Rep. 2056.

(B) *Duty of Servant to Give Warnings or Signals.*[77] Where, in the performance of his duties, a servant assumes a position of danger, he is bound to use all available means to give notice thereof to his master and other servants, and cannot recover for injuries caused by his failure to do so.[78]

Massachusetts.— Hudson *v.* People's St. R. Co., 175 Mass. 23, 55 N. E. 464.

Mississippi.— Hatter *v.* Illinois Cent. R. Co., 69 Miss. 642, 13 So. 827.

New York.— Maxwell *v.* Thomas, 31 N. Y. App. Div. 546, 52 N. Y. Suppl. 30.

Ohio.— Grant *v.* Pittsburg, etc., R. Co., 10 Ohio Cir. Ct. 362, 6 Ohio Cir. Dec. 516.

Pennsylvania.— McDonald *v.* Rockhill Iron, etc., Co., 135 Pa. St. 1, 19 Atl. 797; Rickert *v.* Stephens, 133 Pa. St. 538, 19 Atl. 410.

Rhode Island.— Sullivan *v.* Nicholson File Co., 21 R. I. 540, 45 Atl. 549.

Texas.— Johnson *v.* Galveston, etc., R. Co., (Civ. App. 1895) 30 S. W. 95.

Washington.— Johnson *v.* Anderson, etc., Lumber Co., 31 Wash. 554, 72 Pac. 107.

Wisconsin.— Kennedy *v.* Lake Superior Terminal, etc., Co., 87 Wis. 28, 57 N. W. 976.

United States.— Patton *v.* Texas, etc., R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. ed. 361 [*affirming* 95 Fed. 244, 37 C. C. A. 56]; Whitcomb *v.* McNulty, 105 Fed. 863, 45 C. C. A. 90; Southern Pac. Co. *v.* Johnson, 64 Fed. 951, 12 C. C. A. 479; Peterson *v.* The Chandos, 4 Fed. 645, 6 Sawy. 544.

Canada.— Garand *v.* Allan, 15 Quebec Super. Ct. 81.

See 34 Cent. Dig. tit. "Master and Servant," §§ 737, 742.

Servants on or about cars and locomotives. — Lynch *v.* Boston, etc., R. Co., 159 Mass. 536, 34 N. E. 1072 (failure of servant cleaning under switch bar to look and listen for approach of shunted car); Whitmore *v.* Boston, etc., R. Co., 150 Mass. 477, 23 N. E. 220 (voluntarily going between cars knowing that a newly loaded car is liable to be kicked against them); Forey *v.* Syracuse, etc., R. Co., 12 N. Y. St. 198; Texas, etc., R. Co. *v.* Young, (Tex. Civ. App. 1894) 27 S. W. 145.

Servants on hand-cars.— Woodward Iron Co. *v.* Herndon, 130 Ala. 364, 30 So. 370; Illinois Cent. R. Co. *v.* Modglin, 85 Ill. 481 (in which the servant in charge knew of the approach of a train in time to have been off the track); Chicago, etc., R. Co. *v.* Peterson, 32 Ill. App. 139 (failure of section man to keep lookout for extra, or "wild" trains); Pittsburgh, etc., R. Co. *v.* Goss, 13 Ill. App. 619 (in which plaintiff saw an approaching train, but tried to reach his destination ahead of it); Nelling *v.* Chicago, etc., R. Co., 98 Iowa 554, 63 N. W. 568, 67 N. W. 404 (failure to look out for trains); Jolly *v.* Detroit, etc., R. Co., 93 Mich. 370, 53 N. W. 526 (failure to look back for extra trains); Railway Co. *v.* Leech, 41 Ohio St. 388 (in which decedent, riding to his work on a hand-car, was killed by a passenger train an hour overdue. Neither he nor his foreman had reason to believe that the train had not passed, and they had not inquired at a telegraph station a mile away. But no negligence was shown on the part of those in charge of the train, and it was held that the company was not liable); International, etc., R. Co. *v.* McCarthy, 64 Tex. 632 (in which a road-master voluntarily entered a cut on a velocipede hand-car, knowing that a train was nearly due from the opposite direction); Gulf, etc., R. Co. *v.* Hubert, (Tex. Civ. App. 1900) 54 S. W. 1074; Cooney *v.* Great Northern R. Co., 9 Wash. 292, 37 Pac. 438 (in which the headlight of a locomotive, moving at the rate of only three or four miles an hour, was in plain view for a mile and a half, and a collision could easily have been avoided by removing the hand-car from the track); Texas, etc., R. Co. *v.* Eason, 92 Fed. 553, 34 C. C. A. 530 (in which the servant saw the approaching train in ample time to get off the track). *Compare* Christianson *v.* Chicago, etc., R. Co., 67 Minn. 94, 69 N. W. 640; Texas, etc., R. Co. *v.* Lewis, (Tex. Civ. App. 1894) 26 S. W. 837, in which the servant was injured while moving a hand-car under the orders of his foreman, who was in a better position to see the approaching train, but gave no warning. Plaintiff saw the train, but thought the car could not be removed in time, and it was held that he was free from negligence.

When a running switch is to be made by a servant of a railroad company, he must try the switch, and see that there is nothing to prevent it from working properly, before signaling the engine to come ahead. Jarvis *v.* Drake, 97 Ill. App. 153.

77. Violation of rules or orders see *infra*, IV, F, 4, d, (I).

78. *Alabama.*— Alabama Great Southern R. Co. *v.* Roach, 116 Ala. 360, 23 So. 52 (going under cars to inspect or repair); Davis *v.* Western R. Co., 107 Ala. 626, 18 So. 173 (going between moving cars to uncouple them).

Arkansas.— Fordyce *v.* Briney, 58 Ark. 206, 24 S. W. 250, in which plaintiff, a car-repairer, failed to put out red flags before going under a train.

California.— Stevens *v.* San Francisco, etc., R. Co., 100 Cal. 554, 35 Pac. 165.

Colorado.— Chicago, etc., R. Co. *v.* McGraw, 22 Colo. 363, 45 S. W. 383, in which the servant failed to place flags at both ends of cars between which he went to make repairs.

Georgia.— Lumpkin *v.* Southern R. Co., 99 Ga. 111, 24 S. W. 963.

Idaho.— Snyder *v.* Viola Min., etc., Co., 3 Ida. 28, 26 Pac. 127, failure of miner to give notice that he was ascending the shaft.

Illinois.— St. Louis Press Brick Co. *v.* Kenyon, 57 Ill. App. 640; Atchison, etc., R. Co. *v.* Alsdorf, 56 Ill. App. 578, brakeman going between cars at night to couple them. *Compare* Chicago, etc., R. Co. *v.* Dunleavy, 27 Ill.

(c) *Precautions Required of Servants on or Near Railroad Tracks.*[79] While the rule requiring travelers to look and listen when about to cross a railroad track is not applied in all its strictness to a workman engaged in the line of his duty on or near a railroad track,[80] the law holds him to the exercise of reasonable care and prudence proportioned to the dangers incident to his work and position to avoid injury to himself, and a failure in this regard resulting in injury to him

App. 438 [*affirmed* in 129 Ill. 132, 22 N. E. 15].

Indiana.— Spencer *v.* Ohio, etc., R. Co., 130 Ind. 181, 29 N. E. 915, in which plaintiff failed to notify the engineer before going under the engine.

Iowa.— Campbell *v.* Illinois Cent. R. Co., 124 Iowa 302, 100 N. W. 30 (going between cars); Gibson *v.* Burlington, etc., R. Co., 107 Iowa 596, 78 N. W. 190 (inspecting engine). See also Dillon *v.* Iowa Cent. R. Co., 118 Iowa 645, 92 N. W. 855.

Massachusetts.— McLean *v.* Chemical Paper Co., 165 Mass. 5, 42 N. E. 330.

Michigan.— Schaible *v.* Lake Shore, etc., R. Co., 97 Mich. 318, 56 N. W. 565, 21 L. R. A. 660; Hammond *v.* Chicago, etc., R. Co., 83 Mich. 334, 47 N. W. 965; Harrison *v.* Detroit, etc., R. Co., 79 Mich. 409, 44 N. W. 1034, 19 Am. St. Rep. 180, 7 L. R. A. 623.

Missouri.— Snider *v.* Crawford, 47 Mo. App. 8.

New York.— O'Donnell *v.* International Nav. Co., 49 N. Y. App. Div. 408, 63 N. Y. Suppl. 290; Jenkins *v.* Mahopac Iron-Ore Co., 57 Hun 588, 10 N. Y. Suppl. 484 [*affirmed* in 132 N. Y. 595, 30 N. E. 1151]; Beyer *v.* Victor, 2 Misc. 496, 22 N. Y. Suppl. 392.

Oregon.— Brunell *v.* Southern Pac. Co., 34 Oreg. 256, 56 Pac. 129.

Pennsylvania.— Cypher *v.* Huntington, etc., R., etc., Co., 149 Pa. St. 359, 24 Atl. 225, failure to put up red flag before going under car to repair.

West Virginia.— Seldomridge *v.* Chesapeake, etc., R. Co., 46 W. Va. 569, 33 S. E. 293, going under engine to clean out ash-pan.

Wisconsin.— Hulien *v.* Chicago, etc., R. Co., 107 Wis. 122, 82 N. W. 710 (going under engine to tighten driving-box wedge); Crane *v.* Chicago, etc., R. Co., 93 Wis. 487, 67 N. W. 1132 (failure of fireman to observe established custom to notify engineer before going under engine).

United States.— Southern Pac. Co. *v.* Pool, 160 U. S. 438, 16 S. Ct. 338, 40 L. ed. 485 [*reversing* 7 Utah 303, 26 Pac. 654 (going under car to repair without putting out flag or other signal); Goodlett *v.* Louisville, etc., R. Co., 122 U. S. 391, 7 S. Ct. 1254, 30 L. ed. 123 (running hand-car into deep cut without sending man ahead to warn passenger train about due); Whitcomb *v.* McNulty, 105 Fed. 863, 46 C. C. A. 90 (going under engine to repair); Montague *v.* Chicago, etc., R. Co., 82 Fed. 787, 27 C. C. A. 180 (duty of servant going between cars to give warning to others who are switching trains); O'Rorke *v.* Union Pac. R. Co., 22 Fed. 189 (going under cars without demanding and procuring signal flag). *Compare* Chicago Terminal R. Co. *v.* Stone, 118 Fed. 19, 55 C. C. A. 187, in which a flag was properly placed, and the injury to the car-repairer was caused by a train on another track which struck the cars under which he was working, they being too close to the switch to be cleared.

See 34 Cent. Dig. tit. "Master and Servant," § 738.

Promise of safety by vice-principal.— A car-inspector is not guilty of contributory negligence, as a matter of law, in not complying with a rule requiring him to put out a red flag, as a notice of his presence under a train, where he has the express promise of the yard foreman, in control of the movement of trains in the yard, that no cars shall be sent back on that track. Canon *v.* Chicago, etc., R. Co., 101 Iowa 613, 70 N. W. 755. See also Moore *v.* Wabash, etc., R. Co., 85 Mo. 588.

79. Disease or other physical conditions see *supra*, IV, F, 2, a, (VII).

Violation of rules or orders see *infra*, IV, F, 4, a.

80. *Indiana.*— Baltimore, etc., R. Co. *v.* Peterson, 156 Ind. 364, 59 N. E. 1044; Shoner *v.* Pennsylvania R. Co., 130 Ind. 170, 28 N. E. 616, 29 N. E. 775, track-repairers.

Iowa.— Crowley *v.* Burlington, etc., R. Co., 65 Iowa 658, 20 N. W. 467, 22 N. W. 918 (in which it was said that the measure of care required of travelers would be inconsistent with the duty of employees working on the track); Farley *v.* Chicago, etc., R. Co., 56 Iowa 337, 9 N. W. 230.

Missouri.— Barry *v.* Hannibal, etc., R. Co., 98 Mo. 62, 11 S. W. 308, 14 Am. St. Rep. 610.

Tennessee.— Freeman *v.* Illinois Cent. R. Co., 107 Tenn. 340, 64 S. W. 1; Taylor *v.* Louisville, etc., R. Co., 93 Tenn. 305, 27 S. W. 663.

Texas.— International, etc., R. Co. *v.* Villareal, 36 Tex. Civ. App. 532, 82 S. W. 1063.

United States.— Weiss *v.* Bethlehem Iron Co., 88 Fed. 23, 31 C. C. A. 363, private railway in rolling-mill plant. But see Elliott *v.* Chicago, etc., R. Co., 150 U. S. 245, 14 S. Ct. 85, 37 L. ed. 1068.

See 34 Cent. Dig. tit. "Master and Servant," § 739.

But see Wabash R. Co. *v.* Skiles, 64 Ohio St. 458, 60 N. E. 576; Pennsylvania Co. *v.* Mahoney, 22 Ohio Cir. Ct. 469, 12 Ohio Cir. Dec. 366.

Failure to look and listen not negligence as matter of law see Baltimore, etc., R. Co. *v.* Peterson, 156 Ind. 364, 59 N. E. 1044.

Constant lookout not required of trackman laying new rails see International, etc., R. Co. *v.* Villareal, 36 Tex. Civ. App. 532, 82 S. W. 1063.

will bar a recovery.[81] A crossing flagman or gateman, employed to give notice of

81. *Alabama.*— Burgin *v.* Louisville, etc., R. Co., 97 Ala. 274, 12 So. 395; Columbus, etc., R. Co. *v.* Bradford, 86 Ala. 574, 6 So. 90. *Compare* Georgia Cent. R. Co. *v.* Lamb, 124 Ala. 172, 26 So. 969.

Arkansas.— St. Louis, etc., R. Co. *v.* Bloyd, (1895) 31 S. W. 457.

California.— Kenna *v.* Central Pac. R. Co., 101 Cal. 26, 35 Pac. 332.

Colorado.— Lord *v.* Pueblo Smelting, etc., Co., 12 Colo. 390, 21 Pac. 148.

Dakota.— Elliott *v.* Chicago, etc., R. Co., 5 Dak. 523, 41 N. W. 758, 3 L. R. A. 363.

Georgia.— Rawlston *v.* East Tennessee, etc., R. Co., 94 Ga. 536, 20 S. E. 123.

Illinois.— Illinois Cent. R. Co. *v.* Stassen, 56 Ill. App. 221; Illinois Cent. R. Co. *v.* Neer, 31 Ill. App. 126.

Indiana.— Stewart *v.* Pennsylvania Co., 130 Ind. 242, 29 N. E. 486; Pennsylvania Co. *v.* O'Shaughnessy, 122 Ind. 588, 23 N. E. 675; Indianapolis, etc., R. Co. *v.* Carr, 35 Ind. 510; Cleveland, etc., R. Co. *v.* Goddard, 33 Ind. App. 321, 71 N. E. 514; Indiana, etc., R. Co. *v.* Trinosky, 32 Ind. App. 113, 69 N. E. 402.

Iowa.— Campbell *v.* Illinois Cent., etc., R. Co., 124 Iowa 302, 100 N. W. 30; Nelling *v.* Chicago, etc., R. Co., 98 Iowa 554, 63 N. W. 568, 67 N. W. 404; Keefe *v.* Chicago, etc., R. Co., 92 Iowa 182, 60 N. W. 503, 54 Am. St. Rep. 542; Collins *v.* Burlington, etc., R. Co., 83 Iowa 346, 49 N. W. 848.

Kansas.— Missouri, etc., R. Co. *v.* Faber, 7 Kan. App. 481, 54 Pac. 136.

Kentucky.— Jacobs *v.* Chesapeake, etc., R. Co., 72 S. W. 308, 24 Ky. L. Rep. 1879.

Maine.— Gillin *v.* Patten, etc., R. Co., 93 Me. 80, 44 Atl. 361.

Massachusetts.— Dolphin *v.* New York, etc., R. Co., 182 Mass. 509, 65 N. E. 820; Jean *v.* Boston, etc., R. Co., 181 Mass. 197, 63 N. E. 399; Thompson *v.* Boston, etc., R. Co., 153 Mass. 391, 26 N. E. 1070.

Michigan.— Pahlan *v.* Detroit, etc., R. Co., 122 Mich. 232, 81 N. W. 103; Carlson *v.* Cincinnati, etc., R. Co., 120 Mich. 481, 79 N. W. 688.

Minnesota.— Sours *v.* Great Western R. Co., 84 Minn. 230, 87 N. W. 766.

Mississippi.— Morehead *v.* Yazoo, etc., R. Co., 84 Miss. 112, 36 So. 151.

Missouri.— Sharp *v.* Missouri R. Co., 161 Mo. 214, 61 S. W. 829; Loring *v.* Kansas City, etc., R. Co., 128 Mo. 349, 31 S. W. 6; Harris *v.* Missouri Pac. R. Co., 40 Mo. App. 255; Kelly *v.* Union R., etc. Co. 11 Mo. App. 1.

Nebraska.— Chicago, etc., R. Co. *v.* Yost, 56 Nebr. 439, 76 N. W. 901; Union Pac. R. Co. *v.* Elliott, 54 Nebr. 299, 74 N. W. 627.

New York.— Clark *v.* New York, etc., R. Co., 80 Hun 320, 30 N. Y. Suppl. 126; Crowe *v.* New York Cent., etc., R. Co., 70 Hun 37, 23 N. Y. Suppl. 1100; Redmond *v.* Rome, etc., R. Co., 10 N. Y. Suppl. 330; Ellis *v.* Houston, 4 N. Y. Suppl. 732 [*affirmed* in 117 N. Y. 642, 22 N. E. 1131]. *Compare* Felice *v.* New York Cent., etc., R. Co., 14 N. Y. App. Div. 345, 43 N. Y. Suppl. 922.

Ohio.— Lake Shore, etc., R. Co. *v.* Callahan, 25 Ohio Cir. Ct. 115; Erie R. Co. *v.* McCormick, 24 Ohio Cir. Ct. 86; Pennsylvania R. Co. *v.* Mahoney, 22 Ohio Cir. Ct. 469, 12 Ohio Cir. Dec. 366; Lake Shore, etc., R. Co. *v.* Eagan, 18 Ohio Cir. Ct. 886, 4 Ohio Cir. Dec. 20; Columbus, etc., R. Co. *v.* Burns, 9 Ohio Cir. Ct. 276, 4 Ohio Cir. Dec. 21.

Pennsylvania.— Baldwin *v.* Pennsylvania R. Co., 2 Lanc. Bar, Sept. 10, 1870.

Rhode Island.— Brady *v.* New York, etc., R. Co., 20 R. I. 338, 39 Atl. 186.

Texas.— Bennett *v.* St. Louis Southwestern R. Co., 36 Tex. Civ. App. 459, 82 S. W. 333. See also Southern Pac. R. Co. *v.* Wellington, (Civ. App. 1896) 36 S. W. 1114. *Compare* Chicago, etc., R. Co. *v.* Long, 32 Tex. Civ. App. 40, 74 S. W. 59, 97 Tex. 69, 75 S. W. 483.

Wisconsin.— McCadden *v.* Abbott, 92 Wis. 551, 66 N. W. 694; Wilber *v.* Wisconsin Cent. R. Co., 86 Wis. 535, 57 N. W. 356.

United States.— Elliott *v.* Chicago, etc., R. Co., 150 U. S. 245, 14 S. Ct. 85, 37 L. ed. 1068; Aerkfetz *v.* Humphreys, 145 U. S. 418, 12 S. Ct. 835, 36 L. ed. 758; Dishon *v.* Cincinnati, etc., R. Co., 133 Fed. 471, 66 C. C. A. 345 [*affirming* 126 Fed. 194]; O'Neil *v.* Pittsburg, etc., R. Co., 130 Fed. 204; State Trust Co. *v.* Kansas City, etc., R. Co., 111 Fed. 769, 49 C. C. A. 598; Grand Trunk R. Co. *v.* Baird, 94 Fed. 946, 36 C. C. A. 574; Chicago, etc., R. Co. *v.* Davis, 53 Fed. 61, 3 C. C. A. 429.

Canada.— Plant *v.* Grand Trunk R. Co., 27 U. C. Q. B. 78.

See 34 Cent. Dig. tit. "Master and Servant," § 739.

Standing close to a train passing at the rate of thirty or forty miles an hour is contributory negligence. Illinois Cent. R. Co. *v.* Stassen, 56 Ill. App. 221. *Compare* Chicago, etc., R. Co. *v.* Cullen, 187 Ill. 523, 58 N. E. 455 [*affirming* 87 Ill. App. 374], in which a section foreman was held not to be guilty of negligence in failing to observe a defective car door which swung outward from a passing train, where he had stepped the customary distance from the track.

A motorman, on reaching a street crossing, is guilty of contributory negligence if he fails to look for an approaching car, and a collision results. Bobb *v.* Union Traction Co., 206 Pa. St. 265, 55 Atl. 972.

Sufficiency of precautions.— The fact that a servant, engaged in work on opposite sides of a side-track, once looked and listened before attempting to cross the track will not excuse him, if before crossing he allowed sufficient time to elapse for an engine to come into position where it would render it dangerous for him to cross, and he then attempted to cross without looking and listening. Pennsylvania Co. *v.* Mahoney, 22 Ohio Cir. Ct. 469, 12 Ohio Cir. Dec. 366.

A custom of certain trains to use the main line at a station on all occasions does not excuse the station agent for failing to exercise ordinary care in walking on the side-track at

the approach of trains, cannot recover for an injury resulting from his failure to see a train which it was his duty to observe.[82]

d. Disobedience of Rules or Orders[83]—(I) *In General.* Where a servant is injured by reason of his disobedience of the rules or orders of his master, he is as a general rule guilty of such contributory negligence as to bar a recovery,[84] pro-

the station, knowing that one of such trains is approaching. Morehead *v.* Yazoo, etc., R. Co., 84 Miss. 112, 36 So. 151.

Unblocked frogs and switches.— For a brakeman, knowing that the frogs and switches are not blocked, to move over them while coupling and uncoupling cars, even in moving trains, without any thought of the frogs and guard-rails, or as to where he is stepping, is negligence contributing to the catching of his foot therein. Gillin *v.* Patten, etc., R. Co., 93 Me. 80, 44 Atl. 361.

If a servant has reason to believe that a train will be stopped before reaching him, he is not guilty of contributory negligence in stepping on the track, in the course of duty, in the way of a train backing toward him. Steele *v.* Central R. Co., 43 Iowa 109.

Where a section man stepped eighteen feet from the track, and was struck by a stone thrown by the fireman from the coal, he was not guilty of contributory negligence. Swartz *v.* Great Northern Co., 93 Minn. 339, 101 N. W. 504.

82. Louisville, etc., R. Co. *v.* Crawford, 89 Ala. 240, 8 So. 243; Tirrill *v.* New York, etc., R. Co., 180 Mass. 490, 62 N. E. 745; Clark *v.* Boston, etc., R. Co., 128 Mass. 1.

83. Acts in emergencies see *infra*, IV, F, 4, g.

Compliance with commands involving obedience of rules or orders see *infra*, IV, F, 4, f, (II).

Construction and operation of rules see *supra*, IV, C, 2, f.

Inexperienced or youthful employee see *supra*, IV, F, 2, b, (VII).

Notice to servant in general see *supra*, IV, C, 2, d.

Reasonableness and sufficiency of rules see *supra*, IV, C, 2, c.

84. *Alabama.*— Sanders *v.* McGhee, 114 Ala. 373, 21 So. 1006; Western R. Co. *v.* Williamson, 114 Ala. 131, 21 So. 827; Louisville, etc., R. Co. *v.* Woods, 105 Ala. 561, 17 So. 41; Louisville, etc., R. Co. *v.* Markee, 103 Ala. 160, 15 So. 511, 49 Am. St. Rep. 21; Louisville, etc., R. Co. *v.* Mothershed, 97 Ala. 261, 12 So. 714; Richmond, etc., R. Co. *v.* Free, 97 Ala. 231, 12 So. 294; Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176; Anniston Pipe-Works *v.* Dickey, 93 Ala. 418, 9 So. 720; Pryor *v.* Louisville, etc., R. Co., 90 Ala. 32, 8 So. 55.

Arkansas.— St. Louis, etc., R. Co. *v.* Rice, 51 Ark. 467, 11 S. W. 699, 4 L. R. A. 173.

Connecticut.— Hyde *v.* Mendel, 75 Conn. 140, 52 Atl. 744.

Delaware.— Boyd *v.* Blumenthal, 3 Pennew. 564, 52 Atl. 330.

Georgia.— Binion *v.* Georgia Southern, etc., R. Co., 115 Ga. 330, 41 S. E. 646; Chattanooga Southern R. Co. *v.* Myers, 112 Ga. 237, 37 S. E. 439; Bird *v.* Sparks, 100 Ga. 616, 28 S. E. 395; Rome, etc., Constr. Co. *v.* Dempsey, 86 Ga. 499, 12 S. E. 882; Savannah, etc., R. Co. *v.* Folks, 76 Ga. 527.

Illinois.— Abend *v.* Terre Haute, etc., R. Co., 111 Ill. 202, 53 Am. Rep. 616; Illinois Cent. R. Co. *v.* Houck, 72 Ill. 285; Illinois Steel Co. *v.* Kinnare, 100 Ill. App. 208; Chicago, etc., R. Co. *v.* Myers, 95 Ill. App. 578; Smith *v.* Foster, 93 Ill. App. 138; Mendota Light, etc., Co. *v.* Lafferty, 92 Ill. App. 74; Illinois Cent. R. Co. *v.* Zerwick, 88 Ill. App. 651; Chicago, etc., R. Co. *v.* Stevens, 80 Ill. App. 671; Wabash R. Co. *v.* Zerwick, 74 Ill. App. 670; Mischke *v.* Chicago, etc., R. Co., 56 Ill. App. 472; Illinois Cent. R. Co. *v.* Winslow, 56 Ill. App. 462; Illinois Cent. R. Co. *v.* Neer, 46 Ill. App. 276; Quick *v.* Indianapolis, etc., R. Co., 29 Ill. App. 143; Lake Shore, etc., R. Co. *v.* Hunt, 18 Ill. App. 288. *Compare* Mobile, etc., R. Co. *v.* Harmes, 52 Ill. App. 649.

Indiana.— Sheets *v.* Chicago, etc., R. Co., 139 Ind. 682, 36 N. E. 154; Ft. Wayne, etc., R. Co. *v.* Gruff, 132 Ind. 13, 31 N. E. 460; Louisville, etc., R. Co. *v.* Hannig, 131 Ind. 528, 31 N. E. 187, 31 Am. St. Rep. 443; Pennsylvania Co. *v.* Whitcomb, 111 Ind. 212, 12 N. E. 380; Lake Shore, etc., R. Co. *v.* McCormick, 74 Ind. 440.

Iowa.— Ford *v.* Chicago, etc., R. Co., 91 Iowa 179, 59 N. W. 5, 24 L. R. A. 657; Sedgwick *v.* Illinois Cent. R. Co., 76 Iowa 340, 41 N. W. 35.

Kentucky.— Alexander *v.* Louisville, etc., R. Co., 83 Ky. 589; Louisville, etc., R. Co. *v.* Scanlon, 60 S. W. 643, 22 Ky. L. Rep. 1400; Louisville, etc., R. Co. *v.* Hiltner, 60 S. W. 2, 22 Ky. L. Rep. 1141, 56 S. W. 654, 21 Ky. L. Rep. 1826; Louisville, etc., R. Co. *v.* Veach, 46 S. W. 493, 20 Ky. L. Rep. 403.

Maine.— Fickett *v.* Lisbon Falls Fibre Co., 91 Me. 268, 39 Atl. 996.

Massachusetts.— See Foss *v.* Old Colony R. Co., 170 Mass. 168, 49 N. E. 102, as sustaining the rule.

Michigan.— Fluhrer *v.* Lake Shore, etc., R. Co., 121 Mich. 212, 80 N. W. 23; Benage *v.* Lake Shore, etc., R. Co., 102 Mich. 79, 62 N. W. 1029; Landberg *v.* Brotherton Iron Min. Co., 97 Mich. 443, 56 N. W. 846; Wilson *v.* Michigan Cent. R. Co., 94 Mich. 20, 53 N. W. 797; Brennan *v.* Michigan Cent. R. Co., 93 Mich. 156, 53 N. W. 358; Karrer *v.* Detroit, etc., R. Co., 76 Mich. 400, 43 N. W. 370; Lyon *v.* Detroit, etc., R. Co., 31 Mich. 429.

Minnesota.— Scott *v.* Eastern R. Co., 90 Minn. 135, 95 N. W. 892; Nordquist *v.* Great Northern R. Co., 89 Minn. 485, 95 N. W. 322; Green *v.* Brainerd, etc., R. Co., 85 Minn. 318, 88 N. W. 974; Merritt *v.* Great Northern R. Co., 81 Minn. 496, 84 N. W. 321; Oleson

vided he either knew, or was charged with knowledge, thereof.[85] It is, however,

v. Chicago, etc., R. Co., 38 Minn. 412, 38 N. W. 353.

Mississippi.— Memphis, etc., R. Co. *v.* Thomas, 51 Miss. 637.

Missouri.— Francis *v.* Kansas City, etc., R. Co., 110 Mo. 387, 19 S. W. 935; Schaub *v.* Hannibal, etc., R. Co., 106 Mo. 74, 16 S. W. 924; Renfro *v.* Chicago, etc., R. Co., 86 Mo. 302.

Montana.— Thompson *v.* Montana Cent. R. Co., 17 Mont. 426, 43 Pac. 496.

Nebraska.— Western Mattress Co. *v.* Osteraard, (1904) 99 N. W. 229, 101 N. W. 334.

Nevada.— Patnode *v.* Harter, 20 Nev. 303, 21 Pac. 679.

New Jersey.— Card *v.* Wilkins, 61 N. J. L. 296, 39 Atl. 676.

New York.—Shields *v.* New York Cent., etc., R. Co., 133 N. Y. 557, 30 N. E. 596 [*reversing* 15 N. Y. Suppl. 613]; La Croy *v.* New York, etc., R. Co., 132 N. Y. 570, 30 N. E. 391 [*reversing* 57 Hun 67, 10 N. Y. Suppl. 382]; Devoe *v.* New York Cent., etc., R. Co., 70 N. Y. App. Div. 495, 75 N. Y. Suppl. 136; Moeller *v.* Delaware, etc., R. Co., 55 N. Y. App. Div. 636, 66 N. Y. Suppl. 882; Bruen *v.* Uhlmann, 44 N. Y. App. Div. 620, 60 N. Y. Suppl. 222, 30 N. Y. App. Div. 453, 51 N. Y. Suppl. 958; Sheridan *v.* Long Island R. Co., 40 N. Y. App. Div. 381, 57 N. Y. Suppl. 1075; Drake *v.* New York Cent., etc., R. Co., 80 Hun 490, 30 N. Y. Suppl. 671; Le Bahn *v.* New York Cent., etc., R. Co., 80 Hun 116, 30 N. Y. Suppl. 7; Lee *v.* Barrow Steamship Co., 14 Daly 230, 6 N. Y. St. 285; Moy *v.* Ocean Steamship Co., 12 Misc. 375, 33 N. Y. Suppl. 563; Keenan *v.* New York, etc., R. Co., 2 Misc. 34, 21 N. Y. Suppl. 445.

North Carolina.— Whitson *v.* Wrenn, 134 N. C. 86, 46 S. E. 17; Howard *v.* Southern R. Co., 132 N. C. 709, 44 S. E. 401, 131 N. C. 829, 43 S. E. 1004; Rittenhouse *v.* Wilmington St. R. Co., 120 N. C. 544, 26 S. E. 922; Styles *v.* Richmond, etc., R. Co., 118 N. C. 1084, 24 S. E. 740.

North Dakota.— Bennett *v.* Northern Pac. R. Co., 2 N. D. 112, 49 N. W. 408, 13 L. R. A. 465.

Ohio.— Wolsey *v.* Lake Shore, etc., R. Co., 33 Ohio St. 227; Wheeling, etc., R. Co. *v.* Fisher, 25 Ohio Cir. Ct. 566; Lake Shore, etc., R. Co. *v.* Whidden, 23 Ohio Cir. Ct. 85; Lake Shore, etc., R. Co. *v.* Ney, 17 Ohio Cir. Ct. 677, 8 Ohio Cir. Dec. 567; Johnson *v.* Cleveland, etc., R. Co., 11 Ohio Cir. Ct. 553, 5 Ohio Cir. Dec. 290.

Pennsylvania.— Lonzer *v.* Lehigh Valley R. Co., 196 Pa. St. 610, 46 Atl. 937.

South Carolina.— Morrow *v.* Gaffney Mfg. Co., 70 S. C. 242, 49 S. E. 573.

Tennessee.— Louisville, etc., R. Co. *v.* Wilson, 88 Tenn. 316, 12 S. W. 720.

Texas.— Galveston, etc., R. Co. *v.* Brown, 95 Tex. 2, 63 S. W. 305 [*reversing* (Civ. App. 1900) 59 S. W. 930]; San Antonio, etc., R. Co. *v.* Wallace, 76 Tex. 636, 13 S. W. 565; Murray *v.* Gulf, etc., R. Co., 73 Tex. 2, 11 S. W. 125; Pilkinton *v.* Gulf, etc., R. Co., 70 Tex. 226, 7 S. W. 805; Gulf, etc., R. Co. *v.* Ryan, 69 Tex. 665, 7 S. W. 83; Texas, etc., R. Co. *v.* Fields, 32 Tex. Civ. App. 414, 74 S. W. 930; Missouri, etc., R. Co. *v.* Wood, (Civ. App. 1896) 35 S. W. 879; Fritz *v.* Missouri, etc., R. Co., (Civ. App. 1895) 30 S. W. 85; Southern Pac. Co. *v.* Ryan, (Civ. App. 1895) 29 S. W. 527.

Virginia.— Richmond, etc., R. Co. *v.* Dudley, 90 Va. 304, 18 S. E. 274; Richmond, etc., R. Co. *v.* Pannill, 89 Va. 552, 16 S. E. 748; Norfolk, etc., R. Co. *v.* Briggs, (1893) 16 S. E. 748, (1892) 14 S. E. 753; Richmond, etc., R. Co. *v.* Risdon, 87 Va. 335, 12 S. E. 786; Shenandoah Valley R. Co. *v.* Lucado, 86 Va. 390, 10 S. E. 422.

West Virginia.— Robinson *v.* West Virginia, etc., R. Co., 40 W. Va. 583, 21 S. E. 727; Ward *v.* Chesapeake, etc., R. Co., 39 W. Va. 46, 19 S. E. 389; Beall *v.* Pittsburgh, etc., R. Co., 38 W. Va. 525, 18 S. E. 729; Johnson *v.* Chesapeake, etc., R. Co., 38 W. Va. 206, 18 S. E. 573; Overby *v.* Chesapeake, etc., R. Co., 37 W. Va. 524, 16 S. E. 813; Knight *v.* Cooper, 36 W. Va. 232, 14 S. E. 999; Eastburn *v.* Norfolk, etc., R. Co., 34 W. Va. 681, 12 S. E. 819; Davis *v.* Nuttallsburg Coal, etc., Co., 34 W. Va. 500, 12 S. E. 539.

Wisconsin.— Lockwood *v.* Chicago, etc., R. Co., 55 Wis. 50, 12 N. W. 401. *Compare* Crouse *v.* Chicago, etc., R. Co., 102 Wis. 196, 78 N. W. 446, 778.

United States.— McMillan *v.* Grand Trunk R. Co., 130 Fed. 827, 65 C. C. A. 165; Erie R. Co. *v.* Kane, 118 Fed. 223, 55 C. C. A. 129; Hodges *v.* Kimball, 104 Fed. 745, 44 C. C. A. 193; Lake Erie, etc., R. Co. *v.* Craig, 80 Fed. 488, 25 C. C. A. 585; Gleason *v.* Detroit, etc., R. Co., 73 Fed. 647, 19 C. C. A. 636; Clyde *v.* Richmond, etc., R. Co., 72 Fed. 121, 18 C. C. A. 467; Erskine *v.* Chino Valley Beet-Sugar Co., 71 Fed. 270; Kansas City, etc., R. Co. *v.* Dye, 70 Fed. 24, 16 C. C. A. 604; Central Trust Co. *v.* East Tennessee, etc., R. Co., 69 Fed. 353; Brooks *v.* Northern Pac. R. Co., 47 Fed. 687; Russell *v.* Richmond, etc., R. Co., 47 Fed. 204; Smith *v.* Memphis, etc., R. Co., 18 Fed. 304.

England.— Caswell *v.* Worth, 5 E. & B. 849, 2 Jur. N. S. 116, 25 L. J. Q. B. 121, 4 Wkly. Rep. 231, 85 E. C. L. 849; O'Hara *v.* Cadzow Coal Co., 5 F. (Ct. Sess.) 439; Guthrie *v.* Boase Spinning Co., 3 F. (Ct. Sess.) 769; Dailly *v.* Watson, 2 F. (Ct. Sess.) 1044. *Compare* Lynch *v.* Baird, 6 F. (Ct. Sess.) 271.

Canada.— Holden *v.* Grand Trunk R. Co., 5 Ont. L. Rep. 301; Anderson *v.* Mikado Min. Co., 3 Ont. L. Rep. 581; Coutlee *v.* Grand Trunk R. Co., 23 Quebec Super. Ct. 242; Primeau *v.* Merchants Cotton Co., 19 Quebec Super. Ct. 62. *Compare* Grand Trunk R. Co. *v.* Miller, 32 Can. Sup. Ct. 454.

See 34 Cent. Dig. tit. "Master and Servant," §§ 759, 766–775.

85. *Alabama.*— Alabama Midland R. Co. *v.* McDonald, 112 Ala. 216, 20 So. 472; Brown *v.* Louisville, etc., R. Co., 111 Ala. 275, 19 So. 1001; Louisville, etc., R. Co. *v.* Mother-

the duty of a servant to acquaint himself with all necessary rules, and, in case of injury from failure to obey them, ignorance of the rules is no excuse, unless his failure to know them was not due to his want of care.[86]

(II) *WHAT CONSTITUTES NEGLIGENT DISOBEDIENCE.* Rules and orders are not held to forfeit the right of a servant where otherwise, under the law, he would be entitled to recover, unless there has been a plain and manifestly negligent violation of the rule or order, according to its plain and obvious meaning,[87] or unless such violation has been itself a contributory cause to the injury.[88]

(III) *EXCUSES FOR DISOBEDIENCE*—(A) *In General.* The violation by a servant of a rule or order promulgated by the master for the conduct of his business is not negligence *per se*,[89] and his disobedience will be excused where the rule or order is unreasonable,[90] where obedience thereto is not practicable[91] or

shed, 110 Ala. 143, 20 So. 67; Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. Rep. 47.

District of Columbia.— Mackey *v.* Baltimore, etc., R. Co., 19 D. C. 282.

Georgia.— Brunswick, etc., R. Co. *v.* Clem, 80 Ga. 534, 7 S. E. 84. See also Georgia Cent. R. Co. *v.* Vining, 116 Ga. 284, 42 S. E. 492.

Indiana.— Louisville, etc., R. Co. *v.* Berkey, 136 Ind. 181, 35 N. E. 3; Louisville, etc., Consol. R. Co. *v.* Utz, 133 Ind. 205, 32 N. E. 881.

Minnesota.— Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231, 15 N. W. 241.

Missouri.— Francis *v.* Kansas City, etc., R. Co., 127 Mo. 658, 28 S. W. 842, 30 S. W. 129; Covey *v.* Hannibal, etc., R. Co., 27 Mo. App. 170.

New Jersey.— Humphries *v.* Raritan Copper Works, (Sup. 1905) 60 Atl. 62.

New York.— Sprong *v.* Boston, etc., R. Co., 3 Thomps. & C. 54.

Pennsylvania.— Dougherty *v.* Philadelphia, etc., R. Co., 171 Pa. St. 457, 33 Atl. 340.

Virginia.— See Norfolk, etc., R. Co. *v.* Williams, 89 Va. 165, 15 S. E. 522; Shenandoah Valley R. Co. *v.* Lucado, 86 Va. 390, 10 S. E. 422.

See 34 Cent. Dig. tit. "Master and Servant," § 760.

Knowledge, however acquired, sufficient see Richmond, etc., R. Co. *v.* Thomason, 99 Ala. 471, 12 So. 273.

86. Fordyce *v.* Briney, 58 Ark. 206, 24 S. W. 250.

87. Western, etc., R. Co. *v.* Bussey, 95 Ga. 584, 23 S. E. 201. See also the following cases:

Alabama.— Louisville, etc., R. Co. *v.* Mothershed, 121 Ala. 650, 26 So. 10.

Colorado.— Denver, etc., R. Co. *v.* Smock, 23 Colo. 456, 48 Pac. 681.

Iowa.— Locke *v.* Sioux City, etc., R. Co., 46 Iowa 109.

Missouri.— Hollenbeck *v.* Missouri Pac. R. Co., (1896) 34 S. W. 494.

New York.— Sutherland *v.* Troy, etc., R. Co., 125 N. Y. 737, 26 N. E. 609 [*reversing* 8 N. Y. Suppl. 83]; McKnight *v.* Brooklyn Heights R. Co., 23 Misc. 527, 51 N. Y. Suppl. 738.

Texas.— Gulf, etc., R. Co. *v.* Cooper, 33 Tex. Civ. App. 319, 77 S. W. 263; Southern Pac. Co. *v.* Winton, 27 Tex. Civ. App. 503, 66 S. W. 477; Houston, etc., R. Co. *v.* Higgins, 22 Tex. Civ. App. 430, 55 S. W. 744.

Instantaneous obedience of orders not required see Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. Rep. 47.

88. *Connecticut.*— McElligott *v.* Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181.

Georgia.— Thompson *v.* Rome R. Co., 101 Ga. 26, 28 S. E. 429; Central R. Co. *v.* Mitchell, 63 Ga. 173.

Iowa.— Horan *v.* Chicago, etc., R. Co., 89 Iowa 328, 56 N. W. 507.

Kentucky.— Louisville, etc., R. Co. *v.* Veach, 46 S. W. 493, 20 Ky. L. Rep. 403.

Maine.— Fickett *v.* Lisbon Falls Fibre Co., 91 Me. 268, 39 Atl. 996.

Massachusetts.— Ford *v.* Fitchburg R. Co., 110 Mass. 240, 14 Am. Rep. 598.

New Hampshire.— Deverson *v.* Eastern R. Co., 58 N. H. 129.

Ohio.— Smith *v.* Wm. Powell Co., 10 Ohio Dec. (Reprint) 799, 23 Cinc. L. Bul. 436.

Wisconsin.— Phillips *v.* Chicago, etc., R. Co., 64 Wis. 475, 25 N. W. 544.

United States.— Tullis *v.* Lake Erie, etc., R. Co., 105 Fed. 554, 44 C. C. A. 597.

See 34 Cent. Dig. tit. "Master and Servant," §§ 759, 766–775.

89. Texas Cent. R. Co. *v.* Bender, 32 Tex. Civ. App. 568, 75 S. W. 561; Galveston, etc., R. Co. *v.* Sweeney, 14 Tex. Civ. App. 216, 36 S. W. 800; Gulf, etc., R. Co. *v.* John, 9 Tex. Civ. App. 342, 29 S. W. 558; Ft. Worth, etc., R. Co. *v.* Thompson, 2 Tex. Civ. App. 170, 21 S. W. 137.

90. Bonner *v.* Moore, 3 Tex. Civ. App. 416, 22 S. W. 272.

91. *Alabama.*— Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545, 10 So. 283, in which the servant's duty could not be performed otherwise than by violating the rule.

California.— Holmes *v.* Southern Pac. Co., 120 Cal. 357, 52 Pac. 652.

Kentucky.— Alexander *v.* Louisville, etc., R. Co., 83 Ky. 589, in which the only practicable method of putting cars on a particular switch was by a running switch, which was forbidden by the rules.

Massachusetts.— Slattery *v.* Walker, etc., Mfg. Co., 179 Mass. 307, 60 N. E. 782.

Michigan.— Eastman *v.* Lake Shore, etc., R. Co., 101 Mich. 597, 60 N. W. 309, in which,

is unsafe,[92] where no opportunity is given him to make a required inspection,[93] or where his failure to comply with the rule is caused by sickness.[94] So too a servant who disobeys a rule of the master in compliance with the instruction of the representative of the master on the spot is not guilty of contributory negligence.[95] But the mere assent of a superior servant to the violation of a rule by another servant will not excuse the latter,[96] and generally the violation of a rule by a superior servant does not excuse its violation by his inferior.[97] Nor is a servant excused for disobedience because he thinks compliance with a rule or order unnecessary,[98] because others whose business is well regulated are in the habit of conducting it in a manner contrary to his master's rules,[99] or because his violation of the rule was caused by the fault of other servants;[1] and the fact that an engineer is specially ordered to make a given distance in a certain time will not warrant his disobedience in approaching a station at a particular speed.[2]

(B) *Customary Violation of Rules.* Where a rule is habitually violated with the knowledge and acquiescence, either actual or imputed on the part of the master or those who are acting as his representatives, a servant will not be charged, as a matter of law, with contributory negligence in acting in disregard of it,[3]

in order to couple cars, it was necessary to violate a rule prohibiting going between moving cars.

New York.— Benthin *v.* New York Cent., etc., R. Co., 24 N. Y. App. Div. 303, 48 N. Y. Suppl. 503.

Texas.— Missouri, etc., R. Co. *v.* Williams, (Civ. App. 1902) 68 S. W. 805.

See 34 Cent. Dig. tit. "Master and Servant," § 762.

92. Pennsylvania Co. *v.* Whitcomb, 111 Ind. 212, 12 N. E. 380; Louisville, etc., R. Co. *v.* Foley, 94 Ky. 220, 21 S. W. 866, 15 Ky. L. Rep. 17.

93. Chicago, etc., R. Co. *v.* Fry, 131 Ind. 319, 28 N. E. 989; Myers *v.* Erie R. Co., 44 N. Y. App. Div. 11, 60 N. Y. Suppl. 422.

94. Junction Min. Co. *v.* Ench, 111 Ill. App. 346.

95. Carson *v.* Southern R. Co., 68 S. C. 55, 46 S. E. 525 [*affirmed* in 194 U. S. 136, 24 S. Ct. 609, 48 L. ed. 907]. See also Union Pac. R. Co. *v.* Springsteen 41 Kan. 724, 21 Pac. 774; Kansas City, etc., R. Co. *v.* Kier, 41 Kan. 661, 671, 21 Pac. 770, 13 Am. St. Rep. 311; Hurlbut *v.* Wabash R. Co., 130 Mo. 657, 31 S. W. 1051. *Compare* Keenan *v.* New York, etc., R. Co., 145 N. Y. 190, 39 N. E. 711, 45 Am. St. Rep. 604, in which the servant giving the order was a fellow servant, and unauthorized to give it.

Obedience to order violating rules see *infra*, IV, F, 4, f, (II).

96. Atchison, etc., R. Co. *v.* Reesman, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768. But see Tullis *v.* Lake Erie, etc., R. Co., 105 Fed. 554, 44 C. C. A. 597.

97. Central R., etc., Co. *v.* Kitchens, 83 Ga. 83, 9 S. E. 827; Atchison, etc., R. Co. *v.* Reesman, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768. But see Tullis *v.* Lake Erie, etc., R. Co., 105 Fed. 554, 44 C. C. A. 597.

98. Louisville, etc., R. Co. *v.* Mothershed, 110 Ala. 143, 20 So. 67; Deeds *v.* Chicago, etc., R. Co., 74 Iowa 154, 37 N. W. 124.

99. Louisville, etc., R. Co. *v.* Davis, 99 Ala. 593, 12 So. 786.

1. Georgia R., etc., Co. *v.* Oaks, 52 Ga. 410.

2. Illinois Cent. R. Co. *v.* Neer, 31 Ill. App. 126.

3. *Alabama.*— Alabama Great Southern R. Co. *v.* Roach, 110 Ala. 266, 20 So. 132. But see Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545, 10 So. 283.

Georgia.— Sloan *v.* Georgia Pac. R. Co., 86 Ga. 15, 12 S. E. 179.

Iowa.— Stomne *v.* Hanford Produce Co., 108 Iowa 137, 78 N. W. 841; Spaulding *v.* Chicago, etc., R. Co., 98 Iowa 205, 67 N. W. 227; Fish *v.* Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995; Strong *v.* Iowa Cent. R. Co., 94 Iowa 380, 62 N. W. 799; Lowe *v.* Chicago, etc., R. Co., 89 Iowa 420, 56 N. W. 519.

Kansas.— Atchison, etc., R. Co. *v.* Slattery, 57 Kan. 499, 46 Pac. 941.

Kentucky.— Louisville, etc., R. Co. *v.* Bocock, 107 Ky. 223, 51 S. W. 580, 53 S. W. 262, 21 Ky. L. Rep. 383, 896; Newport News, etc., R. Co. *v.* Campbell, 25 S. W. 267, 15 Ky. L. Rep. 714.

Michigan.— Eastman *v.* Lake Shore, etc., R. Co., 101 Mich. 597, 60 N. W. 309. But *compare* Loranger *v.* Lake Shore, etc., R. Co., 104 Mich. 80, 62 N. W. 137; Benage *v.* Lake Shore, etc., R. Co., 102 Mich. 72, 60 N. W. 286.

Minnesota.— Sather *v.* Ness, 44 Minn. 443, 46 N. W. 909; Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231, 15 N. W. 241.

Missouri.— Francis *v.* Kansas City, etc., R. Co., 127 Mo. 658, 28 S. W. 842, 30 S. W. 129; Barry *v.* Hannibal, etc., R. Co., 98 Mo. 62, 11 S. W. 308, 14 Am. St. Rep. 610. *Compare* Francis *v.* Kansas City, etc., R. Co., 110 Mo. 387, 19 S. W. 935, holding that a rule which forbids jumping on switch engines while in motion was not rendered nugatory by the fact that the servants violated it at will, where the evidence showed that it was enforced by the master, and the rule itself recited that the guardsmen were in the habit of jumping on engines, in the manner prohibited, and that its express purpose was to put an end to the practice.

Ohio.— Michigan Cent. R. Co. *v.* Butler, 23 Ohio Cir. Ct. 459.

unless he has expressly bound himself to observe it, in which case frequent and habitual violation of the rule does not abrogate it.[4]

e. Disregarding Warnings or Signals.[5] A servant cannot recover for an injury caused, or contributed to, by his failure to regard a proper warning or signal,[6] even though his mind was absorbed in his work at the time, and he did

Texas.— Texas Cent. R. Co. *v.* Yarbro, 32 Tex. Civ. App. 246, 74 S. W. 357; Galveston, etc., R. Co. *v.* Collins, 31 Tex. Civ. App. 70, 71 S. W. 560; Missouri, etc., R. Co. *v.* Mayfield, 29 Tex. Civ. App. 477, 68 S. W. 807; Galveston, etc., R. Co. *v.* Slinkard, (Civ. App. 1897) 39 S. W. 961; Texas, etc., R. Co. *v.* Leighty, (Civ. App. 1895) 32 S. W. 799.

Utah.— Wright *v.* Southern Pac. Co., 14 Utah 383, 46 Pac. 374.

United States.— Cleveland, etc., R. Co. *v.* Baker, 91 Fed. 224, 33 C. C. A. 468; Knickerbocker Ice Co. *v.* Finn, 80 Fed. 483, 25 C. C. A. 579; Northern Pac. R. Co. *v.* Nickels, 50 Fed. 718, 1 C. C. A. 625; Smith *v.* Memphis, etc., R. Co., 18 Fed. 304.

See 34 Cent. Dig. tit. "Master and Servant," § 763.

Compare Chicago, etc., R. Co. *v.* Bragonier, 119 Ill. 51, 7 N. E. 688; Sutherland *v.* Troy, etc., R. Co., 74 Hun (N. Y.) 162, 26 N. Y. Suppl. 237. But see Gordy *v.* New York, etc., R. Co., 75 Md. 297, 23 Atl. 607, 32 Am. St. Rep. 391.

Necessity of knowledge and acquiescence by master see Alabama Great Southern R. Co. *v.* Roach, 110 Ala. 266, 20 So. 132; Sloan *v.* Georgia Pac. R. Co., 86 Ga. 15, 12 S. E. 179; Gleason *v.* Detroit, etc., R. Co., 73 Fed. 647, 19 C. C. A. 636.

The notorious and long continued violation of a rule charges the master with notice. Lowe *v.* Chicago, etc., R. Co., 89 Iowa 420, 56 N. W. 519.

Effect of time order.— Where a conductor was injured while running his train in violation of a rule governing the movement of trains, but was doing so under a time order, which in effect authorized him to ignore the rule, and it had never been observed when trains were run under time orders, it was held that the company could not interplead the violation of the rule as a defense to an action by the conductor. Boyle *v.* Union Pac. R. Co., 25 Utah 420, 71 Pac. 988.

4. Louisville, etc., R. Co. *v.* Mothershed, 110 Ala. 143, 20 So. 67; Richmond, etc., R. Co. *v.* Hissong, 97 Ala. 187, 13 So. 209; Hissong *v.* Richmond, etc., R. Co., 91 Ala. 514, 8 So. 776; Binion *v.* Georgia, etc., R. Co., 115 Ga. 330, 41 S. E. 646; Fluhrer *v.* Lake Shore, etc., R. Co., 121 Mich. 212, 80 N. W. 23. But see Bonner *v.* Bean, 80 Tex. 152, 15 S. W. 798; Northern Pac. R. Co. *v.* Nickels, 50 Fed. 718, 1 C. C. A. 625.

5. **Failure to post signals or warnings** see *supra*, IV, F, 4, c, (II), (B).

Sufficiency of warnings or instructions see *supra*, IV, D, 1, g.

6. *Alabama.*— Pioneer Min., etc., Co. *v.* Thomas, 133 Ala. 279, 32 So. 15; Louisville, etc., R. Co. *v.* Smith, 129 Ala. 553, 30 So. 571; Anniston Pipe-Works *v.* Dickey, 93 Ala. 418, 9 So. 720; Holland *v.* Tennessee Coal, etc., R. Co., 91 Ala. 444, 8 So. 524, 12 L. R. A. 232; Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863; Campbell *v.* Lunsford, 83 Ala. 512, 3 So. 522.

Arkansas.— Little Rock, etc., R. Co. *v.* Voss, (1892) 18 S. W. 172.

Colorado.— Anson *v.* Evans, 19 Colo. 274, 35 Pac. 47.

Delaware.— Punkowski *v.* New Castle Leather Co., 4 Pennew. 544, 57 Atl. 559; Murphy *v.* Hughes, 1 Pennew. 250, 40 Atl. 187; Williams *v.* Walton, etc., Co., 9 Houst. 322, 32 Atl. 726; Stewart *v.* Philadelphia, etc., R. Co., 8 Houst. 450, 17 Atl. 639.

Georgia.— Georgia Pac. R. Co. *v.* Mapp, 80 Ga. 631, 6 S. E. 24.

Illinois.— Simmons *v.* Chicago, etc., R. Co., 110 Ill. 340 [*affirming* 11 Ill. App. 147]; Tri-City R. Co. *v.* Killeen, 92 Ill. App. 57; East St. Louis Connecting R. Co. *v.* Eggmann, 58 Ill. App. 69.

Kentucky.— East Jellico Co. *v.* Golden, 79 S. W. 291, 25 Ky. L. Rep. 2056.

Massachusetts.— St. Jean *v.* Boston, etc., R. Co., 170 Mass. 213, 48 N. E. 1088; O'Brien *v.* Staples Coal Co., 165 Mass. 435, 43 N. E. 181. *Compare* Fairman *v.* Boston, etc., R. Co., 169 Mass. 170, 47 N. E. 613.

Michigan.— Monforton *v.* Detroit Pressed Brick Co., 113 Mich. 39, 71 N. W. 586; Saner *v.* Lake Shore, etc., R. Co., 108 Mich. 31, 65 N. W. 624. *Compare* Prewschoff *v.* B. Stroh Brewing Co., 132 Mich. 107, 92 N. W. 945.

Minnesota.— Carlson *v.* Marston, 68 Minn. 400, 71 N. W. 398; Freeberg *v.* St. Paul Plow-Works, 48 Minn. 99, 50 N. W. 1026.

Mississippi.— Georgia Pac. R. Co. *v.* Bradfield, (1892) 10 So. 577.

Missouri.— Evans *v.* Wabash R. Co., 178 Mo. 508, 77 S. W. 515; York *v.* Kansas City, etc., R. Co., 117 Mo. 405, 22 S. W. 1081; Devitt *v.* Pacific R. Co., 50 Mo. 302. *Compare* Stoher *v.* St. Louis, etc., R. Co., 91 Mo. 509, 4 S. W. 389.

Nebraska.— Union Pac. R. Co. *v.* Clark, 51 Nebr. 220, 70 N. W. 923.

New York.— Moeller *v.* Brewster, 131 N. Y. 606, 30 N. E. 124 [*reversing* 17 N. Y. Suppl. 604]; Leach *v.* Central New York Tel., etc., Co., 81 N. Y. App. Div. 637, 80 N. Y. Suppl. 1037; Baker *v.* Sutton, 11 N. Y. App. Div. 271, 42 N. Y. Suppl. 116; Lynch *v.* New York, etc., R. Co., 18 N. Y. Suppl. 417; Rock *v.* Retsof Min. Co., 15 N. Y. Suppl. 872; Lorey *v.* Hall, 8 N. Y. St. 799. *Compare* Lucco *v.* New York Cent., etc., R. Co., 87 Hun 612, 34 N. Y. Suppl. 277; Oties *v.* Cowles Electric Smelting Co., 7 N. Y. Suppl. 251.

North Carolina.— Stewart *v.* Southern R. Co., 128 N. C. 517, 39 S. E. 51.

Pennsylvania.— Lehigh Valley R. Co. *v.* Greiner, 113 Pa. St. 600, 6 Atl. 246; Bark-

not fully comprehend the extent of his danger.[7] But the master is not relieved from liability where the danger would not have been avoided by the servant's compliance with the warning.[8]

f. Compliance With Commands or Threats[9] — (i) *In General.* Even though a servant may know that some danger is involved,[10] he is not chargeable with contributory negligence in obeying a direct and explicit command[11] of the master or authorized agent of the latter,[12] unless the danger is so obvious and imminent

doll *v.* Pennsylvania R. Co., 9 Pa. Cas. 545, 13 Atl. 82; McGrath *v.* Coal Co., 4 Lanc. L. Rev. 281.

Tennessee.— Fletcher *v.* Louisville, etc., R. Co., 102 Tenn. 1, 49 S. W. 739.

Texas.—Robinson *v.* Ft. Worth, etc., R. Co., (1905) 87 S. W. 667 [*affirming* (Civ. App. 1904) 84 S. W. 410]. *Compare* Quinn *v.* Galveston, etc., R. Co., (Civ. App. 1905) 84 S. W. 395.

Utah.— Smith *v.* Centennial Eureka Min. Co., 27 Utah 307, 75 Pac. 749; Helfrich *v.* Ogden City R. Co., 7 Utah 186, 26 Pac. 295.

Virginia.— Clark *v.* Richmond, etc., R. Co., 78 Va. 709, 49 Am. Rep. 394. See also Norfolk, etc., R. Co. *v.* Williams, 89 Va. 165, 15 S. E. 522.

Washington.— Pugh *v.* Oregon Imp. Co., 14 Wash. 331, 44 Pac. 547, 689.

West Virginia.— Ward *v.* Chesapeake, etc., R. Co., 39 W. Va. 46, 19 S. E. 389.

Wisconsin.— Youngbluth *v.* Stephens, 104 Wis. 343, 80 N. W. 443.

United States.— St. Louis, etc., R. Co. *v.* Schumacher, 152 U. S. 77, 14 S. Ct. 479, 38 L. ed. 361. *Compare* McDowell *v.* The France, 53 Fed. 843.

England.— John *v.* Albion Coal Co., 65 J. P. 788.

See 34 Cent. Dig. tit. "Master and Servant," §§ 776–777.

Conflicting signals.— Where an engineer is warned by a danger signal not to proceed with his train, and immediately thereafter another signal is given, which indicates that he may proceed with safety, but both signals are continuously displayed together, leaving it in doubt which signal should be regarded, he is negligent in going on with his train. Devine *v.* Savannah, etc., R. Co., 89 Ga. 541, 15 S. E. 781.

7. Ft. Worth, etc., R. Co. *v.* Robinson, (Tex. Civ. App. 1904) 84 S. W. 410 [*affirmed* in (1905) 87 S. W. 667].

8. Scanlan *v.* Detroit Bridge, etc., Works, 16 Quebec Super. Ct. 264.

9. **Acts in emergencies** see *infra*, IV, F, 4, g.
Assumption of risk see *supra*, IV, E, 8.
Inexperienced or youthful employee see *supra*, IV, F, 2, b, (VIII).
Negligence in giving orders see *supra*, IV, C, 3, b.

10. *Illinois.*—Illinois Steel Co. *v.* Schymanowski, 162 Ill. 447, 44 N. E. 876 [*affirming* 59 Ill. App. 32].

Iowa.— Hosic *v.* Chicago, etc., R. Co., 75 Iowa 683, 37 N. W. 963, 9 Am. St. Rep. 518.

Minnesota.— Greene *v.* Minneapolis, etc., R. Co., 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785.

Missouri.— Monahan *v.* Kansas City Clay, etc., Co., 58 Mo. App. 68; Ballard *v.* Chicago, etc., R. Co., 51 Mo. App. 453.

New York.— Anderson *v.* New York, etc., Steamship Co., 17 Misc. 93, 39 N. Y. Suppl. 425, obedience by seaman.

North Carolina.— Patton *v.* Western North Carolina R. Co., 96 N. C. 455, 1 S. E. 863.

Pennsylvania.— Williams *v.* Clark, 204 Pa. St. 416, 54 Atl. 315.

United States.— English *v.* Chicago, etc., R. Co., 24 Fed. 906.

See 34 Cent. Dig. tit. "Master and Servant," §§ 778, 781, 786–788.

Assurance of safety.— The mere fact that a servant works in a place which he thinks unsafe does not, as a matter of law, constitute contributory negligence, if he was assured by the master that there was no danger, and commanded to go on with the work. McKee *v.* Tourtellotte, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542. See also Schlacker *v.* Ashland Iron Min. Co., 89 Mich. 253, 50 N. W. 839; Keegan *v.* Kavanaugh, 62 Mo. 230 (order to work after complaint an implied assurance of safety); Lehigh Valley R. Co. *v.* Kiszel, 80 Fed. 470, 25 C. C. A. 566.

11. **Command must be direct and explicit.** — Columbus, etc., R. Co. *v.* Bridges, 86 Ala. 448, 5 So. 864, 11 Am. St. Rep. 58; Mason *v.* Richmond, etc., R. Co., 114 N. C. 718, 19 S. E. 362; Louisville, etc., R. Co. *v.* Pitt, 91 Tenn. 86, 18 S. W. 118.

12. *Alabama.*— Southern R. Co. *v.* Shields, 121 Ala. 460, 25 So. 811, 77 Am. St. Rep. 66.

Arkansas.— St. Louis, etc., R. Co. *v.* Rickman, 65 Ark. 138, 45 S. W. 56.

California.— Starr *v.* Kreuzberger, 129 Cal. 123, 61 Pac. 787, 79 Am. St. Rep. 92.

Colorado.— Denver, etc., R. Co. *v.* Wilson, 12 Colo. 20, 20 Pac. 340.

Florida.— Camp *v.* Hall, 39 Fla. 535, 22 So. 792.

Georgia.— Wrightsville, etc., R. Co. *v.* Lattimore, 118 Ga. 581, 45 S. E. 453; East Tennessee, etc., R. Co. *v.* Bridges, 92 Ga. 399, 17 S. E. 645.

Illinois.— Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 109; Illinois Cent. R. Co. *v.* Atwell, 100 Ill. App. 513 [*affirmed* in 198 Ill. 200, 64 N. E. 1095]; Butler Ballast Co. *v.* Hoshaw, 94 Ill. App. 68.

Indiana.— Republic Iron, etc., Co. *v.* Berkes, 162 Ind. 517, 70 N. E. 815; Cincinnati, etc., R. Co. *v.* Madden, 134 Ind. 462, 34 N. E. 227; Hawkins *v.* Johnson, 105 Ind. 29, 4 N. E. 172, 55 Am. Rep. 169; Rogers *v.* Overton, 87 Ind. 410.

Iowa.— Rayburn *v.* Central Iowa R. Co., 74 Iowa 637, 35 N. W. 606, 38 N. W. 520. See

that an ordinarily prudent person would refuse obedience,[13] or unless the thing ordered to be done is what the servant, with full knowledge of the perils ordinarily incident thereto, was employed to do.[14]

also Luby *v.* Chicago, etc., R. Co., 52 Iowa 168, 2 N. W. 1114.

Kansas.— Atchison, etc., R. Co. *v.* Vincent, 56 Kan. 344, 43 Pac. 251.

Kentucky.— Louisville Southern R. Co. *v.* Tucker, 105 Ky. 492, 49 S. W. 314, 20 Ky. L. Rep. 1303.

Louisiana.— Bomar *v.* Louisiana North, etc., R. Co., 42 La. Ann. 983, 8 So. 478, 42 La. Ann. 1206, 9 So. 244.

Maine.— Sawyer *v.* Rumford Falls Paper Co., 90 Me. 354, 38 Atl. 318, 60 Am. St. Rep. 260.

Massachusetts.— Joyce *v.* American Writing Paper Co., 184 Mass. 230, 68 N. E. 213; Crowley *v.* Cutting, 165 Mass. 436, 43 N. E. 197.

Michigan.— Sipes *v.* Michigan Starch Co., 137 Mich. 258, 100 N. W. 447, in which the servant acted in obedience to a direction of another servant, but a vice-principal was present, who made no objection, and it was held that the jury was warranted in finding that the master did not disapprove.

Missouri.— Foster *v.* Missouri Pac. R. Co., (1892) 20 S. W. 888; Plefka *v.* Knapp-Stout Lumber Co., 72 Mo. App. 309.

New York.— Witkowski *v.* Carter, 60 N. Y. App. Div. 577, 70 N. Y. Suppl. 232; Lofrano *v.* New York, etc., Water Co., 55 Hun 452, 8 N. Y. Suppl. 717 [*affirmed* in 130 N. Y. 658, 29 N. E. 1033]; Eldridge *v.* Atlas Steamship Co., 55 Hun 309, 8 N. Y. Suppl. 433 [*affirmed* in 134 N. Y. 187, 32 N. E. 66] (in which the servant, a seaman, could not disobey without danger of punishment); Doyle *v.* Baird, 15 Daly 287, 6 N. Y. Suppl. 517; Rettig *v.* Fifth Ave. Transp. Co., 6 Misc. 328, 26 N. Y. Suppl. 896 [*affirmed* in 144 N. Y. 715, 39 N. E. 859].

North Carolina.— Shadd *v.* Georgia, etc., R. Co., 116 N. C. 968, 21 S. E. 554.

Rhode Island.— Laporte *v.* Cook, 21 R. I. 158, 42 Atl. 519.

Tennessee.— Chattanooga Electric R. Co. *v.* Lawson, 101 Tenn. 406, 47 S. W. 489.

Texas.— Texas, etc., R. Co. *v.* Kelly, 98 Tex. 123, 80 S. W. 79; Gulf, etc., R. Co. *v.* Winton, 7 Tex. Civ. App. 57, 26 S. W. 770.

Virginia.— Southern Bell Tel., etc., Co. *v.* Clements, 98 Va. 1, 34 S. E. 951; Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648, 14 S. E. 361.

United States.— Erquit *v.* New York, etc., Mail Steamship Co., 50 Fed. 325.

See 34 Cent. Dig. tit. "Master and Servant," §§ 778, 781, 786–877.

Obedience to unauthorized orders no excuse see Sparks *v.* East Tennessee, etc., R. Co., 82 Ga. 156, 8 S. E. 424; Keenan *v.* New York, etc., R. Co., 2 Misc. (N. Y.) 34, 21 N. Y. Suppl. 445 [*affirmed* in 145 N. Y. 190, 39 N. E. 711, 45 Am. St. Rep. 604]; Dibb *v.* Dry Dock, etc., R. Co., 1 N. Y. Suppl. 640; Mann *v.* Oriental Print Works, 11 R. I. 152.

13. *Alabama.*— George *v.* Mobile, etc., R. Co., 109 Ala. 245, 19 So. 784.

Colorado.— Greeley *v.* Foster, 32 Colo. 292, 75 Pac. 351; Last Chance Min., etc., Co. *v.* Ames, 23 Colo. 167, 47 Pac. 382.

Georgia.— Wrightsville, etc., R. Co. *v.* Lattimore, 118 Ga. 581, 45 S. E. 453; Whatley *v.* Macon, etc., R. Co., 104 Ga. 764, 30 S. E. 1003; Roul *v.* East Tennessee, etc., R. Co., 85 Ga. 197, 11 S. E. 558.

Illinois.— McArthur Bros. Co. *v.* Troutt, 88 Ill. App. 638.

Indiana.— Atlas Engine Works *v.* Randall, 100 Ind. 293, 50 Am. Rep. 798; Peirce *v.* Oliver, 18 Ind. App. 87, 47 N. E. 485.

Iowa.— Newman *v.* Chicago, etc., R. Co., 80 Iowa 672, 45 N. W. 1054.

Kentucky.— Shemwell *v.* Owensboro, etc., R. Co., 78 S. W. 448, 25 Ky. L. Rep. 1671.

Massachusetts.— Meunier *v.* Chemical Paper Co., 180 Mass. 109, 61 N. E. 810.

Missouri.— McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285; Harney *v.* Missouri Pac. R. Co., 80 Mo. App. 667; Halliburton *v.* Wabash R. Co., 58 Mo. App. 27.

Nebraska.— Ittner Brick Co. *v.* Killian, 67 Nebr. 589, 93 N. W. 951.

New Jersey.— Luckey *v.* Sofield, (Sup. 1904) 57 Atl. 870.

Ohio.— Gensen *v.* Ohio Oil Co., 22 Ohio Cir. Ct. 276, 12 Ohio Cir. Dec. 10; Joswoyak *v.* Lake Shore, etc., R. Co., 4 Ohio Dec. (Reprint) 317, 1 Clev. L. Rep. 306.

Pennsylvania.—Reese *v.* Clark, 146 Pa. St. 465, 23 Atl. 246.

Virginia.— White *v.* Newport News Shipbuilding, etc., Co., 95 Va. 355, 28 S. E. 577.

Washington.— Bier *v.* Hosford, 35 Wash. 544, 77 Pac. 867.

West Virginia.— Riley *v.* West Virginia Cent., etc., R. Co., 27 W. Va. 145.

Wisconsin.— Goodrich *v.* Chippewa Valley Electric R. Co., 108 Wis. 329, 84 N. W. 419; Writt *v.* Girard Lumber Co., 91 Wis. 496, 65 N. W. 173.

United States.— Baltimore, etc., R. Co. *v.* Jones, 95 U. S. 439, 24 L. ed. 506; Kansas, etc., Coal Co. *v.* Reid, 85 Fed. 914, 29 C. C. A. 475; Motey *v.* Pickle Marble, etc., Co., 74 Fed. 155, 20 C. C. A. 366; English *v.* Chicago, etc., R. Co., 24 Fed. 906; Kresanowski *v.* Northern Pac. R. Co., 18 Fed. 229, 5 McCrary 528; Thompson *v.* Chicago, etc., R. Co., 14 Fed. 564, 4 McCrary 629; Miller *v.* Union Pac. R. Co., 12 Fed. 600, 4 McCrary 115; Gravelle *v.* Minneapolis, etc., R. Co., 10 Fed. 711, 3 McCrary 352.

See 34 Cent. Dig. tit. "Master and Servant," § 782.

Fear of discharge no excuse see Haley *v.* Case, 142 Mass. 316, 7 N. E. 877; Gensen *v.* Ohio Oil Co., 22 Ohio Cir. Ct. 276, 12 Ohio Cir. Dec. 10. *Compare* Turner *v.* Goldsboro Lumber Co., 119 N. C. 387, 26 S. E. 23.

14. Greeley *v.* Foster, 32 Colo. 292, 75 Pac. 351.

(II) *Commands Involving Violation of Rules or Orders.*[15] Unless the danger is known and obvious,[16] a servant will not be charged with contributory negligence in obeying an authorized command of his superior, even though it involves the violation of a rule or order of his master.[17] But the mere assent or acquiescence of a superior servant to the violation of a rule or order by an inferior servant will not free the latter from negligence,[18] unless he has acted in the usual and customary manner.[19]

(III) *Method of Compliance.* The fact that a servant was injured while acting in obedience to orders will not relieve him of the charge of contributory negligence, unless he exercised reasonable care for his own safety.[20]

g. Acts in Emergencies[21] — (I) *In General.* Where a servant is injured as the result of an act done by him under an impulse or on a belief created by a sudden danger caused solely by the master's negligence, he is not to be regarded as guilty of contributory negligence, even though the act would be regarded as a negligent one if performed under circumstances not indicating sudden peril.[22] If, however, the emergency in which the servant acts is of his own making, the

15. Excuses for disobeying rules or orders see *supra*, IV, F, 4, d, (III).

16. York *v.* Chicago, etc., R. Co., 98 Iowa 544, 67 N. W. 574; Wescott *v.* New York, etc., R. Co., 153 Mass. 460, 27 N. E. 10; East Tennessee, etc., R. Co. *v.* Smith, 89 Tenn. 114, 14 S. W. 1077.

17. *Illinois.*— Norris *v.* Illinois Cent. R. Co., 88 Ill. App. 614.

Indiana.— Pennsylvania Co. *v.* Roney, 89 Ind. 453, 46 Am. Rep. 173.

Kansas.— Union Pac. R. Co. *v.* Springsteen, 41 Kan. 724, 21 Pac. 774; Kansas City, etc., R. Co. *v.* Kier, 41 Kan. 661, 671, 21 Pac. 770, 13 Am. St. Rep. 311.

Kentucky.— Illinois Cent. R. Co. *v.* Jones, 118 Ky. 158, 80 S. W. 484, 26 Ky. L. Rep. 31.

Massachusetts.— Hannah *v.* Connecticut River R. Co., 154 Mass. 529, 28 N. E. 682.

Missouri.— Hurlbut *v.* Wabash R. Co., 130 Mo. 657, 31 S. W. 1051.

South Carolina.— Carson *v.* Southern R. Co., 68 S. C. 55, 46 S. E. 525 [*affirmed* in 194 U. S. 136, 24 S. Ct. 609, 48 L. ed. 907].

See 34 Cent. Dig. tit. "Master and Servant," § 780.

18. Port Royal, etc., R. Co. *v.* Davis, 95 Ga. 292, 22 S. E. 833; Atchison, etc., R. Co. *v.* Reesman, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768. But see Tullis *v.* Lake Shore, etc., R. Co., 105 Fed. 554, 44 C. C. A. 597.

19. Union Pac. R. Co. *v.* Springsteen, 41 Kan. 724, 21 Pac. 774. See also Kansas City, etc., R. Co. *v.* Kier, 41 Kan. 661, 671, 21 Pac. 770, 13 Am. St. Rep. 311.

20. *Alabama.*— Davis *v.* Western R. Co., 107 Ala. 626, 18 So. 173.

Indiana.— Morewood Co. *v.* Smith, 25 Ind. App. 264, 57 N. E. 199. *Compare* Louisville, etc., Consol. R. Co. *v.* Utz, 133 Ind. 265, 32 N. E. 881.

Iowa.— Thoman *v.* Chicago, etc., R. Co., 92 Iowa 196, 60 N. W. 612.

Massachusetts.— Meunier *v.* Chemical Paper Co., 180 Mass. 109, 61 N. E. 810.

Minnesota.— Smith *v.* St. Paul, etc., R. Co., 51 Minn. 86, 52 N. W. 1068.

New York.— Smith *v.* Bispham, 52 N. Y. Super. Ct. 33.

Pennsylvania.— Carnagie *v.* Penn Bridge Co., 197 Pa. St. 441, 47 Atl. 355.

Washington.— Brennan *v.* Front St. Cable R. Co., 8 Wash. 363, 36 Pac. 272.

United States.— Davidson *v.* The City of St. Louis, 56 Fed. 720; English *v.* Chicago, etc., R. Co., 24 Fed. 906; The Montauk, 17 Fed. 96.

See 34 Cent. Dig. tit. "Master and Servant," § 785.

21. Inexperienced or youthful employee see *supra*, IV, F, 2, b, (IX).

Negligence of master in giving orders in emergencies see *supra*, IV, C, 3, b.

22. *Alabama.*— Bessemer Land, etc., Co. *v.* Campbell, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17.

Arkansas.— St. Louis, etc., R. Co. *v.* Touhey, 67 Ark. 209, 54 S. W. 577, 77 Am. St. Rep. 109.

District of Columbia.— See Baltimore, etc., R. Co. *v.* Elliott, 9 App. Cas. 341.

Georgia.— Georgia R., etc., Co. *v.* Rhodes, 56 Ga. 645.

Illinois.— Peoria, etc., R. Co. *v.* Rice, 144 Ill. 227, 33 N. E. 951 [*affirming* 46 Ill. App. 60].

Indiana.— Clarke *v.* Pennsylvania Co., 132 Ind. 199, 31 N. E. 808, 17 L. R. A. 811.

Iowa.— Haas *v.* Chicago, etc., R. Co., 90 Iowa 259, 57 N. W. 894.

Kentucky.— Middlesborough R. Co. *v.* Stallard, 72 S. W. 17, 24 Ky. L. Rep. 1666; Louisville, etc., R. Co. *v.* Shivell, 18 S. W. 944, 13 Ky. L. Rep. 902. *Compare* Ford *v.* Robinson-Pettett, 65 S. W. 793, 23 Ky. L. Rep. 1654, in which the evidence strongly tended to show that the servant had no reasonable ground to apprehend danger.

Massachusetts.— Olsen *v.* Andrews, 168 Mass. 261, 47 N. E. 90.

Minnesota.— Winczewski *v.* Winona, etc., R. Co., 80 Minn. 245, 83 N. W. 159.

New York.— Rima *v.* Rossie Iron Works, 120 N. Y. 433, 24 N. E. 940; Johnson *v.* Steam Gauge, etc., Co., 72 Hun 535, 25 N. Y. Suppl. 689 [*affirmed* in 146 N. Y. 152, 40 N. E. 773].

Pennsylvania.— Neilson *v.* Hillside Coal,

master cannot be held liable on the theory that it had by its negligence placed him in such a position as to relieve the servant of the duty of exercising ordinary care for his own safety.[23]

(II) *EFFORTS TO AVERT ACCIDENT OR SAVE LIVES OF OTHERS.* A servant is not guilty of contributory negligence where he is injured while attempting, in the face of imminent danger, to avert an accident or to save the lives of others,[24] unless the attempt is made under circumstances constituting rashness in the judgment of prudent persons.[25]

(III) *EFFORTS TO SAVE MASTER'S PROPERTY.* Contributory negligence will not be imputed to a servant where he is injured while making a reasonable effort

etc., Co., 168 Pa. St. 256, 31 Atl. 1091, 47 Am. St. Rep. 886.

Rhode Island.— See Langlois *v.* Dunn Worsted Mills, 25 R. I. 645, 57 Atl. 910; Baumler *v.* Narragansett Brewing Co., 23 R. I. 611, 51 Atl. 203; Sullivan *v.* Nicholson File Co., 21 R. I. 540, 45 Atl. 549.

Tennessee.— East Tennessee, etc., R. Co. *v.* Gurley, 12 Lea 46.

Texas.— White *v.* Houston, etc., R. Co., (Civ. App. 1898) 46 S. W. 382; Gulf, etc., R. Co. *v.* Knott, 14 Tex. Civ. App. 158, 36 S. W. 491; San Antonio, etc., R. Co. *v.* McDonald, (Civ. App. 1895) 31 S. W. 72. *Compare* Texas, etc., R. Co. *v.* Wagner, 2 Tex. App. Civ. Cas. § 336.

Utah.— Mathews *v.* Daly-West Min. Co., 27 Utah 193, 75 Pac. 722.

Virginia.— Richmond, etc., R. Co. *v.* Brown, 89 Va. 749, 17 S. E. 132; South West Imp. Co. *v.* Smith, 85 Va. 306, 7 S. E. 365, 17 Am. St. Rep. 59.

West Virginia.— Haney *v.* Pittsburgh, etc., R. Co., 38 W. Va. 570, 18 S. E. 748.

Wisconsin.— Baltzer *v.* Chicago, etc., R. Co., 83 Wis. 459, 53 N. W. 885; Kelleher *v.* Milwaukee, etc., R. Co., 80 Wis. 584, 50 N. W. 942; Schultz *v.* Chicago, etc., R. Co., 44 Wis. 638.

United States.— Cowen *v.* Ray, 108 Fed. 320, 47 C. C. A. 352; Killien *v.* Hyde, 63 Fed. 172 [*reversed* on other grounds in 67 Fed. 365]; Stevenson *v.* Chicago, etc., R. Co., 18 Fed. 493, 5 McCrary 634.

See 34 Cent. Dig. tit. "Master and Servant," §§ 789–791.

Concurrent negligence of servant as bar to recovery see McCauley *v.* Tennessee Coal, etc., Co., 93 Ala. 356, 9 So. 611; Baltzer *v.* Chicago, etc., R. Co., 93 Wis. 459, 53 N. W. 885.

Disobeying rules or orders in emergency not negligence per se see Georgia R., etc., Co. *v.* Rhodes, 56 Ga. 645; Smith *v.* Wabash, etc., R. Co., 92 Mo. 359, 4 S. W. 129, 1 Am. St. Rep. 729.

Obeying orders in emergency not negligence although danger apparent see Strong *v.* Iowa Cent. R. Co., 94 Iowa 380, 62 N. W. 799; Fox *v.* Chicago, etc., R. Co., 86 Iowa 368, 53 N. W. 259, 17 L. R. A. 289; Allison *v.* Southern R. Co., 129 N. C. 336, 40 S. E. 91; Houston, etc., R. Co. *v.* Rodican, 15 Tex. Civ. App. 556, 40 S. W. 535. *Compare* Novock *v.* Michigan Cent. R. Co., 63 Mich. 121, 29 N. W. 525.

23. Quirouet *v.* Alabama Great Southern R. Co., 111 Ga. 315, 36 S. E. 599; Briscoe *v.* Southern R. Co., 103 Ga. 224, 28 S. E. 638.

24. *Georgia.*— Simmons *v.* East Tennessee, etc., R. Co., 92 Ga. 658, 18 S. E. 999; Central R. Co. *v.* Crosby, 74 Ga. 737, 58 Am. Rep. 463.

Indiana.— Pennsylvania Co. *v.* McCaffrey, 139 Ind. 430, 38 N. E. 67, 29 L. R. A. 104; Pennsylvania Co. *v.* Roney, 89 Ind. 453, 46 Am. Rep. 173.

Iowa.— Knapp *v.* Sioux City, etc., R. Co., 71 Iowa 41, 32 N. W. 18.

Kansas.— Condiff *v.* Kansas City, etc., R. Co., 45 Kan. 256, 25 Pac. 562.

Louisiana.— Whitworth *v.* Shreveport Belt R. Co., 112 La. 363, 36 So. 414, 65 L. R. A. 129 [*citing* Peyton *v.* Texas, etc., R. Co., 41 La. Ann. 861, 6 So. 690, 17 Am. St. Rep. 430, and *distinguishing* De Mahy *v.* Morgan's Louisiana, etc., R. Co., 45 La. Ann. 1329, 14 So. 61].

Maryland.— Maryland Steel Co. *v.* Marney, 88 Md. 482, 42 Atl. 60, 71 Am. St. Rep. 441, 42 L. R. A. 842.

Massachusetts.— Spaulding *v.* W. N. Flynt Granite Co., 159 Mass. 587, 34 N. E. 1134.

Missouri.— Schroeder *v.* Chicago, etc., R. Co., 108 Mo. 322, 18 S. W. 1094, 18 L. R. A. 827.

Nebraska.— Dailey *v.* Burlington, etc., R. Co., 58 Nebr. 396, 78 N. W. 722; Missouri Pac. R. Co. *v.* Lyons, 54 Nebr. 633, 75 N. W. 31; Omaha, etc., R. Co. *v.* Krayenbuhl, 48 Nebr. 553, 67 N. W. 447.

Pennsylvania.— Schall *v.* Cole, 107 Pa. St. 1.

Texas.— San Antonio, etc., R. Co. *v.* Stevens, (Civ. App. 1904) 83 S. W. 235; International, etc., R. Co. *v.* McVey, (Civ. App. 1904) 81 S. W. 991, 83 S. W. 34; Texas Cent. R. Co. *v.* Bender, 32 Tex. Civ. App. 568, 75 S. W. 561; Texas, etc., R. Co. *v.* Scott, 30 Tex. Civ. App. 496, 71 S. W. 26.

Wisconsin.— Cottrill *v.* Chicago, etc., R. Co., 47 Wis. 634, 3 N. W. 376, 32 Am. Rep. 796.

See 34 Cent. Dig. tit. "Master and Servant," § 792.

Mere apprehension of danger is insufficient; the appearance of danger must be such as to arouse a reasonable apprehension. Gulf, etc., R. Co. *v.* Roane, 33 Tex. Civ. App. 299, 76 S. W. 771, (Civ. App. 1903) 75 S. W. 845.

25. Condiff *v.* Kansas City, etc., R. Co., 45 Kan. 256, 25 Pac. 562. See also the following cases:

to save his master's property in an emergency,[26] even though his own acts, in connection with others, occasioned the threatened danger, where his acts were not culpable.[27]

G. Fellow Servants[28] — **1. Rule Stated.** At common law a master is not liable for injuries to a servant caused by the negligence of a fellow servant engaged in the same general business, where the master has furnished proper means for carrying on the work, and has used due care in the selection of servants.[29]

Illinois.— Chicago, etc., R. Co. *v.* Bliss, 6 Ill. App. 411.

Iowa.— Nelling *v.* Chicago, etc., R. Co., 98 Iowa 554, 63 N. W. 568, 67 N. W. 404.

Michigan.— Blair *v.* Grand Rapids, etc., R. Co., 60 Mich. 124, 26 N. W. 855.

Texas.— International, etc., R. Co. *v.* Hester, 72 Tex. 40, 11 S. W. 1041.

United States.— Elliott *v.* Chicago, etc., R. Co., 150 U. S. 245, 14 S. Ct. 85, 37 L. ed. 1068.

26. Prophet *v.* Kemper, 95 Mo. App. 219, 68 S. W. 956; Maltby *v.* Belden, 45 N. Y. App. Div. 384, 60 N. Y. Suppl. 824.

27. Houston, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1899) 51 S. W. 506.

28. As defense in action for wrongful death see Death.

Contracts limiting liability see *supra*, IV, A, 7.

Liability of servant for injuries to fellow servants see *infra*, V, A, 5, b.

Notice to servants of defects as notice to master see *supra*, IV, B, 7, f, (III).

Scope of employment see *supra*, IV, A, 3.

29. *Alabama.*— Melton *v.* E. E. Jackson, Lumber Co., 133 Ala. 580, 31 So. 848; Laughran *v.* Brewer, 113 Ala. 509, 21 So. 415; Buckalew *v.* Tennessee Coal, etc., Co., 112 Ala. 146, 20 So. 606; Walker *v.* Bolling, 22 Ala. 294.

Arizona.— Southern Pac. Co. *v.* McGill, 5 Ariz. 36, 44 Pac. 302.

Arkansas.— St. Louis, etc., R. Co. *v.* Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773; St. Louis, etc., R. Co. *v.* Rice, 51 Ark. 467, 11 S. W. 699, 4 L. R. A. 173; St. Louis, etc., R. Co. *v.* Morgart, 45 Ark. 318.

California.— Mann *v.* O'Sullivan, 126 Cal. 61, 58 Pac. 375, 77 Am. St. Rep. 149; Burns *v.* Sennett, 99 Cal. 363, 33 Pac. 916; Hogan *v.* Central Pac. R. Co., 49 Cal. 128; Yeomans *v.* Contra Costa Steam Nav. Co., 44 Cal. 71.

Colorado.— Denver, etc., R. Co. *v.* Sipes, 23 Colo. 226, 47 Pac. 287; Summerhays *v.* Kansas Pac. R. Co., 2 Colo. 484.

Connecticut.— Peterson *v.* New York, etc., R. Co., 77 Conn. 351, 59 Atl. 502; Nolan *v.* New York, etc., R. Co., 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305; Sullivan *v.* New York, etc., R. Co., 62 Conn. 209, 25 Atl. 711; Wilson *v.* Willimantic Linen Co., 50 Conn. 433, 47 Am. Rep. 653; Burke *v.* Norwich, etc., R. Co., 34 Conn. 474.

Dakota.— See Elliot *v.* Chicago, etc., R. Co., 5 Dak. 523, 41 N. W. 758, 3 L. R. A. 363, construing Civ. Code, § 1130.

Delaware.— Taylor *v.* George W. Bush, etc., Co., (1905) 61 Atl. 236; Wheatley *v.* Philadelphia, etc., R. Co., 1 Marv. 305, 30 Atl. 660.

District of Columbia.— Hughson *v.* Richmond, etc., R. Co., 2 App. Cas. 98.

Florida.— Parrish *v.* Pensacola, etc., R. Co., 28 Fla. 251, 9 So. 696.

Georgia.— Riverside Mills *v.* Jones, 121 Ga. 33, 48 S. E. 700; Evans *v.* Josephine Mills, 119 Ga. 448, 46 S. E. 674; Cedartown Cotton Co. *v.* Hanson, 118 Ga. 176, 44 S. E. 992; Railey *v.* Garbutt, 112 Ga. 288, 37 S. E. 360; McCosker *v.* Hilton, etc., Lumber Co., 110 Ga. 328, 35 S. E. 369; Kerr *v.* Crown Cotton Mills, 105 Ga. 510, 31 S. E. 166; Barry *v.* McGhee, 100 Ga. 759, 28 S. E. 455; McDonald *v.* Eagle, etc., Mfg. Co., 68 Ga. 839.

Idaho.— Larsen *v.* Le Doux, 11 Ida. 49, 81 Pac. 600; Zienke *v.* Northern Pac. R. Co., 8 Ida. 54, 66 Pac. 828.

Illinois.— Chicago Terminal Transfer R. Co. *v.* Schiavone, 216 Ill. 275, 74 N. E. 1048 [*reversing* 116 Ill. App. 335]; Chicago, etc., R. Co. *v.* Bell, 209 Ill. 25, 70 N. E. 754; Metropolitan West Side El. R. Co. *v.* Fortin, 203 Ill. 454, 67 N. E. 977; Frost Mfg. Co. *v.* Smith, 197 Ill. 253, 64 N. E. 305 [*affirming* 98 Ill. App. 308]; Illinois Steel Co. *v.* Bauman, 178 Ill. 351, 53 N. E. 107, 69 Am. St. Rep. 316 [*affirming* 78 Ill. App. 73]; Stafford *v.* Chicago, etc., R. Co., 114 Ill. 244, 2 N. E. 185; Chicago, etc., R. Co. *v.* Geary, 110 Ill. 383; Illinois Cent. R. Co. *v.* Cox, 21 Ill. 20, 71 Am. Dec. 298; Honner *v.* Illinois Cent. R. Co., 15 Ill. 550; Illinois Steel Co. *v.* Rolewicz, 113 Ill. App. 312; Mott *v.* Chicago, etc., El. R. Co., 102 Ill. App. 412; Chicago, etc., R. Co. *v.* Thompson, 99 Ill. App. 277; McAlonan *v.* McArthur Bros. Co., 96 Ill. App. 13; Chicago, etc., R. Co. *v.* Stallings, 90 Ill. App. 609; Swift *v.* McInerny, 90 Ill. App. 294; Chicago, etc., R. Co. *v.* Myers, 83 Ill. App. 469; Klees *v.* Chicago, etc., R. Co., 68 Ill. App. 244; Fitzgerald *v.* Honkomp, 44 Ill. App. 365; Chicago, etc., R. Co. *v.* Clark, 2 Ill. App. 596.

Indiana.— Dill *v.* Marmon, 164 Ind. 507, 73 N. E. 67, 69 L. R. A. 163; Southern Indiana R. Co. *v.* Harrell, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460 [*reversing* (App. 1903) 66 N. E. 1016]; Evansville, etc., R. Co. *v.* Tohill, 143 Ind. 49, 41 N. E. 709, 42 N. E. 352; Evansville, etc., R. Co. *v.* Henderson, 134 Ind. 636, 33 N. E. 1021; Taylor *v.* Evansville, etc., R. Co., 121 Ind. 124, 22 N. E. 876, 16 Am. St. Rep. 372, 6 L. R. A. 584; Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 151, 5 N. E. 187; Capper *v.* Louisville, etc., R. Co., 103 Ind. 305, 2 N. E. 749; Bogard *v.* Louisville, etc., R. Co., 100 Ind. 491; Pittsburgh, etc., R. Co. *v.* Ruby, 38 Ind. 294, 10 Am. Rep. 111; Colum-

This doctrine and the various reasons which have been assigned for it has been

bus, etc., R. Co. *v.* Arnold, 31 Ind. 174, 99 Am. Dec. 615; Ohio, etc., R. Co. *v.* Hammersley, 28 Ind. 371; Slattery *v.* Toledo, etc., R. Co., 23 Ind. 81; Thayer *v.* St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409; Ohio, etc., R. Co. *v.* Tindall, 13 Ind. 366, 74 Am. Dec. 259; Madison, etc., R. Co. *v.* Bacon, 6 Ind. 205; Salem Stone, etc., Co. *v.* Chastain, 9 Ind. App. 453, 36 N. E. 910.

Iowa.— Collingwood *v.* Illinois, etc., Fuel Co., 125 Iowa 537, 101 N. W. 283; Miniter *v.* Chicago, etc., R. Co., 122 Iowa 46, 96 N. W. 1108; Foshurg *v.* Phillips Fuel Co., 93 Iowa 54, 61 N. W. 400; Sullivan *v.* Mississippi, etc., R. Co., 11 Iowa 421.

Kansas.— Donnelly *v.* Cudahy Packing Co., 68 Kan. 653, 75 Pac. 1017; Atchison, etc., R. Co. *v.* Moore, 29 Kan. 632.

Kentucky.— Louisville, etc., R. Co. *v.* Foard, 104 Ky. 456, 47 S. W. 342, 20 Ky. L. Rep. 646; Ft. Hill Stone Co. *v.* Orm, 84 Ky. 183; Illinois Cent. R. Co. *v.* Elliott, 82 S. W. 374, 26 Ky. L. Rep. 669; Illinois Cent. R. Co. *v.* Stewart, 63 S. W. 596, 23 Ky. L. Rep. 637; Potter *v.* Louisville, etc., R. Co., 50 S. W. I, 20 Ky. L. Rep. 1842.

Louisiana.— Stucke *v.* Orleans R. Co., 50 La. Ann. 172, 23 So. 342; Satterly *v.* Morgan, 35 La. Ann. 1166; Poirier *v.* Carroll, 35 La. Ann. 699.

Maine.— Pellerin *v.* International Paper Co., 96 Me. 388, 52 Atl. 842; Stewart *v.* International Paper Co., 96 Me. 30, 51 Atl. 237; Small *v.* Allington, etc., Mfg. Co., 94 Me. 551, 48 Atl. 177; Rounds *v.* Carter, 94 Me. 535, 48 Atl. 175; Demers *v.* Deering, 93 Me. 272, 44 Atl. 922; Cowan *v.* Umbagog Pulp Co., 91 Me. 26, 39 Atl. 340; Carle *v.* Bangor, etc., Canal, etc., Co., 43 Me. 269.

Maryland.— Maryland Clay Co. *v.* Goodnow, 95 Md. 330, 51 Atl. 292, 53 Atl. 427; Baltimore Elevator Co. *v.* Neal, 65 Md. 438, 5 Atl. 338; Cumberland Coal, etc., Co. *v.* Scally, 27 Md. 589; O'Connell *v.* Baltimore, etc., R. Co., 20 Md. 212, 83 Am. Dec. 549.

Massachusetts.— Higgins *v.* Higgins, 188 Mass. 113, 74 N. E. 471; McRea *v.* Hood Rubber Co., 187 Mass. 326, 72 N. E. 1015; Palmer *v.* Coyle, 187 Mass. 136, 72 N. E. 844; Beatty *v.* Weed, 186 Mass. 99, 70 N. E. 1008; Morrison *v.* Whittier Mach. Co., 184 Mass. 39, 67 N. E. 646; Ahern *v.* Hildreth, 183 Mass. 296, 67 N. E. 328; Fay *v.* Wilmarth, 183 Mass. 71, 66 N. E. 410; Nordquist *v.* Fuller, 182 Mass. 411, 65 N. E. 834; Regan *v.* Lombard, 181 Mass. 329, 63 N. E. 895; Healey *v.* Geo. F. Blake Mfg. Co., 180 Mass. 270, 62 N. E. 270; La Belle *v.* Montague, 174 Mass. 453, 54 N. E. 859; Gorman *v.* Woodbury, 173 Mass. 180, 53 N. E. 373; Murch *v.* Wilson, 168 Mass. 408, 47 N. E. 111; King *v.* Boston, etc., R. Corp., 9 Cush. 112; Alhro *v.* Agawam Canal Co., 6 Cush. 75; Farwell *v.* Boston, etc., R. Corp., 4 Metc. 49, 38 Am. Dec. 339.

Michigan.— Lenderink *v.* Rockford, 135 Mich. 531, 98 N. W. 4; Erickson *v.* Victoria Copper Min. Co., 130 Mich. 476, 90 N. W. 291; Middaugh *v.* Mitchell, 120 Mich. 581, 79 N. W. 806; Quincy Min. Co. *v.* Kitts, 42 Mich. 34, 3 N. W. 240; Michigan Cent. R. Co. *v.* Dolan, 32 Mich. 510; Michigan Cent. R. Co. *v.* Leahey, 10 Mich. 193.

Minnesota.— Boyer *v.* Eastern R. Co., 87 Minn. 367, 92 N. W. 326; O'Niel *v.* Great Northern R. Co., 80 Minn. 27, 82 N. W. 1086, 51 L. R. A. 532; Friedrich *v.* St. Paul, 68 Minn. 402, 71 N. W. 387; Foster *v.* Minnesota Cent. R. Co., 14 Minn. 360.

Mississippi.— Farquhar *v.* Alabama, etc., R. Co., 78 Miss. 193, 28 So. 850; Memphis, etc., R. Co. *v.* Thomas, 51 Miss. 637; Howd *v.* Mississippi Cent. R. Co., 50 Miss. 178.

Missouri.— Fogarty *v.* St. Louis Transfer Co., 180 Mo. 490, 79 S. W. 664; Hawk *v.* McLeod Lumber Co., 166 Mo. 121, 65 S. W. 1022; Schaub *v.* Hannibal, etc., R. Co., 106 Mo. 74, 16 S. W. 924; Renfro *v.* Chicago, etc., R. Co., 86 Mo. 302; Brothers *v.* Cartter, 52 Mo. 372, 14 Am. Rep. 424; McDermott *v.* Pacific R. Co., 30 Mo. 115; Herbert *v.* Wiggins Ferry Co., 107 Mo. App. 287, 80 S. W. 978; Godfrey *v.* St. Louis Transit Co., 107 Mo. App. 193, 81 S. W. 1230.

Montana.— Hastings *v.* Montana Union R. Co., 18 Mont. 493, 46 Pac. 264.

Nebraska.— Chicago, etc., R. Co. *v.* Sullivan, 27 Nebr. 673, 43 N. W. 415.

New Hampshire.— Manning *v.* Manchester Mills, 70 N. H. 582, 49 Atl. 91; Lebarge *v.* Berlin Mills Co., 68 N. H. 373, 44 Atl. 533; Nash *v.* Nashua Iron, etc., Co., 62 N. H. 406; Fifield *v.* Northern R. Co., 42 N. H. 225.

New Jersey.— McDonald *v.* Standard Oil Co., 69 N. J. L. 445, 55 Atl. 289; Norman *v.* Middlesex, etc., Traction Co., 68 N. J. L. 728, 54 Atl. 835; Sofield *v.* Guggenheim Smelting Co., 64 N. J. L. 605, 46 Atl. 711, 50 L. R. A. 417; Levene *v.* Standard Oil Co., 64 N. J. L. 63, 44 Atl. 847; Olsen *v.* Nixon, 61 N. J. L. 671, 40 Atl. 694; Campbell *v.* New Jersey Dry Dock, etc., Co., 61 N. J. L. 382, 39 Atl. 658; Maher *v.* Thropp, 59 N. J. L. 186, 35 Atl. 1057.

New Mexico.— Lutz *v.* Atlantic, etc., R. Co., 6 N. M. 496, 30 Pac. 912, 16 L. R. A. 819.

New York.— Rosa *v.* Volkening, 173 N. Y. 590, 65 N. E. 1122 [*affirming* 64 N. Y. App. Div. 426, 72 N. Y. Suppl. 236]; Hutchinson *v.* Parker, 169 N. Y. 579, 61 N. E. 1130 [*affirming* 39 N. Y. App. Div. 133, 57 N. Y. Suppl. 168, 58 N. Y. Suppl. 190]; Quigley *v.* Levering, 167 N. Y. 58, 60 N. E. 276, 54 L. R. A. 62 [*affirming* 50 N. Y. App. Div. 354, 63 N. Y. Suppl. 1059]; Capasso *v.* Woolfolk, 163 N. Y. 472, 57 N. E. 760 [*reversing* 25 N. Y. App. Div. 234, 49 N. Y. Suppl. 409]; Crispin *v.* Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Russell *v.* Hudson River R. Co., 17 N. Y. 134 [*reversing* 5 Duer 39]; Zilver *v.* Robert Graves Co., 106 N. Y. App. Div. 582, 94 N. Y. Suppl. 714; Earle *v.* Clyde Steamship Co., 103 N. Y. App. Div. 21, 92 N. Y. Suppl. 839 [*reversing* 43 Misc. 535, 89 N. Y. Suppl. 500]; Dooling *v.* Deutscher Verein, 97 N. Y. App.

asserted and sustained in the courts of America and in those of England and

Div. 39, 89 N. Y. Suppl. 580; Austin *v.* Fisher Tanning Co., 96 N. Y. App. Div. 550, 89 N. Y. Suppl. 137; Koszlowski *v.* American Locomotive Co., 96 N. Y. App. Div. 40, 89 N. Y. Suppl. 55; White *v.* Lewiston, etc., R. Co., 94 N. Y. App. Div. 4, 87 N. Y. Suppl. 901; Peet *v.* H. Remington, etc., Pulp, etc., Co., 86 N. Y. App. Div. 101, 83 N. Y. Suppl. 524; Koehler *v.* New York Steam Co., 84 N. Y. App. Div. 221, 82 N. Y. Suppl. 588; Ward *v.* Naughton, 74 N. Y. App. Div. 68, 77 N. Y. Suppl. 344; Mulligan *v.* Ballon, 73 N. Y. App. Div. 486, 77 N. Y. Suppl. 214; O'Sullivan *v.* Flynn, 67 N. Y. App. Div. 516, 73 N. Y. Suppl. 1108; Rosa *v.* Volkening, 64 N. Y. App. Div. 426, 72 N. Y. Suppl. 236; Hale *v.* Wayside Knitting Co., 59 N. Y. App. Div. 395, 69 N. Y. Suppl. 404; Schott *v.* Onondaga County Sav. Bank, 49 N. Y. App. Div. 503, 63 N. Y. Suppl. 631; Keegan *v.* New York Cent., etc., R. Co., 45 N. Y. App. Div. 629, 64 N. Y. Suppl. 595; Hutchinson *v.* Parker, 39 N. Y. App. Div. 133, 57 N. Y. Suppl. 168, 58 N. Y. Suppl. 190; Bell *v.* Consolidated Gas, etc., Co., 36 N. Y. App. Div. 242, 56 N. Y. Suppl. 780; Bruen *v.* Uhlmann, 30 N. Y. App. Div. 453, 51 N. Y. Suppl. 958; Bailey *v.* Delaware, etc., Canal Co., 27 N. Y. App. Div. 305, 50 N. Y. Suppl. 87; Sheridan *v.* Long Island R. Co., 27 N. Y. App. Div. 10, 50 N. Y. Suppl. 215; Niles *v.* New York Cent., etc., R. Co., 14 N. Y. App. Div. 58, 43 N. Y. Suppl. 751; Sherman *v.* Rochester, etc., R. Co., 15 Barb. 574 [*affirmed* in 17 N. Y. 153]; Coon *v.* Syracuse, etc., R. Co., 6 Barb. 231; Anderson *v.* New Jersey Steamboat Co., 7 Rob. 611; Karl *v.* Maillard, 3 Bosw. 591; Brennan *v.* Gordon, 14 Daly 47, 3 N. Y. St. 604; Karch *v.* Kipp, 90 N. Y. Suppl. 404; Burns *v.* Staten Island Rapid Transit R. Co., 10 N. Y. St. 352; Pickett *v.* Atlas Steamship Co., 1 N. Y. City Ct. Suppl. 48.

North Carolina.— Wright *v.* Southern R. Co., 128 N. C. 77, 38 S. E. 283; Hobbs *v.* Atlantic, etc., R. Co., 107 N. C. 1, 12 S. E. 124, 9 L. R. A. 838; Hardy *v.* Carolina Cent. R. Co., 76 N. C. 5; Ponton *v.* Wilmington, etc., R. Co., 51 N. C. 245.

North Dakota.— Ell *v.* Northern Pac. R. Co., 1 N. D. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97.

Ohio.— Kelly Island Lime, etc., Co. *v.* Pachuta, 69 Ohio St. 462, 69 N. E. 988, 100 Am. St. Rep. 706; Whaalan *v.* Mad River, etc., R. Co., 8 Ohio St. 249; Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Cincinnati, etc., R. Co. *v.* Thompson, 21 Ohio Cir. Ct. 778, 12 Ohio Cir. Dec. 326.

Oklahoma.— Chaddick *v.* Lindsay, 5 Okla. 616, 49 Pac. 940.

Oregon.— Johnson *v.* Portland Stone Co., 40 Oreg. 436, 67 Pac. 1013, 68 Pac. 425; Knahtla *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 136, 27 Pac. 91.

Pennsylvania.— Benignia *v.* Pennsylvania R. Co., 197 Pa. St. 384, 47 Atl. 359; Duncan *v.* A. & P. Roberts Co., 194 Pa. St. 563, 45 Atl. 330; Reusch *v.* Groetzinger, 192 Pa. St. 74, 43 Atl. 398; Snodgrass *v.* Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104; Bradbury *v.* Kingston Coal Co., 157 Pa. St. 231, 27 Atl. 400; Anderson *v.* Oliver, 138 Pa. St. 156, 20 Atl. 981; Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. Rep. 631; Reading Iron Works *v.* Devine, 109 Pa. St. 246; Weger *v.* Pennsylvania R. Co., 55 Pa. St. 460; Ryan *v.* Cumberland Valley R. Co., 23 Pa. St. 384; Cole *v.* Northern Cent. R. Co., 12 Pa. Co. Ct. 573; Strange *v.* McCormick, 1 Phila. 156; Mitchell *v.* Pennsylvania R. Co., 1 Am. L. Reg. 717.

Rhode Island.— Venbuvr *v.* Lafayette Worsted Mills, 27 R. I. 89, 60 Atl. 770; Burke *v.* National India Rubber Co., 21 R. I. 446, 44 Atl. 307; Hanna *v.* Granger, 18 R. I. 507, 28 Atl. 659.

South Carolina.— Hyland *v.* Southern Bell Tel., etc., Co., 70 S. C. 315, 49 S. E. 879; Rosemand *v.* Southern R. Co., 66 S. C. 91, 44 S. E. 574; Hicks *v.* Southern R. Co., (1901) 38 S. E. 725, 38 S. E. 866; Murray *v.* South Carolina R. Co., 1 McMull. 385, 36 Am. Dec. 268.

South Dakota.— Gates *v.* Chicago, etc., R. Co., 4 S. D. 433, 57 N. W. 200.

Tennessee.— Louisville, etc., R. Co. *v.* Lahr, 86 Tenn. 335, 6 S. W. 663; Nashville, etc., R. Co. *v.* Handman, 13 Lea 423; Nashville, etc., R. Co. *v.* Elliott, 1 Coldw. 611, 78 Am. Dec. 506; Fox *v.* Sandford, 4 Sneed 36, 67 Am. Dec. 587.

Texas.— Galveston, etc., R. Co. *v.* Arispe, 81 Tex. 517, 17 S. W. 47; Price *v.* Houston Direct Nav. Co., 46 Tex. 535; International, etc., R. Co. *v.* Roth, 2 Tex. Unrep. Cas. 245; Galveston, etc., R. Co. *v.* Perry, (Civ. App. 1905) 85 S. W. 62; Quinn *v.* Galveston, etc., R. Co., (Civ. App. 1904) 84 S. W. 395; Consumers' Cotton Oil Co. *v.* Jonte, 36 Tex. Civ. App. 18, 80 S. W. 847; Bering Mfg. Co. *v.* Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869; Wells *v.* Page, 29 Tex. Civ. App. 489, 68 S. W. 528; Sanner *v.* Atchison, etc., R. Co., 17 Tex. Civ. App. 337, 43 S. W. 533; Texas, etc., R. Co. *v.* Wagner, 2 Tex. App. Civ. Cas. § 336.

Utah.—Allen *v.* Logan City, 10 Utah 279, 37 Pac. 496.

Vermont.— Garrow *v.* Miller, 72 Vt. 284, 47 Atl. 1087; Hard *v.* Vermont, etc., R. Co., 32 Vt. 473.

Virginia.— Norfolk, etc., R. Co. *v.* Cromer, 101 Va. 667, 44 S. E. 898; W. R. Trigg Co. *v.* Lindsay, 101 Va. 193, 43 S. E. 349; Norfolk, etc., R. Co. *v.* Nuckols, 91 Va. 193, 21 S. E. 342; Norfolk, etc., R. Co. *v.* Donnelly, 88 Va. 853, 14 S. E. 692.

Washington.— Metzler *v.* McKenzie, 34 Wash. 470, 76 Pac. 114; Ralph *v.* American Bridge Co., 30 Wash. 500, 70 Pac. 1098; Hughes *v.* Oregon Imp. Co., 20 Wash. 294, 55 Pac. 119; Sayward *v.* Carlson, 1 Wash. 29, 23 Pac. 830.

West Virginia.— Cochran *v.* Shanahan, 51 W. Va. 137, 41 S. E. 140; Oliver *v.* Ohio River R. Co., 42 W. Va. 703, 26 S. E. 444;

Canada. The leading English case on this subject was decided in 1837,[30] and in 1841 the same conclusion was reached in a decision rendered by the supreme court of South Carolina.[31] In 1842 the rule of the two decisions just mentioned was adopted and amplified by the supreme court of Massachusetts, in an opinion written by Chief Justice Shaw, and on account of the great learning and ability displayed by the justice this decision has taken rank as the leading American decision on the fellow servant doctrine.[32]

2. Basis of Rule. The most usual ground assigned for the fellow servant doctrine is that the negligence of a fellow servant is one of the risks incident to the employment and assumed by the servant.[33] In the leading American decision it was said: "We are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service,

Criswell *v.* Pittsburgh, etc., R. Co., 30 W. Va. 798, 6 S. E. 31.

Wisconsin.— Kreider *v.* Wisconsin River Paper, etc., Co., 110 Wis. 645, 86 N. W. 662; Liermann *v.* Milwaukee Dry Dock Co., 110 Wis. 599, 86 N. W. 182; Adams *v.* Snow, 106 Wis. 152, 81 N. W. 983; Boelter *v.* Ross Lumber Co., 103 Wis. 324, 79 N. W. 243; Petersen *v.* Sherry Lumber Co., 90 Wis. 83, 62 N. W. 948; Moseley *v.* Chamberlain, 18 Wis. 700.

Wyoming.— McBride *v.* Union Pac. R. Co., 3 Wyo. 247, 21 Pac. 687.

United States.— Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 16 S. Ct. 843, 40 L. ed. 994; Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 3 S. Ct. 322, 27 L. ed. 1003; Hough *v.* Texas, etc., R. Co., 200 U. S. 213, 25 L. ed. 612 [*reversing* 11 Fed. Cas. No. 6,221]; Union Pac. R. Co. *v.* Fort, 17 Wall. 553, 21 L. ed. 739; Lach *v.* Burnham, 134 Fed. 688; Kane *v.* Erie R. Co., 133 Fed. 681, 67 C. C. A. 653, 68 L. R. A. 788 [*reversing* 128 Fed. 474]; Maxfield *v.* Graveson, 131 Fed. 841, 65 C. C. A. 595; Carr *v.* Shields, 125 Fed. 827; Weeks *v.* Scharer, 111 Fed. 330, 49 C. C. A. 372; Beaumont *v.* Northern Pac. R. Co., 109 Fed. 532, 48 C. C. A. 529; Burke *v.* Anderson, 69 Fed. 814, 16 C. C. A. 442; Gulf, etc., R. Co. *v.* Jackson, 65 Fed. 48, 12 C. C. A. 507; Van Wickle *v.* Manhattan R. Co., 32 Fed. 278, 23 Blatchf. 422; The Islands, 28 Fed. 478; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87; Buckley *v.* Gould, etc., Silver Min. Co., 14 Fed. 833, 8 Sawy. 394; Thompson *v.* Chicago, etc., R. Co., 14 Fed. 564, 4 McCrary 629; Totten *v.* Pennsylvania R. Co., 11 Fed. 564; Jordan *v.* Wells, 13 Fed. Cas. No. 7,525, 3 Woods 527; Kielley *v.* Belcher Silver Min. Co., 14 Fed. Cas. Nos. 7,760, 7,761, 3 Sawy. 437, 500, 1 N. Y. Wkly. Dig. 349.

England.— Feltham *v.* England, L. R. 2 Q. B. 33, 7 B. & S. 676, 36 L. J. Q. B. 14, 15 Wkly. Rep. 151; Tarrant *v.* Webb, 18 C. B. 797, 25 L. J. C. P. 261, 4 Wkly. Rep. 640, 86 E. C. L. 797; Vose *v.* Lancashire, etc., R. Co., 2 H. & N. 728, 4 Jur. N. S. 364, 27 L. J. Exch. 249, 6 Wkly. Rep. 295; Barton's Hill Coal Co. *v.* Reid, 4 Jur. N. S. 767, 3 Macq. H. L. 266, 6 Wkly. Rep. 644; Barton's Hill Coal Co. *v.* McGuire, 3 Macq. H. L. 300.

Canada.— Wyman *v.* The Steamship Durat Castle, 6 Can. Exch. 387; Grant *v.* Acadia Coal Co., 34 Nova Scotia 319; Campbell *v.* General Min. Assoc., 1 Nova Scotia Dec. 415; Kelly *v.* Davidson, 31 Ont. 521; Fairweather *v.* Owen Sound Stone Quarry Co., 26 Ont. 604; Plant *v.* Grand Trunk R. Co., 27 U. C. Q. B. 78.

See 34 Cent. Dig. tit. "Master and Servant," § 352.

Rule not in force in Quebec.— As the doctrine of common employment does not prevail in the province of Quebec, acts or omissions by fellow servants of the deceased do not exonerate employers from liability for the negligence of a servant which may have led to injury. Asbestos, etc., Co. *v.* Durand, 30 Can Sup. Ct. 285; Reg. *v.* Grenier, 30 Can. Sup. Ct. 42; Reg. *v.* Filion, 24 Can. Sup. Ct. 482.

Doctrine not in force in Mexico see Mexican Cent. R. Co. *v.* Sprague, 114 Fed. 544, 52 C. C. A. 318; Mexican Cent. R. Co. *v.* Knox, 114 Fed. 73, 52 C. C. A. 21.

30. Priestley *v.* Fowler, 1 Jur. 987, 7 L. J. Exch. 42, M. & H. 305, 3 M. & W. 1.

31. Murray *v.* South Carolina R. Co., 1 McMull. (S. C.) 385, 36 Am. Dec. 268.

32. Farwell *v.* Boston, etc., R. Corp., 4 Metc. (Mass.) 49, 38 Am. Dec. 339.

33. *Alabama.*—Buckalew *v.* Tennessee Coal, etc., R. Co., 112 Ala. 164, 20 So. 606.

Arkansas.— St. Louis, etc., R. Co. *v.* Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773; St. Louis, etc., R. Co. *v.* Rice, 51 Ark. 467, 11 S. W. 699, 4 L. R. A. 173.

California.— Yeomans *v.* Contra Costa Steam Nav. Co., 44 Cal. 71.

Connecticut.—Wilson *v.* Willimantic Linen Co., 50 Conn. 433, 47 Am. Rep. 653.

Georgia.— McDonald *v.* Eagle, etc., Mfg. Co., 68 Ga. 839; Shields *v.* Yonge, 15 Ga. 349, 60 Am. Dec. 698.

Illinois.— Illinois Cent. R. Co. *v.* Cox, 21 Ill. 20, 71 Am. Dec. 298; World's Columbian Exposition *v.* Bell, 76 Ill. App. 591; Fitzgerald *v.* Honkomp, 44 Ill. App. 365; Chicago, etc., R. Co. *v.* Clark, 2 Ill. App. 596.

Indiana.— Dill *v.* Marmon, 164 Ind. 507, 73 N. E. 67, 68 N. E. 262, 69 L. R. A. 163;

and which can be as distinctly foreseen and provided for in the rate of compensation as any others." [34] So public policy is frequently asserted as the true basis of the fellow servant doctrine, and is founded upon the theory that it is calculated to make servants in a common employment watchful of each other, and thereby to promote carefulness in the performance of their duties.[35] The safety and welfare of the public therefore demand the establishment of the non-liability principle on the part of the employer in such cases; while, when established, it can work no injury to the servant, because his entering upon the service is voluntary, is with a knowledge of its hazards, and with a power and right to demand such

Southern Indiana R. Co. *v.* Harrell, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460 [*reversing* (App. 1903) 66 N. E. 1016]; Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 151, 5 N. E. 187; Columbus, etc., R. Co. *v.* Arnold, 31 Ind. 174, 99 Am. Dec. 615.

Iowa.— Collingwood *v.* Illinois, etc., Fuel Co., 125 Iowa 537, 101 N. W. 283.

Kansas.— Donnelly *v.* Cudahy Packing Co., 68 Kan. 653, 75 Pac. 1017; Atchison, etc., R. Co. *v.* Moore, 29 Kan. 632.

Kentucky.— Volz *v.* Chesapeake, etc., R. Co., 95 Ky. 188, 24 S. W. 119, 15 Ky. L. Rep. 727.

Louisiana.— Stucke *v.* Orleans R. Co., 50 La. Ann. 172, 23 So. 342.

Maine.— Stewart *v.* International Paper Co., 96 Me. 30, 51 Atl. 237; Rounds *v.* Carter, 94 Me. 535, 48 Atl. 175.

Maryland.— Cumberland Coal, etc., Co. *v.* Scally, 27 Md. 589; O'Connell *v.* Baltimore, etc., R. Co., 20 Md. 212, 83 Am. Dec. 549.

Massachusetts.— Murch *v.* Wilson, 168 Mass. 408, 47 N. E. 111; Powers *v.* Fall River, 168 Mass. 60, 46 N. E. 408; Holden *v.* Fitchburg R. Co., 129 Mass. 268, 37 Am. Rep. 343; Albro *v.* Agawam Canal Co., 6 Cush. 75; Farwell *v.* Boston, etc., R. Corp., 4 Metc. 49, 38 Am. Dec. 339, in which public policy was also recognized.

Michigan.— Quincy Min. Co. *v.* Kitts, 42 Mich. 34, 3 N. W. 240; Michigan Cent. R. Co. *v.* Dolan, 32 Mich. 510.

Minnesota.— Boyer *v.* Eastern R. Co., 87 Minn. 367, 92 N. W. 326; O'Niel *v.* Great Northern R. Co., 80 Minn. 27, 82 N. W. 1086, 51 L. R. A. 532; Foster *v.* Minnesota Cent. R. Co., 14 Minn. 360.

Mississippi.— New Orleans, etc., R. Co. *v.* Hughes, 49 Miss. 258.

Missouri.—Schaub *v.* Hannibal, etc., R. Co., 106 Mo. 74, 16 S. W. 924; Renfro *v.* Chicago, etc., R. Co., 86 Mo. 302.

Nebraska.— Union Pac. R. Co. *v.* Erickson, 41 Nebr. 1, 59 N. W. 347, 29 L. R. A. 137, in which public policy was also recognized as a reason.

New Hampshire.— Nash *v.* Nashua Iron, etc., Co., 62 N. H. 406; Fifield *v.* Northern R. Co., 42 N. H. 225.

New Jersey.— Collyer *v.* Pennsylvania R. Co., 49 N. J. L. 59, 6 Atl. 437.

New York.— Murphy *v.* Boston, etc., R. Co., 88 N. Y. 146, 42 Am. Rep. 240; Crispin *v.* Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Russell *v.* Hudson River R. Co., 17 N. Y. 134 [*reversing* 5 Duer 39].

North Carolina.— Hobbs *v.* Atlantic, etc., R. Co., 107 N. C. 1, 12 S. E. 124, 9 L. R. A. 838.

Oregon.— Johnson *v.* Portland Stone Co., 40 Oreg. 436, 67 Pac. 1013, 68 Pac. 425; Knahtla *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 136, 27 Pac. 91; Weeklund *v.* Southern Oregon Co., 20 Oreg. 591, 27 Pac. 260.

Pennsylvania.— Benignia *v.* Pennsylvania R. Co., 197 Pa. St. 384, 47 Atl. 359; Bradbury *v.* Kingston Coal Co., 157 Pa. St. 231, 27 Atl. 400; Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. Rep. 631.

Rhode Island.— Hanna *v.* Granger, 18 R. I. 507, 28 Atl. 659; Brodeur *v.* Valley Falls Co., 16 R. I. 448, 17 Atl. 54.

South Carolina.— Rosemand *v.* Southern R. Co., 66 S. C. 91, 44 S. E. 574; Hicks *v.* Southern R. Co., (1901) 38 S. E. 725; Murray *v.* South Carolina R. Co., 1 McMull. 385, 36 Am. Dec. 268.

Tennessee.—Louisville, etc., R. Co. *v.* Lahr, 86 Tenn. 335, 6 S. W. 663; Nashville, etc., R. Co. *v.* Handman, 13 Lea 423; Nashville, etc., R. Co. *v.* Carroll, 6 Heisk. 347.

Virginia.— Norfolk, etc., R. Co. *v.* Nuckols, 91 Va. 193, 21 S. E. 342.

West Virginia.— Oliver *v.* Ohio River R. Co., 42 W. Va. 703, 26 S. E. 444.

Wisconsin.— Wiskie *v.* Montello Granite Co., 111 Wis. 443, 87 N. W. 461, 87 Am. St. Rep. 885.

United States.— Union Pac. R. Co. *v.* Fort, 17 Wall. 553, 21 L. ed. 739; Weeks *v.* Scharer, 111 Fed. 330, 49 C. C. A. 372; Burke *v.* Anderson, 69 Fed. 814, 16 C. C. A. 442; Van Wickle *v.* Manhattan R. Co., 32 Fed. 278, 23 Blatchf. 422; Thompson *v.* Chicago, etc., R. Co., 14 Fed. 564, 4 McCrary 629; Totten *v.* Pennsylvania R. Co., 11 Fed. 564; Kielley *v.* Belcher Silver Min. Co., 14 Fed. Cas. No. 7,760, 3 Sawy. 437.

England.— Lovell *v.* Howell, 1 C. P. D. 161, 45 L. J. C. P. 387, 34 L. T. Rep. N. S. 183, 24 Wkly. Rep. 672.

See 34 Cent. Dig. tit. "Master and Servant," § 567.

Assumption of risk generally see *supra*, IV, E.

34. Farwell *v.* Boston, etc., R. Corp., 4 Metc. (Mass.) 49, 57, 38 Am. Dec. 339.

35. *Connecticut.*— Burke *v.* Norwich, etc., R. Co., 34 Conn. 474, 480, where, however, it is said: "It is by no means certain that the public interest would not be best subserved by holding the superior, with his higher intelligence, his surer means of information, and his power of selecting, direct-

wages as he shall deem compensatory.[36] If this is to be taken as the true ground it would seem that the rule should be confined to those servants whose duties bring them into such juxtaposition that one would be enabled to observe the negligence of his fellows, and this limitation is recognized in some cases.[37]

ing, and discharging subordinates, to the strictest accountability for their misconduct in his service, whoever may be the sufferer from it."

Indiana.— New Pittsburgh Coal, etc., Co. *v.* Peterson, 136 Ind. 398, 35 N. E. 7, 43 Am. St. Rep. 327; Madison, etc., R. Co. *v.* Bacon, 6 Ind. 205.

Iowa.— Sullivan *v.* Mississippi, etc., R. Co., 11 Iowa 421.

Massachusetts.— Rogers *v.* Ludlow Mfg. Co., 144 Mass. 198, 11 N. E. 77, 59 Am. Rep. 68; Farwell *v.* Boston, etc., R. Corp., 4 Metc. 49, 38 Am. Dec. 339.

Missouri.— McDermott *v.* Pacific R. Co., 30 Mo. 115.

New Jersey.— Harrison *v.* Central R. Co., 31 N. J. L. 293.

Tennessee.— Louisville, etc., R. Co. *v.* Lahr, 86 Tenn. 335, 6 S. W. 663.

Texas.— St. Louis, etc., R. Co. *v.* Welch, 72 Tex. 298, 10 S. W. 529, 2 L. R. A. 839.

United States.— Union Pac. R. Co. *v.* Fort, 17 Wall. 553, 21 L. ed. 739.

England.— Priestley *v.* Fowler, 1 Jur. 987, 7 L. J. Exch. 42, M. & H. 305, 3 M. & W. 1.

The rule had its origin in the idea that the employee has the means of knowing just as well as the employer all the ordinary risks incident to the service in which he is about to engage, and that these, including the perils that might arise from the negligence of other servants in the same business, enter into the contemplation of the parties in making the contract; on account of which, the law implies, the servant or employee has insisted upon a rate of compensation which would indemnify him for the hazards of the employment. And again the law supposes that the relation which the several employees sustain to each other, and the business in which they are engaged, would enable them better to guard against such risks and accidents than could the employer. Besides the moral effect of devolving these risks upon the employees themselves would be to induce a greater degree of caution, prudence, and fidelity than would in all probability be otherwise exercised by them. Sullivan *v.* Mississippi, etc., R. Co., 11 Iowa 421.

The rule rests not only upon the implied agreement to assume all the risks consequent upon the negligence of fellow servants, but, in the case of railway employees particularly, it is supported by considerations of a just and true public policy. The safety of the traveling public is largely dependent upon the care and skill with which railway employees discharge their responsible and perilous duties. The fact that such fellow servants must, as between themselves and the company, take upon themselves the results of the carelessness and negligence of a fellow servant, tends to quicken the zeal and arouse the activities of each employee against such negligence. Louisville, etc., R. Co. *v.* Lahr, 86 Tenn. 335, 6 S. W. 663.

As to strangers, upon principles of public policy, the rule treats a master as guilty for the negligence of his servant, but public policy does not demand that he should be so treated as to his own servants, who have the option to examine their surroundings in their service, and to receive pay according to the risk they incur. They may sue a fellow servant for his negligence, but to make the master liable for it, unless that servant is taking the place of the master, is contrary to reason and justice. Hanna *v.* Granger, 18 R. I. 507, 28 Atl. 659.

36. Madison, etc., R. Co. *v.* Bacon, 6 Ind. 205; Sullivan *v.* Mississippi, etc., R. Co., 11 Iowa 421; Farwell *v.* Boston, etc., R. Corp., 4 Metc. (Mass.) 49, 38 Am. Dec. 339; Hanna *v.* Granger, 18 R. I. 507, 28 Atl. 659.

37. Where servants of the same master are directly coöperating with each other in a particular business at the time of the injury, or are by their usual duties brought into habitual consociation, it may well be supposed that they have the power of influencing each other to the exercise of constant caution in the master's work (by their example, advice, and encouragement and by reporting delinquencies to the master) in as great, and in most cases in a greater, degree than the master. If then each servant knows that neither he nor his fellow servant, if injured by the others' negligence, can have redress against the master, he has such incentive to constant care, and such incentive to the exercise of his influence upon his fellow to incite him to constant care, that the well-being of society in such case does not demand that the master be made to answer. But although servants are employed by the same master, and are engaged in doing parts of some great work carried on by the master, still, unless either their duties are such that they usually bring about personal association between such servants, or unless they are actually coöperating at the time of the injury in the business in hand, or in the same line of employment, they have generally no power to incite each other to caution by counsel, exhortation, or example, or by reporting delinquencies to the master, and the well-being of society in such case must depend upon the devotion of the servant to the interests of the master, and the zeal of the master to promote a constant exercise of due care by his servant; and to bring these instrumentalities into action it becomes necessary, as in the case of an injury to a stranger, to adhere to the general rule that the master must answer for the neglect of his servant, and this, because the facts are such that society cannot, in such case, avail

3. Who Are Fellow Servants[38] — a. Definitions — (I) *In General.* Who are fellow servants within the meaning of the rule has been a question of some diversity of decision, although the decided weight of authority is to the effect that all who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, although it may be in different grades or departments of it, are fellow servants, each taking the risk of the other's negligence.[39]

itself of the mutual power and influence of one servant upon another for want of the necessary opportunity for its exercise, and hence must depend for inducements to caution which are supposed to follow the general rule of the master's liability. Chicago, etc., R. Co. *v.* Moranda, 93 Ill. 302, 34 Am. Rep. 168.

38. **Application of doctrine to convicts** see *infra*, IV, G, 4, a, (I), (D).

Application of doctrine to minors see *infra*, IV, G, 4, a, (I), (A).

Servants in different departments see *infra*, IV, G, 4, a, (VIII), b, (IV).

Servants of separate master in same work see *infra*, IV, G, 3, b, (II).

Superior and inferior servants see *infra*, IV, G, 4, a, (VI), b, (III).

Vice-principals and other representatives of master see *infra*, IV, G, 4, a, (VI).

39. Wonder *v.* Baltimore, etc., R. Co., 32 Md. 411, 3 Am. Rep. 143. To like effect see the following cases:

Georgia.— Colley *v.* Southern Cotton Oil Co., 120 Ga. 258, 47 S. E. 932.

Kansas.— Atchison, etc., Bridge Co. *v.* Miller, 71 Kan. 13, 80 Pac. 18, 1 L. R. A. N. S. 682.

Maryland.— O'Connell *v.* Baltimore, etc., R. Co., 20 Md. 212, 83 Am. Dec. 549.

Michigan.— Adams *v.* Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441.

Minnesota.— Foster *v.* Minnesota Cent. R. Co., 14 Minn. 360.

New York.— Mele *v.* Delaware, etc., Canal Co., 59 N. Y. Super. Ct. 367, 14 N. Y. Suppl. 630.

Virginia.— W. R. Trigg Co. *v.* Lindsay, 101 Va. 193, 43 S. E. 349.

"**All who are directly engaged in accomplishing the ultimate purpose in view . . .** must be regarded as engaged in the same general business, within the meaning of the rule." Hard *v.* Vermont, etc., R. Co., 32 Vt. 473, 480 [*approved* in Wonder *v.* Baltimore, etc., R. Co., 32 Md. 411, 3 Am. Rep. 143; O'Connell *v.* Baltimore, etc., R. Co., 20 Md. 212, 83 Am. Dec. 549].

"**Those entering into the service of a common master** become thereby engaged in a common service and are fellow-servants." Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 353, 16 S. Ct. 843, 40 L. ed. 994.

Fellow servants are those who are engaged under the same master in promoting one common object. Ohio, etc., R. Co. *v.* Hammersley, 28 Ind. 371.

"**A fellow servant or co-servant . . . is a** person engaged in the same common service under the same general control of the party injured." Gravelle *v.* Minneapolis, etc., R. Co., 10 Fed. 711, 713, 3 McCrary 352. Where two persons are both engaged in the common service of a master, in conducting and carrying on the same general business, and neither is in any sense under the control or direction of the other, they are fellow servants. Sauls *v.* Chicago, etc., R. Co., 36 Tex. Civ. App. 155, 81 S. W. 89. Whenever co-employees under the control of one master are engaged in the discharge of duties directed to one common end, such duties being so closely related that each employee must know he is exposed to the risk of being injured by the negligence of another, they are "fellow servants." Donnelly *v.* Cudahy Packing Co., 68 Kan. 653, 75 Pac. 1017.

"**To constitute fellow-servants** the employees need not be at the same time engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common work and performing duties and services for the same general purpose." Lewis *v.* Seifert, 116 Pa. St. 628, 646, 11 Atl. 514, 2 Am. St. Rep. 631. See also Duffy *v.* Oliver, 131 Pa. St. 203, 18 Atl. 872; Lehigh Valley Coal Co. *v.* Jones, 86 Pa. St. 432; Hatfield *v.* St. John Gas Light Co., 32 N. Brunsw. 100 [*affirmed* in 23 Can. Sup. Ct. 164].

"**The service must not only be under the same master,** but the employment must be one having a common object. The most approved test of an employment of this character is whether the injured servant can be said to have apprehended the possibility of injury from another servant while engaged in the service for which he hires." Ewan *v.* Lippincott, 47 N. J. L. 192, 196, 54 Am. Rep. 148. See also McAndrews *v.* Burns, 39 N. J. L. 117; Morgan *v.* Vale of Neath R. Co., L. R. 1 Q. B. 149, 5 B. & S. 736, 35 L. J. Q. B. 23, 13 L. T. Rep. N. S. 564, 14 Wkly. Rep. 144, 47 E. C. L. 736; Lovell *v.* Howell, 1 C. P. D. 161, 45 L. J. C. P. 387, 34 L. T. Rep. N. S. 183, 24 Wkly. Rep. 672.

"**Fellow servant**" is a term meaning that where there are two servants or employees of a common master or employer, and one of them, from the negligent act of the other, receives injury, the master is not liable for the same. Jackson *v.* Norfolk, etc., R. Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337.

Performance of duty owing to master.— If the injury to a servant was caused by another servant while performing a duty which he owed to the master, he is a fellow

(II) *STATUTES DEFINING FELLOW SERVANTS.* In many jurisdictions the term "fellow servants" is defined and limited by statute.[40]

b. Relation to Master and Scope of Employment[41] — (I) *IN GENERAL.* In order to the application of the fellow servant rule, it is necessary that the relation of master and servant should obtain between the person sought to be charged and both the person injured and him through whose negligence the injury was occasioned.[42]

servant. American Tel., etc., Co. *v.* Bower, 20 Ind. App. 32, 49 N. E. 182.

In Illinois fellow servants are such as are either strictly coöperating in the particular work they are about, or are usually consociated in their ordinary duties. Chicago, etc., R. Co. *v.* Moranda, 93 Ill. 302, 34 Am. Rep. 168 [*disapproving* Valtez *v.* Ohio, etc., R. Co., 85 Ill. 500; Chicago, etc., R. Co. *v.* Murphy, 53 Ill. 336, 5 Am. Rep. 48, and *following* Toledo, etc., R. Co. *v.* O'Connor, 77 Ill. 391; Ryan *v.* Chicago, etc., R. Co., 60 Ill. 171, 14 Am. Rep. 32; Illinois Cent. R. Co. *v.* Welch, 52 Ill. 183, 4 Am. Rep. 593; Chicago, etc., R. Co. *v.* Swett, 45 Ill. 197, 92 Am. Dec. 206; Chicago, etc., R. Co. *v.* Shannon, 43 Ill. 338]. See also John Spry Lumber Co. *v.* Duggan, 80 Ill. App. 394 [*affirmed* in 182 Ill. 218, 54 N. E. 1002].

Employees working together under one common directing superior are fellow servants. Foster *v.* Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916.

All servants engaged in the prosecution of the same common work, without any dependence upon or relation to each other, except as co-laborers without rank under the direction and management of the master himself, or some servant placed by the master over them, are fellow servants. Moore *v.* Wabash, etc., R. Co., 85 Mo. 588.

Difference in the amount of wages to servants does not affect the question as to whether they are fellow servants. New Orleans, etc., R. Co. *v.* Hughes, 49 Miss. 258.

Employees having interest in business.— The captain of a steamboat, who is one of the owners, is not the fellow servant of a deck hand. Cook *v.* Parham, 24 Ala. 21. *Compare* Zeigler *v.* Day, 123 Mass. 152, holding that one to whom has been committed as superintendent the work of constructing a sewer, because of his skill and competency, is nevertheless a fellow servant of one employed in laying the sewer, although he is to receive one-half the profits as compensation for his work, where he has furnished no capital, is to share no losses, and to be responsible for no debts, and has no lien or interest in the stock or materials, or in the profits as profits.

Neither is a police officer (Kimball *v.* Boston, 1 Allen (Mass.) 417), nor a fireman (Palmer *v.* Portsmouth, 43 N. H. 265), a servant of the city which appoints him, in any such sense as to take away his right of action against it for an injury sustained by reason of a defective highway.

An employee of the state, injured while digging clay, and the captain of a boat belonging to the state, under whose direction he was acting, are fellow servants. Loughlin *v.* State, 105 N. Y. 159, 11 N. E. 371.

40. See *infra,* IV, G, 4, b.

41. Statutory provisions see *infra,* IV, G, 4, b.

42. *California.*— Yeomans *v.* Contra Costa Steam Nav. Co., 44 Cal. 71.

Georgia.— Wadsworth *v.* Duke, 50 Ga. 91.

Indiana.— Abbitt *v.* Lake Erie, etc., R. Co., (1895) 40 N. E. 40; Kentucky, etc., Bridge Co. *v.* Hall, 125 Ind. 220, 25 N. E. 219.

Iowa.— Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391.

Massachusetts.— Poor *v.* Sears, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 272; Com. *v.* Vermont, etc., R. Co., 108 Mass. 7, 11 Am. Rep. 301.

Michigan.— Noe *v.* Rapid R. Co., 133 Mich. 152, 94 N. W. 743.

New York.— Busch *v.* Buffalo Creek R. Co., 29 Hun 112.

Texas.— Ft. Worth, etc., R. Co. *v.* Mackney, 83 Tex. 410, 18 S. W. 949; Evans *v.* Sabine, etc., R. Co., (1892) 18 S. W. 493; Ft. Worth, etc., R. Co. *v.* Bell, 5 Tex. Civ. App. 28, 23 S. W. 922; Campbell *v.* Harris, 4 Tex. Civ. App. 636, 23 S. W. 35.

Wisconsin.— Carroll *v.* Chicago, etc., R. Co., 99 Wis. 399, 75 N. W. 176, 67 Am. St. Rep. 872, holding that a servant is not a co-employee to one who has ceased to work for the same master, and has only returned to secure his check for past services.

United States.— Philadelphia, etc., R. Co. *v.* Derby, 14 How. 468, 14 L. ed. 502; Central Trust Co. *v.* East Tennessee, etc., R. Co., 69 Fed. 353; Chicago, etc., R. Co. *v.* Chambers, 68 Fed. 148, 15 C. C. A. 327; Gray *v.* Philadelphia, etc., R. Co., 24 Fed. 168, 23 Blatchf. 263.

England.— Johnson *v.* Lindsay, [1891] A. C. 371, 55 J. P. 644, 61 L. J. Q. B. 90, 65 L. T. Rep. N. S. 97, 40 Wkly. Rep. 405; Swainson *v.* North-Eastern R. Co., 3 Ex. D. 341, 47 L. J. Exch. 372, 38 L. T. Rep. N. S. 201, 26 Wkly. Rep. 413.

See 34 Cent. Dig. tit. "Master and Servant," §§ 324, 379.

A shipper of live stock, by accepting a pass permitting him to accompany the stock and attend it in transit, does not become the servant of the carrier, and is not within the fellow servant rule. Omaha, etc., R. Co. *v.* Crow, 54 Nebr. 747, 74 N. W. 1066, 69 Am. St. Rep. 741.

Expressman acting as brakeman.— If an expressman in the employ of an express company be acting as a brakeman in the em-

(II) *Servants of Separate Masters Engaged in the Same Work*— (A) *In General.* Servants of separate masters, although engaged in a common undertaking, are not fellow servants. To constitute that relation servants must be in the employ, or under the control of, a common master.[43]

ployment of a railroad company at the time of an accident by which he is injured, he is a servant of the latter, and cannot recover against it for injuries caused by the negligence of the engineer. Chamberlain *v.* Milwaukee, etc., R. Co., 7 Wis. 425.

Contractors to dig shaft and mine employees held fellow servants see Lendberg *v.* Brotherton Iron Min. Co., 75 Mich. 84, 42 N. W. 675.

Effect of sale of business.— A person who, up to and including the day of the transfer of a mine, was paid for his services as mine boss by the vendor, and thereafter by the vendee, and who, at the time of an accident resulting in the death of a miner, on the day of, but subsequent to, the transfer, was acting as mine boss, was such in fact, so that his negligence in failing to keep the openings into another mine closed, causing the action, was that of a fellow servant. Haley *v.* Keim, 151 Pa. St. 117, 25 Atl. 98.

43. *Alabama.*— Holmes *v.* Birmingham Southern R. Co., 140 Ala. 208, 37 So. 338.

California.— Yeomans *v.* Contra Costa Steam Nav. Co., 44 Cal. 71.

Colorado.— Union Gold Min. Co. *v.* Crawford, 29 Colo. 511, 69 Pac. 600.

Connecticut.— Zeiglor *v.* Danbury, etc., R. Co., 52 Conn. 543, 2 Atl. 462.

District of Columbia.— Hughson *v.* Richmond, etc., R. Co., 2 App. Cas. 98.

Illinois.— Grace, etc., Co. *v.* Probst, 208 Ill. 147, 70 N. E. 12; Alton Lime, etc., Co. *v.* Calvey, 47 Ill. App. 343.

Maryland.— Bently *v.* Edwards, 100 Md. 652, 60 Atl. 283; Philadelphia, etc., R. Co. *v.* State, 58 Md. 372.

Massachusetts.— Morgan *v.* Smith, 159 Mass. 570, 35 N. E. 101; Kelly *v.* Johnson, 128 Mass. 530, 35 Am. Rep. 398; Stewart *v.* Harvard College, 12 Allen 58.

Michigan.— Coots *v.* Detroit, 75 Mich. 628, 43 N. W. 17, 5 L. R. A. 315.

Mississippi.— Lonisville, etc., R. Co. *v.* Conroy, 63 Miss. 562, 56 Am. Rep. 835.

Missouri.— Jones *v.* St. Louis Southwestern R. Co., 125 Mo. 666, 28 S. W. 883, 46 Am. St. Rep. 514, 26 L. R. A. 718.

New Jersey.— Jansen *v.* Jersey City, 61 N. J. L. 243, 39 Atl. 1025; Hardy *v.* Delaware, etc., R. Co., 57 N. J. L. 505, 31 Atl. 281.

New York.—Hallet *v.* New York Cent., etc., R. Co., 167 N. Y. 543, 60 N. E. 653 [*reversing* 42 N. Y. App. Div. 123, 58 N. Y. Suppl. 943]; Johnson *v.* Netherlands American Steam Nav. Co., 132 N. Y. 576, 30 N. E. 505 [*affirming* 10 N. Y. Suppl. 927]; Kilroy *v.* Delaware, etc., Canal Co., 121 N. Y. 22, 24 N. E. 192 [*affirming* 56 N. Y. Super. Ct. 138, 1 N. Y. Suppl. 779]; Sanford *v.* Standard Oil Co., 118 N. Y. 571, 24 N. E. 313, 16 Am. St. Rep. 787; Svenson *v.* Atlantic Mail Steamship Co., 57 N. Y. 108 [*affirming* 33 N. Y. Super. Ct. 277]; Ford *v.* Arbuckle, 107 N. Y. App. Div. 221, 94 N. Y. Suppl. 1097; Moran *v.* Carlson, 95 N. Y. App. Div. 116, 88 N. Y. Suppl. 520; Thornton *v.* Hogan, 82 N. Y. App. Div. 500, 81 N. Y. Suppl. 544; Harrington *v.* Erie R. Co., 79 N. Y. App. Div. 26, 79 N. Y. Suppl. 930; Lauro *v.* Standard Oil Co., 74 N. Y. App. Div. 4, 76 N. Y. Suppl. 800; Anderson *v.* Boyer, 13 N. Y. App. Div. 258, 43 N. Y. Suppl. 87.

North Carolina.— Hopper *v.* Southern Express Co., 133 N. C. 375, 45 S. E. 771.

Pennsylvania.— Noll *v.* Philadelphia, etc., R. Co., 163 Pa. St. 504, 30 Atl. 157; Spisak *v.* Baltimore, etc., R. Co., 152 Pa. St. 281, 25 Atl. 497.

Tennessee.— Louisville, etc., R. Co. *v.* Martin, 113 Tenn. 266, 87 S. W. 418.

Texas.— San Antonio, etc., R. Co. *v.* Taylor, (Civ. App. 1896) 35 S. W. 855.

Vermont.— Hoadley *v.* International Paper Co., 72 Vt. 79, 47 Atl. 169; Sawyer *v.* Rutland, etc., R. Co., 27 Vt. 370.

Wisconsin.— Phillips *v.* Chicago, etc., R. Co., 64 Wis. 475, 25 N. W. 544.

United States.— The Elton, 131 Fed. 562; Rohinson *v.* Pittsburg Coal Co., 129 Fed. 324, 63 C. C. A. 258; The Gladestry, 128 Fed. 591, 63 C. C. A. 198 [*affirming* 124 Fed. 112]; The Victoria, 69 Fed. 160. *Compare* The Harold, 21 Fed. 428.

Canada.— St. John Gas Light Co. *v.* Hatfield, 23 Can. Sup. Ct. 164 [*affirming* 32 N. Brunsw. 100].

See 34 Cent. Dig. tit. "Master and Servant," § 480.

Servants of different contractors not fellow servants see Burrill *v.* Eddy, 160 Mass. 198, 35 N. E. 483; Eckman *v.* Lauer, 67 Minn. 221, 69 N. W. 893; Mills *v.* Thomas Elevator Co., 54 N. Y. App. Div. 124, 66 N. Y. Suppl. 398 [*affirmed* in 172 N. Y. 660, 65 N. E. 1119]; Reilly *v.* Atlas Iron Const. Co., 83 Hun (N. Y.) 196, 31 N. Y. Suppl. 618; Johnson *v.* Lindsay, [1891] A. C. 371, 55 J. P. 644, 61 L. J. Q. B. 90, 65 L. T. Rep. N. S. 97, 40 Wkly. Rep. 405 [*reversing* 23 Q. B. D. 508, 58 L. J. Q. B. 581, 61 L. T. Rep. N. S. 864, 38 Wkly. Rep. 119].

Under the Pennsylvania act of April 4, 1868, when any person not an employee of a railroad company shall sustain personal injury while lawfully employed on or about any of the trains or cars, the right of recovery against the company shall be only such as would exist if such person were an employee. Laporte *v.* Pittsburg, etc., R. Co., 209 Pa. St. 469, 58 Atl. 860; Peplinski *v.* Pennsylvania R. Co., 203 Pa. St. 52, 52 Atl. 32; Weaver *v.* Philadelphia, etc., R. Co., 202 Pa. St. 620, 52 Atl. 30. *Compare* Noll *v.* Philadelphia, etc., R. Co., 163 Pa. St. 504, 30

(B) *Servant of One Master Under Control of Another.* Where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as a servant of the man to whom he is lent, although he remains the general servant of the person who lent him; and, if the servant receives injuries in such employment, from the negligence of a servant of the person to whom he is lent, he cannot recover therefor.[44] The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired.[45]

(C) *Master and Contractor.* One exclusively in the employ and under the control of an independent contractor is not a fellow servant of the employees of

Atl. 157; Kelly *v.* Union Traction Co., 9 Pa. Dist. 69.

Lessees of a penitentiary are not responsible for an injury to a convict by the defective construction of a track made by a servant of the penitentiary commissioners having charge of the convicts. Cunningham *v.* Moore, 55 Tex. 373, 40 Am. Rep. 812.

44. *Illinois.*— Illinois Central R. Co. *v.* Cox, 21 Ill. 20, 71 Am. Dec. 298.

Massachusetts.— Delory *v.* Blodgett, 185 Mass. 126, 69 N. E. 1078, 102 Am. St. Rep. 328, 64 L. R. A. 114; Coughlan *v.* Cambridge, 166 Mass. 268, 44 N. E. 218; Morgan *v.* Smith, 159 Mass. 570, 35 N. E. 101; Hasty *v.* Sears, 157 Mass. 123, 31 N. E. 759, 34 Am. St. Rep. 267; Killea *v.* Faxon, 125 Mass. 485; Johnson *v.* Boston, 118 Mass. 114.

New Jersey.— Delaware, etc., R. Co. *v.* Hardy, 59 N. J. L. 35, 34 Atl. 986; Ewan *v.* Lippincott, 47 N. J. L. 192, 54 Am. Rep. 148.

New York.— Higgins *v.* Western Union Tel. Co., 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537; Breslin *v.* Sparks, 97 N. Y. App. Div. 69, 89 N. Y. Suppl. 627; Cunningham *v.* Syracuse Imp. Co., 20 N. Y. App. Div. 171, 46 N. Y. Suppl. 954; Rozelle *v.* Rose, 3 N. Y. App. Div. 132, 39 N. Y. Suppl. 363. See also Murray *v.* Dwight, 161 N. Y. 301, 55 N. E. 901, 48 L. R. A. 673 [*affirming* 15 N. Y. App. Div. 241, 44 N. Y. Suppl. 234].

Ohio.— McCafferty *v.* Dock Company, 11 Ohio Cir. Ct. 457, 5 Ohio Cir. Dec. 262.

Pennsylvania.— Johnson *v.* Western New York, etc., R. Co., 200 Pa. St. 314, 49 Atl. 794.

United States.—The Coleridge, 72 Fed. 676; The Harold, 21 Fed. 428.

England.— Johnson *v.* Lindsay, [1891] A. C. 371, 55 J. P. 644, 61 L. J. Q. B. 90, 65 L. T. Rep. N. S. 97, 40 Wkly. Rep. 405 [*reversing* 23 Q. B. D. 508, 58 L. J. Q. B. 581, 61 L. T. Rep. N. S. 864, 38 Wkly. Rep. 119; Donovan *v.* Laing, etc., Constr. Syndicate, [1893] 1 Q. B. 629, 57 J. P. 583, 63 L. J. Q. B. 25, 68 L. T. Rep. N. S. 512, 4 Reports 317, 4 Wkly. Rep. 455; Rourke *v.* White Moss Colliery Co., 2 C. P. D. 205, 46 L. J. C. P. 283, 36 L. T. Rep. N. S. 49, 25 Wkly. Rep. 263. See also Wiggett *v.* Fox, 11 Exch. 832, 2 Jur. N. S. 955, 25 L. J. Exch. 188, 4 Wkly. Rep. 254.

Canada.— Hastings *v.* Le Roi, 10 Brit. Col. 9.

See 34 Cent. Dig. tit. "Master and Servant," §§ 480–485.

The rule is thus expressed by Lord Watson in Johnson *v.* Lindsay, [1891] App. Cas. 371, 382, 55 J. P. 644, 61 L. J. Q. B. 90, 65 L. T. Rep. N. S. 97, 40 Wkly. Rep. 405: "I can well conceive that the general servant of A. might, by working towards a common end along with the servants of B. and submitting himself to the control and orders of B., become *pro hac vice* B.'s servant, in such sense as not only to disable him from recovering from B. for injuries sustained through the fault of B.'s proper servants, but to exclude the liability of A. for injury occasioned, by his fault, to B.'s own workmen."

A person who is temporarily employed while in the general service of another must be treated as to that particular employment as the servant of the person thus employing him, and the person who has the right to direct and control his conduct in that particular business must likewise be regarded as his master, for the existence of a general relation of master and servant does not exclude a like relation between the servant and a third party, to the extent of the special service in which the servant may be actually engaged. Breslin *v.* Sparks, 97 N. Y. App. Div. 69, 89 N. Y. Suppl. 627.

To establish the fact that the servant of one has transferred his services to another pro hac vice, it must appear that he has assented expressly or impliedly to such transfer. No one could transfer the services of his servant to another master without the servant's consent. It must further appear that the servant has in fact entered upon the service and submitted himself to the direction and control of the new master. His assent may be established by direct proof that he agreed to accept the new master and to submit himself to his control, or by indirect proof of circumstances justifying the inference of such assent. Delaware, etc., R. Co. *v.* Hardy, 59 N. J. L. 35, 34 Atl. 986.

45. Delory *v.* Blodgett, 185 Mass. 126, 69 N. E. 1078, 102 Am. St. Rep. 328, 64 L. R. A. 114; Coughlan *v.* Cambridge, 166 Mass. 268, 44 N. E. 218; Higgins *v.* Western Union Tel. Co., 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537; Rourke *v.* White Moss Colliery Co., 2 C. P. D. 205, 46 L. J. C. P. 283, 36 L. T. Rep. N. S. 49, 25 Wkly. Rep. 263; Hastings *v.* Le Roi, 10 Brit. Col. 9. See also

the principal, although they are engaged in a common work;[46] and the fact that the independent contractor instructs his foreman to obey the orders of the general superintendent of the principal does not make his employees and those of the latter fellow servants.[47] Where, however, the principal has control over the employees of the contractor and power to dismiss them, such employees become fellow servants with the employees of the principal.[48]

(D) *Traffic Arrangements Between Railroad Companies.* The fact that one railroad company uses the track and stations of another under contract between them does not as a rule make the employees of either company fellow servants with the employees of the other.[49]

Ward *v.* New England Fibre Co., 154 Mass. 419, 28 N. E. 299.

46. *Massachusetts.*— Reagan *v.* Casey, 160 Mass. 374, 36 N. E. 58; Ward *v.* New England Fibre Co., 154 Mass. 419, 28 N. E. 299.

Mississippi.— Louisville, etc., R. Co. *v.* Conroy, 63 Miss. 562, 56 Am. Rep. 835.

Nebraska.— Union Pac. R. Co. *v.* Billeter, 28 Nebr. 422, 44 N. W. 483.

New Jersey.— Norman *v.* Middlesex, etc., Traction Co., 71 N. J. L. 652, 60 Atl. 936.

New York.— Coughtry *v.* Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387; Young *v.* New York Cent. R. Co., 30 Barb. 229; Gerlach *v.* Edelmeyer, 47 N. Y. Super. Ct. 292; Krulder *v.* Woolverton, 11 Misc. 537, 32 N. Y. Suppl. 742 [*affirmed* in 152 N. Y. 638, 46 N. E. 1148]; Higgins *v.* Western Union Tel. Co., 8 Misc. 433, 28 N. Y. Suppl. 676 [*affirmed* in 11 Misc. 32, 31 N. Y. Suppl. 841].

Pennsylvania.— Coates *v.* Chapman, 195 Pa. St. 109, 45 Atl. 676; Hunt *v.* Pennsylvania R. Co., 51 Pa. St. 475.

Texas.— Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288; Galveston, etc., R. Co. *v.* Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939.

Vermont.— Hoadley *v.* International Paper Co., 72 Vt. 79, 47 Atl. 169; Sherman *v.* Delaware, etc., Canal Co., 71 Vt. 325, 45 Atl. 227.

England.— Turner *v.* Great Eastern R. Co., 33 L. T. Rep. N. S. 431.

Canada.— Delong *v.* Burrell-Johnson Iron Co., 25 N. Brunsw. 140.

See 34 Cent. Dig. tit. "Master and Servant," § 482.

A servant of a firm of stevedores under contract to unload a vessel is not a fellow servant of a winchman employed by the vessel. The Gladestry, 128 Fed. 591, 63 C. C. A. 198; The Slingsby, 120 Fed. 748, 57 C. C. A. 52; The Victoria, 69 Fed. 160; Union Steamship Co. *v.* Claridge, [1894] A. C. 185, 7 Aspin. 412, 58 J. P. 366, 63 L. J. P. C. 56, 70 L. T. Rep. N. S. 177, 6 Reports 434; Cameron *v.* Nystrom, [1893] A. C. 308, 7 Aspin. 320, 57 J. P. 550, 62 L. J. P. C. 85, 68 L. T. Rep. N. S. 772, 1 Reports 362.

An employee of a subcontractor and an employee of the original contractor are not fellow servants. Dale *v.* Hill-O'Meara Constr. Co., 108 Mo. App. 90, 82 S. W. 1092. The rights of a workman employed by a subcontractor in performing labor under a contract between a principal contactor and defendant for injuries caused by defendant's negligence are not affected by the provisions of a contract between the principal contractor and defendant in regard to accidents to workmen. Wagner *v.* Boston El. R. Co., 188 Mass. 437, 74 N. E. 919.

Contractor not employee of principal.— A contractor is not in any legal sense an employee of the person for whom he is working, and his employees do not stand in any such relation to the latter. Young *v.* New York Cent. R. Co., 30 Barb. (N. Y.) 229.

47. Coates *v.* Chapman, 195 Pa. St. 109, 45 Atl. 676. See also The Slingsby, 120 Fed. 748, 753, 57 C. C. A. 52, where it is said: "When . . . A., and not B., is the one who selects and retains the individual at the particular piece of work to which he is assigned, such individual does not become B.'s servant merely because the latter indirectly pays for his services and gives him his working orders."

48. *Massachusetts.*— Killea *v.* Faxon, 125 Mass. 485; Johnson *v.* Boston, 118 Mass. 114.

New Jersey.— Ewan *v.* Lippincott, 47 N. J. L. 192, 54 Am. Rep. 148.

Ohio.— McCafferty *v.* Dock Co., 11 Ohio Cir. Ct. 457, 5 Ohio Cir. Dec. 262.

Pennsylvania.— Reading Iron Works *v.* Devine, 109 Pa. St. 246.

England.— Wiggett *v.* Fox, 11 Exch. 832, 2 Jur. N. S. 955, 25 L. J. Exch. 188, 4 Wkly. Rep. 254.

See 34 Cent. Dig. tit. "Master and Servant," § 482.

Compare Illinois Cent. R. Co. *v.* Cox, 21 Ill. 20, 71 Am. Dec. 298.

49. *Connecticut.*— Zeigler *v.* Danbury, etc., R. Co., 52 Conn. 543, 2 Atl. 462.

Georgia.— Killian *v.* Augusta, etc., R. Co., 78 Ga. 749, 3 S. E. 621.

Illinois.— Chicago, etc., R. Co. *v.* O'Connor, 119 Ill. 586, 9 N. E. 263. But see Chicago, etc., R. Co. *v.* Clark, 2 Ill. App. 596 [*affirmed* in 92 Ill. 43], holding that where a railroad company leases the tracks of another company, the trains of the lessee being allowed to run over such track, subject to the control, rules, and orders of the lessor, the lessor will be regarded as the common master of the servants of the lessee while running its trains on the leased track, and the employees of the two companies are fellow servants.

Indiana.— Chicago Terminal Transfer R. Co. *v.* Vandenberg, 164 Ind. 470, 73 N. E. 990.

Kentucky.— Martin *v.* Louisville, etc., R. Co., 95 Ky. 612, 26 S. W. 801, 16 Ky. L. Rep. 150.

(III) *VOLUNTEERS.* One who, having no interest in the work, voluntarily assists the servant of another cannot recover from the master for an injury caused by the negligence or misconduct of such servant, since he can impose no greater duty on the master than a hired servant.[50]

(IV) *PERSONS ASSISTING MASTER'S SERVANTS AT THEIR REQUEST.* In some cases it has been held that where a person assists the servant of another at his request, and is injured by reason of the negligence of such servant or of another in the same common employment, he does not become a servant of the master, so as to relieve the latter from liability on the ground that his injuries were caused by the negligence of a fellow servant.[51] In other cases, however, it is held that the servant cannot by any act of his impose a higher liability on the master than the latter was under to himself, and that the person rendering assistance in the service of the master at the request of his servant can have no other

Maryland.— Philadelphia, etc., R. Co. *v.* State, 58 Md. 372.

Massachusetts.— Robertson *v.* Boston, etc., R. Co., 160 Mass. 191, 35 N. E. 775; Snow *v.* Housatonic R. Co., 8 Allen 441, 85 Am. Dec. 720.

Michigan.— See Kastl *v.* Wabash R. Co., 114 Mich. 53, 72 N. W. 28, holding that a switchman employed by a board composed of representatives of three railroads, and beyond the control of any one of the roads, and a car inspector employed by one of such roads, are not fellow servants, although they worked in the same yard, and were engaged in the common enterprise of handling business for the same road, and the inspector was subject to the board's yard regulations.

Missouri.— Erickson *v.* Kansas City, etc., R. Co., 171 Mo. 647, 71 S. W. 1022.

New York.— Sullivan *v.* Tioga R. Co., 112 N. Y. 643, 20 N. E. 569, 8 Am. St. Rep. 793 [*affirming* 44 Hun 304]; Smith *v.* New York, etc., R. Co., 19 N. Y. 127, 75 Am. Dec. 305 [*affirming* 6 Duer 225]; Hurl *v.* New York Cent., etc., R. Co., 68 N. Y. App. Div. 400, 73 N. Y. Suppl. 1042; Strader *v.* New York, etc., R. Co., 86 Hun 613, 33 N. Y. Suppl. 761 [*affirmed* in 157 N. Y. 708, 52 N. E. 1126]; Tierney *v.* Syracuse, etc., R. Co., 85 Hun 146, 32 N. Y. Suppl. 627 [*affirmed* in 155 N. Y. 642, 49 N. E. 1105]; Murphy *v.* New York Cent., etc., R. Co., 44 Hun 242 [*affirmed* in 118 N. Y. 527, 23 N. E. 812]; Noonan *v.* New York Cent., etc., R. Co., 16 N. Y. Suppl. 678 [*affirmed* in 131 N. Y. 594, 30 N. E. 67]; Gross *v.* Pennsylvania, etc., R. Co., 16 N. Y. Suppl. 616.

Pennsylvania.— Vannatta *v.* New Jersey Cent. R. Co., 154 Pa. St. 262, 26 Atl. 384, 35 Am. St. Rep. 823; Catawissa R. Co. *v.* Armstrong, 49 Pa. St. 186; Kelly *v.* Union Traction Co., 9 Pa. Dist. 69, construing the act of April 4, 1868.

Tennessee.— Louisville, etc., R. Co. *v.* Martin, 113 Tenn. 266, 87 S. W. 418.

Texas.— Galveston, etc., R. Co. *v.* Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486; Texas, etc., R. Co. *v.* Easton, 2 Tex. Civ. App. 378, 21 S. W. 575.

Vermont.— Sawyer *v.* Rutland, etc., R. Co., 27 Vt. 370.

Wisconsin.— Phillips *v.* Chicago, etc., R. Co., 64 Wis. 475, 25 N. W. 544.

United States.— Bosworth *v.* Rogers, 82 Fed. 975, 27 C. C. A. 385.

England.— Vose *v.* Lancashire, etc., R. Co., 2 H. & N. 728, 4 Jur. N. S. 364, 27 L. J. Exch. 249, 6 Wkly. Rep. 295.

See 34 Cent. Dig. tit. "Master and Servant," § 484.

A flagman of a railroad company whose tracks are used by other companies is not a fellow servant of the employees of such companies. Erickson *v.* Kansas City, etc., R. Co., 171 Mo. 647, 71 S. W. 1022. See also Louisville, etc., R. Co. *v.* Martin, 113 Tenn. 266, 87 S. W. 418. But see Mills *v.* Orange, etc., R. Co., 2 MacArthur (D. C.) 314.

Servants of connecting railroads not fellow servants see Vannatta *v.* New Jersey Cent. R. Co., 154 Pa. St. 262, 26 Atl. 384, 35 Am. St. Rep. 823.

An employee of a terminal company, and employees of a railroad company, operating in the same switch yard, are not fellow servants. Northern Pac. R. Co. *v.* Craft, 69 Fed. 124, 16 C. C. A. 175.

Under Act Cong. June 5, 1900, c. 718 (31 St. 270), authorizing certain street railway companies to contract with each other for the use of their respective routes, the use of each other's tracks under contract will be held as an adoption by such companies of the appliances of each other for running their cars, so far as is necessary for such use; and for that use the employees of the one became the employees of the other, and all the employees became the fellow servants of each other, so that one of such employees cannot recover for injuries resulting from the negligence of another. Looney *v.* Metropolitan R. Co., 24 App. Cas. (D. C.) 510.

50. Osborne *v.* Knox, etc., R. Co., 68 Me. 49, 28 Am. Rep. 16; Bonner *v.* Bryant, 79 Tex. 540, 15 S. W. 491, 23 Am. St. Rep. 361; Eason *v.* Sabine, etc., R. Co., 65 Tex. 577, 57 Am. Rep. 606; Mayton *v.* Texas, etc., R. Co., 63 Tex. 77, 51 Am. Rep. 637; Degg *v.* Midland R. Co., 1 H. & N. 773, 3 Jur. N. S. 395, 26 L. J. Exch. 171, 5 Wkly. Rep. 364. See also Wischam *v.* Richards, 136 Pa. St. 109, 20 Atl. 532, 20 Am. St. Rep. 900, 10 L. R. A. 97.

51. Chicago, etc., R. Co. *v.* West, 125 Ill. 320, 17 N. E. 788, 8 Am. St. Rep. 380; McIntire R. Co. *v.* Bolton, 43 Ohio St. 224, 1

or different remedy against the master than the servant himself had. His position is that of a volunteer;[52] but viewing him as an employer, at the request of the servant, the relation itself would destroy his right of action.[53]

(v) *PERSON ACTING IN PLACE OF SERVANT.* Where one servant acts in the place of, or as a substitute for, another, he stands in the same relation to the other servants of the master as the servant in whose place he is acting — if the latter is a fellow servant, he is a fellow servant,[54] and *vice versa*.[55] So too a substitute hired by an employee stands in the employee's place, with all of its responsibilities and liabilities, so far as the master is concerned, and a fellow servant of the employee is a fellow servant of the substitute, although no contractual relation exists between the substitute and the master, and the employee is alone responsible for the substitute's wages.[56]

(vi) *SCOPE OF EMPLOYMENT.* Where servants are engaged in the same common employment, the fact that one of them is acting outside of the line of his regular duties at the time of the negligence complained of will not affect the master's liability.[57] But the negligence of a fellow servant in omitting to perform

N. E. 333; Bonner *v.* Bryant, 1 Tex. Civ. App. 269, 21 S. W. 549. See also New Orleans, etc., R. Co. *v.* Harrison, 48 Miss. 112, 12 Am. Rep. 356.

52. Rhodes *v.* Georgia R., etc., Co., 84 Ga. 320, 10 S. E. 922, 20 Am. St. Rep. 362; Wischam *v.* Richards, 136 Pa. St. 109, 20 Atl. 532, 20 Am. St. Rep. 900, 10 L. R. A. 97; Flower *v.* Pennsylvania R. Co., 69 Pa. St. 210, 8 Am. Rep. 251; Wiggett *v.* Fox, 11 Exch. 832, 2 Jur. N. S. 955, 25 L. J. Exch. 188, 4 Wkly. Rep. 254; Abraham *v.* Reynolds, 5 H. & N. 143, 6 Jur. N. S. 53, 1 L. T. Rep. N. S. 330, 8 Wkly. Rep. 181.

53. Flower *v.* Pennsylvania R. Co., 69 Pa. St. 210, 8 Am. Rep. 251 [*citing* Weger *v.* Pennsylvania R. Co., 55 Pa. St. 460; Cumberland Valley R. Co. *v.* Myers, 55 Pa. St. 288; Caldwell *v.* Brown, 53 Pa. St. 453]. See also Marks *v.* Rochester R. Co., 41 N. Y. App. Div. 66, 58 N. Y. Suppl. 210, in which the rule was applied to a boy about twelve years of age of whom the driver of a street car requested assistance.

54. Rodman *v.* Michigan Cent. R. Co., 55 Mich. 57, 20 N. W. 788, 54 Am. Rep. 348; Anderson *v.* Guineau, 9 Wash. 304, 37 Pac. 449; Saunders *v.* The Coleridge, 72 Fed. 676.

55. Louisville, etc., R. Co. *v.* Moore, 83 Ky. 675, holding that a railroad company is liable for injuries to a brakeman, caused by the gross negligence of a fireman, acting according to the custom of the road as engineer, while switching the train, the brakeman not being his coequal while so employed.

56. Anderson *v.* Guineau, 9 Wash. 304, 37 Pac. 449.

57. *Illinois.*— Mercer *v.* Jackson, 54 Ill. 397, holding that the owner of a building is not liable to a mason employed by him for injuries occasioned by the defective construction of a ladder by a carpenter, also employed by him, it being no part of the carpenter's employment to make ladders for the use of other workmen than himself. But see Cleveland, etc., R. Co. *v.* Surrells, 115 Ill. App. 615, where it was held that the general fellow servant rule does not apply where a servant is ordered to do work outside of his regular employment.

Indiana.— Wilson *v.* Madison, etc., R. Co., 18 Ind. 226 (one engaged in coupling an engine to a car is a fellow servant with the engineer, although his employment imposes on him the performance of various other duties); McBride *v.* Indianapolis Frog, etc., Co., 5 Ind. App. 482, 32 N. E. 579 (traveling salesman whose duties, when not traveling, were to do such work at defendant's shops as was directed by the superintendent, held a fellow servant of a blacksmith, whom he was assisting at the time of the latter's injury).

Michigan.— See Kehoe *v.* Allen, 92 Mich. 464, 52 N. W. 740, 31 Am. St. Rep. 608, in which, however, it was said that the injured servant "was in the line of his employment."

Mississippi.— Millsaps *v.* Louisville, etc., R. Co., 69 Miss. 423, 13 So. 696, holding that one working as a fireman on a locomotive, with the permission of the railroad company, for the purpose of learning the business, is a fellow servant of a train despatcher.

Missouri.— See Pettigrew *v.* St. Louis Ore, etc., Co., 14 Mo. App. 441.

New York.— Beatty *v.* Hessman, 2 N. Y. City Ct. 10.

Pennsylvania.— McGrath *v.* Coal Co., 4 Lanc. L. Rev. 281.

Tennessee.— Knox *v.* Pioneer Coal Co., 90 Tenn. 546, 18 S. W. 255, in which plaintiff, at the request of another servant, left the place where he was at work to assist the fellow servant in propping the mine, and while so engaged was injured by falling slate. It was not his duty to prop the mine, and his fellow servant had no authority over him. It was held that he could not recover.

Texas.— Southern Cotton-Oil Co. *v.* De Vond, (Civ. App. 1894) 25 S. W. 43.

See 34 Cent. Dig. tit. "Master and Servant," § 382.

Temporary assignment to new duties.— Where an employee, engaged for a particular service, is temporarily assigned to new and different duties, with the intention that he shall resume his former duties as soon as the new service is performed, his new associates

some act will not relieve the master of liability for an injury to an employee caused thereby, unless it was especially made the duty of the fellow servant to perform the act, although he may have been in the habit of sometimes performing it voluntarily, and without special instructions.[58]

(VII) *SERVANT NOT ON DUTY*—(A) *In General.* As a general rule a servant not on duty is not a fellow servant of those engaged in the same common employment, so as to relieve the master from liability to him for injuries resulting from their negligence.[59] It has been held, however, that where the servant of a railroad company, when not on duty, occupies a building or car furnished by the company, his relation to the other employees of the company is not changed by reason of the fact that he was not actually on duty when injured.[60]

(B) *Going To and From Work.* In a number of cases servants on their way to and from work have been held, although not actually on duty, to be fellow servants of other employees of the master engaged in the same common employment so as to relieve him of liability for injuries received by them through the negligence of such other employees.[61] This rule has been most frequently applied in the case of servants riding to and from work on the master's trains or other conveyances;[62] but other cases hold that an employee in such a situation is not a fellow servant of other employees of the master so as to exonerate him from lia-

become fellow servants for the time being. McGrath *v.* Coal Co., 4 Lanc. L. Rev. (Pa.) 281.

Act in disobedience of orders.— If the owner of a mine has negligently allowed fire damp to accumulate, and it is ignited by a servant who goes into it with a lighted lamp, instead of a safety lamp, contrary to the owner's orders, and another servant is injured by an explosion, the latter has no remedy against the master. Berns *v.* Gaston Gas Coal Co., 27 W. Va. 285, 55 Am. Rep. 304.

58. Gates *v.* Chicago, etc., R. Co., 2 S. D. 422, 50 N. W. 907.

59. *Connecticut.*— Sullivan *v.* New York, etc., R. Co., 73 Conn. 203, 47 Atl. 131.

Maryland.— Baltimore, etc., R. Co. *v.* State, 33 Md. 542.

Massachusetts.— Dickinson *v.* West End St. R. Co., 177 Mass. 365, 59 N. E. 60, 83 Am. St. Rep. 284, 52 L. R. A. 326.

Ohio.— Columbus, etc., R. Co. *v.* O'Brien, 4 Ohio Cir. Ct. 515, 2 Ohio Cir. Dec. 681.

Pennsylvania.— Baird *v.* Pettit, 70 Pa. St. 477.

Tennessee.— Washburn *v.* Nashville, etc., R. Co., 3 Head 638, 75 Am. Dec. 784.

United States.— Fletcher *v.* Baltimore, etc., R. Co., 168 U. S. 135, 18 S. Ct. 35, 42 L. ed. 411 [*reversing* 6 App. Cas. (D. C.) 385]; Orman *v.* Salvo, 117 Fed. 233, 54 C. C. A. 265; The Titan, 23 Fed. 413, 23 Blatchf. 177. But *compare* Disbon *v.* Cincinnati, etc., R. Co., 126 Fed. 194.

See 34 Cent. Dig. tit. "Master and Servant," § 383.

60. International, etc., R. Co. *v.* Ryan, 82 Tex. 565, 18 S. W. 219; St. Louis, etc., R. Co. *v.* Welch, 72 Tex. 298, 10 S. W. 529, 2 L. R. A. 839 (in which the servant, under his contract, was subject to be called out for duty at any moment); Disbon *v.* Cincinnati, etc., R. Co., 126 Fed. 194.

61. A laborer walking on a railroad track to his work and an engineer operating an engine on the track are fellow servants and the former cannot recover from the company for injuries caused by the negligence of the latter. Mele *v.* Delaware, etc., Canal Co., 59 N. Y. Super. Ct. 367, 14 N. Y. Suppl. 630. See also Ewald *v.* Chicago, etc., R. Co., 70 Wis. 420, 36 N. W. 12, 591, 5 Am. St. Rep. 178, in which an engine wiper, while crossing a track in defendant's yards on his way to work, was caught between some cars by the negligence of trainmen, and it was held that he could not recover.

62. *Arizona.*— Southern Pac. Co. *v.* McGill, 5 Ariz. 36, 44 Pac. 302.

Georgia.— Railey *v.* Garbutt, 112 Ga. 288, 37 S. E. 360; Ellington *v.* Beaver Dam Lumber Co., 93 Ga. 53, 19 S. E. 21. But see Central R. Co. *v.* Henderson, 69 Ga. 715.

Indiana.— Baltimore, etc., R. Co. *v.* Clapp, 35 Ind. App. 403, 74 N. E. 267; Indianapolis, etc., Rapid Transit Co. *v.* Andis, 33 Ind. App. 625, 72 N. E. 145.

Kansas.— Kansas Pac. R. Co. *v.* Salmon, 11 Kan. 83.

Massachusetts.— McQuirk *v.* Shattuck, 160 Mass. 45, 35 N. E. 110, 39 Am. St. Rep. 454 (laundress driving to work held fellow servant of driver); O'Brien *v.* Boston, etc., R. Co., 138 Mass. 387, 52 Am. Rep. 279; Gilman *v.* Eastern R. Corp., 10 Allen 233, 87 Am. Dec. 635; Seaver *v.* Boston, etc., R. Co., 14 Gray 466; Gillshannon *v.* Stony Brook R. Corp., 10 Cush. 228.

Michigan.— See Noe *v.* Rapid R. Co., 133 Mich. 152, 94 N. W. 743.

Minnesota.— See Benson *v.* Chicago, etc., R. Co., 78 Minn. 303, 80 N. W. 1050, construing Wis. Laws (1893), c. 220, and holding that co-employees who were riding from their work on hand-cars, furnished by the company at their request, were not, at the time of a collision between such cars, "engaged in the discharge of their duties as such," within the statute, so as to render the company liable.

bility for their negligence.[63] This latter view is in most instances based upon the different department limitation of the fellow servant rule, as recognized in a number of jurisdictions.[64]

4. Application, Extent, and Limitation of Doctrine — a. When Unaffected by Statute — (i) *In General* — (a) *Application to Minors.* The fact that the servant who sustained the injuries which constitute the ground of complaint is a minor will not prevent the application of the fellow servant doctrine,[65] if he has

New York.— Vick *v.* New York Cent., etc., R. Co., 95 N. Y. 267, 47 Am. Rep. 36; Russell *v.* Hudson River R. Co., 17 N. Y. 134 [*reversing* 5 Duer 39]; McLaughlin *v.* Interurban St. R. Co., 101 N. Y. App. Div. 134, 91 N. Y. Suppl. 883, street-car conductor riding on car during temporary suspension of duty due to illness. *Compare* West *v.* New York Cent., etc., R. Co., 17 N. Y. App. Div. 116, 45 N. Y. Suppl. 93. But see McGucken *v.* Western New York, etc., R. Co., 77 Hun 69, 28 N. Y. Suppl. 298, holding that a railroad employee who is ordered to go to a certain point, and travels thither on an employee's pass, is, during the trip, a passenger.

Ohio.— Manville *v.* Cleveland, etc., R. Co., 11 Ohio St. 417. But *compare* Lake Shore, etc., R. Co. *v.* Mau, 9 Ohio Cir. Ct. 173, 4 Ohio Cir. Dec. 5.

West Virginia.— Sanderson *v.* Panther Lumber Co., 50 W. Va. 42, 40 S. E. 368, 88 Am. St. Rep. 841, 55 L. R. A. 908, holding that a foreman of a lumber camp whose duty required him in the interest of the master to ride on a log train to and from the camp to the mill was a fellow servant with the operatives of the train. But see Haney *v.* Pittsburg, etc., R. Co., 38 W. Va. 570, 18 S. E. 748, holding that neither a conductor nor a signal operator is a fellow servant of a section hand going to work on a train.

United States.— Martin *v.* Atchison, etc., R. Co., 166 U. S. 399, 17 S. Ct. 603, 41 L. ed. 1051; Louisville, etc., R. Co. *v.* Stuber, 108 Fed. 934, 48 C. C. A. 149, 54 L. R. A. 696 [*reversing* 102 Fed. 421].

England.— Tunney *v.* Midland R. Co., L. R. 1 C. P. 291, 12 Jur. N. S. 691.

Canada.— Carney *v.* Caraquet R. Co., 29 N. Brunsw. 425; McFarlane *v.* Gilmour, 5 Ont. 302.

See 34 Cent. Dig. tit. "Master and Servant," § 384.

Servant riding on private business.— Mo. Rev. St. (1855) p. 647, § 2, cl. 2, giving damages for the death of a passenger on a railroad caused by an injury resulting from a defect therein, applies only to those who stand strictly in the relation of passengers; and a person who has been employed on a railroad and whose employment has not ceased, but who is temporarily out of work, is not necessarily a passenger when he rides in the baggage car on a private errand of his own and pays no fare, and is regarded by all parties as an employee. Higgins *v.* Hannibal, etc., R. Co., 36 Mo. 418. See also Davis *v.* Chicago, etc., R. Co., 45 Fed. 543, in which deceased and other employees of the railroad had borrowed a car and engine for their own purposes, and it was held that the relation of carrier and passenger did not exist.

63. *Illinois.*— Illinois Cent. R. Co. *v.* Leiner, 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 226 [*affirming* 103 Ill. App. 438]; Toledo, etc., R. Co. *v.* O'Connor, 77 Ill. 391.

Indiana.— Gillenwater *v.* Madison, etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101.

Oregon.— Knahtla *v.* Oregon Short Line R. Co., 21 Oreg. 136, 27 Pac. 91.

Pennsylvania.— McNulty *v.* Pennsylvania R. Co., 182 Pa. St. 479, 38 Atl. 524, 61 Am. St. Rep. 721, 38 L. R. A. 376; O'Donnell *v.* Allegheny Valley R. Co., 59 Pa. St. 239, 98 Am. Dec. 336.

Texas.— Galveston, etc., R. Co. *v.* Crawford, 9 Tex. Civ. App. 245, 27 S. W. 822, 29 S. W. 958.

Washington.— Peterson *v.* Seattle Traction Co., 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586.

See 34 Cent. Dig. tit. "Master and Servant," § 384.

Servant traveling to visit family not fellow servant of other employees see State *v.* Western Maryland R. Co., 63 Md. 433.

64. Servants in different departments of business see *infra*, IV, G, 4, a, (VIII).

65. *Alabama.*—Woodward Iron Co. *v.* Cook, 124 Md. 349, 27 So. 455; Harris *v.* McNamara, 97 Ala. 181, 12 So. 103; Lovell *v.* De Bardelaben Coal, etc., Co., 90 Ala. 13, 7 So. 756.

California.— Fisk *v.* Central Pac. R. Co., 72 Cal. 38, 13 Pac. 144, 1 Am. St. Rep. 22.

Illinois.— Hinckley *v.* Horazdowsky, 133 Ill. 359, 24 N. E. 421, 23 Am. St. Rep. 618, 8 L. R. A. 490; Gartland *v.* Toledo, etc., R. Co., 67 Ill. 498; North Chicago Rolling Mills Co. *v.* Benson, 18 Ill. App. 194.

Indiana.— Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 151, 5 N. E. 187; Chicago, etc., R. Co. *v.* Harney, 28 Ind. 28, 92 Am. Dec. 282.

Massachusetts.— Curran *v.* Merchants' Mfg. Co., 130 Mass. 374, 39 Am. Rep. 457; King *v.* Boston, etc., R. Corp., 9 Cush. 112.

Michigan.— Greenwald *v.* Marquette, etc., R. Co., 49 Mich. 197, 13 N. W. 513.

New York.— Brown *v.* Maxwell, 6 Hill 592, 41 Am. Dec. 771.

Texas.— Texas, etc., R. Co. *v.* Carlton, 60 Tex. 397; Houston, etc., R. Co. *v.* Miller, 51 Tex. 270.

See 34 Cent. Dig. tit. "Master and Servant," § 319.

sufficient capacity to take care of himself and knows and can properly appreciate the risk.[66]

(B) *Application to Persons Compelled to Serve.* The fellow servant doctrine does not apply to persons in compulsory service.[67]

(C) *Application to Corporations.* The rule that a master is not liable to a servant for injuries caused by the negligence of a fellow servant, where the master himself is not at fault, is applicable to corporations as well as to individuals employing servants.[68]

(D) *Unlawful Employment or Services.* The rule that a master is not liable for an injury caused to his servant by a fellow servant is in no way affected by the fact that both servants at the time of the accident were illegally employed, the day being Sunday.[69] On the other hand, an action by a railway employee for injuries received from being struck by a train running at a prohibited rate of speed will not be defeated because the train was in charge of co-employees, where they were running the train pursuant to a time card prepared and promulgated by the company.[70]

(E) *What Law Governs.* In an action for negligence resulting in injuries to a servant the application of the rule as to fellow servants depends on the law of the place where the cause of action arose, and not on the *lex fori*,[71] provided,

66. Hinckley *v.* Horazdowsky, 133 Ill. 359, 24 N. E. 421, 23 Am. St. Rep. 618, 8 L. R. A. 490. And see Hamilton *v.* Galveston, etc., R. Co., 54 Tex. 556; Evans *v.* American Iron, etc., Co., 42 Fed. 519.

67. *Alabama.* — Buckalew *v.* Tennessee Coal, etc., Co., 112 Ala. 146, 20 So. 606, convicts.

Georgia.— Boswell *v.* Barnhart, 96 Ga. 521, 23 S. E. 414, convicts.

Louisiana.— Howes *v.* Red Chief, 15 La. Ann. 321, slaves.

South Carolina.— White *v.* Smith, 12 Rich. 595, slaves.

England.— Smith *v.* Steele, L. R. 10 Q. B. 125, 2 Aspin. 487, 44 L. J. Q. B. 60, 32 L. T. Rep. N. S. 195, 23 Wkly. Rep. 388, pilot employed under English Merchants Shipping Act.

See 34 Cent. Dig. tit. "Master and Servant," §§ 320, 321.

But see Ponton *v.* Wilmington, etc., R. Co., 51 N. C. 245, holding that the rule is applicable to the case of a hired slave injured by the negligence of a foreman in the employ of the same master.

68. *Indiana.* — Madison, etc., R. Co. *v.* Bacon, 6 Ind. 205.

Kansas.— Kansas Pac. R. Co. *v.* Salmon, 11 Kan. 83.

Michigan.—Michigan Cent. R. Co. *v.* Dolan, 32 Mich. 510.

Mississippi.— New Orleans, etc., R. Co. *v.* Hughes, 49 Miss. 258.

Ohio.— Pittsburgh, etc., R. Co. *v.* Lewis, 33 Ohio St. 196.

South Carolina.— Murray *v.* South Carolina R. Co., 1 McMull. 385, 36 Am. Dec. 268.

Texas.— Dallas *v.* Gulf, etc., R. Co., 61 Tex. 196.

Vermont.— Hard *v.* Vermont, etc., R. Co., 32 Vt. 473.

United States.— Gravelle *v.* Minneapolis, etc., R. Co., 10 Fed. 711, 3 McCrary 352.

See 34 Cent. Dig. tit. "Master and Servant," § 322.

Municipal corporations see McDermott *v.* Boston, 133 Mass. 349. But see Turner *v.* Indianapolis, 96 Ind. 51.

69. Houston, etc., R. Co. *v.* Rider, 62 Tex. 267.

70. Bluedorn *v.* Missouri Pac. R. Co., 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615.

71. *Alabama.*— Alabama Great Southern R. Co. *v.* Carroll, 97 Ala. 126, 11 So. 803, 38 Am. St. Rep. 163, 18 L. R. A. 433.

Illinois.— Chicago, etc., R. Co. *v.* Tuite, 44 Ill. App. 535.

Kansas.— Atchison, etc., R. Co. *v.* Moore, 29 Kan. 632.

Massachusetts.— Walsh *v.* New York, etc., R. Co., 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514.

Minnesota.— Njus *v.* Chicago, etc., R. Co., 47 Minn. 92, 49 N. W. 527; Herrick *v.* Minneapolis, etc., R. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771 [*affirmed* in 127 U. S. 210, 8 S. Ct. 1176, 32 L. ed. 109].

Mississippi.— McMaster *v.* Illinois Cent. R. Co., 65 Miss. 264, 4 So. 59, 7 Am. St. Rep. 653.

Ohio.— Alexander *v.* Pennsylvania Co., 48 Ohio St. 623, 30 N. E. 69.

Tennessee.—Nashville, etc., R. Co. *v.* Foster, 10 Lea 351.

Wisconsin.— A distinction is made between rights of action arising at common law and those arising under the statute law of the *locus delicti*, and it is held that where a right of action has vested under the common law of the *locus delicti*, it will be enforced (Eingartner *v.* Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503), but that where the right of action is given by the statute law of another state, it will not be enforced in Wisconsin (Anderson *v.* Milwaukee, etc., R. Co., 37 Wis. 321).

United States.— Minneapolis, etc., R. Co. *v.* Herrick, 127 U. S. 210, 8 S. Ct. 1176, 32

however, that such law does not conflict with the public policy of the latter state.[72]

(II) *As Dependent Upon Number and Supervision of Servants* — (A) *In General.* A master may himself superintend the work at which his servants are engaged, and need not employ a competent superintendent, if he is himself competent to oversee and direct the work, having regard for the safety of his employees.[73]

(B) *Duty to Employ Sufficient Force* — (1) In General. The obligation of a master to furnish reasonably safe instrumentalities for the performance of his work[74] embraces the obligation to provide a sufficient number of servants to perform the work safely, and the fellow servant doctrine cannot be invoked to defeat a recovery for injuries due to his neglect of such duty,[75] unless the injured servant might, by the exercise of ordinary care, have known the danger of undertaking the work with the force furnished.[76]

(2) Usual and Customary Number. It is the duty of a master to furnish such number of competent servants as is usual and customary in his business,[77] and where he does this he cannot as a rule be charged with negligence.[78]

L. ed. 109 [*affirming* 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771]; Boston, etc., R. Co. *v.* McDuffey, 79 Fed. 934, 25 C. C. A. 247. See also Mexican Cent. R. Co. *v.* Sprague, 114 Fed. 544, 52 C. C. A. 318; Mexican Cent. R. Co. *v.* Knox, 114 Fed. 73, 52 C. C. A. 21.

See 34 Cent. Dig. tit. "Master and Servant," § 326.

72. See Walsh *v.* New York, etc., R. Co., 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514; Herrick *v.* Minneapolis, etc., R. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. St. Rep. 771 [*affirmed* in 127 U. S. 210, 8 S. Ct. 1176, 32 L. ed. 109].

73. Haworth *v.* Seevers Mfg. Co., 87 Iowa 765, 51 N. W. 68, 62 N. W. 325.

74. See *supra*, IV, B.

75. *Georgia.*— Ocean Steamship Co. *v.* Cheeney, 95 Ga. 381, 22 S. E. 544 [*affirming* 92 Ga. 726, 19 S. E. 33, 44 Am. St. Rep. 113].

Illinois.— Supple *v.* Agnew, 191 Ill. 439, 61 N. E. 392 [*reversing* 80 Ill. App. 437]. *Compare* Chicago, etc., R. Co. *v.* Donahue, 75 Ill. 106.

Kentucky.— Louisville, etc., R. Co. *v.* Semones, 51 S. W. 612, 21 Ky. L. Rep. 444.

Louisiana.— Evans *v.* Louisiana Lumber Co., 111 La. 534, 35 So. 736; Hill *v.* Big Creek Lumber Co., 108 La. 162, 32 So. 372.

Minnesota.— Peterson *v.* American Grass Twine Co., 90 Minn. 343, 96 N. W. 913.

Missouri.— McMullen *v.* Missouri, etc., R. Co., 60 Mo. App. 231; Craig *v.* Chicago, etc., R. Co., 54 Mo. App. 523.

New Hampshire.— Hilton *v.* Fitchburg R. Co., 73 N. H. 116, 59 Atl. 625, 68 L. R. A. 428.

New York.— Flike *v.* Boston, etc., R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Graham *v.* Chapman, 11 N. Y. Suppl. 318. *Compare* Riordan *v.* Ocean Steamship Co., 124 N. Y. 655, 26 N. E. 1027 [*affirming* 11 N. Y. Suppl. 56].

North Carolina.— Means *v.* Carolina Cent. R. Co., 126 N. C. 424, 35 S. E. 813.

Texas.— Bonn *v.* Galveston, etc., R. Co., (Civ. App. 1904) 82 S. W. 808; San Antonio Traction Co. *v.* De Rodriguez, (Civ. App. 1903) 77 S. W. 420.

Wisconsin.— Johnson *v.* Ashland Water Co., 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243.

United States.— Western Coal, etc., Co. *v.* Ingraham, 70 Fed. 219, 17 C. C. A. 71; Shumacher *v.* St. Louis, etc., R. Co., 39 Fed. 174; Mason *v.* Edison Mach. Works, 28 Fed. 228.

See 34 Cent. Dig. tit. "Master and Servant," § 328.

Compare Colorado Cent. R. Co. *v.* Martin, 7 Colo. 592, 4 Pac. 1116; Craven *v.* Mayers, 165 Mass. 271, 42 N. E. 1131; Scanlon *v.* Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 256.

Failure to keep a watchman at a switch is not necessarily negligence in a railroad company. Sellars *v.* Richmond, etc., R. Co., 94 N. C. 654.

Mining boss.— The Pennsylvania act of June 30, 1885, does not necessitate the employment of a mining boss, for each of several drifts or openings, which are in the same property, and the coal from which is taken over one set of scales, and loaded on cars at the same chutes. Serfass *v.* Dreisbach, 2 Pa. Dist. 56.

76. See Louisville, etc., R. Co. *v.* Semones, 51 S. W. 612, 21 Ky. L. Rep. 444. And see *supra*, IV, F, 4, b, (I), (B), (2).

77. Columbus, etc., R. Co. *v.* Celley, 1 Ohio Cir. Ct. 267, 1 Ohio Cir. Dec. 146; Gulf, etc., R. Co. *v.* Harriett, 80 Tex. 73, 15 S. W. 556.

78. Relyea *v.* Kansas City, etc., R. Co., 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817.

All that is required of a railroad company is that it construct and "equip its side tracks and cars, and station its agents, in the manner usual with well-managed railroads, and as good railroading required." Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 34 N. W. 659. *Compare* East Tennessee, etc., R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315, where it was held that testimony as to the customs or usages of railroads, without reference to whether they are wisely or badly

(3) Absence or Failure to Appear. Where a master has furnished a sufficient number of servants, the absence of one of them from his post of duty without the master's knowledge and consent will not render him liable for injuries caused by reason of such absence,[79] unless the servant who absents himself occupies the position of a vice-principal.[80] But the mere fact that the master has hired the necessary number of servants will not relieve him from liability where, upon the failure of a part of them to appear, he undertakes the work with an insufficient number.[81]

(c) *Supervision and Direction.* It is the duty of a master, either himself or through a vice-principal, to exercise such general supervision and direction over his servants as will render the conduct of his business reasonably safe to his employees.[82] The rule, however, does not require the protection of employees from the negligence of a fellow servant, or extend to obvious dangers.[83]

(d) *Proximate Cause of Injury.* In order to prevent the application of the fellow servant doctrine, and to hold the master liable for injuries alleged to have been caused by reason of the absence of a sufficient number of servants, or through the master's failure to exercise a proper supervision and direction over them, the master's negligence must have been the proximate cause of the injury.[84]

(iii) *Competency of Servants*[85] — (a) *Rule Stated.* The master is bound to the exercise of due care and diligence in the selection and employment of his servants, and if a servant sustains injuries through the incompetence of a fellow

managed, or to their particular location or surroundings, or to peculiar circumstances which in any given instance would tend to illustrate the diligence or negligence of a company in guarding or failing to guard its switches, was inadmissible.

Guarding uncovered trenches.— Evidence of what is usually done at other places, and under different circumstances, as to guarding uncovered trenches, is properly excluded in an action for injuries caused by defendant's negligence in failing to place a watchman at an uncovered trench in which plaintiff was working. Craven *v.* Mayers, 165 Mass. 271, 42 N. E. 1131.

79. Cheeney *v.* Ocean Steamship Co., 92 Ga. 726, 19 S. E. 33, 44 Am. St. Rep. 113; Potter *v.* New York Cent., etc., R. Co., 136 N. Y. 77, 32 N. E. 603; Reickel *v.* New York Cent., etc., R. Co., 130 N. Y. 682, 29 N. E. 763; National Tube Works *v.* Bedell, 96 Pa. St. 175; Parker *v.* New York, etc., R. Co., 18 R. I. 773, 30 Atl. 849.

Absence due to fault of master.— A railroad company is liable for the death of a servant, caused by the absence from a train, for the purpose of getting something to eat, of part of a train crew, who were required to remain on duty nineteen hours without any way of getting meals, although decedent was a fellow servant. Pennsylvania Co. *v.* McCaffery, 139 Ind. 430, 38 N. E. 67, 29 L. R. A. 104.

80. Gerrish *v.* New Haven Ice Co., 63 Conn. 9, 27 Atl. 235; McElligott *v.* Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181.

81. Flike *v.* Boston, etc., R. Co., 53 N. Y. 549, 13 Am. Rep. 545.

82. *Arkansas.*— Bloyd *v.* St. Louis, etc., R. Co., 58 Ark. 66, 22 S. W. 1089, 41 Am. St. Rep. 85.

Connecticut.— Gerrish *v.* New Haven Ice Co., 63 Conn. 9, 27 Atl. 235.

Louisiana.— Evans *v.* Louisiana Lumber Co., 111 La. 534, 35 So. 736; Hill *v.* Big Creek Lumber Co., 108 La. 162, 32 So. 372, 58 L. R. A. 346.

Massachusetts.— Sweat *v.* Boston, etc., R. Co., 156 Mass. 284, 31 N. E. 296.

New York.— Warn *v.* New York Cent., etc., R. Co., 80 Hun 71, 29 N. Y. Suppl. 897; Besel *v.* New York Cent., etc., R. Co., 9 Hun 457 [*reversed* on other grounds in 70 N. Y. 171]; Stewart *v.* New York, etc., R. Co., 5 Silv. Sup. 198, 8 N. Y. Suppl. 19 [*affirmed* in 126 N. Y. 631, 27 N. E. 410]; Koosorowska *v.* Glasser, 8 N. Y. Suppl. 197.

Virginia.— Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827.

United States.— Baltimore, etc. R. Co. *v.* Henthorne, 73 Fed. 634, 19 C. C. A. 623; Keiley *v.* The Allianca, 44 Fed. 97; Au *v.* New York, etc., R. Co., 29 Fed. 72.

See 34 Cent. Dig. tit. "Master and Servant," § 331.

83. Dixon *v.* Union Ironworks, 90 Minn. 492, 97 N. W. 375. See also Hilton, etc., Lumber Co. *v.* Ingram, 119 Ga. 652, 46 S. E. 895, 100 Am. St. Rep. 204; Timm *v.* Michigan Cent. R. Co., 98 Mich. 226, 57 N. W. 116; Malone *v.* Hathaway, 64 N. Y. 5, 21 Am. Rep. 573 [*reversing* 6 Thomps. & C. 1].

84. Henry *v.* Staten Island R. Co., 81 N. Y. 373; Harvey *v.* New York Cent., etc., R. Co., 57 Hun (N. Y.) 589, 10 N. Y. Suppl. 645; Piper *v.* New York Cent., etc., R. Co., 1 Thomps. & C. (N. Y.) 290 [*affirmed* in 56 N. Y. 630]; Anthony *v.* Leeret, 4 N. Y. Suppl. 676; Forey *v.* Syracuse, etc., R. Co., 12 N. Y. St. 198.

85. Concurrent negligence of fellow servants see *infra*, IV, G, 4, a, (iv).

servant whom the master or one acting for him has been negligent in employing or retaining in service, the injured servant may recover for such injuries unless he knew or should have known of such incompetency.[86]

86. *Alabama.*— Tyson *v.* South, etc., Alabama R. Co., 61 Ala. 554, 32 Am. Rep. 8; Mobile, etc., R. Co. *v.* Thomas, 42 Ala. 672; Walker *v.* Bolling, 22 Ala. 294, act of vice-principal in selecting or not dismissing an incompetent servant binds the master.

Arkansas.— Kansas, etc., Coal Co. *v.* Brownlie, 60 Ark. 582, 3 S. W. 453.

California.— Nofsinger *v.* Goldman, 122 Cal. 609, 55 Pac. 425; Matthews *v.* Bull, (1897) 47 Pac. 773.

Colorado.— Colorado Midland R. Co. *v.* O'Brien, 16 Colo. 219, 27 Pac. 701.

Connecticut.— McElligott *v.* Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181, holding that vice-principal or agent must act up to the limit of the duty of the master, otherwise the master's duty is not performed and he is liable.

Delaware.— Giordano *v.* Brandywine Granite Co., 3 Pennew. 423, 52 Atl. 332; Murphy *v.* Hughes, 1 Pennew. 250, 40 Atl. 187.

Georgia.— Cooper *v.* Mullins, 30 Ga. 146, 76 Am. Dec. 638.

Illinois.— Metropolitan West Side El. R. Co. *v.* Fortin, 203 Ill. 454, 67 N. E. 977 [*affirming* 107 Ill. App. 157]; Niantic Coal, etc., Co. *v.* Leonard, 126 Ill. 216, 19 N. E. 294 [*affirming* 25 Ill. App. 95]; Chicago, etc., R. Co. *v.* Sullivan, 63 Ill. 293; Illinois Cent. R. Co. *v.* Jewell, 46 Ill. 99, 92 Am. Dec. 240; Blah *v.* West Chicago St. R. Co., 100 Ill. App. 393; Chicago, etc., R. Co. *v.* Myers, 83 Ill. App. 469; St. Louis Consol. Coal Co. *v.* Seniger, 79 Ill. App. 456.

Indiana.— Hall *v.* Bedford Quarries Co., 156 Ind. 460, 60 N. E. 149; Cincinnati, etc., R. Co. *v.* Madden, 134 Ind. 462, 34 N. E. 227; Nordyke, etc., Co. *v.* Van Sant, 99 Ind. 188; Ohio, etc., R. Co. *v.* Collarn, 73 Ind. 261, 38 Am. Rep. 134.

Iowa.— Scott *v.* Iowa Tel. Co., 126 Iowa 524, 102 N. W. 432; Beresford *v.* American Coal Co., 124 Iowa 54, 98 N. W. 902, 70 L. R. A. 256.

Kansas.— Union Pac. R. Co. *v.* Milliken, 8 Kan. 647.

Kentucky.— Louisville, etc., R. Co. *v.* Collins, 2 Duv. 114, 87 Am. Dec. 486; Chesapeake, etc., R. Co. *v.* McMannon, 8 S. W. 18, 10 Ky. L. Rep. 248.

Louisiana.— Merritt *v.* Victoria Lumber Co., 111 La. 159, 35 So. 497; Poirier *v.* Carroll, 35 La. Ann. 699; Quirk *v.* Haskins, 15 La. Ann. 656.

Maine.— Donnelly *v.* Booth Bros., etc., Granite Co., 90 Me. 110, 37 Atl. 874; Blake *v.* Maine Cent. R. Co., 70 Me. 60, 35 Am. Rep. 297.

Maryland.— Maryland Steel Co. *v.* Marney, 88 Md. 482, 42 Atl. 60, 71 Am. St. Rep. 441, 42 L. R. A. 842.

Massachusetts.— Olsen *v.* Andrews, 168 Mass. 261, 47 N. E. 90; Cayzer *v.* Taylor, 10 Gray 274, 69 Am. Dec. 317.

Michigan.— Lee *v.* Michigan Cent. R. Co., 87 Mich. 574, 49 N. W. 909; Slater *v.* Chapman, 67 Mich. 523, 35 N. W. 106, 11 Am. St. Rep. 593.

Minnesota.—Nutzmann *v.* Germania L. Ins. Co., 78 Minn. 504, 81 N. W. 518; Jenson *v.* Great Northern R. Co., 72 Minn. 175, 75 N. W. 3, 71 Am. St. Rep. 475; McMahon *v.* Davidson, 12 Minn. 357.

Mississippi.— Memphis, etc., R. Co. *v.* Thomas, 51 Miss. 637; New Orleans, etc., R. Co. *v.* Hughes, 49 Miss. 258.

Missouri.— Smith *v.* St. Louis, etc., R. Co., 151 Mo. 391, 52 S. W. 378, 48 L. R. A. 368; Grube *v.* Missouri Pac. R. Co., (1888) 10 S. W. 185; Neilon *v.* Kansas City, etc., R. Co., 85 Mo. 599; Kersey *v.* Kansas City, etc., R. Co., 79 Mo. 362; Moss *v.* Pacific R. Co., 49 Mo. 167, 8 Am. Rep. 126; Harper *v.* Indianapolis, etc., R. Co., 47 Mo. 567, 4 Am. Rep. 353.

New Hampshire.— Hilton *v.* Fitchburg R. Co., 73 N. H. 116, 59 Atl. 625, 68 L. R. A. 428.

New Jersey.— Chandler *v.* Atlantic Coast Electric R. Co., 61 N. J. L. 380, 39 Atl. 674.

New York.— Baird *v.* New York Cent., etc., R. Co., 172 N. Y. 637, 65 N. E. 1113 [*affirming* 64 N. Y. App. Div. 14, 74 N. Y. Suppl. 734]; Sullivan *v.* Metropolitan St. R. Co., 53 N. Y. App. Div. 89, 65 N. Y. Suppl. 842; Barkley *v.* New York Cent., etc., R. Co., 35 N. Y. App. Div. 228, 54 N. Y. Suppl. 766.

North Carolina.— Lamb *v.* Littman, 128 N. C. 361, 38 S. E. 911, 53 L. R. A. 852.

Ohio.— Lake Shore, etc., R. Co. *v.* Ehlert, 25 Ohio Cir. Ct. 37; Cincinnati, etc., R. Co. *v.* Thompson, 21 Ohio Cir. Ct. 778, 12 Ohio Cir. Dec. 326.

Pennsylvania.— Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467; Everson *v.* Rollinson, 5 Pa. Cas. 49, 8 Atl. 194; O'Dowd *v.* Burnham, 19 Pa. Super. Ct. 464.

South Carolina.— Hyland *v.* Southern Bell Tel., etc., Co., 70 S. C. 315, 49 S. E. 879; Hicks *v.* Southern R. Co., 63 S. C. 559, 41 S. E. 753, 38 S. E. 725.

Tennessee.— East Tennessee, etc., R. Co. *v.* Gurley, 12 Lea 46; Nashville, etc., R. Co. *v.* Elliott, 1 Coldw. 611, 78 Am. Dec. 506.

Texas.— Galveston, etc., R. Co. *v.* Davis, 92 Tex. 372, 48 S. W. 570 [*reversing* (Civ. App. 1898) 45 S. W. 956]; Texas, etc., R. Co. *v.* Johnson, 89 Tex. 519, 35 S. W. 1042; Galveston, etc., R. Co. *v.* Sherwood, (Civ. App. 1902) 67 S. W. 776.

Utah.— Handley *v.* Daly Min. Co., 15 Utah 176, 49 Pac. 295, 62 Am. St. Rep. 916.

Washington.— Carlson *v.* Wilkeson Coal, etc., Co., 19 Wash. 473, 53 Pac. 725.

West Virginia.— Oliver *v.* Ohio River R. Co., 42 W. Va. 703, 26 S. E. 444; Core *v.* Ohio River R. Co., 38 W. Va. 456, 18 S. E. 596.

Wisconsin.— Kamp *v.* Coxe, 122 Wis. 206,

(B) *Care Required of Master.* The degree of care required of the master is ordinary or reasonable care,[87] such as men of ordinary care and prudence engaged in the same or similar business on their own account are in the habit of exercis-

99 N. W. 366; Curran *v.* A. H. Stange Co., 98 Wis. 598, 74 N. W. 377.

United States.— Northern Pac. R. Co. *v.* Mares, 123 U. S. 710, 8 S. Ct. 321, 31 L. R. A. 296; Olsen *v.* North Pac. Lumber Co., 100 Fed. 384, 40 C. C. A. 427; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87; Jordan *v.* Wells, 13 Fed. Cas. No. 7,525, 3 Woods 527.

England.— Wilson *v.* Merry, L. R. 1 H. L. 326, 19 L. T. Rep. N. S. 30; Barton's Hill Coal Co. *v.* Reid, 4 Jur. N. S. 767, 3 Macq. H. L. 266, 6 Wkly. Rep. 664.

Canada.— Baird *v.* Dunn, 33 N. Brunsw. 156.

See 34 Cent. Dig. tit. "Master and Servant," § 334.

Want of license as evidence of master's negligence.— Under Ala. Acts (1886–1887), p. 100, §§ 1, 2, requiring locomotive engineers to be licensed where they "operate or drive an engine upon the main line or road-bed of any railroad in this State," and not otherwise, the fact that an engineer had no license does not tend to show negligence on the part of the railroad company, where the accident occurred in a freight yard, in the use of a yard engine, and the engineer was employed only for yard work. Memphis, etc., R. Co. *v.* Askew, 90 Ala. 5, 7 So. 823.

Effect of license or certificate.— Possession of diploma or license is not sufficient evidence of competency. Richardson *v.* Carbon Hill Coal Co., 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338. Although a license may be *prima facie* evidence of competency it will not authorize retention of such servant after notice of his habitual and gross negligence. Walker *v.* Bolling, 22 Ala. 294.

Complaint and promise of removal.— A switchman who has complained of the incompetency of a fireman and received a promise that he should be removed cannot be held to have looked so intently at the fireman on the engine, when afterward signaling to him, as to have identified him as the same person. Galveston, etc., R. Co. *v.* Eckles, 25 Tex. Civ. App. 179, 60 S. W. 830.

A servant's general reputation for recklessness is not alone sufficient to charge a fellow servant, injured by such recklessness, with knowledge thereof. Texas, etc., R. Co. *v.* Johnson, 90 Tex. 304, 38 S. W. 520.

Knowledge of incompetency as bar to recovery see *supra*, IV, E, 4. And see Metropolitan West Side El. R. Co. *v.* Fortin, 203 Ill. 454, 67 N. E. 977; Illinois Cent. R. Co. *v.* Smiesni, 104 Ill. App. 194; Webster Mfg. Co. *v.* Schmidt, 77 Ill. App. 49; White *v.* Lewiston, etc., R. Co., 94 N. Y. App. Div. 4, 87 N. Y. Suppl. 901; Texas, etc., R. Co. *v.* Johnson, 89 Tex. 519, 35 S. W. 1042; Northern Pac. R. Co. *v.* Mares, 123 U. S. 710, 8 S. Ct. 321, 31 L. ed. 296; Oien *v.* The Antonio Zambrana, 89 Fed. 60. But see Lawrence *v.* Texas Cent. R. Co., 25 Tex. Civ. App. 293, 61 S. W. 342.

87. *Alabama.*— Tyson *v.* South, etc., Alabama R. Co., 61 Ala. 554, 32 Am. Rep. 8; Walker *v.* Bolling, 22 Ala. 294.

Arkansas.—Kansas, etc., Coal Co. *v.* Brownlie, 60 Ark. 582, 31 S. W. 453.

California.— Cunningham *v.* Los Angeles R. Co., 115 Cal. 561, 47 Pac. 452; McDonald *v.* Hazletine, 53 Cal. 35.

Delaware.— Murphy *v.* Hughes, 1 Pennew. 256, 40 Atl. 187.

Georgia.— Keith *v.* Walker Iron, etc., Co., 81 Ga. 49, 7 S. E. 166, 12 Am. St. Rep. 296.

Illinois.— Western Stone Co. *v.* Whalen, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244; Illinois Cent. R. Co. *v.* Smiesni, 104 Ill. App. 194; Agnew *v.* Supple, 80 Ill. App. 437 [*affirmed* in 191 Ill. 439, 61 N. E. 392].

Indiana.— Indiana Mfg. Co. *v.* Millican, 87 Ind. 87; Chicago, etc., R. Co. *v.* Harney, 28 Ind. 28, 92 Am. Dec. 282. But see Oakland City Agricultural, etc., Soc. *v.* Bingham, 4 Ind. App. 545, 31 N. E. 383.

Iowa.— Maine *v.* Chicago, etc., R. Co., 109 Iowa 260, 70 N. W. 630, 80 N. W. 315.

Kansas.— Atchison, etc., Bridge Co. *v.* Miller, 71 Kan. 13, 80 Pac. 18, 1 L. R. A. N. S. 682.

Louisiana.— Bell *v.* Globe Lumber Co., 107 La. 725, 31 So. 994.

Maryland.— Norfolk, etc., R. Co. *v.* Hoover, 79 Md. 253, 29 Atl. 994, 47 Am. St. Rep. 392, 25 L. R. A. 710; Wonder *v.* Baltimore, etc., R. Co., 32 Md. 411, 3 Am. Rep. 143; Shauck *v.* Northern Cent. R. Co., 25 Md. 462.

Massachusetts.— McPhee *v.* Scully, 163 Mass. 216, 39 N. E. 1007; Mackin *v.* Boston, etc., R. Co., 135 Mass. 201, 46 Am. Rep. 456.

Michigan.— Walkowski *v.* Penokee, etc., Consol. Mines, 115 Mich. 629, 73 N. W. 895, 41 L. R. A. 33; Lewis *v.* Emery, 108 Mich. 641, 66 N. W. 569; Jungnitsch *v.* Michigan Malleable Iron Co., 105 Mich. 270, 63 N. W. 296; Michigan Cent. R. Co. *v.* Gilbert, 46 Mich. 176, 9 N. W. 243; Davis *v.* Detroit, etc., R. Co., 20 Mich. 105, 4 Am. Rep. 364. *Compare* Timm *v.* Michigan Cent. R. Co., 98 Mich. 226, 57 N. W. 116.

Missouri.— Smith *v.* St. Louis, etc., R. Co., 151 Mo. 391, 52 S. W. 378, 48 L. R. A. 368; Dysart *v.* Kansas City, etc., R. Co., 145 Mo. 83, 46 S. W. 751; Williams *v.* Missouri Pac. R. Co., 109 Mo. 475, 18 S. W. 1098; Zumwalt *v.* Chicago, etc., R. Co., 35 Mo. App. 661.

New Mexico.—Cerrillos Coal R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807.

New York.— Wright *v.* New York Cent. R. Co., 28 Barb. 80 [*reversed* on other grounds in 25 N. Y. 562].

North Carolina.— Pleasants *v.* Raleigh, etc., Air Line R. Co., 121 N. C. 492, 28 S. E. 267, 61 Am. St. Rep. 674; Cowles *v.* Richmond, etc., R. Co., 84 N. C. 309, 37 Am. Rep. 620.

Ohio.— Pittsburg, etc., R. Co. *v.* Devinney, 17 Ohio St. 197.

ing[88] — that degree of diligence and precaution which the exigencies of the particular service reasonably require.[89] The master is not an insurer of the competency of his servants.[90]

(c) *What Constitutes Actionable Incompetency* — (1) IN GENERAL. As preliminary to a discussion of this question it may be premised that what in a given case, constitutes such incompetency in a servant as to render the master liable for

Pennsylvania.— Mansfield Coal, etc., Co. *v.* McEnery, 91 Pa. St. 185, 36 Am. Rep. 662; Delaware, etc., Canal Co. *v.* Carroll, 89 Pa. St. 374; Caldwell *v.* Brown, 53 Pa. St. 453.

South Dakota.— Gates *v.* Chicago, etc., R. Co. 2 S. D. 422, 50 N. W. 907.

Tennessee.— Fox *v.* Sandford, 4 Sneed 36, 67 Am. Dec. 587.

Texas.— El Paso, etc., R. Co. *v.* Kelley, (1905) 87 S. W. 660 [*reversing* (Civ. App. 1904) 83 S. W. 855]; Pilkinton *v.* Gulf, etc., R. Co., 70 Tex. 226, 7 S. W. 805; Houston, etc., R. Co. *v.* Myers, 55 Tex. 110; Consumers' Cotton Oil Co. *v.* Jonte, 36 Tex. Civ. App. 18, 80 S. W. 847; Postal Tel. Cable Co. *v.* Coote, (Civ. App. 1900) 57 S. W. 912; Gulf, etc., R. Co. *v.* Schwabbe, 1 Tex. Civ. App. 573, 21 S. W. 706.

Vermont.— Hard *v.* Vermont, etc., R. Co., 32 Vt. 473.

Virginia.— Big Stone Gap Iron Co. *v.* Ketron, 102 Va. 23, 45 S. E. 740, 102 Am. St. Rep. 839; Norfolk, etc., R. Co. *v.* Nuckol, 91 Va. 193, 21 S. E. 342.

Wisconsin.— Maitland *v.* Gilbert Paper Co., 97 Wis. 476, 72 N. W. 1124, 65 Am. St. Rep. 137.

United States.— Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 2 S. Ct. 932, 27 L. ed. 605; Southern Pac. Co. *v.* Hetzer, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. N. S. 288; Pennsylvania Co. *v.* Fishack, 123 Fed. 465, 59 C. C. A. 269; Southern Pac. Co. *v.* Huntsman, 118 Fed. 412, 55 C. C. A. 366; Melville *v.* Missouri River, etc., R. Co., 48 Fed. 820; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87; Meutzer *v.* Armour, 18 Fed. 373, 5 McCrary 617; Brown *v.* The D. S. Cage, 4 Fed. Cas. No. 2,002, 1 Woods 401; Dillon *v.* Union Pac. R. Co., 7 Fed. Cas. No. 3,916, 3 Dill. 319; Miller *v.* Baltimore, etc., R. Co., 17 Fed. Cas. No. 9,560.

England.— Tarrant *v.* Webb, 18 C. B. 797, 25 L. J. C. P. 261, 4 Wkly. Rep. 640, 86 E. C. L. 797; Lovegrove *v.* London, etc., R. Co., 16 C. B. N. S. 669, 10 Jur. N. S. 879, 33 L. J. C. P. 329, 10 L. T. Rep. N. S. 718, 12 Wkly. Rep. 988, 111 E. C. L. 669; Searle *v.* Lindsay, 11 C. B. N. S. 429, 8 Jur. N. S. 746, 31 L. J. C. P. 106, 5 L. T. Rep. N. S. 427, 10 Wkly. Rep. 89, 103 E. C. L. 427.

See 34 Cent. Dig. tit. "Master and Servant," § 336.

Highest degree of care not necessary see Jungnitsch *v.* Michigan Malleable Iron Co., 105 Mich. 270, 63 N. W. 296.

88. Kansas, etc., Coal Co. *v.* Brownlie, 60 Ark. 582, 31 S. W. 453.

89. "It is such care as, in view of the consequences that may result from negligence on the part of employés, is fairly commensurate with the perils or dangers likely to be encountered." Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 460, 2 S. Ct. 932, 27 L. ed. 605. See also the following cases:

Delaware.— Murphy *v.* Hughes, 1 Pennew. 250, 40 Atl. 187.

Illinois.— Western Stone Co. *v.* Whalen, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244; Illinois Cent. R. Co. *v.* Smiesni, 104 Ill. App. 194.

Michigan.— Michigan Cent. R. Co. *v.* Gilbert, 46 Mich. 176, 9 N. W. 243. And see Jungnitsch *v.* Michigan Malleable Iron Co., 105 Mich. 270, 63 N. W. 296.

Missouri.— Williams *v.* Missouri Pac. R. Co., 109 Mo. 475, 18 S. W. 1098.

United States.— Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87.

90. *California.*— Stephens *v.* Doe, 73 Cal. 26, 14 Pac. 378.

Delaware.— Giordano *v.* Brandywine Granite Co., 3 Pennew. 423, 52 Atl. 332.

Georgia.— Keith *v.* Walker Iron, etc., Co., 81 Ga. 49, 7 S. E. 166, 12 Am. St. Rep. 296; McDonald *v.* Eagle, etc., Mfg. Co., 68 Ga. 839.

Illinois.— Toledo, etc., R. Co. *v.* Conroy, 68 Ill. 560; Columbus, etc., R. Co. *v.* Troesch, 68 Ill. 545, 18 Am. Rep. 578.

Indiana.— Columbus, etc., R. Co. *v.* Arnold, 31 Ind. 174, 99 Am. Dec. 615.

Kansas.— Union Pac. R. Co. *v.* Milliken, 8 Kan. 647.

Maine.— Beaulieu *v.* Portland Co., 48 Me. 291.

Maryland.— Norfolk, etc., R. Co. *v.* Hoover, 79 Md. 253, 29 Atl. 994, 47 Am. St. Rep. 392, 25 L. R. A. 710; Baltimore *v.* War, 77 Md. 593, 27 Atl. 85.

Minnesota.— Foster *v.* Minnesota Cent. R. Co., 14 Minn. 360.

Missouri.— Moss *v.* Pacific R. Co., 49 Mo. 167, 8 Am. Rep. 126.

Pennsylvania.— Mulhern *v.* Lehigh Valley Coal Co., 161 Pa. St. 270, 28 Atl. 1087, 1088.

Texas.— San Antonio, etc., R. Co. *v.* Taylor, (Civ. App. 1896) 35 S. W. 855; Gulf, etc., R. Co. *v.* Schwahbe, 1 Tex. Civ. App. 573, 21 S. W. 706.

United States.— The E. B. Ward Jr., 20 Fed. 702 (admiralty rule); Buckley *v.* Gould, etc., Silver Min. Co., 14 Fed. 833, 8 Sawy. 394.

England.— Wilson *v.* Merry, L. R. 1 H. L. Sc. 326, 19 L. T. Rep. N. S. 30; Tarrant *v.* Webb, 18 C. B. 797, 25 L. J. C. P. 261, 4 Wkly. Rep. 640, 86 E. C. L. 797; Wigmore *v.* Jay, 5 Exch. 354, 14 Jur. 837, 19 L. J. Exch. 300.

injuries to another servant caused thereby necessarily depends upon the facts and circumstances of the particular case.[91]

(2) Inexperience or Youth. The mere fact that a servant is inexperienced in the particular work in which he is employed,[92] or is youthful,[93] is not of itself sufficient to charge the master with negligence. But the youth of a servant may be considered on the question of his competency to do the work assigned him;[94] and where the nature of a servant's work is such as to require experience for its reasonably safe performance, his inexperience is sufficient to show his incompetency.[95]

(3) Physical Disability. The fact that a servant is physically disabled to perform his duties is sufficient to charge the master with negligence in employing him.[96] Nevertheless the fact that a railroad engineer is near-sighted,[97] or that

See 34 Cent. Dig. tit. "Master and Servant," § 335.

91. "Incompetency exists not alone in physical or mental attributes, but in the disposition with which a servant performs his duties. If he habitually neglects these duties, he becomes unreliable, and although he may be physically and mentally able to do well all that is required of him, his disposition toward his work and toward the general safety of the work of his employer and to his fellow-servants makes him an incompetent man." Coppins *v.* New York Cent., etc., R. Co., 122 N. Y. 557, 564, 25 N. E. 915, 19 Am. St. Rep. 523 [*affirmed* 48 Hun 292].

A single act of negligence by a servant resulting in injury to a fellow servant is not of itself sufficient to show incompetency, so as to make the master liable. Galveston, etc., R. Co. *v.* Davis, 92 Tex. 372, 48 S. W. 570 [*reversing* (Civ. App. 1898) 45 S. W. 956]; Spring Valley Coal Co. *v.* Patting, 86 Fed. 433, 30 C. C. A. 168. See also Fournier *v.* Columbian Mfg. Co., 70 N. H. 629, 44 Atl. 104, holding that a servant injured by the negligence of a fellow servant, when the latter was a competent and ordinarily careful servant, cannot recover from the master.

Railroad engineers.— While a railroad company is bound to furnish competent engineers and firemen, it is not required to furnish the best that can be secured. Lyttle *v.* Chicago, etc., R. Co., 84 Mich. 289, 47 N. W. 571.

The incompetency of a locomotive engineer may consist of a disregard of signals, or disobedience of the orders of other employees having authority to direct the movements of the engine. Sizer *v.* Syracuse, etc., R. Co., 7 Lans. (N. Y.) 67.

Unlicensed engineer.— The mere fact that a master employs an unlicensed engineer to run his boiler does not render him liable to his other servants for injuries caused by the explosion of the boiler. Birmingham *v.* Pettit, 21 D. C. 209.

Facts held not to show incompetency of switchman see Deverill *v.* Grand Trunk R. Co., 25 U. C. Q. B. 517.

92. Gibson *v.* Northern Cent. R. Co., 22 Hun (N. Y.) 289; Haskin *v.* New York Cent., etc., R. Co., 65 Barb. (N. Y.) 129 [*affirmed* in 56 N. Y. 608]; National Fertilizer Co. *v.* Travis, 102 Tenn. 16, 49 S. W. 832.

Raising to the post of conductor a person who has served seven years as car coupler and shover, the duties of which position made him acquainted with the modes of making up trains, the dangers incurred by those employed in the work, and by others, when the trains are in motion, and the precautions necessary to guard against accidents, is not of itself negligence, when it does not appear that he has ever shown himself to be incompetent or unfaithful prior to the injury complained of. Haskin *v.* New York Cent., etc., R. Co., 65 Barb. (N. Y.) 129 [*affirmed* in 56 N. Y. 608].

Employment of manual laborer to run steam engine not of itself negligence see Joch *v.* Dankwardt, 85 Ill. 331.

93. Youth of servant not proof of incompetency.— *Arkansas.*— Kansas, etc., Coal Co. *v.* Brownlie, 60 Ark. 582, 31 S. W. 453.

Illinois.— Hansell *v.* Jansen, 46 Ill. App. 335.

Iowa.— Gorman *v.* Minneapolis, etc., R. Co., 78 Iowa 509, 43 N. W. 303.

Michigan.— Walkowski *v.* Penokee, etc., Consol. Mines, 115 Mich. 629, 73 N. W. 895, 41 L. R. A. 33.

Missouri.— Smillie *v.* St. Bernard Dollar Store, 47 Mo. App. 402.

See 34 Cent. Dig. tit. "Master and Servant," § 338.

94. Carlson *v.* Wilkeson Coal, etc., Co., 19 Wash. 473, 53 Pac. 725.

95. Fraser *v.* Schroeder, 163 Ill. 459, 45 N. E. 288; Evansville, etc., R. Co. *v.* Guyton, 115 Ind. 450, 17 N. E. 101, 7 Am. St. Rep. 458 (assigning inexperienced conductor to run a "wild" freight train); Sullivan *v.* Metropolitan St. R. Co., 53 N. Y. App. Div. 89, 65 N. Y. Suppl. 842; Missouri Pac. R. Co. *v.* Patton, (Tex. Civ. App. 1894) 25 S. W. 339 (putting an engineer who had never been over the road in charge of a train sent out to repair the track after a storm).

96. Louisville, etc., R. Co. *v.* Davis, 91 Ala. 487, 8 So. 552 (one-armed brakeman); McPhee *v.* Scully, 163 Mass. 216, 39 N. E. 1007 (servant obviously drunk); Baird *v.* New York Cent., etc., R. Co., 172 N. Y. 637, 65 N. E. 1113 [*affirming* 64 N. Y. App. Div. 14, 71 N. Y. Suppl. 734] (employment of brakeman subject to epilepsy).

97. Texas, etc., R. Co. *v.* Harrington, 62 Tex. 597.

he has the use of only one eye,[98] does not prove him an improper person for the duty.

(D) *Temporary Substitution of One Servant For Another.* The temporary substitution of an unskilled for a competent servant by the master or an authorized agent, whereby a fellow servant is injured, is actionable negligence.[99]

(E) *Incompetency After Employment.* The continuance by a master of an incompetent servant in his employment, whereby another servant is injured, is as much a breach of duty and a ground of liability as the original employment of an incompetent servant,[1] provided the master has notice of such incompetency.[2] But where a servant is skilled when employed, the master has a right to rely upon the presumption that he will continue careful and skilful, and, when notified that he has become careless, he is not ordinarily bound to discharge him without an investigation, unless such notice is accompanied by evidence which leaves no reasonable doubt as to the truth of the charge.[3]

(F) *Master's Knowledge of Incompetency* — (1) IN GENERAL. The mere incompetency of a fellow servant is insufficient to render the master liable for his negligent acts, in the absence of a showing that the master knew or should have known of such incompetency, and was guilty of negligence in employing him, or in retaining him in the service.[4] But the master must use reasonable diligence

98. Keyes *v.* Pennsylvania Co., 1 Pa. Cas. 316, 3 Atl. 15.

99. McElligott *v.* Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181; Ohio, etc., R. Co. *v.* Collarn, 73 Ind. 261, 38 Am. Rep. 134; Harper *v.* Indianapolis, etc., R. Co., 47 Mo. 567, 4 Am. Rep. 353; Core *v.* Ohio River R. Co., 38 W. Va. 456, 18 S. E. 596. *Compare* Rodman *v.* Michigan Cent. R. Co., 55 Mich. 57, 20 N. W. 788, 54 Am. Rep. 348, in which the court was equally divided. But see Greenwald *v.* Marquette, etc., R. Co., 49 Mich. 197, 13 N. W. 513.

Operation of engine by experienced fireman. — The action of an engineer on a switch engine in permitting the engine to be operated under his direction by his fireman, who had nearly two years' experience at the work, and who had been accustomed to handle the engine, is not such negligence as will enable a fellow servant to recover from the railroad company for injuries sustained in coupling a car to the engine while so operated. Thompson *v.* Lake Shore, etc., R. Co., 84 Mich. 281, 47 N. W. 584.

1. Gilman *v.* Eastern R. Co., 13 Allen (Mass.) 433, 90 Am. Dec. 210; Baulec *v.* New York, etc., R. Co., 59 N. Y. 356, 17 Am. Rep. 325; Laning *v.* New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Curran *v.* A. H. Stange Co., 98 Wis. 598, 74 N. W. 377; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87.

2. Cameron *v.* New York Cent., etc., R. Co., 145 N. Y. 400, 40 N. E. 1 [*reversing* 77 Hun 519, 28 N. Y. Suppl. 898].

Master's knowledge of incompetency see *infra*, IV, G, 4, a, (III), (F).

3. Lake Shore, etc., R. Co. *v.* Stupak, 123 Ind. 210, 23 N. E. 246. See also Chapman *v.* Erie R. Co., 55 N. Y. 579 [*reversing* 1 Thomps. & C. 526].

4. *Alabama.*— Alabama, etc., R. Co. *v.* Waller, 48 Ala. 459.

Arkansas.— St. Louis, etc., R. Co. *v.* Morgart, 45 Ark. 318.

California.— Gier *v.* Los Angeles Consol. Electric R. Co., 108 Cal. 129, 41 Pac. 22, construing Civ. Code, §§ 1970, 1971.

Colorado.— Kindel *v.* Hall, 8 Colo. App. 63, 44 Pac. 781.

Georgia.— Hilton, etc., Lumber Co. *v.* Ingram, 119 Ga. 652, 46 S. E. 895, 100 Am. St. Rep. 204; McDonald *v.* Eagle, etc., Mfg. Co., 68 Ga. 839.

Illinois.— Pittsburg, etc., R. Co. *v.* Powers, 74 Ill. 341; Illinois Steel Co. *v.* Paschke, 51 Ill. App. 456.

Indiana.— Parker *v.* Sample, 11 Ind. App. 698, 39 N. E. 173.

Maine.— Blake *v.* Maine Cent. R. Co., 70 Me. 60, 35 Am. Rep. 297.

Massachusetts.— Farwell *v.* Boston, etc., R. Corp., 4 Metc. 49, 38 Am. Dec. 339.

Michigan.— Lee *v.* Michigan Cent. R. Co., 87 Mich. 574, 49 N. W. 909.

Mississippi.— Howd *v.* Mississippi Cent. R. Co., 50 Miss. 178; New Orleans, etc., R. Co. *v.* Hughes, 49 Miss. 258.

Missouri.— Huffman *v.* Chicago, etc., R. Co., 78 Mo. 50; Lee *v.* Detroit Bridge, etc., Works, 62 Mo. 565.

New Hampshire.— Nash *v.* Nashua Iron, etc., Co., 62 N. H. 406.

New York.— Chapman *v.* Erie R. Co., 55 N. Y. 579; Gillen *v.* McAllister, 97 N. Y. App. Div. 310, 89 N. Y. Suppl. 953; Malay *v.* Mt. Morris Electric Light Co., 41 N. Y. App. Div. 574, 58 N. Y. Suppl. 659; O'Donnell *v.* American Sugar Refining Co., 41 N. Y. App. Div. 307, 58 N. Y. Suppl. 640; Hawke *v.* Brown, 28 N. Y. App. Div. 37, 50 N. Y. Suppl. 1032; Gibson *v.* Northern Cent. R. Co., 22 Hun 289; Sizer *v.* Syracuse, etc., R. Co., 7 Lans. 67; Wright *v.* New York Cent. R. Co., 28 Barb. 80 [*reversed* on other grounds in 25 N. Y. 62]; Sutton *v.* New York, etc., R. Co., 21 N. Y. Suppl. 312 [*affirmed* in 142 N. Y. 623, 37 N. E. 564]; Van Dusen *v.* Lake Shore, etc., R. Co., 12 N. Y. St. 351.

Pennsylvania.— Bruce *v.* Penn Bridge Co.,

in determining the competency of his servants,[5] and if he does or ought to know that a servant is incompetent, he is liable for injuries occasioned by such incompetency,[6] if he has been guilty of negligence in retaining the servant after acquiring such knowledge.[7] Where a servant is injured through the incompetency and negligence of a vice-principal, he can recover from the master, whether the latter knew of such incompetency and negligence or not.[8]

(2) CONSTRUCTIVE NOTICE — (a) IN GENERAL. Actual knowledge on the part of the master of the incompetency of a servant through whose acts another servant sustained injury is not indispensable to the injured servant's right of recovery. The master cannot screen himself from liability upon the ground that he did not know of the incompetency of the servant whose negligence caused the injury, if he might have known it by the exercise of reasonable care and caution.[9]

197 Pa. St. 439, 47 Atl. 354; Snodgrass *v.* Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104; Reiser *v.* Pennsylvania Co., 152 Pa. St. 38, 25 Atl. 175, 34 Am. St. Rep. 620; Weger *v.* Pennsylvania R. Co., 55 Pa. St. 460; Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467.

Tennessee.— East Tennessee, etc., R. Co. *v.* Gurley, 12 Lea 46.

Texas.— Texas, etc., R. Co. *v.* Johnson, 90 Tex. 304, 38 S. W. 520; Dallas *v.* Gulf, etc., R. Co., 61 Tex. 196.

Washington.— Hughes *v.* Oregon Imp. Co., 20 Wash. 294, 55 Pac. 119.

United States.— Melville *v.* Missouri River, etc., R. Co., 48 Fed. 820; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87; Johnson *v.* Armour, 18 Fed. 490, 5 McCrary 629; Totten *v.* Pennsylvania R. Co., 11 Fed. 564.

See 34 Cent. Dig. tit. "Master and Servant," § 343.

The Pennsylvania Mine Law of 1885, requiring a person employed at an engine to be sober and competent, does not change the common-law rule that notice of his insobriety or incompetency must have been brought home to the employer. Mulhern *v.* Lehigh Valley Coal Co., 161 Pa. St. 270, 28 Atl. 1087, 1088.

5. **The reasonable diligence required** is not that high degree of care which a prudent man would exercise, if the want of it endangered his own person, but that care which railway officials charged with the duty of discharging servants, employed with due care, as soon as they know or could know that such servants have become incompetent, commonly use in the discharge of this duty. Southern Pac. Co. *v.* Hetzer, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. N. S. 288.

6. *California.*— Matthews *v.* Bull, (1897) 47 Pac. 773, construing Civ. Code, § 1971.

Delaware.— Murphy *v.* Hughes, 1 Pennew. 250, 40 Atl. 187.

Illinois.— Illinois Cent. R. Co. *v.* Jewell, 46 Ill. 99, 92 Am. Dec. 240; Girard Coal Co. *v.* Wiggins, 52 Ill. App. 69.

Indiana.— Ohio, etc., R. Co. *v.* Collarn, 73 Ind. 261, 38 Am. Rep. 134.

Missouri.— Harper *v.* Indianapolis, etc., R. Co., 47 Mo. 567, 4 Am. Rep. 353.

New York.— Wood *v.* New York Cent., etc., R. Co., 32 N. Y. App. Div. 606, 53 N. Y. Suppl. 163.

Pennsylvania.— Huntsinger *v.* Trexler, 181 Pa. St. 497, 37 Atl. 574.

Utah.— Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295.

Wisconsin.— Maitland *v.* Gilbert Paper Co., 97 Wis. 476, 72 N. W. 1124, 65 Am. St. Rep. 137.

United States.— Southern Pac. Co. *v.* Hetzer, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. N. S. 288.

See 34 Cent. Dig. tit. "Master and Servant," § 343.

Effect of mine examiner's certificate.— Incompetency of an engineer known to his employer may be shown in an action against the employer for injury to an employee, and this is true although the master was required to employ an engineer having a certificate of the state board of mine examiners, and the engineer had such certificate. St. Louis Consol. Coal Co. *v.* Seniger, 179 Ill. 370, 53 N. E. 733 [*affirming* 79 Ill. App. 456].

7. Lake Shore, etc., R. Co. *v.* Stupak, 123 Ind. 210, 23 N. E. 246; Louisville, etc., R. Co. *v.* Breedlove, 10 Ind. App. 657, 38 N. E. 357.

8. McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285.

9. *Illinois.*— Charles Pope Glucose Co. *v.* Byrne, 60 Ill. App. 17.

Iowa.— Scott *v.* Iowa Tel. Co., 126 Iowa 524, 102 N. W. 432.

Kansas.— Chicago, etc., R. Co. *v.* Doyle, 18 Kan. 58.

Massachusetts.— Gilman *v.* Eastern R. Co., 13 Allen 433, 90 Am. Dec. 210.

New York.— Baird *v.* New York Cent., etc., R. Co., 172 N. Y. 637, 65 N. E. 1113 [*affirming* 64 N. Y. App. Div. 14, 71 N. Y. Suppl. 734]; Coppins *v.* New York Cent., etc., R. Co., 122 N. Y. 557, 25 N. E. 915, 19 Am. St. Rep. 523.

Texas.— Houston, etc., R. Co. *v.* Patton, (1888) 9 S. W. 175.

See 34 Cent. Dig. tit. "Master and Servant," §§ 345, 346.

The mere statement by a workman to his master that a fellow servant is incompetent, unaccompanied by a recital or statement of any facts showing him to be incompetent, does not impart to the employer any information of actual incompetency which will render him negligent if he continues to employ such

(b) KNOWLEDGE OF VICE-PRINCIPAL. Notice to a vice-principal who is authorized to employ and discharge servants of a servant's incompetency is notice to the master.[10]

(c) HABITS AND REPUTATION — aa. *In General.* A master will be charged with knowledge of the incompetency of a servant who is habitually reckless,[11] and his general reputation is admissible in evidence to charge the master with such knowledge.[12] But where it is shown that the master exercised ordinary care in the

workman. Snodgrass *v.* Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104.

Facts held insufficient to impute notice see Mulhern *v.* Lehigh Valley Coal Co., 161 Pa. St. 270, 28 Atl. 1087; National Fertilizer Co. *v.* Travis, 102 Tenn. 16, 49 S. W. 832; Olsen *v.* North Pac. Lumber Co., 106 Fed. 298.

10. *Alabama.*— Mobile, etc., R. Co. *v.* Thomas, 42 Ala. 672.

Georgia.— Hilton, etc., Lumber Co. *v.* Ingram, 119 Ga. 652, 46 S. E. 895, 100 Am. St. Rep. 204.

Indiana.— Ohio, etc., R. Co. *v.* Collarn, 73 Ind. 261, 38 Am. Rep. 134; Pittsburgh, etc., R. Co. *v.* Ruby, 38 Ind. 294, 10 Am. Rep. 111 (master of transportation); Espenlaub *v.* Ellis, 34 Ind. App. 163, 72 N. E. 527. *Compare* Wilkinson Co-operative Glass Co. *v.* Dickinson, 35 Ind. App. 230, 73 N. E. 957.

Kentucky.— Chesapeake, etc., R. Co. *v.* McMaunon, 8 S. W. 18, 10 Ky. L. Rep. 248.

Massachusetts.— Gilman *v.* Eastern R. Co., 13 Allen 433, 90 Am. Dec. 210.

Michigan.— Lyttle *v.* Chicago, etc., R. Co., 84 Mich. 289, 47 N. W. 571, yard master. *Compare* Michigan Cent. R. Co. *v.* Dolan, 32 Mich. 510.

Missouri.— Maxwell *v.* Hannibal, etc., R. Co., 85 Mo. 95; McDermott *v.* Hannibal, etc., R. Co., 73 Mo. 516, 39 Am. Rep. 526, 87 Mo. 285. See also Williams *v.* Missouri Pac. R. Co., 109 Mo. 475, 18 S. W. 1098, holding that notice to the foreman of defendant's roundhouse of the drinking habits of an engineer was notice to defendant, it being the foreman's duty to look after the engines and the men operating them, and make reports to the company.

New York.—Baird *v.* New York Cent., etc., R. Co., 172 N. Y. 637, 65 N. E. 1113 [*affirming* 64 N. Y. App. Div. 14, 71 N. Y. Suppl. 734]; Chapman *v.* Erie R. Co., 55 N. Y. 579, division superintendent.

Pennsylvania.— Wust *v.* Erie City Iron Works, 149 Pa. St. 263, 24 Atl. 291; Huntingdon, etc., R., etc., Co. *v.* Decker, 82 Pa. St. 119, 84 Pa. St. 419; Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467.

Texas.— Texas Mexican R. Co. *v.* Whitmore, 58 Tex. 276.

Wisconsin.— Kamp *v.* Coxe, 122 Wis. 206, 99 N. W. 366.

United States.— Elliott *v.* Canadian Pac. R. Co., 129 Fed. 163; Baltimore, etc., R. Co. *v.* Henthorne, 73 Fed. 634, 19 C. C. A. 623, authority to suspend temporarily.

See 34 Cent. Dig. tit. "Master and Servant," § 346.

Power to employ and discharge held necessary see Reiser *v.* Pennsylvania Co., 152 Pa. St. 38, 25 Atl. 175, 34 Am. St. Rep. 620 [*distinguishing* Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. Rep. 631]; Kidwell *v.* Houston, etc., R. Co., 14 Fed. Cas. No. 7,757, 3 Woods 313. But see East Tennessee, etc., R. Co. *v.* Wright, 100 Tenn. 56, 42 S. W. 1065, holding that knowledge acquired by a conductor while in charge of a train touching the recklessness and misconduct of his engineer is notice to the company, although the conductor is not empowered to discharge the engineer.

Notice to servant acting as agent of principal.— The question whether the authority of the agent to receive notice was within the scope of the duties of the agency is, upon ascertained facts, one of law, and should not be referred to the jury. Mobile, etc., R. Co. *v.* Thomas, 42 Ala. 672.

11. *Alabama.*— Walker *v.* Bolling, 22 Ala. 294.

Illinois.— St. Louis Consol. Coal Co. *v.* Seniger, 79 Ill. App. 456.

Michigan.— Michigan Cent. R. Co. *v.* Gilbert, 46 Mich. 176, 9 N. W. 243.

New York.— Coppins *v.* New York Cent., etc., R. Co., 122 N. Y. 557, 25 N. E. 915, 19 Am. St. Rep. 523 [*affirming* 48 Hun 292]; Malay *v.* Mt. Morris Electric Light Co., 41 N. Y. App. Div. 574, 58 N. Y. Suppl. 659.

Pennsylvania.— Stasch *v.* Cornwall Ore Bank Co., 19 Pa. Super. Ct. 113.

United States.— Melville *v.* Missouri River, etc., R. Co., 48 Fed. 820.

See 34 Cent. Dig. tit. "Master and Servant," § 347.

12. *Arkansas.*— St. Louis, etc., R. Co. *v.* Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105.

Connecticut.— Hayden *v.* Smithville Mfg. Co., 29 Conn. 548.

Illinois.— Western Stone Co. *v.* Whalen, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244 [*affirming* 51 Ill. App. 512]; Illinois Cent. R. Co. *v.* Jewell, 46 Ill. 99, 92 Am. Dec. 240.

Massachusetts.— Driscoll *v.* Fall River, 163 Mass. 105, 39 N. E. 1003; Summersell *v.* Fish, 117 Mass. 312.

Michigan.— Davis *v.* Detroit, etc., R. Co., 20 Mich. 105, 4 Am. Rep. 364.

Minnesota.— Morrow *v.* St. Paul City R. Co., 71 Minn. 326, 73 N. W. 973.

Missouri.— Grube *v.* Missouri Pac. R. Co., 98 Mo. 330, 11 S. W. 736, 14 Am. St. Rep. 645, 4 L. R. A. 776.

New York.— Park *v.* New York Cent., etc., R. Co., 85 Hun 184, 32 N. Y. Suppl. 482; O'Donnell *v.* American Sugar Refining Co., 41 N. Y. App. Div. 307, 58 N. Y. Suppl. 640.

selection of a servant, mere proof of his reputation for recklessness and carelessness is insufficient, without also proving that he was in fact reckless and careless;[13] and it has been held that a master cannot be charged with his servant's negligence by showing his general reputation for incompetency, without reference to any specific acts of negligence showing that the master knew or ought to have known that the servant was incompetent to perform his particular duties.[14]

bb. *Drinking Habits.* Where an injury results from a fellow servant's intoxication,[15] the master is chargeable with notice of his excessive use of intoxicating liquors, if it has existed so long that a failure to learn of it is negligence.[16] But occasionally taking a drink or occasionally being under the influence of drink does not constitute such a habit of drinking as would authorize a finding that a servant was rendered incompetent thereby;[17] and even the fact that a servant is a habitual drunkard does not necessarily show incompetency where he is not shown to have been drunk at the time of the accident.[18]

(G) *Concurrent Negligence of Competent and Incompetent Servants.* A master is not relieved from liability for injuries which would not have happened but for the negligence of an incompetent servant, of whose incompetency he had

Texas.— Texas, etc., R. Co. *v.* Johnson, 89 Tex. 519, 35 S. W. 1042; Galveston, etc., R. Co. *v.* Henning, (Civ. App. 1897) 39 S. W. 302; Galveston, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 468, 23 S. W. 301.

Utah.— Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295.

See 34 Cent. Dig. tit. "Master and Servant," § 347.

Conversely, evidence of the general reputation of a servant for competency and care at the time and place of employment, of such character as to imply information to the employer, is admissible as tending to disprove alleged negligence in employing such servant. Illinois Cent. R. Co. *v.* Morrissey, 45 Ill. App. 127.

Cannot be shown from speech of people see Park *v.* New York Cent., etc., R. Co., 155 N. Y. 215, 49 N. E. 674, 63 Am. St. Rep. 663 [*reversing* 85 Hun 184, 32 N. Y. Suppl. 482].

Must be confined to those engaged in the same kind of occupation see Galveston, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 468, 23 S. W. 301.

The reputation of a servant ten or fifteen years before the accident caused by his negligence, and while he was yet at school, is not admissible to charge the master with knowledge of his incompetency. Baird *v.* New York Cent., etc., R. Co., 16 N. Y. App. Div. 490, 44 N. Y. Suppl. 926. See also Park *v.* New York Cent., etc., R. Co., 155 N. Y. 215, 49 N. E. 674, 63 Am. St. Rep. 663 [*reversing* 85 Hun 184, 32 N. Y. Suppl. 482].

13. Gier *v.* Los Angeles Consol. Electric R. Co., 108 Cal. 129, 41 Pac. 22.

14. Lambrecht *v.* Pfizer, 49 N. Y. App. Div. 82, 63 N. Y. Suppl. 591.

15. **Evidence of intoxication at time of accident necessary** see Cosgrove *v.* Pitman, 103 Cal. 268, 37 Pac. 232; Galveston, etc., R. Co. *v.* Davis, 92 Tex. 372, 48 S. W. 570 [*reversing* (Civ. App. 1898) 45 S. W. 956].

16. *Illinois.*—Chicago, etc., R. Co. *v.* Sullivan, 63 Ill. 293.

Maryland.— Norfolk, etc., R. Co. *v.* Hoover, 79 Md. 253, 29 Atl. 994, 47 Am. St. Rep. 392, 25 L. R. A. 710.

Massachusetts.— Gilman *v.* Eastern R. Corp., 10 Allen 233, 87 Am. Dec. 635.

Michigan.— Kean *v.* Detroit Copper, etc., Rolling-Mills, 66 Mich. 277, 33 N. W. 395, 11 Am. St. Rep. 492; Hilts *v.* Chicago, etc., R. Co., 55 Mich. 437, 21 N. W. 878.

Missouri.— See Maxwell *v.* Hannibal, etc., R. Co., 85 Mo. 95, in which the master knowingly employed a servant of intemperate habits.

New York.— Chapman *v.* Erie R. Co., 55 N. Y. 579; Laning *v.* New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417.

Pennsylvania.— Huntingdon, etc., R., etc., Co. *v.* Decker, 84 Pa. St. 419.

Texas.— See Galveston, etc., R. Co. *v.* Davis, 92 Tex. 372, 48 S. W. 570 [*reversing* (Civ. App. 1898) 45 S. W. 956].

United States.— Baltimore, etc., R. Co. *v.* Henthorne, 73 Fed. 634, 19 C. C. A. 623; Wabash Western R. Co. *v.* Brow, 65 Fed. 941, 13 C. C. A. 222; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87.

See 34 Cent. Dig. tit. "Master and Servant," § 348.

Effect of rules forbidding drinking.— In an action predicated on the negligence of a railroad in employing an incompetent conductor, the fact that the rules of the company strictly forbade drinking did not make it negligent in employing a drinking man. Galveston, etc., R. Co. *v.* Davis, 92 Tex. 372, 48 S. W. 570 [*reversing* (Civ. App. 1898) 45 S. W. 956].

17. Cosgrove *v.* Pitman, 103 Cal. 268, 37 Pac. 232.

18. Galveston, etc., R. Co. *v.* Davis, 92 Tex. 372, 48 S. W. 570 [*reversing* (Civ. App. 1898) 45 S. W. 956]. See also Harrington *v.* New York Cent., etc., R. Co., 4 N. Y. Suppl. 640, in which there was no evidence that the servant's habits unfitted him for the duties of his position when sober, and there was evidence that he was sober on the day of the accident.

actual or constructive notice by reason of the fact that a competent fellow servant was also negligent.[19]

(H) *Proximate Cause of Injury.* To render a master liable for injuries to a servant, caused by the negligence of an incompetent fellow servant, such incompetency must have been the cause of the injury.[20]

(IV) *Concurrent Negligence of Master and Fellow Servant.*[21] A master is liable for an injury to a servant, who is free from contributory negligence,[22] where it is caused by the concurrent negligence of the master, or his vice-principal, and of a fellow servant.[23] Nevertheless, it is well settled that to

19. Coppins *v.* New York Cent., etc., R. Co., 122 N. Y. 557, 25 N. E. 915, 19 Am. St. Rep. 523 [*affirming* 48 Hun 292, 17 N. Y. St. 916].

20. *California.*— Cosgrove *v.* Pitman, 103 Cal. 268, 37 Pac. 232.

Georgia.— Dartmouth Spinning Co. *v.* Achord, 84 Ga. 14, 10 S. E. 449, 6 L. R. A. 190.

Illinois.— Hansell *v.* Jansen, 46 Ill. App. 335; D. M. Seebler Carriage Co. *v.* O'Neil, 41 Ill. App. 633.

Indiana.— Salem Stone, etc., Co. *v.* Chastain, 9 Ind. App. 453, 36 N. E. 910.

Kansas.— Union Pac. R. Co. *v.* Young, 19 Kan. 488.

Maryland.—Norfolk, etc., R. Co. *v.* Hoover, 79 Md. 263, 29 Atl. 994, 47 Am. St. Rep. 392, 25 L. R. A. 710.

Massachusetts.— McGuerty *v.* Hale, 161 Mass. 51, 36 N. E. 682; Gilman *v.* Eastern R. Corp., 10 Allen 233, 87 Am. Dec. 635.

Mississippi.— New Orleans, etc., R. Co. *v.* Hughes, 49 Miss. 258.

Missouri.— Williams *v.* Missouri Pac. R. Co., 109 Mo. 475, 18 S. W. 1098; O'Hare *v.* Chicago, etc., R. Co., 95 Mo. 662, 9 S. W. 23; Kersey *v.* Kansas City, etc., R. Co., 79 Mo. 362; McDermott *v.* Hannibal, etc., R. Co., 73 Mo. 516, 39 Am. Rep. 526; Murphy *v.* St. Louis, etc., R. Co., 71 Mo. 202; Smillie *v.* St. Bernard Dollar Store, 47 Mo. App. 402; Zumwalt *v.* Chicago, etc., R. Co., 35 Mo. App. 661.

New York.— Coppins *v.* New York Cent., etc., R. Co., 122 N. Y. 557, 25 N. E. 915, 19 Am. St. Rep. 523; Laning *v.* New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Wright *v.* New York Cent. R. Co., 25 N. Y. 562 [*reversing* 28 Barb. 80]; Engelhardt *v.* Delaware, etc., R. Co., 78 Hun 588, 29 N. Y. Suppl. 425; Slattery *v.* New York, etc., R. Co., 4 N. Y. Suppl. 910; Harrington *v.* New York Cent., etc., R. Co., 4 N. Y. Suppl. 640.

Ohio.— Consolidated Coal, etc., Co. *v.* Clay, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848.

Pennsylvania.— Welsh *v.* Pennsylvania R. Co., 192 Pa. St. 69, 43 Atl. 402; Snodgrass *v.* Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104; Johnston *v.* Pittsburgh, etc., R. Co., 114 Pa. St. 443, 7 Atl. 184.

Texas.— Mexican Nat. R. Co. *v.* Musette, 7 Tex. Civ. App. 169, 24 S. W. 520; Campbell *v.* Wing, 5 Tex. Civ. App. 431, 24 S. W. 360; Gulf, etc., R. Co. *v.* Schwabbe, 1 Tex. Civ. App. 573, 21 S. W. 706.

Virginia.— Norfolk, etc., R. Co. *v.* Phillips, 100 Va. 362, 41 S. E. 726.

Wisconsin.— Adams *v.* Snow, 106 Wis. 152, 81 N. W. 983; Klieforth *v.* Northwestern Iron Co., 98 Wis. 495, 74 N. W. 356.

United States.— New Jersey Cent. R. Co. *v.* Keegan, 82 Fed. 174, 27 C. C. A. 105; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87; Johnson *v.* Armour, 18 Fed. 490, 5 McCrary 629.

Canada.— St. Lawrence Sugar Refining Co. *v.* Campbell, 1 Montreal Q. B. 290.

See 34 Cent. Dig. tit. "Master and Servant," § 351.

21. Medical attendance see *supra*, IV, A, 1, f.

Number and supervision see *supra*, IV, G, 4, a, (II).

22. To defeat recovery, contributory negligence must be the negligence of plaintiff or someone for whom he is responsible. Stetler *v.* Chicago, etc., R. Co., 46 Wis. 497, 1 N. W. 112. See also Galveston, etc., R. Co. *v.* Sweeney, 14 Tex. Civ. App. 216, 36 S. W. 800.

23. *Arizona.*— Gila Valley, etc., R. Co. *v.* Lyon, (1905) 80 Pac. 337.

Arkansas.— Neal *v.* St. Louis, etc., R. Co., 71 Ark. 445, 78 S. W. 220; St. Louis, etc., R. Co. *v.* Haist, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65; Fordyce *v.* Briney, 58 Ark. 206, 24 S. W. 250.

California.— Fisk *v.* Central Pac. R. Co., 72 Cal. 38, 13 Pac. 144, 1 Am. St. Rep. 22.

Colorado.— Tanner *v.* Harper, 32 Colo. 156, 75 Pac. 404.

Connecticut.— Farrell *v.* Eastern Mach. Co., 77 Conn. 484, 59 Atl. 611, 107 Am. St. Rep. 45, 68 L. R. A. 239.

Delaware.— Wheatley *v.* Philadelphia, etc., R. Co., 1 Marv. 305, 30 Atl. 660.

Georgia.— Moseley *v.* Schofield, 123 Ga. 197, 51 S. E. 309; Colley *v.* Southern Cotton Oil Co., 120 Ga. 258, 47 S. E. 932; Jackson *v.* Merchants', etc., Transp. Co., 118 Ga. 651, 45 S. E. 254; Augusta *v.* Owens, 111 Ga. 464, 36 S. E. 830; Southern Agricultural Works *v.* Franklin, 111 Ga. 319, 36 S. E. 693; Cheeney *v.* Ocean Steamship Co., 92 Ga. 726, 19 S. E. 33, 44 Am. St. Rep. 113; Ocean Steamship Co. *v.* Matthews, 86 Ga. 418, 12 S. E. 632; Burns *v.* Ocean Steamship Co., 84 Ga. 709, 11 S. E. 493.

Illinois.— Illinois Southern R. Co. *v.* Marshall, 210 Ill. 562, 71 N. E. 597, 66 L. R. A. 297; Chicago, etc., Coal Co. *v.* Moran, 210 Ill. 9, 71 N. E. 38 [*affirming* 110 Ill. App. 664]; Chicago, etc., R. Co. *v.* Wise, 206 Ill.

authorize a recovery the master's negligence must have contributed to the

453, 69 N. E. 500 [*affirming* 106 Ill. App. 174]; Missouri Malleable Iron Co. *v.* Dillon, 206 Ill. 145, 69 N. E. 12 [*affirming* 106 Ill. App. 649]; Leonard *v.* Kinnare, 174 Ill. 532, 51 N. E. 688 [*affirming* 75 Ill. App. 145]; Chicago, etc., R. Co. *v.* House, 172 Ill. 601, 50 N. E. 151 [*affirming* 71 Ill. App. 147]; Monmouth Min., etc., Co. *v.* Erling, 148 Ill. 521, 36 N. E. 117, 39 Am. St. Rep. 187 [*affirming* 45 Ill. App. 411]; Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Chicago City R. Co. *v.* Enroth, 113 Ill. App. 285; Illinois Cent. R. Co. *v.* Johnson, 95 Ill. App. 54 [*affirmed* in 191 Ill. 594, 61 N. E. 334]; Goss Printing Press Co. *v.* Lempke, 90 Ill. App. 427 [*affirmed* in 191 Ill. 199, 60 N. E. 968]; Norris *v.* Illinois Cent. R. Co., 88 Ill. App. 614; Swift *v.* O'Neill, 88 Ill. App. 162 [*affirmed* in 187 Ill. 337, 58 N. E. 416]; North Chicago St. R. Co. *v.* Dudgeon, 83 Ill. App. 528 [*affirmed* in 184 Ill. 477, 56 N. E. 796]; Swift *v.* Rutkowski, 82 Ill. App. 108 [*affirmed* in 182 Ill. 18, 54 N. E. 1038].

Indiana.— Louisville, etc., Consol. R. Co. *v.* Miller, 140 Ind. 685, 40 N. E. 116; Louisville, etc., R. Co. *v.* Berkey, 136 Ind. 181, 35 N. E. 3; Pennsylvania Co. *v.* McCormack, 131 Ind. 250, 30 N. E. 27; Cincinnati, etc., R. Co. *v.* Long, 118 Ind. 579, 21 N. E. 317; Boyce *v.* Fitzpatrick, 80 Ind. 526; Island Coal Co. *v.* Risher, 13 Ind. App. 98, 40 N. E. 158; Hancock *v.* Keene, 5 Ind. App. 408, 32 N. E. 329.

Iowa.— Klaffke *v.* Bettendorf Axle Co., 125 Iowa 223, 100 N. W. 1116; Buehner *v.* Creamery Package Mfg. Co., 124 Iowa 445, 100 N. W. 345, 104 Am. St. Rep. 354.

Kansas.— Schwarzschild *v.* Drysdale, 69 Kan. 119, 76 Pac. 441; Atchison, etc., R. Co. *v.* Holt, 29 Kan. 149.

Louisiana.—Fuller *v.* Tremont Lumber Co., 114 La. 266, 38 So. 164, 108 Am. St. Rep. 348; McGinn *v.* McCormick, 109 La. 396, 33 So. 382; Dixon *v.* Pittsburg, etc., Lumber Co., 52 La. Ann. 1109, 27 So. 654; Faren *v.* Sellers, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256; Towns *v.* Vicksburg, etc., R. Co., 37 La. Ann. 630, 55 Am. Rep. 508.

Massachusetts.— Myers *v.* Hudson Iron Co., 150 Mass. 125, 22 N. E. 631, 15 Am. St. Rep. 176; Lawless *v.* Connecticut River R. Co., 136 Mass. 1; Elmer *v.* Locke, 135 Mass. 575; Cayzer *v.* Taylor, 10 Gray 274, 69 Am. Dec. 317.

Michigan.— Hayes *v.* Stearns, 130 Mich. 287, 89 N. W. 947; Town *v.* Michigan Cent. R. Co., 84 Mich. 214, 47 N. W. 665.

Minnesota.— Thomas *v.* Smith, 90 Minn. 379, 97 N. W. 141; Delude *v.* St. Paul City R. Co., 55 Minn. 63, 56 N. W. 461; Franklin *v.* Winona, etc., R. Co., 37 Minn. 409, 34 N. W. 898, 5 Am. St. Rep. 856; McMahon *v.* Davidson, 12 Minn. 357.

Missouri.— Cole *v.* St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; Deweese *v.* Meramec Iron Min. Co., 128 Mo. 423, 31 S. W. 110; Browning *v.* Wabash Western R. Co., 124 Mo. 55, 27 S. W. 644; Foster *v.* Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916; Bluedorn *v.* Missouri Pac. R. Co., 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615; Stoher *v.* St. Louis, etc., R. Co., 105 Mo. 192, 16 S. W. 591; Steffen *v.* Mayer, 96 Mo. 420, 9 S. W. 630; Irmer *v.* St. Louis Brewing Co., 69 Mo. App. 17.

New Hampshire.— Sirois *v.* Henry, 73 N. H. 148, 59 Atl. 936.

New Jersey.— Campbell *v.* T. A. Gillespie Co., 69 N. J. L. 279, 55 Atl. 276; Cole *v.* Warren Mfg. Co., 63 N. J. L. 626, 44 Atl. 647; Paulmier *v.* Erie R. Co., 34 N. J. L. 151.

New York.— Simone *v.* Kirk, 173 N. Y. 7, 65 N. E. 739 [*reversing* 57 N. Y. App. Div. 461, 67 N. Y. Suppl. 1019]; Auld *v.* Manhattan L. Ins. Co., 165 N. Y. 610, 58 N. E. 1085 [*affirming* 34 N. Y. App. Div. 491, 54 N. Y. Suppl. 222]; Eastland *v.* Clarke, 165 N. Y. 420, 59 N. E. 202, 70 L. R. A. 751 [*reversing* 28 N. Y. App. Div. 621, 51 N. Y. Suppl. 1140, 53 N. Y. Suppl. 1103]; Lilly *v.* New York Cent., etc., R. Co., 107 N. Y. 566, 14 N. E. 503; Ellis *v.* New York, etc., R. Co., 95 N. Y. 546; Cone *v.* Delaware, etc., R. Co., 81 N. Y. 206, 37 Am. Rep. 491 [*affirming* 15 Hun 172]; Booth *v.* Boston, etc., R. Co., 73 N. Y. 38, 29 Am. Rep. 97; Pluckham *v.* American Bridge Co., 104 N. Y. App. Div. 404, 93 N. Y. Suppl. 748; Strauss *v.* New York, etc., R. Co., 91 N. Y. App. Div. 583, 87 N. Y. Suppl 67; O'Donnell *v.* East River Gas Co., 91 Hun 184, 36 N. Y. Suppl. 288; Crowell *v.* Thomas, 90 Hun 193, 35 N. Y. Suppl. 936; Warn *v.* New York Cent., etc., R. Co., 80 Hun 71, 29 N. Y. Suppl. 897; Busch *v.* Buffalo Creek R. Co., 29 Hun 112; Bagley *v.* Consolidated Gas Co., 13 Misc. 6, 34 N. Y. Suppl. 187; Mulvaney *v.* Brooklyn City R. Co., 1 Misc. 425, 21 N. Y. Suppl. 427 [*affirmed* in 142 N. Y. 651, 37 N. E. 568]; Donohue *v.* Brooklyn City R. Co., 14 N. Y. Suppl. 639 [*affirmed* in 131 N. Y. 623, 30 N. E. 865]; Pullutro *v.* Delaware, etc., R. Co., 7 N. Y. Suppl. 510; Kern *v.* De Castro, etc., Sugar Refining Co., 5 N. Y. Suppl. 548; Smith *v.* New York Cent., etc., R. Co., 9 N. Y. St. 612.

North Carolina.— Crutchfield *v.* Richmond, etc., R. Co., 76 N. C. 320.

Ohio.— Pittsburgh, etc., R. Co. *v.* Henderson, 37 Ohio St. 549; Smith *v.* Wm. Powell Co., 10 Ohio Dec. (Reprint) 799, 23 Cinc. L. Bul. 436; Cincinnati Ice Co. *v.* Higdon, 7 Ohio Dec. (Reprint) 239, 2 Cinc. L. Bul. 3.

Oklahoma.— Ruemmeli-Braun Co. *v.* Cahill, 14 Okla. 422, 79 Pac. 260.

Oregon.— Carlson *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 450, 28 Pac. 497; Knahtla *v.* Oregon Short-Line, etc., Co., 21 Oreg. 136, 27 Pac. 91; Hartvig *v.* N. P. Lumber Co., 19 Oreg. 522, 25 Pac. 358.

South Carolina.— Bodie *v.* Charleston, etc., R. Co., 66 S. C. 302, 44 S. E. 943.

Tennessee.— Louisville, etc., R. Co. *v.* Kenley, 92 Tenn. 207, 21 S. W. 326.

injury,[24] and in a number of cases the master's liability is made to depend upon whether his negligence was the proximate or remote cause of the acci-

Texas.— Galveston, etc., R. Co. *v.* Templeton, 87 Tex. 42, 26 S. W. 1066; Gulf, etc., R. Co. *v.* Kizziah, 86 Tex. 81, 23 S. W. 578; Gulf, etc., R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151; Texas, etc., R. Co. *v.* Scott, 64 Tex. 549; Bonn *v.* Galveston, etc., R. Co., (Civ. App. 1904) 82 S. W. 808; Consumers' Cotton Oil Co. *v.* Jonte, 36 Tex. Civ. App. 18, 80 S. W. 847; Texas Cent. R. Co. *v.* Palfrey, 35 Tex. Civ. App. 501, 80 S. W. 346; Ray *v.* Pecos, etc., R. Co., 35 Tex. Civ. App. 123, 80 S. W. 112; Texas, etc., R. Co. *v.* Lee, 32 Tex. Civ. App. 23, 74 S. W. 345; American Cotton Co. *v.* Smith, 29 Tex. Civ. App. 425, 69 S. W. 443; Texas, etc., R. Co. *v.* Maupin, 26 Tex. Civ. App. 385, 63 S. W. 346; Galveston, etc., R. Co. *v.* Jackson, (Civ. App. 1898) 44 S. W. 1072; Galveston, etc., R. Co. *v.* Sweeney, 14 Tex. Civ. App. 216, 36 S. W. 800; Gulf, etc., R. Co. *v.* Warner, (Civ. App. 1896) 36 S. W. 118; Houston, etc., R. Co. *v.* Kelly, (Civ. App. 1896) 35 S. W. 878; International, etc., R. Co. *v.* Williams, (Civ. App. 1896) 34 S. W. 161; San Antonio, etc., R. Co. *v.* Harding, 11 Tex. Civ. App. 497, 33 S. W. 373; Missouri, etc., R. Co. *v.* Woods, (Civ. App. 1894) 25 S. W. 741; Mexican Nat. R. Co. *v.* Musette, 7 Tex. Civ. App. 169, 24 S. W. 520; Texas, etc., R. Co. *v.* Hohn, 1 Tex. Civ. App. 36, 21 S. W. 942.

Utah.— Merrill *v.* Oregon Short Line R. Co., 29 Utah 264, 81 Pac. 85, 110 Am. St. Rep. 695; Hicks *v.* Southern Pac. Co., 27 Utah 526, 76 Pac. 625; Jenkins *v.* Mammoth Min. Co., 24 Utah 513, 68 Pac. 845; Pool *v.* Southern Pac. Co., 20 Utah 210, 58 Pac. 326.

Vermont.— Morrisey *v.* Hughes, 65 Vt. 553, 27 Atl. 205.

Virginia.— Virginia, etc., R. Co. *v.* Bailey, 103 Va. 205, 49 S. E. 33; Norfolk, etc., R. Co. *v.* Phillips, 100 Va. 362, 41 S. E. 726; Norfolk, etc., R. Co. *v.* Nuckol, 91 Va. 193, 21 S. E. 342; Norfolk, etc., R. Co. *v.* Phelps, 90 Va. 665, 19 S. E. 652; Norfolk, etc., R. Co. *v.* Thomas, 90 Va. 205, 17 S. E. 884, 44 Am. St. Rep. 906.

Washington.— Conine *v.* Olympia Logging Co., 36 Wash. 345, 78 Pac. 932; Czarecki *v.* Seattle, etc., R., etc., Co., 30 Wash. 288, 70 Pac. 750.

Wisconsin.— Cowan *v.* Chicago, etc., R. Co., 80 Wis. 284, 50 N. W. 180; Johnson *v.* Ashland First Nat. Bank, 79 Wis. 414, 48 N. W. 712, 24 Am. St. Rep. 722; Sherman *v.* Menominee River Lumber Co., 72 Wis. 122, 39 N. W. 365, 1 L. R. A. 173; Stetler *v.* Chicago, etc., R. Co., 49 Wis. 609, 6 N. W. 303.

United States.— Grand Trunk R. Co. *v.* Cummings, 106 U. S. 700, 1 S. Ct. 493, 27 L. ed. 266; Pennsylvania R. Co. *v.* Jones, 123 Fed. 753, 59 C. C. A. 87; The Anchoria, 120 Fed. 1017, 56 C. C. A. 452 [*affirming* 113 Fed. 982]; Cudahy Packing Co. *v.* Anthes, 117 Fed. 118, 54 C. C. A. 504; Maupin *v.* Texas, etc., R. Co., 99 Fed. 49, 40 C. C. A. 234; Jensen *v.* The Joseph B. Thomas, 81 Fed. 578; Pullman's Palace-Car Co. *v.* Harkins, 55 Fed. 932, 5 C. C. A. 326; Anderson *v.* The Ashebrooke, 44 Fed. 124; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87; Smith *v.* Memphis, etc., R. Co., 18 Fed. 304; Walker *v.* Grand Trunk R. Co., 29 Fed. Cas. No. 17,070, 2 Hask. 96 [*affirmed* in 154 U. S. 653, 14 S. Ct. 1189, 25 L. ed. 977].

Canada.— Myers *v.* Sault St. Marie Pulp, etc., Co., 3 Ont. L. Rep. 600.

See 34 Cent. Dig. tit. "Master and Servant," §§ 515, 518–525.

The rule prevails in admiralty as well as at common law. Jensen *v.* The Joseph B. Thomas, 81 Fed. 578. See also Anderson *v.* The Ashebrooke, 44 Fed. 124; The Phœnix, 34 Fed. 760.

Defect brought about by fellow servant.— A servant charged with the duty of working machinery with another servant is not a fellow servant of the latter in such sense as to relieve the master from responsibility for an injury which happens through a defect in the machinery, although that defect may have been brought about by the negligence of the other servant. McDade *v.* Washington, etc., R. Co., 5 Mackey (D. C.) 144.

The master's presence when a servant is injured by the negligent act of a fellow servant does not make him liable for the injury unless he knew, or ought to have known, the facts that made the act dangerous. Cannon *v.* Mears, 7 Kulp (Pa.) 281. See also Dwyer *v.* Hickler, 16 N. Y. Suppl. 814. *Compare* Norfolk, etc., R. Co. *v.* Thomas, 90 Va. 205, 17 S. E. 884, 44 Am. St. Rep. 906.

Master held liable to youthful and inexperienced servants see Morris *v.* Stanfield, 81 Ill. App. 264; Jones *v.* Florence Min. Co., 66 Wis. 268, 28 N. W. 207, 57 Am. Rep. 269.

24. *Colorado.*— Burlington, etc., R. Co. *v.* Budin, 6 Colo. App. 275, 40 Pac. 503.

Illinois.— Chicago, etc., R. Co. *v.* Becker, 38 Ill. App. 523.

Kentucky.— Coffman *v.* Louisville, etc., R. Co., 18 S. W. 1012, 13 Ky. L. Rep. 866.

Massachusetts.— Sullivan *v.* Wamsutta Mills, 155 Mass. 200, 29 N. E. 516; Cunningham *v.* Washington Mills Co., (1891) 26 N. E. 235; Hayes *v.* Western R. Corp., 3 Cush. 270.

New Hampshire.— Griffin *v.* Glenn Mfg. Co., 67 N. H. 287, 30 Atl. 344.

New York.— Harvey *v.* New York Cent., etc., R. Co., 88 N. Y. 481; Slater *v.* Jewett, 85 N. Y. 61, 39 Am. Rep. 627; De Young *v.* Irving, 5 N. Y. App. Div. 499, 38 N. Y. Suppl. 1089; Bryant *v.* New York Cent., etc., R. Co., 81 Hun 164, 30 N. Y. Suppl. 737; Mahoney *v.* Vacuum Oil Co., 76 Hun 579, 28 N. Y. Suppl. 196; Carr *v.* North River Constr. Co., 48 Hun 266.

Tennessee.— Nashville, etc., R. Co. *v.* Handman, 13 Lea 423.

Texas.— Rose *v.* Gulf, etc., R. Co., (1891) 17 S. W. 789; Corona *v.* Galveston, etc., R. Co., (1891) 17 S. W. 384; Gulf, etc., R. Co. *v.* Compton, 75 Tex. 667, 13 S. W. 667.

dent.[25] On the other hand if the master's or vice-principal's negligence is the proximate or efficient cause of the injury,[26] or if the injury would not have been

See 34 Cent. Dig. tit. "Master and Servant," §§ 515–534.

If the injury would not have happened but for the negligence of a fellow servant, the master is not liable. Hayes *v.* Western R. Corp., 3 Cush. (Mass.) 270. See also Cooper *v.* Hamilton Mfg. Co., 14 Allen (Mass.) 193; McCabe *v.* Brainard, 17 N. Y. App. Div. 45, 44 N. Y. Suppl. 964; Whittaker *v.* Delaware, etc., Canal Co., 49 Hun (N. Y.) 400, 3 N. Y. Suppl. 576; Hall *v.* Cooperstown, etc., R. Co., 49 Hun (N. Y.) 373, 3 N. Y. Suppl. 584; Nashville, etc., R. Co. *v.* Handman, 13 Lea (Tenn.) 423.

Where the accident results from a new and distinct cause, other than the master's negligence, he is not liable. Rose *v.* Gulf, etc., R. Co., (Tex. 1891) 17 S. W. 789.

25. *California.*— Vizelich *v.* Southern Pac. Co., 126 Cal. 587, 59 Pac. 129; Trewatha *v.* Buchanan Gold Min., etc., Co., 96 Cal. 494, 28 Pac. 571, 31 Pac. 561; Kevern *v.* Providence Gold, etc., Min. Co., 70 Cal. 392, 11 Pac. 740.

Illinois.— Chicago, etc., R. Co. *v.* Touhy, 26 Ill. App. 99.

Indiana.— Evansville, etc., R. Co. *v.* Tohill, 143 Ind. 49, 41 N. E. 709, 42 N. E. 352; New York, etc., R. Co. *v.* Perriguey, 138 Ind. 414, 34 N. E. 233, 37 N. E. 976.

Maryland.— Maryland Clay Co. *v.* Goodnow, 95 Md. 330, 51 Atl. 292, 53 Atl. 427.

Missouri.— Relyea *v.* Kansas City, etc., R. Co., (1892) 19 S. W. 1116.

New Mexico.— Lutz *v.* Atlantic, etc., R. Co., 6 N. M. 496, 30 Pac. 912, 16 L. R. A. 819.

New York.— Henry *v.* Staten Island R. Co., 81 N. Y. 373; Connors *v.* Elmira, etc., R. Co., 92 Hun 339, 36 N. Y. Suppl. 926; Leary *v.* Lehigh Valley R. Co., 76 Hun 575, 28 N. Y. Suppl. 187; Harvey *v.* New York Cent., etc., R. Co., 10 N. Y. Suppl. 645; Course *v.* New York, etc., R. Co., 2 N. Y. Suppl. 312 [*affirmed* in 117 N. Y. 652, 22 N. E. 1133].

Virginia.— Richmond, etc., R. Co. *v.* Trible, (1896) 24 S. E. 278; Norfolk, etc., R. Co. *v.* Brown, 91 Va. 668, 22 S. E. 496.

Wisconsin.— Pease *v.* Chicago, etc., R. Co., 61 Wis. 163, 20 N. W. 908; Fowler *v.* Chicago, etc., R. Co., 61 Wis. 159, 21 N. W. 40.

United States.— Little Rock, etc., R. Co. *v.* Barry, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349; Farmers' L. & T. Co. *v.* Toledo, etc., R. Co., 67 Fed. 73.

See 34 Cent. Dig. tit. "Master and Servant," §§ 526–534.

26. *California.*— Brown *v.* Sennett, 68 Cal. 225, 9 Pac. 74, 58 Am. Rep. 8.

Colorado.— Denver, etc., R. Co. *v.* Sipes, 26 Colo. 17, 55 Pac. 1093.

Illinois.— Chicago City R. Co. *v.* Enroth, 113 Ill. App. 285; Chicago, etc., R. Co. *v.* Bell, 111 Ill. App. 280.

Indiana.— Pennsylvania Co. *v.* Congdon, 134 Ind. 226, 33 N. E. 795, 39 Am. St. Rep. 251; Lake Shore, etc., R. Co. *v.* Wilson, 11 Ind. App. 488, 38 N. E. 343; Cole *v.* Wood, 11 Ind. App. 37, 36 N. E. 1074.

Kansas.— Atchison, etc., R. Co. *v.* Lannigan, 56 Kan. 109, 42 Pac. 343.

Kentucky.— Cincinnati, etc., R. Co. *v.* Roberts, 110 Ky. 856, 62 S. W. 901, 23 Ky. L. Rep. 264.

Minnesota.— Ransier *v.* Minneapolis, etc., R. Co., 32 Minn. 331, 20 N. W. 332; McMahon *v.* Davidson, 12 Minn. 357.

Missouri.— Browning *v.* Wabash Western R. Co., 124 Mo. 55, 27 S. W. 644, (1893) 24 S. W. 734; Henry *v.* Wabash Western R. Co., 109 Mo. 488, 19 S. W. 239.

Montana.— Schmidt *v.* Montana Cent. R. Co., 15 Mont. 106, 38 Pac. 226.

New York.— Bushby *v.* New York, etc., R. Co., 107 N. Y. 374, 14 N. E. 407, 1 Am. St. Rep. 844; Redington *v.* New York, etc., R. Co., 84 Hun 231, 32 N. Y. Suppl. 535 [*affirmed* in 152 N. Y. 655, 47 N. E. 1111]; Rickhoff *v.* Heckman, 3 Silv. Sup. 563, 73 N. Y. Suppl. 471; Shiner *v.* Russell, 6 N. Y. St. 78.

North Dakota.— Boss *v.* Northern Pac. R. Co., 2 N. D. 128, 49 N. W. 655, 33 Am. St. Rep. 756.

Tennessee.— Illinois Cent. R. Co. *v.* Spence, 93 Tenn. 173, 23 S. W. 211, 42 Am. St. Rep. 907.

Texas.— Mexican Nat. R. Co. *v.* Mussette, 86 Tex. 708, 26 S. W. 1075, 24 L. R. A. 642; Gulf, etc., R. Co. *v.* Pettis, 69 Tex. 689, 7 S. W. 93; Ray *v.* Pecos, etc., R. Co., (Civ. App. 1905) 88 S. W. 466; Missouri, etc., R. Co. *v.* Hutchens, 35 Tex. Civ. App. 343, 80 S. W. 415; Galveston, etc., R. Co. *v.* Sweeney, 14 Tex. Civ. App. 216, 36 S. W. 800.

Virginia.— Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226; Richmond, etc., R. Co. *v.* George, 88 Va. 223, 13 S. E. 429.

Washington.— Howe *v.* Northern Pac. R. Co., 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949.

Wisconsin.— Grant *v.* Keystone Lumber Co., 119 Wis. 229, 96 N. W. 535, 100 Am. St. Rep. 883; Lago *v.* Walsh, 98 Wis. 348, 74 N. W. 212.

United States.— Shugart *v.* Atlanta, etc., R. Co., 133 Fed. 505, 66 C. C. A. 379; Texas, etc., R. Co. *v.* Carlin, 111 Fed. 777, 49 C. C. A. 605; Mexican Cent. R. Co. *v.* Glover, 107 Fed. 356, 46 C. C. A. 334; Felton *v.* Harbeson, 104 Fed. 737, 44 C. C. A. 188; Clyde *v.* Richmond, etc., R. Co., 69 Fed. 673; Northern Pac. Coal Co. *v.* Richmond, 58 Fed. 756, 7 C. C. A. 485; Boden *v.* Demwolf, 56 Fed. 846; Pullman's Palace-Car Co. *v.* Harkins, 55 Fed. 932, 5 C. C. A. 326; The Manhanset, 53 Fed. 843 [*affirmed* in 69 Fed. 843, 13 C. C. A. 677]; Howard *v.* Delaware, etc., Canal Co., 40 Fed. 195, 6 L. R. A. 75; Heckman *v.* Mackey, 35 Fed. 353; The Phœnix, 34 Fed. 760.

See 34 Cent. Dig. tit. "Master and Servant," §§ 526–534.

sustained but for his negligence,[27] the master is liable, even though it might have been prevented by the exercise of greater care on the part of the fellow servant;[28] nor will the fact that the master's negligence was slight as compared with that of the fellow servant defeat a recovery.[29] Where, however, the negligence of the servant is such as to have caused the injury even had the master not been negligent, then the servant's negligence is the sole cause of the injury, and the master is not liable.[30]

(v) *Gross or Wilful Negligence of Fellow Servants.* Unless so provided by statute,[31] a master is not liable for the gross or wilful negligence of a fellow servant.[32] In Kentucky, however, the master is held liable where the negligent fellow servant stands in a position of superiority to the servant injured,[33] but not otherwise.[34] What, in a given case, will constitute wilful or gross negligence necessarily depends upon its peculiar facts and circumstances.[35]

27. *California.*— Keast *v.* Santa Ysabel Gold Min. Co., 136 Cal. 256, 68 Pac. 771.

Georgia.— Jackson *v.* Merchants', etc., Transp. Co., 118 Ga. 651, 45 S. E. 254; Loveless *v.* Standard Gold Min. Co., 116 Ga. 427, 42 S. E. 741, 59 L. R. A. 596.

Illinois.— Hansell-Elcock Foundry Co. *v.* Clark, 214 Ill. 399, 73 N. E. 787 [*affirming* 115 Ill. App. 209]; Armour *v.* Golkowska, 202 Ill. 144, 66 N. E. 1037 [*affirming* 95 Ill. App. 492].

New York.— Coppins *v.* New York Cent., etc., R. Co., 122 N. Y. 557, 25 N. E. 915, 19 Am. St. Rep. 523; Stringham *v.* Stewart, 100 N. Y. 516, 3 N. E. 575; O'Keefe *v.* Great Northern El. Co., 105 N. Y. App. Div. 8, 93 N. Y. Suppl. 407; Kremer *v.* New York Edison Co., 102 N. Y. App. Div. 433, 92 N. Y. Suppl. 883; Tetherton *v.* U. S. Talc Co., 41 N. Y. App. Div. 613, 58 N. Y. Suppl. 55 [*affirmed* in 165 N. Y. 665, 59 N. E. 1131]; Hall *v.* Cooperstown, etc., R. Co., 49 Hun 373, 3 N. Y. Suppl. 584.

North Carolina.— Bean *v.* Western North Carolina R. Co., 107 N. C. 731, 12 S. E. 600.

Ohio.— Lake Erie, etc., R. Co. *v.* Mulcahy, 16 Ohio Cir. Ct. 204, 9 Ohio Cir. Dec. 82.

Texas.— International, etc., R. Co. *v.* Sipole, (Civ. App. 1895) 29 S. W. 686.

United States.— Northern Pac. R. Co. *v.* Charless, 51 Fed. 562, 2 C. C. A. 380 [*reversed* on another point in 162 U. S. 359, 16 S. Ct. 848, 40 L. ed. 999].

See 34 Cent. Dig. tit. "Master and Servant," §§ 526–534.

28. American Tin-Plate Co. *v.* Williams, 30 Ind. App. 46, 65 N. E. 304; Haskell *v.* Cape Ann Anchor Works, 178 Mass. 485, 59 N. E. 1113, 4 L. R. A. N. S. 220; Ellis *v.* New York, etc., R. Co., 95 N. Y. 546; Cone *v.* Delaware, etc., R. Co., 81 N. Y. 206, 37 Am. Rep. 491 [*affirming* 15 Hun 172]; Clyde *v.* Richmond, etc., R. Co., 59 Fed. 394.

29. O'Laughlin *v.* New York Cent., etc., R. Co., 9 N. Y. St. 384.

30. Gila Valley, etc., R. Co. *v.* Lyon, (Ariz. 1905) 80 Pac. 337.

31. **Under Ala. Code, § 1749,** an employer is liable for the wanton, wilful, or intentional misconduct of an employee inflicting personal injury upon another employee. Southern R. Co. *v.* Moore, 128 Ala. 434, 29 So. 659.

32. Bull *v.* Mobile, etc., R. Co., 67 Ala. 206; Chicago, etc., R. Co. *v.* Thompson, 99 Ill. App. 277. But *compare* Dalton *v.* Receivers, 6 Fed. Cas. No. 3,550, 4 Hughes 180. And see Girard Coal Co. *v.* Wiggins, 52 Ill. App. 69.

33. Cincinnati, etc., R. Co. *v.* Palmer, 98 Ky. 382, 33 S. W. 199, 17 Ky. L. Rep. 998; Louisville, etc., R. Co. *v.* Brantley, 96 Ky. 297, 28 S. W. 477, 16 Ky. L. Rep. 691, 49 Am. St. Rep. 291; Greer *v.* Louisville, etc., R. Co., 94 Ky. 169, 21 S. W. 649, 14 Ky. L. Rep. 876, 42 Am. St. Rep. 345; Louisville, etc., R. Co. *v.* Brooks, 83 Ky. 129, 4 Am. St. Rep. 135; Louisville, etc., R. Co. *v.* Cavens, 9 Bush (Ky.) 559; Louisville, etc., R. Co. *v.* Filbern, 6 Bush (Ky.) 574, 99 Am. Dec. 690; Louisville, etc., R. Co. *v.* Robinson, 4 Bush (Ky.) 507; Louisville, etc., R. Co. *v.* Collins, 2 Duv. (Ky.) 114, 87 Am. Dec. 486.

34. Volz *v.* Chesapeake, etc., R. Co., 95 Ky. 188, 24 S. W. 119, 15 Ky. L. Rep. 727; Ft. Hill Stone Co. *v.* Orm, 84 Ky. 183; Casey *v.* Louisville, etc., R. Co., 84 Ky. 79; Newport News, etc., Co. *v.* Eifort, 15 Ky. L. Rep. 600.

Felonious act.— Where the death of an employee resulted from the felonious act of a co-employee, the employer is not liable for expenses incurred in caring for decedent before his death. Harris *v.* Kentucky Timber, etc., Co., 43 S. W. 462, 45 S. W. 94, 19 Ky. L. Rep. 1731.

35. **Wilful neglect must involve either "an** intentional wrong, or such a reckless disregard of security and right as to imply had faith." Louisville, etc., R. Co. *v.* Filbern, 6 Bush (Ky.) 574, 99 Am. Dec. 690.

Facts held to show gross or wilful negligence see Newport News, etc., Co. *v.* Dentzel, 91 Ky. 42, 14 S. W. 958, 12 Ky. L. Rep. 626; Louisville, etc., R. Co. *v.* Mitchell, 87 Ky. 327, 8 S. W. 706, 10 Ky. L. Rep. 211; Louisville, etc., R. Co. *v.* Moore, 83 Ky. 675; Louisville, etc., R. Co. *v.* Hurst, 20 S. W. 817, 14 Ky. L. Rep. 632; Louisville, etc., R. Co. *v.* Robinson, 16 S. W. 707, 13 Ky. L. Rep. 153.

Gross or wilful negligence not shown see Kincade *v.* Chicago, etc., R. Co., 107 Iowa 682, 78 N. W. 698; Louisville, etc., R. Co. *v.* Coniff, 90 Ky. 560, 14 S. W. 543, 12 Ky. L. Rep. 545; Robinson *v.* Louisville, etc., R. Co.,

(VI) *Superior Servants*[36] — (A) *General Considerations.* In some of the states the rule that a servant because of his rank may be a vice-principal seems to be repudiated *in toto*;[37] but in most of the states it is held that an agent to whom is intrusted the entire management of the master's business, or the management of a separate and distinct department, is a vice-principal and not a fellow servant.[38] Closely allied to this rule is the so-called "superior servant" doctrine adopted in some of the states, under which a servant given the power to control other servants is not their fellow servant, where his negligence in the exercise of such control is the cause of the injury to the inferior servant.[39] Whether a case holding that certain employees are not fellow servants is based on the one rule or the other is oftentimes difficult to determine because of the absence of any fixed rule as to who is the head of the department as distinguished from a mere superior servant. For instance, in some of the states which have expressly repudiated the superior servant doctrine, a superior servant has been held a vice-principal because of his rank, although he was no more the head of a department than any other employee having power to employ and control a gang of workmen.

(B) *Servant Having Power of Control* — (1) In General. The question whether a foreman or other superior servant who is not the head of a department, such as a section foreman on a railroad, is a vice-principal, while it may depend on whether he is exercising some non-delegable duty of the master, is oftentimes determined merely from his rank, so that its solution depends upon whether in the particular state the superior servant rule is followed. The superior servant rule as distinguished from the general manager and head of department rule seems to have been first adopted in this country in Ohio.[40] A suggested basis for the rule is that the duty of using reasonable care in giving orders to servants is one of those obligations which the master cannot delegate so as to absolve himself from liability for their non-performance or improper performanee.[41] In other cases the duty of the inferior servant to obey his superior servant seems to be the controlling idea.[42]

(2) States in Which Rule Has Been Adopted. With more or less qualification the superior servant doctrine is clearly the law in the states of Illinois,[43]

24 S. W. 625, 15 Ky. L. Rep. 626; Chesapeake, etc., R. Co. *v.* McMichael, 15 S. W. 878, 13 Ky. L. Rep. 758; Guthrie *v.* Great Northern R. Co., 76 Minn. 277, 79 N. W. 107; Dalton *v.* Receivers, 6 Fed. Cas. No. 3,550, 4 Hughes 180.

36. Gross negligence see *supra*, IV, G, 4, a, (v).

Under Employers' Liability Act see *infra*, IV, G, 4, b, (III).

37. See *infra*, IV, G, 4, a, (VI), (C).

38. See *infra*, IV, G, 4, a, (VI), (C).

39. See *infra*, IV, G, 4, a, (VI), (B).

40. Cleveland, etc., R. Co. *v.* Keary, 3 Ohio St. 201.

41. Cleveland, etc., R. Co. *v.* Keary, 3 Ohio St. 201; 2 Labatt M. & S. 1462.

42. Chicago, etc., R. Co. *v.* May, 108 Ill. 288.

"In exercising this power he does not stand upon the same plane with those under his control. His position is one of superiority. When he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey, at the peril of losing their situations, and such commands are, in contemplation of law, the commands of the company, and hence it is held responsible for the consequences." Chicago, etc., R. Co. *v.* May, 108 Ill. 288, 299.

43. Fraser *v.* Schroeder, 163 Ill. 459, 45 N. E. 288 [*affirming* 60 Ill. App. 519]; West Chicago St. R. Co. *v.* Dwyer, 162 Ill. 482, 44 N. E. 815 [*affirming* 57 Ill. App. 440] (holding that whether the starter of a street railway was a superior servant of a gripman was a question of fact for the jury); Cleveland, etc., R. Co. *v.* Surrells, 115 Ill. App. 615; Driscoll *v.* Chicago, etc., R. Co., 97 Ill. App. 668; Chicago Dredging, etc., Co. *v.* McMahon, 30 Ill. App. 358; Chicago, etc., R. Co. *v.* Blank, 24 Ill. App. 438.

The injury must result from the negligence of the superior servant acting as such through obedience to his orders. In this respect the rule is different from the rule in Ohio. Chicago, etc., R. Co. *v.* May, 108 Ill. 288.

Acting in part as common laborer.— The mere fact that the servant exercising such authority sometimes or generally labors with the others as a common hand will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. Chicago, Hair, etc., Co. *v.* Mueller, 203 Ill. 558, 68 N. E. 51 [*affirming* 106 Ill. App. 21]; Norton *v.* Nadebok, 190 Ill. 595, 60 N. E. 843, 54 L. R. A. 842; St. Louis Consol. Coal Co. *v.* Gruber, 188 Ill. 584, 59 N. E. 254; Chicago, etc., R. Co. *v.* May, 108 Ill. 288; St. Louis

Kansas,[44] Kentucky,[45] Louisiana,[46] Nebraska,[47] Ohio,[48] Tennessee,[49] Texas,[50] and

Consol. Coal Co. *v.* Fleischbein, 109 Ill. App. 509.

44. Kansas City Car, etc. Co. *v.* Secrist, 59 Kan. 778, 54 Pac. 688 [*following* Walker *v.* Gillett, 59 Kan. 214, 52 Pac. 442]; Consolidated Kansas City Smelting, etc., Co. *v.* Peterson, 8 Kan. App. 316, 55 Pac. 673.

45. Illinois Cent. R. Co. *v.* Josey, 110 Ky. 342, 61 S. W. 703, 22 Ky. L. Rep. 1795, 96 Am. St. Rep. 455, 54 L. R. A. 78; Linck *v.* Louisville, etc., R. Co., 107 Ky. 370, 54 S. W. 184, 21 Ky. L. Rep. 1097; Greer *v.* Louisville, etc., R. Co., 94 Ky. 169, 21 S. W. 649, 14 Ky. L. Rep. 876, 42 Am. St. Rep. 345; Howard *v.* Chesapeake, etc., R. Co., 90 S. W. 950, 28 Ky. L. Rep. 891; Illinois Cent. R. Co. *v.* Elliott, 82 S. W. 374, 26 Ky. L. Rep. 669; Mayfield Woolen Mills *v.* Frazier, 80 S. W. 456, 25 Ky. L. Rep. 2263; Louisville, etc., R. Co. *v.* Hawkins, 51 S. W. 426, 21 Ky. L. Rep. 354; Ritt *v.* Louisville, etc., R. Co., 4 S. W. 796, 9 Ky. L. Rep. 307.

Negligence must be gross.— In this state there is a limitation of the rule which is not adopted in any other state, in that the master is liable for an injury to a subordinate resulting from the gross negligence of the superior, but not for an injury resulting from ordinary negligence. Cincinnati, etc., R. Co. *v.* Palmer, 98 Ky. 382, 33 S. W. 199, 17 Ky. L. Rep. 998; Illinois Cent. R. Co. *v.* Elliott, 82 S. W. 374, 26 Ky. L. Rep. 669; Kentucky Distilleries, etc., Co. *v.* Schreiber, 73 S. W. 769, 24 Ky. L. Rep. 2236; Board *v.* Chesapeake, etc., R. Co., 70 S. W. 625, 24 Ky. L. Rep. 1079. Gross negligence is the failure to use such care as careless and inattentive persons usually exercise under like circumstances. Illinois Cent. R. Co. *v.* Coleman, 59 S. W. 13, 22 Ky. L. Rep. 878.

Subordinate foreman.— It is immaterial that a superior servant himself was subject to the orders of another while engaged in the work in hand. Illinois Cent. R. Co. *v.* Elliott, 82 S. W. 374, 26 Ky. L. Rep. 669.

A railroad yard foreman is not a fellow servant of a switchman. Howard *v.* Chesapeake, etc., R. Co., 90 S. W. 950, 28 Ky. L. Rep. 891.

46. Bonnin *v.* Crowley, 112 La. 1025, 36 So. 842; Evans *v.* Louisiana Lumber Co., 111 La. 534, 35 So. 736; Wilson *v.* Banner Lumber Co., 108 La. 590, 32 So. 460; Vicars *v.* Cumberland Tel., etc., Co., 52 La. Ann. 2153, 28 So. 367; Mattise *v.* Consumers' Ice Mfg. Co., 46 La. Ann. 1535, 16 So. 400, 49 Am. St. Rep. 356.

47. New Omaha Thomson-Houston Electric Light Co. *v.* Baldwin, 62 Nebr. 180, 87 N. W. 27; Union Pac. R. Co. *v.* Doyle, 50 Nebr. 555, 70 N. W. 43 (holding that the absence of the power to hire and discharge is immaterial); Sioux City, etc., R. Co. *v.* Smith, 22 Nebr. 775, 36 N. W. 285; Burlington, etc., R. Co. *v.* Crockett, 19 Nebr. 138, 26 N. W. 921; Chicago, etc., R. Co. *v.* Lundstrom, 16 Nebr. 254, 20 N. W. 198, 49 Am. Rep. 718.

48. Pittsburgh, etc., R. Co. *v.* Lewis, 33 Ohio St. 196; Berea Stone Co. *v.* Kraft, 31 Ohio St. 287, 27 Am. Rep. 510; Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Cleveland, etc., R. Co. *v.* Keary, 3 Ohio St. 201; Little Miami R. Co. *v.* Stevens, 20 Ohio 415; Henry J. Spieker Co. *v.* Ferguson, 25 Ohio Cir. Ct. 671; Andrews Bros. Co. *v.* Burns, 22 Ohio Cir. Ct. 437, 12 Ohio Cir. Dec. 305; Baltimore, etc., R. Co. *v.* Sutherland, 12 Ohio Cir. Ct. 309, 4 Ohio Cir. Dec. 115 [*affirmed* in 52 Ohio St. 676, 44 N. E. 1144]; Hartman *v.* Kloeppinger, 9 Ohio Cir. Ct. 433, 6 Ohio Cir. Dec. 393.

Authority from master.— The master cannot be charged with the negligence of a servant directing another, where the former was not acting under authority of the master or of any one standing in the master's place. Toomey *v.* Avery Stamping Co., 20 Ohio Cir. Ct. 183, 11 Ohio Cir. Dec. 216. The fact that employees have allowed one of their number, on account of his age, to direct the work does not constitute him a foreman of the parties, or render the employer liable for injury resulting from such employee's negligence. Hartman *v.* Kloeppinger, 9 Ohio Cir. Ct. 433, 6 Ohio Cir. Dec. 393.

49. Ohio River, etc., R. Co. *v.* Edwards, 111 Tenn. 31, 76 S. W. 897; Chattanooga Electric R. Co. *v.* Lawson, 101 Tenn. 406, 47 S. W. 489; Louisville, etc., R. Co. *v.* Bowler, 9 Heisk. (Tenn.) 866; Haynes *v.* East Tennessee, etc., R. Co., 3 Coldw. (Tenn.) 222. But see Knox *v.* Southern R. Co., 101 Tenn. 375, 47 S. W. 491; Allen *v.* Goodwin, 92 Tenn. 385, 21 S. W. 760.

The injured servant must be under the control of the negligent servant to make the master liable. Nashville, etc., R. Co. *v.* Wheeless, 10 Lea (Tenn.) 741, 43 Am. Rep. 317.

Merely calling one a foreman does not show that he is a vice-principal. Louisville, etc., R. Co. *v.* Lahr, 86 Tenn. 335, 6 S. W. 663.

Who is superior servant.— A stationary engineer, engaged in the same service with the injured servant, is not *per se* a superior servant for whose negligence the master is liable. Dana *v.* Blackburn, 90 S. W. 237, 28 Ky. L. Rep. 695. The mere fact that a coservant was accustomed to give signals for the starting of cars does not make him a superior servant. Dana *v.* Blackburn, 90 S. W. 237, 28 Ky. L. Rep. 695.

50. Bering Mfg. Co. *v.* Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869.

Power to employ and discharge.— In this state the rule is different from that in any other state in that a superior servant is a fellow servant unless he has the power to employ and discharge the injured servant. See *infra*, IV, G, 4, a, (VI), (D).

Non-delegable duty.— Of course a foreman may be a vice-principal because of the duty being a non-delegable one of the master, al-

Utah.[51] In several other states the superior servant rule seems to have been adopted, although it has not been applied in all cases.[52] In Missouri the rule was apparently rejected in the earlier cases,[53] was afterward adopted,[54] and now seems to be repudiated again.[55] It should be noticed, however, as will be stated hereafter, that even in those states which adopt the superior servant rule there is a difference of opinion as to the extent thereof, in that some of the states, such as Illinois, restrict the liability of the master to injuries resulting from obedience to the orders of the superior servant or from the acts of the superior servant while acting as such,[56] while in other states the master is held liable in all cases where the negligence was that of the superior servant with the right to control, although the injury was the result of the negligence of the superior servant while acting other than in his official capacity;[57] that is, the dual capacity doctrine is recognized in some of the states and not in others. Where a servant is ordered by another employee having the power to control him as to his work to do work outside the scope of his employment, the rule of fellow servants does not apply.[58]

(3) States Repudiating Rule. In most of the states the superior servant

though he has no power to hire and discharge. Young *v.* Hahn, 96 Tex. 99, 70 S. W. 950; Bering Mfg. Co. *v.* Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869.

51. Armstrong *v.* Oregon Shoreline, etc., R. Co., 8 Utah 420, 32 Pac. 693; Andreson *v.* Ogden Union R., etc., Co., 8 Utah 128, 30 Pac. 305.

52. St. Louis, etc., R. Co. *v.* Torrey, 58 Ark. 217, 24 S. W. 244; Bloyd *v.* St. Louis, etc., R. Co., 58 Ark. 66, 22 S. W. 1089, 41 Am. St. Rep. 85; Allison *v.* Southern R. Co., 129 N. C. 336, 40 S. E. 91; Johnson *v.* Southern R. Co., 122 N. C. 955, 29 S. E. 784; Logan *v.* North Carolina R. Co., 116 N. C. 940, 21 S. E. 959; Patton *v.* Western North Carolina R. Co., 96 N. C. 455, 1 S. E. 863; Sandquist *v.* Independent Tel. Co., 38 Wash. 313, 80 Pac. 539; Gaudie *v.* Northern Lumber Co., 34 Wash. 34, 74 Pac. 1009; Zintek *v.* Stimson Mill Co., 9 Wash. 395, 37 Pac. 340. See Fones *v.* Phillips, 39 Ark. 17, 43 Am. Rep. 264. But see Hughes *v.* Oregon Imp. Co., 20 Wash. 294, 55 Pac. 119; Morgan *v.* Carbon Hill Coal Co., 6 Wash. 577, 34 Pac. 152, 772.

Where a servant is told to take his instructions from another employee, which he does, and in following which he is injured, there is no question of fellow servant involved. This is merely another way of stating the superior servant rule. Jancko *v.* West Coast Mfg., etc., Co., 40 Wash. 230, 82 Pac. 284.

53. See Marshall *v.* Schricker, 63 Mo. 308; Lee *v.* Detroit Bridge, etc., Works, 62 Mo. 565; McDermott *v.* Pacific R. Co., 30 Mo. 115.

54. Bradley *v.* Chicago, etc., R. Co., 138 Mo. 293, 39 S. W. 763; Russ *v.* Wabash Western R. Co., 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823; Miller *v.* Missouri Pac. R. Co., 109 Mo. 350, 19 S. W. 58, 32 Am. St. Rep. 673; Schroeder *v.* Chicago, etc., R. Co., 108 Mo. 322, 18 S. W. 1094, 18 L. R. A. 827; Sullivan *v.* Hannibal, etc., R. Co., 107 Mo. 66, 17 S. W. 748, 28 Am. St. Rep. 388; Sherrin *v.* St. Joseph, etc., R. Co., 103 Mo. 378, 15 S. W. 442, 23 Am. St. Rep. 881; McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285; Moore *v.* Wabash, etc., R. Co., 85 Mo. 588; Whalen *v.* St. Louis Centenary Church, 62 Mo. 326; Depuy *v.* Chicago, etc., R. Co., 110 Mo. App. 110, 84 S. W. 103; Bien *v.* St. Louis Transit Co., 108 Mo. App. 399, 83 S. W. 986; Borden *v.* Falk Co., 97 Mo. App. 566, 71 S. W. 478; Fox *v.* Jacob Dold Packing Co., 96 Mo. App. 173, 70 S. W. 164; Kelly *v.* Stewart, 93 Mo. App. 47; Zellars *v.* Missouri Water, etc., Co., 92 Mo. App. 107; Steube *v.* Christopher, etc., Architectural Iron, etc., Co., 85 Mo. App. 640; Claybaugh *v.* Kansas City, etc., R. Co., 56 Mo. App. 630; Higgins *v.* Missouri Pac. R. Co., 43 Mo. App. 547; Clowers *v.* Wabash, etc., R. Co., 21 Mo. App. 213.

A foreman in directing an inferior servant what he is to do, where to do it, and how to do it, is performing the master's duty for the time being and is a vice-principal. Bane *v.* Irwin, 172 Mo. 306, 72 S. W. 522; Dayharsh *v.* Hannibal, etc., R. Co., 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900.

55. Hawk *v.* McLeod Lumber Co., 166 Mo. 121, 65 S. W. 1022; Grattis *v.* Kansas City, etc., R. Co., 153 Mo. 380, 55 S. W. 108, 77 Am. St. Rep. 721, 48 L. R. A. 399; McCarty *v.* Rood Hotel Co., 144 Mo. 397, 46 S. W. 172.

56. See *infra*, IV, G, 4, a, (VI), (E).

57. See *infra*, IV, G, 4, a, (VI), (E).

58. Orman *v.* Mannix, 17 Colo. 564, 30 Pac. 1037, 31 Am. St. Rep. 340, 17 L. R. A. 602; Cleveland, etc., R. Co. *v.* Surrells, 115 Ill. App. 615; Mann *v.* Oriental Print Works, 11 R. I. 152; Union Pac. R. Co. *v.* Fort, 17 Wall. (U. S.) 553, 21 L. ed. 739; Northern Pac. Coal Co. *v.* Richmond, 58 Fed. 756, 7 C. C. A. 485; Gilmore *v.* Northern Pac. R. Co., 18 Fed. 866, 9 Sawy. 558. *Compare* Fisk *v.* Central Pac. R. Co., 72 Cal. 38, 13 Pac. 144, 1 Am. St. Rep. 22. *Contra*, see Crown *v.* Orr, 140 N. Y. 450, 35 N. E. 648; Vitto *v.* Farley, 15 Misc. (N. Y.) 153, 36 N. Y. Suppl. 1105, holding that the direction of a foreman to one employed in drilling holes to step aside from his regular employment and draw a charge of gunpowder and dynamite was the act of a fellow servant, and not that of the master.

rule is either expressly or impliedly repudiated, and it is held that the fact that the person whose negligence caused the injury was a servant of a higher grade than the injured servant, or that the latter was subject to the direction or control of the former, and was engaged at the time in executing the orders of the former, does not prevent the application of the fellow servant rule so as to make the master liable.[59] In these states a mere foreman who is not the head of a depart-

59. *Alabama.* — Mobile, etc., R. Co. *v.* Smith, 59 Ala. 245.

Arizona. — Southern Pac. Co. *v.* McGill, 5 Ariz. 36, 44 Pac. 302.

California. — Leishman *v.* Union Iron Works, 148 Cal. 274, 83 Pac. 30, 3 L. R. A. N. S. 500; Daves *v.* Southern Pac. Co., 98 Cal. 19, 32 Pac. 708, 35 Am. St. Rep. 133; McLean *v.* Blue Point Gravel Min. Co., 51 Cal. 255; Collier *v.* Steinhart, 51 Cal. 116. But see Foley *v.* California Horseshoe Co., 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87.

Connecticut. — Leonard *v.* Mallory, 75 Conn. 433, 53 Atl. 778; Kelly *v.* New Haven Steamboat Co., 74 Conn. 343, 50 Atl. 871; Sullivan *v.* New York, etc. R. Co., 62 Conn. 209, 25 Atl. 711. But see Darrigan *v.* New York, etc., R. Co., 52 Conn. 285, 52 Am. Rep. 590.

Georgia. — Shepherd *v.* Southern Pine Co., 118 Ga. 292, 45 S. E. 220; Gunn *v.* Willingham, 111 Ga. 427, 36 S. E. 804; Hamby *v.* Union Paper-Mills Co., 110 Ga. 1, 35 S. E. 297; Cates *v.* Itner, (1898) 30 S. E. 884; McGovern *v.* Columbus Mfg. Co., 80 Ga. 227, 5 S. E. 492; McDonald *v.* Eagle, etc., Mfg. Co., 68 Ga. 839. But see Blackman *v.* Thomson-Houston Electric Co., 102 Ga. 64, 29 S. E. 120.

Indiana. — Dill *v.* Marmon, 164 Ind. 507, 73 N. E. 67, 69 L. R. A. 163; Southern Indiana R. Co. *v.* Harrell, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460; Southern Indiana R. Co. *v.* Martin, 160 Ind. 280, 66 N. E. 886; Thacker *v.* Chicago, etc., R. Co., 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792; Clarke *v.* Pennsylvania Co., 132 Ind. 199, 31 N. E. 808, 17 L. R. A. 811; Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 151, 5 N. E. 187; Capper *v.* Louisville, etc., R. Co., 103 Ind. 305, 2 N. E. 749; Columbus, etc., R. Co. *v.* Arnold, 31 Ind. 174, 99 Am. Dec. 615; Thayer *v.* St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409; Standard Pottery Co. *v.* Moudy, 35 Ind. App. 427, 73 N. E. 188; American Tel., etc., Co. *v.* Bower, 20 Ind. App. 32, 49 N. E. 182; Peirce *v.* Oliver, 18 Ind. App. 87, 47 N. E. 485; Cole *v.* Wood, 11 Ind. App. 37, 36 N. E. 1074.

Iowa. — Hathaway *v.* Illinois Cent. R. Co., 92 Iowa 337, 60 N. W. 651; Wilson *v.* Dunreath Red Stone Quarry Co., 77 Iowa 429, 42 N. W. 360, 14 Am. St. Rep. 304; Peterson *v.* Whitebreast Coal, etc., Co., 50 Iowa 673, 32 Am. Rep. 143. *Compare* Hoben *v.* Burlington, etc., R. Co., 20 Iowa 562.

Maine. — Small *v.* Allington, etc., Mfg. Co., 94 Me. 551, 48 Atl. 177; Dube *v.* Lewiston, 83 Me. 211, 22 Atl. 112; Conley *v.* Portland, 78 Me. 217, 3 Atl. 658; Doughty *v.* Penobscot Log Driving Co., 76 Me. 143; Lawler *v.* Androscoggin R. Co., 62 Me. 463, 16 Am. Rep. 492; Bealieu *v.* Portland Co., 48 Me. 291.

Maryland. — State *v.* Schwind Quarry Co., 97 Md. 696, 55 Atl. 366; Baltimore Elevator Co. *v.* Neal, 65 Md. 438, 5 Atl. 338; Schauck *v.* Northern Cent. R. Co., 25 Md. 462; O'Connell *v.* Baltimore, etc., R. Co., 20 Md. 212, 83 Am. Dec. 549.

Massachusetts. — Moody *v.* Hamilton Mfg. Co., 159 Mass. 70, 34 N. E. 185, 38 Am. St. Rep. 396; Clifford *v.* Old Colony R. Co., 141 Mass. 564, 6 N. E. 751; O'Connor *v.* Roberts, 120 Mass. 227.

Michigan. — Mikolojczak *v.* North American Chemical Co., 129 Mich. 80, 89 N. W. 75; Lipan *v.* Hall, (1901) 87 N. W. 619; Andre *v.* Winslow Bros. Elevator Co., 116 Mich. 560, 76 N. W. 86; Gavigan *v.* Lake Shore, etc., R. Co., 110 Mich. 71, 67 N. W. 1097; Schroeder *v.* Flint, etc., R. Co., 103 Mich. 213, 61 N. W. 663, 50 Am. St. Rep. 354, 29 L. R. A. 321; Gardner *v.* Michigan Cent. R. Co., 58 Mich. 584, 26 N. W. 301.

Minnesota. — Jemming *v.* Great Northern R. Co., 96 Minn. 302, 104 N. W. 1079, 1 L. R. A. N. S. 696; Lundberg *v.* Shevlin-Carpenter Co., 68 Minn. 135, 70 N. W. 1078; Lindvall *v.* Woods, 41 Minn. 212, 42 N. W. 1020, 4 L. R. A. 793; Olson *v.* St. Paul, etc., R. Co., 38 Minn. 117, 35 N. W. 866; Gonsior *v.* Minneapolis, etc., R. Co., 36 Minn. 385, 31 N. W. 515; Fraker *v.* St. Paul, etc., R. Co., 32 Minn. 54, 19 N. W. 349; Brown *v.* Winona, etc., R. Co., 27 Minn. 162, 6 N. W. 484, 38 Am. Rep. 285; Foster *v.* Minnesota Cent. R. Co., 14 Minn. 360. See Hill *v.* Winston, 73 Minn. 80, 75 N. W. 1030.

Mississippi. — Lagrone *v.* Mobile, etc., R. Co., 67 Miss. 592, 7 So. 432.

Montana. — Goodwell *v.* Montana Cent. R. Co., 18 Mont. 293, 45 Pac. 210.

New Hampshire. — Galvin *v.* Pierce, 72 N. H. 79, 54 Atl. 1014.

New Jersey. — Enright *v.* Oliver, 69 N. J. L. 357, 55 Atl. 277, 101 Am. St. Rep. 720; Longa *v.* Stanley Hod Elevator Co., 69 N. J. L. 31, 54 Atl. 251; Knutter *v.* New York, etc., Tel. Co., 67 N. J. L. 646, 52 Atl. 565; Gilmore *v.* Oxford Iron, etc., Co., 55 N. J. L. 39, 25 Atl. 707; O'Brien *v.* American Dredging Co., 53 N. J. L. 291, 21 Atl. 324.

New York. — Foster *v.* International Paper Co., 183 N. Y. 45, 75 N. E. 933; Madigan *v.* Oceanic Steam Nav. Co., 178 N. Y. 242, 70 N. E. 785, 102 Am. St. Rep. 495; Loughlin *v.* State, 105 N. Y. 159, 11 N. E. 371; Brick *v.* Rochester, etc., R. Co., 98 N. Y. 211; McCosker *v.* Long Island R. Co., 84 N. Y. 77; Crispin *v.* Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Malone *v.* Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; Hofnagle *v.* New York Cent., etc., R. Co., 55 N. Y. 608; Laning *v.* New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Wright *v.* New York Cent. R.

ment but is subordinate to other employees, such as foreman of a gang of section

Co., 25 N. Y. 562; Anglin *v.* American Constr., etc., Co., 109 N. Y. App. Div. 237, 96 N. Y. Suppl. 49; Riola *v.* New York Cent., etc., R. Co., 97 N. Y. App. Div. 252, 89 N. Y. Suppl. 945, 100 N. Y. App. Div. 509, 91 N. Y. Suppl. 599; Lynch *v.* Bush Co., 89 N. Y. App. Div. 286, 85 N. Y. Suppl. 905 [*affirmed* in 180 N. Y. 547, 73 N. E. 1126]; Koehler *v.* New York Steam Co., 71 N. Y. App. Div. 222, 75 N. Y. Suppl. 597; Brown *v.* Terry, 67 N. Y. App. Div. 223, 73 N. Y. Suppl. 733; Clark *v.* Ritter-Conley Co., 39 N. Y. App. Div. 598, 57 N. Y. Suppl. 755; Bell *v.* Consolidated Gas, etc., Co., 36 N. Y. App. Div. 242, 56 N. Y. Suppl. 780; Gibbons *v.* Brush Electric Illuminating Co., 36 N. Y. App. Div. 140, 55 N. Y. Suppl. 378; Ulrich *v.* New York Cent., etc., R. Co., 25 N. Y. App. Div. 465, 51 N. Y. Suppl. 5; Barringer *v.* Delaware, etc., Canal Co., 19 Hun 216; Kenny *v.* Cunard Steamship Co., 55 N. Y. Super. Ct. 558, 14 N. Y. St. 851; Brennan *v.* Gordon, 14 Daly 47, 3 N. Y. St. 604; Murray *v.* Crimmins, 14 Misc. 466, 35 N. Y. Suppl. 1023; Bagley *v.* Consolidated Gas Co., 13 Misc. 6, 34 N. Y. Suppl. 187; Griffiths *v.* New Jersey, etc., R. Co., 5 Misc. 320, 25 N. Y. Suppl. 812; Jenkins *v.* Mahopac Iron-Ore Co., 10 N. Y. Suppl. 484 [*affirmed* in 132 N. Y. 595, 30 N. E. 1151]; Roach *v.* Jackson Architectural Iron Works Co., 14 N. Y. St. 583; Shiner *v.* Russell, 6 N. Y. St. 78.

North Dakota.— Ell *v.* Northern Pac. R. Co., 1 N. D. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97.

Oregon.— Mast *v.* Kern, 34 Oreg. 247, 54 Pac. 950, 75 Am. St. Rep. 580; Willis *v.* Oregon R., etc., Co., 11 Oreg. 257, 4 Pac. 121.

Pennsylvania.— Duffy *v.* Platt, 205 Pa. St. 296, 54 Atl. 1000; Johnson *v.* Western New York, etc., R. Co., 200 Pa. St. 314, 49 Atl. 794; Hughes *v.* Leonard, 199 Pa. St. 123, 48 Atl. 862; Casey *v.* Pennsylvania Asphalt Paving Co., 198 Pa. St. 348, 47 Atl. 1128; Velas *v.* Patton Coal Co., 197 Pa. St. 380, 47 Atl. 360; Ricks *v.* Flynn, 196 Pa. St. 263, 46 Atl. 360 (holding that even if a foreman is a vice-principal his negligence is that of a fellow servant where he takes the place of one whose duty it is to perform certain manual labor); McGinley *v.* Levering, 152 Pa. St. 366, 25 Atl. 824; Spancake *v.* Philadelphia, etc., R. Co., 148 Pa. St. 184, 23 Atl. 1006, 33 Am. St. Rep. 821; Kinney *v.* Corbin, 132 Pa. St. 341, 19 Atl. 141; Duffy *v.* Oliver, 131 Pa. St. 203, 18 Atl. 872; Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. Rep. 631; New York, etc., R. Co. *v.* Bell, 112 Pa. St. 400, 4 Atl. 50; Keystone Bridge Co. *v.* Newberry, 96 Pa. St. 246, 42 Am. Rep. 543; National Tube Works Co. *v.* Bedell, 96 Pa. St. 175; Lehigh Valley Coal Co. *v.* Jones, 86 Pa. St. 432; Weger *v.* Pennsylvania R. Co., 55 Pa. St. 460; O'Dowd *v.* Burnham, 19 Pa. Super. Ct. 464; Strange *v.* McCormick, 1 Phila. 156.

Rhode Island.— Milhench *v.* E. Jenckes Mfg. Co., 24 R. I. 131, 52 Atl. 687; Di Marcho *v.* Builders' Iron Foundry, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661; Larich *v.* Moies, 18 R. I. 513, 28 Atl. 661; Hanna *v.* Granger, 18 R. I. 507, 28 Atl. 659.

South Carolina.— Brabham *v.* American Tel., etc., Co., 71 S. C. 53, 50 S. E. 716.

Texas.— St. Louis, etc., R. Co. *v.* Arnett, (Civ. App. 1905) 84 S. W. 599, construing Arkansas law.

Utah.— Sartin *v.* Oregon Short Line R. Co., 27 Utah 447, 76 Pac. 219, construing Idaho law.

Vermont.— Hard *v.* Vermont, etc., R. Co., 32 Vt. 473.

Virginia.— The early cases seem to adopt the superior servant rule (Moon *v.* Richmond, etc., R. Co., 78 Va. 745, 49 Am. Rep. 401), but in the later cases the rule has been expressly rejected (Southern R. Co. *v.* Mauzy, 98 Va. 692, 37 S. E. 285; Russell Creek Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614; Moore Lime Co. *v.* Richardson, 95 Va. 326, 28 S. E. 334, 64 Am. St. Rep. 785; Richmond Locomotive Works *v.* Ford, 94 Va. 627, 27 S. E. 509. See also Norfolk, etc., R. Co. *v.* Nuckol, 91 Va. 193, 21 S. E. 342).

West Virginia.— Jackson *v.* Norfolk, etc., R. Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337; Criswell *v.* Pittsburgh, etc., R. Co., 30 W. Va. 798, 6 S. E. 31. But see Madden *v.* Chesapeake, etc., R. Co., 28 W. Va. 610, 57 Am. Rep. 695.

Wisconsin.— Grant *v.* Keystone Lumber Co., 119 Wis. 229, 96 N. W. 535, 100 Am. St. Rep. 883; Wiskie *v.* Montello Granite Co., 111 Wis. 443, 87 N. W. 461, 87 Am. St. Rep. 885; McMahon *v.* Ida Min. Co., 95 Wis. 308, 70 N. W. 478, 60 Am. St. Rep. 117; Stutz *v.* Armour, 84 Wis. 623, 54 N. W. 1000; Dwyer *v.* American Express Co., 82 Wis. 307, 52 N. W. 304, 33 Am. St. Rep. 44; Johnson *v.* Ashland Water Co., 77 Wis. 51, 45 N. W. 807; Hoth *v.* Peters, 55 Wis. 405, 13 N. W. 219; Chamberlain *v.* Milwaukee, etc., R. Co., 11 Wis. 238.

Wyoming.— McBride *v.* Union Pac. R. Co., 3 Wyo. 247, 21 Pac. 687.

United States.— Alaska Treadwell Gold Min. Co. *v.* Whelan, 168 U. S. 86, 18 S. Ct. 40, 42 L. ed. 390; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 16 S. Ct. 843, 40 L. ed. 994 [*reversing* 51 Fed. 182, 2 C. C. A. 157]; New Jersey Cent. R. Co. *v.* Keegan, 160 U. S. 259, 16 S. Ct. 269, 40 L. ed. 418; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 13 S. Ct. 914, 37 L. ed. 772; Florence, etc., R. Co. *v.* Whipps, 138 Fed. 13, 70 C. C. A. 443; The Westport, 136 Fed. 391, 69 C. C. A. 235; Fournier *v.* Pike, 128 Fed. 991; Pennsylvania Co. *v.* Fishack, 123 Fed. 465, 59 C. C. A. 269; Pistoner *v.* American Can Co., 119 Fed. 496; Davis *v.* Trade Dollar Consol. Min. Co., 117 Fed. 122, 54 C. C. A. 636; Weeks *v.* Scharer, 111 Fed. 330, 49 C. C. A. 372; Lochbaum *v.* Oregon R., etc., Co., 104 Fed. 852, 44 C. C. A. 220; Stevens *v.* Chamberlin, 100 Fed. 378, 40 C. C. A. 421,

or track men on a railroad, is the fellow servant of those working under him, except as to the duties which the master cannot delegate.[60]

(c) *General Manager or Head of Department.* Although there are decisions which have repudiated or failed to recognize the rule,[61] yet in nearly all the states, including those states which refuse to adopt the superior servant rule, it is held that an employee intrusted with the entire management and supervision of the business of the master,[62] or with the entire management and supervision of a dis-

51 L. R. A. 513; Kelly *v.* Jutte, etc., Co., 98 Fed. 380; Thomas *v.* Cincinnati, etc., R. Co., 97 Fed. 245; Grady *v.* Southern R. Co., 92 Fed. 491, 34 C. C. A. 494; Yager *v.* The Receivers, 88 Fed. 773; Gaynon *v.* Durkee, 87 Fed. 302, 31 C. C. A. 306; Flippin *v.* Kimhall, 87 Fed. 258, 31 C. C. A. 282; Coulson *v.* Leonard, 77 Fed. 538; Balch *v.* Haas, 73 Fed. 974, 20 C. C. A. 151; Cleveland, etc., R. Co. *v.* Brown, 73 Fed. 970, 20 C. C. A. 147 [*reversing* 56 Fed. 804, 6 C. C. A. 142]; Deavers *v.* Spencer, 70 Fed. 480, 17 C. C. A. 215; Kansas, etc., Valley R. Co. *v.* Waters, 70 Fed. 28, 16 C. C. A. 609; Thom *v.* Pittard, 62 Fed. 232, 10 C. C. A. 352; Texas, etc., R. Co. *v.* Rogers, 57 Fed. 378, 6 C. C. A. 403; Harley *v.* Louisville, etc., R. Co., 57 Fed. 144; Stockmeyer *v.* Reed, 55 Fed. 259; Anderson *v.* Winston, 31 Fed. 528; Thompson *v.* Chicago, etc., R. Co., 18 Fed. 239, 5 McCrary 542. See McDonald *v.* Buckley, 109 Fed. 290, 48 C. C. A. 372. *Contra*, Woods *v.* Lindvall, 48 Fed. 62, 1 C. C. A. 37 [*affirming* 47 Fed. 195]; Gravelle *v.* Minneapolis, etc., R. Co., 10 Fed. 711, 3 McCrary 352.

England.— Wilson *v.* Merry, L. R. 1 H. L. Sc. 326, 19 L. T. Rep. N. S. 30; Howells *v.* Landore Siemens Steel Co., L. R. 10 Q. B. 62, 44 L. J. Q. B. 25, 32 L. T. Rep. N. S. 19, 23 Wkly. Rep. 335; Feltham *v.* England, L. R. 2 Q. B. 33, 7 B. & S. 676, 36 L. J. Q. B. 14, 15 Wkly. Rep. 151; Allen *v.* New Gas Co., 1 Ex. D. 251, 45 L. J. Exch. 668, 34 L. T. Rep. N. S. 541; Searle *v.* Lindsay, 11 C. B. N. S. 427, 8 Jur. N. S. 746, 31 L. J. C. P. 106, 5 L. T. Rep. N. S. 427, 10 Wkly. Rep. 89, 103 E. C. L. 427.

Canada.— Dixon *v.* Winnipeg Electric St. R. Co., 11 Manitoba 528; Ferguson *v.* Galt Public School Bd., 27 Ont. App. 480; Fairweather *v.* Owen Sound Stone Quarry Co., 26 Ont. 604; Rudd *v.* Bell, 13 Ont. 47; Matthews *v.* Hamilton Powder Co., 12 Ont. 58; Drew *v.* East Whitby Tp., 46 U. C. Q. B. 107; O'Sullivan *v.* Victoria R. Co., 44 U. C. Q. B. 128.

See 34 Cent. Dig. tit. "Master and Servant," § 436.

60. See *supra*, note 59.

61. *Alabama.*— Mobile, etc., R. Co. *v.* Smith, 59 Ala. 245, superintendent and general manager of railroad.

California.— Collier *v.* Steinhart, 51 Cal. 116. See also Callan *v.* Bull, 113 Cal. 593, 45 Pac. 1017.

Indiana.— Columbus, etc., R. Co. *v.* Arnold, 31 Ind. 174, 99 Am. Dec. 615, master mechanic of railroad. This decision has been characterized as "an extreme case" (Nall *v.* Louisville, etc., R. Co., 129 Ind. 260, 28 N. E. 183, 611), "and does perhaps carry the doctrine beyond its limits." Indiana Car Co. *v.* Parker, 100 Ind. 181.

Maryland.— Yates *v.* McCollough Iron Co., 69 Md. 370, 16 Atl. 280, where it was held that the chief manager of a corporation who hired and discharged the hands, kept their time, etc., was only a fellow servant of a laborer who was injured while operating the machinery.

Massachusetts.—Meehan *v.* Speirs Mfg. Co., 172 Mass. 375, 52 N. E. 518; Floyd *v.* Sugden, 134 Mass. 563; Flynn *v.* Salem, 134 Mass. 351; Albro *v.* Agawam Canal Co., 6 Cush. 75.

Minnesota.— Dixon *v.* Union Ironworks, 90 Minn. 492, 97 N. W. 375; Brown *v.* Winona, etc., R. Co., 27 Minn. 162, 6 N. W. 484, 38 Am. Rep. 285. But see Hess *v.* Adamant Mfg. Co., 66 Minn. 79, 68 N. W. 774; Cook *v.* St. Paul, etc., R. Co., 34 Minn. 45, 24 N. W. 311.

New Jersey.— Knutter *v.* New York, etc., Tel. Co., 67 N. J. L. 646, 52 Atl. 565, 58 L. R. A. 808; Curley *v.* Hoff, 62 N. J. L. 758, 42 Atl. 731.

Oregon.— See Mast *v.* Kern, 34 Oreg. 247, 54 Pac. 950, 75 Am. St. Rep. 580.

United States.— Stevens *v.* Chamberlin, 100 Fed. 378, 40 C. C. A. 421, 51 L. R. A. 513.

England.— Wilson *v.* Merry, L. R. 1 H. L. Sc. 326, 19 L. T. Rep. N. S. 30; Howells *v.* Landore Siemens Steel Co., L. R. 10 Q. B. 62, 44 L. J. Q. B. 25, 32 L. T. Rep. N. S. 19, 23 Wkly. Rep. 335; Feltham *v.* England, L. R. 2 Q. B. 33, 7 B. & S. 676, 36 L. J. Q. B. 14, 15 Wkly. Rep. 151. But see Murphy *v.* Smith, 19 C. B. N. S. 361, 12 L. T. Rep. N. S. 605, 115 E. C. L. 361.

Canada.— Dixon *v.* Winnipeg Electric St. R. Co., 11 Manitoba 528; Smith *v.* Intercolonial Coal Min. Co., 11 Nova Scotia 556; Matthews *v.* Hamilton Powder Co., 14 Ont. App. 261; Fairweather *v.* Owen Sound Stone Quarry Co., 26 Ont. 604; Rudd *v.* Bell, 13 Ont. 47; Drew *v.* East Whitby Tp., 46 U. C. Q. B. 107.

See 34 Cent. Dig. tit. "Master and Servant," § 422 *et seq.*

In Maryland, to make a superintendent a vice-principal, it is held that the master must relinquish all supervision of the work and intrust not only the supervision and direction of the work but also the selection and employment of laborers and the procuring of material, machinery, etc., necessary for the service. Maryland Clay Co. *v.* Goodnow, 95 Md. 330, 51 Atl. 292, 53 Atl. 427; Tates *v.* McCullough Iron Co., 69 Md. 370, 16 Atl. 280.

62. *California.*— Beeson *v.* Green Mountain Gold Min. Co., 57 Cal. 20.

tinct department of the business,[63] is a vice-principal so that the master is liable

Georgia.— Woodson *v.* Johnston, 109 Ga. 454, 34 S. E. 587.

Indiana.— Mitchell *v.* Robinson, 80 Ind. 281, 41 Am. Rep. 812; Parkhurst *v.* Swift, 31 Ind. App. 521, 68 N. E. 620.

Iowa.—Beresford *v.* American Coal Co., 124 Iowa 34, 98 N. W. 902, 70 L. R. A. 256.

Kansas.— Walker *v.* Gillett, 59 Kan. 214, 52 Pac. 442.

Louisiana.— Faren *v.* Sellers, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256.

Michigan.— Ryan *v.* Bageley, 50 Mich. 179, 15 N. W. 72, 45 Am. Rep. 35, holding that it is immaterial whether such managing agent was appointed directly by the master or by an agent of the master.

Minnesota.— Holman *v.* Kempe, 70 Minn. 422, 73 N. W. 186.

Missouri.— Stephens *v.* Hannibal, etc., R. Co., 86 Mo. 221; Gormly *v.* Vulcan Iron Works, 61 Mo. 492.

New York.— Malone *v.* Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; Corcoran *v.* Holbrook, 59 N. Y. 517, 17 Am. Rep. 369; McCampbell *v.* Cunard Steamship Co., 69 Hun 131, 23 N. Y. Suppl. 477; Fort *v.* Whipple, 11 Hun 586.

North Carolina.—Harris *v.* Balfour Quarry Co., 137 N. C. 204, 49 S. E. 95; Turrentine *v.* Wellington, 136 N. C. 308, 48 S. E. 739.

Pennsylvania.— Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. Rep. 631; New York, etc., R. Co. *v.* Bell, 112 Pa. St. 400, 4 Atl. 50; Mullan *v.* Philadelphia, etc., Steamship Co., 78 Pa. St. 25, 21 Am. Rep. 2.

Texas.— Galveston, etc., R. Co. *v.* Sullivan, 2 Tex. Unrep. Cas. 315.

Virginia.— Richmond Granite Co. *v.* Bailey, 92 Va. 554, 24 S. E. 232.

Wisconsin.— Zentner *v.* Oshkosh Gas Light Co., 126 Wis. 196, 105 N. W. 911.

United States.— Lindvall *v.* Woods, 44 Fed. 855.

See 34 Cent. Dig. tit. "Master and Servant," § 422 *et seq.*

A foreman of a gang with power to hire and discharge and direct when, where, and how to do municipal sewer construction work is not a general vice-principal where such foreman is appointed by the superintendent of sewer construction and said superintendent is under the city engineer who is declared by the charter to be the general superintendent of all work done by the city in the streets. Minneapolis *v.* Lundin, 58 Fed. 525, 7 C. C. A. 344.

Complete relinqnishment of control.— To constitute one a vice-principal the master must have committed to him the virtual and substantial control of the business, and the power to do all acts necessary to its conduct. Willis *v.* Oregon R., etc., Co., 11 Oreg. 257, 4 Pac. 121. It is only where the master withdraws from the management of the business, intrusting it to a middleman or superior servant, or where, as in case of a corporation, the business is of such a nature that the general management and control thereof is necessarily committed to agents, that the master can be held liable to a subordinate for the negligent acts of one thus acting in his stead. Malone *v.* Hathaway, 64 N. Y. 5, 21 Am. Rep. 573 [*reversing* 3 Hun 553, 6 Thomps. & C. 1]. The master must confer on the manager the absolute management, exercising no discretion as to the conduct of his business except in providing safe rules and a safe place to work. Ruemmeli-Braun Co. *v.* Cahill, 14 Okla. 422, 79 Pac. 260.

The non-residence of the master, while possibly a point to be considered (Whaley *v.* Bartlett, 42 S. C. 454, 20 S. E. 745), does not of itself make his foreman a vice-principal (Hoth *v.* Peters, 55 Wis. 405, 13 N. W. 219).

Erection of buildings or structures.—Where a master employs a builder to take sole charge and management of the work of building a house, bridge, or other structure, and places other employees under him and subject to his orders, such superintending employee is not a fellow servant with those under him. Slater *v.* Chapman, 67 Mich. 523, 35 N. W. 106, 11 Am. St. Rep. 593; Fort *v.* Whipple, 11 Hun (N. Y.) 586; Galveston, etc., R. Co. *v.* Sullivan, 2 Tex. Unrep. Cas. 315. But see McDonald *v.* Eagle, etc., Mfg. Co., 67 Ga. 761, 68 Ga. 839.

63. *Arkansas.*— Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168, 24 S. W. 106.

Colorado.— Deep Min., etc., Co. *v.* Fitzgerald, 21 Colo. 533, 43 Pac. 210; Denver, etc., R. Co. *v.* Driscoll, 12 Colo. 520, 21 Pac. 708, 13 Am. St. Rep. 243.

Georgia.— Taylor *v.* Georgia Marble Co., 99 Ga. 512, 27 S. E. 768, 59 Am. St. Rep. 238; Atlanta Cotton Factory Co. *v.* Speer, 69 Ga. 137, 47 Am. Rep. 750.

Illinois.— Missouri Malleable Iron Co. *v.* Dillon, 206 Ill. 145, 69 N. E. 12 [*affirming* 106 Ill. App. 649].

Indiana.— Ft. Wayne *v.* Christie, 156 Ind. 172, 59 N. E. 385.

Iowa.— Baldwin *v.* St. Louis, etc., R. Co., 75 Iowa 297, 39 N. W. 507, 9 Am. St. Rep. 479.

Missouri.— Fox *v.* Jacob Dold Packing Co., 96 Mo. App. 173, 70 S. W. 164; Cox *v.* Syenite Granite Co., 39 Mo. App. 424; Devany *v.* Vulcan Iron-Works, 4 Mo. App. 236.

Nebraska.— New Omaha Thomson-Houston Electric Light Co. *v.* Baldwin, 62 Nebr. 180, 87 N. W. 27; Sioux City, etc., R. Co. *v.* Smith, 22 Nebr. 775, 36 N. W. 285.

New York.— Vogel *v.* American Bridge Co., 88 N. Y. App. Div. 68, 84 N. Y. Suppl. 799; Hussey *v.* Coger, 39 Hun 639; Mullane *v.* Houston, etc., Ferry R. Co., 21 Misc. 10, 46 N. Y. Suppl. 957 [*affirming* 20 Misc. 434, 45 N. Y. Suppl. 1039].

North Carolina.— Dobbin *v.* Richmond, etc., R. Co., 81 N. C. 446, 31 Am. Rep. 512.

Oklahoma.— Ruemmeli-Braun Co. *v.* Cahill, 14 Okla. 422, 79 Pac. 260, holding that the servant's authority in his department must be entire and absolute.

Pennsylvania.— Lewis *v.* Seifert, 116 Pa.

for his official acts.[64] For example the president,[65] directors,[66] general superintendent,[67] or other managing agents[68] of a corporation are vice-principals. So the

St. 628, 11 Atl. 514, 2 Am. St. Rep. 631. But see Prevost *v.* Citizens' Ice, etc., Co., 185 Pa. St. 617, 40 Atl. 88, 64 Am. St. Rep. 659.

Rhode Island.— Mann *v.* Oriental Print Works, 11 R. I. 152.

Texas.— Roberts *v.* Fielder Salt Works, (Civ. App. 1903) 72 S. W. 618; Postal Tel. Cable Co. *v.* Coote, (Civ. App. 1900) 57 S. W. 912.

Utah.— Johnson *v.* Union Pac. Coal Co., 28 Utah 46, 76 Pac. 1089, 67 L. R. A. 506, construing Wyoming law.

Washington.— McDonough *v.* Great Northern R. Co., 15 Wash. 244, 46 Pac. 334; Zintek *v.* Stimson Mill Co., 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055.

United States.— Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 16 S. Ct. 843, 40 L. ed. 994; Chicago House Wrecking Co. *v.* Birney, 117 Fed. 72, 54 C. C. A. 458; Minneapolis *v.* Lundin, 58 Fed. 525, 7 C. C. A. 344; Lindvall *v.* Woods, 44 Fed. 855.

See 34 Cent. Dig. tit. "Master and Servant," § 438.

Foreman of work train as head of department.— A foreman in charge of a work train used on but a few miles of the road, and directing a gang of men as conductor of the train, and himself engaging in the work, is not a vice-principal or head of a department of a railroad company, for whose negligence the company is liable. Thom *v.* Pittard, 62 Fed. 232, 10 C. C. A. 352.

A sawyer in charge of a sawmill is a vice-principal. Evans *v.* Louisiana Lumber Co., 111 La. 534, 35 So. 736; Dossett *v.* St. Paul, etc., Lumber Co., 40 Wash. 276, 82 Pac. 273. See also Hendricks *v.* Lesure Lumber Co., 92 Minn. 318, 99 N. W. 1125, 100 N. W. 638.

What constitutes a department.— It has always been found to be difficult, if not impossible, to describe a department in language which will fit all cases, and furnish a sure test by which to determine in every instance if the person in charge of what is claimed to be a department is so in fact, and for that reason is a vice-principal, or is merely a fellow servant. Much depends of course upon the magnitude and character of the work that is done in that subdivision of the business which one has been appointed to superintend, and upon the further question whether the work is of such a nature as requires intelligent and careful supervision on the part of the master. Chicago House Wrecking Co. *v.* Birney, 117 Fed. 72, 54 C. C. A. 458. A person in control and management of a distinct department is to be distinguished from one in charge of a mere separate piece of work in one of the branches of service in a department. Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 16 S. Ct. 843, 40 L. ed. 994. "Thus, between the law department of a railway corporation and the operating department, there is a natural and distinct separation, one which makes the two departments, like two independent kinds of business, in which the one employer and master is engaged. So, oftentimes there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating department; these two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is as to it in the place of the master. But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice principal or representative of the master." Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 383, 13 S. Ct. 914, 37 L. ed. 772. One subject to the control of a superior in the same department is not a superintendent in such department so as to make him a vice-principal. Ruemmeli-Braun Co. *v.* Cahill, 14 Okla. 422, 79 Pac. 260. An employee is not a vice-principal where he is simply charged with special duties, performing them under the direction of the master or under the control of superior officers. Malone *v.* Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; Brown *v.* Minneapolis, etc., R. Co., 2 Del. Co. (Pa.) 155.

64. Mollhoff *v.* Chicago, etc., R. Co., (Okla. 1905) 82 Pac. 733.

Orders given to intermediate servant.— Where work is done under the express direction of a superintendent who is in no sense a fellow servant of the person injured, the fact that directions by the superintendent as to the manner in which the work was to be done were directly to the foreman in the immediate charge of the work does not change the relation between the superintendent and the injured servant. Donahoe *v.* Kansas City, 136 Mo. 657, 38 S. W. 571. See also Beeson *v.* Green Mountain Gold Min. Co., 57 Cal. 20.

Municipal employees.— This rule applies equally well to municipal employees. Augusta *v.* Owens, 111 Ga. 464, 36 S. E. 830; Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565; Adams *v.* West Roxbury, 1 Fed. Cas. No. 67, 1 Hask. 576. But see Dube *v.* Lewiston, 83 Me. 211, 22 Atl. 112; Conley *v.* Portland, 78 Me. 217, 3 Atl. 658.

65. Smith *v.* Oxford Iron Co., 42 N. J. L. 467, 36 Am. Rep. 535.

66. Columbus, etc., R. Co. *v.* Arnold, 31 Ind. 174, 99 Am. Dec. 615; Fifield *v.* Northern R. Co., 42 N. H. 225.

67. Wilson *v.* Willimantic Linen Co., 50 Conn. 433, 47 Am. Rep. 653; Whalen *v.* St. Louis Centenary Church, 62 Mo. 326.

68. St. Louis, etc., R. Co. *v.* Harper, 44 Ark. 524.

following have been held vice-principals as managers or heads of departments of a railroad company: Managing agent,[69] superintendent,[70] assistant superintendent,[71] division superintendent,[72] road master,[73] assistant road master,[74] and master mechanic.[75]

(D) *Power to Hire and Discharge.* While the power to hire and discharge is usually enumerated as a circumstance worthy of consideration in determining whether a servant because of his rank is a vice-principal,[76] yet the general rule is that the mere power to hire and discharge does not make a servant a vice-principal,[77] except as respects the discharge of the non-delegable duty of selecting competent and careful servants;[78] while on the other hand a servant may be a vice-principal, although he has no power to hire and discharge.[79] In Texas, however, it is well settled that a superior servant is not a vice-principal unless he has the power to hire and discharge the party injured by the negligence,[80] except in so

69. Krogg *v.* Atlanta, etc., R. Co., 77 Ga. 202, 4 Am. St. Rep. 77.

70. Lasky *v.* Canadian Pac. R. Co., 83 Me. 461, 22 Atl. 367; Washburn *v.* Nashville, etc., R. Co., 3 Head (Tenn.) 638, 75 Am. Dec. 784.

71. Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 109. But see Chapman *v.* Erie R. Co., 55 N. Y. 579 [*reversing* 1 Thomps. & C. 526].

72. Shuster *v.* Philadelphia, etc., R. Co., (Del. 1906) 62 Atl. 689; Town *v.* Michigan Cent. R. Co., 84 Mich. 214, 47 N. W. 665.

73. Hoke *v.* St. Louis, etc., R. Co., 88 Mo. 360 [*reversing* 11 Mo. App. 574]; McGrath *v.* Texas, etc., R. Co., 60 Fed. 555, 9 C. C. A. 133. But see Walker *v.* Boston, etc., R. Co., 128 Mass. 8; O'Niel *v.* Great Northern R. Co., 80 Minn. 27, 82 N. W. 1086, 51 L. R. A. 532; Tabler *v.* Hannibal, etc., R. Co., 93 Mo. 79, 5 S. W. 810; Reed *v.* Missouri, etc., R. Co., 94 Mo. App. 371, 68 S. W. 364; McDaniel *v.* Charleston, etc., R. Co., 70 S. C. 95, 49 S. E. 2; Borgman *v.* Omaha, etc., R. Co., 41 Fed. 667.

A track master of a cable-road is not a fellow servant of a worker under him. Mullane *v.* Houston, etc., R. Co., 21 Misc. (N. Y.) 10, 46 N. Y. Suppl. 957 [*affirming* 20 Misc. 434, 45 N. Y. Suppl. 1039].

74. La Barre *v.* Grand Trunk Western R. Co., 133 Mich. 192, 94 N. W. 735 [*distinguishing* Morch *v.* Toledo, etc., R. Co., 113 Mich. 154, 71 N. W. 464]; Palmer *v.* Michigan Cent. R. Co., 93 Mich. 363, 53 N. W. 397, 32 Am. St. Rep. 507, 17 L. R. A. 636; Harrison *v.* Detroit, etc., R. Co., 79 Mich. 409, 44 N. W. 1034, 19 Am. St. Rep. 180, 7 L. R. A. 623.

75. St. Louis, etc., R. Co. *v.* Harper, 44 Ark. 524; Taylor *v.* Evansville, etc., R. Co., 121 Ind. 124, 22 N. E. 876, 16 Am. St. Rep. 372, 6 L. R. A. 584; Baltimore, etc., R. Co. *v.* Sutherland, 12 Ohio Cir. Ct. 309, 4 Ohio Cir. Dec. 115 [*affirmed* in 52 Ohio St. 676, 44 N. E. 1144]; Mealman *v.* Union Pac. R. Co., 37 Fed. 189, 2 L. R. A. 192.

76. Peschel *v.* Chicago, etc., R. Co., 62 Wis. 338, 21 N. W. 269; Miller *v.* Union Pac. R. Co., 17 Fed. 67, 5 McCrary 300; Kidwell *v.* Houston, etc., R. Co., 14 Fed. Cas. No. 7,757, 3 Woods 313.

77. *California.*— Stevens *v.* San Francisco, etc., R. Co., 100 Cal. 554, 35 Pac. 165.

Illinois.— Lincoln Coal Min. Co. *v.* McNally, 15 Ill. App. 181.

Missouri.—Hamilton *v.* Iron Mountain Co., 4 Mo. App. 565.

Nebraska.— Union Pac. R. Co. *v.* Doyle, 50 Nebr. 555, 70 N. W. 43.

New Jersey.— Gilmore *v.* Oxford Iron, etc., Co., 55 N. J. L. 39, 25 Atl. 707.

New York.— Vogel *v.* American Bridge Co., 180 N. Y. 373, 73 N. E. 1, 70 L. R. A. 725.

North Carolina.— Webb *v.* Richmond, etc., R. Co., 97 N. C. 387, 2 S. E. 440.

Pennsylvania.— Casey *v.* Pennsylvania Asphalt Paving Co., 198 Pa. St. 348, 47 Atl. 1128.

Rhode Island.— Hanna *v.* Granger, 18 R. I. 507, 28 Atl. 659.

United States.— Alaska Treadwell Min. Co. *v.* Whelan, 168 U. S. 86, 18 S. Ct. 40, 42 L. ed. 390; Lochbaum *v.* Oregon R., etc., Co., 104 Fed. 852, 44 C. C. A. 220.

See 34 Cent. Dig. tit. "Master and Servant," § 448.

78. *Indiana.*— Justice *v.* Pennsylvania Co., 130 Ind. 321, 30 N. E. 303.

Missouri.— Stoddard *v.* St. Louis, etc., R. Co., 65 Mo. 514.

New York.— Chapman *v.* Erie R. Co., 55 N. Y. 579.

Pennsylvania.—Reiser *v.* Pennsylvania Co., 152 Pa. St. 38, 25 Atl. 175, 34 Am. St. Rep. 620.

Rhode Island.— Hanna *v.* Granger, 18 R. I. 507, 28 Atl. 659.

79. Fraser *v.* Schroeder, 163 Ill. 459, 45 N. E. 288 [*affirming* 60 Ill. App. 519]; Kolb *v.* Carrington, 75 Ill. App. 159; Fanter *v.* Clark, 15 Ill. App. 470; Foster *v.* Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916; Miller *v.* Missouri Pac. R. Co., 109 Mo. 350, 19 S. W. 58, 32 Am. St. Rep. 673; Hall *v.* St. Joseph Water Co., 48 Mo. App. 356; Lamb *v.* Littman, 132 N. C. 978, 44 S. E. 646; Zintek *v.* Stimson Mill Co., 9 Wash. 395, 37 Pac. 340. *Contra*, Illinois Cent. R. Co. *v.* Meyer, 65 Ill. App. 531 [*affirmed* in 177 Ill. 591, 52 N. E. 848]; Bryan *v.* Southern R. Co., 128 N. C. 387, 38 S. E. 914.

80. Young *v.* Hahn, 96 Tex. 99, 70 S. W. 950; Campbell *v.* Cook, 86 Tex. 630, 26 S. W. 486, 40 Am. St. Rep. 878; Nix *v.* Texas, etc., R. Co., 82 Tex. 473, 18 S. W. 571, 27 Am. St. Rep. 897; Gulf, etc., R. Co. *v.* Wells,

far as the liability is based on the non-delegable duty of selecting competent servants.[81]

(E) *"Dual Capacity" Doctrine.* Conceding that a servant is a vice-principal because of his rank, either as one merely given the power to control employees under him or a general manager or head of a department, the master is not always liable for his negligence resulting in an injury to another servant. In most of the states which adopt either the superior servant rule or the general manager and head of department rule, the so-called "dual capacity" doctrine is in force, under which the master is liable for what may be called the official acts of the superior servant resulting in the injury for which suit is brought, but not for his acts, such as assisting in manual labor, which are not within his duties, but which are the duty of inferior servants under his control.[82] In some states, however, the

(Tex. 1891) 16 S. W. 1025; Missouri Pac. R. Co. *v.* Williams, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867; Wall *v.* Texas, etc., R. Co., 2 Tex. Unrep. Cas. 432; Bering Mfg. Co. *v.* Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869; Maughmer *v.* Behring, 19 Tex. Civ. App. 299, 46 S. W. 917; Missouri, etc., R. Co. *v.* Hannig, (Tex. Civ. App. 1897) 41 S. W. 196; Missouri, etc., R. Co. *v.* Hamilton, (Tex. Civ. App. 1895) 30 S. W. 679; Connor *v.* Saunders, 9 Tex. Civ. App. 56, 29 S. W. 1140; Ft. Worth, etc., R. Co. *v.* Peters, 7 Tex. Civ. App. 78, 25 S. W. 1077 [*affirmed* in 87 Tex. 222, 27 S. W. 257]; Missouri Pac. R. Co. *v.* Sasse, (Tex. Civ. App. 1893) 22 S. W. 187. See also Gulf, etc., R. Co. *v.* Whisenhunt, (Tex. Civ. App. 1904) 81 S. W. 332. But see Galveston, etc., R. Co. *v.* Smith, 76 Tex. 611, 13 S. W. 562, 18 Am. St. Rep. 78; Galveston, etc., R. Co. *v.* Farmer, 73 Tex. 85, 11 S. W. 156; Gulf, etc., R. Co. *v.* Schwabbe, 1 Tex. Civ. App. 573, 21 S. W. 706.

81. Missouri Pac. R. Co. *v.* Patton, (Tex. 1894) 26 S. W. 978.

82. *Arkansas.*— St. Louis, etc., R. Co. *v.* Torrey, 58 Ark. 217, 24 S. W. 244.

Colorado.— Poorman Silver Mines *v.* Bryant, 34 Colo. 49, 81 Pac. 256; Poorman Silver Mines *v.* Devling, 34 Colo. 37, 81 Pac. 252.

Illinois.—The mere fact that one of a number of servants who are in the habit of working together in the same line of employment, for a common master, has power to control and direct the actions of the others with respect to such employment, will not of itself render the master liable for the negligence of the governing servant resulting in the injury to one of the others, without regard to other circumstances. Chicago, etc., R. Co. *v.* May, 108 Ill. 288. Every case in this respect must depend upon its own circumstances. William Graver Tank Works *v.* O'Donnell, 191 Ill. 236, 60 N. E. 831 [*affirming* 91 Ill. App. 524]; Chicago, etc., R. Co. *v.* May, *supra*; St. Louis Consol. Coal Co. *v.* Fleischbein, 109 Ill. App. 509 [*affirmed* in 207 Ill. 593, 69 N. E. 963]. If the negligence complained of consists of some act done or omitted by one having such authority, which relates to his duty as a common laborer with those under his control and which might just as readily have happened with one of them having no such authority, the master is not liable. Gall *v.* Beckstein, 173 Ill. 187, 50 N. E. 711; Chicago, etc., R. Co. *v.* May, *supra*; Decatur Cereal Mill Co. *v.* Gogerty, 80 Ill. App. 632; Chicago Architectural Iron Works *v.* Nagel, 80 Ill. App. 492; Fitzgerald *v.* Honkomp, 44 Ill. App. 365. See Metropolitan West Side El. R. Co. *v.* Skola, 83 Ill. App. 659 [*affirmed* in 183 Ill. 454, 56 N. E. 171, 75 Am. St. Rep. 120]. If the injury results from obeying orders of the foreman or other superior servant given in the exercise of his authority, the master is liable (Illinois Cent. R. Co. *v.* Atwell, 198 Ill. 200, 64 N. E. 1095 [*affirming* 100 Ill. App. 513]; La Salle *v.* Kostka, 190 Ill. 130, 60 N. E. 72 [*affirming* 92 Ill. App. 91]; Libby *v.* Scherman, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191; Wabash, etc., R. Co. *v.* Hawk, 121 Ill. 259, 12 N. E. 253, 2 Am. St. Rep. 82; Leighton, etc., Steel Co. *v.* Snell, 119 Ill. App. 199 [*affirmed* in 217 Ill. 152, 75 N. E. 462]; Illinois Steel Co. *v.* Sitar, 98 Ill. App. 300; Illinois Steel Co. *v.* McFadden, 98 Ill. App. 296; Illinois Cent. R. Co. *v.* Johnson, 95 Ill. App. 54 [*affirmed* in 191 Ill. 594, 61 N. E. 334]; Norton *v.* Nadebok, 92 Ill. App. 541 [*affirmed* in 190 Ill. 595, 60 N. E. 843, 54 L. R. A. 842]; Frazer *v.* Schroeder, 60 Ill. App. 519; Stearns *v.* Reidy, 33 Ill. App. 246; Fanter *v.* Clark, 15 Ill. App. 470); and the fact that the former at the time of the injury is temporarily acting as co-laborer with the injured servant does not necessarily relieve the master from liability, upon the ground that they were servants of one common master (St. Louis Consol. Coal Co. *v.* Fleischbein 207 Ill. 593, 69 N. E. 963 [*affirming* 109 Ill. App. 509]; William Graver Tank Works *v.* O'Donnell, *supra*; Metropolitan West Side El. R. Co. *v.* Skola, 183 Ill. 454, 56 N. E. 171, 75 Am. St. Rep. 120; Offutt *v.* World's Columbian Exposition, 175 Ill. 472, 51 N. E. 651; Pittsburg Bridge Co. *v.* Walker, 170 Ill. 550, 48 N. E. 915 [*affirming* 70 Ill. App. 55]; Chicago, etc., R. Co. *v.* May, *supra*; Illinois Southern R. Co. *v.* Marshall, 112 Ill App. 514 [*affirmed* in 210 Ill. 562, 71 N. E. 597, 66 L. R. A. 297]; Chicago *v.* Cronin, 91 Ill. App. 466; Braun *v.* Conrad Seipp Brewing Co., 72 Ill. App. 232. See also Leiter *v.* Kinnare, 68 Ill. App. 558. On the other hand, if the injury results from the negligence of a foreman or other su-

doctrine is either expressly repudiated or not fully recognized and the master is held liable without regard to the nature or the quality of the negligent act of the vice-principal.[83] Where the employer himself assumes control and gives an express order not only what to do but how to do it, a vice-principal becomes for the time being a mere co-employee, whatever his general authority under other circumstances.[84]

perior servant, but is not connected with orders given by the foreman to the injured servant in the particular instance, they are fellow servants and the master is not liable. Chicago, etc., R. Co. *v.* Goltz, 71 Ill. App. 414; Beckstein *v.* Gall, 69 Ill. App. 616 [*affirmed* in 173 Ill. 187, 50 N. E. 711].

Indiana.— Hodges *v.* Standard Wheel Co., 152 Ind. 680, 52 N. E. 391, 54 N. E. 383; Taylor *v.* Evansville, etc., R. Co., 121 Ind. 124, 22 N. E. 876, 16 Am. St. Rep. 372, 6 L. R. A. 584; Louisville, etc., R. Co. *v.* Southwick, 16 Ind. App. 486, 44 N. E. 263; Louisville, etc., R. Co. *v.* Isom, 10 Ind. App. 691, 38 N. E. 423; Salem Stone, etc., Co. *v.* Chastain, 9 Ind. App. 453, 36 N. E. 910.

Iowa.— Collingwood *v.* Illinois, etc., Fuel Co., 125 Iowa 537, 101 N. W. 283; McQueeny *v.* Chicago, etc., R. Co., 120 Iowa 522, 94 N. W. 1124; Barnicle *v.* Connor, 110 Iowa 238, 81 N. W. 452.

Maine.— Small *v.* Allington, etc., Mfg. Co., 94 Me. 551, 48 Atl. 177.

Michigan.— Findlay *v.* Russel Wheel, etc., Co., 108 Mich. 286, 66 N. W. 50. But see Shumway *v.* Walworth, etc., Mfg. Co., 98 Mich. 411, 57 N. W. 251.

Minnesota.— Dixon *v.* Union Ironworks, 90 Minn. 492, 97 N. W. 375. See also Hess *v.* Adamant Mfg. Co., 66 Minn. 79, 68 N. W. 774; Corneilson *v.* Eastern R. Co., 50 Minn. 23, 52 N. W. 224.

New Jersey.— Olsen *v.* Nixon, 61 N. J. L. 671, 40 Atl. 694.

New York.— McCosker *v.* Long Island R. Co., 84 N. Y. 77; Wagner *v.* New York, etc., R. Co., 76 N. Y. App. Div. 552, 78 N. Y. Suppl 696; Sweeney *v.* Vacuum Oil Co., 3 N. Y. App. Div. 615, 38 N. Y. Suppl. 96.

Tennessee.— Ohio River, etc., R. Co. *v.* Edwards, 111 Tenn. 31, 76 S. W. 897; National Fertilizer Co. *v.* Travis, 102 Tenn. 16, 49 S. W. 832; Gann *v.* Nashville, etc., R. Co., 101 Tenn. 380, 47 S. W. 493, 70 Am. St. Rep. 687; Illinois Cent. R. Co. *v.* Bolton, 99 Tenn. 273, 41 S. W. 442; Allen *v.* Goodwin, 92 Tenn. 385, 21 S. W. 760; Nashville, etc., R. Co. *v.* Handman, 13 Lea 423.

Washington.—Sayward *v.* Carlson, 1 Wash. 29, 23 Pac. 830. But see Nelson *v.* S. Willey Steamship, etc., Co., 26 Wash. 548, 67 Pac. 237.

Wisconsin.— Klochinski *v.* Shores Lumber Co., 93 Wis. 417, 67 N. W. 934; Hartford *v.* Northern Pac. R. Co., 91 Wis. 374, 64 N. W. 1033. But see Horn *v.* La Crosse Box Co., 123 Wis. 399, 101 N. W. 935, holding that the jury is authorized to find that the general manager of a factory, although at the time feeding a planing machine, was acting as vice-principal in directing an employee to empty a hopper under the machine, it not being a function of the feeder to direct any one to empty it.

United States.— The Miami, 93 Fed. 218, 35 C. C. A. 281 [*affirming* 87 Fed. 757]; Reed *v.* Stockmeyer, 74 Fed. 186, 20 C. C. A. 381; Quinn *v.* New Jersey Lighterage Co., 23 Fed. 363, 23 Blatchf. 209. *Compare* Hardy *v.* Minneapolis, etc., R. Co., 36 Fed. 657.

Starting machinery.— When it is conceded that the employee was a superior servant when he ordered another to put his hand into a machine and do a certain act, it cannot be contended that the act of the former in immediately starting the machine was the act of a fellow servant rather than a superior servant. Norton *v.* Nadebok, 190 Ill. 595, 60 N. E. 843, 54 L. R. A. 842.

83. *Connecticut.*— See Brennan *v.* Berlin Iron Bridge Co., 74 Conn. 382, 50 Atl. 1030.

Kansas.— Consolidated Kansas City Smelting, etc., Co. *v.* Peterson, 8 Kan. App. 316, 55 Pac. 673. But see Crist *v.* Wichita Gas, etc., Co., 72 Kan. 135, 83 Pac. 199.

Kentucky.— Illinois Cent. R. Co. *v.* Coleman, 59 S. W. 13, 22 Ky. L. Rep. 878.

Missouri.— Gormly *v.* Vulcan Iron Works. 61 Mo. 492; Strode *v.* Conkey, 105 Mo. App. 12, 78 S. W. 678; Donnelly *v.* Aida Min. Co., 103 Mo. App. 349, 77 S. W. 130; Haworth *v.* Kansas City Southern R. Co., 94 Mo. App. 215, 68 S. W. 111; Hutson *v.* Missouri Pac. R. Co., 50 Mo. App. 300. But see Fogarty *v.* St. Louis Transfer Co., 180 Mo. 490, 79 S. W. 664; Stephens *v.* Deatherage Lumber Co., 110 Mo. App. 398, 86 S. W. 481; Bien *v.* St. Louis Transit Co., 108 Mo. App. 399, 83 S. W. 986, holding that ordinarily a vice-principal does not become a servant where he does an act which he might have ordered done and which was clearly within the sphere of his duty as superintendent.

Nebraska.— Swift *v.* Bleise, 63 Nebr. 739, 89 N. W. 310; Crystal Ice Co. *v.* Sherlock, 37 Nebr. 19, 55 N. W. 294.

North Carolina.— Purcell *v.* Southern R. Co., 119 N. C. 728, 26 S. E. 161.

Ohio.— Berea Stone Co. *v.* Kraft, 31 Ohio St. 287, 27 Am. Rep. 510; Baltimore, etc., R. Co. *v.* Sutherland, 12 Ohio Cir. Ct. 309, 4 Ohio Cir. Dec. 115.

Texas.— Texas, etc., R. Co. *v.* Reed, 88 Tex. 439, 31 S. W. 1058; Sweeney *v.* Gulf, etc., R. Co., 84 Tex. 433, 19 S. W. 555, 31 Am. St. Rep. 71; Missouri, etc., R. Co. *v.* Smith, 31 Tex. Civ. App. 332, 72 S. W. 418; Young *v.* Hahn, (Civ. App. 1902) 69 S. W. 203 [*reversed* on other grounds in 96 Tex. 99, 70 S. W. 950]; Texas, etc., R. Co. *v.* Reed, (Civ. App. 1895) 32 S. W. 118; Texas, etc., R. Co. *v.* Nix, (Civ. App. 1893) 23 S. W. 328.

84. Prevost *v.* Citizens' Ice, etc., Co., 185 Pa. St. 617, 40 Atl. 88, 64 Am. St. Rep. 659.

(F) *Acts Outside Scope of Superior Servant's Authority.* The master is not liable for the negligence of a vice-principal who is such because of his rank where the act is outside of the scope of his authority or agency.[85]

(G) *Actual Rather Than Apparent Authority as Test.* The fact that the injured servant believed a negligent servant to be a vice-principal and was ignorant of his discharge as foreman does not make the master liable.[86] And a fellow servant cannot, without his master's knowledge, by assumption of authority, convert himself into a vice-principal.[87]

(H) *Temporary Vice-Principal.* An employee who is temporarily occupying the position of one who is a vice-principal is for the time being himself a vice-principal.[88] Of course the master is not liable unless, at the time of the injury, the substitute was invested with the powers conferred upon the vice-principal whose place he has taken.[89]

(VII) *As Determined by Character of Negligent Act* — (A) *General Considerations.* Whether the master is an individual or a corporation,[90] the rule is that personal duties of a master cannot be delegated by him to a servant so as to relieve himself from liability on the ground that the negligence in regard thereto was that of a fellow servant.[91] *A fortiori* the master cannot escape

85. *California.*— Fisk *v.* Central Pac. R. Co., 72 Cal. 38, 13 Pac. 144, 1 Am. St. Rep. 22.

Illinois.— Decatur Cereal Mill Co. *v.* Gogerty, 80 Ill. App. 632.

Louisiana.— Dyer *v.* Rieley, 28 La. Ann. 6.

Michigan.— Page *v.* Battle Creek Pure Food Co., 142 Mich. 17, 105 N. W. 72.

New York.— Gabrielson *v.* Waydell, 135 N. Y. 1, 31 N. E. 969, 31 Am. St. Rep. 793, 17 L. R. A. 228; Wright *v.* New York Cent. R. Co., 25 N. Y. 562.

86. Allen *v.* Goodwin, 92 Tenn. 385, 21 S. W. 760.

87. Hilton, etc., Lumber Co. *v.* Ingram, 119 Ga. 652, 46 S. E. 895, 100 Am. St. Rep. 204.

88. *California.*— Ryan *v.* Los Angeles Ice, etc., Co., 112 Cal. 244, 44 Pac. 471, 32 L. R. A. 524.

Colorado.— Colorado Midland R. Co. *v.* Naylon, 17 Colo. 501, 30 Pac. 249, 31 Am. St. Rep. 335; Colorado Midland R. Co. *v.* O'Brien, 16 Colo. 219, 27 Pac. 701.

Indiana.— Nall *v.* Louisville, etc., R. Co., 129 Ind. 260, 28 N. E. 183, 611.

Iowa.— Baldwin *v.* St. Louis, etc., R. Co., 75 Iowa 297, 39 N. W. 507, 9 Am. St. Rep. 479.

Minnesota.— Blomquist *v.* Chicago, etc., R. Co., 60 Minn. 426, 62 N. W. 818.

Missouri.— Neves *v.* Green, 111 Mo. App. 634, 86 S. W. 508; Browning *v.* Kasten, 107 Mo. App. 59, 80 S. W. 354; Hunt *v.* Desloge Consol. Lead Co., 104 Mo. App. 377, 79 S. W. 710; Steube *v.* Christopher, etc., Architectural Iron, etc., Co., 85 Mo. App. 640.

United States.— Borgman *v.* Omaha, etc., R. Co., 41 Fed. 667.

See 34 Cent. Dig. tit. "Master and Servant," § 446.

But see Boyd *v.* Indian Head Mills, 131 Ala. 356, 31 So. 80, holding that where a foreman having charge of certain work directs another to act in his place, the former having no authority to delegate his powers, the master is not liable for injuries resulting from the negligence of such acting foreman.

Train despatcher acting as superintendent. — Where a train despatcher habitually performs, in the name of the superintendent of a railroad, certain duties of the superintendent in his absence, with the assent of the corporation, any order to an employee from the train despatcher, within the limit of his delegated authority, imposes upon both the corporation and employee the same duties and liabilities as if issued directly by the superintendent himself. Lasky *v.* Canadian Pac. R. Co., 83 Me. 461, 22 Atl. 367.

89. Morch *v.* Toledo, etc., R. Co., 113 Mich. 154, 71 N. W. 464.

90. *Kansas.*— Atchison, etc., R. Co. *v.* Holt, 29 Kan. 149.

Louisiana.— Mattise *v.* Consumers' Ice Mfg. Co., 46 La. Ann. 1535, 16 So. 400, 49 Am. St. Rep. 356.

Maine.— Brown *v.* South Kennebec Agricultural Soc., 47 Me. 275, 74 Am. Dec. 484.

Massachusetts.— Gilman *v.* Eastern R. Co., 13 Allen 433, 90 Am. Dec. 210.

Missouri.— Harper *v.* Indianapolis, etc., R. Co., 47 Mo. 567, 4 Am. Rep. 353.

New Hampshire.— Fifield *v.* Northern R. Co., 42 N. H. 225.

New York.— Malone *v.* Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; Flike *v.* Boston, etc., R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Laning *v.* New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417.

Ohio.— Cleveland, etc., R. Co. *v.* Keary, 3 Ohio St. 201.

South Carolina.— Calvo *v.* Charlotte, etc., R. Co., 23 S. C. 526, 55 Am. Rep. 28.

Texas.— Texas, etc., R. Co. *v.* Whitmore, 58 Tex. 276.

Virginia.— Baltimore, etc., R. Co. *v.* McKenzie, 81 Va. 71.

United States.— Hough *v.* Texas, etc., R. Co., 100 U. S. 213, 25 L. ed. 612.

See 34 Cent. Dig. tit. "Master and Servant," § 390.

91. *Alabama.*— Alabama Great Southern

liability where the duty is expressly imposed upon him by the contract with the injured servant,[92] or where the duty is imposed upon him by statute.[93] Such duties are usually termed "non-delegable duties" and the servant upon whom they are imposed is, in the exercise of such duties, a vice-principal,[94] without regard to his grade or rank.[95] Such non-delegable duties include *inter alia* the

R. Co. *v.* Vail, 142 Ala. 134, 38 So. 124, 110 Am. St. Rep. 23.

Connecticut.— Kelly *v.* New Haven Steamboat Co., 74 Conn. 343, 50 Atl. 871.

District of Columbia.—McDade *v.* Washington, etc., R. Co., 5 Mackey 144.

Illinois.— Illinois Steel Co. *v.* Olste, 116 Ill. App. 303 [*affirmed* in 214 Ill. 181, 73 N. E. 422]; Spring Valley Coal Co. *v.* Robizas, 111 Ill. App. 49.

Indiana.— Southern Indiana R. Co. *v.* Harrell, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460; New Pittsburgh Coal, etc., Co. *v.* Peterson, 136 Ind. 398, 35 N. E. 7, 43 Am. St. Rep. 327; Pennsylvania Co. *v.* Brush, 130 Ind. 347, 28 N. E. 615; Cincinnati, etc., R. Co. *v.* Lang, 118 Ind. 579, 21 N. E. 317; Capper *v.* Louisville, etc., R. Co., 103 Ind. 305, 2 N. E. 749; Peirce *v.* Oliver, 18 Ind. App. 87, 47 N. E. 485.

Iowa.— Collingwood *v.* Illinois, etc., Fuel Co., 125 Iowa 537, 101 N. W. 283.

Kansas.— Hannibal, etc., R. Co. *v.* Fox, 31 Kan. 586, 3 Pac. 320.

Michigan.— Brown *v.* Gilchrist, 80 Mich. 56, 45 N. W. 82, 20 Am. St. Rep. 496.

New Jersey.— Smith *v.* Oxford Iron Co., 42 N. J. L. 467, 36 Am. Rep. 535.

New York.— Geoghegan *v.* Atlas Steamship Co., 3 Misc. 224, 22 N. Y. Suppl. 749.

Ohio.— Cleveland, etc., R. Co. *v.* Keary, 3 Ohio St. 201.

Oregon.— Hough *v.* Grants Pass Power Co., 41 Oreg. 531, 69 Pac. 655; Knahtla *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 136, 27 Pac. 91.

Pennsylvania.— Prevost *v.* Citizens' Ice, etc., Co., 185 Pa. St. 617, 40 Atl. 88, 64 Am. St. Rep. 659; Durkin *v.* Kingston Coal Co., 171 Pa. St. 193, 33 Atl. 237, 50 Am. St. Rep. 801, 29 L. R. A. 808.

South Carolina.— Wilson *v.* Charleston, etc., R. Co., 51 S. C. 79, 28 S. E. 91.

Virginia.— Baltimore, etc., R. Co. *v.* McKenzie, 81 Va. 71; Moon *v.* Richmond, etc., R. Co., 78 Va. 745, 49 Am. Rep. 401.

Canada.— Canada Woolen Mills *v.* Traplin, 35 Can. Sup. Ct. 424.

See 34 Cent. Dig. tit. "Master and Servant," § 385.

Securing ferocious animals.— The fact that the injuries inflicted by a ferocious dog occurred through the negligence of a co-servant in omitting to chain him up does not preclude a recovery from the master. Muller *v.* McKesson, 10 Hun (N. Y.) 44 [*affirmed* in 73 N. Y. 195, 29 Am. Rep. 123].

Effect as making notice to servant notice to master.— Where a master delegates the performance of his own primary or positive duty to another, notice to the latter with respect to the non-performance of such duty is, no matter what his rank, notice to the master. Merrill *v.* Oregon Short Line R. Co., 29 Utah 264, 81 Pac. 85, 110 Am. St. Rep. 695.

Custody of dangerous instruments.— An employee who is given charge of dangerous instruments, such as dynamite, represents his master in the care and custody thereof, and is not a fellow servant, and hence the master is liable for injuries to employees through negligence in the care of such articles. Rush *v.* Spokane Falls, etc., R. Co., 23 Wash. 501, 63 Pac. 500.

Exposure of injured servant.— A master who, after a servant was injured, undertook to take him to his home, is liable where, through the negligence of fellow servants, he was exposed, in consequence of which complications set in, causing his death. Bresnahan *v.* Lonsdale Co., (R. I. 1900) 51 Atl. 624.

Delegation of duty by manager to servant. — Where the duty is a personal one of the master, it is not discharged by the act of a superior servant in directing an inferior servant to perform the duty unless the latter diligently performed it. Hough *v.* Grants Pass Power Co., 41 Oreg. 531, 69 Pac. 655.

92. Spring Valley Coal Co. *v.* Robizas, 111 Ill. App. 49.

93. Baltimore, etc., R. Co. *v.* Peterson, 156 Ind. 364, 59 N. E. 1044; Ashman *v.* Flint, etc., R. Co., 90 Mich. 567, 51 N. W. 645; Pelin *v.* New York Cent., etc., R. Co., 102 N. Y. App. Div. 71, 92 N. Y. Suppl. 468; New York, etc., R. Co. *v.* Lambright, 5 Ohio Cir. Ct. 433, 3 Ohio Cir. Dec. 213. See also Wilson *v.* Lincoln Paper Mills Mfg. Co., 9 Ont. L. Rep. 119; Myers *v.* Sault St. Marie Pulp, etc., Co., 3 Ont. L. Rep. 600.

Statutory limitation as to hours of work. — A breach of a statute providing that a railroad company shall not permit or require an engineer, fireman, etc., who had worked for twenty-four hours to go again on duty or perform any kind of work until he has had at least eight hours' rest gives a cause of action to any other servant injured by reason of its violation. Pelin *v.* New York Cent., etc., R. Co., 102 N. Y. App. Div. 71, 92 N. Y. Suppl. 468.

Violation of ordinance.— A railroad company cannot avoid liability for injuries to an employee caused by its negligence in operating a train in violation of a valid city ordinance on the grounds that the injured party and the persons in charge of the train were fellow servants. Baltimore, etc., R. Co. *v.* Peterson, 156 Ind. 364, 59 N. E. 1044.

94. Peirce *v.* Oliver, 18 Ind. App. 87, 47 N. E. 485; Collingwood *v.* Illinois, etc., Fuel Co., 125 Iowa 537, 101 N. W. 283.

95. *California.*— Skelton *v.* Pacific Lumber Co., 140 Cal. 507, 74 Pac. 13.

Connecticut.— Kelly *v.* New Haven Steam-

furnishing of a safe place to work, safe tools, machinery, and appliances; the inspection and repair thereof; warning and instructing servants; the selection and retention of competent employees and of a sufficient number to perform the work in hand, etc.[96] On the other hand a servant in supervising or carrying out the merely executive details of the work is not a vice-principal.[97] Much difficulty is encountered in determining whether the duty neglected in the particular case is that of the master or is the duty of a servant relating merely to the details of

boat Co., 74 Conn. 343, 50 Atl. 871, 92 Am. St. Rep. 220.

Idaho.— Larsen *v.* Le Doux, 11 Ida. 49, 81 Pac. 600.

Indiana.— Dill *v.* Marmon, (App. 1904) 71 N. E. 669; American Tel., etc., Co. *v.* Bower, 20 Ind. App. 32, 49 N. E. 182.

Kansas.— Coffeyville Vitrified Brick, etc., Co. *v.* Shanks, 69 Kan. 306, 76 Pac. 856.

Kentucky.— Cincinnati, etc., R. Co. *v.* Hill, 89 S. W. 523, 28 Ky. L. Rep. 530.

Michigan.— Page *v.* Battle Creek Pure Food Co., 142 Mich. 17, 105 N. W. 72; Van Dusen *v.* Letellier, 78 Mich. 492, 44 N. W. 572.

New York.— Culligan *v.* Jones, 14 N. Y. St. 186.

North Dakota.— Ell *v.* Northern Pac. R. Co., 1 N. D. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97.

Oregon.— Mast *v.* Kern, 34 Oreg. 247, 54 Pac. 950, 75 Am. St. Rep. 580.

Utah.—Merrill *v.* Oregon Short Line R. Co., 29 Utah 264, 81 Pac. 85, 110 Am. St. Rep. 695.

United States.— Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 13 S. Ct. 914, 37 L. ed. 772.

See 34 Cent. Dig. tit. "Master and Servant," § 385 *et seq.*

96. See *infra*, IV, G, 4, a, (VII), (C), (D), (E), (F), (H).

97. *Colorado.*— Molique *v.* Iowa Gold Min., etc., Co., 18 Colo. App. 223, 71 Pac. 427.

Indiana.— Dill *v.* Marmon, 164 Ind. 507, 73 N. E. 67, 69 L. R. A. 163; Southern Indiana R. Co. *v.* Harrell, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460; Peirce *v.* Oliver, 18 Ind. App. 87, 47 N. E. 485.

Iowa.— Collingwood *v.* Illinois, etc., Fuel Co., 125 Iowa 537, 101 N. W. 283.

Massachusetts.— Whittaker *v.* Bent, 167 Mass. 588, 46 N. E. 121; Bjbjian *v.* Woonsocket Rubber Co., 164 Mass. 214, 41 N. E. 265.

New York.— Perry *v.* Rogers, 157 N. Y. 251, 51 N. E. 1021 [*reversing* 91 Hun 243, 36 N. Y. Suppl. 208]; O'Brien *v.* Buffalo Furnace Co., 68 N. Y. App. Div. 451, 73 N. Y. Suppl. 830; Simone *v.* Kirk, 57 N. Y. App. Div. 461, 67 N. Y. Suppl. 1019; Ulrich *v.* New York Cent., etc., R. Co., 25 N. Y. App. Div. 465, 51 N. Y. Suppl. 5; Miller *v.* Thomas, 15 N. Y. App. Div. 105, 44 N. Y. Suppl. 277.

Oregon.— Mast *v.* Kern, 34 Oreg. 247, 54 Pac. 950, 75 Am. St. Rep. 580.

Rhode Island.— Morgridge *v.* Providence Tel. Co., 20 R. I. 386, 39 Atl. 328, 78 Am. St. Rep. 879.

Texas.— Houston Ice, etc., Co. *v.* Pisch, 33 Tex. Civ. App. 684, 77 S. W. 1047.

See 34 Cent. Dig. tit. "Master and Servant," § 385 *et seq.*

The running of the business, with and in pursuance of the plans, appliances, helps, and helpers thus provided, in other words, the execution of the work, is of the assignable sort, rendering all persons engaged therein fellow servants, so that, if the master used due care in selecting his servants, he will not be responsible to one for an injury produced by the negligence or other default of another. Bishop Noncont. L. § 665 [*cited* in Molique *v.* Iowa Gold, etc., Co., 18 Colo. App. 223, 71 Pac. 427].

Negligence in carrying out the orders of a master generally relates to a detail of the work for which the master is not liable. Whalen *v.* Michigan Cent. R. Co., 114 Mich. 512, 72 N. W. 323; Ryan *v.* McCully, 123 Mo. 636, 27 S. W. 533; Foster *v.* International Paper Co., 183 N. Y. 45, 75 N. E. 933; Hussey *v.* Coger, 112 N. Y. 614, 20 N. E. 556, 8 Am. St. Rep. 787, 3 L. R. A. 559; Martin *v.* Chicago, etc., R. Co., 65 Fed. 384.

The removal of rock from the edge of a cliff or from the side is a mere detail of the work which the master is not required to perform personally, so that where a servant is directed by a foreman to do such work and is injured by the falling of a piece of rock which had been thrown and lodged on the top of the cliff during blasting the master is not liable. Di Vito *v.* Crage, 165 N. Y. 378, 59 N. E. 141 [*reversing* 55 N. Y. Suppl. 64]: Perry *v.* Rogers, 157 N. Y. 251, 51 N. E. 1021.

Putting servant in dangerous place.— The fact that a foreman put a servant in a dangerous place is not a matter affecting the master if the danger arises out of the manner of performing the details of the work. Ulrich *v.* New York Cent., etc., R. Co., 25 N. Y. App. Div. 465, 51 N. Y. Suppl. 5.

Omissions to act in exercise of discretion.— If, in the exercise of judgment by the master's representative, he omits to do something, which has been foreseen and provided against by the master, the latter should not be regarded as chargeable with a responsibility for the result. Vogel *v.* American Bridge Co., 180 N. Y. 373, 73 N. E. 1, 70 L. R. A. 725.

The mere handling of trains and cars upon its road or yards the company may commit to its employees, and in respect to such work it does not owe its employees the duty of seeing that cars are safely handled, or that no servant is negligent, and it is not liable in such cases to one employee for the negligence of the other, so long as it has performed its duty in the employment of the latter, or in

the work,[98] notwithstanding the rule that the line of demarcation between the absolute duty of the master and the duty of the servants is the line that separates the work of construction, preparation, and preservation, from the work of operation.[99] If the specific act which is the subject of the suit is one which can be properly regarded as within the personal duty of the master, he is liable without regard to whether it is an act of negligent performance or one of omission.[1]

(B) *Dual Capacity.* A servant may sustain a dual relation toward the other servants, in that he is a vice-principal as to those duties delegated to him for the due performance of which the master cannot relieve himself from liability, while he is a mere fellow servant in reference to those acts in the performance of the work not within the personal duties of the master.[2]

(C) *Safe Place to Work*[3] — (1) IN GENERAL. The duty devolving upon the master to furnish his servants a safe place to work[4] in the first instance is one which cannot be delegated so as to relieve the master from liability, on the

prescribing rules, where the same are required. Sanner *v.* Atchison, etc., R. Co., 17 Tex. Civ. App. 337, 43 S. W. 533.

98. Peterson *v.* New York, etc., R. Co., 77 Conn. 351, 59 Atl. 502.

"The adjudications upon this subject — so multitudinous as almost to warrant the simile, 'thick as autumnal leaves that strew the brooks in Vallambrosa' — these adjudications are so discordant, enumerating so many rules, stating so many limitations, applying the law to facts so diverse, that one is reminded of Gibbon's remark upon the infinite variety of laws and opinions when Justinian entered upon the reform of codification — that they were beyond the power of any capacity to digest." Ell *v.* Northern Pac. R. Co., 1 N. D. 336, 343, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97.

99. Shaw *v.* Manchester St. R. Co., 73 N. H. 65, 58 Atl. 1073; St. Louis, etc., R. Co. *v.* Needham, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833.

"The line of demarcation between the negligent acts of a fellow-servant for which the master remains liable, and those for which he does not, is sometimes quite vague and shadowy, and it is not surprising that the decisions upon the subject are conflicting. That line has been defined or described in this way: It is 'the line that separates the work of construction, preparation, and preservation from the work of operation. Is the act in question work required to construct, to prepare, to place in a safe location, or to keep in repair the machinery furnished by the employer? If so, it is his personal duty to exercise ordinary care to perform it. Is the act in question required to properly and safely operate the machinery furnished, or to prevent the safe place in which it was furnished from becoming dangerous through its negligent operation? If so, it is the duty of the servants to perform that act, and they, and not the master, assume the risk of negligence in its performance.'" Peterson *v.* New York, etc., R. Co., 77 Conn. 351, 356, 59 Atl. 502; St. Louis, etc., R. Co. *v.* Needham, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833 and note.

1. Beresford *v.* American Coal Co., 124 Iowa 34, 98 N. W. 902, 70 L. R. A. 256; Vogel *v.* American Bridge Co., 180 N. Y. 373, 73 N. E. 1, 70 L. R. A. 725.

2. *California.*— Callan *v.* Bull, 113 Cal. 593, 45 Pac. 1017; Nixon *v.* Selby Smelting, etc., Co., 102 Cal. 458, 36 Pac. 803.

Minnesota.—Perras *v.* Booth, 82 Minn. 191, 84 N. W. 739.

New Jersey.— Knutter *v.* New York, etc., Tel. Co., 67 N. J. L. 646, 52 Atl. 565.

Oregon.— Mast *v.* Kern, 34 Oreg. 247, 54 Pac. 950, 75 Am. St. Rep. 580.

Texas.— Young *v.* Hahn, (Civ. App. 1902) 69 S. W. 203 [*reversed* on other grounds in 96 Tex. 99, 70 S. W. 950].

3. Assumption of risk see *supra*, IV, E, 2.

4. See *supra*, IV, B, 1.

Meaning of "place."— "To make the above statement certain requires a consideration of the meaning of the word 'place.' If by this it is meant that the master, by himself or representative, must be always present to ward off every transient peril that may menace the servant in the particular spot or place that he may chance to occupy while engaged in the performance of his work, then it must be affirmed that the rule of law devolves upon the master a duty that in many instances it would be wholly impracticable to discharge. A railroad company could scarcely employ vice-principals enough to make it sufficiently argus-eyed to guard its servants to that extent. Furthermore, it is to be observed that in some lines of business, like the operation of a railroad, many servants are employed whose respective duties are so correlated that in the very forwarding of the master's business they are protecting the lives and limbs of their co-servants; and if some limitation be not put upon the word 'place,' as respects transient dangers in the conducting of the details of the business, then every one of such servants becomes, for some purposes, a vice-principal, and the integrity of the co-servant rule is destroyed." Southern Indiana R. Co. *v.* Harrell, 161 Ind. 689, 695, 68 N. E. 262, 63 L. R. A. 460. A place, in its broad sense, is never safe in which an accident happens, and an accident always happens in some place, and so the master might almost become an insurer. Southern Indiana R. Co. *v.* Harrell, *supra*; Butler *v.* Townsend, 126 N. Y. 105, 26 N. E. 1017.

ground that the negligence was the act of a fellow servant.[5] So the master cannot escape liability by relying on the fellow servant rule where the place of work afterward becomes unsafe and he knew or ought to have known of its unsafe con-

5. *Colorado.*— Roche *v.* Denver, etc., R. Co., 19 Colo. App. 204, 73 Pac. 880.

Delaware.— Stewart *v.* Philadelphia, etc., R. Co., 8 Houst. 450, 17 Atl. 639.

Georgia.— Southern Bauxite Min., etc., Co. *v.* Fuller, 116 Ga. 695, 43 S. E. 64. But see Keith *v.* Walker Iron, etc., Co., 81 Ga. 49, 7 S. E. 166, 12 Am. St. Rep. 296.

Indiana.— Louisville, etc., R. Co. *v.* Graham, 124 Ind. 89, 24 N. E. 668; Linton Coal, etc., Co. *v.* Persons, 11 Ind. App. 264, 39 N. E. 214; Blondin *v.* Oolite Quarry Co., (App. 1894) 39 N. E. 200, 11 Ind. App. 395, 37 N. E. 812. See also Lehanon *v.* McCoy, 12 Ind. App. 500, 40 N. E. 700.

Kansas.— Good-Eye Min. Co. *v.* Robinson, 67 Kan. 510, 73 Pac. 102.

Massachusetts.—See Jones *v.* Granite Mills, 126 Mass. 84, 30 Am. Rep. 661, fire exits.

Michigan.— Sadowski *v.* Michigan Car Co., 84 Mich. 100 47 N. W. 598.

Minnesota.— Cook *v.* St. Paul, etc., R. Co., 34 Minn. 45, 24 N. W. 311.

Missouri.— Donahoe *v.* Kansas City, 136 Mo. 657, 38 S. W. 571; Day *v.* Emery, etc., Dry Goods Co., 114 Mo. App. 479, 89 S. W. 903, holding that the fact that the hole in a floor was cut by an employee and that his failure to place a guard around it was in disobedience of the master's orders was immaterial.

New Jersey.—Burns *v.* Delaware, etc., Tel., etc., Co., 70 N. J. L. 745, 59 Atl. 220, 592, 67 L. R. A. 956.

New York.— Simone *v.* Kirk, 173 N. Y. 7, 65 N. E. 739 [*reversing* 57 N. Y. App. Div. 461, 67 N. Y. Suppl. 1019]; Kranz *v.* Long Island R. Co., 123 N. Y. 1, 25 N. E. 206, 20 Am. St. Rep. 716 [*reversing* 1 N. Y. Suppl. 751]; Duggan *v.* Phelps, 82 N. Y. App. Div. 509, 81 N. Y. Suppl. 916; Hoelter *v.* McDonald, 82 N. Y. App. Div. 423, 81 N. Y. Suppl. 616; Eichholz *v.* Niagara Falls Hydraulic Power, etc., Co., 68 N. Y. App. Div. 441, 73 N. Y. Suppl. 842 [*affirmed* in 174 N. Y. 519, 66 N. E. 1107]; Freeman *v.* Glens Falls Paper-Mill Co., 61 Hun 125, 15 N. Y. Suppl. 657; Tendrup *v.* John Stephenson Co., 51 Hun 462, 3 N. Y. Suppl. 882 [*affirmed* in 121 N. Y. 681, 24 N. E. 1097]; Bagley *v.* Consolidated Gas Co., 13 Misc. 6, 34 N. Y. Suppl. 187; Hogan *v.* Hendersen, 2 N. Y. St. 119.

Rhode Island.— Vartanian *v.* New York, etc., R. Co., 25 R. I. 398, 56 Atl. 184.

Texas.— Merchants', etc., Oil Co. *v.* Burns, (Civ. App. 1903) 72 S. W. 626.

Utah.— Trihay *v.* Brooklyn Lead Min. Co., 4 Utah 468, 11 Pac. 612.

Virginia.—Richmond Locomotive Works *v.* Ford, 94 Va. 627, 27 S. E. 509.

Washington.— Mullin *v.* Northern Pac. R. Co., 38 Wash. 550, 80 Pac. 814.

Wisconsin.— Baumannn *v.* C. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139; Jarnek *v.* Manitowoc Coal, etc., Co., 97 Wis. 537, 73 N. W. 62; Eingartner *v.* Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503.

United States.—National Steel Co. *v.* Lowe, 127 Fed. 311, 62 C. C. A. 229; F. C. Austin Mfg. Co. *v.* Johnson, 89 Fed. 677, 32 C. C. A. 309; Northwestern Fuel Co. *v.* Danielson, 57 Fed. 915, 6 C. C. A. 636.

See 34 Cent. Dig. tit. "Master and Servant," § 393.

Illustrations of rule.— A foreman and his assistants, engaged in putting up semaphore poles for signal purposes on a railroad, are not fellow servants with a switchman whose duty it is to operate such semaphores. Welty *v.* Lake Superior Terminal, etc., R. Co., 100 Wis. 128, 75 N. W. 1022. An employee who is directed to construct an elevator for the building is in such construction a vice-principal, whose negligence is imputable to the master, where another employee is injured by using it after its construction. Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399. Where a great amount of snow and *débris* was thrown and left upon a shed under which plaintiff was working the negligence of the servants who either ordered the snow to be thrown upon the shed or who knew it was there was that of a vice-principal. Johnson *v.* Ashland First Nat. Bank, 79 Wis. 414, 48 N. W. 712, 24 Am. St. Rep. 722.

Mines.— The duty to provide a safe place to work extends to mines, so that a miner and one charged with the duty of keeping the mine safe are not fellow servants. Carleton Min., etc., Co. *v.* Ryan, 29 Colo. 401, 68 Pac. 279; Blazenic *v.* Iowa, etc., Coal Co., 102 Iowa 706, 72 N. W. 292; Downey *v.* Gemini Min. Co., 24 Utah 431, 68 Pac. 414, 91 Am. St. Rep. 798; Cunningham *v.* Union Pac. R. Co., 4 Utah 206, 7 Pac. 795; Czarecki *v.* Seattle, etc., R., etc., Co., 30 Wash. 288, 70 Pac. 750 (ventilation); Bunker Hill, etc., Min., etc., Co. *v.* Jones, 130 Fed. 813, 65 C. C. A. 363. The failure to properly timber a mine resulting in an injury to a servant makes the master liable therefor. Spring Valley Coal Co. *v.* Rowatt, 196 Ill. 156, 63 N. E. 649 [*affirming* 96 Ill. App. 248]; Cushman *v.* Carbondale Fuel Co., 116 Iowa 618, 88 N. W. 817; Cherokee, etc., Coal, etc., Co. *v.* Britton, 3 Kan. App. 292, 45 Pac. 100; Western Coal, etc., Co. *v.* Ingraham, 70 Fed. 219, 17 C. C. A. 71. A miner and the timberman are not fellow servants. Grant *v.* Varney, 21 Colo. 329, 40 Pac. 771; James *v.* Emmet Min. Co., 55 Mich. 335, 21 N. W. 361. *Contra*, see Quincy Min. Co. *v.* Kitts, 42 Mich. 34, 3 N. W. 240; Consolidated Coal, etc., Co. *v.* Clay, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848.

A statute requiring the employment of a competent mining boss does not relieve the

dition, and failed to remedy it within a reasonable time, where a servant is injured by reason thereof.[6] This rule does not extend, however, to negligent acts of a servant making a safe place unsafe,[7] nor where the negligence relates to details of arrangement and execution in keeping a place safe.[8] Where the place

mine owners from liability for injuries to employees due to the negligence of the mining boss in not keeping the premises in which they are required to work in reasonably safe condition. Linton Coal, etc., Co. *v.* Persons, 11 Ind. App. 264, 39 N. E. 214. But see Redstone Coke Co. *v.* Roby, 115 Pa. St. 364, 8 Atl. 593; Waddell *v.* Simoson, 112 Pa. St. 567, 4 Atl. 725; Reese *v.* Biddle, 112 Pa. St. 72, 3 Atl. 813.

Duty to furnish lights.— The negligence of an employee to whom was delegated the lighting the hold of a ship, where an employee was injured, was that of the master and not of a fellow servant. Madigan *v.* Oceanic Steam Nav. Co., 82 N. Y. App. Div. 206, 81 N. Y. Suppl. 705; The Santiago, 131 Fed. 383; Sumney *v.* Holt, 15 Fed. 880. But see Mellen *v.* Wilson, 159 Mass. 88, 34 N. E. 96, holding that where an employee was injured by falling down an unlighted hatchway, the electric lights having gone out by an accident which the engineer could have repaired, the master was not liable where there were lanterns that might have been used.

Excavations.— Employees engaged in digging a trench are not the fellow servants of those subsequently engaged in laying a pipe in the trench. Eichholz *v.* Niagara Falls Hydraulic Power, etc., Co., 68 N. Y. App. Div. 441, 73 N. Y. Suppl. 842. And see Kranz *v.* Long Island R. Co., 123 N. Y. 1, 25 N. E. 206, 20 Am. St. Rep. 716; Schmit *v.* Gillen, 41 N. Y. App. Div. 302, 58 N. Y. Suppl. 458. *Contra*, see Curley *v.* Hoff, 62 N. J. L. 758, 42 Atl. 731.

Laborer returning from work on cars.— A laborer employed by a street railway company, when returning home after a day's work free of charge, on one of the company's cars, is not a fellow servant of the conductor, so as to preclude recovery for injuries received by falling through a gate on the car, left unsecured by the conductor's negligence. Pendergast *v.* Union R. Co., 10 N. Y. App. Div. 207, 41 N. Y. Suppl. 927.

A conductor cannot be said to represent the master in providing a place for the brakeman on the train even if the placing of a car may be said to constitute providing a place. Ott *v.* Lake Shore, etc., R. Co., 18 Ohio Cir. Ct. 395, 10 Ohio Cir. Dec. 85.

In Washington it is held that the master not only owes the duty to provide a reasonably safe place in which to work but also to observe such care as will not expose the employee to perils and dangers which may be guarded against by reasonable care and diligence, and that where the performance of this positive duty is intrusted by the master to another his failure to perform is the failure of the master. McDonough *v.* Great Northern R. Co., 15 Wash. 244, 46 Pac. 334.

6. Stahl *v.* Duluth, 71 Minn. 341, 74 N. W. 143; Carlson *v.* Northwestern Tel. Exch. Co., 63 Minn. 428, 65 N. W. 914; Richmond Locomotive Works *v.* Ford, 94 Va. 627, 27 S. E. 509. But see Mullin *v.* Northern Pac. R. Co., 38 Wash. 550, 80 Pac. 814.

7. *California.*— See Donnelly *v.* San Francisco Bridge Co., 117 Cal. 417, 49 Pac. 559.

Mississippi.— Deviny *v.* Planters' Oil Mill, (1903) 33 So. 492.

New York.— Page *v.* Naughton, 63 N. Y. App. Div. 377, 71 N. Y. Suppl. 503; Schott *v.* Onondaga County Sav. Bank, 49 N. Y. App. Div. 503, 63 N. Y. Suppl. 631; Byrnes *v.* Brooklyn Heights R. Co., 36 N. Y. App. Div. 355, 55 N. Y. Suppl. 269; Rhodes *v.* Lauer, 32 N. Y. App. Div. 206, 53 N. Y. Suppl. 162.

Rhode Island.— Burke *v.* National India Rubber Co., 21 R. I. 446, 44 Atl. 307.

Texas.— Wells *v.* Page, 29 Tex. Civ. App. 489, 68 S. W. 528.

Utah.—Anderson *v.* Daly Min. Co., 16 Utah 28, 50 Pac. 815.

Virginia.— Russell Creek Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614; Richmond Locomotive Works *v.* Ford, 94 Va. 627, 27 S. E. 509.

See 34 Cent. Dig. tit. "Master and Servant," § 393.

Setting machinery in motion.— An employee injured while working under or about machinery by the negligence of the engineer in setting in motion the machinery cannot recover, the engineer being a fellow servant. Bergstrom *v.* Staples, 82 Mich. 654, 46 N. W. 1035; Ewan *v.* Lippincott, 47 N. J. L. 192, 54 Am. Rep. 148; Henshaw *v.* Pond's Extract Co., 21 N. Y. Suppl. 177 [*affirmed* in 149 N. Y. 582, 43 N. E. 987]. See also Porter *v.* Silver Creek, etc., Coal Co., 84 Wis. 418, 54 N. W. 1019. But see Mullane *v.* Houston, etc., Ferry R. Co., 21 Misc. (N. Y.) 10, 46 N. Y. Suppl. 957 [*affirming* 20 Misc. 434, 45 N. Y. Suppl. 1039].

8. Geoghegan *v.* Atlas Steamship Co., 3 Misc. (N. Y.) 224, 22 N. Y. Suppl. 749 [*affirmed* in 146 N. Y. 369, 40 N. E. 507]; Wiskie *v.* Montello Granite Co., 111 Wis. 443, 87 N. W. 461, 87 Am. St. Rep. 885; The Victoria, 13 Fed. 43.

Ventilation.— Where the room in which a machine is run is suitable for such work, the fact that the foreman in charge of the machine does not ventilate the room on a particular occasion according to the directions of the master, whereby a fellow servant is injured, does not render the master liable, as in such act the foreman is a fellow servant. McGuerty *v.* Hale, 161 Mass. 51, 36 N. E. 682.

When the danger arises, not from the place itself, but from the use of it for the work, and no special skill or experience beyond that involved in doing the work is required to maintain the safety of the place, the main-

for work is reasonably safe the master is not liable for the negligence of a superior servant in placing the injured servant at work at a certain place which is dangerous.[9]

(2) Temporary Place or Place Prepared by Servant. Where the place of work is not permanent, or has not been previously prepared by the master as a place for the doing of the work, or where the servant is employed to make his own place to work in, so that the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses, the rule has no application and the negligent employee is generally held a fellow servant.[10] This rule is applied where the injury results from the fall of a defective staging.[11] So where the work consists in making safe the place and condition of which the injured servant complains the rule that the duty to provide a safe place cannot be delegated has no application.[12] And the master is not liable for the negligent act of a foreman or superintendent in making a place safe for employees, where such negligent act results in direct injury to another servant while the work of making the place safe is in progress.[13]

tenance of such safety is the duty of the servant because it is a part of the work. McLaine *v.* Head, etc., Co., 71 N. H. 294, 52 Atl. 545, 93 Am. St. Rep. 522, 58 L. R. A. 462.

Digging of trench.— If a person employed to dig a trench is injured by the caving in of the sides, his employer is not liable if he furnished the materials for sheathing or shoring up the sides and the materials were not used for that purpose by the person employed by him to superintend the digging of the trench. Floyd *v.* Sugden, 134 Mass. 563; Curley *v.* Hoff, 62 N. J. L. 758, 42 Atl. 731; Collins *v.* Crimmins, 11 Misc. (N. Y.) 24, 31 N. Y. Suppl. 860; Dwyer *v.* Hickler, 16 N. Y. Suppl. 814. *Contra*, Van Steenburgh *v.* Thornton, 58 N. J. L. 160, 33 Atl. 380.

For instance the leaving open a dangerous place, such as a hatchway or trap-door, is negligence as to details rather than negligence in furnishing a safe place to work. Baron *v.* Detroit, etc., Steam Nav. Co., 91 Mich. 585, 52 N. W. 22; Filbert *v.* Delaware, etc., Canal Co., 121 N. Y. 207, 23 N. E. 1104; Bateman *v.* New York Cent., etc., R. Co., 67 N. Y. App. Div. 241, 73 N. Y. Suppl. 390; Karl *v.* Maillard, 3 Bosw. (N. Y.) 591; McCoy *v.* Empire Warehouse Co., 10 N. Y. Suppl. 99; Pawling *v.* Hoskins, 132 Pa. St. 617, 19 Atl. 301, 19 Am. St. Rep. 617; The Louisiana, 74 Fed. 748, 21 C. C. A. 60. *Contra*, see Vandyke *v.* Memphis, etc., Packet Co., 71 S. W. 441, 24 Ky. L. Rep. 1283.

9. Cullen *v.* Norton, 126 N. Y. 1, 26 N. E. 905.

10. Poorman Silver Mines *v.* Devling, 34 Colo. 37, 81 Pac. 252; Greeley *v.* Foster, 32 Colo. 292, 75 Pac. 351; Petaja *v.* Aurora Iron Min. Co., 106 Mich. 463, 64 N. W. 335, 66 N. W. 951, 58 Am. St. Rep. 505, 32 L. R. A. 435; Brown *v.* Terry, 67 N. Y. App. Div. 223, 73 N. Y. Suppl. 733; Warszawski *v.* McWilliams, 64 N. Y. App. Div. 63, 71 N. Y. Suppl. 680; Golden *v.* Sieghardt, 33 N. Y. App. Div. 161, 53 N. Y. Suppl. 460; O'Connell *v.* Clark, 22 N. Y. App. Div. 466, 48 N. Y. Suppl. 74; Davis *v.* Trade Dollar Consol. Min. Co., 117 Fed. 122, 54 C. C. A. 636.

Limitation of rule.— It has been said, however, that the rule has no iron-bound limitations as to whether the place was a temporary or permanent one, and it has been held that if a master sends a servant to work in a place of danger, however temporary, and the danger arises from acts or omissions of other servants against which the servant has no means of protecting himself, it is the duty of the master to provide such warnings or to take such other steps as may be reasonably necessary to safeguard the servant so employed; and if another servant of higher or lower degree is delegated by the master to attend to such safeguarding he is performing the functions of the master, and if guilty of negligence the master is responsible. Crist *v.* Wichita Gas, etc., Co., 72 Kan. 135, 83 Pac. 199; Coffeyville Vitrified Brick, etc., Co. *v.* Shanks, 69 Kan. 306, 76 Pac. 856.

Erection of building.— The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as toward them, of keeping a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows. Armour *v.* Hahn, 111 U. S. 313, 4 S. Ct. 433, 28 L. ed. 440.

11. See *infra*, IV, G, 4, a, (VII), (D), (3), (b).

12. Bedford Belt R. Co. *v.* Brown, 142 Ind. 659, 42 N. E. 359.

Removal of debris.— Thus the rule does not apply to the removal of *débris* after some accident which has made the place unsafe and unfit for the use to which it has been devoted, and where the very object of the work is to clear away the wreckage and restore the place to a condition of safety and usefulness. Florence, etc., R. Co. *v.* Whipps, 138 Fed. 13, 70 C. C. A. 443.

13. Meeker *v.* C. R. Remington, etc., Co., 53 N. Y. App. Div. 592, 65 N. Y. Suppl. 1116.

(3) Application of Rule to Railroad Company. A railroad company must furnish its employees a safe place to work, and where it delegates such duty the servant to whom the duty is delegated is a vice-principal,[14] especially where the duty is imposed by statute.[15] This non-delegable duty extends *inter alia* to the original construction of the roadway,[16] and to the furnishing of a safe track.[17] But where the road-bed is safe but is rendered temporarily unsafe by the act of a fellow servant, the company is not liable where it had no actual or constructive notice thereof.[18] Thus the duty of opening and closing a railroad switch is not one of the personal duties of a master but is a duty of a servant as a duty of operation;[19] it is not a defect in the road-bed for which a person thereby injured can recover from the company, on an allegation of failure to maintain its road-bed in safe condition.[20] Where the duty of keeping the track free from obstructions is delegated to a servant he is not a fellow servant of train employees injured by the former's negligence.[21] So the company is ordinarily liable for injuries to a

14. Philadelphia, etc., R. Co. *v.* Devers, 101 Md. 341, 61 Atl. 418 (watch box for flagman); Wooden *v.* Western New York, etc., R. Co., 18 N. Y. Suppl. 768 [*affirming* 16 N. Y. Suppl. 840] (determination of sufficiency of appliances for holding train in descending a grade).

15. New York, etc., R. Co. *v.* Lambright, 5 Ohio Cir. Ct. 433, 3 Ohio Cir. Dec. 213.

16. Northern Alabama R. Co. *v.* Mansell, 138 Ala. 548, 36 So. 459 (stock gaps); Trask *v.* California Southern R. Co., 63 Cal. 96; Toledo, etc., R. Co. *v.* Conroy, 68 Ill. 560.

17. *Illinois.*— Rogers *v.* Cleveland, etc., R. Co., 211 Ill. 126, 71 N. E. 850, 103 Am. St. Rep. 185.

Kansas.— Rouse *v.* Downs, 5 Kan. App. 549, 47 Pac. 982, improper construction of switch.

Kentucky.— Louisville, etc., R. Co. *v.* Pointer, 113 Ky. 952, 69 S. W. 1108, 24 Ky. L. Rep. 772, construing law of Virginia.

Missouri.— Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 104 Am. St. Rep. 434.

New Jersey.— Smith *v.* Erie R. Co., 67 N. J. L. 636, 52 Atl. 634, 59 L. R. A. 302.

North Carolina.— Bean *v.* Western North Carolina R. Co., 107 N. C. 731, 12 S. E. 600.

South Carolina.— Richey *v.* Southern R. Co., 69 S. C. 387, 48 S. E. 285.

Texas.— Texas, etc., R. Co. *v.* Kirk, 62 Tex. 227. See also Texas Pac. R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60.

See 34 Cent. Dig. tit. "Master and Servant," § 403.

Bridges and culverts.— The company is liable for injuries resulting from a defective bridge over which trains pass, although the bridge was built under a competent foreman and competent inspectors were afterward furnished. Bowen *v.* Chicago, etc., R. Co., 95 Mo. 268, 8 S. W. 230; Galveston, etc., R. Co. *v.* Daniels, 1 Tex. Civ. App. 695, 20 S. W. 955. But see Warner *v.* Erie R. Co., 39 N. Y. 468 [*reversing* 49 Barb. 558]. The same rule applies to culverts. Davis *v.* Central Vermont R. Co., 55 Vt. 84, 45 Am. Rep. 590.

Defective fence.— Where the injury resulted from animals getting on the track through a defective fence the company is liable, although the defect was due to the negligence of a co-servant. Atchison, etc., R. Co. *v.* Reesman, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768.

18. Loranger *v.* Lake Shore, etc., R. Co., 104 Mich. 80, 62 N. W. 137.

19. *California.*— Daves *v.* Southern Pac. Co., 98 Cal. 19, 32 Pac. 708, 35 Am. St. Rep. 133.

Colorado.— Denver, etc., R. Co. *v.* Sipes, 23 Colo. 226, 47 Pac. 287.

Illinois.— Chicago, etc., R. Co. *v.* Henry, 7 Ill. App. 322.

Indiana.— Slattery *v.* Toledo, etc., R. Co., 23 Ind. 81.

Massachusetts.— Walker *v.* Boston, etc., R. Co., 128 Mass. 8.

Minnesota.— Roberts *v.* Chicago, etc., R. Co., 33 Minn. 218, 22 N. W. 389.

New York.— Harvey *v.* New York Cent., etc., R. Co., 88 N. Y. 481; Davis *v.* Staten Island Rapid Transit R. Co., 1 N. Y. App. Div. 178, 37 N. Y. Suppl. 157.

Oregon.— Miller *v.* Southern Pac. Co., 20 Oreg. 285, 26 Pac. 70.

United States.— Mase *v.* Northern Pac. R. Co., 165 U. S. 363, 17 S. Ct. 345, 41 L. ed. 746 [*reversing* 63 Fed. 114, 11 C. C. A. 63 (*affirming* 57 Fed. 283)]; St. Louis, etc., R. Co. *v.* Needham, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833; Naylor *v.* New York Cent., etc., R. Co., 33 Fed. 801.

See 34 Cent. Dig. tit. "Master and Servant," § 400 *et seq.*

Contra, see St. Louis Southwestern R. Co. *v.* Kelton, 28 Tex. Civ. App. 137, 66 S. W. 887; International, etc., R. Co. *v.* Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772.

20. Pleasants *v.* Raleigh, etc., R. Co., 121 N. C. 492, 28 S. E. 267, 61 Am. St. Rep. 674. And see cases cited in preceding note.

21. Bean *v.* Western North Carolina R. Co., 107 N. C. 731, 12 S. E. 600; Baltimore, etc., R. Co. *v.* McKenzie, 81 Va. 71. But see Kentucky Cent. R. Co. *v.* Ryle, 18 S. W. 938, 13 Ky. L. Rep. 862.

Section foremen are vice-principals when engaged in the performance of a duty the master owes to its servants traveling over its road-bed on trains, as where it is their duty to keep the track clear from obstructions.

servant on trains caused by obstructions near the track, although the obstructions were put or left there by other servants of the company,[22] although the rule seems to be otherwise where the obstruction is merely temporary.[23] On the other hand, where the servant of a railroad company, such as a car repairer or the like, is injured while at work under or between an engine or cars by the starting of the engine or an engine backing into the car, the negligent servant is usually considered a fellow servant,[24] except in those states where the superior servant rule is followed and the repairer or inspector was working under the engine or car pursuant to the orders of the negligent superior servant.[25]

(D) *Safe Tools, Machinery, and Appliances* — (1) IN GENERAL. The duty to furnish safe tools, machinery, and other appliances is closely allied to the duty to furnish a safe place to work, and is governed by the same rules.[26] A servant to whom such duty is intrusted is a vice-principal, and for his omission or negligence in regard thereto the master is liable.[27] There are, however, many matters

Fisher *v.* Oregon Short Line, etc., R. Co., 22 Oreg. 533, 30 Pac. 425, 16 L. R. A. 519; Wellman *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 530, 28 Pac. 625; Hulehan *v.* Green Bay, etc., R. Co., 68 Wis. 520, 32 N. W. 529.

22. Holden *v.* Fitchburg R. Co., 129 Mass. 268, 37 Am. Rep. 343; Southern Pac. R. Co. *v.* Markey, (Tex. 1892) 19 S. W. 392. But see New York, etc., R. Co. *v.* Bell, 112 Pa. St. 400, 4 Atl. 50; Gates *v.* Chicago, etc., R. Co., 4 S. D. 433, 57 N. W. 200.

Mail-catcher.—The negligence of employees of a railroad company, charged with the duty of keeping obstructions from the track, in failing to see that a mail-catcher was placed a safe and proper distance from the track, was the negligence of the railroad company, and not of fellow servants, and the company was liable for injuries to a fireman caused thereby. Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 272.

23. Schaub *v.* Hannibal, etc., R. Co., 106 Mo. 74, 16 S. W. 924; Jackson *v.* Missouri Pac. R. Co., (Mo. 1890) 14 S. W. 54.

24. *Florida.*— South Florida R. Co. *v.* Weese, 32 Fla. 212, 13 So. 436.

Illinois.— Valtez *v.* Ohio, etc., R. Co., 85 Ill. 500.

Maryland.— State *v.* South Baltimore Car Works, 99 Md. 461, 58 Atl. 447.

New York.— Corcoran *v.* Delaware, etc., R. Co., 126 N. Y. 673, 27 N. E. 1022; Besel *v.* New York Cent., etc., R. Co., 70 N. Y. 171; Van Sickle *v.* Atlantic Ave. R. Co., 12 Misc. 217, 33 N. Y. Suppl. 265.

North Carolina.— Kirk *v.* Atlanta, etc., R. Co., 94 N. C. 625, 55 Am. Rep. 621.

Ohio.— Pennsylvania R. Co. *v.* Fox, 10 Ohio Cir. Ct. 72, 4 Ohio Cir. Dec. 19.

Pennsylvania.—Fullmer *v.* New York Cent., etc., R. Co., 208 Pa. St. 598, 57 Atl. 1062.

Texas.— Texas, etc., R. Co. *v.* Campbell, (Civ. App. 1894) 39 S. W. 1104; San Antonio, etc., R. Co. *v.* Reynolds, (Civ. App. 1895) 30 S. W. 846; Texas, etc., R. Co. *v.* Cumpston, 4 Tex. Civ. App. 25, 23 S. W. 47.

Wisconsin.— Smith *v.* Chicago, etc., R. Co., 91 Wis. 503, 65 N. W. 183.

But see Nall *v.* Louisville, etc., R. Co., 129 Ind. 260, 28 N. E. 183, 611; Louisville, etc., R. Co. *v.* Hanning, 131 Ind. 528, 31 N. E. 187, 31 Am. St. Rep. 443; Mullin *v.* Northern Pac. R. Co., 38 Wash. 550, 80 Pac. 814.

25. *Arkansas.*— See St. Louis, etc., R. Co. *v.* Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773.

Kansas.— Hannibal, etc., R. Co. *v.* Fox, 31 Kan. 586, 3 Pac. 320.

Kentucky.— Ritt *v.* Louisville, etc., R. Co., 4 S. W. 796, 9 Ky. L. Rep. 307.

Missouri.— Dayharsh *v.* Hannibal, etc., R. Co., 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900; Moore *v.* Wabash, etc., R. Co., 85 Mo. 588.

Texas.— See Wall *v.* Texas, etc., R. Co., 2 Tex. Unrep. Cas. 432.

Washington.— Goe *v.* Northern Pac. R. Co., 30 Wash. 654, 71 Pac. 182.

26. See *supra*, IV, G, 4, a, (VII), (C).

27. *California.*— Wall *v.* Marshutz, 138 Cal. 522, 71 Pac. 692; Higgins *v.* Williams, 114 Cal. 176, 45 Pac. 1041; Nixon *v.* Selby Smelting, etc., Co., 102 Cal. 458, 36 Pac. 803; Sanborn *v.* Madera Flume, etc., Co., 70 Cal. 261, 11 Pac. 710.

Connecticut.— Wilson *v.* Willimantic Linen Co., 50 Conn. 433, 47 Am. Rep. 653.

Delaware.— Foster *v.* Pusey, 8 Houst. 168, 14 Atl. 545.

District of Columbia.— Butler *v.* Frazee, 25 App. Cas. 392.

Illinois.— Frost Mfg. Co. *v.* Smith, 98 Ill. App. 308 [*affirmed* in 197 Ill. 253, 64 N. E. 305].

Indiana.— Indiana Car Co. *v.* Parker, 100 Ind. 181.

Kansas.— Kelley *v.* Ryus, 48 Kan. 120, 29 Pac. 144; Atchison, etc., R. Co. *v.* McKee, 37 Kan. 592, 15 Pac. 484.

Maine.— Small *v.* Allington, etc., Mfg. Co., 94 Me. 551, 48 Atl. 177; Donnelly *v.* Booth Bros., etc., Granite Co., 90 Me. 110, 37 Atl. 874.

Massachusetts.— Chisholm *v.* New England Tel., etc., Co., 185 Mass. 82, 69 N. E. 1042; Myers *v.* Hudson Iron Co., 150 Mass. 125, 22 N. E. 631, 15 Am. St. Rep. 176; Moynihan *v.* Hills Co., 146 Mass. 586, 16 N. E. 574, 4 Am. St. Rep. 348; Rice *v.* King Phillip Mills, 144 Mass. 229, 11 N. E. 101, 59 Am. Rep. 80.

Michigan.— Geller *v.* Briscoe Mfg. Co., 136 Mich. 330, 99 N. W. 281; Brown *v.* Gilchrist,

of detail in the management of safe and adequate machinery and appliances which must be intrusted to the operatives, and as to which the master owes no duty except the employment of competent workmen.[28] The line of division between the duty of the master to furnish and maintain safe and adequate machinery and appliances, and that of the operative to manage and handle it with prudence and care is difficult to define by any general description.[29] It is held that where the master has furnished safe appliances, and the negligence consists in their use,[30] or in the failure to use them at all, or the use of improper instead

80 Mich. 56, 45 N. W. 82, 20 Am. St. Rep. 496.

Minnesota.— Swanson *v.* Oakes, 93 Minn. 404, 101 N. W. 949; Kelly *v.* Erie Tel., etc., Co., 34 Minn. 321, 25 N. W. 706.

Missouri.— Harper *v.* Indianapolis, etc., R. Co., 47 Mo. 567, 4 Am. Rep. 353; Higgins *v.* Missouri Pac. R. Co., 43 Mo. App. 547; Jones *v.* St. Louis, etc., Packet Co., 43 Mo. App. 398; Banks *v.* Wabash Western R. Co., 40 Mo. App. 458; Dutzi *v.* Geisel, 23 Mo. App. 676.

New York.— Benzing *v.* Steinway, 101 N. Y. 547, 5 N. E. 449; Probst *v.* Delamater, 100 N. Y. 266, 3 N. E. 184; Hazzard *v.* State, 108 N. Y. App. Div. 119, 95 N. Y. Suppl. 1103; Sarno *v.* Atlantic Stevedoring Co., 66 N. Y. App. Div. 611, 74 N. Y. Suppl. 578; Bernardi *v.* New York Cent., etc., Co., 78 Hun 454, 29 N. Y. Suppl. 230; Kimmer *v.* Weber, 76 Hun 482, 27 N. Y. Suppl. 1093; Kain *v.* Smith, 25 Hun 146 [*affirmed* in 89 N. Y. 375]; Ryan *v.* Miller, 12 Daly 77 [*affirmed* in 99 N. Y. 665]; Myles *v.* New York, etc., R. Co., 6 N. Y. St. 24.

North Carolina.— Orr *v.* Southern Bell Tel., etc., Co., 132 N. C. 691, 44 S. E. 401.

Ohio.— Lake Shore, etc., R. Co. *v.* Corcoran, 14 Ohio Cir. Ct. 377, 6 Ohio Cir. Dec. 773.

Oklahoma.— Neeley *v.* Southwestern Cotton Seed Oil Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145.

Pennsylvania.— Butterman *v.* McClintic-Marshall Constr. Co., 206 Pa. St. 82, 55 Atl. 839.

Rhode Island.— Crandall *v.* Stafford Mfg. Co., 24 R. I. 555, 54 Atl. 52.

Texas.— Galveston, etc., R. Co. *v.* Sullivan, 2 Tex. Unrep. Cas. 315; Terrell Compress Co. *v.* Arrington, (Civ. App. 1898) 48 S. W. 59.

Washington.— Bailey *v.* Cascade Timber Co., 35 Wash. 295, 77 Pac. 377; Ogle *v.* Jones, 16 Wash. 319, 47 Pac. 747. See also Bailey *v.* Cascade Timber Co., 32 Wash. 319, 73 Pac. 385.

United States.— Gardner *v.* Michigan Cent. R. Co., 150 U. S. 349, 14 S. Ct. 140, 37 L. ed. 1107; Cleveland, etc., R. Co. *v.* Brown, 73 Fed. 970, 20 C. C. A. 147; Northern Pac. R. Co. *v.* Charless, 51 Fed. 562, 2 C. C. A. 380; Telander *v.* Sunlin, 44 Fed. 564; Lund *v.* Hersey Lumber Co., 41 Fed. 202; The Noddleburn, 28 Fed. 855 [*affirmed* in 30 Fed. 142]; Gilmore *v.* Northern Pac. R. Co., 18 Fed. 866, 9 Sawy. 558.

Canada.— Canada Woolen Mills *v.* Traplin, 35 Can. Sup. Ct. 424; Fairweather *v.* Owen Sound Stone Quarry Co., 26 Ont. 604.

See 34 Cent. Dig. tit. "Master and Servant," § 392.

Servant informing foreman that tools are unsafe.— When a servant has informed his foreman and superintendent that his tools are unsafe, it is their duty to furnish reasonably safe tools, and in so doing they are not his fellow servants, but the master's representatives. Lehigh Valley Coal Co. *v.* Warrek, 84 Fed. 866, 28 C. C. A. 540.

Ownership of appliance.— The employer is none the less liable for the negligence of a foreman and manager to whom he had intrusted the construction of a sewer, in setting up and putting to work a steam shovel in an unsafe condition, because the employer did not own the shovel, and did not know that the manager had hired it and put it to work. Higgins *v.* Williams, 114 Cal. 176, 45 Pac. 1041.

28. *California.*— Helling *v.* Schindler, 145 Cal. 303, 78 Pac. 710; Burns *v.* Sennett, 99 Cal. 363, 33 Pac. 916.

Indiana.— Bedford Belt R. Co. *v.* Brown, 142 Ind. 659, 42 N. E. 359.

Maine.— Stewart *v.* International Paper Co., 96 Me. 30, 51 Atl. 237.

New York.— Cregan *v.* Marston, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854 [*reversing* 10 N. Y. Suppl. 681] (defective rope); Conway *v.* New York Cent., etc., R. Co., 13 Misc. 53, 34 N. Y. Suppl. 113 (defective rope).

Pennsylvania.— Honor *v.* Albrighton, 93 Pa. St. 475.

Wisconsin.— Mathews *v.* Case, 61 Wis. 491, 21 N. W. 513, 50 Am. Rep. 151.

United States.— Briody *v.* The Persian Monarch, 55 Fed. 333, 5 C. C. A. 117 [*reversing* 49 Fed. 669]; Miles *v.* The Servia, 44 Fed. 943; The A. Heaton, 43 Fed. 592. But see Lund *v.* Hersey Lumber Co., 41 Fed. 202, holding that the master is liable for the negligence of his foreman, ordered to remove a barge from the water without directions as to means, in selecting unsafe ropes, by the breaking of which a laborer is injured.

See 34 Cent. Dig. tit. "Master and Servant," § 392 *et seq.*

29. Helling *v.* Schindler, 145 Cal. 303, 78 Pac. 710.

30. *Connecticut.*— Leonard *v.* Mallory, 75 Conn. 433, 53 Atl. 778; Kelly *v.* New Haven Steamboat Co., 74 Conn. 343, 50 Atl. 871; 92 Am. St. Rep. 220.

Indiana.— Southern Indiana R. Co. *v.* Harrell, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460; Justice *v.* Pennsylvania Co., 130 Ind. 321, 30 N. E. 303; Clark County Cement

of proper appliances furnished, or the use of defective appliances where other safe appliances of the same kind had been furnished,[31] the negligence relates to a

Co. *v.* Wright, 16 Ind. App. 630, 45 N. E. 817.

Iowa.— Neilson *v.* Gilbert, 69 Iowa 691, 23 N. W. 666.

Massachusetts.— Gilmore *v.* Mittineague Paper Co., 169 Mass. 471, 48 N. E. 623; O'Keefe *v.* Brownell, 156 Mass. 131, 30 N. E. 479; McGinty *v.* Athol Reservoir Co., 155 Mass. 183, 29 N. E. 510; Kelley *v.* Boston Lead Co., 128 Mass. 456.

Michigan.— Henry *v.* Ann Arbor R. Co., 140 Mich. 446, 103 N. W. 846; Frazee *v.* Stott, 120 Mich. 624, 79 N. W. 896; Alford *v.* Metcalf, 74 Mich. 369, 42 N. W. 52.

Minnesota.— Jemming *v.* Great Northern R. Co., 96 Minn. 302, 104 N. W. 1079, 1 L. R. A. N. S. 696.

Mississippi.— Illinois Cent. R. Co. *v.* Bishop, 76 Miss. 758, 25 So. 867.

New Hampshire.— Galvin *v.* Pierce, 72 N. H. 79, 54 Atl. 1014; Nash *v.* Nashua Iron, etc., Co., 62 N. H. 406.

New Jersey.— McLaughlin *v.* Camden Iron Works, 60 N. J. L. 557, 38 Atl. 677; Collyer *v.* Pennsylvania R. Co., 49 N. J. L. 59, 6 Atl. 437.

New York.— Stringham *v.* Hilton, 111 N. Y. 188, 18 N. E. 870, 1 L. R. A. 483; Neubauer *v.* New York, etc., R. Co., 101 N. Y. 607, 4 N. E. 125; McManus *v.* St. Regis Paper Co., 107 N. Y. App. Div. 29, 94 N. Y. Suppl. 932; Dooling *v.* Deutscher Verein, 97 N. Y. App. Div. 39, 89 N. Y. Suppl. 580; Randall *v.* Holbrook, etc., Contracting Co., 95 N. Y. App. Div. 336, 88 N. Y. Suppl. 681; Klos *v.* Hudson River Ore, etc., Co., 77 N. Y. App. Div. 566, 79 N. Y. Suppl. 156; Hall *v.* U. S. Canning Co., 76 N. Y. App. Div. 475, 78 N. Y. Suppl. 617; O'Connor *v.* Hall, 52 N. Y. App. Div. 428, 65 N. Y. Suppl. 136; Kennedy *v.* Allentown Foundry, etc., Works, 49 N. Y. App. Div. 78, 63 N. Y. Suppl. 195; Olsen *v.* Starin, 43 N. Y. App. Div. 422, 60 N. Y. Suppl. 134; Denenfeld *v.* Baumann, 40 N. Y. App. Div. 502, 58 N. Y. Suppl. 110; Crowell *v.* Thomas, 18 N. Y. App. Div. 520, 46 N. Y. Suppl. 137; Marvin *v.* Muller, 25 Hun 163; Kenny *v.* Cunard Steamship Co., 52 N. Y. Super. Ct. 434; Ludlow *v.* Groton Bridge Co., 16 Misc. 222, 37 N. Y. Suppl. 595; Kennedy *v.* Jackson Agricultural Iron Works, 12 Misc. 336, 33 N. Y. Suppl. 630; Beyer *v.* Victor, 2 Misc. 496, 22 N. Y. Suppl. 392; McCampbell *v.* Cunard Steamship Co., 13 N. Y. Suppl. 288; Slatterly *v.* New York, etc., R. Co., 4 N. Y. Suppl. 910. But see Courtney *v.* Cornell, 49 N. Y. Super. Ct. 286.

Pennsylvania.— Barlow *v.* Standard Steel Casting Co., 154 Pa. St. 130, 26 Atl. 12; Brown *v.* Minneapolis, etc., R. Co., 2 Del. Co. 155. See also O'Neal *v.* Clydesdale Stone Co., 207 Pa. St. 378, 56 Atl. 929.

Rhode Island.— Frawley *v.* Sheldon, 20 R. I. 258, 38 Atl. 370; Hanna *v.* Granger, 18 R. I. 507, 28 Atl. 659.

Wisconsin.—Prybilski *v.* Northwestern Coal R. Co., 98 Wis. 413, 74 N. W. 117; Steinke *v.* Diamond Match Co., 87 Wis. 477, 58 N. W. 842; Peschel *v.* Chicago, etc., R. Co., 62 Wis. 338, 21 N. W. 269.

United States.— Anderson *v.* The Ravensdale, 63 Fed. 624.

Canada.— Canada Woolen Mills *v.* Traplin, 35 Can. Sup. Ct. 424.

See 34 Cent. Dig. tit. "Master and Servant," § 392 *et seq.*

Sending street car marked as defective.— Where a street car was found defective and marked for repairs by the proper inspector, the company is not liable to a conductor for injuries resulting from the car starter ignoring the mark for repairs and sending the car out for service, such act being the negligence of a fellow servant. Shaw *v.* Manchester St. R. Co., 73 N. H. 65, 58 Atl. 1073.

31. *Illinois.*— Chicago, etc., R. Co. *v.* Scheuring, 4 Ill. App. 533; Harms *v.* Sullivan, 1 Ill. App. 251.

Maine.— Amburg *v.* International Paper Co., 97 Me. 327, 54 Atl. 765.

Massachusetts.— Wolfe *v.* New Bedford Cordage Co., 189 Mass. 591, 76 N. E. 222; Gauges *v.* Fitchburg R. Co., 185 Mass. 76, 69 N. E. 1063; Meehan *v.* Speirs Mfg. Co., 172 Mass. 375, 52 N. E. 518; Daley *v.* Boston, etc., R. Co., 147 Mass. 101, 16 N. E. 690.

Michigan.— Randa *v.* Detroit Screw Works, 134 Mich. 343, 96 N. W. 454; Flaws *v.* West Bay City Shipbuilding Co., 132 Mich. 169, 92 N. W. 1099; Kehoe *v.* Allen, 92 Mich. 464, 52 N. W. 740, 31 Am. St. Rep. 608. But see Thomas *v.* Ann Arbor R. Co., 114 Mich. 59, 72 N. W. 40.

Minnesota.— Ling *v.* St. Paul, etc., R. Co., 50 Minn. 160, 52 N. W. 378; Hefferen *v.* Northern Pac. R. Co., 45 Minn. 471, 48 N. W. 1526. See also Bell *v.* Lang, 83 Minn. 228, 86 N. W. 95.

Missouri.— Moran *v.* Brown, 27 Mo. App. 487.

New Jersey.— Sofield *v.* Guggenheim Smelting Co., 64 N. J. L. 605, 46 Atl. 711, 50 L. R. A. 417.

New York.— Neubauer *v.* New York, etc., R. Co., 101 N. Y. 607, 4 N. E. 125; Ivers *v.* Minnesota Dock Co., 84 N. Y. App. Div. 27, 82 N. Y. Suppl. 193; Byrne *v.* Eastmans Co., 27 N. Y. App. Div. 270, 50 N. Y. Suppl. 457; Ludlow *v.* Groton Bridge, etc., Co., 11 N. Y. App. Div. 452, 42 N. Y. Suppl. 343; Jenkinson *v.* Carlin, 10 Misc. 22, 30 N. Y. Suppl. 530. But see Vogel *v.* American Bridge Co., 88 N. Y. App. Div. 68, 84 N. Y. Suppl. 799, holding that the master is liable where the employee making the selection is the general manager of the work.

Pennsylvania.— Prescott *v.* Ball Engine Co., 176 Pa. St. 459, 35 Atl. 224, 53 Am. St. Rep. 683.

See 34 Cent. Dig. tit. "Master and Servant," § 392 *et seq.*

Duty to supervise.— Where the master furnishes proper and safe appliances it is

detail of the work and the master is not liable on the theory of inability to delegate a personal duty.

(2) Appliances Furnished by Servant. Where a servant is authorized or required by the employment to himself furnish his own appliances for the work, the master is not liable where a fellow servant is injured because of defects therein.[32] *A fortiori* where machinery is furnished by a fellow servant against the master's orders the master is not liable.[33]

(3) Appliances Constructed as Part of Work — (a) In General. The rule as to the non-delegable duty to furnish a safe place and appliances is subject to the exception that where the master undertakes merely to furnish the materials needed for the construction of some appliance which is to be constructed by the workmen themselves as incident to the main work, the master's duty is performed if he furnishes suitable material and competent workmen, and the negligence of a co-servant who constructs the appliance by which the employee is injured is that of a fellow servant for which the master is not liable.[34] In other words, if the preparation of the appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation owing to the negligence of another servant.[35] And the fact that an injured servant did not become an employee until after the negligent act complained of does not alter the relation of fellow servants.[36]

(b) Scaffolds, Platforms, and Runways. As illustrating the rule just stated, it is held that where a master furnishes proper materials for a scaffold, platform, runway, or the like, and it is constructed by co-servants of one injured because of a defect therein, as a part of the work which they are employed to do, the master is ordinarily not liable,[37] except where the duty to furnish safe and suitable

not his duty to see that they are used. Such duty is a delegable duty, so that negligence in relation thereto relates to a detail of the work for which the master is not liable. Kelly *v.* New Haven Steamboat Co., 74 Conn. 343, 50 Atl. 871, 92 Am. St. Rep. 220.

Failure to light lamps.— Where lamps were provided by the master the negligence of a foreman in failing to light them whereby a servant was injured is the negligence of a fellow servant. Foster *v.* International Paper Co., 183 N. Y. 45, 75 N. E. 933; Madigan *v.* Oceanic Steam Nav. Co., 178 N. Y. 242, 70 N. E. 785, 102 Am. St. Rep. 495 [*reversing* 82 N. Y. App. Div. 206, 81 N. Y. Suppl. 705].

32. Harkins *v.* Standard Sugar Refinery, 122 Mass. 400.

33. Callaway *v.* Allen, 64 Fed. 297, 12 C. C. A. 114.

34. Leishman *v.* Union Iron Works, 148 Cal. 274, 83 Pac. 30, 3 L. R. A. N. S. 500; Burns *v.* Sennett, 99 Cal. 363, 33 Pac. 916; Kiffin *v.* Wendt, 39 N. Y. App. Div. 229, 57 N. Y. Suppl. 109; Buck *v.* New Jersey Zinc Co., 204 Pa. St. 132, 53 Atl. 740, 60 L. R. A. 453; Phœnix Bridge Co. *v.* Castleberry, 131 Fed. 175, 65 C. C. A. 481; Ryan *v.* Smith, 85 Fed. 758, 29 C. C. A. 427.

35. Leishman *v.* Union Iron Works, 148 Cal. 274, 83 Pac. 30, 3 L. R. A. N. S. 500; Callan *v.* Bull, 113 Cal. 593, 45 Pac. 1017; Southern Indiana R. Co. *v.* Harrell, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460; Gittens *v.* William Porten Co., 90 Minn. 512, 97 N. W. 378; Fraser *v.* Red River Lumber Co., 45 Minn. 235, 47 N. W. 785; Enright *v.* Oliver, 69 N. J. L. 357, 55 Atl. 277, 101 Am. St. Rep. 710.

36. Olsen *v.* Nixon, 61 N. J. L. 671, 40 Atl. 694; Hogan *v.* Smith, 125 N. Y. 774, 26 N. E. 742; Lambert *v.* Missisquoi Pulp Co., 72 Vt. 278, 47 Atl. 1085. See also Beal *v.* Bryant, 99 Me. 112, 58 Atl. 428; O'Connor *v.* Rich, 164 Mass. 560, 42 N. E. 111, 49 Am. St. Rep. 483; Butler *v.* Townsend, 126 N. Y. 105, 26 N. E. 1017.

37. *Colorado.*— McKean *v.* Colorado Fuel, etc., Co., 18 Colo. App. 285, 71 Pac. 425.

Iowa.—Benn *v.* Null, 65 Iowa 407, 21 N. W. 700.

Kansas.— Kelly *v.* Detroit Bridge Works, 17 Kan. 558.

Maine.— McCarthy *v.* Claflin, 99 Me. 290, 59 Atl. 293.

Massachusetts.— Kennedy *v.* Spring, 160 Mass. 203, 35 N. E. 779; O'Connor *v.* Neal, 153 Mass. 281, 26 N. E. 857; Hoppin *v.* Worcester, 140 Mass. 222, 2 N. E. 779; Kelley *v.* Norcross, 121 Mass. 508.

Michigan.— Beesley *v.* Wheeler, 103 Mich. 196, 61 N. W. 658, 27 L. R. A. 266; Dewey *v.* Parke, 76 Mich. 631, 43 N. W. 644.

Minnesota.— Marsh *v.* Herman, 47 Minn. 537, 50 N. W. 611; Fraser *v.* Red River Lumber Co., 45 Minn. 235, 47 N. W. 785; Lindvall *v.* Woods, 41 Minn. 212, 42 N. W. 1020, 4 L. R. A. 793.

New Jersey.— Pfeiffer *v.* Dialogue, 64 N. J. L. 707, 46 Atl. 772; Olsen *v.* Nixon, 61 N. J. L. 671, 40 Atl. 694; Maher *v.* McGrath, 58 N. J. L. 469, 33 Atl. 945.

New York.— Butler *v.* Townsend, 126 N. Y. 105, 26 N. E. 1017 [*reversing* 10 N. Y. Suppl.

scaffolding and like appliances is imposed by statute, in which case the master is liable.[38] On the other hand it is generally held that where the appliance is furnished by the master as a completed instrumentality for the use of the employees who are to work thereon, the fellow servant rule is not applicable.[39] Of course the master is liable for the furnishing of improper or defective materials to be used in constructing the scaffold, and where the duty to furnish the materials is

809]; Hogan *v.* Smith, 125 N. Y. 774, 26 N. E. 742 [*reversing* 9 N. Y. Suppl. 881]; Judson *v.* Olean, 116 N. Y. 655, 22 N. E. 555; Vincent *v.* Mauterstock, 30 N. Y. App. Div. 308, 51 N. Y. Suppl. 494; Devlin *v.* Smith, 25 Hun 206; Pickett *v.* Atlas Steamship Co., 12 Daly 441; Reilly *v.* Parker, 11 Misc. 68, 31 N. Y. Suppl. 1014; Quinn *v.* Fish, 6 Misc. 105, 26 N. Y. Suppl. 10; Thompson *v.* Libbey, 19 N. Y. Suppl. 680; McCormack *v.* Crawford, 4 N. Y. St. 835.

Washington.— Metzler *v.* McKenzie, 34 Wash. 470, 76 Pac. 114.

United States.— Phœnix Bridge Co. *v.* Castleberry, 131 Fed. 175, 65 C. C. A. 481; Chambers *v.* American Tin Plate Co., 129 Fed. 561, 64 C. C. A. 129; Grimsley *v.* Hankins, 46 Fed. 400.

See 34 Cent. Dig. tit. "Master and Servant," § 397.

But see John S. Metcalf Co. *v.* Nystedt, 203 Ill. 333, 67 N. E. 764; Herman *v.* George Weidemann Brewing Co., 87 S. W. 775, 27 Ky. L. Rep. 1016; George Weidemann Brewing Co. *v.* Wood, 87 S. W. 772, 27 Ky. L. Rep. 1012.

Where the injured servant participated in the construction of the appliance of course the master is not liable. Adasken *v.* Gilbert, 165 Mass. 443, 43 N. E. 199; Marsh *v.* Herman, 47 Minn. 537, 50 N. W. 611.

Selection of improper materials.— Where the master furnished proper materials he is not liable where the negligent servant selected insufficient lumber from the mass furnished. Colton *v.* Richards, 123 Mass. 484; Butler *v.* Townsend, 126 N. Y. 105, 26 N. E. 1017; Van den Heuvel *v.* National Furnace Co., 84 Wis. 636, 54 N. W. 1016.

Where a sufficient ladder was provided by the master, but a fellow servant constructed a new one, the breaking of which caused the injury, the master is not liable. Bolton *v.* Georgia Pac. R. Co., 83 Ga. 659, 10 S. E. 352.

Supervision of foreman.— In those states in which the superior servant rule is not followed the master is liable, although the appliance was constructed and erected under the supervision of a foreman. Noyes *v.* Wood, 102 Cal. 389, 36 Pac. 766; Kalleck *v.* Deering, 161 Mass. 469, 37 N. E. 450, 42 Am. St. Rep. 421; Howard *v.* Hood, 155 Mass. 391, 29 N. E. 630; Dewey *v.* Parke, 76 Mich. 631, 43 N. W. 644; Warszawski *v.* McWilliams, 64 N. Y. App. Div. 63, 71 N. Y. Suppl. 680; Swain *v.* Brooklyn Alcatraz Asphalt Co., 57 N. Y. App. Div. 56, 68 N. Y. Suppl. 50; Moore *v.* McNeil, 35 N. Y. App. Div. 323, 54 N. Y. Suppl. 956; Bagley *v.* Consolidated Gas Co., 5 N. Y. App. Div. 432, 39 N. Y. Suppl. 302; Mahoney *v.* Vacuum Oil Co., 76 Hun (N. Y.) 579, 28 N. Y. Suppl. 196; Butterworth *v.* Clarkson, 3 Misc. (N. Y.) 338, 22 N. Y. Suppl. 714; Roach *v.* Jackson Architectural Iron Works, 14 N. Y. St. 583; Ross *v.* Walker, 139 Pa. St. 42, 21 Atl. 157, 159, 23 Am. St. Rep. 160; Lambert *v.* Missisquoi Pulp Co., 72 Vt. 278, 47 Atl. 1085. But see Green *v.* Banta, 48 N. Y. Super. Ct. 156.

38. Madden *v.* Hughes, 104 N. Y. App. Div. 101, 93 N. Y. Suppl. 324; Holloway *v.* McWilliams, 97 N. Y. App. Div. 360, 89 N. Y. Suppl. 1074; Stewart *v.* Ferguson, 44 N. Y. App. Div. 58, 60 N. Y. Suppl. 429; Stewart *v.* Ferguson, 34 N. Y. App. Div. 515, 54 N. Y. Suppl. 615; Kuss *v.* Freid, 32 Misc. (N. Y.) 628, 66 N. Y. Suppl. 487.

39. *Illinois.*— Chicago, etc., R. Co. *v.* Scanlan, 170 Ill. 106, 48 N. E. 826 [*affirming* 67 Ill. App. 621]; Rice, etc., Malting Co. *v.* Paulsen, 51 Ill. App. 123.

Iowa.— Haworth *v.* Seevers Mfg. Co., 87 Iowa 765, 51 N. W. 68, 62 N. W. 325; Fink *v.* Des Moines Ice Co., 84 Iowa 321, 51 N. W. 155.

Kansas.— Kansas City Car, etc., Co. *v.* Sawyer, (App. 1898) 53 Pac. 90.

New York.— McCone *v.* Gallagher, 16 N. Y. App. Div. 272, 44 N. Y. Suppl. 697; Kuhn *v.* Delaware, etc., R. Co., 77 Hun 389, 28 N. Y. Suppl. 883; Sellick *v.* Langdon, 13 N. Y. Suppl. 858.

United States.— Chambers *v.* American Tin Plate Co., 129 Fed. 561, 64 C. C. A. 129.

See 34 Cent. Dig. tit. "Master and Servant," § 397.

Contra.—Killea *v.* Faxon, 125 Mass. 485 (staging erected by carpenter and used by servants putting on copper gutters); Hoar *v.* Merritt, 62 Mich. 386, 29 N. W. 15 (carpenters and painters).

For instance, where a servant, who as an incident to his work was obliged to construct a scaffold, was unable to find suitable materials, and so informed the foreman, who told him to use an appliance that had been used in another kind of work, but this appliance was not suitable for the work and the foreman undertook to adapt it thereto, after which he told the servant that it was a good scaffold, and to go on with his work, the foreman was not a fellow servant as to the construction of such scaffold but was a vice-principal. Richards *v.* Hayes, 17 N. Y. App. Div. 422, 45 N. Y. Suppl. 234.

Where the servants constructing the scaffold or other appliance were employed exclusively for that purpose they are not the fellow servants of employees who use such stagings. McNamara *v.* MacDonough, 102 Cal. 575, 36 Pac. 941; Sims *v.* American Steel Barge Co., 56 Minn. 68, 57 N. W. 322,

delegated to a servant he becomes a vice-principal in regard thereto.[40] In some cases the master has been held liable upon the theory that the scaffold was of a permanent character.[41]

(4) STATUTORY PROVISIONS. Where a statute provides that all machinery must be properly guarded and that when guards are taken off in order to make repairs they must be promptly replaced, the failure of the foreman to replace the guard is not the negligence of a fellow servant,[42] and the same rule applies to the failure to use a guard.[43] But a statute requiring the furnishing of safe appliances does not make the master liable for the negligence of a co-servant in operating a safe appliance.[44]

(5) APPLICATION OF RULE TO RAILROAD COMPANY. The duty of a railroad company to furnish its servants safe cars and locomotives is non-delegable.[45] On the other hand, where the injury does not result from the failure to furnish safe cars and locomotives but from the negligence of a fellow servant in the use thereof, the railroad company is ordinarily not liable.[46] For instance, where

45 Am. St. Rep. 451; Cadden *v.* American Steel Barge Co., 88 Wis. 409, 60 N. W. 800.

40. Kansas City Car, etc., Co. *v.* Sawyer, (Kan. App. 1898) 53 Pac. 90; Beal *v.* Bryant, 99 Me. 112, 58 Atl. 428; Kerr-Murray Mfg. Co. *v.* Hess, 98 Fed. 56, 38 C. C. A. 647.

41. Edward Hines Lumber Co. *v.* Ligas, 172 Ill. 315, 50 N. E. 225, 64 Am. St. Rep. 38 [*affirming* 68 Ill. App. 523].

Use as support.— Where a scaffold is intended not only as a place where the workmen are to stand but also as a support upon which to place an entire superstructure during the course of its erection, and the workmen had no control over the mode of the erection of the scaffold, a scaffold is not of such a character as comes within the exception to the general rule which relieves the master from liability for stagings or scaffoldings erected by laborers who are to work thereon. F. C. Austin Mfg. Co. *v.* Johnson, 89 Fed. 677, 32 C. C. A. 309.

42. Pinsdorf *v.* Kellogg, 108 N. Y. App. Div. 209, 95 N. Y. Suppl. 617; McManus *v.* St. Regis Paper Co., 107 N. Y. App. Div. 29, 94 N. Y. Suppl. 932, holding that the master is not absolved by the fact that the superintendent instructed a machine tender to replace the guards, and the latter negligently failed to do so.

43. Espenlaub *v.* Ellis, 34 Ind. App. 163, 72 N. E. 527.

44. Walters *v.* George A. Fuller Co., 82 N. Y. App. Div. 254, 81 N. Y. Suppl. 919.

45. *Illinois.*— Toledo, etc., R. Co. *v.* Ingraham, 77 Ill. 309.

Maryland.— Cumberland, etc., R. Co. *v.* State, 44 Md. 283, 45 Md. 229.

Michigan.— McLean *v.* Pere Marquette R. Co., 137 Mich. 482, 100 N. W. 748, improper kind of car.

Missouri.— Rodney *v.* St. Louis, etc., R. Co., 127 Mo. 676, 28 S. W. 887, 30 S. W. 150; Taylor *v.* Missouri Pac. R. Co., (1891) 16 S. W. 206, car couplers.

Tennessee.— Nashville, etc., R. Co. *v.* Gann, (1898) 47 S. W. 493, brake.

United States.— See Gravelle *v.* Minneapolis, etc., R. Co., 11 Fed. 569, 3 McCrary 359.

See 34 Cent. Dig. tit. "Master and Servant," § 401.

Illustrations.— On the theory that it was the company's duty to furnish safe cars the master has been held liable where the car furnished was not suitable for the load (Redington *v.* New York, etc., R. Co., 84 Hun (N. Y.) 231, 32 N. Y. Suppl. 535 [*affirmed* in 152 N. Y. 655, 47 N. E. 1111]), and also where a rotten stake was used to hold the load on a car, notwithstanding sound lumber had been furnished for stakes (McIntyre *v.* Boston, etc., R. Co., 163 Mass. 189, 39 N. E. 1012).

Purchase of locomotive.— Agents of a railroad company intrusted with the duty of purchasing a locomotive are not the fellow servants of those operating it. Cumberland, etc., R. Co. *v.* State, 44 Md. 283, 45 Md. 229.

Engine without chimney for its headlight. — The fact that a railroad company, which permits an engine to start out on a trip without any chimney for its headlight, in consequence of which a collision results, provides a chimney at a station along the route, which the engineer neglects to obtain, does not relieve the company from liability, the engineer standing in its place, and not in that of a fellow servant, with respect to the duty of obtaining the chimney. Sutter *v.* New York Cent., etc., R. Co., 79 N. Y. App. Div. 362, 79 N. Y. Suppl. 1106.

The duty of a street-car company to furnish cars which are in proper position necessarily involves the duty of selecting cars to be used, so that a car starter performing such duty is in the exercise of a non-delegable duty and the master is not relieved from responsibility for his negligence. Quinn *v.* Brooklyn Heights R. Co., 91 N. Y. App. Div. 489, 86 N. Y. Suppl. 883.

46. Cassidy *v.* Maine Cent. R. Co., 76 Me. 488; Philadelphia Iron, etc., Co. *v.* Davis, 111 Pa. St. 597, 4 Atl. 513, 56 Am. Rep. 305; Whitwam *v.* Wisconsin, etc., R. Co., 58 Wis. 408, 17 N. W. 124.

Defective loading.— A railroad company is generally not liable for injuries to an employee caused by the defective manner in which a car or tender is loaded. Indianapo-

proper car couplers are furnished by the railroad company, it is not liable to a servant for the negligence of a co-servant in using defective couplers.[47] So where a railroad company provided a proper headlight for its locomotive, the negligence of its servants in failing to light it was the negligence of a fellow servant.[48]

(E) *Duty to Inspect and Repair* — (1) IN GENERAL. The duty of the master to inspect and repair, to make the place and appliances safe, is generally held to be non-delegable so as to relieve the master from liability for negligence in respect thereto.[49] The rule in most of the states is that the master cannot shield himself by exercising due care in employing a competent servant to make such inspection and repairs, but that the servant intrusted with such duty is not a fellow servant of one injured because of the failure to properly inspect or repair;[50]

lis, etc., R. Co. *v.* Johnson, 102 Ind. 352, 26 N. E. 200; Jarman *v.* Chicago, etc., R. Co., 98 Mich. 135, 57 N. W. 32; Conger *v.* Flint, etc., R. Co., 86 Mich. 76, 48 N. W. 695; Foster *v.* Minnesota Cent. R. Co., 14 Minn. 360; Ford *v.* Lake Shore, etc., R. Co., 117 N. Y. 638, 22 N. E. 946; Sweeney *v.* Page, 64 Hun (N. Y.) 172, 18 N. Y. Suppl. 890; Schultz *v.* Chicago, etc., R. Co., 67 Wis. 616, 31 N. W. 321, 58 Am. Rep. 881. But see Atchison, etc., R. Co. *v.* Seeley, 54 Kan. 21, 37 Pac. 104. A railroad company is not liable for injuries caused to one of its employees by the negligence of his fellow employee in using a car covered with ice for loading rails. Hanley *v.* Grand Trunk R. Co., 62 N. H. 274.

Running hand-car.—Negligence of a section foreman in running a hand-car at a dangerous speed (Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 16 S. Ct. 848, 40 L. ed. 999), or in ordering section men to run the car to a certain point so close to the schedule time of the train that a collision occurs (Weger *v.* Pennsylvania R. Co., 55 Pa. St. 460), is the negligence of a fellow servant for which the master is not liable.

Injured servant working about defective cars.— Where plaintiff was employed by a railroad company to aid in taking defective cars from trains, the neglect of the customary precaution of chaining up or propping up a defective drawhead, in such a car, whereby plaintiff was injured, if not chargeable in some degree to plaintiff, was the neglect of his co-servants, and not that of the master. Arnold *v.* Delaware, etc., Canal Co., 125 N. Y. 15, 25 N. E. 1064.

Absence of sufficient sand in box on engine. — A railroad company is not liable for injuries to a brakeman, caused by the want of sufficient sand in the sand box on the engine, if the lack of such sand was due to the failure of a servant whose duty it was to fill the sand boxes before trains started; the railroad company not being negligent in the selection and retention of the latter employee. Illinois Cent. R. Co. *v.* Jones, (Miss. 1894) 16 So. 300; Louisville, etc., R. Co. *v.* Petty, 67 Miss. 255, 7 So. 351, 19 Am. St. Rep. 304.

Where a locomotive boiler explodes, not by reason of any defects in it but by reason of an excessive head of steam, the company is not liable. Texas, etc., R. Co. *v.* Thompson, 70 Fed. 944, 71 Fed. 531, 17 C. C. A. 524.

47. Thyng *v.* Fitchburg R. Co., 156 Mass. 13, 30 N. E. 169, 32 Am. St. Rep. 425; Sweeney *v.* New York, etc., R. Co., 58 N. Y. Super. Ct. 223, 10 N. Y. Suppl. 305.

48. Pennsylvania R. Co. *v.* Wachter, 60 Md. 395; Collins *v.* St. Paul, etc., R. Co., 30 Minn. 31, 14 N. W. 60.

49. See *infra*, note 50.

50. *California.*— Shea *v.* Pacific Power Co., 145 Cal. 680, 79 Pac. 373; Skelton *v.* Pacific Lumber Co., 140 Cal. 507, 74 Pac. 13.

Connecticut.—Rincicotti *v.* John J. O'Brien Contracting Co., 77 Conn. 617, 60 Atl. 115, 69 L. R. A. 936; Brennan *v.* Berlin Iron Bridge Co., 74 Conn. 382, 50 Atl. 1030.

Georgia.— Ocean Steamship Co. *v.* Matthews, 86 Ga. 418, 12 S. E. 632.

Illinois.— Odin Coal Co. *v.* Tadlock, 216 Ill. 624, 75 N. E. 332 [*affirming* 119 Ill. App. 310]; Chicago, etc., R. Co. *v.* Kneirim, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259; Tudor Iron Works *v.* Weber, 31 Ill. App. 306 [*affirmed* in 129 Ill. 535, 21 N. E. 1078].

Indiana.— American Rolling Mill Co. *v.* Hullinger, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460; Romona Oolitic Stone Co. *v.* Phillips, 11 Ind. App. 118, 39 N. E. 96.

Kansas.— Atchison, etc., R. Co. *v.* McKee, 37 Kan. 592, 15 Pac. 484; Atchison, etc., R. Co. *v.* Holt, 29 Kan. 149.

Kentucky.— Covington Sawmill, etc., Co. *v.* Clark, 116 Ky. 461, 76 S. W. 348, 25 Ky. L. Rep. 694; Illinois Cent. R. Co. *v.* Hilliard, 99 Ky. 684, 37 S. W. 75, 18 Ky. L. Rep. 505.

Louisiana.— Merritt *v.* Victoria Lumber Co., 111 La. 159, 35 So. 497; Anderson *v.* Elder, 105 La. 672, 30 So. 120.

Maine.— Twombly *v.* Consolidated Electric Light Co., 98 Me. 353, 57 Atl. 85, 64 L. R. A. 551; Shanny *v.* Androscoggin Mills, 66 Me. 420.

Michigan.— Roux *v.* Blodgett, etc., Lumber Co., 94 Mich. 607, 54 N. W. 492; Fox *v.* Spring Lake Iron Co., 89 Mich. 387, 50 N. W. 872; Van Dusen *v.* Letellier, 78 Mich. 492, 44 N. W. 572.

Missouri.— Long *v.* Pacific R. Co., 65 Mo. 225; Huth *v.* Dohle, 76 Mo. App. 671; Hughlett *v.* Ozark Lumber Co., 53 Mo. App. 87; Bridges *v.* St. Louis, etc., R. Co., 6 Mo. App. 389.

New Hampshire.— Jaques *v.* Great Falls Mfg. Co., 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824.

but in some jurisdictions the rule seems to be that if the master has exercised due care in selecting a competent servant to inspect and repair, such servant is a mere fellow servant while in the performance of that duty.[51] The master is not liable where the duty devolving upon the negligent servant could have been fulfilled by

New York.— Koehler *v.* New York Steam Co., 183 N. Y. 1, 75 N. E. 538; Corcoran *v.* Holbrook, 59 N. Y. 517, 17 Am. Rep. 369; Franck *v.* American Tartar Co., 91 N. Y. App. Div. 571, 87 N. Y. Suppl. 219; Hoes *v.* Ocean Steamship Co., 56 N. Y. App. Div. 259, 67 N. Y. Suppl. 782 [*affirmed* in 170 N. Y. 581, 63 N. E. 1118]; Stimper *v.* Fuchs, etc., Mfg. Co., 26 N. Y. App. Div. 333, 49 N. Y. Suppl. 785 [*affirmed* in 161 N. Y. 636, 57 N. E. 1125]; Strauss *v.* Haberman Mfg. Co., 23 N. Y. App. Div. 1, 48 N. Y. Suppl. 425; Egan *v.* Dry Dock, etc., R. Co., 12 N. Y. App. Div. 556, 42 N. Y. Suppl. 188; Ballard *v.* Hitchcock Mfg. Co., 71 Hun 582, 24 N. Y. Suppl. 1101 [*affirmed* in 145 N. Y. 619, 40 N. E. 163]; Kain *v.* Smith, 25 Hun 146 [*affirmed* in 89 N. Y. 375]; Dervin *v.* Herman, 55 N. Y. Super. Ct. 274, 13 N. Y. St. 261; Hillis *v.* Hine, 11 N. Y. St. 656. *Compare* Schulz *v.* Rohe, 149 N. Y. 132, 43 N. E. 420.

North Carolina.—Chesson *v.* John L. Roper Lumber Co., 118 N. C. 59, 23 S. E. 925.

Pennsylvania.— Lillie *v.* American Car, etc., Co., 209 Pa. St. 161, 58 Atl. 272.

Rhode Island.— Mulvey *v.* Rhode Island Locomotive Works, 14 R. I. 204.

South Carolina.— Lasure *v.* Graniteville Mfg. Co., 18 S. C. 275; Gunter *v.* Graniteville Mfg. Co., 18 S. C. 262, 44 Am. Rep. 573.

Texas.— Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13, 15 S. W. 214; Houston, etc., R. Co. *v.* Marcelles, 59 Tex. 334; El Paso, etc., R. Co. *v.* Vizard, (Civ. App. 1905) 88 S. W. 457, decided under Arizona statute which merely reiterates the common law.

Utah.— Trihay *v.* Brooklyn Lead Min. Co., 4 Utah 468, 11 Pac. 612.

Vermont.— Davis *v.* Central Vermont R. Co., 55 Vt. 84, 45 Am. Rep. 590. But see Hard *v.* Vermont, etc., R. Co., 32 Vt. 473.

Virginia.— Norfolk, etc., R. Co. *v.* Phillips, 100 Va. 362, 41 S. E. 726.

West Virginia.— Cooper *v.* Pittsburgh, etc., R. Co., 24 W. Va. 37.

Wisconsin.— Schultz *v.* Chicago, etc., R. Co., 48 Wis. 375, 4 N. W. 399.

United States.— Cudahy Packing Co. *v.* Anthes, 117 Fed. 118, 54 C. C. A. 504; Swift *v.* Short, 92 Fed. 567, 34 C. C. A. 545.

See 34 Cent. Dig. tit. "Master and Servant," § 406.

Inspection of new machinery.— The negligence of defendant's foreman in failing to notice the defect in machinery when it came from the manufacturer, or in failing afterward to discover the defect, is the negligence of a servant in the discharge of a duty which the master owes his other servants, and not the negligence of a fellow servant. Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380.

Mine inspection.— The duty to inspect a mine and its appliances cannot be delegated so as to relieve the master from responsibility where a miner is injured because of the failure so to do. Cerrillos Coal R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807; Costa *v.* Pacific Coast Co., 26 Wash. 138, 66 Pac. 398 (gas inspection); Bunker Hill, etc., Min., etc., Co. *v.* Jones, 130 Fed. 813, 65 C. C. A. 363; Gowen *v.* Bush, 76 Fed. 349, 22 C. C. A. 196 (gas inspection). The duty to take precautions to avoid injuries from unexploded blasts is a non-delegable duty. Hooe *v.* Boston, etc., St. R. Co., 187 Mass. 67, 72 N. E. 341; Anderson *v.* Bennett, 16 Oreg. 515, 19 Pac. 765, 8 Am. St. Rep. 311. But see Hutchinson *v.* Parker, 39 N. Y. App. Div. 133, 57 N. Y. Suppl. 168, 58 N. Y. Suppl. 190, holding that a servant inspecting a place where blasting is in progress, for the purpose of discovering unexploded charges, is a fellow servant of one engaged in clearing away the *débris*, and who is injured by coming in contact with an unexploded charge.

Inspection of telephone poles.— Where the duty of inspecting telephone poles before a lineman climbs the same is delegated by the company to a foreman, he is not a fellow servant of a lineman in that regard, but a vice-principal, and the company is liable to the lineman for an injury due to the failure of the foreman to perform the duty of inspection. Cumberland Tel., etc., Co. *v.* Bills, 128 Fed. 272, 62 C. C. A. 620.

In testing a machine, failure of the servant whose duty it was so to do to exercise reasonable care for the safety of other employees renders the master liable. Skelton *v.* Pacific Lumber Co., 140 Cal. 507, 74 Pac. 13.

Notice to the servant intrusted with the duty of inspection or repair, of a defect in the machinery, is notice to the employer. Anderson *v.* Elder, 105 La. 672, 30 So. 120.

51. *Alabama.*— Tutwiler Coal, etc., Co. *v.* Farrington, 144 Ala. 157, 39 So. 898; Woodward Iron Co. *v.* Cook, 124 Ala. 349, 27 So. 455; Dantzler *v.* De Bardeleben Coal, etc., Co., 101 Ala. 309, 14 So. 10, 22 L. R. A. 361.

Iowa.— Theleman *v.* Moeller, 73 Iowa 108, 34 N. W. 765, 5 Am. St. Rep. 663. See also Fosburg *v.* Phillips Fuel Co., 93 Iowa 54, 61 N. W. 400.

Maryland.— Wonder *v.* Baltimore, etc., R. Co., 32 Md. 411, 3 Am. Rep. 143.

Massachusetts.— Johnson *v.* Boston Tow-Boat Co., 135 Mass. 209, 46 Am. Rep. 458; Cooper *v.* Hamilton Mfg. Co., 14 Allen 193. But see Ellis *v.* Thayer, 183 Mass. 309, 67 N. E. 325; Lawless *v.* Connecticut River R. Co., 136 Mass. 1.

Mississippi.—See Howd *v.* Mississippi Cent. R. Co., 50 Miss. 178; New Orleans, etc., R. Co. *v.* Hughes, 49 Miss. 258.

merely replacing the defective appliance with a sound appliance from a stock furnished by the master.[52] So a failure to report to the proper servant an appliance that is out of order and needs repairs does not of itself make the master liable for an injury resulting from the failure to repair.[53] And the master is not liable for the negligent act in inspecting or repairing machinery or appliances, where such negligent act results in direct injury to another servant while the work of inspection or repairing is in progress.[54] There is no non-delegable duty of inspection of an appliance constructed by the servants in the course of their employment.[55]

(2) Incidental Inspection and Repairs. The rule that a servant intrusted with the duty to inspect and repair is not a fellow servant does not apply to defects arising in the daily use of the machines or appliances, which are not of a permanent character and do not require the help of skilled mechanics to repair, but which may easily be and are usually remedied by the workmen, and to repair which proper and suitable materials are supplied.[56] And when the employee's duty to inspect or repair is incidental to his duty to use the apparatus in the common employment, he is not intrusted with the master's duty to his fellow servants, and the master is not responsible to his fellow servants for his negligence.[57]

New Jersey.— Essex County Electric Co. *v.* Kelly, 57 N. J. L. 100, 29 Atl. 427; Rogers Locomotive, etc., Works *v.* Hand, 50 N. J. L. 464, 14 Atl. 766; McAndrews *v.* Burns, 39 N. J. L. 117. *Contra*, see Hopwood *v.* Benjamin Atha, etc., Co., 68 N. J. L. 707, 54 Atl. 435.

Ohio.— Cuddy *v.* Sczepansky, 19 Ohio Cir. Ct. 356, 10 Ohio Cir. Dec. 263; Love *v.* Ohio, etc., R. Co., 6 Ohio Dec. (Reprint) 839, 8 Am. L. Rec. 417.

England.—Waller *v.* South Eastern R. Co., 2 H. & C. 102, 9 Jur. N. S. 501, 32 L. J. Exch. 205, 8 L. T. Rep. N. S. 325, 11 Wkly. Rep. 731.

Canada.—Canada Woolen Mills *v.* Traplin, 35 Can. Sup. Ct. 424; McFarlane *v.* Gilmour, 5 Ont. 302.

See 34 Cent. Dig. tit. "Master and Servant," § 406.

52. McKinnon *v.* Norcross, 148 Mass. 533, 20 N. E. 183, 3 L. R. A. 320; Cregan *v.* Marston, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854; Webber *v.* Piper, 109 N. Y. 496, 17 N. E. 216 [*affirming* 38 Hun 353]; Stourbridge *v.* Brooklyn City R. Co., 9 N. Y. App. Div. 129, 41 N. Y. Suppl. 128; Headifen *v.* Cooper, 6 Misc. (N. Y.) 263, 26 N. Y. Suppl. 763.

53. Hanrathy *v.* Northern Cent. R. Co., 46 Md. 280; Dodge *v.* Boston, etc., R. Co., 155 Mass. 448, 29 N. E. 1086; McDonald *v.* New York Cent., etc., R. Co., 63 Hun (N. Y.) 587, 18 N. Y. Suppl. 609 [*affirmed* in 138 N. Y. 663, 34 N. E. 514]; Reynolds *v.* Kneeland, 63 Hun (N. Y.) 283, 17 N. Y. Suppl. 895 [*affirmed* in 139 N. Y. 616, 35 N. E. 205]. But see Peoria, etc., R. Co. *v.* Johns, 43 Ill. App. 83.

54. Meeker *v.* C. R. Remington, etc., Co., 53 N. Y. App. Div. 592, 65 N. Y. Suppl. 1116; Morgan *v.* Carbon Hill Coal Co., 6 Wash. 577, 34 Pac. 152, 772. But see Hammarberg *v.* St. Paul, etc., Lumber Co., 19 Wash. 537, 53 Pac. 727, holding that where a millwright was repairing beams over the bench where a sawyer was working, and the millwright carelessly left on the beam a chisel, which fell and injured the sawyer, they were not fellow servants.

55. Phœnix Bridge Co. *v.* Castleberry, 131 Fed. 175, 65 C. C. A. 481.

56. Helling *v.* Schindler, 145 Cal. 303, 78 Pac. 710; McGee *v.* Boston Cordage Co., 139 Mass. 445, 1 N. E. 745; Johnson *v.* Boston Tow-Boat Co., 135 Mass. 209, 46 Am. Rep. 458; Smith *v.* Lowell Mfg. Co., 124 Mass. 114; Cregan *v.* Marston, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854; Koszlowski *v.* American Locomotive Co., 96 N. Y. App. Div. 40, 89 N. Y. Suppl. 55; Manning *v.* Genesee River, etc., Steamboat Co., 66 N. Y. App. Div. 314, 72 N. Y. Suppl. 677.

57. *Massachusetts.* — Bjbjian *v.* Woonsocket Rubber Co., 164 Mass. 214, 41 N. E. 265.

New Hampshire.— McLaine *v.* Head, etc., Co., 71 N. H. 294, 52 Atl. 545, 93 Am. St. Rep. 522, 58 L. R. A. 462; Jaques *v.* Great Falls Mfg. Co., 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824.

New Jersey.— Nord Deutscher Lloyd Steamship Co. *v.* Ingebregsten, 57 N. J. L. 400, 31 Atl. 619, 51 Am. St. Rep. 604.

New York.— Cregan *v.* Marston, 126 N. Y. 568, 27 N. E. 1024, 12 L. R. A. 836.

Washington.— Hammarberg *v.* St. Paul, etc., Lumber Co., 19 Wash. 537, 53 Pac. 727.

See 34 Cent. Dig. tit. "Master and Servant," § 406 *et seq.*

Cleaning and oiling.— The duty of a master to inspect a device does not extend to the cleaning and oiling thereof, which are mere details of the work, but is confined to the condition of the machinery with reference to defects or want of repairs. Quigley *v.* Levering, 167 N. Y. 58, 60 N. E. 276, 54 L. R. A. 62.

Inspection of cars en route.— The non-delegable duty of inspection does not extend

(3) WHERE INJURED EMPLOYEE IS ALSO REPAIRMAN. If both the negligent and the injured servant were engaged in repair work, the master is generally held not liable.[58]

(4) APPLICATION OF RULE TO RAILROAD COMPANY — (a) TRACK REPAIRERS OR INSPECTORS. An inspector of the road-bed of a railway,[59] or track repairers, including section foreman, whose negligence in keeping the road in repair is the cause of the injury,[60] are not fellow servants of injured train employees.

(b) INSPECTION OF CARS, ENGINES, AND OTHER APPLIANCES — aa. *In General.* The general rule is that a servant employed to repair or inspect cars, engines, or other appliances is not a fellow servant of other employees of the railroad engaged in working on the trains or about the yards, where the latter are injured by the negligence of the former in failing to properly inspect or repair.[61] In other words

to a temporary inspection of cars *en route*, such work being a part of the executive details of the operation of the train, and like other acts necessary to be performed by the trainmen to haul the train. St. Louis, etc., R. Co. *v.* Brown, 67 Ark. 295, 54 S. W. 865.

58. *Arkansas.*—Fordyce *v.* Briney, 58 Ark. 206, 24 S. W. 250, holding that a car inspector is a fellow servant of car repairers, where both are subject to the control of a superior.

Massachusetts.— Seaver *v.* Boston, etc., R. Co., 14 Gray 466.

Missouri.— Sherrin *v.* St. Joseph, etc., R. Co., 103 Mo. 378, 15 S. W. 442, 23 Am. St. Rep. 881.

New York.— Murphy *v.* Boston, etc., R. Co., 88 N. Y. 146, 42 Am. Rep. 240.

United States.— Thom *v.* Pittard, 62 Fed. 232, 10 C. C. A. 352.

See 34 Cent. Dig. tit. "Master and Servant," § 406 *et seq.*

If a locomotive, after being repaired, explodes while in use on the road, injuring the engineer or other servants of the company, the latter is responsible for the negligence of other employees in making the repairs. Fuller *v.* Jewett, 80 N. Y. 46, 36 Am. Rep. 575. But where a locomotive is sent to a repair shop, and one of the mechanics employed for the purpose of repairing defective locomotives was injured while engaged in setting the safety valve on it, the company is not liable, although the locomotive had passed the examination and repairs of various classes of workmen in the employ of the company, including the boiler makers, before coming to the hands of the injured mechanic for final tests and repairs. Murphy *v.* Boston, etc., R. Co., 88 N. Y. 146, 42 Am. Rep. 240.

59. Hamilton *v.* Michigan Cent. R. Co., 135 Mich. 95, 97 N. W. 392; Smith *v.* Erie R. Co., 67 N. J. L. 636, 52 Atl. 634, 59 L. R. A. 302.

60. *Illinois.*—Chicago, etc., R. Co. *v.* Eaton, 96 Ill. App. 570 [*affirmed* in 194 Ill. 441, 62 N. E. 784, 88 Am. St. Rep. 161].

Kansas.— St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; Atchison, etc., R. Co. *v.* Moore, 31 Kan. 197, 1 Pac. 644.

Kentucky.— Chesapeake, etc., R. Co. *v.* Venable, 111 Ky. 41, 63 S. W. 35, 23 Ky. L. Rep. 427.

Michigan.— Balhoff *v.* Michigan Cent. R. Co., 106 Mich. 606, 65 N. W. 592.

Minnesota.— Drymala *v.* Thompson, 26 Minn. 40, 1 N. W. 255.

Missouri.— Hall *v.* Missouri Pac. R. Co., 74 Mo. 298; Lewis *v.* St. Louis, etc., R. Co., 59 Mo. 495, 21 Am. Rep. 385; Vautrain *v.* St. Louis, etc., R. Co., 8 Mo. App. 538.

New York.— Gage *v.* Delaware, etc., R. Co., 14 Hun 446.

South Carolina.— Calvo *v.* Charlotte, etc., R. Co., 23 S. C. 526, 55 Am. Rep. 28.

Texas.— Houston, etc., R. Co. *v.* Dunham, 49 Tex. 181; Missouri, etc., R. Co. *v.* Keefe, (Civ. App. 1905) 84 S. W. 679; Missouri Pac. R. Co. *v.* Bond, 2 Tex. Civ. App. 104, 20 S. W. 930; Gulf, etc., R. Co. *v.* Johnson, 1 Tex. Civ. App. 103, 20 S. W. 1123.

Virginia.— Torian *v.* Richmond, etc., R. Co., 84 Va. 192, 4 S. E. 339.

Washington.— Bateman *v.* Peninsular R. Co., 20 Wash. 133, 54 Pac. 996.

United States.— Atchison, etc., R. Co. *v.* Wilson, 48 Fed. 57, 1 C. C. A. 25.

See 34 Cent. Dig. tit. "Master and Servant," § 410.

Compare Burrell *v.* Gowen, 134 Pa. St. 527, 19 Atl. 678.

Contra.— King *v.* Boston, etc., R. Corp., 9 Cush. (Mass.) 112; Rittenhouse *v.* Wilmington St. R. Co., 120 N. C. 544, 26 S. E. 922, holding that a motorman and negligent track foreman are fellow servants.

Injury to switchman.— Although a switchman and track repairers work in the same yard, if an injury to the switchman is caused by the trackmen negligently leaving a dangerous hole in the track, their negligence is attributable to the employer. Louisville, etc., R. Co. *v.* Ward, 61 Fed. 927, 10 C. C. A. 166.

Bridge inspectors.— Servants engaged in watching and ascertaining the condition of tracks and bridges are not the fellow servants of a trainman injured by their negligence. Carlson *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 450, 28 Pac. 497.

Negligence of switch tender.— But the company is not liable for an injury caused by the negligence of a switch tender in allowing the switch to be out of repair. Slattery *v.* Toledo, etc., R. Co., 23 Ind. 81.

61. *Illinois.*— Toledo, etc., R. Co. *v.* Moore, 77 Ill. 217 (engineer and master mechanic); Chicago, etc., R. Co. *v.* Jackson, 55 Ill. 492,

the duty of a railroad company to furnish safe appliances and a place to work extends to the inspection and repair thereof.[62] There are decisions, however, exempting the railroad company, where it has used due care in selecting a competent servant to inspect and make repairs,[63] at least where the negligence was in

8 Am. Rep. 661; Chicago, etc., R. Co. *v.* Kneirim, 48 Ill. App. 243 (car inspector and yard switchman).

Indiana.— Indiana, etc., R. Co. *v.* Snyder, 140 Ind. 647, 39 N. E. 912 (carpenter and section hands); Ohio, etc., R. Co. *v.* Stein, 140 Ind. 61, 39 N. E. 246 (foreman of machine shop and brakeman); Cincinnati, etc., R. Co. *v.* McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; Krueger *v.* Louisville, etc., R. Co., 111 Ind. 51, 11 N. E. 957 (master mechanic and fireman). But see Neutz *v.* Jackson Hill Coal, etc., Co., 139 Ind. 411, 38 N. E. 324, 39 N. E. 147.

Kansas.— Missouri Pac. R. Co. *v.* Dwyer, 36 Kan. 58, 12 Pac. 352; Atchison, etc., R. Co. *v.* Moore, 29 Kan. 632; Kansas Pac. R. Co. *v.* Little, 19 Kan. 267.

Kentucky.— Illinois Cent. R. Co. *v.* Quirey, 89 S. W. 217, 28 Ky. L. Rep. 245.

Michigan.— Morton *v.* Detroit, etc., R. Co., 81 Mich. 423, 46 N. W. 111.

Mississippi.— New Orleans, etc., R. Co. *v.* Hughes, 49 Miss. 258.

Missouri.— Coontz *v.* Missouri Pac. R. Co., 121 Mo. 652, 26 S. W. 661 (engineer and conductor); Covey *v.* Hannibal, etc., R. Co., 27 Mo. App. 170.

New York.— Smith *v.* New York, etc., R. Co., 86 N. Y. App. Div. 188, 83 N. Y. Suppl. 259 [*affirmed* in 178 N. Y. 635, 71 N. E. 1139]; Stevenson *v.* Jewett, 16 Hun 210; Frank *v.* Otis, 15 N. Y. St. 681. But see Gibson *v.* Northern Cent. R. Co., 22 Hun 289.

Pennsylvania.— Marsh *v.* Lehigh Valley R. Co., 206 Pa. St. 558, 56 Atl. 52, fireman and boiler inspector.

Texas.— Missouri, etc., R. Co. *v.* Ferch, (Civ. App. 1898) 44 S. W. 317; Texas, etc., R. Co. *v.* Bingle, 16 Tex. Civ. App. 653, 41 S. W. 90; Sabine, etc., R. Co. *v.* Ewing, 1 Tex. Civ. App. 531, 21 S. W. 700 (engineer and fireman).

Utah.— Bowers *v.* Union Pac. R. Co., 4 Utah 215, 7 Pac. 251.

West Virginia.— Cooper *v.* Pittsburgh, etc., R. Co., 24 W. Va. 37.

United States.— Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 6 S. Ct. 590, 29 L. ed. 755; Texas, etc., R. Co. *v.* Thompson, 70 Fed. 944, 71 Fed. 531, 17 C. C. A. 524; Atchison, etc., R. Co. *v.* Mulligan, 67 Fed. 569, 14 C. C. A. 547, engineer and hostler.

Defects in engine.— A railroad company cannot avoid liability for injuries to an engineer caused by defects in the engine, by showing that it had delegated the duty of keeping it in repair to a fellow servant. Lawless *v.* Connecticut River R. Co., 136 Mass. 1; Ford *v.* Fitchburg R. Co., 110 Mass. 240, 14 Am. Rep. 598.

Employment of competent inspectors not of itself sufficient.— The duty of a railroad company to exercise reasonable care in furnishing adequately safe trains for the use of its employees is not discharged by simply using reasonable care to employ and retain only competent and diligent inspectors, but it is liable if its inspectors in fact fail to discover a defect which a reasonable examination would have disclosed. Union Pac. R. Co. *v.* Snyder, 152 U. S. 684, 14 S. Ct. 756, 38 L. ed. 597 [*affirming* 6 Utah 357, 23 Pac. 762].

Effect of servant giving proper instructions for repairs.— The fact that there was no negligence in employing the superintendent of repairs, or in making proper regulations, and that the master mechanic in charge gave proper instructions for repairing, and that the negligence was that of the workmen directed to make the repairs, does not relieve the master of liability. Fuller *v.* Jewett, 80 N. Y. 46, 36 Am. Rep. 575.

Duty to repair defective cars.— Trainmen charged with the duty, upon discovering the defective condition of a car, to report it to the master for repair, and to discontinue the use of it until it is restored to a reasonably safe condition, are not fellow servants of a section foreman killed in consequence of their neglect. Chicago, etc., R. Co. *v.* Cullen, 87 Ill. App. 374 [*affirmed* in 187 Ill. 523, 58 N. E. 455].

Repairer of electric railway.— The car repairer of an electric railway is not a fellow servant of a conductor whose death was caused by inadequacy of repairs. Denver Tramway Co. *v.* Crumbaugh, 23 Colo. 363, 48 Pac. 503.

Repair of harness.— A driver of a street car is not a fellow servant of the "head changer" and his assistants, whose duty it is to inspect and repair the harness, so as to exempt the company from liability for the driver's death, caused by their negligence in failing to inspect and replace a defective hamestrap. McKnight *v.* Brooklyn Heights R. Co., 23 Misc. (N. Y.) 527, 51 N. Y. Suppl. 738.

Supplies as distinguished from repairs.— A new wick in the headlight of a locomotive, to replace an old one, is a supply, and not a repair; and where a rule of a railroad company requires the engineer to see that the headlight is in order, and he fails to do so, in consequence of which a fireman on another train is injured, the injury is the result of the negligence of a fellow servant. Simpson *v.* Central Vermont R. Co., 5 N. Y. App. Div. 614, 39 N. Y. Suppl. 464.

62. Van Tassell *v.* New York, etc., R. Co., 1 Misc. (N. Y.) 299, 20 N. Y. Suppl. 708 [*affirmed* in 142 N. Y. 634, 37 N. E. 566]; Texas, etc., R. Co. *v.* Barrett, 67 Fed. 214, 14 C. C. A. 373 [*affirmed* in 166 U. S. 617, 17 S. Ct. 707, 41 L. ed. 1136].

63. Mobile, etc., R. Co. *v.* Thomas, 42 Ala. 672; Columbus, etc., R. Co. *v.* Celley, 1 Ohio

inspecting the loading of a car.[64] Of course where defects are latent and not discoverable by an ordinary inspection, the master is not liable where he has employed a competent inspector.[65]

bb. *Car Inspector.* A car inspector is vested with a duty of the master so as to be a vice-principal.[66] He is not a fellow servant of a brakeman so as to relieve the master from liability for the negligence of such inspector in failing to discover a defect which caused an injury to the brakeman.[67]

cc. *Cars of Another Railroad Company.* A railroad company is bound to inspect the cars of another company used upon its road, just as it would inspect its own cars. It owes this duty as master, and is responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it from another road which have defects, visible or discernible by ordinary examination, it must either remedy such defects or refuse to take them, and one to whom such duty is delegated is a vice-principal.[68]

(F) *Duty to Instruct and Warn.* The duty to instruct and warn servants, especially where they are youthful or inexperienced and the work is dangerous,[69]

Cir. Ct. 267, 1 Ohio Cir. Dec. 146; Love *v.* Ohio, etc., R. Co., 7 Ohio Dec. (Reprint) 690, 4 Cinc. L. Bul. 990, 6 Ohio Dec. (Reprint) 839, 8 Am. L. Rec. 417; Texas, etc., R. Co. *v.* Patton, 61 Fed. 259, 9 C. C. A. 487. See Shugard *v.* Union Traction Co., 201 Pa. St. 562, 51 Atl. 325.

64. Lellis *v.* Michigan Cent. R. Co., 124 Mich. 37, 82 N. W. 828, 70 L. R. A. 589; Miller *v.* Michigan Cent. R. Co., 123 Mich. 374, 82 N. W. 58; Jarman *v.* Chicago, etc., R. Co., 98 Mich. 135, 57 N. W. 32; Dewey *v.* Detroit, etc., R. Co., 97 Mich. 329, 52 N. W. 942, 56 N. W. 756, 37 Am. St. Rep. 348, 16 L. R. A. 342, 22 L. R. A. 292; Conger *v.* Flint, etc., R. Co., 86 Mich. 76, 48 N. W. 695; Smith *v.* Potter, 46 Mich. 258, 9 N. W. 273, 41 Am. Rep. 161; Byrnes *v.* New York, etc., R. Co., 113 N. Y. 251, 21 N. E. 50, 4 L. R. A. 151. *Contra*, Atchison, etc., R. Co. *v.* Seeley, 54 Kan. 21, 31, 37 Pac. 104, in which the court said that it was "unable to see any reason for a distinction between the preparation and inspection of the car itself as a fit instrumentality to be placed in a train and the preparation and inspection of a loaded car to be placed in the train for transportation."

65. Indiana, etc., R. Co. *v.* Snyder, (Ind. 1893) 32 N. E. 1129.

66. Chicago, etc., R. Co. *v.* Kellogg, 54 Nebr. 127, 74 N. W. 454.

67. *Indiana.*— Ohio, etc., R. Co. *v.* Pearcy, 128 Ind. 197, 27 N. E. 479.

Iowa.— Brann *v.* Chicago, etc., R. Co., 53 Iowa 595, 6 N. W. 5, 36 Am. Rep. 243.

Kansas.— Missouri Pac. R. Co. *v.* Dwyer, 36 Kan. 58, 12 Pac. 352.

Michigan.— Morton *v.* Detroit, etc., R. Co., 81 Mich. 423, 46 N. W. 111. But see Smith *v.* Potter, 46 Mich. 258, 9 N. W. 273, 41 Am. Rep. 161.

Missouri.— Condon *v.* Missouri Pac. R. Co., 78 Mo. 567; Long *v.* Pacific R. Co., 65 Mo. 225.

New York.— Jennings *v.* New York, etc., R. Co., 12 Misc. 408, 33 N. Y. Suppl. 585.

Texas.— St. Louis, etc., R. Co. *v.* Putnam, 1 Tex. Civ. App. 142, 20 S. W. 1002.

West Virginia.— Cooper *v.* Pittsburgh, etc., R. Co., 24 W. Va. 37.

United States.— Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 6 S. Ct. 590, 29 L. ed. 755; Terre Haute, etc., R. Co. *v.* Mansberger, 65 Fed. 196, 12 C. C. A. 574; Atchison, etc., R. Co. *v.* Myers, 63 Fed. 793, 11 C. C. A. 439; Carpenter *v.* Mexican Nat. R. Co., 39 Fed. 315.

See 34 Cent. Dig. tit. "Master and Servant," § 409.

Contra.— St. Louis, etc., R. Co. *v.* Gaines, 46 Ark. 555; Mackin *v.* Boston, etc., R. Co., 135 Mass. 201, 46 Am. Rep. 456; Little Miami R. Co. *v.* Fitzpatrick, 42 Ohio St. 318; Lake Shore, etc., R. Co. *v.* Lamphere, 9 Ohio Cir. Ct. 263, 4 Ohio Cir. Dec. 26; Nashville, etc., R. Co. *v.* Foster, 10 Lea (Tenn.) 351, construing Alabama law.

Duty of inspection imposed on injured servant.— A car inspector is not a fellow servant of a brakeman who is injured by reason of a defective brake shaft, notwithstanding the fact that a rule requires brakemen to inspect brakes at all stoppings of the train. Eaton *v.* New York Cent., etc., R. Co., 163 N. Y. 391, 57 N. E. 609, 79 Am. St. Rep. 600 [*reversing* 14 N. Y. App. Div. 20, 43 N. Y. Suppl. 666]; Newton *v.* New York Cent., etc., R. Co., 96 N. Y. App. Div. 81, 89 N. Y. Suppl. 23.

68. St. Louis, etc., R. Co. *v.* Brown, 67 Ark. 295, 54 S. W. 865; Macy *v.* St. Paul, etc., R. Co., 35 Minn. 200, 28 N. W. 249; Tierney *v.* Minneapolis, etc., R. Co., 33 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35; Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231, 15 N. W. 241; Eaton *v.* New York Cent., etc., R. Co., 163 N. Y. 391, 57 N. E. 609, 79 Am. St. Rep. 600.

69. *California.*— Verdelli *v.* Gray's Harbor Commercial Co., 115 Cal. 517, 47 Pac. 364.

Indiana.— Noblesville Foundry, etc., Co. *v.* Yeaman, 3 Ind. App. 521, 30 N. E. 10. But see Spencer *v.* Ohio, etc., R. Co., 130 Ind. 181, 29 N. E. 915.

Kansas.— Missouri Pac. R. Co. *v.* Peregoy, 36 Kan. 424, 14 Pac. 7.

as to permanent or constantly recurring dangers is generally held to be non-delegable so as to relieve the master from liability, and an employee upon whom the duty is imposed is not a fellow servant.[70] On the other hand, the duty to instruct and warn as to dangers arising from the execution of the general details of the work is generally held to pertain to the duties of the servants as between themselves, so that a failure or negligence in regard thereto is that of a fellow

Missouri.— Dowling *v.* Allen, 74 Mo. 13, 41 Am. Rep. 298.

New York.— Brennan *v.* Gordon, 118 N. Y. 489, 23 N. E. 810, 16 Am. St. Rep. 775, 8 L. R. A. 818, (1890) 24 N. E. 1103 (holding that where employers select to run their elevator an employee who has never before performed such a service, they are liable for the negligence of an instructor employed by them to teach and instruct such employee as to the manner of running the elevator, resulting in injury to such employee); Buckley *v.* Gutta Percha, etc., Mfg. Co., 41 Hun 450, 1 N. Y. St. 492 [*reversed* on other grounds in 113 N. Y. 540, 21 N. E. 717]; Thall *v.* Carnie, 1 Silv. Sup. 401, 5 N. Y. Suppl. 244.

Washington.— Jancko *v.* West Coast Mfg., etc., Co., 34 Wash. 556, 76 Pac. 78.

United States.— Robertson *v.* Cornelson, 34 Fed. 716.

See 34 Cent. Dig. tit. "Master and Servant," § 419.

But see O'Brien *v.* Rideout, 161 Mass. 170, 36 N. E. 792.

Blasting.— The duty to instruct an inexperienced workman in the work of blasting cannot be delegated so as to relieve the master from liability. Holman *v.* Kempe, 70 Minn. 422, 73 N. W. 186.

70. *Arkansas.*—Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168, 24 S. W. 106.

Georgia.— Cheeney *v.* Ocean Steamship Co., 92 Ga. 726, 19 S. E. 33, 44 Am. St. Rep. 113.

Illinois.— Rogers *v.* Cleveland, etc., R. Co., 211 Ill. 126, 71 N. E. 850, 103 Am. St. Rep. 185; Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; St. Louis Consol. Coal Co. *v.* Wombacher, 134 Ill. 57, 24 N. E. 627 [*affirming* 31 Ill. App. 288]; Kirk *v.* Senzig, 79 Ill. App. 251; Alton Paving, etc., Co. *v.* Hudson, 74 Ill. App. 612.

Indiana.— Flickner *v.* Lambert, 36 Ind. App. 524, 74 N. E. 263.

Iowa.— Collingwood *v.* Illinois, etc., Fuel Co., 125 Iowa 537, 101 N. W. 283; Beresford *v.* American Coal Co., 124 Iowa 34, 98 N. W. 902, 70 L. R. A. 256.

Kentucky.— Cincinnati, etc., R. Co. *v.* Hill, 89 S. W. 523, 28 Ky. L. Rep. 530. See Cincinnati, etc., R. Co. *v.* Curd, 89 S. W. 140, 28 Ky. L. Rep. 177, construing Tennessee law.

Massachusetts.— Wheeler *v.* Wason Mfg. Co., 135 Mass. 294.

Minnesota.— Hjelm *v.* Western Granite Contracting Co., 94 Minn. 169, 102 N. W. 384; Borgerson *v.* Cook Stone Co., 91 Minn. 91, 97 N. W. 734; Carlson *v.* Northwestern Tel. Exch. Co., 63 Minn. 428, 65 N. W. 914.

Missouri.— Zellars *v.* Missouri Water, etc., Co., 92 Mo. App. 107.

New Jersey.— Smith *v.* Oxford Iron Co., 42 N. J. L. 467, 36 Am. Rep. 535.

New York.— Brennan *v.* Gordon, 118 N. Y. 489, 23 N. E. 810, 16 Am. St. Rep. 775, 8 L. R. A. 818; O'Connor *v.* Barker, 25 N. Y. App. Div. 121, 49 N. Y. Suppl. 211.

North Carolina.— Turrentine *v.* Wellington, 136 N. C. 308, 48 S. E. 739.

Pennsylvania.— Lebbering *v.* Struthers, 157 Pa. St. 312, 27 Atl. 720.

Texas.— Waxahachie Cotton Oil Co. *v.* McLain, 27 Tex. Civ. App. 334, 66 S. W. 226.

Washington.— Nelson *v.* S. Willey Steamship, etc., Co., 26 Wash. 548, 67 Pac. 237.

United States.— Burke *v.* Anderson, 67 Fed. 814, 16 C. C. A. 442; Thompson *v.* Chicago, etc., R. Co., 14 Fed. 564, 4 McCrary 629.

See 34 Cent. Dig. tit. "Master and Servant," § 418.

Where the servant does not know, and has no means of knowing, the danger of the place, it has been stated that the duty of the master to warn him thereof cannot be delegated so as to relieve the master of liability. Dossett *v.* St. Paul, etc., Lumber Co., 40 Wash. 276, 82 Pac. 273. See also O'Brien *v.* Page Lumber Co., 39 Wash. 537, 82 Pac. 114.

Warning as to approach of trains.— Where plaintiff's intestate was working on a railway track over which trains ran, and it was the duty of the foreman, on the approach of a train, to call to the men to look out for the train on a certain track, and plaintiff's intestate was killed by failure of the foreman to give the customary warning, such warning was a duty owed by defendant to deceased, and the failure to perform this duty was imputable to defendant as employer. D'Agostino *v.* Pennsylvania R. Co., 72 N. J. L. 358, 60 Atl. 1113. The negligence of a towerman in charge of gates at a railway crossing in failing to give warning of the approach of an engine by lowering the gates, resulting in the injury of a foreman of a switch crew, is the negligence of the master, and not that of a fellow servant. Chicago, etc., R. Co. *v.* Wise, 106 Ill. App. 174 [*affirmed* in 206 Ill. 453, 69 N. E. 500]. A railroad company is liable for injury to an employee while engaged in making repairs under a car on a side track, caused by the failure of his foreman to station a watchman near by to give warning of the approach of trains. Luebke *v.* Chicago, etc., R. Co., 59 Wis. 127, 17 N. W. 870, 48 Am. Rep. 483.

Failure of sawyer to warn men working under him in lumber mill see Dossett *v.* St. Paul, etc., Lumber Co., 40 Wash. 276, 82 Pac. 273; O'Brien *v.* Page Lumber Co., 39 Wash. 537, 82 Pac. 114.

servant, exempting the master from liability,[71] unless the neglect of duty is an

71. *Connecticut.*— Peterson *v.* New York, etc., R. Co., 77 Conn. 351, 59 Atl. 502.

Delaware.— Rex *v.* Pullman's Palace Car Co., 2 Marv. 337, 43 Atl. 246.

Georgia.— Cheeney *v.* Ocean Steamship Co., 92 Ga. 726, 19 S. E. 33, 44 Am. St. Rep. 113; Ocean Steamship Co. *v.* Cheeney, 86 Ga. 278, 12 S. E. 351; White *v.* Kennon, 83 Ga. 343, 9 S. E. 1082.

Indiana.— Kerner *v.* Baltimore, etc., R. Co., 149 Ind. 21, 48 N. E. 364 (holding that the master is not bound to warn skilled servants against the improper use of appliances, and hence that the failure of a servant to suggest danger was that of a fellow servant); Perigo *v.* Indianapolis Brewing Co., 21 Ind. App. 338, 52 N. E. 462. But see Evansville, etc., R. Co. *v.* Holcomb, 9 Ind. App. 198, 36 N. E. 39, injury to car repairer by failure to notify him of approach of engine.

Iowa.— Collingwood *v.* Illinois, etc., Fuel Co., 125 Iowa 537, 101 N. W. 283; Beresford *v.* American Coal Co., 124 Iowa 34, 98 N. W. 902, 70 L. R. A. 256.

Maryland.— State *v.* South Baltimore Car Works, 99 Md. 461, 58 Atl. 447.

Michigan.— Mikolojczak *v.* North American Chemical Co., 129 Mich. 80, 88 N. W. 75; Wellihan *v.* National Wheel Co., 128 Mich. 1, 87 N. W. 75.

Minnesota.— Borgerson *v.* Cook Stone Co., 91 Minn. 91, 97 N. W. 734; Gittens *v.* William Porten Co., 90 Minn. 512, 97 N. W. 378; O'Niel *v.* Great Northern R. Co., 80 Minn. 27, 82 N. W. 1086, 51 L. R. A. 532.

Missouri.— Richardson *v.* Mesker, 171 Mo. 666, 72 S. W. 506.

New Hampshire.— McLaine *v.* Head, etc., Co., 71 N. H. 294, 52 Atl. 545.

New York.— Anglin *v.* American Constr., etc., Co., 109 N. Y. App. Div. 237, 96 N. Y. Suppl. 49; Ryan *v.* Third Ave. R. Co., 92 N. Y. App. Div. 306, 86 N. Y. Suppl. 1070; Sutter *v.* New York Cent., etc., R. Co., 79 N. Y. App. Div. 362, 79 N. Y. Suppl. 1106.

Oregon.— Wagner *v.* Portland, 40 Oreg. 389, 60 Pac. 985, 67 Pac. 300.

Pennsylvania.— Durst *v.* Carnegie Steel Co., 173 Pa. St. 162, 33 Atl. 1102; Shea *v.* Pennsylvania R. Co., 8 Pa. Cas. 603, 13 Atl. 193.

Rhode Island.— Hanna *v.* Granger, 18 R. I. 507, 28 Atl. 659.

South Carolina.—Biggers *v.* Catawba Power Co., 72 S. C. 264, 51 S. E. 882.

Wisconsin.— Dahlke *v.* Illinois Steel Co., 100 Wis. 431, 76 N. W. 362; Fowler *v.* Chicago, etc., R. Co., 61 Wis. 159, 21 N. W. 40. But see Zentner *v.* Oshkosh Gas Light Co., 126 Wis. 196, 105 N. W. 911.

United States.— Martin *v.* Atchison, etc., R. Co., 166 U. S. 399, 17 S. Ct. 603, 41 L. ed. 1051; Southern Pac. Co. *v.* Pool, 160 U. S. 438, 16 S. Ct. 338, 40 L. ed. 485; Hermann *v.* Port Blakely Mill Co., 71 Fed. 853.

See 34 Cent. Dig. tit. "Master and Servant," § 418.

But see San Antonio, etc., R. Co. *v.* McDonald, (Tex. Civ. App. 1895) 31 S. W. 72; Torian *v.* Richmond, etc., R. Co., 84 Va. 192, 4 S. E. 339.

The duty to give signals, as prescribed by rules of the master, ordinarily relates to a mere detail of the work, and the master is not liable for the failure or the negligence of a co-servant in regard thereto. Thayer *v.* St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409; Southern R. Co. *v.* Clifford, 110 Ky. 727, 62 S. W. 514, 23 Ky. L. Rep. 111; Shaw *v.* Bambrick-Bates Constr. Co., 102 Mo. App. 666, 77 S. W. 96; Garland *v.* Missouri, etc., R. Co., 85 Mo. App. 579; McCosker *v.* Long Island R. Co., 84 N. Y. 77. But see Lake Shore, etc., R. Co. *v.* Mau, 9 Ohio Cir. Ct. 173, 4 Ohio Cir. Dec. 5; Sroufe *v.* Moran Bros. Co., 28 Wash. 381, 68 Pac. 896, 92 Am. St. Rep. 847, 58 L. R. A. 373.

The duty of causing a flag to be sent ahead to signal approaching trains while a hand-car was proceeding along the track is not one which the railroad company was required to perform as principal or master, but one which rests upon the foreman merely as a fellow servant with the other members of his gang on the hand-car. Whittlesy *v.* New York, etc., R. Co., 77 Conn. 100, 58 Atl. 459, 107 Am. St. Rep. 21.

A watchman or flagman whose negligence in giving warning results in injury to another employee is a fellow servant of such employee. Luebke *v.* Chicago, etc., R. Co., 63 Wis. 91, 23 N. W. 136, 53 Am. St. Rep. 266; Cooper *v.* Milwaukee, etc., R. Co., 23 Wis. 668. See also Murray *v.* St. Louis, etc., R. Co., 98 Mo. 573, 12 S. W. 252, 14 Am. St. Rep. 661, 5 L. R. A. 735.

Trains following each other.— Neglect of the servant in charge of a train, part of which was standing on the track, detached from the engine, to warn an approaching train, is not a breach of the master's duty to furnish a "safe place" entitling an injured employee to recover. Jenkins *v.* Richmond, etc., R. Co., 39 S. C. 507, 18 S. E. 182, 39 Am. St. Rep. 750.

Where a peril develops during the progress of the work and relates to an incident of the work, the duty of a servant to warn another relates to a mere detail of the work. Maltbie *v.* Belden, 167 N. Y. 307, 60 N. E. 645, 54 L. R. A. 52 [*reversing* 45 N. Y. App. Div. 384, 60 N. Y. Suppl. 824].

Blasting.— Failure to give warning of a blast where such work is being carried on continuously is the negligence of a fellow servant. Gallagher *v.* McMullin, 25 N. Y. App. Div. 571, 49 N. Y. Suppl. 734; Donovan *v.* Ferris, 128 Cal. 48, 60 Pac. 519, 79 Am. St. Rep. 25; Kelly Island Lime, etc., Co. *v.* Pachuta, 69 Ohio St. 462, 69 N. E. 988, 100 Am. St. Rep. 706. *Contra,* Belleville Stone Co. *v.* Mooney, 61 N. J. L. 253, 39 Atl. 764, 39 L. R. A. 834 [*affirming* 60 N. J. L. 323, 38 Atl. 835]. But where the explosion of a particular blast was in the control of plain-

official act of an agent who is a vice-principal by virtue of his rank.[72] Of course there is no duty to warn or instruct where the work is of such a character as to require no special skill or instruction,[73] nor where the danger is obvious and the servant has had experience.[74]

(G) *Promulgation of Rules*[75] — (1) IN GENERAL. The duty of the master to promulgate necessary rules for the conduct of the business[76] cannot be delegated so as to shield him from responsibility.[77] But where the master has performed his duty in this respect he cannot be held liable, where he has used reasonable care in selecting competent servants, for their failure to observe such rules.[78]

(2) TRAIN DESPATCHER. This rule is applied in decisions holding that a train despatcher having control of the movements of trains upon a railroad is, in the performance of his duties as such, a vice-principal as to other employees of the railroad injured by reason of his negligence.[79] So one who performs the duties of

tiff and a fellow servant, and without warning the blast was exploded by the fellow servant, injuring plaintiff, and a custom prevailed that no blast should be exploded without giving two distinct signals, the failure of such fellow servant so to observe the rule was the failure of the master, as such servant stood in his place, and the master was liable for the resulting injuries. Hjelm *v.* Western Granite Contracting Co., 94 Minn. 169, 102 N. W. 384.

Unexploded blasts.— The duty to warn the succeeding shift of miners of unexploded blasts has been held non-delegable. Shannon *v.* Consolidated Tiger, etc., Min. Co., 24 Wash. 119, 64 Pac. 169. But see Anderson *v.* Daly Min. Co., 16 Utah 28, 50 Pac. 815, where the practice was to report to the successors the number of missed holes, but if the outgoing shift failed to report the oncoming shift made inquiry, and this was the rule adopted by them for their security. It is held that the failure to warn a servant engaged in making preparations for a blast as to unexploded charges is the negligence of a fellow servant. Vitto *v.* Keogan, 15 N. Y. App. Div. 329, 44 N. Y. Suppl. 1.

72. See *supra*, IV, G, 4, a, (VI), (C).

Promise to warn.— The duty of one who is a vice-principal because of his rank to give warning to an inferior servant may result from his promise to such servant to give such warning. Bradley *v.* New York Cent. R. Co., 3 Thomps. & C. (N. Y.) 288 [*affirmed* in 62 N. Y. 99]; Wall *v.* Texas, etc., R. Co., 2 Tex. Unrep. Cas. 432. See also Rowland *v.* Missouri Pac. R. Co., 20 Mo. App. 463. On the other hand, if the assurance relates to a mere detail of the work, the master is not bound, even though it be given by his *alter ego*. Schott *v.* Onondaga County Sav. Bank, 49 N. Y. App. Div. 503, 63 N. Y. Suppl. 631. See also Riley *v.* O'Brien, 53 Hun (N. Y.) 147, 6 N. Y. Suppl. 129; Louisville, etc., R. Co. *v.* Lahr, 86 Tenn. 335, 6 S. W. 663.

A switchman who fails to give warning as directed by a vice-principal, whereby a collision results, is not a fellow servant of employees injured by the collision. Lake Shore, etc., R. Co. *v.* Fuller, 21 Ohio Cir. Ct. 605, 11 Ohio Cir. Dec. 799.

73. Roepcke *v.* Michigan Cent. R. Co., 100 Mich. 541, 59 N. W. 243.

74. Wolfe *v.* New Bedford Cordage Co., 189 Mass. 591, 76 N. E. 222.

75. Assumption of risk see *supra*, IV, E, 3. **Concurrent negligence of master and fellow servant** see *supra*, IV, G, 4, a, (IV). **Scope of employment** see *supra*, IV, G, 3, b, (VI).

76. See *supra*, IV, C, 2.

77. Hannibal, etc., R. Co. *v.* Fox, 31 Kan. 586, 3 Pac. 320; Corcoran *v.* New York, etc., R. Co., 46 N. Y. App. Div. 201, 61 N. Y. Suppl. 672; Tully *v.* New York, etc., R. Co., 10 N. Y. App. Div. 463, 42 N. Y. Suppl. 29; Wagner *v.* Portland, 40 Oreg. 389, 60 Pac. 985, 67 Pac. 300. See Daley *v.* Brown, 45 N. Y. App. Div. 428, 60 N. Y. Suppl. 840.

78. *Maryland.*— State *v.* South Baltimore Car Works, 99 Md. 461, 58 Atl. 447.

Massachusetts.— Clifford *v.* Old Colony R. Co., 141 Mass. 564, 6 N. E. 751.

Michigan.— Stanley *v.* Chicago, etc., R. Co., 101 Mich. 202, 59 N. W. 393; Conger *v.* Flint, etc., R. Co., 86 Mich. 76, 48 N. W. 695, running train at speed prohibited by rule.

New York.— Corcoran *v.* New York, etc., R. Co., 46 N. Y. App. Div. 201, 61 N. Y. Suppl. 672; Smith *v.* New York Cent., etc., R. Co., 88 Hun 468, 34 N. Y. Suppl. 881 [*affirmed* in 153 N. Y. 664, 48 N. E. 1107].

West Virginia.— Ward *v.* Chesapeake, etc., R. Co., 39 W. Va. 46, 19 S. E. 339, failure to look for signals.

See 34 Cent. Dig. tit. "Master and Servant," § 411 *et seq.*

Time-table.— Where a railroad company formulates a proper and safe time-table, the negligence of the employees in charge of a train in disregarding such time-table, whereby a collision occurs in which a brakeman is killed, is the negligence of a fellow servant, for which the representatives of the brakeman cannot recover. Rose *v.* Boston, etc., R. Co., 58 N. Y. 217.

79. *Arkansas.*— Little Rock, etc., R. Co. *v.* Barry, 58 Ark. 198, 23 S. W. 1097, 25 L. R. A. 386.

California.— McKune *v.* California South R. Co., 66 Cal. 302, 5 Pac. 482, statute.

Connecticut.— Darrigan *v.* New York, etc., R. Co., 52 Conn. 285, 52 Am. Rep. 590.

Illinois.— Chicago, etc., R. Co. *v.* Young, 26 Ill. App. 115.

Indiana.— Louisville, etc., R. Co. *v.* Heck,

a train despatcher,[80] such as a station agent,[81] is a vice-principal while acting as train despatcher.

(3) Telegraph Operators and Other Servants Transmitting Orders. While the employee who makes rules is not a fellow servant, in so far as negligence in connection therewith is concerned, it is otherwise as to one who merely transmits orders.[82] Thus a telegraph operator whose duty it is to transmit information in regard to the location of trains upon the road and communicate instructions for running them, received by him from the train despatchers, is the fellow servant of employees in charge of such train.[83] So a telegraph operator whose duty it is to display signals to govern the running of trains is a fellow servant of those in charge of a train injured in a collision caused by the operator's neglect of such duty.[84]

(h) *Employment of Servants* — (1) Selection and Retention. The selection of servants is a personal duty of the master and he cannot avoid liability for injuries to another servant caused by the negligent performance of that duty by showing that he delegated the performance of the duty to a fellow servant, the latter being a vice-principal in that respect.[85] For example, where a railroad

151 Ind. 292, 50 N. E. 988 [*disapproving* Robertson *v.* Terre Haute, etc., R. Co., 78 Ind. 77, 41 Am. Rep. 552].

Indian Territory.— Missouri, etc., R. Co. *v.* Elliott, 2 Indian Terr. 407, 51 S. W. 1067.

Michigan.—Hunn *v.* Michigan Cent. R. Co., 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500.

Missouri.— Smith *v.* Wabash, etc., R. Co., 92 Mo. 359, 4 S. W. 129, 1 Am. St. Rep. 729.

New Hampshire.— Wallace *v.* Boston, etc., R. Co., 72 N. H. 504, 57 Atl. 913.

New York.— Hankins *v.* New York, etc., R. Co., 142 N. Y. 416, 37 N. E. 466, 40 Am. St. Rep. 616, 25 L. R. A. 396 [*reversing* 22 N. Y. Suppl. 1120 (*affirming* 55 Hun 81, 8 N. Y. Suppl. 272)]; McChesney *v.* Panama R. Co., 21 N. Y. Suppl. 207.

Pennsylvania.— Brommer *v.* Philadelphia, etc., R. Co., 205 Pa. St. 432, 54 Atl. 1092; Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. 514. 2 Am. St. Rep. 631.

West Virginia.— Flannegan *v.* Chesapeake, etc., R. Co., 40 W. Va. 436, 21 S. E. 1028, 52 Am. St. Rep. 896.

United States.— Sante Fé Pac. R. Co. *v.* Holmes, 136 Fed. 66, 68 C. C. A. 634; Northern Pac. R. Co. *v.* Mix, 121 Fed. 476, 57 C. C. A. 592; Felton *v.* Harbeson, 104 Fed. 737, 44 C. C. A. 188; Clyde *v.* Richmond, etc., R. Co., 69 Fed. 673; Baltimore, etc., R. Co. *v.* Camp, 65 Fed. 952, 13 C. C. A. 233; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87.

See 34 Cent. Dig. tit. "Master and Servant," § 495.

Contra.— Norfolk, etc., R. Co. *v.* Hoover, 79 Md. 253, 29 Atl. 994, 47 Am. St. Rep. 392, 25 L. R. A. 710; Millsaps *v.* Louisville, etc., R. Co., 69 Miss. 423, 13 So. 696.

80. Galveston, etc., R. Co. *v.* Arispe, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33.

A car starter in the employ of a street railway company occupies the position practically equivalent to that of train despatcher of a railroad in so far as the rule of fellow service is concerned. Quinn *v.* Brooklyn Heights R. Co., 91 N. Y. App. Div. 489, 86 N. Y. Suppl. 883.

81. Palmer *v.* Utah, etc., R. Co., 2 Ida. (Hasb.) 315, 13 Pac. 425.

82. Card *v.* Eddy, 129 Mo. 510, 28 S. W. 979, 36 L. R. A. 806, (Mo. 1894) 28 S. W. 753, (Mo. 1893) 24 S. W. 746; Knutter *v.* New York, etc., Tel. Co., 67 N. J. L. 646, 52 Atl. 565, 58 L. R. A. 808; Slater *v.* Jewett, 85 N. Y. 61, 39 Am. Rep. 627.

83. Slater *v.* Jewett, 85 N. Y. 61, 39 Am. Rep. 627; Dana *v.* New York Cent., etc., R. Co., 23 Hun (N. Y.) 473; Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 24 S. Ct. 683, 48 L. ed. 1006; Northern Pac. R. Co. *v.* Dixon, 139 Fed. 737, 71 C. C. A. 555; Illinois Cent. R. Co. *v.* Bentz, 99 Fed. 657, 40 C. C. A. 56; Oregon Short Line, etc., R. Co. *v.* Frost, 74 Fed. 965, 21 C. C. A. 186 [*reversing* 69 Fed. 936]; Baltimore, etc., R. Co. *v.* Camp, 65 Fed. 952, 13 C. C. A. 233; McKaig *v.* Northern Pac. R. Co., 42 Fed. 288. *Contra*, Hall *v.* Galveston, etc., R. Co., 39 Fed. 18.

Statutory provisions.— In Virginia, under a statute authorizing a recovery by an employee engaged in any work in the operation of an engine where the negligence was that of one charged with despatching trains or transmitting telegraphic or telephonic orders therefor, a railroad company is liable to the locomotive engineer for injuries caused by the failure of the telegraph operator to transmit an order sent out from the train despatcher's office in regard to the movement of trains. Virginia, etc., R. Co. *v.* Clower, 102 Va. 867, 47 S. E. 1003.

84. Monaghan *v.* New York Cent., etc., R. Co., 45 Hun (N. Y.) 113; Cincinnati, etc., R. Co. *v.* Clark, 57 Fed. 125, 6 C. C. A. 281.

85. *Alabama.*— Tyson *v.* South, etc., Alabama R. Co., 61 Ala. 554, 32 Am. Rep. 8; Walker *v.* Bolling, 22 Ala. 294.

Connecticut.— See McElligott *v.* Randolph, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181.

Massachusetts.— Gilman *v.* Eastern R. Co., 13 Allen 433, 90 Am. Dec. 210.

Michigan.— Quincy Min. Co. *v.* Kitts, 42 Mich. 34, 3 N. W. 240.

New York.— Baulec *v.* New York, etc., R.

engineer leaves his engine with the management of the fireman or other employee unskilled in running an engine, and a fellow servant is injured thereby, the company is liable.[86] Where a servant becomes incompetent, the negligence of the employee whose duty it was to employ and discharge, in thereafter retaining him, is the negligence of a vice-principal.[87]

(2) DUTY TO SUPPLY SUFFICIENT NUMBER OF SERVANTS. The duty of using reasonable care to supply a sufficient number of servants to perform the work with reasonable and ordinary safety to those engaged in it is one which cannot be delegated to a servant so as to relieve the master from liability.[88]

(VIII) *SERVANTS IN DIFFERENT DEPARTMENTS*[89] — (A) *Not Fellow Servants in Some States.* Employees in different departments of the master's business are in some states not fellow servants,[90] although in most of the states this rule, known

Co., 59 N. Y. 356, 17 Am. Rep. 325; Laning *v.* New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Chapman *v.* Erie R. Co., 1 Thomps. & C. 526 [*reversed* on other grounds in 55 N. Y. 579]; Henry *v.* Brady, 9 Daly 142. But see Wright *v.* New York Cent. R. Co., 25 N. Y. 562 (holding that the employment of a substitute servant, where not within the duties of the employing agent, is the act of a fellow servant rather than of a vice-principal).

Pennsylvania.—Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467.

United States.— Baltimore, etc., R. Co. *v.* Henthorne, 73 Fed. 634, 19 C. C. A. 623.

See 34 Cent. Dig. tit. "Master and Servant," § 473.

Contra.— Wilson *v.* Hume, 30 U. C. C. P. 542.

For instance, where a superintendent sends away the employee in charge of an engine and himself attempts to operate it whereby a servant is injured, the master is liable. Beresford *v.* American Coal Co., 124 Iowa 34, 98 N. W. 902, 70 L. R. A. 256.

Directing inexperienced workmen to perform work.— A master is liable for the negligence of the foreman in directing an inexperienced workman to operate the lever of the machine whereby another servant was injured, on account of the improper manner of handling the lever. Fraser *v.* Schroeder, 163 Ill. 459, 45 N. E. 288 [*affirming* 60 Ill. App. 519]. But where a railroad employed in its repair shop a requisite number of servants who were skilful in doing certain work, but the foreman of the shop negligently detailed on such work an unskilful servant, whose lack of skill caused an injury to another servant, the master was not liable. Hilton *v.* Fitchburg R. Co., 73 N. H. 116, 59 Atl. 625, 68 L. R. A. 428.

86. *Indiana.*— Ohio, etc., R. Co. *v.* Collarn, 73 Ind. 261, 38 Am. Rep. 134.

Missouri.— Harper *v.* Indianapolis, etc., R. Co., 47 Mo. 567, 4 Am. Rep. 353.

New York.— Moylan *v.* Davids, 21 N. Y. Suppl. 249 [*affirmed* in 140 N. Y. 634, 35 N. E. 891].

Virginia.— Norfolk, etc., R. Co. *v.* Thomas, 90 Va. 205, 17 S. E. 884, 44 Am. St. Rep. 906.

West Virginia.— Core *v.* Ohio River R. Co., 38 W. Va. 456, 18 S. E. 596.

Contra.— South Florida R. Co. *v.* Price, 32 Fla. 46, 13 So. 638; Parrish *v.* Pensacola, etc., R. Co., 28 Fla. 251, 9 So. 696; Houston, etc., R. Co. *v.* Myers, 55 Tex. 110.

87. Laning *v.* New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Texas Mexican R. Co. *v.* Whitmore, 58 Tex. 276; Wabash Western R. Co. *v.* Brow, 65 Fed. 941, 13 C. C. A. 222 [*reversed* on other grounds in 164 U. S. 271, 17 S. Ct. 126, 41 L. ed. 431].

The fact that a servant has power to temporarily suspend men under him, where he has not the power to discharge them, does not make him a vice-principal in so far as the duty to exercise reasonable care to retain in the service only those employees who were careful and prudent is concerned. Weeks *v.* Scharer, 129 Fed. 333, 64 C. C. A. 11. *Contra,* Baltimore, etc., R. Co. *v.* Henthorne, 73 Fed. 634, 19 C. C. A. 623.

A yard master, to whom a railroad company has committed the power to discharge for incompetency employees within the yard, is its vice-principal so far as concerns the performance of such duty. Galveston, etc., R. Co. *v.* Eckles, 25 Tex. Civ. App. 179, 60 S. W. 830.

88. Cheeney *v.* Ocean Steamship Co., 92 Ga. 726, 19 S. E. 33, 44 Am. St. Rep. 113; Beresford *v.* American Coal Co., 124 Iowa 34, 98 N. W. 902, 70 L. R. A. 256; Flike *v.* Boston, etc., R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Besel *v.* New York Cent., etc., R. Co., 9 Hun (N. Y.) 457 [*reversed* on other grounds in 70 N. Y. 171]; Hussey *v.* Coger, 9 N. Y. St. 340; Mason *v.* Edison Mach. Works, 28 Fed. 228.

89. Application of doctrine to particular employment see *infra,* IV, G, 4, a, (IX).

Under Employers' Liability Act see *infra,* IV, G, 4, b, (IV).

90. *Arizona.*— Southern Pac. Co. *v.* McGill, 5 Ariz. 36, 44 Pac. 302.

Illinois.— Illinois Steel Co. *v.* Bauman, 178 Ill. 351, 53 N. E. 107, 69 Am. St. Rep. 316; Peoria, etc., R. Co. *v.* Rice, 144 Ill. 227, 33 N. E. 951; Toledo, etc., R. Co. *v.* Ingraham, 77 Ill. 309.

Kentucky.— Louisville, etc., R. Co. *v.* Lowe, 118 Ky. 260, 80 S. W. 768, 25 Ky. L. Rep. 2317, 65 L. R. A. 122; Louisville, etc., R. Co. *v.* Davis, 115 Ky. 270, 71 S. W. 658, 24 Ky. L. Rep. 1415; Dana *v.* Blackburn, 90 S. W. 237, 28 Ky. L. Rep. 695.

as the "different department rule," has been either expressly or impliedly rejected.[91] However, as will be shown in a subsequent section, the rule is now

Louisiana.— Levins *v.* Bancroft, 114 La. 105, 38 So. 72; Merritt *v.* Victoria Lumber Co., 111 La. 159, 35 So. 497; Stucke *v.* Orleans R. Co., 50 La. Ann. 172, 23 So. 342.

Nebraska.— Union Pac. R. Co. *v.* Erickson, 41 Nebr. 1, 59 N. W. 347.

Tennessee.— Louisville, etc., R. Co. *v.* Martin, 113 Tenn. 266, 87 S. W. 418; Louisville, etc., R. Co. *v.* Lahr, 86 Tenn. 335, 6 S. W. 663; Nashville, etc., R. Co. *v.* Carroll, 6 Heisk. 347. In this state the different department rule has no application except as to railroad companies. Coal Creek Min. Co. *v.* Davis, 90 Tenn. 711, 18 S. W. 387.

Utah.— Pool *v.* Southern Pac. Co., 20 Utah 210, 58 Pac. 326; Webb *v.* Denver, etc., R. Co., 7 Utah 363, 26 Pac. 981; Daniels *v.* Union Pac. R. Co., 6 Utah 357, 23 Pac. 762.

United States.— Pike *v.* Chicago, etc., R. Co., 41 Fed. 95; King *v.* Ohio, etc., R. Co., 14 Fed. 277, 11 Biss. 362; Kielley *v.* Belcher Silver Min. Co., 14 Fed. Cas. No. 7,760, 3 Sawy. 437.

See 34 Cent. Dig. tit. "Master and Servant," § 475 *et seq.*

The ground upon which those courts proceed which hold an employer liable to his servants for the negligent acts of other servants in a separate and distinct department is that the servant only accepts the risk of the negligence of those so closely associated with him as that he may be supposed to have contracted with reference to the possibility of their negligence, they coming through such association to some extent under his influence. Louisville, etc., R. Co. *v.* Stuber, 108 Fed. 934, 48 C. C. A. 149, 54 L. R. A. 696.

In Kentucky where the master is liable, under the superior servant rule, only in cases where the negligence is gross, the rule as to gross negligence does not extend to injuries where the servants are in different departments, but in such case ordinary negligence may be sufficient. Louisville, etc., R. Co. *v.* Collins, 2 Duv. 114, 87 Am. Dec. 486.

91. *California.*— Leishman *v.* Union Iron Works, 148 Cal. 274, 83 Pac. 30, 3 L. R. A. N. S. 500; Hogan *v.* Central Pac. R. Co., 49 Cal. 128.

Colorado.— Denver Tramway Co. *v.* O'Brien, 8 Colo. App. 74, 44 Pac. 766, teamster and employee in charge of boiler.

Connecticut.— McQueeney *v.* Norcross, 75 Conn. 381, 53 Atl. 780, 54 Atl. 301.

Florida.— South Florida R. Co. *v.* Weese, 32 Fla. 212, 13 So. 436.

Georgia.— Colley *v.* Southern Cotton Oil Co., 120 Ga. 258, 47 S. E. 932; Ingram *v.* Hilton, etc., Lumber Co., 108 Ga. 194, 33 S. E. 961; Davis *v.* Muscogee Mfg. Co., 106 Ga. 126, 32 S. E. 30; White *v.* Kennon, 83 Ga. 343, 9 S. E. 1082; Keith *v.* Walker Iron etc., Co., 81 Ga. 49, 7 S. E. 166, 12 Am. St. Rep. 296. See Ellington *v.* Beaver Dam Lumber Co., 93 Ga. 53, 19 S. E. 21. But see Bain *v.* Athens Foundry, etc., Mach. Works, 75 Ga. 718, holding that a blaster employed to remove certain rocks on his employer's property, and having sole charge of the work of blasting, is not a fellow servant of a wood workman in the employer's foundry having nothing to do with the blasting. It is now provided by statute that the department rule does not apply except in case of railroad companies. Brush Electric Light, etc., Co. *v.* Wells, 110 Ga. 192, 35 S. E. 365.

Indiana.— In this state the different department rule was adopted in the earlier cases (Fitzpatrick *v.* New Albany, etc., R. Co., 7 Ind. 436; Gillenwater *v.* Madison, etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101); but was afterward overruled (Columbus, etc., R. Co. *v.* Arnold, 31 Ind. 174, 99 Am. Rep. 615), and has not since been followed (Indianapolis, etc., Rapid Transit Co. *v.* Andis, (1904) 72 N. E. 145; Indianapolis, etc., Rapid Transit Co. *v.* Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185).

Iowa.— Treka *v.* Burlington, etc., R. Co., 100 Iowa 205, 69 N. W. 422.

Kansas.— The assignment of servants of the same master to separate departments of the same general enterprise does not affect their relation as fellow servants, unless such departments are so far disconnected that each may be considered a separate undertaking. Atchison, etc., Bridge Co. *v.* Miller, 71 Kan. 13, 80 Pac. 18, 1 L. R. A. N. S. 682. See also Donnelly *v.* Cudahy Packing Co., 68 Kan. 653, 75 Pac. 1017.

Maryland.— Wonder *v.* Baltimore, etc., R. Co., 32 Md. 411, 3 Am. Rep. 143.

Massachusetts.— McGuirk *v.* Shattuck, 160 Mass. 45, 35 N. E. 110, 39 Am. St. Rep. 454 (laundress and coachman); Farwell *v.* Boston, etc., R. Co., 4 Metc. 49, 38 Am. Dec. 339.

Michigan.— Adams *v.* Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441; Sell *v.* Rietz Lumber Co., 70 Mich. 479, 38 N. W. 451.

Minnesota.— Foster *v.* Minnesota Cent. R. Co., 14 Minn. 360.

Mississippi.— New Orleans, etc., R. Co. *v.* Hughes, 49 Miss. 258.

Missouri.— Grattis *v.* Kansas City, etc., R. Co., 153 Mo. 380, 55 S. W. 108, 77 Am. St. Rep. 721, 48 L. R. A. 399; Dickey *v.* Dickey, 111 Mo. App. 304, 86 S. W. 909. See also Stocks *v.* St. Louis Transit Co., 106 Mo. App. 129, 79 S. W. 1176; Johnson *v.* Metropolitan St. R. Co., 104 Mo. App. 588, 78 S. W. 275. *Compare* Shore *v.* American Bridge Co., 111 Mo. App. 278, 86 S. W. 905. The earlier cases accepted the rule. Relyea *v.* Kansas City, etc., R. Co., 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817; Renfro *v.* Chicago, etc., R. Co., 86 Mo. 302.

New Jersey.— Curley *v.* Hoff, 62 N. J. L. 758, 42 Atl. 731.

New York.— Slater *v.* Jewett, 85 N. Y. 61, 39 Am. Rep. 627; Zilver *v.* Robert Graves

adopted by the employers' liability acts in some of the states which had previously rejected it.[92]

(B) *What Constitutes a Department.*[93] One of the reasons given by the courts rejecting the different department rule is the inability to determine what is a separate and distinct department.[94] Even in those states which have adopted the rule no definition has been attempted to determine what constitutes a department. It has been held that the rule cannot be applied where only a few servants are employed, and they are so closely associated in work, and the area of operations is so circumscribed that but one superintendent over all is required.[95] A train crew of a railroad and trackmen are in different departments.[96] Thus a car inspector or repairer has been held to be in a different department from a train

Co., 106 N. Y. App. Div. 582, 94 N. Y. Suppl. 714 (elevator operator and servant addressing envelopes); Bateman *v.* New York Cent., etc., R. Co., 67 N. Y. App. Div. 241, 73 N. Y. Suppl. 390 (plumbers and office cleaners); Wilson *v.* Hudson River Water Power, etc., Co., 71 Hun 292, 24 N. Y. Suppl. 1072 (chemist and laborer engaged in construction of work); Ross *v.* New York Cent., etc., R. Co., 5 Hun 488 [*affirmed* in 74 N. Y. 617]; Spillane *v.* Eastmans, 33 Misc. 463, 67 N. Y. Suppl. 867 [*reversing* 32 Misc. 235, 65 N. Y. Suppl. 668]; McKay *v.* Buffalo Bill's Wild West Co., 17 Misc. 601, 40 N. Y. Suppl. 592. But see McTaggart *v.* Eastmans Co., 28 Misc. 127, 58 N. Y. Suppl. 1118 [*affirming* 27 Misc. 184, 57 N. Y. Suppl. 222], holding that a hod carrier and the driver of a truck are not fellow servants.

North Carolina.— Olmstead *v.* Raleigh, 130 N. C. 243, 41 S. E. 292.

North Dakota.— Ell *v.* Northern Pac. R. Co., 1 N. D. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97.

Pennsylvania.— Spees *v.* Boggs, 198 Pa. St. 112, 47 Atl. 875, 82 Am. St. Rep. 792, 52 L. R. A. 933; New York, etc., R. Co. *v.* Bell, 112 Pa. St. 400, 4 Atl. 50. But see Baird *v.* Pettit, 70 Pa. St. 477, holding that an injured employee, hired to make drawings, was not a fellow servant of a carpenter employed to do jobbing work about the premises.

Rhode Island.— Hanna *v.* Granger, 18 R. I. 507, 28 Atl. 659; Brodeur *v.* Valley Falls Co., 16 R. I. 448, 17 Atl. 54.

South Carolina.— Wilson *v.* Charleston, etc., R. Co., 51 S. C. 79, 28 S. E. 91.

Texas.— Galveston, etc., R. Co. *v.* Farmer, 73 Tex. 85, 11 S. W. 156; Missouri Pac. R. Co. *v.* Watts, 63 Tex. 549; Dallas *v.* Gulf, etc., R. Co., 61 Tex. 196; Consumers' Cotton Oil Co. *v.* Jonte, 36 Tex. Civ. App. 18, 80 S. W. 847.

Virginia.— Norfolk, etc., R. Co. *v.* Nuckol, 91 Va. 193, 21 S. E. 342. The earlier cases accepted the doctrine. Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827; Moon *v.* Richmond, etc., R. Co., 78 Va. 745, 49 Am. Rep. 401.

West Virginia.— Unfried *v.* Baltimore, etc., R. Co., 34 W. Va. 260, 12 S. E. 512.

Wisconsin.— Grant *v.* Keystone Lumber Co., 119 Wis. 229, 96 N. W. 535, 100 Am. St. Rep. 883; Ewald *v.* Chicago, etc., R. Co., 70 Wis. 420, 36 N. W. 12, 591, 5 Am. St. Rep. 178; Chamberlain *v.* Milwaukee, etc., R. Co., 11 Wis. 238.

United States.— Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 14 S. Ct. 983, 38 L. ed. 1009; Quebec Steamship Co. *v.* Merchant, 133 U. S. 375, 10 S. Ct. 397, 33 L. ed. 656; Louisville, etc., R. Co. *v.* Stuber, 108 Fed. 934, 48 C. C. A. 149, 54 L. R. A. 696 [*reversing* 102 Fed. 421]; Tomlinson *v.* Chicago, etc., R. Co., 97 Fed. 252, 38 C. C. A. 148.

See 34 Cent. Dig. tit. "Master and Servant," § 475 *et seq.*

In the federal courts the rule is that if the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply. Northern Pac. R. Co. *v.* Dixon, 194 U. S. 338, 24 S. Ct. 683, 48 L. ed. 1006; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 14 S. Ct. 983, 38 L. ed. 1009; Stuber *v.* Louisville, etc., R. Co., 102 Fed. 421.

Loggers.—Pilers, scalers, sorters, and measurers engaged in different departments of a lumber yard, in the employment of the same master and under the same general control, are fellow servants. Fraser *v.* Red River Lumber Co., 45 Minn. 235, 47 N. W. 785.

Carpenter and sawyer.— A head carpenter in a sawmill, engaged in making repairs around the building and on vessels used in connection therewith is, while moving lumber in the mill, the fellow servant of a sawyer working in the same premises. Sayward *v.* Carlson, 1 Wash. 29, 23 Pac. 830.

A woodcutter and a locomotive engineer in charge of a train used for the purpose of hauling timber to a sawmill and of transporting employees of their common master from the mill to their respective places of work are fellow servants. Railey *v.* Garbutt, 112 Ga. 288, 37 S. E. 360.

92. See *infra*, IV, G, 4, b, (IV).

93. See also *infra*, IV, G, 4, b, (IV), (B).

94. Grattis *v.* Kansas City, etc., R. Co., 153 Mo. 380, 55 S. W. 108, 77 Am. St. Rep. 721, 48 L. R. A. 399.

95. Dana *v.* Blackburn, 90 S. W. 237, 28 Ky. L. Rep. 695.

96. *Illinois.*— Peoria, etc., R. Co. *v.* Rice, 144 Ill. 227, 33 N. E. 951; Chicago, etc., R.

conductor,[97] engineer,[98] hostler,[99] or members of a switching crew.[1] So the train crew and trackmen[2] or flagmen[3] are in different departments, as are a laborer in the car shops and switchmen in the train department,[4] or a yard switchman and a locomotive engineer.[5] Telegraph operators are in a different department from a train crew.[6] It has been held that carpenters who build a scaffold and bricklayers who work upon it are in different departments.[7]

(c) *Consociation Rule*—(1) STATEMENT OF RULE. Under the consociation doctrine adopted in connection with the different department rule in some of the states, employees are fellow servants when they are brought into such personal relations that they may exercise an influence upon each other promotive of their mutual safety either (1) by directly coöperating in the same work at the time of the injury, or (2) by their usual duties.[8] In other words, if the servants at the time of the injury were actually coöperating in the particular business in hand,

Co. *v.* Kelly, 127 Ill. 637, 21 N. E. 203 [*affirming* 28 Ill. App. 655]; Chicago, etc., R. Co. *v.* Moranda, 93 Ill. 302, 34 Am. Rep. 168; Toledo, etc., R. Co. *v.* O'Connor, 77 Ill. 391; Pittsburg, etc., R. Co. *v.* Powers, 74 Ill. 341; Chicago, etc., R. Co. *v.* Bliss, 6 Ill. App. 411. But see Chicago, etc., R. Co. *v.* Murphy, 53 Ill. 336, 5 Am. Rep. 48.

Missouri.— Schlereth *v.* Missouri Pac. R. Co., 115 Mo. 87, 21 S. W. 1110, (1892) 19 S. W. 1134; Dixon *v.* Chicago, etc., R. Co., 109 Mo. 413, 19 S. W. 412, 18 L. R. A. 792; Parker *v.* Hannibal, etc., R. Co., 109 Mo. 362, 19 S. W. 1119, 18 L. R. A. 802; Sullivan *v.* Missouri Pac. R. Co., 97 Mo. 113, 10 S. W. 852; McKenna *v.* Missouri Pac. R. Co., 54 Mo. App. 161. *Contra*, Rohback *v.* Pacific R. Co., 43 Mo. 187. But see Card *v.* Eddy, 129 Mo. 510, 28 S. W. 979, 36 L. R. A. 806, (1894) 28 S. W. 753, where employees were held to be fellow servants because coöperating in the particular business in hand.

Nebraska.— Omaha, etc., R. Co. *v.* Krayenbuhl, 48 Nebr. 553, 67 N. W. 447; Union Pac. R. Co. *v.* Erickson, 41 Nebr. 1, 59 N. W. 347, 29 L. R. A. 137.

Tennessee.— Nashville, etc., R. Co. *v.* Carroll, 6 Heisk. 347; Haynes *v.* East Tennessee, etc., R. Co., 3 Coldw. 222. But see East Tennessee, etc., R. Co. *v.* Rush, 15 Lea 145, holding that an engineer and a servant of the company employed to put danger signals on the track are fellow servants.

United States.— Pike *v.* Chicago, etc., R. Co., 41 Fed. 95, bridge watchman. See also Howard *v.* Delaware, etc., Canal Co., 40 Fed. 195, 6 L. R. A. 75. These decisions are not now the law in the federal courts.

See 34 Cent. Dig. tit. "Master and Servant," § 500.

97. Illinois Cent. R. Co. *v.* Hilliard, 99 Ky. 684, 37 S. W. 75, 18 Ky. L. Rep. 505; Ritt *v.* Louisville, etc., R. Co., 4 S. W. 796, 9 Ky. L. Rep. 307.

98. Chicago, etc., R. Co. *v.* Hoyt, 122 Ill. 369, 12 N. E. 225, holding that the engineer who has brought a railroad train into the yard, and whose duty it is then to take the engine to the roundhouse, is not a fellow servant with a car inspector, who is required to go upon the cars as soon as they are stopped, for the purpose of inspecting them, and who is injured by the negligence of the engineer. See also Webb *v.* Denver, etc., R. Co., 7 Utah 363, 26 Pac. 981.

99. Louisville, etc., R. Co. *v.* Lowe, 118 Ky. 260, 80 S. W. 768, 25 Ky. L. Rep. 2317, 65 L. R. A. 122.

1. Renfro *v.* Chicago, etc., R. Co., 86 Mo. 302 (holding that a crew in charge of a switch engine are not fellow servants of car repairers at work on a car in the switch yards, since the switching crew and repairers are in different departments of work); Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827.

2. Louisville, etc., R. Co. *v.* Davis, 115 Ky. 270, 71 S. W. 658, 24 Ky. L. Rep. 1415; Chesapeake, etc., R. Co. *v.* Venable, 111 Ky. 41, 63 S. W. 35, 23 Ky. L. Rep. 427.

3. Louisville, etc., R. Co. *v.* Martin, 113 Tenn. 266, 87 S. W. 418.

4. Pool *v.* Southern Pac. R. Co., 20 Utah 210, 58 Pac. 326; Daniels *v.* Union Pac. R. Co., 6 Utah 357, 23 Pac. 762.

5. Louisville, etc., R. Co. *v.* Sheets, 13 S. W. 248, 11 Ky. L. Rep. 781.

6. East Tennessee, etc., R. Co. *v.* De Armond, 86 Tenn. 73, 5 S. W. 600, 6 Am. St. Rep. 816; Madden *v.* Chesapeake, etc., R. Co., 28 W. Va. 610, 57 Am. Rep. 695.

7. Chicago, etc., R. Co. *v.* Maroney, 67 Ill. App. 618; Shore *v.* American Bridge Co., 111 Mo. App. 278, 86 S. W. 905.

8. Indiana, etc., R. Co. *v.* Otstot, 212 Ill. 429, 72 N. E. 387 [*affirming* 113 Ill. App. 37]; Chicago City R. Co. *v.* Leach, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216; Voigt *v.* Anglo-American Provision Co., 202 Ill. 462, 66 N. E. 1054 [*affirming* 104 Ill. App. 423]; Pagels *v.* Meyer, 193 Ill. 172, 61 N. E. 1111 [*reversing* on other grounds 88 Ill. App. 169]; Swisher *v.* Illinois Cent. R. Co., 182 Ill. 533, 55 N. E. 555; John Spry Lumber Co. *v.* Duggan, 182 Ill. 218, 51 N. E. 1002 [*affirming* 80 Ill. App. 394]; Chicago, etc., R. Co. *v.* O'Brien, 155 Ill. 630, 40 N. E. 1023; Chicago, etc., R. Co. *v.* Kneirim, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259; Louisville, etc., Consol. R. Co. *v.* Hawthorn, 147 Ill. 226, 35 N. E. 534; Chicago, etc., R. Co. *v.* Kelly, 127 Ill. 637, 21 N. E. 203; Chicago, etc., R. Co. *v.* Hoyt, 122 Ill. 369, 12 N. E. 225; Chicago, etc., R. Co. *v.* Snyder, 117 Ill. 376, 7 N. E. 604; North Chicago Rolling-Mill Co. *v.* Johnson, 114 Ill. 57, 29 N. E.

they are fellow servants for the time being, notwithstanding they may have been regularly employed and their ordinary duties require them to work in different departments of the master's business;[9] while on the other hand it is not necessary that the servants be actually coöperating with each other at the time of the injury in order to be fellow servants if their work is in the same department so as to bring them into habitual association or into such relations that they may exercise an influence upon each other promotive of proper caution.[10] The relation of fellow servants does not depend upon personal acquaintance,[11] nor actual previous association between the servants,[12] nor upon the fact that the injured employee was only temporarily engaged at a particular task.[13] The fact that servants are working under different foremen may prevent them from being fellow servants,[14] but it does not where their work brings them into frequent contact with each other.[15]

(2) Application of Rule. Under this rule the following railroad employees have been held not fellow servants: Boiler maker and locomotive fireman;[16] car inspector or repairer and brakeman;[17] car inspector and yard switchman;[18]

186; Chicago, etc., R. Co. *v.* Geary, 110 Ill. 383; Chicago, etc., R. Co. *v.* Moranda, 108 Ill. 576; Illinois Steel Co. *v.* Olste, 116 Ill. App. 303 [*affirmed* in 214 Ill. 181, 73 N. E. 422]; Dolese, etc., Co. *v.* Johnson, 116 Ill. App. 206; Aurora Boiler Works *v.* Colligan, 115 Ill. App. 527; Gardner-Wilmington Coal Co. *v.* Knott, 115 Ill. App. 515; Illinois Third Vein Coal Co. *v.* Cioni, 115 Ill. App. 455 [*affirmed* in 215 Ill. 583, 74 N. E. 751]; Chicago, etc., R. Co. *v.* Brooks, 115 Ill. App. 5; Chicago, etc., R. Co. *v.* Mikesell, 113 Ill. App. 146; Spring Valley Coal Co. *v.* Patting, 112 Ill. App. 4 [*affirmed* in 210 Ill. 342, 71 N. E. 371]; Chicago City R. Co. *v.* Leach, 104 Ill. App. 30; Otstot *v.* Indiana, etc., R. Co., 103 Ill. App. 136; Western Tube Co. *v.* Polobinski, 94 Ill. App. 640; Cleveland, etc., R. Co. *v.* Lawler, 94 Ill. App. 36; Chicago, etc., R. Co. *v.* Stallings, 90 Ill. App. 609; Edward Hines Lumber Co. *v.* Ligas, 68 Ill. App. 523; Chicago, etc., R. Co. *v.* O'Bryan, 15 Ill. App. 134. But see Chicago, etc., R. Co. *v.* Hoyt, 16 Ill. App. 237.

Illustrations of non-consociation.— The fact that a section foreman, who is injured by a freight train running upon him contrary to signal, was the one who ordered the signal to be given, does not tend to show that he was coöperating with those in charge of the train so as to render them his fellow servants. Peoria, etc., R. Co. *v.* Rice, 144 Ill. 227, 33 N. E. 951. One whose usual employment is to load and unload cars in the yard of a rolling-mill is not the fellow servant of persons whose usual duties it is to have control of trains moving in the yard, even though he and the said persons, while engaged in their respective employments, can each observe how the other does his work. North Chicago Rolling-Mill Co. *v.* Johnson, 114 Ill. 57, 29 N. E. 186. While a railroad section hand may be a fellow servant of men in charge of a construction while he is coöperating with the latter in placing ballast upon the roadbed, he is not such a fellow servant after that work has ceased and he and the men in charge of such train have returned to their former and separate duties. Chicago, etc., R. Co. *v.* Kelly, 127 Ill. 637, 21 N. E. 203. Railroad fence builders and the engineer of a construction train are not fellow servants. Louisville, etc., Consol. R. Co. *v.* Hawthorn, 147 Ill. 226, 35 N. E. 534 [*affirming* 45 Ill. App. 635]. A track repairer in a switch yard is not a fellow servant of the crew in charge of a switching train. Chicago, etc., R. Co. *v.* Shannon, 43 Ill. App. 540.

Painters working on the same building on different stages are fellow servants. World's Columbian Exposition *v.* Lehigh, 196 Ill. 612, 63 N. E. 1089 [*reversing* 94 Ill. App. 433]; World's Columbian Exposition *v.* Bell, 76 Ill. App. 591.

9. Chicago City R. Co. *v.* Leach, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216; Chicago, etc., R. Co. *v.* Kneirim, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259; Abend *v.* Terre Haute, etc., R. Co., 111 Ill. 202, 53 Am. Rep. 616; Chicago, etc., R. Co. *v.* Stallings, 90 Ill. App. 609; Illinois Cent. R. Co. *v.* Swisher, 74 Ill. App. 164 [*affirmed* in 182 Ill. 533, 55 N. E. 555]; Card *v.* Eddy, 129 Mo. 510, 28 S. W. 979, 36 L. R. A. 806.

10. Chicago City R. Co. *v.* Leach, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216; Chicago, etc., R. Co. *v.* Stallings, 90 Ill. App. 609.

11. Chicago, etc., R. Co. *v.* White, 209 Ill. 124, 70 N. E. 588; Chicago, etc., R. Co. *v.* Leach, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216; Klees *v.* Chicago, etc., R. Co., 68 Ill. App. 244.

12. Chicago City R. Co. *v.* Leach, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216.

13. Klees *v.* Chicago, etc., R. Co., 68 Ill. App. 244.

14. Wenona Coal Co. *v.* Holmquist, 51 Ill. App. 507.

15. Chicago, etc., R. Co. *v.* O'Bryan, 15 Ill. App. 134.

16. Nashville, etc., R. Co. *v.* Jones, 9 Heisk. (Tenn.) 27.

17. Chicago, etc., R. Co. *v.* Jackson, 55 Ill. 492, 8 Am. Rep. 661; Daniels *v.* Union Pac. R. Co., 6 Utah 357, 23 Pac. 762.

18. Chicago, etc., R. Co. *v.* Kneirim, 48 Ill. App. 243.

engineer and baggageman;[19] engineer and machinist riding on train;[20] engineer and master mechanic;[21] section men and fence gang;[22] switchmen and employees in repair shop;[23] switch crews belonging to different trains;[24] train crew and track laborers;[25] train crew and shop laborers[26] or a carpenter in the switchyard;[27] train crew and station agent;[28] one shoveling snow, working under engineer, and section men;[29] gripman on street car and wrecking crew;[30] conductor of street car and gripman on another car.[31] The train crew of different trains have been held not fellow servants,[32] although they may be fellow servants because of their working together.[33] The following servants have been held engaged in the same department of work so as to be fellow servants: Switchman and signal man at curve;[34] and engineers on different engines on same train.[35] The following employees other than railroad employees have been held not to be fellow servants: Repairers who work while construction men are absent;[36] boiler foreman and helper at machine drill;[37] and foreman of shipping department and carpenters.[38]

(IX) *APPLICATION OF RULES TO PARTICULAR EMPLOYMENTS* — (A) *Elevators.* A servant running an elevator is ordinarily a fellow servant of other employees working in and about the building.[39]

19. Chicago, etc., R. Co. *v.* Swan, 176 Ill. 424, 52 N. E. 916 [*affirming* 70 Ill. App. 331].

20. Stuber *v.* Louisville, etc., R. Co., 102 Fed. 421.

21. Toledo, etc., R. Co. *v.* Moore, 77 Ill. 217.

22. Chicago, etc., R. Co. *v.* O'Brien, 53 Ill. App. 198 [*affirmed* in 155 Ill. 630, 40 N. E. 1023].

23. Pool *v.* Southern Pac. R. Co., 7 Utah 303, 26 Pac. 654.

24. Illinois Cent. R. Co. *v.* Jones, 97 Ill. App. 131.

But the members of two switching crews which frequently meet when at work are fellow servants. Elgin, etc., R. Co. *v.* Malaney, 59 Ill. App. 114.

25. *Illinois.*—Chicago, etc., R. Co. *v.* Eaton, 96 Ill. App. 570 [*affirmed* in 194 Ill. 441, 62 N. E. 784]. But see Chicago, etc., R. Co. *v.* Keefe, 47 Ill. 108, holding that a laborer employed to unload, under the general orders of the conductor, the cars of a freight train, is not employed in a distinct branch of service from the engineer in charge of the train in such a sense as to except him from the general rule that one servant cannot recover from the common master, for injuries resulting from carelessness of a fellow servant, if the master used due diligence in the selection.

Kentucky.— Chesapeake, etc., R. Co. *v.* Venable, 110 Ky. 41, 63 S. W. 35, 23 Ky. L. Rep. 427.

Missouri.— Sullivan *v.* Missouri Pac. R. Co., 97 Mo. 113, 10 S. W. 852.

Tennessee.— Freeman *v.* Illinois Cent. R. Co., 107 Tenn. 340, 64 S. W. 1.

United States.— Garrahy *v.* Kansas City, etc., R. Co., 25 Fed. 258.

26. Ryan *v.* Chicago, etc., R. Co., 60 Ill. 171, 14 Am. Rep. 32.

27. Egmann *v.* East St. Louis Connecting R. Co., 65 Ill. App. 345.

28. St. Louis, etc., R. Co. *v.* Biggs, 53 Ill. App. 550; Louisville, etc., R. Co. *v.* Jackson, 106 Tenn. 438, 61 S. W. 771.

29. Chicago, etc., R. Co. *v.* Mikesell, 113 Ill. App. 146.

30. West Chicago St. R. Co. *v.* Dwyer, 57 Ill. App. 440 [*affirmed* in 162 Ill. 482, 44 N. E. 815].

31. Chicago City R. Co. *v.* Leach, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216; Chicago City R. Co. *v.* Leach, 80 Ill. App. 354.

32. Chicago, etc., R. Co. *v.* House, 172 Ill. 601, 50 N. E. 151 [*affirming* 71 Ill. App. 147]; Cincinnati, etc., R. Co. *v.* Roberts, 110 Ky. 856, 62 S. W. 901, 23 Ky. L. Rep. 264; Louisville, etc., R. Co. *v.* Edmunds, 64 S. W. 727, 23 Ky. L. Rep. 1049. *Contra*, see Louisville, etc., R. Co. *v.* Robinson, 4 Bush (Ky.) 507.

33. Illinois Cent. R. Co. *v.* Ring, 119 Ill. App. 294; Illinois Cent. R. Co. *v.* Swisher, 74 Ill. App. 164 [*affirmed* in 182 Ill. 533, 55 N. E. 555].

34. Murray *v.* St. Louis, etc., R. Co., 98 Mo. 573, 12 S. W. 252, 14 Am. St. Rep. 661, 5 L. R. A. 735.

35. Cincinnati, etc., R. Co. *v.* Roberts, 110 Ky. 856, 62 S. W. 901, 25 Ky. L. Rep. 264.

36. Joliet Steel Co. *v.* Shields, 146 Ill. 603, 34 N. E. 1108 [*affirming* 45 Ill. App. 453].

37. Heldmaier *v.* Cobbs, 96 Ill. App. 315 [*affirmed* in 195 Ill. 172, 62 N. E. 853].

38. Musick *v.* Jacob Dold Packing Co., 58 Mo. App. 322.

39. *California.*— Mann *v.* O'Sullivan, 126 Cal. 61, 58 Pac. 375, 77 Am. St. Rep. 149.

Illinois.— Tubelowish *v.* Lathrop, 104 Ill. App. 82.

Missouri.— Hughes *v.* Fagin, 46 Mo. App. 37.

Nebraska.— Kitchen Bros. Hotel Co. *v.* Dixon, 71 Nebr. 293, 98 N. W. 816, bell boy and elevator boy.

New York.— Ingram *v.* Fosburgh, 73 N. Y. App. Div. 129, 76 N. Y. Suppl. 344.

Pennsylvania.— Spees *v.* Boggs, 198 Pa. St. 112, 47 Atl. 875, 82 Am. St. Rep. 792, 52 L. R. A. 933.

Texas.— Oriental Inv. Co. *v.* Sline, 17 Tex. Civ. App. 692, 41 S. W. 130.

(B) *Erection of Buildings.* Employees engaged in erecting a building are generally fellow servants.[40]

(C) *Mines, Quarries, and Excavations.* Generally employees working in or about a mine, quarry, or other excavation are fellow servants.[41] A superintendent or foreman of a mine or quarry or excavation who has general power to

United States.— Wolcott *v.* Studebaker, 34 Fed. 8.

Canada.— Carnahan *v.* Robert Simpson Co., 32 Ont. 328.

40. *Georgia.*— Keith *v.* Walker Iron, etc., Co., 81 Ga. 49, 7 S. E. 166, 12 Am. St. Rep. 296, mason and carpenter.

Indiana.— Bier *v.* Jeffersonville, etc., R. Co., 132 Ind. 78, 31 N. E. 471, mason and carpenter.

Massachusetts.— Killea *v.* Faxon, 125 Mass. 485 (coppersmith and carpenter); Harkins *v.* Standard Sugar Refinery, 122 Mass. 400 (servant hoisting material and mason).

Pennsylvania.— Somer *v.* Harrison, 6 Pa. Cas. 109, 8 Atl. 799.

Wisconsin.— Blazinski *v.* Perkins, 77 Wis. 9, 45 N. W. 947.

United States.—Armour *v.* Hahn, 111 U. S. 313, 4 S. Ct. 433, 28 L. ed. 440.

An engineer in charge of an engine which operates a hoisting apparatus is a fellow servant of employees engaged on the structure. Ryan *v.* McCully, 123 Mo. 636, 27 S. W. 533; Sheehan *v.* Prosser, 55 Mo. App. 569.

41. *Idaho.*—Snyder *v.* Viola Min., etc., Co., 3 Ida. 28, 26 Pac. 127, blacksmith and miner.

Illinois.— Kellyville Coal Co. *v.* Humble, 87 Ill. App. 437.

Indiana.— Smallwood *v.* Bedford Quarries Co., 28 Ind. App. 692, 63 N. E. 869.

Kentucky.— Fort Hill Stone Co. *v.* Orm, 84 Ky. 183.

Missouri.— Jackson *v.* Lincoln Min. Co., 106 Mo. App. 441, 80 S. W. 727, holding that "tub hustlers," although under different foremen, are fellow servants.

United States.— Kielley *v.* Belcher Silver Min. Co., 14 Fed. Cas. No. 7,761, 3 Sawy. 500. But see Evans *v.* Carbon Hill Coal Co., 47 Fed. 437, holding that an employee of a mining company, engaged in constructing a railway for transporting coal from the mine, is not necessarily a fellow servant of a miner engaged in hauling lumber for timbering up the mine.

See 34 Cent. Dig. tit. "Master and Servant," § 491.

For example the following have been held fellow servants: Teamster and employee engaged in blasting. Bogard *v.* Louisville, etc., R. Co., 100 Ind. 491; Marshall *v.* Schricker, 63 Mo. 308. Road man employed in mine and miner. Troughear *v.* Lower Vein Coal Co., 62 Iowa 576, 17 N. W. 775. Miner and filler. Consolidated Coal, etc., Co. *v.* Clay, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848. Mining boss and driver boss. Lehigh Valley Coal Co. *v.* Jones, 86 Pa. St. 432. Servant engaged in blasting and servant removing rock after blast. Hendrickson *v.* U. S. Gypsum Co., (Iowa 1905) 105 N. W. 503. Operator of steam drill and his helper. Livengood *v.* Joplin-Galena Consol. Lead, etc., Co., 179 Mo. 229, 77 S. W. 1077. Servant engaged in charging holes in rock and exploding them, and servants drilling holes for charges. Hooe *v.* Boston, etc., St. R. Co., 187 Mass. 67, 72 N. E. 341. Foreman in charge of derrick and laborer moving stone on truck. Scott *v.* Sweeney, 34 Hun (N. Y.) 292. Gas tester and miner, and fan operator on outside of mine and miner. Hughes *v.* Oregon Imp. Co., 20 Wash. 294, 55 Pac. 119. Servants assisting in getting out coal and servants engaged in drilling holes or doing blasting. Cerrillos Coal R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807. Engineer and servant in charge of ventilation of mine, and attending an inside furnace, and guarding buildings at entrance of mine. Coal Creek Min. Co. *v.* Davis, 90 Tenn. 711, 18 S. W. 387. Excavator in city streets and servant whose duty it was to place planks against the side walls of the ditch to prevent earth from caving in. Bergquist *v.* Minneapolis, 42 Minn. 471, 44 N. W. 530. Employee intrusted with the duty of seeing that a tram track in a mine is in proper condition, and employee engaged in spragging the wheels of the tram cars for the purpose of checking their speed on the track. Woodward Iron Co. *v.* Cook, 124 Ala. 349, 27 So. 455.

An engineer in charge of a hoisting apparatus is a fellow servant of those working in the mine or quarry. Trewatha *v.* Buchanan Gold Min., etc., Co., 96 Cal. 494, 28 Pac. 571, 31 Pac. 561 (statute); McAndrews *v.* Burns, 39 N. J. L. 117; Mulhern *v.* Lehigh Valley Coal Co., 161 Pa. St. 270, 28 Atl. 1087, 1088; Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295; Spring Valley Coal Co. *v.* Patting, 86 Fed. 433, 30 C. C. A. 168; Buckley *v.* Gould, etc., Silver Min. Co., 14 Fed. 833, 8 Sawy. 394. In Illinois, however, under the different department rule, such employees are not fellow servants. Illinois Third Vein Coal Co. *v.* Cioni, 215 Ill. 583, 74 N. E. 751 [*affirming* 115 Ill. App. 455]; Spring Valley Coal Co. *v.* Patting, 210 Ill. 342, 71 N. E. 371 [*affirming* 112 Ill. App. 4]; Spring Valley Coal Co. *v.* Buzis, 115 Ill. App. 196. But see Niantic Coal, etc., Co. *v.* Leonard, 25 Ill. App. 95; Starne *v.* Schlothane, 21 Ill. App. 97. An engineer in charge of hoisting machinery is not the fellow servant of employees hauling cars to the foot of the shaft to be carried to the surface. Duffy *v.* Kivilin, 195 Ill. 630, 63 N. E. 503 [*affirming* 98 Ill. App. 483].

Under the different department rule, as adopted in some states (see *supra*, IV, G, 4, a, (VII)), it has been held that an employee whose duty it was to keep up the furnace fire in an air shaft of a mine was not a

direct and control the operation thereof is usually held to be a vice-principal;[42] nevertheless a foreman who is vested with limited power, or who is subordinate to some superior officer, is not ordinarily considered a vice-principal,[43]

fellow servant of those engaged in track-laying in the mine. Angel *v.* Jellico Coal Min. Co., 115 Ky. 728, 74 S. W. 714, 25 Ky. L. Rep. 108. So a timberman employed to prop the roof of a mine is not, as a matter of law, a fellow servant of one employed as a driver in hauling coal in the mine. St. Louis Consol. Coal Co. *v.* Scheiber, 167 Ill. 539, 47 N. E. 1052. Where a mining company was excavating two tunnels — one above the other — on a hillside, and a rock negligently ordered thrown down the hill by the superintendent of the gang at the upper tunnel struck and injured a man working under another superintendent at the lower tunnel, the superintendent of the upper tunnel gang and the injured man were not fellow servants, not having opportunity to take precautions against each other's negligence. Uren *v.* Golden Tunnel Min. Co., 24 Wash. 261, 64 Pac. 174.

42. *California.*—Beeson *v.* Green Mountain Gold Min. Co., 57 Cal. 20.

Illinois.— Chicago Anderson Pressed Brick Co. *v.* Sobkowiak, 148 Ill. 573, 36 N. E. 572 [*affirming* 45 Ill. App. 317].

Missouri.— See Carter *v.* Baldwin, 107 Mo. App. 217, 81 S. W. 204, holding that one who hires and discharges men and superintends the underground work of a mine, directing the men where and how to work, is a vice-principal, although he works with the men and performs the same character and grade of labor that they perform.

Montana.— Allen *v.* Bell, 32 Mont. 69, 79 Pac. 582.

Ohio.— Wellston Coal Co. *v.* Smith, 65 Ohio St. 70, 61 N. E. 143, 87 Am. St. Rep. 547, 55 L. R. A. 99.

Utah.— Reddon *v.* Union Pac. R. Co., 5 Utah 344, 15 Pac. 262; Trihay *v.* Brooklyn Lead Min. Co., 4 Utah 468, 11 Pac. 612.

United States.— Alaska United Gold Min. Co. *v.* Muset, 114 Fed. 66, 52 C. C. A. 14.

See 34 Cent. Dig. tit. "Master and Servant," § 443.

Servant taking place of mine boss.—Where a mine boss who has control of a mine with power to hire and discharge employees delegates his powers and duties to a miner in his employ, such miner as to the performance of such duties is not the fellow servant of other miners but stands in the same relation as the mine boss. Wellston Coal Co. *v.* Smith, 65 Ohio St. 70, 61 N. E. 143, 87 Am. St. Rep. 547, 55 L. R. A. 99.

A boss driver in a coal mine has been held a vice-principal as to the servants employed as drivers. Collingwood *v.* Illinois, etc., Fuel Co., 125 Iowa 537, 101 N. W. 283.

Character of act.— The character of the act of a mine boss in ordering a miner to return and fire a third blast after two have exploded, as an act of superintendence, is not altered by the fact that in preparing the blasts, lighting one, and attempting to light another the boss acted as a fellow servant of the miner. Bane *v.* Irwin, 172 Mo. 306, 72 S. W. 522.

Mine boss where there is a general superintendent.— The relation of vice-principal borne by a mine boss toward a miner is not altered by the fact that there is a general superintendent who has supervision of both. Bane *v.* Irwin, 172 Mo. 306, 72 S. W. 522.

43. *California.*— Stephens *v.* Doe, 73 Cal. 26, 14 Pac. 378.

Indiana.— Brazil, etc., Coal Co. *v.* Cain, 98 Ind. 282; Ross *v.* Union Cement, etc., Co., 25 Ind. App. 463, 58 N. E. 500.

Michigan.— Petaja *v.* Aurora Iron Min. Co., 106 Mich. 463, 64 N. W. 335, 66 N. W. 951, 58 Am. St. Rep. 505, 32 L. R. A. 435.

New Mexico.— Deserant *v.* Cerrillos Coal R. Co., 9 N. M. 495, 55 Pac. 290.

Pennsylvania.— Delaware, etc., Canal Co. *v.* Carroll, 89 Pa. St. 374.

Washington.— Hughes *v.* Oregon Imp. Co., 20 Wash. 294, 55 Pac. 119.

West Virginia.— Williams *v.* Thacker Coal, etc., Co., 44 W. Va. 599, 30 S. E. 107, 40 L. R. A. 812.

United States.— Davis *v.* Trade Dollar Consol. Min. Co., 117 Fed. 122, 54 C. C. A. 636; Weeks *v.* Scharer, 111 Fed. 330, 49 C. C. A. 372; What Cheer Coal Co. *v.* Johnson, 56 Fed. 810, 6 C. C. A. 148.

See 34 Cent. Dig. tit. "Master and Servant," §§ 429, 434.

But see Anderson *v.* Bennett, 16 Oreg. 515, 19 Pac. 765, 8 Am. St. Rep. 311, holding that a foreman of a gang of men engaged in blasting in a tunnel, having authority to direct the work and to control the men, and hire and discharge them, was not a fellow servant of the men under him.

The foreman of one shift of men alternating with others in working in a mine is a fellow servant with the members of the other shifts, and the master is not liable for an injury to one of the men caused by the negligence of the foreman of the preceding shift. Davis *v.* Trade Dollar Consol. Min. Co., 117 Fed. 122, 54 C. C. A. 636.

An outside or "top boss" of a coal mine, who has charge of receiving the coal when brought to the surface, and of lowering material for the miners into it, without authority to employ or discharge men or to take charge of any department, is a fellow servant of the miners. Hughes *v.* Oregon Imp. Co., 20 Wash. 294, 55 Pac. 119.

Mining boss appointed pursuant to statute. — The fact that a mining boss was appointed pursuant to a statute requiring the operator of a mine to employ a skilful and competent mining boss does not change the rule that the grade of servants has no bearing on the question as to whether they are fellow servants. Colorado Coal, etc., Co. *v.* Lamb, 6 Colo. App. 255, 40 Pac. 251; Lineoski *v.* Susquehanna Coal Co., 157 Pa. St. 153, 27

except in those jurisdictions where the so-called superior servant rule is in operation.[44]

(D) *Railroads* — (1) IN GENERAL. Except in those states where the superior servant or different department rule is recognized, the general rule is that all railroad employees in rank below the head of a department are fellow servants where the negligent servant is not intrusted with the personal duties of the master.[45]

(2) NEGLIGENCE OF TRAIN CREW AS TO TRACKMEN. The general rule is that employees operating trains are fellow servants of track employees injured by the negligence of the former,[46] except in those states where the different department

Atl. 577; Redstone Coke Co. *v.* Roby, 115 Pa. St. 364, 8 Atl. 593; Waddell *v.* Simoson, 112 Pa. St. 567, 4 Atl. 725; Reese *v.* Biddle, 112 Pa. St. 72, 3 Atl. 813; Delaware, etc., Canal Co. *v.* Carroll, 89 Pa. St. 374; Lehigh Valley Coal Co. *v.* Jones, 86 Pa. St. 432; Williams *v.* Thacker Coal, etc., Co., 44 W. Va. 599, 30 S. E. 107, 40 L. R. A. 812. See also Weaver *v.* Iselin, 161 Pa. St. 386, 29 Atl. 49.

44. Chicago Anderson Pressed Brick Co. *v.* Sobkowiak, 34 Ill. App. 312.

Illustrations.— The "pit boss" of a mine who has authority to tell the men to do certain work or quit is a vice-principal. St. Louis Consol. Coal Co. *v.* Womhacher, 134 Ill. 57, 24 N. E. 627 [*affirming* 31 Ill. App. 288]. A mine inspector, manager, and pit boss is a vice-principal, and not a fellow servant with a miner who acts under his orders. Westville Coal Co. *v.* Schwartz, 75 Ill. App. 468 [*affirmed* in 177 Ill. 272, 52 N. E. 276].

Question for jury.— Whether the foreman of a mine is a fellow servant of another mine worker in the performance of any particular duties is a question for the jury, in an action for personal injury to the latter caused through the negligence of the former. Westville Coal Co. *v.* Schwartz, 177 Ill. 272, 52 N. E. 276 [*affirming* 75 Ill. App. 468].

45. *Arkansas.*— St. Louis, etc., R. Co. *v.* Rice, 51 Ark. 467, 11 S. W. 699, 4 L. R. A. 173, yard inspector and yard foreman.

Indiana.— Sheets *v.* Chicago, etc., R. Co., 139 Ind. 682, 39 N. E. 154.

Massachusetts.— Fitzgerald *v.* Boston, etc., R. Co., 156 Mass. 293, 31 N. E. 7; Holden *v.* Fitchburg R. Co., 129 Mass. 268, 37 Am. Rep. 343.

Minnesota.— Neal *v.* Northern Pac. R. Co., 57 Minn. 365, 59 N. W. 312, lineman repairing telegraph line and employee blasting stone along track.

New York.— Slattery *v.* New York, etc., R. Co., 4 N. Y. Suppl. 910, servants engaged in removing wreck.

Pennsylvania.— Rehm *v.* Pennsylvania R. Co., 164 Pa. St. 91, 30 Atl. 356; New York, etc., R. Co. *v.* Bell, 112 Pa. St. 400, 4 Atl. 50, yard switchman and shop man.

United States.— Thom *v.* Pittard, 62 Fed. 232, 10 C. C. A. 352; Cincinnati, etc., R. Co. *v.* Mealer, 50 Fed. 725, 1 C. C. A. 633 (yard switchman and negligent section man); Haugh *v.* Texas, etc., R. Co., 11 Fed. Cas. No. 6,221, 3 N. Y. Wkly. Dig. 174 [*reversed* on other grounds in 100 U. S. 213, 25 L. ed. 612].

See 34 Cent. Dig. tit. "Master and Servant," § 493 *et seq.*

Caller and engineer.— A railroad employee, whose business it is merely to call the conductors in a certain order when trains are ready, and if one cannot go to call the next, is a fellow servant of an engineer on one of the trains, and the latter cannot recover for injuries caused by the negligent act of the former. Michigan Cent. R. Co. *v.* Dolan, 32 Mich. 510.

An injured brakeman is a fellow servant of employees engaged in making up the train. Hodgkins *v.* Eastern R. Co., 119 Mass. 419; Sanner *v.* Atchison, etc., R. Co., 17 Tex. Civ. App. 337, 43 S. W. 533.

Employees returning from work on different hand-cars.— Gangs of men in the employment of a railroad, engaged in the same work, returning from their day's labor on different hand-cars, are fellow servants. Baltimore, etc., R. Co. *v.* Henderson, 31 Ind. App. 441, 68 N. E. 308.

46. *Dakota.*— Elliott *v.* Chicago, etc., R. Co., 5 Dak. 523, 41 N. W. 758, 3 L. R. A. 363.

Indiana.— Gormley *v.* Ohio, etc., R. Co., 72 Ind. 31.

Massachusetts.— Clifford *v.* Old Colony R. Co., 141 Mass. 564, 6 N. E. 751.

Michigan.— Schaible *v.* Lake Shore, etc., R. Co., 97 Mich. 318, 56 N. W. 565, 21 L. R. A. 660.

Minnesota.— Swartz *v.* Great Northern R. Co., 93 Minn. 339, 101 N. W. 504; Connelly *v.* Minneapolis, etc., R. Co., 38 Minn. 80, 35 N. W. 582; Foster *v.* Minnesota Cent. R. Co., 14 Minn. 360.

Montana.— Hastings *v.* Montana Union R. Co., 18 Mont. 493, 46 Pac. 264.

New York.— Boldt *v.* New York Cent. R. Co., 18 N. Y. 432; Coon *v.* Syracuse, etc., R. Co., 6 Barb. 231 [*affirmed* in 5 N. Y. 492]; Mele *v.* Delaware, etc., Canal Co., 59 N. Y. Super. Ct. 367, 14 N. Y. Suppl. 630.

North Carolina.— Wright *v.* Northampton, etc., R. Co., 122 N. C. 852, 29 S. E. 100.

Ohio.— Whaalan *v.* Mad River, etc., R. Co., 8 Ohio St. 249; Dick *v.* Indianapolis, etc., R. Co., 7 Ohio Dec. (Reprint) 59, 1 Cinc. L. Bul. 93 [*reversed* on other grounds in 38 Ohio St. 389].

Pennsylvania.— Palko *v.* New Jersey Cent. R. Co., 9 Kulp 550.

Texas.— Southern Pac. Co. *v.* Ryan, (Civ.

rule obtains.[47] This rule applies *inter alia* to track inspectors,[48] bridge gangs,[49] and a car repairer or inspector injured by the negligence of train men.[50]

(3) NEGLIGENCE OF TRAIN CREW AS TO EMPLOYEES MERELY RIDING ON TRAIN. Employees who are injured while merely riding upon a train are ordinarily fellow servants of the train crew.[51]

App. 1895) 29 S. W. 527; Texas, etc., R. Co. *v.* Wagner, 2 Tex. App. Civ. Cas. § 336.

Utah.— Stephani *v.* Southern Pac. Co., 19 Utah 196, 57 Pac. 34.

Virginia.— Norfolk, etc., R. Co. *v.* Nuckol, 91 Va. 193, 21 S. E. 342.

Washington.— Northern Pac. R. Co. *v.* O'Brien, 1 Wash. 599, 21 Pac. 32.

Wisconsin.— Schultz *v.* Chicago, etc., R. Co., 67 Wis. 616, 31 N. W. 321, 58 Am. Rep. 881.

United States.— Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 16 S. Ct. 848, 40 L. ed. 999 [*reversing* 51 Fed. 562, 2 C. C. A. 380]; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 14 S. Ct. 983, 38 L. ed. 1009; O'Neil *v.* Pittsburg, etc., R. Co., 130 Fed. 204 (flagman); McPeck *v.* Central Vermont R. Co., 79 Fed. 590, 25 C. C. A. 110; Easton *v.* Houston, etc., R. Co., 32 Fed. 893; Van Wickle *v.* Manhattan R. Co., 32 Fed. 278, 23 Blatchf. 422.

See 34 Cent. Dig. tit. "Master and Servant," § 500.

Negligence in loading tender.— A railroad company is not liable for injuries to a section hand caused by a stick of wood falling from the tender of a passing engine, due to the negligence of other employees in loading the tender. Foster *v.* Minnesota Cent. R. Co., 14 Minn. 360.

Detective walking on track to discover persons guilty of obstructing it.— A detective in the employ of a railroad company, and engaged in walking along the track in endeavoring to discover persons guilty of obstructing the same, and an engineer operating an engine on such road, are co-employees of the same master. Pyne *v.* Chicago, etc., R. Co., 54 Iowa 223, 6 N. W. 281, 37 Am. Rep. 198.

Street railways.— A track repairer employed by an electric street railway company is a fellow servant of a motorman employed by the company, and hence cannot recover for injuries resulting from the failure of the latter to give timely warning of the approach of a car, as required by the rules. Lundquist *v.* Duluth St. R. Co., 65 Minn. 387, 67 N. W. 1006.

47. See *supra*, IV, G, 4, a, (VIII).

48. Sullivan *v.* Mississippi, etc., R. Co., 11 Iowa 421.

49. International, etc., R. Co. *v.* Ryan, 82 Tex. 565, 18 S. W. 219; St. Louis, etc., R. Co. *v.* Welch, 72 Tex. 298, 10 S. W. 529, 2 L. R. A. 839; Austin, etc., R. Co. *v.* Beatty, 6 Tex. Civ. App. 650, 24 S. W. 934. But see Pike *v.* Chicago, etc., R. Co., 41 Fed. 95.

50. Shuster *v.* Philadelphia, etc., R. Co., (Del. 1906) 62 Atl. 689; Unfried *v.* Baltimore, etc., R. Co., 34 W. Va. 260, 12 S. E. 512.

51. *Arizona.*— Southern Pac. Co. *v.* McGill, 5 Ariz. 36, 44 Pac. 302. But see McGill *v.* Southern Pac. Co., 4 Ariz. 116, 33 Pac. 821.

Illinois.— Chicago, etc., R. Co. *v.* Wise, 206 Ill. 453, 69 N. E. 500 [*affirming* 106 Ill. App. 174].

Indiana.— Indianapolis, etc., Rapid Transit Co. *v.* Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; Capper *v.* Louisville, etc., R. Co., 103 Ind. 305, 2 N. E. 749; Baltimore, etc., R. Co. *v.* Clapp, 35 Ind. App. 403, 74 N. E. 267; Indianapolis, etc., Rapid Transit Co. *v.* Andis, 33 Ind. App. 625, 72 N. E. 145.

Massachusetts.— Seaver *v.* Boston, etc., R. Co., 4 Gray 466.

Mississippi.— Farquhar *v.* Alabama, etc., R. Co., 78 Miss. 193, 28 So. 850.

New York.— Ross *v.* New York Cent., etc., R. Co., 5 Hun 488 [*affirmed* in 74 N. Y. 617].

North Carolina.— Wright *v.* Northampton, etc., R. Co., 122 N. C. 852, 29 S. E. 100.

Ohio.— Manville *v.* Cleveland, etc., R. Co., 11 Ohio St. 417.

Oregon.— Knahtla *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 136, 27 Pac. 91.

Pennsylvania.— Ryan *v.* Cumberland Valley R. Co., 23 Pa. St. 384. But see O'Donnell *v.* Allegheny Valley R. Co., 59 Pa. St. 239, 98 Am. Dec. 336, where employee considered as passenger.

Texas.— Dallas *v.* Gulf, etc., R. Co., 61 Tex. 196. *Contra*, see Galveston, etc., R. Co. *v.* Leonard, (Civ. App. 1894) 29 S. W. 955; Galveston, etc., R. Co. *v.* Norris, (Civ. App. 1894) 29 S. W. 950.

West Virginia.— Sanderson *v.* Panther Lumber Co., 50 W. Va. 42, 40 S. E. 368, 88 Am. St. Rep. 841, 55 L. R. A. 908. *Contra*, see Haney *v.* Pittsburgh, etc., R. Co., 38 W. Va. 570, 18 S. E. 748.

Wisconsin.— Howland *v.* Milwaukee, etc., R. Co., 54 Wis. 226, 11 N. W. 529.

United States.— Louisville, etc., R. Co. *v.* Stuber, 108 Fed. 934, 48 C. C. A. 149, 54 L. R. A. 696; Smith *v.* Memphis, etc., R. Co., 18 Fed. 304. *Contra*, see Northern Pac. R. Co. *v.* Beaton, 64 Fed. 563, 12 C. C. A. 301.

See 34 Cent. Dig. tit. "Master and Servant," §§ 501–503.

A laborer employed on a construction train is a fellow servant of the men in charge of the train. Prather *v.* Richmond, etc., R. Co., 80 Ga. 427, 9 S. E. 530, 12 Am. St. Rep. 263; Wabash, etc., R. Co. *v.* Gordon, 17 Ill. App. 63; Gillshannon *v.* Stony Brook R. Corp., 10 Cush. (Mass.) 228; Forey *v.* Syracuse, etc., R. Co., 12 N. Y. St. 198.

An expressman and baggageman on a passenger train, killed in a collision owing to the negligence of the employees in charge of the train, were the fellow servants of the latter.

(4) NEGLIGENCE OF PARTICULAR EMPLOYEES — (a) CONDUCTOR. While there is a large number of cases holding that a conductor while in charge of a train is a vice-principal as to the engineer, brakeman, fireman, or other employees working on such train,[52] the contrary rule now prevails in the federal courts and in a majority of the state courts.[53] So a laborer on a construction train is generally

Central Trust Co. *v.* Wabash, etc., R. Co., 34 Fed. 616.

An engine wiper, injured through the negligence of an engineer with whom he was riding, is a fellow servant. Streets *v.* Grand Trunk R. Co., 76 N. Y. App. Div. 480, 78 N. Y. Suppl. 729 [*affirmed* in 178 N. Y. 553, 70 N. E. 1109].

Logging railroad.— An engineer, in charge of the locomotive on a tram road belonging to a steam sawmill company, is a fellow servant with a laborer riding on the train, whose duty it is to look after the condition of the tracks; and the latter cannot recover for injuries received by the negligence of the former in operating the train. White *v.* Kennon, 83 Ga. 343, 9 S. E. 1082.

52. *Alabama.*— Perdue *v.* Louisville, etc., R. Co., 100 Ala. 535, 14 So. 366.

Georgia.— Spencer *v.* Brooks, 97 Ga. 681, 25 S. E. 480; Central R. Co. *v.* De Bray, 71 Ga. 406.

Kansas.— Walker *v.* Gillett, 59 Kan. 214, 52 Pac. 442, decided under common law prevailing in Oklahoma.

Kentucky.— Newport News, etc., R. Co. *v.* Dentzel, 91 Ky. 42, 14 S. W. 958, 12 Ky. L. Rep. 626; Louisville, etc., R. Co. *v.* Moore, 83 Ky. 675.

Louisiana.— Van Amburg *v.* Vicksburg, etc., R. Co., 37 La. Ann. 650, 55 Am. Rep. 517.

Nebraska.— Clark *v.* Hughes, 51 Nebr. 780, 71 N. W. 776.

North Carolina.— Purcell *v.* Southern R. Co., 119 N. C. 728, 26 S. E. 161; Shadd *v.* Georgia, etc., R. Co., 116 N. C. 968, 21 S. E. 554; Cowles *v.* Richmond, etc., R. Co., 84 N. C. 309, 37 Am. Rep. 620. See also Haltom *v.* Southern R. Co., 127 N. C. 255, 37 S. E. 262.

Ohio.— Cleveland, etc., R. Co. *v.* Keary, 3 Ohio St. 201; Little Miami R. Co. *v.* Stevens, 20 Ohio 415; Lake, etc., R. Co. *v.* Hunter, 13 Ohio Cir. Ct. 441, 7 Ohio Cir. Dec. 206.

South Carolina.— Rhodes *v.* Southern R. Co., 68 S. C. 494, 47 S. E. 689; Hicks *v.* Southern R. Co., 63 S. C. 559, 41 S. E. 753; Coleman *v.* Wilmington, etc., R. Co., 25 S. C. 446, 60 Am. Rep. 516; Boatwright *v.* Northeastern R. Co., 25 S. C. 128.

Tennessee.— Alabama Great Southern R. Co. *v.* Baldwin, 113 Tenn. 409, 82 S. W. 487, 67 L. R. A. 340; Illinois Cent. R. Co. *v.* Spence, 93 Tenn. 173, 23 S. W. 211, 42 Am. St. Rep. 907.

Washington.— Grout *v.* Tacoma Eastern R. Co., 33 Wash. 524, 74 Pac. 665; Howe *v.* Northern Pac. R. Co., 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949.

See 34 Cent. Dig. tit. "Master and Servant," § 502.

Acts in official capacity.— Where the conductor of a freight train signaled the engineer to back a portion of the train to make a coupling, at a time when a brakeman was between the two portions of the train preparing the cars for coupling, the conductor was acting in his official capacity as vice-principal of the railroad company, and not merely as a fellow servant of the brakeman. Alabama Great Southern R. Co. *v.* Baldwin, 113 Tenn. 409, 82 S. W. 487, 67 L. R. A. 340.

Acting outside line of employment.— Where a conductor of a freight train, while acting as brakeman, signals the engineer to back up the train, thereby injuring a brakeman coupling the cars, he is a fellow servant of the brakeman injured, even if it be conceded that he is a vice-principal when acting in his own line of duty. Jackson *v.* Norfolk, etc., R. Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337.

53. *California.*—Congrave *v.* Southern Pac. R. Co., 88 Cal. 360, 26 Pac. 175.

Florida.— South Florida R. Co. *v.* Price, 32 Fla. 46, 13 So. 638; Parrish *v.* Pensacola, etc., R. Co., 28 Fla. 251, 9 So. 696.

Illinois.— Meyer *v.* Illinois Cent. R. Co., 177 Ill. 591, 52 N. E. 848 [*affirming* 65 Ill. App. 531], holding that the control of the train and crew by the conductor must be complete to constitute him a vice-principal.

Indiana.— Thayer *v.* St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409; Wilson *v.* Madison, etc., R. Co., 18 Ind. 226.

Kansas.— Union Pac. R. Co. *v.* Young, 8 Kan. 658; Union Pac. R. Co. *v.* Milliken, 8 Kan. 647; Dow *v.* Kansas Pac. R. Co., 8 Kan. 642.

Maine.— Lasky *v.* Canadian Pac. R. Co., 83 Me. 461, 22 Atl. 367.

Michigan.— Stanley *v.* Chicago, etc., R. Co., 101 Mich. 202, 59 N. W. 393; La Pierre *v.* Chicago, etc., R. Co., 99 Mich. 212, 58 N. W. 60.

Missouri.— Grattis *v.* Kansas City, etc., R. Co., 153 Mo. 380, 55 S. W. 108, 77 Am. St. Rep. 721, 48 L. R. A. 399; McGowan *v.* St. Louis, etc., R. Co., 61 Mo. 528.

New York.—Wooden *v.* Western New York, etc., R. Co., 147 N. Y. 508, 42 N. E. 199 [*reversing* 5 Misc. 537, 25 N. Y. Suppl. 977]; Laning *v.* New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Sherman *v.* Rochester, etc., R. Co., 17 N. Y. 153.

Ohio.— Ott *v.* Lake Shore, etc., R. Co., 18 Ohio Cir. Ct. 395, 10 Ohio Cir. Dec. 85, decided under law of Michigan.

Pennsylvania.— Hoover *v.* Beach Creek R. Co., 154 Pa. St. 362, 26 Atl. 315.

Texas.— Campbell *v.* Cook, 86 Tex. 630, 26 S. W. 486, 40 Am. St. Rep. 878; Pilkinton *v.* Gulf, etc., R. Co., 70 Tex. 226, 7 S. W. 805; Robinson *v.* Houston, etc., R. Co., 46

held a fellow servant of the conductor thereon and cannot recover for injuries caused by the latter's negligence.[54]

(b) ENGINEER. It has been held in most of the states where the question has come up for decision that a railroad engineer is, where not acting in the performance of some duty which the master cannot delegate so as to escape responsibility, a fellow servant of other members of the train crew injured by his negligence,[55]

Tex. 540. See Galveston, etc., R. Co. *v.* Brown, (Civ. App. 1900) 59 S. W. 930 [*reversed* on other grounds in 95 Tex. 2, 63 S. W. 305]. But see Galveston, etc., R. Co. *v.* Robinett, (Civ. App. 1899) 54 S. W. 263.

Virginia.— Norfolk, etc., R. Co. *v.* Houchins, 95 Va. 398, 28 S. E. 578, 64 Am. St. Rep. 791, 46 L. R. A. 359. But see Richmond, etc., R. Co. *v.* Williams, 86 Va. 165, 9 S. E. 990, 19 Am. St. Rep. 876; Johnson *v.* Richmond, etc., R. Co., 84 Va. 713, 5 S. E. 707; Ayers *v.* Richmond, etc., R. Co., 84 Va. 679, 5 S. E. 582; Moon *v.* Richmond, etc., R. Co., 78 Va. 745, 49 Am. Rep. 401.

West Virginia.— Jackson *v.* Norfolk, etc., R. Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337 [*overruling* Haney *v.* Pittsburgh, etc., R. Co., 38 W. Va. 570, 18 S. E. 748; Daniel *v.* Chesapeake, etc., R. Co., 36 W. Va. 397, 15 S. E. 162, 32 Am. St. Rep. 870, 16 L. R. A. 383; Madden *v.* Chesapeake, etc., R. Co., 28 W. Va. 610, 57 Am. Rep. 695].

Wisconsin.— Pease *v.* Chicago, etc., R. Co., 61 Wis. 163, 20 N. W. 908; Heine *v.* Chicago, etc., R. Co., 58 Wis. 525, 17 N. W. 420; Whitwam *v.* Wisconsin, etc., R. Co., 58 Wis. 408, 17 N. W. 124.

United States.— New England R. Co. *v.* Conroy, 175 U. S. 323, 20 S. Ct. 85, 44 L. ed. 181 [*overruling* Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 5 S. Ct. 184, 28 L. ed. 787, which was *distinguished* but in effect *overruled* in Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 13 S. Ct. 914, 37 L. ed. 772]; Slavens *v.* Northern Pac. R. Co., 97 Fed. 255, 38 C. C. A. 151 (section man); Wright *v.* Southern R. Co., 80 Fed. 260 (section man on hand-car); Northern Pac. R. Co. *v.* Hogan, 63 Fed. 102, 11 C. C. A. 51; Miller *v.* Baltimore, etc., R. Co., 17 Fed. Cas. No. 9,560. See also Northern Pac. R. Co. *v.* Smith, 59 Fed. 993, 8 C. C. A. 663. *Contra*, Canadian Pac. R. Co. *v.* Johnston, 61 Fed. 738, 9 C. C. A. 587, 25 L. R. A. 470; Union Pac. R. Co. *v.* Callaghan, 56 Fed. 998, 6 C. C. A. 205 [*affirmed* in 161 U. S. 91, 40 L. ed. 628]; Northern Pac. R. Co. *v.* Cavanaugh, 51 Fed. 517, 2 C. C. A. 358; Au *v.* New York, etc., R. Co., 29 Fed. 72.

See 34 Cent. Dig. tit. "Master and Servant," § 502.

A motorman and conductor on a street car are fellow servants. Houts *v.* St. Louis Transit Co., 108 Mo. App. 686, 84 S. W. 161; Savage *v.* Nassau Electric R. Co., 42 N. Y. App. Div. 241, 59 N. Y. Suppl. 225 [*affirmed* in 168 N. Y. 680, 61 N. E. 1134]. So a conductor is a fellow servant of a gripman and another conductor who are in charge of another car in the same train. North Chicago St. R. Co. *v.* Dudgeon, 69 Ill. App. 57.

54. *Arkansas.*— St. Louis, etc., R. Co. *v.* Shackelford, 42 Ark. 417.

California.— Fagundes *v.* Central Pac. R. Co., 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824.

Illinois.— Miller *v.* Ohio, etc., R. Co., 24 Ill. App. 326; Chicago, etc., R. Co. *v.* McDonald, 21 Ill. App. 409.

Maine.— Cassidy *v.* Maine Cent. R. Co., 76 Me. 488.

Maryland.— O'Connell *v.* Baltimore, etc., R. Co., 20 Md. 212, 83 Am. Dec. 549.

Missouri.— McGowan *v.* St. Louis, etc., R. Co., 61 Mo. 528. *Contra*, Miller *v.* Missouri Pac. R. Co., 109 Mo. 350, 19 S. W. 58, 32 Am. St. Rep. 673.

Texas.— Corona *v.* Galveston, etc., R. Co., (1891) 17 S. W. 384.

See 34 Cent. Dig. tit. "Master and Servant," § 502.

Contra.— Dobson *v.* New Orleans, etc., R. Co., 52 La. Ann. 1127, 27 So. 670; Burlington, etc., R. Co. *v.* Crockett, 19 Nebr. 138, 26 N. W. 921; Chicago, etc., R. Co. *v.* Lundstrom, 16 Nebr. 254, 20 N. W. 198, 49 Am. Rep. 718; Dobbin *v.* Richmond, etc., R. Co., 81 N. C. 446, 31 Am. Rep. 512.

55. Chicago, etc., R. Co. *v.* Brandau, 65 Ill. App. 150; Wilson *v.* Madison, etc., R. Co., 18 Ind. 226; Devoe *v.* New York Cent., etc., R. Co., 70 N. Y. App. Div. 495, 75 N. Y. Suppl. 136; Moore *v.* Jones, 15 Tex. Civ. App. 391, 39 S. W. 593. And see Whitmore *v.* Boston, etc., R. Co., 150 Mass. 477, 23 N. E. 220; Ewald *v.* Chicago, etc., R. Co., 70 Wis. 420, 36 N. W. 12, 591, 5 Am. St. Rep. 178.

An engineer also acting as conductor is a fellow servant of other members of the train crew who are injured by the negligence of the former. Newport News, etc., Co. *v.* Howe, 52 Fed. 362, 3 C. C. A. 121. But see Cowles *v.* Richmond, etc., R. Co., 84 N. C. 309, 37 Am. Rep. 620, where an engineer was held not a fellow servant where he was also acting as conductor. A regulation of a railroad company, clothing an engineer of a lone engine with the rights and duties of a conductor, within the rule that a train conductor represents the company, so as not to be a fellow servant with his subordinates. Stephani *v.* Southern Pac. Co., 19 Utah 196, 57 Pac. 34; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 13 S. Ct. 914, 37 L. ed. 772.

The head hostler employed at a roundhouse with no power to employ or discharge servants, the roundhouse being in charge of a foreman having such power, is a fellow servant of an engine wiper, and not a vice-principal. Smith *v.* St. Louis, etc., R. Co., 151 Mo. 391, 52 S. W. 378, 48 L. R. A. 368.

An injured conductor is a fellow servant

such as the fireman,[56] and brakeman.[57] Likewise the engineer in charge of a construction train is a fellow servant of laborers connected therewith who are injured through his negligence.[58] Under the different department rule, however,

of the engineer. Edmonson *v.* Kentucky Cent. R. Co., 105 Ky. 479, 49 S. W. 200, 448, 20 Ky. L. Rep. 1296, (1898) 46 S. W. 679.

56. *Alabama.*— Bull *v.* Mobile, etc., R. Co., 67 Ala. 206.

Illinois.— Sanks *v.* Chicago, etc., R. Co., 112 Ill. App. 385; Illinois Cent. R. Co. *v.* Butler, 69 Ill. App. 128; Illinois Cent. R. Co. *v.* Swisher, 61 Ill. App. 611; Illinois Cent. R. Co. *v.* Hosler, 45 Ill. App. 205.

Michigan.— Henry *v.* Lake Shore, etc., R. Co., 49 Mich. 495, 13 N. W. 832.

Montana.— Mulligan *v.* Montana Union R. Co., 19 Mont. 135, 47 Pac. 795.

New York.— Baird *v.* New York Cent., etc., R. Co., 64 N. Y. App. Div. 14, 71 N. Y. Suppl. 734 [*affirmed* in 172 N. Y. 637, 65 N. E. 1113].

South Carolina.— Murray *v.* South Carolina R. Co., 1 McMull. 385, 36 Am. Dec. 268.

Texas.— Gulf, etc., R. Co. *v.* Blohn, 73 Tex. 637, 11 S. W. 867, 4 L. R. A. 764.

United States.— Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 13 S. Ct. 914, 37 L. ed. 772; Shugart *v.* Atlanta, etc., R. Co., 133 Fed. 505, 66 C. C. A. 379; Briegal *v.* Southern Pac. Co., 98 Fed. 958, 39 C. C. A. 359; New Jersey, etc., R. Co. *v.* Young, 49 Fed. 723, 1 C. C. A. 428; Jones *v.* Yeager, 13 Fed. Cas. No. 7,510, 2 Dill. 64. *Contra*, see Ragsdale *v.* Northern Pac. R. Co., 42 Fed. 383.

See 34 Cent. Dig. tit. "Master and Servant," § 503.

57. *Colorado.*—Summerhays *v.* Kansas Pac. R. Co., 2 Colo. 434.

Illinois.— Illinois Cent. R. Co. *v.* Keen, 72 Ill. 512.

Iowa.— Brewster *v.* Chicago, etc., R. Co., 114 Iowa 144, 86 N. W. 221, 89 Am. St. Rep. 348.

Kansas.— Atchison, etc., R. Co. *v.* Moore, 29 Kan. 632.

Kentucky.— Louisville, etc., R. Co. *v.* Sullivan, 76 S. W. 525, 25 Ky. L. Rep. 854, holding that a brakeman is not a fellow servant of a fireman where the latter was temporarily performing the duties of an engineer. *Contra*, see Louisville, etc., R. Co. *v.* Moore, 83 Ky. 675; Louisville, etc., R. Co. *v.* Brooks, 83 Ky. 129, 4 Am. St. Rep. 135; Newport News, etc., R. Co. *v.* Eifort, 15 Ky. L. Rep. 600.

Louisiana.— Bell *v.* Globe Lumber Co., 107 La. 725, 31 So. 994; Wallis *v.* Morgan's Louisiana, etc., R., etc., Co., 38 La. Ann. 156.

New York.— Sherman *v.* Rochester, etc., R. Co., 17 N. Y. 163 [*affirming* 15 Barb. 574]; Moran *v.* New York Cent., etc., R. Co., 67 Barb. 96.

North Carolina.— Hobbs *v.* Atlantic, etc., R. Co., 107 N. C. 1, 12 S. E. 124, 9 L. R. A. 838.

South Carolina.— Evans *v.* Chamberlain, 40 S. C. 104, 18 S. E. 213; Boatwright *v.* Northeastern R. Co., 25 S. C. 128.

Tennessee.— Louisville, etc., R. Co. *v.* Martin, 87 Tenn. 398, 10 S. W. 772, 3 L. R. A. 282; Ragsdale *v.* Memphis, etc., R. Co., 3 Baxt. 426. Where both engineer and brakeman are acting under the orders of the conductor, they are fellow servants. East Tennessee, etc., R. Co. *v.* Smith, 89 Tenn. 114, 14 S. W. 1077; Nashville, etc., R. Co. *v.* Wheless, 10 Lea 741, 43 Am. Rep. 317. But where the brakeman is acting under the orders of the engineer they are not fellow servants. East Tennessee, etc., R. Co. *v.* Collins, 85 Tenn. 227, 1 S. W. 883.

Texas.— Houston, etc., R. Co. *v.* Myers, 55 Tex. 110; Houston, etc., R. Co. *v.* Willie, 53 Tex. 318, 37 Am. Rep. 756; International, etc., R. Co. *v.* Moore, 16 Tex. Civ. App. 51, 41 S. W. 70, holding that the engineer is a fellow servant where he has no authority to superintend, control, or direct the brakeman.

Virginia.— Eckles *v.* Norfolk, etc., R. Co., 96 Va. 69, 25 S. E. 545; McDonald *v.* Norfolk, etc., R. Co., 95 Va. 98, 27 S. E. 821; Norfolk, etc., R. Co. *v.* Brown, 91 Va. 668, 22 S. E. 496.

United States.— Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 31 Fed. 527; Hines *v.* Union Pac. R. Co., 12 Fed. Cas. No. 6,521, 2 Dill. 269 note. *Contra*, see Northern Pac. R. Co. *v.* Cavanaugh, 51 Fed. 517, 2 C. C. A. 358.

See 34 Cent. Dig. tit. "Master and Servant," § 503.

Compare Perdue *v.* Louisville, etc., R. Co., 100 Ala. 535, 14 So. 366.

Conductor acting as brakeman.— The engineer and fireman of a shifting train are fellow servants of the conductor, who, while attempting to act as brakeman, is injured by their negligence. Eckles *v.* Norfolk, etc., R. Co., 96 Va. 69, 25 S. E. 545.

Fireman acting as engineer.— Where a conductor, in the absence of the engineer, ordered the fireman to work the engine, the company was not liable where the fireman was competent, but through his negligent handling of the engine a brakeman was injured. Brazil *v.* Western North Carolina R. Co., 93 N. C. 313.

Waiver of rules.— An engineer in charge of a work train cannot waive an express rule of the company as to coupling cars by ordering a brakeman to go between the cars and couple them in a different way, so as to make the company liable for the negligence of the engineer. Richmond, etc., R. Co. *v.* Finley, 63 Fed. 228, 12 C. C. A. 595 [*reversing* 59 Fed. 419].

58. *Arkansas.*— St. Louis, etc., R. Co. *v.* Shackelford, 42 Ark. 417.

Florida.— Parrish *v.* Pensacola, etc., R. Co., 28 Fla. 251, 9 So. 696.

Illinois.— St. Louis, etc., R. Co. *v.* Britz, 72 Ill. 256; Miller *v.* Ohio, etc., R. Co., 24 Ill. App. 326; Chicago, etc., R. Co. *v.* Mc-

an engineer has been held not a fellow servant where the injured employee was not a member of the train crew but was engaged in a different line of work.[59] So an engineer has been held not a fellow servant of an inferior employee in those states where the superior servant rule is followed.[60]

(c) FIREMAN. The fireman is a fellow servant of a brakeman,[61] even where he is in charge of the engine and acting as engineer.[62] So the fireman is a fellow servant of a trackman.[63]

(d) BRAKEMAN. A brakeman is a fellow servant of a conductor injured by the negligence of the former,[64] and other trainmen;[65] and of an employee charged with the duty of placing sand in the sand boxes of the locomotives.[66] So he is a fellow servant of shovelers on the construction train.[67] And brakemen on the same train are fellow servants of each other,[68] although the negligent brakeman was at the time the acting conductor.[69]

Donald, 21 Ill. App. 409. But see Louisville, etc., Consol. R. Co. *v.* Hawthorn, 147 Ill. 226, 35 N. E. 534 [*affirming* 45 Ill. App. 635], holding that a member of a fence gang is not a fellow servant because engaged in a different department.

Indiana.— Evansville, etc., R. Co. *v.* Henderson, 134 Ind. 636, 33 N. E. 1021; Ohio, etc., R. Co. *v.* Tindall, 13 Ind. 366, 74 Am. Dec. 259.

Maryland.— O'Connell *v.* Baltimore, etc., R. Co., 20 Md. 212, 83 Am. Dec. 549.

Missouri.— Higgins *v.* Missouri Pac. R. Co., 104 Mo. 413, 16 S. W. 409, both engineer and laborer acting under direction of conductor.

New York.— Russell *v.* Hudson River R. Co., 17 N. Y. 134 [*reversing* 5 Duer 39].

Ohio.— Kumler *v.* Junction R. Co., 33 Ohio St. 150.

Texas.— Houston, etc., R. Co. *v.* Rider, 62 Tex. 267; Overton *v.* McCabe, 35 Tex. Civ. App. 133, 79 S. W. 861.

United States.— O'Connor *v.* Atchison, etc., R. Co., 137 Fed. 503, 70 C. C. A. 87.

See 34 Cent. Dig. tit. "Master and Servant," § 503.

59. Hobson *v.* New Mexico, etc., R. Co., 2 Ariz. 171, 11 Pac. 545 (holding that a teamster who hauls ties in the construction of a railroad is not the fellow servant of the engine driver of the train); Ryan *v.* Chicago, etc., R. Co., 60 Ill. 171, 14 Am. Rep. 32 (injured employee a common laborer in carpenter shop); Stuber *v.* Louisville, etc., R. Co., 113 Tenn. 305, 87 S. W. 411 (holding that a foreman of a water-supply on the division of a railroad whose duties relate to the physical condition of the water tanks located along the line is not a fellow servant of an engineer of a detached engine on which he is riding in the performance of his duties). See also Conine *v.* Olympia Logging Co., 36 Wash. 345, 78 Pac. 932.

60. Cincinnati, etc., R. Co. *v.* Palmer, 98 Ky. 382, 33 S. W. 199, 17 Ky. L. Rep. 998 (engineer and porter on train); Louisville, etc., R. Co. *v.* Collins, 2 Duv. (Ky.) 114, 87 Am. Dec. 486 (engineer and common laborer); Howard *v.* Chesapeake, etc., R. Co., 90 S. W. 950, 28 Ky. L. Rep. 891 (engineer of yard switch-engine and switchman); Pennsylvania Co. *v.* Hickley, 20 Ohio Cir. Ct. 668, 11 Ohio Cir. Dec. 379 (engineer and fireman, locomotive in sole charge of engineer).

Effect of duty of brakeman to obey signals given by engineer.— The brakeman and engineer are fellow servants, although the rules of the company require the brakeman to obey certain signals for working brakes when given by the engineer. Pittsburg, etc., R. Co. *v.* Ranney, 37 Ohio St. 665; Pittsburgh, etc., R. Co. *v.* Lewis, 33 Ohio St. 196.

61. Kersey *v.* Kansas City, etc., R. Co., 79 Mo. 362; Galveston, etc., R. Co. *v.* Faber, 63 Tex. 344; Louisville, etc., R. Co. *v.* Kelly, 63 Fed. 407, 11 C. C. A. 260.

62. Greenwald *v.* Marquette, etc., R. Co., 49 Mich. 197, 13 N. W. 513. *Contra*, Louisville, etc., R. Co. *v.* Moore, 83 Ky. 675.

63. Ellington *v.* Beaver Dam Lumber Co., 93 Ga. 53, 19 S. E. 21.

64. Brown *v.* Central Pac. R. Co., 72 Cal. 523, 14 Pac. 138, train broke in two.

65. Plant *v.* Grand Trunk R. Co., 27 U. C. Q. B. 78.

66. Louisville, etc., R. Co. *v.* Petty, 67 Miss. 255, 7 So. 351, 19 Am. St. Rep. 304.

67. St. Louis, etc., R. Co. *v.* Britz, 72 Ill. 256; Henry *v.* Staten Island R. Co., 81 N. Y. 373.

68. *Illinois.*— Chicago, etc., R. Co. *v.* Rush, 84 Ill. 570.

Kansas.— Higgins *v.* Atchison, etc., R. Co., 70 Kan. 814, 79 Pac. 679.

Nebraska.— Chicago, etc., R. Co. *v.* Howard, 45 Nebr. 570, 63 N. W. 872.

Ohio.— Hawks *v.* Lake Shore, etc., R. Co., 16 Ohio Cir. Ct. 377, 8 Ohio Cir. Dec. 414.

United States.— Au *v.* New York, etc., R. Co., 29 Fed. 72.

See 34 Cent. Dig. tit. "Master and Servant," § 505.

Laborers acting alternately as brakemen.— Where laborers, at work on a railroad in transporting dirt on small truck cars a short distance, alternately act as brakemen, they are fellow servants, and no recovery can be had for an injury to one by the neglect of the other, although the negligent laborer was acting as brakeman at the time of the accident, and the injured laborer was not. Casey *v.* Louisville, etc., R. Co., 84 Ky. 79.

69. Hayes *v.* Western R. Corp., 3 Cush. (Mass.) 270.

(e) YARD EMPLOYEES AND SWITCHMEN. A yard master may have such authority as to be a vice-principal,[70] although ordinarily he is not a vice-principal,[71] especially where he is subordinate to a train master.[72] Except where the negligence relates to some non-delegable duty of the master,[73] an employee whose work is connected with railroad yards generally cannot recover for injuries received from the negligence of train or other employees using the yard, they being fellow servants.[74] For instance the members of different switching crews are fellow servants.[75] *A fortiori* members of a switching crew, such as the engineer and brakeman,[76] are fellow servants, as are the employees on a switch or other engine whose negligence was the cause of injury to car employees or switchmen.[77] A hostler is a fellow servant of a yard helper injured by the negligence of the former.[78] So an engineer is a fellow servant of an injured engine cleaner[79] or other yard workman.[80] An engineer in charge of a switch engine is a fellow servant of a switch conductor.[81] The negligence of a switch tender, where the master has used due care in employing a competent person for the

70. Lyttle *v.* Chicago, etc., R. Co., 84 Mich. 289, 47 N. W. 571; Taylor *v.* Missouri Pac. R. Co., (Mo. 1891) 16 S. W. 206.

71. State *v.* South Baltimore Car Works, 99 Md. 461, 58 Atl. 447; Riola *v.* New York Cent., etc., R. Co., 100 N. Y. App. Div. 509, 91 N. Y. Suppl. 599, 97 N. Y. App. Div. 252, 89 N. Y. Suppl. 945; Cincinnati, etc., R. Co. *v.* Gray, 101 Fed. 623, 41 C. C. A. 535, 50 L. R. A. 47; Thomas *v.* Cincinnati, etc., R. Co., 97 Fed. 245.

A subordinate yard inspector is not a vice-principal. St. Louis, etc., R. Co. *v.* Rice, 51 Ark. 467, 11 S. W. 699, 4 L. R. A. 173.

72. Pennsylvania Co. *v.* Fishack, 123 Fed. 465, 59 C. C. A. 269.

73. See *supra*, IV, G, 4, a, (VII), (C).

74. Shuster *v.* Philadelphia, etc., R. Co., (Del. 1906) 62 Atl. 689; Sheets *v.* Chicago, etc., Coal R. Co., 139 Ind. 682, 39 N. E. 154; Spencer *v.* Ohio, etc., R. Co., 130 Ind. 181, 29 N. E. 915; Corcoran *v.* New York, etc., R. Co., 46 N. Y. App. Div. 201, 61 N. Y. Suppl. 672; Watts *v.* Hart, 7 Wash. 178, 34 Pac. 423, 771.

Injury to car inspector.— A yard master in charge of a yard and a brakeman and conductor are fellow servants of an injured car inspector employed in the yard to examine cars and determine whether they are in proper condition for use. Shuster *v.* Philadelphia, etc., R. Co., (Del. 1906) 62 Atl. 689.

Brakemen engaged in switching are fellow servants (Chicago, etc., R. Co. *v.* Rush, 84 Ill. 570), and a brakeman working with a switching crew is a fellow servant of the other members of the crew (Sheets *v.* Chicago, etc., Coal R. Co., 139 Ind. 682, 39 N. E. 154).

A yard clerk whose duty required him to go into the yard to get the record of the seals of the cars which each train left or was to take away was the fellow servant of an engineer and train hand whose negligence in backing down upon him of part of a freight train was the cause of his injury, so as to preclude a recovery against the railroad company. New York, etc., R. Co. *v.* Hyde, 56 Fed. 188, 5 C. C. A. 461.

Different departments.— In those states where the different department rule is followed, employees working in the yard are not necessarily fellow servants. Thus it has been held that a track repairer working on the tracks in the switchyard is not a fellow servant of a crew in charge of a switch train (Chicago, etc., R. Co. *v.* Shannon, 43 Ill. App. 540), and that members of the switching crew in charge of a different train than that on which deceased was employed as a brakeman are not fellow servants with him (Cincinnati, etc., R. Co. *v.* Hill, 89 S. W. 523, 28 Ky. L. Rep. 530).

75. Chicago, etc., R. Co. *v.* Driscoll, 176 Ill. 330, 52 N. E. 921 [*reversing* 70 Ill. App. 91]; Chicago, etc., R. Co. *v.* Hartley, 90 Ill. App. 284; Klees *v.* Chicago, etc., R. Co., 68 Ill. App. 244; Elgin, etc., R. Co. *v.* Malaney, 59 Ill. App. 114; O'Leary *v.* Wabash R. Co., 52 Ill. App. 641; Missouri Pac. R. Co. *v.* Lyons, 54 Nebr. 633, 75 N. W. 31. *Compare* Tierney *v.* Chicago Junction R. Co., 92 Ill. App. 631.

76. Warmington *v.* Atchison, etc., R. Co., 46 Mo. App. 159; Fowler *v.* Chicago, etc., R. Co., 61 Wis. 159, 21 N. W. 40.

77. Chicago, etc., R. Co. *v.* Stafford, 16 Ill. App. 84; Satterly *v.* Morgan, 35 La. Ann. 1166; Rutledge *v.* Missouri Pac. R. Co., 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327; Hudson *v.* Charleston, 55 Fed. 248.

In Kentucky, however, it has been held that a railroad yard switchman injured by the negligence of the locomotive engineer is not a fellow servant of the latter. Louisville, etc., R. Co. *v.* Sheets, 13 S. W. 248, 11 Ky. L. Rep. 781.

78. Clay *v.* Chicago, etc., R. Co., 56 Ill. App. 235; Chicago, etc., R. Co. *v.* Massig, 50 Ill. App. 666.

79. Spencer *v.* Ohio, etc., R. Co., 130 Ind. 181, 29 N. E. 915; Ewald *v.* Chicago, etc., R. Co., 70 Wis. 420, 36 N. W. 12, 591, 5 Am. St. Rep. 178.

80. Texas, etc., R. Co. *v.* Harrington, 62 Tex. 597; Beuhring *v.* Chesapeake, etc., R. Co., 37 W. Va. 502, 16 S. E. 435.

81. Columbus, etc., R. Co. *v.* Troesch, 68 Ill. 545, 18 Am. Rep. 578; Chicago, etc., R. Co. *v.* Henry, 7 Ill. App. 322.

position, resulting in injuries to other employees, is the negligence of a fellow servant.[82]

(f) Station Agent. A station agent having charge of the tracks in and about the station is not a vice-principal but is a fellow servant of a train employee.[83]

(5) Crews of Different Trains — (a) In General. Trainmen working on different trains for the same railroad company are generally held fellow servants,[84] and this rule applies to street railways.[85]

(b) Negligence of Conductor. The conductor in charge of one train is a fellow servant of other employees who are working on another train,[86] as for instance

82. *Arkansas.*— St. Louis, etc., R. Co. *v.* Brown, 67 Ark. 295, 54 S. W. 865.

California.— Fagundes *v.* Central Pac. R. Co., 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824; Brown *v.* Central Pac. R. Co., 68 Cal. 171, 7 Pac. 447, 8 Pac. 828.

Illinois.— See Swisher *v.* Illinois Cent. R. Co., 182 Ill. 533, 55 N. E. 555 [*affirming* 74 Ill. App. 164].

Indiana.— Slattery *v.* Toledo, etc., R. Co., 23 Ind. 81.

Massachusetts.— Gilman *v.* Eastern R. Corp., 10 Allen 233, 87 Am. Dec. 635; Farwell *v.* Boston, etc., R. Corp., 4 Metc. 49, 38 Am. Dec. 339.

Minnesota.— Roberts *v.* Chicago, etc., R. Co., 33 Minn. 218, 22 N. W. 389.

New York.— Sammon *v.* New York, etc., R. Co., 62 N. Y. 251; Tinney *v.* Boston, etc., R. Co., 62 Barb. 218 [*affirmed* in 52 N. Y. 632].

North Carolina.— Ponton *v.* Wilmington, etc., R. Co., 51 N. C. 245.

Rhode Island.— Parker *v.* New York, etc., R. Co., 18 R. I. 773, 30 Atl. 849.

Washington.— Stevick *v.* Northern Pac. R. Co., 39 Wash. 501, 81 Pac. 999.

United States.— Naylor *v.* New York Cent., etc., R. Co., 33 Fed. 801.

Canada.— Deverill *v.* Grand Trunk R. Co., 25 U. C. Q. B. 517.

See 34 Cent. Dig. tit. "Master and Servant," § 514.

Contra.— See Lake Shore, etc., R. Co. *v.* Feller, 21 Ohio Cir. Ct. 605, 11 Ohio Cir. Dec. 799.

A brakeman whose duty it is at a station to turn a switch to enable trains to pass is a fellow servant of the fireman on another train who is injured in a collision with the train on which the brakeman was working. Swisher *v.* Illinois Cent. R. Co., 182 Ill. 533, 55 N. E. 555 [*affirming* 74 Ill. App. 164].

83. Brown *v.* Minneapolis, etc., R. Co., 31 Minn. 553, 18 N. W. 834; Dealey *v.* Philadelphia, etc., R. Co., 2 Pa. Cas. 224, 4 Atl. 170; Brown *v.* Minneapolis, etc., R. Co., 2 Del. Co. (Pa.) 155; Gaffney *v.* New York, etc., R. Co., 15 R. I. 456, 7 Atl. 284; Toner *v.* Chicago, etc., R. Co., 69 Wis. 188, 31 N. W. 104, 33 N. W. 433. See also Galveston, etc., R. Co. *v.* Farmer, 73 Tex. 85, 11 S. W. 156.

84. *Delaware.*— Wheatley *v.* Philadelphia, etc., R. Co., 1 Marv. 305, 30 Atl. 660.

Georgia.— Cooper *v.* Mullins, 30 Ga. 146, 76 Am. Dec. 638.

Michigan.— Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 34 N. W. 659. But see Jarman *v.* Chicago, etc., R. Co., 98 Mich. 135, 57 N. W. 32.

Mississippi.— McMaster *v.* Illinois Cent. R. Co., 65 Miss. 264, 4 So. 59, 7 Am. St. Rep. 653.

New Jersey.— Hampton *v.* Camden, etc., R. Co., 10 N. J. L. J. 236.

Oregon.— Guthrie *v.* Southern Pac. R. Co., (1891) 26 Pac. 76; Miller *v.* Southern Pac. Co., 20 Oreg. 285, 26 Pac. 70.

United States.— Rosnev *v.* Erie R. Co., 135 Fed. 311, 68 C. C. A. 155; Maryland *v.* Baltimore, etc., R. Co., 16 Fed. Cas. No. 9,219, 1 Hughes 337.

See 34 Cent. Dig. tit. "Master and Servant," §§ 506–509.

Laborers unloading gravel train.—A laborer employed in loading and unloading a gravel train on a railroad, and the persons employed to run another train on the same road, which came in collision with the gravel train, whereby the laborer was killed, are servants employed in the same general business. Sullivan *v.* Toledo, etc., R. Co., 58 Ind. 26.

In Kentucky such servants are not fellow servants where the negligent employee is a superior of the injured employee. Kentucky Cent. R. Co. *v.* Ackley, 87 Ky. 278, 8 S. W. 691, 10 Ky. L. Rep. 170, 12 Am. St. Rep. 480.

The brakeman of one train is the fellow servant of employees on another train, injured by the negligence of the former. Wheatley *v.* Philadelphia, etc., R. Co., 1 Marv. (Del.) 305, 30 Atl. 660; Relyea *v.* Kansas City, etc., R. Co., 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817 (1892) 19 S. W. 1116.

85. Chicago City R. Co. *v.* Leach, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216 [*reversing* 104 Ill. App. 30] (conductor and motorman); Stocks *v.* St. Louis Transit Co., 106 Mo. App. 129, 79 S. W. 1176 (conductor and motorman); Hoover *v.* Carbon County Electric R. Co., 191 Pa. St. 146, 43 Atl. 74.

86. Pleasants *v.* Raleigh, etc., R. Co., 121 N. C. 492, 28 S. E. 267, 61 Am. St. Rep. 674. *Contra*, Ragsdale *v.* Northern Pac. R. Co., 42 Fed. 383.

Negligence of conductor in leaving open switch.— A railroad company is not liable for the injury of an employee on one train, caused by the negligence of the conductor in its employment on another train in leaving a switch open that it was his duty to close, as the conductor and the injured employee are fellow servants. Northern Pac. R. Co. *v.* Mase, 63 Fed. 114, 11 C. C. A. 63;

the engineer,[87] fireman,[88] brakeman,[89] baggage master,[90] or a laborer on a work train.[91] So conductors of electric railway cars on the same road are fellow servants.[92]

(c) NEGLIGENCE OF ENGINEER. An engineer whose negligence causes the injury is a fellow servant of employees on another train,[93] such as the engineer,[94] the fireman,[95] the brakeman,[96] or a laborer on a work train.[97]

(E) *Shipping* — (1) MEMBERS OF CREW. It has been stated that a ship-owner who provides a seaworthy vessel, properly equipped, and commanded by competent officers, has discharged his duty toward his subordinates and cannot be held liable for the mere neglect of the officers.[98] In other words negligence of an officer or other member of the crew in the performance of the details of the navigation during the voyage is that of a fellow servant for which the master is not liable.[99] All the members of the crew or employees working on or about the ship

St. Louis, etc., R. Co. *v.* Needham, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833.

87. Oakes *v.* Mase, 165 U. S. 363, 17 S. Ct. 345, 41 L. ed. 746. *Contra*, Louisville, etc., R. Co. *v.* Cavens, 9 Bush (Ky.) 559; Madden *v.* Chesapeake, etc., R. Co., 28 W. Va. 610, 57 Am. Rep. 695.

88. *New York.*— Slater *v.* Jewett, 85 N. Y. 61, 39 Am. Rep. 627; Herrington *v.* Lake Shore, etc., R. Co., 83 Hun 365, 31 N. Y. Suppl. 910.

Pennsylvania.— Cole *v.* Northern Cent. R. Co., 12 Pa. Co. Ct. 573.

South Carolina.— Jenkins *v.* Richmond, etc., R. Co., 39 S. C. 507, 18 S. E. 182, 39 Am. St. Rep. 750.

Wisconsin.— MacCarthy *v.* Whitcomb, 110 Wis. 113, 35 N. W. 707.

United States.— Crosby *v.* Lehigh Valley R. Co., 137 Fed. 765, 70 C. C. A. 199; Maher *v.* Union Pac., etc., R. Co., 106 Fed. 309, 45 C. C. A. 301.

See 34 Cent. Dig. tit. "Master and Servant," § 507.

89. Pittsburg, etc., R. Co. *v.* Devinney, 17 Ohio St. 197 (holding that brakeman injured by the conductor of another train is not within the superior servant rule); Louisville, etc., R. Co. *v.* Dillard, 114 Tenn. 240, 86 S. W. 313, 108 Am. St. Rep. 894, 69 L. R. A. 746; Northern Pac. R. Co. *v.* Poirier, 167 U. S. 48, 17 S. Ct. 741, 42 L. ed. 72; Becker *v.* Baltimore, etc., R. Co., 57 Fed. 188 (construing law of Indiana); Baltimore, etc., R. Co. *v.* Andrews, 50 Fed. 728, 1 C. C. A. 636, 17 L. R. A. 190.

Even in Tennessee a conductor of a passenger train is not a vice-principal, nor engaged in a different department of the master's service, in relation to a brakeman on a freight train, over whom he has no control, and with respect to whom he is charged with no duty of the master, but is a fellow servant with such brakeman. Louisville, etc., R. Co. *v.* Dillard, 114 Tenn. 240, 86 S. W. 313, 108 Am. St. Rep. 894, 69 L. R. A. 746.

90. Kerlin *v.* Chicago, etc., R. Co., 50 Fed. 185, construing law of Indiana.

91. Northern Pac. R. Co. *v.* Smith, 59 Fed. 993, 8 C. C. A. 663.

92. Baltimore Trust, etc., Co. *v.* Atlanta Traction Co., 69 Fed. 358.

93. St. Louis Southwestern R. Co. *v.* Henson, 61 Ark. 302, 32 S. W. 1079; Enright *v.* Toledo, etc., R. Co., 93 Mich. 409, 53 N. W. 536.

94. Ohio, etc., R. Co. *v.* Robb, 36 Ill. App. 627; Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977; Norfolk, etc., R. Co. *v.* Lindamood, (Va. 1892) 14 S. E. 694; Norfolk, etc., R. Co. *v.* Donnelly, 88 Va. 853, 14 S. E. 692; Van Avery *v.* Union Pac. R. Co., 35 Fed. 40.

It is immaterial that the engineers ordinarily run on different sections of the road. Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977.

95. *Alabama.*— Alabama, etc., R. Co. *v.* Waller, 48 Ala. 459.

Illinois.— Chicago, etc., R. Co. *v.* Thompson, 99 Ill. App. 277; Terre Haute, etc., R. Co. *v.* Leeper, 60 Ill. App. 194 [*affirmed* in 162 Ill. 215, 44 N. E. 492].

New York.— Smith *v.* New York Cent., etc., R. Co., 88 Hun 468, 34 N. Y. Suppl. 881.

Pennsylvania.— Cole *v.* Northern Cent. R. Co., 12 Pa. Co. Ct. 573.

United States.— Maher *v.* Union Pac., etc., R. Co., 106 Fed. 309, 45 C. C. A. 301; Howard *v.* Denver, etc., R. Co., 26 Fed. 837.

See 34 Cent. Dig. tit. "Master and Servant," § 508.

96. Louisville, etc., R. Co. *v.* Robinson, 4 Bush (Ky.) 507; Healey *v.* New York, etc., R. Co., 20 R. I. 136, 37 Atl. 676; Northern Pac. R. Co. *v.* Poirier, 167 U. S. 48, 17 S. Ct. 741, 42 L. ed. 72; Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 3 S. Ct. 322, 27 L. ed. 1003; Baltimore, etc., R. Co. *v.* Andrews, 50 Fed. 728, 1 C. C. A. 636, 17 L. R. A. 190. But see Morrison *v.* Northern Pac. R. Co., 34 Wash. 70, 74 Pac. 1064, holding that an engineer of a train which collided with a train on which plaintiff was brakeman, injuring plaintiff, was not necessarily a fellow servant with plaintiff; but, if such engineer was in control of his train to such an extent that he was permitted to order its movements, he was a vice-principal.

97. Corbett *v.* St. Louis, etc., R. Co., 26 Mo. App. 621; Northern Pac. R. Co. *v.* Smith, 59 Fed. 993, 8 C. C. A. 663.

98. Malone *v.* Western Transp. Co., 16 Fed. Cas. No. 8,996, 5 Biss. 315.

99. Olson *v.* Oregon Coal, etc., Co., 104 Fed. 574, 44 C. C. A. 51 (leaving hatchway open); Carlson *v.* United New York Sandy Hook Pilots' Assoc., 93 Fed. 468.

are generally fellow servants.[1] The master or captain of a vessel has been held a vice-principal,[2] although in many cases his negligence has been held that of a fellow servant.[3] A mate may be vested with such authority as to be a vice-principal,[4] although ordinarily he is a fellow servant of other members of the crew.[5] However, a pilot in command is not a fellow servant of a deck hand injured by a collision.[6]

(2) LONGSHOREMEN. A foreman of a gang of longshoremen is their fellow servant,[7] except where he is intrusted with the entire management of loading or

1. Brown *v.* Sennett, 68 Cal. 225, 9 Pac. 74, 58 Am. Rep. 8; Balleng *v.* New York, etc., Mail Steamship Co., 28 Misc. (N. Y.) 238, 58 N. Y. Suppl. 1074; Quebec Steamship Co. *v.* Merchant, 133 U. S. 375, 10 S. Ct. 397, 33 L. ed. 656; Red River Line *v.* Cheatham, 60 Fed. 517, 9 C. C. A. 124; Deehan *v.* The Bolivia, 59 Fed. 626; The City of Norwalk, 55 Fed. 98; The Sachem, 42 Fed. 66; The City of Alexandria, 17 Fed. 390; Morgan *v.* British Yukon Nav. Co., 11 Brit. Col. 316. But see Ingham *v.* John B. Honor Co., 113 La. 1040, 37 So. 963.

Employees on different boats, although owned by the same master, are not, it seems, fellow servants. Connolly *v.* Davidson, 15 Minn. 519, 2 Am. Rep. 154.

Different departments.— The carpenter, the porter, and the stewardess of a steamship, all of whom have signed shipping articles, are fellow servants, although the former belong to that division of the ship's company known as the "deck department," and the two latter to the "steward's department"; such divisions being made merely for convenience of administration, and the captain of the ship being in command of the whole. Quebec Steamship Co. *v.* Merchant, 133 U. S. 375, 10 S. Ct. 397, 33 L. ed. 656.

Employees held to be fellow servants: Engineer and oiler (Stevens *v.* San Francisco, etc., R. Co., 100 Cal. 554, 35 Pac. 165; McCarron *v.* Dominion Atlantic R. Co., 134 Fed. 762); winchman and servant working in the hold (Foley *v.* The Peninsular, 79 Fed. 972); kitchen boy and ship's carpenter (The Esperanza, 133 Fed. 1015); lumpers and calkers (Butler *v.* Townsend, 126 N. Y. 105, 26 N. E. 1017); cook and engineer (Grimsley *v.* Hankins, 46 Fed. 400); ship's carpenter and repairer (Saunders *v.* The Coleridge, 72 Fed. 676); and laborer employed in loading and engineer in charge of machinery operating in loading appliance (Wood *v.* New Bedford Coal Co., 121 Mass. 252).

A steamboat engineer is not a vice-principal. Elliot *v.* Chicago, etc., R. Co., 5 Dak. 523, 41 N. W. 758, 3 L. R. A. 363.

2. Woods *v.* Globe Nav. Co., 40 Wash. 376, 82 Pac. 401; Keating *v.* Pacific Steam-Whaling Co., 21 Wash. 415, 58 Pac. 224; Thompson *v.* Hermann, 47 Wis. 602, 3 N. W. 579, 32 Am. Rep. 784; The Car Float No. 16, 61 Fed. 364, 9 C. C. A. 521 [*reversing* 55 Fed. 98]; The Clatsop Chief, 8 Fed. 163, 7 Sawy. 274. See also McMahon *v.* Davidson, 12 Minn. 357.

3. Belt *v.* Henry Du Bois' Sons Co., 97 N. Y. App. Div. 392, 89 N. Y. Suppl. 1072; Larssen *v.* Delaware, etc., R. Co., 59 N. Y. App. Div. 202, 69 N. Y. Suppl. 352; Geoghegan *v.* Atlas Steamship Co., 3 Misc. (N. Y.) 224, 22 N. Y. Suppl. 749 [*affirmed* in 6 Misc. 127, 25 N. Y. Suppl. 1116 (*affirmed* in 146 N. Y. 369, 40 N. E. 507)]; Olson *v.* Oregon Coal, etc., Co., 96 Fed. 109; Wyman *v.* The Steamship Duart Castle, 6 Can. Exch. 387.

In all matters outside the scope of the master's employment and without the authority committed to him by maritime law, his misconduct is the risk assumed by the seamen for the consequences of which the owners of the vessel are not responsible. Gabrielson *v.* Waydell, 135 N. Y. 1, 31 N. E. 969, 31 Am. St. Rep. 793, 17 L. R. A. 228.

Master discharging ordinary duty of seamen.— The captain of a vessel, in so far as he is discharging the ordinary duty of a seaman in the navigation or management of a ship, is a fellow servant of other members of the crew. The Westport, 136 Fed. 391, 69 C. C. A. 235 [*reversing* 131 Fed. 815]; Sievers *v.* Eyre, 122 Fed. 734.

The master or captain is a fellow servant of the mate.— Caniff *v.* Blanchard Nav. Co., 66 Mich. 638, 33 N. W. 744, 11 Am. St. Rep. 541; Mathews *v.* Case, 61 Wis. 491, 21 N. W. 513, 50 Am. Rep. 151.

4. Gibson *v.* Canadian Pac. Nav. Co., 1 Alaska 407; Nelson *v.* S. Willey Steamship, etc., Co., 26 Wash. 548, 67 Pac. 237; Keating *v.* Pacific Steam-Whaling Co., 21 Wash. 415, 58 Pac. 224; Clowes *v.* The Frank and Willie, 45 Fed. 494.

5. Livingston *v.* Kodiak Packing Co., 103 Cal. 258, 37 Pac. 149; Benson *v.* Goodwin, 147 Mass. 237, 17 N. E. 517; Smith *v.* Empire Transp. Co., 89 Hun (N. Y.) 588, 35 N. Y. Suppl. 534; Olson *v.* Clyde, 32 Hun (N. Y.) 425; Hamilton *v.* The Walla Walla, 46 Fed. 198; The Egyptian Monarch, 36 Fed. 773; Halverson *v.* Nisen, 11 Fed. Cas. No. 5,970, 3 Sawy. 562. But see Dauh *v.* Northern Pac. R. Co., 18 Fed. 625; Peterson *v.* The Chandos, 4 Fed. 645, 6 Sawy. 544.

6. The Titan, 23 Fed. 413, 23 Blatchf. 177. See also Killien *v.* Hyde, 63 Fed. 172 [*reversed* on other grounds in 67 Fed. 365, 14 C. C. A. 418], holding that where the owner and master of a tug-boat left the wheel in charge of an inexperienced deck hand during a meal hour, and while he was absent there was a collision owing to the negligence of the deck hand, the owner and master could not avoid liability on the ground that the injured employee was a fellow servant of the deck hand.

7. Hart *v.* New York Floating Dry Dock

unloading.[8] So the members of a stevedore's crew are fellow servants.[9] Stevedores and longshoremen employed by the ship are fellow servants of the members of the crew where all are engaged in the common work of loading or unloading;[10] but not, it seems, where the latter had nothing to do with the loading or unloading;[11] and longshoremen are not fellow servants of members of the crew where they have no common master.[12]

b. Under Employers' Liability Acts[13] — (i) *General Considerations* — (A) *Nature and Construction of Statutes* — (1) In General.[14] In some of the states constitutional and statutory provisions materially modify, and in some cases abrogate, the common-law rule exempting a master from liability for injuries to a servant caused by the negligence of a fellow servant.[15] In some of the states the statute applies only to railroad companies, while in other states there are separate statutory provisions as to railroad companies.[16] Such statutes, while they are not to be strictly construed,[17] are not to be extended by implication inasmuch as they are in derogation of the common law;[18] and while they do not take away any common-law remedy the servant may have,[19] neither do they relieve him of that care and caution required of him by the common law.[20] The statutes do not make the master liable for an injury to an employee caused by a servant acting without authority wholly outside the scope of his employment.[21]

(2) Statutes Not Expressly Relating to Servants. Before the passage of the employers' liability acts in this country, certain statutes were enacted making railroad or other companies liable to "any person" injured by reason of their negligence in certain particulars, and it was held that such statutes did not change the common-law rule as to a master's non-liability to a servant for injuries due to the negligence of a fellow servant.[22] It was also held that general stat-

Co., 48 N. Y. Super. Ct. 460; The Louisiana, 74 Fed. 748, 21 C. C. A. 60.

8. Brown *v.* Sennett, 68 Cal. 225, 9 Pac. 74, 58 Am. Rep. 8. See also Mullan *v.* Philadelphia, etc., Mail Steamship Co., 78 Pa. St. 25, 21 Am. Rep. 2 [*reversing* 9 Phila. 16].

9. Burns *v.* Sennett, (Cal. 1896) 44 Pac. 1068; Tydeman *v.* Prince Line, 102 N. Y. App. Div. 279, 92 N. Y. Suppl. 446; Kelly *v.* Hogan, 37 Misc. (N. Y.) 761, 76 N. Y. Suppl. 913.

10. The Furnessia, 30 Fed. 878; The Harold, 21 Fed. 428.

Mode of payment.— It is immaterial that a member of the crew was paid by the month directly by the ship and the other men working under the stevedore were paid by the day through the stevedore, where all were paid by the ship. The Harold, 21 Fed. 428.

11. Sansol *v.* Compagnie Générale Transatlantique, 101 Fed. 390; Ferguson *v.* The Terrier, 73 Fed. 265.

12. See *supra*, IV, G, 3, b.

13. **In absence of statutory provisions** see *supra*, IV, G, 4, a.

14. **Constitutionality of statutes** see Constitutional Law, 8 Cyc. 1098, 1099.

15. See the statutes of the several states.

Who are employees, under such statutes, in general see Tennessee Coal, etc., Co. *v.* Hayes, 97 Ala. 201, 12 So. 98; Sloan *v.* Central Iowa R. Co., 62 Iowa 728, 16 N. W. 331; Houser *v.* Chicago, etc., R. Co., 60 Iowa 230, 14 N. W. 778, 46 Am. Rep. 65, foreman.

16. See the statutes of the several states.

17. Virginia, etc., R. Co. *v.* Clower, 102 Va. 867, 47 S. E. 1003.

18. Laughran *v.* Brewer, 113 Ala. 509, 21 So. 415; Beeson *v.* Busenback, 44 Kan. 669, 25 Pac. 48, 10 L. R. A. 839.

19. Ryalls *v.* Mechanics' Mills, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667.

20. Corning Steel Co. *v.* Pohlplatz, 29 Ind. App. 250, 64 N. E. 476; Sievers *v.* Eyre, 122 Fed. 734.

21. Overton *v.* Chicago, etc., R. Co., 111 Mo. App. 613, 86 S. W. 503; Bequette *v.* St. Louis, Iron Mountain, etc., R. Co., 86 Mo. App. 601.

22. *Iowa.*— Sullivan *v.* Mississippi, etc., R. Co., 11 Iowa 421.

Kansas.— Kansas Pac. R. Co. *v.* Salmon, 11 Kan. 83.

Maine.— Hare *v.* McIntire, 82 Me. 240, 19 Atl. 453, 17 Am. St. Rep. 476, 8 L. R. A. 450; Carle *v.* Bangor, etc., Canal, etc., Co., 43 Me. 269.

Mississippi.— New Orleans, etc., R. Co. *v.* Hughes, 49 Miss. 258.

Tennessee.— East Tennessee, etc., R. Co. *v.* Rush, 15 Lea 145.

United States.— Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, 3 S. Ct. 322, 27 L. ed. 1003.

See 34 Cent. Dig. tit. "Master and Servant," § 359.

Injuries inflicted on a "stranger."—A statute providing that railroad companies shall be liable for all injuries inflicted on a "stranger," in the operation of a road, is not applicable to employees injured by the negligence of those standing in the relation of fellow servants to them. New Orleans, etc., R. Co. *v.* Hughes, 49 Miss. 258.

utes giving a right of action for wrongful death did not abrogate the fellow servant rule.[23]

(3) EMPLOYERS AFFECTED.[24] The statutes in most of the states apply only where the employer is a corporation,[25] and have no application to an individual employer,[26] or to a partnership.[27]

(B) *Extraterritorial Effect.* The statutes have no extraterritorial effect and consequently do not create a right of action for an injury sustained by a servant in another state through the negligence of a fellow servant.[28]

(C) *Retroactive Effect.* The statutes do not apply to injuries received prior to the time of their taking effect.[29] So it has been held that the repeal of the statute will not affect an action for injuries which occurred while it was in force.[30]

(D) *Effect on Care Required of Fellow Servant.* The statute making companies liable to an employee for injuries caused by the negligence of a fellow servant do not have the effect of requiring the exercise of extraordinary diligence and care on the part of the latter.[31] It is sufficient if he exercises toward the injured servant that degree of care which prudent persons ordinarily exercise under like circumstances.[32]

(II) *STATUTES DECLARATORY OF COMMON LAW.* The statutes in some of the states are merely declaratory of the common-law rule as it existed in those states which have adopted neither the superior servant nor the different department rule.[33]

(III) *SUPERIOR SERVANT RULE*—(A) *General Statutes*—(1) RECOGNITION OF MINORITY RULE. In several of the states the superior servant rule which had been adopted in some of the states before the enactment of any statutes[34] is now recognized, at least in so far as railroad employees are concerned, with more or less qualifications, by statutory provisions.[35] Under these statutes, the master is

23. Atchison, etc., R. Co. *v.* Farrow, 6 Colo. 498; Elliott *v.* St. Louis, etc., R. Co., 67 Mo. 272; Proctor *v.* Hannibal, etc., R. Co., 64 Mo. 112 [*overruling* Connor *v.* Chicago, etc., R. Co., 59 Mo. 285; Schultz *v.* Pacific R. Co., 36 Mo. 13]; Miller *v.* Coffin, 19 R. I. 164, 36 Atl. 6. But see Casey *v.* Louisville, etc., R. Co., 84 Ky. 79; McKenna *v.* Missouri Pac. R. Co., 54 Mo. App. 161; Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13, 15 S. W. 214.

24. Railroad statutes see *infra*, IV, G, 4, b, (VIII).

25. Ft. Wayne Gas Co. *v.* Nieman, 33 Ind. App. 178, 71 N. E. 59.

26. Acme Bedford Stone Co. *v.* McPhetridge, 35 Ind. App. 79, 73 N. E. 838.

27. Beeson *v.* Busenbark, 44 Kan. 669, 25 Pac. 48, 10 L. R. A. 839.

28. Baltimore, etc., R. Co. *v.* Jones, 158 Ind. 87, 62 N. E. 994; Baltimore, etc., R. Co. *v.* Reed, 158 Ind. 25, 62 N. E. 488, 92 Am. St. Rep. 293.

29. Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494; Dunlap *v.* Barney Mfg. Co., 148 Mass. 51, 18 N. E. 599; Wright *v.* Southern R. Co., 123 N. C. 280, 31 S. E. 652; Rittenhouse *v.* Wilmington St. R. Co., 120 N. C. 544, 26 S. E. 922. But see Cannon *v.* Rowland, 34 Ga. 422, which seems to maintain the contrary doctrine.

30. Culpepper *v.* International, etc., R. Co., 90 Tex. 627, 40 S. W. 386 [*affirming* (Civ. App. 1897) 38 S. W. 818].

31. Hunt *v.* Chicago, etc., R. Co., 26 Iowa 363.

32. Missouri Pac. R. Co. *v.* Haley, 25 Kan. 35.

33. Leishman *v.* Union Iron Works, 148 Cal. 274, 83 Pac. 30, 3 L. R. A. N. S. 500; Donovan *v.* Ferris, 128 Cal. 48, 60 Pac. 519, 79 Am. St. Rep. 25; Mann *v.* O'Sullivan, 126 Cal. 61, 58 Pac. 375, 77 Am. St. Rep. 149; Stevens *v.* San Francisco, etc., R. Co., 100 Cal. 554, 35 Pac. 165; Daves *v.* Southern Pac. Co., 98 Cal. 19, 32 Pac. 708, 35 Am. St. Rep. 133; Congrave *v.* Southern Pac. R. Co., 88 Cal. 360, 26 Pac. 175; Elliott *v.* Chicago, etc., R. Co., 5 Dak. 523, 41 N. W. 758, 3 L. R. A. 363; Northern Pac. R. Co. *v.* Hambley, 154 U. S. 349, 14 S. Ct. 983, 38 L. ed. 1009 (Dakota statute); Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642, 6 S. Ct. 590, 29 L. ed. 755 (Dakota statute); Northern Pac. R. Co. *v.* Hogan, 63 Fed. 102, 11 C. C. A. 51 (North Dakota statute). See also Lundberg *v.* Shevlin-Carpenter Co., 68 Minn. 135, 70 N. W. 1078; Hess *v.* Adamant Mfg. Co., 66 Minn. 79, 68 N. W. 774.

34. See *supra*, IV, G, 4, a, (VI).

35. *Arkansas.*— St. Louis, etc., R. Co. *v.* Thurmond, 70 Ark. 411, 68 S. W. 488; St. Louis, etc., R. Co. *v.* McCain, 67 Ark. 377, 55 S. W. 165; St. Louis, etc., R. Co. *v.* Touhey, 67 Ark. 209, 54 S. W. 577, 77 Am. St. Rep. 109; St. Louis, etc., R. Co. *v.* Rickman, 65 Ark. 138, 45 S. W. 56.

Mississippi.— Southern R. Co. *v.* Cheaves, 84 Miss. 565, 36 So. 691, holding that such employee is entitled to recover, whether he is at the time obeying any special command born of the exigencies of the occasion, or is

liable without regard to whether the superior servant was, at the time of the negligent act, performing the duties of a superior or of a common laborer.[36]

(2) Who Are Superior Servants. The test is not the power to hire and discharge.[37] It is not necessary that the negligent servant was in charge or control of the injured servant if in fact the former was a servant in charge or control of other servants.[38] The following have been held superior servants within the statute so as to make the master liable for their negligence: Engine foreman;[39] foreman of switching crew;[40] foreman of section gang;[41] foreman of construction work on bridge;[42] conductor and engineer where brakeman is injured;[43] engineer

engaged merely and simply in the discharge of his ordinary routine duties; such superior officer or person also being engaged in discharging simply the primary duties of his station, and not the positive duties of the master.

Missouri.— Haworth *v.* Kansas City Southern R. Co., 94 Mo. App. 215, 68 S. W. 111.

Montana.— Wastl *v.* Montana Union R. Co., 24 Mont. 159, 61 Pac. 9; Kelley *v.* Fourth of July Min. Co., 16 Mont. 484, 41 Pac. 273.

Ohio.— Cleveland, etc., R. Co. *v.* Shanower, 70 Ohio St. 166, 71 N. E. 279; Cincinnati, etc., R. Co. *v.* Margrat, 51 Ohio St. 130, 37 N. E. 11.

Oregon.— Sorenson *v.* Oregon Power Co., 47 Oreg. 24, 82 Pac. 10.

South Carolina.— Rutherford *v.* Southern R. Co., 56 S. C. 446, 35 S. E. 136; Bussey *v.* Charleston, etc., R. Co., 52 S. C. 438, 30 S. E. 477.

United States.— Southern Pac. Co. *v.* Schoer, 114 Fed. 466, 52 C. C. A. 268, 57 L. R. A. 707 (construing Utah statute); Hunter *v.* Kansas City, etc., Bridge Co., 85 Fed. 379, 29 C. C. A. 206 (construing Arkansas statute); Peirce *v.* Van Dusen, 78 Fed. 693, 24 C. C. A. 280 (construing Ohio statute); Baltimore, etc., R. Co. *v.* Camp, 65 Fed. 952, 13 C. C. A. 233.

See 34 Cent. Dig. tit. "Master and Servant," § 354 *et seq.*

In **Mississippi** constitutional and statutory provisions modify but do not abrogate the common-law rule inasmuch as they make the master liable only where the injuries result from the negligence of a superior agent or officer or of a person having the right to control or direct the services of the party injured. Fenwick *v.* Illinois Cent. R. Co., 100 Fed. 247, 40 C. C. A. 369. Although originally the statute was confined to the employees of railroad companies, it is now held to include the employees of all corporations. Brooks *v.* Mississippi Cotton Oil Co., 76 Miss. 874, 25 So. 479. Under such statutes the common-law rule does not apply where the negligent servant is a superior agent or officer (Fenwick *v.* Illinois Cent. R. Co., *supra*. See also Moore *v.* Illinois Cent. R. Co., 135 Fed. 67, 67 C. C. A. 541), or is one having the right to control or direct the services of the person injured (Southern R. Co. *v.* Cheaves, 84 Miss. 565, 36 So. 691; Cheaves *v.* Southern R. Co., 82 Miss. 48, 33 So. 649, 34 So. 385).

Nature of negligent act.— The negligence of a fellow servant for which the employer is made liable, under the Ohio statute, is not merely negligence in the performance of a duty imposed upon the master personally but negligence in the performance of work pertaining to the negligent employee and others in the same work. Peirce *v.* Van Dusen, 78 Fed. 693, 24 C. C. A. 280.

In **Texas** the superior servant rule is adopted by statute as to railways. Texas, etc., R. Co. *v.* Carlin, 189 U. S. 354, 23 S. Ct. 585, 47 L. ed. 849 [*affirming* 111 Fed. 777, 49 C. C. A. 605]. And in that state a superior servant having the power to control may recover of the master for injuries caused by the negligence of the workmen under his control. Galveston, etc., R. Co. *v.* Perry, (Tex. Civ. App. 1905) 85 S. W. 62. *Contra*, see Moore *v.* Jones, 15 Tex. Civ. App. 391, 39 S. W. 593.

In **Ohio**, under a provision of the statute that every person in the employ of a railroad company having charge or control of employees in any separate branch or department is not a fellow servant of employees in any other branch or department who have no power to direct or control in the branch or department in which they are employed, the engineer of one train is not a fellow servant of a brakeman on another train of the same company (Cincinnati, etc., R. Co. *v.* Margrat, 51 Ohio St. 130, 37 N. E. 11), or a fireman in a different branch of service (Erie R. Co. *v.* Kane, 118 Fed. 223, 55 C. C. A. 129).

36. Missouri, etc., R. Co. *v.* Dean, (Tex. Civ. App. 1905) 89 S. W. 797; Southern Pac. Co. *v.* Schoer, 114 Fed. 466, 52 C. C. A. 268, 57 L. R. A. 707, construing Utah statute.

37. St. Louis, etc., R. Co. *v.* Touhey, 67 Ark. 209, 54 S. W. 577, 77 Am. St. Rep. 109.

38. St. Louis, etc., R. Co. *v.* McCain, 67 Ark. 377, 55 S. W. 165.

39. St. Louis, etc., R. Co. *v.* Touhey, 67 Ark. 209, 54 S. W. 577, 77 Am. St. Rep. 109.

40. St. Louis, etc., R. Co. *v.* McCain, 67 Ark. 377, 55 S. W. 165.

41. St. Louis, etc., R. Co. *v.* McCain, 67 Ark. 377, 55 S. W. 165; St. Louis, etc., R. Co. *v.* Rickman, 65 Ark. 138, 45 S. W. 56; Haworth *v.* Kansas City Southern R. Co., 84 Mo. App. 215, 68 S. W. 111; Sorenson *v.* Oregon Power Co., 47 Oreg. 24, 82 Pac. 10.

42. San Antonio, etc., R. Co. *v.* McDonald, (Tex. Civ. App. 1895) 31 S. W. 72.

43. Crisswell *v.* Montana Cent. R. Co., 17 Mont. 189, 42 Pac. 767; Moore *v.* Illinois

where locomotive fireman is injured;[44] train despatcher where engineer is injured;[45] and an engineer operating engine engaged in removing an obstruction and having charge of the other employees engaged on the work.[46] On the other hand the following employees have been held not superior servants or officers: Carpenter engaged with laborers in setting posts along a railroad who works under the direction of foreman in charge of the work;[47] temporary foreman of switching crew who had no authority to command the switchmen to pursue any particular line of action;[48] telegraph operator where engineer is injured;[49] and conductor having no authority over the injured engineer in matters affecting the engine.[50]

(B) *Superintendents* — (1) In General. In some jurisdictions the statute imposes liability upon the master where the injury to a servant is caused by the negligence of a co-servant intrusted with and exercising superintendence.[51] In other states the master is made liable only for the negligence of one whose "principal or sole duty" is that of superintendence, while intrusted with and exercising superintendence.[52] These statutes, in so far as adopted in those states which have rejected the superior servant doctrine, change the common-law rule and enlarge the liability of the master.[53]

(2) Who Are Superintendents. A superintendent has been defined as a servant having control, with the power of authority, over other servants.[54] It has been held that it is not necessary to show that the superintendence was over the servant who complains of the negligence of the person intrusted with it.[55] In Massachusetts and other states adopting its statute, the person must be one whose "sole or principal" duty is that of superintendence.[56] Under such statutes an

Cent. R. Co., 135 Fed. 67, 67 C. C. A. 541, construing Mississippi statute. But see Cleveland, etc., R. Co. *v.* Shanower, 70 Ohio St. 166, 71 N. E. 279, holding that an engineer is not made a superior in direction and control of a brakeman by the accidental parting of the train *en route*, the conductor being on one section while the engineer and brakeman are on another.

But an engineer is not a superior employee having the right to control or direct other employees so as to make him a fellow servant of a brakeman, because he had the power by signal to direct the brakeman to apply the brakes. Evans *v.* Louisville, etc., R. Co., 70 Miss. 527, 12 So. 581; Texas Cent. R. Co. *v.* Frazier, 90 Tex. 33, 36 S. W. 432 [*reversing* (Civ. App. 1896) 34 S. W. 664].

Under the Montana statute making a railroad company liable to a servant or employee for negligence sustained by default or wrongful act of his superior, as if such servant or employee was a passenger, the company is liable for an injury to a fireman in its employment on one train caused by the negligence of the conductor in its employment on another train. Northern Pac. R. Co. *v.* Mase, 63 Fed. 114, 11 C. C. A. 63; Ragsdale *v.* Northern Pac. R. Co., 42 Fed. 383.

44. Cheaves *v.* Southern R. Co., 82 Miss. 48, 33 So. 649, 34 So. 385; Cincinnati, etc., R. Co. *v.* Margrat, 51 Ohio St. 130, 37 N. E. 11; Houston, etc., R. Co. *v.* Stuart, (Tex. Civ. App. 1898) 48 S. W. 799. See also Galveston, etc., R. Co. *v.* Ford, (Tex. Civ. App. 1898) 46 S. W. 77.

45. Baltimore, etc., R. Co. *v.* Camp, 65 Fed. 952, 13 C. C. A. 233.

46. Galveston, etc., R. Co. *v.* Roth, (Tex. Civ. App. 1905) 84 S. W. 1112.

47. Hunter *v.* Kansas City, etc., Bridge Co., 85 Fed. 379, 29 C. C. A. 206, construing Arkansas statute.

48. Fenwick *v.* Illinois Cent. R. Co., 100 Fed. 247, 40 C. C. A. 369.

49. Baltimore, etc., R. Co. *v.* Camp, 65 Fed. 952, 13 C. C. A. 233.

50. Culpepper *v.* International, etc., R. Co., 90 Tex. 627, 40 S. W. 386 [*reversing* on this point (Civ. App. 1897) 38 S. W. 818].

51. Postal Tel. Cable Co. *v.* Hulsey, 132 Ala. 444, 31 So. 527; Sheffield *v.* Harris, 101 Ala. 564, 14 So. 357; Gunn *v.* Le Roi Min. Co., 10 Brit. Col. 59; Choate *v.* Ontario Rolling Mill Co., 27 Ont. App. 155; Carnahan *v.* Robert Simpson Co., 32 Ont. 328. And see the statutes of the several states.

52. See Hayward *v.* Key, 138 Fed. 34, 70 C. C. A. 402, construing New York statute. And see the statutes of the several states.

53. Bellegarde *v.* Union Bag, etc., Co., 90 N. Y. App. Div. 577, 86 N. Y. Suppl. 72 [*affirming* 41 Misc. 106, 83 N. Y. Suppl. 925].

54. Malcolm *v.* Fuller, 152 Mass. 160, 25 N. E. 83.

An engineer actually operating engines with his own hands and the aid of a helper, as directed by persons superior to him in the common employment, is not a person having superintendence intrusted to him so as to make the master responsible to one other than the helper for his negligence. Dantzler *v.* De Bardeleben Coal, etc., Co., 101 Ala. 309, 14 So. 10, 22 L. R. A. 361.

55. Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88; Brady *v.* New York, etc., R. Co., 184 Mass. 225, 68 N. E. 227.

56. Murphy *v.* New York, etc., R. Co., 187 Mass. 18, 72 N. E. 330; Mahoney *v.* Bay

employee may be a superintendent, although there is a general superintendent over him,[57] or although he incidentally performs manual labor a part of the time;[58] but where he does the same work as the other laborers,[59] or works with his hands in doing manual labor the greater portion of his time,[60] he is ordinarily not one whose "sole or principal" duty is that of superintendence, although an employee may constantly labor with his hands and yet be one whose principal duty is that of superintendence.[61] The fact that the negligent employee has the charge or control of the ways, works, machinery, or plant or a part thereof does not of itself make him a superintendent within the statute.[62]

(3) Nature of Negligent Act. The act must be that of a superintendent "exercising superintendence."[63] In other words, when the negligence of a superintendent is relied upon, the negligence complained of must occur not only during the superintendence but substantially in the exercise of it.[64] An act may

State Pink Granite Co., 184 Mass. 287, 68 N. E. 234; Trimble *v.* Whitin Mach. Works, 172 Mass. 150, 51 N. E. 463; Cavagnaro *v.* Clark, 171 Mass. 359, 50 N. E. 542; Mahoney *v.* New York, etc., R. Co., 160 Mass. 573, 36 N. E. 588; Prendible *v.* Connecticut River Mfg. Co., 160 Mass. 131, 35 N. E. 675; Roseback *v.* Ætna Mills, 158 Mass. 379, 33 N. E. 577; Shepard *v.* Boston, etc., R. Co., 158 Mass. 174, 33 N. E. 508; Miller *v.* Solvay Process Co., 109 N. Y. App. Div. 135, 95 N. Y. Suppl. 1020; McLaughlin *v.* Interurban St. R. Co., 101 N. Y. App. Div. 134, 91 N. Y. Suppl. 883; Randall *v.* Holbrook Contracting Co., 95 N. Y. App. Div. 336, 88 N. Y. Suppl. 681.

The conductor of a street car on which plaintiff, a conductor off duty, was injured, is not a person whose sole or principal duty was that of superintendence. McLaughlin *v.* Interurban St. R. Co., 101 N. Y. App. Div. 134, 91 N. Y. Suppl. 883. So a conductor of a railroad train is not a superintendent nor one "entrusted with or exercising superintendence . . . in the absence of such superintendent" where he is obeying strict orders as to the running of the train. Crosby *v.* Lehigh Valley R. Co., 137 Fed. 765, 70 C. C. A. 199, construing New York statute.

A foreman of a section gang, who does no work, but only looks on to see how it is done, is a person exercising superintendence. Davis *v.* New York, etc., R. Co., 159 Mass. 532, 34 N. E. 1070.

A yard master has been held a superintendent. Brady *v.* New York, etc., R. Co., 184 Mass. 225, 68 N. E. 227.

Other employees not superintendents.— An employee whose duty it is to signal another employee in charge of a crane to operate the crane, and who gives directions for the carrying out of the orders of a superior, is not a superintendent. Quinlan *v.* Lackawanna Steel Co., 107 N. Y. App. Div. 176, 94 N. Y. Suppl. 942. One who had charge of men engaged in unloading coal from cars and who checked the cars and helped in the unloading was not as to the others exercising superintendence. Miller *v.* Solvay Process Co., 109 N. Y. App. Div. 135, 95 N. Y. Suppl. 1020.

57. McPhee *v.* Scully, 163 Mass. 216, 39 N. E. 1007; Faith *v.* New York Cent., etc., R. Co., 109 N. Y. App. Div. 222, 95 N. Y. Suppl. 774; McBride *v.* New York Tunnel Co., 101 N. Y. App. Div. 448, 92 N. Y. Suppl. 282.

58. Pierce *v.* Arnold Print Works, 182 Mass. 260, 65 N. E. 368; Gardner *v.* New England Tel., etc., Co., 170 Mass. 156, 48 N. E. 937; Reynolds *v.* Barnard, 168 Mass. 226, 46 N. E. 703; Crowley *v.* Cutting, 165 Mass. 436, 43 N. E. 197; Malcolm *v.* Fuller, 152 Mass. 160, 25 N. E. 83.

Performance of manual labor to show the method of operating.— Although the laying of a conduit is under the general charge of a master mechanic, yet one who is a foreman of a particular portion of the work, who is generally present, gives orders under which the work is done, employs and discharges men, and only performs manual labor to show the method of operating, is a superintendent, for whose negligence the master is liable under the Employers' Liability Act. Pierce *v.* Arnold Print Works, 182 Mass. 260, 65 N. E. 368.

59. Mulligan *v.* McCaffery, 182 Mass. 420, 65 N. E. 831; Adasken *v.* Gilbert, 165 Mass. 443, 43 N. E. 199; Dowd *v.* Boston, etc., R. Co., 162 Mass. 185, 38 N. E. 440.

Servant giving direction in absence of superintendent.— A servant who merely gives his fellow laborers directions as to their common service, in the absence of the superintendent, is not a superintendent. Dowd *v.* Boston, etc., R. Co., 162 Mass. 185, 38 N. E. 440.

60. Cunningham *v.* Lynn, etc., R. Co., 170 Mass. 298, 49 N. E. 440; Reynolds *v.* Barnard, 168 Mass. 228, 46 N. E. 703; O'Neil *v.* O'Leary, 164 Mass. 387, 41 N. E. 662; O'Brien *v.* Rideout, 161 Mass. 170, 36 N. E. 792.

61. Canney *v.* Walkeine, 113 Fed. 66, 51 C. C. A. 53, 58 L. R. A. 33, construing Massachusetts statute.

62. Shaffers *v.* General Steam Nav. Co., 10 Q. B. D. 356, 47 J. P. 327, 52 L. J. Q. B. 260, 48 L. T. Rep. N. S. 228, 31 Wkly. Rep. 656. And see Roseback *v.* Ætna Mills, 158 Mass. 379, 33 N. E. 577.

63. See the statutes of the several states.

64. Freeman *v.* Sloss Sheffield Steel, etc., Co., 137 Ala. 481, 34 So. 612; Western R. Co. *v.* Milligan, 135 Ala. 205, 33 So. 438, 93

be one of superintendence where it relates to the furnishing a safe place to work or safe appliances or to the keeping of them in a safe condition.[65] On the other hand the act is not one of superintendence where, at the time and in doing the act complained of, he is engaged in mere manual labor which is the duty of a common workman.[66] But it is held that he is engaged in an act of superintendence, although he is at the time of the injury performing an act of manual labor, where it is done pursuant to directing the work and in furtherance

Am. St. Rep. 31; Southern R. Co. *v.* Shields, 121 Ala. 460, 25 So. 811, 77 Am St. Rep. 66; Dantzler *v.* De Bardelehen Coal, etc., Co., 101 Ala. 309, 14 So. 10, 22 L. R. A. 361; Meagher *v.* Crawford Laundry Mach. Co., 187 Mass. 586, 73 N. E. 853; Brady *v.* New York, etc., R. Co., 184 Mass. 225, 68 N. E. 227; Joseph *v.* George C. Whitney Co., 177 Mass. 176, 58 N. E. 639; McCoy *v.* Westborough, 172 Mass 504, 52 N. E. 1064; Green *v.* Smith, 169 Mass. 485, 48 N. E. 621; Burns *v.* Washburn, 160 Mass. 457, 36 N. E. 199; Fitzgerald *v.* Boston, etc., R. Co., 156 Mass. 293, 31 N. E. 7; McHugh *v.* Manhattan R. Co., 179 N. Y. 378, 72 N. E. 312; Crosby *v.* Lehigh Valley R. Co., 137 Fed. 765, 70 C. C. A. 199, construing New York statute.

Illustrations of acts not those of superintendence.— For a superintendent, when telling an employee to brush off the table of a machine in which were revolving knives, to tickle him, knowing that he was ticklish, whereby he was upset, throwing his hand among the knives, is not an act of superintendence, so as to make the master liable. Western R. Co. *v.* Milligan, 135 Ala. 205, 33 So. 438, 93 Am. St. Rep. 31.

Illustrations of acts of superintendence.— General control of the work of digging a sewer trench was given the superintendent of sewers of a town, and, while workmen were digging it, he walked to the edge of the bank, and, while looking at them, the bank caved, injuring a workman below. It was held that he was engaged in an act of superintendence. McCoy *v.* Westborough, 172 Mass. 504, 52 N. E. 1064. A superintendent, who has authority to continue the work in which he is engaged with the appliance at hand, or to get a suitable appliance, or to employ some other adequate means to do the work, is engaged in an act of superintendence, although he chooses to continue to use means originally employed by servants engaged in carrying out his initial order. Meagher *v.* Crawford Laundry Mach. Co., 187 Mass. 586, 73 N. E. 853.

Failure to observe rules.— The failure of a superintendent to observe the rules of the company, resulting in an injury to an inferior servant, is an act in the exercise of superintendence. Richmond, etc., R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577.

65. Illinois Car, etc., Co. *v.* Walch, 132 Ala. 490, 31 So. 470; Drennen *v.* Smith, 115 Ala. 396, 22 So. 442; Solari *v.* Clark, 187 Mass. 229, 72 N. E. 958, 68 L. R. A. 243; McCabe *v.* Shields, 175 Mass. 438, 56 N. E. 699; Hennessy *v.* Boston, 161 Mass. 502, 37 N. E. 668; McHugh *v.* Manhattan R. Co., 179 N. Y. 378, 72 N. E. 312; Braunberg *v.* Solomon, 102 N. Y. App. Div. 330, 92 N. Y. Suppl. 506.

Starting train while servant making couplings.— Where one, in the absence of the regular train despatcher, had been accustomed for three years to perform his duties, his act in starting a train while plaintiff's decedent was coupling or attempting to withdraw to a place of safety was not a mere detail of work, under the Employers' Liability Act, but that of a superintendent, for whose negligence the railway would be liable. McHugh *v.* Manhattan R. Co., 179 N. Y. 378, 72 N. E. 312.

Falling of staging.— The injury to an employee by the falling of a staging on which he was carrying material is the result of negligence in the exercise of superintendency; the superintendent not having performed his duty of not allowing the staging to be used till he had used due diligence to see that it was properly put together and secured, which would have disclosed that the flooring rested merely on an insecurely nailed stay, with a knot in it. Solari *v.* Clark, 187 Mass. 229, 72 N. E. 958, 68 L. R. A. 243.

66. Cashman *v.* Chase, 156 Mass. 342, 31 N. E. 4.

Illustrations.— A car shifter, whose only duties were to get cars ready for conductors and motormen, starting the turn-table at a car house, was not engaged in an act of superintendency, in so turning the table. Whelton *v.* West End St. R. Co., 172 Mass. 555, 52 N. E. 1072. The putting a can of powder on the edge of the pit, whence it was accidentally knocked into the pit, causing an explosion, is not an act of superintendence. Riou *v.* Rockport Granite Co., 171 Mass. 162, 50 N. E. 525. A street railway company is not liable for the negligence of its paint-shop superintendent while acting as motorman, in shifting cars, whereby a shop employee who was assisting in the work by guiding the trolley was injured. Brittain *v.* West End St. R. Co., 168 Mass. 10, 46 N. E. 111. A superintendent of a foundry, in setting up a mold for a servant to pour melted iron therein, was not exercising superintendence. Whittaker *v.* Bent, 167 Mass. 588, 46 N. E. 121. The act of holding the foot of a ladder while another is upon it, to prevent its slipping, and negligently letting it slip, is not an act of superintendence. Hoffman *v.* Holt, 186 Mass. 572, 72 N. E. 87. An act of a superintendent in negligently turning on a current of electricity is not an act of superintendence. Quinlan *v.* Lackawanna Steel Co., 107 N. Y. App. Div. 176, 94 N. Y. Suppl. 942.

thereof.[67] An act done voluntarily while superintending, where not within the scope of his duties and without the direction or consent of the master, is not an act of superintendence.[68]

(c) *Negligence of Person to Whose Orders Injured Employee Bound to Conform.* Some of the statutes impose liability upon the master, whether a railroad or other corporation, for injuries resulting from the negligence of any person in the service of the corporation to whose orders or direction the injured employee at the time of the injury was bound to conform and did conform.[69] Under such statutes it is held that there can be no recovery unless the injured employee is acting under some special order in respect to the particular service in which he was engaged when injured, as distinguished from general instructions as to duties connected with his employment generally.[70] The injury must be caused by the

67. Meagher *v.* Crawford Laundry Mach. Co., 187 Mass. 586, 73 N. E. 853; Roche *v.* Lowell Bleachery, 181 Mass. 480, 63 N. E. 943; O'Brien *v.* Look, 171 Mass. 36, 50 N. E. 458; McBride *v.* New York Tunnel Co., 101 N. Y. App. Div. 448, 92 N. Y. Suppl. 282.

Starting engine.— Where the negligence complained of consisted in starting an engine under the existing circumstances, and not in the manner in which the engine was started, the decision of defendant's superintendent that the engine should be started was an act of superintendence, for which the master was responsible, although the superintendent also did the manual work of setting the engine in motion. McPhee *v.* New England Structural Co., 188 Mass. 141, 74 N. E. 303.

Act done in accordance with faulty method adopted as superintendent.— An employer is responsible for injuries to one of his workmen who is injured by the negligent act of the superintendent, which act was done in the capacity of an employee, but in accordance with a faulty method adopted by him as superintendent. O'Brien *v.* Look, 171 Mass. 36, 50 N. E. 458.

68. Shea *v.* Wellington, 163 Mass. 364, 40 N. E. 173.

69. Louisville, etc., R. Co. *v.* Wagner, 153 Ind. 420, 53 N. E. 927; Wilkinson Co-operative Glass Co. *v.* Dickinson, 35 Ind. App. 230, 73 N. E. 957; Clear Creek Stone Co. *v.* Carmichael, (Ind. App. 1905) 73 N. E. 935; Acme Bedford Stone Co. *v.* McPhetridge, 35 Ind. App. 79, 73 N. E. 838; Baltimore, etc., R. Co. *v.* Hunsucker, 33 Ind. App. 27, 70 N. E. 556; Terre Haute, etc., R. Co. *v.* Rittenhouse, 28 Ind. App. 633, 62 N. E. 295; Indianapolis Gas Co. *v.* Shumack, 23 Ind. App. 87, 54 N. E. 414; Southern R. Co. *v.* Blevins, 130 Fed. 688, 66 C. C. A. 40 (Indiana statute); Gunn *v.* Le Roi Min. Co., 10 Brit. Col. 59; Shea *v.* John Inglis Co., 12 Ont. L. Rep. 80. See also Muncie Pulp Co. *v.* Davis, 162 Ind. 558, 70 N. E. 875. And see the statutes of the several states.

This provision in the Indiana statute is not nullified or affected by the subsequent subdivision of the statute making the master liable for an injury resulting from the negligence of a person in the service of a corporation having charge of certain enumerated departments of railroad employment (Louisville, etc., R. Co. *v.* Wagner, 153 Ind. 420, 53 N. E. 927), nor by the provision in the subsequent subdivision making the corporation liable where the fellow servant was "acting in the place and performing the duty of the corporation in that behalf" (Indianapolis Gas Co. *v.* Shumack, 23 Ind. App. 87, 54 N. E. 414).

Going to place of danger.— An employee who, as an incident to the execution of the order of a superior, goes to a place of danger, must be deemed to be at such place in conformity to the order of that superior within Burns Annot. St. (1901) § 7083, subd. 2, making corporation liable for injuries to employees, from the negligence of persons in their service to whose order the injured employee was bound to, and did, conform. Clear Creek Stone Co. *v.* Carmichael, (Ind. App. 1905) 73 N. E. 935.

The fact that the duties of the foreman whose demands the injured employee was bound to obey required him to assist the switching crew does not render the foreman a fellow servant of the injured employee. Terre Haute, etc., R. Co. *v.* Rittenhouse, 28 Ind. App. 633, 62 N. E. 295.

It must be shown: (1) That the person who gave the orders or directions was in the service or employment of defendant; (2) that the injured servant was bound to conform to the orders of such person; (3) that he did conform to such orders and that his injuries resulted from having so conformed; and (4) that the person was negligent in giving the orders and directions. Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145.

Relative rank of servants.— An employee may be one to whose orders or direction at the time of the accident the injured servant was bound to conform without regard to the relative rank in the service of the two employees. Ferguson *v.* Galt Public School Bd., 27 Ont. App. 480.

70. Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145; Indiana Mfg. Co. *v.* Buskirk, 32 Ind. App. 414, 68 N. E. 925; Grand Rapids, etc., R. Co. *v.* Pettit, 27 Ind. App. 120, 60 N. E. 1000. *Contra*, Wild *v.* Waygood, [1892] 1 Q. B. 783, 56 J. P. 389, 61 L. J. Q. B. 391, 66 L. T. Rep. N. S. 309, 40 Wkly. Rep. 501; Millward *v.* Midland R. Co., 14 Q. B. D. 68, 49 P. J. 453, 54 L. J. Q. B. 202, 52 L. T. Rep. N. S. 255, 33 Wkly. Rep.

negligence of such superior servant,[71] who must have had authority to give the order,[72] and the injury must have resulted from obedience to the order.[73] Furthermore the injured servant must have been bound to conform to the order.[74]

(IV) *Different Department Statutes*—(A) *In General.* The different department rule which, independent of statute, has been generally rejected,[75] is expressly adopted by statute in several of the states, at least as to railway employees.[76]

(B) *What Constitutes Different Departments or Branches of Service.* The statutes use the term "different department or branch of service" without defining what shall be deemed a different department or branch of service, and hence it must be determined upon principles analogous to those laid down in cases where the departmental limitation has been adopted and applied independent of statute.[77] It is held that "departments" and "branches of service" should not be so limited as to merely embrace those large divisions created for convenience in administering the affairs of the company, but that they relate to those minute ones which concern the daily duties of the employee.[78] It has also been stated that the word "department" or "service" merely means a subdivision of the business, such as running a train, clearing away a wreck, repairing a track, etc.[79] An engineer and a brakeman upon the same train are considered to be in the same department,[80] while on the other hand an engineer on one train is in a different department from the brakeman on another train.[81] So also the following employees have been held to be in different departments or branches of service: A yard helper and an engineer who were engaged in operating locomotives;[82] a switch tender and the conductor and engineer of a yard engine;[83] employees in locomotive and train departments;[84] a fireman and a telegraph operator;[85]

366; Garland *v.* Toronto, 27 Ont. 154; Cox *v.* Hamilton Sewer Pipe Co., 14 Ont. 300.

In other words the master is not liable where the order or direction is as broad as the whole service and where the injured servant without the compulsion of an order or direction from one whose order or direction he was required to obey was at the time governing himself according to his own judgment as to what was proper. Southern Indiana R. Co. *v.* Harrell, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460 [*reversing* (App. 1903) 66 N. E. 1016].

In performing the ordinary duties of his position, the servant is not acting under the special order or direction of another. Grand Rapids, etc., R. Co. *v.* Pettit, 27 Ind. App. 120, 60 N. E. 1000.

71. Indianapolis, etc., Rapid Transit Co. *v.* Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185, holding that no recovery can be had where the employee is injured while conforming to the order or direction of one employee and his injury is caused by the negligence of another employee who has no such authority.

72. Muncie Pulp Co. *v.* Davis, 162 Ind. 558, 70 N. E. 875; Consumers' Paper Co. *v.* Eyer, 160 Ind. 424, 66 N. E. 994; Hodges *v.* Standard Wheel Co., 152 Ind. 680, 52 N. E. 391, 54 N. E. 383.

73. Hodges *v.* Standard Wheel Co., 152 Ind. 680, 52 N. E. 391, 54 N. E. 383; Indiana Mfg. Co. *v.* Buskirk, 32 Ind. App. 414, 68 N. E. 925.

74. Georgia Pac. R. Co. *v.* Propst, 85 Ala. 203, 4 So. 711.

75. See *supra*, IV, G, 4, b, (VIII).

76. Kansas City, etc., R. Co. *v.* Becker, 67 Ark. 1, 53 S. W. 406, 77 Am. St. Rep. 78, 46 L. R. A. 814; Illinois Cent. R. Co. *v.* Hunter, 70 Miss. 471, 12 So. 482; Texas, etc., R. Co. *v.* Scruggs, 23 Tex. Civ. App. 712, 58 S. W. 186 (holding that an employee working under the inside roundhouse foreman, and the outside foreman, the foremen having entirely separate and distinct jurisdictions, are not fellow servants); Houston, etc., R. Co. *v.* Talley, 15 Tex. Civ. App. 115, 39 S. W. 206; St. Louis, etc., R. Co. *v.* Furry, 114 Fed. 898, 52 C. C. A. 518 (construing Arkansas statute). See Gulf, etc., R. Co. *v.* Warner, 89 Tex. 475, 35 S. W. 364.

77. Hill *v.* Lake Shore, etc., R. Co., 22 Ohio Cir. Ct. 291, 12 Ohio Cir. Dec. 241.

Servants engaged in different capacities may nevertheless be in the same branch of service. Froelich *v.* Toledo, etc., R. Co., 24 Ohio Cir. Ct. 359.

78. Cincinnati, etc., R. Co. *v.* Margrat, 51 Ohio St. 130, 37 N. E. 11.

79. Gulf, etc., R. Co. *v.* Warner, 89 Tex. 475, 35 S. W. 364.

80. Cleveland, etc., R. Co. *v.* Shanower, 70 Ohio St. 166, 71 N. E. 279; Hill *v.* Lake Shore, etc., R. Co., 22 Ohio Cir. Ct. 291, 12 Ohio Cir. Dec. 241.

81. Cincinnati, etc., R. Co. *v.* Margrat, 51 Ohio St. 130, 37 N. E. 11.

82. New York, etc., R. Co. *v.* Roe, 25 Ohio Cir. Ct. 628.

83. Lake Shore, etc., R. Co. *v.* Pero, 22 Ohio Cir. Ct. 130, 12 Ohio Cir. Dec. 25.

84. Houston, etc., R. Co. *v.* Talley, 15 Tex. Civ. App. 115, 39 S. W. 206.

85. Illinois Cent. R. Co. *v.* Hunter, 70

chief inspector of cars and brakeman;[86] and two switching crews handling different trains in the same yard.[87] A yard master whose duty it is to make up trains and select the employees who are to operate them, and who has full control over all employees whose duties take them into the yard, is not the fellow servant of a brakeman on a train made up under such yard master's direction.[88]

(v) *Negligence of Employee at Time Acting in Place and Performing Duty of Corporation.* Under the provisions of some statutes the corporation is liable for injuries to its employees where caused by the negligence of a fellow servant engaged in the same common service, where the negligent servant is at the time acting in the place and performing the duty of the corporation.[89]

(vi) *Acts or Omissions in Obedience to Rules.* A statutory provision making the master liable where the injury results from the act or omission of any person done or made in obedience to any rule, regulation, or by-law of the corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf,[90] does not make the master liable where a duty is enjoined by rule, etc., upon a servant and the duty is neglected or negligently performed.[91]

(vii) *Defects in Ways, Works, Machinery, Etc.* The statutes in some of the states make the master liable where the injury results from defects in the ways, works, machinery, etc., not discovered or remedied owing to the negligence of some person intrusted by the master with the duty of seeing that they are in proper condition.[92] Such provisions, which are elsewhere considered,[93] seem to be, at least, in part, merely a statutory reiteration of the common-law rule that the master cannot escape liability for the failure to furnish a safe place to

Miss. 471, 12 So. 482; St. Louis, etc., R. Co. *v.* Furry, 114 Fed. 898, 52 C. C. A. 518, construing Arkansas statute.

86. Columbus, etc., R. Co. *v.* Erick, 51 Ohio St. 146, 37 N. E. 128.

87. Erie R. Co. *v.* Kane, 118 Fed. 223, 55 C. C. A. 129, construing Ohio statute.

88. McCann *v.* Pennsylvania Co., 10 Ohio Cir. Ct. 139, 6 Ohio Cir. Dec. 610.

89. Pittsburgh, etc., R. Co. *v.* Gipe, 160 Ind. 360, 65 N. E. 1034, in which case it was held that where a locomotive engineer leaning out of the cab window was killed by coming in contact with another engine which had been negligently placed in a dangerous position too near the track on which deceased was passing, by the engineer in charge, the company was liable, the engineers being fellow servants within the meaning of the statute.

Statute as restricting common-law liability.— Burns Rev. St. (1901) § 7083, subd. 4, providing that a railroad company shall be liable for injuries to its employees caused by the negligence of a fellow servant, while performing a duty owed by the corporation to the employee injured, and while the latter is obeying an order from one having authority to direct, not only does not enlarge the company's common-law liability, but restricts it, so that the employee injured cannot recover unless he was obeying an order of a superior at the time of his injury. Thacker *v.* Chicago, etc., R. Co., 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792.

90. Postal Tel. Cable Co. *v.* Hulsey, 115 Ala. 193, 22 So. 854; Baltimore, etc., R. Co. *v.* Little, 149 Ind. 167, 48 N. E. 862; Whatley *v.* Holloway, 54 J. P. 645, 62 L. T. Rep. N. S. 639.

91. Laughran *v.* Brewer, 113 Ala. 509, 21 So. 415; Thacker *v.* Chicago, etc., R. Co., 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792; Baltimore, etc., R. Co. *v.* Little, 149 Ind. 167, 48 N. E. 862.

In other words, when the master commands or instructs, by rules and regulations and by-laws of himself, or in obedience to particular instructions given by any person delegated by him, with his authority in that behalf, and an employee obeys and carries out such commands or instructions, and injury is done thereby to a fellow employee, the master is liable. The statute has reference, by its terms, to the instructions of the master, and makes him responsible for them, and when he commands that an act he done or omitted to be done, and the servant obeys in doing the thing commanded to be done or in omitting to do what he was ordered not to do, his disobedience in either case is the act of the master, and if injury results he is liable; but, if the servant disobeys the instructions so given him, by doing something else that he was not instructed to do, or omits to obey instructions at all, and injury to his fellow servant is the result, it is not the act or command of the employer that caused the injury, but the disobedience of the employee, and the master is not liable. He stands in such a case as he stood, and is liable, if at all, at common law, unaffected by the Employers' Liability Act. Laughran *v.* Brewer, 113 Ala. 509, 21 So. 415.

92. See the statutes of the several states.

93. See *supra*, IV, G, 4, b, (III), (B), (3).

work or safe appliances by delegating the duty to a co-servant of the injured employee.

(VIII) *Railroad Employee Statutes* — (A) *In General* — (1) Statutes Limited to Railroad Employees. In a large number of the states the statutes modifying or abrogating the fellow servant rule are expressly limited to railroads or there are special provisions in the general statutes with reference thereto.[94]

(2) Companies Affected — (a) In General. Statutes relating to railroad companies do not apply to companies in no way engaged in railroading.[95] In other respects the statutes have been diversely construed by the courts with regard to what employers are to be deemed within their scope.[96] It has been held that the statutes apply only to railroads open to public travel or use,[97] and that they do not apply to persons or companies engaged in the construction of railroads,[98] nor to companies which have a merely incidental power to operate logging or mining roads or tram roads.[99]

94. See the statutes of the several states.

Extraterritorial effect see *supra*, IV, G, 4, b, (I), (B).

Retroactive effect see *supra*, IV, G, 4, b, (I), (C).

Trains engaged in interstate traffic.— The statute making railroad companies liable for the negligence of a servant affecting another servant is applicable to an action for the death of a railroad engineer owing to a collision between two of defendant's trains, although the trains at the time were engaged in interstate traffic. Missouri, etc., R. Co. *v.* Nelson, (Tex. Civ. App. 1905) 87 S. W. 706.

95. Consumers' Cotton Oil Co. *v.* Jonte, 36 Tex. Civ. App. 18, 80 S. W. 847, cotton gin employee.

96. See cases cited *infra*, this note and notes 97, 98, 99; and *infra*, IV, G, 4, b, (VIII), (A), (2), (b), (c).

Company operating lines of several companies.— A railroad company operating a line composed of the lines of several different companies is within the provisions of Minn. Laws (1887), c. 13, declaring that every railroad corporation "owning or operating" a railroad shall be liable to a servant for the negligence of his fellow servants except where the servant sustaining damages is at the time engaged in the construction of a railroad. Moran *v.* Eastern R. Co., 48 Minn. 46, 50 N. W. 930.

Lessor and lessee.— Iowa Code (1873), §§ 1278, 1307, making lessees of railroads liable, to the same extent as lessors, for injuries to employees caused by the negligence of co-employees, provides merely a cumulative remedy, and does not release the lessor corporation from liability for an injury to an employee, caused by an accident occurring while its road is operating in the corporate name, even though in fact it may have been leased, and was at the time controlled by, another company. Bower *v.* Burlington, etc., R. Co., 42 Iowa 546.

97. Williams *v.* Northern Lumber Co., 113 Fed. 382, construing Minn. Rev. St. (1894) § 2701. See also McKivergan *v.* Alexander, etc., Lumber Co., 124 Wis. 60, 102 N. W. 332.

98. Beeson *v.* Busenbark, 44 Kan. 669, 25 Pac. 48, 10 L. R. A. 839. See also Avery *v.* Southern R. Co., 137 N. C. 130, 49 S. E. 91, holding that N. C. Priv. Laws (1897), p. 83, c. 56, has no application to injuries which have been received by the servant of an independent contractor of a railroad company by reason of the negligence of a fellow servant. *Compare* Mitchell *v.* Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647 (Iowa statute); Nicholson *v.* Transylvania R. Co., 138 N. C. 516, 51 S. E. 40. *Contra*, Southern Indiana R. Co. *v.* Harrell, (Ind. App. 1903) 66 N. E. 1016 [*reversed* on other grounds in 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460]; Mace *v.* Boedker, 127 Iowa 721, 104 N. W. 475; McKnight *v.* Iowa, etc., R. Constr. Co., 43 Iowa 406; Roe *v.* Winston, 86 Minn. 77, 90 N. W. 122; Doughty *v.* Firbank, 10 Q. B. D. 358, 48 J. P. 55, 52 L. J. Q. B. 480, 48 L. T. Rep. N. S. 530.

In Minnesota the statute contains a proviso that nothing in the act shall be so construed as to render any railroad company liable for damages sustained by any employee "while engaged in the construction of a new road, or any part thereof, not open to public [travel or] use." Kline *v.* Minnesota Iron Co., 93 Minn. 63, 100 N. W. 681; Moran *v.* Eastern R. Co., 48 Minn. 46, 50 N. W. 930; Schneider *v.* Chicago, etc., R. Co., 42 Minn. 68, 43 N. W. 783. Work in constructing a yard with tracks in it, to be used as a part of a railroad already open to the public, is not the construction of "a new road, or any part thereof," within the meaning of the statute. Moran *v.* Eastern R. Co., *supra*; Schneider *v.* Chicago, etc., R. Co., *supra*.

99. Ellington *v.* Beaver Dam Lumber Co., 93 Ga. 53, 19 S. W. 21; White *v.* Kennon, 83 Ga. 343, 9 S. E. 1082; McKivergan *v.* Alexander, etc., Lumber Co., 124 Wis. 60, 102 N. W. 332 [*disapproving* Roe *v.* Winston, 86 Minn. 77, 90 N. W. 122]; Williams *v.* Northern Lumber Co., 113 Fed. 382. See Kibbe *v.* Stevenson Iron Min. Co., 136 Fed. 147, 69 C. C. A. 145. *Contra*, Kline *v.* Minnesota Iron Co., 93 Minn. 63, 100 N. W. 681; Schus *v.* Powers-Simpson Co., 85 Minn. 447, 89 N. W. 68, 69 L. R. A. 887; Lodwick Lumber

(b) STREET CAR COMPANIES. While there is some conflict in the authorities, the weight of authority is to the effect that street railroad companies are not within the scope of the statutes,[1] except where the statute expressly includes such companies.[2]

(c) RAILROADS IN HANDS OF RECEIVERS. In a number of states the statutes making railroad companies liable for injuries to a servant from the negligence of a fellow servant have been held to apply to railroad companies operated by receivers.[3] In other states the contrary view is maintained.[4]

(B) *Statutes as Applicable to All Injured Employees* — (1) IN GENERAL. In some of the states the fellow servant rule is practically abrogated in so far as rail-

Co. *v.* Taylor, (Tex. Civ. App. 1905) 87 S. W. 358.

A mining road is not within the Minnesota statute. Kline *v.* Minnesota Iron Co., 93 Minn. 63, 100 N. W. 681; Kibbe *v.* Stevenson Iron Min. Co., 136 Fed. 147, 69 C. C. A. 145.

Power granted by charter.— The fact that a charter granted to a lumber company gave the company power to build railroads to facilitate the carrying on of its business does not make such company a railroad company, and liable as such for injuries to an employee. Ellington *v.* Beaver Dam Lumber Co., 93 Ga. 53, 19 S. E. 21.

1. *Iowa.*— McLeod *v.* Chicago, etc., R. Co., 125 Iowa 270, 101 N. W. 77.

Massachusetts.— Fallon *v.* West End St. R. Co., 171 Mass. 249, 50 N. E. 536, holding that the statute does not extend to street railways or electrically propelled cars.

Minnesota.— Lundquist *v.* Duluth St. R. Co., 65 Minn. 387, 67 N. W. 1006; Funk *v.* St. Paul St. R. Co., 61 Minn. 435, 63 N. W. 1099, 52 Am. St. Rep. 608, 29 L. R. A. 208, cable road.

Missouri.— Sams *v.* St. Louis, etc., R. Co., 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475; Godfrey *v.* St. Louis Transit Co., 107 Mo. App. 193, 81 S. W. 1230; Johnson *v.* Metropolitan St. R. Co., 104 Mo. App. 588, 78 S. W. 275.

Texas.— Riley *v.* Galveston City R. Co., 13 Tex. Civ. App. 247, 35 S. W. 826 (construing the act of May 4, 1893). *Contra*, Austin Rapid Transit R. Co. *v.* Groeth, (Civ. App. 1895) 31 S. W. 197 (construing the act of March 10, 1891).

Contra.— Savannah, etc., R. Co. *v.* Williams, 117 Ga. 414, 43 S. E. 751, 61 L. R. A. 249, holding that while street railroads may not be so dangerous as steam railroads, still they are railroad companies and within the purview of the statute.

See 34 Cent. Dig. tit. "Master and Servant," § 360.

Reason for rule not applicable in case of street railroads.— The many and great dangers to life and limb to which the numerous persons engaged in operating railroads whose cars are moved by steam are exposed, and the many different departments of labor in which such operators are employed, are doubtless the principal reasons which induce the modification of the rule of law heretofore governing the relation of master and servant and prescribing their reciprocal duties and liabilities. But these reasons for changing the law do not exist in respect to those engaged in operating street railroads. Funk *v.* St. Paul City R. Co., 61 Minn. 435, 63 N. W. 1099, 52 Am. St. Rep. 608, 29 L. R. A. 208; Riley *v.* Galveston City R. Co., 13 Tex. Civ. App. 247, 35 S. W. 826, construing the act of May 4, 1893.

Effect of scope of charter.— If a corporation and its servants, who in fact are engaged only in operating a street railroad, are not covered by the fellow servant statute, then the fact that the charter of the corporation authorizes it to own and operate a trunk line steam railroad will not bring them within the statute, or estop the corporation from showing the fact. Sams *v.* St. Louis, etc., R. Co., 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475.

2. See the statutes of the several states.

3. *Iowa.*— Sloan *v.* Central Iowa R. Co., 62 Iowa 728, 16 N. W. 331.

Kansas.— Rouse *v.* Harry, 55 Kan. 589, 40 Pac. 1007.

Minnesota.— Mikkelson *v.* Truesdale, 63 Minn. 137, 65 N. W. 260.

Missouri.— Powell *v.* Sherwood, 162 Mo. 605, 63 S. W. 485.

United States.— Peirce *v.* Van Dusen, 78 Fed. 693, 24 C. C. A. 280; Rouse *v.* Hornsby, 67 Fed. 219, 14 C. C. A. 377; Hornsby *v.* Eddy, 56 Fed. 461, 5 C. C. A. 560. Both of the last two cases are decided under 1 Kan. Gen. St. (1889) par. 1251.

See 34 Cent. Dig. tit. "Master and Servant," § 361.

4. Robinson *v.* Huidekoper, 98 Ga. 306, 25 S. E. 440; Brown *v.* Comer, 97 Ga. 801, 25 S. E. 176 (in which the receiver was appointed on the company's own petition); Youngblood *v.* Comer, 97 Ga. 152, 23 S. E. 509, 25 S. E. 838; Thurman *v.* Cherokee R. Co., 56 Ga. 376; Henderson *v.* Walker, 55 Ga. 481; Campbell *v.* Cook, 86 Tex. 630, 26 S. W. 486, 40 Am. St. Rep. 878 [*reversing* (Civ. App. 1894) 24 S. W. 977]; San Antonio, etc., R. Co. *v.* Reynolds, (Tex. Civ. App. 1895) 30 S. W. 846; Baltimore Trust, etc., Co. *v.* Atlanta Traction Co., 69 Fed. 358; Central Trust Co. *v.* East Tennessee, etc., R. Co., 69 Fed. 353. Both of the last two cases are based on the Georgia statutes.

These decisions are based upon the principle that special statutes which relate expressly and exclusively to railroad companies cannot be held applicable to receivers of a railroad operating it under the orders of a court, for the reason that such receivers are not themselves railroad companies. Robinson *v.* Huidekoper, 98 Ga. 306, 25 S. E. 440;

road employees are concerned.[5] While all employees of a railroad company seem to be within the protection of some of the statutes,[6] most of them apply only to injured employees engaged in the operation of the road or employed in work where they are subject to the hazards peculiar to railroading. In at least one state it is expressly provided by statute that the negligence must be connected with "the use and operation of a railway,"[7] while in other states the statute is

Henderson *v.* Walker, 55 Ga. 481; Campbell *v.* Cook, 86 Tex. 630, 26 S. W. 486, 40 Am. St. Rep. 878 [*reversing* (Civ. App. 1894) 24 S. W. 977].

5. Parrish *v.* Pensacola, etc., R. Co., 28 Fla. 251, 9 So. 696; Georgia R., etc., Co. *v.* Cosby, 97 Ga. 299, 22 S. E. 912; Baker *v.* Western, etc., R. Co., 68 Ga. 699; Georgia R., etc., Co. *v.* Goldwire, 56 Ga. 196. And see the statutes of the several states.

In Florida the statute provides that if any person is injured by a railroad company by the running of the locomotives or cars or other machinery of such company, he being at the time of such injury an employee of the company, and the damage was caused by the negligence of another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to a recovery. This statute limits the rule that an employee cannot recover for an injury occasioned by the negligence of a fellow servant to cases where the person injured was guilty of contributory negligence. Louisville, etc., R. Co. *v.* Wade, 46 Fla. 197, 35 So. 863. A person is not an employee within the statutes where when injured he is not engaged in the performance of his duties as such employee or has quit for the day and is engaged in the pursuit of his own ends. Louisville, etc., R. Co. *v.* Wade, *supra*.

In Wisconsin the statute has been amended several times and its provisions are somewhat different from those in other states. Under the statute of 1880 the company is liable when the injury results from the negligence of certain employees, including an engineer or superintendent. Albrecht *v.* Milwaukee, etc., R. Co., 94 Wis. 397, 69 N. W. 63. The word "superintendent" applies only to one having to do with the movement of trains and cars and does not include the foreman of a repair shop (Hartford *v.* Northern Pac. R. Co., 91 Wis. 374, 64 N. W. 1033), although it does include the foreman of a switching crew (Pier *v.* Chicago, etc., R. Co., 94 Wis. 357, 68 N. W. 464). The provision in the 1893 statute for the benefit of employees engaged in "operating, running, riding upon or switching" trains or cars applies to a freight handler injured by being run into by an engine while pushing a car to the freight house (Ean *v.* Chicago, etc., R. Co., 95 Wis. 69, 69 N. W. 997), but not to one sealing the door of a car and injured by the backing of an engine (Hibbard *v.* Chicago, etc., R. Co., 96 Wis. 443, 71 N. W. 807), nor to a conductor standing by a car for the purpose of watching a switch and closing the car door when it was unloaded, where struck and injured by a bundle negligently thrown from the car by co-employees (Medbury *v.* Chicago, etc., R. Co., 106 Wis. 191, 81 N. W. 659); nor to a car repairer injured by a train running into the stationary car in which he was at work (Smith *v.* Chicago, etc., R. Co., 91 Wis. 503, 65 N. W. 183). Negligent track laborers are not "engaged in the discharge of their duties," within the statute, while riding on hand-cars furnished them by the company for their convenience in reaching their boarding place to get their meals (Benson *v.* Chicago, etc., R. Co., 78 Minn. 303, 80 N. W. 1050, construing Wisconsin statute); but the contrary is held where the master agrees to transport a servant to and from the place of work by the hand-cars, and the employment covered the whole time they were absent from the place they lived (Wallin *v.* Eastern R. Co., 83 Minn. 149, 86 N. W. 76, 54 L. R. A. 481, construing Wisconsin statute).

6. Southern R. Co. *v.* Johnson, 114 Ga. 329, 40 S. E. 235 (holding that an employee is entitled to recover where the injury was occasioned by the defective work of other employees without fault of plaintiff); Georgia R., etc., Co. *v.* Goldwire, 56 Ga. 196; Atlanta, etc., R. Co. *v.* Ayers, 53 Ga. 12 (holding that a track laborer may recover for injuries received by being carried from the place of his work to the camp where he stays at night through the negligence of those in charge of the train).

In Georgia a railroad employee is entitled to recover whether or not his injuries are connected with the running of trains (Georgia R., etc., Co. *v.* Miller, 90 Ga. 571, 16 S. E. 939; Georgia R., etc., Co. *v.* Brown, 86 Ga. 320, 12 S. E. 812; Georgia R. Co. *v.* Ivey, 73 Ga. 499; Thompson *v.* Central R., etc., Co., 54 Ga. 509. But see Central Trust Co. *v.* East Tennessee, etc., R. Co., 69 Fed. 353), or even intimately connected with the maintenance or operation of the railroad (Georgia R., etc., Co. *v.* Hicks, 95 Ga. 301, 22 S. E. 613).

In North Carolina the fellow servant rule seems to be entirely abolished as to railroad companies and an injured employee is entitled to recover where injured in the course of his service or employment whether he is running a train or rendering any other service. Mabry *v.* North Carolina R. Co., 139 N. C. 388, 52 S. E. 124; Sigman *v.* Southern R. Co., 135 N. C. 181, 47 S. E. 420; Mott *v.* Southern R. Co., 131 N. C. 234, 42 S. E. 601. However, the statute does not apply to that part of a railroad which is merely in course of construction and is not actually being operated. Nicholson *v.* Transylvania R. Co., 138 N. C. 516, 51 S. E. 40.

7. See Chicago, etc., R. Co. *v.* O'Brien, 132

broad enough to include all injured employees of a railroad but is limited by judicial construction to injured employees engaged in work at the time of the accident which exposes them to some element of hazard or condition of danger

Fed. 593, 67 C. C. A. 421 (construing Iowa statute); O'Brien *v.* Chicago, etc., R. Co., 116 Fed. 502.

In Iowa, to authorize a recovery under this statute, the employee must show: (1) That he belongs to the class of employees to whom the statute affords a remedy; and (2) that the act which occasioned the injury was of the class of acts for which a remedy is given. Malone *v.* Burlington, etc., R. Co., 65 Iowa 417, 21 N. W. 756, 54 Am. Rep. 11. The accident must grow out of the use and operation of the road. Schroeder *v.* Chicago, etc., R. Co., 41 Iowa 344. But the injured employee, in order to be entitled to recover, need not be employed in the operation of the road if he was injured by its operation (Pierce *v.* Central Iowa R. Co., 73 Iowa 140, 34 N. W. 783), it being sufficient that he is engaged in work which exposes him to the dangers peculiar to the operation of a railroad (Williams *v.* Iowa Cent. R. Co., 121 Iowa 270, 96 N. W. 774; Keatley *v.* Illinois Cent. R. Co., 94 Iowa 685, 63 N. W. 560), at the time of the accident (Akeson *v.* Chicago, etc., R. Co., 106 Iowa 54, 75 N. W. 676). The applicability of the statute to an employee depends upon the nature of the hazards to which he is actually exposed, and not of those which may have been contemplated in his employment. Canon *v.* Chicago, etc., R. Co., 101 Iowa 613, 70 N. W. 755. His employment need not be connected with the running of trains where it requires him to go thereon. Schroeder *v.* Chicago, etc., R. Co., 47 Iowa 375. The words "use and operation" of a railroad refer only to the movement of cars, engines, trains, or machinery on the track. Akeson *v.* Chicago, etc., R. Co., *supra*; Stroble *v.* Chicago, etc., R. Co., 70 Iowa 555, 31 N. W. 63, 59 Am. Rep. 456; Depuy *v.* Chicago, etc., R. Co., 110 Mo. App. 110, 84 S. W. 103, construing Iowa statute. *Contra*, see Smith *v.* Humeston, etc., R. Co., 78 Iowa 583, 43 N. W. 545. The work of the injured employee must be connected in some manner with the moving and not merely work preparatory thereto which may be done away from the train. Akeson *v.* Chicago, etc., R. Co., *supra*; Stroble *v.* Chicago, etc., R. Co., *supra*. The company is liable, although the negligent servant was under the control of the injured servant. Houser *v.* Chicago, etc., R. Co., 60 Iowa 230, 14 N. W. 778, 46 Am. Rep. 65.

The running of trains over a railroad in constructing it is "operating" the railroad. Mace *v.* Boedker, 127 Iowa 721, 104 N. W. 475; McKnight *v.* Iowa, etc., R. Constr. Co., 43 Iowa 406; Missouri Pac. R. Co. *v.* Haley, 25 Kan. 35 (holding that a person employed on a construction train, to carry water to the men, and to gather up tools and care for them, was within the protection of the statute); Roe *v.* Winston, 86 Minn. 77, 90 N. W. 122 (construing Wisconsin statute). But see Mitchell *v.* Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647 (holding that the injury is not connected with the "operation" of a railroad where the work is the reconstruction of an old and abandoned track preparatory to a resumption of its use as a railroad); Nicholson *v.* Transylvania R. Co., 138 N. C. 516, 51 S. E. 40 (holding that where the injury occurred in construction work at a point five or six miles from the completed track and further from the track on which trains were operated, it was not connected with the work of a "railroad company operating in this state").

The transfer of freight by a railroad company from a vessel to its cars is "operating a railroad." Daley *v.* Boston, etc., R. Co., 147 Mass. 101, 16 N. E. 690.

In Missouri the injured servant must be engaged "in the work of operating such railroad." Callahan *v.* St. Louis Merchants' Bridge Terminal R. Co., 170 Mo. 473, 71 S. W. 208, 94 Am. St. Rep. 746, 60 L. R. A. 249 [*affirmed* in 194 U. S. 628, 24 S. Ct. 857, 48 L. ed. 1157] (holding that a section hand stationed in the street below a railroad track to warn other members of the section gang when it was safe for them to throw ties taken from a railroad into the street and to warn pedestrians and remove the ties from the street, where injured by being struck by a tie negligently thrown by the gang without being notified that it was safe to do so, while he was engaged in removing a child from a place of danger in the street, was engaged in the work of operating such railroad); St. Louis, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1905) 90 S. W. 926 (construing Missouri statute and holding that a brakeman in the discharge of his duties lighting lamps in a caboose, which was being switched so as to attach it to his train, when he was injured in a collision, was engaged in operating the railroad). A section hand whose duty it is to assist in repairing the track on a railroad is engaged in operating a railroad (Thompson *v.* Chappell, 91 Mo. App. 297), and is within the protection of the statute where injured while riding on a hand-car by the negligence of a fellow servant (Overton *v.* Chicago, etc., R. Co., 111 Mo. App. 613, 86 S. W. 503; Rice *v.* Wabash R. Co., 92 Mo. App. 35). The replacing old rails with new ones is embraced within the work of operating the railroad. Stubbs *v.* Omaha, etc., R. Co., 85 Mo. App. 192. On the other hand the injured employee need not be actually engaged in the operation of trains thereon (Callahan *v.* St. Louis Merchants' Bridge Terminal R. Co., 170 Mo. 473, 71 S. W. 208, 94 Am. St. Rep. 746, 60 L. R. A. 249 [*affirmed* in 194 U. S. 628, 24 S. Ct. 857, 48 L. ed. 1157], holding that the statute includes all servants whose work is directly necessary for the running of trains over a track and therefore includes section hands engaged in repairing the road, it being

peculiar to railroads.[8] These statutes in those states where the liability is limited have been held to apply to the following injured servants: Foreman of repair gang;[9] section man[10] engaged in repairing the track[11] or in propelling or riding on a hand-car or taking it from the track;[12] laborer on construction train who rides on the train;[13] laborer loading car of dirt train where injured by fall of impending bank;[14] employee whose duty it was to ride on train and remove snow obstructions as encountered;[15] employee operating ditching machine carried on car and worked by movement of car;[16] detective walking along track to discover persons guilty of obstructing it and injured from being run into by engine while insensible on the track;[17] car repairer or cleaner working on car standing on side track;[18] car inspector;[19] employees loading and unloading car by means of cable[20] or locomotive;[21] employee standing between track and warehouse, working on warehouse, and injured by moving train;[22] yard employee injured while stepping from platform to top of passing car;[23] fireman sorting and discarding waste material from the coal while firing engine;[24] employee whose business it is to

sufficient that he is engaged in some service that it is necessary to the movement of trains (Stubbs *v.* Omaha, etc., R. Co., *supra*).

8. Missouri, etc., R. Co. *v.* Medaris, 60 Kan. 151, 55 Pac. 875; Missouri Pac. R. Co. *v.* Haley, 25 Kan. 35; Union Trust Co. *v.* Thomason, 25 Kan. 1; Pope *v.* Great Northern R. Co., 94 Minn. 429, 103 N. W. 331, construing Wisconsin statute.

In Kansas the Iowa statute of 1862 was adopted but the Iowa statute was changed in 1873 and the Kansas statute which remains the same seems broader than the Iowa statute. The statute of 1901 making a railroad liable to an employee for the negligence of its agents and for mismanagement by its engineers or other employees does not create a distinction between agents on the one hand and engineers and other employees on the other, nor between negligence and mismanagement. Missouri, etc., R. Co. *v.* Kellerman, (Tex. Civ. App. 1905) 87 S. W. 401.

In Minnesota, the statute, if given a liberal construction, applies to all employees of railroad companies under all circumstances. But, to avoid constitutional objections, it was limited by judicial construction to such employees as were exposed to the particular and peculiar hazards connected with the use and operation of railroads. Weisel *v.* Eastern R. Co., 79 Minn. 245, 82 N. W. 576; Blomquist *v.* Great Northern R. Co., 65 Minn. 69, 67 N. W. 804; Pearson *v.* Chicago, etc., R. Co., 47 Minn. 9, 49 N. W. 302; Johnson *v.* St. Paul, etc., R. Co., 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419; Lavallee *v.* St. Paul, etc., R. Co., 40 Minn. 249, 41 N. W. 974. In this state there is a class of cases on the border line where a like injury might have resulted in other work than railroad work, but where the work must be done in great haste to avoid danger from passing trains, to which the statute has been held to apply. Anderson *v.* Great Northern R. Co., 74 Minn. 432, 77 N. W. 240; Blomquist *v.* Great Northern R. Co., *supra*.

9. Haden *v.* Sioux City, etc., R. Co., 92 Iowa 226, 60 N. W. 537.

10. Atchison, etc., R. Co. *v.* Vincent, 56 Kan. 344, 43 Pac. 251.

Section man injured while getting on a moving train by the orders of an employee in charge of the train is injured in connection with the use and operation of the train. Rayburn *v.* Central Iowa R. Co., 74 Iowa 637, 35 N. W. 606, 38 N. W. 520.

11. Frandsen *v.* Chicago, etc., R. Co., 36 Iowa 372; Union Pac. R. Co. *v.* Harris, 33 Kan. 416, 6 Pac. 571.

12. Smith *v.* Chicago Great Western R. Co., (Iowa 1899) 80 N. W. 658 (collision with another hand-car); Frandsen *v.* Chicago, etc., R. Co., 36 Iowa 372; Steffenson *v.* Chicago, etc., R. Co., 45 Minn. 355, 47 N. W. 1068, 11 L. R. A. 271; Smith *v.* St. Paul, etc., R. Co., 44 Minn. 17, 46 N. W. 149; Chicago, etc., R. Co. *v.* Artery, 137 U. S. 507, 11 S. Ct. 129, 34 L. ed. 747 (construing Iowa statute).

13. Handelun *v.* Burlington, etc., R. Co., 72 Iowa 709, 32 N. W. 4.

14. Deppe *v.* Chicago, etc., R. Co., 36 Iowa 52. This case was decided under the statute of 1862 and it would seem that the contrary would be held under the statute which is now in force.

15. Smith *v.* Humeston, etc., R. Co., 78 Iowa 583, 43 N. W. 545.

16. Nelson *v.* Chicago, etc., R. Co., 73 Iowa 576, 35 N. W. 611.

17. Pyne *v.* Chicago, etc., R. Co., 54 Iowa 223, 6 N. W. 281, 37 Am. Rep. 198.

18. Jensen *v.* Omaha, etc., R. Co., 115 Iowa 404, 88 N. W. 952; Mitchell *v.* Northern Pac. R. Co., 70 Fed. 15, construing Minnesota statute. But see Foley *v.* Chicago, etc., R. Co., 64 Iowa 644, 21 N. W. 124.

19. Canon *v.* Chicago, etc., R. Co., 101 Iowa 613, 70 N. W. 755.

20. Williams *v.* Iowa Cent. R. Co., 121 Iowa 270, 96 N. W. 774.

21. Stebbins *v.* Crooked Creek R., etc., Co., 116 Iowa 513, 90 N. W. 355.

22. Bain *v.* Northern Pac. R. Co., 120 Wis. 412, 98 N. W. 241, construing Minnesota statute.

23. Leier *v.* Minnesota Belt-Line R., etc., Co., 63 Minn. 203, 65 N. W. 269.

24. Swartz *v.* Great Northern R. Co., 93 Minn. 339, 101 N. W. 504.

remove ashes and fire from locomotives, to supply them with water and sand, and to aid in moving engine tanks in the railroad yard;[25] and employee building retaining wall along an embankment, where injured by the negligence of employees in operating trains.[26] On the other hand employees not engaged in the operation of the road nor subject to the hazards peculiar to railroading have been held to include roundhouse employees;[27] employees merely loading cars;[28] workmen employed in the machine shop;[29] members of a construction gang injured by the negligence of another of the crew;[30] stone mason working around depot and injured by falling of curbstone;[31] employee injured by falling of loose coal while standing on tender of engine;[32] bridge repairers;[33] boiler maker;[34] and pitman engaged in operating steam shovel in a gravel pit and injured in the course of the work.[35] The negligence must be connected with the movement of a train or engine,[36] or the movement of machinery on the track.[37] But the negligent employee need not be one actually upon the train.[38] Where the negligence is that of a locomotive fireman,[39] or a wiper in charge of an engine,[40] or one intrusted with the duty of inspecting and repairing a bridge,[41] it is the negligence of a servant connected with the use and operation of the railroad. The negligent servants are not engaged in operating a railroad where using a steam shovel in a gravel pit on a track some distance from the main line.[42]

(2) SERVANTS OPERATING CARS, LOCOMOTIVES, OR TRAINS. In some states

25. Butler *v.* Chicago, etc., R. Co., 87 Iowa 206, 54 N. W. 208.

26. Keatley *v.* Illinois Cent. R. Co., 94 Iowa 685, 63 N. W. 560.

27. Malone *v.* Burlington, etc., R. Co., 65 Iowa 417, 21 N. W. 756, 54 Am. Rep. 11 (holding that removing snow from a turntable and the tracks do not pertain to the operation of a railroad, although turning the turn-table does); Manning *v.* Burlington, etc., R. Co., 64 Iowa 240, 20 N. W. 169; Malone *v.* Burlington, etc., R. Co., 61 Iowa 326, 16 N. W. 203, 47 Am. Rep. 813. *Contra,* see Mikkelson *v.* Truesdale, 63 Minn. 137, 65 N. W. 260 (roundhouse wiper injured while assisting in coaling an engine, by the engine being negligently moved by a co-employee); Nichols *v.* Chicago, etc., R. Co., 60 Minn. 319, 62 N. W. 386 (wiper employed in roundhouse injured while assisting in straightening a cable used to pull a plow in unloading gravel from cars in repairing the track); Chicago, etc., R. Co. *v.* Stahley, 62 Fed. 363, 11 C. C. A. 88 (construing Kansas statute, roundhouse employee putting an engine in condition for use).

28. Luce *v.* Chicago, etc., R. Co., 67 Iowa 75, 24 N. W. 600; Smith *v.* Burlington, etc., R. Co., 59 Iowa 73, 12 N. W. 763; Pearson *v.* Chicago, etc., R. Co., 47 Minn. 9, 49 N. W. 302 (loading cars with rails where injury results from letting rail fall); Williams *v.* Chicago, etc., R. Co., 106 Mo. App. 61, 79 S. W. 1167 (construing Iowa statute). *Contra,* see Atchison, etc., R. Co. *v.* Brassfield, 51 Kan. 167, 32 Pac. 814; Atchison, etc., R. Co. *v.* Kochler, 37 Kan. 463, 15 Pac. 567; Chicago, etc., R. Co. *v.* Pontius, 157 U. S. 209, 15 S. Ct. 585, 39 L. ed. 675 [*affirming* 52 Kan. 264, 34 Pac. 739].

29. Potter *v.* Chicago, etc., R. Co., 46 Iowa 399.

30. Matson *v.* Chicago, etc., R. Co., 68 Iowa 22, 25 N. W. 911.

31. Missouri, etc., R. Co. *v.* Medaris, 60 Kan. 151, 55 Pac. 875.

32. Weisel *v.* Eastern R. Co., 79 Minn. 245, 82 N. W. 576.

33. O'Niel *v.* Great Northern R. Co., 80 Minn. 27, 82 N. W. 1086, 51 L. R. A. 532 (injury resulting from projecting bolt); Johnson *v.* St. Paul, etc., R. Co., 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419.

34. Lavallee *v.* St. Paul, etc., R. Co., 40 Minn. 249, 41 N. W. 974.

35. Jemmings *v.* Great Northern R. Co., 96 Minn. 302, 104 N. W. 1079, 1 L. R. A. N. S. 696.

36. Akeson *v.* Chicago, etc., R. Co., 106 Iowa 54, 75 N. W. 676.

37. Reddington *v.* Chicago, etc., R. Co., (Iowa 1898) 75 N. W. 679. And see Williams *v.* Iowa Cent. R. Co., 121 Iowa 270, 96 N. W. 774.

38. Keatley *v.* Illinois Cent. R. Co., 103 Iowa 282, 72 N. W. 545.

A train may be controlled by those upon it, or it may be controlled by one not on it, by signals given to those operating the train. It can make no difference, as to the right of recovery, whether the negligence, if any, which resulted in causing the accident, was the act or failure to act of one of the trainmen, or of some other man in defendant's employ, and who was charged with the duty of controlling the movements of the train by flag signal or otherwise. Keatley *v.* Illinois Cent. R. Co., 103 Iowa 282, 72 N. W. 545.

39. Larson *v.* Illinois Cent. R. Co., 91 Iowa 81, 58 N. W. 1076.

40. Whalen *v.* Chicago, etc., R. Co., 75 Iowa 563, 39 N. W. 894.

41. Locke *v.* Sioux City, etc., R. Co., 46 Iowa 109.

42. Jemmings *v.* Great Northern R. Co., 96 Minn. 302, 104 N. W. 1079, 1 L. R. A. N. S. 696.

there is a statutory provision making a railroad company liable for all damages sustained by any servant while "engaged in the work of operating the cars, locomotives or trains" by reason of the negligence of a fellow servant.[43] It has been held that such statute is not limited to train crews but includes a switchman employed in coupling cars while a train was being made up in the yard,[44] and employees operating locomotives in yards, at stations, roundhouses, or coal chutes.[45] An employee is not engaged in "operating" while on his way to take charge of a locomotive.[46] Merely loading or unloading a car is not "operating" it,[47] although if the employee not only loads and unloads but also works in connection with the transfer of the car to another place, he is engaged in operating it.[48] The operation of cars includes hand-cars,[49] and push cars.[50] Placing a hand-car on the track is operating it,[51] as is the removing it from the track.[52]

(c) *Negligence of Particular Employees*—(1) EMPLOYEE IN CHARGE OF ENGINE, CAR, SWITCH, ETC. In some jurisdictions the statutory provisions make the master liable for the negligence of an employee in charge of an engine,[53]

43. Galveston, etc., R. Co. *v.* McAdams, (Tex. Civ. App. 1905) 84 S. W. 1076; Missouri, etc., R. Co. *v.* Keaveney, (Tex. Civ. App. 1904) 80 S. W. 387.

The word "operate," as used in the statute, signifies "to perform a work or labor; to put into, or continue in, operation or activity; to work; as to operate a machine." Perez *v.* San Antonio, etc., R. Co., 28 Tex. Civ. App. 255, 67 S. W. 137.

Injury to foreman.—The statute applies where a statutory vice-principal because of his power to control and command is injured. Texas, etc., R. Co. *v.* Smith, 114 Fed. 728, 52 C. C. A. 360, construing Texas statute.

A fireman who, after attending to the head light of his engine, stood in front of the pilot and while returning to the cab was struck by lumber projecting from the door of one of the passing cars, was engaged in the operation of a railroad. St. Louis, etc., R. Co. *v.* Bussong, (Tex. Civ. App. 1905) 90 S. W. 73.

44. Missouri, etc., R. Co. *v.* Baker, (Tex. Civ. App. 1900) 58 S. W. 964.

45. Gulf, etc., R. Co. *v.* Howard, (Tex. Civ. App. 1903) 75 S. W. 803, 96 Tex. 582, 75 S. W. 805 [*reversed* on other grounds in 97 Tex. 513, 80 S. W. 229].

46. Gulf, etc., R. Co. *v.* Howard, 97 Tex. 513, 80 S. W. 229.

47. Lakey *v.* Texas, etc., R. Co., 33 Tex. Civ. App. 44, 75 S. W. 566; Lawrence *v.* Texas Cent. R. Co., 25 Tex. Civ. App. 293, 61 S. W. 342.

48. Texas Cent. R. Co. *v.* Pelfrey, 35 Tex. Civ. App. 501, 80 S. W. 1036 (servants engaged in loading train of flat cars and hauling them to make a fill on a railroad, the cars being loaded with a steam shovel); Texas, etc., R. Co. *v.* Webb, 31 Tex. Civ. App. 498, 72 S. W. 1044 (employee not only loaded and unloaded car but also regulated its speed by the use of the brake and pushed it back when unloaded).

49. San Antonio, etc., R. Co. *v.* Stevens, (Tex. Civ. App. 1904) 83 S. W. 235; Houston, etc., R. Co. *v.* Jennings, 36 Tex. Civ. App. 375, 81 S. W. 822; Perez *v.* San Antonio, etc., R. Co., 28 Tex. Civ. App. 255, 67 S. W. 137; Texas, etc., R. Co. *v.* Smith, 114 Fed. 728, 52 C. C. A. 360.

50. Seery *v.* Gulf, etc., R. Co., 34 Tex. Civ. App. 89, 77 S. W. 950; Texas, etc., R. Co. *v.* Webb, 31 Tex. Civ. App. 498, 72 S. W. 1044.

51. Houston, etc., R. Co. *v.* Jennings, 36 Tex. Civ. App. 375, 81 S. W. 822; Seery *v.* Gulf, etc., R. Co., 34 Tex. Civ. App. 89, 77 S. W. 950.

52. Texas, etc., R. Co. *v.* Hervey, (Tex. Civ. App. 1905) 89 S. W. 1095.

53. Whatley *v.* Zenida Coal Co., 122 Ala. 118, 26 So. 124.

Who is in charge of engine.—The engineer is usually the employee in charge of the engine (Cleveland, etc., R. Co. *v.* Bergschicker, 162 Ind. 108, 69 N. E. 1000), although a fireman may be an employee in charge of an engine (Louisville, etc., R. Co. *v.* Goss, 137 Ala. 319, 34 So. 1007, holding, however, that a fireman moving levers while the engineer is working under the engine according to the orders of the engineer is not in charge of the engine; Brown *v.* Louisville, etc., R. Co., 111 Ala. 275, 19 So. 1001). Of course two employees cannot be in control of an engine at the same time. Louisville, etc., R. Co. *v.* Richardson, 100 Ala. 232, 14 So. 209.

Engine upon a railroad.—Where the statute refers to an engine upon a railroad it does not include an engine which is stalled in a roundhouse for the purpose of repairs. Perry *v.* Old Colony R. Co., 164 Mass. 296, 41 N. E. 289.

What is a locomotive engine.—A pile-driver, consisting of a steam engine placed on a flat car at one end and a driver used in raising the hammer at the other end, all forming one machine, capable of self-propulsion by means of a sprocket wheel on the axle under the boiler, connected by a chain with the engine, the chain being removed when driving a pile, is not a "locomotive engine." Jarvis *v.* Hitch, 161 Ind. 217, 67 N. E. 1057 [*reversing* in effect (App. 1902) 65 N. E. 608]. A steam crane fixed on a movable truck has been held not a locomotive engine. Murphy *v.* Wilson, 47 J. P. 565,

car,[54] train,[55] points,[56] switch,[57] switch yard,[58] signal,[59] track,[60] etc.[61] These statutes are generally held not to apply to street railroads.[62] The railroad company is liable thereunder, although no gross or wilful negligence is shown,[63] and without regard to the company having used due care in selecting its employees.[64]

(2) EMPLOYEES IN CHARGE OF TRAIN — (a) WHAT CONSTITUTES A TRAIN. The courts have refused to define what, under all circumstances, will constitute a train, within the meaning of the statute.[65] It has been said, however, that a locomotive with one or more cars attached to it, with or without passengers or freight, in motion upon a railroad from one point to another, by means of power furnished

48 J. P. 24, 52 L. J. Q. B. 524, 48 L. T. Rep. N. S. 788.

54. Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88; Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262; Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112.

A hand-car is a car within the meaning of the statute. Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262. See also Richmond, etc., R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577.

Brakemen on cars which are moving from the impetus imparted from a locomotive shortly detached therefrom have not charge or control of the cars. Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112.

Control for special purpose.— If a person who has charge or control of a car only for the purpose of bringing it to rest on a track places it in a dangerous position thereon, and an injury results in consequence, the master is liable. Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88.

The motorman of a street car has charge or control thereof. Snell *v.* Toronto R. Co., 27 Ont. App. 151 [*affirmed* in 31 Can. Sup. Ct. 241].

55. See *infra*, IV, G, 4, b, (VIII), (C), (2).

56. Gibbs *v.* Great Western R. Co., 12 Q. B. D. 208, 48 J. P. 230, 53 L. J. Q. B. 543, 50 L. T. Rep. N. S. 7, 32 Wkly. Rep. 329 [*affirming* 11 Q. B. D. 22, 48 L. T. Rep. N. S. 640, 31 Wkly. Rep. 722].

57. Welch *v.* New York, etc., R. Co., 176 Mass. 393, 57 N. E. 668.

A tower-man whose duty it is to move switches by levers in the tower on signals from the men on the track below is in charge of a switch. Welch *v.* New York, etc., R. Co., 176 Mass. 393, 57 N. E. 668.

58. Indianapolis, etc., Rapid Transit Co. *v.* Andis, 33 Ind. App. 625, 72 N. E. 145.

An employee in charge of a switch is not necessarily in charge of a switch yard. Indianapolis, etc., Rapid Transit Co. *v.* Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; Baltimore, etc., R. Co. *v.* Little, 149 Ind. 167, 48 N. E. 862; Indianapolis, etc., Rapid Transit Co. *v.* Andis, 33 Ind. App. 625, 72 N. E. 145.

59. Chicago, etc., R. Co. *v.* Wicker, (Ind. App. 1904) 71 N. E. 223, 34 Ind. App. 215, 72 N. E. 614, holding that a brakeman required to place and to keep one or more red lights at the rear of a train was in charge of a signal. *Compare* Columbus, etc., R. Co. *v.* Bridges, 86 Ala. 448, 5 So. 864, 11 Am. St. Rep. 58, holding that the statute does not render a railroad company liable for injuries to an engineer caused by the negligence of an employee in giving a signal in a manner at variance with the rules of the company.

60. Alabama, etc., R. Co. *v.* Davis, 119 Ala. 572, 24 So. 862, holding that a section foreman whose duty it is to keep the track in repair is a person in charge or control of a part of the track of a railroad.

Unfinished track.—It is not necessary that the defective track occasioning the injury to a brakeman should be finished or in charge of a regular section foreman. But if it has reached such a stage of construction as to become "the track of a railway," and has been adopted for use, the case is within the statute regardless of whether the negligent employee was the section foreman or a construction foreman. Southern R. Co. *v.* Howell, 135 Ala. 639, 34 So. 6.

61. See the statutes of the several states.

In Indiana the statute has been held not to enlarge the class of vice-principals so as to include brakemen. Baltimore, etc., R. Co. *v.* Little, 149 Ind. 167, 48 N. E. 862. An employee may recover under this subdivision of the statute without showing that he was acting at the time under the direction of a superior. Pittsburgh, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301, 69 L. R. A. 875; Cincinnati, etc., R. Co. *v.* Thiebaud, 114 Fed. 918, 52 C. C. A. 538, Indiana statute. But see Baltimore, etc., R. Co. *v.* Little, 149 Ind. 167, 48 N. E. 862.

62. Indianapolis, etc., Rapid Transit Co. *v.* Andis, 33 Ind. App. 625, 72 N. E. 145; Fallon *v.* West End St. R. Co., 171 Mass. 249, 50 N. E. 536. See also *supra*, IV, G, 4, b, (VIII), (A), (2), (b).

63. Louisville, etc., R. Co. *v.* Graham, 98 Ky. 688, 34 S. W. 229, 17 Ky. L. Rep. 1229, construing Alabama statute.

Proof of intent to injure on the part of defendant's employee is not essential to defendant's liability notwithstanding contributory negligence. Wanton, wilful, or intentional negligence means the conscious failure to use reasonable care to avoid the injury after discovering plaintiff's danger. Alabama Great Southern R. Co. *v.* Williams, 140 Ala. 230, 37 So. 255.

64. Culver *v.* Alabama Midland R. Co., 108 Ala. 330, 18 So. 827.

65. Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112.

by the locomotive, constitutes a train.[66] The term generally signifies cars in motion,[67] with power furnished by a locomotive,[68] although a train does not cease to be such when moving by its own momentum after the power is shut off from the locomotive.[69]

(b) WHO IS IN CHARGE OR CONTROL OF TRAIN. The words "charge or control" have not been defined, although it would seem that they are not intended to mean different things, but are to be regarded, while not perhaps as synonymous, as explanatory of each other, and, used together, as describing more fully one and the same thing.[70] It is the charge or control of the train as a connected whole which is meant, rather than the charge or control of portions which together form a whole,[71] although a person in charge of a train does not necessarily cease to have charge because some of the cars are uncoupled in order to be separately dealt with.[72] A person is in charge or control where for the time being at least he has immediate authority to direct the movements and management of the train as a whole, and of the men engaged upon it.[73] It is not necessary that he should be actually upon the train itself,[74] and more than one person may have "charge or control" of a train at the same time.[75] The conductor is usually an employee in charge of a train,[76] as is an engineer.[77] So it has been held that a yard master whose right to control and cause the moving of cars in the yard is exclusive and whose orders to the switching crew are obeyed is a person in control of a train within the statutes.[78] On the other hand the foreman of a switching gang,[79]

66. Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112; Dacey *v.* Old Colony R. Co., 153 Mass. 112, 26 N. E. 437.

67. Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112; Thyng *v.* Fitchburg R. Co., 156 Mass. 13, 30 N. E. 169, 32 Am. St. Rep. 425.

68. Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112.

69. Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112.

Locomotive not attached.—Whether a number of cars coupled together and in motion, and forming one connected whole, constitute a train, does not depend upon whether a locomotive engine is attached to them at the time and they are moved by the power thus supplied. If the cars are moving from one point to another upon a railroad, under an impetus imparted to them by a locomotive which shortly before the accident has been detached, they constitute a train. Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112.

70. Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112. See Gibbs *v.* Great Western R. Co., 12 Q. B. D. 208, 48 J. P. 230, 53 L. J. Q. B. 543, 50 L. T. Rep. N. S. 7, 32 Wkly. Rep. 329 [*affirming* 11 Q. B. D. 22, 48 L. T. Rep. N. S. 640, 31 Wkly. Rep. 722].

The negligence of the conductor of a switch engine who has charge of making up freight trains in the yard is not that of one who has charge or control of an engine or train "upon a railroad." Thyng *v.* Fitchburg R. Co., 156 Mass. 13, 30 N. E. 169, 32 Am. St. Rep. 425.

One working a capstan whereby he could put a train of trucks in motion was in charge or control of a train. Cox *v.* Great Western R. Co., 9 Q. B. D. 106, 47 J. P. 116, 30 Wkly. Rep. 816.

71. Thyng *v.* Fitchburg R. Co., 156 Mass. 13, 30 N. E. 169, 32 Am. St. Rep. 425.

72. McCord *v.* Cammel, [1896] A. C. 57, 60 J. P. 180, 65 L. J. Q. B. 202, 73 L. T. Rep. N. S. 634.

73. Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112.

Temporary charge under superior.—The mere fact that a laborer or brakeman is put in such a position that for the moment he physically controls and directs its movements under the eye of his superior does not of itself constitute him a person in charge or control of the train. Denver, etc., R. Co. *v.* Vitello, 34 Colo. 50, 81 Pac. 766; Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112.

74. Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112; Donahoe *v.* Old Colony R. Co., 153 Mass. 356, 26 N. E. 868.

75. Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112.

76. Devine *v.* Boston, etc., R. Co., 159 Mass. 348, 34 N. E. 539 (holding that a conductor is in charge of a train even though at the moment when the cars struck the post and caused the injury to a car cleaner, they were separated); Donahoe *v.* Old Colony R. Co., 153 Mass. 356, 26 N. E. 868 (holding that the temporary absence of the conductor does not necessarily prevent him from being in charge of the train).

77. Fairman *v.* Boston, etc., R. Co., 169 Mass. 170, 47 N. E. 613; Davis *v.* New York, etc., R. Co., 159 Mass. 532, 34 N. E. 1070, holding that an engineer has control of a train so far as giving signals and slackening speed are concerned in cases of running down or collision.

78. Brady *v.* New York, etc., R. Co., 184 Mass. 225, 68 N. E. 227.

79. Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112.

a station agent,[80] a tower man,[81] and employees making up trains [82] have been held not in charge or control of a train.

(D) *Common Service Statutes.* In some states the statute provides that all railroad employees in the same grade of employment and who are working together at the same time and place and to a common purpose, neither being intrusted with the power to control employees, are fellow servants, provided they are in the same department or branch of service.[83] In order to be fellow servants under statutes of this character, employees must (1) be engaged in the common service,[84] (2) in the same grade of employment,[85] (3) working at the same time and

80. Fairman *v.* Boston, etc., R. Co., 169 Mass. 170, 47 N. E. 613.

81. Fairman *v.* Boston, etc., R. Co., 169 Mass. 170, 47 N. E. 613.

82. Thyng *v.* Fitchburg R. Co., 156 Mass. 13, 30 N. E. 169, 32 Am. St. Rep. 425.

83. El Paso, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in (1905) 87 S. W. 660]; Missouri, etc., R. Co. *v.* Hutchens, 35 Tex. Civ. App. 343, 80 S. W. 415. And see the statutes of the several states.

Employee riding in caboose.— An employee of a railroad company who in obedience to an order of the company travels in the caboose of a freight train to reach a point where he has been assigned to work, but who takes no part in the running of the train, is not a fellow servant of the engineer of the train. Galveston, etc., R. Co. *v.* Norris, (Tex. Civ. App. 1894) 29 S. W. 950.

84. Houston, etc., R. Co. *v.* Patterson, 20 Tex. Civ. App. 255, 48 S. W. 747, (Civ. App. 1897) 40 S. W. 442.

"'Service' means the thing or work being performed for the employer at the time of the accident and out of which it grew, and 'common' means that which pertains equally to the employes sought to be held fellow servants; and therefore 'common service' means the particular thing or work being performed for the employer, at the time of the accident and out of which it grew, jointly by the employes sought to be held fellow servants. The members of a crew running a train, though each be in the performance of different acts in reference thereto, are all 'engaged in the common service,' for they are jointly performing the thing or work of managing the train for the employer; but they would not be 'engaged in the common service' with the members of a crew running another train for the employer over the same road, for one crew would be jointly performing the thing or work of managing one train while the other would be jointly performing the thing or work of managing the other train. We, therefore, conclude that the engineer and switchman were 'engaged in the common service.'" Gulf, etc., R. Co. *v.* Warner, 89 Tex. 475, 478, 35 S. W. 364.

Illustrations of employees not engaged in common service.— Where a brakeman was struck by a passing switch engine while he was inspecting the couplings of his train and such engine was not engaged in any service or performing any act in reference to said train, the members of the two train crews are not engaged in a common service. Patterson *v.* Houston, etc., R. Co., (Tex. Civ. App. 1897) 40 S. W. 442, 20 Tex. Civ. App. 255, 48 S. W. 747.

85. Galveston, etc., R. Co. *v.* Butshek, 34 Tex. Civ. App. 194, 78 S. W. 740.

When servants are of same grade.— It has been said that "grade" means the rank or relative positions occupied by the employees while engaged in the common service. This definition, however, furnishes no test to determine whether given employees are in the same or different grades. However, the use of the clause in the statute "neither of such persons being entrusted with any superintendence or control over their fellow employes," etc., was held to be explanatory of what was meant by the clause "in the same grade" so that the test was held to be whether one servant was invested with authority or control over others while engaged in the common service. Gulf, etc., R. Co. *v.* Warner, 89 Tex. 475, 35 S. W. 364. Pursuant to this construction of the statutes it was held that a conductor and engineer were of the same grade (Moore *v.* Jones, 15 Tex. Civ. App. 391, 39 S. W. 593), and also the fireman and engineer (Kansas City, etc., R. Co. *v.* Becker, 63 Ark. 477, 39 S. W. 358), but that a locomotive engineer having supervision of the men under him and a fireknocker having no men under him were not of the same grade of employment (St. Louis, etc., R. Co. *v.* Thurmond, 70 Ark. 411, 68 S. W. 488). In Texas, however, under the 1897 amendment of the statute, the provision as to superintendence and control is omitted and it is now held that employees are not necessarily "in the same grade of employment," although neither has authority or control over the other, and that such authority is not the test but rather the order of promotion, skill in the service, and the relative amount of compensation received. Gulf, etc., R. Co. *v.* Elmore, 35 Tex. Civ. App. 56, 79 S. W. 891 (holding that a brakeman and a station porter were not in the same grade of employment).

In Utah it has been held that a miner is not a fellow servant with one whose duty it is to manage and operate a cage by which the miners are conveyed in and out of the mine, nor with one employed as a "tool carrier," whose only duty is to take sharpened tools into the mine and throw them off at the various levels and bring up the dull ones. Jenkins *v.* Mammoth Min. Co.,

place,[86] and (4) to a common purpose;[87] and in Texas, since the amendment of 1897, on the same piece of work,[88] and doing the same character of work or service.[89] Under such statutory provisions the following have been held fellow servants: Hostler and boiler washer, both under the orders of the roundhouse foreman;[90] engineer and switchmen, members of the same switching crew working under a common foreman;[91] employees engaged in the common work of cleaning an engine;[92] conductors of switch engines in the same yard engaged in moving cars under a superior, although their duties were separate and distinct.[93] On the other hand the following employees have been held not fellow servants: Train crew and other employees;[94] engineer and brakeman;[95] station agent and train crew;[96] locomotive engineer and hostler;[97] car repairer in one yard and hostler or switchman in another yard;[98] crew of through freight and of local freight trains;[99] two switch crews;[1] locomotive engineer and yard employees;[2] yard master and brakeman;[3] and foreman and members of yard crew and engineer of road engine temporarily

24 Utah 513, 68 Pac. 845. Question for jury see Dryburg *v.* Mercur Gold Min., etc., Co., 18 Utah 410, 55 Pac. 367.

Where the injured employee is the superior officer, the fellow servant rule applies. Gulf, etc., R. Co. *v.* Howard, 97 Tex. 513, 80 S. W. 229.

86. Texas, etc., R. Co. *v.* Echols, 17 Tex. Civ. App. 677, 41 S. W. 488 (holding that the members of a night crew hired by a railroad company to remove ties unloaded by a day crew were not fellow servants of the members of the day crew); Missouri, etc., R. Co. *v.* Hines, (Tex. Civ. App. 1897) 40 S. W. 152 (holding that an injured conductor of a train used to transport a bridge gang and bridge materials who had nothing to do with the work for which the bridgemen were employed was not their fellow servant while directing one of them how to remove a brake without injury to it or the car, it being necessary to remove it in order to unload bridge timbers).

"While 'at' indicates nearness in time and place, it does not demand an exact coincident as to either, but only that it shall be sufficiently so to afford the employes a reasonable opportunity of observing the conduct of each other with a view of guarding themselves against injury therefrom." Gulf, etc., R. Co. *v.* Warner, 89 Tex. 475, 479, 35 S. W. 364.

Employees need not be in actual bodily contact with each other or engaged in working upon the same part of a machine, or each know exactly what the other is doing, in order to constitute them fellow servants. Galveston, etc., R. Co. *v.* Cloyd, (Tex. Civ. App. 1903) 78 S. W. 43.

87. Gulf, etc., R. Co. *v.* Warner, 89 Tex. 475, 479, 35 S. W. 364.

"By this is meant that the acts required of each in the performance of his duties at the time of the accident must be in furtherance of 'the common service.'" Gulf, etc., R. Co. *v.* Warner, 89 Tex. 475, 35 S. W. 364.

88. Long *v.* Chicago, etc., R. Co., 94 Tex. 53, 57 S. W. 802 (holding that a section man returning from work to the tool house to place his tools therein was not a fellow servant with another section man engaged in carrying tools to the tool house on a handcar); International, etc., R. Co. *v.* Still, (Tex. Civ. App. 1905) 88 S. W. 257 (holding that where a bridge gang under the direction of one foreman was divided into two squads in order to remove bales of cotton, the servants in the two squads were not engaged in the same piece of work).

89. See Long *v.* Chicago, etc., R. Co., 94 Tex. 53, 57 S. W. 802.

90. Missouri, etc., R. Co. *v.* Whitaker, 11 Tex. Civ. App. 668, 33 S. W. 716.

91. Gulf, etc., R. Co. *v.* Warner, 89 Tex. 475, 35 S. W. 364.

92. Cloyd *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1904) 84 S. W. 408; Galveston, etc., R. Co. *v.* Cloyd, (Tex. Civ. App. 1903) 78 S. W. 43.

93. Texas, etc., R. Co. *v.* Tatman, 10 Tex. Civ. App. 434, 31 S. W. 333.

94. Galveston, etc., R. Co. *v.* McAdams, (Tex. Civ. App. 1905) 84 S. W. 1076.

Train crew and laborers riding on train. —Galveston, etc., R. Co. *v.* Leonard, (Tex. Civ. App. 1894) 29 S. W. 955; Galveston, etc., R. Co. *v.* Norris, (Tex. Civ. App. 1894) 29 S. W. 950; Galveston, etc., R. Co. *v.* Waldo, (Tex. Civ. App. 1894) 26 S. W. 1004.

Train crew and track laborers.— Southern Pac. Co. *v.* Ryan, (Tex. Civ. App. 1895) 29 S. W. 527.

95. San Antonio, etc., R. Co. *v.* Bowles, (Tex. Civ. App. 1895) 30 S. W. 89.

96. Gulf, etc., R. Co. *v.* Calvert, 11 Tex. Civ. App. 297, 32 S. W. 246.

97. Texas, etc., R. Co. *v.* Leighty, (Tex. Civ. App. 1895) 32 S. W. 799.

98. San Antonio, etc., R. Co. *v.* Keller, 11 Tex. Civ. App. 569, 32 S. W. 847.

99. Galveston, etc., R. Co. *v.* Worthy, (Tex. Civ. App. 1894) 27 S. W. 426 [*reversed* on other grounds in 87 Tex. 459, 29 S. W. 376, (Civ. App. 1895) 32 S. W. 557].

1. Masterson *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. 1001.

2. San Antonio, etc., R. Co. *v.* Harding, 11 Tex. Civ. App. 497, 33 S. W. 373.

3. International, etc., R. Co. *v.* Sipole, (Tex. Civ. App. 1895) 29 S. W. 686.

in the yards.[4] An engineer is not necessarily a fellow servant of the train despatcher and telegraph operators.[5]

H. Actions[1] — **1. In General — a. Nature and Form of Remedy.**[2] A servant's common-law right of action against his master for negligence is not abolished by the enactment of an Employers' Liability Act,[3] and both at common law and under such acts the servant's remedy is properly by an action *ex delicto*,[4] although the duty owed by the master was imposed by the contract of service, as well as by law, by reason of their relation.[5] Plaintiff may, however, be required to elect, at the time of trial,[6] between a statutory and a common-law count,[7] and a cause of action under one provision of a statute cannot also be set out as a separate cause under another and distinct provision.[8] A statutory right of action is not taken away or in any way affected by a provision imposing a penalty for the violation of the statute.[9]

b. Grounds and Conditions Precedent — (I) *Grounds.* In an action by an employee to recover for injuries caused by the negligence of a fellow servant in performing some act in defendant's service, plaintiff must show either that he was free from fault himself, or that there was negligence on the part of his fellow servant.[10]

(II) *Conditions Precedent* — (A) *Return of Money Received After Injury.* Unless accepted in compromise of his claim, a servant is not bound as a condition precedent to his right of action, to return money received for wages and medical attention after the accident.[11]

(B) *Notice of Injury*[12] — (1) Necessity. In some jurisdictions the Employers'

4. Missouri, etc., R. Co. *v.* Whitlock, 16 Tex. Civ. App. 176, 41 S. W. 407.

5. Hogan *v.* Missouri, etc., R. Co., 88 Tex. 679, 32 S. W. 1035.

1. Conclusiveness of judgment against receiver see Receivers.

Repayment of fraudulent consideration for fraudulent release as condition precedent to action for injuries see Release.

Right of infants to sue for injuries see Infants.

2. Action by parent for injuries to child see Parent and Child.

Nature and form of action for wrongful death see Death, 13 Cyc. 310 *et seq.*

3. Statutory remedy cumulative.—Clark *v.* Merchants', etc., Transp. Co., 151 Mass. 352, 24 N. E. 49; Ryalls *v.* Mechanics' Mills, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667; Monigan *v.* Erie R. Co., 99 N. Y. App. Div. 603, 91 N. Y. Suppl. 657. See also The Clatsop Chief, 8 Fed. 767, 7 Sawy. 279, holding that the statutory remedy given by U. S. Rev. St. (1878) § 4493 [U. S. Comp. St. (1901) p. 3058], does not exclude the right to any other remedy which may be given by the general admiralty law.

The allegations in support of either remedy are the same, except as to service of notice under the statute. Monigan *v.* Erie R. Co., 99 N. Y. App. Div. 603, 91 N. Y. Suppl. 657.

Where an act creates no new liability for a failure to perform a common-law duty, an action for such failure is based on the common law. Ward *v.* Manhattan R. Co., 95 N. Y. App. Div. 437, 88 N. Y. Suppl. 758.

Where an act is unconstitutional, an action for injuries to a servant, in so far as it seeks to recover thereunder, is not maintainable. Yazoo, etc., R. Co. *v.* Schraag, 84 Miss. 125, 36 So. 193, construing Law (1898), p. 84, c. 66, amendatory of Laws (1896), p. 97, c. 87.

4. Action ex delicto.—Obanhein *v.* Arbuckle, 80 N. Y. App. Div. 465, 81 N. Y. Suppl. 133, holding that where a servant, knowing that his tools are defective, is induced to continue work by the master's promise to supply proper tools shortly, and meanwhile to indemnify the servant for any injury, and the servant sustains injuries from the defective tools, an action for damages must be in tort, for the negligence, and not on the promise. But see Williams *v.* Southern R. Co., 128 N. C. 286, 38 S. E. 893.

5. See Kansas City, etc., R. Co. *v.* Becker, 67 Ark. 1, 53 S. W. 406, 77 Am. St. Rep. 78, 46 L. R. A. 814, holding that, on the breach of a duty imposed on the master both by law and by the contract of service, the servant may treat the wrong suffered as a tort, and bring an action *ex delicto*.

6. Monigan *v.* Eric R. Co., 99 N. Y. App. Div. 603, 91 N. Y. Suppl. 657.

7. See May *v.* Whittier Mach. Co., 154 Mass. 29, 27 N. E. 768.

8. Bridges *v.* Tennessee Coal, etc., Co., 109 Ala. 287, 19 So. 495.

9. D. H. Davis Coal Co. *v.* Polland, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319.

10. Florida Cent., etc., R. Co. *v.* Mooney, 40 Fla. 17, 24 So. 148, construing Acts (1891), c. 4071.

11. Continental Tobacco Co. *v.* Knoop, 71 S. W. 3, 24 Ky. L. Rep. 1268.

Repayment of consideration for fraudulent release see Release.

12. Pleading notice of injury see *infra*, IV, H, 2, a, (IV), (B).

Liability Acts require a notice of injury to be given within a prescribed time thereafter as a condition precedent to a right of action under the statute.[13] Such requirements apply only to those cases which lie outside the common law and within the statute, or to a case in which a servant, although he has a remedy at common law, relies on the statute alone;[14] and even where the action is brought under a statute, the failure to give notice may be excused under certain circumstances, as where there is reasonable excuse for the want of it, and no prejudice has resulted to the master.[15]

(2) SUFFICIENCY. While it has been decided that a notice of injury need not be expressed in strictly technical language,[16] it should nevertheless clearly state, in

13. *Colorado.*— Sess. Laws (1893), p. 129, c. 77, requires as a condition to recover the service of notice of injury on the employer within sixty days after the occurrence (Lange *v.* Union Pac. R. Co., 126 Fed. 338, 62 C. C. A. 48, holding that the conditions, limitations, and procedure provided by the act of 1893 were not impliedly repealed by Sess. Laws (1901), p. 161, c. 67); but such a notice is not a prerequisite to an action brought under the act of 1877, authorizing certain relatives of a deceased employee to recover for his death (Colorado Milling, etc., Co. *v.* Mitchell, 26 Colo. 284, 58 Pac. 28 [*affirming* 12 Colo. App. 277, 55 Pac. 736]).

Massachusetts.— Healey *v.* Geo. F. Blake Mfg. Co., 180 Mass. 270, 62 N. E. 270; Veginan *v.* Morse, 160 Mass. 143, 35 N. E. 451, in which the writ was made out before the notice was served.

New York.— Grasso *v.* Holbrook, etc., Contracting Co., 102 N. Y. App. Div. 49, 92 N. Y. Suppl. 101; Johnson *v.* Roach, 83 N. Y. App. Div. 351, 82 N. Y. Suppl. 203; Stahl *v.* Schoonmaker, 84 N. Y. Suppl. 239. But if the complainant in an action for the death of an employee states a cause of action for wrongful death under Code Civ. Proc. § 1902, it is immaterial whether or not the notice to the employer of the time, place, and cause of the injury, under Laws (1902), p. 1748, c. 600, § 2, was given, although such notice is alleged. Holm *v.* Empire Hardware Co., 102 N. Y. App. Div. 505, 92 N. Y. Suppl. 914.

England.— Keen *v.* Millwall Dock Co., 8 Q. B. D. 482, 46 J. P. 435, 51 L. J. Q. B. 277, 46 L. T. Rep. N. S. 472, 30 Wkly. Rep. 503; Moyle *v.* Jenkins, 8 Q. B. D. 116, 51 L. J. Q. B. 112, 46 L. T. Rep. N. S. 472, 30 Wkly. Rep. 324.

Canada.— Lever *v.* McArthur, 9 Brit. Col. 417; Mason *v.* Bertram, 18 Ont. 1; Cox *v.* Hamilton Sewer Pipe Co., 14 Ont. 300.

See 34 Cent. Dig. tit. "Master and Servant," § 806.

Not required under N. Y. Laws (1897), p. 467, c. 415, § 18.— Williams *v.* Roblin, 94 N. Y. App. Div. 177, 87 N. Y. Suppl. 1006.

14. Ryalls *v.* Mechanics' Mills, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667; Schermerhorn *v.* Glens Falls Portland Cement Co., 94 N. Y. App. Div. 600, 88 N. Y. Suppl. 407; Rosin *v.* Lidgerwood Mfg. Co., 89 N. Y. App. Div. 245, 86 N. Y. Suppl. 49.

15. What constitutes reasonable excuse must depend upon the circumstances of each particular case. Rex *v.* Ponsford, 3 Ont. L. Rep. 410.

Physical or mental incapacity as excuse see Cogan *v.* Burnham, 175 Mass. 391, 56 N. E. 585; Ledwidge *v.* Hathaway, 170 Mass. 348, 49 N. E. 656, construing St. (1888) c. 155.

Lack of means and inability to transact business.— Where it was shown that plaintiff was without means and for some weeks after the accident was unable to transact any business and that defendant's business manager and representative saw the accident and arranged for plaintiff's admission into the hospital, where a few days later he discussed with him the cause of the accident, it was held that the circumstances excused the want of notice of injury. Lever *v.* McArthur, 9 Brit. Col. 417.

The knowledge of defendant of the injury and the cause of it at the time it occurs is, in case of death, a reasonable excuse for the want of notice of injury, where there is no evidence that defendant was in any way prejudiced in his defense by the want of it. Armstrong *v.* Canada Atlantic R. Co., 2 Ont. L. Rep. 219.

Lack of knowledge of defect.— Failure to give notice of injury is unavailing as a defense where the employee by reason of the character of the defect in the machinery had no knowledge thereof. Murphy *v.* Marston Coal Co., 183 Mass. 365, 67 N. E. 342.

The burden is on plaintiff to show that defendant has not been prejudiced by his failure to give notice of injury. Shearer *v.* Miller, 2 F. (Ct. Sess.) 114.

16. **It is enough** if it substantially conveys to the mind of the person to whom it is given the name and address of the person injured, and the cause and date of the injury. Stone *v.* Hyde, 9 Q. B. D. 76, 46 J. P. 788, 51 L. J. Q. B. 452, 46 L. T. Rep. N. S. 421, 30 Wkly. Rep. 816.

Notice held sufficient see Brick *v.* Bosworth, 162 Mass. 334, 39 N. E. 36 (notice that the servant was killed by "the falling of a derrick upon him on account of the same being improperly or insecurely fastened"); Lynch *v.* Allyn, 160 Mass. 248, 35 N. E. 550 (in which the notice set forth the time and place of the injury, and stated the cause to be "the falling of a bank of earth," without referring to defendant's superintendence or his conduct); Beauregard *v.* Webb Granite, etc., Co., 160 Mass. 201, 35 N. E. 555; Clarkson *v.* Musgrave, 9 Q. B. D. 386, 51 L. J.

writing,[17] all the particulars required by the statute;[18] be signed by plaintiff or his duly authorized agent;[19] and be served, within the time prescribed by law,[20] by plaintiff or his agent,[21] upon defendant or his duly authorized agent.[22] Under the English and Massachusetts statutes, however, a defect or inaccuracy in a notice of injury which does not prejudice defendant, and which is not for the purpose of misleading him, will not vitiate the notice;[23] while in Ontario defendant, in order to take advantage of the want of notice or of a defective notice, must give formal notice of his objection not less than seven days before the hearing of the action.[24]

(3) VARIANCE. Where a notice of injury served by plaintiff was addressed to defendant and alleged that on the date of plaintiff's injury he was in defendant's employ as a street car conductor, he could not claim on the trial that the evidence showed that he was employed by a certain railway company other than defendant, and that there was no evidence that such company and defendant were identical.[25]

c. Jurisdiction and Venue.[26] Questions of jurisdiction and venue in actions by servants against their masters for personal injuries are as a rule controlled by statute.[27]

Q. B. 525, 31 Wkly. Rep. 47; Cox *v.* Hamilton Sewer Pipe Co., 14 Ont. 300 [*following* Stone *v.* Hyde, 9 Q. B. D. 76, 46 J. P. 788, 51 L. J. Q. B. 452, 46 L. T. Rep. N. S. 421, 30 Wkly. Rep. 816].

17. Moyle *v.* Jenkins, 8 Q. B. D. 116, 51 L. J. Q. B. 112, 46 L. T. Rep. N. S. 472, 30 Wkly. Rep. 324.

18. Keen *v.* Millwall Dock Co., 8 Q. B. D. 482, 46 J. P. 435, 51 L. J. Q. B. 472, 30 Wkly. Rep. 503.

Insufficient notice under N. Y. Laws (1902), p. 1749, c. 600, see Miller *v.* Solvay Process Co., 109 N. Y. App. Div. 135, 95 N. Y. Suppl. 1020.

19. **Signatures held sufficient** see Greenstein *v.* Chick, 187 Mass. 157, 72 N. E. 955 ("David Benshimal, per H. B.," David Benshimal being the person retained to give the notice, and H. B. being his stenographer to whom he dictated it); Steffe *v.* Old Colony R. Co., 156 Mass. 262, 30 N. E. 1137 ("Frank Steffe, by Geo. Fred Williams, his attorney"); Dolan *v.* Alley, 153 Mass. 380, 26 N. E. 989 ("Corcoran & Parker, attorneys for" plaintiff).

Notice in behalf of wrong person insufficient see Hughes *v.* Russell, 104 N. Y. App. Div. 144, 93 N. Y. Suppl. 307.

Signature not required under Workmen's Compensation for Injuries Act see Mason *v.* Bertram, 18 Ont. 1.

20. **Notice by administrator.**— Where the employee dies of his injuries without having given notice within one hundred and twenty days of the accident, a notice given by his administrator more than sixty days after his appointment, although written within one hundred and twenty days of the accident, is insufficient, under N. Y. Laws (1902), p. 1748, c. 600. Holm *v.* Empire Hardware Co., 102 N. Y. App. Div. 505, 92 N. Y. Suppl. 914; Randall *v.* Holbrook, etc., Contracting Co., 95 N. Y. App. Div. 336, 88 N. Y. Suppl. 681. *Contra*, Hoehn *v.* Lautz, 94 N. Y. App. Div. 14, 87 N. Y. Suppl. 921.

21. Healey *v.* Geo. F. Blake Mfg. Co., 180 Mass. 270, 62 N. E. 270.

22. Healey *v.* Geo. F. Blake Mfg. Co., 180 Mass. 270, 62 N. E. 270 (service on commissioner of corporations insufficient); Harding *v.* Lyon, etc., R. Co., 172 Mass. 415, 52 N. E. 535.

Notice to freight agent or to defendant's attorney, where it had made no objection to the receipt of like notices for five years, is a sufficient compliance with Mass. St. (1887) c. 270, § 3, requiring notice to be "given to the employer." De Forge *v.* New York, etc., R. Co., 178 Mass. 59, 59 N. E. 669, 86 Am. St. Rep. 464.

Notice left with clerk in office of general superintendent sufficient see Shea *v.* New York, etc., R. Co., 173 Mass. 177, 53 N. E. 396.

23. Beauregard *v.* Webb Granite, etc., Co., 160 Mass. 201, 35 N. E. 555; Carter *v.* Drysdale, 12 Q. B. D. 91, 53 L. J. Q. B. 557, 32 Wkly. Rep. 171; Previdi *v.* Gatti, 52 J. P. 646, 58 L. T. Rep. N. S. 762, 36 Wkly. Rep. 670; Beckett *v.* Manchester, 52 J. P. 346.

24. Wilson *v.* Owen Sound Portland Cement Co., 27 Ont. App. 328; Cavanagh *v.* Park, 23 Ont. App. 715.

25. McLaughlin *v.* Interurban St. R. Co., 101 N. Y. App. Div. 134, 91 N. Y. Suppl. 883.

26. **Change of venue** see VENUE.

27. *Alabama.*— A railroad may be sued in the state of its domicile for a tort committed in another state. Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276.

Arkansas.— A resident of Arkansas may sue in any county in Arkansas through which a railroad passes for personal injuries received in another state. St. Louis, etc., R. Co. *v.* Brown, 67 Ark. 295, 54 S. W. 865.

Georgia.— An action is maintainable in the county where the employee was injured (Christian *v.* Columbus, etc., R. Co., 79 Ga. 460, 7 S. E. 216; Georgia R., etc., Co. *v.* Oaks, 52 Ga. 410; Thomas *v.* Georgia R., etc., Co., 38 Ga. 222), and a railroad company operating in the state may be sued there for an injury received in another state (Watson

d. Parties — (I) *In General.* Where it appears from the evidence that a lessee is but an agent of the owner, a recovery for an injury to a servant employed in or about the property may be had of the owner.[28] An unincorporated association can be sued by a servant to recover for personal injuries only in the names of its members.[29]

(II) *Joinder.*[30] In an action by a servant to recover for personal injuries it is permissible to join with the master as parties defendant the servants through whose negligence the injury was received;[31] and in Iowa a railroad company which has purchased the road of another company, and which has assumed the payment of all claims against the vendor company, is properly joined as a co-defendant with the vendor in an action for personal injuries sustained by a servant while in the employ of the latter.[32]

(III) *Misjoinder.* In an action by a servant, who was in the employment of two railroad companies at a point where they used a common track, and who was injured while performing a duty for one of the companies only, disconnected from any service performed for the other, the latter is not a proper party defendant.[33] The presence of a superfluous defendant will not, however, prevent a servant from obtaining such relief as he is entitled to against the proper defendant.[34]

e. Defenses. It is no defense to an action by a servant to recover for personal injuries that the legal title to the staging which he was ordered to use was not in the master,[35] or that it had been previously used without accident;[36] and where a servant was injured while attempting to save the life of another, it is no defense that the negligence of the person whose rescue was attempted contributed

v. Richmond, etc., R. Co., 91 Ga. 222, 18 S. E. 306; Alabama Great Southern R. Co. *v.* Fulghum, 87 Ga. 263, 13 S. E. 649).

North Carolina.— Where a servant of a railroad company operating in the state is injured in another state by the negligence of a fellow servant, an action for such injuries is in contract, not in tort, and, in the absence of any showing as to where the contract was made, the North Carolina court has jurisdiction, applying, however, the fellow servant act of the other state. Williams *v.* Southern R. Co., 128 N. C. 286, 38 S. E. 893.

Texas.— An action for an injury resulting from negligence merely, and which does not amount to a "trespass" under Rev. St. art. 1198, par. 8, should be brought in the county where the master resides, and not in the county where the injury happened (Connor *v.* Saunders, 81 Tex. 633, 17 S. W. 236 [*reversing* 9 Tex. Civ. App. 56, 29 S. W. 1140]; Ricker *v.* Shoemaker, 81 Tex. 22, 16 S. W. 645); but an action against a railroad may be brought either in the county in which the injury occurred, or in the county in which plaintiff resided at the time of the injury (Gulf, etc., R. Co. *v.* Rogers, (Civ. App. 1903) 82 S. W. 822), and in determining the venue, the place where an employer of a railroad establishes his headquarters, boards, and sleeps, is his residence (Gulf, etc., R. Co. *v.* Rogers, *supra*. *Compare* Galveston, etc., R. Co. *v.* Cloyd, (Civ. App. 1903) 78 S. W. 43), where the laws of another jurisdiction governing liability for negligence, and the procedure for their enforcement differ from those of Texas, the courts of Texas will refuse to take jurisdiction of an action against a railroad by a servant who entered its service in such other jurisdiction, and was injured there (Mexican Nat. R. Co. *v.* Jackson, 89 Tex. 107, 33 S. W. 857, 59 Am. St. Rep. 28, 31 L. R. A. 276 [*reversing* (Civ. App. 1895) 32 S. W. 230].

See 34 Cent. Dig. tit. "Master and Servant," § 807.

But see Mexican Cent. R. Co. *v.* Jones, 107 Fed. 64, 48 C. C. A. 227.

28. Consolidated Coal Co. *v.* Seniger, 179 Ill. 370, 53 N. E. 733 [*affirming* 79 Ill. App. 456].

29. Standard Light, etc., Co. *v.* Muncey, 33 Tex. Civ. App. 416, 76 S. W. 931, in which certain bondholders of an electric corporation, which was in the hands of a receiver, were engaged in reconstructing a portion of the company's lines under the receiver's permission, and it was held that the fact that, when sued as the "Bondholders of the Dallas Electric Company," they appeared and answered under the same name, did not justify a judgment against them under such appellation.

30. **Joinder of parties** see PARTIES.

31. Morrison *v.* Northern Pac. R. Co., 34 Wash. 70, 74 Pac. 1064; McHugh *v.* Northern Pac. R. Co., 32 Wash. 30, 72 Pac. 450; Howe *v.* Northern Pac. R. Co., 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949.

32. Knott *v.* Dubuque, etc., R. Co., 84 Iowa 462, 51 N. W. 57.

33. Vary *v.* Burlington, etc., R. Co., 42 Iowa 246.

34. Acme Bedford Stone Co. *v.* McPhetridge, 35 Ind. App. 79, 73 N. E. 838.

35. Ehlen *v.* O'Donnell, 102 Ill. App. 141.

36. Rapson *v.* Leighton, 187 Mass. 432, 73 N. E. 540.

to the peril, nor that plaintiff was an employee of defendant.[37] On the other hand a servant cannot recover damages for an injury caused by his violation of a penal statute, although the master may have directed such violation or sanctioned the continuance of a custom contrary to law.[38] Where the defense of assumption of risk is maintained, questions of contributory negligence do not arise, because, if plaintiff assumed the risk, he cannot recover, although he exercised the highest degree of care.[39]

f. Conflict of Laws. When an action against a railroad company to recover damages for personal injuries to a servant while in its employ is tried in a different state from that in which the contract of employment was made, and in which the injury was received, the right of recovery and the rule as to what conduct on his part shall or shall not constitute a defense to the action are governed by the *lex loci*, so that a constitutional provision of the *lex loci*, providing that knowledge of a defect by the servant shall not be a defense, is properly charged, where applicable.[40]

2. Pleading[41] — a. Declaration, Petition, or Complaint[42] — (i) *In General.* The declaration, petition, or complaint in an action by a servant against his master to recover for personal injuries is governed by the general rules of law respecting pleading.[43] While no express form of words is necessary the declaration or complaint must set out with certainty and definiteness all facts necessary to constitute a cause of action,[44] and, in particular, it must show the existence of the relation

37. Pittsburg, etc., R. Co. *v.* Lynch, 69 Ohio St. 123, 68 N. E. 703, 100 Am. St. Rep. 658, 63 L. R. A. 504.

38. Little *v.* Southern R. Co., 120 Ga. 347, 47 S. E. 953, 102 Am. St. Rep. 104, 66 L. R. A. 509.

39. **The defenses of assumption of risk and contributory negligence** are inconsistent with each other, do not rest upon the same principles, and the existence of one necessarily excludes the existence of the other. Ball *v.* Gussenhoven, 29 Mont. 321, 74 Pac. 871.

40. South Carolina, etc., R. Co. *v.* Thurman, 106 Ga. 804, 32 S. E. 863.

41. **Action by parent for injuries to child** see Parent and Child.

Aider by verdict of judgment see Pleading.

Amendment see Pleading.

Conformity of instructions to pleadings see *infra*, IV, H, 7, a, (iv).

Election between counts see Pleading.

General or special demurrer see Pleading.

Joinder of causes of action see Pleading.

Omission to make definite and certain see Pleading.

Replication in pleading see Pleading.

Waiver of objection see Pleading.

42. **Aider by verdict** see Pleading.

Conformity of instructions to pleadings see *infra*, IV, H, 7, a, (iv).

Issues, proof, and variance see *infra*, IV, H, 2, d.

Plea or answer see *infra*, IV, H, 2, b.

Replication or reply see *infra*, IV, H, 2, c.

43. See Pleading.

Joinder.— Where both are based on the same state of facts a count for negligence is properly joined with a count for the violation of a duty imposed by statute. Marquette Third Vein Coal Co. *v.* Dielie, 208 Ill. 116, 70 N. E. 17.

Complaint defective for want of certainty see Peterson *v.* New Pittsburg Coal, etc., Co., 149, Ind. 260, 49 N. E. 8, 63 Am. St. Rep. 289.

Count held bad for duplicity see Laporte *v.* Cook, 20 R. I. 261, 38 Atl. 700. *Compare* Louisville, etc., R. Co. *v.* Mothershed, 97 Ala. 261, 12 So. 714.

Departure.— Where, in the first count of a petition for wrongful death, occasioned by the negligent operation of defendant's train, it was alleged that deceased was in defendant's employ as assistant road-master; in the second that he was in the employ of a company which was reconstructing defendant's tracks; and in the third that he was a passenger on one of defendant's trains, it was held that the second and third counts did not constitute a departure from the first. Rinard *v.* Omaha, etc., R. Co., 164 Mo. 270, 64 S. W. 124.

Surplusage not fatal see Perry *v.* Marsh, 25 Ala. 659; Kinnare *v.* Chicago, 70 Ill. App. 106; Louisville, etc., R. Co. *v.* Reagan, 96 Tenn. 128, 33 S. W. 1050; El Paso, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1904) 83 S. W. 855.

44. *Alabama.*— Alabama Great Southern R. Co. *v.* Williams, 140 Ala. 230, 37 So. 255.

Connecticut.— Anderson *v.* U. S. Rubber Co., 78 Conn. 48, 60 Atl. 1057.

Georgia.— Ballew *v.* Broach, 121 Ga. 421, 49 S. E. 297.

Illinois.— Klawiter *v.* Jones, 219 Ill. 626, 76 N. E. 673 [*affirming* 110 Ill. App. 31]; Mackey *v.* Northern Mill Co., 210 Ill. 115, 71 N. E. 448 [*affirming* 99 Ill. App. 57].

Indiana.— Peterson *v.* New Pittsburg Coal, etc., Co., 149 Ind. 260, 49 N. E. 8, 63 Am. St. Rep. 289; Chicago, etc., R. Co. *v.* Wicker, 34 Ind. App. 215, 72 N. E. 614, (App. 1904) 71 N. E. 223; Cleveland, etc., R. Co. *v.* Lindsay, 33 Ind. App. 404, 70 N. E. 283, 998; Standard Cement Co. *v.* Minor, 27 Ind. App. 479, 61 N. E. 684.

of master and servant at the time of the injury,[45] the nature and circumstances of the injury complained of,[46] the right of the servant to be where he was when injured,[47] and that he was in the performance of the duties of his service,[48] and the performance of any condition precedent to the right of action.[49] If not

Pennsylvania.— Costello *v.* Bailey, 12 Pa. Co. Ct. 422.

Rhode Island.— Durell *v.* Hartwell, 26 R. I. 125, 58 Atl. 448.

United States.— Kasadarian *v.* James Hill Mfg. Co., 130 Fed. 62.

See 34 Cent. Dig. tit. "Master and Servant," § 809.

For instances of sufficiently pleaded facts see Pierson Lumber Co. *v.* Hart, 144 Ala. 239, 39 So. 566; Southern R. Co. *v.* Guyton, 122 Ala. 231, 25 So. 34; Greeley *v.* Foster, 32 Colo. 292, 75 Pac. 351 [*affirming* 15 Colo. App. 176, 61 Pac. 482]; Consolidated Stone Co. *v.* Summit, 152 Ind. 297, 53 N. E. 235; Southern R. Co. *v.* Sittasen, (Ind. App. 1905) 74 N. E. 898; Baltimore, etc., R. Co. *v.* Cavanaugh, 35 Ind. App. 32, 71 N. E. 239; East Chicago Foundry Co. *v.* Ankeny, 19 Ind. App. 150, 47 N. E. 936, 49 N. E. 186; Hearn *v.* Quillen, 94 Md. 39, 50 Atl. 402; Hix *v.* Belton Mills, 69 S. C. 273, 48 S. E. 96; Farley *v.* Charleston Basket, etc., Co., 51 S. C. 222, 28 S. E. 193, 401; Texas, etc., R. Co. *v.* Lee, 32 Tex. Civ. App. 23, 74 S. W. 345; Anderson *v.* Hayes, 101 Wis. 538, 77 N. W. 891, 70 Am. St. Rep. 930; Burch *v.* Southern Pac. Co., 140 Fed. 270; Rabe *v.* Consolidated Ice Co., 91 Fed. 457.

45. *Alabama.*— Walton *v.* Lindsay Lumber Co., (1905) 39 So. 670; Logan *v.* Central Iron, etc., Co., 139 Ala. 548, 36 So. 729, in which the relation was only shown inferentially. *Compare* Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88, in which the relation was held to be sufficiently shown.

Illinois.— See Sargent Co. *v.* Baublis, 215 Ill. 428, 74 N. E. 455, in which allegations that defendant was engaged in operating a foundry, that plaintiff was employed in this business as a laborer, and was directed by defendant to use a certain grindstone, while using which he was injured, were held sufficient, after verdict, as an allegation of the existence of the relation.

Indiana.— Pittsburgh, etc., R. Co. *v.* Lightheiser, 163 Ind. 247, 71 N. E. 218, 660; Wabash R. Co. *v.* Erb, (App. 1905) 73 N. E. 939. *Compare* Hay *v.* Bash, (App. 1906) 76 N. E. 644; Jarvis *v.* Hitch, (App. 1902) 65 N. E. 608.

Maine.— Boardman *v.* Creighton, 93 Me. 17, 44 Atl. 121.

New Jersey.— Wendell *v.* Pennsylvania R. Co., 57 N. J. L. 467, 31 Atl. 720, in which the allegations of the complaint showed that plaintiff was a mere volunteer.

New York.— See McMillan *v.* Saratoga, etc., R. Co., 20 Barb. 449, holding that the complaint set forth facts sufficient to show the relation.

Rhode Island.—Whalan *v.* Whipple, (1887) 13 Atl. 107, holding that a declaration is bad on general demurrer which alleges that plaintiff was employed by defendant's agent and servants, instead of alleging that he was employed by defendant. *Compare* Di Marcho *v.* Builders' Iron Foundry, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661, in which the relation was sufficiently shown.

Texas.— See Bonner *v.* Bryant, 79 Tex. 540, 15 S. W. 491, 23 Am. St. Rep. 361, in which the rule was recognized that one who was injured while assisting in moving cars as a volunteer cannot recover, but the petition in the case was held good, in the absence of a special exception. *Compare* Dallas Electric Co. *v.* Mitchell, 33 Tex. Civ. App. 424, 76 S. W. 935.

United States.— The Conde Wifredo, 77 Fed. 324, 23 C. C. A. 187.

See 34 Cent. Dig. tit. "Master and Servant," §§ 813, 814.

But see Jones *v.* Old Dominion Cotton Mills, 82 Va. 140, 3 Am. St. Rep. 92, holding that it is not necessary that the declaration state whether plaintiff was an employee or a mere trespasser. And see Reardon *v.* Missouri Pac. R. Co., 114 Mo. 384, 21 S. W. 731.

As to volunteers see Mefford *v.* Louisville, etc., R. Co., 20 S. W. 263, 14 Ky. L. Rep. 327; Hart *v.* West Side R. Co., 86 Wis. 483, 57 N. W. 91.

46. Savannah, etc., R. Co. *v.* Chaney, 101 Ga. 420, 28 S. E. 1001; Anderson *v.* Haig, 12 Pa. Co. Ct. 450; Niden *v.* Wolfenden, 12 Pa. Co. Ct. 398; Texas, etc., R. Co. *v.* McCoy, 3 Tex. Civ. App. 276, 22 S. W. 926.

Allegations held sufficient see Gibson *v.* Canadian Pac. Nav. Co., 1 Alaska 407; Augusta *v.* Owens, 111 Ga. 464, 36 S. E. 830; Woodson *v.* Johnston, 109 Ga. 454, 34 S. E. 587; Diamond Block Coal Co. *v.* Cuthbertson, (Ind. 1905) 73 N. E. 818 [*affirming* (App. 1903) 67 N. E. 558, (App. 1905) 73 N. E. 132]; Haggerty *v.* Lake Shore, etc., R. Co., 4 Ohio Dec. (Reprint) 218, 1 Clev. L. Rep. 124; Lee *v.* Reliance Mills Co., 21 R. I. 322, 43 Atl. 536; Texas Cent. R. Co. *v.* Powell, (Tex. Civ. App. 1905) 86 S. W. 21; Galveston, etc., R. Co. *v.* Hitzfelder, 24 Tex. Civ. App. 318, 66 S. W. 707; Baltimore, etc., R. Co. *v.* Doty, 133 Fed. 866.

47. Savannah, etc., R. Co. *v.* Chaney, 101 Ga. 420, 28 S. E. 1001.

48. See Romona Oolitic Stone Co. *v.* Johnson, 6 Ind. App. 550, 33 N. E. 1000.

49. Where notice of injury is required to be given as a prerequisite to a recovery, the giving of the notice must be alleged in the declaration or complaint. Johnson *v.* Roach, 83 N. Y. App. Div. 351, 82 N. Y. Suppl. 203; Gmaehle *v.* Rosenberg, 80 N. Y. App. Div. 541, 80 N. Y. Suppl. 705, 83 N. Y. App. Div. 339, 84 N. Y. Suppl. 1127; Crosby *v.* Lehigh Valley R. Co., 128 Fed. 193, although the time of giving it need not be averred. Steffe *v.*

fatally defective, it may be amended in the discretion of the court, as in other cases.[50]

(II) *Allegations of Negligence*[51] — (A) *In General.* The declaration, petition, or complaint against a master for personal injuries to a servant must contain an averment of negligence on the part of defendant, or someone for whom he is responsible.[52] But, while it is not sufficient to charge negligence in general terms as a conclusion of law, and while it must be shown in what the negligence complained of consisted,[53] the particular acts or omissions which constitute and

Old Colony R. Co., 156 Mass. 262, 30 N. E. 1137.

Where a complaint alleges two causes of action, the first conforming in all respects to the Employers' Liability Act, and the second, which attempts to plead an action for ordinary negligence vesting in the servant's administrator, alleges that plaintiff's intestate was in the employ of defendant when the injuries complained of were sustained and facts bringing the cause of action within the scope of the Employers' Liability Act, but failed to allege the service of notice, it is insufficient. Crosby *v.* Lehigh Valley R. Co., 128 Fed. 193, construing N. Y. Employers' Liability Act (1902), and N. Y. Code Civ. Proc. § 1902.

It is unnecessary to allege notice, where the complaint in an action to recover for the death of an employer through the negligence of the master in the erection of a scaffolding states a good cause of action based on a common-law liability of the master. Gmaehle *v.* Rosenberg, 178 N. Y. 147, 70 N. E. 411 [*reversing* 40 Misc. 267, 81 N. Y. Suppl. 930]. See also Kleps *v.* Bristol Mfg. Co., 107 N. Y. App. Div. 488, 95 N. Y. Suppl. 337.

50. Instances of amendments. — *Georgia.*— Colley *v.* Southern Cotton Oil Co., 120 Ga. 258, 47 S. E. 932; Columbia Min. Co. *v.* Wellmaker, 118 Ga. 606, 45 S. E. 455; Colley *v.* Gate City Coffin Co., 92 Ga. 664, 18 S. E. 817.

Kansas.—Atchison, etc., R. Co. *v.* Beaver, 60 Kan. 856, 55 Pac. 850.

Rhode Island.— Briggs *v.* Callender, etc., Co., 23 R. I. 359, 50 Atl. 653.

South Carolina.— Mew *v.* Charleston, etc., R. Co., 58 S. C. 90, 32 S. E. 828.

Texas.— Texas Cent. R. Co. *v.* Frazier, (Civ. App. 1896) 34 S. W. 664; Texas, etc., R. Co. *v.* Johnson, (Civ. App. 1896) 34 S. W. 186.

See 34 Cent. Dig. tit. "Master and Servant," § 815.

Amendment setting out facts more fully required see Blackstone *v.* Georgia Cent. R. Co., 105 Ga. 380, 31 S. E. 90. But *compare* Moore *v.* Catawba Power Co., 68 S. C. 201, 46 S. E. 1004.

Clerical error corrected see Haggerty *v.* St. Louis, etc., R. Co., 100 Mo. App. 424, 74 S. W. 456, where the word "proper" in the phrase "proper medical and surgical treatment" was corrected so as to read "improper."

51. Acts of agents or representatives in general see *infra*, IV, H, 2, a, (II), (B), (4).

Conformity of instructions to pleading see *infra*, IV, H, 7, a, (IV).

Issues, proof, and variance see *infra*, IV, H, 2, d.

Negligence of master in employing incompetent servants see *infra*, IV, H, 2, a, (II), (B), (8).

Plea or answer see *infra*, IV, H, 2, b.

52. Cox *v.* Providence Gas Co., 17 R. I. 199, 21 Atl. 344.

In a complaint for wilful injury it must be charged that the act complained of was wilfully done, with intent to wilfully and purposely inflict the particular injury of which complaint is made. Walker *v.* Wehking, 29 Ind. App. 62, 63 N. E. 128.

53. *Alabama.*— Whatley *v.* Zenida Coal Co., 122 Ala. 118, 26 So. 124. See also Walton *v.* Lindsay Lumber Co., (1905) 39 So. 670.

Delaware.— Kennedy *v.* Delaware Cotton Co., 4 Pennew. 353, 55 Atl. 7; Clark *v.* Diamond State Steel Co., 2 Pennew. 522, 47 Atl. 1014.

Georgia.— Babcock Bros. Lumber Co. *v.* Johnson, 120 Ga. 1030, 48 S. E. 438; Seaboard Air-Line R. Co. *v.* Pierce, 120 Ga. 230, 47 S. E. 581 (special demurrer); Palmer Brick Co. *v.* Chenall, 119 Ga. 837, 47 S. E. 329; Miller *v.* Merchants', etc., Transp. Co., 115 Ga. 1009, 42 S. E. 385 (special demurrer); Barry *v.* McGhee, 100 Ga. 759, 28 S. E. 455; Central R. Co. *v.* Kenney, 64 Ga. 100.

Illinois.— Klawiter *v.* Jones, 219 Ill. 626, 76 N. E. 673 [*affirming* 110 Ill. App. 31]; Strojay *v.* Griffin Wheel Co., 116 Ill. App. 550; Hinchliff *v.* Rudnick, 70 Ill. App. 148.

Indiana.— Laporte Carriage Co. *v.* Sullender, 165 Ind. 290, 75 N. E. 277; Pittsburgh, etc., R. Co. *v.* Lightheiser, (1904) 71 N. E. 218, 660; McElwaine-Richards Co. *v.* Wall, 159 Ind. 557, 65 N. E. 753; Petersen *v.* New Pittsburg Coal, etc., Co., 149 Ind. 260, 49 N. E. 8, 63 Am. St. Rep. 289; Burns *v.* Windfall Mfg. Co., 146 Ind. 261, 45 N. E. 188; Norton-Reed Stone Co. *v.* Steele, 32 Ind. App. 48, 69 N. E. 198; Citizens St. R. Co. *v.* Brown, 29 Ind. App. 185, 64 N. E. 98; Bowles *v.* Indiana R. Co., 27 Ind. App. 672, 62 N. E. 94, 87 Am. St. Rep. 279.

Maine.— McGraw *v.* Great Northern Paper Co., 97 Me. 343, 54 Atl. 762.

Michigan.— Toronto *v.* Salliotte, 99 Mich. 41, 57 N. W. 1042.

Missouri.— Waldhier *v.* Hannibal, etc., R. Co., 71 Mo. 514.

New York.— Keairns *v.* Coney Island, etc., R. Co., 49 Hun 608, 1 N. Y. Suppl. 906.

Ohio.— Rafferty *v.* Toledo Traction Co., 19 Ohio Cir. Ct. 288, 10 Ohio Cir. Dec. 347; Consolidated St. R. Co. *v.* Maier, 9 Ohio Cir. Ct. 268, 4 Ohio Cir. Dec. 24; Miles *v.* Bar-

go to prove the negligence need not be averred, and it is generally sufficient merely to state such facts as will make it appear to the court what the act of negligence alleged to have caused the injury was;[54] and it is only when the acts

bour, 1 Ohio S. & C. Pl. Dec. 28, 3 Ohio N. P. 326.

Oregon.— Wild *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 159, 27 Pac. 954.

Rhode Island.— Walsh *v.* Smith, 26 R. I. 554, 59 Atl. 922; Russel *v.* Riverside Worsted Mills, 24 R. I. 591, 54 Atl. 375; Desrosiers *v.* Bourn, 24 R. I. 288, 52 Atl. 1080; Milhench *v.* E. Jenckes Mfg. Co., 24 R. I. 131, 52 Atl. 687; Martello *v.* Fusco, 21 R. I. 57[illegible] 45 Atl. 577; Whalan *v.* Whipple, (1887) 13 Atl. 107.

South Carolina.— Branham *v.* Camden Cotton Mill, 61 S. C. 491, 39 S. E. 708.

Virginia.— Norfolk, etc., R. Co. *v.* Jackson, 85 Va. 489, 8 S. E. 370.

Washington.— Bullivant *v.* Spokane, 14 Wash. 577, 45 Pac. 42.

United States.— Carr *v.* Shields, 125 Fed. 827; De Luca *v.* Hughes, 96 Fed. 823; Miller *v.* Union Pac. R. Co., 4 Fed. 768, 2 McCrary 87.

See 34 Cent. Dig. tit. "Master and Servant," §§ 816, 818.

54. "Very general averments, little short indeed of mere conclusions, of a want of care and consequent injury, leaving out the facts which constitute and go to prove negligence, meet all requirements of the law." Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 307, 9 So. 252, 25 Am. St. Rep. 47. See also the following cases in which the averments were held sufficient to charge negligence:

Alabama.— Sloss-Sheffield Steel, etc., Co. *v.* Hutchison, 144 Ala. 221, 40 So. 114; Western R. Co. *v.* Russell, 144 Ala. 142, 39 So. 311; Northern Alabama R. Co. *v.* Shea, 142 Ala. 119, 37 So. 796; Alabama Great Southern R. Co. *v.* Brooks, 135 Ala. 401, 33 So. 181; Highland Ave., etc., R. Co. *v.* Miller, 120 Ala. 535, 24 So. 955; Southern R. Co. *v.* Arnold, 114 Ala. 183, 21 So. 954.

Florida.— Walsh *v.* Western R. Co., 34 Fla. 1, 15 So. 686.

Georgia.— Louisville, etc., R. Co. *v.* Hairston, 122 Ga. 372, 50 S. E. 120 (good against general demurrer); Seaboard Air-Line R. Co. *v.* Pierce, 120 Ga. 230, 47 S. E. 581 (good against general demurrer); Schmidt *v.* Block, 76 Ga. 823.

Illinois.—Consolidated Coal Co. *v.* Scheiber, 167 Ill. 539, 47 N. E. 1052; Consolidated Coal Co. *v.* Wombacher, 134 Ill. 57, 24 N. E. 627.

Indiana.— Clear Creek Stone Co. *v.* Dearmin, 160 Ind. 162, 66 N. E. 609; Louisville, etc., R. Co. *v.* Kemper, 153 Ind. 618, 53 N. E. 931; Peerless Stone Co. *v.* Wray, 152 Ind. 27, 51 N. E. 326; Terre Haute Electric Co. *v.* Kiely, (App. 1904) 72 N. E. 658; Union Traction Co. *v.* Buckland, 34 Ind. App. 420, 72 N. E. 158; Cleveland, etc., R. Co. *v.* Lindsay, 33 Ind. App. 404, 70 N. E. 283, 998; Norton-Reed Stone Co. *v.* Steele, 32 Ind. App. 48, 69 N. E. 198; Diamond Block Coal Co. *v.* Cuthbertson, (App. 1903) 67 N. E. 558; Buehner Chair Co. *v.* Feulner, 28 Ind. App. 479, 63 N. E. 239; Romona Oolitic Stone Co. *v.* Johnson, 6 Ind. App. 550, 33 N. E. 1000. *Compare* Potter *v.* Knox County Lumber Co., 146 Ind. 114, 44 N. E. 1000, in which the complaint, although diffuse, was held good on demurrer.

Kentucky.— U. S. Cast Iron Pipe, etc., Co. *v.* Gable, 78 S. W. 485, 25 Ky. L. Rep. 1692.

Massachusetts.— Woodbury *v.* Post, 158 Mass. 140, 33 N. E. 86.

Minnesota.— Nicholas *v.* Burlington, etc., R. Co., 78 Minn. 43, 80 N. W. 776.

Mississippi.— Taylor *v.* Bradford, 83 Miss. 157, 35 So. 423.

Missouri.— Cambron *v.* Omaha, etc., R. Co., 165 Mo. 543, 65 S. W. 745; Seckinger *v.* Philibert, etc., Mfg. Co., 129 Mo. 590, 31 So. 957; Rickaly *v.* John O'Brien Boiler Works Co., 108 Mo. App. 130, 82 S. W. 963.

New Hampshire.— Merritt *v.* American Woolen Co., 71 N. H. 493, 53 Atl. 303.

New York.— Murphy *v.* Hopper, 75 N. Y. App. Div. 606, 78 N. Y. Suppl. 657.

Ohio.— Snyder *v.* Cleveland, etc., R. Co., 60 Ohio St. 487, 54 N. E. 475 (good against general demurrer); Shailer, etc., Co. *v.* Corcoran, 21 Ohio Cir. Ct. 639, 11 Ohio Cir. Dec. 599.

Oregon.— Hough *v.* Grants Pass Power Co., 41 Oreg. 531, 69 Pac. 655.

Rhode Island.— Laporte *v.* Cook, 20 R. I. 261, 38 Atl. 700.

South Carolina.— Lynch *v.* Spartan Mills, 66 S. C. 12, 44 S. E. 93.

Texas.— Gulf, etc., R. Co. *v.* Montier, 61 Tex. 122 (good against general demurrer); International, etc., R. Co. *v.* Reeves, 35 Tex. Civ. App. 162, 79 S. W. 1099; Galveston, etc., R. Co. *v.* Bohan, (Civ. App. 1898) 47 S. W. 1050; Galveston, etc., R. Co. *v.* Norris, (Civ. App. 1894) 29 S. W. 950.

Washington.— Dossett *v.* St. Paul, etc., Lumber Co., 40 Wash. 276, 82 Pac. 273.

United States.— Santa Fe, etc., R. Co. *v.* Hurley, 172 U. S. 645, 19 S. Ct. 879, 43 L. ed. 1183 [*affirming* 4 Ariz. 258, 36 Pac. 216]; Northern Pac. R. Co. *v.* Mix, 121 Fed. 476, 57 C. C. A. 592; Simpson *v.* La Plata Min., etc., Co., 17 Fed. 125, 5 McCrary 327.

See 34 Cent. Dig. tit. "Master and Servant," §§ 816, 818.

Allegations as to defective or dangerous machinery, appliances, or places held sufficient.— Sloss-Sheffield Steel, etc., Co. *v.* Mobley, 139 Ala. 425, 36 So. 181; Birmingham Traction Co. *v.* Reville, 136 Ala. 335, 34 So. 981; Illinois Car, etc., Co. *v.* Walsh, 132 Ala. 490, 31 So. 470; Highland Ave., etc., R. Co. *v.* Miller, 120 Ala. 535, 24 So. 955; Santa Fe, etc., R. Co. *v.* Hurley, 4 Ariz. 258, 36 Pac. 216; Davies *v.* Oceanic Steamship Co., 89 Cal. 280, 26 Pac. 827; Monaghan *v.* Pacific

and things alleged are such that they cannot constitute negligence under any possible state of facts or circumstances which could be proved under the averments in the declaration or complaint that the court will, after verdict and judg-

Rolling Mill Co., 81 Cal. 190, 22 Pac. 590; McGonigle *v.* Kane, 20 Colo. 292, 38 Pac. 367; Kennedy *v.* Delaware Cotton Co., 4 Pennew. (Del.) 353, 55 Atl. 7; Jones *v.* People's R. Co., 4 Pennew. (Del.) 201, 53 Atl. 1065; Corley *v.* Coleman, 113 Ga. 994, 39 S. E. 558; Atlanta, etc., Air-Line R. Co. *v.* Woodruff, 66 Ga. 707; Eagle, etc., Mfg. Co. *v.* Welch, 61 Ga. 444; Illinois Terra Cotta Lumber Co. *v.* Hanley, 214 Ill. 243, 73 N. E. 373; Illinois Terminal R. Co. *v.* Thompson, 210 Ill. 226, 71 N. E. 328 [*affirming* 112 Ill. App. 463]; Himrod Coal Co. *v.* Clark, 197 Ill. 514, 64 N. E. 282 [*affirming* 99 Ill. App. 332]; Taylor *v.* Felsing, 164 Ill. 331, 45 N. E. 161; Consolidated Stone Co. *v.* Staggs, 164 Ind. 331, 73 N. E. 695 [*affirming* (App. 1904) 71 N. E. 161]; Louisville, etc., R. Co. *v.* Kemper, 153 Ind. 618, 53 N. E. 931; Wabash, etc., R. Co. *v.* Morgan, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85, W. C. De Pauw Co. *v.* Stubblefield, 132 Ind. 182, 31 N. E. 796; Columbus, etc., R. Co. *v.* Arnold, 31 Ind. 174, 99 Am. Dec. 615; Muncie Pulp Co. *v.* Hacker, (App. 1906) 76 N. E. 770; Terre Haute Electric Co. *v.* Kiely, 35 Ind. App. 180, 72 N. E. 658; American Car, etc., Co. *v.* Clark, 32 Ind. App. 644, 70 N. E. 828; Indiana Bituminous Coal Co. *v.* Buffey, 28 Ind. App. 108, 62 N. E. 279; Baltimore, etc., R. Co. *v.* Spaulding, 21 Ind. App. 323, 52 N. E. 410; Coal Bluff Min. Co. *v.* Watts, 6 Ind. App. 347, 33 N. E. 662; Covington Sawmill, etc., Mfg. Co. *v.* Clark, 116 Ky. 461, 76 S. W. 348, 25 Ky. L. Rep. 694; Edmondson *v.* Kentucky Cent. R. Co., 105 Ky. 479, 49 S. W. 200, 448, 20 Ky. L. Rep. 1296; Illinois Cent. R. Co. *v.* Leisure, 90 S. W. 269, 28 Ky. L. Rep. 768; Cincinnati, etc., R. Co. *v.* Maley, 76 S. W. 334, 25 Ky. L. Rep. 690; Louisville, etc., R. Co. *v.* Richardson, 66 S. W. 631, 23 Ky. L. Rep. 2090; Nicholas *v.* Burlington, etc., R. Co., 78 Minn. 43, 80 N. W. 776; Fraser *v.* Red River Lumber Co., 42 Minn. 520, 44 N. W. 878; Gutridge *v.* Missouri Pac. R. Co., 94 Mo. 468, 7 S. W. 476, 4 Am. St. Rep. 392; Condon *v.* Missouri Pac. R. Co., 78 Mo. 567; Covey *v.* Hannibal, etc., R. Co., 27 Mo. App. 170; Schmidtkunst *v.* Sutro, 15 Daly (N. Y.) 93, 19 N. Y. St. 913; Forest City Stone Co. *v.* Richardson, 22 Ohio Cir. Ct. 139, 12 Ohio Cir. Dec. 177; Cox *v.* Providence Gas Co., 17 R. I. 199, 21 Atl. 344; Carson *v.* Southern R. Co., 68 S. C. 55, 46 S. E. 525 [*affirmed* in 194 U. S. 136, 24 S. Ct. 609, 48 L. ed. 907]; Reed *v.* Northeastern R. Co., 37 S. C. 42, 16 S. E. 289; Galveston, etc., R. Co. *v.* Templeton, 87 Tex. 42, 26 S. W. 1066; Galveston, etc., R. Co. *v.* Abbey, 29 Tex. Civ. App. 211, 68 S. W. 293; Missouri, etc., R. Co. *v.* Kirkland, 11 Tex. Civ. App. 528, 32 S. W. 588; Galveston, etc., R. Co. *v.* Crawford, 9 Tex. Civ. App. 245, 27 S. W. 822, 29 S. W. 958; Preston *v.* Johnsbury, etc., R. Co., 64 Vt. 280, 25 Atl. 486; Virginia, etc., Wheel Co. *v.* Harris, 103 Va. 708, 49 S. E. 991; Virginia Portland Cement Co. *v.* Luck, 103 Va. 427, 49 S. E. 577; Richmond Locomotive Works *v.* Ford, 94 Va. 627, 27 S. E. 509; South-West Imp. Co. *v.* Andrew, 86 Va. 270, 9 S. E. 1015; Henne *v.* J. T. Steeb Shipping Co., 37 Wash. 331, 79 Pac. 938; Walker *v.* McNeill, 17 Wash. 582, 50 Pac. 518; Trump *v.* Tidewater Coal, etc., Co., 46 W. Va. 238, 32 S. E. 1035; Humphreys *v.* Newport News, etc., Co., 33 W. Va. 135, 10 S. E. 39; Berns *v.* Gaston Gas Coal Co., 27 W. Va. 285, 55 Am. Rep. 304; Jensen *v.* Hudson Sawmill Co., 98 Wis. 73, 73 N. W. 434; Monahan *v.* Northwestern Contracting Co., 84 Wis. 596, 54 N. W. 1025; Carey *v.* Chicago, etc., R. Co., 67 Wis. 608, 31 N. W. 163; Behm *v.* Armour, 58 Wis. 1, 15 N. W. 806; Northern Pac. R. Co. *v.* Mix, 121 Fed. 476, 57 C. C. A. 592.

Allegations as to negligent methods of work, rules, and orders held sufficient.— Pennsylvania Co. *v.* McCaffrey, 139 Ind. 430, 38 N. E. 67, 29 L. R. A. 104 (complaint sufficient which shows that decedent was killed by the company's moving a train back on him without signals, and with only a fireman in charge); Ohio, etc., R. Co. *v.* Collarn, 73 Ind. 261, 38 Am. Rep. 134 (allegation that defendant ran locomotive carelessly, negligently, and recklessly against, on, and over plaintiff); Lebanon *v.* McCoy, 9 Ind. App. 698, 36 N. E. 547. *Compare* Pittsburgh, etc., R. Co. *v.* Lightheiser, 163 Ind. 247, 71 N. E. 218, 660 (allegation of facts showing that employee in charge of the car violated a rule held insufficient to show duty neglected); Reed *v.* Browning, 130 Ind. 575, 30 N. E. 704 (complaint insufficient in that it failed to allege whose negligence caused the injury); Burk *v.* Burrell, 88 Mich. 289, 50 N. W. 296; Sullivan *v.* Missouri Pac. R. Co., 97 Mo. 113, 10 S. W. 852 (in which the petition set out particularly the circumstances attending the killing, and alleged that intestate's death was caused by the negligence of defendant's servants, while running, conducting, and managing a train of cars); Cardwell *v.* Chicago, etc., R. Co., 90 Mo. App. 31; Huber *v.* Wilson, 11 N. Y. Suppl. 377; International, etc., R. Co. *v.* Hinzie, 82 Tex. 623, 18 S. W. 681; Galveston, etc., R. Co. *v.* Karrer, (Tex. Civ. App. 1902) 70 S. W. 328 (language of rules alleged to have been violated need not be set out); Texas, etc., R. Co. *v.* Cumpston, 15 Tex. Civ. App. 493, 40 S. W. 546 (to show negligence in failing to provide rules, plaintiff need not allege exactly what should have been made); Pike *v.* Chicago, etc., R. Co., 39 Fed. 754. *Compare* Delaware, etc., R. Co. *v.* Voss, 62 N. J. L. 59, 41 Atl. 224, holding that a general averment of negligence in failing to make and enforce reasonable and proper rules and regulations for the guidance of employees, or in the operation of defendant's railroad yards, is not

ment, say, as a matter of law, that negligence was not sufficiently pleaded.[55] In all cases some causal connection must be shown between the acts of negligence and the injury sustained.[56]

(B) *Particular Averments*—(1) DUTY OWED BY MASTER. In an action by a servant to recover for personal injuries, the declaration or complaint must show the particular duty toward the servant which the master failed to perform,[57] which may be implied from the facts stated,[58] and a mere allegation of duty without stating the facts on which it rests is insufficient.[59] A demurrer will lie to a declaration or complaint which charges a higher degree of care than the law imposes.[60]

a sufficient averment of an element of negligence upon which to base an action.

55. Mangum *v.* Bullion Beck, etc., Min. Co., 15 Utah 534, 50 Pac. 834. See also Illinois Terra Cotta Lumber Co. *v.* Hanley, 214 Ill. 243, 73 N. E. 373.

56. *Connecticut.*— Anderson *v.* U. S. Rubber Co., 78 Conn. 48, 60 Atl. 1057.

Georgia.— Moseley *v.* J. S. Schofield's Sons Co., 123 Ga. 197, 51 S. E. 309, in which it affirmatively appeared from the petition that the injuries were not caused by the negligence alleged.

Indiana.— Southern Indiana R. Co. *v.* Martin, 160 Ind. 280, 66 N. E. 886; South Bend Chilled Plow Co. *v.* Cissue, (App. 1905) 74 N. E. 282; Indianapolis, etc., Transit Co. *v.* Andis, (App. 1904) 72 N. E. 145; Consolidated Stone Co. *v.* Staggs, (App. 1904) 71 N. E. 161; Rietman *v.* Bangert, 26 Ind. App. 468, 59 N. E. 1080; La Fayette Carpet Co. *v.* Stafford, 25 Ind. App. 187, 57 N. E. 944.

Ohio.— Wacks *v.* Gawne, 11 Ohio S. & C. Pl. Dec. 222.

Oregon.— Wild *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 159, 27 Pac. 954.

South Carolina.— Land *v.* Southern R. Co., 67 S. C. 290, 45 S. E. 203.

Texas.— Gulf, etc., R. Co. *v.* Renfro, (Civ. App. 1902) 69 S. W. 648.

Wisconsin.— Ean *v.* Chicago, etc., R. Co., 95 Wis. 69, 69 N. W. 997.

See 34 Cent. Dig. tit. "Master and Servant," § 823.

Causal connection sufficiently shown see Clear Creek Stone Co. *v.* Dearmin, 160 Ind. 162, 66 N. E. 609; Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; Young *v.* Shickle, etc., Iron Co., 103 Mo. 324, 15 S. W. 771; Deremer *v.* Delaware, etc., R. Co., 54 N. J. L. 407, 24 Atl. 481; Cleveland, etc., R. Co. *v.* Tehan, 26 Ohio Cir. Ct. 457; Mew *v.* Charleston, etc., R. Co., 55 S. C. 90, 32 S. E. 828; Missouri, etc., R. Co. *v.* Hanson, (Tex. Civ. App. 1905) 90 S. W. 1122; Dingee *v.* Unrue, 98 Va. 247, 35 S. E. 794.

57. Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710; Knahtla *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 136, 27 Pac. 91.

58. *Illinois.*— Cribben *v.* Callaghan, 156 Ill. 549, 41 N. E. 178; Falkenau *v.* Abrahamson, 66 Ill. App. 352.

Indiana.— Ft. Wayne *v.* Christie, 156 Ind. 172, 59 N. E. 385; Ft. Wayne *v.* Patterson, 25 Ind. App. 547, 58 N. E. 747.

Iowa.— Ford *v.* Chicago, etc., R. Co., (1897) 71 N. W. 332.

Texas.— St. Louis, etc., R. Co. *v.* George, 85 Tex. 150, 19 S. W. 1036.

Virginia.— Norfolk, etc., R. Co. *v.* Jackson, (1888) 6 S. E. 220.

United States.— Green *v.* Indian Gold Min. Co., 120 Fed. 715.

See 34 Cent. Dig. tit. "Master and Servant," § 817.

Care of inexperienced minor.— In an action by a boy sixteen years old, a complaint which alleges that defendant, knowing plaintiff, an employee, to be inexperienced, ignorant, and incapable in respect to the dangers of machinery, permitted him to remain alone in close proximity thereto, while it was in motion, resulting in plaintiff's contact therewith and injury therefrom, sufficiently alleges defendant's negligence. White *v.* San Antonio Waterworks Co., 9 Tex. Civ. App. 465, 29 S. W. 252.

Where the facts alleged imply the duty, a paragraph in the complaint stating the bare legal conclusion, that it was defendant's duty to provide plaintiff with a reasonably safe place to work, and to keep the same in reasonably safe condition, is surplusage, and will be stricken out on motion. Green *v.* Indian Gold Min. Co., 120 Fed. 715.

59. Hayden *v.* Smithville Mfg. Co., 29 Conn. 548; Sargent Co. *v.* Baublis, 215 Ill. 428, 74 N. E. 455; Pittsburgh, etc., R. Co. *v.* Lightheiser, 163 Ind. 247, 71 N. E. 218, 660; Burton *v.* Magann-Fawk Lumber Co., 74 S. W. 662, 25 Ky. L. Rep. 40.

60. Norfolk, etc., R. Co. *v.* Jackson, 85 Va. 489, 8 S. E. 370; Canter *v.* Colorado United Min. Co., 35 Fed. 41. But see Henne *v.* J. T. Steeb Shipping Co., 37 Wash. 331, 79 Pac. 938. *Compare* Richmond, etc., R. Co. *v.* Burnett, 88 Va. 538, 14 S. E. 372; South West Imp. Co. *v.* Smith, 85 Va. 306, 7 S. E. 365, 17 Am. St. Rep. 59.

Failure to use reasonable care.— A complaint which shows that defendants failed to use reasonable care to provide plaintiff a safe place of work while in their employ is sufficient. Indiana Stone Co. *v.* Stewart, 7 Ind. App. 563, 34 N. E. 1019. See also Bonner *v.* Moore, 3 Tex. Civ. App. 416, 22 S. W. 272, holding that in a complaint for injuries received in coupling a car, an averment that defendant did not furnish "the safest and best appliances," and "carelessly and negli-

(2) MASTER'S KNOWLEDGE OF DEFECTS AND DANGERS. In an action by a servant against his master to recover for injuries caused by defective or dangerous appliances or places, it must be alleged that the master knew, or ought to have known, of the alleged defects.[61] But a direct averment of actual or constructive knowledge is unnecessary, where it is necessarily implied from the facts alleged;[62]

gently failed to furnish a coupling knife," does not require the highest degree of care in furnishing appliances, and is sufficient, as against a general demurrer, although it does not allege ordinary care as the extent of defendant's duty.

61. *Alabama.*— Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145.

Connecticut.— O'Keefe *v.* National Folding Box, etc., Co., 66 Conn. 38, 33 Atl. 587; Hayden *v.* Smithville Mfg. Co., 29 Conn. 548.

Georgia.— Southern Bell Tel., etc., Co. *v.* Starnes, 122 Ga. 602, 50 S. E. 343; Babcock Bros. Lumber Co. *v.* Johnson, 120 Ga. 1030, 48 S. E. 438.

Illinois.— Western Tube Co. *v.* Polobinski, 192 Ill. 113, 61 N. E. 451 [*affirming* 94 Ill. App. 640], holding that an allegation that defendant, by the exercise of due care, ought to have known, etc., was a charge of "knowledge," and was not objectionable as being merely a charge of "duty," and not a presentation of issuable facts.

Indiana.— Malott *v.* Sample, 164 Ind. 645, 74 N. E. 245; Peterson *v.* New Pittsburg Coal, etc., Co., 149 Ind. 260, 49 N. E. 8, 63 Am. St. Rep. 289; Pennsylvania Co. *v.* Congdon, 134 Ind. 226, 33 N. E. 795, 39 Am. St. Rep. 251; Chicago, etc., R. Co. *v.* Fry, 131 Ind. 319, 28 N. E. 989; Cleveland, etc., R. Co. *v.* Lindsay, 33 Ind. App. 404, 70 N. E. 283, 998; Chamberlain *v.* Waymire, 32 Ind. App. 442, 68 N. E. 306, 70 N. E. 81; Creamery Package Mfg. Co. *v.* Hotsenpiller, 24 Ind. App. 122, 56 N. E. 250; Cleveland, etc., R. Co. *v.* Sloan, 11 Ind. App. 401, 39 N. E. 174.

Kansas.— Carruthers *v.* Chicago, etc., R. Co., 55 Kan. 600, 40 Pac. 915.

Missouri.— Crane *v.* Missouri Pac. R. Co., 87 Mo. 588; Current *v.* Missouri Pac. R. Co., 86 Mo. 62; Mueller *v.* La Prellé Shoe Co., 109 Mo. App. 506, 84 S. W. 1010.

New York.— McMillan *v.* Saratoga, etc., R. Co., 20 Barb. 449; Anderson *v.* New Jersey Steamboat Co., 7 Rob. 611. *Compare* Rupprecht *v.* Brighton Mills, 27 N. Y. App. Div. 77, 50 N. Y. Suppl. 157.

Ohio.— Henkel *v.* Stahl, 18 Ohio Cir. Ct. 831, 9 Ohio Cir. Dec. 397.

Rhode Island.— Cox *v.* Providence Gas Co., 17 R. I. 199, 21 Atl. 344.

Virginia.— Norfolk, etc., R. Co. *v.* Jackson, 85 Va. 489, 8 S. E. 370.

Wisconsin.— Hencke *v.* Ellis, 110 Wis. 532, 86 N. W. 171.

United States.— Dixon *v.* Western Union Tel. Co., 68 Fed. 630; Parrott *v.* New Orleans, etc., R. Co., 62 Fed. 562; Kidwell *v.* Houston, etc., R. Co., 14 Fed. Cas. No. 7,757, 3 Woods 313.

See 34 Cent. Dig. tit. "Master and Servant," § 832.

But see Sweeney *v.* Jessup, etc., Paper Co., 4 Pennew. (Del.) 284, 54 Atl. 954 (action for negligent death); Branch *v.* Port Royal, etc., R. Co., 35 S. C. 405, 14 S. E. 808; Hoffman *v.* Dickinson, 31 W. Va. 142, 6 S. E. 53.

The averment should be that defendant knew, or, but for the want of reasonable care and diligence, would have known, of the defect. An allegation that defendant knew or was bound to know of the existence of the defect is bad. Cox *v.* Providence Gas Co., 17 R. I. 199, 21 Atl. 344.

Where the defects alleged are defects in construction, it is not necessary to aver knowledge thereof in defendant. Chicago, etc., R. Co. *v.* Hines, 33 Ill. App. 271 [*affirmed* in 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515].

Facts showing that defendant knew need not be averred. St. Louis Consol. Coal Co. *v.* Scheiber, 65 Ill. App. 304.

The exact time when defendant learned of the defect need not be alleged. Wabash, etc., R. Co. *v.* Morgan, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85. See also Chicago, etc., R. Co. *v.* Tackett, 33 Ind. App. 379, 71 N. E. 524, holding that the length of time defendant had knowledge of the defect is immaterial, it being alleged that he did have knowledge.

Reasonable time to remove defect after notice need not be alleged. Woodward Iron Co. *v.* Jones, 80 Ala. 123.

62. *Alabama.*— Louisville, etc., R. Co. *v.* Hawkins, 92 Ala. 241, 9 So. 271, holding that an averment that a defect had not been discovered or remedied, owing to defendant's negligence, imports that it had existed long enough to have been discovered and remedied, had defendant used due care.

Illinois.— Illinois Steel Co. *v.* Ostrowski, 194 Ill. 376, 62 N. E. 822 [*affirming* 93 Ill. App. 57] (allegation that defendant allowed the machine to become old and worn, and neglected to make proper inspection thereof); Owens *v.* Lehigh Valley Coal Co., 115 Ill. App. 142 (allegation of injury by reason of the failure of the master to furnish a safe place to work).

Indiana.— Pennsylvania Co. *v.* Sears, 136 Ind. 460, 34 N. E. 15, 36 N. E. 353 (allegation that defendant had negligently maintained the bridge for five years preceding the injury); Louisville, etc., Consol. R. Co. *v.* Utz, 133 Ind. 265, 32 N. E. 881; Ohio, etc., R. Co. *v.* Pearcy, 128 Ind. 197, 27 N. E. 479 (both holding complaint sufficient if it avers that the company had negligently furnished the defective coupling which caused the injury, or had negligently failed to furnish safe and suitable couplings); Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 151, 5 N. E. 187 (general averment that defendant negligently left a sliver or splint projecting from the rail); Cleveland, etc., R. Co. *v.* Lindsay, 33 Ind.

and a general allegation of knowledge by defendant of the defect is sufficient to include constructive as well as actual knowledge.[63]

(3) Ownership, Possession, or Control of Instrumentality or Place. The declaration or complaint in an action by a servant for personal injuries must allege that the instrumentality or place, whose defective or dangerous condition occasioned the injury, was owned or controlled by the master.[64]

(4) Acts or Omissions Through Agents or Representatives. In an action by a servant to recover for personal injuries, an allegation that the negligence relied on was that of defendant is good, as against a demurrer, although in point of fact the negligence was that of a servant for whom defendant, as master, was responsible.[65] The negligence may, however, be charged as that of the servant, where the facts alleged show that it consists of a breach of a non-assignable duty,[66] or it may be charged in the alternative as that of defendant, his servants, or agents, the object being to charge negligence against defendant acting through his servants or agents.[67] It is not sufficient to show a state of facts which merely suggests that a co-servant may have owed a duty which he neglected.[68]

App. 404, 70 N. E. 283, 998 (allegation that railroad yard had been carelessly left, so as to be rotted by time); Louisville, etc., R. Co. *v.* Hicks, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767 (allegation of negligence in improperly loading cars, so that the coal projected above the sides upwards of a foot, without any support, implies notice of defect). But see New Kentucky Coal Co. *v.* Albani, 12 Ind. App. 497, 40 N. E. 702, holding that an allegation that the master negligently furnished defective and unsafe appliance is not equivalent to an allegation of knowledge.

Iowa.— O'Connor *v.* Illinois Cent. R. Co., 83 Iowa 105, 48 N. W. 1002, holding that an allegation that the master negligently furnished defective and unsafe appliances is equivalent to an allegation that he knew or should have known that they were defective and unsafe.

Kentucky.— Wilson *v.* Alpine Coal Co., 118 Ky. 463, 81 S. W. 278, 26 Ky. L. Rep. 337, holding sufficient an allegation that the mine was in an unsafe and dangerous condition by reason of the carelessness and negligence of defendant.

Missouri.— Crane *v.* Missouri Pac. R. Co., 87 Mo. 588, holding that an allegation that defendant negligently furnished defective and unsafe appliance is equivalent to an allegation of knowledge. See also Hall *v.* Missouri Pac. R. Co., 74 Mo. 298, holding sufficient an allegation that the railroad company negligently permitted a loose iron rail to remain upon the path alongside the track used by switchmen.

Nebraska.— Chicago, etc., R. Co. *v.* Kellogg, 55 Nebr. 748, 76 N. W. 462, holding that an averment that defendant negligently permitted a certain appliance to become defective and negligently suffered it to remain in a defective condition implies that he knew, or was culpably ignorant, of the defect.

North Carolina.—Warner *v.* Western North Carolina R. Co., 94 N. C. 250.

Oregon.— Hough *v.* Grants Pass Power Co., 41 Oreg. 531, 69 Pac. 655.

United States.— See Kidwell *v.* Houston, etc., R. Co., 14 Fed. Cas. No. 7,757, 3 Woods 313, holding that a railroad servant suing for an injury caused by a defective car must aver that it was defective when placed on the road, or if it afterward became defective, that notice thereof was brought home to the company.

See 34 Cent. Dig. tit. "Master and Servant," § 832.

63. Louisville, etc., Consol. R. Co. *v.* Miller, 140 Ind. 685, 40 N. E. 116; Lake Erie, etc., R. Co. *v.* McHenry, 10 Ind. App. 525, 37 N. E. 186.

64. Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710; Troth *v.* Norcross, 111 Mo. 630, 20 S. W. 297; Miller *v.* Coffin, 19 R. I. 164, 36 Atl. 6.

Foreign cars.— Where an accident occurs to a railroad employee in consequence of the introduction of a foreign and defectively constructed car into the train on which he is employed, and he sues the railroad for damages, he is not bound to allege in his petition that the accident was caused by the introduction of the foreign car. O'Neil *v.* St. Louis, etc., R. Co., 9 Fed. 337, 3 McCrary 423.

65. Pittsburgh, etc., R. Co. *v.* Lightheiser, 163 Ind. 247, 71 N. E. 218, 660; Chicago, etc., R. Co. *v.* Barnes, (Ind. 1903) 68 N. E. 166; Indianapolis Union R. Co. *v.* Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; Di Marcho *v.* Builders' Iron Foundry, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661; St. Louis, etc., R. Co. *v.* George, 85 Tex. 150, 19 S. W. 1036.

Negligence of master acting through agent. —An allegation that the accident was caused through the negligence of defendant acting through its superintendent and train despatcher is sufficiently specific. Galveston, etc., R. Co. *v.* Arispe, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33.

66. Cole *v.* Wood, 11 Ind. App. 37, 36 N. E. 1074; Vanduzen Gas, etc., Engine Co. *v.* Schelies, 18 Ohio Cir. Ct. 602, 10 Ohio Cir. Dec. 256.

67. Eagle, etc., Mills *v.* Herron, 119 Ga. 389, 46 S. E. 405.

68. Pittsburgh, etc., R. Co. *v.* Lightheiser, 163 Ind. 247, 71 N. E. 218, 660.

(5) NEGLECT OF STATUTORY DUTY. Where the negligence alleged to have caused the injury consists of the breach of a duty imposed by statute the declaration or complaint must set out facts bringing the case within its terms.[69] As a general rule it is sufficient to allege that the injury resulted from a breach of the statute duty,[70] without alleging in what manner the failure to comply with the statute caused the injury;[71] or that plaintiff had no knowledge of the defect or danger;[72] or, where the negligence consists in the failure to guard a machine, that the machine was dangerous.[73] Where the allegations bring the case within the statute, it will be construed as a statutory not a common-law action,[74] and in such a case the statute itself need not be recited or referred to,[75] nor is it necessary to negative exceptions in the statute which do not apply to the particular duty for whose breach the action is brought.[76]

(6) LIABILITY IMPOSED BY STATUTE. Where the liability sought to be enforced is imposed by statute, the declaration or complaint in an action by a servant to recover for personal injuries must allege facts which clearly bring the case within the statute.[77]

69. Consolidated Coal Co. *v.* Yung, 24 Ill. App. 255; Robertson *v.* Ford, 164 Ind. 538, 74 N. E. 1; L. T. Dickason Coal Co. *v.* Unverferth, 30 Ind. App. 546, 66 N. E. 759; Rietman *v.* Bangert, 26 Ind. App. 468, 59 N. E. 1080; Leslie *v.* Rich Hill Coal Min. Co., 110 Mo. 31, 19 S. W. 308 (in which the petition failed to allege a "wilful failure" to comply with the statute); Cole *v.* Mayne, 122 Fed. 836.

70. Averments held sufficient see Baltimore, etc., R. Co. *v.* Peterson, 156 Ind. 364, 59 N. E. 1044; Pittsburgh, etc., R. Co. *v.* Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; Nickey *v.* Dougan, 34 Ind. App. 601, 73 N. E. 288; Indiana Mfg. Co. *v.* Wells, 31 Ind. App. 460, 68 N. E. 319; Buehner Chair Co. *v.* Feulner, 28 Ind. App. 479, 63 N. E. 239; Wheeler *v.* Oak Harbor Head Lining, etc., Co., 126 Fed. 348, 61 C. C. A. 250.

Bill of particulars.— Where a complaint stated that defendant failed to provide lawful safeguards, that one of such safeguards was lacking, and that the place provided for plaintiff to work was unsafe, defendant was entitled to a bill of particulars stating the particular safeguard claimed to have been omitted, and in what respect the place provided to work in was unsafe. O'Leary *v.* Candee, 60 N. Y. Suppl. 1103.

71. Mobile, etc., R. Co. *v.* Bromberg, 141 Ala. 258, 37 So. 395.

72. Indiana Mfg. Co. *v.* Wells, 31 Ind. App. 460, 68 N. E. 319.

73. La Porte Carriage Co. *v.* Sullender, (Ind. App. 1904) 71 N. E. 922.

74. M. S. Huey Co. *v.* Johnston, 164 Ind. 489, 73 N. E. 996; Toledo, etc., R. Co. *v.* Bond, 35 Ind. App. 142, 72 N. E. 647; Chamberlain *v.* Waymire, 32 Ind. App. 442, 68 N. E. 306, 70 N. E. 81; Diamond Block Coal Co. *v.* Cuthbertson, (Ind. App. 1903) 67 N. E. 558 [*affirmed* in (Ind. 1905) 73 N. E. 818].

75. Lore *v.* American Mfg. Co., 160 Mo. 608, 61 S. W. 678. See also Voelker *v.* Chicago, etc., R. Co., 116 Fed. 867, holding that it is not necessary or permissible that the petition in an action for injury from a defective car coupling should cite or refer to the act of congress of March 2, 1893, relative to couplings on cars and by interstate carriers.

76. Chamberlain *v.* Waymire, 32 Ind. App. 442, 68 N. E. 306, 70 N. E. 81.

77. Under Ala. Code (1896), § 1749, subs. 1, it must be averred that the defect in defendant's ways, works, machinery, or plant arose from, or has not been discovered or remedied owing to defendant's negligence or the negligence of some person in the service of defendant and intrusted by defendant with the duty of seeing that such ways, etc., were in proper condition. But it is not necessary to allege the name of the person intrusted with the duty. Northern Alabama R. Co. *v.* Shea, 142 Ala. 119, 37 So. 796. See also and *compare* Sloss-Sheffield Steel, etc., Co. *v.* Mobley, 139 Ala. 425, 36 So. 181; Southern Car, etc., Co. *v.* Jennings, 137 Ala. 247, 34 So. 1002; Houston Biscuit Co. *v.* Dial, 135 Ala. 168, 33 So. 268; Alabama Mineral R. Co. *v.* Marcus, 128 Ala. 355, 30 So. 679; Woodward Iron Co. *v.* Herndon, 114 Ala. 191, 21 So. 430 [*overruling* with regard to the necessity of naming the person intrusted with the duty of seeing to the condition of the ways Louisville, etc., R. Co. *v.* Bouldin, 110 Ala. 185, 20 So. 325]; Conrad *v.* Gray, 109 Ala. 130, 19 So. 398; Seaboard Mfg. Co. *v.* Woodson, 94 Ala. 143, 10 So. 87; Louisville, etc., R. Co. *v.* Hawkins, 92 Ala. 241, 9 So. 271; Louisville, etc., R. Co. *v.* Coulton, 86 Ala. 129, 5 So. 458; Georgia Pac. R. Co. *v.* Propst, 85 Ala. 203, 4 So. 711.

In an action under the Illinois act of 1857, "for injuries done to persons by sea craft," it is sufficient to allege that the injuries to plaintiff, a seaman, were the result of the owner's negligence. The Norway *v.* Jensen, 52 Ill. 373.

Employment of minor.— A count charging that plaintiff was under fourteen years old, and that defendant had notice of that fact, and wrongfully and unlawfully employed him to work in a mine, sufficiently shows a wilful violation of Hurd Rev. St. Ill. (1899) c. 93, giving a right of action to the person injured by a wilful violation thereof. Mar-

(7) Negligent Failure to Warn or Instruct Servant. In an action by a servant to recover for injuries alleged to have been caused by reason of the master's failure to warn or instruct him, the declaration or complaint must allege facts which show the duty to warn or instruct; the master's knowledge and the servant's ignorance of the danger; the negligent failure to warn or instruct; and a causal connection between such failure and the injury complained of.[78]

(8) Negligence in the Employment or Retention of Servants. In an action against a master for injuries caused by the negligence of a fellow servant, based on the theory of the negligence of the master in selecting or retaining in his service an incompetent servant, the declaration or complaint should allege that the servant was incompetent, that the master negligently employed or retained him with knowledge, actual or constructive, of his incompetency, that plaintiff was ignorant thereof, and that the injury was caused by the negligence of such servant.[79] But an allegation that the act of employing a servant was done

quette Third Vein Coal Co. *v.* Dielie, 208 Ill. 116, 70 N. E. 17.

78. *Alabama.*— Postal Tel. Cable Co. *v.* Hulsey, 132 Ala. 444, 31 So. 527, holding that where the facts alleged show a duty on the part of the foreman to warn plaintiff and that plaintiff's injuries resulted from a failure to perform such duty, it is unnecessary specifically to aver the existence of such duty, and the negligent failure to discharge it. See also Alabama Mineral R. Co. *v.* Marcus, 128 Ala. 355, 30 So. 679.

Illinois.— Wabash R. Co. *v.* Bhymer, 214 Ill. 579, 73 N. E. 879 [*reversing* 112 Ill. App. 225].

Indiana.—Peterson *v.* New Pittsburgh Coal, etc., Co., 149 Ind. 260, 49 N. E. 8, 63 Am. St. Rep. 289 (allegation insufficient in not averring that defendant, or the superintendent or foreman, knew, or had reason to know, of plaintiff's ignorance of the dangers); Brazil Block Coal Co. *v.* Young, 117 Ind. 520, 20 N. E. 423 (complaint for injuries to minor must allege either that he was too young for the service he was required to perform, or that he had no knowledge of the danger, or that the master, knowing his age and inexperience, neglected to give him necessary warning and instruction); Danley *v.* Scanlon, 116 Ind. 8, 17 N. E. 158 (complaint for injury to minor held sufficiently specific); Indiana Mfg. Co. *v.* Wells, 31 Ind. App. 460, 68 N. E. 319 (averment of failure to instruct servant indispensable); Peerless Stone Co. *v.* Wray, 10 Ind. App. 324, 37 N. E. 1058 (causal connection must be shown between master's failure to warn and the injury received); Becker *v.* Baumgartner, 5 Ind. App. 576, 32 N. E. 786 (facts must show want of knowledge of danger by servant).

Tennessee.— Whitelaw *v.* Memphis, etc., R. Co., 16 Lea 391, 1 S. W. 37, holding good a declaration which averred that plaintiff, a youth of about nineteen years of age, had never in fact been employed in the particular work in the doing of which the injury was incurred, and was ignorant of the proper tools to perform the work with safety, was not instructed by defendant as to the danger of the work, not furnished with proper tools to do the work.

Texas.— Texas, etc., R. Co. *v.* Harrington, 62 Tex. 597 (averment showing that failure of duty was chargeable to defendant necessarily); Hillsboro Oil Co. *v.* White, (Civ. App. 1899) 54 S. W. 432 (petition held sufficient); White *v.* San Antonio Waterworks Co., 9 Tex. Civ. App. 465, 29 S. W. 252 (complaint for injuries to minor held sufficient); Campbell *v.* Walker, (Civ. App. 1893) 22 S. W. 823 (complaint held good on general demurrer); Bonner *v.* Moore, 3 Tex. Civ. App. 416, 22 S. W. 272 (facts held sufficient to show duty).

West Virginia.— Trump *v.* Tidewater Coal, etc., Co., 46 W. Va. 238, 32 S. E. 1035, holding that the fact that a complaint failed to allege that a minor servant did not possess the necessary experience and skill to appreciate and guard against the increased danger in the work to which he was assigned does not make it demurrable where it was alleged that after he was directed to do more dangerous work defendant "wrongfully and negligently" failed to instruct and direct plaintiff in the discharge of said duty.

United States.— O'Connor *v.* Atchison, etc., R. Co., 137 Fed. 503, 70 C. C. A. 87 (in which the declaration failed to allege that defendant knew, or should have known, that deceased was inexperienced, of immature judgment, or ignorant of the dangers attending the service); Fortin *v.* Manville Co., 128 Fed. 642 (holding that a mere allegation that it was defendant's duty to warn plaintiff, which had not been done, without an allegation of facts from which it appeared that the duty existed, was insufficient).

See 34 Cent. Dig. tit. "Master and Servant," § 834.

79. *Georgia.*— Ellington *v.* Beaver Dam Lumber Co., 93 Ga. 53, 19 S. E. 21.

Indiana.— Indianapolis, etc., Rapid Transit Co. *v.* Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; Pittsburgh, etc., R. Co. *v.* Sullivan, 141 Ind. 83, 40 N. E. 138, 50 Am. St. Rep. 313, 27 L. R. A. 840; Indiana, etc., R. Co. *v.* Dailey, 110 Ind. 75, 10 N. E. 631; Bogard *v.* Louisville, etc., R. Co., 100 Ind. 491; Indianapolis, etc., Rapid Transit Co. *v.* Andis, 33 Ind. App. 625, 72 N. E. 145.

Iowa.— Troughear *v.* Lower Vein Coal Co., 62 Iowa 576, 17 N. W. 775.

Maine.— Elwell *v.* Hacker, 86 Me. 416, 30

in a negligent manner, and that in consequence thereof an incompetent servant was taken into defendant's service, has been held a sufficient specification of negligence in employing an incompetent servant, without alleging that defendant knew, or could have known, of his incompetency.[80]

(9) Negligent Employment of Insufficient Force. Where the theory of an action by a servant to recover for personal injuries is that the master was negligent in failing to employ a sufficient number of men for the work, a general allegation that the master negligently failed to provide a sufficient force, in consequence of which the injury complained of was sustained, is sufficient.[81]

(III) *Negligence of Fellow Servants*—(A) *In General.* A declaration, petition, or complaint to recover for an injury to a servant caused by the negligence of the master need not affirmatively aver that the injury was not caused by the negligence of fellow servants;[82] and where the negligence is charged directly against the master, although a corporation incapable of acting otherwise than through agents, it will not be assumed on demurrer that the act or omission was, in its nature, that of a fellow servant.[83] But where the negligent act or omission

Atl. 64; Lawler *v.* Androscoggin R. Co., 62 Me. 463, 16 Am. Rep. 492.

Maryland.— State *v.* Chesapeake Beach R. Co., 98 Md. 35, 56 Atl. 385.

Missouri.— Moss *v.* Pacific R. Co., 49 Mo. 167, 8 Am. Rep. 126.

Montana.— Kelly *v.* Cable Co., 13 Mont. 411, 34 Pac. 611.

North Carolina.— Harris *v.* Balfour Quarry Co., 131 N. C. 553, 42 S. E. 973.

Ohio.— Binder *v.* Cincinnati, etc., R. Co., 16 Ohio Cir. Ct. 262, 9 Ohio Cir. Dec. 98.

Virginia.— Norfolk, etc., R. Co. *v.* Phillips, 100 Va. 362, 41 S. E. 726.

United States.— Kidwell *v.* Houston, etc., R. Co., 14 Fed. Cas. No. 7,757, 3 Woods 313.

See 34 Cent. Dig. tit. "Master and Servant," § 835.

Necessity of charging negligence in selection of servant see Tennessee Coal, etc., Co. *v.* Bridges, 144 Ala. 229, 39 So. 902.

Allegations held sufficient see Montgomery First Nat. Bank *v.* Chandler, 144 Ala. 286, 39 So. 822; Conrad *v.* Gray, 109 Ala. 130, 19 So. 398; Hall *v.* Bedford Quarries Co., 156 Ind. 460, 60 N. E. 149; Lake Shore, etc., R. Co. *v.* Stupak, 123 Ind. 210, 23 N. E. 246; Blake *v.* Maine Cent. R. Co., 70 Me. 60, 35 Am. Rep. 297; Peter *v.* Middlesex, etc., Traction Co., 69 N. J. L. 456, 55 Atl. 35; Lantry *v.* Lowrie, (Tex. Civ. App. 1900) 58 S. W. 837; Gulf, etc., R. Co. *v.* Pierce, 7 Tex. Civ. App. 597, 25 S. W. 1052; Galveston, etc., R. Co. *v.* Eckols, 7 Tex. Civ. App. 429, 26 S. W. 1117; Conover *v.* Neher-Ross Co., 38 Wash. 172, 80 Pac. 281, 107 Am. St. Rep. 841; Fitts *v.* Waldeck, 51 Wis. 567, 8 N. W. 363; Kasadarian *v.* James Hill Mfg. Co., 130 Fed. 62; Kerlin *v.* Chicago, etc., R. Co., 50 Fed. 185. See Yazoo, etc., R. Co. *v.* Schraag, 84 Miss. 125, 36 So. 193, in which the declaration was not attacked at the trial, and was held sufficient to support a recovery.

The particulars of the servant's incompetency need not be set out. Johnston *v.* Canadian Pac. R. Co., 50 Fed. 886.

The exact time of the master's knowledge of the servant's incompetency need not be alleged. Wabash, etc., R. Co. *v.* Morgan, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85.

An averment of "negligence and carelessness" is not equivalent to alleging that the servant was "incompetent." Kelly *v.* Cable Co., 13 Mont. 411, 34 Pac. 611.

80. Galveston Rope, etc., Co. *v.* Burkett, 2 Tex. Civ. App. 308, 21 S. W. 958.

81. Alabama Great Southern R. Co. *v.* Vail, 142 Ala. 134, 38 So. 124, 110 Am. St. Rep. 23; Supple *v.* Agnew, 191 Ill. 439, 61 N. E. 392 [*reversing* 80 Ill. App. 437]; Harper *v.* Norfolk, etc., R. Co., 36 Fed. 102.

82. Hess *v.* Rosenthal, 160 Ill. 621, 43 N. E. 743; Cribben *v.* Callaghan, 156 Ill. 549, 41 N. E. 178; Mott *v.* Chicago, etc., R. Co., 102 Ill. App. 412; Louisville, etc., Consol. R. Co. *v.* Miller, 140 Ind. 685, 40 N. E. 116; Pennsylvania Co. *v.* Burgett, 7 Ind. App. 338, 33 N. E. 914, 34 N. E. 650; Young *v.* Sickle, etc., Iron Co., 103 Mo. 324, 15 S. W. 771; Behm *v.* Armour, 58 Wis. 1, 15 N. W. 806.

Contributory negligence of fellow servant. — Where a servant alleges that he receives injuries through the negligence of the master and sets forth the acts of omission constituting the negligence, the fact that the petition shows that the negligence of a fellow servant was a contributory cause to the injury does not render it subject to demurrer. Young *v.* Shickle, etc., Iron Co., 103 Mo. 324, 15 S. W. 771. See also Kentucky, etc., Bridge Co. *v.* Hall, 125 Ind. 220, 25 N. E. 219, holding that, in an action against a railroad company by an employee of another company, the complaint need not allege that plaintiff's fellow servants were not guilty of contributory negligence.

83. *California.*— Brown *v.* Central Pac. R. Co., 68 Cal. 171, 7 Pac. 447, 8 Pac. 828.

Florida.— Jacksonville, etc., R. Co. *v.* Galvin, 29 Fla. 636, 11 So. 231, 16 L. R. A. 337.

Illinois.— Libby *v.* Scherman, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191; Braun *v.* Conrad Seipp Brewing Co., 72 Ill. App. 232.

Indiana.— Bedford Belt R. Co. *v.* Brown, 142 Ind. 659, 42 N. E. 359; Hoosier Stone Co. *v.* McCain, 133 Ind. 231, 31 N. E. 956; Ohio, etc., R. Co. *v.* Collarn, 73 Ind. 261, 38 Am.

which caused the injury is charged as that of a servant or agent of the master, the declaration or complaint must show that plaintiff and such agent or servant were not fellow servants,[84] or that defendant was negligent in employing such agent or servant, or retained him after he knew, or ought to have known, that he was incompetent,[85] and that plaintiff had no knowledge thereof.[86]

(B) *Under Statutes Modifying Fellow Servant Rule.* Where a recovery is sought, under an Employers' Liability Act, for injuries caused by the negligence

Rep. 134; Hildebrand *v.* Toledo, etc., R. Co., 47 Ind. 399.

Minnesota.— Fraser *v.* Red River Lumber Co., 42 Minn. 520, 44 N. W. 878; Olson *v.* St. Paul, etc., R. Co., 34 Minn. 477, 26 N. W. 605; Larson *v.* St. Paul, etc., R. Co., 34 Minn. 477, 26 N. W. 604.

New Hampshire.— Fifield *v.* Northern R. Co., 42 N. H. 225.

New York.— Paolo *v.* Hunter, 3 N. Y. App. Div. 528, 38 N. Y. Suppl. 356. But see Kudik *v.* Lehigh Valley R. Co., 78 Hun 492, 29 N. Y. Suppl. 533.

Oregon.— Wild *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 159, 27 Pac. 954.

Utah.— Cramer *v.* Union Pac. R. Co., 3 Utah 504, 24 Pac. 911; Minter *v.* Union Pac. R. Co., 3 Utah 500, 24 Pac. 911.

Wisconsin.— Lessard *v.* Northern Pac. R. Co., 81 Wis. 189, 51 N. W. 321; Haley *v.* Western Transit Co., 76 Wis. 344, 45 N. W. 16; Hulehan *v.* Green Bay, etc., R. Co., 58 Wis. 319, 17 N. W. 17.

United States.— Hermann *v.* Port Blakely Mill Co., 69 Fed. 646.

See 34 Cent. Dig. tit. "Master and Servant," § 839.

84. *California.*— Collier *v.* Steinhart, 51 Cal. 116.

Georgia.— Hovis *v.* Richmond, etc., R. Co., 91 Ga. 36, 16 S. E. 211.

Illinois.— Joliet Steel Co. *v.* Shields, 134 Ill. 209, 25 N. E. 569 [*reversing* 32 Ill. App. 598]; East St. Louis Connecting R. Co. *v.* Dwyer, 41 Ill. App. 522. *Contra*, Duffy *v.* Kivilin, 98 Ill. App. 483 [*affirmed* in 195 Ill. 630, 63 N. E. 503].

Indiana.— Pittsburgh, etc., R. Co. *v.* Lightheiser, 163 Ind. 247, 71 N. E. 218, 660; New Pittsburgh Coal, etc., Co. *v.* Peterson, 136 Ind. 398, 35 N. E. 7, 43 Am. St. Rep. 327 [*affirming* 14 Ind. App. 634, 43 N. E. 270]; Indianapolis, etc., R. Co. *v.* Johnson, 102 Ind. 352, 26 N. E. 200; Bogard *v.* Louisville, etc., R. Co., 100 Ind. 491; Brazil, etc., Coal Co. *v.* Cain, 98 Ind. 282.

Louisiana.— Bell *v.* Globe Lumber Co., 107 La. 725, 31 So. 994.

Maryland.— State *v.* Chesapeake Beach R. Co., 98 Md. 35, 56 Atl. 385.

Massachusetts.—Flynn *v.* Salem, 134 Mass. 351.

Minnesota.— Boyer *v.* Eastern R. Co., 87 Minn. 367, 92 N. W. 326.

Missouri.— Higgins *v.* Missouri Pac. R. Co., 104 Mo. 413, 16 S. W. 409.

Nebraska.— Kitchen Bros. Hotel Co. *v.* Dixon, (1904) 98 N. W. 316.

Rhode Island.— Laporte *v.* Cook, 20 R. I. 261, 38 Atl. 700; Di Marcho *v.* Builders' Iron Foundry, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661.

Wisconsin.— Whitwam *v.* Wisconsin, etc., R. Co., 58 Wis. 408, 17 N. W. 124; Dwyer *v.* American Express Co., 55 Wis. 453, 13 N. W. 471.

United States.—Fortin *v.* Manville Co., 128 Fed. 642; Mealman *v.* Union Pac. R. Co., 37 Fed. 189, 2 L. R. A. 192; Kidwell *v.* Houston, etc., R. Co., 14 Fed. Cas. No. 7,757, 3 Woods 313. But see Evans *v.* Carbon Hill Coal Co., 47 Fed. 437, where the demurrer was overruled on the ground that the court would not assume that servants of the same master are engaged in a common employment.

See 34 Cent. Dig. tit. "Master and Servant," § 838.

Where facts showing the relation of the parties are allowed, an allegation denying the relationship of fellow servants is not necessary. Chicago, etc., R. Co. *v.* Swan, 176 Ill. 424, 52 N. E. 916 [*affirming* 70 Ill. App. 331]; Chicago City R. Co. *v.* Leach, 80 Ill. App. 354.

An allegation that "the engineer was then and there, and in that behalf, the vice-principal of the defendant, and his said act and negligence was the act and negligence of the defendant," is a legal conclusion, and not an averment of an issuable fact. Higgins *v.* Missouri Pac. R. Co., 104 Mo. 413, 16 S. W. 409.

Facts alleged held to negative fellow service see Louisville, etc., Consol. R. Co. *v.* Hawthorn, 147 Ill. 226, 35 N. E. 534 [*affirming* 45 Ill. App. 635]; Hathaway *v.* Des Moines, 97 Iowa 333, 66 N. W. 188; Fraser *v.* Red River Lumber Co., 42 Minn. 520, 44 N. W. 878.

85. *California.*— Collier *v.* Steinhart, 51 Cal. 116.

Indiana.— Indiana, etc., R. Co. *v.* Dailey, 110 Ind. 75, 10 N. E. 631; Helfrich *v.* Williams, 84 Ind. 553; Slattery *v.* Toledo, etc., R. Co., 23 Ind. 81; Salem Stone, etc., Co. *v.* Chastain, 9 Ind. App. 453, 36 N. E. 910.

Louisiana.— Bell *v.* Globe Lumber Co., 107 La. 725, 31 So. 994.

North Carolina.— Hobbs *v.* Atlantic, etc., R. Co., 107 N. C. 1, 12 S. E. 124, 9 L. R. A. 838; Hagins *v.* Cape Fear, etc., R. Co., 106 N. C. 537, 11 S. E. 590.

Rhode Island.— Flynn *v.* International Power Co., 24 R. I. 291, 52 Atl. 1089, holding that a count alleging that a servant was negligently employed to do certain work, that he did it, and was unfit, is sufficient.

86. Indianapolis, etc., Rapid Transit Co. *v.* Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am.

of fellow servants, the declaration or complaint must contain allegations which clearly bring the case within the terms of the statute, and must show to which servant or servants negligence is imputed, and fully and definitely state what acts or omissions of such servants constitute the negligence complained of.[87]

St. Rep. 185; Indiana, etc., R. Co. *v.* Dailey, 110 Ind. 75, 10 N. E. 631.

87. Tennessee Coal, etc., R. Co. *v.* Bridges, 144 Ala. 229, 39 So. 902 (in which the complaint failed to state that the engine or car was "on any railroad track"); Alabama Great Southern R. Co. *v.* Williams, 140 Ala. 230, 37 So. 255 (in which it was left to inference that the person in charge of the locomotive was a servant of defendant); Sloss-Sheffield Steel, etc., Co. *v.* Mobley, 139 Ala. 425, 36 So. 181 (failure to allege that engine was on a railway); Southern Car, etc., Co. *v.* Bartlett, 137 Ala. 234, 34 So. 20 (counts held bad under Code, § 1749, subds. 2, 3); Bear Creek Mill Co. *v.* Parker, 134 Ala. 293, 32 So. 700 (count insufficient under either subd. 2 or 3 of Code, § 1749); Louisville, etc., R. Co. *v.* Jones, 130 Ala. 456, 30 So. 586 (count insufficient under Code, § 1749, subd. 1); Georgia Cent. R. Co. *v.* Lamb, 124 Ala. 172, 26 So. 969 (complaint bad under both subds. 4 and 5 of Code, § 1749); Alabama Great Southern R. Co. *v.* Davis, 119 Ala. 572, 24 So. 862 (count defective for not showing that engine was on a railway, or on some part of the track, within subd. 5 of the act); Postal Tel. Cable Co. *v.* Hulsey, 115 Ala. 193, 22 So. 854 (allegations insufficient under subd. 3 of the act); Louisville, etc., R. Co. *v.* Bouldin, 110 Ala. 185, 20 So. 325 (allegation insufficient under subd. 2 of the act); Louisville, etc., R. Co. *v.* Woods, 105 Ala. 561, 17 So. 41 (allegation insufficient under subd. 5 of the act); Chicago, etc., R. Co. *v.* Barnes, 164 Ind. 143, 73 N. E. 91, (1903) 68 N. E. 166; Muncie Pulp Co. *v.* Davis, 162 Ind. 558, 70 N. E. 875 (failure to allege duty of superior servant under Burns Annot. St. (1901) § 7083, subd. 2); Southern Indiana R. Co. *v.* Martin, 160 Ind. 280, 66 N. E. 886 (failure to allege duty of plaintiff to conform to the order of the foreman, or that the latter was acting in any other capacity than that of a fellow servant); Thacker *v.* Chicago, etc., R. Co., 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792; Cleveland, etc., R. Co. *v.* Peirce, 34 Ind. App. 188, 72 N. E. 604 (failure to allege that negligent servants were in the line of their duty when they committed the acts charged); Ft. Wayne Gas Co. *v.* Nieman, 33 Ind. App. 178, 71 N. E. 59 (failure to allege authority of negligent servant, or that plaintiff was bound to conform to his order); Cleveland, etc., R. Co. *v.* Scott, 29 Ind. App. 519, 64 N. E. 896 (complaint bad under subd. 1 of act, but good under subd. 2); Corning Steel Co. *v.* Pohlplatz, 29 Ind. App. 250, 64 N. E. 476 (averments insufficient under subds. 2, 4, of the act); Atchison, etc., R. Co. *v.* O'Neill, 49 Kan. 367, 30 Pac. 470 (general allegation of negligence insufficient); Albrecht *v.* Milwaukee, etc., R. Co., 87 Wis. 105, 58 N. W. 72, 41 Am. St. Rep. 30 (complaint under Sanborn & B. Annot. St. § 1816*a*, must specify to which class the negligent servant belonged).

While it is unnecessary to use the precise words of the statute in stating a cause of action, yet no form of allegation which amounts to less than the equivalent of the words of the statute will be sufficient. Southern Indiana R. Co. *v.* Martin, 160 Ind. 280, 66 N. E. 886.

The particular acts or omissions constituting the negligence need not be averred. Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145. See also Sloss-Sheffield Steel, etc., Co. *v.* Mobley, 139 Ala. 425, 36 So. 181.

Name of negligent servant.— In Alabama the complaint must allege the name of the negligent fellow servant, or that his name is unknown to plaintiff (Georgia Cent. R. Co. *v.* Lamb, 124 Ala. 172, 26 So. 969; Woodward Iron Co. *v.* Herndon, 114 Ala. 191, 21 So. 430; Southern R. Co. *v.* Cunningham, 112 Ala. 496, 20 So. 639; Louisville, etc., R. Co. *v.* Bouldin, 110 Ala. 185, 20 So. 325. But see McNamara *v.* Logan, 100 Ala. 187, 14 So. 175), but in Massachusetts the name of the superintendent need not be stated (Woodbury *v.* Post, 158 Mass. 140, 33 N. E. 86).

Nature of superintendency need not be averred.— Louisville, etc., R. Co. *v.* Orr, 94 Ala. 602. 10 So. 167.

Averment of knowledge of danger by negligent servant unnecessary see Robinson Min. Co. *v.* Tolbert, 132 Ala. 462, 31 So. 519; Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145. But see Louisville, etc., R. Co. *v.* Bouldin, 110 Ala. 185, 20 So. 325.

Negligence of fellow servants sufficiently pleaded see Alabama Great Southern R. Co. *v.* Williams, 140 Ala. 230, 37 So. 255 (count charging wilful and wanton negligence); Southern Car, etc., Co. *v.* Bartlett, 137 Ala. 234, 34 So. 20 (counts under subds. 2 and 3 of Code, § 1749); Bear Creek Mill Co. *v.* Parker, 134 Ala. 293, 32 So. 700 (count alleging negligence of locomotive engineer, and further count alleging negligence of person intrusted with superintendence of train); Southern R. Co. *v.* Jackson, 133 Ala. 384, 31 So. 988 (complaint under subd. 5); Birmingham Southern R. Co. *v.* Cuzzart, 133 Ala. 262, 31 So. 979 (complaint under subd. 2); Louisville, etc., R. Co. *v.* Jones, 130 Ala. 456, 30 So. 586 (count based on negligence of superintendent); Louisville, etc., R. Co. *v.* York, 128 Ala. 305, 30 So. 676 (count under subd. 5); Southern R. Co. *v.* Shields, 121 Ala. 460, 25 So. 811, 77 Am. St. Rep. 66 (count under subd. 2); Bessemer Land, etc., Co. *v.* Campbell, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17 (negligence of superintendent); Woodward Iron Co. *v.* Herndon, 114 Ala. 191, 21 So. 430 (complaint under subd. 5); Louisville, etc., R. Co. *v.* Markee, 103 Ala. 160, 15 So. 511, 49 Am. St. Rep. 21 (counts under subds. 1 and 5); Highland

(IV) *NEGATIVING ASSUMPTION OF RISK*[88] — (A) *In General.* In a number of states it is necessary, in an action by a servant against his master to recover for personal injuries, for the declaration, petition, or complaint to negative assumption of risk on the part of plaintiff,[89] while in others assumption of risk is

Ave., etc., R. Co. *v.* Dusenberry, 98 Ala. 239, 13 So. 308 (count under subd. 5); Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88 (count under subd. 2); Seaboard Mfg. Co. *v.* Woodson, 94 Ala. 143, 10 So. 87 (count under subd. 2); Hudson *v.* East Tennessee, etc., R. Co., 93 Ga. 816, 21 S. E. 126; Central R. Co. *v.* Hubbard, 86 Ga. 623, 12 S. E. 1020 (charging negligence of persons in charge of engines, etc.); Pittsburgh, etc., R. Co. *v.* Collins, 163 Ind. 569, 71 N. E. 661 (allegation under subd. 4); Chicago, etc., R. Co. *v.* Barnes, (Ind. 1903) 68 N. E. 166 (complaint under subd. 4); Lake Erie, etc., R. Co. *v.* Charman, 161 Ind. 95, 67 N. E. 923 (complaint under subd. 2); Thacker *v.* Chicago, etc., R. Co., 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792 (complaint under subd. 2); Chicago, etc., R. Co. *v.* Lain, (Ind. App. 1904) 72 N. E. 539 (count under subd. 2 not bad for incidentally stating facts constituting cause of action under subd. 4); Chicago, etc., R. Co. *v.* Tackett, 33 Ind. App. 379, 71 N. E. 524 (negligence under subd. 2); Indiana Mfg. Co. *v.* Buskirk, 32 Ind. App. 414, 68 N. E. 925 (complaint under subd. 2); Chicago, etc., R. Co. *v.* Richards, 28 Ind. App. 46, 61 N. E. 18 (negligence of person in charge of locomotive, train, etc.); Louisville, etc., R. Co. *v.* Hawkins, 51 S. W. 426, 21 Ky. L. Rep. 354 (charging negligence in running and operating train); Lindgren *v.* Minneapolis, etc., R. Co., 86 Minn. 152, 90 N. W. 381 (complaint under Gen. St. (1894) § 2701); Cheaves *v.* Southern R. Co., 82 Miss. 48, 33 So. 649, 34 So. 385 (declaration under Const. § 193); Kath *v.* Wisconsin Cent. R. Co., 121 Wis. 503, 99 N. W. 217 (negligence under Rev. St. (1898) § 1816, subd. 2).

88. Conformity of instructions to pleading see *infra*, IV, H, 7, a, (IV).

Issues, proof, and variance see *infra*, IV, H, 2, d, (I), (B).

Plea or answer see *infra*, IV, H, 2, b, (III).

89. *Connecticut.*— Hayden *v.* Smithville Mfg. Co., 29 Conn. 548.

Florida.— See Walsh *v.* Western R. Co., 34 Fla. 1, 15 So. 686.

Indiana.—Indianapolis, etc., Rapid Transit Co. *v.* Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; American Rolling Mill Co. *v.* Hullinger, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460; Salem-Bedford Stone Co. *v.* Hobbs, 144 Ind. 146, 42 N. E. 1022; Peerless Stone Co. *v.* Wray, 143 Ind. 574, 42 N. E. 927; Ames *v.* Lake Shore, etc., R. Co., 135 Ind. 363, 35 N. E. 117; Spencer *v.* Ohio, etc., R. Co., 130 Ind. 181, 29 N. E. 915; Louisville, etc., R. Co. *v.* Corps, 124 Ind. 427, 24 N. E. 1046, 8 L. R. A. 636; Louisville, etc., R. Co. *v.* Sandford, 117 Ind. 265, 19 N. E. 770; Indiana, etc., R. Co. *v.* Dailey, 110 Ind. 75, 10 N. E. 631; Lake Shore, etc., R. Co. *v.* Stupak, 108 Ind. 1, 8 N. E. 630; Indiana, etc., Coal Co. *v.* Batey, 34 Ind. App. 16, 71 N. E. 191; Baltimore, etc., R. Co. *v.* Hunsucker, 33 Ind. App. 27, 70 N. E. 556; Walker *v.* Wehking, 29 Ind. App. 62, 63 N. E. 128; Ohio Valley Coffin Co. *v.* Goble, 28 Ind. App. 362, 62 N. E. 1025; Becker *v.* Baumgartner, 5 Ind. App. 576, 32 N. E. 786. But see Indianapolis, etc., R. Co. *v.* Klein, 11 Ind. 38.

Kentucky.— Bogenschutz *v.* Smith, (1887) 3 S. W. 800.

Maine.— Buzzell *v.* Laconia Mfg. Co., 48 Me. 113, 77 Am. Dec. 212.

Minnesota.— Jorgenson *v.* Smith, 32 Minn. 79, 19 N. W. 388.

Nebraska.— Missouri Pac. R. Co. *v.* Baxter, 42 Nebr. 793, 60 N. W. 1044.

Ohio.— Chicago, etc., Coal, etc., Co. *v.* Norman, 49 Ohio St. 598, 32 N. E. 857; Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Memphis, etc., Packet Co. *v.* Britton, 25 Ohio Cir. Ct. 153.

Rhode Island.— Dalton *v.* Rhode Island Co., 25 R. I. 574, 57 Atl. 383. But see Lee *v.* Reliance Mills Co., 21 R. I. 322, 43 Atl. 536.

Tennessee.— Whitelaw *v.* Memphis, etc., R. Co., 16 Lea 391, 1 S. W. 37.

Vermont.— See Henry *v.* Fitchburg R. Co., 65 Vt. 436, 26 Atl. 485, where it was held that an allegation that the injury occurred while plaintiff was "in the prudent and reasonable discharge of the duties of his employment" was a sufficient allegation of want of knowledge of a defect in appliances as against a general demurrer.

Virginia.— Norfolk, etc., R. Co. *v.* Jackson, 85 Va. 489, 8 S. E. 370.

United States.— Dixon *v.* Western Union Tel. Co., 68 Fed. 630; Parrott *v.* New Orleans, etc., R. Co., 62 Fed. 562.

See 34 Cent. Dig. tit. "Master and Servant," §§ 844–846.

Where a right of action is given for the neglect of a statutory duty, it is not necessary to allege or show in the complaint that plaintiff was ignorant of defendant's negligent failure to perform the duties imposed by the statute, or that he did not assume the risks resulting in his injury. D. H. Davis Coal Co. *v.* Polland, 158 Ind. 607, 62 N. E. 492.

A general allegation of want of knowledge covers both actual and imputed knowledge, and will be sufficient, on demurrer, unless negatived by the specific facts stated. Pennsylvania Co. *v.* Witte, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377. See also Robinson *v.* Etter, 30 Ind. App. 253, 63 N. E. 767; Chicago, etc., R. Co. *v.* Wagner, 17 Ind. App. 22, 45 N. E. 76, 1121; Linton Coal, etc., Co. *v.* Persons, 11 Ind. App. 264, 39 N. E. 214; Louisville, etc., R. Co. *v.* Breedlove, 10 Ind. App. 657, 38 N. E. 357; Hochstettler *v.* Mosier

regarded as an affirmative defense, the burden of proving and establishing which is on defendant.[90]

(B) *Notice or Complaint, and Promise of Remedy.*[91] Where the servant

Coal, etc., Co., 8 Ind. App. 442, 35 N. E. 927; Parke County Coal Co. *v.* Barth, 5 Ind. App. 159, 31 N. E. 585; Louisville, etc., R. Co. *v.* Berry, 2 Ind. App. 427, 28 N. E. 714; Columbus, etc., R. Co. *v.* Shannon, 4 Ohio Cir. Ct. 449, 2 Ohio Cir. Dec. 644. *Compare* Baltimore, etc., R. Co. *v.* Hunsucker, 33 Ind. App. 27, 70 N. E. 556.

Where the defect was not so open and obvious that as a matter of law plaintiff was chargeable with knowledge thereof and the danger therefrom, a demurrer to a complaint alleging that plaintiff had no knowledge of the defect admits the truth of such allegation. Pittsburgh, etc., R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514.

An allegation that plaintiff did not have reason to anticipate or provide against the injuries is sufficient, as against an objection, made on demurrer, that the complaint showed that plaintiff assumed the risk of injury. Walsh *v.* Western R. Co., 34 Fla. 1, 15 So. 686.

An allegation of want of knowledge is unavailing where the facts alleged show knowledge. Indiana, etc., Coal Co. *v.* Batey, 34 Ind. App. 16, 71 N. E. 191.

An allegation of freedom from fault or negligence does not take the place of averments that the risk was not knowingly assumed by plaintiff as an incident to his service. Indianapolis, etc., Rapid Transit Co. *v.* Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185.

The court will not assume knowledge where the petition alleges ignorance of the defects. Bedford Belt R. Co. *v.* Brown, 142 Ind. 659, 42 N. E. 359.

Defects in construction.— Where the injury resulted from agencies dangerous through defects in construction, and not through want of repair or decay, the complaint need not show that the servant's opportunities to discover the danger were not equal to those of the master. Salem Stone, etc., Co. *v.* Griffin, 139 Ind. 141, 38 N. E. 411. See also Evansville, etc., R. Co. *v.* Doan, 3 Ind. App. 453, 29 N. E. 940.

Allegations held sufficient to show assumption of risk see Consolidated Stone Co. *v.* Staggs, 164 Ind. 331, 73 N. E. 695 [*affirming* Ind. App. 1904) 71 N. E. 161]; Brazil Block Coal Co. *v.* Gibson, 160 Ind. 319, 66 N. E. 882, 98 Am. St. Rep. 281; New York, etc., R. Co. *v.* Ostman, (Ind. 1895) 41 N. E. 1037; Heltonville Mfg. Co. *v.* Fields, 138 Ind. 58, 36 N. E. 529; Pennsylvania Co. *v.* Sears, 136 Ind. 460, 34 N. E. 15, 36 N. E. 353; Louisville, etc., R. Co. *v.* Graham, 124 Ind. 89, 24 N. E. 668; Standard Oil Co. *v.* Fordeck, 34 Ind. App. 181, 71 N. E. 163; Citizens' St. R. Co. *v.* Reed, 28 Ind. App. 629, 63 N. E. 770; Salem-Bedford Stone Co. *v.* Hilt, 26 Ind. App. 543, 59 N. E. 97.

90. *Alabama.*— Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145.

California.— Magee *v.* North Pac. Coast R. Co., 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69.

Georgia.— Preston *v.* Central R., etc., Co., 84 Ga. 588, 11 S. E. 143, holding that the contention that plaintiff could have known of the defects by the use of ordinary care and diligence is a matter of defense. *Compare* Dozier *v.* Atlanta, 118 Ga. 354, 45 S. E. 306, holding that where the allegations of the petition show that plaintiff's injuries were occasioned by his having assumed the risk ordinarily incident to the work in which he was employed, and it does not appear that he could not have seen and avoided the danger, a demurrer is properly sustained.

Illinois.— Chicago, etc., R. Co. *v.* Hines, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515.

Michigan.— Ragon *v.* Toledo, etc., R. Co., 91 Mich. 379, 51 N. W. 1004.

Minnesota.— Rolseth *v.* Smith, 38 Minn. 14, 35 N. W. 565, 8 Am. St. Rep. 637, to the effect that the court cannot say as a matter of law that it appears from the allegations of the complaint that plaintiff assumed the risk, unless they so clearly show the fact that there could be no room for different minds reasonably arriving at different conclusions upon any possible evidence admissible under and consistent with the allegations.

Missouri.— Fisher *v.* Central Lead Co., 156 Mo. 479, 56 S. W. 1107; Young *v.* Shickle, etc., Iron Co., 103 Mo. 324, 15 S. W. 771; Crane *v.* Missouri Pac. R. Co., 87 Mo. 588; Cummings *v.* Collins, 61 Mo. 520; Herbert *v.* Mound City Boot, etc., Co., 90 Mo. App. 305; McMullen *v.* Missouri, etc., R. Co., 60 Mo. App. 231; Hall *v.* St. Joseph Water Co., 48 Mo. App. 356; Fugler *v.* Bothe, 43 Mo. App. 44. See also Stalzer *v.* Jacob Dold Packing Co., 84 Mo. App. 565.

Oregon.— Johnston *v.* Oregon Short Line, etc., R. Co., 23 Oreg. 94, 31 Atl. 283.

South Carolina.— Donahue *v.* Enterprise R. Co., 32 S. C. 299, 11 S. E. 95, 17 Am. St. Rep. 854.

Texas.— Galveston Rope, etc., Co. *v.* Burkett, 2 Tex. Civ. App. 308, 21 S. W. 958. See also Gulf, etc., R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151. *Compare* Smith *v.* Armour, (Civ. App. 1905) 84 S. W. 675; Klutts *v.* Gibson, (Civ. App. 1904) 83 S. W. 404, in which the petitions showed an assumption of risk.

West Virginia.— Hoffman *v.* Dickinson, 31 W. Va. 142, 6 S. E. 53.

Wisconsin.— Cole *v.* Chicago, etc., R. Co., 67 Wis. 272, 30 N. W. 600. *Compare* Shepherd *v.* Morton-Edgar Lumber Co., 115 Wis. 522, 92 N. W. 260; Johnson *v.* Ashland Water Co., 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243.

See 34 Cent. Dig. tit. "Master and Servant," §§ 844–846.

91. See *supra*, IV, E, 5, g, (I), (B).

had knowledge of the defect or danger which caused his injuries, but based his right of recovery on a promise by the master to remedy the defect or remove the danger, he should allege notice or complaint to the master, the promise of remedy, his reliance on the promise, and the lapse of a reasonable time for repairing after the promise was made.[92] But on the other hand, if the complaint shows that an unreasonable time had elapsed between the promise and the injury, the servant will be held to have waived the promise and assumed the risk,[93] although this, being a matter of defense, need not be negatived.[94]

(C) *Inexperienced or Youthful Servants.* Assumption of risk is sufficiently negatived where it is alleged that the servant was inexperienced or youthful, that he did not know or appreciate the dangers to which he was exposed, and that the master, knowing these facts, failed to warn or instruct him as to the dangers of his employment.[95]

(V) *Negativing Contributory Negligence*[96] — (A) *In General.* As in the case of assumption of risk, contributory negligence is regarded in some jurisdictions as an affirmative defense, which must be alleged and proved by defendant, and consequently need not be negatived by plaintiff;[97] while in others it is held that the absence of contributory negligence is essential to the servant's

92. *Illinois.*— St. Louis Consol. Coal Co. *v.* Bokamp, 181 Ill. 9, 54 N. E. 567 [*affirming* 75 Ill. App. 605], where, however, the complaint was held sufficient after verdict, although it failed to allege reliance on the promise, or that a reasonable time for repair had elapsed.

Indiana.— Daugherty *v.* Midland Steel Co., 23 Ind. App. 78, 53 N. E. 844 (reliance on promise must be pleaded); Romona Oolitic Stone Co. *v.* Phillips, 11 Ind. App. 118, 39 N. E. 96 (allegations held sufficient).

Kentucky.— McDowell *v.* Chesapeake, etc., R. Co., (1887) 5 S. W. 413, holding that, in the absence of an averment that defendant had failed to repair within a reasonable time, the court cannot adjudge that a delay of three days constituted negligence.

Rhode Island.— Whalan *v.* Whipple, (1887) 13 Atl. 107, allegation of lapse of reasonable time necessary.

United States.— Kidwell *v.* Houston, etc., R. Co., 14 Fed. Cas. No. 7,757, 3 Woods 313, notice to master or vice-principal must be shown.

Averment of failure to fulfil promise unnecessary see McDowell *v.* Chesapeake, etc., R. Co., 8 S. W. 871, 10 Ky. L. Rep. 209.

93. A complaint fails to show that the servant was injured within a reasonable period for the performance of the master's promise, and shows no cause of action, where it alleges that the master had ample time and opportunity, and was able to repair the defect, between the time of the promise and that of the injury, but neglected to do so. Stephenson *v.* Duncan, 73 Wis. 404, 41 N. W. 337, 9 Am. St. Rep. 806.

94. Daugherty *v.* Midland Steel Co., 23 Ind. App. 78, 53 N. E. 844.

95. See Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; Louisville, etc., R. Co. *v.* Cornelius, 14 Ind. App. 399, 43 N. E. 31; Wheeler *v.* Oak Harbor Head Lining, etc., Co., 126 Fed. 348, 61 C. C. A. 250. *Compare* Chicago, etc., Stone Co. *v.* Nelson, 32 Ind. App. 355, 69 N. E. 705.

96. **Assumption of risk** see *supra*, IV, H, 2, a, (IV).

Conformity of instructions to pleading see *infra*, IV, H, 7, e.

Issues, proof, and variance see *infra*, IV, H, 2, d, (I), (B), (4).

Plea or answer see *infra*, IV, H, 2, b, (IV).

Replication or reply see *infra*, IV, H, 2, d.

97. *Alabama.*— Montgomery First Nat. Bank *v.* Chandler, 144 Ala. 286, 39 So. 822; Southern Car, etc., Co. *v.* Jennings, 137 Ala. 247, 34 So. 1002; Mary Lee Coal, etc., Co. *v.* Chambliss, 97 Ala. 171, 11 So. 897. See also Kansas City, etc., R. Co. *v.* Thornhill, 141 Ala. 215, 37 So. 412.

Kansas.— Missouri Pac. R. Co. *v.* McCally, 41 Kan. 639, 655, 21 Pac. 574.

Minnesota.— Rolseth *v.* Smith, 38 Minn. 14, 35 N. W. 565, 8 Am. St. Rep. 637.

Mississippi.— Buckner *v.* Richmond, etc., R. Co., 72 Miss. 873, 18 So. 449.

Missouri.— Duerst *v.* St. Louis Stamping Co., 163 Mo. 607, 63 S. W. 827; Williams *v.* Missouri Pac. R. Co., 109 Mo. 475, 18 S. W. 1098. But *compare* Devore *v.* St. Louis, etc., R. Co., 86 Mo. App. 429, where it was held that a servant is not bound to allege his ignorance of the defect in the machinery, but merely his ignorance of the risk of using it.

Oregon.— Hough *v.* Grants Pass Power Co., 41 Oreg. 531, 69 Pac. 655.

Texas.— International, etc., R. Co. *v.* Zapp, (Civ. App. 1899) 49 S. W. 673; San Antonio, etc., R. Co. *v.* Parr, (Civ. App. 1894) 26 S. W. 861; Martin *v.* Wrought Iron Range Co., 4 Tex. Civ. App. 185, 23 S. W. 387.

Virginia.— Newport News Pub. Co. *v.* Beaumeister, 104 Va. 744, 52 S. E. 627; Richmond Granite Co. *v.* Bailey, 92 Va. 554, 24 S. E. 232. See also Virginia, etc., Wheel Co. *v.* Harris, 103 Va. 708, 49 S. E. 991; Nelson *v.* Chesapeake, etc., R. Co., 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583, declarations held not to show contributory negligence.

cause of action, and that therefore the declaration or complaint must contain allegations negativing negligence on the part of plaintiff.[98] Under either view, if the facts alleged show contributory negligence, the declaration or complaint is

West Virginia.— Unfried *v.* Baltimore, etc., R. Co., 34 W. Va. 260, 12 S. E. 512; Berns *v.* Gaston Gas Coal Co., 27 W. Va. 285, 55 Am. Rep. 304.

United States.— Conroy *v.* Oregon Constr. Co., 23 Fed. 71, 10 Sawy. 630; Knaresborough *v.* Belcher Silver Min. Co., 14 Fed. Cas. No. 7,874, 3 Sawy. 446.

See 34 Cent. Dig. tit. "Master and Servant," §§ 849–851, 853.

98. *Colorado.*— Stiles *v.* Richie, 8 Colo. App. 393, 46 Pac. 694.

District of Columbia.—See Hines *v.* Georgetown Gas Co., 3 App. Cas. 369.

Florida.— See Walsh *v.* Western R. Co., 34 Fla. 1, 15 So. 686.

Georgia.— Charleston, etc., R. Co. *v.* Miller, 113 Ga. 15, 38 S. E. 338; Allen *v.* Augusta Factory, 82 Ga. 76, 8 S. E. 68.

Illinois.— Ward *v.* Danzeizen, 111 Ill. App. 163. *Compare* Wiggins Ferry Co. *v.* Hill, 112 Ill. App. 475, in which the defect in the declaration in failing to aver that the peril was not obvious to plaintiff, not having been raised by demurrer, was held cured by the verdict.

Indiana.— Chicago, etc., R. Co. *v.* Barnes, 164 Ind. 143, 73 N. E. 91, (1903) 68 N. E. 166; Pittsburgh, etc., R. Co. *v.* Lightheiser, 163 Ind. 247, 71 N. E. 218, 660; Cleveland, etc., R. Co. *v.* Parker, 154 Ind. 153, 56 N. E. 86; Peterson *v.* New Pittsburg Coal, etc., Co., 149 Ind. 260, 49 N. E. 8, 63 Am. St. Rep. 289; Louisville, etc., R. Co. *v.* Kemper, 147 Ind. 561, 47 N. E. 214; Sheets *v.* Chicago, etc., Coal R. Co., 139 Ind. 682, 39 N. E. 154; Hildebrand *v.* Toledo, etc., R. Co., 47 Ind. 399; Evansville, etc., R. Co. *v.* Dexter, 24 Ind. 411; South Bend Chilled Plow Co. *v.* Cissne, 35 Ind. App. 373, 74 N. E. 282; Acme Bedford Stone Co. *v.* McPhetridge, 35 Ind. App. 79, 73 N. E. 838; Cleveland, etc., R. Co. *v.* Lindsay, 33 Ind. App. 404, 70 N. E. 283, 998; Chamberlain *v.* Waymire, 32 Ind. App. 442, 68 N. E. 306, 70 N. E. 81; La Fayette Carpet Co. *v.* Stafford, 25 Ind. App. 187, 57 N. E. 944; Daugherty *v.* Midland Steel Co., 23 Ind. App. 78, 53 N. E. 844; Gaar *v.* Wilson, 21 Ind. App. 91, 51 N. E. 502; Chicago, etc., R. Co. *v.* Lee, 17 Ind. App. 215, 46 N. E. 543; New Kentucky Coal Co. *v.* Albani, 12 Ind. App. 497, 40 N. E. 702; Romona Oolitic Stone Co. *v.* Johnson, 6 Ind. App. 550, 33 N. E. 1000.

Kentucky.— Bogenschutz *v.* Smith, 84 Ky. 330, 1 S. W. 578, 8 Ky. L. Rep. 376; Willie *v.* East Tennessee Coal Co., 84 S. W. 1166, 27 Ky. L. Rep. 335. *Compare* Louisville, etc., R. Co. *v.* Richardson, 66 S. W. 631, 23 Ky. L. Rep. 2090, holding that it is not necessary to negative knowledge or equal means of knowledge with the master, where the servant had a right to rely on the master's judgment as to the kind of tool to be used. And see Chesapeake, etc., R. Co. *v.* Venable, 111 Ky. 41, 63 S. W. 35, 23 Ky. L. Rep. 427, which was an action for injuries caused by the derailment of a car, and it was held that as plaintiff, a brakeman, was under no duty and had no opportunity to examine the road-bed, it was not necessary for him to aver and prove that he did not know of the defect.

Maryland.— State *v.* Baltimore, etc., R. Co., 77 Md. 489, 26 Atl. 865.

Massachusetts.— Kilberg *v.* Berry, 166 Mass. 488, 44 N. E. 603.

Ohio.— Hesse *v.* Columbus, etc., R. Co., 58 Ohio St. 167, 50 N. E. 354; Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Egan *v.* New York, etc., R. Co., 26 Ohio Cir. Ct. 616; Cincinnati, etc., R. Co. *v.* Hedges, 15 Ohio Cir. Ct. 254, 8 Ohio Cir. Dec. 265.

Rhode Island.— Russell *v.* Riverside Worsted Mills, 24 R. I. 591, 54 Atl. 375; Flynn *v.* International Power Co., 24 R. I. 291, 52 Atl. 1089; Di Marcho *v.* Builders' Iron Foundry, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661.

Vermont.— Brainard *v.* Van Dyke, 71 Vt. 359, 45 Atl. 758.

United States.— Fortin *v.* Manville Co., 128 Fed. 642; Dunmead *v.* American Min., etc., Co., 12 Fed. 847, 4 McCrary 244. *Compare* Cleveland, etc., R. Co. *v.* Baker, 91 Fed. 224, 33 C. C. A. 468, in which the declaration was held sufficient after verdict.

England.— Griffiths *v.* London, etc., Docks Co., 13 Q. B. D. 259, 49 J. P. 100, 53 L. J. Q. B. 504, 51 L. T. Rep. N. S. 533, 33 Wkly. Rep. 35; Williams *v.* Clough, 3 H. & N. 258, 27 L. J. Exch. 325.

See 34 Cent. Dig. tit. "Master and Servant," §§ 840–851, 853.

An allegation of due care is not a mere inference or conclusion of law, and is sufficient when accompanied by a statement of the particular work the servant was engaged in when injured; but is insufficient when accompanied merely by a general statement that he was employed to assist in the work of carrying on defendant's business. Di Marcho *v.* Builders' Iron Foundry, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661.

The phrase "without fault" sufficiently negatives contributory negligence. Rogers *v.* Overton, 87 Ind. 410. See also Buehner Chair Co. *v.* Feulner, 28 Ind. App. 479, 63 N. E. 239; Pennsylvania Co. *v.* Burgett, 7 Ind. App. 338, 33 N. E. 914, 34 N. E. 605; Louisville, etc., R. Co. *v.* Berry, 2 Ind. App. 427, 28 N. E. 714.

That plaintiff "was in the usual and ordinary course of his employment" amounts to a statement that he was in the exercise of ordinary care. Lake Shore, etc., R. Co. *v.* Conway, 67 Ill. App. 155.

An allegation of freedom from fault, without an allegation of want of knowledge, is in-

bad,[99] even though there is a specific allegation that plaintiff was in the exercise of due care or that he had no knowledge of the defect or danger.[1] But, on the other hand, although the pleading states facts from which it might be inferred that plaintiff was guilty of contributory negligence, yet, when such an inference does not necessarily follow from the averments of the declaration, petition, or complaint, taken as a whole, an allegation directly negativing such negligence renders it good as against a general demurrer.[2]

sufficient. Allen *v.* Augusta Factory, 82 Ga. 76, 8 S. E. 68; Daugherty *v.* Midland Steel Co., 23 Ind. App. 78, 53 N. E. 844; New Kentucky Coal Co. *v.* Albani, 12 Ind. App. 497, 40 N. E. 702; Hochstettler *v.* Mosier Coal, etc., Co., 8 Ind. App. 442, 35 N. E. 927; Russell *v.* Riverside Worsted Mills, 24 R. I. 591, 54 Atl. 375. But see Consolidated Coal Co. *v.* Scheiber, 65 Ill. App. 304; Summit Coal Co. *v.* Shaw, 16 Ind. App. 9, 44 N. E. 676.

A general allegation of want of knowledge includes constructive as well as actual notice, and it is not necessary to allege further that plaintiff could not have obtained knowledge by due diligence. Denver, etc., R. Co. *v.* Smock, 23 Colo. 456, 48 Pac. 681; Diamond Block Coal Co. *v.* Cuthbertson, (Ind. 1905) etc., R. Co. *v.* Roberts, 161 Ind. 1, 67 N. E. 558, (App. 1905) 73 N. E. 132]; Baltimore, etc., R. Co. *v.* Roberts, 161 Ind. 1, 67 N. E. 530; Louisville, etc., R. Co. *v.* Howell, 147 Ind. 266, 45 N. E. 584; Doyle *v.* Hawkins, 34 Ind. App. 514, 73 N. E. 200; Buehner Chair Co. *v.* Feulner, 28 Ind. App. 479, 63 N. E. 239; Famous Mfg. Co. *v.* Harmon, 28 Ind. App. 117, 62 N. E. 306; Chicago, etc., R. Co. *v.* Richards, 28 Ind. App. 46, 61 N. E. 18; Consolidated Stone Co. *v.* Williams, 26 Ind. App. 131, 57 N. E. 558, 84 Am. St. Rep. 278; Gaar *v.* Wilson, 21 Ind. App. 91, 51 N. E. 502; Peter, etc., Stone Works *v.* Green, 76 S. W. 844, 25 Ky. L. Rep. 946; Toomey *v.* Avery Stamping Co., 20 Ohio Cir. Ct. 183, 11 Ohio Cir. Dec. 216.

Where the complaint shows that plaintiff was working outside the scope of his employment, or away from the place of his usual work, his ignorance of the danger to which he was exposed need not be affirmatively shown. Clark County Cement Co. *v.* Wright, 16 Ind. App. 630, 45 N. E. 817.

Allegation insufficient to show due care.— An allegation that plaintiff, "while so in the employ of the defendants, and while so fulfilling his said duty, was injured," even if pleaded directly, would not have been a statement that he was in the exercise of due care. Kilberg *v.* Berry, 166 Mass. 488, 44 N. E. 603.

Allegations held to negative contributory negligence see Hines *v.* Georgetown Gas Co., 3 App. Cas. (D. C.) 369; Walsh *v.* Western R. Co., 34 Fla. 1, 15 So. 686; Moseley *v.* J. S. Schofield's Sons Co., 123 Ga. 197, 51 S. E. 309; Georgia R., etc., Co. *v.* Rayford, 115 Ga. 937, 42 S. E. 234; Charleston, etc., R. Co. *v.* Miller, 115 Ga. 92, 41 S. E. 252; Chattanooga, etc., R. Co. *v.* Owen, 90 Ga. 265, 15 S. E. 853; McFarlan Carriage Co. *v.* Potter, 153 Ind. 107, 53 N. E. 465; Lake Erie, etc., R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 564; Pennsylvania Co. *v.* Brush, 130 Ind. 347, 28 N. E. 615; Ohio, etc., R. Co. *v.* Pearcy, 128 Ind. 197, 27 N. E. 479; Pennsylvania Co. *v.* O'Shaughnessy, 122 Ind. 588, 23 N. E. 675; Baltimore, etc., R. Co. *v.* Clapp, 35 Ind. App. 403, 74 N. E. 267; Citizens' St. R. Co. *v.* Reed, 28 Ind. App. 629, 63 N. E. 770; Romona Oolitic Stone Co. *v.* Tate, 12 Ind. App. 57, 37 N. E. 1065, 39 N. E. 529; Parke County Coal Co. *v.* Barth, 5 Ind. App. 159, 31 N. E. 585; Gince *v.* Beland, 25 R. I. 527, 57 Atl. 300.

Allegations as to age and inexperience held to negative contributory negligence see Canton Cotton Mills *v.* Edwards, 120 Ga. 447, 47 S. E. 937; Smith *v.* Georgia R., etc., Co., 87 Ga. 764, 13 S. E. 904; Stewart *v.* Patrick, 5 Ind. App. 50, 30 N. E. 814; White *v.* San Antonio Waterworks Co., 9 Tex. Civ. App. 465, 29 S. W. 252; Jensen *v.* Hudson Sawmill Co., 98 Wis. 73, 73 N. W. 434.

99. *Alabama.*— Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710. *Compare* Kansas City, etc., R. Co. *v.* Thornhill, 141 Ala. 215, 37 So. 412.

Colorado.— Stiles *v.* Richie, 8 Colo. App. 393, 46 Pac. 694.

Indiana.— Sheets *v.* Chicago, etc., Coal R. Co., 139 Ind. 682, 39 N. E. 154.

Minnesota.— See Rolseth *v.* Smith, 38 Minn. 14, 35 N. W. 565, 8 Am. St. Rep. 637, as to the circumstances under which the court will say, as a matter of law, that the allegations show contributory negligence.

Texas.— International, etc., R. Co. *v.* Doyle, 49 Tex. 190.

West Virginia.— Berns *v.* Gaston Gas Coal Co., 27 W. Va. 285, 55 Am. Rep. 304.

United States.— Parrott *v.* New Orleans, etc., R. Co., 62 Fed. 562.

See 34 Cent. Dig. tit. "Master and Servant," § 857.

1. Louisville, etc., R. Co. *v.* Kemper, 147 Ind. 561, 47 N. E. 214; Romona Oolitic Stone Co. *v.* Johnson, 6 Ind. App. 550, 33 N. E. 1000; Donohoe *v.* Lonsdale Co., 25 R. I. 187, 55 Atl. 326; Baumler *v.* Narragansett Brewing Co., 23 R. I. 430, 50 Atl. 841.

2. Blackstone *v.* Georgia Cent. R. Co., 105 Ga. 380, 31 S. E. 90; D. H. Davis Coal Co. *v.* Polland, 158 Ind. 607, 62 N. E. 492; Salem Stone, etc., Co. *v.* Griffin, 139 Ind. 141, 38 N. E. 411; Cincinnati, etc., R. Co. *v.* Darling, 130 Ind. 376, 30 N. E. 416; Evansville, etc., R. Co. *v.* Malott, 13 Ind. App. 289, 41 N. E. 549; Chicago, etc., R. Co. *v.* Branyan, 10 Ind. App. 570, 37 N. E. 190; Hancock *v.* Keene, 5 Ind. App. 408, 32 N. E. 329; Snowberg *v.*

(B) *Statutory Liability.* Where an action for personal injuries is brought by a servant against his master under the provisions of a statute imposing liability upon the master, contributory negligence need not be negatived in the declaration or complaint.[3]

b. Plea or Answer[4] — (I) *In General.* The plea or answer in an action by a servant to recover from his master for personal injuries is governed, as to form and sufficiency, by the general rules of pleading applicable in similar actions.[5]

(II) *Alleging Negligence of Fellow Servants.* Unless the declaration or complaint is demurrable because it shows on its face that plaintiff was injured by the negligence of a fellow servant,[6] the defense that the injury was caused by such negligence must be set up, in some jurisdictions, by plea or answer.[7] In many jurisdictions, however, defendant may show that the injury was caused by the negligence of a fellow servant, without pleading the fact specially.[8]

(III) *Alleging Assumption of Risk.*[9] In those jurisdictions in which assumption of risk is required to be negatived by plaintiff, it is not necessary for defendant to allege that the risk on account of which the injury occurred was an assumed one;[10] but in others it is an affirmative defense which must be pleaded by

Nelson-Spencer Paper Co., 43 Minn. 532, 45 N. W. 1131; American Cotton Co. *v.* Smith, 29 Tex. Civ. App. 425, 69 S. W. 443.

3. Broslin *v.* Kansas City, etc., R. Co., 114 Ala. 398, 21 So. 475; Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145; Columbus, etc., R. Co. *v.* Bradford, 86 Ala. 574, 6 So. 90; Monteith *v.* Kokomo Wood Enameling Co., 159 Ind. 149, 64 N. E. 610, 58 L. R. A. 944; Nickey *v.* Dougan, 34 Ind. App. 601, 73 N. E. 288; Chicago, etc., R. Co. *v.* Lain, (Ind. App. 1904) 72 N. E. 539; Boyd *v.* Brazil Block Coal Co., (Ind. App. 1898) 50 N. E. 368; Adams *v.* Kansas, etc., Coal Co., 85 Mo. App. 486. But see Linton Coal, etc., Co. *v.* Persons, 11 Ind. App. 264, 39 N. E. 264; Hesse *v.* Columbus, etc., R. Co., 58 Ohio St. 167, 50 N. E. 354.

4. Admissions see PLEADING.

Issues raised and evidence admissible under general issue see *infra*, IV, H, 2, d, (I), (B), (2).

5. See PLEADING.

Answer setting up acceptance of benefits from relief department as release held too indefinite see Chicago, etc., R. Co. *v.* McGraw, 22 Colo. 363, 45 Pac. 383.

A plea is not a plea of justification because it admits the killing of the servant, where it does not admit that decedent was free from fault, or that the other employees were at fault. Central R. Co. *v.* Crosby, 74 Ga. 737, 58 Am. Rep. 463.

An answer does not admit the dangerous condition of a frog where it alleges that plaintiff "could well have known of its location and construction, and the dangers thereto, if any such dangers existed." Coates *v.* Burlington, etc., R. Co., 62 Iowa 486, 17 N. W. 760.

Special denial of negligence in the use of a foreign car held good see Chicago, etc., R. Co. *v.* Fry, 131 Ind. 319, 28 N. E. 989.

6. Mann *v.* O'Sullivan, 126 Cal. 61, 58 Pac. 375, 77 Am. St. Rep. 149.

7. Layng *v.* Mt. Shasta Mineral Spring Co., 135 Cal. 141, 67 Pac. 48; Conlin *v.* San Francisco, etc., R. Co., 36 Cal. 404; Duff *v.* Willamette Steel Works, 45 Oreg. 479, 78 Pac. 363, 668 (construing Ballinger & C. Comp. Oreg. § 72). See also East Tennessee, etc., R. Co. *v.* Collins, 85 Tenn. 227, 1 S. W. 883.

It is not necessary to specify the fellow servant whose negligence caused the injury, or to state in what the negligence consisted, and an amendment to the answer to that effect is properly refused. Cincinnati, etc., R. Co. *v.* Lewallen, 32 S. W. 958, 17 Ky. L. Rep. 863.

An averment that the injury was due to plaintiff's own negligence is insufficient as an averment that it was caused by the negligence of fellow servants. Conlin *v.* San Francisco, etc., R. Co., 36 Cal. 404.

Pleading law of another state.— In an action for injuries to a railroad employee sustained in another state through the negligence of a superior servant, an answer alleging that, by the law of the state where the injury occurred, an employee has no action against his employer for the negligence of a fellow servant in the same common employment, is demurrable for not stating what the law is when the negligence is that of a superior servant. Pittsburgh, etc., R. Co. *v.* Lewis, 33 Ohio St. 196.

8. *Georgia.*— Vinson *v.* Morning News, 118 Ga. 655, 45 S. E. 481; Harrison *v.* Kiser, 79 Ga. 588, 4 S. E. 320.

Illinois.— Wiggins Ferry Co. *v.* Blakeman, 54 Ill. 201.

Missouri.— Kaminski *v.* Tudor Iron Works, 167 Mo. 462, 67 S. W. 221; Sheehan *v.* Prosser, 55 Mo. App. 569.

Nebraska.— Johnson *v.* Heath, (1904) 98 N. W. 832.

South Carolina.— Wilson *v.* Charleston, etc., R. Co., 51 S. C. 79, 28 S. E. 91.

United States.— Pennsylvania Co. *v.* Fishack, 123 Fed. 465, 59 C. C. A. 269.

See 34 Cent. Dig. tit. "Master and Servant," § 864.

9. Evidence admissible under pleading see *infra*, IV, H, 2, d, (I), (B).

10. American Car, etc., Co. *v.* Clark, 32

defendant,[11] unless the risk is usually and ordinarily incident to the employment.[12] Where, however, plaintiff's own evidence shows that the risk was assumed, defendant may avail himself of the defense, although he did not plead it.[13]

(IV) *ALLEGING CONTRIBUTORY NEGLIGENCE.*[14] Contributory negligence need not be specially pleaded in some jurisdictions;[15] but in others it must be,[16] unless

Ind. App. 644, 70 N. E. 828; Baker *v.* Barber Asphalt Co., 92 Fed. 117.

11. *Alabama.*— Montgomery First Nat. Bank *v.* Chandler, 144 Ala. 286, 39 So. 822; Pierson Lumber Co. *v.* Hart, 144 Ala. 239, 39 So. 566; Western R. Co. *v.* Russell, 144 Ala. 142, 39 So. 311.

Colorado.— See Iowa Gold Min. Co. *v.* Diefenthaler, 32 Colo. 391, 76 Pac. 981.

Indiana.— Louisville, etc., R. Co. *v.* Orr, 84 Ind. 50.

Iowa.— Nicholaus *v.* Chicago, etc., R. Co., 90 Iowa 85, 57 N. W. 694; Mayes *v.* Chicago, etc., R. Co., 63 Iowa 562, 14 N. W. 340, 19 N. W. 680.

Nebraska.— Evans Laundry Co. *v.* Crawford, 67 Nebr. 153, 93 N. W. 177, 94 N. W. 814; Union Stock-Yards Co. *v.* Goodwin, 57 Nebr. 138, 77 N. W. 357.

North Carolina.— Dorsett *v.* Clement-Ross Mfg. Co., 131 N. C. 254, 42 S. E. 612; Hudson *v.* Charleston, etc., R. Co., 104 N. C. 491, 10 S. E. 669.

Oregon.— See Tucker *v.* Northern Terminal Co., 41 Oreg. 82, 68 Pac. 426.

Texas.— International, etc., R. Co. *v.* Harris, 95 Tex. 346, 67 S. W. 315 [*affirming* (Civ. App. 1901) 65 S. W. 885]. See also Price *v.* St. Louis Southwestern R. Co., (Civ. App. 1905) 85 S. W. 858; Adams *v.* San Antonio, etc., R. Co., 34 Tex. Civ. App. 413, 79 S. W. 79.

Utah.— Faulkner *v.* Mammoth Min. Co., 23 Utah 437, 66 Pac. 799.

Washington.— Walker *v.* McNeill, 17 Wash. 582, 50 Pac. 518.

United States.— Oregon Short-Line, etc., R. Co. *v.* Tracy, 66 Fed. 931, 14 C. C. A. 199.

See 34 Cent. Dig. tit. "Master and Servant," § 858.

A plea that plaintiff voluntarily incurred the danger amounts merely to an assertion that his action was without compulsion, and is not sufficient. Southern R. Co. *v.* Guyton, 122 Ala. 231, 25 So. 34.

Mere allegation of knowledge of defect by plaintiff insufficient see Western R. Co. *v.* Arnett, 137 Ala. 414, 34 So. 997.

Averment that plaintiff "knew, or by reasonable diligence could have known," etc., fails to show that the danger was obvious. Alabama Great Southern R. Co. *v.* Brooks, 135 Ala. 401, 33 So. 181.

A plea that the danger was obvious and that plaintiff assumed the risk is demurrable, since he might have believed, although the danger was obvious, that he could perform the work safely, if given the promised warning. Postal Tel. Cable Co. *v.* Hulsey, 132 Ala. 444, 31 So. 527.

Averment of knowledge or notice in the alternative is no stronger than an averment of notice, and is subject to demurrer. Osborne *v.* Alabama Steel, etc., Co., 135 Ala. 571, 33 So. 687.

A plea setting up both assumption of risk and contributory negligence is bad for duplicity. Kansas City, etc., R. Co. *v.* Thornhill, 141 Ala. 215, 37 So. 412.

For sufficient pleas and answers setting up assumption of risk see Going *v.* Alabama Steel, etc., Co., 141 Ala. 537, 37 So. 784 (allegation that plaintiff had knowledge of condition of machine, and remained at work for an unreasonable time); Alabama Great Southern R. Co. *v.* Brooks, 135 Ala. 401, 33 So. 181 (plea alleging facts showing that the danger was obvious need not expressly aver that it was obvious); Bryan *v.* International, etc., R. Co., (Tex. Civ. App. 1905) 90 S. W. 693; Price *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1905) 85 S. W. 858; Adams *v.* San Antonio, etc., R. Co., 34 Tex. Civ. App. 413, 79 S. W. 79 (answer alleging that danger which resulted in the injuries were incident to the employment).

12. Curtis *v.* McNair, 173 Mo. 270, 73 S. W. 167; Evans Laundry Co. *v.* Crawford, 67 Nebr. 153, 93 N. W. 177, 94 N. W. 814; Tucker *v.* Northern Terminal Co., 41 Oreg. 82, 68 Pac. 426.

13. Greeley *v.* Foster, 32 Colo. 292, 75 Pac. 351; White *v.* Lewiston, etc., R. Co., 94 N. Y. App. Div. 4, 87 N. Y. Suppl. 901.

14. **Evidence admissible under pleading** see *infra*, IV, H, 2, d.

15. Andrews *v.* Chicago, etc., R. Co., 96 Wis. 348, 71 N. W. 372.

Denial of allegation that plaintiff was without fault raises the issue of contributory negligence. Hutchings *v.* Mills Mfg. Co., 68 S. C. 512, 47 S. E. 710.

16. Montgomery First Nat. Bank *v.* Chandler, 144 Ala. 286, 39 So. 822; Western R. Co. *v.* Russell, 144 Ala. 142, 39 So. 311; Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262; Adams *v.* McCormick Harvesting Mach. Co., 110 Mo. App. 367, 86 S. W. 484.

Sufficiency of plea of contributory negligence.— Sloss-Sheffield Steel, etc., Co. *v.* Smith, (Ala. 1905) 40 So. 91 (plea too general); Kansas City, etc., R. Co. *v.* Thornhill, 141 Ala. 215, 37 So. 412 (plea objectionable as presenting a false issue); Alabama Western R. Co. *v.* Arnett, 137 Ala. 414, 34 So. 997 (plea bad for failure to postulate that plaintiff was negligent in doing the act which caused the injury); Osborne *v.* Alabama Steel, etc., Co., 135 Ala. 571, 33 So. 687 (facts pleaded held sufficient to show contributory negligence); Alabama Great Southern R. Co. *v.* Brooks, 135 Ala. 401, 33 So. 181 (allegation that plaintiff "knew, or by reasonable diligence could have known," etc., held insufficient); Bear Creek Mill Co. *v.* Parker, 134 Ala. 293, 32 So. 700 (plea faulty in not pre-

plaintiff's own case necessarily puts in issue all the facts relied on by defendant to show his contributory negligence.[17]

c. Replication or Reply. As against a plea that the accident was occasioned by the servant's violation of a rule which forbade getting between cars, while in motion, to uncouple them, it is proper matter for replication that the rule could not be observed, consistently with the duties imposed on and required of brakemen by defendant.[18]

d. Issues, Proof, and Variance[19] — (I) *Issues and Proof* — (A) *Matters to Be Proved.* In an action by a servant against his master for personal injuries plaintiff must prove every material[20] allegation of his declaration or complaint,[21] and defendant must establish every material averment of a substantive defense pleaded by him.[22] Where general allegations of negligence are followed by an averment of the specific act of negligence alleged to have caused the injury there can be no recovery unless the specific act is established to the satisfaction of the jury;[23] but where defendant is charged with negligence in several particulars, plaintiff need not prove every branch of the case, but may recover on proof of a cause of action on either.[24]

dicating the matters therein set up as a proximate cause of the injury, and for not properly setting out plaintiff's negligence); Southern R. Co. *v.* Jackson, 133 Ala. 384, 31 So. 988 (plea that plaintiff's own negligence proximately contributed to his injuries is bad for generality); Southern R. Co. *v.* Guyton, 122 Ala. 231, 25 So. 34 (mere general averment of negligence insufficient); Alabama Great Southern R. Co. *v.* Roach, 110 Ala. 266, 20 So. 132 (facts held to show contributory negligence); Louisville, etc., R. Co. *v.* Markee, 103 Ala. 160, 15 So. 511, 49 Am. St. Rep. 21 (general allegation of negligence insufficient); Louisville, etc., R. Co. *v.* Hawkins, 92 Ala. 241, 9 So. 271 (plea that plaintiff knew, "or by the exercise of due care might have known" of the defect, is bad); Alcorn *v.* Chicago, etc., R. Co., 108 Mo. 81, 18 S. W. 188 (not necessary to state matters of evidence); Chicago, etc., R. Co. *v.* Oyster, 58 Nebr. 1, 78 N. W. 359 (general allegation of contributory negligence good as against a demurrer *ore tenus*); Charping *v.* Toxaway Mills, 70 S. C. 470, 50 S. E. 186 (plea is sufficient where it sets out the acts or omissions which defendant wishes to prove as negligence on the part of plaintiff, and alleges the manner in which these contributed to his injury).

17. Murray *v.* Gulf, etc., R. Co., 73 Tex. 2, 11 S. W. 125.

18. Brown *v.* Louisville, etc., R. Co., 111 Ala. 275, 19 So. 1001. *Compare* Alabama Great Southern R. Co. *v.* Richie, 111 Ala. 297, 20 So. 49, in which the replication was held defective in not stating the facts and circumstances rendering it necessary for plaintiff to go between the cars while in motion.

19. **Conformity of instructions to pleading** see *infra*, IV, H, 7, a, (IV).

Responsiveness of verdict to findings see *infra*, IV, H, 8, b.

20. **Immaterial allegations need not be proved.**— Chicago, etc., R. Co. *v.* Spurney, 197 Ill. 471, 64 N. E. 302 [*affirming* 97 Ill. App. 570]; Hearn *v.* Quillen, 94 Md. 39, 50 Atl. 402.

21. *Alabama.*— Birmingham R., etc., Co. *v.* Baylor, 101 Ala. 488, 13 So. 793; Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88.

Indiana.— Terre Haute, etc., R. Co. *v.* McCorkle, 140 Ind. 613, 40 N. E. 62.

Massachusetts.—Palmer *v.* Coyle, 187 Mass. 136, 72 N. E. 844.

Michigan.—Catlin *v.* Michigan Cent. R. Co., 66 Mich. 358, 33 N. W. 515. *Compare* Ragon *v.* Toledo, etc., R. Co., 97 Mich. 265, 56 N. W. 612, 37 Am. St. Rep. 336.

Texas.— McCray *v.* Galveston, etc., R. Co., (Civ. App. 1895) 32 S. W. 548.

See 34 Cent. Dig. tit. "Master and Servant," § 862.

The word "reckless," as used in a complaint charging a master with reckless negligence, means careless and rash conduct, without thought as to the consequences, but does not require the pleader to make out such a case that his own contributory negligence would not stand in the way of a recovery. Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262.

22. Worden *v.* Humeston, etc., R. Co., 72 Iowa 201, 33 N. W. 629.

23. Palmer Brick Co. *v.* Chenall, 119 Ga. 837, 47 S. E. 329.

24. *Alabama.*— Alabama Great Southern R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313.

Illinois.— St. Louis, etc., R. Co. *v.* Dorsey, 189 Ill. 251, 59 N. E. 593 [*affirming* 89 Ill. App. 555]; Illinois Steel Co. *v.* Schymanowski, 162 Ill. 447, 44 N. E. 876; Weber Wagon Co. *v.* Kehl, 139 Ill. 644, 29 N. E. 714; Chicago, etc., R. Co. *v.* Warner, 108 Ill. 538.

Indiana.— Long *v.* Doxey, 50 Ind. 385; Diamond Block Coal Co. *v.* Edmonson, 14 Ind. App. 594, 43 N. E. 242.

Kentucky.—Louisville, etc., R. Co. *v.* Foley, 94 Ky. 220, 21 S. W. 866, 15 Ky. L. Rep. 17.

Missouri.— Dutro *v.* Metropolitan St. R. Co., 111 Mo. App. 258, 86 S. W. 915.

Nebraska.— Clark *v.* Hughes, 51 Nebr. 780, 71 N. W. 776.

Pennsylvania.— Coates *v.* Chapman, 195 Pa. St. 109, 45 Atl. 676.

(B) *Evidence Admissible Under Pleadings*[25] — (1) IN GENERAL. While the evidence in an action by a servant for personal injuries must be confined to the issues made by the pleadings,[26] the general rule is that any evidence is admissible which is relevant to the issue, and which tends to establish or disprove plaintiff's cause of action.[27] The rules governing the admission of evidence in actions by

Texas.— St. Louis, etc., R. Co. *v.* George, 85 Tex. 150, 19 S. W. 1036; East Line, etc., R. Co. *v.* Scott, 71 Tex. 703, 10 S. W. 298, 10 Am. St. Rep. 804; Galveston, etc., R. Co. *v.* Pitts, (Civ. App. 1897) 42 S. W. 255.

United States.— Northern Pac. R. Co. *v.* Babcock, 154 U. S. 190, 14 S. Ct. 978, 38 L. ed. 958.

See 34 Cent. Dig. tit. "Master and Servant," § 862.

25. Admissibility of evidence in general see *infra*, IV, H, 3, b.

26. *Alabama.*— Louisville, etc., R. Co. *v.* Banks, 132 Ala. 471, 31 So. 573; Tennessee Coal, etc., R. Co. *v.* Hansford, 125 Ala. 349, 28 So. 45, 82 Am. St. Rep. 241; Louisville, etc., R. Co. *v.* Woods, 115 Ala. 527, 22 So. 33; Alabama Great Southern R. Co. *v.* Richie, 99 Ala. 346, 12 So. 612.

California.— Pacheco *v.* Judson Mfg. Co., 113 Cal. 541, 45 Pac. 833.

Connecticut.— Whittlesey *v.* New York, etc., R. Co., 77 Conn. 100, 58 Atl. 459, 107 Am. St. Rep. 21; Sullivan *v.* New York, etc., R. Co., 62 Conn. 209, 25 Atl. 711.

Georgia.— Smith *v.* Bibb Mfg. Co., 112 Ga. 680, 37 S. E. 861, 81 Am. St. Rep. 50, 53 L. R. A. 130.

Illinois.— How *v.* Medaris, 183 Ill. 288, 55 N. E. 724 [*reversing* 82 Ill. App. 515]; Sanks *v.* Chicago, etc., R. Co., 112 Ill. App. 385; Illinois Cent. R. Co. *v.* Sathowski, 107 Ill. App. 524; Gravadahl *v.* Chicago Refining Co., 85 Ill. App. 342.

Indiana.— Thompson *v.* Citizens' St. R. Co., 152 Ind. 461, 53 N. E. 462.

Indian Territory.— Choctaw, etc., R. Co. *v.* O'Nesky, (1905) 90 S. W. 300.

Iowa.— Kuhns *v.* Wisconsin, etc., R. Co., 70 Iowa 561, 31 N. W. 868.

Kansas.— Clark *v.* Missouri Pac. R. Co., 48 Kan. 654, 29 Pac. 1138.

Kentucky.— Louisville, etc., R. Co. *v.* Kelly, 100 Ky. 421, 38 S. W. 852, 40 S. W. 452, 19 Ky. L. Rep. 69; Greer *v.* Louisville, etc., R. Co., 94 Ky. 169, 21 S. W. 649, 14 Ky. L. Rep. 876, 42 Am. St. Rep. 345; Louisville, etc., R. Co. *v.* Scanlon, 60 S. W. 643, 22 Ky. L. Rep. 1400.

Michigan.— Sell *v.* Charles Rietz, etc., Lumber Co., 70 Mich. 479, 38 N. W. 451.

Minnesota.— Connelly *v.* Minneapolis Eastern R. Co., 38 Minn. 80, 35 N. W. 582.

Mississippi.— Kent *v.* Yazoo, etc., R. Co., 77 Miss. 494, 27 So. 620, 78 Am. St. Rep. 534.

Nebraska.— Malm *v.* Thelin, 47 Nebr. 686, 66 N. W. 650.

New York.— Dye *v.* Delaware, etc., R. Co., 130 N. Y. 671, 29 N. E. 320.

Ohio.— Lake Shore, etc., R. Co. *v.* Litz, 18 Ohio Cir. Ct. 646, 6 Ohio Cir. Dec. 685; Brandon *v.* Lake Shore, etc., R. Co., 8 Ohio Cir. Dec. 642.

Oregon.— Robinson *v.* Taku Fishing Co., 42 Oreg. 537, 71 Pac. 790.

South Carolina.— Jenkins *v.* McCarthy, 45 S. C. 278, 22 S. E. 883.

Texas.— Galveston, etc., R. Co. *v.* English, (Civ. App. 1900) 59 S. W. 626, 912; Missouri, etc., R. Co. *v.* Baker, (Civ. App. 1900) 58 S. W. 964; International, etc., R. Co. *v.* Arias, 10 Tex. Civ. App. 190, 30 S. W. 446.

Utah.— Edd *v.* Union Pac. Coal Co., 25 Utah 293, 71 Pac. 215; Ohlenkamp *v.* Union Pac. R. Co., 24 Utah 232, 67 Pac. 411.

Virginia.— Norfolk, etc., R. Co. *v.* Phillips, 100 Va. 362, 41 S. E. 726.

Washington.— Henne *v.* J. T. Steeb Shipping Co., 37 Wash. 331, 79 Pac. 938; Richardson *v.* Carbon Hill Coal Co., 10 Wash. 648, 39 Pac. 95.

See 34 Cent. Dig. tit. "Master and Servant," §§ 863, 865–866.

Plaintiff confined to proof of defects alleged.— Tennessee Coal, etc., R. Co. *v.* Hansford, 125 Ala. 349, 28 So. 45, 82 Am. St. Rep. 241; Conrad *v.* Gray, 109 Ala. 130, 19 So. 398; Wright *v.* Wilmington City R. Co., 2 Marv. (Del.) 141, 42 Atl. 440; Chicago, etc., R. Co. *v.* Young, 26 Ill. App. 115; Arcade File Works *v.* Juteau, 15 Ind. App. 460, 40 N. E. 818, 44 N. E. 326; Clark *v.* Missouri Pac. R. Co., 48 Kan. 654, 29 Pac. 1138; Cherokee, etc., Coal, etc., Co. *v.* Wilson, 47 Kan. 460, 28 Pac. 178; Shanke *v.* U. S. Heater Co., 125 Mich. 346, 84 N. W. 283; Harty *v.* St. Louis, etc., R. Co., 95 Mo. 368, 8 S. W. 562; Current *v.* Missouri Pac. R. Co., 86 Mo. 62; Waldhier *v.* Hannibal, etc., R. Co., 71 Mo. 514; Buffington *v.* Atlantic, etc., R. Co., 64 Mo. 246; Page *v.* Naughton, 63 N. Y. App. Div. 377, 71 N. Y. Suppl. 503; Boehm *v.* Mace, 18 N. Y. Suppl. 106, 28 Abb. N. Cas. 138; Davis *v.* New York, etc., R. Co., 20 Abb. N. Cas. (N. Y.) 230; Shailer, etc., Co. *v.* Corcoran, 21 Ohio Cir. Ct. 639, 11 Ohio Cir. Dec. 599; Knabtla *v.* Oregon Short-Line R. Co., 21 Oreg. 136, 27 Pac. 91; McGinn *v.* U. S. Finishing Co., 27 R. I. 58, 60 Atl. 677; De la Vergne Refrigerating Mach. Co. *v.* Stahl, (Tex. Civ. App. 1899) 54 S. W. 40; San Antonio, etc., R. Co. *v.* De Ham, (Tex. Civ. App. 1899) 53 S. W. 375, 54 S. W. 395; Houston, etc., R. Co. *v.* Summers, (Tex. Civ. App. 1899) 49 S. W. 1106.

27. *Alabama.*— Alabama, etc., R. Co. *v.* Davis, 119 Ala. 572, 24 So. 862.

Colorado.— Denver, etc., R. Co. *v.* Simpson, 16 Colo. 55, 26 Pac. 339, 25 Am. St. Rep. 242.

Connecticut.— Currelli *v.* Jackson, 77 Conn. 115, 58 Atl. 762.

Florida.— Louisville, etc., R. Co. *v.* Jones, 50 Fla. 225, 39 So. 485.

Georgia.— Palmer Brick Co. *v.* Chenall, 119 Ga. 837, 47 S. E. 329; Chattanooga, etc., R. Co. *v.* Owen, 90 Ga. 265, 15 S. E. 853; Central

servants for personal injuries, differ in no respect from the rules of evidence governing civil actions generally.

R., etc., Co. *v.* Kent, 84 Ga. 351, 10 S. E. 965.

Illinois.— Belt R. Co. *v.* Confrey, 209 Ill. 344, 70 N. E. 773 [*affirming* 111 Ill. App. 473]; Mt. Olive, etc., Coal Co. *v.* Rademacher, 190 Ill. 538, 60 N. E. 888 [*affirming* 92 Ill. App. 442]; La Salle *v.* Kostka, 190 Ill. 130, 60 N. E. 72 [*affirming* 92 Ill. App. 91]; Illinois Cent. R. Co. *v.* Prickett, 109 Ill. App. 468 [*affirmed* in 210 Ill. 140, 71 N. E. 435]; Ide *v.* Fratcher, 96 Ill. App. 549 [*affirmed* in 194 Ill. 552, 62 N. E. 814]; Chicago, etc., R. Co. *v.* Young, 26 Ill. App. 115.

Iowa.— Jensen *v.* Omaha, etc., R. Co., 115 Iowa 404, 88 N. W. 952; Taylor *v.* Star Coal Co., (1899) 81 N. W. 249; Anderson *v.* Illinois Cent. R. Co., 109 Iowa 524, 80 N. W. 561; Blazenic *v.* Iowa, etc., Coal Co., 102 Iowa 706, 72 N. W. 292; Neville *v.* Chicago, etc., R. Co., 79 Iowa 232, 44 N. W. 367; Henry *v.* Sioux City, etc., R. Co., 66 Iowa 52, 23 N. W. 260; Coates *v.* Burlington, etc., R. Co., 62 Iowa 486, 17 N. W. 760.

Kentucky.— Illinois Cent. R. Co. *v.* Leisure, 90 S. W. 269, 28 Ky. L. Rep. 768; Cincinnati, etc., R. Co. *v.* Maley, 76 S. W. 334, 25 Ky. L. Rep. 690.

Massachusetts.— Connors *v.* Grilley, 155 Mass. 575, 30 N. E. 218; Boyle *v.* Mowry, 122 Mass. 251.

Minnesota.— Olson *v.* St. Paul, etc., R. Co., 34 Minn. 477, 26 N. W. 605; Larson *v.* St. Paul, etc., R. Co., 34 Minn. 477, 26 N. W. 604.

Missouri.— Bender *v.* St. Louis, etc., R. Co., 137 Mo. 240, 37 S. W. 132; Johnson *v.* Missouri Pac. R. Co., 96 Mo. 340, 9 S. W. 790, 9 Am. St. Rep. 351; Dutro *v.* Metropolitan St. R. Co., 111 Mo. App. 258, 86 S. W. 915; Rice *v.* Wabash R. Co., 101 Mo. App. 459, 74 S. W. 428; Adolff *v.* Columbia Pretzel, etc., Co., 100 Mo. App. 199, 73 S. W. 321.

Montana.— Freeman *v.* Sand Coulee Coal Co., 25 Mont. 194, 64 Pac. 347.

New Jersey.— Belleville Stone Co. *v.* Mooney, 60 N. J. L. 323, 38 Atl. 835.

New York.— Young *v.* Syracuse, etc., R. Co., 166 N. Y. 227, 59 N. E. 828.

North Carolina.—Harris *v.* Balfour Quarry Co., 137 N. C. 204, 49 S. E. 95.

Oregon.— Hough *v.* Grants Pass Power Co., 41 Oreg. 531, 69 Pac. 655; Wild *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 159, 27 Pac. 954.

Pennsylvania.— Valentine *v.* A. Colburn Co., 10 Pa. Super. Ct. 453.

Rhode Island.— Petrarca *v.* Quidnick Mfg. Co., 27 R. I. 265, 61 Atl. 648; McGarrity *v.* New York, etc., R. Co., 25 R. I. 269, 55 Atl. 718; Le Fevre *v.* Lawton Spinning Co., 24 R. I. 215, 52 Atl. 1025.

South Carolina.— Richey *v.* Southern R. Co., 69 S. C. 387, 48 S. E. 285; Youngblood *v.* South Carolina, etc., R. Co., 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824.

South Dakota.— Hedlum *v.* Holy Terror Min. Co., 16 S. D. 261, 92 N. W. 31.

Texas.— San Antonio, etc., R. Co. *v.* De Ham, 93 Tex. 74, 53 S. W. 375; St. Louis, etc., R. Co. *v.* Jones, (1890) 14 S. W. 309; Howard Oil Co. *v.* Davis, 76 Tex. 630, 13 S. W. 665; Missouri Pac. R. Co. *v.* Lamothe, 76 Tex. 219, 13 S. W. 194; Ft. Worth, etc., R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742; Galveston, etc., R. Co. *v.* Fitzpatrick, (Civ. App. 1904) 83 S. W. 406; Gammel-Statesman Pub. Co. *v.* Monfort, (Civ. App. 1904) 81 S. W. 1029; International, etc., R. Co. *v.* Martinez, (Civ. App. 1900) 57 S. W. 689; Houston, etc., R. Co. *v.* Speake, (Civ. App. 1899) 51 S. W. 509; Missouri, etc., R. Co. *v.* Calnon, 20 Tex. Civ. App. 697, 50 S. W. 422; San Antonio, etc., R. Co. *v.* Beam, (Civ. App. 1899) 50 S. W. 411; San Antonio, etc., R. Co. *v.* Parr, (Civ. App. 1894) 26 S. W. 861.

Virginia.— Virginia Iron, etc., Co. *v.* Tomlinson, 104 Va. 249, 51 S. E. 362.

Washington.— Crooker *v.* Pacific Lounge, etc., Co., 34 Wash. 191, 75 Pac. 632; Uren *v.* Golden Tunnel Min. Co., 24 Wash. 261, 64 Pac. 174; Rush *v.* Spokane Falls, etc., R. Co., 23 Wash. 501, 63 Pac. 500; Allend *v.* Spokane Falls, etc., R. Co., 21 Wash. 324, 58 Pac. 244.

West Virginia.— Turner *v.* Norfolk, etc., R. Co., 40 W. Va. 675, 22 S. E. 83.

Wisconsin.— Haley *v.* Jump River Lumber Co., 81 Wis. 412, 51 N. W. 321, 956.

United States.— Mexican Cent. R. Co. *v.* Glover, 107 Fed. 356, 46 C. C. A. 334; Shumacher *v.* St. Louis, etc., R. Co., 39 Fed. 174; Knaresborough *v.* Belcher Silver Min. Co., 14 Fed. Cas. No. 7,874, 3 Sawy. 446.

See 34 Cent. Dig. tit. "Master and Servant," §§ 863, 865, 866.

A general allegation of negligence and carelessness is sufficient to support the admission of evidence of any fact contributing proximately to the injury. Uren *v.* Golden Tunnel Min. Co., 24 Wash. 261, 64 Pac. 174.

Evidence of wilful negligence is admissible under a general allegation of negligence. Shumacher *v.* St. Louis, etc., R. Co., 39 Fed. 174.

Defendant's knowledge is an ingredient of negligence, and may be proved under the general allegation of negligence. Knaresborough *v.* Belcher Silver Min. Co., 14 Fed. Cas. No. 7,874, 3 Sawy. 446.

An averment that defendant had actual knowledge of a dangerous condition does not preclude proof that he was negligent in failing to exercise ordinary care to know such condition. Blazenic *v.* Iowa, etc., Coal Co., 102 Iowa 706, 72 N. W. 292.

Evidence of other acts of negligence than the one alleged may be admitted to show the circumstances attending the transaction resulting in the injury; but such evidence will not justify a recovery, unless the specific act of negligence is established. Palmer Brick Co. *v.* Chenall, 119 Ga. 837, 47 S. E. 329.

An allegation that a machine was defective and without proper guards is broad enough

(2) UNDER GENERAL ISSUE OR GENERAL DENIAL.[28] Under the general issue or general denial any defense is available which is not required to be specially pleaded.[29]

(3) UNDER ALLEGATIONS AS TO INCOMPETENCY OF FELLOW SERVANTS. In order to warrant the admission of evidence that the fellow servant through whose negligence plaintiff was injured was incompetent, the declaration or complaint must allege his incompetency.[30] But an allegation of gross negligence involves the competency of the fellow servant, and renders admissible evidence as to his experience;[31] and generally any facts are admissible in evidence, under an allegation of incompetency or lack of skill, which tend to establish or disprove the allegation.[32]

to warrant the admission of evidence tending to establish any defect in the machine which rendered it dangerous to the operator. Valentine *v.* A. Colburn Co., 10 Pa. Super. Ct. 453.

Under an allegation that defendant furnished unsafe tools it is permissible to show what were the proper and ordinary implements for the work in which the servant was engaged. Anderson *v.* Illinois Cent. R. Co., 109 Iowa 524, 80 N. W. 561.

Rules and usages of a railroad company as to the manner of the performance of a duty need not be pleaded, in order to authorize their introduction in evidence. Henry *v.* Sioux City, etc., R. Co., 66 Iowa 52, 23 N. W. 260.

Evidence showing an order and custom to block frogs, although not pleaded, is admissible, in an action for injuries caused by leaving a frog unblocked, as showing that the railroad conceded that unblocked frogs were dangerous. Coates *v.* Burlington, etc., R. Co., 62 Iowa 486, 17 N. W. 760.

In an action for injuries resulting from the negligence or incompetency of a vice-principal, it need not be alleged that such person was vice-principal, or that his incompetency was known to the principal, to let in proof that the injury occurred by the negligence or incompetency of such vice-principal. Harris *v.* Balfour Quarry Co., 137 N. C. 204, 49 S. E. 95.

Evidence admitted as part of res gestæ see Kucera *v.* Merrill Lumber Co., 91 Wis. 637, 65 N. W. 374.

28. **As to pleading assumption of risk** see *supra*, IV, H, 2, b, (III).

As to pleading contributory negligence see *supra*, IV, H, 2, b, (IV).

As to pleading fellow service see *supra*, IV, H, 2, b, (II).

29. Hoosier Stone Co. *v.* McCain, 133 Ind. 231, 31 N. E. 956; Cincinnati, etc., R. Co. *v.* Cook, 75 S. W. 218, 25 Ky. L. Rep. 356, 73 S. W. 765, 24 Ky. L. Rep. 2152; Price *v.* Consumers' Oil Co., (Tex. Civ. App. 1905) 90 S. W. 717; Baxter *v.* New York, etc., R. Co., (Tex. Civ. App. 1893) 22 S. W. 1002.

Under Iowa Code (1873), § 2704, limiting evidence under a denial to such as negatives some fact bound to be proved by the other party, a custom among bricklayers with reference to the building of scaffolds is unavailable; in an action by a bricklayer against his master for injuries sustained through the falling of a scaffold, unless pleaded. Eller *v.* Loomis, 106 Iowa 276, 76 N. W. 686.

30. Greeley *v.* Foster, 32 Colo. 292, 75 Pac. 351.

31. Wood *v.* Heiges, 83 Md. 257, 34 Atl. 872.

32. *Massachusetts.*—McGuerty *v.* Hale, 161 Mass. 51, 36 N. E. 682 (holding that evidence of the competency of the foreman is admissible under an allegation that defendant did not furnish competent servants); Robinson *v.* Fitchburg, etc., R. Co., 7 Gray 92 (under an allegation that a servant was employed at low wages because of his want of skill, defendant may prove by its president that he employed him as a competent and safe engineer).

New York.—Probst *v.* Delamater, 100 N. Y. 266, 3 N. E. 184 (evidence of intoxication admissible on issue of competency); Lyons *v.* New York Cent., etc., R. Co., 39 Hun 385 (plaintiff may show intemperate habits of servant).

Texas.— Branch *v.* International, etc., R. Co., (Civ. App. 1897) 40 S. W. 208, evidence of prior violation of rules, disobedience, and untrustworthiness admissible.

Utah.— Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295, holding that evidence that an engineer was careless to such an extent as to increase the risks and hazards of the employment is proper, under an allegation of his incompetency.

Virginia.— Lane *v.* Bauserman, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872 (holding that under an allegation of incapacity and want of skill, defendant's superintendent may be asked, "Did you assign to the steel gang any but experienced men?"); Dingee *v.* Unrue, 98 Va. 247, 35 S. E. 794.

Washington.— Green *v.* Western American Co., 30 Wash. 87, 70 Pac. 310, holding that evidence of specific acts of incompetency of a pit boss, and that he did not have regard for the lives of the men under his charge, is admissible under a general allegation that he was ignorant and incompetent.

See 34 Cent. Dig. tit. "Master and Servant," § 867.

Failure to keep a competent engineer is in issue under a declaration which details all the facts, showing that at the time of the accident the engine was being managed by the fireman. Norfolk, etc., R. Co. *v.* Thomas, 90 Va. 205, 17 S. E. 884, 44 Am. St. Rep.

(4) UNDER ALLEGATIONS AS TO CONTRIBUTORY NEGLIGENCE. On an issue of contributory negligence defendant may introduce evidence of any facts tending to establish his defense,[33] and plaintiff may avail himself of any facts which tend to disprove such negligence,[34] even though not alleged in his declaration or complaint.[35] But a plea of contributory negligence is not sufficient to let in the defense that the injury was caused by the negligence of fellow servants,[36] and where defendant alleges a specific act of contributory negligence, he cannot rely on any other act of negligence.[37] Since a plea of contributory negligence filed with a general denial admits that there is an issue of negligence between the parties, defendant cannot show that plaintiff was employed by a third person who is the proper party to be sued.[38]

(II) *VARIANCE.* A material variance between the allegations and the proof in an action by a servant against his master for personal injuries is fatal.[39] An

906. *Compare* Harper *v.* Indianapolis, etc., R. Co., 44 Mo. 488, holding that an allegation that it was the duty of defendants to employ a suitable engineer, and that they neglected to do so, does not authorize proof that a fireman, in the absence of the engineer, managed the locomotive, unless it is also alleged that defendants authorized or allowed him to do so.

Evidence of general reputation is not admissible in an action founded on negligence, and not on incompetency. Malcolm *v.* Fuller, 152 Mass. 160, 25 N. E. 83.

Evidence of subsequent discharge of a servant for want of skill and care is not admissible where the action is founded on negligence, not on incompetency. East Tennessee, etc., R. Co. *v.* Collins, 85 Tenn. 227, 1 S. W. 883.

Evidence of intoxication is incompetent if the pleadings do not raise the issue. Gulf, etc., R. Co. *v.* McNeill, (Tex. Civ. App. 1894) 25 S. W. 647. *Compare* Probst *v.* Delamater, 100 N. Y. 266, 3 N. E. 184.

Under an allegation that an engineer was incompetent, and that one of the brakes on the train was defective, evidence is not admissible that the road-bed was in bad condition. Ransier *v.* Minneapolis, etc., R. Co., 30 Minn. 215, 14 N. W. 883.

33. Alabama Great Southern R. Co. *v.* Davis, 119 Ala. 572, 24 So. 862 (holding that under a general plea of contributory negligence any defense of negligence is authorized which defendant's evidence may establish as legally contributory); Alcorn *v.* Chicago, etc., R. Co., 108 Mo. 81, 18 S. W. 188; Marshall *v.* Charleston, etc., R. Co., 57 S. C. 138, 35 S. E. 497; Bell *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1904) 81 S. W. 134. But see Texas, etc., R. Co. *v.* Magrill, 15 Tex. Civ. App. 353, 40 S. W. 188, holding that an allegation of contributory negligence in general terms will not admit of a defense of disobedience of orders.

Admissibility of rules.— Defendant may introduce its rules, for the purpose of showing contributory negligence, without alleging that plaintiff had violated a rule. Alcorn *v.* Chicago, etc., R. Co., 108 Mo. 81, 18 S. W. 188. *Contra,* Strong *v.* Iowa Cent. R. Co., 94 Iowa 386, 62 N. W. 799.

Notice of defect may be proved under plea of contributory negligence. Southern R. Co. *v.* Duvall, 50 S. W. 535, 20 Ky. L. Rep. 1915.

34. Magee *v.* Northern Pac. Coast R. Co., 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69.

35. *Alabama.*— Alabama Great Southern R. Co. *v.* Ellis, 137 Ala. 560, 34 So. 829.

California.—Magee *v.* Northern Pac. Coast R. Co., 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69.

Iowa.— Spaulding *v.* Chicago, etc., R. Co., 98 Iowa 205, 67 N. W. 227.

Texas.— Galveston, etc., R. Co. *v.* Courtney, 30 Tex. Civ. App. 544, 71 S. W. 307.

Vermont.— La Flam *v.* Missisquoi Pulp Co., 74 Vt. 125, 25 Atl. 526.

See 34 Cent. Dig. tit. "Master and Servant," § 869.

Under an allegation of due care, evidence that plaintiff had been directed to do the work he was attempting to do, in the manner in which he was attempting to do it at the time of the injury, is admissible, although there was no averment of a specific direction. Henrietta Coal Co. *v.* Campbell, 211 Ill. 216, 71 N. E. 863 [*affirming* 112 Ill. App. 452].

Under an allegation that plaintiff was "in the prudent and careful discharge of the duties of his employment," proof that he did not know that his fellow servant was incompetent is admissible, as bearing on the question of contributory negligence. Henry *v.* Fitchburg R. Co., 65 Vt. 436, 26 Atl. 485.

36. Higgins *v.* Missouri Pac. R. Co., 43 Mo. App. 547.

37. Ward *v.* Louisville, etc., R. Co., 65 S. W. 2, 23 Ky. L. Rep. 1326. See also St. Louis, etc., R. Co. *v.* McClain, 80 Tex. 85, 15 S. W. 789.

38. Bomar *v.* Louisiana, etc., R. Co., 42 La. Ann. 983, 8 So. 478, 42 La. Ann. 1206, 9 So. 244.

39. **For instances of material variances** see the following cases:

Alabama.— Northern Alabama R. Co. *v.* Mansell, 138 Ala. 548, 36 So. 459; Alabama Great Southern R. Co. *v.* Richie, 111 Ala. 297, 20 So. 49; Conrad *v.* Gray, 109 Ala. 130, 19 So. 398; Collier *v.* Coggins, 103 Ala. 281, 15 So. 578; Dean *v.* East Tennessee, etc., R. Co., 98 Ala. 586, 13 So. 489; East Tennessee, etc., R. Co. *v.* Turvaville, 97 Ala. 122, 12 So. 63.

immaterial variance will, however, be disregarded;[40] and in some states it is provided by statute that no variance shall be deemed material unless it actually mis-

Arizona.— Sante Fe, etc., R. Co. *v.* Hurley, 4 Ariz. 258, 36 Pac. 216.

Delaware.— Higgins *v.* Wilmington, 3 Pennew. 356, 51 Atl. 1.

Florida.—Parrish *v.* Pensacola, etc., R. Co., 28 Fla. 251, 9 So. 696.

Georgia.—Moyer *v.* Ramsay-Brisbane Stone Co., 119 Ga. 734, 46 S. E. 844; Postell *v.* Brunswick, etc., R. Co., 112 Ga. 602, 37 S. E. 869; Thomas *v.* Georgia R., etc., Co., 40 Ga. 231.

Illinois.— Chicago, etc., R. Co. *v.* Bell, 112 Ill. 360; Camp Point Mfg. Co. *v.* Ballou, 71 Ill. 417; Cardiff Coal Co. *v.* Waybright, 108 Ill. App. 561; Jorias *v.* Illinois Steel Co., 101 Ill. App. 416; McCormick Harvesting Mach. Co. *v.* Sendzikowski, 72 Ill. App. 402.

Indiana.— Long *v.* Doxey, 50 Ind. 385; Arcade File Works *v.* Juteau, 15 Ind. App. 460, 40 N. E. 818, 44 N. E. 326.

Indian Territory.— Choctaw, etc., R. Co. *v.* Nicholas, 3 Indian Terr. 40, 53 S. W. 475.

Iowa.— Manuel *v.* Chicago, etc., R. Co., 56 Iowa 655, 10 N. W. 237.

Kentucky.— Howard *v.* Chesapeake, etc., R. Co., 90 S. W. 950, 28 Ky. L. Rep. 891; Bowling Green Stone Co. *v.* Capshaw, 64 S. W. 507, 23 Ky. L. Rep. 945; Thomas *v.* Louisville, etc., R. Co., 35 S. W. 910, 18 Ky. L. Rep. 164.

Massachusetts.— Bowers *v.* Connecticut River R. Co., 162 Mass. 312, 38 N. E. 508; Carey *v.* Boston, etc., R. Co., 158 Mass. 228, 33 N. E. 512; Connors *v.* Holden, 152 Mass. 598, 26 N. E. 137.

Michigan.— Chall *v.* Detroit Stove Co., 140 Mich. 68, 103 N. W. 513; Greenwald *v.* Marquette, etc., R. Co., 49 Mich. 197, 13 N. W. 513; Batterson *v.* Chicago, etc., R. Co., 49 Mich. 184, 13 N. W. 508.

Minnesota.— Pierce *v.* Brennan, 88 Minn. 50, 92 N. W. 507; Doyle *v.* St. Paul, etc., R. Co., 42 Minn. 79, 43 N. W. 787.

Missouri.— Iscber *v.* St. Louis Bridge Co., 95 Mo. 261, 8 S. W. 367; Buffington *v.* Atlantic, etc., R. Co., 64 Mo. 246; Mitchell *v.* Chicago, etc., R. Co., 108 Mo. App. 142, 83 S. W. 289; Studenroth *v.* Hammond Packing Co., 106 Mo. App. 480, 81 S. W. 487; Zentz *v.* Chappell, 103 Mo. App. 208, 77 S. W. 86; Cunningham *v.* Journal Co., 95 Mo. App. 47, 68 S. W. 592.

New York.— Wagner *v.* New York, etc., R. Co., 76 N. Y. App. Div. 552, 78 N. Y. Suppl. 696; Koehler *v.* New York Steam Co., 71 N. Y. App. Div. 222, 75 N. Y. Suppl. 597; O'Connell *v.* Clark, 22 N. Y. App. Div. 466, 48 N. Y. Suppl. 74; Coffey *v.* Chapal, 2 N. Y. Suppl. 648.

North Carolina.— Harris *v.* Balfour Quarry Co., 131 N. C. 553, 42 S. E. 973; Hunt *v.* Vanderhilt, 115 N. C. 559, 20 S. E. 168.

Tennessee.— East Tennessee, etc., R. Co. *v.* Lindamood, 111 Tenn. 457, 78 S. W. 99.

Texas.— Weatherford, etc., R. Co. *v.* Duncan, 88 Tex. 611, 32 S. W. 878; Texas, etc., R. Co. *v.* Beall, (Civ. App. 1898) 43 S. W. 605; Campbell *v.* Wing, 5 Tex. Civ. App. 431, 24 S. W. 360.

Virginia.— Eckles *v.* Norfolk, etc., R. Co., 96 Va. 69, 25 S. E. 545.

See 34 Cent. Dig. tit. "Master and Servant," §§ 870–876.

40. For instances of immaterial variances see the following cases:

Alabama.— Highland Ave., etc., R. Co. *v.* Miller, 120 Ala. 535, 24 So. 955.

Connecticut.— Zeigler *v.* Danbury, etc., R. Co., 52 Conn. 543.

Georgia.— Georgia R., etc., Co. *v.* Miller, 90 Ga. 571, 16 S. E. 939.

Illinois.— Illinois Terminal R. Co. *v.* Thompson, 210 Ill. 226, 71 N. E. 328 [*affirming* 112 Ill. App. 463]; Ehlen *v.* O'Donnell, 205 Ill. 38, 68 N. E. 766 [*affirming* 102 Ill. App. 141]; Chicago, etc., R. Co. *v.* Spurney, 197 Ill. 471, 64 N. E. 302 [*affirming* 97 Ill. App. 570]; Lake Shore, etc., R. Co. *v.* Hundt, 140 Ill. 525, 30 N. E. 458 [*affirming* 41 Ill. App. 220]; Stearns *v.* Reidy, 135 Ill. 119, 25 N. E. 762; Chicago, etc., R. Co. *v.* Jackson, 55 Ill. 492, 8 Am. Rep. 661.

Indiana.— Southern Indiana R. Co. *v.* Hoggatt, 35 Ind. App. 348, 73 N. E. 1096; Indiana Natural, etc., Gas Co. *v.* Marshall, 22 Ind. App. 121, 52 N. E. 232.

Iowa.— Sedgwick *v.* Illinois Cent. R. Co., 73 Iowa 158, 34 N. W. 790.

Kansas.— Chicago, etc., R. Co. *v.* Doyle, 18 Kan. 58.

Kentucky.— Conrad Tanning Co. *v.* Munsey, 76 S. W. 841, 25 Ky. L. Rep. 936; Henderson Brewing Co. *v.* Folden, 76 S. W. 520, 25 Ky. L. Rep. 969; Louisville, etc., R. Co. *v.* Richardson, 66 S. W. 631, 23 Ky. L. Rep. 2090.

Michigan.— Potter *v.* Detroit, etc., R. Co., 122 Mich. 179, 81 N. W. 80, 82 N. W. 245; Kinney *v.* Folkerts, 78 Mich. 687, 44 N. W. 152; James *v.* Emmet Min. Co., 55 Mich. 335, 21 N. W. 361.

Minnesota.—Nutzmann *v.* Germania L. Ins. Co., 82 Minn. 116, 84 N. W. 730; Sonrs *v.* Great Northern R. Co., 81 Minn. 337, 84 N. W. 114.

Missouri.— Smith *v.* Fordyce, 190 Mo. 1, 88 S. W. 679; Hurlbut *v.* Wabash R. Co., 130 Mo. 657, 31 S. W. 1051; Cameron *v.* B. Roth Tool Co., 108 Mo. App. 265, 83 S. W. 279; Eberly *v.* Chicago, etc., R. Co., 96 Mo. App. 361, 70 S. W. 381; Sackewitz *v.* American Biscuit Mfg. Co., 78 Mo. App. 144.

Ohio.— Lake Shore, etc., R. Co. *v.* Lavalley, 36 Ohio St. 221.

Texas.— Houston, etc., R. Co. *v.* Lowe, (1889) 11 S. W. 1065; Missouri, etc., R. Co. *v.* Crum, 35 Tex. Civ. App. 609, 81 S. W. 72; International, etc., R. Co. *v.* Collins, 33 Tex. Civ. App. 58, 75 S. W. 814; New York, etc., R. Co. *v.* Green, (Civ. App. 1896) 36 S. W. 812.

Washington.— Sayward *v.* Carlson, 1 Wash. 29, 23 Pac. 830.

Wisconsin.— Stetler *v.* Chicago, etc., R. Co., 49 Wis. 609, 6 N. W. 303.

leads the opposite party to his prejudice,[41] while in Indiana no judgment will be reversed for anything which might have been amended below.[42]

3. Evidence[43] — a. Presumptions and Burden of Proof — (I) *Presumptions* — (A) *As to Existence of Relation of Master and Servant.* The fact that one is found doing service for another is *prima facie* evidence of an employment;[44] and where plaintiff proves that he was employed by defendant several years prior to the accident, it will be presumed that the contractual relation existed at the time of the injury.[45]

(B) *As to Existence of Remedy.* Where plaintiff brings suit to recover for injuries received in another jurisdiction, while it will be presumed that there is a law in force in such jurisdiction furnishing a remedy for the injury,[46] it will also be presumed that the fellow servant doctrine obtains therein.[47]

(C) *As to Negligence of Master* — (1) In General. In an action by a servant against his master for personal injuries there is a *prima facie* presumption that the master was free from negligence.[48]

(2) Cause of Injury. Where the evidence leaves the cause of an injury unproved, it cannot be attributed to defendant's negligence.[49] But where there was a failure of one or the other of two appliances, and one of them was known to be defective, there is ground for the jury to draw an inference that it was probably the defective appliance that failed, and caused the accident;[50] and where it is shown that the servant was injured while the master was acting in violation of a statute, the damages will be attributed to negligence, in the absence of anything to show the contrary.[51]

(3) Constitutional and Statutory Provisions Imposing Liability. Under constitutional and statutory provisions in force in some of the United States negligence on the part of the master may be presumed.[52]

See 34 Cent. Dig. tit. "Master and Servant," §§ 870–876.

Where the declaration merely alleges the exercise of due care by plaintiff, it is not a variance between pleading and evidence to show that defendant promised to repair and did not do so, and that, relying on such promise, plaintiff continued in defendant's employ and was injured. Sattley Mfg. Co. *v.* Wendt, 116 Ill. App. 375.

41. Rayburn *v.* Central Iowa R. Co., 74 Iowa 637, 35 N. W. 606, 38 N. W. 520 (construing Code (1873), § 2686); Roundtree *v.* Charleston, etc., R. Co., 72 S. C. 474, 52 S. E. 231 (construing Code Civ. Proc. (1902) §§ 190–192); Nelson *v.* S. Willey Steamship, etc., Co., 26 Wash. 548, 67 Pac. 237 (construing Ballinger Annot. Codes & St. § 4949); Walker *v.* McNeill, 17 Wash. 582, 50 Pac. 518 (construing Code Proc. § 217); Northern Pac. R. Co. *v.* O'Brien, 1 Wash. 599, 21 Pac. 32 (construing Code, § 105).

42. Consumers' Paper Co. *v.* Eyer, 160 Ind. 424, 66 N. E. 994, construing Burns Rev. St. (1901) § 670.

43. Instructions see *infra*, IV, H, 7.

44. Perry *v.* Ford, 17 Mo. App. 212.

Where two railroads use a yard indiscriminately, and there is no evidence as to the nature of the contract between the roads, except that several employees in the yard testify that they are paid by the other company, but that a short time before they were paid by defendant, every presumption will be indulged against defendant, since it could easily show the contract between the parties. Missouri Pac. R. Co. *v.* Bond, 2 Tex. Civ. App. 104, 20 S. W. 930.

45. Southern Pac. R. Co. *v.* Wellington, (Tex. Civ. App. 1896) 36 S. W. 1114.

46. Speer *v.* Missouri, etc., R. Co., 23 Kan. 571.

47. Baltimore, etc., R. Co. *v.* Read, 158 Ind. 25, 62 N. E. 488, 92 Am. St. Rep. 293. *Contra*, Williams *v.* Southern R. Co., 128 N. C. 286, 38 S. E. 893.

48. Allen *v.* Kingston Coal Co., 212 Pa. St. 54, 61 Atl. 572. See also Hurlbut *v.* Wabash R. Co., 130 Mo. 657, 31 S. W. 1051.

That a master has indemnity against accidents is not an admission of negligence or of the use of defective appliances on his part. Sawyer *v.* J. M. Arnold Shoe Co., 90 Me. 369, 38 Atl. 333.

Effect of negative evidence.—Evidence that certain witnesses did not hear any instructions given the servant as to how his work should be done, where there was ample opportunity to have given him instructions without the witnesses hearing it, is insufficient to raise a presumption that no instructions were given. Carnes *v.* Guelph Patent Cask Co., 141 Mich. 23, 104 N. W. 322.

49. Sauer *v.* Union Oil Co., 43 La. Ann. 699, 9 So. 566.

50. Keys *v.* Winnsboro Granite Co., 72 S. C. 97, 51 S. E. 549.

51. **Servant struck by train running at prohibited speed** see Bluedorn *v.* Missouri Pac. R. Co., 121 Mo. 258, 25 S. W. 943.

52. *Florida.*— Under Acts (1891), c. 407, providing for recovery for injuries caused by

(4) Existence of Defect or Happening of Accident or Injury.[53] No presumption of negligence on the part of the master arises from the mere existence of a defect or the happening of the accident through which the servant was injured.[54] The maxim "*res ipsa loquitur*" is applicable only where the matter

the negligence of a fellow servant, the presumption that defendant's servant was negligent arises on proof that plaintiff was free from fault. Florida Cent., etc., R. Co. *v.* Mooney, 40 Fla. 17, 24 So. 148.

Georgia.— Under Civ. Code, § 2321, proof that a railroad employee, injured by the running of its locomotives, cars, or machinery, was without fault, raises a presumption that the company was in fault. Augusta Southern R. Co. *v.* McDade, 105 Ga. 134, 31 S. E. 420; Florida Cent. R. Co. *v.* Burney, 98 Ga. 1, 26 S. E. 730; Savannah, etc., R. Co. *v.* Phillips, 90 Ga. 829, 17 S. E. 82; Western, etc., R. Co. *v.* Vandiver, 85 Ga. 470, 11 S. E. 781. *Compare* Georgia R., etc., Co. *v.* Nelms, 83 Ga. 70, 9 S. E. 1049, 20 Am. St. Rep. 308.

Illinois.— The failure of a railroad to comply with the federal statute as to safety appliances is *prima facie* negligence. Malott *v.* Hood, 99 Ill. App. 360.

Minnesota.— The bursting of a boiler on a steamboat raises a presumption of negligence, under 5 U. S. St. at L. p. 306, § 13. Connolly *v.* Davidson, 15 Minn. 519, 2 Am. Rep. 154; Fay *v.* Davidson, 13 Minn. 523; McMahon *v.* Davidson, 12 Minn. 357.

Mississippi.— Under Const. (1890) § 193, negligence will not be inferred from the fact of injury to an employee, but it must be shown. Short *v.* New Orleans, etc., R. Co., 69 Miss. 848, 13 So. 826.

Missouri.— Under Rev. St. § 2873, where it appears that a servant was injured in a train collision, a *prima facie* case is made against the master. Shuler *v.* Omaha, etc., R. Co., 87 Mo. App. 618. *Compare* Caldwell *v.* Missouri Pac. R. Co., 181 Mo. 455, 80 S. W. 897, holding that, to raise the presumption of negligence against the master, there must be proof of the negligence of a fellow servant or agent.

South Carolina.— Const. (1895) art. 9, § 15, while it confers a right, does not create a presumption or rule of evidence. Land *v.* Southern R. Co., 67 S. C. 290, 45 S. E. 203.

See 34 Cent. Dig. tit. "Master and Servant," § 880.

53. As raising question for jury see *infra*, IV, H, 6, a, (III), b, (III).

As to burden of proof see *infra*, IV, H, 3, a, (I), (C), (4).

Weight and sufficiency of evidence see *infra*, IV, H, 3, c, (IV), (B).

54. *Alabama.*— Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494.

California.—Thompson *v.* California Constr. Co., 148 Cal. 35, 82 Pac. 367; Brymer *v.* Southern Pac. Co., 90 Cal. 496, 27 Pac. 371.

Colorado.— Greeley *v.* Foster, 32 Colo. 292, 75 Pac. 351; Kellogg *v.* Denver City Tramway Co., 18 Colo. App. 475, 72 Pac. 609.

District of Columbia.— Butler *v.* Frazee, 25 App. Cas. 392.

Georgia.— Palmer Brick Co. *v.* Chenall, 119 Ga. 837, 47 S. E. 329; East Tennessee, etc., R. Co. *v.* Maloy, 77 Ga. 237, 2 S. E. 941.

Illinois.— Illinois Cent. R. Co. *v.* Swift, 213 Ill. 307, 72 N. E. 737; Omaha Packing Co. *v.* Murray, 112 Ill. App. 233; Garden City Wire Spring Co. *v.* Boecher, 94 Ill. App. 96.

Iowa.— Bergman *v.* Altman, 127 Iowa 693, 104 N. W. 280; Brownfield *v.* Chicago, etc., R. Co., 107 Iowa 254, 77 N. W. 1038.

Kansas.— Lane *v.* Missouri Pac. R. Co., 64 Kan. 755, 68 Pac. 626; Kansas Pac. R. Co. *v.* Salmon, 11 Kan. 83.

Kentucky.— Dana *v.* Blackburn, 90 S. W. 237, 28 Ky. L. Rep. 695; Vissman *v.* Southern R. Co., 89 S. W. 502, 28 Ky. L. Rep. 429, 2 L. R. A. N. S. 469.

Louisiana.— Levins *v.* Bancroft, 114 La. 105, 38 So. 72.

Maine.— Pellerin *v.* International Paper Co., 96 Me. 388, 52 Atl. 842.

Maryland.— Gans Salvage Co. *v.* Byrnes, 102 Md. 230, 62 Atl. 155, 1 L. R. A. N. S. 272.

Massachusetts.— Droney *v.* Doherty, 186 Mass. 205, 71 N. E. 547; Reynolds *v.* Merchants' Woolen Co., 168 Mass. 501, 47 N. E. 406.

Michigan.— Fuller *v.* Ann Arbor R. Co., 141 Mich. 66, 104 N. W. 414; Redmond *v.* Delta Lumber Co., 96 Mich. 545, 55 N. W. 1004.

Minnesota.— Davidson *v.* Davidson, 46 Minn. 117, 48 N. W. 560.

Missouri.— Oglesby *v.* Missouri Pac. R. Co., 177 Mo. 272, 76 S. W. 623; Smith *v.* Missouri Pac. R. Co., 113 Mo. 70, 20 S. W. 896; Deckerd *v.* Wabash R. Co., 111 Mo. App. 117, 85 S. W. 982; Cothron *v.* Cudahy Packing Co., 98 Mo. App. 343, 73 S. W. 279; O'Donnell *v.* Baum, 38 Mo. App. 245.

New York.— Quinlan *v.* New York, etc., R. Co., 181 N. Y. 523, 73 N. E. 1130 [*affirming* 89 N. Y. App. Div. 266, 85 N. Y. Suppl. 814]; Starer *v.* Stern, 100 N. Y. App. Div. 393, 91 N. Y. Suppl. 821; Stackpole *v.* Wray, 99 N. Y. App. Div. 262, 90 N. Y. Suppl. 1045 [*affirmed* in 182 N. Y. 567, 75 N. E. 1134]; Moran *v.* Munson Steamship Line, 82 N. Y. App. Div. 489, 81 N. Y. Suppl. 612; Griffin *v.* Flank, 48 Misc. 617, 95 N. Y. Suppl. 546.

North Carolina.— Womble *v.* Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493.

Pennsylvania.—Allen *v.* Kingston Coal Co., 212 Pa. St. 54, 61 Atl. 572; Surles *v.* Kistler, 202 Pa. St. 289, 51 Atl. 887; Higgins *v.* Fanning, 195 Pa. St. 599, 46 Atl. 102; McKenna *v.* Martin, etc., Paper Co., 176 Pa. St. 306, 35 Atl. 131; Ash *v.* Verlenden, 154 Pa. St. 246, 26 Atl. 374; Cole *v.* Northern Cent. R. Co., 12 Pa. Co. Ct. 573.

South Carolina.— Green *v.* Southern R. Co., 72 S. C. 398, 52 S. E. 45.

Tennessee.— East Tennessee, etc., R. Co. *v.* Lindamood, 111 Tenn. 457, 78 S. W. 99.

of the occurrence or the attendant circumstances are such that the jury can reasonably infer that the occurrence would not have taken place unless the master was lacking in diligence, and where there is the slightest evidence to explain the happening of the occurrence on any other theory than that of the negligence claimed, the jury should disregard the inference arising from the fact of the injury.[55]

(5) As to Tools, Machinery, Appliances, and Places For Work. The law presumes, in the absence of evidence to the contrary, that the master has performed his duty with reference to furnishing his servants with reasonably safe and suitable tools, machinery, appliances, and places for work,[56] and had no notice

Texas.— G. A. Duerler Mfg. Co. *v.* Dullnig, (Civ. App. 1904) 83 S. W. 889 [*affirmed* in (1905) 87 S. W. 332].

Virginia.— Moore Lime Co. *v.* Johnston, 103 Va. 84, 48 S. E. 557.

West Virginia.— Stewart *v.* Ohio River R. Co., 40 W. Va. 188, 20 S. E. 922; Knight *v.* Cooper, 36 W. Va. 232, 14 S. E. 999.

Wisconsin.— Spille *v.* Wisconsin Bridge, etc., Co., 105 Wis. 340, 81 N. W. 397.

United States.— Patton *v.* Texas, etc., R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. ed. 361 [*affirming* 95 Fed. 244]; Northern Pac. R. Co. *v.* Dixon, 139 Fed. 737, 71 C. C. A. 555; Chicago, etc., R. Co. *v.* O'Brien, 132 Fed. 593, 67 C. C. A. 421; Rogers *v.* Louisville, etc., R. Co., 88 Fed. 462; Peirce *v.* Kile, 80 Fed. 865, 26 C. C. A. 201. *Compare* Smith *v.* Memphis, etc., R. Co., 18 Fed. 304, which sustains the general rule, but holds that where the cause of the accident is known to be some particular defect in the tools, machinery, or other appliances, the existence of the defect is of itself evidence of negligence, for which liability attaches, unless the master can satisfactorily show that he has not been negligent in the matter of providing against the defect.

See 34 Cent. Dig. tit. "Master and Servant," § 881.

That an appliance is latently defective raises no presumption of the master's negligence. East Tennessee, etc., R. Co. *v.* Lindamood, 111 Tenn. 457, 78 S. W. 99. See also O'Donnell *v.* Baum, 38 Mo. App. 245.

The mere fact of a collision does not establish a presumption of negligence on the part of a railroad company in favor of its employees, such a presumption existing only in favor of passengers. Smith *v.* Missouri Pac. R. Co., 113 Mo. 70, 20 S. W. 896; Cole *v.* Northern Cent. R. Co., 12 Pa. Co. Ct. 573.

The explosion of a steamboat boiler raises a *prima facie* presumption of negligence, under 5 U. S. St. at L. p. 306, § 13. Connolly *v.* Davidson, 15 Minn. 519, 2 Am. Rep. 154. See also Posey *v.* Scoville, 10 Fed. 140.

55. Palmer Brick Co. *v.* Chenall, 119 Ga. 837, 47 S. E. 329.

Maxim "res ipsa loquitur" applied see Georgia Cent. R. Co. *v.* Vining, 116 Ga. 284, 42 S. E. 492; Central R., etc., Co. *v.* Roach, 64 Ga. 635; Pittsburg, etc., R. Co. *v.* Campbell, 116 Ill. App. 356; Coleman *v.* Mechanics' Iron Foundry Co., 168 Mass. 254, 46 N. E. 1065; Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434; Blanton *v.* Dold, 109 Mo. 64, 18 S. W. 1149; Stoher *v.* St. Louis, etc., R. Co., 91 Mo. 509, 4 S. W. 389; Lee *v.* St. Louis, etc., R. Co., 112 Mo. App. 372, 87 S. W. 12; Sackewitz *v.* American Biscuit Mfg. Co., 78 Mo. App. 144; Gorman *v.* Milliken, 102 N. Y. App. Div. 617, 92 N. Y. Suppl. 1126 [*affirming* 42 Misc. 336, 86 N. Y. Suppl. 699]; Lentino *v.* Port Henry Iron Ore Co., 71 N. Y. App. Div. 466, 75 N. Y. Suppl. 755; Colelli *v.* New Jersey, etc., Concentrating Works, 87 Hun 428, 34 N. Y. Suppl. 310; Green *v.* Banta, 48 N. Y. Super. Ct. 156; Daley *v.* Union Dry Dock Co., 9 Misc. 394, 29 N. Y. Suppl. 1063 [*affirmed* in 151 N. Y. 649, 46 N. E. 1146]; Louisville, etc., R. Co. *v.* Northington, 91 Tenn. 56, 17 S. W. 880, 16 L. R. A. 268; Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380; Welty *v.* Lake Superior Terminal, etc., R. Co., 100 Wis. 128, 75 N. W. 1022; Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565; Bradford Glycerine Co. *v.* Kizer, 113 Fed. 894, 51 C. C. A. 524. See also Chenall *v.* Palmer Brick Co., 117 Ga. 106, 43 S. E. 443.

Presumption rebutted.— The presumption of negligence arising from the fact that the die of a stamping machine, so constructed that the die descended only on pressure of the treadle, descended without apparent cause, is conclusively rebutted by proof that there was no discoverable defect. Vorbrich *v.* Geuder, etc., Mfg. Co., 96 Wis. 277, 71 N. W. 434.

56. *Alabama.*— Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494.

California.— Brymer *v.* Southern Pac. Co., 90 Cal. 496, 27 Pac. 371.

Idaho.— Minty *v.* Union Pac. R. Co., 2 Ida. (Hash.) 471, 21 Pac. 660.

Illinois.— Illinois Cent. R. Co. *v.* Houck, 72 Ill. 285; Illinois Cent. R. Co. *v.* Barslow, 55 Ill. App. 203.

Iowa.— Brownfield *v.* Chicago, etc., R. Co., 107 Iowa 254, 77 N. W. 1038.

Massachusetts.— Ladd *v.* New Bedford R. Co., 119 Mass. 412, 20 Am. Rep. 331.

Michigan.— Redmond *v.* Delta Lumber Co., 96 Mich. 545, 55 N. W. 1004.

Minnesota.— Davidson *v.* Davidson, 46 Minn. 117, 48 N. W. 560.

Missouri.— Glasscock *v.* Swafford Bros. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364, (App. 1903) 74 S. W. 1039; Franklin *v.* Missouri, etc., R. Co., 97 Mo. App. 473, 71 S. W. 540; O'Donnell *v.* Baum, 38 Mo. App. 245; Nolan *v.* Shickle, 3 Mo. App. 300.

of any defects therein.[57] But it will not be presumed that a railroad company inspected a particular car for defects by which an employee was injured, on a showing that it was the custom to inspect all cars.[58]

(6) As to Methods of Work, Rules, and Orders. In the absence of evidence to the contrary, it will be presumed that the methods of work adopted by a master, and the rules and regulations promulgated by him for the government of his employees, are proper and sufficient;[59] and where the existence of a rule is shown it will be further presumed that it was known to an employee at the time of his injury.[60] Where a servant fails to obey positive orders as to the manner of doing his work, it is *prima facie* evidence of his negligence.[61]

(7) As to Selection and Retention of Servants. While a master is presumed to have known in regard to the incompetency of a fellow servant what was generally known to those among whom such servant worked and lived, and what he might have known by the exercise of due care and diligence,[62] he will be presumed, in the absence of affirmative proof to the contrary, to have exercised proper care in the selection and retention of his servants.[63]

New Jersey.— Hampton *v.* Camden, etc., R. Co., 10 N. J. L. J. 236.

New York.—Mulligan *v.* Crimmins, 75 Hun 578, 27 N. Y. Suppl. 819 [*affirmed* in 149 N. Y. 594, 44 N. E. 1126].

Pennsylvania.— McKenna *v.* Martin, etc., Paper Co., 176 Pa. St. 306, 35 Atl. 131; Ash *v.* Verlenden, 154 Pa. St. 246, 26 Atl. 374.

South Carolina.— Davis *v.* Columbia, etc., R. Co., 21 S. C. 93.

Wisconsin.— See Lockwood *v.* Chicago, etc., R. Co., 55 Wis. 50, 12 N. W. 401.

United States.— Gravelle *v.* Minneapolis, etc., R. Co., 10 Fed. 711, 3 McCrary 352.

See 34 Cent. Dig. tit. "Master and Servant," §§ 882–887.

57. Minty *v.* Union Pac. R. Co., 2 Ida. (Hasb.) 471, 21 Pac. 660; Franklin *v.* Missouri, etc., R. Co., 97 Mo. App. 473, 71 S. W. 540. *Compare* Hanley *v.* California Bridge, etc., Co., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597.

Notice of defect in coupling apparatus presumed see Brinkmeier *v.* Missouri Pac. R. Co., 69 Kan. 738, 77 Pac. 586.

That a defective car was attached to a train, with nothing to show that it differed from the other cars, and that it became necessary to use it in such a manner that an employee was injured, he having no knowledge of its defective condition, are *prima facie* evidence of negligence on the part of the railroad, without proof that it had notice of the defect in the car. Guthrie *v.* Maine Cent. R. Co., 81 Me. 572, 18 Atl. 295.

58. Eddy *v.* Prentice, 8 Tex. Civ. App. 58, 27 S. W. 1063. But see Hodges *v.* Kimball, 104 Fed. 745, 44 C. C. A. 193.

59. *Delaware.*— Murphy *v.* Hughes, 1 Pennew. 250, 40 Atl. 187.

Minnesota.— Fraker *v.* St. Paul, etc., R. Co., 32 Minn. 54, 19 N. W. 349.

Missouri.— Smith *v.* Missouri Pac. R. Co., 113 Mo. 70, 20 S. W. 896.

New Jersey.— Hampton *v.* Camden, etc., R. Co., 10 N. J. L. J. 236.

Pennsylvania.— Cole *v.* Northern Cent. R. Co., 12 Pa. Co. Ct. 573.

Virginia.— Norfolk, etc., R. Co. *v.* Williams, 89 Va. 165, 15 S. E. 522.

See 34 Cent. Dig. tit. "Master and Servant," § 890.

The non-observance of a proper rule will not be assumed in the absence of proof for the purpose of charging the master with negligence. Hodges *v.* Kimball, 104 Fed. 745, 44 C. C. A. 193.

60. Knowledge of rule by employee presumed.— Frounfelker *v.* Delaware, etc., R. Co., 48 N. Y. App. Div. 206, 62 N. Y. Suppl. 840, 74 N. Y. App. Div. 224, 77 N. Y. Suppl. 470; Galveston, etc., R. Co. *v.* Gormley, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894 [*reversing* (Civ. App. 1897) 42 S. W. 314]; Pilkinton *v.* Gulf, etc., R. Co., 70 Tex. 226, 7 S. W. 805.

61. Erickson *v.* Monson Consol. Slate Co., 100 Me. 107, 60 Atl. 708.

62. Giordano *v.* Brandywine Granite Co., 3 Pennew. (Del.) 423, 52 Atl. 332.

63. *Alabama.*— Conrad *v.* Gray, 109 Ala. 130, 19 So. 398; Mobile, etc., R. Co. *v.* Thomas, 42 Ala. 672.

California.— See Atkinson *v.* Clark, 132 Cal. 476, 64 Pac. 769.

Colorado.— Summerhays *v.* Kansas Pac. R. Co., 2 Colo. 484; Kindel *v.* Hall, 8 Colo. App. 63, 44 Pac. 781.

Connecticut.— Hayden *v.* Smithville Mfg. Co., 29 Conn. 548.

Georgia.— Baxley *v.* Satilla Mfg. Co., 114 Ga. 720, 40 S. E. 730.

Illinois.— Chicago, etc., R. Co. *v.* Geary, 110 Ill. 383; Columbus, etc., R. Co. *v.* Troesch, 68 Ill. 545, 18 Am. Rep. 578; Chicago, etc., R. Co. *v.* Myers, 83 Ill. App. 469.

Indiana.— Louisville, etc., R. Co. *v.* Bates, 146 Ind. 564, 45 N. E. 108; Ohio, etc., R. Co. *v.* Dunn, 138 Ind. 18, 36 N. E. 702, 37 N. E. 546; Indianapolis, etc., R. Co. *v.* Love, 10 Ind. 554.

Maryland.— Baltimore *v.* War, 77 Md. 593, 27 Atl. 85.

Michigan.— Lee *v.* Michigan Cent. R. Co., 87 Mich. 574, 49 N. W. 909; Catlin *v.* Michigan Cent. R. Co., 66 Mich. 358, 33 N. W. 515; Hilts *v.* Chicago, etc., R. Co., 55 Mich.

(D) *As to Assumption of Risk.* A servant is presumed to have assumed the risks ordinarily incident to his employment,[64] and those arising from defects or dangers of which he has, or ought to have, knowledge.[65] But knowledge of defects and dangers is in some jurisdictions matter of defense, and no presumption of knowledge arises, in the absence of evidence that the servant did have knowledge;[66] nor is he presumed to have assumed the risk of special dangers, arising from a peculiar condition of affairs.[67] Where a servant continues to work because of a promise by the employer to repair a defect, there is no presumption that he assumes the risk incidental to the defect,[68] unless the time for the performance of the promise has gone by, and he knows that the repairs have not been made.[69]

(E) *As to Contributory Negligence.* In some jurisdictions contributory negligence will be presumed, in the absence of evidence to the contrary;[70] while in

437, 21 N. W. 878; Davis *v.* Detroit, etc., R. Co., 20 Mich. 105, 4 Am. Rep. 364.

Missouri.— Roblin *v.* Kansas City, etc., R. Co., 119 Mo. 476, 24 S. W. 1011; Huffman *v.* Chicago, etc., R. Co., 78 Mo. 50; Moss *v.* Pacific R. Co., 49 Mo. 167, 8 Am. Rep. 126.

New Hampshire.— Hilton *v.* Fitchburg R. Co., 73 N. H. 116, 59 Atl. 625, 68 L. R. A. 428.

New Jersey.— Hampton *v.* Camden, etc., R. Co., 10 N. J. L. J. 236.

New York.— Baulec *v.* New York, etc., R. Co., 59 N. Y. 356, 17 Am. Rep. 325; Klos *v.* Hudson River Ore, etc., Co., 77 N. Y. App. Div. 566, 79 N. Y. Suppl. 156; Faulkner *v.* Erie R. Co., 49 Barb. 324; McMillan *v.* Saratoga, etc., R. Co., 20 Barb. 449.

Ohio.— Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312.

Texas.— Southern Cotton-Oil Co. *v.* De Vond, (Civ. App. 1894) 25 S. W. 43.

United States.— McMillan *v.* Grand Trunk R. Co., 130 Fed. 827, 65 C. C. A. 165; Gravelle *v.* Minneapolis, etc., R. Co., 10 Fed. 711, 3 McCrary 352.

See 34 Cent. Dig. tit. "Master and Servant," § 891.

The presumption may be rebutted by evidence of the servant's general reputation for unfitness without proof that such reputation was known to the master's representatives. Davis *v.* Detroit, etc., R. Co., 20 Mich. 105, 4 Am. Rep. 364.

Evidence of incompetency some time before the injuries will not overcome the presumption, unless the time was so short that the servant could not have fitted himself for his duties between the two dates. Baxley *v.* Satilla Mfg. Co., 114 Ga. 720, 40 S. E. 730.

64. Whalen *v.* Illinois, etc., R., etc., Co., 16 Ill. App. 320.

A minor will not be presumed, in the absence of proof to the contrary, to have appreciated and assumed the ordinary risks of his employment, unless they were so obvious that any one must be held to know them. Tucker *v.* National Loan, etc., Co., 35 Tex. Civ. App. 474, 80 S. W. 879.

An ignorant and unskilled common laborer will not be presumed to have known the liability of the retaining wall of a cistern in which he was placed at work to fall, he having been ordered to work there by his foreman. Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565.

65. Chicago, etc., R. Co. *v.* Jackson, 55 Ill. 492, 8 Am. Rep. 661.

Presumption of knowledge of obvious defect see Valley R. Co. *v.* Keegan, 87 Fed. 849, 31 C. C. A. 255.

Instructions putting servant on guard.— Where plaintiff had received instructions sufficient to put him on his guard, and enable him to comprehend the risk of being caught in a gearing, he must be presumed to have appreciated the risk of such injury. Thompson *v.* Edward P. Allis Co., 89 Wis. 523, 62 N. W. 527.

Work outside scope of employment.— Where plaintiff alleges that the work he was directed to perform, and in doing which he was injured, was upon a private track, which was no part of defendant's railroad, and was out of and beyond the scope of his duties as defendant's employee, it will be presumed that the facts were known to him, and he cannot recover. Brown *v.* Toledo, etc., R. Co., 19 Ohio Cir. Ct. 510, 10 Ohio Cir. Dec. 278.

66. Baltimore, etc., R. Co. *v.* Clifford, 99 Ill. App. 381; Louisville, etc., Consol. R. Co. *v.* Miller, 140 Ind. 685, 40 N. E. 116; Hailey *v.* Texas, etc., R. Co., 113 La. 533, 37 So. 131.

Remembrance of a previously known defect or danger will not be conclusively presumed where a servant is called upon to execute an order requiring prompt attention and haste. Viohl *v.* North Pac. Lumber Co., 46 Oreg. 297, 80 Pac. 112.

67. Whalen *v.* Illinois, etc., R., etc., Co., 16 Ill. App. 320.

68. Chicago, etc., R. Co. *v.* Travis, 44 Ill. App. 466.

69. Counsell *v.* Hall, 145 Mass. 468, 14 N. E. 530.

70. *Georgia.*— A presumption of freedom from fault arises only when plaintiff is wholly disconnected with the duties of the particular business in which he was hurt. Central R., etc., Co. *v.* Kenny, 58 Ga. 485.

Illinois.—Chicago, etc., R. Co. *v.* Crowder, 49 Ill. App. 154; Penwell Coal Min. Co. *v.* Diefenthaler, 48 Ill. App. 616.

Indiana.— Thomas *v.* Hoosier Stone Co., 140 Ind. 518, 39 N. E. 500; Phillips *v.* Michaels, 11 Ind. App. 672, 39 N. E. 669, child

others plaintiff will be presumed to have been free from fault.[71] In the case of minors, whether or not contributory negligence will be presumed depends upon their age and capacity, and the obviousness of the danger.[72]

(II) *BURDEN OF PROOF*[73]—(A) *In General.* As in other actions, so in an action by a servant to recover from the master for personal injuries, the burden is upon plaintiff to establish his cause of action by a preponderance of evidence, and upon defendant to establish an affirmative defense.[74]

(B) *Negligence of Master.* In an action for personal injuries it is essential that the servant should prove by a preponderance of the evidence not only that

nearly sixteen years old presumed to appreciate obvious danger.

Iowa.— Baker *v.* Chicago, etc., R. Co., 95 Iowa 163, 63 N. W. 667; Perigo *v.* Chicago, etc., R. Co., 55 Iowa 326, 7 N. W. 627.

Kansas.— Sanborn *v.* Atchison, etc., R. Co., 35 Kan. 292, 10 Pac. 860, holding that a young man, seventeen years and seven months of age, is presumed to have sufficient capacity to be sensible of the danger of working in a machine shop, and to have the power to avoid it.

Massachusetts.— Geyette *v.* Fitchburg R. Co., 162 Mass. 549, 39 N. E. 188. But see Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. 112, where it was held that the care on the part of the servant may be inferred from the absence of evidence of negligence as well as from positive acts of diligence.

New York.— Riordan *v.* Ocean Steamship Co., 124 N. Y. 655, 26 N. E. 1027 [*affirming* 11 N. Y. Suppl. 56]; Van Horn *v.* Boston, etc., R. Co., 4 N. Y. St. 782.

North Dakota.— See Boss *v.* Northern Pac. R. Co., 2 N. D. 128, 49 N. W. 655, 33 Am. St. Rep. 756.

Pennsylvania.— Reading Iron Works *v.* Devine, 109 Pa. St. 246.

Texas.— Pilkinton *v.* Gulf, etc., R. Co., 70 Tex. 226, 7 S. W. 805.

See 34 Cent. Dig. tit. "Master and Servant," § 893.

Notice of natural results presumed.— A servant is chargeable with notice of all natural results with which every mature and reasonable person is supposed to be acquainted. Tobin *v.* Friedman Mfg. Co., 67 Ill. App. 149.

71. *District of Columbia.*—Baltimore, etc., R. Co. *v.* Landrigan, 20 App. Cas. 135.

Kentucky.— Louisville, etc., R. Co. *v.* Tucker, 65 S. W. 453, 23 Ky. L. Rep. 1929.

Michigan.— Jones *v.* Flint, etc., R. Co., 127 Mich. 198, 86 N. W. 838; Smith *v.* Peninsular Car-Works, 60 Mich. 501, 27 N. W. 662, 1 Am. St. Rep. 542.

North Carolina.— Womble *v.* Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493.

Ohio.— See Lake Shore, etc., R. Co. *v.* Whidden, 23 Ohio Cir. Ct. 85, holding that the fact that a servant does not surround himself with all precautions and take the course that in all situations is absolutely free from danger does not raise a presumption of negligence against him; but where there are two ways of accomplishing the work with reasonable despatch, one absolutely safe and the other attended with danger, the adoption of the latter raises a presumption of negligence.

United States.— Au *v.* New York, etc., R. Co., 29 Fed. 72.

See 34 Cent. Dig. tit. "Master and Servant," § 893.

72. Between the ages of seven and fourteen years a child is *prima facie* incapable of exercising judgment and discretion, and therefore incapable of contributory negligence; but in an action to recover for the alleged killing of a child, between the ages of seven and fourteen years, evidence of capacity may be received, contributory negligence imputed, and such negligence shown in defense of the action. Tutwiler Coal, etc., Co. *v.* Enslen, 129 Ala. 336, 30 So. 600, where it was held that the mere fact that a boy of fourteen was shown to be "bright, smart, and industrious" is insufficient to overcome the presumption of the want of judgment and discretion which his age *prima facie* implies.

A boy of sixteen is legally presumed to be capable of recognizing such patent danger as is incident to climbing on moving cars. Worthington *v.* Goforth, 124 Ala. 656, 26 So. 531.

Boy of thirteen presumed to be careful see Rogers *v.* Meyerson Printing Co., 103 Mo. App. 683, 78 S. W. 79.

73. Instructions see *infra*, IV, H, 7, a, (V).

Presumptions see *supra*, IV, H, 3, a, (I).

74. *Alabama.*— Tutwiler Coal, etc., Co. *v.* Farrington, 144 Ala. 157, 39 So. 898.

Illinois.— Columbus, etc., R. Co. *v.* Troesch, 68 Ill. 545, 18 Am. Rep. 578.

Missouri.—Benedict *v.* Chicago Great Western R. Co., 104 Mo. App. 218, 78 S. W. 60.

Oregon.— Ringue *v.* Oregon Coal Co., 44 Oreg. 407, 75 Pac. 703 (burden of establishing relation of parties on plaintiff); Shmit *v.* Day, 27 Oreg. 110, 39 Pac. 870 (burden on defendant to establish assignment of contract for the work at which plaintiff was employed).

Texas.— Haverman *v.* Ft. Worth, etc., R. Co., 20 Tex. Civ. App. 610, 50 S. W. 155; Sabine, etc., R. Co. *v.* Ewing, 1 Tex. Civ. App. 531, 21 S. W. 700.

England.— McNicholas *v.* Dawson, [1899] 1 Q. B. 773, 68 L. J. Q. B. 470, 80 L. T. Rep N. S. 317, 47 Wkly. Rep. 500.

See 34 Cent. Dig. tit. "Master and Servant," § 894.

Burden of proving employment on plaintiff see Larson *v.* American Bridge Co., 40 Wash. 224, 82 Pac. 294, 111 Am. St. Rep. 904.

the master was negligent,[75] but also that his negligence was the cause of the

75. *Arkansas.*— St. Louis, etc., R. Co. *v.* Harper, 44 Ark. 524.

Delaware.—Karczewski *v.* Wilmington City R. Co., 4 Pennew. 24, 54 Atl. 746; Boyd *v.* Blumenthal, 3 Pennew. 564, 52 Atl. 330; Croker *v.* Pusey, etc., Co., 3 Pennew. 1, 50 Atl. 61; Donovan *v.* Harlan, etc., Co., 2 Pennew. 190, 44 Atl. 619; Huber *v.* Jackson, etc., Co., 1 Marv. 374, 41 Atl. 92.

Georgia.— Ludd *v.* Wilkins, 118 Ga. 525, 45 S. E. 429; Railey *v.* Garbutt, 112 Ga. 288, 37 S. E. 360; Brush Electric Light, etc., Co. *v.* Wells, 103 Ga. 512, 30 S. E. 533.

Illinois.— Sack *v.* Dolese, 137 Ill. 129, 27 N. E. 62; Wiggins-Terry Co. *v.* Hill, 112 Ill. App. 475; Chicago, etc., R. Co. *v.* Myers, 95 Ill. App. 578; Garden City Wire Spring Co. *v.* Boecher, 94 Ill. App. 96; Chicago, etc., R. Co. *v.* Armstrong, 62 Ill. App. 228; Chicago, etc., R. Co. *v.* Montgomery, 15 Ill. App. 205.

Indiana.— Davis *v.* Mercer Lumber Co., 164 Ind. 413, 73 N. E. 899; Wabash, etc., R. Co. *v.* Locke, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193; Louisville, etc., R. Co. *v.* Orr, 84 Ind. 50.

Iowa.— Heath *v.* Whitebreast Coal, etc., Co., 65 Iowa 737, 23 N. W. 148.

Kansas.— Lane *v.* Missouri Pac. R. Co., 64 Kan. 755, 68 Pac. 626; Missouri, etc., R. Co. *v.* Faber, 7 Kan. App. 481, 54 Pac. 136.

Kentucky.— Brooks *v.* Louisville, etc., R. Co., 71 S. W. 507, 24 Ky. L. Rep. 1318.

Louisiana.— O'Donnell *v.* American Mfg. Co., 112 La. 720, 36 So. 661.

Maine.— Beaulieu *v.* Portland Co., 48 Me. 291.

Massachusetts.— Murphy *v.* Greeley, 146 Mass. 196, 15 N. E. 654.

Missouri.— Wojtylak *v.* Kansas, etc., Coal Co., 188 Mo. 260, 87 S. W. 506; Hollenbeck *v.* Missouri Pac. R. Co., (1896) 34 S. W. 494; Shore *v.* American Bridge Co., 111 Mo. App. 278, 86 S. W. 905; Glasscock *v.* Swofford Bros. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364, (App. 1903) 74 S. W. 1039; Kelly *v.* Stewart, 93 Mo. App. 47; Krampe *v.* St. Louis Brewing Assoc., 59 Mo. App. 277; Musick *v.* Jacob Dold Packing Co., 58 Mo. App. 322.

New Hampshire.— Hamel *v.* Newmarket Mfg. Co., 73 N. H. 386, 62 Atl. 592; Smith *v.* Boston, etc., R. Co., 73 N. H. 325, 61 Atl. 359; Hill *v.* Boston, etc., R. Co., 72 N. H. 518, 57 Atl. 924; Foss *v.* Baker, 62 N. H. 247.

New Jersey.— Schaumberger *v.* Somerset Chemical Co., 69 N. J. L. 234, 54 Atl. 247; Bahr *v.* Lombard, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167.

New Mexico.—Deserant *v.* Cerrillos Coal R. Co., 9 N. M. 495, 55 Pac. 290.

New York.— Painton *v.* Northern Cent. R. Co., 83 N. Y. 7; Skapura *v.* National Sugar Refining Co., 83 N. Y. App. Div. 21, 81 N. Y. Suppl. 1085; Corcoran *v.* New York, etc., R. Co., 58 N. Y. App. Div. 606, 69 N. Y. Suppl. 73; Byron *v.* New York State Printing Tel. Co., 26 Barb. 39; Doyle *v.* Baird, 15 Daly 287, 6 N. Y. Suppl. 517.

North Carolina.— Hendrix *v.* Cooleemee Cotton Mills, 138 N. C. 169, 50 S. E. 561.

Ohio.— Love *v.* Ohio, etc., R. Co., 7 Ohio Dec. (Reprint) 690, 4 Cinc. L. Bul. 990.

Oklahoma.— Neeley *v.* Southwestern Cotton Seed Oil Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 146.

Pennsylvania.— Snodgrass *v.* Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104; Pawling *v.* Hoskins, 132 Pa. St. 617, 19 Atl. 301, 19 Am. St. Rep. 617; Grimont *v.* Hartman, 1 Pa. Cas. 434 5 Atl. 312.

Rhode Island.— Desrosiers *v.* Bourn, 26 R. I. 156, 58 Atl. 627.

Tennessee.— East Tennessee, etc., R. Co. *v.* Stewart, 13 Lea 432.

Virginia.— Norfolk, etc., R. Co. *v.* Cromer, 99 Va. 763, 40 S. E. 54.

Washington.— Cully *v.* Northern Pac. R. Co., 35 Wash. 241, 77 Pac. 202; Towle *v.* Stimson Mill Co., 33 Wash. 305, 74 Pac. 471; Puget Sound Iron Co. *v.* Lawrence, 3 Wash. Terr. 226, 14 Pac. 869.

Wisconsin.— Crouse *v.* Chicago, etc., R. Co., 102 Wis. 196, 78 N. W. 446, 778.

United States.— Northern Pac. R. Co. *v.* Dixon, 139 Fed. 737, 71 C. C. A. 555; Mountain Copper Co. *v.* Van Buren, 123 Fed. 61, 59 C. C. A. 279; Hodges *v.* Kimball, 104 Fed. 745, 44 C. C. A. 193; Texas, etc., R. Co. *v.* Thompson, 70 Fed. 944, 17 C. C. A. 524; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87.

See 34 Cent. Dig. tit. "Master and Servant," §§ 895, 900–904.

Burden on plaintiff to show actual or constructive knowledge of defects by master.— Ocean Steamship Co. *v.* Matthews, 86 Ga. 418, 12 S. E. 632; Montgomery Coal Co. *v.* Barringer, 109 Ill. App. 185; Chicago, etc., R. Co. *v.* Montgomery, 15 Ill. App. 205; Ohio, etc., R. Co. *v.* Heaton, 137 Ind. 1, 35 N. E. 687; Williams *v.* St. Louis, etc., R. Co., 119 Mo. 316, 24 S. W. 782; Mahoney *v.* New York Cent., etc., R. Co., 19 N. Y. Suppl. 511; Hudson *v.* Charleston, etc., R. Co., 104 N. C. 491, 10 S. E. 669. But see Louisville, etc., R. Co. *v.* Coulton, 86 Ala. 129, 5 So. 458, holding that the burden is not on plaintiff to prove that defendant knew of the imperfection of brakes on a train, whose defects, he alleges, caused the accident.

Plaintiff need not show precise nature of defect.— Nelson *v.* St. Paul Plow Works, 57 Minn. 43, 58 N. W. 868.

On a hearing in damages the burden is on defendant to prove that the injury was not caused by his negligence, and that plaintiff was guilty of contributory negligence. Julian *v.* Stony Creek Red Granite Co., 71 Conn. 632, 42 Atl. 994.

Care of inexperienced or youthful servant. — The mother of an infant cannot recover for injuries received by her child while running a machine which was safe when properly operated, in the absence of evidence that the master failed to give warning of the dangers

injuries;[76] and this obligation is not discharged by merely showing the existence of a defect or the happening of the accident or injury.[77]

of operation. Davis *v.* Augusta Factory, 92 Ga. 712, 18 S. E. 974. But *compare* Gulf, etc., R. Co. *v.* Jones, 76 Tex. 350, 13 S. W. 374.

76. *Arkansas.*— Walker *v.* Louis Werner Sawmill Co., 76 Ark. 436, 88 S. W. 988.

Connecticut.—Lennon *v.* Rawitzer, 57 Conn. 583, 19 Atl. 334.

Delaware.— Giordano *v.* Brandywine Granite Co., 3 Pennew. 423, 52 Atl. 332.

Indiana.— Davis *v.* Mercer Lumber Co., 164 Ind. 413, 73 N. E. 899.

Iowa.— Brownfield *v.* Chicago, etc., R. Co., 107 Iowa 254, 77 N. W. 1038.

Louisiana.— O'Donnell *v.* American Mfg. Co., 112 La. 720, 36 So. 661; Duncan *v.* St. Louis, etc., R. Co., 51 La. Ann. 1775, 26 So. 478; Jones *v.* Texas, etc., R. Co., 51 La. Ann. 1247, 26 So. 86.

Maine.— Kirstead *v.* Bryant, 98 Me. 523, 57 Atl. 788.

Missouri.— Purcell *v.* Tennent Shoe Co., 187 Mo. 276, 86 S. W. 121; Trigg *v.* Ozark Land, etc., Co., 187 Mo. 227, 86 S. W. 222; Goransson *v.* Riter-Conley Mfg. Co., 186 Mo. 300, 85 S. W. 338; Turner *v.* Haar, 114 Mo. 335, 21 S. W. 737; Shore *v.* American Bridge Co., 111 Mo. App. 278, 86 S. W. 905.

New Hampshire.— Hamel *v.* Newmarket Mfg. Co., 73 N. H. 386, 62 Atl. 592.

North Carolina.— Hendrix *v.* Cooleemee Cotton Mills, 138 N. C. 169, 50 S. E. 561.

North Dakota.— Meehan *v.* Great Northern R. Co., 13 N. D. 432, 101 N. W. 183.

Ohio.— Coal Co. *v.* Estievenard, 53 Ohio St. 43, 40 N. E. 725; Crawford *v.* New York, etc., R. Co., 23 Ohio Cir. Ct. 207.

Pennsylvania.— Spees *v.* Boggs, 198 Pa. St. 112, 47 Atl. 875, 82 Am. St. Rep. 792, 52 L. R. A. 933, holding that, even where the conditions are so obviously dangerous as to give rise to an inference of negligence on the part of the master, he has not the burden of satisfactorily accounting for the accident, but merely of showing that he exercised due care.

Texas.— Missouri, etc., R. Co. *v.* Greenwood, (Civ. App. 1905) 89 S. W. 810.

Wisconsin.— Musbach *v.* Wisconsin Chair Co., 108 Wis. 57, 84 N. W. 36; Kruse *v.* Chicago, etc., R. Co., 82 Wis. 568, 52 N. W. 755; McClarney *v.* Chicago, etc., R. Co., 80 Wis. 277, 49 N. W. 963.

United States.— The Columbia, 106 Fed. 745; Hodges *v.* Kimball, 104 Fed. 745, 44 C. C. A. 193; The Lydia M. Deering, 97 Fed. 971; Union Pac. R. Co. *v.* Callaghan, 56 Fed. 988, 6 C. C. A. 205.

See 34 Cent. Dig. tit. "Master and Servant," § 897.

Where a master's negligence concurs with that of a fellow servant in producing an injury, the burden of proof is on plaintiff to show that the master's negligence was the proximate cause of the injury. Union Pac. R. Co. *v.* Callaghan, 56 Fed. 988, 6 C. C. A. 205.

Plaintiff need not point out the particular act or omission which caused the accident, but is only required to furnish evidence from which defendant's negligence may be inferred. Mooney *v.* Connecticut River Lumber Co., 154 Mass. 407, 28 N. E. 352. See also Atchison, etc., R. Co. *v.* Lannigan, 56 Kan. 109, 42 Pac. 343.

Shifting of burden.— Where defendant admitted in its answer that the injury was caused by the unsafe condition of its track, the burden shifted to it to establish its contention that the accident was caused by the malicious act of a trespasser, for whom it was not responsible, and that the consequences of such act could not have been prevented by the exercise of reasonable care. Marcom *v.* Raleigh, etc., R. Co., 126 N. C. 200, 35 S. E. 423.

Where defendant admits knowledge of its tracks being unsafe at the point where an employee was injured by the derailment of a hand-car, it will be presumed that its negligence in failing to maintain a safe track was the cause of the injury, and the burden is cast on it to show that the accident was not caused by its negligence. Wilkie *v.* Raleigh, etc., R. Co., 127 N. C. 203, 37 S. E. 204.

Where deceased was run over twice, it is not necessary to show whether he was killed by the first or second running-over. Brooke *v.* Chicago, etc., R. Co., 81 Iowa 504, 47 N. W. 74.

Where a train ran into an open switch, and a car was overturned, killing a brakeman, and there was evidence tending to show that the track at that point was in a defective condition, the burden was on defendant to show that the defects had no effect in overturning the car. International, etc., R. Co. *v.* Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772.

77. "Res ipsa loquitur" not applicable.— *Alabama.*— Jones *v.* Alabama Mineral R. Co., 107 Ala. 400, 18 So. 30.

Georgia.— See Central R., etc., Co. *v.* Small, 80 Ga. 519, 5 S. E. 794.

Illinois.— Illinois Cent. R. Co. *v.* Prickett, 109 Ill. App. 468 [*affirmed* in 210 Ill. 140, 71 N. E. 435]; Viles *v.* Stantesky, 83 Ill. App. 398; Wabash R. Co. *v.* Farrell, 79 Ill. App. 508. But see Armour *v.* Golkowska, 95 Ill. App. 492.

Kentucky.— Brooks *v.* Louisville, etc., R. Co., 71 S. W. 507, 24 Ky. L. Rep. 1318.

Michigan.— Toomey *v.* Eureka Iron, etc., Works, 89 Mich. 249, 50 N. W. 850.

Missouri.— Glasscock *v.* Swafford Bros. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364, (App. 1903) 74 S. W. 1039. *Compare* Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434; Johnson *v.* Metropolitan St. R. Co., 104 Mo. App. 588, 78 S. W. 275.

Nebraska.— Chicago, etc., R. Co. *v.* Kellogg, 55 Nebr. 748, 76 N. W. 462.

New York.— Klupp *v.* United Ice Lines, 15

(c) *Incompetency or Negligence of Fellow Servants.* In an action by a servant against his master for injuries caused by the negligence of an incompetent servant, plaintiff has the burden of proving the fact of incompetency,[78] and that the master was negligent in selecting such servant, or in retaining him in the service after actual or constructive notice of his incompetency.[79] But the burden of establishing the relation of fellow servants between plaintiff and the servant whose negligence caused the injury, so as to relieve defendant from liability, is upon him;[80] and the courts of one state will not presume that the fellow servant rule exists in another state, so as to throw on a plaintiff who has been injured by the negligence of a fellow servant in such other state the burden of proving that the rule has been abrogated by statute.[81]

N. Y. Suppl. 597 [*following* Martin *v.* Cook, 14 N. Y. Suppl. 329]. *Compare* Areson *v.* Long Island R. Co., 10 N. Y. St. 331.

Ohio.— Love *v.* Ohio, etc., R. Co., 7 Ohio Dec. (Reprint) 690, 4 Cinc. L. Bul. 990.

Pennsylvania.— Snodgrass *v.* Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104; Hanna *v.* Gresh, 16 Montg. Co. Rep. 182.

Texas.— Missouri, etc., R. Co. *v.* Crowder, (Civ. App. 1899) 55 S. W. 380.

Washington.— Towle *v.* Stimson Mill Co., 33 Wash. 305, 74 Pac. 471.

See 34 Cent. Dig. tit. "Master and Servant," § 898.

And see Wright *v.* Southern R. Co., 127 N. C. 225, 37 S. E. 221. But see Griffin *v.* Boston, etc., R. Co., 148 Mass. 143, 19 N. E. 166, 12 Am. St. Rep. 526, 1 L. R. A. 698 (where it is said that no general rule can be laid down that the mere occurrence of an accident is or is not sufficient *prima facie* proof of actionable negligence, for each case must depend upon its own circumstances); Farmers' L. & T. Co. *v.* Toledo, etc., R. Co., 67 Fed. 73.

78. Stewart *v.* Philadelphia, etc., R. Co., 8 Houst. (Del.) 450, 17 Atl. 639; Ohio, etc., R. Co. *v.* Dunn, 138 Ind. 18, 36 N. E. 702, 37 N. E. 546; Wilkinson Co-operative Glass Co. *v.* Dickinson, 35 Ind. App. 230, 73 N. E. 957; Murphy *v.* St. Louis, etc., R. Co., 4 Mo. App. 565; Hampton *v.* Camden, etc., R. Co., 10 N. J. L. J. 236.

Where a child twelve or thirteen years old is employed to do work requiring the exercise of great care and judgment, the employer assumes the burden of proving that the child was in fact competent, if sued for injuries alleged to have resulted from his negligence. Molaske *v.* Ohio Coal Co., 86 Wis. 220, 56 N. W. 475.

79. *Illinois.*— Stafford *v.* Chicago, etc., R. Co., 114 Ill. 244, 2 N. E. 185; St. Louis Press Brick Co. *v.* Kenyon, 57 Ill. App. 640.

Indiana.— Wilkinson Co-operative Glass Co. *v.* Dickinson, 35 Ind. App. 230, 73 N. E. 957.

Maryland.— Wonder *v.* Baltimore, etc., R. Co., 32 Md. 411, 3 Am. Rep. 143.

Missouri.— Roblin *v.* Kansas City, etc., R. Co., 119 Mo. 476, 24 S. W. 1011; McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285; Murphy *v.* St. Louis, etc., R. Co., 71 Mo. 202 [*affirming* 4 Mo. App. 565, on this ground, and *reversing* it on other grounds].

Texas.— Southern Cotton-Oil Co. *v.* De Vond, (Civ. App. 1894) 25 S. W. 43.

Utah.— McCharles *v.* Horn Silver Min., etc., Co., 10 Utah 470, 37 Pac. 733.

Virginia.— Big Stone Gap Iron Co. *v.* Ketron, 102 Va. 23, 45 S. E. 740, 102 Am. St. Rep. 839; W. R. Trigg Co. *v.* Lindsay, 101 Va. 193, 43 S. E. 349.

United States.— Mentzer *v.* Armour, 18 Fed. 373, 5 McCrary 617.

See 34 Cent. Dig. tit. "Master and Servant," § 906.

But see Poirier *v.* Carroll, 35 La. Ann. 699; Gates *v.* Chicago, etc., R. Co., 4 S. D. 433, 57 N. W. 200; Haley *v.* Western Transit Co., 76 Wis. 344, 45 N. W. 16.

Incompetency shown at the time of employment is *prima facie* evidence of the negligence of the master, and the burden is on him to disprove such negligence. Crandall *v.* McIlrath, 24 Minn. 127.

80. *California.*— See Bjorman *v.* Ft. Bragg Redwood Co., 104 Cal. 626, 38 Pac. 451, holding that the burden is not on plaintiff to show that the injuries were not caused by the negligence of a fellow servant.

Illinois.— Spring Valley Coal Co. *v.* Buzis, 115 Ill. App. 196 [*affirmed* in 213 Ill. 341, 72 N. E. 1060]; Chicago, etc., R. Co. *v.* Mikesell, 113 Ill. App. 146 (notwithstanding the existence of the relation may be negatived in the declaration); Southern R. Co. *v.* Stewart, 108 Ill. App. 652. *Contra,* Chicago City R. Co. *v.* Leach, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216 [*reversing* 104 Ill. App. 30].

Kansas.— Consolidated Kansas City Smelting, etc., Co. *v.* Osborne, 66 Kan. 393, 71 Pac. 838.

Nebraska.— Chicago, etc., R. Co. *v.* Oyster, 58 Nebr. 1, 78 N. W. 359.

Texas.— Patterson *v.* Houston, etc., R. Co., (Civ. App. 1897) 40 S. W. 442.

Virginia.— See Moon *v.* Richmond, etc., R. Co., 78 Va. 745, 49 Am. Rep. 401.

See 34 Cent. Dig. tit. "Master and Servant," § 906.

Contra.— Kansas City, etc., R. Co. *v.* Becker, 63 Ark. 477, 39 S. W. 358; Blessing *v.* St. Louis, etc., R. Co., 77 Mo. 410; McGowan *v.* St. Louis, etc., R. Co., 61 Mo. 528; Shaw *v.* Bamhrick-Bates Constr. Co., 102 Mo. App. 666, 77 S. W. 96; Rose *v.* Boston, etc., R. Co., 58 N. Y. 217; Mollhoff *v.* Chicago, etc., R. Co., 15 Okla. 540, 82 Pac. 733.

81. Williams *v.* Southern R. Co., 128 N. C.

(D) *Assumption of Risk.*[82] In a number of jurisdictions the burden of showing assumption of risk is on defendant,[83] while in others the burden is on plaintiff to show that he did not assume the risk.[84] Where a servant has continued in the service notwithstanding knowledge of a defect or danger, the burden is upon him to prove a promise by the master to repair the defect or remove the danger.[85]

(E) *Contributory Negligence.* In some jurisdictions the rule seems to be well settled that the burden is on plaintiff to show by a preponderance of evidence that he was free from contributory negligence,[86] while, on the other hand, in

286, 38 S. E. 893. But see Baltimore, etc., R. Co. *v.* Reed, 158 Ind. 25, 62 N. E. 488, 92 Am. St. Rep. 293.

82. Instructions see *infra*, IV, H, 7, d.
Presumptions see *supra*, IV, H, 3, a, (I), (D).

83. *Alabama.*— E. E. Jackson Lumber Co. *v.* Cunningham, 141 Ala. 206, 37 So. 445.

Iowa.— Calloway *v.* Agar Packing Co., 129 Iowa 1, 104 N. W. 721; Arenschield *v.* Chicago, etc., R. Co., 128 Iowa 677, 105 N. W. 200; Mace *v.* Boedker, 127 Iowa 721, 104 N. W. 475.

Kentucky.— See Judd *v.* Chesapeake, etc., R. Co., 37 S. W. 842, 18 Ky. L. Rep. 747.

Michigan.— McDonald *v.* Champion Iron, etc., Co., 140 Mich. 401, 103 N. W. 829, which seems, however, to limit the burden to cases in which the risk is not ordinarily incident to the employment. See also Swoboda *v.* Ward, 40 Mich. 420, in which plaintiff showed that his injury was in consequence of an increased risk, not incident to his ordinary employment but growing out of the master's negligence, and it was held that the burden was upon the master to show that plaintiff understood the increased dangers.

New York.— Dowd *v.* New York, etc., R. Co., 170 N. Y. 459, 63 N. E. 541 [*affirming* 61 N. Y. App. Div. 612, 70 N. Y. Suppl. 1138]; Hunt *v.* Dexter Sulphite Pulp, etc., Co., 100 N. Y. App. Div. 119, 91 N. Y. Suppl. 279; Appel *v.* Buffalo, etc., R. Co., 2 N. Y. St. 257. But see Brown *v.* New York Cent., etc., R. Co., 42 N. Y. App. Div. 548, 59 N. Y. Suppl. 672.

Texas.— Missouri, etc., R. Co. *v.* Jones, 35 Tex. Civ. App. 584, 80 S. W. 852; Gulf, etc., R. Co. *v.* Royall, 18 Tex. Civ. App. 86, 43 S. W. 815.

Virginia.— Where the servant shows that his injury was in consequence of an increased risk, not incident to his ordinary employment, but growing out of the master's negligence, the burden of proof is on the master to show that the servant understood the increased dangers. Norfolk, etc., R. Co. *v.* Ward, 90 Va. 687, 19 S. E. 849, 44 Am. St. Rep. 945, 24 L. R. A. 717.

Wisconsin.— Where the evidence shows that the danger was one which ought not to have attended plaintiff's employment, but was caused by defendant's negligence, the burden of proving that plaintiff had assumed it as a risk of his employment is on defendant. Nadau *v.* White River Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29. See also Hulehan *v.* Green Bay, etc., R. Co., 68 Wis. 520, 32 N. W. 529.

United States.— Pennsylvania R. Co. *v.* Jones, 123 Fed. 753, 59 C. C. A. 87.

See 34 Cent. Dig. tit. "Master and Servant," § 907.

84. *Georgia.*— Schnibbe *v.* Central R., etc., Co., 85 Ga. 592, 11 S. E. 876.

Idaho.— Minty *v.* Union Pac. R. Co., 2 Ida. (Hasb.) 471, 21 Pac. 660.

Illinois.— Chicago, etc., R. Co. *v.* Heerey, 203 Ill. 492, 68 N. E. 74; Chicago, etc., R. Co. *v.* Bell, 111 Ill. App. 280. But the servant's knowledge of defects is a matter of defense, the burden of proving which is on defendant. Commonwealth Electric Co. *v.* Rose, 214 Ill. 545, 73 N. E. 780 [*affirming* 114 Ill. App. 181]; Dallemand *v.* Saalfeldt, 175 Ill. 310, 51 N. E. 645, 67 Am. St. Rep. 214, 48 L. R. A. 753; Chicago Terminal Transfer R. Co. *v.* Donnell, 114 Ill. App. 345 [*affirmed* in 213 Ill. 545, 72 N. E. 1133]; Pressed Steel Car Co. *v.* Herath, 110 Ill. App. 596.

Indiana.— Evansville Gas, etc., Co. *v.* Raley, (App. 1905) 76 N. E. 548; Chicago, etc., R. Co. *v.* Lee, 29 Ind. App. 480, 64 N. E. 675; Chicago, etc., R. Co. *v.* Wagner, 17 Ind. App. 22, 45 N. E. 76, 1121; Clark County Cement Co. *v.* Wright, 16 Ind. App. 630, 45 N. E. 817; Louisville, etc., R. Co. *v.* Quinn, 14 Ind. App. 554, 43 N. E. 240.

Missouri.— Glasscock *v.* Swafford Bros. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364, (App. 1903) 74 S. W. 1039; Musick *v.* Jacob Dold Packing Co., 58 Mo. App. 322; Stoeckman *v.* Terre Haute, etc., R. Co., 15 Mo. App. 503. But see Ellingson *v.* Chicago, etc., R. Co., 60 Mo. App. 679.

See 34 Cent. Dig. tit. "Master and Servant," § 907.

85. Ford *v.* Chicago, etc., R. Co., 106 Iowa 85, 75 N. W. 650 (in which defendant pleaded a waiver by the servant of defects in an appliance and the reply admitted knowledge of the defects, and alleged a continuance in the employment under protest and promise of repair); Ford *v.* Chicago, etc., R. Co., (Iowa 1897) 71 N. W. 332; Houston *v.* Owen, (Tex. Civ. App. 1902) 67 S. W. 788; Parody *v.* Chicago, etc., R. Co., 15 Fed. 205, 5 McCrary 38.

86. *Delaware.*— Stewart *v.* Philadelphia, etc., R. Co., 8 Houst. 450, 17 Atl. 639.

Georgia.— The rule as to the burden of proof is as follows: "After proving the fact and degree of the injury, if the plaintiff will show himself not to blame, the law then presumes, until the contrary appears, that the

others — and these include a majority of the United States — contributory negligence is regarded as an affirmative defense which must be proved by defendant,[87]

company was to blame; or if he will show, on the other hand, that the company was to blame, the law then presumes, until the contrary appears, that he was not to blame. So that, in order to make a *prima facie* case, and change the onus, he need not go further than to show by evidence one or the other of these two propositions: either that he was not to blame, or that the company was. The company, taking at this stage the burden of reply, can defend successfully by disproving either proposition." Central R., etc., Co. *v.* Kenney, 58 Ga. 485, 489 [*quoted* and *adopted* in Johnston *v.* Richmond, etc., R. Co., 95 Ga. 685, 22 S. E. 694], per Bleckley, J. See also Raleigh, etc., R. Co. *v.* Allen, 106 Ga. 572, 32 S. E. 622; Savannah, etc., R. Co. *v.* Day, 91 Ga. 676, 17 S. E. 959; Kendrick *v.* Central R., etc., Co., 89 Ga. 782, 15 S. E. 685; Sims *v.* East, etc., R. Co., 84 Ga. 152, 10 S. E. 543, 20 Am. St. Rep. 352; Prather *v.* Richmond, etc., R. Co., 80 Ga. 427, 9 S. E. 530, 12 Am. St. Rep. 263; Central R. Co. *v.* Sears, 61 Ga. 279.

Illinois.— Wiggins Ferry Co. *v.* Hill, 112 Ill. App. 475; Illinois Cent. R. Co. *v.* Prickett, 109 Ill. App. 468 [*affirmed* in 210 Ill. 140, 71 N. E. 435]; Anderberg *v.* Chicago, etc., R. Co., 98 Ill. App. 207; St. Louis Nat. Stock Yards *v.* Burns, 97 Ill. App. 175; Chicago, etc., R. Co. *v.* Myers, 95 Ill. App. 578; Foster *v.* Onderdonk, 54 Ill. App. 254; Pitrowsky *v.* J. W. Reedy Elevator Mfg. Co., 54 Ill. App. 253; Brunswick *v.* Strilka, 30 Ill. App. 186.

Iowa.— Belair *v.* Chicago, etc., R. Co., 43 Iowa 662. See also Coates *v.* Burlington, etc., R. Co., 62 Iowa 486, 17 N. W. 760.

Maine.— Cunningham *v.* Bath Iron Works, 92 Me. 501, 43 Atl. 106; McLane *v.* Perkins, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487.

Massachusetts.— Tyndale *v.* Old Colony R. Co., 156 Mass. 503, 31 N. E. 655; Riley *v.* Connecticut River R. Co., 135 Mass. 292.

New York.— Voorhees *v.* Hudson River Tel. Co., 109 N. Y. App. Div. 465, 95 N. Y. Suppl. 703, 1167; Wilson *v.* New York Mills, 107 N. Y. App. Div. 99, 94 N. Y. Suppl. 1090; Hunt *v.* Dexter Sulphite Pulp, etc., Co., 100 N. Y. App. Div. 119, 99 N. Y. Suppl. 279; Goodhines *v.* Chase, 100 N. Y. App. Div. 87, 91 N. Y. Suppl. 313; McManus *v.* Davitt, 94 N. Y. App. Div. 481, 88 N. Y. Suppl. 55; Skapura *v.* National Sugar Refining Co., 83 N. Y. App. Div. 21, 81 N. Y. Suppl. 1085; Vincent *v.* Alden, 45 N. Y. App. Div. 627, 61 N. Y. Suppl. 62; Williams *v.* Delaware, etc., R. Co., 39 N. Y. App. Div. 647, 57 N. Y. Suppl. 203; Eades *v.* Clark, 55 N. Y. Super. Ct. 132, 1 N. Y. St. 725; Van Sickle *v.* Atlantic Ave. R. Co., 12 Misc. 217, 33 N. Y. Suppl. 265.

Ohio.— Where the facts raise a presumption of negligence on plaintiff's part, the burden is on him to remove it. Lake Shore, etc., R. Co. *v.* Whidden, 23 Ohio Cir. Ct. 85; Pittsburgh, etc., R. Co. *v.* Blair, 11 Ohio Cir. Ct. 579, 5 Ohio Cir. Dec. 366; Pittsburgh, etc., R. Co. *v.* Ackworth, 10 Ohio Cir. Ct. 583, 6 Ohio Cir. Dec. 622; Pittsburgh, etc., R. Co. *v.* Zepperlein, 1 Ohio Cir. Ct. 36, 1 Ohio Cir. Dec. 22.

See 34 Cent. Dig. tit. "Master and Servant," § 908.

Burden of proving due care on part of fellow servants on plaintiff see Chicago, etc., R. Co. *v.* Snyder, 117 Ill. 376, 7 N. E. 604.

87. *Arkansas.*— Jones *v.* Malvern Lumber Co., 58 Ark. 125, 23 S. W. 679.

Dakota.— Mares *v.* Northern Pac. R. Co., 3 Dak. 336, 21 N. W. 5.

District of Columbia.— Mackey *v.* Baltimore, etc., R. Co., 19 D. C. 282.

Indiana.— Under the express provisions of Burns Annot. St. (1901) § 359*a*, contributory negligence is a matter of defense, and it is not necessary for plaintiff to prove the want of it. Davis *v.* Mercer Lumber Co., 164 Ind. 413, 73 N. E. 899; Brower *v.* Locke, 31 Ind. App. 353, 67 N. E. 1015. But *compare* Louisville, etc., R. Co. *v.* Orr, 84 Ind. 50; Keller *v.* Gaskill, 9 Ind. App. 670, 36 N. E. 303.

Minnesota.— Engel *v.* Breitkreitz, 39 Minn. 423, 40 N. W. 519.

Montana.— Nord *v.* Boston, etc., Consol. Copper, etc., Min. Co., 30 Mont. 48, 75 Pac. 681.

Nebraska.— New Omaha Thompson-Houston Electric Light Co. *v.* Dent, 68 Nebr. 668, 94 N. W. 819, 103 N. W. 1091; Anderson *v.* Chicago, etc., R. Co., 35 Nebr. 95, 52 N. W. 840.

North Carolina.— Peoples *v.* North Carolina R. Co., 137 N. C. 96, 49 S. E. 87; Womble *v.* Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493; Halton *v.* Southern R. Co., 127 N. C. 255, 37 S. E. 262. But see Owens *v.* Richmond, etc., R. Co., 88 N. C. 502.

South Carolina.— Whaley *v.* Bartlett, 42 S. C. 454, 20 S. E. 745.

Texas.— Bonn *v.* Galveston, etc., R. Co., (Civ. App. 1904) 82 S. W. 808; Consumers' Cotton Oil Co. *v.* Jonte, 36 Tex. Civ. App. 18, 80 S. W. 847; International, etc., R. Co. *v.* Pina, 33 Tex. Civ. App. 680, 77 S. W. 979; Chicago, etc., R. Co. *v.* Long, 32 Tex. Civ. App. 40, 74 S. W. 59, 97 Tex. 69, 75 S. W. 483; San Antonio, etc., R. Co. *v.* Lindsey, 27 Tex. Civ. App. 316, 65 S. W. 668; Galveston, etc., R. Co. *v.* Collins, 24 Tex. Civ. App. 143, 57 S. W. 884; Houston, etc., R. Co. *v.* White, 23 Tex. Civ. App. 280, 56 S. W. 204; Galveston, etc., R. Co. *v.* Gordon, (Civ. App. 1899) 54 S. W. 635; Houston, etc., R. Co. *v.* Kelley, 13 Tex. Civ. App. 1, 34 S. W. 809, 46 S. W. 863. See also Missouri, etc., R. Co. *v.* O'Connor, (Civ. App. 1904) 78 S. W. 374. But see Gulf, etc., R. Co. *v.* Redeker, 67 Tex. 181, 2 S. W. 513; Texas, etc., R. Co. *v.* Crowder, 63 Tex. 502; Texas, etc., R. Co. *v.* Reed, (Civ. App. 1895) 32 S. W. 118.

Virginia.— Baltimore, etc., R. Co. *v.* McKenzie, 81 Va. 71. *Compare* Norfolk, etc.,

unless in those cases where it may be legitimately inferred from plaintiff's own showing.[88]

(F) *Effect of Constitutional and Statutory Provisions.* In a number of jurisdictions there are constitutional and statutory provisions which to some extent affect the ordinary rules controlling the burden of proof.[89]

R. Co. *v.* Cromer, 99 Va. 763, 40 S. E. 54, holding that an instruction imposing the burden of proof on defendant to sustain its plea of contributory negligence by proof that but for such negligence the accident would not have occurred was erroneous.

Washington.— Northern Pac. R. Co. *v.* O'Brien, 1 Wash. 599, 21 Pac. 32.

West Virginia.— Comer *v.* Consolidated Coal, etc., Co., 34 W. Va. 533, 12 S. E. 476.

Wisconsin.— Bain *v.* Northern Pac. R. Co., 120 Wis. 412, 98 N. W. 241.

United States.— Northern Pac. R. Co. *v.* Tynan, 119 Fed. 288, 56 C. C. A. 192; Texas, etc., R. Co. *v.* Baltimore, 118 Fed. 815, 55 C. C. A. 427; Baltimore, etc., R. Co. *v.* Burris, 111 Fed. 882, 50 C. C. A. 48; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87.

England.— McNicholas *v.* Dawson, [1899] 1 Q. B. 773, 68 L. J. Q. B. 470, 80 L. T. Rep. N. S. 317, 47 Wkly. Rep. 500.

See 34 Cent. Dig. tit. "Master and Servant," § 908.

88. See New Omaha Thompson-Houston Electric Light Co. *v.* Dent, 68 Nebr. 668, 94 N. W. 819, 103 N. W. 1091; Anderson *v.* Chicago, etc., R. Co., 35 Nebr. 95, 52 N. W. 840; Smith *v.* Atlanta, etc., Air Line R. Co., 132 N. C. 819, 44 S. E. 663; Galveston, etc., R. Co. *v.* Gordon, (Tex. Civ. App. 1899) 54 S. W. 635; Houston, etc., R. Co. *v.* Kelley, 13 Tex. Civ. App. 1, 34 S. W. 809, 46 S. W. 863; Texas, etc., R. Co. *v.* Moore, 8 Tex. Civ. App. 289, 27 S. W. 962; Shugart *v.* Norfolk, etc., R. Co., (Va. 1895) 22 S. E. 484.

89. *Alabama.*— Louisville, etc., R. Co. *v.* Davis, 91 Ala. 487, 8 So. 552 (under Code, § 2590, subd. 1, a servant injured by a defective appliance had the burden of proving that the defect complained of arose, or had not been discovered and remedied, owing to the master's negligence, or that of his servant charged with such duty); Mobile, etc., R. Co. *v.* Holborn, 84 Ala. 133, 4 So. 146 (Act Feb. 28, 1887, does not apply where an employee has been injured while engaged in his regular duty).

Delaware.— Under 31 U. S. St. at L. 1446 [U. S .Comp. St. (1901) p. 3176], the burden is on plaintiff to show that the cars in question were being used in moving interstate commerce, and were not properly equipped. Winkler *v.* Philadelphia, etc., R. Co., 4 Pennew. 80, 53 Atl. 90.

Georgia.— See Western, etc., R. Co. *v.* Jackson, 113 Ga. 355, 38 S. E. 820; Augusta Southern R. Co. *v.* McDade, 105 Ga. 134, 31 S. E. 420; Robinson *v.* Huidekoper, 98 Ga. 306, 25 S. E. 440; Georgia R., etc., Co. *v.* Hicks, 95 Ga. 301, 22 S. E. 613; Georgia R. Co. *v.* Bryans, 77 Ga. 429; Redding *v.* East Tennessee, etc., R. Co., 74 Ga. 385; Savannah, etc., R. Co. *v.* Barber, 71 Ga. 644; Gassaway *v.* Georgia Southern R. Co., 69 Ga. 347; Central R. Co. *v.* Moore, 61 Ga. 151; Central R., etc., Co. *v.* Sears, 59 Ga. 436; Central R., etc., Co. *v.* Kenney, 58 Ga. 485; Central R., etc., Co. *v.* Kelly, 58 Ga. 107; Atlanta, etc., R. Co. *v.* Campbell, 56 Ga. 586; Thompson *v.* Central R., etc., Co., 54 Ga. 509; Campbell *v.* Atlanta, etc., R. Co., 53 Ga. 488, construing Code, §§ 3033, 3034, 3036.

Illinois.— Where a person is injured by reason of a wilful failure of a mine proprietor to comply with the provisions of the act providing for the health and safety of persons employed in coal mines, it is not necessary for him to show that he was in the exercise of ordinary care, as in cases of personal injuries arising from negligence. Carterville Coal Co. *v.* Abbott, 81 Ill. App. 279.

Kentucky.— Under St. § 2731, a miner who shows that he was injured by an explosion, and that the master had not complied with the statute, makes a *prima facie* case, and throws on defendant the burden of showing contributory negligence. Godfrey *v.* Beattyville Coal Co., 101 Ky. 339, 41 S. W. 10, 19 Ky. L. Rep. 501.

Massachusetts.— Where the Employers' Liability Act does not otherwise provide, plaintiff must show due care in an action under the statute (Shea *v.* Boston, etc., R. Co., 154 Mass. 31, 27 N. E. 672; Taylor *v.* Carew Mfg. Co., 143 Mass. 470, 10 N. E. 308), but he need not prove his ignorance of any danger, or the giving of information thereof to his employer (Connolly *v.* Waltham, 156 Mass. 368, 31 N. E. 302).

Minnesota.— Gen. Laws (1887), c. 13, does not change the rule that the burden of proving contributory negligence is on defendant (Lorimer *v.* St. Paul City R. Co., 48 Minn. 391, 51 N. W. 125), but under 5 U. S. St. at L. p. 306, § 13, a steamboat owner, sued for injuries caused by the explosion of a boiler, must disprove negligence on his part (McMahon *v.* Davidson, 12 Minn. 357).

Mississippi.— Illinois Cent. R. Co. *v.* Cathey, 70 Miss. 332, 12 So. 253 (prior to the constitution of 1890, the burden was on plaintiff, in an action against a railroad, to show negligence on the part of defendant, and that such negligence was the direct cause of the injury); Vicksburg, etc., R. Co. *v.* Phillips, 64 Miss. 693, 2 So. 537 (fact that an injury resulted from the precedent wrong of the person injured will not prevent the application of Rev. Code (1880), § 1059).

New York.— Under Laws (1902), p. 1748, c. 600, plaintiff must show absence of contributory negligence. Hoehn *v.* Lautz, 94 N. Y. App. Div. 14, 87 N. Y. Suppl. 921; McHugh *v.* Manhattan R. Co., 88 N. Y. App. Div. 554, 85 N. Y. Suppl. 184.

b. Admissibility[90] — (i) *In General.* Subject to the general rules of evidence, especially with regard to its competency, relevancy, and materiality,[91] and

Ohio.— Under Rev. St. § 3365, the burden is thrown on the railroad company to show that it has used due diligence, and is not guilty of negligence. Pittsburg, etc., R. Co. *v.* Stone, 24 Ohio Cir. Ct. 192. See also Baltimore, etc., R. Co. *v.* Burris, 111 Fed. 882, 50 C. C. A. 48.

South Carolina.— Under Rev. St. § 1582, plaintiff must prove freedom from contributory negligence. Barksdale *v.* Laurens, 58 S. C. 413, 36 S. E. 661.

Wisconsin.— Rev. St. (1898) § 1816, subd. 1, does not, in an action for injuries caused by the derailment of a train owing to a wash-out, relieve plaintiff from the burden of showing that the wash-out was caused by the defective construction of the track, nor showing that it had existed so long that the company was negligent in not knowing of it, nor of showing that an employee was negligent in not inspecting the road between the time of the wash-out and the happening of the accident (Crouse *v.* Chicago, etc., R. Co., 102 Wis. 196, 78 N. W. 446, 778); and generally plaintiff must show that the injury was caused by the negligence of some "other agent or servant" of the railroad company (Ballou *v.* Chicago, etc., R. Co., 54 Wis. 257, 11 N. W. 559, 41 Am. Rep. 31). But under Laws (1889), c. 438, the burden of disproving contributory negligence is not put on plaintiff, Dugan *v.* Chicago, etc., R. Co., 85 Wis. 609, 55 N. W. 894.

Canada.— An employer who fails to protect with railings machinery used by an employee has the burden of proving that an accident causing the latter's death would have occurred even if the machinery had been properly protected. Montreal Rolling Mills Co. *v.* Corcoran, 8 Quebec Q. B. 488.

See 34 Cent. Dig. tit. "Master and Servant," § 989.

90. Corroboration of witnesses see WITNESSES.

Declarations see EVIDENCE.

Expert and opinion evidence see EVIDENCE.

Extent of cross-examination see WITNESSES.

Extent of injuries and pecuniary loss see DAMAGES.

Scope of evidence and rebuttal see TRIAL.

91. See EVIDENCE, 16 Cyc. 821. And see the following illustrative cases:

Alabama.— Davis *v.* Kornman, 141 Ala. 479, 37 So. 789; Sloss-Sheffield Steel, etc., Co. *v.* Mohley, 139 Ala. 425, 36 So. 181; Western R. Co. *v.* Arnett, 137 Ala. 414, 34 So. 997; Alabama Steel, etc., Co. *v.* Wrenn, 136 Ala. 475, 34 So. 970; Alabama Great Southern R. Co. *v.* Brooks, 135 Ala. 401, 33 So. 181; Alabama Mineral R. Co. *v.* Marcus, 115 Ala. 389, 22 S. W. 135; Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176; Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145; Hissong *v.* Richmond, etc., R. Co., 91 Ala. 514, 8 So. 776.

California.— Luman *v.* Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307; Roche *v.* Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147; Grijalva *v.* Southern Pac. R. Co., 137 Cal. 569, 70 Pac. 622; Limberg *v.* Glenwood Lumber Co., 127 Cal. 598, 60 Pac. 179, 49 L. R. A. 33, 145 Cal. 255, 78 Pac. 728.

Colorado.— Acme Coal Min. Co. *v.* McIver, 5 Colo. App. 267, 38 Pac. 596.

Connecticut.— Currelli *v.* Jackson, 77 Conn. 115, 58 Atl. 762.

Delaware.— Creswell *v.* Wilmington, etc., R. Co., 2 Pennew. 210, 43 Atl. 629; Rex *v.* Pullman's Palace Car Co., 2 Marv. 337, 43 Atl. 246; Chielinsky *v.* Hoopes, etc., Co., 1 Marv. 273, 40 Atl. 1127.

Georgia.— Georgia Cent. R. Co. *v.* Price, 121 Ga. 651, 49 S. E. 683; Robert Portner Brewing Co. *v.* Cooper, 116 Ga. 171, 42 S. E. 408; Georgia R., etc., Co. *v.* Fitzgerald, 108 Ga. 507, 34 S. E. 316, 49 L. R. A. 175.

Illinois.— Mobile, etc., R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416 [*affirming* 115 Ill. App. 621]; Chicago, etc., R. Co. *v.* Howell, 208 Ill. 155, 70 N. E. 15 [*affirming* 109 Ill. App. 546]; Marquette Third Vein Coal Co. *v.* Dielie, 208 Ill. 116, 70 N. E. 17; Illinois Steel Co. *v.* Ryska, 200 Ill. 280, 65 N. E. 734 [*affirming* 102 Ill. App. 347]; Lake Erie, etc., R. Co. *v.* Wilson, 189 Ill. 89, 59 N. E. 573 [*reversing* 87 Ill. App. 360]; Chicago Virden Coal Co. *v.* Rucker, 116 Ill. App. 425; Lobstein *v.* Sajatovich, 111 Ill. App. 654; Chicago, etc., R. Co. *v.* Ryan, 57 Ill. App. 612.

Indiana.— Consumers' Paper Co. *v.* Eyer, 160 Ind. 424, 66 N. E. 994; Louisville, etc., R. Co. *v.* Kemper, 153 Ind. 618, 53 N. E. 931; Avery *v.* Nordyke, etc., Co., 34 Ind. App. 541, 70 N. E. 888; Eureka Block Coal Co. *v.* Wells, 29 Ind. App. 1, 61 N. E. 236, 94 Am. St. Rep. 259.

Iowa.— Pierson *v.* Chicago Great Western R. Co., 116 Iowa 601, 88 N. W. 363; Wimber *v.* Iowa Cent. R. Co., 114 Iowa 551, 87 N. W. 505; McCarthy *v.* Mulgrew, 107 Iowa 76, 77 N. W. 527; Laird *v.* Chicago, etc., R. Co., 100 Iowa 336, 69 N. W. 414; Gadbois *v.* Chicago, etc., R. Co., 75 Iowa 530, 39 N. W. 871.

Kansas.— Weld *v.* Missouri Pac. R. Co., 39 Kan. 63, 17 Pac. 306.

Kentucky.— Cincinnati, etc., R. Co. *v.* Maley, 76 S. W. 334, 25 Ky. L. Rep. 690; Republic Iron, etc., Works *v.* Gregg, 71 S. W. 900, 24 Ky. L. Rep. 1627; Cincinnati, etc., R. Co. *v.* Lewallen, 32 S. W. 958, 17 Ky. L. Rep. 863.

Massachusetts.— McRea *v.* Hood Rubber Co., 187 Mass. 326, 72 N. E. 1015; Gregory *v.* American Thread Co., 187 Mass. 239, 72 N. E. 962; Cohen *v.* Hamblin, etc., Mfg. Co., 186 Mass. 544, 71 N. E. 948; Morrison *v.* Whittier Mach. Co., 184 Mass. 39, 67 N. E. 646; Tenanty *v.* Boston Mfg. Co., 170 Mass. 323, 49 N. E. 654; La Fortune *v.* Jolly, 167 Mass. 170, 45 N. E. 83; Caron *v.* Boston, etc., R. Co., 167 Mass. 72, 44 N. E. 1085;

as to the admission of hearsay,[92] any evidence, direct or circumstantial, which tends to establish or disprove plaintiff's cause of action is admissible in an action by a servant to recover from his master for personal injuries.[93]

Davis *v.* New York, etc., R. Co., 159 Mass. 532, 34 N. E. 1070; Barton *v.* Kirk, 157 Mass. 303, 31 N. E. 1072.

Michigan.— Bernard *v.* Pittsburg Coal Co., 137 Mich. 279, 100 N. W. 396.

Mississippi.— Herrin *v.* Daly, 80 Miss. 340, 31 So. 790, 92 Am. St. Rep. 605.

Missouri.— Wojtylak *v.* Kansas, etc., Coal Co., 188 Mo. 260, 87 S. W. 506; Goransson *v.* Riter-Conley Mfg. Co., 186 Mo. 300, 85 S. W. 338; Black *v.* Missouri Pac. R. Co., 172 Mo. 177, 72 S. W. 559; Doyle *v.* Missouri, etc., Trust Co., 140 Mo. 1, 41 S. W. 255; Dutro *v.* Metropolitan St. R. Co., 111 Mo. App. 258, 86 S. W. 915; Cameron *v.* B. Roth Tool Co., 108 Mo. App. 265, 83 S. W. 279; Edwards *v.* Barber Asphalt Paving Co., 92 Mo. App. 221.

Nebraska.— Omaha Brewing Assoc. *v.* Bullnheimer, 58 Nebr. 387, 78 N. W. 728.

New York.— Sullivan *v.* Metropolitan St. R. Co., 170 N. Y. 570, 62 N. E. 1100 [*affirming* 53 N. Y. App. Div. 89, 65 N. Y. Suppl. 842]; Young *v.* Mason Stable Co., 96 N. Y. App. Div. 305, 89 N. Y. Suppl. 349; Quinn *v.* Brooklyn Heights R. Co., 91 N. Y. App. Div. 489, 86 N. Y. Suppl. 883; Gustafson *v.* Young, 91 N. Y. App. Div. 433, 86 N. Y. Suppl. 851.

Ohio.— Hesse *v.* Columbus, etc., R. Co., 58 Ohio St. 167, 50 N. E. 354.

Pennsylvania.— Briggs *v.* East Broad Top R., etc., Co., 206 Pa. St. 564, 56 Atl. 36.

Rhode Island.— Carr *v.* American Locomotive Co., 26 R. I. 180, 58 Atl. 678; McGarr *v.* National, etc., Worsted Mills, 24 R. I. 447, 53 Atl. 320; Laporte *v.* Cook, 22 R. I. 554, 48 Atl. 798.

Texas.— Quinn *v.* Galveston, etc., R. Co., (Civ. App. 1905) 84 S. W. 395; Bonn *v.* Galveston, etc., R. Co., (Civ. App. 1904) 82 S. W. 808; Missouri, etc., R. Co. *v.* Keaveney, (Civ. App. 1904) 80 S. W. 387; Jernigan *v.* Houston Ice, etc., Co., 33 Tex. Civ. App. 501, 77 S. W. 260; Poling *v.* San Antonio, etc., R. Co., 32 Tex. Civ. App. 487, 75 S. W. 69; Missouri, etc., R. Co. *v.* Bailey, 28 Tex. Civ. App. 609, 68 S. W. 803; Bering Mfg. Co. *v.* Peterson, 28 Tex. Civ. App. 194, 67 S. W. 133; Galveston, etc., R. Co. *v.* English, (Civ. App. 1900) 59 S. W. 626, 912.

Utah.— Wood *v.* Rio Grande Western R. Co., 28 Utah 351, 79 Pac. 182; Johnson *v.* Union Pac. Coal Co., 28 Utah 46, 76 Pac. 1089, 67 L. R. A. 506.

Vermont.— Lewis *v.* Crane, 78 Vt. 216, 62 Atl. 60.

Virginia.— Richmond Locomotive Works *v.* Ford, 94 Va. 627, 27 S. E. 509.

Wisconsin.— Kreider *v.* Wisconsin River Paper, etc., Co., 110 Wis. 645, 86 N. W. 662.

United States.— Canadian Pac. R. Co. *v.* Elliott, 137 Fed. 904, 70 C. C. A. 242 [*reversing* 129 Fed. 163]; Weeks *v.* Scharer, 129 Fed. 333, 64 C. C. A. 11.

See 34 Cent. Dig. tit. "Master and Servant," §§ 909–949.

Evidence that a master carried insurance against loss from injuries to employees is inadmissible in an action by an employee to recover for personal injuries. Roche *v.* Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147; Chielinsky *v.* Hoopes, etc., Co., 1 Marv. (Del.) 273, 40 Pac. 1127; Herrin *v.* Daly, 80 Miss. 340, 31 So. 790, 92 Am. St. Rep. 605; Barrett *v.* Bonham Oil, etc., Co., (Tex. Civ. App. 1900) 57 S. W. 602.

Declarations of the engineer, made two or three hours after the accident, by which a watchman was killed, tending to show himself to have been the negligent cause of the accident, when not offered in impeachment of his testimony, are inadmissible. Walker *v.* O'Connell, 59 Kan. 306, 52 Pac. 894.

Evidence not properly rebuttal evidence will be excluded when offered as such. Hayzel *v.* Columbia R. Co., 19 App. Cas. (D. C.) 359.

92. The written report of a foreman of a switch engine to the train master, of an accident which he did not witness, but which it was his duty to report, is not admissible in evidence at the trial of an action for personal injuries resulting from the accident. Wabash R. Co. *v.* Farrell, 79 Ill. App. 508. See also Cleveland, etc., R. Co. *v.* Ullom, 20 Ohio Cir. Ct. 512, 11 Ohio Cir. Dec. 321, in which the reports of railway officers to the state commissioner of railroads in regard to accidents and injuries to employees and passengers, made up from statements gathered from parties who witnessed the circumstances in compliance with Ohio Rev. St. § 251, were held not to be competent evidence against the companies in actions by injured employees.

93. For miscellaneous instances of evidence held admissible see the following cases:

Alabama.— Montgomery First Nat. Bank *v.* Chandler, 144 Ala. 286, 39 So. 822; Alabama Great Southern R. Co. *v.* Bonner, (1905) 39 So. 619; Davis *v.* Kornman, 141 Ala. 479, 37 So. 789; Alabama Great Southern R. Co. *v.* Williams, 140 Ala. 230, 37 So. 255; Sloss-Sheffield Steel, etc., Co. *v.* Mobley, 139 Ala. 425, 36 So. 181; Houston Biscuit Co. *v.* Dial, 135 Ala. 168, 33 So. 268; Louisville, etc., R. Co. *v.* York, 128 Ala. 305, 30 So. 676; Southern R. Co. *v.* Guyton, 122 Ala. 231, 25 So. 34; Bessemer Land, etc., Co. *v.* Campbell, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17; Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276; Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145.

California.— Dyas *v.* Southern Pac. Co., 140 Cal. 296, 73 Pac. 972.

Colorado.— Denver, etc., Rapid Transit Co. *v.* Dwyer, 20 Colo. 132, 36 Pac. 1106; Sampson Min., etc., Co. *v.* Schaad, 15 Colo. 197, 25 Pac. 89.

Delaware.— Chielinsky *v.* Hoopes, etc., Co., 1 Marv. 273, 40 Atl. 1127.

(II) *Existence of Relation.* In an action by a servant to recover for personal injuries any evidence, otherwise competent, is admissible which tends to prove or disprove the relation of master and servant between the parties,[94] or

Georgia.— Portner Brewing Co. *v.* Cooper, 120 Ga. 20, 47 S. E. 631; Chattanooga, etc., R. Co. *v.* Whitehead, 90 Ga. 47, 15 S. E. 629; Stirk *v.* Central R., etc., Co., 79 Ga. 495, 5 S. E. 105.

Illinois.— Leighton, etc., Steel Co. *v.* Snell, 217 Ill. 152, 75 N. E. 462 [*affirming* 119 Ill. App. 199]; Chicago, etc., R. Co. *v.* Howell, 208 Ill. 155, 70 N. E. 15 [*affirming* 109 Ill. App. 546]; Illinois Steel Co. *v.* Hanson, 195 Ill. 106, 62 N. E. 918 [*affirming* 97 Ill. App. 469]; Mt. Olive, etc., Coal Co. *v.* Rademacher, 190 Ill. 538, 60 N. E. 888 [*affirming* 92 Ill. App. 442]; Griffin Wheel Co. *v.* Markus, 180 Ill. 391, 54 N. E. 206 [*affirming* 79 Ill. App. 82]; Baltimore, etc., R. Co. *v.* Alsop, 176 Ill. 471, 52 N. E. 253, 732 [*affirming* 71 Ill. App. 54]; Edmunds Mfg. Co. *v.* McFarland, 118 Ill. App. 256; Doyle *v.* Illinois Cent. R. Co., 113 Ill. App. 532; Mobile, etc., R. Co. *v.* Healy, 109 Ill. App. 531; McCormick Harvesting Mach. Co. *v.* Sendzikowski, 72 Ill. App. 402.

Indiana.— Cleveland, etc., R. Co. *v.* Bergschicker, 162 Ind. 108, 69 N. E. 1000; Brazil Block Coal Co. *v.* Gibson, 160 Ind. 319, 66 N. E. 882, 98 Am. St. Rep. 281; Avery *v.* Nordyke, etc., Co., 34 Ind. App. 541, 70 N. E. 888; Blanchard-Hamilton Furniture Co. *v.* Colvin, 32 Ind. App. 398, 69 N. E. 1032.

Iowa.— Pierson *v.* Chicago Great Western R. Co., 116 Iowa 601, 88 N. W. 363; Pearl *v.* Omaha, etc., R. Co., 115 Iowa 535, 88 N. W. 1078; Wimber *v.* Iowa Cent. R. Co., 114 Iowa 551, 87 N. W. 505; Taylor *v.* Star Coal Co., 110 Iowa 40, 81 N. W. 249; Worden *v.* Humeston, etc., R. Co., 76 Iowa 310, 41 N. W. 26.

Kansas.— Kansas Pac. R. Co. *v.* Salmon, 14 Kan. 512.

Kentucky.—Cincinnati, etc., R. Co. *v.* Curd, 89 S. W. 140, 28 Ky. L. Rep. 177; McFarland *v.* Harbison, etc., Co., 82 S. W. 430, 26 Ky. L. Rep. 746; Cincinnati, etc., R. Co. *v.* Maley, 76 S. W. 334, 25 Ky. L. Rep. 690.

Maryland.— Maryland Steel Co. *v.* Marney, 88 Md. 482, 42 Atl. 60, 71 Am. St. Rep. 441, 42 L. R. A. 842.

Massachusetts.— Manning *v.* Excelsior Laundry Co., 189 Mass. 231, 75 N. E. 254; Palmer *v.* Coyle, 187 Mass. 136, 72 N. E. 844; Brady *v.* New York, etc., R. Co., 184 Mass. 225, 68 N. E. 227; Rafferty *v.* Nawn, 182 Mass. 503, 65 N. E. 830; Boyle *v.* Columbian Fire Proofing Co., 182 Mass. 93, 64 N. E. 726; Bartolomeo *v.* McKnight, 178 Mass. 242, 59 N. E. 804; Dolphin *v.* Plumley, 175 Mass. 304, 56 N. E. 281; McMahon *v.* McHale, 174 Mass. 320, 54 N. E. 854; Leslie *v.* Granite R. Co., 172 Mass. 468, 52 N. E. 542; McGuire *v.* Lawrence Mfg. Co., 156 Mass. 324, 31 N. E. 3; Sweat *v.* Boston, etc., R. Co., 156 Mass. 284, 31 N. E. 296; Myers *v.* Hudson Iron Co., 150 Mass. 125, 22 N. E. 631, 15 Am. St. Rep. 176.

Michigan.— McLean *v.* Pere Marquette R. Co., 137 Mich. 482, 100 N. W. 748; Bernard *v.* Pittsburg Coal Co., 137 Mich. 279, 100 N. W. 396.

Minnesota.— Macy *v.* St. Paul, etc., R. Co., 35 Minn. 200, 28 N. W. 249.

New Hampshire.— Saucier *v.* New Hampshire Spinning Mills, 72 N. H. 292, 56 Atl. 545.

New Jersey.— Belleville Stone Co. *v.* Comben, 62 N. J. L. 449, 45 Atl. 1090 [*affirming* 61 N. J. L. 353, 39 Atl. 641].

New York.— Joyce *v.* Rome, etc., R. Co., 168 N. Y. 665, 61 N. E. 1130 [*affirming* 92 Hun 107, 36 N. Y. Suppl. 731]; Diamond *v.* Planet Mills Mfg. Co., 97 N. Y. App. Div. 43, 89 N. Y. Suppl. 635; Havlin *v.* Krulish, 26 Misc. 381, 56 N. Y. Suppl. 275 [*reversing* 25 Misc. 402, 54 N. Y. Suppl. 1093].

North Carolina.— Hendrix *v.* Cooleemee Cotton Mills, 138 N. C. 169, 50 S. E. 561; Lamb *v.* Littman, 132 N. C. 978, 44 S. E. 646; Fitzgerald *v.* Alma Furniture Co., 131 N. C. 636, 42 S. E. 946.

Ohio.— Erie R. Co. *v.* McCormick, 24 Ohio Cir. Ct. 86; Schaal *v.* Heck, 17 Ohio Cir. Ct. 38, 8 Ohio Cir. Dec. 596.

Pennsylvania.— Kehler *v.* Schwenk, 151 Pa. St. 505, 25 Atl. 130, 31 Am. St. Rep. 777.

South Dakota.— Hedlun *v.* Holy Terror Min. Co., 16 S. D. 261, 92 N. W. 31.

Texas.— Consumers' Cotton Oil Co. *v.* Jonte, 36 Tex. Civ. App. 18, 80 S. W. 847; Texas, etc., R. Co. *v.* Kelly, 34 Tex. Civ. App. 21, 80 S. W. 1073; Missouri, etc., R. Co. *v.* Schilling, 32 Tex. Civ. App. 417, 75 S. W. 64; International, etc., R. Co. *v.* Bearden, 31 Tex. Civ. App. 58, 71 S. W. 558; Missouri, etc., R. Co. *v.* Hawk, 30 Tex. Civ. App. 142, 69 S. W. 1037; Missouri, etc., R. Co. *v.* Mayfield, 29 Tex. Civ. App. 477, 68 S. W. 807; St. Louis Southwestern R. Co. *v.* Kelton, 28 Tex. Civ. App. 137, 66 S. W. 887.

Utah.— Johnson *v.* Union Pac. Coal Co., 28 Utah 46, 76 Pac. 1089, 67 L. R. A. 506; Linderberg *v.* Crescent Min. Co., 9 Utah 163, 33 Pac. 692.

Vermont.— Lewis *v.* Crane, 78 Vt. 216, 62 Atl. 60.

Virginia.— Lane *v.* Bauserman, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872.

Washington.— Henne *v.* J. T. Steebb Shipping Co., 37 Wash. 331, 79 Pac. 938; Dossett *v.* St. Paul, etc., Lumber Co., 40 Wash. 276, 82 Pac. 273; Green *v.* Western American Co., 30 Wash. 87, 70 Pac. 310.

Wisconsin.— Renne *v.* U. S. Leather Co., 107 Wis. 305, 83 N. W. 473.

United States.— Southern Pac. Co. *v.* Lafferty, 57 Fed. 536, 6 C. C. A. 474.

See 34 Cent. Dig. tit. "Master and Servant," §§ 909–949.

94. *Georgia.*— Georgia R., etc., Co. *v.* Strauss, 110 Ga. 189, 35 S. E. 332, holding that it is error to reject evidence tending to

between defendant and the person for whose negligence it is sought to hold him liable.[95]

(III) *NEGLIGENCE ON PART OF MASTER*[96]—(A) *Care of Inexperienced or Youthful Servant.*[97] In an action to recover for injuries to an inexperienced or youthful servant, any evidence is admissible which tends to show or disprove the servant's inexperience or youth, the master's knowledge, actual or constructive, of the fact, and his failure to exercise due care for the servant's protection.[98]

show hiring by another with same name as defendant's.

Illinois.— Pioneer Fireproof Constr. Co. *v.* Howell, 189 Ill. 123, 59 N. E. 535 [*affirming* 90 Ill. App. 122] (holding that in an action against a contractor and subcontractor for an injury to an employee of the latter, the contracts and specifications between the owner and contractor, and between the latter and his subcontractor, are admissible to show the relation of defendants to one another); Consolidated Coal Co. *v.* Seniger, 179 Ill. 370, 53 N. E. 733 [*affirming* 79 Ill. App. 456] (statement of defendant's superintendent as tending to show relation between the parties).

Kansas.— Brower *v.* Timreck, 66 Kan. 770, 71 Pac. 581 (evidence that defendant insured against accidents to employees, and that the insurance company employed the lawyers and was defending the action); Chicago, etc., R. Co. *v.* Muncie, 56 Kan. 210, 42 Pac. 710 (evidence of previous suit by plaintiff against another for the same injury).

South Carolina.— Powers *v.* Standard Oil Co., 53 S. C. 358, 31 S. E. 276, holding that the fact that the cards, bill heads, etc., used in the business in which plaintiff was employed, were in defendant's name, is admissible.

Texas.— Dallas Electric Co. *v.* Mitchell, 33 Tex. Civ. App. 424, 76 S. W. 935 (holding that, where, in an action against two electric companies, the petition charged that defendants, at the time of the injury, had combined, evidence was admissible to show why one was furnishing power to the patrons of the other, and what the custom was about interchanging power); Missouri, etc., R. Co. *v.* Reasor, 28 Tex. Civ. App. 302, 68 S. W. 332 (holding that, where in an action against a railroad for injuries sustained by plaintiff while acting as an express messenger, and also a baggageman, it was in issue whether plaintiff was employed by the railroad, it was proper to admit evidence that the express company deducted from the wages of plaintiff and of all other employees who acted in both capacities the sum of fifty cents per month as fees for defendant's hospital, which was not done where an employee acted only as messenger); Southern Pac. Co. *v.* Wellington, (Civ. App. 1896) 36 S. W. 1114 (holding that, where defendant alleged that its lease of the road had expired at the time of the injury, it was error to reject a notice of the surrender of the lease, given before the accident, previous to that date. On the other road, tickets, lists of officers, agencies, and stations purporting to have been issued by defendant, together with the folders, and the words, marks, and sizes on bulletin boards, were all competent as tending to prove the existence of the relation at the time of the injury).

Wisconsin.—Kliegel *v.* Aitken, 94 Wis. 432, 69 N. W. 67, 59 Am. St. Rep. 901, 35 L. R. A. 249, in which proof of a hiring by an agent was admitted.

See 34 Cent. Dig. tit. "Master and Servant," § 910.

Evidence held inadmissible see Baker *v.* Lexington, etc., R. Co., 89 S. W. 149, 28 Ky. L. Rep. 140; Coleman *v.* Himmelberger-Harrison Land, etc., Co., 105 Mo. App. 254, 79 S. W. 981; San Antonio Waterworks Co. *v.* White, (Tex. Civ. App. 1898) 44 S. W. 181.

Where a servant engages a substitute, and the latter is injured, evidence of private instructions, given by the foreman to the latter, as to how the work should be done, is admissible to bind the master. Mayfield *v.* Savannah, etc., R. Co., 87 Ga. 374, 13 S. E. 459.

95. Relation between defendant and negligent servant.— The relation of master and servant between defendant and the person of whose negligence plaintiff complains is proved by the admission of defendant's representative, supplemented by other evidence to that effect, and by defendant's admission that such person was performing services for him at the time of the accident, although defendant denies the employment. Fechtman *v.* Huber, 10 N. Y. App. Div. 624, 41 N. Y. Suppl. 791.

96. Expert and opinion evidence see EVIDENCE.

97. Consent of parent to employment of child see PARENT AND CHILD.

98. *Alabama.*— Alabama Steel, etc., Co. *v.* Wrenn, 136 Ala. 475, 34 So. 970, where evidence that plaintiff's brother met defendant's superintendent, and asked him for work for plaintiff, and told him that plaintiff was inexperienced as far as public works were concerned, etc., was held competent, as showing plaintiff's inexperience, and the master's knowledge thereof.

Delaware.— Chielinsky *v.* Hoopes, etc., Co., 1 Marv. 273, 40 Atl. 1127, holding that it is permissible to show, in an action for injuries to a boy, that, although replacing a belt on a shaft was dangerous work, other boys did so, provided it took place in plaintiff's presence, and had entered into, either by permission or order, the work he was to do.

Illinois.— Allen B. Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. 818, holding that the

(B) *Conditions Preceding Injury.*[99] In an action by a servant for personal injuries evidence is admissible to show the condition of the master's machinery, appliances, or places for work previous to the injury, where such condition is shown, or may be presumed, to have continued up to the time of the accident;[1]

question, "You knew, when you put him . . . to work, from your conversation with him and from what he did, that he had little or no experience in this line?" was not objectionable. *Compare* Marquette Third Vein Coal Co. *v.* Dielie, 208 Ill. 116, 70 N. E. 17.

Pennsylvania.— Reese *v.* Hershey, 163 Pa. St. 253, 29 Atl. 907, 43 Am. St. Rep. 795, holding that evidence that the same kind of machines were used without guards in another factory, where the boy had previously worked, was competent.

Texas.— Texas, etc., R. Co. *v.* Brick, 83 Tex. 598, 20 S. W. 511 (evidence that plaintiff, in fact nineteen years old, did not appear to be over sixteen, held admissible, as tending to show that defendant's agent knew him to be a minor); Gammel-Statesman Pub. Co. *v.* Monfort, (Civ. App. 1904) 81 S. W. 1029 (holding that, where an expert had testified that it was the custom for a man to serve two thirds of his apprenticeship before he could handle a machine of the character in question, he might properly testify further as to the term of service of an apprentice).

Utah.— Pence *v.* California Min. Co., 27 Utah 378, 75 Pac. 934, in which evidence as to what the usual custom was that prevailed in the mines in Utah and at defendant's mine in respect of having an experienced miner work with one whom the employer knows to be inexperienced was held admissible to show what precautions were generally taken in such cases, as bearing on the degree of care which defendant exercised for plaintiff's safety.

Virginia.— Virginia Iron, etc., Co. *v.* Tomlinson, (1905) 51 S. E. 362, holding that, in an action for the death of an infant servant, injured while working about certain machinery, evidence that children were permitted to go about the place where deceased was killed was admissible; but that evidence that children were permitted to go in other dangerous places was not competent to show that defendant had failed to instruct children as to the dangers attending their employment, or had given general permission for them to go into dangerous places.

Wisconsin.— Chopin *v.* Badger Paper Co., 83 Wis. 192, 53 N. W. 452, evidence held admissible to show the danger merely to which the boy was exposed, and the duty of warning him.

United States.— New York Biscuit Co. *v.* Rouss, 74 Fed. 608, 20 C. C. A. 555, holding that witness, familiar with the working of a machine, may describe its dangers, and what precautions were necessary to avoid them; may testify that the men usually employed upon it were of mature age, plaintiff being a young lad; and that before setting to work, such men were carefully instructed in the use of the machine.

See 34 Cent. Dig. tit. "Master and Servant," § 914.

Failure to warn servant.— Where the only theory on which plaintiff can recover is that he had not been warned of the dangers of his employment, and that he was too young and immature to understand such dangers, without due explanation and warning, it is not error to permit him to testify that no one had ever given him such explanation and warning. Texas, etc., R. Co. *v.* Brick, 83 Tex. 598, 20 S. W. 511.

Negative evidence as to warning.— Where it is charged that the master had not warned the infant of danger, evidence of other employees that they had never heard the foreman give any instructions to any one as to the danger was not admissible. Virginia Iron, etc., Co. *v.* Tomlinson, (Va. 1905) 51 S. E. 362.

Evidence of experience or inexperience is immaterial where it is not shown that the servant was in the exercise of due care, and that the master was negligent. Kendrick *v.* Central R., etc., Co., 89 Ga. 782, 15 S. E. 685.

Prior injuries to children of plaintiff's age, while attempting to operate the same machine, are inadmissible in evidence. Cohen *v.* Hamblin, etc., Mfg. Co., 186 Mass. 544, 71 N. E. 948. See also Kolb *v.* Chicago Stamping Co., 33 Ill. App. 488. But see McCarragher *v.* Rogers, 8 N. Y. St. 847.

Average intelligence.— It is proper to exclude evidence as to whether plaintiff was "above or below the average intelligence of a boy of his age" (eighteen years and eight months), since it does not show that he was manifestly incapable of understanding the risk without instruction. Leistritz *v.* American Zylonite Co., 154 Mass. 382, 28 N. E. 294.

Evidence that it made a boy dizzy to work at the machine is inadmissible. Steiler *v.* Hart, 65 Mich. 644, 32 N. W. 875.

Defendant cannot show treatment of minor before the accident.— Wilt *v.* Vickers, 8 Watts (Pa.) 227.

Evidence held prejudicial to defendant see Bowe *v.* Bowe, 26 Ohio Cir. Ct. 409.

99. As showing knowledge by master see *infra*, IV, H, 3, b, (III), (F), (3).

1. *Alabama.*— Alabama Great Southern R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313; Birmingham R., etc., Co. *v.* Baylor, 101 Ala. 488, 13 So. 793.

California.— Shea *v.* Pacific Power Co., 145 Cal. 680, 79 Pac. 373.

Illinois.—Pioneer Cooperage Co. *v.* Romanowicz, 186 Ill. 9, 57 N. E. 864 [*affirming* 85 Ill. App. 407]; Weber Wagon Co. *v.* Kehl, 139 Ill. 644, 29 N. E. 714; Williams *v.* Deering, 104 Ill. App. 290. *Compare* Mobile, etc., R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416 [*affirming* 115 Ill. App. 621].

Indiana.— Terre Haute Electric Co. *v.*

and where one of the issues is the nature and sufficiency of repairs to a machine, made shortly before the accident, evidence as to defects in the machine prior to the making of the repairs is admissible.[2]

(c) *Conditions After Injury.* Where, in an action for personal injuries, the condition of machinery, appliances, or places for work, as they appeared within a reasonable time after the accident, warrants an inference as to the conditions existing at the time of the accident, such condition may be given in evidence.[3]

Kieley, 35 Ind. App. 180, 72 N. E. 658; Pittsburgh, etc., R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514; Island Coal Co. *v.* Neal, 15 Ind. App. 15, 42 N. E. 953, 43 N. E. 463.

Kentucky.— Andricus *v.* Pineville Coal Co., 90 S. W. 233, 28 Ky. L. Rep. 704; Dunekake *v.* Beyer, 79 S. W. 209, 25 Ky. L. Rep. 2001. See also Belle of Nelson Distilling Co. *v.* Riggs, 104 Ky. 1, 45 S. W. 99, 20 Ky. L. Rep. 499, holding that it was not reversible error to allow a witness to state what a certain former employee of defendant had said respecting the dangerous condition of an elevator while he was using it.

Massachusetts.— Packer *v.* Thomson-Houston Electric Co., 175 Mass. 496, 56 N. E. 704. *Compare* Powers *v.* Boston, etc., R. Co., 175 Mass. 466, 56 N. E. 710, in which plaintiff made no offer to show that the same condition existed at the time of the accident.

Michigan.— Van Dusen *v.* Letellier, 78 Mich. 492, 44 N. W. 572. *Compare* Robinson *v.* Wright, 94 Mich. 283, 53 N. W. 938, in which repairs were made after the time to which the testimony related.

Missouri.— Pauck *v.* St. Louis Dressed Beef, etc., Co., 166 Mo. 639, 66 S. W. 1070; Doyle *v.* Missouri, etc., Trust Co., 140 Mo. 1, 41 S. W. 255; Swadley *v.* Missouri Pac. R. Co., 118 Mo. 268, 24 S. W. 140, 40 Am. St. Rep. 366; Bowen *v.* Chicago, etc., R. Co., 95 Mo. 268, 8 S. W. 230.

New York.— Havlin *v.* Krulish, 26 Misc. 381, 56 N. Y. Suppl. 275 [*reversing* 25 Misc. 402, 54 N. Y. Suppl. 1093].

Ohio.— Findlay Brewing Co. *v.* Bauer, 50 Ohio St. 560, 35 N. E. 55.

Pennsylvania.— Sopferstein *v.* Bertels, 178 Pa. St. 401, 35 Atl. 1000.

Texas.— Galveston, etc., R. Co. *v.* Burnett, (Civ. App. 1897) 42 S. W. 314; The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117; Ft. Worth, etc., R. Co. *v.* Wilson, 3 Tex. Civ. App. 583, 24 S. W. 686.

Virginia.— Meyer's Sons *v.* Falk, 99 Va. 385, 38 S. E. 178.

Wisconsin.—Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644.

See 34 Cent. Dig. tit. "Master and Servant," § 916.

Bridge constructing.— In an action for injuries caused by the wrecking of a train while crossing a bridge which was in the course of construction, evidence of the condition of the bridge on the day before the accident was not admissible. Keatley *v.* Illinois Cent. R. Co., 94 Iowa 685, 63 N. W. 560.

2. Towle *v.* Stimson Mill Co., 33 Wash. 305, 74 Pac. 471.

3. *Alabama.*— E. E. Jackson Lumber Co. *v.* Cunningham, 141 Ala. 206, 37 So. 495.

Arkansas.— See Little Rock, etc., R. Co. *v.* Eubanks, 48 Ark. 460, 3 S. W. 808, 3 Am. St. Rep. 245, in which evidence as to the condition of a railroad track twenty-one months after the accident was held inadmissible.

Illinois.— Chicago, etc., R. Co. *v.* Gillison, 173 Ill. 264, 50 N. E. 657, 64 Am. St. Rep. 117 [*affirming* 72 Ill. App. 207]; St. Louis, etc., R. Co. *v.* Dorsey, 89 Ill. App. 555 [*affirmed* in 189 Ill. 251, 59 N. E. 593]. See also Chicago, etc., R. Co. *v.* Rains, 203 Ill. 417, 67 N. E. 340.

Indiana.— See Brazil Block Coal Co. *v.* Gibson, 160 Ind. 319, 66 N. E. 882, 98 Am. St. Rep. 281, holding that, where witnesses who testified to having seen a ring at different times after the accident differed as to its condition when seen, evidence that a witness had hammered the laps of the ring together after the accident was admissible.

Iowa.— Brooke *v.* Chicago, etc., R. Co., 81 Iowa 504, 47 N. W. 74; Worden *v.* Humeston, etc., R. Co., 76 Iowa 310, 41 N. W. 26. See also Seagel *v.* Chicago, etc., R. Co., 83 Iowa 380, 49 N. W. 990, in which evidence that the grade of the track had been raised about a foot since the accident was held admissible, plaintiff having stated that the evidence was introduced for the purpose of showing what the grade was when the accident occurred, and not for any other purpose.

Massachusetts.— Droney *v.* Doherty, 186 Mass. 205, 71 N. E. 547; Powers *v.* Boston, etc., R. Co., 175 Mass. 466, 56 N. E. 710; Roskee *v.* Mt. Tom Sulphite Pulp Co., 169 Mass. 528, 48 N. E. 766; Tremblay *v.* Harnden, 162 Mass. 383, 38 N. E. 972.

Missouri.— Gutridge *v.* Missouri Pac. R. Co., 105 Mo. 520, 16 S. W. 943.

New York.— Woods *v.* Long Island R. Co., 159 N. Y. 546, 54 N. E. 1095 [*affirming* 11 N. Y. App. Div. 16, 42 N. Y. Suppl. 140].

Ohio.— See Barbour *v.* Miles, 14 Ohio Cir. Ct. 628, 7 Ohio Cir. Dec. 682, holding that it may be shown in rebuttal that the machinery was defective after the injury, where the jury has inspected the machine and found no apparent defect, and testimony has been introduced by defendant to show that the machine has not been repaired since the injury.

Pennsylvania.— Mixter *v.* Imperial Coal Co., 152 Pa. St. 395, 25 Atl. 587.

Rhode Island.— See Jones *v.* New York, etc., R. Co., 20 R. I. 210, 37 Atl. 1033.

Tennessee.— American Lead Pencil Co. *v.* Davis, 108 Tenn. 251, 66 S. W. 1129. *Com-*

(D) *Precautions Against Recurrence of Injury.* While there is some conflict upon the question, the undoubted weight of authority is to the effect that evidence that after an accident resulting in injury the master took precautions against its recurrence is not admissible to show negligence on his part,[4]

pare East Tennessee, etc., R. Co. *v.* Lindamood, 109 Tenn. 407, 74 S. W. 112.

Texas.— Gulf, etc., R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151; St. Louis, etc., R. Co. *v.* Arnold, (Civ. App. 1905) 87 S. W. 173; San Antonio, etc., R. Co. *v.* Beam, (Civ. App. 1899) 50 S. W. 411; Galveston, etc., R. Co. *v.* Bohan, (Civ. App. 1898) 47 S. W. 1050. *Compare* Sills *v.* Ft. Worth, etc., R. Co., (Civ. App. 1894) 28 S. W. 908.

Utah.— Meyers *v.* Highland Boy Gold Min. Co., 28 Utah 96, 77 Pac. 347; Reese *v.* Morgan Silver-Min. Co., 17 Utah 489, 54 Pac. 759.

Virginia.— Virginia, etc., Wheel Co. *v.* Harris, 103 Va. 708, 49 S. E. 991; Virginia, etc., Wheel Co. *v.* Chalkley, 98 Va. 62, 34 S. E. 976, in both of which the evidence was admitted in rebuttal.

Wisconsin.— Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565.

See 34 Cent. Dig. tit. "Master and Servant," § 917.

But see Huber *v.* Jackson, etc., Co., 1 Marv. (Del.) 374, 41 Atl. 92, where it was held immaterial, on the question of negligence in the maintenance of a safe place for work, as to what condition it was kept in subsequent to the injury.

4. *California.*— Sappenfield *v.* Main St., etc., R. Co., 91 Cal. 48, 27 Pac. 590.

Colorado.— Colorado Electric Co. *v.* Lubbers, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255.

Connecticut.— Nalley *v.* Hartford Carpet Co., 51 Conn. 524, 50 Am. Rep. 47.

Illinois.— Gormully, etc., Mfg. Co. *v.* Olsen, 72 Ill. App. 32.

Indiana.— Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399.

Iowa.— See Kuhns *v.* Wisconsin, etc., R. Co., 76 Iowa 67, 40 N. W. 92, holding that, where the evidence is conflicting as to whether there was a low joint in the track, by which the engine was derailed, it is competent to show that defendant's employees raised the joint immediately after raising the engine, as proof of the existence of the low joint, but not as part of the *res gestæ*.

Kansas.— Cherokee, etc., Coal, etc., Co. *v.* Britton, 3 Kan. App. 292, 45 Pac. 100. See also Weld *v.* Missouri Pac. R. Co., 39 Kan. 63, 17 Pac. 306.

Massachusetts.— Shinners *v.* Merrimack River Locks, etc., 154 Mass. 168, 28 N. E. 10, 26 Am. St. Rep. 226, 12 L. R. A. 554. See also McGuerty *v.* Hale, 161 Mass. 51, 36 N. E. 682.

Michigan.— Fox *v.* Peninsular White Lead, etc., Works, 84 Mich. 676, 48 N. W. 203.

Minnesota.— Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358 [*overruling* O'Leary *v.* Mankato, 21 Minn. 65].

Missouri.— Mahaney *v.* St. Louis, etc., R. Co., 108 Mo. 191, 18 S. W. 895; Alcorn *v.* Chicago, etc., R. Co., 108 Mo. 81, 18 S. W. 188; Alcorn *v.* Chicago, etc., R. Co., (1891) 16 S. W. 229, (1890) 14 S. W. 943; O'Donnell *v.* Baum, 38 Mo. App. 245. But see Crane *v.* Missouri Pac. R. Co., 87 Mo. 588.

North Carolina.— Myers *v.* Concord Lumber Co., 129 N. C. 252, 39 S. E. 960; Lowe *v.* Elliott, 109 N. C. 581, 14 S. E. 51.

Texas.— St. Louis, etc., R. Co. *v.* Jones, (1890) 14 S. W. 309; Gulf, etc., R. Co. *v.* Compton, 75 Tex. 667, 13 S. W. 667; Galveston, etc., R. Co. *v.* Briggs, 4 Tex. Civ. App. 515, 23 S. W. 503.

Virginia.— Virginia, etc., Wheel Co. *v.* Chalkley, 98 Va. 62, 34 S. E. 976.

Wisconsin.— Kreider *v.* Wisconsin River Paper, etc., Co., 110 Wis. 645, 86 N. W. 662; Lang *v.* Sanger, 76 Wis. 71, 44 N. W. 1095.

United States.— Columbia, etc., R. Co. *v.* Hawthorne, 144 U. S. 202, 12 S. Ct. 591, 36 L. ed. 405 [*reversing* 3 Wash. Terr. 353, 19 Pac. 25]; Motey *v.* Pickle Marble, etc., Co., 74 Fed. 155, 20 C. C. A. 366; Atchison, etc., R. Co. *v.* Parker, 55 Fed. 595, 5 C. C. A. 220. But see Columbia, etc., R. Co. *v.* Hawthorne, 144 U. S. 202, 12 S. Ct. 591, 36 L. ed. 405 [*reversing* 3 Wash. Terr. 353, 19 Pac. 25].

See 34 Cent. Dig. tit. "Master and Servant," § 918.

But see Champion Ice Mfg., etc., Co. *v.* Carter, 51 S. W. 16, 21 Ky. L. Rep. 210; Harvey *v.* New York Cent., etc., R. Co., 19 Hun (N. Y.) 556; McKee *v.* Bidwell, 74 Pa. St. 218. *Compare* Krogg *v.* Atlantic, etc., R. Co., 77 Ga. 202, 4 Am. St. Rep. 79.

Reason of rule.— "But, on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong; not for the reason given by some courts, that the acts of the employes in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for

although it may be admissible for other purposes, as for instance to rebut evidence of good condition after the accident.[5]

(E) *Other Accidents or Acts of Negligence.* As a general rule, in an action by a servant for personal injuries, other accidents or acts of negligence are inadmissible in evidence to show negligence on the part of defendant,[6] unless shown to be closely connected with the accident complained of as to time, place, and circumstances.[7] As to whether defendant can show that no similar accident has

continued negligence." Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 468, 16 N. E. 358 [*quoted* with approval in Nalley *v.* Hartford Carpet Co., 51 Conn. 524, 50 Am. Rep. 47; Columbia, etc., R. Co. *v.* Hawthorne, 144 U. S. 202; Cincinnati, etc., R. Co. *v.* Van Horne, 69 Fed. 139, 16 C. C. A. 182].

5. *Connecticut.*— Quinn *v.* New York, etc., R. Co., 56 Conn. 44, 12 Atl. 97, 7 Am. St. Rep. 284 [*distinguishing* Malley *v.* Hartford Carpet Co., 51 Conn. 524, 50 Am. Rep. 47].

Indiana.— La Porte Carriage Co. *v.* Sullender, (App. 1904) 71 N. E. 922.

Iowa.— Kuhns *v.* Wisconsin, etc., R. Co., 76 Iowa 67, 40 N. W. 92.

Kansas.— Atchison, etc., R. Co. *v.* McKee, 37 Kan. 592, 15 Pac. 484.

Massachusetts.— Willey *v.* Boston Electric Light Co., 168 Mass. 40, 46 N. E. 395, 37 L. R. A. 723.

Virginia.— Virginia, etc., Wheel Co. *v.* Chalkley, 98 Va. 62, 34 S. E. 976.

United States.— Cincinnati, etc., R. Co. *v.* Van Horne, 69 Fed. 139, 16 C. C. A. 182 [*distinguishing* Columbia, etc., R. Co. *v.* Hawthorne, 144 U. S. 202, 12 S. Ct. 591, 36 L. ed. 405]; Norris *v.* Atlas Steamship Co., 37 Fed. 426.

See 34 Cent. Dig. tit. "Master and Servant," § 918.

6. *Alabama.*— Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105.

California.—Roche *v.* Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147.

Delaware.— Rex *v.* Pullman's Palace Car Co., 2 Marv. 337, 43 Atl. 246.

Illinois.— Sugar Creek Min. Co. *v.* Peterson, 177 Ill. 324, 52 N. E. 475 [*reversing* 75 Ill. App. 631]; Kolb *v.* Chicago Stamping Co., 33 Ill. App. 488.

Indiana.—Gaar, etc., Co. *v.* Wilson, 21 Ind. App. 91, 51 N. E. 502.

Iowa.— Kuhns *v.* Wisconsin, etc., R. Co., 70 Iowa 561, 31 N. W. 868.

Maryland.— Wise *v.* Ackerman, 76 Md. 375, 25 Atl. 424.

Massachusetts.— Fountaine *v.* Wampanoag Mills, 189 Mass. 498, 75 N. E. 738.

Michigan.— Fox *v.* Peninsular White Lead, etc., Works, 92 Mich. 243, 52 N. W. 623.

Minnesota.— Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358.

New York.— Gustafson *v.* Young, 91 N. Y. App. Div. 433, 86 N. Y. Suppl. 851; Kern *v.* Burden Iron Co., 17 N. Y. App. Div. 135, 45 N. Y. Suppl. 152; Doyle *v.* White, 9 N. Y. App. Div. 521, 35 N. Y. Suppl. 760, 41 N. Y. Suppl. 628; Martin *v.* Cook, 60 Hun 577, 14 N. Y. Suppl. 329.

Pennsylvania.— Weigand *v.* Atlantic Refining Co., 189 Pa. St. 248, 42 Atl. 132.

Utah.— Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295; Snowden *v.* Pleasant Valley Coal Co., 16 Utah 366, 52 Pac. 599; Sullivan *v.* Salt Lake City, 13 Utah 122, 44 Pac. 1039; Hurd *v.* Union Pac. R. Co., 8 Utah 241, 30 Pac. 982.

Wisconsin.— Mueller *v.* Northwestern Iron Co., 125 Wis. 326, 104 N. W. 67.

See 34 Cent. Dig. tit. "Master and Servant," § 919.

Testimony as to general notoriety in regard to the dangerous character of a bridge, and that the witness once saw the dead body of a man lying near the bridge, but was ignorant of the circumstances of his death, is inadmissible on the inquiry whether the bridge had ever before been the means of injuring a person. Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710.

Testimony elicited on cross-examination of a witness of the master will not be excluded because it tends to establish a previous accident at the same place. Schwarzchild *v.* Drysdale, 69 Kan. 119, 76 Pac. 411.

7. *Alabama.*— Houston Biscuit Co. *v.* Dial, 135 Ala. 168, 33 So. 268, 93 Am. St. Rep. 20; Louisville, etc., R. Co. *v.* Woods, 105 Ala. 561, 17 So. 41.

Illinois.— Franke *v.* Hanly, 215 Ill. 216, 74 N. E. 130.

Maryland.— National Enameling, etc., Co. *v.* Cornell, 95 Md. 524, 52 Atl. 588.

Massachusetts.— Spaulding *v.* Forbes Lith. Mfg. Co., 171 Mass. 271, 50 N. E. 543, 66 Am. St. Rep. 424; Shea *v.* Glendale Elastic Fabrics Co., 162 Mass. 463, 38 N. E. 1123; Coffee *v.* New York, etc., R. Co., 155 Mass. 21, 28 N. E. 1128; Myers *v.* Hudson Iron Co., 150 Mass. 125, 22 N. E. 631, 15 Am. St. Rep. 176.

Michigan.—Krantz *v.* Brush Electric Light Co., 82 Mich. 457, 46 N. W. 787.

Minnesota.— Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. E. 358.

New Hampshire.— Shute *v.* Exeter Mfg. Co., 69 N. H. 210, 40 Atl. 391.

New York.— Bailey *v.* Rome, etc., R. Co., 139 N. Y. 302, 34 N. E. 918; Wyman *v.* Orr, 47 N. Y. App. Div. 136, 62 N. Y. Suppl. 195; McCarragher *v.* Rogers, 8 N. Y. St. 847.

North Carolina.— Dorsett *v.* Clement-Ross Mfg. Co., 131 N. C. 254, 42 S. E. 612.

Oregon.— Bowers *v.* Star Logging Co., 41 Oreg. 301, 68 Pac. 516.

Rhode Island.— Moran *v.* Corliss Steam Engine Co., 21 R. I. 386, 43 Atl. 874, 45 L. R. A. 267.

previously happened at the place where the injury occurred or because of the appliance used at the time of the injury, the cases are in direct conflict.[8]

(F) *Defective or Dangerous Machinery, Appliances, and Places*[9]—(1) IN GENERAL. Within the rules as to relevancy, competency, and materiality,[10] any facts are admissible in evidence which tend to establish or disprove negligence on the part of the master in failing to provide reasonably safe and suitable machinery, appliances, and places for work.[11]

Texas.— Taylor, etc., R. Co. *v.* Taylor, 79 Tex. 104, 14 S. W. 918, 23 Am. St. Rep. 316 [*following* Texas, etc., R. Co. *v.* De Milley, 60 Tex. 194].

Wisconsin.— Revolinski *v.* Adams Coal Co., 118 Wis. 324, 95 N. W. 122.

United States.— Wabash Screen Door Co. *v.* Black, 126 Fed. 721, 61 C. C. A. 639.

See 34 Cent. Dig. tit. "Master and Servant," § 919.

8. Non-occurrence of previous accident admissible see Southern R. Co. *v.* McLellan, 80 Miss. 700, 32 So. 283; Havlin *v.* Krulish, 26 Misc. (N. Y.) 381, 56 N. Y. Suppl. 275 [*reversing* 25 Misc. 402, 54 N. Y. Suppl. 1093]; Hoppe *v.* Parmalee, 20 Ohio Cir. Ct. 303, 110 Ohio Cir. Dec. 24. *Contra*, Mobile, etc., R. Co. *v.* Vallowe, 115 Ill. App. 621 [*affirmed* in 214 Ill. 124, 73 N. E. 416]; Bryce *v.* Chicago, etc., R. Co., 103 Iowa 665, 72 N. W. 780; Burgess *v.* Davis Sulphur Ore Co., 165 Mass. 71, 42 N. E. 501.

9. Precautions against recurrence of injury see *supra*, IV, H, 3, b, (III), (D).

10. *Colorado.*— Last Chance Min., etc., Co. *v.* Ames, 23 Colo. 167, 47 Pac. 382.

Illinois.— Chicago, etc., R. Co. *v.* Finnan, 84 Ill. App. 383.

Iowa.— Bryce *v.* Burlington, etc., R. Co., 119 Iowa 274, 93 N. W. 275.

North Carolina.— Marks *v.* Harriet Cotton Mills, 135 N. C. 287, 47 S. E. 432.

Oregon.— Carlson *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 450, 28 Pac. 497.

See 34 Cent. Dig. tit. "Master and Servant," § 920.

Evidence of a more modern and less dangerous system is admissible, where the accident to an employee was not caused by any defect in the machinery. Acme Coal Min. Co. *v.* McIver, 5 Colo. App. 267, 38 Pac. 596.

11. *Alabama.*— Louisville, etc., R. Co. *v.* Jones, 130 Ala. 456, 30 So. 586.

California.— Silveira *v.* Iversen, 128 Cal. 187, 60 Pac. 687.

Illinois.— Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 [*affirming* 109 Ill. App. 468]; Chicago Belt R. Co. *v.* Confrey, 209 Ill. 344, 70 N. E. 773; Chicago, etc., R. Co. *v.* Kinnare, 76 Ill. App. 394.

Iowa.— Cahow *v.* Chicago, etc., R. Co., 113 Iowa 224, 84 N. W. 1056; Keatley *v.* Illinois Cent. R. Co., 94 Iowa 685, 63 N. W. 560; Allen *v.* Burlington, etc., R. Co., 57 Iowa 623, 11 N. W. 614.

Massachusetts.— McMahon *v.* McHale, 174 Mass. 320, 54 N. E. 854; Coleman *v.* Mechanics' Iron Foundry Co., 168 Mass. 254, 46 N. E. 1065.

Minnesota.— Doyle *v.* St. Paul, etc., R. Co., 42 Minn. 79, 43 N. W. 787.

Missouri.— Scott *v.* Springfield, 81 Mo. App. 312.

New Hampshire.— Little *v.* Head, etc., Co., 69 N. H. 494, 43 Atl. 619.

Texas.— Galveston, etc., R. Co. *v.* Jones, 29 Tex. Civ. App. 214, 68 S. W. 190; Bering Mfg. Co. *v.* Peterson, 28 Tex. Civ. App. 194, 67 S. W. 133; Galveston, etc., R. Co. *v.* Pitts, (Civ. App. 1897) 42 S. W. 255; The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

Vermont.— Morrisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102; Geno *v.* Fall Mountain Paper Co., 68 Vt. 568, 35 Atl. 475.

Wisconsin.— Paine *v.* Eastern R. Co. of Minnesota, 91 Wis. 340, 64 N. W. 1005; Nadau *v.* White River Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29.

United States.— Blumenthal *v.* Craig, 81 Fed. 320, 26 C. C. A. 427.

See 31 Cent. Dig. tit. "Master and Servant," § 920.

The cost of appliances is admissible in evidence to show that they were of good quality. Little *v.* Head, etc., Co., 69 N. H. 494, 43 Atl. 619.

Evidence that an engine had been in a head-end collision, and was very old, worn, and leaky, is admissible in an action for injuries caused by its explosion. Illinois Cent. R. Co. *v.* Prickett, 109 Ill. App. 468 [*affirmed* in 210 Ill. 140, 71 N. E. 435].

Evidence of what constitutes a completed bridge is admissible in an action for injuries resulting from the use of a bridge in course of construction. Keatley *v.* Illinois Cent. R. Co., 94 Iowa 685, 63 N. W. 560.

Where the condition of the rails at the place of the accident is in question, it is not necessary to confine the evidence to the condition of the rails at the exact place where the injury was received. Chicago, etc., R. Co. *v.* Kinnare, 76 Ill. App. 394.

Borrowed appliances.— In an action for injuries caused by the falling of a scaffold suspended from iron hooks, one of which broke, it was competent, as showing the care exercised in selecting them, to show that the owner from whom they were borrowed, and who had practical knowledge of their use, recommended them. Little *v.* Head, etc., Co., 69 N. H. 494, 43 Atl. 619.

For instances of evidence held admissible to show master's knowledge of defects or dangers see Birmingham Traction Co. *v.* Reville, 136 Ala. 335, 34 So. 981 (notice to agent); Louisville, etc., R. Co. *v.* Pearson, 97

(2) Customary Appliances or Methods. A general custom [12] amongst others in the same business with regard to their appliances, machinery, places for work, or methods respecting them is admissible in evidence on the question of the master's exercise of due care in providing reasonably safe instrumentalities or places.[13]

Ala. 211, 12 So. 176 (evidence as to length of time defect existed); Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863 (evidence of general notoriety); Colorado City *v.* Liafe, 28 Colo. 468, 65 Pac. 630 (knowledge of street commissioner); Ashley Wire Co. *v.* Mercier, 163 Ill. 486, 45 N. E. 222 (notice to superintendent); Toledo, etc., R. Co. *v.* Bailey, 145 Ill. 159, 33 N. E. 1089 [*affirming* 43 Ill. App. 292] (evidence that engine was regarded as dangerous by defendant's servants); Bates Mach. Co. *v.* Crowley, 115 Ill. App. 540 (conversation between an employee and foreman); Indiana, etc., R. Co. *v.* Bundy, 152 Ind. 590, 53 N. E. 175 (notice to superintendent); Salem Stone, etc., Co. *v.* Griffin, 139 Ind. 141, 38 N. E. 411 (injury to another from same defects); Southern R. Co. *v.* Sittasen, (Ind. App. 1905) 74 N. E. 898 (evidence that ties were rotten throughout the entire length of fill where defect complained of, a low point, existed); Linton Coal, etc., Co. *v.* Persons, 11 Ind. App. 264, 39 N. E. 214 (testimony of former mining boss that he told defendant of the dangerous conditions); Stoutenburgh *v.* Dow, etc., Co., 82 Iowa 179, 47 N. W. 1039 (promise to another employee to remedy defect); Kansas Pac. R. Co. *v.* Little, 19 Kan. 267 (conversations with superior servant); Palmer *v.* Coyle, 187 Mass. 136, 72 N. E. 844 (reputation of horse for viciousness); Bartolomeo *v.* McKnight, 178 Mass. 242, 59 N. E. 804 (statements to foreman); Brady *v.* Norcross, 174 Mass. 442, 54 N. E. 874 (conversation between two foremen); Dutro *v.* Metropolitan St. R. Co., 111 Mo. App. 258, 86 S. W. 915 (notice to foreman); Franklin *v.* Missouri, etc., R. Co., 97 Mo. App. 473, 71 S. W. 540 (defective condition of other tools); Soyer *v.* Great Falls Water Co., 15 Mont. 1, 37 Pac. 838 (evidence as to character of the soil of a track and defendant's means of knowledge thereof held admissible to show that props and braces should have been furnished); Ballard *v.* Hitchcock Mfg. Co., 71 Hun (N. Y.) 582, 24 N. Y. Suppl. 1101 [*affirmed* in 145 N. Y. 619, 22 N. E. 1131] (notice to officers of corporation); Nichols *v.* Brush, etc., Mfg. Co., 53 Hun (N. Y.) 137, 6 N. Y. Suppl. 60 [*affirmed* in 117 N. Y. 646, 22 N. E. 1131] (complaint by another employee to superintendent); McGarrity *v.* New York, etc., R. Co., 25 R. I. 269, 55 Atl. 718 (evidence as to looping of other telltales in same yard); Missouri Pac. R. Co. *v.* Lehmberg, 75 Tex. 61, 12 S. W. 838 (knowledge implied promise of safer engines); Gulf, etc., R. Co. *v.* Boyce, (Tex. Civ. App. 1905) 87 S. W. 395 (occurrence of other storms of as great violence admissible to show that storm should have been anticipated and its effects guarded against); Galveston, etc., R. Co. *v.* Gormley, (Tex. Civ. App. 1894) 27 S. W. 1051 (notice to agent); Ft. Worth, etc., R. Co. *v.* Wilson, 3 Tex. Civ. App. 583, 24 S. W. 686 (notice to telegraph operator); Lane *v.* Banserman, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872 (notice to foreman); Czarecki *v.* Seattle, etc., R., etc., Co., 30 Wash. 288, 70 Pac. 750 (complaint by other servants to managers). And see Schultz *v.* Chicago, etc., R. Co., 67 Wis. 616, 31 N. W. 321, 58 Am. Rep. 881, in which the evidence was rejected because it also tended to show assumption of risk by plaintiff.

12. **Evidence must show general custom.**— Jones *v.* Malvern Lumber Co., 58 Ark. 125, 23 S. W. 679; Robinson *v.* Chicago, etc., R. Co., 71 Iowa 102, 32 N. W. 193; Couch *v.* Watson Coal Co., 46 Iowa 17; Dolan *v.* Boott Cotton Mills, 185 Mass. 576, 70 N. E. 1025; McCarthy *v.* Boston Duck Co., 165 Mass. 165, 42 N. E. 568; Saucier *v.* New Hampshire Spinning Mills, 72 N. H. 292, 56 Atl. 545.

13. *Alabama.*— Northern Alabama R. Co. *v.* Mansell, 138 Ala. 548, 36 So. 459.

Arkansas.— Jones *v.* Malvern Lumber Co., 58 Ark. 125, 23 S. W. 679.

Illinois.— Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 [*affirming* 109 Ill. App. 468]; Chicago, etc., R. Co. *v.* Howell, 208 Ill. 155, 70 N. E. 15 [*affirming* 109 Ill. App. 546]; Stover Mfg. Co. *v.* Millane, 89 Ill. App. 532. *Compare* Chicago, etc., R. Co. *v.* Kinnare, 115 Ill. App. 132. But see Chicago, etc., R. Co. *v.* Driscoll, 176 Ill. 330, 52 N. E. 921 [*reversing* 70 Ill. App. 91], holding that evidence that other railroad companies had in their switch yards butt posts or other obstacles at the ends of stub tracks is inadmissible to show negligence of defendant company in failing to have them.

Indiana.— Indiana, etc., R. Co. *v.* Bundy, 152 Ind. 590, 53 N. E. 175, holding that defendant could show the practice of roads generally in the construction of interlocking switches on one of which plaintiff was injured, but cannot show particulars of construction other than on its own road.

Iowa.— Schroeder *v.* Chicago, etc., R. Co., 128 Iowa 365, 103 N. W. 985; Hamilton *v.* Mendota Coal, etc., Co., 120 Iowa 147, 94 N. W. 282.

Massachusetts.—The admission or exclusion of evidence of custom is within the discretion of the trial court. Ford *v.* Mt. Tom Sulphite Pulp Co., 172 Mass. 544, 52 N. E. 1065, 48 L. R. A. 96; Veginan *v.* Morse, 160 Mass. 143, 35 N. E. 451. See also Myers *v.* Hudson Iron Co., 150 Mass. 125, 22 N. E. 631, 15 Am. St. Rep. 176. *Compare* French *v.* Columbia Spinning Co., 169 Mass. 531, 48 N. E. 269.

Minnesota.—Anderson *v.* Fielding, 92 Minn. 42, 99 N. W. 357, 104 Am. St. Rep. 665.

Mississippi.— Southern R. Co. *v.* McLellan, 80 Miss. 700, 32 So. 283.

Where it is charged that the injury was caused by reason of the absence of an appliance, it is competent to show that such an appliance was in common use by defendant;[14] and where it is in issue whether an obstruction over a railroad track was too low for a brakeman on top of a car to pass under it safely, evidence as to the height of ordinary freight cars on the road is relevant.[15] But testimony as to the custom of a railroad company in making examinations of appliances,[16] or that it ordinarily keeps its tracks in good condition,[17] or that its road compares favorably in construction with other roads,[18] is inadmissible, and where an injury is caused by the negligent use of an appliance or place, the fact that it is stronger or safer than such appliances or places usually are is immaterial.[19]

(3) Inspection, Repair, and Test. In an action for injuries alleged to have been caused by defective or dangerous machinery, or places for work, any facts are admissible in evidence, on the question of defendant's negligence, which tend to show whether or not he has exercised due care with regard to the inspection, repair, and test of such instrumentalities or places.[20]

Missouri.— Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434; Beard *v.* American Car Co., 72 Mo. App. 583. *Compare* Fugler *v.* Bothe, 43 Mo. App. 44.

New Jersey.— Belleville Stone Co. *v.* Comben, 62 N. J. L. 449, 45 Atl. 1090 [*affirming* 61 N. J. L. 353, 39 Atl. 641].

New York.— Bell *v.* Consolidated Gas, etc., Co., 36 N. Y. App. Div. 242, 56 N. Y. Suppl. 780; Barry *v.* Crimmins, 23 N. Y. App. Div. 272, 48 N. Y. Suppl. 156.

Pennsylvania.— Kehler *v.* Schwenk, 151 Pa. St. 505, 25 Atl. 130, 31 Am. St. Rep. 777.

Rhode Island.— Benson *v.* New York, etc., R. Co., 23 R. I. 147, 49 Atl. 689; Laporte *v.* Cook, 22 R. I. 554, 48 Atl. 798.

Vermont.— See Congdon *v.* Howe Scale Co., 66 Vt. 255, 29 Atl. 253, holding that, in an action for injury caused by the bursting of an emery wheel, where the negligence charged was defendant's failure to guard the wheel, he could not show that other factories furnished no guards for such wheels, in the absence of proof that the conditions under which they were operated were the same as those under which plaintiff operated his wheel when injured.

Virginia.— Norfolk, etc., R. Co. *v.* Bell, 104 Va. 836, 52 S. E. 700.

Washington.— Crooker *v.* Pacific Lounge, etc., Co., 34 Wash. 191, 75 Pac. 632.

Wisconsin.—See Kreider *v.* Wisconsin River Paper, etc., Co., 110 Wis. 645, 86 N. W. 662.

See 34 Cent. Dig. tit. "Master and Servant," § 921.

But see Henion *v.* New York, etc., R. Co., 79 Fed. 903, 25 C. C. A. 223.

Evidence limited to general custom of well-regulated and prudently managed companies see Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 [*affirming* 109 Ill. App. 468].

Height of bridges.— In an action by a brakeman for injuries caused by coming in contact with the roof of a covered bridge while riding on top of an unusually high car, it is error to admit evidence that the roof of such bridge was lower than ordinary railroad bridges, since the roof might be lower than those of other bridges, and yet be safe. Cleveland, etc., R. Co. *v.* Walter, 147 Ill. 60, 35 N. E. 529.

14. Use of derailing switches see Smith *v.* Fordyce, 190 Mo. 1, 88 S. W. 679; Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434.

15. East Tennessee, etc., R. Co. *v.* Thompson, 94 Ala. 636, 10 So. 280.

16. Central R., etc., Co. *v.* Kent, 84 Ga. 351, 10 S. E. 965.

17. Ft. Worth, etc., R. Co. *v.* Thompson, 2 Tex. Civ. App. 170, 21 S. W. 137.

18. Riley *v.* West Virginia Cent., etc., R. Co., 27 W. Va. 145.

19. Johnson *v.* Ashland First Nat. Bank, 79 Wis. 414, 48 N. W. 712, 24 Am. St. Rep. 722.

20. *Georgia.*— Central R., etc., Co. *v.* Kent, 84 Ga. 351, 10 S. E. 965.

Illinois.—Pardridge *v.* Gilbride, 98 Ill. App. 134, holding that evidence showing an inspection of an elevator by an official inspector is competent, as showing an exercise of some degree of care by the proprietors.

Iowa.— See Knapp *v.* Sioux City, etc., R. Co., 71 Iowa 41, 32 N. W. 18, holding that evidence of repairs to a railroad track must tend to show that they were made at the place of the accident.

Michigan.— Greenfield *v.* Lake Shore, etc., R. Co., 117 Mich. 307, 75 N. W. 616.

New York.— Rollings *v.* Levering, 18 N. Y. App. Div. 223, 45 N. Y. Suppl. 942.

Ohio.— New York, etc., R. Co. *v.* Ellis, 13 Ohio Cir. Ct. 704, 6 Ohio Cir. Dec. 304.

See 34 Cent. Dig. tit. "Master and Servant," § 922.

Evidence of rules providing for inspection admissible see Kentucky Cent. R. Co. *v.* Carr, 43 S. W. 193, 19 Ky. L. Rep. 1172.

General custom as to inspection admissible see Hover *v.* Chicago, etc., R. Co., (Tex. Civ. App. 1905) 89 S. W. 1084.

Evidence as to customary test.— In an action for the death of a fireman as a result of a defect in defendant's boiler which could have been discovered by hydrostatic test, evidence that it was the practice to make such test was admissible. Bell *v.* Consolidated

(G) *Methods of Work and Rules*[21] — (1) In General. When relevant and material to the issue,[22] not only defendant's rules,[23] but any facts which tend to show negligence or due care on his part with respect to rules and methods of work[24] are admissible in evidence.

(2) Customary Methods.[25] Where such evidence has a tendency to show or disprove defendant's negligence,[26] it is competent to prove what is the usual

Gas, etc., Heat, etc., Co., 36 N. Y. App. Div. 242, 56 N. Y. Suppl. 780.

Want of car-inspectors.— In an action for injuries to an employee occurring from a failure to sufficiently and properly inspect the freight cars of the employer, evidence that it had formerly had two inspectors at the place of the injury, but had none at the time of the accident, was competent, as tending to prove the want of ordinary care on the part of the employer to have its cars sufficiently inspected. Missouri, etc., R. Co. *v.* Miller, 25 Tex. Civ. App. 460, 61 S. W. 978. See also Missouri, etc., R. Co. *v.* Crowder, (Tex. Civ. App. 1899) 55 S. W. 380.

Negative evidence.— Where employers were injured by the falling of a derrick, evidence that they saw no one inspect it, or go up the mast to oil the parts, or for any other purpose, is admissible to show want of inspection. McMahon *v.* McHale, 174 Mass. 320, 54 N. E. 854. *Compare* Duntley *v.* Inman, 42 Oreg. 334, 70 Pac. 529, 59 L. R. A. 785, in which it was held that the fact that one who goes to work in a mill during the night never saw the pulleys therein tested is no evidence that they were not properly inspected and examined.

That a defect might easily have been remedied is admissible in evidence. Belle of Nelson Distilling Co. *v.* Riggs, 104 Ky. 1, 45 S. W. 99, 20 Ky. L. Rep. 499; Turner *v.* Goldsboro Lumber Co., 119 N. C. 387, 26 S. E. 23.

21. Admissibility of rules to show absence of contributory negligence see *infra*, IV, H, 3, b, (VI), (H).

22. A rule relating exclusively to the duty of station agents is inadmissible in behalf of plaintiff, where the injuries were received at a flag station where no agent was kept. Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 34 N. W. 659.

Disputes between an inferior and superior mining boss, relative to the management of the lifting cars while repairs were making in the slope, are inadmissible to show negligence on the part of the mining company in employing a dangerous method of work, in an action by plaintiff, who was assisting in the repairs, and was fully aware of the danger. Jenkins *v.* Mahopac Iron-Ore Co., 10 N. Y. Suppl. 484.

23. *Alabama.*— Louisville, etc., R. Co. *v.* Morgan, 114 Ala. 449, 22 So. 20.

Indiana.— Indiana, etc., R. Co. *v.* Bundy, 152 Ind. 590, 53 N. E. 175.

Iowa.— Pierson *v.* Chicago, etc., R. Co., 116 Iowa 601, 88 N. W. 363; Pearl *v.* Omaha, etc., R. Co., 115 Iowa 535, 88 N. W. 1078; Beems *v.* Chicago, etc., R. Co., 58 Iowa 150, 12 N. W. 222, rule requiring caution in handling cars when "backing."

Kansas.—Atchison, etc., R. Co. *v.* Carter, 60 Kan. 65, 55 Pac. 279.

Kentucky.— Cincinnati, etc., R. Co. *v.* Cook, 113 Ky. 161, 67 S. W. 383, 23 Ky. L. Rep. 2410.

Maryland.—Baltimore, etc., R. Co. *v.* Kean, 65 Md. 394, 5 Atl. 325.

Texas.— Texas, etc., R. Co. *v.* Tatman, 10 Tex. Civ. App. 434, 31 S. W. 333.

West Virginia.— Madden *v.* Chesapeake, etc., R. Co., 28 W. Va. 610, 57 Am. Rep. 695.

Wisconsin.— Dugan *v.* Chicago, etc., R. Co., 85 Wis. 609, 55 N. W. 894.

See 34 Cent. Dig. tit. "Master and Servant," § 924.

Where defendant introduced its "standard code of train rules," in force at the time of the accident, it was not error to exclude testimony as to a certain rule, in the absence of an offer to show that there were oral rules, and that plaintiff knew them. Galveston etc., R. Co. *v.* Pitts, (Tex. Civ. App. 1897) 42 S. W. 255.

24. Palmer *v.* Michigan Cent. R. Co., 87 Mich. 281, 49 N. W. 613; Mengle *v.* McClintic-Marshall Constr. Co., 89 N. Y. App. Div. 334, 85 N. Y. Suppl. 1012.

Facts showing construction of rules admissible see Lake Shore, etc., R. Co. *v.* Andrews, 14 Ohio Cir. Ct. 564, 8 Ohio Cir. Dec. 73; Gulf, etc., R. Co. *v.* Pierce, 7 Tex. Civ. App. 597, 25 S. W. 1052.

Evidence that a rule has been abolished is admissible to show that the propriety of the rule was recognized by defendant, and that his attention was called to the necessity of such a rule. Lake Shore, etc., R. Co. *v.* Starkey, 18 Ohio Cir. Ct. 700, 6 Ohio Cir. Dec. 5.

25. Customary appliances and places for work see *supra*, IV, H, 3, b, (III), (F), (2).

26. Materiality and relevancy necessary.— *Alabama.*— Tennessee Coal, etc., Co. *v.* Hansford, 125 Ala. 349, 28 So. 45, 82 Am. St. Rep. 241 (in which the issue was whether a headlight was burning at the time of the injury, and it was held that evidence of defendant's custom of lighting the headlight was immaterial); Woodward Iron Co. *v.* Herndon, 114 Ala. 191, 21 So. 430.

Georgia.— East Tennessee, etc., R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315, holding that in an action for injuries resulting in part from a misplaced switch defendant cannot show "the common experience of railroads" in getting back switch keys from their employees, and that all railroads have great difficulty in keeping up with such keys, and having them returned by discharged employees.

Illinois.— North Chicago Rolling-Mill Co. *v.* Johnson, 114 Ill. 57, 29 N. E. 186, in which

method of work, either with defendant or others in the same business, under similar conditions.[27]

(H) *Warning and Instructing Servant.* Where such evidence is relevant,[28] it is permissible to show any facts which tend to establish or negative defendant's negligence in failing to give reasonable and proper warning and instruction to plaintiff with regard to the dangers of the employment;[29] and even where no legal obligation rested upon defendant to erect warnings or "telltales," the failure to do so may be proved, as tending to show that the servant did not know of, and had not been warned of, the existence of the obstruction, or the danger thereof.[30]

(I) *Employment or Retention of Incompetent Servants*[31] — (1) IN GENERAL. In an action by a servant for personal injuries, evidence tending to show incompetency on the part of another servant, together with evidence tending to show that the injuries were caused by reason of such incompetency, and that the master knew, or, in the exercise of due care, should have known, of such incompetency, is admissible.[32]

the accident might have resulted whether the customary method was followed or not.

Iowa.— Meloy *v.* Chicago, etc., R. Co., (1888) 37 N. W. 335, 77 Iowa 743, 42 N. W. 563, 14 Am. St. Rep. 325, 4 L. R. A. 287.

Texas.— Gulf, etc., R. Co. *v.* Hockaday, 14 Tex. Civ. App. 613, 37 S. W. 475, holding that evidence that another road maintained its track in a similar condition to defendant's was irrelevant.

Utah.— Bennett *v.* Tintic Iron Co., 9 Utah 291, 34 Pac. 61.

Virginia.— Southern R. Co. *v.* Mauzy, 98 Va. 692, 37 S. E. 285; Richmond Locomotive Works *v.* Ford, 94 Va. 627, 27 S. E. 509.

See 34 Cent. Dig. tit. "Master and Servant," § 925.

27. *Alabama.*— Richmond, etc., R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577; Georgia Pac. R. Co. *v.* Propst, 83 Ala. 518, 3 So. 764.

Colorado.— Denver, etc., R. Co. *v.* Sipes, 26 Colo. 17, 55 Pac. 1093.

Georgia.— Seaboard Air-Line R. Co. *v.* Phillips, 117 Ga. 98, 43 S. E. 494.

Iowa.— Pearl *v.* Omaha, etc., R. Co., 115 Iowa 535, 88 N. W. 1078.

Mississippi.—Alabama, etc., R. Co. *v.* Overstreet, 85 Miss. 78, 37 So. 819.

New York.— Devaney *v.* Degnon-McLean Constr. Co., 178 N. Y. 620, 70 N. E. 1098 [*affirming* 79 N. Y. App. Div. 62, 79 N. Y. Suppl. 1050].

Ohio.— Carl *v.* Pierce, 20 Ohio Cir. Ct. 68, 10 Ohio Cir. Dec. 711.

Oregon.— Hough *v.* Grants Pass Power Co., 41 Oreg. 531, 69 Pac. 655.

South Carolina.— Bodie *v.* Charleston, etc., R. Co., 66 S. C. 302, 44 S. E. 943. See also Bridger *v.* Asheville, etc., R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653.

Texas.— De Walt *v.* Houston, etc., R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534.

Utah.— Fritz *v.* Western Union Tel. Co., 25 Utah 263, 71 Pac. 209.

See 34 Cent. Dig. tit. "Master and Servant," § 925.

Evidence of a customary disregard of a rule of a railroad company by its employees, with the knowledge and approval of the agents of the company, is competent to show that the rule was abrogated or waived. Wright *v.* Southern Pac. Co., 14 Utah 383, 46 Pac. 374.

Rule of another road held admissible see Devoe *v.* New York Cent., etc., R. Co., 174 N. Y. 1, 66 N. E. 568 [*reversing* 70 N. Y. App. Div. 495, 75 N. Y. Suppl. 136].

28. In an action by a railroad employee for injuries, it is error to permit him to show what his instructions were as to flagging trains, when he was not injured while performing such duty. New York, etc., R. Co. *v.* Lyons, 119 Pa. St. 324, 13 Atl. 205.

29. Cameron *v.* B. Roth Tool Co., 108 Mo. App. 265, 83 S. W. 279; Kasjeta *v.* Nashua Mfg. Co., 73 N. H. 22, 58 Atl. 874 (evidence relating to the instructions given and the way in which plaintiff executed them held competent on an issue of defendant's failure to give proper instructions); Bennett *v.* Warren, 70 N. H. 564, 49 Atl. 105; Missouri, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1898) 49 S. W. 265; Gulf, etc., R. Co. *v.* Duvall, 12 Tex. Civ. App. 348, 35 S. W. 699; Gaudie *v.* Northern Lumber Co., 34 Wash. 34, 74 Pac. 1009.

That other employees have been warned or instructed is inadmissible to show due warning and instruction to plaintiff. Verdelli *v.* Gary's Harbor Commercial Co., 115 Cal. 517, 47 Pac. 364. See also Grant *v.* Varney, 21 Colo. 329, 40 Pac. 771; Klaffke *v.* Bettendorf Axle Co., 125 Iowa 223, 100 N. W. 1116.

Prior warnings.— In an action for injuries to a car-repairer through the shifting of another car against the one in which he was employed, evidence that on prior occasions, when he was working in cars on the same tracks, he was always actually warned before the cars were moved, is inadmissible. Rex *v.* Pullman's Palace Car Co., 2 Marv. (Del.) 337, 43 Atl. 246.

30. Pittsburgh, etc., R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. Rep. 120.

31. **Admissibility of evidence under pleadings** see *supra*, IV, H, 2, d, (I), (B), (3).

Habits and reputation see *infra*, IV, H, 3, b, (III), (I), (4).

32. *Delaware.*— Giordano *v.* Brandywine

(2) Retention or Discharge After Accident. The mere fact that a servant is retained in, or discharged from, the service after an accident is not admissible to show his incompetency;[33] but where defendant, in an action for injuries not alleged to have been caused by the incompetency of a fellow servant, depends on the ground that the injuries were due to a fellow servant's negligence, plaintiff may show that it was an imperative rule with defendant either to discharge, suspend, or reprimand employees guilty of such negligence as that alleged by defendant, and that the servant in question was not discharged, suspended, or reprimanded;[34] and evidence of the retention of a negligent servant in the service of a corporation after the injury has been held admissible as characterizing the animus of those controlling the corporation, and as an ingredient in the measure of damages where the fact was known to the officer or agent of the company having power to discharge him.[35]

(3) Other Acts of Negligence. In an action for injuries alleged to have resulted from the incompetency of a fellow servant, evidence of prior specific acts of such servant indicating incompetency is admissible upon the question of his competency,[36] but not to show negligence in doing or omitting the act

Granite Co., 3 Pennew. 423, 52 Atl. 332, holding that evidence that a number of men refused to work with a servant was admissible to show his incompetency and the master's knowledge thereof.

Iowa.— Couch *v.* Watson Coal Co., 46 Iowa 17.

Kansas.— Kansas Pac. R. Co. *v.* Salmon, 14 Kan. 512.

Michigan.— Michigan Cent. R. Co. *v.* Gilbert, 46 Mich. 176, 9 N. W. 243.

Missouri.— McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285.

Pennsylvania.— Bier *v.* Standard Mfg. Co., 130 Pa. St. 446, 18 Atl. 637.

Rhode Island.— Havens *v.* Rhode Island Suburban R. Co., 26 R. I. 48, 58 Atl. 247.

Texas.— Consumers' Cotton Oil Co. *v.* Jonte, 36 Tex. Civ. App. 18, 80 S. W. 847.

Vermont.— Latremouille *v.* Bennington, etc., R. Co., 63 Vt. 336, 22 Atl. 656, holding that, altbough evidence as to capacity of a servant for his work is admissible, general questions as to whether he was bright, intelligent, or fluent of speech did not tend to show such capacity and were incompetent.

Washington.— Green *v.* Western American Co., 30 Wash. 87, 70 Pac. 310.

See 34 Cent. Dig. tit. "Master and Servant," § 928.

That a servant was nicknamed "Crazy Pete" and "The Wild Irishman" is not admissible evidence that the master had knowledge of his incompetency. St. Louis, etc., R. Co. *v.* Corgan, 49 Ill. App. 229.

That brakemen on a train were negroes may not be looked to on the question of their competency to perform the service. Missouri Pac. R. Co. *v.* Christman, 65 Tex. 369.

Evidence that a surgeon is not registered as required by law is inadmissible to show want of proper care in his selection by an employer. Big Stone Gap Iron Co. *v.* Ketron, 102 Va. 23, 45 S. E. 740, 102 Am. St. Rep. 839. See also Poling *v.* San Antonio, etc., R. Co., 32 Tex. Civ. App. 487, 75 S. W. 69, holding that, where it appears that a surgeon had a certificate authorizing him to practice, evidence that he had not been properly examined by the board of medical examiners was incompetent.

That an engineer ran his engine off the track is not sufficient to prove his incompetency. Terrell *v.* Russell, 16 Tex. Civ. App. 573, 42 S. W. 129.

For instances of inadmissible evidence see Buckalew *v.* Tennessee Coal, etc., Co., 112 Ala. 146, 20 So. 606; Staunton Coal Co. *v.* Bub, 218 Ill. 125, 75 N. E. 770 [*affirming* 119 Ill. App. 278]; Cobb Chocolate Co. *v.* Knudson, 207 Ill. 452, 69 N. E. 816 [*affirming* 107 Ill. App. 668]; Michigan Cent. R. Co. *v.* Gilbert, 46 Mich. 176, 9 N. W. 243; Ransier *v.* Minneapolis, etc., R. Co., 30 Minn. 215, 14 N. W. 883.

33. Couch *v.* Watson Coal Co., 46 Iowa 17; Winters *v.* Naughton, 91 N. Y. App. Div. 80, 86 N. Y. Suppl. 439.

34. Atchison, etc., R. Co. *v.* Parker, 55 Fed. 595, 5 C. C. A. 220.

35. Peck *v.* Cooper, 112 Ill. 192, 54 Am. Rep. 231.

36. *Alabama.*— Montgomery First Nat. Bank *v.* Chandler, 144 Ala. 286, 39 So. 822. But see Buckalew *v.* Tennessee Coal, etc., Co., 112 Ala. 146, 20 So. 606.

Delaware.— Giordano *v.* Brandywine Granite Co., 3 Pennew. 423, 52 Atl. 332.

Illinois.— Metropolitan West Side El. R. Co. *v.* Fortin, 203 Ill. 454, 67 N. E. 977; St. Louis Consol. Coal Co. *v.* Seniger, 179 Ill. 370, 53 N. E. 733 [*affirming* 79 Ill. App. 456].

Indiana.— Evansville, etc., R. Co. *v.* Guyton, 115 Ind. 450, 17 N. E. 101, 7 Am. St. Rep. 458.

Iowa.— Couch *v.* Watson Coal Co., 46 Iowa 17.

Michigan.— Michigan Cent. R. Co. *v.* Gilbert, 46 Mich. 176, 9 N. W. 243.

Minnesota.— Morrow *v.* St. Paul City R. Co., 74 Minn. 480, 77 N. W. 303.

Missouri.— Gruhe *v.* Missouri Pac. R. Co., 98 Mo. 330, 11 S. W. 736, 14 Am. St. Rep.

complained of,[37] where it is shown that such acts were known, or ought to have been known, to the master.[38] Where a previous act of negligence has been shown, defendant may be allowed to prove that it was probable that the negligence was that of a third person; and that at the time of the former accident an investigation was caused to be made by an agent, who reported that the servant alleged to have been negligent was free from blame.[39]

(4) HABITS AND REPUTATION. Evidence of a servant's habits,[40] and of his general reputation for competency,[41] is admissible to show that the master was

645, 4 L. R. A. 776; O'Hare *v.* Chicago, etc., R. Co., 95 Mo. 662, 9 S. W. 23.

New York.—Baulec *v.* New York, etc., R. Co., 59 N. Y. 356, 17 Am. Rep. 325; Date *v.* New York Glucose Co., 104 N. Y. App. Div. 207, 93 N. Y. Suppl. 249; Lambrecht *v.* Pfizer, 49 N. Y. App. Div. 82, 33 N. Y. Suppl. 591.

Texas.— International, etc., R. Co. *v.* Branch, (Civ. App. 1900) 56 S. W. 542; Galveston, etc., R. Co. *v.* Davis, (Civ. App. 1898) 45 S. W. 956; Galveston, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 468, 23 S. W. 301.

Washington.— Dossett *v.* St. Paul, etc., Lumber Co., 40 Wash. 276, 82 Pac. 273; Conover *v.* Neher-Ross Co., 38 Wash. 172, 80 Pac. 281, 107 Am. St. Rep. 841.

United States.— Southern Pac. Co. *v.* Hetzer, 135 Fed. 272, 68 C. C. A. 26; Baltimore, etc., R. Co. *v.* Camp, 65 Fed. 952, 13 C. C. A. 233; Wabash R. Co. *v.* Brow, 65 Fed. 941, 13 C. C. A. 222.

See 34 Cent. Dig. tit. "Master and Servant," § 930.

But see Connors *v.* Morton, 160 Mass. 333, 35 N. E. 860; Kennedy *v.* Spring, 160 Mass. 203, 35 N. E. 779; Hatt *v.* Nay, 144 Mass. 186, 10 N. E. 807; Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467. *Compare* Olsen *v.* Andrews, 168 Mass. 261, 47 N. E. 90, holding that where a fellow servant's conduct just before the accident, tending to show his unfitness for his work, is properly before the jury, it may be considered on the issue of the servant's incompetency, although on that issue specific acts of negligence are inadmissible.

37. Montgomery First Nat. Bank *v.* Chandler, 144 Ala. 286, 39 So. 822.

38. *Illinois.*— St. Louis Consol. Coal Co. *v.* Seniger, 179 Ill. 370, 53 N. E. 733 [*affirming* 79 Ill. App. 456].

New York.— Baulec *v.* New York, etc., R. Co., 59 N. Y. 356, 17 Am. Rep. 325; Date *v.* New York Glucose Co., 104 N. Y. App. Div. 207, 93 N. Y. Suppl. 249; Lambrecht *v.* Pfizer, 49 N. Y. App. Div. 82, 63 N. Y. Suppl. 591.

Texas.— Galveston, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 468, 23 S. W. 301.

Washington.— Conover *v.* Neher-Ross Co., 38 Wash. 172, 80 Pac. 281, 107 Am. St. Rep. 841.

United States.— Southern Pac. Co. *v.* Hetzer, 135 Fed. 272, 68 C. C. A. 26; Baltimore, etc., R. Co. *v.* Camp, 65 Fed. 952, 13 C. C. A. 233.

See 34 Cent. Dig. tit. "Master and Servant," § 930.

Proof of actual notice unnecessary see Galveston, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1898) 45 S. W. 956.

39. Baulec *v.* New York, etc., R. Co., 5 Lans. (N. Y.) 436.

40. Habitual carelessness.— Houston, etc., R. Co. *v.* Patton, (Tex. 1888) 9 S. W. 175.

Intoxication.— It is competent to prove that an engine-driver, whose negligence was alleged as the cause of the accident, was drunk at the time of the accident, as part of the *res gestæ*; also that he was habitually intoxicated, and a reckless runner, as tending to show that he was negligent at the time alleged. Hobson *v.* New Mexico, etc., R. Co., 2 Ariz. 171, 11 Pac. 545. See also Missouri, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1903) 75 S. W. 53.

That a servant was an inebriate is inadmissible, when it does not appear that his inebriety is in any way connected with the injury. Miller *v.* Bullion-Beck, etc., Min. Co., 18 Utah 358, 55 Pac. 58.

Evidence that a servant was forgetful and had a habit of screaming without cause is admissible to show general unsuitability for his work as an elevator operator. Ledwidge *v.* Hathaway, 170 Mass. 348, 49 N. E. 656.

41. *Delaware.*— Giordano *v.* Brandywine Granite Co., 3 Pennew. 423, 52 Atl. 332.

Illinois.— Metropolitan West Side El. R. Co. *v.* Fortin, 203 Ill. 454, 67 N. E. 977; Chicago, etc., R. Co. *v.* Hartmann, 71 Ill. App. 427.

Massachusetts.— Ledwidge *v.* Hathaway, 170 Mass. 348, 49 N. E. 656; Monahan *v.* Worcester, 150 Mass. 439, 23 N. E. 228, 15 Am. St. Rep. 226; Hatt *v.* Nay, 144 Mass. 186, 10 N. E. 807.

Ohio.— Cincinnati, etc., R. Co. *v.* Thompson, 21 Ohio Cir. Ct. 778, 12 Ohio Cir. Dec. 326.

Texas.— Gulf, etc., R. Co. *v.* Hays, (Civ. App. 1905) 89 S. W. 29; International, etc., R. Co. *v.* Jackson, 25 Tex. Civ. App. 619, 62 S. W. 91; Galveston, etc., R. Co. *v.* Davis, (Civ. App. 1898) 45 S. W. 956.

Washington.— Green *v.* Western American Co., 30 Wash. 87, 70 Pac. 310.

United States.— Southern Pac. Co. *v.* Hetzer, 135 Fed. 272, 68 C. C. A. 26.

See 34 Cent. Dig. tit. "Master and Servant," § 931.

But see Hobson *v.* New Mexico, etc., R. Co., 2 Ariz. 171, 11 Pac. 545.

That a servant was called "crazy" by his fellow servants is inadmissible. Baird *v.* New York Cent., etc., R. Co., 16 N. Y. App. Div. 490, 44 N. Y. Suppl. 926. See also

guilty of negligence in employing him or retaining him in the service. In showing the general reputation of a servant among those who worked with him, evidence of their actions, what they gave as their reasons, and their mental emotions at times when they refused to work with him is admissible;[42] but reputation among a particular class, including part only of those who knew a servant's character, is inadmissible.[43] Where plaintiff has introduced evidence tending to show a servant's unfitness for his place, evidence offered by defendant that the general reputation of the servant with respect to his work is good is admissible.[44]

(J) *Insufficient Force For Work.* Where an injury is alleged to have resulted from the master's failure to provide a sufficient number of men for the work,[45] evidence is admissible to show the insufficiency of the force, and that defendant had notice of the fact.[46]

(IV) *FELLOW SERVICE.*[47] Where, in an action by a servant for personal injuries, the question of fellow service is in issue, any evidence is admissible which tends to establish or disprove the existence of the relation of fellow servants between plaintiff and the servant whose negligence caused the injury.[48]

(V) *ASSUMPTION OF RISK*—(A) *In General.* On an issue of assumption of

Marrinan *v.* New York Cent., etc., R. Co., 13 N. Y. App. Div. 439, 43 N. Y. Suppl. 606.

42. Giordano *v.* Brandywine Granite Co., 3 Pennew. (Del.) 423, 52 Atl. 332.

43. Southern Pac. Co. *v.* Hetzer, 135 Fed. 272, 68 C. C. A. 26. See also Driscoll *v.* Fall River, 163 Mass. 105, 39 N. E. 1003, holding that the general reputation of a street foreman for incompetency cannot be established merely by evidence of his reputation among the men over whom he has charge.

44. Baltimore, etc., R. Co. *v.* Camp, 81 Fed. 807, 26 C. C. A. 626. But see McCarty *v.* Ritch, 59 N. Y. App. Div. 145, 69 N. Y. Suppl. 129, holding that, after proof was given of specific acts of a servant showing incompetency, the admission of testimony as to his general reputation for competency in his line of work was error.

45. Where it is not claimed that the injury was caused by the insufficiency of the force, it is error to permit plaintiff to show that he was performing extra duties, and that the train was short of hands. Southern R. Co. *v.* McLellan, 80 Miss. 700, 32 So. 283.

46. Savannah, etc., R. Co. *v.* Goss, 80 Ga. 524, 5 S. E. 777; Harvey *v.* New York Cent., etc., R. Co., 19 Hun (N. Y.) 556.

Testimony as to course of business of another road is inadmissible in an action against a railway company for the death of an employee, alleged to have been caused in part by an insufficient switch crew, where it does not appear that the conditions were similar. Creswell *v.* Wilmington, etc., R. Co., 2 Pennew. (Del.) 210, 43 Atl. 629.

Opinion evidence inadmissible see Denver, etc., R. Co. *v.* Wilson, 12 Colo. 20, 20 Pac. 340.

A threat to lay a servant off if he did not "get a move on him" is irrelevant, in an action for injuries owing to the alleged negligence of the master in failing to furnish a sufficient number of workmen. Alabama, etc., R. Co. *v.* Vail, 142 Ala. 134, 38 So. 124, 110 Am. St. Rep. 23.

47. Admissibility of evidence under pleadings see *supra*, IV, H, 2, d, (I), (B).

Negligence of master in employing see *supra*, IV, H, 3, b, (III), (I).

48. Evidence held admissible on issue of fellow service.—*Alabama.*—Birmingham Furnace, etc., Co. *v.* Gross, 97 Ala. 220, 12 So. 36; Richmond, etc., R. Co. *v.* Hammond, 93 Ala. 181, 9 So. 577.

Illinois.— Western Stone Co. *v.* Muscial, 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325 [*affirming* 96 Ill. App. 288]; Morris *v.* Pfeffer, 77 Ill. App. 516; Lebanon Coal, etc., Assoc. *v.* Zerwick, 77 Ill. App. 486; Chicago, etc., R. Co. *v.* Fitzgerald, 40 Ill. App. 476; Krueger *v.* Thiemann, 35 Ill. App. 620.

Indiana.— Baltimore, etc., R. Co. *v.* Roberts, 161 Ind. 1, 67 N. E. 530.

Kansas.— Comstock *v.* Union Pac. R. Co., 56 Kan. 228, 42 Pac. 724.

Massachusetts.— McCabe *v.* Shields, 175 Mass. 438, 56 N. E. 699; O'Brien *v.* Look, 171 Mass. 36, 50 N. E. 458.

South Carolina.—Wilson *v.* Charleston, etc., R. Co., 51 S. C. 79, 28 S. E. 91.

Texas.— Texas, etc., R. Co. *v.* Reed, 88 Tex. 439, 31 S. W. 1058; White *v.* San Antonio Waterworks Co., 9 Tex. Civ. App. 465, 29 S. W. 252.

Virginia.— See Driver *v.* Southern R. Co., 103 Va. 650, 49 S. E. 1000.

Wisconsin.— Wysocki *v.* Wisconsin Lakes Ice, etc., Co., 121 Wis. 96, 98 N. W. 950.

See 34 Cent. Dig. tit. "Master and Servant," §§ 933, 934.

Relative wages of servants admissible see O'Brien *v.* Look, 171 Mass. 36, 50 N. E. 458. But see Fritz *v.* Western Union Tel. Co., 25 Utah 263, 71 Pac. 209.

The general impression among the men in the shop where plaintiff was employed that a certain person was master mechanic on a certain date cannot be shown to prove such fact. Texas Mexican R. Co. *v.* Douglass, 69 Tex. 694, 7 S. W. 77.

The authority given to similar employees by other railroads is inadmissible to show

risk by plaintiff, any facts may be given in evidence which tend to show his assumption or non-assumption of the risk,[49] and especially such as tend to show his knowledge or ignorance of the defect or danger.[50]

(B) *Notice or Complaint, and Promise of Remedy.*[51] To show non-assumption of risk, plaintiff may show notice or complaint in the master, and a promise by him to remedy the defect or remove the danger,[52] or that he only worked under a threat of discharge.[53] On an issue whether certain repairs were promised, defendant cannot prove, in corroboration of testimony that they were not, a custom not to make such promises.[54]

(VI) *CONTRIBUTORY NEGLIGENCE* — (A) *In General.* Any material and relevant facts[55] which tend to establish or disprove contributory negligence on the

that a foreman was a vice-principal. Texas, etc., R. Co. *v.* Reed, 88 Tex. 439, 31 S. W. 1058.

49. *California.*— Hennesey *v.* Bingham, 125 Cal. 627, 58 Pac. 200.

Illinois.— Leighton, etc., Steel Co. *v.* Snell, 217 Ill. 152, 75 N. E. 462 [*affirming* 119 Ill. App. 199]; Illinois Steel Co. *v.* Ryska, 200 Ill. 280, 65 N. E. 734 [*affirming* 102 Ill. App. 347] (conduct of others employed with plaintiff); McCormick Harvesting Mach. Co. *v.* Burandt, 136 Ill. 170, 26 N. E. 588; Colson *v.* Craver, 80 Ill. App. 99 (servant may show master's usual and known manner of performing the business).

Massachusetts.— Boyle *v.* Columbian Fire Proofing Co., 182 Mass. 93, 64 N. E. 726.

Rhode Island.— See Benson *v.* New York, etc., R. Co., 23 R. I. 147, 49 Atl. 689.

Texas.— Galveston, etc., R. Co. *v.* Fitzpatrick, (Civ. App. 1904) 83 S. W. 406; Hildenbrand *v.* Marshall, 30 Tex. Civ. App. 135, 69 S. W. 492.

Vermont.— Morrisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102.

United States.— Valley R. Co. *v.* Keegan, 87 Fed. 849, 31 C. C. A. 255.

See 34 Cent. Dig. tit. "Master and Servant," § 936.

50. *Alabama.*— Birmingham Furnace, etc., Co. *v.* Gross, 97 Ala. 220, 12 So. 36.

Colorado.— McGonigle *v.* Kane, 20 Colo. 292, 38 Pac. 367.

Delaware.— Rex *v.* Pullman's Palace Car Co., 2 Marv. 337, 43 Atl. 246.

Illinois.— Chicago, etc., R. Co. *v.* Kane, 70 Ill. App. 676.

Indiana.— Republic Iron, etc., Co. *v.* Ohler, 161 Ind. 393, 68 N. E. 901; Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18, 9 N. E. 594; Lake Shore, etc., R. Co. *v.* Malcom, 12 Ind. App. 612, 40 N. E. 822.

Iowa.— Keist *v.* Chicago Great Western R. Co., 110 Iowa 32, 81 N. W. 181; Couch *v.* Watson Coal Co., 46 Iowa 17.

Massachusetts.— McKee *v.* Tourtellotte, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542.

Michigan.— Huizega *v.* Cutler, etc., Lumber Co., 51 Mich. 272, 16 N. W. 643.

New York.— Davidson *v.* Cornell, 10 N. Y. Suppl. 521.

Ohio.— Lake Shore, etc., R. Co. *v.* Winslow, 10 Ohio Cir. Ct. 193, 4 Ohio Cir. Dec. 242.

Texas.— International, etc., R. Co. *v.* Hall, 1 Tex. Civ. App. 221, 21 S. W. 1024. *Compare* Galveston, etc., R. Co. *v.* Pitts, (Civ. App. 1897) 42 S. W. 255.

United States.— Great Northern R. Co. *v.* McLaughlin, 70 Fed. 669, 17 C. C. A. 330.

See 34 Cent. Dig. tit. "Master and Servant," § 937.

An application for employment, in which the servant stated his knowledge of the dangers arising from certain kinds of structures built alongside the tracks, is not admissible to establish his assumption of the risk from such a structure alleged to have been negligently placed too close to the track. Texas, etc., R. Co. *v.* Swearingen, 196 U. S. 51, 25 S. Ct. 164, 49 L. ed. 382 [*affirming* 122 Fed. 193, 59 C. C. A. 31]. See also Gulf, etc., R. Co. *v.* Darby, 28 Tex. Civ. App. 413, 67 S. W. 446.

Evidence as to mental capacity to understand danger admissible see Drake *v.* San Antonio, etc., R. Co., (Tex. 1905) 89 S. W. 407 [*reversing* (Civ. App. 1905) 85 S. W. 447].

51. Expert and opinion evidence see EVIDENCE.

52. Springs *v.* Southern R. Co., 130 N. C. 186, 41 S. E. 100.

Evidence as to complaints by another employee is inadmissible. Ford *v.* Chicago, etc., R. Co., 91 Iowa 179, 59 N. W. 5, 24 L. R. A. 657.

53. Doyle *v.* Missouri, etc., Trust Co., 140 Mo. 1, 41 S. W. 255.

54. Missouri, etc., R. Co. *v.* Nordell, 20 Tex. Civ. App. 362, 50 S. W. 601.

55. Relevancy and materiality necessary. —*Alabama.*— Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176; Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262.

Colorado.— Holy Cross Gold Min., etc., Co. *v.* O'Sullivan, 27 Colo. 237, 60 Pac. 570.

Illinois.—Consolidated Coal Co. *v.* Bokamp, 181 Ill. 9, 54 N. E. 567 [*affirming* 75 Ill. App. 605].

Iowa.— Copeland *v.* Ferris, 118 Iowa 554, 92 N. W. 699; Pierson *v.* Chicago, etc., R. Co., 116 Iowa 363, 88 N. W. 363; Trott *v.* Chicago, etc., R. Co., 115 Iowa 30, 86 N. W. 33, 87 N. W. 722.

Massachusetts.— Connors *v.* Merchants' Mfg. Co., 184 Mass. 466, 69 N. E. 218; Smith *v.* Beaudry, 175 Mass. 286, 56 N. E. 596.

North Carolina.— Springs *v.* Southern R. Co., 130 N. C. 186, 41 S. E. 100.

Texas.— Texas, etc., R. Co. *v.* Mortensen, 27 Tex. Civ. App. 106, 66 S. W. 99; Mis-

part of plaintiff may be given in evidence in an action by a servant for personal injuries.[56]

(B) *Habits and Reputation of Injured Servant.* While there are some cases to the contrary,[57] the weight of authority is to the effect that, on an issue of contributory negligence, the habits and general reputation for care and prudence of the injured servant are inadmissible for or against him.[58] The admission of such

souri, etc., R. Co. *v.* Baker, (Civ. App. 1900) 58 S. W. 964; Galveston, etc., R. Co. *v.* Pitts, (Civ. App. 1897) 42 S. W. 255.

Utah.— Konold *v.* Rio Grande Western R. Co., 21 Utah 379, 60 Pac. 1021, 81 Am. St. Rep. 693.

See 34 Cent. Dig. tit. "Master and Servant," § 939.

56. *Alabama.*— Louisville, etc., R. Co. *v.* Banks, 132 Ala. 471, 31 So. 573.

Kentucky.— Louisville, etc., R. Co. *v.* Seibert, 55 S. W. 892, 21 Ky. L. Rep. 1603.

Rhode Island.— Jones *v.* New York, etc., R. Co., 20 R. I. 210, 37 Atl. 1033.

Texas.— Gulf, etc., R. Co. *v.* Boyce, (Civ. App. 1905) 87 S. W. 395; Austin *v.* Forbes, (Civ. App. 1905) 86 S. W. 29; Galveston, etc., R. Co. *v.* McAdams, (Civ. App. 1905) 84 S. W. 1076; Gulf, etc., R. Co. *v.* Garren, (Civ. App. 1903) 72 S. W. 1028; Missouri, etc., R. Co. *v.* Mayfield, 29 Tex. Civ. App. 477, 68 S. W. 807; De Walt *v.* Houston, etc., R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534.

Virginia.— Virginia Portland Cement Co. *v.* Luck, 103 Va. 427, 49 S. E. 577.

Washington.— Sandquist *v.* Independent Tel. Co., 38 Wash. 313, 80 Pac. 539.

United States.— McGhee *v.* Campbell, 101 Fed. 936, 42 C. C. A. 94.

See 34 Cent. Dig. tit. "Master and Servant," § 939.

Evidence admissible on issue of due care.— Western R. Co. *v.* Arnett, 137 Ala. 414, 34 So. 997; Southern Car, etc., Co. *v.* Bartlett, 137 Ala. 234, 34 So. 20; Southern R. Co. *v.* Howell, 135 Ala. 639, 34 So. 6; Iroquois Furnace Co. *v.* McCrea, 191 Ill. 340, 61 N. E. 79 [*affirming* 91 Ill. App. 337]; Pennsylvania Co. *v.* Conlan, 101 Ill. 93; Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 226; Chicago, etc., R. Co. *v.* Myers, 95 Ill. App. 578; Malott *v.* Laufman, 89 Ill. App. 178; O'Fallon Coal Co. *v.* Laquet, 89 Ill. App. 13; Norris *v.* Cudahy Packing Co., 124 Iowa 748, 100 N. W. 853; Brady *v.* New York, etc., R. Co., 184 Mass. 225, 68 N. E. 227; Welch *v.* New York, etc., R. Co., 176 Mass. 393, 57 N. E. 668; Flaherty *v.* Powers, 167 Mass. 61, 44 N. E. 1074; Malcolm *v.* Fuller, 152 Mass. 160, 25 N. E. 83; De Cair *v.* Manistee, etc., R. Co., 133 Mich. 578, 95 N. W. 726; Murphy *v.* Wabash R. Co., 115 Mo. 111, 21 S. W. 862; Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744; Bennett *v.* Warren, 70 N. H. 564, 49 Atl. 105; Jones *v.* New York Cent., etc., R. Co., 62 How. Pr. (N. Y.) 450, 10 Abb. N. Cas. 200; Ham *v.* Lake Shore, etc., R. Co., 23 Ohio Cir. Ct. 496; Pennsylvania Co. *v.* Mahoney, 22 Ohio Cir. Ct. 469, 12 Ohio Cir. Dec. 366; Gulf, etc., R. Co. *v.* Garren, 96 Tex. 605, 74 S. W. 897, 97 Am. St. Rep. 939; Missouri Pac. R. Co. *v.* Lehmberg, 75 Tex. 61, 12 S. W. 838; Galveston, etc., R. Co. *v.* McAdams, (Tex. Civ. App. 1905) 84 S. W. 1076; International, etc., R. Co. *v.* Bearden, 31 Tex. Civ. App. 58, 71 S. W. 558; Galveston, etc., R. Co. *v.* Jenkins, 29 Tex. Civ. App. 440, 69 S. W. 233; San Antonio, etc., R. Co. *v.* Waller, 27 Tex. Civ. App. 44, 65 S. W. 210; Galveston, etc., R. Co. *v.* English, (Tex. Civ. App. 1900) 59 S. W. 912; Missouri, etc., R. Co. *v.* Crane, 13 Tex. Civ. App. 426, 35 S. W. 797; Southern Pac. Co. *v.* Huntsman, 118 Fed. 412, 55 C. C. A. 366; Erie R. Co. *v.* Moore, 113 Fed. 269, 51 C. C. A. 220; Amato *v.* Northern Pac. R. Co., 46 Fed. 561 [*affirmed* in 144 U. S. 465, 12 S. Ct. 740, 36 L. ed. 596].

Evidence admissible on issue of knowledge. — Sachau *v.* Milner, 123 Iowa 387, 98 N. W. 900; Murphy *v.* Marston Coal Co., 183 Mass. 385, 67 N. E. 342; Barker *v.* Lawrence Mfg. Co., 176 Mass. 203, 57 N. E. 366; Buckner *v.* Richmond, etc., R. Co., 72 Miss. 873, 18 So. 449 (construing Const. (1890) § 193); Quinlan *v.* New York, etc., R. Co., 181 N. Y. 523, 73 N. E. 1130 [*affirming* 89 N. Y. App. Div. 266, 85 N. Y. Suppl. 814]; Toledo Consol. St. R. Co. *v.* Mammet, 6 Ohio Cir. Dec. 244; International, etc., R. Co. *v.* McVey, (Tex. Civ. App. 1904) 81 S. W. 991, 83 S. W. 34; Consumers' Cotton Oil Co. *v.* Jonte, (Tex. Civ. App. 1904) 80 S. W. 847; International, etc., R. Co. *v.* Penn, (Tex. Civ. App. 1904) 79 S. W. 624; Neilson *v.* Nebo Brown Stone Co., 25 Utah 37, 69 Pac. 289; Lane *v.* Bauserman, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872.

57. Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 [*affirming* 109 Ill. App. 468]; Toledo, etc., R. Co. *v.* Bailey, 145 Ill. 159, 33 N. E. 1089; Chicago, etc., R. Co. *v.* Clark, 108 Ill. 113; Baltimore, etc., R. Co. *v.* Alsop, 71 Ill. App. 54; Peoria, etc., R. Co. *v.* Puckett, 52 Ill. App. 222; Anglo-American Packing, etc., Co. *v.* Baier, 20 Ill. App. 376; Brouilette *v.* Connecticut River R. Co., 162 Mass. 198, 38 N. E. 507; Overman Wheel Co. *v.* Griffin, 67 Fed. 659, 14 C. C. A. 609.

58. *Dakota.*— Elliott *v.* Chicago, etc., R. Co., 5 Dak. 523, 41 N. W. 758, 3 L. R. A. 363.

Georgia.— East Tennessee, etc., R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315.

Iowa.—Adams *v.* Chicago, etc., R. Co., 93 Iowa 565, 61 N. W. 1059.

Kansas.— Erb *v.* Popritz, 59 Kan. 264, 52 Pac. 871, 68 Am. St. Rep. 362.

Massachusetts.— Thompson *v.* Boston, etc., R. Co., 153 Mass. 391, 26 N. E. 1070.

New York.— Frounfelker *v.* Delaware, etc., R. Co., 48 N. Y. App. Div. 206, 62 N. Y. Suppl. 840.

Texas.— Missouri, etc., R. Co. *v.* Johnson,

evidence was based, in some of the cases expressly or impliedly, on the fact that no direct proof was obtainable on the issue of due care.[59]

(c) *Other Acts of Negligence.* Other disconnected acts of negligence are not admissible to show that plaintiff was guilty of contributory negligence when injured.[60]

(d) *Scope of Employment.* On an issue of contributory negligence, evidence is admissible to show whether or not the injured servant was acting in the line of his duty at the time of his injury.[61]

(e) *Duty to Discover or Remedy Defect.* Evidence is admissible, on an issue of contributory negligence, which tends to show whether the injured servant was negligent in failing to discover or remedy the defect which resulted in his injury.[62]

(f) *Precautions Against Known Dangers.* Whether a servant, after discovering his danger, took reasonable precautions to avoid it, is pertinent on an issue of contributory negligence.[63]

(g) *Disobedience of Rules or Orders.* Where a servant is charged with contributory negligence in having failed to obey a rule or order of the master, the rule or order itself, or evidence tending to establish it, together with evidence tending to show its violation, and that the servant knew, or, in the exercise of due care, ought to have known, of its existence, is admissible.[64] Evidence is also

92 Tex. 380, 48 S. W. 588 [*affirming* (Civ. App. 1898) 49 S. W. 265]. *Compare* De Walt *v.* Houston, etc., R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534.

See 34 Cent. Dig. tit. "Master and Servant," § 941.

59. Illinois Cent. R. Co. *v.* Prickett, 109 Ill. App. 468 [*affirmed* in 210 Ill. 140, 71 N. E. 435]. See also Toledo, etc., R. Co. *v.* Bailey, 145 Ill. 159, 33 N. E. 1089; Chicago, etc., R. Co. *v.* Clark, 108 Ill. 113; Overman Wheel Co. *v.* Griffin, 67 Fed. 659, 14 C. C. A. 609.

60. Central R., etc., Co. *v.* Ryles, 84 Ga. 420, 11 S. E. 499; Belknap, etc., Stone Co. *v.* Harris, 13 Ky. L. Rep. 684; Mansfield Coal, etc., Co. *v.* McEnery, 91 Pa. St. 185, 36 Am. Rep. 662; Southern Pac. R. Co. *v.* Markey, (Tex. 1892) 19 S. W. 392.

61. Chielinsky *v.* Hoopes, etc., Co., 1 Marv. (Del.) 273, 40 Atl. 1127; Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18, 9 N. E. 594; Daley *v.* American Printing Co., 150 Mass. 77, 22 N. E. 439; Bergquist *v.* Chandler Iron Co., 49 Minn. 511, 52 N. W. 136. *Compare* McCray *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1895) 32 S. W. 548.

62. Portner Brewing Co. *v.* Cooper, 120 Ga. 20, 47 S. E. 631; Carroll *v.* East Tennessee, etc., R. Co., 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214; Chicago, etc., R. Co. *v.* Driscoll, 207 Ill. 9, 69 N. E. 620 [*affirming* 107 Ill. App. 615]; Day *v.* Emery, etc., Dry Goods Co., 114 Mo. App. 479, 89 S. W. 903; Steeples *v.* Panel, etc., Co., 33 Wash. 359, 74 Pac. 475; Revolinski *v.* Adams Coal Co., 118 Wis. 324, 95 N. W. 122. *Compare* Island Coal Co. *v.* Risher, 13 Ind. App. 98, 40 N. E. 158, in which it was held that a question to plaintiff on cross-examination as to the duty of a miner to examine the roof of the room into which he goes to work was properly disallowed, it not appearing whether the "duty" sought to be established was one enjoined by law, or by contract between the parties, or by defendant's rules.

Evidence that an engineer was experienced and reliable is not pertinent on the question whether he was to blame for not seeing the washout in time to avoid the accident. Central R., etc., Co. *v.* Kent, 87 Ga. 402, 13 S. E. 502.

Evidence as to the duty of other servants is irrelevant. North Chicago Rolling-Mill Co. *v.* Johnson, 114 Ill. 57, 29 N. E. 186.

63. Quinn *v.* New York, etc., R. Co., 56 Conn. 44, 12 Atl. 97, 7 Am. St. Rep. 284.

64. *Alabama.*— Shorter *v.* Southern R. Co., 121 Ala. 158, 25 So. 853; Kansas City, etc., R. Co. *v.* Webb, 97 Ala. 157, 11 So. 888; Memphis, etc., R. Co. *v.* Askew, 90 Ala. 5, 7 So. 823.

Georgia.— Binion *v.* Georgia Southern, etc., R. Co., 111 Ga. 878, 36 S. E. 938; Parker *v.* Georgia Pac. R. Co., 83 Ga. 539, 10 S. E. 233.

Illinois.— Lake Shore, etc., R. Co. *v.* Rohlfs, 51 Ill. App. 215.

Indiana.— See Lake Erie, etc., R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 564, holding that it is proper to exclude evidence of a rule where it is not shown that the servant acted in violation of it.

Iowa.— Gibson *v.* Burlington, etc., R. Co., 107 Iowa 596, 78 N. W. 190 (in which the rule was not a formal or printed one, but a custom of the employees); Sedgwick *v.* Illinois Cent. R. Co., 73 Iowa 158, 34 N. W. 790. *Compare* Jeffrey *v.* Keokuk, etc., R. Co., 51 Iowa 439, 1 N. W. 765.

Missouri.—Alcorn *v.* Chicago, etc., R. Co., 108 Mo. 81, 18 S. W. 188; Alcorn *v.* Chicago, etc., R. Co., (1891) 16 S. W. 229, (1890) 14 S. W. 943.

New Jersey.— Lehigh Valley R. Co. *v.* Snyder, 56 N. J. L. 326, 28 Atl. 376.

New York.— McDonald *v.* Fitchburg R. Co., 19 N. Y. App. Div. 577, 46 N. Y. Suppl. 600.

admissible to show whether a rule has been sufficiently disregarded to amount to a waiver thereof by the master.[65]

(H) *Methods of Work* — (1) IN GENERAL. On an issue of contributory negligence, evidence is admissible which tends to establish or negative negligence on the part of plaintiff in the method adopted by him.[66]

(2) CUSTOMARY METHODS. Where a servant is charged with contributory negligence in the method adopted by him in doing his work, it is competent to show his usual method of work,[67] and also the customary method of others for doing similar work,[68] unless such method is in itself negligent.[69]

c. Weight and Sufficiency[70] — (I) *IN GENERAL.* In an action by a servant to recover for personal injuries, as in other civil cases, plaintiff need only establish his cause of action by a preponderance of evidence,[71] which may be circumstan-

Texas.— Parks *v.* St. Louis, etc., R. Co., 29 Tex. Civ. App. 551, 69 S. W. 125.

Virginia.— See Norfolk, etc., R. Co. *v.* Marpole, 97 Va. 594, 34 S. E. 462.

See 34 Cent. Dig. tit. "Master and Servant," § 947.

A written contract of employment, advising the servant of the danger of uncoupling moving cars, is competent to show notice of the danger, and the existence of the rule and his knowledge of it. Sedgwick *v.* Illinois Cent. R. Co., 73 Iowa 158, 34 N. W. 790. See also Lehigh Valley R. Co. *v.* Snyder, 56 N. J. L. 326, 28 Atl. 376, where, by the terms of the contract of employment, the servant was to obey certain rules and regulations.

A servant's application for employment is admissible to show his acceptance of and agreement to the rules (Parks *v.* St. Louis, etc., R. Co., 29 Tex. Civ. App. 551, 69 S. W. 125 (but this may be contradicted by testimony of the servant that he was not given a copy of the rules, and was not familiar with them (Missouri, etc., R. Co. *v.* Hauer, (Tex. Civ. App. 1897) 43 S. W. 1078).

Evidence of the posting of a rule where the servant could see it, and that a copy of such rule was delivered to him, is material upon the question of contributory negligence. McDonald *v.* Fitchburg R. Co., 19 N. Y. App. Div. 577, 46 N. Y. Suppl. 600.

Rule admissible to show contributory negligence of fellow servant see Durgin *v.* Munson, 9 Allen (Mass.) 396, 85 Am. Dec. 770.

65. Missouri, etc., R. Co. *v.* Mayfield, 29 Tex. Civ. App. 477, 68 S. W. 807. See also Lake Erie, etc., R. Co. *v.* Craig, 80 Fed. 488, 25 C. C. A. 585. *Compare* Binion *v.* Georgia Southern, etc., R. Co., 118 Ga. 282, 45 S. E. 276.

66. Alabama Midland R. Co. *v.* McDonald, 112 Ala. 216, 20 So. 472; Spaulding *v.* Chicago, etc., R. Co., 98 Iowa 205, 67 N. W. 227; Pringle *v.* Chicago, etc., R. Co., 64 Iowa 613, 21 N. W. 108; Cincinnati, etc., R. Co. *v.* Hill, 89 S. W. 523, 28 Ky. L. Rep. 530; Missouri etc., R. Co. *v.* Baker, (Tex. Civ. App. 1900) 58 S. W. 964; Ft. Worth, etc., R. Co. *v.* Thompson, 2 Tex. Civ. App. 170, 21 S. W. 137. *Compare* Van Gent *v.* Chicago, etc., R. Co., 80 Iowa 526, 45 N. W. 913. But see Central R. Co. *v.* De Bray, 71 Ga. 406.

67. Gibson *v.* Burlington, etc., R. Co., 107 Iowa 596, 78 N. W. 190, holding that where an engineer was killed while inspecting an engine, testimony of a witness that he had personal knowledge of the custom of the engineer in inspecting the engine, and what that custom was, was admissible.

68. *Alabama.*— Kansas City, etc., R. Co. *v.* Webb, 97 Ala. 157, 11 So. 888.

Iowa.— Gorman *v.* Minneapolis, etc., R. Co., 78 Iowa 509, 43 N. W. 303.

Minnesota.— Stauning *v.* Great Northern R. Co., 88 Minn. 480, 93 N. W. 518; Rifley *v.* Minneapolis, etc., R. Co., 72 Minn. 469, 75 N. W. 704.

Ohio.— B. C., etc., R. Co. *v.* Burroughs, 6 Ohio S. & C. Pl. Dec. 527, 3 Ohio N. P. 12.

Texas.— International, etc., R. Co. *v.* Penn, (Civ. App. 1904) 79 S. W. 624; Galloway *v.* San Antonio, etc., R. Co., (Civ. App. 1903) 78 S. W. 32; Galveston, etc., R. Co. *v.* Puente, 30 Tex. Civ. App. 246, 70 S. W. 362; San Antonio, etc., R. Co. *v.* Engelhorn, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68; San Antonio, etc., R. Co. *v.* Beam, (Civ. App. 1899) 50 S. W. 411; Galveston, etc., R. Co. *v.* Pitts, (Civ. App. 1897) 42 S. W. 255. *Compare* McCray *v.* Galveston, etc., R. Co., 89 Tex. 168, 34 S. W. 95.

See 34 Cent. Dig. tit. "Master and Servant," § 949.

69. Chicago, etc., R. Co. *v.* Harrington, 77 Ill. App. 499; Carrier *v.* Union Pac. R. Co., 61 Kan. 447, 59 Pac. 1075.

70. As raising question for jury see *infra,* IV, H, 6.

Presumptions and burden of proof see *supra,* IV, H, 3, a.

Review of questions of fact, verdicts, and findings see *infra,* IV, H, 10, b.

Sufficiency of findings to sustain verdict or judgment see *infra,* IV, H, 8, b.

Variance between allegations and proof see *supra,* IV, H, 2, d, (II).

71. Evidence held sufficient to support verdict see the following cases:

Illinois.— Chicago, etc., R. Co. *v.* Scanlan, 170 Ill. 106, 48 N. E. 826 [*affirming* 67 Ill. App. 621].

Iowa.— Grannis *v.* Chicago, etc., R. Co., 81 Iowa 444, 46 N. W. 1067; Ferguson *v.* Central Iowa R. Co., 58 Iowa 293, 12 N. W. 293, in which the jury was held warranted in finding that plaintiff was acting in the line of his duty.

tial as well as direct.[72] So much at least is required of him, and if he falls short of the requirement a recovery is precluded, even over the verdict of a jury;[73] and even in the case of matters of defense, when it clearly appears from plaintiff's own evidence that he cannot recover in any event, the court cannot ignore the facts so presented, although introduced in support of the main action.[74]

(II) *Existence of Relation.*[75] Plaintiff in a personal injury action must show by a preponderance of evidence, direct or circumstantial, that the relation of master and servant existed between himself and defendant,[76] and the same is true where it becomes necessary to prove the existence of the relation between defendant and a third person.[77]

(III) *Cause of Injury.*[78] In a servant's personal injury action, where the circumstances show nothing as to the real cause of the injury, there is a failure of proof;[79] and the same is true where the evidence fails to show with some degree of certainty that the negligence alleged was the cause of the injuries.[80]

Kentucky.— Cincinnati, etc., R. Co. *v.* Cook, (1904) 83 S. W. 580.

Massachusetts.— Joyce *v.* American Writing Paper Co., 184 Mass. 230, 68 N. E. 213.

Missouri.— Henderson *v.* Kansas City, 177 Mo. 477, 76 S. W. 1045.

New York.— Braunberg *v.* Solomon, 102 N. Y. App. Div. 330, 92 N. Y. Suppl. 506; Van Tassell *v.* New York, etc., R. Co., 1 Misc. 299, 20 N. Y. Suppl. 708 [*affirmed* in 142 N. Y. 634].

Ohio.— Michigan Cent. R. Co. *v.* Butler, 23 Ohio Cir. Ct. 459.

Virginia.— Virginia, etc., R. Co. *v.* Bailey, 103 Va. 205, 49 S. E. 33.

72. **Direct proof by eye-witnesses** of the manner and cause of an accident is not necessary to a recovery for an injury resulting in death. Circumstantial evidence, from which the manner and cause of death may be reasonably inferred, is sufficient on which to submit the question to the jury. Corbin *v.* Western Electric Co., 78 Ill. App. 516.

73. *Colorado.*— Colorado Fuel, etc., Co. *v.* Cummings, 8 Colo. App. 541, 46 Pac. 875.

Indiana.— American Car, etc., Co. *v.* Clark, 32 Ind. App. 644, 70 N. E. 828.

Minnesota.— Martyn *v.* Minnesota, etc., R. Co., 95 Minn. 333, 104 N. W. 133; Carleton *v.* Great Northern R. Co., 93 Minn. 378, 101 N. W. 501.

Missouri.— Morelock *v.* Chicago, etc., R. Co., 112 Mo. App. 640, 87 S. W. 5.

New York.— Welch *v.* New York Cent., etc., R. Co., 17 N. Y. Suppl. 342; Kenney *v.* Ocean Steamship Co., 13 N. Y. Suppl. 950.

Rhode Island.— Venhuvr *v.* Lafayette Worsted Mills, 27 R. I. 89, 60 Atl. 770.

Texas.— Galveston, etc., R. Co. *v.* Walker, (Civ. App. 1905) 85 S. W. 28.

United States.— Canadian Pac. R. Co. *v.* Elliott, 137 Fed. 904, 70 C. C. A. 242 [*reversing* 129 Fed. 163].

Judgment non obstante veredicto see Carleton *v.* Great Northern R. Co., 93 Minn. 378, 101 N. W. 501.

74. Bier *v.* Hosford, 35 Wash. 544, 77 Pac. 867.

75. **Evidence of ownership of railroads** in general see Railroads.

76. Wright *v.* Bertiaux, 161 Ind. 124, 66 N. E. 900; Flynn *v.* Campbell, 160 Mass. 128, 35 N. E. 453.

For cases in which the relation was sufficiently shown see Pennsylvania Co. *v.* Chapman, 118 Ill. App. 201 [*affirmed* in 220 Ill. 428, 77 N. E. 248]; Palmer *v.* Coyle, 187 Mass. 136, 72 N. E. 844; Vallie *v.* Hall, 184 Mass. 358, 68 N. E. 829; Henderson *v.* Kansas City, 177 Mo. 477, 76 S. W. 1045; Goodrich *v.* Kansas City, etc., R. Co., 152 Mo. 222, 53 S. W. 917; Criswell *v.* Montana Cent. R. Co., 17 Mont. 189, 42 Pac. 767; Ringue *v.* Oregon Coal, etc., Co., 44 Oreg. 407, 75 Pac. 703; Missouri Pac. R. Co. *v.* Jones, 75 Tex. 151, 12 S. W. 972, 16 Am. St. Rep. 879; Button *v.* Chicago, etc., R. Co., 87 Wis. 63, 57 N. W. 1110; Bulduzzi *v.* James Ramage Paper Co., 140 Fed. 95.

77. De Grazia *v.* Rudden, 88 N. Y. Suppl. 397. See also Diel *v.* Henry Zeltner Brewing Co., 30 N. Y. App. Div. 291, 51 N. Y. Suppl. 930.

78. **Defective or dangerous appliances or places** see *infra*, IV, H, 3, c, (IV), (C).

Employment of incompetent servants see *infra*, IV, H, 3, c, (IV), (E).

Methods of work see *infra*, IV, H, 3, c, (IV), (D).

79. *Kentucky.*— Hurt *v.* Louisville, etc., R. Co., 116 Ky. 545, 76 S. W. 502, 25 Ky. L. Rep. 755.

Massachusetts.— Dewhirst *v.* Boston, etc., R. Co., 167 Mass. 402, 45 N. E. 757; Felt *v.* Boston, etc., R. Co., 161 Mass. 311, 37 N. E. 375; Corcoran *v.* Boston, etc., R. Co., 133 Mass. 507.

New Hampshire.— Reynolds *v.* Burgess Sulphite Fibre Co., 73 N. H. 126, 59 Atl. 615.

New York.— Nelson *v.* New York, 101 N. Y. App. Div. 18, 91 N. Y. Suppl. 763.

South Carolina.— Green *v.* Southern R. Co., 72 S. C. 398, 52 S. E. 45.

See 34 Cent. Dig. tit. "Master and Servant," § 951.

Compare Alabama Mineral R. Co. *v.* Jones, 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121.

80. *Alabama.*—Southern R. Co. *v.* Guyton, 122 Ala. 231, 25 So. 34; Louisville, etc., R.

Such causal connection need not, however, be shown by direct evidence, but it is sufficient if it is reasonably indicated by the circumstances.[81] But in such case

Co. *v.* Binion, 98 Ala. 570, 14 So. 619; Tuck *v.* Louisville, etc., R. Co., 98 Ala. 150, 12 So. 168.

California.— Taylor *v.* Baldwin, 78 Cal. 517, 21 Pac. 124.

Georgia.— Eslinger *v.* Western, etc., R. Co., 99 Ga. 327, 25 S. E. 701.

Illinois.— Spring Valley Coal Co. *v.* Robizas, 207 Ill. 226, 69 N. E. 925; Chicago, etc., R. Co. *v.* Van Every, 101 Ill. App. 451; Pioneer Fire Proof Constr. Co. *v.* Sandberg, 98 Ill. App. 36; Atchison, etc., R. Co. *v.* Alsdurf, 68 Ill. App. 149; Wabash R. Co. *v.* Brown, 2 Ill. App. 516.

Indiana.— Southern Indiana R. Co. *v.* Martin, 160 Ind. 280, 66 N. E. 886.

Iowa.— Neal *v.* Chicago, etc., R. Co., 129 Iowa 5, 105 N. W. 197, 2 L. R. A. N. S. 905; Donald *v.* Chicago, etc., R. Co., 93 Iowa 284, 61 N. W. 971, 33 L. R. A. 492.

Kentucky.— Hughes *v.* Cincinnati, etc., R. Co., 91 Ky. 526, 16 S. W. 275, 13 Ky. L. Rep. 72; Maloney *v.* Louisville, etc., R. Co., 45 S. W. 107, 20 Ky. L. Rep. 67.

Louisiana.— Ederle *v.* Vicksburg, etc., R. Co., 112 La. 728, 36 So. 664.

Massachusetts.— Bence *v.* New York, etc., R. Co., 181 Mass. 221, 63 N. E. 417; Graham *v.* Boston, etc., R. Co., 156 Mass. 4, 30 N. E. 359.

Michigan.— Lendberg *v.* Brotherton Iron Min. Co., 75 Mich. 84, 42 N. W. 675.

Minnesota.— Phillips *v.* Great Northern R. Co., 94 Minn. 110, 102 N. W. 378; Wendler *v.* Red Wing Gas, etc., Co., 92 Minn. 122, 99 N. W. 625; Bredeson *v.* C. A. Smith Lumber Co., 91 Minn. 317, 97 N. W. 977; Truax *v.* Minneapolis, etc., R. Co., 89 Minn. 143, 94 N. W. 440; Orth *v.* St. Paul, etc., R. Co., 47 Minn. 384, 50 N. W. 363.

Mississippi.—Illinois Cent. R. Co. *v.* Jones, (1894) 16 So. 300.

Missouri.— Trigg *v.* Ozark Land, etc., Co., 187 Mo. 227, 86 S. W. 222; Holmes *v.* Brandenbaugh, 172 Mo. 53, 72 S. W. 550; Epperson *v.* Postal Tel. Cable Co., 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050.

New Hampshire.— Reynolds *v.* Burgess Sulphite Fibre Co., 73 N. H. 126, 59 Atl. 615; Deschenes *v.* Concord, etc., R. Co., 69 N. H. 285, 46 Atl. 467.

New York.— Geoghegan *v.* Atlas Steamship Co., 146 N. Y. 369, 40 N. E. 507 [*affirming* 3 Misc. 224, 22 N. Y. Suppl. 749]; Hudson *v.* Rome, etc., R. Co., 145 N. Y. 408, 40 N. E. 8 [*reversing* 73 Hun 467, 26 N. Y. Suppl. 386]; Cahill *v.* Hilton, 106 N. Y. 512, 13 N. E. 339; Huff *v.* American Fire Engine Co., 88 N. Y. App. Div. 324, 84 N. Y. Suppl. 651; McConnell *v.* New York Cent., etc., R. Co., 63 N. Y. App. Div. 545, 71 N. Y. Suppl. 616; Green *v.* Lawrence Cement Co., 57 N. Y. App. Div. 284, 68 N. Y. Suppl. 7; Craig *v.* Laflin, etc., Powder Co., 55 N. Y. App. Div. 49, 67 N. Y. Suppl. 74; Welle *v.* Celluloid Co., 52 N. Y. App. Div. 522, 65 N. Y. Suppl. 370; Albring *v.* New York Cent., etc., R. Co., 46 N. Y. App. Div. 460, 61 N. Y. Suppl. 763; Douglass *v.* Northern Cent. R. Co., 41 N. Y. App. Div. 615, 58 N. Y. Suppl. 73; Galasso *v.* National Steamship Co., 27 N. Y. App. Div. 169, 50 N. Y. Suppl. 417; Ulrich *v.* New York Cent., etc., R. Co., 25 N. Y. App. Div. 465, 51 N. Y. Suppl. 5; Hotis *v.* New York Cent., etc., R. Co., 2 Silv. Sup. 598, 6 N. Y. Suppl. 605; Shields *v.* Robins, 12 Misc. 332, 33 N. Y. Suppl. 639; Baumwald *v.* Trenkman, 88 N. Y. Suppl. 182; Dering *v.* New York Cent., etc., R. Co., 22 N. Y. Suppl. 344; Wall *v.* Jones, 18 N. Y. Suppl. 674.

Ohio.—Lake Shore, etc., R. Co. *v.* Andrews, 58 Ohio St. 426, 51 N. E. 26; Hunt *v.* Caldwell, 22 Ohio Cir. Ct. 283, 11 Ohio Cir. Dec. 562.

Pennsylvania.— Savitz *v.* Lehigh, etc., R. Co., 199 Pa. St. 218, 48 Atl. 987; Lineoski *v.* Susquehanna Coal Co., 157 Pa. St. 153, 27 Atl. 577; Tunney *v.* Carnegie, 146 Pa. St. 618, 23 Atl. 207; Philadelphia, etc., R. Co. *v.* Hughes, 119 Pa. St. 301, 13 Atl. 286; Fair *v.* Pennsylvania R. Co., 9 Pa. Cas. 591, 14 Atl. 236.

Rhode Island.— Desrosiers *v.* Bourn, 26 R. I. 6, 57 Atl. 935.

Texas.— Missouri Pac. R. Co. *v.* Walker, (1888) 7 S. W. 791; Missouri, etc., R. Co. *v.* Greenwood, (Civ. App. 1905) 89 S. W. 810; G. A. Duerler Mfg. Co. *v.* Dullnig, (Civ. App. 1904) 83 S. W. 889 [*affirmed* in (1905) 87 S. W. 332].

Washington.— Hansen *v.* Seattle Lumber Co., 31 Wash. 604, 72 Pac. 457.

West Virginia.— Cochran *v.* Shanahan, 51 W. Va. 137, 41 S. E. 140.

Wisconsin.—Steffen *v.* Chicago, etc., R. Co., 46 Wis. 259, 50 N. W. 348.

United States.— Pike *v.* Chicago, etc., R. Co., 41 Fed. 95.

See 34 Cent. Dig. tit. "Master and Servant," §§ 959, 970.

81. *Alabama.*— Highland Ave., etc., R. Co. *v.* Miller, 120 Ala. 535, 24 So. 955.

California.— Ryan *v.* Los Angeles Ice, etc., Co., 112 Cal. 244, 44 Pac. 471, 32 L. R. A. 524.

Illinois.— Muren Coal, etc., Co. *v.* Howell, 204 Ill. 515, 68 N. E. 456 [*reversing* 107 Ill. App. 1]; Chicago Screw Co. *v.* Weiss, 203 Ill. 536, 68 N. E. 54 [*affirming* 107 Ill. App. 39]; Armour *v.* Golkowska, 202 Ill. 144, 66 N. E. 1037 [*affirming* 95 Ill. App. 492]; Chicago, etc., R. Co. *v.* Gillison, 72 Ill. App. 207.

Indiana.— Baltimore, etc., R. Co. *v.* Roberts, 161 Ind. 1, 67 N. E. 530; McFarlan Carriage Co. *v.* Potter, 153 Ind. 107, 53 N. E. 465; Louisville, etc., R. Co. *v.* Heck, 151 Ind. 292, 50 N. E. 988; Chicago, etc., R. Co. *v.* Beatty, 13 Ind. App. 604, 40 N. E. 753, 42 N. E. 284.

Iowa.— Sankey *v.* Chicago, etc., R. Co., 118 Iowa 89, 91 N. W. 820; Doyle *v.* Chicago,

the circumstances must not only be consistent with such fact, but they must preclude any other rational conclusion.[82]

(IV) *Negligence of Master*[83] — (A) *In General.* Just what evidence will be deemed sufficient to show negligence on the part of the master must of course depend upon the facts and circumstances of the particular case. There must be a preponderance in favor of plaintiff,[84] but this may arise either circumstantially

etc., R. Co., 77 Iowa 607, 42 N. W. 555, 4 L. R. A. 420.

Kansas.— Atchison, etc., R. Co. *v.* Love, 57 Kan. 36, 45 Pac. 59.

Louisiana.— Smith *v.* Minden Lumber Co., 114 La. 1035, 38 So. 821; Broadfoot *v.* Shreveport Cotton Oil Co., 111 La. 467, 35 So. 643.

Massachusetts.— Chisholm *v.* New England Tel., etc., Co., 185 Mass. 82, 69 N. E. 1042; Mahoney *v.* Bay State Pink Granite Co., 184 Mass. 287, 68 N. E. 234.

Michigan.— Kraatz *v.* Brush Electric Light Co., 82 Mich. 457, 46 N. W. 787.

Minnesota.— Ellington *v.* Great Northern R. Co., 92 Minn. 470, 100 N. W. 218; Le Duc *v.* Northern Pac. R. Co., 92 Minn. 287, 100 N. W. 108; Kurstelska *v.* Jackson, 89 Minn. 95, 93 N. W. 1054.

Missouri.—Cambron *v.* Omaha, etc., R. Co., 165 Mo. 543, 65 S. W. 745; Settle *v.* St. Louis, etc., R. Co., 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633; Dutro *v.* Metropolitan St. R. Co., 111 Mo. App. 258, 86 S. W. 915; Shore *v.* American Bridge Co., 111 Mo. App. 278, 86 S. W. 905; Haworth *v.* Kansas City Southern R. Co., 94 Mo. App. 215, 68 S. W. 111; Devore *v.* St. Louis, etc., R. Co., 86 Mo. App 429; Duggan *v.* Wabash Western R. Co., 46 Mo. App. 266; Schultz *v.* Moon, 33 Mo. App. 329.

New York.— Faith *v.* New York Cent., etc., R. Co., 109 N. Y. App. Div. 222, 95 N. Y. Suppl. 774; Hoes *v.* New York, etc., R. Co., 73 N. Y. App. Div. 363, 77 N. Y. Suppl. 117; Fowler *v.* Buffalo Furnace Co., 41 N. Y. App. Div. 84, 58 N. Y. Suppl. 223; Hosford *v.* New York Cent., etc., R. Co., 39 N. Y. App. Div. 327, 56 N. Y. Suppl. 933; Ford *v.* Lyons, 41 Hun 512; Jones *v.* New York Cent., etc., R. Co., 28 Hun 364 [*affirmed* in 92 N. Y. 628].

Oregon.— Miller *v.* Inman, 40 Oreg. 161, 66 Pac. 713.

Rhode Island.— Sherman *v.* J. W. Bishop Co., 23 R. I. 6, 49 Atl. 39.

South Carolina.— Farley *v.* Charleston Basket, etc., Co., 51 S. C. 222, 28 S. E. 193, 401.

Texas.— Gulf, etc., R. Co. *v.* Melville, (Civ. App. 1905) 87 S. W. 863; Ft. Worth, etc., R. Co. *v.* Caskey, (Civ. App. 1904) 84 S. W. 264; San Antonio, etc., R. Co. *v.* Brock, 35 Tex. Civ. App. 155, 80 S. W. 422; Texas, etc., R. Co. *v.* Kelly, 34 Tex. Civ. App. 21, 80 S. W. 1073; Texas, etc., R. Co. *v.* Gardner, 29 Tex. Civ. App. 90, 69 S. W. 217; International, etc., R. Co. *v.* Newburn, (Civ. App. 1900) 58 S. W. 542 [*affirmed* in 94 Tex. 310, 60 S. W. 429]; International, etc., R. Co. *v.* Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772; International, etc., R. Co. *v.* Turner, (Civ. App. 1897) 43 S. W. 560; San Antonio, etc., R. Co. *v.* Gillum, (Civ. App. 1895) 30 S. W. 697.

Utah.— Hicks *v.* Southern Pac. Co., 27 Utah 526, 76 Pac. 625; Mangum *v.* Bullion, etc., Min. Co., 15 Utah 534, 50 Pac. 834.

Washington.— Janko *v.* West Coast Mfg., etc., Co., 40 Wash. 230, 82 Pac. 284; Goldthorpe *v.* Clark-Nickerson Lumber Co., 31 Wash. 467, 71 Pac. 1091; Shoemaker *v.* Bryant Lumber, etc., Mill Co., 27 Wash. 637, 68 Pac. 380.

Wisconsin.— Nix *v.* C. Reiss Coal Co., 114 Wis. 493, 90 N. W. 437; McClarney *v.* Chicago, etc., R. Co., 80 Wis. 277, 49 N. W. 963.

See 34 Cent. Dig. tit. "Master and Servant," §§ 959, 970.

82. Wheelan *v.* Chicago, etc., R. Co., 85 Iowa 167, 52 N. W. 119.

83. Cause of injury see *supra*, IV, H, 3, c, (III).

84. Evidence held insufficient to show negligence.— *Alabama.*— Western R. Co. *v.* Arnett, 137 Ala. 414, 34 So. 997; Birmingham Furnace, etc., Co. *v.* Gross, 97 Ala. 220, 12 So. 36.

Georgia.— Evans *v.* Josephine Mills, 124 Ga. 318, 52 S. E. 538.

Illinois.— Chicago, etc., R. Co. *v.* Driscoll, 176 Ill. 330, 52 N. E. 921 [*reversing* 70 Ill. App. 91]; Casey *v.* Daugherty, 118 Ill. App. 134; Illinois Cent. R. Co. *v.* May, 106 Ill. App. 613; Illinois Steel Co. *v.* Bycyznski, 106 Ill. App. 331.

Iowa.— Thayer *v.* Smoky Hollow Coal Co., 121 Iowa 121, 96 N. W. 718; Brown *v.* Chicago, etc., R. Co., 120 Iowa 280, 92 N. W. 662; Ferguson *v.* Chicago, etc., R. Co., 100 Iowa 733, 69 N. W. 1026; Kerr *v.* Keokuk Waterworks Co., 95 Iowa 509, 64 N. W. 596.

Kansas.— St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176.

Kentucky.— Cincinnati, etc., R. Co. *v.* Hill, 89 S. W. 523, 28 Ky. L. Rep. 530; Yates *v.* Miller's Creek Constr. Co., 89 S. W. 241, 28 Ky. L. Rep. 331.

Maine.— McTaggart *v.* Maine Cent. R. Co., 100 Me. 223, 60 Atl. 1027; Bryant *v.* Great Northern Paper Co., 100 Me. 171, 60 Atl. 797; Roberts *v.* Boston, etc., R. Co., 88 Me. 260, 34 Atl. 28.

Massachusetts.— McRea *v.* Hood Rubber Co., 187 Mass. 326, 72 N. E. 1015; Hofnauer *v.* R. H. White Co., 186 Mass. 47, 70 N. E. 1038; Gilgan *v.* New York, etc., R. Co., 185 Mass. 139, 69 N. E. 1062; Connors *v.* Merchants' Mfg. Co., 184 Mass. 466, 69 N. E. 218; Archambault *v.* Archambault, 184 Mass. 274, 68 N. E. 199; Martin *v.* Boston, etc., R. Co., 175 Mass. 502, 56 N. E. 719; Murphy *v.* Boston, etc., R. Co., 167 Mass. 64, 44 N. E. 1087; Flynn *v.* Beebe, 98 Mass. 575.

or directly;[85] and in any event the question should be submitted to the jury

Michigan.— Kopf *v.* Monroe Stone Co., 133 Mich. 286, 95 N. W. 72; Peppett *v.* Michigan Cent. R. Co., 119 Mich. 640, 78 N. W. 900.

Minnesota.— Griffin *v.* Minnesota Transfer R. Co., 94 Minn. 191, 102 N. W. 391; Holland *v.* Great Northern R. Co., 93 Minn. 373, 101 N. W. 608; Thomas *v.* Smith, 90 Minn. 379, 97 N. W. 141; Hermann *v.* Clark, 89 Minn. 132, 94 N. W. 436; Manley *v.* Minneapolis Paint Co., 76 Minn. 169, 78 N. W. 1050.

Missouri.— Helm *v.* Missouri Pac. R. Co., 185 Mo. 212, 84 S. W. 5.

Nebraska.— Fremont Tel. Co. *v.* Keeler, (1904) 101 N. W. 245; Chicago, etc., R. Co. *v.* Soderberg, 50 Nebr. 674, 70 N. W. 230.

New Jersey.— Ricker *v.* Central R. Co., (Sup. 1905) 61 Atl. 89; Ahearn *v.* Central R. Co., (Sup. 1900) 45 Atl. 1032; Brown *v.* Paterson Parchment Paper Co., 65 N. J. L. 111, 46 Atl. 756.

New York.— McManus *v.* Davitt, 94 N. Y. App. Div. 481, 88 N. Y. Suppl. 55; Kindorf *v.* Hoellerer, 87 N. Y. App. Div. 628, 84 N. Y. Suppl. 465; Callan *v.* Pugh, 54 N. Y. App. Div. 545, 66 N. Y. Suppl. 1118; Quigley *v.* Levering, 50 N. Y. App. Div. 354, 63 N. Y. Suppl. 1059; Pfeffer *v.* Stein, 26 N. Y. App. Div. 535, 50 N. Y. Suppl. 516; Prescott *v.* J. Ottman Lith. Co., 20 N. Y. App. Div. 397, 46 N. Y. Suppl. 812; O'Connell *v.* Clark, 6 N. Y. App. Div. 33, 39 N. Y. Suppl. 454.

Ohio.— Lake Shore, etc., R. Co. *v.* Vogelson, 23 Ohio Cir. Ct. 361.

Pennsylvania.— Meixner *v.* Philadelphia Brewing Co., 210 Pa. St. 597, 60 Atl. 259; Lawson *v.* American Steel, etc., Co., 204 Pa. St. 604, 54 Atl. 476; Whitley *v.* Evans, 30 Pa. Super. Ct. 41; Hanna *v.* Gresh, 16 Montg. Co. Rep. 182.

Texas.— International, etc., R. Co. *v.* Still, (Civ. App. 1905) 88 S. W. 257; G. A. Duerler Mfg. Co. *v.* Dullnig, (Civ. App. 1904) 83 S. W. 889 [*affirmed* in (1905) 87 S. W. 332]; Jones *v.* Missouri, etc., R. Co., 32 Tex. Civ. App. 286, 73 S. W. 1090; Houston, etc., R. Co. *v.* Martin, 21 Tex. Civ. App. 207, 51 S. W. 641; San Antonio, etc., R. Co. *v.* Bolster, (Civ. App. 1899) 51 S. W. 41.

Virginia.— Wise Terminal Co. *v.* McCormick, 104 Va. 400, 51 S. E. 731.

Wisconsin.— Hibbard *v.* Chicago, etc., R. Co., 102 Wis. 624, 78 N. W. 781; Lee *v.* Chicago, etc., R. Co., 101 Wis. 352, 77 N. W. 714.

United States.— The Troy, 121 Fed. 901; Boudrot *v.* Cochrane Chemical Co., 110 Fed. 919.

See 34 Cent. Dig. tit. "Master and Servant," § 954.

Payment of wages to an injured employee after the accident when no services were rendered is not to be taken as an admission of liability, where the employee was a faithful servant for some time before the accident. Hanna *v.* Gresh, 16 Montg. Co. Rep. (Pa.) 182.

That the master holds an indemnity policy insuring him against liability for injuries to his employees by his negligence, and requiring the company to defend an action against him for such injuries, is not an admission of negligence on the part of the insured. Manley *v.* Minneapolis Paint Co., 76 Minn. 169, 78 N. W. 1050.

Wilful negligence not shown see Collins *v.* Cincinnati, etc., R. Co., 18 S. W. 11, 13 Ky. L. Rep. 670.

85. Negligence shown.—*Alabama.*— Northern Alabama R. Co. *v.* Shea, 142 Ala. 119, 37 So. 796.

Arkansas.— St. Louis, etc., R. Co. *v.* McCain, 67 Ark. 377, 55 S. W. 165.

California.— Grijalva *v.* Southern Pac. Co., 137 Cal. 569, 70 Pac. 622.

Connecticut.— See Ebert *v.* Hartley, 72 Conn. 453, 44 Atl. 723, in which defendant had suffered judgment by default.

Illinois.— Commonwealth Electric Co. *v.* Rose, 214 Ill. 545, 73 N. E. 780 [*affirming* 114 Ill. App. 181]; Chicago, etc., R. Co. *v.* Driscoll, 207 Ill. 9, 69 N. E. 620 [*affirming* 107 Ill. App. 615]; Illinois Steel Co. *v.* Ryska, 200 Ill. 280, 65 N. E. 734 [*affirming* 102 Ill. App. 347]; Illinois Steel Co. *v.* Stonevick, 199 Ill. 122, 64 N. E. 1014; Helmbacher Forge, etc., Co. *v.* Garrett, 119 Ill. App. 166; Baltimore, etc., R. Co. *v.* Alsop, 71 Ill. App. 54.

Indiana.— Southern Indiana R. Co. *v.* Fine, 163 Ind. 617, 72 N. E. 589; Peerless Stone Co. *v.* Wray, 152 Ind. 27, 51 N. E. 326.

Kansas.— Buoy *v.* Clyde Milling, etc., Co., 68 Kan. 436, 75 Pac. 466.

Kentucky.—Louisville, etc., R. Co. *v.* Davis, 115 Ky. 270, 71 S. W. 658, 24 Ky. L. Rep. 1415; Louisville, etc., R. Co. *v.* Richardson, 66 S. W. 631, 23 Ky. L. Rep. 2090; Louisville, etc., R. Co. *v.* Sanders, 44 S. W. 644, 19 Ky. L. Rep. 1941.

Louisiana.— Stewart *v.* Texas, etc., R. Co., 113 La. 525, 37 So. 129.

Maine.— Caven *v.* Bodwell Granite Co., 99 Me. 278, 59 Atl. 285; Withee *v.* Somerset Traction Co., 98 Me. 61, 56 Atl. 204.

Maryland.— Winkelmann, etc., Drug Co. *v.* Colladay, 88 Md. 78, 40 Atl. 1078.

Massachusetts.— McPhee *v.* New England Structural Co., 188 Mass. 141, 74 N. E. 303; Cavagnaro *v.* Clark, 171 Mass. 359, 50 N. E. 542.

Michigan.— Milbourne *v.* Arnold Electric Power Station Co., 140 Mich. 316, 103 N. W. 821, 70 L. R. A. 600; McLean *v.* Pere Marquette R. Co., 137 Mich. 482, 100 N. W. 748.

Minnesota.— Jensen *v.* Commodore Min. Co., 94 Minn. 53, 101 N. W. 944; Bennett *v.* E. W. Backus Lumber Co., 77 Minn. 198, 79 N. W. 682.

Mississippi.— Farmer *v.* Cumberland Tel., etc., Co., 86 Miss. 55, 38 So. 775.

Missouri.— Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434; Bender *v.* St. Louis, etc., R. Co., 137 Mo. 240, 37 S. W. 132 (demurrer to evidence); Warren *v.* Chicago, etc., R. Co., 113 Mo. App. 498, 87 S. W. 585.

where there is any evidence whatever, which has a tendency to show the negligence alleged.[86]

(B) *Existence of Defect or Happening of Accident or Injury.*[87] Mere proof of the existence of a defect or of the happening of the accident or injury is not,

Nebraska — Norfolk Beet-Sugar Co. *v.* Burnett, 55 Nebr. 360, 75 N. W. 839.

Nevada.— Roberti *v.* Anderson, 27 Nev. 396, 76 Pac. 30.

New Hampshire.— Hamel *v.* Newmarket Mfg. Co., 73 N. H. 386, 62 Atl. 592.

New York — Faith *v.* New York Cent., etc., R. Co., 109 N. Y. App. Div. 222, 95 N. Y. Suppl. 774; Hunt *v.* Dexter Sulphite Pulp, etc., Co., 100 N. Y. App. Div. 119, 91 N. Y. Suppl. 279; Quinn *v.* Brooklyn Heights R. Co., 91 N. Y. App. Div. 489, 86 N. Y. Suppl. 883; Mendizabal *v.* New York Cent., etc., R. Co., 89 N. Y. App. Div. 386, 85 N. Y. Suppl. 896; Wiedeman *v.* Everard, 56 N. Y. App. Div. 358, 67 N. Y. Suppl. 738.

Rhode Island.— McGarrity *v.* New York, etc., R. Co., 25 R. I. 269, 55 Atl. 718.

Tennessee.— Louisville, etc., R. Co. *v.* Jackson, 106 Tenn. 438, 61 S. W. 771.

Texas.— Cane Belt R. Co. *v.* Crosson, (Civ. App. 1905) 87 S. W. 867; Robertson *v.* Trammell, (Civ. App. 1904) 83 S. W. 258 [*affirmed* in 98 Tex. 364, 83 S. W. 1098]; Galloway *v.* San Antonio, etc., R. Co., (Civ. App. 1903) 78 S. W. 32; St. Louis South Western R. Co. *v.* Smith, 30 Tex. Civ. App. 336, 70 S. W. 789; Missouri, etc., R. Co. *v.* Mayfield, 29 Tex. Civ. App. 477, 68 S. W. 807; Texas, etc., R. Co. *v.* Gardner, 29 Tex. Civ. App. 90, 69 S. W. 217; Galveston, etc., R. Co. *v.* Sanchez, (Civ. App. 1901) 65 S. W. 893; Galveston, etc., R. Co. *v.* Sanders, (Civ. App. 1901) 65 S. W. 889; Galveston, etc., R. Co. *v.* Dehnisch, (Civ. App. 1900) 57 S. W. 64; Houston, etc., R. Co. *v.* White, 23 Tex. Civ. App. 280, 56 S. W. 204; Missouri, etc., R. Co. *v.* Crowder, (Civ. App. 1899) 55 S. W. 380.

Utah.— Palmquist *v.* Mine, etc., Supply Co., 25 Utah 257, 70 Pac. 994.

Virginia.— Norfolk, etc., R. Co. *v.* Spencer, 104 Va. 657, 52 S. E. 310; Norfolk, etc., R. Co. *v.* Wade, 102 Va. 140, 45 S. E. 915.

Wisconsin.— Nicoud *v.* Wagner, 106 Wis. 67, 81 N. W. 999.

United States.— Cecil *v.* American Sheet Steel Co., 129 Fed. 542, 64 C. C. A. 72; Conner *v.* Pioneer Fire-Proof Constr. Co., 29 Fed. 629.

See 34 Cent. Dig. tit. "Master and Servant," § 954.

Inexperienced or youthful employees.— Grijalva *v.* Southern Pac. Co., 137 Cal. 569, 70 Pac. 622; Black *v.* Middle Georgia, etc., R. Co., 104 Ga. 561, 31 S. E. 404; Marquette Third Vein Coal Co. *v.* Dielie, 208 Ill. 110, 70 N. E. 17; Flickner *v.* Lambert, 36 Ind. App. 524, 74 N. E. 263; La Porte Carriage Co. *v.* Sullender, (Ind. App. 1904) 71 N. E. 922 (construing Burns Annot. St. (1901) § 7087*b*); Sprague *v.* Atlee, 81 Iowa 1, 46 N. W. 756; Patterson *v.* Cole, 67 Kan. 441, 73 Pac. 54; Rudberg *v.* Bowden Felting Co., 188 Mass. 365, 74 N. E. 590; Bowden *v.* Marlborough Electric Mach., etc., Co., 185 Mass. 549, 70 N. E. 1016; Coffee *v.* Phillips, 21 Misc. (N. Y.) 663, 47 N. Y. Suppl. 1105; Bowers *v.* Star Logging Co., 41 Oreg. 301, 68 Pac. 516; Brislin *v.* Kingston Coal Co., 20 Pa. Super. Ct. 234. *Compare* McMellen *v.* Union News Co., 144 Pa. St. 332, 22 Atl. 706; Willis *v.* Cherokee Falls Mfg. Co., 72 S. C. 126, 51 S. E. 538; Barksdale *v.* Laurens, 58 S. C. 413, 36 S. E. 661; Trinity, etc., R. Co. *v.* Lane, 79 Tex. 643, 15 S. W. 477, 16 S. W. 18; Texarkana, etc., R. Co. *v.* Preacher, (Tex. Civ. App. 1900) 59 S. W. 593; Moore Lime Co. *v.* Johnston, 103 Va. 84, 48 S. E. 557; Dingee *v.* Unrue, 98 Va. 247, 35 S. E. 794; Bigelow *v.* Danielson, 102 Wis. 470, 78 N. W. 599; Nadau *v.* White River Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29. *Compare* Mary Lee Coal, etc., Co. *v.* Chambliss, 97 Ala. 171, 11 So. 897; Cantwell *v.* Brennan, 125 Mich. 349, 84 N. W. 299.

86. Evidence held sufficient for submission to jury.— *California.*— Hanley *v.* California Bridge, etc., Co., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597, in which there was a motion for nonsuit.

Iowa.— Morbey *v.* Chicago, etc., R. Co., 105 Iowa 46, 74 N. W. 751.

Kentucky.— Ashland Coal, etc., R. Co. *v.* Wallace, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207, 19 Ky. L. Rep. 849; Kentucky Cent. R. Co. *v.* Carr, 43 S. W. 193, 19 Ky. L. Rep. 1172.

Massachusetts.— Leslie *v.* Granite R. Co., 172 Mass. 468, 52 N. E. 542; Kalleck *v.* Deering, 169 Mass. 200, 47 N. E. 698; Redmund *v.* Butler, 168 Mass. 367, 47 N. E. 108.

Missouri.— Harris *v.* H. D. Williams Cooperage Co., 107 Mo. App. 249, 80 S. W. 924; Eberly *v.* Chicago, etc., R. Co., 96 Mo. App. 361, 70 S. W. 381. *Compare* Caldwell *v.* Missouri Pac. R. Co., 181 Mo. 455, 80 S. W. 897.

New Jersey.— Mills *v.* Maine Ice Co., 51 N. J. L. 342, 17 Atl. 695.

New York.— Hatton *v.* Hilton Bridge Constr. Co., 42 N. Y. App. Div. 398, 59 N. Y. Suppl. 272. *Compare* Hauk *v.* Standard Oil Co., 38 N. Y. App. Div. 621, 56 N. Y. Suppl. 273.

North Carolina.— Johnson *v.* Southern R. Co., 122 N. C. 955, 29 S. E. 784.

Texas.— Houston, etc., R. Co. *v.* Smith, (Civ. App. 1899) 51 S. W. 506; International, etc., R. Co. *v.* Bonatz, (Civ. App. 1898) 48 S. W. 767.

See 34 Cent. Dig. tit. "Master and Servant," § 954.

Question of negligence properly withheld from jury see Fritz *v.* Salt Lake, etc., Gas, etc., Co., 18 Utah 493, 56 Pac. 90.

87. As raising question for jury see *infra*, IV, H, 6, a, (III).

without more, sufficient to establish the master's negligence,[88] unless he has been guilty of a failure to comply with some positive statutory requirement, such as the Interstate Commerce Safety Appliance Act,[89] or the New York Labor Law.[90] Where, however, under the latter law, the evidence shows that the selection of an appliance was a detail of the work, left to the employees, the master will not be liable for defects.[91]

(c) *Defective or Dangerous Appliances or Places*[92] — (1) In General. What evidence will be sufficient to show negligence in failing to provide reasonably safe appliances or places for work must depend upon the facts and circumstances of each particular case.[93]

Incompetency of fellow servants see *infra*, IV, H, 3, c, (v).

88. *Alabama.*— Kansas City, etc., R. Co. *v.* Flippo, 138 Ala. 487, 35 So. 457. *Compare* Alabama Great Southern R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313.

California.— Madden *v.* Occidental, etc., Steamship Co., 86 Cal. 445, 25 Pac. 5.

Iowa.—Kuhns *v.* Wisconsin, etc., R. Co., 70 Iowa 561, 31 N. W. 868.

Kentucky.—Cincinnati, etc., R. Co. *v.* Cook, 73 S. W. 765, 24 Ky. L. Rep. 2152, 75 S. W. 218, 25 Ky. L. Rep. 356; Johnston *v.* East Tennessee, etc., R. Co., 30 S. W. 415, 17 Ky. L. Rep. 67.

Louisiana.— Henry *v.* Brackenridge Lumber Co., 48 La. Ann. 950, 20 So. 221. But see Clairain *v.* Western Union Tel. Co., 40 La. Ann. 178, 3 So. 625.

Maryland.— South Baltimore Car Works *v.* Schaefer, 96 Md. 88, 53 Atl. 665, 94 Am. St. Rep. 560.

Massachusetts.— Hofnauer *v.* R. H. White Co., 186 Mass. 47, 70 N. E. 1038; Drum *v.* New England Cotton Yarn Co., 180 Mass. 113, 61 N. E. 812; Harnois *v.* Cutting, 174 Mass. 398, 54 N. E. 842; Clare *v.* New York, etc., R. Co., 167 Mass. 39, 44 N. E. 1054; Chandler *v.* New York, etc., R. Co., 159 Mass. 589, 35 N. E. 89; Blanchette *v.* Border City Mfg. Co., 143 Mass. 21, 8 N. E. 430.

Michigan.— Whitcomb *v.* Detroit Electric R. Co., 125 Mich. 572, 84 N. W. 1072; Peppett *v.* Michigan Cent. R. Co., 119 Mich. 640, 78 N. W. 900.

Minnesota — Koslowski *v.* Thayer, 66 Minn. 150, 68 N. W. 973.

Missouri.— Plefka *v.* Knapp, 145 Mo. 316, 46 S. W. 974.

New Hampshire.— Nash *v.* Nashua Iron, etc., Co., 62 N. H. 406.

New York.— Hannigan *v.* Lehigh, etc., R. Co., 157 N. Y. 244, 51 N. E. 992 [*reversing* 91 Hun 300, 36 N. Y. Suppl. 293]; Fitzgerald *v.* New York Cent., etc., R. Co., 154 N. Y. 263, 48 N. E. 514; Dobbins *v.* Brown, 119 N. Y. 188, 23 N. E. 537; Quinlan *v.* New York, etc., R. Co., 89 N. Y. App. Div. 266, 85 N. Y. Suppl. 814; Nolan *v.* Brooklyn Heights R. Co., 68 N. Y. App. Div. 219, 74 N. Y. Suppl. 120; Fink *v.* Slade, 66 N. Y. App. Div. 105, 72 N. Y. Suppl. 821; Kern *v.* Burden Iron Co., 40 N. Y. App. Div. 547, 57 N. Y. Suppl. 965; Garvey *v.* New York, etc., Mail Steamship Co., 26 N. Y. App. Div. 456, 50 N. Y. Suppl. 77; Martin *v.* Cook, 60 Hun 577, 14 N. Y. Suppl. 329.

Oregon.— Duntley *v.* Inman, 42 Oreg. 334, 70 Pac. 529, 59 L. R. A. 785.

Pennsylvania.— McGinnis *v.* Kerr, 204 Pa. St. 615, 54 Atl. 479; Kupp *v.* Rummel, 199 Pa. St. 90, 48 Atl. 679; Wojciechowski *v.* Spreckels Sugar Refining Co., 177 Pa. St. 57, 35 Atl. 596; Mixter *v.* Imperial Coal Co., 152 Pa. St. 395, 25 Atl. 587.

Texas.— Houston, etc., R. Co. *v.* Fowler, 56 Tex. 452; Texas Mexican R. Co. *v.* Mendez, (Civ. App. 1903) 78 S. W. 25; McNiff *v.* Texas Midland R. Co., 26 Tex. Civ. App. 558, 64 S. W. 1010. But see Gulf, etc., R. Co. *v.* Wood, (Civ. App. 1901) 63 S. W. 164.

Washington.— Stratton *v.* C. H. Nichols Lumber Co., 39 Wash. 323, 81 Pac. 831, 109 Am. St. Rep. 881.

Wisconsin.— Cosgrove *v.* Filer, etc., Co., 112 Wis. 457, 88 N. W. 220. *Compare* Beyersdorf *v.* Cream City Sasb, etc., Co., 109 Wis. 456, 84 N. W. 860.

United States.—Patton *v.* Texas, etc., R. Co., 95 Fed. 244, 37 C. C. A. 56; Southern Pac. Co. *v.* Johnson, 69 Fed. 559, 16 C. C. A. 317; The Harry Buschman, 33 Fed. 558. But see The Yoxford, 33 Fed. 521.

See 34 Cent. Dig. tit. "Master and Servant," § 955.

That an appliance turns out to be unsafe will not establish the liability of the master for the injury received thereby, unless the circumstances justify an inference that the master had not used the reasonable care required of him. Baldwin *v.* Atlantic City R. Co., 64 N. J. L. 232, 45 Atl. 810.

89. Mobile, etc., R. Co. *v.* Bromberg, 141 Ala. 258, 37 So. 395.

90. Stewart *v.* Ferguson, 164 N. Y. 553, 58 N. E. 662 [*affirming* 52 N. Y. App. Div. 317, 65 N. Y. Suppl. 149]; Tierney *v.* Vunck, 97 N. Y. App. Div. 1, 89 N. Y. Suppl. 612; Johnson *v.* Roach, 83 N. Y. App. Div. 351, 82 N. Y. Suppl. 203. *Compare* Holzman *v.* Katzman, 84 N. Y. Suppl. 250.

91. Ebbitt *v.* Milliken, 103 N. Y. App. Div. 211, 92 N. Y. Suppl. 1033.

92. **Cause of injury** see *supra*, IV, H, 3, c, (III).

Existence of defect or happening of accident see *supra*, IV, H, 3, c, (IV), (B).

93. **Negligence in regard to appliances or places for work shown.**— *Alabama.*— Northern Alabama R. Co. *v.* Shea, 142 Ala. 119, 37 So. 796, defective track.

(2) Customary Appliances. Proof that an appliance is one customarily used

Arkansas.— St. Louis, etc., R. Co. *v.* Robbins, 57 Ark. 377, 21 S. W. 886 (defective track); Little Rock, etc., R. Co. *v.* Voss, (1892) 18 S. W. 172 (obstruction on track).

California.— Monaghan *v.* Pacific Rolling-Mill Co., 81 Cal. 190, 22 Pac. 590.

Georgia — Ousley *v.* Central R., etc., Co., 86 Ga. 538, 12 S. E. 938, defective draw-bar.

Illinois.— Illinois Steel Co. *v.* Olste, 214 Ill. 181, 73 N. E. 585; Henrietta Coal Co. *v.* Campbell, 211 Ill. 216, 71 N. E. 863 [*affirming* 112 Ill. App. 452]; Rock Island Sash, etc., Works *v.* Pohlman, 210 Ill. 133, 71 N. E. 428 [*affirming* 99 Ill. App. 670]; Illinois Cent. R. Co. *v.* Behrens, 208 Ill. 20, 69 N. E. 796 [*affirming* 106 Ill. App. 471]; Riverton Coal Co. *v.* Shepherd, 207 Ill. 395, 69 N. E. 921; Momence Stone Co. *v.* Turrell, 205 Ill. 515, 68 N. E. 1078 [*affirming* 106 Ill. App. 160]; John S. Metcalf Co. *v.* Nystedt, 203 Ill. 333, 67 N. E. 374 [*affirming* 102 Ill. App. 71]; Union Bridge Co. *v.* Teehan, 190 Ill. 374, 60 N. E. 533 [*affirming* 92 Ill. App. 259]; Pioneer Cooperage Co. *v.* Romanowicz, 186 Ill. 9, 57 N. E. 864 [*affirming* 85 Ill. App. 487]; Ross *v.* Shanley, 185 Ill. 390, 56 N. E. 1105 [*affirming* 86 Ill. App. 144]; Donley *v.* Dougherty, 174 Ill. 582, 51 N. E. 714 [*affirming* 75 Ill. App. 379]; National Linseed Oil Co. *v.* McBlain, 164 Ill. 597, 45 N. E. 1015 [*affirming* 64 Ill. App. 117]; Joliet Steel Co. *v.* Shields, 146 Ill. 603, 34 N. E. 1108 [*affirming* 45 Ill. App. 453]; Chicago Union Traction Co. *v.* Sawrisch, 119 Ill. App. 349 [*affirmed* in 218 Ill. 130, 75 N. E. 797]; Jupiter Coal Min. Co. *v.* Mercer, 84 Ill. App. 96.

Indiana.— Perry-Matthews-Buskirk Stone Co. *v.* Speer, (App. 1905) 73 N. E. 933; Chicago, etc., R. Co. *v.* Marton, 31 Ind. App. 308, 65 N. E. 591; Pittsburgh, etc., R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. Rep. 120; Pennsylvania Co. *v.* Burgett, 7 Ind. App. 338, 33 N. E. 914, 34 N. E. 650.

Iowa — Foster *v.* Chicago, etc., R. Co., 127 Iowa 84, 102 N. W. 422 (defective brake); Taylor *v.* Star Coal Co., 110 Iowa 40, 81 N. W. 249; Allen *v.* Chicago, etc., R. Co., 95 Iowa 592, 64 N. W. 613 (defective blocked frog); Seagel *v.* Chicago, etc., R. Co., 83 Iowa 380, 49 N. W. 990 (defective track).

Kansas.—Atchison, etc., R. Co. *v.* Stanley, 71 Kan. 520, 81 Pac. 176 (defective roadbed); Chicago, etc., R. Co. *v.* Blevins, 46 Kan. 370, 26 Pac. 687.

Kentucky — Louisville, etc., R. Co. *v.* Poulter, 119 Ky. 558, 84 S. W. 576, 27 Ky. L. Rep. 193 (defectively constructed scaffold); Mergenthaler-Horton Basket Co. *v.* Taylor, 90 S. W. 968, 28 Ky. L. Rep. 923; Andricus *v.* Pineville Coal Co., 90 S. W. 233, 28 Ky. L. Rep. 704; Stratton *v.* Mattingly, 89 S. W. 513, 28 Ky. L. Rep. 472; Monongahela River Consol. Coal, etc., Co. *v.* Campbell, 78 S. W. 405, 25 Ky. L. Rep. 1599; Kentucky Cent. R. Co. *v.* Ryle, 18 S. W. 938, 13 Ky. L. Rep. 862.

Louisiana.— Taliaferro *v.* Vicksburg, etc., R. Co., 115 La. 443, 39 So. 437.

Maine.— McCarthy *v.* Claflin, 99 Me. 290, 59 Atl. 293.

Massachusetts.— Chambers *v.* Wampanoag Mills, 189 Mass. 529, 75 N. E. 1093; Moylon *v.* D. S. McDonald Co., 188 Mass. 499, 74 N. E. 929; Gregory *v.* American Thread Co., 187 Mass. 239, 72 N. E. 962; Gomes *v.* New Bedford Cordage Co., 187 Mass. 124, 72 N. E. 840 (unguarded cogwheel); Cunningham *v.* Atlas Tack Co., 187 Mass. 51, 72 N. E. 325; Droney *v.* Doherty, 186 Mass. 205, 71 N. E. 547 (defective safety clutches to elevator); McLean *v.* Paine, 181 Mass. 287, 63 N. E. 883; Packer *v.* Thomson-Houston Electric Co., 175 Mass. 496, 56 N. E. 704; Mooney *v.* Connecticut River Lumber Co., 154 Mass. 407, 28 N. E. 352; White *v.* Nonantum Worsted Co., 144 Mass. 276, 11 N. E. 75.

Michigan.— Mayer *v.* Detroit, etc., R. Co., 142 Mich. 459, 105 N. W. 888; McDonald *v.* Champion Iron, etc., Co., 140 Mich. 401, 103 N. W. 829; Irvine *v.* Flint, etc., R. Co., 89 Mich. 416, 50 N. W. 1008, improperly loaded car.

Minnesota.— Erickson *v.* Northwest Paper Co., 95 Minn. 356, 104 N. W. 291 (unguarded machinery); Merrill *v.* Pike, 94 Minn. 186, 102 N. W. 393 (unguarded hole in floor); Haidt *v.* Swift, 94 Minn. 146, 102 N. W. 388; Swanson *v.* Oakes, 93 Minn. 404, 101 N. W. 949; Kurstelska *v.* Jackson, 93 Minn. 385, 101 N. W. 606; Hendricks *v.* Lesure Lumber Co., 92 Minn. 318, 99 N. W. 1125, 100 N. W. 638; Le Duc *v.* Northern Pac. R. Co., 92 Minn. 287, 100 N. W. 108; Chittick *v.* Minneapolis, etc., R. Co., 88 Minn. 11, 92 N. W. 462; Jacobson *v.* Johnson, 87 Minn. 185, 91 N. W. 465; Sandahl *v.* Lammers, 85 Minn. 162, 88 N. W. 532; Thiel *v.* Kennedy, 82 Minn. 142, 84 N. W. 657; Krogstad *v.* Northern Pac. R. Co., 46 Minn. 18, 48 N. W. 409.

Missouri.— Oglesby *v.* Missouri Pac. R. Co., 177 Mo. 272, 76 S. W. 623 (defective car); Copeland *v.* Wabash R. Co., 175 Mo. 650, 75 S. W. 106; Shore *v.* American Bridge Co., 111 Mo. App. 278, 86 S. W. 905 (scaffold erected from materials furnished by master); Mitchell *v.* Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647 (car built by master); Larson *v.* Center Creek Min. Co., 71 Mo. App. 512.

Nebraska.— Fremont Brewing Co. *v.* Schulz, (1904) 101 N. W. 234.

New Hampshire.— Jaques *v.* Great Falls Mfg. Co., 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824.

New York.— Brown *v.* New York Cent., etc., R. Co., 166 N. Y. 626, 60 N. E. 1107 [*affirming* 42 N. Y. App. Div. 548, 59 N. Y. Suppl. 672]; Tetherton *v.* U. S. Talc Co., 165 N. Y. 665, 59 N. E. 1131 [*affirming* 41 N. Y. App. Div. 613, 58 N. Y. Suppl. 55]; Neagle *v.* Syracuse, etc., R. Co., 109 N. Y. App. Div. 339, 95 N. Y. Suppl. 884; Crilley *v.* New Amsterdam Gas Co., 106 N. Y. App. Div. 127, 94 N. Y. Suppl. 102; Finn *v.* Ironclad Mfg. Co., 99 N. Y. App. Div. 625, 90 N. Y. Suppl. 887;

for the purpose, while not conclusive, tends to show due care on the part of the

Stenger *v.* Buffalo Union Furnace Co., 98 N. Y. App. Div. 361, 90 N. Y. Suppl. 222; Welk *v.* Jackson Architectural Iron Works, 98 N. Y. App. Div. 247, 90 N. Y. Suppl. 541; Brown *v.* New York Cent., etc., R. Co., 42 N. Y. App. Div. 548, 59 N. Y. Suppl. 672; Sullivan *v.* Union R. Co., 7 N. Y. App. Div. 238, 40 N. Y. Suppl. 84; Earle *v.* Clyde Steamship Co., 43 Misc. 535, 89 N. Y. Suppl. 500; Van Tassell *v.* New York, etc., R. Co., 1 Misc. 299, 20 N. Y. Suppl. 708 [*affirmed* in 142 N. Y. 634, 37 N. E. 566].

Ohio.— See Hill *v.* Lake Shore, etc., R. Co., 22 Ohio Cir. Ct. 291, 12 Ohio Cir. Dec. 241, construing Rev. St. § 3365–21, as to what is embraced in the term "defective machinery."

Pennsylvania.— McKee *v.* Crucible Steel Co., 213 Pa. St. 333, 62 Atl. 921; Butterman *v.* McClintic-Marshall Constr. Co., 206 Pa. St. 82, 55 Atl. 839; O'Brien *v.* Sullivan, 195 Pa. St. 474, 46 Atl. 130.

Rhode Island.— Petrarca *v.* Quidnick Mfg. Co., 27 R. I. 265, 61 Atl. 648; McCaughey *v.* Jenckes Spinning Co., 26 R. I. 426, 59 Atl. 110; Cummings *v.* National, etc., Worsted Mills, 24 R. I. 390, 53 Atl. 280; McGar *v.* National, etc., Worsted Mills, 22 R. I. 347, 47 Atl. 1092.

South Dakota.— Hedlun *v.* Holy Terror Min. Co., 16 S. D. 261, 92 N. W. 31.

Tennessee.—Robertson *v.* Cayard, 111 Tenn. 356, 77 S. W. 1056; Knoxville Iron Co. *v.* Pace, 101 Tenn. 476, 48 S. W. 232.

Texas.— Missouri Pac. R. Co. *v.* Jones, 75 Tex. 151, 12 S. W. 972, 16 Am. St. Rep. 879; Missouri, etc., R. Co. *v.* Lynch, (Civ. App. 1905) 90 S. W. 511; St. Louis, etc., R. Co. *v.* Bussong, (Civ. App. 1905) 90 S. W. 73; Missouri, etc., R. Co. *v.* Henserlang, (Civ. App. 1905) 86 S. W. 948; Gulf, etc., R. Co. *v.* Garren, (Civ. App. 1905) 84 S. W. 1096; Missouri, etc., R. Co. *v.* Keefe, (Civ. App. 1905) 84 S. W. 679; Texarkana, etc., R. Co. *v.* Toliver, (Civ. App. 1904) 84 S. W. 375; St. Louis, etc., R. Co. *v.* Skaggs, 32 Tex. Civ. App. 363, 74 S. W. 783; Galveston, etc., R. Co. *v.* Collins, 31 Tex. Civ. App. 70, 71 S. W. 560; Dupree *v.* Alexander, 29 Tex. Civ. App. 31, 68 S. W. 739; Missouri, etc., R. Co. *v.* Cox, (Civ. App. 1900) 55 S. W. 354, 56 S. W. 97; Hillsboro Oil Co. *v.* White, (Civ. App. 1899) 54 S. W. 432; Jones *v.* Shaw, 16 Tex. Civ. App. 290, 41 S. W. 690.

Virginia.— South West Imp. Co. *v.* Smith, 85 Va. 306, 7 S. E. 365, 17 Am. St. Rep. 59; Norfolk, etc., R. Co. *v.* Jackson, (1888) 6 S. E. 220.

Wisconsin.— Horr *v.* C. W. Howard Co., 126 Wis. 160, 105 N. W. 668; Nix *v.* C. Reiss Coal Co., 114 Wis. 493, 90 N. W. 437; Cosgrove *v.* Filer, etc., Co., 112 Wis. 457, 88 N. W. 220; Renne *v.* U. S. Leather Co., 107 Wis. 305, 83 N. W. 473; Welty *v.* Lake Superior Terminal, etc., R. Co., 100 Wis. 128, 75 N. W. 1022; Cadden *v.* American Steel Barge Co., 88 Wis. 409, 60 N. W. 800; Thompson *v.* Johnston Bros. Co., 86 Wis. 576, 57 N. W. 298.

United States.— Jones *v.* Pennsylvania R. Co., 114 Fed. 984; Choctaw, etc., R. Co. *v.* McDade, 112 Fed. 888, 50 C. C. A. 591; Northern Pac. R. Co. *v.* Charless, 51 Fed. 562, 2 C. C. A. 380; McFarland *v.* The J. C. Tuthill, 37 Fed. 714.

See 34 Cent. Dig. tit. "Master and Servant," §§ 958, 961–965.

Facts insufficient to show negligence.— Tuck *v.* Louisville, etc., R. Co., 98 Ala. 150, 12 So. 168; Little Rock, etc., R. Co. *v.* Eubanks, 48 Ark. 460, 3 S. W. 808, 3 Am. St. Rep. 245; Luman *v.* Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307; Lyons *v.* Knowles, (Cal. 1893) 32 Pac. 883; McNally *v.* Savannah, etc., R. Co., 86 Ga. 262, 12 S. E. 351; Georgia R., etc., Co. *v.* Nelms, 83 Ga. 70, 9 S. E. 1049, 20 Am. St. Rep. 308; Karr Supply Co. *v.* Kroenig, 167 Ill. 560, 47 N. E. 1051; Chicago, etc., R. Co. *v.* Pennell, 94 Ill. 448; New Virginia Coal Co. *v.* Gower, 119 Ill. App. 1; Junction Min. Co. *v.* Ench, 111 Ill. App. 346; McAlonan *v.* McArthur Bros. Co., 96 Ill. App. 13; Odin Coal Co. *v.* Denman, 84 Ill. App. 190 [*affirmed* in 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45]; Starne Coal Co. *v.* Ryan, 48 Ill. App. 216; St. Louis Bridge Co. *v.* Fellows, 39 Ill. App. 456; Cooper *v.* Wabash R. Co., 11 Ind. App. 211, 38 N. E. 823; Choctaw, etc., R. Co. *v.* Nicholas, 3 Indian Terr. 40, 53 S. W. 475; McCarthy *v.* Mulgrew, (Iowa 1898) 77 N. W. 527; Louisville, etc., R. Co. *v.* Mounce, 71 S. W. 518, 24 Ky. L. Rep. 1378; Boston *v.* Baffum, 97 Me. 230, 54 Atl. 392; Chisholm *v.* Donovan, 188 Mass. 378, 74 N. E. 652; Hayes *v.* New York, etc., R. Co., 187 Mass. 182, 72 N. E. 841; Needham *v.* Stone, 186 Mass. 565, 72 N. E. 80; Gauges *v.* Fitchburg R. Co., 185 Mass. 76, 69 N. E. 1063; Kilberg *v.* Berry, 166 Mass. 488, 44 N. E. 603; Carroll *v.* Willcut, 163 Mass. 221, 39 N. E. 1016; Carbury *v.* Downing, 154 Mass. 248, 28 N. E. 162; Morse *v.* Glendon Co., 125 Mass. 282; Beunk *v.* Valley City Desk Co., 133 Mich. 440, 95 N. W. 548; Huffman *v.* Michigan Cent. R. Co., 109 Mich. 251, 67 N. W. 118; Perry *v.* Michigan Cent. R. Co., 108 Mich. 130, 65 N. W. 608; Robinson *v.* Wright, 94 Mich. 283, 53 N. W. 938; Miller *v.* Chicago, etc., R. Co., 90 Mich. 230, 51 N. W. 370; Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, 34 N. W. 659; McKenna *v.* Chicago, etc., R. Co., 92 Minn. 508, 100 N. W. 373, 101 N. W. 178; Jones *v.* Chicago, etc., R. Co., 80 Minn. 488, 83 N. W. 446, 49 L. R. A. 640; Illinois Cent. R. Co. *v.* Woolley, 77 Miss. 927, 28 So. 26; Blundell *v.* William A. Miller Elevator Mfg. Co., 189 Mo. 552, 88 S. W. 103; Minnier *v.* Sedalia, etc., R. Co., 167 Mo. 99, 66 S. W. 1072; Kappes *v.* Brown Shoe Co., 116 Mo. App. 154, 90 S. W. 1158; Breeden *v.* Big Circle Min. Co., 103 Mo. App. 176, 76 S. W. 731; Nolan *v.* Montana Cent. R. Co., 25 Mont. 107, 63 Pac. 926; Kelley *v.* Cable Co., 8 Mont. 440, 20 Pac. 669; Lincoln Gas, etc., Co. *v.* Thomas, (Nebr. 1905) 104

master in furnishing it.[94] So too a master may show due care by proof that he has used similar appliances or materials for a length of time without accident.[95]

(3) KNOWLEDGE BY MASTER OF DEFECT OR DANGER. In order to show the master's negligence plaintiff must make an affirmative showing of actual knowledge on his part of the defect or danger, or else prove facts which show that, in the exercise of ordinary care, he should have known it.[96] On the other hand the

N. W. 153; Chicago, etc., R. Co. *v.* Howard, 45 Nebr. 570, 63 N. W. 872; Smith *v.* Boston, etc., R. Co., 73 N. H. 325, 61 Atl. 359; Manning *v.* Manchester Mills, 70 N. H. 582, 49 Atl. 91; Gernand *v.* Smith, 66 N. J. L. 390, 49 Atl. 427; Soderman *v.* Kemp, 145 N. Y. 427, 40 N. E. 212; Harley *v.* Buffalo Car Mfg. Co., 142 N. Y. 31, 36 N. E. 813; Dolan *v.* Herring-Hall-Marvin Safe Co., 105 N. Y. App. Div. 366, 94 N. Y. Suppl. 241; Hogan *v.* Strauss, 104 N. Y. App. Div. 623, 93 N. Y. Suppl. 850; Dolan *v.* New York Sanitary Utilization Co., 104 N. Y. App. Div. 14, 93 N. Y. Suppl. 217; Sheridan *v.* Interborough Rapid Transit Co., 101 N. Y. App. Div. 534, 91 N. Y. Suppl. 1052; Schapiro *v.* Levy, 101 N. Y. App. Div. 444, 91 N. Y. Suppl. 1044; Goodhines *v.* Chase, 100 N. Y. App. Div. 87, 91 N. Y. Suppl. 313; Young *v.* Mason Stable Co., 96 N. Y. App. Div. 305, 89 N. Y. Suppl. 349; Hoehn *v.* Lautz, 94 N. Y. App. Div. 14, 87 N. Y. Suppl. 921; Wagner *v.* New York, etc., R. Co., 93 N. Y. App. Div. 14, 86 N. Y. Suppl. 921; Nugent *v.* Brooklyn Union El. R. Co., 64 N. Y. App. Div. 351, 72 N. Y. Suppl. 67; Farrell *v.* Middletown, 56 N. Y. App. Div. 525, 67 N. Y. Suppl. 483; Olsen *v.* Starin, 43 N. Y. App. Div. 422, 60 N. Y. Suppl. 134; Donnelly *v.* New York, etc., R. Co., 3 N. Y. App. Div. 408, 38 N. Y. Suppl. 709; Irvine *v.* F. H. Palmer Mfg. Co., 2 N. Y. App. Div. 69, 37 N. Y. Suppl. 322; Kenney *v.* Second Ave. R. Co., 89 Hun 340, 35 N. Y. Suppl. 395; Toms *v.* Buffalo Creek R. Co., 70 Hun 84, 23 N. Y. Suppl. 1112; Mullins *v.* Manhattan Brass Co., 47 Misc. 138, 93 N. Y. Suppl. 635; Benedict *v.* Scheider, 14 N. Y. Suppl. 888; McGovern *v.* Central Vermont R. Co., 6 N. Y. Suppl. 838; Bajus *v.* Syracuse, etc., R. Co., 5 N. Y. Suppl. 804; Clement *v.* Rankin Knitting Co., 3 N. Y. Suppl. 169; Ferguson *v.* Fall Brook Coal Co., 4 N. Y. St. 423; Hendrix *v.* Cooleemee Cotton Mills, 138 N. C. 169, 50 S. E. 561; Cleveland, etc., R. Co. *v.* Ullom, 20 Ohio Cir. Ct. 512, 11 Ohio Cir. Dec. 321; Diver *v.* Singer Mfg. Co., 205 Pa. St. 170, 54 Atl. 718; Hall *v.* Simpson, 203 Pa. St. 146, 52 Atl. 4; Smith *v.* Philadelphia Traction Co., 202 Pa. St. 54, 51 Atl. 345; McCarthy *v.* Shoneman, 198 Pa. St. 568, 48 Atl. 493; Rehm *v.* Pennsylvania R. Co., 164 Pa. St. 91, 30 Atl. 356; Hart *v.* H. C. Frick Coke Co., 131 Pa. St. 125, 18 Atl. 1011; Erie, etc., R. Co. *v.* Smith, 125 Pa. St. 259, 17 Atl. 443, 11 Am. St. Rep. 895; Carr *v.* American Locomotive Co., 26 R. I. 180, 58 Atl. 678; Rogers *v.* Granger, 21 R. I. 83, 41 Atl. 1010; Houston, etc., R. Co. *v.* Barrager, (Tex. 1890) 14 S. W. 242; Missouri, etc., R. Co. *v.* Hanson, (Tex. Civ. App. 1905) 90 S. W. 1122; Texas, etc., R. Co. *v.* Hemphill, (Tex. Civ. App. 1905) 86 S. W. 350; Galveston, etc., R. Co. *v.* Butchek, (Tex. Civ. App. 1901) 66 S. W. 335; Brown *v.* Miller, (Tex. Civ. App. 1901) 62 S. W. 547; Houston, etc., R. Co. *v.* Loeffler, (Tex. Civ. App. 1900) 59 S. W. 558; Lyon *v.* Galveston, etc., R. Co., 10 Tex. Civ. App. 10, 29 S. W. 1107; Gulf, etc., R. Co. *v.* Abbott, (Tex. Civ. App. 1893) 24 S. W. 299; Moore Line Co. *v.* Johnston, 103 Va. 84, 48 S. E. 557; Sitterding *v.* Patterson, 101 Va. 296, 43 S. E. 557; Atlantic, etc., R. Co. *v.* West, 101 Va. 13, 42 S. E. 914; Norfolk, etc., R. Co. *v.* Poole, 100 Va. 148, 40 S. E. 627; South-West Imp. Co. *v.* Andrew, 86 Va. 270, 9 S. E. 1015; Dunlavey *v.* Racine Malleable, etc., Iron Co., 110 Wis. 391, 85 N. W. 1025; Badger *v.* Janesville Cotton Mills, 95 Wis. 599, 70 N. W. 687; Orttel *v.* Chicago, etc., R. Co., 89 Wis. 127, 61 N. W. 289; Riley *v.* Louisville, etc., R. Co., 133 Fed. 904, 66 C. C. A. 598; The France, 59 Fed. 479, 8 C. C. A. 185.

Evidence of the abnormal action of a machine can only be the basis of an inference tending to show an insufficiency in its construction and repair as the producing cause of the injury, and is conclusively rebutted by evidence that it was free from all discoverable defects. Montanye *v.* Northern Electrical Mfg. Co., 127 Wis. 22, 105 N. W. 1043.

94. *California.*—Martin *v.* California Cent. R. Co., 94 Cal. 326, 29 Pac. 645.

Massachusetts.— Fuller *v.* New York, etc., R. Co., 175 Mass. 424, 56 N. E. 574.

Michigan.— Kellogg *v.* Stephens Lumber Co., 125 Mich. 222, 84 N. W. 136.

New York.— Kunz *v.* Stuart, 1 Daly 431.

United States.— Nyback *v.* Champagne Lumber Co., 109 Fed. 732, 48 C. C. A. 632.

See 34 Cent. Dig. tit. "Master and Servant," § 960.

95. Hart, etc., Mfg. Co. *v.* Tima, 85 Ill. App. 310; Fukare *v.* Kerbaugh, 72 N. J. L. 254, 61 Atl. 376; Skapura *v.* National Sugar Refining Co., 83 N. Y. App. Div. 21, 81 N. Y. Suppl. 1085.

96. Facts held to show knowledge.— *Colorado.*— New York, etc., Min. Syndicate, etc. *v.* Rogers, 11 Colo. 6, 16 Pac. 719, 7 Am. St. Rep. 198.

Illinois.— Momence Stone Co. *v.* Turrell, 205 Ill. 515, 68 N. E. 1078 [*affirming* 106 Ill. App. 160]; Chicago, etc., R. Co. *v.* Russell, 91 Ill. 298, 33 Am. Rep. 54.

Indiana.— Chicago, etc., R. Co. *v.* Branyan, 10 Ind. App. 570, 37 N. E. 190.

Kansas.— Good-Eye Min. Co. *v.* Robinson,

master may show his ignorance of defects by proof that they were latent, and not discoverable on ordinary inspection.[97]

(D) *Methods of Work, Rules, and Orders.* Where the master is charged with negligence in respect to his methods of work, rules, or orders, plaintiff must establish such negligence by a preponderance of evidence.[98] Just what evidence

67 Kan. 510, 73 Pac. 102; Atchison, etc., R. Co. *v.* Holt, 29 Kan. 149.

Missouri.— Stoher *v.* St. Louis, etc., R. Co., 105 Mo. 192, 16 S. W. 591.

Nebraska.— Union Stock Yards Co. *v.* Larson, 38 Nebr. 492, 56 N. W. 1079.

Wisconsin.—Baumann *v.* C. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139.

United States.— Texas, etc., R. Co. *v.* Patton, 61 Fed. 259, 9 C. C. A. 487.

See 34 Cent. Dig. tit. "Master and Servant," § 966.

Knowledge not shown see Yates *v.* Huntsville Hoop, etc., Co., (Ala. 1905) 39 So. 647; Chicago, etc., R. Co. *v.* Driscoll, 176 Ill. 330, 52 N. E. 921 [*reversing* 70 Ill. App. 91]; Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660, 7 Pac. 204 (in which there was only proof of a single defective operation of the machinery); Kelly *v.* Shelby R. Co., 22 S. W. 445, 15 Ky. L. Rep. 311; Krampe *v.* St. Louis Brewing Assoc., 59 Mo. App. 277; Lineoski *v.* Susquehanna Coal Co., 157 Pa. St. 153, 27 Atl. 577; Clough *v.* Hoffman, 132 Pa. St. 626, 19 Atl. 299, 19 Am. St. Rep. 620; Hover *v.* Chicago, etc., R. Co., (Tex. Civ. App. 1905) 89 S. W. 1084; Toner *v.* Chicago, etc., R. Co., 69 Wis. 188, 31 N. W. 104, 33 N. W. 433; The Rheola, 7 Fed. 781.

Facts showing negligence as to inspection, test, and repair.— Shea *v.* Pacific Power Co., 145 Cal. 680, 79 Pac. 373; Maydole *v.* Denver, etc., R. Co., 15 Colo. App. 449, 62 Pac. 964; Seagel *v.* Chicago, etc., R. Co., 83 Iowa 380, 49 N. W. 990; O'Neil *v.* Ginn, 188 Mass. 346, 74 N. E. 668; Irvine *v.* Flint, etc., R. Co., 89 Mich. 416, 50 N. W. 1008; Bender *v.* Great Northern R. Co., 89 Minn. 163, 94 N. W. 546; Thompson *v.* Great Northern R. Co., 79 Minn. 291, 82 N. W. 637; Smith *v.* New York, etc., R. Co., 178 N. Y. 635, 71 N. E. 1139 [*affirming* 86 N. Y. App. Div. 188, 83 N. Y. Suppl. 259]; Myers *v.* Erie R. Co., 44 N. Y. App. Div. 11, 60 N. Y. Suppl. 422; McDonald *v.* Postal Tel. Co., 22 R. I. 131, 46 Atl. 407, 91 Am. St. Rep. 659; Chattanooga Machinery Co. *v.* Hargraves, 111 Tenn. 476, 78 S. W. 105; International, etc., R. Co. *v.* Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772; Cowan *v.* Chicago, etc., R. Co., 80 Wis. 284, 50 N. W. 180; Felton *v.* Bullard, 94 Fed. 781, 37 C. C. A. 1. See also Greenfield *v.* Lake Shore, etc., R. Co., 117 Mich. 307, 75 N. W. 616. *Compare* Louisville, etc., R. Co. *v.* Campbell, 97 Ala. 147, 12 So. 574; Sack *v.* Dolese, 137 Ill. 129, 27 N. E. 62 [*affirming* 35 Ill. App. 636]; Chicago, etc., R. Co. *v.* Hagar, 11 Ill. App. 498; Columbus, etc., R. Co. *v.* Celley, 1 Ohio Cir. Ct. 267, 1 Ohio Cir. Dec. 146; Dickerson *v.* Central R. Co., 189 Pa. St. 567, 42 Atl. 299.

Where it has been shown that defendant "constructed" the defective machinery, no further proof of knowledge of its defects is required. Consolidated Stone Co. *v.* Morgan, 160 Ind. 241, 66 N. E. 696.

Strain on bridge.— The fact that a bridge which fell while plaintiff was crossing it had but two hours before stood twice as much weight as that under which it went down does not conclusively show that defendant could not reasonably have known its unsafe condition. Murray *v.* Usher, 46 Hun (N. Y.) 404 [*affirmed* in 117 N. Y. 542, 23 N. E. 564].

Necessity of showing how long defect has existed see Oehme *v.* Cook, 15 Daly (N. Y.) 381, 28 N. Y. St. 12.

97. Western, etc., R. Co. *v.* Beason, 112 Ga. 553, 37 S. E. 863; Pilucki *v.* Detroit Steel, etc., Works, 117 Mich. 111, 75 N. W. 295; Smith *v.* Chicago, etc., R. Co., 42 Wis. 520. *Compare* Anderson *v.* Minnesota, etc., R. Co., 39 Minn. 523, 41 N. W. 104; Johnson *v.* Bellingham Bay Imp. Co., 13 Wash. 455, 43 Pac. 370.

98. Facts held insufficient to show negligence.— *Georgia.*— Reese *v.* Georgia R., etc., Co., 91 Ga. 97, 16 S. E. 344.

Illinois.— Pioneer Fire Proof Constr. Co. *v.* Sandberg, 98 Ill. App. 36; Illinois Cent. R. Co. *v.* Neer, 31 Ill. App. 126 [*reversed* on other grounds in 138 Ill. 29, 27 N. E. 705].

Indiana.—Cooper *v.* Wabash R. Co., 11 Ind. App. 211, 38 N. E. 823.

Iowa.— McCarthy *v.* Chicago, etc., R. Co., 83 Iowa 485, 50 N. W. 21; Ford *v.* Central Iowa R. Co., 69 Iowa 627, 21 N. W. 587, 29 N. W. 755.

Kansas.—Telle *v.* Leavenworth Rapid Transit Co., 50 Kan. 455, 3 Pac. 1076.

Massachusetts.— Hale *v.* New York, etc., R. Co., 174 Mass. 317, 54 N. E. 844; O'Neil *v.* O'Leary, 164 Mass. 387, 41 N. E. 662; Peaslee *v.* Fitchburg R. Co., 152 Mass. 155, 25 N. E. 71.

Minnesota.— Woods *v.* St. Paul, etc., R. Co., 39 Minn. 435, 40 N. W. 510; Anderson *v.* L. T. Sowle Elevator Co., 37 Minn. 539, 35 N. W. 382.

Missouri.— Glover *v.* Kansas City Bolt, etc., Co., 153 Mo. 327, 55 S. W. 88; Ring *v.* Missouri Pac. R. Co., 112 Mo. 220, 20 S. W. 436.

Montana.— Sweeney *v.* Great Falls, etc., R. Co., 11 Mont. 523, 29 Pac. 15.

New Hampshire.— Hill *v.* Boston, etc., R. Co., 72 N. H. 518, 57 Atl. 924; Foss *v.* Baker, 62 N. H. 247.

New York.— McFadden *v.* Campbell, 13 Misc. 158, 34 N. Y. Suppl. 136; Corcoran *v.* Delaware, etc., R. Co., 19 N. Y. Suppl. 994.

North Carolina.— Keck *v.* American Tel., etc., Co., 131 N. C. 277, 42 S. E. 610.

Ohio.— Gawlack *v.* Michigan Cent. R. Co., 11 Ohio Cir. Ct. 59, 5 Ohio Cir. Dec. 313.

will be sufficient necessarily depends upon the facts of the particular case,[99] and should be left to the jury.[1]

(E) *Employment or Retention of Incompetent Servants* — (1) IN GENERAL. Negligence in the employment or retention of an incompetent servant may be proved like any other fact by either direct or circumstantial evidence. To establish such negligence it is essential that plaintiff should show by a preponderance of evidence the fact of the servant's incompetency,[2] and it is also necessary

Rhode Island.— McGeary *v.* Old Colony R. Co., 21 R. I. 76, 41 Atl. 1007.

United States.— Baltimore, etc., R. Co. *v.* Doty, 133 Fed. 866.

See 34 Cent. Dig. tit. "Master and Servant," §§ 969, 971.

99. Negligence shown.— *California.*— Ryan *v.* Los Angeles Ice, etc., Co., 112 Cal. 244, 44 Pac. 471, 32 L. R. A. 524.

Georgia.— Richmond, etc., R. Co. *v.* Williams, 88 Ga. 16, 14 S. E. 120.

Illinois.— Chicago, etc., R. Co. *v.* Eaton, 194 Ill. 441, 62 N. E. 784, 88 Am. St. Rep. 161 [*affirming* 96 Ill. App. 570].

Iowa.— Meloy *v.* Chicago, etc., R. Co., 77 Iowa 743, 42 N. W. 563, 14 Am. St. Rep. 325, 4 L. R. A. 287; Doyle *v.* Chicago, etc., R. Co., 77 Iowa 607, 42 N. W. 555, 4 L. R. A. 420; Henry *v.* Sioux City, etc., R. Co., 75 Iowa 84, 39 N. W. 193, 9 Am. St. Rep. 457; Pierce *v.* Central Iowa R. Co., 73 Iowa 140, 34 N. W. 783.

Kentucky.— Barber *v.* Cincinnati, etc., R. Co., 21 S. W. 340, 14 Ky. L. Rep. 869.

Massachusetts.— Shea *v.* New York, etc., R. Co., 173 Mass. 177, 53 N. E. 396.

Minnesota.— Pierce *v.* Brennan, 88 Minn. 50, 92 N. W. 507; Moran *v.* Eastern R. Co., 48 Minn. 46, 50 N. W. 930; Stewart *v.* St. Paul, etc., R. Co., 43 Minn. 268, 45 N. W. 431.

Missouri.— Haworth *v.* Kansas City Southern R. Co., 94 Mo. App. 215, 68 S. W. 111.

New York.— Pelin *v.* New York Cent., etc., R. Co., 102 N. Y. App. Div. 71, 92 N. Y. Suppl. 468; Aleckson *v.* Erie R. Co., 101 N. Y. App. Div. 395, 91 N. Y. Suppl. 1029.

Pennsylvania.— Bannon *v.* Lutz, 158 Pa. St. 166, 27 Atl. 890; Grabowski *v.* Pennsylvania Steel Co., 2 Dauph. Co. Rep. 118.

Texas.— San Antonio, etc., R. Co. *v.* Anderson, 31 Tex. Civ. App. 327, 72 S. W. 219.

Utah.— Merrill *v.* Oregon Short Line R. Co., 29 Utah 264, 81 Pac. 85, 110 Am. St. Rep. 695.

Virginia.— Virginia Iron, etc., Co. *v.* Lore, 104 Va. 217, 51 S. E. 371.

Wisconsin.— Neilon *v.* Marinette, etc., Paper Co., 75 Wis. 579, 44 N. W. 772.

United States.— Northern Pac. R. Co. *v.* Mix, 121 Fed. 476, 57 C. C. A. 592; Rouse *v.* Hornsby, 67 Fed. 219, 14 C. C. A. 377; Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 38 Fed. 816.

See 34 Cent. Dig. tit. "Master and Servant," §§ 969, 971.

Facts showing negligent failure to warn or instruct.— Wilder *v.* Great Western Cereal Co., 130 Iowa 263, 104 N. W. 434; Klaffke *v.* Bettendorf Axle Co., 125 Iowa 223, 100 N. W. 1116; Atchison, etc., R. Co. *v.* Forkner, (Kan. 1899) 55 Pac. 854; Dolan *v.* Booth Cotton Mills, 185 Mass. 576, 70 N. E. 1025; Henry *v.* King Philip Mills, 155 Mass. 361, 29 N. E. 581; Hooper *v.* Great Northern R. Co., 80 Minn. 400, 83 N. W. 440; Ft. Worth, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1905) 87 S. W. 371; Texas Cent. R. Co. *v.* Pelfrey, 35 Tex. Civ. App. 501, 80 S. W. 1036; Pocahontas Collieries Co. *v.* Rukas, 104 Va. 278, 51 S. E. 449; Baumann *v.* C. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139. *Compare* Slate Creek Iron Co. *v.* Hall, 12 S. W. 579, 11 Ky. L. Rep. 546; Cron *v.* Toledo, etc., R. Co., 132 Mich. 497, 93 N. W. 1078; Wright *v.* Cooper, 127 Mo. 377, 30 S. W. 153.

1. Southern R. Co. *v.* Shields, 121 Ala. 460, 25 So. 811, 77 Am. St. Rep. 66; Groszewski *v.* Chicago Sugar Refining Co., 84 Ill. App. 583; McGrath *v.* Great Northern R. Co., 76 Minn. 146, 78 N. W. 972.

2. Facts held to show negligence.— *Illinois.* — Chicago, etc., Coal Co. *v.* Nelson, 71 Ill. App. 261.

Iowa.— Scott *v.* Iowa Tel. Co., 126 Iowa 524, 102 N. W. 432.

Massachusetts.— Ledwidge *v.* Hathaway, 170 Mass. 348, 49 N. E. 656.

Minnesota.— Gray *v.* Red Lake Falls Lumber Co., 85 Minn. 24, 88 N. W. 24.

New York.— Barkley *v.* New York Cent., etc., R. Co., 35 N. Y. App. Div. 228, 54 N. Y. Suppl. 766; Fines *v.* Sillery, 73 Hun 549, 26 N. Y. Suppl. 181, evidence that the servant was first employed on the day of the accident, and that the master made no inquiries about him, and knew nothing as to his fitness.

Texas.— Consumers' Cotton Oil Co. *v.* Jonte, 36 Tex. Civ. App. 18, 80 S. W. 847; Postal Tel. Cable Co. *v.* Coote, (Civ. App. 1900) 57 S. W. 912; International, etc., R. Co. *v.* Martinez, (Civ. App. 1900) 57 S. W. 689; International, etc., R. Co. *v.* Wing, (Civ. App. 1896) 34 S. W. 292.

Utah.— Scott *v.* Utah Consol. Min., etc., Co., 18 Utah 486, 56 Pac. 305.

Wisconsin.— Johnson *v.* St. Paul, etc., Coal Co., 126 Wis. 492, 105 N. W. 1048; Kamp *v.* Coxe, 122 Wis. 206, 99 N. W. 366.

United States.— Anderson *v.* New York, etc., Steamship Co., 47 Fed. 38 [*affirmed* in 50 Fed. 462, 1 C. C. A. 529].

See 34 Cent. Dig. tit. "Master and Servant," § 973.

Evidence held insufficient to show negligence on part of master.— Conrad *v.* Gray, 109 Ala. 130, 19 So. 398 (holding that the fact that the servant was guilty of negligence is as a matter of law insufficient to prove that the master was negligent in em-

to show that the master knew, or, in the exercise of ordinary care, should have known, of it.[3]

(2) Happening of Accident or Single Act of Negligence. The mere happening of an accident or proof of some previous act of negligence on the part of a servant is not sufficient to show that he was incompetent.[4]

(3) Cause of Injury. To entitle a servant to recover on the ground that his injuries resulted from the negligence of an incompetent fellow servant for whose employment or retention in the service defendant was chargeable with negligence, it must be definitely shown that it was in fact the negligence of such person which caused the injury.[5]

(F) *Insufficient Force For Work.* Negligence in the employment of an insufficient force of men for the work may be proved by direct or circumstantial evidence.[6]

ploying him); Gunn *v.* Willingham, 111 Ga. 427, 36 S. E. 804; Chicago, etc., R. Co. *v.* Myers, 83 Ill. App. 469 (holding that the fact that an engineer had been engaged as a railroad engineer for twenty-three years prior to his employment by defendant is *prima facie* evidence of his competency); Evansville, etc., R. Co. *v.* Tohill, 143 Ind. 49, 41 N. E. 709, 42 N. E. 352; Ohio, etc., R. Co. *v.* Dunn, 138 Ind. 18, 36 N. E. 702, 37 N. E. 546; McLeod *v.* Chicago, etc., R. Co., 125 Iowa 270, 101 N. W. 77; Wicklund *v.* Saylor Coal Co., 119 Iowa 335, 93 N. W. 305; Corson *v.* Maine Cent. R. Co., 76 Me. 244 (appearance of servant while testifying, together with evidence that he was slow and lazy); Baltimore *v.* War, 77 Md. 593, 27 Atl. 85; Baltimore Elevator Co. *v.* Neal, 65 Md. 438, 5 Atl. 338 (proofs of former acts of carelessness or unskilfulness); Delory *v.* Blodgett, 185 Mass. 126, 69 N. E. 1078, 102 Am. St. Rep. 328, 64 L. R. A. 114 (evidence that servant sometimes drank); Ettore *v.* Swingle, 183 Mass. 194, 66 N. E. 705; O'Neil *v.* O'Leary, 164 Mass. 387, 41 N. E. 662; Morse *v.* Glendon Co., 125 Mass. 282; Quincy Min. Co. *v.* Kitts, 42 Mich. 34, 3 N. W. 240; Fisher *v.* Central Lead Co., 156 Mo. 479, 56 S. W. 1107; Roblin *v.* Kansas City, etc., R. Co., 119 Mo. 476, 24 S. W. 1011; Zumwalt *v.* Chicago, etc., R. Co., 35 Mo. App. 661; Jorgenson *v.* Butte, etc., Commercial Co., 13 Mont. 288, 34 Pac. 37; Klos *v.* Hudson River Ore, etc., Co., 77 N. Y. App. Div. 566, 79 N. Y. Suppl. 156; Ging *v.* Miller, 207 Pa. St. 482, 56 Atl. 1008; Massey *v.* Snowden, 149 Pa. St. 410, 24 Atl. 338; East Tennessee, etc., R. Co. *v.* McKenney, (Tenn. 1886) 1 S. W. 500; Gulf, etc., R. Co. *v.* Pierce, 87 Tex. 144, 27 S. W. 60; International, etc., R. Co. *v.* Tarver, 72 Tex. 308, 11 S. W. 1043; Texas, etc., R. Co. *v.* Berry, 67 Tex. 238, 5 S. W. 817; Moore Lime Co. *v.* Johnston, 103 Va. 84, 48 S. E. 557; Dossett *v.* St. Paul, etc., Lumber Co., 40 Wash. 276, 82 Pac. 273; Grams *v.* C. Reiss Coal Co., 125 Wis. 1, 102 N. W. 586; Thomas *v.* Cincinati, etc., R. Co., 97 Fed. 245.

3. Acme Coal Min. Co. *v.* McIver, 5 Colo. App. 267, 38 Pac. 596; Seccombe *v.* Detroit Electric R. Co., 133 Mich. 170, 94 N. W. 747; Snodgrass *v.* Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104.

Facts held to show knowledge.— Calumet Electric St. R. Co. *v.* Peters, 88 Ill. App. 112; Cherokee, etc., Coal, etc., Co. *v.* Dickson, 10 Kan. App. 391, 61 Pac. 450; Lee *v.* Michigan Cent. R. Co., 87 Mich. 574, 49 N. W. 909; Williams *v.* Missouri Pac. R. Co., 109 Mo. 475, 18 S. W. 1098; Coppins *v.* New York Cent., etc., R. Co., 48 Hun (N. Y.) 292 [*affirmed* in 122 N. Y. 557, 25 N. E. 915, 19 Am. St. Rep. 523]; Lebbering *v.* Struthers, 157 Pa. St. 312, 27 Atl. 720; Houston, etc., R. Co. *v.* Patton, (Tex. 1888) 9 S. W. 175; Terrell *v.* Russell, 16 Tex. Civ. App. 573, 42 S. W. 129.

4. *California.*— Holland *v.* Southern Pac. Co., 100 Cal. 240, 34 Pac. 666.

Connecticut.— Sullivan *v.* New York, etc., R. Co., 62 Conn. 209, 25 Atl. 711.

Illinois.— Mobile, etc., R. Co. *v.* Godfrey, 155 Ill. 78, 39 N. E. 590; Chicago, etc., R. Co. *v.* Myers, 83 Ill. App. 469.

Iowa.— Hathaway *v.* Illinois Cent. R. Co., 92 Iowa 337, 60 N. W. 651.

Maryland.—Baltimore Elevator Co. *v.* Neal, 65 Md. 438, 5 Atl. 338.

Massachusetts.— Peaslee *v.* Fitchburg R. Co., 152 Mass. 155, 25 N. E. 71.

Michigan.— Michigan Cent. R. Co. *v.* Dolan, 32 Mich. 510.

Missouri.— McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285; Craig *v.* Chicago, etc., R. Co., 54 Mo. App. 523.

New York.— Harvey *v.* New York Cent., etc., R. Co., 88 N. Y. 481; Marrinan *v.* New York Cent., etc., R. Co., 13 N. Y. App. Div. 439, 43 N. Y. Suppl. 606; Burke *v.* Syracuse, etc., R. Co., 69 Hun 21, 23 N. Y. Suppl. 458; Baulec *v.* New York, etc., R. Co., 5 Lans. 436; Van Dusen *v.* Lake Shore, etc., R. Co., 12 N. Y. St. 351.

United States.— Thomas *v.* Cincinnati, etc., R. Co., 97 Fed. 245; Buckley *v.* Gould, etc., Min. Co., 14 Fed. 833, 8 Sawy. 394.

See 34 Cent. Dig. tit. "Master and Servant," § 974.

But see Atlanta Cotton Factory Co. *v.* Speer, 69 Ga. 137, 47 Am. Rep. 750.

5. Brunner *v.* Blaisdell, 170 Pa. St. 25, 32 Atl. 607; Brady *v.* Western Union Tel. Co., 113 Fed. 909, 51 C. C. A. 539.

6. *Alabama.*— Alabama Great Southern R. Co. *v.* Vail, 142 Ala. 134, 38 So. 124, 110 Am. St. Rep. 23.

(v) *Negligence of Fellow Servants*[7] — (A) *Relation Between Servants.* Whether the servants occupy the relation of fellow servants or whether one occupies such a position toward the other as to render the master liable for his negligence depends upon the facts and circumstances of the particular case and is generally to be determined by the jury under proper instructions from the court.[8]

(B) *Negligence of Fellow Servant.* The negligence of a fellow servant requires the same, and no more, proof than the negligence of the master himself.[9]

(VI) *Assumption of Risk.*[10] Assumption of risk is provable like any other fact in a civil case. It must be shown by a preponderance of evidence,[11] but

Arkansas.—St. Louis, etc., R. Co. *v.* Gaines, (1890) 13 S. W. 740, negligence not shown.

Illinois.— Supple *v.* Agnew, 191 Ill. 439, 61 N. E. 392 [*reversing* 80 Ill. App. 437].

Minnesota.— McKenna *v.* Chicago, etc., R. Co., 92 Minn. 508, 100 N. W. 373, 101 N. W. 178 (negligence not shown); Peterson *v.* American Grass Twine Co., 90 Minn. 343, 96 N. W. 913.

New York.— Tinney *v.* Boston, etc., R. Co., 52 N. Y. 632, negligence not shown.

See 34 Cent. Dig. tit. "Master and Servant," § 977.

7. As raising question for jury see *infra*, IV, H, 6, c, (v).

Presumptions and burden of proof see *supra*, IV, H, 3, a, (II), (C).

Review of questions of fact, verdicts, and findings see *supra*, IV, H, 10, b.

Sufficiency of findings to sustain verdict or judgment see *infra*, IV, H, 8, b.

To warrant giving of instructions see *infra*, IV, H, 7, c.

8. Facts held to show master liable for acts of superior servant.— *Alabama.*— Bessemer Land, etc., Co. *v.* Campbell, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17.

Massachusetts.— Knight *v.* Overman Wheel Co., 174 Mass. 455, 54 N. E. 890.

Missouri.— Warren *v.* Chicago, etc., R. Co., 113 Mo. App. 498, 87 S. W. 585; Neves *v.* Green, 111 Mo. App. 634, 86 S. W. 508.

Texas.— Austin Rapid Transit R. Co. *v.* Grothe, 88 Tex. 262, 31 S. W. 196.

Wisconsin.— Wysocki *v.* Wisconsin Lakes Ice, etc., Co., 121 Wis. 96, 98 N. W. 950.

See 34 Cent. Dig. tit. "Master and Servant," § 978.

Evidence held to show fellow service.— Illinois Steel Co. *v.* Coffey, 205 Ill. 206, 68 N. E. 751 [*reversing* 107 Ill. App. 582]; McLeod *v.* Chicago, etc., R. Co., 125 Iowa 270, 101 N. W. 77; Sullivan *v.* Thorndike Co., 175 Mass. 41, 55 N. E. 472; Fitzgerald *v.* Boston, etc., R. Co., 156 Mass. 293, 31 N. E. 7; Gillies *v.* Clarke Fork Coal Min. Co., 32 Mont. 320, 80 Pac. 370; Norfolk Beet-Sugar Co. *v.* Koch, 52 Nebr. 197, 71 N. W. 1015; McHugh *v.* Manhattan R. Co., 88 N. Y. App. Div. 554, 85 N. Y. Suppl. 184; Greenway *v.* Conroy, 160 Pa. St. 185, 28 Atl. 692, 40 Am. St. Rep. 715; Gates *v.* Chicago, etc., R. Co., 4 S. D. 433, 57 N. W. 200.

9. Facts held to show negligence of fellow servant.— *California.*— Luman *v.* Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307.

Idaho.— Larsen *v.* Le Doux, 11 Ida. 49, 81 Pac. 600.

Illinois.— Illinois Third Vein Coal Co. *v.* Cioni, 215 Ill. 583, 74 N. E. 751 [*affirming* 115 Ill. App. 455].

Iowa.— Struble *v.* Burlington, etc., R. Co., 128 Iowa 158, 103 N. W. 142. *Compare* Foley *v.* Cudahy Packing Co., 119 Iowa 246, 93 N. W. 284.

Massachusetts.— Needham *v.* Stone, 186 Mass. 565, 72 N. E. 80. *Compare* Morris *v.* Walworth Mfg. Co., 181 Mass. 326, 63 N. E. 910.

Minnesota.— Setterstrom *v.* Brainerd, etc., R. Co., 89 Minn. 262, 94 N. W. 882.

Rhode Island.— Ennis *v.* Little, 25 R. I. 342, 55 Atl. 884, 25 R. I. 401, 56 Atl. 110.

Virginia.— Norfolk, etc., R. Co. *v.* Cromer, 101 Va. 667, 44 S. E. 898.

See 34 Cent. Dig. tit. "Master and Servant," § 979.

Compare Southern Pac. Co. *v.* Pool, 160 U. S. 438, 16 S. Ct. 338, 40 L. ed. 485.

Wilful negligence not shown see Alabama Great Southern R. Co. *v.* Hall, 105 Ala. 599, 17 So. 176; Chambliss *v.* Mary Lee Coal, etc., Co., 104 Ala. 655, 16 So. 572; Fisher *v.* Louisville, etc., R. Co., 146 Ind. 558, 45 N. E. 689; Kentucky Cent. R. Co. *v.* Jameison, 20 S. W. 258, 14 Ky. L. Rep. 345; Simmons *v.* Louisville, etc., R. Co., 18 S. W. 1024, 13 Ky. L. Rep. 941; Koons *v.* Kansas City Suburban Belt R. Co., 178 Mo. 591, 77 S. W. 755. *Compare* Louisville, etc., R. Co. *v.* Hurst, 20 S. W. 817, 14 Ky. L. Rep. 632.

10. As raising question for jury see *infra*, IV, H, 6, d.

Presumptions and burden of proof see *supra*, IV, H, 3, a, (I), (D), (II), (D).

Review of questions of fact, verdicts, and findings see *infra*, IV, H, 10, b.

Sufficiency of findings to sustain verdict or judgment see *infra*, IV, H, 8, b.

To warrant giving of instructions see *infra*, IV, H, 7, d.

11. Assumption of risk not shown.— *California.*— Gisson *v.* Schwabacher, 99 Cal. 419, 34 Pac. 104; Magee *v.* North Pac. Coast R. Co., (1888) 20 Pac. 709, 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69.

Illinois.— Henrietta Coal Co. *v.* Campbell, 211 Ill. 216, 71 N. E. 863 [*affirming* 112 Ill. App. 452]; Momence Stone Co. *v.* Turrell, 205 Ill. 515, 68 N. E. 1078 [*affirming* 106 Ill. App. 160]; Chicago Screw Co. *v.* Weiss, 203 Ill. 536, 68 N. E. 54 [*affirming* 107 Ill. App. 39]; Dallemand *v.* Saalfeldt, 175 Ill.

where this is done it is sufficient. The degree of evidence necessary to warrant a recovery is neither more nor less than in other civil actions.[12]

(VII) *CONTRIBUTORY NEGLIGENCE.*[13] Like assumption of risk, which was

310, 51 N. E. 645, 67 Am. St. Rep. 214, 48 L. R. A. 753 [*affirming* 73 Ill. App. 151]; Illinois Terminal R. Co. *v.* Thompson, 112 Ill. App. 463 [*affirmed* in 210 Ill. 226, 71 N. E. 328].

Indiana.— Baltimore, etc., R. Co. *v.* Roberts, 161 Ind. 1, 67 N. E. 530.

Kentucky.— Mergenthaler-Horton Basket Co. *v.* Taylor, 90 S. W. 968, 28 Ky. L. Rep. 928; Ross-Paris Co. *v.* Brown, 90 S. W. 568, 28 Ky. L. Rep. 813.

Louisiana.— Hailey *v.* Texas, etc., R. Co., 113 La. 533, 37 So. 131.

Massachusetts.— Joyce *v.* American Writing Paper Co., 184 Mass. 230, 68 N. E. 213; McLean *v.* Paine, 181 Mass. 287, 63 N. E. 883.

Minnesota.— Merrill *v.* Pike, 94 Minn. 186, 102 N. W. 393; Jensen *v.* Commodore Min. Co., 94 Minn. 53, 101 N. W. 944; Ellington *v.* Great Northern R. Co., 92 Minn. 470; 100 N. W. 218; Hungerford *v.* Chicago, etc., R. Co., 41 Minn. 444, 43 N. W. 324.

Missouri.— Curtis *v.* McNair, 173 Mo. 270, 73 S. W. 167; Buckalew *v.* Quincy, etc., R. Co., 107 Mo. App. 575, 81 S. W. 1176.

New Hampshire.— Kasjeta *v.* Nashua Mfg. Co., 73 N. H. 22, 58 Atl. 874.

New Jersey.— Zitsch *v.* Steins, 9 N. J. L. J. 374.

New York.— Dorney *v.* O'Neill, 172 N. Y. 595, 64 N. E. 1120 [*affirming* 60 N. Y. App. Div. 19, 69 N. Y. Suppl. 729]; Dowd *v.* New York, etc., R. Co., 170 N. Y. 459, 63 N. E. 541 [*affirming* 61 N. Y. App. Div. 612, 70 N. Y. Suppl. 1138]; Fredenburg *v.* Northern Cent. R. Co., 114 N. Y. 582, 21 N. E. 1049, 11 Am. St. Rep. 697; Hazzard *v.* State, 108 N. Y. App. Div. 119, 95 N. Y. Suppl. 1103.

Oregon.— Bowers *v.* Star Logging Co., 41 Oreg. 301, 68 Pac. 516; Stager *v.* Troy Laundry Co., 38 Oreg. 480, 63 Pac. 645, 53 L. R. A. 459.

Pennsylvania.— Wagner *v.* H. W. Jayne Chemical Co., 147 Pa. St. 475, 23 Atl. 772, 30 Am. St. Rep. 745.

Texas.— Missouri, etc., R. Co. *v.* Follin, 29 Tex. Civ. App. 512, 68 S. W. 810; Gulf, etc., R. Co. *v.* Hayden, 29 Tex. Civ. App. 280, 68 S. W. 530; St. Louis Southwestern R. Co. *v.* Mayfield, 25 Tex. Civ. App. 207, 60 S. W. 896; Gulf, etc., R. Co. *v.* Warner, 22 Tex. Civ. App. 167, 54 S. W. 1064.

Utah.— Mathews *v.* Daly-West Min. Co., 27 Utah 193, 75 Pac. 722.

Washington.— Shoemaker *v.* Bryant Lumber, etc., Mill Co., 27 Wash. 637, 68 Pac. 380.

Wisconsin.— Coolidge *v.* Hallauer, 126 Wis. 244, 105 N. W. 568; Gill *v.* Homrighausen, 79 Wis. 634, 48 N. W. 862; Nadau *v.* White River Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29.

United States.— Sauvageau *v.* River Spinning Co., 129 Fed. 961; The A. Heaton, 43 Fed. 592.

See 34 Cent. Dig. tit. "Master and Servant," §§ 981–986.

12. *Illinois.*— Howe *v.* Medaris, 183 Ill. 288, 55 N. E. 724 [*reversing* 82 Ill. App. 515].

Indiana.— Muncie Pulp Co. *v.* Jones, 11 Ind. App. 110, 38 N. E. 547.

Iowa.— Russ *v.* American Cereal Co., 110 Iowa 743, 81 N. W. 796.

Kansas.— Weld *v.* Missouri Pac. R. Co., 39 Kan. 63, 17 Pac. 306.

Kentucky.— Buey *v.* Chess, etc., Co., 84 S. W. 563, 27 Ky. L. Rep. 198.

Massachusetts.— Wood *v.* Tileston, etc., Co., 182 Mass. 449, 65 N. E. 810.

Michigan.— Carnes *v.* Guelph Patent Cask Co., 141 Mich. 23, 104 N. W. 322; Bays *v.* Warren Featherbone Co., 131 Mich. 205, 91 N. W. 164; Nephew *v.* Whitehead, 123 Mich. 255, 81 N. W. 1083; Davey *v.* Hall, etc., Co., 122 Mich. 206, 80 N. W. 1082.

Minnesota.— Wexler *v.* Salisbury, 91 Minn. 308, 98 N. W. 95; Dixon *v.* Union Ironworks, 90 Minn. 492, 97 N. W. 375; Hermann *v.* Clark, 89 Minn. 132, 94 N. W. 436.

Missouri.— McIntosh *v.* Missouri Pac. R. Co., 58 Mo. App. 281.

New Hampshire.— St. Jean *v.* Tolles, 72 N. H. 587, 58 Atl. 506.

New Jersey.— Green *v.* Barnes Mfg. Co., 69 N. J. L. 596, 55 Atl. 1083.

New York.— Cullen *v.* National Sheet-Metal Roofing Co., 114 N. Y. 45, 20 N. E. 831; Faith *v.* New York Cent., etc., R. Co., 109 N. Y. App. Div. 222, 95 N. Y. Suppl. 774; Davitt *v.* Metropolitan St. R. Co., 106 N. Y. App. Div. 567, 94 N. Y. Suppl. 790; Devoe *v.* New York Cent., etc., R. Co., 70 N. Y. App. Div. 495, 75 N. Y. Suppl. 136.

Pennsylvania.— Lehman *v.* Carbon Steel Co., 204 Pa. St. 612, 54 Atl. 475.

Texas.— Texas, etc., R. Co. *v.* Dillard, 70 Tex. 62, 8 S. W. 113; Bryan *v.* International, etc., R. Co., (Civ. App. 1905) 90 S. W. 693; Gulf, etc., R. Co. *v.* Huyett, (Civ. App. 1905) 89 S. W. 1118; Bell *v.* Gulf, etc., R. Co., (Civ. App. 1904) 81 S. W. 134; Missouri, etc., R. Co. *v.* Dyer, (Civ. App. 1903) 75 S. W. 930; Southern Pac. Co. *v.* Leash, 2 Tex. Civ. App. 68, 21 S. W. 563.

Washington.— Krickeberg *v.* St. Paul, etc., Lumber Co., 37 Wash. 63, 79 Pac. 492.

Wisconsin.— Roth *v.* Barrett Mfg. Co., 93 Wis. 615, 71 N. W. 1034.

United States.— Glenmont Lumber Co. *v.* Roy, 126 Fed. 524, 61 C. C. A. 506.

England.— McNicholas *v.* Dawson, [1899] 1 Q. B. 773, 68 L. J. Q. B. 470, 80 L. T. Rep. N. S. 317, 47 Wkly. Rep. 500.

See 34 Cent. Dig. tit. "Master and Servant," §§ 981–986.

13. As raising question for jury see *infra*, IV, H, 6, e.

Presumptions and burden of proof see *supra*, IV, H, 3, a, (I), (E), (II), (E).

briefly discussed in the preceding section, contributory negligence [14] or its antithesis,

Review of questions of fact, verdict, and findings see *infra*, IV, H, 10, b.

Sufficiency of findings to sustain verdict or judgment see *infra*, IV, H, 8, b.

To warrant giving of instructions see *infra*, IV, H, 7, e.

14. Evidence held to show contributory negligence.— *Alabama.*— Davis *v.* Miller, 109 Ala. 589, 19 So. 699.

Arkansas.— St. Louis, etc., R. Co. *v.* Morgart, 56 Ark. 213, 19 S. W. 751.

Connecticut.— See Ebert *v.* Hartley, 72 Conn. 453, 44 Atl. 723.

Georgia.— Daniel *v.* Georgia Cent. R. Co., 119 Ga. 246, 46 S. E. 107.

Illinois.— O'Donnell *v.* MacVeagh, 205 Ill. 23, 68 N. E. 646.

Indiana.— Fisher *v.* Louisville, etc., R. Co., 146 Ind. 558, 45 N. E. 689; Chicago, etc., R. Co. *v.* Cunningham, 33 Ind. App. 145, 69 N. E. 304; East Chicago Foundry Co. *v.* Ankeny, 19 Ind. App. 150, 47 N. E. 936, 49 N. E. 186.

Iowa.— Flockhart *v.* Hocking Coal Co., 126 Iowa 576, 102 N. W. 494.

Kansas.— Higgins *v.* Atchison, etc., R. Co., 70 Kan. 814, 79 Pac. 679; Libbey *v.* Atchison, etc., R. Co., 69 Kan. 869, 77 Pac. 541.

Kentucky.— Carmony *v.* Louisville, etc., R. Co., 87 S. W. 319, 27 Ky. L. Rep. 948.

Louisiana.— Ederle *v.* Vicksburg, etc., R. Co., 112 La. 728, 36 So. 664; O'Donnell *v.* American Mfg. Co., 112 La. 720, 36 So. 661; Govan *v.* New Orleans, etc., R. Co., 111 La. 125, 35 So. 484; Riley *v.* Banner Lumber Co., 109 La. 274, 33 So. 312; McKinney *v.* McNeely, 108 La. 27, 32 So. 199.

Maine.— Erickson *v.* Monson Consol. Slate Co., 100 Me. 107, 60 Atl. 708; Babb *v.* Oxford Paper Co., 99 Me. 298, 59 Atl. 290; Bessey *v.* Newichawanick Co., 94 Me. 61, 46 Atl. 806.

Massachusetts.— Arkland *v.* Taber-Prang Art Co., 184 Mass. 243, 68 N. E. 219; Jones *v.* New York, etc., R. Co., 184 Mass. 89, 68 N. E. 14.

Michigan.— Dutchowski *v.* Handy Things Co., 141 Mich. 11, 104 N. W. 358; Kupkofski *v.* John S. Speigel Co., 135 Mich. 7, 97 N. W. 48.

Minnesota.—Jensen *v.* Regan, 92 Minn. 323, 99 N. W. 1126; Braaflat *v.* Minneapolis, etc., Elevator Co., 90 Minn. 367, 96 N. W. 920; Parker *v.* Pine Tree Lumber Co., 89 Minn. 500, 95 N. W. 323.

Missouri.— Dickey *v.* Dickey, 111 Mo. App. 304, 86 S. W. 909; Reames *v.* Jones Dry Goods Co., 99 Mo. App. 396, 73 S. W. 935.

Nebraska.— McMahon *v.* O'Donnell, 32 Nebr. 27, 48 N. W. 824; Chicago, etc., R. Co. *v.* Healy, 5 Nebr. (Unoff.) 225, 97 N. W. 1024.

New Jersey.— Phillips *v.* Central R. Co., 68 N. J. L. 605, 53 Atl. 221.

New York.— Dickescheid *v.* Betz, 176 N. Y. 611, 68 N. E. 1115 [*affirming* 80 N. Y. App. Div. 8, 80 N. Y. Suppl. 175]; Hoehn *v.* Lautz, 94 N. Y. App. Div. 14, 87 N. Y. Suppl. 921; Carley *v.* Gair, 93 N. Y. App. Div. 614, 87 N. Y. Suppl. 709; Mullen *v.* Metropolitan St. R. Co., 89 N. Y. App. Div. 21, 85 N. Y. Suppl. 134; Frounfelker *v.* Delaware, etc., R. Co., 74 N. Y. App. Div. 224, 77 N. Y. Suppl. 470; Mohr *v.* Lehigh Valley R. Co., 55 N. Y. App. Div. 176, 66 N. Y. Suppl. 899; Moccia *v.* New York Cent., etc., R. Co., 46 N. Y. App. Div. 58, 61 N. Y. Suppl. 338; Williams *v.* Delaware, etc., R. Co., 39 N. Y. App. Div. 647, 57 N. Y. Suppl. 203; Buckley *v.* Palmer, 36 Misc. 337, 73 N. Y. Suppl. 542; Baird *v.* Richardson, 4 N. Y. St. 648.

North Carolina.— Covington *v.* Smith Furniture Co., 138 N. C. 374, 50 N. E. 761; Miller *v.* Navassa Guano Co., 125 N. C. 323, 34 S. E. 497.

Pennsylvania.— McNeil *v.* Clairton Steel Co., 213 Pa. St. 331, 62 Atl. 923; McIntire *v.* Pittsburg Steel Foundry, 208 Pa. St. 34, 57 Atl. 61; Sanker *v.* Pennsylvania R. Co., 205 Pa. St. 609, 55 Atl. 833; Lonzer *v.* Lehigh Valley R. Co., 196 Pa. St. 610, 46 Atl. 937; Keyes *v.* Pennsylvania Co., 1 Pa. Cas. 316, 3 Atl. 15.

South Carolina.— Barksdale *v.* Laurens, 58 S. C. 413, 36 S. E. 661.

Tennessee.— Nashville Spoke, etc., Co. *v.* Thomas, 114 Tenn. 458, 86 S. W. 379; Greenlaw *v.* Louisville, etc., R. Co., 114 Tenn. 187, 86 S. W. 1072.

Texas.— Trinity, etc., R. Co. *v.* Mitchell, 72 Tex. 609, 10 S. W. 698; Gulf, etc., R. Co. *v.* Powell, (Civ. App. 1904) 84 S. W. 670; Bell *v.* Gulf, etc., R. Co., (Civ. App. 1904) 81 S. W. 134; Texas, etc., R. Co. *v.* Stewart, 30 Tex. Civ. App. 408, 71 S. W. 330; St. Louis, etc., R. Co. *v.* Denny, 5 Tex. Civ. App. 359, 24 S. W. 317.

Virginia.— McDaniel *v.* Lynchburg Cotton Mills Co., 99 Va. 146, 37 S. E. 781; Darracott *v.* Chesapeake, etc., R. Co., 83 Va. 288, 2 S. E. 511, 5 Am. St. Rep. 266.

Washington.— Guley *v.* Northwestern Coal, etc., Co., 7 Wash. 491, 35 Pac. 372.

Wisconsin.— Egnor *v.* N. C. Foster Lumber Co., 115 Wis. 530, 92 N. W. 242.

United States.— National Biscuit Co. *v.* Nolan, 138 Fed. 6, 70 C. C. A. 436; Gilbert *v.* Burlington, etc., R. Co., 128 Fed. 529, 63 C. C. A. 27 [*affirming* 123 Fed. 832]; The Anchoria, 120 Fed. 1017, 56 C. C. A. 452 [*affirming* 113 Fed. 982]; The Saratoga, 94 Fed. 221, 36 C. C. A. 208 [*reversing* 87 Fed. 349].

See 34 Cent. Dig. tit. "Master and Servant," §§ 977-996.

Contributory negligence not shown.— St. Louis, etc., R. Co. *v.* McCain, 67 Ark. 377, 55 S. W. 165; St. Louis, etc., R. Co. *v.* Touhey, 67 Ark. 209, 54 S. W. 577, 77 Am. St. Rep. 109; Little Rock, etc., R. Co. *v.* Voss, (Ark. 1892) 18 S. W. 172; Gisson *v.* Schwabacher, 99 Cal. 419, 34 Pac. 104; Ebert *v.* Hartley, 72 Conn. 453, 44 Atl. 723; Richmond, etc., R. Co. *v.* Wright, 88 Ga. 19, 13 S. E. 820; Illinois Steel Co. *v.* Olste, 214 Ill. 181, 73 N. E. 422; Central Union Bldg. Co. *v.* Kolander, 212 Ill. 27, 72 N. E. 50 [*affirm-*

due care[15] on the part of the servant, may be proved by direct or circumstantial evidence, and where there is any evidence tending to show whether or not he was

ing 113 Ill. App. 305]; Henrietta Coal Co. *v.* Campbell, 211 Ill. 216, 71 N. E. 863 [*affirming* 112 Ill. App. 452]; Illinois Steel Co. *v.* Stonevick, 199 Ill. 122, 64 N. E. 1014; Momence Stone Co. *v.* Groves, 197 Ill. 88, 64 N. E. 335 [*affirming* 100 Ill. App. 98]; Hinckley *v.* Horazdowsky, 133 Ill. 359, 24 N. E. 421, 23 Am. St. Rep. 618, 8 L. R. A. 490; Baltimore, etc., R. Co. *v.* Roberts, 161 Ind. 1, 67 N. E. 530; Chicago, etc., R. Co. *v.* Martin, 31 Ind. App. 308, 65 N. E. 591; Struble *v.* Burlington, etc., R. Co., 128 Iowa 158, 103 N. W. 142; Klaffke *v.* Bettendorf Axle Co., 125 Iowa 223, 100 N. W. 1116; Beresford *v.* American Coal Co., 124 Iowa 34, 98 N. W. 902, 70 L. R. A. 256; Pierson *v.* Chicago Great Western R. Co., 116 Iowa 601, 88 N. W. 363; Taliaferro *v.* Vicksburg, etc., R. Co., 115 La. 443, 39 So. 437; Merritt *v.* Victoria Lumber Co., 111 La. 159, 35 So. 497; Caven *v.* Bodwell Granite Co., 99 Me. 278, 59 Atl. 285; Fountaine *v.* Wampanoag Mills, 189 Mass. 498, 75 N. E. 738; Lynch *v.* M. T. Stevens, etc., Co., 187 Mass. 397, 73 N. E. 478; Welch *v.* New York, etc., R. Co., 182 Mass. 84, 64 N. E. 695; Knapp *v.* Chicago, etc., R. Co., 114 Mich. 199, 72 N. W. 200; Merrill *v.* Pike, 94 Minn. 186, 102 N. W. 393; Hendricks *v.* Lesure Lumber Co., 92 Minn. 318, 99 N. W. 1125, 100 N. W. 638; Bredeson *v.* C. A. Smith Lumber Co., 91 Minn. 317, 97 N. W. 977; Gray *v.* Commutator Co., 85 Minn. 463, 89 N. W. 322; Anderson *v.* Minnesota, etc., R. Co., 39 Minn. 523, 41 N. W. 104; Southern R. Co. *v.* Cheaves, 84 Miss. 565, 36 So. 691; Gulf, etc., R. Co. *v.* Bussey, 82 Miss. 616, 35 So. 166; Fouts *v.* Swift, 113 Mo. App. 526, 88 S. W. 167; Shore *v.* American Bridge Co., 111 Mo. App. 278, 86 S. W. 905; Buckalew *v.* Quincy, etc., R. Co., 107 Mo. App. 575, 81 S. W. 1176; Scheir *v.* Quirin, 171 N. Y. 568, 69 N. E. 1130 [*affirming* 77 N. Y. App. Div. 624, 78 N. Y. Suppl. 956]; Hoes *v.* Ocean Steamship Co., 170 N. Y. 581, 63 N. E. 1118 [*affirming* 56 N. Y. App. Div. 259, 67 N. Y. Suppl. 782]; Harr *v.* New York Cent., etc., R. Co., 114 N. Y. 623, 21 N. E. 425; Irish *v.* Union Bag, etc., Co., 103 N. Y. App. Div. 45, 92 N. Y. Suppl. 695; Hunt *v.* Dexter Sulphite Pulp, etc., Co., 100 N. Y. App. Div. 119, 91 N. Y. Suppl. 279; Krueger *v.* Bartholomay Brewing Co., 94 N. Y. App. Div. 58, 87 N. Y. Suppl. 1054; Pharr *v.* Atlanta, etc., Air Line R. Co., 132 N. C. 418, 44 S. E. 37; Isley *v.* Wabash R. Co., 27 Ohio Cir. Ct. 785; Lake Shore, etc., R. Co. *v.* Fisher, 26 Ohio Cir. Ct. 143 [*affirmed* without opinion in 51 Ohio St. 574]; Toomey *v.* Avery Stamping Co., 20 Ohio Cir. Ct. 183, 11 Ohio Cir. Dec. 216; Sopherstein *v.* Bertels, 178 Pa. St. 401, 35 Atl. 1000; Madara *v.* Pottsville Iron, etc., Co., 160 Pa. St. 109, 28 Atl. 639; Wessel *v.* Jones, etc., Steel Co., 28 Pa. Super. Ct. 332; Carson *v.* Southern R. Co., 68 S. C. 55, 46 S. E. 525 [*affirmed* in 194 U. S. 136, 24 S. Ct. 609, 48 L. ed. 907]; Galveston, etc., R. Co. *v.* Sullivan, 2 Tex. Unrep. Cas. 315; Gulf, etc., R. Co. *v.* Melville, (Tex. Civ. App. 1905) 87 S. W. 863; Texas Cent. R. Co. *v.* Powell, (Tex. Civ. App. 1905) 86 S. W. 21; International, etc., R. Co. *v.* Vanlandingham, (Tex. Civ. App. 1905) 85 S. W. 847; Missouri, etc., R. Co. *v.* Keefe, (Tex. Civ. App. 1905) 84 S. W. 679; International, etc., R. Co. *v.* McVey, (Tex. Civ. App. 1904) 81 S. W. 991, 83 S. W. 34; Gulf, etc., R. Co. *v.* Davis, 35 Tex. Civ. App. 285, 80 S. W. 253; San Antonio, etc., R. Co. *v.* Brock, 35 Tex. Civ. App. 155, 80 S. W. 422; Texas, etc., R. Co. *v.* Kelly, 34 Tex. Civ. App. 21, 80 S. W. 1073; Gulf, etc., R. Co. *v.* Cooper, 33 Tex. Civ. App. 319, 77 S. W. 263; Texas, etc., R. Co. *v.* Carter, (Tex. Civ. App. 1903) 73 S. W. 50; Missouri, etc., R. Co. *v.* Mayfield, 29 Tex. Civ. App. 477, 68 S. W. 807; Dupree *v.* Alexander, 29 Tex. Civ. App. 31, 68 S. W. 739; Texas, etc., R. Co. *v.* Mortensen, 27 Tex. Civ. App. 106, 66 S. W. 99; International, etc., R. Co. *v.* Sipole, (Tex. Civ. App. 1895) 29 S. W. 686; Texas, etc., R. Co. *v.* French, (Tex. Civ. App. 1893) 22 S. W. 866; Wood *v.* Southern R. Co., 104 Va. 650, 52 S. E. 371; Michael *v.* Roanoke Mach. Works, 90 Va. 492, 19 S. E. 261, 44 Am. St. Rep. 927; Hencke *v.* Babcock, 24 Wash. 556, 64 Pac. 755; Renne *v.* U. S. Leather Co., 107 Wis. 305, 83 N. W. 473; Texas, etc., R. Co. *v.* Putman, 120 Fed. 754, 57 C. C. A. 58; Portland Gold Min. Co. *v.* Flaherty, 111 Fed. 312, 49 C. C. A. 361; Craft *v.* Northern Pac. R. Co., 62 Fed. 735 [*affirmed* in 69 Fed. 124, 1 C. C. A. 175].

15. Finding of due care warranted.—*Illinois.*— Muren Coal, etc., Co. *v.* Howell, 204 Ill. 515, 68 N. E. 456 [*reversing* 107 Ill. App. 1]; Dallemand *v.* Saalfeldt, 175 Ill. 310, 51 N. E. 645, 67 Am. St. Rep. 214, 48 L. R. A. 753 [*affirming* 73 Ill. App. 151]; Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 272; Hinchliff *v.* Robinson, 118 Ill. App. 450; Corbin *v.* Western Electric Co., 78 Ill. App. 516. *Compare* Illinois Cent. R. Co. *v.* Swift, 213 Ill. 307, 72 N. E. 737; Brown Hoisting, etc., Mach. Co. *v.* Bennett, 96 Ill. App. 514.

Indiana.—Pittsburgh, etc., R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. Rep. 120.

Maine.— Guthrie *v.* Maine Cent. R. Co., 81 Me. 572, 18 Atl. 295. *Compare* McDonough *v.* Grand Trunk R. Co., 98 Me. 304, 56 Atl. 913; McLane *v.* Perkins, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487.

Massachusetts.— McPhee *v.* New England Structural Co., 188 Mass. 141, 74 N. E. 303; Higgins *v.* Higgins, 188 Mass. 113, 74 N. E. 471; Mahoney *v.* Bay State Pink Granite Co., 184 Mass. 287, 68 N. E. 234; McLean *v.* Paine, 181 Mass. 287, 63 N. E. 883; Connors *v.* Grilley, 155 Mass. 575, 30 N. E. 218. *Compare* Morris *v.* Boston, etc., R. Co., 184 Mass. 368, 68 N. E. 680; Archambault *v.* Archambault, 184 Mass. 274, 68 N. E. 199; Erwin *v.*

guilty of contributory negligence, it should be submitted to the jury.[16] Where the evidence as to contributory negligence is such that reasonable minds might honestly differ, a finding either way cannot be said to be insufficiently supported by the evidence.[17]

4. Measure of Damages — a. In General.[18] Unless limited by statute,[19] the general rule is that a servant is entitled to recover compensatory damages for injuries due to the master's negligence.[20] In some jurisdictions, where the master is only concurrently negligent, the negligence of the servant[21] or of a fellow servant[22] will be considered in mitigation of damages. In an action for the death of a servant, the measure of damages is only the pecuniary value of the life of the servant to his next of kin; and the fact that the injury was wilful cannot be considered to enhance the recovery.[23]

b. Exemplary Damages. In the absence of wanton, gross, or reckless negli-

Alley, 158 Mass. 249, 33 N. E. 517; Henry *v.* King Philip Mills, 155 Mass. 361, 29 N. E. 581; Brady *v.* Ludlow Mfg. Co., 154 Mass. 468, 28 N. E. 901.

Minnesota.— Campbell *v.* Railway Transfer Co., 95 Minn. 375, 104 N. W. 547; Haidt *v.* Swift, 94 Minn. 146, 102 N. W. 388; Le Duc *v.* Northern Pac. R. Co., 92 Minn. 287, 100 N. W. 108.

Missouri.— Chambers *v.* Chester, 172 Mo. 461, 72 S. W. 904.

Nebraska.— Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744.

New Hampshire.— Miller *v.* Boston, etc., R. Co., 73 N. H. 330, 61 Atl. 360.

New York.— Krueger *v.* Bartholomay Brewery Co., 182 N. Y. 544, 75 N. E. 1130 [*affirming* 94 N. Y. App. Div. 58, 87 N. Y. Suppl. 1054]; Weston *v.* City of Troy, 139 N. Y. 281, 34 N. E. 780; Voorhees *v.* Hudson River Tel. Co., 109 N. Y. App. Div. 465, 95 N. Y. Suppl. 703, 1167; Faith *v.* New York Cent., etc., R. Co., 109 N. Y. App. Div. 222, 95 N. Y. Suppl. 774; McHugh *v.* Manhattan R. Co., 88 N. Y. App. Div. 554, 85 N. Y. Suppl. 184. *Compare* Huff *v.* American Fire Engine Co., 88 N. Y. App. Div. 324, 84 N. Y. Suppl. 651; Mohr *v.* Lehigh Valley R. Co., 55 N. Y. App. Div. 176, 66 N. Y. Suppl. 899; Robbins *v.* Brownville Paper Co., 53 N. Y. App. Div. 641, 65 N. Y. Suppl. 955.

Texas.— Gulf, etc., R. Co. *v.* Huyett, (1906) 92 S. W. 454 [*reversing* (Civ. App. 1905) 89 S. W. 1118]; St. Louis, etc., R. Co. *v.* Bussong, (Civ. App. 1905) 90 S. W. 73.

See 34 Cent. Dig. tit. "Master and Servant," §§ 987-996.

Compare Judge *v.* Narragansett Electric Lighting Co., 21 R. I. 128, 42 Atl. 507.

16. *California.*— Smith *v.* Occidental, etc., Steamship Co., 99 Cal. 462, 34 Pac. 84.

Kentucky.— Louisville, etc., R. Co. *v.* Milliken, 51 S. W. 796, 21 Ky. L. Rep. 489.

Massachusetts.— Sullivan *v.* Thorndike Co., 175 Mass. 41, 55 N. E. 472; Murray *v.* Rivers, 174 Mass. 46, 54 N. E. 358; Dolphin *v.* Plumley, 167 Mass. 167, 45 N. E. 87.

New Jersey.—Pierce *v.* Camden, etc., R. Co., 58 N. J. L. 400, 35 Atl. 286.

New York.— Garety *v.* King, 9 N. Y. App. Div. 443, 41 N. Y. Suppl. 633.

Texas.— Missouri, etc., R. Co. *v.* Pawkett, 28 Tex. Civ. App. 583, 68 S. W. 323.

Utah.— Reese *v.* Morgan Silver Min. Co., 15 Utah 453, 49 Pac. 824.

United States.— Swift *v.* Short, 92 Fed. 567, 34 C. C. A. 545.

See 34 Cent. Dig. tit. "Master and Servant," §§ 987-996.

Facts held inconclusive on question of contributory negligence.— American Car, etc., Co. *v.* Clark, 32 Ind. App. 644, 70 N. E. 828; Phinney *v.* Illinois Cent. R. Co., 122 Iowa 488, 98 N. W. 358; Frye *v.* Bath Gas, etc., Co., 94 Me. 17, 46 Atl. 804; Mathews *v.* Daly-West Min. Co., 27 Utah 193, 75 Pac. 722.

Evidence held inconclusive see Hammer *v.* Pressed Steel Car Co., 204 Pa. St. 594, 54 Atl. 355; Texas, etc., R. Co. *v.* McCoy, 17 Tex. Civ. App. 494, 44 S. W. 25.

17. New Omaha Thompson-Houston Electric Light Co. *v.* Dent, 68 Nebr. 668, 94 N. W. 819, 103 N. W. 1091.

18. **In action by parent for injuries to child** see Parent and Child.

Inadequate or excessive damages see Damages.

Injuries to seamen see Seamen.

Injuries to stevedores and licensees of vessels see Shipping.

Injury to property of railroad employee by negligence of railroad company see Railroads.

Measure of damages in general see Damages.

19. **Under Mo. Rev. St. § 2123,** providing that in injuries resulting in a servant's death from the master's negligence, such damages may be recovered, not exceeding two thousand dollars, as are fair and just, with reference to the necessary injury, and also having regard to aggravating circumstances, the word "necessary" is equivalent to "pecuniary." Hickman *v.* Missouri Pac. R. Co., 22 Mo. App. 344.

20. See Damages, 13 Cyc. 30.

Recovery for injury to earning capacity see Chicago, etc., R. Co. *v.* Long, 26 Tex. Civ. App. 601, 65 S. W. 882.

Division of damages in admiralty see The City of Norwalk, 55 Fed. 98.

21. The Frey, 113 Fed. 1003.

22. The Phœnix, 34 Fed. 760.

23. Louisville, etc., R. Co. *v.* Trammell, 93 Ala. 350, 9 So. 870.

gence on the part of the master,[24] exemplary or punitive damages cannot be awarded for injuries to a servant.[25]

5. CONDUCT OF TRIAL. The conduct of the trial of an action by a servant to recover for personal injuries rests largely in the discretion of the court.[26]

6. QUESTIONS OF LAW AND FACT[27] — a. In General — (I) *STATEMENT OF RULE.* As in other cases, in an action by a servant for personal injuries all questions of fact or mixed questions of law and fact are for the jury, under proper instructions from the court.[28] Questions of law are for the court.[29]

(II) *RELATION OF PARTIES.*[30] Where there is a conflict of evidence as to whether the relation of master and servant existed between the parties at the time of the injury, the question should be submitted to the jury.[31]

24. **Exemplary damages allowed for wanton or gross negligence** see Southern R. Co. *v.* Bunt, 131 Ala. 591, 32 So. 507; Newport News, etc., Co. *v.* Dentzel, 91 Ky. 42, 14 S. W. 958, 12 Ky. L. Rep. 626; Louisville, etc., R. Co. *v.* Greer, 29 S. W. 337, 16 Ky. L. Rep. 667; Boyd *v.* Seaboard Air Line R. Co., 67 S. C. 218, 45 S. E. 186; American Lead Pencil Co. *v.* Davis, 108 Tenn. 251, 66 S. W. 1129.

25. *Alabama.*— Columbus, etc., R. Co. *v.* Bridges, 86 Ala. 448, 5 So. 864, 11 Am. St. Rep. 58.

Florida.— Florida Cent., etc., R. Co. *v.* Mooney, 40 Fla. 17, 24 So. 148.

Illinois.— Chicago, etc., R. Co. *v.* Jackson, 55 Ill. 492, 8 Am. Rep. 661.

Kansas.— Kansas City, etc., R. Co. *v.* Kier, 41 Kan. 661, 671, 21 Pac. 770, 13 Am. St. Rep. 311.

Kentucky.— Kentucky Distilleries, etc., Co. *v.* Schreiber, 73 S. W. 769, 24 Ky. L. Rep. 2236; Lingenfelter *v.* Louisville, etc., R. Co., 4 S. W. 185, 9 Ky. L. Rep. 116; Mud River Coal, etc., Co. *v.* Williams, 15 Ky. L. Rep. 847.

Louisiana.— McFee *v.* Vicksburg, etc., R. Co., 42 La. Ann. 790, 7 So. 720.

Michigan.— Batterson *v.* Chicago, etc., R. Co., 49 Mich. 184, 13 N. W. 508.

Missouri.— Stoher *v.* St. Louis, etc., R. Co., 91 Mo. 509, 4 S. W. 389.

Texas.— Gulf, etc., R. Co. *v.* Compton, 75 Tex. 667, 13 S. W. 667.

See 34 Cent. Dig. tit. "Master and Servant," § 998.

26. **Exclusion of evidence of collateral fact discretionary** see Little *v.* Head, etc., Co., 69 N. H. 494, 43 Atl. 619. *Compare* Missouri, etc., R. Co. *v.* Nordell, 20 Tex. Civ. App. 362, 50 S. W. 601.

A statement by counsel that the negligence complained of was that of a fellow servant was not sufficient ground for dismissing the complaint, where he did not expressly limit the right of recovery to such negligence, but also referred to an alleged defect in the appliances. Murphy *v.* Hopper, 75 N. Y. App. Div. 606, 78 N. Y. Suppl. 657.

That the master carries indemnity insurance must not be allowed to be gotten before the jury. Iverson *v.* McDonnell, 36 Wash. 73, 78 Pac. 202.

27. **Application of personal knowledge of jurors** see TRIAL.

Form and scope of motion for nonsuit see TRIAL.

Review of questions of fact, verdicts, and findings see *infra*, IV, H, 10, b.

Sufficiency of evidence to raise question for jury in general see NEGLIGENCE.

28. *Alabama.*— Alabama Great Southern R. Co. *v.* Brooks, 135 Ala. 401, 33 So. 181.

Illinois.— Madison Coal Co. *v.* Hayes, 215 Ill. 625, 74 N. E. 755 [*affirming* 116 Ill. App. 94]; Himrod Coal Co. *v.* Stevens, 104 Ill. App. 639 [*affirmed* in 203 Ill. 115, 67 N. E. 389].

Indiana.—Abbitt *v.* Lake Erie, etc., R. Co., 150 Ind. 498, 50 N. E. 729.

Iowa.— Light *v.* Chicago, etc., R. Co., 93 Iowa 83, 61 N. W. 380.

Nebraska.— Union Stock Yards Co. *v.* Conover, 41 Nebr. 617, 59 N. W. 950.

Pennsylvania.— Monifius *v.* Chambersburg Engineering Co., 196 Pa. St. 47, 46 Atl. 259; Werst *v.* Lehigh Valley R. Co., 190 Pa. St. 482, 42 Atl. 881; Fritz *v.* Jenner, 166 Pa. St. 292, 31 Atl. 80.

United States.— Totten *v.* Pennsylvania R. Co., 11 Fed. 564.

See 34 Cent. Dig. tit. "Master and Servant," § 1000.

29. Graft *v.* Baltimore, etc., R. Co., 5 Pa. Cas. 94, 8 Atl. 206; Texas, etc., R. Co. *v.* Crowder, 76 Tex. 499, 13 S. W. 381.

Whether a machine was a "locomotive engine," within Burns Rev. St. Ind. § 7083, subd. 4, is a question for the court. Jarvis v. Hitch, 161 Ind. 217, 67 N. E. 1057.

30. **Who are independent contractors** see *infra*, V, B, 1.

31. *Connecticut.*— Burke *v.* Norwich, etc., R. Co., 34 Conn. 474.

Georgia.— Barnett *v.* Northeastern R. Co., 87 Ga. 199, 13 S. E. 646.

Illinois.— Grace, etc., Co. *v.* Probst, 208 Ill. 147, 70 N. E. 12; St. Louis Consol. Coal Co. *v.* Bruce, 150 Ill. 449, 37 N. E. 912 [*affirming* 47 Ill. App. 444]. *Compare* Condon *v.* Schoenfeld, 214 Ill. 226, 73 N. E. 333 [*reversing* 114 Ill. App. 468], in which the relation of the parties was only shown by inference.

Indiana.— Evansville, etc., R. Co. *v.* Claspell, 8 Ind. App. 685, 36 N. E. 297.

Iowa.— Aga *v.* Harbach, 127 Iowa 144, 102 N. W. 833, 109 Am. St. Rep. 377.

Massachusetts.— Morgan *v.* Smith, 159 Mass. 570, 35 N. E. 101.

Minnesota.— Caron *v.* Powers-Simpson Co., 96 Minn. 192, 104 N. W. 889.

New Jersey.— Norman *v.* Middlesex, etc., Traction Co., 68 N. J. L. 728, 54 Atl. 835;

(III) *Nature and Cause of Injury.* The determination of the nature and cause of the injury is for the jury,[32] if there is any evidence tending to show

Hardy *v.* Delaware, etc., R. Co., 57 N. J. L. 505, 31 Atl. 281.

New York.— Brophy *v.* Bartlett, 108 N. Y. 632, 15 N. E. 368; Werner *v.* Hearst, 76 N. Y. App. Div. 375, 78 N. Y. Suppl. 788; Chaffee *v.* Erie R. Co., 68 N. Y. App. Div. 651, 74 N. Y. Suppl. 1122.

Oregon.— Ringue *v.* Oregon Coal Co., 44 Oreg. 407, 75 Pac. 703.

Texas.— Missouri, etc., R. Co. *v.* Ferch, (Civ. App. 1896) 36 S. W. 487.

Vermont.— Sherman *v.* Delaware, etc., Canal Co., 71 Vt. 325, 45 Atl. 227.

Wisconsin.—Schultz *v.* Chicago, etc., R. Co., 40 Wis. 589.

United States.—Northwestern Union Packet Co. *v.* McCue, 17 Wall. 508, 21 L. ed. 705.

See 34 Cent. Dig. tit. "Master and Servant," § 1004.

32. *Alabama.*— Sloss-Sheffield Steel, etc., Co. *v.* Mobley, 139 Ala. 425, 36 So. 181; Birmingham Traction Co. *v.* Reville, 136 Ala. 335, 34 So. 981; Houston Biscuit Co. *v.* Dial, 135 Ala. 168, 33 So. 268.

California.—Anderson *v.* Seropian, 147 Cal. 201, 81 Pac. 521; Peters *v.* McKay, 136 Cal. 73, 68 Pac. 478.

Colorado.— Roche *v.* Denver, etc., R. Co., 19 Colo. App. 204, 73 Pac. 880.

District of Columbia.— Baltimore, etc., R. Co. *v.* Landrigan, 20 App. Cas. 135.

Georgia.— Chenall *v.* Palmer Brick Co., 117 Ga. 106, 43 S. E. 443.

Illinois.— Kellyville Coal Co. *v.* Strine, 217 Ill. 516, 75 N. E. 375; Commonwealth Electric Co. *v.* Rose, 214 Ill. 545, 73 N. E. 780 [*affirming* 114 Ill. App. 181]; Central Union Bldg. Co. *v.* Kolander, 212 Ill. 27, 72 N. E. 50 [*affirming* 113 Ill. App. 305]; Spring Valley Coal Co. *v.* Robizas, 207 Ill. 226, 69 N. E. 925; Chicago Hair, etc., Co. *v.* Mueller, 203 Ill. 558, 68 N. E. 51 [*affirming* 106 Ill. App. 21]; Chicago Screw Co. *v.* Weiss, 203 Ill. 536, 68 N. E. 54 [*affirming* 107 Ill. App. 39]; Armour *v.* Golkowska, 202 Ill. 144, 66 N. E. 1037 [*affirming* 95 Ill. App. 492]; D. Sinclair Co. *v.* Waddill, 200 Ill. 17, 65 N. E. 437 [*affirming* 99 Ill. App. 334]; Pagels *v.* Meyer, 193 Ill. 172, 61 N. E. 1111 [*reversing* 88 Ill. App. 169]; Ide *v.* Fratcher, 96 Ill. App. 549 [*affirmed* in 194 Ill. 552, 62 N. E. 814]; Donk Bros. Coal, etc., Co. *v.* Peton, 95 Ill. App. 193 [*affirmed* in 192 Ill. 41, 61 N. E. 330].

Indiana.—Davis *v.* Mercer Lumber Co., 164 Ind. 413, 73 N. E. 899; Muncie Pulp Co. *v.* Hacker, (App. 1906) 76 N. E. 770; Indiana, etc., Coal Co. *v.* Neal, (App. 1905) 75 N. E. 295, (App. 1906) 76 N. E. 527; La Porte Carriage Co. *v.* Sullender, (App. 1904) 71 N. E. 922.

Iowa.— Schroeder *v.* Chicago, etc., R. Co., 128 Iowa 365, 103 N. W. 985; Wible *v.* Burlington, etc., R. Co., 109 Iowa 557, 80 N. W. 679.

Kentucky.— Illinois Cent. R. Co. *v.* McIntosh, 118 Ky. 145, 80 S. W. 496, 81 S. W. 270, 26 Ky. L. Rep. 14; Hurt *v.* Louisville, etc., R. Co., 116 Ky. 545, 76 S. W. 502, 25 Ky. L. Rep. 755; Angel *v.* Jellico Coal Min. Co., 115 Ky. 728, 74 S. W. 714, 25 Ky. L. Rep. 108; Louisville, etc., R. Co. *v.* Mulfinger, 80 S. W. 499, 26 Ky. L. Rep. 3.

Maryland.— Crawford *v.* United R., etc., Co., 101 Md. 402, 61 Atl. 287, 70 L. R. A. 489; Hearn *v.* Quillen, 94 Md. 39, 50 Atl. 402.

Massachusetts.— Fountaine *v.* Wampanoag Mills, 189 Mass. 498, 75 N. E. 738; Palmer *v.* Coyle, 187 Mass. 136, 72 N. E. 844; Thompson *v.* American Writing Paper Co., 187 Mass. 93, 72 N. E. 343; Martin *v.* Merchants', etc., Transp. Co., 185 Mass. 487, 70 N. E. 934; Ellis *v.* Thayer, 183 Mass. 309, 67 N. E. 325; McLean *v.* Paine, 181 Mass. 287, 63 N. E. 883; Flint *v.* Kelly, 180 Mass. 181, 62 N. E. 5; Knight *v.* Overman Wheel Co., 174 Mass. 455, 54 N. E. 890.

Michigan.— Bernard *v.* Pittsburg Coal Co., 137 Mich. 279, 100 N. W. 396; Jones *v.* Flint, etc., R. Co., 127 Mich. 198, 86 N. W. 838.

Minnesota.— Turrittin *v.* Chicago, etc., R. Co., 95 Minn. 408, 104 N. W. 225; Small *v.* Brainerd Lumber Co., 95 Minn. 85, 103 N. W. 726; Schus *v.* Powers-Simpson Co., 85 Minn. 447, 89 N. W. 68, 69 L. R. A. 887.

Missouri.— Duerst *v.* St. Louis Stamping Co., 163 Mo. 607, 63 S. W. 827; Stanley *v.* Chicago, etc., R. Co., 112 Mo. App. 601, 87 S. W. 112; Depuy *v.* Chicago, etc., R. Co., 110 Mo. App. 110, 84 S. W. 103; Haworth *v.* Mineral Belt Tel. Co., 105 Mo. App. 161, 79 S. W. 727; Franklin *v.* Missouri, etc., R. Co., 97 Mo. App. 473, 71 S. W. 540; Parsons *v.* Hammond Packing Co., 96 Mo. App. 372, 70 S. W. 519; Eberly *v.* Chicago, etc., R. Co., 96 Mo. App. 361, 70 S. W. 381; Stalzer *v.* Jacob Dold Packing Co., 84 Mo. App. 565.

Montana.— Nord *v.* Boston, etc., Copper, etc., Min. Co., 30 Mont. 48, 75 Pac. 681.

New Hampshire.—Wallace *v.* Boston, etc., R. Co., 72 N. H. 504, 57 Atl. 913; Olney *v.* Boston, etc., R. Co., 71 N. H. 427, 52 Atl. 1097; Prescott *v.* Laconia Car Co. Works, 71 N. H. 59, 51 Atl. 265; Whitcher *v.* Boston, etc., R. Co., 70 N. H. 242, 46 Atl. 740.

New Jersey.— Kalker *v.* Hedden, 72 N. J. L. 239, 61 Atl. 395.

New York.— McHugh *v.* Manhattan R. Co., 179 N. Y. 378, 72 N. E. 312 [*reversing* 88 N. Y. App. Div. 554, 85 N. Y. Suppl. 184]; Bateman *v.* New York Cent., etc., R. Co., 178 N. Y. 84, 70 N. E. 109 [*reversing* 67 N. Y. App. Div. 241, 73 N. Y. Suppl. 390]; Hosford *v.* New York Cent., etc., R. Co., 161 N. Y. 660, 57 N. E. 1112 [*affirming* 39 N. Y. App. Div. 327, 56 N. Y. Suppl. 933]; O'Keefe *v.* Great Northern Elevator Co., 105 N. Y. App. Div. 8, 93 N. Y. Suppl. 407; Allison *v.* Long Clove Trap Rock Co., 92 N. Y. App. Div. 611, 86 N. Y. Suppl. 833; Swenson *v.* Metropolitan St. R. Co., 78 N. Y. App. Div. 379, 80 N. Y. Suppl. 281; Werner *v.* Hearst, 76 N. Y. App. Div. 375, 78 N. Y. Suppl. 788; Allison *v.* Long

them.[33] Where the cause of the injury is left by the evidence to mere conjecture,[34] or where there is no evidence beyond the mere existence of the defect or the happening of the accident or injury,[35] the case should not be submitted to the jury.

(iv) *SCOPE OF EMPLOYMENT.* Where there is any evidence tending to show

Clove Trap Rock Co., 75 N. Y. App. Div. 267, 78 N. Y. Suppl. 69; Scandell *v.* Columbia Constr. Co., 50 N. Y. App. Div. 512, 64 N. Y. Suppl. 232; Young *v.* Syracuse, etc., R. Co., 45 N. Y. App. Div. 296, 61 N. Y. Suppl. 202.

North Carolina.— Lassiter *v.* Raleigh, etc., R. Co., 133 N. C. 244, 45 S. E. 570.

Pennsylvania.— Thomas *v.* New Jersey Cent. R. Co., 194 Pa. St. 511, 45 Atl. 344.

Texas.— Southern Constr. Co. *v.* Hinkle, (Civ. App. 1905) 89 S. W. 309; Missouri, etc., R. Co. *v.* Kellerman, (Civ. App. 1905) 87 S. W. 401; Gulf, etc., R. Co. *v.* Boyce, (Civ. App. 1905) 87 S. W. 395; San Antonio, etc., R. Co. *v.* Lester, (Civ. App. 1904) 84 S. W. 401; International, etc., R. Co. *v.* Reeves, 35 Tex. Civ. App. 162, 79 S. W. 1099; Texas, etc., R. Co. *v.* Gardner, 29 Tex. Civ. App. 90, 69 S. W. 217; San Antonio, etc., R. Co. *v.* Waller, 27 Tex. Civ. App. 44, 65 S. W. 210.

Virginia.— Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489.

Washington.— Hoveland *v.* Hall Bros. Mar. R., etc., Co., 41 Wash. 164, 82 Pac. 1090; Bailey *v.* Cascade Timber Co., 32 Wash. 319, 73 Pac. 385; Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111.

Wisconsin.— Johnson *v.* St. Paul, etc., Coal Co., 126 Wis. 492, 105 N. W. 1048; Grant *v.* Keystone Lumber Co., 119 Wis. 229, 96 N. W. 535, 100 Am. St. Rep. 883.

United States.— Choctaw, etc., R. Co. *v.* McDade, 191 U. S. 64, 24 S. Ct. 24, 48 C. C. A. 96 [*affirming* 112 Fed. 888, 50 C. C. A. 591]; Shugart *v.* Atlanta, etc., R. Co., 133 Fed. 505, 66 C. C. A. 379; Cecil *v.* American Sheet Steel Co., 129 Fed. 542, 64 C. C. A. 72; Robinson *v.* Pittsburg Coal Co., 129 Fed. 324, 63 C. C. A. 258; Wabash Screen Door Co. *v.* Black, 126 Fed. 721, 61 C. C. A. 639; Portland Gold Min. Co. *v.* Flaherty, 111 Fed. 312, 49 C. C. A. 361; Southern Pac. Co. *v.* Yeargin, 109 Fed. 436, 48 C. C. A. 497; Felton *v.* Harbeson, 104 Fed. 737, 44 C. C. A. 188; Herrick *v.* Quigley, 101 Fed. 187, 41 C. C. A. 294.

Wilful injury question for jury see Claxton *v.* Lexington, etc., R. Co., 13 Bush (Ky.) 636.

Probability of accident question for jury see Texas, etc., R. Co. *v.* Reed, 88 Tex. 439, 31 S. W. 1058.

33. Evidence insufficient to go to jury see the following cases:

Alabama.— Sloss-Sheffield Steel, etc., Co. *v.* Mobley, 139 Ala. 425, 36 So. 181.

Illinois.— O'Donnell *v.* MacVeagh, 205 Ill. 23, 68 N. E. 646.

Kansas.— Consolidated Kansas City Smelting, etc., Co. *v.* Allen, 64 Kan. 70, 67 Pac. 436.

Missouri.— Oglesby *v.* Missouri Pac. R. Co., 177 Mo. 272, 76 S. W. 623.

New York.— Grant *v.* National R. Spring Co., 86 N. Y. App. Div. 593, 83 N. Y. Suppl. 1021; Webb *v.* Haynes, 75 N. Y. App. Div. 620, 78 N. Y. Suppl. 95.

North Carolina.— Hicks *v.* Naomi Falls Mfg. Co., 138 N. C. 319, 50 S. E. 703.

Pennsylvania.— Laven *v.* Moore, 211 Pa. St. 245, 60 Atl. 725; Douglass *v.* New York Cent., etc., R. Co., 209 Pa. St. 128, 58 Atl. 160; Briggs *v.* East Broad Top R., etc., Co., 206 Pa. St. 564, 56 Atl. 36.

Tennessee.— Chattanooga Light, etc., Co. *v.* Hodges, 109 Tenn. 331, 70 S. W. 616, 97 Am. St. Rep. 844, 60 L. R. A. 459.

Texas.— Bryan *v.* International, etc., R. Co., (Civ. App. 1905) 90 S. W. 693.

Wisconsin.— Schultz *v.* Chicago, etc., R. Co., 116 Wis. 31, 92 N. W. 377.

Accidental injury.— Where the evidence shows that the injury was the result of accident, or, if there was any negligence, plaintiff was not free from fault, a nonsuit is properly granted. Edwards *v.* Georgia Cent. R. Co., 118 Ga. 678, 45 S. E. 462.

34. Hope *v.* Fall Brook Coal Co., 3 N. Y. App. Div. 70, 38 N. Y. Suppl. 1040; Van Sickle *v.* Atlantic Ave. R. Co., 12 Misc. (N. Y.) 217, 33 N. Y. Suppl. 265; Johnson *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1895) 30 S. W. 95; Sorenson *v.* Menasha Paper, etc., Co., 56 Wis. 338, 14 N. W. 446.

35. *Kansas.*— Williams *v.* Atchison, etc., R. Co., 22 Kan. 117.

Massachusetts.—Allen *v.* G. W. & F. Smith Iron Co., 160 Mass. 557, 36 N. E. 581. But see Moynihan *v.* Hills Co., 146 Mass. 586, 16 N. E. 574, 4 Am. St. Rep. 348.

New York.— Stuber *v.* McEntee, 61 N. Y. Super. Ct. 338, 19 N. Y. Suppl. 900 [*reversed* on other grounds in 142 N. Y. 200, 36 N. E. 878]. But *compare* Madden *v.* Hughes, 104 N. Y. App. Div. 101, 93 N. Y. Suppl. 324, construing Laws (1897), p. 467, c. 415, § 18.

South Carolina.— Edgens *v.* Gaffney Mfg. Co., 69 S. C. 529, 48 S. E. 538.

West Virginia.— Humphreys *v.* Newport News, etc., Co., 33 W. Va. 135, 10 S. E. 39.

Wisconsin.— Sorenson *v.* Menasha Paper, etc., Co., 56 Wis. 338, 14 N. W. 446.

United States.— Reilly *v.* Campbell, 59 Fed. 990, 8 C. C. A. 438.

See 34 Cent. Dig. tit. "Master and Servant," § 1003.

But see Central R. Co. *v.* Rouse, 77 Ga. 393, 3 S. E. 307; Stoher *v.* St. Louis, etc., R. Co., 91 Mo. 509, 4 S. W. 389 (sudden giving way of track *prima facie* evidence of negligent construction); Ross *v.* Double Shoals Cotton Mills, 140 N. C. 115, 52 S. E. 121, 1 L. R. A. N. S. 298; Stewart *v.* Raleigh, etc., R. Co., 137 N. C. 687, 50 S. E. 312 (fact of collision raises presumption of negligence).

whether or not the servant was acting within the scope of his employment when injured, it should be submitted to the jury.[36]

(v) *Presumptions.* It is for the jury to say whether or not the evidence is sufficient to overcome the presumptions raised by law.[37]

b. Negligence on Part of Master — (i) *In General.* Whether or not there is any evidence tending to show negligence on the part of the master is a question for the court;[38] the weight and sufficiency of the evidence is a question for the jury.[39]

36. *Illinois.*— Dallemand *v.* Saalfeldt, 175 Ill. 310, 51 N. E. 645, 67 Am. St. Rep. 214, 48 L. R. A. 753 [*affirming* 73 Ill. App. 151]; Kingma *v.* Chicago, etc., R. Co., 85 Ill. App. 138.

Nebraska.— Norfolk Beet-Sugar Co. *v.* Hight, 59 Nebr. 100, 80 N. W. 276.

Pennsylvania.— Conley *v.* Lincoln Foundry Co., 14 Pa. Super. Ct. 626.

Texas.— Chicago, etc., R. Co. *v.* Oldridge, 33 Tex. Civ. App. 436, 76 S. W. 581.

United States.—Johnson *v.* Armour, 18 Fed. 490, 5 McCrary 629.

See 34 Cent. Dig. tit. "Master and Servant," § 1005.

37. Palmer Brick Co. *v.* Chenall, 119 Ga. 837, 47 S. E. 329; Savannah, etc., R. Co. *v.* Phillips, 90 Ga. 829, 17 S. E. 82; Central R. Co. *v.* Hubbard, 86 Ga. 623, 12 S. E. 1020.

38. *Georgia.*— Stewart *v.* Seaboard Air Line R. Co., 115 Ga. 624, 41 S. E. 981; Roul *v.* Palmer Brick Co., 114 Ga. 910, 41 S. E. 40.

Illinois.— East St. Louis R. Co. *v.* Hessling, 116 Ill. App. 125.

Kansas.— Fowler *v.* Brooks, (1902) 70 Pac. 600.

Maine.— Elwell *v.* Hacker, 86 Me. 416, 30 Atl. 64.

New York.— Hall *v.* U. S. Radiator Co., 52 N. Y. App. Div. 90, 64 N. Y. Suppl. 1002; Camphell *v.* Jughardt, 50 N. Y. App. Div. 460, 64 N. Y. Suppl. 198.

Pennsylvania.— McEwen *v.* Hoopes, 175 Pa. St. 237, 34 Atl. 623; Allegheny Heating Co. *v.* Rohan, 118 Pa. St. 223, 11 Atl. 789.

Washington.— Cully *v.* Northern Pac. R. Co., 35 Wash. 241, 77 Pac. 202.

United States.— Rosney *v.* Erie R. Co., 135 Fed. 311, 68 C. C. A. 155; Patton *v.* Southern R. Co., 111 Fed. 712, 49 C. C. A. 569; Mexican Cent. R. Co. *v.* Glover, 107 Fed. 356, 46 C. C. A. 334; Texas, etc., R. Co. *v.* Minnick, 61 Fed. 635, 10 C. C. A. 1.

See 34 Cent. Dig. tit. "Master and Servant," § 1001.

39. *Alabama.*— Tennessee Coal, etc., R. Co. *v.* Bridges, 144 Ala. 229, 39 So. 902; Tutwiler Coal, etc., Co. *v.* Enslen, 129 Ala. 336, 30 So. 600.

Delaware.— Murphy *v.* Hughes, 1 Pennew. 250, 40 Atl. 187.

Georgia.— Atlanta, etc., Air-Line R. Co. *v.* Weaver, 121 Ga. 466, 49 S. E. 291; Carey *v.* East Tennessee, etc., R. Co., 95 Ga. 547, 22 S. E. 299; Cook *v.* Western, etc., R. Co., 69 Ga. 619.

Illinois.— Cobb Chocolate Co. *v.* Knudson, 207 Ill. 452, 69 N. E. 816 [*affirming* 107 Ill. App. 668]; Slack *v.* Harris, 200 Ill. 96, 65 N. E. 669; Belt R. Co. *v.* Confrey, 111 Ill. App. 473; Illinois Cent. R. Co. *v.* McNicholas, 98 Ill. App. 54; Gundlach *v.* Schott, 95 Ill. App. 110 [*affirmed* in 192 Ill. 509, 61 N. E. 332, 85 Am. St. Rep. 348]; Banks *v.* Effingham, 63 Ill. App. 221.

Indiana.— M. S. Huey Co. *v.* Johnston, 164 Ind. 489, 73 N. E. 996; Diezi *v.* G. H. Hammond Co., 156 Ind. 583, 60 N. E. 353; Dill *v.* Marmon, (App. 1904) 71 N. E. 669.

Kansas.— Consolidated Kansas City Smelting, etc., Co. *v.* Sharber, 71 Kan. 700, 81 Pac. 476; Walker *v.* Scott, 10 Kan. App. 413, 61 Pac. 1091.

Kentucky.— Illinois Cent. R. Co. *v.* Elliott, 82 S. W. 374, 26 Ky. L. Rep. 669.

Maryland.— Pikesville, etc., R. Co. *v.* State, 88 Md. 563, 42 Atl. 214.

Massachusetts.— Welch *v.* New York, etc., R. Co., 176 Mass. 393, 57 N. E. 668.

Michigan.— Kopf *v.* Monroe Stone Co., 140 Mich. 649, 104 N. W. 313; Steiler *v.* Hart, 65 Mich. 644, 32 S. W. 875.

Minnesota.— Kohout *v.* Newman, 96 Minn. 61, 104 N. W. 764.

Missouri.— Markey *v.* Louisiana, etc., R. Co., 185 Mo. 348, 84 S. W. 61; Bailey *v.* Citizens' R. Co., 152 Mo. 449, 52 S. W. 406; Linn *v.* Massillon Bridge Co., 78 Mo. App. 111.

New York.— Hatton *v.* Hilton Bridge Constr. Co., 167 N. Y. 590, 60 N. E. 1112 [*affirming* 42 N. Y. App. Div. 398, 59 N. Y. Suppl. 272]; De Maio *v.* Standard Oil Co., 68 N. Y. App. Div. 167, 74 N. Y. Suppl. 165; Shambow *v.* New York, etc., R. Co., 15 N. Y. Suppl. 146.

North Carolina.— Marks *v.* Harriet Cotton Mills, 138 N. C. 401, 50 S. E. 769.

Rhode Island.— Vartanian *v.* New York, etc., R. Co., 25 R. I. 398, 56 Atl. 184.

South Carolina.— Scott *v.* Seaboard Air Line R. Co., 67 S. C. 136, 45 S. E. 129; Wood *v.* Victor Mfg. Co., 66 S. C. 482, 45 S. E. 81; Hicks *v.* Southern R. Co., (1901) 38 S. E. 725; Rinake *v.* Victor Mfg. Co., 55 S. C. 179, 32 S. E. 983.

Texas.— International, etc., R. Co. *v.* Vanlandingham, (Civ. App. 1905) 85 S. W. 847; Gulf, etc., R. Co. *v.* Harris, (Civ. App. 1899) 51 S. W. 864; Missouri, etc., R. Co. *v.* St. Clair, 21 Tex. Civ. App. 345, 51 S. W. 666.

Utah.— Frank *v.* Bullion Beck, etc., Min. Co., 19 Utah 35, 56 Pac. 419.

Virginia.— Fisher *v.* Chesapeake, etc., R. Co., 104 Va. 635, 52 S. E. 373, 2 L. R. A. N. S. 954.

Washington.— Costa *v.* Pacific Coast Co., 26 Wash. 138, 66 Pac. 398.

(II) *Care of Inexperienced or Youthful Servant.* Whether or not defendant has exercised due care to protect an inexperienced or youthful servant against injury is a question of fact for the jury,[40] if there is any evidence upon which to base a verdict.[41]

(III) *Tools, Machinery, Appliances, or Places For Work.*[42] Where, in an action by a servant to recover for personal injuries, there is evidence tending to show negligence on the part of the master with respect to his tools, machinery, appliances, or places for work, the question as to his negligence should be submitted to the jury;[43] but where there is no evidence tending to show the master's

Wisconsin.— Kutchera *v.* Goodwillie, 93 Wis. 448, 67 N. W. 729.

United States.— Tennessee Coal, etc., R. Co. *v.* Currier, 108 Fed. 19, 47 C. C. A. 161; Mason, etc., R. Co. *v.* Yockey, 103 Fed. 265, 43 C. C. A. 228; Totten *v.* Pennsylvania R. Co., 11 Fed. 564.

See 34 Cent. Dig. tit. "Master and Servant," § 1001.

Negligence in employment of insufficient force for jury see Supple *v.* Agnew, 191 Ill. 439, 61 N. E. 392 [*reversing* 80 Ill. App. 437]; Young *v.* Syracuse, etc., R. Co., 166 N. Y. 227, 59 N. E. 828 [*affirming* 45 N. Y. App. Div. 296, 61 N. Y. Suppl. 202]; Bonn *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1904) 82 S. W. 808.

40. *California.*— Mansfield *v.* Eagle Box, etc., Co., 136 Cal. 622, 69 Pac. 425.

Georgia.— Canton Cotton Mills *v.* Edwards, 120 Ga. 447, 47 S. E. 937; May *v.* Smith, 92 Ga. 95, 18 S. E. 360, 44 Am. St. Rep. 84; Wynne *v.* Conklin, 86 Ga. 40, 12 S. E. 183.

Iowa.— Mace *v.* Boedker, 127 Iowa 721, 104 N. W. 475; Vohs *v.* A. E. Shorthill Co., 124 Iowa 471, 100 N. W. 495; Sachau *v.* Milner, 123 Iowa 387, 98 N. W. 900.

Kentucky.— Donovan *v.* Overman, etc., Cordage Co., 58 S. W. 798, 22 Ky. L. Rep. 777.

Maryland.— Brager *v.* Austin, 99 Md. 473, 58 Atl. 432; Mercantile Laundry Co. *v.* Kearney, 97 Md. 15, 54 Atl. 966; Yentsch *v.* Chloride of Silver Dry Cell Battery Co., 96 Md. 679, 54 Atl. 877.

Massachusetts.— O'Neill *v.* Lowell Mach. Shop, 189 Mass. 446, 75 N. E. 744; Jarvis *v.* Coes Wrench Co., 177 Mass. 170, 58 N. E. 587; Wheeler *v.* Wason Mfg. Co., 135 Mass. 294.

Michigan.— Sterling *v.* Union Carbide Co., (1905) 105 N. W. 755; Ertz *v.* Pierson, (1902) 89 N. W. 680.

Minnesota.—Johnson *v.* Crookston Lumber Co., 95 Minn. 42, 103 N. W. 891.

Mississippi.— Anderson *v.* Cumberland Tel., etc., Co., 86 Miss. 341, 38 So. 786.

Missouri.— Vanesler *v.* Moser Cigar, etc., Co., 108 Mo. App. 621, 84 S. W. 201; Rogers *v.* Meyerson Printing Co., 103 Mo. App. 683, 78 S. W. 79.

New Hampshire.— Lapelle *v.* International Paper Co., 71 N. H. 346, 51 Atl. 1068.

New York.— Tully *v.* New York, etc., Steamship Co., 162 N. Y. 614, 57 N. E. 1127 [*affirming* 10 N. Y. App. Div. 463, 42 N. Y. Suppl. 29]; Carena *v.* Zanmatti, 82 N. Y. App. Div. 11, 81 N. Y. Suppl. 463; Corbett *v.* St. Vincent's Industrial School, 79 N. Y. App. Div. 334, 79 N. Y. Suppl. 369; Skaarup *v.* Stover, 56 Hun 86, 9 N. Y. Suppl. 92; Hickey *v.* Taaffe, 32 Hun 7 [*reversed* on other grounds in 99 N. Y. 204, 1 N. E. 685, 52 Am. Rep. 19]; Flynn *v.* Erie Preserving Co., 12 N. Y. St. 88.

North Carolina.— Hendrix *v.* Cooleemee Cotton Mills, 138 N. C. 169, 50 S. E. 561; Fitzgerald *v.* Alma Furniture Co., 131 N. C. 636, 42 S. E. 946.

Ohio.— Cleveland, etc., R. Co. *v.* Tehan, 26 Ohio Cir. Ct. 457; Breckenridge *v.* Reagan, 22 Ohio Cir. Ct. 71, 12 Ohio Cir. Dec. 50.

Oregon.— Mundhenke *v.* Oregon City Mfg. Co., 47 Oreg. 127, 81 Pac. 977, 1 L. R. A. N. S. 278.

Pennsylvania.— Crechen *v.* Bromley Bros. Carpet Co., 209 Pa. St. 6, 57 Atl. 1101; Pennsylvania Coal Co. *v.* Nee, 9 Pa. Cas. 579, 13 Atl. 841; Wessel *v.* Jones, etc., Steel Co., 28 Pa. Super. Ct. 332; Levy *v.* Rosenblatt, 21 Pa. Super. Ct. 543; Royer *v.* Tinkler, 16 Pa. Super. Ct. 457.

Texas.— Hamilton *v.* Galveston, etc., R. Co., 54 Tex. 556; Bering Mfg. Co. *v.* Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869; Smith *v.* Gulf, etc., R. Co., (Civ. App. 1901) 65 S. W. 83.

Utah.— Moyes *v.* Ogden Sewer Pipe, etc., Co., 28 Utah 148, 77 Pac. 610.

Vermont.— La Flam *v.* Missisquoi Pulp Co., 74 Vt. 125, 52 Atl. 526.

Washington.— Jancko *v.* West Coast Mfg., etc., Co., 34 Wash. 556, 76 Pac. 78; Boyer *v.* Northern Pac. Coal Co., 27 Wash. 707, 68 Pac. 348.

Wisconsin.— Kaspari *v.* Marsh, 74 Wis. 562, 43 N. W. 368.

United States.— Sink *v.* The Sikes Co., 134 Fed. 144.

See 34 Cent. Dig. tit. "Master and Servant," § 1006.

41. **Evidence insufficient to go to jury.**— Malsky *v.* Schumacher, 7 Misc. (N. Y.) 8, 27 N. Y. Suppl. 331; Dingly *v.* Star Knitting-Mill Co., 12 N. Y. Suppl. 31 [*affirmed* in 134 N. Y. 552, 32 N. E. 35]; Baldwin *v.* Urner, 206 Pa. St. 459, 56 Atl. 38.

42. **Concurrent negligence of master and fellow servants** see *infra*, IV, H, 6, c, (VII).

Methods of work, rules, and orders see *infra*, IV, H, 6, b, (IV).

Review of questions of fact, verdicts, and findings see *infra*, IV, H, 10, b.

43. *Alabama.*—Pierson Lumber Co. *v.* Hart, 144 Ala. 239, 39 So. 566; Sloss-Sheffield Steel, etc., Co. *v.* Hutchinson, 144 Ala. 221,

negligence in this respect, or where the evidence is conclusive one way or the

40 So. 114; E. E. Jackson Lumber Co. *v.* Cunningham, 141 Ala. 206, 37 So. 445; Tennessee Coal, etc., R. Co. *v.* Garrett, 140 Ala. 563, 37 So. 355; Kansas City, etc., R. Co. *v.* Flippo, 138 Ala. 487, 35 So. 457; Southern Car, etc., Co. *v.* Jennings, 137 Ala. 247, 34 So. 1002; Southern R. Co. *v.* Howell, 135 Ala. 639, 34 So. 6; Houston Biscuit Co. *v.* Dial, 135 Ala. 168, 33 So. 268; Robinson Min. Co. *v.* Tolbert, 132 Ala. 462, 31 So. 519; Campbell *v.* Louisville, etc., R. Co., 109 Ala. 520, 19 So. 975; Louisville, etc., R. Co. *v.* Baker, 106 Ala. 624, 17 So. 452; Bromley *v.* Birmingham Mineral R. Co., 95 Ala. 397, 11 So. 341.

Arkansas.— St. Louis, etc., R. Co. *v.* Neal, (1903) 78 S. W. 220.

California.— Davis *v.* Diamond Carriage, etc., Co., 146 Cal. 59, 79 Pac. 596; Merrifield *v.* Maryland Gold Quartz Min. Co., 143 Cal. 54, 76 Pac. 710; Kerrigan *v.* Market St. R. Co., 138 Cal. 506, 71 Pac. 621; Dolan *v.* Sierra R. Co., 135 Cal. 435, 67 Pac. 686; Bowman *v.* White, 110 Cal. 23, 42 Pac. 470.

Colorado.— Tanner *v.* Harper, 32 Colo. 156, 75 Pac. 404; Mulligan *v.* Colorado Fuel, etc., Co., 20 Colo. App. 198, 77 Pac. 977; Roche *v.* Denver, etc., R. Co., 19 Colo. App. 204, 73 Pac. 880; Maydole *v.* Denver, etc., R. Co., 15 Colo. App. 449, 62 Pac. 964.

Dakota.— Boss *v.* Northern Pac. R. Co., 5 Dak. 308, 40 N. W. 590.

Delaware.— Szymanski *v.* Blumenthal, 4 Pennew. 511, 56 Atl. 674, 103 Am. St. Rep. 132.

District of Columbia.— McDade *v.* Washington, etc., R. Co., 5 Mackey 144.

Georgia.— Duke *v.* Bibb Mfg. Co., 120 Ga. 1074, 48 S. E. 408; McDonnell *v.* Georgia Cent. R. Co., 118 Ga. 86, 44 S. E. 840; Barnett *v.* Northeastern R. Co., 87 Ga. 199, 13 S. E. 646; Central R., etc., Co. *v.* Kent, 84 Ga. 351, 10 S. E. 965; Stirk *v.* Central R., etc., Co., 79 Ga. 495, 5 S. E. 105.

Illinois.— Franke *v.* Hanly, 215 Ill. 216, 74 N. E. 130; Hansell-Elcock Foundry Co. *v.* Clark, 214 Ill. 399, 73 N. E. 787 [*affirming* 115 Ill. App. 209]; Chicago Terminal Transfer R. Co. *v.* O'Donnell, 213 Ill. 545, 72 N. E. 1133 [*affirming* 114 Ill. App. 345]; Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 321 [*affirming* 109 Ill. App. 468]; Belt R. Co. *v.* Confrey, 209 Ill. 344, 70 N. E. 773; Libby *v.* Banks, 209 Ill. 109, 70 N. E. 599 [*affirming* 110 Ill. App. 672]; Barnett, etc., Co. *v.* Schlapka, 208 Ill. 426, 70 N. E. 343 [*affirming* 110 Ill. App. 672]; Ehlen *v.* O'Donnell, 205 Ill. 38, 68 N. E. 766 [*affirming* 102 Ill. App. 141]; Donk Bros. Coal, etc., Co. *v.* Stroff, 200 Ill. 483, 66 N. E. 29 [*affirming* 100 Ill. App. 576]; Morris *v.* Maloney, 200 Ill. 132, 65 N. E. 704, 93 Am. St. Rep. 180; O'Fallon Coal, etc., Co. *v.* Laquet, 198 Ill. 125, 64 N. E. 767 [*affirming* 89 Ill. App. 13]; Himrod Coal Co. *v.* Clark, 197 Ill. 514, 64 N. E. 282 [*affirming* 99 Ill. App. 332]; Momence Stone Co. *v.* Groves, 197 Ill. 88, 64 N. E. 335 [*affirming* 100 Ill. App. 98]; Consolidated Coal Co. *v.* Lundak, 196 Ill. 594, 63 N. E. 1079 [*affirming* 97 Ill. App. 109]; Street's Western Stable Car Line *v.* Bonander, 196 Ill. 15, 63 N. E. 688 [*affirming* 97 Ill. App. 601]; Ide *v.* Frather, 194 Ill. 552, 62 N. E. 814 [*affirming* 96 Ill. App. 549]; Illinois Steel Co. *v.* Ostrowski, 194 Ill. 376, 62 N. E. 822 [*affirming* 93 Ill. App. 57]; H. Channon Co. *v.* Hahn, 189 Ill. 28, 59 N. E. 522 [*affirming* 90 Ill. App. 256]; Chicago Edison Co. *v.* Moren, 185 Ill. 571, 57 N. E. 773 [*affirming* 86 Ill. App. 152]; Odin Coal Co. *v.* Denman, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45 [*affirming* 84 Ill. App. 190]; Ames, etc., Co. *v.* Strachurski, 145 Ill. 192, 34 N. E. 48; Aurora Boiler Works *v.* Colligan, 115 Ill. App. 527; Chicago, etc., R. Co. *v.* Mikesell, 113 Ill. App. 146; Omaha Packing Co. *v.* Murray, 112 Ill. App. 233; Montgomery Coal Co. *v.* Barringer, 109 Ill. App. 185; Merchant *v.* Mickelson, 101 Ill. App. 401; Hober *v.* W. P. Nelson Co., 101 Ill. App. 336; Rock Island Sash, etc., Works *v.* Pohlman, 99 Ill. App. 670; Regan *v.* Sargent Co., 98 Ill. App. 617; Driscoll *v.* Chicago, etc., R. Co., 97 Ill. App. 668; Western Stone Co. *v.* Muscial, 96 Ill. App. 288 [*affirmed* in 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325]; Maxwell *v.* Zdarski, 93 Ill. App. 334; Swift *v.* Zerwick, 88 Ill. App. 558; Lake Erie, etc., R. Co. *v.* Wilson, 87 Ill. App. 360; Ross *v.* Shanley, 86 Ill. App. 144 [*affirmed* in 185 Ill. 390, 56 N. E. 1105]; Illinois Cent. R. Co. *v.* Campbell, 58 Ill. App. 275; Kimel *v.* Chicago, etc., R. Co., 55 Ill. App. 244; Chicago, etc., R. Co. *v.* Matthews, 48 Ill. App. 361 [*affirmed* in 153 Ill. 268, 38 N. E. 559]; Joliet, etc., R. Co. *v.* Velie, 36 Ill. App. 450 [*affirmed* in (1890) 26 N. E. 1086]; Tudor Iron Works *v.* Weber, 31 Ill. App. 306 [*affirmed* in 129 Ill. 535, 21 N. E. 1078]; Wood *v.* Illinois Cent. R. Co., 23 Ill. App. 370; Chicago, etc., R. Co. *v.* Clark, 11 Ill. App. 104.

Indiana.— Dill *v.* Mormon, (1905) 73 N. E. 67; Pennsylvania Co. *v.* Long, 94 Ind. 250; La Porte Carriage Co. *v.* Sallender, (App. 1904) 71 N. E. 922; Chicago, etc., R. Co. *v.* Tackett, (App. 1904) 71 N. E. 524; Baltimore, etc., R. Co. *v.* Cavanaugh, (App. 1904) 71 N. E. 239; Baltimore, etc., R. Co. *v.* Henderson, 31 Ind. App. 441, 68 N. E. 308; Baltimore, etc., R. Co. *v.* Leathers, 12 Ind. App. 544, 40 N. E. 1094.

Iowa.— Calloway *v.* Agar Packing Co., 129 Iowa 1, 104 N. W. 721; Pierson *v.* Chicago, etc., R. Co., 127 Iowa 13, 102 N. W. 149; Barto *v.* Iowa Tel. Co., (1904) 101 N. W. 876; Fries *v.* Bettendorf Axle Co., 126 Iowa 138, 101 N. W. 859; Lanza *v.* Le Grand Quarry Co., 124 Iowa 659, 100 N. W. 488; Crane *v.* Chicago, etc., R. Co., 123 Iowa 81, 99 N. W. 169; Hamilton *v.* Mendota Coal, etc., Co., 120 Iowa 147, 94 N. W. 282; Bryce *v.* Burlington, etc., R. Co., 119 Iowa 274, 93 N. W. 275; Sankey *v.* Chicago, etc., R. Co., 118 Iowa 39, 91 N. W. 820; Bach *v.* Iowa Cent. R. Co., 112 Iowa 241, 83 N. W. 959;

other, the question should not be submitted to the jury. So according to prin-

Olson *v.* Hanford Produce Co., 111 Iowa 347, 82 N. W. 903; Taylor *v.* Star Coal Co., 110 Iowa 40, 81 N. W. 249; Anderson *v.* Illinois Cent. R. Co., 109 Iowa 524, 80 N. W. 561; Ford *v.* Chicago, etc., R. Co., (1897) 71 N. W. 332; McFall *v.* Iowa Cent. R. Co., 96 Iowa 723, 65 N. W. 321; Reed *v.* Burlington, etc., R. Co., 72 Iowa 166, 33 N. W. 451, 2 Am. St. Rep. 243; Baldwin *v.* St. Louis, etc., R. Co., 72 Iowa 45, 33 N. W. 356; Hatfield *v.* Chicago, etc., R. Co., 61 Iowa 434, 16 N. W. 336; Brann *v.* Chicago, etc., R. Co., 53 Iowa 595, 6 N. W. 5, 36 Am. Rep. 243.

Kansas.— Atchison, etc., R. Co. *v.* Love, 57 Kan. 36, 45 Pac. 59; Solomon R. Co. *v.* Jones, 30 Kan. 601, 2 Pac. 657; St. Louis, etc., R. Co. *v.* Keller, 10 Kan. App. 480, 62 Pac. 905.

Kentucky.— Louisville, etc., R. Co. *v.* Hall, 115 Ky. 567, 74 S. W. 280, 24 Ky. L. Rep. 2487; Claxton *v.* Lexington, etc., R. Co., 13 Bush 636; Illinois Cent. R. Co. *v.* Leisure, 90 S. W. 269, 28 Ky. L. Rep. 768; McFarland *v.* Harbison, etc., Co., 82 S. W. 430, 26 Ky. L. Rep. 746; Langdon-Creasy Co. *v.* Rouse, 72 S. W. 1113, 24 Ky. L. Rep. 2095; De Hart *v.* Chesapeake, etc., R. Co., 68 S. W. 647, 24 Ky. L. Rep. 431; Reliance Textile, etc., Works *v.* Martin, 65 S. W. 809, 23 Ky. L. Rep. 1625; Covington, etc., Bridge Co. *v.* Goodnight, 60 S. W. 415, 22 Ky. L. Rep. 1242; Sandy River Cannel Coal Co. *v.* Caudill, 60 S. W. 180, 22 Ky. L. Rep. 1175; Wilson *v.* Williams, 58 S. W. 444, 22 Ky. L. Rep. 567; Louisville, etc., R. Co. *v.* Miller, 57 S. W. 230, 22 Ky. L. Rep. 327; Breckinridge, etc., Syndicate *v.* Murphy, 38 S. W. 700, 18 Ky. L. Rep. 915.

Maine.— Guthrie *v.* Maine Cent. R. Co., 81 Me. 572, 18 Atl. 295.

Maryland.— National Enameling, etc., Co. *v.* Cornell, 95 Md. 524, 52 Atl. 588; Baker *v.* Maryland Coal Co., 84 Md. 19, 35 Atl. 10.

Massachusetts.—White *v.* William H. Perry Co., 190 Mass. 99, 76 N. E. 512; Finnegan *v.* Samuel Winslow Skate Mfg. Co., 189 Mass. 580, 76 N. E. 192; Peterson *v.* Morgan Spring Co., 189 Mass. 576, 76 N. E. 220; Feeney *v.* York Mfg. Co., 189 Mass. 336, 75 N. E. 733; Carroll *v.* Metropolitan Coal Co., 189 Mass. 159, 75 N. E. 84; Smith *v.* Thomson-Houston Electric Co., 188 Mass. 371, 74 N. E. 664; Harris *v.* Putnam Mach. Co., 188 Mass. 85, 74 N. E. 287; Lynch *v.* M. T. Stevens, etc., Co., 187 Mass. 397, 73 N. E. 478; Bourbonnais *v.* West Boylston Mfg. Co., 184 Mass. 250, 68 N. E. 232; Garant *v.* Cashman, 183 Mass. 13, 66 N. E. 599; Boucher *v.* Robeson Mills, 182 Mass. 500, 65 N. E. 819; Gurney *v.* Le Baron, 182 Mass. 368, 65 N. E. 789; Pierce *v.* Arnold Print Works, 182 Mass. 260, 65 N. E. 368; Boyle *v.* Columbian Fire Proofing Co., 182 Mass. 93, 64 N. E. 726; Littlefield *v.* Edward P. Allis Co., 177 Mass. 151, 58 N. E. 692; Jones *v.* Pacific Mills, 176 Mass. 354, 57 N. E. 663; Hopkins *v.* O'Leary, 176 Mass. 258, 57 N. E. 342; Brady *v.* Norcross, 174 Mass. 442, 54 N. E. 874; Burgess *v.* Davis Sulphur Ore Co., 165 Mass. 71, 42 N. E. 501; Gibson *v.* Sullivan, 164 Mass. 557, 42 N. E. 110; Bowers *v.* Connecticut River R. Co., 162 Mass. 312, 38 N. E. 508; Hennessy *v.* Boston, 161 Mass. 502, 37 N. E. 668; Prendible *v.* Connecticut River R. Mfg. Co., 160 Mass. 131, 35 N. E. 675; Toy *v.* U. S. Cartridge Co., 159 Mass. 313, 34 N. E. 461; Denning *v.* Gould, 157 Mass. 563, 32 N. E. 862; Murray *v.* Knight, 156 Mass. 518, 31 N. E. 646; Connolly *v.* Waltham, 156 Mass. 368, 31 N. E. 302; Connors *v.* Durite Mfg. Co., 156 Mass. 163, 30 N. E. 559; Graham *v.* Boston, etc., R. Co., 156 Mass. 4, 30 N. E. 359; Fitzgerald *v.* Connecticut River Paper Co., 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537; Hannah *v.* Connecticut River R. Co., 154 Mass. 529, 28 N. E. 682; Cuddy *v.* People's Ice Co., 153 Mass. 366, 26 N. E. 869; Coates *v.* Boston, etc., R. Co., 153 Mass. 297, 26 N. E. 864, 10 L. R. A. 769; Dacey *v.* Old Colony R. Co., 153 Mass. 112, 26 N. E. 437; Myers *v.* Hudson Iron Co., 150 Mass. 125, 22 N. E. 631, 15 Am. St. Rep. 176; Daley *v.* American Printing Co., 150 Mass. 77, 22 N. E. 439; Griffith *v.* Boston, etc., R. Co., 148 Mass. 143, 19 N. E. 166, 12 Am. St. Rep. 526, 1 L. R. A. 698.

Michigan.— Clark *v.* Wolverine Portland Cement Co., 138 Mich. 673, 101 N. W. 845; Rich *v.* Saginaw Bay Towing Co., 132 Mich. 237, 93 N. W. 632, 10 Am. St. Rep. 422; Ouellette *v.* Michigan Alkali Co., 129 Mich. 484, 89 N. W. 436; Jones *v.* Flint, etc., R. Co., 127 Mich. 198, 86 N. W. 838; Shadford *v.* Ann Arbor St. R. Co., 121 Mich. 224, 80 N. W. 30; Woods *v.* Chicago, etc., R. Co., 108 Mich. 396, 66 N. W. 328; Balhoff *v.* Michigan Cent. R. Co., 106 Mich. 606, 65 N. W. 592; Ashman *v.* Flint, etc., R. Co., 90 Mich. 567, 51 N. W. 645; Barnowsky *v.* Helson, 89 Mich. 523, 50 N. W. 989, 15 L. R. A. 33; Tangney *v.* Wilson, 87 Mich. 453, 49 N. W. 666; Fox *v.* Peninsular White Lead, etc., Works, 84 Mich. 676, 48 N. W. 203; Sadowski *v.* Michigan Car Co., 84 Mich. 100, 47 N. W. 598; Eddy *v.* Anrora Iron Min. Co., 81 Mich. 548, 46 N. W. 17; Van Dusen *v.* Letellier, 78 Mich. 492, 44 N. W. 572; Marshall *v.* Widdicomb Furniture Co., 67 Mich. 167, 34 N. W. 541, 11 Am. St. Rep. 573.

Minnesota.— Shalgren *v.* Red Cliff Lumber Co., 95 Minn. 450, 104 N. W. 531; Carlson *v.* Haglin, 95 Minn. 347, 104 N. W. 297; Hebert *v.* Interstate Iron Co., 94 Minn. 257, 102 N. W. 451; Swanson *v.* Oakes, 93 Minn. 404, 101 N. W. 949; Anderson *v.* Fielding, 92 Minn. 42, 99 N. W. 357, 104 Am. St. Rep. 665; Dieters *v.* St. Paul Gaslight Co., 86 Minn. 474, 91 N. W. 15; Walker *v.* Grand Forks Lumber Co., 86 Minn. 328, 90 N. W. 573; Torske *v.* Commonwealth Lumber Co., 86 Minn. 276, 90 N. W. 532; Namyst *v.* Batz, 85 Minn. 366, 88 N. W. 991; Thompson *v.* Great Northern R. Co., 79 Minn. 291, 82 N. W. 637; Corbin *v.* Winona, etc., R. Co., 64 Minn. 185, 66 N. W. 271; Lawson *v.* Truesdale, 60 Minn. 410, 62 N. W. 546; Mullin *v.*

ciples applicable in the trial and disposition of civil actions generally, and which,

Northern Mill Co., 53 Minn. 29, 55 N. W. 1115; Flanders *v.* Chicago, etc., R. Co., 51 Minn. 193, 53 N. W. 544; Moon *v.* Northern Pac. R. Co., 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194; Johnson *v.* St. Paul, etc., R. Co., 43 Minn. 53, 44 N. W. 884; Sather *v.* Ness, 42 Minn. 379, 44 N. W. 128; Anderson *v.* Minnesota, etc., R. Co., 39 Minn. 523, 41 N. W. 104; Franklin *v.* Winona, etc., R. Co., 37 Minn. 409, 34 N. W. 898, 5 Am. St. Rep. 856; Barho *v.* Bassett, 35 Minn. 485, 29 N. W. 198; Robel *v.* Chicago, etc., R. Co., 35 Minn. 84, 27 N. W. 305.

Mississippi.— White *v.* Louisville, etc., R. Co., 72 Miss. 12, 16 So. 248.

Missouri.— Smith *v.* Fordyce, 190 Mo. 1, 88 S. W. 679; Paden *v.* Van Blarcom, 181 Mo. 117, 74 S. W. 124, 79 S. W. 1195; Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434; Chambers *v.* Chester, 172 Mo. 461, 72 S. W. 904; Wendler *v.* People's House Furnishing Co., 165 Mo. 527, 65 S. W. 737; Hamman *v.* Central Coal, etc., Co., 156 Mo. 232, 56 S. W. 1091; Murphy *v.* Wabash R. Co., 115 Mo. 111, 21 S. W. 862; Hamilton *v.* Rich Hill Coal Min. Co., 108 Mo. 364, 18 S. W. 977; Gutridge *v.* Missouri Pac. R. Co., 105 Mo. 520, 16 S. W. 943; Muirhead *v.* Hannibal, etc., R. Co., 103 Mo. 251, 15 S. W. 530; Soeder *v.* St. Louis, etc., R. Co., 100 Mo. 673, 13 S. W. 714, 18 Am. St. Rep. 724; Bowen *v.* Chicago, etc., R. Co., 95 Mo. 268, 8 S. W. 230; Tabler *v.* Hannibal, etc., R. Co., 93 Mo. 79, 5 S. W. 810; Deckerd *v.* Wabash R. Co., 111 Mo. App. 117, 85 S. W. 982; Dean *v.* St. Louis Woolenware Works, 106 Mo. App. 167, 80 S. W. 292; Robbins *v.* Big Circle Min. Co., 105 Mo. App. 78, 79 S. W. 480; McCready *v.* Stepp, 104 Mo. App. 340, 79 S. W. 671; Bair *v.* Heibel, 103 Mo. App. 621, 77 S. W. 1017; Mitchell *v.* Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647; Glasscock *v.* Swoffard Bros. Dry Goods Co., (App. 1903) 74 S. W. 1039; Paden *v.* Van Blarcom, 100 Mo. App. 185, 74 S. W. 124; Franklin *v.* Missouri, etc., R. Co., 97 Mo. App. 473, 71 S. W. 540; Sikes *v.* Missouri Granite Co., 92 Mo. App. 12; Kinloch Tel. Co. *v.* Palmer, 91 Mo. App. 106; Compton *v.* Omaha, etc., R. Co., 82 Mo. App. 175; Flynn *v.* Union Bridge Co., 42 Mo. App. 529; Dedrick *v.* Missouri Pac. R. Co., 21 Mo. App. 433.

Montana.— Ball *v.* Gussenhoven, 29 Mont. 321, 74 Pac. 871; Coleman *v.* Perry, 28 Mont. 1, 72 Pac. 42; Prosser *v.* Montana Cent. R. Co., 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814; Wall *v.* Helena St. R. Co., 12 Mont. 44, 29 Pac. 721.

Nebraska.— Fronk *v.* J. H. Evans City Steam Laundry, 70 Nebr. 75, 96 N. W. 1053; Union Pac. R. Co. *v.* Erickson, 41 Nebr. 1, 59 N. W. 347, 29 L. R. A. 137; Leigh *v.* Omaha St. R. Co., 36 Nebr. 131, 54 N. W. 134; Stevens *v.* Howe, 28 Nebr. 547, 44 N. W. 865.

New Hampshire.— Olney *v.* Boston, etc., R. Co., 71 N. H. 42, 52 Atl. 1097; Whitcher *v.* Boston, etc., R. Co., 70 N. H. 242, 46 Atl. 740.

New Jersey.— Maurer *v.* Gould, 72 N. J. L. 314, 60 Atl. 1134 [*affirming* (Sup. 1904) 59 Atl. 28]; Kalker *v.* Hedden, 72 N. J. L. 239, 61 Atl. 395; Ferguson *v.* Central R. Co., 71 N. J. L. 647, 60 Atl. 382; Dowd *v.* Erie R. Co., 70 N. J. L. 451, 57 Atl. 248; Hopwood *v.* Benjamin Athax, etc., Co., 68 N. J. L. 707, 54 Atl. 435; Flanigan *v.* Guggenheim Smelting Co., 63 N. J. L. 647, 44 Atl. 762; Van Steenburgh *v.* Thornton, 58 N. J. L. 160, 33 Atl. 380; New York, etc., R. Co. *v.* Marion, 57 N. J. L. 94, 30 Atl. 316.

New York.— Koehler *v.* New York Steam Co., 183 N. Y. 1, 75 N. E. 538; Krueger *v.* Bartholomay Brewing Co., 182 N. Y. 544, 75 N. E. 1130 [*affirming* 94 N. Y. App. Div. 58, 87 N. Y. Suppl. 1054]; Daly *v.* Lee, 167 N. Y. 537, 60 N. E. 1109 [*affirming* 39 N. Y. App. Div. 188, 57 N. Y. Suppl. 293]; Auld *v.* Manhattan L. Ins. Co., 165 N. Y. 610, 58 N. E. 1085 [*affirming* 34 N. Y. App. Div. 491, 54 N. Y. Suppl. 222]; Finn *v.* Cassidy, 165 N. Y. 584, 59 N. E. 311, 53 L. R. A. 877; Eastland *v.* Clarke, 165 N. Y. 420, 59 N. E. 202, 70 L. R. A. 751; Capasso *v.* Woolfolk, 163 N. Y. 472, 57 N. E. 760 [*reversing* 25 N. Y. App. Div. 234, 49 N. Y. Suppl. 409]; Byrne *v.* Eastmanns Co., 163 N. Y. 461, 57 N. E. 738; Cavanagh *v.* O'Neill, 161 N. Y. 657, 57 N. E. 1106 [*affirming* 27 N. Y. App. Div. 48, 50 N. Y. Suppl. 207]; Bailey *v.* Rome, etc., R. Co., 139 N. Y. 302, 34 N. E. 918; Wallace *v.* Central Vermont R. Co., 138 N. Y. 302, 33 N. E. 1069; Lilly *v.* New York Cent., etc., R. Co., 107 N. Y. 566, 14 N. E. 503; Bushby *v.* New York, etc., R. Co., 107 N. Y. 374, 14 N. E. 407, 1 Am. St. Rep. 844; Stringham *v.* Stewart, 100 N. Y. 516, 3 N. E. 575; Dukin *v.* Sharp, 88 N. Y. 225; Painton *v.* Northern Cent. R. Co., 83 N. Y. 7; Kirkpatrick *v.* New York Cent., etc., R. Co., 79 N. Y. 240; Smith *v.* New York, etc., R. Co., 19 N. Y. 127, 75 Am. Dec. 305 [*affirming* 6 Duer 225]; Conroy *v.* Acken, 110 N. Y. App. Div. 48, 96 N. Y. Suppl. 530; Kiernan *v.* Eidlitz, 109 N. Y. App. Div. 726, 96 N. Y. Suppl. 387; Di Stefeno *v.* Peekskill Lighting, etc., R. Co., 107 N. Y. App. Div. 293, 95 N. Y. Suppl. 179; Motzing *v.* Excelsior Brewing Co., 107 N. Y. App. Div. 275, 94 N. Y. Suppl. 1118; Haslin *v.* National Foundry Co., 106 N. Y. App. Div. 152, 94 N. Y. Suppl. 101; Pluckham *v.* American Bridge Co., 104 N. Y. App. Div. 404, 93 N. Y. Suppl. 748; Kremer *v.* New York Edison Co., 102 N. Y. App. Div. 433, 92 N. Y. Suppl. 883; McConnell *v.* Morse Iron Works, etc., Co., 102 N. Y. App. Div. 324, 92 N. Y. Suppl. 477; Siversen *v.* Jenks, 102 N. Y. App. Div. 313, 92 N. Y. Suppl. 382; Iesief *v.* New York Cent., etc., R. Co., 102 N. Y. App. Div. 168, 92 N. Y. Suppl. 342; Starer *v.* Stern, 100 N. Y. App. Div. 393, 91 N. Y. Suppl. 821; O'Donnell *v.* Welz, 97 N. Y. App. Div. 286, 89 N. Y. Suppl. 959; Cummings *v.* Kenny, 97 N. Y. App. Div. 114, 89

being sustained by almost innumerable decisions, are too well settled to admit of

N. Y. Suppl. 579; Newton *v.* New York Cent., etc., R. Co., 96 N. Y. App. Div. 81, 89 N. Y. Suppl. 23; Winters *v.* Naughton, 91 N. Y. App. Div. 80, 86 N. Y. Suppl. 439; Leaux *v.* New York, 87 N. Y. App. Div. 405, 84 N. Y. Suppl. 511; Devereux *v.* Utica Steam Cotton Mills, 84 N. Y. App. Div. 34, 82 N. Y. Suppl. 145; Johnson *v.* Roach, 83 N. Y. App. Div. 351, 82 N. Y. Suppl. 203; Muhlens *v.* Obermeyer, 83 N. Y. App. Div. 88, 82 N. Y. Suppl. 527; Walters *v.* George A. Fuller Co., 74 N. Y. App. Div. 388, 77 N. Y. Suppl. 681; Murphy *v.* Coney Island, etc., R. Co., 65 N. Y. App. Div. 546, 73 N. Y. Suppl. 18; Apati *v.* Delaware, etc., R. Co., 64 N. Y. App. Div. 515, 72 N. Y. Suppl. 322; Vincent *v.* Alden, 62 N. Y. App. Div. 558, 71 N. Y. Suppl. 149; Witkowski *v.* George W. Carter, etc., Co., 60 N. Y. App. Div. 577, 70 N. Y. Suppl. 232; Monahan *v.* Eidlitz, 59 N. Y. App. Div. 224, 60 N. Y. Suppl. 335; Cougulin *v.* Brooklyn Heights R. Co., 59 N. Y. App. Div. 126, 68 N. Y. Suppl. 1105; Wiedeman *v.* Everard, 56 N. Y. App. Div. 358, 67 N. Y. Suppl. 738; Jarvis *v.* Northern New York Marble Co., 55 N. Y. App. Div. 272, 67 N. Y. Suppl. 78; Mohr *v.* Lehigh Valley R. Co., 55 N. Y. App. Div. 176, 66 N. Y. Suppl. 899; Bower *v.* Cushman, 55 N. Y. App. Div. 45, 66 N. Y. Suppl. 1103; Hall *v.* U. S. Radiator Co., 52 N. Y. App. Div. 90, 64 N. Y. Suppl. 1002; McLaughlin *v.* Eidlitz, 50 N. Y. App. Div. 518, 64 N. Y. Suppl. 193; Scandell *v.* Columbia Constr. Co., 50 N. Y. App. Div. 512, 64 N. Y. Suppl. 232; Cunningham *v.* Sicilian Asphalt Paving Co., 49 N. Y. App. Div. 350, 63 N. Y. Suppl. 357; Welsh *v.* Cornell, 49 N. Y. App. Div. 203, 63 N. Y. Suppl. 44; Leland *v.* Hearn, 49 N. Y. App. Div. 111, 63 N. Y. Suppl. 204; Dorney *v.* O'Neill, 49 N. Y. App. Div. 8, 63 N. Y. Suppl. 107; Young *v.* Syracuse, etc., R. Co., 45 N. Y. App. Div. 296, 61 N. Y. Suppl. 202; Kaplin *v.* New York Biscuit Co., 5 N. Y. App. Div. 60, 38 N. Y. Suppl. 1049; Dumes *v.* Sizer, 3 N. Y. App. Div. 11, 37 N. Y. Suppl. 929; Scherer *v.* Holly Mfg. Co., 86 Hun 37, 33 N. Y. Suppl. 205; Bennett *v.* Greenwich, etc., R. Co., 84 Hun 216, 32 N. Y. Suppl. 457; Bernardi *v.* New York Cent., etc., R. Co., 78 Hun 454, 29 N. Y. Suppl. 230; Davis *v.* New York, etc., R. Co., 78 Hun 235, 28 N. Y. Suppl. 819 [*affirmed* in 145 N. Y. 621, 40 N. E. 163]; Fancher *v.* New York, etc., R. Co., 75 Hun 350, 27 N. Y. Suppl. 62; Knisley *v.* Pratt, 75 Hun 323, 26 N. Y. Suppl. 1010; Cobb *v.* Welcher, 75 Hun 283, 26 N. Y. Suppl. 1068; Mickee *v.* Walter A. Wood Mowing, etc., Co., 70 Hun 456, 24 N. Y. Suppl. 501; Meek *v.* New York Cent., etc., R. Co., 69 Hun 488, 23 N. Y. Suppl. 420 [*affirmed* in 140 N. Y. 622, 35 N. E. 891]; Pauley *v.* Steam-Gauge, etc., Co., 61 Hun 254, 16 N. Y. Suppl. 820; Palmer *v.* Conant, 58 Hun 333, 11 N. Y. Suppl. 917 [*affirmed* in 128 N. Y. 577, 28 N. E. 250]; Eldridge *v.* Atlas Steamship Co., 58 Hun 96, 11 N. Y. Suppl. 468; Sneider *v.* Treichler, 56 Hun 309, 9 N. Y. Suppl. 584; Selleck *v.* Landon, 55 Hun 19, 8 N. Y. Suppl. 573; Williams *v.* Delaware, etc., R. Co., 39 Hun 430; Near *v.* Delaware, etc., Canal Co., 32 Hun 557; Warner *v.* Erie R. Co., 49 Barb. 558; Plank *v.* New York Cent., etc., R. Co., 1 Thomps. & C. 319 [*affirmed* in 60 N. Y. 607]; Shanley *v.* Stanley, 59 N. Y. Super. Ct. 495, 15 N. Y. Suppl. 136; McCarthy *v.* Thorn, 57 N. Y. Super. Ct. 599, 5 N. Y. Suppl. 917; Guliano *v.* Whitenack, 9 Misc. 8, 29 N. Y. Suppl. 20; Ernst *v.* Brown Hoisting, etc., Co., 4 Misc. 450, 24 N. Y. Suppl. 359; Williams *v.* New York, etc., R. Co., 2 Misc. 30, 21 N. Y. Suppl. 259; Van Tassell *v.* New York, etc., R. Co., 1 Misc. 299, 20 N. Y. Suppl. 708 [*affirmed* in 142 N. Y. 634, 37 N. E. 566]; Joyce *v.* Rome, etc., R. Co., 29 N. Y. Suppl. 898; McCauley *v.* Smith, 19 N. Y. Suppl. 991; Wanamaker *v.* Rochester, 17 N. Y. Suppl. 321; Wooden *v.* Western New York, etc., R. Co., 16 N. Y. Suppl. 840; Wooster *v.* Western New York, etc., R. Co., 16 N. Y. Suppl. 764 [*affirmed* in 135 N. Y. 617, 32 N. E. 645]; Mahoney *v.* New York Cent., etc., R. Co., 15 N. Y. Suppl. 501 [*affirmed* in 131 N. Y. 623, 30 N. E. 864]; Flood *v.* Western Union Tel. Co., 15 N. Y. Suppl. 400; Harley *v.* Buffalo Car Mfg. Co., 15 N. Y. Suppl. 37; Fahy *v.* Rome, etc., R. Co., 13 N. Y. Suppl. 24; Fuchs *v.* William H. Sweeney Mfg. Co., 12 N. Y. Suppl. 870; Mikkelsen *v.* Ocean, etc., Transp. Co., 9 N. Y. Suppl. 741; Pullutro *v.* Delaware, etc., R. Co., 7 N. Y. Suppl. 510; Hunt *v.* Walch, 5 N. Y. Suppl. 802; Radman *v.* Haberstro, 1 N. Y. Suppl. 561 [*affirmed* in 119 N. Y. 659, 23 N. E. 1150]; Dobbin *v.* Brown, 1 N. Y. Suppl. 360; Culligan *v.* Jones, 14 N. Y. St. 186; Hillis *v.* Hine, 11 N. Y. St. 656; Halloran *v.* Bampton, 7 N. Y. St. 227; Hunter *v.* New York, etc., R. Co., 5 N. Y. St. 64; Frank *v.* Otis, 2 N. Y. St. 679; Disher *v.* New York Cent., etc., R. Co., 2 N. Y. St. 276.

North Carolina.— Biles *v.* Seaboard Air Line R. Co., 139 N. C. 528, 52 S. E. 129; Harris *v.* Balfour Quarry Co., 137 N. C. 204, 49 S. E. 95; Womble *v.* Merchants' Grocery Co., 135 N. C. 747, 47 S. E. 493; Walker *v.* Carolina Cent. R. Co., 135 N. C. 738, 47 S. E. 675; Dorsett *v.* Clement-Ross Mfg. Co., 131 N. C. 254, 42 S. E. 612; McCord *v.* Southern R. Co., 130 N. C. 491, 41 S. E. 886; Fleming *v.* Greenleaf-Johnson Lumber Co., 128 N. C. 532, 39 S. E. 43; Wright *v.* Southern R. Co., 127 N. C. 225, 37 S. E. 221.

North Dakota.— Bennett *v.* Northern Pac. R. Co., 3 N. D. 91, 54 N. W. 314.

Ohio.— Lake Shore, etc., R. Co. *v.* Fitzpatrick, 31 Ohio St. 479; Hill *v.* Lake Shore, etc., R. Co., 22 Ohio Cir. Ct. 291, 12 Ohio Cir. Dec. 241; E. P. Breckenridge Co. *v.* Reagan, 22 Ohio Cir. Ct. 71, 12 Ohio Cir. Dec. 50; Lake Shore, etc., R. Co. *v.* Raitz, 10 Ohio Cir. Ct. 70, 4 Ohio Cir. Dec. 18; McManus *v.* Pittsburg, etc., R. Co., 8 Ohio

doubt whether there is any evidence which has a tendency to show negligence, or

Dec. (Reprint) 796, 9 Cinc. L. Bul. 364; Johns *v.* Cleveland, etc., R. Co., 10 Ohio S. & C. Pl. Dec. 348, 7 Ohio N. P. 592; Maitland *v.* Cleveland, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 636, 7 Ohio N. P. 353.

Oregon.— Geldard *v.* Marshall, 43 Oreg. 438, 73 Pac. 330; Conlin *v.* Oregon Short Line, etc., R. Co., 23 Oreg. 499, 32 Pac. 397; Johnston *v.* Oregon Short Line, etc., R. Co., 23 Oreg. 94, 31 Pac. 283; Knahtla *v.* Oregon Short Line, etc., R. Co., 21 Oreg. 136, 27 Pac. 91.

Pennsylvania.— Bartholomew *v.* Kemmerer, 211 Pa. St. 277, 60 Atl. 908; Wallace *v.* Henderson, 211 Pa. St. 142, 60 Atl. 574; Miller *v.* Merritt, 211 Pa. St. 127, 60 Atl. 508; Kepler *v.* Lackawanna Lumber Co., 209 Pa. St. 244, 58 Atl. 284; Calhoun *v.* Holland Laundry, 208 Pa. St. 139, 57 Atl. 350; Conger *v.* Wiggins, 208 Pa. St. 122, 57 Atl. 341; Marsh *v.* Lehigh Valley R. Co., 206 Pa. St. 558, 56 Atl. 52; Geist *v.* Rapp, 206 Pa. St. 411, 55 Atl. 1063; Webster *v.* Monongahela River Consol. Coal, etc., Co., 201 Pa. St. 278, 50 Atl. 964; Young *v.* Mercantile Steam Laundry Co., 198 Pa. St. 553, 48 Atl. 497; Dyer *v.* Pittsburg Bridge Co., 198 Pa. St. 182, 47 Atl. 979; Bonner *v.* Pittsburg Bridge Co., 183 Pa. St. 278, 38 Atl. 896; Vanesse *v.* Catsburg Coal Co., 159 Pa. St. 403, 28 Atl. 200; Bennett *v.* Standard Plate Glass Co., 158 Pa. St. 120, 27 Atl. 874; Walbert *v.* Trexler, 156 Pa. St. 112, 27 Atl. 65; Cougle *v.* McKee, 151 Pa. St. 602, 25 Atl. 115; Glossen *v.* Gehman, 147 Pa. St. 619, 23 Atl. 843; Lee *v.* Electric Light, etc., Co., 140 Pa. St. 618, 21 Atl. 405; Strawbridge *v.* Bradford, 128 Pa. St. 200, 18 Atl. 346, 15 Am. St. Rep. 670; Philadelphia, etc., R. Co. *v.* Huber, 128 Pa. St. 63, 18 Atl. 334, 5 L. R. A. 439; Pottstown Iron Co. *v.* Fanning, 114 Pa. St. 234, 6 Atl. 578; Tissue *v.* Baltimore, etc., R. Co., 112 Pa. St. 91, 3 Atl. 667, 56 Am. Rep. 310; Murphy *v.* Crossan, 98 Pa. St. 495; Baker *v.* Allegheny Valley R. Co., 95 Pa. St. 211, 40 Am. Rep. 634; Johnson *v.* Bruner, 61 Pa. St. 58, 100 Am. Dec. 613; Silliman *v.* Marsden, 6 Pa. Cas. 570, 9 Atl. 639; Cambria Iron Co. *v.* Shaffer, 5 Pa. Cas. 105, 8 Atl. 204; O'Rourke *v.* Alphons Custodis Chimney Constr. Co., 21 Pa. Super. Ct. 52; De Grazia *v.* Piccardo, 15 Pa. Super. Ct. 107.

Rhode Island.— Cox *v.* American Agricultural Chemical Co., 24 R. I. 503, 53 Atl. 871, 60 L. R. A. 629; Le Febvre *v.* Lawton Spinning Co., 24 R. I. 215, 52 Atl. 1025.

South Carolina.— Roach *v.* Haile Gold Min. Co., 71 S. C. 79, 50 S. E. 543; Boyd *v.* Seaboard Air Line R. Co., 67 S. C. 218, 45 S. E. 186; Sims *v.* Southern R. Co., 66 S. C. 520, 45 S. E. 90; Wood *v.* Victor Mfg. Co., 66 S. C. 482, 45 S. E. 81; Evans *v.* Chamberlain, 40 S. C. 104, 18 S. E. 213; Price *v.* Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732; Carter *v.* Oliver Oil Co., 34 S. C. 211, 13 S. E. 419, 27 Am. St. Rep. 815; Coleman *v.* Wilmington, etc., R. Co., 25 S. C. 446, 60 Am. Rep. 516.

Tennessee.— Virginia Iron, etc., Co. *v.* Hamilton, 107 Tenn. 705, 65 S. W. 401; Louisville, etc., R. Co. *v.* Gower, 85 Tenn. 465, 3 S. W. 824.

Texas.— Drake *v.* San Antonio, etc., R. Co., (1905) 89 S. W. 407 [*reversing* (Civ. App. 1905) 85 S. W. 447]; Ft. Worth, etc., R. Co. *v.* Kime, (1899) 54 S. W. 240 [*affirming* 24 Tex. Civ. App. 271, 51 S. W. 558]; Texas, etc., R. Co. *v.* Robertson, 82 Tex. 657, 17 S. W. 1041, 27 Am. St. Rep. 929; Houston, etc., R. Co. *v.* Randall, 50 Tex. 254; Chicago, etc., R. Co. *v.* Jackson, (Civ. App. 1905) 89 S. W. 1117; El Paso, etc., R. Co. *v.* Vizard, (Civ. App. 1905) 88 S. W. 457; International, etc., R. Co. *v.* Reeves, 35 Tex. Civ. App. 162, 79 S. W. 1099; Texas Mexican R. Co. *v.* Mendez, (Civ. App. 1903) 78 S. W. 25; Jernigan *v.* Houston Ice, etc., Co., 33 Tex. Civ. App. 501, 77 S. W. 260; St. Louis, etc., R. Co. *v.* Skaggs, 32 Tex. Civ. App. 363, 74 S. W. 783; General Electric Co. *v.* Murray, 32 Tex. Civ. App. 226, 74 S. W. 50; Chicago, etc., R. Co. *v.* Long, 32 Tex. Civ. App. 40, 74 S. W. 59 [*affirmed* in 97 Tex. 69, 75 S. W. 483]; Galveston, etc., R. Co. *v.* Collins, 31 Tex. Civ. App. 70, 71 S. W. 560; Dupree *v.* Alexander, 29 Tex. Civ. App. 31, 68 S. W. 739; Texas, etc., R. Co. *v.* Utley, (Civ. App. 1901) 66 S. W. 311; Galveston, etc., R. Co. *v.* Davis, 27 Tex. Civ. App. 279, 65 S. W. 217; Gulf, etc., R. Co. *v.* Powell, 25 Tex. Civ. App. 91, 60 S. W. 979; De la Vergne Refrigerating Mach. Co. *v.* Stahl, 24 Tex. Civ. App. 471, 60 S. W. 319; Galveston, etc., R. Co. *v.* English, (Civ. App. 1900) 59 S. W. 626, 912; Galveston, etc., R. Co. *v.* Norris, (Civ. App. 1894) 29 S. W. 950; Galveston, etc., R. Co. *v.* Crawford, 9 Tex. Civ. App. 245, 27 S. W. 822, 29 S. W. 958; Texas, etc., R. Co. *v.* Raney, (Civ. App. 1893) 23 S. W. 340; Missouri Pac. R. Co. *v.* Sasse, (Civ. App. 1893) 22 S. W. 187.

Utah.— Cunningham *v.* Union Pac. R. Co., 4 Utah 206, 7 Pac. 795.

Vermont.— Severance *v.* New England Talc Co., 72 Vt. 181, 47 Atl. 833.

Virginia.— Wood *v.* Southern R. Co., 104 Va. 650, 52 S. E. 371; Johnston *v.* Moore Lime Co., 104 Va. 547, 52 S. E. 360; Virginia Iron, etc., Co. *v.* Tomlinson, 104 Va. 249, 51 S. E. 362; Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489.

Washington.—Westby *v.* Washington Brick, etc., Co., 40 Wash. 289, 82 Pac. 271; Hart *v.* Cascade Timber Co., 39 Wash. 279, 81 Pac. 738; Jancko *v.* West Coast Mfg., etc., Co., 34 Wash. 556, 76 Pac. 78; Currans *v.* Seattle, etc., R., etc., Co., 34 Wash. 512, 76 Pac. 87; Gaudie *v.* Northern Lumber Co., 34 Wash. 34, 74 Pac. 1009; Towle *v.* Stimson Mill Co., 33 Wash. 395, 74 Pac. 471; Bailey *v.* Cascade Timber Co., 32 Wash. 319, 73 Pac. 385; McDannald *v.* Washington, etc., R. Co., 31 Wash. 585, 72 Pac. 481; Goe *v.* Northern Pac. R. Co., 30 Wash. 654, 71 Pac. 182; Morton *v.* Moran Bros. Co., 30 Wash. 362, 70 Pac. 968; Crooker *v.* Pacific Lounge, etc., Co., 29 Wash. 30, 69

whether the evidence conclusively shows it, or its absence, is for the court to determine.[44]

Wash. 359; Sroufe *v.* Moran Bros. Co., 28 Wash. 381, 68 Pac. 896, 92 Am. St. Rep. 847; Rush *v.* Spokane Falls, etc., R. Co., 23 Wash. 501, 63 Pac. 500.

Wisconsin.— Montanye *v.* Northern Electrical Mfg. Co., 127 Wis. 22, 105 N. W. 1043; Zentner *v.* Oshkosh Gas Light Co., 126 Wis. 196, 105 N. W. 911; Berg *v.* U. S. Leather Co., 125 Wis. 262, 104 N. W. 60; Kreider *v.* Wisconsin River Paper, etc., Co., 110 Wis. 645, 86 N. W. 662; Crouse *v.* Chicago, etc., R. Co., 104 Wis. 473, 80 N. W. 752; Deisenrieter *v.* Kraus-Markel Malting Co., 92 Wis. 164, 66 N. W. 112; Paine *v.* Minnesota Eastern R. Co., 91 Wis. 340, 64 N. W. 1005; Colf *v.* Chicago, etc., R. Co., 87 Wis. 273, 58 N. W. 408; Engstrom *v.* Ashland Iron, etc., Co., 87 Wis. 166, 58 N. W. 241; Radmann *v.* Chicago, etc., R. Co., 78 Wis. 22, 47 N. W. 97; Nadau *v.* White River Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29; Pool *v.* Chicago, etc., R. Co., 53 Wis. 657, 11 N. W. 15; Wedgwood *v.* Chicago, etc., R. Co., 44 Wis. 44.

United States.—Texas, etc., R. Co. *v.* Swearingen, 196 U. S. 51, 25 S. Ct. 164, 49 C. C. A. 382 [*affirming* 122 Fed. 193, 59 C. C. A. 31]; Choctaw, etc., R. Co. *v.* Tennessee, 191 U. S. 326, 24 S. Ct. 99, 48 C. C. A. 201 [*affirming* 116 Fed. 23, 53 C. C. A. 497]; Texas, etc., R. Co. *v.* Carlin, 189 U. S. 354, 23 S. Ct. 585, 47 C. C. A. 849 [*affirming* 111 Fed. 777, 49 C. C. A. 605]; Cunard Steamship Co. *v.* Carey, 119 U. S. 245, 7 S. Ct. 1360, 30 L. ed. 354; Moore *v.* Illinois Cent. R. Co., 135 Fed. 67, 67 C. C. A. 541; Shugart *v.* Atlanta, etc., R. Co., 133 Fed. 505, 66 C. C. A. 379; Mountain Copper Co. *v.* Van Buren, 133 Fed. 1, 66 C. C. A. 151; Chicago, etc., R. Co. *v.* Benton, 132 Fed. 460, 65 C. C. A. 660; Chicago Great Western R. Co. *v.* Roddy, 131 Fed. 712, 65 C. C. A. 470; Cumberland Tel., etc., Co. *v.* Bills, 128 Fed. 272, 62 C. C. A. 620; Wabash Screen Door Co. *v.* Black, 126 Fed. 721, 61 C. C. A. 639; Highland Boy Gold Min. Co. *v.* Pouch, 124 Fed. 148, 61 C. C. A. 40; Gilbert *v.* Chicago, etc., R. Co., 123 Fed. 832; Pennsylvania R. Co. *v.* Jones, 123 Fed. 753, 59 C. C. A. 87; O'Connell *v.* Pennsylvania Co., 118 Fed. 989, 55 C. C. A. 483; Mexican Cent. R. Co. *v.* Townsend, 114 Fed. 737, 52 C. C. A. 369; Western Union Tel. Co. *v.* Tracy, 114 Fed. 282, 52 C. C. A. 660 [*affirming* 110 Fed. 103]; Texas, etc., R. Co. *v.* Allen, 114 Fed. 177, 52 C. C. A. 133; Erie R. Co. *v.* Moore, 113 Fed. 269, 51 C. C. A. 226; Nyback *v.* Champagne Lumber Co., 109 Fed. 732, 48 C. C. A. 632; Lafayette Bridge Co. *v.* Olsen, 108 Fed. 335, 47 C. C. A. 367, 54 L. R. A. 33; Tennessee Coal, etc., R. Co. *v.* Currier, 108 Fed. 19, 47 C. C. A. 161; Dunn *v.* New York, etc., R. Co., 107 Fed. 666, 46 C. C. A. 546; Mexican Cent. R. Co. *v.* Jones, 107 Fed. 64, 48 C. C. A. 227; Great Northern R. Co. *v.* Kasischke, 104 Fed. 440, 43 C. C. A. 626; Felton *v.* Girardy, 104 Fed. 127, 43 C. C. A. 439; Mason, etc., R. Co. *v.* Yockey, 103 Fed. 265, 43 C. C. A. 228; Texas, etc., R. Co. *v.* Wineland, 102 Fed. 673, 42 C. C. A. 588; Mexican Cent. R. Co. *v.* Eckman, 102 Fed. 274, 42 C. C. A. 344; Kansas City, etc., R. Co. *v.* Spellman, 102 Fed. 251, 42 C. C. A. 321; Herrick *v.* Quigley, 101 Fed. 187, 41 C. C. A. 294; Westland *v.* Gold Mines Co., 101 Fed. 59, 41 C. C. A. 80; Bethlehem Iron Co. *v.* Weiss, 100 Fed. 45, 40 C. C. A. 270; Grace, etc., Co. *v.* Kennedy, 99 Fed. 679, 40 C. C. A. 69; Felton *v.* Bullard, 94 Fed. 781, 37 C. C. A. 1; Clune *v.* Ristine, 94 Fed. 745, 36 C. C. A. 450; Atchison, etc., R. Co. *v.* Mulligan, 67 Fed. 569, 14 C. C. A. 547; Van Dyke *v.* Atlantic Ave. R. Co., 67 Fed. 296 [*affirmed* in 72 Fed. 458, 18 C. C. A. 632]; Northern Pac. R. Co. *v.* Mortenson, 63 Fed. 530, 11 C. C. A. 335; Northern Pac. R. Co. *v.* Teeter, 63 Fed. 527, 11 C. C. A. 332; Kansas City, etc., R. Co. *v.* Kirksey, 60 Fed. 999, 9 C. C. A. 321; Southern Pac. Co. *v.* Burke, 60 Fed. 704, 9 C. C. A. 229; Union Pac. R. Co. *v.* Jarvi, 53 Fed. 65, 3 C. C. A. 433; New Jersey, etc., R. Co. *v.* Young, 49 Fed. 723, 1 C. C. A. 428; Hall *v.* Union Pac. R. Co., 16 Fed. 744, 5 McCrary 257.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1010–1031.

44. *Colorado.*— Denver, etc., R. Co. *v.* Scott, (1905) 81 Pac. 763; Deane *v.* Roaring Fork Electric Light, etc., Co., 5 Colo. App. 521, 39 Pac. 346.

District of Columbia.— Sardo *v.* Moreland, 17 App. Cas. 219.

Georgia.— Georgia Cent. R. Co. *v.* Edwards, 111 Ga. 528, 36 S. E. 810.

Illinois.— Mobile, etc., R. Co. *v.* Healy, 100 Ill. App. 586; Chicago, etc., R. Co. *v.* Armstrong, 62 Ill. App. 228.

Indian Territory.— Kilpatrick *v.* Choctaw, etc., R. Co., 3 Indian Terr. 635, 64 S. W. 560.

Iowa.— Phinney *v.* Illinois Cent. R. Co., 122 Iowa 488, 98 N. W. 358; Hall *v.* Iowa Cent. R. Co., 111 Iowa 523, 82 N. W. 999; Griffith *v.* Burlington, etc., R. Co., 72 Iowa 645, 34 N. W. 609.

Kentucky.— Justice *v.* W. M. Ritter Lumber Co., 89 S. W. 171, 28 Ky. L. Rep. 242; Wintuska *v.* Louisville, etc., R. Co., 20 S. W. 819, 14 Ky. L. Rep. 579.

Massachusetts.— Bodwell *v.* Moore, 180 Mass. 590, 62 N. E. 971.

Michigan.— Fuller *v.* Ann Arbor R. Co., 141 Mich. 66, 104 N. W. 414; Nowakowski *v.* Detroit Stove Works, 130 Mich. 308, 89 N. W. 956; Sargee *v.* Clark Can Co., 126 Mich. 508, 85 N. W. 1105; Manning *v.* Chicago, etc., R. Co., 105 Mich. 260, 63 N. W. 312; Mackin *v.* Alaska Refrigerator Co., 100 Mich. 276, 58 N. W. 999; Redmond *v.* Delta Lumber Co., 96 Mich. 545, 55 N. W. 1004.

Minnesota.— Ellison *v.* Truesdale, 49 Minn. 240, 51 N. W. 918; Larson *v.* St. Paul, etc., R. Co., 43 Minn. 488, 45 N. W. 1096.

Missouri.— Goransson *v.* Ritter-Conley Mfg. Co., 186 Mo. 300, 85 S. W. 338; Furber *v.*

(IV) *METHODS OF WORK, RULES, AND ORDERS*[45] — (A) *Methods of Work.* It is a question for the court whether there is any evidence tending to show negligence on the part of the master with respect to his methods of work, or in the methods adopted by those for whose negligence he is responsible,[46] while it is for

Kansas City Bolt, etc., Co., 185 Mo. 301, 84 S. W. 890; Gardner *v.* St. Louis, etc., R. Co., 135 Mo. 90, 36 S. W. 214; Coontz *v.* Missouri Pac. R. Co., 121 Mo. 652, 26 S. W. 661; O'Malley *v.* Missouri Pac. R. Co., 113 Mo. 319, 20 S. W. 1079; Parsons *v.* Missouri Pac. R. Co., 94 Mo. 286, 6 S. W. 464; Hollingsworth *v.* National Biscuit Co., 114 Mo. App. 20, 88 S. W. 1118; Stafford *v.* Adams, 113 Mo. App. 717, 88 S. W. 1130; Smith *v.* Hammond Packing Co., 111 Mo. App. 13, 85 S. W. 625; Wendall *v.* Chicago, etc., R. Co., 100 Mo. App. 556, 75 S. W. 689; Lee *v.* Kansas City Gas Co., 91 Mo. App. 612.

Montana.— Shaw *v.* New Year Gold Mines Co., 31 Mont. 138, 77 Pac. 515.

Nebraska.— Swift *v.* Holoubek, 60 Nebr. 784, 84 N. W. 249, 62 Nebr. 31, 86 N. W. 900.

New Jersey.— Snyder *v.* J. S. Rogers Co., 69 N. J. L. 347, 55 Atl. 303; Atz *v.* Newark Line, etc., Mfg. Co., 59 N. J. L. 41, 34 Atl. 980; Bahr *v.* Lombard, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167.

New York.— Quinn *v.* Baird, 172 N. Y. 631, 65 N. E. 1121 [*affirming* 49 N. Y. App. Div. 270, 63 N. Y. Suppl. 235]; Sicso *v.* Lehigh, etc., R. Co., 145 N. Y. 296, 39 N. E. 958 [*reversing* 75 Hun 582, 27 N. Y. Suppl. 671]; Dingley *v.* Star Knitting Co., 134 N. Y. 552, 32 N. E. 35 [*affirming* 12 N. Y. Suppl. 31]; Borden *v.* Delaware, etc., R. Co., 131 N. Y. 671, 30 N. E. 586; Reichel *v.* New York Cent., etc., R. Co., 130 N. Y. 682, 29 N. E. 703; De Vau *v.* Pennsylvania, etc., Canal, etc., R. Co., 130 N. Y. 632, 28 N. E. 532 [*reversing* 7 N. Y. Suppl. 692]; Barsalou *v.* Peirce, 109 N. Y. App. Div. 506, 96 N. Y. Suppl. 538; Owen *v.* Retsof Min. Co., 102 N. Y. App. Div. 130, 92 N. Y. Suppl. 270; O'Connell *v.* Clark, 75 N. Y. App. Div. 619, 78 N. Y. Suppl. 93; Trapasso *v.* Coleman, 74 N. Y. App. Div. 33, 76 N. Y. Suppl. 798; Murray *v.* New York Cent., etc., R. Co., 55 N. Y. App. Div. 344, 66 N. Y. Suppl. 856; Kelly *v.* Erie R. Co., 53 N. Y. App. Div. 465, 65 N. Y. Suppl. 1046; Racine *v.* New York Cent., etc., R. Co., 70 Hun 453, 24 N. Y. Suppl. 388; Lawson *v.* Merrall, 69 Hun 278, 23 N. Y. Suppl. 560; Powers *v.* New York Cent., etc., R. Co., 60 Hun 19, 14 N. Y. Suppl. 408 [*affirmed* in 128 N. Y. 659, 29 N. E. 148]; Bailey *v.* Rome, etc., R. Co., 49 Hun 377, 3 N. Y. Suppl. 585; Coppins *v.* New York Cent., etc., R. Co., 43 Hun 26; Hayden *v.* Brooklyn Electric R. Co., 17 N. Y. Suppl. 352; Conlin *v.* Rogers, 14 N. Y. Suppl. 782; Beaudin *v.* Central Vermont R. Co., 14 N. Y. Suppl. 700; Schoening *v.* Knickerhocker Ice Co., 13 N. Y. Suppl. 434.

North Carolina.— Meekins *v.* Norfolk, etc., R. Co., 127 N. C. 29, 37 S. E. 77; Young *v.* Virginia, etc., Constr. Co., 109 N. C. 618, 14 S. E. 58.

Oregon.— Kincaid *v.* Oregon Short Line, etc., R. Co., 22 Oreg. 35, 29 Pac. 3.

Pennsylvania.— Gallagher *v.* Snellenburg, 210 Pa. St. 642, 60 Atl. 307; Laudeman *v.* Ryan, 209 Pa. St. 3, 57 Atl. 1118; Hartman *v.* Pennsylvania R. Co., 144 Pa. St. 345, 22 Atl. 701; Melchert *v.* Smith Brewing Co., 140 Pa. St. 448, 21 Atl. 755; Ford *v.* Anderson, 139 Pa. St. 261, 21 Atl. 18; Frazier *v.* Lloyd, (1889) 16 Atl. 418; Pittston Coal Co. *v.* McNulty, 120 Pa. St. 414, 14 Atl. 387; Rick *v.* Cramp, 9 Pa. Cas. 372, 12 Atl. 495; Crawford *v.* Stewart, 4 Pa. Cas. 382, 8 Atl. 5; Hawthorne *v.* Pennsylvania Salt Co., 10 Pa. Co. Ct. 77; Linkitus *v.* Butler Colliery, 7 Kulp 73.

South Carolina.— Gentry *v.* Southern R. Co., 66 S. C. 256, 44 S. E. 728; Hicks *v.* Sumter Cotton Mills, 39 S. C. 39, 17 S. E. 509.

Texas.— Proffitt *v.* Missouri, etc., R. Co., 95 Tex. 593, 68 S. W. 979; Johnson *v.* Houston, etc., R. Co., 31 Tex. Civ. App. 532, 72 S. W. 1021; El Paso, etc., R. Co. *v.* McComas, (Civ. App. 1903) 72 S. W. 629; Broadway *v.* San Antonio Gas Co., 24 Tex. Civ. App. 603, 60 S. W. 270; Missouri, etc., R. Co. *v.* Thompson, 11 Tex. Civ. App. 658, 33 S. W. 718.

Utah.— Roth *v.* Eccles, (1905) 79 Pac. 918.

Washington.— Kirby *v.* Rainier-Grand Hotel Co., 28 Wash. 705, 69 Pac. 378.

West Virginia.— Ketterman *v.* Dry Fork R. Co., 48 W. Va. 606, 37 S. E. 683.

Wisconsin.— Groth *v.* Thomann, 110 Wis. 488, 86 N. W. 178; Sherman *v.* Menominee River Lumber Co., 77 Wis. 14, 45 N. W. 1079; Ballou *v.* Chicago, etc., R. Co., 54 Wis. 257, 11 N. W. 559, 41 Am. Rep. 31.

United States.— Patton *v.* Texas, etc., R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. ed. 361 [*affirming* 95 Fed. 244, 37 C. C. A. 56]; Diamond Coal, etc., Co. *v.* Allen, 137 Fed. 705, 71 C. C. A. 107; Toledo Brewing, etc., Co. *v.* Bosch, 101 Fed. 530, 41 C. C. A. 482; Hunt *v.* Kile, 98 Fed. 49, 38 C. C. A. 641; Cotter *v.* Alabama Great Southern R. Co., 61 Fed. 747, 10 C. C. A. 35; Hathaway *v.* East Tennessee, etc., R. Co., 29 Fed. 489.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1010–1031.

45. **Negligence of fellow servants** see *infra*, IV, H, 6, h, (IV).

Review of questions of fact, verdicts, and findings see *infra*, IV, H, 10, b.

46. *Colorado.*— Murray *v.* Denver, etc., R. Co., 11 Colo. 124, 17 Pac. 484.

Iowa.— Aurandt *v.* Chicago, etc., R. Co., 90 Iowa 617, 57 N. W. 442; Skellenger *v.* Chicago, etc., R. Co., 61 Iowa 714, 17 N. W. 151.

the jury to say whether the evidence submitted is sufficient to show negligence.[47]

Maryland.— Baltimore, etc., R. Co. *v.* State, 101 Md. 359, 61 Atl. 189.

Minnesota.— Puffer *v.* Chicago Great Western R. Co., 65 Minn. 350, 68 N. W. 39; Steffenson *v.* Chicago, etc., R. Co., 48 Minn. 285, 51 N. W. 610.

Missouri.— Harrington *v.* Wabash R. Co., 104 Mo. App. 663, 78 S. W. 662.

New York.— Hurl *v.* New York Cent., etc., R. Co., 68 N. Y. App. Div. 400, 73 N. Y. Suppl. 1042; Kemmerer *v.* Manhattan R. Co., 81 Hun 444, 31 N. Y. Suppl. 82; McDonough *v.* Walsh, 66 Hun 633, 21 N. Y. Suppl. 303.

Pennsylvania.— Barton *v.* Jones, 6 Pa. Cas. 64, 8 Atl. 850.

Texas.— St. Louis Southwestern R. Co. *v.* Arnold, (Civ. App. 1905) 87 S. W. 173.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1032–1035.

47. *Alabama.*— Alabama Great Southern R. Co. *v.* Ellis, 137 Ala. 560, 34 So. 829; McGhee *v.* Willis, 134 Ala. 281, 32 So. 301; Louisville, etc., R. Co. *v.* Banks, 132 Ala. 471, 31 So. 573; Louisville, etc., R. Co. *v.* Smith, 129 Ala. 553, 30 So. 571; Alabama Mineral R. Co. *v.* Jones, 121 Ala. 113, 25 So. 814; Jones *v.* Alabama Mineral R. Co., 107 Ala. 400, 18 So. 30; Louisville, etc., R. Co. *v.* Woods, 105 Ala. 561, 17 So. 41; Birmingham R., etc., Co. *v.* Baylor, 101 Ala. 488, 13 So. 793.

Arizona.— Gila Valley, etc., R. Co. *v.* Lyon, (1903) 71 Pac. 957.

Colorado.— Colorado Electric Co. *v.* Lubbers, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255.

District of Columbia.— Baltimore, etc., R. Co. *v.* Landrigan, 20 App. Cas. 135.

Georgia.— Tuten *v.* Central R., etc., Co., 88 Ga. 228, 14 S. E. 185.

Illinois.— Spring Valley Coal Co. *v.* Buzis, 213 Ill. 341, 72 N. E. 1060; Indiana, etc., R. Co. *v.* Otstot, 212 Ill. 429, 72 N. E. 387 [*affirming* 113 Ill. App. 37]; Chicago, etc., R. Co. *v.* Eaton, 194 Ill. 441, 62 N. E. 784, 88 Am. St. Rep. 161 [*affirming* 96 Ill. App. 570]; Wells *v.* Bourdages, 193 Ill. 328, 61 N. E. 1010 [*affirming* 88 Ill. App. 473]; Illinois Cent. R. Co. *v.* Gilbert, 157 Ill. 354, 41 N. E. 724 [*affirming* 51 Ill. App. 404]; Wight Fire-Proofing Co. *v.* Poczekai, 130 Ill. 139, 22 N. E. 543; Chicago, etc., R. Co. *v.* Kelly, 127 Ill. 637, 21 N. E. 203 [*affirming* 28 Ill. App. 655]; Chicago, etc., R. Co. *v.* Kreger, 124 Ill. 457, 17 N. E. 52 [*affirming* 23 Ill. App. 639]; Duffy *v.* Kivilin, 98 Ill. App. 483 [*affirmed* in 195 Ill. 630, 63 N. E. 503]; Illinois Cent. R. Co. *v.* McNicholas, 98 Ill. App. 54.

Indiana.— Island Coal Co. *v.* Swaggerty, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026; Jarvis *v.* Hitch, (App. 1902) 65 N. E. 608.

Iowa.— Brown *v.* Burlington, etc., R. Co., 92 Iowa 408, 60 N. W. 779; Nicholaus *v.* Chicago, etc., R. Co., 90 Iowa 85, 57 N. W. 694; Whalen *v.* Chicago, etc., R. Co., 75 Iowa 563, 39 N. W. 894; Meloy *v.* Chicago, etc., R. Co., (1888) 37 N. W. 335; Dunlavy *v.* Chicago, etc., R. Co., 66 Iowa 435, 23 N. W. 911; Bryant *v.* Burlington, etc., R. Co., 66 Iowa 305, 23 N. W. 678, 55 Am. Rep. 275.

Kentucky.— Illinois Cent. R. Co. *v.* McIntosh, 118 Ky. 145, 80 S. W. 496, 81 S. W. 270, 26 Ky. L. Rep. 14, 347; Louisville, etc., R. Co. *v.* Ewing, 117 Ky. 624, 78 S. W. 460, 25 Ky. L. Rep. 1712; Cincinnati, etc., R. Co. *v.* Cook, 113 Ky. 161, 67 S. W. 383, 23 Ky. L. Rep. 2410; Illinois Cent. R. Co. *v.* Cane, 90 S. W. 1061, 28 Ky. L. Rep. 1018; Louisville, etc., R. Co. *v.* Gordon, 72 S. W. 311, 24 Ky. L. Rep. 1819; Louisville, etc., R. Co. *v.* Gilliam, 71 S. W. 863, 24 Ky. L. Rep. 1536; Louisville, etc., R. Co. *v.* Simpson, 64 S. W. 750, 23 Ky. L. Rep. 1075; Illinois Cent. R. Co. *v.* Walters, 56 S. W. 706, 22 Ky. L. Rep. 137.

Maryland.— State *v.* South Baltimore Car Works, 99 Md. 461, 58 Atl. 447; New York, etc., R. Co. *v.* Coulbourn, 60 Md. 360, 16 Atl. 208, 9 Am. St. Rep. 430, 1 L. R. A. 541.

Massachusetts.— Nagle *v.* Boston, etc., St. R. Co., 188 Mass. 38, 73 N. E. 1019; Brady *v.* New York, etc., R. Co., 184 Mass. 225, 68 N. E. 227; Cote *v.* Lawrence Mfg. Co., 178 Mass. 295, 59 N. E. 656; Gagnon *v.* Seaconnet Mills, 165 Mass. 221, 43 N. E. 82; Mahoney *v.* New York, etc., R. Co., 160 Mass. 573, 36 N. E. 588; Neveu *v.* Sears, 155 Mass. 303, 29 N. E. 472; Pierce *v.* Cunard Steamship Co., 153 Mass. 87, 26 N. E. 415.

Michigan.— La Barre *v.* Grand Trunk Western R. Co., 133 Mich. 192, 94 N. W. 735.

Minnesota.— Dolson *v.* Dunham, 96 Minn. 227, 104 N. W. 964; Campbell *v.* Railway Transfer Co., 95 Minn. 375, 104 N. W. 547; Meyer *v.* Kenyon-Rosing Mach. Co., 95 Minn. 329, 104 N. W. 132; Setterstrom *v.* Brainerd, etc., R. Co., 89 Minn. 262, 94 N. W. 882; Leonard *v.* Minneapolis, etc., R. Co., 63 Minn. 489, 65 N. W. 1084; Schulz *v.* Chicago, etc., R. Co., 57 Minn. 271, 59 N. W. 192; Slette *v.* Great Northern R. Co., 53 Minn. 341, 55 N. W. 137; Schumaker *v.* St. Paul, etc., R. Co., 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257.

Missouri.— Helm *v.* Missouri Pac. R. Co., 185 Mo. 212, 84 S. W. 5; Schlereth *v.* Missouri Pac. R. Co., 115 Mo. 87, 21 S. W. 1110; Dixon *v.* Chicago, etc., R. Co., 109 Mo. 413, 19 S. W. 412, 18 L. R. A. 792; Depuy *v.* Chicago, etc., R. Co., 110 Mo. App. 110, 84 S. W. 103; Dover *v.* Mississippi River, etc., R. Co., 100 Mo. App. 330, 73 S. W. 298; Haworth *v.* Kansas City Southern R. Co., 94 Mo. App. 215, 68 S. W. 111.

Nebraska.— Union Pac. R. Co. *v.* Broderick, 30 Nebr. 735, 46 N. W. 1121.

New York.— Abel *v.* Delaware, etc., Canal Co., 128 N. Y. 662, 28 N. E. 663 [*affirming* 10 N. Y. Suppl. 154]; Burns *v.* Palmer, 107 N. Y. App. Div. 321, 95 N. Y. Suppl. 161; Lane *v.* New York Cent., etc., R. Co., 107 N. Y. App. Div. 166, 94 N. Y. Suppl. 988; Wall *v.* Delaware, etc., R. Co., 54 Hun 454, 7 N. Y. Suppl. 709 [*affirmed* in 125 N. Y.

The test is that the question should not be submitted, if the court would be bound to set aside a verdict for plaintiff.[48]

(B) *Rules* — (1) CONSTRUCTION. The construction of rules promulgated by a master is a question of law for the court.[49]

(2) DUTY TO PROMULGATE AND ENFORCE. Whether a master was negligent in making and promulgating rules for the protection of his servants, or in failing to use due care and diligence, after the promulgation of a necessary rule, to have it enforced, is, under evidence from which reasonable men might differ as to whether the duty has been performed, a question for the jury.[50] But the question whether the master was negligent is for the court, in the absence of any evidence showing the necessity, practicability, and utility of such rules,[51] or their applicability to the case.[52]

727, 26 N. E. 757]; Matteson *v.* New York Cent. R. Co., 62 Barb. 364; Flynn *v.* Harlow, 61 N. Y. Super. Ct. 293, 19 N. Y. Suppl. 705.

North Carolina.—Peoples *v.* North Carolina R. Co., 137 N. C. 96, 49 S. E. 87; Smith *v.* Atlanta, etc., R. Co., 132 N. C. 819, 44 S. E. 663.

Ohio.— Kracht *v.* Lake Shore, etc., R. Co., 25 Ohio Cir. Ct. 521.

Oregon.— Wild *v.* Oregon Short-Line, etc., R. Co., 21 Oreg. 159, 27 Pac. 954.

Pennsylvania.— McCoy *v.* Ohio Valley Gas Co., 213 Pa. St. 367, 62 Atl. 858; Hickey *v.* Solid Steel Casting Co., 212 Pa. St. 255, 61 Atl. 798; Brommer *v.* Philadelphia, etc., R. Co., 205 Pa. St. 432, 54 Atl. 1092; Williams *v.* Clark, 204 Pa. St. 416, 54 Atl. 315.

Texas.— Bonnet *v.* Galveston, etc., R. Co., 89 Tex. 72, 33 S. W. 334; Gulf, etc., R. Co. *v.* Hays, (Civ. App. 1905) 89 S. W. 29; International, etc., R. Co. *v.* Still, (Civ. App. 1905) 88 S. W. 257; Texas Cent. R. Co. *v.* Phillips, (Civ. App. 1905) 87 S. W. 187; Galveston, etc., R. Co. *v.* Perry, (Civ. App. 1905) 85 S. W. 62; Quinn *v.* Galveston, etc., R. Co., (Civ. App. 1905) 84 S. W. 395; St. Louis, etc., R. Co. *v.* Skaggs, 32 Tex. Civ. App. 363, 74 S. W. 783; Chicago, etc., R. Co. *v.* Long, 32 Tex. Civ. App. 40, 74 S. W. 59 [*affirmed* in 97 Tex. 69, 75 S. W. 483]; Roberts *v.* Fielder Salt Works, (Civ. App. 1903) 72 S. W. 618; Galveston, etc., R. Co. *v.* Karrer, (Civ. App. 1902) 70 S. W. 328; Missouri, etc., R. Co. *v.* Follin, 29 Tex. Civ. App. 512, 68 S. W. 810; Texas, etc., R. Co. *v.* Abernathy, (Civ. App. 1900) 58 S. W. 175; Galveston, etc., R. Co. *v.* Adams, (Civ. App. 1900) 55 S. W. 803 [*affirmed* in 94 Tex. 100, 58 S. W. 831].

Virginia.— Chesapeake, etc., R. Co. *v.* Pierce, 103 Va. 99, 48 S. E. 534.

Washington.— Gustafson *v.* Seattle Traction Co., 28 Wash. 227, 68 Pac. 721.

Wisconsin.— Johnson *v.* St. Paul, etc., Coal Co., 126 Wis. 492, 105 N. W. 1048; Bain *v.* Northern Pac. R. Co., (1904) 98 N. W. 241; Promer *v.* Milwaukee, etc., R. Co., 90 Wis. 215, 63 N. W. 90, 48 Am. St. Rep. 905; Baltzer *v.* Chicago, etc., R. Co., 83 Wis. 459, 53 N. W. 885; Kruse *v.* Chicago, etc., R. Co., 82 Wis. 568, 52 N. W. 755.

United States.— Chicago, etc., R. Co. *v.* McLaughlin, 119 U. S. 566, 7 S. Ct. 1366, 30 L. ed. 477; Elliott *v.* Canadian Pac. R. Co., 129 Fed. 163; Texas, etc., R. Co. *v.* Dashiell, 128 Fed. 23, 62 C. C. A. 531; Northern Pac. R. Co. *v.* Mix, 121 Fed. 476, 57 C. C. A. 592; Texas, etc., R. Co. *v.* Putnam, 120 Fed. 754, 57 C. C. A. 58; Alaska United Gold Min. Co. *v.* Keating, 116 Fed. 561, 53 C. C. A. 655; St. Louis, etc., R. Co. *v.* Needham, 69 Fed. 823, 16 C. C. A. 457; Holmes *v.* Junod, 68 Fed. 858, 16 C. C. A. 36; Southern Pac. R. Co. *v.* Lafferty, 57 Fed. 536, 6 C. C. A. 474; O'Neill *v.* Chicago, etc., R. Co., 50 Fed. 189; Grant *v.* Union Pac. R. Co., 45 Fed. 673.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1032–1035.

48. Cummings *v.* Chicago, etc., R. Co., 89 Ill. App. 199 [*affirmed* in 189 Ill. 608, 60 N. E. 51].

49. Illinois Cent. R. Co. *v.* Murphy, 52 Ill. App. 65; Denver, etc., R. Co. *v.* Maydole, 33 Colo. 150, 79 Pac. 1023. But see Le Duc *v.* Northern Pac. R. Co., 92 Minn. 287, 100 N. W. 108.

50. *Delaware.* — Murphy *v.* Hughes, 1 Pennew. 250, 40 Atl. 187.

New York.— Daley *v.* Brown, 45 N. Y. App. Div. 428, 60 N. Y. Suppl. 840; Warn *v.* New York Cent., etc., R. Co., 92 Hun 91, 36 N. Y. Suppl. 336; Eastwood *v.* Retsof Min. Co., 86 Hun 91, 34 N. Y. Suppl. 196 [*affirmed* in 152 N. Y. 651, 47 N. E. 1106]; Morgan *v.* Hudson River Ore, etc., Co., 15 N. Y. Suppl. 609; Berrigan *v.* New York, etc., R. Co., 14 N. Y. Suppl. 26; Ford *v.* Lake Shore, etc., R. Co., 2 N. Y. Suppl. 1.

Ohio.— Lake Shore, etc., R. Co. *v.* Murphy, 50 Ohio St. 135, 33 N. E. 403.

Oregon.— Hartvig *v.* N. P. Lumber Co., 19 Oreg. 522, 25 Pac. 358.

Texas.— Cumpston *v.* Texas, etc., R. Co., (Civ. App. 1895) 33 S. W. 737.

Utah.— Johnson *v.* Union Pac. Coal Co., 28 Utah 46, 76 Pac. 1089, 67 L. R. A. 506.

See 34 Cent. Dig. tit. "Master and Servant," § 1037.

51. Murphy *v.* Milliken, 84 N. Y. App. Div. 582, 82 N. Y. Suppl. 951; Kapella *v.* Nichols Chemical Co., 83 N. Y. App. Div. 45, 82 N. Y. Suppl. 477; Corcoran *v.* New York, etc., R. Co., 58 N. Y. App. Div. 606, 69 N. Y. Suppl. 73, 77 N. Y. App. Div. 505, 78 N. Y. Suppl. 953; Burke *v.* Syracuse, etc., R. Co., 69 Hun (N. Y.) 21, 23 N. Y. Suppl. 458; Wagner *v.* Portland, 40 Oreg. 389, 60 Pac. 985, 67 Pac. 300.

52. Cunningham *v.* Bath Iron Works, 92 Me. 501, 43 Atl. 106.

(3) REASONABLENESS AND SUFFICIENCY. The reasonableness of any rule for the government of servants in the course of their employment is a question of law for the court,[53] while its adequacy and sufficiency is a question for the jury,[54] provided there is any evidence upon which to base a submission of the question.[55]

(4) WAIVER. The question as to whether a rule of an employer respecting the conduct of his business has been waived by him is for the jury.[56]

(c) *Orders.* The question whether an order was or was not in fact given,[57] and if so, whether it was negligently given,[58] and was the cause of the injury,[59] is for the jury, where there is evidence upon which to base its submission.[60]

(v) *WARNING AND INSTRUCTING SERVANT.* In accordance with well settled general principles, whether the master was guilty of negligence with respect to warning and instructing the injured servant is a question of fact for the jury,[61]

53. Kansas City, etc., R. Co. *v.* Hammond, 58 Ark. 324, 24 S. W. 723; Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 109; Chicago, etc., R. Co. *v.* Stevens, 80 Ill. App. 671; Le Duc *v.* Northern Pac. R. Co., 92 Minn. 287, 100 N. W. 108.

54. Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 109; Illinois Cent. R. Co. *v.* Neer, 31 Ill. App. 126 [*reversed* on other grounds in 138 Ill. 29]; Devoe *v.* New York Cent., etc., R. Co., 174 N. Y. 1, 66 N. E. 568 [*reversing* 70 N. Y. App. Div. 495, 75 N. Y. Suppl. 136]; Ford *v.* Lake Shore, etc., R. Co., 124 N. Y. 493, 26 N. E. 1101, 12 L. R. A. 454; Abel *v.* Delaware, etc., Canal Co., 103 N. Y. 581, 9 N. E. 325, 57 Am. Rep. 773; Sheeban *v.* New York Cent., etc., R. Co., 91 N. Y. 332; Warn *v.* New York Cent., etc., R. Co., 80 Hun (N. Y.) 71, 29 N. Y. Suppl. 897; Byrnes *v.* New York, etc., R. Co., 71 Hun (N. Y.) 209, 24 N. Y. Suppl. 517; Van Tassell *v.* New York, etc., R. Co., 1 Misc. (N. Y.) 299, 20 N. Y. Suppl. 708 [*affirmed* in 142 N. Y. 634, 37 N. E. 566]; Pittsburgh, etc., R. Co. *v.* Eis, 2 Ohio Cir. Ct. 3, 1 Ohio Cir. Dec. 329; Southern Pac. Co. *v.* Wellington, (Tex. Civ. App. 1896) 36 S. W. 1114; Gulf, etc., R. Co. *v.* Finley, 11 Tex. Civ. App. 64, 32 S. W. 51.

55. Smith *v.* Missouri Pac. R. Co., 113 Mo. 70, 20 S. W. 896; Ward *v.* Manhattan R. Co., 95 N. Y. App. Div. 437, 88 N. Y. Suppl. 758; Hebert *v.* Delaware, etc., Canal Co., 16 N. Y. Suppl. 561.

56. Binion *v.* Georgia, etc., R. Co., 111 Ga. 878, 36 S. E. 938; Tullis *v.* Lake Erie, etc., R. Co., 105 Fed. 554, 44 C. C. A. 597.

57. Kean *v.* Detroit Copper, etc., Rolling-Mills, 66 Mich. 277, 33 N. W. 395, 11 Am. St. Rep. 492; Small *v.* Brainerd Lumber Co., 95 Minn. 95, 103 N. W. 726.

58. *Georgia.*— Fenn *v.* Seaboard Air-Line R. Co., 120 Ga. 664, 48 S. E. 141.

Illinois.— Illinois Steel Co. *v.* Delac, 201 Ill. 150, 66 N. E. 245 [*affirming* 103 Ill. App. 98]; Illinois Steel Co. *v.* Sitar, 199 Ill. 116, 64 N. E. 984 [*affirming* 98 Ill. App. 300]; Illinois Steel Co. *v.* McFadden, 196 Ill. 344, 63 N. E. 671, 89 Am. St. Rep. 319 [*affirming* 98 Ill. App. 296].

Indiana.— Republic Iron, etc., Co. *v.* Berkes, 162 Ind. 517, 70 N. E. 815.

Massachusetts.— Murphy *v.* New York, etc., R. Co., 187 Mass. 18, 72 N. E. 330; Prendible *v.* Connecticut River Mfg. Co., 160 Mass. 131, 35 N. E. 675.

Minnesota.— Myhre *v.* Tromanhauser, 64 Minn. 541, 67 N. W. 660.

Missouri.— Mitchell *v.* Chicago, etc., R. Co., 108 Mo. App. 142, 83 S. W. 289; Buckalew *v.* Quincy, etc., R. Co., 107 Mo. App. 575, 81 S. W. 1176.

New York.— Sutherland *v.* Troy, etc., R. Co., 125 N. Y. 737, 26 N. E. 609 [*affirming* 8 N. Y. Suppl. 83]; McGovern *v.* Central Vermont R. Co., 123 N. Y. 280, 25 N. E. 373 [*reversing* 6 N. Y. Suppl. 306]; Cullen *v.* Norton, 52 Hun 9, 4 N. Y. Suppl. 774; Rettig *v.* Fifth Ave. Transp. Co., 6 Misc. 328, 26 N. Y. Suppl. 896 [*affirmed* in 144 N. Y. 715, 39 N. E. 859].

Ohio.— Pittsburgh, etc., R. Co. *v.* Henderson, 37 Ohio St. 549; McManus *v.* Pittsburg, etc., R. Co., 8 Ohio Dec. (Reprint) 796, 9 Cinc. L. Bul. 364.

Texas.— Galveston, etc., R. Co. *v.* Puente, 30 Tex. Civ. App. 246, 70 S. W. 362; Texas Cent. R. Co. *v.* Hicks, 24 Tex. Civ. App. 400, 59 S. W. 1125; Gulf, etc., R. Co. *v.* Finley, 11 Tex. Civ. App. 64, 32 S. W. 51; Galveston, etc., R. Co. *v.* Arispe, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33.

See 34 Cent. Dig. tit. "Master and Servant," § 1041.

Orders to inexperienced or youthful servants.— Kansas City, etc., R. Co. *v.* Hammond, 58 Ark. 324, 24 S. W. 723; Palmer *v.* Michigan Cent. R. Co., 87 Mich. 281, 49 N. W. 613; Berg *v.* Boston, etc., Consol. Copper, etc., Min. Co., 12 Mont. 212, 29 Pac. 545; Kain *v.* Smith, 89 N. Y. 375 [*affirming* 25 Hun 146]; Pennsylvania Co. *v.* Hickley, 20 Ohio Cir. Ct. 668, 11 Ohio Cir. Dec. 379.

59. Abel *v.* Butler-Ryan Co., 66 Minn. 16, 68 N. W. 205; Northern Pac. R. Co. *v.* Behling, 57 Fed. 1037, 6 C. C. A. 681.

60. Smith *v.* Martin, 14 N. Y. Suppl. 935; Harris *v.* Norfolk, etc., R. Co., 88 Va. 560, 14 S. E. 535.

61. *Arkansas.*— St. Louis, etc., R. Co. *v.* Davis, 55 Ark. 462, 18 S. W. 628.

District of Columbia.— Staubley *v.* Potomac Electric Power Co., 21 App. Cas. 160; McDade *v.* Washington, etc., R. Co., 5 Mackey 144.

Illinois.— Shickle-Harrison, etc., Iron Co. *v.* Beck, 212 Ill. 268, 72 N. E. 423; Rogers

if there is any evidence tending to show such negligence in the absence of such evidence the question should not be submitted to the jury.[62]

e. Fellow Service — (i) *Existence of Relation.* While the question of whether servants of a common master are fellow servants is usually one of fact for the jury, under proper instructions from the court;[63] yet, when the facts are

v. Cleveland, etc., R. Co., 211 Ill. 126, 71 N. E. 850, 103 Am. St. Rep. 185 [*reversing* 109 Ill. App. 494]; Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215 [*affirming* 41 Ill. App. 34]; Chicago Anderson Pressed Brick Co. *v.* Reineiger, 140 Ill. 334, 29 N. E. 1106, 33 Am. St. Rep. 249 [*affirming* 41 Ill. App. 324].

Iowa.— Morbey *v.* Chicago, etc., R. Co., 116 Iowa 84, 89 N. W. 105.

Kansas.— Comstock *v.* Union Pac. R. Co., 56 Kan. 228, 42 Pac. 724.

Kentucky.— Illinois Cent. R. Co. *v.* Jordan, 117 Ky. 512, 78 S. W. 426, 25 Ky. L. Rep. 426.

Maine.— Campbell *v.* Eveleth, 83 Me. 50, 21 Atl. 784.

Massachusetts.— Rafferty *v.* Nawn, 182 Mass. 503, 65 N. E. 830; Armstrong *v.* Forg, 162 Mass. 544, 39 N. E. 190; Hanson *v.* Ludlow Mfg. Co., 162 Mass. 187, 38 N. E. 363; Lynch *v.* Allyn, 160 Mass. 248, 35 N. E. 550; Ciriack *v.* Merchants' Woolen Co., 151 Mass. 152, 23 N. E. 829, 21 Am. St. Rep. 438, 6 L. R. A. 733; Ryan *v.* Tarbox, 135 Mass. 207; O'Connor *v.* Adams, 120 Mass. 427.

Michigan.— La Barre *v.* Grand Trunk Western R. Co., 133 Mich. 192, 94 N. W. 735; Chilson *v.* Lansing Wagon Works, 128 Mich. 43, 87 N. W. 79; Hoffman *v.* Adams, 106 Mich. 111, 64 N. W. 7.

Minnesota.— Nutzmann *v.* Germania L. Ins. Co., 82 Minn. 116, 84 N. W. 730; Barg *v.* Bousfield, 65 Minn. 355, 68 N. W. 45; Kaillen *v.* Northwestern Bedding Co., 46 Minn. 187, 48 N. W. 779.

Missouri.— Chambers *v.* Chester, 172 Mo. 461, 72 S. W. 904; Reisert *v.* Williams, 51 Mo. App. 13.

New Jersey.— Ricker *v.* Central R. Co., (Sup. 1905) 61 Atl. 89; Western Union Tel. Co. *v.* McMullen, 58 N. J. L. 155, 33 Atl. 384, 32 L. R. A. 351.

New York.— Borgeson *v.* U. S. Projectile Co., 2 N. Y. App. Div. 57, 37 N. Y. Suppl. 458; Crowell *v.* Thomas, 90 Hun 193, 35 N. Y. Suppl. 936; McGonigle *v.* Canty, 80 Hun 301, 30 N. Y. Suppl. 320; Heavey *v.* Hudson River Water-Power, etc., Co., 57 Hun 339, 10 N. Y. Suppl. 585; Brennan *v.* Gordon, 13 Daly 208; Ferguson *v.* Smith, 15 Misc. 251, 36 N. Y. Suppl. 415 [*affirmed* in 154 N. Y. 752, 49 N. E. 1096]; Healey *v.* Hart Bagging Co., 14 N. Y. Suppl. 934; McDermott *v.* New York Cent., etc., R. Co., 13 N. Y. Suppl. 435; Albertz *v.* Bache, 10 N. Y. Suppl. 639; Ogley *v.* Miles, 8 N. Y. Suppl. 270; Goldman *v.* Mason, 2 N. Y. Suppl. 337.

Pennsylvania.— Sweigert *v.* Klingensmith, 210 Pa. St. 565, 60 Atl. 253; Kilgallon *v.* Delaware, etc., Canal Co., 174 Pa. St. 392, 34 Atl. 597; Fisher *v.* Delaware, etc., Canal Co., 153 Pa. St. 379, 26 Atl. 18; Rummell *v.* Dilworth, etc., Co., 131 Pa. St. 509, 19 Atl. 345, 346, 17 Am. St. Rep. 827.

Texas.— Ft. Worth, etc., R. Co. *v.* Smith, (Civ. App. 1905) 87 S. W. 371; Dewalt *v.* Houston, etc., R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534; Hillsboro Oil Co. *v.* White, (Civ. App. 1899) 54 S. W. 432.

Utah.— Trihay *v.* Brooklyn Lead Min. Co., 4 Utah 468, 11 Pac. 612.

Vermont.— Reynolds *v.* Boston, etc., R. Co., 64 Vt. 66, 24 Atl. 134, 33 Am. St. Rep. 908.

Wisconsin.— Segall *v.* Padlasky, 123 Wis. 207, 101 N. W. 381; Wolski *v.* Knapp-Stout, etc., Co., 90 Wis. 178; Chopin *v.* Badger Paper Co., 83 Wis. 192, 53 N. W. 452; Hughes *v.* Chicago, etc., R. Co., 79 Wis. 264, 48 N. W. 209.

United States.— Britton *v.* Central Union Tel. Co., 131 Fed. 844, 65 C. C. A. 598; Orman *v.* Salvo, 117 Fed. 233, 54 C. C. A. 265; Richardson *v.* Swift, 96 Fed. 699, 37 C. C. A. 557; New York Biscuit Co. *v.* Rouss, 74 Fed. 608, 20 C. C. A. 555; Grant *v.* Union Pac. R. Co., 45 Fed. 673.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1044–1050.

Sufficiency of warning held question of law see Ft. Worth, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1905) 87 S. W. 371. *Contra*, McDade *v.* Washington, etc., R. Co., 5 Mackey (D. C.) 144; Campbell *v.* Eveleth, 83 Me. 50, 21 Atl. 784.

62. Geesen *v.* Saquin, 115 Iowa 7, 87 N. W. 745; Hernischel *v.* Texas Drug Co., 26 Tex. Civ. App. 1, 61 S. W. 419; Groth *v.* Thomann, 110 Wis. 488, 86 N. W. 178.

Warning of obvious danger not required see Chmiel *v.* Thorndike Co., 182 Mass. 112, 65 N. E. 47; Melchert *v.* Smith Brewing Co., 140 Pa. St. 448, 21 Atl. 755.

Reasonableness of instructions a question of law see Tullis *v.* Hassell, 54 N. Y. Super. Ct. 391.

63. *Arkansas.*— Kansas City, etc., R. Co. *v.* Hammond, 58 Ark. 324, 24 S. W. 723.

Georgia.— Chandler *v.* Southern R. Co., 113 Ga. 130, 38 S. E. 305.

Illinois.— Leighton, etc., Steel Co. *v.* Snell, 217 Ill. 152, 75 N. E. 462 [*affirming* 119 Ill. App. 199]; Wabash R. Co. *v.* Rhymer, 214 Ill. 579, 73 N. E. 879 [*reversing* 112 Ill. App. 225]; Illinois Southern R. Co. *v.* Marshall, 210 Ill. 562, 71 N. E. 597, 66 L. R. A. 297 [*affirming* 112 Ill. App. 514]; Spring Valley Coal Co. *v.* Patting, 210 Ill. 342, 71 N. E. 371 [*affirming* 112 Ill. App. 4]; Chicago, etc., R. Co. *v.* White, 209 Ill. 124, 70 N. E. 588; Chicago City R. Co. *v.* Leach, 208 Ill. 198, 70 N. E. 222 [*reversing* 104 Ill. App. 30]; Consolidated Coal Co. *v.* Fleischbein, 207 Ill. 593, 69 N. E. 963 [*affirming* 109 Ill. App. 509]; Spring Valley Coal Co. *v.* Robizas, 207

conceded, or there is no dispute with reference thereto, and all reasonable minds

Ill. 226, 69 N. E. 925; Chicago, etc., R. Co. *v.* Driscoll, 207 Ill. 9, 69 N. E. 620 [*affirming* 107 Ill. App. 615]; Chicago, etc., R. Co. *v.* Wise, 206 Ill. 453, 69 N. E. 500 [*affirming* 106 Ill. App. 174]; Missouri Malleable Iron Co. *v.* Dillon, 206 Ill. 145, 69 N. E. 12 [*affirming* 106 Ill. App. 649]; Metropolitan West Side El. R. Co. *v.* Fortin, 203 Ill. 454, 67 N. E. 977; Allen B. Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. 818; Slack *v.* Harris, 200 Ill. 96, 65 N. E. 669 [*affirming* 101 Ill. App. 527]; Hartley *v.* Chicago, etc., R. Co., 197 Ill. 440, 64 N. E. 382 [*reversing* 96 Ill. App. 227]; Supple *v.* Agnew, 191 Ill. 439, 61 N. E. 392 [*reversing* 80 Ill. App. 437]; Norton *v.* Nadebok, 190 Ill. 595, 60 N. E. 843, 54 L. R. A. 842; H. Channon Co. *v.* Hahn, 189 Ill. 28, 59 N. E. 522 [*affirming* 90 Ill. App. 256]; Chicago, etc., R. Co. *v.* Swan, 176 Ill. 424, 52 N. E. 916 [*affirming* 70 Ill. App. 331]; Chicago, etc., R. Co. *v.* O'Brien, 155 Ill. 630, 40 N. E. 1023 [*affirming* 53 Ill. App. 198]; Wenona Coal Co. *v.* Holmquist, 152 Ill. 581, 38 N. E. 946 [*affirming* 51 Ill. App. 507]; Goldie *v.* Werner, 151 Ill. 551, 38 N. E. 95 [*affirming* 50 Ill. App. 297]; Lake Erie, etc., R. Co. *v.* Middleton, 142 Ill. 550, 32 N. E. 453 [*affirming* 46 Ill. App. 218]; Chicago, etc., R. Co. *v.* Kelly, 127 Ill. 637, 21 N. E. 203 [*affirming* 28 Ill. App. 655]; Chicago, etc., R. Co. *v.* Moranda, 108 Ill. 576; Chicago Union Traction Co. *v.* Sawusch, 119 Ill. App. 349 [*affirmed* in 218 Ill. 130, 75 N. E. 797]; Hinchliff *v.* Robinson, 118 Ill. App. 450; Wabash R. Co. *v.* Thomas, 117 Ill. App. 110; Cleveland, etc., R. Co. *v.* Surrells, 115 Ill. App. 615; Himrod Coal Co. *v.* Clingan, 114 Ill. App. 568; Chicago, etc., R. Co. *v.* Mikesell, 113 Ill. App. 146; Indiana, etc., R. Co. *v.* Otstot, 113 Ill. App. 37 [*affirmed* in 212 Ill. 429, 72 N. E. 387]; Shickle-Harrison, etc., Iron Co. *v.* Beck, 112 Ill. App. 444; Junction Min. Co. *v.* Goodwin, 109 Ill. App. 144; Gruenendahl *v.* Consolidated Coal Co., 108 Ill. App. 644; Tubelowish *v.* Lathrop, 104 Ill. App. 82; Otstot *v.* Indiana, etc., R. Co., 103 Ill. App. 136; John S. Metcalf Co. *v.* Nystedt, 102 Ill. App. 71 [*affirmed* in 203 Ill. 333, 67 N. E. 764]; Illinois Cent. R. Co. *v.* Jones, 97 Ill. App. 131; Maxwell *v.* Zdarski, 93 Ill. App. 334; Consolidated Coal Co. *v.* Gruber, 91 Ill. App. 15 [*affirmed* in 188 Ill. 584, 59 N. E. 254]; Malott *v.* Crow, 90 Ill. App. 628; Lehigh *v.* World's Columbian Exposition, 67 Ill. App. 27; Kimel *v.* Chicago, etc., R. Co., 55 Ill. App. 244; Chicago, etc., R. Co. *v.* Tuite, 44 Ill. App. 535; Joliet Steel Co. *v.* Shields, 32 Ill. App. 598; Miller *v.* Ohio, etc., R. Co., 24 Ill. App. 326; Shedd *v.* Moran, 10 Ill. App. 618; Holton *v.* Daly, 4 Ill. App. 25.

Iowa.— Theleman *v.* Moeller, 73 Iowa 108, 34 N. W. 765, 5 Am. St. Rep. 663; Potter *v.* Chicago, etc., R. Co., 46 Iowa 399.

Kansas.— Brower *v.* Timreck, 66 Kan. 770, 71 Pac. 581.

Kentucky.— Crabtree Coal Min. Co. *v.* Sample, 72 S. W. 24, 24 Ky. L. Rep. 1703.

Massachusetts.— Twomey *v.* Swift, 163 Mass. 273, 39 N. E. 1018; Mahoney *v.* Dore, 155 Mass. 513, 30 N. E. 366; Arkerson *v.* Dennison, 117 Mass. 407.

Michigan.— McDonald *v.* Michigan Cent. R. Co., 108 Mich. 7, 65 N. W. 597.

Minnesota.— Johnson *v.* Crookston Lumber Co., 95 Minn. 142, 103 N. W. 891; Comers *v.* Washburn-Crosby Co., 91 Minn. 105, 97 N. W. 733; Perras *v.* Booth, 82 Minn. 191, 84 N. W. 739, 85 N. W. 179; Theisen *v.* Porter, 56 Minn. 555, 58 N. W. 265.

Missouri.— Gayle *v.* Missouri Car, etc., Co., 177 Mo. 427, 76 S. W. 987.

Nebraska.— Union Pac. R. Co. *v.* Doyle, 50 Nebr. 555, 70 N. W. 43.

New York.— Di Stefeno *v.* Peekskill Lighting, etc., R. Co., 107 N. Y. App. Div. 293, 95 N. Y. Suppl. 179; Devine *v.* Tarrytown, etc., Union Gaslight Co., 22 Hun 26.

Ohio.— Cincinnati, etc., R. Co. *v.* Thompson, 21 Ohio Cir. Ct. 778, 12 Ohio Cir. Dec. 326; Toomey *v.* Avery Stamping Co., 20 Ohio Cir. Ct. 183, 11 Ohio Cir. Dec. 216; Cincinnati Ice Co. *v.* Higdon, 7 Ohio Dec. (Reprint) 239, 2 Cinc. L. Bul. 3; Stevens *v.* Little Miami R. Co., 1 Ohio Dec. (Reprint) 335, 7 Cinc. L. Bul. 369.

Oregon.— Busch *v.* Robinson, 46 Oreg. 539, 81 Pac. 237.

Pennsylvania.— Evilhock *v.* Philadelphia, etc., R. Co., 169 Pa. St. 592, 32 Atl. 588; Hass *v.* Philadelphia, etc., R. Co., 88 Pa. St. 269, 32 Am. Rep. 462.

South Carolina.— Wilson *v.* Charleston, etc., R. Co., 51 S. C. 79, 28 S. E. 91; Whaley *v.* Bartlett, 42 S. C. 454, 20 S. E. 745.

Texas.— Young *v.* Hahn, 96 Tex. 99, 70 S. W. 950 [*reversing* (Civ. App. 1902) 69 S. W. 203]; Ray *v.* Pecos, etc., R. Co., (Civ. App. 1905) 88 S. W. 466; Texas, etc., Coal Co. *v.* Manning, 54 Tex. Civ. App. 322, 78 S. W. 545; Jernigan *v.* Houston Ice, etc., Co., 33 Tex. Civ. App. 501, 77 S. W. 260; Mexican Nat. R. Co. *v.* Finch, 8 Tex. Civ. App. 409, 27 S. W. 1028.

Virginia.— Baltimore, etc., R. Co. *v.* McKenzie, 81 Va. 71.

United States.— Cunard Steamship Co. *v.* Carey, 119 U. S. 245, 7 S. Ct. 1360, 30 L. ed. 354; Chicago House Wrecking Co. *v.* Birney, 117 Fed. 72, 54 C. C. A. 458; Great Northern R. Co. *v.* McLaughlin, 70 Fed. 669, 17 C. C. A. 330; Alaska Treadwell Gold Min. Co. *v.* Whelan, 64 Fed. 462, 12 C. C. A. 225 [*reversed* on other grounds in 168 U. S. 83, 18 S. Ct. 40, 42 L. ed. 390].

See 34 Cent. Dig. tit. "Master and Servant," §§ 1062–1066.

But see Donovan *v.* Ferris, 128 Cal. 48, 60 Pac. 519, 79 Am. St. Rep. 25.

Where a servant occupies a dual role of vice-principal and fellow servant, whether a particular act is the act of a fellow servant or of a vice-principal is a question of fact for the jury. Chicago, etc., R. Co. *v.* Driscoll, 107 Ill. App. 615 [*affirmed* in 207 Ill. 9, 69 N. E. 620]. See also Mobile, etc., R. Co. *v.*

will agree that the relation of fellow servants does or does not exist, then the question is one of law.[64]

(II) *NUMBER AND SUPERVISION.* Whether the master has been negligent in failing to provide a sufficient number of servants for the work,[65] and in properly supervising and directing their work,[66] and whether such negligence was the cause of the injury,[67] are questions for the jury.

(III) *COMPETENCY.* In an action for personal injuries due to the negligence of a fellow servant, the question whether the servant was incompetent and whether the master negligently employed, or retained him with knowledge, actual or constructive, of such incompetency, are questions of fact for the jury,[68] where

Massey, 152 Ill. 144, 38 N. E. 787 [*affirming* 52 Ill. App. 556]; Fogarty *v.* St. Louis Transfer Co., 180 Mo. 480, 79 S. W. 664, decided under the "dual capacity doctrine" of Illinois.

64. *Illinois.*— Spring Valley Coal Co. *v.* Patting, 210 Ill. 342, 71 N. E. 371 [*affirming* 112 Ill. App. 4]; Chicago City R. Co. *v.* Leach, 208 Ill. 198, 70 N. E. 222 [*reversing* 104 Ill. App. 30]; Illinois Steel Co. *v.* Coffey, 205 Ill. 206, 68 N. E. 751 [*reversing* 107 Ill. App. 582]; Chicago, etc., R. Co. *v.* Driscoll, 176 Ill. 330, 52 N. E. 921 [*reversing* 70 Ill. App. 91]; Wabash R. Co. *v.* Thomas, 117 Ill. App. 110; Cleveland, etc., R. Co. *v.* Surrells, 115 Ill. App. 615; Himrod Coal Co. *v.* Clingan, 114 Ill. App. 568; Chicago, etc., R. Co. *v.* Mikesell, 113 Ill. App. 146; Gruenendahl *v.* Consolidated Coal Co., 108 Ill. App. 644; Tubelowish *v.* Lathrop, 104 Ill. App. 82; Ashmore *v.* Charleston Light, etc., Co., 99 Ill. App. 262; Duffy *v.* Kivilin, 98 Ill. App. 483 [*affirmed* in 195 Ill. 630, 63 N. E. 503]; Illinois Cent. R. Co. *v.* Jones, 97 Ill. App. 131; O'Leary *v.* Wabash R. Co., 52 Ill. App. 641.

Indiana.— Keller *v.* Gaskill, 20 Ind. App. 502, 50 N. E. 363, in which the facts were found by special verdict.

Massachusetts.— McGinty *v.* Athol Reservoir Co., 155 Mass. 183, 29 N. E. 510; Johnson *v.* Boston Tow Boat Co., 135 Mass. 209, 46 Am. Rep. 458.

Missouri.— Gayle *v.* Missouri Car, etc., Co., 177 Mo. 427, 76 S. W. 987; Marshall *v.* Schricker, 63 Mo. 308; Stevens *v.* Deatherage Lumber Co., 110 Mo. App. 398, 86 S. W. 481; Shaw *v.* Bambrick-Bates Constr. Co., 102 Mo. App. 666, 77 S. W. 96.

Nebraska.— New Omaha Thomson-Houston Electric Light Co. *v.* Baldwin, 62 Nebr. 180, 87 N. W. 27.

New York.— Crispin *v.* Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Riola *v.* New York Cent., etc., R. Co., 97 N. Y. App. Div. 252, 89 N. Y. Suppl. 945, 100 N. Y. App. Div. 509, 91 N. Y. Suppl. 599; Koszlowski *v.* American Locomotive Co., 96 N. Y. App. Div. 40, 89 N. Y. Suppl. 55.

Wisconsin.— MacCarthy *v.* Whitcomb, 110 Wis. 113, 85 N. W. 707.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1062–1066.

Where the question depends upon contract, its determination is for the court. McCafferty *v.* Dock Co., 11 Ohio Cir. Ct. 457, 5 Ohio Cir. Dec. 262.

65. *Alabama.*— Georgia Pac. R. Co. *v.* Propst, 90 Ala. 1, 7 So. 635.

Colorado.— Denver, etc., R. Co. *v.* Wilson, 12 Colo. 20, 20 Pac. 340.

New York.— Harvey *v.* New York Cent., etc., R. Co., 19 Hun 556.

Pennsylvania.— Weaver *v.* Iselin, 161 Pa. St. 386, 29 Atl. 49.

Wisconsin.— Kelley *v.* Chicago, etc., R. Co., 53 Wis. 74, 9 N. W. 816.

See 34 Cent. Dig. tit. "Master and Servant," § 1051.

66. Babcock *v.* Old Colony R. Co., 150 Mass. 467, 23 N. E. 325.

67. Tinney *v.* Boston, etc., R. Co., 62 Barb. (N. Y.) 218; Rumsey *v.* Delaware, etc., R. Co., 6 Kulp (Pa.) 359.

68. *Dakota.*— Mares *v.* Northern Pac. R. Co., 3 Dak. 336, 21 N. W. 5.

Illinois.— Joch *v.* Dankwardt, 85 Ill. 331; La Salle County Carbon Coal Co. *v.* Offergeld, 104 Ill. App. 494; Pagels *v.* Meyer, 88 Ill. App. 169; Calumet Electric St. R. Co. *v.* Peters, 88 Ill. App. 112.

Indiana.— Evansville, etc., R. Co. *v.* Guyton, 115 Ind. 450, 17 N. E. 101, 7 Am. St. Rep. 458.

Kentucky.— Greer *v.* Louisville, etc., R. Co., 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345.

Maryland.— Campbell, etc., Co. *v.* Roediger, 78 Md. 601, 28 Atl. 901.

Michigan.— Lee *v.* Michigan Cent. R. Co., 87 Mich. 574, 49 N. W. 909; Michigan Cent. R. Co. *v.* Gilbert, 46 Mich. 176, 9 N. W. 243.

Missouri.— O'Hare *v.* Chicago, etc., R. Co., 95 Mo. 662, 9 S. W. 23.

New York.— Mann *v.* Delaware, etc., Canal Co., 91 N. Y. 495; Irwin *v.* Brooklyn Heights R. Co., 59 N. Y. App. Div. 95, 69 N. Y. Suppl. 80; O'Loughlin *v.* New York Cent., etc., R. Co., 87 Hun 538, 34 N. Y. Suppl. 297; Cameron *v.* New York Cent., etc., R. Co., 77 Hun 519, 28 N. Y. Suppl. 898; Wall *v.* Delaware, etc., R. Co., 54 Hun 454, 7 N. Y. Suppl. 709; Coppins *v.* New York Cent., etc., R. Co., 48 Hun 292 [*affirmed* in 122 N. Y. 557, 25 N. E. 915, 19 Am. St. Rep. 523]; Newell *v.* Ryan, 40 Hun 286; Devine *v.* Tarrytown, etc., Union Gaslight Co., 22 Hun 26; Henry *v.* Brady, 9 Daly 142; Bossout *v.* Rome, etc., R. Co., 10 N. Y. Suppl. 602; O'Loughlin *v.* New York Cent., etc., R. Co., 9 N. Y. St. 384.

Pennsylvania.— Hughes *v.* Baltimore, etc., R. Co., 164 Pa. St. 178, 30 Atl. 383, 44 Am. St. Rep. 597.

Texas.— Texas, etc., R. Co. *v.* Lee, 32 Tex.

there is evidence tending to show such facts, but in the absence of such evidence the questions should not be submitted to their determination.[69]

(IV) *STATUTES ABOLISHING OR LIMITING DOCTRINE.* It is a question of fact for the jury whether the case is within the terms of a statute which abolishes or modifies the fellow servant doctrine.[70]

(V) *NEGLIGENCE OF FELLOW SERVANT.*[71] Where there is evidence tending to show it,[72] the question whether a fellow servant has been negligent is one of fact for the jury.[73]

(VI) *CAUSE OF INJURY.* The question whether the negligence of a fellow servant was the proximate cause of the injury is ordinarily one of fact for the jury.[74]

Civ. App. 23, 74 S. W. 345; Lantry *v.* Lowrie, (Civ. App. 1900) 58 S. W. 837.

Washington.— Richardson *v.* Carbon Hill Coal Co., 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338.

United States.— Southern Pac. Co. *v.* Huntsman, 118 Fed. 412, 55 C. C. A. 366.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1054–1056.

69. Evidence held insufficient to go to jury see Peaslee *v.* Fitchburg R. Co., 152 Mass. 155, 25 N. E. 71; Sutherland *v.* Troy, etc., R. Co., 125 N. Y. 737, 26 N. E. 609 [*reversing* 8 N. Y. Suppl. 83]; Duffy *v.* Platt, 205 Pa. St. 296, 54 Atl. 1000; Galveston, etc., R. Co. *v.* Faber, 77 Tex. 153, 8 S. W. 64.

70. *Alabama.*— Culver *v.* Alabama Midland R. Co., 108 Ala. 330, 8 So. 827.

Iowa.— Schroeder *v.* Chicago, etc., R. Co., 41 Iowa 344.

Massachusetts.— Cunningham *v.* Atlas Tack Co., 187 Mass. 51, 72 N. E. 325; Knight *v.* Overman Wheel Co., 174 Mass. 455, 54 N. E. 890; Reynolds *v.* Barnard, 168 Mass. 226, 46 N. E. 703; Geloneck *v.* Dean Steam Pump Co., 165 Mass. 202, 43 N. E. 85; Steffe *v.* Old Colony R. Co., 156 Mass. 262, 30 N. E. 1137; Dacey *v.* Old Colony R. Co., 153 Mass. 112, 26 N. E. 437; Babcock *v.* Old Colony R. Co., 150 Mass. 467, 23 N. E. 325.

Minnesota.— Kreuzer *v.* Great Northern R. Co., 83 Minn. 385, 86 N. W. 413.

Missouri.— Stanley *v.* Chicago, etc., R. Co., 112 Mo. App. 601, 87 S. W. 112.

United States.— Chicago Terminal Transfer R. Co. *v.* Stone, 118 Fed. 19, 55 C. C. A. 187; Dells Lumber Co. *v.* Erickson, 80 Fed. 257, 25 C. C. A. 397.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1057–1059.

71. Negligence in methods of work see *supra*, IV, H, 6, b, (IV).

Negligence in warning and instructing co-employees see *supra*, IV, H, 6, b, (V).

72. Evidence held insufficient to go to jury see Houston *v.* Culver, 88 Ga. 34, 13 S. E. 953; Allen *v.* Chicago, etc., R. Co., 126 Iowa 213, 101 N. W. 863; Louisville, etc., R. Co. *v.* Hocker, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119, 23 Ky. L. Rep. 982; McGillis *v.* Duluth, etc., R. Co., 95 Minn. 363, 104 N. W. 231.

73. *Illinois.*— Baier *v.* Selke, 211 Ill. 512, 71 N. E. 1074, 103 Am. St. Rep. 208 [*reversing* 112 Ill. App. 568]; Chicago Terminal Transfer R. Co. *v.* O'Donnell, 114 Ill. App. 345 [*affirmed* in 213 Ill. 545, 72 N. E. 1133].

Kansas.— Carrier *v.* Union Pac. R. Co., (1897) 50 Pac. 873.

Kentucky.— Louisville, etc., R. Co. *v.* Bishop, 89 S. W. 221, 28 Ky. L. Rep. 321; Louisville, etc., R. Co. *v.* Lowe, (1902) 66 S. W. 736.

Massachusetts.— Knight *v.* Overman Wheel Co., 174 Mass. 455, 54 N. E. 890.

Minnesota.— Renlund *v.* Commodore Min. Co., 89 Minn. 41, 93 N. W. 1057, 99 Am. St. Rep. 534; Theisen *v.* Porter, 56 Minn. 555, 58 N. W. 265.

Missouri.— Hinzeman *v.* Missouri Pac. R. Co., 182 Mo. 611, 81 S. W. 1134; Francis *v.* Kansas City, etc., R. Co., 127 Mo. 658, 28 S. W. 842, 30 S. W. 129; Haworth *v.* Kansas City Southern R. Co., 94 Mo. App. 215, 68 S. W. 111.

Montana.—Wastl *v.* Montana Union R. Co., 24 Mont. 159, 61 Pac. 9.

New Jersey.— Day *v.* Donohue, 62 N. J. L. 380, 41 Atl. 934.

New York.— O'Brien *v.* Buffalo Furnace Co., 183 N. Y. 317, 76 N. E. 161; Smith *v.* New York Cent., etc., R. Co., 9 N. Y. St. 612.

Ohio.— Ham *v.* Lake Shore, etc., R. Co., 23 Ohio Cir. Ct. 496.

Texas.— Missouri, etc., R. Co. *v.* Kellerman, (Civ. App. 1905) 87 S. W. 401; Ft. Worth, etc., R. Co. *v.* Caskey, (Civ. App. 1904) 84 S. W. 264.

Virginia.— Norfolk, etc., R. Co. *v.* Spencer, 104 Va. 657, 52 S. E. 310.

Wisconsin.— Kath *v.* Wisconsin Cent. R. Co., 121 Wis. 503, 99 N. W. 217.

See 34 Cent. Dig. tit. "Master and Servant," § 1060.

To sustain a motion for nonsuit, negligence of a fellow servant defeating the liability of the master must clearly appear from plaintiff's evidence. Comben *v.* Belleville Stone Co., 59 N. J. L. 226, 36 Atl. 473.

74. *Arizona.*— Gila Valley, etc., R. Co. *v.* Lyon, (1903) 71 Pac. 957.

California.— Bjorman *v.* Ft. Bragg Redwood Co., 104 Cal. 626, 38 Pac. 451.

Georgia.— Reedy *v.* East Tennessee, etc., R. Co., 87 Ga. 323, 13 S. E. 555.

Illinois.— Canning *v.* McMillan, 55 Ill. App. 232.

Kentucky.— Ritt *v.* Louisville, etc., R. Co., 4 S. W. 796, 9 Ky. L. Rep. 307.

(VII) *CONCURRENT NEGLIGENCE OF MASTER AND FELLOW SERVANT.* Whether the negligence of an employee resulting in injury to a fellow servant was the sole cause of the injury, or only a cause concurring with the negligence of the master, is a question for the jury.[75]

d. Assumption of Risks.[76] Where, on an issue of assumption of risk by a servant who has sustained injuries, the facts are controverted, or such that different inferences may be drawn therefrom, the question as to assumption of risk should be submitted to the jury under proper instructions from the court.[77] On

Massachusetts.— Lack *v.* Hargraves Mills, 190 Mass. 56, 76 N. E. 235.

Michigan.— Wellihan *v.* National Wheel Co., 128 Mich. 1, 87 N. W. 75.

Minnesota.— Barrett *v.* Reardon, 94 Minn. 425, 104 N. W. 309.

Missouri.— Sikes *v.* Missouri Granite Co., 92 Mo. App. 12.

Nebraska.— Burlington, etc., R. Co. *v.* Wallace, 28 Nebr. 179, 44 N. W. 223.

New York.— Burke *v.* Brown, 14 N. Y. St. 619.

Ohio.— Dick *v.* Indianapolis, etc., R. Co., 38 Ohio St. 389 [*reversing* 7 Ohio Dec. (Reprint) 59, 1 Cinc. L. Bul. 93].

Oregon.— Hartvig *v.* N. P. Lumber Co., 19 Oreg. 522, 25 Pac. 358.

Pennsylvania.— Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146.

South Carolina.— Koon *v.* Southern R. Co., 69 S. C. 101, 48 S. E. 86.

Washington.— Hart *v.* Cascade Timber Co., 39 Wash. 279, 81 Pac. 738.

Wisconsin.— Grant *v.* Keystone Lumber Co., 119 Wis. 229, 96 N. W. 535, 100 Am. St. Rep. 883.

United States.— Northern Pac. R. Co. *v.* Perry, 116 Fed. 609, 54 C. C. A. 65; Union Pac. R. Co. *v.* Callaghan, 56 Fed. 988, 6 C. C. A. 205.

See 34 Cent. Dig. tit. "Master and Servant," § 1061.

75. *New Hampshire.*—Hamel *v.* Newmarket Mfg. Co., 73 N. H. 386, 62 Atl. 592.

New York.— McDermott *v.* Brooklyn City R. Co., 83 Hun 614, 31 N. Y. Suppl. 388; Cullen *v.* Norton, 1 Silv. Sup. 510, 5 N. Y. Suppl. 523; Flynn *v.* Harlow, 61 N. Y. Super. Ct. 293, 19 N. Y. Suppl. 705; Whittaker *v.* Delaware, etc., Canal Co., 11 N. Y. Suppl. 914.

Pennsylvania.— Goodman *v.* Delaware, etc., Canal Co., 167 Pa. St. 332, 31 Atl. 670.

Texas.— Gulf, etc., R. Co. *v.* Hays, (Civ. App. 1905) 89 S. W. 29.

United States.— Northern Pac. R. Co. *v.* Poirier, 67 Fed. 881, 15 C. C. A. 52.

See 34 Cent. Dig. tit. "Master and Servant," § 1067.

76. Inexperienced or youthful employee see *infra*, IV, H, 6, b, (II).

Review of questions of fact, verdicts, and findings see *infra*, IV, H, 10, b.

77. *Alabama.*— Tutwiler Coal, etc., Co. *v.* Farrington, 144 Ala. 157, 39 So. 898; Going *v.* Alabama Steel, etc., Co., 141 Ala. 537, 37 So. 784; Postal Tel. Cable Co. *v.* Hulsey, 132 Ala. 444, 31 So. 527; Whatley *v.* Zenida Coal Co., 122 Ala. 118, 26 So. 124.

Arkansas.— Emma Cotton Seed Oil Co. *v.* Hale, 56 Ark. 232, 19 S. W. 600; Davis *v.* St. Louis, etc., R. Co., 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283.

California.— Anderson *v.* Seropian, 147 Cal. 201, 81 Pac. 521; Olsen *v.* Gray, 147 Cal. 112, 81 Pac. 414; Merrifield *v.* Maryland Gold Quartz Min. Co., 143 Cal. 54, 76 Pac. 710; Daubert *v.* Western Meat Co., 135 Cal. 144, 67 Pac. 133; Alexander *v.* Central Lumber, etc., Co., 104 Cal. 532, 38 Pac. 410; Ingerman *v.* Moore, 90 Cal. 410, 27 Pac. 306, 25 Am. St. Rep. 138.

Connecticut.— Hayden *v.* Smithville Mfg. Co., 29 Conn. 548.

District of Columbia.— McDade *v.* Washington, etc., R. Co., 5 Mackey 144.

Georgia.— Augusta Southern R. Co. *v.* McDade, 105 Ga. 134, 31 S. E. 420.

Idaho.— Harvey *v.* Alturas Gold Min. Co., 3 Ida. 510, 31 Pac. 819.

Illinois.— National Enameling, etc., Co. *v.* McCorkle, 219 Ill. 557, 76 N. E. 843; Siegel *v.* Trcka, 218 Ill. 559, 75 N. E. 1053, 109 Am. St. Rep. 302, 2 L. R. A. N. S. 647 [*affirming* 115 Ill. App. 56]; Wabash R. Co. *v.* Bhymer, 214 Ill. 579, 73 N. E. 879 [*reversing* 112 Ill. App. 225]; South Side El. R. Co. *v.* Neswig, 214 Ill. 403, 73 N. E. 749 [*reversing* 114 Ill. App. 355]; Mobile, etc., R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416; Indiana, etc., R. Co. *v.* Otstot, 212 Ill. 429, 72 N. E. 387 [*affirming* 113 Ill. App. 37]; Illinois Terminal R. Co. *v.* Thompson, 210 Ill. 226, 71 N. E. 328 [*affirming* 112 Ill. App. 463]; Chicago, etc., R. Co. *v.* Howell, 208 Ill. 155, 70 N. E. 15 [*affirming* 109 Ill. App. 546]; Pressed Steel Car Co. *v.* Herath, 207 Ill. 576, 69 N. E. 959; Chicago Hair, etc., Co. *v.* Mueller, 203 Ill. 558, 68 N. E. 51 [*affirming* 106 Ill. App. 21]; Chicago, etc., R. Co. *v.* Heerey, 203 Ill. 492, 68 N. E. 74 [*reversing* 105 Ill. App. 647]; Allen B. Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. 818; Armour *v.* Golkowska, 202 Ill. 144, 66 N. E. 1037 [*affirming* 95 Ill. App. 492]; Illinois Steel Co. *v.* Ryska, 200 Ill. 280, 65 N. E. 734 [*affirming* 102 Ill. App. 347]; Chicago, etc., R. Co. *v.* Camper, 199 Ill. 569, 65 N. E. 448 [*reversing* 100 Ill. App. 21]; Hartley *v.* Chicago, etc., R. Co., 197 Ill. 440, 64 N. E. 382 [*reversing* 96 Ill. App. 227]; Illinois Steel Co. *v.* Mann, 197 Ill. 186, 64 N. E. 328 [*affirming* 100 Ill. App. 367]; Western Stone Co. *v.* Muscial, 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325 [*affirming* 96 Ill. App. 288]; Ide *v.* Fratcher, 194 Ill. 552, 62 N. E. 814 [*affirming* 96 Ill. App. 549]; Gundlach *v.* Schott, 192 Ill. 509, 61 N. E. 332, 85 Am. St. Rep. 348 [*affirming*

the other hand where the evidence is harmonious and consistent, and the circum-

95 Ill. App. 110]; Western Tube Co. *v.* Polobinski, 192 Ill. 113, 61 N. E. 451 [*affirming* 94 Ill. App. 640]; William Graver Tank Works *v.* O'Donnell, 191 Ill. 236, 60 N. E. 831 [*affirming* 91 Ill. App. 524]; Chicago, etc., R. Co. *v.* Kinnare, 190 Ill. 9, 60 N. E. 57 [*affirming* 91 Ill. App. 508]; Pioneer Fireproof Constr. Co. *v.* Howell, 189 Ill. 123, 59 N. E. 535 [*affirming* 90 Ill. App. 122]; Swift *v.* O'Neill, 187 Ill. 337, 58 N. E. 416 [*affirming* 88 Ill. App. 162]; Chicago, etc., R. Co. *v.* House, 172 Ill. 601, 50 N. E. 151 [*affirming* 71 Ill. App. 147]; Chicago Drop Forge, etc., Co. *v.* Van Dam, 149 Ill. 337, 36 N. E. 1024 [*affirming* 50 Ill. App. 470]; Joliet, etc., R. Co. *v.* Velie, (1891) 26 N. E. 1086; Chicago, etc., R. Co. *v.* Jackson, 55 Ill. 492, 8 Am. Rep. 661; Wabash R. Co. *v.* Thomas, 117 Ill. App. 110; Consolidated Barb Wire Co. *v.* Maxwell, 116 Ill. App. 296; Riverton Coal Co. *v.* Shepherd, 111 Ill. App. 294; Chicago, etc., R. Co. *v.* Bell, 111 Ill. App. 280; Montgomery Coal Co. *v.* Barringer, 109 Ill. App. 185; Whalen *v.* Utica Hydraulic Cement Co., 103 Ill. App. 149; Pardridge *v.* Gilbride, 98 Ill. App. 134; Hass *v.* Chicago, etc., R. Co., 97 Ill. App. 624; Illinois Cent. R. Co. *v.* North, 97 Ill. App. 124; William D. Gibson Co. *v.* Glizozinski, 76 Ill. App. 400; Penwell Coal Min. Co. *v.* Diefenthaler, 48 Ill. App. 616; Chicago Anderson Pressed Brick Co. *v.* Sobkowiak, 38 Ill. App. 531; Goldberg *v.* Schrayer, 37 Ill. App. 316; Whalen *v.* Illinois, etc., R., etc., Co., 16 Ill. App. 320.

Indiana.— Annadall *v.* Union Cement, etc., Co., 165 Ind. 110, 74 N. E. 893; Ft. Wayne *v.* Christie, 156 Ind. 172, 59 N. E. 385; Rogers *v.* Leyden, 127 Ind. 50, 26 N. E. 210; Muncie Pulp Co. *v.* Hacker, (App. 1906) 76 N. E. 770; Chicago, etc., R. Co. *v.* Bryan, (App. 1905) 75 N. E. 678; Avery *v.* Nordyke, etc., Co., 34 Ind. App. 541, 70 N. E. 888; Chicago, etc., R. Co. *v.* Tackett, 33 Ind. App. 379, 71 N. E. 524; Pittsburgh, etc., R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. Rep. 120; Daugherty *v.* Midland Steel Co., 23 Ind. App. 78, 53 N. E. 844.

Iowa.— Wilder *v.* Great Western Cereal Co., 130 Iowa 263, 104 N. W. 434; Calloway *v.* Agar Packing Co., 129 Iowa 1, 104 N. W. 721; Arenschield *v.* Chicago, etc., R. Co., 128 Iowa 677, 105 N. W. 200; Bryce *v.* Burlington, etc., R. Co., 128 Iowa 483, 104 N. W. 483; Schroeder *v.* Chicago, etc., R. Co., 128 Iowa 365, 103 N. W. 985; Woolf *v.* Nauman Co., 128 Iowa 261, 103 N. W. 785; Mace *v.* Boedker, 127 Iowa 721, 104 N. W. 475; Coles *v.* Union Terminal R. Co., 124 Iowa 48, 99 N. W. 108; Gorham *v.* Sioux City Stock Yards Co., 118 Iowa 749, 92 N. W. 698; Copeland *v.* Ferris, 118 Iowa 554, 92 N. W. 699; Pieart *v.* Chicago, etc., R. Co. 82 Iowa 148, 47 N. W. 1017.

Kansas.— Wurtenberger *v.* Metropolitan St. R. Co., 68 Kan. 642, 75 Pac. 1049.

Kentucky.— Henderson Tobacco Extract Works *v.* Wheeler, 116 Ky. 322, 76 S. W. 34, 25 Ky. L. Rep. 495; Lawrence *v.* Hagemeyer, 93 Ky. 591, 20 S. W. 704, 14 Ky. L. Rep. 566; Ahrens, etc., Mfg. Co. *v.* Rellihan, 82 S. W. 993, 26 Ky. L. Rep. 919; Adams Express Co. *v.* Smith, 72 S. W. 782, 24 Ky. L. Rep. 1915; Ward *v.* Louisville, etc., R. Co., 65 S. W. 2, 23 Ky. L. Rep. 1326; Nance *v.* Newport News, etc., R. Co., 17 S. W. 570, 13 Ky. L. Rep. 554.

Maine.— Dempsey *v.* Sawyer, 95 Me. 295, 49 Atl. 1035.

Massachusetts.— White *v.* William H. Perry Co., 190 Mass. 99, 76 N. E. 512; Arnold *v.* Harrington Cutlery Co., 189 Mass. 547, 76 N. E. 194; Chambers *v.* Wampanoag Mills, 189 Mass. 529, 75 N. E. 1093; Manning *v.* Excelsior Laundry Co., 189 Mass. 231, 75 N. E. 254; Moylon *v.* D. S. McDonald Co., 188 Mass. 499, 74 N. E. 929; Wagner *v.* Boston El. R. Co., 188 Mass. 437, 74 N. E. 919; Taylor *v.* Boston, etc., R. Co., 188 Mass. 390, 74 N. E. 591; O'Neil *v.* Ginn, 188 Mass. 346, 74 N. E. 668; Murphy *v.* New York, etc., R. Co., 187 Mass. 18, 72 N. E. 330; Fearns *v.* New York Cent., etc., R. Co., 186 Mass. 529, 72 N. E. 68; McKinnon *v.* Riter-Conley Mfg. Co., 186 Mass. 155, 71 N. E. 296; Murphy *v.* Marston Coal Co., 183 Mass. 385, 67 N. E. 342; Rafferty *v.* Nawn, 182 Mass. 503, 65 N. E. 830; Gurney *v.* Le Baron, 182 Mass. 368, 65 N. E. 789; Littlefield *v.* Edward P. Allis Co., 177 Mass. 151, 58 N. E. 692; Jones *v.* Pacific Mills, 176 Mass. 354, 57 N. E. 663; Burgess *v.* Davis Sulphur Ore Co., 165 Mass. 71, 42 N. E. 501; Gibson *v.* Sullivan, 164 Mass. 557, 42 N. E. 110; Anderson *v.* Duckworth, 162 Mass. 251, 38 N. E. 510; Mahoney *v.* Dore, 155 Mass. 513, 30 N. E. 366.

Michigan.— McDonald *v.* Champion Iron, etc., Co., 140 Mich. 401, 103 N. W. 829; Milbourne *v.* Arnold Electric Power Station, etc., Co., 140 Mich. 316, 103 N. W. 821, 70 L. R. A. 600; Hewitt *v.* East Jordan Lumber Co., 136 Mich. 110, 98 N. W. 992; Barr *v.* Guelph Patent Cask Co., 129 Mich. 278, 88 N. W. 640; Mann *v.* Lake Shore, etc. R. Co., 124 Mich. 641, 83 N. W. 596; Shadford *v.* Ann Arbor St. R. Co., 121 Mich. 224, 80 N. W. 30; Balhoff *v.* Michigan Cent. R. Co., 106 Mich. 606, 65 N. W. 592; Walker *v.* Lake Shore, etc., R. Co., 104 Mich. 606, 62 N. W. 1032.

Minnesota.— Shalgren *v.* Red Cliff Lumber Co., 95 Minn. 450, 104 N. W. 531; Barrett *v.* Reardon, 95 Minn. 425, 104 N. W. 309; Campbell *v.* Railway Transfer Co., 95 Minn. 375, 104 N. W. 547; Anderson *v.* Great Northern R. Co., 95 Minn. 212, 103 N. W. 1021; Fry *v.* Great Northern R. Co., 95 Minn 87, 103 N. W. 733; Anderson *v.* Fielding, 92 Minn. 42, 99 N. W. 357, 104 Am. St. Rep. 665; Spoonick *v.* Backus-Brooks Co., 89 Minn. 354, 94 N. W. 1079; Bender *v.* Great Northern R. Co., 89 Minn. 163, 94 N. W. 546; Ready *v.* Peavy Elevator Co., 89 Minn. 154, 94 N. W. 442; Ziegler *v.* Gotzian, 86 Minn. 290, 90 N. W. 387; Gray *v.* Commutator Co., 85 Minn. 463, 89 N. W. 322; Namyst *v.* Batz, 85 Minn. 366, 88 N. W. 991; Gray

stances permit of but one conclusion, the question whether plaintiff assumed

v. Red Lake Falls Lumber Co., 85 Minn. 24, 88 N. W. 24; Perras *v.* Booth, 82 Minn. 191, 84 N. W. 739, 85 N. W. 179; Sneda *v.* Libera, 65 Minn. 337, 68 N. W. 36; Voyer *v.* Dispatch Printing Co., 62 Minn. 393, 64 N. W. 1138; Craver *v.* Christian, 36 Minn. 413, 31 N. W. 457, 1 Am. St. Rep. 675; Sherman *v.* Chicago, etc., R. Co., 34 Minn. 259, 25 N. W. 593; Tierney *v.* Minneapolis, etc., R. Co., 33 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35; Madden *v.* Minneapolis, etc., R. Co., 32 Minn. 303, 20 N. W. 317; Russell *v.* Minneapolis, etc., R. Co., 32 Minn. 230, 20 N. W. 147; Bunnell *v.* St. Paul, etc., R. Co., 29 Minn. 305, 13 N. W. 129; Le Clair *v.* First Div. St. Paul, etc., R. Co., 20 Minn. 9.

Missouri.— Cole *v.* St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; Hamman *v.* Central Coal, etc., Co., 156 Mo. 232, 56 S. W. 1091; Tabler *v.* Hannibal, etc., R. Co., 93 Mo. 79, 5 S. W. 810; Dale *v.* St. Louis, etc., R. Co., 63 Mo. 455; Lee *v.* St. Louis, etc., R. Co., 112 Mo. App. 372, 87 S. W. 12; Depuy *v.* Chicago, etc., R. Co., 110 Mo. App. 110, 84 S. W. 103; Mueller *v.* La Prelle Shoe Co., 109 Mo. App. 506, 84 S. W. 1010; Honts *v.* St. Louis Transit Co., 108 Mo. App. 686, 84 S. W. 161; Carter *v.* Baldwin, 107 Mo. App. 217, 81 S. W. 204; Studenroth *v.* Hammond Packing Co., 106 Mo. App. 480, 81 S. W. 487; Dean *v.* St. Louis Woodenware Works, 106 Mo. App. 167, 80 S. W. 292; Glasscock *v.* Swofford Bros. Dry Goods Co., (App. 1903) 74 S. W. 1039; Adolff *v.* Columbia Pretzel, etc., Co., 100 Mo. App. 199, 73 S. W. 321; Sinberg *v.* Falk Co., 98 Mo. App. 546, 72 S. W. 947; Franklin *v.* Missouri, etc., R. Co., 97 Mo. App. 473, 71 S. W. 540; Adams *v.* McCormick Harvesting Mach. Co., 95 Mo. App. 111, 68 S. W. 1053; Nash *v.* Dowling, 93 Mo. App. 156; Haworth *v.* Kansas City Southern R. Co., 94 Mo. App. 215, 68 S. W. 111; Edwards *v.* Barber Asphalt Paving Co., 92 Mo. App. 221; Devore *v.* St. Louis, etc., R. Co., 86 Mo. App. 429; Moore *v.* St. Louis Wire Mill Co., 55 Mo. App. 491; Hughes *v.* Fagin, 46 Mo. App. 37.

Montana.— McCabe *v.* Montana Cent. R. Co., 30 Mont. 323, 76 Pac. 701; Nord *v.* Boston, etc., Consol. Copper, etc., Min. Co., 30 Mont. 48, 75 Pac. 681; Coleman *v.* Perry, 28 Mont. 1, 72 Pac. 42.

Nebraska.— New Omaha Thompson-Houston Electric Light Co. *v.* Rombold, 68 Nebr. 54, 93 N. W. 966, 97 N. W. 1030; Ittner Brick Co. *v.* Killian, 67 Nebr. 589, 93 N. W. 951; Lee *v.* Smart, 45 Nebr. 318, 63 N. W. 940.

Nevada.— Taylor *v.* Nevada-California-Oregon R. Co., 26 Nev. 415, 69 Pac. 858.

New Hampshire.— Hamel *v.* Newmarket Mfg. Co., 73 N. H. 386, 62 Atl. 592; Sirois *v.* Henry, 73 N. H. 148, 59 Atl. 936; Kasjeta *v.* Nashua Mfg. Co., 73 N. H. 22, 58 Atl. 874; English *v.* Amidon, 72 N. H. 301, 56 Atl. 548; Slack *v.* Carter, 72 N. H. 267, 56 Atl. 316; Boyce *v.* Johnson, 72 N. H. 41, 54 Atl. 707; Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 101 Am. St. Rep. 660, 61 L. R. A. 495; Olney *v.* Boston, etc., R. Co., 71 N. H. 427, 52 Atl. 1097; Bennett *v.* Warren, 70 N. H. 564, 49 Atl. 105.

New Jersey.— Kalker *v.* Hedden, (1905) 61 Atl. 395; Osterhout *v.* Jersey City, etc., R. Co., (Sup. 1905) 62 Atl. 190; D'Agostino *v.* Pennsylvania R. Co., 72 N. J. L. 358, 60 Atl. 1113; Albanese *v.* Central R. Co., 70 N. J. L. 241, 57 Atl. 447; Dowd *v.* Erie R. Co., 70 N. J. L. 451, 57 Atl. 248; Young *v.* Delaware, etc., R. Co., 68 N. J. L. 603, 53 Atl. 293; Flanigan *v.* Guggenheim Smelting Co., 63 N. J. L. 647, 44 Atl. 762; Western Union Tel. Co. *v.* McMullen, 58 N. J. L. 155, 33 Atl. 384, 32 L. R. A. 351.

New York.— O'Brien *v.* Buffalo Furnace Co., 183 N. Y. 317, 76 N. E. 161; Krueger *v.* Bartholomay Brewing Co., 182 N. Y. 544, 75 N. E. 1130 [*affirming* 94 N. Y. App. Div. 58, 87 N. Y. Suppl. 1054]; Welle *v.* Celluloid Co., 175 N. Y. 401, 67 N. E. 609 [*reversing* 52 N. Y. App. Div. 522, 65 N. Y. Suppl. 370]; Davidson *v.* Cornell, 132 N. Y. 228, 30 N. E. 573; Plank *v.* New York Cent., etc., R. Co., 60 N. Y. 607; Di Stefeno *v.* Peekskill Lighting, etc., Co., 107 N. Y. App. Div. 293, 95 N. Y. Suppl. 179; Rooney *v.* Brogan Constr. Co., 107 N. Y. App. Div. 258, 95 N. Y. Suppl. 1; Overbaugh *v.* Wieber, 106 N. Y. App. Div. 283, 94 N. Y. Suppl. 644; Madden *v.* Hughes, 104 N. Y. App. Div. 101, 93 N. Y. Suppl. 324; Siversen *v.* Jenks, 102 N. Y. App. Div. 313, 92 N. Y. Suppl. 382; Aleckson *v.* Erie R. Co., 101 N. Y. App. Div. 395, 91 N. Y. Suppl. 1029; Schermerhorn *v.* Glens Falls Portland Cement Co., 94 N. Y. App. Div. 600, 88 N. Y. Suppl. 407; Klein *v.* Garvey, 94 N. Y. App. Div. 183, 87 N. Y. Suppl. 998; Lynch *v.* Brooklyn Heights R. Co., 89 N. Y. App. Div. 217, 85 N. Y. Suppl. 805; Cooper *v.* New York, etc., R. Co., 84 N. Y. App. Div. 42, 82 N. Y. Suppl. 98; Devereux *v.* Utica Steam Cotton Mills, 84 N. Y. App. Div. 34, 82 N. Y. Suppl. 145; Madigan *v.* Oceanic Steam Nav. Co., 82 N. Y. App. Div. 206, 81 N. Y. Suppl. 705; Allison *v.* Long Clove Trap Rock Co., 75 N. Y. App. Div. 367, 78 N. Y. Suppl. 69; Walters *v.* Fuller, 74 N. Y. App. Div. 388, 77 N. Y. Suppl. 681; Smith *v.* King, 74 N. Y. App. Div. 1, 77 N. Y. Suppl. 3; De Maio *v.* Standard Oil Co., 68 N. Y. App. Div. 167, 74 N. Y. Suppl. 165; Witkowski *v.* Carter, 60 N. Y. App. Div. 577, 70 N. Y. Suppl. 232; Dorney *v.* O'Neill, 60 N. Y. App. Div. 19, 69 N. Y. Suppl. 929; Cosselmon *v.* Dunfee, 59 N. Y. App. Div. 467, 69 N. Y. Suppl. 271; Pilkey *v.* Harrower, 59 N. Y. App. Div. 378, 69 N. Y. Suppl. 243; Hall *v.* U. S. Radiator Co., 52 N. Y. App. Div. 90, 64 N. Y. Suppl. 1002; Boyle *v.* Degnon-McLean Constr. Co., 47 N. Y. App. Div. 311, 61 N. Y. Suppl. 1043; Young *v.* Syracuse, etc., R. Co., 45 N. Y. App. Div. 296, 61 N. Y. Suppl. 202; Fox *v.* Le Comte, 2 N. Y. App. Div. 61, 37 N. Y. Suppl. 316; Borgeson *v.* U. S. Projectile Co., 2 N. Y. App. Div. 57, 37 N. Y.

the risk becomes one of law for the determination of the court, and a sub-

Suppl. 458; Simmons *v.* Peters, 85 Hun 93, 32 N. Y. Suppl. 680; Pratt *v.* Lake Shore, etc., R. Co., 63 Hun 616, 18 N. Y. Suppl. 682 [*affirmed* in 136 N. Y. 654, 32 N. E. 1016]; Palmer *v.* Conant, 58 Hun 333, 11 N. Y. Suppl. 917 [*affirmed* in 128 N. Y. 577, 28 N. E. 250]; Heavey *v.* Hudson River Water-Power, etc., Co., 57 Hun 339, 10 N. Y. Suppl. 585; Bulkley *v.* Port Henry Iron Co., 49 Hun 609, 2 N. Y. Suppl. 133; McCarragher *v.* Gaskell, 42 Hun 451; Schwandner *v.* Birge, 33 Hun 186; Cielfield *v.* Browning, 9 Misc. 98, 29 N. Y. Suppl. 710; Slacer *v.* Field Engineering Co., 4 Misc. 493, 24 N. Y. Suppl. 550; Ryan *v.* H. W. Johns Mfg. Co., 18 N. Y. Suppl. 754; Pullutro *v.* Delaware, etc., R. Co., 7 N. Y. Suppl. 510.

North Carolina.— Jones *v.* American Warehouse Co., 138 N. C. 546, 51 S. E. 106, 137 N. C. 337, 49 S. E. 355; Pressly *v.* Dover Yarn Mills, 138 N. C. 410, 51 S. E. 69; Marks *v.* Harriet Cotton Mills, 138 N. C. 401, 50 S. E. 769; McDougald *v.* Lumberton, 129 N. C. 200, 39 S. E. 826.

Ohio.— Cleveland, etc., R. Co. *v.* Somers, 24 Ohio Cir. Ct. 67.

Oregon.— Mundhenke *v.* Oregon City Mfg. Co., 47 Oreg. 127, 81 Pac. 977, 1 L. R. A. N. S. 278; Busch *v.* Robinson, 46 Oreg. 539, 81 Pac. 237; Anuerson *v.* North Pac. Lumber Co., 21 Oreg. 281, 28 Pac. 5.

Pennsylvania.— Maines *v.* Harbison-Walker Co., 213 Pa. St. 145, 62 Atl. 640; Held *v.* American Window Glass Co., 207 Pa. St. 534, 56 Atl. 1077; Giles *v.* Jones, 204 Pa. St. 444, 54 Atl. 280; Rummel *v.* Dilworth, etc., Co., 131 Pa. St. 509, 19 Atl. 345, 346, 17 Am. St. Rep. 827; Rummell *v.* Dilworth, 111 Pa. St. 343, 2 Atl. 355, 363; Silliman *v.* Marsden, 6 Pa. Cas. 570, 9 Atl. 639; Esher *v.* Mineral R., etc., Co., 28 Pa. Super. Ct. 387.

Rhode Island.— McGar *v.* National, etc., Worsted Mills, 22 R. I. 347, 47 Atl. 1092.

South Carolina.— Bodie *v.* Charleston, etc., R. Co., 61 S. C. 468, 39 S. E. 715; Youngblood *v.* South Carolina, etc., R. Co., 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824; Mew *v.* Charleston, etc., R. Co., 55 S. C. 90, 32 S. E. 828; Whaley *v.* Bartlett, 42 S. C. 454, 20 S. E. 745; Boatwright *v.* Northeastern R. Co., 25 S. C. 128.

Texas.— Drake *v.* San Antonio, etc., R. Co., (1905) 89 S. W. 407 [*reversing* (Civ. App. 1905) 85 S. W. 447]; International, etc., R. Co. *v.* McVey, (1905) 87 S. W. 328 [*reversing* (Civ. App. 1904) 81 S. W. 991]; Peck *v.* Peck, (1905) 87 S. W. 248 [*affirming* (Civ. App. 1904) 83 S. W. 257]; Hilje *v.* Hettich, 95 Tex. 321, 67 S. W. 90 [*reversing* (Civ. App. 1901) 65 S. W. 491]; Bonnet *v.* Galveston, etc., R. Co., 89 Tex. 72, 33 S. W. 334; Gulf, etc., R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151; Price *v.* Consumers' Cotton Oil Co., (Civ. App. 1905) 90 S. W. 717; Missouri, etc., R. Co. *v.* Dickson, (Civ. App. 1905) 90 S. W. 507; Texas Cent. R. Co. *v.* Phillips, (Civ. App. 1905) 87 S. W. 187; Quinn *v.* Galveston, etc., R. Co., (Civ. App. 1905) 84 S. W. 395; International, etc., R. Co. *v.* Jourdan, (Civ. App. 1904) 84 S. W. 266; Galveston, etc., R. Co. *v.* Manns, (Civ. App. 1904) 84 S. W. 254; Bonn *v.* Galveston, etc., R. Co., (Civ. App. 1904) 82 S. W. 808; El Paso Northeastern R. Co. *v.* Ryan, 36 Tex. Civ. App. 190, 81 S. W. 563; El Paso, etc., R. Co. *v.* McComus, 36 Tex. Civ. App. 170, 81 S. W. 760; Galveston, etc., R. Co. *v.* Butshek, 34 Tex. Civ. App. 194, 78 S. W. 740; Missouri, etc., R. Co. *v.* Blackman, 32 Tex. Civ. App. 200, 74 S. W. 74; Rea *v.* St. Louis Southwestern R. Co., (Civ. App. 1903) 73 S. W. 555; International, etc., R. Co. *v.* Bearden, 31 Tex. Civ. App. 58, 71 S. W. 558; Galveston, etc., R. Co. *v.* Pendleton, 30 Tex. Civ. App. 431, 70 S. W. 996; Missouri, etc., R. Co. *v.* Follin, 29 Tex. Civ. App. 512, 68 S. W. 810; American Cotton Co. *v.* Smith, 29 Tex. Civ. App. 425, 69 S. W. 443; Gulf, etc., R. Co. *v.* Hayden, 29 Tex. Civ. App. 280, 68 S. W. 530; Ft. Worth, etc., R. Co. *v.* Gary, 29 Tex. Civ. App. 122, 68 S. W. 200; Gulf, etc., R. Co. *v.* Darby, 28 Tex. Civ. App. 413, 67 S. W. 446; Galveston, etc., R. Co. *v.* Sanchez, (Civ. App. 1901) 65 S. W. 893; Gulf, etc., R. Co. *v.* Knox, 25 Tex. Civ. App. 450, 61 S. W. 969; Texas Cent. R. Co. *v.* Lyons, (Civ. App. 1896) 34 S. W. 362; International, etc., R. Co. *v.* Williams, (Civ. App. 1896) 34 S. W. 161; International, etc., R. Co. *v.* Hall, 1 Tex. Civ. App. 221, 21 S. W. 1024.

Utah.— Merrill *v.* Oregon Short Line R. Co., 29 Utah 264, 81 Pac. 85, 110 Am. St. Rep. 695; Moyes *v.* Ogden Sewer Pipe, etc., Co., 28 Utah 148, 77 Pac. 610.

Vermont.— McKane *v.* Marr, 77 Vt. 7, 58 Atl. 721; Severance *v.* New England Talc Co., 72 Vt. 181, 47 Atl. 833.

Virginia.— Virginia, etc., Wheel Co. *v.* Harris, 103 Va. 708, 49 S. E. 991; Chesapeake, etc., R. Co. *v.* Lash, (1896) 24 S. E. 385.

Washington.— Williams *v.* Ballard Lumber Co., 41 Wash. 338, 83 Pac. 323; De Mase *v.* Oregon R., etc., Co., 40 Wash. 108, 82 Pac. 170; Hart *v.* Cascade Timber Co., 39 Wash. 279, 81 Pac. 738; Jancko *v.* West Coast Mfg., etc., Co., 34 Wash. 556, 76 Pac. 78; Gaudie *v.* Northern Lumber Co., 34 Wash. 34, 74 Pac. 1009; McDannald *v.* Washington, etc., R. Co., 31 Wash. 585, 72 Pac. 481; Crooker *v.* Pacific Lounge, etc., Co., 29 Wash. 30, 69 Pac. 359.

Wisconsin.— Johnson *v.* St. Paul, etc., Coal Co., 126 Wis. 492, 105 N. W. 1048; Coolidge *v.* Hallauer, 126 Wis. 244, 105 N. W. 568; Hocking *v.* Windsor Spring Co., 125 Wis. 575, 104 N. W. 705; Berg *v.* U. S. Leather Co., (1905) 104 N. W. 60; Lounsbury *v.* Davis, 124 Wis. 432, 102 N. W. 941; Revolinski *v.* Adams Coal Co., 118 Wis. 324, 95 N. W. 122; Yerkes *v.* Northern Pac. R. Co., 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961; Renne *v.* U. S. Leather Co., 107 Wis. 305, 83 N. W. 473; Kennedy *v.* Lake Superior Terminal, etc., R. Co., 93 Wis. 32, 66 N. W.

mission of such question by the court to the determination of the jury is of course erroneous.[78]

e. Contributory Negligence.[79] Contributory negligence, like assumption of risk, is a mixed question of law and fact, and should be submitted to the jury, under proper instructions, whenever the evidence is inconclusive or where it is such that different inferences may legitimately be drawn therefrom.[80] The

1137; Kucera *v.* Merrill Lumber Co., 91 Wis. 637, 65 N. W. 374; Daly *v.* Sang, 91 Wis. 336, 64 N. W. 997; Luebke *v.* Berlin Mach. Works, 88 Wis. 442, 60 N. W. 711, 43 Am. St. Rep. 913; Nadau *v.* White River Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29.

United States.— Texas, etc., R. Co. *v.* Behymer, 189 U. S. 468, 23 S. Ct. 622, 47 L. ed. 905 [*affirming* 112 Fed. 35, 50 C. C. A. 106]; Cincinnati, etc., R. Co. *v.* Robertson, 139 Fed. 519, 71 C. C. A. 335; Hayward *v.* Key, 138 Fed. 34, 70 C. C. A. 402; Pittsburgh, etc., R. Co. *v.* Lamphere, 137 Fed. 20, 69 C. C. A. 542; Hawley *v.* Chicago, etc., R. Co., 133 Fed. 150, 66 C. C. A. 216; Chicago, etc., R. Co. *v.* Benton, 132 Fed. 460, 65 C. C. A. 660; Sauvageau *v.* River Spinning Co., 129 Fed. 961; Pennsylvania R. Co. *v.* Jones, 123 Fed. 753, 59 C. C. A. 87; Texas, etc., R. Co. *v.* Swearingen, 122 Fed. 193, 59 C. C. A. 31; Wright *v.* Stanley, 119 Fed. 330, 56 C. C. A. 234; Choctaw, etc., R. Co. *v.* McDade, 112 Fed. 888, 50 C. C. A. 591; Great Northern R. Co. *v.* Kasischke, 104 Fed. 440, 43 C. C. A. 626; Louisville, etc., R. Co. *v.* Miller, 104 Fed. 124, 43 C. C. A. 436; Mason, etc., R. Co. *v.* Yockey, 103 Fed. 265, 43 C. C. A. 228; Oregon Short Line, etc., R. Co. *v.* Tracy, 66 Fed. 931, 14 C. C. A. 199; New York, etc., Steamship Co. *v.* Anderson, 50 Fed. 462, 1 C. C. A. 529 [*affirming* 47 Fed. 38]; Thompson *v.* Chicago, etc., R. Co., 14 Fed. 564, 4 McCrary 629.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1068–1088.

78. *Illinois.*— Consolidated Barb Wire Co. *v.* Maxwell, 116 Ill. App. 296.

Indiana.— Chicago, etc., R. Co. *v.* Bryan, (App. 1905) 75 N. E. 678; Avery *v.* Nordyke, etc., Co., 34 Ind. App. 541, 70 N. E. 888.

Kansas.— Rush *v.* Missouri Pac. R. Co., 36 Kan. 129, 12 Pac. 582.

Maryland.— Yates *v.* McCullough Iron Co., 69 Md. 370, 16 Atl. 280.

Michigan.— Breig *v.* Chicago, etc., R. Co., 98 Mich. 222, 57 N. W. 118.

Missouri.—Carter *v.* Baldwin, 107 Mo. App. 217, 81 S. W. 204.

New York.— Appel *v.* Buffalo, etc., R. Co., 111 N. Y. 550, 19 N. E. 93; Kueckel *v.* O'Connor, 73 N. Y. App. Div. 594, 76 N. Y. Suppl. 829 [*affirming* 36 Misc. 335, 73 N. Y. Suppl. 546]; Ireland *v.* Gardner, 4 Silv. Sup. 119, 7 N. Y. Suppl. 609.

Pennsylvania.— Boyd *v.* Harris, 176 Pa. St. 484, 35 Atl. 222; Nattress *v.* Philadelphia, etc., R. Co., 150 Pa. St. 527, 24 Atl. 753; Northern Cent. R. Co. *v.* Husson, 101 Pa. St. 1, 47 Am. Rep. 690.

South Carolina.— Adkins *v.* Atlanta, etc., R. Co., 27 S. C. 71, 2 S. E. 849.

Texas.— Galveston, etc., R. Co. *v.* Brown, 33 Tex. Civ. App. 589, 77 S. W. 832; St. Louis Southwestern R. Co. *v.* Austin, (Civ. App. 1903) 72 S. W. 212.

Washington.— Week *v.* Fremont Mill Co., 3 Wash. 629, 29 Pac. 215.

Wisconsin.— Revolinski *v.* Adams Coal Co., 118 Wis. 324, 95 N. W. 122; Powalske *v.* Cream City Brick Co., 110 Wis. 461, 86 N. W. 153; Herold *v.* Pfister, 92 Wis. 417, 66 N. W. 355.

United States.— Glenmont Lumber Co. *v.* Roy, 126 Fed. 524, 61 C. C. A. 506; St. Louis Cordage Co. *v.* Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1068–1088.

79. Review of questions of fact, verdicts, and findings see *infra*, IV, H, 10, b.

80. *Alabama.*— Sloss-Sheffield Steel, etc., Co. *v.* Smith, (1905) 40 So. 91; Herren *v.* Tuscaloosa Waterworks Co., (1905) 40 So. 55; Pierson Lumber Co. *v.* Hart, 144 Ala. 239, 39 So. 566; Shea *v.* Manning, 141 Ala. 628, 37 So. 632; Going *v.* Alabama Steel, etc., Co., 141 Ala. 537, 37 So. 784; Kansas City, etc., R. Co. *v.* Thornhill, 141 Ala. 215, 37 So. 412; Sloss-Sheffield Steel, etc., Co. *v.* Mobley, 139 Ala. 425, 36 So. 181; Kansas City, etc., R. Co. *v.* Flippo, 138 Ala. 487, 35 So. 457; Southern R. Co. *v.* Howell, 135 Ala. 639, 34 So. 6; Houston Biscuit Co. *v.* Dial, 135 Ala. 168, 33 So. 268; McGhee *v.* Willis, 134 Ala. 281, 32 So. 301; Illinois Car, etc., Co. *v.* Walch, 132 Ala. 490, 31 So. 470; Postal Tel. Cable Co. *v.* Hulsey, 132 Ala. 444, 31 So. 527; Woodward Iron Co. *v.* Herndon, 130 Ala. 364, 30 So. 370; Tutwiler Coal, etc., Co. *v.* Enslen, 129 Ala. 336, 30 So. 600; Louisville, etc., R. Co. *v.* Bouldin, 121 Ala. 197, 25 So. 903; Louisville, etc., R. Co. *v.* Bouldin, 110 Ala. 185, 20 So. 325; McNamara *v.* Logan, 100 Ala. 187, 14 So. 175; Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176; Highland Ave., etc., R. Co. *v.* Walters, 91 Ala. 435, 8 So. 357; Louisville, etc., R. Co. *v.* Watson, 90 Ala. 68, 8 So. 249; Louisville, etc., R. Co. *v.* Perry, 87 Ala. 392, 6 So. 40; Georgia Pac. R. Co. *v.* Propst, 83 Ala. 518, 3 So. 764; Eureka Co. *v.* Bass, 81 Ala. 200, 8 So. 216, 60 Am. Rep. 152.

California.— Davis *v.* Diamond Carriage, etc., Co., 146 Cal. 59, 79 Pac. 596; Hillebrand *v.* Standard Biscuit Co., 139 Cal. 233, 73 Pac. 163; O'Connor *v.* Golden Gate Woolen Mfg. Co., 135 Cal. 537, 67 Pac. 966, 87 Am. St. Rep. 127; Habishaw *v.* Standard Quicksilver Co., 131 Cal. 430, 63 Pac. 728; Murdock *v.* Oakland, etc., Electric R. Co., 128 Cal. 22, 60 Pac. 469; Mullin *v.* California Horseshoe Co., 105 Cal. 77, 38 Pac. 535; Bjorman *v.* Ft. Bragg Redwood Co., 104 Cal.

rule is based on well settled principles governing the procedure in the trial of all

626, 38 Pac. 451; Martin *v.* California Cent. R. Co., 94 Cal. 326, 29 Pac. 645; Magee *v.* North Pac. Coast R. Co., 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69.

Colorado.— Tanner *v.* Harper, 32 Colo. 156, 75 Pac. 404; Moffatt *v.* Tenney, 17 Colo. 189, 30 Pac. 348; Sampson Min., etc., Co. *v.* Schaad, 15 Colo. 197, 25 Pac. 89; Colorado Electric Co. *v.* Lubbers, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255; Roche *v.* Denver, etc., R. Co., 19 Colo. App. 204, 73 Pac. 880; Colorado Coal, etc., Co. *v.* Lamb, 6 Colo. App. 255, 40 Pac. 251; Davis *v.* Graham, 2 Colo. App. 210, 29 Pac. 1007; Lantry *v.* Silverman, 1 Colo. App. 404, 29 Pac. 180.

Dakota.— Mares *v.* Northern Pac. R. Co., 3 Dak. 336, 21 N. W. 5; Herbert *v.* Northern Pac. R. Co., 3 Dak. 38, 13 N. W. 349.

Delaware.— Szymanski *v.* Blumenthal, 4 Pennew. 511, 56 Atl. 674, 103 Am. St. Rep. 132.

District of Columbia.— Baltimore, etc., R. Co. *v.* Landrigan, 20 App. Cas. 135.

Florida.— Florida Cent., etc., R. Co. *v.* Mooney, 45 Fla. 286, 33 So. 1010, 110 Am. St. Rep. 73.

Georgia.— Steinhauser *v.* Savannah, etc., R. Co., 118 Ga. 195, 44 S. E. 800; Richmond, etc., R. Co. *v.* Garner, 91 Ga. 27, 16 S. E. 110; Georgia Pac. R. Co. *v.* Hudson, 89 Ga. 558, 16 S. E. 70; Reedy *v.* East Tennessee, etc., R. Co., 87 Ga. 323, 13 S. E. 555; Mills *v.* East Tennessee, etc., R. Co., 87 Ga. 102, 13 S. E. 205; Rhodes *v.* Georgia R., etc., Co., 84 Ga. 320, 10 S. E. 922, 20 Am. St. Rep. 362; Smith *v.* Wrightsville, etc., R. Co., 83 Ga. 671, 10 S. E. 361; Central R., etc., Co. *v.* Kitchens, 83 Ga. 83, 9 S. E. 827; Prather *v.* Richmond, etc., R. Co., 80 Ga. 427, 9 S. E. 530, 12 Am. St. Rep. 263; Stirk *v.* Central R., etc., Co., 79 Ga. 495, 5 S. E. 105; Central R. Co. *v.* Freeman, 66 Ga. 170.

Illinois.— National Enameling, etc., Co. *v.* McCorkle, 219 Ill. 557, 76 N. E. 843; Siegel *v.* Treka, 218 Ill. 559, 75 N. E. 1053, 109 Am. St. Rep. 302, 2 L. R. A. N. S. 647 [*affirming* 115 Ill. App. 56]; Leighton, etc., Steel Co. *v.* Snell, 217 Ill. 152, 75 N. E. 462 [*affirming* 119 Ill. App. 199]; Chicago, etc., R. Co. *v.* Walters, 217 Ill. 87, 75 N. E. 411; Illinois Third Vein Coal Co. *v.* Cioni, 215 Ill. 583, 73 N. E. 751 [*affirming* 115 Ill. App. 455]; Commonwealth Electric Co. *v.* Rose, 214 Ill. 545, 73 N. E. 780 [*affirming* 114 Ill. App. 181]; Chicago Terminal Transfer Co. *v.* O'Donnell, 213 Ill. 545, 72 N. E. 1133 [*affirming* 114 Ill. App. 345]; Indiana, etc., R. Co. *v.* Otstot, 212 Ill. 429, 72 N. E. 387 [*affirming* 113 Ill. App. 37]; Shickle-Harrison, etc., Iron Co. *v.* Beck, 212 Ill. 268, 72 N. E. 423; Illinois Terminal R. Co. *v.* Thompson, 210 Ill. 226, 71 N. E. 328 [*affirming* 112 Ill. App. 463]; Rock Island Sash, etc., Works *v.* Pohlman, 210 Ill. 133, 71 N. E. 428 [*affirming* 99 Ill. App. 670]; Chicago, etc., Coal Co. *v.* Moran, 210 Ill. 9, 71 N. E. 38 [*affirming* 110 Ill. App. 664]; Chicago Belt R. Co. *v.* Confray, 209 Ill. 344, 70 N. E. 773; Cobb Chocolate Co. *v.* Knudson, 207 Ill. 452, 69 N. E. 816 [*affirming* 107 Ill. App. 668]; Hartrich *v.* Hewes, 202 Ill. 334, 67 N. E. 13 [*affirming* 103 Ill. App. 433]; Armour *v.* Golkowska, 202 Ill. 144, 66 N. E. 1037 [*affirming* 95 Ill. App. 492]; Illinois Cent. R. Co. *v.* Sporleder, 199 Ill. 184, 65 N. E. 218 [*affirming* 100 Ill. App. 626]; Illinois Cent. R. Co. *v.* Atwell, 198 Ill. 200, 64 N. E. 1095 [*affirming* 100 Ill. App. 513]; Himrod Coal Co. *v.* Clark, 197 Ill. 514, 64 N. E. 282 [*affirming* 99 Ill. App. 332]; Momence Stone Co. *v.* Groves, 197 Ill. 88, 64 N. E. 335 [*affirming* 100 Ill. App. 98]; Illinois Steel Co. *v.* McFadden, 196 Ill. 344, 63 N. E. 671 [*affirming* 98 Ill. App. 296]; Street's Western Stable Car Line *v.* Bonander, 196 Ill. 15, 63 N. E. 688 [*affirming* 97 Ill. App. 601]; La Salle *v.* Kostka, 190 Ill. 130, 60 N. E. 72 [*affirming* 92 Ill. App. 91]; Channon *v.* Hahn, 189 Ill. 28, 59 N. E. 522 [*affirming* 90 Ill. App. 256]; Illinois Cent. R. Co. *v.* Gilbert, 157 Ill. 354, 41 N. E. 724 [*affirming* 51 Ill. App. 404]; Weber Wagon Co. *v.* Kehl, 139 Ill. 644, 29 N. E. 714; Chicago, etc., R. Co. *v.* Gross, 133 Ill. 37, 24 N. E. 563 [*affirming* 35 Ill. App. 178]; Lake Shore, etc., R. Co. *v.* Parker, 131 Ill. 557, 23 N. E. 237; Chicago, etc., R. Co. *v.* Snyder, 128 Ill. 655, 21 N. E. 520; Chicago, etc., R. Co. *v.* Warner, 108 Ill. 538; Missouri Furnace Co. *v.* Abend, 107 Ill. 444, 47 Am. Rep. 425 [*affirming* 9 Ill. App. 319]; Ehlen *v.* O'Donnell, 102 Ill. App. 141; Chicago, etc., R. Co. *v.* Vipond, 101 Ill. App. 607; Pardridge, etc., R. Co. *v.* Gilbride, 99 Ill. App. 134; Wierzbicky *v.* Illinois Steel Co., 94 Ill. App. 400; McFadden *v.* Sollitt, 94 Ill. App. 271; Chicago, etc., R. Co. *v.* Cleveland, 92 Ill. App. 308; William Graver Tank Works *v.* O'Donnell, 91 Ill. App. 524 [*affirmed* in 191 Ill. 236, 60 N. E. 831]; Chicago, etc., R. Co. *v.* Kinnare, 91 Ill. App. 508 [*affirmed* in 190 Ill. 9, 60 N. E. 57]; Iroquois Furnace Co. *v.* McCrea, 91 Ill. App. 337 [*affirmed* in 191 Ill. 340, 61 N. E. 79]; Chicago, etc., R. Co. *v.* Stevens, 91 Ill. App. 171 [*affirmed* in 189 Ill. 226, 59 N. E. 577]; Bennett *v.* Brown Hoisting, etc., Mach. Co., 89 Ill. App. 113; Pagels *v.* Meyer, 88 Ill. App. 169; Kingma *v.* Chicago, etc., R. Co., 85 Ill. App. 138; Chicago, etc., R. Co. *v.* Knapp, 74 Ill. App. 148; Lake Shore Foundry Co. *v.* Rakowski, 54 Ill. App. 213; Chicago, etc., R. Co. *v.* Matthews, 48 Ill. App. 361; Chicago, etc., R. Co. *v.* Shannon, 43 Ill. App. 540; Chicago, etc., R. Co. *v.* Matthews, 39 Ill. App. 541; Knickerbocker Ice Co. *v.* De Haas, 37 Ill. App. 195; Middleton *v.* Roycroft, 33 Ill. App. 381.

Indiana.— Annadall *v.* Union Cement, etc., Co., 165 Ind. 110, 74 N. E. 893; M. S. Huey *v.* Johnston, 164 Ind. 489, 73 N. E. 996; Diamond Block Coal Co. *v.* Cuthbertson, (1905) 73 N. E. 818 [*affirming* (App. 1903) 67 N. E. 558, (App. 1905) 73 N. E. 132]; Buehner Chair Co. *v.* Feulner, 164 Ind. 368, 73 N. E. 816; Hill *v.* Gust, 55 Ind. 45; Southern R. Co. *v.* Sittasen, (App. 1905) 74

civil actions. In accordance with the same general principles which control in

N. E. 898; Flickner *v.* Lambert, 36 Ind. App. 524, 74 N. E. 263; Baltimore, etc., R. Co. *v.* Cavanaugh, 35 Ind. App. 32, 71 N. E. 239; Espenlaub *v.* Ellis, 34 Ind. App. 163, 72 N. E. 527; Ætna Powder Co. *v.* Earlandson, 33 Ind. App. 251, 71 N. E. 185; Republic Iron, etc., Co. *v.* Jones, 32 Ind. App. 189, 69 N. E. 191; Jarvis *v.* Hitch, (App. 1902) 65 N. E. 608; Wortman *v.* Minich. 28 Ind. App. 31, 62 N. E. 85; Baltimore, etc., R. Co. *v.* Leathers, 12 Ind. App. 544, 40 N. E. 1094; Cleveland, etc., R. Co. *v.* Sloan, 11 Ind. App. 401, 39 N. E. 174; Chicago, etc., R. Co. *v.* Branyan, 10 Ind. App. 570, 37 N. E. 190.

Iowa.— Wilder *v.* Great Western Cereal Co., 130 Iowa 263, 104 N. W. 434; Calloway *v.* Agar Packing Co., 129 Iowa 1, 104 N. W. 721; Schroeder *v.* Chicago, etc., R. Co., 128 Iowa 365, 103 N. W. 985; Hughes *v.* Iowa Cent. R. Co., 128 Iowa 207, 103 N. W. 339; Mace *v.* Boedker, 127 Iowa 721, 104 N. W. 475; Foster *v.* Chicago, etc., R. Co., 127 Iowa 84, 102 N. W. 422; Pierson *v.* Chicago, etc., R. Co., 127 Iowa 13, 102 N. W. 149; Barto *v.* Iowa Tel. Co., 126 Iowa 241, 101 N. W. 876. 106 Am. St. Rep. 347; Fries *v.* Bettendorf Axle Co., 126 Iowa 138, 101 N. W. 859; Collingwood *v.* Illinois, etc., Fuel Co., 125 Iowa 537, 101 N. W. 283; Norris *v.* Cudahy Packing Co., 124 Iowa 748, 100 N. W. 853; Vohs *v.* Shorthill, 124 Iowa 471, 100 N. W. 495; Buehner *v.* Creamery Package Mfg. Co., 124 Iowa 445, 100 N. W. 345, 104 Am. St. Rep. 354; Camp *v.* Chicago Great Western R. Co., 124 Iowa 238, 99 N. W. 735; Coles *v.* Union Terminal R. Co., 124 Iowa 48, 99 N. W. 108; Sachau *v.* Milner, 123 Iowa 387, 98 N. W. 900; Branz *v.* Omaha, etc., R. Co., 120 Iowa 406, 94 N. W. 996; Hamilton *v.* Mendota Coal, etc., R. Co., 120 Iowa 147, 94 N. W. 282; Foley *v.* Cudahy Packing Co., 119 Iowa 246, 93 N. W. 284, 97 Am. St. Rep. 324; Gorham *v.* Sioux City Stock Yards Co., 118 Iowa 749, 92 N. W. 698; Trott *v.* Chicago, etc., R. Co., 115 Iowa 80, 86 N. W. 33, 87 N. W. 722; Olson *v.* Hanford Produce Co., 111 Iowa 347, 82 N. W. 903; Taylor *v.* Star Coal Co., 110 Iowa 40, 81 N. W. 249; Keist *v.* Chicago Great Western R. Co., 110 Iowa 32, 81 N. W. 181; Baldwin *v.* Chicago Great Western R. Co., 109 Iowa 752, 81 N. W. 160; Spaulding *v.* Chicago, etc., R. Co., 98 Iowa 205, 67 N. W. 227; Morris *v.* Excelsior Coal Co., 95 Iowa 639, 64 N. W. 627; Tobey *v.* Burlington, etc., R. Co., 94 Iowa 256, 62 N. W. 761, 33 L. R. A. 496; Hopkinson *v.* Knapp, etc., Co., 92 Iowa 328, 60 N. W. 653; Harker *v.* Burlington, etc., R. Co., 88 Iowa 409, 55 N. W. 316, 45 Am. St. Rep. 242; Kroener *v.* Chicago, etc., R. Co., 88 Iowa 16, 55 N. W. 28; Meloy *v.* Chicago, etc., R. Co., 77 Iowa 743, 42 N. W. 563, 14 Am. St. Rep. 325, 4 L. R. A. 287; Whalen *v.* Chicago, etc., R. Co., 75 Iowa 563, 39 N. W. 894; Rayburn *v.* Central Iowa R. Co., 74 Iowa 537, 35 N. W. 606, 38 N. W. 520; Pierce *v.* Central Iowa R. Co., 73 Iowa 140, 34 N. W. 783; Baldwin *v.* St. Louis, etc., R. Co., 72 Iowa 45, 33 N. W. 356; Burns *v.* Chicago, etc., R. Co., 69 Iowa 450, 30 N. W. 25, 58 Am. Rep. 227; Crabell *v.* Wapello Coal Co., 68 Iowa 751, 28 N. W. 56; Henry *v.* Sioux City, etc., R. Co., 66 Iowa 52, 23 N. W. 260; Bucklew *v.* Central Iowa R. Co., 64 Iowa 603, 21 N. W. 103; Sloan *v.* Central Iowa R. Co., 62 Iowa 728, 16 N. W. 331; Romick *v.* Chicago, etc., R. Co., 62 Iowa 167, 17 N. W. 458; Hatfield *v.* Chicago, etc., R. Co., 61 Iowa 434, 16 N. W. 336; Houser *v.* Chicago, etc., R. Co., 60 Iowa 230, 14 N. W. 778, 46 Am. Rep. 65; Boyle *v.* Chicago, etc., R. Co., 56 Iowa 765, 9 N. W. 360; Locke *v.* Sioux City, etc., R. Co., 46 Iowa 109; Campbell *v.* Chicago, etc., R. Co., 45 Iowa 76; Belair *v.* Chicago, etc., R. Co., 43 Iowa 662.

Kansas.— Atchison, etc., R. Co. *v.* Stanley, 71 Kan. 520, 81 Pac. 176; Brinkmeier *v.* Missouri Pac. R. Co., 69 Kan. 738, 77 Pac. 586; Missouri Pac. R. Co. *v.* Johnson, 69 Kan. 721, 77 Pac. 576; Atchison, etc., R. Co. *v.* Sledge, 68 Kan. 321, 74 Pac. 1111; St. Louis, etc., R. Co. *v.* French, 56 Kan. 584, 44 Pac. 12; Beaver *v.* Atchison, etc., R. Co., 56 Kan. 514, 43 Pac. 1136; Atchison, etc., R. Co. *v.* Wells, 56 Kan. 222, 42 Pac. 699; Atchison, etc., R. Co. *v.* Rowan, 55 Kan. 270, 39 Pac. 1010; Morbach *v.* Home Min. Co., 53 Kan. 731, 37 Pac. 122; Union Pac. R. Co. *v.* Geary, 52 Kan. 308, 34 Pac. 887; Condiff *v.* Kansas City, etc., R. Co., 45 Kan. 256, 25 Pac. 562; Missouri Pac. R. Co. *v.* McCally, 41 Kan. 639, 655, 21 Pac. 574; St. Louis, etc., R. Co. *v.* Irwin, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266; Union Pac. R. Co. *v.* Fray, 35 Kan. 700, 12 Pac. 98; St. Louis, etc., R. Co. *v.* Keller, 10 Kan. App. 480, 62 Pac. 905.

Kentucky.— Illinois Cent. R. Co. *v.* McIntosh, 118 Ky. 145, 80 S. W. 496, 81 S. W. 270, 26 Ky. L. Rep. 14, 347; Louisville, etc., R. Co. *v.* Ewing, 117 Ky. 624, 78 S. W. 460, 25 Ky. L. Rep. 1712; Murphy *v.* Baltimore, etc., R. Co., 114 Ky. 696, 71 S. W. 886, 24 Ky. L. Rep. 1500; Koltinsky *v.* Wood, 112 Ky. 372, 65 S. W. 848, 23 Ky. L. Rep. 1665; Standard Oil Co. *v.* Eiler, 110 Ky. 209, 61 S. W. 8, 22 Ky. L. Rep. 1641; Illinois Cent. R. Co. *v.* Cane, 90 S. W. 1061, 28 Ky. L. Rep. 1018; Mayfield Woolen Mills *v.* Frazier, 80 S. W. 456, 25 Ky. L. Rep. 2263; Central Coal, etc., Co. *v.* Pierce, 80 S. W. 449, 25 Ky. L. Rep. 2269; East Jellico Coal Co. *v.* Golden, 79 S. W. 291, 25 Ky. L. Rep. 2056; Louisville, etc., R. Co. *v.* Gordon, 72 S. W. 311, 24 Ky. L. Rep. 1819; Crabtree Coal Min. Co. *v.* Sample, 72 S. W. 24, 24 Ky. L. Rep. 1703; East Jellico Coal Co. *v.* Stewart, 68 S. W. 624, 24 Ky. L. Rep. 420; Louisville, etc., R. Co. *v.* Tucker, 65 S. W. 453, 23 Ky. L. Rep. 1929; Southern R. Co. *v.* Cooper, 62 S. W. 858, 23 Ky. L. Rep. 290; Wilson *v.* Williams, 58 S. W. 444, 22 Ky. L. Rep. 567; Louisville, etc., R. Co. *v.* Hiltner, 56 S. W. 654, 21 Ky. L. Rep. 1826;

the trial of civil actions, however, it is equally well settled that where the evidence

Louisville, etc., R. Co. *v.* Seibert, 55 S. W. 892, 21 Ky. L. Rep. 1603; Southern R. Co. *v.* Duvall, 54 S. W. 741, 56 S. W. 988, 22 Ky. L. Rep. 56; Lexington, etc., Min. Co. *v.* Huffman, 32 S. W. 611, 17 Ky. L. Rep. 775; Barber *v.* Cincinnati, etc., R. Co., 21 S. W. 340, 14 Ky. L. Rep. 869.

Maine.— Frye *v.* Bath Gas, etc., Co., 94 Me. 17, 46 Atl. 804.

Maryland.— Maryland Steel Co. *v.* Engleman, 101 Ind. 661, 61 Atl. 314; New York, etc., R. Co. *v.* Coulbourne, 69 Md. 360, 16 Atl. 208, 9 Am. St. Rep. 430, 1 L. R. A. 541.

Massachusetts.— Finnegan *v.* Samuel Winslow Skate Mfg. Co., 189 Mass. 580, 76 N. E. 192; Chambers *v.* Wampanoag Mills, 189 Mass. 529, 75 N. E. 1093; Fountaine *v.* Wampanoag Mills, 189 Mass. 498, 75 N. E. 738; Moylon *v.* D. S. McDonald Co., 188 Mass. 499, 74 N. E. 929; Wagner *v.* Boston El. R. Co., 188 Mass. 437, 74 N. E. 919; Taylor *v.* Boston, etc., R. Co., 188 Mass. 390, 74 N. E. 591; Smith *v.* Thomson-Houston Electric Co., 188 Mass. 371, 74 N. E. 664; Meagher *v.* Crawford Laundry Mach. Co., 187 Mass. 586, 73 N. E. 853; Gregory *v.* American Thread Co., 187 Mass. 239, 72 N. E. 962; Gomes *v.* New Bedford Cordage Co., 187 Mass. 124, 72 N. E. 840; Thompson *v.* American Writing Paper Co., 187 Mass. 93, 72 N. E. 343; Fearns *v.* New York Cent., etc., R. Co., 186 Mass. 529, 72 N. E. 68; Droney *v.* Doherty, 186 Mass. 205, 71 N. E. 547; McKinnon *v.* Riter-Conley Mfg. Co., 186 Mass. 155, 71 N. E. 296; Carter *v.* Boston Towboat Co., 185 Mass. 496, 70 N. E. 933; Martin *v.* Merchants', etc., Transp. Co., 185 Mass. 487, 70 N. E. 934; Chisholm *v.* New England Tel., etc., Co., 185 Mass. 82, 69 N. E. 1042; Bourbonnais *v.* West Boylston Mfg. Co., 184 Mass. 250, 68 N. E. 232; Rafferty *v.* Nawn, 182 Mass. 503, 65 N. E. 830; Pierce *v.* Arnold Print Works, 182 Mass. 260, 65 N. E. 368; O'Brien *v.* New York, etc., R. Co., 180 Mass. 403, 62 N. E. 727; Donahue *v.* Boston, etc., R. Co., 178 Mass. 251, 59 N. E. 663; Bartolomeo *v.* McKnight, 178 Mass. 242, 59 N. E. 804; Knight *v.* Overman Wheel Co., 174 Mass. 455, 54 N. E. 890; Flaherty *v.* Norwood Engineering Co., 172 Mass. 134, 51 N. E. 463; Cavagnaro *v.* Clark, 171 Mass. 359, 50 N. E. 542; Burgess *v.* Davis Sulphur Ore Co., 165 Mass. 71, 42 N. E. 501; Houlnan *v.* Connecticut River R. Co., 164 Mass. 555, 42 N. E. 108; Twomey *v.* Swift, 163 Mass. 273, 39 N. E. 1018; Mears *v.* Boston, etc., R. Co., 163 Mass. 150, 39 N. E. 997; Lang *v.* Terry, 163 Mass. 138, 39 N. E. 802; Bronillette *v.* Connecticut River R. Co., 162 Mass. 198, 38 N. E. 507; Hennessy *v.* Boston, 161 Mass. 502, 37 N. E. 668; Lynch *v.* Allyn, 160 Mass. 248, 35 N. E. 550; Kennedy *v.* Spring, 160 Mass. 203, 35 N. E. 779; Patnode *v.* Warren Cotton Mills, 157 Mass. 283, 32 N. E. 161, 34 Am. St. Rep. 275; O'Driscoll *v.* Faxon, 156 Mass. 527, 31 N. E. 685; Connolly *v.* Waltham, 156 Mass. 368, 31 N. E. 302; Sweat *v.* Boston, etc., R. Co., 156 Mass. 284, 31 N. E. 296; Steffe *v.* Old Colony R. Co., 156 Mass. 262, 30 N. E. 1137; Graham *v.* Boston, etc., R. Co., 156 Mass. 4, 30 N. E. 359; Mahoney *v.* Dore, 155 Mass. 513, 30 N. E. 366; Hannah *v.* Connecticut River R. Co., 154 Mass. 529, 28 N. E. 682; Mooney *v.* Connecticut River Lumber Co., 154 Mass. 407, 28 N. E. 352; Dacey *v.* Old Colony R. Co., 153 Mass. 112, 26 N. E. 437; Daley *v.* American Printing Co., 150 Mass. 77, 22 N. E. 439; Griffin *v.* Boston, etc., R. Co., 148 Mass. 143, 19 N. E. 166, 12 Am. St. Rep. 526, 1 L. R. A. 698; Glover *v.* Dwight Mfg. Co., 148 Mass. 22, 18 N. E. 597, 12 Am. St. Rep. 512; O'Connor *v.* Adams, 120 Mass. 427; Huddleston *v.* Lowell Mach. Shop, 106 Mass. 282; Hackett *v.* Middlesex Mfg. Co., 101 Mass. 101; Snow *v.* Housatonic R. Co., 8 Allen 441, 85 Am. Dec. 720.

Michigan.— Sterling *v.* Union Carbide Co., 142 Mich. 284, 105 N. W. 755; Milbourne *v.* Arnold Electric Power Station Co., 140 Mich. 316, 103 N. W. 821, 70 L. R. A. 600; McLean *v.* Pere Marquette R. Co., 137 Mich. 482, 100 N. W. 748; Bernard *v.* Pittsburg Coal Co., 137 Mich. 279, 100 N. W. 396; Sipes *v.* Michigan Starch Co., 137 Mich. 258, 100 N. W. 447; De Cair *v.* Manistee, etc., R. Co., 133 Mich. 578, 95 N. W. 726; Jarvis *v.* Flint, etc., R. Co., 128 Mich. 61, 87 N. W. 136; Jones *v.* Flint, etc., R. Co., 127 Mich. 198, 86 N. W. 838; Shadford *v.* Ann Arbor St. R. Co., 121 Mich. 224, 80 N. W. 30; Balhoff *v.* Michigan Cent. R. Co., 106 Mich. 606, 65 N. W. 592; Piette *v.* Bavarian Brewing Co., 91 Mich. 605, 52 N. W. 152; Ashman *v.* Flint, etc., R. Co., 90 Mich. 567, 51 N. W. 645; Sweet *v.* Michigan Cent. R. Co., 87 Mich. 559, 49 N. W. 882; Smith *v.* Dunham, 74 Mich. 310, 41 N. W. 933; Luke *v.* Wheat Min. Co., 71 Mich. 364, 39 N. W. 11; Gardner *v.* Michigan Cent. R. Co., 58 Mich. 584, 26 N. W. 301; Swoboda *v.* Ward, 40 Mich. 420.

Minnesota.— Dolson *v.* Dunham, 96 Minn. 227, 104 N. W. 964; Turrittin *v.* Chicago, etc., R. Co., 95 Minn. 408, 104 N. W. 225; Meyer *v.* Kenyon-Rosing Mach. Co., 95 Minn. 329, 104 N. W. 132; Graham *v.* Minneapolis, etc., R. Co., 95 Minn. 49, 103 N. W. 714; Ellington *v.* Great Northern R. Co., 92 Minn. 470, 100 N. W. 218; Anderson *v.* Fielding, 92 Minn. 42, 99 N. W. 357, 104 Am. St. Rep. 665; Vant Hul *v.* Great Northern R. Co., 90 Minn. 329, 96 N. W. 789; Scott *v.* Eastern R. Co., 90 Minn. 135, 95 N. W. 892; Setterstrom *v.* Brainerd, etc., R. Co., 89 Minn. 262, 94 N. W. 882; Ready *v.* Peavy Elevator Co., 89 Minn. 154, 94 N. W. 442; Lyons *v.* Dee, 88 Minn. 490, 93 N. W. 899; Stanning *v.* Great Northern R. Co., 88 Minn. 480, 93 N. W. 518; Isherwood *v.* H. L. Jenkins Lumber Co., 87 Minn. 388, 92 N. W. 230; Murran *v.* Chicago, etc., R. Co., 86 Minn. 470, 90 N. W. 1056; Klages *v.* Gillette-Herzog Mfg. Co., 86 Minn. 458, 90 N. W. 1116; Walker *v.* Grand Forks Lumber Co., 86 Minn. 328, 90 N. W. 573; Torske *v.* Commonwealth Lum-

is conclusive one way or the other, or is of such a character that but one

ber Co., 86 Minn. 276, 90 N. W. 532; Roe *v.* Winston, 86 Minn. 77, 90 N. W. 122; Attix *v.* Minnesota Sandstone Co., 85 Minn. 142, 88 N. W. 436; Perras *v.* Booth, 82 Minn. 191, 84 N. W. 739, 85 N. W. 179; Hooper *v.* Great Northern R. Co., 80 Minn. 400, 83 N. W. 440; Corbin *v.* Winona, etc., R. Co., 64 Minn. 185, 66 N. W. 271; Lawson *v.* Truesdale, 60 Minn. 410, 62 N. W. 546; Slette *v.* Great Northern R. Co., 53 Minn. 341, 55 N. W. 137; Mullin *v.* Northern Mill Co., 53 Minn. 29, 55 N. W. 1115; Flanders *v.* Chicago, etc., R. Co., 51 Minn. 193, 53 N. W. 544; Britton *v.* Northern Pac. R. Co., 47 Minn. 340, 50 N. W. 231; Johnson *v.* St. Paul, etc., R. Co., 43 Minn. 53, 44 N. W. 884; Sather *v.* Ness, 42 Minn. 379, 44 N. W. 128; McDonald *v.* Chicago, etc., R. Co., 41 Minn. 439, 43 N. W. 380, 16 Am. St. Rep. 711; Sobieski *v.* St. Paul, etc., R. Co., 41 Minn. 169, 42 N. W. 863; Wuotilla *v.* Duluth Lumber Co., 37 Minn. 153, 33 N. W. 551, 5 Am. St. Rep. 832; Barbo *v.* Bassett, 35 Minn. 485, 29 N. W. 198; Robel *v.* Chicago, etc., R. Co., 35 Minn. 84, 27 N. W. 305; Craver *v.* Christian, 34 Minn. 397, 26 N. W. 8; Anderson *v.* Morrison, 22 Minn. 274.

Mississippi.— Anderson *v.* Cumberland Tel., etc., Co., 86 Miss. 341, 38 So. 786; Yazoo, etc., R. Co. *v.* Schraag, 84 Miss. 125, 36 So. 193; Welsh *v.* Alabama, etc., R. Co., 70 Miss. 20, 11 So. 723.

Missouri.— Kennedy *v.* Kansas City, etc., R. Co., 190 Mo. 424, 89 S. W. 370; Wojtylak *v.* Kansas, etc., Coal Co., 188 Mo. 260, 87 S. W. 506; Cole *v.* St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434; Curtis *v.* McNair, 173 Mo. 270, 73 S. W. 167; Black *v.* Missouri Pac. R. Co., 172 Mo. 177, 72 S. W. 559; Cambron *v.* Omaha, etc., R. Co., 165 Mo. 543, 65 S. W. 745; Fisher *v.* Central Lead Co., 156 Mo. 479, 56 S. W. 1107; Nicholds *v.* Crystal Plate Glass Co., 126 Mo. 55, 28 S. W. 991; Card *v.* Eddy, (1894) 28 S. W. 753 [*affirming* (1893) 24 S. W. 746]; Burdict *v.* Missouri Pac. R. Co., 123 Mo. 221, 27 S. W. 453, 45 Am. St. Rep. 528, 26 L. R. A. 384; Church *v.* Chicago, etc., R. Co., 119 Mo. 203, 23 S. W. 1056; Swadley *v.* Missouri Pac. R. Co., 118 Mo. 268, 24 S. W. 140, 40 Am. St. Rep. 366; O'Mellia *v.* Kansas City, etc., R. Co., 115 Mo. 205, 21 S. W. 503; Foster *v.* Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916; Murphy *v.* Wabash R. Co., 115 Mo. 111, 21 S. W. 862; Francis *v.* Kansas City, etc., R. Co., 110 Mo. 387, 19 S. W. 935; Dixon *v.* Chicago, etc., R. Co., 109 Mo. 413, 19 S. W. 412, 18 L. R. A. 792; Blanton *v.* Dold, 109 Mo. 64, 18 S. W. 1149; Bluedorn *v.* Missouri Pac. R. Co., 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615, (1893) 24 S. W. 57, 121 Mo. 258, 25 S. W. 943; Hamilton *v.* Rich Hill Coal Min. Co., 108 Mo. 364, 18 S. W. 977; Schroeder *v.* Chicago, etc., R. Co., 108 Mo. 322, 18 S. W. 1094, 18 L. R. A. 827; Alcorn *v.* Chicago, etc., R. Co., 108 Mo. 81, 18 S. W. 188; Sullivan *v.* Missouri Pac. R. Co., 97 Mo. 113, 10 S. W. 852; Parsons *v.* Missouri Pac. R. Co., 94 Mo. 286, 6 S. W. 464; Stoddard *v.* St. Louis, etc., R. Co., 65 Mo. 514; Day *v.* Emery, etc., Dry Goods Co., 114 Mo. App. 479, 89 S. W. 903; Stafford *v.* Adams, 113 Mo. App. 717, 88 S. W. 1130; Zongker *v.* People's Union Mercantile Co., 110 Mo. App. 382, 86 S. W. 486; Adams *v.* McCormick Harvesting Mach. Co., 110 Mo. App. 367, 86 S. W. 484; Depuy *v.* Chicago, etc., R. Co., 110 Mo. App. 110, 84 S. W. 103; Mueller *v.* La Prelle Shoe Co., 109 Mo. App. 506, 84 S. W. 1010; Bien *v.* St. Louis Transit Co., 108 Mo. App. 399, 83 S. W. 986; Mitchell *v.* Chicago, etc., R. Co., 108 Mo. App. 142, 83 S. W. 289; Dean *v.* St. Louis Woodenware Works, 106 Mo. App. 167, 80 S. W. 292; Benedict *v.* Chicago Great Western R. Co., 104 Mo. App. 218, 78 S. W. 60; Hester *v.* Jacob Dold Packing Co., 95 Mo. App. 16, 74 S. W. 695; Glasscock *v.* Swofford Bros. Dry Goods Co., (App. 1903) 74 S. W. 1039; Adolff *v.* Columbia Pretzel, etc., Co., 100 Mo. App. 199, 73 S. W. 321; Franklin *v.* Missouri, etc., R. Co., 97 Mo. App. 473, 71 S. W. 540; Eberly *v.* Chicago, etc., R. Co., 96 Mo. App. 361, 70 S. W. 381; Fox *v.* Jacob Dold Packing Co., 96 Mo. App. 173, 70 S. W. 164; Kane *v.* Falk Co., 93 Mo. App. 209; Nash *v.* Dowling, 93 Mo. App. 156; Sikes *v.* Missouri Granite Co., 92 Mo. App. 12; Devore *v.* St. Louis, etc., R. Co., 86 Mo. App. 429; Thompson *v.* Chicago, etc., R. Co., 86 Mo. App. 141; Scott *v.* Springfield, 81 Mo. App. 312; Harney *v.* Missouri Pac. R. Co., 80 Mo. App. 667; Hogue *v.* Sligo Furnace Co., 62 Mo. App. 491; Warner *v.* Chicago, etc., R. Co., 62 Mo. App. 184; Fogus *v.* Chicago, etc., R. Co., 50 Mo. App. 250; Hughes *v.* Fagin, 46 Mo. App. 37; Cox *v.* Syenite Grantire Co., 39 Mo. App. 424; Dutzi *v.* Geizel, 23 Mo. App. 676.

Montana.— McCabe *v.* Montana Cent. R. Co., 30 Mont. 323, 76 Pac. 701; Nord *v.* Boston, etc., Consol. Copper, etc., Min. Co., 30 Mont. 48, 75 Pac. 681.

Nebraska.— Western Mattress Co. *v.* Ostergaard, (1904) 99 N. W. 229, 101 N. W. 334; New Omaha Thompson-Houston Electric Light Co. *v.* Dent, 68 Nebr. 668, 94 N. W. 819, 103 N. W. 1091; Ittner Brick Co. *v.* Killian, 67 Nebr. 589, 93 N. W. 951; O'Neill *v.* Chicago, etc., R. Co., 62 Nebr. 358, 86 N. W. 1098.

New Hampshire.— Murray *v.* Boston, etc., R. Co., 72 N. H. 32, 54 Atl. 289, 101 Am. St. Rep. 660, 61 L. R. A. 495; Olney *v.* Boston, etc., R. Co., 71 N. H. 427, 52 Atl. 1097; Lapelle *v.* International Paper Co., 71 N. H. 346, 51 Atl. 1068; Stone *v.* Boscawen, 71 N. H. 288, 32 Atl. 119; Thompson *v.* Bartlett, 71 N. H. 174, 51 Atl. 633, 98 Am. St. Rep. 504; Carr *v.* Manchester Electric Co., 70 N. H. 308, 48 Atl. 286; Whitcher *v.* Boston, etc., R. Co., 70 N. H. 242, 46 Atl. 740.

New Jersey.— D'Agostino *v.* Pennsylvania R. Co., 72 N. J. L. 358, 60 Atl. 1113; Maurer

inference can be drawn from it by all reasonable minds, the question whether

v. Gould, 72 N. J. L. 314, 60 Atl. 1134 [*affirming* (Sup. 1904) 59 Atl. 28]; Young *v.* Delaware, etc., R. Co., 68 N. J. L. 603, 53 Atl. 293; Ruch *v.* Gas Electric Co., 65 N. J. L. 399, 47 Atl. 504; Flanigan *v.* Guggenheim Smelting Co., 63 N. J. L. 647, 44 Atl. 762.

New York.— Wazenski *v.* New York Cent., etc., R. Co., 180 N. Y. 466, 73 N. E. 229 [*reversing* 86 N. Y. App. Div. 629, 83 N. Y. Suppl. 1118]; Gallenkamp *v.* Garvin Mach. Co., 179 N. Y. 588, 72 N. E. 1142 [*affirming* 91 N. Y. App. Div. 141, 86 N. Y. Suppl. 878]; Wolf *v.* Devitt, 179 N. Y. 569, 72 N. E. 1152 [*affirming* 83 N. Y. App. Div. 42, 82 N. Y. Suppl. 189]; True *v.* Niagara Gorge R. Co., 175 N. Y. 487, 67 N. E. 1090 [*affirming* 70 N. Y. App. Div. 383, 75 N. Y. Suppl. 216]; Eichholz *v.* Niagara Falls Hydraulic Power, etc., Co., 174 N. Y. 519, 66 N. E. 1107 [*affirming* 68 N. Y. App. Div. 441, 73 N. Y. Suppl. 842]; Eastland *v.* Clarke, 165 N. Y. 420, 59 N. E. 202, 70 L. R. A. 751 [*reversing* 53 N. Y. Suppl. 1103]; Di Vito *v.* Crage, 165 N. Y. 378, 59 N. E. 141 [*reversing* 35 N. Y. App. Div. 155, 55 N. Y. Suppl. 64]; Tully *v.* New York, etc., Steamship Co., 162 N. Y. 614, 57 N. E. 1127 [*affirming* 10 N. Y. App. Div. 463, 42 N. Y. Suppl. 29]; Hoes *v.* Edison Gen. Electric Co., 161 N. Y. 35, 55 N. E. 285 [*reversing* 23 N. Y. App. Div. 433, 48 N. Y. Suppl. 323]; Stuber *v.* McEntee, 142 N. Y. 200, 36 N. E. 878 [*reversing* 61 N. Y. Super. Ct. 338, 19 N. Y. Suppl. 900]; Whittaker *v.* Delaware, etc., Canal Co., 126 N. Y. 544, 27 N. E. 1042 [*affirming* 11 N. Y. Suppl. 914]; McGovern *v.* Central Vermont R. Co., 123 N. Y. 280, 25 N. E. 373 [*reversing* 6 N. Y. Suppl. 838]; McCarragher *v.* Rogers, 120 N. Y. 526, 24 N. E. 812; Murphy *v.* New York Cent., etc., R. Co., 118 N. Y. 527, 23 N. E. 812; Goodrich *v.* New York Cent., etc., R. Co., 116 N. Y. 398, 22 N. E. 397, 15 Am. St. Rep. 410, 5 L. R. A. 750; Lilly *v.* New York Cent., etc., R. Co., 107 N. Y. 566, 14 N. E. 503; Benzing *v.* Steinway, 101 N. Y. 547, 5 N. E. 449; Probst *v.* Delamater, 100 N. Y. 266, 3 N. E. 184; Kain *v.* Smith, 89 N. Y. 375 [*affirming* 25 Hun 146]; Hawley *v.* Northern Cent. R. Co., 82 N. Y. 370 [*affirming* 17 Hun 115]; Laning *v.* New York Cent. R. Co., 49 N. Y. 521, 10 Am. Rep. 417; Kiernan *v.* Eidlitz, 109 N. Y. App. Div. 726, 96 N. Y. Suppl. 387; Burke *v.* Manhattan R. Co., 109 N. Y. App. Div. 722, 96 N. Y. Suppl. 516; Lane *v.* New York Cent., etc., R. Co., 107 N. Y. App. Div. 166, 94 N. Y. Suppl. 988; Overbaugh *v.* Wieber, 106 N. Y. App. Div. 283, 94 N. Y. Suppl. 644; Vaughn *v.* Glens Falls Portland Cement Co., 105 N. Y. App. Div. 136, 93 N. Y. Suppl. 979; Madden *v.* Hughes, 104 N. Y. App. Div. 101, 93 N. Y. Suppl. 324; McConnell *v.* Morse Iron Works, etc., Co., 102 N. Y. App. Div. 324, 92 N. Y. Suppl. 477; Keating *v.* Coon, 102 N. Y. App. Div. 112, 92 N. Y. Suppl. 474; McBride *v.* New York Tunnel Co., 101 N. Y. App. Div. 448, 92 N. Y. Suppl. 282; Hempstock *v.* Lackawanna Iron, etc., Co., 98 N. Y. App. Div. 332, 90 N. Y. Suppl. 663; O'Donnell *v.* Welz, 97 N. Y. App. Div. 286, 89 N. Y. Suppl. 959; Wood *v.* New York Cent., etc., Co., 93 N. Y. App. Div. 53, 86 N. Y. Suppl. 817; Franck *v.* American Tartar Co., 91 N. Y. App. Div. 571, 87 N. Y. Suppl. 219; Levy *v.* Grove Mills Paper Co., 80 N. Y. App. Div. 384, 80 N. Y. Suppl. 730; Corbett *v.* St. Vincent's Industrial School, 79 N. Y. App. Div. 334, 79 N. Y. Suppl. 369; Allison *v.* Long Clove Trap Rock Co., 75 N. Y. App. Div. 267, 78 N. Y. Suppl. 69; Griffin *v.* Ithaca St. R. Co., 62 N. Y. App. Div. 551, 71 N. Y. Suppl. 140; Coughlin *v.* Brooklyn Heights R. Co., 59 N. Y. App. Div. 126, 68 N. Y. Suppl. 1105; Dzinbienski *v.* J. L. Mott Iron Works, 56 N. Y. App. Div. 58, 67 N. Y. Suppl. 256; Pierson *v.* New York, etc., R. Co., 53 N. Y. App. Div. 363, 65 N. Y. Suppl. 1039; Hall *v.* United States Radiator Co., 52 N. Y. App. Div. 90, 64 N. Y. Suppl. 1002; McLaughlin *v.* Eidlitz, 50 N. Y. App. Div. 518, 64 N. Y. Suppl. 193; Whitney *v.* Queen City Ice Co., 49 N. Y. App. Div. 485, 63 N. Y. Suppl. 535; Hannigan *v.* Lehigh, etc., R. Co., 91 Hun 300, 36 N. Y. Suppl. 293; O'Laughlin *v.* New York Cent., etc., R. Co., 87 Hun 538, 34 N. Y. Suppl. 297; Fancher *v.* New York, etc., R. Co., 75 Hun 350, 27 N. Y. Suppl. 62; Gaul *v.* Rochester Paper Co., 72 Hun 485, 25 N. Y. Suppl. 443 [*affirmed* in 145 N. Y. 603, 40 N. E. 163]; Gorman *v.* McArdle, 67 Hun 484, 22 N. Y. Suppl. 479; Tonnesen *v.* Ross, 58 Hun 415, 12 N. Y. Suppl. 150, 151; Thompson *v.* Ross, 58 Hun 415 note, 12 N. Y. Suppl. 150, 151 [*affirmed* in 132 N. Y. 595, 30 N. E. 1151]; Eldridge *v.* Atlas Steamship Co., 58 Hun 96, 11 N. Y. Suppl. 468; Moeller *v.* Brewster, 57 Hun 554, 11 N. Y. Suppl. 484; Heavey *v.* Hudson River Water-Power, etc., Co., 57 Hun 339, 10 N. Y. Suppl. 585; Skaarup *v.* Stover, 56 Hun 86, 9 N. Y. Suppl. 92; Wall *v.* Delaware, etc., R. Co., 54 Hun 454, 7 N. Y. Suppl. 709 [*affirmed* in 125 N. Y. 727, 26 N. E. 757]; Cullen *v.* Norton, 52 Hun 9, 4 N. Y. Suppl. 774; Hart *v.* Naumburg, 50 Hun 392, 3 N. Y. Suppl. 227 [*affirmed* in 123 N. Y. 641, 25 N. E. 385]; Cullen *v.* National Sheet Metal Roofing Co., 46 Hun 562; Williams *v.* Delaware, etc., R. Co., 39 Hun 430 [*reversed* on other grounds in 116 N. Y. 628, 22 N. E. 1117]; Marsh *v.* Chickering, 25 Hun 405 [*reversed* on other grounds in 101 N. Y. 396, 5 N. E. 36]; McMahon *v.* Port Henry Iron Ore Co., 24 Hun 48; Fort *v.* Whipple, 11 Hun 586; Shanley *v.* Stanley, 59 N. Y. Super. Ct. 495, 15 N. Y. Suppl. 136; Baxter *v.* Richardson, 54 N. Y. Super. Ct. 230; Sweeney *v.* New York Steam Co., 15 Daly 312, 6 N. Y. Suppl. 528 [*affirmed* in 117 N. Y. 642, 22 N. E. 1131]; Craig *v.* Manhattan R. Co., 13 Daly 214; Brennan *v.* Gordon, 13 Daly 208; McLarney *v.* Long Island R. Co., 11 Misc. 64, 31 N. Y. Suppl.

plaintiff has been guilty of contributory negligence becomes one of law for

862; Rettig *v.* Fifth Ave. Transp. Co., 6 Misc. 328, 26 N. Y. Suppl. 896 [*affirmed* in 144 N. Y. 715, 39 N. E. 859]; Van Tassell *v.* New York, etc., R. Co., 1 Misc. 299, 20 N. Y. Suppl. 708 [*affirmed* in 142 N. Y. 634, 37 N. E. 566]; McCauley *v.* Smith, 19 N. Y. Suppl. 991; Gross *v.* Pennsylvania, etc., R. Co., 16 N. Y. Suppl. 616; Shields *v.* New York Cent., etc., R. Co., 15 N. Y. Suppl. 613; Flood *v.* Western Union Tel. Co., 15 N. Y. Suppl. 400; Koosorowska *v.* Glasser, 8 N. Y. Suppl. 197; Sutherland *v.* Troy, etc., R. Co., 8 N. Y. Suppl. 83; Pullutro *v.* Delaware, etc., R. Co., 7 N. Y. Suppl. 510; Goldman *v.* Mason, 2 N. Y. Suppl. 337; McQuigan *v.* Delaware, etc., R. Co., 14 N. Y. St. 651; Flynn *v.* Erie Preserving Co., 12 N. Y. St. 88; Hogan *v.* Hendersen, 2 N. Y. St. 119.

North Carolina.— Sherrill *v.* Southern R. Co., 140 N. C. 252, 52 S. E. 940; Marks *v.* Harriet Cotton Mills, 138 N. C. 401, 50 S. E. 769; Whisenhant *v.* Southern R. Co., 137 N. C. 349, 49 S. E. 559; Peoples *v.* North Carolina R. Co., 137 N. C. 96, 49 S. E. 87; Smith *v.* Atlanta, etc., R. Co., 132 N. C. 819, 44 S. E. 663; Coley *v.* North Carolina R. Co., 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817, 128 N. C. 534, 39 S. E. 43.

North Dakota.— Bennett *v.* Northern Pac. R. Co., 3 N. D. 91, 54 N. W. 314.

Ohio.— Lake Shore, etc., R. Co. *v.* Murphy, 50 Ohio St. 135, 33 N. E. 403; Lake Shore, etc., R. Co. *v.* Fisher, 26 Ohio Cir. Ct. 143 [*affirmed* without opinion in 51 Ohio St. 574]; Kracht *v.* Lake Shore, etc., R. Co., 25 Ohio Cir. Ct. 521; Pittsburg, etc., R. Co. *v.* Stone, 24 Ohio Cir. Ct. 192; Ham *v.* Lake Shore, etc., R. Co., 23 Ohio Cir. Ct. 496; Brown Oil Can Co. *v.* Green, 22 Ohio Cir. Ct. 518; Lake Shore, etc., R. Co. *v.* Schultz, 19 Ohio Cir. Ct. 639; Rafferty *v.* Toledo Traction Co., 19 Ohio Cir. Ct. 288; Bohaslav *v.* Standard Oil Co., 4 Ohio Dec. (Reprint) 537, 2 Clev. L. Rep. 337; Stevens *v.* Little Miami R. Co., 1 Ohio Dec. (Reprint) 335, 7 West. L. J. 369.

Oregon.— Mundhenke *v.* Oregon City Mfg. Co., 47 Oreg. 127, 81 Pac. 977, 1 L. R. A. N. S. 278; Viohl *v.* North Pac. Lumber Co., 46 Oreg. 297, 80 Pac. 112; Johnston *v.* Oregon Short Line R. Co., 23 Oreg. 94, 31 Pac. 283.

Pennsylvania.— Maines *v.* Harbison-Walker Co., 213 Pa. St. 145, 62 Atl. 640; Hickey *v.* Solid Steel Casting Co., 212 Pa. St. 255, 61 Atl. 798; Bartholomew *v.* Kemmerer, 211 Pa. St. 277, 60 Atl. 908; Schiglizzo *v.* Dunn, 211 Pa. St. 253, 60 Atl. 724, 107 Am. St. Rep. 571; Dynes *v.* Bromley, 208 Pa. St. 633, 57 Atl. 1123; Conger *v.* Wiggins, 208 Pa. St. 122, 57 Atl. 341; Butterman *v.* McClintic-Marshall Constr Co., 206 Pa. St. 82, 55 Atl. 839; Doyle *v.* Pittsburg Waste Co., 204 Pa. St. 618, 54 Atl. 363; Webster *v.* Monongahela River Consol. Coal, etc., Co., 201 Pa. St. 278, 50 Atl. 964; Reese *v.* Clark, 198 Pa. St. 312, 47 Atl. 994; Coates *v.* Chapman, 195 Pa. St. 109, 45 Atl. 676; McKeever *v.* Westinghouse Electric, etc., Co., 194 Pa. St. 149, 44 Atl. 689; Vorhees *v.* Lake Shore, etc., R. Co., 193 Pa. St. 115, 44 Atl. 335; Neilson *v.* Hillside Coal, etc., Co., 168 Pa. St. 256, 31 Atl. 1091, 47 Am. St. Rep. 886; Stoltenberg *v.* Pittsburg, etc., R. Co., 165 Pa. St. 377, 30 Atl. 980; Dooner *v.* Delaware, etc., Canal Co., 164 Pa. St. 17, 30 Atl. 269; Bannon *v.* Lutz, 158 Pa. St. 166, 27 Atl. 890; Walbert *v.* Trexler, 156 Pa. St. 112, 27 Atl. 65; Gates *v.* Pennsylvania R. Co., 154 Pa. St. 566, 26 Atl. 598; Kehler *v.* Schwenk, 151 Pa. St. 505, 25 Atl. 130, 31 Am. St. Rep. 777; Lee *v.* Electric Light, etc., Co., 140 Pa. St. 618, 21 Atl. 405; Strawbridge *v.* Bradford, 128 Pa. St. 200, 18 Atl. 346, 15 Am. St Rep. 670; Philadelphia, etc., R. Co. *v.* Huber, 128 Pa. St. 63, 18 Atl. 334, 5 L. R. A. 439; Pennsylvania R. Co. *v.* Zink, 126 Pa. St. 288, 17 Atl. 614; Woodward *v.* Shumpp, 120 Pa. St. 458, 14 Atl. 378, 6 Am. St. Rep. 716; Somerset, etc., R. Co. *v.* Galbraith, 109 Pa. St. 32, 1 Atl. 371; Payne *v.* Reese, 100 Pa. St. 301; Honor *v.* Albrighton, 93 Pa. St. 475; Johnson *v.* Bruner, 61 Pa. St. 58, 100 Am. Dec. 613; Pennsylvania Coal Co. *v.* Nee, 9 Pa. Cas. 579, 13 Atl. 841; Rumsey *v.* Delaware, etc., R. Co., 6 Kulp 359.

Rhode Island.— Lebeau *v.* Dyerville Mfg. Co., 26 R. I. 34, 57 Atl. 1092; McGarrity *v.* New York, etc., R. Co., 25 R. I. 269, 55 Atl. 718; Crandall *v.* Stafford Mfg. Co., 24 R. I. 555, 54 Atl. 52; Le Febre *v.* Lawton Spinning Co., 24 R. I. 215, 52 Atl. 1025; Flynn *v.* Shaw, 22 R. I. 328, 47 Atl. 883; Maguire *v.* Little, (1887) 13 Atl. 108.

South Carolina.— Keys *v.* Winnsboro Granite Co., 72 S. C. 97, 51 S. E. 549; Lasure *v.* Graniteville Mfg. Co., 18 S. C. 275.

Tennessee.— Louisville, etc., R. Co. *v.* Stacker, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840.

Texas.— Drake *v.* San Antonio, etc., R. Co., (1905) 89 S. W. 407 [*reversing* (Civ. App.) 1905) 85 S. W. 447]; Peck *v.* Peck, (1905) 87 S. W. 248 [*affirming* (Civ. App. 1904) 83 S. W. 257]; Missouri, etc., R. Co. *v.* Purdy, (1905) 86 S. W. 321 [*reversing* (Civ. App. 1904) 83 S. W. 37]; Galveston, etc., R. Co. *v.* Adams, 94 Tex. 100, 58 S. W. 831 [*affirming* (Civ. App. 1900) 55 S. W. 803]; Galveston, etc., R. Co. *v.* Jackson, 93 Tex. 262, 54 S. W. 1023 [*affirming* (Civ. App. 1899) 53 S. W. 81]; H. S. Hopkins Bridge Co. *v.* Burnett, 85 Tex. 16, 19 S. W. 886; Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13, 15 S. W. 214; Galveston Oil Co. *v.* Thompson, 76 Tex. 235, 13 S. W. 60; Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288; International, etc., R. Co. *v.* Kindred, 57 Tex. 491; Southern Constr. Co. *v.* Hinkle, (Civ. App. 1905) 89 S. W. 309; Gulf, etc., R. Co. *v.* Boyce, (Civ. App. 1905) 87 S. W. 395; Texas Cent. R. Co. *v.* Phillips, (Civ. App. 1905) 87 S. W. 187; Texarkana Table, etc., Co. *v.* Webb, (Civ. App. 1905) 86 S. W. 782; International, etc., R. Co. *v.* Vanlandingham, (Civ. App. 1905) 85 S. W. 847; International, etc., R. Co. *v.* Jacobs, (Civ. App. 1904) 84 S. W.

the determination of the court, and it is error for the court to submit it

288; International, etc., R. Co. *v.* Jourdan, (Civ. App. 1904) 84 S. W. 266; Galveston, etc., R. Co. *v.* Manns, (Civ. App. 1904) 84 S. W. 254; San Antonio, etc., R. Co. *v.* Stevens, (Civ. App. 1904) 83 S. W. 235; International, etc., R. Co. *v.* McVey, (Civ. App. 1904) 81 S. W. 991, 83 S. W. 34; Texas Cent. R. Co. *v.* Pelfrey, 35 Tex. Civ. App. 501, 80 S. W. 1036; Missouri, etc., R. Co. *v.* Hoskins, 34 Tex. Civ. App. 627, 79 S. W. 369; Galveston, etc., R. Co. *v.* Butshek, 34 Tex. Civ. App. 194, 78 S. W. 740; Texas, etc., R. Co. *v.* Kelly, 34 Tex. Civ. App. 21, 80 S. W. 1073; International, etc., R. Co. *v.* Penn, (Civ. App. 1904) 79 S. W. 624; Galveston, etc., R. Co. *v.* Walker, (Civ. App. 1903) 76 S. W. 228; Texas Cent. R. Co. *v.* Bender, 32 Tex. Civ. App. 568, 75 S. W. 561; Texas Portland Cement Co. *v.* Poe, 32 Tex. Civ. App. 469, 74 S. W. 563; Texas Cent. R. Co. *v.* Yarbro, 32 Tex. Civ. App. 246, 75 S W. 357; Missouri, etc., R. Co. *v.* Jones, (Civ. App. 1903) 75 S. W. 53; Missouri, etc., R. Co. *v.* Bodie, 32 Tex. Civ. App. 168, 74 S. W. 100; Rea *v.* St. Louis Southwestern R. Co., (Civ. App. 1903) 73 S. W. 555; Gulf, etc., R. Co. *v.* Garren, (Civ. App. 1903) 72 S. W. 1028; San Antonio, etc., R. Co. *v.* Ankerson, 31 Tex. Civ. App. 327, 72 S. W. 219; Galveston, etc., R. Co. *v.* Courtney, 30 Tex. Civ. App. 544, 71 S. W. 307; Galveston, etc., R. Co. *v.* Pendleton, 30 Tex. Civ. App. 431, 70 S. W. 996; Galveston, etc., R. Co. *v.* Puente, 30 Tex. Civ. App. 246, 70 S. W. 362; Gulf, etc., R. Co. *v.* Cornell, 29 Tex. Civ. App. 596, 69 S. W. 980; Parks *v.* St. Louis Southwestern R. Co., 29 Tex. Civ. App. 551, 69 S. W. 125; Missouri, etc., R. Co. *v.* Mayfield, 29 Tex. Civ. App. 477, 68 S. W. 807; American Cotton Co. *v.* Smith, 29 Tex. Civ. App. 425, 69 S. W. 443; Missouri, etc., R. Co. *v.* Pawkett, 28 Tex. Civ. App. 583, 68 S. W. 323; San Antonio, etc., R. Co. *v.* Connell, 27 Tex. Civ. App. 533, 66 S. W. 246; Galveston, etc., R. Co. *v.* Quay, 27 Tex. Civ. App. 516, 66 S. W. 219; Galveston, etc., R. Co. *v.* Sanchez, (Civ. App. 1901) 65 S. W. 893; Gulf, etc., R. Co. *v.* Newman, 27 Tex. Civ. App. 77, 64 S. W. 790; Burns *v.* Merchants', etc., Oil Co., 26 Tex. Civ. App. 223, 63 S. W. 1061; De la Vergne Refrigerating Mach. Co. *v.* Stahl, 24 Tex. Civ. App. 471, 60 S. W. 319; Bookrum *v.* Galveston, etc., R. Co., (Civ. App. 1900) 57 S. W. 919; Galveston, etc., R. Co. *v.* Nicholson, (Civ. App. 1900) 57 S. W. 693; De Walt *v.* Houston, etc., R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534; International, etc., R. Co. *v.* Elkins, (Civ. App. 1899) 54 S. W. 931; International, etc., R. Co. *v.* Hawes, (Civ. App. 1899) 54 S. W. 325; Gulf, etc., R. Co. *v.* Harris, (Civ. App. 1899) 51 S. W. 864; Galveston, etc., R. Co. *v.* Gormley, (Civ. App. 1896) 35 S. W. 488; Eddy *v.* Bodkin, (Civ. App. 1894) 28 S. W. 54; Missouri, etc., R. Co. *v.* Woods, (Civ. App. 1894) 25 S. W. 741.

Utah.— Merrill *v.* Oregon Short Line R. Co., 29 Utah 264, 81 Pac. 85, 110 Am. St. Rep. 695; Moyes *v.* Ogden Sewer Pipe, etc., Co., 28 Utah 148, 77 Pac. 610; Garity *v.* Bullion-Beck, etc., Min. Co., 27 Utah 534, 76 Pac. 556; Hicks *v.* Southern Pac. Co., 27 Utah 526, 76 Pac. 625; Hone *v.* Mammoth Min. Co., 27 Utah 168, 75 Pac. 381; Boyle *v.* Union Pac. R. Co., 25 Utah 420, 71 Pac. 988; Chapman *v.* Southern Pac. Co., 12 Utah 30, 41 Pac. 551; Wells *v.* Denver, etc., R. Co., 7 Utah 482, 27 Pac. 688.

Vermont.— Kilpatrick *v.* Grand Trunk R. Co., 74 Vt. 288, 52 Atl 531, 93 Am. St. Rep. 887; La Flam *v.* Missisquoi Pulp Co., 74 Vt. 125, 52 Atl. 526; Lambert *v.* Missisquoi Pulp Co., 72 Vt. 278, 47 Atl. 1085; Sherman *v.* Delaware, etc., Canal Co., 71 Vt. 325, 45 Atl. 227.

Virginia.— Norfolk, etc., R. Co. *v.* Spencer, 104 Va. 657, 52 S. E. 310; Fisher *v.* Chesapeake, etc., R. Co., 104 Va. 635, 52 S. E. 373, 2 L. R. A. N. S. 954; Johnston *v.* Moore Lime Co., 104 Va. 547, 52 S. E. 360; Virginia Iron, etc., Co. *v.* Lore, 104 Va. 217, 51 S. E. 371; Virginia Portland Cement Co. *v.* Luck, 103 Va. 427, 49 S. E. 577; Chesapeake, etc., R. Co. *v.* Pierce, 103 Va. 99, 48 S. E. 534; Chesapeake, etc., R. Co. *v.* Lash, (1896) 24 S. E. 385; Bertha Zinc Co. *v.* Martin, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999.

Washington.— Hansen *v.* Seattle Lumber Co., 41 Wash. 349, 83 Pac. 102; Williams *v.* Ballard Lumber Co., 41 Wash. 338, 83 Pac. 323; Dossett *v.* St. Paul, etc., Lumber Co., 40 Wash. 276, 82 Pac. 273; Hart *v.* Cascade Timber Co., 39 Wash. 279, 81 Pac. 738; Sandquist *v.* Independent Tel. Co., 38 Wash. 313, 80 Pac. 539; Jancko *v.* West Coast Mfg., etc., Co., 34 Wash. 556, 76 Pac. 78; Currans *v.* Seattle, etc., R., etc., Co., 34 Wash. 512, 76 Pac. 87; Crooker *v.* Pacific Lounge, etc., Co., 34 Wash. 191, 75 Pac. 632; Gaudie *v.* Northern Lumber Co., 34 Wash. 34, 74 Pac. 1009; Bailey *v.* Cascade Timber Co., 32 Wash. 319, 73 Pac. 385; McDannald *v.* Washington, etc., R. Co., 31 Wash. 585, 72 Pac. 481; Morton *v.* Moran Bros. Co., 30 Wash. 362, 70 Pac. 968; Green *v.* Western American Co., 30 Wash. 87, 70 Pac. 310; Christianson *v.* Pacific Bridge Co., 27 Wash. 582, 68 Pac. 191.

Wisconsin.— Johnson *v.* St. Paul, etc., Coal Co., 126 Wis. 492, 105 N. W. 1048; Coolidge *v.* Hallauer, 126 Wis. 244, 105 N. W. 568; Zentner *v.* Oshkosh Gas Light Co., 126 Wis. 196, 105 N. W. 911; Williams *v.* North Wisconsin Lumber Co., 124 Wis. 328, 102 N. W. 589; Horn *v.* La Crosse Box Co., 123 Wis. 399, 101 N. W. 935; Kamp *v.* Coxe, 122 Wis. 206, 99 N. W. 366; Kath *v.* Wisconsin Cent. R. Co., 121 Wis. 503, 99 N. W. 217; Bain *v.* Northern Pac. R. Co., 120 Wis. 412, 98 N. W. 241; Revolinski *v.* Adams Coal Co., 118 Wis. 324, 95 N. W. 122; Kennedy *v.* Lake Superior Terminal, etc., R. Co., 93 Wis. 32, 66 N. W. 1137; Disotell *v.* Henry Luther Co., 90 Wis. 635, 64 N. W. 425; Baltzer *v.* Chicago, etc., R. Co., 89 Wis. 257, 60 N. W. 716; Colf *v.* Chicago, etc., R. Co., 87 Wis. 273, 58 N. W.

to the jury.[81] Where it is evident that the risk was one assumed by plain-

408; Nadau *v.* White River Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29; Neilon *v.* Marinette, etc., Paper Co., 75 Wis. 579, 44 N. W. 772; Sorenson *v.* Menasha Paper, etc., Co., 56 Wis. 338, 14 N. W. 446; Kelley *v.* Chicago, etc., R. Co., 50 Wis. 381, 7 N. W. 291; Cottrill *v.* Chicago, etc., R. Co., 47 Wis. 634, 3 N. W. 376, 32 Am. Rep. 796; Ditberner *v.* Chicago, etc., R. Co., 47 Wis. 138, 2 N. W. 69.

United States.— Northern Pac. R. Co. *v.* Egeland, 163 U. S. 93, 16 S. Ct. 975, 41 L. ed. 82 [*affirming* 56 Fed. 200, 5 C. C. A. 471]; Washington, etc., R. Co. *v.* McDade, 135 U. S. 554, 10 S. Ct. 1044, 34 L. ed. 235 [*affirming* 5 Mackey (D. C.) 144]; Dunlap *v.* Northeastern R. Co., 130 U. S. 649, 9 S. Ct. 647, 32 L. ed. 1058; Kane *v.* Northern Cent. R. Co., 128 U. S. 91, 9 S. Ct. 16, 32 L. ed. 339; Northern Pac. R. Co. *v.* Mares, 123 U. S. 710, 8 S. Ct. 321, 31 L. ed. 296 [*affirming* 3 Dak. 336, 21 N. W. 5]; Cunard Steamship Co. *v.* Carey, 119 U. S. 245, 7 S. Ct. 1360, 30 L. ed. 354; Hayward *v.* Key, 138 Fed. 34, 70 C. C. A. 402; Hawley *v.* Chicago, etc., R. Co., 133 Fed. 150, 66 C. C. A. 216; Chicago, etc., R. Co. *v.* Benton, 132 Fed. 460, 65 C. C. A. 660; Sauvageau *v.* River Spinning Co., 129 Fed. 961; Wheeler *v.* Oak Harbor Head Lining, etc., Co., 126 Fed. 348, 61 C. C. A. 250; Olsen *v.* Cook Inlet Coal Fields Co., 121 Fed. 726, 58 C. C. A. 146; Northern Pac. R. Co. *v.* Tynan, 119 Fed. 288, 56 C. C. A. 192; Alaska United Gold Min. Co. *v.* Muset, 114 Fed. 66, 52 C. C. A. 14; Southern R. Co. *v.* Craig, 113 Fed. 76, 51 C. C. A. 63; Baltimore, etc., R. Co. *v.* Burris, 111 Fed. 882, 50 C. C. A. 48; Western Union Tel. Co. *v.* Burgess, 108 Fed. 26, 47 C. C. A. 168; Mason, etc., R. Co. *v.* Yockey, 103 Fed. 265, 43 C. C. A. 228; Mexican Cent. R. Co. *v.* Eckman, 102 Fed. 274, 42 C. C. A. 344; Herrick *v.* Quigley, 101 Fed. 187, 41 C. C. A. 294; Nelson *v.* New Orleans, etc., R. Co., 100 Fed. 731, 40 C. C. A. 673; Bethlehem Iron Co. *v.* Weiss, 100 Fed. 45, 40 C. C. A. 270; Northern Cent. R. Co. *v.* Herchiskel, 74 Fed. 460, 20 C. C. A. 593; Hayes *v.* Northern Pac. R. Co., 74 Fed. 279, 20 C. C. A. 52; Lake Erie, etc., R. Co. *v.* Craig, 73 Fed. 642, 19 C. C. A. 631; Oregon, etc., R. Co. *v.* Tracy, 66 Fed. 931, 14 C. C. A. 199; Northern Pac. R. Co. *v.* Mortenson, 63 Fed. 530, 11 C. C. A. 335; Northern Pac. R. Co. *v.* Teeter, 63 Fed. 527, 11 C. C. A. 332; Norman *v.* Wabash R. Co., 62 Fed. 727, 10 C. C. A. 617; Griffin *v.* Overman Wheel Co., 61 Fed. 568, 9 C. C. A. 542; Kansas City, etc., R. Co. *v.* Kirksey, 60 Fed. 999, 9 C. C. A. 321; Southern Pac. R. Co. *v.* Burke, 69 Fed. 704, 9 C. C. A. 229; Haas *v.* Balch, 56 Fed. 984, 6 C. C. A. 201; Union Pac. R. Co. *v.* Jarvi, 53 Fed. 65, 3 C. C. A. 433; Northern Pac. R. Co. *v.* Nickels, 50 Fed. 718, 1 C. C. A. 625; New Jersey, etc., R. Co. *v.* Young, 49 Fed. 723, 1 C. C. A. 428; Grant *v.* Union Pac. R. Co., 45 Fed. 673; Rillston *v.* Mather, 44 Fed. 743; Telander *v.* Sunlin, 44 Fed. 564; Seese *v.* Northern Pac. R. Co., 39 Fed. 487; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87.

Canada.— Day *v.* Dominion Iron, etc., Co., 36 Nova Scotia 113; Scriver *v.* Lowe, 32 Ont. 290; Moore *v.* J. D. Moore Co., 4 Ont. L. Rep. 167.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1089–1132.

Imminence of danger.— Whether danger is so obvious and imminent that no ordinarily prudent person would consent to undertake it is usually a question for the jury under all the facts and circumstances of the case. Walker *v.* Shelton, 59 Kan. 774, 52 Pac. 441; Pennsylvania R. Co. *v.* Snyder, 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. Rep. 700; Folk *v.* Schaeffer, 186 Pa. St. 253, 40 Atl. 401; Houston, etc., R. Co. *v.* Milam, (Tex. Civ. App. 1900) 58 S. W. 735, (Civ. App. 1901) 60 S. W. 591; Dryburg *v.* Mercur Gold Min., etc., Co., 18 Utah 410, 55 Pac. 367; Reese *v.* Morgan Silver Min. Co., 17 Utah 480, 54 Pac. 759; Southern Bell Tel., etc., Co. *v.* Clements, 98 Va. 1, 34 S. E. 951; George *v.* Clark, 85 Fed. 608, 29 C. C. A. 374.

81. *District of Columbia.*—Mills *v.* Orange, etc., R. Co., 2 MacArthur 314.

Georgia.— Evans *v.* Josephine Mills, 119 Ga. 448, 46 S. E. 674; Roberts *v.* Albany, etc., R. Co., 114 Ga. 678, 40 S. E. 698; Gassaway *v.* Georgia Southern R. Co., 69 Ga. 347.

Illinois.— Lake Shore Foundry Co. *v.* Rakowski, 54 Ill. App. 213.

Iowa.— McLeod *v.* Chicago, etc., R. Co., 125 Iowa 270, 101 N. W. 77; Oleson *v.* Maple Grove Coal, etc., Co., 115 Iowa 74, 87 N. W. 736; Conners *v.* Burlington, etc., R. Co., 74 Iowa 383, 37 N. W. 966.

Kentucky.— Brown *v.* Louisville, etc., R. Co., 65 S. W. 588, 23 Ky. L. Rep. 1504.

Maine.— Babb *v.* Oxford Paper Co., 99 Me. 298, 59 Atl. 290.

Massachusetts.— Dacey *v.* New York, etc., R. Co., 168 Mass. 479, 47 N. E. 418.

Minnesota.— Swenson *v.* Osgood, etc., Mfg. Co., 91 Minn. 509, 98 N. W. 645.

Missouri.— Caldwell *v.* Missouri Pac. R. Co., 181 Mo. 455, 80 S. W. 897.

Nebraska.—Hubler *v.* Johnson-McLain Co., (1905) 105 N. W. 247; Fielding *v.* Chicago, etc., R. Co., (1904) 101 N. W. 1022; Fay *v.* Chicago, etc., R. Co., (1903) 96 N. W. 638.

New Jersey.— Gill *v.* National Storage Co., 70 N. J. L. 53, 56 Atl. 146.

New York.— McQuigan *v.* Delaware, etc., R. Co., 122 N. Y. 618, 26 N. E. 13; Hartwig *v.* Bay State Shoe, etc., Co., 118 N. Y. 664, 23 N. E. 24 [*reversing* 43 Hun 425]; Palcheski *v.* Brooklyn Heights R. Co., 69 N. Y. App. Div. 440, 74 N. Y. Suppl. 987; Sprong *v.* Boston, etc., R. Co., 60 Barb. 30; Eades *v.* Clark, 55 N. Y. Super. Ct. 132, 11 N. Y. St. 725.

Pennsylvania.— Jones *v.* Scranton Coal Co., 211 Pa. St. 577, 61 Atl. 577; Owens *v.* Thomas Kent Mfg. Co., 211 Pa. St. 406, 60 Atl. 987; Schlemmer *v.* Buffalo, etc., R. Co.,

tiff, there is no necessity for a submission of the issues of contributory negligence.[82]

7. Instructions[83] — a. In General — (i) *Form and Sufficiency Generally.* The general rules of law governing instructions in civil actions apply in the case of an action by a servant to recover for personal injuries.[84] As in other cases an

207 Pa. St. 198, 56 Atl. 417; Matthews *v.* Park, 159 Pa. St. 579, 28 Atl. 435; Bemisch *v.* Roberts, 143 Pa. St. 1, 21 Atl. 998; Zurn *v.* Tetlow, 134 Pa. St. 213, 19 Atl. 504.

Rhode Island.— Gaffney *v.* J. O. Inman Mfg. Co., 18 R. I. 781, 31 Atl. 6.

Texas.— International, etc., R. Co. *v.* Villareal, 36 Tex. Civ. App. 532, 82 S. W. 1063; Hettick *v.* Hillje, 33 Tex. Civ. App. 571, 77 S. W. 641; Young *v.* Hahn, (Civ. App. 1902) 69 S. W. 203; Dupree *v.* Alexander, 29 Tex. Civ. App. 31, 68 S. W. 739; Texas Cent. R. Co. *v.* Lyons, (Civ. App. 1896) 34 S. W. 362; Harrison *v.* Texas, etc., R. Co., (Civ. App. 1895) 31 S. W. 242.

Washington.— Steeples *v.* Panel, etc., Co., 33 Wash. 359, 74 Pac. 475; Pugh *v.* Oregon Imp. Co., 14 Wash. 331, 44 Pac. 547, 689.

Wisconsin.— Groth *v.* Thomann, 110 Wis. 488, 86 N. W. 178; Jones *v.* Sutherland, 91 Wis. 587, 65 N. W. 496; Kliegel *v.* Weisel, etc., Mfg. Co., 84 Wis. 148, 53 N. W. 1119; Peffer *v.* Cutler, 83 Wis. 281, 53 N. W. 508.

United States.— Richmond Locomotive Works *v.* Ramsey, 131 Fed. 197, 65 C. C. A. 503; Erie R. Co. *v.* Kane, 118 Fed. 223, 55 C. C. A. 129.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1089–1132.

82. Hettich *v.* Hillje, 33 Tex. Civ. App. 571, 77 S. W. 641.

83. **Assumptions of judge as to facts** see Trial.

Error in instruction cured by withdrawal or giving other instructions see Trial.

Necessity and sufficiency of request for instructions see Trial.

Necessity and sufficiency of request submitting matters of law not controverted by law see Trial.

Request for instructions see Trial.

Right to object to instructions see Trial.

Sufficiency of charge as a whole see Trial.

Waiver of objection to instructions see Trial.

84. See Trial.

Instances of instructions held correct.— Skelton *v.* Pacific Lumber Co., 140 Cal. 507, 74 Pac. 13; Belt R. Co. *v.* Confrey, 209 Ill. 344, 70 N. E. 773; Ide *v.* Fratcher, 96 Ill. App. 542 [*affirmed* in 194 Ill. 552, 62 N. E. 814]; St. Louis, etc., R. Co. *v.* Cronin, 87 Ill. App. 524; Consolidated Stone Co. *v.* Morgan, 160 Ind. 241, 66 N. E. 696; Clear Creek Stone Co. *v.* Dearmin, 160 Ind. 162, 66 N. E. 609; Terre Haute, etc., R. Co. *v.* Rittenhouse, 28 Ind. App. 633, 62 N. E. 295; Illinois Cent. R. Co. *v.* Leisure, 90 S. W. 269, 28 Ky. L. Rep. 768; Mergenthaler-Horton Basket Mach. Co. *v.* Lyon, 89 S. W. 522, 28 Ky. L. Rep. 471; Philadelphia, etc., R. Co. *v.* Devers, 101 Md. 341, 61 Atl. 418; O'Driscoll *v.* Faxon, 156 Mass. 527, 31 N. E. 685; Clark *v.* Soule, 137 Mass. 380; Ribich *v.* Lake Superior Smelting Co., 123 Mich. 401, 82 N. W. 279, 81 Am. St. Rep. 215, 48 L. R. A. 649; O'Hare *v.* Chicago, etc., R. Co., 95 Mo. 662, 9 S. W. 23; Cameron *v.* B. Roth Tool Co., 108 Mo. App. 265, 83 S. W. 279; Knight *v.* Sadtler Lead, etc., Co., 91 Mo. App. 574; O'Leary *v.* Buffalo Union Furnace Co., 100 N. Y. App. Div. 136, 91 N. Y. Suppl. 579; Purcell *v.* Hoffman House, 97 N. Y. App. Div. 307, 89 N. Y. Suppl. 975; McDonald *v.* Postal Tel. Co., 22 R. I. 131, 46 Atl. 407; Morriss *v.* Bowers, 105 Tenn. 59, 58 S. W. 328; Gulf, etc., R. Co. *v.* Wells, (Tex. 1891) 16 S. W. 1025; Missouri, etc., R. Co. *v.* Keefe, (Tex. Civ. App. 1905) 84 S. W. 679; International, etc., R. Co. *v.* Villareal, 36 Tex. Civ. App. 532, 82 S. W. 1063; Houston, etc., R. Co. *v.* Jennings, 36 Tex. Civ. App. 375, 81 S. W. 822; Galveston, etc., R. Co. *v.* Mortson, 31 Tex. Civ. App. 142, 71 S. W. 770; Gulf, etc., R. Co. *v.* Hill, 29 Tex. Civ. App. 12, 70 S. W. 103; Galveston, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1894) 28 S. W. 110; Eddy *v.* Prentice, 8 Tex. Civ. App. 58, 27 S. W. 1063; Virginia, etc., Wheel Co. *v.* Harris, 103 Va. 708, 49 S. E. 991; Johnson *v.* St. Paul, etc., Coal Co., 126 Wis. 492, 105 N. W. 1048; Mountain Copper Co. *v.* Van Buren, 133 Fed. 1, 66 C. C. A. 151.

Duty to give.— Morbey *v.* Chicago, etc., R. Co., 105 Iowa 46, 74 N. W. 751; Stanning *v.* Great Northern R. Co., 88 Minn. 480, 93 N. W. 518; Illinois Cent. R. Co. *v.* Abrams, 84 Miss. 456, 36 So. 542; Cleveland, etc., R. Co. *v.* Baker, 91 Fed. 224, 33 C. C. A. 468.

Not error to refuse instruction covered by other instructions see Texas Cent. R. Co. *v.* Fox, 24 Tex. Civ. App. 295, 59 S. W. 49.

In the absence of evidence to sustain plaintiff's cause of action, an affirmative charge in favor of defendant should be given. Highland Ave., etc., R. Co. *v.* Miller, 120 Ala. 535, 24 So. 955. See also Parks *v.* St. Louis Southwestern R. Co., 29 Tex. Civ. App. 551, 69 S. W. 125; Montanye *v.* Northern Electrical Mfg. Co., 127 Wis. 22, 105 N. W. 1043.

Where the evidence is conflicting, a binding instruction is properly refused. Smith *v.* Oil City Tube Co., 183 Pa. St. 485, 38 Atl. 1014.

Must not ignore material evidence see Crown Cotton Mills *v.* McNally, 123 Ga. 35, 51 S. E. 13.

Must not give undue prominence to particular facts or issues see Ashland Coal, etc., R. Co. *v.* Wallace, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207, 19 Ky. L. Rep. 849; National Enameling, etc., Co. *v.* Cornell, 95 Md. 524, 52 Atl. 588.

Must limit evidence to purpose for which it was admitted.— Brush Electric Light, etc.,

instruction must be supported by some evidence,[85] and must be pertinent,[86] definite,[87] and not calculated to mislead the jury.[88] To be sufficient, an instruction should be complete in itself;[89] but all the instructions are to be read together, and

Co. *v.* Wells, 103 Ga. 512, 30 S. E. 533. *Compare* Missouri, etc., R. Co. *v.* Kellerman, (Tex. Civ. App. 1905) 87 S. W. 401, in which it was held that an instruction was properly refused which restricted the evidence unduly.

Technical language.— On the issue of a release given by a servant, an instruction to find for defendant if the jury should find that the "release in question was the act and deed of the servant" was properly refused, where there was no instruction explaining the quoted language. Momence Stone Co. *v.* Turrell, 205 Ill. 515, 68 N. E. 1078 [*affirming* 106 Ill. App. 160].

An instruction which is a mere statement of fact is properly refused. Lowrimore *v.* Palmer Mfg. Co., 60 S. C. 153, 38 S. E. 430.

Harmless error see Ford *v.* Chicago, etc., R. Co., (Iowa 1897) 71 N. W. 332.

85. *Florida.*— Louisville, etc., R. Co. *v.* Jones, 50 Fla. 225, 39 So. 485.

Georgia.— Raleigh, etc., R. Co. *v.* Allen, 106 Ga. 572, 32 S. E. 622.

Illinois.— Momence Stone Co. *v.* Turrell, 205 Ill. 515, 68 N. E. 1078 [*affirming* 106 Ill. App. 160]; Sugar Creek Min. Co. *v.* Peterson, 177 Ill. 324, 52 N. E. 475 [*reversing* 75 Ill. App. 631]. *Compare* Spring Valley Coal Co. *v.* Rowatt, 196 Ill. 156, 63 N. E. 649 [*affirming* 96 Ill. App. 248].

Iowa.— Quinn *v.* Chicago, etc., R. Co., 107 Iowa 710, 77 N. W. 464.

Kentucky.— See Louisville, etc., R. Co. *v.* Gilliam, 71 S. W. 863, 24 Ky. L. Rep. 1536, in which the evidence was held to warrant an instruction on punitive damages on the ground of wilful negligence.

Minnesota.— McGrath *v.* Great Northern R. Co., 76 Minn. 146, 78 N. W. 972.

Missouri.— See Curtis *v.* McNair, 173 Mo. 270, 73 S. W. 167.

New York.— See Schapiro *v.* Levy, 101 N. Y. App. Div. 444, 91 N. Y. Suppl. 1044, holding erroneous an instruction that the jury might consider the failure to produce certain books which were inadmissible in evidence.

Texas.— Mayton *v.* Sonnefield, (Civ. App. 1898) 48 S. W. 608. *Compare* Galveston, etc., R. Co. *v.* Pendleton, 30 Tex. Civ. App. 431, 70 S. W. 996.

Utah.— Konold *v.* Rio Grande Western R. Co., 21 Utah 379, 60 Pac. 1021, 81 Am. St. Rep. 693.

See 34 Cent. Dig. tit. "Master and Servant," § 1133.

Must not be founded on controverted evidence see Murray *v.* Rivers, 174 Mass. 46, 54 N. E. 358.

86. Vogel *v.* American Bridge Co., 88 N. Y. App. Div. 68, 84 N. Y. Suppl. 799.

87. Illustration held too general see Duerst *v.* St. Louis Stamping Co., 163 Mo. 607, 63 S. W. 827.

88. *Alabama.*— Alabama Great Southern R. Co. *v.* Davis, 119 Ala. 572, 24 So. 862.

Georgia.— Western, etc., R. Co. *v.* Jackson, 113 Ga. 355, 38 S. E. 820. *Compare* Augusta *v.* Owens, 111 Ga. 464, 36 S. E. 830.

Illinois.—Armour *v.* Brazeau, 191 Ill. 117, 60 N. E. 904 [*reversing* 93 Ill. App. 235].

Indiana.— Espenlaub *v.* Ellis, 54 Ind. App. 163, 72 N. E. 527. *Compare* Gould Steel Co. *v.* Richards, 30 Ind. App. 348, 66 N. E. 68.

Iowa.— Thayer *v.* Smoky Hollow Coal Co., 121 Iowa 121, 96 N. W. 718; Shebeck *v.* National Cracker Co., 120 Iowa 414, 94 N. W. 930.

Kentucky.— Louisville, etc., R. Co. *v.* Sander, 44 S. W. 644, 19 Ky. L. Rep. 1941.

Missouri.—Adolff *v.* Columbia Pretzel, etc., Co., 100 Mo. App. 199, 73 S. W. 321.

New York.— Cooper *v.* New York, etc., R. Co., 84 N. Y. App. Div. 42, 82 N. Y. Suppl. 98.

Ohio.— National Malleable Castings Co. *v.* Luscomb, 19 Ohio Cir. Ct. 673, 6 Ohio Cir. Dec. 313.

Texas.— See Reser *v.* American Cotton Co., (Civ. App. 1903) 71 S. W. 782.

Virginia.— Moon *v.* Richmond, etc., R. Co., 78 Va. 745, 49 Am. Rep. 401.

See 34 Cent. Dig. tit. "Master and Servant," § 1133.

Instructions held not to be misleading see Saucier *v.* New Hampshire Spinning Mills, 72 N. H. 292, 56 Atl. 545; International, etc., R. Co. *v.* Mills, 34 Tex. Civ. App. 127, 78 S. W. 11; International, etc., R. Co. *v.* Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772; Missouri, etc., R. Co. *v.* Milam, 20 Tex. Civ. App. 688, 50 S. W. 417; Texas, etc., R. Co. *v.* Breadow, 19 Tex. Civ. App. 483, 47 S. W. 816; Texas, etc., R. Co. *v.* Behymer, 189 U. S. 468, 23 S. Ct. 622, 47 L. ed. 905 [*affirming* 112 Fed. 35, 50 C. C. A. 106].

89. Pittsburgh, etc., R. Co. *v.* McGrath, 15 Ill. App. 85. See also the following illustrative cases:

California.— Killelea *v.* California Horseshoe Co., 140 Cal. 602, 74 Pac. 157.

Illinois.— Illinois Cent. R. Co. *v.* Smith, 208 Ill. 608, 70 N. E. 628. *Compare* La Salle *v.* Kostka, 190 Ill. 130, 60 N. E. 72 [*affirming* 92 Ill. App. 91].

Indiana.— Indiana Natural Gas, etc. Co. *v.* Vanble, 31 Ind. App. 370, 68 N. E. 195.

North Carolina.— Hamrick *v.* Balfour Quarry Co., 132 N. C. 282, 43 S. E. 820.

Texas.— Hirsh *v.* Ashe, 35 Tex. Civ. App. 495, 80 S. W. 650; Houston Electric Co. *v.* Robenson, (Civ. App. 1903) 76 S. W. 209.

Virginia.— Virginia, etc., Wheel Co. *v.* Chalkley, 98 Va. 62, 34 S. E. 976.

See 34 Cent. Dig. tit. "Master and Servant," § 1133.

But see Mumford *v.* Chicago, etc., R. Co., 128 Iowa 685, 104 N. W. 1135.

It is proper for the court, in charging the jury, to require them to find whether the evidence establishes the existence of the speci-

an instruction, in some respects deficient, may be aided by other instructions which fully state the law.[90] Mere errors of form or phraseology which could not possibly have misled the jury are immaterial.[91]

(II) *CONFLICT OF LAWS.* It is the duty of the court of the state in which an action for personal injuries is brought, alleged to have occurred in another state, to instruct the jury fully as to any conflict in the laws of the two states relative to the liability of the master to his servant.[92]

(III) *RELATION OF PARTIES.* Where the relation of the parties is in issue, the court should upon request or of its own motion properly instruct the jury thereon.[93]

fied group of facts which, if true, would in law establish plaintiff's cause of action or defendant's defense, and to instruct the jury that, if they find such group of facts to be established by the evidence, they should find in favor of the respective party. Galveston, etc., R. Co. *v.* Buch, 27 Tex. Civ. App. 283, 65 S. W. 681.

Gross negligence.— In an action for an injury from gross negligence, the court should instruct as to what constitutes gross negligence. Cincinnati, etc., R. Co. *v.* Lewallen, 32 S. W. 958, 17 Ky. L. Rep. 863.

90. *Arkansas.*— Little Rock, etc., R. Co. *v.* Voss, (1892) 18 S. W. 172.

Illinois.— Whitney, etc., Co. *v.* O'Rourke, 172 Ill. 177, 50 N. E. 242 [*affirming* 68 Ill. App. 487]; Pardridge *v.* Gilbride, 98 Ill. App. 134.

Iowa.—Ford *v.* Chicago, etc., R. Co., (1897) 71 N. W. 332.

Missouri.— Doyle *v.* Missouri, etc., Trust Co., 140 Mo. 1, 41 S. W. 255; Ruth *v.* Chicago, etc., R. Co., 70 Mo. App. 190.

New Jersey.— Belleville Stone Co. *v.* Comben, 62 N. J. L. 449, 45 Atl. 1090 [*affirming* 61 N. J. L. 353, 36 Atl. 641].

Texas.— Bonner *v.* Glenn, 79 Tex. 531, 15 S. W. 572; Gulf, etc., R. Co. *v.* Davis, 35 Tex. Civ. App. 285, 80 S. W. 253; International, etc., R. Co. *v.* Mills, 34 Tex. Civ. App. 127, 78 S. W. 11; International, etc., R. Co. *v.* Gourley, 21 Tex. Civ. App. 579, 54 S. W. 307; Missouri, etc., R. Co. *v.* Nordell, 20 Tex. Civ. App. 362, 50 S. W. 601. But *compare* Paris, etc., R. Co. *v.* Stokes, (Civ. App. 1897) 41 S. W. 484.

Washington.— Goldthorpe *v.* Clark-Nickerson Lumber Co., 31 Wash. 467, 71 Pac. 1091; Shannon *v.* Consolidated Tiger, etc., Min. Co., 24 Wash. 119, 64 Pac. 169.

United States.— Swift *v.* Short, 92 Fed. 567, 34 C. C. A. 545.

See 34 Cent. Dig. tit. "Master and Servant," § 1133.

91. Dyas *v.* Southern Pac. Co., 140 Cal. 296, 73 Pac. 972; Pagels *v.* Meyer, 193 Ill. 172, 61 N. E. 1111 [*reversing* 88 Ill. App. 169]; Rinake *v.* Victor Mfg. Co., 58 S. C. 360, 36 S. E. 700; St. Louis Southwestern R. Co. *v.* Smith, 36 Tex. Civ. App. 336, 70 S. W. 789; Missouri, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1901) 67 S. W. 769 [*affirmed* in 95 Tex. 409, 67 S. W. 768]; San Antonio, etc., R. Co. *v.* Beam, (Tex. Civ. App. 1899) 50 S. W. 411.

92. In Texas a master cannot be held liable for the consequences of the negligence of a fellow servant of plaintiff, the master's servant. In Kansas the rule is otherwise. In a suit brought in Kansas against a railroad corporation by a brakeman to recover damages for injuries caused in Texas by the negligence of the employees of the corporation, whose duty it was to give notice of a fall of gravel on the track, the judge presiding at the trial failed to make clear to the jury the distinction between the rule prevailing in Texas and that prevailing in Kansas, and a verdict was rendered for plaintiff. It was held that a new trial should be granted. Atchison, etc., R. Co. *v.* Moore, 29 Kan. 632.

In an action in North Carolina against a railroad company for wrongfully causing the death of an engineer on a part of its road in South Carolina, an attorney from the latter state testified that, under the constitution of that state, knowledge by the deceased of the dangerous condition of the trestle by the falling of which he was killed would not defeat recovery for his death, and cited South Carolina cases in support of his statement. On cross-examination, witness testified that any degree of contributory negligence would defeat recovery, and defined "contributory negligence." It was held to sustain an instruction that if the trestle was defective, to the knowledge of defendant, knowledge by deceased of its dangerous condition would not defeat recovery. Harrill *v.* South Carolina, etc., R. Co., 135 N. C. 601, 47 S. E. 730.

93. *Illinois.*— Grace, etc., Co. *v.* Probst, 208 Ill. 147, 70 N. E. 12; O'Sullivan *v.* Chicago, etc., R. Co., 23 Ill. App. 646.

Michigan.— Willis *v.* Toledo, etc., R. Co., 72 Mich. 160, 40 N. W. 205.

New Jersey.— See Delaware, etc., R. Co. *v.* Hardy, 59 N. J. L. 35, 34 Atl. 986.

Ohio.— Toledo, etc., R. Co. *v.* Hydell, 25 Ohio Cir. Ct. 579.

Oregon.— Ringue *v.* Oregon Coal Co., 44 Oreg. 407, 75 Pac. 703.

Texas.— Denham *v.* Trinity County Lumber Co., 73 Tex. 78, 11 S. W. 151; Texas Short Line R. Co. *v.* Waymire, (Civ. App. 1905) 89 S. W. 452; Reser *v.* American Cotton Co., (Civ. App. 1903) 71 S. W. 782. See also Missouri, etc., R. Co. *v.* Reasor, 28 Tex. Civ. App. 302, 68 S. W. 332.

See 34 Cent. Dig. tit. "Master and Servant," § 1135.

(IV) *Conformity to Pleadings and Issues.* The instructions in an action by a servant to recover for personal injuries must conform to and be confined to the issues made by the pleadings and litigated upon the trial.[94] Where the plead-

94. *Alabama.*— Southern Car, etc., Co. *v.* Jennings, 137 Ala. 247, 34 So. 1002; Alabama Mineral R. Co. *v.* Jones, 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121; Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145.

California.— Gibson *v.* Sterling Furniture Co., 113 Cal. 1, 45 Pac. 5.

Florida.— Jacksonville, etc., R. Co. *v.* Galvin, 29 Fla. 636, 11 So. 231, 16 L. R. A. 337.

Georgia.— Port Royal, etc., R. Co. *v.* Davis, 95 Ga. 292, 22 S. E. 833.

Illinois.— Lake Erie, etc., R. Co. *v.* Wilson, 189 Ill. 89, 59 N. E. 573 [*reversing* 87 Ill. App. 360]; Chicago, etc., R. Co. *v.* Kneirim, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259; Chicago, etc., R. Co. *v.* Myers, 86 Ill. App. 401; Stevens *v.* Lewandowski, 66 Ill. App. 538; Swift *v.* Raleigh, 54 Ill. App. 44; Illinois Fuel Co. *v.* Parsons, 38 Ill. App. 182.

Indiana.— Pennsylvania Co. *v.* Ebaugh, 144 Ind. 687, 43 N. E. 936; Ohio, etc., R. Co. *v.* Stein, 140 Ind. 61, 39 N. E. 246.

Iowa.— Quinn *v.* Chicago, etc., R. Co., 107 Iowa 710, 77 N. W. 464; Van Winkle *v.* Chicago, etc., R. Co., 93 Iowa 509, 61 N. W. 929; McDermott *v.* Iowa Falls, etc., R. Co., 85 Iowa 180, 52 N. W. 181 [*reversing* (1891) 47 N. W. 1037]; Worden *v.* Humeston, etc., R. Co., 72 Iowa 201, 33 N. W. 629.

Kansas.— Schwarzschild, etc., Co. *v.* Weeks, 66 Kan. 800, 72 Pac. 274; Atchison, etc., R. Co. *v.* Irwin, 35 Kan. 286, 10 Pac. 820.

Kentucky.— Illinois Cent. R. Co. *v.* McIntosh, 118 Ky. 145, 80 S. W. 496, 81 S. W. 270, 26 Ky. L. Rep. 14, 347; Legsdon *v.* Western Brick Co., 74 S. W. 706, 25 Ky. L. Rep. 141; Louisville, etc., R. Co. *v.* Sanders, 44 S. W. 644, 19 Ky. L. Rep. 1941.

Massachusetts.— Shaughnessey *v.* Sewall, etc., Cordage Co., 160 Mass. 331, 35 N. E. 861.

Michigan.— Culver *v.* South Haven, etc., R. Co., 138 Mich. 443, 101 N. W. 663; Weiden *v.* Brush Electric Light Co., 73 Mich. 268, 41 N. W. 269.

Minnesota.— Thompson *v.* Great Northern R. Co., 79 Minn. 291, 82 N. W. 637.

Missouri.— Wojtylak *v.* Kansas, etc., Coal Co., 188 Mo. 260, 87 S. W. 506; Erickson *v.* Kansas City, etc., R. Co., 171 Mo. 647, 71 S. W. 1022; Smith *v.* St. Louis, etc., R. Co., 151 Mo. 391, 52 S. W. 378, 48 L. R. A. 368; Schlereth *v.* Missouri Pac. R. Co., 96 Mo. 509, 10 S. W. 66; Harty *v.* St. Louis, etc., R. Co., 95 Mo. 368, 8 S. W. 562; Rendlich *v.* Hammond Packing Co., 106 Mo. App. 717, 80 S. W. 683; Dean *v.* St. Louis Woodenware Works, 106 Mo. App. 167, 80 S. W. 292; Colliott *v.* American Mfg. Co., 71 Mo. App. 163; O'Brien *v.* St. Louis Drayage Co., 60 Mo. App. 89.

Nebraska.— Swift *v.* Bleise, 63 Nebr. 739, 89 N. W. 310; Lincoln St. R. Co. *v.* Cox, 48 Nebr. 807, 67 N. W. 740.

New Jersey.— Huebner *v.* Erie R. Co., 68 N. J. L. 468, 53 Atl. 545.

North Dakota.— Bennett *v.* Northern Pac. R. Co., 4 N. D. 348, 61 N. W. 18.

Oregon.— Woodward *v.* Oregon R., etc., Co., 18 Oreg. 289, 22 Pac. 1076.

Rhode Island.— Carr *v.* American Locomotive Co., 26 R. I. 180, 58 Atl. 678.

Tennessee.— East Tennessee, etc., R. Co. *v.* Collins, 86 Tenn. 227, 1 S. W. 883.

Texas.— Galveston, etc., R. Co. *v.* Jackson, 93 Tex. 262, 54 S. W. 1023 [*affirming* (Civ. App. 1899) 53 S. W. 81]; Texas, etc., R. Co. *v.* French, 86 Tex. 96, 23 S. W. 642 [*reversing* (Civ. App. 1893) 22 S. W. 866]; Dillingham *v.* Brown, (1891) 17 S. W. 45; Texas Pac. R. Co. *v.* Overheiser, 76 Tex. 437, 13 S. W. 468; Texas Mexican R. Co. *v.* Douglass, 69 Tex. 694, 7 S. W. 77; Houston, etc., R. Co. *v.* Gilmore, 62 Tex. 391; Bryan *v.* International, etc., R. Co., (Civ. App. 1905) 90 S. W. 693; Cane Belt R. Co. *v.* Crosson, (Civ. App. 1905) 87 S. W. 867; St. Louis Southwestern R. Co. *v.* Arnold, (Civ. App. 1905) 87 S. W. 173; Horton *v.* Ft. Worth Packing, etc., Co., 33 Tex. Civ. App. 150, 76 S. W. 211; Texas, etc., R. Co. *v.* Lee, 32 Tex. Civ. App. 23, 74 S. W. 345; Lantry *v.* Lowrie, (Civ. App. 1900) 58 S. W. 837; San Antonio, etc., R. Co. *v.* Beam, (Civ. App. 1899) 50 S. W. 411; Louisiana Extension R. Co. *v.* Carstens, 19 Tex. Civ. App. 190, 47 S. W. 36; Gulf, etc., R. Co. *v.* Warner, (Civ. App. 1896) 36 S. W. 118; Texas, etc., R. Co. *v.* Johnson, (Civ. App. 1896) 34 S. W. 186; Texas, etc., R. Co. *v.* Bingle, 9 Tex. Civ. App. 322, 29 S. W. 674; Galveston, etc., R. Co. *v.* Sweeney, 6 Tex. Civ. App. 173, 24 S. W. 947; Galveston, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 468, 23 S. W. 301.

Wisconsin.— Curran *v.* A. H. Stange Co., 98 Wis. 598, 74 N. W. 377; Maitland *v.* Gilbert Paper Co., 97 Wis. 476, 72 N. W. 1124, 65 Am. St. Rep. 137; Pier *v.* Chicago, etc., R. Co., 94 Wis. 357, 68 N. W. 464; Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565.

United States.— Union Pac. R. Co. *v.* James, 163 U. S. 485, 16 S. Ct. 1109, 41 L. ed. 236; Mexican Cent. R. Co. *v.* Murray, 102 Fed. 264, 42 C. C. A. 334; Kerr-Murray Mfg. Co. *v.* Hess, 98 Fed. 56, 38 C. C. A. 647; Cleveland, etc., R. Co. *v.* McClintock, 91 Fed. 223, 33 C. C. A. 466; Alaska Treadwell Gold Min. Co. *v.* Whelan, 64 Fed. 462, 12 C. C. A. 225 [*reversed* on other grounds in 168 U. S. 86, 18 S. Ct. 40, 42 L. ed. 390]; Twitchell *v.* Grand Trunk R. Co., 39 Fed. 419 [*reversed* on other grounds in 59 Fed. 727, 8 C. C. A. 237].

See 34 Cent. Dig. tit. "Master and Servant," §§ 1136–1139.

For instances of pertinent instructions see Dyas *v.* Southern Pac. Co., 140 Cal. 296, 73 Pac. 972; Central R., etc., Co. *v.* Attaway, 90 Ga. 656, 16 S. E. 956; Libby *v.* Scherman, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191; Hinckley *v.* Horazdowsky, 133 Ill.

ings warrant it, and evidence upon which to base an instruction has been introduced, either party is entitled to an instruction upon his theory of the case,[95] and such instruction need not embrace the theory of the other party, since the latter can submit his theory in an instruction of his own.[96] Instructions are properly limited by the court to the count of the declaration or complaint to which they are applicable.[97]

(v) *Presumptions and Burden of Proof.* The instructions in a personal injury action must correctly state the presumptions of law applicable to the issues raised, and upon whom the burden of proof devolves;[98] but it is not necessary that a specific instruction upon the question be given, where it has already been fully averred in other instructions.[99] It is not, however, error to refuse to charge on the burden of proof, where there is no defect in plaintiff's proof, and the issues are clearly submitted on the facts;[1] and when the circumstances and facts of a case are proven by direct testimony, it is error to instruct the jury that they

359, 24 N. E. 421, 23 Am. St. Rep. 618, 8 L. R. A. 490; Wabash, etc., R. Co. *v.* Morgan, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85; Howorth *v.* Seevers Mfg. Co., (Iowa 1893) 54 N. W. 430; Hannibal, etc., R. Co. *v.* Kanaley, 39 Kan. 1, 17 Pac. 324; United Laundry Co. *v.* Steele, 72 S. W. 305 24 Ky. L. Rep. 1899; Millar *v.* Madison Car Co., 130 Mo. 517, 31 S. W. 574; McPherson *v.* St. Louis, etc., R. Co., 97 Mo. 253, 10 S. W. 846; Zongker *v.* People's Union Mercantile Co., 110 Mo. App. 382, 86 S. W. 486; International, etc., R. Co. *v.* Hinzie, 82 Tex. 623, 18 S. W. 681; Houston, etc., R. Co. *v.* Jennings, 36 Tex. Civ. App. 375, 81 S. W. 822; Missouri, etc., R. Co. *v.* Blackman, 32 Tex. Civ. App. 200, 74 S. W. 74; Rea *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1903) 73 S. W. 555; Galveston, etc., R. Co. *v.* Hampton, 24 Tex. Civ. App. 458, 59 S. W. 928; Galveston, etc., R. Co. *v.* Jackson, (Tex. Civ. App. 1899) 53 S. W. 81 [*affirmed* in 93 Tex. 262, 54 S. W. 1023]; Texas, etc., R. Co. *v.* Reed, (Tex. Civ. App. 1895) 32 S. W. 118; Texas, etc., R. Co. *v.* Easton, 2 Tex. Civ. App. 378, 21 S. W. 575; Rush *v.* Spokane Falls, etc., R. Co., 23 Wash. 501, 63 Pac. 500; Union Pac. R. Co. *v.* James, 56 Fed. 1001, 6 C. C. A. 217 [*affirmed* in 163 U. S. 485, 16 Sup. Ct. 1109, 41 L. ed. 236].

95. Holy Cross Gold Min., etc., Co. *v.* O'Sullivan, 27 Colo. 237, 60 Pac. 570; Freeman *v.* Nashville, etc., R. Co., 120 Ga. 469, 47 S. E. 931; Georgia Cent. R. Co. *v.* Goodwin, 120 Ga. 83, 47 S. E. 641; El Paso, etc., R. Co. *v.* Whatley, (Tex. Civ. App. 1905) 85 S. W. 306; Houston, etc., R. Co. *v.* Turner, 34 Tex. Civ. App. 397, 78 S. W. 712.

Where there is no evidence to support an issue made by the pleadings, an instruction on such issue is improper. Osborne *v.* Pennsylvania Co., 11 S. W. 207, 10 Ky. L. Rep. 970.

96. Hester *v.* Jacob Dold Packing Co., 84 Mo. App. 451.

97 Cobb Chocolate Co. *v.* Knudson, 207 Ill. 452, 69 N. E. 816 [*affirming* 107 Ill. App. 668].

98. *Alabama.*— Alabama Mineral R. Co. *v.* Jones, 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121.

California.— Lindall *v.* Bode, 72 Cal. 245, 13 Pac. 660.

Illinois.— Illinois Steel Co. *v.* McFadden, 196 Ill. 344, 63 N. E. 671 [*affirming* 98 Ill. App. 296]; Omaha Packing Co. *v.* Murray, 112 Ill. App. 233.

Iowa.— Morbey *v.* Chicago, etc., R. Co., 105 Iowa 46, 74 N. W. 751.

New York.—Probst *v.* Delamater, 100 N. Y. 266, 3 N. E. 184.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Hughes, 119 Pa. St. 301, 13 Atl. 286.

Texas.— Gulf, etc., R. Co. *v.* Hill, 95 Tex. 629, 69 S. W. 136; Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13, 15 S. W. 214; Galveston, etc., R. Co. *v.* Jenkins, 29 Tex. Civ. App. 440, 69 S. W. 233; Texas, etc., R. Co. *v.* Maupin, 26 Tex. Civ. App. 385, 63 S. W. 346.

Wisconsin.— Cowan *v.* Chicago, etc., R. Co., 80 Wis. 284, 50 N. W. 180.

United States.— Mexican Nat. R. Co. *v.* Palmer, 128 Fed. 407, 63 C. C. A. 149.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1140–1144.

Instances of correct instructions as to presumptions and burden of proof.—Little Rock, etc., R. Co. *v.* Voss, (Ark. 1892) 18 S. W. 172; Chattanooga, etc., R. Co. *v.* Owen, 90 Ga. 265, 15 S. E. 853; Chicago, etc., R. Co. *v.* Rains, 203 Ill. 417, 67 N. E. 840; Heldmaier *v.* Cobbs, 195 Ill. 172, 62 N. E. 853 [*affirming* 96 Ill. App. 315]; Erie, etc., Transp. Co. *v.* Gaines, 112 Ill. App. 189; Graham *v.* Badger, 164 Mass. 42, 41 N. E. 61; Swift *v.* Holoubek, 62 Nebr. 31, 86 N. W. 900 [*reversing* 60 Nebr. 784, 84 N. W. 249]; Burlington, etc., R. Co. *v.* Wallace, 28 Nebr. 179, 44 N. W. 223; Lachappelle *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1905) 90 S. W. 349; The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

99. Chicago, etc., R. Co. *v.* Champion, 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 53 Am. St. Rep. 357; Ouillette *v.* Overman Wheel Co., 162 Mass. 305, 38 N. E. 511; Parker *v.* South Carolina, etc., R. Co., 48 S. C. 364, 26 S. E. 669; Downey *v.* Gemini Min. Co., 24 Utah 431, 68 Pac. 414, 91 Am. St. Rep. 798.

1. Taylor, etc., R. Co. *v.* Taylor, 79 Tex. 104, 14 S. W. 918, 23 Am. St. Rep. 316.

should consider and give proper weight to the instincts and presumptions which naturally lead men to avoid injury and preserve their own lives, in determining whether, at the time he was injured, plaintiff was in the exercise of ordinary care.[2]

(VI) *CAUSE OF INJURY.* In an action by a servant against the master to recover for personal injuries, the jury should be instructed as to the distinction between proximate and remote cause,[3] and as to the necessity of finding that the negligence charged did in fact contribute to cause the injury.[4] Where negligence is charged in two or more particulars, an instruction which requires the jury to find that the injury was caused by negligence in each particular is erroneous;[5] and as in other cases an instruction upon causation must be supported by evidence tending to show that the injury was caused by the negligence with respect to which the instruction is requested.[6] An instruction need not embrace negligence which was an incident to, and not the proximate cause of, the injury.[7]

(VII) *ACCIDENTAL OR IMPROBABLE INJURY.* Where, in a personal injury action, there is evidence tending to support defendant's theory that the injury was of an accidental or improbable character, the court should instruct the jury as to the meaning of "accident,"[8] and as to the law with respect to accidental injuries,[9] applying the principle, in a proper case, to the specific defense relied on.[10] But where the jury have been charged as to the burden of proof, and as to what facts will raise a presumption of liability against the master, it is not error to omit to charge, in the same connection, the law applicable to defendant's theory that the injury was a mere accident, it being sufficient if the law bearing on such theory is elsewhere charged.[11]

2. Whitsett *v.* Chicago, etc., R. Co., 67 Iowa 150, 25 N. W. 104; Dunlavy *v.* Chicago, etc., R. Co., 66 Iowa 435, 23 N. W. 911. *Compare* Way *v.* Illinois Cent. R. Co., 40 Iowa 341.

3. Colorado Coal, etc., Co. *v.* Lamb, 6 Colo. App. 255, 40 Pac. 251.

Instruction defining proximate cause held correct see Nix *v.* C. Reiss Coal Co., 114 Wis. 493, 90 N. W. 437. *Compare* Bigelow *v.* Danielson, 102 Wis. 470, 78 N. W. 599.

4. *Alabama.*— Louisville, etc., R. Co. *v.* Banks, 132 Ala. 471, 31 So. 573.

Kentucky.— Avery *v.* Meek, 96 Ky. 192, 28 S. W. 337, 16 Ky. L. Rep. 384.

Missouri.— Musick *v.* Jacob Dold Packing Co., 58 Mo. App. 322; Moore *v.* St. Louis Wire Mill Co., 55 Mo. App. 491.

New York.— Murtaugh *v.* New York Cent., etc., R. Co., 49 Hun 456, 3 N. Y. Suppl. 483.

Ohio.— National Malleable Castings Co. *v.* Luscomb, 19 Ohio Cir. Ct. 673, 6 Ohio Cir. Dec. 313.

Texas.—Culpepper *v.* International, etc., R. Co., 90 Tex. 627, 40 S. W. 386 [*affirming* (Civ. App. 1897) 38 S. W. 818]; Missouri, etc., R. Co. *v.* Baker, (Civ. App. 1900) 58 S. W. 964; Houston, etc., R. Co. *v.* Milam, (Civ. App. 1900) 58 S. W. 735; Quintana *v.* Consolidated Kansas City Smelting, etc., Co., 14 Tex. Civ. App. 347, 37 S. W. 369; Mexican Nat. R. Co. *v.* Musette, 7 Tex. Civ. App. 169, 24 S. W. 520; Fordyce *v.* Yarborough, 1 Tex. Civ. App. 260, 21 S. W. 421.

Wisconsin.— Bigelow *v.* Danielson, 102 Wis. 470, 78 N. W. 599.

See 34 Cent. Dig. tit. "Master and Servant," § 1145.

Instances of correct instructions upon causation.— Kennedy *v.* Kansas City, etc., R. Co., 190 Mo. 424, 89 S. W. 370; Bering Mfg. Co. *v.* Peterson, 28 Tex. Civ. App. 194, 67 S. W. 133 (form); Missouri, etc., R. Co. *v.* Kirkland, 11 Tex. Civ. App. 528, 32 S. W. 588; Bonner *v.* Moore, 3 Tex. Civ. App. 416, 22 S. W. 272; Virginia Iron, etc., Co. *v.* Tomlinson, 104 Va. 249, 51 S. E. 362; Baumann *v.* C. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139.

Instruction held non-prejudicial to defendant see Kraatz *v.* Brush Electric Light Co., 82 Mich. 457, 46 N. W. 787.

5. National Enameling, etc., Co. *v.* Cornell, 95 Md. 524, 52 Atl. 588; Chase *v.* Spartanburg R., etc., Co., 64 S. C. 212, 41 S. E. 899.

6. Gulf, etc., R. Co. *v.* Harriett, 80 Tex. 73, 15 S. W. 556; Missouri, etc., R. Co. *v.* Lamothe, 76 Tex. 219, 13 S. W. 194. See also Catlin *v.* Michigan Cent. R. Co., 66 Mich. 358, 33 N. W. 515.

7. Trott *v.* Chicago, etc., R. Co., 115 Iowa 80, 86 N. W. 33, 87 N. W. 722.

8. Barnett, etc., Co. *v.* Schlapka, 208 Ill. 426, 70 N. E. 343 [*affirming* 110 Ill. App. 672].

9. Illinois Steel Co. *v.* McFadden, 196 Ill. 344, 63 N. E. 671, 89 Am. St. Rep. 319 [*affirming* 98 Ill. App. 296]; Texas, etc., R. Co. *v.* Minnick, 57 Fed. 362, 6 C. C. A. 387.

Instructions held sufficient see Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434; Houston, etc., R. Co. *v.* Speake, (Tex. Civ. App. 1899) 51 S. W. 509.

10. Principle applied to specific defense see East Tennessee, etc., R. Co. *v.* Smith, 91 Ga. 176, 17 S. E. 104.

11. Raleigh, etc., R. Co. *v.* Allen, 106 Ga. 572, 32 S. E. 622.

(VIII) *INVADING PROVINCE OF JURY.* As has been previously stated,[12] questions of fact are for the determination of the jury, and consequently an instruction which assumes, or undertakes to determine, facts invades the province of the jury, and is erroneous.[13]

b. Negligence on Part of Master.[14] In an action by a servant to recover for

12. See *supra*, IV, H, 6, a, (I).

13. *Alabama.*— Louisville, etc., R. Co. *v.* Jones, 130 Ala. 456, 30 So. 586; Mobile, etc., R. Co. *v.* Georgia, 94 Ala. 199, 10 So. 145.

Georgia.— Carroll *v.* East Tennessee, etc., R. Co., 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214; Central R., etc., Co. *v.* Roach, 64 Ga. 635.

Illinois.— Ohio, etc., R. Co. *v.* Wangelin, 152 Ill. 138, 38 N. E. 760 [*affirming* 43 Ill. App. 324]; Chicago, etc., R. Co. *v.* Warner, 123 Ill. 38, 14 N. E. 206; Lake Shore, etc., R. Co. *v.* O'Conner, 115 Ill. 254, 3 N. E. 501; Toledo, etc., R. Co. *v.* Moore, 77 Ill. 217; Chicago Junction R. Co. *v.* Pietrzak, 110 Ill. App. 549; Chicago, etc., R. Co. *v.* Harrington, 77 Ill. App. 499; Bannon *v.* Sanden, 68 Ill. App. 164; William Graver Tank Works *v.* McGee, 58 Ill. App. 250; Chicago, etc., R. Co. *v.* Du Bois, 56 Ill. App. 181; Kimel *v.* Chicago, etc., R. Co., 55 Ill. App. 244.

Indiana.— Wabash, etc., R. Co. *v.* Morgan, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85.

Massachusetts.— Dolphin *v.* Plumley, 175 Mass. 304, 56 N. E. 281; Avilla *v.* Nash, 117 Mass. 318.

Michigan.— Steiler *v.* Hart, 65 Mich. 644, 32 N. W. 875.

Minnesota.— McGrath *v.* Great Northern R. Co., 76 Minn. 146, 78 N. W. 972; Anderson *v.* Great Northern R. Co., 74 Minn. 432, 77 N. W. 240.

Missouri.— Bluedorn *v.* Missouri Pac. R. Co., 121 Mo. 258, 25 S. W. 943.

North Carolina.— Marcus *v.* Loane, 133 N. C. 54, 45 S. E. 354.

South Carolina.— Bodie *v.* Charleston, etc., R. Co., 66 S. C. 302, 44 S. E. 943. *Compare* Rinake *v.* Victor Mfg. Co., 58 S. C. 360, 36 S. E. 700; Farley *v.* Charleston Basket, etc., Co., 51 S. C. 222, 28 S. E. 193, 401.

Texas.— Missouri, etc., R. Co. *v.* Smith, (Civ. App. 1904) 82 S. W. 787; Houston, etc., R. Co. *v.* Burns, (Civ. App. 1901) 63 S. W. 1035; San Antonio, etc., R. Co. *v.* Waller, (Civ. App. 1900) 62 S. W. 554; Missouri, etc., R. Co. *v.* Baker, (Civ. App. 1900) 58 S. W. 964; Houston, etc., R. Co. *v.* Smith, (Civ. App. 1899) 51 S. W. 506; International, etc., R. Co. *v.* Zapp, (Civ. App. 1899) 49 S. W. 673; Houston, etc., R. Co. *v.* Gaither, (Civ. App. 1896) 35 S. W. 179. *Compare* Dillingham *v.* Crank, 87 Tex. 104, 27 S. W. 93; Louisiana Extension R. Co. *v.* Carstens, 19 Tex. Civ. App. 190, 47 S. W. 36.

West Virginia.— McKelvey *v.* Chesapeake, etc., R. Co., 35 W. Va. 500, 14 S. E. 261.

United States.— Baltimore, etc., R. Co. *v.* Camp, 105 Fed. 212, 44 C. C. A. 451; Cleveland, etc., R. Co. *v.* McClintock, 91 Fed. 223, 33 C. C. A. 466.

See 34 Cent. Dig. tit. "Master and Servant," § 1147.

14. **Accidental or improbable injury** see *supra*, IV, H, 7, a, (VII).

Cause of injury see *supra*, IV, H, 7, a, (VI).

Concurrent negligence of master as affecting assumption of risk see *supra*, IV, H, 7, d, (VI).

Instructions invading province of jury see *supra*, IV, H, 7, a, (VIII).

For instances of sufficient instructions on negligence see the following cases:

Alabama.— Alabama Steel, etc., Co. *v.* Wrenn, 136 Ala. 475, 34 So. 970; Woodward Iron Co. *v.* Herndon, 130 Ala. 364, 30 So. 370.

Arkansas.— Little Rock, etc., R. Co. *v.* Voss, (1892) 18 S. W. 172.

California.— Higgins *v.* Williams, 114 Cal. 176, 45 Pac. 1041.

Colorado.—Mollie Gibson Consol. Min., etc., Co. *v.* Sharp, 5 Colo. App. 321, 38 Pac. 850.

District of Columbia.— Mackey *v.* Baltimore, etc., R. Co., 19 D. C. 282.

Georgia.— Sanders *v.* Georgia Cent. R. Co., 123 Ga. 763, 51 S. E. 728; Merchants', etc., Transp. Co. *v.* Jackson, 120 Ga. 211, 47 S. E. 522; Georgia Pac. R. Co. *v.* Freeman, 83 Ga. 583, 10 S. E. 277.

Illinois.— Shickle-Harrison, etc., Iron Co. *v.* Beck, 212 Ill. 268, 72 N. E. 423; Chicago Screw Co. *v.* Weiss, 203 Ill. 536, 68 N. E. 54 [*affirming* 107 Ill. App. 39]; Allen B. Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. 818; Himrod Coal Co. *v.* Clark, 197 Ill. 514, 64 N. E. 282 [*affirming* 99 Ill. App. 332]; Western Tube Co. *v.* Polobinski, 192 Ill. 113, 61 N. E. 451 [*affirming* 94 Ill. App. 640]; Pawnee Coal Co. *v.* Royce, 184 Ill. 402, 56 N. E. 621 [*reversing* 79 Ill. App. 469]; Westville Coal Co. *v.* Schwartz, 177 Ill. 272, 52 N. E. 276 [*affirming* 75 Ill. App. 468]; Chicago, etc., R. Co. *v.* Scanlan, 170 Ill. 106, 48 N. E. 826 [*affirming* 67 Ill. App. 621]; Chicago, etc., R. Co. *v.* Delaney, 169 Ill. 581, 48 N. E. 476 [*affirming* 68 Ill. App. 307]; West Chicago St. R. Co. *v.* Dwyer, 162 Ill. 482, 44 N. E. 815 [*affirming* 57 Ill. App. 440]; Harris *v.* Shebeck, 151 Ill. 287, 37 N. E. 1015; St. Louis Consol. Coal Co. *v.* Lundak, 97 Ill. App. 109 [*affirmed* in 196 Ill. 594, 63 N. E. 1079]; McLean County Coal Co. *v.* McVey, 38 Ill. App. 158.

Indiana.— Johnson *v.* Gebhauer, 159 Ind. 271, 64 N. E. 855; Brazil Block Coal Co. *v.* Gaffney, 119 Ind. 455, 21 N. E. 1102, 12 Am. St. Rep. 422, 4 L. R. A. 850; Flickner *v.* Lambert, 36 Ind. App. 524, 74 N. E. 263; Terre Haute Electric Co. *v.* Kicley, 35 Ind. App. 180, 72 N. E. 658; Doyle *v.* Hawkins, 34 Ind. App. 514, 73 N. E. 200; Chicago, etc., R. Co. *v.* Tackett, 33 Ind. App. 379, 71 N. E. 524; Blanchard-Hamilton Furniture Co. *v.* Colvin, 32 Ind. App. 398, 69 N. E. 1032; Baltimore, etc., R. Co. *v.* Spaulding, 21 Ind. App. 323, 52 N. E. 410.

personal injuries, if there is evidence upon which to base an instruction upon

Iowa.—Arenschield *v.* Chicago, etc., R. Co., 128 Iowa 677, 105 N. W. 200; Hughes *v.* Iowa Cent. R. Co., 128 Iowa 201, 103 N. W. 339; Nugent *v.* Cudahy Packing Co., 126 Iowa 517, 102 N. W. 442; Light *v.* Chicago, etc., R. Co., 93 Iowa 83, 61 N. W. 380; Haworth *v.* Seevers Mfg. Co., 87 Iowa 765, 51 N. W. 68, 62 N. W. 325; Knott *v.* Dubuque, etc., R. Co., 84 Iowa 462, 51 N. W. 57; McKee *v.* Chicago, etc., R. Co., 83 Iowa 616, 50 N. W. 209, 13 L. R. A. 817.

Kentucky.— Louisville, etc., R. Co. *v.* Pointer, 113 Ky. 952, 69 S. W. 1108, 24 Ky. L. Rep. 772; Illinois Cent. R. Co. *v.* Leisure, 90 S. W. 269, 28 Ky. L. Rep. 768; Louisville, etc., R. Co. *v.* Chandler, 72 S. W. 805, 24 Ky. L. Rep. 2035, 70 S. W. 666, 24 Ky. L. Rep. 998; Reliance Textile, etc., Works *v.* Martin, 65 S. W. 809, 23 Ky. L. Rep. 1625.

Maine.— Sawyer *v.* J. M. Arnold Shoe Co., 90 Me. 369, 38 Atl. 333.

Massachusetts.— Crowley *v.* Appleton, 148 Mass. 98, 18 N. E. 675; Keith *v.* Granite Mills, 126 Mass. 90, 30 Am. Rep. 666.

Michigan.— Dompier *v.* Lewis, 131 Mich. 144, 91 N. W. 152; Jahrmatter *v.* Kline, 129 Mich. 154, 88 N. W. 383.

Missouri.— Markey *v.* Louisiana, etc., R. Co., 185 Mo. 348, 84 S. W. 61; Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434; Copeland *v.* Wabash R. Co., 175 Mo. 650, 75 S. W. 106; Cambron *v.* Omaha, etc., R. Co., 165 Mo. 543, 65 S. W. 745; Wendler *v.* People's House Furnishing Co., 165 Mo. 527, 65 S. W. 737; Bradley *v.* Chicago, etc., R. Co., 138 Mo. 293, 39 S. W. 763; Gorham *v.* Kansas City, etc., R. Co., 113 Mo. 408, 20 S. W. 1060; Abbott *v.* Marion Min. Co., 112 Mo. App. 550, 87 S. W. 110; Stumbo *v.* Duluth Zinc Co., 100 Mo. App. 635, 75 S. W. 185; Parsons *v.* Hammond Packing Co., 96 Mo. App. 372, 70 S. W. 519; Kelly *v.* Stewart, 93 Mo. App. 47.

Nebraska.— Swift *v.* Holoubek, 62 Nebr. 31, 86 N. W. 900, 60 Nebr. 784, 84 N. W. 249; Chicago, etc., R. Co. *v.* Kellogg, 55 Nebr. 748, 76 N. W. 462; Joseph Garneau Cracker Co. *v.* Palmer, 28 Nebr. 307, 44 N. W. 463.

New York.—Abel *v.* Delaware, etc., Canal Co., 128 N. Y. 662, 28 N. E. 663 [*affirming* 10 N. Y. Suppl. 154]; Bannon *v.* Buffalo Union Furnace Co., 109 N. Y. App. Div. 324, 95 N. Y. Suppl. 891; Diamond *v.* Planet Mills Mfg. Co., 97 N. Y. App. Div. 43, 89 N. Y. Suppl. 635; Wiedeman *v.* Everard, 56 N. Y. App. Div. 358, 67 N. Y. Suppl. 738; Gillespie *v.* Dry Dock, etc., R. Co., 12 N. Y. App. Div. 501, 42 N. Y. Suppl. 245; Sciolina *v.* Erie Preserving Co., 7 N. Y. App. Div. 417, 39 N. Y. Suppl. 916.

North Carolina.— Hedrick *v.* Southern R. Co., 136 N. C. 510, 48 S. E. 830.

Rhode Island.— Carr *v.* American Locomotive Co., 26 R. I. 180, 58 Atl. 678; McGar *v.* National, etc., Worsted Mills, 22 R. I. 347, 47 Atl. 1092.

South Carolina.— Sanders *v.* Aiken Mfg. Co., 71 S. C. 58, 50 S. E. 679; Boyd *v.* Seaboard Air Line R. Co., 67 S. C. 218, 45 S. E. 186; Farley *v.* Charleston Basket, etc., Co., 50 S. C. 222, 28 S. E. 193, 401; Coleman *v.* Wilmington, etc., R. Co., 25 S. C. 446, 60 Am. Rep. 516.

Tennessee.— Tennessee, etc., R. Co. *v.* Jarrett, 111 Tenn. 565, 82 S. W. 224.

Texas.— St. Louis Southwestern R. Co. *v.* Rea, (1905) 87 S. W. 324 [*reversing* (Civ. App. 1904) 84 S. W. 428]; Taylor, etc., R. Co. *v.* Taylor, 79 Tex. 104, 14 S. W. 918, 23 Am. St. Rep. 316; Missouri Pac. R. Co. *v.* James, (1888) 10 S. W. 332; Gulf, etc., R. Co. *v.* Silliphant, 70 Tex. 623, 8 S. W. 673; St. Louis, etc., R. Co. *v.* Smith, (Civ. App. 1905) 90 S. W. 926; St. Louis Southwestern R. Co. *v.* Demsey, (Civ. App. 1905) 89 S. W. 786; Wood *v.* Texas Cotton Product Co., (Civ. App. 1905) 88 S. W. 496; Galveston, etc., R. Co. *v.* Roth, (Civ. App. 1905) 84 S. W. 1112; International, etc., R. Co. *v.* Villareal, 36 Tex. Civ. App. 532, 82 S. W. 1063; International, etc., R. Co. *v.* Reeves, 35 Tex. Civ. App. 162, 79 S. W. 1099; Lancaster Cotton Oil Co. *v.* White, 32 Tex. Civ. App. 608, 75 S. W. 339; Missouri, etc., R. Co. *v.* Jones, (Civ. App. 1903) 75 S. W. 53; Missouri, etc., R. Co. *v.* Bodie, 32 Tex. Civ. App. 168, 74 S. W. 100; Chicago, etc., R. Co. *v.* Long, 32 Tex. Civ. App. 40, 74 S. W. 59, 97 Tex. 69, 75 S. W. 483; Galveston, etc., R. Co. *v.* Mortson, 31 Tex. Civ. App. 142, 71 S. W. 770; Missouri, etc., R. Co. *v.* Hawk, 30 Tex. Civ. App. 142, 69 S. W. 1037; Missouri, etc., R. Co. *v.* Baker, (Civ. App. 1902) 68 S. W. 556; Galveston, etc., R. Co. *v.* Jones, 29 Tex. Civ. App. 214, 68 S. W. 190; Missouri, etc., R. Co. *v.* Crowder, (Civ. App. 1899) 55 S. W. 380; Houston, etc., R. Co. *v.* Smith, (Civ. App. 1903) 75 S. W. 53; Missouri, etc., R. Co. *v.* Felts, (Civ. App. 1899) 50 S. W. 1031; Texas, etc., R. Co. *v.* Breadow, 19 Tex. Civ. App. 483, 47 S. W. 816; Texas, etc., R. Co. *v.* Black, (Civ. App. 1898) 44 S. W. 673; Missouri, etc., R. Co. *v.* Hauer, (Civ. App. 1897) 43 S. W. 1078; Houston, etc., R. Co. *v.* Gaither, (Civ. App. 1897) 43 S. W. 266; Missouri, etc., R. Co. *v.* Crane, 13 Tex. Civ. App. 426, 35 S. W. 797; Mexican Nat. R. Co. *v.* Musette, 7 Tex. Civ. App. 169, 24 S. W. 520; Texas Cent. R. Co. *v.* Rowland, 3 Tex. Civ. App. 158, 22 S. W. 134; Fordyce *v.* Culver, 2 Tex. Civ. App. 569, 22 S. W. 237.

Utah.— Downey *v.* Gemini Min. Co., 24 Utah 431, 68 Pac. 414, 91 Am. St. Rep. 798; Brown *v.* Southern Pac. Co., 7 Utah 288, 26 Pac. 579.

Vermont.— Morrisey *v.* Hughes, 65 Vt. 553, 27 Atl. 205.

Virginia.— Norfolk, etc., R. Co. *v.* Bell, 104 Va. 836, 52 S. E. 700; Norfolk, etc., R. Co. *v.* Poole, 100 Va. 148, 40 S. E. 627; Richmond, etc., R. Co. *v.* Burnett, 88 Va. 538, 14 S. E. 372.

Washington.— Kirkham *v.* Wheeler-Osgood Co., 39 Wash. 415, 81 Pac. 869; Young *v.* O'Brien, 36 Wash. 570, 79 Pac. 211; Bailey *v.* Cascade Timber Co., 35 Wash. 295, 77 Pac.

negligence,[15] it is the duty of the court to instruct the jury fully as to what will in law constitute negligence under the pleadings and evidence, and as to the degree of care required of the master to protect his servants from injury;[16] and

377; Gustafson *v.* Seattle Traction Co., 28 Wash. 227, 68 Pac. 721; Allend *v.* Spokane Falls, etc., R. Co., 21 Wash. 324, 58 Pac. 244.

Wisconsin.— Mueller *v.* Northwestern Iron Co., 125 Wis. 326, 104 N. W. 67.

United States.— Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. ed. 624; Pittsburgh, etc., R. Co. *v.* Lamphere, 137 Fed. 20, 69 C. C. A. 542; Northern Pac. R. Co. *v.* Mix, 121 Fed. 476, 57 C. C. A. 592; Texas, etc., R. Co. *v.* Putman, 120 Fed. 754, 57 C. C. A. 58; Wright *v.* Stanley, 119 Fed. 330, 56 C. C. A. 234; Cudahy Packing Co. *v.* Anthes, 117 Fed. 118, 54 C. C. A. 504; Choctaw, etc., R. Co. *v.* Tennessee, 116 Fed. 23, 53 C. C. A. 497.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1148–1161.

Instructions held sufficient when read with other instructions.— Kansas City, etc., R. Co. *v.* Becker, 67 Ark. 1, 53 S. W. 406, 77 Am. St. Rep. 78, 46 L. R. A. 814; Dolan *v.* Sierra R. Co., 135 Cal. 435, 67 Pac. 686; Cobb Chocolate Co. *v.* Knudson, 207 Ill. 452, 69 N. E. 816 [*affirming* 107 Ill. App. 668]; Illinois Steel Co. *v.* Wierzbicky, 206 Ill. 201, 68 N. E. 1101 [*affirming* 107 Ill. App. 69]; Smizel *v.* Odanah Iron Co., 116 Mich. 149, 74 N. W. 488; Chambers *v.* Chester, 142 Mo. 461, 72 S. W. 904; Mulligan *v.* Montana Union R. Co., 19 Mont. 135, 47 Pac. 795; Whaley *v.* Bartlett, 42 S. C. 454, 20 S. E. 745; Denison, etc., R. Co. *v.* Binkley, (Tex. Civ. App. 1905) 87 S. W. 386; Missouri, etc., R. Co. *v.* Schilling, 32 Tex. Civ. App. 417, 75 S. W. 64; St. Louis, etc., R. Co. *v.* Skaggs, 32 Tex. Civ. App. 363, 74 S. W. 783; Morgan *v.* Mammoth Min. Co., 26 Utah 174, 72 Pac. 688; Russell Creek Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614; Sroufe *v.* Moran Bros. Co., 28 Wash. 381, 68 Pac. 896, 92 Am. St. Rep. 847, 58 L. R. A. 313.

15. Necessity of evidence to support instruction.— *Alabama.*— Tennessee Coal, etc., Co. *v.* Garrett, 140 Ala. 563, 37 So. 355.

Arkansas.— St. Louis, etc., R. Co. *v.* Torrey, 58 Ark. 217, 24 S. W. 244.

Illinois.— Cleveland, etc., R. Co. *v.* McLaughlin, 56 Ill. App. 53.

Kansas.— Griffin Wheel Co. *v.* Stanton, 70 Kan. 762, 79 Pac. 651.

Massachusetts.— Downey *v.* Sawyer, 157 Mass. 418, 32 N. E. 654; Northcoate *v.* Bachelder, 111 Mass. 322.

Missouri.— Wojtylak *v.* Kansas, etc., Coal Co., 188 Mo. 260, 87 S. W. 506; Minnier *v.* Sedalia, etc., R. Co., 167 Mo. 99, 66 S. W. 1072; Meily *v.* St. Louis, etc., R. Co., 107 Mo. App. 466, 81 S. W. 639.

New York.— Ballard *v.* Hitchcock Mfg. Co., 51 Hun 188, 4 N. Y. Suppl. 940.

Rhode Island.— Carr *v.* American Locomotive Co., 26 R. I. 180, 58 Atl. 678.

Texas.— Gulf, etc., R. Co. *v.* Kizziah, 86 Tex. 81, 23 S. W. 578 [*reversing* 4 Tex. Civ. App. 356, 22 S. W. 110, 26 S. W. 242]; H. S. Hopkins Bridge Co. *v.* Burnett, 85 Tex. 16, 19 S. W. 886; Gulf, etc., R. Co. *v.* Blohn, 73 Tex. 637, 11 S. W. 867, 4 L. R. A. 764; Texas Pac. R. Co. *v.* Wisenor, 66 Tex. 674, 2 S. W. 667; San Antonio, etc., R. Co. *v.* Weigers, 22 Tex. Civ. App. 344, 54 S. W. 910; De Walt *v.* Houston, etc., R. Co., 21 Tex. Civ. App. 403, 55 S. W. 534; Hodo *v.* Mexican Nat. R. Co., (Civ. App. 1895) 31 S. W. 708.

Utah.— Wood *v.* Rio Grande Western R. Co., 28 Utah 351, 79 Pac. 182; Coates *v.* Union Pac. R. Co., 24 Utah 304, 67 Pac. 670.

Virginia.— Parlett *v.* Dunn, 102 Va. 459, 46 S. E. 467.

Washington.—Kirby *v.* Rainier-Grand Hotel Co., 28 Wash. 705, 69 Pac. 378.

Wisconsin.— Musbach *v.* Wisconsin Chair Co., 108 Wis. 57, 84 N. W. 36; Baltzer *v.* Chicago, etc., R. Co., 83 Wis. 459, 53 N. W. 885.

United States.— Choctaw, etc., R. Co. *v.* Holloway, 191 U. S. 334, 24 S. Ct. 102, 48 L. ed. 207 [*affirming* 114 Fed. 458, 52 C. C. A. 260].

See 34 Cent. Dig. tit. "Master and Servant," §§ 1148–1161.

16. *Alabama.*— Sloss-Sheffield Steel, etc., Co. *v.* Smith, (1905) 40 So. 91; Going *v.* Alabama Steel, etc., Co., 141 Ala. 537, 37 So. 784; Memphis, etc., R. Co. *v.* Askew, 90 Ala. 5, 7 So. 823.

Arkansas.— Kansas, etc., Coal Co. *v.* Chandler, 71 Ark. 518, 77 S. W. 912; St. Louis, etc., R. Co. *v.* Torrey, 58 Ark. 217, 24 S. W. 244.

Georgia.— Central R., etc., Co. *v.* Kent, 87 Ga. 402, 13 S. E. 502; Western, etc., R. Co. *v.* Vandiver, 85 Ga. 470, 11 S. E. 781.

Illinois.— Rock Island Sash, etc., Works *v.* Pohlman, 210 Ill. 133, 71 N. E. 428 [*affirming* 99 Ill. App. 670]; Western Stone Co. *v.* Muscial, 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325 [*affirming* 96 Ill. App. 288]; Cleveland, etc., R. Co. *v.* Walter, 147 Ill. 60, 35 N. E. 529 [*affirming* 45 Ill. App. 642]; Toledo, etc., R. Co. *v.* Conroy, 61 Ill. 162; Pioneer Fire Proofing Co. *v.* Clifford, 118 Ill. App. 457; Star, etc., Milling Co. *v.* Thomas, 27 Ill. App. 137; Anglo-American Packing, etc., Co. *v.* Lewandowski, 26 Ill. App. 629.

Indiana.— Kentucky, etc., Bridge Co. *v.* Eastman, 7 Ind. App. 514, 34 N. E. 835.

Iowa.— Keatley *v.* Illinois Cent. R. Co., 94 Iowa 685, 63 N. W. 560.

Kansas.— Missouri Pac. R. Co. *v.* Gibson, 56 Kan. 661, 44 Pac. 612.

Kentucky.— Logsden *v.* Western Brick Co., 79 S. W. 290, 25 Ky. L. Rep. 2060, 74 S. W. 706, 25 Ky. L. Rep. 141; Louisville, etc., R. Co. *v.* Milliken, 51 S. W. 796, 21 Ky. L. Rep. 489.

Missouri.— Wojtylak *v.* Kansas, etc., Coal Co., 188 Mo. 260, 87 S. W. 506; Hinzeman *v.* Missouri Pac. R. Co., 182 Mo. 611, 81 S. W. 1134; Leslie *v.* Rich Hill Coal Min. Co., 110

an instruction which imposes on the master a higher degree of care than is imposed by law is erroneous.[17] The instructions in a personal injury action must

Mo. 31, 19 S. W. 308; Donovan *v.* Gay, 97 Mo. 440, 11 S. W. 44; Covey *v.* Hannibal, etc., R. Co., 86 Mo. 635.

Montana.— Kelley *v.* Cable Co., 7 Mont. 70, 14 Pac. 633.

New York.— Lake *v.* Wendt, 21 N. Y. App. Div. 276, 48 N. Y. Suppl. 50; Banzhaf *v.* Ludwig, 28 Misc. 496, 59 N. Y. Suppl. 535; Shepard *v.* New York Cent., etc., R. Co., 18 N. Y. Suppl. 665.

North Carolina.— Stewart *v.* Van Deventer Carpet Co., 138 N. C. 60, 50 S. E. 562; Marcus *v.* Loane, 133 N. C. 54, 45 S. E. 354; Williams *v.* Southern R. Co., 119 N. C. 746, 26 S. E. 32.

Ohio.— Memphis, etc., Packet Co. *v.* Britton, 25 Ohio Cir. Ct. 153.

Texas.— St. Louis Southwestern R. Co. *v.* Pope, (1905) 86 S. W. 5 [*reversing* (Civ. App. 1904) 82 S. W. 360]; Galveston, etc., R. Co. *v.* Gormley, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894 [*reversing* (Civ. App. 1897) 42 S. W. 314]; Texas Mexican R. Co. *v.* Douglas, 73 Tex. 325, 11 S. W. 333; Houston, etc., R. Co. *v.* Willie, 53 Tex. 318, 37 Am. Rep. 756; Vicars *v.* Gulf, etc., R. Co., (Civ. App. 1904) 84 S. W. 286; Pledger *v.* Texas Cent. R. Co., (Civ. App. 1902) 68 S. W. 516; Johnson *v.* International, etc., R. Co., (Civ. App. 1899) 54 S. W. 620; Texas Mexican R. Co. *v.* Taylor, (Civ. App. 1898) 44 S. W. 892.

Utah.— Ohlenkamp *v.* Union Pac. R. Co., 24 Utah 232, 67 Pac. 411.

Vermont.— La Flam *v.* Missisquoi Pulp Co., 74 Vt. 125, 52 Atl. 526.

Virginia.—Newport News Pub. Co. *v.* Beaumeister, 104 Va. 744, 52 S. E. 627; Norfolk, etc., R. Co. *v.* Cromer, 99 Va. 763, 40 S. E. 54.

Wisconsin.— Guinard *v.* Knapp-Stout, etc., Co., 95 Wis. 482, 70 N. W. 671; Propsom *v.* Leatham, 80 Wis. 608, 50 N. W. 586.

United States.—Southern Pac. Co. *v.* Gloyd, 138 Fed. 388, 70 C. C. A. 528; Highland Boy Gold Min. Co. *v.* Pouch, 124 Fed. 148, 61 C. C. A. 40; F. C. Austin Mfg. Co. *v.* Johnson, 89 Fed. 677, 32 C. C. A. 309.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1148–1161.

Instructions properly refused.— Louisville, etc., R. Co. *v.* Jones, 130 Ala. 456, 30 So. 586; Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130; Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710; Stevens *v.* San Francisco, etc., R. Co., 100 Cal. 554, 35 Pac. 165; Binion *v.* Georgia Southern, etc., R. Co., 118 Ga. 282, 45 S. E. 276; Illinois Steel Co. *v.* Wierzbicky, 206 Ill. 201, 68 N. E. 1101 [*affirming* 187 Ill. App. 69]; Illinois Steel Co. *v.* McFadden, 196 Ill. 344, 63 N. E. 671, 89 Am. St. Rep. 319 [*affirming* 98 Ill. App. 296]; Alton Paving, etc., Co. *v.* Hudson, 176 Ill. 270, 52 N. E. 256 [*affirming* 74 Ill. App. 612]; Hinckley *v.* Horazdowsky, 133 Ill. 359, 24 N. E. 421, 23 Am. St. Rep. 618, 8 L. R. A. 490; Chicago, etc., R. Co. *v.* Dunleavy, 27 Ill. App. 438 [*affirmed* in 129 Ill. 132, 22 N. E. 15]; Neville *v.* Chicago, etc., R. Co., 79 Iowa 232, 44 N. W. 367; Chase *v.* Burlington, etc., R. Co., 76 Iowa 675, 39 N. W. 196; Knapp *v.* Sioux City, etc., R. Co., 71 Iowa 41, 32 N. W. 18; Interstate, etc., R. Co. *v.* Fox, 41 Kan. 715, 21 Pac. 797; Bowler *v.* Lane, 3 Metc. (Ky.) 311; Cincinnati, etc., R. Co. *v.* Conley, 20 S. W. 816, 14 Ky. L. Rep. 568; Louisville, etc., R. Co. *v.* Shivell, 18 S. W. 944, 13 Ky. L. Rep. 902; Swift *v.* Holoubek, 62 Nebr. 31, 86 N. W. 900, 60 Nebr. 784, 84 N. W. 249; Gillespie *v.* Dry Dock, etc., R. Co., 12 N. Y. App. Div. 501, 42 N. Y. Suppl. 245; Bier *v.* Standard Mfg. Co., 130 Pa. St. 446, 18 Atl. 1064. See also McCombs *v.* Pittsburgh, etc., R. Co., 130 Pa. St. 182, 18 Atl. 613 (in which the request to charge was properly modified by the court); McGarrity *v.* New York, etc., R. Co., 25 R. I. 269, 55 Atl. 718; Lowrimore *v.* Palmer Mfg. Co., 60 S. C. 153, 38 S. E. 430; Tennessee Coal, etc., Co. *v.* Jarrett, (Tenn. 1904) 82 S. W. 224; Louisville, etc., R. Co. *v.* Kenley, 92 Tenn. 207, 21 S. W. 326; Bonner *v.* Whitcomb, 80 Tex. 178, 15 S. W. 899; Ft. Worth, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1905) 87 S. W. 371; International, etc., R. Co. *v.* Villareal, 36 Tex. Civ. App. 532, 82 S. W. 1063; Missouri, etc., R. Co. *v.* Gearheart, (Tex. Civ. App. 1904) 81 S. W. 325; Merchants', etc., Oil Co. *v.* Burns, (Tex. Civ. App. 1903) 72 S. W. 626; Galveston, etc., R. Co. *v.* Renz, 24 Tex. Civ. App. 335, 59 S. W. 280; International, etc., R. Co. *v.* Hawes, (Tex. Civ. App. 1899) 54 S. W. 325; Missouri, etc., R. Co. *v.* Felts, (Tex. Civ. App. 1899) 50 S. W. 1031; Galveston, etc., R. Co. *v.* McCray, (Tex. Civ. App. 1897) 43 S. W. 275; Houston, etc., R. Co. *v.* Gaither, (Tex. Civ. App. 1897) 43 S. W. 266; Columbia, etc., R. Co. *v.* Hawthorne, 3 Wash. Terr. 353, 19 Pac. 25; Mueller *v.* Northwestern Iron Co., 125 Wis. 326, 104 N. W. 67; Lounsbury *v.* Davis, 124 Wis. 432, 102 N. W. 941; Wedgwood *v.* Chicago, etc., R. Co., 44 Wis. 44.

Instructions improperly refused.— Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145; Doyle *v.* Hawkins, (Ind. App. 1905) 73 N. E. 200; Batty *v.* Niagara Falls Hydraulic Power, etc., Co., 37 N. Y. App. Div. 93, 55 N. Y. Suppl. 1088; Missouri, etc., R. Co. *v.* Baker, (Tex. Civ. App. 1896) 37 S. W. 94; Texas, etc., R. Co. *v.* Rhodes, 71 Fed. 145, 18 C. C. A. 9.

17. *Alabama.*— Davis *v.* Kornman, 141 Ala. 479, 37 So. 789, in which the instruction failed to hypothesize knowledge or notice of the defect.

California.—Roche *v.* Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147. *Compare* Grijalva *v.* Southern Pac. Co., 137 Cal. 569, 70 Pac. 622.

Colorado.— Grant *v.* Varney, 21 Colo. 329,

be limited to the specified act or acts of negligence alleged, and restrict the right of recovery thereto;[18] and where separate grounds of negligence are charged, it is proper to submit them separately;[19] and it is error to require judgment for defendant unless all the enumerated acts of negligence are found in favor of plaintiff.[20] An instruction advising the jury as to the duty owing plaintiff as to his safety is properly directed to the duty to him in particular, without regard to the safety of defendant's servants in general;[21] and while it is the better practice to state the qualifications of a master's liability to an employee in connection with

40 Pac. 771; Colorado Cent. R. Co. *v.* Ogden, 3 Colo. 499.

Illinois.— Wells *v.* O'Hare, 209 Ill. 627, 70 N. E. 1056 [*reversing* 110 Ill. App. 71]; Chicago, etc., R. Co. *v.* Kerr, 148 Ill. 605, 35 N. E. 1117 [*affirming* on another point 48 Ill. App. 231]; Stover Mfg. Co. *v.* Millane, 89 Ill. App. 532; Chicago, etc., R. Co. *v.* Finnan, 84 Ill. App. 383; Wabash R. Co. *v.* Farrell, 79 Ill. App. 508; Illinois River Paper Co. *v.* Albert, 49 Ill. App. 363; Peoria, etc., R. Co. *v.* Johns, 43 Ill. App. 83; Chicago, etc., R. Co. *v.* Merckes, 36 Ill. App. 195; Chicago, etc., R. Co. *v.* Standart, 16 Ill. App. 145. See also John S. Metcalf Co. *v.* Nystedt, 102 Ill. App. 71 [*affirmed* in 203 Ill. 333, 67 N. E. 764]. *Compare* Whitney *v.* O'Rourke, 172 Ill. 177, 50 N. E. 242 [*affirming* 68 Ill. App. 487].

Iowa.— Scott *v.* Chicago Great Western R. Co., 113 Iowa 381, 85 N. W. 631; Newbury *v.* Getchel, etc., Lumber, etc., Co., 100 Iowa 441, 69 N. W. 743, 62 Am. St. Rep. 555; Van Winkle *v.* Chicago, etc., R. Co., 93 Iowa 509, 61 N. W. 929. See also Taylor *v.* Star Coal Co., 110 Iowa 40, 81 N. W. 249.

Kentucky.— Illinois Cent. R. Co. *v.* Jones, 118 Ky. 158, 80 S. W. 484, 26 Ky. L. Rep. 31; Louisville, etc., R. Co. *v.* Mattingly, 38 S. W. 686, 18 Ky. L. Rep. 823.

Maryland.— National Enameling, etc., Co. *v.* Brady, 93 Md. 646, 49 Atl. 845.

Minnesota.— Gates *v.* Southern Minnesota R. Co., 28 Minn. 110, 9 N. W. 579.

Missouri.— Bailey *v.* Citizens' R. Co., 152 Mo. 449, 52 S. W. 406; Gibson *v.* Midland Bridge Co., 112 Mo. App. 594, 87 S. W. 3; Zellars *v.* Missouri Water, etc., Co., 92 Mo. App. 107, element of knowledge or notice omitted.

Nebraska.— Cudahy Packing Co. *v.* Roy, (1904) 99 N. W. 231; Kearney Electric Co. *v.* Laughlin, 45 Nebr. 390, 63 N. W. 941.

New York.— Buckley *v.* Gutta Percha, etc., Mfg. Co., 113 N. Y. 540, 21 N. E. 717; Leonard *v.* Collins, 70 N. Y. 90; Richards *v.* Hayes, 12 Misc. 44, 33 N. Y. Suppl. 30.

Oregon.— Scott *v.* Astoria R. Co., 43 Oreg. 26, 72 Pac. 594, 99 Am. St. Rep. 710, 62 L. R. A. 543.

Tennessee.— Railway Co. *v.* Hicks, 89 Tenn. 301, 17 S. W. 1036; Nashville, etc., R. Co. *v.* Jones, 9 Heisk. 27.

Texas.— International, etc., R. Co. *v.* Bell, 75 Tex. 50, 12 S. W. 321; Harry Bros. Co. *v.* Brady, (Civ. App. 1905) 86 S. W. 615; Bering Mfg. Co. *v.* Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869; Texas Mexican R. Co. *v.* Taylor, (Civ. App. 1898) 44 S. W. 892; Gulf, etc., R. Co. *v.* Abbott, (Civ. App. 1893) 24 S. W. 299; Galveston, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 468, 23 S. W. 301; Galveston, etc., R. Co. *v.* Daniels, 1 Tex. Civ. App. 695, 20 S. W. 955; Fordyce *v.* Yarborough, 1 Tex. Civ. App. 260, 21 S. W. 421. *Compare* San Antonio, etc., R. Co. *v.* Hahl, (Civ. App. 1904) 83 S. W. 27; Texas, etc., R. Co. *v.* Black, (Civ. App. 1898) 44 S. W. 673; Houston, etc., R. Co. *v.* Gaither, (Civ. App. 1897) 43 S. W. 236; Quintana *v.* Consolidated Kansas City Smelting, etc., Co., 14 Tex. Civ. App. 347, 37 S. W. 369.

Washington.— Dean *v.* Oregon R., etc., Co., 38 Wash. 565, 80 Pac. 842.

United States.— See Peirce *v.* Clavin, 82 Fed. 550, 27 C. C. A. 227.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1148–1161.

18. *California.*— Roche *v.* Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147.

Colorado.— Colorado Coal, etc., Co. *v.* Carpita, 6 Colo. App. 248, 40 Pac. 248.

Indiana.— Cleveland, etc., R. Co. *v.* Snow, (App. 1905) 74 N. E. 908.

Kentucky.— Louisville, etc., R. Co. *v.* Sullivan, 76 S. W. 525, 25 Ky. L. Rep. 854; Louisville, etc., R. Co. *v.* Mounce, 71 S. W. 518, 24 Ky. L. Rep. 1378.

Massachusetts.— Wyman *v.* Clark, 180 Mass. 173, 62 N. E. 245.

Missouri.— Gibson *v.* Midland Bridge Co., 112 Mo. App. 594, 87 S. W. 3; Adolff *v.* Columbia Pretzel, etc., Co., 100 Mo. App. 199, 73 S. W. 321.

New York.— O'Leary *v.* Buffalo Union Furnace Co., 100 N. Y. App. Div. 136, 91 N. Y. Suppl. 579.

Texas.— Galveston, etc., R. Co. *v.* Perry, 36 Tex. Civ. App. 414, 82 S. W. 343; Texas, etc., R. Co. *v.* Utley, (Civ. App. 1901) 66 S. W. 311; Galveston, etc., R. Co. *v.* Jackson, (Civ. App. 1898) 44 S. W. 1072.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1148–1161.

Under an allegation of negligence in employing servants, the court may charge both as to the duty of the master in originally employing and in retaining such servants. Galveston, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1898) 45 S. W. 956.

19. Galveston, etc., R. Co. *v.* McAdams, (Tex. Civ. App. 1905) 84 S. W. 1076.

20. Texas, etc., R. Co. *v.* Mortensen, 27 Tex. Civ. App. 106, 66 S. W. 99.

21. Barnett, etc., Co. *v.* Schlapka, 208 Ill. 426, 70 N. E. 343 [*affirming* 110 Ill. App. 672]. *Compare* St. Louis Southwestern R.

a statement of the liability, the failure to do so, where such qualifications are referred to in connection with a statement of the liability, will not render the charge misleading.[22] Where an action is predicated upon the violation of a statute by the master, an instruction following the language of the statute as to the duties imposed upon the master is proper;[23] and, although a servant, neither in his petition, nor by his argument, nor otherwise, indicates that the action is brought under, or that he is relying on, the Interstate Commerce Safety Appliance Act, the court may and should instruct as to his rights thereunder, where the evidence shows that the act is applicable.[24] It is not error for the court to refuse a charge explaining the difference in the degree of care to be exercised by a common carrier toward a passenger and an employee.[25]

c. Negligence of Fellow Servants.[26] Where, in an action by a servant for personal injuries, defendant claims that the injuries were due to the negligence of a fellow servant, and there is evidence upon which to predicate instructions as to the fellow servant doctrine,[27] it is the duty of the court, if so requested,[28] to lay down rules in its instructions defining the relation of fellow servants with substantial accuracy,[29] and to instruct the jury as to the liability of the master for the acts of a vice-principal or superior servant,[30] as to the distinction between a fellow

Co. *v.* Rea, (Tex. Civ. App. 1904) 84 S. W. 428 [*reversed* on other grounds in (1905) 87 S. W. 324].

22. International, etc., R. Co. *v.* Jackson, 25 Tex. Civ. App. 619, 62 S. W. 91.

23. Kellyville Coal Co. *v.* Strine, 217 Ill. 516, 75 N. E. 375; Donk Bros. Coal, etc., Co. *v.* Peton, 192 Ill. 41, 61 N. E. 330 [*affirming* 95 Ill. App. 193]; Espenlaub *v.* Ellis, 34 Ind. App. 163, 72 N. E. 527. See also Gulf, etc., R. Co. *v.* Boyce, (Tex. Civ. App. 1905) 87 S. W. 395.

24. Voelker *v.* Chicago, etc., R. Co., 116 Fed. 867.

25. Cooper *v.* Iowa Cent. R. Co., 44 Iowa 134.

26. Assumption of risks see *infra*, IV, H, 7, d.

Conformity to pleadings see *supra*, IV, H, 7, a, (IV).

Instructions invading province of jury see *supra*, IV, H, 7, a, (VIII).

27. *Missouri.*— Harty *v.* St. Louis, etc., R. Co., 95 Mo. 368, 8 S. W. 562.

Tennessee.— Coal Creek Min. Co. *v.* Davis, 90 Tenn. 711, 18 S. W. 387.

Texas.— Denham *v.* Trinity County Lumber Co., 73 Tex. 78, 11 S. W. 151.

Utah.— Jenkins *v.* Mammoth Min. Co., 24 Utah 513, 68 Pac. 845.

Washington.— Young *v.* O'Brien, 36 Wash. 570, 79 Pac. 211.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1162–1166.

Compare Ahrens, etc., Mfg. Co. *v.* Rellihan, 82 S. W. 993, 26 Ky. L. Rep. 919.

28. Houston, etc., R. Co. *v.* Stuart, (Tex. Civ. App. 1898) 48 S. W. 799. See also McCabe *v.* Brainard, 17 N. Y. App. Div. 45, 44 N. Y. Suppl. 964.

Where no instruction as to what constitutes a fellow servant has been asked, an instruction which tells the jury that if they believe from the evidence that plaintiff was injured by the negligence of a fellow servant, or by the negligence of himself combined with that of a fellow servant, then he cannot recover, is improper and should be refused. St. Louis Consol. Coal Co. *v.* Shepherd, 112 Ill. App. 458.

29. *Arkansas.*— Fordyce *v.* Key, 74 Ark. 19, 84 S. W. 797.

Illinois.— National Enameling, etc., Co. *v.* McCorkle, 219 Ill. 557, 76 N. E. 843; Pagels *v.* Meyer, 193 Ill. 172, 61 N. E. 1111 [*reversing* 88 Ill. App. 169]; Western Tube Co. *v.* Polobinski, 192 Ill. 113, 61 N. E. 451 [*affirming* 94 Ill. App. 640]; Whitney, etc., Co. *v.* O'Rourke, 172 Ill. 177, 50 N. E. 242 [*affirming* 68 Ill. App. 487]; Mobile, etc., R. Co. *v.* Godfrey, 155 Ill. 78, 39 N. E. 590; Peoria, etc., R. Co. *v.* Rice, 144 Ill. 227, 33 N. E. 951 [*affirming* 46 Ill. App. 60]; Illinois Steel Co. *v.* Rolewicz, 113 Ill. App. 312; Chicago Architectural Iron Works *v.* Nagel, 80 Ill. App. 492; Chicago, etc., R. Co. *v.* Hoyt, 16 Ill. App. 237; Pittsburgh, etc., R. Co. *v.* McGrath, 15 Ill. App. 85; Chicago, etc., R. Co. *v.* Bragonier, 11 Ill. App. 516.

Michigan.—La Barre *v.* Grand Trunk Western R. Co., 133 Mich. 192, 94 N. W. 735.

Missouri.— Musick *v.* Jacob Dold Packing Co., 58 Mo. App. 322.

New York.— Hart *v.* New York Floating Dry Dock Co., 48 N. Y. Super. Ct. 460.

Pennsylvania.— Giberson *v.* Patterson Mills Co., 174 Pa. St. 369, 34 Atl. 563, 52 Am. St. Rep. 823.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1162, 1166.

Instructions held sufficient see Wenona Coal Co. *v.* Holmquist, 152 Ill. 581, 38 N. E. 946 [*affirming* 51 Ill. App. 507]; Hicks *v.* Southern R. Co., (S. C. 1901) 38 S. E. 725, 38 S. E. 866; Braegger *v.* Oregon Short Line R. Co., 24 Utah 391, 68 Pac. 140.

30. *Iowa.*— Baldwin *v.* St. Louis, etc., R. Co., 63 Iowa 210, 18 N. W. 884.

Missouri.— Smith *v.* St Louis, etc., R. Co., 151 Mo. 391, 52 S. W. 378, 48 L. R. A. 368; Miller *v.* Missouri Pac. R. Co., 109 Mo. 350, 19 S. W. 58, 32 Am. St. Rep. 673.

servant's personal negligence and his negligence in a matter in which he stands in the place of the master,[31] and as to the non-liability of the master for injuries proximately caused by the negligence of a fellow servant, except in the case of incompetency of which the master knew, or, in the exercise of ordinary care, should have known.[32] Where applicable, the jury should also be instructed as to the effect of concurrent negligence on the part of the master and a fellow servant,[33] and, in some states, as to the duty of the master to exercise reasonable supervision over his servants.[34] In a case so requiring, the distinction between the negligence of a competent fellow servant and the unskilfulness of an incompetent fellow servant should be clearly pointed out to the jury.[35]

d. Assumption of Risk[36] — (I) *In General.* In a personal injury action the court should instruct the jury fully upon the law relating to the assumption by the servant of risks incident to his employment,[37] and also as to the assumption of

Montana.— Kelley *v.* Cable Co., 7 Mont. 70, 14 Pac. 633.

New York.— Conlan *v.* New York Cent., etc., R. Co., 74 Hun 115, 26 N. Y. Suppl. 659 [*affirmed* in 148 N. Y. 748, 43 N. E. 986].

North Carolina.— Chesson *v.* John L. Roper Lumber Co., 118 N. C. 59, 23 S. E. 925.

Pennsylvania.— See Evilhock *v.* Philadelphia, etc., R. Co., 169 Pa. St. 592, 32 Atl. 588.

South Carolina.— Hicks *v.* Southern R. Co., (1901) 38 S. E. 725, 38 S. E. 866.

Texas.— Galveston, etc., R. Co. *v.* Dehnisch, (Civ. App. 1900) 57 S. W. 64; San Antonio, etc., R. Co. *v.* Adams, 6 Tex. Civ. App. 102, 24 S. W. 839.

Utah.— Braegger *v.* Oregon Short Line R. Co., 24 Utah 391, 68 Pac. 140.

Virginia.— Southern R. Co. *v.* Oliver, 102 Va. 710, 47 S. E. 862.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1164, 1165.

Instances of sufficient instructions see Seaboard Mfg. Co. *v.* Woodson, 98 Ala. 378, 11 So. 733; Sciolina *v.* Erie Preserving Co., 7 N. Y. App. Div. 417, 39 N. Y. Suppl. 916; St. Louis, etc., R. Co. *v.* George, 85 Tex. 150, 19 S. W. 1036; St. Louis Southwestern R. Co. *v.* Smith, 30 Tex. Civ. App. 336, 70 S. W. 789; San Antonio, etc., R. Co. *v.* Weigers, 22 Tex. Civ. App. 344, 54 S. W. 910.

31. Baier *v.* Selke, 211 Ill. 512, 71 N. E. 1074, 103 Am. St. Rep. 208 [*reversing* 112 Ill. App. 568]; Chicago, etc., R. Co. *v.* Sullivan, 27 Nebr. 673, 43 N. W. 415; Allen *v.* Goodwin, 92 Tenn. 385, 21 S. W. 760; St. Louis, etc., R. Co. *v.* Lemon, 83 Tex. 143, 18 S. W. 331.

32. *Alabama.*— Northern Alabama R. Co. *v.* Mansell, 138 Ala. 548, 36 So. 459.

Arizona.— Gila Valley, etc., R. Co. *v.* Lyon, (1903) 71 Pac. 957.

Colorado.— Kindel *v.* Hall, 8 Colo. App 63, 44 Pac. 781.

Illinois.— Wells *v.* O'Hare, 209 Ill. 627, 70 N. E. 1056 [*reversing* 110 Ill. App. 7].

Kentucky.— Cumberland Tel., etc., Co. *v.* Ware, 115 Ky. 581, 74 S. W. 289, 24 Ky. L. Rep. 2519; Cincinnati, etc., R. Co. *v.* Roberts, 110 Ky. 856, 62 S. W. 901, 23 Ky. L. Rep. 264; Louisville, etc., R. Co. *v.* Sullivan, 76 S. W. 525, 25 Ky. L. Rep. 854.

Michigan.— Harrison *v.* Detroit, etc., R. Co., 79 Mich. 409, 44 N. W. 1034, 19 Am. St. Rep. 180, 7 L. R. A. 623.

Minnesota.— Kurstelska *v.* Jackson, 89 Minn. 95, 93 N. W. 1054.

Missouri.— Kaminski *v.* Tudor Iron Works, 167 Mo. 462, 67 S. W. 221.

Montana.— Kelly *v.* Cable Co., 13 Mont. 411, 34 Pac. 611.

New York.— McCabe *v.* Brainard, 17 N. Y. App. Div. 45, 44 N. Y. Suppl. 964.

North Carolina.— Kirk *v.* Atlanta, etc., R. Co., 97 N. C. 82, 2 So. 536.

Texas.— Young *v.* Hahn, (Civ. App. 1902) 69 S. W. 203 [*reversed* on other grounds in 96 Tex. 99, 70 S. W. 950]; Galveston, etc., R. Co. *v.* Parrish, (Civ. App. 1897) 40 S. W. 191.

Virginia.— Virginia, etc., R. Co. *v.* Bailey, 103 Va. 205, 49 S. E. 33.

Washington.— Ralph *v.* American Bridge Co., 30 Wash. 500, 70 Pac. 1098.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1162–1166.

33. *Arizona.*— Gila Valley, etc., R. Co. *v.* Lyon, (1903) 71 Pac. 957.

Iowa.— Baldwin *v.* St. Louis, etc., R. Co., 68 Iowa 37, 25 N. W. 918.

Massachusetts.— See Garant *v.* Cashman, 183 Mass. 13, 66 N. E. 599.

New York.— Hall *v.* Cooperstown, etc., R. Co., 49 Hun 373, 3 N. Y. Suppl. 584; Smith *v.* New York Cent., etc., R. Co., 9 N. Y. St. 612.

Pennsylvania.— Wallace *v.* Henderson, 211 Pa. St. 142, 60 Atl. 574.

Virginia.— McCoy *v.* Norfolk, etc., R. Co., 99 Va. 132, 37 S. E. 788.

United States.— Atlantic Ave. R. Co. *v.* Van Dyke, 72 Fed. 458, 18 C. C. A. 632.

See 34 Cent. Dig. tit. "Master and Servant," § 1167.

34. Rogers *v.* Ludlow Mfg. Co., 144 Mass. 198, 11 N. E. 77, 59 Am. Rep. 68. *Compare* Babcock *v.* Old Colony R. Co., 150 Mass. 467, 23 N. E. 325.

35. Ingram *v.* Hilton, etc., Lumber Co., 108 Ga. 194, 33 S. E. 961.

36. **Conformity to pleadings** see *supra*, IV, H, 7, a, (IV).

Instructions invading province of jury see *supra*, IV, H, 7, a, (VIII).

37. *Alabama.*— Louisville, etc., R. Co. *v.*

the risk of any defect or danger of which he knows, or should, in the exercise of ordinary care, know,[38] and as to his right to rely upon the master's exercise of

Smith, 129 Ala. 553, 30 So. 571; Postal Tel. Cable Co. *v.* Hulsey, 115 Ala. 193, 22 So. 854; Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145.

Arkansas.— St. Louis, etc., R. Co. *v.* Jagerman, 59 Ark. 98, 26 S. W. 591.

Illinois.— Illinois Terra Cotta Lumber Co. *v.* Hanley, 214 Ill. 243, 73 N. E. 373; Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 [*affirming* 109 Ill. App. 468]; Libby *v.* Scherman, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191; Pioneer Fire Proofing Co. *v.* Clifford, 118 Ill. App. 457; Guaranty Constr. Co. *v.* Broeker, 93 Ill. App. 272; Chicago, etc., R. Co. *v.* Cleveland, 92 Ill. App. 308.

Iowa.— Quinn *v.* Chicago, etc., R. Co., 107 Iowa 710, 77 N. W. 464.

Ohio.— Cleveland *v.* Wolf, 25 Ohio Cir. Ct. 406.

Rhode Island.— Benson *v.* New York, etc., R. Co., 23 R. I. 147, 49 Atl. 689.

South Carolina.— Price *v.* Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732.

Tennessee.— Porter *v.* Waters-Allen Foundry, etc., Co., 94 Tenn. 310, 29 S. W. 227.

Texas.— Nix *v.* Texas Pac. R. Co., 82 Tex. 473, 18 S. W. 571, 27 Am. St. Rep. 897; Fordyce *v.* Yarborough, 1 Tex. Civ. App. 260, 21 S. W. 421.

Utah.— Ohlenkamp *v.* Union Pac. R. Co., 24 Utah 232, 67 Pac. 411.

Virginia.— Moon *v.* Richmond, etc., R. Co., 78 Va. 745, 49 Am. Rep. 401.

United States.— Atchison, etc., R. Co. *v.* Myers, 63 Fed. 793, 11 C. C. A. 439.

See 34 Cent. Dig. tit. "Master and Servant," § 1170.

Instructions held sufficient on assumption of incidental risks.— Southern Indiana R. Co. *v.* Fine, 163 Ind. 617, 72 N. E. 589; Pierce *v.* Arnold Print Works, 182 Mass. 260, 65 N. E. 368; Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434; Deckerd *v.* Wabash R. Co., 111 Mo. App. 117, 85 S. W. 982; Youngblood *v.* South Carolina, etc., R. Co., 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824; Southern Pac. R. Co. *v.* Aylward, 79 Tex. 675, 15 S. W. 697; Missouri Pac. R. Co. *v.* Crenshaw, 71 Tex. 340, 9 S. W. 262; International, etc., R. Co. *v.* McVey, (Tex. Civ. App. 1904) 81 S. W. 991, 83 S. W. 34; Gulf, etc., R. Co. *v.* Wilder, (Tex. Civ. App. 1903) 75 S. W. 546; Texas, etc., R. Co. *v.* Scott, (Tex. Civ. App. 1902) 71 S. W. 26; International, etc., R. Co. *v.* Emery, 14 Tex. Civ. App. 551, 40 S. W. 149; Galveston, etc., R. Co. *v.* Crawford, 9 Tex. Civ. App. 245, 27 S. W. 822, 29 S. W. 958; Crawford *v.* American Steel, etc., Co., 123 Fed. 275, 59 C. C. A. 293; Texas, etc., R. Co. *v.* Archibald, 75 Fed. 802, 21 C. C. A. 520 [*affirmed* in 170 U. S. 665, 18 S. Ct. 777, 42 L. ed. 1188].

Instruction held inapplicable to case see Pfisterer *v.* Peter, 117 Ky. 501, 78 S. W. 450, 25 Ky. L. Rep. 1605.

38. *Alabama.*—Alabama Great Southern R. Co. *v.* Richie, 99 Ala. 346, 12 So. 612.

California.— Sowden *v.* Indho Quartz Min. Co., 55 Cal. 443.

Illinois.— Chicago, etc., R. Co. *v.* Heerey, 203 Ill. 492, 68 N. E. 74 [*reversing* 105 Ill. App. 647]; Swift *v.* Rutkowski, 167 Ill. 156, 47 N. E. 362 [*reversing* 67 Ill. App. 209]; Omaha Packing Co. *v.* Murray, 112 Ill. App. 233; Helbig *v.* Slaughter, 95 Ill. App. 623.

Indiana.— Southern Indiana R. Co. *v.* Moore, 34 Ind. App. 154, 72 N. E. 479; Cleveland, etc., R. Co. *v.* Scott, 29 Ind. App. 519, 64 N. E. 896; Pittsburg, etc., R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. Rep. 120; Indiana Bituminous Coal Co. *v.* Buffey, 28 Ind. App. 108, 62 N. E. 279.

Kansas.— Union Pac. R. Co. *v.* Monden, 50 Kan. 539, 31 Pac. 1002.

Massachusetts.— Peterson *v.* Morgan Spring Co., 189 Mass. 576, 76 N. E. 220; Sullivan *v.* Thorndike Co., 175 Mass. 41, 55 N. E. 472.

Missouri.— Dickson *v.* Omaha, etc., R. Co., 124 Mo. 140, 27 S. W. 476, 46 Am. St. Rep. 429, 25 L. R. A. 320; Williams *v.* Missouri Pac. R. Co., 109 Mo. 475, 18 S. W. 1098.

New Jersey.— Durand *v.* New York, etc., R. Co., 65 N. J. L. 656, 48 Atl. 1013.

New York.— Garety *v.* King, 9 N. Y. App. Div. 443, 41 N. Y. Suppl. 633.

Rhode Island.— McGarrity *v.* New York, etc., R. Co., 25 R. I. 269, 55 Atl. 718; Benson *v.* New York, etc., R. Co., 23 R. I. 147, 49 Atl. 689.

Texas.— Houston, etc., R. Co. *v.* De Walt, 96 Tex. 121, 70 S. W. 531, 97 Am. St. Rep. 877; Texas, etc., R. Co. *v.* Conroy, 83 Tex. 214, 18 S. W. 609; Denison, etc., Suburban R. Co. *v.* Binkley, (Civ. App. 1905) 87 S. W. 386; Consumers' Cotton Oil Co. *v.* Jonte, (Civ. App. 1904) 80 S. W. 847; Chicago, etc., R. Co. *v.* Oldridge, 33 Tex. Civ. App. 436, 76 S. W. 581; Gulf, etc., R. Co. *v.* Hill, 29 Tex. Civ. App. 12, 70 S. W. 103; Galveston, etc., R. Co. *v.* English, (Civ. App. 1900) 59 S. W. 626, 912; Galveston, etc., R. Co. *v.* Moss, (Civ. App. 1900) 57 S. W. 910; Houston, etc., R. Co. *v.* Kelly, (Civ. App. 1896) 35 S. W. 878; Gulf, etc., R. Co. *v.* Hohl, (Civ. App. 1895) 29 S. W. 1131; International, etc., R. Co. *v.* Beasley, 9 Tex. Civ. App. 569, 29 S. W. 1121; Texas, etc., R. Co. *v.* Guy, (Civ. App. 1893) 23 S. W. 633.

Vermont.— Latremouille *v.* Bennington, etc., R. Co., 63 Vt. 336, 22 Atl. 656.

Washington.— Smith *v.* Hecla Min. Co., 38 Wash. 454, 80 Pac. 779.

United States.— Roccia *v.* Black Diamond Coal Min. Co., 121 Fed. 451, 57 C. C. A. 567; Taylor-Craig Corp. *v.* Hage, 69 Fed. 581, 16 C. C. A. 339.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1175, 1176.

Instructions on knowledge or notice held proper.— Little Rock, etc., R. Co. *v.* Voss, (Ark. 1892) 18 S. W. 172; Perry-Mattbews-Buskirk Stone Co. *v.* Speer, 36 Ind. App.

due care for his protection.[39] Where, however, the declaration or complaint alleges that plaintiff did not know, and had not the means of knowing, the danger to which he was exposed, an instruction that if the jury "believing, from the evidence, that the plaintiff has made out his case as alleged in his declaration in this case, or in any one count thereof, by a preponderance of the evidence, then it is your duty to find the issues in favor of the plaintiff," is not erroneous as omitting the element of assumed risk.[40] As in other cases, an instruction upon assumption of risk must be supported by evidence.[41]

(II) *Inexperienced or Youthful Servants.* In an action by a servant for personal injuries, the instructions should distinguish between an employee having knowledge of, and experience in, the business and one having no such knowledge and experience;[42] and instructions which ignore the fact of a plain-

340, 73 N. E. 933; Chicago, etc., R. Co. *v.* Lee, 29 Ind. App. 480, 64 N. E. 675; Baltimore, etc., R. Co. *v.* Spaulding, 21 Ind. App. 323, 52 N. E. 410; Barker *v.* Lawrence Mfg. Co., 176 Mass. 205, 57 N. E. 366; Herbert *v.* Mound City Boot, etc., Co., 90 Mo. App. 305; Loid *v.* J. S. Rogers Co., 68 N. J. L. 713, 54 Atl. 837; Belleville Stone Co. *v.* Comben, 61 N. J. L. 353, 39 Atl. 641; Stewart *v.* Ferguson, 44 N. Y. App. Div. 58, 60 N. Y. Suppl. 429; Hogan *v.* Smith, 9 N. Y. Suppl. 881; Green *v.* New York, etc., R. Co., 26 Ohio Cir. Ct. 609; Hoffman *v.* Clough, 124 Pa. St. 505, 17 Atl. 19; Tucker *v.* Charleston, etc., R. Co., 51 S. C. 306, 28 S. E. 943; H. S. Hopkins Bridge Co. *v.* Burnett, 85 Tex. 16, 19 S. W. 886; International, etc., R. Co. *v.* Tisdale, 36 Tex. Civ App. 174, 81 S. W. 347; Horton *v.* Ft. Worth Packing, etc., Co., 33 Tex. Civ. App. 150, 76 S. W. 211; Moore *v.* Missouri, etc., R. Co., 30 Tex. Civ. App. 266, 69 S. W. 997; Gulf, etc., R. Co. *v.* Moore, 28 Tex. Civ. App. 603, 68 S. W. 559; Galveston, etc., R. Co. *v.* Newport, 26 Tex. Civ. App. 583, 65 S. W. 657; Galveston, etc., R. Co. *v.* Renz, 24 Tex. Civ. App. 335, 59 S. W. 280; Carbine *v.* Bennington, etc., R. Co., 61 Vt. 348, 17 Atl. 491; Southern R. Co. *v.* Mauzy, 98 Va. 692, 37 S. E. 285; Tham *v.* J. T. Steeb Shipping Co., 39 Wash. 271, 81 Pac. 711; Shoemaker *v.* Bryant Lumber, etc., Mill Co., 27 Wash. 637, 68 Pac. 380; Hennesey *v.* Chicago, etc., R. Co., 99 Wis. 109, 74 N. W. 554; Klatt *v.* N. C. Foster Lumber Co., 92 Wis. 622, 66 N. W. 791; Roccia *v.* Black Diamond Coal Min. Co., 121 Fed. 451, 57 C. C. A. 567.

39. It is proper to instruct that plaintiff, an employee, was not bound to inspect the elevator but had a right to rely on defendant's having put in a proper elevator, where the defect, if any, was in the manner in which the elevator was constructed, and it was not claimed that either the master or servant actually knew of the defect prior to the accident, and the master, knowing all the circumstances attending the construction and putting in of the elevator, did not believe any defect or danger existed. Eastman *v.* Curtis, 67 Vt. 432, 32 Atl. 232.

Instruction as to reliance on assurance of safety by foreman held correct see Haywood *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1905) 85 S. W. 433.

Erroneous instructions as to reliance on master see Pennsylvania Co. *v.* Burgett, 7 Ind. App. 338, 33 N. E. 914, 34 N. E. 650; McKee *v.* Tourtellotte, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542; McKelvey *v.* Chesapeake, etc., R. Co., 35 W. Va. 500, 14 S. E. 261.

40. Chicago, etc., R. Co. *v.* Howell, 109 Ill. App. 546 [*affirmed* in 208 Ill. 155, 70 N. E. 15]. But *compare* Illinois Cent. R. Co. *v.* Sporleder, 90 Ill. App. 590.

41. *Arkansas.*— Choctaw, etc., R. Co. *v.* Stallings, 70 Ark. 603, 70 S. W. 303; Little Rock, etc., R. Co. *v.* Leverett, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230.

Georgia.— Austin *v.* Appling, 88 Ga. 54, 13 S. E. 955.

Illinois.— Ashley Wire Co. *v.* Mercier, 61 Ill. App. 485; Ambrose *v.* Angus, 61 Ill. App. 304.

New York.— Rose *v.* Boston, etc., R. Co., 58 N. Y. 217.

Pennsylvania.— Trainor *v.* Philadelphia, etc., R. Co., 137 Pa. St. 148, 20 Atl. 632.

Texas.— International, etc., R. Co. *v.* Hinzie, 82 Tex. 623, 18 S. W. 681; Missouri Pac. R. Co. *v.* Lehmberg, 75 Tex. 61, 12 S. W. 838; Gulf, etc., R. Co. *v.* Silliphant, 70 Tex. 623, 8 S. W. 673; Quinn *v.* Galveston, etc., R. Co., (Civ. App. 1905) 84 S. W. 395; Texas, etc., R. Co. *v.* Lee, 32 Tex. Civ. App. 23, 74 S. W. 345; Missouri, etc., R. Co. *v.* Baker, (Civ. App. 1900) 58 S. W. 964; International, etc., R. Co. *v.* Newburn, (Civ. App. 1900) 58 S. W. 542 [*affirmed* in 94 Tex. 298, 60 S. W. 429]; Houston, etc., R. Co. *v.* Gaither, (Civ. App. 1897) 43 S. W. 266; Mexican Nat. R. Co. *v.* Jackson, (Civ. App. 1895) 32 S. W. 230; Galveston, etc., R. Co. *v.* Leonard, (Civ. App. 1894) 29 S. W. 955; Galveston, etc., R. Co. *v.* Norris, (Civ. App. 1894) 29 S. W. 950; Ft. Worth, etc., R. Co. *v.* Thompson, 2 Tex. Civ. App. 170, 21 S. W. 137.

United States.— Pittsburgh, etc., R. Co. *v.* Thompson, 82 Fed. 720, 27 C. C. A. 333.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1169, 1170, 1175, 1176.

Instruction as to servant's age and appreciation of danger held inappropriate under the evidence see Kaufhold *v.* Arnold, 163 Pa. St. 269, 29 Atl. 883.

42. Baltimore, etc., R. Co. *v.* Stricker, 51 Md. 47, 34 Am. Rep. 291. See also Smith

tiff's tender age and youthful instincts and his exposure to danger are erroneous and properly refused.[43]

(III) *Choice of Dangerous Method of Work.* An instruction as to the effect of the choice by plaintiff of a dangerous method of doing his work, when other safer methods were open to him, is insufficient if it omits the essential element of his knowledge of such safer methods;[44] and it is proper to refuse to charge that if, among different modes of performing his duty, some of which were safe, plaintiff chose one which was less safe, he took the risk of his choice, as this is but a circumstance which the jury should consider with the other facts in determining whether plaintiff was at fault.[45]

(IV) *Risks Outside Scope of Employment.* Where there is evidence tending to show that the servant was injured while voluntarily performing work outside the scope of his employment,[46] the court should instruct the jury that, if he undertook to do something which it was not duty to do, he assumed all the risk in that undertaking.[47]

(V) *Notice or Complaint to Master, and Promise of Remedy.* Where there is evidence to show notice or complaint to the master by the servant of a defect or danger, and a promise by the master or his agent to remedy the defect or remove the danger, the jury should be instructed as to the effect of such notice or complaint and promise on the servant's assumption of risk in continuing the work;[48] and it is proper to instruct the jury that when a servant complains of defective machinery which the master refused to repair and directs him to proceed, unless the defect is so palpable that only a reckless man would do so, the servant may presume that the master considers it reasonably safe.[49]

(VI) *Concurrent Negligence of Master.* An instruction upon assumption of risk by a servant which ignores the question of concurrent negligence on the part of the master or of someone for whose negligence the master is responsible is erroneous.[50] But where the jury is instructed as to assumption of risk, an

v. Gulf, etc., R. Co., (Tex. Civ. App. 1901) 65 S. W. 83; Galveston, etc., R. Co. *v.* Renz, 24 Tex. Civ. App. 355, 59 S. W. 280, in which the instructions omitted the element of plaintiff's inexperience.

Correct instruction as to effect of inexperience see Missouri Pac. R. Co. *v.* King, 2 Tex. Civ. App. 122, 20 S. W. 1014, 23 S. W. 917.

43. Tutwiler Coal, etc., Co. *v.* Enslen, 129 Ala. 336, 30 So. 600.

Correct instructions as to youthful servants see Newburg *v.* Getchell, etc., Lumber, etc., Co., 100 Iowa 441, 69 N. W. 743, 62 Am. St. Rep. 582; Kehler *v.* Schwenk, 144 Pa. St. 348, 22 Atl. 910, 27 Am. St. Rep. 633, 13 L. R. A. 374; Hayes *v.* Colchester Mills, 69 Vt. 1, 37 Atl. 269, 60 Am. St. Rep. 915.

44. Kilpatrick *v.* Grand Trunk R. Co., 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887.

45. Central R. Co. *v.* De Bray, 71 Ga. 406.

46. Where there is evidence that the work was within the servant's duties, it is proper to charge as to the assumption by him of the ordinary risks of his employment. Millar *v.* Madison Car Co., 130 Mo. 517, 31 S. W. 574.

47. Hamrick *v.* Balfour Quarry Co., 132 N. C. 282, 43 S. E. 820.

48. An instruction is erroneous which lacks the essential element that a servant does not assume the risk of defective or dangerous appliances, where he objects or protests to the master against the continuance of the defects. Greenleaf *v.* Dubuque, etc., R. Co., 33 Iowa 52.

An instruction which omits the element of a promise to repair, express or fairly implied, is erroneous and should not be given. McKelvey *v.* Chesapeake, etc., R. Co., 35 W. Va. 500, 14 S. E. 261.

Obvious and imminent danger.— An instruction is misleading which fails to state that plaintiff was not justified in relying on a promise to remove a danger which is so obvious and imminent that no person of ordinary prudence would under like circumstances have exposed himself to it. Kansas, etc., Coal Co. *v.* Chandler, 71 Ark. 518, 77 S. W. 912.

Instruction held justified by the evidence see Highland Boy Gold Min. Co. *v.* Pouch, 124 Fed. 148, 61 C. C. A. 40.

49. Virginia, etc., Wheel Co. *v.* Harris, 103 Va. 708, 49 S. E. 991.

50. *Alabama.*— Louisville, etc., R. Co. *v.* Bouldin, 110 Ala. 185, 20 So. 325.

Illinois.— Cobb Chocolate Co. *v.* Knudson, 207 Ill. 452, 69 N. E. 816 [*affirming* 107 Ill. App. 668]; Illinois Steel Co. *v.* Wierzbicky, 206 Ill. 201, 68 N. E. 1101 [*affirming* 107 Ill. App. 69]; Ambrose *v.* Angus, 61 Ill. App. 304.

Iowa.— Sankey *v.* Chicago, etc., R. Co., 118 Iowa, 39, 91 N. W. 820; Connors *v.* Burlington, etc., R. Co., 74 Iowa 383, 37 N. W. 966.

instruction on the master's duties is not erroneous for failure to mention the question of the servant's assumption of risk.[51]

e. Contributory Negligence[52] — (I) *In General.* Where an instruction on contributory negligence is applicable to the pleadings and facts in a personal injury case,[53] the court should correctly instruct the jury as to what constitutes, and the effect of, such negligence,[54] and also as to the degree of care required of

Missouri.— Curtis *v.* McNair, 173 Mo. 270, 73 S. W. 167.

Pennsylvania.— McCombs *v.* Pittsburgh, etc., R. Co., 130 Pa. St. 182, 18 Atl. 613.

Texas.— St. Louis Southwestern R. Co. *v.* Smith, (Civ. App. 1901) 63 S. W. 1064; Houston, etc., R. Co. *v.* Kelley, 13 Tex. Civ. App. 1, 34 S. W. 809, 46 S. W. 863.

See 34 Cent. Dig. tit. "Master and Servant," § 1179.

Instances of correct instructions on concurrent negligence.— Knapp *v.* Sioux City, etc., R. Co., 71 Iowa 41, 32 N. W. 18; Roux *v.* Blodgett, etc., Lumber Co., 94 Mich. 607, 54 N. W. 492; San Antonio, etc., R. Co. *v.* Stevens, (Tex. Civ. App. 1904) 83 S. W. 235; San Antonio, etc., R. Co. *v.* Klaus, 34 Tex. Civ. App. 492, 79 S. W. 58; Missouri, etc., R. Co. *v.* Hawk, 30 Tex. Civ. App. 142, 69 S. W. 1037; Galveston, etc., R. Co. *v.* Pitts, (Tex. Civ. App. 1897) 42 S. W. 255; International, etc., R. Co. *v.* Bonnet, (Tex. Civ. App. 1896) 38 S. W. 813.

51. Ford *v.* Chicago, etc., R. Co., (Iowa 1897) 71 N. W. 332; McGar *v.* National, etc., Worsted Mills, 22 R. I. 347, 47 Atl. 1092.

52. Conformity to pleadings see *supra*, IV, H, 7, a, (IV).

Instructions invading province of jury see *supra*, IV, H, 7, a, (VIII).

53. *Alabama.*— Kansas City, etc., R. Co. *v.* Thornhill, 141 Ala. 215, 37 So. 412.

California.— Silveira *v.* Iversen, 128 Cal. 187, 60 Pac. 687.

Kentucky.— Harp *v.* Cumberland Tel., etc., Co., 80 S. W. 510, 25 Ky. L. Rep. 2133.

Michigan.— Mayer *v.* Detroit, etc., R. Co., 142 Mich. 459, 105 N. W. 888.

Missouri.— Coleman *v.* Himmelberger-Harrison Land, etc., Co., 105 Mo. App. 254, 79 S. W. 981.

Nebraska.— Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744.

Ohio.— Northern Ohio R. Co. *v.* Rigby, 69 Ohio St. 184, 68 N. E. 1046.

Texas.— Denham *v.* Trinity County Lumber Co., 73 Tex. 78, 11 S. W. 151; Texarkana, etc., R. Co. *v.* Toliver, (Civ. App. 1904) 84 S. W. 375; El Paso Northeastern R. Co. *v.* Ryan, 36 Tex. Civ. App. 190, 81 S. W. 563; Ft. Worth, etc., R. Co. *v.* Kelley, 33 Tex. Civ. App. 442, 76 S. W. 942; Gulf, etc., R. Co. *v.* Cooper, 33 Tex. Civ. App. 319, 77 S. W. 263; International, etc., R. Co. *v.* Moynahan, 33 Tex. Civ. App. 302, 76 S. W. 803; Gulf, etc., R. Co. *v.* Hill, 29 Tex. Civ. App. 12, 70 S. W. 103; St. Louis Southwestern R. Co. *v.* Smith, (Civ. App. 1901) 63 S. W. 1064.

Utah.— Downey *v.* Gemini Min. Co., 24 Utah 431, 68 Pac. 414, 91 Am. St. Rep. 798.

Virginia.— Newport News Pub. Co. *v.* Beaumeister, 104 Va. 744, 52 S. E. 627.

Washington.— Young *v.* O'Brien, 36 Wash. 570, 79 Pac. 211.

United States.— Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. ed. 624.

54. *Iowa.*— Ford *v.* Chicago, etc., R. Co., 106 Iowa 85, 75 N. W. 650; Morbey *v.* Chicago, etc., R. Co., 105 Iowa 46, 74 N. W. 751.

Kansas.— Walker *v.* Brantner, 59 Kan. 117, 52 Pac. 80, 68 Am. St. Rep. 344.

Michigan.— Brown *v.* Gilchrist, 80 Mich. 56, 45 N. W. 82, 20 Am. St. Rep. 496.

Missouri.— Abbott *v.* Marion Min. Co., 112 Mo. App. 550, 87 S. W. 110; Meily *v.* St. Louis, etc., R. Co., 107 Mo. App. 466, 81 S. W. 639. See also Kaminski *v.* Tudor Iron Works, 167 Mo. 462, 67 S. W. 221.

New York.— Smith *v.* Pennsylvania Coal Co., 18 N. Y. Suppl. 637.

North Carolina.— Kirk *v.* Atlanta, etc., Air-Line R. Co., 97 N. C. 82, 2 S. E. 536.

Pennsylvania.— Greenway *v.* Conroy, 160 Pa. St. 185, 28 Atl. 692, 40 Am. St. Rep. 715.

Texas.— Missouri, etc., R. Co. *v.* McGlamory, 89 Tex. 635, 35 S. W. 1058; St. Louis Southwestern R. Co. *v.* Arnold, (Civ. App. 1905) 87 S. W. 173; Bering Mfg. Co. *v.* Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869; Hodo *v.* Mexican Nat. R. Co., (Civ. App. 1895) 31 S. W. 708.

West Virginia.— Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

See 34 Cent. Dig. tit. "Master and Servant," § 1180.

On an issue of defendant's negligence it is proper to refuse to charge as to contributory negligence, especially where the court gave such charge as a separate issue. Cogdell *v.* Southern R. Co., 129 N. C. 398, 40 S. E. 202.

Instances of sufficient instructions on contributory negligence.— Central R., etc., Co. *v.* Lanier, 83 Ga. 587, 10 S. E. 279; Parker *v.* Georgia Pac. R. Co., 83 Ga. 539, 10 S. E. 233; Chicago Folding Box Co. *v.* Schallawitz, 118 Ill. App. 9; Cincinnati, etc., R. Co. *v.* McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; Greenleaf *v.* Dubuque, etc., R. Co., 33 Iowa 52; Herman *v.* George Weidemann Brewing Co., 87 S. W. 775, 27 Ky. L. Rep. 1016; George Weidemann Brewing Co. *v.* Wood, 87 S. W. 772, 27 Ky. L. Rep. 1012; Black *v.* Missouri Pac. R. Co., 172 Mo. 177, 72 S. W. 559; Grube *v.* Missouri Pac. R. Co., 98 Mo. 330, 11 S. W. 736, 14 Am. St. Rep. 645, 4 L. R. A. 776; Rice *v.* Wabash R. Co., 101 Mo. App. 459, 74 S. W. 428; Bowers *v.* Star Logging Co., 41 Oreg. 301, 68 Pac. 516; Lowrimore *v.* Palmer Mfg. Co., 60 S. C. 153, 38 S. E. 430; Gulf, etc.,

a servant in the prosecution of his work,[55] and as to his right to rely upon the

R. Co. *v.* Howard, 96 Tex. 582, 75 S. W. 805; Gulf, etc., R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151; St. Louis Southwestern R. Co. *v.* Arnold, (Tex. Civ. App. 1905) 87 S. W. 173; Quinn *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1904) 84 S. W. 395; El Paso Northeastern R. Co. *v.* Ryan, 36 Tex. Civ. App. 190, 81 S. W. 563; Missouri, etc., R. Co. *v.* Jones, 35 Tex. Civ. App. 584, 80 S. W. 852; Consumers' Cotton Oil Co. *v.* Gentry, 35 Tex. Civ. App. 445, 80 S. W. 394; Texas, etc., R. Co. *v.* Kelly, 34 Tex. Civ. App. 21, 80 S. W. 1073; Horton *v.* Ft. Worth Packing, etc., Co., 33 Tex. Civ. App. 150, 76 S. W. 211; International, etc., R. Co. *v.* Zapp, (Tex. Civ. App. 1899) 49 S. W. 673; Texas, etc., R. Co. *v.* McCoy, 17 Tex. Civ. App. 494, 44 S. W. 25; Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489; Johnson *v.* Ashland First Nat. Bank, 79 Wis. 414, 48 N. W. 712, 24 Am. St. Rep. 722.

Instruction on burden of proof.— Although plaintiff's evidence discloses contributory negligence, an instruction that the burden of proving contributory negligence is on defendant is not erroneous, where the jury are also told to look to all of the testimony, by whomsoever introduced. General Electric Co. *v.* Murray, 32 Tex. Civ. App. 226, 74 S. W. 50.

Instances of insufficient instructions.— Alabama Great Southern R. Co. *v.* Davis, 119 Ala. 572, 24 So. 862; Louisville, etc., R. Co. *v.* Thornton, 117 Ala. 274, 23 So. 778; Wadsworth *v.* Bugg, 71 Ark. 501, 76 S. W. 549; Grant *v.* Varney, 21 Colo. 329, 40 Pac. 771; Carroll *v.* East Tennessee, etc., R. Co., 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214; Hale Elevator Co. *v.* Trude, 41 Ill. App. 253; Pittsburgh, etc., R. Co. *v.* Collins, 163 Ind. 569, 71 N. E. 661; Pittsburgh, etc., R. Co. *v.* Lightheiser, 163 Ind. 247, 71 N. E. 218, 660; Missouri Pac. R. Co. *v.* Gibson, 56 Kan. 661, 44 Pac. 612; Smith *v.* Atlanta, etc., R. Co., 130 N. C. 344, 42 S. E. 139, 131 N. C. 616, 42 S. E. 976; Coates *v.* Chapman, 195 Pa. St. 109, 45 Atl. 676; Texas, etc., R. Co. *v.* Eberheart, 91 Tex. 321, 43 S. W. 510 [*affirming* (Civ. App. 1897) 40 S. W. 1060]; Texas, etc., R. Co. *v.* Reed, 88 Tex. 439, 31 S. W. 1058; Gulf, etc., R. Co. *v.* Hill, 29 Tex. Civ. App. 12, 70 S. W. 103; Virginia, etc., Wheel Co. *v.* Chalkley, 98 Va. 62, 34 S. E. 976.

55. Erroneous instruction on care required of servant. — *Alabama.* — Montgomery First Nat. Bank *v.* Chandler, 144 Ala. 286, 39 So. 822.

Arkansas.— Mt. Nebo Anthracite Coal Co. *v.* Williamson, 73 Ark. 530, 84 S. W. 779; Fordyce *v.* Edwards, 65 Ark. 98, 44 S. W. 1034.

Georgia.— Atlanta R., etc., Co. *v.* Bennett, 115 Ga. 879, 42 S. E. 244.

Illinois.— Rock Island Sash, etc., Works *v.* Pohlman, 210 Ill. 133, 71 N. E. 428 [*affirming* 99 Ill. App. 670]; Chicago, etc., R. Co. *v.* Avery, 109 Ill. 314; Gruenendahl *v.* Consolidated Coal Co., 108 Ill. App. 644; Illinois Cent. R. Co. *v.* North, 97 Ill. App. 124; Cleveland, etc., R. Co. *v.* Selsor, 55 Ill. App. 685; Missouri Furnace Co. *v.* Abend, 9 Ill. App. 319 [*affirmed* in 107 Ill. 44, 47 Am. Rep. 425].

Iowa.— Hawley *v.* Chicago, etc., R. Co., 71 Iowa 717, 29 N. W. 787; Greenleaf *v.* Dubuque, etc., R. Co., 33 Iowa 52.

Missouri.— Kennedy *v.* Kansas City, etc., R. Co., 190 Mo. 424, 89 S. W. 370; Donovan *v.* Gay, 97 Mo. 440, 11 S. W. 44.

Nebraska.— Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744.

Ohio.— Lake Shore, etc., R. Co. *v.* Fisher, 26 Ohio Cir. Ct. 143 [*affirmed* in 51 Ohio St. 574].

Tennessee.— Jackson, etc., St. R., etc., Co. *v.* Simmons, 107 Tenn. 392, 64 S. W. 705.

Texas.— Southern Pac. R. Co. *v.* Aylward, 79 Tex. 675, 15 S. W. 697; Texas Portland Cement, etc., Co. *v.* Lee, 36 Tex. Civ. App. 482, 82 S. W. 306 [writ of error *denied* in 98 Tex. 236, 82 S. W. 1025]; International, etc., R. Co. *v.* Stephenson, 22 Tex. Civ. App. 220, 54 S. W. 1086; Missouri, etc., R. Co. *v.* Parker, 20 Tex. Civ. App. 470, 49 S. W. 717, 50 S. W. 606.

Wisconsin.— Suter *v.* Park, etc., Lumber Co., 90 Wis. 118, 62 N. W. 927.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1181, 1188.

Instructions as to care required of servants held sufficient.— Alabama Steel, etc., Co. *v.* Wrenn, 136 Ala. 475, 34 So. 970; Sanders *v.* Georgia Cent. R. Co., 123 Ga. 763, 51 S. E. 728; Louisville, etc., R. Co. *v.* Thompson, 113 Ga. 983, 39 S. E. 483; Rock Island Sash, etc., Works *v.* Pohlman, 210 Ill. 133, 71 N. E. 428 [*affirming* 99 Ill. App. 670]; Whitney, etc., Co. *v.* O'Rourke, 172 Ill. 177, 50 N. E. 242 [*affirming* 68 Ill. App. 487]; Lake Shore, etc., R. Co. *v.* Parker, 131 Ill. 557, 23 N. E. 237; Hawley *v.* Chicago, etc., R. Co., 71 Iowa 717, 29 N. W. 787; Wendler *v.* People's House Furnishing Co., 165 Mo. 527, 65 S. W. 737; Swift *v.* Bleise, 63 Nebr. 739, 89 N. W. 310; Bennett *v.* Warren, 70 N. H. 564, 49 Atl. 105; Turrentine *v.* Wellington, 136 N. C. 308, 48 S. E. 739; Ritt *v.* True Tag Paint Co., 108 Tenn. 646, 69 S. W. 324; San Antonio, etc., R. Co. *v.* Lester, (Tex. 1905) 89 S. W. 752 [*reversing* (Tex. Civ. App. 1904) 84 S. W. 401]; International, etc., R. Co. *v.* Valandingham, (Tex. Civ. App. 1905) 85 S. W. 847; International, etc., R. Co. *v.* Tisdale, 36 Tex. Civ. App. 174, 81 S. W. 347; Southern Kansas R. Co. *v.* Sage, (Tex. Civ. App. 1904) 80 S. W. 1038; Missouri, etc., R. Co. *v.* Williams, 28 Tex. Civ. App. 615, 68 S. W. 805; Galveston, etc., R. Co. *v.* Williams, 26 Tex. Civ. App. 153, 62 S. W. 808; Sherman, etc., R. Co. *v.* Bell, (Tex. Civ. App. 1900) 58 S. W. 147; Galveston, etc., R. Co. *v.* Bonnet, (Tex. Civ. App. 1896) 38 S. W. 813; Virginia, etc., Wheel Co. *v.* Harris, 103 Va. 708, 49 S. E. 991; Druglis *v.* Northwestern Imp. Co., 41 Wash. 398, 83 Pac. 101; McCreery *v.* Ohio River R. Co., 49 W. Va. 301, 38 S. E. 534.

exercise of due care by the master or those for whom the master is responsible.[56] An instruction which omits the essential element of plaintiff's knowledge, actual or constructive, of the defect or danger, is erroneous,[57] as is one which fails to hypothesize negligence on his part,[58] or which ignores the question of proximate

Necessity of explaining meaning of "due care" see Brick *v.* Bosworth, 162 Mass. 334, 39 N. E. 36.

Where there is no direct evidence as to the immediate cause of the injury, the jury is properly instructed that they may take into account the instinct of self-preservation, in determining whether the servant exercised due care. Phinney *v.* Illinois Cent. R. Co., 122 Iowa 488, 98 N. W. 358.

Where injuries result from the master's violation of law, it is proper to instruct the jury that plaintiff is relieved from showing that he was in the exercise of ordinary care. Pawnee Coal Co. *v.* Royce, 184 Ill. 402, 56 N. E. 621 [*reversing* 79 Ill. App. 469].

Instruction on imminent danger.— The submission of the question whether a danger was so imminent that a prudent person "ought" not to have subjected himself to it was not prejudicial to the master, where the court, in charging on the subject, correctly used the word "would." Curran *v.* A. H. Stange Co., 98 Wis. 598, 74 N. W. 377.

56. McGhee *v.* Willis, 134 Ala. 281, 32 So. 301; Illinois Steel Co. *v.* McFadden, 196 Ill. 344, 63 N. E. 671, 89 Am. St. Rep. 319 [*affirming* 98 Ill. App. 296]; Pippin *v.* Sherman, etc., R. Co., (Tex. Civ. App. 1900) 58 S. W. 961; Jackson *v.* Missouri, etc., R. Co., 23 Tex. Civ. App. 319, 55 S. W. 376.

Correct instructions as to reliance on care of master.— Chicago, etc., R. Co. *v.* Lee, 29 Ind. App. 480, 64 N. E. 675; Missouri Pac. R. Co. *v.* Williams, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867; Moore *v.* Missouri, etc., R. Co., 30 Tex. Civ. App. 266, 69 S. W. 997. *Compare* Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710; West Chicago St. R. Co. *v.* Petters, 95 Ill. App. 479 [*affirmed* in 196 Ill. 298, 63 N. E. 662]; Carroll *v.* Williston, 44 Minn. 287, 46 N. W. 352; Cumberland Tel. Co. *v.* Loomis, 87 Tenn. 504, 11 S. W. 356.

57. *Alabama.*— Louisville, etc., R. Co. *v.* Banks, 132 Ala. 471, 31 So. 573; Louisville, etc., R. Co. *v.* Jones, 130 Ala. 456, 30 So. 586.

Illinois.— Erie, etc., Transp. Co. *v.* Gaines, 112 Ill. App. 189; Star, etc., Mill Co. *v.* Thomas, 27 Ill. App. 137.

Indiana.— Chicago, etc., R. Co. *v.* Glover, 154 Ind. 584, 57 N. E. 244; Terre Haute, etc., R. Co. *v.* Pruitt, 25 Ind. App. 227, 57 N. E. 949.

Iowa.— McDermott *v.* Iowa Falls, etc., R. Co., (1891) 47 N. W. 1037.

Texas.— Consumers' Cotton Oil Co. *v.* Gentry, 35 Tex. Civ. App. 445, 80 S. W. 394; Ft. Worth Ironworks *v.* Stokes, (Civ. App. 1903) 76 S. W. 231.

United States.— Texas, etc., R. Co. *v.* Rhodes, 71 Fed. 145, 18 C. C. A. 9.

See 34 Cent. Dig. tit. "Master and Servant," § 1185.

Instructions on knowledge or notice held sufficient.— *Georgia.*— Robert Portner Brewing Co. *v.* Cooper, (1904) 47 S. E. 631. *Compare* Georgia Cent. R. Co. *v.* Price, 121 Ga. 651, 49 S. E. 683.

Illinois.— Chicago, etc., R. Co. *v.* Knapp, 176 Ill. 127, 52 N. E. 927 [*affirming* 74 Ill. App. 148], holding that an instruction that plaintiff must show that he was "exercising reasonable and ordinary care," or was injured "while in the exercise of due care," is a sufficient submission of the question whether plaintiff knew that the appliances causing the injury were dangerous.

Indiana.— Pittsburgh, etc., R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. Rep. 120.

Kentucky.— Covington, etc., Bridge Co. *v.* Hull, 90 S. W. 1055, 28 Ky. L. Rep. 1038.

Michigan.— Chilson *v.* Lansing Wagon Works, 128 Mich. 43, 87 N. W. 79.

New York.— Odell *v.* New York Cent., etc., R. Co., 120 N. Y. 323, 24 N. E. 478, 17 Am. St. Rep. 650.

North Carolina.— De Berry *v.* Carolina Cent. R. Co., 100 N. C. 310, 6 S. E. 723.

Texas.— Texas, etc., R. Co. *v.* Kelly, 98 Tex. 123, 80 S. W. 79; Gulf, etc., R. Co. *v.* Silliphant, 70 Tex. 623, 8 S. W. 673; International, etc., R. Co. *v.* Vanlandingham, (Civ. App. 1905) 85 S. W. 847; Gulf, etc., R. Co. *v.* Gray, 25 Tex. Civ. App. 99, 63 S. W. 927; Galveston, etc., R. Co. *v.* Bonnet, (Civ. App. 1896) 38 S. W. 813. *Compare* International, etc., R. Co. *v.* Gourley, 21 Tex. Civ. App. 579, 54 S. W. 307.

Washington.— Hansen *v.* Seattle Lumber Co., 41 Wash. 349, 83 Pac. 102.

See 34 Cent. Dig. tit. "Master and Servant," § 1185.

Compare Postal Tel. Cable Co. *v.* Halsey, 115 Ala. 193, 22 So. 854; Breeden *v.* Big Circle Min. Co., 103 Mo. App. 176, 76 S. W. 731; Gensen *v.* Ohio Oil Co., 22 Ohio Cir. Ct. 276, 12 Ohio Cir. Dec. 10; Christianson *v.* Pioneer Furniture Co., 92 Wis. 649, 66 N. W. 699.

For correct instruction under S. C. Const. art. 9, § 15, see Younghlood *v.* South Carolina, etc., R. Co., 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824.

58. *Alabama.*— Sloss-Sheffield Steel, etc., Co. *v.* Smith, (1905) 40 So. 91; Tennessee Coal, etc., Co. *v.* Bridges, 144 Ala. 229, 39 So. 902.

Illinois.— Hartrich *v.* Hawes, 202 Ill. 334, 67 N. E. 13 [*affirming* 103 Ill. App. 433]; Chicago, etc., R. Co. *v.* Eaton, 194 Ill. 441, 62 N. E. 784, 88 Am. St. Rep. 161 [*affirming* 96 Ill. App. 570]; Erie, etc., Transp. Co. *v.* Gaines, 112 Ill. App. 189.

Massachusetts.— Knight *v.* Overman Wheel

cause.[59] To entitle defendant to an instruction grouping the evidence on an issue of contributory negligence, the facts must have been specifically pleaded.[60]

(II) *Scope of Employment.* Where there is evidence tending to show that a servant was injured while doing work outside of the scope of his employment,[61] it is proper to instruct the jury that the servant cannot recover, if the injury occurred while he was in the performance of an act outside of his duties, and that the scope of duty within which a servant is entitled to protection is to be defined by what he was employed to perform, and what, with the knowledge and approval of the employer, he did perform, rather than by the verbal designation of his position.[62]

(III) *Inexperienced or Youthful Servants.* In an action for injuries to an inexperienced or youthful servant, the jury should be charged to consider the servant's experience, age, capacity, and appearance on the question of contributory negligence, and on the question of how much instruction and care he was entitled to, and it is not sufficient to charge generally upon his duty to exercise reasonable care.[63]

Co., 174 Mass. 455, 54 N. E. 890, in which the instruction assumed that the servant was negligent.

North Carolina.— Meredith *v.* Cranberry Coal, etc., Co., 99 N. C. 576, 5 S. E. 659; Cornwall *v.* Charlotte, etc., R. Co., 97 N. C. 11, 2 S. E. 659.

Tennessee.— Louisville, etc., R. Co. *v.* Wallace, 90 Tenn. 53, 15 S. W. 921; Cumberland Tel. Co. *v.* Loomis, 87 Tenn. 504, 11 S. W. 356.

Texas.— Missouri, etc., R. Co. *v.* Bodie, 32 Tex. Civ. App. 168, 74 S. W. 100. *Compare* Texas, etc., R. Co. *v.* Kelly, (Civ. App. 1903) 80 S. W. 1073.

Wisconsin.— Craven *v.* Smith, 89 Wis. 119, 61 N. W. 317.

59. Youngblood *v.* South Carolina, etc., R. Co., 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824; St. Louis, etc., R. Co. *v.* Rea, (Tex. 1905) 87 S. W. 324 [*reversing* (Civ. App. 1904) 84 S. W. 428]; Consumers' Cotton Oil Co. *v.* Gentry, 35 Tex. Civ. App. 445, 80 S. W. 394; Bonner *v.* Moore, 3 Tex. Civ. App. 416, 22 S. W. 272; McCreery *v.* Ohio River R. Co., 49 W. Va. 301, 38 S. E. 534; Craven *v.* Smith, 89 Wis. 119, 61 N. W. 317.

Necessity of evidence to support instruction see Atchison, etc., R. Co. *v.* Howard, 49 Fed. 206, 1 C. C. A. 229. See also New York, etc., R. Co. *v.* Lyons, 119 Pa. St. 324, 13 Atl. 205; Columbia, etc., R. Co. *v.* Hawthorne, 3 Wash. Terr. 353, 19 Pac. 25.

Instructions on proximate cause upheld.— Prather *v.* Richmond, etc., R. Co., 80 Ga. 427, 9 S. E. 930, 12 Am. St. Rep. 263; Church *v.* Chicago, etc., R. Co., 119 Mo. 203, 23 S. W. 1056; Charping *v.* Toxaway Mills, 70 S. C. 470, 50 S. E. 186; Missouri, etc., R. Co. *v.* Purdy, (Tex. 1905) 86 S. W. 321 [*reversing* (Civ. App. 1904) 83 S. W. 37]; St. Louis, etc., R. Co. *v.* McClain, 80 Tex. 85, 15 S. W. 789; Galveston, etc., R. Co. *v.* McAdams, (Tex. Civ. App. 1905) 84 S. W. 1076; San Antonio, etc., R. Co. *v.* Ankerson, 31 Tex. Civ. App. 327, 72 S. W. 219; Houston, etc., R. Co. *v.* Higgins, 22 Tex. Civ. App. 430, 55 S. W. 744. *Compare* El Paso, etc., R. Co. *v.* Vizard, (Tex. Civ. App. 1905) 88 S. W. 457; Missouri, etc., R. Co. *v.* Kellerman, (Tex. Civ. App. 1905) 87 S. W. 401; Norfolk, etc., R. Co. *v.* Cromer, 99 Va. 763, 40 S. E. 54.

60. Missouri, etc., R. Co. *v.* Parker, (Tex. Civ. App. 1899) 49 S. W. 717.

61. See Weiden *v.* Brush Electric Light Co., 73 Mich. 268, 41 N. W. 269.

62. Rummel *v.* Dilworth, 131 Pa. St. 509, 19 Atl. 345, 346, 17 Am. St. Rep. 827. *Compare* International, etc., R. Co. *v.* Walters, (Tex. Civ. App. 1904) 80 S. W. 668, in which an instruction was upheld which gave no definition of scope of employment.

It was not error to refuse an instruction that a brakeman was guilty of contributory negligence, if, when ordered to deliver a message to the engineer, he stayed from his post longer than necessary, where an instruction had been given that defendant was not liable for injuries received by the brakeman, owing to his being at a location on the train not within the scope of his duty. Norfolk, etc., R. Co. *v.* Marpole, 97 Va. 594, 34 S. E. 462.

Erroneous instruction on scope of employment see Baltimore, etc., R. Co. *v.* Doty, 133 Fed. 866, 67 C. C. A. 38.

63. Keating *v.* Coon, 102 N. Y. App. Div. 112, 92 N. Y. Suppl. 474.

In an action by a minor employee, the court should instruct that plaintiff's minority did not relieve him from the duty of using the care to prevent injury to himself which one of his age and intelligence would use under similar circumstances. Bering Mfg. Co. *v.* Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869.

For instances of instructions as to inexperienced or youthful servant held correct see Alabama Steel, etc., Co. *v.* Wrenn, 136 Ala. 475, 34 So. 970; Eagle, etc., Mills *v.* Herron, 119 Ga. 389, 46 S. E. 405; Vinson *v.* Morning News, 118 Ga. 655, 45 S. E. 481; Scott *v.* McMenamin, 51 Ill. App. 121; Stanley *v.* Chicago, etc., R. Co., 112 Mo. App. 601, 87 S. W. 112; McCarragher *v.* Rogers, 120 N. Y. 526, 24 N. E. 812; Roth *v.* Northern Pac. Lumbering Co., 18 Oreg. 205, 22 Pac. 842; Honlahan *v.* New American File

(iv) *Duty to Discover or Remedy Defect.*[64] An instruction, in an action by a servant for personal injuries, which ignores the duty of the servant to inform himself of the surroundings and perils attendant on the nature of the service in which he was engaged at the time of his injury, and which were open to his observation in the exercise of reasonable care on his part, is erroneous;[65] and where there is a distinct issue made as to whether it was the duty of plaintiff to inspect the machinery, appliances, or place of work, the court should charge that, if such duty rested on him, he cannot recover for any defects which he might have discovered by inspection.[66] So too, where there is evidence to show that it was the servant's duty to see that the appliances or place of work were kept in a reasonably safe condition the court should give a proper instruction presenting the subject of his duty to the jury.[67] Where the court has fully charged as to contributory negligence, a refusal to charge that it was the servant's duty to take notice of the visible circumstances affecting his safety is not error.[68]

(v) *Methods of Work.* Where there is evidence that plaintiff's injuries were caused by the method of work adopted by him,[69] the jury should be instructed that if plaintiff was guilty of negligence in the method of work adopted by him, and this negligence contributed to his injury, he cannot recover, and that he was bound to exercise such care as was commensurate with the danger of his employment at the time of the injury, and that if he did not use such care, and by its exercise could have avoided the injury, he cannot recover;[70] and where it appears that there were two ways in which a servant might have performed his work

Co., 17 R. I. 141, 20 Atl. 268; Texas, etc., R. Co. *v.* Brick, 83 Tex. 598, 20 S. W. 511; Hillsboro Oil Co. *v.* White, (Tex. Civ. App. 1899) 54 S. W. 452; Gulf, etc., R. Co. *v.* Wittig, (Tex. Civ. App. 1896) 35 S. W. 857; Virginia Iron, etc., Co. *v.* Tomlinson, 104 Va. 249, 51 S. E. 362; Nyback *v.* Champagne Lumber Co., 109 Fed. 732, 48 C. C. A. 632.

Where plaintiff was of mature years, and, while it was alleged that he was inexperienced in the work, it appeared that the danger was open to the observation of any one of ordinary mental capacity, it was held error to refuse a charge that if such danger was as much open to the observation of plaintiff as it was to that of defendant's foreman, under whose direction he was working, plaintiff could not recover, as in such case he assumed the risk. Texas, etc., R. Co. *v.* French, 86 Tex. 96, 23 S. W. 642.

64. Reliance on care of master see *supra*, IV, H, 7, d, (v).

65. Fordyce *v.* Edwards, 60 Ark. 438, 30 S. W. 758; Illinois Cent. R. Co. *v.* Pummill, 58 Ill. App. 83; Haley *v.* Jump River Lumber Co., 81 Wis. 412, 51 N. W. 321, 956.

Necessity of evidence to support instruction see Bonner *v.* Whitcomb, 80 Tex. 178, 15 S. W. 899; Houston, etc., R. Co. *v.* Rodican, 15 Tex. Civ. App. 556, 40 S. W. 535; Wedgwood *v.* Chicago, etc., R. Co., 44 Wis. 44.

For instructions which have been upheld see Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130; McNamara *v.* Logan, 100 Ala. 187, 14 So. 175; Little Rock, etc., R. Co. *v.* Voss, (Ark. 1892) 18 S. W. 172; Le Clair *v.* First Div. St. Paul, etc., R. Co., 20 Minn. 9; Dooner *v.* Delaware, etc., Canal Co., 171 Pa. St. 581, 33 Atl. 415; Little Rock, etc., R. Co. *v.* Moseley, 56 Fed. 1009, 6 C. C. A. 225. *Compare* Peoria, etc., R. Co. *v.* Hardwick, 48 Ill. App. 562; Greenleaf *v.* Dubuque, etc., R. Co., 33 Iowa 52; Missouri Pac. R. Co. *v.* Crenshaw, 71 Tex. 340, 9 S. W. 262; Bookrum *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1900) 57 S. W. 919; Sabine, etc., R. Co. *v.* Ewing, 1 Tex. Civ. App. 531, 21 S. W. 700.

66. Cumberland Tel. Co. *v.* Loomis, 87 Tenn. 504, 11 S. W. 356; Gulf, etc., R. Co. *v.* Kizziah, 86 Tex. 81, 23 S. W. 578 [*reversing* 4 Tex. Civ. App. 356, 22 S. W. 110, 26 S. W. 242]; Mexican Cent. R. Co. *v.* Henderson, 114 Fed. 892, 52 C. C. A. 512.

67. Stroble *v.* Chicago, etc., R. Co., 70 Iowa 555, 31 N. W. 63, 59 Am. Rep. 456.

68. Newport News, etc., Co. *v.* Campbell, 25 S. W. 267, 15 Ky. L. Rep. 714.

69. Chase *v.* Burlington, etc., R. Co., 76 Iowa 675, 39 N. W. 196; Adams *v.* Eddy, (Tex. Civ. App. 1894) 29 S. W. 180; Bonner *v.* Hickey, (Tex. Civ. App. 1893) 23 S. W. 85.

70. St. Louis, etc., R. Co. *v.* Traweek, 84 Tex. 65, 19 S. W. 370.

For other forms of instructions as to method of work see Baltimore Boot, etc., Mfg. Co. *v.* Jamar, 93 Md. 404, 49 Atl. 847, 86 Am. St. Rep. 428; Curtis *v.* McNair, 173 Mo. 270, 73 S. W. 167; Prosser *v.* Montana Cent. R. Co., 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814 (as to the effect, custom, or usage); Kaiser *v.* Flaccus, 138 Pa. St. 332, 22 Atl. 88; O'Brien *v.* Missouri, etc., R. Co., 36 Tex. Civ. App. 528, 82 S. W. 319.

For instances of erroneous and misleading instructions see Tennessee Coal, etc., R. Co. *v.* Bridges, 144 Ala. 229, 39 So. 902; Gibson *v.* Burlington, etc., R. Co., 107 Iowa 596, 78 N. W. 190; Union Pac. R. Co. *v.* Fray, 35 Kan. 700, 12 Pac. 98; Bodie *v.* Charleston, etc., R. Co., 61 S. C. 468, 39 S. E. 715 (as to effect of custom or usage); Missouri, etc.,

with reasonable despatch, one safe and the other attended with danger, and the servant adopted the dangerous way, failure, on request, to instruct that the burden rests on the servant to remove the presumption of negligence, and to show that he was exercising ordinary care before he can recover, is prejudicial error.[71]

(vi) *Disobedience of Rules and Orders.* Where there is evidence to justify an instruction thereon,[72] the court should instruct the jury as to the effect of a servant's knowingly violating a rule or order,[73] and as to the effect of acquiescence in such violation on the part of the master or his representative.[74] An instruction which ignores the element of the servant's knowledge of a rule,[75] which excludes the effect of contributory negligence in defeating a recovery,[76] or which ignores precautions shown to have been taken by the servant to comply with the rule he is charged with having violated[77] is erroneous. Where the evidence warrants it, it is proper to instruct that if plaintiff violated a rule of defendant, and his injuries were the result thereof, he will not be debarred from recovery, if under the circumstances a reasonably prudent person would have done as he did.[78]

(vii) *Compliance With Commands.* In an action by a servant, injured while acting in obedience to the order of his master or of one for whose negli-

R. Co. *v.* Baker, (Tex. Civ. App. 1900) 58 S. W. 964 (as to effect of custom); Fordyce *v.* Yarborough, 1 Tex. Civ. App. 260, 21 S. W. 421.

71. Lake Shore, etc., R. Co. *v.* Whidden, 23 Ohio Cir. Ct. 85. See also Texas Cent. R. Co. *v.* Pelfrey, 35 Tex. Civ. App. 501, 80 S. W. 1036.

Charge holding plaintiff to excessive degree of care see Postal Tel. Cable Co. *v.* Hulsey, 115 Ala. 193, 22 So. 854.

72. Western, etc., R. Co. *v.* Bussey, 95 Ga. 584, 23 S. E. 207; Deeds *v.* Chicago, etc., R. Co., 74 Iowa 154, 37 N. W. 124; Covel *v.* Harvey, (Miss. 1893) 12 So. 462; Texas, etc., R. Co. *v.* Leighty, 88 Tex. 604, 32 S. W. 515.

Where evidence of a rule has been properly excluded, it is proper to refuse to instruct that plaintiff could not recover if such a rule existed, and was known to him, and if the failure to comply therewith contributed to his injury. Missouri Pac. R. Co. *v.* Lamothe, 76 Tex. 219, 13 S. W. 194.

73. Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545, 10 So. 283; Straight Creek Coal Co. *v.* Haney, 87 S. W. 1114, 27 Ky. L. Rep. 1117; Louisville, etc., R. Co. *v.* Ward, 61 Fed. 927, 10 C. C. A. 166. *Compare* Missouri, etc., R. Co. *v.* Mayfield, 29 Tex. Civ. App. 477, 68 S. W. 807.

In the case of disobedience of an order by a convict, an instruction requested by defendant, that if there was such an order, and this fact was known to plaintiff, it was his duty to comply therewith strictly, and his failure so to do was negligence which would prevent his recovery, should be given, but upon the hypothesis of duress and fear of punishment. Knoxville Iron Co. *v.* Smith, 86 Tenn. 45, 5 S. W. 438.

Mere omission of comma in instruction immaterial see Jarvis *v.* Flint, etc., R. Co., 128 Mich. 61, 87 N. W. 136.

74. **Where there is evidence of such habitual violation of certain rules that the master was presumably aware of such violation and approved of it,** it is proper to refuse instructions in regard to the violation of such rules that omit all reference to the question of the master's acquiescence therein. Chicago, etc., R. Co. *v.* Flynn, 154 Ill. 488, 40 N. E. 332 [*affirming* 54 Ill. App. 387].

Instance of correct instructions.— The instruction: "If you find there was a rule prohibiting brakemen from uncoupling cars while in motion, or, if there was a rule requiring the brakeman, before taking charge of a train, to inspect the coupling appliances of the cars, and such rules were brought to the plaintiff's notice . . . and [he] neglected to comply with either of said rules, and such neglect was the cause of the injury, then the plaintiff cannot recover, unless you find . . . that the brakemen habitually disregarded them, with the acquiescence and knowledge of defendant," correctly states the law governing the observance of rules by employees. Louisville, etc., R. Co. *v.* Reagan, 96 Tenn. 128, 139, 33 S. W. 1050. See also Prather *v.* Richmond, etc., R. Co., 80 Ga. 427, 9 S. E. 530, 12 Am. St. Rep. 263. *Compare* Chicago, etc., R. Co. *v.* Myers, 86 Ill. App. 401, where an instruction on waiver of a rule by the master was held to be misleading, in that it implied that plaintiff was relieved of exercising due care for his own safety, irrespective of the rule.

75. Conners *v.* Burlington, etc., R. Co., 87 Iowa 147, 53 N. W. 1092.

Instructions withdrawing all inquiry as to plaintiff's knowledge of a rule which he had violated from the jury are properly refused. Louisville, etc., R. Co. *v.* Perry, 87 Ala. 392, 6 So. 40.

76. Deeds *v.* Chicago, etc., R. Co., 69 Iowa 164, 28 N. W. 488, in which the jury were instructed that a servant, injured solely on account of his negligence in violating the master's rules, cannot recover.

77. Texas, etc., R. Co. *v.* Lester, 75 Tex. 56, 12 S. W. 955.

78. Texas, etc., R. Co. *v.* Mortensen, 27 Tex. Civ. App. 106, 66 S. W. 99.

gence the master is responsible, the question of contributory negligence is properly presented to the jury by an instruction which states in effect that plaintiff will not be barred from recovery by the fact that the work was dangerous, unless the danger was so obvious and imminent, and the injury thereby so inevitable, that a man of ordinary prudence would refuse to obey, if ordered by his master to do it.[79]

(VIII) *ACTS IN EMERGENCIES.* Where there is evidence upon which to base an instruction upon the doctrine of emergency or sudden danger,[80] it is proper to instruct the jury that a man under sudden excitement or peril is only required to exercise such care for his safety as an ordinarily prudent man would have exercised under the circumstances, and if he exercised such degree of care, then in that case he is not guilty of contributory negligence.[81] Such an instruction should, however, refer to the question as to whether the servant had time, after knowing his danger, to protect himself.[82]

(IX) *INJURY AVOIDABLE BY CARE OF MASTER.* Where there is evidence to justify an instruction upon the doctrine of discovered peril,[83] the court should instruct the jury that a servant may recover notwithstanding his own negligence, if defendant or his representative knew that he was negligent and in danger long enough before the accident to have prevented it, in the exercise of reasonable and ordinary care;[84] and an instruction which in effect withdraws the issue of discovered peril raised by the evidence from the jury is properly refused.[85]

8. VERDICT AND FINDINGS[86] — a. General Verdict. In an action by a servant for an injury claimed to be due to defendant's negligence, a general verdict is conclusive on the questions of contributory negligence and assumed risk;[87] and where the act or omission complained of constitutes actionable negligence, a general verdict for plaintiff includes a finding that the negligence was the proximate cause of the injury.[88]

b. Sufficiency of Findings to Sustain Verdict or Judgment. In order to support a verdict or judgment in a personal injury case,[89] special findings must be

79. Van Duzen Gas, etc., Engine Co. *v.* Schelies, 61 Ohio St. 298, 55 N. E. 998.

For other instructions which have been upheld as to obedience to orders see Hunt *v.* Conner, 26 Ind. App. 41, 59 N. E. 50; Elmore *v.* Seaboard Air Line R. Co., 132 N. C. 865, 44 S. E. 620, 131 N. C. 569, 42 S. E. 989, 130 N. C. 506, 41 S. E. 786; Galveston, etc., R. Co. *v.* Sanchez, (Tex. Civ. App. 1901) 65 S. W. 893. *Compare* Bonner *v.* Whitcomb, 80 Tex. 178, 15 S. W. 899.

Instructions held properly refused see Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145; Illinois Cent. R. Co. *v.* Sporleder, 90 Ill. App. 590; Hawley *v.* Chicago, etc., R. Co., 71 Iowa 717, 29 N. W. 787.

It is erroneous to instruct that "it is in general the duty of an employe to obey the orders of his superior, and in the absence of knowledge or means of knowledge to the contrary, he may presume it safe for him to do so," in that it implies that the servant might, as a matter of law, presume it safe for him to obey the command. Chicago, etc., R. Co. *v.* McCarty, 49 Nebr. 475, 68 N. W. 633.

80. **Instruction must be based on evidence.** — Martin *v.* California Cent. R. Co., 94 Cal. 326, 29 Pac. 645; Condiff *v.* Kansas City, etc., R. Co., 45 Kan. 256, 25 Pac. 562; Jackson, etc., St. R. Co. *v.* Simmons, 107 Tenn. 392, 64 S. W. 705.

81. Richmond, etc., R. Co. *v.* Farmer, 97 Ala. 141, 12 So. 86.

For instances of sufficient instructions see Peoria, etc., R. Co. *v.* Rice, 144 Ill. 227, 33 N. E. 951 [*affirming* 46 Ill. App. 60]; St. Louis Southwestern R. Co. *v.* Jacobson, 23 Tex. Civ. App. 150, 66 S. W. 1111; Dingee *v.* Unrue, 98 Va. 247, 35 S. E. 794.

Forgetfulness at a critical moment is not, as a matter of law, negligence, and hence an instruction that plaintiff was guilty of contributory negligence if he knew of the danger of performing his work in the manner selected, and from inattention failed to avoid it, is properly refused. Kilpatrick *v.* Grand Trunk R. Co., 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887.

82. Jeffrey *v.* Keokuk, etc., R. Co., 56 Iowa 546, 9 N. W. 884.

83. **Evidence to support instruction necessary** see Aurandt *v.* Chicago, etc., R. Co., 90 Iowa 617, 57 N. W. 442.

84. See Morbey *v.* Chicago, etc., R. Co., 116 Iowa 84, 89 N. W. 105; Bodie *v.* Charleston, etc., R. Co., 61 S. C. 468, 39 S. E. 715.

85. Chicago, etc., R. Co. *v.* Williams, (Tex. Civ. App. 1904) 83 S. W. 248.

86. **Interrogatories which must be submitted to jury** see TRIAL.

Verdict and findings in general see TRIAL.

87. Hone *v.* Mammoth Min. Co., 27 Utah 168, 75 Pac. 381.

88. Chicago, etc., R. Co. *v.* Wicker, (Ind. App. 1904) 71 N. E. 223.

89. **Instances of findings held sufficient to support verdict or judgment** see Louisville,

definite and unambiguous,[90] and supported by the evidence;[91] and in Wisconsin a special verdict should find whether there was any actionable negligence, in what it consisted, and whether it was the proximate cause of the injury.[92] Where a general verdict is in irreconcilable conflict with the special findings, it will not be allowed to stand;[93] nor can a judgment be based upon inconsistent special

etc., R. Co. *v.* Graham, 124 Ind. 89, 24 N. E. 668; Boyce *v.* Schroeder, 21 Ind. App. 28, 51 N. E. 376; Keller *v.* Gaskill, 20 Ind. App. 502, 50 N. E. 363; Kinney *v.* North Carolina R. Co., 122 N. C. 961, 30 S. E. 313; Groth *v.* Thomann, 110 Wis. 488, 86 N. W. 178; Crouse *v.* Chicago, etc., R. Co., 102 Wis. 196, 78 N. W. 446, 778; New York, etc., R. Co. *v.* O'Leary, 93 Fed. 737, 35 C. C. A. 562.

Findings held insufficient see Bane *v.* Keefer, 152 Ind. 544, 53 N. E. 834; Evansville, etc., R. Co. *v.* Tohill, 143 Ind. 49, 41 N. E. 709, 42 N. E. 352; East Chicago Foundry Co. *v.* Ankeny, 19 Ind. App. 150, 47 N. E. 936, 49 N. E. 186; Terry *v.* Louisville, etc., R. Co., 15 Ind. App. 353, 43 N. E. 273, 44 N. E. 59; Cleveland, etc., R. Co. *v.* Martin, 13 Ind. App. 485, 41 N. E. 1051; Louisville, etc., R. Co. *v.* Breedlove, 10 Ind. App. 657, 38 N. E. 357; Ebersole *v.* Northern Cent. R. Co., 23 Hun (N. Y.) 114; Andrews *v.* Chicago, etc., R. Co., 96 Wis. 348, 71 N. W. 372; Rysdorp *v.* George Pankratz Lumber Co., 95 Wis. 622, 70 N. W. 677; Klochinski *v.* Shores Lumber Co., 93 Wis. 417, 67 N. W. 934.

90. See Indiana Bituminous Coal Co. *v.* Buffey, 28 Ind. App. 108, 62 N. E. 279; Keller *v.* Gaskill, 20 Ind. App. 502, 50 N. E. 303; Sherman *v.* Menominee River Lumber Co., 77 Wis. 14, 45 N. W. 1079.

91. Morris *v.* Winchester Repeating Arms Co., 73 Conn. 680, 49 Atl. 180; Crane *v.* Chicago, etc., R. Co., 83 Minn. 278, 86 N. W. 328; Westbrook *v.* Crowdus, (Tex. Civ. App. 1900) 58 S. W. 195; Beyersdorf *v.* Cream City Sash, etc., Co., 109 Wis. 456, 84 N. W. 860; Lagage *v.* Chicago, etc., R. Co., 91 Wis. 507, 65 N. W. 165.

Finding authorized by evidence see Daley *v.* Brown, 167 N. Y. 381, 60 N. E. 752 [*affirming* 45 N. Y. App. Div. 428, 60 N. Y. Suppl. 840].

A fact involving contributory negligence need not be found from direct evidence, but may be gathered by inference from other facts. Hyde *v.* Mendel, 75 Conn. 140, 52 Atl. 744.

92. Kucera *v.* Merrill Lumber Co., 91 Wis. 637, 65 N. W. 374. See also Groth *v.* Thomann, 110 Wis. 488, 86 N. W. 178; Maitland *v.* Gilbert Paper Co., 97 Wis. 476, 72 N. W. 1124, 65 Am. St. Rep. 137; Andrews *v.* Chicago, etc., R. Co., 96 Wis. 348, 71 N. W. 372; Rysdorp *v.* George Pankratz Lumber Co., 95 Wis. 622, 70 N. W. 677; Bagnowski *v.* A. J. Linderman, etc., Co., 93 Wis. 592, 67 N. W. 1131; Kutchera *v.* Goodwillie, 93 Wis. 448, 67 N. W. 729 [*following* Kucera *v.* Merrill Lumber Co., 91 Wis. 637, 65 N. W. 374].

Unless the fact appears by necessary implication from the facts found or from undisputed evidence, a finding that defendant's negligence was the proximate cause of the injury is essential to a recovery. Maitland *v.* Gilbert Paper Co., 97 Wis. 476, 72 N. W. 1124, 65 Am. St. Rep. 137.

A finding that "the machine was not safe to be used in the mill" does not necessarily show that the use of it was negligent as against an employee. Rysdorp *v.* George Pankratz Lumber Co., 95 Wis. 622, 70 N. W. 677.

93. *California.* — Vaughn *v.* California Cent. R. Co., 83 Cal. 18, 23 Pac. 215.

Illinois. — East St. Louis Connecting R. Co. *v.* Gehring, 54 Ill. App. 35.

Indiana. — Baltimore, etc., R. Co. *v.* Paul, 143 Ind. 23, 40 N. E. 519, 28 L. R. A. 216; Grand Rapids, etc., R. Co. *v.* Boyd, 65 Ind. 526; J. Wooley Coal Co. *v.* Bracken, 30 Ind. App. 624, 66 N. E. 775; Consolidated Stone Co. *v.* Redmon, 23 Ind. App. 319, 55 N. E. 454; Guedelhofer *v.* Ernsting, 23 Ind. App. 188, 55 N. E. 113; Arcade File Works *v.* Juteau, 15 Ind. App. 460, 40 N. E. 818, 44 N. E. 326; Wilson *v.* Evers, 15 Ind. App. 46, 43 N. E. 572; Lynch *v.* Chicago, etc., R. Co., 8 Ind. App. 516, 36 N. E. 44; Stewart *v.* Patrick, 5 Ind. App. 50, 30 N. E. 814.

Iowa. — Coffman *v.* Chicago, etc., R. Co., 90 Iowa 462, 57 N. W. 955; Baird *v.* Chicago, etc., R. Co., 55 Iowa 121, 7 N. W. 460.

Kansas. — St. Louis, etc., R. Co. *v.* Bricker, 61 Kan. 224, 59 Pac. 268.

Michigan. — Thorsen *v.* Babcock, 68 Mich. 523, 36 N. W. 723.

Wisconsin. — Darcey *v.* Farmers' Lumber Co., 87 Wis. 245, 58 N. W. 382.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1195, 1196.

Compare the following cases in which it was held that there was no irreconcilable conflict between the special findings and the general verdict: William Graver Tack Works *v.* O'Donnell, 191 Ill. 236, 60 N. E. 831 [*affirming* 91 Ill. App. 524]; Quick *v.* Indianapolis, etc., R. Co., 130 Ill. 334, 22 N. E. 709 [*reversing* 29 Ill. App. 143]; Chicago, etc., R. Co. *v.* Snyder, 128 Ill. 655, 21 N. E. 520; Clear Creek Stone Co. *v.* Dearmin, 160 Ind. 162, 66 N. E. 609; D. H. Davis Coal Co. *v.* Polland, 158 Ind. 607, 62 N. E. 492; Indianapolis Union R. Co. *v.* Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; Louisville, etc., R. Co. *v.* Kemper, 153 Ind. 618, 53 N. E. 931; Consolidated Stone Co. *v.* Summit, 152 Ind. 297, 53 N. E. 235; Ft. Wayne, etc., R. Co. *v.* Beyerle, 110 Ind. 100, 11 N. E. 6; Robinson *v.* Etter, 30 Ind. App. 253, 63 N. E. 767; Chicago, etc., R. Co. *v.* Lee, 29 Ind. App. 480, 64 N. E. 675; Flutter *v.* New York, etc., R. Co., 27 Ind. App. 511, 59 N. E. 337; Chicago, etc., R. Co. *v.* Ferguson, 27 Ind. App. 114, 59 N. E. 1088; Indianapolis Gas Co. *v.* Shumack, 23 Ind. App. 87, 54 N. E. 414; Hobbs *v.* Salem-Bedford Stone Co., 22 Ind. App. 436, 53 N. E. 1063;

findings. Such a judgment is so manifestly erroneous that it will be reversed, although no other error is disclosed.[94]

c. Responsiveness to Issues and Instructions. To be upheld, the verdict and special findings of the jury in a personal injury action must be responsive to the issues and instructions;[95] and it is improper to submit special interrogatories which do not conform to the issues.[96] The fact that the jury makes a finding upon an immaterial issue is not ground for exception.[97]

d. Construction. The verdict and findings of the jury in an action by a servant to recover for personal injuries are to be construed reasonably, and are not to be set aside unless clearly erroneous or insufficient.[98]

9. New Trial. It is error to refuse a new trial where the great preponderance of evidence is against the finding of the jury.[99]

10. Appeal and Error[1] **— a. In General.** An appeal or writ of error in an action by a servant to recover from his master for personal injuries is governed by the general rules of law governing such proceedings in other civil actions.[2]

Lake Shore, etc., R. Co. *v.* Malcom, 12 Ind. App. 612, 40 N. E. 822; American Straw Board Co. *v.* Faust, 11 Ind. App. 638, 39 N. E. 528; Indianapolis Union R. Co. *v.* Ott, 11 Ind. App. 564, 38 N. E. 842, 39 N. E. 529; Romona Oolitic Stone Co. *v.* Phillips, 11 Ind. App. 118, 39 N. E. 96; Lake Erie, etc., R. Co. *v.* McHenry, 10 Ind. App. 525, 37 N. E. 186; Pieart *v.* Chicago, etc., R. Co., 82 Iowa 148, 47 N. W. 1017; Conners *v.* Burlington, etc., R. Co., 71 Iowa 490, 32 N. W. 465, 60 Am. Rep. 814; Roe *v.* Winston, 89 Minn. 160, 94 N. W. 433; Crandall *v.* McIlrath, 24 Minn. 127. See Gates *v.* Chicago, etc., R. Co., 2 S. D. 422, 50 N. W. 907, in which the special findings were held immaterial in view of the evidence.

94. Porter *v.* Western North Carolina R. Co., 97 N. C. 66, 2 S. E. 581, 2 Am. St. Rep. 272; Deisenrieter *v.* Kraus-Merkel Malting Co., 97 Wis. 279, 72 N. W. 735; Darcey *v.* Farmers' Lumber Co., 91 Wis. 654, 65 N. W. 491; Goff *v.* Chippewa River, etc., R. Co., 86 Wis. 237, 56 N. W. 465; Murray *v.* Abbot, 61 Wis. 198, 20 N. W. 910; McBride *v.* Union Pac. R. Co., 3 Wyo. 247, 21 Pac. 687. *Compare* New York, etc., R. Co. *v.* Ostman, (Ind. 1895) 41 N. E. 1037; Stetler *v.* Chicago, etc., R. Co., 49 Wis. 609, 6 N. W. 303, in which the findings were held not to be inconsistent.

In Indiana, where special findings as to whether plaintiff should have discovered the defect, negative each other, a general verdict for plaintiff is decisive that he was not guilty of contributory negligence. Matchett *v.* Cincinnati, etc., R. Co., 132 Ind. 334, 31 N. E. 792.

95. Cincinnati, etc., R. Co. *v.* Darling, 130 Ind. 376, 30 N. E. 416; Southern Kansas R. Co. *v.* Griffith, 54 Kan. 428, 38 Pac. 478; Omaha, etc., R. Co. *v.* Hall, 33 Nebr. 229, 50 N. W. 10. *Compare* Monaghan *v.* Pacific Rolling-Mill Co., 81 Cal. 190, 22 Pac. 590; Consumers' Paper Co. *v.* Eyer, 160 Ind. 424, 66 N. E. 994; Cosgrove *v.* Filer, etc., Co., 112 Wis. 457, 88 N. W. 220.

Where the evidence is in conflict on the question whether the employment was dangerous or not, the jury is not obliged to find for defendant under an instruction that if the work was dangerous and plaintiff knew it, he cannot recover. Union Pac. R. Co. *v.* O'Hern, 24 Nebr. 775, 40 N. W. 293.

96. McCormick Harvesting Mach. Co. *v.* Sendzikowski, 72 Ill. App. 402; Nix *v.* C. Reiss Coal Co., 114 Wis. 493, 90 N. W. 437; Okonski *v.* Pennsylvania, etc., Fuel Co., 114 Wis. 448, 90 N. W. 429.

Duty of court to submit proper questions on request see Bigelow *v.* Danielson, 102 Wis. 470, 78 N. W. 599; Hennesey *v.* Chicago, etc., R. Co., 99 Wis. 109, 74 N. W. 554.

97. Petrarca *v.* Quidnick Mfg. Co., 27 R. I. 265, 61 Atl. 648.

98. See Thompson *v.* Citizens' St. R. Co., 152 Ind. 461, 53 N. E. 462; Hoosier Stone Co. *v.* McCain, 133 Ind. 231, 31 N. E. 956; Chicago, etc., R. Co. *v.* Fry, 131 Ind. 319, 28 N. E. 989; Ervin *v.* Evans, 24 Ind. App. 335, 56 N. E. 725; Lake Shore, etc., R. Co. *v.* Wilson, 11 Ind. App. 488, 38 N. E. 343; Scagel *v.* Chicago, etc., R. Co., 83 Iowa 380, 49 N. W. 990; Kansas Pac. R. Co. *v.* Salmon, 14 Kan. 512; Kelleher *v.* Milwaukee, etc., R. Co., 80 Wis. 584, 50 N. W. 942; Goltz *v.* Milwaukee, etc., R. Co., 76 Wis. 136, 44 N. W. 752.

99. International, etc., R. Co. *v.* Moore, 16 Tex. Civ. App. 51, 41 S. W. 70.

1. Practice on appeal in general see Appeal and Error.

2. *Connecticut.*— Nolan *v.* New York, etc., R. Co., 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305, holding that where every special fact from which the court inferred the liability of defendant is found, its inferences are reviewable as conclusions of law.

Georgia.— East Tennessee, etc., R. Co. *v.* Smith, 90 Ga. 558, 16 S. E. 950, holding that where there is evidence to sustain the verdict, the discretion of the court in refusing to grant a new trial will not be overruled.

Illinois.— Chicago, etc., R. Co. *v.* Swan, 70 Ill. App. 331, to the effect that failure to state in the declaration that the servant by whose negligence plaintiff was injured was not a fellow servant is a defect cured by verdict.

b. Review of Questions of Fact. Ordinarily, where there is any evidence which, if believed by the jury, is legally sufficient, or might reasonably tend to support the verdict or findings of fact of the jury, the appellate court will not, in the absence of constitutional or statutory provisions, disturb such verdict or findings.[3]

Indiana.— Indianapolis Frog, etc., Co. *v.* Boyle, 18 Ind. App. 169, 47 N. E. 690, where it was held that an objection that a material averment of the complaint was defective cannot be raised for the first time on appeal.

Kansas.— Walker *v.* Gillett, 59 Kan. 214, 52 Pac. 442, to the effect that a judgment for plaintiff will not be reversed for want of formal proof of a fact admitted by the answer, where no question as to it was raised at the trial, and the testimony and instructions of defendant were based on the theory of its truth.

Kentucky.— Ray *v.* Jeffries, 86 Ky. 367, 5 S. W. 867, 9 Ky. L. Rep. 602 (holding that a verdict for one cent will not be set aside on appeal, where defendant does not complain of it); Louisville, etc., R. Co. *v.* Hiltner, 60 S. W. 2, 22 Ky. L. Rep. 1141 [*reversing* 56 S. W. 654, 21 Ky. L. Rep. 1826] (holding that defendant cannot complain that the instructions given on plaintiff's motion did not specifically charge as to the contributory negligence, where the court on defendant's motion instructed the jury, in general terms, as to such negligence, and no more specific instruction was asked thereon).

Massachusetts.— Gagnon *v.* Seaconnet Mills, 165 Mass. 221, 43 N. E. 82, holding that where injuries are alleged to be due to the negligent manner in which defendant loaded timber on a carriage, and also for its failure to keep its "ways" (St. (1887) c. 270, § 1) in repair, and there is evidence to show negligence in loading the timber, refusal to instruct to find for defendant on the whole evidence does not bring up for review the question whether the road was a part of defendant's "ways."

Missouri.— Rutledge *v.* Missouri Pac. R. Co., 110 Mo. 312, 19 S. W. 38, holding that where the record fails to show whether it is customary and prudent for switchmen to mount cars to uncouple them it cannot be said as a matter of law that it is contributory negligence to do so.

New York.— O'Connall *v.* Thompson-Starrett Co., 72 N. Y. App. Div. 47, 76 N. Y. Suppl. 296, to the effect that where plaintiff has recovered judgment on the ground of negligence, he must, on defendant's appeal, have the record show negligence, if it did so appear at the trial.

Pennsylvania.— Bentley *v.* Cranmer, 137 Pa. St. 244, 20 Atl. 709, holding that a claim that the case should have been taken from the jury on the ground of assumption of risk and contributory negligence cannot be considered in the absence of a request for a direction to find for defendant.

Tennessee.— Ferguson *v.* Phœnix Cotton Mills, 106 Tenn. 236, 61 S. W. 53, as to necessity of assignment that the evidence did not support the verdict.

Texas.— Galveston, etc., R. Co. *v.* Sullivan, 2 Tex. Unrep. Cas. 315, holding that where the jury found for plaintiff, under proper instructions as to the law, to which no exceptions were taken, it must be presumed on appeal that the jury found plaintiff not guilty of contributory negligence.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1199, 1200.

3. See APPEAL AND ERROR, 3 Cyc. 345–383. See also the following illustrative cases:

Connecticut.— Sprague *v.* New York, etc., R. Co., 68 Conn. 345, 36 Atl. 791, 37 L. R. A. 638.

Georgia.— Northeastern R. Co. *v.* Barnett, 89 Ga. 399, 15 S. E. 492.

Illinois.— The supreme court has no jurisdiction to consider any questions of fact on appeal from the appellate court. Alton Paving, etc., Co. *v.* Hudson, 176 Ill. 270, 52 N. E. 256 [*affirming* 74 Ill. App. 612].

Kentucky.— Ohio Valley R. Co. *v.* McKinley, 33 S. W. 186, 17 Ky. L. Rep. 1028.

Minnesota.— Greene *v.* Minneapolis, etc., R. Co., 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785.

New York.— Hunter *v.* New York, etc., R. Co., 10 N. Y. Suppl. 795.

Rhode Island.— Jones *v.* New York, etc., R. Co., 20 R. I. 210, 37 Atl. 1033.

Texas.— Missouri Pac. R. Co. *v.* Crenshaw, 71 Tex. 340, 9 S. W. 262; Postal Tel. Cable Co. *v.* Coote, (Civ. App. 1900) 57 S. W. 912; Houston, etc., R. Co. *v.* Kelley, 13 Tex. Civ. App. 1, 34 S. W. 809, 46 S. W. 863.

Utah.— Pidcock *v.* Union Pac. R. Co., 5 Utah 612, 19 Pac. 191, 1 L. R. A. 131.

Virginia.— Goodman *v.* Richmond, etc., R. Co., 81 Va. 576.

See 34 Cent. Dig. tit. "Master and Servant," § 1201.

Compare Berlick *v.* Ashland Sulphite, etc., Co., 93 Wis. 437, 67 N. W. 712.

Negligence on part of master.—Anderson *v.* Hinshaw, 110 Cal. 682, 43 Pac. 389; Rosewarn *v.* Washington Gold Min. Co., 84 Cal. 219, 23 Pac. 1035 (evidence not brought up); Leahy *v.* Southern Pac. R. Co., 65 Cal. 150, 3 Pac. 622; Keller *v.* Gaskill, 9 Ind. App. 670, 36 N. E. 303; Union Pac. R. Co. *v.* Fray, 43 Kan. 750, 23 Pac. 1039; Atchison, etc., R. Co. *v.* Thul, 32 Kan. 255, 4 Pac. 352, 49 Am. Rep. 484; Glover *v.* Dwight Mfg. Co., 148 Mass. 22, 18 N. E. 597, 12 Am. St. Rep. 512; Fox *v.* Peninsular White Lead, etc., Works, 84 Mich. 676, 48 N. W. 203; Nelson *v.* Lumberman's Min. Co., 65 Mich. 288, 32 N. W. 438; Edwards *v.* Tilton Mills, 70 N. H. 574, 50 Atl. 102; Gottlieb *v.* New York, etc., R. Co., 29 Hun (N. Y.) 637 [*affirmed* in 100 N. Y. 462, 3 N. E. 344];

c. Harmless Error. A judgment, in an action by a servant to recover for personal injuries, will not be reversed for error which resulted in no disadvantage to the party seeking to take advantage of it.[4]

Oties *v.* Cowles Electric Smelting Co., 4 Silv. Sup. (N. Y.) 274, 7 N. Y. Suppl. 251; Filbert *v.* Delaware, etc., Canal Co., 56 N. Y. Super. Ct. 170, 2 N. Y. Suppl. 623; Kanare *v.* Troy Steel, etc., Co., 19 N. Y. Suppl. 789; McGourty *v.* Curran, 11 N. Y. Suppl. 777; Huber *v.* Wilson, 11 N. Y. Suppl. 377; Mikkelsen *v.* Ocean, etc., Transp. Co., 9 N. Y. Suppl. 741; Piggott *v.* Hanckett, 8 N. Y. Suppl. 731; Gamble *v.* Hine, 2 N. Y. Suppl. 778; Toomey *v.* Avery Stamping Co., 20 Ohio Cir. Ct. 183, 11 Ohio Cir. Dec. 216; Texas, etc., R. Co. *v.* Robertson, 82 Tex. 657, 17 S. W. 1041, 27 Am. St. Rep. 929; Texas, etc., R. Co. *v.* O'Fiel, 78 Tex. 486, 15 S. W. 33; Galveston Oil Co. *v.* Thompson, 76 Tex. 235, 13 S. W. 60; Gulf, etc., R. Co. *v.* Silliphant, 70 Tex. 623, 8 S. W. 673; Texas etc., R. Co. *v.* Black, (Tex. Civ. App. 1898) 44 S. W. 673; Ft. Worth, etc., R. Co. *v.* Graves, (Tex. Civ. App. 1893) 21 S. W. 606; Daniels *v.* Union Pac. R. Co., 6 Utah 357, 23 Pac. 762; Chicago Great Western R. Co. *v.* Price, 97 Fed. 423, 38 C. C. A. 239; Seese *v.* Northern Pac. R. Co., 39 Fed. 487. *Compare* Globe Smelting, etc., Co. *v.* Spann, 6 Colo. App. 146, 40 Pac. 198.

Negligence of fellow servants.— Ocean Steamship Co. *v.* Cheeney, 95 Ga. 381, 22 S. E. 544; Springside Coal Min. Co. *v.* Grogan, 169 Ill. 50, 48 N. E. 190 [*affirming* 67 Ill. App. 487]; Chicago, etc., R. Co. *v.* O'Brien, 53 Ill. App. 198 [*affirmed* in 155 Ill. 630, 40 N. E. 1023]; Fraser *v.* Hand, 33 Ill. App. 153; Devine *v.* Boston, etc., R. Co., 159 Mass. 348, 34 N. E. 539.

Assumption of risk and contributory negligence.— Brown *v.* Central Pac. R. Co., (Cal. 1887) 12 Pac. 512; Fish *v.* Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995; Daley *v.* American Printing Co., 152 Mass. 581, 26 N. E. 135; Bohan *v.* St. Paul, etc., R. Co., 49 Minn. 488, 52 N. W. 133; Eldridge *v.* Atlas Steamship Co., 134 N. Y. 187, 32 N. E. 66; Bonner *v.* La None, 80 Tex. 117, 15 S. W. 803; Howard Oil Co. *v.* Davis, 76 Tex. 630, 13 S. W. 665; Galveston, etc., R. Co. *v.* Garrett, 73 Tex. 262, 13 S. W. 62, 15 Am. St. Rep. 781; Texas Cent. R. Co. *v.* Yarbro, 32 Tex. Civ. App. 246, 74 S. W. 357; Seley *v.* Southern Pac. R. Co., 6 Utah 319, 23 Pac. 751; Harris *v.* Chesapeake, etc., R. Co., (Va. 1895) 23 S. E. 219; Pool *v.* Chicago, etc., R. Co., 56 Wis. 227, 14 N. W. 46.

4. See APPEAL AND ERROR, 3 Cyc. 383 *et seq.* And see the following illustrative cases:

Alabama.— Louisville, etc., R. Co. *v.* Mothershed, 121 Ala. 650, 26 So. 10; Georgia Pac. R. Co. *v.* Davis, 92 Ala. 300, 9 So. 252, 25 Am. St. Rep. 47.

Arizona.— Hobson *v.* New Mexico, etc., R. Co., 2 Ariz. 171, 11 Pac. 545.

Arkansas.— St. Louis, etc., R. Co. *v.* Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773.

California.— Davis *v.* Button, 78 Cal. 247, 18 Pac. 133, 20 Pac. 545.

Illinois.— Chicago, etc., R. Co. *v.* Kerr, 148 Ill. 605, 35 N. E. 1117; Cleveland, etc., R. Co. *v.* Walter, 147 Ill. 60, 35 N. E. 529; St. Louis Consol. Coal Co. *v.* Maehl, 130 Ill. 551, 22 N. E. 715; Niantic Coal, etc., Co. *v.* Leonard, 126 Ill. 216, 19 N. E. 294; Beard *v.* Skeldon, 113 Ill. 584.

Indiana.— Rogers *v.* Leyden, 127 Ind. 50, 26 N. E. 210.

Iowa.— Butler *v.* Chicago, etc., R. Co., 87 Iowa 206, 54 N. W. 208; McDermott *v.* Iowa Falls R. Co., (1891) 47 N. W. 1037; Van Gent *v.* Chicago, etc., R. Co., 80 Iowa 526, 45 N. W. 913; Worden *v.* Humeston, etc., R. Co., 76 Iowa 310, 41 N. W. 26; Pringle *v.* Chicago, etc., R. Co., 64 Iowa 613, 21 N. W. 108; Kitteringham *v.* Sioux City, etc., R. Co, 62 Iowa 285, 17 N. W. 585; Beems *v.* Chicago, etc., R. Co., 58 Iowa 150, 12 N. W. 222.

Kansas.— Atchison, etc., R. Co. *v.* Love, 57 Kan. 36, 45 Pac. 59; Atchison, etc., R. Co. *v.* McKee, 37 Kan. 592, 15 Pac. 484.

Michigan.— Kraatz *v.* Brush Electric Light Co., 82 Mich. 457, 46 N. W. 787; Jones *v.* Lake Shore, etc., R. Co., 49 Mich. 573, 14 N. W. 551.

Missouri.— McPherson *v.* St. Louis, etc., R. Co., 97 Mo. 253, 10 S. W. 846; Fugler *v.* Bothe, 43 Mo. App. 44. *Compare* Alcorn *v.* Chicago, etc., R. Co., (1890) 14 S. W. 943.

New York.— Gorman *v.* McArdle, 67 Hun 484, 22 N. Y. Suppl. 479; Koosorowska *v.* Glasser, 8 N. Y. Suppl. 197.

Oregon.— Wellman *v.* Oregon Short Line, etc., R. Co., 21 Oreg. 530, 28 Pac. 625.

Tennessee.— East Tennessee, etc., R. Co. *v.* Gurley, 12 Lea 46.

Texas.— Galveston, etc., R. Co. *v.* Gormley, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894 [*reversing* (Civ. App. 1897) 42 S. W. 314]; Texas, etc., R. Co. *v.* Johnson, 89 Tex. 519, 35 S. W. 1042; Austin Rapid Transit R. Co. *v.* Grothe, 88 Tex. 262, 31 S. W. 196; Green *v.* Cross, 79 Tex. 130, 15 S. W. 220; Missouri Pac. R. Co. *v.* Lamothe, 76 Tex. 219, 13 S. W. 194; Missouri, etc., R. Co. *v.* Baker, (Civ. App. 1900) 58 S. W. 964; Galveston, etc., R. Co. *v.* Ford, 22 Tex. Civ. App 131, 54 S. W. 37; Missouri, etc., R. Co. *v.* Milam, 20 Tex. Civ. App. 688, 50 S. W. 417; Galveston, etc., R. Co. *v.* Bohan, (Civ. App. 1898) 47 S. W. 1050; Houston etc., R. Co. *v.* Rodican, 15 Tex. Civ. App. 556, 40 S. W. 535; Galveston, etc., R. Co. *v.* Henning, (Civ. App. 1897) 39 S. W. 302; San Antonio, etc., R. Co. *v.* Harding, 11 Tex. Civ. App. 497, 33 S. W. 373; Ft. Worth, etc., R. Co. *v.* Peters, 7 Tex. Civ. App. 78, 25 S. W. 1077.

V. LIABILITY FOR INJURIES TO THIRD PERSONS.[1]

A. Acts or Omissions of Servants[2]— 1. Grounds on Which Master Held Liable — a. Enumeration. The master may be liable for the acts of his servant on either of the following grounds: (1) Negligence of the master in selecting his servants or instructing them as to the duties of their position;[3] (2) an express demand to the servant to do the act resulting in the injury to the third person;[4] (3) acquiescence in, or assent to, former like acts of the servant, or to the act in question;[5] (4) the fact that the act of the servant was within the scope of his employment and in the line of his duties while engaged in such employment;[6] and (5) ratification by the master of the act of the servant causing the injury to the third person.[7] Of course the master is not liable where the employee himself would not be liable if he had acted in his own behalf instead of as a servant.[8]

b. Ratification by Master. By ratifying a wrongful act of a servant, the master may become liable in damages to a third person injured thereby, although he would not otherwise be liable.[9] So, where otherwise liable for actual damages,

Virginia.— Richmond Granite Co. *v.* Bailey, 92 Va. 554, 24 S. E. 232; Chesapeake, etc., R. Co. *v.* Lash, (1896) 24 S. E. 385.

United States.— St. Louis, etc., R. Co. *v.* Needham, 69 Fed. 823, 16 C. C. A. 457. *Compare* Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 16 S. Ct. 848, 40 L. ed. 999 [*reversing* 51 Fed. 562, 2 C. C. A. 380].

See 34 Cent. Dig. tit. "Master and Servant," §§ 1206–1208.

1. Constitutionality of statutes enlarging liability of master see CONSTITUTIONAL LAW, 8 Cyc. 1098.

2. Parents' liability for torts of children see PARENT AND CHILD.

Liability of particular employers: Carriers see CARRIERS, 6 Cyc. 359, 597. Charitable associations see CHARITIES, 6 Cyc. 975, 976. Corporations in general see CORPORATIONS, 10 Cyc. 1203 *et seq.* Druggist's liability for negligence of clerk see DRUGGISTS, 14 Cyc. 1087. Employer of pilot see PILOTS. Innkeeper, liability to guest for acts of servant see INNKEEPERS, 22 Cyc. 1080. Mail contractors see POST-OFFICE. Municipal corporations see COUNTIES, 11 Cyc. 498; MUNICIPAL CORPORATIONS; TOWNS; STATES. Owners of tugs engaged in towage see TOWAGE. Owner of vessel engaged in shipping see SHIPPING. Principal see PRINCIPAL AND AGENT. Railroad companies, acts of employees in removing trespassers from trains, see RAILROADS. Sleeping-car companies see CARRIERS, 6 Cyc. 657. Street car company, injuries to trespassers, see STREET RAILROADS. Telegraph or telephone companies in general see TELEGRAPHS AND TELEPHONES.

Liability of master for particular torts: Injuries inflicted by animals kept by servant see ANIMALS, 2 Cyc. 379. Injuries to animals by servant see ANIMALS, 2 Cyc. 420.

3. Mitchell *v.* Boston, etc., R. Co., 68 N. H. 96, 34 Atl. 674; Carman *v.* New York, 14 Abb. Pr. (N. Y.) 301; Missouri, etc., R. Co. *v.* Freeman, (Tex. Civ. App. 1903) 73 S. W. 542 (holding that the master is liable to a third person for injuries received in the employment of an incompetent and negligent servant, without inquiry); Holladay *v.* Kennard, 12 Wall. (U. S.) 254, 20 L. ed. 390 (holding that where skill and capacity are required to accomplish an undertaking, it is negligence on the part of the master not to employ persons having such qualifications, and that such negligence will render him liable for injuries to third persons occasioned thereby); The Elton, 131 Fed. 562. See McGahie *v.* McClennen, 86 N. Y. App. Div. 263, 83 N. Y. Suppl. 692; Knox *v.* Eden Musee American Co., 17 N. Y. App. Div. 365, 45 N. Y. Suppl. 255, holding that an employer is not negligent in not knowing or suspecting the dishonesty of an employee, who for several years had performed his duties honestly and faithfully, so as to render the employer liable to one whom the employee by virtue of his employment was enabled to defraud, although the dishonesty could easily have been detected by an inspection of the books. *Compare* as *contra*, Benton *v.* James Hill Mfg. Co., 26 R. I. 192, 58 Atl. 664.

4. Searle *v.* Parke, 68 N. H. 311, 34 Atl. 744; Byram *v.* McGuire, 3 Head (Tenn.) 530. See also Lee *v.* Lord, 76 Wis. 582, 45 N. W. 601.

5. East St. Louis Connecting R. Co. *v.* Reames, 173 Ill. 532, 51 N. E. 68 (holding that where employees of a railroad company customarily used its engine in going from their work to dinner, with its knowledge, it is liable for damages to third persons resulting from negligence in such use); Elder *v.* Bemis, 2 Metc. (Mass.) 599; Byram *v.* McGuire, 3 Head (Tenn.) 530; Fletcher *v.* Baltimore, etc., R. Co., 168 U. S. 135, 18 S. Ct. 35, 42 L. ed. 411.

6. See *infra*, V, A, 3, a.

7. See *infra*, V, A, 1, b.

8. New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 12 S. Ct. 109, 35 L. ed. 919.

9. Simmon *v.* Bloomingdale, 39 Misc. (N. Y.) 847, 81 N. Y. Suppl. 499; Byram *v.* McGuire, 3 Head (Tenn.) 530.

the master's ratification may authorize the imposition of exemplary damages.[10] What constitutes a ratification is generally a question of fact for the jury.[11] Retaining the guilty servant in the employ does not necessarily show a ratification of the act,[12] although it is some evidence of ratification where the master has knowledge of the facts.[13]

2. Relation of Master and Servant — a. Necessity For Relationship. Before further considering when and under what circumstances one is liable to third persons injured by the act or omission of his workmen, it should be observed that the liability primarily rests on the existence of the relation of master and servant at the time of the act complained of. If that relation does not exist at that time the rule of *respondeat superior* cannot apply.[14]

b. When Relationship Exists — (i) *General Rules.* To constitute the relationship of master and servant, in so far as the liability of the former for the acts of the latter is concerned, there need be no actual contract of employment,[15] nor

Ratification by corporation in general see Corporations, 10 Cyc. 1208.

10. See Damages, 13 Cyc. 114.

11. See *infra*, V, C, 7.

Evidence showing merely an unfriendly disposition toward plaintiff does not establish ratification. Arasmith *v.* Temple, 11 Ill. App. 39.

Making payment to wrong-doer.— The owner of a building is liable for the value of bricks wrongfully taken from a third person by the builder in erecting the same, after notice of the trespass, neglect to prevent their use, and payment of the builder. Dawson *v.* Powell, 9 Bush (Ky.) 663, 15 Am. Rep. 745. But a contractor, by accepting and paying for work done thereon by a mechanic, without his prior order or authority, does not render himself liable for injuries caused to a third person by a negligent act committed by the mechanic while doing the work, not a part or result of the work itself. Coomes *v.* Houghton, 102 Mass. 211.

Demand for payment.— Where plaintiff ordered coal of defendant, and a third person, without authority, delivered it, and in so doing negligently injured plaintiff's building, the fact that thereafter defendant demanded payment for the coal, with knowledge of the accident, constituted a ratification of the acts of the person delivering the coal. Dempsey *v.* Chambers, 154 Mass. 330, 28 N. E. 279, 26 Am. St. Rep. 249, 13 L. R. A. 219.

Knowledge of master.— The fact that in two isolated instances there has been an unauthorized departure from the prescribed order of business in a master's establishment does not charge him with liability to a third person for a further like departure by a servant, where the unauthorized acts were not brought to the master's attention. Cogswell *v.* Rochester Mach. Screw Co., 39 N. Y. App. Div. 223, 57 N. Y. Suppl. 145.

12. Williams *v.* Pullman Palace Car Co., 40 La. Ann. 87, 3 So. 631, 8 Am. St. Rep. 512; Donivan *v.* Manhattan R. Co., 1 Misc. (N. Y.) 368, 21 N. Y. Suppl. 457; Gulf, etc., R. Co. *v.* Kirkbride, 79 Tex. 457, 15 S. W. 495; International, etc., R. Co. *v.* McDonald, 75 Tex. 41, 12 S. W. 860.

13. Cobb *v.* Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909; Bass *v.* Chicago, etc., R. Co., 42 Wis. 654, 24 Am. Rep. 437.

Source of information.— Where a tort is committed by a servant, it is not necessary, in order to show ratification by the master, that the information as to the tort should come from the injured person. Cobb *v.* Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909.

14. *Colorado.*— Sagers *v.* Nuckolls, 3 Colo. App. 95, 32 Pac. 187.

Connecticut.— Corbin *v.* American Mills, 27 Conn. 274, 71 Am. Dec. 63.

Georgia.— Lindsay *v.* Central R., etc., Co., 46 Ga. 447.

Missouri.— Appel *v.* Eaton, etc., Co., 97 Mo. App. 428, 71 S. W. 741.

New Jersey.— Haines *v.* Atlantic City R. Co., 65 N. J. L. 27, 46 Atl. 595, 50 L. R. A. 862.

New York.— Herrmann *v.* Sarles, 42 N. Y. App. Div. 268, 58 N. Y. Suppl. 1017.

Pennsylvania.—Bryson *v.* Philadelphia Brewing Co., 209 Pa. St. 40, 57 Atl. 1105; Hess *v.* Berwind-White Coal Min. Co., 178 Pa. St. 239, 35 Atl. 990; Fuhrmeister *v.* Wilson, 163 Pa. St. 310, 30 Atl. 150; Connor *v.* Pennsylvania R. Co., 24 Pa. Super. Ct. 241; Blattenberger *v.* Little Schuylkill Nav. Co., 2 Miles 309.

Texas.— Wilkins *v.* Ferrell, 10 Tex. Civ. App. 231, 30 S. W. 450, dentist.

Virginia.— Muse *v.* Stern, 82 Va. 33, 3 Am. St. Rep. 77.

See 34 Cent. Dig. tit. "Master and Servant," § 1210 *et seq.*

Concurrent negligence.— Where the negligence of a bridge tender employed by defendant city, and that of a helper employed by the tender personally, without authority from the city, combined to cause injury to plaintiff, defendant was not free from liability because the helper was not its servant. Chicago *v.* O'Malley, 196 Ill. 197, 63 N. E. 652.

15. Gaines *v.* Bard, 57 Ark. 615, 22 S. W. 570, 38 Am. St. Rep. 266; Ward *v.* Young, 42 Ark. 542 (holding that the liability arises from the relation itself and not from the contract of employment); Denver, etc., R. Co. *v.* Gustafson, 21 Colo. 393, 41 Pac. 505; Althorf *v.* Wolfe, 22 N. Y. 355; Hill *v.* Morey, 26 Vt.

payment for the services.[16] If one knowingly and without objection receives the benefits of labor, or holds out to the public one as engaged in his service, he is liable as a master for the acts of the latter as his servant,[17] subject to the rule that the relation of master and servant cannot exist where the employment is for the prosecution of an unlawful business.[18] The relation of master and servant exists where the employer selects the workman, and may remove or discharge him for misconduct, and may order not only what work shall be done, but the mode and manner of performance.[19] The power to control the alleged servant is the test of the existence of the relationship.[20] Where the person employed is in the exercise of an independent and distinct employment, and not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the acts of the former;[21] and hence an independent contractor is not a servant so as to make a master liable for his acts or those of the contractor's servants.[22] A lessee or licensee is not the servant of the lessor or licensor,[23] nor is an inmate of a hos-

178 (holding that where one volunteers to assist another in a piece of work and the latter consents thereto, they stand in the relation of master and servant).

The mere hiring of a person is not always sufficient to create the relation of master and servant. Boniface *v.* Relyea, 36 How. Pr. (N. Y.) 457.

16. Gaines *v.* Bard, 57 Ark. 615, 22 S. W. 570, 38 Am. St. Rep. 266; Denver, etc., R. Co. *v.* Gustafson, 21 Colo. 393, 41 Pac. 505; Baldwin *v.* Abraham, 57 N. Y. App. Div. 67, 67 N. Y. Suppl. 1079; Beatty *v.* Thilemann, 16 Daly (N. Y.) 20, 8 N. Y. Suppl. 645.

Proof of relation but not test.— The fact that the men employed were paid by defendant for their services might, in the absence of evidence negativing the relation of master and servant, be accepted as some proof of employment, but it is by no means the determining test. Beatty *v.* Thilemann, 16 Daly (N. Y.) 20, 8 N. Y. Suppl. 645.

Manner of paying for work.— It follows that the manner of paying for the work or thing done, whether by the day or job (Corbin *v.* American Mills, 27 Conn. 274, 71 Am. Dec. 63), or by commissions (Riggs *v.* Standard Oil Co., 130 Fed. 199) is immaterial.

17. Denver, etc., R. Co. *v.* Gustafson, 21 Colo. 393, 41 Pac. 505.

18. Sagers *v.* Nuckolls, 3 Colo. App. 95, 32 Pac. 187.

19. Butler *v.* Townsend, 126 N. Y. 105, 26 N. E. 1017; Walsh *v.* Riesenberg, 94 N. Y. App. Div. 466, 89 N. Y. Suppl. 58. And see Michael *v.* Stanton, 3 Hun (N. Y.) 462.

Where the alleged master had no voice in the selection of the workmen it has been held that the relation did not exist. Cain *v.* Syracuse, etc., R. Co., 20 Misc. (N. Y.) 459, 45 N. Y. Suppl. 538.

Power to discharge.— A person cannot be held liable as master under the doctrine of *respondeat superior*, unless he has the power of discharging the party whose negligent act occasions the injury complained of. Crudup *v.* Schreiner, 98 Ill. App. 337.

Grantor in deed of trust.— A grantor in a deed of trust, who constitutes the trustee his attorney in fact to take control of the mortgaged premises, receive the rents, pay the expenses and interest on the secured debt, etc., nevertheless remains the principal of an elevator operator hired by such trustee, and is responsible for his negligence, resulting in injury to a passenger. Luckel *v.* Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035.

A medical officer of an accident insurance company, examining a person injured, as provided by the terms of the accident policy, is a servant of the company; and it is liable for injuries resulting from his negligence or misconduct. Tompkins *v.* Pacific Mut. L. Ins. Co., 53 W. Va. 479, 44 S. E. 439, 97 Am. St. Rep. 1006, 62 L. R. A. 489.

Contract for piece of work.— The relation of master and servant is not created by a single contract between the parties to do a particular piece of work. Loughrain *v.* Autophone Co., 77 N. Y. App. Div. 542, 78 N. Y. Suppl. 919.

20. Crudup *v.* Schreiner, 98 Ill. App. 337; Wadsworth Howland Co. *v.* Foster, 50 Ill. App. 513; Gahagan *v.* Aermotor Co., 67 Minn. 252, 69 N. W. 914; Long *v.* Richmond, 68 N. Y. App. Div. 466, 73 N. Y. Suppl. 912; Brady *v.* Chicago, etc., R. Co., 114 Fed. 100, 52 C. C. A. 48, 57 L. R. A. 712. See also Falardeau *v.* Boston Art Students' Assoc., 182 Mass. 405, 65 N. E. 797. And see *infra*, V, A, 2, b, (IV).

Overseer.— One who on account of peculiar skill is employed by the day to oversee work for his employer, and who takes the entire charge of it, is yet so far a servant that his employer is answerable for his misfeasance. Morgan *v.* Bowman, 22 Mo. 538.

21. De Forrest *v.* Wright, 2 Mich. 368, Abrahams *v.* California Powder Works, 5 N. M. 479, 23 Pac. 785, 8 L. R. A. 378.

22. See *infra*, V, B, 2, a.

23. Fluker *v.* Georgia R., etc., Co., 81 Ga. 461, 8 S. E. 529, 12 Am. St. Rep. 328, 2 L. R. A. 843; Sawyer *v.* Martins, 25 Ill. App. 521; Blackwell *v.* Wiswall, 24 Barb. (N. Y.) 355, 14 How. Pr. 257; Lefkowitch *v.* Harper, 7 Ohio Dec. (Reprint) 369, 2 Cinc. L. Bul. 197. But see Dillon *v.* Hunt, 82 Mo. 150 [*affirming* 11 Mo. App. 246], holding that the relation of master and servant exists between the owner of a building and others, whom he allows, after it is burned, to enter on the premises for the purpose of removing the *débris*, which they do so unskilfully that

pital the servant of a superintendent of such hospital,[24] nor a convict a servant of the hirer of his services.[25] So railway postal clerks are not the servants of the railway company.[26]

(II) *ASSISTANTS PROCURED BY SERVANT.* The master is liable for the negligence or other tort of persons employed by his servants in the prosecution of the master's business, or of persons who assist his servants at their request,[27] provided the servants had express or implied authority to procure assistance,[28] subject of course to the rule that the act resulting in the injury must be within the scope of the employment.[29] If the employment was authorized, the employing servant is not liable for the acts of the servant so employed.[30]

(III) *OFFICERS AS SERVANTS.* The fact that the servant is also an officer of the law does not relieve the master from liability for his acts within the scope of his authority as servant.[31] But if the act is done while in pursuance of his duty

they knock down the walls of the house on adjoining premises.

24. Schrubbe *v.* Connell, 69 Wis. 476, 34 N. W. 503.

25. Cunningham *v.* Bay State Shoe, etc., Co., 25 Hun (N. Y.) 210 [*affirmed* in 93 N. Y. 481]. *Contra*, see Ward *v.* Young, 42 Ark. 542.

26. Poling *v.* Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215. See also CARRIERS, 6 Cyc. 598 note 61. And see POST-OFFICE.

27. *Arkansas.*— Gaines *v.* Bard, 57 Ark. 615, 22 S. W. 570, 38 Am. St. Rep. 266.

Florida.— Bucki *v.* Cone, 25 Fla. 1, 6 So. 160.

Louisiana.— Wichtrecht *v.* Fasnacht, 17 La. Ann. 166.

Mississippi.— Southern Express Co. *v.* Brown, 67 Miss. 260, 7 So. 318, 8 So. 425, 19 Am. St. Rep. 306.

Missouri.— See Appel *v.* Eaton, etc., Co., 97 Mo. App. 428, 71 S. W. 741; Dimmitt *v.* Hannibal, etc., R. Co., 40 Mo. App. 654; James *v.* Muehlebach, 34 Mo. App. 512.

New York.— Althorf *v.* Wolfe, 22 N. Y. 355 [*affirming* 2 Hilt. 344]; Gleason *v.* Amsdell, 9 Daly 393; Wellman *v.* Miner, 19 Misc. 644, 44 N. Y. Suppl. 417; Hill *v.* Sheehan, 20 N. Y. Suppl. 529; Edwards *v.* Jones, 67 How. Pr. 177. But see Long *v.* Richmond, 68 N. Y. App. Div. 466, 73 N. Y. Suppl. 912 [*affirmed* in 175 N. Y. 495, 67 N. E. 1084]; Parker *v.* Homan, 88 N. Y. Suppl. 137.

North Carolina.— Jackson *v.* American Tel., etc., Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738. *Compare* Thorp *v.* Minor, 109 N. C. 152, 13 S. E. 702.

Oregon.— See Lakin *v.* Oregon Pac. R. Co., 15 Oreg. 220, 15 Pac. 641.

England.— Quarman *v.* Burnett, 4 Jur. 969, 9 L. J. Exch. 308, 6 M. & W. 499.

See 34 Cent. Dig. tit. "Master and Servant," § 1211.

It is immaterial that the master has no immediate control of such employees. Montgomery Gas Light Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372, 5 So. 735.

Liability for acts of agent's employees see also PRINCIPAL AND AGENT.

Liability of master for injuries to assistants procured by servants see *supra*, IV, A, 2, d, (II).

28. Smaltz *v.* Boyce, 109 Mich. 382, 69 N. W. 21; Haluptzok *v.* Great Northern R. Co., 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739; Mangan *v.* Foley, 33 Mo. App. 250; Jewell *v.* Grand Trunk R. Co., 55 N. H. 84.

Liability for acts of substitute.— It has been held that the master is not liable where the negligence is that of a substitute engaged by a servant without any authority to delegate his master's power as to the particular work in charge of the servant. Appel *v.* Eaton, etc., Co., 97 Mo. App. 428, 71 S. W. 741. On the other hand a master has been held liable for the acts of persons employed by a servant engaged to sell and distribute oil on a commission. Riggs *v.* Standard Oil Co., 130 Fed. 199.

29. See *infra*, V, A, 4.

30. Ellis *v.* Southern R. Co., 72 S. C. 465, 52 S. E. 228, 2 L. R. A. N. S. 378.

31. *Arkansas.*— St. Louis, etc., R. Co. *v.* Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105.

Illinois.— Illinois Steel Co. *v.* Novak, 84 Ill. App. 641 [*affirmed* in 184 Ill. 501, 56 N. E. 966]. But see Hardy *v.* Chicago, etc., R. Co., 58 Ill. App. 278.

Indiana.— Dickson *v.* Waldron, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 41 Am. St. Rep. 440, 24 L. R. A. 483, 488.

Michigan.— Foster *v.* Grand Rapids R. Co., 140 Mich. 689, 104 N. W. 380.

Missouri.— Brill *v.* Eddy, 115 Mo. 596, 22 S. W. 488.

See 34 Cent. Dig. tit. "Master and Servant," § 1212.

Special police officer as servant.— Contrary to the rule stated in the text, it is held in some states that a special police officer appointed on the application of defendant and paid by him is not the mere servant of the person on whose premises he is appointed for duty and by whom his salary is paid, and such person is not responsible for his official acts. Healey *v.* Lothrop, 171 Mass. 263, 50 N. E. 540; Hershey *v.* O'Neill, 36 Fed. 168, construing New York statute. But see Illinois Steel Co. *v.* Novak, 84 Ill. App. 641 [*affirmed* in 184 Ill. 501, 56 N. E. 966].

Statutes.— Under a statute which provides that station agents of railroad companies shall preserve order in the waiting rooms,

as a public officer rather than as the master's servant,[32] or outside the scope of his authority as servant, although within his authority as a police officer,[33] the master is not liable.

(iv) *General and Special Employment*[34] — (a) *In General.* A person who avails himself of the use, temporarily, of the services of a servant regularly employed by another person may be liable as master for the acts of such servant during the temporary service.[35] The test is whether in the particular service which he is engaged or requested to perform he continues liable to the direction and control of his original master or becomes subject to that of the person to whom he is lent or hired, or who requests his services.[36] It is not so much the

and giving them power to arrest persons guilty of disorderly conduct, they do not become officers of the law so as to prevent their acts from being imputable to the company. King *v.* Illinois Cent. R. Co., 69 Miss. 245, 10 So. 42.

32. Foster *v.* Grand Rapids R. Co., 140 Mich. 689, 104 N. W. 380; Sharp *v.* Erie R. Co., 90 N. Y. App. Div. 502, 85 N. Y. Suppl. 553.

Presumptions.— When a disorderly person is arrested by a police officer, the presumption is that the officer is acting in his official capacity, and not as an agent for the party who pays him. Foster *v.* Grand Rapids R. Co., 140 Mich. 689, 104 N. W. 380.

33. Wells *v.* Washington Market Co., 19 D. C. 385.

34. **Liability for acts of bailee's servant** in general see Bailments, 5 Cyc. 212.

35. *Illinois.*— Union R., etc., Co. *v.* Kallaher, 114 Ill. 325, 2 N. E. 77 [*affirming* 12 Ill. App. 400]; Wabash, etc., R. Co. *v.* Peyton, 106 Ill. 534, 46 Am. Rep. 705.

Louisiana.— See Thompson *v.* New Orleans, etc., R. Co., 10 La. Ann. 403.

Massachusetts.— Wood *v.* Cobb, 13 Allen 58.

New York.— McDowell *v.* Homer Ramsdell Transp. Co., 78 Hun 228, 28 N. Y. Suppl. 821.

Texas.— Gulf, etc., R. Co. *v.* Shelton, 30 Tex. Civ. App. 72, 69 S. W. 653; Missouri, etc., R. Co. *v.* McGlamory, (Civ. App. 1896) 34 S. W. 359.

United States.— Smith *v.* Booth, 122 Fed. 626, 58 C. C. A. 479.

See 34 Cent. Dig. tit. "Master and Servant," § 1214.

Mechanic sent to make repairs.— Where a mechanic in the general employ of defendant was sent by defendant, at the request of a third person, to repair certain machinery of the latter, and he was entirely under the latter's direction, who, however, relied largely on his skill and experience, the servant, in making the repairs, was the servant of the latter and not of defendant. Samuelian *v.* American Tool, etc., Co., 168 Mass. 12, 46 N. E. 98.

Flagman at railroad crossing.— The fact that a flagman of a railroad crossing was employed and paid by another railroad company, where he also acts for defendant railroad company, or is employed by both companies, does not release the latter from liability. Taylor *v.* Western Pac. R. Co., 45 Cal. 323; Denver, etc., R. Co. *v.* Gustafson, 21 Colo. 393, 41 Pac. 505; Buchanan *v.* Chicago, etc., R. Co., 75 Iowa 393, 39 N. W. 663; Brow *v.* Boston, etc., R. Co., 157 Mass. 399, 32 N. E. 362; Illinois Cent. R. Co. *v.* King, 69 Miss. 852, 13 So. 824. But see Chicago City R. Co. *v.* Volk, 45 Ill. 175.

36. *Connecticut.*— Geer *v.* Darrow, 61 Conn. 220, 23 Atl. 1087.

Illinois.— Crndup *v.* Schreiner, 98 Ill. App. 337; Wadsworth Howland Co. *v.* Foster, 50 Ill. App. 513.

Louisiana.— See De Armas *v.* Bell, 109 La. 181, 33 So. 188.

Massachusetts.— Clapp *v.* Kemp, 122 Mass. 481.

Minnesota.— Gahagan *v.* Aermotor Co., 67 Minn. 252, 69 N. W. 914. *Compare* Fay *v.* Davidson, 13 Minn. 523.

New York.— Boniface *v.* Relyea, 6 Rob. 397, 5 Abb. Pr. N. S. 259, 36 How. Pr. 457; Beatty *v.* Thilemann, 16 Daly 20, 8 N. Y. Suppl. 645.

Ohio.— See Paddock *v.* Toledo, etc., R. Co., 11 Ohio Cir. Dec. 789.

Oregon.— Swackhamer *v.* Johnson, 39 Oreg. 383, 65 Pac. 91, 54 L. R. A. 625.

United States.— Brady *v.* Chicago, etc., R. Co., 114 Fed. 100, 52 C. C. A. 48, 57 L. R. A. 712.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1213, 1214.

If one person is under the immediate direction and control of another who may terminate such control by discharge, and direct him what work to do, when to do it, how to do it, and to designate the means to be employed in doing the work, the relation of master and servant between these persons is complete (Beatty *v.* Thilemann, 16 Daly (N. Y.) 20, 8 N. Y. Suppl. 645), and the fact that the services are paid for by another is of no importance (see *supra*, V, A, 2, b).

Applications of rule.— Geer *v.* Darrow, 61 Conn. 220, 23 Atl. 1087 (holding that where one who undertakes to build a retaining wall for a city is to use his own implements, and employ, discharge, and have full control of the workmen, they are his servants, and not the city's, notwithstanding that his remuneration is to be measured by the days' and hours' work of himself and his men); Clapp *v.* Kemp, 122 Mass. 481 (holding that whether a teamster, through whose negligence in delivering coal one falls into a coal-hole and is injured, is, in an action therefor, to be considered as the servant of the occupant of

actual exercise of control which is regarded as the right to exercise such control.[37] To escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under the control of a third person.[38] Subject to these rules, the original master is not liable for injuries resulting from acts of the servant while under the control of a third person;[39] but on the other hand the original master is liable, and the third person is not liable where the control of the servant is retained by the original master.[40] Where a servant acts under the directions of municipal officers the master is not liable.[41]

the building, depends on whether such occupant had the right to control the manner of delivery).

37. Baldwin *v.* Abraham, 57 N. Y. App. Div. 67, 67 N. Y. Suppl. 1079; Saunders *v.* Toronto, 26 Ont. App. 265. And see Corbin *v.* American Mills, 27 Conn. 274, 71 Am. Dec. 63.

38. Garven *v.* Chicago, etc., R. Co., 100 Mo. App. 617, 75 S. W. 193.

39. *California.*— Cotter *v.* Lindgren, 106 Cal. 602, 39 Pac. 950, 46 Am. St. Rep. 255.

Iowa.— Miller *v.* Minnesota, etc., R. Co., 76 Iowa 655, 39 N. W. 188, 14 Am. St. Rep. 258.

Massachusetts.— Haskell *v.* Boston Dist. Messenger Co., 190 Mass. 189, 76 N. E. 215, 2 L. R. A. N. S. 1091, messenger company furnishing messenger to plaintiff who assumed control over boy.

Missouri.— Garven *v.* Chicago, etc., R. Co., 100 Mo. App. 617, 75 S. W. 193.

New York.— Connor *v.* Koch, 63 N. Y. App. Div. 257, 71 N. Y. Suppl. 836. See also Olive *v.* Whitney Marble Co., 103 N. Y. 292, 8 N. E. 552. But see Currier *v.* Henderson, 85 Hun 300, 32 N. Y. Suppl. 953; O'Connell *v.* Hillyard, 2 N. Y. City Ct. 28.

Oregon.— See Swackhamer *v.* Johnson, 39 Oreg. 383, 65 Pac. 91, 54 L. R. A. 625.

United States.— Byrne *v.* Kansas City, etc., R. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1213, 1214.

One who requests the servant of another to perform a duty not connected with his employment, where the servant, in acceding thereto, injures a third person, is liable for the injuries. Pittsburgh, etc., Dock Co. *v.* Detroit Transp. Co., 122 Mich. 445, 81 N. W. 269. And if the servant, in performing a duty, is acting under the express directions of the person injured, the master is not liable. Atherton *v.* Kansas City Coal, etc., Co., 106 Mo. App. 591, 81 S. W. 223.

Display of fireworks.— Where a company selling fireworks furnishes employees to fire them, but such employees are under the control of the purchasers, the company is not liable for an injury to a bystander caused by the negligence of such employee. Consolidated Fireworks Co. *v.* Koehl, 190 Ill. 145, 60 N. E. 87 [*reversing* 92 Ill. App. 8]; Wyllie *v.* Palmer, 63 Hun (N. Y.) 8, 17 N. Y. Suppl. 434 [*affirmed* in 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285]. But where the purchaser did nothing in connection with the fireworks more than to locate the stand where the display took place, the servants being sent by the seller directing the display and the seller paying their expenses, such servants, in discharging the fireworks, are the servants of the seller, who is liable for their negligence. Consolidated Fireworks Co. *v.* Koehl, 206 Ill. 283, 68 N. E. 1077 [*affirming* 103 Ill. App. 152].

Lessee of slave.— The hirer of a slave is liable for the damage occasioned by the latter's negligence or other tort while actively engaged in the duties intrusted to him. Fitzgerald *v.* Ferguson, 11 La. Ann. 396; Gaillardet *v.* Demaries, 18 La. 490.

40. *Massachusetts.*— Hickey *v.* Merchants', etc., Transp. Co., 152 Mass. 39, 24 N. E. 860.

Mississippi.— New Orleans, etc., R. Co. *v.* Norwood, 62 Miss. 565, 52 Am. Rep. 191.

New Jersey.— See Pennsylvania R. Co. *v.* Russ, 57 N. J. L. 126, 30 Atl. 524, 26 L. R. A. 283.

New York.— Wright Steam Engine Works *v.* Lawrence Cement Co., 167 N. Y. 440, 60 N. E. 739; Arctic F. Ins. Co. *v.* Austin, 69 N. Y. 470, 25 Am. Rep. 221; Stevens *v.* Armstrong, 6 N. Y. 435; Walsh *v.* Riesenberg, 94 N. Y. App. Div. 466, 89 N. Y. Suppl. 58, Diehl *v.* Robinson, 72 N. Y. App. Div. 19, 76 N. Y. Suppl. 252; Stajakowski *v.* New York Cent., etc., R. Co., 63 N. Y. App. Div. 532, 71 N. Y. Suppl. 710; Coyle *v.* Pierrepont, 37 Hun 379; Higgins *v.* Western Union Tel. Co., 8 Misc. 433, 28 N. Y. Suppl. 676 [*affirmed* in 11 Misc. 32, 31 N. Y. Suppl. 841].

Pennsylvania.— McCullough *v.* Shoneman, 105 Pa. St. 169, 51 Am. Rep. 194.

United States.— Thayer *v.* Checkley, 127 Fed. 556, 62 C. C. A. 500.

See 34 Cent. Dig. tit. "Master and Servant," §§ 1213, 1214.

Compare Coggin *v.* Central R. Co., 62 Ga. 695, 35 Am. Rep. 132.

The owner of a steam roller is liable for injuries caused by the engineer's neglect to warn travelers of the danger of escaping steam, where he hires and has power to discharge the engineer, and pays his wages, although the roller has been hired by the day to a municipality for use upon its streets, and its officers direct where the roller shall be used. Stewart *v.* California Imp. Co., 131 Cal. 125, 63 Pac. 177, 724, 52 L. R. A. 205, (1900) 61 Pac. 280.

41. Geary *v.* Stevenson, 169 Mass. 23, 47 N. E. 508 (holding that the master is not

(B) *Driver and Team Hired to Third Person.* Applying the rules just considered, a master, such as a livery-stable keeper or other owner of horses and conveyances,[42] who furnishes a driver and team to another for the latter's use for a trip or for a specified time or for a particular purpose, is nevertheless liable for injuries resulting from the acts of the servant while performing such services for the third person, provided exclusive control of the driver is not vested in the hirer.[43] On the other hand, where the driver is actually placed under the exclusive control of the hirer, the master is not liable, but the hirer is liable.[44]

responsible for acts of an employee in making an arrest where he was acting under the direction and control of a police officer); New Omaha Thompson-Houston Electric Light Co. *v.* Anderson, (Nebr. 1905) 102 N. W. 89 (holding that a lineman of an electric light company while acting at fires, under the directions of city authorities, in pursuance of an ordinance, cannot render the company liable in the absence of special authority).

42. See, generally, LIVERY-STABLE KEEPERS, 25 Cyc. 1504.

43. *Indiana.*— Crockett *v.* Calvert, 8 Ind. 127.

Iowa.— Fenner *v.* Crips, 109 Iowa 455, 80 N. W. 526.

Massachusetts.— Huff *v.* Ford, 126 Mass. 24, 30 Am. Rep. 645; Kimball *v.* Cushman, 103 Mass. 194, 4 Am. Rep. 528.

New York.— Moore *v.* Stanton, 80 N. Y. App. Div. 295, 80 N. Y. Suppl. 244 [*affirmed* in 177 N. Y. 581, 69 N. E. 1127]; Catlin *v.* T. B. Peddie, etc., Co., 46 N. Y. App. Div. 596, 62 N. Y. Suppl. 76; Michael *v.* Stanton, 3 Hun 462, 5 Thomps. & C. 634.

Pennsylvania.— Hershberger *v.* Lynch, 2 Pa. Cas. 91, 11 Atl. 642.

United States.— Cargill *v.* Duffy, 123 Fed. 721; Quinn *v.* Complete Electric Constr. Co., 46 Fed. 506.

England.— Waldock *v.* Winfield, [1901] 2 K. B. 596, 70 L. J. K. B. 925, 85 L. T. Rep. N. S. 202; Laugher *v.* Painter, 5 B. & C. 547, 8 D. & R. 550, 4 L. J. K. B. O. S. 309, 11 E. C. L. 579; Sammell *v.* Wright, 5 Esp. 263. See also Abraham *v.* Bullock, 86 L. T. Rep. N. S. 796, 50 Wkly. Rep. 626.

Canada.— Canada Consol. Plate Glass Co. *v.* Caston, 29 Can. Sup. Ct. 624 [*reversing* 26 Ont. App. 63].

See 34 Cent. Dig. tit. "Master and Servant," § 1213.

It is immaterial that the person hiring expressly asked for the services of the particular driver who caused the injury (Joslin *v.* Grand Rapids Ice Co., 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54), or that the arrangement is a continuing one, as where the same driver is always sent and he wears the livery of the hirer and has accepted gratuities from him (Quarman *v.* Burnett, 4 Jur. 969, 9 L. J. Exch. 308, 6 M. & W. 499).

Express directions of passenger.—A passenger in a carriage, who is driven by a servant of the carrier, and who requests the driver to pass a vehicle in front of them upon being assured by the driver that it can be done, is not responsible for an accident caused by a collision of the vehicles, since the driver does not became his servant. Richardson *v.* Van Ness, 53 Hun (N. Y.) 267, 6 N. Y. Suppl. 618.

Incompetency as distinguished from wilful acts.— If one agrees to furnish another with a team and suitable driver, he must bear all loss or damage occasioned to the team in consequence of the incapacity and negligence of the driver. The employer would be liable for the acts of the driver done in pursuance of his orders, but the owner is liable for his incompetency. Ames *v.* Jordan, 71 Me. 540, 36 Am. Rep. 352.

44. *Georgia.*— Brown *v.* Smith, 86 Ga. 274, 12 S. E. 411, 22 Am. St. Rep. 456.

Massachusetts.— Kimball *v.* Cushman, 103 Mass. 194, 4 Am. Rep. 528.

Missouri.— See Cook *v.* Hannibal, etc., R. Co., 63 Mo. 397.

New York.— Howard *v.* Ludwig, 57 N. Y. App. Div. 94, 67 N. Y. Suppl. 1095.

Pennsylvania.— Kelton *v.* Fifer, 26 Pa. Super. Ct. 603.

England.— Jones *v.* Scullard, [1898] 2 Q. B. 565, 67 L. J. Q. B. 895, 79 L. T. Rep. N. S. 386, 47 Wkly. Rep. 303.

See 34 Cent. Dig. tit. "Master and Servant," § 1214.

Name on wagon.— The fact that the hirers, with the apparent sanction and assent of the original master, were permitted to put their own name and address upon the wagon as an advertisement to the general public that it was theirs, or at least in use in their business, is one of great significance in determining in whose service the driver is to be regarded as driving at the time of the accident. Howard *v.* Ludwig, 57 N. Y. App. Div. 94, 67 N. Y. Suppl. 1095.

Horse owned by hirer.— The owner of a brougham and horse, with its harness, kept them at a livery stable. He had no coachman, but hired a driver from the livery-stable keeper at a certain weekly sum. The livery-stable keeper paid the driver's wages. The owner of the equipage supplied the driver with a full set of livery clothes, and there was evidence that the driver had been approved of by the owner. The horse was new to London life and had only been driven a few times in the brougham by the driver, and its peculiarities were unknown both to the livery-stable keeper and to the driver. It was held that the driver was the servant of the owner of the equipage, who was liable for injuries caused to a third person through the negligence of the driver while driving the equipage. Jones *v.* Scullard, [1898] 2 Q. B.

c. Joint Employment. Where a servant is jointly employed by several persons who are not partners, each contributing to his wages, one of the masters is not liable for the misconduct of the servant while engaged solely in the service of another master.[45] On the other hand the fact that a servant is employed by two or more, such as a flagman at a railroad crossing, does not exonerate from liability the master in whose service he is negligent or otherwise commits a tort.[46]

d. Termination of Relation. When the relation is terminated, either temporarily or permanently, of course the master is no longer liable because of any future acts of the sometime servant before the relationship is resumed.[47]

e. Persons to Whom Master Is Liable. The master is ordinarily not liable to a fellow servant of the one whose act was the cause of the injury,[48] nor to volunteers or others assisting the servant, except as modified by the rules as to assumption of risk and acts of fellow servants.[49] He may be liable, however, to the servant of his independent contractor injured by the acts of his servant.[50]

3. Nature of Act or Omission — a. Scope of Employment — (I) *General Rule.* The primary test to determine the master's liability for the act of his servant is whether the act was within the scope of his employment.[51] The master is liable for the act of a servant within the scope of his employment,[52] but is not

565, 67 L. J. Q. B. 895, 79 L. T. Rep. N. S. 386, 47 Wkly. Rep. 303.

45. Bell *v.* Pistorius, 18 Ohio Cir. Ct. 73, 9 Ohio Cir. Dec. 869, holding that where three persons hired a coachman and divided his wages, and the carriage belonged to one and the horses to another, and a person was injured by the negligence of the coachman while driving one of them, the latter alone was liable for such injuries.

46. See Buchanan *v.* Chicago, etc., R. Co., 75 Iowa 393, 39 N. W. 663; Brow *v.* Boston, etc., R. Co., 157 Mass. 399, 32 N. E. 362; Illinois Cent. R. Co. *v.* King, 69 Miss. 852, 13 So. 824.

47. Brown *v.* Purviance, 2 Harr. & G. (Md.) 316; Flint *v.* Gloucester Gaslight Co., 9 Allen (Mass.) 552. See also Nicholas *v.* Keeling, 21 Pa. Super. Ct. 181. But see Com. *v.* Brockton St. R. Co., 143 Mass. 501, 10 N. E. 506, holding that the driver of a horse railroad car is none the less a servant after yielding up the reins to a substitute who ordinarily takes his place to allow him to go to his meals.

48. See *supra*, IV, G, 1.

49. See *supra*, IV, G, 3, b, (III).

50. Lookout Mountain Iron Co. *v.* Lea, 144 Ala. 169, 39 So. 1017.

51. **What acts are within scope** see *infra*, V, A, 4.

52. *Connecticut.*— Rooney *v.* Woolworth, 78 Conn. 167, 61 Atl. 366.

Illinois.— Chicago, etc., R. Co. *v.* Sykes, 96 Ill. 162; Dinsmoor *v.* Wolber, 85 Ill. App. 152.

Minnesota.— Morier *v.* St. Paul, etc., R. Co., 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793.

New York.— Lynch *v.* Metropolitan El. R. Co., 90 N. Y. 77, 43 Am. Rep. 141 [*affirming* 24 Hun 506].

South Carolina.— Priester *v.* Augley, 5 Rich. 44.

Texas.— See Missouri, etc., R. Co. *v.* Rodgers, (Civ. App. 1897) 39 S. W. 383.

Wisconsin.— Enos *v.* Hamilton, 24 Wis. 658.

United States.— See The Amiable Nancy, 1 Fed. Cas. No. 331, 1 Paine 111.

Canada.— Willams *v.* Cunningham, 23 Quebec Super. Ct. 263.

See 34 Cent. Dig. tit. "Master and Servant," § 1217 *et seq.*

Reason for rule.— The liability of the master to answer for the conduct of his servant, or that of the principal for the conduct of his agent, is founded on the superintendence and control which the master is supposed to exercise over his servant, or the principal over his agent. 1 Blackstone Comm. 431. By the civil law, that liability was confined to the person standing in the relation of *pater familias* to the person doing the injury. And although by the common law the rule of liability has been extended to cases where the agent is not a mere domestic, yet the principle and the reason upon which it rests is the same. This rule of *respondeat superior*, as its terms import, arises out of the relation of superior and subordinate, is applicable to that relation wherever it exists, whether between principal and agent or master and servant, and is coextensive with it, and ceases where the relation itself ceases to exist. It is founded on the power of control and direction which the superior has a right to exercise, and which for the safety of other persons he is bound to exercise, over the acts of his subordinates, and in strict analogy to the liability *ex contractu*, upon the maxim *qui facit per alium facit per se*. The direct coincidence and coexistence of the rule of *respondeat superior* with the relation to which it belongs is an unvarying test of its application. Clark *v.* Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Quarman *v.* Burnett, 4 Jur. 969, 9 L. J. Exch. 308, 6 M. & W. 497.

Statutes.— In Georgia the statute fixing the liability applies only to injuries connected with the performance of the servant's duty. Columbus, etc., R. Co. *v.* Christian,

liable for acts committed outside the scope of his employment,[53] although intended to promote the master's interests.[54] The test is not the character of the act,[55] nor whether it was done during the existence of the servant's employment;[56] but whether the injury complained of was committed by the authority of the master expressly conferred or fairly implied in the nature of the employment and the duties incident to it.[57] The master's liability is not limited to cases where he is present and remains passive,[58] nor to cases where the act is without his knowledge or express authority.[59] On the other hand the master is not liable for any act of his servant which he would not have been liable for if he had done it himself.[60] The difficult question in all cases is whether the particular act was really within the scope of the servant's employment.[61]

(II) *EXCEPTIONS TO RULE.* There are certain exceptions to the rule confining

97 Ga. 56, 25 S. E. 411. In Louisiana the civil code confines the responsibility of masters to damages occasioned by their servants "in the exercise of the functions in which they are employed;" and they are not liable for collateral torts committed by servants while attending to the duties of their employment. Vara *v.* R. M. Quigley Constr. Co., 114 La. 261, 38 So. 162.

Acts outside scope of authority.— Contrary to the general rule, it has been held that where an employee of the owners of a building opened a coal-hole in the sidewalk and left it unprotected, and plaintiff was injured by falling into it, the master is liable for injuries sustained, although such employee acted beyond the scope of his authority. King *v.* Herb, 18 Ohio Cir. Ct. 41, 9 Ohio Cir. Dec. 797.

Rule as applicable to corporation see CORPORATIONS, 10 Cyc. 1203 *et seq.*

53. *Alabama.*— Palos Coal, etc., Co. *v.* Benson, (1905) 39 So. 727; Mayer *v.* Thompson-Hutchison Bldg Co., 104 Ala. 611, 16 So. 620, 53 Am. St. Rep. 88, 28 L. R. A. 433.

California.— See Andrews *v.* Runyon, 65 Cal. 629, 4 Pac. 669.

Georgia.— Georgia Cent. R. Co. *v.* Morris, 121 Ga. 484, 49 S. E. 606, 104 Am. St. Rep. 164; Lee *v.* Nelms, 57 Ga. 253.

Illinois.— Illinois Steel Co. *v.* Zolnowski, 118 Ill. App. 209.

Indiana.— Helfrich *v.* Williams, 84 Ind. 553.

Iowa.— Yates *v.* Squires, 19 Iowa 26, 87 Am. Dec. 418.

Louisiana.— Boulard *v.* Calhoun, 13 La. Ann. 445.

Massachusetts.— Howe *v.* Newmarch, 12 Allen 49; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

Michigan.— Caniff *v.* Blanchard Nav. Co., 66 Mich. 638, 33 N. W. 744, 11 Am. St. Rep. 541.

Missouri.—Snyder *v.* Hannibal, etc., R. Co., 60 Mo. 413; Hartman *v.* Muehlbach, 64 Mo. App. 565; Jones *v.* St. Louis, etc., Packet Co., 43 Mo. App. 398; Farber *v.* Missouri Pac. R. Co., 32 Mo. App. 378; Eckert *v.* St. Louis Transfer Co., 2 Mo. App. 36.

Nebraska.— Clancy *v.* Barker, (1905) 103 N. W. 446, 69 L. R. A. 642; Western Union Tel. Co. *v.* Mullins, 44 Nebr. 732, 62 N. W. 880.

New Hampshire.— Rowell *v.* Boston, etc., R. Co., 68 N. H. 358, 44 Atl. 488.

New Jersey.— Holler *v.* Ross, 68 N. J. L. 324, 53 Atl. 472, 96 Am. St. Rep. 546, 59 L. R. A. 943.

New York.— Mott *v.* Consumers' Ice Co., 73 N. Y. 543; Feneran *v.* Singer Mfg. Co., 20 N. Y. App. Div. 574, 47 N. Y. Suppl. 284; Courtney *v.* Baker, 37 N. Y. Super. Ct. 249; Sheridan *v.* Charlick, 4 Daly 338; Doyle *v.* Trinity Church Corp., 5 N. Y. St. 53.

Ohio.— Little Miami R. Co. *v.* Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373.

Pennsylvania.— Towanda Coal Co. *v.* Heeman, 86 Pa. St. 418; Philadelphia, etc., R. Co. *v.* Wilt, 4 Whart. 143. See Hobdy *v.* Margotto, 4 Lack. Leg. N. 17.

South Carolina.— McClenaghan *v.* Brock, 5 Rich. 17.

Wisconsin.— Cobb *v.* Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909.

United States.— Bowen *v.* Illinois Cent. R. Co., 136 Fed. 306, 69 C. C. A. 444, 70 L. R. A. 915.

England.— Lamb *v.* Palk, 9 C. & P. 629, 38 E. C. L. 367.

Canada.— Coll *v.* Toronto R. Co., 25 Ont. App. 55.

See 34 Cent. Dig. tit. "Master and Servant," § 1217 *et seq.*

54. Coll *v.* Toronto R. Co., 25 Ont. App. 55.

55. Dolan *v.* Hubinger, 109 Iowa 408, 80 N. W. 514.

56. Mott *v.* Consumers' Ice Co., 73 N. Y. 543; Lima R. Co. *v.* Little, 67 Ohio St. 91, 65 N. E. 861; Bergman *v.* Hendrickson, 106 Wis. 434, 82 N. W. 304, 80 Am. St. Rep. 47.

57. Harbison *v.* Iliff, 10 Ohio S. & C. Pl. Dec. 58, 8 Ohio N. P. 392.

58. Korah *v.* Ottawa, 32 Ill. 121, 83 Am. Dec. 255; Hart *v.* New Orleans, etc., R. Co., 1 Rob. (La.) 178, 36 Am. Dec. 689; Baker *v.* Hagey, 11 Montg. Co. Rep. (Pa.) 205.

59. Denver, etc., R. Co. *v.* Conway, 8 Colo. 1, 5 Pac. 142, 54 Am. Rep. 537; Robinson *v.* Webb, 11 Bush (Ky.) 464; Snyder *v.* Hannibal, etc., R. Co., 60 Mo. 413; Gilmartin *v.* New York, 55 Barb. (N. Y.) 239; Hardegg *v.* Willards, 12 Misc. (N. Y.) 17, 33 N. Y. Suppl. 25. And see Deck *v.* Baltimore, etc., R. Co., 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 399.

60. Russell *v.* Irby, 13 Ala. 131.

61. See *infra*, V, A, 4.

a master's liability to acts of the servant within the scope of his employment and in the line of his duties. For instance railroad companies have been held responsible for assaults committed by their servants upon passengers, upon the ground that they undertook an additional duty involving the utmost care and good faith, the master's liability being placed on the ground of public policy, it being more reasonable that the master, who has placed his servant in a position of trust than the irresponsible stranger, should suffer.[62] By like reasoning it has been held that a shop-keeper is liable for the acts of his servants toward a customer in the store, even though such acts are not committed within the strict line of employment.[63] So where a servant is employed to guard the property of a third person, and he steals some of the property, the master has been held liable, although the act was outside the scope of his employment.[64] So the rule as to injuries from dangerous appliances intrusted to the care of the servant[65] may perhaps be said to be an exception to the general rule.[66]

b. Wilful or Malicious Acts of Servant. The earlier cases held that the master was not liable for the wilful or malicious acts of his servant, as distinguished from his neglect, unless the act was done pursuant to the master's express orders or with his assent, notwithstanding it was done in the line of the servant's duties.[67]

62. See CARRIERS, 6 Cyc. 600.

63. Swinarton *v.* Le Boutillier, 7 Misc. (N. Y.) 639, 28 N. Y. Suppl. 53, 31 Abb. N. Cas. 281 [*affirmed* in 148 N. Y. 752, 43 N. E. 990] (holding that allowing servants to snap pins at objects and persons in a store was negligence for which a storekeeper was liable to a customer who was injured thereby); Mallach *v.* Ridley, 9 N. Y. Suppl. 922, 24 Abb. N. Cas. 172.

Contrary rule.— "It is true that customers in such case are upon the premises by invitation, and the merchant owes the positive duty to the customer of using ordinary care to keep the premises in a reasonably safe condition for use by the customer in the usual way; and this doubtless includes the duty of using ordinary care to employ competent and law-abiding servants, but we do not understand that he insures the customer's personal safety. . . . The general principle as frequently stated is that persons who come upon premises to do business with the occupant at his express or implied request are there by invitation, and that they are entitled to the same treatment due to all invited persons, namely, the exercise of ordinary care by the occupant." Cobb *v.* Simon, 119 Wis. 597, 604, 97 N. W. 276, 100 Am. St. Rep. 909. And see Hupfer *v.* National Distilling Co., 114 Wis. 279, 90 N. W. 191.

Blacksmith.— The proprietor of a blacksmith shop is liable for the negligence and unskilfulness of his servants whom he left in charge of his shop, and who were intrusted by plaintiff, in the proprietor's absence, with the task of shoeing his horse, although they were not employed for the purpose of shoeing horses. Finding them in charge and at work, plaintiff had a right to assume that they had authority and sufficient skill. Leviness *v.* Post, 6 Daly (N. Y.) 321.

64. Williams *v.* Brooklyn Dist. Tel. Co., 12 Misc. (N. Y.) 565, 33 N. Y. Suppl. 849.

65. See *infra*, V, A, 4, c, (II).

66. See Barmore *v.* Vicksburg, etc., R. Co., 85 Miss. 426, 38 So. 210, 70 L. R. A. 627.

67. See the following cases:

Alabama.— Selma, etc., R. Co. *v.* Webb, 49 Ala. 240; Cox *v.* Keahey, 36 Ala. 340, 76 Am. Dec. 325.

California.— Turner *v.* North Beach, etc., R. Co., 34 Cal. 594.

Connecticut.— Thames Steamboat Co. *v.* Housatonic R. Co., 24 Conn. 40, 63 Am. Dec. 154; Church *v.* Mansfield, 20 Conn. 284. See Crocker *v.* New London, etc., R. Co., 24 Conn. 249.

Illinois.— Oxford *v.* Peter, 28 Ill. 434; Illinois Cent. R. Co. *v.* Downey, 18 Ill. 259; Tuller *v.* Voght, 13 Ill. 277.

Iowa.—De Camp *v.* Mississippi, etc., R. Co., 12 Iowa 348.

Kentucky.—Brasher *v.* Kennedy, 10 B. Mon. 28.

Maryland.— Brown *v.* Purviance, 2 Harr. & G. 316.

Massachusetts.— Southwick *v.* Estes, 7 Cush. 385; Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

Michigan.— Moore *v.* Sanborne, 2 Mich. 519, 59 Am. Dec. 209.

Mississippi.— New Orleans, etc., R. Co. *v.* Harrison, 48 Miss. 112, 12 Am. Rep. 356; McCoy *v.* McKowen, 26 Miss. 487, 59 Am. Dec. 264.

New York.— Isaacs *v.* Third Ave. R. Co., 47 N. Y. 122, 7 Am. Rep. 418; Vanderbilt *v.* Richmond Turnpike Co., 2 N. Y. 479, 51 Am. Dec. 315; Hughes *v.* New York, etc., R. Co., 36 N. Y. Super. Ct. 222; Steele *v.* Smith, 3 E. D. Smith 321; Garvey *v.* Dung, 30 How. Pr. 315; Wright *v.* Wilcox, 19 Wend. 343, 32 Am. Dec. 507. See Priest *v.* Hudson River R. Co., 65 N. Y. 589.

North Carolina.— Wesson *v.* Seaboard, etc., R. Co., 49 N. C. 379; Harriss *v.* Mabry, 23 N. C. 240; Campbell *v.* Staiert, 6 N. C. 389.

Pennsylvania.— Pittsburg, etc., Pass. R. Co. *v.* Donahue, 70 Pa. St. 119; Yerger *v.*

It is now well settled, however, that the master is liable for the wilful or malicious acts of his servant where they are done in the course of his employment and within its scope.[68] On the other hand, where the servant does a wilful or malicious act while engaged in his master's work, but outside of his authority, as where he steps aside from his employment to gratify some personal animosity or to accomplish some purpose of his own, the master is generally not liable.[69] If a third person is injured by the act of a servant done in the course of his employ-

Warren, 31 Pa. St. 319; Snodgrass *v.* Bradley, 2 Grant 43.

Tennessee.— Puryear *v.* Thompson, 5 Humphr. 397.

Vermont.—Andrus *v.* Howard, 36 Vt. 248, 84 Am. Dec. 680.

Virginia.— Harris *v.* Nicholas, 5 Munf. 483.

England.— McManus *v.* Crickett, 1 East 106, 5 Rev. Rep. 518.

See 34 Cent. Dig. tit. "Master and Servant," § 1230.

Statutes.— Ga. Code, § 2961, making a person liable for torts committed by his servants, whether by negligence or voluntarily, applies to domestic servants only. Lockett *v.* Pittman, 72 Ga. 815.

68. *Alabama.*— City Delivery Co. *v.* Henry, 139 Ala. 161, 34 So. 389.

Arkansas.— St. Louis, etc., R. Co. *v.* Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105; Duggins *v.* Watson, 15 Ark. 118, 60 Am. Dec. 560.

Illinois.— Toledo, etc., R. Co. *v.* Harmon, 47 Ill. 298, 95 Am. Dec. 489; Franklin L. Ins. Co. *v.* People, 103 Ill. App. 554; Dinsmoor *v.* Wolber, 85 Ill. App. 152.

Indiana.— Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116, 10 Am. Rep. 103.

Iowa.— McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748, holding that the master is liable where the servant is executing what he supposes to be the orders of the master, although the orders do not contemplate such acts.

Maryland.— Baltimore Consol. R. Co. *v.* Pierce, 89 Md. 495, 43 Atl. 940, 45 L. R. A. 527.

Massachusetts.—Aiken *v.* Holyoke St. R. Co., 184 Mass. 269, 68 N. E. 238; Young *v.* South Boston Ice Co., 150 Mass. 527, 23 N. E. 326; Howe *v.* Newmarch, 12 Allen 49.

Mississippi.— Richberger *v.* American Express Co., 73 Miss. 161, 18 So. 922, 55 Am. St. Rep. 522, 31 L. R. A. 390, expressly overruling earlier Mississippi cases cited in preceding note.

Nebraska.— Chicago, etc., R. Co. *v.* Kerr, (1905) 104 N. W. 49.

New Hampshire.— Rowell *v.* Boston, etc., R. Co., 68 N. H. 358, 44 Atl. 488.

New York.— Magar *v.* Hammond, 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. 1038; Mott *v.* Consumers' Ice Co., 73 N. Y. 543; Cohen *v.* Dry Dock, etc., R. Co., 69 N. Y. 170 [*affirming* 40 N. Y. Super. Ct. 368]; Tway *v.* Salvin, 109 N. Y. App. Div. 288, 95 N. Y. Suppl. 653 (holding that where the servant of a saloonkeeper in the scope of his authority wilfully puts a drug in a drink served to a customer, the master is liable therefor); Levy *v.* Ely, 48 N. Y. App. Div. 554, 62 N. Y. Suppl. 855; Burns *v.* Glens Falls, etc., R. Co., 4 N. Y. App. Div. 426, 38 N. Y. Suppl. 856; Clark *v.* Koehler, 46 Hun 536; Swinarton *v.* Le Boutillier, 7 Misc. 639, 28 N. Y. Suppl. 53, 31 Abb. N. Cas. 281 [*affirmed* in 148 N. Y. 752, 43 N. E. 990].

North Carolina.—Jackson *v.* American Tel., etc., Co., 139 N. C. 347, 51 S. E. 1015, 30 L. R. A. 738.

Ohio.— Nelson Business College Co. *v.* Lloyd, 60 Ohio St. 448, 54 N. E. 471, 71 Am. St. Rep. 729, 46 L. R. A. 314; Harbison *v.* Iliff, 10 Ohio S. & C. Pl. Dec. 58, 8 Ohio N. P. 392.

Tennessee.— Luttrell *v.* Hazen, 2 Sneed 20.

Wisconsin.— Schaefer *v.* Osterbrink, 67 Wis. 495, 30 N. W. 922, 58 Am. Rep. 875; Craker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504.

United States.— Bowen *v.* Illinois Cent. R. Co., 136 Fed. 306, 69 C. C. A. 444, 70 L. R. A. 915.

England.— Citizens' L. Assur. Co. *v.* Brown, [1904] A. C. 423, 73 L. J. P. C. 102, 90 L. T. Rep. N. S. 739, 20 T. L. R. 497, 53 Wkly. Rep. 176.

See 34 Cent. Dig. tit. "Master and Servant," § 1230.

Liability of corporation.— The rule that a master is liable for the wilful torts of his servant, committed in the course of the servant's employment, applies as well where the master is a corporation as where he is a private individual. See CORPORATIONS, 10 Cyc. 1203, 1210.

The owner of a race-horse is liable to the owner of a competing horse, where his rider fouls or intentionally runs against him. McKay *v.* Irvine, 10 Fed. 725, 11 Biss. 168.

69. *Alabama.*— Collins *v.* Alabama, etc., R. Co., 104 Ala. 390, 16 So. 140.

Illinois.— Illinois Cent. R. Co. *v.* Downey, 18 Ill. 259; Belt R. Co. *v.* Banicki, 102 Ill. App. 642.

Indiana.— Evansville, etc., R. Co. *v.* Baum, 26 Ind. 70.

Kentucky.— Patterson *v.* Maysville, etc., R. Co., 78 S. W. 870, 25 Ky. L. Rep. 1750.

Massachusetts.— Howe *v.* Newmarch, 12 Allen 49.

Mississippi.— New Orleans, etc., R. Co. *v.* Harrison, 48 Miss. 112, 12 Am. Rep. 356.

Missouri.— Jackson *v.* St. Louis, etc., R. Co., 87 Mo. 422, 56 Am. Rep. 460.

New Jersey.— Evers *v.* Krouse, 70 N. J. L. 653, 58 Atl. 181, 66 L. R. A. 592.

New York.— Mott *v.* Consumers' Ice Co., 73 N. Y. 543; Rounds *v.* Delaware, etc., R. Co., 64 N. Y. 129, 21 Am. Rep. 597; Clark *v.*

ment, the motive or intention of the servant is immaterial;[70] but when the nature of the act is such as to render it equivocal whether the act comes within the scope of the servant's employment, the intention with which the act is done may be looked at in determining its character.[71]

c. Criminal Acts.[72] Ordinarily a master is not liable in damages for criminal acts of the servant not within the scope of his employment, and not authorized or sanctioned by him,[73] such as larceny[74] or murder.[75] On the other hand the master may be liable in damages because of the criminal acts of his servant, where such acts can be said to be within the scope of the servant's employment.[76]

d. Liability For Particular Acts or Omissions — (1) *NEGLIGENCE.* The master is liable for the negligence of a servant while acting as such and within the scope of his employment.[77] Thus the owner of horses is liable for injuries to

Koehler, 46 Hun 536; Weldon *v.* Harlem R. Co., 5 Bosw. 576.

Ohio.— Stranahan Bros. Catering Co. *v.* Coit, 55 Ohio St. 398, 45 N. E. 634, 4 L. R. A. N. S. 506.

Pennsylvania.— Brennan *v.* Merchant, 205 Pa. St. 258, 54 Atl. 891.

Rhode Island.— Paulton *v.* Keith, 23 R. I. 164, 49 Atl. 635, 91 Am. St. Rep. 624.

Tennessee.— Deihl *v.* Ottenville, 14 Lea 191.

Texas.— St. Louis Southwestern R. Co. *v.* Mayfield, 35 Tex. Civ. App. 82, 79 S. W. 365.

Washington.—Thorburn *v.* Smith, 10 Wash. 479, 39 Pac. 124.

See 34 Cent. Dig. tit. "Master and Servant," § 1230.

70. Passenger R. Co. *v.* Young, 21 Ohio St. 518, 8 Am. Rep. 78.

Malice toward master.— The liability of the master is not affected, where the servant's act is done in the course of his employment, because the act was the result of malice toward the master. Stranahan Bros. Catering Co. *v.* Coit, 55 Ohio St. 398, 45 N. E. 634, 4 L. R. A. N. S. 506.

71. Passenger R. Co. *v.* Young, 21 Ohio St. 518, 8 Am. Rep. 78.

72. Sales of intoxicating liquors see INTOXICATING LIQUORS, 23 Cyc. 205–209.

73. Jackson *v.* St. Louis, etc., R. Co., 87 Mo. 422, 56 Am. Rep. 460.

Carrying away slaves.— Where an act of a servant is illegal, as where the master of a steamboat employs or carries off a slave, the owners are only liable when it is proved that they might have, but have not, prevented the act. Duncan *v.* Hawks, 18 La. 548; Buel *v.* New York Steamer, 17 La. 541; Ware *v.* Barataria, etc., Canal Co., 15 La. 169, 35 Am. Dec. 189; Goldenbow *v.* Wright, 13 La. 371; Burke *v.* Clarke, 11 La. 206; Strawbridge *v.* Turner, 9 La. 213; Palfrey *v.* Kerr, 8 Mart. N. S. (La.) 503.

74. Cheshire *v.* Bailey, [1905] 1 K. B. 237, 74 L. J. K. B. 176, 92 L. T. Rep. N. S. 142, 21 T. L. R. 130, 53 Wkly. Rep. 322.

Trespass ordered by master.—A master who ordered his servants to break and enter plaintiff's locked room in a building in which they were decorating, for the purpose of completing the work, is not liable for a larceny committed by the servants while in the room. Searle *v.* Parke, 68 N. H. 311, 34 Atl. 744. The larceny of a servant, not authorized or ratified, immediately following an unlawful trespass, which trespass was directed and authorized by the master, such larceny having been committed, not as a means or for the purpose of performing the master's work, or connected with the trespass, is not within the scope of his authority and does not make the master liable. Harbison *v.* Iliff, 10 Ohio S. & C. Pl. Dec. 58, 8 Ohio N. P. 372.

Larceny by watchman.— But where a guard employed to protect the building from burglars enters and himself commits larceny, the employer of the guard is liable to the owner of the building, although the act is outside of the scope of the servant's employment. Williams *v.* Brooklyn Dist. Tel. Co., 12 Misc. (N. Y.) 565, 33 N. Y. Suppl. 849. See also WAREHOUSEMEN.

75. Candiff *v.* Louisville, etc., R. Co., 42 La. Ann. 477, 7 So. 601.

76. Lloyd *v.* Nelson Business College, 13 Ohio Cir. Ct. 358, 7 Ohio Cir. Dec. 318. And see *infra*, V, A, 4.

77. *Alabama.*— Lookout Mountain Iron Co. *v.* Lea, 144 Ala. 169, 39 So. 1017; Montgomery Gas Light Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372, 5 So. 735.

Delaware.— Ford *v.* Charles Warner Co., 1 Marv. 88, 37 Atl. 39; Wilson *v.* Rockland Mfg. Co., 2 Harr. 67.

Georgia.— Macon, etc., R. Co. *v.* Davis, 13 Ga. 68; Scudder *v.* Woodbridge, 1 Ga. 195.

Illinois.— Toledo, etc., R. Co. *v.* Harmon, 47 Ill. 298, 95 Am. Dec. 489; American Express Co. *v.* Haggard, 37 Ill. 465, 87 Am. Dec. 257; Korah *v.* Ottawa, 32 Ill. 121, 83 Am. Dec. 255; St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353.

Indiana.— Brudi *v.* Luhrman, 26 Ind. App. 221, 59 N. E. 409.

Kentucky.— Johnson *v.* Small, 5 B. Mon. 25.

Louisiana.— Levins *v.* Bancroft, 114 La. 105, 38 So. 72; Costa *v.* Yochim, 104 La. 170, 28 So. 992; Hart *v.* New Orleans, etc., R. Co., 1 Rob. 178, 36 Am. Dec. 689; Gaillardet *v.* Demaries, 18 La. 490.

Massachusetts.—Powell *v.* Deveney, 3 Cush. 300, 50 Am. Dec. 738; Gray *v.* Portland Bank, 3 Mass. 364, 3 Am. Dec. 156.

third persons by the negligence of his driver in leaving them unattended or unhitched, or in driving them.[73] The liability is not limited to acts of the serv-

Michigan.— Peck *v.* Michigan Cent. R. Co., 57 Mich. 3, 23 N. W. 466.

Minnesota.— Crandall *v.* Boutell, (1905) 103 N. W. 890; Gunderson *v.* Northwestern Elevator Co., 47 Minn. 161, 49 N. W. 694; Brazil *v.* Peterson, 44 Minn. 212, 46 N. W. 331, holding that the proprietor of a saloon is liable for the negligence of his bar-keeper for forcibly ejecting one in an intoxicated and helpless condition.

Missouri.— Gass *v.* Coblens, 43 Mo. 377; Douglass *v.* Stephens, 18 Mo. 362; Dale *v.* Hill-O'Meara Constr. Co., 108 Mo. App. 90, 82 S. W. 1092.

Nebraska.— L. W. Pomerene Co. *v.* White, 70 Nebr. 171, 97 N. W. 232.

New Hampshire.— Sinclair *v.* Pearson, 7 N. H. 219.

New York.— Lannen *v.* Albany Gaslight Co., 44 N. Y. 459; Kelmer *v.* Reckitt, 75 N. Y. App. Div. 180, 77 N. Y. Suppl. 395; Post *v.* Stockwell, 44 Hun 28; Baxter *v.* Warner, 6 Hun 585; Harlow *v.* Humiston, 6 Cow. 189.

North Carolina.— Jones *v.* Glass, 35 N. C. 305; Harriss *v.* Mabry, 23 N. C. 240; Campbell *v.* Staiert, 6 N. C. 389.

Pennsylvania.— Brunner *v.* American Tel., etc., Co., 160 Pa. St. 300, 28 Atl. 690; Pennsylvania Tel. Co. *v.* Varnau, (1888) 15 Atl. 624; Shaw *v.* Reed, 9 Watts & S. 72; Myers *v.* Snyder, Brightly 489. See also Garner *v.* Citizens' Natural Gas Co., 198 Pa. St. 16, 47 Atl. 965.

South Carolina.—Parker *v.* Gordon, Dudley 270; Moore *v.* Drayton, Dudley 268; O'Connell *v.* Strong, Dudley 265.

Tennessee.— Puryear *v.* Thompson, 5 Humphr. 397.

Vermont.— Sherman *v.* Delaware, etc., Canal Co., 71 Vt. 325, 45 Atl. 227; Tuel *v.* Weston, 47 Vt. 634.

Washington.— Dumontier *v.* Stetson, etc., Mill Co., 39 Wash. 264, 81 Pac. 693.

Wisconsin.— Lawton *v.* Waite, 103 Wis. 244, 79 N. W. 321, 45 L. R. A. 616.

United States.— De Haven *v.* Hennessey Bros., etc., Co., 137 Fed. 472, 69 C. C. A. 620; Lowe *v.* Stockton, 15 Fed. Cas. No. 8,567, 4 Cranch C. C. 537.

England.— Beard *v.* London Gen. Omnibus Co., [1900] 2 Q. B. 530, 69 L. J. Q. B. 895, 83 L. T. Rep. N. S. 362, 48 Wkly. Rep. 658. See Abraham *v.* Bullock, 86 L. T. Rep. N. S. 796, 50 Wkly. Rep. 626.

Canada.— Stephens *v.* Chausse, 15 Can. Sup. Ct. 379; Cunningham *v.* Grand Trunk R. Co., 31 U. C. Q. B. 350.

See 34 Cent. Dig. tit. "Master and Servant," § 1226.

Discharge of fireworks.— One is liable for personal injuries caused by the negligent discharge of fireworks by his servants. Colvin *v.* Peabody, 155 Mass. 104, 29 N. E. 59.

Leaving trap-door or coal-hole open.— Where a servant, whose work requires him to open a trap-door or coal-hole, or like contrivance, fails to close it, the master is liable for injuries resulting to third persons therefrom. Ray *v.* Jones, etc., Co., 92 Minn. 101, 99 N. W. 782; Todd *v.* Havlin, 72 Mo. App. 565. And see *infra*, V, A, 4, a.

Contagious disease.— Where a person, in purchasing a ticket at a railroad station, contracts a contagious disease from the ticket agent, the railroad company is not liable in damages, unless it be shown that it, or its superior officers, knew that the agent had the disease. Long *v.* Chicago, etc., R. Co., 48 Kan. 28, 28 Pac. 977, 30 Am. St. Rep. 271, 15 L. R. A. 319. *Compare* Missouri, etc., R. Co. *v.* Freeman, (Tex. Civ. App. 1903) 73 S. W. 542.

Ground of liability.— The liability of a master arising out of an act of negligence committed by his servant does not rest upon the ground that the master himself was negligent, but upon considerations of public policy, which hold him responsible for the acts of his servants when acting about his business. Helms *v.* Northern Pac. R. Co., 120 Fed. 389.

Medical examiner of accident insurance company.— Where one insured under an accident policy has sprained his foot, requiring a plaster cast thereon until the injured ligaments heal, and the agent of the insurer, in making an examination, removes and fails to replace such cast, and an injury results, he is guilty of negligence for which the insurer is liable. Tompkins *v.* Pacific Mut. L. Ins. Co., 53 W. Va. 479, 44 S. E. 439, 97 Am. St. Rep. 1006, 62 L. R. A. 489. Physician as independent contractor see *infra*, V, B, 1, b.

Negligence not within scope.— A master is not responsible to one injured by the unauthorized and forbidden conduct of his employees not within the scope of their employment, unless after knowledge thereof he was himself guilty of some misconduct. Healy *v.* Patterson, 123 Iowa 73, 98 N. W. 576. Where a servant acts under the special orders of his master, the master is not liable for his negligence in doing business outside of the scope of his employment. Wilson *v.* Peverly, 2 N. H. 548. A master is not answerable for the negligence of his servant in doing something the master has not ordered done, if he has not authorized the servant to exercise his discretion in determining what to do. St. Louis Southwestern R. Co. *v.* Mayfield, 35 Tex. Civ. App. 82, 79 S. W. 365.

Liability of corporations in general see CORPORATIONS, 10 Cyc. 1221.

78. *Colorado.*— Pierce *v.* Conners, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279.

Illinois.— Dinsmoor *v.* Wolber, 85 Ill. App. 152; L. Wolff Mfg. Co. *v.* Wilson, 46 Ill. App. 381 [*affirmed* in 152 Ill. 9, 38 N. E. 694, 26 L. R. A. 229].

Iowa.— Healy *v.* Johnson, 127 Iowa 221, 103 N. W. 92.

Louisiana.— Westerfield *v.* Levis, 43 La. Ann. 63, 9 So. 52.

ant done under the master's instructions or approved by the master during the service.[79] It is immaterial that the master was not present at the time,[80] that he had no actual notice of the omission constituting the servant's negligence,[81] that he had delegated to a third person the power to give the servant instructions as to his work,[82] or that the servant acted without the knowledge or contrary to the wishes of his master.[83] The general rule is that the liability of the master for the negligence of his servant is not affected by the fact that he exercised all possible care in the selection of the servant,[84] although the rule is otherwise, where it is sought to make the master liable for the acts or omissions from want of skill by one employed by him in some independent work,[85] or where the master is sued by one servant for the negligence of a fellow servant.[86] Plaintiff cannot recover, although defendant's servant was negligent in the scope of his employment, if plaintiff himself was guilty of contributory negligence.[87] But the concurrent negligence of a third person is not a defense[88] any more than if the master himself was the person alleged to be guilty of negligence.[89]

(II) *OTHER TORTS.* In respect of other torts committed by the servant there can be no question but that the master is liable, at the present day, for an assault,[90]

Massachusetts.— McDonald *v.* Snelling, 14 Allen 290, 92 Am. Dec. 768.

New York.— Wolfe *v.* Mersereau, 4 Duer 473.

Pennsylvania.— Hummell *v.* Wester, Brightly 133.

See 34 Cent. Dig. tit. "Master and Servant," § 1227.

Application of rule.— If a servant causes a runaway by his own negligence and runs against a cart intentionally and with a view to the best interests of his employer, the master is not exempt from liability because the servant ran against the cart of the third person to save himself from greater peril, if it was also for his master's interest. And even though the horses ran away without any negligence of the servant, the owner is liable if the servant caused the injury by running against the wagon, although he ran against it solely with a view to his own personal safety, provided the act was a prudent one by which to stop the horses Wolfe *v.* Mersereau, 4 Duer (N. Y.) 473.

Third person driving.— In an action for damages for injuries resulting from negligence of a servant in driving a cart, the employer is liable, although the servant was not driving at the time of the accident, but had surrendered the reins to a person riding with him, and who was not in the service of defendant. Booth *v.* Mister, 7 C. & P. 66, 32 E. C. L. 502.

Want of negligence.— Of course the owner is not liable where the horses ran away without any negligence on the part of the driver. Steudle *v.* Rentchler, 64 Ill. 161.

Statutes.— A master is not liable, under Mass. Rev. St. c. 51, § 3, for the damages sustained by any party by reason of the omission of his servant seasonably to drive the master's vehicle to the right of the middle of the traveled part of a road when meeting another vehicle. Goodhue *v.* Dix, 2 Gray (Mass.) 181.

Leaving team unattended on highway generally see STREETS AND HIGHWAYS.

79. Keep *v.* Walsh, 17 N. Y. App. Div. 104, 44 N. Y. Suppl. 944.

80. See *supra*, V, A, 3, a, (I).

81. Burt *v.* Wrigley, 43 Ill. App. 367. And see *supra*, V, A, 3, a, (I).

82. Clark *v.* Geer, 86 Fed. 447, 32 C. C. A. 295.

83. Whaley *v.* Citizens' Nat. Bank, 28 Pa. Super. Ct. 531. And see *infra*, V, A, 4, b.

84. Connolly *v.* Des Moines Inv. Co., 130 Iowa 633, 105 N. W. 400; Hays *v.* Millar, 77 Pa. St. 238, 18 Am. Rep. 445; Shaw *v.* Reed, 9 Watts & S. (Pa.) 72; St. Louis, etc., R. Co. *v.* Miller, 27 Tex. Civ. App. 344, 66 S. W. 139.

85. Hays *v.* Millar, 77 Pa. St. 238, 18 Am. Rep. 445. And see *infra*, V, B, 3, e.

86. See *supra*, IV, G.

87. See Dufour *v.* Central Pac. R. Co., 67 Cal. 319, 7 Pac. 769; Hector Min. Co. *v.* Robertson, 22 Colo. 491, 45 Pac. 406; Western Union Tel. Co. *v.* Quinn, 56 Ill. 319; Stone *v.* Western Transp. Co., 38 N. Y. 240; Van Houten *v.* Fleischman, 1 Misc. (N. Y.) 130, 20 N. Y. Suppl. 643 [*affirmed* in 142 N. Y. 624, 37 N. E. 565]; Rahn *v.* Singer Mfg. Co., 26 Fed. 912 [*affirmed* in 132 U. S. 578, 10 Sup. Ct. 175, 33 L. ed. 440]. See also Corneilson *v.* Eastern R. Co., 50 Minn. 23, 52 N. W. 224. See, generally, NEGLIGENCE.

88. Andrews *v.* Boedecker, 126 Ill. 605, 18 N. E. 651, 9 Am. St. Rep. 649 [*affirming* 27 Ill. App. 30]; Lane *v.* Atlantic Works, 107 Mass. 104.

Intervention of act of third person.—Where the negligence of a servant is an effective cause of an injury, the intervention, between the negligence of the servant and the injury, of the negligence of another person which immediately causes the injury does not relieve the master from his liability for the negligence of his servant. Engelhart *v.* Farrant, [1897] 1 Q. B. 240, 66 L. J. Q. B. 122, 75 L. T. Rep. N. S. 617, 45 Wkly. Rep. 179.

89. See, generally, NEGLIGENCE.

90. *California.*— Wade *v.* Thayer, 40 Cal. 578.

false arrest and imprisonment,[91] malicious prosecution,[92] trespass,[93] conversion,[94] or a libel[95] by his servant in the scope of his employment. On the other hand he is

Illinois.— Ziegenhein *v.* Smith, 116 Ill. App. 80; Illinois Steel Co. *v.* Novak, 84 Ill. App. 641 [*affirmed* in 184 Ill. 501, 56 N. E. 966]; Alton R., etc., Co. *v.* Cox, 84 Ill. App. 202; Mogk *v.* Chicago City R. Co., 80 Ill. App. 411; Arasmith *v.* Temple, 11 Ill. App. 39.

Indiana.— Dickson *v.* Waldron, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 41 Am. St. Rep. 440, 24 L. R. A. 483, 488; Oakland City Agricultural, etc., Soc. *v.* Bingham, 4 Ind. App. 545, 31 N. E. 383.

Iowa.— McDonald *v.* Franchere, 102 Iowa 496, 71 N. W. 427; Johnson *v.* Chicago, etc., R. Co., 58 Iowa 348, 12 N. W. 329.

Massachusetts.— Gray *v.* Boston, etc., R. Co., 168 Mass. 20, 46 N. E. 397.

Missouri.— Canfield *v.* Chicago, etc., R. Co., 59 Mo. App. 354.

New York.— Rounds *v.* Delaware, etc., R. Co., 64 N. Y. 129, 21 Am. Rep. 597 [*affirming* 3 Hun 329, 5 Thomps. & C. 475]; Peddie *v.* Gally, 109 N. Y. App. Div. 178, 95 N. Y. Suppl. 652; O'Connell *v.* Samuel, 81 Hun 357, 30 N. Y. Suppl. 889; Griffith *v.* Friendly, 30 Misc. 393, 62 N. Y. Suppl. 391.

Wisconsin.— Bergman *v.* Hendrickson, 106 Wis. 434, 82 N. W. 304, 80 Am. St. Rep. 475; Rogahn *v.* Moore Mfg., etc., Co., 79 Wis. 573, 48 N. W. 669.

Canada.— Ferguson *v.* Roblin, 17 Ont. 167.

See 34 Cent. Dig. tit. "Master and Servant," § 1231.

Effect of being on premises by invitation.— It would seem that the liability of the master for the assault of his servant is extended where the person assaulted is on the premises of the master at his general or special invitation. Brooks *v.* Jennings County Agricultural Joint-Stock Assoc., 35 Ind. App. 221, 73 N. E. 951.

Liability of corporations in general see CORPORATIONS, 10 Cyc. 1213.

91. *Arkansas.*— St. Louis, etc., R. Co. *v.* Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105.

Indiana.— Dickson *v.* Waldron, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 41 Am. St. Rep. 440, 24 L. R. A. 483, 488.

Minnesota.—Smith *v.* Munch, 65 Minn. 256, 68 N. W. 19.

Missouri.—Brill *v.* Eddy, 115 Mo. 596, 22 S. W. 488; Knowles *v.* Bullene, 71 Mo. App. 341.

New York.— Craven *v.* Bloomingdale, 54 N. Y. App. Div. 266, 66 N. Y. Suppl. 525 [*affirming* 30 Misc. 650, 64 N. Y. Suppl. 262]; Hamel *v.* Brooklyn, etc., Ferry Co., 1 Silv. Sup. 584, 6 N. Y. Suppl. 102 [*affirmed* in 125 N. Y. 707, 26 N. E. 753]; Kolzem *v.* Broadway, etc., R. Co., 1 Misc. 148, 20 N. Y. Suppl. 700; Mallach *v.* Ridley, 9 N. Y. Suppl. 922, 24 Abb. N. Cas. 172.

North Carolina.—Jackson *v.* American Tel., etc., Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738.

Rhode Island.— Staples *v.* Schmid, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824.

Tennessee.— Eichengreen *v.* Louisville, etc., R. Co., 96 Tenn. 229, 34 S. W. 219, 54 Am. St. Rep. 833, 31 L. R. A. 702.

Wisconsin.— Cobb *v.* Simon, 124 Wis. 467, 102 N. W. 891, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909.

See 34 Cent. Dig. tit. "Master and Servant," § 1231.

Liability of corporations in general see CORPORATIONS, 10 Cyc. 1217.

92. See *infra*, V, A, 4, d, (v).

Liability of corporations in general see CORPORATIONS, 10 Cyc. 1216.

93. *Alabama.*— Birmingham Water-Works Co. *v.* Hubbard, 85 Ala. 179, 4 So. 607, 7 Am. St. Rep. 35.

Illinois.— Western Union Tel. Co. *v.* Satterfield, 34 Ill. App. 386.

Massachusetts.— Elder *v.* Bemis, 2 Metc. 599.

Michigan.— Smith *v.* Webster, 23 Mich. 298.

Minnesota.— Lesch *v.* Great Northern R. Co., 93 Minn. 435, 101 N. W. 965.

New Hampshire.—Searle *v.* Parke, 68 N. H. 311, 34 Atl. 744.

New York.— Reed *v.* New York, etc., Gas Co., 93 N. Y. App. Div. 453, 87 N. Y. Suppl. 810; Van Siclen *v.* Jamaica Electric Light Co., 45 N. Y. App. Div. 1, 61 N. Y. Suppl. 210 [*affirmed* in 168 N. Y. 650, 61 N. E. 1135]; Carman *v.* New York, 14 Abb. Pr. 301.

Tennessee.— Luttrell *v.* Hazen, 3 Sneed 20.

Vermont.— Andrus *v.* Howard, 36 Vt. 248, 84 Am. Dec. 680.

See 34 Cent. Dig. tit. "Master and Servant," § 1229.

Liability of corporations in general see CORPORATIONS, 10 Cyc. 1212.

94. *Minnesota.*— Potulni *v.* Saunders, 37 Minn. 517, 35 N. W. 379.

Missouri.— Eagle Constr. Co. *v.* Wabash R. Co., 71 Mo. App. 626.

New Hampshire.— Arthur *v.* Balch, 23 N. H. 157.

New York.— Buckingham *v.* Vincent, 23 N. Y. App. Div. 238, 48 N. Y. Suppl. 747; Electric Power Co. *v.* Metropolitan Tel., etc., Co., 75 Hun 68, 27 N. Y. Suppl. 93 [*affirmed* in 148 N. Y. 746, 43 N. E. 986].

Texas.— Burnett *v.* Oechsner, 92 Tex. 588, 50 S. W. 562, 71 Am. St. Rep. 880.

Vermont.— May *v.* Bliss, 22 Vt. 477.

See 34 Cent. Dig. tit. "Master and Servant," § 1229.

95. Trapp *v.* Du Bois, 76 N. Y. App. Div. 314, 78 N. Y. Suppl. 505; Youmans *v.* Paine, 86 Hun (N. Y.) 479, 35 N. Y. Suppl. 50 [*reversed* on other grounds in 153 N. Y. 214, 47 N. E. 265]; Citizens' L. Assur. Co. *v.* Brown, [1904] A. C. 423, 73 L. J. P. C. 102, 90 L. T. Rep. N. S. 739, 20 T. L. R. 497, 53 Wkly. Rep. 176. See, generally, LIBEL AND SLANDER.

Liability of corporations in general see CORPORATIONS, 10 Cyc. 1215.

not liable for such torts of the servant where the act is not within the scope of his employment.[96]

4. Acts Within Scope of Employment — a. General Rules. In determining whether a master is liable for the torts of his servants the most difficult question is whether the particular act or omission of the servant causing the injury for which the master is sought to be held liable was committed within the scope of the servant's employment; and this question is in most cases one of fact to be determined by the jury from the surrounding facts and circumstances.[97] The terms "course of employment" and "scope of the authority" are not susceptible of accurate definition.[98] What acts are within the scope of the employment can be determined by no fixed rule,[99] the authority from the master generally being

96. See cases cited *infra*, this note.

Assault and battery.— Curtis *v.* Dinneen, 4 Dak. 245, 30 N. W. 148; Mogk *v.* Chicago City R. Co., 80 Ill. App. 411 (holding that a trespass committed by a servant merely to prevent an annoyance to himself is not an act for which the master is liable); Cofield *v.* McCabe, 58 Minn. 218, 59 N. W. 1005; Weiler *v.* Pennsylvania R. Co., 29 Pittsb. Leg. J. (Pa.) 347; Sekator *v.* Lannon, 26 R. I. 125, 58 Atl. 456.

Malicious prosecution.— A master is not liable for a malicious prosecution instigated by his servant, in the absence of evidence that the master was personally concerned in the prosecution, or of evidence of the nature and scope of the servant's employment sufficient to warrant an inference of the servant's authorization by the master to instigate the prosecution. Staton *v.* Mason, 106 N. Y. App. Div. 26, 94 N. Y. Suppl. 417. See, generally, Malicious Prosecution, *ante* p. 1, *et seq.*.

97. See *infra*, V, C, 7, a.

98. Harbison *v.* Iliff, 10 Ohio S. & C. Pl. Dec. 58, 8 Ohio N. P. 392.

99. See cases cited *infra*, this note.

Mixing water with milk.— Where a servant employed to deliver milk to a factory mixed it with filthy water to gratify his malice toward his employer, and then delivered the milk, it was held that the tort was committed within the scope of his employment. Stranahan Bros. Catering Co. *v.* Coit, 55 Ohio St. 398, 45 N. E. 634, 4 L. R. A. N. S. 506.

Use of different means of conveyance.— Where a servant is not shown to have been authorized to use a wagon, he having previously used a push-cart in the business, the master is not liable for injuries inflicted on a third person by the use of such wagon. Wilson *v.* Pennsylvania R. Co., 63 N. J. L. 385, 43 Atl. 894. And where a servant was sent on an errand, and without the consent or knowledge of the master wrongfully took possession of a horse and buggy and therewith ran plaintiff down, the master was not liable. Stretton *v.* Toronto, 13 Ont. 139.

The closing of a trap-door or coal-hole, or the like, where the servant's duties required him to open it to perform his work, is considered to be within the scope of his employment. Burt *v.* Wrigley, 43 Ill. App. 367; Ray *v.* Jones, etc., Co., 92 Minn. 101, 99 N. W. 782; Todd *v.* Havlin, 72 Mo. App. 565; Pomerens Co. *v.* White, 70 Nebr. 171, 97 N. W. 232; Minns *v.* Omemee, 2 Ont. L. Rep. 579. But see King *v.* Herb, 18 Ohio Cir. Ct. 41, 9 Ohio Cir. Dec. 797.

Setting up goods sold.— Where machinery or hardware is sold under an agreement whereby the seller is to set it up, the acts of the servant in setting it up in a defective manner (Crandall *v.* Boutell, 95 Minn. 114, 103 N. W. 890; Wrought-Iron Range Co. *v.* Graham, 80 Fed. 474, 25 C. C. A. 570), or testing it to discover defects after it was set up (Wright Steam Engine Works *v.* Lawrence Cement Co., 167 N. Y. 440, 60 N. E. 739), are within the scope of his employment.

Persons employed in different branches of work.— Where servants engaged in running a steamboat used to carry persons to a railway, both steamboat and railway being owned by the same person, mismanaged the railway so as to cause injuries to third persons, nothing being shown as to any authority or right on their part to operate the railway, the act was not within the scope of their employment. Biederman *v.* Brown, 49 Ill. App. 483.

Where one went to an express office to obtain an overcharge paid by him, and the agent maltreated him because he had demanded and received the overcharge, the act was considered to be so within the scope of the agent's employment as to render the express company liable therefor. Richberger *v.* American Express Co., 73 Miss. 161, 18 So. 922, 55 Am. St. Rep. 522, 31 L. R. A. 390. But see Bowen *v.* Illinois Cent. R. Co., 136 Fed. 306, 69 C. C. A. 444, 70 L. R. A. 915.

Use of elevators as within scope of employment see Cullen *v.* Higgins, 216 Ill. 78, 74 N. E. 698; Hall *v.* Poole, 94 Md. 171, 50 Atl. 703; Gibson *v.* International Trust Co., 177 Mass. 100, 58 N. E. 278, 52 L. R. A. 928; Cogswell *v.* Rochester Mach. Screw Co., 39 N. Y. App. Div. 223, 57 N. Y. Suppl. 145; Jossaers *v.* Walker, 14 N. Y. App. Div. 303, 43 N. Y. Suppl. 891; Arzt *v.* Lit, 198 Pa. St. 519, 48 Atl. 297; Stephens *v.* Chausse, 15 Can. Sup. Ct. 379.

Acts within scope of employment in general see Phelon *v.* Stiles, 43 Conn. 426 (leaving part of load on side of highway); Camp *v.* Hall, 39 Fla. 535, 22 So. 792; Holmes *v.* Tennessee Coal, etc., R. Co., 49 La. Ann. 1465, 22 So. 403; Evans *v.* Davidson, 53 Md. 245, 36 Am. Rep. 400 (striking cow with stone while driving out of master's field);

gatherable from the surrounding circumstances.[1] An act is within the scope of the servant's employment, where necessary to accomplish the purpose of his employment, and intended for that purpose,[2] although in excess of the powers actually conferred on the servant by the master.[3] The purpose of the act rather than its method of performance is the test of the scope of employment.[4] But the act cannot be said to be within the scope of the employment merely because done with intent to benefit or serve the master,[5] nor merely because the injuries com-

Ridge *v.* Railroad Transfer Co., 56 Mo. App. 133 (delivery of goods on platform of elevator); Price *v.* Simon, 62 N. J. L. 153, 40 Atl. 689 (iceman running in street with open ice tongs); P. Cox Shoe Mfg. Co. *v.* Gorsline, 63 N. Y. App. Div. 517, 71 N. Y. Suppl. 619; Riegler *v.* Tribune Assoc., 40 N. Y. App. Div. 324, 57 N. Y. Suppl 989 [*affirmed* in 167 N. Y. 542, 60 N. E. 1119]; Kavanagh *v.* Vollmer, 84 N. Y. Suppl. 475 (use of water in sweeping sidewalk); Hyman *v.* Tilton, 208 Pa. St. 641, 57 Atl. 1124 (causing boy to fall off wagon which servant was driving).

Acts outside scope of employment in general see Williams *v.* Mineral City Park Assoc., 128 Iowa 32, 102 N. W. 783, 111 Am. St. Rep. 184, 1 L. R. A. N. S. 427 (use of beer bottles by members of band playing at place of amusement); Graham *v.* St. Charles St. R. Co., 47 La. Ann. 1656, 18 So. 707, 49 Am. St. Rep. 436 (discrimination of foreman in employing laborers); Brown *v.* Jarvis Engineering Co., 166 Mass. 75, 43 N. E. 1118, 55 Am. St. Rep. 382, 32 L. R. A. 605; Smith *v.* Spitz, 156 Mass. 319, 31 N. E. 5 (bill-poster leaving bills in road miles away from bill-boards); Wiltse *v.* State Road Bridge Co., 63 Mich. 639, 30 N. W. 370; Aycrigg *v.* New York, etc., R. Co., 30 N. J. L. 460 (master of ferry-boat towing burning barge); Ray *v.* Keene, 19 N. Y. App. Div. 147, 45 N. Y. Suppl. 896 [*affirmed* in 160 N. Y. 706, 57 N. E. 1123] (act of servant who was trainer of horses for his master in compelling exercise boy to ride a horse of third person in which master was not interested); McCauley *v.* Fidelity, etc., Co., 16 Misc. (N. Y.) 574, 38 N. Y. Suppl. 773 (detaching gas-pipes in replacing broken glass); Williams *v.* Gobble, 106 Tenn. 367, 61 S. W. 51; San Antonio, etc., R. Co. *v.* Belt, (Tex. Civ. App. 1898) 46 S. W. 374 (stopping runaway horse); Winkler *v.* Fisher, 95 Wis. 355, 70 N. W. 477 (shooting squirrels in woods where sent to shoot crows in field); Beard *v.* London Gen. Omnibus Co., [1900] 2 Q. B. 530, 69 L. J. Q. B. 895, 83 L. T. Rep. N. S. 362, 48 Wkly. Rep. 658 (driving of omnibus by conductor).

Acts of railroad employees within scope of employment in general see East St. Louis Connecting R. Co. *v.* Reames, 173 Ill. 582, 51 N. E. 68; Scott *v.* St. Louis, etc., R. Co., 112 Iowa 54, 83 N. W. 818; Baxter *v.* Chicago, etc., R. Co., 87 Iowa 488, 54 N. W. 350 (removal of dead animal by section men not employed on section where animal killed); Hawks *v.* Locke, 139 Mass. 205, 1 N. E. 543, 52 Am. Rep. 702 (driving swine to place of safety after wreck); Chapman *v.* New York Cent. R. Co., 33 N. Y. 369, 88 Am. Dec. 392 [*affirming* 31 Barb. 399] (leaving bars down whereby cattle escaped on track); Tinker *v.* New York, etc., R. Co., 71 Hun (N. Y.) 431, 24 N. Y. Suppl. 977 (leaving timber on railroad right of way near highway); Gross *v.* Pennsylvania, etc., R. Co., 16 N. Y. Suppl. 616; Ft. Worth, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1894) 25 S. W. 1032 (dumping dirt against house of third person).

Acts of railroad servants not within scope of employment in general see Gilliam *v.* South, etc., Alabama R. Co., 70 Ala. 268; Hopkins *v.* Western Pac. R. Co., 50 Cal. 190; Keating *v.* Michigan Cent. R. Co., 97 Mich. 154, 56 N. W. 346, 37 Am. St. Rep. 328; Burger *v.* St. Louis, etc., R. Co., 123 Mo. 679, 27 S. W. 393; Jackson *v.* St. Louis, etc., R. Co., 87 Mo. 422, 56 Am. Rep. 460; Bequette *v.* St. Louis Iron Mountain, etc., R. Co., 86 Mo. App. 601; Murphey *v.* Philadelphia Rapid Transit Co., 30 Pa. Super Ct. 87 (motorman leaving car and attempting to start horses obstructing track); Davenport *v.* Charleston, etc., R. Co., 72 S. C. 205, 51 S. E. 677, 110 Am. St. Rep. 598 (throwing bricks at dwelling-house near track from moving freight train); St. Louis Southwestern R. Co. *v.* Mayfield, 35 Tex. Civ. App. 82, 79 S. W. 365; Robinson *v.* McNeill, 18 Wash. 163, 51 Pac. 355 (loan of hand-car).

1. Leggett *v.* Simmons, 7 Sm. & M. (Miss.) 348.

2. Evansville, etc., R. Co. *v.* Baum, 26 Ind. 70; West Jersey, etc., R. Co. *v.* Welsh, 62 N. J. L. 655, 42 Atl. 736, holding that a servant has implied authority to do what is necessary to protect his master's property or fulfil the duty intrusted to him.

3. St. Louis, etc., R. Co. *v.* Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105; Chicago, etc., R. Co. *v.* Sykes, 96 Ill. 162; Lynch *v.* Metropolitan El. R. Co., 90 N. Y. 77, 43 Am. Rep. 141 [*affirming* 24 Hun 506]; Levy *v.* Ely, 48 N. Y. App. Div. 554, 62 N. Y. Suppl. 855.

Liability of corporations in general see CORPORATIONS. 10 Cyc. 1205 note 66.

4. Cobb *v.* Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 969.

5. Brown *v.* Jarvis Engineering Co., 166 Mass. 75, 43 N. E. 1118, 55 Am. St. Rep. 382, 32 L. R. A. 605; Daniel *v.* Atlantic Coast Line R. Co., 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455; Limpus *v.* London Gen. Omnibus Co., 1 H. & C. 526, 9 Jur. N. S. 333, 32 L. J. Exch. 34, 7 L. T. Rep. N. S. 641, 11 Wkly. Rep. 149.

plained of would not have been committed without the facilities afforded by the servant's relations to his master,[6] nor because the servant supposed that he possessed authority to do the act in question.[7] On the other hand the act may be within the scope of the employment, although it is not necessary for the proper performance of the servant's duty to his master,[8] or although it was not done in the interest and business of the master.[9] An act cannot be said to be within the scope of the employment where the master himself, if present, would have no authority to do the act;[10] but this rule does not prevent the holding of the master liable for the wrongful or excessive exercise of the servant's discretion in a case where the act done would have been lawful if the supposed circumstances had been real.[11]

b. Violations of Instructions or Orders. The fact that a servant, while engaged in the business of his master, deviates from the master's instructions does not of itself make the act outside of the scope of the servant's employment so as to absolve the master from liability.[12] Likewise a particular act of a servant may be within the scope of his employment, although it violates the express instructions or orders of the master.[13]

6. Garretzen *v.* Duenckel, 50 Mo. 104, 11 Am. Rep. 405.

7. Mallach *v.* Ridley, 43 Hun (N. Y.) 336.

8. McCann *v.* Consolidated Traction Co., 59 N. J. L. 481, 36 Atl. 888, 38 L. R. A. 236; McCauley *v.* Hutkoff, 20 Misc. (N. Y.) 97, 45 N. Y. Suppl. 85.

9. See Williams *v.* Southern R. Co., 115 Ky. 320, 73 S. W. 779, 24 Ky. L. Rep. 2214.

10. Sagers *v.* Nuckolls, 3 Colo. App. 95, 32 Pac. 187; Mali *v.* Lord, 39 N. Y. 381, 100 Am. Dec. 448; Poulton *v.* London, etc., R. Co., L. R. 2 Q. B. 534, 8 B. & S. 616, 36 L. J. Q. B. 294, 17 L. T. Rep. N. S. 11, 16 Wkly. Rep. 309; Lyons *v.* Martin, 8 A. & E. 512, 7 L. J. Q. B. 214, 3 N. & P. 509, 35 E. C. L. 707.

11. Staples *v.* Schmid, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824.

The criterion of the master's liability is not whether the act would have been lawful for the master to have done under the circumstances as they actually existed. Staples *v.* Schmid, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824.

12. *Illinois.*— Armstrong *v.* Cooley, 10 Ill. 509. But see Oxford *v.* Peter, 28 Ill. 434, holding that where a servant is directed to drive cattle out of a certain field, and he drives them elsewhere than out of the field, and one of them dies, the master is not liable.

Kansas.—Atchison, etc., R. Co. *v.* Randall, 40 Kan. 421, 19 Pac. 783.

Minnesota.— Crandall *v.* Boutell, 95 Minn. 114, 103 N. W. 890.

Mississippi.— Barmore *v.* Vicksburg, etc., R. Co., 85 Miss. 426, 38 So. 210, 70 L. R. A. 627. See also Fairchild *v.* New Orleans, etc., R. Co., 60 Miss. 931, 45 Am. Rep. 427.

New York.— Cosgrove *v.* Ogden, 49 N. Y. 255, 10 Am. Rep. 361; Clark *v.* Koehler, 46 Hun 536.

Oregon.— Oliver *v.* North Pac. Transp. Co., 3 Oreg. 84.

Tennessee.— Eichengreen *v.* Louisville, etc., R. Co., 96 Tenn. 229, 34 S. W. 219, 54 Am. St. Rep. 833, 31 L. R. A. 702.

West Virginia.—Gregory *v.* Ohio River R. Co., 37 W. Va. 606, 16 S. E. 819.

See 34 Cent. Dig. tit. "Master and Servant," § 1223.

Discretion confided in servant.— When an employer gives his servant general directions as to the business which is intrusted to him to perform, the employer is held to have confided in the discretion of the servant, and is answerable for all the negligent acts of the servant in the performance of the duty required and for the damages resulting therefrom. Rosecranes *v.* Iowa, etc., Tel. Co., 65 Iowa 444, 21 N. W. 769.

Mistake as to orders.— Where a master instructed his servant to go to a certain place and kill a beef, and the servant went, and, finding no animal there but plaintiff's bull, killed and dressed that, the master was liable. Maier *v.* Randolph, 33 Kan. 340, 6 Pac. 625.

13. *Alabama.*— Postal Tel. Cable Co. *v.* Brantley, 107 Ala. 683, 18 So. 321.

California.— Turner *v.* North Beach, etc., R. Co., 34 Cal. 594.

Florida.— Camp *v.* Hall, 39 Fla. 535, 22 So. 792.

Illinois.— Consolidated Ice Mach. Co. *v.* Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696; Toledo, etc., R. Co. *v.* Harmon, 47 Ill. 298, 95 Am. Dec. 489; Dinsmoor *v.* Wolber, 85 Ill. App. 152.

Iowa.— Healy *v.* Johnson, 127 Iowa 221, 103 N. W. 92.

Kentucky.— Robinson *v.* Webb, 11 Bush 464.

Louisiana.— Winston *v.* Foster, 5 Rob. 113; Buel *v.* New York Steamer, 17 La. 541.

Massachusetts.— Barden *v.* Felch, 109 Mass. 154; Southwick *v.* Estes, 7 Cush. 385.

Michigan.—Fitzsimmons *v.* Milwaukee, etc., R. Co., 98 Mich. 257, 57 N. W. 127.

Minnesota.— Smith *v.* Munch, 65 Minn. 256, 68 N. W. 19.

Missouri.— Snyder *v.* Hannibal, etc., R. Co., 60 Mo. 413; Garretzen *v.* Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Payne *v.* Missouri Pac. R. Co., 105 Mo. App. 155, 79 S. W. 719; Knowles *v.* Bullene, 71 Mo. App. 341.

New Jersey.— McCann *v.* Consolidated Traction Co., 59 N. J. L. 481, 36 Atl. 888, 38

c. Act of Servant in His Own Behalf — (1) *GENERAL RULES.* The act of a servant done to effect some independent purpose of his own, and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is ordinarily held not to be within the scope of his employment so as to render the master liable therefor.[14] If the injury occurs at such a time it is immaterial that the facilities afforded to the servant by his relation to the master were used in committing the injury, if such facilities were not used with the authority or consent of the master.[15] However, a mere deviation by the servant from the direct and usual route does not constitute such a turning aside from pursuing the business of his employment as to absolve the master from liability.[16] On the other hand if a servant, such as a driver, turns wholly aside

L. R. A. 236; Driscoll *v.* Carlin, 50 N. J. L. 28, 11 Atl. 482.

New York.— Cosgrove *v.* Ogden, 49 N. Y. 255, 10 Am. Rep. 361; Riegler *v.* Tribune Assoc., 40 N. Y. App. Div. 324, 57 N. Y. Suppl. 989; McCauley *v.* Hutkoff, 20 Misc. 97, 45 N. Y. Suppl. 85. But see Long *v.* Richmond, 68 N. Y. App. Div. 466, 73 N. Y. Suppl. 912.

Ohio.— Harriman *v.* Pittsburgh, etc., R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Harbison *v.* Iliff, 10 Ohio S. & C. Pl. Dec. 58, 8 Ohio N. P. 392.

Oregon.—French *v.* Cresswell, 13 Oreg. 418, 11 Pac. 62.

Pennsylvania.— McClung *v.* Dearborne, 134 Pa. St. 396, 19 Atl. 698, 19 Am. St. Rep. 708, 8 L. R. A. 204.

Texas.— Houston, etc., R. Co. *v.* Bulger, (1904) 80 S. W. 557; St. Louis Southwestern R. Co. *v.* Mayfield, 35 Tex. Civ. App. 82, 79 S. W. 365; Houston, etc., R. Co. *v.* Bell, (Civ. App. 1903) 73 S. W. 56; Chandler *v.* Deaton, 1 Tex. App. Civ. Cas. § 488.

Wisconsin.— Cobb *v.* Simon, 119 Wis. 597, 97 N. W 276, 100 Am. St. Rep. 909; Reinke *v.* Bentley, 90 Wis. 457, 63 N. W. 1055.

United States.— Philadelphia, etc., R. Co. *v.* Derby, 14 How. 468, 14 L. ed. 502; Harris *v.* Louisville, etc., R. Co., 35 Fed. 116; Heenrich *v.* Pullman Palace-Car Co., 20 Fed. 100.

See 34 Cent. Dig. tit. "Master and Servant," § 1224.

But see Axtell *v.* Northern Pac. R. Co., 9 Ida. 392, 74 Pac. 1075.

Use of torpedoes.— The fact that signal torpedoes, negligently placed upon the track by trainmen, who were authorized to use them in the management of the train, were put there when there was no necessity for doing so, and contrary to the rules of the company, does not exempt the company from liability to one injured, without any contributing fault, by such improper and negligent use of the torpedoes. Harriman *v.* Pittsburgh, etc., R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507. And see *infra*, V, A, 4, c, (II).

14. Sullivan *v.* Morrice, 109 Ill. App. 650; Krzikowsky *v.* Sperring, 107 Ill. App. 493; Chicago Consol. Bottling Co. *v.* McGinnis, 86 Ill. App. 38; Morier *v.* St. Paul, etc., R. Co., 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793; Barmore *v.* Vicksburg, etc., R. Co., 85 Miss. 426, 38 So. 210, 70 L. R. A. 627; Burke *v.* Shaw, 59 Miss. 443, 42 Am. Rep. 370; Cosgrove *v.* Ogden, 49 N. Y. 255, 10 Am. Rep. 361. *Compare* Chapman *v.* New York Cent. R. Co., 33 N. Y. 369, 88 Am. Dec. 392.

15. Chicago Consol. Bottling Co. *v.* McGinnis, 86 Ill. App. 38.

16. *Connecticut.*— Loomis *v.* Hollister, 75 Conn. 718, 55 Atl. 561; Ritchie *v.* Waller, 63 Conn. 155, 28 Atl. 29, 38 Am. St. Rep. 361, 27 L. R. A. 161. But see Stone *v.* Hills, 45 Conn. 44, 29 Am. Rep. 635.

Illinois.— Krzikowsky *v.* Sperring, 107 Ill. App. 493; Chicago Consol. Bottling Co. *v.* McGinnis, 86 Ill. App. 38. But see Chicago Consol. Bottling Co. *v.* McGinnis, 51 Ill. App. 325, holding that where a servant employed in the delivery of goods by wagon drives out of the way of his route for the purpose of visiting his home, the master is not liable for injuries to a child caused by the servant's negligent driving as he left his home.

New York.— Quinn *v.* Power, 87 N. Y. 535, 41 Am. Rep. 392; Williams *v.* Koehler, 41 N. Y. App. Div. 426, 58 N. Y. Suppl. 863 (holding that an owner of a team is responsible for injuries caused by his employees leaving the team unattended and untied in a street of a populous city while visiting a sick friend, although the employee had deviated two blocks from his course to reach his friend's house); Geraty *v.* National Ice Co., 16 N. Y. App. Div. 174, 44 N. Y. Suppl. 659. But see Cavanagh *v.* Dinsmore, 12 Hun 465, holding that a recovery against the master cannot be had where the servant, a truck driver in defendant's employment, ran over a person while away from his proper course; having gone, at the request of a third person, a friend of his own, to deliver a trunk, unconnected with defendant's business.

South Dakota.— Lovejoy *v.* Campbell, 16 S. D. 231, 92 N. W. 24.

England.— Sleath *v.* Wilson, 9 C. & P. 607, 2 M. & Rob. 181, 38 E. C. L. 355.

See 34 Cent. Dig. tit. "Master and Servant," § 1223.

Effort to resume accustomed place of service.— Where the servant has departed from his route for personal purposes, even if the master's liability is suspended while the servant has deviated from the route for his own purpose, it reattaches when the servant has resumed the prosecution of the master's business by starting to return. Geraty *v.* National Ice Co., 16 N. Y. App. Div. 174, 44

from the master's employment and goes on an independent journey, wholly foreign to his employment, for a purpose exclusively his own, the master is not liable for his acts during such time.[17] For instance, if the servant takes out the master's horse or team,[18] automobile,[19] or hand-car,[20] for his own pleasure or purposes, when not acting for the master, or after he has been ordered to put them in the stable, the master is not liable for injuries received by third persons while the servant is thus acting for himself. So if the act occurs while the servant was off duty for the day,[21] or after quitting for the day,[22] and the act is not in further-

N. Y. Suppl. 659; Missouri, etc., R. Co. *v.* Edwards, (Tex. Civ. App. 1902) 67 S. W. 891; Merritt *v.* Hepenstal, 25 Can. Sup. Ct. 150.

It is immaterial that the act occurred at a place to which the servant's duty did not necessarily call him, if the act, if continued to its completion, would have furthered the master's business and been within the scope of the servant's employment. Geraty *v.* National Ice Co., 16 N. Y. App. Div. 174, 44 N. Y. Suppl. 659.

Absence of specific orders as to mode of dealing with vehicle.— A distinction has been drawn between an employment where a vehicle is intrusted to a servant to be used entirely in his discretion, and an employment where the servant has specific orders as to the mode of dealing with the vehicle. For instance, it has been held that where the owner of an express wagon intrusted it to a servant with authority to secure such business as he could, and the servant deviated from his route to get a load of poles for himself, and while taking them home negligently ran over a child, the owner was liable for such injuries, although the servant was carrying his own property. Mulvehill *v.* Bates, 31 Minn. 364, 17 N. W. 959, 47 Am. Rep. 796. And see Venables *v.* Smith, 2 Q. B. D. 279, 46 L. J. Q. B. 470, 36 L. T. Rep. N. S. 509, 25 Wkly. Rep. 584.

Combination of master's and servant's business.— If the usage of the parties, under the servant's contract of hiring, was of such a character that it allowed the servant to attend to his duties on such terms as suited his convenience, and at the time of the commission of the tort he was engaged in his own private business, but at the same time was pursuing defendant's business in the service for which he was employed, defendant would still be liable. Rahn *v.* Singer Mfg. Co., 26 Fed. 912.

Use of hand-car.— In a recent case in which the distinction between deviating and turning away is thoroughly discussed, and where the authorities are reviewed at length, it was held that where an employee was allowed to use a railroad tricycle to gather fuel, and he went to a certain point in search of it, but deviated from his purpose of gathering the same so far as to carry a sick friend to a station beyond, and on returning from the station negligently struck plaintiff before reaching the point at which he had originally taken up his sick friend and deviated from his employment, the employee had resumed the duties of his employment so that the master was liable for the accident. Barmore *v.* Vicksburg, etc., R. Co., 85 Miss. 426, 38 So. 210, 70 L. R. A. 627.

17. McCarthy *v.* Timmins, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490 (where driver, after master had ordered carriage taken to barn, went in opposite direction for the sole purpose of getting a drink, and left team unattended in front of a saloon); Mitchell *v.* Crassweller, 13 C. B. 237, 17 Jur. 716, 22 L. J. C. P. 100, 1 Wkly. Rep. 153, 76 E. C. L. 237.

18. *Connecticut.*— Fiske *v.* Enders, 73 Conn. 338, 47 Atl. 681.

Michigan.— Reaume *v.* Newcomb, 124 Mich. 137, 82 N. W. 806.

New York.— Fish *v.* Coolidge, 47 N. Y. App. Div. 159, 62 N. Y. Suppl. 238; Cavanagh *v.* Dinsmore, 12 Hun 465; Sheridan *v.* Charlick, 4 Daly 338. And see Long *v.* Richmond, 68 N. Y. App. Div. 466, 73 N. Y. Suppl. 912.

North Carolina.— Thorp *v.* Minor, 109 N. C. 152, 13 S. E. 702.

Pennsylvania.— Bard *v.* Yohn, 26 Pa. St. 482.

Vermont.— Way *v.* Powers, 57 Vt. 135.

England.— Storey *v.* Ashton, L. R. 4 Q. B. 476, 10 B. & S. 337, 38 L. J. Q. B. 223, 17 Wkly. Rep. 727; Sleath *v.* Wilson, 9 C. & P. 607, 2 M. & Rob. 181, 38 E. C. L. 355.

See 34 Cent. Dig. tit. "Master and Servant," § 1220.

19. Reynolds *v.* Buck, 127 Iowa 601, 103 N. W. 946; Clark *v.* Buckmobile Co., 107 N. Y. App. Div. 120, 94 N. Y. Suppl. 771; Stewart *v.* Baruch, 103 N. Y. App. Div. 577, 93 N. Y. Suppl. 161.

20. Sammis *v.* Chicago, etc., R. Co., 97 Ill. App. 28; Harrell *v.* Cleveland, etc., R. Co., 27 Ind. App. 29, 60 N. E. 717; Branch *v.* International, etc., R. Co., 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 844.

21. Carl Corper Brewing, etc., Co. *v.* Huggins, 96 Ill. App. 144; Reynolds *v.* Buck, 127 Iowa 601, 103 N. W. 946.

22. Lima R. Co. *v.* Little, 67 Ohio St. 91, 65 N. E. 861; Dells *v.* Stollenwerk, 78 Wis. 339, 47 N. W. 431. But see Chapman *v.* New York Cent. R. Co., 33 N. Y. 369, 88 Am. Dec. 392 [*affirming* 31 Barb. 399], where a railroad company was held liable because of the act of a servant in taking down the bars in a fence on the side of the track after his day's labor was over, where the duties of the employment required the servant to attend, without being specially directed, to anything which required prompt attention, even though after his day's labor.

ance of the master's business and in the line of the servant's duty, the master is not liable.

(II) *MISCHIEVOUS ACTS FOR PLEASURE OF SERVANT.* If the servant does an act merely to frighten a third person or animal,[23] or to perpetrate a joke on a third person,[24] and the act is entirely disconnected with the purpose of the employment, the master is generally not liable. This rule is limited, however, in some states by the "dangerous appliances" theory, that is, that a servant cannot depart from the duty intrusted to him when that duty regards the rights of others in respect to the employment of dangerous implements by the master in the prosecution of his business without making the master liable for the consequences.[25] The act of a servant in charge of an engine in blowing off steam or whistling, even where purely mischievous or malicious, has been held within the scope of his employment.[26] So where a servant in charge of torpedoes in use by the master negligently uses them,[27] or uses them for his own amusement or to play a joke,[28] the master is liable for injuries inflicted thereby. On the other hand if torpedoes are placed on the track by a servant not authorized to use them, and not in furtherance of the interests of his master,[29] as where placed on the

23. Wabash R. Co. *v.* Linton, 26 Ind. App. 596, 60 N. E. 313; Mace *v.* Ashland Coal, etc., R. Co., 118 Ky. 885, 82 S. W. 612, 26 Ky. L. Rep. 865; Guille *v.* Campbell, 200 Pa. St. 119, 49 Atl. 938, 86 Am. St. Rep. 70, 55 L. R. A. 111.

24. Berry *v.* Boston El. R. Co., 188 Mass. 536, 74 N. E. 933; Canton Cotton Warehouse Co. *v.* Pool, 78 Miss. 147, 28 So. 823, 84 Am. St. Rep. 620; International, etc., R. Co. *v.* Cooper, 88 Tex. 607, 32 S. W. 517 [*reversing* (Civ. App. 1895) 30 S. W. 470].

25. Barmore *v.* Vicksburg, etc., R. Co., 85 Miss. 426, 38 So. 210, 70 L. R. A. 627; Pittsburgh, etc., R. Co. *v.* Shields, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. Rep. 840, 8 L. R. A. 464; Euting *v.* Chicago, etc., R. Co., 116 Wis. 13, 92 N. W. 358, 96 Am. St. Rep. 936, 60 L. R. A. 158.

The departure of a servant from the employment of a master is to be distinguished from his departure from or neglect of a duty connected with that employment; the servant may depart from his employment without making his master liable for his negligence when outside the employment of the master. But he cannot depart from a duty intrusted to him when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business without making the master liable for the consequences. Pittsburgh, etc., R. Co. *v.* Shields, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. Rep. 840, 8 L. R. A. 464.

What are dangerous appliances.— A handcar has been held not a dangerous appliance (Branch *v.* International, etc., R. Co., 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 844), although the contrary has also been held (Barmore *v.* Vicksburg, etc., R. Co., 85 Miss. 426, 450, 38 So. 210, 70 L. R. A. 627). In the latter case the court said: "The absolute duty of the master, which cannot be delegated, in reference to the degree of care demanded in the custody, control, and operation of dangerous instrumentalities, applies not to those alone which are operated or propelled by the power of steam, electricity, powder, dynamite, or kindred forces, but to all instrumentalities employed by the master which, by reason of the method of their operation, are capable of, and liable to, inflict serious injury to others. The motive power is not the sole consideration in determining whether an instrumentality falls within the general classification of 'dangerous agencies and appliances.' An attempt has been made, in a very few illogically reasoned cases, to draw a distinction between instrumentalities 'dangerous in themselves' and those 'dangerous by reason of improper use,' and confine the master's liability to cases due to mismanagement of the former class alone. An analysis will show that the distinction is more imaginary than real, and too refined to be of any practical benefit as a method of determining legal responsibility."

26. Regan *v.* Reed, 96 Ill. App. 460; Alsever *v.* Minneapolis, etc., R. Co., 115 Iowa 338, 88 N. W. 841, 56 L. R. A. 748; Skipper *v.* Clifton Mfg. Co., 58 S. C. 143, 36 S. E. 509; Texas, etc., R. Co. *v.* Scoville, 62 Fed. 730, 10 C. C. A. 479, 27 L. R. A. 179. *Contra*, International, etc., R. Co. *v.* Yarbrough, (Tex. Civ. App. 1897) 39 S. W. 1096. See also RAILROADS.

27. Merschel *v.* Louisville, etc., R. Co., 85 S. W. 710, 27 Ky. L. Rep. 465 [*distinguishing* Sullivan *v.* Louisville, etc., R. Co., 115 Ky. 447, 74 S. W. 171, 24 Ky. L. Rep. 2344, 103 Am. St. Rep. 330, as a case where the party who caused the injury did not have the care and custody of the torpedo].

28. Pittsburgh, etc., R. Co. *v.* Shields, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. Rep. 840, 8 L. R. A. 464; Harriman *v.* Pittsburgh, etc., R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Euting *v.* Chicago, etc., R. Co., 116 Wis. 13, 92 N. W. 358, 96 Am. St. Rep. 936, 60 L. R. A. 158.

29. Chicago, etc., R. Co. *v.* Epperson, 26 Ill. App. 72; Sullivan *v.* Louisville, etc., R. Co., 115 Ky. 447, 74 S. W. 171, 24 Ky. L. Rep. 2344, 103 Am. St. Rep. 330; Obertoni *v.* Boston, etc., R. Co., 186 Mass. 481, 71

track for his own amusement,[30] the master is not liable, except possibly in those states where the "dangerous appliances" doctrine is fully accepted.[31]

d. Particular Acts — (I) *Setting Fires.* The building of a fire in connection with the destruction of rubbish or the clearing of land, or other like work, is usually considered as within the scope of the servant's employment so as to make the master liable for damages resulting therefrom.[32] The master is not liable, however, where the fire is kindled merely to serve a purpose of the servant, having no connection with the master's work.[33]

(II) *Invitation to Go on Premises or to Ride.* An employer is not bound by the act of his servant in inviting or permitting children to be on the premises.[34] On the other hand it is within the apparent authority of a clerk to invite a customer into that part of the store where the material the customer desires the purchase is kept.[35] But it is not within the scope of the employment where a servant directs a stranger to use a passageway not usually used, where the person injured is a stranger who has gone on the premises merely to accommodate the servant.[36] The servant generally has no implied authority to invite a third person, to whom the master owes no duty, to ride on a horse, wagon, or car in charge of the servant.[37]

(III) *Assault and Battery* — (A) *In General.*[38] While an assault by a servant may be within the scope of the employment so as to render the master liable,[39] an assault by a servant not committed as a means or for the purpose of performing the work which he was employed to do is ordinarily not within the scope of his employment, and the master is not liable therefor;[40] as where a

N. E. 980, 67 L. R. A. 422; Smith *v.* New York Cent., etc., R. Co., 78 Hun (N. Y.) 524, 29 N. Y. Suppl. 540.

30. Chicago, etc., R. Co. *v.* Epperson, 26 Ill. App. 72.

31. The doctrine of the Ohio cases *supra*, based on the theory that persons having instruments of danger in their custody must keep them with the utmost care, and that the duty cannot be devolved upon another so as to absolve the master from the consequences of an injury caused to others by the negligent manner in which the duty in regard to the custody of such an instrument may be performed, has been repudiated by the courts of Massachusetts (Obertoni *v.* Boston, etc., R. Co., 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422), and the courts of Kentucky (Sullivan *v.* Louisville, etc., R. Co., 115 Ky. 447, 74 S. W. 171, 24 Ky. L. Rep. 2344, 103 Am. St. Rep. 330).

32. Ellegard *v.* Ackland, 43 Minn. 352, 45 N. W. 715; Voegeli *v.* Pickel Marble, etc., Co., 49 Mo. App. 643; Simons *v.* Monier, 29 Barb. (N. Y.) 419. But see Andrews *v.* Green, 62 N. H. 436, holding that where defendant's employees, in direct disobedience of his orders, and without his or his overseer's knowledge, purposely start a fire in clearing defendant's field, which spreads to plaintiff's field, defendant is not liable for the resulting damage.

33. Morier *v.* St. Paul, etc., R. Co., 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793.

34. Formall *v.* Standard Oil Co., 127 Mich. 496, 86 N. W. 946. But see Houston, etc., R. Co. *v.* Bulger, 35 Tex. Civ. App. 478, 80 S. W. 557. See, generally, NEGLIGENCE.

35. Clack *v.* Southern Electrical Supply Co., 72 Mo. App. 506.

36. Lackat *v.* Lutz, 94 Ky. 287, 22 S. W. 218, 15 Ky. L. Rep. 75.

37. See Schulwitz *v.* Delta Lumber Co., 126 Mich. 559, 85 N. W. 1075 [*followed* in Mahler *v.* Stott, 129 Mich. 614, 89 N. W. 340]. See also Marquis *v.* Robidoux, 19 Quebec Super. Ct. 36], holding that a servant was not acting within the scope of his duties in permitting a boy to remain in the wagon after discovering his presence. But see Missouri, etc., R. Co. *v.* Rodgers, (Tex. Civ. App. 1897) 39 S. W. 383.

An invitation to a child to ride on a colt, where the servant was riding him to water (Bowler *v.* O'Connell, 162 Mass. 319, 38 N. E. 498, 44 Am. St. Rep. 359, 27 L. R. A. 173) or to ride on a cart (Driscoll *v.* Scanlon, 165 Mass. 348, 43 N. E. 100, 52 Am. St. Rep. 523) or hand-car (Dawkins *v.* Gulf, etc., R. Co., 77 Tex. 232, 13 S. W. 984) is not within the scope of his employment.

38. Assaults on passengers see CARRIERS, 6 Cyc. 600.

Liability of corporations in general see CORPORATIONS, 10 Cyc. 1213.

39. Barden *v.* Felch, 109 Mass. 154; McClung *v.* Dearborne, 134 Pa. St. 396, 19 Atl. 698, 19 Am. St. Rep. 708, 8 L. R. A. 204; Houston, etc., R. Co. *v.* Bell, (Tex. Civ. App. 1903) 73 S. W. 56.

40. *Alabama.*— Palos Coal, etc., Co. *v.* Benson, (1905) 39 So. 727.

Louisiana.—Williams *v.* Pullman Palace Car Co., 40 La. Ann. 87, 3 So. 631, 8 Am. St. Rep. 512.

Massachusetts.— Fairbanks *v.* Boston Storage Warehouse Co., 189 Mass. 419, 75 N. E. 737, 109 Am. St. Rep. 646; Brown *v.* Boston Ice Co., 178 Mass. 108, 59 N. E. 644, 86 Am. St. Rep. 469.

servant, not engaged as a watchman or guard, throws a stone or other object at a child annoying him.[41] And this rule applies to servants of railroad companies,[42] where the person injured is not a passenger,[43] so as to render the railroad company not liable where the servant injures third persons by throwing from the car his own property or property in his custody not intrusted to the railroad company as a carrier,[44] or where he throws a stone or other object at persons near the right of way.[45] If the master owes a duty to the person injured,[46] as where the latter is a passenger,[47] the master is generally liable without regard to the express or implied authority of the servant to commit the assault. And even where the master owes no duty to the person injured, the authority to use force may be implied from the nature of the employment,[48] so as to render the master liable,

Minnesota.— Johanson *v.* Pioneer Fuel Co., 72 Minn. 405, 75 N. W. 719.

New York.— Meehan *v.* Morewood, 52 Hun 566, 5 N. Y. Suppl. 710 [*affirmed* in 126 N. Y. 667, 27 N. E. 854].

Rhode Island.— Benton *v.* James Hill Mfg. Co., 26 R. I. 192, 58 Atl. 664.

Tennessee.—Smith *v.* Memphis, etc., Packet Co., (1886) 1 S. W. 104.

See 34 Cent. Dig. tit. "Master and Servant," § 1221.

41. Benton *v.* James Hill Mfg. Co., 26 R. I. 192, 58 Atl. 664. See Kennedy *v.* White, 91 N. Y. App. Div. 475, 86 N. Y. Suppl. 852; Kaiser *v.* McLean, 20 N. Y. App. Div. 326, 46 N. Y. Suppl. 1038.

42. *Georgia.*— Lynch *v.* Florida Cent., etc., R. Co., 113 Ga. 1105, 39 S. E. 411, 54 L. R. A. 810, act of station agent.

Illinois.— Illinois Cent. R. Co. *v.* Ross, 31 Ill. App. 170, flagman's assault on boy throwing stones on track.

Iowa.— Porter *v.* Chicago, etc., R. Co., 41 Iowa 358.

Kansas.— Missouri Pac. R. Co. *v.* Divinney, (1902) 69 Pac. 351, act of station agent.

Minnesota.— Camphell *v.* Northern Pac. R. Co., 51 Minn. 488, 53 N. W. 768.

Pennsylvania.— Rudgeair *v.* Reading Traction Co., 180 Pa. St. 333, 36 Atl. 859, motorman getting off car and assaulting person whose wagon was obstructing track.

South Dakota.— Waaler *v.* Great Northern R. Co., 18 S. D. 420, 100 N. W. 1097, 70 L. R. A. 731.

See 34 Cent. Dig. tit. "Master and Servant," § 1221.

Injuries to trespassers on trains see RAILROADS.

43. Assaults on passengers see CARRIERS, 6 Cyc. 600.

44. Walton *v.* New York Cent. Sleeping Car Co., 139 Mass. 556, 2 N. E. 101; Walker *v.* Hannibal, etc., R. Co., 121 Mo. 575, 26 S. W. 360, 42 Am. St. Rep. 547, 24 L. R. A. 363; Cunningham *v.* Grand Trunk R. Co., 31 U. C. Q. B. 350.

45. Georgia R., etc., Co. *v.* Wood, 94 Ga. 124, 21 S. E. 288, 47 Am. St. Rep. 146; Dolan *v.* Hubinger, 109 Iowa 408, 80 N. W. 514; Louisville, etc., R. Co. *v.* Routt, 76 S. W. 513, 25 Ky. L. Rep. 887.

46. See Johnson *v.* Chicago, etc., R. Co., 58 Iowa 348, 12 N. W. 329, holding that a station agent, who ejects from the station a person waiting for a train, but not for one on defendant's road, is nevertheless considered as acting in the course of his employment by defendant.

47. See CARRIERS, 6 Cyc. 600.

48. *Illinois.*— Ziegenhein *v.* Smith, 116 Ill. App. 80, holding that where a servant was attempting in good faith, in his own way, to carry out the purpose for which he was employed, the master is liable.

Iowa.— McDonald *v.* Franchere, 102 Iowa 496, 71 N. W. 427, holding that a clerk, undertaking to obtain from a customer an article which he believed was stolen, is acting within the scope of his employment.

Missouri.— Canfield *v.* Chicago, etc., R. Co., 59 Mo. App. 354.

New York.— See Geraty *v.* Stern, 30 Hun 426.

Wisconsin.— Rogahn *v.* Moore Mfg., etc., Co., 79 Wis. 573, 48 N. W. 669.

Canada.— Ferguson *v.* Robbin, 17 Ont. 167.

See 34 Cent. Dig. tit. "Master and Servant," § 1221.

But see Wagner *v.* Haak, 170 Pa. St. 495, 32 Atl. 1087, holding that a direction of defendant to persons to go through a certain roadway and tear down a fence which plaintiff had erected across it, no matter what the cost, and he would stand by them, warrants no implication of instructions for them to commit assault and battery on plaintiff.

Assault to collect money.—An assault committed by a servant, whose duty it was to collect for property sold at the time of the sale, for the purpose of compelling him to pay, is within the scope of the servant's employment. Bergman *v.* Hendrickson, 106 Wis. 434, 82 N. W. 304, 80 Am. St. Rep. 47. It has been held, however, that a lock-keeper on a canal is not authorized to assault a person not paying toll. Ware *v.* Barataria, etc., Canal Co., 15 La. 169, 35 Am. Dec. 189. And where the assault, although connected with the attempt to collect, is because of personal differences between the parties (Collette *v.* Rebori, 107 Mo. App. 711, 82 S. W. 552), where the servant is merely authorized to remove the goods sold with the buyer's consent (McGrath *v.* Michaels, 80 N. Y. App. Div. 458, 81 N. Y. Suppl. 109), where the servant's instructions are not to retake the property sold, and the assault is in connection with an attempt to retake it (Feneran *v.* Singer Mfg. Co., 20 N. Y. App. Div. 574, 47

even though the servant goes beyond the necessity of the situation and uses more force than necessary.[49] For instance the authority to use force is ordinarily implied where the employee is a watchman[50] or doorkeeper.[51]

(B) *Shooting.* If a servant shoots a third person, the act is ordinarily not within the scope of his employment, especially where he is not a watchman or detective, or the like.[52] And the mere employment of a watchman to guard property and keep away trespassers does not involve authority to shoot trespassers;[53] and if he shoots a third person, to whom the master owes no duty, without provocation, no attempt to trespass having been made,[54] or shoots a trespasser who is retreating,[55] the act is not within the scope of the servant's employment, so as to make the master liable. On the other hand a master is liable where a third person is shot by his servant, who is authorized to make arrests, in connection with making the arrest,[56] or where the master asks his servant to assist him by fighting an adversary, all being armed.[57]

(IV) *ARREST AND FALSE IMPRISONMENT.*[58] The arrest, or arrest and imprisonment, of a third person, where done to protect the business of the master, may be within the scope of the authority of a servant, so as to make the master liable therefor.[59] For instance, such power may be impliedly vested in a floor-

N. Y. Suppl. 284), or where the servant did not demand immediate payment on delivery, but made the assault next day, the failure to collect making the servant personally liable (McDermott *v.* American Brewing Co., 105 La. 124, 29 So. 498, 83 Am. St. Rep. 225, 52 L. R. A. 684), the master is not liable.

Retaking property.— A servant sent to retake property is impliedly authorized to use force to recover it, so as to make the master liable for assault in connection with its recovery. Peddie *v.* Gally, 109 N. Y. App. Div. 178, 95 N. Y. Suppl. 652; O'Connell *v.* Samuel, 81 Hun (N. Y.) 357, 30 N. Y. Suppl. 889; Griffith *v.* Friendly, 30 Misc. (N. Y.) 393, 62 N. Y. Suppl. 391.

49. Rounds *v.* Delaware, etc., R. Co., 64 N. Y. 129, 21 Am. Rep. 597 [*affirming* 3 Hun 329, 5 Thomps. & C. 475]. And see Letts *v.* Hoboken R. Warehouse, etc., Co., 70 N. J. L. 358, 57 Atl. 392.

And this is so even if the use of any but reasonable and necessary force is expressly prohibited. Letts *v.* Hoboken R. Warehouse, etc., Co., 70 N. J. L. 358, 57 Atl. 392; West Jersey, etc., R. Co. *v.* Welsh, 62 N. J. L. 655, 42 Atl. 736, 72 Am. St. Rep. 659.

Where the servant is authorized to use force against another when necessary in executing his master's orders or in conducting the business intrusted to him, the master commits it to him to decide what degree of force he shall use, and if through misjudgment or violence of temper the servant goes beyond the necessity of the occasion, and gives a right of action to another, he cannot be said, as to third persons, to have been acting beyond the line of his duty, or to have departed from his master's business. Rogahn *v.* Moore Mfg., etc., Co., 79 Wis. 573, 48 N. W. 669.

50. Alton R., etc., Co. *v.* Cox, 84 Ill. App. 202; Gray *v.* Boston, etc., R. Co., 168 Mass. 20, 46 N. E. 397.

51. Dickson *v.* Waldron, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 41 Am. St. Rep. 440, 21 L. R. A. 483, 488; Oakland City Agricultural, etc., Soc. *v.* Bingham, 4 Ind. App. 545, 31 N. E. 383; Barabasz *v.* Kabat, 86 Md. 23, 37 Atl. 720.

52. Turley *v.* Boston, etc., R. Co., 70 N. H. 348, 47 Atl. 261; Lytle *v.* Crescent News, etc., Co., 27 Tex. Civ. App. 530, 66 S. W. 240; Bowen *v.* Illinois Cent. R. Co., 136 Fed. 306, 69 C. C. A. 444, 70 L. R. A. 915.

53. Belt R. Co. *v.* Banicki, 102 Ill. App. 642. See also Holler *v.* Ross, 68 N. J. L. 324, 53 Atl. 472, 96 Am. St. Rep. 546, 59 L. R. A. 943 [*reversing* 67 N. J. L. 60, 50 Atl. 342], holding that a servant employed to watch the personal property of his master stored on the land of another is not acting within the line of his duty where he shot a person who was merely trespassing on the land. But see Letts *v.* Hoboken R. Warehouse, etc., Co., 70 N. J. L. 358, 57 Atl. 392. *Compare* Magar *v.* Hammond, 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. N. S. 1038 [*reversing* 95 N. Y. App. Div. 249, 88 N. Y. Suppl. 796], holding that the owner of a fish reserve is not liable for injuries to a poacher who was shot by a watchman, where the shooting was accidental or merely negligent.

54. Grimes *v.* Young, 51 N. Y. App. Div. 239, 64 N. Y. Suppl. 859. See also Sandles *v.* Levenson, 78 N. Y. App. Div. 306, 79 N. Y. Suppl. 959.

55. Golden *v.* Newbrand, 52 Iowa 59, 2 N. W. 537, 35 Am. Rep. 257. But see Haehl *v.* Wabash R. Co., 119 Mo. 325, 24 S. W. 737.

56. Southern R. Co. *v.* James, 118 Ga. 340, 45 S. E. 303, 63 L. R. A. 257. See Patterson *v.* Maysville, etc., R. Co., 78 S. W. 870, 25 Ky. L. Rep. 1750; Gerber *v.* Viosca, 8 Rob. (La.) 150.

57. Fraser *v.* Freeman, 56 Barb. (N. Y.) 234 [*reversed* on other grounds in 43 N. Y. 566, 3 Am. Rep. 740].

58. See, generally, FALSE IMPRISONMENT, 19 Cyc. 328.

Liability of carriers see FALSE IMPRISONMENT, 19 Cyc. 328.

59. *Minnesota.*—Smith *v.* Munch, 65 Minn. 256, 68 N. W. 19, arrest, by superintendent of

walker,[60] a salesman in charge of the master's store,[61] a watchman,[62] or a detective;[63] but one employed as a detective, nothing being shown as to his authority, is not necessarily authorized to arrest and imprison a third person.[64] The authority may be implied when the arrest is made by the servant in the absence of the master for the protection of property that is in danger, and in some cases it has been inferred when the arrest was to recover the property back, or where the crime was at the time being perpetrated.[65] Of course, if the arrest is caused by a servant having nothing to do with the matters in relation to which the arrest is made, or is not for the purpose of protecting the employer's property, the master is not liable.[66] The master is ordinarily not liable when the arrest is made after the supposed crime has been committed,[67] nor where the object of the arrest is the punishment of the offense, rather than the protection of the property.[68]

manufacturing company, of person attempting to create strike of employees.

Missouri.— Knowles *v.* Bullene, 71 Mo. App. 341.

New York.— Craven *v.* Bloomingdale, 54 N. Y. App. Div. 266, 66 N. Y. Suppl. 525 [*affirming* 30 Misc. 650, 64 N. Y. Suppl. 262] (act of driver in causing arrest of person refusing to pay for goods delivered, or to return them); Hamel *v.* Brooklyn, etc., Ferry Co., 1 Silv. Sup. 584, 6 N. Y. Suppl. 102 [*affirmed* in 125 N. Y. 707, 26 N. E. 753] (gate-keeper); Kolzem *v.* Broadway, etc., R. Co., 1 Misc. 148, 20 N. Y. Suppl. 700. See also Mallach *v.* Ridley, 9 N. Y. Suppl. 922, 24 Abb. N. Cas. 172.

Tennessee.— Eichengreen *v.* Louisville, etc., R. Co., 96 Tenn. 229, 34 S. W. 219, 54 Am. St. Rep. 833, 31 L. R. A. 702.

Wisconsin.— Cobb *v.* Simon, 124 Wis. 467, 102 N. W. 891, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909.

United States.— Harris *v.* Louisville, etc., R. Co., 35 Fed. 116.

Arrest to get third person out of way.— The act of a servant of a telephone company in causing a landowner to be unlawfully arrested for the purpose of putting him out of the way, so that the company's agents and servants might erect poles on his land, is an act done in the course of the company's employment and in furtherance of its business, and for such the company is liable in damages. Jackson *v.* American Tel., etc., Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738.

60. Knowles *v.* Bullene, 71 Mo. App. 341; Mallach *v.* Ridley, 9 N. Y. Suppl. 922, 24 Abb. N. Cas. 172; Cobb *v.* Simon, 124 Wis. 467, 102 N. W. 891, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909, holding, however, that where a floor-walker falsely accused plaintiff of having stolen goods, and by a trick made it appear as if she had done so, and afterward assaulted and imprisoned her to extort money, his acts were not within the scope of his employment.

61. Staples *v.* Schmid, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824. *Contra,* Mali *v.* Lord, 39 N. Y. 381, 100 Am. Dec. 448.

62. Kastner *v.* Long Island R. Co., 76 N. Y. App. Div. 323, 78 N. Y. Suppl. 469, 12 N. Y. Annot. Cas. 77.

63. Eichengreen *v.* Louisville, etc., R. Co., 96 Tenn. 229, 34 S. W. 219, 54 Am. St. Rep. 833, 31 L. R. A. 702.

64. Penny *v.* New York Cent., etc., R. Co., 34 N. Y. App. Div. 10, 53 N. Y. Suppl. 1043.

65. Markley *v.* Snow, 207 Pa. St. 447, 56 Atl. 999, 64 L. R. A. 685.

66. Waters *v.* Anthony, 20 App. Cas. (D. C.) 124.

For instance, if an employee causes the arrest of a third person for an alleged theft, committed off the premises of the master, of property belonging to a customer of the master, and in which the master had no interest, the master is not liable. Lubliner *v.* Tiffany, 54 N. Y. App. Div. 326, 66 N. Y. Suppl. 659. To the same effect see McKay *v.* Hudson River Line, 56 N. Y. App. Div. 201, 67 N. Y. Suppl. 651.

A doorkeeper instructed to admit only persons with tickets has no implied authority to direct the arrest of one attempting to enter without a ticket. Barabasz *v.* Kabat, 86 Md. 23, 37 Atl. 720.

Accountant.— It is not within the scope of the authority of a clerk employed to keep accounts, to collect and pay bills, and to purchase and sell supplies, to cause the arrest of persons who left the employment of the master while the latter was absent, and while indebted to him. Vara *v.* R. M. Quigley Constr. Co., 114 La. 261, 38 So. 162.

Arrest in connection with assault.— It has been held that if the arrest is in connection with the assault, and the assault was within the scope of the employment, it is immaterial whether the arrest was within the servant's authority, where the master is sued both for assault and false imprisonment. Fortune *v.* Trainor, 19 N. Y. Suppl. 598 [*affirmed* in 141 N. Y. 605, 36 N. E. 740].

67. Markley *v.* Snow, 207 Pa. St. 447, 56 Atl. 999, 64 L. R. A. 685.

68. Allen *v.* London, etc., R. Co., L. R. 6 Q. B. 65, 11 Cox C. C. 621, 40 L. J. Q. B. 55, 23 L. T. Rep. N. S. 612, 19 Wkly. Rep. 127.

Presumptions.— It has been held in England that it will be presumed where a servant, not specially appointed to protect property, arrests a person whom he supposes to have stolen his master's goods, that he acted in pursuance of his duty as a good citizen and not in the scope of his employment as a servant. Edwards *v.* London, etc., R. Co., L. R. 5 C. P. 445, 39 L. J. C. P. 241, 22 L. T.

(v) *MALICIOUS PROSECUTION.*[69] A servant authorized to cause an arrest in certain instances has authority to prefer a criminal charge against the person arrested, so as to render the master liable, in an action for malicious prosecution where the arrest was within the scope of the servant's employment.[70] Generally, however, the duty of superintendence does not carry with it an implied authority to either arrest or prosecute.[71] A credit clerk has not, by virtue of his position alone, implied authority to criminally prosecute any one for an offense committed against his master, so as to render the latter liable in case the prosecution is instituted maliciously.[72]

(vi) *TRESPASS.*[73] It often happens that the duties of a servant are such that the commission of a trespass upon the property of another may be within the scope of his employment,[74] as where the servant is authorized to search for property,[75] or to cut trees interfering with poles belonging to the master.[76]

(vii) *CONVERSION.*[77] The conversion of the property of a third person may be within the scope of the employment of the servant,[78] as where the servant obeys a command to remove such property as is pointed out by another.[79] So, where a servant is employed to drive a team, the taking of the hay of a third person to feed them has been held to be within the line of his employment.[80]

5. PERSONAL LIABILITY OF SERVANT — a. General Rules. The wrongful acts of a servant may render him personally liable to a third person injured thereby.[81]

Rep. N. S. 656, 18 Wkly. Rep. 834. But this rule has not been followed in this country. Staples *v.* Schmid, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824.

69. See, generally, MALICIOUS PROSECUTION, *ante*, p. 1.

70. Ruth *v.* St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055.

71. Markley *v.* Snow, 207 Pa. St. 447, 56 Atl. 999, 64 L. R. A. 685.

72. Staton *v.* Mason, 106 N. Y. App. Div. 26, 94 N. Y. Suppl. 417. And see Moses *v.* Bates, 2 N. Y. City Ct. 59.

73. See, generally, TRESPASS.

74. Postal Tel. Cable Co. *v.* Brantley, 107 Ala. 683, 18 So. 321; Reed *v.* New York, etc., Gas Co., 93 N. Y. App. Div. 453, 87 N. Y. Suppl. 810. See also Church *v.* Mansfield, 20 Conn. 284.

Placing powder on land of another.— The act of a servant having the custody of powder, in placing it in plaintiff's blacksmith shop to preserve it from rain until the next day, when it exploded, was within the scope of his duty, where the act was done with the *bona fide* purpose of preserving the powder and furthering the interest of his master. Birmingham Water-Works Co. *v.* Hubbard, 85 Ala. 179, 4 So. 607, 7 Am. St. Rep. 35.

Cutting timber on land of another.— A servant who is ordered to cut trees acts within the scope of his employment where he cuts trees on the land of another by mistake (Smith *v.* Webster, 23 Mich. 298), or even where the cutting is the result of his negligence or wilfulness (Luttrell *v.* Hazen, 3 Sneed (Tenn.) 20). Especially is the master liable where he neglected to employ a competent person to superintend the work, or to instruct the servants so they could distinguish boundaries of his land. Carman *v.* New York, 14 Abb. Pr. (N. Y.) 301. But it has been held that where no discretion is vested in the laborer, the master is not liable where he cuts trees on the property of others. Fairchild *v.* New Orleans, etc., R. Co., 60 Miss. 931, 45 Am. Rep. 427.

75. Lesch *v.* Great Northern R. Co., 93 Minn. 435, 101 N. W. 965.

Finding cattle.— Where the servant was sent to a field of the master for cattle and they were not there, and he recovered them on the property of a third person and drove them out, such act was within the scope of his employment. Andrus *v.* Howard, 36 Vt. 248, 84 Am. Dec. 680.

76. Western Union Tel. Co. *v.* Satterfield, 34 Ill. App. 386; Van Siclen *v.* Jamaica Electric Light Co., 45 N. Y. App. Div. 1, 61 N. Y. Suppl. 210 [*affirmed* in 168 N. Y. 650, 61 N. E. 1135].

77. See, generally, TROVER AND CONVERSION.

Liability of the master for larceny of servant as dependent on act being a criminal one see also *supra*, V, A, 3, c.

78. Eagle Constr. Co. *v.* Wabash R. Co., 71 Mo. App. 626; Arthur *v.* Balch, 23 N. H. 157; Electric Power Co. *v.* Metropolitan Tel., etc., Co., 75 Hun (N. Y.) 68, 27 N. Y. Suppl. 93 [*affirmed* in 148 N. Y. 746, 43 N. E. 986]; Burnett *v.* Oechsner, 92 Tex. 588, 50 S. W. 562, 71 Am. St. Rep. 880. See also May *v.* Bliss, 22 Vt. 477.

79. Buckingham *v.* Vincent, 23 N. Y. App. Div. 238, 48 N. Y. Suppl. 747.

80. Potulni *v.* Saunders, 37 Minn. 517, 35 N. W. 379.

81. Horner *v.* Lawrence, 37 N. J. L. 46; Hardrop *v.* Gallagher, 2 E. D. Smith (N. Y.) 523; Michael *v.* Alestree, 2 Lev. 172.

If the servant aids or assists in the wrongful act he is liable. Perkins *v.* Smith, 1 Wils. C. P. 328.

Conversion.— A servant may be sued by a third person for conversion, although the act was innocent and for the benefit of his master, without regard to whether it was done

The earlier cases which are still adhered to in many jurisdictions limited the servant's liability to his acts of misfeasance as distinguished from non-feasance,[82] but this distinction has been repudiated in some states and the servant held liable for acts of non-feasance as well as misfeasance.[83] At any event, no action can be maintained against a servant unless he can be considered a wrong-doer;[84] and where the servant obeys the commands of his master without negligence on his part, he is not liable for injuries to third persons unless he knew, or had reason to believe, that the act or acts were hazardous and liable to occasion injury to some third person.[85]

b. To Co-Servant. A servant is liable to a co-servant for injuries received by the latter because of the negligent or wrongful act of the former,[86] although the liability is generally limited to injuries caused by the misfeasance as distinguished from the non-feasance of the servant.[87] The liability exists notwithstanding the master has incurred no liability to the injured servant.[88] Subject to the rule in some states that the servant is not liable for acts of non-feasance,[89] the servant may be liable where the injury was received from defects in the place of work, tools, or machinery, if he was responsible therefor;[90] but not where the servant is not responsible therefor.[91]

by the master's orders. Porter *v.* Thomas, 23 Ga. 467; Stephens *v.* Elwall, 4 M. & S. 259. But a servant is not liable for his master's wrongful conversion of a chattel that had been lawfully taken by the servant, with the owner's consent. Silver *v.* Martin, 59 N. H. 580. And the servant is not liable for conversion of chattels put into his custody by his master and which he refused to surrender on demand of another, although he may have reason to believe the chattels belonged to such other. Hensey *v.* Howland, 10 Misc. (N. Y.) 756, 31 N. Y. Suppl. 823.

82. Albro *v.* Jaquith, 4 Gray (Mass.) 99, 64 Am. Dec. 56; Murray *v.* Usher, 117 N. Y. 542, 23 N. E. 564; Sullivan *v.* Dunham, 35 N. Y. App. Div. 342, 54 N. Y. Suppl. 962; Burns *v.* Pethcal, 75 Hun (N. Y.) 437, 27 N. Y. Suppl. 499; Henshaw *v.* Noble, 7 Ohio St. 226; Stevens *v.* Little Miami R. Co., 1 Ohio Dec. (Reprint) 335, 7 West. L. J. 369; Bryce *v.* Southern R. Co., 125 Fed. 958 [*affirming* 122 Fed. 709]; Kelly *v.* Chicago, etc., R. Co., 122 Fed. 286; Burch *v.* Caden Stone Co., 93 Fed. 181. See Lane *v.* Cotton, 12 Mod. 472.

83. Ellis *v.* Southern R. Co., 72 S. C. 465, 52 S. E. 228, 2 L. R. A. N. S. 378. And see Stiewel *v.* Borman, 63 Ark. 30, 37 S. W. 404; Lough *v.* Davis, 30 Wash. 204, 70 Pac. 491, 94 Am. St. Rep. 848, 59 L. R. A. 802.

84. Silver *v.* Martin, 59 N. H. 580; Hill *v.* Caverly, 7 N. H. 215, 26 Am. Dec. 735; Woodward *v.* Webb, 65 Pa. St. 254; Stone *v.* Cartwright, 6 T. R. 411, 3 Rev. Rep. 220. See also Chambers *v.* Ohio L. Ins., etc., Co., 1 Disn. 327, 12 Ohio Dec. (Reprint) 650. *Compare* Brown *v.* Lent, 20 Vt. 529.

85. Gustafson *v.* Chicago, etc., R. Co., 128 Fed. 85.

86. *Indiana.*— Rogers *v.* Overton, 87 Ind. 410; Hinds *v.* Overacker, 66 Ind. 547, 32 Am. Rep. 114; Hinds *v.* Harbou, 58 Ind. 121.

Maine.— Hare *v.* McIntire, 82 Me. 240, 19 Atl. 453, 17 Am. St. Rep. 476, 8 L. R. A. 450.

Massachusetts.— Osborne *v.* Morgan, 130 Mass. 102, 39 Am. Rep. 437.

Minnesota.—Griffiths *v.* Wolfram, 22 Minn. 185.

Ohio.— See Stegeman *v.* Humbers, 2 Ohio Cir. Ct. 51, 1 Ohio Cir. Dec. 356.

Pennsylvania.— Durkin *v.* Kingston Coal Co., 171 Pa. St. 193, 33 Atl. 237, 29 L. R. A. 808, 50 Am. St. Rep. 801.

Texas.— Kenney *v.* Lane, 9 Tex. Civ. App. 150, 36 S. W. 1063.

United States.— Warax *v.* Cincinnati, etc., R. Co., 72 Fed. 637.

See 34 Cent. Dig. tit. "Master and Servant," § 1236.

The fellow servant rule does not apply to actions by one servant against another servant under the employ of the same master. Lawton *v.* Waite, 103 Wis. 244, 79 N. W. 321, 45 L. R. A. 616.

87. See *supra*, V, A, 4, a, text and notes 82, 83.

88. Osborne *v.* Morgan, 137 Mass. 1.

89. Murray *v.* Usher, 117 N. Y. 543, 23 N. E. 564; Burns *v.* Pethcal, 75 Hun (N. Y.) 437, 27 N. Y. Suppl. 499.

90. Osborne *v.* Morgan, 137 Mass. 1; Steinhauser *v.* Spraul, 114 Mo. 551, 21 S. W. 515, 859, holding that the master's wife may be sued as a fellow servant for injuries sustained in using, at the wife's bidding, a ladder known to the wife to be unsafe.

An employee who selects the means and directs the mode of setting up apparatus furnished by the employer, becomes personally liable to a co-employee injured by his negligence in so doing, although the work was satisfactory to the employer, since the fact that the employer approves the employee's conduct without directing it does not defeat the employee's liability to a co-employee for negligence. The employee is not liable, however, where the employer or his agent directs or controls the setting up of the apparatus. Atkins *v.* Field, 89 Me. 281, 36 Atl. 375, 56 Am. St. Rep. 424.

91. Atkins *v.* Field, 89 Me. 281, 36 Atl. 375, 56 Am. St. Rep. 424; Griffiths *v.* Wolfram, 22 Minn. 185.

c. To Master.[92] A servant is liable to his master for damages which the master has been compelled to pay to third persons because of the negligent or other wrongful act of the servant, where the master is not himself in fault.[93] He is also liable for the amount voluntarily paid by the master to the third person because of the acts of the servant, provided it is not in excess of the sum for which the master was legally liable.[94] It is no defense, where the servant was negligent, that other persons were also culpable.[95]

6. Joint Liability of Master and Servant.[96] Although there are authorities to the contrary,[97] the better rule and the one supported by the weight of authority is that where the master is liable for the negligent or wrongful act of his servant solely upon the ground of the relationship between them, under the doctrine of *respondeat superior*, and not by reason of any personal share in the negligent or wrongful act, by his presence or express direction, he is not liable jointly with the servant, and a joint action cannot be brought against them.[98] At any event the master and servant cannot be joined where the act of the servant was wilful.[99]

7. Criminal and Penal Responsibilities.[1] A servant who does an unlawful act which would subject him to imprisonment or liability for a penalty if he was acting in his own behalf is generally personally liable therefor.[2] The master is not

For instance a superior servant is not liable to a co-servant for injuries received by the latter because of the master's failure to provide safe and suitable machinery, although it was the superior servant's duty to look after the condition of the machinery. Cincinnati, etc., R. Co. *v.* Robertson, 115 Ky. 858, 74 S. W. 1061, 25 Ky. L. Rep. 265.

92. **Deductions from wages** see *supra*, III, B, 2, d.

Judgment against servant as conclusive on master see Judgments, 23 Cyc. 1265.

93. Costa *v.* Yochim, 104 La. 170, 28 So. 992; Grand Trunk R. Co. *v.* Latham, 63 Me. 177.

Time when action accrues.— The cause of action does not accrue until the master has been compelled to pay the party injured by the act of the servant. Gaffner *v.* Johnson, 39 Wash. 437, 81 Pac. 859.

94. Smith *v.* Foran, 43 Conn. 244, 21 Am. Rep. 647. See Georgia, etc., R. Co. *v.* Jossey, 105 Ga. 271, 31 S. E. 179.

95. Brannan *v.* Hoel, 15 La. Ann. 308.

96. See, generally, Joinder and Splitting of Actions, 23 Cyc. 432, 433.

Joint actions against corporations and servants in general see Corporations, 10 Cyc. 1209.

97. Wright *v.* Compton, 53 Ind. 337; Indiana Nitroglycerin, etc., Co. *v.* Lippincott Glass Co., (Ind. App. 1904) 72 N. E. 183; Martin *v.* Louisville, etc., R. Co., 95 Ky. 612, 26 S. W. 801, 16 Ky. L. Rep. 150; Phelps *v.* Wait, 30 N. Y. 78; Fort *v.* Whipple, 11 Hun (N. Y.) 586; Suydam *v.* Moore, 8 Barb. (N. Y.) 358; Montfort *v.* Hughes, 3 E. D. Smith (N. Y.) 591; Wright *v.* Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507; Able *v.* Southern R. Co., 73 S. C. 173, 52 S. E. 962; Schumpert *v.* Southern R. Co., 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802. See also Montgomery, etc., R. Co. *v.* Chambers, 79 Ala. 338.

98. McNemar *v.* Cohn, 115 Ill. App. 31; Herman Berghoff Brewing Co. *v.* Przbylski, 82 Ill. App. 361 [*overruling* Johnson *v.* Magnuson, 68 Ill. App. 448]; Mulchey *v.* Methodist Religious Soc., 125 Mass. 487; Parsons *v.* Winchell, 5 Cush. (Mass.) 592, 52 Am. Dec. 745; McIntyre *v.* Southern R. Co., 131 Fed. 985; Shaffer *v.* Union Brick Co., 128 Fed. 97; Gustafson *v.* Chicago, etc., R. Co., 128 Fed. 85 (where punitive damages were recoverable under the allegations in the complaint against the servant, but only compensatory damages were recoverable against the master); Helms *v.* Northern Pac. R. Co., 120 Fed. 389; Doremus *v.* Root, 94 Fed. 760; Gableman *v.* Peoria, etc., R. Co., 82 Fed. 790; Landers *v.* Felton, 73 Fed. 311; Warax *v.* Cincinnati, etc., R. Co., 72 Fed. 637; Hukill *v.* Maysville, etc., R. Co., 72 Fed. 745. See Kelly *v.* Chicago, etc., R. Co., 122 Fed. 286. *Contra*, see Riser *v.* Southern R. Co., 116 Fed. 215; Charman *v.* Lake Erie, etc., R. Co., 105 Fed. 449; Estes *v.* Worthington, 30 Fed. 465.

There must be actual negligence on the part of the master as distinguished from imputed negligence to render a master and servant jointly liable for negligence to a third person. McIntyre *v.* Southern R. Co., 131 Fed. 985; Shaffer *v.* Union Brick Co., 128 Fed. 97.

Trespass.— A joint action of tort, in the nature of trespass, may be maintained against a corporation and its servant, for a personal injury inflicted by the latter in discharging the duties imposed on him by the corporation, and excluding plaintiff from the depot of the corporation, although they might have been equally well discharged without the use of undue or illegal force. Hewett *v.* Swift, 3 Allen (Mass.) 420 [*distinguishing* Parsons *v.* Winchell, 5 Cush. (Mass.) 592, 52 Am. Dec. 745, as an action on the case].

99. Wright *v.* Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507; Gustafson *v.* Chicago, etc., R. Co., 128 Fed. 85. *Contra*, Able *v.* Southern R. Co., 73 S. C. 173, 52 S. E. 962.

1. **Liability of corporations** in general see Corporations, 10 Cyc. 1225 *et seq.*

2. State *v.* Walker, 16 Me. 241; Com. *v.* Ohio, etc., R. Co., 1 Grant (Pa.) 329.

criminally liable for the acts of his servant unless committed by his command or with his assent.[3] But where a master, owing a duty to the public, intrusts its performance to a servant, he is responsible criminally for the failure of his servant to discharge that duty if its non-performance is a crime.[4] A statutory penalty cannot be recovered from the master because of the acts or omissions of his servant, where not authorized by the master,[5] except where the facts are sufficient to authorize a presumption that the acts of the servant were done under a general authority from the master.[6]

8. INDEMNITY TO SERVANT. It is well settled that there can be no indemnity among joint wrong-doers.[7] It would seem, however, that if the servant is compelled to pay damages for injuries to a third person not caused by his negligence or wilful and wrongful act except as directed by his master, he may recover over from his employer.[8] An agreement by the master to indemnify the servant against liability for his act may be valid,[9] where the object is apparently in the furtherance of justice, and in the exercise of a right, and the means are not in themselves criminal, and not known by the servant to be wrongful.[10]

B. Work of Independent Contractor[11] — 1. WHO ARE — a. Definition. An independent contractor is one who, carrying on an independent business,[12] con-

Participation in fraud.—A clerk who knowingly assists in the fraudulent practices of his principal is as much a party to the fraud as the principal himself. U. S. *v.* Flemming, 18 Fed. 907.

3. Sloan *v.* State, 8 Ind. 312; Deerfield *v.* Delano, 1 Pick. (Mass.) 465; State *v.* Dawson, 2 Bay (S. C.) 360.

4. U. S. *v.* Buchanan, 9 Fed. 689, 4 Hughes 487.

5. Satterfield *v.* Western Union Tel. Co., 23 Ill. App. 446.

6. Verona Cent. Cheese Co. *v.* Murtaugh, 50 N. Y. 314 [*reversing* 4 Lans. 17].

7. See INDEMNITY, 22 Cyc. 99.

8. See Corbin *v.* American Mills, 27 Conn. 274, 71 Am. Dec. 63.

Relation of master and servant.— To constitute the relation of master and servant between an employer and an employee, so as to render the former liable to indemnify the latter for damages to which he has been subjected on account of injuries committed by him while using ordinary care in the employer's business, the employee must be acting at the time strictly in the place of the employer, in accordance with and representing the employer's will, and not his own, and the business must be strictly that of the employer, and not in any respect the employee's. Corbin *v.* American Mills, 27 Conn. 274, 71 Am. Dec. 63.

9. See, generally, INDEMNITY, 22 Cyc. 83.

10. Ives *v.* Jones, 25 N. C. 538, 40 Am. Dec. 421.

A contract to furnish bail if the servant is arrested is valid. Where a railroad company employed a detective, agreeing to furnish him bail in case of arrest in the performance of his duties, and to pay the expenses of his defense, and he was arrested and tried for being concerned in lynching a man whom he had caused to be arrested for wrecking a train, it was held that the detective's arrest was not the proximate result of the service so as to bind the master. Hewlett *v.* Cincinnati, etc., R. Co., 65 Miss. 463, 4 So. 547.

11. Employees of master and those of independent contractor as fellow servants see *supra*, IV, G, 3, b, (II), (C).

Liability for injuries from dangerous condition of demised premises due to negligence of independent contractor see LANDLORD AND TENANT, 24 Cyc. 1116, 1117.

Liability of municipality for acts of independent contractor see MUNICIPAL CORPORATIONS.

Owner of tug as independent contractor see TOWAGE.

Stevedores or their employees see SHIPPING.

What constitutes negligence see NEGLIGENCE.

12. See cases cited *infra*, this note.

Independent nature of employee's business.— The mere fact that the employee is one who carries on a separate and independent employment does not make him an independent contractor. Brackett *v.* Lubke, 4 Allen (Mass.) 138, 81 Am. Dec. 694; Sadler *v.* Henlock, 3 C. L. R. 760, 4 E. & B. 570, 1 Jur. N. S. 677, 24 L. J. Q. B. 138, 3 Wkly. Rep. 181, 82 E. C. L. 570. On the other hand, while the definitions of an independent contractor usually refer to one "exercising an independent employment," and generally to an independent contractor having a business of his own, no case has been found where a person who would otherwise be an independent contractor has been held not one because he, through the employment, is not engaged in any independent business. There are cases, however, where the fact of the employee having an independent business has been especially referred to to support the contention that he was an independent contractor. McCarthy *v.* Portland Second Parish, 71 Me. 318, 36 Am. Rep. 320; De Forrest *v.* Wright, 2 Mich. 368; Milligan *v.* Wedge, 12 A. & E. 737, 10 L. J. Q. B. 19, 4 P. & D. 714, 40 E. C. L. 366; Laugher *v.* Pointer, 5 B. & C.

tracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work.[13] Generally the circumstances which go to show one to be an independent contractor, while separately they may not be conclusive, are the independent nature of his business, the existence of a contract for the performance of a specified piece of work, the agreement to pay a fixed price for the work, the employment of assistants by the employee who are under his control, the furnishing by him of the necessary materials, and his right to control the work while it is in progress except as to results.[14]

b. Right to Control. The test of the relationship is the right to control.[15] It is not the fact of actual interference with the control but the right to interfere that makes the difference between an independent contractor and a servant or agent.[16] To enlarge the test is whether the employee represents his employer as

547, 8 D. & R. 550, 4 L. J. K. B. O. S. 309, 11 E. C. L. 579.

13. *Indiana.*—Indiana Iron Co. *v.* Gray, 19 Ind. App. 565, 48 N. E. 803.

Louisiana.— Holmes *v.* Tennessee Coal, etc., Co., 49 La. Ann. 1465, 22 So. 403.

Maine.— Keys *v.* Second Baptist Church, 99 Me. 308, 59 Atl. 446; McCarthy *v.* Portland Second Parish, 71 Me. 318, 36 Am. Rep. 320.

Massachusetts.— Linnehan *v.* Rollins, 137 Mass. 123, 50 Am. Rep. 287; Forsyth *v.* Hooper, 11 Allen 419.

Minnesota.— Waters *v.* Pioneer Fuel Co., 52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564.

Missouri.— Gayle *v.* Missouri Car, etc., Co., 177 Mo. 427, 76 S. W. 987; Crenshaw *v.* Ullman, 113 Mo. 633, 20 S. W. 1077.

Pennsylvania.— Smith *v.* Simmons, 103 Pa. St. 32, 49 Am. Rep. 113.

Tennessee.— Powell *v.* Virginia Constr. Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925.

Virginia.— Norfolk, etc., R. Co. *v.* Stevens, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367.

See 34 Cent. Dig. tit. "Master and Servant," § 1242 *et seq.*

Fixing of price and specifications.— Where one contracts to do certain work for another the fact that no price was fixed and no specifications made as to the work to be done does not render the contract one of mere hire and service. Hexamer *v.* Webb, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703. And see Galatia Coal Co. *v.* Harris, 116 Ill. App. 70.

Result as distinguished from service.— "We think that the word 'result,' as so used, means a production or product of some sort, and not a service. One may contract to produce a house, a ship, or a locomotive; and such house, or ship, or locomotive produced is the 'result.' Such 'results' produced are often, and probably generally, by independent contractors. But we do not think that plowing a field, mowing a lawn, driving a carriage, or a horse-car, for one trip or for many trips a day, is a 'result' in the sense that the word is used in the rule. Such acts do not result in a product. They are simply a service." Jensen *v.* Barbour, 15 Mont. 582, 593, 39 Pac. 906.

Identity of employing and contracting company.— The fact that the employing company and the contracting company were controlled and managed by the same person has been considered sufficient to authorize a recovery against the employing company. Chicago Economic Fuel Gas Co. *v.* Myers, 168 Ill. 139, 48 N. E. 66. See also James McNeil, etc., Co. *v.* Crucible Steel Co., 207 Pa. St. 493, 56 Atl. 1067.

Estoppel to deny relationship.— The mere fact that an employee had reason to believe, from the acts and conduct of the owner, that the one employing him was simply the servant of the owner will not estop the owner from denying such relation of master and servant and relying on the rule applicable to independent contractors. Johnson *v.* Owen, 33 Iowa 512, rule applicable as between contractor and subcontractor. See also Smith *v.* Belshaw, 89 Cal. 427, 26 Pac. 834.

14. See *supra*, note 13.

15. *California.*— Hedge *v.* Williams, 131 Cal. 455, 63 Pac. 721, 64 Pac. 106, 32 Am. St. Rep. 366, statutory definition of servant.

Illinois.— Andrews *v.* Boedecker, 17 Ill. App. 213.

Maryland.— Hearn *v.* Quillen, 94 Md. 39, 50 Atl. 402.

Minnesota.— Vosbeck *v.* Kellogg, 78 Minn. 176, 80 N. W. 957; Whitson *v.* Ames, 68 Minn. 23, 70 N. W. 793; Rait *v.* New England Furniture, etc., Co., 66 Minn. 76, 68 N. W. 729.

Pennsylvania.— Connor *v.* Pennsylvania R. Co., 24 Pa. Super. Ct. 241. See also as sustaining this view Fox *v.* Porter, 6 Pa. Dist. 85, 18 Pa. Co. Ct. 641.

England.— Sadler *v.* Henlock, 3 C. L. R. 760, 4 E. & B. 570, 1 Jur. N. S. 677, 24 L. J. Q. B. 138, 3 Wkly. Rep. 181, 82 E. C. L. 570.

See 34 Cent. Dig. tit. "Master and Servant," § 1257.

16. Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 28 Atl. 32; Linnehan *v.* Rollins, 137 Mass. 123, 50 Am. Rep. 287; Hawke *v.* Brown, 28 N. Y. App. Div. 37, 50 N. Y. Suppl. 1032; Goldman *v.* Mason, 2 N. Y. Suppl. 337.

Where the relation is that of independent contractor the liability of the contractor

to the result of the work only or as to the means as well as the result.[17] If the employee is merely subject to the control or direction of the owner or his agent as to the result to be obtained, he is an independent contractor.[18] If the employee is subject to the control of the employer as to the means, he is not an independent contractor.[19] But even where an employer retains control over the mode and manner of doing a specified portion of the work, and an injury results to a third person from the doing of other portions of the work, he is not liable.[20] Subject to these rules, the following have been held to be independent contractors: Persons engaged in construction work in general;[21] persons who undertake the construction of an entire building or specific portions thereof;[22] persons engaged to make repairs or improvements on a building;[23] architects who merely draw up

for damages for injuries arises from the fact of actual interference and control. Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 28 Atl. 32.

17. *Iowa.*— Parrott *v.* Chicago Great Western R. Co., 127 Iowa 419, 103 N. W. 352. See also Kelleher *v.* Schmitt, etc., Mfg. Co., 122 Iowa 635, 98 N. W. 482.

Minnesota.— Barg *v.* Bousfield, 65 Minn. 355, 68 N. W. 45.

New York.— Hexamer *v.* Webb, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703.

Pennsylvania.— Miller *v.* Merritt, 211 Pa. St. 127, 60 Atl. 508; Karl *v.* Juniata County, 206 Pa. St. 633, 56 Atl. 78.

Texas.— Southwestern Tel., etc., Co. *v.* Paris, (1905) 87 S. W. 724; Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632.

See 34 Cent. Dig. tit. "Master and Servant," § 1257.

18. See *infra*, V, B, 1, c.

19. *Alabama.*— Drennen *v.* Smith, 115 Ala. 396, 22 So. 442; Campbell *v.* Lunsford, 83 Ala. 512, 3 So. 522.

Florida.— St. Johns, etc., R. Co. *v.* Shalley, 33 Fla. 397, 14 So. 890; Mumby *v.* Bowden, 25 Fla. 454, 6 So. 453.

Illinois.— Coal Run Coal Co. *v.* Strawn, 15 Ill. App. 347.

Indiana.— Dehority *v.* Whitcomb, 13 Ind. App. 558, 41 N. E. 1059.

Iowa.— Parrott *v.* Chicago Great Western R. Co., 127 Iowa 419, 103 N. W. 352; Hughbanks *v.* Boston Inv. Co., 92 Iowa 267, 60 N. W. 340.

Kentucky.— Adams Express Co. *v.* Schofield, 111 Ky. 832, 64 S. W. 903, 23 Ky. L. Rep. 1120; Louisville, etc., R. Co. *v.* Tow, 63 S. W. 27, 23 Ky. L. Rep. 408, 66 L. R. A. 941.

Louisiana.— Holmes *v.* Tennessee Coal, etc., Co., 49 La. Ann. 1465, 22 So. 403; Camp *v.* St. Louis Church, 7 La. Ann. 321.

Massachusetts.— Dutton *v.* Amesbury Nat. Bank, 181 Mass. 154, 63 N. E. 405; Linnehan *v.* Rollins, 137 Mass. 123, 50 Am. Rep. 287; Brackett *v.* Lubke, 4 Allen 138, 81 Am. Dec. 694; Lowell *v.* Boston, etc., Corp., 23 Pick. 24, 34 Am. Dec. 33.

Minnesota.— Corrigan *v.* Elsinger, 81 Minn. 42, 83 N. W. 492; Waters *v.* Pioneer Fuel Co., 52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564.

Missouri.— O'Neill *v.* Blase, 94 Mo. App. 648, 68 S. W. 764.

Montana.— Jensen *v.* Barbour, 15 Mont. 582, 39 Pac. 906.

New York.— Fisher *v.* Rankin, 78 Hun 407, 29 N. Y. Suppl. 143; Gilbert *v.* Beach, 5 Bosw. 445; Ketcham *v.* Newman, 14 Daly 57, 3 N. Y. St. 566. *Compare* Kirby *v.* Lackawanna Steel Co., 109 N. Y. App. Div. 334, 95 N. Y. Suppl. 833, where, notwithstanding control was reserved by the employer, the employee was held an independent contractor.

Pennsylvania.— James McNeil, etc., Co. *v.* Crucible Steel Co., 207 Pa. St. 493, 56 Atl. 1067; Washington Natural Gas Co. *v.* Wilkinson, 1 Pa. Cas. 263, 2 Atl. 338; McMasters *v.* Pennsylvania R. Co., 3 Pittsb. 1.

Texas.— Burton *v.* Galveston, etc., R. Co., 61 Tex. 526; Taylor, etc., R. Co. *v.* Warner, (Civ. App. 1900) 60 S. W. 442; Texas, etc., R. Co. *v.* Dudley, 1 Tex. App. Civ. Cas. § 540.

United States.— Singer Mfg. Co. *v.* Rahn, 132 U. S. 518, 10 S. Ct. 175, 33 L. ed. 440 [*affirming* 26 Fed. 912]; Texas, etc., R. Co. *v.* Juneman, 71 Fed. 939, 18 C. C. A. 394; Fuller *v.* Citizens' Nat. Bank, 15 Fed. 875.

England.— Sadler *v.* Henlock, 3 C. L. R. 760, 4 E. & B. 570, 1 Jur. N. S. 677, 24 L. J. Q. B. 138, 3 Wkly. Rep. 181, 82 E. C. L. 570.

Canada.— Johnston *v.* Hastie, 30 U. C. Q. B. 232.

See 34 Cent. Dig. tit. "Master and Servant," § 1242 *et seq.*

Details in discretion of employee.— Where the employer retains the right to control the employee the fact that he left details to the employee's discretion does not render him a contractor. Pickens *v.* Diecker, 21 Ohio St. 212, 8 Am. Rep. 55.

20. St. Paul Water Co. *v.* Ware, 16 Wall. (U. S.) 566, 21 L. ed. 485.

21. Aston *v.* Nolan, 63 Cal. 269 (excavator); Independence *v.* Slack, 134 Mo. 66, 34 S. W. 1094 (builder of sidewalk); Benedict *v.* Martin, 36 Barb. (N. Y.) 288 (mason).

22. Hughbanks *v.* Boston Inv. Co., 92 Iowa 267, 60 N. W. 640; Robinson *v.* Webb, 11 Bush (Ky.) 464; Deford *v.* State, 30 Md. 179; Emmerson *v.* Fay, 94 Va. 60, 26 S. E. 386.

23. Francis *v.* Johnson, 127 Iowa 391, 101 N. W. 878 (painter); Conners *v.* Hennessey, 112 Mass. 96; McCarthy *v.* Portland Second Parish, 71 Me. 318, 36 Am. Rep. 320 (roof slater).

the plans;[24] persons operating mines;[25] draymen and the like;[26] drovers;[27] persons employed to clear land;[28] persons assisting in public entertainments;[29] stevedores;[30] croppers;[31] farm superintendent in exclusive control of farm;[32] plumbers;[33] gas-fitters;[34] mill operators;[35] loggers;[36] elevator company putting in elevator;[37] and a physician sent by defendant to examine plaintiff pending suit.[38]

e. Right of Supervision. The fact that the right of supervision is reserved to the owner or his representative for the purpose of seeing that the specific work is done in compliance with the contract will not prevent the employee from being an independent contractor.[39] In other words, the retention of the right to

24. Burke *v.* Ireland, 166 N. Y. 305, 59 N. E. 914; Pitcher *v.* Lennon, 12 N. Y. App. Div. 356, 42 N. Y. Suppl. 156; White *v.* Green, (Tex. Civ. App. 1904) 82 S. W. 329. And see Boswell *v.* Laird, 8 Cal. 469, 68 Am. Dec. 345.

25. Harris *v.* McNamara, 97 Ala. 181, 12 So. 103 (ore-digger paid by car, furnishing his own tools and his assistants); Mayhew *v.* Sullivan Min. Co., 76 Me. 100.

26. Jahn *v.* McKnight, 117 Ky. 655, 78 S. W. 862, 25 Ky. L. Rep. 1758; McMullen *v.* Hoyt, 2 Daly (N. Y.) 271.

A truckman employed by merchants to move paper from the second to the fourth floor of a warehouse not belonging to them (work requiring skill and judgment and one which the truckman is competent to perform), who, being given no instructions by the merchants concerning the manner of performance, employs other men to assist him, pays them for their labor and sends his bill to the merchants, is an independent contractor. Kueckel *v.* Ryder, 54 N. Y. App. Div. 252, 66 N. Y. Suppl. 522 [*affirmed* in 170 N. Y. 562, 62 N. E. 1096].

27. Milligan *v.* Wedge, 12 A. & E. 737, 10 L. J. Q. B. 19, 4 P. & D. 714, 40 E. C. L. 366.

28. St. Louis, etc., R. Co. *v.* Yonley, (Ark. 1890) 13 S. W. 333 (person clearing rubbish off railroad right of way at so much per mile and hiring own servants); Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Black *v.* Christchurch Finance Co., [1894] A. C. 48, 58 J. P. 332, 63 L. J. P. C. 32, 70 L. T. Rep. N. S. 77, 6 Reports 394.

29. Smith *v.* Benick, 87 Md. 610, 41 Atl. 56, 42 L. R. A. 277; Heidenwag *v.* Philadelphia, 168 Pa. St. 72, 31 Atl. 1063.

30. Murray *v.* Currie, L. R. 6 C. P. 24, 40 L. J. C. P. 26, 23 L. T. Rep. N. S. 557, 19 Wkly. Rep. 104. See, generally, SHIPPING.

31. Duncan *v.* Anderson, 56 Ga. 398.

32. Marsh *v.* Hand, 120 N. Y. 315, 24 N. E. 463 [*affirming* 40 Hun 339].

33. Bennett *v.* Truebody, 66 Cal. 509, 6 Pac. 329, 56 Am. Rep. 117; Larow *v.* Clute, 14 N. Y. Suppl. 616. But see Anderson *v.* Moore, 108 Ill. App. 106; Bernauer *v.* Hartman Steel Co., 33 Ill. App. 491, in both of which cases a plumber was held not an independent contractor where he was not given possession of the premises and no special contract was made.

34. Rapson *v.* Cubitt, C. & M. 64, 6 Jur. 606, 11 L. J. Exch. 271, 9 M. & W. 710, 41 E. C. L. 41.

35. State *v.* Emerson, 72 Me. 455; Ziebell *v.* Eclipse Lumber Co., 33 Wash. 591, 74 Pac. 680.

36. Moore *v.* Sanborne, 2 Mich. 519, 59 Am. Dec. 209; Knowlton *v.* Hoit, 67 N. H. 155, 30 Atl. 346; Carter *v.* Berlin Mills Co., 58 N. H. 52, 42 Am. Rep. 572; Pierrepont *v.* Loveless, 72 N. Y. 211.

37. Parkhurst *v.* Swift, 31 Ind. App. 521, 68 N. E. 620.

38. Pearl *v.* West End St. R. Co., 176 Mass. 177, 57 N. E. 339, 79 Am. St. Rep. 330, 49 L. R. A. 826.

39. *Arkansas.*— St. Louis, etc., R. Co. *v.* Knott, 54 Ark. 424, 16 S. W. 9.

California.— Green *v.* Soule, 145 Cal. 96, 78 Pac. 337.

Connecticut.— Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 28 Atl. 32.

Georgia.— Harrison *v.* Kiser, 79 Ga. 588, 4 S. E. 320.

Illinois.— Boyd *v.* Chicago, etc., R. Co., 217 Ill. 332, 75 N. E. 496, 108 Am. St. Rep. 253 [*affirming* 118 Ill. App. 433]; Schwartz *v.* Gilmore, 45 Ill. 455, 92 Am. Dec. 227; Geist *v.* Rothschild, 90 Ill. App. 324; Fitzpatrick *v.* Chicago, etc., R. Co., 31 Ill. App. 649.

Indiana.— New Albany Forge, etc. *v.* Cooper, 131 Ind. 363, 30 N. E. 294.

Iowa.— See also Callahan *v.* Burlington, etc., R. Co., 23 Iowa 562, where an engineer of a railroad company was authorized to give directions as to the mode of removing perishable materials.

Maine.— Eaton *v.* European, etc., R. Co., 59 Me. 520, 8 Am. Rep. 430.

Massachusetts.— See Dane *v.* Cochrane Chemical Co., 164 Mass. 453, 41 N. E. 678.

Michigan.— Lenderink *v.* Rockford, 135 Mich. 531, 98 N. W. 4. See also Samuelson *v.* Cleveland Iron Min. Co., 49 Mich. 164, 13 N. W. 499, 43 Am. St. Rep. 456.

Missouri.— Crenshaw *v.* Ullman, 113 Mo. 633, 20 S. W. 1077; McKinley *v.* Chicago, etc., R. Co., 40 Mo. App. 449.

Nebraska.— Omaha Bridge, etc., R. Co. *v.* Hargadine, 5 Nebr. (Unoff.) 418, 98 N. W. 1071.

New York.— Hawke *v.* Brown, 28 N. Y. App. Div. 37, 50 N. Y. Suppl. 1032; Weber *v.* Buffalo R. Co., 20 N. Y. App. Div. 292, 47 N. Y. Suppl. 7; Clare *v.* National City Bank, 40 N. Y. Super. Ct. 104; Jaskoev *v.* Consolidated Gas Co., 33 Misc. 790, 67 N. Y. Suppl. 976.

Ohio.— Hughes *v.* Cincinnati, etc., R. Co., 39 Ohio St. 461.

supervise as to results, as distinguished from the right to supervise as to the means by which the intermediate results should be obtained, does not affect the relationship.[40] For instance, a contractee's reservation of the right to direct changes in the time and manner of doing the work,[41] the right to direct as to the

Pennsylvania.— Miller *v.* Merritt, 211 Pa. St. 127, 60 Atl. 508; Thomas *v.* Altoona, etc., Electric R. Co., 191 Pa. St. 361, 43 Atl. 215; Welsh *v.* Parrish, 148 Pa. St. 599, 24 Atl. 86; Welsh *v.* Lehigh, etc., Coal Co., 2 Pa. Cas. 319, 5 Atl. 48.

Texas.— Simonton *v.* Perry, (Civ. App. 1901) 62 S. W. 1090.

Virginia.— Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 14 S. E. 163.

Wisconsin.— Smith *v.* Milwaukee Builders', etc., Exch., 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504.

United States.— Salliotte *v.* King Bridge Co., 122 Fed. 378, 58 C. C. A. 466, 65 L. R. A. 620.

See 34 Cent. Dig. tit. "Master and Servant," § 1258.

"Under the supervision and subject to the approval."— A provision that the work is to be done "under the supervision and subject to the approval" of the employer or his agent does not affect the independent nature of the contract. Alabama Midland R. Co. *v.* Martin, 100 Ala. 511, 14 So. 401; Callan *v.* Bull, 113 Cal. 593, 45 Pac. 1017; Eaton *v.* European, etc., R. Co., 59 Me. 520, 8 Am. Rep. 430; Vosbeck *v.* Kellogg, 78 Minn. 176, 80 N. W. 957; Thomas *v.* Altoona, etc., Electric R. Co., 191 Pa. St. 361, 43 Atl. 215; Casement *v.* Brown, 148 U. S. 615, 13 S. Ct. 672, 37 L. ed. 582. A requirement that the work shall be executed under the supervision of an engineer, and authorizing him to prescribe the "order" in which the materials should be placed, and to "give the lines and levels" to be used, does not make the contractor a servant. Callan *v.* Bull, *supra*.

Performance "to satisfaction" of employer's representative.— The fact that the contract stipulates that the work is to be done "to the satisfaction" of the employer's representative, is not such an assumption of the right to control as to the details or methods of doing the work as to make the employer responsible for the acts of the contractor. Eldred *v.* Mackie, 178 Mass. 1, 59 N. E. 673; Kelly *v.* New York, 11 N. Y. 432; Powell *v.* Virginia Constr. Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925; Smith *v.* Milwaukee Builders', etc., Exch., 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504.

Right to reject improper or defective materials.— The independent nature of the contract is not affected by a provision that the employer or his agent is to have the right to reject improper or defective materials. Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 28 Atl. 32; Fitzpatrick *v.* Chicago, etc., R. Co., 31 Ill. App. 649; Hardaker *v.* Idle Dist. Council, [1896] 1 Q. B. 335, 60 J. P. 196, 65 L. J. Q. B. 363, 74 L. T. Rep. N. S. 69, 44 Wkly. Rep. 323.

Illustrations of reservation of something more than right to supervise.— Under a written contract to demolish a building, containing a clause that the "work of demolition is to be carried out according to the directions of the supervising architect, whose decisions on all points . . . I agree to accept as final," such control over the work was reversed as prevented the contractor from being independent, and created the relation of master and servant. Faren *v.* Sellers, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256. Where a railroad company was the employer, and reserved the right to determine the extent of the excavation to be made, and undertook to furnish a locomotive and train crew and transport the material removed, the contractor was held not an independent contractor. Louisville, etc., R. Co. *v.* Tow, 63 S. W. 27, 23 Ky. L. Rep. 408, 66 L. R. A. 941. Where the contractor agreed to put in posts in building a walk as the employer company should require, and he was to submit to the supervision and direction of the company's engineer and to do the work satisfactorily, the contractor was not an independent contractor. New Orleans, etc, R. Co. *v.* Hanning, 15 Wall. (U. S.) 649, 21 L. ed. 220. Where an excavation was to be made as the employer's engineer should direct, and any one refusing to obey the engineer's orders was to be discharged by the contractor, he is not an independent contractor. Larson *v.* Metropolitan St. R. Co., 110 Mo. 234, 19 S. W. 416, 33 Am. St. Rep. 439, 16 L. R. A. 330. And see, generally, Waters *v.* Greenleaf-Johnson Lumber Co., 115 N. C. 648, 20 S. E. 718.

The right to supervise does not make the employer liable to a servant of the contractor because of a failure to supervise, where the servant is injured, since the reservation accrues solely to the benefit and security of the employer and creates no duty on his part on behalf of the contractor's workmen. Samuelson *v.* Cleveland Iron Min. Co., 49 Mich. 164, 13 N. W. 499, 43 Am. Rep. 456; Burke *v.* Ireland, 26 N. Y. App. Div. 487, 50 N. Y. Suppl. 369.

40. Vosbeck *v.* Kellogg, 78 Minn. 176, 80 N. W. 957. And see Morgan *v.* Smith, 159 Mass. 570, 35 N. E. 101, holding that the mere fact that the architect of the owner directs certain things to be done by the contractor, where he does not exercise any control over him in his manner of doing the work, or his choice of workmen, does not make the contractor a servant of the owner.

41. Schwartz *v.* Gilmore, 45 Ill. 455, 92 Am. Dec. 227; Erie *v.* Caulkins, 85 Pa. St. 247, 27 Am. Rep. 642. See also as sustaining this view Green *v.* Soule, 145 Cal. 96, 78 Pac. 337.

Time of doing work.— Where the driver of

quantity of work to be done,[42] or the right to make any deviation from the contract[43] is not a right to control the mode or manner of doing the work so as to make the contractee liable. And it has been held that the fact that the contractee's representative directs how the work is to be done does not affect the independency of the contract.[44]

d. Control of Premises. The fact that the owner of the premises on which work is to be done by an employee retains control thereof does not prevent the employee being an independent contractor.[45]

e. Mode of Payment. While payment for the whole work by a specific sum is one of the ordinary incidents of an independent contract, and the mode of payment is a circumstance to be considered in determining whether one is an independent contractor,[46] the mode of payment is not conclusive nor the test as to the relationship.[47] One may be an independent contractor, although not to be paid a round sum for his work,[48] as where paid by the day,[49] or the cost of the work and a per cent.[50] On the other hand a person is not an independent contractor merely because paid by the piece or job.[51]

f. Furnishing of Material and Appliances. An employee is not an independent contractor merely because he furnishes the appliances and materials, or either.[52] On the other hand the fact that materials are furnished by the employer does not prevent the employee being an independent contractor.[53]

a wagon was not subject to discharge by defendant and was in nowise under its control beyond the fact that it had the right to instruct him when to haul its product, he is not deemed its servant, and the doctrine of independent contractor applies. Chicago Hydraulic Press Brick Co. *v.* Campbell, 116 Ill. App. 322.

42. Hughes *v.* Cincinnati, etc., R. Co., 39 Ohio St. 461.

43. Frassi *v.* McDonald, 122 Cal. 400, 55 Pac. 139.

44. Dane *v.* Cochrane Chemical Co., 164 Mass. 453, 41 N. E. 678.

45. Louthan *v.* Hewes, 138 Cal. 116, 70 Pac. 1065; Boomer *v.* Wilbur, 176 Mass. 482, 57 N. E. 1004, 53 L. R. A. 172. And see Geist *v.* Rothschild, 90 Ill. App. 324. But see Fuller *v.* Citizens' Nat. Bank, 15 Fed. 875.

Reservation by owner of use of premises.— The fact that a railroad company reserved the right to run its trains over a bridge during the time of its repair by an experienced bridge builder does not destroy the independency of the contractor's employment. Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 14 S. E. 163.

46. Indiana Iron Co. *v.* Cray, 19 Ind. App. 565, 48 N. E. 803; Redstrake *v.* Swayze, 52 N. J. L. 414, 21 Atl. 953; State *v.* Swayze, 52 N. J. L. 129, 18 Atl. 697.

47. Corbin *v.* American Mills, 27 Conn. 274, 71 Am. Dec. 63; Morgan *v.* Smith, 159 Mass. 570, 35 N. E. 101; New Orleans, etc., R. Co. *v.* Reese, 61 Miss. 581.

48. Morgan *v.* Smith, 159 Mass. 570, 35 N. E. 101.

49. Harrison *v.* Collins, 86 Pa. St. 153, 27 Am. Rep. 699; Emmerson *v.* Fay, 94 Va. 60, 26 S. E. 386. See also Wabash, etc., R. Co. *v.* Farver, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696; Hexamer *v.* Webb, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703.

Mode and amount of payment.— That a person alleged to be an independent contractor is employed at two dollars per day, and hires other persons at the rate of one dollar and a half per day, does not take away the independent character of his employment. Karl *v.* Juniata County, 206 Pa. St. 633, 56 Atl. 78.

50. Whitney, etc., Co. *v.* O'Rourke, 68 Ill. App. 487; New Orleans, etc., R. Co. *v.* Reese, 61 Miss. 581.

51. Holmes *v.* Tennessee Coal, etc., Co., 49 La. Ann. 1465, 22 So. 403; Waters *v.* Pioneer Fuel Co., 52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564; O'Neill *v.* Blase, 94 Mo. App. 648, 68 S. W. 764; Fink *v.* Missouri Furnace Co., 10 Mo. App. 61 [*reversed* on other grounds in 82 Mo. 276, 52 Am. Rep. 376]; Sadler *v.* Henlock, 3 C. L. R. 760, 4 E. & B. 570, 1 Jur. N. S. 677, 24 L. J. Q. B. 138, 3 Wkly. Rep. 181, 82 E. C. L. 570.

52. Adams Express Co. *v.* Schofield, 111 Ky. 832, 64 S. W. 903, 23 Ky. L. Rep. 1120; Tiffin *v.* McCormack, 34 Ohio St. 638, 32 Am. Rep. 408.

53. *New Hampshire.*— Carter *v.* Berlin Mills Co., 58 N. H. 52, 42 Am. Rep. 572.

New York.— Benedict *v.* Martin, 36 Barb. 288.

Pennsylvania.— Smith *v.* Simmons, 103 Pa. St. 32, 49 Am. Rep. 113.

Virginia.— Emmerson *v.* Fay, 94 Va. 60, 26 S. E. 386.

England.— Overton *v.* Freeman, 11 C. B. 867, 3 C. & K. 52, 16 Jur. 65, 21 L. J. C. P. 52, 73 E. C. L. 867.

See 34 Cent. Dig. tit. "Master and Servant," § 1242 *et seq.*

Name of employer on wagons.— The fact that defendant's name was upon the wagons, which, however, belonged to the employee, does not prevent the employee being an independent contractor. Foster *v.* Wadsworth-Howland Co., 168 Ill. 514, 48 N. E. 163.

g. Power to Terminate Contract. The fact that the contract provides that the employer or his representative may discharge the contractor at any time or upon the happening of certain contingencies, while a fact to be considered,[54] is not conclusive that the contractor is not an independent contractor.[55]

h. Power Over Assistants. The reservation to the employer of the right to demand the discharge of the contractor's servants under certain circumstances does not affect the relationship of independent contractor where it otherwise exists.[56] So the fact that in practice employees would discharge their servants, on request of the employers, for refusal to observe certain rules, and that the employers objected to the hiring of a certain class of servants, does not show such reservation of control as creates the relation of master and servant.[57] So the right to annul the contract for a failure to employ a force in kind and quality to the satisfaction of the employer's representative does not show such a right of selection of the contractor's servant as to make the employer liable for injuries thereto.[58]

i. Subcontractors. A subcontractor under an original contractor may be an independent contractor as to such original contractor.[59] And in determining whether a subcontractor is an independent contractor, in so far as his relation to the principal contractor is concerned, the same rules apply that have already been considered as between the original employer and employee.[60]

j. Dual Capacity of Servant and Contractor. The fact that a person is a servant of his employer in respect to certain work does not preclude his being an independent contractor as regards other work.[61]

2. General Rule as to Non-Liability of Contractee — a. Contractor Not Servant. An independent contractor is not a servant within the rule that makes a

54. See Parrott *v.* Chicago Great Western R. Co., 127 Iowa 419, 103 N. W. 352; Deford *v.* State, 30 Md. 179; Tiffin *v.* McCormack, 34 Ohio St. 638, 32 Am. Rep. 408.

Right to discharge as if ordinary laborer.— So the fact that the alleged contractor, although there was no express provision in the contract in regard thereto, could be discharged the same as any ordinary laborer, is to be considered in support of the contention that he is not an independent contractor. Texas, etc., R. Co. *v.* Juneman, 71 Fed. 939, 18 C. C. A. 394.

55. See New Albany Forge, etc. *v.* Cooper, 131 Ind. 363, 30 N. E. 294; Robinson *v.* Webb, 11 Bush (Ky.) 464; Thomas *v.* Altoona, etc., Electric R. Co., 191 Pa. St. 361, 43 Atl. 215.

56. Bayer *v.* Chicago, etc., R. Co., 68 Ill. App. 219; New Albany Forge, etc. *v.* Cooper, 131 Ind. 363, 30 N. E. 294; McKinley *v.* Chicago, etc., R. Co., 40 Mo. App. 449; Reedie *v.* London, etc., R. Co., 4 Exch. 244, 20 L. J. Exch. 65, 6 R. & Can. Cas. 184. See also Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Rogers *v.* Florence R. Co., 31 S. C. 378, 9 S. E. 1059.

But the reservation of the right to have discharged any servant of the contractor who disobeys the order of the owner's representative creates the relation of master and servant as between the employer and employee. Larson *v.* Metropolitan St. R. Co., 110 Mo. 234, 19 S. W. 416, 33 Am. St. Rep. 439, 16 L. R. A. 330.

57. Harris *v.* McNamara, 97 Ala. 181, 12 So. 103.

58. Burmeister *v.* New York El. R. Co., 47 N. Y. Super. Ct. 264. See also Thomas *v.* Altoona, etc., R. Co., 191 Pa. St. 361, 43 Atl. 215.

59. Green *v.* Soule, 145 Cal. 96, 78 Pac. 337.

60. *Illinois.*— Crudup *v.* Schreiner, 98 Ill. App. 337.

Minnesota.—Klages *v.* Gillette-Herzog Mfg. Co., 86 Minn. 458, 90 N. W. 1116; Aldritt *v.* Gillette-Herzog Mfg. Co., 85 Minn. 206, 88 N. W. 741.

Tennessee.— Powell *v.* Virginia Constr. Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925.

Virginia.— Richmond *v.* Sitterding, 101 Va. 354, 43 S. E. 562, 65 L. R. A. 445.

Washington.— Larson *v.* American Bridge Co., 40 Wash. 224, 82 Pac. 294, 111 Am. St. Rep. 904.

See 34 Cent. Dig. tit. "Master and Servant," § 1242 *et seq.*

Contract not executed in good faith.— Where it appears that a contract between the original contractor and a subcontractor was not executed in good faith to express the real relation of the parties, or if, notwithstanding such contract, supervision of the work was assumed by the original contractor, then the application of the doctrine of *respondeat superior* is to be determined by the conduct of the parties. Klages *v.* Gillette-Herzog Mfg. Co., 86 Minn. 458, 90 N. W. 1116.

61. Hedge *v.* Williams, 131 Cal. 455, 63 Pac. 721, 64 Pac. 106, 82 Am. St. Rep. 366; Samyn *v.* McClosky, 2 Ohio St. 536; Knight *v.* Fox, 5 Exch. 721, 14 Jur. 963, 20 L. J. Exch. 9. See also Toomey *v.* Donovan, 158 Mass. 232, 33 N. E. 396; Wolf *v.* American Tract Soc., 25 N. Y. App. Div. 98, 49 N. Y. Suppl. 236.

master liable to third persons for the acts of his servants. The work done by the independent contractor is not under the control and direction of the contractee.[62]

b. Early English Rule. An early case in England,[63] followed by a few decisions in this country,[64] holding the contractee liable for the acts of the contractor or the contractor's servants has been directly overruled and is not now the law in any state.[65] Likewise the distinction attempted to be drawn by that case between the owner of real and personal property, and attaching liability to the owner of real property upon which work is being done by an independent contractor because of the ownership of the property,[66] has been expressly overruled in England,[67] and has been distinctly and unanimously disclaimed as authority in this country.[68]

c. Existing Rule. Although the rule is stated in the decisions in many different ways, and although there is a considerable conflict of authority as to whether a particular state of facts brings the case within the general rule relieving the contractee from liability, or causes it to fall within one of the exceptions which render him liable, the general rule deducible from the decisions is that where the relation of an independent contract exists, and due diligence has been exercised in selecting a competent contractor, and the thing contracted to be done is not in itself a nuisance, nor will necessarily result in a nuisance if proper precautionary measures are used, and an injury to a third person results, not from the fact that the work is done, but from the wrongful or negligent manner of doing it by a contractor or his servants, the contractee is not liable therefor.[69] *A*

62. *Kansas.*— Kansas Cent. R. Co. *v.* Fitzsimmons, 18 Kan. 34.

Kentucky.— Robinson *v.* Webb, 11 Bush 464.

Maine.— Wilbur *v.* White, 98 Me. 191, 56 Atl. 657.

Minnesota.— Aldritt *v.* Gillette-Herzog Mfg. Co., 85 Minn. 206, 88 N. W. 741.

New York.— Berg *v.* Parsons, 156 N. Y. 109, 50 N. E. 957, 66 Am. St. Rep. 542, 41 L. R. A. 391.

Ohio.— Cincinnati *v.* Stone, 5 Ohio St. 38.

Oregon.— Macdonald *v.* O'Reilly, 45 Oreg. 589, 78 Pac. 753.

Pennsylvania.— Hanna *v.* Gresh, 16 Montg. Co. Rep. 182.

Canada.— McCann *v.* Toronto, 28 Ont. 650.

See 34 Cent. Dig. tit. "Master and Servant," § 1241 *et seq.*

Compare Myer *v.* Hobbs, 57 Ala. 175, 29 Am. Rep. 719.

63. Bush *v.* Steinman, 1 B. & P. 404 [*followed* in Sly *v.* Edgley, 6 Esp. 6].

64. See Earle *v.* Hall, 2 Metc. (Mass.) 353; Lowell *v.* Boston, etc., R. Corp., 23 Pick. (Mass.) 24, 34 Am. Dec. 33; Stone *v.* Codman, 15 Pick. (Mass.) 297; New York *v.* Bailey, 2 Den. (N. Y.) 433; Wiswall *v.* Brinson, 32 N. C. 554; Myers *v.* Snyder, Brightly (Pa.) 489.

65. *California.*— Boswell *v.* Laird, 8 Cal. 469, 68 Am. Dec. 345.

Iowa.— Hoff *v.* Shockley, 122 Iowa 720, 98 N. W. 573, 101 Am. St. Rep. 289, 64 L. R. A. 538; Kellogg *v.* Payne, 21 Iowa 575.

Missouri.— Morgan *v.* Bowman, 22 Mo. 538.

New Hampshire.— Carter *v.* Berlin Mills Co., 58 N. H. 52, 42 Am. Rep. 572; Wright *v.* Holbrook, 52 N. H. 120, 13 Am. Rep. 12.

New Jersey.— Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

New York.— Blake *v.* Ferris, 5 N. Y. 48, 55 Am. Dec. 304.

Ohio.— Clark *v.* Fry, 8 Ohio St. 358, 72 Am. Dec. 590.

Virginia.— Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 14 S. E. 163.

See 34 Cent. Dig. tit. "Master and Servant," § 1245 *et seq.*

66. Bush *v.* Steinman, 1 B. & P. 404 [*followed* in Laugher *v.* Pointe, 5 B. & C. 547, 8 D. & R. 550, 4 L. J. K. B. O. S. 309, 11 E. C. L. 579; Quarman *v.* Burnett, 4 Jur. 969, 9 L. J. Exch. 308, 6 M. & W. 499].

67. Reedie *v.* London, etc., R. Co., 4 Exch. 244, 20 L. J. Exch. 65, 6 R. & Can. Cas. 1841.

68. *California.*— Boswell *v.* Laird, 8 Cal. 469, 68 Am. Dec. 345.

Iowa.— Hoff *v.* Shockley, 122 Iowa 720, 98 N. W. 573, 101 Am. St. Rep. 289, 64 L. R. A. 538.

Massachusetts.— Hilliard *v.* Richardson, 3 Gray 349, 63 Am. Dec. 743.

Missouri.— Morgan *v.* Bowman, 22 Mo. 538.

New Hampshire.— See Carter *v.* Berlin Mills, 58 N. H. 52, 42 Am. Rep. 572; Wright *v.* Holbrook, 52 N. H. 120, 13 Am. Rep. 12 [*questioning* Stone *v.* Cheshire R. Corp., 19 N. H. 427, 51 Am. Dec. 192].

New Jersey.— Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

New York.— King *v.* New York Cent., etc., R. Co., 66 N. Y. 181, 23 Am. Rep. 37; Simons *v.* Monier, 29 Barb. 419.

Ohio.— Chambers *v.* Ohio L. Ins., etc., Co., 1 Disn. 327, 12 Ohio Dec. (Reprint) 650.

69. *Alabama.*— Massey *v.* Oates, 143 Ala. 248, 39 So. 142.

California.— Stewart *v.* California Imp. Co., 131 Cal. 125, 63 Pac. 177, 724, 52 L. R. A. 205; Du Pratt *v.* Lick, 38 Cal. 691; Boswell *v.* Laird, 8 Cal. 469, 68 Am. Dec. 345.

fortiori the original contractee is not liable for the negligent acts of a subcon-

Colorado.— Chicago, etc., R. Co. *v.* Ferguson, 3 Colo. App. 414, 33 Pac. 684.

Connecticut.— Wilmot *v.* McPadden, 78 Conn. 276, 61 Atl. 1069.

Georgia.— Ridgeway *v.* Downing Co., 109 Ga. 591, 34 S. E. 1028; Parker *v.* Waycross, etc., R. Co., 81 Ga. 387, 8 S. E. 871.

Illinois.— Hale *v.* Johnson, 80 Ill. 185; Prairie State Loan, etc., Co. *v.* Doig, 70 Ill. 52; Geist *v.* Rothschild, 90 Ill. App. 324; Wadsworth Howland Co. *v.* Foster, 50 Ill. App. 513.

Indiana.— Wabash, etc., R. Co. *v.* Faver, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696.

Iowa.— Brown *v.* McLeish, 71 Iowa 381, 32 N. W. 385; Callahan *v.* Burlington, etc., R. Co., 23 Iowa 562.

Kentucky.— Robinson *v.* Webb, 11 Bush 464.

Louisiana.— Sweeny *v.* Murphy, 32 La. Ann. 628; Peyton *v.* Richards, 11 La. Ann. 62.

Maine.— Leavitt *v.* Bangor, etc., R. Co., 89 Me. 509, 36 Atl. 998, 36 L. R. A. 382.

Maryland.— Smith *v.* Benick, 87 Md. 610, 41 Atl. 56, 42 L. R. A. 277; City, etc., R. Co. *v.* Moores, 80 Md. 348, 30 Atl. 643, 45 Am. St. Rep. 345.

Massachusetts.— Pye *v.* Faxon, 156 Mass. 471, 31 N. E. 640; Conners *v.* Hennessey, 112 Mass. 96; Forsyth *v.* Hooper, 11 Allen 419.

Michigan.— St. Ignace Tp. Road Dist. No. 4 *v.* Pelton, 129 Mich. 31, 87 N. W. 1029; Riedel *v.* Moran, etc., Co., 103 Mich. 262, 61 N. W. 509; Charlebois *v.* Gogebic, etc., R. Co., 91 Mich. 59, 51 N. W. 812; De Forrest *v.* Wright, 2 Mich. 368.

Missouri.— Fink *v.* Missouri Furnace Co., 82 Mo. 276, 52 Am. Rep. 376; Burns *v.* McDonald, 57 Mo. App. 599.

New Jersey.— Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

New York.— Berg *v.* Parsons, 156 N. Y. 109, 50 N. E. 957, 66 Am. St. Rep. 542, 41 L. R. A. 391 [*reversing* on other grounds 90 Hun 267, 35 N. Y. Suppl. 780]; Roemer *v.* Striker, 142 N. Y. 134, 36 N. E. 808; Engel *v.* Eureka Club, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692; Butler *v.* Townsend, 126 N. Y. 105, 26 N. E. 1017; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; King *v.* New York Cent., etc., R. Co., 66 N. Y. 181, 23 Am. Rep. 37; Slater *v.* Mersereau, 64 N. Y. 138; McCafferty *v.* Spuyten Duyvil, etc., R. Co., 61 N. Y. 178, 19 Am. Rep. 267; Blake *v.* Ferris, 5 N. Y. 48, 55 Am. Dec. 304; Boss *v.* Jarmulowsky, 81 N. Y. App. Div. 577, 81 N. Y. Suppl. 400; Sullivan *v.* Dunham, 35 N. Y. App. Div. 342, 54 N. Y. Suppl. 962; King *v.* Livermore, 9 Hun 298; Schular *v.* Hudson River R. Co., 38 Barb. 653; Vanderpool *v.* Husson, 28 Barb. 196; Gardner *v.* Bennett, 38 N. Y. Super Ct. 197; O'Rourke *v.* Hart, 7 Bosw. 511; Potter *v.* Seymour, 4 Bosw. 140; Hauser *v.* Metropolitan St. R. Co., 27 Misc. 538, 58 N. Y. Suppl. 286; McCauley *v.* Fidelity, etc., Co., 16 Misc. 574, 38 N. Y. Suppl. 773; Roemer *v.* Striker, 2 Misc. 573, 21 N. Y. Suppl. 1090 [*affirmed* in 142 N. Y. 134, 36 N. E. 808]; McCann *v.* Kings County El. R. Co., 19 N. Y. Suppl. 668.

Ohio.— Clark *v.* Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Chambers *v.* Ohio L. Ins., etc., Co., 1 Disn. 327, 12 Ohio Dec. (Reprint) 650; Fisher *v.* Tryon, 15 Ohio Cir. Ct. 541, 8 Ohio Cir. Dec. 556.

Pennsylvania.— Eby *v.* Lebanon County, 166 Pa. St. 632, 31 Atl. 332; Smith *v.* Simmons, 103 Pa. St. 32, 49 Am. Rep. 113; Harrison *v.* Collins, 86 Pa. St. 153, 27 Am. Rep. 699; Wray *v.* Evans, 80 Pa. St. 102; Reed *v.* Allegheny City, 79 Pa. St. 300.

South Carolina.— Conlin *v.* Charleston, 15 Rich. 201.

Vermont.— Bailey *v.* Troy, etc., R. Co., 57 Vt. 252, 52 Am. Rep. 129; Pawlet *v.* Rutland, etc., R. Co., 28 Vt. 297; Clark *v.* Vermont, etc., R. Co., 28 Vt. 103.

Wisconsin.— Hackett *v.* Western Union Tel. Co., 80 Wis. 187, 49 N. W. 822.

United States.— Salliotte *v.* King Bridge Co., 122 Fed. 378, 58 C. C. A. 466, 65 L. R. A. 620; Dwyer *v.* National Steamship Co., 4 Fed. 493, 17 Blatchf. 472.

England.— Steel *v.* South Eastern R. Co., 16 C. B. 550, 81 E. C. L. 550; Hobbit *v.* London, etc., R. Co., 4 Exch. 254; Reedie *v.* London, etc., R. Co., 4 Exch. 244, 20 L. J. Exch. 65, 6 R. & Can. Cas. 184; Butler *v.* Hunter, 7 H. & N. 826, 31 L. J. Exch. 214, 10 Wkly. Rep. 214; Hole *v.* Sittingbourne, etc., R. Co., 6 H. & N. 488, 30 L. J. Exch. 81, 3 L. T. Rep. N. S. 750, 9 Wkly. Rep. 274.

Canada.— Woodhill *v.* Great Western R. Co., 4 U. C. C. P. 449. See Carroll *v.* Plympton, 9 U. C. C. P. 345; Lennox *v.* Harrison, 7 U. C. C. P. 496.

See 34 Cent. Dig. tit. "Master and Servant," § 1245 *et seq.*

Control of premises.— To relieve the employer from liability, where the work is done upon his premises by an independent contractor, it is not necessary that the entire and exclusive control of the premises is surrendered to such contractor, it being sufficient that the contractor is in possession of that part of the premises upon which the work is to be done with the exclusive control of the work. Geist *v.* Rothschild, 90 Ill. App. 324. And see Conlin *v.* Charleston, 15 Rich. (S. C.) 201. See also *supra*, V, B, 1, d.

The insolvency of the contractor has no effect upon the liability of his employer in so far as the negligence of the contractor is concerned. Simonton *v.* Perry, (Tex. Civ. App. 1901) 62 S. W. 1090.

Opening coal-hole.— Where a boy is injured by walking into a coal-hole left open in the pavement in front of a sugar refinery by a master rigger employed by the owner to bring certain heavy material from a railroad station into the refinery, the owner is not liable. Harrison *v.* Collins, 86 Pa. St. 153, 27 Am. Rep. 699.

tractor or his servants.[70] This rule, with its exceptions, is reiterated by statutes in some of the states.[71]

d. Application to Particular Contracts. This rule exempting the contractee from liability has been applied *inter alia* to contracts for the erection of buildings,[72] contracts for the repair and improvement of buildings,[73] contracts for

Liability to contractor for negligence of co-contractor.— A corporation that lets to each of several persons the driving of logs in the same stream is not liable to one of such persons for the negligence of another of them. Darling *v.* Passadumkeag Log Driving Co., 85 Me. 221, 27 Atl. 109.

Statute imposing liability on corporations. — A statute providing that a company shall be liable for all damages occasioned by reason of its negligence does not necessarily make it liable for the negligence of an independent contractor. Chartiers Valley Gas Co. *v.* Waters, 123 Pa. St. 220, 16 Atl. 423; Sanford *v.* Pawtucket St. R. Co., 19 R. I. 537, 35 Atl. 67, 33 L. R. A. 564.

Liability of independent contractor for negligence see NEGLIGENCE.

Liability of landlord to tenant for negligence in making repairs, where work done by independent contractor see LANDLORD AND TENANT, 24 Cyc. 1117.

70. *Alabama.*— Scarborough *v.* Alabama Midland R. Co., 94 Ala. 497, 10 So. 316.

Arkansas.— St. Louis, etc., R. Co. *v.* Knott, 54 Ark. 424, 16 S. W. 9.

Georgia.— Parker *v.* Waycross, etc., R. Co., 81 Ga. 387, 8 S. E. 871.

Iowa.— Callahan *v.* Burlington, etc., R. Co., 23 Iowa 562.

Michigan.— Moore *v.* Sanborne, 2 Mich. 519, 59 Am. Dec. 209.

Minnesota.—Aldritt *v.* Gillette-Herzog Mfg. Co., 85 Minn. 206, 88 N. W. 741.

Missouri.— Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202.

New Jersey.— Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

71. Ridgeway *v.* Downing Co., 109 Ga. 591, 34 S. E. 1028; Parker *v.* Waycross, etc., R. Co., 81 Ga. 387, 8 S. E. 871. And see the statutes of the several states.

72. *California.*— Frassi *v.* McDonald, 122 Cal. 400, 55 Pac. 139, injury to pedestrian falling into hole in sidewalk.

Georgia.— Ridgway *v.* Downing Co., 109 Ga. 591, 34 S. E. 1028.

Illinois.— Schwartz *v.* Gilmore, 45 Ill. 455, 92 Am. Dec. 227; Scammon *v.* Chicago, 25 Ill. 424, 79 Am. Dec. 334; Moline *v.* McKinnie, 30 Ill. App. 419.

Indiana.— Ryan *v.* Curran, 64 Ind. 345, 31 Am. Rep. 123, excavation in sidewalk negligently left uncovered.

Iowa.— Hoff *v.* Shockley, 122 Iowa 720, 98 N. W. 573, 64 L. R. A. 538, absence of lights on sand pile in front of premises.

Kentucky.— Baumeister *v.* Markham, 101 Ky. 122, 39 S. W. 844, 41 S. W. 816, 19 Ky. L. Rep. 308, 72 Am. St. Rep. 397, opening in sidewalk.

Massachusetts.— Hilliard *v.* Richardson, 3 Gray 349, 63 Am. Dec. 743.

Missouri.— Wiese *v.* Remme, 140 Mo. 289, 41 S. W. 797, leaving excavation filled with water.

New York.—Neumeister *v.* Eggers, 29 N. Y. App. Div. 385, 51 N. Y. Suppl. 481 (falling of brick from building); Wolf *v.* American Tract Soc., 25 N. Y. App. Div. 98, 49 N. Y. Suppl. 236 (falling of brick from building); Gilbert *v.* Beach, 4 Duer 423 [*reversed* on other grounds in 16 N. Y. 606]; Korn *v.* Weir, 88 N. Y. Suppl. 976 (no liability to adjoining owner).

Pennsylvania.— Allen *v.* Willard, 57 Pa. St. 374, leaving cellar unguarded.

Virginia.— Richmond *v.* Sitterding, 101 Va. 354, 43 S. E. 562, 65 L. R. A. 445; Emmerson *v.* Fay, 94 Va. 60, 26 S. E. 386.

See 34 Cent. Dig. tit. "Master and Servant," § 1246.

73. *California.*— Louthan *v.* Hewes, 138 Cal. 116, 70 Pac. 1065.

Illinois.— Jefferson *v.* Jameson, etc., Co., 165 Ill. 138, 46 N. E. 272 [*reversing* 60 Ill. App. 587]; McDermott *v.* McDaneld, 55 Ill. App. 226.

Massachusetts.— Hilliard *v.* Richardson, 3 Gray 349, 63 Am. Dec. 743.

Missouri.— Independence *v.* Slack, 134 Mo. 66, 34 S. W. 1094.

New York.— Hexamer *v.* Webb, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703; Boss *v.* Jarmulowsky, 81 N. Y. App. Div. 577, 81 N. Y. Suppl. 400; Ryder *v.* Thomas, 13 Hun 296; Maltbie *v.* Bolting, 6 Misc. 339, 26 N. Y. Suppl. 903.

Illustrations of rule.— The owner of a building abutting upon the sidewalk of a public street in a city, who employs competent mechanics to paint the same, retaining no control over the manner of doing the work, and giving no directions as to the details thereof, is not liable for injuries to persons on the walk below, resulting from the negligence of such mechanics in permitting a coil of rope to fall from their scaffolds. Geist *v.* Rothschild, 90 Ill. App. 324. Owners of property adjacent to a street, while improving it, owe no duty to the city and the public of placing safeguards around obstructions placed in the street by independent contractors. Independence *v.* Slack, 134 Mo. 66, 34 S. W. 1094.

Interference with party-walls.— Where the owner of one of two adjoining buildings supported by a party-wall makes a change in the position of the beams in the party-wall, in improving his property, but the work is of such a description that it can be performed with perfect safety to the party-wall, he is not liable to the owner of the adjoining building either as a trespasser or for the negligence of an independent contractor who performs the work. Keller *v.* Abrahams, 13

excavations,[74] and railroad construction contracts.[75] So the rule has been applied to torts of such independent contractors as draymen,[76] contractors for the removal of a building or wall,[77] and contractors for the laying of a sidewalk.[78] So where a contractor agrees to clear land[79] or to protect property from fire by burning around it,[80] the owner is not liable for the negligence of the contractor or his servant in performing such contract whereby the fire is communicated to other property.

e. Acts of Subcontractors. The principle upon which the superior who has contracted with another exercising an independent employment for the doing of the work is exempt from liability for the negligence or other wrongful act of the latter in the execution of it applies as between the contractor and his subcontractor.[81] The original contractor may be liable, however, under the same circumstances which constitute an exception to the general rule exempting the original contractee from liability.[82] The original contractor is liable where he

Daly (N. Y.) 188. *Contra*, see Eno *v.* Del Vecchio, 6 Duer (N. Y.) 17.

74. Myer *v.* Hobbs, 57 Ala. 175, 29 Am. Rep. 719; Aston *v.* Nolan, 63 Cal. 269; Kepperly *v.* Ramsden, 83 Ill. 354; Fink *v.* Missouri Furnace Co., 82 Mo. 276, 52 Am. Rep. 376. See also Chartiers Valley Gas Co. *v.* Waters, 123 Pa. St. 220, 16 Atl. 423. But see *infra*, V, B, 3, c, d.

75. *Alabama.*— Scarborough *v.* Alabama Midland R. Co., 94 Ala. 497, 10 So. 316; Rome, etc., R. Co. *v.* Chasteen, 88 Ala. 591, 7 So. 94.

Maine.— Eaton *v.* European, etc., R. Co., 59 Me. 520, 8 Am. Rep. 430.

Michigan.— Charlebois *v.* Gogebic, etc., R. Co., 91 Mich. 59, 51 N. W. 812.

Mississippi.— New Orleans, etc., R. Co. *v.* Reese, 61 Miss. 581.

Missouri.— Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202.

New York.— McCafferty *v.* Spuyten Duyvil, etc., R. Co., 61 N. Y. 178, 19 Am. Rep. 267.

Texas.— Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632; Houston, etc., R. Co. *v.* Bayless, 1 Tex. App. Civ. Cas. § 500; Gulf, etc., R. Co. *v.* Flake, 1 Tex. App. Civ. Cas. § 253.

Canada.— Woodhill *v.* Great Western R. Co., 4 U. C. C. P. 449.

76. De Forrest *v.* Wright, 2 Mich. 368.

77. Engel *v.* Eureka Club, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692.

78. Massey *v.* Oates, 143 Ala. 248, 39 So. 142.

79. Shute *v.* Princeton Tp., 58 Minn. 337, 59 N. W. 1050; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Gillson *v.* North Grey R. Co., 33 U. C. Q. B. 128 [*affirmed* in 35 U. C. Q. B. 475]. See St. Louis, etc., R. Co. *v.* Yonley, 53 Ark. 503, 14 S. W. 800, 9 L. R. A. 604, holding that liability depends on whether burning of rubbish was, under the circumstances, dangerous to property of adjoining proprietors, even if carefully performed.

Effect of statute.— A statute providing that if any "hireling" shall wilfully set fire to any woods, etc., so as to occasion damage to any other person, with the consent or by the command of the employer, such employer shall be liable, refers to the servants of a railroad company but not to independent contractors. St. Louis, etc., R. Co. *v.* Yonley, (Ark. 1890) 13 S. W. 333.

80. Kellogg *v.* Payne, 21 Iowa 575.

81. *California.*— Green *v.* Soule, 145 Cal. 96, 78 Pac. 337.

Minnesota.—Aldritt *v.* Gillette-Herzog Mfg. Co., 85 Minn. 206, 88 N. W. 741.

New Jersey.— Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

New York.—Gerlach *v.* Edelmeyer, 47 N. Y. Super. Ct. 292; Gourdier *v.* Cormack, 2 E. D. Smith 254.

Pennsylvania.— Rubin *v.* Miller, 30 Pittsb. Leg. J. 351.

Tennessee.— Powell *v.* Virginia Constr. Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925.

United States.— Salliotte *v.* King Bridge Co., 122 Fed. 378, 58 C. C. A. 466, 65 L. R. A. 620.

England.— Overton *v.* Freeman, 11 C. B. 867, 3 C. & K. 52, 16 Jur. 65, 21 L. J. C. P. 52, 73 E. C. L. 867; Rapson *v.* Cubitt, C. & M. 64, 6 Jur. 606, 11 L. J. Exch. 271, 9 M. & W. 710, 41 E. C. L. 41; Knight *v.* Fox, 5 Exch. 721, 14 Jur. 963, 20 L. J. Exch. 9.

An independent contractor is not liable for the negligence of another independent contractor or his employee, the latter being employed by the owner, even though the latter's contract is in the nature of a subcontract. Rubin *v.* Miller, 30 Pittsb. Leg. J. (Pa.) 351.

82. See *infra*, V, B, 3.

Where joint supervision and coöperation of the principal contractor of a building on a highway and of his subcontractor of a portion of it becomes necessary and is exercised, a joint obligation to the public will exist, and joint liability be fixed for personal injury to a stranger resulting from an act done or duty omitted by the latter during prosecution of the business. Baumeister *v.* Markham, 101 Ky. 271, 39 S. W. 844, 41 S. W. 816, 19 Ky. L. Rep. 308, 72 Am. St. Rep. 397.

Acceptance of work.— A contractor who sublets part of the work and knows, or might with reasonable care and diligence have known, that the work sublet was done

retains even partial control of the work let out,[83] or where the injury is caused by the order of a servant of the contractor who had charge of the work.[84] So the duty of the contractor in constructing a building may render him liable for failure to properly oversee and protect the work done by a subcontractor.[85]

3. Circumstances Under Which Contractee Liable — a. In General. There are certain well-recognized exceptions to the rule exempting a contractee from liability, although there is considerable conflict in the authorities as to when the general rule applies and when the case is within an exception, and considerable difficulty is encountered in determining under what particular exception the contractee should be held liable.

b. Injury From Work Contractor Employed to Do — (I) *In General.* Where the act which causes the injury is one which the contractor was employed to do and the injury results, not from the manner of doing the work but from the doing of it at all, the employer is liable for the acts of his independent contractor.[86] So where the work which the contractor is employed to do is wrong-

improperly, or with improper materials, so that it is unsafe, but who incorporates the work as his own and accepts it as it proceeds, is liable for injuries to a third person, resulting from acts of the subcontractor. Bast *v.* Leonard, 15 Minn. 304.

83. Hart *v.* Ryan, 3 Silv. Sup. (N. Y.) 415, 6 N. Y. Suppl. 921; Allen *v.* Willard, 57 Pa. St. 374.

84. Butts *v.* J. C. Mackey Co., 72 Hun (N. Y.) 562, 25 N. Y. Suppl. 531.

85. Creed *v.* Hartmann, 29 N. Y. 591, 86 Am. Dec. 341; McCleary *v.* Kent, 3 Duer (N. Y.) 27.

86. *Alabama.*— Montgomery St. R. Co. *v.* Smith, (1905) 39 So. 757.

California.— Williams *v.* Fresno Canal, etc., Co., 96 Cal. 14, 30 Pac. 961, 31 Am. St. Rep. 172.

Illinois.— Chicago *v.* Norton Milling Co., 97 Ill. App. 651; Florsheim *v.* Dullaghan, 58 Ill. App. 593.

Massachusetts.—Woodman *v.* Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482, 14 Am. St. Rep. 427, 4 L. R. A. 213; Conlon *v.* Eastman R. Co., 135 Mass. 195.

Michigan.— McDoncll *v.* Rifle Boom Co., 71 Mich. 61, 38 N. W. 681.

Missouri.— Wiggin *v.* St. Louis, 135 Mo. 558, 37 S. W. 528.

New Hampshire.— Thomas *v.* Harrington, 72 N. H. 45, 54 Atl. 285, 65 L. R. A. 742.

New York.— Mullins *v.* Siegel-Cooper Co., 183 N. Y. 129, 75 N. E. 1112 [*affirming* 95 N. Y. App: Div. 234, 88 N. Y. Suppl. 737]; Ketcham *v.* Newman, 114 N. Y. 205, 36 N. E. 197, 24 L. R. A. 102 [*reversing* 2 Misc. 427, 22 N. Y. Suppl. 181]; Braisted *v.* Brooklyn, etc., R. Co., 46 N. Y. App. Div. 204, 61 N. Y. Suppl. 674; Johnston *v.* Phœnix Bridge Co., 44 N. Y. App. Div. 581. 60 N. Y. Suppl. 947 [*affirmed* in 169 N. Y. 581, 62 N. E. 1096]; Downey *v.* Low, 22 N. Y. App. Div. 460, 48 N. Y. Suppl. 207.

Wisconsin.— Whitney *v.* Clifford, 46 Wis. 138, 49 N. W. 835, 32 Am. Rep. 703.

United States.— St. Paul Water Co. *v.* Ware, 16 Wall. 566, 21 L. ed. 485 [*affirming* 29 Fed. Cas. No. 17,172]; McNamee *v.* Hunt, 87 Fed. 298, 30 C. C. A. 653.

England.— Pickard *v.* Smith, 10 C. B. N. S. 470, 4 L. T. Rep. N. S. 470, 100 E. C. L. 470; Ellis *v.* Sheffield Gas Consumers Co., 2 C. L. R. 249, 2 E. & B. 767, 18 Jur. 146, 2 Wkly. Rep. 19, 75 E. C. L. 767; Butler *v.* Hunter, 7 H. & N. 826, 31 L. J. Exch. 214, 10 Wkly. Rep. 214; Hole *v.* Sittinghourne, etc., R. Co., 6 H. & N. 488, 30 L. J. Exch. 81, 3 L. T. Rep. N. S. 750, 9 Wkly. Rep. 274; Pitts *v.* Kingsbridge Highway Bd., 25 L. T. Rep. N. S. 195, 19 Wkly. Rep. 884.

Canada.— Wheelhouse *v.* Darch, 28 U. C. C. P. 269.

See 34 Cent. Dig. tit. "Master and Servant," § 1259.

Illustrations of rule.— An owner of shore land, who contracts with another to dredge in front of it, and deposit the dredging on the rear, without providing means of preventing it from sliding on the land of an adjacent owner, is as much a trespasser as the contractor, where the deposit spreads on the adjacent land, for it is the thing contracted to be done which produces the injury. Braisted *v.* Brooklyn, etc., R. Co., 46 N. Y. App. Div. 204, 61 N. Y. Suppl. 674. Where the obstruction of a street was the direct and necessary incident of certain work, liability on the part of the employer for negligence in respect thereto cannot be avoided on the ground that the work was being performed by an independent contractor. Johnston *v.* Phœnix Bridge Co., 44 N. Y. App. Div. 581, 60 N. Y. Suppl. 947 [*affirmed* in 169 N. Y. 581, 62 N. E. 1096]. The fact that a building is being erected by an independent contractor does not exempt the owner from liability for injuries to pedestrians arising from the negligent failure of the contractor to guard excavations adjacent to the sidewalk, and required to be made by the specifications for the building. Wiggin *v.* St. Louis, 135 Mo. 558, 37 S. W. 528.

Where the injury does not necessarily result from the work a contractee is not liable under this exception. Strauss *v.* Louisville, 108 Ky. 155, 55 S. W. 1075; Hackett *v.* Western Union Tel. Co., 80 Wis. 187, 49 N. W. 822; Butler *v.* Hunter, 7 H. & N. 826, 31 L. J. Exch. 214, 10 Wkly. Rep. 214. For

ful in itself,[87] or if done in the ordinary manner would result in a nuisance,[88] the contractee is liable for injury resulting to third persons, although the work is done by an independent contractor. For instance, where the work involves the commission of a trespass, or where a trespass is committed by the advice or direction of the contractee, he cannot escape liability because the work was done by an independent contractor.[89]

instance, if a contractor erects in the street an embankment, not in the performance of his contract nor called for by it, the contractee is not liable. Chattahoochee, etc., R. Co. *v.* Behrman, 136 Ala. 508, 35 So. 132.

87. *Georgia.*— Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231.

Illinois.— Waller *v.* Lasher, 37 Ill. App. 609.

Nebraska.— Palmer *v.* Lincoln, 5 Nebr. 136, 25 Am. Rep. 470.

New York.— Berg *v.* Parsons, 156 N. Y. 109, 50 N. E. 957, 66 Am. St. Rep. 542, 41 L. R. A. 391; Creed *v.* Hartmann, 29 N. Y. 591, 86 Am. Dec. 341 [*affirming* 8 Bosw. 123]; Pitcher *v.* Lennon, 12 N. Y. App. Div. 356, 42 N. Y. Suppl. 156; Skelton *v.* Larkin, 82 Hun 388, 31 N. Y. Suppl. 234 [*affirmed* in 146 N. Y. 365, 41 N. E. 90]; Congreve *v.* Morgan, 5 Duer 495; Brennan *v.* Schreiner, 20 N. Y. Suppl. 130, 28 Abb. N. Cas. 481.

Ohio.— Clark *v.* Fry, 8 Ohio St. 358, 72 Am. Dec. 590.

Texas.— Houston, etc., R. Co. *v.* Van Bayless, 1 Tex. App. Civ. Cas. § 500.

England.— Peachey *v.* Rowland, 13 C. B. 182, 17 Jur. 764, 22 L. J. C. P. 81, 76 E. C. L. 182; Ellis *v.* Sheffield Gas Consumers Co., 2 C. L. R. 249, 2 E. & B. 767, 18 Jur. 146, 23 L. J. Q. B. 42, 2 Wkly. Rep. 19, 75 E. C. L. 767; Rex *v.* Medley, 6 C. & P. 292, 25 E. C. L. 439.

Canada.— Walker *v.* McMillan, 6 Can. Sup. Ct. 241.

See 34 Cent. Dig. tit. "Master and Servant," § 1264.

For instance, in defense to an action for damages to adjoining property from the cutting into and underpinning of a party-wall, defendant cannot plead that the work was done for them by independent contractors. Waller *v.* Lasher, 37 Ill. App. 609.

Proximate cause of injury.— The contractee is not liable where the doing of the unlawful act is not the proximate cause of the injury. Wilbur *v.* White, 98 Me. 191, 56 Atl. 657.

88. *Georgia.*— Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231.

Illinois.— Scammon *v.* Chicago, 25 Ill. 424, 79 Am. Dec. 334.

Indiana.— Briggs *v.* Klosse, 5 Ind. App. 129, 31 N. E. 208, 51 Am. St. Rep. 238.

Kentucky.— Baumeister *v.* Markham, 101 Ky. 122, 39 S. W. 844, 41 S. W. 816, 19 Ky. L. Rep. 308, 72 Am. St. Rep. 397; James *v.* McMinimy, 93 Ky. 471, 20 S. W. 435, 14 Ky. L. Rep. 486, 40 Am. St. Rep. 200. See also Young *v.* Trapp, 82 S. W. 429, 26 Ky. L. Rep. 752.

Maine.—Burbank *v.* Bethel Steam Mill Co., 75 Me. 373, 46 Am. Rep. 400.

Maryland.— See Deford *v.* State, 30 Md. 179.

Massachusetts.— Woodman *v.* Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482, 14 Am. St. Rep. 427, 4 L. R. A. 213.

New Jersey.— Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

New York.— Berg *v.* Parsons, 156 N. Y. 109, 50 N. E. 957, 66 Am. St. Rep. 542, 41 L. R. A. 391.

Ohio.— Clark *v.* Fry, 8 Ohio St. 358, 72 Am. Dec. 590.

United States.— St. Paul Water Co. *v.* Ware, 16 Wall. 566, 21 L. ed. 485; Chicago *v.* Robbins, 2 Black 418, 17 L. ed. 298.

England.— Overton *v.* Freeman, 11 C. B. 867, 3 C. & K. 52, 16 Jur. 65, 21 L. J. C. P. 52, 73 E. C. L. 867.

Work not necessarily resulting in nuisance.— The building of a railroad does not necessarily result in a nuisance (Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231), nor is the operation of a portable engine six feet or more over a public highway necessarily a nuisance (Wabash, etc., R. Co. *v.* Farver, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696). The fact that the property is capable of being so used as to constitute a nuisance does not make the contractee liable. Carter *v.* Berlin Mills Co., 58 N. H. 52, 42 Am. Rep. 572. So the contractee is not liable where the contract itself does not call for the creation of an obstruction in the street which would constitute a nuisance. Green *v.* Soule, 145 Cal. 96, 78 Pac. 337.

89. *Illinois.*— Mamer *v.* Lussem, 65 Ill. 484.

Kansas.— Chicago, etc., R. Co. *v.* Watkins, 43 Kan. 50, 22 Pac. 985.

Maine.— Eaton *v.* European, etc., R. Co., 59 Me. 520, 8 Am. Rep. 430.

Missouri.— Crenshaw *v.* Ullman, 113 Mo. 633, 20 S. W. 1077; Ullman *v.* Hannibal, etc., R. Co., 67 Mo. 118; Williamson *v.* Fischer, 50 Mo. 198.

New York.— McClanathan *v.* New York, etc., R. Co., 1 Thomps. & C. 501.

See 34 Cent. Dig. tit. "Master and Servant," § 1264.

When trespass not directed.— Where no trespass is directed or called for by the work the contractee is not liable therefor. McKinley *v.* Chicago, etc., R. Co., 40 Mo. App. 449. Where a statute required a landowner excavating for a building to shore up the walls of adjacent buildings, where given the necessary license to enter upon the adjoining land, the letting of a contract to do such shoring "as required by law" is not a direc-

(II) *Defective Plans or Methods.* Where the injury is due to the contractee's defective plans or methods, pursuant to which the work was done, such plans or methods being furnished or directed by the contractee, he is liable,[90] except when the plans were prepared by a skilful architect employed by the owner, and he used ordinary care in the selection of an architect, and the defects in the plans in no way proceeded from the direction or interference of the contractor.[91]

c. Work Dangerous Unless Precautions Observed. Another exception to the general rule, closely related to the one just considered, is that where the work is dangerous of itself, or as often termed is "inherently" or "intrinsically" dangerous, unless proper precautions are taken, liability cannot be evaded by employing an independent contractor to do the work.[92] Stated in another way, where

tion by the owner to the contractor to commit a trespass on the adjacent buildings without first obtaining a license and against the protests of the occupants. Ketcham *v.* Newman, 141 N. Y. 205, 36 N. E. 197, 24 L. R. A. 102.

90. *Georgia.*— Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. 277, 26 Am. St. Rep. 231.

Kansas.— Cloud County *v.* Vickers, 62 Kan. 25, 61 Pac. 391.

Louisiana.— Faren *v.* Sellers, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256.

Missouri.— Lancaster *v.* Connecticut Mut. L. Ins. Co., 92 Mo. 460, 5 S. W. 23, 1 Am. St. Rep. 739; Horner *v.* Nicholson, 56 Mo. 220.

New Jersey.— Church of Holy Communion *v.* Paterson Extension R. Co., 68 N. J. L. 339, 53 Atl. 449, 1079.

New York.— Lockwood *v.* New York, 2 Hilt. 66.

Pennsylvania.— See Jones *v.* Philadelphia Traction Co., 185 Pa. St. 75, 39 Atl. 889.

Washington.— See Koch *v.* Sackman-Phillips Inv. Co., 9 Wash. 405, 37 Pac. 703.

See 34 Cent. Dig. tit. "Master and Servant," § 1261.

Contractor furnishing incorrect copy of plans to subcontractor.— Where a contractor is employed to make repairs and improvements on a building, the employers are not responsible for his negligence in furnishing subcontractors with an incorrect copy of the plans and specifications, whereby the work was done improperly, causing a wall to fall, which killed an employee. Hawke *v.* Brown, 28 N. Y. App. Div. 37, 50 N. Y. Suppl. 1032.

91. Burke *v.* Ireland, 26 N. Y. App. Div. 487, 50 N. Y. Suppl. 369; White *v.* Green, (Tex. Civ. App. 1904) 82 S. W. 329.

92. *Alabama.*— Montgomery St. R. Co. *v.* Smith, (1905) 39 So. 757.

Connecticut.— Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 28 Atl. 32.

Georgia.— Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. 277, 26 Am. St. Rep. 231. But see Ridgeway *v.* Downing Co., 109 Ga. 591, 34 S. E. 1028, in which state exceptions to rule are statutory.

Illinois.— Chicago Economic Fuel Gas Co. *v.* Myers, 168 Ill. 139, 48 N. E. 66 [*affirming* 64 Ill. App. 270], propelling of explosive gas through pipes.

Iowa.— Wood *v.* Mitchell Independent School Dist., 44 Iowa 27.

Kentucky.— Robinson *v.* Webb, 11 Bush 464.

Massachusetts.— Wetherbee *v.* Partridge, 175 Mass. 185, 55 N. E. 894, 78 Am. St. Rep. 486.

New York.—Downey *v.* Low, 22 N. Y. App. Div. 460, 48 N. Y. Suppl. 207.

North Carolina.— Davis *v.* Summerfield, 133 N. C. 325, 45 S. E. 654, 63 L. R. A. 492.

Ohio.— Ohio Southern R. Co. *v.* Morey, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701.

South Dakota.— McCarrier *v.* Hollister, 15 S. D. 366, 89 N. W. 862, 91 Am. St. Rep. 695.

England.— Hardaker *v.* Idle Dist. Council, [1896] 1 Q. B. 335, 60 J. P. 196, 65 L. J. Q. B. 363, 74 L. T. Rep. N. S. 69, 44 Wkly. Rep. 323; Tarry *v.* Ashton, 1 Q. B. D. 314, 45 L. J. Q. B. 260, 34 L. T. Rep. N. S. 97, 24 Wkly. Rep. 581; Pickard *v.* Smith, 10 C. B. N. S. 470, 4 L. T. Rep. N. S. 470, 100 E. C. L. 470.

In New York the exception is limited to work "intrinsically" dangerous, and the contractee is held not liable where "the act to be done may be safely done in the exercise of due care, although in the absence of such care injurious consequences to third persons would be likely to result." Engel *v.* Eureka Club, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692.

The tearing down of a wall destroyed by fire is dangerous work and the contractee is bound to see that reasonable care is used. Covington, etc., Bridge Co. *v.* Steinbrock, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375 [*affirming* 7 Ohio S. & C. Pl. Dec. 401, 5 Ohio N. P. 374]. And see Baumeister *v.* Markham, 101 Ky. 122, 39 S. W. 844, 41 S. W. 816, 19 Ky. L. Rep. 308, 72 Am. St. Rep. 397. But see Engel *v.* Eureka Club, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692.

What work is not dangerous.— It has been held that the making a cellar in a building waterproof is not inherently dangerous (Maltbie *v.* Bolting, 6 Misc. (N. Y.) 339, 26 N. Y. Suppl. 903), nor is the raising of a party-wall (Negus *v.* Becker, 143 N. Y. 303, 38 N. E. 290, 42 Am. St. Rep. 724, 25 L. R. A. 667), the clearing off wood and brush from a piece of land (Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544), the floating logs

injuries to third persons must be expected to arise unless means are adopted by which such consequences may be prevented, the contractee is bound to see to the doing of that which is necessary to prevent the mischief.[93] The injury need not be a necessary result of the work;[94] but the work must be such as will probably, and not which merely may, cause injury if proper precautions are not taken.[95]

down stream (Pierrepont *v.* Loveless, 72 N. Y. 211), the constructing a telephone line (Vosbeck *v.* Kellogg, 78 Minn. 176, 80 N. W. 957), or the pulling down a house (Butler *v.* Hunter, 7 H. & N. 826, 31 L. J. Exch. 214, 10 Wkly. Rep. 214). The erection of buildings adjacent to a highway, with the usual and necessary excavations, and the consequent obstructions to the sidewalk and street, is not within the exception to the general rule, which attaches liability to employers where the work in hand is inherently dangerous, or will necessarily create a nuisance. Richmond *v.* Sitterding, 101 Va. 354, 43 S. E. 562, 65 L. R. A. 445. And see Neumann *v.* Greenleaf Real Estate Co., 73 Mo. App. 326.

Dangerous machinery.— Where the employer is to furnish machinery for the contractor and a machine is included therein which is dangerous when operated by one not properly instructed, the contractee is liable to an employee of the contractor injured thereby because not properly instructed as to its use. Jacobs *v.* Fuller, etc., Co., 67 Ohio St. 70, 65 N. E. 617, 65 L. R. A. 833. But see Southern Oil Co. *v.* Church, 32 Tex. Civ. App. 325, 74 S. W. 797, 75 S. W. 817. *Compare* Wood *v.* Mitchell Independent School Dist., 44 Iowa 27, where dangerous work is distinguished from work in which dangerous machinery is employed, and it was held that where a person contracted for drilling a well and left his drilling machine unlocked and unguarded and children were injured while playing with it, the contractee was not liable.

Blasting by independent contractor as dangerous work see EXPLOSIVES, 19 Cyc. 9.

93. *Connecticut.*— Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 28 Atl. 32.

Indiana.— Cameron *v.* Oberlin, 19 Ind. App. 142, 48 N. E. 386.

Maryland.— Bonaparte *v.* Wiseman, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482.

Massachusetts.— Thompson *v.* Lowell, etc., St. R. Co., 170 Mass. 577, 49 N. E. 913, 64 Am. St. Rep. 323, 40 L. R. A. 345; Woodman *v.* Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482, 14 Am. St. Rep. 427, 4 L. R. A. 213.

North Carolina.— Davis *v.* Summerfield, 133 N. C. 325, 45 S. E. 654, 63 L. R. A. 492.

Vermont.— Bailey *v.* Troy, etc., R. Co., 57 Vt. 252, 52 Am. Rep. 129.

Wisconsin.— Carlson *v.* Stocking, 91 Wis. 432, 65 N. W. 58.

England.— Bower *v.* Peate, 1 Q. B. D. 321, 45 L. J. Q. B. 446, 35 L. T. Rep. N. S. 321.

See 34 Cent. Dig. tit. "Master and Servant," § 1259.

Allowing fire to escape.— A proprietor of land is liable for the negligence of an independent contractor in clearing his land, resulting in the burning of the property of the adjacent owner, where the negligence flows directly from the acts which the contractor agrees to do, and is by the proprietor authorized to do, and is the natural and probable consequence of the performance of the work in the manner and at the time agreed on. Cameron *v.* Oberlin, 19 Ind. App. 142, 48 N. E. 386. And see Black *v.* Christ Church Finance Co., [1894] A. C. 48, 58 J. P. 332, 63 L. J. P. C. 32, 70 L. T. Rep. N. S. 77, 6 Reports 394. But see *supra*, V, B, 2.

Restatement of rule.— "A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else — whether it be the contractor employed to do the work from which the danger arises or some independent person — to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted." Bower *v.* Peate, 1 Q. B. D. 321, 326, 45 L. J. Q. B. 446, 35 L. T. Rep. N. S. 321.

Collateral negligence in connection with work not contemplated by the contract does not render the contractee liable. Boomer *v.* Wilbur, 176 Mass. 482, 57 N. E. 1004, 53 L. R. A. 172; Hackett *v.* Western Union Tel. Co., 80 Wis. 187, 49 N. W. 822.

94. Thompson *v.* Lowell, etc., St. R. Co., 170 Mass. 577, 49 N. E. 913, 64 Am. St. Rep. 323, 40 L. R. A. 345.

95. Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 725, 14 S. E. 163. In this case the court said: "Work is constantly being performed by independent contractors, as well as others, which in the nature of things may, in the course of its execution, result in injury to others; but it by no means follows that an employer in any such case must personally supervise the work and see that the necessary precautions are taken, and that, for his failure to do so, he must be held liable in damages for injuries to other persons. For if, in the nature of things, the mere liability of the work to result in injury to some one be made the test, then it is obvious that the line of distinction becomes shadowy and indistinct between acts which are unlawful, or are *per se* nuisances, or that

This rule is most often applied to work which is dangerous to persons using streets or highways, such as excavations in or adjacent to streets, including the construction of a street railway or other like work.[96] So where it might reasonably be anticipated that the work would probably cause an injury to an adjoining owner the contractee is liable especially where he gives no notice of the nature and extent of the work to the adjoining owner.[97] Another application of the rule is found in decisions holding that when the owner of premises which are under his control employs an independent contractor to do work upon them which from its nature is likely to render the premises dangerous to persons who may come upon them by the invitation of the owner, the owner is not relieved by reason of the contract from the obligation of seeing that due care is used to protect such persons.[98]

cannot be done without doing damage, and those the performance of which not only may, but in the nature of things must often be committed to others; as is the case with a railway company in the construction and repair of its roadway, bridges, and other structures."

96. *Alabama.*— Montgomery St. R. Co. *v.* Smith, (1905) 39 So. 757.

California.— Spence *v.* Schultz, 103 Cal. 208, 37 Pac. 220; Donovan *v.* Oakland, etc., Rapid Transit Co., 102 Cal. 245, 36 Pac. 516; Colgrove *v.* Smith, 102 Cal. 220, 36 Pac. 411, 27 L. R. A. 590, (1893) 33 Pac. 115.

Illinois.— Boyd *v.* Chicago, etc., R. Co., 217 Ill. 332, 75 N. E. 496, 108 Am. St. Rep. 253; North Chicago St. R. Co. *v.* Dudgeon, 184 Ill. 477, 56 N. E. 796; Chicago Economic Fuel Gas Co. *v.* Myers, 168 Ill. 139, 48 N. E. 66; Chicago Bridge, etc., Co. *v.* La Mantia, 112 Ill. App. 43.

Kentucky.— Matheny *v.* Wolffs, 2 Duv. 137.

Massachusetts.— Woodman *v.* Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482, 14 Am. St. Rep. 427, 4 L. R. A. 213.

New Hampshire.— Thomas *v.* Harrington, 72 N. H. 45, 54 Atl. 285.

New York.— Ann *v.* Herter, 79 N. Y. App. Div. 6, 79 N. Y. Suppl. 825; Murphy *v.* Perlstein, 73 N. Y. App. Div. 256, 76 N. Y. Suppl. 657; Johnston *v.* Phœnix Bridge Co., 44 N. Y. App. Div. 581, 60 N. Y. Suppl. 947; McCamus *v.* Citizens' Gaslight Co., 40 Barb. 380. *Contra*, Scanlon *v.* Carroll, 1 N. Y. City Ct. 351.

Ohio.— Hawver *v.* Whalen, 49 Ohio St. 69, 29 N. E. 1049, 14 L. R. A. 828.

South Dakota.— McCarrier *v.* Hollister, 15 S. D. 366, 89 N. W. 862, 91 Am. St. Rep. 695.

Texas.— Cameron Mill, etc., Co. *v.* Anderson, 34 Tex. Civ. App. 105, 78 S. W. 8 [*affirmed* in 98 Tex. 156, 81 S. W. 282, 1 L. R. A. N. S. 198].

England.— Black *v.* Christ Church Finance Co., [1894] A. C. 48, 58 J. P. 332, 63 L. J. P. C. 32, 70 L. T. Rep. N. S. 77, 6 Reports 394; Hughes *v.* Percival, 8 App. Cas. 442, 47 J. P. 772, 52 L. J. Q. B. 719, 49 L. T. Rep. N. S. 189, 31 Wkly. Rep. 725; Holliday *v.* National Tel. Co., [1899] 2 Q. B. 392, 68 L. J. Q. B. 1016, 81 L. T. Rep. N. S. 252, 47 Wkly. Rep. 658; Penny *v.* Wimbledon Urban Dist. Council, [1899] 2 Q. B. 72, 63 J. P. 406, 68 L. J. Q. B. 704, 80 L. T. Rep. N. S. 615, 47 Wkly. Rep. 565.

But see Ryan *v.* Curran, 64 Ind. 345, 31 Am. Rep. 123; Chartiers Valley Gas Co. *v.* Lynch, 118 Pa. St. 362, 12 Atl. 435; Fuller *v.* Citizens' Nat. Bank, 15 Fed. 875.

While a company constructing a telephone line cannot relieve itself from liability by contracting with another, with regard to obstructions in the street which make it dangerous to the traveling public, yet the owner is not liable for the acts of an independent contractor in negligently failing to keep a child from voluntarily interfering with one of the appliances used in doing the work. Vosbeck *v.* Kellogg, 78 Minn. 176, 80 N. W. 957.

Collateral obstructions or defects.— Where the obstruction or defect caused or created in the street or elsewhere is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his servants, the contractee is not liable. Chicago City R. Co. *v.* Hennessy, 16 Ill. App. 153; Davie *v.* Levy, 39 La. Ann. 551, 2 So. 395, 4 Am. St. Rep. 225; Robbins *v.* Chicago, 4 Wall. (U. S.) 657, 18 L. ed. 427.

Non-delegable duty in connection with power to work in streets see *infra*, V, B, 3, d.

97. Samuel *v.* Novak, 99 Md. 558, 58 Atl. 19; Bonaparte *v.* Wiseman, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482; Davis *v.* Summerfield, 133 N. C. 325, 45 S. E. 654, 63 L. R. A. 492, 131 N. C. 352, 42 S. E. 818; Angus *v.* Dalton, 4 Q. B. D. 162, 48 L. J. Q. B. 25, 40 L. T. Rep. N. S. 605, 27 Wkly. Rep. 623; Bower *v.* Peate, 1 Q. B. D. 321, 45 L. J. Q. B. 446, 35 L. T. Rep. N. S. 321. And see Fowler *v.* Saks, 7 Mackey (D. C.) 570, 7 L. R. A. 649; Dorrity *v.* Rapp, 72 N. Y. 307; Hart *v.* Ryan, 3 Silv. Sup. (N. Y.) 415, 6 N. Y. Suppl. 921. *Contra*, Myer *v.* Hobbs, 57 Ala. 175, 29 Am. Rep. 719; Crenshaw *v.* Ullman, 113 Mo. 633, 20 S. W. 1077.

98. Curtis *v.* Kiley, 153 Mass. 123, 26 N. E. 421. And see Conradt *v.* Clauve, 93 Ind. 476, 47 Am. Rep. 388; Thompson *v.* Lowell, etc., St. R. Co., 170 Mass. 577, 49 N. E. 913, 64 Am. St. Rep. 323, 40 L. R. A. 345. *Compare* Knottnerus *v.* North Park St. R. Co., 93 Mich. 348, 53 N. W. 529, 17 L. R. A. 726, injury from roller-coaster.

The fact that a shooting exhibition was provided and conducted by an independent

d. Non-Delegable Duties of Contractee[99] — (I) *STATEMENT OF RULE.* Another exception to the general rule is that a person causing something to be done, the doing of which casts upon him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to an independent contractor.[1]

(II) *STATUTORY DUTIES AND DUTIES UNDER LICENSE.* For instance, if the duty is imposed upon one by statute or municipal ordinance he cannot escape liability by delegating the work to an independent contractor.[2] This rule is often applied

contractor does not wholly relieve the principal from responsibility for accidents, since it would probably cause injury to a spectator, unless due precautions were taken to guard against harm. Thompson *v.* Lowell, etc., St. R. Co., 170 Mass. 577, 49 N. E. 913, 64 Am. St. Rep. 323, 40 L. R. A. 345.

Balloon ascensions.— When a company advertises a balloon ascension at its park, it is liable for injuries resulting from the negligence of the person employed by it to make the ascension, in failing to warn visitors that the poles will fall when the balloon is released, although he be an independent contractor. Richmond, etc., R. Co. *v.* Moore, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258. But see Smith *v.* Benick, 87 Md. 610, 41 Atl. 56, 42 L. R. A. 277, holding that where a person employed to make the ascension was free to exercise his own judgment as to the means of making it, and in inflating the balloon the contractor used implements not contemplated by his employment, without the proprietor's knowledge, the latter was not liable for injuries sustained by a spectator through the use of such instruments.

99. Delegation of duties owing to servant by employment of an independent contractor see *supra*, III.

Duty imposed upon owner to furnish appliances as available to employees of contractor see *infra*, V, B, 5, b.

Liability of carrier for negligence of connecting carrier see CARRIERS, 6 Cyc. 478 *et seq.*

Liability of landlord to tenant for negligence in making repairs where such work done by independent contractor see LANDLORD AND TENANT, 24 Cyc. 1117.

1. *Alabama.*— Montgomery St. R. Co. *v.* Smith, (1905) 39 So. 757.

Maryland.— City, etc., R. Co. *v.* Moores, 80 Md. 348, 30 Atl. 643, 45 Am. St. Rep. 345.

Massachusetts.— Lowell *v.* Boston, etc., R. Corp., 23 Pick. 24, 34 Am. Dec. 33.

New York.— See Brennan *v.* Ellis, 70 Hun 472, 24 N. Y. Suppl. 426.

Ohio.— Southern Ohio R. Co. *v.* Morey, 47 Ohio St. 207, 24 N. E. 269.

Pennsylvania.— Lancaster Ave. Imp. Co. *v.* Rhoads, 116 Pa. St. 377, 9 Atl. 852, 2 Am. St. Rep. 608; Fox *v.* Porter, 6 Pa. Dist. 85, 18 Pa. Co. Ct. 641.

Rhode Island.— Sanford *v.* Pawtucket St. R. Co., 19 R. I. 537, 35 Atl. 67, 33 L. R. A. 564.

Texas.— Taylor, etc., R. Co. *v.* Warner, 88 Tex. 642, 32 S. W. 868 [*affirming* (Civ. App. 1895) 31 S. W. 66].

West Virginia.— Carrico *v.* West Virginia Cent., etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50, duty of carrier to passengers.

United States.— Texas, etc., R. Co. *v.* Juneman, 71 Fed. 939, 18 C. C. A. 394.

England.— Dalton *v.* Angus, 6 App. Cas. 740, 50 L. J. Q. B. 689, 44 L. T. Rep. N. S. 844, 30 Wkly. Rep. 191; The Snark, [1899] P. 74, 8 Aspin. 483, 68 L. J. P. 22, 80 L. T. Rep. N. S. 25, 47 Wkly. Rep. 398; Pickard *v.* Smith, 10 C. B. N. S. 470, 4 L. T. Rep. N. S. 470, 100 E. C. L. 470.

See 34 Cent. Dig. tit. "Master and Servant," § 1254.

Preëxisting obligation.— Where the person for whom the work to be done is under a preëxisting obligation to have the work done in a particular way or to have certain precautions against accident observed, he cannot be discharged by creating the relation between himself and another of employer and contractor. Fowler *v.* Saks, 7 Mackey (D. C.) 570, 7 L. R. A. 649.

The duty need not be imposed by statute, although such is frequently the case. If it be a duty which is imposed by law, the principle is the came as if required by statute. Covington, etc., Bridge Co. *v.* Steinbrock, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375.

The duty to see that no nuisance is created or maintained resting upon the owner of real estate cannot be delegated. Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 28 Atl. 32; James *v.* McMinimy, 93 Ky. 471, 20 S. W. 435, 14 Ky. L. Rep. 486, 40 Am. St. Rep. 200; Hughes *v.* Cincinnati, etc., R. Co., 39 Ohio St. 461; Tarry *v.* Ashton, 1 Q. B. D. 314, 45 L. J. Q. B. 260, 34 L. T. Rep. N. S. 97, 24 Wkly. Rep. 581, holding that the occupant of a house in front of which a heavy lamp projected several feet over the public footway and which fell upon plaintiff and injured her was liable because of his implied duty to make the lamp reasonably safe, although he employed an independent contractor to put it in repair.

Persons giving public exhibitions.— The owner of a building erected for use for public exhibitions or entertainments is liable for injuries caused by the unsafe condition of the building, although it was erected by an independent contractor. Fox *v.* Buffalo Park, 21 N. Y. App. Div. 321, 47 N. Y. Suppl. 788. And see *supra*, V, B, 3, c.

2. *California.*— Spence *v.* Schultz, 103 Cal. 208, 37 Pac. 220; Barry *v.* Terkildsen, 72 Cal. 254, 13 Pac. 657, 1 Am. St. Rep. 55.

to obstructions and excavations in streets and highways pursuant to authority derived from a statute or municipal ordinance or from a permit or license granted by the municipality.[3] But where the duty is imposed upon the owner "or"

District of Columbia.— Fowler *v.* Saks, 7 Mackey 570, 7 L. R. A. 649.

Georgia.—Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231; Wilson *v.* White, 71 Ga. 506, 51 Am. Rep. 269.

Illinois.— Kepperly *v.* Ramsden, 83 Ill. 354.

New York.— Berg *v.* Parsons, 156 N. Y. 109, 50 N. E. 957, 66 Am. St. Rep. 542, 41 L. R. A. 391; Pitcher *v.* Lennon, 12 N. Y. App. Div. 356, 42 N. Y. Suppl. 156.

Ohio.— Cincinnati, etc., R. Co. *v.* Van Doran, 1 Ohio Cir. Ct. 292, 1 Ohio Cir. Dec. 160.

Pennsylvania.— Evans *v.* Wray, 7 Leg. Gaz. 158. But see Chartiers Valley Gas Co. *v.* Lynch, 118 Pa. St. 362, 12 Atl. 435.

Texas.— Houston, etc., R. Co. *v.* Meador, 50 Tex. 77; Gulf, etc., R. Co. *v.* Doran, 2 Tex. Unrep. Cas. 442; Taylor, etc., R. Co. *v.* Warner, (Civ. App. 1895) 31 S. W. 66; Gulf, etc., R. Co. *v.* Yell, 3 Tex. App. Civ. Cas. § 366; Gulf, etc., R. Co. *v.* Flake, 1 Tex. App. Civ. Cas. § 253.

Wisconsin.— Smith *v.* Milwaukee Builders', etc., Exch., 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504.

England.— Penny *v.* Wimbledon Urban Dist. Council, [1899] 2 Q. B. 72, 63 J. P. 406, 68 L. J. Q. B. 704, 80 L. T. Rep. N. S. 615, 47 Wkly. Rep. 565; Gray *v.* Pullen, 5 B. & S. 970, 34 L. J. Q. B. 265, 11 L. T. Rep. N. S. 569, 13 Wkly. Rep. 257, 117 E. C. L. 970; Pickard *v.* Smith, 10 C. B. N. S. 470, 4 L. T. Rep. N. S. 470, 100 E. C. L. 470; Hole *v.* Sittingbourne, etc., R. Co., 6 H. & N. 488, 30 L. J. Exch. 81, 3 L. T. Rep. N. S. 750, 9 Wkly. Rep. 274.

See 34 Cent. Dig. tit. "Master and Servant," § 1254.

Applications of rule.— Where a building is being constructed on a city lot, and the excavation in the sidewalk is not protected as required by ordinance, the owner of the lots is liable to persons injured by falling therein, although the work is being done by an independent contractor. Spence *v.* Schultz, 103 Cal. 208, 37 Pac. 220. The non-performance by the owner of a building in the course of erection of the duty imposed by an ordinance requiring the erection of a roofed passageway over the sidewalk after the completion of the first story cannot be excused by a plea that an independent contractor has agreed to perform the duty. Smith *v.* Milwaukee Builders', etc., Exch., 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504.

Railroad construction contracts see Cincinnati, etc., R. Co. *v.* Van Dorn, 1 Ohio Cir. Ct. 292, 1 Ohio Cir. Dec. 160; Gulf, etc., R. Co. *v.* Doran, 2 Tex. Unrep. Cas. 442; Taylor, etc., R. Co. *v.* Warner, (Tex. Civ. App. 1895) 31 S. W. 66; Gulf, etc., R. Co. *v.* Yell, 3 Tex. App. Civ. Cas. § 366; Gulf, etc., R. Co. *v.* Flake, 1 Tex. App. Civ. Cas. § 253. Where a railroad company was required by statute to place stock guards on the right of way, it was liable for the failure to perform such duty, although resulting from the negligence of a contractor. Houston, etc., R. Co. *v.* Meador, 50 Tex. 77.

3. *Alabama.*— Montgomery St. R. Co. *v.* Smith, (1905) 39 So. 757.

California.— Colgrove *v.* Smith, 102 Cal. 220, 36 Pac. 411, 27 L. R. A. 590, (1893) 33 Pac. 115.

Georgia.— Wilson *v.* White, 71 Ga. 506, 51 Am. Rep. 269.

Illinois.— North Chicago St. R. Co. *v.* Dudgeon, 184 Ill. 497, 56 N. E. 796; Chicago Economic Fuel Gas Co. *v.* Myers, 168 Ill. 139, 48 N. E. 66.

Maine.— See Veazie *v.* Penobscot R. Co., 49 Me. 119.

Maryland.— City, etc., R. Co. *v.* Moores, 80 Md. 348, 30 Atl. 643, 45 Am. St. Rep. 345.

Massachusetts.— Woodman *v.* Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482, 14 Am. St. Rep. 427, 4 L. R. A. 213.

Michigan.— Darmstaetter *v.* Moynahan, 27 Mich. 188.

New York.— Deming *v.* Terminal R. Co., 49 N. Y. App. Div. 493, 63 N. Y. Suppl. 615; Burke *v.* Ireland, 26 N. Y. App. Div. 487, 50 N. Y. Suppl. 369; McCamus *v.* Citizens' Gas Light Co., 40 Barb. 380.

Pennsylvania.— Lancaster Ave. Imp. Co. *v.* Rhoads, 116 Pa. St. 377, 9 Atl. 852, 2 Am. St. Rep. 608, turnpike company.

Texas.— Cameron Mill, etc., Co. *v.* Anderson, 98 Tex. 156, 81 S. W. 282, 1 L. R. A. N. S. 198 [*affirming* 34 Tex. Civ. App. 105, 78 S. W. 8].

England.— Holliday *v.* National Tel. Co., [1899] 2 Q. B. 392, 68 L. J. Q. B. 1016, 81 L. T. Rep. N. S. 252, 47 Wkly. Rep. 658; Gray *v.* Pullen, 5 B. & S. 970, 34 L. J. Q. B. 265, 11 L. T. Rep. N. S. 569, 13 Wkly. Rep. 257, 117 E. C. L. 970.

See 34 Cent. Dig. tit. "Master and Servant," § 1254.

Duties where license or permit is granted. — Where the work is done pursuant to a permit or license granted to the employer, and certain duties are expressly or impliedly imposed in connection therewith, the employer is liable, although the work was done by an independent contractor. Colgrove *v.* Smith, 102 Cal. 220, 36 Pac. 411, 27 L. R. A. 590, (1893) 33 Pac. 115; Darmstaetter *v.* Moynahan, 27 Mich. 188; Downey *v.* Low, 22 N. Y. App. Div. 460, 48 N. Y. Suppl. 207; Weber *v.* Buffalo R. Co., 20 N. Y. App. Div. 292, 47 N. Y. Suppl. 7; McCamus *v.* Citizens' Gas Light Co., 40 Barb. (N. Y.) 380; Reuben *v.* Swigart, 15 Ohio Cir. Ct. 565, 7 Ohio Cir. Dec. 638. But see Masscy *v.* Oates, 143 Ala. 248, 39 So. 142; Fulton County St. R. Co.

general contractor the owner is not liable where the duty is in connection with work done by the contractor.[4]

(III) *Existence of Corporate Franchise.*[5] Corporations have been held liable for the wrongful act of an independent contractor while exercising, with the assent of the corporation, some chartered power or privilege of the corporation;[6] but the liability is limited to wrongs done in the performance of acts which could not have been done except for the existence of the charter of the

v. McConnell, 87 Ga. 756, 13 S. E. 828. However, this exception does not apply merely because of the existence of building laws, since they do not confer the privilege of building but merely limit existing rights. Burke *v.* Ireland, 26 N. Y. App. Div. 487, 50 N. Y. Suppl. 369.

Applications of rule.— Where a municipal ordinance requires the owner of materials forming an obstruction in a street to prepare and place lights thereon with such care and diligence as reasonably to secure their burning till daylight, such owner is liable to third persons for injuries occurred through negligence in the performance of this duty, either by himself or by a contractor in his employ. Wilson *v.* Wbite, 71 Ga. 506, 51 Am. Rep. 269. One who employs another to fill his ice-house by the cord, and obtains license from the municipal authorities to encumber the street for that purpose, cannot shield himself from liability for injuries caused by unlawfully obstructing the street with blocks and fragments of the ice, under an objection that his employee was a contractor, and alone liable. Darmstaetter *v.* Moynahan, 27 Mich. 188.

Obstructions purely collateral to work contracted to be done.— When an obstruction or defect, caused or created in a public street, is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the owner of the premises is not liable. Davie *v.* Levy, 39 La. Ann. 551, 2 So. 395, 4 Am. St. Rep. 225. So where a street car company, authorized by charter to build a street railroad, lets a contract for constructing the road to an independent contractor, without any agreement as to the particular manner in which the work shall be done, it is not liable for injuries caused by a wire stretched across the road by such contractor in the course of the work. Sanford *v.* Pawtucket St. R. Co., 19 R. I. 537, 35 Atl. 67, 33 L. R. A. 564.

4. Koch *v.* Fox, 71 N. Y. App. Div. 288, 75 N. Y. Suppl. 913, duty to build temporary roof over sidewalk in front of building in course of construction.

5. Liability of railroad company for acts of lessees of road see Railroads.

6. Boyd *v.* Chicago, etc., R. Co., 217 Ill. 332, 75 N. E. 496, 108 Am. St. Rep. 253; North Chicago St. R. Co. *v.* Dudgeon, 184 Ill. 476, 56 N. E. 796; Chicago Economic Fuel Gas Co. *v.* Myers, 168 Ill. 139, 48 N. E. 66 [*affirming* 64 Ill. App. 270]; West *v.* St. Louis, etc., R. Co., 63 Ill. 545; Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 105; Chicago, etc., R. Co. *v.* McCarthy, 20 Ill. 385, 71 Am. Dec. 285; Capital Electric Co. *v.* Hauswald, 78 Ill. App. 359; Toledo, etc., R. Co. *v.* Conroy, 39 Ill. App. 351, holding that a contractor engaged in changing the gauge of a railroad is a servant of the company so as to make it chargeable with his negligence in causing an injury to one of his employees. And see Chicago Bridge, etc., Co. *v.* La Mantia, 112 Ill. App. 43.

In Illinois this rule seems to have been carried further than in any other state. It is held that a contractor exercising the chartered power of a corporation, with its assent, must be regarded, in so far as the public and third persons are concerned, as the servant or agent of the corporation. Metropolitan West Side El. R. Co. *v.* Dick, 87 Ill. App. 40. Where a corporation is authorized by its charter to enter upon the premises of individuals and take therefrom materials for the construction of its work, and provision was made for assessing the value of the materials taken and damages occasioned by reason of the taking, and judgment was to be rendered against the corporation for such value in damages, it was held liable for the act of a contractor in taking such materials. Hinde *v.* Wabash Nav. Co., 15 Ill. 72; Lesher *v.* Wabash Nav. Co., 14 Ill. 85, 56 Am. Dec. 494. So where acts of incorporation conferred the right to enter upon premises and construct a railroad track over them, and the work was let to contractors, who entered upon land and took down the fences and left them down, resulting in the killing of stock and other damages, the corporation was liable. Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 105; Illinois Cent. R. Co. *v.* Finnigan, 21 Ill. 646; Chicago, etc., R. Co. *v.* McCarthy, 20 Ill. 385, 71 Am. Dec. 285. Where an elevated railway company was authorized to occupy certain public streets by a city ordinance, and let certain construction work to an independent contractor, it was liable for the negligence of the contractor's servants in dropping a heavy piece of steel on a pedestrian who was passing under the structure, since the contractor was performing the work by virtue of a special privilege granted the corporation by its charter and by the ordinance. Metropolitan West Side El. R. Co. *v.* Dick, *supra*. A gas company authorized to construct mains through the streets of a city cannot avoid liability for negligence in such construction by letting a contract to a third person, as such person will be regarded as its agent while exercising any of the powers granted under its franchise. Chicago Economic Fuel Gas Co. *v.* Myers, 168 Ill. 139, 48 N. E. 66 [*affirming* 64 Ill. App. 270].

Railroad companies.— Especially is this exception applicable to a railroad corporation

company.[7] If the act is one which might have been done by an individual, no different rule obtains as to liability merely because it is a corporation.[8]

(iv) *CONTRACT DUTY.* Where a person is bound by contract to do particular work he cannot avoid responsibility by contracting with another person to do the work.[9]

e. Employment of Incompetent Contractor. A contractor is liable for the negligent or wrongful acts of an independent contractor where he knew his bad character for negligence when he employed him or where he failed to exercise due and reasonable care to select a competent and skilful contractor.[10] But knowledge of the incompetency of the contractor has been held not to make the contractee liable to a servant of the contractor for injuries resulting therefrom.[11] The fact that a contractor is negligent in respect of the work in question raises no presumption that the employer was guilty of negligence in employing him.[12]

f. Active Interference With Work. Any interference, assumption of con-

which is given the right of eminent domain. Solomon R. Co. *v.* Jones, 30 Kan. 601, 2 Pac. 657. And see on this subject cases cited *supra*, this note.

Operation of railroad.— The exception has been applied to the operation of a railroad by an independent contractor. Philadelphia, etc., R. Co. *v.* Hahn, 9 Pa. Cas. 364, 12 Atl. 479. *Contra*, see Kansas Cent. R. Co. *v.* Fitzsimmons, 18 Kan. 34.

Liability of carrier to passenger see CARRIERS, 6 Cyc. 533 *et seq.*

7. Boyd *v.* Chicago, etc., R. Co., 217 Ill. 332, 75 N. E. 496, 108 Am. St. Rep. 253 [*affirming* 118 Ill. App. 433]; North Chicago St. R. Co. *v.* Dudgeon, 184 Ill. 477, 56 N. W. 796; West *v.* St. Louis, etc., R. Co., 63 Ill. 545; Suburban R. Co. *v.* Balkwill, 94 Ill. App. 454; Metropolitan West Side El. R. Co. *v.* Dick, 87 Ill. App. 40.

The construction of a railroad by a contractor upon the right of way and property of a railroad corporation is not the exercise of charter powers or privileges by the contractor. Boyd *v.* Chicago, etc., R. Co., 217 Ill. 332, 75 N. E. 496, 108 Am. St. Rep. 253 [*affirming* 118 Ill. App. 433].

Another statement of rule.— The principle that a railroad company cannot delegate to an employee its chartered rights and privileges so as to exempt it from liability does not extend to the use of the ordinary ways and means for the construction of the road, but to the use of such extraordinary powers only as the company itself could not exercise without having first complied with the conditions of the legislative grant of authority. Thus, after having first procured the right of way, the company can delegate to another lawful authority to enter upon the same and make its road-bed and perform other proper acts of construction; but it cannot delegate such lawful authority without having first secured the right of way by donation, purchase, or the exercise of the right of eminent domain. Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231; Sanford *v.* Pawtucket St. R. Co., 19 R. I. 537, 35 Atl. 67, 33 L. R. A. 564; Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632.

8. Boyd *v.* Chicago, etc., R. Co., 217 Ill. 332, 75 N. E. 496, 108 Am. St. Rep. 253 [*affirming* 118 Ill. App. 433].

9. Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231; Butts *v.* J. C. Mackey Co., 72 Hun (N. Y.) 562, 25 N. Y. Suppl. 531; Brennan *v.* Ellis, 70 Hun (N. Y.) 472, 24 N. Y. Suppl. 426; Lasker Real-Estate Assoc. *v.* Hatcher, (Tex. Civ. App. 1894) 28 S. W. 404; St. Paul Water Co. *v.* Ware, 16 Wall. (U. S.) 566, 21 L. ed. 485. And see Bast *v.* Leonard, 15 Minn. 304; Hole *v.* Sittinghourne, etc., R. Co., 6 H. & N. 488, 30 L. J. Exch. 81, 3 L. T. Rep. N. S. 750, 9 Wkly. Rep. 274.

Illustration of rule.— An incorporated company which undertook to lay water-pipes in a city, agreeing that it would protect all persons against damages by reason of excavations made by them in laying pipes, and to be responsible for all damages which might occur by reason of the neglect of their employees on the premises, was held liable for injuries received by one passing over the street owing to the negligence of a subcontractor to whom the work had been let out. St. Paul Water Co. *v.* Ware, 16 Wall. (U. S.) 566, 21 L. ed. 485. A railroad company which, in the notarial act granting it the right of way, has agreed with the landowner to pay all damages caused by it or its employees in the construction of the road, cannot avoid the liability thus created by letting the work out to contractors. Bechnel *v.* New Orleans, etc., R. Co., 28 La. Ann. 522.

Duty of landlord to tenant see LANDLORD AND TENANT, 24 Cyc. 1116–1117.

10. Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 28 Atl. 32; Brannock *v.* Elmore, 114 Mo. 55, 21 S. W. 451; Fox *v.* Ireland, 46 N. Y. App. Div. 541, 61 N. Y. Suppl. 1061; Berg *v.* Parsons, 84 Hun (N. Y.) 60, 31 N. Y. Suppl. 1091; Simonton *v.* Perry, (Tex. Civ. App. 1901) 62 S. W. 1090. But see Schip *v.* Pabst Brewing Co., 64 Minn. 22, 66 N. W. 3; Knoxville Iron Co. *v.* Dobson, 7 Lea (Tenn.) 367.

11. Schip *v.* Pabst Brewing Co., 64 Minn. 22, 66 N. W. 3; Knoxville Iron Co. *v.* Dobson, 7 Lea (Tenn.) 367; Simonton *v.* Perry, (Tex. Civ. App. 1901) 62 S. W. 1090.

12. Hawke *v.* Brown, 28 N. Y. App. Div. 37, 50 N. Y. Suppl. 1032.

trol, or directions given by the contractee or his representative as to work being done by contractors, may render him personally liable for injuries caused to third persons by the negligent conduct of such contractors in work done in obedience to such directions.[13]

g. Ratification of Contractor's Act. A contractee may be liable for the negligent or wrongful act of the contractor or the contractor's servants, although not otherwise liable, because of his ratification of such acts.[14]

h. Abandonment, Completion, or Acceptance of the Work. If the work is completed the contractee is responsible for injuries thereafter resulting from its imperfect construction or dangerous condition in which he permits it to remain,[15] especially after the contractee has accepted the work.[16] So where the contractor is dismissed,[17] or where he abandons the contract and the owner assumes control,[18] the contractee's liability attaches as to injuries thereafter resulting from the work done.

i. Failure to Remedy Nuisance. After notice to the contractor during the progress of the work that it is necessary to create a nuisance to do the work, the contractor is liable for injuries to third persons occurring thereafter where he fails to take such steps as are in his power to suppress the nuisance.[19]

j. Joint Wrongful Act. Where the wrongful act of the contractor joins with

13. *Connecticut.*— Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 28 Atl. 32.

Indiana.— Bohrer *v.* Dienhart Harness Co., (App. 1896) 45 N. E. 668.

Kentucky.— Louisville, etc., R. Co. *v.* Tow, 63 S. W. 27, 23 Ky. L. Rep. 408, 66 L. R. A. 941.

Louisiana.— Faren *v.* Sellers, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256.

Missouri.— Long *v.* Moon, 107 Mo. 334, 17 S. W. 810; Appel *v.* Eaton, etc., Co., 97 Mo. App. 428, 71 S. W. 741.

New York.— Berg *v.* Parsons, 156 N. Y. 109, 50 N. E. 957, 66 Am. St. Rep. 542, 41 L. R. A. 391; Hawke *v.* Brown, 28 N. Y. App. Div. 37, 50 N. Y. Suppl. 1032; Burke *v.* Ireland, 26 N. Y. App. Div. 487, 50 N. Y. Suppl. 369; Heffernan *v.* Benkard, 1 Rob. 432.

Ohio.— Clark *v.* Fry, 8 Ohio St. 358, 72 Am. Dec. 590.

United States.— Philadelphia, etc., Steam Tow-Boat Co. *v.* Philadelphia, etc., R. Co., 19 Fed. Cas. No. 11,085.

See 34 Cent. Dig. tit. "Master and Servant," § 1257.

Where a railroad construction contractor is left without discretion, and must implicitly follow the directions of the locating engineer, the railroad company is responsible for every wrong done by the contractor in grading the road-bed, on the ground that such grading is conclusively presumed to have been done pursuant to its directions, given through its engineer, unless the contractor went beyond instructions, and inflicted an injury outside of the limits of his contractual duties. Alabama Midland R. Co. *v.* Williams, 92 Ala. 277, 9 So. 203; Alabama Midland R. Co. *v.* Coskry, 92 Ala. 254, 9 So. 202.

14. Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231; Harrison *v.* Kiser, 79 Ga. 588, 4 S. E. 320; Eaton *v.* European, etc., R. Co., 59 Me. 520, 8 Am. Rep. 430; Chicago *v.* Robbins, 2 Black (U. S.) 418, 17 L. ed. 298. See also Consolidated Ice Mach. Co. *v.* Keifer, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696; Reynolds *v.* Braithwaite, 131 Pa. St. 416, 18 Atl. 1110; Easter *v.* Hall, 12 Wash. 160, 40 Pac. 728, knowledge not amounting to ratification.

15. St. Louis, etc., R. Co. *v.* Hopkins, 54 Ark. 209, 15 S. W. 610, 12 L. R. A. 189; Khron *v.* Brock, 144 Mass. 516, 11 N. E. 748; Sturges *v.* Cambridge Theological Education Soc., 130 Mass. 414, 39 Am. Rep. 463; Wilkinson *v.* Detroit Steel, etc., Works, 73 Mich. 405, 41 N. W. 490.

16. Donovan *v.* Oakland, etc., Rapid Transit Co., 102 Cal. 245, 36 Pac. 516; Mulchey *v.* Methodist Religious Soc., 125 Mass. 487; Gorham *v.* Gross, 125 Mass. 232, 28 Am. Rep. 224; Vogel *v.* New York, 92 N. Y. 10, 44 Am. Rep. 349; Paris Gaslight Co. *v.* McHam, 2 Tex. App. Civ. Cas. § 651. And see Swart *v.* Justh, 24 App. Cas. (D. C.) 596; Bast *v.* Leonard, 15 Minn. 304, in which it was held that it will be considered that a contractor had accepted the work of a subcontractor where he uses the work and pays the subcontractor therefor.

Formal acceptance.— Where the contractee had assumed practical control by appropriating the work to the use for which it was erected, he was liable to third persons injured by it to the same extent as if there had been a formal acceptance. Read *v.* East Providence Fire Dist., 20 R. I. 574, 40 Atl. 760.

17. Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Steam Tow Boat Co., 23 How. (U. S.) 209, 16 L. ed. 433.

18. Savannah, etc., R. Co. *v.* Phillips, 90 Ga. 829, 17 S. E. 82.

19. James *v.* McMinimy, 93 Ky. 471, 20 S. W. 435, 14 Ky. L. Rep. 486, 40 Am. St. Rep. 200; Clark *v.* Fry, 8 Ohio St. 358, 72 Am. Dec. 590.

that of the contractee in causing the injury, the contractee is liable.[20] So where a part of the work is done by employees of the contractee, the failure to guard the work done by such employees renders the contractee liable, although other work in connection therewith was performed by an independent contractor.[21]

4. Stipulations as Exempting Contractee From Liability. One who employs another as a contractor cannot release himself from liability for damages by any stipulation with the contractor in so far as the rights of third persons who may be injured are concerned.[22]

5. Liability of Contractee to Servants of Contractor — a. General Rule. Ordinarily the contractor and not the contractee is the person liable to an employee of the contractor for injuries received by the employee in the course of his employment;[23] and the contractee is not liable to the employees of a contractor for

20. Slater *v.* Mersereau, 64 N. Y. 138. And see Chicago Economic Fuel Gas Co. *v.* Myers, 168 Ill. 139, 48 N. E. 66; Baumeister *v.* Markham, 101 Ky. 122, 39 S. W. 844, 41 S. W. 816, 19 Ky. L. Rep. 308, 72 Am. St. Rep. 397.

Concurrent negligence.— If an accident occurs through defects in a structure which are due to the owner's negligence, the fact that an independent contractor who erected the building was also negligent does not absolve the owner from liability. Burke *v.* Ireland, 26 N. Y. App. Div. 487, 50 N. Y. Suppl. 369.

Where the act is done jointly by the employer and the contractor they are jointly liable. Holliday *v.* National Tel. Co., [1899] 2 Q. B. 392, 68 L. J. Q. B. 1016, 81 L. T. Rep. N. S. 252, 47 Wkly. Rep. 658.

21. Hawyer *v.* Whalen, 49 Ohio St. 69, 29 N. E. 1049, 14 L. R. A. 828, holding that where the owners of a lot, in constructing thereon a building abutting on a street, make, by their employees, an excavation in the adjacent sidewalk for coal vaults, and an area to be used in connection with the building, it is their duty to guard it with ordinary care; and this duty is not shifted from them by letting the work of building the area walls and constructing the coal vaults to an independent contractor, who is to furnish all the material and perform all the labor necessary therefor. And see Mayhew *v.* Sullivan Min. Co., 76 Me. 100.

22. Tibbetts *v.* Knox, etc., R. Co., 62 Me. 437; Ominger *v.* New York Cent., etc., R. Co., 4 Hun (N. Y.) 159, 6 Thomps. & C. 498; Osborn *v.* Union Ferry Co., 53 Barb. (N. Y.) 629; Erie *v.* Caulkins, 85 Pa. St. 247, 27 Am. Rep. 642; St. Paul Water Co. *v.* Ware, 16 Wall. (U. S.) 566, 21 L. ed. 485.

23. *Alabama.*— Holt *v.* Whatley, 51 Ala. 569.

California.— Hedge *v.* Williams, 131 Cal. 455, 63 Pac. 721, 64 Pac. 106, 82 Am. St. Rep. 366.

Connecticut.— Burke *v.* Norwich, etc., R. Co., 34 Conn. 474.

Georgia.— Central R., etc., Co. *v.* Grant, 46 Ga. 417, statute does not change rule.

Illinois.— Boyd *v.* Chicago, etc., R. Co., 217 Ill. 332, 75 N. E. 496, 108 Am. St. Rep. 253; West *v.* St. Louis, etc., R. Co., 63 Ill. 545.

Indiana.— Vincennes Water-Supply Co. *v.* White, 124 Ind. 376, 24 N. E. 747.

Iowa.— Humpton *v.* Unterkircher, 97 Iowa 509, 66 N. W. 776.

Kansas.— St. Louis, etc., R. Co. *v.* Willis, 38 Kan. 330, 16 Pac. 728.

Louisiana.—Gallagher *v.* Southwestern Exposition Assoc., 28 La. Ann. 943; Camp *v.* St. Louis Church, 7 La. Ann. 321.

Michigan.— Piette *v.* Bavarian Brewing Co., 91 Mich. 605, 52 N. W. 152.

New York.— Burke *v.* Ireland, 26 N. Y. App. Div. 487, 50 N. Y. Suppl. 369; Cullom *v.* McKelvey, 26 N. Y. App. Div. 46, 49 N. Y. Suppl. 669; Larock *v.* Ogdensburg, etc., R. Co., 26 Hun 382; Young *v.* New York Cent. R. Co., 30 Barb. 229; Coughtry *v.* Globe Woolen Co., 1 Thomps. & C. 452 [*reversed* in 56 N. Y. 124, 15 Am. St. Rep. 387]; Green *v.* Banta, 48 N. Y. Super. Ct. 156; Heiner *v.* Heuvelman, 45 N. Y. Super. Ct. 88; Barrett *v.* Singer Mfg. Co., 1 Sweeny 545.

Pennsylvania.— Hunt *v.* Pennsylvania R. Co., 51 Pa. St. 475.

Virginia.— Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 14 S. E. 163.

See 34 Cent. Dig. tit. "Master and Servant," § 1251.

The owner, where he designs a safe and proper building, and employs a competent builder as contractor for its construction, is not liable to the workmen of the contractor or his subcontractor for injury from the defective condition of the building occasioned by the negligence of the contractor. Murphy *v.* Altman, 28 N. Y. App. Div. 472, 51 N. Y. Suppl. 106; Burke *v.* Ireland, 26 N. Y. App. Div. 487, 50 N. Y. Suppl. 369. And in such a case the owner is not liable to an employee of one contractor for an injury caused by the negligence of another independent contractor. Murphy *v.* Altman, *supra*.

Guaranty of skill and care of contractor.— One who employs a contractor to erect a building, or to do any other mechanical work, does not become a guarantor to all the employees of the contractor for his skill and care in performing the work. In such a case the contractor is a principal of the persons whom he employs. Hunt *v.* Pennsylvania R. Co., 51 Pa. St. 475.

Unsafe tools furnished by contractor.— A master is not liable to an employee of the contractor for injuries received from the

the negligence of the employees of another contractor.[24] The liability of the contractee to the servants of the contractor is not as extensive as his liability to third persons, that is, the act may be such as to render the contractee liable to third persons, although it would not make him liable to a servant of the contractor.[25] In order to make the owner liable to the employees of an independent contractor for injuries received by the employees there must be some negligence on the part of the owner.[26] Where the real cause of the injury is the negligence of a servant of the contractee working together with the servants of the contractor, the contractee is liable.[27]

b. Safety of Place to Work and Appliances. Except where there are statutory provisions to the contrary,[28] the owner of real estate does not ordinarily owe to a person employed on his premises in the service of an independent contractor the duty to furnish a safe place for work, and for omission to do so he is not liable in damages.[29] But the owner may be liable, under particular circumstances, where a duty devolving on him is not fulfilled.[30] In the absence of

furnishing of unsafe tools by the contractor. Omaha Bridge, etc., R. Co. *v.* Hargadine, 5 Nebr. (Unoff.) 418, 98 N. W. 1071.

Repair on building damaged by fire.— Where the owner of a building damaged by fire turns it over to an independent contractor to repair, he is not, because of the arrangement of the interior, which may become dangerous to one not familiar therewith, liable to the servant of one whom the contractor employs on the building for damages caused by personal injuries received. Butler *v.* Lewman, 115 Ga. 752, 42 S. E. 98.

Rule applicable as between contractor and subcontractor.— An employee of a subcontractor cannot recover from the contractor for personal injuries caused by his employer's negligence, if the contractor retained no power of directing and controlling the work. Mohr *v.* McKenzie, 60 Ill. App. 575. See Diehl *v.* Robinson, 72 N. Y. App. Div. 19, 76 N. Y. Suppl. 252. In order to find a contractor responsible to a person working for a subcontractor on the reconstruction of a building, there must be some act of personal negligence on the part of the contractor which caused the accident, independent of all other causes. Nelson *v.* Young, 91 N. Y. App. Div. 457, 87 N. Y. Suppl. 69 [*affirmed* in 180 N. Y. 523, 72 N. E. 1146].

Mistake as to employment.— The fact that some of the servants were paid at the store of the contractee, and that some of them thought they were working for him, is immaterial. Smith *v.* Belshaw, 89 Cal. 427, 26 Pac. 834. But see Solomon R. Co. *v.* Jones, 30 Kan. 601, 2 Pac. 657.

24. Butler *v.* Townsend, 126 N. Y. 105, 26 N. E. 1017. And see Jehle *v.* Ellicott Square Co., 31 N. Y. App. Div. 336, 52 N. Y. Suppl. 366.

25. Omaha Bridge, etc., R. Co. *v.* Hargadine, 5 Nebr. (Unoff.) 418, 98 N. W. 1071.

26. Kelleher *v.* Schmitt, etc., Mfg. Co., 122 Iowa 635, 98 N. W. 482.

27. Chicago, etc., R. Co. *v.* Clark, 26 Nebr. 645, 42 N. W. 703; Johnson *v.* Netherlands American Steam Nav. Co., 10 N. Y. Suppl. 927.

28. Rooney *v.* Brogan Constr. Co., 107 N. Y. App. Div. 258, 95 N. Y. Suppl. 1. See also Camp *v.* St. Louis Church, 7 La. Ann. 321.

29. Reilly *v.* Chicago, etc., R. Co., 122 Iowa 525, 98 N. W. 464; Callan *v.* Pugh, 54 N. Y. App. Div. 545, 66 N. Y. Suppl. 1118.

Premises under control of owner.— But if the premises on which the contractor's employees are at work in carrying out the contract are under the control of the owner it is his duty to use reasonable care to see that they are safe. Kelleher *v.* Schmitt, etc., Mfg. Co., 122 Iowa 635, 98 N. W. 482. The servants of an independent contractor are deemed to be upon the premises of the proprietor by his implied invitation; and he is bound to exercise reasonable care to protect them from dangers arising from the condition of the premises, of which he is aware and concerning which they have neither actual nor constructive knowledge. Stevens *v.* United Gas, etc., Co., 73 N. H. 159, 60 Atl. 848, 70 L. R. A. 119.

30. See Perkins *v.* Furness, 167 Mass. 403, 45 N. E. 759; O'Driscoll *v.* Faxon, 156 Mass. 527, 31 N. E. 685; Horner *v.* Nicholson, 56 Mo. 220; Stevens *v.* United Gas, etc., Co., 73 N. H. 159, 60 Atl. 848, 70 L. R. A. 119, holding that where plaintiff was employed by an independent contractor on the construction of a power-house for defendant electric company, and a staging had been erected outside the walls and within a short distance of defendant's electric wires, defendant owed a non-delegable duty to plaintiff of using reasonable care to protect him from the concealed danger occasioned by the maintenance of a high voltage of electricity on such wires.

Agreement to erect supports.— Where the owner agreed with the contractor to erect supports when notified by the contractor that they were necessary, the owner is liable to an employee of the contractor for injuries received because of the lack of such supports, although not notified by the contractor, where he had actual knowledge of the necessity therefor. Kelly *v.* Howell, 41 Ohio St. 438. To the same effect see Toomey *v.* Donovan, 158 Mass. 232, 33 N. E. 396.

provisions therefor in the contract the contractor is usually under no duty to furnish any appliances for the contractor.[31] But if unsafe appliances are furnished by the contractee and a servant of the contractor is injured thereby the contractee is liable,[32] especially where it is the duty of the contractee to furnish them

Where the owner and contractor work together, each doing certain work and dividing the profits, it is the duty of the owner to see that the place of work is in a reasonably safe condition. Rice *v.* Smith, 171 Mo. 331, 71 S. W. 123.

Where a contractor employs a subcontractor to do certain portions of the work, the contractor is bound to do his part of the work so as to render it safe for the employee of the subcontractor. Johnston *v.* Ott, 155 Pa. St. 17, 25 Atl. 751. The duty of shoring a building rests on the contractor as against subcontractors, in the absence of proof to the contrary. Nelson *v.* Young, 91 N. Y. App. Div. 457, 87 N. Y. Suppl. 69.

If the owner of a mine turns it over to contractors when it is in an unsafe condition of which he knows or might know by exercising proper care, he is responsible for injuries resulting to a miner who is put to work in ignorance of the danger. Samuelson *v.* Cleveland Iron Min. Co., 49 Mich. 164, 173, 13 N. W. 499, 43 Am. Rep. 456. In this case the court said: "The owner may rent a mine, resigning all charge and control over it, and at the same time put off all responsibility for what may occur in it afterwards. If he transfers no nuisance with it, and provides for nothing by his lease which will expose others to danger, he will from that time have no more concern with the consequences to others than any third person. If instead of leasing he puts contractors in possession the result must be the same as if there is nothing in the contract which is calculated to bring about danger. But if, on the other hand, he retains charge and control, and gives workmen a right to understand that he is caring for their safety and that they may rely upon him to guard against negligent conduct in the contractors and others, his moral accountability for their safety is as broad as it would be if he were working the mine in person; and his legal accountability ought to be commensurate with it." Where a mining corporation contracting for the removal of ore reserves to itself such arrangements as are necessary for the protection of workmen, it is liable for such injuries as happen to employees of the contractors without the fault of the employees. Lake Superior Iron Co. *v.* Erickson, 39 Mich. 492, 33 Am. Rep. 423.

31. See Wingert *v.* Krakauer, 92 N. Y. App. Div. 223, 87 N. Y. Suppl. 261, holding that defendants who had employed an independent contractor to install machinery for a factory were under no obligation to erect a scaffold necessary for their use in that work.

32. Kelleher *v.* Schmitt, etc., Mfg. Co., 122 Iowa 635, 98 N. W. 482; Fell *v.* Rich Hill Coal Min. Co., 23 Mo. App. 216; The Rheola, 19 Fed. 926. See also Neimeyer *v.* Weyerhaueser, 95 Iowa 497, 64 N. W. 416; Ferris *v.* Aldrich, 12 N. Y. Suppl. 482. But see Riley *v.* State Line Steamship Co., 29 La. Ann. 791, 29 Am. Rep. 249; Southern Oil Co. *v.* Church, 32 Tex. Civ. App. 325, 74 S. W. 797, 75 S. W. 817, holding that, where defendant furnished an independent contractor a derrick with which to do the work, defendant was not liable for injuries to a servant of such contractor by reason of the derrick's defective condition, in the absence of proof that it was inherently dangerous or that defendant intentionally or wilfully caused the injury.

Scaffold.— Coughtry *v.* Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387; Hoffner *v.* Prettyman, 6 Pa. Super. Ct. 20, 41 Wkly. Notes Cas. 258. See Wingert *v.* Krakauer, 92 N. Y. App. Div. 223, 87 N. Y. Suppl. 261, where it was held that defendant did not furnish or erect the scaffold, merely because two workmen whom defendant had agreed to furnish to assist the contractor had erected the scaffold by the direction of defendant's foreman. If materials for a scaffold are selected by servants of the contractor, with the consent of the contractee, but in the absence of any agreement in regard thereto, from lumber on the premises, and the scaffold breaks, the contractee is not liable, especially where it is not shown that proper lumber could not have been found on the premises. Callahan *v.* Phillips Academy, 180 Mass. 183, 62 N. E. 260.

Where the materials furnished by the owner are rejected by the employees of the contractor, and such employees select other materials belonging to the owner, the latter is not liable for an injury resulting from the use of such other materials. Nugent *v.* Atlas Steamship Co., 51 Hun (N. Y.) 306, 3 N. Y. Suppl. 861, 16 N. Y. Suppl. 66 [*affirmed* in 147 N. Y. 709, 42 N. E. 724].

Consent to use of appliances.— But the use of defective appliances belonging to the owner, with his consent, where the owner is under no duty to furnish the appliances, does not make him liable. Bush *v.* Grant, 61 S. W. 363, 22 Ky. L. Rep. 1766.

By statute in some states the owner is liable to an employee of the contractor who is injured because of defects in the appliances furnished by the contractee to the contractor. Toomey *v.* Donovan, 158 Mass. 232, 33 N. E. 396.

Negligent use of appliances.— But where the contractee furnishes tools and machinery he is not liable for an injury to an employee of the contractor resulting from the negligent use thereof. Reier *v.* Detroit Steel, etc., Works, 109 Mich. 244, 67 N. W. 120.

Machinery dangerous to operate without instructions.— Where the contractee furnished all the tools and a machine danger-

because of his agreement with the contractor;[33] but if safe appliances are furnished and they afterward become defective, the contractor is not liable,[34] unless the contract is construed as calling for continued supervision of the appliances.[35] Where the contractee agrees to furnish material to make the place safe for work, and he fails to do so, he is liable to a servant of the contractor for injuries caused by the failure so to do.[36] The contractor is liable for injuries to a servant of a subcontractor where resulting from defects in that part of the work done by the contractor.[37] Where the employee of a contractor is injured by the combined fault of the contractor and the owner, the latter is liable.[38]

C. Actions[39] — **1. General Considerations.** A person injured by the act of a servant may usually sue either the master or the servant, or both,[40] the action being *ex delicto*.[41] A statutory remedy applicable where one employed by a contractor is injured is not exclusive so as to prevent an action by the servant against the owner.[42] Where an officer is not considered the servant of the person requesting his appointment, such as a special policeman in some states, the remedy is upon the bond given by the person securing his appointment.[43]

2. Grounds and Defenses. The general grounds on which the action against the master for the acts of his servant is based have already been considered.[44] So have many of the defenses, such as the non-existence of the relationship of master and servant,[45] the act not within the scope of the employment,[46] etc. The following have been held not defenses: The good motive of a servant;[47] consent of plaintiff to the absence of the servant, where he failed to return as he had promised, which was the cause of the injury;[48] the servant losing his temper and without provocation using an unreasonable amount of force;[49] and the fact that the judgment for the damages resulting might be enforced by an execution against the person.[50]

ous to operate without instructions, and plaintiff was injured, by neglect to notify him of the dangerous character of the machine, and to instruct him, the defense that plaintiff was an employee of an independent contractor is not available, since a resulting injury might have been anticipated as the direct consequence of the performance of the work contracted for, where no reasonable care was exercised. Jacobs *v.* Fuller, etc., Co., 67 Ohio St. 70, 65 N. E. 617, 65 L. R. A. 833.

33. Coughtry *v.* Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387 (scaffold); Bright *v.* Barnett, etc., Co., 88 Wis. 299, 60 N. W. 418, 26 L. R. A. 524 (scaffold).

Continuous nature of duty.— If there is a duty to furnish the contractor with appliances, it seems that it is not necessary for the contractor to keep watch of the work to determine when appliances are necessary. Miller *v.* Moran Bros. Co., 39 Wash. 631, 81 Pac. 1089, 109 Am. St. Rep. 917, 1 L. R. A. N. S. 283. And see Callahan *v.* Phillips Academy, 180 Mass. 183, 62 N. E. 260.

34. Kelleher *v.* Schmitt, etc., Mfg. Co., 122 Iowa 635, 98 N. W. 482; Central Coal, etc., Co. *v.* Bailey, 76 S. W. 842, 25 Ky. L. Rep. 973, 115 Ky. 745, 74 S. W. 1058, 25 Ky. L. Rep. 165, 65 L. R. A. 455; Riley *v.* State Line Steamship Co., 29 La. Ann. 791, 29 Am. Rep. 249; King *v.* New York Cent., etc., R. Co., 66 N. Y. 181, 23 Am. Rep. 37. And see Barrett *v.* Singer Mfg. Co., 1 Sweeny (N. Y.) 545; Knoxville Iron Co. *v.* Dobson, 7 Lea (Tenn.) 367.

35. See Johnson *v.* Spear, 76 Mich. 139, 42 N. W. 1092, 15 Am. St. Rep. 298.

Duty to repair.—Where the machinery provided remains under the control of the owner and he is under obligation to keep it in repair, he is liable for injuries resulting from his failure to do so. Kelleher *v.* Schmitt, etc., Mfg. Co., 122 Iowa 635, 98 N. W. 482; Toomey *v.* Donovan, 158 Mass. 232, 33 N. E. 396; Toledo Stove Co. *v.* Reep, 18 Ohio Cir. Ct. 58, 9 Ohio Cir. Dec. 467.

36. Leslie *v.* Rich Hill Coal Min. Co., 110 Mo. 31, 19 S. W. 308.

37. Curley *v.* Harris, 11 Allen (Mass.) 112.

38. Faren *v.* Sellers, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256.

39. Right to exemplary damages see Damages, 13 Cyc. 114, 115. See also Carriers, 6 Cyc. 568, 634.

40. See *supra*, V, A, 1, 5, 6.

41. Action on the case as proper form of action see Case, Action on, 6 Cyc. 693.

Trespass as proper form of action see Trespass.

42. Rooney *v.* Brogan Constr. Co., 107 N. Y. App. Div. 258, 95 N. Y. Suppl. 1.

43. Healey *v.* Lothrop, 178 Mass. 151, 59 N. E. 653.

44. See *supra*, V, A.

45. See *supra*, V, A, 2.

46. See *supra*, V, A, 4.

47. Passenger R. Co. *v.* Young, 21 Ohio St. 518, 8 Am. Rep. 78.

48. Gaines *v.* Bard, 57 Ark. 615, 22 S. W. 570, 38 Am. St. Rep. 266.

49. Texas, etc., R. Co. *v.* Taylor, 31 Tex. Civ. App. 617, 73 S. W. 1081.

50. Levy *v.* Ely, 48 N. Y. App. Div. 554, 62 N. Y. Suppl. 855.

The contributory fault of plaintiff may bar a recovery,[51] although his improper conduct is ordinarily not a defense.[52] The master's knowledge that his servant was insane at the time of the employment renders the master liable for a killing by the servant.[53] The statutory liability of a servant does not preclude the common-law liability of his master.[54]

3. PARTIES. The master and servant may be sued jointly in most states to recover damages resulting from the tort of the servant.[55] However, the servant is not a necessary party to an action against the master,[56] and where the employment is joint, so that several are liable as masters, any one of them may be sued alone.[57]

4. PLEADING — a. In General. Where an action is brought by a third person against a master to recover damages for injuries resulting from the acts of defendant's servants, the complaint must allege the existence of the relationship of master and servant,[58] and that the servant was acting as such at the time of the injury,[59] and negligence[60] or other wrongful act[61] of the servant.[62] Except where the

51. Candiff *v.* Louisville, etc., R. Co., 42 La. Ann. 477, 7 So. 601, holding that where a person was detected in breaking open a railroad car, and when discovered ran and refused to stop when halted, whereupon he was shot, the joint and contributory fault barred a recovery.

52. Bergman *v.* Hendrickson, 106 Wis. 434, 82 N. W. 304, 80 Am. St. Rep. 47, holding that the fact that plaintiff conducted himself in such a manner as to bring on a fight with the servant, and that the assault was in part the result of such conduct, was no defense.

53. Christian *v.* Columbus, etc., R. Co., 79 Ga. 460, 7 S. E. 216.

54. Reynolds *v.* Hanrahan, 100 Mass. 313.

55. See *supra*, V, A.

56. Wilkins *v.* Ferrell, 10 Tex. Civ. App. 231, 30 S. W. 450.

57. Fisher *v.* Cook, 125 Ill. 280, 17 N. E. 763.

58. Sagers *v.* Nuckolls, 3 Colo. App. 95, 32 Pac. 187. See also Radke *v.* Schlundt, 30 Ind. App. 213, 65 N. E. 770; Missouri, etc., R. Co. *v.* Freeman, (Tex. Civ. App. 1903) 73 S. W. 542.

Construction of pleadings.— Alleging that plaintiff was on defendant's premises at the latter's request for the purpose of doing certain work on a roof does not show that plaintiff was in defendant's employ. Barowski *v.* Schultz, 112 Wis. 415, 88 N. W. 236. The word "being," as used in the allegation that a named person, being defendant's servant, negligently set a fire which extended to plaintiff's land, refers to the time of the alleged negligence. Henderson *v.* Chapman, 3 Ont. Pr. 331.

59. Birnbaum *v.* Lord, 7 Misc. (N. Y.) 493, 28 N. Y. Suppl. 17, holding that a complaint alleging that a wagon which had run over plaintiff belonged to defendants, and was driven by one of their agents or servants, sufficiently shows that the driver was acting as defendants' servant at the time of the injury.

60. See Brasher *v.* Kennedy, 10 B. Mon. (Ky.) 28, holding that a complaint must charge the negligence to be that of the master without mentioning the servant.

Mode of pleading negligence in general see NEGLIGENCE.

Details of negligence.— Where negligence was alleged in driving a wagon, plaintiff will not be required, on motion, to state in detail in what the negligence consisted, and in what manner the horse and wagon were negligently driven. Adams Express Co. *v.* Aldridge, 20 Colo. App. 74, 77 Pac. 6.

Pleading evidence.— In an action for injuries to plaintiff by being struck by a wagon driven by defendant's servant, the rate of speed of the wagon is a matter of evidence, and need not be pleaded. Lachenbruch *v.* Cushman, 87 N. Y. Suppl. 476.

Whether one or more causes of action are stated.— In an action against a railroad company and its employees for injuries, where the petition alleges that the injuries were caused by the negligence of all the defendants in operating a train, and by the negligence of the company in not having the cars equipped with proper apparatus, the petition is not open to the objection that it states one cause of action against all defendants and another cause against the company only. Pugh *v.* Chesapeake, etc., R. Co., 101 Ky. 77, 39 S. W. 695, 19 Ky. L. Rep. 149, 72 Am. St. Rep. 392.

61. See Christian *v.* Columbus, etc., R. Co., 90 Ga. 124, 15 S. E. 701.

62. Thompson *v.* Wright, 109 Ga. 466, 34 S. E. 560; Banister *v.* Pennsylvania Co., 98 Ind. 220. See also Pennsylvania Co. *v.* Rusie, 95 Ind. 236, justice of the peace practice.

Common counts.— A complaint which alleges in the form of a common count that defendant by one of its employees committed an assault on plaintiff is sufficient. Letts *v.* Hoboken R., etc., Connecting Co., 70 N. J. L. 358, 57 Atl. 392; Lewis *v.* Chicago, etc., R. Co., 35 Fed. 639. And see Lewis *v.* Schultz, 98 Iowa 341, 67 N. W. 266.

Description of servants.— A complaint for damages from being handcuffed and tied to a post under orders of the captain of defendant's steamer sufficiently shows which of defendant's servants were the wrong-doers, where it alleges that the acts were committed by defendant's servants and agents, "who

action is against the servant,[63] the complaint must allege that the act was within the scope of the servant's employment,[64] although there need not be a direct averment in terms.[65] The facts must be stated to show that the act was within the scope of the servant's employment,[66] the general averment that the acts were within the scope being insufficient because a mere conclusion of law.[67] If the action is based on a statute the complaint must allege the necessary facts to bring the case within the statute.[68] Where the action is brought by an employee of a contractor against the owner, the complaint must set forth the facts to show the liability of the owner.[69]

b. Evidence Admissible Under Pleadings. As in other civil actions, evidence outside the issues presented by the pleadings is not admissible.[70] Where the servant's negligence is the only ground relied on in the complaint, evidence is inadmissible to show the incompetency or intemperateness of the servant,[71] or to show defects in the machinery.[72] Under a general denial, evidence is admissible to show that plaintiff assaulted the servant first, and the latter acted in self-defense.[73]

5. Evidence — a. Presumptions and Burden of Proof.[74] The burden of show-

were at said time in charge of said steamer." Trabing *v.* California Nav., etc., Co., 121 Cal. 137, 53 Pac. 644.

63. Hoffman *v.* Gordon, 15 Ohio St. 211.

64. *Alabama.*— Mobile, etc., R. Co. *v.* Seales, 100 Ala. 368, 13 So. 917, replication.

Indiana.— See Radke *v.* Schlundt, 30 Ind. App. 213, 65 N. E. 770.

Massachusetts.— McCann *v.* Tillinghast, 140 Mass. 327, 5 N. E. 164.

Minnesota.— See Campbell *v.* Northern Pac. R. Co., 51 Minn. 488, 53 N. W. 768.

Missouri.— Raming *v.* Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268.

New York.— Fisher *v.* Brooklyn Jockey Club, 50 N. Y. App. Div. 446, 64 N. Y. Suppl. 69; Hamberg *v.* Singer Mfg. Co., 4 N. Y. Suppl. 185.

Ohio.— O'Neil *v.* Baltimore, etc., R. Co., 2 Ohio Cir. Ct. 504, 1 Ohio Cir. Dec. 610.

Rhode Island.— Benton *v.* James Hill Mfg. Co., 26 R. I. 192, 58 Atl. 664.

Texas.— See Missouri, etc., R. Co. *v.* Freeman, (Civ. App. 1903) 73 S. W. 542.

Sufficiency of allegations.—Where the complaint in an action for injuries caused by collision with a truck alleges that the truck was "in possession of defendants' servant, who was driving the same," it sufficiently alleges that the truck was driven by defendants' servant in the course of his employment, as it will be presumed that the servant was acting within his duty. Doherty *v.* Lord, 8 Misc. (N. Y.) 227, 28 N. Y. Suppl. 720.

Omission as ground for demurrer to evidence.— Where the petition alleges that the injuries were caused by the negligent act of defendant's servant, but omits to state that he was guilty of such act while employed as such servant in discharge of the duties of his employment, a demurrer will not lie to the evidence by reason of this omission, since the omitted matter might be reasonably implied from the allegation of the petition. Todd *v.* Havlin, 72 Mo. App. 565; Voegeli *v.* Pickel Marble, etc., Co., 49 Mo. App. 643.

Admissions in answer.— An allegation in the answer that plaintiff sustained the injuries complained of while attempting to commit an assault "upon a porter or workman employed and performing his duties as such" on defendant's premises is not an admission that the foreman was acting within the scope of his authority, where there is no evidence that the porter and the foreman committing the assault were the same person. Meehan *v.* Morewood, 52 Hun (N. Y.) 566, 5 N. Y. Suppl. 710 [*affirmed* in 126 N. Y. 667, 27 N. E. 854].

65. Indianapolis, etc., Rapid Transit Co. *v.* Derry, 33 Ind. App. 499, 71 N. E. 912. See also Louisville, etc., R. Co. *v.* Kendall, 138 Ind. 313, 36 N. E. 415; Wabash R. Co. *v.* Savage, 110 Ind. 156, 9 N. E. 85.

66. Thomas *v.* McGuinness, 94 Ill. App. 248; Snyder *v.* Hannibal, etc., R. Co., 60 Mo. 413.

67. Snyder *v.* Hannibal, etc., R. Co., 60 Mo. 413; Davis *v.* Houghtellin, 33 Nebr. 582, 50 N. W. 765, 14 L. R. A. 737; Letts *v.* Hoboken R., etc., Connecting Co., 70 N. J. L. 358, 57 Atl. 392. See also Campbell *v.* Northern Pac. R. Co., 51 Minn. 488, 53 N. W. 768.

68. Tuller *v.* Voght, 13 Ill. 277.

69. Boardman *v.* Creighton, 95 Me. 154, 49 Atl. 663.

Sufficiency of allegations to show firm an independent contractor.— An allegation that a certain firm was constructing a portion of the road-bed of a railroad company, and that plaintiff was working for them as a common laborer, sufficiently shows that said firm were independent contractors. Boyle *v.* Great Northern R. Co., 13 Wash. 383, 43 Pac. 344.

70. See Fiske *v.* Enders, 73 Conn. 338, 47 Atl. 681.

71. Dinsmoor *v.* Wolber, 85 Ill. App. 152; Shaw *v.* Hollenback, 55 S. W. 686, 21 Ky. L. Rep. 1561; American Straw Board Co. *v.* Smith, 94 Md. 19, 50 Atl. 414.

72. Healy *v.* Patterson, 123 Iowa 73, 98 N. W. 576.

73. Oakland City Agricultural, etc., Soc. *v.* Bingham, 4 Ind. App. 545, 21 N. E. 383.

74. In general see Evidence, 16 Cyc. 926–936, 1050–1087.

ing negligence on the part of defendant's servants,[75] and that it was the cause of plaintiff's injury,[76] is upon plaintiff. So ordinarily the burden is upon plaintiff to show that the person whose act caused the injury was the servant of defendant,[77] and that he acted within the scope of his employment.[78] The facts may, however, raise a presumption that the person causing the injury was in the employ of defendant at the time of the injury,[79] and that the servant was acting within the scope of his employment.[80] If defendant claims that he is not liable because the work was being done by an independent contractor, it seems that the burden is upon him to prove such relationship;[81] but where the employer is sought to be held liable for the negligence of an independent contractor, the burden is upon plaintiff to show a failure of the employer's duty to see that the materials furnished by the employer, and used by the contractor, were suitable for the purpose.[82]

b. Admissibility — (I) *Existence of Relation.* To show the relationship of master and servant, evidence of the giving of orders by the former to the latter is admissible.[83] So evidence that the master's name was on the wagon which the servant was driving is admissible.[84] Where the servant is also a police officer, evidence of such fact is admissible.[85] Any legal evidence is admissible to show that the alleged servant was in reality an independent contractor.[86]

75. Robinson *v.* Fitchburg, etc., R. Co., 7 Gray (Mass.) 92; Hestonville, etc., Pass. R. Co. *v.* Kelley, 102 Pa. St. 115.

76. De Benedetti *v.* Mauchin, 1 Hilt. (N. Y.) 213.

77. Axtell *v.* Northern Pac. R. Co., 9 Ida. 392, 74 Pac. 1075; Harrigan *v.* Donegan, 1 N. Y. Suppl. 329.

78. Randall *v.* Chicago, etc., R. Co., 113 Mich. 115, 71 N. W. 450, 38 L. R. A. 666; Drolshagen *v.* Union Depot R. Co., 186 Mo. 258, 85 S. W. 344; Raming *v.* Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268; Kessler *v.* Deutsch, 44 Misc. (N. Y.) 209, 88 N. Y. Suppl. 846.

79. Thiry *v.* Taylor Brewing, etc., Co., 37 N. Y. App. Div. 391, 56 N. Y. Suppl. 85; McCoun *v.* New York Cent., etc., R. Co., 66 Barb. (N. Y.) 338.

80. Deck *v.* Baltimore, etc., R. Co., 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 399 (special police officer); McCoun *v.* New York Cent., etc., R. Co., 66 Barb. (N. Y.) 338; Appleton *v.* Welch, 20 Misc. (N. Y.) 343, 45 N. Y. Suppl. 751. See also Consolidated R. Co. *v.* Pierce, 89 Md. 495, 43 Atl. 940; Stewart *v.* Baruch, 103 N. Y. App. Div. 577, 93 N. Y. Suppl. 161, holding that evidence that defendant was the owner of the automobile which ran over plaintiff, and that the chauffeur operating the automobile was employed by defendant for that purpose, is sufficient to establish *prima facie* that the chauffeur was acting within the scope of his employment at the time of the collision.

Servant driving master's horse.— Where a boy was in defendant's employ and had been sent by him to get goods, during which time the horse he was driving ran over plaintiff, it will be presumed the boy was at the time acting in his employment, and the burden of showing the contrary was on defendant. Cleveland *v.* Newsom, 45 Mich. 62, 7 N. W. 222. If the master is being driven by the servant, it may be inferred without other proof that the latter is engaged in the master's business and is subject to his control. Kelton *v.* Fifer, 26 Pa. Super. Ct. 603.

81. See Slayton *v.* West End St. R. Co., 174 Mass. 55, 54 N. E. 351.

82. Callahan *v.* Phillips Academy, 180 Mass. 183, 62 N. E. 260.

83. Steinhauser *v.* Spraul, 114 Mo. 551, 21 S. W. 515, 859.

84. Schulte *v.* Holliday, 54 Mich. 73, 19 N. W. 752.

Ownership of wagon.— In an action for injuries sustained by reason of the negligence of the driver of a wagon said to belong to defendant, testimony as to the routes of defendant's drivers on the morning of the accident, for the purpose of showing that the wagon referred to was not one of defendant's, was properly excluded. Perstein *v.* American Express Co., 177 Mass. 530, 59 N. E. 194, 52 L. R. A. 959.

85. Deck *v.* Baltimore, etc., R. Co., 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 399.

86. Fink *v.* Missouri Furnace Co., 82 Mo. 276, 52 Am. Rep. 376; Moore *v.* Bernstein, 30 Misc. (N. Y.) 191, 61 N. Y. Suppl. 1127.

Admissibility of contract.— In a suit against the concessionaires under a concession from an exposition company for the erection of certain structures for personal injuries sustained while said structures were being erected an agreement between the contractor and defendants is admissible to show the state of affairs at the time of the accident, but not for the purpose of binding plaintiff. De La Vergne Refrigerating Mach. Co. *v.* McLeroth, 69 Ill. App. 529.

Indemnity policy.— On an issue as to whether the person, through whose negligence plaintiff was injured, was an independent contractor, evidence is admissible that defendants held a policy indemnifying them from liability by reason of injury to any employees and that the insurer was defending

(II) *Negligence in Employing Servant.* Evidence of the habits of the servant is admissible to show that he was not a suitable person to be employed, and that the master, by reasonable diligence, might have discovered what his habits were.[87] And this rule applies where the relation is that of contractor and contractee, instead of master and servant.[88]

(III) *Negligence of Servant.*[89] To show negligence on the part of the servant, evidence of his general incompetency is inadmissible,[90] as is evidence that he was discharged shortly after the accident.[91] Evidence is inadmissible on behalf of the master to show that he properly instructed the servant as to the use of the property,[92] that instructions were given the servant to be cautious,[93] or that the servant was ordinarily a sober, careful, or skilful man, where plaintiff has not attempted to show the contrary.[94] Evidence that the servant was intoxicated at the time of the accident is admissible;[95] and where it was admitted that the servant had been drinking on the day of the accident, evidence that defendant knew of the servant's intemperate habits was admissible.[96] So evidence of the servant's habit of doing the act resulting in the injury is admissible to show that the master knew of and permitted, or should have known of, in the use of ordinary care, the acts.[97] Where the negligence charged is a violation of the rules of the master, a book containing such rules is admissible.[98] Evidence that defendant ordered an animal, injured through the negligence of his servant, to be shot, and that he expected to pay plaintiff its value, is not admissible.[99]

(IV) *Scope of Employment.* Any legal evidence is admissible which tends to show that the servant acted outside the scope of his employment at the time of the injury.[1] Where a servant testifies that no authority had been given him to invite any one to come on the premises, evidence that instructions had been given him not to permit persons to visit such premises is immaterial.[2] The

the suit against defendant. Barg *v.* Boansfield, 65 Minn. 335, 68 N. W. 45.

To whom permit to do work issued.— Where defendant claimed that excavations made in a street were made by an independent contractor, and that the work was done under the supervision and direction of the city engineer, it is proper to prove by the city engineer that the permit to do the work was secured by one stated to be defendant's general manager. Montgomery St. R. Co. *v.* Smith, (Ala. 1905) 39 So. 757.

87. Carson *v.* Canning, 180 Mass. 461, 62 N. E. 964 (holding that evidence of the servant's drinking and intoxication in the presence of the master, and his reputation as a sport and gambler, was admissible); Cox *v.* Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97.

88. Berg *v.* Parsons, 90 Hun (N. Y.) 267, 35 N. Y. Suppl. 780.

89. See, generally, NEGLIGENCE.

90. Central R., etc., Co. *v.* Roach, 64 Ga. 635; Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341.

91. Hewitt *v.* Taunton St. R. Co., 167 Mass. 483, 46 N. E. 106. *Contra*, Martin *v.* Towle, 59 N. H. 31. See, generally, NEGLIGENCE.

92. Read *v.* Pennsylvania R. Co., 44 N. J. L. 280.

93. Hammond, etc., Electric R. Co. *v.* Spyzchalski, 17 Ind. App. 7, 46 N. E. 47.

94. Towle *v.* Pacific Imp. Co., 98 Cal. 342, 33 Pac. 207; Smith *v.* Middleton, 112 Ky. 588, 66 S. W. 388, 23 Ky. L. Rep. 2010, 99 Am. St. Rep. 308, 56 L. R. A. 484; Jagger *v.* National German-American Bank, 53 Minn. 386, 55 N. W. 545; Harriman *v.* Pullman Palace-Car Co., 85 Fed. 353, 29 C. C. A. 194. See also Williams *v.* Edmunds, 75 Mich. 92, 42 N. W. 534.

Where plaintiff has offered evidence to show the servant's want of skill, defendant may show that the servant was possessed of proper skill. Peterson *v.* Adamson, 67 Iowa 739, 21 N. W. 701.

95. Connor *v.* Koch, 63 N. Y. App. Div. 257, 71 N. Y. Suppl. 836.

96. Vernon *v.* Cornwell, 104 Mich. 62, 62 N. W. 175.

97. Sammis *v.* Chicago, etc., R. Co., 97 Ill. App. 28; Schulte *v.* Holliday, 54 Mich. 73, 19 N. W. 752.

98. Hobbs *v.* Eastern R. Co., 66 Me. 572. *Contra*, see Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341.

99. Nulsen *v.* Priesmeyer, 30 Mo. App. 126.

1. Perlstein *v.* American Express Co., 177 Mass. 530, 59 N. E. 194, 52 L. R. A. 959; Brunner *v.* American Tel., etc., Co., 151 Pa. St. 447, 25 Atl. 29.

Order to servant not to do act.— In an action for damages occasioned by fires alleged to have been started by defendant's servants, there is no error in allowing a witness to testify that he heard defendant order his servants not to start any fires as tending to show that defendant had not authorized fires. Moe *v.* Job, 1 N. D. 140, 45 N. W. 700.

2. Houston, etc., R. Co. *v.* Bulger, 35 Tex. Civ. App. 478, 80 S. W. 577.

conduct of a servant is not evidence of his authority to commit a tort, although he had been employed a long time and was not called as a witness to deny his authority.[3]

(v) *Liability For Acts of Contractor.* Where a contractor is sought to be made liable for an injury to an employee of a subcontractor by the fall of a building, evidence is admissible, on the issue of notice to defendant, that some time before the accident the superintendent of the building notified defendant that the building was unsafe.[4] So, where an employee of a subcontractor was injured on a train of the construction company, evidence is admissible to show that the employee frequently rode on the train, and that the construction company made no objection.[5]

(vi) *Evidence as to Damages.* Where punitive damages are not recoverable, and defendant admits the negligence, evidence of the circumstances of the injury and of gross negligence is inadmissible.[6]

e. **Weight and Sufficiency.** The weight and sufficiency of the evidence in actions against the master for the acts of his servant, or in an action against an employer for the acts of independent contractors, or their employees, is governed by the rules applicable thereto in civil actions in general.[7] A preponderance of the evidence is sufficient;[8] and even in an action against a master for damages for a wilful homicide committed by his servant, no element of the case need be established with such certainty as to leave no reasonable doubt on the minds of the jury.[9] Evidence that a wagon which ran into plaintiff bore defendant's name

3. Fletcher *v.* Willis, 180 Mass. 243, 62 N. E. 2.

4. Nelson *v.* Young, 91 N. Y. App. Div. 457, 87 N. Y. Suppl. 69.

5. Mathews *v.* Great Northern R. Co., 81 Minn. 363, 84 N. W. 101, 83 Am. St. Rep. 383.

6. Rueping *v.* Chicago, etc., R. Co., 116 Wis. 625, 93 N. W. 843, 96 Am. St. Rep. 1013.

7. See Evidence, 17 Cyc. 753 *et seq.* And see Stewart *v.* Baruch, 103 N. Y. App. Div. 577, 93 N. Y. Suppl. 161; White *v.* Roydhouse, 211 Pa. St. 13, 60 Atl. 316; Prinz *v.* Lucas, 210 Pa. St. 620, 60 Atl. 309; Southwestern Tel., etc., Co. *v.* Paris, (Tex. Civ. App. 1905) 87 S. W. 724.

Cause of injury see Deck *v.* Baltimore, etc., R. Co., 100 Md. 168, 59 Atl. 650; Melvin *v.* Pennsylvania Steel Co., 180 Mass. 196, 62 N. E. 379; Dohn *v.* Dawson, 90 Hun (N. Y.) 271, 35 N. Y. Suppl. 984; Kummer *v.* Christopher, etc., R. Co., 2 Misc. (N. Y.) 298, 21 N. Y. Suppl. 941.

Existence of relationship of master and servant see Diehl *v.* Roberts, 134 Cal. 164, 66 Pac. 202; Lovingston *v.* Bauchens, 34 Ill. App. 544; Louisville Water Co. *v.* Phillips, 89 S. W. 700, 28 Ky. L. Rep. 557; Doherty *v.* Rice, 182 Mass. 182, 64 N. E. 967; Driscoll *v.* Towle, 181 Mass. 416, 63 N. E. 922; Reagan *v.* Casey, 160 Mass. 374, 36 N. E. 58; Svenson *v.* Atlantic Mail Steamship Co., 57 N. Y. 108 [*affirming* 33 N. Y. Super. Ct. 277]; Tway *v.* Salvin, 109 N. Y. App. Div. 288, 95 N. Y. Suppl. 653; O'Leary *v.* Muldoon, 56 N. Y. App. Div. 626, 67 N. Y. Suppl. 511; Callan *v.* Pugh, 54 N. Y. App. Div. 545, 66 N. Y. Suppl. 1118; Lannen *v.* Albany Gas Light Co., 46 Barb. (N. Y.) 264 [*affirmed* in 44 N. Y. 459]; Glaser *v.* Michelson, 86 N. Y. Suppl. 286; Thurn *v.* Williams, 84 N. Y. Suppl. 296; Missouri Pac. R. Co. *v.* Sasse, (Tex. Civ. App. 1893) 22 S. W. 187; Henning *v.* Western Union Tel. Co., 43 Fed. 131.

Existence of relationship of independent contractor see Mahoney *v.* Dankwart, 108 Iowa 321, 79 N. W. 134; Klages *v.* Gillette-Herzog Mfg. Co., 86 Minn. 458, 90 N. W. 1116.

Existence of negligence see Melvin *v.* Pennsylvania Steel Co., 180 Mass. 196, 62 N. E. 379; Perry *v.* Smith, 156 Mass. 340, 31 N. E. 9; Sheehan *v.* Edgar, 58 N. Y. 631; Van Houten *v.* Fleischman, 1 Misc. (N. Y.) 130, 20 N. Y. Suppl. 643 [*affirmed* in 142 N. Y. 624, 37 N. E. 565]; Dumontier *v.* Stetson, etc., Co., 39 Wash. 264, 81 Pac. 693.

As within scope of servant's employment see Southern R. Co. *v.* James, 118 Ga. 340, 45 S. E. 303, 63 L. R. A. 257; Healy *v.* Patterson, 123 Iowa 73, 98 N. W. 576; Haehl *v.* Wabash R. Co., 119 Mo. 325, 24 S. W. 737; Reilly *v.* Hannibal, etc., R. Co., 94 Mo. 600, 7 S. W. 407; Stewart *v.* Baruch, 103 N. Y. App. Div. 577, 93 N. Y. Suppl. 161; Cogswell *v.* Rochester Mach. Screw Co., 39 N. Y. App. Div. 223, 57 N. Y. Suppl. 145; Vogel *v.* McAuliffe, 18 R. I. 791, 31 Atl. 1; Texas, etc., R. Co. *v.* Taylor, 31 Tex. Civ. App. 617, 73 S. W. 1081; Houston, etc., R. Co. *v.* Bell, (Tex. Civ. App. 1903) 73 S. W. 56 [*affirmed* in 97 Tex. 71, 75 S. W. 484]; Davis *v.* Dregne, 120 Wis. 63, 97 N. W. 512.

Knowledge of servant's character see Carson *v.* Canning, 180 Mass. 461, 62 N. E. 964.

8. See Rome R. Co. *v.* Barnett, 94 Ga. 446, 20 S. E. 355.

9. Rome R. Co. *v.* Barnett, 94 Ga. 446, 20 S. E. 355.

is *prima facie* sufficient to show that it was defendant's property, and that the driver in charge of it was his servant.[10]

6. Matters to Be Proved. Allegations in a complaint, where not of the gist of the action, such as the mental unfitness of the servant and the intent of the master, need not be proved by plaintiff to authorize a recovery.[11]

7. Questions of Fact — a. In General. Where the facts are in dispute, or more than one inference can be drawn therefrom, the question of the employee's negligence is for the jury,[12] as is the contributory negligence of plaintiff,[13] the cause of the injury,[14] the existence of the relation of master and servant,[15] the existence of the relationship of contractor and contractee,[16] whether an employee is a servant of the contractor or contractee,[17] whether the servant acted within the scope of his employment,[18] ratification by the master of the servant's

10. Edgeworth *v.* Wood, 58 N. J. L. 463, 33 Atl. 940; Seaman *v.* Koehler, 122 N. Y. 646, 25 N. E. 353; Baldwin *v.* Abraham, 57 N. Y. App. Div. 67, 67 N. Y. Suppl. 1079 [*affirmed* in 171 N. Y. 677, 64 N. E. 1118]; Isenman *v.* Miles, 38 N. Y. App. Div. 469, 56 N. Y. Suppl. 420; Cohn *v.* David Mayer Brewing Co., 38 N. Y. App. Div. 5, 56 N. Y. Suppl. 293; Doherty *v.* Lord, 8 Misc. (N. Y.) 227, 28 N. Y. Suppl. 720; Tuomey *v.* O'Reilly, etc., Co., 3 Misc. (N. Y.) 302, 22 N. Y. Suppl. 930 [*affirmed* in 142 N. Y. 678, 37 N. E. 825]; Elze *v.* Baumann, 2 Misc. (N. Y.) 72, 21 N. Y. Suppl. 782.

11. Christian *v.* Columbus, etc., R. Co., 90 Ga. 124, 15 S. E. 701.

12. Louisville, etc., R. Co. *v.* Tow, 63 S. W. 27, 23 Ky. L. Rep. 408, 66 L. R. A. 941; Samuel *v.* Novak, 99 Md. 558, 58 Atl. 19; Abbott *v.* Concord, etc., R. Co., 69 N. H. 176, 44 Atl. 912; Diehl *v.* Robinson, 72 N. Y. App. Div. 19, 76 N. Y. Suppl. 252; Krulder *v.* Woolverton, 11 Misc. (N. Y.) 537, 32 N. Y. Suppl. 742 [*affirmed* in 152 N. Y. 638, 46 N. E. 1148]. See, generally, Negligence.

13. Louisville, etc., R. Co. *v.* Tow, 63 S. W. 27, 23 Ky. L. Rep. 408, 66 L. R. A. 941; Diehl *v.* Robinson, 72 N. Y. App. Div. 19, 76 N. Y. Suppl. 252; Krulder *v.* Woolverton, 11 Misc. (N. Y.) 537, 32 N. Y. Suppl. 742 [*affirmed* in 152 N. Y. 638, 46 N. E. 1148]; Missouri, etc., R. Co. *v.* Freeman, (Tex. Civ. App. 1903) 73 S. W. 542. See, generally, Negligence.

14. Samuel *v.* Novak, 99 Md. 558, 58 Atl. 19.

15. *Maryland.*—Sacker *v.* Waddell, 88 Md. 43, 56 Atl. 399, 103 Am. St. Rep. 374.

Massachusetts.— Onlighan *v.* Butler, 189 Mass. 287, 75 N. E. 726; Preston *v.* Knight, 120 Mass. 5.

Minnesota.— Gahagan *v.* Aermotor Co., 67 Minn. 252, 69 N. W. 914.

Missouri.— Sandifer *v.* Lynn, 52 Mo. App. 553.

New York.— Howard *v.* Ludwig, 171 N. Y. 507, 64 N. E. 172; Stone *v.* Western Transp. Co., 38 N. Y. 240; Glavin *v.* Savarese, 5 N. Y. Suppl. 547.

Ohio.— Lima R. Co. *v.* Little, 67 Ohio St. 91, 65 N. E. 861.

Pennsylvania.— Connor *v.* Pennsylvania R. Co., 24 Pa. Super. Ct. 241.

See 34 Cent. Dig. tit. "Master and Servant," § 1274.

16. *Illinois.*— Arasmith *v.* Temple, 11 Ill. App. 39.

Minnesota.— Rait *v.* New England Furniture, etc., Co., 66 Minn. 76, 68 N. W. 729; Barg *v.* Bonsfield, 65 Minn. 335, 68 N. W. 45.

New York.— Brophy *v.* Bartlett, 108 N. Y. 632, 15 N. E. 368; Benedict *v.* Martin, 36 Barb. 288; Goldman *v.* Mason, 2 N. Y. Suppl. 337.

North Carolina.— Cratt *v.* Albermarle Timber Co., 132 N. C. 151, 43 S. E. 597.

Wisconsin.— Carlson *v.* Stocking, 91 Wis. 432, 65 N. W. 58.

See 34 Cent. Dig. tit. "Master and Servant," § 1276.

If on the evidence it is doubtful whether the person in charge of the work was an independent contractor the question is one for the jury and a failure to submit such question would be erroneous. Vosbeck *v.* Kellogg, 78 Minn. 176, 80 N. W. 957.

What constitutes an independent employment, under which the relation of master and servant does not exist, is one for the court, which should define its requisites in the instructions. Emmerson *v.* Fay, 94 Va. 60, 26 S. E. 386. And if there is no conflict in the evidence as to the terms of the contract, the question whether it creates the relationship of independent contractor is one of law. Green *v.* Soule, 145 Cal. 96, 78 Pac. 337.

17. Greenberg *v.* Western Turf Assoc., 148 Cal. 126, 82 Pac. 684; Oulighan *v.* Butler, 189 Mass. 287, 75 N. E. 726.

18. *Alabama.*— Highland Ave., etc., R. Co. *v.* Robinson, 125 Ala. 483, 28 So. 28.

Connecticut.— Thames Steamboat Co. *v.* Housatonic R. Co., 24 Conn. 40, 63 Am. Dec. 154.

Iowa.— Lewis *v.* Schultz, 98 Iowa 341, 67 N. W. 266.

Maryland.— Baltimore, etc., R. Co. *v.* Deck, 102 Md. 669, 62 Atl. 958; Deck *v.* Baltimore, etc., R. Co., 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 399; Baltimore Consol. R. Co. *v.* Pierce, 89 Md. 495, 43 Atl. 940, 45 L. R. A. 527.

Massachusetts.— Collins *v.* Wise, 190 Mass. 206, 76 N. E. 657; Brough *v.* Towle, 187 Mass. 590, 73 N. E. 851.

Michigan.— Smaltz *v.* Boyce, 109 Mich. 382, 69 N. W. 21.

Minnesota.— Waters *v.* Pioneer Fuel Co.,

act,[19] and the incompetency of the servant.[20] So whether the master knew or ought to have known of the carelessness or incompetency of the servant, and whether he might have known by the exercise of diligence, are questions for the jury.[21] And it is a question for the jury whether a railroad tricycle was a dangerous instrumentality, within the rule holding the master liable for injuries caused by his servant in the use thereof.[22] So the question whether injury ought reasonably to have been anticipated from the doing of work let out to a contractor is a question for the jury.[23] Where there is conflicting evidence, or different inferences may be drawn, the liability of the contractee for the acts of his contractor or the contractor's servants is a question for the jury.[24]

b. Nonsuit or Directed Verdict. If there is any evidence tending to prove the cause of action, from which different inferences may be drawn, or if there is a conflict in the evidence as to material issues, a nonsuit or directed verdict should not be granted.[25] On the other hand, where the evidence is not conflicting and

52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564.

New York.— Magar *v.* Hammond, 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. N. S. 1038; Girvin *v.* New York Cent., etc., R. Co., 166 N. Y. 289, 59 N. E. 921 [*affirming* 52 N. Y. App. Div. 562, 65 N. Y. Suppl. 299]; Greene *v.* New York, etc., R. Co., 102 N. Y. App. Div. 322, 92 N. Y. Suppl. 424; P. Cox Shoe Mfg. Co. *v.* Gorsline, 63 N. Y. App. Div. 517, 71 N. Y. Suppl. 619; Petersen *v.* Hubbell, 12 N. Y. App. Div. 372, 42 N. Y. Suppl. 554; Tierney *v.* Syracuse, etc., R. Co., 85 Hun 146, 32 N. Y. Suppl. 627; Tinker *v.* New York, etc., R. Co., 71 Hun 431, 24 N. Y. Suppl. 977; Foley *v.* Young Men's Christian Assoc., 90 N. Y. Suppl. 406; Baylis *v.* Schwalbach Cycle Co., 14 N. Y. Suppl. 933.

North Carolina.—Jackson *v.* American Tel., etc., Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738.

Pennsylvania.— Brennan *v.* Merchant, 205 Pa. St. 258, 54 Atl. 891.

South Carolina.— Redding *v.* South Carolina R. Co., 3 S. C. 1, 16 Am. Rep. 681.

South Dakota.— Lovejoy *v.* Campbell, 16 S. D. 231, 92 N. W. 24; Knight *v.* Towles, 6 S. D. 575, 62 N. W. 964.

Texas.— St. Louis Southwestern R. Co. *v.* Mayfield, 35 Tex. Civ. App. 82, 79 S. W. 365.

Wisconsin.— See Bergman *v.* Hendrickson, 106 Wis. 434, 82 N. W. 304, 80 Am. St. Rep. 47.

United States.— De Haven *v.* Hennessey Bros., etc., Co., 137 Fed. 472, 69 C. C. A. 620.

See 34 Cent. Dig. tit. "Master and Servant," § 1275.

But where the facts are undisputed and do not admit of a different or contrary inference, the question is one of law and should not be submitted to the jury. Barmore *v.* Vicksburg, etc., R. Co., 85 Miss. 426, 38 So. 210, 70 L. R. A. 627; Ochsenbein *v.* Shapley, 85 N. Y. 214; Collins *v.* Butler, 83 N. Y. App. Div. 12, 81 N. Y. Suppl. 1074; Connor *v.* Pennsylvania R. Co., 24 Pa. Super. Ct. 241.

19. Cobb *v.* Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909.

20. Calumet Electric St. R. Co. *v.* Peters, 88 Ill. App. 112.

21. Calumet Electric St. R. Co. *v.* Peters, 88 Ill. App. 112.

22. Barmore *v.* Vicksburg, etc., R. Co., 85 Miss. 426, 38 So. 210, 70 L. R. A. 627.

23. Samuel *v.* Novak, 99 Md. 558, 58 Atl. 19.

24. Appel *v.* Eaton, etc., Co., 97 Mo. App. 428, 71 S. W. 741; Hart *v.* Ryan, 3 Silv. Sup. (N. Y.) 415, 6 N. Y. Suppl. 921; Berberich *v.* Ebach, 131 Pa. St. 165, 18 Atl. 1008.

Notice imputed to employer.— Where an independent contractor, employed to keep defendant supplied with coal, delivers a wagon-load through a manhole in the sidewalk, maintained by defendant for that purpose by permission of the city, and fails to properly replace the manhole cover, it is for the jury to say whether notice could be imputed to defendant, so as to render him liable for an accident to a traveler occurring fifteen minutes later. Benjamin *v.* Metropolitan St. R. Co., 133 Mo. 274, 34 S. W. 590.

Riding on train by invitation.— The question whether an employee of a subcontractor rode on a train of the construction company, at the invitation and with the consent of the construction company, where the employees of the subcontractors were in the habit of riding to and from their work on the construction train, is one of fact for the jury. Mathews *v.* Great Northern R. Co., 81 Minn. 363, 84 N. W. 101, 83 Am. St. Rep. 383.

Whether work intrinsically dangerous.— Whether the work contracted for, where the contract was to make excavations for sewers, called, in its natural and reasonable execution, for such operation as would obviously expose plaintiff's property to probable injury, is a question for the jury. Norwalk Gaslight Co *v.* Norwalk, 63 Conn. 495, 28 Atl. 32.

25. *California.*— Dixon *v.* Pluns, (1893) 31 Pac. 931.

Illinois.— Consolidated Fireworks Co. of America *v.* Koehl, 190 Ill. 145, 60 N. E. 87; Morris *v.* Chicago Union Traction Co., 119 Ill. App. 527.

Missouri.— Gayle *v.* Missouri Car, etc., Co., 177 Mo. 427, 76 S. W. 987.

only one inference can be drawn therefrom, or where there is no evidence to prove a material fact as to which plaintiff has the burden of proof, it is proper to grant a nonsuit or direct a verdict.[26]

8. Instructions. The rules applicable to instructions in civil actions in general apply in actions against a master to recover for injuries resulting from the acts of his servants or from the acts of an independent contractor or his servants.[27]

Montana.— Jensen *v.* Barbour, 15 Mont. 582, 39 Pac. 906.

New Hampshire.— Abbott *v.* Concord, etc., R. Co., 69 N. H. 176, 44 Atl. 912; Rowell *v.* Boston, etc., R. Co., 68 N. H. 358, 44 Atl. 488.

New Jersey.— Wolfarth *v.* Sternberg, 70 N. J. L. 198, 56 Atl. 173; Grosshart *v.* Samuel, 65 N. J. L. 543, 47 Atl. 501.

New York.— Crofoot *v.* Syracuse, etc., R. Co., 75 N. Y. App. Div. 157, 77 N. Y. Suppl. 389; Magar *v.* Hammond, 54 N. Y. App. Div. 532, 67 N. Y. Suppl. 63; Fowler *v.* Holmes, 3 N. Y. Suppl. 816.

Ohio.— Nelson Business College Co. *v.* Lloyd, 60 Ohio St. 448, 54 N. E. 471, 71 Am. St. Rep. 729, 46 L. R. A. 314.

Texas.— Lipscomb *v.* Houston, etc., R. Co., 95 Tex. 5, 64 S. W. 923, 93 Am. St. Rep. 804, 55 L. R. A. 869.

See 34 Cent. Dig. tit. "Master and Servant," § 1274.

26. *Iowa.*— Hirschl *v.* J. I. Case Threshing Mach. Co., 85 Iowa 451, 52 N. W. 363.

Maryland.— Hall *v.* Poole, 94 Md. 171, 50 Atl. 703.

Massachusetts.— McCarthy *v.* Timmins, 178 Mass. 378, 59 N. E. 1038, 96 Am. St. Rep. 490.

Minnesota.— Mouso *v.* A. N. Kellogg Newspaper Co., 58 Minn. 406, 59 N. W. 941.

New York.— Fish *v.* Coolidge, 47 N. Y. App. Div. 159, 62 N. Y. Suppl. 238; Meighan *v.* Hollister, 60 N. Y. Super. Ct. 139, 17 N. Y. Suppl. 180; Ferris *v.* Aldrich, 19 N. Y. Suppl. 353; Kuebler *v.* New York, 15 N. Y. Suppl. 187; Walker *v.* Wilson, 2 N. Y. Suppl. 154; Ditberner *v.* Rogers, 13 Abb. N. Cas. 436.

Washington.— Weideman *v.* Tacoma R., etc., Co., 7 Wash. 517, 35 Pac. 414.

United States.— Doran *v.* Flood, 47 Fed. 543.

See 34 Cent. Dig. tit. "Master and Servant," § 1274.

27. See, generally, Trial.

Instructions as to negligence.— It is proper to charge that the jury may consider, in determining whether the servant was negligent, the fact that he had no practical experience in the work, where that was admitted. Bower *v.* Cushman, 55 N. Y. App. Div. 45, 66 N. Y. Suppl. 1103. Where the evidence failed to show negligence on the part of defendant's servants, it was proper to instruct that if the jury believed the injury sustained was caused by an unavoidable accident on the part of the servants of defendant without negligence on their part, they should render a verdict for defendant. Steen *v.* Williamson, 92 Cal. 65, 28 Pac. 53. As to what constitutes negligence in sending out servants without foreman where constructing telephone line see Clay *v.* Postal Tel. Cable Co., 70 Miss. 406, 11 So. 658.

Construction of charge.— An instruction, in an action for the death of a person by the reckless driving of another, that if defendant's servants, "while in the service of defendant," through their negligence, caused a wagon in their control to run against decedent, causing his death, a verdict for plaintiff should be rendered, was not open to the objection that it authorized a verdict without finding that the servants were at the time of the accident engaged in the performance of their duties. Louisville Water Co. *v.* Phillips, 89 S. W. 700, 28 Ky. L. Rep. 557.

In an action against both master and servant an instruction defining the extent of the master's liability for the acts of his servant should be limited to the liability sought to be imposed on the master as such for the acts of the servant. Johnson *v.* Barber, 10 Ill. 425, 50 Am. Dec. 416.

Charge as to scope of employment.— An instruction to find for defendant, if the employee is not acting within the scope of his employment, is improper, standing alone, without further explanation. Case *v.* Hulsehush, 122 Ala. 212, 26 So. 155. An instruction precluding a recovery if the jury should believe that the act of the servant was malicious "and not done in the interest and business of the defendant" is erroneous and misleading, where used instead of the phrase "not done in the line of his employment and while acting within the scope of his authority." Williams *v.* Southern R. Co., 115 Ky. 320, 73 S. W. 779, 24 Ky. L. Rep. 2214. An instruction that if a servant's wrongful act is not done in the interest or in the prosecution of the master's business the master is not liable is erroneous as excluding liability for acts of the servant within the scope of his employment, but not with the intent of promoting the master's business. Southern R. Co. *v.* Wildman, 119 Ala. 565, 24 So. 764. An instruction that defendant was liable only for those acts committed by its servants in doing those things necessary in getting a piano sufficiently guarded defendant's rights where the servant had committed an assault on plaintiff as they were removing a piano at the request of plaintiff. Canton *v.* Grinnell, 138 Mich. 590, 101 N. W. 811. Sufficiency of instruction as to departure of servant from the direct course of duty, although for a purpose of his own, as not of itself such a departure from the master's business as to relieve him from liability see Loomis *v.* Hollister, 75 Conn. 718, 55 Atl. 561.

The parties, on request,[28] are entitled to instructions correctly stating the law of the case.[29] The instructions must be applicable to the issues[30] and to the facts which the evidence tends to prove.[31] Matters in dispute must not be assumed as facts,[32] and the charge must not be misleading.[33] Questions of law must not be submitted,[34] while on the other hand the instructions must not invade the province of the jury.[35] The instructions are to be construed as a whole, and the fact that one portion considered separately might be open to contradiction does not constitute error if the charge is correct in its entirety.[36]

9. Verdict, Findings, and Judgment. On this question it is sufficient to say that the general rules applicable in civil cases as to verdict and findings[37]

Contributory negligence.— An instruction stating the liability of the master for the acts of his servants is erroneous where it wholly ignores the necessity of proof of care on the part of plaintiff. Chicago City R. Co. *v.* Freeman, 6 Ill. App. 608. But an instruction which does not pretend to determine the liability of defendant but merely lays down the general principles of care required by its servants need not state that plaintiff when injured must have been in the exercise of care. Chicago, etc., R. Co. *v.* Woolridge, 32 Ill. App. 237.

28. Kelly *v.* Doody, 116 N. Y. 575, 22 N. E. 1084; Montgomery *v.* Sartirano, 16 N. Y. App. Div. 95, 44 N. Y. Suppl. 1066; Kelly *v.* Cohoes Knitting Co., 84 Hun (N. Y.) 154, 32 N. Y. Suppl. 459. See Rome, etc., R. Co. *v.* Chasteen, 88 Ala. 591, 7 So. 94 (requests to charge must be complete in themselves); Sloane *v.* Elmer, 64 N. Y. 201 (what constitutes refusal to charge).

29. Alexander *v.* Mandeville, 33 Ill. App. 589; Flint *v.* Gloucester Gas Light Co., 3 Allen (Mass.) 343.

General instructions as to the liability of a master for the acts of his servant, although correct, may be insufficient where there are no specific instructions adapted to the facts bearing on each of the claims of both parties. Dore *v.* Babcock, 74 Conn. 425, 50 Atl. 1016. For instance, where the court instructed that "to ratify" means to confirm or approve of, and that such ratification may be signified by acts of omission as well as of commission, and that in deciding the question the jury might consider what defendant did not do that he should have done, as well as what he did do indicative of affirmance, it was held erroneous because the jury should have been told in the particular case under what circumstances the retention of an employee constitutes ratification, and that they might have found ratification from the failure of the master to see plaintiff after she had told her story. Cobb *v.* Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909.

30. Louisville Water Co. *v.* Phillips, 89 S. W. 700, 28 Ky. L. Rep. 557; Shaw *v.* Hollenback, 55 S. W. 686, 21 Ky. L. Rep. 1561; Heller *v.* Donellan, 45 Misc. (N. Y.) 355, 90 N. Y. Suppl. 352.

31. Christian *v.* Columbus, etc., R. Co., 90 Ga. 124, 15 S. E. 701; Barabasz *v.* Kabat, 86 Md. 23, 37 Atl. 720; Mullen *v.* Conlon, (Mo. 1887) 4 S. W. 925; Mound City Paint, etc., Co. *v.* Conlon, 92 Mo. 221, 4 S. W. 922; Fisher *v.* Texas Tel. Co., 34 Tex. Civ. App. 308, 79 S. W. 50.

32. Rome, etc., R. Co. *v.* Chasteen, 88 Ala. 591, 7 So. 94; Samuel *v.* Novak, 99 Md. 558, 58 Atl. 19; American Straw Board Co. *v.* Smith, 94 Md. 19, 50 Atl. 414.

Instruction not open to objection.— An instruction that if plaintiff fell into a coalhole "which had been left open by defendant's servant or employee while engaged in the course of his employment," etc., although inartificially drawn, is not open to the objection that it assumes that the person opening the hole was defendant's servant. Todd *v.* Havlin, 72 Mo. App. 565.

33. *Alabama.*— Rome, etc., R. Co. *v.* Chasteen, 88 Ala. 591, 7 So. 94.

Illinois.— Chicago *v.* O'Malley, 196 Ill. 197, 63 N. E. 652.

Missouri.— Mullen *v.* Conlon, (1887) 4 S. W. 925; Mound City Paint, etc., Co. *v.* Conlon, 92 Mo. 221, 4 S. W. 922.

New York.— Kelly *v.* Doody, 116 N. Y. 575, 22 N. E. 1084.

England.— Chaproniere *v.* Mason, 21 T. L. R. 633.

See 34 Cent. Dig. tit. "Master and Servant," § 1277.

34. Krzikowsky *v.* Sperring, 107 Ill. App. 493, holding that the use of the phrase "line of his duty and acting within the scope of his authority" did not submit to the jury a question of law.

35. Prairie State L. & T. Co. *v.* Doig, 70 Ill. 52; Campbell *v.* Trimble, 75 Tex. 270, 12 S. W. 863.

36. International, etc., R. Co. *v.* Branch, 29 Tex. Civ. App. 144, 68 S. W. 338.

37. See, generally, Trial.

Finding as conclusion of law.—In an action against an employer for an assault committed on plaintiff by an employee, a special finding of the jury that the employee was not acting in the course of his employment at the time of the assault is a mere conclusion of law, and may be disregarded in rendering judgment where other special findings show that the employee was acting in the course of his employment at the time. Fick *v.* Chicago, etc., R. Co., 68 Wis. 469, 32 N. W. 527, 60 Am. Rep. 878.

Construction of finding.— A finding that defendant's servant drove the cart against plaintiff's carriage "violently, negligently, and carelessly," and "with great force and violence," throwing plaintiff upon the pavement, imports simply negligence, and not a

and judgment[38] are applicable. These general principles are elsewhere considered in this work.

10. Appeal and Error. The rules which govern the disposition of appeals from judgments in civil actions in general apply equally well to an appeal from a judgment in an action against a master to recover for the acts of his servant or independent contractor.[39]

VI. Liability of Third Person to Master For Injuries to Servant.[40]

As a general rule the master has no right of action for personal injuries to his servant unless some loss of service or capacity to serve results therefrom.[41] This rule has been applied to assaults upon the servant.[42] The principles which govern the right to recover in such a case are those which govern the right of a parent to recover for the loss of services of his child by reason of personal injuries,[43] or an action by a husband to recover for injuries to his wife.[44]

VII. Interference With the Relation by Third Persons.

A. Civil Liability[45] — 1. Enticing Servant to Leave Employment — a. General Rule. A third person who wilfully entices a servant, knowing that he is in the

wilful act, so as to relieve defendant from liability. Metcalf *v.* Baker, 57 N. Y. 662.

38. See, generally, Judgments.

Recovery against master where servant acquitted.— Where a master and servant are joined as defendants in an action founded solely on the negligence of the servant, on the acquittal of the servant there can be no recovery against the master. Indiana Nitroglycerine, etc., Co. *v.* Lippincott Glass Co., 165 Ind. 361, 75 N. E. 649 [*reversing* (App. 1904) 72 N. E. 183]; Montfort *v.* Hughes, 3 E. D. Smith (N. Y.) 591. *Contra*, Gardner *v.* Southern R. Co., 65 S. C. 341, 43 S. E. 816.

Judgment as evidence in action by master against servant.— In an action by a master to recover from his servant the damages which he has been made to pay for the servant's negligence, the judgment against the master for the damages is evidence against the servant who was notified and who was a witness in the damage case; and such judgment is properly taken as the basis for the judgment in the case against the servant unless error is shown. Costa *v.* Yochim, 104 La. 170, 28 So. 992. Judgments as conclusive against persons responsible over see Judgments. 23 Cyc. 1270.

39. See, generally, Appeal and Error.

Disturbing verdict based on conflicting evidence see Chicago Hansom Cab Co. *v.* McCarthy, 35 Ill. App. 199; Oelerich *v.* New York Condensed Milk Co., 2 Silv. Sup. (N. Y.) 563, 6 N. Y. Suppl. 127.

Error in instructions as harmless see Yazoo, etc., R. Co. *v.* Martin, (Miss. 1901) 29 So. 829; Strohl *v.* Levan, 39 Pa. St. 177; Repsher *v.* Wattson, 17 Pa. St. 365.

40. **Seduction of servant** see Seduction.

41. Woodward *v.* Walton, 2 B. & P. N. R. 476; Robert Mary's Case, 9 Coke 111*b*, 113*a*; Martinez *v.* Gerber, 5 Jur. 463, 10 L. J. C. P. 314, 3 M. & G. 88, 3 Scott N. R. 386, 42 E. C. L. 55.

If the servant dies of the injuries it seems that the master has no cause of action. Osborn *v.* Gillett, L. R. 8 Exch. 88, 42 L. J. Exch. 53, 28 L. T. Rep. N. S. 197, 21 Wkly. Rep. 409; Higgins *v.* Butcher, Yelv. 89.

Actions for torts springing from contract, which consist in a mere omission of a contract duty, must be brought by the party injured, and cannot be sustained by the master on the part of his servant for loss of services. Fairmount, etc., St. Pass. R. Co. *v.* Stutler, 54 Pa. St. 375, 93 Am. Dec. 714.

Menial servants.— This rule has been held inapplicable, however, to permit a recovery where the person injured was an agricultural laborer and not a menial servant. Burgess *v.* Carpenter, 2 S. C. 7, 16 Am. Rep. 643. But such limitation is not now recognized.

False imprisonment.— Where a person of full age is hired by the year, as a clerk, by a merchant, the relation of master and servant is thereby created sufficient to sustain an action on the case by the employer, for loss of service, against one who unlawfully imprisons the person employed. Woodward *v.* Washburn, 3 Den. (N. Y.) 369.

42. Fluker *v.* Georgia R., etc., Co., 81 Ga. 461, 8 S. E. 529, 12 Am. St. Rep. 328, 2 L. R. A. 843; Voss *v.* Howard, 28 Fed. Cas. No. 17,013, 1 Cranch C. C. 251.

43. See Parent and Child.

44. See Husband and Wife, 21 Cyc. 1525 *et seq.*

45. **Actions by parent** for enticing away or harboring child see Parent and Child.

Conspiracy see Conspiracy.

Injunctive relief see Injunctions, 22 Cyc. 854.

Interference by labor unions or their representatives see Labor Unions.

Interference with contract rights in general see Actions, 1 Cyc. 662–665.

Interference with obtaining employment as tort in general see Torts.

Seduction of servant see Seduction.

employ of another, to quit such service is liable in damages to the master.[46] This rule has been reiterated by statutes in several of the states,[47] which have been held constitutional.[48] It is immaterial that the servant is enticed away before the commencement of the performance of services.[49] But a person making a contract with a servant of another, to take effect at the expiration of his term of service, is not liable.[50] It must be shown that the third person acted maliciously, not in the sense of actual ill-will to the employer, but in the sense of an act done to the apparent damage of another without legal excuse.[51] It follows that if a

46. *Georgia.*— Employing Printers' Club *v.* Doctor Blosser Co., 122 Ga. 509, 50 S. E. 353, 106 Am. St. Rep. 137, 69 L. R. A. 90; Caldwell *v.* O'Neal, 117 Ga. 775, 45 S. E. 41; Jones *v.* Blocker, 43 Ga. 331.

Louisiana.— Dickson *v.* Dickson, 33 La. Ann. 1261. But see Kline *v.* Eubanks, 109 La. 241, 33 So. 211, holding that employing a laborer already employed by another person will not create a liability on the part of the one employing him, unless it is done with some degree of threat, fraud, falsehood, deception, or benefit.

Massachusetts.— Walker *v.* Cronin, 107 Mass. 555.

New Hampshire.— Bixby *v.* Dunlap, 56 N. H. 456, 22 Am. Rep. 475.

New Jersey.— Noice *v.* Brown, 39 N. J. L. 569. See also Frank *v.* Herold, 63 N. J. Eq. 443, 52 Atl. 152.

New York.— Haight *v.* Badgeley, 15 Barb. 499.

North Carolina.— Haskins *v.* Royster, 70 N. C. 601, 16 Am. Rep. 780.

Texas.— J. S. Brown Hardware Co. *v.* Indiana Stove Works, 96 Tex. 453, 73 S. W. 800 [*reversing* (Civ. App. 1902) 69 S. W. 805]. See also Raymond *v.* Yarrington, 96 Tex. 443, 72 S. W. 580, 73 S. W. 800, 97 Am. St. Rep. 914, 62 L. R. A. 962.

United States.— Angle *v.* Chicago, etc., R. Co., 151 U. S. 1, 14 S. Ct. 240, 38 L. ed. 55; Milburne *v.* Byrne, 17 Fed. Cas. No. 9,542, 1 Cranch C. C. 239.

England.— Quinn *v.* Leathem, [1901] A. C. 495, 65 J. P. 708, 70 L. J. P. C. 76, 82 L. T. Rep. N. S. 289, 50 Wkly. Rep. 139; Temperton *v.* Russell, [1893] 1 Q. B. 715, 57 J. P. 676, 62 L. J. Q. B. 412, 69 L. T. Rep. N. S. 78, 4 Reports 376, 41 Wkly. Rep. 565; Bowen *v.* Hall, 6 Q. B. D. 333, 45 J. P. 373, 50 L. J. Q. B. 305, 44 L. T. Rep. N. S. 75, 29 Wkly. Rep. 367; Lumley *v.* Gye, 2 E. & B. 216, 17 Jur. 827, 22 L. J. Q. B. 463, 1 Wkly. Rep. 432, 75 E. C. L. 216.

See 34 Cent. Dig. tit. "Master and Servant," § 1283.

Contra.— See Bourlier *v.* Macauley, 91 Ky. 135, 15 S. W. 60, 34 Am. St. Rep. 171, 11 L. R. A. 550.

Menial services.— The rule is not confined to contracts for menial services. Walker *v.* Cronin, 107 Mass. 555.

Where one agrees to work out a debt, and thereafter hires out to another, and the creditor takes the servant away after such hiring, the creditor is not liable for enticing, at least not until the debt is worked out. Wharton *v.* Jossey, 46 Ga. 578.

Justification.— The third person is not liable if he was justified, but there is no general rule as to what constitutes justification which must be determined by the circumstances of the particular case. In analyzing the circumstances, regard might be had to the nature of the contract broken, the position of the parties to the contract, the grounds for the breach, the means employed to procure the breach, the relation of the person procuring the breach to the person breaking the contract, and also to the object of the person procuring the breach. Glamorgan Coal Co. *v.* South Wales Miners' Federation, [1902] 2 K. B. 545, 72 L. J. K. B. 893, 89 L. T. Rep. N. S. 393, 52 Wkly. Rep. 165.

47. See the statutes of the several states.

In Kentucky, under a statute providing that any person who wilfully entices another to break a contract of service shall be liable to the person injured, it has been held that a theatrical manager who maliciously induces an actress to break her engagement at another theater, and to perform at his own, is not liable to the manager of the first theater, since the statute was intended to apply to farm laborers and other like laborers, and not to the services of an artist. Bourlier *v.* Macauley, 91 Ky. 135, 15 S. W. 60, 12 Ky. L. Rep. 737, 34 Am. St. Rep. 171, 11 L. R. A. 550.

48. Hoole *v.* Dorroh, 75 Miss. 257, 22 So. 829.

49. Walker *v.* Cronin, 107 Mass. 555; Boston Glass Manufactory *v.* Binney, 4 Pick. (Mass.) 425; Lumley *v.* Gye, 2 E. & B. 216, 17 Jur. 827, 22 L. J. Q. B. 463, 1 Wkly. Rep. 432, 25 E. C. L. 216.

Under a statute fixing a penalty for enticing one to "leave the service" of his employer, it is not an offense to entice servants to quit work where they have been hired, but have not commenced work. Sears *v.* Whitaker, 136 N. C. 37, 48 S. E. 517.

50. Boston Glass Manufactory *v.* Binney, 4 Pick. (Mass.) 425.

51. Morgan *v.* Smith, 77 N. C. 37.

The term "malicious," used in this connection, is to be given a liberal meaning. The act is malicious when the thing done is with the knowledge of plaintiff's rights, and with the intent to interfere therewith. It is a wanton interference with another's contractual rights. Ineffective persuasion to induce another to violate his contract would not of itself be actionable, but if the persuasion be used for the purpose of injuring plaintiff, or benefiting defendant at the expense of plaintiff, with a knowledge of the subsistence of

servant is employed by a third person, without notice of his employment by another, the third person is not liable.[52] Employment by an agent[53] or tenant[54] of a third person, without the latter's authority, knowledge, or consent, does not make him liable, unless he subsequently ratifies the act. If the servant is not legally bound because of the invalidity of the contract, and he himself terminates the relation, no action can be maintained against one who subsequently employs such servant.[55] It has been held that where one who employs a person, without knowledge that he is the servant of another and has quit before the expiration of his term, discovers such facts before the termination of the original employment, he is not liable, although he afterward refuses to discharge the servant.[56]

b. Relation of Master and Servant. To maintain an action for enticing away a servant, there must be a contract of hire with the party complaining, entered into by the servant himself or by some other person having authority to bind him to the service.[57] To constitute one a servant, so that a third person will be liable to the master for enticing him away, the relation need not be created by a written contract,[58] except where the statute otherwise provides;[59] and it is immaterial that the contract is invalid, under the statute of frauds, because not in writing.[60] A contract of hire, although voidable on the part of the servant, sufficiently creates the relation.[61] So if the contract is in writing it is not essential that it should have been made in the presence of witnesses.[62] Furthermore the terms of the employment need not bind the servant to give his exclusive personal services to the master for the whole time agreed on.[63] A cropper is a servant, within the rule as to enticing away.[64]

c. Actions. An action for enticing away a servant is for a tort, and not for a breach of an implied contract.[65] The common-law remedy by an action on the case is available, notwithstanding the existence of a remedy by an action for the penalty, as provided for by statute, where it is merely cumulative.[66] The right to sue may be lost by failure to notify the third person of the prior contract of hire,[67] or by a failure to comply with conditions precedent in the statute.[68] If

the contract, it becomes a malicious act, and if injury ensues from it a cause of action accrues to the injured party. Employing Printers' Club *v.* Doctor Blosser Co., 122 Ga. 509, 50 S. E. 353, 106 Am. St. Rep. 137, 69 L. R. A. 90; Bowen *v.* Hall, 6 Q. B. D. 333, 45 J. P. 373, 50 L. J. Q. B. 305, 44 L. T. Rep. N. S. 75, 29 Wkly. Rep. 367.

52. Clark *v.* Clark, 63 N. J. L. 1, 42 Atl. 770; James *v.* Leroy, 6 Johns. (N. Y.) 274; Morgan *v.* Smith, 77 N. C. 37.

53. Lee *v.* West, 47 Ga. 311.

54. Sunnyside Co. *v.* Read, 71 Ark. 59, 70 S. W. 462.

55. Duckett *v.* Pool, 32 S. C. 238, 11 S. E. 689; Sykes *v.* Dixon, 9 A. & E. 693, 8 L. J. Q. B. 102, 1 P. & D. 463, 1 W. W. & H. 120, 36 E. C. L. 366.

56. Wolf *v.* New Orleans Tailor-Made Pants Co., 113 La. 388, 37 So. 2.

Statutes.— Under the statute which makes liable a person who hires without knowledge of a previous contract of hire and fails to discharge the laborer on being notified that the servant is under a contract, or has violated it, the second employer is liable, although the employee had quit his former master before he was employed by defendant. Morris *v.* Neville, 11 Lea (Tenn.) 271.

57. Campbell *v.* Cooper, 34 N. H. 49.

58. Salter *v.* Howard, 43 Ga. 601; Frank *v.* Herold, 63 N. J. Eq. 443, 52 Atl. 152; Daniel *v.* Swearengen, 6 S. C. 297, 24 Am. Rep. 471.

The relation exists where one person is willing to work for another, and the latter desires the labor and makes his business arrangements accordingly. Frank *v.* Herold, 63 N. J. Eq. 443, 52 Atl. 152.

59. Caldwell *v.* O'Neal, 117 Ga. 775, 45 S. E. 41.

60. Duckett *v.* Pool, 33 S. C. 238, 11 S. E. 689.

61. Salter *v.* Howard, 43 Ga. 601; Campbell *v.* Cooper, 34 N. H. 49; Keane *v.* Boycott, 2 H. Bl. 511, 3 Rev. Rep. 494.

62. Huff *v.* Watkins, 18 S. C. 510.

63. Duckett *v.* Pool, 34 S. C. 311, 13 S. E. 542.

64. Huff *v.* Watkins, 15 S. C. 82, 40 Am. Rep. 680 [*overruling* Burgess *v.* Carpenter, 2 S. C. 7, 16 Am. Rep. 643]; McCutchin *v.* Taylor, 11 Lea (Tenn.) 259. *Contra*, see Barron *v.* Collins, 49 Ga. 580.

65. Huff *v.* Watkins, 20 S. C. 477, holding that the cause of action does not survive the death of defendant.

66. Scidmore *v.* Smith, 13 Johns. (N. Y.) 322.

67. Demyer *v.* Souzer, 6 Wend. (N. Y.) 436.

68. Kline *v.* Eubanks, 109 La. 241, 33 So. 211, holding, under the Louisiana statute, that an action for double damages cannot be

the complaint is for harboring or entertaining a servant, evidence of enticement is not necessary.[69] Employment is *prima facie* evidence of enticement,[70] inasmuch as it will be presumed, where one knowingly hires the servant of another, that the servant was enticed away.[71] The general rules as to pleading,[72] admissibility of evidence,[73] and instructions to the jury[74] applicable to civil actions in general govern an action for enticing away.

d. Damages. The measure of damages for enticing away the servant of another, who is hired for a definite time, is the actual loss sustained by the master.[75] If an entire loss of service during the balance of the term of employment is shown, the value of the services for all of such time is recoverable.[76] In a proper case exemplary damages may be awarded.[77] By statute, in some states, double damages may be recovered.[78]

2. Injury to Servant by Malicious Procurement of Discharge — a. Liability in General. A servant may recover damages from a third person who maliciously and without justifiable cause procures the master to discharge him pending the term of employment.[79] There must be an actual discharge terminating the

maintained until after the laborer is convicted of a misdemeanor.

69. Dubois *v.* Allen, Anth. N. P. (N. Y.) 128.

70. Milburne *v.* Byrne, 17 Fed. Cas. No. 9,542, 1 Cranch C. C. 239.

71. Milburne *v.* Byrne, 17 Fed. Cas. No. 9,542, 1 Cranch C. C. 239.

72. Milburne *v.* Byrne, 17 Fed. Cas. No. 9,542, 1 Cranch C. C. 239, holding that an averment in the declaration of a contract of hiring for a certain price is supported by proof of an agreement to serve in consideration of a payment to a third person.

73. Boston Glass Manufactory *v.* Binney, 4 Pick. (Mass.) 425 (holding that articles of agreement, between some of plaintiffs and some of defendants, not to employ workmen, while in the service of the others, is inadmissible in evidence, in an action on the case for enticing workmen from plaintiff's service); Forbes *v.* Morse, 69 Vt. 220, 37 Atl. 295.

74. Duckett *v.* Pool, 34 S. C. 311, 13 S. E. 542.

75. Lee *v.* West, 47 Ga. 311.

Net profits.— The average net profits made by men of fair business capacity, out of the labor of such a servant during the year for which the enticed servant was hired, are recoverable. Lee *v.* West, 47 Ga. 311. Where, in an action for enticing away plaintiff's servants, it appears that defendant's conduct was of an aggravated character, a verdict for less than the net profits which plaintiff would have realized but for defendant's conduct, and for plaintiff's loss by reason of his inability to improve his property, is properly rendered, and not excessive. Smith *v.* Goodman, 75 Ga. 198.

Value of services, expenses, and damages sustained.— In an action for damages for enticing away plaintiff's servants, plaintiff will be entitled to recover the value of the services lost up to the commencement of the suit, the reasonable expenses necessarily incurred in getting the servants back again, and damages for the loss of time, trouble, and injury sustained in consequence of such taking away. Hays *v.* Borders, 6 Ill. 46.

Value of services while in defendant's employ.— While the value of the services during the time the servant has been in defendant's employ is recoverable, the jury may, in certain aggravated cases, give the whole value of the servant by way of damages, as where, after ill blood has been created between a master and servant by the intermeddling of a third person, the servant ceases to be of any value to the master. Dubois *v.* Allen, Anth. N. P. (N. Y.) 128.

76. Hays *v.* Borders, 6 Ill. 46.

77. Duckett *v.* Pool, 34 S. C. 311, 13 S. E. 542. See, generally, Damages, 13 Cyc. 105 *et seq.*

78. See the statutes of the several states.

In Mississippi, by statute, one who knowingly employs a laborer under contract to another for a specified time is liable in double damages. It has been held, under such statute, that the fact that the laborer breaks the contract and ceases to work thereunder before he is employed by defendant does not render the latter any the less liable, and that the measure of damages is double the damages sustained because of the breach of contract by the laborer, and is not limited to double the damages sustained by the employer because of the laborer's employment by defendant. Armistead *v.* Chatters, 71 Miss. 509, 15 So. 39. Indebtedness of a servant to his master, created by the contract of hiring, is not a proper element of damages. Chrestman *v.* Russell, 73 Miss. 452, 18 So. 656. Evidence that plaintiff had furnished such laborer certain clothes and provisions does not support a verdict, where the value of neither of such articles is shown. Hoole *v.* Dorroh, 75 Miss. 257, 22 So. 829.

79. *Florida.*— Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367.

Illinois.— London Guarantee, etc., Co. *v.* Horn, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185 [*affirming* 101 Ill. App. 355].

Iowa.— Hollenbeck *v.* Ristine, 114 Iowa 358, 86 N. W. 377.

Maine.— Perkins *v.* Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252.

Maryland.—Lucke *v.* Clothing Cutters', etc.,

employment,[80] since if the attempt to procure the discharge, although malicious, is not successful, the act is not actionable.[81] It is no defense that the service is for no fixed period,[82] that the act of discharge does not give a right of action against the employer himself,[83] or that the wages are not fixed.[84]

b. Motive.[85] The bad motive of the third person who procures the servant's discharge is immaterial where the acts done by him are legal in themselves and violate no superior right of the servant.[86] And a threat to do what defendant has a right to do is held not such a threat as will make defendant liable irrespective of motive.[87] On the other hand express malice on the part of the person procuring the discharge need not be shown, it being sufficient that there was an intentional interference without lawful justification.[88] If the act was wilful,

Assembly, 77 Md. 396, 26 Atl. 505, 39 Am. St. Rep. 421, 19 L. R. A. 408.

Massachusetts.— Berry *v.* Donovan, 188 Mass. 353, 74 N. E. 603, 108 Am. St. Rep. 499, 5 L. R. A. N. S. 899; Moran *v.* Dunphy, 177 Mass. 485, 59 N. E. 125, 83 Am. St. Rep. 289, 52 L. R. A. 115.

Missouri.— Lally *v.* Cantwell, 40 Mo. App. 44.

New York.— See Connell *v.* Stalker, 20 Misc. 423, 45 N. Y. Suppl. 1048.

North Carolina.— Holder *v.* Cannon Mfg. Co., 135 N. C. 392, 47 S. E. 481, 138 N. C. 308, 50 S. E. 681.

Ohio.— Dannenberg *v.* Ashley, 10 Ohio Cir. Ct. 558, 5 Ohio Cir. Dec. 40. See also Lancaster *v.* Hamburger, 70 Ohio St. 156, 71 N. E. 289, 65 L. R. A. 856.

Pennsylvania.— See Temple Iron Co. *v.* Carmanoskie, 10 Kulp 37.

Vermont.— See Raycroft *v.* Tayntor, 68 Vt. 219, 35 Atl. 53, 54 Am. St. Rep. 882, 33 L. R. A. 225.

England.— Allen *v.* Flood, [1898] A. C. 1, 62 J. P. 595, 67 L. J. Q. B. 119, 77 L. T. Rep. N. S. 717, 46 Wkly. Rep. 258.

See 34 Cent. Dig. tit. "Master and Servant," § 1286. See also LABOR UNIONS, 24 Cyc. 820, 831.

80. Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367.

81. Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367.

82. *Florida.*— Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367.

Illinois.— London Guarantee, etc., Co. *v.* Horn, 101 Ill. App. 355 [*affirmed* in 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185].

Maine.— Perkins *v.* Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252.

Massachusetts.— Berry *v.* Donovan, 188 Mass. 353, 74 N. E. 603, 108 Am. St. Rep. 499, 5 L. R. A. N. S. 899; Moran *v.* Dunphy, 177 Mass. 485, 59 N. E. 125, 83 Am. St. Rep. 289, 52 L. R. A. 115.

Ohio.— Dannerberg *v.* Ashley, 10 Ohio Cir. Ct. 558, 5 Ohio Cir. Dec. 40.

See 34 Cent. Dig. tit. "Master and Servant," § 1286.

Contra.— Holder *v.* Cannon Mfg. Co., 138 N. C. 308, 50 S. E. 681, 135 N. C. 392, 47 S. E. 481.

The fact that the actual damages are not ascertainable because the contract of employment is for no fixed time does not defeat a recovery of at least nominal damages. Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367.

83. Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367; Moran *v.* Dunphy, 177 Mass. 485, 59 N. E. 125, 83 Am. St. Rep. 289, 52 L. R. A. 115.

84. Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367.

85. See, generally, ACTIONS, 1 Cyc. 650–652, 668 *et seq.*

86. Lancaster *v.* Hamburger, 70 Ohio St. 156, 71 N. E. 289, 65 L. R. A. 856 (holding that a passenger incurs no liability to a conductor by reporting to the superintendent the conductor's misconduct toward another person, although in making the report he is prompted by ill-will and a desire to secure the conductor's discharge); Raycroft *v.* Tayntor, 68 Vt. 219, 35 Atl. 53, 54 Am. St. Rep. 882, 33 L. R. A. 225 (holding that a superintendent of a quarry who refuses to permit another to take stone therefrom unless the latter discharges a certain employee is not liable for causing such discharge, even though he acts maliciously, where the contract under which the employer is to take stone from the quarry was for no definite period and was terminable at the pleasure of the superintendent); Allen *v.* Flood, [1898] A. C. 1, 62 J. P. 595, 67 L. J. Q. B. 119, 77 L. T. Rep. N. S. 717, 46 Wkly. Rep. 258.

87. Heywood *v.* Tillson, 75 Me. 225, 46 Am. Rep. 373 [*approved* in Perkins *v.* Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252]; Raycroft *v.* Tayntor, 68 Vt. 219, 35 Atl. 53, 54 Am. St. Rep. 882, 33 L. R. A. 225.

Threat to withhold gratuity.— If a third person simply threatens to withhold a gratuity from an employer, although provided for by contract, if he does not discharge an employee, the latter has no cause of action, when such withholding or breach of contract is not of itself proof of procurement or persuasion to make the discharge; but evidence of such threat is, it seems, admissible to show that the withholding or breach was used with malicious purpose and as a means of procuring or persuading the employer to discharge the employee. Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367.

88. Lucke *v.* Clothing Cutters', etc., Assembly No. 7507, K. of L., 77 Md. 396, 26 Atl. 505, 39 Am. St. Rep. 421, 19 L. R. A. 408; Berry *v.* Donovan, 188 Mass. 353, 74 N. E. 603, 108 Am. St. Rep. 499, 5 L. R. A.

malicious, and unlawful, it is not necessary that the discharge was procured by false and fraudulent representations.[89]

c. Pleading[90] and Evidence.[91] The complaint, in an action to recover damages for a discharge owing to false statements alleged to have been made by defendant, must state the substance of the statements.[92] Where the complaint alleges a contract of employment for a period of time, no recovery can be had where there is no evidence of a contract for a definite term of service.[93] The burden of proof is upon defendant to show that plaintiff obtained, or might have obtained, employment during the time in question after his discharge.[94]

d. Damages. The measure of damages for wrongfully causing plaintiff's discharge from his employment is the same as the master himself is liable for where he discharges his servant without cause,[95] that is, the contract price for the term less sums earned or which could have been earned by the servant.[96] The speculative profits of a new or proposed partnership between the employer and the employee are too uncertain to be recoverable.[97] It seems that exemplary damages may, in a proper case, be recovered.[98]

B. Criminal Prosecutions — 1. Offenses — a. In General. Statutes in some of the states make punishable as a crime the enticing away or the employment of a servant of another,[99] or the preventing him from performing the duties

N. S. 899; Holder *v.* Cannon Mfg. Co., 135 N. C. 392, 47 S. E. 481, 138 N. C. 308, 50 S. E. 681. But see Perkins *v.* Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252 (holding that whenever a person by means of "fraud or intimidation" procures the discharge of an employee, where, but for such wrongful interference, the employment would have continued, he is liable in damages for such injuries as naturally result therefrom). *Contra*, Bonsall *v.* Reagan, 7 Del. Co. (Pa.) 545.

Libelous charges.— One person cannot advise another to discharge an employee, accompanying his advice with libelous charges, and escape liability therefor. Hollenbeck *v.* Ristine, 114 Iowa 358, 86 N. W. 377; Moran *v.* Dunphy, 177 Mass. 485, 59 N. E. 125, 83 Am. St. Rep. 289, 52 L. R. A. 115.

What constitutes justification for interference.— Competition in trade, employment, or business constitutes sufficient justification for interference. But a desire to compel the employee to surrender a cause of action, wholly disconnected with the continuance of his employment, does not afford justification for interference by a third person who desires the satisfaction of the alleged liability. London Guarantee, etc., Co. *v.* Horn, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185 [*affirming* 101 Ill. App. 355]. So the conduct of the servant in going on a strike and refusing to make up for lost time cannot be used by the employer to effect his discharge from a subsequent employment. Holder *v.* Cannon Mfg. Co., 135 N. C. 392, 47 S. E. 481.

89. Holder *v.* Cannon Mfg. Co., 135 N. C. 392, 47 S. E. 481.

Whether the inducement is false slanders or successful persuasion is immaterial. Moran *v.* Dunphy, 177 Mass. 485, 59 N. E. 125, 83 Am. St. Rep. 289, 52 L. R. A. 115. *Contra*, see Perkins *v.* Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252.

If persuasion is used for the indirect purpose of injuring the servant, or of benefiting the third person at the expense of the servant, it is a malicious act and therefore a wrongful one, so as to be actionable if injury results therefrom. Bowen *v.* Hall, 6 Q. B. D. 333, 45 J. P. 373, 50 L. J. Q. B. 305, 44 L. T. Rep. N. S. 75, 29 Wkly. Rep. 367, which was an action for enticing a servant, but this rule is stated therein sufficiently broad to cover actions for causing discharge.

90. See, generally, Pleading.

91. See, generally, Evidence.

92. Moran *v.* Dunphy, 177 Mass. 485, 59 N. E. 125, 83 Am. St. Rep. 289, 52 L. R. A. 115.

93. Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367. See also Lucke *v.* Clothing Cutters', etc., Assembly No. 7507, K. of L., 77 Md. 396, 26 Atl. 505, 39 Am. St. Rep. 421, 19 L. R. A. 408.

94. Lally *v.* Cantwell, 40 Mo. App. 44.

95. See *supra*, I, C, 2, b, (VII).

96. Lally *v.* Cantwell, 40 Mo. App. 44; Connell *v.* Stalker, 20 Misc. (N. Y.) 423, 45 N. Y. Suppl. 1048, holding that the value of time lost is the measure of damages, although no employment is sought in other localities.

97. Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367.

98. See Chipley *v.* Atkinson, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367.

99. See the statutes of the several states. See also Murrell *v.* State, 44 Ala. 367.

What constitutes employment by accused. — The word "employment" as used in a statute forbidding the employment of a servant of another under written contract means any use of a servant for a special or general purpose inconsistent with his duty to his employer, with a mutual benefit. The contract need not be signed by the master. Hightower *v.* State, 72 Ga. 482.

In Louisiana the enticing away of a serv-

of a lawful employment.[1] Of course no offense is committed where the master consents to the hiring by the accused.[2] Under a statute providing for the punishment of both the enticer and the servant, the servant cannot be punished for leaving his master's service without enticement.[3] No offense is committed where the accused had a prior verbal contract with the laborer, the term of which had not expired, and which the prosecutor enticed him to abandon,[4] even though the contract was voidable under the statute of frauds, where treated by the parties thereto as valid.[5]

b. What Constitutes Enticing. The mere employment of a servant after he has left his former master does not constitute an enticing away.[6]

c. Who Are Servants or Laborers. A superintendent is not a servant within such a statute.[7] A cropper hired to work land for a part of the crop is a laborer;[8] but not where he rented the farm and was to make a crop and have full control of the farm, although he was to pay as rent half of all he made.[9] If he rents land for a stipulated rental and agrees to cultivate it with the understanding that he will work for the landlord whenever the latter needs him, the relation is that of landlord and tenant rather than master and servant.[10]

d. Infant Servants. Enticing away an infant servant is an offense, although the infant's contract is voidable, since the privilege of avoiding is personal to the infant.[11] But after an infant has disaffirmed his voidable contract for personal services, a person who entices him away is not punishable.[12] If the contract for the infant's services was made with his father[13] or guardian,[14] a person enticing the servant away is not guilty of an offense where the statute forbids the enticing away of a servant under contract with another.[15] And a father, after hiring out his minor child, may entice or order him to quit without committing a punishable offense.[16]

2. Procedure — a. Indictment or Complaint. The indictment or complaint must follow the statute by setting forth all the facts and circumstances going to make up the offense.[17] An indictment for enticing away must either state the christian

ant is not an offense. State *v.* Sypher, 19 La. Ann. 71.

1. Luter *v.* State, 32 Tex. Cr. 69, 22 S. W. 140; Fischer *v.* State, 101 Wis. 23, 76 N. W. 594.

2. Prestwood *v.* State, 87 Ala. 147, 6 So. 392.

3. State *v.* Daniel, 89 N. C. 553.

4. Turner *v.* State, 48 Ala. 549.

5. Tartt *v.* State, 86 Ala. 26, 5 So. 577.

6. McAllister *v.* State, 122 Ga. 744, 50 S. E. 921; Jackson *v.* State, (Miss. 1894) 16 So. 299. *Contra,* Tarpley *v.* State, 79 Ala. 271, holding that the hiring of a servant after he has abandoned the services of his master, providing the hiring is within the term of service covered by the former contract and before its expiration, is punishable.

7. Bryan *v.* State, 44 Ga. 328.

8. Mondschein *v.* State, 55 Ark. 389, 18 S. W. 383; Ward *v.* State, 70 Miss. 245, 12 So. 249.

9. Mondschein *v.* State, 55 Ark. 389, 18 S. W. 383. See also Landlord and Tenant, 24 Cyc. 1476.

10. State *v.* Hoover, 107 N. C. 795, 12 S. E. 451, 10 L. R. A. 726.

11. Murrell *v.* State, 44 Ala. 367; State *v.* Harwood, 104 N. C. 724, 10 S. E. 171.

12. Langham *v.* State, 55 Ala. 114.

13. State *v.* Rhody, 67 S. C. 287, 45 S. E. 205; State *v.* Aye, 63 S. C. 458, 41 S. E. 519.

14. State *v.* Richardson, 86 Miss. 439, 38 So. 497.

15. *Compare* Winslow *v.* State, 92 Ala. 78, 9 So. 728, holding that one charged with the offense of enticing a minor from a person to whom his mother has hired him cannot justify upon the ground that his father is entitled to his services, when it appears that the father deserted his family when the child was two years old, and has since contributed nothing to his support.

16. Driscol *v.* State, 77 Ala. 84; State *v.* Anderson, 104 N. C. 771, 10 S. E. 475.

17. Triplett *v.* State, 80 Miss. 379, 31 So. 743 (holding that an indictment merely alleging the starting to move a laborer or tenant was insufficient); Fischer *v.* State, 101 Wis. 23, 76 N. W. 594.

Intimidating servant to abandon employment.— An indictment under a whitecapping statute alleging acts to intimidate a person into an abandonment of his home and employment does not sufficiently aver that his home is in a certain county by alleging that the intimidation took place in such county. The indictment should show the nature of the business conducted by the employer, should allege that the persons intimidated were in his employ, and should describe the employer as a corporation, firm, etc. It must

name of the laborer or allege that it is unknown;[18] the fact that the person enticed or employed was a laborer;[19] the name of the person in whose employ the servant was at the time of the alleged illegal act;[20] the name of the agent of the accused who is alleged to have unlawfully employed the servant;[21] and the absence of the employer's consent to the reëmployment.[22] It need not specify whether the contract of employment was written or oral,[23] nor the acts or words by which the enticement was effected.[24]

b. Variance. A conviction cannot be had upon a charge of enticing away a laborer or servant, by proof of enticing away a renter or share cropper, where the two acts are made different offenses by statute.[25] So an indictment for enticing away or hiring a servant of another is not supported by evidence that the hiring was done by defendant's agent or partner in business, and that defendant knowingly received a part of the profits of the laborer's service.[26]

c. Evidence. The rules relating to the admissibility and sufficiency of evidence in criminal cases in general apply to prosecutions for interfering with the relation of master and servant.[27]

MASTER BUILDER. A contractor who employs men to build.[1] (See, generally, MASTER AND SERVANT; MECHANICS' LIENS.)

MASTER IN CHANCERY. An officer of a court of chancery who acts as an assistant to the judge or chancellor.[2] (Master in Chancery: In General, see EQUITY; REFERENCES. Authority to Take — Acknowledgment, see ACKNOWLEDGMENTS; Affidavit, see AFFIDAVITS; Deposition, see DEPOSITIONS.)

MASTER OF A SHIP. One who commands a ship on a voyage under an appointment from the owners;[3] one who for his knowledge of navigation and for his fidelity and discretion has the government of the ship committed to his care and management;[4] the commander or first officer of a ship, a captain, etc.;[5] he to whom is committed the government, care, and direction of the vessel and cargo.[6] (Master of a Ship: Appointment and Removal, see SHIPPING. Authority, Duties and Liabilities — In General, see SHIPPING; To Create Lien on Vessel, see

aver the party by whom the person intimidated is employed. Breeland *v.* State, 79 Miss. 527, 31 So. 104.

Preventing performance of duties.— An information under a statute making punishable the preventing a servant from performing the duties "of a lawful employment" is defective when it fails to set forth the nature of the lawful employment. Luter *v.* State, 32 Tex. Cr. 69, 22 S. W. 140.

18. Roseberry *v.* State, 50 Ala. 160.

19. Jackson *v.* State, (Miss. 1893) 13 So. 935.

20. Hudson *v.* State, 46 Ga. 624.

21. Hudson *v.* State, 46 Ga. 624.

22. Jackson *v.* State, (Miss. 1893) 13 So. 935; Ward *v.* State, 70 Miss. 245, 12 So. 249.

23. Mondschein *v.* State, 55 Ark. 389, 18 S. W. 383; State *v.* Harwood, 104 N. C. 724, 10 S. E. 171.

24. State *v.* Harwood, 104 N. C. 724, 10 S. E. 171.

25. Streater *v.* State, 137 Ala. 93, 34 So. 395.

26. Roseberry *v.* State, 50 Ala. 160.

27. See CRIMINAL LAW, 12 Cyc. 390 *et seq.*

Admissibility.— A declaration made by the accused to the effect that he himself would not live with the prosecutor is irrelevant on the trial of one charged with enticing away the servant of another. Broughton *v.* State, 114 Ga. 34, 39 S. E. 866.

Sufficiency.—Evidence that the servant left the place of his employment in company with accused is insufficient to sustain a conviction for enticing away the servant of another. Broughton *v.* State, 114 Ga. 34, 39 S. E. 866.

Harmless error.— Error in refusing to allow one accused of attempting to intimidate workmen to testify whether he intended to intimidate them is harmless where he had denied any attempt to intimidate them. Fischer *v.* State, 107 Wis. 23, 76 N. W. 594.

1. Standard Dict. [*quoted* in Little Rock, etc., R. Co. *v.* Spencer, 65 Ark. 183, 198, 47 S. W. 196, 42 L. R. A. 334].

2. Black L. Dict. See also Schuchardt *v.* People, 99 Ill. 501, 504, 39 Am. Rep. 34; Johnson *v.* Gallegos, 10 N. M. 1, 4, 60 Pac. 71; *In re* Durant, 60 Vt. 176, 182, 12 Atl. 650; Kimberly *v.* Arms, 129 U. S. 512, 523, 9 S. Ct. 355, 32 L. ed. 764.

3. Hubbell *v.* Denison, 20 Wend. (N. Y.) 181, 182.

4. 2 Pet. Adm. appendix lxxiv [*quoted* in Martin *v.* Farnsworth, 33 N. Y. Super. Ct. 246, 260].

5. Bouvier L. Dict. [*quoted* in Millaudon *v.* Martin, 6 Rob. (La.) 534, 538].

6. Lex Mercatoria Americana 131 [*quoted*

MARITIME LIENS. Change as Affecting Right to Insurance, see MARINE INSURANCE. Competency as Affecting Liability For Collision, see COLLISION. Enforcement of Claim For Services, see ADMIRALTY. Liability For Landing Alien Immigrants, see ALIENS. Liability of Ship For Assault on Passenger by, see CARRIERS. Negligence of, as Affecting Liability on Marine Policy, see MARINE INSURANCE. Wages and Other Remuneration, see SHIPPING.)

MASTER'S DRAFT. An abbreviated form of bottomry.[7] (See, generally, SHIPPING.)

MASTHEAD. At the very top of the standing mast.[8]

MASTURBATION. See DIVORCE.

MATCH. An honorable marriage.[9]

MATE. The first officer of a vessel under the master;[10] a respectable officer of the ship.[11] (See, generally, SEAMEN.)

MATERIAL. As an adjective,[12] relating to or consisting of matter; corporeal; not spiritual; physical;[13] substantial as opposed to formal.[14] As a noun, the substance or matter of which anything is made;[15] everything of which anything is made;[16] any article employed in the erection and completion of buildings;[17] something that goes into and forms part of the finished structure.[18] (Material: Furnished, see MECHANICS' LIENS. Man, see MECHANICS' LIENS. Used in Manufacture, see MANUFACTURES. Variance, see PLEADING. See also MATERIALITY; MATERIALLY.)

MATERIALITY. The property of substantial importance or influence, especially, as distinguished from formal requirement.[19] (Materiality: Of Alteration of Written Instrument, see ALTERATIONS OF INSTRUMENTS. Of Evidence — Generally, see EVIDENCE; In Criminal Prosecution, see CRIMINAL LAW. Of Issue, see PLEADING. Of Representation as Affecting Policy, see FIRE INSURANCE; and the Insurance Titles. Of Representation or Concealment as Constituting Fraud, see FRAUD.)

MATERIALLY. Substantially, essentially, really are some definitions given;[20]

in Millaudon *v.* Martin, 6 Rob. (La.) 534, 538]. See also Bas *v.* Steel, 2 Fed. Cas. No. 1087, Pet. C. C. 406, 408.

Used in the definition of a bill of lading, as a written acknowledgment, signed by the master, that he has received goods, etc., the term stands for any one authorized to bind the vessel or carrier. The Guiding Star, 62 Fed. 407, 411, 10 C. C. A. 454.

7. Hanschell *v.* Swan, 23 Misc. (N. Y.) 304, 307, 51 N. Y. Suppl. 42.

8. Valentine *v.* Cleugh, 29 Eng. L. & Eq. 49, 57.

9. Clute *v.* Clute, 101 Wis. 137, 138, 76 N. W. 1114, where it is said: "We are not aware that the word . . . has ever acquired the meaning of illicit or criminal intercourse."

10. Ely *v.* Peck, 7 Conn. 239, 242; Lex Mercatoria Americana 181 [*quoted* in Millaudon *v.* Martin, 6 Rob. (La.) 534, 539].

He is not a mariner or seaman.— Ely *v.* Peck, 7 Conn. 239, 242.

11. Atkyns *v.* Burrows, 2 Fed. Cas. No. 618, 1 Pet. Adm. 244, 246.

12. Used in connection with other words see the following phrases: "Material allegation" see Lusk *v.* Perkins, 48 Ark. 238, 247, 2 S. W. 847; Tucker *v.* Parks, 7 Colo. 62, 67, 298, 1 Pac. 427, 3 Pac. 486; Barret *v.* Godshaw, 12 Bush (Ky.) 592, 600; Gillson *v.* Price, 18 Nev. 109, 117, 1 Pac. 459; Newnian *v.* Otto, 4 Sandf. (N. Y.) 668, 670; Rhemke *v.* Clinton, 2 Utah 230, 236; Iba *v.* State Cent. Assoc., 5 Wyo. 355, 366, 40 Pac. 527, 42 Pac. 20. "Material facts" see Adams *v.* Way, 32 Conn. 160, 168; State *v.* McCarver, 194 Mo. 717, 732, 92 S. W. 684; Boggs *v.* America Ins. Co., 30 Mo. 63, 68. "Material injury" see Lux *v.* Haggin, 69 Cal. 255, 396, 10 Pac. 674. "Material issue" see Wooden *v.* Waffle, 6 How. Pr. (N. Y.) 145, 151.

13. People *v.* Jones, 92 Ill. App. 447, 449.

14. Johnson Dict. [*quoted* in David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 57 Fed. 980, 986, 6 C. C. A. 661].

15. Webster Dict. [*quoted* in Pendleton *v.* Franklin, 7 N. Y. 508, 511; Moyer *v.* Pennsylvania Slate Co., 71 Pa. St. 293, 294].

16. Bouvier L. Dict. [*quoted* in Central Trust Co. *v.* Sheffield, etc., Coal, etc., Co., 42 Fed. 106, 110, 9 L. R. A. 67].

17. Ellis *v.* Cochran, 8 Tex. Civ. App. 510, 512, 28 S. W. 243.

18. Armour *v.* Western Constr. Co., 36 Wash. 529, 538, 78 Pac. 1106.

19. Bouvier L. Dict. [*quoted* in David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 57 Fed. 980, 986, 6 C. C. A. 661].

With reference to evidence the word does not have the same signification as "relevancy." Pangburn *v.* State, (Tex. Cr. App. 1900) 56 S. W. 72, 73.

20. Grand Rapids Hydraulic Co. *v.* American F. Ins. Co., 93 Mich. 396, 399, 53 N. W. 538.

and it has been said that one of the meanings of the term is in "an important degree." [21] (See MATERIAL.)

MATERIALMAN. See MARITIME LIENS; MECHANICS' LIENS.

MATHEMATICAL. Demonstrable by the use of mathematics or by the rules of surveying, which is a branch of the science of mathematics.[22] (Mathematical: Evidence, see EVIDENCE.)

MATRICIDE. The crime of killing one's mother.[23] (See, generally, HOMICIDE.)

MATRIMONIA DEBENT ESSE LIBERA. A maxim meaning "Marriage ought to be free." [24]

MATRIMONIAL COHABITATION. See COHABITATION.

MATRIMONIAL DOMICILE. See DOMICILE.

MATRIMONIUM SUBSEQUENS LEGITIMOS FACIT. A maxim meaning "A subsequent marriage makes the children legitimate." [25]

MATRIMONIUM SUBSEQUENS TOLLIT PECCATUM PRÆCEDENS. A maxim meaning "Subsequent marriages cure precedent criminality." [26]

MATRIMONY. See MARRIAGE.

MATRIX. In the civil law, the protocol or first draft of a legal instrument from which all copies must be taken.[27] (See COPY.)

MATRONS, JURY OF. Such a jury is impaneled to try if a woman condemned to death be with child.[28] (See DE VENTRE INSPICIENDO.)

MATTER. Some substance or essential thing, opposed to form.[29] In law, a fact or facts constituting a whole or a part of a ground of action or defense.[30]

21. Webster Dict. [*quoted* in Artz *v.* Chicago, etc., R. Co., 38 Iowa 293, 296].

This word is not synonymous with "essentially," having a legal force which the latter word does not possess. Hoffman *v.* Supreme Council, A. L. of H., 35 Fed. 252, 254.

22. Brown *v.* House, 118 N. C. 870, 884, 24 S. E. 786.

23. Abbott L. Dict.

24. Morgan Leg. Max.

25. Peloubet Leg. Max.

26. Morgan Leg. Max.

27. Black L. Dict. [*citing* Downing *v.* Diaz, 80 Tex. 436, 451, 16 S. W. 49].

28. Black L. Dict. See also 12 Cyc. 772 note 34.

29. Bouvier L. Dict. [*quoted* in Douglas *v.* Beasley, 40 Ala. 142, 148].

As used in connection with other words see the following phrases: "Matter of aggravation" see Southern R. Co. *v.* O'Bryan, 119 Ga. 147, 150, 45 S. E. 1000. "Matter in controversy" see Hancock *v.* Barton, 1 Serg. & R. (Pa.) 269, 270; Smith *v.* Giles, 65 Tex. 341, 343; Buckner *v.* Metz, 77 Va. 107, 125; Lewis *v.* Long, 3 Munf. (Va.) 136, 154; Melson *v.* Melson, 2 Munf. (Va.) 542. "Matters of detail" see Lehigh Coal, etc., Co. *v.* Central R. Co., 34 N. J. Eq. 88, 90. "Matter of dispute" see Dumphy *v.* Guindon, 13 Cal. 28, 30; Mason *v.* Oglesby, 2 La. Ann. 793, 794; McKee *v.* Ellis, 2 La. Ann. 163, 167; Gallagher *v.* Asphalt Co., 65 N. J. Eq. 258, 283, 55 Atl. 259; Chapman *v.* U. S., 164 U. S. 436, 447, 17 S. Ct. 76, 41 L. ed. 504; Smith *v.* Adams, 130 U. S. 167, 175, 9 S. Ct. 566, 32 L. ed. 895; Lee *v.* Watson, 1 Wall. (U. S.) 337, 339, 17 L. ed. 557; Shields *v.* Thomas, 17 How. (U. S.) 3, 4, 15 L. ed. 93; Kanouse *v.* Martin, 15 How. (U. S.) 198, 207, 14 L. ed. 660; U. S. *v.* More, 3 Cranch (U. S.) 159, 173, 2 L. ed. 397; Turner *v.* Southern Home Bldg., etc., Assoc., 101 Fed. 308, 313, 41 C. C. A. 379; Cowell *v.* City Water-Supply Co., 96 Fed. 769, 772; Simon *v.* House, 46 Fed. 317, 318; Sharon *v.* Terry, 36 Fed. 337, 347, 13 Sawy. 387, 1 L. R. A. 572; New York Imp., etc., Co. *v.* Milburn Gin, etc., Co., 35 Fed. 225, 228; Morrison *v.* Glover, 4 Exch. 430, 444, 14 J. P. 84, 19 L. J. Exch. 20. "Matters of fact" see Santa Ana *v.* Gildmacher, 133 Cal. 395, 398, 65 Pac. 883; Com. *v.* Lawless, 103 Mass. 425, 431. "Matters of form" see Lake Shore, etc., R. Co. *v.* Kurtz, 10 Ind. App. 60, 35 N. E. 201, 37 N. E. 303, 306; Goff *v.* Robinson, 60 Vt. 633, 643, 15 Atl. 339; State *v.* Amidon, 58 Vt. 524, 525, 2 Atl. 154; Meath *v.* Mississippi Levee Com'rs, 109 U. S. 268, 274, 3 S. Ct. 284, 27 L. ed. 930; U. S. *v.* Noelke, 1 Fed. 426, 431; U. S. *v.* Conant, 25 Fed. Cas. No. 14,844; U. S. *v.* Tusca, 28 Fed. Cas. No. 16,550, 14 Blatchf. 5, 6. "Matter in issue" see Kitson *v.* Farwell, 132 Ill. 327, 339, 23 N. E. 1024; Gutheil *v.* Goodrich, 160 Ind. 92, 95, 66 N. E. 446; Vaughan *v.* Morrison, 55 N. H. 580, 588; King *v.* Chase, 15 N. H. 9, 17, 41 Am. Dec. 675; Reynolds *v.* Stockton, 140 U. S. 254, 270, 35 L. ed. 464; Smith *v.* Ontario, 4 Fed. 386, 390, 18 Blatchf. 454. "Matter of probate" see Martinovich *v.* Marsicano, 137 Cal. 354, 356, 70 Pac. 459. "Matters of substance" see State *v.* Amidon, 58 Vt. 524, 525, 2 Atl. 154.

30. Nelson *v.* Johnson, 18 Ind. 329, 332.

"Subject" and "matter" are often used as synonyms, and as used in a constitutional provision, that every act shall embrace but one subject and matters properly connected therewith, they are nearly so, the only difference being the offices they are respectively made to perform. "Subject" is there used to indicate the chief thing about which a legislation is had, and "matters," the things which are secondary, subordinate, or incidental. Clarke *v.* Darr, 156 Ind. 692, 697,

MATTER IN PAIS. Matter of fact that is not in writing.[31] (See In Pais.)

MATTERS OF SUBSISTENCE FOR MAN. A phrase which comprehends all articles or things, whether animal or vegetable, living or dead, which are used for food, and whether they are consumed in the form in which they are bought from the producer, or are only consumed after undergoing a process of preparation, which is greater or less, according to the character of the article.[32]

MATURITY. Applied to commercial paper, the time when the paper becomes due and demandable.[33] As used in a will, lawful age;[34] the combined result of age and education.[35] (Maturity: Of Bill or Note, see Commercial Paper. Of Bond, see Bonds. Of Claim After Institution of Proceedings, see Insolvency. Of Debt Due on Attachment, see Attachment. Of Debt Secured by Chattel Mortgage, see Chattel Mortgages. Of Infant, see Infants. Of Principal Affecting Infant, see Interest. Liability of Guarantor For Interest After Maturity of Loan, see Guaranty.)

MATZOON. The Armenian name for fermented milk.[36]

MAXIM. An established principle or proposition; a principle of law universally admitted, as being a correct statement of the law, or as agreeable to natural reason.[37] (See, generally, Equity. See also the Latin Maxims, *passim*, 1 Cyc. *et seq.*)

MAXIMA ILLECEBRA EST PECCANDI IMPUNITATIS SPES. A maxim meaning "The greatest incitement to guilt is the hope of sinning with impunity."[38]

MAXIME PACI SUNT CONTRARIA, VIS ET INJURIA. A maxim meaning "The greatest enemies to peace are force and wrong."[39]

MAXIMUS ERRORIS POPULUS MAGISTER. A maxim meaning "The people is the greatest master of error."[40]

MAY.[41] In general, an auxiliary verb qualifying the meaning of another verb by expressing ability, contingency, possibility, or probability;[42] to have permission — be allowed;[43] to be possible.[44] As used in statutes, in its ordinary sense

60 N. E. 688; State *v.* Gerhardt, 145 Ind. 439, 458, 44 N. E. 469, 33 L. R. A. 313; State *v.* Roby, 142 Ind. 168, 187, 41 N. E. 145, 51 Am. St. Rep. 174, 33 L. R. A. 213.

31. Black L. Dict., thus distinguished from matter in deed and matter of record.

32. Sledd *v.* Com., 19 Gratt. (Va.) 813, 822.

33. Bouvier L. Dict. [*quoted* in Gilbert *v.* Sprague, 88 Ill. App. 508, 509]; Century Dict. [*quoted* in Gilbert *v.* Sprague, *supra*].

34. Carpenter *v.* Boulden, 48 Md. 122, 129; Cruikshank *v.* Cruikshank, 39 Misc. (N. Y.) 401, 405, 80 N. Y. Suppl. 8.

35. Condict *v.* King, 13 N. J. Eq. 375, 380, where it is said: "The term 'maturity' is not synonymous with legal majority."

36. Dadirrian *v.* Theodorian, 15 Misc. (N. Y.) 300, 302, 37 N. Y. Suppl. 611.

37. Black L. Dict.

Coke defines a maxim as "a proposition to be of all men confessed and granted without proof, argument or discourse. A sure foundation or ground of art, so called, *quia maxima est ejus dignitas et certissima authoritas, atque quod maximé omnibus probetur*, so sure and uncontrollable as that they ought not to be questioned. And that which Littleton calleth a maxim, hereafter he calleth a principle, and it is all one with a rule, a common ground *postalatum* or an *axiome*, and it were too much curiosity to make nice distinctions between them." 1 Coke Litt. (Thomas) 16, 17.

Basis of nomenclature.— "A maxim is so called because its dignity is chiefest; its authority the most certain; and because it is universally approved by all." Morgan Leg. Max.

38. Peloubet Leg. Max.

39. Burrill L. Dict.

40. Morgan Leg. Max.

41. As used in connection with other words see the following phrases: "May be." White *v.* Disher, 67 Cal. 402, 404, 7 Pac. 826; Pitkin County *v.* Aspen Min., etc., Co., 3 Colo. App. 223, 32 Pac. 717, 718; Shoemaker *v.* Smith, 37 Ind. 122, 128; Brown *v.* Wyandotte County, 58 Kan. 672, 675, 50 Pac. 888; Griggs *v.* St. Paul, 56 Minn. 150, 154, 57 N. W. 461; Long Island R. Co. *v.* Conklin, 32 Barb. (N. Y.) 381, 387 [*affirmed* in 29 N. Y. 572, 578]; Callaway County *v.* Foster, 93 U. S. 567, 573, 23 L. ed. 911. "May depart." Reding *v.* Ridge, 14 La. Ann. 36. "May have." Heeney *v.* Brooklyn Benev. Soc., 33 Barb. (N. Y.) 360, 363; Paddock *v.* Potter, 67 Vt. 360, 363, 31 Atl. 784. "May pay." Fame Ins. Co.'s Appeal, 83 Pa. St. 396, 397. "May receive." Greene *v.* Robinson, 41 Conn. 470, 471, as indicating futurity. "May recover." Robertson *v.* Northern R. Co., 63 N. H. 544, 548, 3 Atl. 621.

42. Webster Dict. [*quoted* in Home Ins. Co. *v.* Peoria, etc., R. Co., 78 Ill. App. 137, 140].

43. Anderson L. Dict. [*quoted* in Hall *v.* Wabash R. Co., 80 Mo. App. 463, 470]; Standard Dict. [*quoted* in Hall *v.* Wabash R. Co., 80 Mo. App. 463, 470].

44. Webster Dict. [*quoted* in Owen *v.* Kelly, 6 D. C. 191, 193].

the word is permissive and not mandatory,[45] merely importing permission, ability, possibility, or contingency;[46] but it has been properly construed as employed in an imperative or mandatory sense when the legislature imposes a positive duty and not a discretion[47] or where a public duty is involved,[48] where a right is given or a duty imposed,[49] where the public interest, or where a matter of public policy and not merely a private right is involved,[50] where the statute directs the doing of a thing for the sake of justice or the public good,[51] or where the statute imposes a duty or confers a power on a public officer for public purposes,[52] or

45. Cooke *v.* State Nat. Bank, 52 N. Y. 96, 98, 11 Am. Rep. 667; Medbury *v.* Swan, 46 N. Y. 200, 201; *Ex p.* Yeager, 11 Gratt. (Va.) 655, 656; Bouvier L. Dict. [*quoted* in *In re* McCort, 52 Kan. 18, 21, 34 Pac. 456].

46. Santa Cruz Rock Pavement Co. *v.* Heaton, 105 Cal. 162, 165, 38 Pac. 693 [*citing* Thompson *v.* Carroll, 22 How. (U. S.) 422, 434, 16 L. ed. 387; Minor *v.* Mechanics' Bank, 1 Pet. (U. S.) 46, 64, 7 L. ed. 47].

Permissive when coupled with a discretion. State *v.* Knowles, 90 Md. 646, 655, 45 Atl. 877, 49 L. R. A. 695.

Ordinary or permissive sense.— In the following cases the word "may" has been construed as having been used in its merely permissive or ordinary sense. Webb *v.* Robbins, 77 Ala. 176; *Ex p.* Banks, 28 Ala. 28, 35; Amason *v.* Nash, 24 Ala. 279; Isom *v.* Rex Crude Oil Co., 140 Cal. 678, 74 Pac. 294; Fresno Nat. Bank *v.* San Joaquin County Super. Ct., 83 Cal. 491, 24 Pac. 157; Carlin *v.* Freeman, 19 Colo. App. 334, 75 Pac. 26; Holzendorf *v.* Hay, 20 App. Cas. (D. C.) 576; Continental Nat. Bank *v.* Folsom, 78 Ga. 449, 3 S. E. 269; People *v.* Chicago Sanitary Dist., 184 Ill. 597, 56 N. E. 953; Fowler *v.* Pirkins, 77 Ill. 271; Gillinwater *v.* Mississippi, etc., R. Co., 13 Ill. 1; People's Nat. Bank *v.* Ayer, 24 Ind. App. 212, 56 N. E. 267; Budd *v.* Rutherford, 4 Ind. App. 386, 30 N. E. 1111; Downing *v.* Oskaloosa, 86 Iowa 352, 53 N. W. 256; Equitable L. Ins. Co. *v.* Gleason, 56 Iowa 47, 8 N. W. 790; Dean *v.* White, 5 Iowa 266; Central Branch R. Co. *v.* Ingram, 20 Kan. 66; State *v.* New Orleans, 42 La. Ann. 92, 7 So. 674; State *v.* Police Jury, 40 La. Ann. 755, 5 So. 23; State *v.* Sweetsir, 53 Me. 438; National Contracting Co. *v.* Com., 183 Mass. 89, 66 N. E. 639; Heavor *v.* Page, 161 Mass. 109, 36 N. E. 750; Com. *v.* Cheney, 141 Mass. 102, 6 N. E. 724, 55 Am. Rep. 448; Opinion of Justices, 11 Pick. (Mass.) 538; Breen *v.* Kehoe, 142 Mich. 58, 105 N. W. 28, 1 L. R. A. N. S. 349; State *v.* Hannibal, etc., R. Co., 51 Mo. 532; Schaeffer *v.* Lohman, 34 Mo. 68; Ballard *v.* Purcell, 1 Nev. 342; Proctor *v.* Green, 59 N. H. 350; Drew *v.* Spaulding, 45 N. H. 472; Bartley *v.* Smith, 43 N. J. L. 321; State *v.* Patterson, 32 N. J. L. 177; Brothers *v.* Pickel, 31 N. J. Eq. 647; Medbury *v.* Swan, 46 N. Y. 200; Weir *v.* Barker, 104 N. Y. App. Div. 112, 93 N. Y. Suppl. 732; People *v.* Syracuse, 59 Hun (N. Y.) 258, 12 N. Y. Suppl. 890; Darby *v.* Condit, 1 Duer (N. Y.) 599; Copley *v.* Hay, 16 Daly (N. Y.) 446, 12 N. Y. Suppl. 277; Bennett *v.* Matthews, 40 How. Pr. (N. Y.) 428; *In re* Thirty-Fourth St. R Co., 2 How. Pr. (N. Y.) 369; Malcom *v.* Rogers, 5 Cow. (N. Y.) 188, 15 Am. Dec. 464; Verplanck *v.* Mercantile Ins. Co., 1 Edw. (N. Y.) 84; Sifford *v.* Beaty, 12 Ohio St. 189; Rafferty *v.* Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763; Longbine *v.* Piper, 70 Pa. St. 378; Mott *v.* Pennsylvania R. Co., 30 Pa. St. 9, 72 Am. Dec. 664; Holmes *v.* Wilmington Nat. Bank, 18 S. C. 31, 44 Am. Rep. 558; Anderson *v.* Medbery, 16 S. D. 324, 92 N. W. 1089; State *v.* Hall, 14 S. D. 161, 164, 84 N. W. 766; Elrod *v.* Gray Lumber Co., 92 Tenn. 476, 22 S. W. 2; Lewis *v.* State, 3 Head (Tenn.) 127; Weber *v.* Rogan, 94 Tex. 62, 54 S. W. 1016, 55 S. W. 559, 57 S. W. 940; San Angelo Nat. Bank *v.* Fitzpatrick, 88 Tex. 213, 30 S. W. 1053; Boydston *v.* Rockwall County, 86 Tex. 234, 24 S. W. 272; Eslinger *v.* Pratt, 14 Utah 107, 46 Pac. 763; Carson *v.* Phœnix Ins. Co., 41 W. Va. 136, 23 S. E. 552; Smith *v.* Harrington, 3 Wyo. 503, 27 Pac. 803; U. S. *v.* Thoman, 156 U. S. 353, 15 S. Ct. 378, 39 L. ed. 450; Minor *v.* Mechanics Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47; The Shelbourne, 30 Fed. 510; Jones *v.* Harrison, 3 Eng. L. & Eq. 579.

47. Forbes *v.* Bethel, 28 Me. 204, 209; Spaulding *v.* Suss, 4 Mo. App. 541, 551; New York *v.* Furze, 3 Hill (N. Y.) 612, 615; Com. *v.* Cleary, 148 Pa. St. 26, 46, 23 Atl. 1110; Dillon *v.* Whatcom County, 12 Wash. 391, 402, 41 Pac. 174; Minor *v.* Mechanics Bank, 1 Pet. (U. S.) 46, 64, 7 L. ed. 47.

48. Pelletier *v.* Saunders, 67 N. C. 261, 262; Kennedy *v.* Sacramento, 19 Fed. 580, 583.

49. Adriance *v.* New York, 12 How. Pr. (N. Y.) 224, 231.

50. Swazey *v.* Blackman, 8 Ohio 5, 18.

51. Mitchell *v.* Duncan, 7 Fla. 13, 21; Douglass *v.* Cline, 12 Bush (Ky.) 608, 650; McRaven *v.* McGuire, 9 Sm. & M. (Miss.) 34, 54; Steines *v.* Franklin County, 48 Mo. 167, 178, 8 Am. Rep. 87; Follmer *v.* Nuckolls County, 6 Nebr. 204, 209; People *v.* Livingston County, 68 N. Y. 114, 116, 119; People *v.* Otsego County, 51 N. Y. 401, 406; Malcom *v.* Rogers, 5 Cow. (N. Y.) 188, 193, 15 Am. Dec. 464; Johnston *v.* Pate, 95 N. C. 68, 71; Shaeffer *v.* Jack, 14 Serg. & R. (Pa.) 426, 429; Territory *v.* Nelson, 2 Wyo. 346, 359; Mason *v.* Fearson, 9 How. (U. S.) 248, 259, 13 L. ed. 125; Winsor Coal Co. *v.* Chicago, etc., R. Co., 52 Fed. 716, 719; Rex *v.* Barlow, 2 Salk. 609; Bouvier L. Dict. [*quoted* in Campbell *v.* McCormick, 1 Ohio Cir. Ct. 504, 510, 1 Ohio Cir. Dec. 281; Territory *v.* Nelson, 2 Wyo. 346, 359].

52. Chicago, etc., R. Co. *v.* Howard, 38 Ill. 414, 417; State *v.* St. Louis, 158 Mo. 505, 510, 59 S. W. 1101; Hagadorn *v.* Raux, 72 N. Y. 583, 586; People *v.* Herkimer County,

for the purpose of enforcing a right but not to create one;[53] although it should be construed as meaning must or shall only where public interests and rights are concerned, and where the public or third persons have a claim *de jure*, that the power should be exercised;[54] nevertheless whether the word is to be construed

56 Barb. (N. Y.) 452, 454; Shapiro *v.* Burns, 27 N. Y. Suppl. 980, 983, 31 Abb. N. Cas. 144; New York *v.* Furze, 3 Hill (N. Y.) 612, 615; Rex *v.* Barlow, 2 Salk. 609.

53. *Ex p.* Banks, 28 Ala. 28, 35; State *v.* Holt County Ct. Justices, 39 Mo. 521, 524; State *v.* Hudson, 13 Mo. App. 61, 66.

Imperative or mandatory sense.—It has been held to be used in an imperative or mandatory sense in the following cases: *Ex p.* Chase, 43 Ala. 303, 311; Pirani *v.* Barden, 5 Ark. 81; Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627; Lyon *v.* Rice, 41 Conn. 245; Dabney *v.* Dabney, 20 App. Cas. (D. C.) 440; Weston *v.* Jones, 41 Fla. 188, 25 So. 888; Manufacturers Exhibition Bldg. Co. *v.* Landay, 219 Ill. 168, 76 N. E. 146; Boyer *v.* Onion, 108 Ill. App. 612; Sparrow *v.* Kelso, 92 Ind. 514; Indianapolis *v.* McAvoy, 86 Ind. 587; State *v.* Hortman, 122 Iowa 104, 97 N. W. 981; Douglass *v.* Cline, 12 Bush (Ky.) 608; Banton *v.* Griswold, 95 Me. 445, 50 Atl. 89; Monmouth *v.* Leeds, 76 Me. 28; Low *v.* Dunham, 61 Me. 566; Hubbard *v.* Lamburn, 189 Mass. 296, 75 N. E. 707; State *v.* Buffalo County, 6 Nebr. 454; Stowe *v.* Kearny, 72 N. J. L. 106, 59 Atl. 1058; Kennelly *v.* Jersey City, 57 N. J. L. 293, 30 Atl. 531, 26 L. R. A. 281; Davison *v.* Davison, 17 N. J. L. 169; Hagadorn *v.* Raux, 72 N. Y. 583; Hines *v.* Lockport, 60 Barb. (N. Y.) 378; Walker *v.* Maronda, (N. D. 1906) 106 N. W. 296; Mills *v.* Fortune, (N. D. 1905) 105 N. W. 235; Swazey *v.* Blackman, 8 Ohio 5; Kohn *v.* Hinshaw, 17 Oreg. 308, 20 Pac. 629; Jester *v.* Jefferson Tp. Overseers of Poor, 11 Pa. St. 540; Shaeffer *v.* Jack, 14 Serg. & R. (Pa.) 426; Davenport *v.* Caldwell, 10 S. C. 317; Barnes *v.* Thompson, 2 Swan (Tenn.) 313; *Ex p.* Young, (Tex. Cr. App. 1906) 95 S. W. 98; Granville *v.* Hancock, 55 Vt. 323; Kellogg *v.* Page, 44 Vt. 356, 8 Am. Rep. 383; Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817; *Ex p.* Lester, 77 Va. 663; Leigton *v.* Maury, 76 Va. 865; Van Dyke *v.* Lewis County School Dist. No. 77, (Wash. 1906) 86 Pac. 402; Elliott *v.* Hutchinson, 8 W. Va. 452; Atty.-Gen. *v.* Lock, 3 Atk. 164, 26 Eng. Reprint 897; Macdougall *v.* Paterson, 11 C. B. 755, 15 Jur. 1108, 21 L. J. C. P. 27, 2 L. M. & P. 681, 73 E. C. L. 755, 7 Eng. L. & Eq. 510; Crake *v.* Powell, 2 C. & B. 210, 21 L. J. Q. B. 183, 75 E. C. L. 210, 10 Eng. L. & Eq. 329; Fenson *v.* New Westminster, 2 Can. Cr. Cas. 52.

54. Blair *v.* Murphree, 81 Ala. 454, 456, 2 So. 18; *Ex p.* Simonton, 9 Port. (Ala.) 390, 395, 33 Am. Dec. 320; Edwards *v.* Hall, 30 Ark. 31, 36; Kemble *v.* McPhaill, 128 Cal. 444, 446, 60 Pac. 1092; Hayes *v.* Los Angeles County, 99 Cal. 74, 33 Pac. 766; Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 357, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627; Stoeckle *v.* Lewis, (Del. Ch. 1897) 38 Atl. 1059, 1062; Brokaw *v.* Bloomington Tp. Highway Com'rs, 130 Ill. 482, 490, 22 N. E. 596, 6 L. R. A. 161; James *v.* Dexter, 112 Ill. 489, 491; Fowler *v.* Pirkins, 77 Ill. 271, 273; Kane *v.* Footh, 70 Ill. 587, 590; Gillinwater *v.* Mississippi, etc., R. Co., 13 Ill. 1, 3; Schuyler County *v.* Mercer County, 9 Ill. 20, 24; Rothschild *v.* New York L. Ins. Co., 97 Ill. App. 547, 553; State *v.* Buckles, 39 Ind. 272, 275; Bansemer *v.* Mace, 18 Ind. 27, 32, 81 Am. Dec. 344; Nave *v.* Nave, 7 Ind. 122, 123; State *v.* McCarty, Wils. (Ind.) 205, 222; Downing *v.* Oskaloosa, 86 Iowa 352, 353, 53 N. W. 256; Phelps *v.* Lodge, 60 Kan. 122, 124, 55 Pac. 840; *In re* McCort, 52 Kan. 18, 21, 34 Pac. 456; Furbish *v.* Kennebec County, 93 Me. 117, 132, 44 Atl. 364; Monmouth *v.* Leeds, 76 Me. 28, 31; Low *v.* Dunham, 61 Me. 566, 569; Veazie *v.* China, 50 Me. 518, 526; Henkel *v.* Pioneer Sav., etc., Co., 61 Minn. 35, 37, 63 N. W. 243; Lovell *v.* Wheaton, 11 Minn. 92, 101; State *v.* King, 136 Mo. 309, 318, 36 S. W. 681, 38 S. W. 80; State *v.* Laughlin, 73 Mo. 443, 449; Ball *v.* Fagg, 67 Mo. 481, 483; State *v.* Garroutte, 67 Mo. 445, 454; Steines *v.* Franklin County, 48 Mo. 167, 178, 8 Am. Rep. 87; Leavenworth, etc., R. Co. *v.* Platte County Ct., 42 Mo. 171, 175; State *v.* Buffalo County, 6 Nebr. 454, 463; Blake *v.* Portsmouth, etc., R. Co., 39 N. H. 435; Seiple *v.* Elizabeth, 27 N. J. L. 407, 410; Medbury *v.* Swan, 46 N. Y. 200, 202; Phelps *v.* Hawley, 3 Lans. (N. Y.) 160, 166 [*affirmed* in 52 N. Y. 23]; Adriance *v.* New York, 12 How. Pr. (N. Y.) 224, 231; Buffalo, etc., Plank Road Co. *v.* Lancaster Highway Com'rs, 10 How. Pr. (N. Y.) 237, 239; New York, etc., R. Co. *v.* Coburn, 6 How. Pr. (N. Y.) 223, 224; Newburgh, etc., Turnpike Road Co. *v.* Miller, 5 Johns. Ch. (N. Y.) 101, 113; Kerlin Bros. Co. *v.* Toledo, 11 Ohio Cir. Dec. 56, 81; Com. *v.* Keim, 15 Phila. (Pa.) 1, 7; Com. *v.* Marshall, 3 Wkly. Notes Cas. (Pa.) 182, 186; Rains *v.* Herring, 68 Tex. 468, 472, 5 S. W. 369; Kellogg *v.* Page, 44 Vt. 356, 361, 8 Am. Rep. 383; *Ex p.* Lester, 77 Va. 663, 673; Leigton *v.* Maury, 76 Va. 856, 870; Bean *v.* Simmons, 9 Gratt. (Va.) 389, 391; Virginia Exch. Bank *v.* Lewis County, 28 W. Va. 273, 292; Elliott *v.* Hutchinson, 8 W. Va. 452, 459; Market Nat. Bank *v.* Hogan, 21 Wis. 317, 319; Cutler *v.* Howard, 9 Wis. 309, 311; Pensacola Provisional Municipality *v.* Lehman, 57 Fed. 324, 332, 6 C. C. A. 349.

"Must"—*Construed to mean "must"* in *Ex p.* Cincinnati, etc., R. Co., 78 Ala. 258; Nabors *v.* Nabors, 2 Port. (Ala.) 162; Crocker *v.* Conrey, 140 Cal. 213, 73 Pac. 1006; Kemble *v.* McPhaill, 128 Cal. 444, 60 Pac. 1092; People *v.* Rio Grande County, 7 Colo. App. 229, 42 Pac. 1032; Levy *v.* Millman, 7 Ga. 167; Mercy Hospital *v.* Chicago, 187 Ill. 400, 58 N. E. 353; Kane County *v.* Young, 31 Ill. 194; Randolph County *v.* Ralls, 18 Ill. 29; Whitney *v.* Ragsdale, 33 Ind. 107, 5 Am. Rep. 185; Kansas Pac. R. Co. *v.* Reynolds, 8 Kan. 623; Forbes *v.* Bethel, 28 Me. 204; Sifford *v.* Morrison, 63 Md. 14; Rich *v.* Board of State Canvassers, 100 Mich. 453, 59

as mandatory and imposing a duty or merely as permissive and conferring discretion is to be determined in each case from the apparent intention of the statute

N. W. 181; Whitten *v.* State, 61 Miss. 717; Spaulding *v.* Suss, 4 Mo. App. 541; Doane *v.* Omaha, 58 Nebr. 815, 80 N. W. 54; State *v.* Duffy, 7 Nev. 342, 8 Am. Rep. 713; Blake *v.* Portsmouth, etc., R. Co., 39 N. H. 435; O'Reilley *v.* Kingston, 114 N. Y. 439, 21 N. E. 1004; Phelps *v.* Hawley, 52 N. Y. 23 [*affirming* 3 Lans. 160]; Mitchell *v.* Pike, 17 Hun (N. Y.) 142; Appleton *v.* Warner, 51 Barb. (N. Y.) 270; Brainerd *v.* De Graef, 29 Misc. (N. Y.) 560, 61 N. Y. Suppl. 953; Shapiro *v.* Burns, 7 Misc. (N. Y.) 418, 27 N. Y. Suppl. 980; Adriance *v.* New York, 12 How. Pr. (N. Y.) 224; Drought *v.* Curtiss, 8 How. Pr. (N. Y.) 56; Johnston *v.* Pate, 95 N. C. 68; State *v.* Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686; Columbus, etc., R. Co. *v.* Mowatt, 35 Ohio St. 284; Kerlin Bros. Co. *v.* Toledo, 20 Ohio Cir. Ct. 603, 11 Ohio Cir. Dec. 56; Pope *v.* Pollock, 1 Ohio Cir. Ct. 347, 1 Ohio Cir. Dec. 193; Thornton's Estate, 5 Ohio S. & C. Pl. Dec. 151, 7 Ohio N. P. 335; Richardson *v.* Augustine, 5 Okla. 667, 49 Pac. 930; *In re* Brown, 2 Okla. 590, 39 Pac. 469; Reed *v.* Penrose, 2 Grant (Pa.) 472; Seattle, etc., R. Co. *v.* O'Meara, 4 Wash. 17, 29 Pac. 835; State *v.* Board of State Canvassers, 36 Wis. 498; Kent *v.* U. S., 113 Fed. 232, 51 C. C. A. 189.

Construed not to mean "must" in Blair *v.* Murphree, 81 Ala. 454, 456, 2 So. 18; Coopers *v.* San Jose, 55 Cal. 599; State *v.* Williams, 4 Ida. 502, 42 Pac. 511; Union School Dist. No. 6 *v.* Sterricker, 86 Ill. 595; Kelly *v.* Morse, 3 Nebr. 224; Talmage *v.* Third Nat. Bank, 91 N. Y. 531; Morse *v.* Press Pub. Co., 71 N. Y. App. Div. 351, 75 N. Y. Suppl. 976; Reynolds *v.* Union Free School Dist. Bd. of Education, 33 N. Y. App. Div. 88, 53 N. Y. Suppl. 75; Cooke *v.* State Nat. Bank, 50 Barb. (N. Y.) 339, 3 Abb. Pr. N. S. 339 [*affirmed* in 52 N. Y. 96, 11 Am. Rep. 667]; Columbia Bank *v.* Jackson, 4 N. Y. Suppl. 433; Buffalo, etc., Plank Road Co. *v.* Lancaster Highway Com'rs, 10 How. Pr. (N. Y.) 237; Deane *v.* Willamette Bridge Co., 22 Oreg. 167, 29 Pac. 440, 15 L. R. A. 614; *In re* Carter, 3 Oreg. 293; Reitz *v.* Thomas, 13 Pa. Co. Ct. 315; Atlantic, etc., R. Co. *v.* Peake, 87 Va. 130, 12 S. E. 348; Market Nat. Bank *v.* Hogan, 21 Wis. 317.

Shall — *Construed to mean "shall"* in Hoppe *v.* Hoppe, (Cal. 1894) 36 Pac. 389; Demartin *v.* Demartin, 85 Cal. 71, 24 Pac. 594; Ballentine's Estate, 45 Cal. 696; Cooke *v.* Spears, 2 Cal. 409, 56 Am. Dec. 348; Pueblo County *v.* Smith, 22 Colo. 534, 45 Pac. 357, 33 L. R. A. 465; State *v.* Richards, 74 Conn. 57, 49 Atl. 858; Vason *v.* Augusta, 38 Ga. 542; Chicago, etc., R. Co. *v.* People, 163 Ill. 616, 45 N. E. 122; Peotone, etc., Drainage Dist. No. 1 *v.* Adams, 163 Ill. 428, 45 N. E. 266; Chicago Pub. Stock Exch. *v.* McClaughry, 148 Ill. 372, 36 N. E. 88; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144; Cairo *v.* Campbell, 116 Ill. 305, 5 N. E. 114, 8 N. E. 688; James *v.* Dexter, 112 Ill. 489; Schuyler County *v.* Mercer County, 9 Ill. 20; Rothschild *v.* New York L. Ins. Co., 97 Ill. App. 547; Phillips *v.* Fadden, 125 Mass. 198; Com. *v.* Smith, 111 Mass. 407; Worcester County *v.* Schlesinger, 16 Gray (Mass.) 166; Maine *v.* Gould, 11 Metc. (Mass.) 220; Freud *v.* Wayne Cir. Judge, 131 Mich. 606, 92 N. W. 109; McBrian *v.* Grand Rapids, 56 Mich. 95, 22 N. W. 206; Gilfillan *v.* Hobart, 35 Minn. 185, 28 N. W. 222; State *v.* Withrow, (Mo. 1891) 24 S. W. 638; State *v.* Laughlin, 73 Mo. 443; Western Travelers' Acc. Assoc. *v.* Taylor, 62 Nebr. 783, 87 N. W. 950; State *v.* Buffalo County, 6 Nebr. 454; People *v.* Buffalo County, 4 Nebr. 150; Walley's Estate, 11 Nev. 260; Bufford *v.* Johnson, 34 N. H. 489; People *v.* Livingston County, 68 N. Y. 114; People *v.* Otsego County, 51 N. Y. 401; Williams *v.* People, 24 N. Y. 405; Carter *v.* Barnum, 24 Misc. (N. Y.) 220, 53 N. Y. Suppl. 539; Devine's Case, 11 Abb. Pr. (N. Y.) 90; People *v.* Brooks, 1 Den. (N. Y.) 457, 43 Am. Dec. 704; Smith *v.* King, 14 Oreg. 10, 12 Pac. 8; *In re* Carter, 3 Oreg. 293; Walton *v.* Walton, 96 Tenn. 25, 33 S. W. 561; Barnes *v.* Thompson, 2 Swan (Tenn.) 313; Smisson *v.* State, 71 Tex. 222, 9 S. W. 112; Central Vermont R. Co. *v.* Royalton, 58 Vt. 234, 4 Atl. 868; Sabin *v.* Kelton, 54 Vt. 283; Lee *v.* Mutual Reserve Fund L. Assoc., 97 Va. 160, 33 S. E. 556; Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817; Welsh *v.* Solenberger, 85 Va. 441, 8 S. E. 91; Hutcheson *v.* Priddy, 12 Gratt. (Va.) 85; Bean *v.* Simmons, 9 Gratt. (Va.) 389; Buena Vista Freestone Co. *v.* Parrish, 34 W. Va. 652, 12 S. E. 817; Rock Island County *v.* U. S., 4 Wall. (U. S.) 435, 18 L. ed. 419; Winsor Coal Co. *v.* Chicago, etc., R. Co., 52 Fed. 716; *In re* Patterson, 18 Fed. Cas. No. 10,815, 1 Ben. 508.

Construed not to mean "shall" in People *v.* Henderson, 12 Colo. 369, 21 Pac. 144; Caldwell *v* State, 34 Ga. 10; Dawson *v.* Black, 148 Ill. 484, 36 N. E. 413; Vigo County *v.* Davis, 136 Ind. 503, 36 N. E. 141, 22 L. R. A. 515; Allen *v.* Wells, 22 Ind. 118; Cross *v.* Pearson, 17 Ind. 612; Ridley *v.* Ridley, 24 Miss. 648; State *v.* St. Louis, 158 Mo. 505, 59 S. W. 1101; State *v.* Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; Atchison, etc., R. Co. *v.* Lawler, 40 Nebr. 356, 58 N. W. 968; Rogers *v.* Bowen, 42 N. H. 102; *In re* Goddard, 94 N. Y. 544; State *v.* Budd, 65 Ohio St. 1, 60 N. E. 988; Echols *v.* Brennan, 99 Va. 150, 37 S. E. 786; Ailstock *v.* Page, 77 Va. 386; Bolling *v.* Petersburg, 3 Rand. (Va.) 563.

"Must" or "shall" — *Construed to mean "must" or "shall"* in State *v.* Neuner, 49 Conn. 232; Rockwell *v.* Clark, 44 Conn. 534; Birdsong *v.* Brooks, 7 Ga. 88; Young *v.* Carey, 184 Ill. 613, 56 N. E. 960; Ticknor *v.* McClelland, 84 Ill. 471; Gillinwater *v.* Mississippi, etc., R. Co., 13 Ill. 1; Havens *v.* Pope, 10 Kan. App. 299, 62 Pac. 538; Hill *v.* Duncan, 110 Mass. 238; Montana Ore Purchasing Co. *v.* Lindsay, 25 Mont. 24, 63 Pac. 715; People *v.* Brooklyn, 22 Barb. (N. Y.),

as gathered from the context, as well as the language of the particular provision ;[55] and it is always used in a permissive sense unless necessary to give effect to the intent of the legislature.[56] So too in various other instruments or writings the word has been construed as being either permissive or mandatory according to the intent of the parties using it.[57] (May: Indicating Continuing Guaranty, see GUARANTY. Used in Statutes, see STATUTES.)

404; Rumsey *v.* Lake, 55 How. Pr. (N. Y.) 339; Grantman *v.* Thrall, 31 How. Pr. (N. Y.) 464; Neuse Mfg. Co. *v.* Brower, 105 N. C. 440, 11 S. E. 313; Jones *v.* Statesville, 97 N. C. 86, 2 S. E. 346.

Construed to mean neither "must" nor "shall" in Lovell *v.* Wheaton, 11 Minn. 92; Skinner *v.* Tibbitts, 13 N. Y. Civ. Proc. 370; Perkins *v.* Butler, 42 How. Pr. (N. Y.) 102; New York, etc., R. Co. *v.* Coburn, 6 How. Pr. (N. Y.) 223; King Real Estate Assoc. *v.* Portland, 23 Oreg. 199, 31 Pac. 482; *Ex p.* Lowrie, 4 Utah 177, 7 Pac. 493; Cutler *v.* Howard, 9 Wis. 309.

55. Kansas Pac. R. Co. *v.* Reynolds, 8 Kan. 623, 628; Moies *v.* Economical Mut. L. Ins. Co., 12 R. I. 259, 262; Colby University *v.* Canandaigua, 69 Fed. 671, 673.

56. People *v.* Syracuse, 59 Hun (N. Y.) 258, 260, 12 N. Y. Suppl. 890 [*affirmed* in 128 N. Y. 632, 29 N. E. 146].

57. Chicago, etc., R. Co. *v.* Meech, 163 Ill. 305, 315, 45 N. E. 290 (construed as synonymous with "should" in an instruction); Weymouth *v.* Penobscot Log Driving Co., 71 Me. 29, 38 (in the charter of a logging company, as permissive); Hall *v.* Wabash R. Co., 80 Mo. App. 463, 471 (in instructions to the jury, as permissive); Ellis *v.* Aldrich, 70 N. H. 219, 222, 47 Atl. 95 (in a will, as imperative); Matter of Thirty-Fourth St. R. Co., 2 How. Pr. N. S. (N. Y.) 369, 377 (in constitutional provision, as permissive); McIntyre *v.* McIntyre, 123 Pa. St. 323, 329, 16 Atl. 783, 10 Am. St. Rep. 529 (in a will, as precatory); McClain *v.* Williams, 10 S. D. 332, 334, 73 N. W. 72, 43 L. R. A. 287 (in constitutional provision, as permissive); Fleming *v.* Appleton, 55 Wis. 90, 92, 12 N. W. 462 (in a city charter, as imperative); The Mary M. Hogan, 17 Fed. 813, 814 (in a rule of admiralty, as permissive); Entwisle *v.* Dent, 1 Exch. 812, 18 L. J. Exch. 138 (in a letter, as imperative).

MAYHEM

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For Matters Relating to :

Aggravated Assault, see Assault and Battery,
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I. DEFINITION.

Mayhem at common law is defined as the violently depriving another of the use of such of his members as may render him less able in fighting to defend himself or to annoy his adversary.[1]

1. 4 Blackstone Comm. 206; 1 East P. C. 393. It is similarly defined in Com. *v.* Newell, 7 Mass. 245, 246; State *v.* Johnson, 58 Ohio St. 417, 423, 51 N. E. 40, 65 Am. St. Rep. 769; Com. *v.* Porter, 1 Pittsb. (Pa.) 502, 505; Terrell *v.* State, 86 Tenn. 523, 525, 8 S. W. 212.

Glanville defines mayhem as "the breaking of any bone or injuring the head by wounding or abrasion." Foster *v.* People, 50 N. Y. 598, 605, 1 Cow. Cr. 508.

Maim and mayhem are equivalent terms at common law and mean the same thing. State *v.* Johnson, 58 Ohio St. 417, 51 N. E.

II. NATURE AND ELEMENTS.

A. In General. The crime was a felony at the ancient common law,[2] but whether it was so regarded at common law after the retaliatory punishment was superseded by fine and imprisonment[3] the authorities are not in accord.[4] The nature of the offense has since been fixed by various statutory provisions as a felony both in England and the United States,[5] or a misdemeanor, according to the gravity of the injury against which the statute provides or the circumstances under which the injury is inflicted.[6]

B. Intent — Malice and Premeditation — 1. In General. At common law an indictment for mayhem could be supported only when the act was done with malice,[7] and under the Coventry Act[8] the deed must have been committed of malice aforethought and of a deliberate and premeditated design to do an injury of the sort described;[9] but the malicious intention need not have been directed against any particular person,[10] and although the statute provided against the particular acts "with intention to maim or disfigure," yet if the intent was of a higher nature, as to murder, and in the attempt the offender did not kill but only maimed, it was an offense within the act.[11] So under the American statutes the

40, 65 Am. St. Rep. 769. See also Guest *v.* State, 19 Ark. 405.

2. Molette *v.* State, 49 Ala. 19; Com. *v.* Newell, 7 Mass. 245.

3. See *infra*, VI.

4. **Felony.**—Blackstone classifies the crime at common law as a felony, although he leaves the nature of the offense in doubt after the punishment *membrum pro membro* was changed by saying that after this punishment went out of use "by the common law, as it for a long time stood, mayhem was only punishable with fine and imprisonment; unless perhaps the offence of mayhem by castration, which all our old writers held to be felony." 4 Blackstone Comm. 205. East says that all maims were said to be felony anciently because the offender had judgment of the loss of the same member he had occasioned, but that afterward the judgment was fine and imprisonment, from which the offense seems to have been afterward considered more in the nature of an aggravated assault. 1 East P. C. 393. But he classes the offense as a "felony, punishable by Fine and Imprisonment." 1 East P. C. 392. In Com. *v.* Porter, 1 Pittsb. (Pa.) 502, 504, it was held that the offense was always a felony at common law and that it was so in Pennsylvania; that the discord in the authorities comes from early misquotations of Coke as defining the offense as "under all felonies and above all other inferior offences," whereas his language is (as appears from 1 Coke, 1st Am. ed. from 19th London ed. p. 127): "This offence of mayhem is under all felonies deserving death, and above all other inferior offences." See also 1 East P. C. 393.

Misdemeanor.— But it has been regarded as of a lower grade than felony at common law after the punishment was changed, except in the one instance of mayhem by castration. Adams *v.* Barrett, 5 Ga. 404 (holding that mayhem, at common law, was not a felony, because there was no judgment of forfeiture either of lands or goods and therefore it is not one of those offenses for which it is necessary for the injured party to prosecute the criminal to conviction or acquittal before he is entitled to his action for damages); Com. *v.* Newell, 7 Mass. 245; Com. *v.* Lester, 2 Va. Cas. 198 (where it is held that the offense was not felony, with one exception).

Immaterial.— In Foster *v.* People, 1 Colo. 293, it was held that the question whether the offense was felony or misdemeanor was important only with reference to the old rule that a conviction for misdemeanor could not be had upon an indictment for felony, which does not prevail in Colorado.

5. Molette *v.* State, 49 Ala. 18; State *v.* Nichols, 38 Ark. 550; State *v.* Brown, 60 Mo. 141; Canada *v.* Com., 22 Gratt. (Va.) 899 (malicious cutting and wounding with intent to maim); 1 East P. C. 393. And see *infra*, II, C, 1.

6. See Strawn *v.* State, 14 Ark. 549 (felony under the statute, but a maim inflicted in a mutual fight is not a maiming but an aggravated assault); Carpenter *v.* People, 31 Colo. 284, 72 Pac. 1072; Foster *v.* People, 1 Colo. 293 (under a provision reducing the offense to a misdemeanor when the injured person was assailant); State *v.* Holmes, 4 Pennew. (Del.) 196, 55 Atl. 343 (where it appears the offense was a felony if there was a lying in wait, otherwise a misdemeanor); State *v.* Fisher, 103 Ind. 530, 3 N. E. 379 (felony where the maiming is with malice, otherwise "simple mayhem").

7. 1 East P. C. 393.

8. See *infra*, II, C, 1.

9. State *v.* Mairs, 1 N. J. L. 453; 1 East P. C. 394, 398.

10. Rex *v.* Carroll, Leach C. C. 66; 1 East P. C. 396.

Blow aimed at another.— If a blow be intended to maim one and by accident maim another the offense may be committed. 1 East P. C. 396 [*citing* Wright's Case, Coke Litt. 127, 1 Hale P. C. 412, 11 Jac. 1].

11. Rex *v.* Coke, 16 How. St. Tr. 54.

act must be done in the manner and with the intent inhibited, as maliciously, on purpose, and with evil intent;[12] but this is generally all that is necessary under provisions punishing the wilful, intentional, or malicious acts prescribed; the act is maliciously done when it is done on purpose and with evil intent and whether such an act results in the unlawful purpose intended or in some other evil or unlawful purpose makes no difference.[13] And so where the offense is simply the unlawful depriving of the member, etc., the specific intent to maim is not necessary,[14] nor the specific intent to injure as to a particular part of the body; but if the act is intentionally done from which the resultant inhibited act arises the offense is complete.[15] Sometimes under the statute the injury must be wilfully inflicted with the intent to injure, disfigure, or disable, that being the offense punishable by the statute;[16] but this intent may be presumed from the act of maiming unless the contrary appears.[17]

2. Premeditation — Lying in Wait — a. In General. At common law the act might have amounted to mayhem no matter how sudden the occasion,[18] but under the Coventry Act there not only must have been malice aforethought but by lying in wait for the premeditated purpose,[19] and so under like provisions in

12. Molette *v.* State, 49 Ala. 18 (defining malice); State *v.* Abram, 10 Ala. 928; State *v.* Simmons, 3 Ala. 497 (as distinguished from accident); State *v.* Ma Foo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414 (where an instruction was upheld which distinguished the intent from mere accident and permitted the presumption from a wilful act that defendant intended the natural consequences thereof); State *v.* Ormond, 18 N. C. 119 (on purpose).

13. Molette *v.* State, 49 Ala. 18; State *v.* Simmons, 3 Ala. 497 (holding that a malicious design to injure is meant); People *v.* Wright, 93 Cal. 564, 29 Pac. 240 [*distinguishing* Godfrey *v.* People, 63 N. Y. 207; Tully *v.* People, 67 N. Y. 15, both of which were under statutes requiring premeditated design evinced by lying in wait] (holding premeditation not necessary); State *v.* Skidmore, 87 N. C. 509; Davis *v.* State, 22 Tex. App. 45, 2 S. W. 630 (presumption of intention if such means are used as would result in maiming).

Malice is implied from the unlawful act unless circumstances of provocation are shown to remove the presumption. Baker *v.* State, 4 Ark. 56; Carpenter *v.* People, 31 Colo. 284, 72 Pac. 1072; Terrell *v.* State, 86 Tenn. 523, 8 S. W. 212 (under a statute not specifying that the act should be done with intent to maim); Worley *v.* State, 11 Humphr. (Tenn.) 172.

14. Baker *v.* State, 4 Ark. 56; Carpenter *v.* People, 31 Colo. 284, 72 Pac. 1072; Terrell *v.* State, 86 Tenn. 523, 8 S. W. 212; Bowers *v.* State, 24 Tex. App. 542, 7 S. W. 247, 5 Am. St. Rep. 901.

15. Molette *v.* State, 49 Ala. 18.

16. State *v.* Hair, 37 Minn. 351, 34 N. W. 893; Respublica *v.* Langcake, 1 Yeates (Pa.) 415 (holding that under the first clause of an early statute there, only a general intent to maim was necessary, but that under another clause directed particularly against putting out the eye, a specific intent to pull or put out the eye was necessary); Davis *v.* State, 22 Tex. App. 45, 2 S. W. 630 (distinguishing assault with intent to main and the offense defined as maiming); State *v.* Bloedow, 45 Wis. 279.

17. State *v.* Jones, 70 Iowa 505, 30 N. W. 750 (where an instruction was sustained which charged that a specific intent to disfigure was an essential element of the crime, and that such intent might be inferred or presumed if the act which caused the disfigurement was done deliberately, and the disfigurement was reasonably to be apprehended as the natural and probable consequence of the act, but that they ought to consider all the circumstances of the transaction in determining whether the specific intent existed in defendant's mind at the time, or whether he did the act deliberately); State *v.* Clark, 69 Iowa 196, 28 N. W. 537; State *v.* Hair, 37 Minn. 351, 34 N. W. 893; State *v.* Girkin, 23 N. C. 121; State *v.* Crawford, 13 N. C. 425; State *v.* Evans, 2 N. C. 281. But in State *v.* Cody, 18 Oreg. 506, 23 Pac. 891, 24 Pac. 895, it was held that where the injury was inflicted in a fight which arose out of a sudden heat of passion the offense was not committed. The statute was directed against the "purposely and maliciously" doing particular acts, and the court proceeds upon the reasoning of Tully *v.* People, 67 N. Y. 15, and Godfrey *v.* People, 63 N. Y. 207, which were upon a statute expressly requiring premeditated design evinced by lying in wait or otherwise.

18. 1 East P. C. 393.

19. State *v.* Mairs, 1 N. J. L. 453; Rex *v.* Tickner, 1 Leach C. C. 222, where the injury arose out of a sudden attack unconnected with any premeditated design against the person and it was held not to be within the statute.

One need not rush from a lurking place in order to come within the meaning of the provision requiring a lying in wait, but if after forming the intention to maim he takes a convenient opportunity of deliberately doing the injury it is sufficient. State *v.* Mairs, 1 N. J. L. 453; Rex *v.* Mills, 1 Leach C. C. 294.

American statutes requiring a lying in wait,[20] or premeditation,[21] evinced by lying in wait or otherwise, under which the existence of the design cannot be found from the mere proof of the commission of the act.[22] On the other hand it is held that the malice aforethought may be implied even under a statutory provision embracing malice aforethought,[23] and a premeditated design is not necessary because the purpose may be inferred from the act,[24] and so the premeditated design may be inferred from the nature of the act where the statute does not expressly require malice aforethought and lying in wait.[25]

b. Where Injury Inflicted in Conflict. Under the statutory rule that there must be a premeditated design, if the injury arises out of a sudden attack unconnected with any premeditated design, against the person the offense is not committed.[26] On the other hand it is held that even while the act must be done with malice aforethought it is entirely immaterial at what period of time the design was formed;[27] and in other cases, under provisions which are fully met by proof of the commission of the act, from which the law will presume that it was done unlawfully and maliciously unless the evidence shows the contrary, it does not matter that the intent was formed during the conflict.[28] Under some of the statutes guilt is excluded when the act is done by "change medley, sudden affray or adventure,"[29] or in a fight.[30]

3. Assault With Intent to Maim. A charge of the commission of an act with intent to maim cannot be supported as to the intent charged where the act alleged does not constitute a maiming.[31] But where maiming is a felony an assault with intent to maim is an assault with intent to commit a felony under a statute punishing the latter offense,[32] and sometimes the statute provides specifically against certain assaults, as shooting at or shooting a person, with intent to maim,[33] or cut-

20. Respublica *v.* Langcake, 1 Yeates (Pa.) 415 (holding that the malice and lying in wait need not be expressly proved but may be collected from the circumstances of the case as in Rex *v.* Mills, 1 Leach C. C. 294), *supra*, note 19; Pennsylvania *v.* McBirnie, Add. (Pa.) 28.

21. State *v.* Cody, 18 Oreg. 506, 23 Pac. 891, 24 Pac. 895, under a provision requiring the act to be "purposely and maliciously" done.

22. **Premeditated design by lying in wait or otherwise.**— In New York the statute required premeditated design evinced by lying in wait or otherwise. The design must precede the conflict. Tully *v.* People, 67 N. Y. 15; Godfrey *v.* People, 63 N. Y. 207; Burke *v.* People, 4 Hun (N. Y.) 481.

23. State *v.* Irwin, 2 N. C. 112.

24. State *v.* Simmons, 3 Ala. 497; State *v.* Girkin, 23 N. C. 121; State *v.* Crawford, 13 N. C. 425; State *v.* Evans, 2 N. C. 281. See also State *v.* Skidmore, 87 N. C. 509.

25. U. S. *v.* Gunther, 5 Dak. 234, 38 N. W. 79. See also cases cited *supra*, note 16.

26. Tully *v.* People, 67 N. Y. 15; Godfrey *v.* People, 63 N. Y. 207; Burke *v.* People, 4 Hun (N. Y.) 481; State *v.* Cody, 18 Oreg. 506, 23 Pac. 891, 24 Pac. 895; Rex *v.* Tickner, Leach C. C. 222.

27. State *v.* Simmons, 3 Ala. 497.

28. People *v.* Wright, 93 Cal. 564, 29 Pac. 240; State *v.* Skidmore, 87 N. C. 509.

Self defense see *infra*, IV.

29. 37 Hen. IV, c. 6; 1 East P. C. 393.

30. Carpenter *v.* People, 31 Colo. 284, 72 Pac. 1072; Foster *v.* People, 1 Colo. 293, in both of which cases it appears that the statute provides that no person shall be found guilty of mayhem where the fact occurred during a fight had by consent, nor unless it appear that the person accused shall have been the assailant, or that the party maimed had in good faith endeavored to decline further combat, etc.

31. Foster *v.* People, 50 N. Y. 598 (where it was held that the provision of the statute was intended as a statutory definition of the crime of mayhem, and that the term included only the injuries there enumerated; that a blow aimed at, and delivered on, the head, cannot constitute the crime of assault and battery with intent to maim); State *v.* Johnson, 58 Ohio St. 417, 51 N. E. 40, 65 Am. St. Rep. 769 (holding that a count in an indictment charging defendant with maliciously biting the ear of another with intent to maim cannot be supported as to the particular intent charged). See also Com. *v.* Lester, 2 Va. Cas. 198. So under a statute against wounding with intent to maim and disable, it was held that there was no proof of an intent to maim and disable, as the blow was aimed at the head of the prosecutor, although it would have been otherwise if it had been aimed at his arm to prevent his being able to use it. Reg. *v.* Sullivan, C. & M. 209, 41 E. C. L. 118. *Compare* Briggs' Case, 1 Lew. C. C. 61, 1 Moody C. C. 318.

32. State *v.* Brown, 60 Mo. 141; State *v.* Thompson, 30 Mo. 470.

33. State *v.* Elborn, 27 Md. 483; Ridenour *v.* State, 38 Ohio St. 272. See, generally for aggravated assaults, Assault and Battery, 3 Cyc. 1014.

ting or stabbing with such intent;[34] and if the intent to maim is wanting the offense is not made out, although there may have been an assault.[35]

C. Nature, Means, and Extent of Injury — 1. Nature in General. If the injury disfigured only without diminishing the victim's corporal abilities it did not fall within the crime of mayhem at common law.[36] The offense was at an early date regulated and enlarged by statutes in England[37] and in the United States, many of which statutes declare what acts shall constitute maiming, although some of the acts enumerated amount to mayhem at common law and some do not, the blending of them in the same definition putting all of them on the same legal footing,[38] as under provisions directed against the depriving of a human being of a member of his body or disfiguring it or rendering it useless, and sometimes expressly defining such acts so resulting as mayhem or maiming,[39] or making

34. See Reg. *v.* Spooner, 6 Cox C. C. 392; Rex *v.* Murrow, 1 Moody C. C. 456; Rex *v.* Boyce, 1 Moody C. C. 29. And see *infra*, II, C, 1.

35. Reg. *v.* Abraham, 1 Cox C. C. 208. See also *supra*, notes 13, 16.

36. Foster *v.* People, 50 N. Y. 598, 1 Cow. Cr. 508; Godfrey *v.* People, 5 Hun (N. Y.) 369 [*reversed* in 63 N. Y. 207, on question of intent]; Com. *v.* Porter, 1 Pittsb. (Pa.) 502; Terrell *v.* State, 86 Tenn. 523, 8 S. W. 212; Chick *v.* State, 7 Humphr. (Tenn.) 161; 1 East P. C. 393, where it is said that upon this distinction, the cutting off, disabling, or weakening a man's hand or finger, or striking out an eye or foretooth, or castrating him, or, as Lord Coke adds, breaking his skull, are said to be maims; but the cutting off his ear or nose are not such at common law.

37. 1 East P. C. 393, where the early acts are shown, the first being that of 5 Hen. IV, c. 5, to remedy a mischief which then prevailed of beating, wounding, imprisoning, or maiming persons, and after purposely "cutting their tongues or putting out their eyes," to prevent them from giving evidence against the perpetrators, the offense being declared a felony. The act of 37 Hen. VIII, c. 6, was directed against the cutting off or causing to be cut off an ear.

The Coventry Act, being the act of 22 & 23 Car. II, c. 1, and called the Coventry Act from the circumstances of its having passed on occasion of an assault made on Sir John Coventry in the street, and slitting his nose, by persons who lay in wait for him for that purpose, in revenge as was supposed for some obnoxious words uttered by him in parliament, provided "that if any person or persons shall, on purpose and of malice forethought, by laying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject; with intention in so doing to maim or disfigure him in any the manners before mentioned; that then the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to the offence as aforesaid, shall be declared to be felons, and suffer death as in cases of felony without benefit of clergy." But not to work corruption of blood, forfeiture of dower, or of the lands or goods of the offender. 1 East P. C. 394.

Transverse cut.— The slitting of the nose was not confined to any particular form or direction, but any division of the flesh or gristle of the nose, whether perpendicular or transverse, came within the denomination of a slit and was equally a disfiguring. Rex *v.* Carroll, Leach C. C. 66; Rex *v.* Coke, 16 How. St. Tr. 54, 1 East P. C. 395.

38. See the various statutes.

Statute exclusive.— The crime of mayhem includes those injuries only which are enumerated in the statute. Foster *v.* People, 50 N. Y. 598, 1 Cow. Cr. 508; Rex *v.* Lee, Leach C. C. 61.

39. *Alabama.*— Molette *v.* State, 49 Ala. 18.

Arkansas.— State *v.* Nichols, 38 Ark. 550 (biting off the ear); Guest *v.* State, 19 Ark. 405; Baker *v.* State, 4 Ark. 56 (holding that it is sufficient if bodily vigor is affected by his strength, activity, etc., being decreased).

California.— People *v.* Wright, 93 Cal. 564, 29 Pac. 240; People *v.* Golden, 62 Cal. 542.

Colorado.— The biting off of an ear of a human being falls under a statute against disabling or disfiguring a member of the body. Carpenter *v.* People, 31 Colo. 284, 72 Pac. 1072; Foster *v.* People, 1 Colo. 293.

Dakota.— U. S. *v.* Gunther, 5 Dak. 234, 38 N. W. 79.

Georgia.— Kitchens *v.* State, 80 Ga. 810, 7 S. E. 209.

Iowa.— Benham *v.* State, 1 Iowa 542.

Kentucky.— Swan *v.* Com., 5 Ky. L. Rep. 238, tearing off an ear under a provision against biting or slitting off an ear.

New York.— Tully *v.* People, 67 N. Y. 15; Godfrey *v.* People, 5 Hun 369 [*reversed* in 63 N. Y. 207 on another point], holding that the external ear is a member of the human body within the meaning of the statute of mayhem.

Oregon.— State *v.* Vowels, 4 Oreg. 324.

Tennessee.— Terrell *v.* State, 86 Tenn. 523, 8 S. W. 212.

Texas.— Slattery *v.* State, 41 Tex. 619. It is maiming, under such statute, to knock out a front tooth, as it is a member of the body. High *v.* State, 26 Tex. App. 545, 10 S. W. 238, 8 Am. St. Rep. 488.

Virginia.— Com. *v.* Lester, 2 Va. Cas. 198.

Wisconsin.— Moore *v.* State, 3 Pinn. 373, 4 Chandl. 168.

punishable maiming, wounding, or disfiguring, in more general terms,[40] or making punishable certain acts, without designating the offense, including such as would have been mayhem, at common law,[41] and the military or combative importance of the organ injured or destroyed to which the old common law had special regard is of no significance.[42]

2. MEANS. The statute against depriving a person of the use of a limb, etc., may be violated by whatever instrument or means it is done.[43]

3. EXTENT OF INJURY. Where the inhibition is directed against an injury which disfigures, it is not necessary that the whole member should be mutilated or detached if the injury impairs comeliness;[44] but the cutting or biting off of a small portion of the member which does not disfigure the person, and could only be discovered by close inspection, or examination, when attention is directed to it, will not constitute mayhem under the statute.[45] Under a provision defining maim as, among other acts, the depriving one of any member of his body, if the act is once completely committed the offense is not the less complete because the member was put back and grew to its proper place,[46] but it is held that by disabling a limb or member, the statute contemplates a permanent injury, not a mere temporary disabling.[47]

United States.— U. S. *v.* Scroggins, 27 Fed. Cas. No. 16,243, Hempst. 478.

See 34 Cent. Dig. tit. "Mayhem," §§ 3, 4.

Act with intent to maim not mayhem.— But in Com. *v.* Newell, 7 Mass. 245, it is held that in a statute declaring that if any person with malice, etc., and with an intention to maim and disfigure, shall unlawfully cut off an ear of another, he shall be punished, etc., the word "maim" is used in the popular sense of "mutilated," and not as synonymous with the technical word "mayhem," as the statute does not make the cutting off the ear mayhem, but only punishes the act defined.

40. State *v.* Vaughn, 164 Mo. 536, 65 S. W. 236.

Similar statutes in England.— See Reg. *v.* Spooner, 5 Cox C. C. 392; Rex *v.* Boyce, 1 Moody C. C. 29; 9 Geo. IV, c. 31, § 12; 43 Geo. III, c. 58, § 1; 1 Vict. c. 85, § 4.

To constitute a wound under the English statute (1 Vict. c. 85, § 2) for wounding, etc., with intent to maim or disable, it was held that the whole skin must be broken. Reg. *v.* McLoughlin, 8 C. & P. 635, 34 E. C. L. 934; Rex *v.* Wood, 4 C. & P. 381, 19 E. C. L. 564. But where the skin was divided by throwing a sledge-hammer it was a wounding within 9 Geo. IV, c. 31, §§ 11, 12, although the sledge-hammer, from being blunt, was not an instrument calculated to inflict a wound. Rex *v.* Withers, 4 C. & P. 446, 1 Moody C. C. 294, 19 E. C. L. 595. And there need be no effusion of blood. Reg. *v.* Smith, 8 C. & P. 173, 34 E. C. L. 673. So under the act 9 Geo. IV, a charge of wounding with intent to disfigure cannot be supported by proof of the throwing of vitriol into the face of the injured person, as this is not a wounding. Rex *v.* Murrow, 1 Moody C. C. 456.

41. State *v.* Cody, 18 Oreg. 506, 23 Pac. 891, 24 Pac. 895; State *v.* Vowels, 4 Oreg. 324, which cases hold that the statute extends the law of mayhem as it existed at common law, although it does not use the name except in the title of the chapter of the code covering the matter.

42. Kitchens *v.* State, 80 Ga. 810, 7 S. E. 209.

43. Baker *v.* State, 4 Ark. 56; U. S. *v.* Scroggins, 27 Fed. Cas. No. 16,243, Hempst. 478. See also Carpenter *v.* People, 31 Colo. 284, 72 Pac. 1072.

Biting off the nose is held to be a cutting off, within the meaning of the statute of New Jersey. State *v.* Mairs, 1 N. J. L. 453. But see U. S. *v.* Askins, 24 Fed. Cas. No. 14,471, 4 Cranch C. C. 98, for a different construction of a Virginia statute.

The word "bite" is not equivalent to the word "slit," as used in Cal. Pen. Code, § 203, defining "mayhem," with respect to slitting the lip. People *v.* Demasters, 105 Cal. 669, 39 Pac. 35.

Wounding with intent to maim.— Under the English statute 9 Geo. IV, for wounding with intent to maim, etc., the character of the instrument used has been held to be immaterial, and a kick producing a wound will be sufficient. Briggs' Case, 1 Lew. C. C. 61, 1 Moody C. C. 318. See also Reg. *v.* Duffill, 1 Cox C. C. 49. But see Rex *v.* Harris, 7 C. & P. 446, 32 E. C. L. 700; Rex *v.* Stevens, 1 Moody C. C. 409, which cases confine the wound to such as is produced by some instrument. Where the prisoner struck the prosecutor on the side of his hat with an air-gun, with great force, by which the prosecutor was wounded, but the wound was made by the violence with which the hat was struck, the weapon used by the prisoner never coming in contact with the head of the prosecutor, it was held a wounding. Rex *v.* Sheard, 7 C. & P. 846, 32 E. C. L. 903.

44. State *v.* Abram, 10 Ala. 928; Hawaii *v.* Gallagher, 9 Hawaii 587; State *v.* Harrison, 30 La. Ann. 1329; State *v.* Girkin, 23 N. C. 121.

45. State *v.* Abram, 10 Ala. 928.

46. Slattery *v.* State, 41 Tex. 619.

47. State *v.* Briley, 8 Port. (Ala.) 472; Rex *v.* Boyce, 1 Moody C. C. 29, under the

D. By and Upon Whom Committed.[48] The crime may be committed by a white man on the body of a slave,[49] and the statutes are held to give the same protection to the internal organs of the female as to the external organs of the male.[50] Under early English statutes which were directed against the maiming of others, it was held that if one maimed himself or procured himself to be maimed, both he and the party by whom the maim was effected were subject to fine and imprisonment.[51]

III. INDICTMENT.[52]

A. Allegation of Offense in General. Where the statute defines what acts shall constitute the offense it is sufficient to allege the commission of such acts in the terms of the statute,[53] although the exact language need not be employed if equivalent terms are used.[54] And so where the statute prescribes a punishment for maiming, it is sufficient to allege the commission of acts which will constitute maiming as defined.[55] An express allegation in addition that in so disfiguring or maiming defendant assaulted the injured person is not necessary.[56] At the common law, in both the appeal of mayhem and the indictment, the offense must be alleged to have been committed feloniously,[57] and so the offense must be charged in the United States, where it is regarded as a felony at common law;[58] but it is held that where the word enters into no part of the definition of the offense as created by the statute, it is properly omitted in the indictment.[59]

B. Charge of Intent. An indictment under a statute making the intent or purpose an essential element of the offense must allege such intent,[60] or pur-

act of 43 Geo. III, c. 58, against cutting, etc., with intent to maim and disable.

48. Principals, aiders, and accessaries see CRIMINAL LAW, 12 Cyc. 183 *et seq.*

49. Eskridge *v.* State, 25 Ala. 30; Worley *v.* State, 11 Humphr. (Tenn.) 172; Com. *v.* Carver, 5 Rand. (Va.) 660, shooting with intent to maim, etc.

50. Kitchens *v.* State, 80 Ga. 810, 7 S. E. 209 (holding that under the statute defining mayhem, and punishing injuries to the private parts not amounting to castration, the wilful and malicious injuring, wounding, or disfiguring the private parts of a woman, with intent to disfigure them is mayhem); Moore *v.* State, 3 Pinn. (Wis.) 373, 4 Chandl. 168.

51. 1 East P. C. 296 [*citing* Wright's Case, Coke Litt. 127, 1 Hale P. C. 412, 11 Jac. 1], where the maiming is effected that the party may have more color to beg or to prevent being pressed for a soldier.

52. Forms of indictment see State *v.* Briley, 8 Port. (Ala.) 472; State *v.* Absence, 4 Port. (Ala.) 397; Kitchens *v.* State, 80 Ga. 810, 7 S. E. 209; State *v.* Vaughn, 164 Mo. 536, 65 S. W. 236; State *v.* Munson, 76 Mo. 109 (maiming by assault with weapon likely to produce death, under statute); State *v.* Mairs, 1 N. J. L. 453 (on the Coventry Act); State *v.* Evans, 2 N. C. 281; State *v.* Vowels, 4 Oreg. 324; Pennsylvania *v.* McBirnie, Add. (Pa.) 28; Com. *v.* Read, 4 Pa. L. J. Rep. 459, 10 Pa. L. J. 141; Moore *v.* State, 3 Pinn. (Wis.) 373, 4 Chandl. 168; Rex *v.* Carroll, Leach C. C. 66 (under the Coventry Act).

For general matters, as laying venue, time, etc., see INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

Charge embracing lesser offense see INDICTMENTS AND INFORMATIONS, 22 Cyc. 376, *et seq.*; 466, *et seq.*

53. State *v.* Briley, 8 Port. (Ala.) 472; State *v.* Absence, 4 Port. (Ala.) 397; Ridenour *v.* State, 38 Ohio St. 272, shooting with intent to maim.

An independent proviso need not be negatived by anticipating circumstances which under the proviso would reduce the crime to a lower grade. Foster *v.* People, 1 Colo. 293.

54. Tully *v.* People, 67 N. Y. 15.

55. Davis *v.* State, 22 Tex. App. 45, 2 S. W. 630. Under a statute providing a punishment where any person "shall be maimed, wounded, or disfigured" by the act of another under circumstances which would constitute murder or manslaughter if death had ensued, an indictment alleging that defendant did unlawfully assault and cut with a knife prosecuting witness, whereby he was "maimed, wounded, and disfigured, and received great bodily harm," sufficiently charges the offense. State *v.* Vaughn, 164 Mo. 536, 65 S. W. 236. See also Jennings *v.* State, 9 Mo. 862 [*followed* in State *v.* Magrath, 19 Mo. 678].

56. Benham *v.* State, 1 Iowa 542.

57. Com. *v.* Newell, 7 Mass. 245; 1 East P. C. 401.

58. Com. *v.* Porter, 1 Pittsb. (Pa.) 502. In Com. *v.* Read, 4 Pa. L. J. Rep. 459, 10 Pa. L. J. 141, it is held that whether mayhem be felony or misdemeanor it is properly charged as being feloniously done. But see Com. *v.* Lester, 2 Va. Cas. 198.

59. State *v.* Absence, 4 Port. (Ala.) 397.

60. 1 East P. C. 402. In State *v.* Briley, 8 Port. (Ala.) 472, it is said that the state-

pose,[61] and the intent charged must be to accomplish the particular result against which the statute is directed.[62]

C. Charge of Premeditation and Malice. Where the element of premeditated design is essential the indictment must allege it,[63] but the circumstances showing it need not be alleged;[64] and the act must be alleged to have been maliciously and wilfully done where these are statutory elements.[65]

D. Nature of Injury. An indictment for a common-law maim must allege that the party was thereby maimed,[66] notwithstanding a fixed purpose to maim is not an element of the crime,[67] or that he was disfigured,[68] or disabled where the statute punishes, as an offense, a disabling or disfiguring by the infliction of certain injuries.[69] But the nature of the injury need not be set forth more specifically than in the general language of the act.[70] Conversely under a statute which prescribes a punishment for biting or slitting the tongue, nose, lip, etc.,

ment of the assault and battery and breaking the arm were but a history of the violence, which could have been omitted; that the superadding the intention to maim is, when examined, nothing more than a reiteration of the idea previously conveyed to the mind, by the words "on purpose, and of malice aforethought."

Shooting with intent.— An indictment under an act which prohibits unlawfully shooting at any person, etc., with intent to maim must charge the intent with which the act was done in the words prescribed in the statute. State *v.* Elborn, 27 Md. 483.

61. State *v.* Ormond, 18 N. C. 119.

62. State *v.* Johnson, 58 Ohio St. 417, 51 N. E. 40, 65 Am. St. Rep. 769.

63. Tully *v.* People, 67 N. Y. 15.

64. Tully *v.* People, 67 N. Y. 15, under a statute providing against certain acts committed with premeditated design evinced by lying in wait or otherwise. But in Respublica *v.* Reiker, 3 Yeates (Pa.) 282, it is held that the indictment should contain the words "lying in wait." And so it was under the Coventry Act. 1 East P. C. 402.

Different grades of offense.— Under a statute in Delaware one section of which provides that, if any person shall maliciously and by lying in wait deprive any person of one of his genital members, or put out an eye, etc., he shall be deemed guilty of a felony; and another section of which provides that if any person shall maliciously, without lying in wait, maim another, he shall be guilty of a misdemeanor, and shall be fined, an indictment under the latter, charging defendant with maiming prosecutrix by throwing acid into her eyes and injuring one of them, was held not objectionable for failure to charge that the offense was committed either with or without lying in wait. State *v.* Holmes, 4 Pennew. (Del.) 196, 55 Atl. 343.

65. See Neblett *v.* State, (Tex. Cr. App. 1905) 85 S. W. 813, holding that an indictment charging that defendant made an assault on the prosecutor, and then and there unlawfully and maliciously set fire to a cannon cracker held by the prosecutor, which exploded, and destroyed the prosecutor's hand, sufficiently charged that the hand was blown off wilfully and maliciously.

Wound less than mayhem.— In Louisiana, where the indictment charged defendant with "feloniously" inflicting a wound less than mayhem, under Act (1888), No. 17, and omitted the words "maliciously and wilfully," as contained in the statutory definition of the offense, it was held that no judgment could be entered upon the plea of guilty, as the indictment charged no offense against the law. State *v.* Watson, 41 La. Ann. 598, 7 So. 125.

66. Guest *v.* State, 19 Ark. 405; Com. *v.* Newell, 7 Mass. 245; Chick *v.* State, 7 Humphr. (Tenn.) 161.

Designating offense generally see INDICTMENTS AND INFORMATIONS, 22 Cyc. 302.

67. Terrell *v.* State, 86 Tenn. 523, 8 S. W. 212.

68. Terrell *v.* State, 86 Tenn. 523, 8 S. W. 212.

69. Com. *v.* Lester, 2 Va. Cas. 198.

Equivalent language.— Tully *v.* People, 67 N. Y. 15, holding an indictment for mayhem, under a statute defining the crime as "cutting off or disabling any limb or member of another intentionally," sufficient which charges that the accused did "cut, bite, slit, and destroy" the thumb of the prosecutor, the evidence proving that the thumb was disabled, since the word "destroy" requires stronger proof than the statutory word "disable."

70. Kitchens *v.* State, 80 Ga. 810, 7 S. E. 209, holding that an allegation that the person whose private parts were injured was a female is equivalent to a direct allegation that the injury did not amount to castration.

What member injured.— In charging actual maim the indictment should set forth what member was actually injured, but in charging an assault with intent to maim under the statute it is not necessary to set forth the manner in which it was intended to inflict the injury. Ridenour *v.* State, 38 Ohio St. 272. In an indictment for biting off an ear, it need not be alleged whether it was the right or the left ear. State *v.* Green, 29 N. C. 39.

That the party was maimed need not be alleged where the statute contains all the necessary ingredients of the offense, which are charged, although it would be otherwise if the statute merely adopted the common-law

without giving a name to the offense, the fact that the indictment designates the crime as mayhem does not affect the validity of the verdict.[71] Where the statute punishes specific injuries inflicted with intent to maim and disfigure, it is not necessary to allege that the accused did maim and disfigure,[72] or to describe the instrument used.[73]

E. Allegations Under Alternative Provisions — Duplicity.[74] Where the words of the statute are in the disjunctive, with intent to maim or with intent to disfigure, an averment of either is sufficient;[75] and the general rule is applied that upon a statute enumerating disjunctively several offenses connected with the same transaction and with the intent necessary to commit the offense, they may be alleged conjunctively and must be so alleged when embraced in one count.[76]

IV. DEFENSE.[77]

Son assault demesne is a good defense to an indictment or to an appeal of mayhem at common law,[78] and may be shown under the modern statutes;[79] but the defense can only be sustained by proof that the resistance was in proportion to the injury offered.[80]

V. TRIAL.

A. Evidence and Burden of Proof — 1. Burden of Proof. As in other criminal cases, the state must prove every element of the offense as charged;[81] and on the theory that the burden of proof never shifts it is erroneous to charge that if the injury is found to have been inflicted the burden is on defendant to

offense without defining it. State *v.* Absence, 4 Port. (Ala.) 397; Guest *v.* State, 19 Ark. 405.

71. Swan *v.* Com., 5 Ky. L. Rep. 238. An offense made punishable by Oreg. Cr. Code, § 527, which punishes acts like those in the Coventry Act, may be denominated mayhem in indictments. State *v.* Vowels, 4 Oreg. 324.

72. U. S. *v.* Gunther, 5 Dak. 234, 38 N. W. 79; Com. *v.* Read, 4 Pa. L. J. Rep. 459, 10 Pa. L. J. 141.

73. Briggs' Case, 1 Lew. C. C. 61, 1 Moody C. C. 318.

74. See Indictments and Informations, 22 Cyc. 376 *et seq.*

75. 1 East P. C. 402.

76. Angel *v.* Com., 2 Va. Cas. 231, where the charge was "shooting with intention to maim, disfigure, disable, and kill." See also Derieux *v.* Com., 2 Va. Cas. 379.

Several means of commission.— So under a statute providing several means in the alternative whereby the offense may be committed, an indictment may charge them conjunctively as one offense, as that the accused "did slit, cut off and bite off the ear." State *v.* Ailey, 3 Heisk. (Tenn.) 8. See also Canada *v.* Com., 22 Gratt. (Va.) 899; Briggs' Case, 1 Lew. C. C. 61, 1 Moody C. C. 318, proof of either means sufficient.

77. Plea in criminal cases see Criminal Law, 12 Cyc. 343 *et seq.*

78. 1 East P. C. 402, where it is said that this plea is confined to defense of person and not extended to defense of property, unless the defense is against a known felony threatened to be committed with violence against his property.

79. State *v.* Skidmore, 87 N. C. 509.

Wilfulness of slave.— Under a statute declaring that every slave "who shall wilfully maim, put out an eye, or cut, or bite off the lip, ear, or nose of any white person, shall suffer death," it is held that an intentional and unnecessary mutilation, by a slave, of any of the members of a white person, enumerated in the statute as constituting mayhem will be "wilfully" committed, but that if the slave be engaged in mortal strife, his adversary armed with a deadly weapon, and he defenseless, such a mutilation will not be considered as having been wantonly done when it would be deemed wilful, within the meaning of the act. State *v.* Abram, 10 Ala. 928.

80. People *v.* Wright, 93 Cal. 564, 29 Pac. 240 (where, under the statute, a premeditated design being unnecessary, it is held that the fact that the act is done in an altercation is no excuse unless it was done in self-defense, and under circumstances which were at the time unavoidable to prevent the infliction or attempted infliction of great bodily harm by the party injured); Hayden *v.* State, 4 Blackf. (Ind.) 546; 1 East P. C. 402.

81. See Criminal Law, 12 Cyc. 379.

Variance.— When the indictment alleges that the slave who was maimed belonged to defendant's wife, while the evidence shows that defendant himself was the owner, the variance is fatal; the allegation of ownership, being a material part of the description of the slave, must be proved as laid, in order to identify the person on whom the offense was committed, thus enabling defendant to prepare his defense, and making the record of his conviction or acquittal a protection against a second indictment for

show that it was inflicted under circumstances making it justifiable.[82] So where the statute is against an act committed with intent to maim, the intent must be proved;[83] but where the intent may be inferred from the act proved, further proof need not be adduced to show intent.[84]

2. ADMISSIBILITY AND SUFFICIENCY. General rules of evidence are applied in admitting evidence on the trial of a prosecution for mayhem or the statutory maim or injuring with intent to maim.[85] Any evidence which fairly tends to throw light upon a particular issue involved may be considered.[86] It is error to reject evidence showing that the act was not wilfully and maliciously done where this is an element of the statutory offense.[87]

B. Questions For Jury. Whether the offense has been committed is a question for the jury, and this includes the question of the intent or wilfulness of the act where that is an element of the offense;[88] and whether the part of the human body mentioned in the statute is a member of the body has been held to be a question of fact for the jury.[89]

the same offense. Eskridge *v.* State, 25 Ala. 30.

82. State *v.* Conahan, 10 Wash. 268, 38 Pac. 996, where under the evidence, however, it was held that the error was without prejudice. But in State *v.* Skidmore, 87 N. C. 509, it is held that where the injury occurred in a fight and there was no proof as to the condition of the parties struggling upon the ground beyond the proof of the fight itself, inasmuch as the mutilation was admitted, a charge which made it incumbent on defendant to satisfy the jury that the act was done in his necessary defense was proper.

Proof of lesser offense see INDICTMENTS AND INFORMATIONS, 22 Cyc. 468.

83. Briggs' Case, 1 Lew. C. C. 61, 1 Moody C. C. 318. An indictment under the English statute 43 Geo. III, for cutting, etc., with intent to maim and disable, is not supported by evidence of intent to produce a temporary disability. Rex *v.* Boyce, 1 Moody C. C. 29.

84. State *v.* Jones, 70 Iowa 505, 30 N. W. 750; State *v.* Ma Foo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414 (sustaining an instruction which permitted the presumption of intention from the act but in which the court fully warned the jury of the presumption of innocence to which defendant was entitled); State *v.* Girkin, 23 N. C. 121; State *v.* Crawford, 13 N. C. 425; Davis *v.* State, 22 Tex. App. 45, 2 S. W. 630. So in Reg. *v.* Smith, 8 C. & P. 173, 34 E. C. L. 673, the court left it to the jury to say whether defendant intended to do that which the instrument he used was naturally calculated to produce.

Extent of injury.— Baker *v.* State, 4 Ark. 56, where it is held that if the proof shows that the injured person was made lame it will be presumed that the lameness was permanent unless the contrary is made to appear.

85. See CRIMINAL LAW, 12 Cyc. 379 *et seq.*

Evidence of ill-feeling held admissible in State *v.* Fry, 67 Iowa 475, 25 N. W. 738.

Evidence of threats held admissible in People *v.* Demasters, 109 Cal. 607, 42 Pac. 236; State *v.* Fry, 67 Iowa 475, 25 N. W. 738.

Evidence of violent character held admissible under the charge of wounding less than mayhem under the statute. State *v.* Saunders, 37 La. Ann. 389.

86. See Eskridge *v.* State, 25 Ala. 30, holding that under an indictment of mayhem of a slave in shooting him in the leg, evidence that the shot "seemed to go together making a continuous wound" is material, and an instruction submitting it to the jury to look to the character of the wound for the purpose of determining whether the accused fired with a view of striking and disabling the leg is not improper, and the jury might properly consider the circumstances above mentioned as indicating that the accused was close to the victim. So discharging a gun at the prosecutor at such a distance that the shot only rattled against his back and could not have injured him will not sustain the felonious charge of shooting with intent to maim. Reg. *v.* Abraham, 1 Cox C. C. 208.

Sufficient evidence to support a verdict of guilty see State *v.* Fry, 67 Iowa 475, 25 N. W. 738; State *v.* Hair, 37 Minn. 351, 34 N. W. 893; Terrell *v.* State, 86 Tenn. 523, 8 S. W. 212, where the testimony of the accused was uncorroborated as to provocation and apprehension of danger and he was contradicted by other witnesses.

87. Bowers *v.* State, 24 Tex. App. 542, 7 S. W. 247, 5 Am. St. Rep. 901.

88. State *v.* Jones, 70 Iowa 505, 30 N. W. 750 (as to whether the necessary intent existed in the mind of the accused at the time of the act); Slattery *v.* State, 41 Tex. 619; Bowers *v.* State, 24 Tex. App. 542, 7 S. W. 247, 5 Am. St. Rep. 901; Reg. *v.* Smith, 8 C. & P. 173, 34 E. C. L. 673; Rex *v.* Coke, 16 How. St. Tr. 54.

Whether there was premeditated design by lying in wait or otherwise under the statute is a question for the jury. Tully *v.* People, 67 N. Y. 15.

89. Slattery *v.* State, 41 Tex. 619. *Compare* the cases cited *supra*, note 39.

Whether a corner tooth is a front tooth is a question of fact for the jury. High *v.* State, 26 Tex. App. 545, 10 S. W. 238, 8 Am. St. Rep. 488.

C. Instructions. The court must submit all questions of fact to the jury and cannot presume in an instruction what must be found by the jury as a fact.[90] But an instruction is properly refused which imposes a greater burden of proof on the state than the law requires of it.[91] Notwithstanding the charge of mayhem or the particular statutory crime involving mayhem or attempt to maim, involves, as a lesser offense, assault and battery,[92] where the only question presented by the facts is whether or not defendant committed the higher offense charged in the indictment, the court should refuse to instruct upon the lesser offense.[93]

D. Verdict.[94] A verdict of guilty must be certain as to the elements specially found.[95] Where the accused is acquitted of the larger offense charged in the indictment and found guilty of a lower grade embraced in such charge, the verdict should show with reasonable certainty that the jury has found him guilty of the offense of the lesser grade.[96]

VI. PUNISHMENT.

At the ancient common law the accused on conviction was punished by the loss of the same member of which he had caused the loss;[97] but later this went out of use and then by the common law as it stood for a long time the offense was punished by fine or imprisonment,[98] and the offense came to be regarded in

90. Slattery *v.* State, 41 Tex. 619.

Definition of elements.— The court should define the terms "wilfully" and "maliciously" as qualifying the inhibited act. Bowers *v.* State, 24 Tex. App. 542, 7 S. W. 247, 5 Am. St. Rep. 901. See also State *v.* Cook, 42 La. Ann. 85, 7 So. 64 (where it was held to be the duty of the court to define the word "maliciously" in the statute as inflicting a wound less than mayhem); State *v.* Ma Foo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414 (where an instruction that the jury should find defendant guilty if she made an assault with intent feloniously, on purpose, and of malice aforethought. to maim the boy, and in pursuance of such intent did feloniously, on purpose, and of her malice aforethought, throw a corrosive fluid into the eyes of the boy, and did in such way put out his eyes, where the court thereafter correctly defined the terms "malice," "malice aforethought," and "on purpose"). In State *v.* Munson, 76 Mo. 109, in a prosecution for wounding whereby the victim was maimed under the statute, it was held that an instruction was sufficient which permitted a conviction if the defendant "did unlawfully assault," without defining the term "maliciously."

91. State *v.* Jones, 70 Iowa 505, 30 N. W. 750, holding that this would be the effect of an instruction that the jury would not be warranted in convicting unless there was other evidence of the existence of intent than the mere presumption which would arise from the doing of the act or the manner in which it is done, and that such instruction is properly refused.

92. See CRIMINAL LAW, 12 Cyc. 639 *et seq.*; INDICTMENTS AND INFORMATIONS, 22 Cyc. 466.

93. Carpenter *v.* People, 31 Colo. 284, 72 Pac. 1072. See also People *v.* Stanton, 106 Cal. 139, 39 Pac. 525.

94. Verdicts generally see CRIMINAL LAW, 12 Cyc. 686 *et seq.*

95. State *v.* Blœdow, 45 Wis. 279, holding that upon an indictment for mayhem charging the specific malicious intent which under the statute was an essential element, a verdict, "guilty as charged in the information, with the malicious intent as implied by law," was not sufficiently certain as to the intent.

96. Strawn *v.* State, 14 Ark. 549, where on an indictment for mayhem it was held that a verdict "not guilty as charged in the within indictment, but find that he and the within named . . . fought by mutual agreement" should have shown more explicitly that the person was maimed, yet the conclusion is reasonable that such was the meaning and intent of the jury and the verdict will bear that construction and is sufficient to warrant a sentence for the offense of the reduced grade under a proviso in the statute where the maiming occurs in a fight by mutual agreement.

Sufficient verdict.— On an indictment for maliciously stabbing with intent to maim, a verdict, "guilty of unlawful cutting, as charged in the within indictment," was held sufficient as a finding of the intent, the language used having reference both to the cutting and to the intent. Jones *v.* Com., 31 Gratt. (Va.) 830. So a verdict, "not guilty of malicious cutting and wounding as charged in the within indictment; but guilty of an assault and battery as charged in the within indictment," was held to show sufficiently an acquittal of the felony charged and a conviction for the misdemeanor. Canada *v.* Com., 22 Gratt. (Va.) 899.

Conviction of lesser offense see INDICTMENTS AND INFORMATIONS, 22 Cyc. 466 *et seq.*

97. Com. *v.* Newell, 7 Mass. 245; Foster *v.* People, 50 N. Y. 598, 1 Cow. Cr. 508; Com. *v.* Porter, 1 Pittsb. (Pa.) 502.

98. Com. *v.* Porter, 1 Pittsb. (Pa.) 502. The judgment for the loss of a member went out of use because the law of retaliation was found to be an inadequate rule of punishment

the nature of an aggravated trespass,[99] until by statute it was made felony and punishment therefor specifically provided,[1] and in the United States the punishment of conviction is regulated by statute, which either fixes the grade of the offense and assesses the punishment or merely assesses the punishment.[2]

MAYOR.[1] The chief governor, magistrate, or officer of a city or municipal corporation;[2] the chief or executive magistrate of a city;[3] the chief judge of the city court.[4] (Mayor: In General, see MUNICIPAL CORPORATIONS. Acknowledgment Before, see ACKNOWLEDGMENTS. Authority — To Admit to Bail, see BAIL; To Take Affidavit, see AFFIDAVITS. Judicial Power and Jurisdiction — In Bastardy Proceeding, see BASTARDY; In Civil Action, see JUSTICE OF THE PEACE; In Criminal Proceeding, see CRIMINAL LAW.)

MAYOR'S COURT. A court established in some cities, in which the mayor sits with the powers of a police judge or committing magistrate in respect to offenses committed within the city, and sometimes with civil jurisdiction in small causes, or other special statutory powers.[5] (See, generally, COURTS; JUSTICES OF THE PEACE.)

MAZA. A Hindustani word meaning "taste."[6]

M. D. The initial letters of the phrase Doctor of Medicine.[7] (See, generally, PHYSICIANS AND SURGEONS.)

and because, upon a repetition of the offense, the penalty could not be repeated. Adams *v.* Barrett, 5 Ga. 404; 4 Blackstone Comm. 206.

99. See *supra*, 4, 6, 37.

1. St. 5 Hen. IV, c. 5; 37 Hen. VIII, c. 6; 22 & 23 Car. II, c. 1. Under the last-mentioned act, the offense defined was declared to be felony and the penalty prescribed was death as in the case of felony without benefit of clergy, but not to work corruption of blood, forfeiture of dower, or of the loss of goods of the vendor. 1 East P. C. 393, 394. The subject was also regulated by statute 7 & 8 Geo. IV, and 9 Geo. IV, and later by 1 Vict. 85.

2. See *supra*, notes 4, 6, 37. See also State *v.* Ryder, 36 La. Ann. 294, where the punishment was by fine and imprisonment with or without labor, and where it is held that under another statute declaring that persons who default in the payment of a fine may be sentenced to an imprisonment for a period not exceeding one year, one receiving the extreme penalty under the mayhem statute cannot be sentenced to additional punishment at hard labor for another year upon default in payment of the fine.

Change in punishment.—In Clarke *v.* State, 23 Miss. 261, it was held that where an act changed the punishment from pillory and fine to imprisonment in the penitentiary, and provided that no offense committed and no penalty or forfeiture incurred prior to the act should be affected, the act did not operate as a pardon for offenses previously committed, and that upon conviction after the act for an offense committed prior thereto the accused may elect whether he will take punishment under the old or new act, and that in the absence of an election he should be punished by the act in force when the offense was committed.

1. Origin and history of term.— "Mayor" (*præfectus urbis*), anciently, "meyr," comes from the British *miret*, i. e., *custodire*; or from the old English word "*maier*," viz., *potestas*, and not from the Latin "*major*." Jacob L. Dict. [*quoted* in Waldo *v.* Wallace, 12 Ind. 569, 577]. The word originally meant "an overseer, a bailiff." Webster Dict. [*quoted* in Waldo *v.* Wallace, *supra*].

2. Bailey Dict. [*quoted* in Waldo *v.* Wallace, 12 Ind. 569, 577]; Jacob L. Dict. [*quoted* in Waldo *v.* Wallace, *supra*]; Webster Int. Dict. [*quoted* in Crovatt *v.* Mason, 101 Ga. 246, 253, 28 S. E. 891; Waldo *v.* Wallace, *supra*].

3. Bouvier L. Dict. [*quoted* in Waldo *v.* Wallace, 12 Ind. 569, 577].

4. Webster Dict. [*quoted* in Waldo *v.* Wallace, 12 Ind. 569, 577].

"He is an officer of the city, elected by the people by virtue of the provision of the charter." Starkweather *v.* Superior, 90 Wis. 612, 618, 64 N. W. 304.

Mayor and aldermen as used in the Georgia act of Sept. 26, 1883, touching the town of Reynolds, is synonymous with the corporate name and style "Mayor and Council." Gostin *v.* Brooks, 89 Ga. 244, 15 S. E. 361.

Avoiding deed for duress of mayor see 9 Cyc. 453 note 66.

5. Black L. Dict.

The term includes any court organized under the legislature pursuant to section 34 of article 5 of the constitution. It is not essential that the court should be presided over by a mayor. Such courts have usually been presided over by a mayor, and called mayors' courts in this state. *Ex p.* Peacock, 25 Fla. 478, 489, 6 So. 473.

6. *In re* Densham, [1895] 2 Ch. 176, 179, 188, 64 L. J. Ch. 634, 72 L. T. Rep. N. S. 614, 12 Reports 283, 43 Wkly. Rep. 515.

7. Townshend *v.* Gray, 62 Vt. 373, 375, 19 Atl. 635, 8 L. R. A. 112.

MEADOW. Low ground adjacent to streams;[8] a tract of low or level land producing grass which is mowed for hay;[9] cultivated land growing grass sowed thereon;[10] tillable, mowing, or grass land, exclusive of uninclosed woodlands.[11] (See EMBLEMENTS; FIELD; and, generally, CROPS.)

MEAL. The pulverized grain ground but unbolted;[12] food that is eaten to satisfy the requirements of hunger.[13] (See, generally, INNKEEPERS; INTOXICATING LIQUORS; MILLS.)

MEAN. As a noun, the middle between two extremes; and that either in time or dignity.[14] As a verb, to have in mind, view, or contemplation, to intend.[15] (See MESNE.)

MEANDER.[16] To follow a winding or flexuous course.[17] (See, generally, BOUNDARIES.)

MEANS.[18] In one sense, that which produces a result;[19] that through or by the help of which an end is attained; an immediate agency or measure;[20] CAUSE,[21]

8. Scott *v.* Willson, 3 N. H. 321, 322.

9. Black L. Dict. [*quoted* in State *v.* Crook, 132 N. C. 1053, 1057, 44 S. E. 32].

The term is applied to the tracts which lie above the shore and are overflowed by spring and extraordinary tide only and yield grasses which are good for hay. Church *v.* Meeker, 34 Conn. 421, 429, where the term is distinguished from "sedge flats."

"**A meadow** is in the nature of a permanent improvement, and is not like annual crops." Vermilya *v.* Chicago, etc., R. Co., 66 Iowa 606, 616, 24 N. W. 234, 55 Am. Rep. 279. See EMBLEMENTS.

10. State *v.* Crook, 132 N. C. 1053, 1056, 44 S. E. 32.

11. Barrows *v.* McDermott, 73 Me. 441, 451.

12. Washington Mut. Ins. Co. *v.* Merchants', etc., Mut. Ins. Co., 5 Ohio St. 450, 486, where it is said: "The making of meal consists in the simple process of grinding."

13. Reg. *v.* Sauer, 3 Brit. Col. 308, 309, 1 Can. Cr. Cas. 317.

What does not constitute a meal within the meaning of a statute prohibiting the sale of liquor except with a meal see Matter of Cullinan, 93 N. Y. App. Div. 427, 429, 87 N. Y. Suppl. 660; Matter of Kinzel, 28 Misc. (N. Y.) 622, 625, 59 N. Y. Suppl. 682; Matter of Lyman, 28 Misc. (N. Y.) 408, 409, 59 N. Y. Suppl. 968; Reg. *v.* Sauer, 3 Brit. Col. 308, 309, 1 Can. Cr. Cas. 317.

14. Jacob L. Dict.

"**Mean time**" formerly meant the average or standard sun time, as distinguished from local sun time, as shown by a sun dial. State *v.* Johnson, 74 Minn. 381, 383, 77 N. W. 293. See TIME.

"**Mean sun time**" is what is called "standard time." The difference between standard time and sun time is exactly the same over each meridian. There is a difference of four minutes for each degree between true sun time, which is obtained by the means of a dial, and standard or mean sun time. *Ex p.* Parker, 35 Tex. Cr. 12, 15, 29 S. W. 480, 790. See TIME.

15. Century Dict. See Bigelow *v.* Norris, 139 Mass. 12, 13, 29 N. E. 61, construing the expression "I mean right."

16. The word "meander" is derived from a winding river in Asia Minor, known by that name in classic history. In our language, we say that a stream meanders, but we never thus speak of a shore. To speak of a meandering shore would be to use a singularly inapt expression. Seneca Nation of Indians *v.* Knight, 23 N. Y. 498, 500.

17. Turner *v.* Parker, 14 Oreg. 340, 12 Pac. 495.

The "meander-line" of a watercourse is the line showing the place of the watercourse, and its sinuosities, courses, and distances. Hendricks *v.* Feather River Canal Co., 138 Cal. 423, 426, 71 Pac. 496; Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82, 100, 88 Am. Dec. 59.

18. Distinguished from: "Machine" in Tilghman *v.* Proctor, 102 U. S. 707, 728, 26 L. ed. 279 [*quoted* in Boyden Power-Brake Co. *v.* Westinghouse, 170 U. S. 537, 556, 18 S. Ct. 707, 42 L. ed. 1136]. "Materials" in Lawson *v.* Higgins, 1 Mich. 225, 227.

19. Tucker *v.* Hartford Mut. Ben. L. Ins. Co., 50 Hun (N. Y.) 50, 53, 4 N. Y. Suppl. 505. See also Littell *v.* State, 133 Ind. 577, 580, 33 N. E. 417; U. S. *v.* Cargo of Sugar, 25 Fed. Cas. No. 14,722, 3 Sawy. 46.

"**Means calculated to inflict great bodily injury**" see Keley *v.* State, 12 Tex. App. 245.

20. Littell *v.* State, 133 Ind. 577, 580, 33 N. E. 417.

"**All means within its power**" see St. Louis, etc., R. Co. *v.* Vincent, 36 Ark. 451, 455.

"**By any means of force**" see People *v.* Perales, 141 Cal. 581, 583, 75 Pac. 170.

"**By means of**" see Hillier *v.* Allegheny County Mut. Ins. Co., 3 Pa. St. 470, 471, 45 Am. Dec. 656; State *v.* Labounty, 63 Vt. 374, 375, 21 Atl. 730; Spencer *v.* Marriott, 1 B. & C. 457, 459, 2 D. & R. 665, 1 L. J. K. B. O. S. 134, 25 Rev. Rep. 453, 8 E. C. L. 195.

"**By mechanical or other means**" see State *v.* Villines, 107 Mo. App. 593, 596, 81 S. W. 212.

"**Legal means**" see McCandless *v.* Allegheny Bessemer Steel Co., 152 Pa. St. 139, 149, 25 Atl. 579.

"**Means necessary to an end**" see State *v.* Hancock, 35 N. J. L. 537, 546.

"**Other means**" see Maxwell *v.* People, 158 Ill. 248, 254, 41 N. E. 995; McDade *v.* People, 29 Mich. 50, 55.

"**Proper means**" see Hoard *v.* Garner, 10 N. Y. 261, 267.

21. Tucker *v.* Mutual Ben. L. Ins. Co., 50 Hun (N. Y.) 50, 53, 4 N. Y. Suppl. 505.

q. v., procurement or instigation.[22] In another sense, property;[23] resources or income;[24] money;[25] estate.[26]

MEANS RELIGIOUS DOCTRINE. A belief and faith that conversions of sinners to Christianity and the salvation of human souls is and may be aided by the use of human means, as contradistinguished from the "anti-means" doctrine, which is a belief and faith in the exact opposite; that is, that such conversions and salvation cannot be brought about or aided by any human means or effort whatever, but that the same must be, and is, wholly and naturally the work of the Lord.[27]

MEANTIME. The intervening time.[28]

MEASURE.[29] Amount.[30] (Measure: Of Damages, see DAMAGES. Of Distances, Etc., see BOUNDARIES. Of Logs, see LOGGING. Of Proof, see CRIMINAL LAW; EVIDENCE. See also WEIGHTS AND MEASURES.)

MEAT. A term which applies not only to the flesh of all animals used for food, but, in a general sense, to all kinds of provisions[31] fit for the sustenance of man.[32] (See, generally, FOOD; INSPECTION.)

MEAT HOUSE. A building in which meat is stored and kept.[33]

22. Fitchburg *v.* Cheshire R. Co., 110 Mass. 210, 212.

23. Vass *v.* Southall, 26 N. C. 301, 303.

"**Means of satisfaction**" see Knighton *v.* Curry, 62 Ala. 404, 408; Perrine *v.* Fireman's Ins. Co., 22 Ala. 575, 576.

24. Webster Dict. [*quoted* in Sacry *v.* Lobree, 84 Cal. 41, 49, 23 Pac. 1088; Brigham *v.* Tillinghast, 13 N. Y. 215, 218].

"**Is shown to have means,**" as used in the request to charge, are synonymous with the words "of sufficient ability," as used in the statute. Keenan *v.* Brooklyn City R. Co., 145 N. Y. 348, 350, 40 N. E. 15.

"**Other means**" see Crosby *v.* Lyon, 37 Cal. 242, 245; State *v.* Walsh, 31 Nebr. 469, 476, 48 N. W. 263.

"**Means of support.**"—In its general sense, all those resources from which the necessaries and comforts of life are or may be supplied, such as lands, goods, salaries, wages, or other sources of income. McMahon *v.* Sankey, 133 Ill. 636, 644, 24 N. E. 1027; Meidel *v.* Anthis, 71 Ill. 241, 246; Schneider *v.* Hosier, 21 Ohio St. 98, 112. See also Woolheather *v.* Risley, 38 Iowa 486, 491; Gorey *v.* Kelly, 64 Nebr. 605, 607, 90 N. W. 554; Volans *v.* Owen, 74 N. Y. 526, 530, 30 Am. Rep. 337. In a limited sense, it signifies any resource from which the wants of life may be supplied. McMahon *v.* Sankey, 133 Ill. 636, 647, 24 N. E. 1027; Meidel *v.* Anthis, 71 Ill. 241, 246; Schneider *v.* Hosier, 21 Ohio St. 98, 112. See also McCann *v.* Roach, 81 Ill. 213, 214; Herring *v.* Ervin, 48 Ill. App. 369, 370; Eddy *v.* Courtright, 91 Mich. 264, 269, 51 N. W. 887; Hayes *v.* Phelan, 4 Hun (N. Y.) 733, 738; Mulford *v.* Clewell, 21 Ohio St. 191, 197; Wightman *v.* Devere, 33 Wis. 570, 578.

"**Sufficient means**" **of support** see Miller *v.* Miller, 75 N. C. 70, 71.

"**Visible calling or means of support**" see People *v.* Herrick, 59 Mich. 563, 564, 26 N. W. 767.

25. Black L. Dict.

According to the context, the term has been held to exclude money. Leinkauf *v.* Barnes, 66 Miss. 207, 215, 5 So. 402, construing the terms "any of her means."

"**Means**" **does not necessarily mean money on hand,** although money in the treasury would be such means, since to speak of a person as a man of means clearly does not signify that he only has money on deposit in bank. People *v.* Palmer, 13 Misc. (N. Y.) 727, 729, 35 N. Y. Suppl. 231.

"**Available means**" see 4 Cyc. 1075. See also Benedict *v.* Huntington, 32 N. Y. 219, 224.

26. Williams *v.* Johnson, 112 Ill. 61, 67, 1 N. E. 274; Webster Dict. [*quoted* in Brigham *v.* Tillinghast, 13 N. Y. 215, 218].

27. Smith *v.* Pedigo, 145 Ind. 361, 373, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838.

28. Webster Int. Dict.

"**In the mean time**" are words of relation, and refer not only to a time that is to begin, but to a time which is also to end. Stevens *v.* Dethick, 3 Atk. 39, 43, 26 Eng. Reprint 826. See also Scarlett *v.* Linckels, 56 N. J. Eq. 777, 782, 40 Atl. 596; Sweet *v.* Mowry, 71 Hun (N. Y.) 381, 385, 25 N. Y. Suppl. 32; *In re* Irving, 13 Fed. Cas. No. 7,073, 8 Ben. 463, 466; Wheldale *v.* Partridge, 5 Ves. Jr. 388, 393, 8 Ves. Jr. 227, 239, 32 Eng. Reprint 341.

29. **Distinguished from** "**estimate**" see Winch *v.* Winchester, 1 Ves. & B. 375, 377, 12 Rev. Rep. 238, 35 Eng. Reprint 146. See ESTIMATED, 16 Cyc. 670.

An election of an officer by a board is not a "measure" passed by such board. Rich *v.* McLaurin, 83 Miss. 95, 101, 35 So. 337.

30. Atlanta, etc., R. Co. *v.* Bryant, 110 Ga. 247, 249, 34 S. E. 350 [*citing* Florida Cent., etc., R. Co. *v.* Burney, 98 Ga. 1, 11, 26 S. E. 730].

31. State *v.* Oakley, 51 Ark. 112, 114, 10 S. W. 17; State *v.* Patrick, 79 N. C. 655, 656, 28 Am. Rep. 340.

32. State *v.* Morey, 2 Wis. 494, 495, 60 Am. Dec. 439.

33. Benton *v.* Com., 91 Va. 782, 793, 21 S. E. 495, holding that the term is synonymous with and is included within the term "storehouse."

The words "**meat stores**" should be construed to include all sorts of meats, whether

MEAT MARKET. A word sometimes used as synonymous with the term "butcher shop."[34] (See MARKET.)

MECHANIC.[35] An ARTIFICER,[36] *q. v.*; an artist;[37] an artisan;[38] a handicraftsman;[39] a LABORER,[40] *q. v.*; any skilled worker with tools;[41] one employed in mechanical labor;[42] one skilled in a mechanical occupation or art;[43] more specifically one who practices any mechanical art;[44] one skilled in the art of building, and acquainted with the rules and methods observed and pursued by those engaged in constructing, altering, and repairing buildings of all kinds, and possessing skill to follow rules, and to adopt and follow methods;[45] one who follows a mechanical occupation for a living,[46] one who is skilled in the use of tools or instruments;[47] one who works machines or instruments;[48] an operative;[49] a person skilled in all the trades which have to do with the construction of buildings;[50] a person whose occupation is to construct machines, or goods, wares, instruments, furniture, and the like;[51] a workman employed in shaping and uniting materials, such as wood, metal, etc., into some kind of structure, machine, or other object, requiring the use of tools;[52] a workman or laborer other than agricultural;[53] a workman who shapes and applies material in the construction of houses; one actually engaged with his own hands in constructive

fish, flesh, or fowl. Vosse *v.* Memphis, 9 Lea (Tenn.) 294, 299.

34. Wiest *v.* Luyendyk, 73 Mich. 661, 665, 41 N. W. 839.

35. Derived from the Latin *mechanicus*. Webster Dict. [*quoted* in Gulledge *v.* Preddy, 32 Ark. 433, 434].

"Practical mechanic" see People *v.* Buffalo, 18 Misc. (N. Y.) 533, 536, 42 N. Y. Suppl. 545; Gray *v.* Mechanics' Bank, 10 Fed. Cas. No. 5,723, 2 Cranch C. C. 51. See also PRACTICAL.

36. Anderson L. Dict. [*quoted* in Mechanical Business Case, 9 Pa. Co. Ct. 1, 3 (*citing* Imperial Dict.; Worcester Dict.)]; Webster Dict. [*quoted* in Gulledge *v.* Preddy, 32 Ark. 433, 434].

37. Berks County *v.* Bertolet, 13 Pa. St. 522, 524.

38. Berks County *v.* Bertolet, 13 Pa. St. 522, 524; Anderson L Dict. [*quoted* in Mechanical Business Case, 9 Pa. Co. Ct. 1, 3 (*citing* Imperial Dict.; Worcester Dict.)]; Century Dict. [*quoted* in People *v.* Buffalo, 18 Misc. (N. Y.) 533, 536, 42 N. Y. Suppl. 545]; Webster Dict. [*quoted* in Gulledge *v.* Preddy, 32 Ark. 433, 434].

39. Century Dict. [*quoted* in People *v.* Buffalo, 18 Misc. (N. Y.) 533, 536, 42 N. Y. Suppl. 545].

40. Missouri, etc., R. Co. *v.* Baker, 14 Kan. 563, 567.

41. New Orleans *v.* Lagman, 43 La. Ann. 1180, 1181, 10 So. 244; *In re* Osborn, 104 Fed. 780, 781.

The term includes all mechanics whether master, workmen, or journeymen, who personally work with their own tools and with their own hands; it is used in contradistinction to contractors, superintendents, capitalists, or mere owners of machinery. Parkerson *v.* Wightman, 4 Strobh. (S. C.) 363, 365.

42. Worcester Dict. [*quoted* in Mechanical Business Cases, 9 Pa. Co. Ct. 1, 2].

43. Webster Dict. [*quoted* in Smith *v.* Osburn, 53 Iowa 474, 476, 5 N. W. 681, construing Iowa Code, § 797].

44. Webster Dict. [*quoted* in Mechanical Business Cases, 9 Pa. Co. Ct. 1, 4].

45. People *v.* Buffalo, 18 Misc. (N. Y.) 533, 536, 42 N. Y. Suppl. 545.

46. American Encycl. Dict. [*quoted* in Smith *v.* German Ins. Co., 107 Mich. 270, 278, 65 N. W. 236, 30 L. R. A. 368]; Imperial Dict. [*quoted* in Mechanical Business Cases, 9 Pa. Co. Ct. 1, 4].

47. American Encyclopedic Dict. [*quoted* in Smith *v.* German Ins. Co., 107 Mich. 270, 283, 65 N. W. 236, 30 L. R. A. 368].

48. Webster Dict. [*quoted* in Gulledge *v.* Preddy, 32 Ark. 433, 434; Smith *v.* Osborn, 53 Iowa 474, 486, 5 N. W. 681; Mechanical Business Cases, 9 Pa. Co. Ct. 1, 4].

49. Imperial Dict. [*quoted* in Mechanical Business Cases, 9 Pa. Co. Ct. 1, 3].

To be a mechanic, it is necessary that the person should be an operative engaged in a business requiring some particular skill in doing work. Evans *v.* Beddingfield, 106 Ga. 755, 757, 32 S. E. 664.

50. People *v.* Buffalo, 18 Misc. (N. Y.) 533, 536, 42 N. Y. Suppl. 545.

51. Savannah, etc., R. Co. *v.* Callahan, 49 Ga. 506, 511; Webster Dict. [*quoted* in Smith *v.* Osburn, 53 Iowa 474, 486, 5 N. W. 681].

52. Merrigan *v.* English, 9 Mont. 113, 124, 22 Pac. 454, 5 L. R. A. 837; Story *v.* Walker, 11 Lea (Tenn.) 515, 517, 47 Am. Rep. 305; Anderson L. Dict. [*quoted* in Smith *v.* German Ins. Co., 107 Mich. 270, 278, 65 N. W. 236, 30 L. R. A. 368; Mechanical Business Cases, 9 Pa. Co. Ct. 1, 4]; Webster Dict. [*quoted* in Gulledge *v.* Preddy, 32 Ark. 433, 434; Mechanical Business Cases, 9 Pa. Co. Ct. 1, 4].

53. Webster Dict. [*quoted* in Gulledge *v.* Preddy, 32 Ark. 433, 434; Merrigan *v.* English, 9 Mont. 113, 124, 22 Pac. 454, 5 L. R. A. 837; Mechanical Business Cases, 9 Pa. Co. Ct. 1, 4].

It is a term somewhat loosely applied but always excluding agricultural laborers or laborers engaged with pick, shovel, or spade or similar tools, and sometimes restricted to those employed in making or repairing ma-

work.[54] (Mechanic: Exemption of, see EXEMPTIONS. Lien of, see MECHANICS' LIENS. Subject to License-Tax, see LICENSES. See also CRAFT; HANDICRAFT; LABOR; LABORER; and, generally, MECHANICS' LIENS.)

MECHANICAL.[55] Pertaining to the science of mechanics or mechanism; skilled in mechanics; bred to manual labor;[56] belonging to or relating to those who live by hand labor; of the artisan class;[57] pertaining to artisans or mechanics or their implements;[58] pertaining to, governed by, or in accordance with machinery or the laws of motion depending upon mechanism or machinery;[59] hence done as if by a machine or without conscious exertion of will, proceeding from habit, not from intention or reflection; as a mechanical action or movement;[60] pertaining

chinery. Imperial Dict. [*quoted* in Mechanical Business Cases, 9 Pa. Co. Ct. 1, 3].

54. New Orleans *v.* Lagman, 43 La. Ann. 1180, 1181, 10 So. 244.

The term has been held to include: A baker. *In re* Osborn, 104 Fed. 780, 781. A barber. State *v.* Hirn, 46 La. Ann. 1443, 1444, 16 So. 403; State *v.* Dielenschneider, 44 La. Ann. 1116, 11 So. 823; Terry *v.* McDaniel, 103 Tenn. 415, 418, 53 S. W. 732, 46 L. R. A. 559. A builder. Savannah, etc., R. Co. *v.* Callahan, 49 Ga. 506, 511. A carpenter. Thurman *v.* Pettitt, 72 Ga. 38, 39; New Orleans *v.* Lagman, 43 La. Ann. 1180, 1181, 10 So. 244. A civil engineer. Amazon Irr. Co. *v.* Briesen, 1 Kan. App. 758, 41 Pac. 1116, 1119. A conductor. Miller *v.* Dugas, 77 Ga. 386, 388, 4 Am. St. Rep. 90. A dentist. Maxon *v.* Perrott, 17 Mich. 332, 337, 97 Am. Dec. 191. A house and sign painter. Waite *v.* Franciola, 90 Tenn. 191, 193, 16 S. W. 116. A master machinist. Parkerson *v.* Wightman, 4 Strobh. (S. C.) 363, 365. A merchant tailor. *In re* Jones, 13 Fed. Cas. No. 7,445, 2 Dill. 343, 344. A plasterer. New Orleans *v.* Bayley, 35 La. Ann. 545, 546; Merrigan *v.* English, 9 Mont. 113, 124, 22 Pac. 454, 5 L. R. A. 837. A printer. Smith *v.* Osburn, 53 Iowa 474, 476, 5 N. W. 681. A sawmill owner. Gulledge *v.* Preddy, 32 Ark. 433, 434.

The term has been held not to include: An abstracter of titles. Tyler *v.* Coulthard, 95 Iowa 705, 706, 64 N. W. 681, 58 Am. St. Rep. 452. An architect. Raeder *v.* Bensberg, 6 Mo. App. 445, 447; Price *v.* Kirk, 13 Phila. (Pa.) 497, 498. A boss or director. Kyle *v.* Montgomery, 73 Ga. 337, 343. A contractor. New Orleans *v.* Pohlmann, 45 La. Ann. 219, 221, 12 So. 116. See also Theobalds *v.* Conner, 42 La. Ann. 787, 7 So. 689. A contractor or master builder. Winder *v.* Caldwell, 14 How. (U. S.) 434, 444, 14 L. ed. 487. A dentist. Whitcomb *v.* Reid, 31 Miss. 567, 569, 66 Am. Dec. 579. A draftsman. Leinau *v.* Albright, 10 Pa. Co. Ct. 171, 173; Price *v.* Kirk, 13 Phila. (Pa.) 497, 498. An employee with annual salary. State *v.* Martindale, 47 Kan. 147, 150, 27 Pac. 852 [*quoted* in Billingsley *v.* Marshall County, 5 Kan. App. 435, 49 Pac. 329]. A farmer. Bevitt *v.* Crandall, 19 Wis. 581, 583. A farmer or miller. Berks County *v.* Bertolet, 13 Pa. St. 522, 524. A foreman or superintendent. Texas, etc., R. Co. *v.* Allen, 1 Tex. App. Civ. Cas. §§ 568, 569. A furnisher of lumber. Boutner *v.* Kent, 23 Ark. 389; Stevens *v.* Wells, 4 Sneed (Tenn.) 387, 389. A furnisher of machinery. East Tennessee Iron Mfg. Co. *v.* Bynum, 3 Sneed (Tenn.) 268, 269, 65 Am. Dec. 56. A furnisher of lumber or machinery. Duncan *v.* Bateman, 23 Ark. 327, 328, 79 Am. Dec. 109. A manufacturer. Richie *v.* McCauley, 4 Pa. St. 471, 472. A materialman. Richards *v.* Shear, 70 Cal. 187, 189, 11 Pac. 607. A painter. Smith *v.* German Ins. Co., 107 Mich. 270, 277, 65 N. W. 236, 30 L. R. A. 368. A photographer. Story *v.* Walker, 11 Lea (Tenn.) 515, 517, 47 Am. Rep. 305; Mullinnix *v.* State, 42 Tex. Cr. 526, 527, 60 S. W. 768. See also New Orleans *v.* Robira, 42 La. Ann. 1098, 8 So. 402, 11 L. R. A. 141. A scenic artist. Garing *v.* Hunt, 27 Ont. 149, 151. A subcontractor. Parks *v.* Locke, (Tex. Civ. App. 1894) 25 S. W. 702, 703; Krakauer *v.* Locke, 6 Tex. Civ. App. 446, 449, 25 S. W. 700. A superintendent or manager. Raynes *v.* Kokomo Ladder, etc., Co., 153 Ind. 315, 317, 54 N. E. 1061.

55. **Derived from** the Latin, *mechanicus*; the Greek, *mechane*, a machine. Imperial Dict. [*quoted* in Mechanical Business Cases, 9 Pa. Co. Ct. 1, 4].

The term "mechanical" is employed to indicate that the business, calling, or occupation in view must be one which cannot be utilized unless resort is had to the use of some machinery or instrument of force or appliance of power in aid to manual work in some physical undertaking in which the intervention or interaction of a superior mind is not required. In other words, the expression means that the occupation must be one by which the object realized is not dependent for its condition on the exertion of a controlling intellect, but rather on the adaptation of some helping mechanism or use of some auxiliary tool or instrument. New Orleans *v.* Robira, 42 La. Ann. 1098, 1099, 8 So. 402, 11 L. R. A. 141, holding that the term does not include photography.

57. Webster Dict. [*quoted* in Mechanical Business Cases, 9 Pa. Co. Ct. 1, 4].

58. Imperial Dict. [*quoted* in Mechanical Business Cases, 9 Pa. Co. Ct. 1, 3].

59. Webster Dict. [*quoted* in Mechanical Business Cases, 9 Pa. Co. Ct. 1, 2].

60. Webster Dict. [*quoted* in Mechanical Business Cases, 9 Pa. Co. Ct. 1, 2].

"Mechanical movement" is the combination and arrangement of mechanical parts intended for the translation or transformation of motion. Campbell Printing-Press, etc., Co. *v.* Miehle Printing-Press, etc., Co., 102 Fed. 159, 168, 42 C. C. A. 235, where the court said: "They are mechanisms adapted usu-

to or in accordance with the principal laws of mechanics; depending upon mechanism or machinery.[61] (See MECHANIC.)

MECHANICAL EQUIVALENT. As generally understood, a term employed where one thing may be adopted, instead of another, by a person skilled in the art, from his knowledge of the art.[62] (See, generally, PATENTS.)

ally for employment in wholly different classes of machines . . . [which] happen to require a similar resultant, motion or movement of parts." Distinguished from "philosophical instruments" see *In re* Massachusetts Gen. Hospital, 95 Fed. 973, 974 [*citing* Robertson *v.* Oelschlaeger, 137 U. S. 436, 438, 11 S. Ct. 148, 34 L. ed. 744].

"**Mechanical process**" see Risdon Iron, etc., Works *v.* Medart, 158 U. S. 68, 80, 15 S. Ct. 745, 39 L. ed. 899; Cochrane *v.* Deener, 94 U. S. 780, 785, 24 L. ed. 139; American Fibre-Chamois Co. *v.* Buckskin Fiber Co., 72 Fed. 508, 514, 18 C. C. A. 662.

61. Imperial Dict. [*quoted* in Mechanical Business Cases, 9 Pa. Co. Ct. 1, 3].

"**Mechanical business**" is a term which refers to the employment of skilled labor in shaping materials into structures or products of utility, and not as incident to one of the arts or professions. Mechanical Business Cases, 9 Pa. Co. Ct. 1, 2, holding that the term does not include preparing and mechanically executing designs for decorating and finishing a building, nor dredging, excavating, building, and executing submarine work. A mechanical business is one closely allied to or incidental to some kind of manufacturing business. Cowling *v.* Zenith Iron Co., 65 Minn. 263, 268, 68 N. W. 48, 60 Am. St. Rep. 471, 33 L. R. A. 508, holding that the term includes the mining of ore. The business of erecting buildings is a mechanical business. Finnegan *v.* Noerenberg, 52 Minn. 239, 245, 53 N. W. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778.

"**Mechanical engineer**" is an engineer possessing a proficiency not possessed by the others in the knowledge of designing, constructing, setting up, and operating boilers, engines, pumps, and machinery generally. Craven *v.* Orleans Levee Dist., 51 La. Ann. 1267, 1269, 26 So. 104.

"**Mechanical operations**" see Robertson *v.* North Easthope, 15 Ont. 423, 428.

"**Mechanical pursuit**" see State *v.* Hirn, 46 La. Ann. 1443, 1444, 16 So. 403; New Orleans *v.* Lagman, 43 La. Ann. 1180, 1181, 10 So. 244; Theobalds *v.* Conner, 42 La. Ann. 787, 789, 7 So. 689; New Orleans *v.* Bayley, 35 La. Ann. 545. See also Mullinnix *v.* State, 42 Tex. Cr. 526, 60 S. W. 768. Master builders and contractors, who employ others to do the work which they merely superintend, are not engaged in mechanical pursuits. Theobalds *v.* Conner, 42 La. Ann. 787, 790, 7 So. 689.

"**Mechanical skill**" is that skill which involves only the expression of the ordinary faculties of reasoning upon the material supplied, by a special knowledge and the facility of manipulation which results from its habitual and intelligent practice. J. J. Warren Co. *v.* Rosenblatt, 80 Fed. 540, 542, 25 C. C. A. 625. The term "mechanical skill," as used in patents, is not restricted to the skill of any particular mechanic. Johnson Co. *v.* Pennsylvania Steel Co., 67 Fed. 940, 942. A roller in a particular combination had been used before without designs on it, and a roller with designs on it had also been used in another combination. It was held that the placing of designs on the roller in the first-named combination should be construed to involve mechanical skill, within the meaning of United States patent laws, as contradistinguished from a patentable invention, and hence not patentable. Stimpson *v.* Woodman, 10 Wall. (U. S.) 117, 122, 19 L. ed. 866. Distinguished from "inventive genius" in Perfection Window Cleaner Co. *v.* Bosley, 2 Fed. 574, 577, 9 Biss. 385.

"**Mechanical tools.**"— The ordinary meaning of "mechanical tools" will include those of a dentist. Maxon *v.* Perrott, 17 Mich. 332, 337, 97 Am. Dec. 191.

"**Manual or mechanical labor**" see Anderson Driving Park Assoc. *v.* Thompson, 18 Ind. App. 458, 48 N. E. 259, 260.

62. Johnson *v.* Root, 13 Fed. Cas. No. 7,411; May *v.* Johnson County, 16 Fed. Cas. No. 9,334; Smith *v.* Marshall, 22 Fed. Cas. No. 13,077 [*citing* Curtis Pat. § 332]. See also Chicago, etc., R. Co. *v.* Sayles, 97 U. S. 554, 556, 24 L. ed. 1053; McCormick *v.* Talcott, 20 How. (U. S.) 402, 405, 15 L. ed. 930; Alaska Packers' Assoc. *v.* Letson, 119 Fed. 599, 611; Brammer *v.* Schroeder, 106 Fed. 918, 920, 46 C. C. A. 41; National Hollow Brake-Beam Co. *v.* Interchangeable Brake-Beam Co., 106 Fed. 693, 713, 45 C. C. A. 544; Brill *v.* St. Louis Car Co., 90 Fed. 666, 668, 33 C. C. A. 213; Adams Electric R. Co. *v.* Lindell R. Co., 77 Fed. 432, 440, 23 C. C. A. 223; Carter Mach. Co. *v.* Hanes, 70 Fed. 859, 866; Holmes *v.* Truman, 67 Fed. 542, 545, 14 C. C. A. 517; Jensen Can-Filling Mach. Co. *v.* Norton, 67 Fed. 236, 239, 14 C. C. A. 383; Stirrat *v.* Excelsior Mfg. Co., 61 Fed. 980, 981, 10 C. C. A. 216.